**IN THE SUPREME COURT OF THE STATE OF UTAH**

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| League of Women Voters of Utah, Mormon Women for Ethical Government, Stefanie Condie, Malcolm Reid, Victoria Reid, Wendy Martin, Eleanor Sundwall, Jack Markman, and Dale Cox,<br><br>*Plaintiffs-Respondents*,<br><br>v.<br><br>Utah State Legislature, Utah Legislative Redistricting Committee, Sen. Scott Sandall, Rep. Brad Wilson, Sen. J. Stuart Adams, and Lt. Gov. Deidre Henderson,<br><br>*Defendants-Petitioners.* | Case No. 20220991-SC |

# Amicus Curiae Brief of Professor Bertrall Ross in Support of Plaintiffs-Respondents League of Women Voters of Utah, *et al.*

On Appeal from the Third Judicial District Court, Salt Lake County,
Honorable Dianna M. Gibson, District Court No. 220901712


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## IDENTITY AND INTEREST OF AMICUS CURIAE

Bertrall L. Ross II is the Justice Thurgood Marshall Distinguished Professor of Law and Director of the Karsh Center for Law and Democracy at the University of Virginia School of Law. Professor Ross teaches and writes in the areas of constitutional law, constitutional theory, election law, administrative law, and statutory interpretation. He has also researched and written specifically about the influence of the English Bill of Rights Act of 1689 on the principle of legislative independence and the development of Free Elections Clauses in American state constitutions. *See, e.g.*, Bertrall L. Ross II, *Challenging the Crown: Legislative Independence and the Origins of the Free Elections Clause,* 73 Ala L. Rev. 221 (2021). Professor Ross's scholarship has been cited by both sides in this case, and he has a professional interest in ensuring that his work is properly understood. More broadly, he seeks to ensure that state constitutional jurisprudence properly accounts for the origins of Free Elections Clauses and for the significance of those clauses in securing core structural protections against legislative manipulation of electoral processes.

## STATEMENT OF TIMELY NOTICE TO FILE BRIEF

Pursuant to this Court's March 1, 2023 Order in this matter, counsel for Professor Ross provided timely notice to all counsel of record for all parties to this appeal of Professor Ross's intent to file this Brief.

## STATEMENT OF CONSENT BY ALL PARTIES

Pursuant to Utah R. App. P. 25(e)(5), undersigned counsel for Professor Ross hereby state that all parties to this appeal have consented under Utah R. App. P. 25(b)(2) to the filing of this Brief.

## STATEMENT PURSUANT TO RULE 25(e)(6)

Pursuant to Utah R. App. P. 25(e)(6), counsel for Professor Ross hereby state that no party or party's counsel authored this Brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this Brief; and no person—other than the amicus curiae or his counsel—contributed money that was intended to fund preparing or submitting this Brief.

## INTRODUCTION & SUMMARY OF ARGUMENT

Utah's Constitution guarantees that "[a]ll elections shall be free, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Utah Const. art. I, § 17. This provision, including its initial Free Elections Clause, is a linchpin of Utah's system of government. It is as foundational—and as judicially cognizable—as the Constitution's guarantees of due process and uniform operation of laws. The Clause demands that electoral processes fairly and neutrally translate the popular will into representation and political power. When partisans stack the deck by manipulating district lines, they deny Utahns the free elections that their Constitution promises. This understanding of Utah's Free Elections Clause accords with historical context, underlying structural principles, and persuasive authority.

I. The lineage of Utah's Free Elections Clause confirms that it functions in part as an anti-gerrymandering provision. The Clause can be traced back through a series of earlier state constitutions and, ultimately, to the English Bill of Rights of 1689, which declared that elections "ought to be free." The English provision responded to the Crown's efforts to pack Parliament with loyalists and dilute the opposition's power by strategically manipulating the borough system—the seventeenth century equivalent of a partisan gerrymander. As originally understood, an election was not "free" when those in power rigged boundaries to skew representation in favor of themselves or their allies.

Early state constitutions imported and adapted the free elections principle. Pennsylvania's Free Elections Clause is the first American ancestor of Utah's provision, and its history is similarly instructive. Pennsylvanians embraced the Clause to disapprove of efforts to dilute voting power and representation based on geography, religion, and politics. Prior to the adoption of Utah's Constitution, the Pennsylvania Supreme Court had expressly construed that state's Clause to apply to electoral districting.

II. Construing Utah's Free Elections Clause to constrain partisan gerrymandering is not only faithful to the provision's historical origins; it also best aligns with the Constitution's core structural principles. Utah's Constitution is, at bottom, a document premised on the idea of rule by the people, with safeguards against abuses of power. Lawmakers who manipulate district lines to achieve their preferred political outcomes exceed their authority as the people's agents and interfere with the people's ability to self-govern through representatives who accurately reflect the popular will. Like Utahns today,

the drafters and ratifiers of Utah's Constitution cherished self-rule and rejected unchecked legislative power. It is difficult to imagine that their blueprint for the state's government gave lawmakers free rein to stack the deck when adopting electoral maps.

III. Persuasive authority from other states bolsters the conclusion that partisan gerrymandering contravenes Utah's Free Elections Clause. Multiple courts in other states have applied Free Elections Clauses to reject partisan gerrymanders. The Utah Constitution should not be construed to provide less protection against partisan gerrymandering than the constitutions of these sibling states.

## ARGUMENT

### I. UNDERSTOOD IN ITS HISTORICAL CONTEXT, UTAH'S FREE ELECTIONS CLAUSE IS AN ANTI-GERRYMANDERING PROVISION.

From the seventeenth century forward, Free Elections Clauses have stood as safeguards against anti-democratic mischief. Defendants here appear to accept that Utah's Free Elections Clause prohibits *some* forms of partisan manipulation of the electoral process, such as interferences with casting a ballot, but they insist that the Clause has nothing to say about partisan gerrymandering. Given that Article I, § 17 separately bars interference with "the free exercise of the right of suffrage," Defendants' reading would reduce the Free Elections Clause to mere surplusage. Their effort to limit the Clause's scope runs counter to historical evidence, which shows that the Free Elections Clause arrived in Utah as a safeguard against partisan redistricting abuses.

### A. The Principle of "Free Elections" Embodied in the English Bill of Rights of 1689 Prohibited Government Manipulation of Electoral Districts.

Utah's Free Elections Clause traces its lineage back through several state constitutions and ultimately to the English Bill of Rights Act of 1689. More than two centuries before Utahns approved a Constitution in 1895 declaring that all elections "shall be free," Parliament declared that all elections "ought to be free." The genesis of this original free elections provision indicates that Utah's Clause is properly regarded as a restraint on gerrymandering. *Cf. Am. Bush v. City of S. Salt Lake*, 2006 UT 40, ¶ 10, 140 P.3d 1235 (explaining that "constitutional 'language … is to be read not as barren words in a dictionary but as symbols of historic experience'" and that it is proper to consider "the background out of which [a provision] arose") (quoting *Dennis v. United States*, 341 U.S. 494, 523 (1951) (Frankfurter, J., concurring); *State v. Betensen*, 14 Utah 2d 121, 378 P.2d 669, 669 (1963)).

In the early 1680s, King Charles II was eager to gain the upper hand over his Whig opposition in Parliament and pack the body with Tory loyalists. He opted to revive a seldom-used power to issue a writ of quo warranto and unilaterally revise or revoke municipal corporate charters for boroughs (towns and cities). Bertrall L. Ross II, *Challenging the Crown: Legislative Independence and the Origins of the Free Elections Clause,* 73 Ala L. Rev. 221, 258-59, 267-77 (2021). Through the use—and abuse—of this prerogative, the Crown could control who in the boroughs could vote for members of Parliament and, more broadly, whether particular boroughs would even receive parliamentary representation. *See id.* The Crown could also approve entirely new boroughs

and give them parliamentary franchises. *Id.* Prior to Charles, the Crown had used this power sparingly and only to resolve local conflicts, but under Charles and his successor, James II, the Crown increasingly sought to manipulate the laws and boundaries of boroughs to pack Parliament with allies. *Id.*

Ultimately, the abuse of this prerogative contributed to James's downfall and to the Glorious Revolution and the English Bill of Rights—including its decree that elections "ought to be free." *See id.* at 281-89. Defendants accept much of this historical account, *see* Def.'s Br. at 41-43, but they seek to cabin its implications in two ways. First, they characterize the borough remodeling campaign as being solely about denying qualified electors the right to vote. *Id*. at 43. Second, they suggest that the free elections principle encompassed only executive rather than legislative electoral machinations. *Id.* at 42-43. Defendants are wrong on both counts.

First, the Crown's 1680s-era borough remodeling campaign entailed much more than stripping borough residents of their voting rights. It is true that in many boroughs the Crown altered municipal charters to limit or deny the franchise for large swaths of residents in order to suppress votes for opposition candidates. *See* Ross, *supra*, at 268. In other boroughs, however, the Crown unscrupulously *extended* the franchise to non-residents so as to dilute the opposition's voting power. *See id.* at 269.

Beyond manipulating the franchise, the Crown also sought to deplete the opposition's ranks by removing or withholding boroughs' rights to return members to Parliament. *See id*. The Whig stronghold of London, for instance, had its charter revoked

and could not send representatives to Parliament for five years in the 1680s. *See id.* at 273-74, 283. At the same time, the Crown sought to pack Parliament with allies by creating new boroughs, often small ones, that had the same representation as larger boroughs. *See id.* at 269-77. This further diluted the opposition's power. *See id*. James used this maneuver to approve forty-four new boroughs in the lead-up to the first Parliamentary elections under his rule. *Id.* at 275. Thus, the royal prerogative that inspired the free elections principle encompassed much more than denying the right to vote. It was about manipulating boundaries and representation to weaken the opposition's power and give the upper hand to loyalists—concepts that mirror the ills of modern partisan gerrymandering.

Second, though the Crown's misdeeds served as an impetus for the free elections provision of the English Bill of Rights, the idea was not to shift mischief-making power from the King to Parliament. Instead, consistent with its expansive terms, the provision condemned electoral manipulations, whatever their source. At a minimum, this is plainly how the provision was understood by the time Founding-era Americans imported free elections clauses into the earliest state constitutions. The governments that these early constitutions established had extremely weak executives and lacked truly independent executive branches. *See, e.g.*, Gordon S. Wood, The Creation of the American Republic, 1776-1787, 135-41, 149 (1969); Miriam Seifter, *Gubernatorial Administration*, 131 Harv. L. Rev. 483, 493 (2017). Governors were largely figureheads who did not possess anything akin to a royal prerogative power. Instead, authority over elections rested principally with legislatures. As detailed below, the Free Elections Clauses of state constitutions sought to

guard against abuses of *that* authority; they were not limited to constraining a virtually non-existent executive authority. The fact that Free Elections Clauses in Utah and elsewhere appear in the Constitution's Declaration of Rights reinforces this conclusion, since such declarations serve to constrain the legislative branch and not merely the executive.

### B. As Imported to the United States, the "Free Elections" Principle Encompassed Freedom from Partisan Districting Abuses.

When the American founders set out to create state governments, they looked to the English Bill of Rights for inspiration. The first eleven states to adopt constitutions (in 1776-1777), including the highly influential Pennsylvania and Virginia constitutions, all had free elections provisions. *See* Ross, *supra*, at 289 n.475. As new states were admitted into the Union, they continued to include these provisions through an ongoing process of constitutional borrowing. *See, e.g.,* Gordon Morris Bakken, Rocky Mountain Constitution Making, 1850-1912, 11-12 (1987). This is ultimately how the Free Elections Clause arrived in Utah, bringing with it a shared tradition of prohibiting governmental manipulation of legislative districts.

Specifically, constitutional convention records indicate that Utah's Free Elections Clause traces its lineage through Washington, Oregon, Indiana, and Pennsylvania. Utah's 1895 convention indicates that the state modeled its Free Elections Clause on Washington's, which had been approved in 1889. *Official Report of the Proceedings and Debates of the Convention Assembled at Salt Lake City on the Fourth Day of March 1895*

*to Adopt a Constitution for the State of Utah, Vol. I,* 310 (1898) ("*Utah Official Report*").[1] Washington, in turn, drew its provision from Oregon; Oregon adopted its from Indiana; and Indiana took its from Pennsylvania, which was the first state to adopt a clause that guarantees that elections shall be "free and equal." *See Foster v. Sunnyside Valley Irr. Dist.*, 102 Wash. 2d 395, 405, 687 P.2d 841 (1984); *League of Women Voters of Pa. v. Commonwealth*, 645 Pa. 1, 101-08, 178 A.3d 737 (2018); *see also* John D. Barnhart, *Sources of Indiana's First Constitution*, Indiana Magazine of History 39, 59 (March 1943).

The influence of Pennsylvania's Free Elections Clause on Utah's is especially important here because Pennsylvania's provision has a rich history that likely would have been familiar to the Utah Constitution's framers and ratifiers. It is well-documented that Pennsylvania's first two Free Elections Clauses (in the state's 1776 and 1790 constitutions) were enacted in response to laws that diluted the voting power of citizens based on geography, religion, and political beliefs. *See League of Women Voters of Pa.*, 178 A.3d at 804-09. The 1776 Clause reacted to the colonial assembly's deliberate efforts to

[1] Utah's delegates removed "and equal" from Washington's Clause, which provided that "[a]ll elections shall be free *and equal.*" *Official Report of the Proceedings and Debates of the Convention Assembled at Salt Lake City on the Fourth Day of March 1895 to Adopt a Constitution for the State of Utah, Vol. I*, 323 (1898). This change might have been merely to avoid surplusage, as records from Washington suggested that "free" and "equal" were to be given the same meaning. *The Journal of the Washington State Constitutional Convention, 1889,* 508. Moreover, the Utah delegates elsewhere provided for the "uniform operation" of laws and guaranteed equal "political rights" for all Utahns, maintaining, if not enhancing, the "equal" election rights contained in Washington's constitution. Utah Const. art. I, § 24; *id.*, art. IV, § 1.

underrepresent the City of Philadelphia and western Pennsylvania in the colonial government, which caused much strife pre-statehood. *Id.*

In 1790, Pennsylvania adopted a new constitution in an effort to curb the partisan rancor and severe governmental dysfunction that beset the state in its early years. That constitution reflected a compromise: One faction got the bicameral legislature and chief executive it preferred, while the other faction was guaranteed—in part through the Free Elections Clause—"popular elections in which the people's right to elect their representatives in government would be equally available to all, and would, hereinafter, not be intentionally diminished by laws that discriminated against a voter based on his social or economic status, geography of his residence, or his religious and political beliefs." *Id.* at 808. Thus, Pennsylvania's Free Elections Clause stood firmly in opposition to legislative schemes to manipulate how representation is allocated.

By the time of Utah's constitutional convention, the Pennsylvania Supreme Court had affirmatively construed that state's Free Elections Clause to bar legislative schemes to dilute the power of disfavored voters. In *Patterson v. Barlow*, 60 Pa. 54, 75 (1869), the Court made clear that the Clause required the legislature to "arrange all the qualified electors into suitable districts, and make their votes equally potent in the election; so that some shall not have more votes than others, and that all shall have an equal share in filling the offices of the Commonwealth." *Id. Patterson* involved a challenge to a voter

registration requirement, not a districting plan, which makes it especially notable that the court nevertheless identified the Clause as a safeguard against districting abuses.[2]

This history bolsters the District Court's conclusion that Plaintiffs stated a cognizable claim under Utah's Free Elections Clause. Free Elections Clauses have long served as bulwarks against partisan manipulation of elections: Just as Pennsylvanians understood their clause to embrace principles of fair representation, so, too, did the framers and ratifiers of Utah's Constitution. And just as the original Free Elections Clause repudiated a seventeenth century scheme to stymie Whigs and pack Parliament with Tory-loyalists, Utah's Clause bars the twenty-first century analog that Plaintiffs have alleged.

## II. PARTISAN GERRYMANDERING CONTRAVENES THE UTAH CONSTITUTION'S CORE STRUCTURAL PRINCIPLES.

Defendants' efforts to narrow Utah's Free Elections Clause also run counter to the Constitution's core commitments to popular self-rule and limited government. From start to finish, the Utah Constitution guarantees the right of Utahns to govern themselves and requires lawmakers, as elected agents, to act for the people, not against them. These foundational democratic principles are the Constitution's north star. And here, they confirm that the Free Elections Clause is properly understood to check legislative schemes to manipulate district lines for partisan gain. *Cf. Univ. of Utah v. Shurtleff*, 2006 UT 51, ¶ 17,

[2] Gerrymandering was a looming issue when *Patterson* was decided. According to an eminent authority on Pennsylvania's Constitution, by the state's 1873-74 constitutional convention, Pennsylvanians regarded gerrymandering as "one of the most flagrant evils and scandals of the time, involving notorious wrong to the people and open disgrace to republican institutions." *League of Women Voters of Pa.*, 178 A.3d at 815 (quoting Thomas Raeburn White, *Commentaries on the Constitution of Pennsylvania* 61 (1907)).

144 P.3d 1109 (explaining that constitutional provisions should be interpreted in light of "the meaning and function of the constitution as a whole").

### A. A Constitution Premised on Popular Sovereignty Cannot Be Understood to Condone Partisan Gerrymandering.

A cramped construction of the Free Elections Clause that leaves gerrymandering unredressed is at odds with the Utah Constitution's bedrock commitment to popular sovereignty and democratic self-government. The Free Elections Clause is no mere window dressing. Instead, it operates in conjunction with other provisions to ensure that the people remain firmly in control of a government that must respect their rights and pursue their interests.

After confirming that individuals have "inherent and inalienable" rights to life, liberty, and property, Utah Const. art. I, § 1, the Utah Constitution declares unequivocally—as it has since the beginning—that "[a]ll political power is inherent in the people," and that "free governments are founded on their authority for their equal protection and benefit," art. I, § 2; *see also Carter v. Lehi City*, 2012 UT 2, ¶ 30, 269 P.3d 141 ("Under our constitutional assumptions, all power derives from the people, who can delegate to representative instruments which they create.") (quoting *City of Eastlake v. Forest City Enters*., 426 U.S. 668, 672 (1976)). The Constitution then proceeds to identify and enshrine a series of rights that are preconditions to democratic self-governance, including religious liberty, *id.*, art. I, § 4; due process, *id.*, art. I, § 7; freedom of speech and press, *id*., art. I, § 15; uniform operation of laws, *id*. art. I, § 24; and, crucially, free elections and "the free exercise of the right of suffrage," *id.*, art. I, § 17; *see also id*., art. IV (further

fleshing out the right of suffrage); *Ferguson v. Allen*, 7 Utah 263, 274, 26 P. 570 (Utah 1891) ("This right [to vote] is a fundamental right. All other rights, civil or political, depend on the free exercise of this one, and any material impairment of it is, to that extent, a subversion of our political system."). The Constitution makes clear that its enumeration of these rights is not exclusive, *see id.*, art. I, § 25, and that, to ensure "the security of individual rights and the perpetuity of free government," "[f]requent recurrence to fundamental principles is essential," *id*., art. I, § 27.

Collectively, these provisions make plain that a "fundamental principle" of the Utah Constitution—indeed, the ultimate touchstone of Utah's constitutional system—is rule by the people. *See, e.g.*, *Gallivan v. Walker*, 2002 UT 89, ¶ 22, 54 P.3d 1069 ("The government of the State of Utah was founded pursuant to the people's organic authority to govern themselves."). As this Court has recognized, the Constitution's "system of checks and balances" is "hindered" when a numerical minority receives "an inordinate and disproportionate amount of power" at the expense of the majority. *Id*. ¶ 61. That principle offers the proper lens for construing and applying the Free Elections Clause. Reading the Clause to promote popular self-rule by checking partisan gerrymandering and the representational inequalities and distortions that come with it is far more faithful to the Utah Constitution's democratic structure and values than the alternative construction Defendants advocate. *Cf.* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Colum. L. Rev. 859 (2021). Moreover, properly accounting for the relationship between the people and the legislature helps to explain why

the Free Elections Clause is indeed self-executing. The Clause exists to bar lawmakers from subverting the people's right to choose who will govern in their name. It would be incongruous to say that a constitutional provision adopted to protect the people from legislative usurpations cannot be enforced unless the legislature first enacts anti-usurpation legislation. *See also* Utah Const. art. I, § 26 ("The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.").

### B. The Constitution's Drafters and Ratifiers, Who Were Gravely Concerned About Legislative Abuses of Power, Did Not Give Lawmakers Carte Blanche to Manipulate District Lines.

The Utah Constitution's commitment to popular self-rule goes hand in hand with its rejection of unchecked legislative power. The Constitution was drafted and ratified during a period marked by high-profile episodes of legislative corruption and capture. *See* Martin B. Hickman, *The Utah Constitution Retrospect and Prospect*, in Neal A. Maxwell and Edward W. Clyde, *Interim Report of the Constitutional Revision Commission Submitted to the Governor and the Legislature of the State of Utah,* 30 (1971) ("All of the accumulated mistrust of state legislatures which is the hallmark of state constitution development in the nineteenth century is reflected in the Utah constitution."); *see also* Thomas G. Alexander, *Utah's Constitution: A Reflection of the Territorial Experience*, 64 Utah Hist. Q. 264, 266 (1996). Convention delegates in Utah and elsewhere were "horrified" by the "open venality of legislators" and committed to ensuring that the "biennial mob of adventurers" who occupied legislative office would not aggrandize themselves and their allies at the people's expense. Alexander, *supra*, 266; Bakken, *supra*, 102-103.

Accordingly, the drafters of Utah's Constitution took great care to cabin legislative authority. *See, e.g.*, *Gallivan*, *supra*, ¶ 21 ("[G]overnment … is an organization created *by* the people for their own purposes, to wit, for governmental purposes. As such the government has powers [that] are strictly limited by the constitution.") (quoting *Duchesne Cty. v. State Tax Comm'n*, 140 P.2d 335, 339 (Utah 1943)). The Constitution is premised on the notion that those who are elected to do the people's business must remain their faithful agents. This is why, in addition to adopting a detailed Declaration of Rights and multiple protections for suffrage, the Constitution's drafters placed a litany of substantive and procedural limitations on the legislature, from capping the length of legislative sessions, to precluding an array of "private or special laws," and much more. *See* Hickman, *supra*, at 30 (summarizing the numerous restrictions).

All of these provisions aim to keep the people in the driver's seat. As this Court has recognized, "the people themselves are not creatures or creations of the Legislature. They are the father of the Legislature, its creator, and in the act [of] creating the Legislature the people provided that its voice should never silence or control the voice of the people in whom is inherent all political power; and … the Legislature, the child of the people, cannot limit or control its parent, its creator, the source of all power." *Carter*, *supra*, ¶ 30, n.20 (quoting *Utah Power & Light v. Provo City*, 74 P.2d 1191, 1205 (Utah 1937) (Larson, J., concurring)).

A constitution so centrally preoccupied with the dangers of legislative overreach and so committed to keeping government dependent on the people cannot reasonably be

construed to have handed lawmakers unfettered power to manipulate electoral districts for partisan advantage. Instead, through the Free Elections Clause, the Utah Constitution provides a vital safeguard against this particularly pernicious form of legislative mischief.

### C. Utah Courts Have the Authority and Responsibility to Check Partisan Gerrymandering.

Consistent with the Utah Constitution's history and structure, it is entirely proper for Utah courts to entertain claims that electoral maps have been manipulated in violation of the Free Elections Clause. Although late nineteenth century constitution makers harbored deep mistrust of legislatures, they "expressed faith in the judiciary" and "manifested a growing willingness … to trust the judicial system" to protect rights, including political rights. Bakken, *supra*, at 35, 102-03; *see also Craftsman Builder's Supply, Inc. v. Butler Mfg. Co.*, 1999 UT 18, ¶ 35, 974 P.2d 1194 (explaining that, at the time of the Utah Constitution's adoption, "the people, disillusioned by what they perceived as legislative corruption … [,] vest[ed] increased power in the judiciary") (Stewart, J., concurring) (quoting David Schulman, The Right to a Remedy, 65 Temple L. Rev. 1197, 1200 (1992)). Nothing in the Constitution's text or surrounding context suggests that claims involving redistricting improprieties were somehow beyond the judiciary's reach. To the contrary, Utahns at this time were familiar with redistricting litigation in other states and expressed no reservations about the judiciary's involvement.

In the run-up to statehood, high courts resolved redistricting challenges in a number of states, including Wisconsin and Indiana—cases that received contemporaneous coverage in Utah. *See, e.g.*, Salt Lake Tribune at 4 (Mar. 29, 1892) ("Gerrymandering has

received a black eye in Wisconsin."); *Gerrymandering*, Salt Lake Herald-Republican (Dec. 24, 1892) ("When the courts can be appealed to, as in the Indiana case, with an assurance of the right being vindicated, the evil [of gerrymandering] receives an efficient check."). In Wisconsin, the state supreme court rejected assertions that its intervention would "invade the province of legislation" and held that it had "the judicial power to declare [an] apportionment act unconstitutional, and to set it aside as absolutely void." *State ex rel. Att'y Gen. v. Cunningham*, 81 Wis. 440, 477, 51 N.W. 724, 728, 730 (1892). The court stressed that "courts of justice have the right, and are in duty bound, to test every law by the constitution." *Id*. at 728. According to the court, the legislature was not free to disregard constitutional restrictions on its redistricting authority—restrictions "adopted … [to] prevent the legislature from gerrymandering the state" in contravention of the people's "sacred" and "fundamental" rights to equal representation and self-government. *Id*. at 730. In the court's words, "If the remedy for these great public wrongs cannot be found in this court, it exists nowhere." *Id*.; *see also id*. at 735 (Pinney, J., concurring) (explaining that the court, "as a conservative and restraining power," had a duty to enforce "the constitutional rules of apportionment designed to secure a fair and just representation" in order to "to protect and preserve the government against … the struggles of partisan strife and factional fury with might otherwise overthrow it").

The Indiana Supreme Court likewise held that "actions calling in question the validity of apportionment acts" are justiciable. *Parker v. Powell*, 133 Ind. 178, 32 N.E. 836, 838 (1892). The court rejected an argument that only a subset of constitutional

provisions or legal theories could be litigated. *See id*. at 839 ("If the courts have jurisdiction to declare an apportionment act void because it violates one provision of the constitution, we are unable to perceive why they have not such jurisdiction where it violates some other provision."). A concurring opinion stressed that the court's duty to "stand[] immovably against legislative encroachment … is as clear where apportionment acts are involved as in cases concerning other acts." *Id.* at 846 (Elliott, J., concurring). According to the concurrence, "the duty is, if possible, higher and sterner in such cases than in any others, for, if unconstitutional apportionment acts are conceded to be beyond the domain of the judiciary, then the legislative power is absolutely unlimited and unfettered, and a legislative body would be at full and unrestrained liberty to enact measures perpetuating its own existence and augmenting its own power. Constitutional limitations are imposed to prevent unrestrained legislative action, and are intended to guard against legislative usurpation." *Id*.

These rulings, moreover, accord with a leading contemporary treatise, Thomas Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* (6th ed. 1890). Delegates at Utah's 1895 convention repeatedly referenced Cooley's treatise, praising it as a "great work," and describing Cooley as "a man who stands as high as any living man on the question of constitutional law." *Utah Official Report* at 438, 913; *see also Am. Bush v. City of S. Salt Lake*, 2006 UT 40, ¶ 13, 140 P.3d 1235 (describing Cooley as "the preeminent authority of the late nineteenth century on state constitutional matters"). Cooley's treatise states that

"[a]ll regulations of the elective franchise … must be reasonable, uniform, and *impartial*; they must not have for their purpose directly or indirectly to deny or abridge the constitutional right of citizens to vote, or unnecessarily to impede its exercise; if they do, *they must be declared void*." Cooley, *supra*, at 758 (emphasis added). Consistent with the position of Cooley and the weight of other historical authority, it is entirely appropriate for this Court to exercise jurisdiction over Plaintiffs' claims and to hold that the Utah Constitution's Free Elections Clause restricts partisan gerrymandering.

## III. PERSUASIVE AUTHORITY FROM OTHER STATES CORRECTLY RECOGNIZES THAT FREE ELECTIONS CLAUSES CONSTRAIN PARTISAN GERRYMANDERING.

The District Court's recognition that Utah's Free Elections Clause protects against governmental manipulation of electoral districts also accords with modern practice and precedent in other states with similar clauses. Consistent with the District Court's decision, courts in several states have recently invoked their Free Elections Clauses to reject both Democratic and Republican gerrymanders.

Take Pennsylvania. As previously described, the Pennsylvania Supreme Court long recognized that its Free Elections Clause prohibits legislative manipulation of electoral districts. *See Patterson*, 60 Pa. at 75. In 2018, the Court applied this precedent and directly held that its Clause prohibits partisan gerrymandering of legislative districts. In *League of Women Voters of Pa.,* the Court explained that the "plain and expansive sweep" of the Clause's words were "indicative of the framers' intent that all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our

Commonwealth, and, also, conducted in a manner which guarantees, to the greatest degree possible, a voter's right to equal participation in the electoral process for the selection of his or her representatives in government." *League of Women Voters of Pa.*, 178 A.3d at 804. The Court's bottom line is equally applicable here: the Free Elections Clause "provides the people of this Commonwealth an equally effective power to select the representative of his or her choice[] and bars the dilution of the people's power to do so." *Id.* at 814.

Pennsylvania is not alone. In 2022, a Maryland Circuit Court invalidated a congressional redistricting plan as an unlawful partisan gerrymander (favoring Democrats) under the state's Free Elections Clause (which provides that elections shall be "free and frequent"), among other provisions. *See Szeliga v. Lamone*, No. C-02-CV-21-001816, 2022 WL 2132194 (Md. Cir. Ct. Mar. 25, 2022). Examining the Clause's history, as well as case law "broadly interpret[ing]" the Clause in other contexts, the court concluded that it "afford[s] a greater protection" to Maryland voters "than is provided under the Federal Constitution." *Id*. at *14. According to the court, "protect[ing] the right of political participation in Congressional elections" was a "pivotal goal" of the Clause, and the challenged redistricting plan violated this right by "suppress[ing] the voice of Republican voters." *Id.* at *14, *46.

There is also North Carolina. In February 2022, the North Carolina Supreme Court rejected congressional and state legislative district plans as unlawful partisan gerrymanders (favoring Republicans) under the state constitution's Free Elections, Equal Protection, Free

Speech, and Freedom of Assembly Clauses. *Harper v. Hall*, 380 N.C. 317, 868 S.E.2d 499 (2022). As to the Free Elections Clause, which provides that "[a]ll elections shall be free," the court provided a thorough historical analysis. The Court correctly traced the Clause's lineage to the English Bill of Rights and noted the "key principle" that it prohibits manipulating districts to dilute votes for electoral gain. *Id.* at 373. The Court examined other states' experiences with free elections clauses, including Pennsylvania's. *Id.* 373-74. And, consistent with the state constitution's core commitment to popular sovereignty, the Court emphasized that "elections are not free if voters are denied equal voting power in the democratic processes which maintain our constitutional system of government." *Id.* at 376.

Earlier this year, shortly after the North Carolina Supreme Court's composition changed, the court "reheard" and reversed *Harper. Harper v. Hall,* __ S.E. __, 2023 WL 3137057 (N.C. Apr. 28, 2023). The Court held that partisan gerrymandering claims present nonjusticiable political questions. Addressing the Free Elections Clause, the new majority agreed that the English Bill of Rights influenced the Clause but nevertheless construed the Clause narrowly to apply only when a law "prevents a voter from voting according to one's judgment" or "votes are not accurately counted." *Id.* at *44. This conclusion is historically dubious, and its persuasive value is undermined by the case's highly unusual posture. Significantly, the Court's analysis is also distinguishable because Utah's Free Elections Clause, unlike North Carolina's, derives from Pennsylvania's Free Elections Clause, which was plainly enacted to bar legislative machinations to dilute the power of disfavored voters.

Beyond the partisan gerrymandering context, several more state courts have long interpreted their state's Free Elections Clauses to embrace anti-vote dilution principles that closely resemble the principle underlying Plaintiffs' claims here. These rulings are contrary to Defendants' position that Utah's Free Elections Clause should be limited to overt forms of vote denial. The Illinois Supreme Court's decision in *People v. Hoffman*, 116 Ill. 587, 5 N.E. 596 (1886), is especially notable since that court articulated its anti-dilution position shortly before Utah's constitutional convention. According to *Hoffman*, the guarantee that "elections shall be free and equal" means, in part, that "the vote of every elector is equal in its influence upon the result to the vote of every other elector; when each ballot is as effective as every other ballot." *Id*. at 599. The high courts of Indiana, Kentucky, and Oregon have conveyed similar understandings. *See Oviatt v. Behme,* 238 Ind. 69, 75, 147 N.E.2d 897 (1958) ("The constitutional provision that 'all elections shall be free and equal' means that 'the vote of every elector is equal in its influence upon the result to the vote of every other elector'."); *Perkins v. Lucas*, 197 Ky. 1, 7, 246 S.W. 150 (1922) ("This is a constitutional guaranty to the citizen that, if he is a legal voter, he can freely vote for whom or for what he may choose, and that his vote shall be equal in effect to the vote of any other citizen."); *Ladd v. Holmes*, 40 Or. 167, 178, 66 P. 714 (1901) ("Every elector has the right to have his vote count for all it is worth, in proportion to the whole number of qualified electors desiring to exercise their privilege."). Thus, while these courts have not yet specifically applied their Free Elections Clauses to partisan gerrymandering, they have embraced the underlying logic of such claims and rejected the cramped reading of the Clause that Defendants advocate here. Consistent with these rulings, this Court should hold

that Utah's Free Elections Clause guarantees to Utahns of all partisan stripes the right to exert electoral influence on equal terms, free from the distortions of doctored electoral districts.

## CONCLUSION

For the foregoing reasons, *Amicus* respectfully urges this Court to affirm the District Court's decision finding that the Plaintiffs properly stated claims under the Utah Constitution.

Respectfully submitted,

Dated this 19th day of May 2023.

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## CERTIFICATE OF COMPLIANCE

Pursuant to Utah R. App. P. 25(e)(8) and 24(a)(11), I hereby certify that:

1. This Brief complies with the word limits set forth in Utah R. App. P. 25(f) because this Brief contains 5,980 words, excluding the parts of the Brief exempted by Utah R. App. P. 25(f). Times New Roman 13-point font used.
2. This Brief complies with Utah R. App. P. 21(h) regarding public and nonpublic filings.

/s/ Alan L. Smith_____
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## CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of May 2023, I caused the foregoing to be served via email on the following:

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## Appendix

A. Curriculum Vitae of Bertrall L. Ross II

B. Bertrall L. Ross II, *Challenging the Crown: Legislative Independence and the Origins of the Free Elections Clause,* 73 Ala L. Rev. 221 (2021)

# A. Curriculum Vitae of Bertrall L. Ross II

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## ACADEMIC APPOINTMENTS

**University of Virginia School of Law** 2021-pres.
*Justice Thurgood Marshall Distinguished Professor of Law*
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*Founder, Designing Democracy Project*
*Member, Grand Challenges Steering Committee on Digital Technology and Democracy*

**Free University, Berlin** Spring 2022
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**American Academy, Berlin** Fall 2021
*Berlin Prize Fellow*

**University of California, Berkeley School of Law** 2010-2021
*Chancellor's Professor of Law* 2017-2021
*Chair, Othering and Belonging Institute:*
*Diversity and Democracy Cluster* 2020-2021
*Professor of Law* 2016-2017
*Assistant Professor of Law* 2010-2016

**Courses Taught:** Constitutional Law, Election Law, Constitutional Theory, Legislation, Election Law Practicum, Notes Publishing Workshop

**Service:** Appointments Committee Chair (2018-2020); Curriculum Committee Chair (2017-2018), Dean Search Committee (2016-17); Equity and Inclusion Committee (2014-2017); Haas Institute for a Fair and Inclusive Society, Diversity and Democracy Cluster search committee (2018-19, 2014-15, 2012-13); Academic Placement Committee Co-chair (2015-2016) and committee member (2012-13, 2010-11); Thelton E. Henderson Center for Social Justice co-faculty chair (2014-15) and committee member (2010-2016); First Generation Professional faculty advisor (2011-present).

**University of Virginia School of Law** Fall 2020
*Visiting Professor*

**Princeton University** 2013-2014
*Fellow, Program on Law and Public Affairs*

**Columbia Law School** 2008-2010
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## OTHER APPOINTMENT

**Administrative Conference of the United States** 2020-pres
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**President Biden's Commission on Supreme Court Reform** 2021
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## EDUCATION

**J.D.** **Yale Law School** 2006

**M.P.A.** **Princeton University, School of Public and International Affairs** 2003
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**M.Sc.** **London School of Economics and Political Science** 2001
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**Honors:** *Summa cum laude, Marshall Scholarship*

## HONORS AND AWARDS

**Rutter Award for Teaching Excellence** 2021
UC Berkeley School of Law
- Award description: Honors Berkeley Law professors who have demonstrated an outstanding commitment to teaching.

**Berlin Prize** 2020
American Academy in Berlin
- Prize description: Awarded annually to US-based scholars, writers, composers, and artists who represent the highest standards of excellence in their fields.

**Law and Public Affairs Fellowship** 2013-2014
Princeton University
- Fellowship description: in residence fellowship program for outstanding faculty members, independent scholars, lawyers and judges.

## PUBLICATIONS

### *Articles and Chapters*

*We (Who are Not) the People: Interpreting the Undemocratic Constitution*, 102 TEX. L. REV. ___ (forthcoming 2023) (with Joy Milligan)

*Fundamental: How the Vote Became a Right*, 109 IOWA L. REV. ___ (forthcoming 2023)

*The Supreme Court and the Racial Gerrymandering Thicket*, in OXFORD HANDBOOK ON ELECTION LAW (forthcoming 2023)

*Inequality, Anti-Republicanism, and Our Unique Second Amendment*, 135 HARV. L. REV. FORUM 491 (2022)

*Race and Election Law: Interest-Convergence, Minority Voting Rights, and America's Progress Toward a Multiracial Democracy"*, in OXFORD HANDBOOK OF RACE AND THE LAW (2022)

*Voter Data, Democratic Inequality, and the Risk of Political* Violence, 107 CORNELL L. REV. 1011 (2022) (with Douglas Spencer)

*Challenging the Crown: Legislative Independence and the Origins of the Free Elections Clause*, 73 ALA. L. REV. 223 (2021)

*Guns and the Tyranny of American Republicanism*, BRENNAN CTR FOR JUSTICE (2021)

*Passive Voter Suppression: Campaign Mobilization and the Effective Disfranchisement of the Poor*, 114 NW. U. L. REV. 633 (2019) (with Douglas Spencer)

*Administrative Constitutionalism as Popular Constitutionalism*, 168 U. PA. L. REV. 1783 (2019)

*Addressing Inequality in the Age of* Citizens United, 93 N.Y.U. L. REV. 1120 (2018)

*Partisan Gerrymandering, the First Amendment, and the Political Outsider*, 118 COLUM. L. REV. 2187 (2018)

*A Constitutional Path to Fair Representation for the Poor*, 66 KANSAS L. REV. 92 (2018)

*Administering Suspect Classes*, 66 DUKE L.J. 1807 (2017)

*Measuring Political Power: Suspect Class Determinations and the Poor*, 104 CAL. L. REV. 323 (2016) (with Su Li)

*Embracing Administrative Constitutionalism*, 95 B.U. L. REV. 519 (2015)

*Paths of Resistance to Our Imperial First Amendment*, 113 MICH. L. REV. 917 (2015) (book review of Robert Post, Citizens Divided: Campaign Finance Reform and the Constitution)

*The State as Witness: Credibility and the Democratic Process*, 89 N.Y.U. L. REV. 2027 (2017) (selected for the Yale-Harvard-Stanford Junior Faculty Forum – 2014)

*Denying Deference: Civil Rights and Judicial Resistance to Administrative Constitutionalism,* 2014 U. CHI. LEGAL F. 223

*Democracy and Renewed Distrust: Equal Protection and the Evolving Judicial Conception of Politics*, 101 CAL. L. REV. 1565 (2013)

*Reconsidering Statutory Interpretive Divergence Between Elected and Appointed Judges*, 80 U. CHI. L. REV. DIALOGUES 53 (2013)

*The Representative Equality Principle: Disaggregating the Equal Protection Intent Standard*, 81 FORDHAM L. REV. 101 (2012) (selected for the Yale-Harvard-Stanford Junior Faculty Forum – 2012)

*The Costs and Elusive Gains of Creating Complementarities Between Party and Popular Democracy*, 3 CAL. L. REV. CIRCUIT 146 (2012)

*Against Constitutional Mainstreaming*, 78 U. CHI. L. REV. 1203 (2011)

*Minimum Responsiveness and the Political Exclusion of the Poor*, 72 L. & CONTEMP. PROBS. 197 (2009) (with Terry Smith)

*Reconciling the* Booker *Conflict: A Substantive Sixth Amendment in a Real Offense Sentencing System*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 725 (2006)

***Works in Progress***

*Fixing Partisan Gerrymandering*

*Subordinating Cities (with Rich Schragger)*

*"This is [Not] a White Man's Government: The Fifteenth Amendment and the Constitutionalization of Democratic Self-Governance*

***Reports***

*Presidential Commission of the Supreme Court: Final Report* (with other members of the commission) (2021)

*Fair Elections During a Crisis* (joint report by an ad hoc committee for 2020 Election Fairness and Integrity) (with various other scholars and policy advocates) (2020)

***Encyclopedia Entries***

"Minor v. Happersett," "United Jewish Organization v. Carey," and "Republican Party of Minnesota v. White," *in* ENCYCLOPEDIA OF THE UNITED STATES CONSTITUTION (David Schultz ed., 2009)

"The Fifteenth Amendment," "Literacy Tests," "Voter Disenfranchisement," "Voting Rights Act of 1965," *in* ENCYCLOPEDIA OF CAMPAIGNS, ELECTIONS, AND ELECTORAL BEHAVIOR (Kenneth F. Warren ed., 2008)

## PRESENTATIONS AND INVITED LECTURES

Panelist, New York City Bar Association Rule of Law Federalism Program (May 2023)

Panelist, UCLA Law School Safeguarding Democracy Conference (March 2023)

"Fundamental: How the Vote Became a Right," presented at the University of Texas Law School Faculty Workshop (October 2022) and the Louisiana State University Law Center Faculty Workshop (March 2023)

"We (Who are Not) the People: Interpreting the Undemocratic Constitution," presented at the Georgetown Law Center Faculty Workshop (February 2023) and the UC Berkeley Law School Public Law Workshop (March 2023)

Panelist, Conference on Constitutional Political Economy, Georgetown Law Center (November 2022)

Panelist, Election Gamesmanship, University of Toledo Law Review Symposium (October 2022)

Panelist, *Merrill v. Milligan* (Section 2 Voting Rights Act Case), American Constitution Society and Southern Poverty Law Center (September 2022)

Panelist, Constitution Day Conversation, American Constitution Society (September 2022)

Panelist/Judge, Supreme Court Preview at William & Mary School of Law (September 2022)

"This is [Not] a White Man's Government: The Fifteenth Amendment and the Constitutionalization of Democratic Self-Governance, Law and Society Association Annual Meeting, ISCTE University Institute of Lisbon (July 2022)

Panelist, AALS Faculty Focus: Creating an Inclusive Classroom (April 2022)

"Inequality, Anti-Republicanism, and Our Unique Second Amendment," presented at the Duke-Harvard Conference on Guns, Violence, and Democracy (March 2022)

Commentator, Election Emergencies, Federalist Society National Symposium (March 2022)

Panelist, Voting Rights Under Attack, Washington Institute for the Study of Inequality and Race, University of Washington (January 2022)

Election Subversion: Assessing the Dangers to American Democracy, AALS Annual Conference (January 2022)

What Research Can Tell Us About How Law Schools, Lawyers, and Leaders Can Nourish Democracy, AALS Annual Conference (January 2022)

Redistricting, Gerrymandering, the Voting Rights Act, AALS Annual Conference (January 2022)

"Voter Data, Economic Inequality, and the Risk of Political Violence, NYU Constitutional Theory Colloquium (November 2021)

Inaugural American Academy Lecture, Overcoming the Constitutional Barriers to Economic Inequality in the United States, Free University of Berlin (November 2021)

Berthold Leibinger Lecture, The Fifteenth Amendment and the Constitutionalization of Democratic Self-Governance, American Academy in Berlin (October 2021)

Keynote Lecture, The Constitution, Democracy, and Economic Inequality, Federal Bar Association Annual Conference, San Diego Chapter (July 2021)

The Hugo Black Lecture, Inequality, Democracy, and the First Amendment, Wesleyan University (March 2021)

"Partisan Gerrymandering as a Threat to Multiracial Democracy," presentation at Southwestern Law School (February 2021), AALS Conference on Rebuilding Democracy (May 2021)

"Challenging the Crown: Checks, Balances, and the Principle of Legislative Independence," presentation at Duke Law School (February 2021), Berkeley Law School Public Law Workshop (January 2021), AALS Election Law Works in Progress Panel (January 2021), University of Michigan Law School (April 2021), Research Workshop on American Politics, UC Berkeley (April 2021)

Guns and the Tyranny of American Republicanism, Brennan Center Workshop on Gun Rights and Regulation (February 2021)

Voting During a Pandemic, presentation at the Association of American Law Schools Annual Meeting (January 2021)

Where We Are After the 2020 Election, panel presentation at Duke Law School (November 2020)

The Future of Freedom: Reparations after 400 years, moderator, UC Berkeley Othering and Belonging Institute (2020)

Lessons from the 2020 Election, panel presentation at UC Berkeley (November 2020)

Litigating the Election, panel presentation at the University of Virginia Law School's Karsh Center for Democracy (November 2020)

Pandemic Voting: From Crowds to Clouds, panel presentation at the UC Berkeley Matrix On Point (October 2020)

"Voter Data and Democratic Inequality," presentation at the University of Virginia Law School (October 2020), Denver University School of Law (October 2020), Columbia University Knight First Amendment Institute Data & Democracy Conference (October 2020)

Campaign Finance and Female Officeholding: An Empirical Assessment of the Second "Year of the Woman," presentation at the University of Colorado Symposium on the Nineteenth Amendment (April 2020)

Fair Elections in a Crisis, The Role of Election Law, panel presentation at UC Irvine Law School (January 2020)

Explaining the Decline of Legislative Constitutionalism, presentation at the Association of American Law Schools Annual Meeting (January 2020)

"The Supreme Court and the Partial Rationing of Democracy," presentation at the University of Wisconsin School of Law (October 2019)

"Fixing Distortions in our Democracy," Keynote Speech, Constitution Day Rights and Wrongs Conference, San Francisco State University (September 2019)

Discussant, Restoration and Suppression: The Contemporary Frontiers of Voting Rights, American Political Science Association Annual meeting (September 2019)

"Flipping the Narrative on American Democracy," presentation at the American Constitution Society National Convention (June 2019)

Distinguished Commentator, National Conference of Constitutional Law Scholars, University of Arizona School of Law (March 2019)

"Passive Voter Suppression," presentation at UC Berkeley Center for the Study of Law and Society (January 2019), George Washington Law School (February 2019), University of Wisconsin Law School (March 2019), UC Berkeley Public Law Workshop (August 2019)

"Administrative Constitutionalism as Popular Constitutionalism", presentation at University of Pennsylvania Law School (October 2018)

"Partisan Gerrymandering, the First Amendment, and the Political Outsider," presentation at Columbia University Law School (March 2018)

"The Gerrymandering Harm," presentation at the University of California, Berkeley School of Law Public Law Workshop (January 2018)

"The Legacy of Shaw," presentation at the American Association of Law Schools Annual Conference (January 2018)

"Re-Imagining Representative Fairness," presentation at the University of Kansas Law School (October 2017)

"Addressing Inequality in the Age of Citizens United," presentations at University of Colorado Law School (October 2016), Arizona State University Law School (November 2016), UC Davis Law School (November 2016), University of Texas Law School (December 2016), Cornell University Law School (December 2016), University of Arizona Law School (March 2017), UCLA Law School (March 2017), University of Minnesota Law School (April 2017), and Seoul National University Law School (July 2017)

"Administering Suspect Classes," presentation at Duke University Law School (March 2017)

"The New First Amendment Categoricalism," presentations at Stanford Law School (February 2016), Free Speech for the People Conference at Seton Hall Law School (April 2016), and UC Davis School of Law Faculty Workshop (September 2016)

"What the Constitution Owes the Poor," presentations at Columbia Law School (April 2016) and University of Chicago Law School (May 2016)

"Measuring Political Power: Suspect Class Determinations and the Poor," presentations at

University of Chicago Law School (May 2016), University of Southern California School of Law (March 2016), UC Irvine School of Law (December 2015) University of Colorado School of Law (November 2015), Culp Colloquium, Duke Law School (May 2015), UC Berkeley School of Law Faculty Workshop (March 2015), UC Berkeley School of Law Junior Working Ideas Group (February 2015), Class Crits VII, UC Davis School of Law (November 2014), UC Davis Center for Poverty Research, Poverty and Place Conference (November 2014)

"Toward a Class Conscious Voting Rights Act," presentation at Florida State University School of Law (March 2015)

"Embracing Administrative Constitutionalism," presentation at Duke Law School Culp Colloquium (May 2014), Princeton University Law and Public Affairs Seminar (March 2014), Emory Law School Faculty Workshop (October 2014)

"Transparent Adjudication: Promoting Dialogue on Judicial Conceptions of Politics," presentation at the University of Maryland School of Law Constitutional Law Schmooze (February 2014)

American Constitution Society, Convening on Voting Rights, George Washington University Law School (December 2013)

"Resisting Administrative Constitutionalism," presentation at the University of Chicago Legal Forum on the 50th Anniversary of the Civil Rights Act (November 2013)

"The State as Witness: Credibility and the Democratic Process," presentation at the Fordham Law School Legal Theory Workshop (October 2013), Loyola Constitutional Law Colloquium (November 2013), and the Harvard-Yale-Stanford Junior Faculty Forum at Stanford Law School (June 2014)

"Discrete and Insular: Re-Assessing the Political Power of the Poor," presentation at the American University School of Law Poverty Law Conference (October 2013)

"Democracy and Renewed Distrust: Equal Protection and the Evolving Judicial Conception of Politics," and "Transparent Adjudication: Promoting Democratic Dialogue on Judicial Conceptions of Politics," presentation at the U.C. Berkeley School of Law Faculty Workshop (April 2013), Race, Ethnicity, and Immigration Colloquium, Institute of Governmental Studies, UC Berkeley (February 2013), Junior Faculty Federal Courts Workshop at William & Mary School of Law (October 2012), Law and Society Association Annual Meeting (June 2012)

American Constitution Society, Convening on Federalism and Marijuana Legalization, Washington D.C. (April 2013)

"Democracy and Renewed Distrust: Equal Protection and the Evolving Judicial Conception of Politics," and "The State as Witness: Credibility and the Democratic Process," invited

presentation at the Workshop on Law, Philosophy, and Political Theory, U.C. Berkeley School of Law (April 2013)

"U.S. Supreme Court Preview," Panel Presentation at the Bar Association of San Francisco (October 2012)
"NFIB v. Sebelius," panel Presentation at the U.C. Berkeley Summer Faculty Colloquium Supreme Court Review (July 2012)

"The Representative Government Principle," presentation at the Yale-Harvard-Stanford Junior Faculty Forum, Harvard Law School (June 2012), Duke Law School Culp Colloquium (May 2012), UCLA School of Law faculty workshop (April 2012), UC Berkeley School of Law Junior Working Ideas Group (December 2011)

"Against Constitutional Mainstreaming," presentation at the UC Berkeley School of Law Junior Working Ideas Group Workshop (December 2010), and the Columbia Law School Legislation Works Roundtable (April 2011)

"Against Constitutional Mainstreaming: Toward a Proper Role for Courts in Dynamic Statutory Interpretation," job talk presentation at the law school faculty workshops at Fordham, Boston University, Cardozo, Minnesota, University of Colorado, UC Davis, Vanderbilt, Duke, Temple, Loyola-Los Angeles, San Diego, University of North Carolina, American, UC Irvine, UC Berkeley, UCLA (October 2009-January 2010), Columbia Law School Summer Junior Faculty Workshop (July 2009); Columbia Law School Associates' and Fellows' Workshop (May 2009)

"Minimum Responsiveness and the Political Exclusion of the Poor," invited paper presentation at Race & Socio-economic Class: Unraveling a Complex Tapestry, Duke Law School, Durham, NC (January 2009), Columbia Law School Associates' and Fellows' Workshop (December 2009)

"North American Monetary Union," workshop presentation to members of Congress – Princeton University, Princeton, NJ (April 2003)

"Regulations Confronting Trade in Services," presentation to officials from the European Commission – London, UK (May 2001)

## PROFESSIONAL SERVICE

**Multistate Bar Exam, Constitutional Law Committee** 2022-present
*Member*

**Journal of American Constitutional History** 2022-present
*Editorial Board*

**The Order of the Coif Book Award Committee** 2019-present

*Committee Member; Chair*

**Emerging Scholars Program/Culp Colloquium** 2015-present
*Organizer/Mentor for aspiring academics and junior scholars of color*

**AALS Election Law Section** 2021-present
*Executive Committee Member*

**AALS Section on Legislation & Law of the Political Process** 2015-16
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**Peer-Reviewed articles and book manuscripts for**:

- American Political Science Review
- Cambridge University Press
- Yale Law Journal, Harvard Law Review, Law and Social Inquiry, and the California Law Review

## MEDIA APPEARANCES

- National Public Radio, Salute to MLK – January 2023
- Common Law, UVA Law School Podcast (Independent state legislature doctrine) – November 2022
- Scholars Circle, Voter Suppression – November 2022
- KCBS – San Francisco, Methods of Voting – November 2022
- National Public Radio (All Sides with Ann Fisher – Election Denialism) – September 2022
- National Public Radio (On Point – Independent State Legislature Doctrine) – July 2022
- National Public Radio (Your Call – The Right to Vote) – January 2022
- PBS, The Open Mind (America's Extraconstitutional Supreme Court) – May 2021
- National Public Radio (The Electoral College Vote, and What Happens Next) – Dec. 2020
- National Public Radio (A Look at the Court Battles of the 2020 Presidential Election – November 2020
- National Public Radio – Forum (Electoral College in the Spotlight) – November 2020
- National Public Radio (Safeguarding the Electoral Vote) – October 2020
- National Public Radio (How Do Elections Work in a Pandemic) – May 2020
- BBC
- CNBC
- New Zealand Public Radio (Voting rights, enfranchisement & disenfranchisement in US elections) – October 2020
- Various local media appearances in California and Virginia

**B. Bertrall L. Ross II, *Challenging the Crown: Legislative Independence and the Origins of the Free Elections Clause*, 73 Ala L. Rev. 221 (2021)**

# CHALLENGING THE CROWN: LEGISLATIVE INDEPENDENCE AND THE ORIGINS OF THE FREE ELECTIONS CLAUSE

*Bertrall L. Ross II*

# CHALLENGING THE CROWN: LEGISLATIVE INDEPENDENCE AND THE ORIGINS OF THE FREE ELECTIONS CLAUSE

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*The American system of checks and balances is under considerable stress. The President's exercise of unilateral and unchecked powers, once limited to foreign affairs and war, has increasingly been extended to domestic matters. At the same time, Congress's authority to check the President's unilateral exercise of power, long emasculated in foreign affairs and war, now is threatened in domestic affairs by its own declining will to check. Unrestrained executive power has grown as Congress recedes into the background.*

*Congress's declining will to check presidential unilateralism bottomed out during the Trump presidency, when Congress could not muster the will to check clear abuses of executive authority. The President's co-partisans in Congress refused to discharge their constitutional role because they needed the President's support for their own reelections. Since the Constitution requires congressional super-majorities to override inevitable presidential vetoes of legislation blocking unilateral presidential authority, the unwillingness of the President's co-partisans to reign him in rendered Congress a dependent subordinate to the President.*

*To fully understand the checks and balance framework and how the Constitution protects legislative independence, it is necessary to move beyond legal scholarship's usual starting points. Focusing on Montesquieu and Madison, the Constitutional Convention and ratification debates in 1787, and the Federalist Papers contributes to the misleading impression that the American checks and balances framework began with Montesquieu and ended with the U.S. Constitution. The U.S. Constitution's checks and balance framework, I argue, originated in the overlooked struggle between the Crown and Parliament in seventeenth-century England. To comprehend a key pillar of the checks and balance framework, we need to account for those struggles.*

*The roots of the checks and balances framework arose from a coordination theory of governance, in which Parliament's will to check arose from its coequality with, and independence from, the Crown. During those struggles, successive crowns sought to undermine the equality and independence of Parliament, but Parliament reclaimed both through civil war and revolution. English revolutionaries ultimately secured protection for parliamentary independence by constitutionalizing free elections, which they understood to be parliamentary elections free from undue crown influence. The free election clause, which was a central feature of the English Bill of Rights, would later be included in every new state constitution adopted during the American Revolution in order to protect legislative independence.*

*This Article, which recovers the roots of checks and balances, serves as the first in a three-article series that will ultimately link this history to the present. In doing so, this article expands our historical understanding of the checks and balance framework so that we can better effectuate its goal of preventing the concentration of power in any one branch. The second article will connect the English principle of legislative independence to the American constitutional project a century later. The third article will*

* Justice Thurgood Marshall Distinguished Professor of Law, University of Virginia Law School.. For their valuable comments and feedback, I am grateful to Tabatha Abu El-Haj, Aziza Ahmed, Maggie Blackhawk, Richard Briffault, Guy Charles, William Eskridge, Ned Foley, Daryl Levinson, Timothy Lovelace, Joy Milligan, Derek Muller, Teddy Rave, Luis Fuentes-Rowher, Reva Siegel, Douglas Spencer, Franita Tolson, and the participants in the AALS Panel on Legislative Constitutionalism, the AALS Election Law Works-in-Progress Session, the UC Berkeley Public Law Workshop, and the Duke Law School Faculty Workshop. I would also like to thank the editors of the University of Alabama Law Review for their helpful editing and feedback.

*explore the modern electoral threats to legislative independence and propose methods to counteract them so that Congress can fulfill its constitutionally assigned role of checking the President.*

## INTRODUCTION

> *[The Framers] put [the power of impeachment] in the constitution for a reason . . . . For a man who would be disdainful of constitutional limit, ignoring or defeating the other branches of government and their co-equal powers . . . . For a man who believed himself above the law and beholden to no one. For a man, in short, who would be a king.*[1]

On February 15, 2019, President Trump proclaimed a national emergency along the southern border only weeks after Congress rejected his request to fund the border wall he promised during his 2016 presidential campaign.[2] That rejection indicated that most Congressmembers agreed there was no emergency requiring funding for a wall along the southern border.[3] Yet, for the first time ever, a president invoked the National Emergencies Act to override Congress so that Trump could divert money appropriated elsewhere for the wall.[4]

Less than two weeks after the emergency proclamation, Republican Senator Thom Tillis authored an op-ed that appeared in the *Washington Post*. Tillis declared that as "a member of the Senate" he had "grave concerns when our

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1. Congressman Adam Schiff (D-CA), Lead House Manager in President Donald Trump's First Impeachment Trial (Jan. 22, 2020). The full excerpt of Adam Schiff's opening statement in President Trump's impeachment trial:

> They did not intend for the power of impeachment to be used frequently, or over mere matters of policy, but they also put it in the constitution for a reason. For a man who would subvert the interests of our nation to pursue his own interests. For a man who would seek to perpetuate himself in office by inviting foreign interference and cheating in an election. For a man who would be disdainful of constitutional limit, ignoring or defeating the other branches of government and their co-equal powers. For a man who would believe[] that the constitution gave him the right to do anything he wanted and practiced in the art of deception. For a man who believed himself above the law and beholden to no one. For a man, in short, who would be a king.

*Read Adam Schiff's Opening Argument at Senate Impeachment Trial*, POLITICO (Jan. 22, 2020), https://www.politico.com/news/2020/01/22/adam-schiff-opening-argument-trump-impeachment-trial-102202.

2. Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019); *see also President Donald J. Trump's Border Security Victory*, TRUMP WHITE HOUSE ARCHIVE (Feb. 15, 2019), https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trumps-border-security-victory/ ("President Trump was elected partly on his promise to secure the Southern Border with a barrier and, since his first day in office, he has been following through on that promise. . . . President Trump is taking Executive action to ensure we stop the national security and humanitarian crisis at our Southern Border.").

3. Consolidated Appropriations Act, 2019, Pub. L. No. 116–6, 133 Stat. 13, 28 (appropriating only $1.375 billion of the $5.7 billion that President Trump requested for the construction of a border wall). Scholarly observers agreed that the conditions on the border did not constitute an emergency. *See, e.g.*, Daniel A. Farber, *Exceptional Circumstances: Immigration, Imports, the Coronavirus, and Climate Change as Emergencies*, 71 HASTINGS L.J. 1143, 1150 (2020) ("If an emergency is supposed to be sudden and unexpected, the Proclamation's description of border conditions fails to meet the bill.").

4. *See President Donald J. Trump's Border Security Victory*, *supra* note 2 (specifying the amount of congressionally appropriated money that the President intended to divert to build the wall).

institution looks the other way at the expense of weakening Congress's power."[5] He deemed it his "responsibility to be a steward of the Article I branch, to preserve the separation of powers and to curb the kind of executive overreach that Congress has allowed to fester for the better part of the past century."[6]

Soon after Senator Tillis's op-ed, President Trump issued a warning to Republicans who were thinking of challenging his emergency declaration. "I really think that Republicans that vote against border security and the wall," Trump asserted in a *Fox News* interview, "put themselves at great jeopardy."[7] Trump's warning was accompanied by threats from Trump-supporting conservative activists and GOP party leaders calling for a primary challenge of the Republican Senator.[8]

Tillis, who was up for reelection in November 2020, began to waver. A little over a week after President Trump's *Fox News* interview, Senator Tillis voted against a resolution of disapproval under the National Emergencies Act that could have terminated the emergency and halted the President's diversion of congressionally appropriated funds.[9] Tillis was not the only Republican congressmember to reverse course.[10] Senators and members of the House of

5. Thom Tillis, Opinion, *I Support Trump's Vision on Border Security. But I Would Vote Against the Emergency*, WASH. POST (Feb. 25, 2019), https://www.washingtonpost.com/opinions/2019/02/25/i-support-trumps-vision-border-security-i-would-vote-against-emergency/.

6. *Id.*

7. *Trump Says Republicans Who Oppose His Border Emergency Declaration Are in 'Great Jeopardy'*, ASSOCIATED PRESS (Mar. 2, 2019), https://www.marketwatch.com/story/trump-says-republicans-who-oppose-emergency-declaration-are-in-great-jeopardy-2019-03-01.

8. *See* Scott Wong & Alexander Bolton, *GOP's Tillis Comes Under Pressure for Taking on Trump*, THE HILL (Mar. 13, 2019), https://thehill.com/homenews/senate/433929-gops-tillis-comes-under-pressure-for-taking-on-trump (describing the political pressure that President Trump and his supporters placed on Senator Tillis and the threats of a primary challenge).

9. 50 U.S.C. § 1622 (describing the method by which Congress can terminate a presidentially declared emergency under the National Emergencies Act).

10. Around the same time as Tillis's op-ed, Republican Senator Ben Sasse of Nebraska predicted, "If we get used to presidents just declaring an emergency any time they can't get what they want from Congress, it will be almost impossible to go back to a Constitutional system of checks and balances." Bret Stephens, Opinion, *Twelve Righteous Republicans (and 41 Cowards)*, N.Y. TIMES (Mar. 15, 2019), https://www.nytimes.com/2019/03/15/opinion/republicans-trump-veto-emergency.html. Senate Majority Leader Mitch McConnell privately opposed the emergency declaration and warned the President "he would face a significant bloc of GOP defections." Paul Kane, *Tillis's Reversal Sums Up the State of Republicans—Few Willing to Cross Trump*, WASH. POST (Mar. 14, 2019) [hereinafter Kane, *Tillis's Reversal Sums Up the State of Republicans*], https://www.washingtonpost.com/powerpost/tilliss-reversal-sums-up-state-of-senate-republicans—few-willing-to-cross-trump/2019/03/14/aceb6c4a-45d5-11e9-8aab-95b8d80a1e4f_story.html; *see also* Emily Cochrane & Glenn Thrush, *Bill to Curtail Future Emergency Declarations Could Save Trump's Current One*, N.Y. TIMES (Mar. 12, 2019), https://www.nytimes.com/2019/03/12/us/politics/bill-emergency-declarations.html (describing the political pressure that President Trump and his supporters placed on Senators who initially opposed the emergency declaration). Senators Sasse and McConnell, whose Senate seats were also up for election in November 2020, ultimately joined Tillis in voting against the resolution of disapproval. Stephens, *supra*. A similar pattern arose in the House of Representatives where every member was up for reelection in 2020. In the days immediately following the emergency declaration, some Republican congressmembers openly opposed it. But after President Trump's *Fox News* interview, opposition from Republican congressmembers died down as most fell in line with the President's assertion of authority. *See* Paul Kane, *Republicans' Pack*

Representatives, who initially opposed the President's emergency proclamation, fell in line after President Trump's threat. In the end, every Republican Senator up for reelection, except Senator Susan Collins of Maine, voted against the resolution's approval, as did all but thirteen House Republicans.[11] Although the resolution passed with the support of Democrats and a small number of retiring, libertarian, and swing state or swing district Republicans, Congress lacked the votes to override the President's veto.[12] President Trump moved forward with his co-optation of Congress's power of the purse, a power that James Madison considered "the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people."[13]

Congress's unwillingness to check Trump's assertion of unilateral presidential authority to fund the border wall is easy to forget given the constant tumult of the Trump presidency. But it is crucially important: President Trump provided a blueprint for future presidents to exercise even more expansive unchecked emergency authority. As Justice Frankfurter warned in *Youngstown Sheet & Tube Co. v. Sawyer*, the case establishing the constitutional separation of powers framework used today, "[t]he accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority."[14]

The Constitution's checks and balances framework requires all three governmental branches to defend their powers from other branches' encroachment to prevent the accumulation of power in any one branch. If branches fail to defend their power, rule by one branch's arbitrary will may result.[15]

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*Mentality in Trump Era Leaves Little Room for Course Correction*, WASH. POST (Feb. 27, 2019) [hereinafter Kane, *Republicans' Pack Mentality in Trump Era*], https://www.washingtonpost.com/powerpost/republicans-pack-mentality-in-trump-era-leaves-little-room-for-course-correction/2019/02/26/7b2e42bc-3a0f-11e9-a06c-3ec8ed509d15_story.html.

11. *See* James Arkin & John Bresnahan, *'Beware the Fury of Trump': 2020 GOP Senators Back President on Border*, POLITICO (Mar. 14, 2019), https://www.politico.com/story/2019/03/14/senate-republicans-trump-national-emergency-vote-1222367 (noting how "[n]early every other Republican on the ballot in 2020 voted to uphold the emergency" and quoting a Republican donor's warning, "[b]eware the fury of Trump" as "Republican senators could have faced primary challenges for opposing Trump on the issue.").

12. *See* Erica Werner et al., *House Passes Resolution to Nullify Trump's National Emergency Declaration*, WASH. POST (Feb. 27, 2019), https://www.washingtonpost.com/powerpost/house-sponsor-of-resolution-to-nix-emergency-declaration-acknowledges-uphill-battle-on-overriding-expected-trump-veto/2019/02/26/22104532-39d2-11e9-aaae-69364b2ed137_story.html (providing an account of the ideological leanings of the thirteen Republican House members and Senators up for reelection that voted for the disapproval resolution).

13. THE FEDERALIST NO. 58, at 359 (James Madison) (Clinton Rossiter ed., 1961).

14. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring).

15. *See, e.g.*, THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 126 (1785) (describing the concentration of legislative, executive, and judicial powers into the same hands as "precisely the definition of despotic government"); *see also* THE FEDERALIST NO. 48, *supra* note 13, at 310–11 (James Madison) (quoting JEFFERSON, *supra*).

Individual officials must embrace their branch's prerogative for the framework to operate. In James Madison's words, "[t]he interest of the man must be connected with the constitutional rights of the place."[16] The "man" in this quote is an elected or appointed official; the place is the branch to which he belongs. This connection between an official and his branch of government is supposed to be "the great security against a gradual concentration of the several powers in the same department,"[17] giving each official the "personal motive" and "ambition" that is necessary to counteract other officials' drives to aggrandize power.[18]

Yet in the border wall episode described above, a pivotal segment of Congress subordinated the legislature's authority to their desire to please a president they determined posed an existential threat to their reelection prospects. With the President making clear to congressmembers that he would view support for the disapproval as "an act of betrayal," Republican congressmembers concluded, "[t]here's no way to win reelection if you don't first win the GOP primary."[19] Thus, "even Republicans who could face difficult general elections lined up behind Trump rather than risk his wrath."[20]

A Congress dependent on the President represents a structural breakdown in the American system of checks and balances. For the Framers of the Constitution's checks and balances framework, the independence of the branches from each other was critical for maintaining each branch's institutional will to check.[21] The Constitution established specific tenure and selection processes to secure judicial and executive independence from legislative encroachment.[22] But the Framers were silent about the means of protecting legislative independence from executive encroachment. That silence,

16. THE FEDERALIST NO. 51, supra note 13, at 322 (James Madison).

17. *Id.* at 321.

18. *Id.*

19. Kane, *supra* note 10.

20. *Id.*; *see also* Jonathan Martin & Maggie Haberman, *Fear and Loyalty: How Donald Trump Took Over the Republican Party*, N.Y. TIMES (Dec. 21, 2019), https://www.nytimes.com/2019/12/21/us/politics/trump-impeachment-republicans.html (interviewing a Republican congressmember who explained, "[t]here is no market . . . for independence" as "Mr. Trump will target you among Republicans . . . and the vanishing voters from the political middle will never have a chance to reward you because you would not make it through a primary").

21. THE FEDERALIST NO. 68, *supra* note 13, at 413 (Alexander Hamilton) (defending the Electoral College system for reelecting the president as a means by which the president would be "independent for his continuance in office on all but the people themselves" removing the president's temptation to "sacrifice his duty . . . for those whose favor was necessary to the duration of his official consequence"); THE FEDERALIST NO. 78, *supra* note 13, at 465 (Alexander Hamilton) (describing judicial independence from the "encroachments and oppressions of the representative body" as "the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws").

22. *See* U.S. CONST. art. II, § 1, cl. 2–3 (establishing the Electoral College system for the selection of the President); U.S. CONST. art. III, § 1, cl. 1 (establishing life tenure for federal judges); *see also* Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 419 n.118 (1995) (explaining the branch independence from the different modes of selection for the different branches of government).

however, did not mean that the Framers neglected or deemed legislative independence unnecessary. Rather, they recognized that the means for protecting legislative independence had already been established prior to the adoption of the Constitution. These means were ultimately incorporated into the Constitution in a way that scholars have thus far overlooked.

In this Article, I argue that President Trump's domination of Congress is not a new problem, nor was the challenge overlooked in America's construction of its constitutional system. America's revolutionaries of 1776 would have readily understood the great threat represented by an executive dominating the legislature.[23] Their predecessors, the English who fought the Glorious Revolution against an overreaching king, would also have recognized the danger as the primary evil that they opposed.[24]

Seventeenth-century England saw sustained clashes over the relative power of Parliament and the Crown. Out of these clashes emerged the "coordination" theory of governance, in which the king stood in an equal and coordinate position with the two houses of Parliament, rather than exercising absolute monarchical power. English kings were loath to relinquish power, however, and sought to undermine Parliament's independence by corrupting parliamentary selection processes in order to fill the Parliament with loyalists.[25] The Glorious Revolution of 1688 arose in response to that pattern of excessive Crown influence over parliamentary selection, as well as deep disputes over religious tolerance.[26]

After Parliament prevailed, the English revolutionaries presented to their newly installed monarch a declaration of rights listing their grievances against the prior kings and the obligations of the new monarch.[27] A principal obligation of the new monarch was "[t]hat election of members of Parlyament ought to be free."[28] For the parliamentarians, free elections meant elections free from undue influence, which they understood to be the principal means by which parliamentary independence would be permanently secured.

Safeguarding legislative independence was thus a cornerstone of the constitutional framework elaborated in England. That principle would be transported to America eighty years after the Glorious Revolution through

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23. *See, e.g.*, Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1057 (1994) ("A prime goal of constitution makers in the newly independent American states was the creation of limited executive authorities that would be unable to exercise the vast control that the British Kings and Royal Governors had asserted over legal and social arrangements."); Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715, 718 (2012) ("The colonial experience with overly powerful executives and judges answerable only to a distant crown led to the creation of almost unfettered legislatures in the early Republic.").

24. *See infra* Part V.

25. *See infra* Part IV.

26. *See infra* Part V.

27. *See* Bill of Rights, 1688, 1 W. & M., c. 2 (Eng.), https://www.legislation.gov.uk/aep/WillandMarSess2/1/2.

28. *See id.*

provisions for free elections, which were included in every new state constitution written between the Revolution and the U.S. Constitution's ratification.[29]

It is impossible to understand the checks and balances regime that we inherited from England unless one grasps how the experience of executive dominance and legislative independence underpinned the constitutional system they designed. Yet modern separation of powers scholarship, with its focus on the eighteenth century and the contributions of Montesquieu and Madison to the theory, bypasses those key historical origins.[30] In this Article, I excavate and recover that much older understanding of the origins of checks and balances. I use this history to shed light on the modern problem of a weakened Congress, unwilling to check an overreaching president.

That history's significance is two-fold: First, it illuminates the meaning and modern utility of the "free election" clauses found within state constitutions, which govern federal elections just as they do state ones. Those clauses provide a constitutional mandate for addressing and curing legislative dependence. Second, the history provides a broader foundation for understanding the goals of, and foremost threats to, our constitutional scheme of checks and balances. As this Article foregrounds, legislative independence and the role of electoral structures in securing it are core and neglected features of the U.S. checks and balances framework.

The Article proceeds in five parts. In Part I, I describe the problem of presidential unilateralism from the perspective of the system of checks and balances. I focus on the unique challenges that President Trump's exercise of

29. *See infra* text accompanying note 475.

30. *See, e.g.*, Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1750 (1996) ("[V]irtually none of the even self-consciously historicist work on separation of powers begins the story much before the summer of 1787."). A few scholars have consciously pushed the separation of powers analysis beyond Madison and Montesquieu in an attempt to uncover the deeper eighteenth-century roots of the principle. *See, e.g.*, William Seal Carpenter, *The Separation of Powers in the Eighteenth Century*, 22 AM. POL. SCI. REV. 32, 32–38 (1928) (examining the eighteenth-century American colonial roots of separation of powers); Jeremy Waldron, *Separation of Powers in Thought and Practice?*, 54 B.C. L. REV. 433, 452–56 (2013) (questioning Montesquieu's contribution to the American separation of powers framework and identifying other eighteenth-century sources). The seventeenth-century English roots, however, remain mostly overlooked in scholarly accounts of the American checks and balances system. For the rare examples of legal scholarship that mentions without interrogating the seventeenth-century roots of the American checks and balances system, see Edward H. Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 375–76 (1976) (providing a brief account of the influence of the Glorious Revolution on American thought, but lacking details about the nature of that influence); Benjamin F. Wright, Jr., *The Origins of the Separation of Powers in America*, 40 ECONOMICA 169, 169 (1933) (recognizing the role of seventeenth-century English Republican theorists on the theoretical development of checks and balances). Two scholars have provided more extensive accounts of the seventeenth-century origins of separation of powers, but their foci differ from mine. *See* M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 41–75 (1967) (identifying the theoretical origins of separation of powers from the mid-seventeenth-century English Civil War onward, but overlooking the struggles between the king and Parliament that were central to the development of the principle of legislative independence); W.B. Gwyn, *The Meaning of the Separation of Powers*, 9 TUL. STUD. POL. SCI. 1 (1965) (deriving the roots of the American conception of liberty and tyranny from the struggle for judicial independence from the executive in seventeenth-century England).

unilateral authority raised from his successful efforts to undermine congressional independence by depressing its will to check.

In the remainder of the Article, I use original source materials to reconstruct one of the foundations of the American system of checks and balances: legislative independence. In Part II, I begin the historical excavation of the principle of legislative independence by tracing the origins of the coordination theory of government, which continues to be at the foundation of the checks and balances framework today. In Part III, I examine the period of the de facto operation of the coordination theory and the rise of the English Parliament as a coequal institution that checked the crown's exercise of unilateral authority. In Part IV, I trace the Crown's attack on parliamentary independence through his use of royal prerogative to remodel boroughs. Finally, in Part V, I document the English response to the Crown's threat on parliamentary independence, which led to a revolution and adoption of a Constitution protecting legislative independence through the provision for free elections. I conclude by previewing how my future work will connect this history and constitutional principle to the current crisis in America's checks and balances framework.

## I. THE PROBLEM OF PRESIDENTIAL UNILATERALISM

President Trump's emergency proclamation to build a wall along the southern border of the United States is only the most recent example of presidential unilateralism. In this Part, I provide an account of the constitutional and historical bases for presidential unilateralism. I focus here on emergency powers that have served as the foundation for broader presidential unilateralism in both foreign and domestic affairs. I then describe the challenges to checks and balances arising from presidential unilateralism in the Trump era. Throughout the Part, I show how conventional and modern approaches for operationalizing the system of checks and balances have proven inadequate to address the problem of presidential unilateralism.

### *A. Checks and Balances and Presidential Unilateralism*

The principal mischief that the system of checks and balances seeks to avoid is despotic tyranny that leads to rule by arbitrary will.[31] The rule of law, developed most prominently in the political philosophy of John Locke, stood

31. As James Madison explained,

> An *elective despotism* was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy as that no one could transcend their legal limits without being effectually checked and restrained by the others.

THE FEDERALIST NO. 48, *supra* note 13, at 311 (James Madison).

as the antithesis to rule by arbitrary will.[32] Rule of law demands the public promulgation of laws that are equally enforced and independently adjudicated so that the governors are as constrained as the governed in their actions by the laws they establish.[33]

Under the American checks and balances system, most exercises of power require the consent of at least two independent branches of government who represent distinct but overlapping parts of the polity.[34] Proponents of the Constitution, however, argued that in narrow circumstances, the existential needs of the state ultimately outweighed concerns about despotic power. Five years after the Constitution's ratification, Alexander Hamilton proffered a full-throated defense of unilateral executive power during the debate over President Washington's authority to declare American neutrality during a war between European powers.[35] Hamilton, writing under the pseudonym Pacificus, pointed to a difference between the Vesting Clauses of Articles I and II as the foundation for his claim that executive authority extends beyond that specified in the Constitution.[36] Whereas the Article I Vesting Clause specifies, "All legislative Powers herein granted shall be vested in a Congress of the United States," the Article II Vesting Clause only says, "[t]he executive Power shall be vested in a President of the United States."[37] Hamilton interpreted the decision to not include the language "herein granted" in the Article II Vesting Clause to mean that the executive power included powers not specified in Article II.[38]

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32. As John Locke theorized,

> Wherever law ends, tyranny begins, if the law be transgressed to another's harm. And whosoever in authority exceeds the power given him by the law, and makes use of the force he has under his command, to compass that upon the subject, which the law allows not, ceases in that to be a magistrate. . . .

JOHN LOCKE, TWO TREATISES OF GOVERNMENT 217–18 (Mark Goldie ed., 1993) (1690).

33. *See, e.g.*, Paul R. Verkuil, *Separation of Powers, The Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 303–07 (1989) (describing the relationship between separation of powers and rule of law).

34. *See, e.g.*, John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1979–84 (2011) (describing the distinct and overlapping constituencies that the President and two houses of Congress represent and their shared powers under the constitutional framework).

35. President Washington ultimately declared American neutrality between the warring European powers without congressional consent. *See* George Washington, Neutrality Proclamation (April 22, 1793), *reprinted in* THE PACIFICUS-HELVIDIUS DEBATES OF 1793–1794: TOWARD THE COMPLETION OF THE AMERICAN FOUNDING 1 (Morton J. Frisch ed., 2007); *see also* ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 18 (First Mariner Books ed. 1973) (defining President Washington's neutrality declaration as "a unilateral presidential act" that "involved . . . in the eyes of some, a repudiation of obligations assumed by the United States in its treaty with France of 1778").

36. *See* Alexander Hamilton, *Pacificus Number 1* (June 29, 1793), *reprinted in* THE PACIFICUS-HELVIDIUS DEBATES OF 1793-1794: TOWARD THE COMPLETION OF THE AMERICAN FOUNDING 8–17 (Morton J. Frisch ed., 2007).

37. U.S. CONST. art. I, § 1; U.S. CONST. art. II, § 1, cl. 1.

38. *See* Hamilton, Pacificus Number 1, *supra* note 36 at xviii (rejecting the claim that the Executive has only those powers contained in Article II, arguing, "It would not consist with the rules of sound construction to consider this enumeration of particular authorities as derogating from the more comprehensive grant contained in the general clause"). Presidents have since relied on this constitutional textual argument to justify unilateral exercises of executive power. *See* Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1404 (1989) (describing how Presidents Theodore Roosevelt, Harry Truman, and Richard Nixon

Even Hamilton's greatest opponent during the debate on the neutrality proclamation, Thomas Jefferson, came to agree with him that the President had the authority to unilaterally exercise powers not contained in the Constitution. During a presidency in which he exercised emergency authority to protect military assets, Jefferson wrote in a letter that "on great occasions every good officer must be ready to risk himself in going beyond the strict line of law."[39] In a later letter, Jefferson further acknowledged that "[a] strict observance of the written laws is doubtless *one* of the high duties of a good citizen: but it is not *the highest*."[40] Instead, "[t]he laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation."[41]

The Madisonian theory of checks and balances suggested that the opportunities for the President to exercise unilateral power would nonetheless be limited. The contesting ambitions of the political branches would presumably lead members of one branch to protect their prerogative by checking another branch's unilateral exercise of power that went too far and lasted for too long.

The first century and a half of American history supported the Framers' assumptions that congressional ambition would check exercises of presidential unilateralism beyond the temporal and substantive limits of an emergency.[42] Since World War I, however, the dynamics of emergency power have changed dramatically, particularly in the context of foreign affairs. Two World Wars, an undeclared and lengthy Cold War, and an undefined and indefinite War on Terror has left the United States in a state of emergency for most of the past century.[43] In these states of emergency, which have spawned international military conflicts, entanglements, and agreements, presidents have broadly exercised unilateral authority.[44]

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relied on Hamilton's argument to assert that "the President has inherent power to do either anything necessary to preserve the United States, or, even more broadly, anything not explicitly forbidden by the Constitution").

39. Letter from Thomas Jefferson to Governor William C.C. Claiborne Washington (Feb. 3, 1807), https://founders.archives.gov/documents/Jefferson/99-01-02-5008.

40. Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810), *in* 11 THE WORKS OF THOMAS JEFFERSON 146 (Paul Leicester Ford ed., 1905).

41. *Id.* at 148.

42. SCHLESINGER, *supra* note 35, at 26–34 (describing the dynamics between Congress and the courts between the Jefferson years and the Civil War in which Congress actively checked presidential exercises of power and presidents were restrained in their exercises of power).

43. *See, e.g.*, Lobel, *supra* note 38, at 1404 (describing how during the Cold War "the ideology and reality of permanent crisis . . . dramatically transformed the constitutional boundaries between emergency and non-emergency powers. . . . Emergency rule has become permanent."); Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001, 1015 (2004) ("[T]he Cold War ushered in an era of 'permanent emergency' in which the constitutional sacrifices that were to be made were not clearly temporary or reversible."); ANDREW RUDALEVIGE, THE NEW IMPERIAL PRESIDENCY: RENEWING PRESIDENTIAL POWER AFTER WATERGATE 237–56 (2006) (describing President George W. Bush's exercise of unilateral powers after the 9/11 terror attacks).

44. Presidents Woodrow Wilson and Franklin Roosevelt exercised unilateral emergency authority both at home and in support of allies abroad prior to congressional declarations of war during World Wars I and

In war and foreign affairs, neither the Supreme Court nor Congress has had the ambition to check the President's exercise of unilateral powers that the Madisonian theory of checks and balances predicted. Both Congress and the Supreme Court have, through their delegation of and deference to unilateral exercises of authority, implicitly acknowledged their own capacity limits and the President's unique advantages to address matters of war and foreign affairs.[45] As a result, the President's exercise of unilateral power in those realms has gone mostly unchecked.[46]

In domestic affairs, however, the Supreme Court has been more willing to check unilateral exercises of presidential power during emergencies. For example, the Supreme Court in *Ex Parte Milligan* rejected the President's assertion of unilateral emergency power during the Civil War to employ military commissions to try and sentence American citizens for crimes committed during the war.[47] Repudiating the President's claimed need to exercise unilateral authority to protect the nation's security even at the expense of an individual's constitutional liberty, the Court asserted, "[n]o doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of

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II. *See* SPECIAL COMM. ON THE TERMINATION OF THE NAT'L EMERGENCY, WAR AND EMERGENCY POWER STATUTES, S. REP. NO. 93-549, at 2–4 (1973) (describing the use of unilateral emergency authority by Presidents Wilson and Roosevelt). The Cold War global conflicts between the United States and the Soviet Union involved Presidents Harry Truman, Lyndon Johnson, and Richard Nixon in the unilateral commission of the American military to conflicts in Korea and Vietnam and subsequent presidents' unilateral commission of troops abroad into other conflicts without congressional declarations of war or statutory permission in many cases. *See, e.g.*, J. William Fulbright, The Decline—and Possible Fall—of Constitutional Democracy in America, *reprinted in* 117 CONG. REC. 10355 (1971) (describing exercises of presidential unilateralism by Presidents Roosevelt, Truman, Johnson, and Nixon); SCHLESINGER, *supra* note 35, at 132–206 (providing a historical account of presidential exercises of power between Presidents Truman and Nixon). During the War on Terror following the tragedy of 9/11, President George Bush unilaterally ordered the indefinite detention of enemy combatants and Presidents Barack Obama and Trump participated in active drone strike campaigns sometimes only loosely connected to the statutory authorization for the use of military force. *See, e.g.*, Scheppele, *supra* note 43, at 1053 ("The avoidance of separation of powers constraints in the domestic war on terrorism has reached its height with the claimed presidential power to label suspect individuals as enemy combatants who are immune from legal process altogether.").

45. *See, e.g.*, United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319–22 (1936) (interpreting the constitutional framework giving the President broad unfettered authority over foreign affairs); Lobel, *supra* note 38, at 1406 (positing that "the executive branch has often relied on the President's generic and ill-defined power as 'the sole organ of foreign affairs,' articulated by dicta in *United States v. Curtiss-Wright Export Corp.*, to justify power to act in emergency situations"); *see also* PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 29 (2009) ("For their part, courts become involved in disputes over executive authority only episodically and are anxious about decision making in areas where they might lack expertise or could be perceived as intruding in policy making, as opposed to legal interpretation.").

46. *See* Scheppele, *supra* note 43, at 1022 (arguing in the post-Cold War period, "[t]he practical deference of courts to the political branches is nearly universal on all matters of foreign and military policy, including outsized claims of national security"); Amy L. Stein, *A Statutory National Security President*, 70 FLA. L. REV. 1183, 1203 (2018) ("With undefined [statutory] terms and broad delegated powers, a president is free to make the requisite [national security] finding with limited accountability.").

47. *Ex parte* Milligan, 71 U.S. 2, 121 (1866).

government."[48] "Such a doctrine," the Court concluded, "leads directly to anarchy or despotism."[49] During the domestic economic emergency of the Great Depression, the Supreme Court in *Home Building & Loan Ass'n v. Blaisdell* was equally adamant about the limits of emergency powers when such exercises of powers infringed constitutional rights.[50] In rejecting a state's provision of emergency mortgage relief that would violate the federal Constitution, the Court explained, "Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved."[51] Finally, in the seminal case of *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Jackson's concurring opinion proffered a doctrinal framework to check presidential abuses of unilateral power over domestic affairs.[52]

Although the Court has imposed greater checks on presidential exercises of unilateral power over domestic affairs, its bark has proven to be greater than its actual bite.[53] The Court, in reviewing exercises of presidential unilateralism, has made clear that Congress is the primary line of defense against executive abuses of power that could undermine the rule of law and lead to rule by arbitrary will. As Justice Jackson explained in his influential concurring opinion in *Youngstown*, "A crisis that challenges the President equally, or perhaps primarily, challenges Congress. . . . We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers."[54]

Congress has responded to Justice Jackson's invitation by being more assertive in checking presidential exercises of unilateral power over matters of domestic affairs.[55] The effectiveness of congressional checks has been bolstered

48. *Id.*

49. *Id.*

50. Home Bldg. & Loan Ass'n. v. Blaisdell, 290 U.S. 398, 425 (1934).

51. *Id.*

52. 343 U.S. at 635–38 (Jackson, J., concurring) (establishing the tripartite framework that permitted presidential action only when either Congress has approved or "the imperatives of events and contemporary imponderables" support the president's actions when Congress has been silent); *but see* Lobel, *supra* note 38, at 1410 ("Although advocates of congressional authority look to *Youngstown*'s invalidation of the President's seizure of the steel mills as the basis for imposing limits on executive authority, the decision contains the seeds for an expansion of the President's emergency power.").

53. *See, e.g.*, ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 111 (2008) (arguing the "*Youngstown* framework is . . . of very dubious relevance to actual political outcomes . . . [because] it is excessively plastic" and there are "serious question[s] whether any actors will have the motivation to enforce it.").

54. *Youngstown Sheet*, 342 U.S. at 654 (Jackson, J., concurring); *see also* POSNER & VERMEULE, *supra* note 53, at 54 (identifying as "the basic problem underlying judicial review of emergency measures . . . the divergence between the courts' legal powers and their political legitimacy in times of perceived crisis"); Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 171 (1999) ("[T]he Court, in staying out of many separation of powers issues, has essentially left it up to Congress to protect its own institutional interests against presidential aggrandizement.").

55. In domestic affairs, Congress does not suffer the same capacity constraints as it does in foreign affairs or war situations as it often can obtain the information and develop the corresponding expertise to

by presidential self-restraint in the exercise of unilateral power over domestic affairs that may have arisen out of fear of the electoral consequences from going alone on matters that directly impact Americans.[56] President Nixon, however, fundamentally changed this dynamic. He exercised unilateral powers in domestic affairs in ways not previously seen in American history. Most prominently, Nixon exercised unilateral authority to not spend money Congress appropriated for certain programs and to support domestic policies.[57] Nixon's impoundment of congressionally appropriated money allowed the President to unilaterally employ an unauthorized line-item veto over spending statutes without check from Congress.[58]

Before President Nixon could further undermine the rule of law and distort the system of checks and balances, the Watergate scandal forced his resignation.[59] A resurgent Congress reasserted some of the authority that had been long ceded to the President. In the four-year period following President Nixon's resignation, Congress passed: (1) the War Powers Resolution (WPR) to limit presidential unilateralism in the involvement of the United States in war,[60] (2) the Congressional Budget and Impoundment Control Act to prevent the President from unilaterally impounding congressionally appropriated funds,[61] (3) the National Emergencies Act (NEA) to terminate all prior emergencies and formalize a role for Congress in checking presidential exercises of emergency powers,[62] and (4) the International Emergency Economic Powers Act (IEEPA) to constrain presidential exercises of economic powers during peacetime emergencies.[63]

For the moment, the theory of checks and balances accorded with reality; the ambition of Congress counteracted the ambition of the President. But the

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determine whether the President needs to exercise unilateral power to protect the nation from an existential threat. *See, e.g.*, SCHLESINGER, *supra* note 35, at ix ("Confronted by presidential initiatives in domestic policy, the countervailing branches of the national government — the legislature and the judiciary — have ample confidence in their own information and judgment.").

56. For example, when presidents exercised unilateral emergency powers in the context of domestic affairs during the Civil War and the two World Wars, they soon thereafter turned to Congress to sanction the actions as a means to mobilize public support through statutory authorization and to raise funds through congressional appropriations. *See id.* at xiii–xiv. On issues of civil rights between the 1930s and 1960s, presidents did exercise unilateral power to overcome southern congressional resistance to legislative initiatives. *See* Moe & Howell, *supra* note 54, at 160 (describing past presidential exercises of unilateral power to advance civil rights).

57. *See* SCHLESINGER, *supra* note 35, at 238–40 (describing Nixon's policy of impounding congressionally appropriated funds).

58. *Id.* at 240; RUDALEVIGE, *supra* note 43, at 88–90 (describing both the President's unilateral impoundment of funds and unilateral exercises of war powers in parts of Southeast Asia despite congressional denial of funds to support his military actions).

59. RUDALEVIGE, *supra* note 43, at 99.

60. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973).

61. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (1974).

62. National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976).

63. International Emergency Economic Powers Act, Pub. L. No. 95-223, 91 Stat. 1626 (1977).

match between separation of powers theory and reality proved to be ephemeral in the realm of war and foreign affairs. First, the Supreme Court in *Dames & Moore v. Regan* held that the President had unilateral authority to issue an executive order implementing economic agreements with Iran to end the Iran hostage crisis.[64] In the process, the Court treated the IEEPA as a statute "indicating congressional acceptance of a broad scope for executive action in circumstances such as those presented in this case."[65]

Soon thereafter, the Supreme Court declared the legislative veto unconstitutional.[66] The legislative veto embedded into the WPR, NEA, and IEEPA was considered a critical tool by which Congress could check presidential unilateralism during wars and emergency.[67] Through the legislative veto, the two houses of Congress could terminate the war or the emergency without presidential approval.[68] Without the legislative veto, any check on the President's exercise of unilateral emergency power required passage of a statute with the support of congressional supermajorities to counter the President's likely veto.[69]

Finally, congressional capacity constraints in the realm of foreign affairs did not change with the passage of the checking legislation. Congress continued to lack the expertise needed to assess the nature and extent of national security threats from abroad.[70] Thus, while the moment of presidential corruption associated with Watergate increased the electoral incentives for Congress to respond to other Nixonian abuses of executive power, a lack of congressional capacity limited the branch's willingness to apply those checks to subsequent exercises of presidential unilateralism in foreign affairs.[71]

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64. Dames & Moore v. Regan, 453 U.S. 654, 655 (1981).

65. *Id.* at 677.

66. Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 951 (1983) (invalidating the legislative veto because the lawmaking process contained in Article I, Section Seven of the Constitution "represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure").

67. *See, e.g.*, Lobel, *supra* note 38, at 1416 (describing the legislative veto as "a critical congressional check in the War Powers Resolution, NEA, and IEEPA").

68. *Id.*

69. *Id.* at 1417.

70. *See, e.g.*, SCHLESINGER, *supra* note 35, at 296–97 (finding that in foreign affairs, Congress "lacked continuity . . . and interest . . . information and expertise . . . power to command national attention . . . the capacity to make clear and quick decisions . . . [and] guts").

71. For example, since the adoption of the WPA, the President has reported the introduction of U.S. forces into hostilities and imminent hostilities abroad 168 times. MATTHEW C. WEED, CONG. RSCH. SERV., R42699, THE WAR POWERS RESOLUTION: CONCEPTS AND PRACTICES 68 (2019). Only once, two years after the Act's passage and while the legislative veto was still in effect, did the President cite its obligations under the WPR as a reason for doing so thus triggering the sixty-day troops withdrawal requirement under the statutes. *Id.* at 10. On several occasions of committing forces abroad, "none of the President, Congress, or the courts has been willing to initiate the procedures of or enforce the directives in the War Powers Resolution." *Id.* at Summary. Similarly, presidents have invoked the NEA fifty-nine times to pursue unilateral actions. ELAINE HALCHIN, CONG. RSCH. SERV., R98-505, NATIONAL EMERGENCY POWERS 12–17 (2020). Only once, in response to President Trump's emergency proclamation regarding the southern border, did

In domestic affairs, however, a more balanced equilibrium emerged between the President and Congress after Nixon's resignation. In this more balanced equilibrium, presidents generally resisted invoking emergency powers over matters of domestic affairs. Of the fifty-nine invocations of the NEA, only five primarily involved domestic affairs.[72] Two emergency orders responded to pandemics, one responded to a drought, another targeted weapons proliferation by Americans, and the last involved the southern border.[73]

Only one of those five presidential assertions of emergency powers over domestic affairs, the emergency involving the southern border, saw the invocation of the only mechanism by which the President can access funds to respond to, or mitigate, an emergency without congressional approval.[74] That invocation of emergency powers to access funds for the border wall represents the same threat to the system of checks and balances as President Nixon's impoundment of funds. This time, however, an impeachment of the President would not halt this distortion to the system of checks and balances. Rather, the episode would reveal a fundamental weakness in the system, which future presidents could exploit in ways that would irreparably damage the rule of law.

### *B. Presidential Unilateralism in the Trump Era*

Trump's presidency brought together the perfect storm of four factors that threaten the proliferation of future presidential abuses of unilateral emergency powers: (1) a President with authoritarian tendencies willing to push the boundaries of presidential authority beyond its limits and electorally punish those congressmembers who seek to constrain him;[75] (2) an intensely loyal and

Congress pass a bill to terminate the emergency under the NEA. *Id.* at 17–18. That effort to check presidential unilateralism ultimately failed as a result of President Trump's veto. *Id.* at 20.

72. The Congressional Research Service provides a list of all fifty-nine emergency declarations since the adoption of the NEA. I coded the declarations as foreign if the exercise of power was principally directed at a foreign person, entity, or government and domestic if it did not. ELAINE HALCHIN, CONG. RSCH. SERV., R98-505, NATIONAL EMERGENCY POWERS 12–17 (2020).

73. Exec. Order No. 12,930, 59 Fed. Reg. 50,475 (Sept. 29, 1994) (Ordering measures to restrict the participation by United States persons in weapons proliferation activities); Proclamation No. 6907, 61 Fed. Reg. 35,083 (July 1, 1996) (declaring a state of emergency and release of feed grain from the disaster reserve); Proclamation No. 8443, 74 Fed. Reg. 55,439 (Oct. 23, 2009) (declaring a national emergency with respect to the 2009 H1N1 influenza pandemic); Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019) (declaring a national emergency concerning the southern border of the United States); Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020) (declaring a national emergency concerning the novel coronavirus disease (COVID-19) outbreak).

74. 10 U.S.C. § 2808 (authorizing "the Secretaries of the military departments to undertake military construction projects, not otherwise authorized by law that are necessary to support such use of the armed forces" when the President declares a national emergency). President Trump invoked the statute to support his diversion of money for the construction of the wall. *See* ELAINE HALCHIN, CONG. RSCH. SERV., R98-505, NATIONAL EMERGENCY POWERS 17–19 (2020).

75. *See, e.g.*, Douglas Kellner, *Donald Trump as Authoritarian Populist: A Frommian Analysis*, *in* CRITICAL THEORY AND AUTHORITARIAN POPULISM 71–79 (Jeremiah Morelock ed., 2018) (describing the authoritarian traits exhibited by Donald Trump).

politically active minority of the American people willing to support the President no matter what he does in office;[76] (3) electoral structures that empower this minority to exercise undue influence on congressional elections;[77] and (4) co-partisan congressmembers who care intensely about reelection, are willing to ignore executive abuses of power, and will sacrifice their governing ambitions to curry favor with, or avoid punishment from, the President.[78]

The consequence of this perfect storm was President Trump's exercise of unchecked unilateral authority. As described in the introduction, under the pretext of an emergency, President Trump unilaterally diverted congressionally appropriated funds to build a wall along the southern border.[79] Similarly, President Trump invoked national security to unilaterally impose a travel ban almost entirely focused on countries with predominantly Muslim populations.[80] The President also selectively enforced trade agreements and effectively halted asylum using national security as the pretext for his unilateral actions.[81]

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76. *See, e.g.*, Edward Lempinen, *Despite Drift Toward Authoritarianism, Trump Voters Stay Loyal. Why?*, BERKELEY NEWS (Dec. 7, 2020), https://news.berkeley.edu/2020/12/07/despite-drift-toward-authoritarianism-trump-voters-stay-loyal-why/ (providing an account of the loyalty of Trump supporters and explanations for that loyalty).

77. *See, e.g.*, Susan Davis, *GOP Primaries Focus on Candidates' Loyalty to President Trump*, NPR (May 4, 2018), https://www.npr.org/2018/05/04/608193538/gop-primaries-focus-on-candidates-loyalty-to-president-trump (describing the efforts of Republican primary candidates to attract the support of Trump loyalists to win congressional elections).

78. *See, e.g.*, Reid J. Epstein & Nick Corasaniti, *How Gerrymandering Will Protect Republicans Who Challenged the Election*, N.Y. TIMES (Jan. 19, 2021), https://www.nytimes.com/2021/01/19/us/politics/republicans-gerrymander-trump-election.html (describing Republican congressmembers' support of President Trump's efforts to overturn the election and showing how gerrymandering will insulate the congressmembers from electoral accountability).

79. *See* Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019) (declaring a national emergency concerning the southern border of the United States); *see also* Stephen I. Vladeck, *The Separation of National Security Powers: Lessons from the Second Congress*, 129 YALE L.J. F. 610, 610–11 (2019) (describing how "President Trump's declaration of a 'national emergency' . . . belatedly focused meaningful public attention on . . . Congress's systematic over-delegation of authority to the President to respond to a surprisingly broad array of real or invented (or, at least, overblown) crises").

80. *See* Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017) (implementing the third of three travel bans and the one the Supreme Court upheld); *see also* Cecillia D. Wang, *Ending Bogus Immigration Emergencies*, 129 YALE L.J. F. 620, 623–26 (2019) (reviewing President Trump's exercises of immigration authority and concluding that the lesson "is that the checks and balances against presidential power . . . may be dangerously ineffective").

81. *See, e.g.*, Proclamation No. 9894, 84 Fed. Reg. 23,987 (May 19, 2019) (adjusting imports of steel into the United States); Proclamation No. 10,060, 85 Fed. Reg. 49,921 (Aug. 6, 2020) (adjusting imports of aluminum into the United States); *see also* CONG. RSCH. SERV., R45529, TRUMP TARIFF ACTIONS: FREQUENTLY ASKED QUESTIONS 1–3 (2019); Presidential Determination on Refugee Admissions for Fiscal Year 2019, 83 Fed. Reg. 55,091 (Nov. 1, 2018) (limiting the number of refugees to be admitted to the United States during the 2019 fiscal year to 30,000); *see also* Farber, *supra* note 3, at 1155 (describing President Trump's aggressive use of unilateral trade authority pursuant to Section 232 of the Trade Expansion Act of 1962, which granted the President the authority to impose trade restrictions for national security purposes, and criticizing the flimsy national security rationales supporting the exercises of unilateral power); Leigh Ann Caldwell & Heidi Pryzbyla, *GOP's Division on Tariffs Erupts on Senate Floor*, NBC NEWS (June 12, 2018), https://www.nbcnews.com/politics/congress/gop-s-division-tariffs-erupts-senate-floor-n882581
(reporting on political opposition to the President's unilateral trade actions but an unwillingness to check the

Finally, and most perniciously, President Trump exercised unilateral power to support his reelection efforts. In this effort, the President illegally impounded money Congress appropriated for Ukrainian security to coerce Ukrainian authorities to investigate his future opponent in the presidential election, Joe Biden.[82] That presidential abuse of power led to President Trump's impeachment in the House of Representatives.[83] But the Senate, controlled by the President's co-partisans, refused to convict and remove the President for this action.[84] Furthermore, in the immediate aftermath of the impeachment, there would not be a resurgence of Congress as a check on presidential unilateralism as occurred after the Watergate scandal forced the resignation of President Nixon.[85] Rather, President Trump followed his impeachment with more exercises of unchecked presidential unilateralism, retaliating against witnesses for testifying during the impeachment hearings and the Inspector General for fulfilling his statutory duty of reporting the President's interaction with Ukrainian authorities to Congress.[86]

Public opinion surveys suggest President Trump's exercises of presidential unilateralism lacked the support of the majority of the people.[87] Yet, Congress

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President because of "the damage a presidential Twitter tirade against Republicans could cause the party in a difficult election season").

82. U.S. GOV'T ACCOUNTABILITY OFF., B-331564, MATTER OF OFFICE OF MANAGEMENT AND BUDGET—WITHHOLDING OF UKRAINE SECURITY ASSISTANCE (2020) (describing the President's Office of Management and Budget's illegal impoundment of funds that Congress appropriated for Ukrainian security).

83. *See, e.g.*, Martin & Haberman, *supra* note 20.

84. *See id.* (describing the President's iron grip over the Republicans during the impeachment proceeding with the result that "[n]o House Republican supported either article, or even authorized the investigation" into the President's dealings with Ukraine as "they defended him as a victim of partisan fervor").

85. *See supra* notes 60–63.

86. *See* Peter Baker et al., *Trump Hits Back, Firing Witnesses After Acquittal*, N.Y. TIMES, Feb. 8, 2020, at A1 (reporting that Trump removed two central witnesses in the impeachment trial from their government posts two days after his acquittal in the Senate); Maggie Haberman et al., *Trump to Fire Intelligence Watchdog Who Had Key Role in Ukraine Complaint*, N.Y. TIMES (Apr. 3, 2020), https://www.nytimes.com/2020/04/03/us/trump-inspector-general-intelligence-fired.html (reporting President Trump's firing of "the intelligence community inspector general whose insistence on telling lawmakers about a whistle-blower complaint about his dealings with Ukraine triggered impeachment proceedings").

87. *See, e.g.*, Domenico Montanaro, *Poll: 6-In-10 Disapprove of Trump's Declaration of a National Emergency*, NPR (Feb. 19, 2019), https://www.npr.org/2019/02/19/695720851/poll-6-in-10-disapprove-of-trumps-declaration-of-a-national-emergency (reporting a survey finding that 61% of surveyed adults disapproved and 36% approved of President Trump's emergency declaration); Ben Casselman & Ana Swanson, *Survey Shows Broad Opposition to Trump Trade Policies*, N.Y. TIMES (Sept. 19, 2019), https://www.nytimes.com/2019/09/19/business/economy/trade-war-economic-concerns.html (reporting that 58% of surveyed adults thought increased tariffs between the United States and China were bad and only 38% thought they were good for the United States); Michael Burke, *Poll: Just 30 Percent Favor Stricter Asylum Rules as Trump Calls for Tightening Restrictions*, THE HILL (Apr. 30, 2019), https://thehill.com/homenews/news/441300-poll-just-30-percent-favor-stricter-asylum-rules-as-trump-calls-for-tightening (reporting a poll finding that 30% supported making asylum more difficult as Trump's executive order did, while 27% supported making asylum easier and 34% supported keeping the law the same); *but see* Steven Shepard, *Poll: Majority of Voters Back Trump Travel Ban*, POLITICO (July 5, 2017),

failed to check any of these exercises of power. According to the leading separation of powers accounts, the failure of Congress to check the President should not be surprising. Daryl Levinson and Richard Pildes argue that congressmembers' loyalties lie more with their parties than with the branches they serve.[88] As a result, the operation of the system of checks and balances is predicated on divided government in which a member of one party controls the presidency and members of the other party control both branches of Congress.[89] Only in divided government, Levinson and Pildes contend, might we expect Congress to pass statutes or pursue other checks on presidential actions.[90] Since there was never completely divided government during the Trump administration, Congress's failure to check presidential unilateralism was entirely predictable.[91]

While correct in its predictions about the operation of the system of checks and balances, Levinson and Pildes's Separation of Parties theory has at least two blind spots that the Trump years exposed. First, the theory fails to fully account for how presidential unilateralism shifts the burden to Congress to override the President's actions through the passage of a statute requiring supermajority support to overcome a presidential veto. As a result, divided government alone does little to secure the operation of the system of checks and balances when the president takes the initiative. Only when the opposing party controls a supermajority of the seats in the House and Senate, which has never happened in the history of this Republic, would Congress be able to check presidential unilateralism under the Separation of Parties framework.

Furthermore, the theory fails to account for the willingness of co-partisans to check presidential abuses of authority. Dozens of Republican congressmembers expressed opposition to President Trump's exercises of unilateral authority on policy grounds due to the unpopularity of the President's actions, but also in defense of congressional authority and the system of checks and balances.[92] These expressions of opposition suggest a willingness by

https://www.politico.com/story/2017/07/05/trump-travel-ban-poll-voters-240215 (reporting a poll finding that 60% of respondents supported the travel ban and only 28% opposed it).

88. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2323–24 (2006) (arguing that "the political interests of elected officials generally correlate more strongly with party than with branch").

89. *Id.* at 2323 ("[P]arties can create the conditions necessary for interbranch competition to emerge.").

90. *Id.* at 2329.

91. During the first half of Trump's presidency, Republicans controlled the two houses of Congress. Aaron Blake, *Trump Set to Be First President Since 1932 to Lose Reelection, the House and the Senate*, WASH. POST, (Jan. 6, 2021), https://www.washingtonpost.com/politics/2021/01/06/trump-set-be-first-president-since-1932-lose-reelection-house-senate/. During the second half, Republicans controlled the Senate and Democrats controlled the House. *Id.*

92. *See supra* notes 5–6, 10, and accompanying text; *see also* JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 30–31 (2017) (arguing "members of Congress do, on some occasions, care about their chamber's power, per se").

members of Congress to put aside partisan loyalties to protect branch prerogative, the constitutional framework, and ultimately the rule of law.

However, far too few of these Republicans formalized their opposition through votes in favor of bills or other actions that would check presidential unilateralism. They failed to do so because of the perfect storm of factors that required they either be loyal to the President or risk losing their seats in Congress. President Trump made clear his willingness to electorally punish disloyal Republicans. And Republican congressmembers recognized the President's capacity to mobilize his devoted followers who, though they represented a minority in the nation at-large, benefited from electoral structures that enabled them to disproportionately influence congressmembers' reelection prospects.[93] Rather than facing a primary challenger supported by the President, most Republican congressmembers acquiesced to presidential exercises of unilateral authority even when they involved clear abuses of power.[94] Most Republicans who opposed the President either faced defeat in their next primary or general election or chose to retire from Congress.[95] Republican congressmembers during the Trump era were therefore dependent on the President for their reelection in ways not accounted for in the Separation of Parties framework.

That dynamic of congressional dependence also distorted the system of checks and balances in ways that the constitutional framers did not anticipate. That oversight probably reflects the Founders' focus on constructing a checks and balances framework that could adequately combat the principal mischief they feared, legislative tyranny.[96]

In contrast to the Framers and modern separation of powers theorists, the American revolutionaries, who participated in the construction of state constitutions over a decade before the federal Constitutional Convention, were fully cognizant of the executive's capacity to secure legislative loyalty and dependence. The revolutionaries were familiar with the efforts of English kings over the prior two centuries to influence parliamentary elections to secure a

93. *See* Janet Hook, *Donald Trump's Iron Grip on the GOP: Why Republicans Stick With Him*, L.A. TIMES (June 12, 2020), https://www.latimes.com/politics/story/2020-06-12/republican-officials-fear-trump (showing how the interaction of a primary system and the devoted support of a Republican minority in states and districts renders most elected officials dependent on the President).

94. *See supra* notes 9–11 and accompanying text.

95. *See* Martin & Haberman, *supra* note 20 ("Interviews with current and former Republican lawmakers as well as party strategists, many of whom requested anonymity so as not to publicly cross the president, suggest that many elected officials are effectively faced with two choices. They can vote with their feet by retiring . . . [o]r they can mute their criticism of him.").

96. As James Madison complained, "[t]he legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex." He then acknowledged that "it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions." THE FEDERALIST NO. 48, *supra* note 13, at 309 (James Madison); *see also* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 603 (1984) ("The Constitutional Convention arose out of dissatisfaction with a government dominated by the legislature.").

loyal and dependent Parliament willing to acquiesce to the monarch's exercise of unchecked unilateral power. They were also familiar with episodes of parliamentary resistances to such monarchical efforts to protect Parliament's co-equality with, and independence from, the Crown. In the remainder of this Article, I excavate the origins of the checks and balances framework to recover the source of the legislative will to check.

## II. EVOLVING THEORIES OF GOVERNANCE AND THE PARLIAMENTARY ROLE

The Trump presidency exposed the value of a central predicate to our constitutional system of checks and balances, legislative independence. Although much has been written about the value of judicial and executive independence to our frame of government, American legal scholars have entirely overlooked the principle of legislative independence. One reason is that there is nothing in the Constitution itself that speaks directly to the principle of legislative independence. Whereas the Constitution provides for selection mechanisms in the form of life tenure to protect judicial independence and the electoral college system to protect executive independence, there is nothing apparent in the document that provides for the analogous legislative independence.[97] Furthermore, the Framers of the Constitution, who are an obvious focal point in judicial review and scholarly discussions of our system of checks and balances, defended the constitutional mechanisms for protecting judicial and executive independence, but did not say anything at all about legislative independence.[98]

In the following, I argue that despite this silence, the principle of legislative independence, like the principles of judicial and executive independence, is a core component of the American checks and balances framework. To begin advancing this argument, I explore the seventeenth-century Crown–Parliament struggle that has been neglected in legal scholarly accounts of the origins of the American checks and balances framework. On one side of this struggle stood successive English kings asserting unilateral authority in the form of royal prerogative, pursuant to a theory that kings had the divine right to rule absolutely and perpetually. On the other side stood Parliament seeking to shed its historical status as an institution dependent on, and subordinate to, the Crown through a theory of coordinated power in which the two Houses of Parliament are independent from, and coequal to, the Crown. In this Part, I outline the theoretical and historical origins of Crown–Parliament disputes about parliamentary power and status in the evolving English frame of government.

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97. *See* sources cited *supra* note 22.

98. *See* sources cited *supra* note 21.

### *A. The Divine Right of Kings and Royal Absolutism*

Royal absolutism derived from a divine right theory of kingship was the leading theory of governmental authority in England at the beginning of the tumultuous seventeenth century.[99] The theory of divine right draws from biblical conceptions of the origins and evolution of human society. God as the origin of authoritative power created Adam and conferred on him absolute dominion over all of his children.[100] Adam's absolute authority over his children served as the foundation for his regal authority over the world.[101] That regal authority was passed down from Adam to his male descendant and after the Great Flood was extended to all parts of the globe through Noah and his children.[102]

Kings, according to this theory, were God's vicegerents holding absolute and perpetual power over their subjects.[103] In the words of one of the leading philosophers of royal absolutism, the King had the power "to dispose of [the people's] property and persons [and] govern the state as he thinks fit."[104] The King could exercise such power according to his own will or according to laws that he made, enforced, and interpreted.[105] In exercising this power, the King was accountable only to God.[106]

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99. Matthew White, *The Turbulent 17th Century: Civil War, Regicide, The Restoration and The Glorious Revolution*, BRITISH LIBRARY (June 21, 2018), https://www.bl.uk/restoration-18th-century-literature/articles/the-turbulent-17th-century-civil-war-regicide-the-restoration-and-the-glorious-revolution.

100. *See, e.g.*, NATHANIEL JOHNSTON, THE EXCELLENCY OF MONARCHICAL GOVERNMENT 13 (London, Printed by T.B. for R. Clavel 1686) ("We have reason to judge, (according to Scripture) that God gave *Adam* (as an universal Monarch) Dominion over all his Fellow Creatures, and of all Men that should be born into the World as long as he liv'd . . . .").

101. According to leading divine right theorist Robert Filmer, *"[c]reation made man Prince of his posterity*. And indeed not only *Adam*, but the succeeding *Patriarchs* had, by Right of Fatherhood, Royal Authority over their Children. . . . And this subjection of Children [is] the Fountain of all *Regal Authority*, by the Ordination of God himself . . . ." ROBERT FILMER, PATRIARCHA: OR THE NATURAL POWER OF KINGS 11–12 (London, 1680).

102. *See, e.g.*, JOHN WILSON, A DISCOURSE OF MONARCHY 19 (London, Printed by M.C. for Jos. Hindmarsh 1684) (describing the passing of sovereign power to Noah and his children after the Flood).

103. *See, e.g.*, ROBERT SHERINGHAM, THE KINGS SUPREMACY ASSERTED 34 (London, 1660) (deriving the King's supremacy from him "being the only head of the Kingdome, having no equal or Superiour but God alone, whose Vicegerent he is upon earth"). English historians C.C. Weston and J.R. Greenberg explain that political theories of divine right and patriarchalism were frequently voiced in early modern England where the belief in a divinely ordered "world was ubiquitous, their advocates arguing that since God, the author of the universe, had ordained kings to rule as his vicars on earth, the English king was the human source of law and political authority generally." CORINNE COMSTOCK WESTON & JANELLE RENFROW GREENBERG, SUBJECTS AND SOVEREIGNS: THE GRAND CONTROVERSY OVER LEGAL SOVEREIGNTY IN STUART ENGLAND 1–2 (1981).

104. JEAN BODIN, SIX BOOKS OF THE COMMONWEALTH 27 (M.J. Dooley trans., Alden Press, 1955) (1576).

105. *Id.* at 25–26 (theorizing that the king as sovereign possesses the "absolute and perpetual power vested in a commonwealth").

106. JOHNSTON, *supra* note 100, at 131 ("[Kings] are accountable to none but the Great Sovereign of the Universe."). The divine right theorists frequently referenced the revered thirteenth-century English cleric and jurist, Henry de Bracton, who asserted in his famous writings on law, "[t]he king must not be under man

The only constraints on royal power, according to the divine right theory, were those the King chose to impose on himself through concessions that he granted to his subjects.[107] In pre-seventeenth-century English history, monarchs made two major concessions to the people. First, under the Magna Carta, monarchs would have to obtain the general consent of the "archbishops, bishops, abbots, earls, and greater barons," summoned to convene in what later became known as a Parliament, in order to tax the people.[108] Second, in a practice that began with Henry III in the thirteenth century and evolved over time, monarchs granted to the nobility and commoners summoned to a Parliament the power to deliberate and advise on laws the King had made.[109]

Despite these concessions to subjects convened in parliaments, monarchs under the divine right theory of kingship continued to claim absolute sovereign power. This was made manifestly clear in the assertion that the King stood exempt from the laws he made. "Kingly power," according to Robert Filmer, the leading seventeenth-century divine right theorist, "is by the Law of God, so it hath no inferiour Law to limit it."[110] Divine right adherent and Anglican prelate, James Ussher, further elaborated that kings "are not liable to the civil punishments set down for the breach of any law, as having no superior upon earth that may exercise any such power over them."[111] "[I]f the Sovereign were obliged . . . to give an account of his Administration to his Subjects," Nathaniel Johnston concludes, "he should cease from being a Sovereign."[112]

In addition to being above the law, the King claimed unilateral royal prerogatives that positioned the Crown as the unrivaled sovereign power. This included powers to call and dissolve Parliament, command the militia, coin money, pardon felonies and treasons, make offices, and appoint officers.[113] And then there were the two royal prerogatives that would emerge as central focal points in the late seventeenth-century Crown–Parliament struggle: (1) the

but under God." 2 HENRY DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 33 (Samuel E. Thorne trans., 1968) (1235). *See e.g.*, PETER HEYLYN, THE STUMBLING-BLOCK OF DISOBEDIENCE AND REBELLION 249–50 (London, Printed by E. Cates for Henry Seile 1658) ("*Bracton* . . . affirms expressly, that the King hath supreme power and jurisdiction over all causes and persons in this his Majesties Realm of *England*, that all jurisdictions are vested in him and are issued from him, and that he hath . . . the right of the sword, for the better governance of his people.").

107. JOHNSTON, *supra* note 100, at 71 ("[T]he Kings of *England* . . . are not limited by any other Power than their own Royal Pleasure . . . .").

108. MAGNA CARTA, cl. 14 (G.R.C Davis trans., British Museum 1963) (1215), https://www.bl.uk/magna-carta/articles/magna-carta-english-translation#.

109. ROBERT HOLBORNE, *The Freeholder's Grand Inquest Touching Our Sovereign Lord the King, and His Parliament*, *in* PATRIARCHA AND OTHER POLITICAL WORKS OF SIR ROBERT FILMER 143 (Peter Laslett ed., 1949) (1653) (describing Henry III's first calling of a Parliament comprised of commoners and nobles).

110. FILMER, *supra* note 101, at 81.

111. JAMES USSHER, *The Power Communicated by God to the Prince and the Obedience Required of the Subject*, *in* 11 THE WHOLE WORKS OF THE MOST REVEREND JAMES USSHER 317 (Charles R. Elrington ed., Dublin, Hodges and Smith 1847) (1654).

112. JOHNSTON, *supra* note 100, at 133.

113. *Id.* at 126 (describing the extent of the royal prerogatives).

prerogative to grant, revise, and revoke charters to borough corporations, including those responsible for selecting members of Parliament;[114] and (2) the prerogative to dispense with laws "upon Causes only known to him."[115]

King James I, the first of four successive seventeenth-century kings from the House of Stuart, assertively espoused the divine right theory both before his accession to the English crown and during his reign. In the *Trew Law of Free Monarchies*, King James ascribed to kings the status of Gods who had the unfettered authority "to minister Justice and Judgement to the people," "[t]o advance the good, and punish the evill," "[t]o establish good Lawes to his people," and "procure obedience . . . ."[116] King James derived absolute royal authority to make laws from the divine rights theory's account of history. According to this version of history, kings preceded in time any convening of parliaments.[117] Therefore, "it followes of necessitie, that the kings were the authors and makers of the Lawes, and not the Lawes of the kings."[118] Furthermore, James asserted, "it lies in the power of no Parliament, to make any kinde of Lawe or Statute, without his Scepter be to it, for giving it the force of a Law . . . ."[119]

The governing hierarchy established in the mind of King James I at the turn of the seventeenth century was one in which the monarch held absolute power as ruler over its subjects. The Parliament, as a convening of nobility and commoners, stood as a subordinate subject to the Crown.

After James acceded to the Crown, his divine right theory of kings and its associated royal absolutism began to encounter resistance from a more assertive Parliament. The opportunity for Parliament to take the initiative and claim for itself a more significant role than subordinate subject to the King arose from its power to withhold consent to the Crown's requests for money.[120] Due to the combination of the Crown's constant involvement in war, the growing expense of war due to technological developments, and economic inflation, King James faced a shortage of monetary supplies to fund war efforts and to support his royal household.[121]

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114. *See, e.g.*, JOHN KIDGELL, THE POWER OF THE KINGS OF ENGLAND TO EXAMINE THE CHARTERS OF PARTICULAR CORPORATIONS AND COMPANIES 4–8 (London, 1684) (providing a defense of the King's power over corporate borough charters).

115. FILMER, *supra* note 101, at 98.

116. KING JAMES I, *The Trew Law of Free Monarchies*, *in* KING JAMES VI AND I: POLITICAL WRITINGS 63–64 (Johann P. Sommerville ed., 1994) (1598).

117. *Id.* at 73–74.

118. *Id.* at 73.

119. *Id.* at 74.

120. *See* WALLACE NOTESTEIN, THE WINNING OF THE INITIATIVE BY THE HOUSE OF COMMONS 31 (London, Oxford Univ. Press 1924).

121. *See* CONRAD RUSSELL, KING JAMES VI AND I AND HIS ENGLISH PARLIAMENTS: THE TREVELYAN LECTURES DELIVERED AT THE UNIVERSITY OF CAMBRIDGE 1995, at 2–4 (Richard Cust & Andrew Thrush eds., 2011).

James's rather desperate financial situation provided Parliament the opening to make demands for redress of grievances arising from royal exercises of prerogative power.[122] Along with these grievances came parliamentary assertions of privileges that prior monarchs had denied. These included parliamentary members' privilege to be free from royal arrest for statements or actions in their official capacity, to speak on issues arising in the kingdom without the Crown's permission, and to resolve election disputes involving members of the House of Commons.[123]

By the end of James I's reign, there was a subtle and slight shift in the balance of power between the Crown and Parliament. Most still considered royal authority to be absolute and unequaled as the King made only limited concessions in response to parliamentary grievances directed at his exercise of royal prerogatives.[124] But even King James himself acknowledged during his most desperate financial state in 1610 that he as King was "bound to observe that paction made to his people by his Lawes . . . ."[125] In addition to acknowledging being bound by his laws, the King recognized parliamentary privileges to be free from arrest, to decide election disputes, and to speak freely in order to advise the king on matters of government.[126]

### *B. Toward a Coordinate Theory of Governance*

Even as Parliament asserted important privileges, the institution continued to function as a subordinate to a monarch that exercised almost entirely unfettered authority. But the problem of inadequate monetary supply continued to plague James's son and successor, King Charles I, when he assumed the throne.[127] Unlike James, who philosophized about absolute monarchical power but nonetheless respected a parliamentary role in governing, Charles viewed and treated Parliament as a subject from which he demanded obedience and

122. *See* NOTESTEIN, *supra* note 120 (describing Parliament's increasingly assertive demands that the King respond to grievances prior to Parliament consenting to subsidies).

123. *See* DAVID L. SMITH, THE STUART PARLIAMENTS, 1603–1689, at 45–46, 65–67 (John Morrill & Pauline Croft eds., 1999) (describing the assertions of these privileges during the reign of King James I). One of Parliament's most famous assertions of privileges came early in the reign of King James at a time of great tension between the Crown and Parliament. *See* House of Commons, Form of Apology and Satisfaction (June 20, 1604), *in* J.R. TANNER, CONSTITUTIONAL DOCUMENTS OF THE REIGN OF JAMES I 217–24 (Cambridge Univ. Press, 1961).

124. *See* SMITH, *supra* note 123, at 45–46, 65–67.

125. KING JAMES I, A Speech to the Lords and the Commons of the Parliament at White-Hall (Mar. 21, 1610), *in* KING JAMES VI AND I, POLITICAL WRITINGS, *supra* note 116, at 183.

126. *See, e.g.*, TANNER, *supra* note 123, at 201, 302 (describing a controversy between the Crown and Parliament over which institution had the authority to resolve disputed parliamentary election returns and a case addressing the privilege of parliamentarians to be free from arrest for speeches and actions as members of Parliament).

127. RUSSELL, *supra* note 121, at 184 (describing the debt situation of the Crown at the time Charles assumed the throne).

loyalty.[128] A deeply adversarial relationship arose between the Crown and Parliament in which Charles was viewed by members of Parliament as an existential threat to the institution and to the people's liberties.[129]

Parliament sought to restrain Charles in the same way that they did James—by withholding consent to taxation to force him to limit his exercise of royal prerogatives.[130] In a Petition of Right, Parliament requested that in exchange for monetary supplies, the King recognize the people's liberties and restrain from nonparliamentary forms of revenue-raising without their consent.[131] Charles responded to Parliament with an ultimatum: "if you . . . should not do your duties in contributing what this State at this time needs I must in discharge of my conscience use those other means which God hath put into my hands to save that . . . the follies of particular men may otherwise hazard to lose."[132] In other words, Charles warned Parliament to either fulfill its historical function and provide him with the money demanded or he would use other unilateral ways to obtain the funds and render Parliament irrelevant.

The Parliament refused to supply the King the money he demanded and Charles dissolved the Parliament in March of 1629.[133] Charles then proceeded to rule without a Parliament for over a decade.[134] This period of personal rule marked the last period of royal absolutism in English history, as it would be followed by the emergence of an alternative theory of governance that put the Crown and Parliament on a more equal standing.

After Charles dissolved the Parliament, he exercised royal prerogatives to raise revenue without parliamentary consent. The King granted monopolies and patents, sold honors and titles, applied customs and impositions to imports, and forced the people to lend money to the Crown.[135] Each of these forms of

128. SMITH, *supra* note 123, at 113 ("Although he was not averse to Parliaments in principle he tended, far more than James, to regard them as tests of his subjects' loyalty, and he was acutely sensitive to the slightest sign of disobedience.").

129. *Id.* (Due to Charles's authoritarian tendency and demands for parliamentary obedience, many members of the House of Commons during the late 1620s "became more and more fearful about the future of Parliaments").

130. After Charles assumed the throne, Parliament sought to impose further limits on the King's taxing powers by limiting to one year the King's capacity to impose customs as opposed to his lifetime as parliaments had granted to prior kings. *Id.* at 54.

131. Petition of Right 1628, 3 Car. 1 c. 1 (Eng.), https://oll.libertyfund.org/page/1628-petition-of-right.

132. King Charles I, King's Speech to Parliament (Mar. 17, 1628), *in* J.P. KENYON, THE STUART CONSTITUTION OF 1603-1688: DOCUMENTS AND COMMENTARY 80–81 (1966).

133. *See* PEREZ ZAGORIN, THE COURT AND THE COUNTRY: THE BEGINNING OF THE ENGLISH REVOLUTION 66 (1970) (describing the political context in which Charles dissolved Parliament as one of "bitterest animosity" between the Crown and Parliament).

134. *See* JOHN K. GRUENFELDER, INFLUENCE IN EARLY STUART ELECTIONS, 1604–1640, at 183 (1981) (describing the period of King Charles's "personal rule" as one in which "royal policies seemed to emphasize the growing division of interest between the king and his subjects").

135. *See, e.g.*, LINDA LEVY PECK, COURT PATRONAGE AND CORRUPTION IN EARLY STUART ENGLAND 137–43 (1990) (describing the King's sale of honors and titles and grant of patents of monopolies

nonparliamentary revenue generation had encountered some resistance from prior Parliaments and the people.[136] But it was Charles's new form of nonparliamentary revenue generation, the required payment of ship money, that led to a constitutional controversy about royal prerogatives and parliamentary authority.

English kings long claimed the authority to demand that coastal towns and counties provide ships for defense of the realm in an emergency.[137] When Charles first conscripted ships from coastal towns in 1634, England faced multiple perils from contending Spanish and French warships in the English Channel, fierce competition from Dutch fishermen along the western coast, and "marauding barbary corsairs" or pirates on all sides.[138] The conscription of ships therefore fit within the long-standing royal prerogative to defend the realm. The next year, however, Charles extended the demand to inland counties and asked that they provide money instead of ships to support the building of a stronger navy during these emergencies.[139] Soon after Charles made these demands, however, it became clear that emergency defense was a mere pretext for raising money that Charles used for things other than building a strong navy, including supporting the popularly reviled Catholic Spain in its thirty-year war on the continent.[140]

When the imposition of ship money was challenged in court as a tax without parliamentary consent in violation of the Magna Carta, a seven-judge majority of the King's Court of Exchequer ruled in favor of Charles.[141] The court's majority deferred to the King's emergency justification for the imposition, concluding that it lacked the competency to question whether an

as a tool to generate revenue); SMITH, *supra* note 123, at 53–54 (providing an account of the King's use of forced loans and custom and impositions to raise revenue).

136. *See* Statute of Monopolies 1623, 21 Jac. 1 c. 3 (Eng.) (establishing limits on the Crown's grant of monopolies); The Five Knights' case (1627), 3 How. St. Tr. 1 (challenging forced loans imposed by King Charles); *The Commons Remonstrance of Tonnage and Poundage*, *in* THE CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION 73 (Samuel Gardiner ed., 1906) (1628) (declaring "[t]hat the receiving of Tonnage and Poundage, and other impositions not granted by Parliament, is a breach of the fundamental liberties of this kingdom"). In the Remonstrance of Tonnage and Poundage, the House of Commons not only disputed the Crown's power to raise impositions but also the Court of the Exchequer's decision that validated the Crown's power to raise impositions without parliamentary consent. Bate's Case (1606), 2 St. Tr. 371, *in* ERNEST C. THOMAS, LEADING CASES IN CONSTITUTIONAL LAW BRIEFLY STATED 26–27 (London, Steven & Haynes 1908).

137. KENYON, *supra* note 132, at 88 ("The right of the king to demand ships from the maritime towns and counties for the defence of the realm and the suppression of piracy was undoubted . . . .").

138. *Id.*

139. *Id.*

140. *Id.*; *see also* CONRAD RUSSELL, THE CRISIS OF PARLIAMENTS: ENGLISH HISTORY 1509–1660, at 321 (1971) (recounting how ship money "was by far the most profitable of Charles's financial expedients").

141. Rex v. Hampden (1637) 3 How. St. Tr. 826, *in* ERNEST CHESTER THOMAS, LEADING CASES IN CONSTITUTIONAL LAW BRIEFLY STATED 30–34 (London, Steven & Haynes 1908).

emergency in fact existed.[142] Five judges, however, dissented, and their dissents inspired a campaign of popular evasion of the tax that dramatically reduced the King's ship-money revenue.[143] The reduced ship-money revenue came at an unfortunate time for Charles as a religious dispute with Scotland involving his exercise of royal prerogative triggered a war that increased his demand for revenue beyond what he could raise without Parliament.[144] In April 1640, Charles summoned a Parliament, concluding his decade of personal rule.[145]

When Charles summoned Parliament, it was in no mood to aid the King's war efforts with the Scots. Many members, in fact, supported the Scots and sought to use the King's predicament as an opportunity to limit the royal prerogative to tax without parliamentary consent.[146] Within a month, Charles dissolved the Parliament having received nothing from it in support of his war efforts.[147] The Scots' military advances and ultimate occupation of parts of England forced Charles to summon another Parliament four months later in hopes of staving off the collapse of his government.[148]

That Parliament, which later became known as the Long Parliament because it would sit for nearly twenty years,[149] made a series of demands on the King. First, Parliament demanded that the King renounce the collection of ship-money as unlawful.[150] Charles quickly acceded to the request. "[W]hat parts of my revenue that shall be found illegal or grievous to the public," Charles announced in a speech to Parliament in January 1641, "I shall willingly lay down, relying entirely upon the affections of my people."[151]

Just over a year later, in March 1642, Parliament, distrusting the King exercising royal prerogative to command and direct the militia during his war with Scotland, passed the Militia Ordinance without the King's assent.[152] This

142. *See id.* at 32 ("The law which has given the interest and sovereignty of defending and governing the kingdom to the king, also gives him power to charge his subjects for its defence, and they are bound to obey.").

143. *See* RUSSELL, *supra* note 140, at 322 (explaining that the dissents "gravely damaged the king's case in the eyes of the public, and people who previously had only complained of their assessments began a massive campaign of tax refusal").

144. *See id.* at 323–27 (describing the lead up to the war with Scotland over matters of religion).

145. *Id.* at 327.

146. *See* ZAGORIN, *supra* note 133, at 103 (recounting the shared interests between the Scots and the English opponents to the King in Parliament and explaining that "the English oppositionists saw the revolt as the occasion that might reinstate liberty and religion in England").

147. *Id.* at 104.

148. *Id.* at 104–05.

149. *Id.* at 116–18.

150. Ship Money Act 1640, 16 Car. 1 c. 14, *reprinted in* 5 Statutes of the Realm, 1628–80, at 116–17 (John Raithsby ed., Great Britain Record Commission 1819), http://www.british-history.ac.uk/statutes-realm/vol5/pp116-117.

151. King's Speech (Jan. 25, 1641), *in* KENYON, *supra* note 132, at 19. Parliament also codified a prohibition on ship-money. *See* Act Declaring the Illegality of Ship-Money 1641, 17 Car. 1 c. 14, *reprinted in* THE CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION, *supra* note 136, at 189–191.

152. *See* CHRISTOPHER HIBBERT, CAVALIERS & ROUNDHEADS: THE ENGLISH CIVIL WAR, 1642–1649, at 37–38 (1993).

ordinance granted to Parliament the power to command and direct the militia.[153] Two months later, the Parliament declared, on the basis of the King's coronation oath requiring that he uphold "the Laws and Rightful Customs which the Commonalty of this your Kingdom have," that the King could not withhold his royal assent to laws passed by Parliament.[154] That limitation on the royal prerogative to withhold his assent to laws sought to dramatically shift lawmaking authority to the Parliament.

Finally, in June 1642, the Parliament sent a set of demands in the form of nineteen propositions to Charles, who had since departed from London in preparation for a possible civil war against the Parliament.[155] Those included demands that Parliament approve appointments to royal offices, as well as be able to debate, resolve, and transact "the great Affairs of the Kingdom," and that the King acquiesce to the Militia Ordinance delegating to the Parliament command over the militia.[156]

Charles's ministers answered the Nineteen Propositions in the King's name.[157] They rejected the parliamentary demands arguing that they would subvert the government.[158] But importantly, in the Answer, the ministers made a critical and apparently inadvertent concession to Parliament in response to its efforts to deprive the King of his prerogative to withhold his royal assent to laws passed in Parliament. In the Answer, the King's ministers acknowledged a lawmaking authority that deviated from the one espoused in the divine right theory of kings, in which the monarch exclusively made the laws and Parliament's only role was deliberation and advising.[159] In that theory, there existed a governing hierarchy in which the King operated above and apart from the three estates in Parliament comprising the Lords Spiritual and Temporal in the House of Lords and the Commons in the House of Commons.[160]

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153. An Ordinance of the Lords and Commons in Parliament, for the Safety and Defence of the Kingdom of England, and Dominion of Wales (1642), I ACTS & ORDS. INTERREGNUM 1–5.

154. *See* A Declaration of the Lords and Commons in Parliament concerning His Majesty's Proclamation of the 27th May 1642 (June 6, 1642), *reprinted in* KENYON, *supra* note 132, at 248–49 (1969); HENRY PARKER, OBSERVATIONS UPON SOME OF HIS MAJESTIES LATE ANSWERS AND EXPRESSES 5 (London, 1642) (citing the coronation oath's confirmation of "all Lawes and rightfull customs" as support for the theory that "the King is bound to consent to new Lawes if they be necessary, as well as defend old").

155. XIX. Propositions Made by Both Houses of Parliament, to the Kings Most Excellent Majestie: With His Majestie's Answer Thereunto (York, Robert Barker 1642), *reprinted in* 1 THE STRUGGLE FOR SOVEREIGNTY: SEVENTEENTH CENTURY ENGLISH POLITICAL TRACTS 148–54 (Joyce Lee Malcolm ed., 1999) [hereinafter 1 THE STRUGGLE FOR SOVEREIGNTY].

156. *Id.* at 148–53.

157. *Id.* at 154–78; *see also* WESTON & GREENBERG, *supra* note 103, at 36 (identifying the King's three ministers as the authors of the Answer to the Nineteen Propositions).

158. WESTON & GREENBERG, *supra* note 103, at 36.

159. *See supra* text accompanying note 109.

160. *See, e.g.*, HOLBORNE, *supra* note 109, at 147 (citing Sir Edward Coke for a definition of the three estates comprising "1. The Lords Spiritual 2. The Lords Temporal 3. And the Commons" with the King separate and apart).

In the Answer, the ministers advanced a different understanding of lawmaking and the relationship between the King and Parliament. "In this Kingdom," the ministers wrote, "the Laws are jointly made by a King, by a House of Peers, and by a House of Commons chosen by the People, all having free Votes and particular Priviledges."[161] The Answer further described the distinctive roles of the three estates in the shared process of law-making and the responsibilities of each of the three estates to check abuses of power by the others.[162]

The pronouncement in the Answer to the Nineteen Propositions marked a critical point of departure for a previously marginalized coordination theory of governance.[163] That theory later served as the foundation for the system of checks and balances that would be developed more fully in the eighteenth century.[164]

Contemporaneous theorists, who scholars label parliamentarians,[165] built from the assertions in the Answer to develop a more complete account of coordination theory to compete with the divine right theory for acceptance as the English model of governance. According to the influential parliamentarian Charles Herle, "*Englands* is not a simply *subordinative*, and *absolute*, but a *Coordinative*, and *mixt Monarchy*."[166] Repeating the assertions in the Answer, Herle elaborated that "here the *Monarchy*, or *highest* power is it selfe *compounded* of [three] *Coordinate* Estates, a *King*, and two *Houses* of Parliament . . . ."[167] "The *Parliament* cannot be said properly to be a *Subject*," Herle concluded, "because the *King* is a part, and so hee should be *subject* to himself . . . ."[168] Philip Hunton, another influential parliamentarian, concurred with Herle's arguments for a coordinated theory of government and advanced the principle of institutional independence as a critical precondition to ensure that coordinated government did not devolve into absolutism. Hunton explained, "[t]he end of constituting these two Estates being the limiting and preventing the excesses of the third,

161. XIX. Propositions Made by Both Houses of Parliament, to the Kings Most Excellent Majestie: With His Majesties Answer Thereunto (York, Robert Barker 1642), *reprinted in* 1 THE STRUGGLE FOR SOVEREIGNTY, *supra* note 155, at 168.

162. *Id.* at 168–69.

163. Prior to the 1640s, there were very few published defenses of the coordination theory of government. Sir Thomas Smith authored one of those few published defenses in the late sixteenth century, but it did not appear to gain much popular support. *See* SIR THOMAS SMITH, DE REPUBLICA ANGLORUM: A DISCOURSE ON THE COMMONWEALTH OF ENGLAND 48 (L. Alston ed., Cambridge Univ. Press 1906) (1583) (arguing that "[t]he most high and absolute power of the realme of Englande, consisteth in the Parliament . . . . where the king himselfe in person, the nobilitie, the rest of the gentilitie, and the yeomanrie are . . . .").

164. *See, e.g.*, Gwyn, *supra* note 30, at 25–26 (identifying a link between the coordinate theory advanced in the Answer to the Nineteen Propositions and modern separation of powers).

165. *See generally* WESTON & GREENBERG, *supra* note 103, at 2–3.

166. CHARLES HERLE, A FULLER ANSWER TO A TREATISE WRITTEN BY DR. FERNE 2 (London, John Bartlet 1642).

167. *Id.*

168. *Id.* at 3.

their power must not be totally dependent and derived from the third, for then it were unsuitable for the end for which it was ordained . . . ."[169]

To support the coordination theory of governance, the parliamentarians first advanced an alternative origins story of governance that deviated from the divine right account. While the parliamentarians agreed with the divine right theorists that God ordained government, they claimed that God gave to the people the power to choose the form of government.[170] Thus, absolute monarchy was not ordained by God as asserted in the divine right theory.[171] Rather, the form of governmental authority was derived from the people's consent.[172]

The parliamentarians then drew from history to ascertain that the government the people chose in England was a limited monarchy with a king subject to law, accountable to the people, and a coequal partner to the Parliament. In the historical account of leading parliamentarians, the ancient Saxon institution that would later be named Parliament predated kings in England and those ancient parliaments originally elected kings.[173] As an elected monarch, the King was merely equal and coordinate to the two Houses of Parliament in governing.[174] The lawmaking power was therefore said to be anciently shared between the King and the Parliament.[175]

It would be going too far to suggest that the coordination theory secured the acquiescence and support of all, or even most, of the English people.[176]

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169. PHILIP HUNTON, A TREATISE OF MONARCHIE 43 (London, John Bellamy & Ralph Smith 1643).

170. *See, e.g.*, JOHN MILTON, THE TENURE OF KINGS AND MAGISTRATES 8 (London, Matthew Simmons 1650) ("No man who knows ought, can be so stupid to deny that all men naturally were borne free, being the image and resemblance of God himself, and were by privilege above all the creatures, born to command and not to obey: and that they liv'd so.").

171. *See supra* text accompanying notes 100–106.

172. MILTON, *supra* note 170, at 11 ("It being thus manifest that the power of Kings and Magistrates is nothing else, but what is only derivative, transferr'd and committed to them in trust from the People, to the Common good of them all . . . .").

173. *See, e.g.*, JOHN SADLER, RIGHTS OF THE KINGDOM 35 (London, Richard Bishop 1649) ("[O]f our Saxon Ancestors, the *Mirror* is very plain, that They did *Elect*, or Chuse, Their King from among themselves . . . . And being *Elected*, they did So, and So Limit Him: by *Oath*, and *Lawes* . . . .").

174. *See, e.g.*, HUNTON, *supra* note 169, at 35 (describing how the Saxons brought their form of government from Germany to England in which "[t]heir Kings had no absolute but limited power: and all weighty matters were dispatched by generall meetings of all the Estates.").

175. *See, e.g.*, JAMES HOWELL, THE PRE-EMINENCE AND PEDIGREE OF PARLEMENT 8–13 (London, Humphrey Moseley 1642) (describing the shared governing arrangement between the Parliament and the King in the ancient period); *see also* WILLIAM PETYT, THE ANTIENT RIGHT OF THE COMMONS OF ENGLAND ASSERTED 12 (London, F. Smith et al. 1680) ("[I]t is apparent and past all contradiction, that the Commons in [the ancient period] were an essential part of the Legislative power, in making and ordaining Laws, by which themselves and their posterity were to be governed . . . .").

176. From the Civil War to the Glorious Revolution, adherents of the divine right theory rejected the coordination theory on various grounds. *See* WESTON & GREENBERG, *supra* note 103, at 42 ("From 1642 until the end of the century . . . [r]oyalists contended that despite Charles I's words in the Answer to the Nineteen Propositions, the three estates who made law in parliament were, properly speaking, the lords spiritual, the lords temporal, and the commons, with the king at their head."); *see also* JOHN SPELMAN, THE CASE OF OUR AFFAIRES, IN LAW, RELIGION, AND OTHER CIRCUMSTANCES BRIEFLY EXAMINED, AND PRESENTED TO THE CONSCIENCE 2–7 (Oxford, W.W. 1643) (rejecting the principle of coequality between

Many in England were royalists and devout believers in the divine right theory of monarchy, and thus continued to view the relationship between the monarch and Parliament in hierarchical terms.[177] But the coordination theory had been established as a serious competitor to the divine right theory and provided theoretical support to parliamentarian efforts to weaken the Crown and strengthen itself.

Despite King Charles's concessions and inadvertent acknowledgment of the coordination theory of governance, civil war erupted in England in August of 1642 between forces aligned with the King and forces aligned with Parliament.[178] The Parliament, and the House of Commons in particular, emerged as the military and political victor. After a trial in January 1649, the Parliament's High Court of Justice found Charles guilty of treason and sentenced him to death.[179] He was executed three days later.[180] And a week after Charles's execution, the House of Commons abolished the monarchy and established a commonwealth.[181] The next month, the House of Commons abolished the House of Lords leaving itself as the sole governing authority in England.[182] During what ended up being just over a decade long interregnum, England briefly flirted with a republican form of government before settling on a protectorate led by Oliver Cromwell, who exercised many of the powers of the kings that preceded him.[183] When Cromwell died in September 1658, the protectorate slowly collapsed without a competent successor.[184] King Charles's son, who had been exiled to France along with his brother James, returned to

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the Parliament and the Crown and arguing that the King is the sovereign superior to the subject Parliament); HEYLYN, *supra* note 106, at 249 (arguing that "the King established in an absolute *Monarchy,* from whom the meeting of the *three* Estates in Parliament detracteth nothing of his power and authority Royal"); JOHN B. BRYDALL, THE ABSURDITY OF THAT NEW DEVISED STATE-PRINCIPLE (London, T.D. 1681) ("If [Parliament] be Co-partners in the Soveraignty, in what a fine Condition are we, that must be obliged to Impossibilities. For we must obey three Masters, Commanding contrary things.").

177. *See* WESTON & GREENBERG, *supra* note 103, at 6 (explaining that the divine right theory "had stout advocates as late as the Glorious Revolution").

178. *See, e.g.*, RUSSELL, *supra* note 140, at 342–60 (providing the political context of the Civil War and an account of the battles between parliamentary and royal forces during the war).

179. The Death Warrant of Charles I (January 29, 1649), *in* CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION, *supra* note 136, at 380.

180. A LOOKING-GLASS FOR THE TIMES IN THE TRYAL AND MARTYRDOM OF KING CHARLES THE I, at 19–24 (London, n. pub. 1689).

181. Act Abolishing Kingship (1649), *reprinted in* PAUL L. HUGHES & ROBERT F. FRIES, CROWN AND PARLIAMENT IN TUDOR-STUART ENGLAND: A DOCUMENTARY CONSTITUTIONAL HISTORY, 1485– 1714, at 236 (G.P Putnam's Sons 1959).

182. Act Abolishing the House of Lords (1649), *reprinted in* HUGHES & FRIES, *supra* note 181, at 235–36.

183. Act Establishing the Commonwealth (1649), *reprinted in* HUGHES & FRIES, *supra* note 181, at 237; The Instrument of Government (1653), *reprinted in* HUGHES & FRIES, *supra* note 181, at 240–42 (establishing the protectorate).

184. *See, e.g.*, CHRISTOPHER HILL, THE CENTURY OF REVOLUTION: 1603–1714, at 117 (Christopher Brooke & Denis Mack Smith eds., 1980) (describing the failure of Oliver Cromwell's successors to continue the Protectorate and avoid anarchy).

England and was officially restored to the throne as King Charles II in May 1660.[185]

## III. THE ROYAL PREROGATIVE AND THE RISE OF THE PARLIAMENTARY CHECK

With the restoration of the King came renewed debate about the form of government. Although the restoration marked the end of parliamentarian efforts to rule without a monarch, Parliament would not be returned to the subordinate status of its past. Instead, the theory of coordination lived on and assumed an increasingly dominant position. Prior to the King's restoration, Parliament passed a resolution that affirmed the coordination theory, declaring that "Government is, and ought to be, by King, Lords, and Commons."[186]

After the King's restoration, the Parliament took the initiative as an active participant in lawmaking while continuing to control the power of the purse. Far from being the subordinate subject of the King, the Parliament operated as something akin to a coequal institution. King Charles II nonetheless held the same ambition as his predecessors of advancing his preferred policy program, along with a willingness to do so unilaterally, if necessary. Parliament's role in lawmaking and control over money, however, continued to be an obstacle. This Part explores the immediate post-restoration period of English history, which served as a precursor to an intense power struggle between the Crown and Parliament, culminating in the Glorious Revolution.

### *A. Post-Restoration England and Religion*

At the time of the restoration, England was deeply divided over religion. The two principal religious factions comprised of Anglicans, who were adherents to the established Church of England, and Protestant dissenters, who did not conform to the practices and beliefs of the Church of England.[187] For the most part, the two religious factions were on opposite sides during the Civil War and Interregnum. Most Anglicans supported Charles and advocated for restoring the monarchy after his death.[188] Most Protestant dissenters supported

185. RUSSELL, *supra* note 140, at 397.

186. Resolution Re-establishing the Government (1660), *in* 8 JOURNAL OF THE HOUSE OF COMMONS, 1660–1667, at 8 (London, His Majesty's Stationery Office 1802), http://www.british-history.ac.uk/commons-jrnl/vol8/pp4-8.

187. *See, e.g.*, PAUL SEAWARD, THE RESTORATION, 1660–1688, at 41–43 (1991) (describing the religious divisions between Anglicans and Protestant dissenters in England during the seventeenth century).

188. *See*, *e.g.*, PAUL SEAWARD, THE CAVALIER PARLIAMENT AND THE RECONSTRUCTION OF THE OLD REGIME, 1661–1667, at 327 (1988) (recounting Anglican gentry support for restoration of the monarchy during the Interregnum).

the Parliament during and after the Civil War.[189] Until the late years of the Interregnum, the Protestant dissenters opposed restoring the monarchy.[190] The two groups were also divided over theories of governance, with Anglicans more sympathetic to a strong monarchy consistent with the divine right theory and Protestant dissenters seeking a weaker monarchy in accordance with the coordination theory.[191] The one major point of agreement between Anglicans and Protestant dissenters, and most English people for that matter, was their fear and loathing of Catholics.

Catholics comprised a very small portion of the English population, estimated at 1.2%.[192] Yet a combination of historical memory and European continental developments provoked continuous alarm, bordering on paranoia, about the Catholic threat to the English nation and the Protestant religion. The English could not forget the Catholic Queen Mary I, who, in seeking to undo the English Reformation that separated the nation from the Catholic Church, persecuted and burned at the stake hundreds of Protestants during her five-year reign in the mid-sixteenth century.[193] Also fixed in the English memory were several attempted Catholic assassinations of English monarchs sanctioned by the pope.[194] This included the failed Gunpowder Plot to blow up the House of Lords while King James I presided over the opening of Parliament in 1605.[195] Nor did the English forget the more recent massacre of Protestant settlers by Catholics in Ireland during the Irish Rebellion of 1641.[196]

Developments on the European continent further fueled English Protestant fears of Catholics. Catholic France, as the leading power in Europe, was seen as a constant threat to England and its Protestant religion and form of government.[197]

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189. *See, e.g.*, TIM HARRIS, POLITICS UNDER THE LATER STUARTS: PARTY CONFLICT IN A DIVIDED SOCIETY, 1660–1715, at 32 (John Morrill & David Cannadine eds., 1993).

190. *See, e.g.*, RUSSELL, *supra* note 140, at 361–70 (describing the linkages between Protestant dissenters and parliamentarians during the Interregnum).

191. *See, e.g.*, HARRIS, *supra* note 189, at 7 (identifying disagreements about the appropriate power of the king during the post-Restoration period).

192. *Id.* at 12.

193. *See* 5 DAVID HUME, THE HISTORY OF ENGLAND, FROM THE INVASION OF JULIUS CAESAR TO THE REVOLUTION IN 1688, at 337 (1778) (describing Queen Mary's reign of terror over Protestants that resulted in the royally sanctioned killing of hundreds of Protestants).

194. *See* MICHAEL A.R. GRAVES, THE TUDOR PARLIAMENTS: CROWN, LORDS AND COMMONS, 1485–1603, at 130–31 (John Morrill & David Cannadine eds., 1985) (describing Catholic attempts to assassinate Queen Elizabeth during the sixteenth century).

195. *See* 5 DAVID HUME, THE HISTORY OF ENGLAND, FROM THE INVASION OF JULIUS CAESAR TO THE REVOLUTION IN 1688, at 25–32 (1778) (recounting the Gunpowder Plot).

196. *See id.* at 335–47 (providing an account of the Irish rebellion and associating it "with circumstances of the utmost horror, bloodshed, and devastation"). What was, however, forgotten or conveniently excused were the many instances of Protestant persecution and killing of Catholics in England, Ireland, and elsewhere.

197. *See* J.R. JONES, THE REVOLUTION OF 1688 IN ENGLAND 76–78 (1972) (detailing the English Protestant fear and hatred of Catholic France and its absolute form of government that they saw as a threat to the Protestant religion).

The Anglicans and Protestant dissenters used the threat of Catholicism, which they pejoratively labeled "popery" and associated with absolutism, against each other during the Restoration. The Anglicans claimed that Protestant dissenters' demands for a more comprehensive English church enabled popery, while Protestant dissenters responded by associating the Anglican hierarchy in their religious rituals and practices with popery.[198] These religious divisions turned into constitutional controversies between the Crown and Parliament because of the Catholic sympathies held by Charles II and the Catholic beliefs of his brother and future successor, James II.

### *B. An Early Threat to Parliamentary Independence*

In the Restoration settlement, some of the changes that the Parliament extorted from Charles I prior to the Civil War remained in place. Those included a prohibition on the Crown's unilateral exercise of taxing power without parliamentary consent.[199] In exchange, the Parliament provided Charles II with a continuous stream of money for royal expenses.[200] During the first two decades of Charles II's reign, however, the taxes provided less revenue than anticipated, and the revenue shortage re-ignited the old struggle between the Crown and the Parliament over money.[201]

Matters of religion were also tense between the Crown and the Parliament. Prior to assuming the crown in 1660, Charles II promised in his *Declaration of Breda* that there would be religious toleration upon his restoration.[202] However, the Anglicans, who controlled Parliament, pushed in another direction. Through several laws passed in the early 1660s, Parliament not only rejected religious toleration but imposed strict conformity requirements on non-

198. *See*, *e.g.*, HARRIS, *supra* note 189, at 70 (describing the Anglicans' belief that "[t]olerating Dissent . . . would only lead to the growth of popery").

199. Tenures Abolition Act 1660, 12 Car. 2 c. 24, *reprinted* in 5 STATUTES OF THE REALM, 1628–80, *supra* note 162, at 259–66, http://www.british-history.ac.uk/statutes-realm/vol5/pp259-266 (abolishing several forms of royal prerogative taxation); *see also* SMITH, *supra* note 123, at 59.

200. Tenures Abolition Act 1660, *supra* note 199, at 259. The Restoration Parliament determined that preserving its full power over the purse was key to avoiding another instance of personal sovereign rule that England experienced under King Charles I with its potential to lead to absolute monarchy. *See* SMITH, *supra* note 123, at 59 (recounting the parliamentary desire to avoid a repeat of royal personal rule and cataloguing the parliamentary abolition of unilateral crown taxation after the Restoration).

201. SMITH, *supra* note 123, at 60.

202. In the *Declaration of Breda*, Charles proclaimed,

> We do declare a Liberty to Tender Consciences, and that no man shall be disquieted or called in question for differences of opinion in matters of Religion, which do not disturb the Peace of the Kingdom; And that we shall be ready to consent to such an Act of Parliament, as upon mature Deliberation shall be offered to us for the full granting that indulgence.

King Charles II, His Declaration to all his Loving Subjects of the Kingdom of England Dated from his Court at Breda in Holland, the 4/14 of April 1660 (Harts Close, Christopher Higgins 1660), https://quod.lib.umich.edu/e/eebo/B02052.0001.001/1:1.1?rgn=div2;view=fulltext.

Anglicans.[203] By initiating these laws, Parliament continued in the role as a primary lawmaking institution that it assumed prior to the Civil War.

A final element of the Restoration settlement provided a roadmap for changing the dynamic of parliamentary supremacy. Soon after the Restoration, the Parliament introduced the Corporation Act designed to purge nonconformists and persons suspected of disloyalty to the King from municipal governments.[204] These municipal governments administered boroughs, which were responsible for selecting most of the members to the House of Commons.[205] Much of the pressure for the purge of disloyal borough officials came from within the boroughs themselves. Anglican supporters of the monarchy after the Restoration sought to respond in kind to their removal from municipal offices by Protestant dissenters and other supporters of the Parliament during the Interregnum.[206] As introduced, the Corporation Bill gave the Parliament the power to appoint a body of special commissioners "to purge corporations of 'disaffected' members."[207] Those commissioners would have the authority to remove municipal government officeholders who refused to take the Oath of Allegiance and Supremacy to the King as the supreme governor of the Church of England and to declare nonresistance to the King.[208] Upon removal, the commissioners would have the authority to fill any vacancy in municipal government with any inhabitant from the borough.[209]

Charles and his brother saw the bill as an opportunity not only to rein in municipal independence but also to exercise greater influence over the House of Commons's membership.[210] Under one amendment proposed by the Crown,

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203. *See, e.g.*, Act of Uniformity, May 19, 1662, *in* THE EDINBURGH SOURCE BOOK FOR BRITISH HISTORY, 1603–1707, at 77–79 (Basil Williams ed., 1933) (requiring religious uniformity in prayer, service, and the administration of sacraments and rights); An Act to Prevent and Suppresse Seditious Conventicles 1670, 22 Car. 2 c. 1, *reprinted in* 5 STATUTES OF THE REALM, 1628–80, *supra* note 150, at 516–20, http://www.british-history.ac.uk/statutes-realm/vol5/pp516-520 (prohibiting religious gatherings of more than five persons outside of the Church of England).

204. An Act for the Well Governing and Regulating of Corporations 1661, 13 Car. 2 c. 1, *reprinted in* 5 STATUTES OF THE REALM, 1628–80, *supra* note 150, at 321, http://www.british-history.ac.uk/statutes-realm/vol5/pp321-323.

205. *See infra* Part IV.A.

206. *See, e.g.*, PAUL D. HALLIDAY, DISMEMBERING THE BODY POLITIC: PARTISAN POLITICS IN ENGLAND'S TOWNS, 1650–1730, at 15–19 (Anthony Fletcher et al. eds., 1998) (describing the series of purges and counter-purges arising from local partisan strife).

207. John Miller, *The Crown and the Borough Charters in the Reign of Charles II*, 100 ENG. HIST. REV. 53, 60 (1985).

208. ANDREW SWATLAND, THE HOUSE OF LORDS IN THE REIGN OF CHARLES II 239 (1996).

209. JENNIFER LEVIN, THE CHARTER CONTROVERSY IN THE CITY OF LONDON, 1660–1688, AND ITS CONSEQUENCES 9 (1969).

210. *See* Robert Pickavance, The English Boroughs and the King's Government: A Study of the Tory Reaction, 1681–85, at 38 (1976) (Ph.D. dissertation, Oxford University), https://ora.ox.ac.uk/objects/uuid:0ff12ca6-f7e8-4302-b407-acffd978bdef (stating that with the Corporation Act, "[t]he crown intended to solve the double problem of municipal independence—magisterial autonomy and parliamentary representation—at a single blow").

all royal charters for incorporation would have to be renewed or forfeited.[211] In the renewed charters, the King could control the appointment of new borough members and influence the parliamentary selection processes.[212] A second amendment proposed by the Crown shifted authority from Parliament to the King to appoint the special commissioners and delegated to the commissioner permanent authority to remove municipal government officials.[213]

Members of Parliament opposed the amendments as they considered them a threat to borough autonomy and independence.[214] One dissenting member suggested the Crown's amendments would produce "[s]o total an Alteration of the Government" that it "may have an ill Influence upon the free Elections."[215] The dissenting parliamentarian clearly understood free elections to mean elections free from Crown influence. Another dissenter noted the permanent nature of the changes to the relationship between the central government and municipalities that would be wrought by the amendments to the detriment of municipal autonomy.[216]

The parliamentary opponents blocked the amendments providing for the required renewal of corporate charters and granting the King the power to choose future recorders, town clerks, and mayors.[217] Parliament did agree, however, to the amendment providing for the Crown appointment of the special commissioners, but the commissioners' powers expired fifteen months after the act's adoption.[218] Although the King did not get all he wanted in the Corporation Act, he was able to use the power under the Act to systematically purge municipal governments and appoint officeholders loyal to the Crown and the monarchical system of government.[219]

In the decade that followed, there continued to be disputes about royal prerogative and parliamentary authority, but none that raised the same threats of absolute monarchy or devolution into civil war associated with the reign of Charles I.[220] That relative harmony between the Crown and the Parliament

211. *Id.*

212. *See* J.H. Sacret, *The Restoration Government and Municipal Corporations*, 45 ENG. HIST. REV. 232, 250 (1930) (the proposed amendments would have given the Crown the authority to nominate "all future recorders and town clerks, and virtually also of mayors"); 1 EDWARD PORRITT ASSISTED BY ANNIE G. PORRITT, THE UNREFORMED HOUSE OF COMMONS: PARLIAMENTARY REPRESENTATION BEFORE 1832, at 393 (1903) (describing the proposal to give the Crown the authority to limit the parliamentary franchise in the borough to the common council he was primarily responsible for selecting).

213. Sacret, *supra* note 212, at 247.

214. Historian J.H. Sacret recounts that "[e]ven the royalist members for boroughs seem to have been aghast at this attempt to reduce their constituents to servitude." *Id.* at 250.

215. *Id.*

216. *Id.*

217. *Id.* at 251.

218. Miller, *supra* note 207, at 63.

219. *See* BETTY KEMP, KING AND COMMONS: 1660–1832, at 14 (1st ed. 1957) ("The Corporation Act of 1661, which gave the King absolute control over the officers of the corporations for fifteen months, and a limited control thereafter, provided a basis for royal influence over elections.").

220. *See id.* at 18–19.

began to break down in the 1670s, when threats (real and imagined) of "popery" and absolute monarchy fueled parliamentary distrust of the King and attempts to limit the Crown's powers. The King, unable to subordinate parliaments in the ways of his predecessors, responded by reviving royal prerogatives used by his predecessors.

### *C. The Revival of the Royal Prerogative*

After the Restoration settlement, the status and extent of the royal prerogative remained underdetermined. The settlement deprived the Crown of the royal prerogative to engage in any form of nonparliamentary taxation and restored the royal prerogative to direct and command the militia.[221] The limits of royal prerogative over the courts were also resolved during the settlement.[222] But two important royal prerogatives went entirely unaddressed. The first was the royal prerogative to dispense with, or suspend, laws. Divine right theorists argued that monarchs could exercise this unilateral power when equity demanded that they do so or for reasons only known to the Crown.[223] That power to dispense with laws had awesome potential as it could lead to a range of unilateral royal lawmaking that the Parliament would lack any authority to check. For that reason, there was considerable tension between the power to dispense with laws and the coordination theory of governance since the coordination theory required the participation of the King and the two houses of Parliament in the lawmaking process.[224]

The restoration settlement did not resolve the question of the continued availability of the royal prerogative to dispense with laws because it had not been the subject of major dispute or controversy prior to the Civil War and interregnum.[225] It would, however, emerge as a source of major controversy after the restoration as both Charles II and James II attempted to employ the royal prerogative to advance a policy of religious tolerance and liberty of conscience.[226]

A second royal prerogative left unresolved in the settlement that would also emerge as a source of considerable controversy was the King's power to issue

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221. *See supra* text accompanying note 150; *see also* An Act Declaring the Sole Right of the Militia to be in King and for the Present Ordering & Disposing the Same 1661, 13 Car. 2 c. 6, *reprinted in* 5 STATUTES OF THE REALM, 1628–80, *supra* note 150, at 308–09, http://www.british-history.ac.uk/statutes-realm/vol5/pp308-309.

222. *See* SMITH, *supra* note 123, at 147 (noting that after the Restoration, "the Courts of Star Chamber and High Commission remained permanently abolished").

223. *See* WESTON & GREENBERG, *supra* note 103, at 32 (arguing that the royal dispensing power was central to the divine right theory of governing).

224. *See supra* Part II.B.

225. *See* WESTON & GREENBERG, *supra* note 103, at 32 (describing the lack of controversy surrounding the royal dispensing power).

226. *See infra* Parts III.C.1 & IV.C.

a writ of quo warranto and unilaterally revise or revoke municipal borough corporate charters.[227] The restoration settlement did not resolve the question regarding the continued legitimacy of this prerogative because under the prior Stuart kings it had been mostly used as a tool to resolve local disputes rather than to convey royal power.[228] The prerogative, nonetheless, held tremendous potential to enhance crown authority as the King could use it to force changes in the parliamentary selection process,[229] undermining the independence and co-equal status of Parliament.

In what follows I describe the re-emergence of these royal prerogatives and the constitutional controversies that followed. Out of these disputes over the two royal prerogatives came critical steps in the evolution of the constitutional framework. These steps included (1) further limiting royal prerogatives by embedding them within a checks and balances framework; and (2) establishing parliamentary independence as a core principle of constitutional balance preserved through parliamentary selection processes free from undue crown influence.

### *1. Religion and the Royal Power to Dispense with Laws*

Two years after Charles declared from Breda that he would promote religious tolerance once restored to the crown, the King followed through with his Declaration of Indulgence in 1662.[230] The Declaration, issued pursuant to the King's exercise of royal prerogative, granted religious toleration to Protestant dissenters, Catholics, and other Nonconformists through the suspension of penal laws applied to these groups.[231] Prior monarchs' exercise of royal prerogative to dispense with laws had, at most, been met with ineffective protest and subsequent acquiescence to the King's exercise of such power.[232] Since the King was head of the Church of England with exclusive authority over ecclesiastical matters, the expectation was that Parliament would

227. *See* HALLIDAY, *supra* note 206, at 26 ("By quo warranto, the King inspected and corrected those who misused corporate powers that derived from the King.").

228. *See, e.g.*, Catherine Patterson, *Quo Warranto and Borough Corporations in Early Stuart England: Royal Prerogative and Local Privileges in the Central Courts*, 120 ENG. HIST. REV. 879, 880 (2005) (finding that the early-seventeenth-century Crown's use of quo warranto was focused more on addressing local concerns than applying arbitrary power).

229. *See* 1 HENRY ALWORTH MEREWETHER & ARCHIBALD JOHN STEPHENS, THE HISTORY OF THE BOROUGHS AND MUNICIPAL CORPORATIONS OF THE UNITED KINGDOM, at xxxix–xl, lii–liv (London, Stevens and Sons, S. Sweet, & A. Maxwell 1835).

230. HARRIS, *supra* note 189, at 55.

231. *Id.*

232. For a widely held view of the King's dispensing power prior to the Restoration, see, for example, SHERINGHAM, *supra* note 103, at 98 ("[T]here is scarcely any man in the Kingdom, so much a stranger to the Laws, but knows that the King alone hath power to dispense with the Statutes . . . .").

once again acquiesce to the King's exercise of royal prerogative.[233] But this first Declaration of Indulgence provoked a more intense and immediate reaction from Parliament.[234] Rather than acquiescing, Parliament forced the King to withdraw the declaration and compelled the King to assent to additional laws rejecting toleration in favor of enforced conformity to the Church of England.[235]

The first Declaration of Indulgence triggered parliamentarian distrust about the religious leanings of the King. Many parliamentarians suspected the King had Catholic sympathies, which they saw as a threat to Parliament because of the religion's popular association with "popery" and royal absolutism.[236] Two series of events in the early 1670s exacerbated parliamentarian fears and reignited Crown–parliamentarian conflict.

The first involved the King in another exercise of unilateral royal prerogative. In 1670, Charles concluded the Treaty of Dover with King Louis XIV of France, which allied England with Catholic France against the Protestant Dutch Republic.[237] For parliamentarians, the treaty represented a betrayal of the Protestant faith and contributed to anxiety about the influence of French "popery" and absolutism on the king.[238] This anxiety had some foundation as the treaty included a secret provision in which the French agreed to provide Charles with subsidies in return for his promise to declare his allegiance to the Catholic faith when the opportunity arose.[239] In accord with the treaty, Charles declared war against the Dutch in 1672.[240] Two days after the war declaration, Charles employed his royal prerogative to issue his second Declaration of Indulgence suspending penal laws applied to Protestant dissenters, Catholics, and other Nonconformists and granting religious tolerance to these groups.[241]

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233. *See, e.g.*, J.L. DE LOLME, THE CONSTITUTION OF ENGLAND 71 (London, G.G.J. & J. Robinson Paternost-Row & J. Murray 1793) (ascribing to the king the status of "Supreme Head of the Church").

234. For an example of popular resistance to the declaration of indulgence from an Anglican leader, see generally RICHARD BAXTER, FAIR WARNING: OR, XXV REASONS AGAINST TOLERATION AND INDULGENCE OF POPERY; WITH THE ARCH-BISHOP OF CANTERBURY'S LETTER TO THE KING, AND ALL THE BISHOPS OF IRELANDS PROTESTATION TO THE PARLIAMENT TO THE SAME PURPOSE (London, S.U.N.T.F.S. 1663) (providing twenty-five reasons to oppose toleration of popery).

235. *See* HARRIS, *supra* note 189, at 55 ("The King's Declaration of Indulgence of 1662 . . . provoked an outcry against popery, and not only did Parliament force the King to withdraw the Indulgence, but proceeded to introduce bills to prevent the growth of popery.").

236. *See* SEAWARD, *supra* note 187, at 47 (describing the "king's sympathy for catholics" in the 1660s that "gave him an attitude towards religious persecution and protestant uniformity that to churchmen was disquietingly ambivalent").

237. Treaty of Dover, *reprinted in* ENGLAND UNDER CHARLES II: FROM THE RESTORATION TO THE TREATY OF NIMEGUEN, 1660–1678, at 101–03 (W.F. Taylor ed., 1889).

238. *See* SMITH, *supra* note 123, at 151–52 (describing the broader religious-based distrust between Parliament and the King during the late 1660s and early 1670s).

239. Treaty of Dover, *supra* note 237, at 101.

240. HARRIS, *supra* note 189, at 56.

241. *See* Charles II, Declaration of Indulgence, March 15, 1672, *reprinted in* FRANK BATE, THE DECLARATION OF INDULGENCE, 1672: A STUDY IN THE RISE OF ORGANISED DISSENT 76–78 (1908).

Once again, the declaration provoked an intense and immediate parliamentary reaction.[242] To check the King, Parliament returned to a familiar tool, the power of the purse. Facing a serious parliamentary threat to deny him needed funds to pay his military, the King was forced to withdraw the declaration and make peace with the Dutch.[243] Parliament, however, did not stop there. In 1672, Parliament compelled the King to assent to the Test Act.[244] That Act excluded from civil and military office anyone who refused to take the oath of allegiance and supremacy to the crown and renounce belief in the Roman Catholic doctrine of transubstantiation.[245] Through the Test Act of 1672, the Parliament not only codified another form of religious intolerance against the King's wishes, but also limited his royal prerogative to appoint civil and military officials of his choosing.

The second series of events involved the King's brother, James II, who was the successor to the throne because Charles lacked a legitimate male heir.[246] James had converted to Catholicism in 1669 and publicly affirmed his allegiance to Catholicism three years later by refusing to take the Anglican sacrament.[247] The next year, James married the devout Catholic Mary of Modena.[248] James's conversion to Catholicism and marriage to a Catholic meant that unless Charles's wife, Queen Catherine of Branganza, bore a male child—an increasingly unlikely proposition given her age—England would soon be ruled by a Catholic monarch for the first time since Queen Mary Tudor in the sixteenth century.[249] This prospect of royal succession to a Catholic monarch further amplified parliamentarian anxiety and would contribute to an intense struggle between the crown and Parliament as the Parliament tried to coerce the King into excluding James from the Crown.

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242. BATE, *supra* note 241, at 117–18 (quoting a letter from Parliament to the King opposing the Declaration of Indulgence as an unconstitutional royal dispensation of law); *see also* The Second Parliament of Charles II: Eleventh Session- Begins 4/2/1673, *in* 1 THE HISTORY AND PROCEEDINGS OF THE HOUSE OF COMMONS: 1660–1680, at 163–78 (London, Chandler 1742), http://www.british-history.ac.uk/commons-hist-proceedings/vol1/pp163-178 ("[W]e find ourselves bound in Duty to inform your Majesty, That Penal Statutes in Matters ecclesiastical cannot be suspended but by Act of Parliament.") (quoting Edward Seymour, Speaker, House of Commons, Address to His Majesty Against the Declaration of Indulgence (Feb. 19, 1673)).

243. SMITH, *supra* note 123, at 152.

244. *Id.*

245. An Act for Preventing Dangers Which May Happen from Popish Recusants 1672, 25 Car. 2 c. 2, *reprinted in* 5 STATUTES OF THE REALM, 1628–80, *supra* note 150, at 782, http://www.british-history.ac.uk/statutes-realm/vol5/pp782-785.

246. HARRIS, *supra* note 189, at 56.

247. *Id.* at 56–57.

248. *Id.* at 57.

249. *Id.* at 56–57.

*2. The Exclusion Crisis*

Six months after the marriage between James and Mary, a member of the House of Lords, the Earl of Carlisle, proposed a measure excluding from succession "any prince [of blood] who married a Catholic without parliament's approval."[250] The proposal to exclude the Catholic successor to the Crown marked the first salvo in the Exclusion Crisis. Charles tried to head off the proposal and avoid a crisis of succession by abandoning his pursuit of religious tolerance. The King instructed his Lord Treasurer Thomas Osborne, the Earl of Danby (Lord Danby), to secure majority support for the King and opposition to exclusion in the Anglican-controlled Parliament through the pursuit of a pro-Anglican policy of religious intolerance.[251] That included aggressive royal enforcement of penal laws targeting Catholics and Protestant dissenters and support for the passage of a second Test Act of 1678 that excluded anyone who failed to take communion in the Church of England from serving in Parliament.[252] Danby also sought to curry royal favor in the Parliament through the provision of pensions and bribes to its members.[253] Danby's actions were part of a scheme to construct a Court party in the Parliament that would be loyal to, and dependent on, the King and hence support and defend the monarchy and royal succession.[254]

Danby's scheme met with mixed success as he was able to temporarily foreclose the introduction of an Exclusion Bill in Parliament. He, however, proved unable to organize a cohesive faction in the Parliament as distrust remained about the Crown's religious sympathies and ambitions.[255] Yet, despite his mixed success, Danby might have been able to avoid a constitutional crisis regarding succession if not for the emergence of the "popish plot."

In 1678, the English priest Titus Oates started to spread an ostentatious and fictitious tale about a Catholic plot to murder the king.[256] Despite the lack of evidence, pervasive English anxieties about "popery" and absolutism made them vulnerable to believing the baseless tale. Public hysteria about the threats

250. In proposing this measure, Carlisle received the support of the influential Ashley Cooper, the first earl of Shaftesbury (Lord Shaftesbury), the former Lord Chancellor of England, and future leader of the first political party in England, the Whigs, the principal organized proponents of Exclusion. SWATLAND, *supra* note 208, at 217.

251. *See id.* at 242–43 (describing Danby's policy program of religious conformism in the Parliament).

252. An Act for the more effectuall preserving the Kings Person and Government by disableing Papists from sitting in either House of Parlyament 1678, *reprinted in* 5 STATUTE OF THE REALM, 1628–80, *supra* note 150, http://www.british-history.ac.uk/statutes-realm/vol5/pp894-896.

253. *See* HARRIS, *supra* note 189, at 62–63 (describing Danby's use of bribes and pensions).

254. *See* J.H. PLUMB, THE GROWTH OF POLITICAL STABILITY IN ENGLAND, 1675–1725, at 47–48 (1967) (detailing Danby's efforts to build a Court Party in Parliament).

255. *See* HARRIS, *supra* note 189, at 63 (describing the limits on Danby's efforts to organize a cohesive Court party in Parliament).

256. *See* W.A. SPECK, RELUCTANT REVOLUTIONARIES: ENGLISHMEN AND THE REVOLUTION OF 1688, at 32 (1988) (recounting the fictional popish plot).

to the English religion and form of government ensued.[257] The calls from the Parliament and English society to exclude James from succession grew louder. Lord Shaftesbury, the former lead minister under Charles, organized parliamentary proponents of exclusion into a rudimentary party.[258] The proponents of exclusion were pejoratively labeled Whigs.[259]

The Whigs comprised mainly members of a "Country" faction in the Parliament who opposed the Court's corruption of Parliament, including Danby's schemes to bribe members of Parliament to support the Crown.[260] The Whigs under Shaftesbury coalesced around a shared theory of governance that built on the foundation of Country opposition to the Court. Most prominently, the Whigs supported the coordination theory of government and its mixed monarchy consisting of the Kings, Lords, and Commons sharing sovereign authority.[261] The Whigs also coalesced around their shared religion as the party was dominated by Protestant dissenters who sought a more comprehensive church in opposition to the stringent conformity promoted by the Anglicans.[262] But like the Anglicans, the Whigs rejected religious toleration for Catholics due to their association of the religion with popery and absolutism.[263]

Despite the rumored popish plot and growing popular support for Exclusion, the Whigs, as they coalesced into a party, were in the minority in the predominantly Anglican Parliament that had sat since the restoration in 1660.[264] That Parliament was comprised of members required under the Corporation Act to take the oath of allegiance and supremacy to the King as the head of the Church of England.[265] And although Protestant dissenters still held seats in Parliament after the Corporation Act through their "casual" conformity to the Church of England, they were a distinct parliamentary minority unable to advance their platform of Exclusion.[266]

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257. *See* SWATLAND, *supra* note 208, at 253 (associating public hysteria with the popish plot).

258. *See* JONES, *supra* note 197, at 39 (defining the Whigs as a party with "a clearly defined and accepted group of leaders").

259. The Whigs were named after Scottish Presbyterian rebels who opposed the King's efforts to secure religious conformity in Scotland. HARRIS, *supra* note 189, at 8.

260. J.R. JONES, THE FIRST WHIGS: THE POLITICS OF THE EXCLUSION CRISIS, 1678–1683, at 11 (1961).

261. *See* CAROLINE ROBBINS, THE EIGHTEENTH-CENTURY COMMONWEALTHMAN 6 (1959) ("[The Whigs] believed in a separation of powers and hoped that each of the three parts of the government would balance or check the others.").

262. *See* JONES, *supra* note 197, at 39 (identifying the association between the Whigs and Protestant dissenters).

263. *See* HARRIS, *supra* note 189, at 89–91 (describing the Whig antipathy toward Catholics and popery).

264. *See* BASIL DUKE HENNING, THE HISTORY OF PARLIAMENT: THE HOUSE OF COMMONS 1660–1690, at 77 (Secker & Warburg eds., 1983) (detailing the political orientation of members of Parliament and showing the Anglican and Court domination of the Cavalier Parliament that sat from 1661–1678).

265. *See supra* notes 204–208 and accompanying text.

266. *See* HALLIDAY, *supra* note 206, at 112 (describing the phenomenon of casual, or occasional, conformity).

However, in the midst of the public hysteria surrounding the popish plot, Danby's secret negotiations with the French on behalf of the King were discovered.[267] Danby's negotiations served as the basis for parliamentary allegations that Danby was "popishly affected."[268] The House of Commons subsequently initiated an impeachment proceeding against Danby.[269] In response, and as a way of defending Danby, the King exercised his royal prerogative to dissolve the Parliament in January 1679.[270] That decision to dissolve Parliament proved to be a pivotal political misstep for the King. In the election that followed the King's summoning of the next Parliament in March 1679, proponents of Exclusion won a majority of the seats after Shaftesbury and the Whigs pursued a sophisticated and organized electoral campaign.[271] In this campaign, the Whigs promoted exclusion "as the only means of preserving the liberties, property and religion of Englishmen" and denounced those who opposed exclusion as "favourers of Popery and arbitrary government."[272]

The newly constituted House of Commons held its first session in March 1679 and introduced a bill to exclude James from the succession in May 1679.[273] Charles offered concessions to the exclusionists in the form of limitations that would be placed on a Catholic successor, which included depriving the Crown of "rights of ecclesiastical patronage and of appointment to civil, legal and military offices whenever a Catholic occupied the throne."[274] The exclusionists rejected the concessions, and Charles dissolved the Parliament in July 1679 after only four months in session.[275] The King summoned another Parliament in October 1679, but the King prorogued the Parliament until October 1680 in hopes that the popish hysteria would die down.[276] It did not, and the Whig-controlled House of Commons introduced a second exclusion bill rejecting the Crown's additional concessions.[277] Three months later, the King dissolved the Parliament.[278] The King then summoned a third Parliament and required that it be moved from London, a Whig stronghold, to Oxford, a more pro-royalist

267. SMITH, *supra* note 123, at 156; *see also* ANDREW MARVELL, AN ACCOUNT OF THE GROWTH OF POPERY AND ARBITRARY GOVERNMENT IN ENGLAND 3, 12 (1678) (reviving the memories of Queen Mary Tudor and other instances of Catholic persecution and threats to Protestants and their magistrates).

268. SMITH, *supra* note 123, at 156.

269. *Id.*

270. *See* JONES, *supra* note 260, at 34 (describing the decision to dissolve the Parliament "a calculated gamble").

271. LEVIN, *supra* note 209, at 5–6 ("Shaftesbury . . . created a very efficient 'party' organisation geared to win elections.").

272. HENNING, *supra* note 264, at 37.

273. LEVIN, *supra* note 209, at 6.

274. SMITH, *supra* note 123, at 157.

275. HARRIS, *supra* note 189, at 98.

276. SMITH, *supra* note 123, at 157–58.

277. *Id.* at 158 (describing the King's "offer to accept 'any new remedies which shall be proposed that may consist with the preserving the succession of the Crown in its due and legal course of descent'").

278. *Id.*

constituency.[279] The move did little to change the dynamics as the Whig-controlled Parliament introduced a third exclusion bill. After being in session for only a week in March 1681, the King dissolved this third exclusion Parliament.[280] The Exclusion Crisis continued without a clear resolution in sight.

After several centuries in which the Parliament served as a supplicant subordinate to the Crown, the institution had emerged as a coordinate rival to the Crown by the early 1680s. Continuing the dynamic from the period immediately before the Civil War, the Parliament during the post-Restoration period assertively checked royal exercises of unilateral authority to advance policies of religious tolerance and took the initiative in the lawmaking process to promote religious conformity. But facing an intransigent Parliament seeking to prevent the succession of his brother to the Crown, Charles shifted tactics with major potential consequences for the coordination theory of government.

Following the dissolution of the Oxford Parliament, the King revived his rarely used royal prerogative to revoke or revise municipal corporate charters through the issuance, or threats to issue, writs of quo warranto against borough corporations.[281] Since municipal corporate charters set the terms of municipal membership and governance as well as elections to the House of Commons, the King's exercise of this royal prerogative posed a major threat to parliamentary independence. By deciding who held borough offices and who had the power to choose members of Parliament through the remodeling of corporate charters, the King could create a class of parliamentarians dependent on him for office and ultimately loyal to his policy program.

For Charles in the immediate term, this meant ensuring the selection of parliamentarians opposed to Exclusion. For James in the longer term, this meant ensuring the selection of parliamentarians that would support or defer to the Crown's unilateral exercise of power to promote religious tolerance for Catholics. In broader constitutional terms, if the King proved able to secure parliamentary dependence on the Crown, the door would be open to a return to the divine right theory and royal absolutism with Parliament reassuming the role of the subordinate supplicant to the King. In the next part, I turn to the Crown's assault on parliamentary independence in the 1680s that led to a revolutionary response recounted in Part V.

279. *Id.*

280. *See* HENNING, *supra* note 264, at 39 (attributing Charles's decision to so quickly dissolve the Parliament to his newfound financial independence from his secret arrangement with King Louis of France).

281. *Id.* at 40.

## IV. THE CROWN ASSAULT ON PARLIAMENTARY INDEPENDENCE

By the early 1680s, the Crown and the Parliament were at a crossroads. After the King summoned and dissolved three Parliaments in just over two years,[282] the two bodies were unable to come to an agreement on succession. The Whig-controlled Parliament, however, appeared to be in the driver's seat with a crown concession to rigid exclusion appearing to be only a matter of time. The vehemently anti-Catholic English public increasingly supported exclusion and the parliamentarians assumed the King could not avoid summoning a new Parliament, which would likely be no different than the previous ones in its partisan orientation.[283] Under the Triennial Act of 1664, adopted to prevent the Crown from ruling without Parliament, the King was required to call Parliament at least once in three years.[284] Moreover, Parliament controlled the power of the purse and the King was legally prohibited from raising revenue without parliamentary consent beyond the funding streams provided in the restoration settlement.[285]

Two factors, however, worked against these assumed Whig advantages. First, for most of the English, loyalty to the King far exceeded loyalty to a particular cause, especially if that cause threatened to divide the country and expose it to the violence, chaos, and anarchy of the Civil War years.[286] Second, the King proved to be more capable of ruling without Parliament than the Whigs might have assumed. The Triennial Act lacked any mechanism of enforcement.[287] Moreover, the combination of peace, secret subsidies from France, and a trade boom that increased the Crown's customs receipts made the King financially independent and without need for additional parliamentary appropriations.[288] Over the remaining four years of his life, Charles proceeded to rule without Parliament. Since Parliament provided a key platform for the Whig cause, its absence diminished the ability of the Whigs to influence public opinion.[289] On the flip side, the King, without the competition of Parliament, had a greater capacity to influence the views of his people.

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282. *See supra* text accompanying notes 270–278.

283. *See* JONES, *supra* note 197, at 39 (describing the successful efforts of the Whigs to mobilize public support for exclusion in the early 1680s).

284. An Act for the assembling and holding of Parliaments once in Three yeares at the least 1664, 16 Car. 2 c. 1, *reprinted in* 5 STATUTES OF THE REALM, 1628–80, *supra* note 150, at 513, http://www.british-history.ac.uk/statutes-realm/vol5/p513.

285. *See supra* note 200 and accompanying text.

286. *See* SMITH, *supra* note 123, at 162 (noting that in the 1680s, "Popular loyalty to the Crown remained high").

287. *Supra* note 284.

288. *See* HARRIS, *supra* note 189, at 35 (describing the improved financial situation of the King that allowed him "to become both economically and politically independent of Parliament during the last years of his reign").

289. *See* JONES, *supra* note 260, at 182 (describing the deterioration of the Whigs' position due to the crippling effect of the King's rule without a Parliament).

The King's capacity to rule without Parliament bought the Crown time to pursue a strategy of purging opponents from governing institutions that functioned as rivals to his authority and put his partisan allies in control. Through the strategy that contemporaneous critics called packing, the Crown gained control over the membership of municipal boroughs and local courts and thereby influenced the composition of Parliament.[290] Through this strategy, both municipal boroughs and Parliament became more amenable to the Crown's policy preferences, particularly on the issue of succession, and more deferential to the Crown because of officials' dependence on the Crown for their offices. To purge opponents from borough and parliamentary offices and replace them with loyalists, Charles revived a royal prerogative that had gone mostly dormant over the prior century: the power to revoke and revise corporate charters to remodel municipal boroughs.[291] The charters dictated the terms by which boroughs operated local courts and the means and mechanisms of parliamentary selection from boroughs.

I begin this part with a brief history of boroughs, the Crown's use of royal powers to create and revise borough charters, and this power's relationship to the selection of members of Parliament. I then return to the context of the 1680s and examine Charles's extensive efforts to remodel boroughs that produced, after his death, a Parliament dominated by his newly organized partisan allies, the Tories. In the final section of this part, I describe James's efforts to pack a new Parliament with members willing to assent to his exercise of unilateral royal prerogative to secure religious tolerance for Catholics.

### *A. The History of Royal Prerogative over Municipal Borough Charters*

Since at least the ancient Saxon period, which spanned from the eighth century to the Norman Conquest in 1066, England had been comprised of two principal types of political subdivisions.[292] The first, known as shires, arose from the division of earlier subkingdoms that existed on the island. Those shires later took on the appellation "counties."[293] In the counties, two of the King's appointees had primary authority: the aldermen who governed and the sheriffs who adjudicated and enforced laws.[294] The second political subdivisions were boroughs.[295] All towns and cities were constituted as boroughs and their constituents, who went by the name burgesses, were the free inhabitants of the

290. Miller, *supra* note 207, at 53.

291. *Id.* at 57–58.

292. *See* MEREWETHER & STEPHENS, *supra* note 229, at viii–ix (detailing the origins of boroughs and counties).

293. *Id.* at ix–x.

294. *Id.* at x.

295. *Id.*

boroughs.[296] The burgesses had duties and privileges, which included paying taxes (scots and lots) and serving on the municipal court (the court leet).[297]

In the late thirteenth century, King Edward I called upon boroughs to return members to Parliament for the first time.[298] The burgesses and the knights of the shire formed into a political body of commoners, later known as the House of Commons.[299] By the early fourteenth century, the Commons had secured its right to be represented and was included in every Parliament that followed.[300]

Over time, the boroughs became objects of Crown manipulation to secure royal influence over Parliament. Whereas counties were subject to a law that fixed voting qualifications for parliamentary elections, in the boroughs, the Crown could exercise control over borough membership and thereby the voting qualifications for parliamentary elections.[301] The Crown exercised that control through the process of municipal incorporation. The Crown granted its first charter of municipal incorporation to a borough in the fifteenth century.[302] According to historians H.A. Merewether and A.J. Stephens, the purpose of incorporation was "to give to the grantees a general name by which they might sue and be sued, and take and grant lands; and that they should enjoy all their rights, privileges, and possessions by perpetual succession."[303]

Through incorporation, the charters granted to the boroughs franchises, defined as "Royal Priviledge in the Hands of a Subject, of some Benefit, Power, or Freedom that Persons or Places have above others . . . ."[304] One franchise granted to corporate boroughs was the privilege to return two of its members

296. *Id.* at v.

297. *Id.*

298. *See* J.S. Roskell, *The Composition of the House of Commons*, *in* THE HISTORY OF PARLIAMENT: THE HOUSE OF COMMONS 1386–1421 (J.S. Roskell et al. eds., 1993), https://www.historyofparliamentonline.org/volume/1386-1421/survey/v-composition-house-commons (describing the Crown's experimentation with different compositions for the House of Commons before settling on a body with two representatives from counties and boroughs with the exception of London, which sent four representatives).

299. *Id.*

300. *Id.*

301. *See* Electors of Knights of the Shire Act 1432, 10 Hen. 6 c. 2 (Eng.) (establishing a voting qualification requiring that individuals possess a freehold of at least 40 shillings). *See also* CHARLES SEYMOUR, ELECTORAL REFORM IN ENGLAND AND WALES: THE DEVELOPMENT AND OPERATION OF THE PARLIAMENTARY FRANCHISE, 1832–1885, at 11 (1915) (providing an account of what motivated the forty-shilling freehold requirement).

302. *See* 1 THOMAS HINTON BURLEY OLDFIELD, THE REPRESENTATIVE HISTORY OF GREAT BRITAIN AND IRELAND 170 (London, Baldwin, Cradock, & Joy 1816) (finding that King Edward IV granted the first parliamentary charter to Wenlock in the late fifteenth century).

303. MEREWETHER & STEPHENS, *supra* note 229, at xxxvii.

304. THE POWER OF THE KINGS OF ENGLAND TO EXAMINE THE CHARTERS OF PARTICULAR CORPORATIONS AND COMPANIES 2 (London, John Kidgell 1684).

to Parliament.[305] Initially, the corporate charters did not significantly interfere with borough autonomy regarding decisions about governance, membership, and parliamentary selection.[306] But as the Crown extended corporate status to more boroughs, the threat to borough autonomy grew.[307]

Along with the extension of corporate status to boroughs came the Crown's assertion of prerogative to determine which municipal corporate boroughs had the authority to return members to Parliament.[308] And as the Crown embedded the parliamentary franchise into certain corporate charters, kings and queens through their charters dictated who within the borough had the right to select members of Parliament.

Thus, whereas in the era prior to borough incorporation, all free inhabitants who paid taxes could participate in the selection of the borough's members of Parliament, charters limited the right in some boroughs to property holders, or so-called burgage tenants, and in other boroughs the charters extended the right to nonresidents.[309] These charter innovations had as one of their objectives increasing Crown influence over parliamentary selection so that the Crown could secure Parliaments more amenable to royal requests for taxes and revenue.[310]

From the sixteenth century forward, the Crown also sought to influence the composition of Parliament by expanding the body through the grant of charters with parliamentary franchises to new, and often smaller and poorer, boroughs.[311] In these boroughs (later nicknamed rotten boroughs), nonresident lords, barons, and other nobles allied with the King could control parliamentary selection and assume seats in Parliament that borough residents had no interest in contesting.[312]

Finally, the Crown influenced the composition of Parliament using the royal prerogative to revoke borough charters and remodel municipal

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305. Although the Crown originally granted to all boroughs the authority to send burgesses to Parliament, the sheriffs had considerable discretion over which boroughs returned members to Parliament. *See* OLDFIELD, *supra* note 302, at 171–74.

306. *See* MEREWETHER & STEPHENS, *supra* note 229, at xxxix–xl (describing early Crown efforts to influence borough membership and parliamentary selection).

307. In this extension of corporate status, the Crown often used the more expedient vehicle of incorporation "by *inference* or *implication*." *Id.* at xxxviii; *see also* Pickavance, *supra* note 210, at 10 (explaining that for the monarch, "[m]unicipal independence was . . . seen as an ever-present threat to the establishment to authoritarian government").

308. MEREWETHER & STEPHENS, *supra* note 229, at xl.

309. *Id.* at xliv–l (describing the different voting qualifications established in boroughs during the sixteenth-century reign of Queen Elizabeth).

310. *Id.* at lii ("[B]y those means [of charter innovation] all [borough] rights were brought under the influence and control of the crown.").

311. *See* PORRITT, *supra* note 212, at 367–76 ("It was . . . the . . . desire of the Crown [for control of the House of Commons] that, between the reigns of Henry VI and James I, so many boroughs were enfranchised and the number of members of the House of Commons so largely increased.").

312. *See id.* at 390–92 (describing the proliferation of rotten boroughs at the behest of English monarchs).

corporations through a legal process initiated by the writ of quo warranto.[313] The writ of quo warranto requires a corporation to show "by what warrant . . . [it] claim[s] to be a corporation or to exercise a certain privilege granted by the King."[314] Whenever a corporation fails to use, refuses to use, or abuses and misuses the corporate franchise granted to the borough, a judge can declare "that the body politic has broken the condition upon which it is incorporated, and thereupon the incorporation is void."[315] Since corporate charters tended to be longstanding and included several privileges that were trivial, technical, and sometimes outdated, most, if not all, corporate boroughs were vulnerable to charter invalidation through the quo warranto writ by the late seventeenth century.[316] With this power to revoke municipal corporate charters, the Crown could remodel boroughs and change the terms of their membership and influence the parliamentary selection process.

Prior to the latter part of the seventeenth century, the Crown rarely used the royal prerogative to revoke and revise charters for purposes of influencing the composition of Parliament. As historian Catherine Patterson has catalogued, before the seventeenth century, the writ of quo warranto was primarily used by the Crown to recover "jurisdictional and fiscal rights allegedly usurped by [their] subjects" and to "curb[] private authority among their subjects."[317] It was only during the reigns of Charles II and James II that the power came to be primarily "associated with absolutism and arbitrary authority," as these two monarchs' use of the quo warranto writ was widely seen as a tool to control boroughs and Parliament.[318]

Crown influence over borough parliamentary selection had particularly strong implications for parliamentary independence in the 1680s. At this time, boroughs were responsible for returning nearly eighty percent of the members of the House of Commons.[319] Thus, if the Crown could influence or control parliamentary selection in the boroughs through quo warranto writs and charter remodeling, a loyal and dependent Parliament could be secured.

313. According to historian Catherine Patterson, the "writ seems to have originated in the thirteenth century [and] its use can be found as early as Henry III's reign" from 1207 to 1272. Patterson, *supra* note 228, at 881.

314. HALLIDAY, *supra* note 206, at 26.

315. *Id.* (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *262).

316. *See* JONES, *supra* note 197, at 45 ("The legal officers were invariably certain of success in [quo warranto] actions against the charters, since they could always find technical breaches to justify forfeiture.").

317. Patterson, *supra* note 228, at 881.

318. *Id.* at 879.

319. *See* Pickavance, *supra* note 210, at 16 ("[Since] [a]bout four fifths of the members of the House of Commons were returned by the boroughs[,] the independence of Parliament itself was . . . underwritten by the municipal franchise.").

### *B. Borough Remodeling*

At the conclusion of the third exclusion Parliament in Oxford, Charles made a rare address to his people.[320] At the time, the King faced not only a Parliament pressing him on the issue of exclusion but also a public still anxious about the popish plot. The Whigs had successfully amplified the fictional plot to mobilize fear about the threat of James's succession to both the Protestant religion and the English form of government.[321]

In his speech, the King sought to counter the Whig exclusion campaign by providing his side of the negotiations with Parliament. Charles highlighted the compromises he proposed to the House of Commons that he said were designed to protect "the Security of the Protestant Religion" while "preserving the Succession of the Crown, in its due and legal Course of Descent . . . ."[322] The King explained that he was willing to consider other means "to remove all reasonable Fears that might arise from the Possibility of a Popish Successor's coming to the Crown," including limiting the successor's powers to administer government and religion.[323] "We were ready to hearken to any Expedient," Charles announced, "by which the Religion Establish'd might be Preserv'd, and the Monarchy not Destroy'd."[324]

Through his speech, the King sought to shift the public perception of the threats to the English government and religion from his brother's succession to Parliament's demand for exclusion. Just as the Whigs in their propaganda revived the historical memories of Catholic persecution of Protestants to motivate fear of a Catholic king, Charles in his speech tried to revive the memory of civil strife, bloodshed, and anarchy from forty years earlier when the House of Commons resisted the King and disrupted the monarchy. The King implored, "We cannot, after the sad Experience We have had of the late Civil War[], that Murder'd Our Father of Blessed Memory, and ruin'd the Monarchy, consent to a Law, that shall establish another most Unnatural War."[325] The King then assured his people that he would preserve the English form of government in which summoning Parliament continued to be "look[ed] upon as the best Method for healing the Distempers of the Kingdom . . . ."[326] And he vowed to protect the English religion by "us[ing] Our utmost Endeavours to extirpate Popery . . . ."[327]

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320. *See* KING CHARLES II, HIS MAJESTIES DECLARATION TO ALL HIS LOVING SUBJECTS TOUCHING THE CAUSES AND REASONS THAT MOVED HIM TO DISSOLVE THE LAST TWO PARLIAMENTS (1681).

321. *See* SWATLAND, *supra* note 208, at 256 (identifying the Whigs' exploitation of the plot to arouse public anxiety).

322. CHARLES II, *supra* note 320, at 4.

323. *Id.* at 6.

324. *Id.*

325. *Id.* at 7.

326. *Id.* at 9.

327. *Id.*

Finally, the King appeared to preview his assault on parliamentary independence when he confidently declared, "Our next meeting in Parliament, shall perfect all that Settlement and Peace which shall be found wanting either in Church or State."[328] In this Parliament, the King continued, "We shall be Assisted therein by the Loyalty and good Affections of all those who consider the Rise and Progress of the late Troubles and Confusions, and desire to preserve their Countrey from a Relapse."[329]

The King's declaration, read from every pulpit in the kingdom, galvanized public support for succession and fueled the rise of a nascent political party, the Tory party, to oppose the Whigs and exclusion.[330] The Tories, disparagingly nicknamed by their opponents after Catholic–Irish bandits, included deeply conservative Englishmen who supported a strong monarchy and the established Church.[331] Most Tories were Anglicans who staunchly supported religious conformity and advocated for the exclusion of Protestant dissenters and Catholics from public life as well as the prosecution of casual conformists or nonconformists who attained civil and military offices.[332] The Tories were also adherents to the divine right theory, in which the King's civil authority was "derived directly from God" and not from the people.[333] The Tories considered the King to be the absolute sovereign power, only limited by the laws he created, who must be obeyed and could not be resisted.[334]

The Tories supported the Crown's succession to a Catholic monarch despite their ardent religious intolerance because they considered him bound by established laws to preserve the Protestant religion.[335] The Tories therefore viewed James as less of a threat to the established religion than the Whigs and Protestant dissenters.[336] For the Tories, the Whigs' support for religious comprehension and for republican principles invited "popery" and arbitrary government by undermining both religious unity and the King as protector of the Protestant religion.[337]

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328. *Id.* at 9–10.

329. *Id.* at 10.

330. Pickavance, *supra* note 210, at 92.

331. SWATLAND, *supra* note 208, at 234.

332. SMITH, *supra* note 123, at 159.

333. *Id.*

334. *See* EDWARD VALLANCE, THE GLORIOUS REVOLUTION 6 (2008) (describing as core beliefs of the Tory party, "non-resistance and passive obedience" to the Crown); *see also* HENRY ST. JOHN & LORD VISCOUNT BOLINGBROKE, A DISSERTATION UPON PARTIES 5 (11th ed. 1786) ("Divine, hereditary, indefeasible right, lineal succession, passive-obedience, prerogative, non-resistance . . . were associated in many minds to the idea of a Tory . . . .").

335. *See* HARRIS, *supra* note 191, at 97, 121–22 (accounting for the source of Tory support for Charles and his policy of succession).

336. *See id.* at 99 (recounting the Tory "depiction of the Whigs as Nonconformists and republicans whose real aim was to destroy the Church and State as by law established").

337. *Id.* at 99–100.

The King's speech triggered the "Tory reaction" that initially targeted London, the heart of Whig opposition. The Tory reaction had three principal components.[338] First, Tory officials supported by the Crown actively prosecuted Whig opponents, sometimes for acts against the Crown and at other times for failure to abide by laws requiring religious conformity.[339] Second, when the Tory-led legal prosecutions ran up against the obstacle of Whig-sympathetic courts and juries appointed by borough officials, the Crown, through local Tory officials, tried to manage and corrupt elections to advance officials favorable to the King.[340] Finally, when the efforts to manage and corrupt elections proved too difficult, the King used his royal prerogative over corporate charters to support local Tories in their campaigns to purge Whigs from borough governments.[341]

In London, the Crown's efforts began with the discovery of a fictitious Protestant plot to kill the King involving the former Lord, and now Earl, of Shaftesbury.[342] At the time of the prosecution, Shaftesbury was still the leader of the Whigs and therefore a prime target of the Crown's efforts to suppress opposition.[343] Shaftesbury, however, was a resident of the London borough, and in London the Whig sheriffs had the authority to appoint grand jurors.[344] For Shaftesbury's grand jury, the Whig sheriff appointed fellow Whig jurors, including former Whig members of the Exclusion Parliament.[345] After hearing witnesses and evidence, the grand jury returned an ignoramus verdict protecting Shaftesbury from any further prosecution.[346]

Shaftesbury's acquittal convinced the King that the only way to secure political control over the recalcitrant city was through the revocation of the borough's charter. Just over a month after the acquittal, Charles issued a writ of quo warranto against the London borough.[347] The writ charged the council

338. *See* Pickavance, *supra* note 210, at 93 (describing the King's speech as a call to arms for a newly emerging Tory party comprised of Englishpersons "inclined to support [the King]").

339. *Id.* at 8–9 (describing as one of the "most conspicuous effects" of the Tory reaction, "the vigorous prosecution of protestant nonconformity [and] the harassment of men and women who regarded themselves as living beyond the pale of the political nation").

340. *See id.* at 110–11.

341. *See id.*

342. *See* 1 GILBERT BURNET, BISHOP BURNET'S HISTORY OF HIS OWN TIME 504–06 (Thomas Burnet ed., 1818) (providing details of the supposed Protestant Plot against the King).

343. *See* Pickavance, *supra* note 210, at 9.

344. *See* BURNET, *supra* note 342, at 495 (alluding to the past practices of London sheriffs returning juries favorable to Whigs).

345. *Id.* at 508–09.

346. *Id.* at 508.

347. LEVIN, *supra* note 209, at 23. After the issuance of the writ and prior to the trial on the writ, the Crown attempted to manage and corrupt borough elections for the London sheriffs and the city council through measures that included the disenfranchisement of Protestant dissenters, violence targeting Whig opponents, and blatant refusals to count votes cast. The efforts were only partially successful and demonstrated to the Crown and local Tories the political unsustainability of managing and corrupting elections every year. *See* BURNET, *supra* note 342, at 529–31 (describing the Crown's extensive efforts to manage and corrupt London borough elections).

with two violations of its charter. The first charged sedition for the council's petition to the King opposing his earlier prorogation of the Parliament.[348] The second charged violation of the corporation's franchise privileges for imposing taxes not provided for in the charter.[349] Despite facing long odds and high costs, the city council defended itself against the charges before the King's Bench, but to no avail. The court ruled in favor of the Crown and forced the city to forfeit its charter.[350]

The King's successful revocation of the London charter set in motion an extensive corporate borough remodeling campaign that continued through the remaining years of Charles's reign. London's failure to defend its charter demonstrated to other corporations the costly futility of resisting the King's request to surrender their charter.[351] In the four years between the dissolution of the Oxford Parliament and the summoning of James's first Parliament in 1685, the Crown remodeled charters for more than 120 boroughs, 98 of which selected members of Parliament.[352] In most of these corporate remodels, the King purged Whigs from borough offices and appointed Tories as the first corporate officials under the new charters.[353] He then gave himself the power to veto the selection of future corporate borough officials and to remove borough officials at his pleasure.[354]

The powers that Charles granted to himself through the borough remodeling campaign were the same powers that Charles had earlier attempted to give himself through his proposed amendments to the Corporation Act of 1661.[355] At that time, Parliament rejected Charles's proposals as a threat to borough independence that would also undermine parliamentary independence.[356] In the new partisan context of the 1680s, only the Whigs continued to foreground these threats.[357] However, with the Parliament dissolved, the Whigs lacked that platform to air their concerns and mobilize the English people to oppose this exercise of royal prerogative that had the potential to give rise to royal absolutism. On the other side of the partisan divide, the Tories rallied in favor of the King's efforts to remodel borough

348. BURNET, *supra* note 342, at 533.

349. *Id.*

350. LEVIN, *supra* note 209, at 48–49.

351. JONES, *supra* note 197, at 45.

352. *See* Pickavance, *supra* note 210, at i, 60.

353. *See* HALLIDAY, *supra* note 206, at 22–34 (detailing the partisan purges that resulted from the Crown's extensive remodeling of boroughs).

354. JONES *supra* note 197, at 45.

355. *See supra* text accompanying notes 210–212.

356. *See supra* text accompanying notes 214–215.

357. *See, e.g.*, REFLECTIONS ON THE CITY-CHARTER, AND WRIT OF QUO WARRANTO 28–31 (London, E. Smith 1682) (urging resistance to the Crown's efforts to control the selection of London borough officials, including sheriffs, through his revocation of its charter).

charters to purge their partisan opponents from office.[358] The Tories proved willing to sacrifice borough and parliamentary independence to not only protect the Monarchy and the Church but also to satisfy their ambition for power, even if such power was constrained by the need to be loyal to the Crown. In the end, "of all [the] attempts in the seventeenth century to bring the municipalities to a greater dependence on the crown, none was as successful as in the period of Tory reaction."[359]

On February 6, 1685, Charles died.[360] His borough remodeling campaign was not complete, but the Crown passed to his brother James without controversy.[361] James, however, needed to summon a Parliament to secure its consent for taxes and revenue that automatically terminated upon his brother's death. In the three months leading up to the assembling of Parliament in May, James continued Charles's remodeling campaign, adding forty-four of the ninety-eight new charters for parliamentary boroughs established in the four years between the two parliaments.[362]

In the first parliamentary election since the borough remodeling campaign began, only 142 members of the Oxford Parliament were returned to the 513-member House of Commons.[363] In this new Parliament, which has been labeled the Loyal Parliament, Tories and their allies were elected to a super-majority of seats in the Commons while Whigs were elected to only fifty-seven.[364] Modern scholars dispute how much borough remodeling contributed to this dramatic shift in the partisan dynamics of Parliament.[365] It is probably the case that the Tories owed at least some of their success to increasing public support for the King and the Crown's right of succession, along with declining support for the Whigs. But it is also likely the case that the Tories would not have been nearly as successful in the parliamentary election without the extensive borough remodeling. Regardless of how modern historians interpret and revise their understandings of the past, what matters for the account of the

358. *See* HALLIDAY, *supra* note 206, at 22–34 (describing the local Tory support for the King's remodeling of boroughs).

359. Pickavance, *supra* note 210, at iii.

360. *Id.* at 60.

361. *Id.* at 123.

362. *Id.* at 60.

363. *Id.* at 50.

364. HARRIS, *supra* note 189, at 120.

365. For example, Pickavance argues that borough remodeling had a limited impact on the composition of Parliament because the remodeled boroughs only returned 194 members to the new Parliament and not all of these remodeled boroughs shifted power from Whigs to Tories. Furthermore, Pickavance points out that Tories were just as successful in counties, which were not subject to borough remodeling, as they were in the boroughs. *See* Pickavance, *supra* note 210, at 60–64. J.R. Jones, however, provides further context that suggests borough remodeling had a greater influence on the composition of the 1685 Parliament. Jones finds that Whigs were elected to only 9 of the 195 seats in the remodeled boroughs, and most of the remodeled boroughs took the unusual step of pledging loyalty to the crown upon James's accession. *See* JONES, *supra* note 197, at 46–47.

constitutional principle that arose in response to the borough remodeling campaign is how contemporaries understood the Crown's actions.

Those who lived during Charles's reign associated the borough remodeling campaign with the Crown's effective packing of Parliament with loyalists. For example, influential Scottish philosopher and historian Gilbert Burnet, whose writings date to King Charles II's reign, associated borough remodeling with the court's desire to "free [itself] from the fears of troublesome parliaments for the future."[366] English diarist John Evelyn included in his memoirs a description of the Loyal Parliaments that seemed to accord with a widely held view of the remodeling campaign's effect: "A Parliament was now summoned, and great industry used to obtain elections which might promote the Court-interest, most of the Corporations being now, by their new charters, empowered to make what returns . . . members [of the court] pleased."[367] English politician and government official Lord Bolingbroke explained that the borough remodeling campaign gave "the crown such an influence over the elections of members to serve in parliament, as could not fail to destroy that independency, by which alone the freedom of our government hath been, and can be supported."[368]

If there were any doubts about whether Charles's borough remodeling campaign was part of an assault on parliamentary independence, his brother James's actions toward the boroughs in the years that followed removed them. Given the loyalty of the Parliament elected after the extensive borough remodeling campaign, the new King's need to engage in a further assault on parliamentary independence might appear surprising. But a broken promise that went to the core of the Tory religious identity forced James to search for new parliamentary loyalists who would assent to his exercise of royal prerogative to promote religious tolerance toward Catholics.[369]

That search led him to Whig Protestant dissenters who had just been nearly vanquished from Parliament and whom James thought might be amenable to a program of religious tolerance after their years of suffering political and legal persecution at the hands of Anglican religious conformists.[370] To return supportive Whigs to power, James planned to use the very tools provided in the new charters that previously had been used to purge the Whigs. However, the deep and widespread antipathy that Tories and Whigs held toward Catholics prevented James from carrying out this strategy as the former partisan enemies came together during the Glorious Revolution to force James to abdicate the

366. BURNET, *supra* note 342, at 528.

367. 2 JOHN EVELYN, DIARY OF JOHN EVELYN 216 (William Bray ed., 1907).

368. BOLINGBROKE, *supra* note 334, at 81.

369. *See generally* JONES, *supra* note 197, at 5, 138–40; G. H. WAKELING, KING AND PARLIAMENT 90–91 (New York, Scribner 1896).

370. *See generally* JONES, *supra* note 197, at 107, 138–40.

Crown.[371] That constitutional near miss, which could have led to the revival of unchecked royal prerogative beyond the limits of law, ultimately prompted the Whig and Tory push to constitutionalize a principle providing for parliamentary elections free from undue crown influence.

### *C. The Crown's Attempted Packing of Parliament*

In a speech to the privy council on the day he assumed the throne, James announced, "I shall make it my Endeavour to Preserve this Government, both in Church and State as it is now by Law Established."[372] Then, in a nod to his Tory allies and dependents that he hoped would control the Parliament to come, James continued with a promise: "I know the Principles of the Church of *England* are for Monarchy, and the Members of it have shewed themselves Good and Loyal Subjects, therefore I shall alwayes take care to Defend and Support it."[373] With the King's promise to defend and support the Church of England, the Tory-dominated Parliament emerged as a body that a contemporaneous historian described as "the most loyal Parliament a Stewart ever had."[374] During its first session, at least, the Parliament proved to be more loyal and deferential to the King than any prior Parliament during the seventeenth-century reign of the House of Stuart.

Unlike prior Stuart-era parliaments, the Loyal Parliament approved generous custom revenue streams for the Crown that put James in a strong position of financial independence from Parliament.[375] When Charles's illegitimate son led a rebellion to restore a Protestant king to the Crown, Parliament supported James in his raising of a substantial army in which James commissioned many Catholics to command the forces.[376] After the suppression of the rebellion, James made his boldest request yet: he requested money from Parliament to maintain a standing army to ostensibly defend the Crown against future rebellions.[377] Prior Parliaments had consistently opposed funding standing armies out of fear that the King would use the army against Parliament and its people.[378] Under ordinary parliaments, that fear would have been particularly pronounced if the King making the request had been Catholic, with rejection of the Crown's request certain to follow. But this was not an ordinary

371. *See generally* 8 DAVID HUME, HISTORY OF ENGLAND 190–91 (Dublin, United Co. of Booksellers 1775); SMITH, *supra* note 123, at 163–64.

372. King James II, Speech to the Privy Council (Feb. 7, 1684), *in* LONDON GAZETTE (1685).

373. *Id.*

374. WAKELING, *supra* note 369, at 91.

375. *See* HUME, *supra* note 371, at 190–91 (providing an account of the parliamentary approved impositions that gave James a generous supply of funds).

376. HARRIS, *supra* note 189, at 124.

377. SMITH, *supra* note 123, at 162.

378. *See* 6 DAVID HUME, HISTORY OF ENGLAND 366–68 (Oxford, Talboys & Wheeler 1826) (1757) (describing past parliamentary opposition to standing armies).

Parliament. This most loyal of all the Stuart parliaments seemed open to James's request until he went too far in taking Parliament's loyalty for granted.

Prior to Parliament's vote on supplies for the standing army, James made a speech to Parliament in which he announced his plans to dispense with the Test Act of 1672's prohibition on Catholics holding military office.[379] The speech set off a firestorm in Parliament that led the body to issue an address to the King asserting that "the penalties of the test act could in no way 'be taken off but by an act of Parliament.'"[380]

Despite the fact that James's proposal broke his promise to the people to preserve the government in Church and State according to the law established, the resolution opposing the proposal only carried by one vote because of extensive parliamentary loyalty to the King.[381] But rather than using his influence to change a single vote in a Parliament comprised of many beneficiaries of the Crown's borough remodeling campaign, James instead impetuously prorogued Parliament a week later before dissolving it altogether in July 1687.[382]

After proroguing Parliament, James proceeded to rule without Parliament and to advance his policy of religious tolerance through the unilateral exercise of royal prerogative. James initially sought legal validation from the Court of King's Bench for his dispensation of the Test Act. Although the court in *Godden v. Hales* ruled in the King's favor, the judgment was tainted by James's purge of potential judicial opponents to his exercise of prerogative powers prior to the decision.[383] Following the decision in *Godden*, James directed preachers to avoid religious controversies during their sermons.[384] When the preachers refused to comply, James set up a Commission for Ecclesiastical Causes to police and punish members of the clergy.[385]

James also attempted to address the anti-Catholic teaching and indoctrination in schools and universities with the Anglican Oxford University as his primary target. He first tried to install a Catholic named Anthony Farmer to preside over the famed Magdalen College.[386] When the governing fellows

379. James II, King of England, His Majesties Most Gracious Speech to Both Houses of Parliament (Nov. 9, 1685).

380. WESTON & GREENBERG, *supra* note 103, at 232; *see also* House of Commons, Address Against Catholic Officers, *in* 9 JOURNAL OF THE HOUSE OF COMMONS, 1667–1687, at 758 (1685).

381. WESTON & GREENBERG, *supra* note 103, at 231–32 (explaining that the vote was significant because "many of its members elected by corporations that Charles II had remodeled, might have been expected to take the king's lead.").

382. PORRITT, *supra* note 212, at 398.

383. Godden v. Hales, 11 St. Tr. 1165 (1686), *in* ERNEST C. THOMAS, LEADING CASES IN CONSTITUTIONAL LAW 13 (1908) ("The laws of England are the king's laws; it is his inseparable prerogative to dispense with penal laws, in particular cases and upon particular reasons; and of these reasons the king himself is sole judge.").

384. *See* HUME *supra* note 371, at 479 (detailing the directions to preachers).

385. HARRIS, *supra* note 189, at 125.

386. *Id.*

rejected that move, James expelled them from the college.[387] The King then forcibly installed Farmer as president and replaced the fellows with his own appointees.[388]

Not seeing any checks arising to his authority, James then issued an audacious and, to the Catholics, courageous Declaration of Indulgence.[389] In the declaration, he unilaterally suspended all religious penal laws, the Test Acts' religious requirements for holding office, and the Corporation Act's mandatory oath of allegiance and supremacy to the King and Church of England.[390] That declaration was more far-reaching than those issued by his brother in the 1660s and 1670s that only sought incremental changes for marginally greater religious tolerance. Through his exercise of royal prerogative, James tried to produce a wholesale transformation of the religious conditions in England in favor of liberty of conscience.

As a King financially independent from Parliament and therefore without need to call another one any time soon, James could have continued along this path of royal unilateralism to secure de jure religious tolerance. But the King faced a critical dilemma. Like his brother, he lacked a male offspring to inherit the Crown and maintain his policy of religious tolerance. If James passed without a male heir, the Crown would be passed down to his Protestant daughter from a prior marriage, Mary, and her Protestant husband William, King of Holland.[391]

James therefore set out to pack the next Parliament with loyalists dependent on him for their seats and willing to support laws codifying his policy of religious tolerance. He initiated this Parliament-packing in late 1687 with a poll of borough officials to assess whether they were willing to support him in securing the election of members of Parliament who would commit to repealing the religious penal laws and Test Acts.[392] As he received the results of the surveys in late 1687 and early 1688, James systematically annulled corporate charters, using the writ of quo warranto, to expel and replace borough officials who refused to commit to repealing the religious conformity laws.[393] In many

387. *See* BURNET, *supra* note 342, at 384–85.

388. *See id.* at 699–700 (describing the Crown's efforts to install a Catholic president and fellows at Magdalene College).

389. King James II, Declaration of Indulgence (Apr. 4, 1687), *in* 8 ENGLISH HISTORICAL DOCUMENTS, 1660–1714, 399–400 (Andrew Browning ed., 1953); *see also* JONES *supra* note 197, at 52 (arguing that James's "Declaration of Indulgence . . . represented a conscious bid for the cooperation of dissenters who had formerly been identified with the Whigs" as well as being designed to "advanc[e] Catholic interests").

390. King James II, *supra* note 389.

391. *See* JONES, *supra* note 197, at 52 (describing how "James expected to be succeeded by his irrevocably Protestant daughter Mary . . . [and] since she deferred in everything to her husband, William would rule after James").

392. *See* GEORGE FLOYD DUCKETT, PENAL LAWS AND TEST ACT: QUESTIONS TOUCHING THEIR REPEAL PROPOUNDED IN 1687–88 BY JAMES II, at V–VI (London, 1882) (describing the Crown's process of canvassing boroughs for supporters of the Test Act).

393. *Id.* at VI.

instances, James replaced Anglican Tories, who benefited from the initial borough remodel under Charles but opposed his program of religious tolerance, with officials he thought would be more sympathetic including Catholics, Protestant dissenters, and former Whigs.[394]

In April 1688, as James prepared for parliamentary elections that he planned for the latter part of 1688,[395] he reissued his Declaration of Indulgence requiring the clergy to read it from the pulpit in every church in England on two successive Sundays.[396] Unlike the original issuance of the declaration that many opposed but few actively resisted, the clergy openly resisted the re-issued declaration. Their resistance precipitated a crisis from which the King would not survive.

After the issuance of the declaration, seven Anglican bishops asked to be excused from reading the declaration in their churches.[397] James rejected the bishops' request and then jailed and prosecuted them for seditious libel to head off further resistance.[398] The bishops were tried in the same purged Court of King's Bench that approved James's dispensation of the Test Act.[399] But to the King's surprise and dismay, the bishops were acquitted.[400]

The acquittal gave rise to celebrations throughout the country including among some of the regiments in the King's standing army.[401] Worse yet for the King, the prosecution and trial of the bishops cost him the support of religious nonconformists who he needed to approve his religious toleration program in Parliament. During the case of the seven bishops, Tory Anglicans made a promise to their erstwhile rivals, the Whig Protestant dissenters. The Tory Anglicans offered to accept religious tolerance for Protestant dissenters in exchange for the Whig commitment to protect the Church of England from the Catholic offensive that they said threatened to destroy the Church.[402] After the trial and the Anglican promise, many Protestant dissenters shifted their

394. *See also* JONES, *supra* note 197, at 154–57 (detailing James's efforts at partisan realignment).

395. According to historian J.R. Jones, by April the Crown's process of enlisting agents and sending them to boroughs "to prepare for favourable parliamentary elections" was complete. JONES, *supra* note 197, at 133. Over the summer, James continued to purge mostly Tory borough officials, added regulations to existing borough charters, and issued thirty-two new charters. *Id.* The Crown then distributed propaganda in the boroughs favorable to the Monarch and a nomination list of "106 royally approved candidates." *Id.*

396. King James II, Declaration of Indulgence (Apr. 27, 1688) *in* ENGLISH HISTORICAL DOCUMENTS, *supra* note 389, at 399–400.

397. William Sancroft et al., Petition of the Seven Bishops (May 18, 1688) *in* SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, 583–84 (Carl Stephenson & Frederick George Marcham eds., New York, Haper & Row 1953).

398. WESTON & GREENBERG, *supra* note 103, at 242.

399. Seven Bishops' Case, 12 St. Tr. 183 (1688), *in* ERNEST C. THOMAS, LEADING CASES IN CONSTITUTIONAL LAW 14 (1876).

400. *Id.*

401. JONES, *supra* note 197, at 127.

402. HARRIS, *supra* note 189, at 128.

allegiance away from the King and to the bipartisan efforts to resist James and his unilateral exercises of power.[403]

Added urgency to this movement to resist the King arose from the birth of James's son in June of 1688. That birth ensured a Catholic successor to the Crown if James remained on the throne.[404] Weeks after the birth of James's son, seven prominent English nobles, who were later described as "the Immortal Seven," sent a letter to King William of the Protestant Dutch Republic.[405] In the letter to William, who was married to James's daughter Mary, the nobles pledged the support of the English people if he sent a small force to invade England, remove James, and restore the protections to the Protestant religion in the Kingdom.[406] After months of military preparations over the summer, William invaded with a force, and the Glorious Revolution began.

## V. THE GLORIOUS REVOLUTION AND THE ENGLISH DEFENSE OF PARLIAMENTARY INDEPENDENCE

Religion was at the core of the dispute between James and his opponents during the Glorious Revolution, but of equal or greater importance to the opponents was James's attempt to pack the Parliament.[407] James's opponents understood what his successful packing of Parliament would mean for the limited monarchy. The attempt to pack Parliament therefore provoked resistance to royal control over Parliament and a responsive call for elections free from undue Crown influence.

In a letter to King William titled *A Memorial from the Church of England to the Prince of Orange*, the English and Scottish clergy expressed the many grievances that they said the English people suffered at the hands of James. The clergy proclaimed, "the Protestants of England, who continue true to their religion and government established by law, have been many ways troubled and vexed by restless contrivances and designs of Papists, under pretence of the royal authority, and things required of them unaccountable before God and Man."[408]

403. *See id.* at 129 (explaining that, after the trial, "[m]ost dissenters decided to rally behind the bishops in their opposition to the second Declaration of Indulgence, proclaiming that they wanted 'liberty by law'").

404. JONES, *supra* note 197, at 52 (providing an account of the meaning of the birth of James's son to the succession).

405. Charles Talbot et al., Invitation to the Prince of Orange, *in* ENGLISH HISTORICAL DOCUMENTS, *supra* note 389, at 120–22; *see also* SPECK, *supra* note 256, at 76 (referring to the nobles as "the Immortal Seven").

406. Talbot et al., *supra* note 405.

407. *See, e.g.*, JONES, *supra* note 197, at 129–30 ("Of all [the] domestic policies, the campaign to pack Parliament was easily the most important in provoking the Revolution, more resented and feared than even the attack on the Church and its leaders."); *see also* BOLINGBROKE, *supra* note 334, at 281 ("The cry of the nation was for a free parliament, and no man seem'd to doubt in that ferment, but that a parliament must be free, when the influence, which the crown had usurp'd, in the precedent reigns, over the elections, was removed as it was by the revolution.").

408. A Memorial from the Church of England to the Prince of Orange (1688), *in* SOURCE-BOOK OF ENGLISH HISTORY: LEADING DOCUMENTS 417 (Gary Carlton Lee ed., 1900).

The clergy recounted direct threats to the Protestant religion arising from the use of ecclesiastical commissions to deprive Protestants of their "[e]cclesiastical benefits and preferment."[409] They also criticized James's exercise of "a pretended dispensing power," his maintenance of a standing army during peacetime, and his commissioning of Catholics contrary to law thereby transforming the English army into what they declared to be "a popish mercenary army."[410]

Much of the letter, however, focused on the threat to the Protestant religion arising from changes James had made to the English form of government. These changes included, most prominently, the dissolution of corporations as a means to control Parliament. The clergy explained to William that the "[l]iberty of chusing members of Parliament" had been "wholly taken away, by Quo Warrantos served against corporations."[411] The King's polling of borough members along with his removal of opponents and appointment of allies to borough offices were, according to the clergy, "carried on in open view for the propagation and growth of Popery, for which the courts of England and France have so long jointly laboured, with so much application and earnestness."[412]

The clergy concluded their letter with a plea to William for his protection from James's "suspending and encroachments made upon law, for maintenance of the Protestant religion, our civil and fundamental rights and privileges."[413] And they asked that William "be pleased to insist, that the free Parliament of England, according to law, may be restored," the religious conformity laws be again applied to Catholics, the royal power to suspend or dispense with the law be nullified, and "the rights and privileges of the City of London, the free choice of their magistrates, and the liberties as well of that as of other corporations restored."[414]

William accepted the invitations and entreaties and prepared to invade England during the summer of 1688.[415] In late September, James published a declaration summoning a Parliament to meet in November.[416] The King announced as the purpose of the Parliament "a legal Establishment of an Universal Liberty of Conscience for all our Subjects . . . ."[417] Out of either prudence or a desire to hedge against the risk of a potential Dutch invasion, the King resolved in his declaration "to preserve the Church of England" and to

409. *Id.*

410. *Id.*

411. *Id.* at 418.

412. *Id.*

413. *Id.*

414. *Id.*

415. *See* TIM HARRIS, REVOLUTION: THE GREAT CRISIS OF THE BRITISH MONARCHY, 1685–1720 at 274–76 (2006) (describing William's preparations for invasion).

416. King James II, Declaration of Indulgence (Sept. 20, 1688), *in* 1 A COLLECTION OF STATE TRACTS 43, 43–44 (1705).

417. *Id.* at 43.

abide by the Test Act's prohibition on Catholics serving as members of the House of Commons.[418]

When James declared his intent to summon a Parliament, the English people harbored deep distrust of James because of his suspension of established laws and his perceived failure to protect the Protestant religion.[419] The King's borough policy and construction of an increasingly Catholic standing army quartered in the homes of a predominantly Protestant English public contributed to domestic discontent and disorder.[420] James seemed to recognize that he lacked popular support. Thus, when James received intelligence that the Dutch military preparations were for the purpose of invading England, he withdrew his declaration to summon Parliament even though his plan to pack Parliament did not depend on popular support.[421] James appeared to make the calculation that a potential invasion by a Protestant king posed the risk that he might lose control of the inevitably majority Protestant Parliament. That would put him in the same jeopardy as his father of being overthrown through the combined efforts of Parliament and a foreign invading force.

As the Prince of Orange's invasion loomed, James made a concession in hopes of recovering the support of the English people in the face of the existential threat to his crown. The first concession evidenced what James understood to be a primary source of English opposition to the Crown: the borough remodeling policy.[422] James addressed his brother's very first action in the borough remodeling campaign, the writ of quo warranto against London that led to the legal forfeiture of London's charter.[423] Since the forfeiture five years earlier, England's largest city had existed without a charter and was thereby denied the privilege of electing members to Parliament.[424] The King, in early October, sought to undo this wrong, declaring to the London Common Council, the Lord Aldermen, and the Sheriffs of London that he would "restore to them their ancient Charter and Privileges, and . . . put them into the same Condition they were in at the time of the Judgment pronounced against them upon the *QUO WARRANTO*."[425]

A day after the King's declaration in London, the Archbishop of Canterbury and nine other bishops appealed to the King to do more.[426] They asked James to terminate the ecclesiastical commission, abide by the Test Acts

418. *Id.*

419. *Id.*

420. *Id.* at 42.

421. King James II, Declaration of Indulgence (Sept. 28, 1688), *in* 1 A COLLECTION OF STATE TRACTS, *supra* note 416, at 44–45.

422. *Id.* at 45.

423. *Id.*

424. *See* LEVIN, *supra* note 209, at 55–58 (recounting the five-year period in which London operated without a charter).

425. King James II, *supra* note 416, at 45.

426. The Last Appeal, *in* SOURCE-BOOK OF ENGLISH HISTORY, *supra* note 408, at 412–13.

and remove Catholics from offices held in violation of the Act, restore the President and fellows of Magdalen College, and cease from exercising his dispensing power until Parliament could determine the legality of the royal prerogative.[427]

Finally, they requested that James do for other corporations what he had done for London, which is to restore "their ancient charters, privileges, and franchises" and "supersede all further prosecution of Quo Warranto's against corporations."[428] Upon restoring the corporations and thereby ending his campaign to pack Parliament, the bishops requested that James summon "a free and regular Parliament, in which the church of England may be secured according to the Acts of Uniformity; provision[s] may be made for a due liberty of conscience, and for securing the liberties and properties of all your subjects; and a mutual confidence and good understanding may be established between Your Majesty and all your people."[429] The appeal indicated that the bishops did not seek to remove James from the Crown. Rather, they wanted to return the kingdom to a form of government in which the King's power could be properly checked by Parliament. At the core of a limited or mixed Monarchy stood an independent Parliament that could protect the church and English liberties against royal exercises of unilateral power that might threaten them.

The bishops' acknowledgment of the liberty of conscience was evidence of the Anglicans' compromise with Protestant dissenters that confirmed their united front against the King. Facing this united opposition and continued dissension from the English people, the King responded by acceding to many of the requests including the dissolution of the ecclesiastical commission and the return of the President and fellows of Magdalen College.[430] Most importantly, James, in a declaration, restored the corporate charters and all of the franchises and privileges they had prior to Charles's borough remodeling campaign.[431]

As part the process of restoring borough charters, James removed officials who had taken office pursuant to the borough remodeling campaign and replaced them with those who had held office prior to the campaign.[432] The object was to put the boroughs "into the same State and Condition they were in . . . before any Deed of Surrender was made of their Charters or Franchises."[433] The boroughs would, therefore, completely recover their prior

427. *Id.*

428. *Id.* at 413.

429. *Id.*

430. King James II, *supra* note 416, at 51.

431. King James II, Proclamation (October 17, 1688), *in* 1 A COLLECTION OF STATE TRACTS, *supra* note 416, at 49–50.

432. *Id.*

433. *Id.* at 49.

autonomy and independence regarding governance and elections to borough offices and Parliament.

Despite these concessions, the threat from the Prince of Orange remained. English distrust and discontent festered as James stubbornly refused to summon a Parliament during "the General Disturbance of our Kingdom by the intended Invasion . . . ."[434] When the Crown intercepted a declaration from the Prince of Orange to the English people, he tried to suppress it.[435] And when William landed in England with his forces in early November, James sought to preempt the Prince's declaration with one of his own.[436] Although most of the English people had not read the Prince's declaration due to the King's suppression of it,[437] James made many references to it in what came to resemble a counter-declaration.

James began, "It is but too evident, by a late Declaration published by [William], That notwithstanding the many specious and plausible Pretences it carries, *His Designs at the bottom do tend to nothing less than an absolute usurping our Crown and Royal Authority* . . . ."[438] James continued to recognize in his declaration that the freedom and independence of Parliament stood at the core of the revolutionary fervor. He, therefore, attempted to shift the threat to a free Parliament from his recently terminated borough remodeling campaign to England's potential occupation by an invading force. James explained, referring to William, "in order to the effecting of his ambitious Designs, he seems desirous in the close of his Declaration to submit all to the determination of a Free Parliament, hoping thereby to ingratiate himself with our People . . . ."[439] "[T]ho nothing is more evident," James continued, "than that a Parliament cannot be *Free*, so long as there is an Army of Foreigners in the Heart of our Kingdoms; so that in truth he himself is the sole Obstructer of such a Free Parliament."[440] The King then expressed his continued resolve, "so soon as by the Blessing of God our Kingdoms shall be delivered from this Invasion, to call a Parliament . . . ."[441] A Parliament "no longer be liable to the least Objection of not being freely chosen, since We have actually restored all the Boroughs and Corporations of this our Kingdom to their ancient Rights and Privileges . . . ."[442]

James's counter-declaration did little to bolster support for him among the English people. Instead, it highlighted James's refusal to call a Parliament, which

434. *Id.* at 50.

435. King James II, *supra* note 416, at 53.

436. King James II, Declaration of Indulgence (Nov. 6, 1688) *in* 1 A COLLECTION OF STATE TRACTS, *supra* note 416, at 58–59.

437. *Id.* at 58.

438. *Id.*

439. *Id.*

440. *Id.*

441. *Id.*

442. *Id.*

served only to deepen popular distrust of the King.[443] By the time that William landed in England in early November, his declaration had been broadly distributed despite the King's suppression efforts.[444]

William protested in his declaration against James's alteration of religion contrary to law and raised a constitutional objection to his exercise of unilateral royal prerogative to dispense with the laws through the Declaration of Indulgence.[445] In objecting to James's unilateral royal prerogative, William embraced the coordination theory of government. He explained, "[T]here is nothing more certain, than that, as no Laws can be made but by the joint Concurrence of King and Parliament . . . ."[446] Therefore, "Laws so enacted, which secure the publick Peace and Safety of the Nation, and the Lives and Liberties of every Subject in it, cannot be repealed or suspended but by the same Authority."[447] William proceeded to describe the many English grievances against the King, including James's dispensation of the Corporation Act and Test Act, establishment of the Ecclesiastical Commission with Catholic commissioners, the Crown's legal actions against the seven bishops, the expulsion of the President and fellows of Magdalen College, and the purging of the courts.[448]

At the heart of his declaration appealing to the English people, the Prince of Orange extensively criticized James's effort to pack the Parliament. William detailed the several objectionable features of the borough-remodeling and Parliament-packing campaign and clearly articulated its goal. "[C]ontrary to the Charters and Privileges of those Boroughs that have a Right to send Burgesses to Parliament," William expounded, the King and his ministers "have ordered such Regulations to be made, as they thought fit and necessary for assuring themselves all the Members that are to be chosen by those Corporations."[449]

The Prince also advanced a constitutional claim against borough remodeling and Parliament packing that centered upon free parliaments through free elections. "[A]ccording to the Constitution of the *English* Government and immemorial Custom," William asserted, "all Elections of Parliament-men ought to be made with an intire Liberty, without any sort of Force, or the requiring the Electors to choose such Persons as shall be named to them . . . ."[450] And he continued by proclaiming that "[p]ersons thus freely

443. King James II, *supra* note 416, at 59.

444. *See* 6 DAVID HUME, DAVID HUME, THE HISTORY OF ENGLAND, FROM THE INVASION OF JULIUS CAESAR TO THE REVOLUTION IN 1688, at 509 (recounting that just prior to William's invasion his "declaration was dispersed over the kingdom, and met with universal approbation").

445. *See* Prince of Orange's Declaration (Dec. 19, 1688), *in* 10 JOURNAL OF THE HOUSE OF COMMONS 1688–93, at 1 (London, 1802).

446. *Id.* at 1.

447. *Id.*

448. *See id.* at 1–6.

449. *Id.* at 3.

450. *Id.*

elected ought to give their Opinions freely upon all Matters that are brought before them, having the Good of the Nation ever before their Eyes, and following in all things the Dictates of their Conscience."[451] Under James, William contended, "the People of *England* cannot expect a Remedy from a free Parliament legally called and chosen; but they may perhaps see one called" a Parliament "which will be composed of such Persons of whom those evil Counsellors hold themselves well assured, in which all things will be carried on according to their Direction and Interest, without any Regard to the Good or Happiness of the Nation."[452]

William concluded by justifying his invasion as necessary for the reconvening of a free Parliament to protect the Protestant religion and the liberties of the people. This Parliament, the Prince claimed, would be comprised of members "lawfully chosen" who "shall meet and sit in full Freedom."[453] Members in the two houses "may concur in the Preparing of such Laws as they, upon full and free Debate, shall judge necessary and convenient, both for the confirming and executing the Law concerning the Test, and such other Laws as are necessary for the Security and Maintenance of the Protestant Religion."[454] The parliamentary body would be called to do all of the things, "which the Two Houses of Parliament shall find necessary for the Peace, Honour and Safety of the Nation, so that the[re] may be no . . . Danger of the Nation's falling at any time hereafter under arbitrary Government."[455] The Prince then invited the English people to come and assist him "in order to the Executing of this our Design, against all such as shall endeavour to oppose us."[456]

The English people faced a choice. Would they side with a king who they distrusted because of his exercise of unilateral authority to undercut the Protestant religion established by law and attempt to pack Parliament? Or would they shift their loyalties to an invading prince who promised to protect the Protestant religion and summon and preserve a free Parliament? For many of the non-Catholic English people, the choice proved easy. In the months after the Declaration, prominent English lords, nobles, and their English followers joined in support of William.[457] And with only a few minor skirmishes between forces devoted to William and forces devoted to James, the mostly bloodless revolution ultimately forced James to flee his kingdom for France and abdicate his throne.[458]

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451. *Id.*

452. *Id.* at 3–4.

453. *Id.* at 4.

454. *Id.*

455. *Id.*

456. *Id.*

457. *See* King James II, *supra* note 416, at 62 (describing the lords, nobles, and army regiments' desertions of the King and joining in support of Prince William).

458. *See id.* at 78–87.

After James's abdication, a Convention Parliament assembled to decide the constitutional future of the country, including questions about the authority and limitation of the King and who should assume the throne.[459] The Convention Parliament agreed to a Declaration of Rights that contained thirteen grievances and thirteen clauses limiting the Crown.[460] The grievances were familiar and mirrored those earlier made in the bishops' appeal to James and in William's declaration of reasons for invading England. The limitations on Crown power, which were responsive to the grievances listed, prohibited the Crown from dispensing or suspending laws, establishing ecclesiastical commissions or courts, imposing taxes without parliamentary authorization, and maintaining a standing army without parliamentary consent.[461] The Declaration also included clauses limiting the Crown through protections for Parliament, including the freedom of members to speak and debate on issues without fear of punishment, and the requirement that parliaments be held frequently.[462] Finally, the Declaration included a mandate that "Election of Members of Parlyament ought to be free."[463]

The Declaration of Rights represented a clear embrace of principles central to the coordination theory of government, in which the King and Parliament were equal and coordinated powers in governing. The Declaration constrained the Crown's unilateral authority and made his most important exercises of power dependent on the concurrence of a Parliament—Parliament that needed to be independent in order to be a true equal to the King.[464] In February 1689, Parliament presented the Declaration of Rights to their chosen monarchs, William and Mary.[465] Two months later, when the new monarchs were crowned, they signaled their acceptance of the Declaration's central precepts in their coronation oath. In the oath, William and Mary swore "to Governe the People of this Kingdome of England . . . according to the Statutes in Parlyament Agreed on and the Laws and Customs of the same . . . ."[466] This oath, acquiescing to a form of government in which the King exercised power from within, rather than above, Parliament, diverged from that of prior monarchs who swore to "confirm to the people of England *the laws and customs to them granted by the King[] of England*."[467] The coordination theory and an independent

459. *See* Jennifer Carter, *The Revolution and the Constitution*, *in* BRITAIN AFTER THE GLORIOUS REVOLUTION, 1689–1714, at 40–41 (Geoffrey Holmes ed., 1969) (describing the debates in the convention on the English form of government after the abdication of King James).

460. *See* Bill of Rights, *supra* note 27.

461. *Id.*

462. *Id.*

463. *Id.*

464. BOLINGBROKE, *supra* note 334, at 163.

465. *See* HARRIS, *supra* note 189, at 117.

466. Coronation Oath Act of 1688, 1 W. & M., c. 6, *reprinted in* 6 STATUTES OF THE REALM 56 (London, John Raithsby ed. 1819).

467. SMITH, *supra* note 123, at 165.

Parliament had emerged as core principles shaping the English form of government.

## CONCLUSION

In December 1689, the Glorious Revolution culminated with the King-in-Parliament's codification of the Declaration of Rights as the English Bill of Rights.[468] In a country famous for never having a written constitution, the Bill of Rights represented "[t]he closest approximation."[469] The Bill of Rights "was the statutory institution of conditional kingship[s] for the future" through its mandate for an independent Parliament through free elections.[470] As a contemporary from the period, Lord Bolingbroke wrote, "[T]he design of the revolution was not accomplish'd, the benefit of it was not secured to us, the just expectations of the nation could not be answer'd, unless the freedom of elections, and the frequency, integrity, and independency of parliaments were sufficiently provided for."[471] These, Bolingbroke continued, "are the essentials of British liberty."[472]

Free elections would also emerge as one of the essentials of American liberty. In the first American state constitution adopted 87 years after the English Bill of Rights enactment, the New Hampshire Constitution began "WE, the members of the Congress of New Hampshire, chosen and appointed by the free suffrages of the people of said colony," as a clear signal of their independence from Crown influence in their selection.[473] And even after independence from England was secured, the first part of the New Hampshire Constitution of 1784, which defined the legislative powers, adopted language from the English Bill of Rights declaring "[a]ll elections ought to be free."[474]

New Hampshire was not the only state to embrace free elections. In fact, the constitutions of all twelve states that adopted constitutions prior to the federal constitutional convention contained clauses protecting or recognizing free elections as a fundamental right or principle.[475] The inclusion of those

468. Bill of Rights, *supra* note 27.

469. PETER D.G. THOMAS, GEORGE III: KING AND POLITICIANS, 1760–1770, at 1 (2002).

470. KEMP, *supra* note 219, at 30.

471. BOLINGBROKE, *supra* note 334, at 163.

472. *Id.*

473. N.H. CONST. of 1776.

474. *Id.* art. XI.

475. *See* MASS. CONST. art. IX ("All elections ought to be free . . . ."); MD. CONST. of 1776, art. V ("[T]he right in the people to participate in the Legislature is the best security of liberty, and the foundation of all free government; for this purpose, elections ought to be free and frequent . . . ."); N.C. CONST. of 1776, art. VI ("That elections of members, to serve as Representatives in General Assembly, ought to be free."); N.J. CONST. of 1776, pmbl. ("We, the representatives of the colony of New Jersey, having been elected by all the counties, in the freest manner, and in congress assembled, have, after mature deliberations, agreed upon a set of charter rights and the form of a Constitution . . . ."); *id.* art. VI ("That the Council shall . . . in all respects be a free and independent branch of the Legislature of this Colony."); N.Y. CONST. of 1777,

clauses demonstrated the continued importance of the principle of legislative independence even to the republican forms of government that the new states established in their constitutions.

In the next chapter to this project of recovering the constitutional principle of legislative independence, I will argue that the mandate of free elections was also incorporated into the federal Constitution through (1) Article I, Section 2 and the Seventeenth Amendment's delegation to the states to set the qualifications for congressmembers and senators consistent with those established for the most numerous branch of the state legislature and (2) Article I, Section 4's delegation to the states of the authority to set the time, place, and manner for federal elections.[476] The requirement that elections be free is both a qualification and manner of election established for state legislatures that I argue also applies to Congress. Thus, as in seventeenth-century England, congressional independence through free elections should be understood as a key constitutional tool for preventing the distortions of the American form of government that can arise from disabling congressional check on executive power. In the twenty-first century, the revival of congressional independence is key to reducing the considerable stress on the American checks and balances framework and defending against the creep toward despotism.

pmbl. ("[T]his convention hath by their suffrages and free choice[s] been appointed . . . ."); PA. CONST. of 1776, art. VII ("That all elections ought to be free . . . ."); S.C. CONST. of 1776 art. I ("That this congress being a full and free representation of the people of this colony, shall henceforth be deemed and called the general assembly of South Carolina . . . ."); VA. CONST. of 1776, § 6 ("That elections of members to serve as representatives of the people, in assembly, ought to be free . . . ."); GA. CONST. of 1777, art. X ("No officer whatever shall serve any process, or give any other hinderances to any person entitled to vote, either in going to the place of election or during the time of the said election, or on their returning home from such election; nor shall any military officer, or soldier, appear at any election in a military character, to the intent that all elections may be free and open."); VT. CONST. of 1777, ch. I, art. VIII ("That all elections ought to be free . . . ."). Rhode Island continued to operate under its royal charter until 1843. R.I. CONST. pmbl.

476. U.S. CONST. art. I, §§ 2, 4; *id.* amend. XVII.