A Cheap Bill for Deviant Enclosures: Legal Change and the Eighteenth Century Enclosure Movement

Robert Tennyson
This article considers the question of legal change in the context of the parliamentary enclosure movement of eighteenth century England. While the English court of Chancery had enabled late Tudor and early Stuart enclosures by inserting a controlled uncertainty into the enclosure process, it refused to enforce them where an individual with rights of common held out. The eighteenth century parliament overcame this difficulty by allowing bill suitors to obtain private enclosure legislation in the face of ever-greater numbers of dissenters. This dilution of the unanimous assent standard occurred through the efforts of suitors who were encouraged by parliamentary procedures to challenge it repeatedly. Utilizing the notion of the expected value of a legal claim from the economic analysis of law, the article models the arrangement of procedure and fees for bills originated in the House of Commons and the House of Lords to show that the former was more tolerant of novel challenges to existing rules and expectations. The article closes by briefly considering the implications of the model for the generation of novel claims in the litigation setting.

Contents
Overview 2
Open fields, common rights and the historiography of the enclosure movement 6
The law of enclosure 16
How parliamentary enclosure became a viable option 29
  Openness to private business after 1680 29
  The dilution of the unanimous assent standard 33
  The free rider problem 41
What encouraged suitors to attempt the reduction in assent requirements? 42
  The economic analysis of a legal claim and its application to “deviant” legislation 43
  The components of the analysis and its results 48
  The parliamentary agent 60
Conclusion 64

* Ph.D., University of California, Berkeley School of Law, Jurisprudence and Social Policy (Fall 2009), J.D., Tulane Law School (May 1996). The author would like to thank Tom Barnes, Bob Cooter, David Lieberman and James Vernon for their helpful comments on earlier versions of the material.
Overview
This is an article about legal change, by way of a question about the economic history of eighteenth century England. At the opening of the eighteenth century, nearly a quarter of all land in England was cultivated in open fields, in common pasture and meadow, and upon manorial waste lands. About open fields, owners possessed scattered strips of land, possibly to reduce the risks inherent in single-crop farming. These fields, when permitted to lie fallow, allowed for the commoning of cattle or sheep by these owners. On unenclosed pastures and wastes, those possessing common of pasture had the right to graze and release livestock for fattening and manure. Poorer inhabitants and laborers, who may have lacked the means to hold rights in arable land or to own a cow, nonetheless enjoyed certain local customs permitting gleaning after harvest or reflecting common rights of turbury and estover. In the seventy years after 1750, however, 6.8 million acres of land ceased to be held in open fields or subject to common rights or customs, the result of a multitude of enclosure acts passed by an active British parliament.

Parliamentary enclosure altered the English landscape finally and dramatically, reshaping wholesale the real property interests of landowners and tenants. Huge tracts of waste land were put under the plow. Common fields, cultivated by holders and tenant farmers under arrangements agreed among them, were divided up into separate plots and enclosed by hedges of hawthorn. Many tenants at will or at sufferance and living in unendowed cottages, who might once have eked out or supplemented a meager living through local norms permitting gleaning, turbary or other limited rights of use, found themselves without means of subsistence. If not driven to seek work in rapidly-growing, congested cities, they became base laborers, living off of poor relief when farm work was not to be found. Many small landowners found themselves unable to shoulder the burden of

---


3 The number of those “proletarized” by parliamentary enclosure remains an issue of debate for English social historians. The traditional view is that of a heavy toll borne by a numerous the English “peasantry.” See J. M. Neeson, Commons: Common Right, Enclosure and Social Change in England, 1700-1820 (Cambridge U.P. 1993); E. P. Thompson, Customs in Common (The New Press 1993) 97-184; and E. P. Thompson, The Making of the English Working Class (Vintage
enclosure costs and sold out to larger owners. Meanwhile, those substantial landowners who remained were able to increase the rent on their enclosed holdings at the advantage of rent-squeezed tenant farmers who could often nonetheless expect to increase their incomes through modest productivity gains.

Why did this wave of parliamentary enclosures occur when it did, not centuries earlier or later? It is not as though incentives in favor of enclosure did not exist in the past. A wave of forcible enclosures in the early Tudor period testifies well enough to the perceived or extant advantages that might be had, even then. So what developments caused suitors to storm Westminster beginning in the 1750s with bills to do away with long-standing systems of land use? A key part of the answer is that parliament made it easy for proponents of enclosure to overcome those holdouts and free riders who often stood in the way of agricultural reforms. The costs of obtaining enclosure legislation dropped substantially as a consequence, opening up parliament to a dramatic influx in bills and acts. But this answer only gives rise to a second, more tantalizing question. The changes in parliament

---


5 Robert C. Allen, “Agriculture During the Industrial Revolution,” in Roderick Floud and Paul Johnson, ed. *The Cambridge Economic History of Modern Britain, Volume 1: Industrialization, 1700-1860* (Cambridge Univ. Press 2004) 96. How much substantial landowners could expect to increase their rents or raise productivity remains an open question. But, on the issue of whether the rent gains or productivity gains only became “live” after 1750, the answer appears to be negative. See infra.

6 Alternatively, as McCloskey has put it, why did agriculture across open fields and commons persist for as long as it did? Also, while this article speaks of a single “wave” of parliamentary enclosure, there can in fact be seen two separate waves in the period, the first beginning in about 1750 and cresting in the mid-1770s and the second beginning in the late 1780s and cresting around 1810. In the former period, a substantial portion of the enclosures pertained to open fields while the later wave was directed more toward enclosure of common pasture and waste. See, M. E. Turner, *English Parliamentary Enclosure* (Folkstone Press 1980) and J. R. Wordie, “The Chronology of English Enclosure: A Reply,” *The Economic History Review*, New Series, 37 (Vol. 4, Nov. 1984) 560-562.
that reduced the costs of obtaining legislation only came about because in the lead-up to the great wave, suitors after enclosure were willing to attempt legislation contesting extant substantive rules and norms regarding its legislative propriety. These suitors would not have made such challenges to the status quo in the absence of institutional rules and norms that made it rational, from a cost-benefit standpoint, to try.

This leads to our question regarding legal change: What were those institutions of parliament that gave suitors the wherewithal to contest its substantive rules and norms regarding the propriety of enclosure? This is a specific case study to shine some light on a more general question: What legal institutions encourage litigants to attempt novel legal claims or departures from extant legal rules? The answer this article posits to the specific question is that the particular procedural rules and informal institutions in and surrounding parliament provided suitors with the opportunity to resolve uncertainties about their particular challenges at a relatively slight cost. These rules and informal institutions permitted suitors to discern whether their attempts to deviate from accepted rules and norms would succeed early in the legislative process, without risking serious investment on those attempts. Until 1740, suitors could discover, through hearings on presented petitions, their chances of success before going to the effort of drafting and presenting a bill, and negotiating the same through parliament. Thereafter, suitors came to rely on the specialized knowledge of a group of quasi-legal professionals, the parliamentary agents, when it came to evaluating the possible success of deviation from current norms. Because costs of resolving informational deficits were comparatively lower than those of attempting to comply with existing rules and norms in the first instance, it made more sense for suitors to attempt early enclosure in parliament than to meliorate holdouts or to rely on local social norms to prevent free riding by enclosure supporters. This answer to the specific question also suggests an approach to fostering legal change in the face of existing rules or substantive norms — namely, crafting legal institutions that permit litigants to discover valuable, viable information regarding the expected value of deviation from the current rule or norm early in the legal process that is lower at the margin than the expected gain from compliance at the outset.

This article will approach these issues first by generally describing the historiography surrounding the parliamentary enclosure movement and its timing. The second part of the article is a brief review of the structure of landholding in open and common fields, legal alternatives to parliamentary
enclosure in the initial decades of the eighteenth century and the limitations of these alternatives. The third part elaborates the changes in parliament’s substantive rules and norms pertaining to enclosure that enabled suitors to expect a net benefit from pursuing legislation. Three sorts of developments permitted suitors to reduce their costs in attempting enclosure legislation: (1) Institutional changes allowing for the distribution outside of parliament of its internal goings-on made oversight by suitors possible, reducing the agency costs of promoting legislation; (2) substantive rules and norms requiring the assent of affected landowners before legislation would be enacted were diluted by parliament, increasing the ability of landowners to impose enclosure legislation on ever larger numbers of stakeholders refusing to endorse enclosure bills; and (3) legislative mechanisms were introduced to force reticent landowners to internalize a proportion of the costs of enclosure regardless of their support for legislation, thereby eliminating the free-rider problem of landowners seeking the benefits of enclosure without partaking in its costs.

Focusing on the second development, the article next turns to a question about the features of parliament that encouraged suitors to initiate the legislative process in the face of increasing numbers of holdouts. The answer to this question turns principally on an examination of parliament’s procedural rules and norms. These will be broadly described, and then an attempt at an economic analysis of the costs and benefits of bringing forward “deviant” legislation will be offered. This analysis expands on an existing body of literature in law and economics that utilizes the model of the expected value of a legal claim to discern when a rational litigant will sue. Here, the model is used instead to probe the question of when suitors would comply with existing rules and norms regarding the propriety of enclosure or would seek to depart from them. A comparison of costs and procedures in the House of Commons as contra the House of Lords, moreover, provides an opportunity to test this model. We are fortunate in that it is possible to make such a comparison between the two houses of parliament, which for much of the pre-1750 period ordered bill procedure very differently and imposed costs in different ways, with clear differences in the results: Procedure in the House of Commons allowed suitors to quickly and relatively inexpensively determine a bill’s chances of success, while procedure in the House of Lords required suitors to wait until a substantial sum had been expended before similar information could be known. Even though suitors bringing legislation into the Lords appear to have paid less overall for enclosure acts and might have expected a better chance of enactment (though this may well have been, as we will see, a consequence of self-selection among suitors), it was in the Commons that suitors initiated
enclosure bills excluding ever greater numbers of dissenting landholders. In addition to the shifting contours of parliamentary procedures, other developments that made suitor challenges to existing substantive rules and norms possible will be considered, including the role of parliamentary agents in the private bill process. The article concludes with an attempt to draw out some general insights regarding legal change.

Open fields, common rights and the historiography of the enclosure movement

Depending on how one chooses to count them, in the seven decades following 1750, anywhere between 3790 and 3828 enclosure acts were passed by the British parliament.\(^7\) If we expand the count to include all enclosure initiatives originated in parliament during this period, regardless of enactment, the number swells to at least 5143 enclosure bills.\(^8\) (Chart 1 plots this growth between

\(^7\) The 3790 count is my figure, the 3828 figure comes from Daunton, *Progress and Poverty* at 102. My count excludes a number of municipal enclosures for recreational purposes, certain enclosures purely incidental and antecedent to drainage projects and a handful of bills that aim to cash out tithes for glebe lands. This may account for the difference.

\(^8\) Many of these bills we can count as duplicates, however. By my rough count, nearly a quarter of suitors seeking bills to enclose lands, if they failed to obtain an act in one session, would return to parliament within the following two sessions.
1715 and 1820. Some have argued that this explosive growth in enclosure bills and acts marks only the tip of the iceberg — that a large number of enclosures in this period took place without recourse to parliament. Others contend that nearly the sum total of enclosures occurring in the modern era (after 1600) came about through this wave of parliamentary enclosure acts. Regardless of whether either of these claims is borne out, the massive wave of enclosure matters addressed by parliament after 1750 was a dramatic occurrence, one that did away with nearly all of the remaining open fields, common meadows and wastes in England after 1700. The rapid extinguishment of those systems of landholding and common rights has attracted the attention of social, legal and economic historians, all inquiring into its causes and effects in two largely divergent fashions. Social and legal historians have generally delved into the “equitable” effects of parliamentary enclosure, examining its impacts on the land-poor village laborer and the dissolution of existing social relations in rural England.


See e.g., John Chapman, “The Chronology of English Enclosure,” The Economic History Review, New Series 37, No. 4 (Nov. 1984) 557-59. Also see, John Chapman and Sylvia Seeliger, “Susses: Open Field and their Disappearance,” Southern History 17 (1995) 88-97 (noting that only 32 of the 104 open fields existing in Sussex in 1700 were enclosed as a consequence of parliamentary enclosure and that of the remainder, formal agreement to enclose was the rare exception rather than the rule. Open fields in Sussex typically vanished through either (1) piecemeal consolidation of holdings, (2) de facto consolidation by unification of all lands into the hands of a tenant farmer, or (3) neglect (by the commoners, the manorial court, etc.))

Gregory and Anthony Clark, “Common Rights to Land in England, 1475-1839,” Journal of Economic History 61, No. 4, 1009-1036 (Dec. 2001). This, contra, J. R. Wordie, “The Chronology of English Enclosure, 1500-1914,” The Economic History Review, New Series, 36 (Vol. 3, 1983) 483-505 (contending that 24 percent of the surface area of England was enclosed between 1600 and 1699). Also see, Mark Overton, Agricultural Revolution in England: The Transformation of the Agrarian Economy 1500-1850 (Cambridge Univ. Press 1996) 149-51, accepting Wordie’s chronology. Before then, agricultural historians operated under the assumption that there were two major periods of enclosure in the early modern and modern eras — the Tudor enclosures of the late fifteenth and sixteenth centuries, which were the subject of contemporary condemnation by the government due to the methods through which local magnates carried them out and to its perceived impact in increasing the numbers of wandering poor, and the parliamentary enclosures of the late eighteenth and nineteenth centuries, during which enclosure was instead welcomed and assisted by the government. Sandwiched between these two eras in which enclosure was viewed with public opprobrium or encomium was an alleged seventeenth century boom in enclosures to which agricultural historians have only recently turned their attention. The Clarks’ recent work challenges this revised chronology.


This historiography consists, to paraphrase Alfred North Whitehead, of footnotes to the The Village Labourer. Writing at the opening of the twentieth century, John and Barbara Hammond indicted the parliamentary enclosure movement as a devastating blow by the aristocracy to the life and livelihood of the village laborer, who had previously enjoyed the benefits of “the common-field system” that “formed a world in which the villagers lived their own lives and
cultivated the soil on a basis of independence.” J. L. Hammond and Barbara Hammond, The Village Labourer, 1760-1832: A Study in the Government of England Before the Reform Bill, 2d ed. (Longmans, Green & Co. London 1913) 34. For the Hammonds, “enclosure was fatal to the three classes: the small farmer, the cottager, and the squatter.” Id. at 97. On this class-based approach, the small farmer, unable to pay enclosure’s steep costs, was forced to sell his awarded lands; the cottager received a small allotment inadequate to maintain his independence, if he was not turned out as a mere renter; and the squatter, residing without legal rights, but only at the tolerance of the lord, lost whatever tolerance had allowed. Also see, J. M. Martin, “The Parliamentary Enclosure Movement and Rural Society in Warwickshire,” The Agricultural History Review 15 (1967) 19, 34-37 and J. M. Martin, “The Small Landowner and Parliamentary Enclosure in Warwickshire,” The Economic History Review, New Series, 32 (Vol. 3, 1979) 328-343 (suggesting a 25 percent decline in small landowners). But see, Whyte, Ian D., “Parliamentary enclosure and changes in landownership in an upland environment: Westmorland c.1770-1860,” Agricultural History Review 54 (Vol. 2 2006) 240-256 (asserting that upcountry enclosures had little impact upon the fortunes of small landowners, in part because of the customary tenures generally enjoyed by them). Thompson depicted enclosure as “a plain enough case of class robbery, played according to fair rules of property and law laid down by a Parliament of property-owners and lawyers.” E.P. Thompson, The Making of the English Working Class (Vintage: New York 1963) 218. A confluence of self-interest and an ideology that believed the best means of encouraging labor was through deprivation, the enclosure acts removed many small holders to the cities and reduced the rest to mere agricultural laborers. As part of a move away from the class-based materialist history of much of the twentieth century, recent work has moved away from the “social” approach to these issues, focusing instead on the agency of laborers who resisted enclosure. Concentrating on the agency of small holders in resisting enclosure, for example, Jeanette Neeson has recently argued that these were usually hopeless fights, the end result of which was the severing of customary communal economies of villages subject to common rights. Beyond simply depopulating the villages of an extant peasantry, parliamentary enclosure drove a fatal wedge between the laboring poor and the aristocracy that was to persist into the twentieth century. Neeson, Commoners, supra note 3, at 297-330.

On the other side of the question have been those who have generally denied that enclosure had any deeply traumatic impact on small owners, laborers and the poor. At the same time that the Hammonds were arguing that enclosure depopulated villages and reduced the independent cottager to the status of wage laborer, historians investigating contemporary land tax records were coming to a separate conclusion. The decline of the small owner and the small farmer was well under way in the later seventeenth and early eighteenth centuries, long before the parliamentary enclosure movement occurred. Arthur H. Johnson, The Disappearance of the Small Landowner (Oxford Univ. Press 1909) 106 (describing enclosure as having “removed the obstacles to ongoing land consolidation, and thus facilitated consolidation, but did not do much more”). These findings were bolstered by the later work of Johnathan Chambers and Gordon Mingay. See, generally, Johnathan David Chambers and G.E. Mingay, The Agricultural Revolution, 1750-1880 (Schochen Books: New York 1966). Moreover, according to Johnathan Chambers, parliamentary enclosure, rather than decimating the lives of village laborers, improved their circumstances by increasing the demand for labor throughout the year. J.D. Chambers, “Enclosure and the Labor Supply in the Industrial Revolution,” Economic History Review, 2d ser., 5 (1953) 319-43. Questions have even been raised about the scurrying of squatters. As Neeson noted, by the end of the twentieth century, the predominant understanding of the outcome of the enclosure movement was that, if anything, enclosure had operated to forestall the steady erosion of small farmers and agricultural laborers from the countryside. See, J.V. Beckett, “The Disappearance of the Cottager and the Squatter from the English Countryside: The Hammonds Revisited,” in B.A. Holderness and Michael Turner, eds., Land, Labor and Agriculture, 1700-1920: Essays for Gordon Mingay (Hambledon Press: London 1991) 49-68.

Recent work has found something of a middle ground on the equitable effects of enclosure. The overall tenor of recent historiography has been that while small farmers and agricultural laborers with common rights had largely disappeared by the mid-1750s, enclosure was a final and devastating coup de grace for those who remained. As K.D.M. Snell has shown (contra Chambers), far from being materially better off as a consequence of enclosure with steady employment, post-enclosure agricultural labor was highly seasonal, leaving many laborers to make due with parish relief. K.D.M. Snell, Annals of the Laboring Poor: Social Change and Agrarian England, 1660-1900 (Cambridge Univ. Press 1987) 147-58. See also Neeson, Commoners, supra note 3 (concluding in her work on commoners in Northamptonshire, Oxfordshire and Leicestershire that for those cottages possessing appendant common rights, their loss at enclosure
Legal historians (and social historians operating as legal historians) have adopted as true the tragic understanding of enclosure held by many materialist equitable historians and their followers. Meanwhile, economic historians have been interested in the “efficiency” of parliamentary enclosure, asking for example whether and what productivity gains were made by the switch from holding in open fields to holding in severalty. Our question regarding the timing of the parliamentary enclosure movement tends to fall into the second category of enclosure historiography, if only because an answer to the question why the movement began when it did may also provide some insight into productivity gains that were to be had from enclosure. At the same time, it takes the legal historiography into a new direction, using law to help explain why the enclosure movement occurred.

resulted in reduction of their status to that of dependent wage laborer). The loss of common rights, when it occurred, could be devastating. At the same time, the recent work of Leigh Shaw-Taylor has confirmed the earlier claims of Chambers and Mingay that cottages with common rights attached were possessed by only a small minority at the opening of the parliamentary enclosure movement — the large tenant farmer had already squeezed them and the small farmer out. Leigh Shaw-Taylor, “Parliamentary Enclosure and the Emergence of an English Agricultural Proletariat,” *Journal of Economic History* 61 (Vol. 3 2001) 640-662. Typically, according to Shaw-Taylor, about 2 to 3 percent of agricultural laborers owned cottages with common of pasture attached and between 13 and 18 percent rented endowed cottages. A later piece criticizes the work of the Hammonds, Thompson and Neeson for overreliance on out-of-context anecdote to support claims of widespread impact of enclosure. Leigh Shaw-Taylor, “Labourers, Cows, Common Rights and Parliamentary Enclosure: The Evidence of Contemporary Comment c.1760-1810,” *Past and Present* 171 (May 2001) 95-126. In the context of other work showing that while severe the impact of enclosure was not pervasive, the extensive body of anecdotal evidence of distress in the villages perhaps to the perverse hypothesis that if anything, the propertied elite were over-sensitive to claims of economic distress following enclosure. Those who were harmed by enclosure were disposessed and alienated, but they were much fewer than earlier scholars had believed.

Regardless of the pervasiveness of prolitarianization, there was at the least a perceived sense that something fundamental in the social order was fast changing and that enclosure was contributing to it. It was not merely that small holders and cottagers were observed to have lost rights and interests. There was also the involuntary redistribution and reallocation of the property of moderate and substantial holders, perhaps not to their immediate or lasting detriment, but unwelcome nonetheless. Nonetheless, this could be reconciled to the ideology of property. Property was sole dominion, especially over land, and common rights, a species of property though they were, interfered with this dominion. They subjected owners to the claims of others, preventing them from rightfully choosing how to use their land and disabling improvement. From this perspective, those persons with small interests who objected to enclosure were the ones threatening property and its stability. But property, as it was experienced, was hemmed about by law. So, even if enclosure in the abstract could be reconciled to property and even if its impact was in fact limited, there remained the matter of whether parliamentary procedure adequately recognized the protections provided at law for property or whether it was only a mechanism for reallocation to a perceived better use.

The contrary is also the case. Economic historians have typically tackled the question of why parliamentary enclosure began when it did because the tools of economic analysis have seemed best suited to resolving the question. See McCloskey, “The Economics of Enclosure” at 127-28.
Broadly speaking, the dominant reason given through the nineteenth and twentieth centuries for the enclosure of open fields and commons through act of parliament is reflected in moralist William Paley’s 1785 observation on the impediments to improvement posed by common rights:

There exists in this country conditions of tenure which condemn the land itself to perpetual sterility. Of this kind is the right of common, which precludes each proprietor from the improvement, or even the convenient occupation, of his estate, without (what seldom can be obtained) the consent of many others. This tenure is also usually embarrassed by the interference of manorial claims, under which it often happens that the surface belongs to one owner, and the soil to another; so that neither owner can stir a clod without the concurrence of his partner in the property. . . In these cases, the owner wants, what the first rule of rational policy requires, “sufficient power over the soil for its perfect cultivation.” This power ought to be extended to him by some easy and general law of enfranchisement, partition, and enclosure; which, though compulsory upon the lord, or the rest of the tenants, whilst it has in view the melioration of the soil, and tenders an equitable compensation for every right that it takes away, is neither more arbitrary, nor more dangerous to the stability of property, than that which is done in the construction of roads, bridges, embankments, navigable canals, and indeed in almost every public work, in which private owners of land are obliged to accept that price for their property which an indifferent jury may award.15

One of the most aggressive proponents of enclosure in the late eighteenth century, Arthur Young, saw it as a means of spurring owners and occupiers to invest in innovation.16 This perception continued to shape perceptions and explanations of enclosure through the nineteenth and twentieth centuries, through to the present. The most recent advocate of the position that enclosure allowed farmers to take advantage of recent advances in agriculture, Mark Overton, contends that the enclosure movement allowed farmers to take advantage of recent improvements in crop rotation — the Norfolk four-course — that had not become common knowledge until the middle of the eighteenth century.17 Advances in the methods of agricultural production — e.g., the Norfolk four

16 Arthur Young, The Farmer’s Letters to the People of England: Containing the Sentiments of a Practical Husbandman, on Various Subjects of the Utmost Importance, 2d ed. (London 1768) 90-91, 326-334. For the young Young, the enclosure and engrossment of open fields and wastes into large farming tracts were spurs to innovation and greater productivity. A well-known, common refrain in Young’s work is that only gentlemen farmers on large estates have the lands and insight to incorporate new agricultural innovations on their farm: “They who suppose any improvement originally owing to common farmers are somewhat mistaken.” Arthur Young, A Six Weeks Tour Through the Southern Counties of England and Wales, 2d ed. (London 1769) viii.
course — created new incentives for landholders and tenant farmers to make capital improvements in lands, sparking the enclosure movement. As the argument goes, innovations had occurred in agricultural technology that made it possible to raise productivity on fields and farms, but landowners and tenant farmers could not, or had little incentive to, make those improvements on open fields. The technological innovations of the period would have been difficult to implement just along the narrow strips of open fields. Additionally, it was unlikely the innovative farmer realized the value of his improvements to the commonable lands on his strips alone. Thus, the existence of open fields and underutilized wastes frustrated the ability of those improvement-minded owners and tenants to expend capital; enclosure was necessary to allow those individuals to capture the gains from capital investment in land. At mid-century, the productivity gains from investment in technology outpaced the costs of parliamentary enclosure; manorial lords and local property owners then began to petition parliament for enclosure acts to enable them to reap the rewards of improvements.\textsuperscript{18}

Recent research, however, has shown that landowners did not follow up enclosures by immediately taking advantage of improvements in agricultural technology. First, contrary to the expectation that enclosure was associated with the utilization of productivity-enhancing technologies on arable lands, the late eighteenth century saw little in the way of increased yields on enclosed farms in contradistinction to open field agriculture.\textsuperscript{19} At best, there were variable yields per acre on arable fields post-enclosure, but overall gains were slight. Little direct evidence of increased capital investment in enclosed lands — above the costs of building hedges and the like necessitated by enclosure — has been shown. Nor did enclosure permit landowners or tenant farmers to better take advantage of the agricultural labor market, which itself saw surprisingly few changes. Instead, as most economic historians have come to conclude, enclosure appears simply to have permitted tenant farmers to slightly raise their own productivity (maybe) and landowners to raise their rents on

\textsuperscript{18} Revisionist historians have made the claim that at least in some regions, open field agriculture was more open to innovation. Because the system of agriculture had local flexibility, it was possible for new rotations to be tried on strips of land. See, e.g., Robert C. Allen, “The Efficiency and Distributional Consequences of Eighteenth Century Enclosures,” \textit{Economic Journal} 92, no. 374 (1982), 937, 949, and J. A. Yelling, \textit{Common Field and Enclosure in England, 1500-1850} (MacMillan 1997).

\textsuperscript{19} Robert C. Allen, \textit{Enclosure and the Yeoman} (Clarendon Press: Oxford 1992). Allen argues that owners and tenant farmers on enclosed lands were generally more likely to adopt new technologies than their counterparts working open fields. \textit{Id.} at 107-29. However, this willingness to innovate did not yield significant gains in productivity. \textit{Id.} at 130-170. Unsurprisingly, enclosure of waste lands did result in substantial productivity increases.
the land out productivity gains. As posited by McCloskey (following Young), a landowner after enclosure could expect to double his rents on land; others have contended the amount was far less. In any case, the gains from enclosure had little or nothing to do with contemporary technological, labor or other conditions, but either derived from better allowing farmers to capture the proceeds from farming or from the appearance of greater productivity attendant on redistributive rent increases. Importantly, these advantages were not just available to landowners and farmers from the middle of the eighteenth century; they were there to be had at any point in the early modern or modern era. Moreover, landowners and farmers were not oblivious to possible advantages of enclosure; as early as the seventeenth century, commentators were promoting its benefits to anyone

---

20 Robert C. Allen, “Agriculture During the Industrial Revolution,” in Roderick Floud and Paul Johnson, ed., The Cambridge Economic History of Modern Britain, Volume 1: Industrialization, 1700-1860 (Cambridge Univ. Press 2004) 96, 110-111. See also, Allen, Enclosure and the Yeoman at 181. While it was historically asserted that a rise in productivity (and subsequent gains by tenants) prompted an increase in rents, Arthur Young drew the conditional in the other direction, contending that those gains in productivity were often a consequence of the rent increases:

In the first place it is to be observed, that the rise of rents on enclosing is uncommonly great, from 2s. 6d. to 12s. is a much quicker rise than I remember to have heard of; nor is it for good land already in culture, but for waste land to be improved, and at the tenants expence: the subdividing walls, with from 30s. to 45s. per acre in lime, are very heavy charges, to come with a rise of 8s. or 10s. on land, much of it as black as night with ling. Moors have been enclosed, and are private property ready for enclosing in many parts of the north of England, without a mortal's thinking of the work; but here the whole country is improved at once by an enclosure.

I attribute this in a very great degree to the raising rents. How it came to pass that the landlords of this country set so high a value on their land, I know not; but when they valued it so much, and let it accordingly, tenants did the same, and found it was impossible for them to live without going quickly to work with improvements; this raised a spirit of industry; land at 1s. 6d. an acre is not valued by a tenant; a few straggling sheep will pay the rent; no other use will ever be made of it: but raise it to 10s. such slovens conduct then will not do, the soil must be applied to some other use, or the farmer starves. In the north of England, I have rode over tracts of moors as good as any of these and though the landlords have a right of inclosing whenever they please, yet no improvements are thought of. This is owing to the land being let at 1s. or 2s. an acre: were those landlords to raise the moors to 10s. we should soon see them improved.


21 McCloskey, “The Economics of Enclosure,” at 156-57. For McCloskey, the doubling of rents was indicative of an increase in productivity upon enclosure. Allen disputes this claim, noting that “[t]he problem of land valuation in the eighteenth and nineteenth centuries was an exercise in . . . ‘bounded rationality’.” Allen, Enclosure and the Yeoman at 185. Landlords and tenants operated under a best-guess estimate of the value of their holdings and tended to utilize a rule of thumb that the surplus captured from enclosure would support a doubling of rents. Rather, the doubling of rents was, intentionally or otherwise, largely a redistributive wealth transfer from the tenant farmer to the landlord. Id. at 181. Gregory Clark, in a study of Charity Commission reports, provides a lengthy historiography of notion that rents doubled and calls into question the conventional wisdom of a doubling of rents upon enclosure, arguing instead that rents upon enclosure were little more than needed to cover its costs. Gregory Clark, “Common Sense: Common Property Rights, Efficiency, and Institutional Change,” The Journal of Economic History 58, No. 1 (March 1998) 73.
who would listen. We remain where we started, without a compelling explanation of why the parliamentary enclosure movement took off after 1750.

Historians of enclosure have not looked solely at its internalized benefits in seeking an answer to why owners enclosed. McCloskey has detailed the variety of cost inputs that went into the decision to enclose. Following her lead, a number of historians have investigated the records of enclosure costs in various counties during the late eighteenth and nineteenth centuries. Typically, these historians have focused their attention on the back-end costs of an enclosure — those costs incurred after an act had been passed. Thus, these works have focused on the costs of employing surveyors and commissioners, as well as the costs of enclosing the redistributed lands. The front-end costs have largely been ignored. A couple of reasons might account for this. First, compared to the costs of carrying out an act of parliament, those of obtaining the act appear relatively meager. Second,..

---


The greatest impediments in this Improvement are chiefly these.
First men cannot make the best of their own lands.
Secondly, when they have, they cannot sell the increase of it to the best advantage. And these may be thus amended.

First, by a liberty for every man to enjoy his lands in severalty and inclosure; one of the greatest Improvements this nation is capable of; for want whereof, we finde by daily experience, that the profit of a great part of the land and stock in this kingdom, as now employed, is wholly lost. And this appears, in that the land of the common fields, almost in all places of this nation, with all the advantages that belong unto them, will not let for above one third part so much, as the same land would do inclosed, and always several. And on the great commons, a house with commoning, will not let for one quarter so much, as it would do were its proportion several unto it. . . .

23 Alternative attempts to answer this question have mainly looked at social changes — the wearing away of patriarchal conceptions of class relations; at price fluctuations; or to modern methods of risk management to explain why the boom in enclosure acts began in late eighteenth century. These explanations are either incomplete or fail to link up with the timing of the enclosure waves.


26 Evidence has indicated that the manner in which enclosure was paid for was somewhat dependent on the kinds of lands to be enclosed. The enclosure of open fields was typically financed through the levy of a charge on the benefitting lands, while the enclosure of waste lands was often financed through the sale of some enclosures. See B. J. Buchanan, “The Financing of Parliamentary Waste Land Enclosure: Some Evidence from North Somerset, 1770-1830,” *Agricultural History Rev.* 30 (1982) 112-26.
until the end of the eighteenth century, records of those costs give the appearance of relative stability. The appearance of both lesser costs and stable costs is deceptive, however. For one thing, there is reason to think that the costs of negotiating an act through parliament rose slightly over the course of the century, with a jump in costs after 1774, 1801 and 1810, when parliament revised its orders regarding the promotion of private and local business related to enclosures. More importantly, though, these studies ignore the often substantial costs of compliance with parliamentary rules and norms imposed on suitors seeking enclosure before they even petitioned for a bill. These costs — particularly the costs of negotiating with recalcitrant possessors of common rights — are typically not to be found in accounts of enclosure costs upon award because they usually accrued before the process of obtaining an act in parliament was initiated. Nonetheless, these compliance costs could be sizable. It was only in the first half of the eighteenth century that procedural changes in parliament lowered the costs of obtaining this legislation to such a degree that it became cost-effective to prosecute legislation there.

As Ron Harris has noted, “Legal history in Britain is, to a degree, lawyers, or pre-Hurstian, legal history.” Thus, we should not expect to see many connections between the traditional English legal history of enclosure and the work of social or economic historians. Not surprisingly, because the history of parliamentary enclosure typically played out in the national parliament and the local pub, not the law courts, almost nothing has been said about it by traditional legal historians. Rather, most work on the role of law, broadly conceived, in the conduct of the parliamentary enclosure movement has been from the perspective of the economic or social historian. This is something of a shame because the early history of enclosure before the court of Chancery in the seventeenth century and before parliament in the eighteenth has implications for the unfurling of concepts in English law. The development of Chancery’s equitable jurisdiction, the use of the commission in an evidentiary role, the development of the specific performance, and partition of estates held by

---

27 34 Journal of the House of Commons (CJ) 676 (1774), 56 CJ 627, 629, 661 (1801); 65 CJ 304 (1810).
28 Likely the sole historian aside from McCloskey to see the full importance of the conduct of parliamentary business was William Tate. See, e.g., W. E. Tate, “Members of Parliament and the Proceedings upon Enclosure Bills,” The Economic History Review, 12, No. 1/2 (1942) 68-75 (using data on MPs in engaged in prosecuting enclosure legislation for Nottinghamshire to show that those MPs were generally not engaged in self-dealing) and W. E. Tate, “Members of Parliament and their Personal Relations to Enclosure: A Study with Special Reference to Oxfordshire Enclosures, 1757-1843,” Agricultural History, 23, No. 3 (Jul. 1949) 213-220 (same, but with study focused upon Oxfordshire).
common tenancy all owe somewhat to Chancery’s early enclosure business. Further, the particular legal rules and understandings regarding the propriety of enclosure that are the object of traditional legal history are essential to discerning the particular roles enclosure served in English society. These understandings and their internal workings are too easily lost in the work of many historians, who perceive law as evidence of social, cultural or economic forces at work and rarely the contrary. Law, as traditionalists have understood, possesses its own logic. And while that logic may vary depending upon how reified its institutions are, it is that logic that generates its rules, procedures and practices. How well these rules, procedures and practices function for those who have contact with law will of course affect whether they are readily obeyed, become the subject of challenges or are ignored through practice. But knowing how that old law yields to this new law is the first essential step to understanding law’s history and its relation to economy, culture and society.

Back to the legal history authored by social and economic historians of enclosure. Here, curiously, there has been a rare point of agreement by efficiency and equitable historians as to the role of law. For both, the law was purely an instrument of the propertied elite in the furtherance of innovation or of class theft. This instrumentalist understanding appears not only in economic and social histories of enclosure, but in specific analyses of law in the enclosure setting. Kenneth Pomeranz recently described how the contemporary historiography of enclosure has treated government institutions as inessential to the matter of economic development. E.P Thompson, in his detailed examination of local customs and norms in the face of enclosure, said of the law that it “was employed as an instrument of agrarian capitalism, furthering the ‘reasons’ of improvement.” And Peter King’s analysis of Steel v. Haughton et Uxor and the (largely failed) application of the rule against gleaning in the county often pinpoints the conflux of social interests at stake — i.e., the propertied elite, farmers and laboring poor — as being directly responsible for social change, without the intermediation of those institutions themselves.

---

This article, utilizing the economic analysis of law, aims to complicate this picture by showing that the functioning of law on behalf of one interest or another was not transparent, but was dependant on the internal mechanisms of the legal process — its procedures, its existing rules and its jurisprudential standards. Even the eighteenth century parliament — the principal agency of the propertied elite — In its conclusion, this chapter aims to complicate the picture by showing that even parliament — could not get away from the internal workings of its procedures, it conceptions of law and the constitutional conventions that limited or encouraged challenges to established rules and norms. Public law (even public law for private purposes) was shaped by the efforts of litigants offering novel claims and the willingness of legal institutions to advance those claims as acceptable to varied and often conflicting ideologies as well as the perceived limitations imposed by rule and precedent. Claims for diluted consent were brought to parliament by suitors encouraged by procedure. These claims were negotiated within the constraints of existing law and practice, bounded by the conflicting ideologies of improvement, of property, of localism and of custom.

The law of enclosure

Before turning to the question of why landowners turned to parliament en masse only after 1750 to authorize enclosures, it is worth considering the prior matter of why they turned to parliament at all. If common law or statute had provided enough opportunities for holders of land subject to common rights to extinguish those rights, they might never have turned to parliament in the first place, or at least, only rarely. Before the nineteenth century, however, the prospects for a landowner to enclose lands either through his own initiative or in concert with other landowners was surely limited. The common law provided landowners with only a handful of very circumscribed options to unilaterally enclose common fields or wastes. And though Chancery became a popular destination for groups of landowners in open fields seeking to affirm, carry out or enforce an agreement for enclosure during the seventeenth century, it ultimately failed to give landowners the tools they needed to carry out enclosure in larger villages or where the number of stakeholders was

large, as well as in those locales where there recalcitrant landowners opposed to any enclosure or its costs.\textsuperscript{33}

An enclosure typically served one of two ends. It authorized the consolidation of numerous scattered holdings in large open fields into single, unified parcels of land. Or, it permitted the extinguishment of various rights of common across fields, pastures, meadows or wastes. Often it accomplished both. The open fields, common fields or “champion country” (as it was often called at the time) to be consolidated under the authority of an enclosure act operated under a system of landholding usual in arable regions of England from the medieval era through the nineteenth century. Under it, owners possessed strips of land of varying lengths scattered over several large fields surrounding a village. Through agreement with other owners made in the manorial court or the parish vestry, each field would be farmed with a particular crop, such as barley, or left to lie fallow for the season. Each owner would then cultivate his or her strip(s) in each field according to the agreement.\textsuperscript{34} The possessory rights of each of these owners in the open fields were not those of a joint tenant or tenant in common with the other owners. Rather, each owner was a copyholder or freeholder, with a several interest in his or her strips throughout the open fields. Thus, holders owned a greater or lesser number of distributed strips and could purchase or sell strips, just as they could any other freehold or copyhold estate. Strips were passed by descent or devise, by the custom of the manor or through the common law. There was nothing different at law about the lands held in open fields and those held in severalty; rather, what set them apart were their collective field management and their susceptibility to common right.

After harvest and during certain crop rotations, an open field would become subject to various common rights and customs. The most pervasive common right was the right to pasture livestock on an unenclosed field or waste, not surprisingly termed “common of pasture.” Common of

\textsuperscript{33} Indeed, mention of the enclosure jurisdiction of Chancery is almost entirely absent from nineteenth century treatises on either the court’s jurisdiction, equity or the law of commons.

\textsuperscript{34} The plainest description of the English open fields system that I have come across is Frederic Seebohm’s late nineteenth century depiction of the open field holdings of the residents of the village of Hitchin in Hertfordshire. See, Frederic Seebohm, \textit{The English Village Community Examined in Its Relations to the Manorial and Tribal Systems and to the Common Or Open Field System of Husbandry: An Essay in Economic History} (London: Longmans, Green & Co. 1883) 1-16. A more recent and complex overview of how open fields agriculture operated in the various villages can be found in Mark Overton, \textit{Agricultural Revolution in England: Transformation of the Agrarian Economy 1500-1850} (Cambridge Univ. Press 1996) 22-35.
pasture permitted its possessor to place certain kinds of livestock onto the land of another under particular limitations to graze. In an open field, common of pasture permitted an owner of a strip of land to place cattle or sheep on the field generally either to graze (if fodder crops had been planted) or to manure the soil after a harvest. Local customs and social norms may also have permitted common usage of an open field after owners had ceased to make use of arable strips for a season. For example, local norms permitted inhabitants of some villages to glean dropped, cut grain from unenclosed open fields after the harvest had been taken away.


36 There were three principal categories of common of pasture: common appendant, common appurtenant, and common gross. Typically, common of pasture was appendant, “permitted, not only for the encouragement of agriculture, but for the necessity of the thing.” Blackstone, Commentaries on the Laws of England, vol. 2, 33. According to contemporaries, common of pasture appendant allowed owners of the cattle, horses and sheep of holders to pasture that livestock in open fields because they were needed to either plow or manure the soil on their individual strips or other arable lands and carried with it several benefits at common law. Tyrringham’s Case, 76 Eng. Rep. 973, 975-978, 4 Co. Rep. 36b, 37a-37b (K.B. 1584). First, common law created a presumption of common appendant on open fields and like unenclosed lands — there was no reason to prescribe for it on arable land held “time out of mind.” Daniel v. Count De Hertford, 79 Eng. Rep. 1067, 1068, Croke Car. 542, 542 (K.B. 1638) and Edward Coke, The First Part of the Institutes of the Laws of England (Coke on Littleton), vol. 1, 18th ed., (London 1823) 122a. Moreover, common law did not require the livestock to be pastured under common appendant to be enumerated; the number of beasts commonable was determined by how many were levant and couchant on the estate of the owner — that is, how many beasts were reasonably needed for arable agriculture on the dominant estate. Tyrringham’s Case, supra, at 978, 37a, and The Law of Commons and Commoners at 28. Common of pasture could also be appurtenant, extending to beasts not necessary for the agriculture on the owner’s estate. Unlike common appendant, a litigant averring possession of common appurtenant was obligated to plead prescription or grant for the common. Emerton v. Selby, 91 Eng. Rep. 156, 156, 1 Salkeld 169, 169 (K.B. 1703) and Sacheverill v. Porter, Croke Car. 482, 482 (K.B. 1736). But, the common extended not only to beasts necessary for arable agriculture, but could include animals of any sort and potentially, of unlimited number if by grant. Standred v. Shoreditch, 79 Eng. Rep. 496, 496, Croke Jac. 580, 580 (K.B. 1621). Finally, common in gross was untied to any land; it could be for any type of animal, but it could only exist by grant or prescription. Coke on Littleton at 122a.

37 Historians of common rights and interests regularly and confusingly use the term “custom” to refer both to customary rights as would be recognized at common law and local social norms permitting the use of land by non-owners more generally. In this article, I have tried to separate the two usages, to refer to customary rights when discussing legally cognizable rights and to refer to social or local norms when discussing customary uses and arrangements regardless of whether they would have been recognized by common law.

Rights of common, both common law and customary, as well as social norms for regulation of
commons lay not only over open fields, but were possessed by owners and inhabitants on common
meadows or in the manorial waste grounds. Common meadows operated somewhat akin to open
fields, sown with hay for the feeding of cattle in the winter. After it was cut, comminable animals
were let out on the land to graze.\(^{39}\) In the wastes, landowners and tenants would not only have
possessed commons of pasture, including common appurtenant allowing the release of hogs, but
also rights of turbury — to cut turf for fuel — and of estover — to take wood as needed to repair
houses or fences. Depending on the region, farmers and endowed cottagers may have held other
common rights to take stones from the waste, to remove minerals or to take nuts and acorns.\(^{40}\)
These common rights at law were dependent on possession of lands or fixtures. Not only enclosed
lands or strips in open fields endowed possessors with rights of common; some cottages in a village
would often be invested with common rights. Even those not possessing property rights as
landowners or their lessees occasionally received some benefit from the meadows or wastes.\(^{41}\)
These norms governing the use of commons, though no doubt a feature of local practice, often may not
have been recognized under the common law because they were uncertain or general in nature.\(^{42}\)

We know little about the opportunities for enclosure of common fields or wastes under the Norman
and Angevin kings of medieval England. Those opportunities were likely limited (at least against
freehold tenants), given that it was not until the Statute of Merton was promulgated in 1235 by
Henry III that the lord of a manor or other holder of waste lands acquired the authority to enclose
some of those lands against those freeholders possessing common of pasture.\(^{43}\) Under the statute,


\(^{40}\) See, generally, Humphry W. Woolrych, *A Treatise on the Law of Rights of Common*, 13-19 (Butterworth & Son,
London 1824).

\(^{41}\) Neeson, for example, describes field orders in the village of Maxey that did not distinguish ancient from recent
cottages for purposes of recording rights of pasture on the waste. *Commoners, supra* note 3, at 68. Whether this local
norm would have qualified as a custom under common law is an open question, but there are reasons to believe that
such a custom permitting recent cottages access to the waste may have been valid so long as the attribution of cattle per
cottage remained fixed and the right remained fixed to cottages, not inhabitants.

\(^{42}\) See, Sir Edward Coke, “The Complete Copyholder; being a Discourse of the Antiquity and Nature of Manors
and Copyholds,” in *Three Law Tracts* (London 1764) 61-63. Inability to enforce local customary norms at law did not
lead to their extirpation, however. As Peter King has shown in the instance of gleaning, while the right was held not to
exist at common law, gleaners still regularly enforced these norms with the assistance of local magistrates. There was in
practice little that owners and tenant farmers could do to resist them.

\(^{43}\) 20 Hen. III, c. 4 (1235). However, it bears mention that the assise of novel disseisen, under which freeholders
 gained the ability to challenge dispossession of their free tenements had only come into existence in the 1160s, about
the lord of a manor could unilaterally “approve” a portion of the waste through enclosure, so long as sufficient waste remained for tenants with common of pasture appendant or appurtenant to exercise their rights.\(^44\) This power of approvement came with several other limitations. First, it only operated against those who possessed common of pasture attached to a dominant tenement.\(^45\) A lord could not approve against a holder of common \textit{in gross}, even if sufficient pasture was left in the waste. Nor could the lord enclose the entire waste, even if he left sufficient pasture for tenants on other lands.\(^46\) Finally, a commoner who believed that insufficient common remained after approvement was entitled to engage in self-help to knock down the enclosure or, if he brought an assize against the lord, to have treble damages against the lord under a statute of Edward VI.\(^47\) For owners of wastes, the right to approve brought little gain with a high risk of greater loss.

There were other ways that the lord of a manor or other owner of land subject to common right might unilaterally enclose land. Some villages had customs permitting the enclosure of lands by holders in open fields.\(^48\) Proving those customs in an action for trespass, however, could be costly.

\(^{44}\) Id. See, Edward Coke, The Second Part of the Institutes of the Laws of England: Containing the Exposition of Many Ancient and Other Statutes (Second Part of the Institutes) (Brooks: London 1797) 87 (“Now it is to be seen how this approvement must be. And it must be divided by some inclosure or defence, as it may be made several, for it is lawful to the tenant to put on his cattle into the residue of the common, and if they stray into that part, whereof the approvement is made, in default of inclosure, he is no trespasser.”).

\(^{45}\) That is, common of pasture appendant or appurtenant. Coke, Second Part of the Institutes at 86.


\(^{47}\) 3 Edw. 6, c. 3 (1549/50). See Mason v. Caesar, 86 Eng. Rep. 944, 945, 2 Mod. 65, 66 (C.B. 1676) (upholding verdict for defendant on trespass where defendant pulled down the hedges of approving lord); Arthington v. Fawkes, 23 Eng. Rep. 824, 825, 2 Vern. 356, 356 (Chan. 1697) (sending case to trial at law on sufficiency of remaining commons on approvement after self-help exercised by defendants). Chancery would, however, grant an temporary injunction against the taking down of the hedges while the question of right was tried at the assizes. See, e.g., Weeks v. Staker, 23 Eng. Rep. 794, 794, 2 Vern. 301, 301 (1693).

to the enclosing owner. One trick that appears to have been available in the early part of the seventeenth century was for the lord of the manor to enfranchise copyhold lands with common rights in the waste. Under a series of decisions in the late Tudor and early Stuart periods, the courts came to conclude that a copyhold estate determined by enfranchisement was a new estate and that unless the rights of common were extended by the freehold grant, those common rights attached to the copyhold would be extinguished. At least one lord attempted to take advantage of

44 (H.L. 1722); Clarkson v. Woodhouse, 99 Eng. Rep. 606, 608, 3 Dougld. 189, 193 (K.B. 1782); and Foiston v. Crachroode, 76 Eng. Rep. 962, 963-65, 4 Coke Rep. 31b, 31b-32a (K.B. 1587) (holding that copyholder averring common right against the lord of the manor’s lands cannot prescribe personally against the lord, but must use real prescription, alleging the custom of the manor as basis for right).

This method of extinguishing common did not operate on “shack” — the intercommoning on open fields. Where lands in open fields fell into the same hands, despite the unity of possession, the commons were not extinguished, because of the “necessity of the publick good to use without inclosure.” The Law of Commons at 106 (citing The Bishop of London’s Case, 1 Rolle Abr. 935).

This rule appears to have emerged out of the general doctrine that unity of possession extinguishes a servitude. In Bradshaw v Eyre, the court of Queen’s Bench addressed the issue of whether the common of pasture benefiting a tenant’s holding persisted when the tenant transferred the lands to the lord of the manor, who in turn rented those lands with common of pasture of identical scope. The court found under the doctrine of unity of possession that the transfer of the land to the lord of the manor extinguished the common in the lord’s servient waste. The entering lessee held common by virtue of a grant instead. 78 Eng. Rep. 814, 814, Croke Eliz. 570, 570 (Q.B. 1595). The court took this doctrine a step further the following year in Worledge v. Kingswell. 78 Eng. Rep. 1024, 1024, Croke Eliz. 794, 794 (C.B. 1597). In that case, the tenant’s copyhold escheated to the lord of the manor, who in turn granted the land in freehold with common of pasture of identical scope as was possessed on the previous copyhold estate. The Court of Common Pleas found the grant of common with the freehold to be a new grant of common, as the land had returned to the hands of the lord. Under the doctrine of unity of possession, therefore, the right of common attached to the prior estate was extinguished. See also, Worledge v. Kyngeswell, 123 Eng. Rep. 603, 604, 2 Anderson 168, 169 (C.B. 1597) (same case).

The unreported case of Forth v. Ward three years later extended the circumstances under which an alteration in the dominant estate would cause common rights attached to the estate precedent to evaporate. 42 & 43 Eliz. Roll 367 and The Law of Commons at 109-110. There the copyholder had the right to take estovers out of the wastes of the lord to repair his hedges. The lord granted the copyholder with a freehold the land using the words, “[g]rant unto him all the Lands, Tenements and Hereditaments thereunto appertaining, and therewith used and occupied.” Id. The court found that the grant of the freehold estate destroyed the common of turbury attached to the copyhold and that the general grant of freehold did not attach common of turbary to the new enfranchised lands. It is unclear, however, whether the court saw the customary common of turbury enjoyed by the copyholder being extinguished by the unity of possession upon the lord’s brief (and perhaps fictional) recovery of possession of the land, per Worledge, or whether the grant of the greater estate bounded by law destroyed the prior estate and its customary benefits.

Marsham v. Hunter confirmed and extended the holding of Forth. In Marsham, the copyholder for life possessed common of pasture (apparently appurtenant) by prescription. He was then enfranchised cum pertinentiis (with appurtenances) by the lord of the manor. The attorney for the landholder argued that the common of pasture benefited the land, not the prior copyhold estate — i.e., that the copyhold was endowed with common of pasture by local prescription, pursuant to which the right existed to benefit the land, not the estate. Marsam v. Hunter, 123 Eng. Rep. 901, 902-03, 2 Brownlow & Goldesborough 209, 210-11 (K.B. 1609) (recounting the argument of the freeholder’s counsel). The court rejected this argument, because the common rights of copyholders were prescribed for by the custom of the manor, as had been ruled in Foiston v. Crachroode. 76 Eng. Rep. at 963-65, 4 Coke Rep. at 31b-32a. Because the common of pasture derived from the custom of the manor regulating the copyhold, when the estate was enfranchised, it was no
this rule to buy out most of his copyholders and enfranchise the remainder with the aim of extinguishing all rights of common. However, when the case, *Styant v. Staker*, was brought by the dispossessed freeholder into Chancery, the court concluded that although the common law would not bar the enclosure of the waste, equity would continue to recognize the common rights of the freeholder and prevent the enclosure.51 Through the eighteenth century, the extent of Chancery’s holding in the *Styant* remained in question: Did the case place an equitable bar against extinguishing commons on all lands enfranchised or was the case confined to its facts — i.e., where a lord enfranchised a tenant with the purpose of later enclosing lands?52

51 *Styant v. Staker*, 23 Eng. Rep. 761, 762, 2 Vern. 250, 250 (Chan. 1691) (holding, in case where lord of the manor enfranchised copyholder and bought out the rest, that equity would preserve the right of common — no rational is provided in the case). There also appeared the possibility that the common law courts were moving away from their earlier rigid stance regarding the destruction of right of common upon enfranchisement. In *Crowder v. Oldfield*, Judge Holt’s reasoning suggested a way around the problem: Rather than allege common attached to the copyhold estate by custom of the manor, the holder of those recently-enfranchised lands might show the common belonged originally to the land as common appendant. As belonging to the land, it could not be extinguished by enfranchisement. *Crowder v. Oldfield*, 87 Eng. Rep. 783, 785, 6 Modern 19, 20 (Q.B. 1703) (per Holt, J.). Judge Holt’s reasoning in the report of the case by Salkeld, however, was at little variance with pre-existing law: “W]here copyholder claims common in the wastes of the manor, it properly and strictly belongs to the estate, and if he enfranchise his copyhold, in that case his common is lost; but where he claims out of the manor, it belongs to the land and not to the estate; and if he enfranchise the estate, the common continues.” *Crowder v. Oldfield*, 91 Eng. Rep. 316, 317, 1 Salk. 364, 366 (K.B. 1704?) (per Holt, J.). Whatever ray of light Holt’s opinion might have cast, custom of the manor seems to blot it out. It is hard to conceive the circumstances that would permit a prior copyholder to show he or she enjoyed common belonging to the land when the custom of the manor contemporaneously permitted copyholders similar common rights.

52 James Bird, writing at the turn of the nineteenth century, took the former to be the case, that the commons extinguished by law can be enforced in equity. J. B. Bird, *The Laws Respecting Commons and Commoners* (Clark & Sons: London 1801) 64 (noting that relief may be had in equity). Woolrych, writing three decades later, held the opposite view. Woolrych, *Rights of Common*. The author of the *Law of Commons*, writing in 1720, completely ignored the doctrine out of Chancery.
It was possible to obtain an enclosure of open fields and wastes by unanimous agreement of
commoners, the impro priator and the lord of the manor in a village.\textsuperscript{53} Reaching such
unanimity in the disposition of property was (and remains) challenging, to say the least. In the first
instance lay the problem of getting everyone to agree on appropriate division by enclosure. But, even were that
difficulty to be surmounted, there remained the problem of enforcing any agreement. In the
common law courts, a prevailing plaintiff bringing an action to recover for breach of an
agreement — for example, an agreement to purchase a freehold tenement — would only receive damages for
his effort, not the freehold itself.\textsuperscript{54} Thus, if any party or parties refused to abide by an agreement to
enclose, the best award that the parties not in breach could receive would have been damages against
those in breach; the agreed enclosure would remain undone. The equitable process in Chancery
offered an injunctive remedy against a party or parties in breech. A seller who refused to transfer
land to a purchaser, for example, would be subject to a subpoena out of Chancery requiring him to
transfer the property covered by the agreement. A party who refused to enclose his plot or broke
the hedgerows of the others across his strips could be promptly enjoined to abide by the agreement.
Reflecting this awareness, by the later Tudor period, parties to enclosure agreements began to appear
in Chancery, seeking decrees against those who repudiated or breeched an agreement to enclose.\textsuperscript{55}
These genuine actions to decree an enclosure were quickly surpassed by collusive ones, attempts to
enroll the awards of newly-several plots, thereby securing the titles of the parties.\textsuperscript{56} By the beginning

\textsuperscript{53} Ellis, \textit{Common and Waste Lands} at 166.

\textsuperscript{54} See David Ibbetson, \textit{A Historical Introduction to the Law of Obligations} (Oxford Univ. Press 1999) 213. According
to Ibbetson, the common law courts were already recognizing expectation damages as the appropriate remedy in
contractual matters. However, just as in the case of a bargain and sale of land, assessing the appropriate expectation
damages would have been difficult and perhaps inappropriate in the breach of an enclosure agreement. As with any
unique thing, it would have been impossible to gauge the value of the enclosure to the plaintiff — the only means for
the plaintiff to receive the value of his expectations would have been to compel the enclosure in Chancery.

\textsuperscript{55} M. W. Beresford, “The Decree Rolls of Chancery as a Source for Economic History, 1547-c.1700,” \textit{The Economic History Review, 2d Series}, 32, No. 1 (1979) 1, 2 (noting that the earlier agreement for enclosure appearing on
examined decree rolls was for Condover, Shropshire “made in May 1550 and enrolled in 1586”). See also, E. M.
Series}, 19 (1905) 101 (describing the key role played by Chancery in seventeenth century enclosures). In the law reports,
the first cases that indicate the involvement of Chancery and the equity side of the Exchequer in affecting enclosure
agreements are \textit{All Souls’ College v. Everal} and \textit{All Souls’ College v. Leighton}, where it appears the plaintiffs sought to have
commissioners set out contested lands and ways under an enclosure. From the short notes on both, Chancery dismissed
the common rights-based claims as sounding in law, but issued commissions to set out ways. \textit{All Souls’ College v. Everal},
21 Eng. Rep. 40, Cary 75 (Chan. 1579) and \textit{All Souls’ College v. Leighton}, 21 Eng. Rep. 85, Choice Cas. in Chan. 142 (Chan.
1579). See also, \textit{Law of Commons} at 223.

of the seventeenth century, then, the court of Chancery was playing an important role in upholding
and in recording private arrangements for enclosure.

If Chancery had merely contented itself with decreeing agreements for certain enclosures to be made
by the parties, it is unlikely that the court would have done its tremendous enclosure business during
the seventeenth century. Instead, Chancery became actively involved in the implementation of
enclosure agreements, not only by decreeing those allotments made by third parties pursuant to
agreement, but also by issuing commissions to “set out the meets and bounds” of the plots to be
held by the parties. The court was in the business of setting up enclosure commissions to carry out
agreements.  

A thought experiment quickly reveals the value of letting commissioners out of Chancery—or
some other third party—make a binding enclosure award on the parties, as opposed to having
those parties hash out the distribution as part of coming to the agreement. Assume three
landowners A, B and C, each of whom possesses strips scattered through an open field like so:

According to Leonard, this typically took the form of an action by the proprietors against the lord of the manor on the
grounds that he had refused to assent to some aspect of the enclosure agreement and requesting a decree that all persons
abide by the agreement, with the lord answering that he did, in fact, assent to the enclosure and not contesting the entry
of the decree.

For an example of an award decreed by Chancery, see “Enclosure by Agreement at Marston” at 89 (describing
the roll of the surveyor in setting out tracts). Also, see Bishop v. Bishop, 21 Eng. Rep. 510, 510, 1 Chan. Rep. 142, 142
(holding that Chancery may compel a party to perform his part of award, even though award not made at direction of
court); Fooc v. Shrewsbury, 21 Eng. Rep. 139, 139, Tothill 111, 111 (Chan. 1637-38) (compelling a party to adhere to an
enclosure award, if he had consented to the original agreement); and Wright v. Stamford, 21 Eng. Rep. 139, 139, Tothill
111, 111 (Chan. 1634-35) (upholding articles of agreement in enclosure case). For examples of enclosure commissions
the Inclosure should be performed; and a Commission then was awarded to set out each Persons Lot....”). Also,
794, Nelson 79, 79-80 (Chan. 1664) (same case).

Possibly, this authority of Chancery to issue commissions to make an enclosure award existed as early as the
late Tudor period. The note on the 1582-83 case Lovett v. Chamberlen reveals Chancery ordering commissions to examine
witnesses and certify an enclosure award under their hands. 21 Eng. Rep. 95, 95, Choice Cas. in Chan. 164 (Chan. 1582-
83).
Each strip has a land value of 2; moreover, the owners value frontage property and each outside edge increases the value of a strip by 1. So, for example, the top left strip possessed by A is valued at 4 — 2 for the land itself and 2 because, as a corner strip, it has two outside edges. The middle strip owned by C, in contrast, has only a value of 2, being completely an interior strip. However, under the distribution above, no one has a total property value in his strips higher than any other owner: A, B and C each has lands valued at 10.\textsuperscript{58}

Now, assume that enclosure raises the land value of the strips enclosed by 0.2 per strip enclosed. A, B and C all have \textit{prima facie} reason to enclose, given a potential land value gain of 0.6 for their holdings. But, to enclose A, B and C have to agree to reallocate and exchange their strips so that each owner’s holdings are contiguous — that is, any strip in an enclosure of an owner must have a side-by-side connection to another strip possessed by that owner. Any attempt to make an enclosure by consolidating strips in this manner quickly reveals that there is no way to enclose such that each owner’s holdings are equivalent in value; furthermore, one owner who participates in the enclosure \textit{will} lose value through it.\textsuperscript{59} For example, take the following enclosure plan, which one of a set of the most equitable distributions:

\textsuperscript{58} A: \( (2+2)+(2+1)+(2+1) = 10 \)
\textsuperscript{59} B: \( (2+1)+(2+1)+(2+2) = 10 \)
\textsuperscript{59} C: \( (2+2)+(2+0)+(2+2) = 10 \)

One other condition is that the distribution of value within strips is not uniform; that is, we cannot cut across strips to ensure equal frontage. If that condition is removed, the inequality is readily solved:
On this distribution, A’s three strips in enclosure possesses five edges, giving him a total value of 11.6. B’s three enclosed strips are on land with four edges, giving him a total value of 10.6. Both A and B therefore gain by the enclosure on this distribution. C, however, takes three strips with only three edges of frontage; the total value of his enclosed holding is 9.6, less than the 10 he possessed in open fields. Barring transfer payments, C rationally would refuse to agree to this enclosure. Likewise, on any other enclosure distribution, there would be one party who would refuse to an agreement.

There is, however, a way of getting around the enclosure loss problem. Assume that the parties are willing to introduce some uncertainty into their agreement, for example, either by agreeing to allow a commission to allocate the enclosures or by agreeing to let a coin toss decide the order in which the owners chose them. If decided by a coin toss, each owner has an equal chance of enclosing first, second or last; each owner can expect a 1/3 chance of each enclosure within the distribution.

Even were we to assume that transfer payments could be made, there would be transaction costs in coming to an enclosure plan and to a division of the surplus gained from enclosure that might prevent any agreement from being made. While there is an equitable division, it is not the only distribution that would be rational for the owners to accept. It would not be surprising to find that the transaction costs of coming to a viable solution outweigh the gains for at least one owner.
Whatever we assume the ultimate distribution would be, each owner would expect to gain the average of the probable outcomes. In other words, each owner could rationally expect to have an enclosure worth 10.6, or a gain of 0.6. By agreeing to introduce a present uncertainty into the process that will be resolved by a certain means, it becomes rational for the parties to agree to an enclosure. Chancery’s willingness to issue commissions to set out binding enclosures or enforce distribution awards decided by third parties upon agreement by unanimous proprietors served this function, thereby permitting a number of enclosures to be carried out that likely otherwise would have been unworkable.

While assisting lords of manors and local landholders in their efforts to reach enclosure agreements, Chancery drew the line at forcing resistant parties to enclose their lands. Through the seventeenth century, lords and holders occasionally came to Chancery seeking its help to compel dissenting property holders to join into an enclosure. Yet, time and again, Chancery refused. Thus, in Ingram v. Wells, the court declined to enforce an award against a person who had not assented to an enclosure agreement.61 Again, shortly after the Restoration, the plaintiffs in Thirveton v. Collier brought a bill to have a commission award allotments on an enclosure, including individuals who had not been parties to the agreement but who possessed an interest in the common. While Chancery granted the enclosure commission, it rejected their request to enforce its decree against those who were not parties to the agreement, stating, “if there were any that had Interest and were not Parties to the Agreement, they could not be bound by the Decree, and so at no Prejudice.”62 At the same time, however, according to the report of the case, the court enigmatically noted that “one or two willful persons” should not have the power to frustrate the public good.63 Similarly, in Constable v. Davenport, the court rejected a bill to decree an enclosure against an unwilling freeholder where the plaintiffs had failed to charge either that he would be benefitted by the enclosure or that he had consented to a prior agreement.64 Dicta in the case of Delabeere v. Beddingfield emphasized the resistance of Chancery to compel an enclosure on a dissenting individual. There, the court decreed an earlier agreement to stint — or apportion — cattle upon a common, despite that one or two individuals had not been parties to the stinting agreement. “There is a great difference between an

63 Id. at 14.
agreement for enclosure, and an agreement only for stint of common,” the court observed. Stinting a pasture was a “proper and natural equity,” akin to the partition of tenancy in common. It was “otherwise with enclosure.”

Through the much of early modern period, then, enclosure of open fields was accomplished — at least by law — either through legal piecemeal exchanges or reclamations of wastes, or through the agreement of commoners to partition those lands and exchange holdings for consolidation. In the seventeenth (and eighteenth) century, it was not unusual for commoners who had agreed to an enclosure to bring a fictional action in Chancery to obtain a decree confirming the exchanges or setting forth an award. For the remainder of enclosable fields, the transaction costs of obtaining an enclosure by simple agreement were simply too high where the parties concerned were numerous. Similarly, wastes could be enclosed by the decision of the lord of the manor who had possession of them. But this ability to enclose waste lands was limited by the Statute of Merton, which permitted enclosure only to the extent that owners with rights of common could continue to exercise their rights without impediment. Enclosure by act of parliament promised one method of circumventing those impediments, but it was not until the middle of the eighteenth century that landowners began in earnest to make use of parliamentary enclosure.

At the close of the seventeenth century, then, the efforts made by landowners to use decrees in Chancery to bind recalcitrant owners from frustrating a total enclosure of common fields or waste grounds had repeatedly proven unsuccessful. While Chancery had been willing to impose stints on a handful of owners or tenants who resisted and had permitted any enclosure that had been undisturbed for thirty years to stand, the court had firmly ruled that extinguishing rights of common altogether was an entirely different bag of hash, and that no possessor of a common right could be forced to give it up. Finally, from the turn of the eighteenth century, Chancery’s procedures began a notable atrophy, while the court’s costs began to steadily mount, dissuading those prospective

---

68 M. J. Daunton, Progress and Poverty: An Economic and Social History of Britain 1700-1850 (Oxford Univ. Press 1995) 100-06.
69 20 Hen. 3, c.4 (1235).
plaintiffs, if any, who would have challenged Chancery’s unwillingness to force an enclosure on grounds of public benefit. Thus, owners seeking to enclose lands and for whom the transaction costs of obtaining complete agreement of commoners was cost prohibitive had by the early eighteenth century lost a brisk, inexpensive forum in which to push modification of the law. Prospective litigants would have to look elsewhere for a forum welcome to efforts at legal change.

How parliamentary enclosure became a viable option

Openness to private business after 1680

On rare occasions, parliament had been an option for enclosure-seekers in the seventeenth century. In the first half of the century, parliament passed six acts confirming enclosure agreements or decrees out of Chancery or the equitable side of the Exchequer, four of them pertaining to crown lands. After the Restoration, there were another thirteen plausible enclosure attempts, of which four made their way to the statute books. But, in this century a number of difficulties faced the suitor or suitors who wished to obtain an enclosure act out of parliament. First, unlike the law courts and chancery — which met regularly in its four sessions at Michaelmas, Hilary, Easter and Trinity — parliament was available only when the king deigned to summon (or cease to issue serial prorogations of) it. Aside from the two decades following the Restoration, this meant that parliamentary sessions were infrequent, at best. Coupled with this infrequency was the difficulty posed by the ability of the king to dissolve or prorogue parliament at his pleasure. These prerogatives of the crown were hemmed by few conventional checks, giving the king broad authority to dispense with parliament when it became inconvenient for it to continue. Given the propensity of the Stuart kings to enrage and frustrate their parliaments, this meant that their parliaments were typically short or infrequent.

Finally, and perhaps most importantly, credible information about proceedings on bills, especially those private bills of which enclosure legislation was a type, was very hard to come by. The late

71 7 Jac. 1, private act, c.1 (1609); 7 Jac. 1, private act, c.2 (1609); 7 Jac. 1, private act, c.3 (1609); 21 Jac. 1, private act, c.16 (1621); 1 Car. 1, private act, c.1 (1625); and 1 Car. 1, private act, c.2 (1625). Information on the civil war and interregnum eras is incomplete or lacking.

72 16 Car. 2, private act c.5 (1664); 19&20 Car. 2, private act c.12 (1667); 29&30 Car. 2, st. 2, private act c.3 (1677); and 1 Jac. 2, private act, c.2 (1685). Some of these later bills and acts were not, strictly speaking, bills for enclosure **per se**. One in 1677, was aimed at allocating rights of common in the manors of West Derby and Wavertree in Lancashire, not enclosure, specifically. 29&30 Car. 2, st. 2, private act c.3 (1677). And another in 1685 was for the repeal of a provision in an earlier act for draining the Bedford Level pertaining to enclosure on drained lands. 1 Jac. 2, private act, c.2 (1685).
Stuart era had seen the growth of a number of outlets of information about the internal operation of parliament — printed newspapers, newsletters and transmission of information via the coffee house. However, the sources of parliamentary information suffered from two deficits: For one thing, they tended to reveal very little about the private business of parliament, but rather reported on and reveled in the political controversies of the day, when their producers were not facing censorship trials. More importantly, though, they lacked credibility as sources of information. Instead, they operated to disseminate rumor, speculation and propaganda. The only credible material generally to be found in print reports were weekly bills of mortality and price tables. These informational deficits raised the agency costs to suitors of doing business in parliament. If not living in the environs of Westminster, suitors were hard pressed to check and evaluate the efforts of MPs in furthering their bills.

The arrival of William III in 1688 is usually credited as marking a shift in the status of parliament as a regular institution. Thereafter, parliament met annually, usually for sessions lasting several months, providing ample time within which to complete business. This significant departure from previous practice, under which parliament met largely at the whim of the crown, certainly had a great deal to do with suitors’ recourse to it in obtaining enclosure acts. But, the change likely having a more substantial impact on suitors’ willingness to venture bills was the growth of mechanisms for the collection and redistribution of information about legislative promotions. The driving force behind this change was the publication of the Votes and Proceedings of the House of Commons, which began in 1680. The printed Votes was a skeletal account of the promotion of legislation and other parliamentary activity that had occurred the day before. Printed and provided for free to members

75 Sheila Lambert, “Printing for the House of Commons in the Eighteenth Century,” 23 The Library, Series 5 (1968) 23, 25-28. One commonplace claim about the Votes is that they were bare-boned and uninformative, the only account of speeches in the Commons reproduced being those of the king at the open and close of a session. This picture is a false one — the contents of the Votes (which generally reflect the entries in the Commons Journal each day) included reproductions of petitions for and on public and private legislation, useful information for individuals interested in the regular progress of bills. Their lack of use is belied by the rising demand for copies of the Votes through the first half of the eighteenth century. Businessmen needed to keep their heads on top of business and the relevant business of parliament was only occasionally to be found in the debates of members on distant public business. (However, that information, when made available, could also provide a check on members.) Astute watchers of
of the House, there were always extra copies available for those who knew where to look. By the 1690s, these extra copies were in wider circulation to crown officers as well as interested lobbyists.\textsuperscript{76} At the turn of the eighteenth century, members were regularly sending copies to their constituencies, to keep them apprised of parliamentary activity. Newsletter writers were utilizing them to provide reports of relevant business to clients in local government and in coffeehouses throughout the country. This increased circulation apparently infuriated the Lords, which in the initial decade of the eighteenth century made several attempts to silence dissemination of information in the \textit{Votes} outside of parliament and government.\textsuperscript{77}

The \textit{Votes} gave suitors a means of obtaining credible information regarding the efforts of members to further those initiatives. Because it publicized the state of parliamentary business, permitting those on the outside to know the status of measures promoted inside, suitors were able to hold members accountable for inaction.\textsuperscript{78} It was to their representative members that individuals and communities looked in endeavoring to have their proposals for legislation — enclosure and otherwise — refined and prosecuted in parliament. The City of Chester entrusted their petitions for leave to introduce a bill to make the River Dee navigable to the member for the city, the barrister

\begin{flushright}
\textsuperscript{77} Id. at 227 and 16 \textit{LJ} 764 (21 June 1701). Again in November of 1702, the Lords were moved to offer an address to the Queen about the contents of the \textit{Votes}, which had printed a reprimand against the Bishop of Worcester. This effort to enlist Queen Anne into the fight appears not to have gone anywhere. 17 \textit{LJ} 168 (November 19, 1702). The commonplace nature of the \textit{Votes} is also implied by the letters produced in the Lords regarding a supposed “Scottish Conspiracy” of December 1703 in which information in the \textit{Votes} are referred to as information had “by every Post, for One of my Friends here sends it punctually” and as part of the “public Papers.” 17 \textit{LJ} 428 (9 February 1704). Michael Harris has recounted a somewhat more successful effort in the Lords to tamp down on information-sharing by newsletter writers and coffeehouse owners during the 1706-07 session. Michael Harris, “Parliament in the Public Sphere,” \textit{supra}, note 70, at 69-72.  \\
\textsuperscript{78} Given that the primary focus in the history of private legislation has been on the role of the parliamentary clerks and agents — this a consequence of having the first major works on the history of private legislation written by, one, a parliamentary agent and, two, a clerk of the House of Commons — it is no surprise that the role of the local member of parliament or lord has received only passing mention. Fredrick Clifford, author of the two volume \textit{A History of Private Bill Legislation} was himself a parliamentary agent during the latter half of the nineteenth century and Orlo Williams, who authored a two volume work on the history of private bill procedure and of the clerks of the House of Commons was himself at one point a clerk in the House during the first half of the twentieth century. As a consequence, the part played by MPs in prosecuting private and local bills in the late seventeenth and eighteenth centuries has been largely overlooked.
\end{flushright}
Peter Shakerley. The Tanner’s Company sought the advice of the same Peter Shakerley over a decade later when they needed to know their options for defeating a proposed leather tax in the winter of 1710/1711. Even those who no longer sat in the Commons often continued to direct business there. Thus in 1705, then-defeated MP James Lowther appears to have freely stalked the Commons’ gallery, galvanizing opposition to the Parton Harbor bill.

By scanning the Votes, suitors could discover whether the members were fulfilling their responsibilities as representatives and to prod them along when they were lagging. So, when Peter Shakerley failed to present the River Dee navigation petition previously delivered to him from Chester and instead moved for a separate bill, the proposed undertaker of the navigation along with several members of the city council learned of it through the printed Votes. They then sent letters to Shakerley and petitions to parliament demanding that he present their petition instead. In 1695, Edward Harley diminished Thomas Baron Conningsby’s stature with his Leominster constituency by having the Votes sent to the town revealing Conningsby’s position on the leather tax. This resulted in Conningsby’s loss of his seat in the following election. And, in the early 1700s, Robert Harley, as speaker, prevented the printing in the Votes the division on a money bill, so as not to embarrass Tory supporters who had voted with the Whigs in its favor. The publication of the Votes meant that members, who before the 1680s could neglect or surreptitiously oppose measures given them by their constituencies or neighbors with little concern of being found out, were thereafter under increasing scrutiny to ensure that they carried out perceived obligations to those local and private interests. In other words, the publication of the Votes, and its distribution, directly by post or indirectly through newsletters and coffeehouse reports, dropped the agency costs to those seeking parliamentary access.

---

79 Minutes of Assembly Meeting, 21 October 1698, City of Chester Assembly Book 3, Cheshire Archives, ZA/B/3/68-68v. On the role of the barristers (and attorneys) in parliament generally, see David Lemmings, Gentlemen and Barristers: The Inns of Court and the English Bar, 1680-1730 (Oxford Univ. Press 1990) 178-234 and chapter 3.
80 Shakerley reply to Tanner’s Company (unknown date in 1710/1711), Tanners’ Company Papers, Cheshire Archives, G21/8/4.
Over the course of the eighteenth century, bill suitors would have the advantage of other developments which increased the reliability of information and the speed with which it was distributed. Increasingly, suitors or their surrogates in parliament paid the clerks in parliament to keep an eye on affairs or to slow-walk legislation through the process and used parliamentary agents to coordinate legislative action. Suitors were thereby apprised of the best time to move legislation forward. Opponents also used clerks to learn when and how to derail promotions. Further, faster communications over the following century permitted suitors to react quickly and with growing effectiveness to events in parliament. Both these immediate and later developments reduced the uncertainties resulting from deficits in information out of parliament, better allowing prospective suitors to evaluate expected costs and gains of seeking local and private bills, including bills for enclosure.

The dilution of the unanimous assent standard

Even though the agency costs of promoting legislation had been reduced in the decades following 1680 by the easier flow of credible information out of Westminster, this did not mean that more than a handful of suitors would have found it worthwhile to attempt an act in parliament. Through the late seventeenth century, chancery remained a viable option for lords and landowners interested in enclosure. And, in the early decades of the following century, parliament demanded uniform assent on all bills aimed at the modification of private property rights. Thus, both estate and enclosure legislation required the unanimous or nearly-unanimous approval of those whose rights would be affected. Although subject to different procedural hurdles, estate legislation exemplified how demanding parliament was when it came to the issue of assent. The holders of estates in the late seventeenth century (and thereafter) labored under a regimen of restraints, rent charges and testamentary limitations over lands they currently possessed, typically in favor of wives, sons, daughters, brothers, sisters and other relations, near and distant. Complications arose whenever

85 See Lloyd Bonfield, Marriage Settlements 1601-1740 (Cambridge Univ. Press 1983) 7 (“The early modern marriage settlement accomplished two goals: immutably fixing the bridges jointure and transmitting the patrimony between the generations in the manner desired by the landowner.”); A. W. B. Simpson, A History of the Land Law, 2d ed. (Oxford Univ. Press 1986) 229-31; and Eileen Spring, Law, Land & Family: Aristocratic Inheritance in England, 1300 to 1800 (Univ. of North Carolina Press: Chapel Hill 1993) 144-47 (Strict settlement “established a family constitution, the character of which is summed up in three words: patrilineal, primogenative, and patriarchal.”).

The usual form of the settlement by the early eighteenth century was that popularized, though not entirely invented, by Orlando Bridgeman. While other forms of settlement at law existed, none was as popular as the strict settlement — particularly after it received the full sanction of the House of Lords in 1740 — for a couple of reasons. Dormer v. Parkhurst, 6 Bro. P. C. 351 (Lords 1740). First, and this it shared with most forms of settlement, it provided for
those holders fell into debt beyond their current means to pay; or saw an opportunity to consolidate
their estate, but could not because the lands they would need to mortgage or sell to finance the
purchase were encumbered with interest in favor of those family members; or were incapable of
engaging in a transaction due to minority. In these situations — and others — parliament would
step in to allow the current possessor to pay creditors, purchase lands or conduct transactions
despite legal incapacity.86 But only if every person with an interest in the relevant estate assented to the bill. The
only exceptions appear to have been when consent could not be obtained due to unreasonable
refusal by an affected person or when an owner could not be found. Thus, in the anomalous
1691/92 session during which petitions to the Commons for private legislation were routinely
committed, the future lord chancellor Simon Harcourt made a point of noting the consensual nature
of a proposed bill to allow the sons of Hugh Molineux to sell lands despite their status as tenants for
life or in tail, as beneficiaries of a trust.87 The committee on a bill previously passed by the Lords to
grant Henry Cavendish a larger allowance in 1693/94 was ordered to examine previous settlements
on the estate and make certain that all parties benefitting from the settlements and affected by the

the entire family: upon a marriage, the settlor would be made a life tenant; the groom would receive a life estate upon the
settlor’s death and an income in the meanwhile; and the spouse of the groom would receive a fixed jointure in lieu of
overcame a vexing problem extant in earlier settlement devices that allowed the settlement to disintegrate (or at least be
broken) upon the forfeiture or other premature determination of a tenant in possession’s life estate. An unborn “heir”
would lose his patrimony in favor of the common law heir of the tenant, against the settlor’s best wishes. By vesting in
trustees to preserve the future interests of the life tenant’s progeny during the remainder of his life in the unfortunate
circumstance that the tenant’s estate was determined, if the life tenant bore an heir tail as specified in the settlement, that
heir would take on the life tenant’s demise or (preferably) upon the marriage of the heir tail. Bonfield, *Marriage
Settlements*, at 55-82. Simpson, *Land Law*, at 235-41. Finally, the strict settlement made the exclusion of daughters (and
younger progeny) in the settlement bearable by creating trusts to pay portions to the excluded children. Spring, *Law,
Land & Family*, at 142-44.86

As the anonymous author of *The Compleat Conveyancer* stated, “a private Act of Parliament is necessary, to enable
[the tenants in possession] . . . to do any Thing for the Good of themselves; either to make Settlements in a Marriage, in
Consideration of a Marriage Fortune, and for Preferment therein; or to make any Sale of any Part of the Estate
descended, tho’ never so considerable, for Payment of any just Debts or Incumbrances. . . .” *The Complete Conveyancer*
(London 1723) 395. Worse still, though, was the conveyance gone awry: “For it may sometimes happen, that, by the
ingenuity of some, and the blunders of other practitioners, an estate is most grievously entangled by a multitude of
contingent remainders, resulting trusts, springing uses, executor devices, and the like artificial contrivances . . . . so that it
is out of the power of either the courts of law or equity to relieve the owner.” To sever the “Gordian knot” of the
inexpert conveyance, Blackstone recognized, an act of parliament was needed. William Blackstone, *Commentaries on the
entertaining, though not for its suitors, was the private bill for confirming the settlement on the marriage of Charles and
Dorothy Owen, which sought to repair an estate where the indenture of feoffment made had “been so tore and eaten by
Vermin or otherwise prejudiced, that the whole is not legible, and the sense is only collected from the precedent and
subsequent words.” 4&5 Anne, private act, c.7 (1705).

Recent work by Dan Bogart and Gary Richardson has shown that the flexibility inherent in estate acts assisted
the reallocation of land toward higher-value uses. See, Dan Bogart and Gary Richardson, “Making property productive:
87
legislation had assented to the bill.\(88\) The Lords, faced in the 1705 session with a question regarding the necessity of obtaining the consent of affected parties on an amendment offered in the committee on the bill ordered an instruction to be sent to each select committee that the assent of any absent person be obtained before an amendment to legislation would be permitted.\(89\)

Despite that enclosures were perceived as matters quite separate from estate bills, the same assent requirements were regularly in play in the handful of bills presented before 1720. The committee of the House of Lords examining the Farmington enclosure bill in 1713 noted that the consents on the bill had been earlier proven before the judges, to whom the bill had been submitted because it contained an estate component.\(90\) This raised two sorts of difficulties, at least. First, it was possible to exclude uninterested proprietors from the enclosure agreement, allowing them to continue arable farming on strips as before and providing continued common rights across the several lands of assenting owners in proportion to an award. But, exclusion of enough dissenters would result in an inoperable arrangement, with enclosing owners unable to fully reap the benefits of their investment in enclosure. Alternatively, proprietors in favor of enclosure could seek to bring everyone on board for an enclosure bill. But, this situation raised an obvious problem of holdouts. If everyone had to assent to an enclosure, holdouts would have been able to make excessive demands, raising its costs beyond any justifiable benefit. Just so, the range of enclosure acts tracked that of decrees out of Chancery, confirming pre-existing agreements to enclose between handfuls of parties or aiming at an exchange of lands for the permanent commutation of tithes. Had parliament continued on its restrictive course, there is no reason to think that the mid-century launch of the enclosure movement would ever have occurred.

Beginning in the 1720s and extending into the 1750s, however, there was a gradual, but steady dilution of parliament's unanimous assent standard for enclosure bills, as revealed by reports out of petition and bill committees. Using the reports of petition and bill committees out of the Commons, it is possible to see a dramatic shift in the way that assent was treated in parliament.\(91\)

\(88\) 11 CJ 119 (6 March 1693/94).
\(89\) 17 LJ 614 (12 January 1704/05).
\(90\) Historical Manuscripts Commission, Manuscripts of the House of Lords, vol. 10 (HMSO: London 1953) [3108] 332. Also, 13 Ann., private act, c.7 (1713).
\(91\) The reports out of the Lords, however, reveal little about the extent of assent required before an enclosure bill would be enacted. When the Lords did report on the assents to a bill, it was typically with the stock notation that “the
What these reports and other related material reveal is that parliament gradually modified and loosened its assent requirements, making it easier for lords and landowners to enclose entire tracts without reaching out to every owner and without being required to make exception for those who refused to assent. Between 1719 and 1729, only one committee report out of the Commons shows a prosecution in which there was less than unanimous consent of the affected parties. Instead, ten out of the twenty-six enclosure initiatives prosecuted were aimed at confirming a pre-existing agreement for enclosure among a handful of parties. These acts confirmed a division and enclosure of lands previously agreed to by the various proprietors of the lands, with few if any persons seeking exemption. So, the preambles to these bills typically indicate that the articles of agreement were comprehensive, covering every interest in a commons. For example, the Overton-Longville enclosure bill described the various articles of agreement among each affected proprietor in favor of enclosure and setting aside their respective, specific proprietary interests. The remainder of the bills, such as the Sunningwell *cum* Bayworth enclosure measure, put off the particulars of the enclosure to a commission to be established after enactment, just as had previously been done in Chancery. But again, the support for these acts was nearly unanimous among landowners and tenants. So, in the case of the Sunningwell enclosure, the preamble of the bill recites the consenting proprietors to be “Sir John Stonhouse (lord of the manor), and John Peniston (rector of the parish church) and all other the proprietors (excepting the said Thomas Dalby).”

Only one report in this decade (out of a bill committee the Commons) reveals an unusual amount of dissent. In that case, a petition opposing the Balstonbury Commons enclosure bill had been presented and referred to the committee considering the bill. The committee, however, went to lengths to show that the opposition was largely manufactured. The committee reported the testimony of a proponent of the bill to the effect that opponents to the legislation had previously parties concerned had given their consents” to the legislation. While not indicative of the degree of assent required before an enclosure bill would be approved out of the Lords, the reports provide only scant information about how the Lords’s assent expectations varied from those for estate bills or for enclosure bills proceeding out of the Commons. Other sources, such as minutes of proceedings and notes on enclosure bills in the Harper collection provide additional insight into the Lords’s approach to enclosures, provide a bit more information. By contrast, the reports of petition committees and bill committees reproduced in the *Journals of the House of Commons* are highly revealing for enclosure measures introduced there throughout the eighteenth century. These reports, when there were unusual assent arrangements, regularly detail how many persons consented, their holdings and the overall number of persons or lands to be affected.

92 1 Geo. 2, private act, c.26 (1728).
93 10 Geo. 1, private act, c.6 (1724).
consented to the bill when notice had been promulgated in the countryside. Moreover, it appeared, many of the persons who signed the petition lacked any right of common at all. Those persons had signed the petition in opposition for the sole concern that the proposed enclosure would adversely impact the local highways.\footnote{19 CJ 328 (4 Apr. 1720).}

Between 1730 and 1740, though, reports out of committees in the Commons reveal decreasingly strident consent demands on enclosure initiatives. The first committee report detailing less than full consent of the proprietors was that on the Welsbourne Mountfort enclosure bill in the 1729-1730 session, where the bill committee found that all the parties had consented “except one person ‘who has One Three-yard Land out of Forty-seven, and declared, he would not sign the Bill.’”\footnote{21 CJ 540 (10 Apr. 1730).} However, the committee asserted in its report that the lone dissenter had provided no rationale for his decision, nor had he believed that he would be adversely affected. It is clear from the report that the Commons was open to permitting enclosure bills to proceed with less than full consent so long as it could justify doing so because either the number of proprietors opposing were few or the lands involved were a small proportion of the whole to be affected by the enclosure.

Over the following years, the consent requirements were further tested, typically in the petition committee in the Commons. In the case of the Broughton West Manor enclosure in 1730-1731, the petition committee noted that an unspecified number of persons interested in the commons and waste grounds had not agreed to the enclosure, but did not oppose a bill.\footnote{21 CJ 663 (11 Mar. 1730/31).} In the case of the Prestbury enclosure bill in the same session, the petition committee in the Commons gave its leave for the suitors to introduce an enclosure bill where 5 proprietors possessing 1/16 of the affected lands had not consented, but had merely remained neutral.\footnote{21 CJ 610 (18 Feb. 1730/31).} In the case of the failed Wakefield enclosure bill of the 1731-1732 session, the petition committee described the testimony offered by the suitors to prove consents:

\begin{quote}
Mr. Alexander Ready and Mr. Robert Dailey; who proved the signing of the Petition; but said, there are Three or Four Proprietors, who have not signed it, yet were consenting, that the common Fields should be enclosed: The only Reason, those
\end{quote}
Three or Four Persons gave for not signing the Petition, was, because that they apprehended, they should thereby bring an Expense upon themselves.\textsuperscript{98}

The House granted the petitioners leave to present an enclosure bill.

The committee on the Alderminster enclosure petition three years later reported that three persons who had a right of mowing on the land had not consented to the proposed bill by signing the petition, but that those three would be free to exercise their rights in any case. And, in the case of the Ixworth enclosure, although only two-thirds of the proprietors had signed the petition for a bill, the remainder had already taken matters into their own hands, establishing \textit{de facto} enclosures along lord of the manor’s sheep-walk. One of Richard Granville’s several enclosure attempts during the period, the Ashenden enclosure petition was reported to have the consent of all but one person possessing one-quarter of a yard land — 20 acres — with commons appurtenant. By the time the bill was before the committee, the number of opposed proprietors and their property interests had doubled, but only to 40 acres out of the 900 with appurtenant rights of common.\textsuperscript{99} Meanwhile, in the case of the Castle Dodington enclosure, the petition committee reported and leave was given to present legislation where of 119 proprietors, 11 had refused to sign the petition, of whom 7 later assented. The remaining holdouts possessed only 17 pastures out of a total of 491.\textsuperscript{100} By 1740, it appears, obtaining the consent of 90 percent of affected lands was adequate to have a petition reported as possessing adequate assent and legislation ordered. In its report on the Chawton enclosure petition, the committee noted that the documents offered by the parliamentary agent on

\textsuperscript{98} 21 \textit{CJ} 816 (28 Feb. 1731/32).
\textsuperscript{99} 23 \textit{CJ} 100 (17 Mar. 1737/38); 23 \textit{CJ} 136 (7 Apr. 1738). Also see, Henry E. Huntington Library, Stowe Collection, Granville papers, manorial and local, STG M&L Box 4, f.31 (c.1738). The final bill contained the exception for the two landowners in question:

\begin{quote}
And whereas the said \textit{Richard Grenville}, the said Dean and Chapter, the Warden or Rector, and Scholars, and the said \textit{Richard Lord Viscount Cobham}, \textit{Lydia Clements}, and \textit{Elizabeth Rice}, being the several Proprietors and Owners of the said lands (except the said \textit{James Hynd}, and \textit{Mary} his wife, who have an undivided Fourth Part of one Half Yard-land, and the Right of Common belonging to the same; which Half Yard-land doth not contain above Twenty Acres; and also except the Heir at Law, or Devisee of the said \textit{Jane Dare}, who is intituled to one other undivided Fourth Part of the said Half Yard-land last-mentioned, and the Right of Common belonging to the same; and also except the said \textit{George Franklyn}, who is Mortgagee of the said last-mentioned Half Yard-land) are desirous that the said several Inconveniences may be remedied and prevented, and for that Purpose have agreed, That the said Common Fields, Wastes, and uninclosed Grounds, shall be forthwith divided and inclosed, and all Right of Common therein extinguished....
\end{quote}

\textsuperscript{100} 23 \textit{CJ} 56 (3 Mar. 1737/38).
the bill revealed that all but one person, who possessed a one-tenth share of the lands to be covered by the enclosure, had consented to petition. The reason allegedly given by the holdout, who remained neutral, was that “he did not know who was to be at the Expense” of making the enclosures.  

Through the following decade, the percentage of lands to be enclosed held by consenting proprietors crept ever downwards. In the case of the Aston Cantlow enclosure bill in the 1741-1742 session, proprietors holding only 105 yard lands out of the 118 to be enclosed consented to the bill. The bill committee on the Ripon, Littlethorpe enclosure amendment bill in 1745 appears to have been satisfied that “most of the Parties concerned had given their Consent to the Bill, to the Satisfaction of the Committee; and that the rest, although publick Notice was given, did not appear to oppose the Bill. . . .” The bill committee on the Broad Blunsdon Tithing Enclosure in the 1748-1749 session reported that 81 ¾ acres out of 700 to be enclosed had not consented in the bill.

In 1751, the committee on the Staverton enclosure reported the bill even though consent was substantially lower: Proprietors consenting to the bill were possessed only 36 ¾ yard lands out of a total of 47. Of those not consenting, three proprietors holding 2 3/8 yard lands were neutral and another 15 proprietors, possessing a total of 7 7/8 yard lands, were opposed. The report endeavored to play down the holdings of the opponents to the bill, describing one opponent “who is possessed of One Quartern and One Half Quarter Yard Land, for Life” as owning land in which the reversionary interest was in “Mr. Markham, who is a Petitioner for the Bill.” The lack of consent by another proprietor was diminished by the note that “she was in her Judgement for the Bill; but that she had given a Bond for Thirty Pounds, to oppose the Bill; otherwise she would have consented; and that the Reversion of her Half Yard Land goes to her Son, who appeared personally at the Committee, and declared Consent to the Bill. . . .” The limited consent for the bill doomed it after the bill’s report, however. After the legislation had been engrossed, opponents successfully

101 23 CJ at 543 (28 Nov. 1740). Per the language of the bill, he was — for his portion of the enclosed grounds, in any case.
102 24 CJ (13 May 1742).
103 25 CJ 74 (21 Feb. 1745/46).
104 26 CJ 217 (6 May 1751).
petitioned to be heard against the bill before its third reading, and once heard, they managed to have a third reading of the bill put off.\textsuperscript{105}

The loss of the Staverton bill did not prevent a successful effort in the following year to obtain legislation with the consent of only 5/6 of the affected lands.\textsuperscript{106} And in the 1753, a committee reported a bill where it appears there was substantial, but not demarcated opposition:

\begin{quote}
Parties concerned had given their Consent to the Bill, to the Satisfaction of the Committee, except Sir Ralph Millbank, who is possessed of a Fifty-fifth part of the said Wastes and Commons, and who refused to sign the bill, and except 24 other persons, who having been applied to, said they would not oppose the same; and also except about Forty-six other Persons, who have but a small Interest in the said Wastes and Commons, and of whom about Six are Minors, and the rest either beyond the Sea, or could not be found; and that none of the said Parties appeared before the Committee to oppose the Bill. \ldots\textsuperscript{107}
\end{quote}

The line appears to have been drawn in a report on the Quinnington enclosure bill, however. There, the committee found that all parties had sufficiently consented to the bill “except William Volkins, Charles Stephens, Susannah Tombs, and John Godwin, who are possessed of Eleven Yard Lands and One-half” out of a total proposed enclosure of thirty seven yard lands. Despite that the four proprietors were nonetheless neutral toward the bill, upon report it was noted that “some other Amendments” were proper to be made to the legislation and the bill was recommitted.\textsuperscript{108} In the second report, the number of parties who refused consent had grown by one, but so had the extent of the proposed enclosure: The five parties refusing their assent possessed in total 382 acres, only 20 percent of the approximately 1900 acres to be affected by the enclosure.\textsuperscript{109}

Thereafter, for the remainder of the century, the proportion of lands owned by suitors whose consents were required sat at about 80 percent. Homer’s \textit{Essay} on enclosures printed in 1766 states that for a parliamentary enclosure “a Concurrence of so many of the Parties, as are possess of four-

\begin{footnotes}
\textsuperscript{105} The absence of consent is the chief grounding of the opponents’ objection to the legislation, as revealed in a contemporaneously printed piece of ephemeral matter by the opponents. According to \textit{The Humble Representation of the Petitioners against the Stareton [Staverton] Common Bill}, the petitioners against the bill contend that they amount to “Nineteen in Number; and are possessed of a Fourth Part of the whole Field; and have a Right of Common over all of it.” \textit{Id.} at 1 (1751) (University of London, Kress Library).

\textsuperscript{106} Ridley Manor enclosure act, 25 Geo. 2, private act c.24; 26 \textit{CJ} (14 Feb. 1751/52).

\textsuperscript{107} 26 \textit{CJ} 749 (7 Apr. 1753).

\textsuperscript{108} 26 \textit{CJ} 551 (5 Feb. 1753).

\textsuperscript{109} 26 \textit{CJ} 621-22 (28 Feb. 1753).
\end{footnotes}
fifths of the Property, is now looked upon as a sufficient Ground for an Application to the Legislature . . . provided the Lord of the Manor and the Impropriator, who have been considered as separate and leading Interests, concur in the Application.” In 1801, parliamentary agent Charles Ellis similarly remarked in his Practical Remarks and Precedents of Proceedings in Parliament that “Parliament have been understood to expect the consents of as many proprietors as have amongst them four-fifths in value of the lands to be inclosed or drained. . . .”

The free rider problem
Permitting suitors of enclosure legislation to run roughshod over the interests of upwards of 20 percent of dissenting property did pose an inherent collective action problem. Under the standing orders of the House, those who signed the petition for a bill were sureties for the bill, obligated to pay its fees and costs. By refusing to sign or assent to the petition (or bill), then, an owner could avoid its parliamentary costs. Moreover, as parliament grew increasingly willing to impose enclosures on villages despite unanimous consent, it would have made sense for those desirous of enclosure to free ride on the prosecution efforts of others by not consenting, but receiving the benefit of an enclosure act regardless.

Often, particularly in the first half of the eighteenth century, this was not an issue. The lord of the manor, anticipating a substantial increase in rents from enclosure, would be willing to bear the sum of its costs. So, for example, Richard Granville by agreement paid the costs of enclosure in Wooten Underwood and Ashenden in Buckinghamshire. But where the lord of the manor or another

110 H. Homer, An Essay on the Nature and Method of Ascertaining the Specific Shares of Proprietors upon the Inclosure of Common Fields (Oxford 1766) 42. Numerous writers on the enclosure movement have mysteriously claimed that the Inclosure Act of 1773 (13 Geo. 3, c.81) reduced the consent requirements for parliamentary enclosure from 80 percent of lands held to 75 percent. See, e.g., McCloskey “Enclosure of Open Fields” at 27. From the language of the statute this is demonstrably false. The three-quarters figure recited pertains, first, to the authority of local holders in open fields and commons to enclose and direct the management of the lands, so as to permit the technological improvements described in the preamble and, second, to permitting the Lord of the Manor to let one-twelfth of waste grounds for the purpose of improving the residue of waste grounds. The enclosure provisions in this act faced the same transaction cost difficulties as other efforts to agree in advance on lands to enclose — namely, getting three-fourths of the holders to agree, in a meeting on which tracts of land would be enclosed by whom would have been a monumental undertaking. See, supra, at text surrounding nn. 55-58. Moreover, assent requirements had been dropped in 1773, one would expect that their numbers would have shot up in the following sessions; rather, in the following decade, that number fell. For the text of the act, see http://www.opsi.gov.uk/RevisedStatutes/Acts/apgb/1773/capgb_17730081_en_1.


112 Henry E. Huntington Library, Stowe Collection, Granville papers, manorial and local, STG M&L Box 4, ff. 29, 31, 25 (1737-41).
landowner was unable to personally bear the costs of enclosure, free rider problems would arise. As described above in the case of the Castle Dodington enclosure, suitors for enclosure bills regularly informed petition and bill committees that the one or more of the dissenters were persons who were in favor of enclosure, but who did not want to pay for it.

How was the free rider problem managed? Beginning in the 1730, enclosure bills began to contain a provision that all parties benefiting from an enclosure bill would be required to pay the costs of the enclosure, including the costs of obtaining the act. Prior to then, no act contained a defraying clause. In the Lillington enclosure act, this changed, with the introduction of a clause that “as well as the Charges in Passing this Act, as for the Surveying, Allotting, Settling and Enrolling the Allotments, shall be defrayed by the Owners and Proprietors of the Lands, according to their respective Interests, the same to be calculated by an equal Pound Rate, as the Lands shall be rated at the Time of Passing this Act. . . .”

Through the remainder of the decade, a similar defraying clause occasionally appeared in enclosure bills, although becoming more sophisticated. The West Stafford cum Froom Bellet Act imposed the costs of enclosure on owners and proprietors based upon their respective holdings at the completion of the enclosure. The Westbury enclosure bill of 1764 put teeth to the defraying clause, giving commissioners of enclosure the power to levy rates and collect those rates by distress and sale. Because all who benefitted would be required to pay, regardless of their approval or dissent to the enclosure, it made no sense for a self-serving beneficiary not to sign a petition or bill.

What encouraged suitors to attempt the reduction in assent requirements?

What lead to the steady erosion of assent requirements in the first half of the eighteenth century? At its core, it was the work of suitors after enclosure bills, often members of parliament themselves, endeavoring to circumvent existing norms regarding assent for the purpose of shutting out disagreeable tenants from the process of obtaining private acts. But early suitors would not have exerted themselves were there nothing to be gained from it. This section uses the analysis of the

---

113 3 Geo. 2, private act, c.4 (1730).
114 9 Geo. 2, private act, c.35 (1736).
115 4 Geo. 3, private act, c. 61 (1763).
116 One side effect of this may have been to increase the number of assents for legislation. Those free riders who would have refused to sign enclosure petitions and bills on the grounds of cost lost the incentive to do so in light of a defraying clause. In this way, parliament increased opportunities for enclosure not only by tamping down the assent standard, but by incentivizing landowners and proprietors to sign enclosure agreements in greater numbers.
expected value of litigation from the law and economics literature to address this problem. The expected value analysis is a fairly standard mechanism of describing the circumstances under which a rational litigant will rationally bring an action to remedy a perceived wrong or vindicate a perceived right. This section pushes the analysis into new territory, to address an issue of legal change — namely, the question of when an agent will seek to deviate from or modify a substantive rule or norm. Using this analysis, we will see that the procedural rules and norms of the House of Commons in the early eighteenth century invited attempts to deviate from existing norms regarding consent. Moreover, the growth of a professional class of parliamentary agents to prosecute these private bills after the 1740s enabled suitors to comfortably invest in increasing their chances of legislative success, further raising the willingness of suitors to promote bills that departed from extant norms.

This section has three parts. In the first part, the expected value analysis as utilized in the law and economics literature will be presented and extended to address the present question about the organization of process and legal change. The second part turns to the issue of how the private legislative process in the early eighteenth century in the House of Commons would have encouraged suitors to attempt to change existing norms regarding the propriety of passing bills with less than the full consent of affected parties. The final part discusses the part played by parliamentary agents in the mid-eighteenth century and forward.

_The economic analysis of a legal claim and its application to “deviant” legislation_

In the traditional law and economics literature, there is a fairly standard model in use for discerning when a litigant will file suit to vindicate a legal claim. In condensed form, according to this model, the expected value of a legal claim is, for every outcome where the probable value to be obtained by that outcome is greater than the probable costs to be incurred in obtaining the outcome, the sum of the probable value of each outcome minus the sum of the probable costs incurred in obtaining each outcome. A litigant will sue if the value of the claim is more than £0 and will do nothing if its value equals £0. If the probable value of each outcome is less than the probable costs for that outcome, the expected value of the claim is £0, since the litigant will take no legal action when she stands to lose. The aspects of this model relevant to the current matter can be unpacked in the following illustration: Suppose Samuel, an eighteenth century landowner, desires to sell Blackacre, an estate subject to a bevy of rent charges. To do so, however, Samuel must first obtain an act of parliament
transferring the rent charges to other properties and clearing the property of any other defects in title. Parliament, however, requires Samuel to first consult with the beneficiaries of the rent charges to make certain that none of them object to his planned sale and transfer of those rents. Assuming that they agree, Samuel would then file an application in parliament for a private bill. Without delving too deeply into the actual details of the relevant procedure, this application would be summarily reviewed by a pair of common law judges, who would determine whether, on its face, an estate act would be permissible — that is, whether it was within the rough boundaries of the common law and all interests had consented. If however, an initial review determined that it was prima facie permissible for an estate bill to be introduced, a bill would be ordered, presented and eventually referred to a select committee to fill in missing details of the bill, to make certain there was nothing missed and to determine if everyone was in agreement on the provisions of the legislation. For example, it might be uncovered before the committee that there are interested parties who have only recently come to light or that the property, Whiteacre, onto which the rent charges are to be transferred does not produce enough income to support everyone, preventing a report of the bill. Assuming that it is reported, however, we can assume that it will pass both Houses and will be signed into law by the king as a private act, allowing him to dispose of Blackacre.

Chart 2: Selling Blackacre in the miserly parliament
In making the decision to sell Blackacre, Samuel, like most rational people, performs a thumbnail calculation to see what everything would cost. At the back end of the calculation is the benefit to be gained from selling Blackacre, against which this cost is to be weighed. Deciding whether to go through the trouble of obtaining the private act is largely a function of the benefit to be gained selling Blackacre versus the costs involved in getting permission to do it. Timing also plays an important role: When those costs are imposed and the likelihood of surmounting various stumbling blocks in the process effect both the expected costs and the expected benefits. Assume for the moment that the only costs associated with selling Blackacre are those imposed by the simplified legislative process just outlined — the value to be realized by Samuel on the sale of Blackacre is £1000. He is aware that the legislative process will cost roughly £500. He also knows that he will have problems convincing his cousin Ophelia, who receives rents on Blackacre and doubts the rental value of Whiteacre, to agree to clear the decks for its sale. As a result, there is a better than even chance that no act will be forthcoming, say 60 percent. Under these circumstances, should Samuel attempt to obtain a private act? The answer depends on when the fees (and costs) of prosecuting the bill come due.

Assume that Samuel is required to pay the full cost up front. Parliament reasonably does not want to be holding the bag when applications for legislation fail and therefore seeks to be paid the costs of the process in advance. Call this the miserly parliament scenario. If Samuel has only a 40 percent chance of successfully obtaining an act, it makes no sense to apply for it. His expected benefit is

---

117 Alternatively, he might seek out a solicitor, a member expert in prosecuting such bills or a parliamentary agent because it is cheaper for them to determine the costs of legislation than Samuel, so he would be willing to pay for the service.
only 40 percent of £1000 — or £400— and he is forced to pay the miserly parliament its £500 up
front, win or lose. So, at the outset, he would be down £100. Rationally, Samuel has no reason to
attempt an enclosure bill, unless there is some investment he could make that would rationally
increase the likelihood that the application would be granted. Now assume Samuel can avoid paying
for an enclosure bill until he actually obtains one. Parliament is unusually generous and eats the
costs of the legislative process for those who are not successful in getting a permit. Call this the
generous parliament scenario. Here, Samuel has every incentive to apply for an act at a 40 percent
chance of success. At a 40 percent chance of success, his expected benefit from seeking a permit
would be £200, that is, the probable gain from selling Blackacre minus the probable cost to be paid,
or .4(£1000) - .4(£500).

Charts 2 and 3 graphically represent Samuel’s expected value both on the miserly and generous
parliament scenarios. Moreover, it is possible to establish the likelihood of success at which it
becomes rational for Samuel to try to obtain a private act in either the miserly or generous
scenario. So, in the misery parliament scenario, as chart 2 shows, Samuel would need to have a
greater than 50 percent chance of success to make it worth his while to obtain legislation. In
contrast, on the generous parliament scenario, Samuel has every incentive to apply for an act so long
as his chances of success are greater than none. We can refer to the former procedural scenario as
one that is intolerant of uncertainty and the later scenario as one that is completely tolerant of
uncertainty.

Things gets more complicated if payment is gradated — that is, were Samuel obligated to pay costs
in obtaining consents, again at application and before the judges, prior to commitment of the bill
and on enactment. In these cases, tolerance of uncertainty will sit somewhere between the extremes
charted above. We can chart this detailed process, but there is no need to do so for purposes of the
illustration. The above gives us the relevant core elements of the standard analysis of the expected
value calculus in the law and economics literature, satisfactory for the purposes of this chapter.

\[ pB = C_{pre-pleading} + (1 - r_{pleading}(1 - p))C_{pleading} + (1 - (r_{pleading} + r_{smj})(1 - p))C_{smj} + pC_{trial} \]

\(^{118}\) This is essentially a matter of gauging the relative chances of failure at each stage of the process \( r \), then using
that to ascertain the probability of success at each stage for every overall probability of success \( p \). To put it another
way, as a litigant, I know that if I am going to lose my case, there is a 25 percent chance it will happen at the pleadings, a
50 percent chance it will happen at summary judgment and a 25 percent chance it will happen at trial. With this in mind
as well as a knowledge of benefits \( B \) and costs \( C \), I can determine how high my overall chances of success must be to
make it worthwhile to litigate. It is the value of \( p \) where:
Onto the above analysis, we need to layer an additional factor in the determination of whether Samuel would seek to prosecute an application. Even when we are considering single-party prosecutions — applications for benefits or decisions of where to invest — the probabilities of obtaining a favorable result are not static. That is, by taking particular actions, litigants can increase the pre-existing chances of success, or at least increase their information so that they have a more stable idea of our chances. So, by hiring an expert solicitor and through well-distributed tips to appropriate officers, for example, it would be possible for Samuel to raise his chances of getting an estate act. Or, for example, by including a clause in the bill that grants Ophelia a greater rent charge out of Whitacre and Greenacre, Samuel’s overall chances of obtaining consent and acceptance of the bill by parliament would rise. Chart 4 provides an example of this in the miserly parliament scenario. To chart 3, a curve has been added to illustrate the costs to Samuel of investment in increasing his chances of success. (Here, as one would expect, as his chances of success rise, it costs more to boost those chances further. So, for purposes of illustration, an initial investment by Samuel in obtaining a parliamentary agent or paying off Ophelia of £10 will increase his chances of success by 10 percent, while it takes another £20 to raise them an additional 10 percent, £60 to raise them a further 10 percent, and so on.)

119 The former is a matter of taking steps to make a case more favorable, the later is a matter of reducing variability in our probability estimate, potentially for the better.
The figure shows that by investing over a certain amount (between roughly £12-£320), Samuel could raise his probability of obtaining a private act to a sufficient degree to make it worth chancing. The optimal point of investment here would be the point in this range where the marginal increase in expected benefit equals the marginal costs of increasing the probability of success (at roughly £90). To some extent, a better result is conditioned on how much Samuel is willing to spend, but as his chances of success get higher, the costs of increasing those chances of success grow steeper, making it irrational to attempt the investment. In short, investment in increasing one’s chances can turn a losing proposition into a reasonable one, although over-investment lowers those chances once more.

A more complex version of this analysis is regularly utilized to explore the question of when it is rational for a prospective litigant to sue to secure a right or remedy a wrong. Typically, this analysis involves multiple outcomes where the probable benefit exceeds the probable costs at some level and is two-sided, involving assessments of outcomes by the plaintiff based upon strategic interactions with a defendant. For purposes of this chapter, the multiple outcome or multi-party analysis is unnecessary and unduly cumbersome to add. Altogether, the concepts presented are all we need to unravel issues pertaining to the effects of procedure on the encouragement of novel enclosure legislation by parliament.

The components of the analysis and its results

The analysis outlined provides a model for understanding how parliament’s procedures and fee structures were a factor encouraging novel attempts to lower the assent standard on enclosure bills. At the same time, it sheds light on perhaps a more arcane part of the history of parliament — why particular classes of business settled in one or the other house. In the early eighteenth century, suitors for enclosure bills had a choice in where they introduced legislation. Bills could be originated in the “democratic” House of Commons or the “aristocratic” House of Lords, as suitors saw fit. Over the course of the century, though, this business came to be housed almost entirely in the Commons. As chart 5 illustrates, for the first thirty years of the eighteenth century, the enclosure business parliament entertained was almost entirely initiated in the House of Lords. Prior to the 1719-20 session, this business was very sparse, with only two clearly identifiable enclosure bills having been brought into parliament, one to enclose Ropley Commons in 1704 and another to

120 It is also useful for determining whether and when in the process settlement is likely.
enclose common grounds at Throckmorton in 1710. The 1719-20 session marked the opening of a small, but steady stream of business, two enclosure bills being introduced in that year, one for the enclosure of Balstonbury Common in Somerset and the other for the enclosure of Gratwood Heath in Eccleshall, Staffordshire. Until 1730, however, the flow of legislation issued almost completely out of the Lords. Over the following decade, a trickle of enclosure business emerged out of the Commons, but not so much as to seriously compete with the Lord’s dominance. This trickle of business in the Commons grew to a steady stream in the 1740s, during which time the enclosure business introduced into the Lords all but dried up. After 1750, the enclosure business in the Commons rose to a torrent, with the Lords’s contribution to that enclosure business for the most part limited to operation as a second, occasionally amending, house.

The factors behind for this shift in the locus of business between the Lords and the Commons have not been adequately accounted for. Sheila Lambert, probably the principal authority on this type of legislative business, has confessed to being at a loss to provide a satisfying explanation. As a tentative account, she points to increasing insistence by the Commons on the right to initiate various sorts of private business “imposing a burden on the subject” at mid-century and after. However, as Lambert further rightly concludes, “if enclosure bills were not to begin in the Lords because they

121 Private acts, 6 Geo. 1, c.5 and 6 Geo. 1, c.7, respectively.
included an element of taxation, the petitions for the bills should have been committed in the Commons, but that practice was dropped just at the time that the Commons began to claim the right to initiate.” Moreover, both the timing and expected effects of the alleged insistence are off. The evidenced demands of the Commons to initiate various categories of private business — for example, the rejection of a bill for redrawing parish boundaries on grounds that they should first be proposed in the Commons — did not come until after the enclosure business of parliament was being regularly brought into the Commons. And, had the Commons put its foot down to safeguard an existing authority over the origination of enclosure business, there would have been no slow dwindling of business initiated in the Lords to an occasional trickle, but a sudden and immediate stoppering of that business at its source. Thus, when in 1767 and again in 1774 the Commons rejected an enclosure bill originated in the Lords, reintroducing a fresh measure into the Commons, it was not admonishing the Lords for violating an age-old institutional requirement. Rather, it was putting an institutional stamp on an informally established practice.

How, then, did this practice of originating enclosures in the Commons develop — why did it change hands out of the Lords? The emigration of enclosure business out of the Lords was not due to


123 A precedent question might be why, until 1730, did the enclosure business of parliament issue almost uniformly out of the Lords? One suggestion has been that the early enclosure business was initiated in the Lords because it was seen as an organic offshoot of the estate business of that house and therefore a part of that overall business for a period of time. See, Lambert, Bills and Acts at 129-30. For several reasons, however, this cannot be right. First off, the Lords never treated enclosure bills in the same manner as estate bills. Although after 1705 the Lords uniformly referred petitions for estate bills to the Judges for a determination of the suitability of legislation, no enclosure bill was similarly referred, except for the solitary case of the 1733 act to amend the Aldham and Boyne enclosure of 1729. See Private act, 6 Geo. 2, c.24 (amending 2 Geo. 2, c.25). Indeed, in 1721, in response to the jump in enclosure initiatives over the prior sessions, the Lords ordered a committee to look into the procedures to be used in oversight of that legislation. Such a move would have been unusual had the Lords considered enclosures to have been a de facto part of its estate business. Second, it is hardly clear that suitors would have seen it that way either. The most closely analogous estate bills and enclosure bills would have been estate bills to partition or exchange lands upon the basis of an agreement among the suitors and enclosure bills to confirm a prior division and enclosure award over open fields. Had this later category of enclosure business been the sole such business presented, then there might have been something to the observation. But a substantial share of enclosure legislation was of a different sort, prospectively authorizing the division and enclosure of open fields, or common fields and wastes, through the determination of a third party. This kind of enclosure legislation had a long history. In fact, what might arguably be the first “enclosure” act on the statute book, that for the partition of Houndslow Heath in Middlesex in 1544, was a bill encouraged by Henry VIII to permit third parties to divide open fields among interested owners and proprietors of the lands there. 37 Hen. 8, c.2. See T. E. Scrutton, Commons and Common Fields at 95 (1887). In addition, of the 39 enclosure initiatives introduced in the eighteenth century up to 1730, 27 were of this type. Only 12 sought to confirm an agreement settling pre-existing divisions among owners and proprietors of the lands involved. Finally, even if enclosure bills shared identifying features
any rule promulgated by either House directing the flow of business. The answer to our question therefore is likely to be found in other features of the enclosure bill process which indirectly affected how suitors promoted legislation. That practice was shaped by the actions of suitors in response to legislative circumstances should not, by now, be a surprising contention.\footnote{\textsuperscript{124}}

with estate bills, this would not have dictated their origination into the Lords. That is, there was no requirement that estate bills be brought into the Lords which might have prompted scrupulous suitors to have initiated legislation there. Estate bills were increasingly originated in the Lords because the expected value of legislation brought there was greater. It was cheaper for the suitor promoting estate business to get the hearing before the judges out of the way first, saving the costs incurred in the event the proposed legislation possessed a mortal, even venal, flaw. One expects that if enclosures were seen as a type of estate bill, \textit{and even if they were not}, the sorts of cost determinations that caused estate suitors to favor the Lords were also made by suitors for enclosure bills. In the case of enclosure bills, a preference for the Lords may have been due to a combination of habit and certainty of promotion in that house. Prior to 1730, only two of the 26 enclosure bills brought into the Lords failed to pass, only once after a second reading — i.e., fees had been paid. This seems to reflect the certainty of suitors that their enclosures would be enacted; moreover, there having been no prosecutions of enclosure bills in the Commons, there might have been some self-reinforcing hesitancy on the part of promoters. Moreover, enclosure bills initiated in the Lords in this period were premised on the same facts as an enclosure decree in Chancery — namely, the consent of all parties affected by the legislation. Together, these considerations likely overcame the downside of an increased initial cost of bringing legislation into the Lords, a situation that persevered at least until suitors began to promote what might have been seen as riskier enclosure schemes where the expected value of legislation would have come out higher if a bill was initiated in the Commons.

One possible reason for the movement of business into the Commons is that for identical bills, the possibility of obtaining legislation was better in there. This does not seem to have been the case however. First, as we have seen, the arrangement of costs and critical points would often have a greater impact on where business was originated than simple differences in expectations of success. Moreover, there are empirical reasons to think that suitors after enclosure acts did not perceive a difference in their chances of success between the two houses, or at least one favorable to the Commons, enactment percentages for the period notwithstanding. Table 1 illustrates the difference in five year enactment percentages for legislation brought into the Lords and Commons between 1720 and 1750. The differences in enactment percentages that were present tended to favor origination of bills in the Lords. Even further, there is justification to conclude that these disparities were not tied to any greater attention to the detail of enclosure bills by one or the other house. Despite that the reports of those committees reveal little of these efforts, often blandly proclaiming that the parties had given their consents to the legislation, studying the minute books of committees on enclosure bills in the House of Lords, Sheila Lambert has found that the committees of the house were diligent inspectors of enclosure bills, often sending solicitors traipsing into the countryside or abroad to obtain the consent of an essential proprietor.

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|c|c|c|}
\hline
\textbf{Lords Initiatives and Acts} & \textbf{Commons Initiatives and Acts} \\
\textbf{Initiatives} & \textbf{Percentage of total} & \textbf{Acts} & \textbf{Enactment percentage} & \textbf{Initiatives} & \textbf{Percentage of total} & \textbf{Acts} & \textbf{Enactment percentage} \\
\hline
1719-1725 & 12 & 1.0000 & 11 & 0.9167 & 0 & 0.0000 & 0 & — \\
1725-1730 & 20 & 0.8000 & 18 & 0.9000 & 5 & 0.2000 & 3 & 0.6000 \\
1731-1735 & 17 & 0.6538 & 15 & 0.8834 & 9 & 0.3462 & 5 & 0.5556 \\
1736-1740 & 14 & 0.6087 & 12 & 0.8571 & 9 & 0.3913 & 7 & 0.7778 \\
1741-1745 & 8 & 0.3636 & 8 & 1.0000 & 14 & 0.6364 & 13 & 0.9286 \\
1746-1750 & 3 & 0.1500 & 2 & 0.6666 & 17 & 0.8500 & 13 & 0.7647 \\
\hline
\end{tabular}
\caption{Enclosure Initiatives and Acts in the Commons and Lords, five year totals, 1720-1750}
\end{table}

On the Commons side, while we lack similar records of the activity of enclosure committees in minute books and records, which burned along with Westminster palace in the autumn of 1834, the Commons Journals often do
The first part of modeling the expected costs of legislation in each house and each house’s tolerance for novel legislation is to distinguish the relevant procedures of each, particularly describing those points at which an application for a bill might be lost. Beginning with the Lords, for the entire period under consideration, its procedure remained unchanged. The procedure of the Lords for dealing with enclosure bills was less complex than its procedure for estate matters, in that the petition for an enclosure bill was not referred to the judges for examination and report, nor was there a hearing before the house to determine if a bill should proceed. Rather, upon presentation, the question of leave to introduce legislation was immediately put to a vote, and typically an order granting leave was entered. Thereafter, it was (usually) presented, read twice and committed. The bill committee would next look to see whether the parties with an interest in the lands to be enclosed had provided their consent, examine whether the premises were true and mark up the bill. The bill would then be reported, ordered engrossed, read for a third time, and passed. Following this, it would be transmitted to the Commons. There it would be read twice and committed as in the Lords. Upon report, the bill would then be read for a third time. If the Commons had made

reveal the efforts taken to investigate the consents of proprietors, for example. Thus, on the Balstonbury commons enclosure bill originated in the Lords in the winter of 1720, the bill committee of the Commons reported that:

. . . it appeared by the Testimony of John Sever, That, about Ten Weeks ago, he was sent to all the Persons supposed to have Right of Common, to give Notice of the intended Bill, to be brought into Parliament, for inclosing the said Common; and to ask their Consent, and particularly those who had now signed the Petition against it; who declared, They would not oppose the Bill; which was confessed at the Committee: And some of the Petitioners, although they had no Right of Common, owned they signed the same for no other Reason, than that they apprehended the Bill would be prejudicial to the Highways; they never having seen the Bill. . . .

19 CJ 328 (4 Apr. 1720). Private act, 6 Geo. 1, c.5 (1720). The petition committee on the failed Watchfield enclosure initiative of 1732 similarly went into the reasons that several proprietors refused to consent to the measure, stating that according to the witnesses for the bill, “The only Reason, those Three or Four Persons gave for not signing the Petition, was, because that they apprehended, they should thereby bring an Expense upon themselves.” 21 CJ 816 (28 Feb. 1732). The committee on the the Nonkeeling enclosure act of 1740 similarly reported that it had delved into the necessity of the act, revealing that the reasons for enclosure were an inability of two proprietors to enter into an enclosure agreement, despite an apparent willingness to proceed — as was so often the case with private bills, legislation was aimed at overcoming an impediment at law. 23 CJ 456-57 (12 Feb. 1740). Private act, 13 Geo. 2, c.16. Overall then, while often terse, these reports (as well as end-of-the-century the statements of later solicitors who had to travel far and wide to obtain the consents of proprietors) reveal a Commons examining enclosure measures with as fine an eye as their counterparts in the Lords. Thus, just as the Lords rode hard on enclosure bills introduced there, carefully examining each to determine if concerned parties — owners and proprietors — had assented to the enclosure, the Commons were similarly unforgiving when it came to establishing the relevant consent, refusing to report bills originated there where inadequate property had boarded up for the enclosure. Rather, as was the case with estate bills, the steady dominance of the Commons over the initiation of enclosure business was due to differences in the manner in which determinative steps and costs were distributed among the stages of the private legislative process for business in each house.
amendments, the bill would be returned to the Lords for their approval. If approved, it would be delivered to the king for his signature.

For enclosure legislation introduced into the Commons, procedure before 1741 was somewhat different. Whereas a motion for leave to introduce a bill was summarily put to a vote in the Lords upon presentation of the petition there, it was determined in the 1729 (1728-29) session in the case of Oxford University’s petition for leave to introduce legislation for the enclosure of the common fields at Wick Rissington, that the petition was to be referred to a committee for an examination of the matters contained within.\textsuperscript{125} Thereafter, through 1740, the procedure for enclosure legislation promoted originally into the Commons included the initial commitment of the petition for the bill. While petition committee reports indicate some confusion among members about its purpose, the petition committee typically made an examination of witnesses to insure that the allegations of the petition were true and make a preliminary determination regarding the adequacy of consent. Once the petition was reported, the bill would follow roughly the same pattern as legislation promoted in the Lords.\textsuperscript{126} It is key to note here, however, that unlike with estate legislation, where a bill originated in the Commons would be referred to the judges upon transmission up, an enclosure initiative originated in the Lords would not be forced to go before the fairly analogous committee on the petition in the Commons. In other words, the parliamentary procedure for enclosure business originated in the Commons before 1741 included a step for committal of petitions not present in the procedure for enclosure business as originated in the Lords.

\textsuperscript{125} 21 CJ 243-44 (28 Feb. 1729). This was an unusual determination, given that enclosure bills did not threaten the imposition of a rate on the subject or a duty on goods, the precondition for committal under the Commons’ standing order of 1717 regarding petitions for certain rate-setting local bills.

\textsuperscript{126} To recap, thereafter, a bill would be presented and read a first time. After a few days, provided fees on the bill were paid, the legislation would receive a second reading and the question for commitment would be put. In committee, the witnesses would attend to evidence, the preamble and the consents on the bill, and the committee would then go through the legislation clause-by-clause, filling up blanks and making changes. Upon receiving an acceptable report from the committee, the question whether a bill would be engrossed would be made by the lower house, and after the engrossment of the bill, the legislation would be put to a third reading. If the bill then passed the house, an order would be made out for transmitting the legislation to the upper house, where the bill would promptly receive a first reading. After the fees in that house were paid, it would receive a second reading and go to committee and upon report usually be ordered to a third reading. If it was read a third time, and no amendments were made, the bill passed and went to the king for his royal assent. If there were amendments, the legislation would be transferred back to the originating house, which usually concurred in the amendments, and the legislation was then submitted to the king.
The next component of our model of the expected costs of legislation is a description of the costs incurred at each stage of the process. There was obviously no standard cost for an enclosure bill. Each had its own peculiarities, resulting in some variety in their costs. It is possible, nonetheless, to estimate broadly the minimum fees and charges that suitors for an enclosure bill would incur. With much less confidence, we can likewise estimate the costs of using a solicitor or agent to oversee the progress of a bill. A couple of points bear mention here, nonetheless. Because they are grounded in fee tables promulgated by the houses and assessments of multiple enclosure bills, our ability to ascertain the minimum fees and charges that could be collected by officers of parliament on an enclosure bill are fairly precise. Information on the costs of using a solicitor or agent to oversee the passage of legislation is not standardized and consequently reveals much more variation. Moreover, for much of the period under consideration, enclosures were prosecuted through parliament at the initiative of a Lord or member who would agree to promote its passage. In this regard, then, it behooves us to construct two models, one relying solely on fees and another using the total cost data. This data is summarized in table 2.

<table>
<thead>
<tr>
<th>Point of loss</th>
<th>Commons</th>
<th>Lords</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Prior fees and costs</td>
<td>Prior total costs</td>
</tr>
<tr>
<td>No report of petition</td>
<td>£2.50</td>
<td>£13.67</td>
</tr>
<tr>
<td>No bill presented</td>
<td>£3.17</td>
<td>£14.33</td>
</tr>
<tr>
<td>No bill report</td>
<td>£45.62</td>
<td>£71.41</td>
</tr>
<tr>
<td>Enactment</td>
<td>£122.05</td>
<td>£156.17</td>
</tr>
<tr>
<td>No report in Commons</td>
<td>£121.6</td>
<td>£151.72</td>
</tr>
</tbody>
</table>

The final bit of information required for our model is the relative chance of failure at each stage of the process. We lack contemporary sources that identify the perceived likelihood of trouble at each step. While notes and practice guides do indicate those points of process where suitors were likely to be tripped up, there is no comparative ordering of those steps. Instead, then, we will use as a

---

127 A table describing the typical costs incurred at each step of the process is provided at www.bepress.com/robert_tennyson.
surrogate the relative proportions of failure drawn from failed enclosure bills. Based on this information, we can discern the relative proportion of bills lost at each stage for a particular period. There are obviously some caveats to this. For one thing, the total number of enclosure applications brought into parliament before the 1750s was small and the number that were lost is still smaller — too small, perhaps, to yield a completely meaningful picture. Second, relative chances may have shifted during the periods under consideration, as some points in the process became more or less important. Using relative proportions masks and distorts any such shifts that may have occurred. Third, because we cannot gauge the “close calls” on enacted bills, we may be missing important parts of the process that suitors believed precarious (and thus for which they made careful preparation), even though few measures were in fact lost at that stage. Finally, it is far from clear that information of lost measures, such as it was, translated neatly to knowledge of trouble spots in the legislative process. Nonetheless, and in spite of these problems, the information on relative proportions provides a known, concrete basis for making operational the relative chance of failure in this setting.

---

128 A table detailing the stages at which enclosure bills were lost in each house between 1715 and 1774 can be found on www.bepress.com/robert_tennyson.
Table 2 summarizes the relevant information about process, costs and relative chances of failure for bills originated in the Commons and the Lords between 1719 and 1740. Based on the information summarized in the table (and represented in the charts), it is possible to model the expected costs of originating an enclosure bill in each house and gather some idea of the tolerance of each to novel measures. Chart 5 compares the expected costs of enclosure bills in the Commons and Lords between 1719 and 1740 assuming suitors only paid the minimum fees and charges assessed under the table of fees promulgated by the houses. Chart 6 compares those expected costs with the supposed professional charges of solicitors, clerks and agents factored in. Both comparisons show that it only made sense to proceed in the Lords when one was confident about his or her chances of success. Suitors who brought bills into the Commons would likely have done so out of a concern that the chances of obtaining an act were not high. The comparisons demonstrate how during this period there would have been a steady mixture of business originating in both houses, as each was welcoming to some prosecutions to which the other was not so amenable. Why, on the models given, does this appear to be the case? For one thing, the use by the Commons of the petition committee, while raising the overall costs of obtaining enclosure bills, made the process very tolerant for suitors who wished to test out novel measures. Further, enclosure bills offered into the Commons generally tended to founder early in the process, relieving suitors of paying increasingly steep costs as legislation progressed. Finally, the huge differential in the fees due in the Commons and Lords to be paid before a second reading clearly made the lower house more attractive. In fees
alone, the costs of getting to a second reading in the Lords were nearly 60 percent more than those of getting to the same place with a prosecution in the Commons — and this after hearings in the petition committee, no less! The models suggest that for the suitor who was uncertain of whether his enclosure bill was politically, factually or legally sufficient to pass, it made more sense to originate legislation in the Commons, where there was an early hearing and the initial fees were comparatively less.

Overall data on enactment percentages for enclosure bills confirms what the models indicate. At 68 percent, the enactment percentage for bills originated into the Commons fell well below the breakpoint at which it became more costly to pursue legislation on either comparison above. In other words, suitors with chancier legislation — such as suitors seeking to deviate from norms regarding consent — were opting to bring their enclosure projects before the lower house. In addition, at 89.23 percent, the enactment percentage for legislation being brought into the Lords fell comfortably near or above the break at which a suitor would have opted to bring legislation into that house, depending on the costs on considers. We can also say something about the proportion of suitors who thought their position to have been better or worse about legislation, based upon these figures. Most suitors must have felt pretty confident of their chances, over 72 percent of suitors having been willing to proceed into the Lords to avoid the additional costs of initiating legislation in the other house. In less than 28 percent of cases was it likely a suitor concluded that the chances of success were sufficiently slim to make proceeding to legislation in the House of Commons worthwhile. Those who required tolerance of novelty were plainly in the minority.

An extension of the comparisons made above can also shed light on why the Commons claimed the lion’s share of enclosure business beginning in the 1740s. In the 1741-42 session, the Commons ceased committing petitions for enclosure bills and instead adopted the Lords’ practice of allowing a motion for leave to introduce a bill to be made immediately following the petition’s reading. It is far from clear why this change occurred. Perhaps it was noted in the Commons that enclosure bills were offered into the Lords as well as the Commons — something impermissible if those bills were aimed at setting a rate. And, were it _de facto_ the case that such bills were not setting rates, there would have been no cause to commit the petitions on their behalf. Such a rationale would have been adequate excuse for the lower house to be rid of a frustrating redundancy, one that no doubt taxed the patience of suitors — who had to pay greater costs overall on legislation — as well as of
many committee members — who had to hear evidence supporting the need of the legislation and the existence of consent twice, once under the standing orders of 1699 for bills which would be enrolled as private acts before the bill committee and again under the resolution of 1717 requiring examination of the same thing on petitions. With the cessation of the practice of committing petitions for enclosure bills, so too went the attendant costs, though some of those costs would have been shifted to the bill committee, in the form of increased fees and costs for additional days spent examining consents. And, while the committee on the petition ceased to be a breakwater for unsuccessful legislation, it remained the case that enclosure bills started in the Commons typically failed in the house before bill commitment.

<table>
<thead>
<tr>
<th>Point of loss</th>
<th>Prior fees and costs</th>
<th>Prior total costs</th>
<th>Relative chances of failure</th>
</tr>
</thead>
<tbody>
<tr>
<td>Petition rejected</td>
<td>£0</td>
<td>£5.17</td>
<td>0.037</td>
</tr>
<tr>
<td>No bill presented</td>
<td>£0.33</td>
<td>£5.5</td>
<td>0.683</td>
</tr>
<tr>
<td>Second reading negatived</td>
<td>£12.06</td>
<td>£23.35</td>
<td>0.006</td>
</tr>
<tr>
<td>No second reading</td>
<td>£12.06</td>
<td>£23.35</td>
<td>0.134</td>
</tr>
<tr>
<td>Negative to commit bill</td>
<td>£40.06</td>
<td>£53.35</td>
<td>0.018</td>
</tr>
<tr>
<td>No bill reported</td>
<td>£42.79</td>
<td>£62.91</td>
<td>0.091</td>
</tr>
<tr>
<td>Engrossment negatived</td>
<td>£43.12</td>
<td>£63.24</td>
<td>0.018</td>
</tr>
<tr>
<td>Negative at third reading</td>
<td>£55.62</td>
<td>£78.07</td>
<td>0.006</td>
</tr>
<tr>
<td>No report of bill in the Lords</td>
<td>£119.22</td>
<td>£147.67</td>
<td>0.006</td>
</tr>
</tbody>
</table>
Using the data from fee tables and of the stages at which enclosure bills were lost in the Commons, we can again summarize the relative chances for bills originated there. Table 3 does this. In addition, from this information, it is possible to compare the expected costs of originating enclosure business in the Commons against doing so in the Lords; these comparisons are made in charts 7 and 8. As they make apparent, at any level of success, it was cheaper to proceed in the Commons than it was to originate legislation in the Lords. Why was this so? In the first place, doing away with the
petition committee dropped the overall costs of originating business in the Commons to below that of proceeding in the Lords. Because most losses occurred at or before committal of the bill in each house, the comparative costs of getting to the committee also explain why the Commons dominated enclosure business. After 1741, failure in the Commons at the committee stage meant losing around £52; a loss at the same point in the Lords stayed around £100. And so, prosecutions of enclosure bills in the Lords fell away, as suitors became increasingly aware of the savings to be had for promoting business in the Commons, even when expectations of success were great. Further, as time passed and bills were only sporadically introduced into the Lords, reliable information regarding overall and relative expectations of success decreased. This raised the expected costs of proceeding in the upper house still further. It additionally reduced the number of attempts ventured there in a vicious cycle. Eventually, the enclosure business of the House of Lords was a footnote to the regular process, one which was deleted when in 1774. Then, the Commons decided to put a procedural imprimatur on actual practice, requiring the last enclosure bill introduced into the Lords to be reinitiated in the Commons. By that time, the practice of the past thirty years weighed against their being brought anywhere else.

*The parliamentary agent*

We have seen that prior to 1741, the procedural hurdle of the petition committee was a factor in encouraging challenges to the uniform assent standard. The committee rendered the process of obtaining enclosure legislation tolerant of novel attempts. Suitors were given the choice between a certain payoff to holdouts and a small additional payout for the chance to avoid accommodating those holdouts. Many opted for the later alternative. But, after 1741, the Commons ceased to refer petitions for enclosure bills to a committee. The formal opportunity to challenge the existing assent standard prior to incurring legislative costs was lost. Meanwhile, though, suitors continued to push against assent standards, driving them down by nearly 10 percent over the decade. And, as charts 7 and 8 indicate, if anything, process in the Commons grew even more tolerant of novel enclosure bills. How did this happen once the ‘try-out’ opportunity of the petition committee was gone?

One factor, it seems, was simple inertia. Committees in parliament were visibly open to reporting bills with ever-lower numbers of assenting signatures in the name of “innovation.” Hence, repeat and well-attuned players would know this and therefore had reason to suspect that the downward trend in assent percentages would generally continue. These lords and owners would have revised
upwards their subjective probabilities of success accordingly. But a larger factor in continued suitor challenges to the assent standard was the increased use of professional parliamentary agents to oversee the progress of bills. One agent, Robert Harper, expanded his parliamentary business from estate matters to enclosure bills in the late 1730s and 1740s. For two decades, Harper advised clients on anywhere from one-third to over half of the enclosure bills prosecuted in a session. By the time Harper began to reduce his practice in the 1750s, other parliamentary agents were beginning to fill the breach.129

The parliamentary agent was the functional and professional successor to the private solicitor, retained clerk in parliament and parliamentary barrister. In their respective works, O. C. Williams and Sheila Lambert have identified evidence of private solicitors with an occasional practice before Parliament by the middle of the seventeenth century. But, for the most part, it was unnecessary for this practice to be anything other than an offshoot of a solicitor’s general practice.130 In addition, by the late seventeenth century, there was a growth in the number and function of clerks operating in parliament, each of whom seems to have carried on some agency business on behalf of suitors, or — more often it seems — members of the parliamentary bar.131 But at none of these points did the solicitor or retained clerk operate as anything other than an actor at the periphery of the prosecution of private business. Across all categories, members were at the center of the legislative process, ensuring that all relevant steps were followed and aggressively working the levers of the process on behalf of clients and constituents.

As regards estate bills, the appearance of specialized practitioners was heralded by the Lords’ standing orders of 1705/06. These orders effectively dovetailed estate legislation into the common law by directing all estate petitions and draft bills to two of the common law judges to review. The need to have an experienced practitioner who knew exactly what the judges were looking for in estate petitions and bills and who could coordinate the actions of local solicitors in obtaining consents; insure the presence of witnesses; draft reports for the judges to the Lords reflecting their opinions; and competently argue on behalf of clients — all without the distraction of outside legal or legislative business — created a niche that was soon filled by barristers who possessed substantial

129 Lambert, Bills and Acts, supra note 122, at 198-225.
130 O. C. Williams, Clerical Organization at 185-189; Lambert, Bills and Acts, supra note 122, at 13-14.
experience in conveyances and friends in the legislature. This niche was at least filled by 1722, when Robert Harper began his practice as a parliamentary agent.

Before the second quarter of the century, though, the need for a specialist to oversee the promotion of enclosure or other local business in the Commons was slight. A measure was usually entrusted to a member of parliament from or representing the locality or interest who would oversee its progress himself. The only reason for resort to the solicitor or the clerk (outside the usual compass of his parliamentary duties) would have been to draw up a bill or petition, to keep an eye out for the introduction of opposing business and to inspect copies of a bill for mistakes before introduction. In the early years, it is probable that some of the business in communications bills was handled by clerks with business in the Commons, including private clerks, such as Zachary Hamlyn, private clerk to Paul Jodrell, clerk of the House in the early eighteenth century. As pointed out by Lambert, Hamlyn was advising clients on a number of river navigation measures by the early 1720s. But, these demands appear to have been slight enough that members could continue to oversee the progress of bills. The records of the Portsmouth and Sheetbridge turnpike reveal resort to members to guide legislation through parliament until mid-century. But as the century wore on, the incentives for obtaining a professional agent grew as committee hearings and reports became increasingly complex. The demands of consultation between the center and the community steadily rose alongside an increase in overall parliamentary oversight of private bills. Moreover, parliament progressively required suitors for bills to produce more and better witnesses to testify on their behalf. Maintaining these consultative ties and coordinating the appearance of necessary witnesses was simply beyond the particular competence of the parliamentary barrister. As a result, the parliamentary bar began to release the controls of the private legislative machine, as a professional class of parliamentary agents — individuals who from the center began to organize all aspects of the prosecution of business — took over. Certainly by mid-century, if Lambert is correct, outside agency became the norm.

The employment of professional agents to oversee business before parliament meant that each aspect of the bill process could be attended to with increased diligence. The agent would have experience in drawing up the petition to be given to a member of parliament for presentation, based either upon the promoters' express wishes or upon an already drafted bill. More so than an ordinary solicitor, whose information on the operation of parliament might be second hand, coming more
from copies of the *Votes* or information gleaned while looking after business in the law courts, an agent would have advanced knowledge of when parliament would sit and adjourn, be aware of which members were regular attendees at committees, and have a good rapport with the clerks who would draw orders, sit at committees and the like. Thus, an agent could better insure that each reading of the bill would occur on time, drawing up the breviate of a bill and making certain it was in the hands of the member who would present a bill. He would also be better placed to coordinate a committee meeting, not through mere reliance on attendance by members, but by, for example, sending letters on gilt stationary to members of the committee imploring them to appear on the scheduled day. Retention of experienced agents therefore increased the chances of a private measure’s passage. Their employment also permitted suitors to learn early in the process if bills were doomed to failure. In terms of the expected value model, parliamentary agents raised the probability of enactment through their efforts. Suitors would have employed them because the marginal expected gain from employing them surpassed the marginal costs of their hire.

The parliamentary agent, therefore, made it possible for suitors to challenge the assent standard in three ways. First, the agent increased the enactment chances of bills through their detailed knowledge of the process and the legislators who formally prosecuted legislation. Also, they served a vital coordination function as the process became more complex. Second, the parliamentary agent allowed suitors early insight into deficiencies in a prosecution or opposition to an enclosure. The former was a function of their knowledge of member’s opinions about the prevailing rules and norms governing parliamentary enclosures. Regarding the later, by exercising their informal legislative contacts among both members and clerks, agents were made aware early of any potential opposition. After 1741, nearly 70 percent of all failed enclosure prosecutions were lost before any bill was presented. A factor in this was no doubt the superior ability of parliamentary agents to ferret out information about members who had irresolvable problems with bills. Finally, parliamentary agents through their practice were able to transform the general mass of parliamentary opinion into a set of established norms of prosecution. Like any legal practitioner, this permitted the parliamentary agent to act as a screen to prosecutions. Agents could, based upon their experience in this aspect of the *lex parliamentia*, tell their clients whether a prosecution was likely to

---

132 An example from much later in the century, see the fee chart of parliamentary agent Edward Barwell on the Buckingham Parish Church Bill of 1777, Huntington Library, Stowe Collection, Granville papers, manorial and local, STG M&L Box 8(16) (May 4, 1777).
succeed. They could also inform them how to remedy defects in a prosecution for a subsequent year. It is likely that the settling of the assent standard took place here more than anywhere else, as agents informed their clients not to attempt legislation if they could not reach an 80 percent margin.\footnote{See generally Lambert, \textit{Bills and Acts}, supra note 122, at 136-38.}

\textbf{Conclusion}

Three propositions about the enclosure have been argued in this article. The first is that as early as the seventeenth century, commissioners were necessary for many kinds of enclosure to occur. Enclosure might be a net social gain, but without the introduction of a controlled uncertainty into the process, those who stood to lose would be reluctant to enclose. Second, an important factor in the parliamentary enclosure movement of the late eighteenth and nineteenth centuries was to be found on the “supply side” of the legislative process. The dilution of the assent standard for enclosures reduced the costs of obtaining the needed assent for a parliamentary enclosure, increasing its availability in English villages. Lastly, the dilution of the assent standard was made possible by the alignment of parliamentary procedures and fees in the first instance and later by use of parliamentary agents. In the former case, the arrangement of these procedures and fees made the process for bills introduced into the Commons relatively tolerant of challenges to the existing standard. These challenges over time eroded support for a unanimous consent standard in a parliament increasingly supportive of “innovation” in trade and agriculture. In the later case, the employment of parliamentary agents increased overall probabilities of success for enclosure bills, increasing the expected gain from challenges.

As the enclosure example shows, procedure and practice are a factor in making legal change possible. Tolerant institutions that allow for the resolution of matters early in the process and at low cost encourage novel claims. Those intolerant institutions that place the final adjudication of matters at the end of an expensive process are unlikely to see as much flourishing in legal claims. To the extent that extant court systems are intolerant to novelty, that they regularly permit cases to dither unresolved, law grows out of touch with the milieu in which it is situated. Novel legal claims are necessary to the efficient and effective functioning of law in an ever-changing social and cultural environment. Tolerance, of course, has its own trade-offs; the earlier a case is decided, the greater the likelihood of factual error in its results. Where the line is to be drawn in procedure between
error and relevance is a difficult one, perhaps appropriately drawn by parliament in the eighteenth century. But it remains an open question in other, more contemporary settings.