ARTICLE

DISCRETIONARY JUSTICE: THE RIGHT TO PETITION AND THE MAKING OF FEDERAL PRIVATE LEGISLATION

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Over the course of the late eighteenth, nineteenth, and early twentieth centuries, Congress received tens of thousands of petitions seeking payment of private claims against the government and its officers. In response, legislators enacted thousands of private laws for the benefit of individual citizens and corporations. In some Congresses, private laws accounted for more than eighty percent of all laws enacted. This Article offers the first comprehensive analysis of this important, but largely forgotten, practice.

Through its historical framework, the Article addresses a set of interrelated concerns familiar to all liberal governments: to what degree should statutory law permit the exercise of discretion and, to the extent that such discretion exists, to whom shall the authority for exercising it be entrusted? On the one hand, discretion is inimical to the rule of law because it threatens to subordinate the law's commands to the venal whims of officeholders. On the other hand, discretion is an indispensable tool for rounding out the law's hard edges to ensure just outcomes in individual cases. While this tension is familiar, the mechanism that

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early federal legislators adopted to deal with it is not. For much of our national history, federal private legislation—that is, congressional enactments for the benefit of private individuals—operated as the primary mechanism for dispensing discretionary justice.

Our contemporary understanding of statutory lawmaking, by contrast, envisions a process fundamentally concerned with the promulgation of general rules reflecting public norms. As this Article aims to show, this understanding does not capture some inherent aspect of legislation, but rather is the product of a historical process that began with a far different conception of the purpose of legislative bodies. Indeed, for much of the eighteenth and nineteenth centuries, local and national legislatures devoted a significant amount (if not most) of their time to functions that appear to modern eyes as judicial or administrative in nature: granting pensions, resolving boundary disputes, and settling tort and contract claims against the government. Through a qualitative analysis of the many thousands of petitions submitted to Congress during its early history, this Article seeks to better understand the gradual evolution of our modern conception of legislation. Among its central insights is that private lawmaking, while hardly efficient, contributed significantly to the development of public administrative law and the articulation of broader legal norms. It did so, in part, by helping spawn a larger interbranch dialogue about how best to serve democratic principles, on the one hand, while delivering justice to deserving individual claimants on the other.

I. Introduction

Public laws are blunt instruments. By design, they aspire to regulate a broad array of conduct in a manner that promotes efficient administration while maintaining fidelity to democratic norms. If a legislature is to realize these aims, it must engage in a certain degree of line drawing that favors uniformity of treatment over individualized determinations. To do otherwise would risk introducing capriciousness into a system of governance that ostensibly exists to further the public good. John Locke captured this principle well in *The Second Treatise on Civil Government*, in which he cautioned that the first duty of legislators is to "govern by promulgated established laws, not to be varied in particular cases."[1] Even if every hardship produced by public laws could be anticipated and every contingency planned for, it would be imprudent to do so. For, to act justly, a legislature must adhere to the basic principle that all citizens deserve equality of treatment under the law.

Our conception of justice, however, cannot be so easily divorced from the particular circumstances in which the law operates. A rigid application of general rules, without regard to the character or circumstances of the individual transgressor, threatens to promote injustice rather than alleviate it. For this reason, philosophers have long understood that legal justice and moral justice are not synonymous. One who lacks a claim to the former, or who forfeits it through mistake or ignorance, is not automatically barred from asserting a claim to the latter. As Aristotle argued in his *Rhetoric*:

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[1] John Locke, *The Second Treatise on Civil Government*, *in* The Second Treatise on Civil Government and A Letter Concerning Toleration 3, 71 (J.W. Gough ed., Basil Blackwell Oxford 1948) (1690).

> Equity bids us be merciful to the weakness of human nature; to think less about the laws than about the man who framed them, and less about what he said than about what he meant; not to consider the actions of the accused so much as his choice, nor this or that detail so much as the whole story; to ask not what a man is now but what he has always or for the most part been.[2]

Accordingly, the law's interpreters must be permitted some degree of discretion to deviate from the written law, or to supplement it, if society is to approach the ideal of true justice.

Equity in its broadest sense, then, is the power to dispense with the technical rigidity of the written law in particular cases where conscience dictates. Today when we speak of "equity" or "equitable discretion" we ordinarily do so in one of three narrow ways, all of which stress the primacy of judges (as opposed to legislators or administrators) in our legal system. The first is in the context of judges deciding disputes between individual private litigants. Fraud and duress, for instance, are two familiar equitable defenses courts have permitted to invalidate contracts founded on unfair bargains.[3] Likewise, specific performance is an equitable remedy only available to those whose conduct conforms to moral principles.[4] The second familiar notion of equity involves judge-made law in private class action or mass torts litigation. In mass torts, for instance, courts have sometimes invoked their equitable powers to relax traditional causation requirements, both to ensure worthy plaintiffs are adequately compensated for their injuries, and to properly incentivize those best able to bear the costs of preventing future accidents.[5] In this way, equity acts as a gap-filler to which courts look when addressing novel legal situations. Third, equity is frequently discussed as a contested aspect of judicial power in public law litigation.[6] Here, as is also true in the mass torts context, equity is conceived of as an appropriate judicial response to legislative or regulatory failure.[7] The inability or unwilling-

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[2] 2 ARISTOTLE, *Rhetoric*, *in* THE COMPLETE WORKS OF ARISTOTLE 2152, 2189 (Jonathan Barnes ed., Princeton Univ. Press 1984) (c. 350 B.C.E.).

[3] *See, e.g.*, Robert M. Summers, *General Equitable Principles Under Section 1-103 of the Uniform Commercial Code*, 72 NW. U. L. REV. 906, 914 (1978).

[4] *See, e.g.*, Emily L. Sherwin, *Law and Equity in Contract Enforcement*, 50 MD. L. REV. 253, 253–54 (1991).

[5] *See, e.g.*, Jack B. Weinstein & Eileen B. Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U. ILL. L. REV. 269, 274–75 (1991).

[6] *See, e.g.*, PETER C. HOFFER, THE LAW'S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA 85–106 (1990); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1292–96 (1976); Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350, 373–74 (2011); William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 635 (1982); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Litigation Succeeds*, 117 HARV. L. REV. 1015, 1062 (2004); John Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CALIF. L. REV. 1121, 1121–22 (1996).

[7] *See, e.g.*, Ewing & Kysar, *supra* note 6 (arguing that courts should forbear deciding controversial climate change lawsuits on procedural grounds as a means of encouraging legis-

ness of governmental bodies to tackle complex or politically contentious problems prods judges into filling the void, which they do by issuing declaratory judgments or injunctions. For proponents of such broad remedial powers, equity vindicates important statutory and constitutional rights;[8] to its opponents, equity thus conceived is an affront to the democratic process and a transgression of fundamental constitutional norms.[9]

The purpose of this Article is to reorient our understanding of the role of equitable discretion in American law by highlighting a historical practice long forgotten: the enactment of private legislation by Congress for the benefit of specific individuals. Until relatively recently, Congress, with the assistance of executive agencies, routinely engaged in the type of equitable balancing we ordinarily envision as exclusively administrative or judicial in character. It did so by receiving and adjudicating tens of thousands of private claims petitions seeking the benefit of, or relief from, general legislation.

This Article does not mean to suggest that Congress borrowed from the specific procedures or doctrines of eighteenth-century equity law. Rather, its contention is that Congress exercised its private bill making power in a fashion similar to that of a traditional (i.e., medieval) high court of equity. Congress possessed, and frequently acted upon, the power to dispense extraordinary relief based on equitable principles. In reviewing private claims, Congress was the sole instrument for redressing the grievances of petitioners who lacked a valid legal claim. For many decades, this discretionary power over equitable claims was thought to be so integral to Congress's institutional character that efforts to transfer the administration of private claims to other branches were routinely defeated.

Raw statistics bear witness to the remarkable impact of private legislation on Congress's total legislative output. Of the more than 94,000 laws enacted by Congress during its lifetime, nearly half have been private laws.[10] The 1st Congress (1789–91) received over 600 petitions,[11] but passed just

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latures and executive agencies to solve pressing collective action problems); Fletcher, *supra* note 6, at 637 (arguing that remedial discretion is legitimate where "the political bodies that should ordinarily exercise such discretion are seriously and chronically in default"); Sabel & Simon, *supra* note 6, at 1062 (describing the "prima facie case for public law destabilization" as consisting of "two elements: failure to meet standards and political blockage").

[8] *See, e.g.*, OWEN M. FISS & DOUG RENDLEMAN, INJUNCTIONS 528 (2d ed. 1984) (arguing that the purpose of structural injunctions is "to safeguard constitutional values from the threats posed by bureaucratic organizations").

[9] GARY L. MCDOWELL, EQUITY AND THE CONSTITUTION 11 (1982) ("The Court, under the guise of its 'historic equitable remedial powers,' has been endeavoring to formulate public policies for which it lacks not only the institutional capacity but, more important, the constitutional legitimacy."); Gene R. Shreve, *Federal Injunctions and the Public Interest*, 51 GEO. WASH. L. REV. 382, 382–83 (1983) (labeling as "misguided" efforts to eliminate traditional limitations on the exercise of equitable power).

[10] A HISTORY OF THE COMMITTEE ON THE JUDICIARY, 1813–2006, H.R. DOC. NO. 109-153, at 143 n.1 (2007) ("[B]etween 1789 and 2006, Congress enacted a total of 94,120 laws. Of these, 45,937—49 percent—have been private laws.").

[11] 8 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA: PETITION HISTORIES AND NONLEGISLATIVE OFFICIAL DOCUMENTS, at xi (Kenneth R. Bowling et al. eds., 1998) [hereinafter DHFFC].

ten private laws; the 59th Congress (1905–06), by contrast, enacted 6,249, a number that dwarfs the 775 public bills passed during that same term.[12] Since then, the number of private enactments has gradually declined. Today Congress passes few private laws.[13]

Despite the practice's contemporary obsolescence, the history of private legislation has much to teach us about the development of American legal institutions and their administration. Even a partial list of the kinds of private laws frequently enacted by Congress throughout its history reveals an astonishing breadth of subject matter. That list includes: pensions and disability payments for military veterans,[14] damage awards for torts committed by public officials,[15] compensation for government takings,[16] satisfaction of debts incurred through public contracts,[17] indemnification agreements with federal officials,[18] salary adjustments for government employees,[19] ransom payments for Americans kidnapped abroad,[20] extensions of the franking privilege,[21] discharges from federal imprisonment,[22] immigration relief and naturalization requests,[23] tax rebates and tariff reductions,[24] bankruptcy relief,[25] public land sales and boundary dispute settlements,[26] remunerations

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[12] A HISTORY OF THE COMMITTEE ON THE JUDICIARY, *supra* note 10, at 143; 7 CLARENCE CANNON, CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 1028 (1921).

[13] The 113th Congress (2013–15) enacted none. The 112th Congress enacted only one private law. *See* An Act for the Relief of Sopuruchi Chukwueke, Priv. L. No. 112-1 (2012).

[14] *See*, *e.g.*, An Act for the relief of disabled soldiers and seamen lately in the service of the United States, and of certain other persons, ch. 44, 6 Stat. 3 (1790).

[15] *See*, *e.g.*, An Act to compensate the corporation of trustees of the public grammar school and academy of Wilmington, in the state of Delaware, for the occupation of, and damages done to, the said school, during the late war, ch. 21, 6 Stat. 8 (1792).

[16] *See*, *e.g.*, An Act to authorize the Secretary for the Department of War to exchange Lands, with the Ursuline Nuns, of the City of New Orleans, ch. 61, 6 Stat. 107 (1812).

[17] *See*, *e.g.*, An Act concerning the Claim of John Brown Cutting against the United States, ch. 44, 6 Stat. 10 (1792).

[18] *See*, *e.g.*, An Act to indemnify the Estate of the late Major General Nathaniel Green, for a certain bond entered into by him during the late war, ch. 26, 6 Stat. 9 (1792).

[19] *See*, *e.g.*, An Act directing the payment of a detachment of militia, for services performed in the year one thousand seven hundred and ninety-four, under Major James Ore, ch. 41, 6 Stat. 34 (1798).

[20] *See*, *e.g.*, An Act to authorize the adjustment and payment at the treasury, of the expenses of George Smith and John Robertson, for their ransom from captivity at Algiers, ch. 21, 6 Stat. 29 (1797).

[21] *See*, *e.g.*, An Act to extend the privilege of franking letters and packages to Martha Washington, ch. 18, 6 Stat. 40 (1800).

[22] *See, e.g.*, An Act to discharge Robert Sturgeon from his imprisonment, ch. 20, 6 Stat. 40 (1800).

[23] *See*, *e.g.*, An Act for the relief of Antonio Andrea Chitato, Priv. L. No. 84-491, 70 Stat. A3 (1956).

[24] *See*, *e.g.*, An Act for the relief of Thomas Jenkins and Company, ch. 20, 6 Stat. 2 (1790).

[25] *See, e.g.*, An Act for the relief of Joshua Harvey, and others, ch. 38, 6 Stat. 50 (1803).

[26] *See*, *e.g.*, An Act for ascertaining the bounds of a tract of land purchased by John Cleves Symmes, ch. 19, 6 Stat. 7 (1792).

for prize captures,[27] patent issues and extensions,[28] acts incorporating municipalities and charities,[29] vessel registrations,[30] payments to congressional witnesses,[31] gratuities for extraordinary government services,[32] and grants of rights of way to steamboats and railroads.[33] Of course, Congress never maintained a total monopoly on adjudicating petitions arising under any of these subject areas. Instead, it functioned in ways similar to a traditional high court of equity by reserving to itself discretion over the "hard" cases and providing claimants with an alternative forum for seeking redress wherever prevailing law afforded an inadequate remedy. Despite the obvious administrative burdens of this regime, Congress continually resisted delegating claims adjudication to executive agencies and courts. It instead experimented with alternative arrangements that sought to involve the executive and judicial branches without surrendering Congress's prerogative to dispense with claims as it saw fit. Only through a series of landmark procedural reforms undertaken during the nineteenth and twentieth centuries did Congress gradually relinquish its discretionary power over the disposition of private claims.[34]

The existence of congressional adjudication of private claims is significant because it draws into question basic assumptions about our constitutional order. A multimember deliberative body like Congress seems poorly equipped to carefully weigh the respective merits of individual claims. One is naturally inclined to suspect that such a process would lead to arbitrary and inefficient decision making. And private legislation appears to present the perfect opportunity for the type of rent-seeking behavior that the Framers

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[27] *See, e.g.*, An Act for the relief of the captors of the Moorish armed ships Meshouda and Mirboha, ch. 30, 6 Stat. 54 (1804).

[28] *See*, *e.g.*, An Act to extend certain privileges as therein mentioned to Anthony Boucherie, ch. 6, 6 Stat. 70 (1808).

[29] *See*, *e.g.*, An Act to incorporate the Directors of the Columbian Library Company, ch. 10, 6 Stat. 51 (1804).

[30] *See*, *e.g.*, An Act to authorize the issuing of a register for the brig Gulnare, ch. 42, 6 Stat. 831 (1842).

[31] *See, e.g.*, An Act making provision for the compensation of witnesses who attended the trial of the impeachment of Samuel Chase, ch. 34, 6 Stat. 61 (1806).

[32] *See*, *e.g.*, An Act to allow the Baron de Glaubeck the pay of a Captain in the Army of the United States, ch. 26, 6 Stat. 1 (1789).

[33] *See*, *e.g.*, An Act Granting the Right of Way to the St. Louis and Iron Mountain Railroad Company, and for Other Purposes, ch. 68, 10 Stat. 754 (1853).

[34] Some of the more important statutory reforms, which are discussed in Parts IV and VI *infra* include: the act establishing the Court of Claims, whose jurisdiction was initially limited to suits against the government arising in contract, *see* Act of February 24, 1855, ch. 122, 10 Stat. 612; the Tucker Act, which expanded the Court of Claims's jurisdiction to include admiralty, tax, pay, and takings cases, *see* Act of March 3, 1877, ch. 359, 24 Stat. 505 (codified at 28 U.S.C. § 1491 (2012)); the Federal Tort Claims Act, which did the same for suits in tort, *see* Act of June 25, 1948, ch. 646, Title IV, 62 Stat. 982 (codified at 28 U.S.C.A. § 1346(b) (West 2013)); and the Administrative Procedure Act, which provided considerable discretion to administrative agencies and formalized courts' power to review agency determinations, *see* Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified in scattered sections of 5 U.S.C. (2012)).

consciously sought to avoid.[35] Congressional adjudication of private claims against the public fisc is also antithetical to the fundamental constitutional maxim, often repeated by the Framers, that no one should act as a judge in his own cause.[36] Sensitive to this admonition, separation of powers doctrine embraces the proposition that Congress is authorized to enact general laws only, leaving the task of applying and interpreting those laws to executive agencies and judges respectively.[37] The Due Process and Equal Protection Clauses add further weight to the idea of private legislation as an unconstitutional anomaly.[38]

All of these concerns have merit; indeed, all of them were articulated at one time or another by prominent voices both within and outside of Congress who argued for the abolition of private legislation.[39] From its very inception, Congress's equity power as exercised through private claims adjudication proved controversial.[40] Nevertheless, it would be a mistake for

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[35] Jeffrey Rosen, *Class Legislation, Public Choice, and the Structural Constitution*, 21 HARV. J.L. & PUB. POL'Y 181, 181 (1997) ("[R]egulations that benefit private interests are ultra vires and unconstitutional. This suspicion of economic 'class legislation' was of such pressing concern to the Framers and ratifiers of the original Constitution and the Civil War amendments that it is reflected throughout the text . . . .").

[36] THE FEDERALIST NO. 10, at 42 (James Madison) (Terrence Ball ed., 2003) ("No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men, are unfit to be both judges and parties, at the same time . . . .").

[37] *See, e.g.*, 2 AM. JUR. 2D *Administrative Law* § 59 (2016) ("The doctrine of separation of powers declares that governmental powers are divided among the three separate and independent branches of government and broadly operates to distribute the power to make law to the legislature, the power to execute law to the executive, and the power to interpret law to the judiciary.").

[38] U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1; *see, e.g.*, Donald Marritz, *Making Equality Matter (Again): The Prohibition Against Special Laws in the Pennsylvania Constitution*, 3 WIDENER J. PUB. L. 161, 171 (1993) ("The [Supreme] Court has not given adequate recognition or protection to equality commensurate with equality's status as an explicit federal constitutional right."); Note, *Private Bills in Congress*, 79 HARV. L. REV. 1684, 1684 (1966) ("A private law is an anomaly. . . . [I]t lacks the generality of application normally thought to be an aspect of legislation. Such generality . . . is thought to help ensure that the law applies equally to all and that no account is specifically taken of the particular individuals to be affected.").

[39] *See, e.g.*, *Diary Entry (Feb. 23, 1832)*, *in* 8 MEMOIRS OF JOHN QUINCY ADAMS 480 (1876) ("There ought to be no private business before Congress. There is a great defect in our institutions by the want of a Court of Exchequer or Chamber of Accounts. It is judicial business, and legislative assemblies ought to have nothing to do with it. One-half of the time of Congress is consumed by it, and there is no common rule of justice for any two of the cases decided. A deliberative assembly is the worst of all tribunals for the administration of justice."); President Abraham Lincoln, *First Annual Message (Dec. 3, 1861)*, *in* 6 RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1907 51 (1908) ("It is as much the duty of Government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals."); Sen. George Sutherland, *Necessity of Greater Care in Making Laws*, INDEPENDENT, Mar. 25, 1909, at 635 ("It would, of course, be impossible to abolish all private legislation, but it would be entirely feasible to get rid of the greater portion by devolving upon some tribunal . . . the authority finally to pass upon such matters under some general law . . . .").

[40] *See Lloyd's Notes, 4 May 1789*, *in* 10 DHFFC, *supra* note 11, at 392 (statement of Rep. James Jackson) (expressing opposition to motion to receive petition of Andrew Newell and

scholars to dismiss the practice as some quaint relic of an underdeveloped political system existing at the margins of American constitutionalism. For all its shortcomings, legislative equity featured prominently in the development of public administrative law and the articulation of legal norms. It also formed part of a broader interbranch dialogue about how best to balance democratic priorities, on the one hand, with a basic moral commitment to provide justice for deserving individual claimants on the other.

Moreover, on further inspection many of our intuitions about private legislation turn out to be wrong. As a general rule, claims adjudication was neither capricious nor corrupt. Through highly routinized procedures for processing claims, Congress sought to strike a proper balance between claimants' equitable interests and the need for sound administration of the public laws. While those procedures differed in some important ways from those of courts, the substantive standards used to decide the merits of private claims were closely aligned with prevailing notions of law. Written opinions guided by precedent and informed by administrative fact-finding gave congressional equity a predictable and relatively transparent character. That is not to say congressional involvement in claims administration was either efficient or desirable. But it does suggest the existence of a relatively well-developed canon of congressional common law that demands further elucidation.

Accordingly, what follows is an attempt to provide an overview of the private lawmaking process. Because of a dearth of scholarly studies focused on private legislation, any effort to analyze its history must necessarily begin as a descriptive endeavor. Not a single monograph is devoted to the subject, and few articles go further than mentioning private laws in passing.[41] Petitions, which functioned as the vehicle for presenting private bills in Congress, have received more generous scholarly treatment, at least in recent years.[42] However, the bulk of these studies have tended to focus on the mi-

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Seth Clarke for fear of "[a] thousand pouring in"); *id.* (statement of Rep. George Thatcher) (warning of the time commitment needed "to attend to the private petitions of every individual").

[41] Two notable exceptions are Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381 (1998) (discussing claims adjudication in colonial New York as a means of understanding the growing power of the colonial assembly vis-à-vis the Crown); and James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862 (2010) (discussing the important, but narrow, issue of private bills for the indemnification of government officials).

[42] *See generally* LAURA JENSEN, PATRIOTS, SETTLERS, AND THE ORIGINS OF AMERICAN SOCIAL POLICY (2003); SUSAN ZAESKE, SIGNATURES OF CITIZENSHIP: PETITIONING, ANTISLAVERY, AND WOMEN'S POLITICAL IDENTITY (2003); PETITIONS IN SOCIAL HISTORY (Lex Heerma van Voss ed., 2002); THE HOUSE AND SENATE IN THE 1790S: PETITIONING, LOBBYING, AND INSTITUTIONAL DEVELOPMENT (Kenneth R. Bowling & Donald R. Kennon eds., 2002); Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557 (1999); Kristin A. Collins, *"Petitions Without Number": Widows' Petitions and the Early Nineteenth-Century Origins of Public Marriage-Based Entitlements*, 31 L. & HIST. REV. 1 (2013); John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524

nority of petitions that were public in nature as a way of unearthing early forms of popular political expression.[43] What is still needed, then, is a general history of the procedural and substantive law that shaped private congressional lawmaking.

This Article aims to satisfy that need. Part II provides a brief history of legislative equity and private lawmaking in England and colonial America. It describes how petitioning emerged as a mechanism of sovereign grace whereby the King could ameliorate the private grievances of his subjects and blunt the injustices caused by his own personal immunity. Over time, this power became a contested one, both in England between the King and Parliament, and in America between the King's governors and colonial assemblies. Knowledge of this backstory is a prerequisite to understanding why Congress embraced the model of adjudication that it did.

Part III explores the survival of private legislation in light of the Framers' legendary distrust of state legislatures and their desire to circumscribe legislative interference in judicial matters. Although the Framers succeeded in limiting the scope of private lawmaking in some important respects, the practice retained its vitality whenever petitions touched on matters of national sovereignty, particularly where the expenditure of public monies was implicated.[44]

Part IV provides an overview of private lawmaking as it evolved during Congress's first decade of existence. This period deserves special emphasis because it was here that Congress first experimented with alternative institutional arrangements, including the delegation of claims administration to courts and executive agencies. The failure of those initial experiments had a profound effect on the future of private legislation because they tended to reinforce longstanding constitutional and political concerns regarding delegation.

Parts V and VI are devoted to a more general analysis of the procedural and substantive aspects of congressional claims administration. While Congress gradually ceded authority over certain types of claims to other actors, its practice for dealing with those over which it retained control was—at least on the surface—largely consistent from decade to decade. Part V looks at the substantive law Congress developed when dispensing with its equitable powers. Congress's decision to follow a practice of stare decisis resulted

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(2005); Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142 (1986); Gary Lawson & Guy Seidman, *Downsizing the Right to Petition*, 93 NW. U. L. REV. 739 (1999); Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153 (1998); James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899 (1997); Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667 (2003).

[43] *But see generally* JENSEN, *supra* note 42; Desan, *supra* note 41; Goldberg, *supra* note 42; Pfander, *supra* note 42; Pfander & Hunt, *supra* note 41; Wishnie, *supra* note 42.

[44] *See generally* Jay Tidmarsh & Paul F. Figley, *The Appropriations Power and Sovereign Immunity*, 107 MICH. L. REV. 1207 (2009) (arguing that the Appropriations Clause provides a textual basis supporting the government's immunity from suits seeking money damages).

in the development of a congressional common law of private claims adjudication. While congressional committees relied heavily on the factual findings of administrative agencies, Congress ultimately maintained its prerogative to disagree with administrative recommendations wherever the equities of a case so dictated. Part VI examines the process of private legislation from a bill's initial submission in the form of a petition to its ultimate enactment as law. It offers a detailed accounting of the work of congressional committees, many of which were founded precisely to deal with private claims, as well as the work of executive agencies tasked with advising those committees as to the merits of particular claims.

II. Private Lawmaking in England & Colonial America

Private lawmaking in the early American republic was shaped to a considerable degree by its English and colonial American antecedents. Accordingly, this Part provides a brief overview of those antecedents with the goal of establishing three propositions. First, that Congress's decision to hear and respond to private petitions was consistent with traditional Anglo-American legislative practice. Second, that this admixture of legislative and judicial functions was a feature common to both English and colonial governments. And third, that political developments in England and its American colonies during the seventeenth and eighteenth centuries resulted in legislatures on both sides of the Atlantic wielding authority over claims against the public treasury. Resolution of claims involving money damages, in turn, made up a considerable portion of colonial legislatures' lawmaking activity.

Section A examines the rise of petitioning in medieval England and the development of common law remedies for perceived violations committed by the Crown against its subjects. This Section concludes with a discussion of the political battles between Crown and Parliament that resulted in Parliament asserting its lawmaking supremacy and authority over the public revenue. Section B builds on this theme by demonstrating how disputes between colonial assemblies and royal governors paralleled the political and economic developments then taking place in England. The Section also considers how and why colonial governments failed to adopt many of the English common law procedures, and then briefly describes the main contours of private legislation passed by colonial assemblies.

A. England

The primary function of early English parliaments was not, as is often supposed, to legislate for the entire realm, but instead to act as a high court dedicated to resolving disputes which either the common law courts of the time proved ill-equipped to handle or that touched upon the King's interests

directly.[45] During the reign of Edward I (1272–1307), the King opened Parliament's doors to the broader English community by allowing any of his subjects to appeal to him personally by way of petition. Beginning in 1278, the holding of each Parliament was preceded by a public announcement of the King's intention to receive petitions together with his instructions regarding the proper time and place for their delivery.[46] The number and variety of petitions submitted to the Crown during Edward I's reign attest to the vehicle's popularity as a means of appealing decisions from, or bypassing altogether, the complex patchwork of feudal and common law courts that collectively made up the English legal system of the time.[47] Indeed, the frequency of medieval parliaments owed more to petitioners' desire to procure justice than any pressing necessity on the part of the Crown.[48]

Nearly all the petitions directed to the King and his council during the medieval period concerned individual grievances.[49] Presented in humble, beseeching terms, they sought the King's interdiction on the petitioner's behalf, most commonly through the dispensation of a writ or a private law. Complaints tended to focus on a petitioner's inability to obtain redress through the ordinary common law process and appealed to the King's obligation to do "justice" to his subjects.[50] However, requests that included petitions asking for grants, offices, and pardons, sought the extraordinary exercise of royal "grace" which the King himself was solely capable of providing.[51]

The responses of Parliament to these complaints and requests were nearly as diverse as the subject matter of the petitions themselves. Parliament could hear original actions, overturn or set aside the judgments of inferior courts, refer cases to the royal courts of King's Bench, Exchequer, and Chancery, initiate criminal proceedings on behalf of a petitioner, issue injunctions or exemptions, or approve compensation for those whom the King had wronged and to whom the royal household owed money. It was through the petitioning process instituted by Edward I and continued by his successors that the ideal of the King as the realm's fountain of justice became something more than a mere political aphorism. According to the medieval historian Gwilym Dodd, "The success rate of petitions presented in parlia-

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[45] A long line of English historians have outlined the contours of this argument. *See, e.g.*, GWILYM DODD, JUSTICE AND GRACE: PRIVATE PETITIONING AND THE ENGLISH PARLIAMENT IN THE LATE MIDDLE AGES 5–6 (2007); C.H. MCILWAIN, THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY, at viii (1910); A.F. POLLARD, THE EVOLUTION OF PARLIAMENT 20–24 (1920). *See generally* GEORGE O. SAYLES, THE KING'S PARLIAMENT OF ENGLAND (1974).

[46] POLLARD, *supra* note 45, at 36–37.

[47] For a discussion of the gradual triumph of common law over Roman and canonical law in England, see generally FREDERIC W. MAITLAND & FRANCIS C. MONTAGUE, A SKETCH OF ENGLISH LEGAL HISTORY (1915).

[48] POLLARD, *supra* note 45, at 43. Pollard notes that besides seeking direct relief, many petitioners simply wanted the Crown to "mov[e]" the courts by instructing obstinate judges to render more timely decisions. *Id.* at 39.

[49] *See generally* DODD, *supra* note 45.

[50] *Id.* at 1–2.

[51] *Id.*

ment [was] surprisingly impressive," evidence that attests to the fact that "the Crown generally took its responsibilities very seriously in providing redress, where [it] was deserved."[52]

Among the petitions directed to the King were those requesting repayment of debts incurred by the royal household or that resulted from the exigencies of state administration. Strictly speaking, individuals seeking to recover debts could not sue the King in his own courts because, as chief magistrate of the realm, the King could not logically issue a writ against himself.[53] No court was capable of exercising its jurisdiction over the King for, in the words of Sir William Blackstone, "all jurisdiction implies superiority of power."[54] That did not mean, however, a total absence of remedies for those who were owed money. Instead, recognizing that such claims were likely to be numerous and that it was to the King's advantage to amicably resolve any disputes that might arise with his creditors, the Crown instituted a special form of pleading called the petition of right.[55] This device allowed the King, through the exercise of his royal grace, to allow private suits against him to proceed in his courts. Although the King preserved the ability to deny petitions of right, the prevailing practice allowed the petitions to proceed provided the claims contained therein were legitimate. Throughout the medieval and Tudor eras, the King routinely granted petitions of right with the customary notation "Let Right be Done."[56]

Once granted, however, a petition of right merely afforded the subject a hearing before a committee appointed by the King to investigate the merits of the claim.[57] Even if the committee found in favor of the petitioner, its decision was in no way binding, and the King could either reject or ignore it by failing to provide the requisite relief.[58] The petition of right was contin-

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[52] *Id.* at 86.

[53] Frederick Pollock & William Maitland, The History of English Law Before the Time of Edward I, at 518 (1898) ("He can not be compelled to answer in his own court, but this is true of every petty lord of every petty manor; that there happens to be in this world no court above his court is, we may say, an accident.").

[54] 1 William Blackstone, Commentaries on the Laws of England 235 (1765–69). Of course, this theory was conditional upon Henry VIII's separation from the Catholic Church, a decision that emancipated the monarchy from the restraints of canon law. The preamble to the 1533 Act of Appeals offers a self-conscious justification for the King's assumption of power (24 Hen. 8 c. 12): "Where by divers sundry old authentic histories and chronicles it is manifestly declared and expressed that this realm of England is an empire . . . governed by one supreme head and King having the dignity and royal estate of the imperial Crown of the same . . . he being also institute and furnished by the goodness and sufferance of Almighty God with plenary, whole and entire power . . . ." Glenn Burgess, British Political Thought 1500–1660, at 31–32 (2009).

[55] W.S. Holdsworth, *The History of Remedies Against the Crown*, 38 L.Q. Rev. 141, 142 (1922) ("It became an established rule [during the reign of Edward I] that the subject, though he could not sue the King, could bring his petition of right, which, if acceded to by the King, would enable the Court to give redress.").

[56] Ludwik Ehrlich, *No. XII: Proceedings Against the Crown (1216–1377)*, *in* 6 Oxford Studies in Social and Legal History 42, 97 (Paul Vinogradoff ed., 1921).

[57] Tidmarsh & Figley, *supra* note 44, at 1213.

[58] *Id.*

gent not only upon the King's willingness to listen, then, but also his willingness to pay. Willingness to pay, in turn, usually meant ability to pay and, considering the constant complaints of penury from English monarchs, probably functioned as a significant barrier to a speedy recovery for many creditors.[59] However unfair the practice might have seemed to those creditors, English law invested the King with what Blackstone called "certain attributes of a great and transcendent nature . . . which may enable him with greater ease to carry on the business of government."[60] The petition of right was therefore an exercise in persuasion rather than an effort to compel payment. For, while "no wise prince [would] ever refuse to stand to a lawful contract,"[61] to provide individuals with an absolute right to compensation would threaten the monarch's ability to effectively govern his or her subjects.

The role of the Commons in the petitioning process was, at first, extremely limited. Members of Parliament may have brought their own petitions with them or forwarded those of their constituents to the King, but they lacked a voice in the decision-making process.[62] Instead, at the beginning of each Parliament, the King would appoint a committee of receivers tasked with expediting the handling of petitions by directing them to the authority best capable of addressing the petitioner's grievance.[63] A separate committee of triers, composed of churchmen, nobility, and judges, was invested with the power to render judgment in cases that did not require the King's grace or involve Crown interests directly.[64] Over time, however, MPs gradually came to realize that many of the private petitions they brought with them dealt with grievances of a similar nature. This realization encouraged them to aggregate the petitions into what became known as "common" petitions toward the end of the reign of Edward II (1307–27).[65] Despite their name, common petitions actually comprised a heterogeneous mix of general complaints and individual grievances. All bore the imprimatur of popular legitimacy, however, and formed the basis for statutory legislation when assented to by the King. MPs quickly came to the further realization that common petitions could be used to gain concessions from the King in exchange for their willingness to submit to his requests for taxation. Astute individual petitioners capitalized on this development by directing their petitions to the

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[59] In 1672, Charles II unilaterally suspended payment of debts owed to a group of goldsmith-bankers, an event known as the "Stop of the Exchequer." *See generally* J. Keith Horsefield, *The "Stop of the Exchequer" Revisited*, 35 ECON. HIST. REV. 511 (1982).

[60] BLACKSTONE, *supra* note 54, at 234.

[61] *Id.* at 236 (quoting SAMUEL VON PUFENDORF, OF THE LAW OF NATURE AND NATIONS (1672)).

[62] *See* POLLARD, *supra* note 45, at 54–55.

[63] For a detailed description of this process, see DODD, *supra* note 45, at 91–108.

[64] *Id.* at 91.

[65] *Id.* at 126–55; POLLARD, *supra* note 45, at 59–60.

Commons with the hopes of having them endorsed before reaching the King.[66]

Until the Stuart ascendancy, English monarchs had done well to avoid major political conflicts with the Commons. Although the rising costs of civil administration and foreign wars necessitated more frequent recourse to Parliamentary grants of revenue, only rarely did the Commons subject monarchs to the indignity of stipulating how they should spend it.[67] That fragile balance collapsed soon after James I (1603–25) assumed the throne, partly because he seemed ideologically committed to provoking a supremacy contest,[68] and partly because the royal revenue could not keep pace with inflation and the increasing costs of running an imperial government.[69] The contests between King and Commons that occurred throughout the seventeenth century have received considerable treatment from historians elsewhere and need not be covered in detail here. For the purposes of this Article, the central point is that the House of Commons eventually wrested significant control over the treasury from the Crown. Following the abdication of James II (1685–88), the Commons purposely limited the amount of money it granted to his successor, William III (1689–1702), in order to necessitate the calling of frequent parliaments.[70] During the 1690s, Parliament further expanded its powers by separating the revenue used to pay the expenses of civil administration from that used for military expenditures, taking control over the latter and assuming the power to fund the national debt through its incorporation of the Bank of England in 1695.[71] Additionally, Parliament convinced William to forfeit his traditional right to a hereditary revenue in exchange for annual and lifetime grants derived from ordinary taxes.[72]

The late seventeenth and eighteenth centuries witnessed sweeping changes to the British polity that reverberated throughout the empire. Although the King maintained a considerable degree of influence, the locus of sovereignty shifted dramatically toward Parliament. The profound implications of these changes in terms of individuals' ability to bring private claims

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[66] DODD, *supra* note 45, at 146 ("This did not herald the end of the old type of 'singular' petition; but it did now place a special premium on the ability of private petitioners to have their complaints incorporated amongst the common petitions."); POLLARD, *supra* note 45, at 59–60.

[67] Tidmarsh & Figley, *supra* note 44, at 1218 ("Although it occasionally appropriated funds only for specific purposes, Parliament rarely sought to control how the King used tax revenues.").

[68] *See* Charles Howard McIlwain, *Introduction* to THE POLITICAL WORKS OF JAMES I, at xli (Charles Howard McIlwain, ed., Harvard Univ. Press 1918) ("In James's theory there is no more place for the supremacy or even the independence of the national assembly than for its decrees.") (discussing James I's political philosophy).

[69] Tidmarsh & Figley, *supra* note 44, at 1218–22.

[70] *See id.* at 1228 ("By laying an axe to the ancient root that the King should 'live of his own,' Parliament carved a new constitutional order as the seventeenth century ended.").

[71] *Id.* at 1229. Parliament eventually took control over appropriations for the civil list in 1782. *Id.*

[72] *Id.* at 1230.

are illustrated by a court case that took place at the turn of the eighteenth century. In 1697, a group of creditors who had lent money to Charles II several decades earlier sought to recoup the nominal value of their debts plus interest from the Crown. Rather than pursue the traditional remedy available, a petition of right, the creditors chose instead to sue for recovery in the common Court of Exchequer.[73] The question before the judges tasked with deciding the *Bankers' Case* was, first, whether the King's debts could be binding on his successors, and second, whether a suit in the Court of Exchequer was the proper method for obtaining redress. The judges answered both questions in the affirmative, a decision that some scholars interpret as a qualified rejection of sovereign immunity.[74]

But as the legal scholars Jay Tidmarsh and Paul F. Figley have astutely pointed out, the importance of the *Bankers' Case* lies not so much in the opinions of the judges who decided the case as it does in what happened afterwards. Though the bankers won their suit, they could not immediately obtain the relief to which they were entitled. This was because Parliament, by taking control of the King's hereditary revenue, now exercised final judgment over those funds from which the bankers' settlement (estimated at more than £1,000,000) was to be drawn.[75] Consequently, the bankers were forced to enter into negotiations with Parliament to recoup their investments. In the end, the bankers fared poorly, receiving three percent annuities in replacement of the six percent annuities they had originally been promised. Tidmarsh and Figley have found that the decision to trim the interest rate stemmed from a belief that the bankers had essentially extorted a hapless Charles II into agreeing to exorbitant interest rates and then sold the debt to speculators at a deep discount.[76] Whatever its rationale, Parliament's handling of the *Bankers' Case* signaled not the end of sovereign immunity, but rather its transference to the legislative realm. "Henceforth," Tidmarsh and Figley write, "settling claims against the government was ab initio a legislative function, interwoven with Parliament's control over finance and appropriations."[77]

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[73] *See* Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 7–8 (1963) (discussing R v. Hornby (The Bankers' Case) (1696) 87 Eng. Rep. 500; 5 Mod. 29 (Eng.)).

[74] *See, e.g.*, *id. But see* Tidmarsh & Figley, *supra* note 44, at 1234 ("On the surface, the *Bankers' Case* provides unequivocal support for those who argue that sovereign immunity did not exist in England in the years before the American Revolution. . . . A deeper examination of the case and its aftermath, however, points to the opposite conclusion.").

[75] Tidmarsh & Figley, *supra* note 44, at 1228, 1235.

[76] *See id.* at 1235 n.236.

[77] *Id.* at 1236.

B. American Colonies

Believing themselves fully entitled to the rights of Englishmen, American colonists expected to reap the benefits of the Glorious Revolution.[78] But those benefits were slow to make their way across the Atlantic Ocean, as the Crown continued to enjoy nearly uncontested authority over the administration of the colonies.[79] The Crown's refusal to interpret the results of the Glorious Revolution as applicable to the colonies produced widespread tension between colonial assemblies and royal administrators during the eighteenth century. Colonists tended to adhere to a seventeenth-century mentality of opposition toward the Crown, with representatives viewing themselves as the rightful guardians of the public trust and the promoters of popular sovereignty.[80] A general pattern of struggle between the assemblies and royal governors emerged throughout the colonies. As a result, the assemblies gradually came to exert their supremacy in matters involving public finance and consequently enjoyed what one scholar has characterized as a "'*de facto* independence of royal control.'"[81] The Crown, dependent as it was on colonial trade and distracted by internal domestic issues, unwittingly allowed these powers to grow unchecked.

Nothing analogous to the petition of right existed in America because the King's physical absence made such a mechanism unnecessary.[82] Instead, those with financial grievances against their colonial governments petitioned whoever controlled the public purse strings.[83] In most colonies, the power to satisfy claims shifted away from royal officials toward colonial legislatures as the latter accumulated more power.[84] The rise of the colonial assemblies,

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[78] DAVID S. LOVEJOY, THE GLORIOUS REVOLUTION IN AMERICA, at xi (1987) (explaining that, after the Glorious Revolution, colonists "fell back on a conception of empire which assumed that colonists in America were guaranteed the same rights as Englishmen who stayed at home").

[79] *See* Desan, *supra* note 41, at 1401 (noting that, in America, "the King was the operative member of the political abstraction [of Commons, Lords, and Monarch]").

[80] *See id.* at 1398; *see also* JACK P. GREENE, PERIPHERIES AND CENTER: CONSTITUTIONAL DEVELOPMENT IN THE EXTENDED POLITIES OF THE BRITISH EMPIRE AND THE UNITED STATES, 1607–1788, at 111 (1990); LOVEJOY, *supra* note 78, at xi.

[81] Jack P. Greene, *Political Mimesis: A Consideration of the Historical and Cultural Roots of Legislative Behavior in the British Colonies in the Eighteenth Century*, 75 AM. HIST. REV. 337, 337 (1969) (quoting Charles M. Andrews, *On the Writing of Colonial History*, 3 WM. & MARY Q. 1, 39 (1944)).

[82] *See* Jaffe, *supra* note 73, at 19 n.56.

[83] *See* Desan, *supra* note 41, at 1407 (explaining that, before 1706, "in New York, the governor and his council—an authority both administrative and judicial—had resolved all claims for public money").

[84] *E.g.*, RAYMOND C. BAILEY, POPULAR INFLUENCE UPON PUBLIC POLICY: PETITIONING IN EIGHTEENTH-CENTURY VIRGINIA 129–30 (1979) (discussing practices in Virginia); THOMAS L. PURVIS, PROPRIETORS, PATRONAGE, AND PAPER MONEY: LEGISLATIVE POLITICS IN NEW JERSEY, 1703–76, at 179 (1986) (discussing practices in New Jersey); Desan, *supra* note 41, at 1413 (discussing practices in New York); Higginson, *supra* note 42, at 144–49 (discussing practices in Connecticut); Alan Tully, *Constituent-Representative Relationships In Early America: The Case of Pre-Revolutionary Pennsylvania*, 11 CAN. J. HIST. 139 (1976) (discussing practices in Pennsylvania).

in other words, was more than a concerted effort led by a small group of colonial elites. It was also a reflection of the growing needs of ordinary colonists and their tendency to look to their colonial representatives for satisfaction of those needs.[85] The explosion of population and wealth of each colony outstripped the ability of both local and imperial institutions to render effective government. Colony-wide issues of war, defense, and trade necessitated coordination efforts that only the assemblies could provide.[86] At the same time, colonists expected their representatives to advocate on behalf of a variety of local matters and so the assemblies became a place of intra-colonial competition for limited resources. Colonists most commonly expressed their grievances in the form of petitions, which the colonial legislatures received and responded to by passing both public and private laws. Through their responsiveness to petitions, the assemblies increased both their jurisdiction as well as their standing in the eyes of the colonists.[87] Although the gentry-dominated colonial assemblies were far from democratic, they could legitimately claim to be more representative of the voice of the people than any other institution in colonial America.

As was the case in England, the development of colonial assemblies grew out of their assumption of judicial functions. In colonial Connecticut, for instance, the first recorded act "concerned a grievance that one Henry Stiles had 'traded a peece [firearm] [sic] with the Indians for Corne [sic].' "[88] The role of colonial assemblies in passing general legislation only came later, the result of the developments discussed in the preceding paragraphs. Even when the assemblies procured extensive legislative powers, they did not cease to function as courts and administrative tribunals. Indeed, the record of colonial assemblies contains a hodgepodge of judicial, administrative, and legislative business. Statutes relating to public matters such as the regulation of paper money and the establishment of military fortifications were dwarfed by the numerous private acts compensating war widows, docking entail, granting divorce, issuing pardons to private debtors, reprimanding local officials for acts of malfeasance, and providing individuals with the right to operate factories, mines, toll roads, and ferries.[89] A study of revolutionary New Jersey found that, of more than 1,000 petitions submitted to the Assembly between the years 1703 and 1775, only a third dealt with public or colony-wide issues.[90] Studies of private legislation in colonial

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[85] *See generally* Alison G. Olson, *Eighteenth-Century Colonial Legislatures and Their Constituents*, 79 J. AM. HIST. 543 (1992) (describing the function and importance of colonial legislatures).

[86] *See id.* at 550–51.

[87] *See* Higginson, *supra* note 42, at 150 ("Colonial assemblies seized on petitions to extend their authority.").

[88] *Id.* at 144.

[89] *See id.* at 150; BAILEY, *supra* note 84, at 114 (discussing resident petitions prompting ferry construction); RALPH HARLOW, THE HISTORY OF LEGISLATIVE METHODS IN THE PERIOD BEFORE 1825, at 19–20 (1917); Olson, *supra* note 85, at 562.

[90] PURVIS, *supra* note 84, at 179.

Pennsylvania, Virginia, and Connecticut produced similar findings.[91] Petitions and private lawmaking provided colonial representatives and, later, state representatives with much needed information regarding conditions in local communities. It also enabled them to expand the legislatures' jurisdiction over public finances and allowed a degree of credit claiming that legislators could use to boost their popularity among their constituents. In sum, despite the burdens it imposed on their time, private legislation was highly attractive to early American legislators.

III. Private Lawmaking & the Constitution

The Framers' well-known hostility toward state legislatures is frequently posited as one of the motivating influences behind the movement for a new federal constitution.[92] Among the primary complaints leveled at those legislatures was their tendency to aggrandize their own powers at the expense of other government branches and their members' willingness to serve local or private interests at the expense of the broader political community. Yet private lawmaking, which was very much about local or individual interests, survived the transition to the national stage. The purpose of this Part is to better understand how certain structural features of the new constitutional order permitted, and may have even encouraged, this outcome.

The Constitution sets forth several important limits on Congress's lawmaking authority with respect to individuals, namely by prohibiting the passage of ex post facto laws,[93] bills of attainder,[94] and titles of nobility.[95] With respect to state legislatures, it goes even further by preventing those bodies from passing any law "impairing the Obligation of Contracts"[96] and by providing Congress with the exclusive authority to regulate interstate commerce.[97] Scholars have ably analyzed these features of the Constitution elsewhere.[98] Instead, this Part examines a problem that played surprisingly little role in the framing of the Constitution or the debates surrounding its ratification, but one whose dimensions proved increasingly problematic from

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[91] *See generally* Bailey, *supra* note 84 (findings for Virginia); Higginson, *supra* note 42 (findings for Connecticut); Tully, *supra* note 84 (findings for Pennsylvania).

[92] *See* Gordon S. Wood, The Creation of the American Republic, 1776–1787, at 525 (1998). For a more recent iteration of this familiar theme, see generally Calvin H. Johnson, Righteous Anger at the Wicked States: The Meaning of the Founders' Constitution (2005).

[93] U.S. Const. art. I, § 9.

[94] *Id.*

[95] *Id.*

[96] U.S. Const. art. I, § 10.

[97] U.S. Const. art. I, § 8.

[98] *See generally* William W. Crosskey, *The True Meaning of the Constitutional Prohibition of Ex-Post-Facto Laws*, 14 U. Chi. L. Rev. 539 (1947); Richard A. Epstein, *Towards a Revitalization of the Contract Clause*, 51 U. Chi. L. Rev. 703 (1984); Jacob Reynolds, *The Rule of Law and the Origins of the Bill of Attainder Clause*, 18 St. Thomas L. Rev. 177 (2005).

an institutional perspective as the new federal government came into being. That problem involved the proper allocation of authority, or discretion, over private claims.

In the aftermath of the Revolution, state legislatures' power had become a major source of controversy. The Pennsylvania Council of Censors reported in 1786 that "'the people have been taught to consider an application to the legislature as a shorter and more certain mode of obtaining relief from hardships and losses, than the usual process of law.'"[99] Writing in *Federalist* No. 48, James Madison referred to the Council's report as evincing a disturbing tendency whereby "[t]he legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex."[100]

At first glance, then, Congress's assumption of the power to arbitrate disputes between private claimants and the state appears inconsistent with both the Framers' understanding of separation of powers and the functions they intended the new Congress to serve. As Alexander Hamilton wrote in *Federalist* No. 78:

> If it be said that the legislative body are themselves the constitutional judges of their own powers . . . it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution . . . . It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts.[101]

Likewise, the Framers sought to create a legislative body that would privilege the national good over private interests and exercise its duties efficiently, in contrast to its much-maligned predecessor.[102] To accomplish this end, the Constitution embodied an elaborate system of checks and balances that consciously limited popular participation in the new government. Hearing and responding to petitions for redress—a time-consuming task that would necessarily divert Congress's attention away from national concerns toward the consideration of private interests—seems contrary to the Framers' emphasis on both efficiency and the public good.

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[99] WOOD, *supra* note 92, at 408.

[100] THE FEDERALIST NO. 48, at 241 (James Madison) (Terrence Ball ed., 2003).

[101] THE FEDERALIST NO. 78, at 307 (Alexander Hamilton), *in* WORDS OF THE FOUNDING FATHERS: SELECTED QUOTATIONS OF FRANKLIN, WASHINGTON, ADAMS, JEFFERSON, MADISON AND HAMILTON WITH SOURCES (Steve Coffman ed., 2012).

[102] Frank H. Easterbrook, *State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1329 (1994) (quoting JON ELSTER, SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY 35 (1983) ("Madison believed that, in the words of a modern republican, 'the core of the political process is the public and rational discussion about the common good, not the isolated act of voting according to private preferences.'")).

A closer analysis, however, reveals considerable ambivalence among the Framers concerning the proper forum for adjudicating private claims against the state. While the Constitution provides the courts jurisdiction over cases in which the United States is a party, it also charges Congress with the power to "pay the Debts . . . of the United States"[103] and stipulates that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."[104]

These features of the new constitutional order limited the courts' potential for deciding cases involving private claims in at least three ways. First, the Constitution explicitly afforded Congress the power to pay the nation's "debts." As early claims practice revealed, this power was understood to include not only the ability to pay legal claims, but also the power to satisfy claims based on equitable, or moral, considerations.[105] In fact, as will become evident in Part IV, the vast majority of private petitions were of the latter variety, as they sought some form of extraordinary relief not then proscribed by law. Delegating the power to recognize the legitimacy of such amorphous claims to unelected, life-tenured judges was apparently a step too far for even the most liberal-minded Framers. Second, courts lacked any practical mechanism for compelling Congress to appropriate specific funds for the payment of those claims. Consequently, in the absence of a general authorizing statute, any judgments procured from an Article III court against the U.S. Treasury would have been non-final and, thus, unenforceable.[106] Third, courts would have faced a considerable informational deficit in deciding the merits of individual cases. Resolution of the vast majority of claims, particularly those arising out of the Revolutionary War, depended on a re-

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[103] U.S. CONST. art. I, § 8.

[104] U.S. CONST. art. I, § 9.

[105] The Supreme Court eventually recognized this interpretation of the clause as the proper one in *United States v. Realty Co.*, 163 U.S. 427 (1896). The case involved the payment of bounties to two sugar manufacturers. The Treasury Department had refused to pay the bounties under the theory that the statute authorizing the payments, which had since been repealed, was unconstitutional. Without deciding the statute's constitutionality, the Court found for the plaintiffs by interpreting the payment of the bounties as authorized by Congress's equitable power to pay its debts. *See id.* at 440–41 ("The term 'debts' includes those debts or claims which rest upon a merely equitable or honorary obligation, and which would not be recoverable in a court of law if existing against an individual. The nation, speaking broadly, owes a 'debt' to an individual when his claim grows out of general principles of right and justice—when, in other words, it is based upon considerations of a moral or merely honorary nature, such as are binding on the conscience or the honor of an individual, although the debt could obtain no recognition in a court of law.").

[106] Even after Congress had waived its sovereign immunity by establishing the Court of Claims, it sometimes tried to undo the work of that body. For instance, in *Klein v. United States*, 80 U.S. (13 Wall.) 128 (1872), the Supreme Court famously struck down Congress's attempt to prescribe a rule of decision retroactively. Klein, a Southerner, had recovered money under the Civil War enemy property acts after receiving a presidential pardon. Congress, incensed at the recovery, passed an Act while the case was on appeal directing courts to treat a pardon as conclusive evidence of disloyalty, thereby invalidating Klein's recovery. The Court declined to do so, finding Congress's effort to be a violation of separation of powers.

view of information in the government's exclusive possession.[107] In the early days of the federal government, merely transmitting that information to federal district courts on a case-by-case basis would have generated substantial transaction costs.[108]

The Framers' invocation of sovereign immunity provides some tangential support for the notion that they believed Congress, rather than the courts, would hear private claims against the government. For instance, in attempting to rebut critics of the proposed Constitution who warned of the potentially harmful consequences of allowing states to be sued in federal court by private citizens of another state, Hamilton argued:

> It is inherent in the nature of sovereignty, [for a state] not to be amenable to the suit of an individual *without its consent* . . . . The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action, independent of the sovereign will.[109]

According to Hamilton's reasoning, then, Article III's grant of jurisdiction to the courts over controversies "to which the United States shall be a party" or those "between a state and citizens of another state" was wholly contingent upon the consent of the sovereign entities involved.[110] Given the long history of private claims legislation and the Framers' desire to maintain legislative supremacy over matters of finance, there is ample reason to believe they envisioned a continuing role for Congress in the claims resolution process.

Indeed, that interpretation accords with the views expressed by Edmund Randolph and John Marshall in the Virginia ratifying convention. In responding to his colleague Patrick Henry's concern that the new federal government's assumption of the Confederation's debts under Article VI would subject it to suit by private individuals, Randolph observed that creditors would be in the same position as they had been under the old Congress: "I come now to what will be agitated by the judiciary. They are to enforce the performance of *private* contracts . . . . The federal judiciary cannot intermeddle with those public claims without violating the letter of the Constitu-

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[107] *See infra* Part IV.

[108] For an overview of the poor quality of transportation in the early United States, see generally JOHN LAURITZ LARSON, INTERNAL IMPROVEMENT: NATIONAL PUBLIC WORKS AND THE PROMISE OF POPULAR GOVERNMENT IN THE UNITED STATES (2001).

[109] THE FEDERALIST NO. 81, at 397 (Alexander Hamilton) (Terrence Ball ed., 2003).

[110] U.S. CONST. art. III. The issue of state suability by private citizens proved to be a matter of considerable controversy during the state ratification debates. In the Virginia ratifying convention, both Madison and John Marshall worked to assuage the fears of their Anti-Federalist counterparts by adopting a position similar to that expressed by Hamilton in *Federalist* No. 81. For a detailed discussion of their remarks, see generally Susan Randall, *Sovereign Immunity and the Uses of History*, 81 NEB. L. REV. 1 (2002). The issue of federal suability, however, was not a subject of extended discussion.

tion."[111] John Marshall likewise rejected a similar textualist argument that Article III authorized individuals to sue states. As Marshall rhetorically asked, "If an individual has a just claim against any particular state, is it to be presumed that, on application to its legislature, he will not obtain satisfaction?"[112] Randolph and Marshall's comments reveal a shared understanding that Congress, through its appropriations power, would maintain ultimate responsibility over private claims against the public fisc.[113]

IV. Early Private Lawmaking in the Federal Congress

In practice, sovereign immunity did not amount to a denial of recourse for those who felt wronged by the government. As the history of the early Congress demonstrates, politicians and citizens uniformly agreed that those with legitimate grievances against the state were entitled to payment. The point at issue was whether the legislative or judicial branch was the ideal venue for securing such relief. In making that determination, Congress had to strike a balance between its constitutional obligation to maintain control over public expenditures in a manner that reflected democratic priorities and a basic moral commitment to do justice to deserving claimants.[114] Whether through inertia or deliberate choice, successive Congresses opted to continue the practice of legislative adjudication rather than delegate claims management to executive agencies or the judiciary.

Before following that path, however, Congress did experiment with efforts to uncouple claims adjudication from the ordinary lawmaking process. Section A examines those efforts and why they ultimately failed, at least in the short term. Section B then considers Congress's subsequent move to formalize its control over claims procedure through the formation of a standing Committee of Claims.

The insights in this Part are drawn from a quantitative analysis and review of the legislative history of nearly 4,000 petitions, private and public, submitted to Congress between 1789 and 1801.[115] The information gleaned

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[111] Edmund Randolph, *Speech to the Ratifying Convention (June 15, 1788)*, *in* 3 Debates in the Several State Conventions on the Adoption of the Federal Constitution 478 (Jonathan Elliot ed., 2d ed. 1891) [hereinafter Elliot's Debates] (emphasis added).

[112] John Marshall, *Speech to the Ratifying Convention (June 20, 1788)*, *in* Elliot's Debates, *supra* note 111, at 556.

[113] *See also* Tidmarsh & Figley, *supra* note 44, at 1259 ("[T]he assumption in the ratification debates was that state legislatures would retain [the power to adjudicate money claims] after independence, and that Congress would enjoy the same power after ratification.").

[114] A similar point is made by Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative to a Judicial Model of Payment*, 45 La. L. Rev. 625, 626 (1985), and Desan, *supra* note 41, at 1383.

[115] The distinction between a private petition and a public one lies in the remedy requested by the petitioning party. Private petitions appealed for relief that, when granted, resulted in an act applicable to the petitioner only, whereas public petitions sought the introduction, modification, or repeal of general legislation.

from this review is, in turn, supported by a qualitative analysis of all congressional committee adjudications[116] of petitions during the period.[117]

A. Experimentation (1789–94)

Scarcely a month after Congress had reached the quorum necessary to commence its operations, Representative Fisher Ames of Massachusetts rose from his seat in the House of Representatives to present the first three petitions of the new Federal Congress—those of Andrew Newell and Seth Clarke, Sarah Parker, and Martha Walker.[118] Newell and Clarke were residents of Ames's district who jointly sought payment for their service as Assistant Commissaries of Issues during the American Revolution and prayed "that the proper office may be authorised to receive and examine their accounts . . . ."[119] Sarah Parker was a widow whose husband had been wounded in the battle of Bunker Hill and died several days later in a Boston jail, leaving behind Parker and her seven children. By a strict interpretation of the laws of the Continental Congress, she had been denied a widow's pension because her husband had not been officially commissioned an officer by that body at the time of his death.[120] Martha Walker also sought a pension, but under different circumstances. Walker's husband, who died in 1788, had been a prominent merchant and magistrate in Montreal who embraced the American cause.[121] For his troubles, he was imprisoned by the British and suffered £2500 worth of damages to his estate, which he and his wife later abandoned when fleeing to Boston.[122] In a letter to Ames, Walker opined that her "*Wellbeing*, for the small remainder of Life, depends on the *Success* of my Petition to Congress; & that a disappointment there, will render me the most deplorable of the human race."[123]

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[116] I use the term "adjudication" somewhat loosely here. Congressional committees adjudicated petitions in the sense that they reached merits decisions based on the evidence, legal arguments, and policy justifications offered by petitioners. Furthermore, each committee would give recorded reasons for either granting or denying a petition in written reports, some of which were published. The process was not a formal or adversarial one, however. While congressional committees did seek information from executive agencies and sometimes even heard from witnesses, neither the government nor petitioners typically enjoyed formal representation. *See infra* Parts V & VI.

[117] The analysis here is based on both original archival research at the National Archives in Washington, D.C. and research drawn from electronic and microfilm reproductions of congressional records.

[118] *See* H. JOURNAL, 1st Cong., 1st Sess. 26 (1789).

[119] 7 DHFFC, *supra* note 11, at 6. As Assistant Commissaries of Issues, Newell and Clarke purchased provisions for the Continental Army during the war.

[120] *Id.* at 252; *see Report of the Secretary of War (21 February 1793)*, *in* 7 DHFFC, *supra* note 11, at 253.

[121] 7 DHFFC, *supra* note 11, at 36.

[122] *Id.*

[123] Letter from Martha Walker to Fisher Ames, Boston (July 17, 1789), *in* 7 DHFFC, *supra* note 11, at 36–37; *see also* Letter from Alexander Hamilton to Martha Walker (July 2, 1791), *in* 9 THE WORKS OF ALEXANDER HAMILTON 484 (Henry Cabot Lodge ed., 1904) ("While I dare not encourage any expectation, and while my conduct must be determined by

Beyond the fact that they were the first Revolutionary War claims delivered to the Federal Congress, the petitions presented by Ames are significant for two reasons. First, Congress had not yet established executive agencies. Once the Constitution had been ratified, considerable confusion existed over the old Board of Treasury's ability to continue to carry out its functions. To rectify this uncertainty, Newell and Clarke prayed that Congress would establish a proper office for reviewing their claims.[124]

Second, the delegates to the Constitutional Convention had expressly provided that all debts incurred under the Confederation Congress "shall be as valid against the United States under this Constitution, as under the Confederation."[125] But the Confederation Congress, in an effort to limit its liability and protect its coffers against fraud, had also enacted statutes of limitations for most types of claims. Newell and Clarke's petition asked the new Congress to disregard those acts and in so doing raised the question of whether this new government would adhere to precedents established by the Confederation Congress or adopt a more liberal attitude toward future claimants.

Both points occasioned a lively debate in the House, which centered on the utility and equity of private lawmaking more broadly. After reading the petitions in their entirety in accordance with House rules, Ames made a motion to refer them to a select committee.[126] Representative James Jackson of Georgia immediately rose in opposition to the motion. He expressed his regret that Ames had introduced the petitions at all and opposed referring them to a committee for fear of "a thousand pouring in."[127] Representative Thomas Fitzsimons of Pennsylvania echoed the concerns of his southern colleague. He worried that entertaining claims barred by the acts of limitation would give false expectations to people unlikely to receive favorable results, and by doing so would unnecessarily encourage similar types of petitions.[128] Ames's colleague from Massachusetts, George Thatcher, proffered another reason to table the petitions—the lack of a proper executive agency to refer them to. He warned of the excessive time commitment that would result if Congress felt compelled "to attend to the private petitions of every individual."[129]

Other representatives displayed a more sympathetic attitude towards the petitions. James Madison, while agreeing to table Ames's motion temporarily, was less eager than his colleagues to dismiss private claims altogether.

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my sense of official propriety and duty, I may with great truth say that I shall enter into the examination with every prepossession which can be inspired by favorable impression of personal merit, and by a sympathetic participation in the distresses of a lady as deserving as unfortunate.").

[124] *See* 7 DHFFC, *supra* note 11, at 6.

[125] U.S. CONST. art. VI.

[126] *May 4, 1789*, 10 DHFFC, *supra* note 11, at 392 (House Debates).

[127] *Id.*

[128] *Id.*

[129] *Id.*

He pronounced his skepticism toward the acts of limitation, which he felt had unfairly barred just claims by not providing claimants with sufficient notice of their enforcement, and he promised to raise the issue of revising the limitations at a later date.[130] Ames, for his part, acknowledged that such petitions were "inconvenient," but felt Congress was "bound to pay a decent attention to [them]."[131] After all, what message would it send to the American people, he wondered aloud, if the new government turned a deaf ear to their complaints? As obnoxious as petitions might become, the people had a right to appeal to their representatives and expect a decent attention to their concerns.

Ames lost his motion, but his broader point regarding Congress's duty to receive petitions won out in the end. Perhaps buoyed by Ames's action, other representatives started bringing forward similar petitions on behalf of their constituents. A total of sixty private petitions were presented in the House between May and August of 1789 alone, roughly half of which concerned Revolutionary War claims.[132]

Once Congress established the practice of receiving all types of private petitions, it had to decide how to dispense with them. In establishing the Treasury and War Departments, Congress sought to relieve itself of much of the burden of having to deal with private claims individually. Although the War Department Act did not describe the department's relationship to Congress specifically, it did give the department "custody and charge of all records, books, and papers" of its predecessor, the Board of War.[133] Henceforth, the first three Congresses would routinely refer petitions relating to Revolutionary War service, of which there were hundreds, to the Secretary of War for his "information."[134]

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[130] *Id.*

[131] *Id.*

[132] This information is calculated from a self-constructed database of all House and Senate Journal entries referencing the introduction of petitions between 1789 and 1801, nearly 4,000 petitions in total [hereinafter Petitions Database]. Among these petitions were those of Baron de Glaubeck, a foreign volunteer, who in a May 15 petition sought payment for his services from Congress in order to offset enormous debts he had incurred during the war, *see* 7 DHFFC, *supra* note 11, at 199–201; the petition of Bartlett Hinds, "in behalf of himself and the continental pensioners [of Massachusetts]," who as a lieutenant in the Continental Army had "received a musket ball through one of his lungs," requesting an increase in his pension, *see Report of the Secretary of War (8 February 1793)*, *in* 7 DHFFC, *supra* note 11, at 387; and the petition of Duncan Campbell, requesting reimbursement for "sundry advances" he had made to the United States during the war as deputy quartermaster general for the northern department, *id*. at 475. That Campbell was among the first claimants to petition the new federal government probably surprised no one, given the fact that he had petitioned the Confederation Congress no fewer than seven times between 1781 and 1787. His claims had been repeatedly rejected by that body, its members assenting to the opinion of the Board of War, which had reported that since 1781, "Col[.] Campbell has not done one day's public duty, except settling his own public accounts." *Id.*

[133] 6 DHFFC, *supra* note 11, at 2028–29.

[134] *See, e.g.*, H.R. Res., 2d Cong. (Nov. 7, 1792) (ordering that the petitions of Richard O'Brian and other Americans held captive in Algiers be referred "to the Secretary of State, for information").

Debates over the proper distribution of private claims administration among the three branches featured prominently in the formation of the Treasury Department. The Treasury Act established a specific office of Auditor to review claims against the public fisc and forward his report to the Comptroller for a final decision.[135] In the debates over the Treasury Act's passage, Madison questioned whether the Comptroller "can or ought to have any interference in the settling and adjusting the legal claims against the United States."[136] In Madison's eyes, the Comptroller was neither wholly executive nor judicial, but a distinct entity that combined functions of both.[137] He therefore proposed making the Comptroller accountable to all three branches of government. The President would be allowed to appoint the officer, Congress would have the power of removal, and the Supreme Court would hear appeals arising from the Comptroller's decisions.[138]

Although Madison's colleagues rejected his novel proposal, that rejection did not signal Congress's intent to abandon control over private claims adjudication altogether. Ultimate control remained firmly entrenched in Congress because, like the English Parliament, Congress was responsible for appropriating the money needed to satisfy claims. If Congress disagreed with a decision, it could simply refuse to pay for it. If a claimant disagreed, he or she had the right to appeal to Congress to overturn that decision. Furthermore, because individual claims often raised thorny legal questions that required statutory interpretation, petitioners and the Comptroller alike looked to Congress for guidance.

The creation of the Treasury and War Departments resulted in a bifurcated review process for the majority of private claims. The executive agencies enjoyed the authority to review routine contract and pension claims in the first instance, subject always to Congress's final approval. Congress, on the other hand, considered appeals seeking equitable remedies for claims that could not meet the strict requirements of existing statutory law. The method that the House, which received the overwhelming majority of petitions, most commonly employed when receiving a petition was to first refer it to either the War or Treasury Department for a report. If the report was favorable to the petitioner, the House would establish a select committee made up of three to five members to review that report and recommend a bill as warranted. If any amendments were subsequently agreed to by the House, the bill would be recommitted to the select committee for revision.

Almost immediately, the system began to show signs of strain. The executive agencies were poorly equipped to handle the massive demands being placed upon them. The first three Congresses (1789–95) referred more than six hundred petitions to the War Department alone, despite the fact that its

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[135] An Act to Establish the Treasury Department, ch. 12, 1 Stat. 65, 65–66 (1789).
[136] 1 Annals of Congress 638 (1789) (Joseph Gales ed., 1834).
[137] *Id.* at 637–38.
[138] *Id.*

staff consisted of only the Secretary, Henry Knox, and a single clerk.[139] The Treasury Department, which had a staff of close to forty but also had far more responsibilities than the War Department, fared only slightly better. During the same time period, Congress referred more than three hundred petitions to its doorstep.[140] While Hamilton was frantically trying to finish his *First Report on Public Credit* by the beginning of Congress's second session, he was also charged with determining whether one Englebert Kemmena was entitled to compensation for "certain medicines and services" he had provided to the army during the war.[141] Although they did their best to comply with Congress's instructions, the War and Treasury Departments struggled to deal with the petitions efficiently. It was not uncommon for a claimant to wait as long as four years before receiving a report on his petition.[142]

Mutual suspicion and resentment began to define the relationship between Congress and the executive departments. The rising tension can be seen in the reports that the secretaries of War and Treasury prepared for Congress. Each grew tired of receiving petitions that were essentially identical to ones they had previously reported unfavorably on. In reviewing their reports, it becomes apparent that many congressmen were abusing the referral process in order to provide themselves political cover with their constituents. In a report dated February 25, 1791, for instance, Secretary of War Henry Knox observed with obvious irritation that "[a] considerable number of the petitions presented in this session, state Colds, Rheumatisms and other disorders caught ten or fifteen years ago, as the causes of a pension."[143] Most of these petitions attempted to overturn or modify policies implemented by *state* legislatures.[144] Knox admonished congressmen for entertaining such requests. "To suppose that the Congress of the United States, removed at a distance, . . . could equitably reverse judgments made in the respective states," Knox wrote, "is to suppose that they possess a greater portion of intuition, than has been assigned the human Race."[145]

Many congressmen, for their part, believed Congress had ceded too much control over claims to the executive branch. There was considerable fear that executive agencies might usurp Congress's lawmaking function by

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[139] Referral figures are taken from the Petitions Database, *supra* note 132. For information on the organization of the War and Treasury Departments, see LEONARD D. WHITE, THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY 147 (1948).

[140] *See* Petitions Database, *supra* note 132.

[141] The House referred Kemmena's petition to Hamilton on September 25, 1789, with instructions to report to the next session of Congress. H. JOURNAL, 1st Cong., 1st Sess. 123 (1789). Just four days earlier, the House had commissioned Hamilton to complete a report on the young nation's outstanding debt. *See id.* at 117.

[142] In fact, it took Hamilton more than four years to report on Kemmena's petition. *See* 16 ALEXANDER HAMILTON, *Report on Several Petitions Barred by the Acts of Limitation*, *in* THE PAPERS OF ALEXANDER HAMILTON 99, 100 (Harold C. Syrett ed., 1987).

[143] 7 DHFFC, *supra* note 11, at 376.

[144] *See id.*

[145] *Id.*

proposing specific statutory language in their reports. In an attempt to obviate these fears, Hamilton and Knox were extremely careful to avoid overstepping their bounds. When presented with a petition requesting repeal of the statute of limitations for invalid pensioners, for instance, Knox stated that the issue was one "of considerable importance to the public," but avoided saying more because Congress "had not instructed [him] to report an opinion."[146] Congressmen also feared the role that political calculations might play in executive agency determinations. Colonel Anthony Walton White, who was seeking reimbursement for expenditures he had made on behalf of the United States as an officer during the Revolution, employed the help of his friend Aedanus Burke, a representative from South Carolina. Burke, a prominent Anti-Federalist, had openly feuded with Alexander Hamilton.[147] Because of that dispute, he explained to White that he and the Secretary of War "are not on good terms," and that he was "afraid of [him] throwing Cold Water on the buisiness [sic]."[148]

Congress's next move laid the groundwork for what has become a foundational case in the federal jurisdiction canon. When it became apparent that the executive heads were incapable of responding to petitions in a timely fashion, Congress looked to the judiciary for assistance in adjudicating claims. Reasoning that the workload of the circuit courts was relatively light, Congress directed them to review pension applications under a statute it enacted on March 23, 1792, for the relief of Revolutionary invalids, widows, and orphans.[149] The Act directed the Supreme Court Justices riding Circuit to interview the petitioners, examine physical and written evidence, and hear the testimony of physicians.[150] Once they made their findings, the Justices were to report their recommendations to the Secretary of War.[151] Congress, however, retained final determination of pension claims as evidenced by Section 4 of the Act, which stated, "That in any case, where the said Secretary shall have cause to suspect imposition or mistake, he shall have power to withhold the name of such applicant from the pension list, and make report of the same to Congress, at their next session."[152] Several Justices cited this section as an unconstitutional breach of the judiciary's independence. The U.S. Circuit Court of New York took the unusual step of issuing an opinion concerning the Act's constitutionality before any pension applicant had even appeared.[153] Reasoning that the pension responsibilities given to

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[146] *Id.* at 370.

[147] For the circumstances behind their dispute, see JOANNE B. FREEMAN, AFFAIRS OF HONOR: NATIONAL POLITICS IN THE NEW REPUBLIC 29–31 (2001).

[148] Letter from Aedanus Burke to Anthony Walton White (Jan. 3, 1791), *in* 7 DHFFC, *supra* note 11, at 549.

[149] *See* Act of Mar. 23, 1792, ch. 11, 1 Stat. 243 (1845).

[150] *See id.*

[151] *See id.*

[152] *Id.*

[153] *See* 6 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 33–34 (Maeva Marcus ed., 1998).

the circuit courts could not be considered judicial since they were reviewable by another branch of government, Justices Jay, Cushing, and Duane agreed to hear the claims only in their capacity as private citizens and not as Justices. To ensure this division of labor was clear, the Court would formally adjourn before proceeding to consider the pension claims.[154]

The circuit court in Pennsylvania, however, took a different approach. When William Hayburn came forward to be placed on the pension list, the court simply refused to entertain his petition.[155] Shortly thereafter, Hayburn turned to Congress for relief but Congress, hesitant to act, adjourned without reviewing Hayburn's claim. The Attorney General, Edmund Randolph, took matters into his own hands by asking the Supreme Court to compel the circuit court to hear Hayburn's petition.[156] However, the Court, which was not inclined to grant Randolph's motion for obvious reasons, withheld making a determination in order to give the next session of Congress time to amend the act. This face-saving gesture allowed Congress to do just that, and by amending the Act to ensure that the Justice's duties were purely limited to fact-finding, Congress eased the Court's constitutional concerns.[157] Congress, however, had learned an important lesson. In the future, it would refrain from entrusting the judiciary with private claims for fear that the Court's insistence on the finality of its judgments would encroach upon Congress's control over the public treasury.

B. Institutionalization: Committee of Claims (1794–1801)

After experimenting with delegating claims administration to executive and judicial bodies, Congress decided to exert greater control by institutionalizing its own claims procedures. In 1794, Congress created a standing Committee of Claims and gave it the authority to "take in to consideration all such petitions, and matters or things touching claims or demands on the United States . . . and to report their opinion thereupon, together with such propositions for relief . . . as to them shall seem expedient."[158] The Committee had jurisdiction over all money claims, including those involving pensions, government contracts, and public lands.[159] All of its members had considerable legislative experience, and three, including the chairman, were trained lawyers.[160] A year later, Congress established a similar standing com-

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[154] *See id.*

[155] *See id.* at 35.

[156] *See* Hayburn's Case, 2 U.S. (2 Dall.) 409, 409 (1792).

[157] *See* 6 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, *supra* note 153, at 35–41; *see also* Act of Feb. 28, 1793, ch. 17, 1 Stat. 324 (1845).

[158] H. COMM. OF CLAIMS, RECORD BOOK, 3D. CONG., 2ND SESS.—5TH CONG., 2D. SESS., *in* 1 TRANSCRIBED REPORTS OF THE COMMITTEES OF THE U.S. HOUSE OF REPRESENTATIVES, 1789–1841, Reel 1 (1986).

[159] *See id.*

[160] The Committee's members included Uriah Tracy (chairman), Dwight Foster, Francis Malbone, William Montgomery, John Heath, Gabriel Christie, and Alexander Mebane. Tracy,

mittee to "take into consideration all such petitions and matters of things touching the commerce and manufactures of the United States."[161] The aptly named Committee of Commerce and Manufactures considered merchant requests for drawbacks, special exemptions from taxes due to acts of God, and direct patronage through special subsidies.

The result of these changes was dramatic. Whereas the first three Congresses had referred more than half of all petitions to the Treasury or War Department, the subsequent three Congresses referred almost none.[162] On the few occasions when later Congresses did refer a petition, they almost always included the instruction that the referral was "for information only." The efficiency of the claims process improved as a result, even though service on the Committee of Claims was not always highly valued by its members. When proposed for a second term, the Committee's first chairman, Uriah Tracy, unsuccessfully lobbied the Speaker to be excused. Tracy complained "[h]e had been extremely hard employed last year, and had undergone much trouble about this business of claims."[163] Despite Tracy's distaste for the "business" of claims adjudication, the Committee managed to work diligently and produce reports on most claims in a matter of months.[164]

The success rate of private claims petitions is difficult to determine. At first glance, the numbers suggest that the likelihood of success was small. Only 39 of the 547 petitions (less than 1 in 10) that the Committee of Claims heard between the 3rd and 6th Congresses received a favorable report.[165] This low number, however, is misleading for three reasons. First, no individual Congress's action was ever definitive because each Congress was considered a distinct lawmaking body. Petitioners unsuccessful in one Congress were free to pursue their claims at the next. Many did just that, which helps explain why the record of Revolutionary War claims stretches all the way

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Foster, and Heath were trained lawyers. *See Tracy, Uriah*, BIOGRAPHICAL DIRECTORY U.S. CONGRESS, 1774–PRESENT, http://bioguide.congress.gov/scripts/biodisplay.pl?index=T000348 [https://perma.cc/Q95V-LH35]; *Foster, Dwight*, BIOGRAPHICAL DIRECTORY U.S. CONGRESS, 1774–PRESENT, http://bioguide.congress.gov/scripts/biodisplay.pl?index=F000301 [https://perma.cc/NB34-8S6A]; *Heath, John*, BIOGRAPHICAL DIRECTORY U.S. CONGRESS, 1774–PRESENT, http://bioguide.congress.gov/scripts/biodisplay.pl?index=H000431 [https://perma.cc/YT6P-NWWC].

[161] H. COMM. OF COMMERCE AND MANUFACTURES, RECORD BOOK, 4TH CONG., 1ST SESS.—6TH CONG., 2D SESS., *in* 1 TRANSCRIBED REPORTS OF THE COMMITTEES OF THE U.S. HOUSE OF REPRESENTATIVES, 1789–1841, Reel 1 (1986).

[162] Fewer than one percent of the more than 1,500 petitions submitted to the House of Representatives during the 4th, 5th, and 6th Congresses were referred to executive agencies. *See* Petitions Database, *supra* note 132.

[163] WHITE, *supra* note 139, at 355–56; *see also* 1 ANNALS OF CONGRESS 130 (1795) (Joseph Gales ed., 1834) (statement of Rep. William Brach Giles) ("Mr. Giles said, that Mr. Tracy was, perhaps, better qualified than any other member in the House for expediting that business. He had been at much trouble about it, for which the House were obliged to him. It was something of a systematic nature, and new members would not be able to go on it with the same degree of information and experience.").

[164] *See* Petitions Database, *supra* note 132.

[165] H. COMM. OF CLAIMS, THE INDEX TO REPORTS OF THE COMMITTEE ON CLAIMS, 3D CONGRESS, 2D SESS., TO 16TH CONGRESS, 1ST SESS. (1794–1820), M1267.

into the latter half of the nineteenth century.[166] This extra work of hearing repeat petitions frustrated the Committee of Claims to no end. The Committee's *Report on the Petition of Peter Perrit*, for instance, noted disapprovingly that Perrit had "petitioned Congress three times . . . he has had three reports from the Secretary at War, and two or three reports of special committees . . . all against the validity of his claim: but Captain Perrit still continues to pray . . . ."[167] Whatever the Committee's feelings on the matter, it was Congress's openness to reversing prior decisions that encouraged people like Perrit to press forward.

The second reason to be skeptical of the significance of the low success rate is that the Committee would sometimes dismiss a petition because it determined that it lacked proper jurisdiction or that a remedy was already available under existing law.[168] An unsuccessful petition, in other words, did not equal an unsuccessful claimant.

Finally, some petitions that initially failed were later subsumed under general legislation. A prime example is invalid pension petitions that the First Congress initially denied due to the statute of limitation acts of its predecessor, the Confederation Congress.[169] The Second Congress suspended those acts and in doing so enabled petitioners who had failed in the First Congress to make it onto the pension rolls.[170]

One of the many illuminating debates that arose from the suspension of the Acts of Limitation was whether invalid pensioners who were added to the pension rolls after 1792 were entitled to back payment of their pensions. Joab Stafford, a captain in the Continental Army, received a pension in 1794 for injuries he sustained at the Battle of Bennington in 1777.[171] Stafford petitioned Congress in November 1794 requesting that he be paid $1,980 (approximately $39,900 in today's dollars), the total amount of his pension due to him from the time of his injury.[172] Stafford's petition was similar to that of several other pensioners, all of which were treated in a single report by the

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[166] For a detailed listing of these claims, see DIGESTED SUMMARY AND ALPHABETICAL LIST OF PRIVATE CLAIMS WHICH HAVE BEEN PRESENTED TO THE HOUSE OF REPRESENTATIVES (1853–1882).

[167] H. COMM. OF CLAIMS, 3D CONG., 2D SESS., REPORT ON THE PETITION OF PETER PERRIT, JAN. 6, 1795, *microformed on* M1267.

[168] *See, e.g.*, *H. Comm. Rep. [on the Petition of James Price], May 7, 1790*, *in* 7 DHFFC, *supra* note 11, at 42 ("That part of the demand of the said James Price, has been admitted by the Officers of the Treasury . . . . [T]he Committee can only recommend, that James Price have leave to withdraw his petition.").

[169] *See* 7 DHFFC, *supra* note 11, at 334 (quoting Letter from Henry Knox to William Eustis (Dec. 13, 1789), Knox Papers, Massachusetts Historical Society ("Congress presumed that the states had taken all the necessary precautions, and that therefore no revisions ought to operate to strike off any who were now on the lists, or to place any new ones there—And the only necessary arrangement was to pay, the same persons whom the states had paid.")).

[170] For the text of the Acts of Limitation and the statutes repealing those acts, see generally 7 DHFFC, *supra* note 11.

[171] H. COMM. OF CLAIMS, 3D CONG., 2D SESS., REPORT ON THE PETITION OF JOAB STAFFORD, JAN. 2, 1795, *microformed on* M1267.

[172] H. JOURNAL, 3d Cong., 2d Sess. 26 (1794).

Committee of Claims in 1795.[173] That report describes in detail the pensioners' reasoning behind their claims to back pay. According to the report, the pensioners based their claim on "an original promise of government founded on the principle of justice," which stipulated that those who were injured in the country's service should be entitled to pensions, and that payment of such pensions should begin at the time of their injury.[174] The pensioners argued that the First Congress, by repealing the Acts of Limitation, had "revived the original promise, in all its extent."[175] Furthermore, they believed the government "ought to adopt the same rule of construction, when contemplating this promise, as a Court of justice would adopt were it in the power of the claimants to bring the question before such court . . . ."[176] By this, the petitioners were appealing to Congress's equitable power directly.

The Committee of Claims, however, did not find the petitioners' reasoning persuasive. In reporting against the claims, the Committee stated its opinion that the Acts of Limitation in no way revived the original invalid pension act that had been passed by the Continental Congress in 1776. "If maintenance is the meaning of this pension, because the invalid is rendered incapable of labor," the Committee wrote, "it is some proof, that antecedent to the applications under the existing law, the applicants were able to procure a maintenance, or they would have applied before, when so many opportunities offered."[177] The Committee added that, while the Acts of Limitation specifically instructed the Secretary of Treasury to disregard the reasons why petitioners had not applied for a pension in a timely fashion, this instruction was not meant to authorize him to approve requests for back pay.[178] Additionally, there was a more self-serving reason, the Committee suggested, why so many of the petitioners had not applied earlier. Many were officers, and as such, entitled to commutation pay, which amounted to five years' full salary. The Committee explained: "The arrears of a full pension will now purchase the commutation to be returned, and leave a handsome sum over."[179] Finally, the Committee recommended against allowing arrears because of the enormous administrative costs such a decision would produce: it would be impossible to determine with any accuracy the proper ratio of payment considering that the degree of a pensioner's disability had probably increased as a result of the natural aging process.[180] The House eventually agreed with the Committee's report, and on January 20, 1795,

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[173] REPORT ON THE PETITION OF JOAB STAFFORD, *supra* note 171.
[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] *Id.*
[180] *See id.*

ruled on these claims by adopting a resolution stating "that no arrears, in any case, be allowed."[181]

Much of the Committee of Claims' work required them to deliberate on petitions asking for an exception to the Acts of Limitation. In deciding these claims, the Committee generally divided petitioners into two groups. In the first were those whose failure to comply with the acts was due to unavoidable circumstances, such as acts of God or prolonged absences from the country. The second consisted of those whose failure derived, in the Committee's judgment, from simple negligence or inattention. William Seymour, a captain in the Continental Army, fell into the former group. While fighting to defend Fort Griswold in Connecticut, "when every officer, but one, was killed or badly wounded," Seymour's knee had been "shattered to pieces by a ball, by which he lost his leg, and received many other wounds by bayonets &c."[182] Seymour's justification for not applying for a pension sooner was that he had been living in the West Indies since the war and did not know of the pension law's existence.[183] The Committee deemed his excuse legitimate and accordingly proposed a bill for his relief. On March 2, 1795, Congress approved "An Act for the relief of William Seymour," entitling him to a pension of $20 per month for the remainder of his life.[184]

The petition of Thomas Curtis was another story altogether. Curtis claimed money owed to him as an ordinary soldier. The only excuse he offered Congress for not applying sooner was his ignorance of the law. The Committee of Claims acknowledged that there was "probably pay due [to] him," but denied the claim on the grounds that it had not been filed in a timely manner.[185] In responding to a similar petition, Congress took the opportunity to engage in a broader discussion of why it believed Congress should resist suspending the Acts of Limitation further to allow for claims like the one put forward by Curtis. Cases of extreme hardship were so few that they could be dealt with on a case-by-case basis through the "special interposition of government."[186] But claims like Curtis's could be rejected for both legal and policy reasons. Statutes of limitation aided Congress in ascertaining the amount of debt owed by the government in order to dispose of the same in a reasonable time. Congress had a duty, according to the Committee, to protect the public treasury against fraud and abuse.[187] As

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[181] H.R. Res. 60, 3d Cong. (1795) (enacted).

[182] H. COMM. OF CLAIMS, 3D CONG., 2D SESS., REPORT ON THE PETITION OF WILLIAM SEYMOUR, FEB. 14, 1795, *microformed on* M1267.

[183] *Id.*

[184] Act of Mar. 2, 1795, ch. 38, 2 Stat. 20 (1795).

[185] H. COMM. OF CLAIMS, 3D CONG., 2D SESS., REPORT ON THE PETITION OF THOMAS CURTIS, FEB. 27, 1795, *microformed on* M1267.

[186] H. COMM. OF CLAIMS, 3D CONG., 2D SESS., REPORT ON THE PETITION OF GEORGE CAMPBELL, FEB. 25, 1795, *microformed on* M1267.

[187] *See, e.g.*, *Report on Renewal of Lost Certificates, Feb. 6, 1797*, *in* 5 AMERICAN STATE PAPERS 196 (1834) ("[I]t would be extremely difficult, if not impossible, at this time, to guard against fraud and imposition, should further provision be made for renewing [lost public debt certificates] . . . .").

years went by, memories faded, witnesses died, and papers became misplaced, all of which invited fraudulent claims. According to the Comptroller of the Treasury, the suspension of the Acts of Limitation "was attended with consequences . . . far more injurious to the public interest than could have been anticipated."[188]

The Committee of Claims was also exceedingly conscious that its decisions would be cited as precedent by future Congresses as well as would-be petitioners. Petitioners did, in fact, often cite the Congress's behavior towards other petitioners when presenting their own claims.[189] Respect for precedent caused the Committee to adopt a conservative approach toward claims adjudication. The case of Benjamin Titcomb is illustrative. Titcomb, whom the Committee acknowledged was "very much disabled," petitioned for permission to receive a pension without returning his commutation, which his impoverished circumstances had forced him to sell for one-sixth of its value.[190] Though convinced Titcomb's situation was "very distressing," the Committee recommended that his claim be denied. The laws demanded that any officer who wished to be placed on the pension rolls return his commutation, and to depart from this standard through a special act "would be attended with bad consequences as a precedent, after so long a practice upon known rules."[191] The Committee tried to avoid special acts whenever possible. "A deviation in favor of any one applicant singly," it wrote in response to another petition, "would form an inconvenient precedent, and such a one as it would be difficult to resist."[192]

Congress's authority over expenditures provided it with a dual role in the administration of public affairs. First, Congress acted as the sole forum for petitioners seeking equitable relief. Those whose claims were defaulted according to a strict interpretation of the laws could nonetheless seek special relief from Congress. Although Congress was cognizant of the need to treat classes of claimants equally and prevent fraud, it proved willing to accede to petitioners' requests when doing so was in keeping with the general purpose of the laws in question. Second, Congress also operated as a sort of appellate authority from which claimants could seek review of executive agency decisions. Executive agency officers, while sometimes sympathetic to a petitioner's claim, often felt compelled to reject it for want of proper authority.[193]

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[188] Letter from John Steele, Comptroller, to the Honorable Dwight Foster, Chairman, Comm. of Claims, 4th Cong., 2d sess. (Dec. 22, 1797), *microformed on* M1267.

[189] H. Comm. of Claims, 3d Cong., 2d sess., Report on the Petition of Noble Benedict, James Clark, and John Trawbridge, Dec. 28, 1795, *microformed on* M1267.

[190] H. Comm. of Claims, 3d Cong., 2d sess., Report on the Petition of Benjamin Titcomb, Dec. 22, 1795, *microformed on* M1267.

[191] *Id.*

[192] *Id.*

[193] See, for example, Secretary Hamilton's December 12, 1791 report on the petition of George Webb, *in* 5 American State Papers 32 (1834), stating that "The refusal of the Treasury to admit a further allowance seems to have proceeded on the ground of want of authority, and probably upon the supposition that some further legislative provision was necessary."

In such cases, Congress was the only authority capable of redressing the grievance. Because Congress persisted in its unwillingness to transfer this discretion to executive agencies or the courts, it retained its role as final arbiter over most claims through the first half of the nineteenth century. In the following two Parts, this Article reviews the substantive guidelines and procedures that Congress used in determining the merits of those claims.

V. The Substance of Equitable Private Lawmaking

Although Congress's power to satisfy private claims was, by definition, discretionary, it was far from lawless. To the contrary, as I seek to show in this Part and the next, congressional administration over private claims was bounded by routinized procedures and substantive guidelines that provided claimants with a reasonable expectation of their prospects for success. What makes private lawmaking a particularly interesting subject of study is that it combined features of ordinary statutory lawmaking with the sort of individualized determinations more typically thought of as administrative or judicial in nature. The present Part is therefore dedicated to a general description of how Congress formed its judgments on the merits of individual claims. The following Part then examines how the practice of claims adjudication evolved or, perhaps more accurately, devolved over time.

While Congress never formally codified the standards used to determine which claims were cognizable or deserving of favorable judgments, congressional committees were very careful to ensure that the dispensation of each claim was accompanied by a written opinion. As demonstrated in Part IV, each opinion gave specific reasons for the acceptance or rejection of a petitioner's claims. The reasons typically contemplated: (a) the character of the individual claimant and his acts; (b) the general purpose behind a legislative enactment to which the petitioner appealed; (c) the public policy and administrative ramifications of recognizing the individual claim; and (d) the potential for an individual determination to serve as future precedent. In addition to making its reasons known to individual petitioners, over time Congress began to print its reports, first, for the benefit of its own members, and second, so that the public more broadly would recognize the principles behind its decisions.[194]

In the Sections that follow, this Article provides a brief synopsis of the most important factors that Congress considered when deciding claims on their merits. This list, while not exhaustive, offers a fairly comprehensive picture of how congressional claims committees ruled.

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[194] *See* William R. Brock, The United States, 1789–1890: The Sources of History 109 (1975).

A. Precedent

Congressional committees were exceedingly conscientious of relevant precedents and were hesitant to overturn them.[195] At the same time, one of the characteristics that distinguished congressional claims adjudication from the sort practiced by courts was the absence of finality. That each individual Congress enjoyed attributes of sovereignty meant that, at least in theory, none were bound by the actions of their predecessors.[196] Congressional decisions also involved weighing the rights of claimants against a shifting public interest. This could mean, for example, that even just claims might go unrecognized when public exigencies like war made the payment of claims appear too costly.[197]

As a general rule, however, precedent dictated the disposition of a large number of private claims. This rule took two forms. First, in the case of repeat petitioners, congressional committees placed great reliance on the factual findings and, to a slightly lesser extent, legal conclusions of prior committee or executive agency reports.[198] In some sense, this was simply a time saving device that permitted overburdened committees to turn their attention to seemingly worthier claims. More generously, it reflected the committees' faith in an experiential knowledge derived from years of claims adjudication practice. Unless a petitioner could adduce new evidence demonstrating why a prior report had been in error, or point to some public policy that its author

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[195] *See, e.g.*, *H. Comm. Rep. on Petition of Henry Laurens for Frances Eleanor Laurens (Jan. 28, 1791)*, *in* 7 DHFFC, *supra* note 11, 26–27 ("[The Committee] have cause to apprehend, that an admission of the claim in this instance, would not only justify a revision of all cases of deferred payment (where strict justice would equally require an allowance of interest) but would at the same time establish a precedent likely to be attended with considerable inconvenience to the government."); *S. Comm. Rep. on the "Bill to satisfy the claim of the Representatives of David Gould deceased against the united States" (July 5, 1790)*, *in* 7 DHFFC, *supra* note 11, at 331 ("[T]he committee are of opinion that to agree to this bill would be implicitly acknowledging a claim not founded in contract, and by its precedent, might open the door for numerous applications for gratuities not stipulated by the resolves of Congress—Therefore that the Bill ought to be disagreed to in Senate.").

[196] In an 1848 report, the Committee of Claims referred to the practice as a necessary evil given what it perceived to be the flawed method used to decide claims. H.R. REP. NO. 30-498, at 6 (1848) ("Under the present system, when the examination of claims by committees is necessarily so imperfect, and the action of Congress so far from being a deliberate and intelligent action, it would be most unjust to refuse action upon a claim, merely because it had already received the unfavorable decision of a committee or of the House; and, under this system, the evil must necessarily continue and increase.").

[197] *See* H.R. REP. NO. 25-730, at 3 (1838) ("In the early history of this Government a strict adherence to statutes of limitation, requiring the presentation of claims within short periods, debarred many claims.").

[198] *See, e.g.*, *Report of the Committee of Claims on the Petition of Gilbert Dench*, *in* 1 AMERICAN STATE PAPERS 193 (1834) (praying for depreciation of loan office certificates) ("The petitioner has heretofore brought this subject under the view of Congress, who, after a full investigation, resolved that the prayer of his petition ought not to be granted. Though the committee are sorry for the misfortunes of Mr. Dench, they cannot find sufficient reasons to justify an opinion that the House should now make a different decision; and therefore report that he have leave to withdraw his petition.").

had failed to consider, committees generally rejected the claim in swift fashion.

The second application of precedent was to new claims whose authors raised essentially the same arguments as previous claimants. For instance, in considering several claims seeking renewal of loan officer certificates that had been accidentally lost or destroyed, a 1798 Committee of Claims report noted that the issue had repeatedly been raised and rejected by prior Congresses. In the Committee's words, "Precedents have already been established by authority, which the committee feel themselves bound to respect."[199] Petitioners seeking to overturn longstanding precedents, in other words, were better advised to direct their appeals to Congress as a whole. Of course, precedent could also be helpful to claimants. In reporting favorably on the 1796 petition of Catherine Greene, the Committee of Claims supported its decision by referencing an earlier congressional act in her favor.[200] Greene, the widow of Revolutionary War hero Nathanael Greene, sought indemnification for demands against her husband's estate arising out of his wartime activities. Congress had responded favorably to her first petition by enacting a private law on her behalf, a law that the 1796 Committee viewed as sufficient reason to recommend satisfaction of her subsequent claim.[201]

B. Administrative Fact-Finding and Ex Parte Evidence

As explained in Part IV, Congress experimented with, but ultimately rejected, transferring administration of discretionary claims to the executive agencies. However, because those agencies functioned as the primary repositories of government information on which most claims were based, Congress continued to rely on their staffs to a great deal in the fact-finding process. This was accomplished through general correspondence between the committees and lower level executive officers.[202] In contrast to the practice of the first three Congresses, executive agency heads were rarely involved in the process themselves. Congress also relied on administrative findings of fact in cases where the claimant used the petitioning process to appeal a prior administrative denial of the claim.

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[199] *Report of the Committee of Claims on the Memorials and Petitions of George P. Frost et al.*, *in* 9 AMERICAN STATE PAPERS 216 (1834).

[200] An Act to indemnify the Estate of the late Major General Nathanael Greene, ch. 26, 6 Stat. 9 (1792).

[201] *Report of the Committee of Claims on the Petition of Catherine Greene, May 13, 1796*, *in* 9 AMERICAN STATE PAPERS 189–90 (1834) ("This act has served as a precedent to the committee, in deciding on the present petition, as there are the same reasons existing for the interference of Government now, as then, to which may now be added the weight of precedent.").

[202] *See, e.g.*, *Report of the Committee of Claims on the Petition of Azor Bagley, Dec. 22, 1797*, *in* 1 AMERICAN STATE PAPERS 203 (1834) ("In the investigation of this claim, the committee have inquired at the proper offices for facts, so far as they could be there ascertained. They are detailed in a letter received from the Comptroller of the Treasury . . . .").

Acceptance of administrative findings of fact is not surprising. Executive agency employees were perceived as being neutral players capable of objectively reporting on the content of the petitioners' files. Moreover, congressional committees simply did not have the time or the resources to conduct hundreds of factual investigations at each congressional sitting. For much of the first half of the nineteenth century, congressional committees lacked their own staff members.[203] Individual congressmen were therefore responsible for authoring their own reports.

Congressional committees also did not have the resources to hold elaborate adjudications or trials. When claimants were invited to participate in committee hearings, the evidence given to the committee was taken ex parte. Government administrators did not attend to cross-examine the claimant or offer a contrary version of events.[204] More typically, the committees simply relied on the written record before it. For this reason, petitioners were well advised to append all necessary information in support of their claims to the bodies of their petitions.

Where a discrepancy existed between a petitioner's account and that of an agency, the committees almost always sided with the agency. This calculus reflected the general assumption that petitioners were likely to misstate the evidence in order to put their claims in the best light possible.[205] Wary of fraud, congressmen logically deferred to the agency's determination.

C. General Principles

In addition to precedent and administrative fact finding, congressional committees looked to a series of other decisional principles when determining the merits of individual claims. Many of these principles have already been stated in Part IV by way of example, but they bear restating here.

First, Congress would not afford relief wherever a non-congressional remedy existed elsewhere. On several occasions, for example, petitioners

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[203] LAUROS GRANT MCCONACHIE, CONGRESSIONAL COMMITTEES: A STUDY IN THE ORIGINS AND DEVELOPMENT OF OUR NATIONAL AND LOCAL LEGISLATIVE METHODS 65 (1898) (reporting that proposals to provide each committee with two clerks were defeated in 1803, 1815, and 1817).

[204] The ex parte nature of the proceedings became a frequent source of complaint among reformers. *See* 30 ANNALS OF CONGRESS 377 (1816) (Joseph Gales ed., 1834) (Statement of Rep. John Ross) ("No man, Mr. R[oss] said, even Aristides himself, however just, intelligent, and upright, can decide correctly judicial matters, who receives his information *ex parte*."); H.R. REP. NO. 30-498, at 6 (1848) ("The testimony which is now taken in claims before committees is entirely *ex parte*. The United States is never present by any of its officers or agents to cross-examine the witnesses. No proof is taken on behalf of the government to controvert that of the petitioner.").

[205] *Report of the Secretary of War (Feb. 8, 1793)*, *in* 7 DHFFC, *supra* note 11, at 386 ("But if it should be the judgment of Congress, that increased allowance to any invalids, under special circumstances ought to be admitted, yet it will be necessary to prevent abuse, that there be an Actual inspection of such Invalids taken place by the same Judges as have or may be appointed to judge of the admission of Invalids, not heretofore placed on the list.").

were simply mistaken about their eligibility under existing law.[206] Additionally, the enactment of new laws or amendments to existing ones meant that eligibility requirements sometimes changed while a petition was pending. This occurred frequently with pension applications. Whenever Congress relaxed the statute of limitations or eased the evidentiary burdens for proving disability, committee reports simply advised petitioners to repair to the executive agencies where their claims would now be cognizable. Similarly, in cases where courts could potentially exercise jurisdiction over a matter, congressional committees would generally refuse to intervene. This sometimes happened in cases where a third party could be sued for nonpayment of a government debt.[207] In practice, directing petitions to the courts had the effect of barring many petitions, such as those brought on behalf of destitute Revolutionary soldiers who claimed to never have received pay from their regiments' paymasters. Congress directed these petitioners to sue the paymasters directly, a rather unyielding stance considering that many of those paymasters were likely judgment proof.[208]

Second, claimants needed to establish a lack of fault. This meant, in the first instance, that the burden was on the petitioner to put forward a good reason for having not complied with the strict terms of the written law. As in other areas of the law, congressional committees did not look upon ignorance favorably.[209] Where a petitioner had failed to comply with a statute of limitation, for instance, he or she needed to prove an extraordinary reason behind the error.

Third, as a corollary to the second factor, claimants needed to establish some reasonable relationship between the conduct complained of and the functions typically served by government. To take but one of several exam-

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[206] *See, e.g.*, *Report of the Secretary of Treasury on the Petition of Joseph Packwood (Mar. 3, 1794)*, *in* 7 DHFFC, *supra* note 11, at 52 ("The Petitioner is mistaken that there was at the time no law relative to prizes recaptured."); *Federal Sock House Committee Report on the Petition of the Freeholders of Albany and Washington Counties, New York (Jan. 28, 1791)*, *in id.* at 431 ("On the whole, your Committee are not satisfied, that the said Younglove is entitled to a pension, by virtue of any ordinance of Congress prior to the act aforesaid, nor agreeably to any rule or principle adopted by Congress under the present constitution.").

[207] *See Report of the Committee of Claims on the Petitions of Samuel Abbot et al., Feb. 21, 1797*, *in* 1 AMERICAN STATE PAPERS 199–200 (1834).

[208] At one point, the Committee of Claims actually issued a favorable report on behalf of such claimants, but Congress rejected it. *See id.*

[209] *Compare, e.g.*, *Report of the Committee of Claims on the Petition of Asahel Clark, Mar. 12, 1818*, *in* 1 AMERICAN STATE PAPERS 592–93 (1834) (seeking indemnification for expenses as a judge advocate) ("[I]t appears the petitioner is an innocent sufferer, having become involved in this concern without fault or intention. He has had his claim before the Secretary of War, but has been advised the equitable authority of this officer does not extend to the allowance of a settlement of it.") *with Report of the Committee of Claims on the Petition of Catharine McNiff, Dec. 4, 1818*, *in* 1 AMERICAN STATE PAPERS 611 (1834) (rejecting claim for rent owed for occupation of house during war) ("[I]n the eye of the law and common sense, every person is deemed competent at all times to manage his own interest . . . . The petitioner, therefore, can have no claim on the United States for additional compensation. If that which has been already received was not sufficient, it is her own fault in not having made a greater charge, or stipulating at the time for more than was paid.").

ples, many claimants complained of personal property damaged at the hand of British forces during the Revolutionary War.[210] As a policy matter, Congress had never recognized any federal responsibility for depredations committed by an invading army. To have done so would have vastly expanded the scope of government liability. Accordingly, to secure compensation a claimant needed to show that his or her property would not have been destroyed, but for the actions of the U.S. military.[211] This could be shown, for example, by the fact that the United States had occupied the property prior to the complained of offense, thereby making the property a prime target of British forces.[212]

Fourth, claims would be recognized if they fit within the general purpose of a statute, even if they escaped its strict terms.[213] This represented an honest recognition by Congress that general lawmaking was often flawed, and that statutes could not pretend to cover every conceivable class of individuals who might be impacted by their terms. The converse, however, was also true. If the textual language of a statute specifically excluded a certain type of claim or class of claimant, the petitioner seeking relief under that statute would be hard pressed to offer an explanation of why Congress had erred.

The foregoing analysis has sought to provide a general overview of the substantive bases of congressional decision making with respect to private claims. In Part VI, this Article turns to an examination of how petitions were presented to Congress and the procedures adopted to handle them.

VI. The Process of Equitable Private Lawmaking

In considering the procedures used for presenting and adjudicating claims, a logical starting point is the text of the First Amendment, which provides that "Congress shall make no law . . . abridging . . . the right of the

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[210] *See generally* 7 DHFFC, *supra* note 11, at 103–28 (describing claims).

[211] An Act to Authorize the Payment for Property Lost, Captured, or Destroyed by the Enemy, While in the Military Service of the United States, and for Other Purposes, ch. 40, 3 Stat. 261 (1816).

[212] *See Report of the Committee of Claims on Revising the Act Authorizing Payment for Property Destroyed by the Enemy During the War with Great Britain, Dec. 17, 1816*, *in* 1 American State Papers 486 (1834) ("The ninth section of the act authorizes payment for a house or building destroyed by the enemy *while* the same was occupied as a *military deposite*, under the authority of an officer or agent of the United States, if it shall appear that *such occupation* was the *cause* of its destruction. A mere temporary occupation of the house for one night and a part of the next day, by one or two companies of militia, cannot impart to the house even the character of barracks, but much less that of a military deposite.").

[213] *Report of the Committee on Pensions and Revolutionary Claims, Jan. 13, 1815*, *in* 1 American State Papers 446–47 (1834) (praying renewal of loan office certificates) ("It also appears that the requisites of the resolve of 1780 have not been complied with, so far as to advertise the destruction *immediately* after it happened. The committee feel satisfied, however, that as the destruction was advertised, and as a petition was presented to Congress, and not to the Treasury, before the limited time had expired, there has been a compliance with the *spirit*, although not with the letter of the laws.").

people . . . to petition the Government for a redress of grievances."[214] As the historian Edmund Morgan has noted, the right to petition seems odd in a system based on popular sovereignty. Why would anyone "need a right to pray, beg, or supplicate, especially if the power thus implored is supposed to be inferior to the supplicants?"[215] Indeed, in some sense, the right to petition was merely declaratory in character; most Americans probably assumed they retained the right to petition their elected officials.

The content of private petitions, on the other hand, indicates that the prayerful nature of the right was not entirely a conceit; many petitioners did indeed "pray" for Congress to recognize their claims as a matter of justice or moral obligation as opposed to one of legal right. This Part begins, therefore, by asking how petitioners knew what to say and whom to address when formulating their claims.

The answers lie primarily in custom. By the late eighteenth century, the petition was such a familiar vehicle for obtaining redress that all understood its basic features. Nearly every petition communicated to Congress during the eighteenth and nineteenth century assumed a standard format consisting of three basic parts: (1) a preamble identifying the name of the claimant and the body to which his or her petition was addressed; (2) a statement of the claim; and (3) a request for compensation or other remedy.

In addition to these common features that comprised the body of nearly all petitions, claimants would often reference and attach supporting documents. For instance, individuals seeking resolution of contract claims would customarily include a statement of their accounts procured from the Treasury or War Departments.[216] Likewise, pensioners requesting an increase in their disability allowances offered medical reports attesting to their deteriorated conditions.[217] And those who had previously received a favorable report from a congressional committee were sure to reference that fact in subsequent petitions, perhaps including a copy of the prior report for the committee members' convenience.[218]

The standard format that petitions assumed and Congress's liberalized procedures for receiving them meant that anyone with a basic degree of literacy could access the congressional claims adjudication forum. In an era of large-scale disenfranchisement, private petitioning stands out for its inclusiveness. Attesting to the vehicle's equitable character, it was neither uncom-

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[214] U.S. CONST. amend. I.

[215] *See* EDMUND MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 225 (1988).

[216] *See, e.g.*, *Petition of William Paine (Oct. 1814)*, *in* 7 DHFFC, *supra* note 11, at 28; *Petition of Henry Laurens (Nov. 13, 1790)*, *in* 7 DHFFC, *supra* note 11, at 62.

[217] *See, e.g.*, *Report of the Secretary of War on the Petition of William Oliver*, *in* 7 DHFFC, *supra* note 11, at 344–45 ("[I]t does not appear by the examination of Doctor [Charles] Mcknight the certificate of which is annex'd, that such a degree of disability has ensued as to entitle the petitioner to a pension.").

[218] *See, e.g.*, *Petition of Baron de Steuben (Aug. 25, 1789)*, *in* 7 DHFFC, *supra* note 11, at 207–33.

mon nor objectionable for those excluded from formal political participation—women, minors, aliens, and minorities—to press their claims upon Congress.[219] Appeals to moral justice from these groups perhaps carried even greater weight than ordinary claims because their authors could look to no other legal mechanism for redressing their grievances.

In fitting with the nation's republican character, petitions to Congress were generally shorn of the florid rhetoric that characterized many colonial petitions.[220] The petition of Isaac Briggs offers a typical example of the simple form that most petitions assumed. According to his petition, Briggs undertook a survey of a post road from Washington D.C. to New Orleans in 1804 at the request of Thomas Jefferson.[221] Because Briggs's survey had not been authorized by statute, a consequence of the secrecy that enshrouded Jefferson's action, he was forced to appeal to Congress's discretion for payment of the extraordinary expenses he had incurred. Accordingly, Briggs began his 1808 petition with a preamble addressed simply to "the House of Representatives of the United States in Congress assembled."[222] Briggs's decision to address his petition to the House was no accident since the Constitution mandated that all money bills originate in that chamber.

Next, Briggs included a common formulation that identified both the nature of the document being presented to the House and its author ("the petition of Isaac Briggs respectfully showeth").[223] Aside from maintaining consistency with custom, Briggs's decision to include this introduction served a useful record keeping function. Many private petitions were first forwarded to the House clerk, who was responsible for transcribing and maintaining copies of the original petitions in alphabetical order so that members would have easy access to their contents.[224] By adhering to the standard prefatory address, Briggs could be confident that the House clerk would properly file his petition and that the petition would reach its intended audience when the House was called upon to act on its contents.

The next stage—the statement of the claim—comprised the substantive narrative of the petition. Here, petitions often diverged between those offering a full elaboration of the factual and legal bases in support of the claim and those containing only a conclusory statement of its merits.[225] Briggs followed the latter course, opting to allow two letters that he attached from

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[219] For discussion of petitioning activities by, and on behalf of, disenfranchised groups, see generally ZAESKE, *supra* note 42; PETITIONS IN SOCIAL HISTORY, *supra* note 42; Ruth Bogin, *Petitioning and the New Moral Economy of Post-Revolutionary America*, 45 WM. & MARY Q. 395 (1988); Collins, *supra* note 42.

[220] For more on the changing style of petitions, see Bogin, *supra* note 219, at 420–21.

[221] *Petition of Isaac Briggs to the House of Representatives, Mar. 18, 1808*, *in* 1 AMERICAN STATE PAPERS 362 (1834).

[222] *Id.*

[223] *Id.*

[224] *See generally* 1 TRANSCRIBED REPORTS OF THE COMMITTEES OF THE U.S. HOUSE OF REPRESENTATIVES, 1789–1841, Reel 1 (1986).

[225] For an example of the former, see *State of Facts Alluded to in the Baron Steuben's Memorial (Aug. 25, 1789)*, *in* 7 DHFFC, *supra* note 11, at 208.

President Jefferson to speak to the merits of his claim.[226] In the body of the petition, Briggs began with a short summary of the nature of his appointment as a postal road surveyor and the specific duty he had been obligated to perform.[227] He then addressed the purpose of his claim in one sentence:

> That your petitioner . . . had no expectation of extraordinary expense or difficulty; but that in the course of this service, he encountered great expense and extreme hardships, which were immediately followed by a severe and tedious sickness, and a shock to his constitution, from the effects of which it will probably never recover.[228]

To this he merely added that the House already possessed his report on the road President Jefferson had directed him to survey.[229] In total, the body of Briggs's petition amounted to only three sentences, a succinct recitation of the purpose for which he sought relief.

Finally, Briggs concluded his petition with an appeal to Congress's "mercy and liberality," an open acknowledgment that the relief he requested was extraordinary.[230] In praying for compensation, Briggs neglected to specify the precise amount he felt was due to him, instead leaving the decision to whatever Congress deemed "just and reasonable."[231] Such deference was also consistent with the custom of the time, as petitioners were careful to avoid appearing as though they were attempting to dictate to Congress what the terms of any equitable settlement should be.

While not all petitioners followed his example, for several reasons Briggs was well advised to keep his petition brief. First, because the introduction of a petition in the House was accompanied by its full reading on the floor, congressmen logically valued brevity. Second, committees sometimes looked to petitions when framing the language of private acts.[232] Petitions that succinctly stated the nature of the claim at issue therefore assisted in the process of legislative drafting. Third, and perhaps most importantly, congressmen generally viewed private claimants with a healthy degree of skepticism. Rather than relying on the body of the petition for proof of its merits, Briggs instead allowed the letters from President Jefferson to do the talking for him. Jefferson noted that "the map [prepared by Briggs] has been the foundation of all our proceedings in the prosecution of this road, has saved

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[226] *Petition of Isaac Briggs to the House of Representatives, Mar. 18, 1808*, *in* 1 AMERICAN STATE PAPERS 362 (1834).

[227] *Id.*

[228] *Id.*

[229] *Id.*

[230] *Id.*

[231] *Id.*

[232] *See, e.g.*, 8 DHFFC, *supra* note 11, at xxiv–xxv ("[Attorney Miers] Fisher not only drafted the Bailey Bill for the House committee on the patent petition of his client, Francis Bailey, he also kept notes of his testimony before a Senate committee, and later seems to have assumed the role of its secretary during the markup of the bill.").

us the expense of making the preparatory general survey with the chain and compass, and had, in fact, been completely profited as public property."[233] To this, he added a somewhat ominous warning concerning the potential effects of denying Briggs's petition, cautioning that "[g]entlemen who say they will never sanction an expenditure made without a previous law, will leave their country exposed to incalculable injury in those unforeseen occurrences where the voluntary sacrifices of virtuous citizens might save the public interest if the prospect of indemnification were not shut out."[234] Briggs undoubtedly understood that the comments of a sitting President would likely have a far greater effect in his favor than anything he could say on his own behalf.[235]

To be sure, few claimants could call upon a sitting President to vouch for their claims. But the manner in which a petition was presented could have considerable influence on its likelihood of success. In the first instance, to be considered by either the House or the Senate, a petition needed to have a congressional sponsor willing to present it on the floor. This itself was hardly an onerous barrier to entry, as nearly all congressmen felt duty bound to present the claims of their constituents.[236] More problematic was the tendency of congressmen to wait until the end of a session before presenting a claim. By doing so, a representative could claim credit for introducing the claim without doing the legwork to ensure that it received a proper hearing. According to an 1838 report by the Committee on Claims, between the 22d and the 24th Congresses, only 5,353 of the 8,655 petitions—roughly three of every five—were ever acted upon.[237] To be successful, then, a claimant needed to ensure that both the representative sponsoring the petition was prepared to move for its referral to the proper committee and that the petition itself was introduced early enough to ensure the said committee would have time to consider its merits.

The generalized nature of the petition meant that it was accessible to anyone with access to pen and parchment. Indeed, some of the petitions bear witness to their authors' limited literacy and seem to confirm the notion that the vehicle did not discriminate between rich and poor. However, consistency in style and form naturally raise the question of whether petitioners employed the help of intermediaries such as professional draftsmen or lawyers. Evidence in this regard is inconclusive. While there are instances in which congressmen themselves drew up petitions on their constituents' be-

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[233] *Thomas Jefferson, Letter of February 16, 1807 (accompanying Briggs's petition)*, *in* 1 AMERICAN STATE PAPERS 362 (1834).

[234] *Id.*

[235] The strategy ultimately prevailed, albeit belatedly, as Congress took ten years before passing an act to settle Briggs's accounts.

[236] 8 DHFFC, *supra* note 11, at xxii ("Congressmen usually presented their constituents' petitions, which were either mailed to them or which they carried with them from their home districts when they returned from a recess . . . .").

[237] H.R. REP. NO. 30-498, at 4 (1848).

half,[238] the more ordinary practice appears to have been for petitioners to forward already composed petitions for their representative's review.[239] Occasionally, particularly when there was some complex issue of law involved, petitioners would employ lawyers who would draft and append legal memoranda in support of their claims.[240] Such instances, however, were the exception rather than the rule, at least in Congress's early years. The relatively insubstantial amounts sought by many claimants likely made employing a professional lawyer cost prohibitive.

It was not uncommon for petitioners to travel to the seat of Congress to lobby members in person. Even the records of the First Congress are replete with instances in which petitioners harangued congressmen to support their claims.[241] The inventor John Fitch, for example, engaged in a voluminous correspondence with members and personally attended to them while seeking support for his patent claim regarding a contested steamboat invention. Fitch petitioned the First Congress on no fewer than four separate occasions,[242] all the while maintaining a detailed list of the identities of his purported "friends" and "enemies."[243] Fitch's initial application attests to the importance petitioners attached to speed, particularly in matters of patent legislation. In a letter to Senator William Johnson, Fitch warned of "the incessant, though hitherto unavailing, attempts, which a rich and powerful party have made, who are engaged with Mr. James Rumsey [Fitch's rival], to take away my Rights . . . ."[244] He added that, "As soon as your honorable House shall think it proper to take my Claims into Consideration, I shall be ready to attend, being now engaged in preparing my Papers and Docu-

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[238] *See, e.g.*, *Francis Taylor to James Madison (Nov. 7, 1790)*, *in* 13 THE PAPERS OF JAMES MADISON 300–01 (Charles F. Hobson et al., eds. 1981). Taylor asked Madison to rewrite his petition, which he feared was "not drawn in the proper manner." *Id.*

[239] *See, e.g.*, *Petition of Francis Bailey (Feb. 2, 1790)*, *in* 8 DHFFC, *supra* note 11, at 76.

[240] *See, e.g.*, *Petition of Washington Bowie and John Kurtz et al. (undated)*, *in* 1 AMERICAN STATE PAPERS 617–27 (1834) (praying indemnification for the loss of a ship at Algiers, and attaching a list of objections to the prayer and answers).

[241] *See, e.g.*, 7 DHFFC, *supra* note 11, at 118 (describing lobbying efforts by the trustees of Wilmington Academy, which had been damaged by fire during the War); *id.* at 130 (describing plans of James Gibbons, an officer seeking commutation pay, to travel to New York to "seek federal office and probably also support for his commutation claim"); *Petition of the Officers of Benjamin Flower's Regiment (Sept. 14, 1789)*, *in* 7 DHFFC, *supra* note 11, at 133 ("Your Petitioners . . . beg leave to add, that they have at a very great expence [sic] attended several times at New-York, for the purpose of obtaining those just dues which a concurrence of unfortunate circumstances has hitherto rendered abortive.").

[242] 8 DHFFC, *supra* note 11, at 38–65.

[243] John Fitch, *Tally of Congressional Support (Jan. 5–Feb. 10, 1791)*, *in* 8 DHFFC, *supra* note 11, at 73. Fitch included the names of several representatives along with remarks like "Refused an audience I suppose because he thought me to be a quaker," *id.*, no doubt a reference to a concerted Quaker lobbying campaign then ongoing to abolish the slave trade. *See generally* William C. diGiacomantonio, *'For the Gratification of a Volunteering Society': Antislavery and Pressure Group Politics in the First Federal Congress*, 15 J. EARLY REPUBLIC 169 (1995).

[244] Letter from John Fitch to Sen. William Johnson (Apr. 2, 1789), *in* 8 DHFFC, *supra* note 11, at 52–53.

ments . . . ."[245] Despite his best efforts, Fitch failed to gain the upper hand in his contest with Rumsey, as both men received patents for their respective inventions.

While in-person lobbying by petitioners was not uncommon, professional lobbying emerged only gradually. By the latter half of the nineteenth century, commentators were increasingly identifying the private lawmaking process as the cause of "the lobby," a body that they decried as undermining the virtue of the American political system. Writing in *The Atlantic* in 1878, the lawyer and sometimes-lobbyist Arthur G. Sedgwick explained that "during about a quarter of the entire year an active and powerful, though indeterminate body devotes itself to watching, furthering, or opposing the work the legislatures is called into existence to do, and which it is supposed to do without interference of any kind."[246] The cause of this pernicious force was easily identifiable: "The lobby is produced by private claims upon the government."[247] Rather than blame the lobbyists themselves, Sedgwick directed his ire at the claims process. "So far as claims are concerned," Sedgwick wrote, "Congress is a court whose jurisdiction is the most extensive and whose methods of procedure are the most cumbrous in the world."[248] Seen in this light, claimants' resort to professional lobbyists was not only understandable, but also essential to their prospects for success.

The Supreme Court, for its part, did its best to stem the tide of supposed corruption by refusing to validate lobbying contracts. In 1874, the Court was tasked with deciding a dispute between Nicholas P. Trist, a lobbyist, and Linus M. Child, the son of a claimant who had executed a contract with Trist.[249] The contract established a contingency fee arrangement whereby, in the event Trist was successful in achieving payment of the claim, Child or his heirs should receive twenty-five percent of all sums disbursed by the Treasury.[250] This seemingly bad bargain becomes somewhat more understandable when one considers the extraordinary nature of the relief requested. The claim, which Trist began lobbying for in 1866, involved services rendered by Child nearly twenty years prior in relation to the Treaty of Guadalupe Hidalgo. Trist did not succeed in persuading Congress to pass an act in Child's favor until 1871.[251] In the intervening period Child died, and his son subsequently disputed the validity of the contract with Trist. Trist then prevailed upon the Treasury to suspend payment, a sort of lien placed on the settlement until the courts could rectify the dispute.

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[245] *Id.*

[246] Arthur G. Sedgwick, *The Lobby: Its Cause and Cure*, ATLANTIC MONTHLY, Apr. 1878, at 1.

[247] *Id.*

[248] *Id.* at 2.

[249] *See generally* Trist v. Child, 88 U.S. (21 Wall.) 441 (1875).

[250] *Id.* at 442.

[251] *Id.*

In negating the contract on public policy grounds, the Court took the unusual step of publishing a letter that the younger Child had written to Trist offering directives on how to pursue the father's claim. Although benign by contemporary standards, the Court pointed to the letter as demonstrating "the effects of contracts such as the one in this case."[252] In the letter, Child instructed Trist to "write to your friends to write immediately to any member of Congress. Every vote tells, and a simple request to a member may secure his vote, he not caring anything about it. Set every man you know at work, even if he knows a page, for a page often gets a vote. The most I fear is indifference."[253] The Court, in denying the validity of the contract, began by referring to a proposition from Roman law that "a promise made to effect a base purpose, as to commit homicide or sacrilege, is not binding."[254] Although there was no evidence that Trist had used fraud or bribery to secure resolution of the claim, the Court refused to sanction the contract, seemingly providing a windfall to the younger Child. The Court explained:

> A private bill is apt to attract little attention. It involves no great public interest, and usually fails to excite much discussion. Not unfrequently the facts are whispered to those whose duty it is to investigate, vouched for by them, and the passage of the measure is thus secured. If the agent is truthful and conceals nothing, all is well. If he uses nefarious means with success, the springhead and the stream of legislation are polluted. To legalize the traffic of such service would open a door at which fraud and falsehood would not fail to enter and make themselves felt at every accessible point.[255]

To understand how the claims process became the object of such derision, a brief sketch of its development throughout the nineteenth century may be illuminating. As that century wore on, Congress was increasingly besieged by private claims, many of which lacked substantive merit and had already been rejected, or reported unfavorably on, by prior Congresses. For reasons explained in Part IV, Congress felt constitutionally compelled to retain final authority over all claims, and was therefore reticent to surrender control to executive agencies or courts. The fact that claims administration involved equitable decision making reinforced this reticence; Congress simply could not conceive of the other branches exercising this power in a manner consistent with the public interest.[256]

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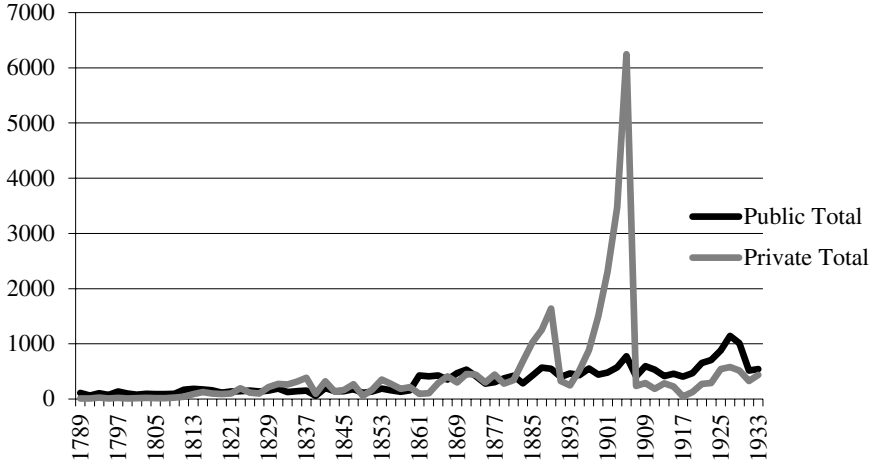
[252] *Id.* at 443.
[253] *Id.*
[254] *Id.* at 448.
[255] *Id.* at 451.
[256] Even in advancing a proposal to establish a Board of Commissioners to deal with the bulk of petitions, the Committee of Claims could not foresee abandoning Congress's role in equitable cases. *See* H.R. REP. NO. 30-498, at 7 (1848) ("Many of the claims are of an equitable character, falling within the principles, but not the express provisions of any existing laws. These are cases in which Congress may, and often should, in the exercise of its sovereign

To cope with its increasing burden, Congress divided the claims administration process between several committees formed for that purpose. In addition to the Claims and Commerce committees previously mentioned, these included one for Public Lands (1805), Pension and Revolutionary Claims (1813), Private Land Claims (1816), Revolutionary Pensions (1825), and Invalid Pensions (1831). By the early 1830s, Congress had set aside two full legislative days—Fridays and Saturdays—to consideration of private claims petitions alone.[257] In other words, Congress devoted nearly half of its legislative calendar to time for responding to petitions and crafting private legislation.

The following two graphs depict (a) (Figure 1) the number of public and private acts passed by Congress between 1789 and 1934, and (b) (Figure 2) the number of private acts passed by Congress during the period in percentage terms. The graphs provide a fair indication of what Congress was up against, although it should be noted that they only represent the number of bills actually enacted, not the total number of claims received (a considerably greater number).

FIGURE 1. TOTAL NUMBER OF PUBLIC & PRIVATE ACTS BY CONGRESS[258]

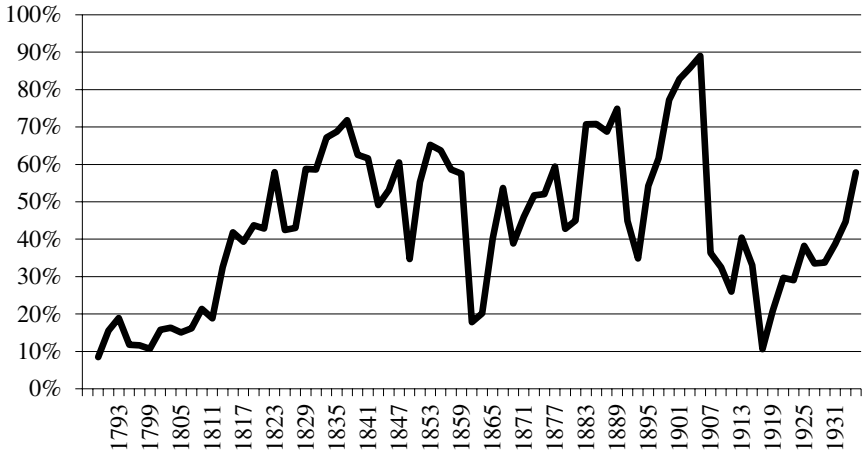


power, grant relief. They are matters which cannot be entrusted to any board of commissioners, nor so far as a final decision is concerned, be in any manner delegated.").

[257] H. Rule 128, THE STANDING RULES AND ORDERS FOR CONDUCTING BUSINESS IN THE HOUSE OF REPRESENTATIVES AND SENATE OF THE UNITED STATES (1865) (enacted 1810 & 1826) ("Friday and Saturday in every week shall be set apart for the consideration of private bills and private business, in preference to any other, unless otherwise determined by a majority of the House.").

[258] 7 CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 1028 (1936). The huge increase in private legislation during the 59th Congress was due to that body's liberal attitude towards pension applicants. The *New York Times* reported that the House passed more than 320 private pension acts in an hour and a half, the chairman displaying "auctioneer-like

FIGURE 2. PRIVATE ACTS AS PERCENTAGE OF TOTAL ACTS ENACTED BY CONGRESS[259]



The War of 1812 proved to be a pivotal moment in the history of private claims adjudication. In the aftermath of that conflict, the inefficiencies and inequities produced by Congress's involvement in the claims process was laid bare for all to see. One editorial writer in the *Buffalo Gazette*, for instance, complained:

> The sufferers too well remember, the toilsome days and sleepless nights of *December*, 1813 and *January*, 1814; and while they remember . . . the *devastation* and the *sufferings*, they will burn with indignation, not to be quenched, until that government, (who denied them protection, in the hour of danger, and who now actually turns a deaf ear to their petitions,) shall amply remunerate their losses, by a prompt and honorable liquidation of their claims.[260]

Faced with such criticism, Congress elected to vest the power to hear certain claims arising from the war in a one-man commission. The Act authorizing the appointment of the commissioner provided him with nearly unbridled discretion over a broad range of claims, most controversially those involving the destruction of property while "occupied as a military deposite [sic]."[261] The Act also afforded successful claimants the opportunity to seek

qualities of the first rank in putting the bills through." *Three Pensions a Minute*, N.Y. TIMES, May 12, 1906, at 9.

[259] 7 CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 1028 (1936).

[260] Smith Salisbury, *Niagara Frontier Claims*, BUFFALO GAZETTE, Jan. 28, 1817, at 3 (quoted in Michele Landis Dauber, *The War of 1812, September 11th, and the Politics of Compensation*, 53 DEPAUL L. REV. 289, 289 (2003)).

[261] An Act to Authorize the Payment for Property Lost, Captured, or Destroyed by the Enemy, While in the Military Service of the United States, and for Other Purposes, ch. 40, 3 Stat. 261 (1816).

immediate payment from the Treasury Department without going through the hazardous (and frequently unsuccessful) congressional claims process. In contrast, unsuccessful claimants could still petition Congress for relief, although they were unlikely to achieve a contrary judgment. Significantly, the Act did not require the appointment of an individual to represent the government's interest in the claims resolution process. Instead, just as Congress itself did when adjudicating claims, the Commissioner enjoyed the responsibility to act as both government advocate and judicial decision maker.

The honor of serving as Commissioner, if one can call it that, was bestowed on a Virginian by the name of Richard Bland Lee. Lee was a well-connected former congressman from Virginia who had frequently lobbied President Madison for a public job due to his poor financial circumstances.[262] Eventually, Madison rewarded him with the Commissioner position, which paid a rather large sum of $2,000 per year.[263]

By all accounts, Lee approached his new job with zeal and managed to deal with the cascade of claims in a remarkably expeditious process. Between July and December 1816, for instance, Lee made 850 decisions and awarded roughly a quarter of a million dollars in compensation.[264] Nonetheless, Lee's tenure as Commissioner provoked a flurry of protest that gave rise to one of the more remarkable debates of the era pitting two of the country's best known politicians (and usual political allies) against one another. At the time, John Calhoun and Henry Clay were both in the infancy of their impressive congressional careers, each of them having been elected immediately prior to the War of 1812 on a pro-war agenda. Though allies on the issue of war, Clay and Calhoun diverged sharply when it came to the propriety of delegating Congress's traditional claims administration authority. Their extensive debate over the issue highlights both the significance that political actors of the day attached to the practice of claims adjudication as well as the competing values at play in efforts to reform the process.

Opponents of the initial decision to delegate authority over the War of 1812 claims were not content to let their criticisms lie. Instead, they pounced on the opportunity to impugn Commissioner Lee for what they perceived to be his unwarranted generosity and liberal attitude towards claims in a manner that exceeded the scope of the authorizing statute. The key dispute centered on several decisions that Lee made with respect to section 9 of the Act, the terms of which were left undefined and presumably to his discretion. That section authorized payment for "destruction of [a claimant's] house or building by the enemy, while the same was occupied as a military deposite [sic], under the authority of an officer or agent of the United States."[265]

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[262] Dauber, *supra* note 260, at 298–99.

[263] *Id.*

[264] *Id.* at 306.

[265] An Act to Authorize the Payment for Property Lost, Captured, or Destroyed by the Enemy, While in the Military Service of the United States, and for Other Purposes, ch. 40, 3 Stat. 261 (1816).

Understandably, claimants struggled to produce the proof needed to demonstrate that the cause of the destruction of their homes was due to occupation as a "military deposite." Read strictly, that provision would have foreclosed relief to many deserving claimants whose homes had been destroyed by British forces as a result of occupation by U.S. forces. By its terms, the statute seems to warrant relief only where the destruction occurred while the occupation was ongoing, and only where the occupation was for the purpose of munitions storage. Lee, understandably reluctant to ascribe such a harsh construction to the statute, sought advice from executive officers, including the Attorney General (who refused to offer an opinion as he was not authorized by statute to do so)[266] and the Secretary of War (who generally acceded to Lee's construction).[267] Lee believed that the law was "remedial & therefore ought to be construed liberally so as to promote and not defeat the remedy intended—that is to say payment for the injuries sustained by our citizens."[268] In other words, he read the statute in a purposivist fashion and proceeded to adjudicate several section 9 claims on this basis.

From a practical and political perspective, the primary problem with Lee's actions was that the claims adjudicated were of substantial value, often exceeding $10,000.[269] These large compensation figures seemed to realize the worst fears of those in Congress who had previously expressed skepticism towards the establishment of the commission system. What resulted was a broader debate about the relative merits of congressional adjudication versus delegation. On one side, Henry Clay vigorously denounced a congressional claims process he saw as inefficient and, in some sense, corrupt. "The right to be heard by petition in this House," Clay remarked, "is in fact little more than the right to have your petition rejected."[270] Although perhaps somewhat hyperbolic, there was little disagreement about the slow pace at which the wheels of congressional justice churned. Clay had a unique vantage point on which to view the claims process owing to his position as House Speaker. "Case after case," Clay reported, "was decided on the report of the Committee of Claims, without a single individual, except the members of the committee and the member who presented the petition, knowing anything about it."[271] Many times in his capacity as Speaker, Clay had requested a vote on a committee report without receiving "a solitary aye or no on the question!"[272]

To these complaints, John Calhoun rose to offer a vigorous rebuttal. Accepting that the House was "not very vigilant in superintending the re-

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[266] Letter from Richard Bland Lee, Comm'r of Claims, to George Graham, Acting Sec'y of War (Mar. 31, 1817) (on file with the National Archives and Records Administration, RG 217, Entry 623, vol. 1: Letters Sent) (quoted in Dauber, *supra* note 260, at 309).

[267] *Id.*

[268] *Id.*

[269] Dauber, *supra* note 260, at 307–08.

[270] 30 ANNALS OF CONGRESS 386 (1817).

[271] *Id.*

[272] *Id.*

ports of its committees," Calhoun proceeded to consider why that was so.[273] Was it not, he rhetorically asked, because congressmen had a well-founded confidence in the recommendations contained in the reports? As far as Calhoun was concerned, "[t]he House was as capable . . . as any tribunal whatever."[274] Moreover, he disagreed with Clay's assertion that the right to petition was a right to have one's petition denied. In fact, Calhoun "considered the reverse the fact; that mere importunity sometimes succeeded in obtaining claims which ought never to have been allowed."[275] If there was anything to fault congressmen for, "it was that they acted with too much feeling; and when the claimants came before this House, they would find ample indulgence."[276]

Congressional debate over Lee's actions lasted several weeks and produced a number of proposals that called for his removal and sought to cabin the discretion of his successor. While Lee ultimately escaped removal, Congress passed an act that severely limited his discretion. For all outstanding cases, Lee was to function as merely an investigator whose recommendations and findings of fact were reviewable by Congress.[277] Additionally, the Act mandated a strict construction of the term "military deposite," required Lee to appoint investigators who would travel to examine evidence and record testimony regarding any claim in excess of $200, and recommended the appointment of a lawyer to argue on the government's behalf.[278] Although the idea of delegation survived in theory, the debate over Lee's actions cast a long shadow over every subsequent effort to reform the traditional congressional claims adjudication procedure.[279]

Congressional committees, however, could not simply ignore the increase in private claims activities as their members struggled to attend to their other responsibilities. Two reports by the Committees of Claims, one in 1838 and the other in 1848, attest to the growing inequities of a system unable to cope with the enormous burden that had been placed upon it. The 1838 report began by identifying the problem as one injurious to both claimants and representatives:

> [T]he accumulation of private claims has been so great, within a few years past, as to burden several of the committees of Congress, and to retard final action on a great proportion of the private claims, and on many important subjects of a public character; members elected to participate in the examination and discussion of national subjects have devoted their time in the adjustment of private claims, and when called to vote on questions involving the

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[273] 30 Annals of Congress 392 (1817).
[274] *Id.*
[275] *Id.*
[276] *Id.*
[277] Act of March 3, 1817, ch. 110, 3 Stat. 397–98.
[278] *Id.*
[279] *Id.*

> national policy . . . they have been obliged . . . to rely on the reports of committees, and on debates, to guide them in their decisions, without an opportunity being afforded to investigate for themselves.[280]

The Committee went on to note that the sheer number of petitions presented to Congress made the claims adjudication process "expensive as well as dilatory."[281] Claimants and their agents could spend years trying to satisfy a small claim to no avail. This delay, "in many instances, amounted to a denial of justice."[282] Compounding the problem was Congress's refusal to pay interest on claims, which often left the claimant "a debtor to an amount that embarrasses him for years."[283] The Committee also observed that delay increased the chances for fraud, and so the government had an independent interest in settling claims promptly. The report concluded by noting, "The sentiment seems to be prevalent, that some mode should be adopted to settle the claims against the United States."[284]

What that "mode" should be, however, proved a continuing sort of debate and contention. The 1838 Committee's recommendation for the appointment of a three man board, whose decisions would be appealable to and reviewable by Congress, went unheeded. A similar recommendation outlined by the Committee of Claims in an 1848 report was also rejected. The 1848 Committee had canvassed all of the European ambassadors to the United States for information about how their governments handled such claims. In summarizing the ambassadors' responses, the Committee condemned the congressional system in strong terms: "These governments, although far behind us in civil freedom and constitutional liberty, never shrink from the full and fair investigation of the claims, and always submit to an adverse decision by the courts. It has been left to our government to deny the citizen, who has a demand against it, the power to try the question before its own courts, and yet has furnished no adequate tribunal for the purpose."[285] Like its predecessor, the 1848 report complained of the effects of the private claims system on individual petitioners. "Claimants," the Committee wrote, "have the most just ground of complaint."[286] When an individual withholds money from the government, it noted, it "is regarded as a crime, and punished by fine and imprisonment."[287] Conversely, when the government withholds money from "a citizen [who] has a claim equally honest . . . he is

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[280] H.R. REP. NO. 25-730, at 1 (1838).
[281] *Id.* at 8.
[282] *Id.*
[283] *Id.*
[284] *Id.*
[285] H.R. REP. NO. 30-498, at 7–8 (1848).
[286] *Id.* at 1.
[287] *Id.* at 2.

denied the right of instituting a suit against his own government . . . and he is informed that Congress can alone give relief."[288]

Despite all its talk about courts, the Committee's report decided against recommending the establishment of a judicial outlet for hearing claims. It perceived that the objections to transferring claims to a court were too persuasive to overcome. Those objections were three-fold. First, Congress worried about the constitutional implications of delegating claims adjudication to an Article III court. The imposition of a finality requirement would make those judgments unreviewable and could potentially violate the Constitution's Appropriations Clause. Second, along these lines, congressmen worried that courts would be too generous in their awards to claimants and too lenient in their standards of review, potentially to the point of imperiling the public revenue. Third, and finally, Congress recognized the equitable nature of the relief ordinarily requested and thought courts a poor forum for weighing the considerations those determinations necessarily involved. For all of these reasons, the Committee persisted in advancing the plan previously rejected—the appointment of a three man board answerable to Congress only.

Once again, Congress rejected the Committee's proposal. This was not for lack of knowledge about the deficiencies of the system then in place, but rather because members denied the effectiveness of the proposed remedy. If the Board's opinions were merely advisory, congressmen rightly feared that the cost and time savings would be minimal. Petitioners who received an adverse result could simply contest the Board's decision in yet another petition to Congress. Other members saw no way of escaping the primary dilemma of having Congress itself decide what cases merited recognition based on principles of moral or equitable justice. Consequently, the committees were left to toil away for nearly another decade before Congress addressed the issue anew.

VII. Conclusion

It would take Congress another century to get out of the claims business altogether. Along the way, beginning in 1855 with the formation of the Court of Claims,[289] Congress undertook a series of legislative reforms aimed at rationalizing the system and decreasing its workload. In spite of these reforms, the idea of Congress as the ultimate arbiter of equitable claims against the state retained its force. For much of its history, Congress continued to review decisions by the Court of Claims and continued to exercise discretion over the payment of final judgments. Moreover, until very recently, certain classes of claims were not recognized as justiciable at all, the most notable example being torts committed by the government or its agents. Until the passage of the Federal Tort Claims Act in 1946, tort claim-

[288] *Id.*
[289] Act of February 25, 1855, ch. 122, 10 Stat. 612.

ants had to either sue the government employee in his personal capacity (who then sought indemnification by way of petition), or petition Congress directly.[290]

Examining petitions presented to Congress in its formative years calls into question many of our modern assumptions about the Framers' conception of separation of powers. It also highlights the many tensions that emerged in Congress as a result of the ambiguous compromises reached during the Constitutional Convention. Among those tensions was how legislators should reconcile their duties as representatives of local constituencies with their responsibilities as national lawmakers. Likewise, petitions forced legislators to balance the claims of private individuals against the interests of the state as embodiment of the people writ large. Although superseded by more modern forms of political and legal participation, petitioning was central to how early Americans conceptualized their polity in theory and how that polity functioned in practice.

A study of private petitions during the early national era also illuminates certain aspects of the constitutional and political culture of the late eighteenth and early nineteenth centuries that modern changes in our laws and society have obscured. As the legal historian Christine Desan argues, there are elements of our constitutional tradition, like petitioning, that once figured prominently in our political system but today scarcely enter into our collective consciousness. These forgotten "ghosts," as Desan labels them, do not fit neatly into contemporary modes of constitutional analysis and tend to complicate discussions of what the Framers' intended the Constitution to achieve.[291]

For instance, as any student of federal jurisdiction can attest, one of the most vexing problems in contemporary scholarship is the issue of government suability. What remedies are, or should be, available to an individual who suffers harm at the hands of the government or its agents? The Supreme Court has answered this question by decreeing that both federal and state government agencies enjoy broad immunity under the Constitution from private suit.[292] The Court has based its reasoning on a historical understanding of the English common law doctrine of sovereign immunity and its incorporation into American law.[293] The consequence of the Court's embrace of sovereign immunity has been to largely prohibit damages actions against

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[290] 28 U.S.C. § 1346(b) (2012).

[291] Desan, *supra* note 41, at 1383.

[292] *See generally* Florida Prepaid Post-Secondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999); Alden v. Maine, 527 U.S. 706 (1999); Dalehite v. United States, 346 U.S. 15 (1953), *overruled by* United States v. Gaubert, 499 U.S. 315 (1991) (establishing a two-part test for determining liability under the Federal Tort Claims Act); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821).

[293] *See, e.g.*, *Alden*, 527 U.S. at 715 ("When the Constitution was ratified, it was well established in English law that the Crown could not be sued without its consent in its courts.").

government entities except in cases where those entities provide a clear statutory waiver of their immunity.[294]

The reasoning employed by the Court has engendered a great deal of criticism from legal scholars.[295] Much of that criticism has centered on the supposed inaccuracy of the Court's historical analysis. Critics of the Court's decisions argue, first, that the term sovereign immunity does not appear anywhere in the discussions over the framing of the Constitution or within the text itself.[296] In contrast, the Constitution does expressly allow the judiciary to consider cases in which the federal government or the states are parties. Although the Eleventh Amendment obviously limited the courts' jurisdiction over states in significant ways, critics stress that it did not obliterate that jurisdiction altogether.[297] Second, the idea of sovereign immunity strikes many legal commentators as antithetical to the primary principles on which the Constitution was founded, namely popular sovereignty and the rule of law. The Founders, according to this line of thinking, consciously rejected those elements of English law that conflicted with American ideas of liberty and independence. Sovereign immunity, a doctrine which initially developed as a means of placing a divinely appointed king beyond the scope of ordinary common law, runs counter to the egalitarian ethos of the revolutionary period. Why should a government entrusted with the protection of life, liberty, and property be afforded legal immunity when it acts in ways that violate that trust? Third, and finally, critics lament the imbalance of power that occurs between citizens and their governments as a result of sovereign immunity protections. Such protections create obstacles for holding government officials accountable and therefore incentivize misbehavior while increasing the likelihood of arbitrary lawmaking.[298]

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[294] Pfander, *supra* note 42, at 964 (citing Lane v. Pena, 518 U.S. 187 (1996) and United States v. Nordic Village, 503 U.S. 30, 37 (1992) ("[T]he unequivocal expression of elimination of sovereign immunity that we insist upon is an expression in statutory text.")).

[295] *See generally* Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201 (2001); Kenneth Culp Davis, *Sovereign Immunity Must Go*, 22 ADMIN. L. REV. 383 (1970); Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521 (2003); Pfander, *supra* note 42; Susan Randall, *Sovereign Immunity and the Uses of History*, 81 NEB. L. REV. 1 (2002).

[296] *See* Chemerinsky, *supra* note 295, at 1205 ("Sovereign immunity . . . is a right that cannot be found in the text or the framers' intent.").

[297] The Eleventh Amendment was ratified in 1795 as a direct response to the Supreme Court's ruling in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which upheld the right of Chisholm, a citizen of South Carolina, to sue the State of Georgia for an unpaid Revolutionary War debt. For criticism of the Supreme Court's Eleventh Amendment jurisprudence, see generally Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983); Vicki C. Jackson, *The Supreme Court, The Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1 (1998).

[298] Davis, *supra* note 295, at 383 ("What happens is that officers whose action is judicially unreviewable because of sovereign immunity normally lack incentive to provide the kind of procedural safeguards that courts would insist upon if sovereign immunity did not cut off review.").

The debate over sovereign immunity's role in our polity has too often been marred by poor history on both sides. In contrast to the overblown claims of those who criticize the Court's current jurisprudence, sovereign immunity remained an integral part of the constitutional landscape in late-eighteenth- and early-nineteenth-century America. But those same critics should take solace in the fact that sovereign immunity's existence did not amount to a wholesale denial of recourse for those owed money by the government. Rather, as the practice of early Congresses demonstrates, politicians and citizens uniformly agreed that those with legitimate grievances against the federal government should be entitled to relief, at least in theory. As this Article has argued, and as others have noted elsewhere,[299] the point at issue was whether the legislative or judicial branch was the ideal venue for providing that relief.

Although it has largely faded into obsolescence, the process of private lawmaking has cast a long shadow. Contemporary understandings of what Congress is and what it does are, in significant part, a product of what it no longer does with any regularity. Congress's piecemeal delegation of equitable discretion to other political actors and institutions gradually transformed the American political system. But the tension between general lawmaking and equitable discretion lives on in both courts and administrative agencies.

The burdens that claims adjudication imposed on Congress are obvious, and legislative adjudication seems to have functioned as a poor vehicle for distributing justice fairly or efficiently. The purpose of this Article has not been to defend the validity of the system employed, but rather to show that, whatever its faults, the system of congressional claims adjudication assumed the form of law based on equitable principles. More work undoubtedly needs to be done to fill in the interstices of the story, but this Article has hopefully provided a strong foundation for those efforts by showing how and why Congress adopted the posture towards private claims that it did.

[299] *See, e.g.*, Shimomura, *supra* note 114, at 626.