March 8, 2019

Dear Members of the Boston College Legal History Roundtable,

Thank you for taking the time to read this essay, titled *Individualized Lawmaking and the Problem of Legislative Discretion*. It might be helpful to know, as you read it, that it originated as the introduction to my dissertation, *Congress and the Problem of Legislative Discretion, 1790-1870*. When I wrote the introduction, I hadn’t thought of it as a piece on its own, and in its current form it’s a hybrid: part historiographical essay, part original research. I’m eager to hear what you think of my attempts to muscle it into a stand-alone format, and what directions you think I should pursue from here. As it is still very much a work in progress, I ask that you not circulate, cite, or rely on the research it contains without permission.

Thanks again for reading. I’m looking forward to our discussion.

Best,
Jane
At roughly 2 o’clock in the afternoon on Monday, January 23rd, 1837, Simon Greenleaf, Harvard’s Royall Professor of Law, reached the final crescendo of his oral argument in the case before the Supreme Court, Charles River Bridge v. Warren Bridge.\(^1\) Greenleaf had, for the past several years, served as counsel for the proprietors of the Warren Bridge, a newly-built, soon-to-be-free bridge connecting Charlestown and Boston, defending them in a suit brought by the owners of the older Charles River Bridge, also between Charlestown and Boston, whose toll revenue the Warren Bridge had sharply reduced.\(^2\) By the time he reached his argument’s conclusion, Greenleaf had spent nearly five hours rebutting the plaintiffs’ contention that the charter the Massachusetts legislature had granted to the Warren Bridge Corporation had unconstitutionally violated the state’s contractual obligations to the older bridge’s owners, whose charter authorized them to collect tolls until 1855. Public grants had to be construed narrowly, Greenleaf had explained; in

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no way could the legislature’s earlier Charles River Bridge charter be read as exclusive. The case, highlighting as it did the tension between corporate rights and public need, had attracted a good deal of local attention. Despite the deep snow that had blanketed the District of Columbia over the weekend — one observer wrote that it had snowed steadily for 17 hours on Saturday, and forty miles to the north, Baltimore had received over a foot — the Supreme Court’s chamber in the basement of the Capitol was full. A “very large” audience, Greenleaf’s Harvard colleague Justice Joseph Story later reported, had come to witness the arguments: “a large circle of ladies, of the highest fashion, and taste, and intelligence, numerous lawyers, and gentlemen of both Houses of Congress, and towards the close, the foreign ministers, or at least two or three of them.”

Now, as he warmed to his finale, Greenleaf turned to what he viewed as the crux of his argument: whether the Warren Bridge charter had been a taking — a seizure of private property for public use triggering the legislature’s judicially-enforceable obligation to compensate. Greenleaf believed it was not. The reason the grant to the Charles River Bridge owners could not have been exclusive was that exclusivity would have ceded to the proprietors something a legislature was unable to give away: the sovereign powers to “provid[e] safe and convenient ways for the public necessity and convenience” and to “tak[e] private property for public use.” Because these powers originated not with the legislature, but with the people, the legislature merely held them, Greenleaf explained, in “trust for the public good.”

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4. Story to Charles Sumner qtd. in Kutler, *Privilege and Creative Destruction*, 75-76. The courtroom description is from Kutler as well.

5. See Konefsky, “Simon Greenleaf, Boston Elites, and the Social Meaning and Construction of the Charles River Bridge Case,” 25 (“When the case was re-argued in 1837…the contract clause issues…were stalking horses for the takings issue, the question of redistribution.”).

across the Charles River in the first place. “If the plaintiffs have sustained any damages, not anticipated, nor provided for,” it followed, that did not constitute “a case for the interference of this court,” but rather, “a ground of application to the commonwealth of Massachusetts.” The legislature, not the courts, was the proper arena for such non-legal (“damnum absque injuria”) questions. In a concluding flourish, Greenleaf explained the significance:

Let it not be said, that in the American tribunals, the presumption and intendment of law is, that a state will not redeem its pledges, any further than it is compelled by judicial coercion; that it is incapable of discerning its true interests, or of feeling the force of purely equitable considerations; and that its most solemn engagements are worth little more than the parchment on which they are written. Let such a principle be announced from this place, and it is easy to foresee its demoralizing effect on our own community. But proclaim it to Europe, and we shall hear its reverberations, in tones louder than the thundering echoes of this capitol; with the bitter taunt, that while the unit monarch of the old world, is the dignified representative of national honor, the monarch multitude of the new, is but the very incarnation of perfidy.

For Greenleaf, the case was not simply about the money the Charles River Bridge owners believed they had lost. It was, as Greenleaf saw it, a question of the appropriate balance of powers in a republic, and a test of the United States’ grand experiment in democracy. If America’s “monarch multitude” could not be trusted to make good on its moral obligations — to “feel[] the force of purely equitable considerations” — but instead had to be compelled by court decree, then it would prove to the world that the experiment had been a failure. When it came to the powers granted to the legislature in “trust for the public good,” Greenleaf believed the court’s role was, as with any equity court overseeing a trust document, to protect the trust and the interests of the beneficiary against any misfeasance by the trustee. But where the plaintiffs looked to the courts to

7. Ibid., 471.
8. Ibid., 471.
hold the legislature — the trustee — accountable, Greenleaf wanted the Court to interpret the grant narrowly in accordance with the terms of the trust, which would certainly not permit the cession of a power so fundamental to the trust property: the power to pursue the public good. “If the plaintiffs have sustained any damages, not anticipated, nor provided for,” Greenleaf explained, “they are merely consequential, for which no remedy lies against the defendants; nor is it a case for the interference of this court.”

This is not an essay about Charles River Bridge. It is, instead, an essay about the vision of the legislative role that Greenleaf so well articulated — a vision that understood the weighing of public need versus private right to be, in the United States’ unique constitutional arrangement, a fundamentally legislative responsibility — and what became of it. The Bridge case is a chestnut of American law, and it is generally seen, as Morton Horwitz has characterized it, as “the last great contest in America between two different models of economic development,” with the 5-2 decision in favor of the Warren Bridge representing the victory of a model of growth premised on free enterprise rather than vested rights. In this conventional telling, the winning side saw the Charles River Bridge losses as the unfortunate but unavoidable cost of progress: if the legislature believed that the Warren Bridge (which was to become state-owned and toll-free) was in the people’s best interest, then so be it; the owners of the Charles River Bridge, who thought they’d been granted a monopoly franchise, were simply out of luck.

10. Horwitz, Transformation I, 134. Charles Warren offers a similar analysis, see History of Harvard Law School, Vol., 1, 507-543, as does Kutler. Kent Newmyer sees the dispute between Story and Justice Taney, who wrote the majority opinion, as having more to do with republicanism and Taney’s willingness to overthrow its tenets, including republicanism’s commitment to contract as the basis of social relations. See Kent Newmyer, “Justice Joseph Story: The Charles River Bridge Case and the Crisis of Republicanism,” 17 American Journal of Legal History 232 (1973).
The position taken by Simon Greenleaf invites another interpretation.\textsuperscript{11} For Greenleaf, the fundamental issue was a contest not between economic models, but between branches of government. The owners of the Charles River Bridge believed the loss they had suffered from the chartering of the Warren Bridge required indemnification, and Greenleaf did not dispute it. For Greenleaf, the question was not whether a legislature could “take private property for public uses without compensation”\textsuperscript{12} — it could not, he thought — but rather whether the court was in this case the proper forum to administer relief. To Greenleaf, the Constitution was silent on the question of consequential damages like the ones the Charles River Bridge owners had suffered. The obligation to compensate, which for Greenleaf was “sacred & binding,” was a matter that could be addressed only in a legislative forum. “[Y]ou know,” he wrote to his Harvard colleague Justice Story on February 7\textsuperscript{th}, stung by the criticisms he had heard from Boston’s disappointed elite upon his return from Washington, “that I have ever held that the obligation to remunerate the party thus impoverished was sacred & binding on the State. I only insist that in such cases the State is the final judge of the amount due, & must be presumed to mean right — & to be actuated by just & liberal motives, & incapable of defrauding its own citizens.”\textsuperscript{13} For Greenleaf, the question was not whether compensation was owed, but the branch of government that got to make the call: not the courts, but the legislature, the proper forum for weighing what Greenleaf labeled the case’s “equitable considerations.”\textsuperscript{14} To Greenleaf, and perhaps to the justices as well, the legitimacy of


\textsuperscript{14} Charles River Bridge, 36 U.S. (11 Pet.) at 473.
America’s republican order hinged not on the judiciary’s enforcement of the people’s will, but on the legislature’s willingness to honor private claims. If this is right, then *Charles River Bridge* did not reject the doctrine of vested rights. It simply reassigned it, leaving it to legislators to validate American democracy by demonstrating their adherence to the principles of private right.

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The vision of the legislative role that Greenleaf embraced is utterly foreign to us today. The process that Greenleaf likely had in mind — the Charles River Bridge proprietors petitioning the Massachusetts legislature for compensation for what Greenleaf believed were their non-justiciable “consequential” losses, stressing the “equitable considerations” of their situation in the hopes of winning relief — is a process that contemporary political theory sees as far better suited to an administrative or judicial forum, whose procedures are designed to ensure both efficiency and equal treatment under law. We think of the legislature, in contrast, as the branch of government designed to make general laws — statutes affecting the population at large, not targeted at one or a handful of individuals.

This understanding of separation of powers is not the one that prevailed at the nation’s founding. As Christine Desan demonstrated over twenty years ago, Americans in the half century leading up to the Revolution believed that the legislature — the government’s most representative branch — was the appropriate forum for deciding money claims against the public fisc, weighing what colonial New York’s Governor Hunter described as “the just Demands of private Men”\(^\text{15}\) against public needs in a process Desan labeled “legislative adjudication.”\(^\text{16}\) If an individual sought


\(^{16}\) Desan, “Remaking Constitutional Tradition at the Margin of the Empire: The Creation of Legislative Adjudication in Colonial New York,” 16 *Law and History Review* 257 (1998); see also
a tax refund, money for goods impressed into the colony’s service, or the payment of a military pension, he went not to Crown officials or the courts, but to his representatives in the colonial assembly, who sought to strike the correct balance between private right and the common good in keeping with what they called “the public faith.” unlike in England, where the determination of such claims had long been the province of Crown officials or the courts, the colonies’ constitutional innovation set an expectation that money claims were to be decided by elected representatives. in matters affecting the public purse, Desan showed, lawmaking and judging were joined, not separated, enabling lawmakers to make adjustments in the instances in which justice demanded an exception to the rule. When the Constitution’s framers secured the right of petition and lodged the power of the purse in Congress, this was the institutional practice and constitutional understanding that informed their choice: the political tradition that, E. James Ferguson put it, “defined individual rights against government and linked popular control of taxation with the preservation of liberty.”

Other scholars have described other pieces of this story. Floyd Shimomura has traced the history of private money claims before Congress following the Revolution, showing how the growing time burden, concerns about inconsistent treatment, and swelling numbers of unanswered

Desan, “Constitutional Commitment.” Desan focuses her investigation on colonial New York, but speculates, based on evidence from scholarship on the other colonies, that the practice she terms “legislative adjudication” existed in several other colonies as well. See “Remaking Constitutional Tradition,” 260 n.4.
18. See generally Desan, “Remaking Constitutional Tradition,” 269-272 (discussing the Bankers’ Case and its role in shifting the locus of authority over money claims from the Treasury to the courts).
20. Desan, “Constitutional Commitment,” 1481-82; see also Maggie McKinley, “Petitioning and the Making of the Administrative State,” 127 Yale Law Journal 1448 (2018) (arguing that the petition clause was a crucial component of the framers’ envisioned democratic structure because it allowed minorities to seek exceptions to general laws in the individual case).
petitions pushed Congress in 1855 to establish the Court of Claims, a body that originated as an arm of Congress but became, a century later, an Article III court. Greg Mark has explored the history of petitioning, arguing that the ability to petition one’s government was at the core of the founders’ understanding of political speech, while Maggie McKinley, drawing on the robust database of petitions she and her colleagues have assembled, has argued that the First Amendment petition right is the constitutional cornerstone of what we now call the “administrative state.”

James Pfander and Jonathan Hunt have shown that antebellum federal officers held personally liable in court for actions taken in the line of duty regularly petitioned Congress for indemnification, which was routinely granted. Historian Richard McCormick sees simple political logic behind the transition away from legislative dispensation of monopoly grants and other special privileges: why parcel out benefits in a manner that stoked anger and suspicion when you could make them available to all who met certain threshold requirements? Naomi Lamoreaux and John Wallis advance a related thesis in their exploration of measures like states’ free banking


24. McKinley, “Petitioning and the Making of the Administrative State;” see also Jerry L. Mashaw, “Administration and ‘The Democracy’: Administrative Law from Jackson to Lincoln, 1829-1861,” 117 Yale Law Journal 1568 (2008), in which Mashaw describes the extent of administrative action in the early days of the Republic, revising the standard narrative that places the administrative state’s origins in the late 19th century. Counterintuitively, Mashaw notes, the executive branch experienced one of its most robust periods of growth during the famously anti-government Jacksonian era, as Jacksonians’ opposition to concentrated power and special privilege led them to reject the governance-by-elites model of their predecessors, developing instead a cadre of trained administrators to perform the key functions of government. “Democracy,” in Mashaw’s pithy phrase, “begat bureaucracy.”


and general incorporation laws as well as the late-nineteenth-century adoption of public purpose constitutional amendments, all of which they see as “practical solution[s] to a set of concrete problems faced by the states” that unintentionally ushered in America’s “open access” social order and, more generally, the rule of law as we understand it today. Farah Peterson has recently surveyed states’ efforts to rein in special legislation by constitutional amendment during conventions of the 1840s and 50s — efforts that often resulted in the transfer of much of the legislature’s accustomed discretion to the judicial branch.

Once we bring these discrete accounts of individualized lawmaking together, we start to see the outlines of a very different understanding of the legislative role: an understanding in which individuated lawmaking was very much the norm, not the exception. Early Americans viewed their access to a legislative hearing as fundamental to political speech, and they viewed money claims in particular as appropriate for determination in the government’s most representative branch. When, in January 1837, Simon Greenleaf described the legislature’s duty to compensate the owners of the Charles River Bridge as “sacred & binding,” it was this understanding that informed his thinking. The “sacred & binding” obligation he alluded to was what a generation or two earlier would have known as keeping the “public faith”: the legislature’s principled commitment to balancing public needs against private claims.

What became of this constitutional understanding? Thanks to the existing scholarship, we have a strong grasp on the conception of the legislative role underlying individualized lawmaking — the “public faith” kept by Desan’s actors — as well as an increasingly clear sense of the process.


by which the United States, at both the federal and state levels, began in the 1840s and 50s to abandon the practice, shifting the consideration of individual cases into the executive and judicial branches and substituting open access measures for the discretionary dispensations that had preceded them. What we know less about is why the shift occurred. Treatments of nineteenth-century individuated lawmaking, whether approving or disapproving, tend to be works of recovery, stressing the discordance of the practice to modern ears in order to unsettle contemporary constitutional understandings. They pay less attention to the reasons behind the practice’s denouement; where they do, they generally explain its gradual abandonment as the natural and inevitable result of concerns for efficiency and consistency, the product of partisan politics, or a technocratic solution to mid-nineteenth century political crises.29

In the rest of this essay, I’ll argue that more than efficiency, consistency, and partisan politics were at stake. Generally, scholars who have looked at individualized lawmaking have treated all of the various labels associated with the practice — special legislation, private legislation, equitable consideration, claims, petitions, memorials — as more or less interchangeable, all references to the same forgotten legislative modus operandi. This essay questions that assumption. Special legislation, it will argue, was different from private legislation; memorials and petitions were distinct. The difference between private laws and public laws, moreover, was not always so clear; legal actors in the first several decades of the Republic often weren’t sure of the difference, and often didn’t think it mattered. These differences are more than semantic. By attending to the subtle variations in meaning, I argue, we find a nation still in the process of working out its theories of legislation and of government, and still struggling to balance a concern for individual rights and

29. Farah Peterson’s work is an exception. While Peterson’s work is framed as a study of statutory interpretation, she devotes close attention to both the practical frustrations and growing conceptual discomfort with legislatures’ individuated decisionmaking, exploring how these forces ended up empowering judges at the expense of legislators. See Peterson, Statutory Interpretation and Judicial Authority, 1776-1860, 239-256.
for individuated lawmaking with a commitment to the public good.

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When Simon Greenleaf referred to the “equitable considerations” in favor of a legislative payout to the Charles River Bridge owners, he meant the term as a shorthand for those considerations that could not be reached in a court of law — those considerations that were, as he saw it, ripe only for legislative redress. Today, the idea of “equitable consideration” in a legislative context raises eyebrows: equitable consideration is something you find in a court, not a legislature. But for the first several decades of the Republic, references to a legislature’s “equitable consideration” were common, and almost always tied to the process by which legislatures weighed individual appeals for legislative intervention: a discretionary practice that pitted public needs against private claims, mostly for money. The allusion to equity was deliberate: like an equity court, a legislature took into account factors not strictly legal, but whose consideration was nevertheless essential to ensure justice in the individual case at hand.30

The parameters of what a legislature could and could not consider in its equitable capacity were not spelled out; as with equity courts, that was the whole point. Not surprisingly, what a legislature deemed worthy of its equitable consideration varied. In 1828, for instance, Stephen

30. In 1811, for instance, when General James Wilkinson tried to get reimbursed by Congress for the expenses he had incurred in his efforts to thwart Aaron Burr’s alleged conspiracy to form a breakaway republic, the House Committee of Claims divided his remuneration requests into expenses “that appear to be legal and founded in justice” and those “entitled to equitable consideration.” American State Papers: Claims (Washington: Gales and Seaton, 1833), 1:411 (March 2, 1811); see also Nancy Isenberg, Fallen Founder: The Life of Aaron Burr (New York: Viking, 2007), 351. In 1812, during House deliberations over whether to authorize the Secretary of the Treasury to remit the penalties imposed on American merchants who had illegally importing British goods after the United States’ declaration of war, the fact that the merchants, stationed in England, had not known of the war’s outbreak at the time of shipment was urged as an “equitable consideration” in their favor. 25 Annals of Cong. 323 (1812) (“Merchants’ Bonds”).
Olney, a former Revolutionary War captain and a member of a prominent Rhode Island family,31 “respectfully present[ed]” to Congress “his case to the equitable consideration of his country,” acknowledging that he could not “claim compensation as having a right to demand it.”32 He had missed out on the commutation his fellows officers had received by retiring from the army a year too early, and he was hoping Congress might make an exception in his case. Appended to Olney’s petition were words of praise from three Revolutionary War heroes as well as John Jay’s letter promoting him to captain33. Two years later, Congress granted Olney’s petition,34 explaining simply that his service was “worthy of remembrance.”35

Fourteen years earlier, however, military service had not been enough for army paymaster Zachariah Schoonmaker, who had petitioned Congress to be relieved of the debt he owed on funds the district paymaster had given him to pay New York’s second volunteer regiment. Although Schoonmaker’s petition explained that he had lost the money in transport, the House Committee of Claims determined that he not presented “a fit case for the equitable consideration and interference of Congress.” “If the loss were produced by some inevitable accident,” the report explained, “such as capture by an enemy, or some other unforeseen event, and which it would not be in the power of human diligence and wisdom to prevent or control,” it would be a different matter. But here, where Schoonmaker had “received money from the United States, to discharge a debt which the Government owes to its soldiery, and for which he received an adequate compensation,” the Committee reasoned, “he must be considered liable for the risk of the money,

33. Ibid.
as well as its faithful and honest application.”

In 1827, a handful of surviving Revolutionary War officers were similarly out of luck. They’d hoped to be compensated for the losses they had sustained by selling the depreciated government certificates they had received as pay, but Kentucky’s Representative Wickliffe denied that equitable relief was warranted. “Suppose I had given my creditor a note for twice the amount I owed him, and he had passed it off for half its value; has he any claim on me either in law or equity?” Wickliffe asked his colleagues. “Certainly not…[T]his is a legal discharge, and law should always prevail against equity, unless there be fraud, mistake, or accident” — the circumstances commonly cited as warranting equity court intervention — and “[t]here is neither in this case[.]” Not surprisingly, to many early Americans, the “equitable consideration” that legislators devoted to the individual appeals they heard looked at best arbitrary, at worst hopelessly biased. The game was rigged.

**Special Legislation, Private Legislation, and Equity Courts**

In 1836, the Jacksonian lawyer Robert Rantoul gave a rousing speech in favor of codification to a crowd in Scituate, Massachusetts. To Rantoul, codification — a movement generally read as Jacksonians’ effort to rein in the power of judges through legislative fiat — was necessary to check judges’ vast discretion. “The law,” Rantoul explained:

> should be a positive and unbending text, otherwise the Judge has an arbitrary power, or discretion; and the discretion of a good man is often nothing better than caprice…while the discretion of a bad man is an odious and irresponsible tyranny….Judge-made law, is ex post facto law, and therefore unjust…Judge-made law, is special legislation. The Judge is human, and feels the bias which the coloring of the particular case gives. If he wishes to decide the next case differently, he has only to distinguish and thereby make a new law.

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36. 29 Annals of Cong. 700 (1816) (“Money Lost by a Paymaster”).
38. Robert Rantoul, Jr., “An Oration Delivered before the Democrats and Antimasons, of the
Rantoul directed his criticism at courts in general, but arbitrariness was a charge that had long been leveled at equity courts in particular. In their classical conception, equity courts were designed to blunt the occasional harsh effects of the common law’s unbending nature: to ensure that justice was done in each individual case. But if equity judges were not guided by common law rules, what was their basis for decision? Commentators on England’s common law had long observed that, in the words of John Austin, liberty itself depended on “the distinctive certainty of English justice.” Montesquieu had seen the fixity of England’s court decisions as key to its constitutional commitment to political liberty; Lord Camden had decried that “the discretion of a judge is the law of tyrants.” If certainty was the bedrock of England’s cherished rule of law, where did equity fit?

Americans, too, fretted about equity’s unbounded discretion. In England, Thomas Jefferson wrote to his friend Philip Mazzei in 1785, “a very unexpected revolution” had lately been transforming the common law, thanks to the “pretorian discretion” of a handful of common law judges who had “been able…to persuade the courts of Common law to revive the practice of

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40. Ibid., 79.


construing their text equitably,” and in so doing had “render[ed the law] more incertain under pretence of rendering it more reasonable.”

It was not that Jefferson did not think equity jurisdiction had its place; properly constrained, he thought, it ought to function like “a nursery for the forming new plants for the department of the common law,” nurturing new cases until they were susceptible of general rules of application and ready for transfer to the law courts. But without clearly defined limits, Jefferson feared, equity would be “a monster whose existence should not be suffered one moment in a free country wherein every power is dangerous which is not bound up by general rules.”

For Jefferson, equity courts in particular evoked fear of an unaccountable, unbounded power; for Rantoul, all judging was suspect. Equity courts simply showcased judicial lawmaking in its most extreme manifestation, as judges driven by human bias granted exceptions to general rules on a case by case basis. For Rantoul, in other words, the problem with judicial lawmaking was not that it encroached on the legislature’s role; this was no turf battle. The problem was that by engaging in such decisionmaking, judges exercised an intolerable degree of discretion, transforming the law from “a positive and unbending text” into the tool of a despot.

Jacksonians like Rantoul were well aware that judges were not the only state actors to exhibit biased decisionmaking. In labeling judge-made law “special legislation,” Rantoul had employed an epithet that had long been applied to laws that unfairly privileged one group of constituents over another — “unequal legislation,” as the Jacksonian Democrat William Leggett wrote in The Plaindealer in December 1836, five months after Rantoul’s speech, that “confers privileges on one set of men, no matter for what purpose, which are withheld from the rest.”

Although Jacksonians

43. Ibid.
44. Ibid.
like Leggett and Rantoul are commonly thought of as champions of the legislative branch, they in fact viewed most statutes with the same jaundiced eye they trained on judicial opinions. “Special legislation” was an especially potent slur in the Jacksonian lexicon; it referred to “legislative intermeddling” with trade “either by immunities or prohibitions, by restraining laws or special charters”: in short, “monopoly legislation.”

For Leggett and Rantoul, the answer to society’s problems was rarely more legislation; usually, it was less. When several New York banks failed in the Panic of 1837 despite the existence of the state’s safety fund law, for instance, Leggett did not call on Albany for even stronger protections, as one might expect of a legislative supremacists. Instead, he called for getting rid of the laws currently in place. Subscribing the motto “Laissez nous faire” to a May 1837 Plaindealer article titled “The Crisis,” Leggett wrote that the spate of bank failures had finally revealed “that true wisdom consists…simply in letting trade alone.” It was not a failure of regulation that had led to the crisis, but the “stimulus of special legislation.” Thanks to the activism of Leggett and other radical Jacksonians, Albany’s response to the Panic was not to assert its own power to amend the banks’ charters but rather to pass, the following year, one of the nation’s first free banking laws. For Leggett and likeminded radical egalitarians, the solution to society’s ills was not legislative supremacy but the eradication of government discretion, no matter the branch.

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If special legislation earned Jacksonians’ particular opprobrium, private legislation was the especial bugaboo of their conservative counterparts. To modern ears, the two terms sound similar:

47. Ibid., 311.
48. See James Roger Sharp, Jacksonians Versus the Banks: Politics in the States After the Panic of 1837 (New York: Columbia University Press, 1970), 297-305. For Sharp, Jacksonians’ support for free banking in New York is one piece of evidence that they were truly committed to egalitarian principles, rather than self-seeking political actors simply after the spoils of power.
both connote pieces of legislation aimed at an individual rather than the whole, at an exception rather than a universal rule. But in Jacksonian America, the concepts were distinct. Whereas special legislation referred to special favors bestowed on legislative favorites, private lawmaking referred simply, as Leggett put it in 1835, to the legislation produced in response to claims “not susceptible of judicial decision, and therefore brought before Congress as the only resort…”

Like any other private actor, the federal government possessed property, incurred debts, extended credit, and generally engaged in a world of exchange and obligation. These were not obligations for which a sovereign could be held to account in a court of law. Even those who believed that sovereign immunity did not bar suits against the United States acknowledged, as Chief Justice John Jay had in 1793’s *Chisolm v. Georgia*, that compelling the United States to “do justice” to an individual citizen would be difficult where there was “no power which the courts can call to their aid” to enforce the judgment.

But that did not mean such obligations disappeared. They were simply routed through Congress, whose “constitutional commitment” to paying claims was their way of keeping “the public faith.”

For Jacksonians like Leggett, such private lawmaking, although targeted at individuals, did not pose the systemic, anti-egalitarian threat of special legislation. For Leggett, the worst aspect of private legislation was that it was a time-consuming distraction, something that caused the “vast mass of public business” to remain untouched at the end of each session of Congress.

For political conservatives, however, private legislation undermined the fundamental constitutional order. “There ought to be no private business before Congress,” John Quincy Adams wrote in his diary in 1832, two years after he’d been elected to the House as a representative from Massachusetts. The House had just rejected a suggestion that it limit to one day a week (down from two) the

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hearing of private claims, and Adams was put out. “It is judicial business, and legislative assemblies ought to have nothing to do with it,” he grumbled. “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,” Adams concluded, “is the worst of all tribunals for the administration of justice.”

Adams’ sentiment was not new; political conservatives had argued since the founding that private matters involving individual rights required adjudication in a court, not a legislature. Where Democrats like Leggett were concerned that legislatures were dispensing too many individual privileges, conservatives like Adams were concerned they were dispensing too few: that the vagaries of politics were causing legislators to put off, reject, or just simply ignore justified claims against the state, thereby violating the fundamental republican credo that for every right, there was a remedy.

Although they approached the issue from different sides, both Jacksonians and conservatives like Adams were worried about the same phenomenon: the exercise of discretion in a democratic republic. By the 1830s, their criticisms seemed more urgent: in most sessions of Congress, private business constituted close to half of the legislation generated, while special legislation at both the state and federal level encouraged, in Harry Scheiber’s memorable phrase, “repeated trips to

54. Charles E. Schamel offers a helpful history of private claims in Congress, emphasizing their utility as a source of information about early Americans’ daily lives, in “Untapped Resources: Private Claims and Private Legislation in the Records of the U.S. Congress,” 27 Prologue 1 (Spring 1995). Schamel’s statistics – credited to Christine Desan – are striking: private legislation accounted for over 35% of the legislation generated by all but five congresses between 1814 and 1971; in ten of those congresses, the percentage was over 75%. 
the public trough,” amplifying the frustration and anger of Jacksonian critics. Both sides were driven by the problem of individuated discretion in a society premised on the rule of law. How, they wondered, could a lawmaker treat like parties alike without hewing to precedent? How could he decide individual cases in a way that would meet society’s changing needs without destabilizing expectations? Where was the line between ensuring justice in the individual case and an arbitrary exercise of power?

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The Line Between Public and Private

Special legislation. Partial legislation. Unequal legislation. Class legislation. Most scholars would lump the statutes described by these various labels under the general heading of “private laws.” But what, exactly, made a piece of legislation “private”? Often, scholars answer this by looking to the legislation that originated in Congress’s various committees on claims, the first of which was established in 1794 as the House’s third standing committee. But petitions seeking individual redress didn’t always go to Congress’s committees on claims. Petitions for tax relief in the wake of natural disaster, for instance, generally went to the Senate’s Finance Committee and to the House’s Committees on Commerce or Ways and Means — committees charged with thinking not about claims, but about revenue and spending. Complicating the categories further, not all legislation passed in response to such claims was deemed private — at least not at first. When Congress received a request for tax relief in the wake of an 1835 New York fire, for instance, it seemed to think the New Yorkers’ memorial was neither private nor a claim. The House did not

wait to hear the request until a Monday or a Saturday, the two days that it had set aside for the hearing of private petitions, and it assigned the request not to its standing Committee on Claims but instead to Ways and Means. The relief measures that resulted — the New Yorkers got both a credit extension on back taxes and a remission of the duties owed on goods destroyed in the fire — seem not to have been considered private, either.\(^57\) Gales and Seaton’s Register of Debates in Congress\(^58\) included the credit extension measure — officially, the March 17, 1836 “ACT for the relief of the sufferers by the fire in the city of New York” — among its list of “Laws of a Public Nature” passed in the first session of the 24\(^{th}\) Congress,\(^59\) something it did not do for dozens of other acts passed that session in response to private petitions. A privately-published 1837 compilation dedicated solely to Congress’s “public and general statutes,” meanwhile, listed the 1836 fire relief legislation in its entirety.\(^60\) When Congress passed the second relief measure in 1838, remitting the duties on goods destroyed in the fire, that too was classified as a public act.\(^61\)

The uncertain divide between public and private legislation speaks to one of this essay’s central claims: that the taxonomies that historians often attribute to 19\(^{th}\) century Congress are in fact a post hoc imposition onto a lawmaking body that was only starting to divide its legislation into such

\(^{57}\) The indices of the Journals of the House and Senate didn’t distinguish between public and private bills — in the 1836 Senate Index, the fire relief bills are simply listed alphabetically, appearing between Fire Insurance Company, An Act to Incorporate, in the town of Alexandria, in the District of Columbia,” and “Fishery, Mackerel.” 24 Journal of the Senate of the United States 694 (1836). The title page lists the publication year as 1835, but that can’t be right, as the events recorded extend through July 4, 1836.

\(^{58}\) The Register of Debates was published by Joseph Gales and William Seaton, who had been ousted as the House’s official public printer in December 1835, little more than a week before the New York fire, in favor of Blair and Rives, who were deemed “favorable to the administration.” Cong. Globe, 24th Cong. 1st Sess. 98 (January 13, 1836); see also Reg. Deb., 24th Cong., 1st Sess. 1948 (Dec. 8, 1835).


To explore this point, let’s look more closely at the New York fire legislation. In some ways, treating the relief measures as public rather than private made perfect sense. The fire took place in the nation’s largest commercial port, which in 1835 was both the heart of America’s emerging national economy and, thanks to the duties paid by its importing merchants, the source of roughly 60% of the Treasury’s yearly intake. Estimates of loss ranged from $15 to $20 million, just a few million dollars shy of the nation’s average annual revenue. The fire’s effects, relief proponents predicted, would be felt by merchants in every corner of the Union, as the disaster forced New York creditors to call in their loans. Of course relief was a public concern.

But later taxonomists disagreed. In 1841, the Senate put together its own list, a report prepared by the Senate Secretary Asbury Dickins listing all private claims that had been before the House since the 14th Congress. Each of the several relief petitions the New Yorkers had submitted was listed there, under “New York, sufferers by fire in the city of,” along with its fate. And in 1848,

62. Consider the evolving definition of the word petition. Today, Black’s Law Dictionary defines a petition as “[a] formal written request presented to a court or other official body.” Bryan A. Garner ed., Black’s Law Dictionary, 8th ed. (St. Paul, Minn.: West, 2004), 1182. This matches our intuitions: we consider petitions to be largely private documents, appropriate not for a legislature but for a court, the forum best suited to consider individual cases. But this definition is in fact of relatively recent vintage, introduced only in 1999 in the dictionary’s 7th edition, when the editors for the first time linked petitions to courts. Black’s Law Dictionary, 7th ed. (1999), 1165. Before that, the dictionary’s definition of petition did not specify the document’s intended audience so precisely. Instead, it described a petition as “[a] written address, embodying an application or prayer from the person or persons preferring it, to the power, body, or person to whom it is presented, for the exercise of his or their authority in the redress of some wrong, or the grant of some favor, privilege, or license,” a definition that had not changed since Henry Campbell Black first published his dictionary in 1891. Henry Campbell Black, Black’s Law Dictionary (1891), 896. One can guess the reason for the change: whereas in 1891, petitions were still viewed as a form of entreaty appropriate for any governmental forum, by 1999, the evolution of legislative logic described here had made petitions seem a form of private address and thus appropriate primarily for a court, not a legislature.

63. Congress’s response to the New York Fire of 1835 is addressed in detail in my dissertation, Congress and the Problem of Legislative Discretion, 1790-1870 (on file with author).

the House ordered the compilation of a similar list, covering all private claims that had appeared before it since the first Congress; after several years and the hiring of several additional clerks, the collection was finally published for public consumption in 1853.⁶⁵ There, too, the fire claims were listed, with four entries under “New York City, citizens of,” each detailing the New Yorkers’ various, repeated efforts to obtain relief after the fire and what happened to them: whether the matter reached the House through a Senate bill or directly by petition; whether the bill was passed or left to lie on the table.⁶⁶ The careful reader would be forgiven for being confused. Was the fire relief public or private?

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Despite the tidy charts contained in Congress’s reports on private claims, distinguishing between public and private laws had always been an imperfect science, and one that Congress paid little attention to for the first several decades of its existence. Since 1791, Congress had regularly ordered the publication of recently-passed legislation in newspapers around the country, and it had periodically authorized and distributed various collections of those laws among state executives, the territories, and members of Congress.⁶⁷ Once, in 1820, Congress limited a newspaper

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⁶⁵ See House Resolutions dated January 27, 1848, September 2, 1850, and December 22, 1851, reprinted in Digested Summary and Alphabetical List of Private Claims which have been Presented to the House of Representatives from the First to the Thirty-First Congress, Vol. II (Washington: W.M. Belt, 1853).

⁶⁶ Ibid., 571-72. The first entry indicates that the “nature or object of the claim” was “relief of sufferers by fire in said city,” and that the matter reached the House through a Senate bill. The second, third, and fourth entries are each labeled “Remission of duties on goods destroyed by fire,” and state that the matter came to the House variously by petition or Senate bill. I believe Entry four’s indication that Ways and Means issued an adverse report on remission on June 27, 1838 is wrong, as the House Journal — the compilation’s main source — makes no mention of such a report, and I could not find one in other sources. Moreover, ten days after the alleged adverse report, the bill remitting duties to New York’s merchants was signed into law.

⁶⁷ Asbury Dickins, Synoptical Index to the Laws and Treaties of the United States of America (Boston: Little, Brown, 1852), 454-55. Note that Asbury Dickins, the Senate secretary who authored the 1841 Senate report on private claims, is the author of the Synoptical Index, and that it was also published by Little and Brown, at the behest of the Senate. Ibid. (“Advertisement”).
publication order to laws “of a public nature,” but otherwise, lists published at its behest simply presented laws in the order they were passed, not bothering to distinguish one type of law from another.68 In 1814, for instance, when Congress contracted to purchase a collection of U.S. laws published by John Bioren, W. John Duane, and R.C. Weightman, it made no mention of separating public from private law,69 and the idea doesn’t seem to have occurred to the publishers, either; all acts appear in the volumes in strict chronological order regardless of type or subject matter.70

The first compilation to distinguish between private and public laws was published not at the instigation of Congress, but of private actors. In 1827, Wells and Lilly, a Boston publisher, put out *The Public and General Statutes Passed by the Congress of the United States of America*, a collection focused solely on Congress’s public acts. “The Statutes at large,” the preface explained, “embracing a great mass of private statutes, have already become very unwieldy, voluminous, and expensive.”71 Wells and Lilly’s solution was to trim the fat, leaving out all “strictly private Acts, such as those, which are for the relief of particular persons, or corps,” as well as any temporary measures, such as appropriations acts, that did not from their “nature or importance…illustrate the history of our national policy.”72 The entire compilation, the publishers made sure to note, had “passed under the inspection of Mr. Justice Story, who has given it an attentive examination.”73

Joseph Story’s involvement is noteworthy but not surprising. As Story’s biographer R. Kent Newmyer makes clear, Story was a committed nationalist, perpetually attuned to opportunities to standardize American law across the United States’ multiple jurisdictions. As Wells and Lilly

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68. Ibid.
69. Ibid.
72. Ibid., v.
73. Ibid., vi.
pointed out, one of the chief obstacles to the widespread dissemination of law books was their steep cost; the first step to nationalization was to make such publications affordable. As a political conservative, Story would likely have shared John Quincy Adams’ view that the adjudication of private claims had no place in a deliberative body, making private laws the obvious target of any effort to excise unimportant legislation from the collection.

By 1845, however, Story seems to have changed his mind. That year, the Boston firm of Little & Brown — Story’s publisher since 1838 — put out the first several volumes of what would ultimately be an eight-volume edition of congressional statutes, from the founding to the present. The collection was the first to set off all private laws in their own volume, and Story seems to have been the driving force behind it. In January of 1844, Charles C. Little and James Brown had asked Congress to patronize a new edition of “the laws of the United States” that they were contemplating, and in March of 1845 a joint resolution of Congress authorized the attorney general to contract for 1,000 copies of the multi-volume work. (A year later, apparently happy with the product, Congress declared the collection “competent evidence” of congressional statute,


75. See Cong. Globe, 28th Cong., 1st Sess. (1844), 162 (Jan. 18, 1844) (“Mr. TAPPAN presented a memorial from Charles C. Little and James Brown, representing that they contemplated publishing a stereotype edition of the laws of the United States, and praying the patronage of Congress thereto.”). The Joint Resolution authorizing the project refers to a memorial submitted in the then-present session of Congress, which would have been the second session, rather than the first. See No. 10, *A Resolution to authorize the Attorney General to contract for copies of a proposed edition of the Laws and Treaties of the United States*, 5 Stat. 798 (1845). This suggests that Little & Brown re-submitted their memorial in the second session after no action was taken in the first; the second memorial may have included more detail regarding the work’s layout, as it was likely written after work on the effort had begun.

the first time it had bothered to make such a declaration.)

The authorizing resolution specified that the volumes were to be executed in the style Little and Brown had proposed, and were to contain the Articles of Confederation, the Constitution, all treaties with foreign nations and Indian tribes, as well as “all the public and all the private laws and resolves, whether obsolete, repealed, or in force,…temporarily or permanent.” The treaties and private laws, Congress allowed, “may be printed separately…in two additional octavo volumes,” the resolution’s permissive language implying that the idea to distinguish between public and private laws had, like the style and content of the work, been part of Little & Brown’s pitch.

The work was to be edited by Richard Peters, who had until 1843 been the Supreme Court’s reporter, and the plan for its execution seems to have been entirely Story’s handiwork. As the Court’s reporter, Peters had attempted, with Story’s encouragement, to increase the circulation of the Supreme Court’s opinions (largely in an effort to make his own role as reporter more remunerative); when he was dismissed by the Court in 1843 because of a personal conflict with Justices Baldwin and Catron, Justice Story had reportedly been so angry that he had considered resigning over the matter. Instead, he appears to have secured for Peters the editorship of a legislative compilation the plan for which, if Peters’ fulsome tribute is any indication, had long been gestating in Story’s mind. “This work is indebted to you,” Peters wrote in his January 1845

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dedication, “for its existence. It has been prepared according to a plan suggested by you; and in your approbation of the manner in which it has been edited by me, there is a perfect assurance that it will receive the sanction and support of all.”

Why would Story have changed his mind about private laws? In 1827, he had approved their excision, but by 1844 he deemed them worthy of their own volume. Part of the reasoning may of course have been the fact that this edition, unlike Wells and Lilly’s, was assured of congressional patronage, which meant that both sales and dissemination were guaranteed. But another reason for Story’s change of heart, I suspect, had to do with Congress’s increasing focus on private claims. Adams had complained about the volume of private business before the House in 1832; in 1838, the House Committee on Claims had recommended the establishment of a Board of Commissioners to settle all private claims, reasoning that “the right peaceably to assemble and petition the Government for a redress of grievances” did not preclude such outsourcing. Story himself, in his 1838 Commentaries on Equity Pleadings, had ruefully noted the absence of an American petition of right, the English device by which a suit against the Crown might be heard in Chancery or the Court of the Exchequer. In 1841, Senate Secretary Asbury Dickins put out his own list of private claims that had appeared before the Senate, likely relying on the records he had pulled together in 1838 to assist in the preparation of the House “Board of Claims” report. By 1844, the sustained attention to private claims before Congress, focusing on both their mushrooming numbers and the inconsistency of the justice they rendered, would have made their inclusion in a stand-alone volume seem warranted.

82. See Joseph Story, Commentaries on Equity Pleadings, and the Incidents Thereto, According to the Practice of the Courts of Equity, of England and America, 57 n.3 (Boston: Little, Brown, 1838).
83. Asbury Dickins, Report from the Secretary of the Senate (1841); see also H. Rep. No. 730 (1838), 10.
But perceiving a need for such a volume was one thing; executing it was another. What made a law “private,” anyway? Neither Congress nor Richard Peters seemed completely sure. How, for instance, to classify 1803’s “Act for the relief of the sufferers by fire, in the town of Portsmouth”? On the one hand, it offered tax relief to a discrete group of people in response to an individual’s request, which seemed private. (The Portsmouth customs collector had suggested the measure to Treasury Secretary Albert Gallatin, writing that a year’s credit extension would “greatly relieve, and be singularly gratifying, to” the ports’ importing merchants, and would “tend to evince the continued attention of the Government to relieve the distresses of the people.”) But then again, it didn’t identify the recipients of Congress’s grace by name, but instead simply offered extended credit to “all persons who, being indebted to the United States, for duties on merchandise, have given bond therefor, with one or more sureties, payable to the collector for the District of Portsmouth, and who have suffered a loss of property by the late conflagration at that place.”

Looking at the law forty years later, Peters seems not to have known where to place it. Wells and Lilly hadn’t included the measure in their 1827 compilation of “public and general statutes,” but Peters either didn’t notice or wasn’t convinced. Whether out of confusion, oversight, or an


85. Extension of Duty Bonds, January 14, 1803, in American State Papers: Finance (Washington: Gales and Seaton, 1833), 3:192. The Portsmouth collector, Joseph Whipple, had written to Treasury Secretary Albert Gallatin after the fire, reporting that the custom house and public stores had both been burnt, that among the sufferers were several “persons indebted to the United States on bond for duties,” and recommending a “prolongation of the term of credit.” Gallatin endorsed the recommendation and forwarded the letter to Samuel Smith, the chairman of the House Committee on Commerce and Manufactures, who in turn introduced a resolution that the Committee of Ways and Means inquire into the “expediency” of such a measure. John Randolph, chairman of Ways and Means, both reported a resolution recommending the requested credit extension and introduced the recommended bill the next day; the law was passed the following month. See ibid.; 12 Annals of Cong., 7th Cong., 2d Sess., 375, 380 (Jan. 13 & 14, 1803).

86. Thirteen years later, Congress still wasn’t sure whether a private law had to list all individuals by name, or whether specifying a “class” was sufficient. See Cong. Globe, 35th Cong., 1st Sess., 1652-57 (“Barclay and Livingston and Others”) (April 17, 1858).

abundance of caution, Peters included the law in his compilation twice: once in Volume II, which covered Congress’s public statutes passed by congresses six through twelve, and again in Volume VI, the volume dedicated to private law.88

Peters betrayed no such confusion about the 1836 and 1838 New York relief measures: he listed both measures only once, in volumes dedicated to public acts,89 overlooking, intentionally or not, their inclusion in Dickins’ 1841 report on private claims. Perhaps, as the Portsmouth fire example would seem to suggest, Peters believed that private claims did not necessarily result in private laws. After all, the New Yorkers’ entreaty had not been labeled a petition, but rather a “memorial,” a word that had a public rather than a private flavor. Perhaps Peters, like the members of Congress at the time of the fire, believed that the measures’ significance or their open-ended nature made them more public than private.

We can’t be sure what Peters’ reasoning was. But we do know that these categories that we now take for granted were once in flux. And we do know that by the time the House compiled its own list of private claims in 1853, both fire relief bills were once again categorized as private: the kind of claim that was increasingly viewed as inappropriate for congressional deliberation. In Congress’s emerging theory of legislation, questions of private right were to be decided separately from questions of the public good. Where once Americans had seen the weighing of such individual claims against public needs as central to a legislature’s “public faith,” they now viewed the blending of public and private concerns with suspicion. Increasingly, Congress viewed questions of individual right as matters to be decided only on the basis of private law principle, without regard to competing public demands.

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The Warren Bridge proprietors’ victory in the *Charles River Bridge* case is widely seen as a triumph for Jacksonian populism — for legislative power over “vested privilege.”\textsuperscript{90} And yet the same political movement credited with victory in *Charles River Bridge* — the same movement that embraced legislative supremacy as a guiding tenet — had, by 1837, begun to look with increasing mistrust at one of the legislature’s central practices: individualized lawmaking. To Jacksonians, the unfettered discretion they saw in the practice looked profoundly unfair, guaranteed to favor some individuals and some groups over others. And, as we have seen, Jacksonians weren’t the only ones concerned by the practice. Whigs, too, were concerned that legislatures were not equipped to treat the individual relief requests they received with the care and consistency that justice required. From both ends of the political spectrum, legislative discretion was starting to appear deeply problematic.

Legislators were not immune to such disparagement; many were among individualized lawmaking’s most vocal critics. To these lawmakers, blunting such criticisms by outsourcing this problematic discretion to others seemed an increasingly attractive option. In 1838, the year after Simon Greenleaf’s victory for legislative discretion, New York passed its open-access free banking law, and the House Committee of Claims released a report that recommended delegating the House’s claims practice to a board of commissioners.\textsuperscript{91} In 1846, a New York convention, populated by more than a few state legislators, amended the state’s constitution to prohibit most special legislation chartering corporations;\textsuperscript{92} in 1851, Indiana did the same,\textsuperscript{93} heeding the governor’s call to eradicate the “growing evil” of special legislation. In 1848, the House

\textsuperscript{90} Kutler, *Privilege and Creative Destruction*, at 155.
\textsuperscript{91} See Shimomura, “The History of Claims Against the United States, at 649 n. 190 and 191.
\textsuperscript{92} See Peterson, *Statutory Interpretation and Judicial Authority*, 1776-1860, 256.
\textsuperscript{93} See Lamoreaux and Wallis, “Fixing the Machine that Would Not Go of Itself,” 30. Lamoreaux and Wallis report that Indiana’s amendment was more sweeping than New York’s, and that in 1874, New York again amended its constitution, this time in a manner more like Indiana’s.
Committee of Claims upped the ante, issuing a new report that also spoke of the “evils” of the current system, which left so many claims unheard and justice so grievously undone;\(^{94}\) in 1855, Congress established its Court of Claims,\(^ {95}\) which a century later it would cede to the third branch.

In many ways, these developments fit into a familiar narrative in American legal history, one told perhaps most clearly in Morton Horwitz’s *The Transformation of American Law, 1780-1860*. In his account of legal development in the early decades of the republic, Horwitz characterizes the relationship between law and politics — between courts and legislatures, lawyers and lawmakers — as a zero-sum competition; a power struggle featuring law as the agent of the propertied few and politics as the weapon of the masses. In this telling, representatives of America’s growing electorate fought gamely but ultimately unsuccessfu


\(^{95}\) Shimomura, “History of Claims,” 652.

\(^{96}\) Horwitz, *Cf.* Farah Peterson, “Interpretation as Statecraft: Chancellor Kent and the Collaborative Era of American Statutory Interpretation,” 77 Md. L. Rev. 712, 714 (2018) (arguing that what has been characterized as a shift of power from the legislative to the judicial branch would more accurately be described as “power sharing”).