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Petitioning and the Making of the Administrative State

ABSTRACT. The administrative state is suffering from a crisis of legitimacy. Many have questioned the legality of the myriad commissions, boards, and agencies through which much of our modern governance occurs. Scholars such as Jerry Mashaw, Theda Skocpol, and Michele Dauber, among others, have provided compelling institutional histories, illustrating that administrative lawmaking has roots in the early American republic. Others have attempted to assuage concerns through interpretive theory, arguing that the Administrative Procedure Act of 1946 implicitly amended our Constitution. Solutions offered thus far, however, have yet to provide a deeper understanding of the meaning and function of the administrative state within our constitutional framework. Nor have the lawmaking models of classic legal process theory, on which much of our public law rests, captured the nuanced democratic function of these commissions, boards, and agencies.

This Article takes a different tack. It begins with an institutional history of the petition process, drawn from an original database of over 500,000 petitions submitted to Congress from the Founding until 1950 and previously unpublished archival materials from the First Congress. Historically, the petition process was the primary infrastructure by which individuals and minorities participated in the lawmaking process. It was a formal process that more closely resembled litigation in a court than the tool of mass politics that petitioning has become today. The petition process performed an important democratic function in that it afforded a mechanism of representation for the politically powerless, including the unenfranchised. Much of what we now call the modern “administrative state” grew out of the petition process in Congress. This Article offers three case studies to track that outgrowth: the development of the Court of Claims, the Bureau of Pensions, and the Interstate Commerce Commission. These case studies supplement dynamics identified previously in the historical literature and highlight the integral role played by petitioning in the early administrative state — a role unrecognized in most institutional histories. Rather than simply historical, this excavation of the petition process is distinctly legal in that it aims to name the petition process and to connect it with the theory and law that structure the practice.



Excavating the historical roots of these myriad commissions, boards, and agencies in the petition process provides a deeper functional and textual understanding of the administrative state within our constitutional framework. First, it highlights the function of the administrative state in facilitating the participation of individuals and minorities in lawmaking. By providing a mechanism of representation for individuals and minorities, the “participatory state” serves as an important supplement to the majoritarian mechanism of the vote. Second, it offers new historical context against which to read the text of Article I and the First Amendment. This new interpretation could begin to calm discomfort, at least in part, held by textualists and originalists with regard to the administrative state. Lastly, this Article offers a few examples to illustrate how this new interpretation could provide helpful structure to our administrative law doctrine. With its concern over procedural due process rights, administrative law largely reflects the quasi-due process protections offered by the Petition Clause. This Article explores two areas where the Petition Clause could direct a different doctrinal result, arguing for a stronger procedural due process right for petitioners of the administrative state than that offered by *Mathews v. Eldridge* and arguing against the Supreme Court’s decision in *INS v. Chadha* holding the legislative veto unconstitutional.

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ARTICLE CONTENTS

INTRODUCTION	1543
I. ORIGINS	1551
A. The Rediscovery of Early American Lawmaking	1552
B. The Petition Process in Congress	1555
C. The Infrastructure of Petitioning	1560
D. The Rise and Fall of Congressional Petitioning	1568
1. Petitioning the Early Congress (1789-1795)	1568
2. The Congressional Petitions Database	1570
3. The Legislative Reorganization Act and the Administrative Procedure Act of 1946	1575
II. EVOLUTIONS	1579
A. Siphoning Off Adjudication: The Court of Claims	1581
B. Siphoning Off the Provision of Public Benefits: The Bureau of Pensions	1586
C. Siphoning Off Regulation: The Interstate Commerce Commission	1594
III. THE PARTICIPATORY STATE	1600
A. Naming the Participatory State	1601
B. Updating Our Lawmaking Models	1605
1. Legal Process Theory: Lawmaking Without Petitioning	1606
2. Amending Legal Process Theory	1609
IV. PETITIONING WITHIN THE ADMINISTRATIVE STATE	1611
A. The Administrative State Within Our Constitutional Framework	1612
1. The Critics and Their Models	1613
2. A Case Study in Correcting the Models: The Legislative Veto	1620
B. Participatory Administrative Law	1622
C. Objections	1626
CONCLUSION	1628



METHODS APPENDIX	1630
A. The <i>Journals</i> Dataset	1630
B. The <i>Record</i> Dataset	1633
C. Limitations	1635
D. First Congress Archival Materials	1636

INTRODUCTION

[The right to petition] would seem unnecessary to be expressly provided for in a republican government, since it results from the very nature of its structure and institutions. It is impossible that it could be practically denied until the spirit of liberty had wholly disappeared, and the people had become so servile and debased as to be unfit to exercise any of the privileges of freemen.
 – Joseph Story, *Commentaries on the Constitution* (1833)¹

Our government is suffering from a crisis of legitimacy.² As James O. Freedman has described, Americans have endured a “recurrent sense of crisis” over whether the procedures of administrative lawmaking accord with the Constitution.³ Classic legal process theory reminds us that recurring crises in the public’s faith in our lawmaking procedure undermines the legitimacy of our laws.⁴ Recent scholarship by Gillian Metzger declares the administrative state to be “under siege” across a “range of public arenas – political, judicial, and academic in particular.”⁵ Metzger argues that these challenges – unlike earlier challenges to the administrative state – are frequently “surfacing in court and being framed in terms of constitutional doctrine.”⁶ Moreover, the constitutional issues raised by

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1. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES BEFORE THE ADOPTION OF THE CONSTITUTION § 1894, at 645 (William S. Hein & Co., 5th ed. 1994) (1891).
 2. The legitimacy debate often centers not around a “thick normative notion” of legitimacy, but that of sociological and public legitimacy. See Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005); see also Frank I. Michelman, *Rawls on Constitutionalism and Constitutional Law*, in THE CAMBRIDGE COMPANION TO RAWLS 394, 395 (Samuel Freeman ed., 2003) (considering the “conditions of the possibility of political legitimacy in modern, plural societies”); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283 (2003) (discussing how procedural fairness increases the perceived legitimacy of judicial proceedings).
 3. JAMES O. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 260 (1978).
 4. See, e.g., HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); William N. Eskridge, Jr. & Philip P. Frickey, *The Making of The Legal Process*, 107 HARV. L. REV. 2031 (1994); see also Tom R. Tyler, *Governing Amid Diversity: The Effect of Fair Decisionmaking Procedures on the Legitimacy of Government*, 28 LAW & SOC’Y REV. 809, 809 (1994) (finding that empirical studies “strongly support the argument that procedural justice judgments influence evaluations of the legitimacy of a national-level political institution”).
 5. Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 8 (2017).
 6. *Id.* at 9.

these challenges are not piecemeal. Rather, the challenges frame the entire administrative state as unconstitutional.⁷ “While still a minority position,” Metzger observes, “this view is gaining more judicial and academic traction than at any point since the 1930s.”⁸

Cass Sunstein and Adrian Vermeule identified this nascent movement in charting the creation of “libertarian administrative law.”⁹ This strain of critique characterizes the administrative state as an abandonment of both classical American liberalism and the core values of our “Constitution in Exile” — namely, individual rights, limited national government, and due process.¹⁰ Critics take issue with the abandonment of the strict, tripartite separation of powers embodied in constitutional text for the so-called “Fourth Branch” — a branch not recognized by the text of our original Constitution.¹¹ By Sunstein and Vermeule’s account, the administrative state has become a lightning rod for the clash between libertarian and progressive philosophies¹² in our increasingly polarized political culture.¹³

Given the philosophical cast of much of the critique, it is unsurprising that it has been met with rebuttals based in intellectual history. Most recently, legal historian Daniel R. Ernst examined the intellectual origins of the New Deal and argued that an intellectual consensus of elites and their expressly liberal concerns over due process should put to rest any charge that the administrative state is out of step with liberal American values.¹⁴ Even assuming Ernst’s careful archival

7. *Id.*

8. *Id.*

9. Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393 (2015). Although Sunstein and Vermeule document a recent strain of doctrine animated by judicial critics of the administrative state, Vermeule has made clear his position that “the administrative state has never been more secure” and that any questions of administrative law legitimacy are cabined to “elite discourse” only. Adrian Vermeule, *Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State*, 130 HARV. L. REV. 2463, 2465 (2017); see also Adrian Vermeule, *What Legitimacy Crisis?*, CATO UNBOUND (May 9, 2016), <http://www.cato-unbound.org/2016/05/09/adrian-vermeule/what-legitimacy-crisis> [http://perma.cc/44JE-RQ22] (“[I]t is hardly obvious that there is any widespread illegitimacy afflicting the administrative state . . .”).

10. Sunstein & Vermeule, *supra* note 9, at 402-03.

11. *Id.* at 403-09.

12. *Id.*

13. Notably, Sunstein and Vermeule also call for an administrative law proceduralism devoid of politics eerily reminiscent of the process school. See *id.* at 466.

14. DANIEL R. ERNST, *TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940* (2014). Sunstein and Vermeule clothe the same moment of consensus in constitutional theory and describe the passage of the Administrative Procedure Act of 1946 as

work could document an intellectual consensus,¹⁵ however, it is doubtful that such a moment of agreement could overcome the core of the libertarian critique: that is, the lack of constitutional text establishing the lawmaking procedure of the administrative state by formal means.¹⁶

Other defenders of the administrative state have provided institutional histories undermining the libertarians' claim that the administrative state is an alien outgrowth of a twentieth century communitarian political philosophy foreign to our founding constitutional culture. Jerry Mashaw,¹⁷ Theda Skocpol,¹⁸ Nicholas Parrillo,¹⁹ Michele Dauber,²⁰ and Daniel Carpenter,²¹ among others, have begun the vital project of excavating legislative and executive practices during the eighteenth and nineteenth centuries. This work contradicts previous descriptions of that era as one encompassing only a weak "state of courts and parties."²² It has generally interrogated the mismatch between particular values previously understood as originating with the New Deal—like that of social welfare²³—and the

an example of what William Eskridge and John Ferejohn have labeled a "superstatute"—namely, a statute that assumes the authority of constitutional law by virtue of a strong consensus at its passage—pointing to compromise over the bill as evidence that administrative law stripped the liberal-communitarian debate from its core. Sunstein & Vermeule, *supra* note 9, at 466.

15. See Jeremy K. Kessler, *The Struggle for Administrative Legitimacy*, 129 HARV. L. REV. 718 (2016) (reviewing Ernst's book).
16. See Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994) ("The post-New Deal administrative state is unconstitutional."); see also PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014) (arguing the same).
17. JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* (2012).
18. THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* (1995).
19. NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940* (2013).
20. MICHELE LANDIS DAUBER, *THE SYMPATHETIC STATE: DISASTER RELIEF AND THE ORIGINS OF THE AMERICAN WELFARE STATE* (2013).
21. DANIEL CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATION, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862-1928* (2001).
22. STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920*, at 285 (1982); Daniel P. Carpenter, *The Multiple and Material Legacies of Stephen Skowronek*, 27 SOC. SCI. HIST. 465, 470 (2003).
23. In particular, Skocpol and Dauber take aim at the charge that the welfare programs of the New Deal represent the colonization of the American mind by twentieth-century communitarianism. They offer a revisionist history that traces the origins of the welfare practices of the New Deal to the war pensions, disaster relief, and other forms of social insurance offered readily by early American national government. DAUBER, *supra* note 20; SKOCPOL, *supra* note 18.

reality of historical practice. But nothing has done more to undermine the characterization of the administrative state as an alien outgrowth of the late nineteenth and early twentieth century than the work of Jerry Mashaw.

Mashaw's impressive installments in the *Yale Law Journal*, later compiled into a book, trace the practices of American administrative governance to the founding.²⁴ Mashaw's administrative state, if such a term still applies, is an incrementalist project that was built statute by statute as Congress met new challenges with new forms of governance.²⁵ His rich historical narrative problematizes the libertarian critique that our Founding witnessed little national administrative governance and adhered to a strict separation of powers.²⁶ It remains unclear, however, whether Mashaw's account sufficiently addresses the critique that these new forms of lawmaking procedure were never formally established. To many, historical practice alone does not amend the Constitution.

This Article aims to build on Mashaw's incrementalist narrative and to intervene in the debate over the legitimacy of administrative lawmaking. But unlike these prior contributions, it grounds this intervention in the Constitution and in constitutional text—namely, the Petition Clause of the First Amendment. Drawing on an original database of over 500,000 petitions submitted to Congress, as well as archival materials from the First Congress, this Article excavates the petition process comprehensively for the first time and documents how petitioning shaped the modern administrative state. This excavation tracks petitioning in the House of Representatives from the First Congress through the Eightieth, at which point the volume of legislative petitioning dropped dramatically following

24. MASHAW, *supra* note 17. See Jerry L. Mashaw, *Administration and "the Democracy": Administrative Law from Jackson to Lincoln, 1829-1861*, 117 YALE L.J. 1568 (2008) [hereinafter Mashaw, *Administration and "the Democracy"*]; Jerry L. Mashaw, *The American Model of Federal Administrative Law: Remembering the First One Hundred Years*, 78 GEO. WASH. L. REV. 975 (2010); Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1356 (2010) [hereinafter Mashaw, *Law in the Gilded Age*]; Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 YALE L.J. 1256 (2006); Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801-1829*, 116 YALE L.J. 1636 (2007).

25. MASHAW, *supra* note 17, at 16 ("At the most general level I imagine the development of our administrative constitution as a waltz, a three-step pattern often repeated. First, something happens in the world. Second, public policy makers identify that happening as a problem, or an opportunity, and initiate new forms of governmental action to take advantage of or to remedy the new situation. Third, these new forms of action generate anxieties about the direction and control of public power. Means are thus sought to make the new initiative fit within existing understandings of what it means to be accountable to law.").

26. *Id.*

implementation of the Legislative Reorganization Act and the Administrative Procedure Act of 1946.²⁷

In doing so, this Article offers three primary contributions to the debate. First, it provides a revisionist history of the administrative state as an outgrowth of the petition process by detailing congressional petitioning from the Founding into the twentieth century. Second, it updates legal process theory to incorporate petitioning and its integral role in affording participation for individuals and minorities in the lawmaking process. Third, this Article argues that the Petition Clause could offer additional support for the constitutionality of the administrative state. But just as excavating the petitioning process reveals the historical and textual roots of the administrative state, it also demonstrates that our doctrine has migrated quite far from those origins. This history, then, also sheds lights on how this doctrine could better reflect the important constitutional and democratic function that the administrative state performs in supplementing the congressional petition process.

Although largely lost from our modern understanding of lawmaking, the institution of petitioning formed a core part of our Congress for much of this nation's history. The petition process performed an important lawmaking function within colonial legislatures in allowing the aggrieved to be heard. After the revolution, the petition process provided a mechanism of representation for individuals and minorities not represented by the majoritarian mechanism of the vote. Even the unenfranchised could petition: women, free African Americans, Native Americans, the foreign born, and children turned to the petition process to participate in lawmaking.

The petition process offered the politically powerless a means of participation that was formal, public, and not driven by political power. In this way, the petition process resembled litigation in a court more closely than the rough and tumble public engagement process described by political scientists today. Petitioners would submit formal documents, like complaints, to trigger petition actions in Congress. The House clerk tracked these actions in a petition docket book throughout formal proceedings—from submission to referral to reporting to disposition. Although the petition process was primarily located in the House,

27. In so doing, this Article challenges the widely held conclusion in the historical literature that the petition process “died out” in the nineteenth century as a result of either the Gag Rule, administrability problems, or other procedural changes in Congress. See Maggie L. McKinley, *Lobbying and the Petition Clause*, 68 STAN. L. REV. 1131, 1153 n.146 (2016) (surveying the debate).

the consideration of petitions dominated congressional dockets into the twentieth century – often far surpassing the volume of congressional business on other matters.

The petition process formed an integral part of our congressional lawmaking process until after the Second World War. The year 1945 marked not only the end of the war, but also the beginning of a comprehensive effort to restructure a government that had rapidly expanded under a series of wartime administrations. As part of this effort, Congress passed two laws in the summer of 1946 that fundamentally restructured the federal lawmaking process: the Administrative Procedure Act (APA)²⁸ and the Legislative Reorganization Act (LRA).²⁹ Histories of the administrative state rarely treat these two statutes together,³⁰ but they were passed only months apart and their effects were felt in tandem. Together, these statutes dismantled the last vestiges of the petition process in Congress. In so doing, they transferred much of that existing infrastructure to the administrative state and to the courts. In particular, the LRA reduced the number of standing committees in Congress – once the core loci for petition review and processing – and banned the passage of certain private bills that Congress had used to resolve petitions. The APA transferred jurisdiction over these petitions explicitly to the courts and the executive – most notably through the Federal Tort Claims Act – and attempted to strengthen congressional oversight of the agencies.³¹ Finally, the APA codified procedural standards for the agencies to ensure protection of the petition right, including a provision requiring a petition process in the agencies.

These two statutes did not themselves cause the decline of the petition process in Congress. Rather, they dismantled an infrastructure rendered vestigial after Congress siphoned off the petition process into specialized boards, commissions, and agencies.³² This siphoning can be seen across a range of substantive areas, including public lands, Indian affairs, military affairs, public infrastructure, regulation and incorporation of the territories, post offices and roads, labor, education, agriculture, immigration, and election administration.³³

28. Pub. L. No. 79-404, 60 Stat. 237 (1946).

29. Pub. L. No. 79-601, 60 Stat. 812 (1946).

30. See JOANNA L. GRISINGER, *THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL 109-152* (2014) (providing a recent and rare exception).

31. *Id.*

32. See *infra* Section I.C (“Following a steady decline in petition volume after 1914, when specialized agencies and boards mushroomed after World War I, Congress finally dismantled the last vestiges of the congressional petition process with the passage of two statutes.”).

33. *Id.*

Over time, the resulting assortment of boards, commissions, and agencies has come to be pejoratively referred to as the “Fourth Branch” – denoting a mysterious entity not recognized by our tripartite constitutional structure. But, as this Article will demonstrate, the administrative state traces its roots to constitutional text and historical practice – specifically to siphoning off of the petitioning process – and performs many of the functions originally managed by that process.³⁴ However, to date, there has been little research on the petition process in Congress, and few scholars have explored the implications of this process and the Petition Clause for the theory and law of the administrative state.

That history, recovered here, has broad implications. Most relevant for current debates over the administrative state’s legitimacy, it offers a counter-narrative to the libertarian vision of the administrative state as a rights-invading, and even unconstitutional, construction. Instead, this history reveals an administrative state that was established, at least in part, to protect individual rights and to maintain equal liberty by affording individuals and minorities a mechanism for meaningful participation in the making of law.³⁵

This counternarrative also exposes flaws in the overly simplistic model of legal process theory. This theory of lawmaking, popularized in the 1950s and 1960s, still animates much of our public law scholarship and jurisprudence. The libertarian vision rests on this imperfect theory. The simple legal process model provides only a thin account of the lawmaking process and fails to capture the necessity of facilitating equal participation to ensure equal liberty.³⁶ In so doing,

34. Part I details this process, but I include a brief introduction here for ease of understanding. At the Founding and for much of this nation’s history, petitioning provided a formal means by which anyone, including the unenfranchised, could access the lawmaking process. Women, Native Americans, African Americans, and the foreign-born all engaged in petitioning, and Congress provided formal consideration to all. Petitioners submitted a variety of petitions to Congress, each comprising a formal document with a statement of grievance and a signatory list, and often attached maps, charts, draft statutory language, and other forms of argumentation to the document. Much like a complaint filed in a court, the legislative petitioning process was public: members of Congress read each petition on the floor and then referred the petition to either the executive, an ad hoc committee, or one of the many standing committees specific to the subject matter of the petition. Action on each petition was recorded into the formal record of Congress, and standing committees kept dockets of action on petitions. The authority to which the petition was referred would then issue a report on the petition with a recommendation for resolution. Some studies place the documented reporting rate as high as sixty or seventy percent. Congress would then take action on the report, choosing to pass a bill, public or private, in response to the petition, or the committee might deny the petition and take no further action. McKinley, *supra* note 27, at 6-7.

35. See *infra* Part II.

36. HART & SACKS, *supra* note 4; Eskridge & Frickey, *supra* note 4, at 2050 & n.116 (noting the near absence of any discussion of representation, elections, direct democracy, or any concern

legal process theory perpetuates the misconception that equality and liberty are supported only by the “rights” side of the Constitution. It overlooks how the structural and procedural components of the lawmaking process also promote those values.³⁷ Scholars of critical legal studies recognized over fifty years ago that the legal process theory model of lawmaking fails to take account of the need to accommodate and protect individuals and minorities within the lawmaking process.³⁸ Incorporating petitioning and other recent scholarship on the structural protection of minority participation³⁹ into our model of lawmaking begins to answer these longstanding criticisms.

Finally, the history of petitioning and the Petition Clause offers further support for the constitutionality of the administrative state. As I have described elsewhere, the petition right protects formal, public, and nonarbitrary access to the lawmaking process without regard to the political power of the petitioner and resembles the right of procedural due process in courts.⁴⁰ The administrative state and the doctrine that has developed around it already embody the Petition Clause values of fair, public, and nonarbitrary process.⁴¹ For textualists and originalists, the Petition Clause could provide the textual hook necessary to calm recurrent anxieties over administrative lawmaking.⁴² For others, the Petition Clause offers a new framework to understand the dynamics at work in Congress’s translation of the petition right into the modern state, and its historical practice could bring clarity to administrative law doctrine more broadly.⁴³

This Article proceeds in four parts. Part I introduces the burgeoning historical literature on eighteenth- and nineteenth-century governance and points to disputes left unresolved by these histories. It provides context for understanding the Petition Clause before turning to the Congressional Petitions Database. This

with structural protections for minorities and minority representation in the original *Legal Process* manuscript).

37. Heather K. Gerken, Windsor’s *Mad Genius: The Interlocking Gears of Rights and Structure*, 95 B.U. L. REV. 587, 594 & n.29 (2015).
38. See, e.g., MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 214-18 (1987); Eskridge & Frickey, *supra* note 4, at 2050-51.
39. See, e.g., Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745 (2005); Heather K. Gerken, *Exit, Voice, and Disloyalty*, 62 DUKE L.J. 1349 (2013); Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889 (2014) [hereinafter Gerken, *New Nationalism*]; Gerken, *supra* note 37, at 594; Maria Paula Saffon & Nadia Urbinati, *Procedural Democracy, the Bulwark of Equal Liberty*, 41 POL. THEORY 441, 443-45 (2013).
40. McKinley, *supra* note 27, at 1182-85.
41. See *infra* Section IV.B (noting that “the quasi-procedural due process right of the kind promised by the Petition Clause” protects values such as equality, transparency, and participation”).
42. See *infra* Section IV.A (discussing how the Petition Clause offers a textual hook for many of the innovative forms of governance we now call the administrative state).
43. *Id.*

Part then provides an overview of congressional petitioning from the Founding until 1948.

Next, Part II illustrates the siphoning off of the petition process with three case studies. The first is roughly termed “adjudicative” and tracks the origins of the federal claims system from the petition process to the Court of Claims and the federal courts. The next, termed “public benefits,” tracks the pension system from the Committees on Pension to the Bureau of Pensions. The final “regulatory” case study tracks the regulation of commerce from the Commerce and Manufactures Committees to the executive – most notably the Interstate Commerce Commission.

Part III begins to articulate what I term the “participatory state” and situates petitioning and the administrative state within the theoretical literature – legal process theory, in particular – as a structural protection for minority participation in the lawmaking process.

Part IV then turns to the critics of the administrative state and shows how their criticisms rest largely on the simple, and incomplete, tripartite separation-of-powers model of legal process theory. Part IV argues that excavating the origins of the administrative state in the petition process adds nuance to these simple models and resolves concerns over the “amorphous” constitutional status of the administrative state. Next, Part IV studies how this more nuanced model could justify the stickiness of the legislative veto⁴⁴ – a procedure whereby Congress authorized one chamber to overturn administrative action – despite the Supreme Court’s holding the procedure unconstitutional in *INS v. Chadha*.⁴⁵ In the original petition process, a single chamber could deny a petition even in the absence of bicameralism and presentment. Furthermore, viewing the administrative state through the lens of the Petition Clause provides a textual basis for the doctrine of administrative due process first established in the *Morgan v. United States* cases.⁴⁶ Lastly, Part IV explores some potential objections before concluding.

I. ORIGINS

Why is so much attention paid to trifling memorials? . . . And why should we support men at Congress to trifle away their time upon them?

44. See Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS. 273 (1993).

45. *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983).

46. *Morgan v. United States (Morgan II)*, 304 U.S. 1 (1938).

The answer to questions of this kind is obvious. Justice is uniform. It is the same when administered to an individual, a state, or a nation . . . There is a mutual dependence between the supreme power and the people. And since the whole government is composed of individuals, does it appear inconsistent that individuals should be heard in the public councils? . . . In order to gain the confidence of the people they must be fully convinced that their memorials and petitions will be duly attended when they are not directly repugnant to the interest and welfare of the community. – Candidus, Gazette of the United States (June 5, 1790)⁴⁷

A. *The Rediscovery of Early American Lawmaking*

With the publication of *Building a New American State* in 1982, Stephen Skowronek issued a clarion call to scholars of politics and law to refocus their attention not only on political history, but also on the institutions and institutional practice that operated within this history.⁴⁸ The state-centered and historical turn in political science modeled by Skowronek ushered in a renaissance in the study of early American administrative development. According to Jerry Mashaw, this movement has transformed our understanding of “law” in the field of administrative law to incorporate more than the decisions of courts.⁴⁹

Theda Skocpol crafted one of the earliest and undoubtedly most thorough of these institutional histories of the administrative state in *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States*.⁵⁰ But while Skocpol’s history traces the administrative state’s roots to the postbellum pension system, twenty years later, Michele Dauber pushed Skocpol’s revisionist history back to the Founding.⁵¹ In *The Sympathetic State: Disaster Relief and the Origins of the Modern Welfare State*, Dauber traces the disaster rhetoric used to support relief for the Great Depression back to the First Congress and the national government’s program of disaster relief appropriations.⁵² Dauber describes a disaster relief system that began with the petition process in Congress and then expanded over time to commissions, established by general legislation,

47. Candidus, *Extract from a Speculation Signed Candidus in the Farmer’s Journal of May 27*, 2 GAZETTE U.S. 477, 477 (1790).

48. SKOWRONEK, *supra* note 22.

49. MASHAW, *supra* note 17.

50. SKOCPOL, *supra* note 18.

51. DAUBER, *supra* note 20.

52. *Id.* at 1-16.

charged with resolving petitions emanating from specific disasters.⁵³ Congress located its power to develop these disaster relief systems in the General Welfare Clause of the Constitution.⁵⁴

Ironically, some of the institutional histories responding to Skowronek's call have turned these methods against *Building a New American State* itself—in particular, its claim that nineteenth-century America was a state of “courts and parties” devoid of administrative infrastructure. Daniel Carpenter charted the early formation and evolution of the United States Department of Agriculture and the United States Postal Service in *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies 1862-1928*.⁵⁵ Nicholas Parrillo recently documented the salary scheme that allowed for early administrative structures to function over loose networks of private individuals in *Against the Profit Motive: The Salary Revolution in American Government, 1780-1940*.⁵⁶

Mashaw himself offered perhaps the strongest revisionist history against the “courts and parties” image in his survey of early American governance. Mashaw documents the growth of national administration—“the development and implementation of law and policy by officials specifically charged with that responsibility”—from the Founding Era until the Gilded Age.⁵⁷ His revisionist narrative lays to rest the notion that the administrative state was born in 1887 with the Interstate Commerce Commission. Across his hundred-year survey, Mashaw offers a number of case studies, including the first Board of Patents, the land claims system, steamboat regulation, and Civil War pensions.⁵⁸

Mashaw notes that his identification of early American administration is contingent on a necessary shift in methodology.⁵⁹ In particular, his work avoids traditional event-centered administrative history and instead focuses “on practice, structure, and policy, not on social movements, political rhetoric, or legal justification.”⁶⁰ With this inquiry, Mashaw identified “transsubstantive ideas in the patterns of legislative and administrative action, not in the language of political debate, academic analysis, or legal doctrines generated by judicial review.”⁶¹ It is

53. *Id.*

54. *Id.* at 19-20.

55. CARPENTER, *supra* note 21.

56. PARRILLO, *supra* note 19.

57. MASHAW, *supra* note 17, at 16.

58. *Id.* at 50, 119, 187, 256.

59. *Id.* at 3-17.

60. *Id.* at 16.

61. *Id.* (defining “transsubstantive ideas” as features shared across substantive areas of the law).

among these transsubstantive practices,⁶² those that predate and were codified into the APA, that Mashaw hopes to locate administrative law or what he terms “the internal law of administration.”⁶³

As was the case with Dauber’s disaster relief system and Skocpol’s pension review, Mashaw often describes these administrative practices as disparate activities that share characteristics but not a common root. In this Article, I aim to name a transsubstantive pattern in the practice, structure, and policy of early American lawmaking – patterns relating to petitioning. Petitioning has often occupied an unnamed but central role in the background of these institutional histories. Dauber’s first chapter, for example, begins with a description of the “private bill” system in Congress,⁶⁴ a petition system that she argues gave birth to our welfare state. Petitions also play a recurring role in Mashaw’s survey.⁶⁵ Skocpol’s Civil War pension system derived from and operated within the petition process.⁶⁶ But none of the three has wholly excavated petitioning and the implications of this practice for understanding the development of our modern administrative state.

My aim in naming, identifying, and exploring petitioning as a transsubstantive practice is not only historical—it is also legal. First, I aim to describe petitioning in sufficient depth to reveal it as a particular transsubstantive practice that has been lost to our modern parlance. Our modern familiarity with voting, for example, allows us to more clearly see patterns of relation between settings. Thus, variations in voting practice, such as raising a hand in one setting and marking a ballot in another, are nonetheless still seen as voting practices, and not

62. I offer here a friendly amendment to Mashaw’s methodological turn toward transsubstantive ideas and patterns of action. Here, I instead focus firmly on transsubstantive *practice*. Akin to the act of naming petitioning, this methodological move changes little in the substance of the analysis. Rather, it roots Mashaw’s methodology squarely in practice theory—alongside the works of Bourdieu, Wittgenstein, and other theorists of the structure-agency divide—where it might gain deeper insights. See, e.g., PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* 78–79 (Richard Nice trans., 1977) (“The ‘unconscious’ is never anything other than the forgetting of history which history itself produces by incorporating the objective structures it produces in the second natures of habitus: ‘ . . . in each of us, in varying proportions, there is part of yesterday’s man; it is yesterday’s man who inevitably predominates in us, since the present amounts to little compared with the long past in the course of which we were formed and from which we result. Yet we do not sense this man of the past, because he is inveterate in us; he makes up the unconscious part of ourselves.” (quoting EMILE DURKHEIM, *L’ÉVOLUTION PÉDAGOGIQUE EN FRANCE* 16 (1938))).

63. MASHAW, *supra* note 17, at 7.

64. DAUBER, *supra* note 20, at 17.

65. MASHAW, *supra* note 17, at 3–25.

66. SKOCPOL, *supra* note 18, at 102–51.

as unrelated acts. The petition process to date has only been documented in sparse and disparate terms – the private bill system in one setting, meeting with a congressman in another, and petitioning an agency under the APA in yet another. Naming petitioning and giving it shape will allow us to more readily identify it across these settings, and relate the practices to their transsubstantive origins.

Second, and most important, I aim to connect this transsubstantive practice with the theory and law that structure it.⁶⁷ The founding generation saw this process as an integral part of a republican form of government. It fostered representation of the entire demos, including the unenfranchised, and served as a counterpoint to the majoritarian electoral process.⁶⁸ From its earliest days, Congress devoted an extraordinary amount of time and resources to institutionalizing and maintaining the right to petition.⁶⁹ Behind the particular transsubstantive practice of petitioning and the text of both Article I and the Petition Clause are bodies of theory and law on which these institutional histories have yet to reflect.

B. The Petition Process in Congress

In the winter of 1799, the Reverend Absalom Jones joined seventy other African American petitioners in signing and submitting to the Sixth Congress “The Petition of the People of Colour, Freemen within the City and Suburbs of Philadelphia.”⁷⁰ As was customary, the petitioners submitted the petition to their own representative. To introduce the petition to Congress, Representative Robert Waln of Pennsylvania read the petition aloud on the floor of the House.⁷¹ Their petition read, in pertinent part:

The Petition of the People of Colour, Freemen within the City and Suburbs of Philadelphia— That thankful to God our Creator and to the Government under which we live, for the blessing and benefit extended to us in the enjoyment of our natural right to Liberty, and the protection of our Persons and property from the oppression and violence which so great a number of like colour and National Descent are subjected

67. McKinley, *supra* note 27, at 1182-86.

68. *Id.*

69. *Id.*

70. Nicholas P. Wood, A “Class of Citizens”: *The Earliest Black Petitioners to Congress and Their Quaker Allies*, 74 WM. & MARY Q. 109, 111 (2017).

71. *Id.* at 136.

We are incited by a sense of Social duty and humbly conceive ourselves authorized to address and petition you in their behalf, believing them to be objects of representations in your public Councils, in common with ourselves and every other class of Citizens within the Jurisdiction of the United States, according to the declared design of the present Constitution We apprehend this solemn Compact is violated by a trade carried on in clandestine manner to the Coast of Guinea⁷²

In the body of the petition, the petitioners identified as their grievance an illegal slave trade market functioning off the coast of Guinea, in violation of the 1794 Slave Trade Act.⁷³ In their “prayer” or request for resolution of their grievance, the petitioners prayed that Congress “may exert every means in [its] power to undo the heavy burdens, and prepare the way for the oppressed to go free.”⁷⁴ As was customary, Representative Waln then moved to refer the petition to a committee in Congress for investigation, review, and reporting.⁷⁵

Although the petition garnered northern support, southern congressmen moved quickly to block the referral and reject the petition entirely.⁷⁶ The grounds for the motion to reject the petition might come as a surprise, however. Rather than take issue with the race of the petitioners, the southern congressmen raised a procedural objection: petitions to Congress were to be rejected as improperly filed when the petition prayed for a remedy that fell outside of Congress’s jurisdiction.⁷⁷ In addition to praying for regulation of the international slave trade, the petitioners also prayed for regulation of domestic slavery. Regulation of slavery was widely accepted at the time as falling squarely within the jurisdiction of the several states. In response, Representative Waln amended his motion to direct the committee to address only those aspects of the petition clearly within the authority of Congress—regulation of the international slave trade.⁷⁸ Recent research by historian Nicholas P. Wood has revealed that, contrary to the prevailing literature,⁷⁹ the amended motion to refer the petition was

72. Absalom Jones et al., *The Petition of the People of Colour, Freemen within the City and Suburbs of Philadelphia* (Dec. 30, 1799), reprinted in SIDNEY KAPLAN, *THE BLACK PRESENCE IN THE ERA OF THE AMERICAN REVOLUTION* 273, 273-75 (1973).

73. *Id.*

74. *Id.*

75. Wood, *supra* note 70, at 137.

76. *Id.*

77. *Id.* at 137-38.

78. *Id.* at 137.

79. *Id.* at 113-14. Historians had mistakenly read the vote on whether to refer to a committee the emancipation grievance of the petition, which was dismissed, as a vote on whether to refer

“resolved in the affirmative.”⁸⁰ The reviewing committees considered the grievance alleged in the petition and each reported favorably that Congress should grant the petition.⁸¹ Both chambers of Congress agreed, and, five months following the submission of the petition, Congress drafted and passed the Slave Trade Act of 1800,⁸² increasing the penalties for engaging in the slave trade and holding liable those who participated even indirectly – including investors, employees, and the like.⁸³

The process by which this politically powerless minority successfully advocated for reform once comprised an integral part of lawmaking in Congress. While historians often draw on petitions as archival materials on which to base their research, a comprehensive institutional history of the petition process has yet to be written. The archival work required to conduct a thorough history of the petition process in Congress has to date proved too burdensome for most scholars of Congress and of political history. The First Congress, for example, received approximately 600 petitions, and the historians of the First Federal Congress Project filled two of their twenty volumes of the *Documentary History of the First Federal Congress* with summaries of these petitions and their dispositions. One volume focused entirely on petitions for Revolutionary War claims.⁸⁴ The original congressional petitions and supporting documents remain unpublished and often unavailable, stored on microfilm in the National Archives. Moreover, these efforts catalogue only the First Congress. The volume of petitioning in later Congresses only increased, and petition records often fill the archives of entire congressional committee records.

There is an alternative means to study the petition process without having access to the original archival materials: the congressional record. From the Founding onward, petitions submitted to Congress were read aloud on the floor, and a summary of the petition was made part of the formal record. Collaborators at the North American Petition Project and I have used digitized versions of the *Congressional Record* and *Journal* to build the Congressional Petitions Database,

the entire petition, including all grievances. Because historians read this earlier vote as one to dismiss the petition entirely, not simply in part, they missed the second vote, which resolved in the affirmative the question of whether to *refer* the international slave trade grievance to committee for review. *Id.* at 113-14, 137-38.

80. *Id.* at 138 (quoting 10 ANNALS OF CONG. 238-245 (1800)).

81. *Id.* at 138-39.

82. Ch. 51, § 4, 2 Stat. 70.

83. Wood, *supra* note 70, at 139.

84. 8 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 4 MARCH 1789-3 MARCH 1791, at 232-33 (Kenneth R. Bowling et al. eds., 1998) [hereinafter DOCUMENTARY HISTORY VOL. 8].

a database of all petition introductions to Congress from the Founding until the present.⁸⁵ Exploration of this Database is still in its earliest stages, but it reveals a petition process far more comprehensive, institutionalized, and enduring than heretofore documented. The following institutional history draws in part from this Database, supplemented with archival research into the papers of the First Congress and secondary sources.

The petition process had deep roots in American lawmaking procedures. While the framing generation mythologized American petitioning in Magna Carta and the petition of right, colonial and state governments had long developed a distinctly American form of petitioning.⁸⁶ Petitioning has played an integral role within legislatures throughout history.⁸⁷ In Parliament, the terms *bill* and *petition* were often used interchangeably.⁸⁸ It is speculated that Parliament itself was simply an institutionalization of the petition process.⁸⁹ Petitioning was ubiquitous throughout colonial legislatures and often drove legislative agendas.⁹⁰

As I have discussed in prior work, the American colonists conceived of themselves as an unrepresented and unenfranchised minority, and they based their

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85. More on the methodology behind the Database and its limitations can be found in the Methods Appendix. But I provide a brief description here of the Database to provide context for the sections that follow. We first developed algorithms to locate and separate out petition introductions from the *Congressional Record* and *Journal*. We then coded these petition introductions for geographic, demographic, and topical content.
86. See Christine A. Desan, *Remaking Constitutional Tradition at the Margin of the Empire: The Creation of Legislative Adjudication in New York*, 16 *LAW & HIST. REV.* 257 (1998) (documenting the usurpation of public claims adjudication by colonial legislatures as a distinctly American constitutional innovation); see also Daniel Carpenter, *Democracy by Petition* 1-68 (unpublished manuscript) (on file with author) (documenting the rise of a distinct form of American petitioning, the spread of participatory democracy, and the abolition of aristocracy in the antebellum era correlating with a ubiquitous peak in petitioning activity).
87. *Id.* at 1142-47 (chronicling the extensive use of petitioning from Magna Carta to the early Republic).
88. K. Smellie, *Right of Petition*, in 12 *ENCYCLOPAEDIA OF THE SOCIAL SCIENCES* 98, 98 (Edwin R.A. Seligman ed., 1937).
89. Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth*, 21 *HASTINGS CONST. L.Q.* 15, 20-21 (1993) (outlining the centrality of petitioning in Parliament).
90. Stephen A. Higginson, Note, *A Short History of the Right To Petition the Government for Redress of Grievances*, 96 *YALE L.J.* 142 (1986).

claimed right to a distinct American sovereignty in the Declaration of Independence on the failure of the petitioning process.⁹¹ The founding generation then codified protection of the petition right into their constitutions, both state and federal.⁹² The right protected by the Petition Clause was strictly procedural. It protected a right not to a particular legislative outcome, but a right to equal, formal, and public access to the lawmaking process akin to the right of procedural due process.⁹³

The petition process also provided an underappreciated avenue for political participation distinct from the vote. The process was available to even the unfranchised and did not operate by a majoritarian decision rule. Through the petition process, aggrieved individuals and minorities could articulate their grievances and pray for redress, even in the absence of a particular cause of action.⁹⁴ The mechanism of American petitioning was thus open to equal participation by all – politically powerful and powerless alike. The unfranchised – women, Native Americans, and non-enslaved African Americans – were afforded process on par with franchised petitioners. Congress received, before the end of the Civil War, a steady influx of petitions submitted by the unfranchised. From 1789 until 1865, of 145,892 total petitions, Congress introduced 10,131 petitions (6.9%) submitted by primary signatories who were unfranchised. Of these 10,131, women submitted 9,258 petitions (91.38%),⁹⁵ Native Americans submitted 569 petitions (5.62%), foreign nationals submitted 180 petitions (1.78%), and African Americans submitted 124 petitions (1.22%).⁹⁶ Because Congress

91. McKinley, *supra* note 27, at 1142-43 (citing THE DECLARATION OF INDEPENDENCE para. 4 (U.S. 1776) (“In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury.”)).

92. Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right To Petition*, 66 *FORDHAM L. REV.* 2153, 2199-2212 (1998) (recounting the constitutionalization of the right to petition in state and federal constitutions).

93. McKinley, *supra* note 27, at 1145 (explaining how the petition process increased political access for otherwise marginalized groups).

94. *Id.*

95. Not only were the petitions themselves an important and effective lawmaking technology for the unfranchised, the act of petitioning often caused second-order effects on unfranchised communities and empowered later, more comprehensive petitioning campaigns. See Daniel Carpenter & Colin D. Moore, *When Canvassers Became Activists: Antislavery Petitioning and the Political Mobilization of American Women*, 108 *AM. POL. SCI. REV.* 479 (2014).

96. These figures are drawn from the Congressional Petitions Database. They likely understate the number of petitions that included participation of the unfranchised, because the data include only those petitions where an unfranchised petitioner was listed as the primary petitioner and the member petition introduction noted the demographics of the petitioner. Aggregating the unfranchised from petition introductions would not capture all of the petitions where an unfranchised petitioner was one of many signers. It also bears noting that

treated petitions from the unenfranchised like all other petitions and did not demarcate them in any way, they are challenging to track in the record and these numbers are likely quite understated.

The relative political power and characteristics of any individual petitioner did not drive petition procedure, nor did petitions with fewer signatures receive different or lesser process. The petition process thus afforded a means of participation for the politically powerless. The process was also formal. Parliamentary rules governed the procedure by which petitions were received, investigated, and reported, and a petitioner knew the process to expect in response to a petition. Like a court, the clerk's office in the House kept a docket book that tracked each petition from submission to reporting to disposition. Finally, the petition process in Congress was presumed to be a public process. All petition introductions were read in full on the floor, making them part of the formal legislative record, and subsequent action on a petition was similarly recorded.⁹⁷ Petitioning served a vital role in lawmaking and ensured a more egalitarian form of participation in the lawmaking process.

C. *The Infrastructure of Petitioning*

The practice of petitioning developed by Parliament and refined in the colonial and state legislatures formed an early and important aspect of lawmaking in the First Congress. Indeed, petitioning constituted such a fundamental component of lawmaking that the establishment and formalization of the petition process occurred less than one week after the House of Representatives achieved its first quorum on April 1, 1789.⁹⁸ Before the ratification of the Seventeenth Amendment, the popularly elected House was closer to the electorate, and it remains to this day the sole originator of revenue bills – a common resolution of petitioners' grievances. Not surprisingly, the House also quickly became the primary chamber for the bulk of petitioning activity.⁹⁹ On April 6, 1789, both chambers of Congress met to count the votes of the Electoral College and confirm the election of George Washington as the first President of the United States.¹⁰⁰ The procedures governing petitioning were reported on the second page of the

these figures do not capture white male non-landholders who were also excluded from the franchise.

97. DOCUMENTARY HISTORY VOL. 8, *supra* note 84.

98. 1 A Record of the Reports of Select Committees of the House of Representatives of the United States (1789) (unpublished manuscript) (on file with the National Archives, Index to Committee Reports, Executive Reports, 1st Congress, 2d Session, Record Group 233.2) [hereinafter A Record of the Reports of Select Committees].

99. *Id.*

100. *Id.*

House Record of the Reports of Select Committees, the record documenting Congress's earliest parliamentary procedures. Only several pages later did the House address such fundamental procedures as how to present bills to the President for signature or establish conference committees. The first executive departments—State, War, and Treasury, respectively—were established even later.

The petition process established by the First Congress resembled more closely the formalized and routinized litigation of a court than a tool of mass politics. Of note, this newly institutionalized petition process embodied the values of transparency and fairness found in judicial procedure. Each petition submitted to a member of Congress or the clerk would be “introduced” into Congress. Under the newly established parliamentary procedures in the House, the Speaker or a member in his place would present a petition on the day of its introduction:

Petitions, memorials, and other papers addressed to the House shall be presented through the Speaker, or by a member in his place, and shall not be debated or decided on the day of their being first read, unless where the House shall direct otherwise, but shall lie on the table, to be taken up in the order they were read.¹⁰¹

To introduce a petition, the Speaker or member would read the entire petition on the House floor. Following this full recitation, a summary of the petition would become part of the House Journal, the record of Congress published regularly and made available for the public. Then the petition would be “tabled” — or held in the queue, seemingly without time limit — to be taken up for further consideration in the order the petition was received.¹⁰²

Following introduction, petitioning followed a standard four-stage process: referral, investigation, reporting, and disposition. Petitions were most often referred to a committee within Congress with jurisdiction over the petition or, alternatively, to the executive, most commonly the Secretary of the Treasury or the Secretary of War, for investigation of the grievances alleged in the petition. Within Congress, committees — either standing or select — became the locus of petition processing.¹⁰³ Following referral, the committee or executive official to

^{101.} *Id.*

^{102.} DOCUMENTARY HISTORY VOL. 8, *supra* note 84, at xvi.

^{103.} From the First Congress, the petition process shaped lawmaking infrastructure within the Congress — largely through the development of ad hoc and standing committees. See Tobias Resch et al., Petitions and the Legislative Committee Formation: Theory and Evidence from Revolutionary Virginia and the Early U.S. House 24 (Jan. 3, 2017) (unpublished manuscript), http://www.loc.gov/loc/kluge/news/pdf/CongressHistory-PetitionsCommitteeFormation_SchneerReschCarpentrMcKinley.pdf [<http://perma.cc/59MS-RMXT>]. The process also

whom the petition was referred would conduct an investigation and complete a report that included factual and legal findings and a recommended disposition, all of which were recorded in full in the record for select committees or for each standing committee.¹⁰⁴ Following the issuance of such a report, either a subcommittee within Congress or a committee of the whole – a committee consisting of the entire membership of one chamber – would then review the report and decide on the disposition, including proposing a bill or resolution to redress the petitioner’s grievance.¹⁰⁵

Petitions themselves were drafted as formal documents that resembled a complaint. Each petition followed certain conventions of form and structure – including an addressee (a petition title summarizing the names of the petitioners); a petition topic (a formal statement of grievance outlining the issue at hand); a prayer for relief; and a signature list.¹⁰⁶

The archival records for the First Congress reveal an even more institutionalized and formalized petition process than the parliamentary procedures of each chamber betray. Beginning with the First Congress, the House of Representatives maintained a detailed docket of all petitions submitted, sorted by session and by Congress.¹⁰⁷ Published for the first time in the pages that follow, the petition docket of the First Congress, like a court docket, tracked all important procedural considerations of the petition. These included the date the petition was

defied modern notions of separation of powers with ready reliance on the executive and the courts.

104. *Id.* at 19.

105. A Record of the Reports of Select Committees, *supra* note 98; DOCUMENTARY HISTORY VOL. 8, *supra* note 84, at xvii.

106. DOCUMENTARY HISTORY VOL. 8, *supra* note 84, at xviii-xix. Each petition would often begin by stating to whom the petition was addressed – the House of Representatives or the Senate, for example – and failure to state the correct addressee was grounds to refuse to receive a petition entirely. The prayer for relief was then expected to state the specific relief sought in clear and detailed terms. Failure to include sufficient detail articulating the specific relief requested could result in Congress’s treating the petition as “informational” only. Petitioning Congress also required deferential language. Throughout the statement of grievance and prayer, the petition’s text was expected to be respectful, and the failure to frame the petition in sufficiently deferential language was often a means to challenge receipt of the petition. The statement of grievance and prayer would then be followed by a signatory list that could range from a “list” of a single signature to one including hundreds of thousands of signatures. *Id.* at xix-xx.

107. An Alphabetical List of Petitions Presented to the House of Representatives from the Commencement of the First Congress to the End of the Second Session of the Third Congress with the Proceedings Thereon (1789) (unpublished manuscript) (on file with the National Archives, Petition Book, 1st Congress, 1st Session - 3d Congress, 2d Session, Record Group 233). Committees, standing and select, also kept similar petition dockets within their own record books.

presented, the petitioners' identities, the date and location of the petition referral, the report date, additional procedures after the report was issued, and the disposition. Within the docket book sections, petitions were listed alphabetically by the organizational name or surname of the primary petitioner. The petition docket listed petitions from unenfranchised petitioners in exactly the same manner as all other petitioners and without demarcation. Although each petition was docketed by Congress and by session, the petition book detailed future action on each petition across Congresses.

The investigation and reporting practices for processing petitions involved detailed and thorough factfinding. Reports on petitions ranged from succinct partial-page reports stating that the grievance alleged in the petition was barred by a statute of limitations to reports in excess of ten pages, with detailed charts, calculations, and factual findings.¹⁰⁸

Each stage of the petition process complicates our modern view of what legislatures do – namely, make laws. More often than not, processing petitions involved an amalgam of legislating, adjudicating, and enforcing. For example, one of the first reports issued by a select committee addressed two petitions for intellectual property protection submitted by John Churchman and David Ramsay and received within weeks of the convening of the First Congress.¹⁰⁹ In response, the House formed one of its earliest select committees, which issued a report five days following referral.¹¹⁰ In the report, the committee mentions specifically that it conferred with at least one of the petitioners, Churchman, in formulating the approximately one-page report, which was recorded into the formal log for the select committees of the House. In this way, the petition process in Congress blended legislative and adjudicative functions, and resembled proceedings in a court more closely than the purely political forces we imagine animate the law-making process.

The petition process therefore qualifies our modern view of Article I law-making. Decisions on petitions created a wide array of “laws” – general laws, private laws, individual commission decisions, and decisions by congressional committees. Resolution of petitions at times involved passing public laws through the traditional means of bicameralism and presentment.¹¹¹ But more often, resolving a petition involved what would today be perceived as nontraditional law-making – processes which at the Founding were viewed as equally within Congress's power to control. To illustrate, petition declinations were not considered

108. A Record of the Reports of Select Committees, *supra* note 98.

109. *Id.*; DOCUMENTARY HISTORY VOL. 8, *supra* note 84, at xi-xxvii.

110. A Record of the Reports of Select Committees, *supra* note 98.

111. *Id.*

“legislative acts” that would require bicameralism and presentment.¹¹² If the report on a petition recommended against redressing the petitioner’s grievance – or was “reported against,” to use the parlance of the period – Congress often deferred to the committee or executive’s expertise and declined to act on the petition.¹¹³ Denial of a petition’s request for resolution of grievance did not require the passage of any law. Committees therefore issued declinations without the passage of any bill, thereby avoiding the requirements of bicameralism and presentment.¹¹⁴ Committees also occasionally provided the petitioner the opportunity to withdraw petitions that were improperly filed or were suspected as fraudulent.¹¹⁵

Favorable disposition of pending petitions most often took one of two forms. If the report recommended redress of the petitioner’s grievance, the committee would often propose a bill or resolution that Congress would pass through the traditional lawmaking procedures of bicameralism and presentment. Alternatively, Congress could employ the unique authority held at the Founding to pass “private laws,” or laws that applied to a single individual or case – much like a court judgment. The chosen method depended on the grievance alleged and the relief prayed for in the petition. While private laws were commonly used to redress petitions for claims, pensions, contracts, intellectual property, and other government benefits,¹¹⁶ the relationship between petitions and private laws was complex. The earlier mentioned Ramsay and Churchman petitions for intellectual property provide a helpful illustration of this relationship.

Following issuance of the committee report on the Ramsay and Churchman petitions, the House first initiated debate on the report. After that debate, where portions of the report were “tabled” or left to be resolved by future committees, the House consented to the report.¹¹⁷ It is unclear why the House declined to adopt the legislative practice common in the states, under which private bills would have granted Ramsay and Churchman intellectual property protection for

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*; DOCUMENTARY HISTORY VOL. 8, *supra* note 84, at xi-xxvii.

116. See *List of the Private Acts of Congress*, in 6 THE PUBLIC STATUTES AT LARGE OF THE UNITED STATES OF AMERICA FROM THE ORGANIZATION OF THE GOVERNMENT IN 1789; TO MARCH 3, 1845 iii (Richard Peters ed., 1848); see also *id.* at 943-91 (compiling an index of the beneficiaries and purposes of private laws).

117. Edward C. Walterscheid, *Charting a Novel Course: The Creation of the Patent Act of 1790*, 25 AIPLA Q.J. 445, 458 (1997).

their described inventions. However, the House had from its very first days expressed concerns over its capacity to process petitions on a case-by-case basis.¹¹⁸ Instead of simply granting the petitioners the relief they sought, the House appointed another committee on April 20, 1789—just 19 days following the first quorum—to draft and bring a bill or bills for a public law, “making a general provision for securing authors and inventors the exclusive right of their respective writings and discoveries.”¹¹⁹

Two months later, the committee reported out a bill that would form the basis for the first Patent Act, signed into law on April 10, 1790 by President George Washington. The Act established the general infrastructure for patent protection and, specifically, it established a three-member commission to resolve petitions for patents that would exist independent of the petition process in Congress.¹²⁰ These early intellectual property petitions illustrate how Congress addressed petitions focused on individual interests not only through private bills but also by establishing new structures of governance through general legislation.

An in-depth examination of the petition procedures in the early Congresses complicates our simple notions of the legislative process. The petition process began and was institutionalized in earnest within the first days of Congress. Rather than a simple process of members introducing and passing bills through deliberation, bicameralism, and presentment, lawmaking in Congress was incredibly complex. Members could introduce bills, but the public engaged in the lawmaking process also and suggested bills through their petitions. The investigation and reporting aspects of the petition process involved functions that looked more adjudicatory than legislative. The processing of exceptions and working out the nuanced application of general laws looked more executive. Moreover, Congress began to build out the infrastructure of the petition process

118. DOCUMENTARY HISTORY VOL. 8, *supra* note 84, at xv.

119. Walterscheid *supra*, note 117, at 458. During its deliberations on the Patent Act, Congress continued to receive petitions for patent protection, but these petitions were tabled until Congress passed the Patent Act and the petitioners submitted their petitions pursuant to the terms of the Act. Thereby, Congress dealt with the petitions in aggregate by establishing infrastructure to resolve petitions of that kind in the future. The national government did not begin to resolve petitions for patents until July 30, 1790, when it granted the first federal patent to Samuel Hopkins of Philadelphia, Pennsylvania. President Washington and two Patent Commission members signed Hopkins’s patent and, unlike the grant of an intellectual property monopoly through a private bill, the grant did not require bicameralism and presentment. See P.J. Federico, *Operation of the Patent Act of 1790*, 18 J. PAT. OFF. SOC’Y. 237, 244-45 (1936).

120. Patent Act of 1790, 1 Stat. 109. This independent commission comprised the Secretary of War, the Secretary of State, and the Attorney General. It could approve a patent with the approval of two of its members and later formed the basis for the Patent and Trademark Office. *Id.*

into the other branches. In addition to relying upon the other branches for fact-finding and administration, Congress began to establish entirely new structures of governance to resolve petitions. The next Sections will give a better sense of the volume of the petition process and show how it dominated Congress's docket for decades.

FIGURE 1.
PETITION DOCKET BOOK COVER — FIRST CONGRESS TO THIRD CONGRESS, 1789

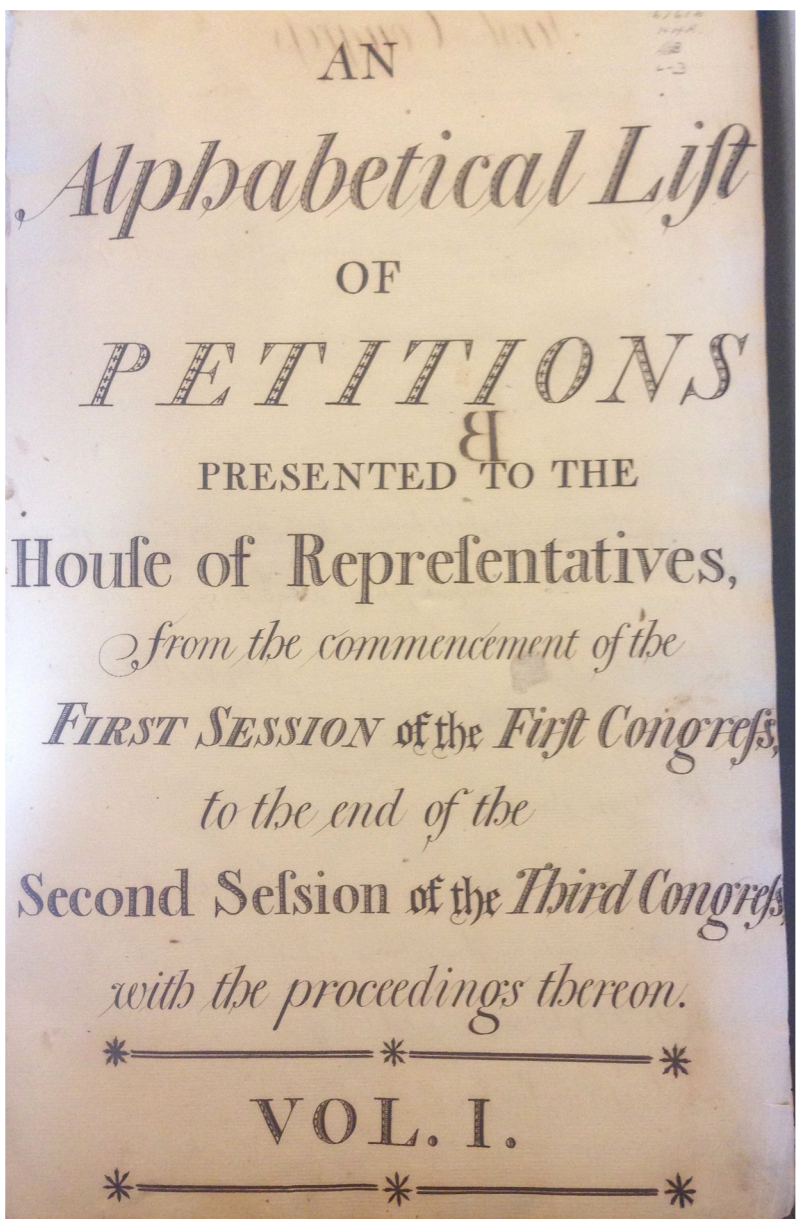


FIGURE 2.
PETITION DOCKET BOOK – SECOND CONGRESS, 1791-1793

Second Congress		First Session	
Name of the petitioner	Date	Name of the petitioner	Date
M		M	
Oct 21. Aaron Packard	17 th Dec 1791 Secretary of War	5 th April 1792 returned	5 th April 1792 returned Antonio Lewis
W. Cary Elizabeth	17 th Dec 1791 ditto	11 th July 1792	
Mrs Charles for separation (See Jacob Smith)			
Nov 2. Mearns John	5 th Nov 1791 Secretary of War	5 th April 1792 returned	5 th April 1792 returned Elizabeth Gray
M. Cornick Charles	4 th Nov 1791 ditto	5 th April 1792 returned	16 th April 1792 returned Frederick W. Stebbins
Mountfort Timothy	4 th Nov 1791 ditto	21 st July 1792	
Muchlroy James	4 th Nov 1791 Secretary of War	5 th April 1792 returned	16 th April 1792 returned Jonathan Strong
M. Kiny John	4 th Nov 1791 Secretary of War	5 th April 1792 returned	26 th April 1792 reported by the Committee
Nov John Elias	21 st Nov 1791 Secretary of War	5 th April 1792 returned	12 th April 1792 returned Aaron Kitchell
Nov David	22 nd Nov 1791 Secretary of War	5 th April 1792 returned	
Nov Alphus, on behalf of the petition of William	22 nd Nov 1791 ditto	5 th July 1792 returned	
M. Gowan John	22 nd Nov 1791 Secy of the Treasury	5 th July 1792 returned	
Murray Ruben	22 nd Nov 1791 ditto	22 nd Nov 1792	
Dec 2. Mearns John D. (See John Blakey & others)	2 nd Dec 1791 Com on Bill	21 st April 1792	refused to, 16 th Dec 92 26 th April 1792 reported by the Committee
Mearns John D.	5 th Dec 1791 Com on petition	21 st April 1792	refused to, 16 th Dec 92 26 th April 1792 reported by the Committee
Mrs Elizabeth, widow of Geo. Mearns	15 th Dec 1791 Secretary of War	21 st April 1792	refused to, 16 th Dec 92 26 th April 1792 reported by the Committee

D. The Rise and Fall of Congressional Petitioning

1. Petitioning the Early Congress (1789-1795)

The petition process had already been firmly institutionalized in colonial and state legislatures by the time that the First Congress cracked open the doors of the just-renovated Federal Hall in New York City in early spring of 1789.¹²¹ Petitioners had climbed the steps of Federal Hall before when it served as the meeting place of the Confederation Congress.¹²² The Articles of Confederation had established a petition process of its own, and the Confederation Congress often

121. DOCUMENTARY HISTORY VOL. 8, *supra* note 84, at xvi-xvii; FERGUS M. BORDEWICH, THE FIRST CONGRESS: HOW JAMES MADISON, GEORGE WASHINGTON, AND A GROUP OF EXTRAORDINARY MEN INVENTED THE GOVERNMENT 25-26 (2016).

122. BORDEWICH, *supra* note 121, at 2.

worked closely with the executive to resolve certain petitions.¹²³ Following ratification of the new Constitution, petitioners wasted no time in navigating this familiar terrain to submit their petitions to the new Federal Congress.

The First Congress received 621 petitions: 598 to the House and 23 to the Senate.¹²⁴ The House continued to receive the majority of petitions – an average of 78% of the petition volume – over the next one hundred and fifty years, from the First Congress (1789-1791) to the Eightieth (1947-1949).¹²⁵

Petitions in the early Congresses alleged grievances on a range of issues, and the process defied modern notions of separation of powers from its earliest days. From the First Congress to the end of the first session of the Fourth Congress, 1,887 petitions were introduced.¹²⁶ Of these 1,887 petitions, the majority addressed the military (63.17%) and administration (non-military) (17.91%).¹²⁷ But the petitions also included commercial petitions (9.64%), and a handful of miscellaneous petitions (5.14%) on subjects ranging from abolition to admission of Vermont as a state to maritime issues.¹²⁸ Before the establishment of standing committees, Congress referred a majority of these petitions – 1,004 (53.22%) – to the executive for review, investigation, and reporting. Congress directed approximately 97% of these executive referrals to the Secretary of Treasury or the Secretary of War. Congress referred the balance of these early petitions, or 647 (34.29%), to select committees or one of the two early standing committees – elections and claims. Congressional committees and the executive took the referral of a petition quite seriously. Once referred, the executive returned a report in

123. See STAFF OF H. COMM. ON ENERGY & COMMERCE, 99TH CONG., PETITIONS, MEMORIALS AND OTHER DOCUMENTS SUBMITTED FOR THE CONSIDERATION OF CONGRESS, MARCH 4, 1789 TO DECEMBER 14, 1795, at 5-6 (Comm. Print 1986) [hereinafter COMM. ON ENERGY REPORT]. This 1986 report undertaken by the House Committee on Energy and Commerce to study the origins of the Committee on Commerce and Manufactures – the original predecessor of the Committee on Energy and Commerce, established on December 14, 1795 – sheds light on how the House responded to the volume of early petitioning. The report expands on the work of the First Federal Congress Project to examine petitioning in the House for the first three Congresses and a portion of the Fourth Congress. *Id.*

124. These data are drawn from the Congressional Petitions Database, comparing the Senate data to the volume in the House.

125. *Id.*

126. COMM. ON ENERGY REPORT, *supra* note 123, at 362 tbl.II.

127. *Id.*

128. *Id.* As for the disposition of these diverse petitions, the vast majority received some substantive response. Congress “tabled” a minority of petitions (11.76%), a procedure used when Congress determined that a petition addressed matters outside its jurisdiction or needed to postpone consideration. It rejected or gave leave to withdraw only a small sliver of petitions (0.74%), procedures used when petitions were procedurally inadequate, improperly filed, or believed to be fraudulent. *Id.* at 361 tbl.I.

response to 71.61% of petitions referred and congressional committees reported at a rate of 60.90%.

2. *The Congressional Petitions Database*

Identifying trends in the over 500,000 petitions introduced to Congress during the twenty Congresses convened between the Founding and 1980 presents a considerable challenge. The petition process underwent repeated changes as Congress redirected petitions on particular topics toward specialized commissions and boards. The story of the petition process that follows focuses on changes in volume. A preliminary analysis of the House, the chamber that handled the lion's share of petitions, reveals a petition process that grew in volume and scope steadily over 150 years, and then essentially disappeared from Congress in the late 1940s. Amidst a growing population, an increase in federal power, and a reduction in communication costs, the petition volume in Congress grew. However, rather than growing in leaps and bounds after the Civil War, volume adjusted for population stabilized. Then, in the late 1940s, the petition volume in Congress dropped to near-zero levels, where it has remained until modern day. The following Sections describe this growth and then offer an explanation for the disappearance.

FIGURE 3.
HOUSE PETITION VOLUME, FIRST THROUGH ONE-HUNDREDTH CONGRESSES

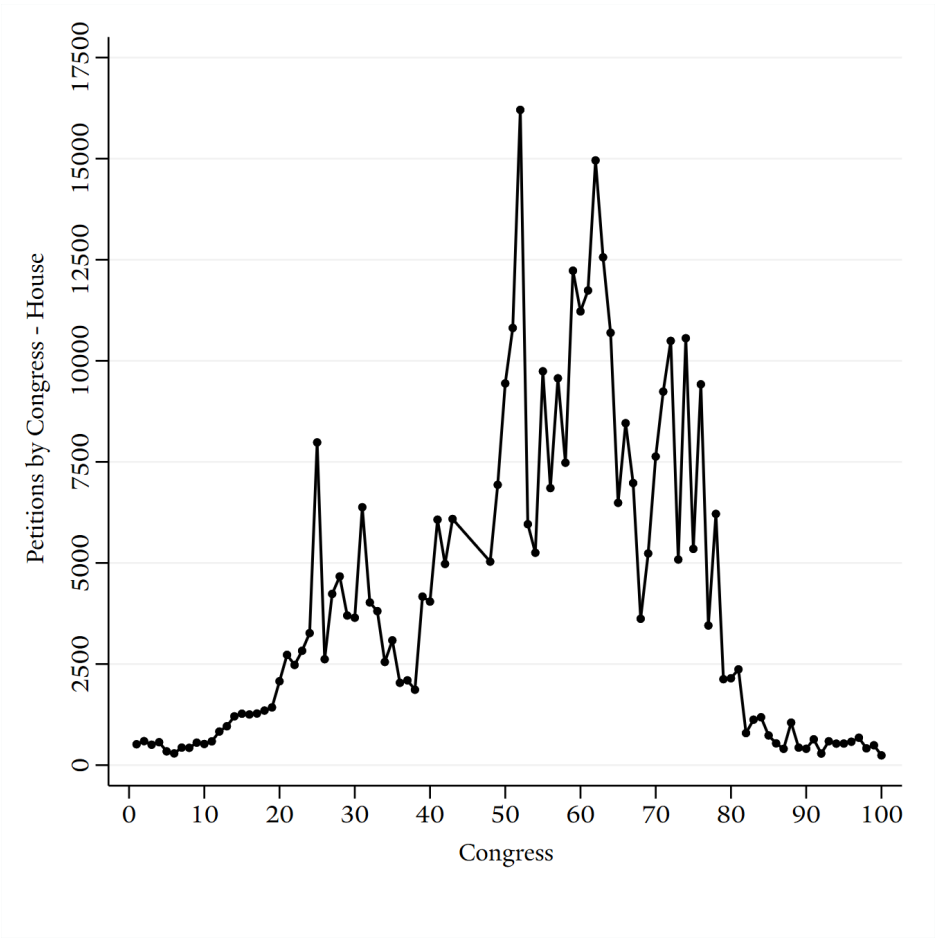
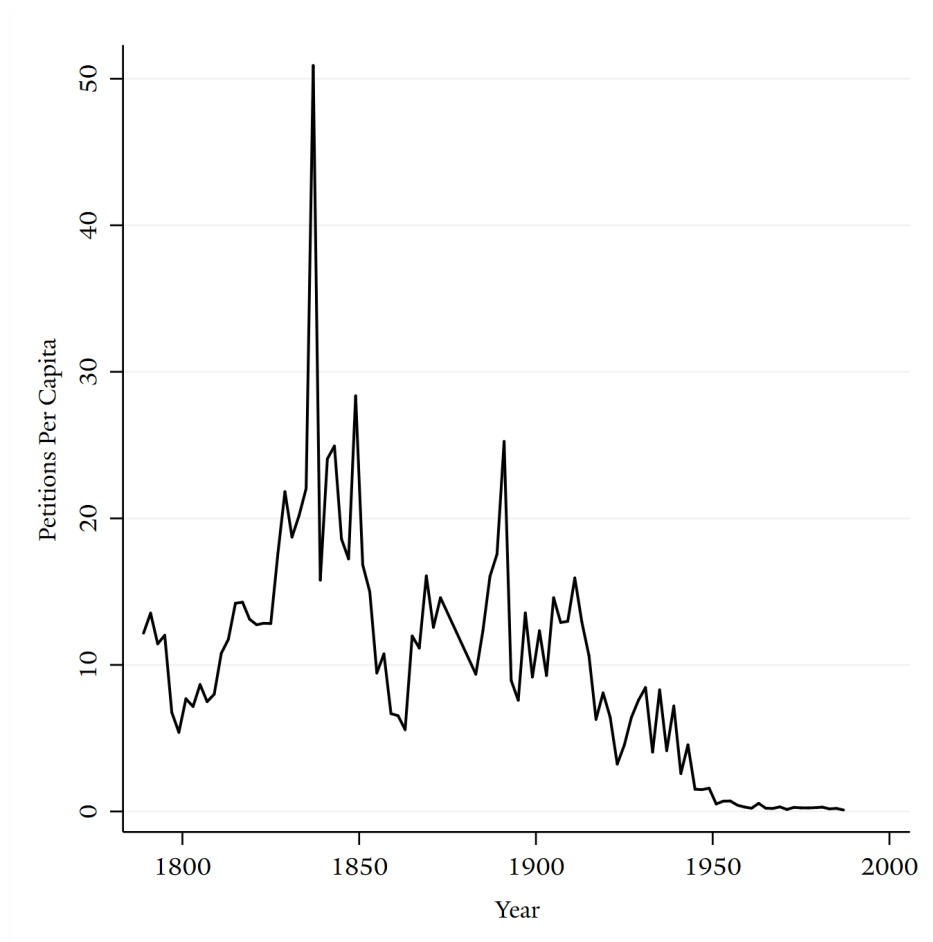
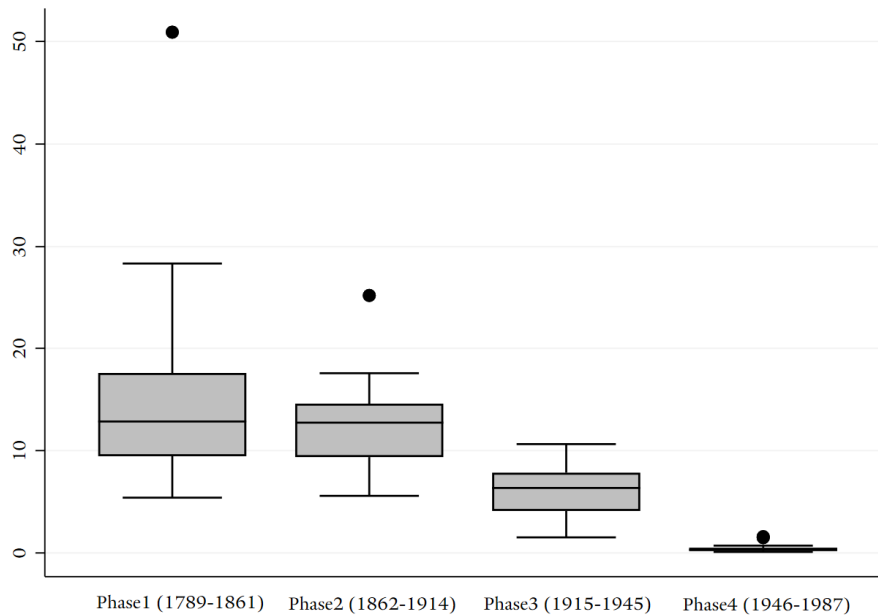


FIGURE 4.
HOUSE PETITIONS PER 100,000 POPULATION, 1789-1980



With respect to overall trends, the House saw an increase in volume from 598 petition introductions at the Founding to 14,957 in the 62nd Congress (1911-1913), which roughly tracked the growth of population in the United States from 4 million at the Founding to approximately 92 million in 1910. Following the 62nd Congress (1911-1913), however, petitioning in the House began a period of decline and never again saw the peaks in volume it experienced in the late nineteenth and early twentieth centuries. Major wars, including the Civil War (37th-38th Congress, 1861-1865), World War I (63rd-65th Congress, 1914-1918), and World War II (76th-78th Congress, 1939-1945), generally saw a decline in the volume of petition introductions as both Congress and the population turned their attention to more pressing matters.

FIGURE 5.
MEAN PETITION INTRODUCTION BY PHASE PER 100,000 POPULATION



With respect to specific trends, it is helpful to divide the petition volume in Congress into four distinct phases.¹²⁹ The first phase (1789-1861) saw an overall increase in petition volume from the First Congress until the 62nd Congress, as the population of the United States grew and its jurisdiction expanded west. Following a lull in petition introductions during the Jeffersonian era and the War of 1812, the volume kept pace with, and often increased faster than the rate of population growth during this period. This phase also saw one of the highest peaks in petition volume. During the 25th Congress (1837-1839) abolitionists

129. These four phases are a simplified version of the phases outlined in the Final Report of the Attorney General's Committee on Administrative Procedure that tracks the growth of "ABC" agencies over time. REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 8, at 1-11 (1st Sess. 1941). There, the Committee described the "growth of the administrative agencies" in five phases: from "1789 to the close of the Civil War"; from "1865 to the turn of the century"; from "1900 to the end of the World War"; from "1918 to the beginning of the depression of 1929"; and from "1930 to 1940." *Id.* To better see trends in the volume panel data that also tracked the growth of formal administrative agencies, I adopted these phases in a consolidated form. Such consolidation better illustrated trends in the panel data without unnecessary duplication and allowed me to examine data past the 1941 publication date of the report.

submitted over 4,000 petitions in response to the Gag Rule, a resolution enacted by the House to table all petitions submitted on the subject of slavery, which had just gone into effect. Many legal historians have argued that the Gag Rule ended the petition process in Congress,¹³⁰ but as the panel data show, petition volume in fact continued to grow for the next hundred years.

The second phase (1862-1914) lasted from the Civil War until World War I. Per capita petition volume largely maintained the levels seen previously, but with slightly less variation. This phase saw a number of peaks in petition volume due to high-volume petition campaigns on particular issues of public concern. The Industrial Revolution and lowered communication costs likely contributed to a qualitative change in the petition process during this period, as campaigns were better coordinated and able to organize mass responses to fashionable issues of the day. For example, petition volume during the 52nd Congress (1891-1893), which saw an all-time high of 16,206 petition introductions, was largely driven by a petition campaign over whether the four-hundred-year celebration of the discovery of the Americas, the Columbus Exposition, would open its doors on a Sunday.

The third phase (1915-1945) was a period of significant decline in per capita petition volume from the levels of the last two phases. This phase also saw the greatest level of growth in the administrative state as Congress created more than double the number of agencies seen before 1915. The four-year period from 1934 to 1938 saw more than thirty-eight “alphabet agencies” created as part of the New Deal. As petitioners turned to specialized agencies and boards for relief, petitioning appears to have changed qualitatively in Congress as well. As with the second phase, volume during this period continued to be driven by high-volume campaigns on matters of public concern.

The fourth and final phase began in 1947, with the 80th Congress. This phase witnessed a precipitous decline in petitioning campaigns. It began with the implementation of the 1946 Legislative Reorganization Act, which transformed the committee system in Congress, banned the passage of private bills often used to resolve petitions, and transferred jurisdiction over the most common topics of petitions to the courts and the executive. Two hundred years after

130. See, e.g., David C. Frederick, *John Quincy Adams, Slavery, and the Disappearance of the Right of Petition*, 9 LAW & HIST. REV. 113 (1991); Gary Lawson & Guy Seidman, *Downsizing the Right To Petition*, 93 NW. U. L. REV. 739, 751 (1999); Higginson, *supra* note 90, at 158-65. The volume of petitions on a range of matters from public to private continued to grow in the House following the Gag Rule. In fact, Congress witnessed steady petition campaigns on public matters into the twentieth century, when petitions on private matters declined in Congress and increased within the agencies and the courts. Recent scholarship in legal history and political science has begun to chip away at the widespread belief that the congressional petition process died out after the Gag Rule. Data from the Congressional Petitions Database should finally put this theory to rest.

the Founding, and with a population that now exceeded 131 million, the 100th Congress saw the introduction of only 241 petitions into the House, half the number introduced to the House during the Founding Congress.

3. *The Legislative Reorganization Act and the Administrative Procedure Act of 1946*

Following a steady decline in petition volume after 1914, when specialized agencies and boards mushroomed during and after World War I, Congress finally dismantled the last vestiges of the congressional petition process with the passage of two statutes in the summer of 1946: the Legislative Reorganization Act¹³¹ and the Administrative Procedure Act.¹³² These Acts put an end to the congressional petition process. In particular, the LRA reduced the standing committees in Congress, which had been the loci of petition processing, and granted jurisdiction over these petitions to the executive and to the courts. The APA ensured procedural protections for petitioners in the agencies, while the LRA positioned Congress as the watchdog of those procedural protections.

The APA is inarguably the most researched and litigated statute governing the administrative state. To date, however, the relationship between the Administrative Procedure Act and the petition process has received little attention.¹³³ This omission is all the more surprising given the Act's explicit tethering to the petition process. The APA directly extended the right of petition to the agencies, and it codified certain procedures that resembled the petition process in Congress. In particular, the Act protected the right to petition directly in the context of rulemaking, requiring all agencies to "accord any interested person the right to petition for the issuance, amendment, or repeal of a rule," and requiring agencies to provide prompt notice for the denial of any petition.¹³⁴

There is evidence that the Petition Clause itself motivated inclusion of this provision. The legislative history prepared by the Senate cites the Petition Clause

131. Pub. L. No. 79-601, 60 Stat. 812 (1946).

132. Pub. L. No. 79-404, 60 Stat. 237 (1946).

133. The rare administrative history that treats these two statutes together, authored by legal historian Joanna Grisinger, has recognized that Congress envisioned the two statutes as complementary. GRISINGER, *supra* note 30, at 109-52. In particular, she recalls the Administrative Procedure Act as an effort to bring procedural due process into the administrative state and to foster oversight of that due process through judicial review. She describes the Legislative Reorganization Act as the legislative counterpart to that judicial oversight and an effort to provide Congress with the infrastructure necessary to provide similar oversight. *Id.* No history to date, however, has discussed the connection between the two Acts and the petition process.

134. Pub. L. No. 79-404, §§ 4, 6, 60 Stat. at 241.

explicitly as the basis for the provision.¹³⁵ The Final Report of the Attorney General's Committee on Administration, heralded at the time as "undoubtedly the most thorough and comprehensive study ever made of Federal administrative procedure,"¹³⁶ recommended inclusion of a formal petition process as part of an overall scheme to strengthen public participation within the rulemaking process.¹³⁷

Notice and comment rulemaking itself embodies the petition right indirectly. The Final Report of the Attorney General found that much of the administrative state, rather than responding to individual petitions on rules, had begun to announce proposed regulations in advance and to hold public hearings before issuance. The APA did not invent new practices for administrative procedures out of whole cloth; rather, the Act aimed to reaffirm the best procedures already at work in some corners of the administrative state. At the recommendation of the Attorney General's Report,¹³⁸ the APA required that agencies provide notice to the public of a proposed rule and "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments," either in a public hearing or otherwise.¹³⁹ Thus, the Act codified procedures that had originated in the petition process.

While the APA transformed the administrative state, the comparatively understudied LRA transformed Congress. During the last throes of World War II, Congress created the first Joint Committee on the Organization of Congress to draft a bill that would fundamentally restructure Congress and the lawmaking process.¹⁴⁰ Formation of the Joint Committee was a response to concerns that the administrative state was handling the bulk of public affairs with little or no

135. S. DOC. NO. 79-248, at 21 (1946) ("One agency objects to the statutory statement of a right of petition on the ground that it would 'force' a 'tremendous' number of hearings. The alternative implied is that no one should have a right of petition, leaving action or inaction to the initiative of the agency concerned. Even Congress, under the Bill of Rights, is required to accord the right of petition to any citizen. If a petitioner states and supports a valid ground for hearing or relief, manifestly he should be entitled to hearing or relief. Not every petition need result in a hearing, just as not every complaint need result in trial.").

136. James Hart, *Final Report of the Attorney General's Committee on Administrative Procedure*, 35 AM. POL. SCI. REV. 501, 501 (1941).

137. REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 8, at 1-202 (1st Sess. 1941).

138. *Id.* at 105-08.

139. 5 U.S.C. § 553(c) (2012).

140. REPORT OF THE JOINT COMMITTEE ON THE ORGANIZATION OF CONGRESS, S. REP. NO. 79-1011, at 1 (1946).

congressional oversight.¹⁴¹ After thorough investigation, the Joint Committee declared that “the real workshop” of Congress¹⁴² – that is, the committees – had stalled due to a muddled and overly complex committee structure.¹⁴³

To afford members “time properly to weigh and consider legislative matters referred” to the committees, the report recommended reducing the standing committees in the Senate from thirty-three to sixteen and from forty-eight to eighteen in the House.¹⁴⁴ It suggested limitations on how many committees each member could join. Finally, it supported an appropriation to expand legislative infrastructure, including a permanent staff to assist each committee, a legislative counsel’s office to assist in drafting, and a research service to provide unbiased research support.¹⁴⁵ According to the report, the increased staff was necessary to prevent the practice of borrowing specialized executive staff – which had become increasingly prevalent within congressional committees – and to stem the tide of bills drafted by the executive – which the Joint Committee estimated at over half of all bills introduced to Congress.¹⁴⁶

The Joint Committee shaped the LRA to accomplish two primary ends. The first was to refocus congressional attention toward national matters.¹⁴⁷ To address this issue, the LRA banned the private bills that had long served as a means

141. *Id.* (“Our committee was created in response to a widespread congressional and public belief that a grave constitutional crisis exists in which the fate of representative government itself is at stake. Public affairs are now handled by a host of administrative agencies headed by non-elected officials with only casual oversight by Congress. The course of events has created a breach between government and the people Under these conditions, it was believed, the time is ripe for Congress to reconsider its role in the American scheme of government and to modernize its organization and procedures.”).

142. *Id.* at 2 (“About 90 percent of all the work of the Congress on legislative matters is carried on in these committees. Most bills recommended by congressional committees become laws of the land and the content of legislation finally passed is largely determined in the committees.”).

143. Standing committees mushroomed to a total of eighty-one: thirty-three in the Senate and forty-eight in the House with overlapping and unclear jurisdictions. *Id.* Committee surveys revealed that members were stretched thin between the work of these committees, as many members of the Senate served on upwards of seven to ten committees, and members of the House served on as many as six or more committees. *Id.* at 2-3.

144. *Id.* at 3-4.

145. *Id.* at 3-18.

146. *Id.* at 11.

147. 92 CONG. REC. 10048 (1946) (statement of Rep. Michener); STAFF OF JOINT COMM. ON THE ORG. OF CONG., LEGISLATIVE REORGANIZATION ACT OF 1946, at 7 (Comm. Print 1974) (“Congress is overburdened by many local and private matters which divert its attention from national policy making and which it ought not to have to consider. It functions as a common council for the District of Columbia. It serves as a tribunal for the settlement of private claims.

of resolving petitions for private claims, pension bills, bridge bills, and other local and private legislation.¹⁴⁸ Further, the law reduced the number of standing committees in Congress and transferred jurisdiction over those petitions to the executive or the courts. The Act also addressed the informal method of public engagement in the lawmaking process that had come to fill the void of the petition process in Congress: lobbying. In its draft bill, the Joint Committee included the first proposed lobbying regulations at the federal level—the Federal Regulation of Lobbying Act—that designed a registration and disclosure regime for professional federal lobbyists.¹⁴⁹

The second primary purpose of the LRA was to create infrastructure within Congress for oversight of the agencies, including the petition process that Congress had transferred to the executive. To this end, the LRA matched the consolidated committee structure in Congress to the exact structure and jurisdiction of the administration.¹⁵⁰ For example, the Committees on Pensions, Invalid Pensions, and World War Veterans' Legislation were consolidated into a Committee on Veterans' Affairs, an analogue to the United States Department of Veterans Affairs.¹⁵¹ The LRA also expanded the committees' enforcement power by increasing investigative and subpoena capacity, and it recommended charging the restructured committees "to conduct a continuous review of the laws originally reported by the committees."¹⁵² Finally, in the event that it was not wholly clear, the LRA included an explicit charge that the consolidated standing committees should provide ongoing oversight of the administration.¹⁵³

It spends much time on pension bills, the construction of bridges over navigable waters, and other private and local matters. . . . Congressmen are also handicapped by a host of routine chores for constituents which they are glad to perform, but which leave them little time for adequate study of national legislative problems.”)

148. Pub. L. No. 79-601, § 131, 60 Stat. 812, 831 (1946).

149. *Id.* at §§ 301-11, 60 Stat. at 814, 839. The bill also established self-government for the District of Columbia, provided each member with administrative support for constituent services, and established a private commission to resolve correction of military records, among other provisions. *Id.* at § 207, 60 Stat. at 837 (military records).

150. REPORT OF THE SPECIAL COMM. ON THE ORG. OF CONG., S. REP. NO. 79-1400, at 6 (1946) (“The reconstructed standing committees will, it is hoped, roughly parallel the reorganized administrative structure of the executive branch of the Government and will be utilized as vehicles of consultation and collaboration between Congress and the corresponding administrative agencies within their respective jurisdictions.”); *id.* at §§ 102, 121, 60 Stat. at 814, 822.

151. *Id.*

152. S. REP. NO. 79-1011, *supra* note 140, at 6.

153. Section 136 of the Act provided: “To assist the Congress in appraising the administration of the laws and in developing such amendments or related legislation as it may deem necessary, each standing committee of the Senate and the House of Representatives shall exercise continuous watchfulness of the execution by the administrative agencies concerned of any laws,

Together, the LRA and the APA redefined the petition process. They dismantled petition infrastructure in Congress, transferred jurisdiction over the remaining petition volume to the executive and the courts, and restructured Congress to serve as overseer. However, these two statutes merely erased the last vestiges of a process that had largely relocated elsewhere. Petition volume had already been steadily declining since 1914, when Congress began in earnest to build the modern state and transfer jurisdiction over increasing numbers of petitions from congressional committees into various commissions, boards, and agencies. The following Section explores that evolution in greater depth.

II. EVOLUTIONS

The narrative of petitioning in this Article draws its arc from the volume of congressional petitioning over time. In the first decade after the Founding, the petition volume in Congress grew as the population grew. However, at the end of the nineteenth century and into the early twentieth century, the petition volume stabilized and then began to decline. Finally, the volume of petitions in Congress dropped dramatically in the late 1940s to levels lower than at the Founding, adjusted for population. One hypothesis to explain this reduction in volume is that Congress had steadily constructed separate boards, agencies, commissions, and courts to process these petitions and had siphoned off many petitions to Congress to these other fora.

To better explore this hypothesis, as well as some of the other dynamics of the congressional petition process and its institutional development, we constructed a topic model in the Database to sort petitions into topics. Congress largely constructed alternative fora for petitions based on substantive expertise. By tracking petitions according to topic, the topic model documents the siphoning of topics into these specialized fora. In particular, examining topics that had the highest volume of petitioning illustrates the larger siphoning-off process that rendered the congressional petition process largely vestigial by the late 1940s. To this end, I selected three of the highest volume topic areas of petitions – claims, pensions, and commerce – and crafted case studies specific to each. The case study of each high-volume topic area documents the siphoning of petition volume away from Congress and into the specialized boards, commission, agencies, and courts that now constitute the modern state.

the subject matter of which is within the jurisdiction of such committee; and, for that purpose, shall study all pertinent reports and data submitted to the Congress by the agencies in the executive branch of Government.” *Id.* § 136, 60 Stat. at 832.

Each of the case studies shares a common narrative arc. The siphoning process for claims, pensions, and commerce all originated within the committee system in Congress. Congress often began by constructing infrastructure within Congress to resolve petitions. But it quickly turned to the courts and executive offices and agents to build out the infrastructure of the petition process. Finally, Congress turned to such innovative institutional forms as independent commissions, boards, agencies, and specialized courts.

Moreover, each of the case studies offers a view on the petition process and the development of the modern state. For example, both claims and pensions required additional infrastructure to resolve a growing workload. But pensions required the assistance of the executive, specifically the Department of War. Claims petitions were seen as more adjudicative, in that they required more due process and the proliferation of general principles to resolve uniformly. Congress therefore quickly transitioned from operating through an adjudicative board to creating a new form of court. Finally, commerce petitions presented a distinctive case; there, petitions drove the creation of regulatory programs. Through an iterative process, Congress built commercial infrastructure in response to petitions and then responded to petitions in regulating how that commercial infrastructure would be used. Congress constructed the commerce petition process to facilitate specialization and public engagement around the types of commercial infrastructure and the markets that relied on that infrastructure. These three case studies also document some of the earliest standing committees – Claims, Pensions, and Commerce – established by Congress, and provide a view of the early institutional development of the Founding Era.

Collectively, these case studies provide an extended longitudinal view of the petition process through dramatic shifts in parties, wars, technological revolution, and population growth from under 4 million to over 142 million. The Committee on Claims existed in various forms for over 150 years in the House until the LRA abolished it in 1946.¹⁵⁴ The 133-year-old Committee on Pensions remained in operation until the LRA fundamentally restructured it in 1946 and charged the renamed “Committee on Veterans’ Affairs” with mere oversight of pension processing elsewhere.¹⁵⁵ And the Committee on Commerce survived the LRA largely unscathed and has remained in continuous operation in the House, under various names, for over 200 years.¹⁵⁶ Together, these case studies document the siphoning of petition volume from the congressional petition process

154. GUIDE TO THE RECORDS OF THE UNITED STATES HOUSE OF REPRESENTATIVES AT THE NATIONAL ARCHIVES, 1789-1989: BICENTENNIAL EDITION ch. 6 (Charles E. Schamel et al. eds., 1995) [hereinafter HOUSE RECORDS GUIDE].

155. *Id.* ch. 20.

156. *Id.* ch. 7.

and into the modern state – revealing the roots of the modern state in the petition process and the rise and fall of congressional petitioning.

A. Siphoning Off Adjudication: The Court of Claims

As the second oldest standing committee in the House, the Committee on Claims has witnessed the inner workings of Congress for over two hundred years. Over the course of those two hundred years, pressed by concerns about capacity and expertise, Congress built out the petition infrastructure for claims processing by creating independent commissions and specialized courts. Petitions for claims spanned a broader range of grievances than our claims process encompasses today. Grievances included not only claims of government misconduct but also refund requests; requests for waiver of rules of general applicability; and relief for harm caused by natural disasters, wars, and other misfortunes. Michele Dauber reminds us that this expansive disaster relief system held the origins of our modern welfare state.¹⁵⁷ The claims petition system began with the resolution of individual petitions through private bills, but Congress quickly turned to the use of general legislation to resolve petitions for classes of claimants.¹⁵⁸ Dauber notes that “[b]y 1827 Congress had already granted more than two dozen claims for relief, encompassing thousands of claimants and millions of dollars, following events such as the Whiskey Rebellion; the slave insurrection in St. Domingo (Haiti); and various fires, floods, and storms.”¹⁵⁹

Despite the use of general legislation to resolve petitions en masse, the expansive claims system soon began to strain under the volume of claims petitions. In the First Congress, the House of Representatives adopted its petition procedures for settling claims against the federal government from the Confederation Congress, but the volume of claims following the Revolutionary War exceeded the capabilities of the newly formed institution.¹⁶⁰ To address this growing volume, in 1794 the House established a mixed legislative and executive claims petition process, including the Committee on Claims and a process within the

157. DAUBER, *supra* note 20, at 17-34.

158. *Id.* at 18.

159. *Id.* at 5.

160. HOUSE RECORDS GUIDE, *supra* note 154, paras. 6.15-6.32; 7 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 4 MARCH 1789-3 MARCH 1791, at xvii-xviii (Kenneth R. Bowling et al. eds., 1997) [hereinafter DOCUMENTARY HISTORY VOL. 7]; DOCUMENTARY HISTORY VOL. 8, *supra* note 84, at xi.

Treasury Department that resembled the Confederation Congress's three-member commission termed the "Board of Treasury."¹⁶¹ Unlike the Confederation Congress, however, the United States Congress began to direct all claims to the Comptroller of the newly formed Treasury, which then issued a decision.¹⁶² If the claimant was satisfied with the Comptroller's decision, it became final.¹⁶³ Congress maintained some control over the process through its appropriations power—it could always decline to grant an appropriation for the award.¹⁶⁴ Congress also provided the means of appeal; dissatisfied claimants could challenge the Comptroller's decision with a petition to Congress, which was most often resolved by the Committee on Claims.¹⁶⁵

The antebellum era saw a preservation and expansion of the mixed legislative and executive claims process, and the Congressional Petitions Database reveals a steady increase in claims petition introductions of over 700% from the Founding until 1835. With this increase in volume came delays in consideration as well as complete failures to respond. Only 40% of the claims petitions introduced to the 22nd through 24th Congresses (1831-1837) received any kind of process.¹⁶⁶ Although the mixed legislative-executive claims petition process had not raised constitutional concern, violations of the petition right caused by undue delays were seen as serious. Congress faced growing criticism over its mishandling of claims petitions.

After leaving the presidency, John Quincy Adams became a House Representative and fierce advocate on behalf of the right to petition.¹⁶⁷ Adams began to call for a court of claims as early as 1832.¹⁶⁸ To Adams, protection of the right to petition was paramount—even above and beyond preserving Congress's traditional role as the primary institution for claims petitions. Even if processing

161. Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 LA. L. REV. 625, 634, 643-44 (1985).

162. *Id.* at 637-45.

163. *Id.* at 644-45.

164. *Id.* at 637; *see also id.* at 644 (“[D]uring this period two general but separate claims systems were functioning—the congressional committee system and the Treasury Department system.”).

165. *Id.* at 637, 644-45.

166. William M. Wiecek, *The Origin of the United States Court of Claims*, 20 ADMIN. L. REV. 387, 392 (1968).

167. WILLIAM LEE MILLER, *ARGUING ABOUT SLAVERY: JOHN QUINCY ADAMS AND THE GREAT BATTLE IN THE UNITED STATES CONGRESS 443-44* (1998) (defending the right to petition against the “gag rules”).

168. Wiecek, *supra* note 166, at 392.

claims petitions was traditionally legislative, Adams argued that claims petitions required courts to secure due process.

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 a 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.¹⁶⁹

The House Committee of Claims, charged in 1832 with examining the efficiency of its claims process, shared Adams's concerns that legislative resolution of claims was simply not administrable and required a more streamlined process, such as a commission empowered to issue judgments. As the committee stated in its report:

Whoever has attended to the proceedings on private claims in our House, must be sensible of the impracticability of doing justice in more than two hundred cases by this course. Years will sometimes elapse before a claimant can obtain even the form of a discussion of his case in the House; and then it may be under such circumstances of apathy and inattention, as shall render the chance of obtaining justice very uncertain at best. A distinguished member has observed that the right of petitioning Congress virtually had become the right of having petitions rejected.¹⁷⁰

By 1848, over a decade later, faith in the claims processing system in Congress had only declined. The House Committee on Claims described its own claims process as “a system of unparalleled injustice, and wholly discreditable to any civilized nation.”¹⁷¹ Congressmen began to call for a solution that would “relieve the Speaker’s table from that accumulated and accumulating mass of private business under which it has literally groaned for five-and-twenty years.”¹⁷²

169. 8 MEMOIRS OF JOHN QUINCY ADAMS: COMPRISING PORTIONS OF HIS DIARY FROM 1795 TO 1848, at 480 (Charles Francis Adams ed., Philadelphia, J. B. Lippincott & Co. 1876).

170. H.R. REP. NO. 22-386, at 19 (1831).

171. H.R. REP. NO. 30-498, at 2 (1948); *see also* WILSON COWEN ET AL., THE UNITED STATES COURT OF CLAIMS, A HISTORY, PART II: ORIGIN-DEVELOPMENT-JURISDICTION, 1855-1978, at 9 (1978); Wiecek, *supra* note 166, at 395.

172. Wiecek, *supra* note 166, at 395 (quoting CONG. GLOBE, 32d Cong., 2d Sess. 96 (1852)).

The solution came in 1855 in the form of the Court of Claims Act.¹⁷³ The Act had originated in the Senate as a bill to establish a general commission “for the examination and adjustment of private claims.”¹⁷⁴ Earlier claims commissions had been given narrow jurisdiction over claims specific to a particular event, most often war, and the predecessor of the Court of Claims Act aimed to repurpose an old solution for a new problem. An overworked Congress mustered enough opposition to amend the three-member commission into a three-judge court with jurisdiction over “all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States.”¹⁷⁵

The Act raised concerns over both feasibility and constitutionality.¹⁷⁶ Both chambers questioned particulars of the proposed solution—that is, would the court be empowered to issue final judgments and would Congress still be required to pass an appropriation to fund those judgments—and whether those particulars accorded with the Constitution.¹⁷⁷ As is often the case with controversial legislative proposals, Congress resolved the debate with ambiguity and delay.¹⁷⁸ The 1855 Court of Claims Act passed both houses without clear text determining whether the court would resolve claims with finality.¹⁷⁹

Early efforts by the House to disallow final judgments from the “experimental” Court of Claims by reviewing them in select committees, rather than with a pro forma stamp of approval from the whole House, stymied the court.¹⁸⁰ Members began to refer to the Court of Claims as an “excres[c]ence on the Government,” calling its judgments “a mere mockery on justice.”¹⁸¹ Abraham Lincoln called for quick reform in his first State of the Union in 1861.¹⁸²

173. *Id.* (quoting Act of Feb. 24, 1855, 10 Stat. 612 (1855)).

174. CONG. GLOBE, 33rd Cong., 2nd Sess. 70 (1855).

175. Ernst Freund, *Private Claims Against the State*, 8 POL. SCI. Q. 625, 632 (1893).

176. Wiecek, *supra* note 166, at 396–97.

177. *Id.* at 396.

178. *Id.* at 397.

179. *Id.*

180. *Id.*; Shimomura, *supra* note 161, at 652–53.

181. Wiecek, *supra* note 166, at 398.

182. *Id.* (quoting 7 MESSAGES AND PAPERS OF THE PRESIDENTS 3252 (James D. Richardson ed., 1897–1911)) (“It is important that some more convenient means should be provided, if possible, for the adjustment of claims against the government, especially in view of their increased number by reason of the war The investigation and adjudication of claims in their nature belong to the judicial department; besides, it is apparent that the attention of Congress will be more than usually engaged, for some time to come, with great national questions. It was intended, by the organization of the Court of Claims, mainly to remove this branch of business from

Congress attempted to respond to Lincoln's call for reform, but it stalled over whether the new bill should maintain the Court of Claims or refer claims to the federal district courts, and whether the bill should waive sovereign immunity explicitly.¹⁸³ A conflicted Congress stalled reform for over two years until a flood of Civil War claims propelled the 1863 Court of Claims Act through both chambers and onto Lincoln's desk.¹⁸⁴ The flood of Civil War claims did not, however, wash away all of the constitutional concerns with the court.¹⁸⁵ The Act purported to provide for finality of the court's judgments and appeal of the judgments to the Supreme Court.¹⁸⁶ But, at the same time, it preserved and reaffirmed a practice whereby the Secretary of the Treasury had to "estimate[] for" each claim before it was paid and Congress had to appropriate the funds for each judgment.¹⁸⁷ Constitutional concerns faded as the Court of Claims established itself as an efficient means to process petitions for claims, and as Congress steadily siphoned more claims petitions to the courts.

Over the eighty years that followed, Congress transferred the legislative-executive claims system into the courts through a progression similar to that of the Court of Claims. Congress first transferred expanded advisory jurisdiction over portions of the petition process and requested reports in return, rather than final judgments.¹⁸⁸ Expanded advisory jurisdiction eventually ripened into full jurisdiction, as Congress transferred full consideration of claims, either generally or

the halls of Congress; but while the court has proved to be an effective and valuable means of investigation, it in great degree fails to effect the object of its creation for want of power to make its judgments final."); *see also* COWEN ET AL., *supra* note 171, at 21 (quoting Lincoln and describing Congress's reaction); Shimomura, *supra* note 161, at 655 (quoting Lincoln); Wiecek, *supra* note 166, at 398-99 (quoting Lincoln and describing Congress's attempt to follow his instructions).

183. Wiecek, *supra* note 166, at 399.

184. *Id.*

185. Shimomura, *supra* note 161, at 657-58.

186. *Id.* at 657.

187. *Id.* (quoting CONG. GLOBE, 37th Cong., 3d Sess. 426 (1863)); *see also* Wiecek, *supra* note 166, at 400 (describing the last-minute amendment requiring the Secretary to "estimate[]" claims). Congress repealed this requirement in 1866 after *Gordon v. United States*, 69 U.S. (2 Wall.) 561 (1864), called the Court of Claims's status as an Article III court into question, in part, because of the lack of finality of the Court's judgments due to the provision. Wiecek, *supra* note 166, at 401-02.

188. Shimomura, *supra* note 161, at 663-66. In 1883, Congress reached out to the courts for assistance with a growing claims petition docket with an "act to afford assistance and relief to Congress and the executive departments in the investigation of claims and demands against the government." Bowman Act, ch. 116, 22 Stat. 485 (1883). The Bowman Act provided that all claims petitions pending before any Senate or House committee or before the executive

for specific classes of petitions. What had once been the work of Congress and an independent commission had now become the work of the courts.¹⁸⁹

The final large transfer of claims petitions came in 1946 with the passage of the LRA and, in particular, Title IV of the Act, separately titled the Federal Tort Claims Act (FTCA). The FTCA abolished the claims committees in Congress, banned the issuance of private bills for covered claims, and delegated jurisdiction over all claims petitions to the Court of Claims and the federal courts.¹⁹⁰ Following this transfer, the number of claims petitions in Congress decreased to the low volume of petitions seen today, dramatically lower even than the claims petition volume at the Founding.

B. Siphoning Off the Provision of Public Benefits: The Bureau of Pensions

The American pension system began with the Revolution, and it began with petitions. Over the next 150 years, the pension petition system followed a similar pattern to that of claims. It originated within the committee system in Congress and then, in response to workload and expertise concerns, Congress began to build out the pension petition process using the infrastructure of the federal courts, independent commissions, and the executive.

The Continental Congress, faced with mounting petitions for relief in the spring of 1776, passed the nascent government's first general pension legislation offering "invalid pensions" – pensions to soldiers whose injuries during Revolutionary War service left them unable to earn a livelihood.¹⁹¹ These pensions were first paid for and administered by the separate states, which would report annually a roll of all pensioners to the Secretary of War.¹⁹²

In 1789, the First Congress took responsibility for payments to all pensioners listed on the state pension rolls with the intention of limiting pensions to only

requiring investigation or fact finding would be transferred to the Court of Claims for investigation and reporting. The court then issued a report back to Congress or the executive for final judgment. *Id.* at 485-86.

189. One of the most notable transfers came in 1887 in the form of the Tucker Act. Tucker Act, ch. 359, 24 Stat. 505 (1887) (codified as amended at 28 U.S.C. § 1491 (2012)). To relieve Congress of some of its growing claims petition volume, Congress expanded the jurisdiction of the Court of Claims to encompass claims for violation of the Constitution, claims grounded in government contracts, and claims for damages. The Tucker Act also leveraged the resources of the growing federal judiciary by creating limited concurrent jurisdiction over these same claims in the lower federal courts. *Id.*

190. Pub. L. No. 79-601, tit. IV, 60 Stat. 812, 842 (1946).

191. DOCUMENTARY HISTORY VOL. 7, *supra* note 160, at 332.

192. *Id.*

those listed.¹⁹³ But, in response to a number of petitions, the First Congress quickly began to make exceptions.¹⁹⁴ Upon receipt of these petitions, Congress would refer them primarily to the Secretary of War for a report.¹⁹⁵ Following review of the Secretary's report on a particular petition, Congress would draft and pass a private bill to resolve the petitioner's grievance.¹⁹⁶ Any petition requiring the attention of Congress would be referred to the Committee on Claims, which held jurisdiction over pension petitions until the creation of a separate standing pensions committee in 1813.¹⁹⁷ Despite these exceptions, the class of pensioners by early 1792 did not exceed 1,500 individuals.¹⁹⁸

Faced with a steady stream of petitions for exceptions, the Second Congress attempted to streamline the process and to draw on the resources of the judiciary and the executive.¹⁹⁹ The 1792 Pension Act invited new pension petitions by repealing the 1788 statute of limitations restricting the pension rolls, and establishing a hybrid judicial-executive process to resolve those new petitions.²⁰⁰ According to the 1792 Act, petitioners would submit their petitions not to Congress, but to the federal district courts. These courts would conduct the medical examination, review the petition, certify any requisite affidavits, and recommend a pension amount. The Act then directed the district courts to submit the examination, certified documents, and recommendation to the Secretary of War, who would ultimately decide whether to grant the petitioner a pension.

Some members of the federal courts rebelled against the 1792 Act.²⁰¹ Five of the then six sitting justices of the Supreme Court, who also served on the lower courts pursuant to the 1789 Judiciary Act, sent letters to President George Washington, declining their new appointments as "commissioners" under the 1792 Act.²⁰² United States Attorney General Edmond Randolph quickly petitioned for a writ of mandamus on behalf of pension petitioner William Hayburn to force

193. Act of Sept. 29, 1789, ch. 24, 1 Stat. 95.

194. See STAFF OF H. COMM. ON ENERGY & COMMERCE, 99TH CONG., PETITIONS, MEMORIALS, AND OTHER DOCUMENTS SUBMITTED FOR THE CONSIDERATION OF CONGRESS, MARCH 7, 1789 TO DECEMBER 14, 1795, at 5 (Comm. Print 1986).

195. *Id.* at 5-9, 11.

196. *Id.* at 5-9.

197. HOUSE RECORDS GUIDE, *supra* note 154, ch. 6.

198. DOCUMENTARY HISTORY VOL. 7, *supra* note 160, at 334.

199. *Id.*

200. Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792).

201. *Id.* at 408.

202. *Id.* at 408 n.*.

the courts to comply with the Act.²⁰³ Hayburn's writ never resulted in a decision on the merits, as the Supreme Court continued the case to buy time and put pressure on Congress to amend the Act.²⁰⁴ The Court, in its order continuing the case, foreshadowed its constitutional concerns.²⁰⁵ In particular, the Court expressed deep concerns over the separation of powers issues raised by granting the Secretary of War the ability to override the district court's recommendation to issue a pension.²⁰⁶ "Such revision and control," the Court noted, was "radically inconsistent with the independence of that judicial power which is vested in the courts; and, consequently, with that important principle which is so strictly observed by the constitution of the United States."²⁰⁷ Moreover, it was clear, the Court noted, that Congress could also easily override any decision by either the Secretary or the courts, and that the Secretary did not hold the life tenure of a judge and was therefore subject to the caprice of Congress in his decision making.²⁰⁸

Legal scholars have deemed *Hayburn's Case* an important early expression of the Supreme Court's position on separation of powers, justiciability, and even judicial review of legislative action.²⁰⁹ But it remains equally important for its acceptance of the assignment of the petition process to the courts. In the remonstrances submitted to the Congress by the circuit courts, appended to the order,²¹⁰ the courts did not question the 1792 Act's requirement that the district courts assist in investigation and fact-finding. The remonstrances also did not raise concerns regarding the Secretary of War's role — even though the pension process previously had been well accepted as within the province of the legislature. The fact that the courts continued to assist Congress with the petition process affirmed that omission of these concerns was likely intentional.

203. *Id.* at 408.

204. *Id.* at 408-10; see also William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455, 536 (2005) ("[T]he Court decided to delay to see if Congress would respond to the constitutional concerns that had been raised and repeal the Invalid Pensions Act.").

205. 2 U.S. (2 Dall.) at 408 n.*.

206. *Id.*

207. *Id.*

208. *Id.*

209. See, e.g., Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 438-41 (1996).

210. *Hayburn's Case*, 2 U.S. (2 Dall.) at 408 n.*; 6 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, CASES: 1790-1795, at 33 n.4 (Maeva Marcus et al. eds., 1998).

Before the Supreme Court could act on *Hayburn's Case*, Congress acquiesced and passed an amendment to the Act in 1793.²¹¹ Pursuant to the amendment, the district courts would continue to examine petitions and certify affidavits and documentation, but would no longer make a recommendation on whether to grant the pension. To avoid lodging all discretion with the Secretary of War, the amendment required the Secretary of War to report all pensions granted to the Committee on Claims for final consideration.²¹²

The standing Committee on Claims continued to handle final approvals on pension petitions for the next fifty years. But in 1813, a Congress overwhelmed by the War of 1812 created the first standing Committee on Pensions and Revolutionary War Claims. However, the flood of pension petitions only grew in the antebellum era. The number of pensioners in 1816 was 2,200, only a few hundred more than the 1,500 pensioners on rolls during the First Congress. But just four years later, that figure had risen to 17,730. That increase was no doubt due, in part, to Congress's expansion of military pensions in 1818 to all Revolutionary War veterans living in poverty, regardless of disability. Advocates of the 1818 Pension Act anticipated 2,000 new pension petitions. Instead, following passage of the Act, the Pension Bureau was overwhelmed with 20,000 petitions for new pensions. Pension petitions to the Committee on Pensions and Revolutionary War Claims increased by nine times between the 15th and 19th Congresses²¹³ until yet another war tested the capacity of the Committee.²¹⁴

211. Invalid Pensions Act of 1793, ch. 17, 1 Stat. 324; see also Maeva Marcus, *Is the Supreme Court a Political Institution?*, 72 GEO. WASH. L. REV. 95, 104 & n.38 (2003) (describing the political context of the continuance and subsequent mooting of *Hayburn's Case*).

212. See Invalid Pensions Act §§ 1-2, 1 Stat. at 324-25. What Congress considered final consideration shifted over the years as Congress asserted more or less control over the process. To illustrate Congress's mercurial approach to oversight: For about seven years, from 1796 until 1803, Congress began to pass private bills to grant new petitions for new pensions. See WILLIAM H. GLASSON, *FEDERAL MILITARY PENSIONS IN THE UNITED STATES* 61-62 (1918). Then in 1803, Congress authorized the Secretary of War to add petitioners to the pension rolls in the absence of a private bill. *Id.* at 62. This phase lasted for another few years, until Congress reclaimed the pension process for itself and again began to pass private bills to resolve petitioners' pension grievances. *Id.* at 63.

213. The figures here are drawn from the Congressional Petitions Database.

214. Over time, Congress would attempt to handle the increase in petition workload by creating more and more specialized committees to resolve petitions for particular pensions. In 1825, handling both pension petitions and revolutionary claims petitions became unmanageable and Congress split the pension committee in two. HOUSE RECORDS GUIDE, *supra* note 154, para. 6.34. The Committee on Revolutionary Claims continued to receive and process petitions for claims. *Id.* para. 6.73. But the Committee on Military Pensions became the sole committee for pension petitions until Congress split the committee again a few years later. *Id.* para. 6.40. Congress's liberalization of pensions would only continue, as Congress expanded pension eligibility for veterans of all wars – including the Indian Wars, the Mexican-American

As Theda Skocpol has rigorously documented, the Civil War took hold of the antebellum era pension system and shook it to its core.²¹⁵ In 1862, before the enrollment of Civil War pensioners, the pension rolls totaled 10,700 pensioners at an expenditure of approximately \$1 million per year.²¹⁶ A mere four years later, in 1866, the pension rolls had grown to over 126,722 pensioners at an expenditure of approximately \$15.5 million per year.²¹⁷ The Pension Bureau of the antebellum era employed 72 staff members, but that number had multiplied to 1,500 members by the mid-1880s.²¹⁸ By 1891 the Pension Bureau, now a part of the Department of the Interior, employed over 2,000 staff members with a support staff of 419.²¹⁹ But the sheer volume of pension petitions submitted to the Pension Bureau began to overwhelm even the infrastructure of what some considered “the largest executive bureau in the world.”²²⁰ The backlog measured several hundred thousand claims and stalled the pension system into the 1890s.²²¹

As was the case in the early nineteenth century, the congressional petition process served as a pressure valve for the Pension Bureau and allowed aggrieved individuals to petition Congress for redress. However, unlike the Pension Bureau, which had expanded its staff and resources, Congress remained essentially the same institution, dependent upon its members without much staff support. Representative Robert M. La Follette, father of Robert M. La Follette Jr., who was one of the architects of the LRA, recalled that he spent 25-33% of his time in the House addressing pension petitions.²²² La Follette was not the only member

War, and others—in 1832, and to their widows in 1836. Theda Skocpol, *America's First Social Security System: The Expansion of Benefits for Civil War Veterans*, 108 POL. SCI. Q. 85, 92 (1993); see also Kristin A. Collins, “Petitions Without Number”: *Widows' Petitions and the Early Nineteenth-Century Origins of Marriage-Based Entitlements*, 31 L. & HIST. REV. 8 (2013). To distribute workload over the new pensioners, Congress again split the Committee on Military Pensions in two during the 22nd Congress (1831-1833). HOUSE RECORDS GUIDE, *supra* note 154, para. 6.40. The Committee on Revolutionary Pensions would serve as a generalist committee for pensions granted based on service or need, while the Committee on Invalid Pensions would focus on disability pensions. *Id.* paras. 6.46, 6.59.

215. SKOCPOL, *supra* note 18, at 102-51.

216. *Id.* at 107-08.

217. *Id.* at 108.

218. MASHAW, *supra* note 17, at 263.

219. THEDA SKOCPOL, SOCIAL POLICY IN THE UNITED STATES: FUTURE POSSIBILITIES IN HISTORICAL PERSPECTIVE 60 (1995).

220. *Id.* (quoting Green B. Raum, *Pensions and Patriotism*, 153 NORTH AM. REV. 205, 211 (1891)); accord SKOCPOL, *supra* note 18, at 121.

221. SKOCPOL, *supra* note 18, at 121.

222. *Id.*

to expend a considerable amount of energy on pension petitions.²²³ Despite the best efforts of these members, the process afforded to petitions in Congress necessarily became increasingly informal.

Pension petitioners began to raise their grievances through letters to their representatives, rather than submitting formal complaint-like petitions. Interactions between Congress and the Pension Bureau, although voluminous, were not conducted according to any formalized process at that time.²²⁴ During the period that La Follette was in office, the

volume of correspondence between the Pension Bureau and members of Congress was immense. In 1880 it was reported as amounting to nearly 40,000 written and personal inquiries; in 1888 it had more than doubled (94,000 items); and by 1891 it reached a peak of 154,817 congressional calls for information on cases, an average of over 500 for each working day.²²⁵

Even after shifting much of the pension process to the Pension Bureau, members of Congress still retained the ability to circumvent the agency entirely and resolve pensioners' petitions with the passage of private bills. Through private bills, Congress could add pensioners directly to the rolls, increase the rate of a petitioner's pension, or correct a soldier's military record to remove barriers to pension qualification, such as a desertion or dishonorable discharge.²²⁶ But private pension bills began to skyrocket under the informal petition "appeals" process of the late nineteenth century.

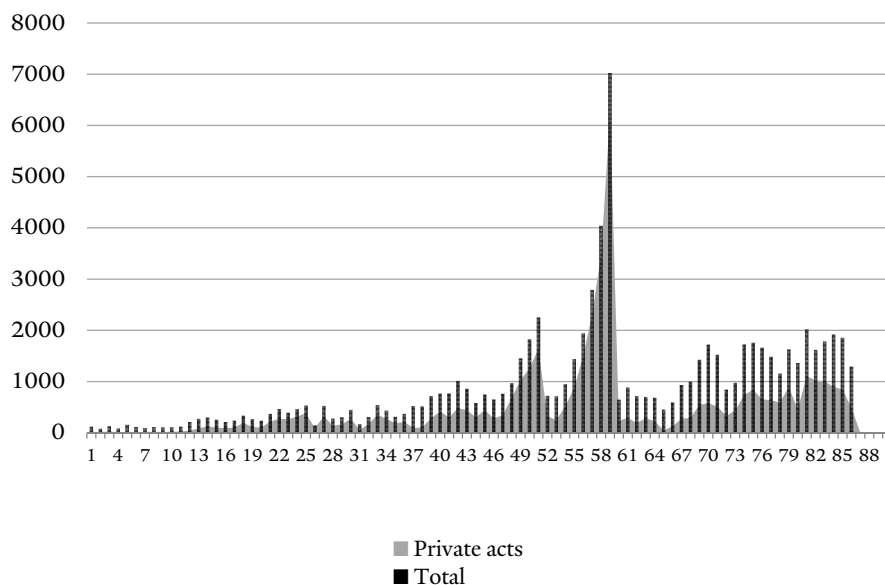
223. *Id.* (discussing Representative Roswell G. Horr).

224. *Id.* at 122.

225. *Id.* (quoting LEONARD D. WHITE, *THE REPUBLICAN ERA: A STUDY IN ADMINISTRATIVE HISTORY: 1869-1901*, at 75 (1958)).

226. *Id.* at 122-23.

FIGURE 6.
PRIVATE BILLS BY CONGRESS



Passage of private pension bills peaked in Congress during the 1880s and again in the 59th Congress (1909-1911) with a record high of 9,649. “In the 49th Congress [1885-1887], 40 percent of the legislation in the House and 55 percent in the Senate consisted of special pension acts. It was customary for Friday evening to be ‘pension night’ during congressional sessions.”²²⁷

Earlier Congresses referred pension petitions to the Pension Committees of each chamber and required a comprehensive reporting and review process. But the Pension Committees of the late nineteenth century, overwhelmed by the volume of pension petitions, relaxed the formal petition process even further.²²⁸ The Pension Committees began dividing the pension petitions equally among all of the membership of each chamber for review.²²⁹ The sheer volume of petitions often precluded review in any real depth, however, and many members simply handed their allocation over to their secretaries and congressional

227. SKOCPOL, *supra* note 219, at 63 (alteration in original) (quoting MORTON KELLER, *AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH-CENTURY AMERICA* 311 (1977)).

228. GLASSON, *supra* note 212, at 275-77.

229. *Id.*

clerks.²³⁰ Congress would then pass private pension bills with little to no formal process.²³¹

A review of the Congressional Petitions Database reveals a fairly steady decline in pension petitions introduced into Congress in the twentieth century. This reduction, however, witnessed little corresponding decrease in the number of pensions actually processed.²³² Years of frantic attempts to increase efficiency had finally transformed the petition process completely, taking with it many of the formalities and procedural protections afforded to each claimant. Descriptions of the petition process during the 1920s capture a fully routinized system of pension processing wholly distinct from the petition process that preceded it. Petitions were no longer read on the floor, made part of the formal record, and processed individually.²³³ Rather, the first day of the 70th Congress (1927-1929) “broke an all time record for the number of bills referred to a committee in a single day” when 3,775 draft private bills were introduced to the House Committee on Pensions.²³⁴ The Committee then bundled these private bills into a single omnibus bill which again broke records as “the largest bill ever printed during any Congress.”²³⁵ It was this routinized system at which the LRA took aim. The Act explicitly banned the private bills used to resolve pensions, transferred jurisdiction over those pensions firmly to the Veterans Administration, and abolished the Committee on Pensions.²³⁶ The Act had its intended effect—the number of private pension bills slowed to the low volumes that we see today.

The staggering rise and gradual decline of the petition process for pensions reveals several dynamics important for understanding the development of the modern administrative state. Ultimately, it shows how a process that allowed for formal interaction with Congress did not break down for fear of comingling of legislative and adjudicatory powers; nor did the process break down over concerns that Congress created an innovative agency, board, or commission. Instead, the petition process broke down with respect to pensions because Congress refused to construct an agency, board, or commission with full jurisdiction to process petitions. As the workload of Congress increased with a growth in

230. *Id.*

231. *Id.*

232. HOUSE RECORDS GUIDE, *supra* note 154.

233. *Id.*

234. *Id.* para. 6.56.

235. *Id.*

236. Legislative Reorganization Act of 1946, Pub. L. No. 79-601, § 131, 60 Stat. 812, 831 (banning private bills); *id.* § 121(a), 60 Stat. at 829 (establishing the Committee on Veterans’ Affairs); see also HOUSE RECORDS GUIDE, *supra* note 154, para. 6.65.

population and a series of wars, Congress nevertheless attempted to retain pension petition processing internally. Until it was abolished, the petition process for pensions was replete with interactions between constituents and Congress that did not involve the vote or the initiative process.

C. Siphoning Off Regulation: The Interstate Commerce Commission

Like claims and pensions, commerce petitions also originated from the committee system in Congress. Congress transferred the commerce petition process into commissions, boards, and agencies that could develop specialized expertise. But commerce petitions differed in many ways from those making claims seeking pensions. The volume of petitions did not drive the creation of further petition infrastructure; rather, the petitions' *substance* led to the construction of commercial infrastructure and mediated the use of that infrastructure. Petitions served as a mechanism by which the public could shape the development of the economy and have voice as to how Congress would regulate that economy.

The House established the standing Committee on Commerce and Manufactures in the first session of the Fourth Congress (1795-1797) in order to "take into consideration all such petitions and matters or things touching the commerce [and manufactures] of the United States . . ." ²³⁷ Petitions later referred to the newly established Committee on Commerce had earlier been resolved with a referral to the Secretary of Treasury or to a select committee in the House. ²³⁸ A review of the Database – specifically, petition introductions during the antebellum era that were referred to the Committee on Commerce and Manufactures – reveals petitions addressing a range of topics. However, petitions mostly focused on the regulation of commerce directly through the imposition of duties, tariffs, excises, embargoes, and indirectly by subsidizing and building the infrastructure of waterborne commerce.

Commerce petitions provide examples of the complex ends to which petitioners exercised the process – both to promote general legislation regulating commerce and then to request specific exceptions and amendments to that gen-

²³⁷. CONSTITUTION OF THE UNITED STATES OF AMERICA WITH THE AMENDMENTS THERETO: TO WHICH ARE ADDED JEFFERSON'S MANUAL OF PARLIAMENTARY PRACTICE, THE STANDING RULES AND ORDERS FOR CONDUCTING BUSINESS IN THE HOUSE OF REPRESENTATIVES AND SENATE OF THE UNITED STATES, AND BARCLAY'S DIGEST 183 (1871) (documenting the relevant rule of the House adopted on Dec. 14, 1795).

²³⁸. See STAFF OF H. COMM. ON ENERGY & COMMERCE, 99TH CONG., PETITIONS, MEMORIALS, AND OTHER DOCUMENTS SUBMITTED FOR THE CONSIDERATION OF CONGRESS, MARCH 7, 1789 TO DECEMBER 14, 1795, at 6 (Comm. Print 1986).

eral legislation. Early petitioners to the House, usually in the form of trade associations organized by city, petitioned for the passage of general legislation promoting American manufacture and trade through the imposition of duties and tariffs on imports.²³⁹ Congress responded with the passage of general duty and tariff legislation, known as the Impost Act, which went into effect in August 1789.²⁴⁰ As early as December of that year, Congress began to receive petitions requesting exemptions from and amendments to the general revenue legislation. President Ezra Stiles of Yale College submitted the first petition for an exemption, praying for a refund of import duties paid on a “philosophical Apparatus” — in modern parlance, basic lab equipment like air pumps and microscopes — recently purchased from London for use at the college.²⁴¹ Alexander Hamilton, then Secretary of Treasury, issued a report on Stiles’s petition, finding that another recent act had exempted philosophical apparatus from import duties in the future. On those grounds, he recommended an equitable restitution of Stiles’s duties paid.²⁴² Congress created a specific exemption for Yale College²⁴³ and, as was often the case, deferred to the report’s recommendation to continue the exemption in future iterations of the statute.²⁴⁴

Beyond legislation regulating commerce through tariffs and the like, Congress’s early regulation of commerce involved a complex relationship between subsidy of commercial infrastructure and licensing to regulate the use of that infrastructure. Petitions drove the subsidy process by identifying areas for development, and commercial agents then had to petition for licenses to take advantage of the subsidy. A review of petition introductions in the Congressional Petitions Database reveals that, during the antebellum era, Congress primarily subsidized infrastructure for waterborne trade. These petitions provided the primary mechanism by which Congress identified the need for improvements, as cities, localities, and occasionally associations of individuals and merchants petitioned Congress for improvements in their areas. Petitions included requests for

239. DOCUMENTARY HISTORY VOL. 8, *supra* note 84, at 360-62.

240. Act of July 4, 1789, ch. 2, 1 Stat. 24; *see* DOCUMENTARY HISTORY VOL. 8, *supra* note 84, at 362-63. Also in 1789, the same year that Congress passed general tariff legislation, Congress instituted a licensing scheme “for Registering and Clearing Vessels, Regulating the Coasting Trade, and for other purposes.” 1 Stat. 55 (1789). The scheme’s primary aim was to facilitate the collection of duties and tariffs by requiring licensed ships to petition duty collectors for a license at each port and by requiring disclosure of all cargo subject to duties and delivery of the ship to collectors for inspection. *Id.*

241. DOCUMENTARY HISTORY VOL. 8, *supra* note 84, at 363-64.

242. *Id.* at 364.

243. *Id.* at 362-63 (“[T]he Ways and Means Act [HR-83] had specifically exempted from duties ‘Philosophical apparatus specially imported for any seminary of learning.’”).

244. *Id.*

construction of navigation aids, like lighthouses, fog signals, and beacons; the designation of ports of entry to administer duties and tariffs; and improvement of the nation's waterways with channels, bridges, and ports.

In the first thirty years of the Republic, Congress focused its subsidies on coastal commerce, but before long the allure of steam power drew those subsidies inland. A review of petitions from the 1820s in the Congressional Petitions Database reveals petitions for coastal lighthouses and ports that began to commingle with petitions for inland waterway improvements for steamboats. Such petitions included requests to improve the navigability of Lake Erie, as well as the Connecticut, Hudson, and Ohio Rivers, among others. Given the ability of steamboats to traverse inland waterways at never-before-seen speeds, petitions also prayed for lakeside harbors, river lighthouses and bells, and the construction of canals to connect lakes and rivers. Not surprisingly, a review of the Congressional Petitions Database reveals that many of these petitions derived from coalitions of steamboat owners and merchants, while residents of cities and states submitted the rest.

Congress then began to regulate who could use its subsidized commercial infrastructure by requiring petitions for licenses.²⁴⁵ In effect, the subsidized infrastructure served as a vehicle for Congress to regulate areas of commerce previously entirely under the province of the states.²⁴⁶ For example, in response to petitions, the federal government began to open domestic waterways like the Hudson River to steamboat commerce, and then Congress required steamboat operators to petition for a license to use those domestic waterways.²⁴⁷

As ships carrying federal licenses made their way into the interior of the United States, jurisdictional disputes arose between federal and state licensing schemes. These disputes evolved into the foundational efforts to clarify congressional jurisdiction over the regulation of commerce. Former steamboat partners, Aaron Ogden and Thomas Gibbons, found themselves engaged in such a dispute following the bitter dissolution of their partnership in 1818.²⁴⁸ After their partnership dissolved, Ogden sued Gibbons in New York court to enforce his rights under the New York license they had previously shared. Gibbons countered that he had been granted a federal license to operate a ship, under a later version of the 1789 federal licensing scheme, which preempted Ogden's monopoly.²⁴⁹ The

245. Mashaw, *Administration and "the Democracy,"* *supra* note 24, at 1631.

246. *Id.* at 1629.

247. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

248. *Id.*

249. *Id.*

New York Court of Errors sided with Ogden, and Gibbons appealed to the United States Supreme Court.²⁵⁰

In 1824, Chief Justice John Marshall authored the Court's opinion in *Gibbons v. Ogden*, reversing the Court of Errors and clarifying that Congress's past regulation of navigation – through licensing and infrastructure subsidy – fell within the scope of the term “commerce” in the Commerce Clause.²⁵¹ To the question of whether the enumerated power to regulate “commerce” should encompass regulation of navigation, the Court looked to past practice.²⁵² The power to regulate navigation, as an aspect of commerce, had been “exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation.”²⁵³ Because Congress had the power to regulate navigation and because the 1793 licensing scheme was a proper exercise of this power, the Supreme Court held that the state license must give way under the preemptive power of the Supremacy Clause.²⁵⁴

Congress soon began to require petitions for licenses not only to regulate who could use its subsidized infrastructure but also to regulate how this infrastructure would be used. In response to an increasing number of petitions praying for resolution of safety concerns around subsidized infrastructure, Congress aimed its licensing requirements at safety concerns. To use steamboats again as an illustration, despite Congress's best efforts at ensuring the safety of the new steam powered waterways, this new form of transportation still presented a significant hazard. Many quite gruesome boiler explosions aboard steamships, some carrying hundreds of passengers, raised public concern over steamboat safety.²⁵⁵ Petitions began to pray in the 1830s for national regulation of boilers. In 1838, following an extensive report by the Treasury recommending regulation, a call for regulation by President Andrew Jackson in his 1832 State of the Union

250. *Id.*

251. *Id.* at 94.

252. *Id.* at 72.

253. *Id.* at 190.

254. *Id.* at 81-82. It bears noting that the difference between the United States Supreme Court and the New York Court of Errors did not lie in the interpretation of the term “commerce.” See *Gibbons v. Ogden*, 17 Johns. 488, 509-10 (1820). The latter court made clear in its opinion that, had Congress issued a monopoly license in conflict with New York's license, the state license would have given way. *Id.* The outcome turned on the difference in interpretation of the reach of the 1793 licensing act, Act of Feb. 18, 1793, ch. 8, 1 Stat. 305. *Id.* Both courts took for granted that “commerce” would of course include regulation of navigation.

255. Robert Gudmestad, *The Horrific Accident that Created the Regulatory State*, BLOOMBERG (Jan. 31, 2013, 11:40 AM), <http://www.bloomberg.com/view/articles/2013-01-31/the-horrific-accident-that-created-the-regulatory-state> [<http://perma.cc/4AB6-BKAJ>].

Address to Congress,²⁵⁶ and three horrific boiler explosions, Congress finally acted with the passage of the Steamboat Act of 1838.²⁵⁷

Some have heralded the Act as the beginning of comprehensive regulation of commerce, but contemporaries quickly came to view it as ineffective because it lacked an enforcement mechanism.²⁵⁸ In 1852, Congress amended the Steamboat Act, replacing “the three-page, thirteen-section statute that it had passed in 1838 [with a] bill contain[ing] forty-three sections and r[unning] fourteen pages in the statutes at large.”²⁵⁹ Most importantly, the 1852 Amendment created a Board of Supervising Inspectors to not only regulate steamboat safety, but also facilitate public engagement in that regulation through the petition process.²⁶⁰ This nine-member commission met annually to set rules and regulations for the inspectors of steamboats and for the steamboat pilots and masters.²⁶¹ Although seemingly regulatory in nature, Board procedure often blurred the lines between regulation and adjudication.²⁶² The Board “often described its rules as responding to petitions or complaints from outside parties.”²⁶³ By 1858, the Board formally set aside “time at its annual meeting to hear orally from petitioners.”²⁶⁴ Early Board meetings resembled congressional petition procedure as the Board received petitions and responded to them through ad hoc committees or through deliberation of the whole Board.²⁶⁵

The regulation of steam-powered rail followed a similar path to that of steam-powered boats. It began with the development of infrastructure through the congressional petition process, and moved into the construction by statute of a commission to regulate and process petitions as to how that infrastructure would be used. A review of the Congressional Petitions Database revealed a

256. Andrew Jackson, President of the U.S., Fourth Annual Message (Dec. 4, 1832), <http://www.presidency.ucsb.edu/ws/index.php?pid=29474> [<http://perma.cc/MYC4-FELS>].

257. Act of July 7, 1838, ch. 191, 5 Stat. 304.

258. See MASHAW, *supra* note 17, at 187-208.

259. *Id.* at 192.

260. Act of Aug. 30, 1852, ch. 98, 10 Stat. 38.; see also MASHAW, *supra* note 17, at 192.

261. MASHAW, *supra* note 17, at 193-94.

262. *Id.* at 196-200.

263. *Id.* at 203.

264. *Id.*

265. *Id.* at 202.

steady increase in petitions for rail infrastructure between the 1820s and 1830s.²⁶⁶ Petitioners prayed for exemptions from duties on iron imports, the construction of railways by the federal government, grants of timberland to supply timber, and for subscriptions of railroad stock. But most often, petitioners prayed for land. The steady westward expansion of the United States and the displacement of native peoples through aggressive removal policies had increased the public landholdings of the federal government.²⁶⁷ Rail companies turned to Congress with petition and hat in hand, and the length of United States railroad track began to grow.²⁶⁸

Much like the regulation of steamboats in exchange for licenses, Congress began its regulation of rails with an investigation and reporting scheme contingent on the receipt of federal subsidy. By 1878, when Congress established the Office of the Auditor of Railroad Accounts within the Department of the Interior, most railroads fell squarely within the Act's jurisdiction.²⁶⁹ The 1878 Act gave the Auditor of Railroad Accounts the power to investigate the railroads and report to the Secretary of the Interior, while the railroads were required to make their books available and provide all prescribed reports.²⁷⁰ Mashaw has noted the similarities between the investigatory and reporting power of this precursor to the Interstate Commerce Act of 1887, and the powers of the Interstate Commerce Commission established by the Act.²⁷¹ Like the 1838 Steamboat Act,²⁷² the 1878 Act lacked an enforcement mechanism and was soon decried as insufficient.²⁷³

Nine years later, Congress established the Interstate Commerce Commission, created by the Interstate Commerce Act of 1887 to regulate the railroads and to facilitate public engagement in that regulation.²⁷⁴ The Interstate Commerce Commission is often described as the first independent administrative

266. Although the Database recognizes particular petition topics, it is not yet refined sufficiently and the "prayer" field not yet cleaned sufficiently to allow automatic coding of subtopics. Instead, I reviewed the petitions from this period by hand for both number and substance.

267. RICHARD WHITE, *RAILROADED* 24-25 (2012).

268. *Id.* at 130-31.

269. Mashaw, *Law and the Gilded Age*, *supra* note 24, at 1398.

270. *Id.*

271. *Id.* at 1398 n.113.

272. MASHAW, *supra* note 17, at 190, 195.

273. *See id.* at 244; Act of June 19, 1878, ch. 316, § 5, 20 Stat. 169, 170 (providing that fines under the Act could only be levied upon referral to the Attorney General).

274. *Id.* at 1365 n.1 (quoting LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 439 (2d ed. 1985) ("In hindsight, the development of administrative law seems mostly a contribution of the 20th century The creation of the Interstate Commerce Commission, in 1887, has been taken to be a kind of genesis.")).

agency, and its creation is often pointed to as the birth of the American administrative state.²⁷⁵ However, as this Section illustrates, the structure of the Commission was not necessarily innovative. Rather, it resembled closely the structure of commissions established by earlier Congresses and especially the Board of Supervising Inspectors established by the Steamboat Act of 1852.²⁷⁶ Like the Steamboat Act of 1852,²⁷⁷ the Interstate Commerce Act established a multi-member commission to oversee inspection of the railroads and enforcement of the Act.²⁷⁸ Enforcement of the Act also relied, in part, on a petition process.²⁷⁹ Specifically, the Act allowed individuals and organizations to petition the Commission to address particular charges of violations of the Act or to clarify the Act.²⁸⁰ In 1888, the year following the Act, the Congressional Petitions Database revealed that petition introductions to regulate equitable rates dropped nearly to zero.

The last few years of the nineteenth century and the first few decades of the twentieth century were characterized by a general decline in petition volume in the generalist Interstate Commerce Committee, as most of the commerce petitions were better served by specialized commissions.²⁸¹ The Interstate Commerce Committee was one of eighteen committees that survived the 1946 Legislative Reorganization Act's reduction of House standing committees from 48 to 19.²⁸² However, petition volume in the Committee only continued to decline.

III. THE PARTICIPATORY STATE

The original meaning of the term "democracy," coined in the political theory of ancient Greece, was: government by the people (demos = people, kratein = govern). The essence of the political phenomenon designated by the term was the participation of the governed in the government, the principle of freedom in

275. *Id.*

276. Act of Aug. 30, 1852, ch. 106, 10 Stat. 61.

277. *Id.*

278. An Act to Regulate Commerce (Interstate Commerce Act), ch. 104, 24 Stat. 379, 386 (1887).

279. *Id.* at § 13; Jerry L. Mashaw, *Administration and "the Democracy," supra* note 24.

280. *Id.*

281. Although the general trend is decline, this period in the Congressional Petitions Database saw heavy variation in petition volume due to high volume petition campaigns on matters of public interest. For example, the 55th Congress experienced a surge in petitions regarding the regulation of the interstate shipping of cigarettes, interstate shipping of gambling materials, and an anti-scalping bill for railroad tickets.

282. Legislative Reorganization Act of 1946, Pub. L. No. 79-601, § 121(a), 60 Stat. 812, 826; David C. King, *The Nature of Congressional Committee Jurisdictions*, 88 AM. POL. SCI. REV. 48, 55 (1994).

*the sense of political self-determination; and this was the meaning with which the term has been taken over by the political theory of Western civilization. – Hans Kelsen, Foundations of Democracy (1955)*²⁸³

Out of the petition process, Congress has constructed what I designate the “participatory state.”²⁸⁴ Because of shortcomings in the models on which much of our public law theory is grounded, public law scholarship has often neglected the existence and function of the participatory facets of our government. Excavation of the petition process, however, reveals the architecture of the participatory state more clearly.

This Part draws out the lessons of the history of petitioning for our understanding of the participatory state. Section III.A grounds the historical narrative in emerging and established theories on governance and participation – the work of Heather Gerken and Hans Kelsen, respectively. Section III.B then takes these lessons and offers friendly amendments to legal process theory.

A. Naming the Participatory State

As Part I described, from the Founding onward, Congress responded to individual petitions through a formal, public, and equal process that resembles litigation more closely than politics. Congress constructed by statute boards and commissions that were not clearly within one single branch of government, and it made law not in isolation, but in consultation with individuals and minorities affected by those laws. Many aspects of our government that seem of ambiguous constitutional status – the Court of Claims, public benefit programs, and such – have their roots in the petition process in Congress, and were born of Congress’s efforts to satisfy its obligations under the Petition Clause. The making of specific laws, public or private, thus involved a process closer to adjudication. Congress passed laws of general application in response to petition campaigns. Even once legislation was passed, the lawmaking process reflected an understanding that

²⁸³. Hans Kelsen, *Foundations of Democracy*, 66 ETHICS 1, 3 (1955).

²⁸⁴. The participatory state responds also to Jody Freeman’s call for a new administrative law agenda that reflects upon “how governance depends heavily on private participation.” Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 673 (2000). In modern administrative governance, Freeman documents “a deep interdependence among public and private actors in accomplishing the business of governance.” *Id.* at 547. According to Freeman, it is this interdependence that animates the legitimacy crisis in administrative law and Freeman roots a new concept of administration, that of a “set of negotiated relationships,” in order to recognize this interdependence and resolve the legitimacy crisis. *Id.* at 548. In essence, Freeman proposed nearly twenty years ago a form of the participatory state and a similar move away from a strictly Weberian view of administration.

laws of general applicability could affect various populations differently and, thus, Congress created exceptions and amendments in response to petitions.²⁸⁵

The historical petition process problematizes the belief that our modern notion of strict separation of powers had any real place in early American lawmaking. Engagement with the public through the petition process took many forms, not all of them clearly delineated as adjudicative, legislative, or executive. This history demonstrates that a deeper understanding of our legislatures and legislative process has much to contribute to the study of public law generally beyond the specific field of legislation.

Understanding the historical petition process and its role within the lawmaking process helps identify a countermajoritarian function of the administrative state other than technocratic governance. From the Founding, one of the primary functions of Congress was to consider and process petitions submitted by the public. The petition process thus preserved the ability of individuals and minorities to participate in the lawmaking process outside of the majoritarian mechanism of the vote. Congress afforded these politically powerless petitioners equal, public, and formal process, even when they were not enfranchised. As the size of the public grew and the forms of participation became specialized to particular regulatory areas, Congress constructed new commissions and boards to facilitate continued public participation. By building these myriad commissions and boards, Congress preserved a vital aspect of the lawmaking process: a formalized voice for individuals and minorities.

In short, understanding the historical petition process helps to define the wide range of innovative forms of governance created by Congress over the last two hundred years. The contours of the so-called “Fourth Branch” are more difficult to define than its critics admit, as its actual infrastructure lives within the executive, the legislature, and the courts, as well as places in between. This infrastructure also performs a range of functions beyond that of “administration,”

285. The similarities between the petition process and the dynamics of equity bear further reflection. Aristotle defined equity (*epieikeia*) as a force that intervenes into “law where law is defective because of its generality.” ARISTOTLE, *THE NICOMACHEAN ETHICS* 112 (Robert C. Bartlett & Susan D. Collins eds., 2011). The petition process functioned, in part, as a mechanism to allow individuals and minorities the ability to seek redress for injustice in a specific application of a general law. The specific connection between petitioning and equity has yet to be fully articulated, but scholars have begun to draw a connection between equity and the petition dynamics at work within the administrative state. See, e.g., Henry E. Smith, *Equity and Administrative Behaviour*, in *EQUITY AND ADMINISTRATION* 326 (P.G. Turner ed., 2016) (“At its widest, we can label as ‘equity’ any intervention that corrects the law when it is defective owing to its generality This tradition stands behind one variant of the ‘equity of the statute,’ and it formed the backdrop to the desire for flexible expert administration in the early twentieth century.”).

including adjudication and regulation. By naming these innovative forms of governance as the “participatory state,” rather than the “administrative state,” we can better map their place and function.

Today, the participation of individuals and minorities takes place through procedures within the specialized boards, commissions, and agencies that comprise the administrative state – in particular, the notice and comment rulemaking process and the petitions required by the APA. Under the APA, agencies offer a petition process for rulemaking and undergo notice and comment on proposed regulations.²⁸⁶ But as the case studies illustrate, the participatory state spans more broadly than the “administrative state,” encompassing the courts – including specialized courts like the Court of Claims – and Congress. As for the latter, the modern Congress has attempted to facilitate participation in lawmaking through our current lobbying system. But, as I have argued elsewhere, these attempts fall short of ensuring the public, equal, and formal participation protected by the Petition Clause.²⁸⁷

Finally, understanding the historical petition process allows us to better understand the role played by the participatory state within our republican democracy. Libertarian critics of the administrative state decry these innovative forms of governance as rights-invading communitarian outgrowths of the Progressive Era, foreign to our Founding documents. However, understanding the myriad federal commissions, agencies, and boards as loci for public participation in the lawmaking process challenges the libertarian narrative. Congress constructed these new forms of governance not as a Weberian bureaucracy but rather as a means to protect individual rights – particularly the right to petition – and individual liberty. Liberty in this sense is Kelsenian.²⁸⁸ It encompasses more than simply freedom from regulation; it also encompasses freedom to participate equally in making the laws by which one is governed.²⁸⁹ The mechanism of the vote ensures the participation of the majority through a majoritarian decision rule. In fostering participation for individuals and minorities, the participatory state functions as supplement to the majoritarian vote and ensures equal liberty.²⁹⁰ In this way, these innovative forms of governance actually further the libertarian project by ensuring equal liberty and democratic legitimacy through their facilitation of participation.

^{286.} 5 U.S.C. § 553 (2012).

^{287.} McKinley, *supra* note 27, at 1198–1204.

^{288.} HANS KELSEN, *THE ESSENCE AND VALUE OF DEMOCRACY* 26–33 (Nadia Urbinati & Carlo Invernizzi Accetti eds., Brian Graf trans., 2013).

^{289.} *Id.* at 28.

^{290.} *Id.* at 58 (discussing the petition as a mechanism of representation similar to the vote).

Moreover, contrary to the proponents of libertarian administrative law, this vision of liberty and of republican democracy is not twentieth-century communitarianism, but rather part and parcel of our Founding culture. The Founding generation viewed petitioning as an integral component of a republican form of government and codified the value of minority participation into the Petition Clause. In constructing the participatory state, Congress translated that petition right into innovative forms of governance.²⁹¹ As the population grew, along with its demands, so too did Congress's ability to meet its citizenry's participation demands through the creation of the participatory administrative state.

As noted above, in addition to protecting the rights and liberty of individuals, the participatory state also plays an important role in protecting democratic legitimacy by empowering minority lawmaking. The theory of the participatory state therefore joins a growing body of scholarship that identifies and examines these structural protections for minorities throughout government.²⁹² Most notably, recent work by Heather Gerken documents the structural protections for minorities at work within state and local government and celebrates "the power wielded by agents within our Tocquevillian bureaucracy."²⁹³

But minorities wield power at the federal level as well. The participatory state expands Gerken's framework to encompass minority empowerment at the national level, including the petitioner's power to force the majority to engage through our Tocquevillian bureaucracy. So, too, here are the "discursive benefits of structure" at work within the petition process in Congress and the myriad commissions, boards, and agencies that constitute our modern state.²⁹⁴ Local structures, in Gerken's words, "giv[e] political outliers an opportunity to force engagement, set the national agenda, [and] dissent from within rather than complain from without."²⁹⁵ Similarly, political outliers force engagement, set the agenda, and voice dissent from within the petition process.²⁹⁶ Beyond the often

291. Cf. Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1189-1211 (1993) (outlining a theory of constitutional interpretative fidelity based on "translation" from the original interpretative context to the present); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 396-410 (1995) (justifying the New Deal reforms as part of this translation, which adapted old understandings to a new social reality); Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365, 1371-76 (1997) (further explicating the theory of constitutional translation as a process that preserves interpretative fidelity).

292. See *supra* note 39.

293. Heather K. Gerken, *Abandoning Bad Ideas and Disregarding Good Ones for the Right Reasons: Reflections on a Festschrift*, 48 TULSA L. REV. 535, 537 (2013).

294. Gerken, *New Nationalism*, *supra* note 39, at 1894.

295. *Id.* at 1895.

296. See *supra* Part I.

ineffective soapbox offered by speech protections, the participatory state provides a certain amount of power to minorities to engage in lawmaking.

B. Updating Our Lawmaking Models

An excavation of the petition process also affords us the opportunity to interrogate some of the models that operate in the background of our public law scholarship, many of which contribute to the ongoing “crisis” over the legitimacy of administrative lawmaking. After all, we cannot determine whether it violates the Constitution when Congress creates commissions and boards unless we have some model of how legislatures ought to legislate and what constitutes delegation. Nor can we determine whether one of those commissions or boards violates the separation of powers by comingling executive, judicial, and legislative functions unless we have a model of what constitutes executing, adjudicating, and legislating.

Comprehensive models of the lawmaking process have become less common as the world of legal scholarship has become more siloed.²⁹⁷ Increasingly, scholars focus their attention on a single institution in government: scholars of federal courts and civil procedure focus on the courts, administrative law scholars study the agencies and the APA, and election law scholars focus on state and federal elections. Even constitutional law, the traditional home of more comprehensive theories, has become a house divided between the study of structure and the study of rights.²⁹⁸ Structuralists focus on the distribution of power, while rights scholars study the protection of liberty and equality – leaving neither to study the lawmaking process overall and how those structures and institutions might also contribute to the protection of equality and liberty. Few theories within the legal academy offer a comprehensive view of the lawmaking process or offer models of those lawmaking institutions in action and collaboration. This Section documents how legal process theory – perhaps the last comprehensive model remaining – fails to incorporate petitioning into its theory of lawmaking.

297. See e.g., Paul J. Stancil, *The Legal Academy as Dinner Party: A (Short) Manifesto on the Necessity of Inter-Interdisciplinary Legal Scholarship* 2011 U. ILL. L. REV. 1577, 1577 (“The various branches or ‘silos’ of legal academic thought remain rather distressingly segregated and, in some cases, almost definitionally opposed to one another.”).

298. See, e.g., Daryl J. Levinson, *Rights and Votes*, 121 YALE L.J. 1286, 1293 (2012) (“A conventional divide in constitutional law separates structure from rights. . . . But the rights/structure distinction is in many ways misleading.”).

1. *Legal Process Theory: Lawmaking Without Petitioning*

Recent scholarship has documented the reemergence of legal process theory, a shopworn but highly respected theory of the lawmaking process within both the academy and the courts that applies across a range of areas, including statutory interpretation, federal courts, administrative law, and legislation.²⁹⁹ Legal process theory has had a longstanding hold on public law scholarship generally and particularly on debates over relationships between lawmaking institutions. Most notably, it fostered the extended debate over the countermajoritarian difficulty,³⁰⁰ which continues to haunt the judiciary despite sustained criticism.³⁰¹

299. See, e.g., William N. Eskridge, Jr., *Nino's Nightmare: Legal Process Theory as a Jurisprudence of Toggling Between Facts and Norms*, 57 ST. LOUIS U. L.J. 865 (2013); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); Richard H. Fallon, Jr., *Reflections on the Hart and Weschler Paradigm*, 47 VAND. L. REV. 953 (1994); Richard H. Fallon, Jr., *The Supreme Court, Habeas Corpus, and the War on Terror: An Essay on Law and Political Science*, 110 COLUM. L. REV. 352 (2010); Richard H. Fallon, Jr., *Why and How To Teach Federal Courts Today*, 53 ST. LOUIS U. L.J. 693 (2009); Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in an Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 66 (2015); Joseph Landau, *Due Process and the Non-Citizen: A Revolution Reconsidered*, 47 CONN. L. REV. 879 (2015); Marin K. Levy, *Judging Justice on Appeal*, 123 YALE L.J. 2386 (2014) (book review); John F. Manning, *Justice Ginsburg and the New Legal Process*, 127 HARV. L. REV. 455 (2013); Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013 (2008); Victoria F. Nourse, *Elementary Statutory Interpretation: Rethinking Legislative Intent and History*, 55 B.C. L. REV. 1613 (2014); Victoria Nourse & Gregory Shaffer, *Varieties of a New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61 (2009); Daniel B. Rodriguez, *The Substance of the New Legal Process*, 77 CALIF. L. REV. 919 (1989) (book review); Edward L. Rubin, *Statutory Interpretations and the Therapy of the Obvious*, 68 VAND. L. REV. 159 (2015) (book review); Edward Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393 (1996); Jeffrey Rudd, *The Evolution of the Legal Process School's "Institutional Competence" Theme: Unintended Consequences for Environmental Law*, 33 ECOLOGY L.Q. 1045 (2006); Geoffrey C. Shaw, *H.L.A. Hart's Lost Essay: Discretion and the Legal Process School*, 127 HARV. L. REV. 666 (2013).

300. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (2d ed. 1986).

301. See, e.g., Robert W. Bennett, *Response: On Substantiation of Positive Social Theory*, 95 NW. U. L. REV. 977, 979 (2001) ("This fixation is puzzling, because the rest of American democracy is not sensibly thought of as 'majoritarian.'"); Erwin Chemerinsky, *The Supreme Court 1988—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 71 (1989); Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1717-29 (2008); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 165 (2002) ("Perhaps the best proof that we are dealing with an obsession is that most of the scholarship in which the countermajoritarian difficulty appears rests on an overly simplified and largely inaccurate understanding of American democracy.").

Legal process theorist John Hart Ely advanced an enduring model of judicial review with his contribution to that debate.³⁰² Within the field of administrative law, legal process theory is experiencing a recent renaissance, as administrative law scholars connect the institutionalist focus of their field with its legal process theory roots.³⁰³ The field of legislation has long acknowledged and celebrated its debts to the legal process school. And modern critics of the administrative state work within the legal process framework in advancing their attacks.

Legal process theory took hold in the years after the Second World War.³⁰⁴ At its creation, the fathers of the theory, Henry M. Hart and Albert Sacks, aimed

302. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

303. See, e.g., NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMIC, AND PUBLIC POLICY* 3-13 (1994); CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 259-63 (1999); ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 63-85 (2006); Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 74-75 (2008); Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 490-97 (2005); Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1209-13 (2001); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1171-75 (2008); Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1275, 1291-92 (2006); Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1713-16 (2002); Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277, 1279-86 (2001); Clayton P. Gillette, *Expropriation and Institutional Design in State and Local Government Law*, 80 VA. L. REV. 625, 631-35 (1994); Jeff A. King, *Institutional Approaches to Judicial Restraint*, 28 OXFORD J. LEG. STUD. 409, 432-40 (2008); M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 649-54 (2001); Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695, 717-25 (2008); Jide Nzelibe & John Yoo, *Rational War and Constitutional Design*, 115 YALE L.J. 2512, 2514-16 (2006); Jeffrey J. Rachlinski, *Bottom-Up Versus Top-Down Lawmaking*, 73 U. CHI. L. REV. 933, 934-37 (2006); Daphna Renan, *The Fourth Amendment as Administrative Governance*, 68 STAN. L. REV. 1039, 1108-28 (2016); Frederick Schauer, *The Dilemma of Ignorance: PGA Tour, Inc. v. Casey Martin*, 2001 SUP. CT. REV. 267, 288-95; Mark Seidenfeld, *Who Decides Who Decides: Federal Regulatory Preemption of State Tort Law*, 65 N.Y.U. ANN. SURV. AM. L. 611, 640-49 (2010); Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 484-520 (2008); Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1424 n.2 (2011); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 126-43 (2005); Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 914-19 (2003); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 65-122 (2004).

304. Henry M. Hart and Albert M. Sacks, both professors of law at Harvard Law School, compiled materials for a course on legal process theory that went unpublished. However, they copyrighted a version of their course materials in 1958. HENRY M. HART, JR. & ALBERT M. SACKS,

to chart a middle ground between the schools of legal realism and legal formalism that had dominated debates over the nature of law during the first half the twentieth century.³⁰⁵ Hart and Sacks eschewed the naïve simplicity of formalism and accepted the basic premise of legal realism that legal principles do not alone bind judges.³⁰⁶ But in crafting legal process theory, they offered a defense of democratic lawmaking against the legal realist charge that lawmaking was necessarily arbitrary and political, and lacked any form of restraint on the individual exercise of power.³⁰⁷

Hart and Sacks saw institutional architecture as the means by which to constrain individual lawmakers—even when the letter of the law might not.³⁰⁸ Law was legitimate not because it transcended legal institutions, but because it arose from them and was made according to accepted procedures within those institutions.³⁰⁹ Setting acceptable procedures and then creating law pursuant to those procedures provided, to Hart, the core of democratic legitimacy: “[D]ecisions which are the due result of those [institutional] processes must, by that fact alone, have a moral claim to acceptance.”³¹⁰ Hart and Sacks offered a view of the law as a system that existed within and between institutions of varied functions and they constructed models of each of those institutions, including legislatures.³¹¹ These models describe institutions through their different functions and often convey a greater sense of the separation of powers than existed historically.³¹²

The legal process theory contains one glaring omission. The legislature of legal process theory structures government, manages appropriations, and oversees the executive through the making of laws.³¹³ According to Hart and Sacks’s model, however, the legislature ought not facilitate public engagement other than through the electoral process. In other words, the legislature of legal process

THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (tentative ed. 1958).

305. Eskridge & Frickey, *supra* note 4, at 2032-33.

306. *Id.* at 2037-38.

307. *Id.* at 2038-40.

308. *Id.*

309. *Id.*

310. *Id.* at 2040 (quoting Henry M. Hart, Jr., *Note on Some Essentials of a Working Theory of Law (revised, n.d.)*, in PAPERS OF HENRY M. HART, JR., Box 17, Folder 1, 36 (on file with the Harvard Law School Library)).

311. 1 HART & SACKS, *supra* note 304, at 1-9.

312. *Id.* at 183-89.

313. *Id.* at 186-88.

theory does not exist to ensure participation of individuals and minorities.³¹⁴ While Hart and Sacks discuss briefly the private claims system and “private” legislation, they declare that “these trivia” fall within the province of the courts and the administration.³¹⁵ Nowhere do the models of the legislature, or the executive for that matter, mention the petition right or the participation of individuals and minorities during the lawmaking process beyond claims petitions.³¹⁶ To the contrary, they offer only some strong and largely critical language regarding lobbying.³¹⁷

2. Amending Legal Process Theory

The history revealed by this Article suggests that in addition to overseeing the structures of government through the making of laws, legislatures also must ensure the participation and representation of the public during the lawmaking process. They can do so by preserving and maintaining the petition right. More than a mere extension of the vote, the original petition process protected the ability of individuals and minorities to seek redress of their grievances before their government. As Justice Story remarked nearly two hundred years ago, the right to petition is fundamental to a republican form of government.³¹⁸ A legislature of republican design is not simply majoritarian — it offers mechanisms for participation by the majority and the minority through both the vote and the petition process. A government must protect both mechanisms in order to maintain the legitimacy of its lawmaking process.

The authors of legal process theory may have simply overlooked petitioning. Legal process theory came of age in the 1950s and 1960s after the LRA dismantled the last vestiges of the petition process.³¹⁹ *The Legal Process* teaching materials reflect an ignorance of this lost history. In particular, Hart and Sacks’s commentary on the triviality of private bills and criticism of lobbying, coupled with a total omission of the petition right, dates the piece to a time when the petition process had fallen out of favor in Congress.³²⁰ Moreover, neither Hart nor Sacks

314. Eskridge & Frickey, *supra* note 4, at 2049-51.

315. HART & SACKS, *supra* note 4, at 701.

316. See 2 HART & SACKS, *supra* note 304, at 1006-12 (discussing the use of private bills to resolve claims petitions).

317. HART & SACKS, *supra* note 4, at 804-10.

318. See 2 STORY, *supra* note 1, § 1894, at 645.

319. Eskridge & Frickey, *supra* note 4, at 2040-42.

320. See *supra* Section I.D.2.

had actually spent much time working in Congress. Their models, while sophisticated, reflected no firsthand experience with the lawmaking process. Both Hart and Sacks had worked in the executive branch, long after the New Deal vision of the administrative state as bureaucratic and technocratic regulator had supplanted any memory of the petition process.³²¹

But the omission also reflects a fundamental flaw at the heart of legal process theory. As William Eskridge and Phillip Frickey explain, legal process theory failed to address considerations of representation generally, and particularly representation of individuals and minorities in the lawmaking process:

Chapter 4 of *The Legal Process*, in fewer than fifty pages . . . , provided no more than a glimpse at direct democracy, the election of public officials, and reapportionment. For example, the chapter expresses doubts about the judicial capacity to force reapportionment, especially where a federal court order concerns a state legislature. In “Note on the Relation Between the Voters’ Choice and the Determination of Public Policy by the Legislature,” Hart and Sacks considered the responsiveness of elected officials to public preferences but did not concern themselves with the “*Carolene* question,” namely, whether discernible groups with demonstrably less power in the political process should receive any judicial protection against legislation that disadvantages them.³²²

Most controversially, the teaching materials for *The Legal Process*, crafted in the 1950s, omitted any mention of *Brown v. Board of Education*.³²³

The omission of *Brown* reflected Hart and Sacks’s commitment to a strict proceduralism that accepted any law passed by proper procedures as legitimate, no matter how unjust the law or the lawmaking procedures.³²⁴ This formalist stance came into direct conflict with the civil rights movement of the 1960s, which demanded increased participation for aggrieved minorities.³²⁵ In its refusal to provide any normative vision or constitutional requirement regarding the representation of minorities, legal process theory failed to respond to those long excluded from the very institutions that legal process theory celebrated.³²⁶

321. ERNST, *supra* note 14, at 62; Edward A. Purcell, Jr., *Henry Melvin Hart, Jr.*, in THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 255-56 (Roger K. Newman ed., 2009).

322. HART & SACKS, *supra* note 4, at cxi n.272 (citations omitted).

323. *Id.* at cvi.

324. *Id.* at cxi.

325. *Id.* at cvi-cxiii.

326. *Id.*

Hart and Sacks's careful work was soon thoroughly rejected by scholars of critical legal studies.³²⁷

Incorporating petitioning and the petition right into our models of lawmaking could remedy this fundamental flaw in legal process theory. An understanding of petitioning could reinvigorate the proceduralist vision of democracy at the heart of legal process theory, but in such a way that recognizes the importance of minority participation and protection. Frickey, Eskridge, and others have criticized the strict proceduralism of legal process theory for its lack of any normative baseline to evaluate procedures, many of which have historically excluded minorities.³²⁸ Some have argued that proceduralism is itself the flaw.³²⁹

But as political theorists Maria Paula Saffon and Nadia Urbinati describe, proceduralist democracy could provide the normative baseline necessary to distinguish good process from bad process.³³⁰ Saffon and Urbinati argue that proceduralist democracy – that is, a vision of democracy that sees proper process as paramount over proper outcomes – is the best means of protecting “equal liberty in a context of pluralism and dissent.”³³¹ Proper procedures should accommodate various and often competing visions of the good, and allow for fair and equitable resolution of those disputes through formal process.³³² But in order for proceduralism to protect equal liberty, lawmaking procedures must protect equal participation, including minority participation through mechanisms other than the majoritarian vote.³³³ Petitioning provides one such mechanism.

IV. PETITIONING WITHIN THE ADMINISTRATIVE STATE

The same philosophy governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government. Certainly the right to petition extends to all departments of the Government. – California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972).

327. William N. Eskridge & Phillip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process School Era*, 48 U. PITT. L. REV. 691, 710-17 (1987).

328. See, e.g., HART & SACKS, *supra* note 4, at cvi-cxiii.

329. *Id.*

330. Saffon & Urbinati, *supra* note 39, at 443-45.

331. *Id.* at 442.

332. *Id.*

333. *Id.*

A. *The Administrative State Within Our Constitutional Framework*

The flaws of the legal process theory have practical implications for the contemporary assault on the administrative state. Indeed, scholars have documented a recent resurgence in direct and indirect structural challenges to the administrative state, and these simple models are often at the heart of this resurgence. Gillian Metzger recently declared the administrative state as “under siege” from challenges to restrictions on presidential power over administration, administrative adjudication, and congressional delegation – all motivated by separation of powers concerns.³³⁴ Simple legal process models animate this attack. Contemporary critics invoke unreconstructed tripartite models to define “legislative,” “judicial,” and “executive” power – often without nuance or explication.³³⁵ They often express discomfort with any activities by one branch that resemble, as described by the simple tripartite model, the activities of another branch. Moreover, because critics rely on these simple models, they find so-called delegations of these powers deeply suspect, and they ground these suspicions with textual arguments. Originalist or libertarian critics often point to the Vesting Clauses of Article I and Article II, assuming that “vested” means non-delegable. Drawing upon the simple legal process models, critics presume that the public’s only check on national power is the vote. In this view, the lack of oversight by a branch with an electoral process presumably leaves agencies, boards, and commissions “unaccountable.” In these and many other ways, legal process theory has cemented a strict view of the separation of powers at odds with the history of petitioning. The following sections describe the critics and their models, and provide a case study of how incorporating petitioning into these simple models could reshape doctrine around the structure of the administrative state.

334. Metzger, *supra* note 5, at 8.

335. To provide a few examples, Justice Thomas, concurring in *Perez v. Mortgage Bankers Ass’n*, invoked a simple model of the three branches and their strict separation as “core principles of our constitutional design, essential to the protection of individual liberty.” 135 S. Ct. 1199, 1215 (2015) (Thomas, J., concurring). Justice Scalia, dissenting from *Mistretta v. United States*, accused the majority of condoning the creation of “a sort of junior-varsity Congress” in allowing for the creation of an independent sentencing commission within the judiciary. 488 U.S. 361, 427 (1989) (Scalia, J., dissenting). Judge Ginsburg, architect of a strand of libertarian administrative law, invoked the simple model to criticize abandonment of the non-delegation doctrine following the New Deal in his speech to the Cato Institute. Douglas H. Ginsburg, *On Constitutionalism*, 2002-2003 CATO S. CT. REV. 16-17.

1. *The Critics and Their Models*

The simple models of legal process theory are ubiquitous throughout the federal courts. The Supreme Court often struggles to articulate coherent theories and to create public law around these simple models. Chief Justice Roberts, a noted practitioner of legal process theory,³³⁶ recently provided an apt illustration of the difficulties of the simplistic model in practice.³³⁷ In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, Chief Justice Roberts dissented from the Court's holding that "legislature" in the Elections Clause could mean the people of Arizona, who had formed through initiative an independent redistricting commission.³³⁸ The majority turned to dictionaries to define "legislature" as "the power that makes laws."³³⁹ Chief Justice Roberts writing in dissent struggled to explain exactly why this definition was insufficient.³⁴⁰ He turned first to the seventeen other references to a state legislature in the Constitution and pointed out inconsistencies with the majority's holding. How could the people in Arizona take a legislative recess?³⁴¹ How can all of the people of Arizona have a "most numerous branch"?³⁴² When trying to define "legislature" directly, however, Chief Justice Roberts stumbled.³⁴³ The Chief Justice resorted to leaning heavily on the notion of representation, distinguishing his "legislature" from the Court's as "*the representative body* which ma[kes] the laws of the people."³⁴⁴ But what exactly he meant by "representative body" was never made clear.

Chief Justice Roberts has applied similarly simple models to support challenges to the administrative state. He took a lead role in the attack on the administrative state in his majority opinion in *King v. Burwell*—an opinion that summarily rejected any deference to administrative interpretation of the Affordable Care Act.³⁴⁵ Although Chief Justice Roberts did not articulate in great detail in

336. Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 66 (2015).

337. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015).

338. *Id.* at 2671 (holding that "the people may delegate their legislative authority over redistricting to an independent commission just as the representative body may choose to do").

339. *Id.*

340. *Id.* at 2680–81 (Roberts, C.J., dissenting).

341. *Id.* at 2681.

342. *Id.* at 2680.

343. *Id.*

344. *Id.*

345. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015).

King why deference was inappropriate for significant questions, he had signaled discomfort with administrative deference previously. His reasoning on this issue relied heavily on the simple tripartite legal process model of lawmaking. In *City of Arlington v. FCC*, Chief Justice Roberts began his dissent with the simple model: “One of the principal authors of the Constitution famously wrote that the ‘accumulation of all powers, legislative, executive, and judiciary, in the same hands, . . . may justly be pronounced the very definition of tyranny.’”³⁴⁶ Modern administrative agencies, according to Chief Justice Roberts, exercise legislative power by “promulgating regulations with the force of law,” exercise executive power by “policing compliance with those regulations,” and exercise judicial power by “adjudicating enforcement actions and imposing sanctions.”³⁴⁷ It was the absence of a strict separation of powers in administrative agencies and the “danger posed by the growing power of the administrative state” that moved Chief Justice Roberts to dissent against deference.³⁴⁸ His dissent addressed nothing about the specific constitutional arrangement of the agency at issue. Rather, it took the form of many modern critiques in framing its critique in general terms: “the claim is that the whole thrust and purpose of modern administrative government deviates from the Framers’ separation of powers design.”³⁴⁹

Although frequently cast in originalist terms, judicial discomfort with the administrative state often derives from consequentialist fears that lack of accountability will lead to intrusions into individual liberty.³⁵⁰ These concerns, however, reflect the simplistic notions of accountability and liberty emanating from the legal process model. According to these critics, the Framers formulated a strict, tripartite separation of powers to hold government accountable through the vote, thereby avoiding intrusions into liberty. As Chief Justice Roberts wrote for the Court in *Free Enterprise Fund*:

Our Constitution was adopted to enable the people to govern themselves, through their elected leaders. The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive’s control, and thus from that of the people.³⁵¹

346. 569 U.S. 290, 312 (2013) (quoting THE FEDERALIST NO. 47, at 324 (James Madison) (J. Cooke ed., 1961)).

347. *Id.* at 312-13.

348. *Id.* at 315.

349. Metzger, *supra* note 5, at 45-46 (footnote omitted).

350. Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 SUP. CT. REV. 41, 44.

351. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010).

Policing the boundaries of this tripartite framework is not simply formalism for formalism's sake; rather, any transgression leaves the government able to intrude broadly into private life by avoiding public accountability through the vote. To these critics, the primary, if not the only, accountability mechanism against intrusions into personal liberty is the power of the franchise.

The “siege” on the administrative state by the courts has been supported by attacks from the academy. Legal process's simple tripartite model of separation of powers also underlies many contemporary academic attacks on the administrative state. Libertarian critics decry that “[t]he post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution.”³⁵² Gary Lawson and others have not minced words in leading the charge to reclaim what they envision as our lost constitutional framework.³⁵³ In a prominent, albeit extreme, example, Philip Hamburger compared administrative adjudication and administrative rulemaking to oppressive practices of royal prerogative in Britain like the Star Chamber and the High Commission.³⁵⁴

Academic attacks are largely framed in originalist terms, lamenting the lack of an explicit constitutional basis for the administrative state. These critics cite the New Deal as the point when our constitutional framework deviated from original intent.³⁵⁵ Richard Epstein, for example, highlights not simply a constitutional moment, but a sharp break between “Our Two Constitutions” during the 1930s.³⁵⁶ Our original Constitution, according to Epstein, “says absolutely nothing about the existence, let alone the organization and regulation, of these administrative agencies.”³⁵⁷ The structure of these agencies “represents a conscious and complete inversion of the principle of separation of powers.”³⁵⁸ Citing the “death of constitutional government,” Gary Lawson describes a Constitution that restricted the powers of the national government to those enumerated in the constitutional text.³⁵⁹ Crucially, he locates this restriction in the Vesting Clauses' enumeration of powers as distinctly legislative, executive, and judicial, and as resting in separate spheres of government.³⁶⁰ However, according to Lawson,

352. Lawson, *supra* note 16, at 1231 (footnotes omitted).

353. *Id.*

354. See PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 135, 462 (2014).

355. RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION 1-71 (2014).

356. *Id.*

357. *Id.* at 39.

358. *Id.*

359. Lawson, *supra* note 16, at 1233.

360. *Id.* at 1237-38.

pragmatic concerns over the ability of our national government to govern have caused us to abandon our Constitution, because we tell ourselves that “Congress simply cannot do its job absent an ability to delegate power under broad general directives.”³⁶¹

Few defenders of the administrative state have confronted its critics on their own terms. Instead, they have most often pushed back on the movement’s underlying presumptions: strict constitutional construction, and a national government of limited, enumerated powers.³⁶² Of course, critics of the administrative state would respond that these defenders are guilty of choosing the administrative state over the Constitution.³⁶³ But even accepting critics’ textualist premises, the longstanding function of petitioning within the legislative process poses some fundamental challenges to their critiques.

First, petitioning complicates the simplistic notion of legislative power described by the tripartite model of separation of powers. From the Founding, the petition process within Congress resembled more closely adjudication than the legislative power envisioned by the simple tripartite model. Yet the Founding generation and the Founding Era Congress envisioned petitioning as an integral aspect of lawmaking and interpreted the vested powers to encompass petitioning. From the very first days of the young Congress, individuals submitted petitions in the form of formal documents, like complaints, and Congress institutionalized procedures to respond.³⁶⁴ By contrast to the Star Chamber, the petition process was public; petitions were read on the floor and each step in the petition process was made part of the formal record. Denial of a petition was not a “legislative act” that required bicameralism and presentment, and could be completed by the decision of a single committee.³⁶⁵ Granting a petition could result in general legislation, passed through the traditional legislative process.³⁶⁶ But it could equally result in a private bill or even the decision of an agency, board, or commission.³⁶⁷

361. *Id.* at 1241 (quoting *Mistretta v. United States*, 488 U.S. 361, 372 (1989)).

362. See, e.g., Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 667 (1984); see also Adrian Vermeule, *No, A Review of Is Administrative Law Unlawful by Philip Hamburger*, 93 TEX. L. REV. 1547 (2015).

363. Lawson, *supra* note 16, at 1241.

364. See *supra* Section I.C.

365. See *supra* notes 112-115 and accompanying text.

366. See *supra* notes 119-120 and accompanying text.

367. See, e.g., *supra* note 197 and accompanying text.

This practice did not end with the Founding generation. Petitions dominated Congress's docket until well into the twentieth century.³⁶⁸ Much of this process did not fall squarely into the tripartite model categories of legislative, executive, or judicial. Congress would investigate and find facts to resolve petitions, often involving the executive and the judiciary—both state and federal—to assist in that process.³⁶⁹ It is unclear whether this process of working out the application of a general rule to particular cases is itself a legislative or an executive act. But both Congress and the executive created exceptions and amendments to general rules in response to petitions, much like the administrative state does today.³⁷⁰

In related fashion, excavating the institution of petitioning problematizes a different aspect of the strict separation of powers described by the tripartite model: that each branch operates in isolation. From its earliest days, Congress drew on the assistance of the other branches to process petitions, both to support Congress in providing due process to petitioners and to run the petition process independently.³⁷¹ Also from the beginning, Congress expressed concerns over its own internal capacity to provide petitioners due process.³⁷² In order to facilitate and protect the right to petition, Congress constructed through statute innovative forms of governance that could afford petitioners due process and could scale to meet the demands of a growing population.³⁷³ One of the earliest examples arose from the First Congress with the statute that created the Patent Board, the precursor to the Patent and Trade Office and one of the earliest administrative commissions.³⁷⁴ Petitions for patents had historically been resolved through the passage of private bills, for which the Constitution required bicameralism and presentment.³⁷⁵ With ratification still a recent memory, the Patent Board resolved petitions for intellectual property without private bills. Rather, the Board could issue a patent upon a simple majority vote of the three-member Board and the signature of the President.³⁷⁶ Congress saw the creation of boards, commissions, agencies, and courts to process petitions as necessary to meet its obligation to protect the petition right.

368. See *supra* Figures 3 and 4.

369. See *supra* Section II.A.

370. Again, the similarities here between the petition process and that of the dynamics of equity bear noting. See *supra* note 285 and accompanying text.

371. See *supra* Section II.B.

372. See *supra* Part II.

373. See *supra* Section I.B.

374. See *supra* notes 117-120 and accompanying text.

375. See *supra* notes 117-120 and accompanying text.

376. See *supra* Section II.C.

From the Founding period onward, members of Congress rarely raised concerns over separation of powers in creating these innovative forms of governance.³⁷⁷ Instead, they expressed an obligation to protect the petition process, a process seen as fundamental to lawmaking, and the right to petition, a right seen as fundamental to liberty. The petition process, like much of the institutional history of the eighteenth and nineteenth centuries, therefore complicates the simple model of separation of powers that Lawson has inferred from the Vesting Clauses.³⁷⁸ Lawson's interpretation of the Vesting Clauses, even under the strictest textualist and originalist terms, is likely much too narrow.

Last, excavating the institution of petitioning problematizes the simple notion of accountability derived from the tripartite model. Congress saw petitioning as an integral part of the lawmaking process because it recognized the necessity of engaging with the public directly during lawmaking.³⁷⁹ As outlined above, because political power was not a prerequisite to participation in the petition process, petitioning provided a mechanism for individual and minority participation. Individuals and minorities could petition, even if they could never persuade or even garner the attention of an electoral majority. In this way, the petition process served as a complement to the purely majoritarian mechanism of the vote.³⁸⁰ Petitioner grievances included a range of harms incurred by government policy, natural disaster, or private deprivation.³⁸¹ Through the petition process, Congress grappled with the complexities of general laws and the unintended consequences of applying general laws to a large and heterogeneous public.³⁸² Libertarian critiques of the administrative state overlook petitioning and the important function it served as a mechanism of representation.³⁸³ These critics are less reliant on textual arguments about the Vesting Clauses, but they nevertheless argue that the administrative state is a headless extra-Constitutional leviathan, wholly unaccountable to the people through the electoral process.³⁸⁴

These concerns about a deficit of electoral accountability inspire judicial invocations of the non-delegation doctrine. For example, Justice Kennedy recently noted the "unique constitutional position" of administrative agencies in his call

377. See *supra* note 291 and accompanying text.

378. See Lawson, *supra* note 16, at 1238.

379. See *supra* notes 67-69 and accompanying text.

380. See *supra* note 290 and accompanying text.

381. See *supra* Section II.A.

382. See *supra* Section II.B.

383. See Metzger, *supra* note 5 (summarizing the libertarian critique); see also Sunstein & Vermeule, *supra* note 9 (same).

384. See Ginsburg, *supra* note 335, at 16-17.

to limit agency discretion, because “[i]f agencies were permitted unbridled discretion, their actions might violate important constitutional principles of separations of powers and checks and balances.”³⁸⁵ Libertarians see the non-delegation doctrine as an important check on administrative power because the electorally accountable Congress must limit the agencies’ discretion with an intelligible principle.³⁸⁶ However, such concerns rest on the presupposition that voting is the only mechanism of representation within our republican form of government. Understanding the petition process as a meaningful mechanism of representation for individuals and minorities on par with the vote could provide an alternative means of accountability for the agencies. In particular, the Petition Clause’s quasi-procedural due process right could be used to hold agencies accountable by forcing them to engage with the public, consider input, and respond. It is possible that the procedural due process requirements of the petition right could provide sufficient mechanisms of accountability to calm libertarian concerns. For example, Justice Kennedy’s concurrence in *Fox* went on to offer the procedural protections of the APA as a partial solution to his concerns over agency accountability and non-delegation.³⁸⁷

The administrative state is “under siege” by direct and indirect structural challenges in large part because of concerns over its constitutional status. Locating and identifying the origins of the administrative state in the petition process can begin to situate, on firmer historical and constitutional footing, the administrative state within our constitutional framework. By understanding the function of the petition process and the petition right, critics could begin to move away from the overly simplistic tripartite models of legal process theory. From the Founding, petitioning has performed an integral function within our lawmaking process, both in facilitating the participation of individuals and minorities in lawmaking and providing an important mechanism of representation to supplement the vote. Congress saw building the infrastructure of the administrative state as necessary to provide petitioners due process and to protect the right to petition. As an outgrowth of the petition process, the administrative state now performs the important functions of the petition process.³⁸⁸

385. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 536 (2008) (Kennedy, J., concurring).

386. Sunstein & Vermeule, *supra* note 9, at 415.

387. *Fox*, 556 U.S. at 537 (“[T]he APA was a ‘working compromise, in which broad delegations of discretion were tolerated as long as they were checked by extensive procedural safeguards.’” (quoting Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1248 (1982))).

388. It bears noting that the Supreme Court has already recognized that the petition right extends to administrative agencies. *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). This recognition, however, was not grounded in the historical relationship between

2. A Case Study in Correcting the Models: The Legislative Veto

In the well-known case of *INS v. Chadha*, the Supreme Court held that Section 244(c)(2) of the Immigration and Naturalization Act, a so-called “legislative veto” provision, was unconstitutional.³⁸⁹ The Immigration and Naturalization Act set a general rule that all foreign nationals would be deported for having “remained in the United States for a longer time than permitted.”³⁹⁰ It also authorized the Attorney General to make exceptions to the general rule upon petition by an individual for a deportation suspension.³⁹¹ Without further action by Congress, the Attorney General’s grant of a petition for deportation suspension was final.³⁹² Section 244(c)(2) of the Act, however, required the Attorney General to report all petitions granted to the House of Representatives, which could overrule or “veto” the Attorney General’s grant of a petition through the passage of a resolution.³⁹³

The Supreme Court struck down this arrangement, grounding its holding in a putatively originalist understanding of the separation of powers. Chief Justice Burger, writing for the Court, held first that the legislative veto provision was an Article I legislative act in that “Congress has *acted* and its action has altered Chadha’s status.”³⁹⁴ Drawing upon an 1897 Senate Committee Report that documented longstanding congressional practice, the Court defined an Article I legislative act as an act that “contain[s] matter which is properly to be regarded as legislative in its character and effect.”³⁹⁵ Further, the Court held that the Constitution includes an enumerated and exclusive list of four contexts where Congress may engage in a legislative act without bicameralism and presentment: the initiation of impeachments, conducting a trial following an impeachment, the approval or disapproval of presidential appointments, and the ratification of treaties.³⁹⁶ It is unclear from the Court’s opinion how it determined that this list was

the petition process and the administrative state. *Id.* At the time of these decisions, this history was not before the Court. The full contours of the extension of the Petition Clause to the administrative state have yet to be articulated.

389. *INS v. Chadha*, 462 U.S. 919, 928 (1983).

390. *Id.* at 923 (citing 8 U.S.C. § 1252(b)).

391. *Id.* at 923-924 (citing 8 U.S.C. § 1254(a)(1)).

392. *Id.* at 925.

393. *Id.*

394. *Id.* at 952.

395. *Id.* (citing S. REP. NO. 1335, at 8 (1897)).

396. *Id.* at 955.

exclusive and not simply illustrative.³⁹⁷ But because a legislative veto of the grant of a petition was nowhere enumerated, the Court held Section 244(c)(2) unconstitutional.³⁹⁸

Interestingly, in reaching its holding that the veto was a legislative act, the Court recognized that the petition process established by the Immigration and Naturalization Act was once part of the “private bill procedure” or petition process.³⁹⁹ “After long experience with the clumsy, time-consuming private bill procedure, Congress made a deliberate choice to delegate to the Executive Branch, and specifically to the Attorney General, the authority to allow deportable aliens to remain in this country in certain specified circumstances.”⁴⁰⁰ But any recognition of the dynamics of the petition process stopped there. The Court concluded that the delegation of the petition process was itself a legislative act, and therefore Congress could not amend that delegation without another legislative act.⁴⁰¹ The Court disregarded that Congress’s delegation of the petition process was itself conditioned with the veto.⁴⁰² Justice Powell’s concurrence fared no better in arguing that the legislative veto was unconstitutional as a usurpation of judicial power. His opinion protested that, because Congress had made specific determinations regarding six individual cases, “[i]t thus undertook the type of decision that traditionally has been left to other branches.”⁴⁰³

Examining *INS v. Chadha* through the lens of the petition process would direct a different outcome. Like many other statutes before it, the Immigration and Naturalization Act provided a mechanism to process petitions on a particular subject: here, petitions for the suspension of deportation. This process was quite consistent with historical practice. From the Founding, Congress often established rules of general applicability, like that of the general deportation rule, and then allowed for exceptions to that general rule through the petition process.⁴⁰⁴ Significantly, a petition denial never required Congress to pass a bill — a so-called legislative act. It was only the grant of petitions that often, but not always,⁴⁰⁵

397. *Id.*

398. *Id.* at 959.

399. *Id.* at 954.

400. *Id.*

401. *Id.* at 955 (“Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked.”).

402. *Id.*

403. *Id.* at 965 (Powell, J., concurring).

404. *See supra* Part I.

405. Congress often directed executive behavior through simple resolution. *See Fisher, supra* note 44, at 277.

required the passage of a bill, either public or private.⁴⁰⁶ Committees at the Founding often declined petitions without passing any bill or even a resolution, and they often declined to act on favorable reports from the executive.⁴⁰⁷

Founding Era practice thus undermines the Court's reasoning in *Chadha* based on the simplistic conception of the separation of powers. The denial of a petition was either not a legislative act or it was a legislative act that did not require bicameralism and presentment.⁴⁰⁸ Congress oversaw the work of the executive through the petition process and the Legislative Reorganization Act only strengthened this oversight function.⁴⁰⁹ The Court should not have held the legislative veto in this context unconstitutional.

Congressional practice following *Chadha* undermined its holding. The legislative veto, a mechanism in place since the 1930s in thousands of statutes, apparently outlived the Supreme Court's handiwork in *Chadha*. In 1993, Louis Fisher reported that Congress had enacted more than 200 legislative vetoes since the Court held the practice unconstitutional.⁴¹⁰ *Chadha* also drove the legislative veto underground into "informal and nonstatutory understandings" between congressional committees and executive agencies.⁴¹¹ As an integral component of the petition process and of Congress's ability to oversee executive involvement in that process, the legislative veto seems to have outlived even the Supreme Court's best efforts. This persistence can be understood as the extension of a historical requirement of congressional oversight to ensure petition rights in the participatory state.

B. Participatory Administrative Law

Beyond defending the administrative state against structural challenges by constitutional critics, a deeper understanding of the participatory state would also lead to amendments to current administrative law doctrine. The cramped version of the horizontal separation of powers embraced by legal process theory and adopted by contemporary originalists has not only led to structural challenges, it has also influenced important administrative law precedents. This section considers a line of doctrine – administrative due process – that would benefit from incorporating notions of the participatory state.

406. See *supra* Part I.

407. See *supra* Part I.

408. See *supra* Part I.

409. See *supra* Part I.B.

410. Fisher, *supra* note 44, at 277.

411. *Id.* at 288.

As described in Part I, the First Congress institutionalized a formal petition process within its parliamentary procedures and its recordkeeping. Congress then oversaw implementation of the petition process within the courts and within agencies, boards, and commissions. In ratifying the Petition Clause, the Founders codified formal, public, access to the lawmaking process.⁴¹² The petition process originated in Congress, but Congress has over time expanded the process by statute to the executive and judicial branches. For the agencies, the APA codified these practices into its formal procedural protections that included an administrative petition process and the requirement of notice and comment rulemaking.⁴¹³ In this way, the APA guaranteed and specified the petition right in the same way that the Federal Rules of Civil Procedure guaranteed procedural due process.

Without naming the petition right explicitly, administrative law doctrine has long recognized the quasi-procedural due process right of the kind promised by the Petition Clause. For example, in *Morgan v. United States (Morgan II)*,⁴¹⁴ the Supreme Court mandated that “administrative proceedings of quasi-judicial character” satisfy “the fundamental requirements of fairness” that structure judicial proceedings.⁴¹⁵ In *Morgan II*, that “fundamental fairness” required a hearing that comported with traditional notions of due process.⁴¹⁶ Chief Justice Hughes, writing for the Court, did not root the source of the “fundamental fairness” requirement in constitutional text—the Due Process Clause or otherwise. Rather, the Court rested its holding in the structure of the administrative arrangement and the need to preserve public trust in its processes.⁴¹⁷ An understanding of petitioning, from which many of these administrative processes grew, justifies the concerns over fairness animating the Court in *Morgan II*. Moreover, the Petition Clause could provide additional structure and direction to administrative due process doctrine.

⁴¹². See McKinley, *supra* note 27, at 1147–53.

⁴¹³. 5 U.S.C. §§ 551–559 (2012).

⁴¹⁴. *Morgan v. United States (Morgan II)*, 304 U.S. 1 (1938). Issued on April 25, 1938, *Morgan II* formed part of the legal process trifecta that included *Carolene Products*, of footnote four fame, and *Erie*. See *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). The Court issued all three opinions on the same day. Notably, each aimed to ensure minority protection through structure and proceduralism: *Carolene Products* through judicial oversight of the political process; *Erie* through the protection of federalism; and *Morgan II* through the protection of individuals petitioning the administrative state.

⁴¹⁵. *Morgan II*, 304 U.S. at 14–19.

⁴¹⁶. *Id.*

⁴¹⁷. *Id.* at 14–15.

Over the last fifty years, concerns over “fundamental fairness” have driven a “due process revolution,” as the courts have required ever increasing procedural protections for those who engage with the administrative state.⁴¹⁸ Unlike the Court’s earlier foray into “fundamental fairness,” the recent due process revolution rests squarely in the Due Process Clauses of the Fifth and Fourteenth Amendments.⁴¹⁹ In a series of cases in the 1970s, litigated largely in the context of public benefits, the Court developed a test for administrative due process that embodied a utilitarianism foreign to the notion of procedural due process.⁴²⁰ The *Mathews v. Eldridge* test involves complex balancing between the interest of the petitioner, the value of additional procedure, and the interest of the government—including the public cost of implementing the additional procedure.⁴²¹ Not surprisingly, judicial review of administrative procedure under the test has been “intrusive,” as *Eldridge* placed courts in the role of second-guessing transsubstantive administrative procedure and determining proper procedures piecemeal on a case-by-case cost-benefit analysis.⁴²²

One possible explanation for the failures of the *Eldridge* test is its development within the context of public benefits, an area traditionally governed by the petition process.⁴²³ As Parts I and II described, from the Founding, individuals requested and received public benefits, usually pensions, by petitioning Congress and the executive. The petition process’s guarantee of formal consideration and response was not rooted in Due Process Clause concerns over deprivation of life, liberty, or property, but rather in the Petition Clause and its preservation of the right to a fair, equal, and public petition process.⁴²⁴ The “fundamental fairness” of *Morgan II* more closely captures the petition right than does *Eldridge*’s concern over benefits as property.⁴²⁵

As it stands, the *Eldridge* test fails to fulfill the values reflected in the petition process and suffers from fundamental internal flaws. As identified by Mashaw,

418. Jerry L. Mashaw, *The Supreme Court’s Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 28 n.1 (1976) (collecting cases).

419. *Id.*

420. *Id.* at 47 & n.61.

421. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

422. Mashaw, *supra* note 418, at 29-30.

423. See *supra* Section II.B.

424. McKinley, *supra* note 27, at 1182-85.

425. *Morgan v. United States (Morgan II)*, 304 U.S. 1, 19-20 (1938). Cf. Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 742 (1964) (analyzing the expansion of property-like rights in public benefits).

the value of a particular public benefit or its utility to a particular individual cannot be determined on a case-by-case basis.⁴²⁶ Forcing a petition right into the text of the Fifth and Fourteenth Amendments has produced the awkward result that public benefits—in *Eldridge*, social security payments—are property.⁴²⁷ The *Eldridge* test then asks the court to value that property for the petitioner in order to determine what process is due.⁴²⁸ As a result, the *Eldridge* test places the court in the position of policymaker, as it must determine the optimal design of individual administrative programs—balancing the cost of procedures against the likelihood that those procedures would benefit the petitioner.⁴²⁹

These flaws reflect the shortcomings of an administrative due process right grounded solely in utilitarian justification. Because *Eldridge* leaves courts with only one value to consider—i.e., overall welfare maximization—the court must calculate the minute tradeoffs of particular policies in each particular case. An administrative due process that considered values other than general welfare might result in a role for the courts that is less intrusive into policy details, but more protective of petitioners' rights. Such reform would also answer criticism that the *Eldridge* test fails to consider many of the values traditionally found in procedural due process, like equality, transparency, predictability, rationality, and participation.⁴³⁰

An administrative due process right rooted in the Petition Clause would require courts to review administrative procedure for equality, formality, and transparency only, without consideration of whether the case involved a property interest of a sufficient value. In this way, administrative due process would more closely resemble Mashaw's theory of dignitary due process than the utilitarian balancing of *Eldridge*.⁴³¹ Mashaw's theory of dignitary due process envisions administrative due process as distinct from any substantive interest, focusing instead on the protection of participants' dignity through proper procedures.⁴³² Although he does not make the connection wholly explicit, Mashaw frames dignity in terms of the ability to participate equally in lawmaking.⁴³³ Like Mashaw's dignitary due process, the petition right does not promise or protect a particular

426. Mashaw, *supra* note 418, at 47-49.

427. *Mathews v. Eldridge*, 424 U.S. 319, 333-35 (1976).

428. *Id.*

429. *Id.*

430. See Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 899-904 (1981).

431. *Id.*

432. *Id.* at 922-25.

433. *Id.* at 896, 922.

utilitarian balance, but rather safeguards equality, formality, and transparency in participating in the lawmaking process.⁴³⁴

Consider, by way of illustration, Mashaw's description of the expressive value of voting, as distinguished from its miniscule utilitarian value:

Disenfranchisement in a general election carries with it a loss of political power so minute that cold calculation should convince us that our personal franchise is in practical, political terms valueless. Yet something — the affront to our self-image as citizens, the sense of unfairness from exclusion — has led some of us to pursue this “valueless” privilege to participate in political decisionmaking through every available court. Involvement in the process of political decisionmaking, via the exercise of a right to voter participation, seems to be valued for its own sake. The same may well be true for other processes.⁴³⁵

The same may well be true for petitioning. From the Founding, the petition right offered a mechanism of participation for individuals and minorities in complement to the majoritarian mechanism of the vote. Like voting, the petition right is valued for its own sake. Congress built portions of the administrative state specifically to facilitate this mechanism of participation and to protect the right to petition.⁴³⁶ Developing an administrative due process right rooted in the Petition Clause would safeguard the courts' role in reviewing administrative due process, but limit that role to the consideration of the values intrinsic to the petition right — that is, public, formal, and equal process.

C. *Objections*

This Section addresses two possible objections to recognizing the administrative state as a participatory state and amending administrative law in light of the petition right. First, proponents of libertarian administrative law might object that they are most concerned with the administrative state's regulation of markets beyond the authority granted in the Commerce Clause. The Petition Clause, they could argue, cannot resolve this concern. The second objection pertains to agency rulemaking as opposed to agency adjudication. Does the participatory state theory justify lawmaking outside of the legislature without abiding by the strictures of Article I, Section 7?

434. *Id.* at 899-904; *see also* McKinley, *supra* note 27, at 1182-85.

435. Mashaw, *supra* note 430, at 888.

436. *See supra* Part II.

With respect to the first objection, proponents of libertarian administrative law are in large part concerned with the regulation of markets by the administrative state.⁴³⁷ Those concerned with communitarian redistribution writ large might take little solace in viewing the administrative state as protecting the right to petition. Moreover, the Petition Clause alone cannot resolve concerns over Congress exceeding its power under the Commerce Clause. As described in Part II, Congress entertained petitions related to the regulation of Commerce, but petitioning alone could not expand the government's jurisdiction.⁴³⁸ In fact, Congress often dismissed petitions for grievances outside of its enumerated powers to redress.⁴³⁹ Future research could explore the relationship between petitioning and Commerce Clause doctrine.

However, even if the Petition Clause does not calm concerns over the growing regulation of commerce, it at least helps separate the constitutional debate from a more general ideological debate over neoliberalism. It is helpful to clarify that the libertarians' concern is not aimed at "big government" in the abstract, which we now know includes structures built to protect rights and facilitate participation of individuals and minorities. Rather, the concerns are rooted in how big government operates. An understanding of petitioning could help refine this debate. For example, concerns over redistribution being foreign to our founding culture are simply false. The petition process served from the Founding as a mechanism to facilitate the redistribution of wealth and property to the disadvantaged, most notably veterans and victims of disasters.⁴⁴⁰ Social welfare programs are not evidence of a colonial communist culture, but are part and parcel of our republican form of government. If proponents of libertarian administrative law nevertheless remain concerned about the constitutional question of the scope of the Commerce Clause power, then we ought to focus the debate there.

With respect to the second objection, questions remain regarding whether the petition process underlies not only the structures of administrative adjudication, but also legislative rulemaking in the absence of bicameralism and presentment. Historically, the petition process was housed entirely within legislatures, and Congress created boards and commissions to resolve petitions elsewhere. Congress often resolved petitions by passing laws through the formal Article I,

437. See Lawson, *supra* note 16, at 1231; Sunstein & Vermeule, *supra* note 9, at 393.

438. See *supra* Section II.C.

439. DOCUMENTARY HISTORY VOL. 8, *supra* note 84, at xv.

440. See DAUBER, *supra* note 20, at 17 ("Requests for government relief of loss began in the earliest days of the American republic. At first, requests came from individual citizens . . . in the form of a memorial or petition.")

Section 7 process. But the fact remains that Congress constructed so-called independent agencies to facilitate the petition process in the earliest days of the Republic.

The petition process at the very least reveals complexities in the lawmaking process that should dictate which legislative actions are subject to the strictures of Article I, Section 7, and which are not. Although Congress did resolve petitions through the passage of legislation, those laws were often private bills. Private bills occupy a unique status in the lawmaking process. The historical record is replete with examples of Congress viewing private bills as something not truly legislative and potentially exempted from the requirements of bicameralism and presentment. Congress was quick to delegate jurisdiction over petitions calling for resolution by private bill, and members repeatedly decried the private bill process as something not meriting the attention of Congress.⁴⁴¹

Can the private bill process, a process that by definition raises the rights of specific parties, provide any support for agencies' general rulemaking powers? Perhaps because we refer to private bills as "bills" and not judgments, we often create too strict a divide between common law regulation and legislative regulation. The petition process, like the common law, created precedent that Congress drew on in resolving future petitions. In this way, private bills, like judicial opinions, created general rules. In many ways, private bills prefigured the approach of our agencies as they adjudicate particular cases and formulate general rules over time.

CONCLUSION

Even for those who do not subscribe to the vision of a "Constitution in Exile," a sense of discomfort with the "amorphous" constitutional status of the administrative state can still be cause for concern—especially when that discomfort, as it often does, operates in the background of our doctrine. Naming the petition process and understanding its integral role within the architecture of the administrative state could alleviate some of the discomfort with administrative lawmaking. Unlike institutional histories and arguments from intellectual and statutory consensus, petitioning offers the loudest critics the exact salve they seek—constitutional text. At the very least, the Petition Clause could focus and clarify a debate that has raged for decades, often unmoored from the history of the practices that have constituted our government from the Founding.

In responding to critics of the administrative state, we might also develop a deeper and more refined understanding of our lawmaking institutions. To the extent that the fathers of legal process theory discussed representation at all, Hart

441. See *supra* Sections II.B.1, II.B.2.

and Sacks confined themselves to a narrow exploration of the majoritarian mechanisms of the vote and of direct democracy. A conversation about the representation and participation of individuals and minorities within the lawmaking process is long overdue. Relegating the protection of minorities to the rights side of the Constitution ignores the complex structures by which individuals and minorities wield power and participate in making the laws that govern them. Empowerment and participation preserve a democratic value distinct from the substantive outcomes that preoccupy rights theorists. Recognizing this important value would strengthen our lawmaking models.

There is a role for the field of legislation in reforming these models. In contrast to most other administrative histories, this Article has told the story of the administrative state from the perspective of Congress. For scholars of government structure – even those concerned with the rights of minorities – Congress has a greater role to play in the legal academy. Scholars of legislation can ensure that role is recognized. Legislation carries the legacy of its predecessor, legal process theory, and the field of legislation has evolved over the years with an explicit recognition and embrace of those intellectual roots. Scholars of legislation must ensure that the theory does not again neglect the representation of minorities. Recognition of the petition process and the vitality of the participatory state could provide an early step in remedying this neglect.

METHODS APPENDIX

This Article draws upon the Congressional Petitions Database developed by our research team at the North American Petitions Project in the Harvard Department of Government. The Congressional Petitions Database, which I have worked with a team to assemble, is the first comprehensive database of petitions submitted to the federal Congress. The Database is an amalgam of two datasets drawn from the *Congressional Journals* and the *Congressional Record* respectively to create a comprehensive database of all petitions introduced to the Congress from the Founding until 1950 for the Senate and from the Founding until 2013 for the House of Representatives. The first dataset is drawn from the *Journals* and consists of all petitions introduced to both chambers from the Founding in 1789 until 1875. The second dataset is drawn from the *Record* and consists of all petitions introduced to the Senate from 1882 until 1948 and all petitions introduced to the House of Representatives from 1882 until 2013. Because the methods used to build each portion of the Database vary, the following describes each dataset in turn before describing limitations of the Database as a whole. Finally, this Appendix briefly touches upon the archival materials from the early Congresses drawn upon by the Article and, in some instances, published here for the first time.

A. The Journals Dataset

To create this dataset, we used a digitized version of the *Congressional Journals*, the formal published record of the daily proceedings of Congress that are produced by the clerk's office of both chambers. The *Journals* consist of a summary of the day's proceedings in Congress, including bill introductions and other forms of legislative action. Although the *Journals* have been kept continuously since the Founding to the present, a digitized version of the *Journals* is currently available from the Founding only until 1875. As a consequence, this portion of the Database tracks petition introductions for the first one hundred years or the first approximately fifty Congresses.

By excavating the legislative record of each chamber, we were able to overcome the need to aggregate an immense amount of archival materials necessary to fully capture the volume of petitioning activity in Congress over time. These archival materials are often not available in digitized or machine-readable format and some have been lost to fire or other disaster. However, because the petition process in Congress required each petition introduction to include a full reading of the petition on the floor of each chamber, a summary of each petition and

subsequent action on that petition became part of the *Journals*.⁴⁴² Summary petition introductions from the *Journals* generally included the names of the primary petitioners, the residence of the petitioner, the prayer of the petition, and the initial disposition of the petition. A petition introduction extracted from the *Journal* of the First Congress illustrates:

A petition of the tradesmen, manufacturers, and others, of the town of Baltimore, in the State of Maryland, whose names are thereunto subscribed, was presented to the House and read, stating certain matters, and praying an imposition of such duties on all foreign articles which can be made in America, as will give a just and decided preference to the labors of the petitioners, and that there may be granted to them, in common with the other manufacturers and mechanics of the United States, such relief as in the wisdom of Congress may appear proper.

Ordered, That the said petition be referred to the Committee of the Whole House on the State of the Union.⁴⁴³

Summary petition introductions from 1789 until 1875 exceeded 145,000 in number, which made hand-coding these introductions unmanageable. Instead, we built and implemented an algorithm that both locates and extracts petition introductions from the *Journals*. We developed a methodology for the algorithm that relied upon supervised learning. Over a two-year period, a team of human coders (undergraduate students, law students, and Ph.D. students) located and extracted petition introductions from over two hundred randomly selected days from the *Journals*. The human coders would also code for each petition a series of fields from petitioner name, demographics, geography, referrals, subsequent legislative procedures, and petition topics. Oftentimes at least two human coders coded each randomly selected day with a third human coder functioning as a tiebreaker. From these hand-coded data, we developed a training dataset that instructed the petitions algorithm to better locate petition introductions and to identify information within those petition introductions. Eventually, we refined the algorithm to identify more petition introductions in the *Journals* than those identified by the human coders and to create an even more accurate dataset than that created by hand.

442. We initially began work on our Database with a combination of the *Annals of Congress* and the *Register of Debates*. However, we soon discovered that these sources consistently resulted in an undercount of petition introductions. Even our initial tests on the *Journals* resulted in a petition introduction count of two to three times the number documented in the *Annals* and the *Register*.

443. H.R. JOURNAL, 1st Cong., 1st Sess. 12 (Apr. 11, 1789).

We also refined the algorithm to classify each petition into a particular topic. To develop this aspect of the algorithm, we relied on our supervised learning approach by having human coders classify petitions into a set of thirteen mutually exclusive categories.⁴⁴⁴ The human coders classified 1,650 petitions overall. We then trained an ensemble classifier on the hand-coded petitions and used the resulting model to predict the topics for the remaining petitions in the Database (more than 100,000 count) for the House of Representatives only.⁴⁴⁵ We predicted these topics by using the text of each petition description from the *Journals*. For each petition description, we removed the numbers and punctuation, put all characters in lower case, removed stopwords, stemmed the document, and stripped any remaining whitespace. With the cleaned petition description, we then created a document term matrix for each petition. We removed infrequently used words and then normalized the word frequencies.

Using the document term matrix, we then trained the ensemble classifier on the hand-coded petitions and used the results to predict the category for the not-yet coded petitions. The ensemble classifier consists of two different classifiers: a random forest model and a support vector model.⁴⁴⁶ To classify each petition, each classifier yields a predicted probability that a petition falls into a specific category. We averaged the results from each classifier to yield a single predicted probability for each petition.

To create exclusive categories of petitions, categorizing each petition into a single one of the thirteen possible categories, we performed thirteen independent binary classifications. For example, for the category “INFRASTRUCTURE / TRANSPORTATION,” we placed all coded petitions that fell in this category into the “on-topic” category and all other petitions into the “off-topic” category. We then ran the classifiers on the training set of petitions and recovered predicted probabilities for the full set of petitions in the sample. We repeated this process for each of the thirteen categories. As a result, for each petition we actually estimated the predicted probability that it was on the topic of each of the thirteen categories. To make our prediction, we placed the petition into the category with the highest predicted probability.

The classification procedure performed well. To test the accuracy of classification using this method, we initially trained the model on 1,200 of the 1,650

444. The categories are: “INFRASTRUCTURE / TRANSPORTATION,” “MILITARY / NAVY,” “PENSIONS,” “TARIFF / TAX,” “PUBLIC LANDS / TERRITORIES,” “CLAIMS,” “EXPENDITURES,” “FINANCE / BANKING / ECONOMY,” “CIVIL RIGHTS / SLAVERY,” “FOREIGN AFFAIRS,” “JUDICIARY,” “LABOR,” and “REGULATION.”

445. In future development of the Database, we will undertake a similar analysis for the Senate.

446. For details on the models, see TREVOR HASTIE ET AL., *THE ELEMENTS OF STATISTICAL LEARNING: DATA MINING, INFERENCE, AND PREDICTION* (2d ed. 2009).

total coded petitions, and then we made predictions on the remaining 450 petitions. By comparing our prediction to the petitions coded by our human coders, we assessed the performance of the classification procedure implemented. Across all categories, the classifier placed the petition in the correct category 84% of the time.

In summary, the *Journals* dataset yielded 145,892 petition introductions for both chambers during the eighty-six-year period from the Founding in 1789 until 1875, when the digitized version of the *Journals* ends.

B. *The Record Dataset*

To create this dataset, we used a digitized version of the *Congressional Record*, the formal published record of the in-depth daily proceedings of Congress. The *Record* in general includes far more in-depth information on the daily legislative activity in Congress than the *Journals*, including verbatim transcripts of speeches and debates. The *Record* began publication in 1873. However, the first few years of the *Record* do not keep a thorough enough record to draw upon for petition introductions. To avoid systematically undercounting petitions from this period, the Congressional Petitions Database limits use of this dataset until after 1883. We have currently located and extracted petitions from the digitized version of the record from 1883 until 1948 for the Senate and from 1883 until 2013 for the House of Representatives.⁴⁴⁷

For this dataset, we again exploited the procedural step in the petition process. Petition introductions required reading the petition on the floor of each chamber, thereby making the petition introduction part of the formal record of Congress. Similar to the *Journals*, the *Record* recorded summaries of petition introductions that included the name of the primary petitioners, their residence, a summary of the prayer of the petition, and initial petition disposition. Petition introductions in the *Record* commonly appear as a series of introductions clustered together in a many sequential paragraphs. A petition introduction section extracted from the *Record* of the 68th Congress illustrates:

Mr. JONES of Washington presented a petition of sundry citizens of Ballard, Wash., praying for the passage of legislation granting adequate compensation to postal employees, which was referred to the Committee on Post Offices and Post Roads.

He also presented a petition of sundry citizens of Seattle, Wash., praying for the passage of House bill 4123, for the reclassification of postal

447. Future development of the Database will complete petition location and extraction for the Senate until 2013.

salaries, which was referred to the Committee on Post Offices and Post Roads.

He also presented a petition of sundry citizens of Walla Walla, Wash., praying for the adoption of the so-called Mellon tax-reduction plan, which was referred to the Committee on Finance.

He also presented a petition of sundry citizens of Walla Walla, Wash., praying an amendment to the Constitution regulating child labor, which was referred to the Committee on Judiciary.

Mr. LADD presented the petition of Zach Shackman and 77 other citizens of Berlin, N. Dak., praying for an increased tariff on wheat and repeal of the drawback and milling-in-bond provision of the so-called Fordney-McCumber Tariff Act, which was referred to the Committee on Finance.

He also presented the petition of Ed. Mack and 75 other citizens of Lewistown, Mont., praying for increased tariff duties on wheat, flour, flax, and linseed oil, which was referred to the Committee on Finance.⁴⁴⁸

We developed an independent algorithm to locate and extract petition introductions in the *Record*. The algorithm first identified the section in the *Record* that contained petition introductions for that day. It would then identify the first petition introduction recorded in that section and then it would cycle through the remaining petitions.⁴⁴⁹ It would continue to cycle through the remaining petitions until no further petition introductions remained. For each petition introduction, the algorithm extracted the name of the primary petitioner, the text description of the prayer of the petition, and the initial petition disposition by using regular expressions. The initial petition disposition would extract the particular legislative action, most commonly a referral or tabling, and would extract the name of the entity to whom the petition was referred, either a committee or the executive. The algorithm also extracted geographic data on the petition using a combination of natural language processing and regular expressions.

In summary, the *Journals* dataset yielded 348,116 petition introductions for both chambers during the period from 1883 until 1948. The *Journals* dataset also yielded 16,010 petition introductions for the House of Representatives from 1949 until 2013 for a total of 364,126 petition introductions.

448. 65 CONG. REC. 1549 (1924).

449. This dataset also benefitted from the additional procedural requirement that implemented a unique numbering system for all petitions submitted to the House of Representatives after 1920.

C. *Limitations*

Together, the *Journals* and *Record* datasets constitute the Congressional Petitions Database, the largest and most comprehensive database of petitioning activity in Congress ever created. The Database yields 510,018 petition introductions and documents over two hundred years of legislative activity. Although there is much here to be celebrated, there are also some notable limitations that bear mention.

First, the Database lacks panel data for the eight-year period from 1875 until 1883. This postbellum period could prove crucial for studying in-depth the petitioning activity around the Reconstruction Amendments and other advocacy efforts following the Civil War. However, as described, digitized versions of congressional records for this period are lacking. The digitized version of the *Journals* ends in 1875 and the *Record* does not begin dependably until 1883. Although digital versions of the *Annals* and the *Register* are likely available for this period, we found these sources systematically undercount petition introductions by comparison to the *Journals*. We aim to fill this gap in our panel data either by locating an alternative, more dependable source for tracking legislative activity for this period or by locating a digitized version of the *Journals* that extends past 1875. Until then, however, this Article omits these data entirely from its analysis.

Second, the Congressional Petitions Database currently combines datasets developed with two distinct methodologies, each developed to differing levels of rigor. In particular, we developed the *Journals* dataset after creating the *Record* dataset and have improved our methodology over time. In constructing the *Journals* dataset, for example, we used a supervised learning approach that refined our algorithm with two years of hand-coded data. Although we developed and refined the algorithm for the *Record* database, we did not use a supervised learning approach.

Third, we began our project on the Congressional Petitions Database on the digitized version of the *Record* relied upon for the *Record* dataset. This digitized version is a proprietary version of the *Congressional Record* sold by Westlaw. Westlaw built the digitized version of the *Record* with an optical character recognition conversion of scans of the *Congressional Record* documents. Optical character recognition of scanned documents rarely creates clean and accurate text, especially when applied to historical documents. It did not create the cleanest database here. Even a cursory review of the digitized *Record* reveals occasional garbled text that does not lend itself to easy cleaning. In an ideal process, we would return to the *Record* to apply our later developed methodology of supervised learning and our more refined algorithm, including topic coding. However, the somewhat rough *Record* data does not yet lend itself to the refined work of the algorithm we developed with the *Journals*.

Fourth, the Congressional Petitions Database currently tracks only petition introduction, but further legislative activity is difficult to assess. Later procedural developments, like the requirement of a unique petition identifying number in the House of Representatives after 1920, came too late to provide a simple means to track activity on a single petition over time. Rather, the *Journals* or *Record* include petition introductions that are often separated by days or even months or years from later legislative action on that petition. The Congressional Petitions Database allows us to chart the volume of petition introductions in Congress for the very first time and it also allows us to chart initial dispositions of those petitions in the form of referrals, tabling, or otherwise. By conducting individual searches, I am often able to locate further action on particular petitions. However, the Database does not yet allow for tracking further legislative action in the aggregate. We plan future development of the Database to resolve this issue. In particular, we plan to develop a unique identifier for each petition and to chart consideration and disposition of each petition over time.

D. First Congress Archival Materials

The Article also draws on archival materials from the first four Congresses housed in the National Archives in Washington, D.C. I used these materials to supplement the Congressional Petitions Database and the secondary literature on early petitioning. In particular, I aimed to deepen the understanding of the petition process in Congress and its institutional form with a review of the early record on petition procedure. Archival materials were often unavailable on microfilm and I instead reviewed the original documents.

Among these original documents, I discovered a set of bound documents titled “Petition Books” by the archivists at the National Archives. While these documents are cited in a few summaries of materials in the *Documentary History of the First Federal Congress*, these so-called petition books are nowhere duplicated or described. Nor have these materials been published or described in any alternative publication. My reproduction in this Article of these petition books is likely the first publication of these materials, and the first in-depth exploration of their significance.

I have begun initial research into the extent to which Congress maintained petition books over time by reviewing the inventory of the National Archives. The National Archive inventory guides for the House of Representatives note petition books within the clerk’s record for almost all Congresses from the Founding until the 83rd Congress (1953–1955). Following the 83rd Congress, the House could have maintained petition books, but the National Archives does not provide an inventory guide for this later period. The National Archive inventory guides for the Senate are less clear and petition books were less commonly listed

PETITIONING AND THE MAKING OF THE ADMINISTRATIVE STATE

in the clerk's records. In future research, I plan to locate these petition books and examine their scope in greater depth.