

# REDISCOVERING THE JOURNAL CLAUSE: THE LOST HISTORY OF LEGISLATIVE CONSTITUTIONAL INTERPRETATION

*Nicholas Handler\**

## ABSTRACT

*Article I, Section 5 of the United States Constitution requires that each house of Congress keep a Journal of its proceedings. Contemporary observers have largely ignored this provision, treating it as a vestigial record-keeping requirement with little significance for modern law. This dismissive attitude is misguided. Historically, legislative Journals were one of the primary mechanisms by which Parliament, and later Congress, made and interpreted constitutional law. Journals are the official histories of legislatures' activity. They record what legislatures do as institutions—what powers they exercise, what procedures they use, and what actions by the coordinate branches they protest or resist. In systems in which many aspects of legislative power are not reviewable by outside courts, the historical record of a legislature's actions, and of actions by other governmental actors which they accept as legitimate, are critical sources of legal precedent. By keeping Journals, early Anglo-American legislatures learned to strategically manage this precedent in order to negotiate the contours of sovereign power with other governmental bodies. In the mid-nineteenth century, this practice largely disappeared as legislatures turned their attention to newer forms of record keeping, such as transcripts of floor debates, which were designed to accommodate the policy agendas of partisan interest groups. The institutional practices that evolved to enable legislatures to express collective judgments on questions of constitutional law through Journal-keeping atrophied. As a result, by the twentieth century legislatures were largely considered to be incapable of the kinds of sophisticated legal analysis employed by courts and the Executive. This assumption, which is now pervasive, has generated pessimism about Congress's ability to engage in sustained, rational discourse on important questions of structural constitutionalism. The forgotten history of Journals and the Journal Clause demonstrates that legal reasoning by legislatures is not only possible in theory but was exercised in practice for centuries with a great degree of sophistication.*

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## INTRODUCTION

Article I, Section 5 of the United States Constitution requires that each house of Congress “keep a Journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy.”<sup>1</sup> This mandate that Congress keep and publish records of its official acts—the “Journal Clause”—has been largely ignored by the legal community. No court has ever given it an authoritative interpretation, nor has any scholar written a definitive account of its origins or purpose.<sup>2</sup> This neglect is unfortunate, because the tradition of journal-keeping that the clause codifies was once a core source of constitutional construction in Anglo-American law.

The few scholars who have mentioned the Journal Clause in passing have mostly understood it as a prototype of modern legislative practices. In standard accounts of congressional procedure, for instance, the Journal Clause is usually written off as an antique form of legislative history—a “skeletal procedural record” with pre-modern origins, whose usefulness in deciphering congressional intent has been superseded by other, more voluminous paper records such as committee reports and the *Congressional Record*.<sup>3</sup> Other commentators, looking for constitutional predicates to modern concepts of government transparency, have suggested that the Journal Clause was intended to serve an information-producing function.<sup>4</sup>

<sup>1</sup> U.S. CONST. art. I, § 5, cl. 3.

<sup>2</sup> See PAUL F. ROTHSTEIN & SUSAN W. CRUMP, FEDERAL TESTIMONIAL PRIVILEGES § 6:4 (2d ed. 2018) (noting that the Journal Clause “has been the subject of very little judicial construction”).

<sup>3</sup> Nicholas Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890-1950*, 123 YALE L.J. 266, 271 (2013).

<sup>4</sup> See, e.g., Josh Chafetz, *Congress’s Constitution*, 160 U. PA. L. REV. 715, 744 n.155 (2012) (citing the Journal Clause as evidence of a requirement that legislative proceedings be mostly open to the public); Marci A. Hamilton & Clemens G. Kohnen, *The Jurisprudence of Information Flow: How the Constitution Constructs the Pathways of Information*, 25 CARDOZO L. REV. 267, 281 (2003) (describing

Adrian Vermeule has argued that “[m]any participants [in the Constitutional Convention] desired to constitutionalize some version of a requirement that Congress publicize its deliberations and votes,” and that “[a]lthough the framers realized that transparency might distort deliberation . . . many delegates believed that future legislators could not be trusted to weigh the costs and benefits of transparency in public-regarding fashion.”<sup>5</sup> David Pozen likewise argues that the Journal Clause “contemplates legislative secrecy,” in its allowance that Congress may in its discretion keep proceedings secret, “but only as a deviation from a norm of publicity; the Constitution’s sole grant of a secrecy power is coupled to an anterior duty of disclosure.”<sup>6</sup> These observers find the Journal Clause unremarkable. They see it as an early mechanism for forcing democratic accountability, worth noting as a matter of precedent, but no longer relevant in any practical sense.

These accounts are misguided. Because they view the Journal Clause through the lens of twentieth and twenty-first century legal concerns, modern commentators miss its true significance. The Journals of the House and the Senate, and of the House of Lords and the House of Commons in the British Parliament, are not intended to facilitate transparency. Indeed, from their origins in late medieval England until the beginning of the nineteenth century, legislative Journals existed alongside highly restrictive regimes of legislative secrecy, under which both British and American legislatures forbade the public from observing or publishing accounts of their debates. Nor were legislative Journals intended to serve as tools of statutory interpretation. They predate the modern concept of legislative history by several centuries.<sup>7</sup>

Rather, the Journals are law-producing documents, and a critical medium through which Parliament and later Congress historically engaged in constitutional interpretation. When Parliament began keeping official records of its proceedings in the thirteenth century, their purpose was to establish an institutional identity for the nascent legislature. They performed this task in two ways: (1) by establishing precedents for the internal rules and procedures by which Parliament operated, and (2) by memorializing agreements with the Crown over the limits of parliamentary authority. The

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the Journal Clause as a constitutional requirement that Congress make information public); Shannon E. Martin & Gerry Lanosga, *The Historical and Legal Underpinnings of Access to Public Documents*, 102 LAW LIBR. J. 613, 614 (2010) (citing the Journal Clause to state that the Constitution “clearly indicates that the actions of Congress shall be recorded and made public”); Barry Sullivan, *FOIA and the First Amendment: Representative Democracy and the People’s Elusive “Right to Know,”* 72 MD. L. REV. 1, 62 (2012) (categorizing the Journal Clause as a structural aspect of the Constitution that protects liberty).

<sup>5</sup> Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 372 (2004).

<sup>6</sup> David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 293 (2010).

<sup>7</sup> See Parrillo, *supra* note 3, at 272–74 (describing the growing use of legislative history by courts from the mid-nineteenth century onward).

intended audience for parliamentary Journals was not the public at large, but rather the Crown and future Parliaments. Together, these functions formed the basis for a significant portion of English constitutional law. The first function—establishing how Parliament functioned, and what the rights and obligations of the body and its members were—laid the groundwork for what later became known as the *lex et consuetudo Parliamenti* (“*lex Parliamenti*”), a body of law that developed concurrently with English common law and that governed the operation of the legislature.<sup>8</sup> The second function—negotiating the boundaries of parliamentary power—formed the basis for the principle of parliamentary sovereignty that was established following the political conflicts of the seventeenth century.<sup>9</sup> From early in their history, parliamentary Journals were considered by English law to constitute precedent-making acts of state. By the seventeenth century, texts and treatises on the law of Parliament cited the Journals of the House of Lords and Commons as the authoritative source of law on the resolution of many constitutional disputes.<sup>10</sup>

The legal importance of the English Journals reached its pinnacle during the seventeenth century. The successive upheavals of the English Civil War, the Restoration, and the Glorious Revolution laid the foundation for the sovereignty of Parliament in British law. Parliament, however, understood its victory over absolute monarchy not as the defeat of Britain’s existing political order, but as the defense of ancient liberties against royal excesses. The seventeenth century saw a revival of interest in ancient legal sources by Parliamentarians eager to root their political gains in a constitutional tradition.<sup>11</sup> Consistent with this renewed focus on precedent, Parliament expanded and innovated on its Journal-keeping practices as never before. Committees were established to explore and report on the contents of the Journals to resolve constitutional disputes. Controversial acts of Parliament were expunged by resolution, voiding their precedential effect. The House of Lords began permitting members to enter formal dissents to legislative acts on its Journals. All of this represented a new understanding that the content of Parliament’s records—the practices and legislative privileges asserted there and the powers over taxation and military affairs to which previous monarchs had formally consented—played a critical role in determining the contours of sovereign power and allowed those who held political authority to legitimize their position by pointing to a legal and historical tradition of

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<sup>8</sup> See *infra* Section I.B.

<sup>9</sup> See *infra* Section I.B.

<sup>10</sup> See *infra* Section I.B.

<sup>11</sup> See *infra* Section I.C. For a general discussion of the use of historical texts by parliamentary advocates in the seventeenth century, see JANELLE GREENBERG, *THE RADICAL FACE OF THE ANCIENT CONSTITUTION* (2001).

consensual gains. By managing its records, Parliament was, in effect, interpreting and creating constitutional law.

This tradition of resolving constitutional disputes—particularly disputes between the legislative and the executive power—by reference to legislative records was well known to the American colonies. Parliamentary traditions strongly influenced colonial legislatures, and every assembly kept Journals in the British tradition.<sup>12</sup> On the eve of American independence, colonial lawyers and politicians were as familiar with the practice of creating and interpreting legislative precedent as they were with common law precedent. The Journal Clause thus codified a practice that had become integral to Anglo-American constitutionalism by the late eighteenth century. The Journals played a primary role in delineating the powers and obligations of the legislature and differentiating it from other departments of government. Historians have observed that the boundaries between the coordinate branches were not clearly defined in the early American republic.<sup>13</sup> Legislatures engaged in a variety of practices, such as resolving cases and controversies between citizens and administering public benefits, that would appear foreign to twenty-first century constitutionalists.<sup>14</sup> Disputes with the executive were common.<sup>15</sup> Indeed, as scholars of “departmentalism” have noted, not only were the powers of different government actors unclear in the early republic, so too was the ultimate power to interpret the Constitution itself.<sup>16</sup> Incidences of the early Executive branch administering policy according to its own interpretation of the Constitution have been well documented.<sup>17</sup> But the Journals provided a vehicle for the legislature to engage in constitutional interpretation as well. As they had in Britain, the American Journals recorded Congress’s resolution of disputes over rules, privileges, and procedures. They also recorded Congress’s decision to exercise, or not to exercise, jurisdiction over certain government powers. In short, they formed a historical foundation for the institutional identity of Congress, as they had for the British Parliament.

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<sup>12</sup> See *infra* Section II.A.

<sup>13</sup> See, e.g., Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1755 (1996) (“[A] genuine reconstruction of the Founding belies the contention that the Founders either always or primarily viewed the doctrine of separation of powers in modern formalist terms.”).

<sup>14</sup> See *infra* Section II.C.

<sup>15</sup> See *infra* Section II.C.

<sup>16</sup> See *infra* Section II.C.

<sup>17</sup> See *infra* Section II.C.

In a tripartite system of government in which many of Congress's procedures and obligations were exempted from judicial review or executive control,<sup>18</sup> the Journals' role in developing that identity assumed constitutional significance. Legislative records established precedent on separation-of-powers questions in a way that judicial interpretation of the Constitution alone could not. In times of political crisis, the Journals also served as a medium for debating constitutional norms. This was particularly so in the 1830s, when rising tensions over slavery and the combative policies of the Jackson presidency combined to generate a series of constitutional crises. In several high-profile disputes—including a showdown between Jackson and the Senate over the President's decision to defund the Second Bank of the United States and controversies in both houses of Congress over the right of citizens to petition for the abolition of slavery—Congress's Journals, rather than the records of any judicial court, served as the primary medium of legal discourse. Legislators revived ancient parliamentary practices such as expurgation in order to record their judgments on the Journals of Congress, often invoking the historical role that legislative records had played in constitutional construction.<sup>19</sup>

The Journals declined in political importance beginning in the 1840s. There were no longer highly-publicized disputes over their contents, as there had been in previous decades. But this was not, as some scholars have suggested, because the Journals were superseded by newer legislative records that performed their intended functions more effectively. New documents—in particular, the transcripts of legislative debate that were ultimately formalized as the *Congressional Record*—did replace the Journals.<sup>20</sup> But the intended purpose of these records was radically different. Beginning in the late 1700s, the centuries-long tradition of legislative secrecy in Britain and America was rapidly reversed. Legislative debates, long held behind closed doors, were opened to the public and, more importantly, the press. Transcripts of these debates—quickly compiled and widely distributed—became the ideal legislative record for the era of mass politics and mass communication. While the transcripts were a boon for democratic accountability, however, their rise in prominence diminished the traditional role of legislative Journals. The transcripts were fundamentally political documents; they allowed individual legislators to communicate (through floor speeches) their positions on specific political issues to their constituents and their parties with unprecedented rapidity. The Journals, by contrast, were legal documents. They provided the legislature with a medium for

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<sup>18</sup> See, e.g., James G. Wilson, *American Constitutional Conventions: The Judicially Unenforceable Rules that Combine with Judicial Doctrine and Public Opinion to Regulate Political Behavior*, 40 *BUFF. L. REV.* 645, 645–47 (1992) (describing the non-justiciability of constitutional determinations assigned to Congress by Article I).

<sup>19</sup> See *infra* Section II.C.

<sup>20</sup> See *infra* Part III.

debating constitutional norms, both within the confines of its own chambers and with the other branches of government. They recorded the judgment of the institution as a whole on a legal issue, rather than the various positions of its constituent members. The importance of these law-producing and law-interpreting functions was lost as the attention of the public and the legal community shifted to newer forms of record-keeping. As legislators were incentivized to tailor their on-record statements more toward regional or party constituencies, the older institutional dimension of their record-making receded.

The effect of this change in record-keeping practice has been significant but underappreciated by contemporary historians and legal scholars. Many of the structural constitutional issues that the Journals evolved to adjudicate continue to evade formal judicial resolution, either because they are considered “political questions”<sup>21</sup> committed to the legislature by the constitutional text or because they depend on norms<sup>22</sup> of governmental behavior that courts lack the competency to adjudicate. These include consequential questions of legislative procedure and inter-branch relations.<sup>23</sup> But while Congress remains primarily responsible for resolving these disputes, modern observers no longer consider it capable of adjudicating them through the reasoned application of legal principles. Rather, it is perceived to be uniquely (and perhaps exclusively) governed by the political

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<sup>21</sup> See *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189 (2012) (defining the political question doctrine in the context of deciding whether the claim before the Court was justiciable); *Nixon v. United States*, 506 U.S. 224 (1993) (same); *Baker v. Carr*, 369 U.S. 186 (1962) (same); see also Louis Michael Seidman, *The Secret Life of the Political Question Doctrine*, 37 J. MARSHALL L. REV. 441, 441-43 (2004) (describing the Supreme Court’s historical efforts to avoid imposing legal rules on political decision-making). But see Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 237 (2002) (arguing that the political questions doctrine has declined in importance in recent jurisprudence).

<sup>22</sup> Josh Chafetz, in a compelling discussion of some underused aspects of Congress’s constitutional authority, has written that the Constitution “leaves . . . the resolution” of “substantive issues” in structural constitutional law, as well as “the resolution of the meta-question as to the proper site of resolution for those issues,” to “constitutional politics.” Chafetz, *supra* note 4, at 721–22 (emphasis and quotation marks omitted) (quoting Josh Chafetz, *Multiplicity in Federalism and the Separation of Powers*, 120 YALE L.J. 1084, 1113 (2011) (book review)). The “space for conflict” created by “interbranch tension” produces an incentive for the Congress and the Executive to “compete publicly for the affections of the people” in a manner that “promotes healthy deliberation as to the public good” and requires each branch to “make its case in the public sphere.” *Id.* at 722. David Pozen has drawn on doctrines from other areas of law, such as self-help and bath faith, to examine these questions. See David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885 (2016); David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2 (2014) [hereinafter Pozen, *Self-Help*].

<sup>23</sup> The literature on inter-branch relations, and on the difficulty of resolving constitutional disputes between the political branches non-judicially, is immense. For two particularly insightful recent examinations of these issues, see Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312 (2006) and Pozen, *Self-Help*, *supra* note 22.

incentives of its constituent members.<sup>24</sup> The courts, even in times of partisan conflict over the judiciary, are still widely treated as capable of applying content-neutral principles to the resolution of disputes.<sup>25</sup> The Executive, too, through mediums such as Office of Legal Counsel memoranda and presidential veto and signing statements, can express coherent interpretations of constitutional law.<sup>26</sup> While these interpretations may have partisan motivations, they are still legal, rather than political, in character. They present a formal analysis that is susceptible to critique and revision. The failure of Congress to provide any similar accounting for its institutional behavior—to rationalize, by reference to democratic principles or constitutional mandates, why it asserts or refrains from asserting certain powers, or why it applies particular rules of internal procedure—has created a legal vacuum in areas where reasoned discourse is badly needed. Observers have worried that Congress’s substitution of partisan incentives for institutional ones has a destabilizing effect on democratic politics and leads to an escalating cycle of constitutional brinkmanship.<sup>27</sup>

Although many lament the degradation of legal discourse within the political branches, there has been a noticeable failure to trace the root institutional causes of this dysfunction. Lawyers and political scientists often treat the atomized, political behavior of Congress as an inherent feature of large elected bodies.<sup>28</sup> The history of the Journal Clause provides a much-needed corrective to this assumption. The causes of our modern democratic pathologies are undeniably complex, and no single historical development can fully explain them. But as scholars of administrative law have long recognized, record-keeping requirements are accountability mechanisms

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<sup>24</sup> See, e.g., Jeremy Waldron, *The Dignity of Legislation*, 54 MD. L. REV. 633, 640 (1995) (describing this attitude among twentieth century theorists).

<sup>25</sup> See, e.g., RICHARD A. POSNER, HOW JUDGES THINK (2010) (describing the role that institutional constraints and legal reasoning play in assisting judges to decide novel cases and structuring judicial discretion); BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE (2010) (demonstrating how judges have historically rendered decisions that accommodate political realities, while still conforming to rule-bound methods of decision-making).

<sup>26</sup> For an overview of contemporary debates concerning the interpretive role of the Office of Legal Counsel, see, for example, Sonia Mittal, *OLC’s Day in Court: Judicial Deference to the Office of Legal Counsel*, 9 HARV. L. & POL’Y REV. 211 (2015); Rachel Ward Saltzman, Comment, *Executive Power and the Office of Legal Counsel*, 28 YALE L. & POL’Y REV. 439 (2010). For an overview of presidential interpretations of the Constitution through signing statements and other mechanisms, see Henry L. Chambers, Jr., *Presidential Constitutional Interpretation, Signing Statements, Executive Power, and Zivotofsky*, 87 U. COLO. L. REV. 1183 (2016).

<sup>27</sup> See *infra* Part IV.

<sup>28</sup> The most influential expression of this idea has been in the field of political economy known as “public choice theory,” which holds that the legislative process is often co-opted by well-organized special interest groups who manipulate it for private gain. See, e.g., Dorothy A. Brown, *The Invisibility Factor: The Limits of Public Choice Theory and Public Institutions*, 74 WASH. U. L.Q. 179, 180 (1996) (describing this theory). While it is most often used to critique legislation in specific areas of public policy, it has also been employed to question the ability of the legislature to reason coherently within a system of second-order institutional rules. See, e.g., Waldron, *supra* note 24, at 644.

that have an important effect on institutional behavior.<sup>29</sup> By determining what categories of information institutions are required to record, and what audiences those records are presented to, societies mandate that institutions prioritize certain values and perspectives over others. Records help structure the way in which institutions reason. The seismic shift in record-keeping procedure within Anglo-American legislatures between the late-eighteenth and mid-nineteenth century—in which Congress, Parliament, and other elective bodies transitioned rapidly from regimes of extreme secrecy to extreme transparency; in which they began producing tens of thousands of pages of transcripts targeted at emergent voting constituencies and political parties; and in which they concurrently discarded the once-central practice of strategically managing and interpreting precedential official histories—has remained little studied. This shift dramatically changed the types of reasoning in which American society incentivized its national legislature to engage. As the legal community reckons with the consequences of unreasoned combat over questions of structural constitutionalism, it is worth remembering that deliberate choices in institutional design facilitated and normalized this behavior.

This Article aims to recover the lost history of legislative constitutionalism contained in the Journals of Parliament and Congress, and to explore its relevance to contemporary law. Part I recounts the origins of legislative Journal-keeping in England, from its beginnings in the late Middle Ages to its rise to constitutional prominence in the seventeenth and eighteenth centuries. Part II describes the development of legislative Journal-keeping in America, from the colonial period, through the drafting of the Journal Clause, to the important record-keeping debates of the 1830s. Part III describes the rise of the transcripts of debate in the early nineteenth century and their eventual displacement of the Journals as the preeminent records of legislative activity. Part IV situates the Journals within a theoretical legal framework and describes their relevance to modern constitutionalism.

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<sup>29</sup> See, e.g., Jerry L. Mashaw, *Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance*, 76 GEO. WASH. L. REV. 99, 101–03, 116–18 (2007) (noting among similarities between American and European governing that “reason giving is fundamental to the moral and political legitimacy of [their] legal orders”).

## I. LEGISLATIVE JOURNALS IN THE ENGLISH CONSTITUTIONAL TRADITION

### A. *The Early Origins of Legislative Journals*

The Journals of the House of Commons and the House of Lords are the authoritative records of official activity in each house of Parliament. They evolved from the legislature's earlier official records, the *Rotuli Parliamentorum* or "Rolls of Parliament," which in turn consolidated a disparate body of legal documents and informal accounts of the convocations of Parliaments that began to emerge in the early twelfth century.<sup>30</sup> The Journals are the authoritative record of Parliament's proceedings, a status that was formalized by statute in the sixteenth century, and has been continuously reaffirmed by legal authorities since.<sup>31</sup> Unlike statute books, the Journals' primary purpose is not to record the positive law enacted by Parliament. Rather, they record the means by which Parliament governs itself: the votes it takes, the resolutions it adopts, the rules it amends, and the external documents of which it takes cognizance.<sup>32</sup> Every volume of the Journals represents the official institutional history of a parliamentary sitting, compiled by the clerk and unanimously approved by a vote of the members of each house.

Parliament's records played a critical role in establishing Parliament's institutional identity, and in defining its relationship to the other organs of English government. When the Crown began to call, or "convoke," Parliaments in the thirteenth century, they did not have a permanent administrative structure, a defined jurisdiction or legal purpose, or an agreed-upon collection of legal powers.<sup>33</sup> They were convened sporadically and often reluctantly because, pursuant to the terms of the Magna Carta, the monarch required the assent of the country's nobility, as well as representatives of the counties, in order to levy taxes.<sup>34</sup> At their beginning, they were no more than "afforced" or enlarged versions of the king's advisory council of powerful nobles, clerics and ministerial advisers, and were known in the early thirteenth century as "great councils."<sup>35</sup> These councils began to meet with greater frequency during the reign of Henry III, as a result of his need to finance wars in France, and began to be called 'Parliaments' in the middle of the thirteenth century.<sup>36</sup> As the Crown's financial needs

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<sup>30</sup> 1 The Parliament Rolls of Medieval England, 1275–1504: Edward I, 1275–1294, at 1 (Paul Brand, ed., 2005) [hereinafter Parliament Rolls].

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at § A(ii).

<sup>33</sup> See G.O. Sayles, *The Functions of the Medieval Parliament of England* 12 (1988).

<sup>34</sup> See *id.*

<sup>35</sup> See *id.* (explaining the origins of more expansive king's advisory councils).

<sup>36</sup> See J.R. MADDICOTT, *THE ORIGINS OF THE ENGLISH PARLIAMENT, 924–1327*, at 166–77 (2010) (explaining the origin of the term "parliament").

increased, Parliament leveraged its control of the money supply to secure a larger and more stable role in governance, emerging as a more permanent institution in the early fourteenth century.<sup>37</sup> Through its size and the geographic reach of its membership, it was also able to provide useful administrative support to the early modern state. By the end of the thirteenth century, Parliament had evolved to serve a dual role in English government. On one hand, it served as counsel to the King, acting as a court to assist in the administration of justice and advising on increasingly complex matters of public policy.<sup>38</sup> On the other hand, it also acted as a locus of resistance to perceived abuses and misgovernment, using its power to withhold taxes as a means of curtailing monarchical excess.<sup>39</sup> This dynamic persisted throughout the late Medieval and early modern period as Parliament's jurisdiction expanded, its membership expanded, and the complexity of its internal management increased.

Parliament began keeping written records of its proceedings in the middle of the thirteenth century.<sup>40</sup> These early documents appear to have focused on criticism of crown policy, and may have specified conditions attached to Parliament's assent to new taxes.<sup>41</sup> The Oxford Parliament of 1258, convened pursuant to an agreement with Henry III in exchange for a grant of supply for an invasion of Sicily, was larger and more sophisticated than previous meetings, and may have kept official records, though none have survived.<sup>42</sup> The first extant Rolls of Parliament date from the reign of Edward I in the 1270s.<sup>43</sup> From that time forward, the main business of Parliament was consolidated into the parchment rolls, which constituted the "master record" of the burgeoning institution.<sup>44</sup> The Rolls were compiled and arranged by the clerk of Parliament, a position appointed by the Crown from among the clerks of chancery, but which owed loyalty neither to the monarch nor to the legislature.<sup>45</sup> Medieval Parliaments did not maintain their own archives. Once the contents of the Rolls were finalized, they were

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<sup>37</sup> See *id.* at 338–40, 352.

<sup>38</sup> See, e.g., *id.* at 177–80 (describing the growth of Parliament's role in advising the crown).

<sup>39</sup> See *id.* at 173–75 (describing the use of Parliament's power over taxation to influence royal policy); *id.* at 300–10 (same); see also *id.* at 218–26, 353–55 (describing role of Parliaments in resisting royal abuses and advocating for local issues).

<sup>40</sup> *Id.* at 181; see also 1 MATTHEW PARIS, MATTHEW PARIS'S ENGLISH HISTORY FROM THE YEAR 1235 TO 1278, at 398–400 (John Allen Giles trans., London, George Bell & Sons 1889) (recounting a hostile exchange between barons and Henry III being recorded); 2 MATTHEW PARIS, MATTHEW PARIS'S ENGLISH HISTORY FROM THE YEAR 1235 TO 1278, at 79 (John Allen Giles trans., London, Henry G. Bohn 1853) (recounting the creation of a council with recorded determinations).

<sup>41</sup> MADDICOTT, *supra* note 36, at 181.

<sup>42</sup> MADDICOTT, *supra* note 36, at 246–47.

<sup>43</sup> Paul Brand, *Introduction* to 1 PARLIAMENT ROLLS, *supra* note 30, at § A(ii).

<sup>44</sup> G.R. Elton, *The Rolls of Parliament: 1449–1547*, 22 HIST. J. 1, 1 (1979).

<sup>45</sup> See A.F. Pollard, *The Clerical Organization of Parliament*, 57 ENG. HIST. REV. 31, 34 (1942) (explaining the process by which clerks of Parliament were appointed).

deposited with the Master of the Rolls, a Crown archivist, and stored with the records of the courts of chancery in Chancery Lane.<sup>46</sup>

For the first several decades of their existence, the content and composition of the Rolls is inconsistent.<sup>47</sup> However, in 1341, a regularized format emerged which persisted until they were displaced by the Journals as official records in the early sixteenth century.<sup>48</sup> The Rolls recorded four primary items of business in a parliamentary session: (1) the opening “charge” or speech, and the opening sermon when one occurred; (2) the appointment by Parliament of the members of a sub-committee to receive and adjudicate private petitions; (3) grants of taxation; and (4) petitions submitted collectively by the Commons to the Crown, along with the Crown’s answers.<sup>49</sup> Memoranda recounting important legal cases and other acts of government were also occasionally included.<sup>50</sup> In addition, explanatory text linking the various agenda items increased, such that the Rolls were now “written up in the form of a discursive narrative” that would be legible to readers from future Parliaments and elsewhere in government.<sup>51</sup> By the fifteenth century, the Rolls also recorded the procedures by which legislative bills (which had emerged from the Commons’ petition as a distinct instrument of legislative procedure) were introduced and debated.<sup>52</sup> This evolution in composition coincided with Parliament’s increased role in governance following the beginning of the Hundred Years’ War: as the Crown’s request for taxation increased, Parliament’s role in supervising royal expenditures grew, and its requests for royal concessions in exchange for grants of supply proliferated.<sup>53</sup>

The Rolls, and later the Journals, were critical to facilitating the development of both (1) the legislature’s administrative capacities and (2) its role as the primary check on the royal prerogative. With respect to its administrative capacities, the first and most important function of the early Rolls was to record (“enroll”) Parliament’s receipt and adjudication of petitions, or requests for a redress of grievances by private citizens.<sup>54</sup> Petitions were a common method of seeking relief from royal courts, but

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<sup>46</sup> Elton, *supra* note 44, at 12.

<sup>47</sup> Brand, *supra* note 43, at 3; *see also* W.M. Ormrod, *On—and Off—the Record: The Rolls of Parliament, 1337–1377*, 23 *PARLIAMENTARY HIST.* 39, 40 (2004) (noting that “[t]here was little in the way of narrative text linking the various elements of business listed in the rolls, and little sense of a chronological arrangement: the early rolls read very much as memoranda compiled as a means of cross-referencing with other chancery series recording actions taken upon private and public business completed in parliament”).

<sup>48</sup> Ormrod, *supra* note 47, at 39–40.

<sup>49</sup> Ormrod, *supra* note 47, at 40.

<sup>50</sup> Ormrod, *supra* note 47, at 40.

<sup>51</sup> Ormrod, *supra* note 47, at 40.

<sup>52</sup> Elton, *supra* note 44, at 4, 17.

<sup>53</sup> Ormrod, *supra* note 47, at 40 (footnote omitted).

<sup>54</sup> MADDICOTT, *supra* note 36, at 298–99.

beginning in the 1270s, under the reign of Edward I, these requests began to be submitted to Parliament in very large numbers.<sup>55</sup> Throughout the Middle Ages, petitioning constituted the overwhelming majority of Parliament's governmental work.<sup>56</sup> The handling of petitions was both a judicial function (in that it required Parliament to resolve individual, fact-specific complaints) and an administrative function (in that it represented the bulk of Parliament's activity, and allowed it to take concrete action toward addressing problems of social and economic importance). Petitions presented to Parliament were sorted by appointed judges and clerks known as "receivers," who would review them, and either refer them to Parliament for resolution or transfer them to the appropriate prerogative court.<sup>57</sup> Those referred to Parliament would be sent to an appointed committee of "triers," usually nobles and bishops, for adjudication, and the contents of the petition, along with the answers of the triers, would be recorded or "enrolled" on the Rolls of Parliament at the end of each session.<sup>58</sup> Prior to Parliament's assumption of formal legislative powers, petitioning also developed into a quasi-legislative function, as the House of Commons would aggregate private petitions into consolidated commons petitions to present to the Crown for royal assent.<sup>59</sup> The records of petitions thus provided an account of the evolving scope of Parliament's jurisdiction to address questions of policy.

In addition to contributing to the formation of a parliamentary identity, petitioning also first established the legal authority of the Rolls as documents. Because of the judicial nature of Parliament's petition work, the sections of the Rolls that reflected the hearing of petitions were the first portions to be recognized as having precedential force outside of the legislature itself.<sup>60</sup> The petitions that were resolved by Parliament, rather than referred to a prerogative court, were often politically important, and the lords elected to act as triers were well educated in the common law.<sup>61</sup> Edward Coke noted in the *Fourth Institute* that the comparatively thorough legal reasoning of Parliament's petition resolution was a primary factor in elevating the authority of the Rolls, observing that "[t]he reason wherefore the Records of Parliament have been so highly extolled, is, for that therein is set down in cases of difficulty, not only the judgment, or resolution, but the reasons, and

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55 MADDICOTT, *supra* note 36, at 294.

56 MADDICOTT, *supra* note 36, at 294, 298–99.

57 See Pollard, *supra* note 45, at 202–04; see also 4 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 11 (The Lawbook Exchange, Ltd. 2002) (1681) (describing the duties of receivers).

58 See 4 COKE, *supra* note 57, at 11.

59 MADDICOTT, *supra* note 36, at 356–57.

60 Ormrod, *supra* note 47, at 42 (noting that the Parliament Rolls were "necessarily authoritative in regard to the legal cases heard in parliament"); see also H.G. Richardson & G.O. Sayles, *The Early Records of the English Parliament*, in THE ENGLISH PARLIAMENT IN THE MIDDLE AGES, at V 130 (1981) (describing the documents prepared in the hearing of petitions and situations in which they were relied upon).

61 Richardson & Sayles, *supra* note 60, at VI 535–36.

causes of the same by so great advice,” and that while other common law courts recorded the reasoning for their holdings, “these also, though of great credit, and excellent use in their kind, yet far underneath the Authority of the Parliament Rols [sic], reporting the Acts, Judgments, and resolutions of that highest Court.”<sup>62</sup> Through the recording of petitions, Parliament came to understand itself as an institution that could interpret law as a court—it was in this period that it first came to be referred to as the “high court of Parliament”—and expect its interpretations to bind both subjects and coordinate governing institutions.<sup>63</sup> It also came to see its Rolls as a critical source of legal precedent—as documents whose cataloguing of past legislative actions provided guidance in the resolution of future disputes. As Commons petitions became more frequent, Parliament came to rely on the assistance of clerks (who had both access to the Roll archives at Chancery and knowledge of their contents) to draft petitions that referenced the precedents of previous Parliaments in order to strengthen their arguments.<sup>64</sup>

Moreover, as the scope of Parliament’s activity expanded, and as it sought a stronger and permanent role in making and administering policy, it increasingly viewed the Rolls in their entirety—not just those portions that reflected its judicial business—as precedentially binding documents. While its judicial functions were delegated to committees of lords, the idea of Parliament as a legal institution was not limited to those committees. As historian G.O. Sayles has observed, “parliament is a single whole: its parts do not function separately: it is subject to a unifying authority.”<sup>65</sup> For instance, in 1353, local representatives meeting with Commons specifically insisted that an ordinance that had been issued at the previous session “shall be repeated at the next parliament and entered in the roll of the same parliament, for the reason that the ordinances and agreements made in councils are not on record as they would be if they were made by common parliament.”<sup>66</sup> Conversely, in 1404, Commons specifically demanded that its agreement to consent to an extraordinary tax levy *not* be recorded in the Rolls, and that all copies of the agreement be burned, so that it could not be used as a precedent for future grants.<sup>67</sup> Demands such as these reflect a growing recognition that the written records of Parliament’s interaction with

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<sup>62</sup> 4 COKE, *supra* note 57, at 34.

<sup>63</sup> See, e.g., 4 HATSELL *supra* note 67, at 78 (tracing records of the judicial proceedings of the “High Court of Parliament” to the reign of Edward I (1239-1307)).

<sup>64</sup> Ormrod, *supra* note 47, at 54–56 (footnotes omitted). Occasionally the clerks may have even intentionally misrepresented past practices as a means of helping the Commons to strengthen its case. *Id.*

<sup>65</sup> Richardson & Sayles, *supra* note 60, at VI 532.

<sup>66</sup> Ormrod, *supra* note 47, at 43 (citing 2 PARLIAMENT ROLLS, *supra* note 30, at 253).

<sup>67</sup> Chris Given-Wilson, *The Rolls of Parliament, 1399–1421*, 23 PARLIAMENTARY HIST. 57, 64 (2004).

the Crown could have legal implications for the authority of the legislature and its place within the broader architecture of government.<sup>68</sup>

Aside from recording the accumulated body of Parliament's legislative and adjudicatory work, the Rolls also recorded the traditions by which the legislature managed itself and disposed of its growing docket of public business. Because Parliaments initially met infrequently, and were composed of a frequently changing membership, they required a robust institutional memory of how business was transacted, and how the two houses of the legislature interacted with each other and the Crown. This institutional memory was learned primarily from the Rolls, which recorded the narrative history of prior sessions of Parliament, and thus provided a blueprint for the order of business in future sittings. Perhaps the most important procedural development to emerge from the Rolls was the power of impeachment, which was exercised for the first time in 1376 against William Latimer, a Chamberlain of the Household of Edward III. Commons accused Latimer on the Rolls of Parliament of corrupt dealings with the King, and Latimer, being a peer, denied the charges and demanded his right of trial by the Lords, where he was ultimately convicted.<sup>69</sup> The precedent of accusation by Commons and trial by the Lords (according to procedures of their choosing) served as the basis for all future trials for those who were considered outside the jurisdiction of the prerogative courts.<sup>70</sup>

Another significant change was the creation of the position of Speaker.<sup>71</sup> Speakers represented the entire House and presented requests to the Crown on their behalf. On an institution-building level, this innovation was an important step in developing the corporate identity of Parliament as a cohesive entity that bargained collectively with the monarch for political concessions. On a practical level, it also insulated individual members from retribution for voicing controversial opinions, a legitimate fear for much of Parliament's history.<sup>72</sup> Speakers also took primary responsibility for resolving disputes over the order of proceedings, a role which greatly

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<sup>68</sup> See Ormrod, *supra* note 47, at 42 (noting that while the "memoranda" on policy questions in the Parliament Rolls were not formally acknowledged as legally binding in the fourteenth century, "[n]evertheless, it does seem that the status of parliament as a court of record was also now of more general importance and was deemed relevant to other substantive business such as taxation and legislation").

<sup>69</sup> See 4 John Hatsell, *Precedents of Proceedings in the House of Commons* 57 (London, Luke Hansard & Sons 1818).

<sup>70</sup> See *id.* at 56–69.

<sup>71</sup> See 2 HATSELL, *supra* note 69, at 212–17 (citing the Rolls and Journals to trace the evolution of this position).

<sup>72</sup> One of the most famous early examples of this sort of retribution was Haxey's case, described *infra*, and in JOSH CHAFETZ, *DEMOCRACY'S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS* 69–70 (2007).

facilitated the development of other areas of parliamentary law.<sup>73</sup> Precedents of parliamentary practice such as these formed the basis for the modern law of legislative procedure. They came to be regarded as the authoritative source for resolving disputes over the proper means of introducing, debating, and enacting legislation, and for carrying out other parliamentary business.

Both the Crown and the legislature quickly recognized the practical importance of procedural precedents. As Arthur Onslow, an eighteenth-century Clerk of Commons, observed, “the forms of proceeding, as instituted by our ancestors, operated as a check and controul on the actions of Ministers; and that they were, in many instances, a shelter and protection to the minority, against the attempts of power.”<sup>74</sup> Because the procedure of Parliament controlled how it conducted its affairs, and how it interacted with the monarch, procedural precedents could have a meaningful impact on the legislature’s ability to negotiate effectively and wield political influence. Inefficient procedure, or procedure that yielded strategic advantages to the Crown, could alter the outcome of substantive debates over law, policy, and finance. As a result, both Parliament and the monarchy sought to establish favorable precedents on the legislature’s official records. This impulse—or, conversely, the impulse to grant a procedural concession in a specific instance while stipulating that it should not be used as a precedent for future practice—is reflected throughout the Parliament Rolls. For instance, in 1402, Henry IV approved a parliamentary request to appoint a committee of Lords to “intercommune” with the Commons, but only “with the reservation that he did not wish to make this a right or a custom,” and that he had only “agreed to it of his special grace on this occasion;” he thus “charged the clerk of parliament that this reservation should be recorded on the Roll of Parliament.”<sup>75</sup>

These procedural disputes could have significant implications for the operation of government. In 1407, under Henry IV, a dispute over a grant of supply led to the establishment of two foundational elements of parliamentary law: (1) that all money bills must originate in the House of Commons, and (2) that the Crown may not take notice of any debate in Parliament until the two houses have come to an agreement and presented a formal report of their decision.<sup>76</sup> Henry had requested the Lords to debate, in his presence, the state of the kingdom, and the necessity of granting subsidies to the Crown in order to secure the national defense. After the Lords had specified the requisite sums, the King had sent a deputation to the Commons to demand that they assent to the grant. The maneuver

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<sup>73</sup> See 2 HATSELL, *supra* note 69, at 230–36 (citing examples of the exercise of this function from the Rolls and Journals).

<sup>74</sup> See 2 HATSELL, *supra* note 69, at 237.

<sup>75</sup> Given-Wilson, *supra* note 67, at 64.

<sup>76</sup> Thomas Pitt Taswell-Langmead, *English Constitutional History from the Teutonic Conquest to the Present Time* 260 (Philip A. Ashworth ed., 5th ed. 1896) (1881).

represented a transparent attempt by the King to deny Commons any meaningful role in the tax deliberations, by presenting them a finalized grant of supply and, in effect, demanding their assent. The Commons realized that allowing the process to stand on the Rolls as precedent could damage its ability to control the money supply in the future—a power which was, in the Middle Ages, its chief source of political leverage. It thus recorded a reply to Henry stating that it was “greatly disturbed at it, saying and affirming it to be much to the prejudice and derogation of their liberties,” and refused to approve the supply.<sup>77</sup> The King yielded to the Commons’ pressure, and agreed that the Crown would no longer receive such reports from one house of Parliament before both had “commune[d]” with each other.<sup>78</sup> He was further compelled that this concession “should be entered as a record on the roll of parliament.”<sup>79</sup> Henry Elsynge, the Clerk of the House of Commons in the early seventeenth century and one of the first treatise-writers to make a comprehensive study of the precedents contained in the Rolls and Journals, later confirmed the effect of this agreement, writing that it could not be shown “by any antient [sic] record, that the king did ever take notice of any of the commons speeches or consultations, until they were reported unto his majesty in open Parliament.”<sup>80</sup> The written precedents contained in the Rolls thus formed the primary basis for justifying Parliament’s procedures, and its liberties against the Crown, as a foundational aspect of the law of English government.

With respect to the Parliament’s role as a check on royal authority, the Rolls served two functions: they (1) recorded the evolution of Parliament’s privileges against interference and harassment by the Crown, and (2) recorded Parliament’s official protests of what it perceived to be unconstitutional exercises of royal authority. With respect to the first function, parliamentary privileges are rights which, as the former Clerk of the House of Commons Sir Thomas Erskine May observed in his influential treatise on parliamentary practice, “are necessary for the support of [its] authority, and for the proper exercise of the functions entrusted to [it] by the constitution.”<sup>81</sup> Like the recording of parliamentary procedure, the Rolls’ and Journals’ elaboration of parliamentary privileges was precedential in nature. At its beginning, Parliament had no privileges of its own, but, as council and advisers to the King, claimed certain rights (specifically, the right of access to the King and the Speaker of the House of Commons, freedom from arrest while Parliament was in session, and freedom of speech) in their

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<sup>77</sup> *Id.* at 260.

<sup>78</sup> *Id.* at 260–61; *see also* HENRY ELSYNGE, THE MANNER OF HOLDING PARLIAMENTS IN ENGLAND 182 (London, Richardson & Clark 1768) (1624) (describing this exchange).

<sup>79</sup> Given-Wilson, *supra* note 67, at 64.

<sup>80</sup> ELSYNGE, *supra* note 78, at 180.

<sup>81</sup> Sir Thomas Erskine May, A Treatise on the Law, Privileges, Proceedings and Usage of Parliament 68 (9th ed. 1883).

capacity as servants of the Crown.<sup>82</sup> For instance, in an answer to a petition to Edward I seeking leave to distrain, or seize property, for a debt owed by a member of Parliament, the King replied that “[i]t does not seem fit that the king should grant that they who are of his council should be distrained in time of Parliament.”<sup>83</sup> This concession later served as the basis for the privilege of freedom from arrest.<sup>84</sup> Parliament asserted such rights, which derived from royal prerogative, in petitions to the King, and those petitions along with the King’s answers were recorded in the Rolls and Journals.

But as precedents proliferated, parliamentarians became more willing to assert these privileges as longstanding Anglo-Saxon rights that existed independent of the royal will. Early treatise writers and lawyers relied heavily on the Rolls and Journals to prove the existence of inviolable legislative privileges in English law. Freedom from arrest was never established by statute. Indeed, the Lords refused to assent to a Commons petition to Henry IV seeking treble damages for a violation of its freedom from arrest, reasoning that sufficient penalties already existed in parliamentary law.<sup>85</sup> But Elsynge suggested that this refusal by the Lords merely reflected the strength (and institutional importance) of recorded parliamentary precedent. He argued that the Lords preferred to keep privilege of freedom from arrest, and the associated damages, as a matter of “antient custom” recorded on the Rolls, rather than enacting it into statute.<sup>86</sup> To request the King’s assent to such a law would suggest that Parliament lacked the authority to establish its privileges and to assess punishment for breaches through their own records alone; the Lords “thought it more honourable to retain it, than to enact a new law to punish the contemnners of their privileges, as if they had not been otherwise able to do it of themselves, but were subject to scorn and contempt.”<sup>87</sup>

Elsynge dated the Crown’s implicit recognition of the privilege of freedom of speech to at least the reign of Edward III, observing that the Rolls reflected that “[Commons] did oftentimes . . . discuss and debate among themselves many things . . . ; and agreed upon petitions for laws to be made . . . yet they were never interrupted in their consultations, nor received check for the same.”<sup>88</sup> The privilege was, in the account of most legal authorities, “signally confirmed” by Henry IV in 1397, in Haxey’s case.<sup>89</sup> Thomas Haxey, a Member of Commons, had been condemned for treason by Richard II for introducing a bill criticizing the expenses of the royal

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<sup>82</sup> ELSYNGE, *supra* note 78, at 175.

<sup>83</sup> ERSKINE MAY, *supra* note 81 at 128 (quoting 1 PARLIAMENT ROLLS *supra* note 30, at 61).

<sup>84</sup> ERSKINE MAY, *supra* note 81 at 128.

<sup>85</sup> ELSYNGE, *supra* note 78, at 187–88.

<sup>86</sup> ELSYNGE, *supra* note 78, at 188.

<sup>87</sup> ELSYNGE, *supra* note 78, at 188.

<sup>88</sup> ELSYNGE, *supra* note 78, at 177.

<sup>89</sup> ERSKINE MAY, *supra* note 81, at 119.

household. On the ascension of Henry IV, Haxey presented a petition asking the King to annul the judgment as “against the law and custom which had been before in Parliament,” which the King did, confirming in the Rolls that the former judgment was “of no force or effect.”<sup>90</sup> The Commons’ 1407 dispute with Henry IV over the King’s right to take notice of debates within either House of Parliament also served as an important precedent for Members of Parliament’s (MP’s) right to free speech.<sup>91</sup> “If the king might not take notice of the subsidy” he had agreed to with the Lords outside the presence of Commons, then, Elysnge concluded, “much less might any thing else moved amongst the commons be reported unto his majesty before the commons were fully agreed thereon, and declared the same by their speaker, or otherwise, either unto the king or lords.”<sup>92</sup> Similar precedents on the Rolls and Journals dating through the sixteenth century served as continuous confirmations of the privilege’s pedigree, though it too was never confirmed by statute.<sup>93</sup> By the sixteenth century, the existence of Parliament’s core privileges was ritually invoked by the Commons’ Speaker at the beginning of each session: the Speaker would formally petition the Crown for a recognition of the liberties, and both the request and the Crown’s response would be recorded in the Journals.<sup>94</sup> The assertion of such precedential authority for parliamentary privilege would not have been possible without the increasingly sophisticated record-keeping systems that evolved from the thirteenth century onward.<sup>95</sup>

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<sup>90</sup> ERSKINE MAY, *supra* note 81, at 119 (quoting 3 PARLIAMENT ROLLS, *supra* note 30, at 430).

<sup>91</sup> ELSYNGE, *supra* note 78, at 182.

<sup>92</sup> ELSYNGE, *supra* note 78, at 182.

<sup>93</sup> *See, e.g.*, ERSKINE MAY, *supra* note 81, at 119–22. In 1512 in Strode’s Act, 4 Hen. 8 c. 8, Parliament declared by statute that the imprisonment of MP Richard Strode for introducing a bill was contrary to the privilege of freedom of speech. However, controversies over the extent of the privilege persisted well after this period. In *Rex v. Hollis, Eliot and Valentine*, the King’s bench held that Strode’s Act was a private act without general application. CHAFETZ, *supra* note 72, at 73. The privilege was not recognized in statutory form until the English Bill of Rights in 1688. ERSKINE MAY, *supra* note 81, at 123.

<sup>94</sup> *See, e.g.*, ELSYNGE, *supra* note 78, at 176 (noting, with respect to the right of access to the king, that “[t]his request for access unto his majesty is first recorded, an. 28 H. 8. to be made by Richard Riche, speaker; then by Thomas Moyle, speaker, an. 33 H. 8. and afterwards by all others whose speeches are in the journals” (emphasis omitted)).

<sup>95</sup> Elysnge likewise relied on the records of proceedings in the Rolls to establish the Commons’ right of access to the monarch, noting that from the reign of Richard II forward, “the commons, with the speaker, were ever admitted to the king’s presence in Parliament to deliver their answers: and oftentimes. . . they did propound matters to the king, which were not given them in charge to treat of.” ELSYNGE, *supra* note 78, at 176.

In addition to establishing the law of privilege, a second means by which the Rolls served as a check on royal power was through the recording of protests. As early as the thirteenth century, prior to the introduction of the Rolls, Parliament used written records as medium for criticizing crown policy, or for emphasizing that their assent to taxation only permitted funds to be spent in certain ways. Matthew Paris records that when Parliament convened in 1242 to debate a request from Henry III to finance a military expedition in France,<sup>96</sup> they granted further funds, but only on the condition that the King first make good-faith attempts to negotiate for peace, and “in order that the tenour of the barons’ reply might not be lost in oblivion, these things were all reduced to writing,” memorializing the agreement.<sup>97</sup> A similar grant in 1244 included a written record of the King’s agreement that military expenditures be overseen by a committee of nobles.<sup>98</sup> In its early years, these protests began to instill Parliament with a collective understanding that its rights and its interests were separate from those of the Crown. As Parliament grew in size and influence, and as its control over taxation became established by the precedent of successive Kings, protests entered on the Rolls began to exercise a meaningful constraining effect on the Crown. By the fourteenth century, the legislature began to enter conditions for how the Crown could spend grants of supply on the Rolls, and to demand oversight of royal expenditures from independent treasurers. For instance, in 1348, Commons specifically insisted that the conditions which they had attached to the grant of a new tax “should be entered on the parliament roll as a matter of record, by which the commonalty could have remedy, if anything is attempted to the contrary in times to come.”<sup>99</sup> In 1371, the Commons unsuccessfully petitioned the Crown to appoint a committee of treasurers to oversee the expenditure of funds.<sup>100</sup> But, by the 1400s, it had become common practice for Commons to make grants of supply dependent on the Crown’s fulfillment of certain conditions, which were recorded in the Parliament Rolls. In 1404, for instance, Commons granted a large supply to Henry IV on the condition that it be expended according to the terms of the grant, and that the dispensation be overseen by treasurers appointed by Parliament.<sup>101</sup>

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<sup>96</sup> 1 PARIS, *supra* note 40, at 398-99.

<sup>97</sup> 1 PARIS, *supra* note 40, at 400.

<sup>98</sup> 2 PARIS, *supra* note 40, at 12.

<sup>99</sup> Ormrod, *supra* note 47, at 42-43.

<sup>100</sup> Ormrod, *supra* note 47, at 47.

<sup>101</sup> TASWELL-LANGMEAD, *supra* note 76, at 259.

Parliament also combined the practice of protesting with its leverage over taxation to demand that successive Kings “confirm” rights that were either granted to Parliament in the Magna Carta, or other charters, or were believed to exist as a matter of governing precedent, in exchange for grants of supply. In 1297, Edward I issued the best-known confirmation, the *Confirmatio Cartarum*, a reaffirmation of the rights granted in the Magna Carta, in exchange for Parliament’s grant of supply for war in France. Parliament was particularly eager to reaffirm the principle that no taxes could be levied without its consent, as it worried that their consent “might turn to a bondage to them and their heirs, because they might be at another time found in the rolls,” and thus made explicit in their record that “we shall not draw such aids, tasks nor prises into a custom, for anything that hath been done heretofore, or that may be found by roll in any other manner.”<sup>102</sup> Confirmations like this enjoyed an ambiguous status, as something between a routine legislative record and (because they received a form of royal assent) something like a statute.<sup>103</sup> Yet monarchs could and often did attempt to ignore the terms of these agreements: Henry III inspired numerous protests by his supposed disregard for the terms of the Magna Carta and its subsequent confirmations.<sup>104</sup> Edward I went so far as to receive an absolution from Pope Clement V authorizing him to disregard the *Confirmatio*, though he never acted on it.<sup>105</sup> The real value of the confirmations was not in the binding effect of a single record entry, but in the cumulative effect of successive monarchs agreeing on public record to be bound by the charters in exchange for financial assistance. They were, like other parliamentary rights, precedential in nature.

By providing an authoritative chronology of Parliament’s rights, its procedures, and its position within the broader constitutional order, the Rolls and Journals played a critical part in establishing the legislature as a legal entity with a coherent identity and a claim to state power. They facilitated its transition, in the words of G.O. Sayles, from an “occasion” to an “institution.”<sup>106</sup> This first aspect of the Journals’ importance might be labeled a ‘constitutional law-producing’ function. Early Parliaments did not necessarily conceive of themselves as permanent institutions that constituted part of a broader constitutional order. They did not initially believe that they were engaging in a legal discourse by, for instance, petitioning for recognition

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<sup>102</sup> 1 William Reynell Anson, *The Law and Custom of the Constitution*, 255 (Maurice L. Gwyer, ed., 5th ed. 1922).

<sup>103</sup> Brand, *supra* note 43, at 3. William Prynne, a prominent figure in the Parliamentary party during the English Civil War, argued in 1628 that the *Confirmatio*, as well as the Magna Carta and several other confirmations, were technically statutes and represented positive law, because they received the royal assent. See Elizabeth Read Foster, *Petitions and the Petition of Right*, 14 J. BRIT. STUD. 21, 24 (1974). As Foster points out, the legal status of such petitions was less clear. *Id.* at 24–25.

<sup>104</sup> MADDICOTT, *supra* note 36, at 166–67.

<sup>105</sup> TASWELL-LANGMEAD, *supra* note 76, at 216 n.3.

<sup>106</sup> SAYLES, *supra* note 35, at 17.

of privileges; or establishing written traditions of debate and internal organization; or receiving requests from private petitioners; or creating a written record of their criticisms of crown policy. But they did understand themselves as inhabiting a world governed in part by tradition, and in part by a series of carefully negotiated agreements with a nearly absolute monarch. And they understood the importance of creating a written record that interpreted those traditions and agreements favorably, and they created space in the constitutional order for an institution that could restrain the monarchy and represent the interests of other social and political stakeholders. The use of written records to develop those traditions built a body of precedent that ultimately came to be accepted as public law and formed the foundations of English constitutionalism.

### *B. Journals in the Sixteenth Century*

By the sixteenth century, Parliament did begin to develop an institutional consciousness and to conceive of itself as institution with legal rights and obligations within a broader constitutional order. The legislature was still largely subservient to royal will: Parliaments did not meet regularly, and criticism of crown policy was infrequent.<sup>107</sup> But while Parliament did not make any dramatic claims to constitutional authority, it did begin to establish its institutional autonomy in significant ways. The Speaker reasserted the existence of Parliament's privileges at the opening of each session, and Commons began to assert the right to enforce its own privileges through its Serjeant-at-Arms.<sup>108</sup> Legislative procedure was formalized considerably, and rules of proceeding were further reticulated.<sup>109</sup> New and more sophisticated fixtures of internal organization were established. For instance, in 1571, Commons established a "committee for motions of griefs and petitions" for the first time to centralize the process of formulating petitions to the Crown and reducing them to writing.<sup>110</sup> This process instituted a more systematic study of Parliament's historic records (which provided legal precedents on which petitions could draw), and also pushed Parliament further in the direction of recording new requests for relief in a regularized format, and according to a predetermined strategy.<sup>111</sup>

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<sup>107</sup> Faith Thompson, *A Short History of Parliament: 1295–1642*, at 142–43 (1953).

<sup>108</sup> *Id.* at 162–63.

<sup>109</sup> *Id.* at 149, 167–70.

<sup>110</sup> Foster, *supra* note 103, at 28.

<sup>111</sup> Foster, *supra* note 103, at 28.

The process for introducing and enacting legislation was also refined. Bills and petitions were still used interchangeably to request the monarch's assent to official acts.<sup>112</sup> But Parliament now used these devices more aggressively to attempt to initiate topics for discussion and legislation, an initiative that had previously belonged, for the most part, to the Crown.<sup>113</sup> Most prominently, the Commons repeatedly attempted to petition Elizabeth I for a redress of grievances concerning the grant of royal monopolies. While the queen was willing to negotiate on the substance of these complaints, she consistently maneuvered to prevent the parliamentary record from reflecting that the initiative for reform had originated with Parliament rather than the Crown. In 1571, 1589, and again in 1598, Elizabeth I, aware that petitions were being formulated by the Committee for Motions of Grievs and Petitions, preempted formal requests for legislation by promising her own relief.<sup>114</sup> Commons was also aware of the precedential importance of records reflecting the Crown's accession to its demands, and sought to record that accession in the Journals despite the queen's evasions. In 1601, when the Queen again promised monopoly reform in response to a parliamentary petition, a member moved that her response "might be written in the books and records of this House."<sup>115</sup> Robert Cecil, the Queen's chief minister, demurred on the request, replying that the Queen did not idly "notify in public a matter of this weight."<sup>116</sup> Other members insisted. One protested that, "[a]s the Gospel is registered and written, so would I have that also."<sup>117</sup> Another observed that "[r]ecords remain [in existence for] long [periods of time]" and urged that "the clerk may" record the response.<sup>118</sup> It is not known whether the reply was ultimately recorded on the Journal, since it has been lost (the Queen's proclamation on monopolies appeared the next day),<sup>119</sup> but the exchanges over monopoly reform reflect an understanding on the part of both Crown and Parliament that procedural records in the Journals could have meaningful implications for the balance of power within government.

All of these developments were made possible by the existence of increasingly sophisticated records: more elaborate procedures required more meticulous documentation; more aggressive assertions of parliamentary authority required a longer and more convincing pedigree. It was in the early sixteenth century that the Journals supplanted the Rolls as the official documents of legislative activity and began to assume their present form.

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<sup>112</sup> *Id.* at 27–28.

<sup>113</sup> THOMPSON, *supra* note 107, at 166.

<sup>114</sup> Foster, *supra* note 103, at 28.

<sup>115</sup> Foster, *supra* note 103, at 32.

<sup>116</sup> Foster, *supra* note 103, at 32.

<sup>117</sup> Foster, *supra* note 103, at 32.

<sup>118</sup> Foster, *supra* note 103, at 32.

<sup>119</sup> Foster, *supra* note 103, at 32.

While the Rolls encompassed the activity of Parliament as a whole, the Journals were divided into two separate series of books: one for the Lords, which began in 1509, and another for Commons, beginning in 1547.<sup>120</sup> More and better educated clerks were tasked with modernizing Journal practice; transcription was improved; the format of records was rationalized.<sup>121</sup>

Procedural steps were also taken to ensure that Journal manuscripts were approved by the membership of each house and protected from tampering. The Clerks of Parliament were now selected by the Houses and appointed by the Crown under letters patent. They were appointed to serve for life, suggesting that they were intended to be politically independent, and insulated from periodic changes in the composition of Parliament. Upon assuming office, each Clerk took an oath, kneeling before the Lord Chancellor, swearing to: “[M]ak[e] true entries, remembrances, and journals of the things done and past in the same . . . [and] keep secret all such matters as shall be treated in his said Parliaments; and not disclose the same before they shall be published, but to such as it ought to be disclosed unto.”<sup>122</sup>

Indeed, in 1641, the Clerk was sanctioned for allowing a Member to take the Journals from the Clerk’s table and examine them without the permission of the House. In response, it was resolved that:

[I]t was a fundamental order of the House, that the Clerk, who is the sworn officer, and intrusted with the entries, and the custody of the records of the House, ought not to suffer any Journal or record to be taken from the table, or out of his custody; and that if he shall hereafter do it, after this warning, that at his peril he shall do it.<sup>123</sup>

Clerks were forbidden from making entries into the Journals except on the orders of the House, and individual Members could not, of their own initiative, direct the official records of the session to be altered. For instance, in 1628, when the House of Lords requested the Journal record of a speech made by a Member of the House of Commons, Commons replied that no such record existed on its books, because the transcription “was without warrant at all times, and in that Parliament, by order of the House, rejected and left.”<sup>124</sup> Clerks, thus, did not take notes of proceedings “without the precedent directions and command of the House, but only of the Orders and Reports made in this House.”<sup>125</sup> Thus even if a speech was made in Parliament, and “any number of Members, call[ed] out to have them taken down . . . this call of particular Members, though ever so general, is not properly, indeed cannot be, an Order of the House.”<sup>126</sup> In short, as

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<sup>120</sup> THOMPSON, *supra* note 107, at 148.

<sup>121</sup> THOMPSON, *supra* note 107, at 148.

<sup>122</sup> See 2 HATSELL, *supra* note 71, at 241.

<sup>123</sup> 2 HATSELL, *supra* note 71, at 251.

<sup>124</sup> 2 HATSELL, *supra* note 71, at 251.

<sup>125</sup> 2 HATSELL, *supra* note 71, at 251.

<sup>126</sup> 2 HATSELL, *supra* note 71, at 255.

Parliament began to rely more heavily on its precedents to build sophisticated structures of internal organization, and to press more ambitious claims of privilege against the Crown, it became aware of the need for official records that were equal to those tasks, and that accurately reflected its decisions on points of parliamentary law.

More significantly, both parliamentarians and other English legal authorities began to conceive of the increasingly sophisticated body of institutional history collected in the Journals not only as received tradition, but as law. Because Parliament had historically spent a significant portion of its time adjudicating petitions for relief—either in the form of complaints against abusive royal officials, or requests for assistance through private bills—it had come to be regarded not only as a legislature, but also a “court of record”—in the words of one contemporary, “the highest and most authentic court of England.”<sup>127</sup> From the fourteenth century onward, only the House of Lords exercised formal judicial functions, such as the hearing of appeals from royal courts.<sup>128</sup> But in the sixteenth and seventeenth century, parliamentarians and other legal authorities began to regard the broader universe of precedent contained in Parliament’s records—those aspects that touched on privilege, procedure, and Parliament’s attempts to enforce the obligations of the monarch through its control of taxation; not just its adjudication of private petitions—as a coherent body of law, as authoritative in the realm of government as the common law was in private law. This doctrine was known to English authorities as the *lex et consuetudo Parliamenti* (“*lex Parliamenti*”), or the “law of Parliament.”<sup>129</sup>

And just as the common law could be learned from the records of judgments by common law courts (which were also assuming a more regularized format in this era),<sup>130</sup> so could the law of Parliament be learned from consulting the records of legislative judgments contained in the Rolls and Journals. By the seventeenth century, it was widely accepted that “[t]he Laws, Customs, Liberties, and Privileges of Parliament are better to be learn’d out of the Rolls of Parliament, and other Records, and by Precedents, and continual Experience, then [sic] can be expressed by any one mans [sic] pen.”<sup>131</sup> Two doctrinal developments in this era are of particular importance. First, through statutory acts and through the gradual accumulation of a body of legal thought contained in influential treatises,

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<sup>127</sup> DAVID L. SMITH, *THE STUART PARLIAMENTS: 1603–1689*, at 34 (1999).

<sup>128</sup> House of Lords of the U.K., Library Note: The Appellate Jurisdiction of the House of Lords 2 (2009), <http://www.Parliament.uk/documents/lords-library/lln2009-010appellate.pdf>.

<sup>129</sup> For a contemporary overview of the concept of *lex Parliamenti*, see CHAFETZ, *supra* note 72, at 27–48.

<sup>130</sup> See *History of the Common Law: The Development of Anglo-American Legal Institutions* 817–19 (John H. Langbein et al., eds., 2009).

<sup>131</sup> George Petyt, *Lex Parliamentaria: Or, a Treatise of the Law and Custom of the Parliaments of England* 235–36 (London, Timothy Goodwin ed., 1690) (1689).

Parliament affirmed that its records were the authoritative sources of the *lex Parliamenti*. Parliament first suggested that the Journals were official state records in 1514 in “An Act Concerning the Burgesses of the Parliament,” which prohibited members of Parliament from departing before the end of a parliamentary session, unless they had received the license of the Speaker, “and the same license be entered of record in the book of the clerk of the Parliament appointed or to be appointed for the common house.”<sup>132</sup> Many later British treatise writers identified this 1514 statute as establishing the Journals as official records of Parliament. The *Lex Parliamentaria*, a prominent seventeenth-century treatise, noted that the “Book of the Clerk of the House of Commons is a Record, as it is affirmed by Act of Parliament, 6 Hen. 8, c.16.”<sup>133</sup> Edward Coke, in the *Institutes*, likewise noted that “the Journals of the house of the lords, and the book of the clerk of the house of commons, . . . is a record, as it is affirmed by act of Parliament in anno 6 H. 8. ca. 16.”<sup>134</sup>

These records were thus widely acknowledged as the most authentic source of parliamentary law. Erskine May later summarized:

The only method . . . of proving that this or that maxim is a rule of the common law, is by shewing that it hath always been the custom to observe it . . . it is laid down as a general rule that the decisions of courts of justice are the evidence of what is common law. The same rule is strictly applicable to matters of privilege, and to the expounding of the unwritten law of Parliament.<sup>135</sup>

By the seventeenth century, Edward Coke could even proclaim that records of “common law courts” were “far underneath the authority of the Parliament rols [sic].”<sup>136</sup> In short, by the end of the sixteenth century, Parliament was able to claim that its judgments as recorded in its Journals represented binding law on questions of legislative power and privilege.

The second principle Parliament asserted was that only it had the right to determine the contents of its own records. Blackstone wrote that “the whole of the law and custom of Parliament has it’s [sic] origin from this one maxim; ‘that whatever matter arises concerning either house of Parliament, ought to be examined, discussed, and adjudged in that house to which it relates, and not elsewhere.’”<sup>137</sup> “Hence,” May later confirmed, “it follows that whatever the Parliament has constantly declared to be a privilege, is the only evidence of its being part of the ancient law of Parliament.”<sup>138</sup> This meant that not only Parliament, but the Crown and courts, were required to

<sup>132</sup> 6 Hen. 8 c. 16 (Eng.) (quoted in 6 J.M. LELY, STATUTES OF PRACTICAL UTILITY PASSED IN 1905, at 783 (5th ed. 1905)).

<sup>133</sup> PETYT, *supra* note 131, at 64.

<sup>134</sup> 4 COKE, *supra* note 57, at 23.

<sup>135</sup> ERSKINE MAY, *supra* note 81, at 72 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES \*68, 71).

<sup>136</sup> 4 COKE, *supra* note 57, at 3.

<sup>137</sup> 1 William Blackstone, Commentaries \*158.

<sup>138</sup> ERSKINE MAY, *supra* note 81, at 72.

accept Parliament's records as definitive evidence of parliamentary law, such that "by another law and custome of Parliament the king cannot take notice of any thing said or done in the House of Commons, but by the report of the House of Commons."<sup>139</sup> By the end of the seventeenth century, it was widely accepted that Parliament's Journals were conclusive, self-authenticating evidence of what was said and done by the legislature. John Hatsell, the Clerk of the House of Commons in the late eighteenth century and the author of a well-known treatise on parliamentary procedure, recorded in 1785 that "the Journal of the lords is a record, to which every subject may resort for information; and the mode of acquiring this information to the House of Commons, is, by their appointing a Committee to inspect the record, and to report the same to them."<sup>140</sup>

### C. *Journal-Keeping as Constitutional Argument During the English Civil War*

The Stuart period and the Civil War era revealed the full potential of official legislative records to advance substantive constitutional arguments. Two innovations in Journal practice were particularly important to this evolution. One was Parliament's adaptation of centuries-old procedural mechanisms to make new and more ambitious claims on sovereign authority. Charles I's avowed belief in a powerful monarchy, his suspected Roman Catholic sympathies, and his aggressive attempts to collect revenue without the consent of Parliament precipitated fears about the security of England's legislative institutions and Protestant religion. In response to perceived encroachments on parliamentary rights, MPs and legal authorities marshaled evidence to contest the legality of the Crown's actions. Elsynge, as Clerk of Commons, combed laboriously through the old Rolls to collect precedents supporting the House of Lords' power of impeachment, which it began to wield against corrupt royal officials.<sup>141</sup> The Rolls and the Journals gained new prominence as proof of a centuries-old tradition of parliamentary independence and negotiated power-sharing agreements between the legislature and the Crown. Parliamentarians realized that it was to their advantage to interpret these records in ways that legitimized their claims to constitutional authority, by presenting them as the logical extension of the body of parliamentary law that had accumulated since the thirteenth century. As disputes over sovereignty escalated, MPs with legal training,

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<sup>139</sup> 4 COKE, *supra* note 57, at 14.

<sup>140</sup> 2 HATSELL, *supra* note 71, at 266–69. For discussions of the status of Parliament as a "court of record," see 1 ANSON, *supra* note 102, at 189; LORD CAMPION, AN INTRODUCTION TO THE PROCEDURE OF THE HOUSE OF COMMONS 90 (3d ed. 1958); THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE 53 (London, Brooke & Clarke 2d ed. 1804); 1 THOMAS STARKIE, A PRACTICAL TREATISE OF THE LAW OF EVIDENCE AND DIGEST OF PROOFS 234 (Philadelphia, T. & J. W. Johnson 7th ed. 1842).

<sup>141</sup> See generally HENRY ELSYNG, JUDICATURE IN PARLEMENT xii–xiii (Elizabeth Read Foster ed., 1991).

such as Edward Coke, engaged in a project of re-conceptualizing Journal-keeping as an explicit form of legal argument. The most visible manifestation of this trend was in the use of ancient parliamentary procedures, such as the practice of petitioning or entering protests of crown policy on the legislative record, to draft and publicize legal arguments. Many of the most significant constitutional documents of the seventeenth century followed this pattern.

The 1628 Petition of Right, for instance, adapted the ancient practice of petitioning the Crown for private legislation to a new, more explicitly constitutional purpose: demanding the Crown's recognition of certain fundamental limitations on royal authority, including the power to levy taxes without parliamentary consent and to impose martial law.<sup>142</sup> It was a radical reimagining of the concept of petitions, which in previous centuries had requested specific forms of assistance or asked for the Crown's confirmation of longstanding privileges, and it was the product of several decades' worth of reforms to petition procedure.<sup>143</sup> From the beginning of James I's reign in 1604, Parliament's own understanding of its place in the constitutional order diverged sharply with the Crown's. Petitioning, which became significantly more formalized in this period, played a critical role in mediating the constitutional disputes that ensued. Parliament continued to assert the right to initiate reform legislation, rather than to merely request concessions from the Crown in exchange for grants of supply. It also began to request concessions from the Crown on issues that had historically been considered solely within the royal prerogative, such as foreign relations, royal marriage, and monopolies. In 1621, for instance, the Commons presented a "remonstrance and petition" to James I criticizing his position on Catholicism, and his proposed marriage of Prince Charles into the Spanish Hapsburgs, by which they sought to "humbly . . . shew . . . what may be prejudicial to the King and the state."<sup>144</sup>

In advancing new legal claims, Parliament was assisted by a subtle procedural development in the manner of drafting and presenting petitions. Historically, there had been no single process for petitioning the Crown, and aside from the distinction between individual and Commons petitions, the petitions themselves were not subdivided into separate legal instruments. In the early seventeenth century, under the guidance of Edward Coke, Parliament came to differentiate between petitions of "grace" and petitions of "right."<sup>145</sup> Petitions of grace requested an act of grace from the Crown—a gratuity that it was under no obligation to provide—and therefore did not require an answer. These were useful, because they allowed Parliament to document its increasing participation in areas of policy traditionally reserved

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<sup>142</sup> Foster, *supra* note 103, at 21.

<sup>143</sup> See *supra* Section I.A (noting the text of the petition is not recorded in the Journal, only the fact of its reception).

<sup>144</sup> Foster, *supra* note 103, at 32–33.

<sup>145</sup> Foster, *supra* note 103, at 30–36.

for the Crown, while minimizing any immediate claims on legal authority, and thereby reducing the risk of royal backlash. Petitions of right, on the other hand, presented grievances to the Crown, usually after the grievances had been investigated by a committee, and demanded redress as a matter of law. By inventing the concept of a petition of right, Parliament impliedly assumed the authority to declare its own rights and the rights of its subjects, and to insist that the Crown bring its policies into conformity with those rights—a dramatically new claim to constitutional power. In 1604, for instance, Commons submitted a petition criticizing the Crown’s exercise of its purveyance power (historically a matter of prerogative) as “against law and right.”<sup>146</sup> Though Commons conceded the Crown’s prerogative to exact purveyance (i.e., the right to purchase provisions at less than market value), it claimed to have proven through committee investigations that the prerogative had been exercised abusively, and therefore illegally.<sup>147</sup> While theoretically limited in their scope, such petitions memorialized an important shift in parliamentary thinking: Parliament had begun to assume the authority to judge the legality of the Crown’s actions.

The tradition of entering protests of crown policy on the Journals, too, was adapted to advance new constitutional arguments. Where previous protests had objected to the King’s execution of specific domestic or military projects, Civil War-era protests made more aggressive demands for the reform of royal administration and openly asserted Parliament’s rights and privileges as immutable aspects of the English constitution. Unlike petitions, remonstrances neither asked for the Crown’s cooperation as a matter of grace nor demanded it as a matter of right: they simply declared on the parliamentary record that the Crown had acted contrary to law in some way. The Stuart Kings were aware of Parliament’s attempts to build a written record of its privileges and its right to participate in deliberations on issues touching the royal prerogative and resented them. In 1614, James I issued a warning to Parliament “against excess of lavish and licentious speech of matters of state,” speech which Parliament considered privileged under its right to freedom of debate.<sup>148</sup> The conflict culminated in 1621, when the King sent a message to Parliament justifying the detention of MP Sir Edwyn Sandys, who had been arrested in connection with his opposition activities.<sup>149</sup> James reprimanded “those fiery spirits of some of the House of Commons, who had presumed to argue and debate publicly of matters far above their

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<sup>146</sup> Foster, *supra* note 103, at 33–34.

<sup>147</sup> Foster, *supra* note 103, at 33–34. Likewise, in 1610, Commons sent a petition to James I complaining of the imposition of royal duties, another matter traditionally within the prerogative. Invoking the privilege of free speech, Commons prefaced its petition with the statement that “[w]e hold it an ancient, general and undoubted right of Parliament to debate freely, all matters which do properly concern the subject, and his right or state.” Foster, *supra* note 103, at 36.

<sup>148</sup> Foster, *supra* note 103, at 35.

<sup>149</sup> 1 HATSELL, *supra* note 69, at 136–38.

reach and capacity, tending to our high dishonor, and breach of Prerogative Royal,”<sup>150</sup> and commanded Parliament to “resolve” that the Crown was “very free and able to punish any man’s misdemeanors in Parliament.”<sup>151</sup> The Commons, outraged at the King’s open attack on its freedom of speech, responded with a remonstrance stating that its privileges were “its ancient and undoubted birthright.”<sup>152</sup> The protest was ordered to be “presently entered of Record in the Journal of the House.”<sup>153</sup> The King, in a final attempt to abrogate Parliament’s claimed right to opine on matters of state, “sen[t] for the Journal Book,” and struck out the “[e]ntry with his own hand,” and “in full assembly of his Council, and in the presence of the Judges, did declare the said protestation to be invalid, annulled, void, and of no effect,” and ordered it “erased out of all memorials, and utterly annihilated.”<sup>154</sup> The ringleaders of the protest, including Coke and John Pym, were imprisoned in the Tower of London for their role in drafting it.<sup>155</sup> Likewise, in 1626, Charles I reprimanded Parliament for conducting an “unparliamentary inquisition” against the Duke of Buckingham, a close personal ally, and warned it against interfering in matters of state.<sup>156</sup> Commons again responded with a “[r]emonstrance,”<sup>157</sup> in which they informed the King that “it hath been the ancient, constant, and undoubted right and usage of [P]arliaments, to question and complain of all persons of what degree soever, found grievous to the commonwealth.”<sup>158</sup>

The tradition of protestation reached its apotheosis in the Grand Remonstrance, a sweeping list of 204 grievances presented to Charles I in 1641. Like the Petition of Right, the Grand Remonstrance adopted a form of parliamentary record that had previously been used to address specific grievances, and used it to demand systemic constitutional change, requesting changes in religious policy and parliamentary oversight of royal administration.<sup>159</sup> The implication of the document was that the sovereign authority of the Crown was bounded by the constraints of English law, a

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<sup>150</sup> 1 HATSELL, *supra* note 69, at 137.

<sup>151</sup> 1 HATSELL, *supra* note 69, at 138.

<sup>152</sup> CHAFETZ, *supra* note 72, at 72.

<sup>153</sup> 18 Dec. 1621, HC Jour. (1621). While the protest was ordered to be entered “of record” in the Journal, the text itself does not appear in the printed version. *Id.* The text of petitions and remonstrances was often omitted from the Journals, but the documents were incorporated into the official parliamentary record once they were approved by the relevant House, and that approval was recorded in the Journals.

<sup>154</sup> 1 HATSELL, *supra* note 69, at 139–40.

<sup>155</sup> 1 HATSELL, *supra* note 69, at 140–41.

<sup>156</sup> Foster, *supra* note 103, at 36. Receipt of the message is recorded in the Journal at 14 Mar. 1626, HC Jour. (1626).

<sup>157</sup> 5 Apr. 1626, HC Jour. (1626).

<sup>158</sup> Foster, *supra* note 103, at 36.

<sup>159</sup> The Remonstrance was presented to the King, along with an attendant petition seeking his recognition of its contents. *See* 2 Dec. 1641, HC Jour. (1641).

position Charles I resisted. Also like the Petition of Right, the Remonstrance was so bold it proved unacceptable to the King and precipitated yet another dissolution of Parliament. As one historian of the English Civil War has summarized, the Remonstrance “masqueraded as a document for the attention of the King, but it was in truth addressed to the people: it was a public statement by the Commons accusing the King, a procedure as yet unheard of in the annals of England.”<sup>160</sup> Both the Petition of Right and the Grand Remonstrance demonstrated the possibility of adapting ancient parliamentary forms of record-keeping to assert new rights and powers on behalf of the legislature, and to situate new claims to constitutional authority within existing legal traditions.

The second innovation in Journal practice during the seventeenth century was Parliament’s creation of new record-keeping procedures to manage this body of written precedent as it rapidly increased in size and complexity. The developments of the Stuart era—the appropriation of old legislative functions to challenge royal authority; the reinvention of old judicial functions to try cases of impeachment and attainder—transformed Parliament into an institution that purposefully and self-consciously interpreted constitutional law. The Rolls and the Journals incentivized Parliament to reason precedentially and provided the legislature with the legal and procedural vocabulary to bolster its legitimacy by situating its rise to supremacy within the historical evolution of the English state. But the purpose of employing a body of official records to advance claims on constitutional power was to demonstrate that those claims derived naturally from existing notions of law and existing understandings of the distribution of authority within the state. The rapid proliferation of new Journal entries—new assertions of parliamentary privilege, more expansive claims on the legislature’s jurisdiction, new and more sophisticated forms of legislative procedure—could threaten to subvert the usefulness of those records by transforming them into a jumble of opportunistic and contradictory constitutional arguments.

As succeeding regimes gained control of the legislature—from the Long Parliament, to the Restoration Parliament, to the Cavalier Parliament and the Convention Parliament of 1689—they recognized the need to harmonize parliamentary precedent with Parliament’s present claims about the structure of the constitution. New Journal-keeping devices facilitated this harmonization. One was a procedure known alternatively as “expurgation,” “erasure,” or “obliteration.” By “expunging” a Journal entry, a house voted to order the clerk to cross that entry out of the relevant Journal book, officially “erasing” it from the parliamentary record and voiding it of precedential effect. In a sense, expurgation was also an innovation on an older form of Journal-keeping procedure. The Houses of Parliament had

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<sup>160</sup> C.V. WEDGWOOD, *THE KING’S PEACE: 1637–1641*, at 483 (1955).

long exercised the right to alter their Journals to correct factual errors or errors in transcription (which were more common in earlier eras, before the professionalization of the clerical staff).<sup>161</sup> Seventeenth-century Journal practice expanded the conception of error correction to encompass not only factual errors, but legal or constitutional errors as well. Under this new understanding, an “incorrect” constitutional judgment of Parliament could be erased from its records, no differently than a Clerk’s error in recording a vote or the enrollment of a petition. The Long Parliament began this practice in the 1640s. In 1645, the House of Commons ordered the vacation and expurgation from the Journals of an order from 1643 impeaching and expelling the member Henry Marten for suggesting the abolition of the monarchy.<sup>162</sup> Likewise, in 1647 both Houses of Parliament ordered the expurgation of a petition that had been accepted and enrolled the previous year which criticized the conduct of the parliamentary army. The order stated that:

The Lords and Commons, being tender of the Honour of the said Army, have thought fit to Ordain and Declare, and be it Declared and Ordained, . . . That the said former Declaration . . . be rased and expunged out of the Records and Books of the said Houses; and wholly taken away, and made void: And that no Member of the said Army shall receive any Damage, Prejudice, or Reproach, for any thing in the said former Declaration.<sup>163</sup>

The Rump Parliament that reconvened in 1659, and the Convention Parliament of 1660 that followed it, significantly enlarged the practice of expurgation. Several parliamentary committees were appointed to review the Journal entries of the Long Parliament in their entirety and “make Report of what they shall think fit to be expunged thereout, as treasonable, and scandalous to his Majesty, and his Royal Father, of blessed Memory.”<sup>164</sup> These Committees, which were established in 1659,<sup>165</sup> 1661,<sup>166</sup> and 1685,<sup>167</sup> were tasked with revising the official parliamentary record of the previous twenty years to render it consistent with the constitutional values of the Restoration. Significant procedural decisions were obliterated, including Cromwell’s dissolution of Parliament (Henry Scobell, the Clerk of the Long Parliament, was granted indemnity upon admitting he had entered the order of dissolution in the Journal book)<sup>168</sup>; any orders mandating members of Parliament to take the oath of “Engagement” under Cromwell<sup>169</sup>; a

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<sup>161</sup> See *supra* Section I.B.

<sup>162</sup> 16 Aug. 1643, HC Jour. n. 2 (1643).

<sup>163</sup> 5 Jun. 1647, HC Jour. (1647).

<sup>164</sup> 14 May 1661, HC Jour. (1661).

<sup>165</sup> 18 May 1659, HC Jour. (1659).

<sup>166</sup> 14 May 1661, HC Jour. (1661).

<sup>167</sup> 26 May 1685, HC Jour. (1685). This Committee was revived several months later. See 3 Jun. 1685, HC Jour. (1685).

<sup>168</sup> 7 Jan. 1659, HC Jour. (1659).

<sup>169</sup> 13 Mar. 1659, HC Jour. (1659).

resolution of December 18, 1648, permitting members of the House of Commons to dissent from a resolution of the House accepting Charles I's conditions for peace<sup>170</sup>; an order June 9, 1649 suspending members who refused to dissent from the agreement to peace<sup>171</sup>; and orders permitting the election of new members to replace those who were suspended.<sup>172</sup> For good measure, the Committee was also directed to investigate, "expunge and obliterate" any "other Votes there are of this Nature; and report their Opinion to the Parliament, Which of them they conceive fit to be vacated."<sup>173</sup> During this period, Parliament used expurgation to resolve less overtly political disputes as well. In *Skinner's Case*, the House of Commons challenged the House of Lord's right to assume original jurisdiction in civil suits and declared its adjudication of a suit against the East India Company illegal. The dispute was resolved in consultation with Charles I, who recommended that the Lords obliterate all records of its proceedings in the case, which it did, effectively abandoning its jurisdictional claims.<sup>174</sup>

The purpose of expurgations was not to erase or manipulate the historical record, but to provide a procedural method by which Parliament could void the "precedents" on its records when those precedents were no longer consistent with constitutional values. Expurgation did remove any reference to an order from printed copies of Parliament's Journals, aside from footnotes indicating that an entry had been annulled.<sup>175</sup> But as later historians have discovered, clerks rarely attempted to erase previous legislative acts from the original manuscript Journals in the parliamentary record. This was demonstrated most prominently by a resolution of 1661 to reverse an act of attainder passed by Parliament against the Earl of Strafford. Strafford had been the Lord Deputy of Ireland, and was accused by the House of Commons of conspiring with Charles I to raise a royalist army in Ireland to suppress the parliamentary cause.<sup>176</sup> After a failed impeachment for treason, Commons and Lords passed a bill of attainder for treason against Strafford in 1641. His subsequent execution was an important precipitating event in

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<sup>170</sup> 21 Feb. 1659, HC Jour. (1659).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> See, e.g., 1 LUKE OWEN PIKE, CONSTITUTIONAL HISTORY OF THE HOUSE OF LORDS FROM ORIGINAL SOURCES 281–82 (London, Macmillan & Co. 1894). The House of Commons resolved that all matters "relating to the business between the East India Company and Skinner" would be erased from its Journals. *Id.* at 282. The House of Lords passed a similar resolution. *Id.* Charles II reciprocated by ordering all records of the matter in the Council Books and in the Exchequer to be erased as well. *Id.*

<sup>175</sup> See, e.g., 16 Aug. 1643, HC Jour. n.2 (1643) (describing the expungement of the Order of the House for the imprisonment and expulsion of Mr. Marten).

<sup>176</sup> DIANE PURKISS, THE ENGLISH CIVIL WAR 113–17 (2006) (describing Stafford's trial and eventual execution).

the Civil War.<sup>177</sup> In 1660, the House of Lords resolved to expunge the record of Strafford's attainder from its Journal books.<sup>178</sup> The order of expurgation vacated the act of attainder, and directed the clerk to physically erase it from the manuscript Journals.<sup>179</sup> Yet the House of Lords chose only to obliterate the bill of attainder passed against Strafford—the actual parliamentary act of condemnation—while leaving the records of the impeachment untouched. Indeed, while the Restoration Parliament resolved to reverse the attainder itself within a year of convening, it debated for over thirty-five years on whether to expunge the impeachment proceedings from the Journal before deciding against it.<sup>180</sup> It was only in 1698 that the special committee of the House of Lords concluded that “by former Orders made by this House, relating to the cancelling and obliterating of the Earl's Attainder, it could not be intended that any other Proceedings should be obliterated than those relating specially to the said Act of Attainder” and that:

[W]hatsoever stands crossed upon the Journals, relating to the Proceedings of the Impeachment of the said Earl, ought not nor shall be looked on as obliterated; and that the several Orders for obliterating and vacating any Proceedings concerning the Earl of Strafford must be taken to have been intended as to what related to the Act of Attainder only.<sup>181</sup>

These specifications insured that there would be no confusion as to whether the procedural requirements for passing a bill of attainder had been altered. More importantly, they emphasized the legal function of expurgation—not to erase historical memory, but to amend the evolving record of parliamentary law to indicate that a particular action of Parliament was no longer valid, and that no future precedential use could be made of it. Thus the “obliterated” attainder in the Lords manuscript Journal was not actually erased, but only lightly crossed out, leaving “no difficulty in reading every word.”<sup>182</sup>

A second development of this era was the decision to allow parliamentarians to enter written dissents on the Journals. Like modern judicial dissents, these entries registered MPs' opposition to actions taken by Parliament. Unlike other procedural innovations of the era, the practice of dissenting was limited to only one house of Parliament, the House of Lords. The tradition of entering individual protests on the Lords' Journals began in

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<sup>177</sup> *Id.* at 158.

<sup>178</sup> 4 HATSELL, *supra* note 69, at 238–40.

<sup>179</sup> Paul Christianson, The ‘Obliterated’ Portions of the House of Lords Journals Dealing with the Attainder of Strafford, 1641, 95 ENG. HIST. REV. 339, 339 (1980); see also A.S. Turberville, The House of Lords under Charles II, 45 ENG. HIST. REV. 58, 71 (1930).

<sup>180</sup> Christianson, *supra* note 179, at 339.

<sup>181</sup> 5 Jul. 1698, HL Jour. (1698).

<sup>182</sup> Christianson, *supra* note 179, at 340 (quoting 9 S.R. GARDNER, HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES I. TO THE OUTBREAK OF THE CIVIL WAR 1603–1642, at 355 n.1 (London, Longmans, Green & Co. 1894)).

the sixteenth century. Early protests were entered primarily in response to religious measures taken under the Reformation,<sup>183</sup> and were recorded in the Journal simply as a list of the names of dissenting peers under the title *dissentientibus*.<sup>184</sup> But during the Long Parliament written dissents, giving reasons for Lords' disagreement with a legislative act, began to appear. These entries were officially authorized in 1642 by a standing order "[t]hat such Lords as shall make Protestation, or enter their Dissents, to any Votes of this House, shall make their said Protestation, or give Directions to have their Dissents entered into the Clerk's Book."<sup>185</sup> It is noteworthy that the House of Lords, where opposition to the Crown was much more equivocal than in Commons, authorized this practice at the same moment that Commons was perfecting the use of the ancient tradition of collective protests, or remonstrances, to advance increasingly radical constitutional arguments. The Commons explicitly denied its members the right of entering individual protests in its Journals during its debate on the Grand Remonstrance in 1641.<sup>186</sup>

A majority of peers frequently opposed the radical measures undertaken by Commons during the political crisis of the 1640s.<sup>187</sup> As a result, those sympathetic to the parliamentary cause were forced to develop their own procedural innovations to advance constitutional arguments in the upper house, and to deny royalist peers the appearance of united opposition to the Commons. The practice of dissenting reveals the extent to which parliamentarians began to view their Journals not only as a procedural record, but as a medium for constitutional dispute. For instance, in 1642, the Commons proposed the Militia Bill, whereby they requested that Charles I cede control of the Army to Parliament to suppress the uprising in Ireland. The Lords, and ultimately Charles, rejected the bill, and the dispute over the armed forces became one of the precipitating causes of the Civil War. One of the first formal protests of the Lords was by a minority who dissented against the Peers' decision not to support the Commons' request for control of the army, a measure it called "absolutely necessary to the settling of present distempers."<sup>188</sup> Many such protests were entered throughout the eighteenth century, and the practice of protesting continued until well into the twentieth.

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<sup>183</sup> 1 James E. Thorold Rogers, *A Complete Collection of the Protests of the Lords with Historical Introductions* vi–vii (Oxford, Clarendon Press, 1875).

<sup>184</sup> Clyve Jones, *Dissent and Protest in the House of Lords, 1641–1998: An Attempt to Reconstruct the Procedures Involved in Entering a Protest into the Journals of the House of Lords*, 27 *PARL. HIST.* 309, 309–10 (2008).

<sup>185</sup> 5 Mar. 1641, 4 *HL Jour.* 625, 628 (1642).

<sup>186</sup> 1 ROGERS, *supra* note 183, at xvi–xvii.

<sup>187</sup> WEDGWOOD, *supra* note 160, at 388.

<sup>188</sup> 1 ROGERS, *supra* note 183, at 910.

By the end of the seventeenth century, the Journals, as the living records of Parliament's actions and its interactions with the Crown, had become one of the primary vehicles for structuring debate on the English constitution; the form and functions of the legislature; and the distribution of governing power within the state. The addition of new procedural mechanisms allowed Parliament to adapt to the increased scope of its written precedent in this period (through the use of committee review); changes in that precedent over time (through the use of expurgation); and the existence of contemporaneous disagreement among MPs on questions of constitutional importance (through the entry of dissents in the Lords' Journals). Of course, not every question of parliamentary law could be given a definitive answer by consulting Parliament's records. Significant aspects of England's governing traditions are, as scholars commonly observe, "unwritten" and practiced solely out of received tradition.<sup>189</sup> And even where Parliament's records did serve as a source of legal authority, they were not necessarily the only source. Sometimes the records confirmed the continuing validity of other external documents, such as the Magna Carta. In other instances, rules or privileges that were initially derived from Journal practice were later codified by statute. Parliament's records did inform many points of *lex Parliamenti*.

But more importantly, they defined Parliament as an institution that makes and interprets constitutional law. Proving this capacity was critical to establishing the legislature's legitimacy as a governing institution, particularly in the seventeenth and eighteenth centuries when the supreme sovereignty of Parliament was first asserted. John Locke, for instance, discussed the importance of a legislature that was itself governed by law in his *Second Treatise of Government*, arguing that:

For all the power the government has, being only for the good of the society, as it ought not to be arbitrary and at pleasure, so it ought to be exercised by established and promulgated laws; that both the people may know their duty, and be safe and secure within the limits of the law; and the rulers, too, kept within their bounds.<sup>190</sup>

Blackstone, who resisted Locke's appeals to popular sovereignty,<sup>191</sup> also believed that the law of Parliament promoted the legitimacy and stability of

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<sup>189</sup> See, e.g., A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 23–24 (London, Macmillan & Co. 3rd ed. 1889) (1885) (noting that rules can be "written or unwritten," derive from "custom" and "tradition," and consist of "conventions, understandings, habits, or practices").

<sup>190</sup> JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 72–73 (C.B. Macpherson ed., 1980) (1690).

<sup>191</sup> To Locke's contention that "there remains still inherent in the people 'a supreme power to remove or alter the legislative, when they 'find the legislative act contrary to the trust reposed in them,'" Blackstone replied that devolving sovereign power to the people would result in "dissolution of the whole form of government established by that people," and thus "annihilate[e] the sovereign power" and "repeal[] all positive laws whatsoever before enacted," making any permanent law impossible. 1 WILLIAM BLACKSTONE, COMMENTARIES \*142, \*157. A society could only achieve

the English government. He recognized that legislative authority that was entirely unbounded by law posed a threat to just government, and that British subjects would be “without remedy” if Parliament, “being the highest and greatest court, over which none other can have jurisdiction in the kingdom,” should abuse its power “by any means” of “misgovernment.”<sup>192</sup>

Rules of Parliament’s own making could act as a restraint on the legislature without subverting its sovereign authority, and constitutional history proved that they had done so. The Journals provided the means by which the “rulers” in Parliament demonstrated—to each other, to the Crown, and, increasingly, to the public—that they were themselves governed by the rule of law. “[A]s every court of justice hath laws and customs for it’s [sic] direction,” Blackstone explained, “some the civil and canon, some the common law, others their own peculiar laws and customs, so the high court of parliament hath also it’s [sic] own peculiar law, called the *lex et consuetudo parliamenti*”—a law that could best be learned “out of the rolls of parliament, and other records, and by precedents, and continual experience.”<sup>193</sup>

## II. LEGISLATIVE JOURNALS IN THE AMERICAN CONSTITUTIONAL TRADITION

### A. *The Status of Journals in the Colonial Era*

Americans of the seventeenth and eighteenth centuries inherited traditional British understandings of constitutionalism. They viewed the “constitution” not as a single master-statement defining the law of sovereignty, but as a collection of individual liberties and restraints on state action that were grounded in historical precedent. Its contours were gleaned from evidence of longstanding practice or prior agreements between governing institutions. Such precedent endowed the exercise of power with the legitimacy of consent—the Crown, the Parliament, or the colonies were invested with a particular authority, because the historical record proved that all of the stakeholders in the legal system had previously recognized that liberty or authority as rightful. By the eighteenth century, this understanding began to assume the familiar aspects of the theory of government by contract or consent.<sup>194</sup> Some legal authorities viewed the

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legal stability, in Blackstone’s analysis, by reposing sovereign authority in institutions, rather than the people.

<sup>192</sup> *Id.* at \*142, \*157.

<sup>193</sup> *Id.* at \*158.

<sup>194</sup> See 3 JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY TO LEGISLATE 160* (1991) (describing one of the precedents argued during the American Revolution as “assumptive claims” that the colonies “never disputed the power of Parliament to bind them in all cases whatsoever”) (internal quotation marks omitted); GORDON S.

“constitution” in purely descriptive terms—it was, literally, the collection of common law and institutional precedent that constituted the government, and it could be altered as new sovereign agreements superseded previous ones.<sup>195</sup> Others—particularly American and English Whigs—viewed it in more normative terms, as a governing order that was derived from historical precedents, but that ultimately reflected the dictates of natural law.<sup>196</sup> But Americans generally agreed that the limits of what the government could do were determined by evidence of what it had done in the past.

As a result of this widespread emphasis on historical precedent, in the colonial era arguments in constitutional law, like arguments in common law, often reasoned by analogy from past historical practice to resolve contemporary disputes over sovereign power. John Reid has labeled this form of argument “forensic” history.<sup>197</sup> The resolution of specific disputes sounding in tort or contract were thought to reveal the general principles by which the common law operated. Under what Coke dubbed the “artificial reason”<sup>198</sup> of the law, as one recent article has summarized:

[The legal practitioner would] perceive[] a relevant similarity between the situation involved in some previous decision and the situation at issue in the instant case, and then use[] the analogy between the previous decision and the instant case to argue that the instant case ought to be decided in the same way as the previous one.”<sup>199</sup>

In the same way, the resolution of disputes over individual rights or sovereign authority were thought to reveal more generally applicable doctrines of the law of government. The American colonists were, for instance, aggressive in opposing the relatively minor taxes that Parliament enacted in the early 1760s, not primarily because of the law’s onerous terms, but because they feared that by acquiescing they would be deemed by extension to have ratified the general legitimacy of parliamentary laws enacted without colonial representation. As one American opponent of an excise tax on cider argued in 1763, “if this new extension of the Excise-laws is confirmed, it must effectually justify and authorise every future extension of them which can be proposed, till the Excise becomes general.”<sup>200</sup>

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WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787*, at 270 (1969) (“Obedience by the people to acts of the legislature was explicable in terms of consent, because the people presumably participated in the legislature and thereby bound themselves to the laws.”).

<sup>195</sup> Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* 9–10 (2004).

<sup>196</sup> *Id.* at 911; *see also* WOOD, *supra* note 194, at 259–68.

<sup>197</sup> 3 REID, *supra* note 194, at 161.

<sup>198</sup> *Prohibitions Del Roy* (1607) 77 Eng. Rep. 1342, 1343; 12 Co. Rep. 63, 65 (quoted in Frederick Schauer & Barbara A. Spellman, *Analogy, Expertise, and Experience*, 84 U. CHI. L. REV. 249, 251 n.4 (2017)).

<sup>199</sup> Schauer & Spellman, *supra* note 198, at 251–52.

<sup>200</sup> 3 REID, *supra* note 194, at 159–160.

Likewise, two years later Attorney General Charles Yorke argued that the Stamp Act was a “precedent” which “may . . . be in argument extended far, to other future taxes, upon the colonies.”<sup>201</sup> “That,” as Reid explains, “was one reason American whigs rioted—to keep the Act from becoming a precedent.”<sup>202</sup> The knowledge that discrete political acts could serve as the basis for general propositions of constitutional law strongly affected legal thinking. Lawyers and political advocates thus frequently deployed historical arguments in the service of a legal agenda.<sup>203</sup>

A number of legal historians have explored the importance of precedent in early American law.<sup>204</sup> But in examining how precedent was interpreted, they have often overlooked the corollary question of how and why it was generated in the first place. The accumulation of precedent was not a passive process. While historical precedent generally was accorded greater importance in the eighteenth century than it is today, the law placed a special emphasis on written documents. “Like all Englishmen,” writes Gordon Wood, “the colonists were familiar with written documents as barriers to encroaching power.”<sup>205</sup> And of all of the forms of written precedent, those that came from institutions invested with sovereign power—such as legislatures, courts, and the Crown and its executive officers—carried the greatest weight. Moses Mather summarized the importance colonists accorded to the written agreements whereby Parliament had reduced royal authority, “[a]nxious to preserve and transmit” their rights “unimpaired to posterity,” the English people had repeatedly “caused them to be reduced to writing, and in the most solemn manner to be recognized, ratified and confirmed,” by the Crown, and “afterwards by a multitude of corroborating acts” culminating in the English Bill of Rights and the Acts of Settlement.<sup>206</sup>

Governing institutions understood this dynamic. Not just courts, but legislatures and executive officials, were aware that the documents that had the greatest persuasive weight in constitutional argument were those that they generated in the course of their official duties. The statements that they issued protesting or acceding to an assertion of authority by a coordinate department; the portions of their records that they relied on in legal debates; and the portions that they deliberately expunged—these things shaped the universe of historical precedents that lawyers could rely on in pressing constitutional arguments. The constitution changed as the written sources of legal authority changed. As the English legal theorist Thomas Rutherford

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<sup>201</sup> 3 REID, *supra* note 194, at 160.

<sup>202</sup> 3 REID, *supra* note 194, at 160.

<sup>203</sup> 3 REID, *supra* note 194, at 160.

<sup>204</sup> See, e.g., KRAMER, *supra* note 195, at 11–14 (discussing various forms of precedent used in legal arguments during America’s early history); 3 REID, *supra* note 185, at 160–67 (same); WOOD, *supra* note 194, at 259–68.

<sup>205</sup> WOOD, *supra* note 194, at 268.

<sup>206</sup> WOOD, *supra* note 194, at 268.

wrote in the 1750s, “[w]hatever constitution . . . might appear from former usage to have been established in any civil society,” a “different or contrary usage, after it obtains, will afford the same evidence, that the governors and the people have mutually agreed to change the constitution.”<sup>207</sup> By controlling the contents of their historical records, these institutions could exert considerable influence over the direction of constitutional debate.<sup>208</sup> Record-keeping practices determined which historical precedents existed and which of those continued to be recognized and relied upon by the constituent elements of the state. Just as modern courts are strategic in drafting opinions, aware that the legal conclusions they place on the judicial record will be applied to a wide array of future disputes, so were the Anglo-American governmental institutions of the seventeenth and eighteenth centuries strategic in composing their official records.<sup>209</sup> Compilers were guided by a combination of constitutional values, institutional goals, and political concerns in determining what their official records did—and did not—say.

Legislative Journals were particularly important to the process of precedent creation in America, beginning in the colonial era. There were two reasons for this. First, the legislature had gained considerable theoretical and practical significance in Anglo-American government. In England, Parliament had largely established its supremacy.<sup>210</sup> As a result of its unequaled legal and political authority, the constructions it placed on issues of constitutional law carried unique weight. It was, if not the only interpreter of the constitution, at least the most important. Legislatures had outsized importance in the colonies as well. They were the primary representatives of local colonial populations within the imperial government.<sup>211</sup> They also took responsibility for many aspects of political administration, enacting local laws and adjudicating legal disputes.<sup>212</sup> Because colonial legislatures were responsible for most of the daily administration of American affairs, their records, like those of medieval Parliaments, had a practical importance that made them difficult for the royal authorities to ignore. By the seventeenth century many assemblies began to view themselves as colonial analogues of Parliament—endowed with the same constitutional legitimacy to make and

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<sup>207</sup> KRAMER, *supra* note 195, at 16.

<sup>208</sup> Reid recounts an illustrative episode in which the Massachusetts House of Representatives doctored portions of a letter between the Massachusetts governor and Charles II to prove that it had never consented to direct parliamentary legislation. 3 REID, *supra* note 194, at 162.

<sup>209</sup> For an overview of the self-conscious act of precedent-creation by courts, see generally Paul J. Watford et al., *Crafting Precedent*, 131 HARV. L. REV. 543 (2017).

<sup>210</sup> 3 REID, *supra* note 194, at 73-75.

<sup>211</sup> See, e.g., Bernard Bailyn, *The Origins of American Politics* 6-9 (1967).

<sup>212</sup> *Id.* Mary Patterson Clarke, in her extensive history of parliamentary privilege in the colonies, has examined the growth of the assemblies' judicial functions, and their roots in ancient parliamentary practice. See MARY PATTERSON CLARKE, *PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES* 15-38 (1943).

interpret law within their localized jurisdictions as Parliament was in England. As the lower house of the Maryland Assembly expressed on its record in 1697, it was “in like nature to the Parliament of England as to this province.”<sup>213</sup> Second, colonial assemblies inherited the legislative record-keeping practices that had developed in England since the thirteenth century, which enabled them to build and manage precedent with much greater sophistication. All of the assemblies kept Journals after the parliamentary tradition, and by the early eighteenth century the form and procedure for recording them had become relatively formalized.<sup>214</sup>

Much like early Parliaments, colonial assemblies quickly learned that by strategically managing their historical records, they could actively direct the evolution of institutional relationships in government. Colonies often leveraged their Journals to interpret their powers and privileges in ways that significantly expanded their autonomy. The relationship between colonial assemblies and royal governors, the Crown’s appointed administrators on the American continent, was not well defined when the colonies were first chartered. While colonial legislatures understood themselves as continental analogues of Parliament, and governors as extensions of the Crown, in theory by the eighteenth century the governors wielded much greater executive authority in America than the monarch did in English domestic affairs. Royal governors had the right to prorogue colonial assemblies at will, a power that had been severely limited in England by the Glorious Revolution and the Triennial and Septennial Acts; the Crown still enjoyed an unfettered veto over colonial legislation; and royal governors still retained the right to appoint and remove colonial judges at will.<sup>215</sup>

As early as the seventeenth century, colonial assemblies made concerted efforts to import the doctrines of parliamentary privilege that had emerged in England into American legislative practice, and to record and refine those precedents in their Journals in order to bolster their legal rights against the incursions of the royal government. Many began imitating the parliamentary practice of having the Speaker petition for recognition of the body’s privileges—freedom of speech, access to the governor, and freedom from arrest—at the beginning of each session and recording the petition on the Journal.<sup>216</sup> Colonies enforced these privileges as well and recorded their assertions in Journals. In South Carolina, in 1701, for example, a member of the South Carolina assembly insulted the royal governor during a debate on an admiralty bill. The governor dissolved the debate in retaliation, and

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<sup>213</sup> Charles M. Andrews, *The Colonial Background of the American Revolution* 37 (1924).

<sup>214</sup> Elizabeth Gregory McPherson, *Reporting the Debates of Congress*, 28 Q.J. Speech 141, 141 (1942).

<sup>215</sup> BAILYN, *supra* note 211, at 67–68.

<sup>216</sup> CLARKE, *supra* note 212, at 62–67 (describing the evolution of the Speaker’s petition in colonial assemblies, and its recording in legislative Journals).

the assembly formally protested on its Journal that the dissolution was a violation of its freedom of speech, which was “their undoubted right.”<sup>217</sup>

Freedom from arrest was asserted more aggressively, as most colonies enacted this freedom as a positive statute, rather than relying exclusively on Journal precedent.<sup>218</sup> But here, too, Journals still played an important role. In several colonies, including Pennsylvania, South Carolina, and Jamaica, assemblies later expounded the statutory protection from arrest by voting for resolutions which formally defined its contours.<sup>219</sup> More importantly, colonial assemblies continued to exercise the traditional authority that Parliament had to define and punish breaches of this privilege through formal, quasi-judicial proceedings.<sup>220</sup> The right to exercise this authority, and the procedures by which it was exercised, were derived from parliamentary practice and from the assemblies’ own Journal precedents.<sup>221</sup> Assemblies also developed legislative precedent that enabled them to expand their jurisdiction to governmental functions that had historically rested with royal governors, including determining the time and duration of sittings, the appointment of judges, and (critically) control of finances.<sup>222</sup>

Yet the colonists’ relationship with Journal precedent was not merely opportunistic. To the extent that they viewed themselves as replicas of the English Parliament, endowed with the same rights and privileges, they also understood their Journals to embody a coherent doctrine of parliamentary law. Colonial lawyers and legislators were well acquainted with the English doctrine of *lex Parliamenti*.<sup>223</sup> Through the publication of scholarly English treatises (which were enabled by the professionalization of parliamentary staff and the renewed institutional focus on records in the seventeenth century), Americans became familiar with the extensive body of Journal precedent that had developed since the middle ages. Thomas Jefferson, who served as the Clerk of the Virginia House of Burgesses, relied extensively on Hatsell—whose compendium of parliamentary Journal precedents he

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<sup>217</sup> CLARKE, *supra* note 212, at 94. In an extensive dispute between the Maryland assembly and the royal governor in the 1740s over the extent of that body’s freedom of speech, both parties made arguments on the legislative record attempting to justify their positions through interpretations of parliamentary precedent and the English Bill of Rights. CLARKE, *supra* note 212, at 96–97.

<sup>218</sup> CLARKE, *supra* note 212, at 100–02.

<sup>219</sup> CLARKE, *supra* note 212, at 102.

<sup>220</sup> CLARKE, *supra* note 212, at 103–05.

<sup>221</sup> CLARKE, *supra* note 212, at 103–05 (defining adjudicative procedures and punishments and citing colonial Journals). Some colonies did define their punishments by positive statute, including Massachusetts which enacted a schedule of fines for breaching the privilege against arrest. CLARKE, *supra* note 212, at 104 n. 23.

<sup>222</sup> ANDREWS, *supra* note 212, at 37.

<sup>223</sup> See, e.g., Warren M. Billings, *Justices, Books, Laws, and Courts in Seventeenth-Century Virginia*, 85 LAW LIBR. 277, 286 (1993) (describing the influence of English parliamentary treatises on legal and legislative practice in colonial Virginia); see also CLARKE, *supra* note 212, at 20–22 & n.15 (describing the adaptation of parliamentary-style adjudication by American colonies).

described as “preeminent”—as well as Elsynge and a host of other English authorities to develop his understanding of legislative law and procedure.<sup>224</sup>

The keeping of Journals also enabled assemblies to conceptualize themselves as adjudicative bodies, that not only made positive law but acted collectively to interpret and apply legal concepts. Colonial assemblies played a crucial role in adjudicating private legal disputes, acting (as medieval Parliament did) as a court of law that resolved cases through the application of precedent.<sup>225</sup> While not every private petition for relief was recorded in colonial Journals, the most prominent were.<sup>226</sup> Assemblies also played an important role in adjudicating disputes over public law, including monetary claims against colonial governments. Here, too, Journals helped establish a new area of legislative jurisdiction and conditioned the legislature to behave as a body that created and applied legal precedent. Christine Desan has examined the example of New York, whose colonial assembly extensively adjudicated citizens’ claims for government compensation in the eighteenth century. As Desan notes, New York “did not simply inherit adjudicative authority,” but rather “had to invent that authority” by constructing precedent.<sup>227</sup> Thus, “[t]he formulaic entries in the assembly Journals [adjudicating public claims] and in the official rhythms of the statutes [awarding compensation] reveal starkly the constitutional innovations that brought the legislature its jurisdiction to determine public claims.”<sup>228</sup> For the historian reviewing New York’s colonial legislative record, “the shape of government itself suddenly fills the pages of the assembly Journal. The claims discussed . . . tell the story of everyday administration,” and “reveal the public activity of the province, outlining the areas on which its officials spent money.”<sup>229</sup>

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<sup>224</sup> THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE FOR THE USE OF THE SENATE OF THE UNITED STATES xxviii (U.S. Gov’t Printing Office, 1993) (1801). The list of sources Jefferson consulted in compiling his authoritative manual of legislative procedure is found in the 1993 edition published by the Government Printing Office. *Id.* at xv–xxi.

<sup>225</sup> See, e.g., 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, 27–40 (1993) (summarizing the emergence of colonial petitions from English practice).

<sup>226</sup> For most petitions, only the fact of the reception and a brief description of the contents were recorded, for fear of overwhelming the pages of the Journals. See 8 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS: PETITION HISTORIES AND NONLEGISLATIVE OFFICIAL DOCUMENTS xvi (Kenneth R. Bowling et al., eds., 1998).

<sup>227</sup> Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381, 1409 (1998).

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 1436.

Moreover, while the seventeenth century had seen the most significant use of parliamentary records to resolve constitutional questions, Journal disputes continued to occur in England in the eighteenth century and to capture the attention of the American public. The case of John Wilkes, MP for Middlesex, was the most prominent of these. Wilkes had won his seat in Commons in 1768, but the House subsequently declared him ineligible on the basis of certain allegedly libelous articles he had published years earlier which had offended George III and his allies in Parliament. The controversy pit competing theories of legislative power (Josh Chafetz has labelled these “Blackstonian,” for William Blackstone, and “Millian,” for John Stuart Mill) against each other.<sup>230</sup> Traditional theories of parliamentary rights, which viewed the authority of Parliament over its own proceedings as absolute and inviolable, supported the right of Commons to exclude Wilkes for any reason it deemed proper. Blackstone defended the House’s right to exclude Wilkes as not only “evident from precedents,” but “clear from reason,” because “it would expose the judicature of the house of commons to the most flagrant insult and contempt . . . if the member expelled to-day, should be forced upon it to-morrow.”<sup>231</sup> More modern theories, influenced by increasingly popular norms of electoral accountability, held that Parliament could not exercise its privileges in a manner that was subversive of democratic rights. Edmund Burke warned against granting Parliament uncontrolled power over seating members, arguing that “all men possessed of an uncontrolled power leading to the aggrandizement and profit of their own body have always abused it.”<sup>232</sup>

Following a public campaign lasting six years (in which some sixty thousand subjects petitioned the Crown on his behalf), Wilkes was finally seated in Parliament in 1774.<sup>233</sup> In 1782, he succeeded in having the House resolution declaring him ineligible expunged from the House of Commons Journal “as being subversive of the rights of the whole body of electors of this kingdom.”<sup>234</sup> The Wilkes case became a cause célèbre among American Whigs, themselves chafing at what they perceived as the overbearing exercise of parliamentary authority. “Wilkes and Liberty” was a popular rallying cry.<sup>235</sup> William Palfrey, member of Boston Sons of Liberty and associate of John Hancock, wrote to Wilkes in 1768 that the colonies desired ministers of the Crown who were “reverenced and loved by the people,” and for enlightened members of Parliament, and hoped that Wilkes would be one such member.<sup>236</sup> The extensive use that both sides made of Journal precedent in adjudicating the controversy, and the effort Wilkes himself

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<sup>230</sup> CHAFETZ, *supra* note 72, at 156–58.

<sup>231</sup> CHAFETZ, *supra* note 72, at 158.

<sup>232</sup> CHAFETZ, *supra* note 72, at 157.

<sup>233</sup> See CHAFETZ, *supra* note 72, at 156–58; 3 REID, *supra* note 194, at 22–26.

<sup>234</sup> 22 William Cobbett, *Parliamentary History of England 1411* (T.C. Hansard ed., 1814).

<sup>235</sup> Arthur H. Cash & John Wilkes: *The Scandalous Father of Civil Liberty* 231–32 (2006).

<sup>236</sup> *Id.* at 233.

made in having the prior judgment of the House expunged from the Journals to formalize his legal victory, reflects the continued prominence of legislative Journals in constitutional discourse during the eighteenth century.

### *B. Drafting the Journal Clause*

The drafting of the Journal Clause at the Philadelphia Convention solidified the importance of legislative Journals as law-producing documents and reinforced their status within the hierarchy of government records. Article I sought to achieve apparently conflicting goals. Responding to the failures of the Articles of Confederation, it endeavored to craft a national legislature that was both sufficiently powerful and sufficiently independent to carry into execution the state-building agenda of a larger and more centralized federal government; and that was also confident enough in its constitutional authority to check incursions by competing branches of government.<sup>237</sup> At the same time, Article I also attempted to ensure that the national legislature was sufficiently governed by rules and democratic norms that it did not become overweening or tyrannical—an increasingly urgent concern by the late 1780s, when state legislatures had come to be seen by many as dangerous instruments of populist rule.<sup>238</sup>

The Journal Clause responded to both concerns. With respect to the need for a more muscular and constitutionally assertive legislative branch, the clause served to codify a tradition of precedential recordkeeping that had been one of the primary tools of both Parliament and the colonial legislatures in wresting legal authority from the Crown. Because of the Framers' broad familiarity with the history of Journal-keeping practice, and its role in constitutional development, many of the specifics of the provision were borrowed from existing record-keeping traditions with minimal disagreement. The Articles of Confederation contained a provision mandating the regular publication of legislative proceedings that served as a model.<sup>239</sup> So, too, did many state constitutions.<sup>240</sup> Debate on the text of the new clause thus focused on relatively narrow procedural questions, most of

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<sup>237</sup> See, e.g., WOOD, *supra* note 185, at 544–47.

<sup>238</sup> WOOD, *supra* note 185, at 404–09 (describing state legislatures' abuses of authority in the eighteenth century); WOOD, *supra* note 185, at 522–23 (describing the Founders' fear of similar excesses by Congress).

<sup>239</sup> ARTICLES OF CONFEDERATION of 1781 art. VII, § 7.

<sup>240</sup> See, e.g., MASS. CONST. of 1780, ch. I, art. II; N.Y. CONST. of 1777, art. XV; PA. CONST. of 1776, § 14; N.C. CONST. of 1776, art. XIV. States legislatures whose constitutions did not explicitly require them to keep journals still did, continuing the colonial practice. See, e.g., JOURNAL OF THE HOUSE OF DELEGATES OF VIRGINIA (Samuel Shepard & Co. eds., 1828) (1776), <https://archive.org/details/journalofhouseof1776virg>; see also *Early State Records Online*, MD. ST. ARCHIVES, <http://msa.maryland.gov/megafile/msa/speccol/sc4800/sc4872/html/all.html> (last visited May 1, 2019) (listing archives copies of the Journals of the Maryland Senate and House of Delegates from 1777 onward).

which focused on ensuring that the Journals were sufficiently succinct.<sup>241</sup> Indeed, perhaps the most significant fact about the Journal Clause of Article I is that it was included in the Constitution at all. No other branch of government was similarly required to produce a record of its proceedings. Article III, for instance, contains no equivalent mandate that judicial courts produce procedural records or publish opinions. The explicit incorporation of a legislative record-keeping requirement into the Constitution's final text reflects the particular importance accorded Journals at the time; an attitude that is consistent with the primacy of the legislature in the political theory of late eighteenth-century America.<sup>242</sup>

Consistent with the goal of empowering Congress to keep and publish its own records with minimal external restraints, the Journal Clause also loosened restrictions imposed by the Articles of Confederation. The Articles had required Congress to publish its proceedings monthly. They had also strictly circumscribed the legislature's power to make redactions: only those portions of the legislative record relating to "treaties, alliances or military operations" could be withheld.<sup>243</sup> Article I eliminated both restrictions: the new Congress was required only to publish its proceedings "from time to time;" and it could redact any portions of the record which, "in its discretion," required secrecy.<sup>244</sup> Unlike other portions of the Journal Clause, these changes did inspire controversy, both at the Philadelphia Convention and at the state ratifying conventions. George Mason argued that a blanket allowance for Congress to withhold portions of its Journals at its own discretion would turn the legislature into a "conclave."<sup>245</sup> James Wilson likewise argued that the "people have a right to know what their Agents are doing or have done," and that therefore Congress should have no option to keep its Journals secret.<sup>246</sup> There were also objections in both the Virginia,<sup>247</sup> and the North Carolina ratifying conventions to the absence of a strict timetable for publishing records<sup>248</sup> Patrick Henry called the "provision for periodical publication . . . too inexplicit and ambiguous," and worried that, without a strict mandate to publish their proceedings, Congress could "carry on the most wicked and pernicious schemes under the dark veil of secrecy."<sup>249</sup> The most forceful response to these objections was made by James Madison,

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<sup>241</sup> These debates, which focused on questions such as the quorum required to record a vote, are found in the published records of the Constitutional Convention. *See* 2 *The Records of the Federal Convention of 1787*, 256 (Max Farrand ed., 1911).

<sup>242</sup> *See supra* Section II.A; *see also* WOOD, *supra* note 194, at 162–63.

<sup>243</sup> ARTICLES OF CONFEDERATION of 1781, art. VII, § 7.

<sup>244</sup> U.S. CONST. art. I, § 5, cl. 3.

<sup>245</sup> CHAFETZ, *supra* note 65, at 52.

<sup>246</sup> CHAFETZ, *supra* note 65, at 52.

<sup>247</sup> 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 315–16 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter *Elliot's Debates*].

<sup>248</sup> 4 *ELLIOT'S DEBATES*, *supra* note 247, 72–73.

<sup>249</sup> 3 *ELLIOT'S DEBATES*, *supra* note 247, at 169–70.

who argued during the Virginia ratifying convention that relaxing these restrictions merely vested Congress with the same authority as the House of Commons and the majority of state legislatures—both of which had wide discretion regarding the publication and redaction of their records.<sup>250</sup> While Madison did not dispute the potential danger of political secrecy—a concern that had been raised periodically throughout the drafting and ratification process<sup>251</sup>—he contended that the traditional norms of legislative recordkeeping would prevent abuse. “There was,” he explained, “never any legislative assembly without a discretionary power of concealing important transactions, the publication of which might be detrimental to the community. There can be no real danger as long as the government is constructed on such principles.”<sup>252</sup>

But despite the greater discretion it conferred on Congress to compile and publish its own records, the Journal Clause also implicitly addressed the need to construct a national legislature bound by rules. In order to ensure legislative independence, Article I had granted Congress sole authority over several important areas of governance. Section 5, for instance, authorized each House to determine the rules of its own proceedings, and to punish or expel its members for violations.<sup>253</sup> That Section also made Congress the judge of its own elections, and the returns and qualifications of its members.<sup>254</sup> Section 2 permitted each House to choose its Speakers and other officers.<sup>255</sup> Sections 2 and 3 designated the House of Representatives and the Senate as having the sole power to initiate and try impeachments, respectively, and also authorized each house to select its own officers.<sup>256</sup> These provisions largely codified rights that Parliament and the colonial assemblies had won as a precedential matter by the eighteenth century, after extended legal struggles.<sup>257</sup> As the attempts of the Stuarts and earlier monarchs to manipulate the procedures by which legislation was enacted demonstrated, a legislature’s power over the rules of its proceedings was an essential element of its political independence.<sup>258</sup> Likewise, the role of the Crown in selecting Speakers and other legislative officers had long been a means of undermining the autonomy of Parliament and American legislative

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<sup>250</sup> 3 ELLIOT’S DEBATES, *supra* note 247, at 409.

<sup>251</sup> *See, e.g.*, 3 ELLIOT’S DEBATES, *supra* note 247, at 315–16 (Patrick Henry detailing dangers of political secrecy).

<sup>252</sup> 3 ELLIOT’S DEBATES, *supra* note 247, at 409.

<sup>253</sup> U.S. CONST. art. I, § 5, cls. 1, 2.

<sup>254</sup> *Id.* cl. 1.

<sup>255</sup> *Id.* § 2, cl. 5.

<sup>256</sup> *See id.* (granting the House of Representatives the “sole Power of Impeachment”); *id.* § 3, cl. 6 (granting the Senate the “sole Power to try all Impeachments”).

<sup>257</sup> *See supra* Part I.

<sup>258</sup> *See supra* Section I.C.

assemblies.<sup>259</sup> Impeachment was perhaps the most powerful weapon legislatures possessed against the “evil ministers” of the Executive.<sup>260</sup> Affirming that Congress had sole authority in these areas was thus essential to stabilizing a system of separated powers.

Yet these functions were also important components of a representative democracy. As Locke and Blackstone had expressed reservations about the unlimited sovereignty of Parliament in the eighteenth century, so Americans worried that granting Congress unchecked authority to determine the process by which laws were made, impeachments were tried, or legislators were seated risked permitting the legislature to behave arbitrarily.<sup>261</sup> There was no black-letter provision of the Constitution that ensured that Congress would discharge these duties in a manner that was generally accepted as consistent with republican values. The Journal Clause provided a solution to this difficulty, because it continued the well-established English and colonial practice of recording and compiling the precedents of legislative procedure in a legally binding government record. And as the *Wilkes* case had recently demonstrated, written precedent could serve not only to advance the legislature’s interests against the Crown, but also to ensure that the legislature itself remained bounded by legal norms—that, as Locke had explained, the “rulers” were “kept within their due bounds.”<sup>262</sup> Indeed, as legislatures on both sides of the Atlantic had grown more powerful in the eighteenth century, ensuring that those bodies were bounded by rules of fairness and procedure took on even greater political importance.<sup>263</sup> Patrick Henry’s fear that Congress might carry on “pernicious schemes” if it were not forced to disclose its proceedings, and James Wilson’s demand that the public know what its “Agents were doing or have done” reflected an anxiety among the founding generation that a legislature unbounded by transparent and widely accepted rules of procedure was liable to become abusive.

The drafters of the Constitution and early legislators considered the Journals of the House and Senate to import existing precedents of parliamentary law from England and from the colonial assemblies into congressional practice. Thomas Jefferson drafted a manual of legislative procedure for the Senate—a version of which governed questions of Senate procedure until the 1970s,<sup>264</sup> and still governs questions of House

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<sup>259</sup> See *supra* Sections I.A & I.C. For a discussion of the role gubernatorial patronage played in checking the power of colonial legislatures, see BAILYN, *supra* note 211, at 72–80.

<sup>260</sup> See *supra* Sections I.A & I.C.

<sup>261</sup> For a discussion of anxieties about legislative supremacy in the colonial and early republican era, see 3 REID, *supra* note 194, at 71–84, 301; WOOD, *supra* note 194, at 404–09.

<sup>262</sup> LOCKE, *supra* note 190, at 72–73.

<sup>263</sup> WOOD, *supra* note 194, at 404–09 (describing state legislatures’ abuses of authority in the eighteenth century).

<sup>264</sup> JEFFERSON, *supra* note 224, at xiii–xiv.

procedure<sup>265</sup> for issues on which it has not been explicitly superseded—that structured much of the institution’s early rules, and that was adopted almost entirely from Hatsell’s compendium of precedents from parliamentary Journals.<sup>266</sup> The surviving writings of John James Beckley, the influential first Clerk of the House of Representatives and a confidant of Jefferson, likewise indicate a belief that Congress would be governed by the history of parliamentary practice. Beckley was well read in the major treatises on British parliamentary procedure, including Coke and Hatsell,<sup>267</sup> and in an unpublished treatise on legislative procedure he reviewed “the jurisdiction & power of Parliament” in order to derive the “general principles” of legislative law, and apply them to “the specified & enumerated powers of Congress” and “the general nature and design of those Legislative and judicial functions with the execution of which, it is entrusted, as the supreme power of the Union.”<sup>268</sup>

In addition, the Journals provided the means for Congress to adopt new precedents where prior practice did not provide adequate guidance. Both the House and the Senate understood that the proceedings recorded in their Journals would themselves assume precedential effect on disputed questions of procedure.<sup>269</sup> The establishment of a fixed system of rules lent order and legitimacy to congressional proceedings. Like Parliament, both Houses of Congress directed their clerical staff to take special care to ensure their

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<sup>265</sup> RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 114-192, at 1030–31 (2015); *see also id.* at 127 n.1 (noting that Jefferson’s Manual has controlled House procedure unless explicitly contradicted since 1837). The House version omits portions of the Manual that refer exclusively to Senate or procedure or the procedures of Parliament. *Id.*

<sup>266</sup> JEFFERSON, *supra* note 224, at xxviii.

<sup>267</sup> JOHN JAMES BECKLEY, JUSTIFYING JEFFERSON: THE POLITICAL WRITINGS OF JOHN JAMES BECKLEY 142–46 (Gerard W. Gawalt ed., 1995) (recounting Beckley essay referencing British parliamentary procedure); *see also* Edmund S. Berkeley & Dorothy S. Berkeley, “The Ablest Clerk in the U.S.”: *John James Beckley*, 70 VA. MAG. HIST. & BIOGRAPHY 434, 436 (1962) (discussing Beckley’s early English legal education); Noble E. Cunningham, *John Beckley: An Early American Party Manager*, 13 WM. & MARY Q. 40, 40 (1956) (discussing Beckley’s experience as a clerk in various legislatures).

<sup>268</sup> BECKLEY, *supra* note 267, at 144.

<sup>269</sup> The use of record precedents to resolve disputes of procedure has continued to the present day. Former Clerk Asher Hinds, in his definitive treatment of procedure in the House of Representatives in 1907, wrote in the introduction to his treatise that “[t]he value of precedents in guiding the action of a legislative body had been demonstrated by the experience of the House of Representatives for too many years to justify any arguments in their favor now.” ASHER C. HINDS, HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES iii (1907); *see also* 6 CLARENCE CANNON, CANNON’S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES v (1935) (recognizing the influence of Hinds’ Precedents). The Senate’s compendium of procedure, written by former Parliamentarian Floyd Riddick, likewise relies on Journal precedent to articulate many of the rules of legislative practice. *See* FLOYD M. RIDDICK, RIDDICK’S SENATE PROCEDURE: PRECEDENTS AND PRACTICES xv (Alan S. Frumin ed., 1992) (“These rulings and opinions extend over a long period of time and were made by many different Presiding Officers—some going back almost to the very first session of the Senate. The Senate portions of the *Congressional Record* and the *Senate Journal*, for the period from December 3, 1883, to date, have been perused for rulings by Presiding Officers and practices which relate to Senate procedure.”).

accuracy. Journal entries could be made or changed only at the formal direction of the relevant house, and their contents were strictly controlled.<sup>270</sup> By providing a formal mechanism by which the legislature could both consult historical precedent, and, where necessary, establish new legal and procedural rules, Journals lent structure to an area of government that the Constitution had left underdetermined.

### C. *Journals in the Early Republic*

Legal historians in recent decades have revived the study of the early republican theory of constitutional interpretation known as “departmentalism.”<sup>271</sup> The Founding generation anticipated that where an ambiguity existed in constitutional doctrine, all three federal departments (and, under some versions of this theory, the states as well) would participate in constructing governing precedent. The courts enjoyed no legal monopoly on constitutional interpretation. As James Madison asserted in 1789:

“[There is no ‘one department’ that] draws from the constitution greater powers than another, in marking out the limits of the powers of the several departments. . . . If the constitutional boundary of either be brought into

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<sup>270</sup> The Clerk of the House and the Secretary of the Senate was “the sworn recording officer of the assembly,” and, like the Clerks of Parliament who were forbidden from making entries at the entreaties of individual legislators, was “subject only to the control of the assembly itself, and not to the control of the presiding officer, or of any other member.” See LUTHER STEARNS CUSHING, *LEX PARLIAMENTARIA AMERICANA: ELEMENTS OF THE LAW AND PRACTICE OF LEGISLATIVE ASSEMBLIES OF THE UNITED STATES OF AMERICA* 169 (2d ed. 1859). House rules specifically charged that “clerk is to let no journals, records, accounts, or papers be taken from the table, or out of his custody.” JEFFERSON, *supra* note 224, at 25. This care ensured that Congress’s records, and the constitutional precedents reflected in them, would command respect from both the public and the coordinate branches of government. In contrast to emerging newspaper reports of legislative debates, which often provided detailed transcriptions of floor speeches, the contents of the Journals were intentionally spare. See *infra* Part III (describing the rise of the transcripts of debate in the early nineteenth century, and their eventual displacement of the Journals as the preeminent records of legislative activity). They recorded only the votes, attendance, resolutions, and official messages exchanged by either house—the official acts undertaken by the House and Senate as collective bodies, which could be used by the institutions as precedent for future institutional conduct.

<sup>271</sup> See LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 108–11 (2004) (describing the “departmental theory” of the early Republic, in which “[e]ach branch could express its views as issues came before it in the ordinary course of business . . . [b]ut none of the branches’ views were final or authoritative”); see also LOUIS FISHER, *CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS* (1988) (arguing that “constitutional law is not a monopoly of the judiciary,” but rather “a process in which all three branches con-verge and interact with their separate interpretations”); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 *GEO. L.J.* 217, 232–33 (1994) (describing the belief, articulated in the Federalist Papers, that “one-branch interpretative supremacy” was undesirable, and that “each department should have a will of its own” by “being made independent of other departments”); Gary Apfel, *Whose Constitution Is It Anyway? The Authority of the Judiciary’s Interpretation of the Constitution*, 46 *RUTGERS L. REV.* 771, 777 (1994) (noting that “executive officials” have “frequently advocated departmentalism as opposed to judicial supremacy” from “the earliest days of the republic until the present day”).

question, I do not see that any one of these independent departments has more right than another to declare their sentiments on that point.”<sup>272</sup>

While courts asserted the right to review statutes and other state actions for constitutionality, they exercised this jurisdiction only rarely in the late eighteenth and early nineteenth centuries.<sup>273</sup> Moreover, even when courts did interpret the constitution, they rarely espoused the more radical doctrine of judicial supremacy, i.e., that judicial interpretations were binding on other departments.<sup>274</sup> In the ordinary course of government, the early Constitution relied on multiple institutional interpreters to give it construction.

Yet surprisingly little attention has been paid to the question of what these non-judicial constitutional interpretations looked like in daily practice, how they were formulated, and what legal authority they had. The history of legislative Journals demonstrates that constitutional interpretation by the coordinate branches was more than a theoretical possibility in the early years of the republic. Republicans in particular emphasized the importance of Congress, viewing constitutional interpretation by an elective assembly as an important corrective to the aristocratic and centralizing impulses of the judicially-oriented Federalists.<sup>275</sup> As John Randolph of Virginia protested during the debate to repeal the Judiciary Act of 1801, “are we [in Congress] not as deeply interested in the true exposition of the Constitution as the judges can be? With all the deference to their talents, is not Congress as capable of forming a correct opinion as they are?”<sup>276</sup> The pre-1787 history of legislative records provided a ready-made framework for Congress to deliberate upon questions of law, and to build an authoritative body of precedent. Congress not only had an equal right to interpret the Constitution, it also had an array of well-established, time-tested institutional tools with which to do so. The records that it managed as part of its daily proceedings allowed it to register its interpretations of constitutional law, and to respond to the interpretations asserted by other branches, as both Parliament and the colonial assemblies had done before it.

Indeed, because of the active role that legislatures had historically played in contributing to constitutional doctrine, not only Congress but the other branches considered legislative constitutionalism to be a natural feature of the tripartite system of government. Competing interpretations of constitutional law, memorialized in parallel government records, could lead to the sorts of procedural disputes that characterized seventeenth century England and colonial American politics. But in the ordinary course of early

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<sup>272</sup> KRAMER, *supra* note 195, at 105–06.

<sup>273</sup> KRAMER, *supra* note 195, at 147–48 (discussing how rarely judicial review was implemented).

<sup>274</sup> KRAMER, *supra* note 195, at 150–60 (recounting the rocky beginnings of judicial supremacy).

<sup>275</sup> KRAMER, *supra* note 195, at 141–42 (comparing Federalist and Republican views on judicial review).

<sup>276</sup> KRAMER, *supra* note 195, at 143.

republican government, departmental interpretations of the constitution were often complimentary rather than conflicting. Congress, for instance, took care in its early records to memorialize its respect for the prerogatives of other branches. In 1806, William Smith, an admiral and Revolutionary War veteran, and Samuel G. Ogden, a New York ship owner, submitted an unusual petition to Congress. Ogden and Smith had been arrested for violation of the 1794 Neutrality Act<sup>277</sup> after Smith had been captured by the Spanish Navy while bound for Venezuela with men and weapons on a ship owned by Ogden. The men claimed that they had been secretly encouraged by President Jefferson and Secretary of State James Madison to provide assistance to Francisco de Miranda in his war for independence against Spain, charges which Jefferson and Madison denied.<sup>278</sup>

While their prosecution was pending in New York, they submitted a petition to Congress alleging that they had been acting under executive orders from the President and “praying such relief [ ] as the wisdom of Congress might think proper to grant.”<sup>279</sup> A number of congressmen viewed the petition as an attempt to implicate the President in a secret military plot on the Journals of Congress, and as an improper request for Congress to interfere in an ongoing trial. Nathan Williams of New York claimed that the petitions were an attempt, “by obtaining the sanction of the House of their contents, to throw blame and censure on the prosecutors.”<sup>280</sup> The petitions, claimed Williams, were “of a most dangerous tendency” both because they implied the possibility of Congress interfering in a judicial proceeding, and because they would “tend to incense not only the country against the Administration, but against the tribunals of justice.”<sup>281</sup> After a lengthy debate, the House entered a resolution declaring that the memorials were “presented at a time and under circumstances insidiously calculated to excite unjust prejudice . . . against the existing Administration,” and thus directing “that the said memorials be by the Clerk of this House returned to those from whom they came” and expunged from the Journals.<sup>282</sup> The resolution thus adopted the ancient parliamentary practice of expurgation—of annulling the precedential effect of a Journal entry—in order to ensure that Congress’s records accurately reflected the constitutional boundaries between the coordinate branches.

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<sup>277</sup> 18 U.S.C. § 960 (1994).

<sup>278</sup> See generally *United States v. Smith*, 27 F. Cas. 1192 (C.C.D.N.Y. 1806) (No. 16,342).

<sup>279</sup> 15 ANNALS OF CONG. 1086 (1806).

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> *Id.* The resolution passed by a large margin. *Id.* at 1094.

Similar instances in which Congress omitted or erased entries thought to impugn the prerogatives of other departments occurred throughout the early republican era. In 1818, for instance, Vicente Pazos, who purported to be an agent of the governments of Mexico and Venezuela, submitted a petition to Congress seeking compensation for property damage suffered by inhabitants of Amelia Island, which had recently been annexed by the United States. The Executive had already rejected similar requests and had not yet formally recognized either government. The House of Representatives voted to refuse to receive the petition, as it appeared to be a request for Congress to grant implicit recognition on its formal records to governments that the Executive had not yet recognized, and also to reverse an Executive decision on compensating foreign nationals. As John Rhea of Tennessee summarized, “[t]he Constitution had given this business to the Executive—this House had nothing to do with it; and he did not wish to encourage appeals, either to the people or this House, from the Executive by any foreign agent.”<sup>283</sup> In instances such as these, Congress utilized its Journals not to wrest power from coordinate branches, but to formally reaffirm its respect for their constitutional prerogatives, establishing the comity necessary for departmental interpretation to function properly.

Courts, in turn, recognized Congress’s authority to reason as a law-interpreting body. The most significant example of this dynamic was the recognition of Congress’s right to hold non-members in contempt. The congressional power of contempt, which is not explicitly granted by Article I, is traditionally traced to the Supreme Court’s holding in *Anderson v. Dunn* in 1821.<sup>284</sup> But while *Anderson* did recognize Congress’s inherent power to punish contempt, this recognition was not so much a legal innovation as an adoption of existing constitutional doctrine established by congressional precedent. Parliament had exercised the right to hold non-members in contempt, as had most colonial and state legislatures.<sup>285</sup> Congress first asserted the same authority in 1795, when members of the House of Representatives accused two private citizens, Robert Randall and Charles Whitney, of attempting to bribe them in exchange for land development rights in Michigan.<sup>286</sup> The House, at the urging of William Smith of South

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<sup>283</sup> 31 ANNALS OF CONG. 1258 (1818).

<sup>284</sup> 19 U.S. 204, 204 (1821). For modern authorities tracing the power of contempt to *Anderson*, see for example, *Watkins v. United States*, 354 U.S. 178, 216 (1957) (Frankfurter, J., concurring) (citing *Anderson v. Dunn*, 19 U.S. at 204) (“The power of the Congress to punish for contempt of its authority is, as the Court points out, rooted in history. It has been acknowledged by this Court since 1821.”). In 1857, Congress enacted a statute, Act of Jan. 24, 1857, ch. 14, 11 Stat. 155, establishing contempt as a criminal offense punishable by judicial process. See *Watkins*, 354 U.S. at 216 (Frankfurter, J., concurring) (noting this enactment).

<sup>285</sup> See CHAFETZ, *supra* note 72, at 193–206 (providing a history of the use of contempt powers and the theories supporting their use).

<sup>286</sup> See 4 ANNALS OF CONG. 166–95 (1795) (providing an account of Congressional action taken in response to bribery attempts).

Carolina, resolved to formally claim the ancient parliamentary prerogative for itself. Smith explained:

As every jurisdiction had certain powers necessary for its preservation, so the Legislature possessed certain privileges incident to its nature, and essential for its very existence. This is called in England the parliamentary law; and as from that law are derived the usages and proceedings of the several State Legislatures, so will the proceedings of this House be generally guided by the long-established usages of the State Legislatures.<sup>287</sup>

Smith urged that Congress use its Journals to define the laws and procedures governing its right of contempt, since neither the Constitution nor the courts could supply the proper guidance. “This was the first instance, since the organization of this Government,” Smith noted, “in which it had been found necessary to resort to this high prerogative: it was right, therefore, that the principles on which it was founded should be well understood, and that the privileges of the House should stand unimpaired.”<sup>288</sup> The Committee on Privileges thus drafted a resolution, voted by the House, which formally defined the mode of proceeding for the trial.<sup>289</sup> Throughout, the Journals served as the equivalent of a court record, listing formal charges devised by the Committee on Privileges, as well as pleas, testimony, and the judgment of the House.<sup>290</sup>

When John Anderson, likewise accused of attempted bribery, stood trial for contempt in 1818, the House of Representatives relied heavily on the precedent of Randall and Whitney to prosecute the case. The procedures employed in 1795 were closely replicated.<sup>291</sup> When several Republican congressmen attacked the proceedings as unconstitutional, Federalists replied that that the Congress had already considered and rejected these arguments and established its right to hold non-members in contempt as a matter of precedent. Joseph Hopkinson of Pennsylvania encapsulated the Federalist position, explaining that the Republicans’ objection “had been heretofore solemnly debated and adjudged; and all the objections now expressed had been brought forward in their greatest force, without effect; and the precedent then established was entitled to respect.”<sup>292</sup> In the case of Randall and Whitney, “it was well known a full opportunity was given for the freest discussion; the parties arraigned at the bar having been heard by their counsel on this question.”<sup>293</sup> “In such cases,” Hopkinson concluded,

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<sup>287</sup> *Id.* at 181.

<sup>288</sup> *Id.* at 182.

<sup>289</sup> *Id.* at 194–95.

<sup>290</sup> *See id.* at 166–95 (listing specific charges brought by the Committee on Privileges).

<sup>291</sup> As in the case of Randall and Whitney, the House adopted a resolution formally announcing the charges and defining the mode of proceeding. Its contents substantially reproduced the procedure established in 1795. 31 ANNALS OF CONG. 607 (1818). The resolution is printed in the House Journal. H.R. JOURNAL, 15th Cong., 1st Sess. 125 (1818).

<sup>292</sup> 15 ANNALS OF CONG. 595–96 (1818).

<sup>293</sup> *Id.* at 596.

“we have ever been guided by precedent, and we have done right.”<sup>294</sup> Charles Mercer of Virginia gave an even more forceful defense of the power of Congressional precedent. Mercer said:

It has been correctly said that the multiplicity of laws constitutes the security of the citizen. So, sir, does the multitude of precedents which, sanctioned by usage, operate with the force of law. Precedents established in good times, stay, in disastrous days, the rage of faction, and the hand of tyranny . . .<sup>295</sup>

Even Republicans opposed to the congressional power of contempt appeared to acknowledge the force of the Whitney and Randall precedent—rather than urging the Congress to ignore it, several encouraged Congress to explicitly overrule it instead. “If solitary precedents might be found on the Journals of the exercise of such a power by the House,” urged Philemon Beecher of Ohio, “it was time now to put a stop to it.”<sup>296</sup>

When Anderson brought a trespass action against the Sergeant at Arms of the House of Representatives for detaining him in connection with his contempt proceeding (arguing that the detention was not authorized by law, because Congress had no constitutionally sanctioned power to punish contempt), he was in effect asking the court to overrule twenty years of settled congressional precedent, which was based in turn on several centuries of parliamentary practice. Much as Ogden or Pazos had done in Congress, Anderson was asking the judiciary to invade the long-established prerogative of a coordinate branch of government. The Supreme Court rejected Anderson’s arguments, and in doing so employed reasoning that closely mirrored that of Congress. It was true, the court conceded, that the Constitution did not grant Congress the express power to punish contempt. “But what,” the Court asked, “is the alternative? The argument obviously leads to the total annihilation of the power of the House of Representatives to guard itself from contempts, and leaves it exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may meditate against it.”<sup>297</sup> In response to Anderson’s argument that neither the Constitution nor the coordinate branches provided any limitation on the contempt power, and that as a result it was liable to be abused, the court replied that this was not so. Congress’s power to punish *was* subject to limits—specifically, the limits of precedent and legal reasoning. Congress could not stretch its authority to punish beyond reason, because it was required to reason publicly and accountable to the public for its judgments. The Court replied:

That a deliberate assembly clothed with the majesty of the people, and charged with the care of all that is dear to them . . . whose deliberations are required by public opinion to be conducted under the eye of the public, and

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<sup>294</sup> *Id.*

<sup>295</sup> *Id.* at 642.

<sup>296</sup> *Id.* at 606.

<sup>297</sup> *Anderson v. Dunn*, 19 U.S. 204, 228 (1821).

whose decisions must be clothed with all that sanctity which unlimited confidence in their wisdom and purity can inspire, that such an assembly should not possess the power to suppress rudeness, or repel insult, is a supposition too wild to be suggested.<sup>298</sup>

And these judgments were not to be made from whole cloth. Rather, they were to be derived (legally, analogically) from the powers established by long usage, as revealed by the legislature's records. The Court concluded:

[T]he Constitution is not a new creation, but a combination of existing materials, whose properties and attributes were familiarly understood, and had been determined by reiterated experiments. It is not, therefore, reasoning upon things as they are, to suppose that any deliberative assembly, constituted under it, would ever assert any other rights and powers than those which had been established by long practice, and conceded by public opinion.<sup>299</sup>

In short, the Court viewed Congress's building of institutional law as legitimate and complementary to the work of the judiciary—as establishing reasoned government in areas of law where early courts rarely tread—rather than as an intrusion on judicial power or civil liberty.

The tradition of legislative constitutionalism reached the height of its development in the 1830s. While legislative Journals were important tools in elucidating the contours of sovereign power, their contents were rarely subject to the kind of bitter controversy that could capture the attention of the entire legal or political community. Such disputes only occurred in times of crisis when structural constitutional norms were challenged, and they threw into sharp relief the usually hidden or subtle role that legislatures played in constructing constitutional doctrine. The English Civil War was one such period in history of the English Journals. The 1830s was another for the Journals of Congress. During that decade, a series of conflicts over issues ranging from nullification to slavery to the limits of Executive power and Article I jurisdiction quickly escalated to the verge of political crisis. Some of these disputes—nullification, for instance—played out as battles between the states and the national government, but others were fought within the federal government itself.<sup>300</sup> In the era before the advent of judicial supremacy, the federal courts were not always the only—or even the most natural—department to resolve disputed points of constitutional law. Under these circumstances, parties turned to the political branches for formal, legal resolution. Two such disputes are of particular relevance here, because they demonstrate the legal community's consciousness of the importance of formal legislative records as law-making documents through the 1830s, as well as the continued vitality of formal record-keeping practices as a method of constitutional adjudication: (1) the dispute between President Jackson and the Senate over the right of the President to intentionally defund

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<sup>298</sup> *Id.* at 228–29.

<sup>299</sup> *Id.* at 232.

<sup>300</sup> KRAMER, *supra* note 195, at 178–82 (providing a summary of the criticism of judicial supremacy).

the Second Bank of the United States; and (2) the dispute over the authority of Congress to abolish slavery in federal territories.

1. *Andrew Jackson and the “Bank War”*

President Jackson’s opposition to the Second Bank of the United States, which he believed to be an unconstitutional abuse of Congress’s legislating powers under the Necessary and Proper Clause of Article I, is well-documented.<sup>301</sup> So, too, is his belief that each branch of government enjoyed a co-equal right to execute the law according to its own interpretation of the Constitution.<sup>302</sup> These two components of Jackson’s political worldview intersected in a bitter confrontation with Congress in 1832 over the re-chartering of the bank. The bank’s 1816 federal charter was scheduled to expire in 1836. Jackson’s opponents in Congress—chief among them Henry Clay—had gathered enough support in both houses to pass a bill renewing the bank’s charter that year, four years ahead of schedule and early enough to place the bank at issue during Jackson’s reelection campaign. Congress enacted the re-charter, forcing Jackson to either veto a widely popular institution, which the Supreme Court had already declared in *McCulloch v. Maryland*<sup>303</sup> to be within the permissible scope of Congress’s Article I powers, or sign the bill, surrendering on a key policy platform. Jackson vetoed it nonetheless. In doing so, he issued arguably the most famous veto message in American history, outlining his belief that he was constitutionally obligated to veto the bank notwithstanding the Supreme Court’s decision in *McCulloch*.<sup>304</sup> Following his reelection in 1832, Jackson took the more aggressive step of defunding the bank before its charter expired. He ordered Treasury Secretary Louis McLane to remove its deposits and transfer them to various state-chartered institutions. When McLane refused, believing that he was not authorized to do so under the terms of the charter, Jackson summarily removed him from office, and replaced him with William Duane,

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<sup>301</sup> Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 *CASE W. RES. L. REV.* 1451, 1538 (1997) (citation omitted) (“Jackson hated the Bank with an almost irrational vehemence, and he described it at times as a hydra-headed monster that impaired the morals of the American people, corrupted their leaders, and threatened their liberty.”).

<sup>302</sup> *See, e.g.,* KRAMER, *supra* note 195, at 189 (arguing that Jackson sought to “frustrate the court’s judgment”).

<sup>303</sup> 17 U.S. (4 Wheat.) 316, 316 (1819) (“The power of establishing a corporation is not a distinct sovereign power or end of Government, but only the means of carrying into effect other powers which are sovereign. Whenever it becomes an appropriate means of exercising any of the powers given by the Constitution to the Government of the Union, it may be exercised by that Government”).

<sup>304</sup> *See* PROCESSES OF CONSTITUTIONAL DECISION MAKING 74–77 (Paul Brest et al., eds., 5th ed. 2006) (“It is maintained by advocates of the bank that its constitutionality in all its features ought to be considered as settled by precedent and by decision of the Supreme Court. To this conclusion I cannot assent.”).

who likewise refused to carry out the order. Jackson ultimately appointed Roger Taney, who finalized the removals.<sup>305</sup>

Jackson's enemies in the Senate viewed these orders as patently unconstitutional. Jackson's unvarnished defiance of both Congress and the judiciary, and his direct appeal to the electorate for popular legitimacy, seemed to confirm many of his critics' long-held suspicion that the President was a demagogue who held the republican system in contempt. Clay warned that the nation was "in the midst of a revolution," in which the political system was "rapidly advancing to a concentration of all the powers of Government in one man," and that under the broad Executive authority assumed by Jackson "the powers of Congress are paralyzed, except where they are in compliance with his own will."<sup>306</sup> But what came to be known as the "Bank War" raised more specific constitutional disputes as well. First, Jackson appeared to renege unilaterally on what had previously been settled constitutional doctrine concerning the authority of Congress to charter a bank. He also appeared to violate a clear congressional mandate in the Bank's charter concerning the security of federal deposits.<sup>307</sup> In addition, Jackson's decision to remove two Secretaries of the Treasury within the space of four months for refusing to obey a presidential order revived a debate over the presidential removal power that had recurred periodically since 1789.<sup>308</sup> While Article II provided a procedure for the President to appoint executive officers, it had never specified a process for removal. Congress had thoroughly debated the question of whether to impose strict limits on removal in 1789, but had never settled on a final resolution, leaving the constitutional question open to future articulation.<sup>309</sup>

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<sup>305</sup> For a description of the events of the Bank War, see Daniel Walker Howe, *What Hath God Wrought: The Transformation of America, 1815–1848*, at 375–87 (2007); 3 David P. Currie, *The Constitution in Congress: Democrats and Whigs 1829–1861*, at 58–83 (2005); Jean Alexander Wilbur, *Biddle's Bank: The Crucial Years* (1967) (providing a history of the Bank War from the point of view of the Bank's supporters).

<sup>306</sup> CONG. GLOBE, 23d Cong., 1st Sess. 54 (1833).

<sup>307</sup> The federal charter directed that the government's deposits were to be kept at the bank "unless the Secretary of the Treasury shall at any time otherwise order and direct." Act of Apr. 10, 1816, ch. 44, 3 Stat. 266, 274 § 16. However, it also required the Secretary, in the event that he decided to remove the deposits, to present a formal statement of "the reasons of such order or direction" to Congress. *Id.* Jackson's opponents argued that the requirement that the Secretary give reasons for his decision to Congress impliedly granted Congress final approval over the Secretary's decision. *See, e.g.*, CONG. GLOBE, 23d Cong., 1st Sess. 55 (1833) (recounting speech of Sen. Henry Clay).

<sup>308</sup> *See, e.g.*, LOUIS FISHER, *THE LAW OF THE EXECUTIVE BRANCH: PRESIDENTIAL POWER* 84–91 (Stephen M. Sheppard ed., 2014) (offering a brief history of the presidential removal power).

<sup>309</sup> *Id.* at 85–86 ("President Jackson collided with Congress in 1833 when he removed the Secretary of the Treasury for refusing to carry out his policy towards the U.S. Bank).

Jackson's allies controlled the House of Representatives, which removed impeachment as a possibility. But his opponents in the Senate still hoped to deal the President a political defeat, and more importantly to place on the public record their objection to his expansive interpretation of Executive power. They opted instead to vote a formal resolution censuring the President, and declaring that "the President, in the late Executive proceedings in relation to the public revenue, has assumed upon himself authority and power not conferred by the constitution and laws, but in derogation of both."<sup>310</sup> Jackson immediately protested the censure as itself unconstitutional, arguing that it constituted a procedurally improper "impeachment" by only one house of Congress, or, in the alternative, an impermissible bill of attainder declaring him "guilty" of violating his oath of office.<sup>311</sup> For Jackson, the dispute was not merely a question of personal pride. If the legal judgment of the Senate were permitted to remain, uncontested, on its official records, Jackson feared that he would be deemed to have acquiesced in a highly restrictive reading of Executive power—a reading that, in a tripartite system of constitutional interpretation, could acquire the status of legal precedent. Thus, in the closing paragraph of his message, the President made formal disagreement unambiguous:

To the end that the resolution of the Senate may not be hereafter drawn into precedent," he concluded, "with the authority of silent acquiescence on the part of the executive department; and to the end, also, that my motives and views in the executive proceedings denounced in that resolution may be known to my fellow-citizens, to the world, and to all posterity, respectfully request that this message and protest be entered at length on the Journals of the Senate."<sup>312</sup>

The Senate, unwilling to compromise the exclusive control of their records, or to weaken the legal force of their condemnation, determined that Jackson's protest of the censure, and his demand that it be printed in the Senate Journal, constituted an invasion of legislative privilege.<sup>313</sup> They voted on May 6, 1834 to refuse to receive the message, and to expunge all references to it from the Journals.<sup>314</sup> Soon after its passage, Jackson in turn began rallying his allies in the Senate to expunge the censure from the Journal. The same day that the President's message was returned, Thomas Hart Benton of Missouri, a staunch Jacksonian, invoked the House of Commons' resolution banning John Wilkes—which, after fourteen years of agitation, "was judged and condemned, for adopting a resolution which was held by the subjects of the British Crown to be a violation of their Constitution, and a subversion of the rights of Englishmen"—and vowed to

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<sup>310</sup> S. JOURNAL, 23d Cong., 1st Sess. 197 (1834).

<sup>311</sup> CONG. GLOBE, 23d Cong., 1st Sess. 312 (1834).

<sup>312</sup> *Id.* at 317.

<sup>313</sup> S. JOURNAL, 23d Cong., 1st Sess. 227 (1834).

<sup>314</sup> *Id.* at 248–49.

the Senate that he would not rest until its censure was formally removed from the Journal.<sup>315</sup> He was ultimately successful, and the resolution was expunged in 1837.<sup>316</sup>

The dispute over Jackson's censure and its expurgation has perplexed modern historians. The debates consumed a considerable amount of time, effort, and political capital. To contemporary lawyers, the years-long fight over the formal constitutional judgment of the Senate on Jackson's conduct and on the limits of Executive power appears to be little more than an exercise in partisan combat. As one commentator has argued, the resolution acted merely as nonbinding commentary on a controversial policy debate. In adopting it, the Senate was "filling a well-established role—and nothing more . . . . By approving this resolution senators simply recounted the events as they saw them and noted their disagreement with the legality of the President's actions, leaving it to others—historians, the American people—to determine Jackson's fate, and the state of his honor."<sup>317</sup> As another puts it:

The shouting match over the rights of the President and the Senate to comment on one another's actions . . . ended pretty much in a draw. . . . Federal officers of all types habitually sound off on topics unrelated to their substantive authority, and nobody tends to complain; we are wont to dismiss the release of hot air as not rising to the level of an exercise of power.<sup>318</sup>

But such assessments of the censure episode do not appreciate the important role that official legislative records played in constitutional construction until well into the nineteenth century. In the 1830s, the Senate's formal judgment on the legality of the President's actions still represented a precedential interpretation of the scope of Executive authority. This was President Jackson's primary reason for attacking the resolution. Jackson was one of the most aggressive expositors of departmentalism, and his veto message defending his decision to refuse to re-charter the bank is still considered among the most significant expressions of that interpretative theory.<sup>319</sup>

Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it," the President argued, "and not as it is understood by others. . . . The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both."<sup>320</sup>

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<sup>315</sup> CONG. GLOBE, 23d Cong., 1st Sess. 318 (1834).

<sup>316</sup> S. JOURNAL, 24th Cong., 2d Sess. 123 (1837).

<sup>317</sup> James C. Ho, *Misunderstood Precedent: Andrew Jackson and the Real Case Against Censure*, 24 HARV. J.L. & PUB. POL'Y 283, 285 (2000).

<sup>318</sup> 3 CURRIE, *supra* note 305, at 75.

<sup>319</sup> See CONSTITUTIONAL DECISION MAKING, *supra* note 304, at 74–77.

<sup>320</sup> Andrew Jackson, Veto Message, July 10, 1832, in CONSTITUTIONAL DECISION MAKING, *supra* note 304, at 75.

But Jackson understood the constitutional judgments of Congress to be of equal significance to those of the Executive.<sup>321</sup> Jackson's insistence that the Senate expunge his censure was similarly framed as a demand that the body correct an interpretative error on its record books. In his 1834 protest, Jackson argued:

When the chief Executive Magistrate is by one of the most important branches of the Government, in its official capacity, in a public manner, and by its recorded sentence, but without precedent, competent authority, or just cause, declared guilty of a breach of the laws and Constitution, it is due to his station, to public opinion, and to a proper self-respect, that the officer denounced should promptly expose the wrong which has been done."<sup>322</sup>

Jackson's opponents in the Senate—who by the Twenty-Fourth Congress had lost their majority—resisted the President's call for expurgation by arguing that such a resolution would violate the injunction of the Journal Clause itself. This dubious argument rested on a restrictive reading of the Clause's text. Defenders of the censure argued that to erase it would be to violate the requirement that the Senate "keep" a Journal of its proceedings. John C. Calhoun of South Carolina, Jackson's former Vice President and now bitter rival, was particularly outspoken in pressing this interpretation. Calhoun argued:

[The word keep is] of the most comprehensive meaning, and, at the same time, free from all ambiguity . . . . It implies that our proceedings shall be fully and accurately recorded, and, when so recorded, and, when so recorded, that the journal containing them shall be carefully protected and preserved . . . discharge this obligation, we are bound, not only to abstain from destroying, altering, or in any respect injuring the journals ourselves.<sup>323</sup>

There was little textual or historical support for this literalist reading of the Journal Clause, but Calhoun argued that it most closely reflected the privileged place the Journals held as official legislative records:

The impression that they are our journals and that we may do with them as we please, is the result of a gross misconception. They indeed contain an account of our proceedings, but they belong not to us. They are the property of the public. They belong to the people of these confederated States; and we have no more right to injure, alter, or destroy them, than the stranger

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<sup>321</sup> Indeed, Jackson had previously objected to entries on Congress's Journals on the grounds that they exceeded the Congress's authority or expressed incorrect interpretations of the Constitution. In 1831, Jackson protested the Senate's condemnation of an allegedly "improper" nomination of a candidate to a federal land office. *See* THE PAPERS OF ANDREW JACKSON 298–99 (Daniel Feller et al., eds., 2016). Jackson ultimately resubmitted the applicant's nomination to demonstrate his refusal to acquiesce in the Senate's judgment of its legality. S. EXEC. JOURNAL, 22d Cong., 1st Sess. 255 (1832). In a second incident in 1832, Jackson drafted (but did not send) a message to Senate demanding that it expunge an entry on its Executive Journal which proposed to investigate an agent employed by Jackson in negotiations with Native American tribes. THE PAPERS OF ANDREW JACKSON, *supra*, at 28–29.

<sup>322</sup> CONG. GLOBE, 23d Cong., 1st Sess. 311 (1834).

<sup>323</sup> 12 REG. DEB. 971 (1836).

that walks the streets; no more than we have to alter or destroy the journal of the other House, or the records of the courts of justice.<sup>324</sup>

Jackson's allies had not only the votes to expunge the censure, but the stronger arguments as well. They agreed that Article I imposed a duty on the legislature to keep faithful records but insisted that expurgation was entirely consistent with both the history and the purpose of the Journal Clause. In a sprawling speech recounting the history of English and American Journals, Benton noted that both Parliament and Congress had historically allowed the amendment or erasure of Journal entries. He cited the ancient parliamentary practice of ordering corrections on the Journals for the proposition "the business of rectifying mistakes or erroneous entries in the Journals is as old as the Journals themselves."<sup>325</sup> He referred to the Attainder of Strafford as well, declaring:

I have seen no instance in which the duty to keep a Journal of its proceedings has been set up in opposition to any motion to expunge unfit matter from the Journal; and therefore I hold it to be the settled law of Parliament that each House has power over its own Journal, both to correct it, and to efface objectionable matter from it.<sup>326</sup>

Benton also cited the case of Ogden's petition as an American precedent, noting that they were excised from the Journals because they were "presented by the political enemies of Mr. Jefferson, and so far as they received the support or countenance, it was from the ranks of the Opposition."<sup>327</sup> The Senate's denunciation of Jackson, like the attempt to implicate Jefferson in a military plot, was an act of "[p]arty warfare," and now "the same party spirit, and the same party—the bank federal party, which in 1806, wished to have its charges against President Jefferson transferred from the newspapers to the Journals of Congress, thence to be transmitted to posterity as a part of the legislative history of the country" had condemned Jackson on the Journals as well.<sup>328</sup>

This history, Benton continued, revealed the true intent behind the Clause's mandate that Congress "keep" a record of its proceedings. It did not require that either house maintain a static administrative history of its decisions. Rather, it incorporated the ancient tradition whereby both English and American legislatures produced and amended an evolving account of their constitutional judgments. For Benton, who believed in the constitutionality of Jackson's transfer of the deposits and his removal of the Secretary of the Treasury (twice), the presence on the Journals of a resolution condemning the President was itself an error that required correction. "The right to expunge," he claimed "rests upon the right to keep the Journal clear

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<sup>324</sup> *Id.*

<sup>325</sup> CONG. GLOBE, 24th Cong., 1st Sess. 189–190 (1836).

<sup>326</sup> *Id.* at 190.

<sup>327</sup> *Id.* at 192.

<sup>328</sup> *Id.*

of what ought never to be upon it. It rests upon the right to purify it from anything improper, which inadvertence, mistake, or the injustice, virulence, and fury of party spirit may have put upon it.”<sup>329</sup> As had happened so many times before in the history of the Journals, the question of when and how a legislative body could correct “errors” on its records morphed from a secretarial one to a political and constitutional one. As a logical corollary, Benton argued that allowing the resolution to remain on the Journals was itself an affirmative act—by not expunging the record, the Senate was implicitly endorsing it. The Constitution, thus, did not require the Senate to “preserve” the record, it required the Senate to expunge the record as an incorrect judgment on the constitutionality of a presidential act, to “correct” it as the Cavalier Parliament had “corrected” the Attainder of Strafford.

Likewise, the purpose of these erasures was not to misrepresent the history of legislative sittings, but to amend and revise the judgments reflected on Congress’s records. Thus, Jackson’s censure—like Strafford’s attainder—would not be obscured from the physical pages of the Journal books, but circumscribed and crossed out; in other words, symbolically erased to represent the Senate’s revision of its previous resolution. He claimed:

Nothing is suppressed, nothing so insane is intended. The whole effect, the whole design of the motion, is to declare the solemn sense of the Senate that such proceedings ought never to have taken place; that they were wrong from the beginning, and require a remedy which extirpates to the root. The order to expunge does this, and there is no other remedy which can amount to its equivalent, or stand for its substitute.<sup>330</sup>

The purpose of the expurgation was not to erase the fact of the resolution, but to declare that it had been wrong.

## 2. *Petitions Against Slavery*

The second example of the prominent role legislative Journals played in constitutional construction in the 1830s is the decade-long controversy over Congress’s receipt of citizen petitions demanding the abolition of slavery in federal territories, including the District of Columbia. In 1831, a group of Pennsylvania abolitionists submitted petitions to the House of Representatives, which John Quincy Adams introduced, requesting that the House abolish both slavery and the slave trade in the District of Columbia—an act arguably within its power, as the District was under the jurisdiction of the federal government. In the coming years, the number of petitions demanding federal action on slavery swelled to a flood.<sup>331</sup> Like the Senate’s

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<sup>329</sup> *Id.*

<sup>330</sup> *Id.* at 190.

<sup>331</sup> 4 DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: DESCENT INTO THE MAELSTROM 1829–1861*, 4–6 (2005). A detailed narrative of the entire petition fight is provided by WILLIAM

censure of President Jackson, the slavery petitions addressed a question on which Article I was ambiguous, and which courts had consistently failed to resolve: What precisely was the extent of Congress's authority to regulate or restrict slavery, particularly in federal territories?<sup>332</sup> The legislative and executive branches, too, had avoided the debate, preferring to compromise rather than risk political crisis.<sup>333</sup> The organized petition campaign was an attempt to force the issue to a resolution through popular pressure. Also like the Senate's censure of Jackson, the petition campaign transformed into a multi-year political conflict due to a dispute over a seemingly minor point of legislative procedure. Petitions seeking the partial or total abolition of slavery had been presented sporadically to Congress since the beginning of the republic.<sup>334</sup> In response, the slave states had established a fixed procedure for suppressing any floor debate on the issue. The petitions would be received but referred to Southern-dominated committees who would either report adversely on them or simply refuse to report on them at all. When the most recent wave of petitions was presented in the 1830s, this strategy was revived and public controversy over the issue was largely contained.<sup>335</sup> But in 1836, Senator Calhoun and Representative John C. Hammond in the House, both among the most prominent defenders of slaveholding interests, insisted on a new and more radical procedural approach. Rather than simply tabling the abolitionist petitions, Calhoun and Hammond proposed that Southern legislators impose a rule that would prevent the Congress from receiving them at all.<sup>336</sup>

The result was a political debacle for the South. The rule change was never enacted in the Senate, and was implemented for a time in the House only to be decisively repealed in 1844.<sup>337</sup> Moreover, even if this "gag rule," as it came to be called, had been successful it would have done little to stem congressional debate on slavery: The petitions were already excluded from floor debate, while legislators were free to raise the issue themselves

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LEE MILLER, ARGUING ABOUT SLAVERY: THE GREAT BATTLE IN THE UNITED STATES CONGRESS (1996).

<sup>332</sup> See generally Paul Finkelman, *Defining Slavery Under A "Government Instituted for Protection of the Rights of Mankind,"* 35 HAMLINE L. REV. 551, 573–87 (2012).

<sup>333</sup> See, e.g., Paul Finkelman, *The Cost of Compromise and the Covenant with Death*, 38 PEPP. L. REV. 845, 866–67 (2011) (discussing the impact of the Missouri Compromise and its considerable concessions for pro-slavery states); see also Paul Finkelman, *Lincoln v. The Proslavery Constitution: How a Railroad Lawyer's Constitutional Theory Made Him the Great Emancipator*, 47 ST. MARY'S L. J. 63, 71–73 (2015) (noting the compromise made during the Constitutional Convention to suspend the application of the Commerce Clause to the slave trade for twenty years).

<sup>334</sup> Representative Caleb Cushing, whose speech is discussed *infra*, detailed this history on the floor of the House. See CONG. GLOBE, 24th Cong., 1st Sess. 100–01 (1836).

<sup>335</sup> CURRIE, *supra* note 331, at 4–5.

<sup>336</sup> CURRIE, *supra* note 331, at 6.

<sup>337</sup> CURRIE, *supra* note 331, at 21–22.

regardless.<sup>338</sup> And in advocating it, Calhoun alienated a key group of moderate allies in free states. These legislators had been happy to let anti-slavery petitions languish in committee because they felt little support for abolitionists, and preferred to focus their attention on more immediately profitable legislative programs such as internal improvements.<sup>339</sup> But the refusal to receive abolitionist petitions appeared to infringe on the First Amendment's protection of citizens' right to petition for a redress of grievances. "If," as James Buchanan, then a Senator from Pennsylvania, argued, "the people have a right to command, it is the duty of their servants to obey . . . . If the people have a right to petition their representatives, it is our duty to receive their petition."<sup>340</sup> While the Congress could refuse to debate petitions under its authority to control the rules of its own proceedings, many congressmen believed that the Petition Clause required each house to receive the documents in the first instance. A perceived violation of this protection would have been widely unpopular in the early republic, when access to the legislative process still held practical as well as theoretical importance. Ordinary citizens relied on formal petitions to Congress to receive critical forms of public assistance, and to promote locally significant bills.<sup>341</sup>

Because Calhoun's proposal would have had a minimal impact on the slavery debates, and because it left the pro-slavery caucus weaker and more isolated than it had been before, historians have largely treated it as a perplexing tactical error. David Currie, in his four-volume history of constitutional debate in Congress prior to the Civil War, calls the move "singularly stupid,"<sup>342</sup> and concludes:

[I]f Calhoun and his acolytes were looking for a feud, they got what they wanted. They succeeded in making enemies of a great many people, in and out of Congress, who had no thought of abolishing slavery in the District or anywhere else. For they managed to turn what had been the quixotic crusade of a despised and miniscule abolitionist minority into a broad-based defense of the right to petition.<sup>343</sup>

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<sup>338</sup> As Cushing reminded the House: "Nor do you attain anything, so far as this House is concerned; for, by shutting out petitions you do not shut out debate; any member of the House can bring on debate any day, by moving some general resolution applicable to the subject." 12 REG. DEB. 2331 (1836).

<sup>339</sup> 4 CURRIE, *supra* note 331, at 6.

<sup>340</sup> 12 REG. DEB. 685 (1836).

<sup>341</sup> *See, e.g.*, 8 PETITION HISTORIES, *supra* note 226, at xi (describing the political importance of early petitions); Gary Lawson & Guy Seidman, *Downsizing the Right to Petition*, 93 NW. U. L. REV. 739, 750–51 (1999) (describing the practice of petitioning from the first Continental Congress in 1774 to the 1830s).

<sup>342</sup> 4 CURRIE, *supra* note 331, at 6 n.28.

<sup>343</sup> 4 CURRIE, *supra* note 331, at 6.

But, as with modern assessments of Jackson's censure, such accounts do not fully appreciate the constitutional importance of legislative formalities in the era and so fail to understand Calhoun's motives. The courts' increasing reluctance to intervene in the slavery debate had lent the actions of the political branches greater constitutional significance than ever. In the absence of an affirmative judicial resolution on Congress's authority to limit slavery, stakeholders expected that constitutional doctrine would be derived, as it always had been, from the records of the official acts of the coordinate branches.<sup>344</sup>

Calhoun was concerned about the damaging optics of allowing attacks on slavery in floor debate, but he was more concerned about the potential constitutional implications of permitting Congress to accept the abolitionist petitions. Since the Middle Ages, legislatures had documented the receipt of petitions through the process of enrollment. The nature of the petition, the name of the petitioner, and its disposition were recorded in the Journal books of Parliament, and later of colonial assemblies and of Congress.<sup>345</sup> Enrollment served an administrative purpose, but it also acted as a catalogue of legislatures' expanding jurisdictions. Legislatures strategized to expand the scope of their activity by accepting new classes of petitions which demanded new forms of relief. Over time, petitions came to be used expressly for constitutional advocacy, the Petition of Right being the preeminent example of this phenomenon in England. Likewise, the American colonies used petitioning to expand the scope of their autonomous political activity prior to formal independence. In short, for a legislature to accept a petition, and to document that acceptance on its formal records, was a political act which had legal consequences.<sup>346</sup>

Calhoun understood this. There was little possibility that any of these petitions would succeed in their ostensible objective of abolishing slavery or the slave trade in the District of Columbia. But by forcing Congress to formally receive them, the petitioners were advancing a longer-term objective by establishing precedent for Congress to consider the question. Even if the petitions were never debated, the legislature would have implicitly acknowledged its authority to implement restrictions on slavery. Calhoun was acutely sensitive to the precarious constitutional status of slavery and felt that a determination by Congress as to whether it did or did not have the authority to limit the institution would be critical to the South's cause. "On the decision, then, of the question of receiving," Calhoun explained, in defending the gag rule, "depends the important question of jurisdiction. To receive is to take jurisdiction—to give an implied pledge to investigate and

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<sup>344</sup> See *supra* Sections II.B, II.C.

<sup>345</sup> See *supra* Part I and Sections II.A, II.B.

<sup>346</sup> See *supra* Sections I.A, I.C, II.B.

decide on the prayer, to give the petition a place in our archives, and become responsible for its safe-keeping.”<sup>347</sup>

[Whoever voted for receiving, and recording, that petition] on the ground on which its reception is placed, votes that Congress is bound to take jurisdiction of the question of abolishing slavery both here and in the States; gives an implied pledge to take the subject under consideration; and orders the petition to be placed among the public records for safe-keeping.<sup>348</sup>

Calhoun—who professed his “high estimation” for the “institutions of our English ancestors”—argued that the precedents of Parliament and Congress established that neither house was under any obligation to receive a petition and cited a series of instances in which the House of Commons resolved to refuse certain classes of petitions as proof.<sup>349</sup>

The petitions’ defenders understood the larger implications of the dispute as well. While proponents often downplayed the potential constitutional significance of the precedent they were seeking (preferring to focus on the less controversial issue of the petitioners’ First Amendment rights), they did occasionally acknowledge that dispute had implications for defining the scope of Congress’s authority to regulate slavery under Article I. Caleb Cushing of Massachusetts, for instance, made a lengthy defense of the right of citizens to petition the House of Representatives in which he focused primarily on the ancient constitutional pedigree of petitioning. But Cushing also engaged Calhoun’s jurisdictional arguments, which were being advanced concurrently in the House by Southern congressmen. He rejected the argument that a petition had to request relief that was clearly within Congress’s constitutional power to provide in order to be received. He “ask[ed] of the House how it appears that we have no right by the Constitution to legislate upon the subject-matter of the petition? It may be so; and it may not. One member of the House has earnestly averred that it is; another that it is not.”<sup>350</sup> The constitutional question had never been clearly determined, and thus, Cushing concluded, “I cannot think it becomes the House to decide either way, upon the mere *ipse dixit* of individual members.”<sup>351</sup>

To the contrary, he insisted that abolitionist petitions should be received precisely because the legislature’s jurisdiction to regulate slavery was so vigorously disputed. The controversy over abolition was precipitating a political crisis which required a constitutional resolution that, Cushing argued, only Congress was able to provide by formally adjudicating the matter.

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<sup>347</sup> CONG. GLOBE, 24th Cong., 1st Sess. 224 (1836).

<sup>348</sup> *Id.*

<sup>349</sup> *Id.*

<sup>350</sup> *Id.* at 100.

<sup>351</sup> *Id.*

If there be any plausible reason for supposing that we have the right to legislate on the slave interests of the District," he warned, "you cannot put down the investigation of the subject out of doors, by refusing to receive petitions. On the contrary, you give the petitioners new force and efficiency, by giving them a new cause of complaint and of excitement."<sup>352</sup>

If, as the South protested, Congress had no right to regulate slavery, it should employ its traditional practice of referring the matter to a committee, receiving a "deliberate report," and entering a resolution on its Journals declaring as much.<sup>353</sup> Indeed, Cushing pointed out, Congress already had employed this method to resolve precisely the same question as early as 1790. In that year, anti-slavery petitions had been referred to a select committee at the urging of James Madison; the committee had rendered a report to the Committee of the Whole House, concluding that Article I did not empower Congress to abolish slavery; and that report was "discussed on four successive days; . . . reported to the House with amendments, and by the House ordered to be inscribed on its Journals, and then laid on the table."<sup>354</sup>

Cushing's arguments, and those like them, turned the South's reasoning on its head. The role of the Journals was not to exclude disputed constitutional arguments, but rather to resolve them. As he explained of the 1791 resolution purporting to limit Article I jurisdiction over slavery:

Congress calmly and considerately examined the whole broad question, not of the slave trade only, but also of the slave interest. It decided how far it could go, and how far it would go. Its decision went forth to the world and settled the questions involved in it, as it were, forever.<sup>355</sup>

If petition opponents were so sure of their constitutional footing, they should allow the same method of adjudication to take its course fifty years later.<sup>356</sup> This perspective did little to appease slavery's defenders, as adjudication was precisely what they were attempting to avoid. Because precedential lawmaking was iterative, the opinions of a single Congress (or Parliament, or court) were never permanent—they were subject to revision and change over time, as even a cursory review of the history of legislative Journals would confirm. While Southern legislators might have been able to extract a resolution forbidding Congress from regulating the domestic slave trade in 1790, as the battle over abolition intensified they felt less confident of their ability to secure a similar resolution in 1836, let alone ten or twenty years in the future. The safer course was to secure a rule that prevented the issue from being adjudicated at all, however inconsistent it might be with the underlying purpose of legislative Journal-keeping.

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352 *Id.*

353 *Id.*

354 *Id.*

355 *Id.* at 101.

356 *Id.*

As with Jackson's censure, what modern historians have overlooked in analyzing the petition controversy is the substantive legal importance of legislative Journals in the early republican era. The authoritative records of congressional proceedings elucidated the contours of the Constitution. No less than in Stuart England, controlling the contents of those records meant, in effect, controlling constitutional interpretation. It is true that at least in the case of slavery, congressional attempts to resolve constitutional questions (like judicial ones) did not avert civil war. But the importance of Journals extended beyond a discrete set of legal issues. Journals represented an alternative means of making and refining constitutional doctrine; a medium of constitutional discourse that often reached issues that courts could not or would not resolve themselves.

### III. THE RISE OF LEGISLATIVE TRANSPARENCY

Questions regarding the separation of powers, or the nature of Congress's constitutional obligations under Article I, did not disappear in the later decades of the nineteenth century. On the contrary, they have persisted to the present.<sup>357</sup> And federal courts decline to adjudicate many of these disputes, because they are considered to be within the exclusive purview of the political branches. But this begs the question: why, then, did the Journals decline in prominence in the United States after the 1830s? Why did Journal-keeping procedure not evolve and mature—as it did in seventeenth-century England—to resolve such disputes? Many scholars have noted the difficulties caused by the lack of a clear body of legal precedent in these areas.<sup>358</sup> The episodes involving Jackson's censure and the slavery petitions provide a glimpse of what such an evolution might have looked like. The Journals remained—and still remain—the primary source for adjudicating disputes over legislative procedure, which is a constitutionally important body of precedent. But they did not expand to resolve new conflicts involving broader questions of law.

This Part advances two related explanations for the decline of Journal-keeping as a constitutionally meaningful practice. First, as the nineteenth century advanced, the Journals were eclipsed in prominence by a new form of legislative recordkeeping: transcripts of debate in the House and Senate. Prior to the nineteenth century, legislative sittings in both the United States and Britain had been conducted in secret. The Houses of Commons and

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<sup>357</sup> See, e.g., Pozen, *Self-Help*, *supra* note 22 (discussing the continuing importance of constitutional norms that exist outside the jurisdiction of Article III courts); Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1103–15, 1129–32 (2013) (discussing the continuing relevance of non-justiciable exercises of authority by the political branches).

<sup>358</sup> See *infra* Part IV.

Lords met in secret from their earliest origins until the early 1800s. Nearly every colonial legislature met in secret;<sup>359</sup> the Continental Congress met in secret; the Constitution was drafted in secret;<sup>360</sup> and, while the House of Representatives opened its doors to debate in 1789, the Senate refused to permit observation of its debates until the year 1795.<sup>361</sup> And even after Congressional debates became putatively public, both houses made liberal use of their right to invoke the “injunction of secrecy” to seal debates from public view. Indeed, many executive sessions of the Senate remained secret as a matter of course well into the nineteenth and even twentieth century. Deliberations on executive nominations were only made public in 1929.<sup>362</sup>

As the franchise steadily expanded<sup>363</sup> and communication technology improved,<sup>364</sup> the public began to seek more information about the positions their elected representatives were taking on key political issues. As a result of these converging trends, by the early nineteenth century, demands for greater transparency in Congress could no longer be ignored. Almost simultaneously in England and America, legislatures began not only to permit observation of their debates, but to permit the recording and printing of them for mass circulation. In England, *Hansard* began to print verbatim accounts of parliamentary debates in 1803.<sup>365</sup> In the United States, newspaper accounts of House debates appeared beginning in 1789, and accounts of Senate debates appeared beginning when that chamber lifted its general rule of secrecy in 1795.

These reports of debates emerged, initially, to serve a political role, rather than an institutional one. In America, legislative secrecy was a contested issue from the first session of Congress. Republicans viewed legislative transparency as a means of checking Federalist attempts to expand the power of the national government. As one Republican newspaper in Philadelphia declared in 1794, “[s]ecrecy and dissimulation are the foundations on which despotism stands, and tyrants reign only by keeping people in ignorance. Candor and publicity are the characteristics of free government.”<sup>366</sup> In the

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<sup>359</sup> McPherson, *supra* note 214, at 141.

<sup>360</sup> See generally Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113 (2003) (discussing the secrecy surrounding the Constitutional Convention).

<sup>361</sup> CUSHING, *supra* note 270, at 138.

<sup>362</sup> See generally R. Earl McClendon, *Violations of Secrecy In Re Senate Executive Sessions, 1789-1929*, 51 AM. HIST. REV. 35 (1945) (discussing the secrecy that enshrouded executive nominations prior to 1929).

<sup>363</sup> See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES*, 32–35 (2000) (linking the expansion of the franchise to inter-party competition for new voters and the rise of mass electioneering).

<sup>364</sup> See HOWE, *supra* note 305, at 5 (describing America during this era as experiencing a “communications revolution”).

<sup>365</sup> See H. Donaldson Jordan, *The Reporting of Parliamentary Debates, 1803–1908*, 34 ECONOMICA 437 (1931); P.W. Wilson, *Reporting Parliament and Congress*, 214 N. AM. REV. 326, 328–29 (1921).

<sup>366</sup> Untitled, *PHILADELPHIA GAZETTE AND UNIVERSAL DAILY ADVERTISER* (Jul. 22, 1794) (on file with Proquest Historical Newspapers).

1790s, legislative transparency appeared to be largely a Republican issue, with many fearful of Federalist machinations around the First National Bank and the assumption of Revolutionary War debts. John Beckley—a staunch Jeffersonian when not acting in his capacity as congressional Clerk—coauthored a pamphlet with James Monroe in 1793 in which they attacked the bank and used the occasion to decry Senate secrecy as destructive of democratic accountability. Monroe and Beckley wrote:

The best expedient which policy could dictate to remedy those inconveniences resulting from the [distance between representatives and their constituents], was by opening their doors, to subject their legislative discussion to the free and common audience of every citizen, and to promote the free and rapid circulation of the newspapers. But has this been done? On the contrary, have we not seen with amazement, one branch of the legislature, withdraw itself into a sequestered chamber, and shut its doors upon its constituents, still guarding them with obstinate perseverance, although more than one half the union have required that they be opened?<sup>367</sup>

The Senate Journal records that votes on the repeated motions to open Senate debate split mostly along party lines.<sup>368</sup>

But Republicans did not have a monopoly on pious demands for transparency. Under Republican administrations, Federalist papers began turning Republicans' insistence on open legislation against them. The *New York Gazette*, for instance, criticized the secrecy surrounding Congress's decision to declare war against Britain in 1812, writing that “whenever a Congress shall be elected, independent and honest enough to strip the veil from the Journals of Congress, the most shameful arts, the most paltry intrigues, will rush forth to astonish this abused and suffering people.”<sup>369</sup> And indeed, while secrecy died hard in the Senate, many elected representatives welcomed the opportunity to communicate more regularly with their constituents through printed debates. In both England and America, the publication of legislative speeches in print offered a means to grandstand before mass electioneering was practical.<sup>370</sup> The records of debate, which began as private newspaper accounts and steadily evolved into what has become the *Congressional Record*, fulfilled that purpose. Where the Journals contained the official records of the legislature's votes, acts, and resolutions—its binding decisions, approved by the body as a whole—the records of debate contained detailed transcripts of speeches given by individual

<sup>367</sup> John Beckley & James Monroe, An Examination of the Late Proceedings in Congress Respecting the Official Conduct of the Secretary of the Treasury, in BECKLEY, *supra* note 267, at 50.

<sup>368</sup> See S. JOURNAL, 1st Cong., 3d Sess. 181 (1791) (motion to open debate to public defeated 17-9).

<sup>369</sup> *Congressional Secrecy*, N.Y. GAZETTE (Aug. 14, 1813) (on file with Proquest Historical Newspapers).

<sup>370</sup> See, e.g., John Ferejohn, *Accountability and Authority: Toward a Theory of Political Accountability*, in DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 131, 138–39 (Adam Przeworski, et al., eds., 1999) (“Indeed, within a very few years, the Senate itself was transformed from a closed council to a highly public showplace of the rhetorical talents of the leading orators of the day.”).

legislators. This allowed for the communication of policy positions between elected representatives and their constituents.<sup>371</sup>

The establishment of reporting on congressional debate is arguably the first triumph of the concept that has become known as government transparency. It provided voters with more knowledge, and thus more political control, over a branch of government than had ever been available previously and represented a major advance in democratic accountability. But the records of debate were a fundamentally different sort of document from the Journals. The records were not law-producing documents, but political ones. They did not represent the binding judgment of an entire house of Congress on a question of legal precedent. Rather, they collated the individual political positions of hundreds of legislators on countless political issues, some of national and some of purely local concern. The first contemporaneously published collection of congressional speeches, the *Register of Debates*, was intended to collect politically engaging speeches, rather than provide an institutional history of the Congress or its legislative activity. As Joseph Gales and William Seaton, the *Register's* publishers, explicitly stated in their introduction to the inaugural issue, the purpose of the publication was to supply relevant and timely political information, rather than an official history of Congress: “the object” of the *Register*, they wrote, was:

to embody the Debates and striking Incidents only of the sittings of Congress[.] [T]he possessor of this volume will be disappointed if he looks to find in it a Journal of the two Houses of Congress. No part of their Proceedings is given except what involves Debate, or some Incident, novel or important in its character, and therefore worthy of preservation.<sup>372</sup>

In contrast to the strict norms of accuracy that governed Journal-keeping, accusations of political manipulation of the debate transcripts were commonplace, and occasionally even acknowledged by the publishers themselves. In an era when most newspapers were openly partisan toward either Federalist or Republican interests, which printers had access to which debates often depended on whether the party with which they were aligned controlled the Speakership.<sup>373</sup> And the newspapers in which debates appeared often doubled as both vehicles for political editorials, and as

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<sup>371</sup> Another familiar component of congressional recordkeeping is the committee report, a comprehensive report on a bill or an investigation produced by one of the committees of the House of Senate. See generally Thomas F. Broden, Jr., *Congressional Committee Reports: Their Role and History*, 33 NOTRE DAME L. REV. 209 (1958). Committee reports were produced in some form since the earliest sessions of Congress. *Id.* at 215–216. But due to the informal nature of Congress’s internal organization, they were not used frequently and their structure was not consistent. *Id.* at 217–18. By the 1830s reports had become more formal and precise, *id.* at 227, but Congress’s use of them was still “meager.” *Id.* at 228–30. It was not until the later nineteenth century that they became a regular component of Congress’s record-making, as the scale and complexity of Congress’s legislative activity changed considerably. *Id.* at 238.

<sup>372</sup> 1 REG. DEB. 1 (1825).

<sup>373</sup> William E. Ames, A History of the “National Intelligencer” 27 (1972).

platforms for Federalist or Republican politicians to communicate directly with constituents.<sup>374</sup> Joseph Gales, for instance, developed a reputation for aiding opponents of Andrew Jackson in the records of debate.<sup>375</sup> In short, where the Journals were intended to record generational shifts in constitutional norms, the records of debate were intended to provide information about individual policy positions in as close to real time as possible. Thomas Hart Benton made this distinction clear in an 1848 report to the Senate, which was later cited by the Joint Committee on Printing to justify more extensive congressional reporting. Benton argued:

[I]t would be a very narrow construction [of the Journal Clause] and a very insufficient communication of the proceedings of Congress to the people to confine the publication . . . to the yeas and nays and the notice of bills and motions which appear on the journal. . . . Publicity is the soul of our Government action. The nature of our Government, the interests of the country, and the will of the people require publicity . . . .<sup>376</sup>

As legislators began to tailor their behavior to the new mechanisms of accountability created by debate transcripts,<sup>377</sup> the older tradition of legislative adjudication of constitutional questions receded. The Journals had allowed Congress to define and defend the prerogatives of the legislature relative to the other branches of government. But as transparency placed more power in the hands of voters and political parties, local and partisan concerns came to compete with institutional ones.<sup>378</sup>

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<sup>374</sup> *Id.* at 30–33.

<sup>375</sup> An example of Gales manipulating congressional speeches for the benefit of Jacksonians is recounted at AMES, *supra* note 373, at 177. *See also* EUGENE IRVING MCCORMAC, JAMES K. POLK: A POLITICAL BIOGRAPHY 22 (1922).

<sup>376</sup> J. COMM. ON PRINTING, COST OF PUBLISHING THE DEBATES OF CONGRESS, H.R. REP. NO. 43-641, at 2 (1874) (internal quotation marks omitted) (quoting William G. Donnan).

<sup>377</sup> Similar observations have been made about the response of legislators to televised floor debates. It has been argued that speeches made for the benefit of C-SPAN are less focused on legislative substance, and more focused on signaling policy agreements to core constituencies. *See, e.g.*, Nancy S. Marder, *The Conundrum of Cameras in the Courtroom*, 44 ARIZ. ST. L.J. 1489, 1559 (2012). Indeed, the manner in which such incentives distort the public records of Congress has been one argument in favor of courts ignoring congressional debates when analyzing legislative history. *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION 34–37 (1997); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 683 (1997).

<sup>378</sup> The *Congressional Globe* was replaced by the *Congressional Record*, which was printed by Congress, in 1873. *See* AMES, *supra* note 373, at 31–33. But the creation of a government-printed record left the original, newspaper-based style of compiling transcripts virtually unchanged. Indeed, when the *Congressional Record* was created in 1873, the House merely resolved to hire the staff of the *Congressional Globe*, which had succeeded the *Register* as the privately printed record of debate, in its entirety to continue in their same roles at the *Congressional Record*, where they would “hereafter, until otherwise ordered, be officers of the House, under the direction of the Speaker, who shall receive the same compensation now allowed to the official reporters of committees.” *See* H.R. JOURNAL CLERK, 45TH CONG., DIGEST AND MANUAL OF THE RULES AND PRACTICE OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 324 (1877) (Henry H. Smith).

The second explanation for the decline in use of the Journals derives from a change in recordkeeping practices elsewhere in government. By the 1840s, judicial review came to displace more dispersed forms of constitutional adjudication such as departmentalism as the primary form of legal exposition in the United States.<sup>379</sup> As John Langbein and others have shown, changes in recordkeeping and legal writing played a significant, yet underappreciated, role in bringing this evolution about. As the focus of legislative recordkeeping was moving from structured records of precedent to unstructured transcripts of debate in the early nineteenth century, records of judicial decisions were moving in the opposite direction. In the early republic, the concept of formal, written judicial opinions that contributed to a body of legal precedent had not yet taken hold.<sup>380</sup> Judges and juries were often inclined to resolve cases by reference to informal notions of fairness rather than to formal legal doctrine.<sup>381</sup>

In the first decades of the nineteenth century, a group of elite jurists led by James Kent and Justice Joseph Story, among others, embarked on a sustained campaign to model American law and judging after European, and particularly English, traditions. The project of producing “learned law” was antithetical to the practice and identity of much of the early American legal system. Because courts often considered themselves to be instruments of popular democracy, applying communal traditions of justice rather than formal rules, they neither relied on nor generated written precedent. While English law had produced a large collection of legal treatises, they were difficult for most American lawyers to access in the eighteenth and early-nineteenth centuries.<sup>382</sup> And even where these resources were available, courts were resistant to rely on them: There was still a pervasive hostility to the English legal profession in much of the country, as well as a democratic resistance to the notion of professional or scientific law generally.<sup>383</sup>

In addition to ignoring English precedent, American courts generated comparatively little of their own. Legal opinions were not written or published, but were rather issued orally from the bench.<sup>384</sup> And because the primary audience for these opinions was the parties and their counsel, rather than the bench generally or other institutions of government, early decisions rarely employed the kind of formal reasoning rooted in precedent that is now familiar. As a result, no indigenous body of American case law emerged from

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<sup>379</sup> For a description of the turn toward judicial supremacy in the 1830s and 1840s, and the role that Story and others played in this evolution, see KRAMER, *supra* note 195, at 183–88.

<sup>380</sup> See John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 566–68 (1993).

<sup>381</sup> *Id.* at 571–72.

<sup>382</sup> See, e.g., Zoey F. Orol, Note, Reading the Early American Legal Profession: A Study of the First American Law Review, 87 N.Y.U. L. REV. 1523, 1524 (2012).

<sup>383</sup> See Langbein, *supra* note 380, at 567–68.

<sup>384</sup> See Langbein, *supra* note 380, at 571–72.

which judges could develop more sophisticated legal principles.<sup>385</sup> The lack of meaningful, written documentation of cases was common to every state, and to the federal judiciary as well. In its early years, before the ascendance of John Marshall, even the United States Supreme Court lacked an official reporter, or a formal body of published case law.<sup>386</sup> While oral dispositions of state and federal cases were occasionally recorded, and broken down into some sort of legal analysis by professional reporters looking to sell their products to practitioners, these records were notoriously inaccurate or incomplete.<sup>387</sup>

The professionalist movement sought to change this, by mandating that the opinions of courts be written, printed and distributed. The Supreme Court, spurred by Justice Story, regularized its reporting in 1816 with the appointment of Henry Wheaton as the court's permanent reporter.<sup>388</sup> State courts, led by Kent in New York, underwent a similar evolution in the first several decades of the nineteenth century.<sup>389</sup> The growth of accurate, structured reporting of decisions was instrumental in creating the modern institutional identity of judicial courts. The change enabled future courts to rely on precedent by creating that precedent and making it widely available for the first time. More importantly, however, by regularizing the reporting and printing of judicial decisions—and by making clear that the purpose of this reporting was to provide material for precedent—the professionalists changed the way that American courts decided cases.<sup>390</sup> Courts were forced to record and rationalize their decisions in such a way that they could fit into a broader universe of legal principles. Because decisions had precedential effect, they had to be logically sound and broadly applicable in their reasoning. They also had to consider the broader political implications of judicial decision-making.

These changes reflect a specialization in the roles of the different branches, which record-keeping played an integral role in bringing about. As Kent and Story succeeded in their goal of restructuring American law along a hierarchy of reasoned, reported opinions, the judiciary became a more expository and analytical institution. The records that defined it were the end product of litigation: a legal order accompanied by a mode of analysis derived from older, published precedent. At the same time, the legislature became less expository. The records that came to define it after the early republican period were intended to be read by voters and partisan allies. By encouraging the judiciary to adapt its practices and reasoning to the needs of

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<sup>385</sup> See Langbein, *supra* note 380, at 573–74.

<sup>386</sup> See Craig Joyce, The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy, 83 MICH. L. REV. 1291, 1293–94 (1985).

<sup>387</sup> *Id.* at 1303–04; see also Langbein, *supra* note 380, at 574–77.

<sup>388</sup> See Joyce, *supra* note 386, at 1294, 1330–38.

<sup>389</sup> See Langbein, *supra* note 380, at 578–81.

<sup>390</sup> For an overview of this evolution and its contribution to the rise of judicial review, see KRAMER, *supra* note 195, at 148–52.

a sophisticated precedential system, reported cases strengthened the judiciary's collective identity as a governmental institution. By encouraging atomized recordkeeping and communication between legislators and their parties and constituents, the rise of the records of debate may have had the opposite effect.

### CONCLUSION

What relevance do the Journal Clause and the history of legislative Journal-keeping have for contemporary law? One answer is that the history of legislative Journal-keeping, which has never before been explored in any depth, provides valuable insight into how legislatures evolve as institutions, and how that evolution in turn shapes the broader constitutional order. The division of functions and powers between governmental institutions is not static. Even in the United States, which operates under a written Constitution that delimits the powers of the three coordinate branches, the system of separated powers has changed considerably over time.<sup>391</sup> The history of Journals provides insight into a key mechanism by which this change occurs. As the preceding sections have shown, Journal-keeping formed the basis for legislatures' institutional identity. Journals elucidated rules, procedures, and privileges for members that defined how the legislature effectuated its role in evolving democracies. They also recorded the resolution of key disputes with other branches of government, and thereby helped to define as a matter of law the relationship between the legislature and other institutions. Journals demonstrate the importance of record-keeping in constitutional law, particularly in areas where traditional judicial review is often unavailable.

The revolutionary shift between the 1780s and the 1830s from almost total legislative secrecy to total legislative transparency remains little studied. By the early nineteenth century, American courts were moving away from an arbitral model of adjudication, dominated by laypeople and largely unconcerned with formal precedent, and towards a more structured and hierarchical model of lawmaking. During the same period, legislatures appear to have moved in the opposite direction—restrictions on the franchise were loosened, rules of secrecy were relaxed or abolished, and large portions of the citizenry (often in tandem with party organizations and partisan newspapers) began to exert an unprecedented degree of influence over the day-to-day activity of Congress, and the behavior of its members. The practice of using ancient precedential records to resolve disputes of constitutional importance was gradually abandoned; the most important legislative records were those that informed the immediate landscape of party politics, not those that resolved institutional questions that might shape inter-

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<sup>391</sup> See generally Flaherty, *supra* note 13 (describing the historical evolution of the separation of powers and summarizing contemporary accounts of its relevance).

branch relations for generations. It is difficult to determine to what extent records caused these shifts in institutional identity, and to what extent they were used by ideologically motivated reformers (sophisticated party operatives, in the case of Congress; anti-populist judges like Kent and Story, in the case of the courts) to execute a preconceived political agenda. But in either case, these changes in recordkeeping practices normalized a fundamental shift in how government actors perceive the boundary between law and politics.

This development has had an important influence on how modern law conceptualizes inter-branch relations. A number of the structural constitutional issues that the Journals evolved to adjudicate remain outside the scope of judicial resolution, either because they are committed to the legislature by the constitutional text or because they rely on norms of governmental behavior that do not present judicially manageable standards.<sup>392</sup> These include consequential questions of legislative procedure (take, for instance, the question of whether the Senate is required to hold a vote for a President's nomination to the Supreme Court, which was bitterly disputed following President Obama's unsuccessful nomination of Judge Merrick Garland)<sup>393</sup> and the separation of powers.<sup>394</sup> But while Congress remains responsible for adjudicating these issues, contemporary observers no longer treat it as capable of resolving them through the reasoned application of legal principles. Rather, Congress is presumed to be motivated primarily by partisan incentives. Jeremy Waldron, for instance, has noted that there is a "deafening" silence in legal philosophy regarding the legal principles that govern legislative procedure; that "[t]here is nothing about legislatures or legislation in modern philosophical jurisprudence remotely comparable to the discussion of decision-making by judges."<sup>395</sup> This neglect, Waldron suggests, derives from modern law's assumption that "[j]udicial reasoning poses a special problem for jurisprudence in the way that the reasoning of legislators does not," because "[t]he processes by which courts reach their decisions . . . are supposed to be special and distinctive, not directly political, but interpretative of already established political conclusions or expressive of some underlying spirit of legality."<sup>396</sup> Argument in legislatures, by contrast, is "explicitly and unashamedly political," reflecting "either the interplay of interests, or the direct clash of policy proposals and ideologies."<sup>397</sup> The

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<sup>392</sup> See *supra* note 21.

<sup>393</sup> See, e.g., Josh Chafetz, *Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past*, 131 HARV. L. REV. 96, 106–10 (2017) (describing the constitutional debate over Garland's nomination and explaining the role of historical precedent in analyzing this dispute).

<sup>394</sup> See, e.g., Pozen, *Self-Help*, *supra* note 22, at 9, 34–39 (describing the role of non-judicially enforceable norms in structuring the separation of powers).

<sup>395</sup> Waldron, *supra* note 24, at 644.

<sup>396</sup> Waldron, *supra* note 24, at 644.

<sup>397</sup> Waldron, *supra* note 24, at 644.

constitutional “law” governing the relationship between the political branches has received similar treatment. Some commentators have suggested that constitutional scholars should analyze questions about the limitations and distribution of power in American democracy not at the level of formal governmental institutions, but at the level of political interest groups. These are the parties who compete to capture and control governmental institutions, and who compete for real political power.<sup>398</sup> For instance, Daryl Levinson and Richard Pildes observe that the “Madisonian conception of separation of powers”—in which the “ambition” of competing institutions with different constitutional prerogatives is intended to prevent the consolidation of power in any single department of government—was preempted shortly after the ratification of the Constitution by partisan politics.<sup>399</sup> Ideological competition “between the legislative and executive branches” was “displaced by competition between two major parties,” and as result the “machine” that was supposed to promote stable institutional norms and an equitable distribution of power “stopped running.”<sup>400</sup>

This shift from institutional to political reasoning as the definitive dynamic in structural constitutionalism has caused alarm, particularly as political polarization has increased in recent decades. Observers have worried that the partisan commitments of legislative and executive officials will so outweigh their institutional commitments, that they will be willing to undermine longstanding norms of legislative procedure or inter-branch comity in order to score short-term victories.<sup>401</sup> This dynamic, the argument goes, threatens to permanently subordinate second-order commitments to the republican process to first-order policy goals, leading to entrenched dysfunction.<sup>402</sup> Interpretations of constitutional rules are motivated less by fidelity to the principle of separated powers, and more by the maximalist commitment to political victory.<sup>403</sup> Brinkmanship animated by sharply divergent views of the relative powers of the political branches becomes more

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<sup>398</sup> See John Ferejohn, *Power in Public Law: Some Reactions*, 130 HARV. L. REV. FORUM 9 (2016).

<sup>399</sup> Levinson & Pildes, *supra* note 23, at 2313.

<sup>400</sup> Levinson & Pildes, *supra* note 23, at 2313.

<sup>401</sup> See, e.g., Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 529–30 (2004) (describing this process of “partisan entrenchment”); see also Pozen, *Self-Help*, *supra* note 22, at 62 & n.272 (describing Tushnet and others as assuming that contemporary separation of powers disputes occur in an “essentially unregulated zone”).

<sup>402</sup> Daryl Levinson has argued for the desirability of institutional norms that constrain politics. See Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657 (2011).

<sup>403</sup> See, e.g., Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 325–29 (2011) (discussing examples of the ways that polarized parties may modify structural checks to maintain political power); see also Jonathan Zasloff, *Courts in the Age of Dysfunction*, 121 YALE L.J. ONLINE 479, 480 (2012) (noting that the “formal institutions of U.S. constitutional government have become impotent,” and that America’s system of checks and balances has become one of “prods and pleas”).

common,<sup>404</sup> and political actors become increasingly willing to accuse their opponents of “bad faith” interpretations of constitutional commitments.<sup>405</sup> In the extreme, these showdowns may lead to “constitutional crises” in which disputes over legal authority are resolved not by reasoned discourse, but by the use of force.<sup>406</sup>

But while there is a vast literature that describes—and laments—the politicization of structural constitutionalism, there have been surprisingly few attempts to locate the ultimate causes of this dysfunction. Scholarship generally assumes that partisan rather than institutional competition is the operative dynamic within the political branches; it rarely questions whether this development was inevitable. The history of the Journal Clause demonstrates that within the Legislative Branch deliberate choices were made in the development of recordkeeping practices that ultimately rendered Congress more responsive to partisan concerns than to institutional ones. Two models of legislative recordkeeping existed at the beginning of the early Republic: one (the Journals) was based on precedential lawmaking, and focused on adjudicating the competing prerogatives of constitutional actors; the other (the records of debate) was rooted in politics, and focused on holding legislators accountable to their constituents and party. By the middle of the nineteenth century, the former model, despite playing a critical role in constitutional law for centuries, had faded into obscurity, while the latter had become a powerful force in shaping legislative behavior. This change was a crucial but now largely forgotten factor in facilitating the displacement of institutional concerns within the Legislative Branch with partisan ones.

Thus, if the “law” of legislative procedure or the “law” of inter-branch relations seems to modern observers to be uniquely unreasoned—uniquely subject to the vicissitudes of partisanship—that is in part because the legislature was incentivized by its own record-making regime to conceptualize legal disputes in that way. Records are accountability mechanisms. They provide a narrative of what the record-keeper does and why. As scholars have observed in the context of administrative law, a society shapes the institutions it is governed by in part by determining the type of records those institutions keep (i.e., the categories of information those records contain) and the audience toward whom those records are addressed (i.e., the interest groups to whom the institution is to be held accountable).<sup>407</sup> To the extent that earlier generations of legislators opted to emphasize a

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<sup>404</sup> See, e.g., Pildes, *supra* note 403, at 325–29 (noting that “[d]ivided government has been characterized as producing a politics of ‘confrontation, indecision, and deadlock.’”).

<sup>405</sup> See generally David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885 (2016).

<sup>406</sup> See, e.g., Sanford Levinson & Jack M. Balkin, *Constitutional Crises*, 157 U. PA. L. REV. 707, 747–53 (2009) (providing a typology of constitutional crises and describing potential long-term negative effects of continuous confrontation over constitutional norms).

<sup>407</sup> See, e.g., Mashaw, *supra* note 29, at 108–11, 116–18 (discussing the importance of “reason giving” as a tool of administrative accountability).

uniquely political form of recordkeeping in their legislative practice, it is not surprising that the result was an institution that often reasons and behaves in an explicitly political way. But this choice has unnecessarily limited modern lawyers' ability to conceptualize alternative models of legislative reasoning. Waldron has observed that legislatures lack "an ideal type or theoretical model that would do for our understanding of legislation what, for example," Ronald Dworkin's idealized judge, Hercules, "purports to do for adjudicative reasoning."<sup>408</sup> This disparity may derive in part from the fact that courts have spent the last two centuries developing and refining models of formal dispute resolution, thanks to the project of learned law.<sup>409</sup> If a judge such as Hercules wanted to develop an idealized model of adjudication, he would have ample source material to work with. If, by contrast, a hypothetical legislature were to attempt a similar project—improving its rules of procedure, and developing formal mechanisms whereby disputes over constitutional requirements could be definitively settled through the application of legal reasoning—it would have to start mostly from scratch, because the system of recordkeeping that could have formed the basis for such an endeavor was abandoned generations ago.

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<sup>408</sup> Waldron, *supra* note 24, at 644.

<sup>409</sup> See Watford et al., *supra* note 209.