Jane Manners
October 2024
Draft – please do not cite or circulate

THE EQUITABLE CONSIDERATION OF CONGRESS AND THE PRIVATE LAW OF PUBLIC RELIEF

In the frigid, waning days of 1835, a committee of nine prominent New Yorkers prepared an unusual memorial to the U.S. Congress, seeking relief in the wake of what would soon be known as the Great New York Fire, which had struck New York City's commercial district in mid-December.[1] The memorial asked for four forms of relief, focusing on one in particular: the remission of the import duty bonds that New York importing merchants had posted on goods subsequently destroyed in the fire. Such requests were not unusual. In 1835, it was practically universal to pay duties by bond promising payment at a statutorily-determined date, thus creating a credit system that enabled merchants to sell their goods and recoup the duties they owed before their debts came due.[2] Since the founding, Congress had received dozens of requests for remission of bonds where some fire, flood, or other disaster had prevented merchants from recouping their duties by selling their goods. Since 1802, Congress had firmly refused such requests, offering unfortunate merchants the consolation prize of an interest-free credit extension: merchants could not be released from their bonds, but they could have more time to raise the funds.

---

[1] H.R. Doc. No. 33, 24th Cong., 1st Sess. (Dec. 29, 1835) ("Memorial of the Citizens of New York") (hereinafter "Memorial"). On the fire's acquisition of the all-capitals moniker, see Manners, Jane, "The Great New York Fire of 1835 and the Marketing of Disaster," *From The Stacks*, New-York Historical Society, July 10, 2019, https://www.nyhistory.org/blogs/the-great-new-york-fire-of-1835-and-the-marketing-of-disaster.

[2] *See, e.g.,* Richard Rush, *Extension of Time for Benefit of Drawback of Duties on Exports*, ASP No. 741, 19th Cong., 1st Sess., at 313-14; Churchill C. Cambreleng, *Cash Duties – Warehouse System*, H. Rp. 93, 20th Cong., 2nd Sess.

What was unusual about the New Yorkers' request in 1835 was the logic used to press their case. Previous requests had always assumed that congressional action was an indulgence, something that legislators could grant or refuse at their discretion. Instead, the New Yorkers' memorial suggested that duty bond remission was a matter of right. Framed as a legal brief and drawing on doctrines of private law, the memorial contended that the importing merchant should be considered the nation's "important and useful agent;" a de facto tax farmer who paid duties upfront that would ultimately fall on downstream consumers. The memorial argued that by destroying the merchant's goods before they could be offered for sale, the fire had destroyed the "consideration of his agency," voiding an implied contract with the government and justifying remission of the merchant's duty bonds. If ever there were a case that required Congress's "equitable interposition," the memorial contended, the New York fire was such a case. By recasting the merchant as an quasi-governmental agent, the memorial appealed not for grace but for compensation as a matter of right, thus offering a principled reason to disregard decades of contrary legislative precedent.

The strategy was successful: in 1838, Congress remitted the duty bonds on goods destroyed in the New York fire. Nine years later, Congress did so again, relying on the same rights-based logic in the wake of another destructive New York fire. Nine years after that, Congress made post-disaster bond remission a permanent feature of the nation's tax policy, thereby socializing a significant portion of the merchants' risk. Today, if imported goods

are destroyed before entering domestic consumption, Congress provides bond remission as a matter of course.[3]

What explains the memorialists' transformative rights claim in 1835? It is tempting to dismiss the appeal merely as a historical oddity: a strangely legalistic example of a genre characterized by its supplicatory language,[4] perhaps making an innovative rights claim to mask crass partisan and interest-group motivations.[5] But to do so would overlook what the argument of the memorial and its success reveal about the antebellum Congress's approach to private money claims, the requests for payment or loan forgiveness that gave rise to a striking amount of private legislation in the first several decades of the republic.[6]

Both authors of the 1835 memorial, Albert Gallatin and Louis McLane, were former members of Congress, former Treasury secretaries, and former Secretaries of State.[7] These political veterans were aware of the moment's auspicious circumstances, including the U.S.

---

[3] 19 U.S.C. 1563.

[4] Linda Kerber has argued, with regard to the Revolutionary era, that petitions' "rhetoric of humility" made them particularly suitable for women, whose own "acknowledgment of subordination" was a prerequisite to any form of political entreaty. Linda K. Kerber, *Women of the Republic: Intellect and Ideology in Revolutionary America* (Chapel Hill: University of North Carolina Press, 1980), 85; *see also* Susan Zaeske, *Signatures of Citizenship: Petitioning, Antislavery, and Women's Political Identity* (Chapel Hill: University of North Carolina Press, 2003), 3 (describing petitions' "humble tone").

[5] Today, political science and public choice theory teach us that legislation is, in the colorful words of the legal philosopher Jeremy Waldron, the end result of "deal-making, log-rolling, interest-pandering, pork-barrelling, horse-trading, and Arrovian cycling." Jeremy Waldron, "The Dignity of Legislation," 54 Maryland Law Review 633 (1995). This Chapter does not deny that such political considerations were at play in the debate over the petition; they may well have determined its outcome. Yet, it contends, the memorialists' logic of private right is nonetheless revealing on its own terms.

[6] *See* Charles E. Schamel, "Untapped Resources: Private Claims and Private Legislation in the Records of the U.S. Congress," 27 *Prologue* 1 (Spring 1995) (private legislation accounted for over 35% of the legislation generated by all but five congresses between 1814 and 1971; in ten of those congresses, the percentage was over 75%). On the connection between democracy and petitioning, *see generally* Daniel Carpenter, *Democracy By Petition: Popular Politics in Transformation, 1790-1870* (Cambridge: Harvard University Press, 2021) and Maggie McKinley, "Petitioning and the Making of the Administrative State," 127 *Yale Law Journal* 1448 (2018).

[7] Newspapers variously described the memorial as "written by Louis M'Lane" or "concocted by Albert Gallatin." "State of the City," *The Herald* (New York), January 4, 1836.

Treasury's first-ever surplus, New Yorkers' prominence at the highest reaches of the federal government, and deep dissatisfaction with the current tariff regime.[8] Gallatin and McLane also knew the mechanics of petitioning the federal government. They knew which requests could be handled by a Treasury official and which relief would have to be directly managed by Congress. They knew that Congress would evaluate such requests using rigorous application of precedent while guarding against possible fraud. Gallatin and McLane also knew that even though remission requests were routinely denied, appeals for payment framed as indemnifying government officers were likely to be granted. The trick was to convert the importing merchant from a supplicant into an agent, the bearer of a contractual right in need of a remedy. Even the authors' choice to call their nine-page submission a memorial rather than a petition reflects this framing, aligning their request for relief with the "memorials" submitted by officers seeking indemnification and distinguishing it from the dozens of "petitions" for disaster relief that Congress had received from importing merchants in previous years.[9]

---

[8] Getting rid of the surplus had been a main focus of both President Andrew Jackson's Address to Congress and Secretary of the Treasury Levi Woodbury's annual report, both delivered earlier that month. *See* Andrew Jackson, Seventh Annual Address to Congress, Dec. 7, 1835, available at *https://www.loc.gov/item/maj025349/*; H.R. Doc. No. 3, 24th Cong., 1st Sess. (Dec. 8, 1835). In the winter of 1835-36, New Yorkers occupied the chair of both the House's Committee on Ways and Means and the Senate's Committee on Finance and the vice presidency.

[9] Although in the 1830s, the distinction between the two terms was not fixed, the word memorial generally referred to written statements claiming a right or urging a change of policy, often from an official or quasi-official body: the "Salem (Mass.) Memorial" opposing drawback reform, the "Kent County (Del.) Memorial" for a restoration of public deposits to the Bank of the United States. Reg. Deb. 23rd Cong. 2d Sess. 3647-48 (April 14, 1834). Petitions, in contrast, tended to come from individuals and to use more supplicatory language. *See supra* note 4. Tellingly, officers' indemnification requests, discussed *infra*, were often labeled "memorials" rather than petitions. See, e.g., Navy Department Circular, 12 March 1799, reprinted in H.R. Rep. No. 8-44 (2d Sess. 1805), *reprinted in* 1 American State Papers: Naval Affairs 138 (Washington, Gales & Seaton 1834) (House Committee of Claims report on "the memorial of Alexander Murray, a Captain in the navy of the United States")(hereinafter "Murray Report"); Laura Jensen, *Patriots, Settlers, and the Origins of American Social Policy* (Cambridge: Cambridge University Press, 2003) at n. 40, 106-07 ("Memorial of the

This chapter argues that the memorial's unusual application of private law logic in a public law forum was entirely consonant with the way the antebellum Congress adjudicated private money claims. Like a claims adjustor or an equity court, Congress approached money claims with a first-order inquiry: who owned the risk, the government or the individual? Where an explicit or implicit contractual arrangement clearly placed the risk on one party or the other, this was an easy question. But sometimes, the arrangement was less clear, as when the claiming officer's actions went beyond what the law had authorized, or when something outside of a petitioning debtor's control threatened his ability to make a payment. In such instances, Congress would consider the merits of the particular claim, on the one hand, and more systemic prudential concerns on the other: the implications of relieving this individual, but not others; the related risk of setting a precedent that would invite similar requests; how such relief and possible follow-on appeals would affect the state of the Treasury.[10]

In making such evaluations, Congress exercised what was frequently termed its "equitable consideration." Like an equity court, legislators weighed the equities, and like an equity court, they employed contractual reasoning that we today associate with private law. Because we do not expect to find private law in Congress, scholars have underappreciated

Surviving Officers of the late Revolutionary Army and Navy of the State of New-York"); *but see* 29 Annals of Cong. 770 (1816) ("Money Lost by a Paymaster") (describing appeal by War of 1812 officer as petition).

[10] Christine Desan has argued that in the decades leading up to the Revolution, New York's colonial assembly understood the practice of balancing public need against private right in the evaluation of money claims, which they called keeping "the public faith," to be fundamental to the legislative role. Christine Desan, "The Constitutional Commitment to Legislative Adjudication in the Early American Tradition," 111 *Harvard Law Review* 1381, 1463, 1481-82 (1998).

Congress's reliance on such doctrines.[11] Yet the contractual logic that runs through Congress's exercise of its equitable consideration is no mere historical oddity. Rather, it reveals something fundamental about early American understandings of officer liability, government accountability, and the rule of law.

***

In 1842's *Farwell v. Boston and Worcester Railroad Corporation,* the era's canonical case on workplace risk, Massachusetts Supreme Judicial Court Chief Justice Lemuel Shaw held that a railroad worker who had lost his right hand to the negligence of a fellow employee could not recover from his employer.[12] Shaw explained that *respondeat superior*—the legal maxim that masters were responsible for the wrongs committed by their servants—applied only in cases where a servant had injured a stranger, not a fellow employee whose own relationship with the master was governed by contract principles.

[11] Scholars have recognized aspects of Congress's court-like procedure in the hearing of private claims, to be sure. *See, e.g.* Jensen, *supra* note 9 at 69, 105 (noting the "legalistic, rights-based argument" in favor of veterans' pensions and memorials presented on "footing of right"); Kristin A. Collins, "'Petitions Without Number': Widows' Petitions and the Early Nineteenth Century Origins of Public-Based Marriage Entitlements," 31 *Law and History Review* 1, 25, 53 n.219 (2013) (noting the reliance on precedent in claims consideration); Michele Landis Dauber, The Sympathetic State: Disaster Relief and the Origins of the American Welfare State (Chicago: University of Chicago Press, 2012): 22-23 (noting reliance on precedent); James E. Pfander and Jonathan Hunt, "Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic," *New York University Law Review* 85 (2010), 146 (same). Floyd D. Shimomura, "The History of Claims Against the United States: The Evolution From a Legislative Toward a Judicial Model of Payment," 45 Louisiana Law Review 625 (1984-85); Maggie Blackhawk, "Equity Outside the Courts," 120 Colum. L. Rev. 2037 (identifying the consideration of petitions as an instance of equity outside traditional courts); Christine A. Desan, "The Constitutional Commitment to Legislative Adjudication in the Early American Tradition," 111 *Harvard Law Review* 1381, 1463 (1998) (describing court-like procedures and distinctions between rights and gratuities in colonial New York's practice of "legislative adjudication"). These are revealing snapshots of the influence of 'private' law in congressional decisionmaking, which this chapter attempts to combine into a coherent picture of "equitable consideration."

[12] 45 Mass. 49 (Mass. 1842).

Shaw reasoned that the implied employment contract between Farwell and the Boston and Worcester Railroad contained no such indemnity. Noting pointedly that Farwell's $2-a-day wages were higher than those he had been earning as a machinist, Shaw concluded that "he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal presumption, the compensation is adjusted accordingly."[13] Citing Joseph Story's treatise on bailments, Shaw underscored the "expediency of throwing the risk upon those who can best guard against it"—in this case, the employee Farwell— and ruled for the Boston and Worcester.[14] The rule drastically limited the ability of workers to recover for workplace accidents, contributing to an industrial and political crisis that led, as John Fabian Witt has demonstrated, to the widespread adoption of compulsory state-administered workingmen's insurance programs in the first two decades of the 20th century.[15]

Less is known about the allocation of risk with respect to governmental workers in the nineteenth century. Scholars frequently note the absence of modern doctrines of qualified immunity in the founding era: even an officer acting in good faith was liable for

---

[13] *Id.* at 57.
[14] *Id.* at 59.
[15] John Fabian Witt, *Crippled Workingmen, Destitute Widows, and the Remaking of American Law* (Cambridge: Harvard University Press, 2009): 4-5 (describing the range of legal and institutional responses to the industrial accident crisis). Christopher Tomlins has argued that *Farwell* was not so much a deviation from existing rules limiting employers' liability to their employees as it was a definitive foreclosure of incipient attempts to expand it. Tomlins, *Law, Labor, and Ideology in the Early American Republic* (Cambridge: Cambridge UP, 1993): 302-03. Earlier accounts focusing on the evolution of tort law in response to the sharply rising incidence of workplace accidents include Morton Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (New York: Oxford UP, 1994), Lawrence M. Friedman and Jack Ladinsky, "Social Change and the Law of Industrial Accidents," 67 Colum. L. Rev. (1967), and G. Edward White, *Tort Law in America: An Intellectual History* (New York: Oxford UP, 1980).

wrongs committed under color of office.[16] Yet Congress would sometimes indemnify federal officers for damages incurred, in instances where legislators determined that the officer had acted in good faith and within the scope of his authority.[17] In this way, sovereign immunity in the Early Republic was less a shield for unlawful activity than an institutional device to ensure that Congress, rather than the courts, had the last word on what costs an officer would bear.[18] Put in private law terms, sovereign immunity forced a rearrangement of the liability relationships established by *respondeat superior*: rather than having the victim recover directly from the principal, she would recover from the agent, who would then seek indemnification from the principal, not in court but in the legislature.[19]

How far did such principles of government indemnification extend? In their study on congressional indemnification, James Pfander and Jonathan Hunt found that among officers indemnified by Congress between 1789 to 1860, military officers and tax collectors predominate: out of 68 claimants listed, 39 were military officers and 22 were revenue collectors.[20] Both offices were what the legal historian Nicholas Parillo has described as bounty officers: government agents whose work involved the disagreeable

---

[16] *See, e.g.,* William Baude, "Is Qualified Immunity Unlawful?," 106 Calif. L. Rev. 45, 51-60 (2018); David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 14–21 (1972); Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 414–22 (1987); Pfander and Hunt, *supra* note 11 at 102-03.

[17] Pfander and Hunt, *supra* note 11 at 143 (noting that in one instance, Congress rejected repeated petitions for remuneration on the ground that "'when an agent departs entirely from the objects of his appointment and disregards the instructions of his principal, the agent becomes personally liable' because 'the power delegated did not authorize the act'" (quoting H.R. REP. NO. 24-233, at 2 (2d Sess. 1837)).

[18] *See id.* at 107.

[19] *See id*. at 149 (explaining that, like a common law court, Congress would determine whether the agent was acting in the scope of employment before agreeing to pay the claim).

[20] *Id.* at Appendices 2 & 3.

task of "alien imposition," the enforcement of unwanted laws imposed by an external sovereign on a local population (e.g., federal customs laws in a port city).[21] To encourage bounty officers to act in the face of community displeasure, the enforcing sovereign would offer financial incentives. Naval officers in the Early Republic, for instance, could keep half the proceeds recovered in admiralty from a vessel in violation of a federal trade regulation,[22] while revenue officers would receive a large share of the money recovered in a successful forfeiture action.[23]

Such substantial incentives encouraged zealous pursuit of the external sovereign's objectives despite local opprobrium—and the risk of substantial personal liabilities. If a naval officer incorrectly seized a vessel on suspicion of violating a trade embargo, he might incur a decree for damages, just as a customs collector could be sued in assumpsit or trespass for wrongful collections or seizures.[24] Bounty officers were not merely rendering themselves unpopular by enforcing alien impositions on their neighbors; they were also subjecting themselves to the harsh liability rules of the common law, which left little room for officer discretion.

We might evaluate a typical bounty officer's compensation in *Farwell*-ian terms: two distinct sets of pairs, each one offsetting risk with reward. As the historian Jonathan Levy

---

[21] Nicholas R. Parillo, *Against the Profit Motive: The Salary Revolution in American Government, 1780-1940* (New Haven, Yale UP, 2013): 24-26.
[22] *See, e.g.* Act of Feb. 9, 1799, Stat. III, ch. 2, Section 1 ("every such ship or vessel, together with her cargo, shall be forfeited; and shall accrue, the one half to the use of the United States, and the other half to the use of any person or persons, citizens of the United States, who will inform and prosecute for the same").
[23] *See* Gautham Rao, *National Duties: Customs Houses and the Making of the American State* (Chicago: University of Chicago Press, 2016): 68.
[24] While collectors' liabilities in assumpsit were by convention covered by money set aside in their accounts with the Treasury, this was not true of trespass. See Pfander and Hunt, *supra* note 11 at n54 and accompanying text.

has observed, Chief Justice Shaw conceived of a worker's "risk" as "an element of…self-ownership."[25] In Shaw's eyes, Farwell's wages comprised both compensation for his labor (pair one) and a monetary reward—a "premium"—for his agreement to take on the downside risk of his employment (pair two). Likewise, for naval officers, the chance to earn large bounties compensated officers for the perils of making a seizure at sea: an upside chance as consideration for the downside risk of physical danger. Indemnification against personal liability, meanwhile, constituted the second risk-reward pair comprising a bounty officer's compensation: the government would compensate officers who suffered financial loss under color of law, so long as their actions were within the scope of their employment.[26]

Recognizing the prevalence of bounty officers among the beneficiaries of congressional indemnification helps explain why the New York memorialists framed their argument as they did. Unlike Farwell, and unlike officers who received most of their compensation in the form of salary or fees, bounty officers were not thought to have "assumed the risk" in exchange for a salary premium. Where Farwell's augmented salary was understood to include such consideration for assuming the risk of workplace injury, a bounty officer's compensation came largely in the form of upside chance, which was understood not to offset the liability risks—which often ran to the tens of thousands of dollars—entailed in the role. The officers most likely to be indemnified, in other words,

---

[25] Jonathan Levy, *Freaks of Fortune: The Emerging World of Capitalism and Risk in America* (Cambridge: Harvard University Press, 2012): 8

[26] Pfander and Hunt recognize a similar relationship among these factors, describing personal liability is a "counterweight" to the incentives created by commissions, while indemnification "temper[ed] the moderating influence" of personal liability. Pfander and Hunt, *supra* note 11 at 153. But where they analyze liability, bounties, and indemnification as interrelated incentives, I consider them through the lens of private law, a view that attempts to capture the understanding of lawmakers at the time.

were those who received the bulk of their compensation not in the form of salary, but in the chance to make a sizable profit. And what were importing merchants if not speculators hoping to make their fortune in the domestic market? They could hardly claim to be agents compensated by salary or fee. But they could describe their role in the high-risk, high-reward terms of bounty: agents paid in possibility, who deserved to be indemnified against uncompensated harms.

***

The New Yorkers' memorial to Congress[27] is a carefully-worded document. In addition to Gallatin and McLane, the authoring committee included New York City Mayor and former Congressman Cornelius Lawrence, Judge John Irving of the Court of Common Pleas, and several prominent merchants.[28] Seven of the memorial's nine pages sought to persuade Congress to remit the bonds that were posted for goods destroyed in the fire. The reason for the memorialists' focus is easy to guess: duty remission was far more remunerative than a credit extention, the other requested form of relief. Take the case of Moses Taylor, a sugar importer who made his preference for remission clear.[29] A December

[27] Addressed to the House and the Senate, the document was in fact mailed to the six members of New York City's congressional delegation: Senators Silas Wright and N.P. Tallmadge and House Members C.C. Cambreleng, Gideon Lee, Ely Moore, and John McKeon. H.Doc. No. 33, 24th Cong., 1st Sess. (Dec. 29, 1835).
[28] *Fosters' Account of the Conflagration of the Principal Portion of the First Ward of the City of N. York, On the night of the 16th of December, 1835*; other members included anti-tariff merchants George Griswold and Preserved Fish. Gallatin was well aware of officers' liability hazards: as early as 1808, he had written to Thomas Jefferson of the difficulties in enforcing the embargo on trade with Britain, explaining that the administration "cannot expect that the collectors will risk all they are worth in doubtful cases;" later, he proposed a statute that would send all embargo litigation to federal court and immunize collectors whom Congress deemed had acted reasonably, but the measure did not pass. Jerry Mashaw, "Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829," 116 YALE L.J. 1636, 1679 (2007) (quoting Gallatin's letter to Jefferson).
[29] Moses Taylor to Churchill Cambreleng, March 12, 1836, Moses Taylor Papers, New York Public Library (Series I, Box 55).

1837 tally of claims for remission reported Taylor's total as $19,803.92.[30] At the then-standard 6% interest, a 4-year credit extension (the duration of most previous credit extensions, and so what New York's merchants could reasonably hope to get) would have been worth 24% of the value of the extended bond. In contrast, the remission of duties would theoretically provide merchants with 124% of the value of the cancelled debts over that same four-year period (the returned amount plus interest). For Taylor, that meant that he stood to gain $24,557 from the remission of his duty bonds, more than five times the $4,756 he could expect from a credit extension.

Unfortunately for the merchants, remission was the relief less likely to be granted: since 1802, Congress had repeatedly refused to remit duty bonds on goods destroyed by flood, fire, or other inevitable accident. During the first few Congresses, members were willing, without recorded dissent, to remit duties for goods destroyed by fire or flood to a few well-connected importing merchants. In June of 1790, for instance, Congress refunded duties collected under the nation's first tariff to Thomas Jenkins, a prominent Federalist merchant and political associate of Alexander Hamilton's father-in-law, after a fire had destroyed "a parcel of hemp, duck, ticklenberg, and molasses" in transit to Hudson, New York.[31] Two months later, Congress remitted duties on eighteen hundred bushels of salt

---

[30] S. Doc. No. 41, 24th Cong., 2d. Sess. (Jan. 2, 1837). The report was supported by 136 merchant affidavits.

[31] "An Act for the Relief of Thomas Jenkins and Company," Statute II, Ch. XX. Hemp, duck, and ticklenberg are all shipbuilding materials; Jenkins, originally from Nantucket, had founded Hudson in 1785 as a whaling port. Anna Bradbury, *History of the City of Hudson, New York: with biographical sketches of Henry Hudson and Robert Fulton* (Record Printing: New York, 1908), at 16, 39. The brig *Miverva* had arrived in New York City from Port-au-Prince on March 22, 1790, and caught fire two days later while docked near Fort Lee, New Jersey. *See* "Arrivals at New York," *Albany Gazette*, March 22, 1790; "Ship News," *Pennsylvania Mercury and Universal Advertiser*, April 1, 1790. Jenkins' connection to Schuyler is documented in John P. Kaminski, "New York: The Reluctant Pillar," in Stephen Schechter, ed., *The*

"casually destroyed by a flood" to John Stewart and John Davidson, the customs collector at Annapolis.[32] And on May 9, 1794, Congress remitted the duties on eleven hogsheads of coffee that were destroyed by fire in Baltimore.[33] The remission almost certainly went to the debtors' sureties, the only individuals named in the act, John Elliott and J.H. Purviance, the latter of whom was the son of a Revolutionary War hero, the nephew of a high-ranking Washington appointee, and an active appointment-seeker[34] who would later that year become the personal secretary of James Monroe, then minister to France. [35] But beyond a

Reluctant Pillar: New York and the Adoption of the Federal Constitution (Russell Sage College: Troy, 1985), pp. 83-84.

[32] "An Act for the Relief of John Stewart and John Davidson," August 4, 1790. Alexander Hamilton had advised Davidson that, as Secretary of the Treasury, he lacked the power to relieve him. Hamilton to Davidson, June 7, 1790, RG 56, Letters to Collectors at Small Ports, "Set G," National Archives. Stewart and Davidson's petition was presented to the House on July 24, 1790, while Congress was in the midst of debating Alexander Hamilton's plan to assume state debts, of which Davidson was a significant holder. E. James Ferguson, *The Power of the Purse: A History of American Public Finance, 1776-1790* (Chapel Hill: University of North Carolina Press, 1961), 276. Their relief and Hamilton's plan were passed on the same day. *See* "Congress: House of Representatives, Saturday, July 24," *Connecticut Journal* (New Haven), Aug. 4, 1790. Hamilton responded to Davidson's query regarding remission on June 7th.

[33] The act described the coffee as imported from Cape Francois by "two French Citizens." "An Act for the Remission of the Duties on eleven hogsheads of Coffee which have been destroyed by fire," May 9, 1794.

[34] For Purviance's relations and office-seeking, see note accompanying "To George Washington from Robert Purviance, 19 May 1789," *Founders Online,* National Archives, last modified October 5, 2016, http://founders.archives.gov/documents/Washington/05-02-02-0242. [Original source: *The Papers of George Washington*, Presidential Series, vol. 2, *1 April 1789 – 15 June 1789*, ed. Dorothy Twohig. Charlottesville: University Press of Virginia, 1987, pp. 332–334.]; *see also* Gaillard Hunt, *Calendar of Applications and Recommendations for Office During the Presidency of George Washington* (Government Printing Office: Washington, 1901), p. 104, for a list of the applications and recommendations submitted by Purviance or on his behalf.

[35] From existing records, it is possible to piece together what likely happened. Elliot and Purviance were merchants in Norfolk, VA, dealing in such West Indian goods as sugar, coffee, and molasses. *See* "Just Imported," *Norfolk and Portsmouth Chronicle*, Dec. 3, 1791. On June 24, 1793, Elliott and Purviance announced they were dissolving their business, and that Purviance would be removing himself permanently to Cape Francois. "Notice," *American Gazette and Norfolk & Portsmouth Daily Advertiser*, August 13, 1793. Unfortunately for Purviance, three days earlier a slave revolt had "consumed more than half" of Cape Francois by fire. James Alexander Dun*, Dangerous Neighbors: Making the Haitian Revolution in Early America* (Philadelphia: University of Pennsylvania Press, 2016), 89-90. Reading between the lines, it seems likely that the "two French citizens" who had imported the destroyed coffee from Cape Francois were Purviance's business associates. When they defaulted on their bond in the aftermath of the destruction, they left sureties Elliott and Purviance on the hook for the debt. By August, Purviance was planning to return from the West Indies to his family home in Baltimore, probably in the hopes of at last obtaining a federal appointment. *See* "To George Washington from David Plunket, 7

handful of early instances of relief to influential supplicants, the history of remissions requests in Congress was solidly against the memorialists.

An 1802 report from the House Ways and Means Committee gives the reasons for Congress's opposition to remission. The Committee's mercurial chair, the Virginian John Randolph, had been told to "inquire into the expediency" of establishing a policy of remitting duties on domestically distilled spirits in all cases where there was proof that the stills or distilling materials had been destroyed by "unavoidable casualty."[36] On April 2nd, Randolph delivered a two-sentence response, advising against remission: ""The Government ought not to become the ensurer of any person," and "the adoption of a contrary doctrine, should it be extended to commercial cases"—that is, to import duties rather than excises, which applied to domestically-produced goods—"might prove infinitely dangerous to the revenue of the United States."[37]

August 1793," *Founders Online,* National Archives, last modified October 5, 2016, http://founders.archives.gov/documents/Washington/05-13-02-0250. [Original source: *The Papers of George Washington*, Presidential Series, vol. 13, *1 June–31 August 1793*, ed. Christine Sternberg Patrick. Charlottesville: University of Virginia Press, 2007, pp. 377–378.] Upon returning home, Purviance seems to have done business with Baltimore merchants David Plunket and his partner, David Stewart; this would explain why the hogsheads of coffee had been imported at Norfolk but burned in Stewart and Plunket's Baltimore storehouse. It would also explain why Plunket and Stewart, rather than Purviance, petitioned for the remission. *See Annals of Congress*, Monday, April 21, 1794. By the following winter, however, Purviance was again abroad, doing business in Paris and associating with James Monroe, who would soon engage him as his secretary, thereby securing for him his long-coveted federal position. *See* "To James Madison from James Monroe, 30 November 1794," *Founders Online,* National Archives, last modified October 5, 2016, http://founders.archives.gov/documents/Madison/01-15-02-0304. [Original source: *The Papers of James Madison*, vol. 15, *24 March 1793 – 20 April 1795*, ed. Thomas A. Mason, Robert A. Rutland, and Jeanne K. Sisson. Charlottesville: University Press of Virginia, 1985, pp. 398–405.], and accompanying notes.

[36] H.Doc. No. 183, "Remission of Duties," 7th Cong., 1st Sess., April 6, 1802.

[37] The date is significant, as four days later, Congress would, at Randolph's prodding, entirely repeal all excises (domestic duties), including those on whiskey. Alexander Hamilton had introduced excise taxes – taxes on domestic goods, as opposed to "imposts," or taxes on imports -- in 1791, and they had been deeply unpopular ever since. Randolph himself had labeled excises "vexatious, oppressive, and obnoxious." Davis Rich Dewey, *Financial History of the United States*, 2d ed. (Longman, Greens & Co.: New York, 1903): 151.

Randolph's terse argument that having the government insure individuals against disaster risked setting a precedent that might ruin the national fisc was repeated by members of Congress for more than thirty years. After 1802, Congress refused to grant another remission request, though it continued regularly to receive them. Members raised concerns that granting remission would enable petitioners to escape the consequences of imprudent behavior, a "moral hazard," and that saying yes in one instance would make it harder to say no in others. In 1805, for instance, Massachusetts Representative Benjamin Crowninshield, a member of a prominent Boston shipping family, reasoned in a report from the Committee of Commerce and Manufactures that remission was inappropriate because the merchant should have privately insured the duties paid on his imports. For the government to remit duties in such a circumstance would only encourage similar recklessness in the future.[38] In 1817, William Lowndes of South Carolina, chair of Ways and Means, emphasized the line-drawing problem to deny remission to two Boston merchants. The relief-seekers, Lowndes noted, had argued that all indirect taxes, import and excise duties included, were intended to fall on consumers, who paid commensurately higher prices on dutiable goods.[39] Accepting the premise, Lowndes turned the petitioners' argument against them. "[S]uch relief cannot be granted without imprudence," he concluded, for if the importer or manufacturer had a legitimate claim for the remission of duties paid on destroyed goods, how was the ultimate consumer any different? "[E]very purchaser of similar merchandise for consumption or speculation," Lowndes explained,

[38] Remission of Duties, Dec. 4, 1804 in *American State Papers: Finance* (Washington: Gales and Seaton, 1833) 2:114.
[39] On the accuracy of this characterization as a normative matter, see infra note 87.

"having paid the same duty in the shape of an enhanced price of the article, has the same substantial claim upon the justice of the Government."[40]

The problem of line-drawing that so exercised Lowndes was one manifestation of the problem of "special" or "class" legislation, a particular concern of lawmakers in the early republic. How could a legislature justify bestowing benefits on a particular group or class, the argument went, and not others? Class legislation was viewed as corrupt legislation, giving to particularly influential individuals or groups favors that were not available to the majority.[41] South Carolina's George McDuffie used such arguments in 1830 against Boston merchants who had lost goods in a fire, claiming that granting relief to this set of petitioners while denying relief to others in similar circumstances would make the bill "partial in its operation, and partial justice [i]s the greatest injustice."[42] Lawmakers' heightened concerns about partial legislation made them suspicious of any relief measure that might be characterized not as charity instead of justice. After a Savannah fire in 1820, Georgia's Alfred Cuthbert told the House that he and his fellow Georgians "seek no charity; we appeal not to your generosity; we ask only a liberal and enlightened justice." But his colleagues were unpersuaded. North Carolina's James Smith replied that he would vote for remission "[w]ere he governed by his feelings alone," but "obeying the impulse of duty, he could find no power in Congress to disburse the public moneys in acts of charity or

---

[40] "Remission of Duty," H.Doc. No. 491, 14th Cong., 2d Sess., *ASP*, Jan. 2, 1817.
[41] For an account particularly attuned to this outlook as it applied to internal improvements, see John Lauritz Larson, *Internal Improvement: National Public Works and the Promise of Popular Government in the Early United States* (UNC Press: Durham, 2001). For a recent analysis of the effects of concerns over class legislation on American economic development before the Civil War, *see* Naomi R. Lamoreaux and John Joseph Wallis, "States, Not Nation: The Sources of Political and Economic Development in the Early United States,"September 2015, *available online at* http://economics.yale.edu/sites/default/files/files/Faculty/Lamoreaux/lamoreaux-wallis-2015.pdf.
[42] "Goods Destroyed by Fire," *RD*, 21st Cong., 1st Sess., March 13, 1830.

generosity." Finding himself unable to distinguish the Savannah fire from other instances of loss, Smith concluded that he "could see no difference between remitting this duty and taking so much money from the Treasury, which Congress had no right to do." As Samuel Foot of Connecticut succinctly put it, "Congress can no more remit the duties, which have become a debt, than appropriate a sum of money from the Treasury, in charity. The principle is the same in both cases."[43]

Justice did not compel remission; charity did not justify spending from the Treasury. By the time of the Savannah fire, however, there was an alternative form of relief that Congress had offered in several earlier instances: an extension of credit on the duties owed. Congress had offered this form of relief to fire sufferers in Portsmouth, New Hampshire in 1803, a year after John Randolph's report opposing remission; to fire sufferers in Norfolk, VA, in 1804; and again to Portsmouth fire sufferers in 1807.[44] Savannah's fire sufferers, too, ultimately received a credit extension in lieu of remission. By 1822, this alternative form of relief was so well established that Maine's John Holmes, chairman of the Senate's Committee of Finance, could describe "a principle heretofore decided by Congress []: In case of the loss of the goods after importation, and the duties secured, the utmost relief to be given is *a delay of payment*."[45] Congress, in other words, could not forgive petitioners' debts. It could only delay their collection, just as any sensible creditor might do.[46]

---

[43] "Savannah Sufferers," *Annals of Congress*, April, 1820, pp. 1799-1807.
[44] These acts are all listed in Richard Peters, *The Public Statutes at Large in the United States of America, from the Organization of Government in 1789, to March 3, 1845, Vol. VI: List of the Private Acts of Congress* (Little & Brown: Boston, 1846).
[45] "Remission of Duties," S.Doc. No. 4, *ASP*, 17th Cong., 1st Sess., March 12, 1822 (italics in original).
[46] Gautham Rao, in *National Duties*, makes clear how critical the use of "indulgences" was to early Treasury Secretaries' ability to accommodate merchants and thereby ensure – or at least encourage – their continued cooperation with the overall customs regime. *See generally* Rao, *supra* note 23.

***

The petitions Congress received from fire sufferers were often described as appropriate for Congress's "equitable consideration." In 1820, for instance, Treasury Comptroller Joseph Anderson used this phrase in a letter explaining that his department could not help certain merchants whose imported goods had been destroyed by fire because their goods had already been "landed" and were therefore subject to duty.[47] Anderson explained that for landed goods, "the risk" of fire belonged to the owner, not the government, and any relief would therefore have to come from Congress's "equitable consideration."[48]

In 1839's *Emerson v. Hall*, Supreme Court Justice John McLean laid out a helpful taxonomy of the types of claims that Congress typically considered under its equitable consideration.[49] "Services rendered under the requirements of law or of contract for which a compensation is fixed," he explained, "constitute a legal demand," while "[s]ervices rendered under an authority which is casual or in some degree discretionary may constitute an equitable claim."[50] In addition, the government often bestowed "rewards" on individuals who had performed a "highly meritorious act," such as saving public property from fire. Such payments were not rightly deemed claims, McLean thought; rather, they were "gratuit[ies]," paid "[f]rom motives of public policy." Pensions given to the heirs of

---

[47] Even though duties applied only to goods that had been landed, it was decreed by statute that collectors must assess the goods and collect the duties (or bonds) while the goods were still in their vessel. *See* Act of March 4, 1799, ch. 5, §19 (requiring duties to be paid or bonded before landing).
[48] Remission of Duties, Jan. 28, 1822 in *American State Papers: Finance* (Washington, DC: Gales and Seaton, 1833), 3:700. *See also* Letter to Samuel Swartwout from Levi Woodbury, May 8, 1837, reprinted in Reg. Deb. Appendix, 25th Cong., 1st Sess., 24-25 ("Report on the Finances") ("The general practice has been op- posed to the existence or exercise of any legal authority, except in Congress, to grant delay in the payment of such bonds, until after an action is instituted or judgment is confessed.")
[49] 38 U.S. 409 (1839).
[50] *Id.* at 412.

military veterans were a prototypical example; unlike the government's payment of a legal or equitable claim, pensions were acts of "generosity" from the government that depended on its "volition" and were in no way obligatory.[51] The difference, McLean explained, lay in the fact that legal and equitable claims "arise[] out of a contract express or implied," whereas gratuities were payments for benefits "voluntarily conferred on the government" by the claimant, rather than for acts performed "at the request of any officer of the government or under the sanction of any law or authority."[52] In the *Emerson* case, a government officer had received a payment from Congress in gratitude for his efforts in seizing a ship that illegally sought to bring over two hundred[53] enslaved men, women, and children into the United States, in violation of Congress's 1807 ban on the international slave trade. The officer had thought that the statute promised him a moiety, or half, of the "proceeds of the vessel and cargo" for his actions.[54] In fact, however, the law had identified only armed vessels of the Navy or revenue cutters as eligible for the moiety, and so in 1825 the Supreme Court held that Emerson, a government surveyor, was not entitled to the money.[55] In McLean's eyes, that meant Congress's 1831 authorization of a payment to Emerson was a gratuity rather than payment of a just or equitable claim: a payment motivated by "public policy," not legal obligation.[56]

---

[51] *Id.*
[52] *Id.* at 413.
[53] *See* Lucas Koutsoukos-Chalhoub, "Illegally Sold: The Captives from the Josefa Segunda in New Orleans, 1818-31" at 1 (ms on file with author) (describing the over 200 Africans sold into captivity following the ship's seizure).
[54] *An Act to Prohibit the Importation of Slaves into any Port or Place within the Jurisdiction of the United States*, 2 Stat. 526 (1807).
[55] *The Josefa Segunda*, 23 U.S. 312 (1825).
[56] Because Emerson had died in 1828, the 1831 payment went to Emerson's heirs; the Supreme Court case arose from their efforts to escape a creditor's claim to the payment.

McLean's classification of legal claims, equitable claims, and gratuities matched the basic logic that members of Congress had been using for decades to evaluate the thousands of money petitions they received. Congress first analyzed who, between the government and the petitioner, owned the risk.[57] Where Congress clearly owned the risk, it was labeled a "legal claim," the type that, as Senator Nathaniel Macon of South Carolina put it in 1818, ought to be paid regardless of "the condition of the Treasury."[58] Should Congress pay Peter Bargy, Jr., and his fellow petitioners the $8,430.62 they had requested as compensation for their failed efforts to construct a dam for the United States government? An 1830 report from the House Committee on Claims answered yes, because the petitioners made a "legal claim": the dam had failed because a federal commissioner had directed Bargy to dig the foundation in a poor quality riverbed, and thus "the permanency of the foundation was at the risk of the United States, and not at the risk of the petitioners."[59]

To label a claim legal was to insist on the justice of the request: the terms of the arrangement made clear that the risk lay with the government, not the petitioner.

---

[57] To be sure, petitioners and members of Congress routinely characterized as legal claims that McLean would have understood as equitable, and as equitable claims that McLean would have deemed requests for gratuities. In 1818, for instance, veteran officers seeking the restoration of pensions that Congress had previously commuted described themselves as advancing "equitable claims" premised on the government's "quasi-contractual" obligations stemming from their commuted pensions; they employed "the language of remonstrance rather than petition" in their appeals, on the theory that such a framing was "more likely to ensure success." Jensen, *supra* note 9 at 66-67, 104-05. 108 n.40. Not everyone agreed that the officers' claims were "on the footing of right": in an 1827 debate over compensation to the unlucky officers for the losses they had sustained by selling the depreciated government certificates they had received as pay, Kentucky's Representative Wickliffe denied that equitable relief was warranted. "Suppose I had given my creditor a note for twice the amount I owed him, and he had passed it off for half its value; has he any claim on me either in law or equity?" Wickliffe asked his colleagues. "Certainly not…[T]his is a legal discharge, and law should always prevail against equity, unless there be fraud, mistake, or accident. There is neither in this case[.]" Reg. Deb. 19th Cong., 2d Sess., 708 (Jan. 13, 1827) ("Surviving Officers of the Revolution").

[58] Macon qtd in Jensen, *supra* note 9 at 77.

[59] H. R. Doc. No. 248, 21st Cong., 1st Sess. ("Peter Bargy, Jr., *et al*") (March 2, 1830).

Conversely, to assert that the petitioner had assumed the risk was to deem a claim ineligible for payment. In 1814, for instance, army paymaster Zachariah Schoonmaker petitioned for debt relief on funds the district paymaster had given him to pay New York's second volunteer regiment. Because Schoonmaker had lost the money in transport, the House Committee of Claims determined that he "must be considered liable for the risk." It would be a different matter if "the loss were produced by some inevitable accident," the report explained, "such as capture by an enemy, or some other unforeseen event, and which it would not be in the power of human diligence and wisdom to prevent or control." But here, where Schoonmaker had "received money from the United States, to discharge a debt which the Government owes to its soldiery, and for which he received an adequate compensation," the Committee reasoned that "he must be considered liable for the risk of the money, as well as its faithful and honest application."[60] Just as the risk of injury had been priced into Farwell's salary as a railroad worker, the "risk of the money" had been priced into Schoonmaker's compensation from the Army. It was not Congress's job to indemnify him against such perils.

Gratuities and legal claims were at opposite ends of the spectrum of congressional obligation. Gratuities were payments made to petitioners who had not shifted their risk to the government, but whose service invited reward nonetheless. In the early republic, as Laura Jensen and Kristin A. Collins have shown, pensions were given to veteran soldiers and their widows both as individual private bills and through executive branch programs.[61] Such dispensations expressed the nation's gratitude, and they seem to have

[60] 29 Annals of Cong. 700 (1816) ("Money Lost by a Paymaster").
[61] *See generally* Collins, *supra* note 11, and Jensen, *supra* note 9.

disproportionately benefited well-connected petitioners, at least at first.[62] In 1828, for instance, Stephen Olney, a former Revolutionary War captain from a prominent Rhode Island family,[63] "respectfully present[ed] his case to the equitable consideration of his country," explaining that he had retired one year too early to receive the commutation that his fellows officers received and acknowledging that he could not "claim compensation as having a right to demand it."[64] To boost his chances, Olney appended three letters of praise from Revolutionary War heroes as well as John Jay's letter promoting him to captain.[65] Despite Olney's acknowledgement that he lacked any legal claim, Congress voted in 1830 to grant Olney's petition,[66] explaining simply that his service was "worthy of remembrance."[67]

Under McLean's rubric, equitable claims fell somewhere between legal claims and gratuities. This type of claim was marked by two interrelated features, McLean explained: they arose from "[s]ervices rendered under an authority which is casual or in some degree discretionary," and the petitioners had not labored for "a compensation that is fixed," both key features of bounty offices. For example, Captains Alexander Murray and George Little were naval officers held liable for damages for their actions during the Quasi-War with

---

[62] *See* Collins, *supra* note 11 (describing the "leveling up" and "leveling down" of widows' pensions in response to petitioning and public pressure).
[63] For more on the Olney family's clout, *see generally* Frederick Dalzell, "Prudence and the Golden Egg: Establishing the Federal Government in Providence, Rhode Island," *The New England Quarterly* 65 (1992): 355-388.
[64] H.R. Rep. No. 53, 21st Cong. 1st Sess. (1830) ("Case of Stephen Olney"), 2.
[65] Ibid.
[66] *See* "Olney, Stephen (R.I.)" in *Digested Summary and Alphabetical List of Private Claims*, Vol. 2 (1853), 609 (bill approved May 28, 1830).
[67] H.R. Rep. No. 53 21st Cong. 1st Sess. (1830). *See also* Charles C. Binney, Origin and Development of Legal Recourse Against the Government in the United States, 57 U. Pa. L. Rev. 372, 378 (1909) (explaining that the Treasury Department handled routine claims for payment on government contracts, with any relief from a departmental refusal coming from Congress).

France.[68] Both men had wrongfully seized and libeled neutral ships on the mistaken belief that the ships were violating domestic trade prohibitions.[69] In court, Little and Murray lost twice: first, by missing out on the handsome profits they'd hoped to receive from the libel, and second when they were each held liable to damages as lawless captors.[70]

If Little and Murray had won their libel suits, they would have split the proceeds with government. This upside chance was part of their compensation and it was vital consideration for the perils of their work. If they had merely lost their libel, Little and Murray would have had no claim for indemnification; the chance to bring suit had been their consideration. But that chance to bring a libel action did not compensate them for the hefty damages they owed. They had not assumed this risk, and it was for this uncompensated loss that they sought indemnification in Congress.

In deliberating the officers' claims, members did not treat the officers' memorials as "legal" claims, obligatory without regard for the equities, even though both men had been following orders. Unlike Peter Bargy, who had simply dug the foundation where he was told, Little and Murray had possessed the discretionary authority to determine whether to seize and libel the vessels in question.[71]

---

[68] On Murray's and Little's liability, *see generally* Jane Manners, "Executive Power and the Rule of Law in the Marshall Court: A Rereading of Little v. Barreme and Murray v. Schooner Charming Betsy," 89 Ford. L. Rev. 1941 (2021).

[69] *See id.* at 1951.
[70] *Murray vs. The Charming Betsy*, 2 Cranch 64 (1804) at 73 (argument of counsel).
[71] Whether or not this authority was in fact discretionary—that is, whether the statute had authorized the officers to determine whether there was "probable cause" to believe the ships had been violating Congress's trading prohibition and thus liable to seizure, or whether they would in fact be held strictly liable for any erroneous seizure, regardless of probable cause, because they had not be delegated such discretion—was a key issue in the case that Chief Justice Marshall ultimately resolved by concluding that although the statute had authorized the officers to seize on probable cause, in neither case had there in fact been probable cause to do so. *See* Manners, *supra* note 68 at 1962-65.

Congress first analyzed whether the captains' actions were inside their delegated authority. If so, compensation would be due. If not, they might still prevail, but it would depend on how Congress weighed the equities. In Murray's case, things moved quickly; the equities were clear. Murray's memorial noted that he believed he had been fulfilling his duty by following orders, and the Navy Secretary's letter to the House Committee of Claims argued that Murray, was bound to obey as the government's agent.[72] Murray's relief bill passed in January 1805, a little more than two months after the House received his memorial.[73]

For Little, things took longer, even though he too had been following orders.[74] The holdup appears to have stemmed from members' disagreement over whether Little's actions were inside the scope of his duty, since the order he had received[75] went beyond what the statute permitted.[76] In Little's case, Representative Barnabas Bidwell of Massachusetts recalled a month after his relief bill had passed, some members "held that a

---

[72] *See* Navy Department Circular, 12 March 1799, reprinted in H.R. Rep. No. 8-44 (2d Sess. 1805), *reprinted in* 1 American State Papers: Naval Affairs 138 (Washington, Gales & Seaton 1834) (hereinafter "Murray Report") at 129, 131.

[73] *See* Act for the Relief of Alexander Murray, ch. 7, 6 Stat. 56 (1805); 14 Annals of Congress 985 (1805) (noting that Murray's memorial had been referred to the Committee of Claims on Nov. 23, 1804).

[74] Although the House Committee of Claims recommended relief in February 1805 because "the principle on which the relief is requested...has already been clearly recognized," the House postponed the vote on relief for over two years. H.R. Rep. No. 8-46 (2d Sess. 1805) *reprinted in* American State Papers: Naval Affairs, at 138. Scholars who have looked at Captain Little's case have been unable to explain this delay, as the debate itself is not recorded. *See, e.g.,* Pfander & Hunt, at 1902 ("No immediate reason for the delay appears in the records we have reviewed.")

[75] The order instructed officers to take special care that "vessels or cargoes really American, but covered by Danish or other foreign papers, and bound to or from French Ports do not escape you." Little v. Barreme, 6 U.S. (2 Cranch) 170, 171 (1804). *See also* Murray Report.

[76] Act of Feb. 9, 1799, Stat. III, ch. 2, Section 5. ("if, upon examination, it shall appear that such ship or vessel is bound or sailing to any port or place within the territory of the French Republic"). The difference is that while the statute authorized seizing vessels sailing to any French port, the orders authorized seizure of any vessel sailing to or from a French port. Little had seized a ship sailing from a French port.

military or naval officer is not bound to take notice of any law in opposition to, or even in explanation of, the orders of his superior."[77] But Bidwell disagreed: "the Executive orders, under which [Little] claimed, taken in connexion with the law, which was referred to in the orders, did not appear to me to warrant the transaction."[78] Bidwell acknowledged that some cases were less clear cut, as when an officer had misunderstood an ambiguous statute or responded to "some great emergency not provided for by law."[79] In those cases, the officer might be "equitably entitled to indemnification."[80] But Bidwell did not see Little's case in that category. Bidwell's comments suggest that the delay in Little's case resulted from uncertainty regarding how to respond to Little's statutory violation. To Bidwell and his like-minded colleagues, the statute, which had been referred to specifically in the Navy Secretary's order, was not ambiguous. Little therefore should have known that his action was beyond the scope of his duty and thus unlawful: he owned the risk.

***

Albert Gallatin and Louis McLane, the 1835 fire memorial's authors, were intimately familiar with such congressional practices. They understood that persuading Congress to ignore three decades of anti-remission precedent would require a claim where the justice of the merchants' request clearly outweighed the equities on the other side. The claim needed to look less like a gratuity and more like a legal right. In 1835, the most common way to conceptualize the relationship between importers and the government was to describe the importers as paying a fee in exchange for a "lottery ticket[], a chance for a

[77] 16 Annals of Congress 563 (1807).
[78] *Id.*
[79] *Id.*
[80] *Id.*

prize," as Representative William Graves of Kentucky would describe it during the fire relief debates in Congress the following February.[81] But purchasers of lottery tickets were not entitled to a refund if they lost: the chance to play *was* the reward. To argue that the merchants were owed their money back as a matter of right, the memorialists knew that they needed be individuals entitled to coverage of their downside risks. In other words, the trick was to characterize the merchants as government officers for whom compensation for loss was part of the arrangement. They needed to look like Peter Bargy, who had a legal claim because he performed a service and through no fault of his own was not compensated, or like Murray and Little, whose equitable claims were grounded in the understanding that their compensation came mostly through the upside chance.

***

It took the memorialists only three days to draft their appeal to Congress.[82] The document reads like a dramatic legal brief: a presentation of facts carefully chosen to anticipate and rebut the likely objections of its audience—moral hazard, the problem of distinguishing between worthy and unworthy recipients, and dangerous precedent—followed by a proposed legal rule and its justification. The memorial's opening two pages lay out the facts, establishing the extent of the damage and New Yorkers' valiant but unsuccessful efforts to limit it. The fire had been "unexampled and appalling in its consequences;" the weather "so cold as to freeze the water in the hose and engines of the fire companies." To save their goods, New Yorkers had removed them from their stores and

---

[81] Reg. Deb. 24th Cong., 1st Sess. 2562 (Feb. 17, 1836).
[82] A Citizens' Committee authorized the drafting of the memorial at a meeting on December 21st; the final version was signed on December 24th. *See* "Memorial of the Citizens of New York," H.Doc. No. 33, 24th Cong., 1st Sess., December 29, 1836.

placed them in the streets, but the flames proved "so rapid and irresistible" that most were lost.[83] The total destruction was estimated at between 15 and 20 million dollars.

Having described the gravity of New York's situation, the memorialists turned to private insurance. Although the merchants were insured for nearly the entire amount of the loss, the fire's exceptional nature meant that most of the city's insurance companies would be "involved in a common ruin with the immediate sufferers from the conflagration." Here, the memorialists were dispelling concerns about moral hazard: the merchants had taken all proper measures to avoid disaster, leaving no reason that they should own the risk. However, just as the fire had overcome their efforts to mitigate the physical harm, so too had it overcome the New York underwriters' efforts to guard against financial loss. "Since the famous fire of London," the memorialists wrote, "a similar calamity, arising from accidental causes, and equally destructive of property, has not occured [*sic*]; and in fact, it can only be resembled to disasters resulting from sudden floods and earthquakes;" citing two of the four examples that Joseph Story had included in his treatise on bailments three years earlier.[84]

Next, the memorialists turned to precedent, lingering on a few early instances when Congress had remitted duties and dismissing as inapposite the multiple occasions when Congress had not. If ever there were a circumstance that called for Congressional aid, the

---

[83] James Gordon Bennett's *Herald* repeatedly stressed the loss of goods from another cause: plunder rather than fire. *See, e.g., The Herald*, January 4, 1836 ("The boys and Irishwomen are still plundering among the Ruins"); "General Sessions, January 16," January 17, 1836, ("Thos. Kating, grand larceny, in stealing from the fire, shawls and gloves to the amount of $300, for each offence 2 years and 6 months at Sing Sing.").

[84] Joseph Story, *Commentaries on the Law of Bailments: With Illustrations from the Civil and the Foreign Law* (Cambridge: Hilliard and Brown, 1832), §25. ("[b]y inevitable accident, commonly called the act of God is meant any accident produced by any physical cause, which is irresistible; such as a loss by lightning or storms, by the perils of the seas, by an inundation or earthquake, or by sudden death or illness.").

memorialists urged, the New York fire was it. Congress should use the crisis before them to "settle some definite principle for the future:" that "where imported goods are destroyed in their original packages by inevitable accident, -- such as no prudence, nor any of the ordinary precautions could prevent or guard against, -- while entitled to drawback, and before they had entered into the mass of commodities destined for the general consumption of the country, the duties should not be exacted; unless it should become impossible, by satisfactory proof, to establish the facts."

The component parts of this proposed legal rule are worth examining. Both *where imported goods are destroyed in their original packages* and the coda – *unless it should be impossible, by satisfactory proof, to establish the facts* – are guarantees against fraud; an acknowledgement both of the temptation to cheating that such a rule would present and of Congress's need to guard against such abuses. ("Original packages" had been shorthand for not-tampered-with since at least as early as 1819, when Henry Baldwin, Chair of the House Committee of Manufactures, had proposed an auction tax that would assess a 5% surcharge if an item was sold in other than its original package.)[85] *By inevitable accident,--such as no prudence, nor any of the ordinary precautions could prevent or guard against* employs the language of a standard insurance contract as a nod to moral hazard, offering the memorialists' assurance that any rule of remission would not absolve merchants of the obligation to follow prudent business practices. *While entitled to drawback, and before they had entered into the mass of commodities destined for the general consumption of the*

---

[85] 36 Annals of Cong., 2173 (May 1820). "Original package" was also the dividing line articulated by Chief Justice Marshall in *Brown v. Maryland* (1827) between goods that were imports and thus free from state taxation and goods that were merchandise and thus susceptible to it. *See infra* note 86.

country is the memorialists' answer to the line-drawing question: merchants were entitled to remission so long as they were entitled to drawback—the longstanding policy under which importing merchants were permitted to "draw back" duties on goods subsequently exported—and had yet to enter their goods into the domestic market.[86] By marking these conceptual and temporal boundaries, the memorialists hoped to establish a clear line between legitimate and illegitimate claimants. Remitting duties to a merchant who had lost his goods to fire, but not to an individual consumer in the same situation, was premised not on an invidious "partial" distinction between individuals but on a justified division between goods that had entered the "consumption of the country" and those that had not.

Having thus laid out the rule, the memorialists used a remarkable blend of contractual logic and political economy as justification. Echoing the argument of William Lowndes' 1817 petitioners, the memorialists explained that the United States, like England, raised its revenue through indirect taxes, paid in the first instance by importers but, they contended, "intended to be levied upon all the consumers of imported merchandise." This system, they explained, was mainly for the "convenience of the Government," enabling it to

[86] Here too, *Brown v. Maryland* was likely of service. In that case, Chief Justice Marshall had proposed his own line between imports immune from state taxation and goods subject to it. An imported good would cease to fall under the prohibition on state import duties, he reasoned—in language remarkably similar to that in the memorial – when "it has become mixed up and incorporated with the mass of property in the country." So long, however, as the item remained "the property of the importer, in his warehouse, in the original form or package in which it was imported," it was still within the clause's ambit. 25 U.S. (12 Wheat.) 419, 441 (1827). Alison LaCroix describes this dividing line, which became known as the "original package doctrine," as "a quintessentially Marshallian blend of quasi-mystical imagery with a gesture toward a clear rule" in service of the management of concurrent state and federal power. LaCroix, "Original Packages and Sluggish Streams: Negotiating Concurrent Power in the Antebellum Federal Republic," at 11, on file with author.

"avoid the odium and impositions of direct taxation."[87] Premise established, the memorialists turned to the heart of their argument. "In this respect," they wrote:

> the importer ought justly to be considered as the important and useful agent of the Government, for the sale of the commodities and the collection of the duties. The reasonable understanding and expectation of both parties is, that for the advances which the importer, in the first instance, makes, he will have a reasonable time, or the ordinary opportunities, to make the necessary collections from the consumers. The importer stipulates for nothing more than ordinary vigilance and activity in the sale of the commodity, and for the usual precautions of safety in the interim.

In the case before them, in other words, New York's importing merchant was owed remission as a matter of right. By describing the merchant as an agent of government, the memorialists inverted the common view, discussed with approval by Chief Justice Marshall in 1827's *Brown v. Maryland*, that that "the importer purchases, by payment of the duty to the United States, a right to dispose of his merchandise, as well as to bring it into the country."[88] On the contrary, describing the importing merchant as the nation's de facto tax

---

[87] Though the memorialists may not have known it, the political economy premise on which their claim of right rested – that import taxes were *intended* to fall exclusively on consumers – was revisionist history. When the impost was first adopted, the fact that consumers ended up paying the tax as part of the goods' purchase price was a matter of practical politics, not principle. As Robert Morris, the country's Superintendent of Finance throughout the Revolution and the driving force behind much of the early government's revenue structure, explained it, "[o]f All Taxes, those on the Consumption of Articles are most agreable; because, being mingled with the price, they are less sensible to the people." Robert Morris qtd. in Robin L. Einhorn, *American Taxation, American Slavery* (Chicago: University of Chicago Press, 2008), 146. *See also* Alexander Hamilton, Alexander Hamilton, "Federalist No. 35, The Same Subject Continued," in Alexander Hamilton, James Madison, John Jay, *The Federalist Papers* (Mineola, NY: Dover, 2014), 158 (noting that sometimes, because of the way import taxes worked, importers would not be able to pass on the costs of goods to their consumers). Although it is beyond the scope of this chapter, it is interesting to speculate about the influence of debates over the remission of merchants' bonds, premised on the idea that importing merchants were not *supposed* to pay the duties, and the criticisms of the fundamental regressivity of the impost that dominated political debate over the tariff by the end of the nineteenth century. *See, e.g.,* Ajay Mehrotra, *Making the Modern American Fiscal State: Law, Politics, and the Rise of Progressive Taxation, 1877-1929* (Cambridge: Cambridge UP, 2013): 3.

[88] *Brown v. State of Maryland*, 25 U.S. (12 Wheat.) 419, 560-61 (1827). The plaintiff's argument was that the importer purchased with his duty a right not only to import his goods, but also to dispose of them, and thus that the state was barred from taxing the exercise of that right by the constitutional prohibition on

farmer suggested a model in which his compensation might, like that of a bounty officer, be seen as comprising two distinct pairs. In exchange for taking on the onerous work of tax collection, the merchant received the upside chance of making a profit in the domestic market. And in exchange for the posting of duty bonds upfront, he was guaranteed to get that money back. Had the fire destroyed only the merchant's upside chance of profit, it would have imposed no commensurate duty on Congress, for the fire had also relieved the merchant of his tax farmer obligations. But the fire had also destroyed the merchant's ability to recoup his upfront payment of duties. This was a risk, the memorial argued, that the importer should not have to bear. In such a circumstance, refusing to remit the importer's advance would turn the importer from the government's agent into its insurer "against all risks whatever," a role that was in no way part of the importer's original undertaking. As Joseph Story would explain four years later in *Commentaries on the Law of Agency*, "[a] factor is commonly said to be an agent employed to sell goods or merchandise, consigned or delivered to him by or for his principal, for [] compensation…..the agent…is held entitled to be indemnified against all losses, which have been innocently sustained by him on the [] account."[89] In recasting the importing merchant as the federal government's de facto tax collector, they recast the nation's approach to revenue collection as rooted in the rights-based logic of agency law. The importer was not a gambler with a lottery ticket,

---

state import and export duties. MENTION THAT MERCHANT AS GOVERNMENT AGENT WASN'T NEW – SEE COKE (? – CHECK EMMA ROTHSCHILD), FERGUSON, HANNAH FARBER. ALSO note, as pointed out in union at risk p 94, that a big goal of Force Bill - drafted by McLane, see Freehling - was to protect customs agents, who were on front lines. It gave circuit courts original (That is, before facts are determined) jxn over cases arising under revenue laws)). See very helpful Woolhandler article here. CITE Ferguson for commission agent relationship in Ch 5.

[89] Joseph Story, *Commentaries on the Law of Agency: as a Branch of Commercial and Maritime Jurisprudence: with occasional illustrations from the civil and foreign law* (Boston: Little and Brown, 1839), §33, §340.

the purchaser of a right to sell. He was an agent with a legal right to be indemnified against loss.

***

By the time the merchants' memorial reached Washington, a relief bill was already under consideration in both houses. (News had arrived only two days after the fire, when Treasury Secretary Levi Woodbury received a letter from the New York customs collector, asking for Woodbury's permission not to turn over New York merchants' unpaid duty bonds to the district attorney for prosecution.)[90] To move debate along quickly, Churchill Cambreleng, the powerful chair of the House Ways and Means Committee, opted to focus the initial relief bill exclusively on credit extensions, the form of relief that had been standard since 1802, and to postpone a more controversial remission measure, which Cambreleng acknowledged would "require previous examination and deliberation."[91] Yet Cambreleng's extension bill did not meet with the equanimity he had hoped. Critics focused on its unusual second section, which extended the credits on all bonds posted at the New York customs house before the date of the fire regardless of whether the debtors actually lost goods in the blaze.[92] Criticism came sharp and quick: aid to the fire's immediate sufferers was one thing, but aid to New Yorkers who simply lived in proximity to these victims was quite another. Accusations of partial legislation drew out debate on the bill for over three months, postponing its eventual passage until that March.[93]

---

[90] Committee of Ways and Means, *Fire in New York*, H.R. REP. NO. 41, at 1-3 (1835).
[91] *Cong. Globe*, 24th Cong., 1st Sess., 38.
[92] *Cong. Globe*, 24th Cong., 1st Sess., 111.
[93] An Act for the relief of the sufferers of the fire in the city of New York, ch. 42, 5 Stat. 6 (March 19, 1836).

During debate, members showed surprising solicitude for remission of duty bonds, despite the fact that the bill included no such provision. Massachusetts's Stephen Phillips, while speaking in support of the credit extension bill, focused more on the justice of remission than on the virtues of the current bill. Rep. Bellamy Storer of Ohio considered remission a superior form of relief and viewed the credit extension bill as an "imperfect" but necessary stopgap measure.[94] Horace Everett of Vermont was persuaded by "the principle that duties are a tax on the consumer" and regretted that in the past he had rejected similar remission requests, as those votes had been "wrong."[95] Cambreleng had believed on the basis of precedent that remission would be the more controversial relief measure, but debates on the floor of the House and the Senate suggested this was not the case. Where once remission had been opposed as a threat to the public fisc, it was now more palatable than a temporary credit extension to a commercial community — not because its financial impact would be less (early estimates suggested remission would cost over $100,000 more than credit extensions), but because it could be justified in terms of legal right.

***

Congress's relative calm about remitting the New York merchants' duties should not be overstated. Skeptics were worried that remission to the New York merchants would drain the Treasury of millions of dollars, invite rampant fraud, and oblige the government

---

[94] Reg. Deb. 24th Cong. 1st Sess. 2580 (Feb. 18, 1836).

[95] "Remarks of Mr. Everett of Vermont – New York Fire Bill," *Cong. Globe App.*, 24th Cong., 1st Sess. 151-52 (March 8, 1836).

to bear the risk of the merchants' own imprudence.[96] When Cambreleng first introduced a remission bill on April 9, 1836, three weeks after the credit extension measure had become law, opponents ensured that the bill went nowhere before the end of the session. But the New York merchants persisted, as did their Senate sponsors and House backers. Two years later, New York's fire sufferers finally got their duty bonds remitted. In so doing, they set a precedent for future relief seekers, one that quickly enshrined the agency law logic that the New York memorialists had put forward, sidelining the concerns over the public fisc that had previously guided congressional consideration of such requests.

The final bill reflects its advocates' efforts to respond to their adversaries' concerns. In particular, it adopted a systematic approach to rooting out fraud, specifying that the port's collector, naval officer, and district attorney would determine the amount of duties paid or secured to be paid on merchandise destroyed in unbroken and original packages. Meetings would be publicized in local papers and written testimony would be transmitted, along with the commission's decisions, to the Treasury Secretary for review; willful false swearing would constitute perjury under New York law. Before receiving the certificate entitling them to remission, the relief-seeker had to give the New York customs collector a bond for double the amount, in case it later came out that the goods hadn't in fact been destroyed in the fire as stated. Any remission would be reduced by the amount the

---

[96] *See, e.g.,* "N. and L. Dana," Reg. Deb. 24th Cong., 2nd Sess. 1388 (Jan. 14, 1837); H.R. Rep. No. 99, 24th Cong., 1st Sess. ("N. and L. Dana and Company") (Jan. 12, 1836) (laying out reasons to oppose remission).

recipient may have already saved thanks to credit extensions on goods unaffected by the fire.[97]

The bill also addressed concerns that merchants would receive compensation twice over, once from their insurers and once from the government. It required that any remission tabulation be reduced by the total of all insurance payouts the merchant had or expected to receive, thereby effectively excluding from relief any merchant who had received the full value of his insurance claim, even if that claim had not covered the duties.[98] The effect was to eliminate merchants' incentive to insure goods for their duty-enhanced value, the practice that Benjamin Crowninshield had once deemed so central to mercantile prudence. Relief was still available to those who failed to do so, after all, and any insurance payouts a merchant did receive would count against him in the government's remission ledgers. Why bother to pay the premiums to private insurers when the government would compensate you at no charge?

During the House's final debate on the bill in 1838, Cambreleng and his fellow New Yorkers had assured their colleagues that the measure would not set a precedent for the future. Yet that is exactly what did happen, over the following decade and a half. In 1840, the House rejected an attempt to amend the 1838 measure to extend its provisions to "all persons in sea port towns, being ports of entry, who had sustained losses by fire of goods in unbroken packages."[99] But that July, two merchants named Chastelain and Ponvert won

---

[97] Ibid., *see also* "Congress," *Boston Weekly Messenger*, July 18, 1838. The *Daily National Intelligencer* does not specify the ways in which the bill was amended, but a comparison between Senate Bill No. 18 and the legislation that ultimately resulted reveals this proviso as the only salient change.
[98] Because duties were never more than the value of the goods themselves, a fully-paid claim on the goods would cancel out any remission the merchant might otherwise be eligible for.
[99] *Niles National Register*, March 28, 1840.

remission of the duties they had paid on Cuban sugar that had been destroyed by fire nine years earlier.[100] The report recommending relief implicitly distinguished the situation of Chastelain and Ponvert from those of other would-be remission-seekers by emphasizing the petitioners' uniquely deserving circumstances. Unlike other petitioners, Chastelain and Ponvert had not yet landed their goods at the time of their destruction and thus could not have obtained private insurance. Also, unlike other petitioners, Chastelain and Ponvert did not actually have physical custody of their goods at the time of the fire—a federal customs officer had.[101] Neither of these factors had meant the difference between remission and rejection in 1832,[102] or 1833,[103] or 1835,[104] or 1836,[105] or 1837,[106] or 1838,[107] or 1839,[108] all years in which Chastelain and Ponvert's petition for remission was under congressional consideration. In the wake of the New York fire bill, Congress's treatment of remission requests began to change, as both legislators and supplicants sought to expand access to the unusual dispensation the New York merchants had received.

By 1849, the drip, drip, drip of individual petitions for remission in the wake of disaster had become a flow. That year, Virginia's Robert Hunter reported on behalf of the Senate Committee on Finance that these petitions were "founded upon a principle of justice" that called for relief. "The privilege of importing goods for home consumption," Hunter explained, "is the consideration upon which the duty is exacted, and if the goods are

---

[100] *See* 1 Stat. 99 (July 21, 1840) ("An Act for the relief of Chastelain and Ponvert, and for other purposes").
[101] *See* H. Rep. No. 8, 26th Cong., 1st Sess. ("Chastelain and Ponvert"), Feb. 29, 1840.
[102] H.Rep. No. 203, 22nd Cong., 1st Sess., January 4, 1832.
[103] H. Rep. No. 49, 23rd Cong., 1st Sess., Dec. 19, 1833.
[104] H. Rep. No. 38, 23rd Cong., 2d Sess., Jan. 9, 1835.
[105] H. Rep. No. 1, 25th Cong., 2d Sess., Dec. 14, 1837, reprinting report of Feb. 5, 1836.
[106] Cong. Globe, 25th Cong., 2d Sess., Dec. 22, 1837.
[107] H.R. Rep. No. 894, 25th Cong., 3rd Sess., Dec. 19, 1838 ("A Bill for the Relief of Chastelain and Ponvert").
[108] Cong. Globe, 25th Cong. 3rd Sess. 167, Feb. 7, 1839.

destroyed by unavoidable accident the consideration fails."[109] The government was bound to be compensated for the lost duties by the revenue it would derive from the importation of replacement goods. Indeed, by protecting the merchant from risk in this manner, the government would likely boost the nation's overall volume of trade. In the end, Hunter argued, it would be the consumer who would benefit: by shifting the risk from merchant to government, remission would reduce the cost of the merchants' private insurance, a savings that in turn would reduce the price that merchants charged their own purchasers. Risk, in Hunter's formulation, "constitute[d] a tax upon consumption;" the benefits of assigning it to the government rather than the merchant would inevitably trickle down to the consumer. The bill that Hunter's Committee put forward mimicked the 1838 New York fire bill in all but one respect: whereas the only insurance-based distinction the New York law had made was between those merchants who had received payouts on their duty-enhanced claims and those who hadn't, Hunter's bill would only remit those duties who had not been insured. The reason, Hunter explained, was to prevent fraud; without this stipulation, merchants might get paid twice, once by their insurer and once by the government. But the effect, as Hunter surely knew, would be to make government the sole insurer of goods' duty-enhanced value. Why would a merchant seek to insure the duties when he was guaranteed remission for free, and where having private insurance could only hurt his claim?

---

[109] S. Rep. Com. No. 321, 30th Cong., 2d Sess., February 23, 1849.

Hunter's bill did not become law in 1849. But in 1853, he proposed a similar piece of legislation as an amendment to the nation's recently-created warehousing system,[110] and on March 28, 1854, this bill did pass. The warehousing system, which had been created as part of reforms ushered in by the trade-friendly Walker Tariff of 1846, allowed merchants to store their imports duty-free for up to a year in a public warehouse before removing them for sale or re-export, as long as they first posted bond for double the amount of duties owed on the stored goods. Hunter's amendment extended to three years the length of time merchants could store their goods prior to withdrawal, effectively granting them a two-year interest-free extension of credit. More significantly, it authorized the Secretary of the Treasury to return duties on any goods stored in a public warehouse under bond, or in transit under bond from one port of entry to another, that had been wholly or partially destroyed by accidental fire or other casualty.[111] This measure was not, as subsequent commentators have assumed, premised on the idea that the government was responsible for the loss because the goods had been in government custody at the time of their destruction. The amendment's definition of "public storehouse" included private bonded warehouses over which the government exercised negligible control,[112] and the goods themselves were still stored at the risk of the owner,[113] not the government. Rather, the

[110] *See* Cong. Globe 32nd Cong., 2d Sess. 381, Jan. 24, 1853 ("Warehouse System"); "Bills Introduced," Cong. Globe, 33rd Cong. 1st Sess. 67, December 20, 1853.

[111] *See* "An Act to Extend the Warehousing System by establishing private bonded warehouses, and for other purposes," Cong. Globe, 33rd Cong., 1st Sess. 2227, March 28, 1854.

[112] *See* ibid.

[113] *See* Cong. Globe 33rd Cong., 1st Sess. 2227, March 28, 1854 ("An Act to Extend the Warehousing System by establishing private bonded warehouses, and for other purposes"). Scholars who have written about the 1854 Act's subsequent iterations have often assumed they are premised on the idea that the government is responsible for harms that took place while in its custody. *See, e.g.*, Ronald J. Cornell, Jr., "Property Damage Claims Against the Customs Service: Are There Adequate Remedies?," 22 *Vand. J. Transnat'l L.* 385, 425 (1989).

amendment was premised on the principle Hunter had articulated in his 1849 report, and that the New York memorialists had put forward before that: that they payment of duties purchased a risk-free right to sell goods in the domestic market, and that any importer subsequently unable to access that market was owed his duties back as a matter of right. It is a principle still with us today. When, in 1874, Congress authorized the compilation of the Revised Statutes of the United States, the Act of March 28, 1854 became Section 2984[114] of Title 34, "Collection of Duties," Ch. 7, which in turn became Section 563 of the Tariff of 1922, which in turn became codified, in language much the same as that employed in 1854, as 19 U.S.C. 1563: "Allowance for Loss, Abandonment of Warehouse Goods."[115]

[114] *See Revised Statutes of the United States*, 2d ed. (1878), 575.
[115] 19 U.S.C. 1563.