In the year 1858 Congress assembled in an unfinished Capitol in Washington, D.C. Cranes and scaffolding loomed over the unfinished cast iron dome, and the chambers of the House and Senate were not quite complete. In the meantime the members of Congress who lived in boardinghouses yearned to return home. The road to the Capitol building, like all the other roads in the nation’s capital, was pounded dirt. Dusty in summer, a river of mud in the spring, it was deeply rutted and humble, much like the federal government in 1858.

Congress roiled that year in sectional animosity; bitter debates pitted North versus South and Republican versus Democrat. A pall of violence hung in the air. Southerners sensed affronts to their honor and threats to their institutions, and northerners grew testy at the sight of so many slaves in the streets. Who could tell if the nation itself would survive the increasingly bitter debates surrounding “Bleeding Kansas” long enough to see the building project completed?

The great national forum, the focal point of representative government, the Capitol had seen giants walk its corridors and fill its halls with immortal oratory. Now, with the nation looking on as Congress debated the future of the nation and the shape of the federal government, the House and Senate chambers took
on even greater importance. Set in the center of their respective new wings, the chambers were spacious halls with the speaker’s or presiding officer’s rostrum at the front and an array of desks in a semicircle facing the front of the room. Because they were at the center of their respective wings, there were no windows. Illumination came from skylights in the ceiling and gas lighting. Many members complained about the air quality, especially in the Senate chamber, where the vents improperly let in the stench of basement mold, mildew, and rot. The acoustics in both rooms were poor, and the voices of speakers often could not carry above the din on the floor. The walls created various dead spots. Some modern commentators have traced the decline of congressional oratory to the effects of the new halls.

The additions had cost millions and had already consumed several years of intermittent progress. By the close of the construction project, the architect and the chief engineer would no longer be on speaking terms. Their sole communication took place through subordinates and the charge and countercharge relayed by their respective champions in the House and Senate. In a final irony Jefferson Davis, a man who would be the leader of the cause to dismantle the union, was the prime mover behind the project.

Surrounded if not comforted by the grandeur of their new home, senators worked at their desks on the floor of their chamber. They franked their speeches and wrote their correspondence, while others waxed eloquent a few yards away. More than one foreign visitor to the Capitol in the early 1860s gazed on these two bodies of men who embodied the ways and legislated for the republic, disbelieving that the institution functioned at all. The oratory itself, although done with great “fluency,” was often accompanied by bizarre hand gestures, pacing, and poor elocution. During a member’s speech other members would be clapping their hands to get the attention of the pages, who would then be “running about the floor, ministering to the members’ wishes,” carrying petitions, water, delivering letters, and “running with general messages.” At their seats congressmen had trouble hitting the spittoons with their expectoration, and tobacco smoke filled the air. As one observer wryly complained in 1876: “There is . . . an increasing hum of conversation as the session progresses, and a uniform circulation from one part of the Chamber to the other . . . . Members stand up and talk to each other in the aisles of the hall during the disposition of every kind of business. They send for books, they post letters, buy postage-stamps, and in a word do everything that could be done in a smoking-car except smoke cigars and play cards.”

1 To Enlarge the Machinery of Government
The procedures for the debates themselves confounded even the most expert legislator, and the exchanges on the floor alternated between benign indifference and brawling free-for-alls and everything in between. A visitor to the House in 1862 noted of one meeting, “The scene looks like a lecture room where the class is paying no attention to the lecturer.” For journalist George Alfred Townsend, covering Congress for the *Chicago Tribune*, “the great, noisy, reedy, jarring assembly which reminds you, at the first peep, of some temple once honoured by worship, where they are now selling doves.” The Senate was usually quieter, “a grave, sparsely attended assembly, where voices seldom rise to oratorical pitch,” a French visitor remarked in 1864. Given that much if not most of the business of Congress took place in committee, many members were said to have used the House chamber only to write letters and deliver the occasional speech. Some congressmen memorized their speeches and delivered them in a schoolboy manner. Others were famous for their lively style of delivery.

But in their fashion the activities that made the floors of the House and Senate so lively revealed the essence of American democracy. It was a republic of words, a nation that loved the spoken word, whose politics still featured the stump speakers and whose orators were honored like today’s movie stars. Congressmen such as Daniel Webster and Henry Clay might not wield the power of party managers or ever hold the high office they so much desired, but they were worshiped as demigods when they took the floor. (One might say, with much justice, that even the written culture was a reflection of oral traditions—storytellers such as James Fenimore Cooper, Nathaniel Hawthorne, Washington Irving, Herman Melville, and Edgar Allan Poe had simply become men of letters.) In any case one cannot help but be repulsed, amused, and awe-struck at the vast profusion of words uttered in the Congress.

Even more important, of all the “public spaces” in which words were spoken and heard in the nineteenth century—the arenas in which ideas were tested and refined—Congress was the foremost. The “great debates” in its halls from the Missouri Compromise to the end of the century, which were reported in the newspapers, became or reflected the debates that framed the national political agenda.

Of course, some of these “debates” never really occurred. They were manufactured after a fashion. Some speeches were ghostwritten. Others were not spoken but were added to the *Globe* or *Record*. Some were altered and some deleted from the records entirely by crafty opponents. As one correspondent bitterly complained in 1874, “the Congressional Record is a fraud, covering about sev-
enty pages per day. The real debates in Congress are not contained in it. Whenever there is anything interesting in the way of an exchange of observations, the remarks are ‘withheld for revision.’” Political spite, in large measure, motivated many of these complaints. Editors and correspondents were political actors and exercised “a power in their own right.” They did not seek objectivity, much less neutrality. They too were partisans. And, following them, one might conclude that all of the debates were about party and personal pique. The Congress of the newspapers is all about party and full of foible.

Yet one cannot read the *Congressional Globe* and the *Congressional Record*, the officially disseminated version of remarks made on the floor of the House of Representatives and the Senate, without experiencing more than a little awe. Even if they were never a word-for-word transcription of the exchanges on the floors of both houses, even if members often submitted their remarks without actually delivering them, and speeches uttered could be amended after the fact to delete substantial portions of the text as well as provide new sections, even if Congress and contemporaries lamented the corrupted nature of what is supposed to be an impartial record, one cannot dismiss the obvious effort, occasional eloquence, and intellectual content of the congressmen’s remarks.

While the conventional approach might derogate the speeches and repartee in *Congressional Globe* and *Congressional Record* as mere bombast and posturing, a sideshow outside the big top where the real action was, it is a mistake to dismiss the congressmen’s words or reduce the speeches to mere reflections of party and personality. Congressmen might have ulterior motives for what they said, but they were careful not to speak against their larger beliefs or to offend their constituents. What is more important still is the fact that the contributors to the *Globe* and the *Record* believed in their wider impact. The participants in these debates well knew that their words could influence other audiences than the ones in the galleries, including newspaper readers receiving a choice quote or constituents getting the reprint of their remarks through the franking privilege accorded to members of Congress. They took ideas from their mail and from newspapers. They conversed incessantly with one another in the boarding-houses where they lived, ate, and spent their leisure time. There was no congressional staff to speak of, no speech writers, no researchers. Only committee chairmen had a clerk until 1884, when senators received one clerk each. Unlike in the Congress of more recent decades, congressmen themselves created the words in the *Globe* and *Record*. 

To Enlarge the Machinery of Government
Most important, the words associated with congressmen and directed to particular matters of state afford critical insights into the minds of the creators of the U.S. state because they formed the precedent, the public discourse, on the problem and prospects of adding or subtracting from the national state’s administrative apparatus. If one were to analogize the Congress to a court (much as the Parliament in England is a court), then the published exchanges (not the spoken or back room or private correspondence) could be like judges’ published opinions. For the purposes of this analogy it would not matter what the politics or the personal backgrounds of the congressmen might be, just as it does not matter what the politics or the personal backgrounds of the judges might be. It is their published words, connected to particular issues just as the judges’ opinions are tied to particular cases, which create the precedent.

The analogy to a great court is not as far-fetched as it may seem (at least in light of the conventional fashion of reporting these debates). The United States Supreme Court and courts in general in the twentieth century have relied on these very legislative records to derive congressional intent, so this oftentimes less-than-accurate account generates substantial comment from justices, judges, law scholars, and historians concerned with the evidentiary value of these critical documents. Many of the members of Congress had reputations as excellent speakers. More important, almost all of those who took key roles in the dialogue over the shape of government, as we will see, had experience as legal pleaders. Although judges, justices, and legal commentators derided statutes in comparison to the common law, it is not surprising that congressmen cared enough to prepare their remarks and enter into exchanges with their colleagues in the *Globe* and *Record*.27

The fact that many of the congressmen in these pages were lawyers with varying degrees of courtroom experience, or that some had argued cases before the Supreme Court, also plays a vital part in understanding how the second state’s discourse within the government was framed.28 As the French visitor Alexis de Tocqueville wrote in the 1830s, “lawyers are called upon to play the leading part in the political society,” and “the government of the Union rests almost entirely on legal fictions” that lawyers understood and manipulated.29 De Tocqueville was more interested in the way that courts, judges, and juries functioned than in legislatures and statutes, but he understood that being a lawyer was more than just practicing law.30 These values included the celebration of the objectivity and elevating power of words by the “lawyer statesman.” Founding fathers such as
John Adams, Alexander Hamilton, Thomas Jefferson, and James Wilson were all able practicing lawyers whose professional work taught them how to use words in the framing of the new nation.\textsuperscript{31} As Felix Frankfurter saw, looking back, the lawyers were “the coordinator, the mediator.”\textsuperscript{32} The lawyers’ habits of speech and thought of the key debaters were crucial—for to a remarkable extent these were conversations among lawyers. Whether they had been successful or not, whether they went on to hold offices in the legal system, to teach in its schools, or simply used their legal contacts to vault into politics, the lawyer-congressmen came to understand that the only safe foundation for enlarging the state was in the close attention of lawyers to the framing and management of those additions. That lawyers’ principles, allegiances, and argument styles had a disproportionate influence should also come as no surprise. After all, U.S. litigiousness, intellectual proclivities, and legalistic conceptions are notorious.\textsuperscript{33} Behind the otherwise bewildering words of our political leaders, the foundation of our modern state is the result of this lawyers’ encoding process: both in terms of the restraints upon it and the outcome of the American paradox.\textsuperscript{34}

By training, experience, and preturnature, the lawyers of later generations privileged their words in debates on public policy. They had a powerful sense that the lawyer could see the principles of republicanism in clearer fashion than others—what two recent students of American legal culture have called the nineteenth-century lawyers’ “Ciceronian” faith in their own perspicuity.\textsuperscript{35} They also understood the limits of lawmaking because they were lawyers.\textsuperscript{36} Many had no doubt learned the principles of hermeneutics from the works of Francis Lieber, the widely read Columbia University law professor who had immigrated to the United States from Germany. This legal theory taught a method for reading texts in order to discover their intended meaning which was particularly suited to lawyers. That method required close attention to the manifest (expressed) intent of the speaker or writer. Hermeneutics spoke to private law as well as public policy—for example, the intent of the parties was vital in determining whether an exchange of promises was an enforceable contract.\textsuperscript{37} This and other claims to preeminence in fashioning laws might well have had a special impact in the high-turnover and especially heavy lawyer congresses of the nineteenth century as opposed to the more careerist, institutionalized, and lighter lawyer congresses of the twentieth century, the usual focus of the roll call studies that dispute the lawyers’ impact.\textsuperscript{38}

It is true that there were many kinds of lawyers sitting in Congress. Some had
extensive practices (which sometimes called them away from D.C. during the debates), while others had largely abandoned the practice of the law. Some grew rich from law; others never were successful at it. Yet the legal culture in which they learned the law and practiced it imposed on them certain ways of seeing and hearing, of using words. Equally important, that legal culture featured a kind of administrative apparatus—the courts and the lawyers together—which would become the model for the reluctant leviathan that the congressional lawyers ultimately constructed in the second state era.

The crucial common element in the experience of learning and practicing the law, whether or not the lawyer in Congress went on to a lucrative practice, was the administration of estates. Every lawyer of whatever rank became adept in this area—the management of property of the deceased for the surviving family members, the administration of a business that had failed, or keeping together a farm or plantation in the face of the demands of the creditors. Administration of estates required a light touch, for the property did not belong to the lawyer. He acted for others. He could and was expected to sponsor various projects for the good of the estate; he could and was expected to supervise the assets’ use to ensure that they were not wasted; he could and often did arrange with the court (which supervised him) to standardize various kinds of property in the estate, that is, to eliminate the danger of misuse of the assets. Play this same scenario on the screen of congressional action—as Congress faced new demands and opportunities; as the nation itself grew; as war, economic innovation, and industrialization posed new problems—and think of the “estate” as the commonwealth, and one sees in a flash how lawyerly habits of mind, training, and experience infused the second state even as early as 1858, when our story begins in the “great, noisy, reedy, jarring assembly” that was the Congress of the United States.