

# HARVARD JOURNAL *of* LAW & PUBLIC POLICY

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## LAW AND DEMOCRACY

THE FORTY-SECOND ANNUAL FEDERALIST SOCIETY  
NATIONAL STUDENT SYMPOSIUM ON LAW AND PUBLIC  
POLICY – 2023

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## PREFACE

The *Harvard Journal of Law & Public Policy* is proud to present Volume 47, Issue 1. When I came to campus as a 1L, I never thought I would end my time here as the Editor-in-Chief of JLPP. I joined JLPP because I love legal scholarship, especially scholarship promoting serious intellectual debate. But I stayed for the community—JLPP has become my second family on campus. It has been a privilege and pleasure to give back to a community that has made my law school experience more intellectually fulfilling and fun.

One of my goals as Editor-in-Chief was reinvigorating the JLPP community after being mostly remote for the past few years. The editing process for this Issue began with a fully in-person subcite—the first one we have had in a while. And it could not have been better. The 1L editors each sat next to a 2L or 3L editor, who was able to guide them through the editing process. It was heartwarming to see members of JLPP not only learn from one another, but also form friendships in the process. JLPP began with a small group of law school students who cared about conservative legal thought, sitting together editing important scholarship. It was amazing to see JLPP go back to its roots this past fall—but now with a room of more than 100 editors.

Another goal for this year was to bring together leading scholars to discuss pressing legal issues with the Harvard community. JLPP, the University of Richmond School of Law (Kurt Lash), and the University of Illinois College of Law (Jason Mazzone) co-hosted a History & Tradition Symposium at Harvard Law School in February of this year. Judge Kevin Newsom of the United States Courts of Appeals for the Eleventh Circuit gave the keynote address, and Professors Vikram Amar, Stephanie Barclay, Jud Campbell, Kurt Lash, Jennifer Mascott, Jason Mazzone, Bradley Rebeiro, Steven Sachs, and Reva Siegel engaged in panel discussions about the future of the History & Tradition jurisprudence in constitutional law. Papers from this symposium will be published in Issue 3 this summer.

*JLPP: Per Curiam* has continued to grow under the amazing leadership of Marcos Mullin. *Per Curiam* began the academic year by publishing “Remembering the Life and Legacy of Judge Silberman,” a series of short essays written by Judge Silberman’s law clerks—including Justice Amy Coney Barrett, Paul Clement, and Judge Eric D. Miller—reflecting on the Judge’s jurisprudence and mentorship. *Per Curiam* also co-hosted an administrative law symposium at Harvard Law School with the Pacific Legal Foundation, which featured many esteemed practitioners, judges, and scholars.

JLPP’s accomplishments are made possible by the amazing students who make up the JLPP masthead. I would like to thank a few individuals in particular for their hard work so far this year. It is hard to put into words how much I appreciate the time, energy, and care that Eric Bush, our Deputy Editor-in-Chief, dedicates to JLPP. I could not imagine leading JLPP with anyone else. I also want to recognize our Articles Team, led by Articles Chair Max Alvarez, and our Notes Team, led by Notes Chair Arianne Minks—they have spent countless hours helping select important, interesting, and insightful scholarship for Volume 47. Additionally, I am grateful for the work of Managing Editors Jessica Flores, Benjamin Sonnenberg, and Juliette Turner-Jones; Deputy Managing Editors Margaret Cross, Wyatt Hayden, Andrew Hayes, and Jack Lucas; and Chief Financial Officer Ryan Brown. Marcos Mullin also deserves a round of applause for the amazing job he has done leading *Per Curiam* this year. Finally, I am deeply grateful for the encouragement and mentorship of Volume 45’s Editor-in-Chief Eli Nachmany and Volume 46’s Editor-in-Chief Mario Fiandiero—both Eli and Mario were exceptionally helpful as I took on the role of Editor-in-Chief.

\* \* \*

Before we get into the content of Volume 47, Issue 1, it is important to first say a few words about beloved Harvard Law School Professor, longtime faculty advisor to the Harvard Federalist Society, and JLPP Board of Advisors member, Charles

Fried, who passed away earlier this year. Professor Fried had a legendary legal career—he graduated at the top of his class from Columbia Law School, clerked for Justice John Marshall Harlan II on the United States Supreme Court, served as Solicitor General of the United States during the Reagan administration, and taught at Harvard Law School for more than six decades. He was, without a doubt, a brilliant legal mind and a skilled teacher. More importantly, Professor Fried was a wonderful person who touched the lives of thousands of Harvard Law School students and faculty members. His colleagues and students have described him as warm, charming, generous, caring, ebullient, witty, and invariably kind. His contributions to Harvard, the Federalist Society, and JLPP are greatly appreciated, and he will be sorely missed.

\* \* \*

Continuing a long-held tradition, Issue 1 features essays from the 42<sup>nd</sup> Annual Federalist Society National Student Symposium, which took place at the University of Texas Law School in Austin, Texas during the spring of 2023. The focus of this National Student Symposium was law and democracy. The Issue begins with Governor Greg Abbott’s keynote address to the symposium attendees in Austin, Texas. It then features symposium pieces from Professors Jud Campbell, Sanford Levinson, Daniel Lowenstein, and Ilya Somin. Each year, we assemble a team of student editors from law schools across the country to prepare the symposium pieces for publication. This year, we had a wonderful team of editors led by one of our Managing Editors, Ben Sonnenberg. Thank you to Ben and his team of editors for the hard work they did for Issue 1.

The symposium pieces are just the beginning. Following the symposium portion of Issue 1, we have a speech by Judge Patrick J. Bumatay of the Ninth Circuit on the value of dissents. In his speech, Judge Bumatay evaluates the history of dissenting opinions before concluding that “respectful dissent opens important dialogue, inspires others, and strengthens our constitutional system.”

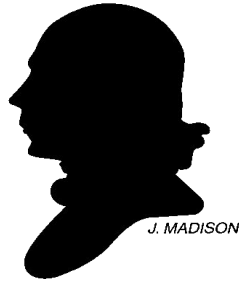
After Judge Bumatay's remarks, Issue 1 features two articles. First, Josh Halpern and Lavi M. Ben Dor examine the constitutional status of boycotts from before the founding to the present and find that state actors have consistently treated boycotts as economic conduct subject to government control. From there, they conclude that modern anti-boycott laws not only fit within, but also improve upon, constitutional traditions. Then, Owen Smitherman (former JLPP Senior Articles Editor) explains why historical understanding of the public nuisance tort and special damage is unconnected to the original meaning of Article III while also critiquing "the current Supreme Court's lack of concern for originalism in standing doctrine."

Issue 1 concludes with two fantastic pieces of writing from our own editors. Ted Steinmeyer discusses why challenges to school-voucher programs under the education articles of state constitutions misinterpret those articles, and might be recast as reasons to expand, rather than curtail, voucher programs. And a note by Marisa Sylvester describes how enforcement of statutory deadlines under Section 706(1) of the APA can keep agencies within the bounds of the law.

Thank you for reading and enjoy!

Hayley Isenberg  
*Editor-in-Chief*

# THE FEDERALIST SOCIETY



*presents*

*The Forty-Second Annual National Student Symposium  
on Law and Public Policy*

## ***Law and Democracy***

March 3–4, 2023

University of Texas School of Law

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## Remarks to the 2023 Federalist Society National Student Symposium

GOVERNOR GREG ABBOTT\*

Thank you all very much. Let me start out tonight with a couple of quick questions. One, I see some people in cowboy hats, and I wonder: for those in cowboy hats, how many of you are wearing it for the first time? Just a couple. From Boston, right? Good to have you here.

Second question: Please raise your hand if you are currently in law school. Fantastic. That's what I was looking for because I'm on a recruiting mission tonight. I want to talk about what's going on in our world—more importantly, what's going on in our country—and reflect on it through the lens of my legal career.

As we speak, the country is in a battle for the soul of the future of America. On one side are the social justice warriors and anti-constitutionalists. On the other side are those who believe in the rule of law. I happen to believe in the rule of law. That's why I went to law school.

The founders of our country, the authors of the United States Constitution, instilled the rule of law into our Constitution because they wanted to create a country that was based upon the rule of law, not the rule of man. And that fledgling country has gone on to be the most successful country in the history of the entire world. And I submit to you that a principal reason for that success—the principle that causes America to stand apart from all other countries—is our Constitution and our adamant insistence on the rule of

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\* Greg Abbott is the Governor of Texas.



law. If we allow our elected officials to undermine the rule of law, I believe it will destroy our country.

There are two categories of people involved in this battle: those in the field and those on the sidelines. You're either in the game, or you're on the sidelines. I believe those who believe in the rule of law are outnumbered. The other team has more people in the field, but we must change that. We need more people who believe in the rule of law, more people who believe in the Constitution, in the field engaged in that battle.

Despite our position on the side of righteousness, if we come up short in numbers, who knows what may happen. And I want to quickly guide you through my career and show you that during the course of your careers, even now when you're in law school, you have plenty of on-ramps to get into the battle. And we need you if we're going to win this fight for the soul of America.

For me, the fight began when I was in law school. When I was in law school sitting in constitutional law, I was both amazed and concerned when I saw opinion after opinion that seemed to rewrite the Constitution, skirt around the words of the Constitution, and make up new law. I knew that if we continued down that path, we would soon be governed by the rule of men.

The idea of five justices possessing the power to determine the fate of our laws motivated me to enter this fight for the rule of law. I knew when I left law school that I wanted to be engaged in this fight for the rule of law. The problem is that things changed for me after I left law school. I moved to Houston with my wife where I had taken a job with a large law firm. I was studying for the bar exam, ten days away from taking it. And I wanted to take a break, so I went out for a jog.

While I was out jogging, a huge oak tree, taller than the ceiling in this room, crashed down onto my back, fractured my vertebrae and my spinal cord, and left me immediately paralyzed for the rest of my life—altering the course of my life. Some of you are thinking, "Man, I don't want to have to use that as an excuse for missing the bar exam." It set me back a year in my career because I had to go through hospitalization and rehabilitation. But I eventually was

able to go to work, long before the Americans with Disabilities Act of 1990<sup>1</sup> was even in place, and I moved forward, navigating different challenges.

In fact, when I went to take the bar exam a year after my accident, my wife dropped me off at the convention center in downtown Houston, Texas, and for me to get into the convention center, I had to hop a curb. And when I hopped the curb, I had to do just a little wheelie, then my wife would lift up the rest of the chair.

On this particular day, the bar exam was beginning in fifteen minutes, and when I lifted up my wheelchair, the front wheel came off. We had no idea how to get back it on. And yet, somehow, somehow, we got that wheel back on, got me in there, and I was able to take the exam.

Here's a tip for those preparing for the bar exam—it appears that most in the room have raised their hands: you'll be taking the bar one of these days, and the reality is you won't know the answers to all the questions. This is not the SAT. If you get every question right, you probably overstudied. Have some fun with it, even if you don't get everything right.

When I took the bar exam, I got a question: "What is a *writ of certiorari*?" I had no idea. Instead of skipping it, I decided to amuse the grader by writing that it was a type of fish. I might have gotten credit for it. Who knows?

I successfully passed the bar exam and began practicing law. I may have been the only litigator in Houston in a wheelchair. And in my early days, one of the primary tasks for a litigator was showing up to argue motions. Every Monday was motion day. You go to the courthouse, and there would be various motions to address, such as motions for summary judgment. Court started at 9:00 a.m., and I got there about five minutes before 9:00.

When I came in, every possible seat was taken. So I improvised and went next to the jury box, which extended from one side to the

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1. 42 U.S.C. §§ 12101–13.

other. I sat right here at the end, just in time before the bailiff announced, “All rise.” Everyone stood up as the judge entered and took his seat.

For those who may practice or have ever practiced in Houston, the judge was Wyatt Heard.<sup>2</sup> Judge Heard ascended the bench, scanned the room, and saw me seated next to the jury box. He looked at me and said, “Sir, when the bailiff says, ‘All rise,’ that means stand up.” I wheeled out a little bit and said, “Your Honor, I would if I could, but I can’t.” He turned beet red, and I won the motion that day. Word spread so fast at the law firm, and anyone with a motion in Wyatt Heard’s court said, “Let Abbott have it. He’s gonna win it.”

But it got even more amazing because eventually you go from motions to trials. I had a trial against a guy who claimed he could not go to work because he was hurt. Because he was supposedly injured, he testified in front of the witness stand with a cane.

For those who want to be litigators, this is a handy tool: there are some advantages to being in a wheelchair, one of which is being close to the jury. To cross-examine the person who was bringing the lawsuit, I pulled up next to the jury box as though I was sitting there with them. I wasn’t just presenting an argument to them—I was one of them. So, my suggestion to you is, if you ever become a litigator, pull up a chair next to the jury box when cross-examining someone or making your closing argument. As opposed to standing over them and telling them what to do, join with them.

During my cross-examination of the guy with the cane, the irony of his claim that he couldn’t work was not lost on the jury. No kidding, the guy got out of the witness box and started beating my wheelchair with his cane. Case dismissed—it was over.

I continued to represent an array of clients, from individuals to some of the largest businesses in the United States. But along the way, I encountered a frustrating reality. I invested significant time and money in meticulously crafting motions, ensuring every detail

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2. Wyatt Heard, UVALDE LEADER-NEWS (July 23, 2017), <https://www.uvaldeleadernews.com/articles/wyatt-h-heard/> [https://perma.cc/LPF8-9TWY].

and citation was impeccable, only to enter the courtroom and have a judge say, “Listen. I haven’t read all this stuff. I know Donny Joe over there, and Donny Joe’s a good guy. And I know what he’s thinking is right, so I’m just going to go with him.” I have no idea how much money I racked up on behalf of my client only to have a judge make impulsive decisions rather than consider the detailed motions.

At that moment, I made a decision. I was going to use that frustration as an on-ramp to return to the mission I had in law school, which was to ensure that the rule of law prevailed in our society. In Texas, we elect our judges. So, I decided, at that moment, “By God, not only am I going to run for judge, I’m going to run for judge in that court against that judge.” Well, that judge saw the writing on the wall and decided not to run. And not only did I run, but I won the election, and served there for three years.<sup>3</sup>

At the time, George W. Bush was governor of Texas.<sup>4</sup> He appointed me to be a justice on the Texas Supreme Court where I was elected and reelected before eventually being elected as attorney general.<sup>5</sup> As attorney general, I needed to assemble a team of outstanding lawyers to make sure that Texas would be the standard-bearer for the United States in upholding the rule of law. I brought in people I had never met before who possessed extraordinary talent and capability. For my solicitor general, I brought in Ted Cruz,<sup>6</sup> who I’d never met before, but he turned out to be pretty good.

And as a special counsel, I brought in a guy named Donny Ray. Donny Ray Willett, Judge Willett, who I saw earlier in some smashing pants. Don, Ted and others guided me in the early days of my tenure as attorney general. And we tried to do our best to ensure that the rule of law was applied.

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3. *About Texas Attorney General Greg Abbott*, ATT’Y GEN. TEX. GREG ABBOTT (Sept. 3, 2013), [https://web.archive.org/web/20131017181451/https://www.oag.state.tx.us/agency/agga\\_bio.shtml](https://web.archive.org/web/20131017181451/https://www.oag.state.tx.us/agency/agga_bio.shtml) [https://perma.cc/NW3X-MTU2].

4. *Id.*

5. *Id.*

6. *Solicitor General Ted Cruz*, UNIV. ST. THOMAS (May 11, 2005), [https://www.stthom.edu/Public/getFile.asp?File\\_Content\\_ID=3434&isDownlo..](https://www.stthom.edu/Public/getFile.asp?File_Content_ID=3434&isDownlo..) [https://perma.cc/52ZJ-RXN6].

Until one day, an atheist walked across the Texas Capitol grounds. And then he got offended when he saw the Ten Commandments.<sup>7</sup> It sounds like the beginning of a joke. But it actually was the beginning of a lawsuit against the State of Texas to have that Ten Commandments monument torn down. I told my team, “Not on our watch will we allow the Ten Commandments to be torn down on the Texas Capitol grounds.” The case<sup>8</sup> went all the way to the United States Supreme Court, and gave me the opportunity that I’d been looking for.

If you want to be a litigator, the ultimate place to litigate is the United States Supreme Court. And I got my chance in this consequential First Amendment case. We then get to the Court and prepare for argument only to realize I’m not going to fit at the podium.

On this particular day, Chief Justice Rehnquist was absent for oral argument because he was ill. So the presiding judge was Justice Stevens, and he told me to argue from the table, which I did. At the conclusion of my argument, Justice Stevens said I had demonstrated that “it’s not necessary to stand at the lectern in order to do a fine job.”<sup>9</sup> But he ruled against us. This just goes to show, just because you get a compliment from a judge does not mean they’re going to rule in your favor.

I based my argument on Justice O’Connor’s jurisprudence—the then leading author of the First Amendment and freedom of religion cases. So it didn’t matter who asked me a question, I was going to respond with an answer that I thought appealed to Justice O’Connor. For example, Justice Scalia asked me a very predictable question attempting to pin me down to say that the reason the Ten Commandments were on the Texas Capitol grounds was to convey a religious message. I said it was not. He disagreed with me strongly.<sup>10</sup> And I thought, “The last person that’s going to vote

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7. See *Van Orden v. Perry*, 545 U.S. 677, 682 (2005).

8. *Id.*

9. Transcript of Oral Argument at 45, *Van Orden v. Perry*, 545 U.S. 677 (2005) (No. 03-1500).

10. *Id.* at 29.

against the Ten Commandments is Scalia, so don't worry about that."

So I geared everything towards Justice O'Connor. When the opinion came out at the end of June, we won 5-4. We lost Justice O'Connor's vote, but for some reason, gained Justice Breyer's.<sup>11</sup> As a result, those Ten Commandments still stand on the Texas Capitol grounds today.<sup>12</sup>

After this case, America and the presidency changed. The galvanization and organization of the social justice warriors led to the anti-constitutionalists. The installation of Barack Obama as president evidenced this change because just as we were enforcing the rule of law, someone was circumventing it. And that person was none other than the President. So much so, that it led to a recharacterization of my office. I told people that as attorney general, I wake up, I go into the office, I sue Barack Obama, and I go home. In fact, I set a record for the most lawsuits filed against Barack Obama.<sup>13</sup>

One of these suits involved Obamacare.<sup>14</sup> It doesn't matter where you stand on healthcare. Obamacare had one flaw, but it was the one thing needed in order for it to be effective—the individual mandate. The individual mandate was something that was never before seen in our country's history. Congress relied on the Commerce Clause to argue that healthcare was commerce, and therefore it could impose this mandate.<sup>15</sup> Even though Congress and courts had continuously expanded the Commerce Clause's scope and meaning, the Court had never construed the clause so broadly as to apply it to someone who refused to engage in commerce. The rule is that

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11. *Perry*, 545 U.S. at 678.

12. *Ten Commandments Monument*, TEX. STATE PRESERVATION BD., <https://tspb.texas.gov/prop/tcg/tcg-monuments/08-ten-commandments/index.html> [https://perma.cc/M2D5-3CSF].

13. Dan Frosch & Jacob Gershman, *Abbott's Strategy in Texas: 44 Lawsuits, One Opponent: Obama Administration*, WALL ST. J. (June 24, 2016), <https://www.wsj.com/articles/abbotts-strategy-in-texas-44-lawsuits-one-opponent-obama-administration-1466778976> [https://perma.cc/3KWR-48QV].

14. See *Nat'l Fed. of Indep. Bus. v. Sebelius (NFIB)*, 567 U.S. 519 (2012).

15. *Cf. id.* at 536 (discussing the Commerce Clause in the context of Obamacare).

if you engage in commerce, then Congress can regulate it.<sup>16</sup> But if you abstain from commerce, Congress has no authority to regulate you or your behavior.<sup>17</sup>

But Congress did just that with the individual mandate. It forced you to participate in Obamacare. To us this was clearly unconstitutional. All the know-it-alls said we were fools for even thinking that. But Texas and twelve other states—we called ourselves the thirteen original colonies of Obamacare—which became twenty-six, a majority of the States, sought to overturn Obamacare.<sup>18</sup> And it went to the Supreme Court.<sup>19</sup>

We were at the Court not just for the argument but also when the decision was handed out. The oral argument wasn't an hour, which is typical, nor was it one day. It lasted for three days.<sup>20</sup> The opinion of the Court was read by Chief Justice Roberts. It first discussed that Obamacare was not a tax for purposes of the anti-tax injunction act.<sup>21</sup>

Chief Justice Roberts then got to the heart of it—the Commerce Clause.<sup>22</sup> He explained exactly what our position was, that Article I, Section 8 does not authorize Congress to force somebody into the stream of commerce.<sup>23</sup> And thus, Congress could not enact Obamacare based on the Commerce Clause.<sup>24</sup> The Court then went to the Necessary and Proper Clause argument.<sup>25</sup> The Chief Justice read that whether or not Obamacare was necessary, it was not

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16. *Cf. id.* (discussing Congress's Commerce Clause power).

17. *See id.* at 551 (“Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority.”).

18. *Id.* at 520 (noting that twenty-six states had sued).

19. *See generally id.*

20. *See Supreme Court Health Care Law Oral Argument, Day 3, Severability*, C-SPAN (March 28, 2012), <https://www.c-span.org/video/?305134-1/supreme-court-health-care-law-oral-argument-day-3-severability> [<https://perma.cc/4XR5-CFG6>].

21. *NFIB*, 567 U.S. at 546.

22. *See id.* at 546–58.

23. *See id.* at 551.

24. *See id.*

25. *Id.* at 558–61.

proper.<sup>26</sup> And then, the Court got to the argument we thought was the easiest of them all—whether or not Obamacare was a “tax.”

The law clearly said that if you don’t have health care, you’ll be subject to a “penalty.”<sup>27</sup> “Penalty” is the word that was used. But more importantly, Congress meant to use the word “penalty,” not “tax,” because Congress knew they did not have the votes to get it passed if it was a tax. And President Obama was clear. The way he sold it to America was, “This is not a tax.”<sup>28</sup>

The point is this: The executive branch said that it was not a tax. The legislative branch said it was not a tax. Only one person said that it was a tax, and that was Chief Justice Roberts.<sup>28</sup> And that was all it took to join with four other justices to uphold Obamacare.<sup>29</sup> But in doing so, we were successful in doing what I wanted to achieve, going back to my law school days, and that was to rein in the abuses that I saw taking place by the never-ending expansion of the Commerce Clause.

So we go from there to me running for and getting elected to be Governor of Texas, which happened in November 2014.<sup>30</sup> And just a few weeks after the election, there was a nationally televised presentation by President Obama on November 20, 2014. During that presentation, he told America something that he’d been dealing with during his entire presidency. His entire presidency—his own party was nudging the president, pushing him, condemning him for doing nothing with regard to loosening the immigration laws of the United States.

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26. *Id.* at 560.

27. *Id.* at 564.

28. ABC News, *President Obama in 2009: Mandate is Not a Tax*, YOUTUBE (Sept. 20, 2009), [https://www.youtube.com/watch?v=\\_0ZUBMqMnWs](https://www.youtube.com/watch?v=_0ZUBMqMnWs) [<https://perma.cc/2DYD-2VET>].

28. See *NFIB*, 567 U.S. at 566 (“[W]hat is called a ‘penalty’ here may be viewed as a tax.”).

29. *Id.* at 529.

30. *Texas Election Results*, N.Y. TIMES, Dec. 17, 2014, <https://www.nytimes.com/elections/2014/texas-elections> [<https://perma.cc/5272-4PHE>].



And he said he couldn't do anything about it. It was up to Congress.<sup>31</sup> He said many times<sup>32</sup> that he didn't have the ability to do anything about it until, on November 20, 2014, he announced he was taking executive action to grant amnesty to five million people who were in the country illegally.<sup>33</sup> The president does not have the authority to make law. President Obama knew he made law by granting that amnesty.<sup>34</sup>

I knew that was wrong. I knew it was an abuse of executive authority. I knew it had to be stopped, but I was on my way out of office. I needed to do something about it urgently. Thirteen days later, I filed a lawsuit to put a stop to it.<sup>35</sup> I was able to do it that quickly and that effectively because of the lead counsel who was in charge of it. One of the most brilliant people I've ever met: Andy Oldham,<sup>36</sup> now Judge Oldham on the Fifth Circuit.<sup>37</sup>

Also, along the way, I omitted a name, not purposely. I forgot to bring it up. When we filed that lawsuit, that Obamacare lawsuit, my solicitor general at that time was Jim Ho, now Judge Ho on the

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31. Joel Rose, *President Obama Also Faced A 'Crisis' At The Southern Border*, NPR (Jan. 9, 2019, 2:29 PM), <https://www.npr.org/2019/01/09/683623555/president-obama-also-faced-a-crisis-at-the-southern-border> [<https://perma.cc/8ZM2-XK4M>].

32. Jan C. Ting, *Obama's Own Words Refute His Stand on Immigration Authority*, N.Y. TIMES: ROOM FOR DEBATE (July 8, 2015, 5:09 PM), <https://www.nytimes.com/room-fordebate/2014/11/18/constitutional-limits-of-presidential-action-on-immigration-12/obamas-own-words-refute-his-stand-on-immigration-authority> [<https://perma.cc/DFX4-WYW3>].

33. Tanya Somanader, *"We Were Strangers Once, Too": The President Announces New Steps on Immigration*, THE WHITE HOUSE: PRESIDENT BARACK OBAMA (Nov. 20, 2014, 9:25 PM), <https://obamawhitehouse.archives.gov/blog/2014/11/20/we-were-strangers-once-too-president-announces-new-steps-immigratio> [<https://perma.cc/449D-CNVQ>].

34. See Ting, *supra* note 33.

35. David Montgomery and Julia Preston, *17 States Suing on Immigration*, N.Y. TIMES, Dec. 3, 2014, <https://www.nytimes.com/2014/12/04/us/executive-action-on-immigration-prompts-texas-to-sue.html> [<https://perma.cc/QEL7-HFSL>].

36. Emma Platoff, *A Texas Lawsuit Killed One Obama Immigration Policy. Can the Same Strategy Defeat DACA?*, THE TEX. TRIBUNE (May 7, 2018, 12:00 PM), <https://www.texastribune.org/2018/05/07/texas-lawsuit-daca-dapa-ken-paxton/> [<https://perma.cc/QYE2-P2TK>].

37. *5th Circuit Judges*, U.S. CT. APPEALS FOR THE FIFTH CIRCUIT, <https://www.ca5.uscourts.gov/about-the-court/fifth-circuit-judges> [<https://perma.cc/J8U9-JXWU>] (last visited Feb. 10, 2024).

Fifth Circuit as well.<sup>38</sup> So I see him over there, standing next to my current General Counsel, James Sullivan. It looks like a murderer's row over there. That's what you call legal talent right there.

And so, what I'm doing tonight, I'm trying to help you understand that we need legal talent like that to get in the game: people who can make a difference. That's exactly what they did, and I didn't finish the story about the court. In the case that Andy filed, we won in the trial court.<sup>39</sup> It went all the way to the Supreme Court.<sup>40</sup> Andy was then in my general counsel's office as governor at the time, but the Supreme Court ruled in favor of the lawsuit that we filed, upholding our position that the President had exceeded his executive powers.<sup>41</sup>

So once again, all of this relates to ways in which we must take action to ensure that all actors are going to conduct their affairs constitutionally. It's the rule of law. The only way that we will survive as a country is to ensure that the rule of law is protected. The only way we'll achieve that goal is to have people like those in the room tonight. As you move forward in your careers, in your pathways, you will keep in mind the necessity to have you not on the sidelines, but in the game. If you do that, I can assure you the United States will remain the mightiest, strongest, and best country in the history of the world. Thank you all. God bless you all. And God bless the great state of Texas.

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38. *Id.*

39. *Texas v. United States*, 86 F.Supp.3d 591, 677–78 (S.D. Tex. 2015)

40. *United States v. Texas*, 579 U.S. 547 (2016).

41. *Id.* at 548.



## FOUR VIEWS OF THE NATURE OF THE UNION

JUD CAMPBELL\*

*This Essay summarizes four Founding-Era views about the nature of the Union and the key interpretive implications that followed from those views. In doing so, it emphasizes the importance of social-contract theory and engages a recent scholarly debate over the influence of the law of nations on Founding-Era constitutional interpretation. Without taking a position about which view of the Union was correct, the Essay aims to illuminate the range of interpretive possibilities, including ones informed more by social-contractarian premises than by the law of nations.*

One of the most enjoyable yet challenging aspects of studying American constitutional history is that the earlier generations often did not share our vision of constitutional law. For us, the written Constitution grounds constitutional argument. We treat the text as the source of our fundamental law,<sup>1</sup> and then as Justice Scalia would say, the rest is “a matter of interpretation.”<sup>2</sup>

In taking this approach, we have mostly rejected other ways of grounding constitutional law—including through invocations of social-contract theory, natural rights, and natural law. These are things that might come up in a philosophy class, but they have little

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1. Even “substantive due process” rights—frequently described as “unenumerated” rights—are grounded in the Due Process Clauses. *See, e.g.,* *Lawrence v. Texas*, 539 U.S. 558, 564–65 (2003).

2. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997).

relevance to legal doctrine. Not coincidentally, we also have mostly moved beyond the fights over sovereignty and the “nature of the Union” that dominated the first century of American constitutional debate.<sup>3</sup>

But Americans from the Founding through Reconstruction did not share this perspective. For them, the text mattered a great deal. But there were deeper foundations—and more fundamental sources of authority—than the written document. Americans thus often debated how the text of the Constitution fit within a broader matrix of fundamental law. This was especially true of federalism disputes, which frequently turned on social-contractarian assumptions about the locus of sovereignty within the federal system. So in order to think historically, we need to imagine the nature of constitutional law—and the grounding of constitutional law—in these older ways.

This Essay describes four Founding-Era views about the nature of the Union—views exemplified by the writings of Thomas Jefferson, James Madison, John Marshall, and James Wilson—and it explores how these theoretical disagreements about the grounding of federal authority impacted constitutional debates. Rather than saying which view was correct, my hope is to help clarify the terrain of historical argument. In doing so, this Essay also intervenes in an ongoing scholarly debate over the relevance of the law of nations to constitutional interpretation at the Founding,<sup>4</sup> illustrating how assumptions about the nature of the Union remain salient today—

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3. See ELIZABETH KELLEY BAUER, COMMENTARIES ON THE CONSTITUTION, 1790–1860 (1952) (documenting the importance of sovereignty and the nature of the Union in early treatises).

4. Particularly, this Essay emphasizes how social-contract theory provided a competing paradigm for evaluating transfers of sovereign authority. For the most part, however, social-contract theory is missing from the literature addressing the influence of the law of nations on federalism debates. See, e.g., Martin S. Flaherty, *Peerless History, Meaningless Origins*, 1 J. AM. CONST. HIST. 670 (2023); David S. Schwartz, *The International Law Origins of Compact Theory: A Critique of Bellia & Clark on Federalism*, 1 J. AM. CONST. HIST. 629 (2023); Ryan C. Williams, *Federalism, The Law of Nations, and the Excluded Middle*, 1 J. AM. CONST. HIST. 721 (2023). But see Jonathan Gienapp, *In Search of Nationhood at the Founding*, 89 FORDHAM L. REV. 1783 (2021) (drawing heavily on social-contract theory to illuminate federalism debates).

even if mostly below the surface of our constitutional consciousness.<sup>5</sup>

## I. SOCIAL-CONTRACT THEORY

The starting point of Founding-Era constitutionalism was social-contract theory, which framed how the Founders thought about the purposes and limits of governmental authority.<sup>6</sup> The gist of social-contract theory was that God created humans as political equals and endowed them with natural rights—capacities that they would enjoy in a hypothesized state of nature, subject to the dictates of natural law.<sup>7</sup> Principally, this meant that political authority had to be rooted in consent, and particularly in an imagined social contract (or “social compact”<sup>8</sup>) through which individuals unanimously agreed to create a self-governing polity.<sup>9</sup> This way of thinking undergirded the principle of “popular sovereignty,” which posited that ultimate political authority resided in a sovereign body politic composed of all citizens.<sup>10</sup>

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5. Although mostly concealed, contests over the nature of the Union occasionally surface. *See, e.g.*, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 846 (1995) (Thomas, J., dissenting); Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817, 1819–21 (2010).

6. *See* Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 CONST. COMMENT. 85, 87–90 (2017); Gienapp, *supra* note 4, at 1788–92.

7. *See* Campbell, *supra* note 6, at 87–88.

8. *See* Jud Campbell, *Compelled Subsidies and Original Meaning*, 17 FIRST AMEND. L. REV. 249, 263 n.68 (2018) (“The term ‘social compact’ is more historical, but it is avoided in this Essay to prevent confusion with the separate notion of ‘compact’ frequently invoked in historical debates over the nature of the federal union.”).

9. *See* Campbell, *supra* note 6, at 87–88; *see, e.g.*, 1 EMER DE VATTEL, *THE LAW OF NATIONS; OR PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* 12 (J. Newbery et al. eds., 1760) (arguing that political obligation “is not derived to nations immediately from Nature, but from the agreement by which civil society is formed: it is therefore not absolute, but conditional, that is, it supposes an human act, a pa[c]t or agreement of society”).

10. *See* Campbell, *supra* note 6, at 89–90; *see, e.g.*, *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 454–58 (1793) (discussing different conceptions of sovereignty and defending the sovereignty of the people).

After sovereignty was vested in a polity, the people would then, through majority consent, create a system of government in a “constitution.”<sup>11</sup> Thus, a constitution was a secondary agreement, or collection of agreements, predicated on an even more fundamental political compact—the social contract.<sup>12</sup>

Although social-contract theory was widely accepted at the Founding, it was uncertain how these ideas would operate in a federal system.<sup>13</sup> Thus, while “it was clear that *the people* wielded sovereign authority,” Jonathan Gienapp observes, “it was much less clear *which* people delegated the relevant authority: the people of the United States or the people of the separate states.”<sup>14</sup> This dispute over “the nature of the Union” was foundational.

## II. FOUNDING-ERA VIEWS OF THE NATURE OF THE UNION

Very little sophistication was needed to theorize about the nature of the Union or to appreciate its importance. For anyone with a basic understanding of social-contract theory, three possibilities

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11. See Campbell, *supra* note 6, at 89.

12. See, e.g., 2 THOMAS RUTHERFORTH, *INSTITUTES OF NATURAL LAW* 159 (J. Bentham ed., 1756) (“The right . . . which this second compact [*i.e.*, the constitution] conveys to the magistrate, though it may be less, cannot possibly be greater, than what the first compact [*i.e.*, the social contract] had given to the collective body of the society: so that unless we can shew, that the first compact gives the collective body such a right or such a power . . . the second compact can convey no such right or power to the civil magistrate.”). Moreover, eliminating a constitution did not dissolve the social contract. See JAMES MADISON, *Comments on Petitions of Kentuckians* (1782), in 5 *THE PAPERS OF JAMES MADISON: CONGRESSIONAL SERIES* 82, 83 (William T. Hutchinson & William M. E. Rachal eds., 1967) (“The dissolution of the Charter did not break the social Compact among the people.”).

13. Debates about the status of Great Britain in relation to England, Wales, and Scotland presaged some of the American debates. See ALISON LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* 11–29 (2010). But the existence of a unitary British Parliament and King—without separate Parliaments or heads of state in England, Wales, and Scotland—made the American situation unique.

14. Gienapp, *supra* note 4, at 1793; see CHRISTIAN G. FRITZ, *AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA’S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR* 194 (2008) (making the same point); ST. GEORGE TUCKER, *View of the Constitution of the United States* (1803), in *VIEW OF THE CONSTITUTION OF THE UNITED STATES: WITH SELECTED WRITINGS* 91, 101 (Liberty Fund ed., 1999) (1803) (inquiring “[w]hether this original compact be considered as merely federal, or social, and national”).

were readily apparent: the Constitution was (1) essentially a treaty among sovereign states, (2) a true “constitution” grounded in a sovereign national polity, or (3) something in between.<sup>15</sup> And the nationalist position had two variants: one that traced nationhood to constitutional ratification and the other that traced it to American Independence.

Four approaches to the nature of the Union thus emerged: first, compact theory; second, quasi-nationalism; third, 1787 nationalism; and fourth, 1776 nationalism. This Essay illuminates these four perspectives by focusing on the writings of four leading Founders: Thomas Jefferson, James Madison, John Marshall, and James Wilson.<sup>16</sup> For expository reasons, it makes sense to proceed from the least nationalistic to the most nationalistic.

#### A. *Jefferson’s Compact Theory*

Jefferson denied national sovereignty. In his eyes, no national body politic existed, and the peoples of the several states remained

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15. Because the historical debate was framed in these terms, analogies to *other* types of instruments are, in my view, generally unhelpful. Cf. John Mikhail, *Is the Constitution a Power of Attorney or a Corporate Charter?*, 17 GEO. J.L. & PUB. POL’Y 407 (2019) (analogizing to corporate charters); Farah Peterson, *Expounding the Constitution*, 130 YALE L.J. 2 (2020) (analogizing to public and private legislative acts). By and large, the Founders had no need to reason by analogy to other types of legal instruments. Rather, social-contract theory and the law of nations already supplied the relevant intellectual frameworks for debating the nature of the Union and its implications. See, e.g., 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 314–15 (Max Farrand ed., 1911) (remarks of James Madison) (commenting on the importance of determining whether the Articles of Confederation were “analagous [sic] to the fundamental compact by which individuals compose one Society” or “to the conventions among individual States”).

16. In my view, each of these writers was mostly consistent in his statements about the nature of the Union, but this Essay does not aim to prove that point. Rather, in order to sharpen our understanding of the range of views held at the Founding, it generally assumes the consistency of each writer across time. Cf. J.G.A. Pocock, *Introduction: The State of the Art*, in VIRTUE, COMMERCE, AND HISTORY: ESSAYS ON POLITICAL THOUGHT AND HISTORY, CHIEFLY IN THE EIGHTEENTH CENTURY 1, 11 (1985) (“It does not make the historian an idealist to say that he regularly, though not invariably, presents the language in the form of an ideal type: a model by means of which he carries on explorations and experiments.”).



the only true sovereigns.<sup>17</sup> To be sure, the federal government held several “sovereign” powers—political authority that the sovereign states had authorized through their ratification of the Constitution of 1787.<sup>18</sup> But the idea of delegating *powers* without transferring *sovereignty* was commonplace in eighteenth-century legal thought, both in domestic and international contexts.

Domestically, this perspective underpinned the logic of limited monarchy. The British King, for example, held a variety of sovereign “prerogatives” and therefore was often called “the sovereign.”<sup>19</sup> But British and American writers universally agreed that the people were sovereign and that the King possessed only delegated powers.<sup>20</sup> Because they ultimately remained sovereign, the people could reallocate or repossess their power, at least in certain situations.<sup>21</sup>

International delegations of sovereign power were also common. Treatise writers on the “law of nations” had long recognized that sovereign nations could delegate authority to a foreign government

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17. See H. Jefferson Powell, *The Principles of '98: An Essay in Historical Retrieval*, 80 VA. L. REV. 689, 717–18 (1994).

18. See Thomas Jefferson, *Draft of the Kentucky Resolutions of 1798*, in 30 THE PAPERS OF THOMAS JEFFERSON 536, 536 (Barbara B. Oberg ed., 2003) [hereinafter *Kentucky Resolutions*] (explaining that “the several states . . . constituted a general government for special purposes [and] delegated to that government certain definite powers”).

19. See, e.g., 1 WILLIAM BLACKSTONE, COMMENTARIES \*216 (referring to “our present gracious sovereign, king George the third”).

20. See, e.g., ALEXANDER HAMILTON, *The Farmer Refuted* (1775), in THE PAPERS OF ALEXANDER HAMILTON 81, 90 (Harold C. Syrett ed., 1961) (arguing that George III was “King of America, by virtue of a compact between us and the Kings of Great-Britain); JOHN ADAMS, *Novanglus* No. VII (1775), in THE POLITICAL WRITINGS OF JOHN ADAMS 58, 74 (George W. Carey ed., 2000) (“[W]e, as well as the people of England, made an original, express contract with King William.”); see also MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 28 (2020) (describing the British view of royal prerogative governed by law).

21. See, e.g., JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 149, in LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 166 (Ian Shapiro ed., 2003) (1689); FRITZ, *supra* note 14, at 101.

or to a confederated league, even while remaining sovereign.<sup>22</sup> And Americans were especially familiar with this paradigm, since it captured how they thought about the British Empire on the eve of the Revolution. On this view, the American colonies were distinct polities, independent of Parliamentary authority, even while enjoying the protection of the Crown.<sup>23</sup> As Alexander Hamilton explained, the colonies were “individual societies, or bodies politic, united under one common head.”<sup>24</sup> The King thus possessed certain delegated sovereign powers but not sovereignty itself. And many Americans viewed federal authority under the Articles of Confederation in the same way.<sup>25</sup>

Jefferson took these lessons to heart. In the Kentucky Resolutions of 1798, he stated that the federal Constitution was merely a “compact under the style & title of a Constitution.”<sup>26</sup> In other words, although the Constitution might *claim* to be a “constitution”—that is, an act of a sovereign body politic—Jefferson thought that the document was mislabeled. At core, the Constitution was a pact among

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22. See, e.g., VATTEL, *supra* note 9, at 11 (“Several foreign and independent states may unite themselves together by a perpetual confederation without each in particular ceasing to be a perfect state.”); see also Anthony J. Bellia Jr. & Bradford R. Clark, *The International Law Origins of American Federalism*, 120 COLUM. L. REV. 835, 852–53 (2020).

23. See JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870*, at 131–209 (1978); see also Jud Campbell, *General Citizenship Rights*, 132 YALE L.J. 611, 629–31 (2023) (summarizing this view and collecting sources).

24. HAMILTON, *supra* note 20, at 98.

25. See, e.g., JAMES MADISON, *Vices of the Political System of the United States* (1787), in 9 THE PAPERS OF JAMES MADISON 345, 352 (Robert A. Rutland et al. eds., 1975) (“As far as the Union of the States is to be regarded as a league of sovereign powers, and not as a political Constitution by virtue of which they are become one sovereign power . . .”); see also JERRILYN GREENE MARSTON, *KING AND CONGRESS: THE TRANSFER OF POLITICAL LEGITIMACY, 1774–1776* 9 (1987) (observing that the Articles of Confederation assigned to the Continental Congress many displaced royal powers).

26. *Kentucky Resolutions*, *supra* note 18, at 536; see also JOHN C. CALHOUN, *A DISQUISITION ON GOVERNMENT AND A DISCOURSE ON THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES* 276 (Richard K. Cralle ed., 1853) (“It is but a *compact* and not a *constitution*.”).

states.<sup>27</sup> As fellow Virginian Spencer Roane stated, “The act of union thus entered into” was really “to all intents and purposes a *treaty* between sovereign states.”<sup>28</sup>

To be sure, the Constitution was not an ordinary treaty. After all, it was approved by the sovereign peoples of the several states—not by the state governments. It therefore trumped state law.<sup>29</sup> But the core point remains: To Jefferson’s mind, states had delegated sovereign *power* to a federal government without transferring *sovereignty* itself. At core, then, the United States remained a league of states, bound together by an interstate compact misleadingly called a “constitution.”

And this was far from a trivial fight over semantics. If the Constitution was not a constitution in the technical sense, but merely a compact among states, then it naturally made sense to interpret it as an agreement among sovereigns under the law of nations.<sup>30</sup> Above all else, those rules favored a narrower, “strict construction” of federal powers.<sup>31</sup> As William Branch Giles commented during the 1791 debates over the Bank of the United States, broad incidental powers “seem to me to apply to a government growing out of a state of society [*i.e.*, those premised on an underlying social contract], and not to a government composed of chartered rights from previously existing governments, or the people of those governments.”<sup>32</sup> It also meant that federal institutions lacked final interpretive authority regarding constitutional questions and probably also that states could secede, at least in certain situations, as the

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27. See JOHN TAYLOR, CONSTRUCTION CONSTRUED, AND CONSTITUTIONS VINDICATED 39–50 (1820).

28. Spencer Roane, *Hampden No. IV* (1819), in JOHN MARSHALL’S DEFENSE OF *McCULLOCH V. MARYLAND* 138, 150 (Gerald Gunther ed., 1969).

29. See TAYLOR, *supra* note 27, at 43.

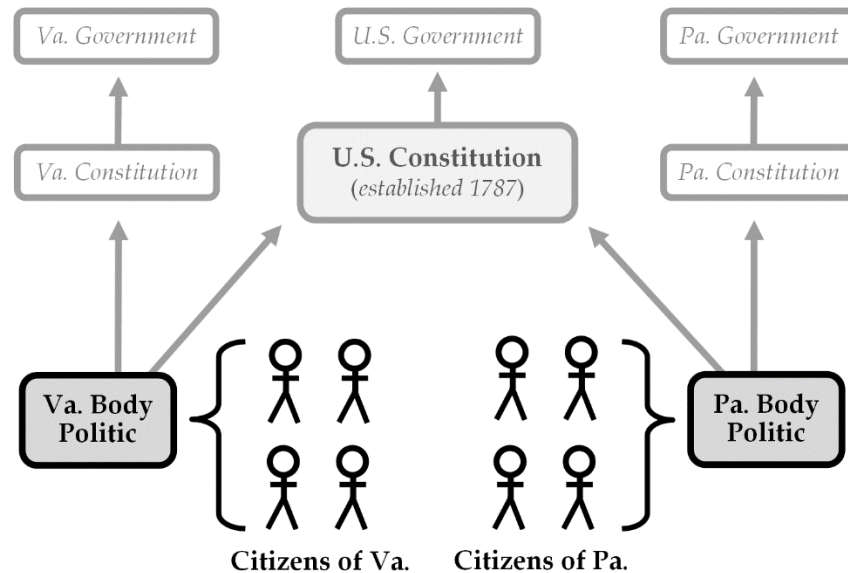
30. Accord Schwartz, *supra* note 4, at 631–32.

31. See, e.g., TUCKER, *supra* note 14, at 101–02; see also Anthony J. Bellia Jr. & Bradford R. Clark, *The Constitutional Law of Interpretation*, 98 NOTRE DAME L. REV. 519, 569 (2022) (“Under the rules recognized by the law of nations, a legal instrument could be read to alienate sovereign rights only if it did so in clear and express terms.”).

32. *Gazette of the United States* (Apr. 6, 1791), in 14 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 466, 467 (William Charles DiGiacomantonio et al. eds., 1995).

American Revolutionaries had done.<sup>33</sup> This was, of course, a logic that eventually came to fruition in what Southerners would insist was a “War Between the States.”<sup>34</sup>

**FIGURE 1: JEFFERSON’S COMPACT THEORY**



Explanation: This figure depicts Jefferson’s theory of federal authority, under which the peoples of the several states formed an interstate compact by adopting the federal Constitution. On this view, the Constitution was more enduring than the earlier Articles of Confederation, which was a treaty made by state governments, not by the people themselves. But the Constitution did not transfer or diminish state sovereignty. It merely delegated certain powers to the federal government. (Note: Black depicts the locus of sovereignty.)

33. See Kentucky Resolutions, *supra* note 18, at 536 (stating that “the government created by this compact was not made the exclusive or final judge of the extent of the powers delegated to itself” and that “each party has an equal right to judge for itself, as well of infractions, as of the mode & measure of redress”). Scholars have long disputed Jefferson’s exact views about the scope of unilateral state remedies. See Powell, *supra* note 17, at 720.

34. See 2 ALEXANDER H. STEPHENS, A CONSTITUTIONAL VIEW OF THE LATE WAR BETWEEN THE STATES 425–26 (1870) (noting how the terminology—“Civil War” or “war between the States”—reflected the fight over the nature of the Union); DAVID ARMITAGE, CIVIL WARS: A HISTORY IN IDEAS 178–95 (2017) (same).

### B. Madison's Quasi-Nationalism

James Madison took a more nationalistic approach than Jefferson, but he still recognized confederal aspects of the federal system. In *Federalist No. 39*, he probed at length whether the Framers had “preserved the *federal* form” by recognizing “a *confederacy* of sovereign states” or, instead, had “framed a *national* government, which regards the union as a *consolidation* of the States.”<sup>35</sup> He concluded that the Framers had blended confederal and national features through what we might call a *quasi-nationalist* approach.

Genealogically, Madison accepted that the Constitution was authorized by the peoples of the several states, acting as “independent States, not as forming one aggregate nation.”<sup>36</sup> He bolstered this conclusion by invoking the social-contractarian precept that constitutions needed only the approval of a simple majority: “Were the people regarded in this transaction as forming one nation,” Madison explained, “the will of the majority of the whole people of the United States, would bind the minority; in the same manner as the majority in each State must bind the minority.”<sup>37</sup> State-by-state ratification made the Constitution in *some* sense an interstate compact. The bodies politic of the several states were thus, as Madison later explained in 1800, “parties to the compact from which the powers of the federal government result.”<sup>38</sup>

Departing from Jefferson, however, Madison also viewed the federal Union as having national characteristics.<sup>39</sup> The Constitution formed “an intimate and constitutional union,” Madison wrote, unlike “the case of ordinary conventions between different nations.”<sup>40</sup>

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35. THE FEDERALIST NO. 39, at 253 (James Madison) (Jacob E. Cooke ed., 1961).

36. *Id.* at 254; see also, e.g., Letter from James Madison to Daniel Webster (March 15, 1833), in 9 THE WRITINGS OF JAMES MADISON 604 n.1 (Gaillard Hunt ed., 1910) (“[T]he undisputed fact is, that the Constitution was made by the people, but as embodied into the several States[.]”).

37. THE FEDERALIST NO. 39, *supra* note 35, at 254.

38. *The Report of 1800*, in 17 THE PAPERS OF JAMES MADISON 303, 309 (David B. Mattern et al. eds., 1991) (“The Constitution of the United States was formed by the sanction of the states, given by each in its sovereign capacity.”).

39. *Accord* Powell, *supra* note 17, at 717.

40. *Report of 1800*, *supra* note 38, at 310.

For example, although the Senate would represent states, the House of Representatives was to represent “the people of America.”<sup>41</sup> And federal legislation would directly bind “the individual citizens, composing the nation, in their individual capacities,” rather than having to rely on states as intermediating institutions, as occurred under the Articles of Confederation.<sup>42</sup> Moreover, the process of amending the Constitution revealed its quasi-national character. “Were it wholly national,” Madison stated, “the supreme and ultimate authority would reside in the *majority* of the people of the Union.”<sup>43</sup> But “[w]ere it wholly federal on the other hand, the concurrence of each State in the Union would be essential to every alteration that would be binding on all.”<sup>44</sup> In sum, the Constitution was “neither a national nor a federal constitution; but a composition of both.”<sup>45</sup>

Madison came back to this theme decades later, spurred by the Nullification Crisis in South Carolina. Against John C. Calhoun’s assertion of state sovereignty and Daniel Webster’s embrace of American nationalism,<sup>46</sup> Madison rejected their binary framing. “[T]he true character of the Constitution,” he wrote to Edward Everett, was neither “a consolidated Government” nor “a Confederated Gov[ernment]” but instead “a mixture of both.”<sup>47</sup> To be sure, the Constitution was initially “formed by the States—that is by the people in each of the States, acting in their highest sovereign capacity.”<sup>48</sup> In that sense, it was an interstate compact authorized by

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41. THE FEDERALIST NO. 39, *supra* note 35, at 255.

42. *Id.*

43. *Id.* at 257.

44. *Id.*

45. *Id.*

46. See John C. Calhoun, *South Carolina Exposition* (Dec. 1828), in 1 THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS 97 (Kurt T. Lash ed., 2021); Daniel Webster, *The Constitution Is Not a Compact* (Feb. 16, 1833), in THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS, *supra*, at 106.

47. Letter from James Madison to Edward Everett (Aug. 28, 1830), in 9 WRITINGS OF JAMES MADISON, *supra* note 36, at 383–84.

48. *Id.* at 386.

states “in their individual capacities.”<sup>49</sup> But once ratified, the Constitution had “constitut[ed] the people thereof one people for certain purposes.”<sup>50</sup>

In viewing things this way, Madison drew on social-contractarian logic. The social contract was an agreement among individuals in a state of nature, much like the Constitution was an agreement among states. Yet upon forming the social contract, individuals had unified themselves into a single polity composed of all citizens, much like the Constitution had done among the peoples of each state. In other words, although sovereignty resided in the people themselves—a citizenry composed of constituent members—the social contract also transformed the people into “one moral whole,” with ultimate power exercised through majority will.<sup>51</sup> Madison essentially took the same view of the federal system.<sup>52</sup>

Nonetheless, the unique character of the polity and its formation justified, in Madison’s eyes, a more historically based approach to constitutional interpretation, focusing on how the Constitution was understood at the moment of its adoption.<sup>53</sup> It was a mistake, he thought, to construe the federal Constitution in light of the usual

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49. *Id.* at 385.

50. *Id.* at 386

51. THEOPHILUS PARSONS, *Essex Result* (1778), in MEMOIR OF THEOPHILUS PARSONS 359, 366 (1861) (“When men form themselves into society, and erect a body politic or State, they are to be considered as one moral whole, which is in possession of the supreme power of the State. This supreme power is composed of the powers of each individual collected together, and voluntarily parted with by him.”); see also LOCKE, *supra* note 21, at bk. 2, chap. 8, § 96 (“For when any number of Men have, by the consent of every individual, made a *Community*, they have thereby made that *Community* one Body, with a Power to act as one Body, which is only by the Will and Determination of the *Majority*.”).

52. Notably, the Framers’ letter announcing the Constitution employed this analogy. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 666–67 (Max Farrand ed., 1911).

53. See Letter from James Madison to Henry Lee (June 25, 1824), in 9 WRITINGS OF JAMES MADISON, *supra* note 36, at 190–91 (“I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation.”). For discussion, see Christopher L. Eisgruber, *Marbury, Marshall and the Politics of Constitutional Judgment*, 89 VA. L. REV. 1203, 1221 (2003); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 339–65 (1996).

authority of polities to promote the public good.<sup>54</sup> That was typically the correct approach.<sup>55</sup> But “the case is obviously different,” Madison insisted, with respect to the *federal* Constitution, since states had retained much of their sovereignty.<sup>56</sup> “There is certainly a reasonable medium between expounding the Constitution with the strictness of a penal law, or other ordinary statute,” he wrote, “and expounding it with a laxity which may vary its essential character, and encroach on the local sovereignties with w[hich] it was meant to be reconcilable.”<sup>57</sup> In short, the Constitution ought to be interpreted in light of the unique, hybrid nature of the polity it created.

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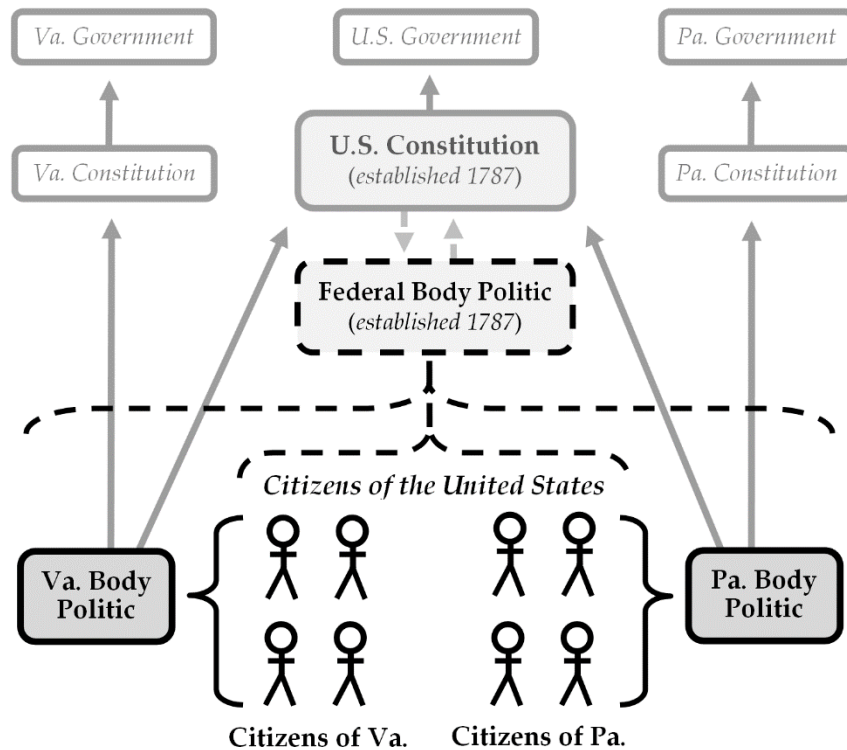
54. Letter from James Madison to Spencer Roane (Sep. 2, 1819), in 8 THE WRITINGS OF JAMES MADISON 447, 451 (Gaillard Hunt ed., 1908) (“Much of the error in expounding the Constitution has its origin in the use made of the species of sovereignty implied in the nature of Gov[ernment].”).

55. *Id.* at 452 (stating that powers were usually “understood to extend to all the Acts whether as means or ends required for the welfare of the Community, and falling within the range of just Government.”).

56. *Id.*

57. *Id.* at 451–52.



**FIGURE 2: MADISON'S QUASI-NATIONALISM**

Explanation: This figure depicts Madison's theory of quasi-nationalism, under which the peoples of the several states, upon adopting the Constitution, transferred part of their sovereignty to a federal body politic. But on Madison's view, the Constitution blended confederal and national features, and it therefore created a distinctive polity—one that remained somewhat tethered to state polities. The methods and processes for construing the Constitution should thus reflect its idiosyncratic origins and character. (Note: Black depicts the locus of sovereignty; the dashed lines and braces reflect the idiosyncratic origins and hybrid character of the federal polity.)

### C. Marshall's 1787 Nationalism

In some ways, John Marshall's theory of the Union was similar to Madison's. From a genealogical standpoint, Marshall thought that a federal polity was created through the Constitution's ratification, whereby individual sovereign states had transferred portions of

their sovereignty to a federal polity.<sup>58</sup> In response to Spencer Roane's attacks on *McCulloch v. Maryland*,<sup>59</sup> for instance, Marshall agreed that "[t]he Constitution of the United States was not adopted by the people of the United States as one people, it was adopted by the several states."<sup>60</sup> In this way, the formation of the national body politic departed from the imagined social-contractarian origins of other polities.

Yet Marshall also insisted that the United States was a sovereign nation, undergirded by a unitary, national body politic. "[T]he constitution of the United States is not an alliance, or a league, between independent sovereigns; nor a compact between the government of the union, and those of the states," he wrote, "but is itself a government, created for the nation by the whole American people."<sup>61</sup> It should thus be construed as "the act of a single party"—namely, "the people of the United States, assembling in their respective states."<sup>62</sup> Or, as he declared in *Cohens v. Virginia*,<sup>63</sup> "the United States form, for many, and for most important purposes, a single nation . . . [with] one people."<sup>64</sup>

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58. See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 187 (1824) (the Constitution was "the instrument by which that change [in the nature of the Union] was effected").

59. 17 U.S. (4 Wheat.) 316 (1819).

60. John Marshall, *A Friend of the Constitution* No. 3 (July 2, 1819), in JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 167, 167 (Gerald Gunther ed., 1969); John Marshall, *A Friend of the Constitution* No. 7 (July 9, 1819), in JOHN MARSHALL'S DEFENSE, *supra*, at 196, 197; see also John Marshall, *A Friend of the Constitution* No. 6 (July 6, 1819), in JOHN MARSHALL'S DEFENSE, *supra*, at 191, 194; John Marshall, *A Friend of the Union* No. 1 (Apr. 24, 1819), in JOHN MARSHALL'S DEFENSE, *supra*, at 78, 88–90.

61. John Marshall, *A Friend of the Constitution* No. 8, in JOHN MARSHALL'S DEFENSE, *supra* note 60, at 202.

62. *Id.* at 203; see also *Gibbons*, 22 U.S. (9 Wheat.) at 187 ("[W]hen these allied sovereigns converted their league into a government . . . the whole character in which the States appear, underwent a change . . .").

63. 19 U.S. (6 Wheat.) 264 (1821).

64. *Id.* at 413. Importantly, Marshall used the plural verb not because "the United States" referred merely to a collection of states, cf. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 846 n.1 (1995) (Thomas, J., dissenting), but instead because collective nouns often took plural verbs. See Ronald R. Butters, *Grammatical Structure*, in 6 THE CAMBRIDGE HISTORY OF THE ENGLISH LANGUAGE 325, 335–36 (John Algeo ed., 2001) (noting the shift in American grammar).

At first glance, it is perplexing that Marshall articulated a unitary, nationalistic account of the Union alongside a state-based description of its genesis.<sup>65</sup> But once again, basic precepts of social-contract theory bolstered this position.<sup>66</sup> Although the parties to a social contract began as individuals, they forged themselves together into a unitary whole—a body politic. From this perspective, a state-based account of the Union’s formation did not undermine the unitary character of the national polity.<sup>67</sup>

Given his nationalistic view of the Union, it is no surprise that Marshall’s reading of the Constitution was more nationalistic than Jefferson’s and Madison’s. Although Marshall acknowledged that federal powers were limited, he insisted that the grounding of federal authority (in a national body politic) paralleled the grounding of state authority (in state bodies politic). And for that reason, the federal Constitution should be interpreted using essentially the same methods as were used to construe state constitutions. As Marshall explained in *McCulloch v. Maryland*, the “nature” of a constitution “requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves . . . . [W]e must never forget that it is a constitution we are expounding.”<sup>68</sup>

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65. See, e.g., TAYLOR, *supra* note 27, at 143 (“No derived power can be greater than the primitive power. No state, nor a majority of states, had any species of primitive sovereignty or supremacy over other states.”).

66. See *supra* notes 51–52 and accompanying text.

67. Marshall, *A Friend of the Constitution No. 7*, *supra* note 60, at 197 (“The character of a government depends on its constitution, not on its being adopted by the people acting in a single body, or in single bodies.”); see Martin S. Flaherty, *John Marshall, McCulloch v. Maryland, and We the People: Revisions in Need of Revising*, 43 WM. & MARY L. REV. 1339, 1373 (2002) (describing Marshall’s view).

68. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); see also Powell, *supra* note 17, at 728 (“Nationalists of the 1790s often displayed something close to impatience with the Republicans’ legalistic mode of constitutional argument.”).

Marshall's overriding approach to constitutional interpretation thus differed from Madison's.<sup>69</sup> Both men, of course, invoked standard interpretive devices—text, history, pragmatic reasoning, and so on. But for Marshall, interpreters should consider the Constitution's author as the people of the nation. Even his invocations of original public meaning are revealing in this respect—quietly assuming a unitary (and thus national) American public.<sup>70</sup> Relatedly, and in contrast to Madison,<sup>71</sup> Marshall was mostly interested in the Constitution's deeper principles, not in the specific intentions of its drafters or ratifiers.<sup>72</sup> “It is impossible to construe such an instrument rightly,” he stated, “without advert[ing] to its nature, and marking the points of difference which distinguish it from ordinary contracts.”<sup>73</sup> Although the Constitution was ratified at a particular moment, it was authored by an enduring polity, and the broad language of the Preamble was among its most important interpretive guides.<sup>74</sup>

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69. To be sure, Marshall favorably cited *Federalist* No. 39, but he did so only in reference to the idea that sovereignty was divided within the United States. See Marshall, *A Friend of the Constitution* No. 6, *supra* note 60, at 194.

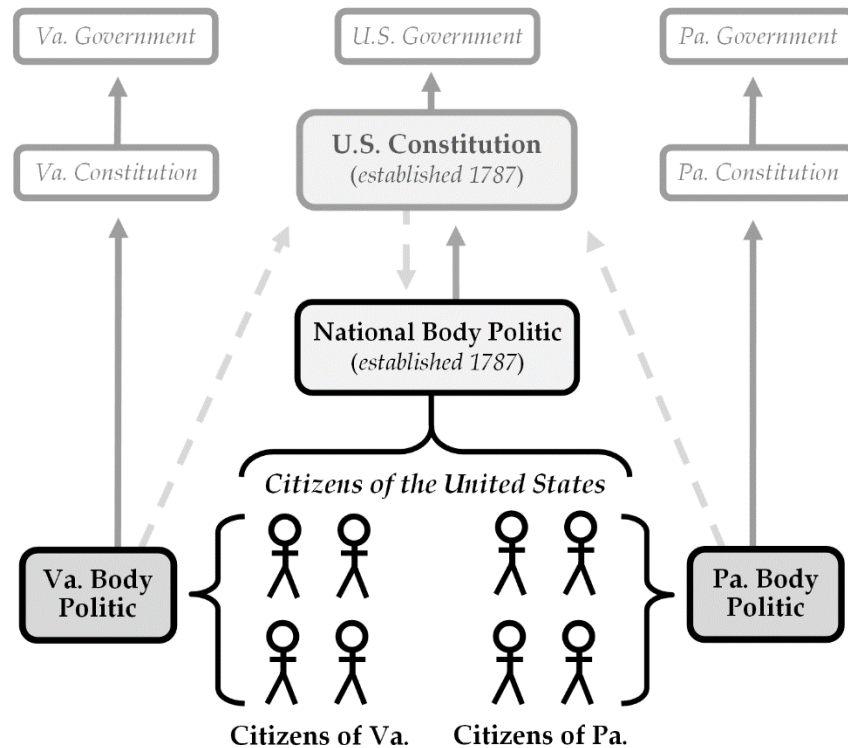
70. See Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953, 1979 (2021) (collecting citations).

71. See sources cited *supra* notes 53–70; *infra* notes 72–73.

72. See, e.g., John Marshall, *A Friend of the Constitution* No. 2, in JOHN MARSHALL'S DEFENSE, *supra* note 60, at 161, 163 (invoking principles applicable to sovereigns under the law of nations); Marshall, *A Friend of the Constitution* No. 3, *supra* note 60, at 167 (“I admit it to be a principle of common law, ‘that when a man grants any thing, he grants also that without which the grant cannot have its effect.’”); see also Eisgruber, *supra* note 53, at 1221 (“Marshall did refer to ‘intent’—but he almost always did so in a highly abstract way, referring not to any specific judgments made by actual Framers but rather to aspirations that the American people must have had when they adopted the Constitution, given the general nature of the constitutional project.”); Jeremy Telman, *John Marshall's Constitution: Methodological Pluralism and Second-Order Ipse Dixit in Constitutional Adjudication*, 24 LEWIS & CLARK L. REV. 1151, 1187 (2020) (“Gestures towards the Framers’ intentions become the sleight of hand through which the Justices obscure other interpretive modalities, such as appeals to natural law or pragmatic considerations.”).

73. See Marshall, *A Friend of the Constitution* No. 3, *supra* note 60, at 171.

74. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188–89 (1824) (“[I]t is a well settled rule, that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction.”).

**FIGURE 3: MARSHALL'S 1787 NATIONALISM**

Explanation: This figure depicts Marshall's theory of nationalism, under which the peoples of the several states, upon adopting the Constitution, transferred part of their sovereignty to a national body politic. The national polity thus had idiosyncratic origins, having been created through a written agreement among states rather than through an imagined social contract among individuals. But after ratification, the federal polity became fully autonomous and sovereign within the scope of its authority. Consequently, the Constitution paralleled state constitutions and should be interpreted using standard methods of constitutional interpretation. (Note: Black depicts the locus of sovereignty; the dashed lines, showing the idiosyncratic origins of the federal polity, are faded to reflect their insignificance to constitutional interpretation after ratification.)

#### *D. Wilson's 1776 Nationalism*

While Jefferson, Madison, and Marshall agreed that states were fully sovereign prior to ratification of the Constitution, James Wil-

son took a different view. He thought that national sovereignty inhered in a national social contract created in 1776. As he saw it, the act of declaring independence vested the people of the United States with certain national rights and national powers.<sup>75</sup>

Wilson began articulating this view from the outset. Less than a month after the Declaration of Independence, Wilson opined on the nature of the Union: “[I]t has been said that Congress is a representation of states; not of individuals.” But “as to those matters which are referred to Congress,” he retorted, “we are not so many states; we are one large state.”<sup>76</sup> He reiterated this position a decade later, writing:

The United States have *general* rights, *general* powers, and *general* obligations, not derived from *any* particular States, nor from *all* the particular States, taken *separately*; but *resulting from the union of the whole*. . . . To many purposes, the United States are to be considered as one *undivided, independent* nation; and as possessed of *all the rights, and powers, and properties*, by the law of nations *incident* to such.<sup>77</sup>

Wilson based this nationalist view in part on a genealogical account of the nation’s origins. “The act of independence was made before the articles of confederation,” he argued, and it was done in the name of “‘*these UNITED Colonies*,’ (not enumerating them separately).”<sup>78</sup> The nation thus became a freestanding political entity in 1776—not one created by the several states in 1787.<sup>79</sup>

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75. See Jonathan Gienapp, *The Myth of the Constitutional Given: Enumeration and National Power at the Founding*, 69 AM. U. L. REV. F. 183, 198–204 (2020); Gienapp, *supra* note 4, at 1795–97; John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1074–78 (2014).

76. Thomas Jefferson, *Notes of Proceedings in the Continental Congress* (July 30–Aug. 1, 1776), in 1 THE PAPERS OF THOMAS JEFFERSON 309, 327 (Julian P. Boyd ed., 1950) (remarks of Rep. Wilson).

77. JAMES WILSON, CONSIDERATIONS ON THE BANK OF NORTH-AMERICA 10 (Philadelphia, Hall & Sellers 1785).

78. *Id.*

79. For a scholarly evaluation of this genealogical claim, see Craig Green, *United/States: A Revolutionary History of American Statehood*, 119 MICH. L. REV. 1 (2020). On Wilson’s view, the Articles of Confederation did not form the nation nor recognize

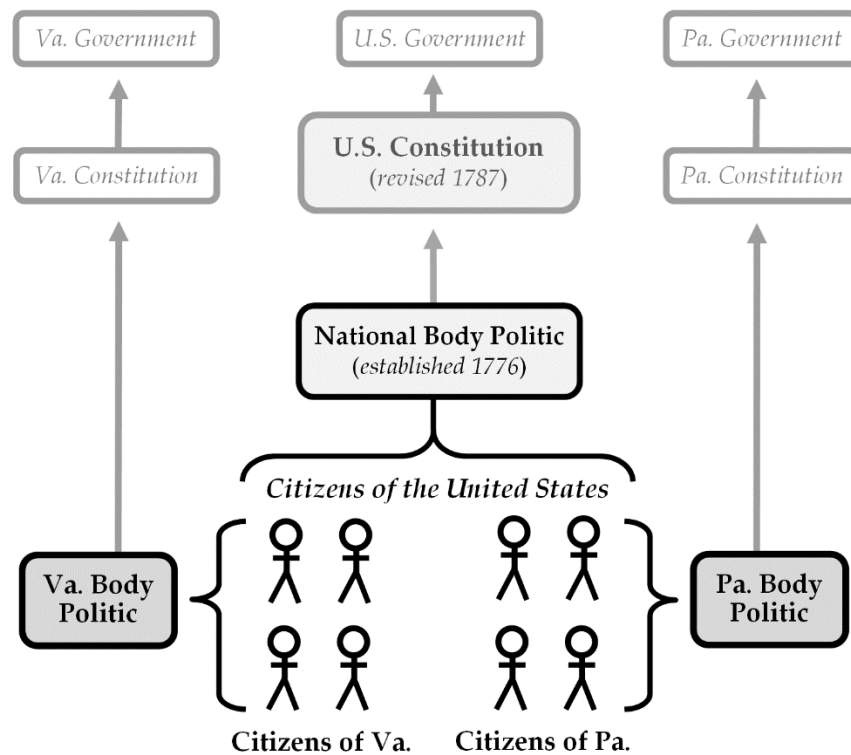
Viewing the nature of the Union in this way profoundly affected constitutional interpretation. Because Congress represented a national body politic, Wilson argued, it had inherent powers that exceeded those mentioned in Article I of the Constitution. For instance, the federal government had authority over those matters where “no particular state is competent.”<sup>80</sup> It also meant that final interpretive authority rested in national institutions, not in individual states.<sup>81</sup>

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the full swath of its powers. “The confederation,” he wrote, “was not intended to weaken or abridge the *powers and rights*, to which the United State were *previously* entitled.” WILSON, *supra* note 77, at 10.

80. WILSON, *supra* note 77, at 66; *see also* Mikhail, *supra* note 75, at 1074–78.

81. *See, e.g.,* Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304 (1816); 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION §§ 163–77 (1833).

**FIGURE 4: WILSON'S 1776 NATIONALISM**

Explanation: This figure depicts Wilson's theory of nationalism, under which the people of the United States—acting in a national capacity, and not through the states—formed a national body politic upon declaring independence in 1776. On this view, the Constitution formed a new system of government but did not create the nation. (Note: Black depicts the locus of sovereignty.)

### III. RECONSIDERING THE LAW OF NATIONS

In recent articles, Professors Anthony J. Bellia Jr. and Bradford Clark have argued that because federal constitutional authority came from sovereign states, the law of nations supplied rules for constitutional interpretation.<sup>82</sup> Most notably, these rules demanded

82. See Bellia & Clark, *supra* note 22; Bellia & Clark, *supra* note 31.



clarity before recognizing the derogation of a sovereign right.<sup>83</sup> Thus, for instance, the Constitution preserved state sovereign immunity and withheld federal power to commandeer states.<sup>84</sup>

If Jefferson was right about the nature of the Union, then Bellia and Clark have a convincing argument. *If* the Constitution was a compact among sovereign states and merely assigned certain powers to a federal government, then using interpretive principles from the law of nations made sense.<sup>85</sup>

But as we have seen, the law of nations was not the only interpretive framework for evaluating consolidations of political authority. Social-contract theory offered an alternative.<sup>86</sup> In its traditional form, social-contract theory stipulated that sovereign individuals had transferred sovereignty to a new corporate entity—the body politic—in which they became constituent members.<sup>87</sup> In a sense, their rights were thus preserved, since sovereignty remained in themselves. But after forming a social contract, sovereignty belonged to the people collectively, not individually.<sup>88</sup> A social-

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83. Professors Bellia and Clark try to cast their argument in narrower terms—admitting room for “ordinary” interpretation rather than only “strict” interpretation, *see, e.g.*, Bellia and Clark, *supra* note 31, at 563–66, and focusing on the nonderogation of “residual sovereign rights of the States through doctrines such as sovereign immunity, the anticommandeering doctrine, and the equal sovereignty doctrine,” rather than on the general scope of federal power, *id.* at 523. But these distinctions do not seem to have been grounded in eighteenth-century understandings of the law of nations. It is highly doubtful, for instance, that principles of “strict construction” differed from a requirement that delegations of sovereign powers had to be enumerated in “clear and express terms.” *Cf. id.* at 552. And as Professors Bellia and Clark acknowledge, “One of the most significant rights possessed by all sovereign states was the exclusive right to govern persons and property within their own territory.” *Id.* at 546.

84. Bellia and Clark, *supra* note 31, at 523. Of course, one might defend state sovereign immunity and anticommandeering doctrine under other views of the nature of the Union.

85. *See* Schwartz, *supra* note 4, at 631–32.

86. *See supra* notes 51–52, 65–67 and accompanying text.

87. *See* *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 456, 458 (1793) (opinion of Wilson, J.) (“The sovereign, when traced to his source, must be found in the *man*.”); *see also* Campbell, *supra* note 6, at 90 (discussing Wilson’s argument).

88. *See, e.g.*, NATHANIEL CHIPMAN, *SKETCHES OF THE PRINCIPLES OF GOVERNMENT* 208 (J. Lyon ed., 1793) (discussing “the people, thus associated, not individually, but collectively”).

contractarian account of political authority, rather than one framed by the law of nations, thus made sense when previously independent entities agreed to consolidate their sovereignty, retaining it among themselves but now exercising it collectively through a new polity. Unlike the law of nations, which addressed transfers of sovereign *power*, social-contract theory supplied a framework for considering the consolidation of *sovereignty* itself.

Marshall embraced this reasoning with gusto, defending the existence of a fully sovereign national body politic—albeit one formed in an unusual way and vested with sovereignty in only certain respects.<sup>89</sup> Madison, by contrast, viewed the polity as having a hybrid form.<sup>90</sup> Both men, however, rejected the Jeffersonian premise that the Constitution had merely transferred certain powers to a confederal government. “All arguments founded on leagues and compacts,” Marshall stated, “must be fallacious when applied to a government like this.”<sup>91</sup>

#### CONCLUSION

Fights over the nature of the Union were not simply philosophical debates. Although Americans disagreed sharply, they recognized that the nature of the Union profoundly impacted how to read the Constitution. This is why virtually all early treatises on constitutional law started with a discussion of sovereignty. As John Pomeroy observed in his treatise, “all the relations of the United States and the several commonwealths to each other, and of all the functions of the general and local governments, must depend” on “the essential character of this organic law, and of the body-politic

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89. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824) (observing that federal power is “limited to specified objects”).

90. See *supra* Part II.B.

91. See Marshall, *A Friend of the Constitution* No. 8, *supra* note 61, at 203; see also Marshall, *A Friend of the Constitution* No. 3, *supra* note 60, at 169 (“The difference between the instruments in the examples taken from Vattel, or from the books of the common law; and the constitution of a nation, is, I think, too apparent to escape the observation of any reflecting man.”).

which lies behind it.”<sup>92</sup> Everybody took the text seriously. But as Pomeroy recognized, contrasting views of the nature of the Union enabled people to see that text in very different ways.

For Jefferson, the text was a treaty-like compact among sovereign states, and therefore it had to be interpreted using principles of “strict construction.” Nontextual federal powers or nontextual limits on state power thus made no sense. This way of thinking also led Jefferson to view states as the ultimate expositors of constitutional meaning.

For Madison, the Constitution was a textual marker of an agreement created by the peoples of the several states at a particular historical moment. It therefore should be interpreted based on the intentions of those who ratified it. This helps explain why Madison cared so much about ratifiers’ intent. Perhaps these intentions could include implied powers or dormant limits, but only if history said so. This approach also led Madison to think that the most authoritative way of interpreting the Constitution was for state legislatures to collectively announce their views.

For Marshall and Wilson, the foundation of federal authority was a national body politic that paralleled state bodies politic. The federal Constitution should thus be interpreted in essentially the same way as state constitutions. This meant, for instance, that ambiguities could be settled by looking to the Preamble. And by accepting the notion that states had transferred some of their sovereignty in 1787, as Marshall believed, or had begun with limited sovereignty in 1776, as Wilson thought, the nationalist perspective also made space for arguments about inherent powers as well as “dormant” or “negative” inferences from express powers. It also meant that *national* institutions were the final expositors of federal constitutional law.<sup>93</sup>

Crucially, this dispute was not merely over constitutional *interpretation*. It went to the deeper, more fundamental question of the

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92. JOHN N. POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES: ESPECIALLY DESIGNED FOR STUDENTS, GENERAL AND PROFESSIONAL 20 (3d ed. 1888).

93. *See, e.g.,* *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

nature of the Union. Or, to put the point more bluntly, one could not know how to approach constitutional law without first knowing the locus of sovereignty in the federal system. Understanding the nature of the Union was a predicate of—not a product of—constitutional interpretation.<sup>94</sup>

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94. In their original oral form, these remarks responded to a prompt about whether constitutional federalism promotes unity or disunity, and my overriding point was to challenge the directional assumption of the question—that is, that we can properly understand the Constitution without *first* considering whether Americans are united or disunited.



# TEMPLATES OF AMERICAN DEMOCRACY FOR THE 21ST CENTURY: THE IMPORTANCE OF LOOKING AT AMERICAN STATE CONSTITUTIONS

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I am grateful to the Federalist Society for giving me these two opportunities to discuss the need for significant constitutional reform. First at its annual student gathering—this year, delightfully, in my hometown of Austin, Texas—and now in *The Harvard Journal of Law & Public Policy*. I begin this essay by looking at the title of the session in Austin: “Unique Aspects of American Democracy: Structural Bugs or Features?” I believe this title illuminates the difficulties we often face when discussing “American democracy.” I have increasingly become a vociferous critic of American legal education in this regard, for a deceptively simple reason: We—that is, the professoriate at America’s “leading” law schools charged with teaching “constitutional law”—fixate exclusively on only one of the fifty-one constitutions within the United States. That one is, of course, the 1787 United States Constitution. It is, to be sure, a topic of great interest, but however interpreted, it presents only an extraordinarily partial, and even misleading, picture of the entirety of “American constitutionalism.” Even more, study of only the United States Constitution limits the possibilities inherent in the notion of

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“American democracy.” That is especially true regarding the possibility of changing, by amendment or otherwise, the structures of the constitutional system themselves.

Whatever my views in the abstract are about American federalism—I suspect that I am more committed than many members of the Federalist Society to the virtues of the “consolidated” national government that I believe was by and large envisioned by a critical mass of the delegates to the Philadelphia Convention, including, most certainly, James Madison and Alexander Hamilton—I believe that the state constitutions are enormously interesting and remarkably different from the United States Constitution. And, in some important respects, state constitutions are significantly *better* than the 1787 Constitution. I published a book in 2006 called *Our Undemocratic Constitution* that I think established, beyond a reasonable doubt, that the United States Constitution drafted in 1787 does not meet the tests posed by any plausible twenty-first-century theory of democracy. Most, if not all, of the other fifty constitutions do meet those tests.

Perhaps the most important evidence for this proposition is that the 1787 Constitution has *not* truly served as the prototype for the state constitutions drafted afterwards. Obviously, states adopted some features that we associate with the national Constitution, including (save for courageous Nebraska) bicameralism and a gubernatorial, separation-of-powers system instead of one or another version of parliamentary government. But in many other respects, states broke with the federal template. For example, almost all the states have rejected the strong unitary executive in favor of what Harvard Law Professor Jacob Gersen has called the “unbundled executive.”<sup>1</sup> This departure is clearest regarding the separation between governors and state attorneys general (AGs). Most states elect each, and with some frequency the governor and attorney

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1. Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385, 1386 (2008).

general come from different political parties. Even if they belong to the same party, AGs will often view themselves as potential candidates for governor and will scarcely operate under the thumb of their ostensibly gubernatorial superior. Texas is probably the clearest case of the almost exuberant rejection of the unitary executive; among department heads, the governor gets to name only the relatively insignificant secretary of state. Even the lieutenant governor, as devotees of Texas politics are well aware, runs independently. But Texas is not truly “exceptional” in this regard.

Texas, like many other states, elects its judges—again perhaps to an exuberant degree.<sup>2</sup> Going back to the 1832 Mississippi Constitution and the far more influential 1846 New York Constitution, the people—or, at least, the relevant electorate—of those states expressed their fears that judges would become the faithful servants of the appointing governors and their political friends.<sup>3</sup> Mississippi and New York’s solution was for the people at large to select their judges.<sup>4</sup> Even states that have rejected popular election often constrain gubernatorial discretion to appoint judges. For example, the so-called “Missouri Plan” limits gubernatorial appointees to candidates presented by an ostensibly independent commission.<sup>5</sup> In New Jersey, gubernatorial appointees (confirmed by the state senate) must run for retention after seven years.<sup>6</sup> In California, judges get twelve years before having to face the electorate.<sup>7</sup> These models for selecting judges are obviously different than the model presented

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2. TEX. CONST. of 1876, art. V, § 1.

3. Kermit L. Hall, *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850-1920*, 9 AM. BAR FOUND. RSCH. J. 345, 346-448 (1984); Madison B. McClellan, *Merit Appointment Versus Popular Election: A Reformer’s Guide to Judicial Selection Methods in Florida*, 43 FLA. L. REV. 529, 534 (1991).

4. MISS. CONST. of 1832, art. IV, §§ 2, 11; N.Y. CONST. of 1846, art. VI, § 12.

5. *Nonpartisan Court Plan*, MO. CTS., <https://www.courts.mo.gov/page.jsp?id=297> [https://perma.cc/T2KV-4QEN].

6. *About NJ Government*, OFF. SITE STATE N.J., <https://www.nj.gov/nj/gov/understand> [https://perma.cc/Z6HX-YGDW].

7. CAL. CONST. of 1879, art. VI, § 16.



by the U.S. Constitution. The U.S. Constitution provides for what many people across party and ideological lines consider indefensible and what I am tempted to call “full-life tenure” for federal judges.<sup>8</sup> One can certainly argue at length about which model is more congruent with given theories of “democratic” control, assuming of course that one believes an “independent judiciary” should be accountable to the *demos* at all. But there is no reason to assume that the federal model necessarily makes better sense than the model presented by any given state, even if one believes that Texas is *too* exuberant in its system of electing judges.<sup>9</sup>

Whatever one’s abstract theory of democracy, though, I think it fair to assert that state constitutions are, generally speaking, far more “democratic” than their federal counterpart.<sup>10</sup> Part of the reason for this is that only a few of the Founding Fathers were proponents of democracy.<sup>11</sup> This is a major theme of a splendid recent article by Professors Jessica Bulman-Pozen and Miriam Seifter tellingly titled *State Constitutional Rights and Democratic Proportionality*.<sup>12</sup> As they write: “Democratic self-rule lies at the ‘heart’ of the state constitutional project. These constitutions are oriented around majoritarian democracy in a way the federal Constitution is not . . . .”<sup>13</sup> With regard to our federal Constitution, many of the Framers agreed with Elbridge Gerry that one of the problems facing the nascent, and possibly failing, new country was an excess of

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8. U.S. CONST. art. III, § 1.

9. Texas has two courts of last resort—one criminal and the other civil. The judges of both courts of last resort must run for re-election, on a partisan basis, every six years. See TEX. CONST. art. V, §§ 2, 4.

10. John Kincaid, *State Constitutions in the Federal System*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 12, 21 (1988).

11. Dora Mekouar, *Today’s Democracy Isn’t Exactly What Wealthy US Founding Fathers Envisioned*, VOICE OF AM. (Jan. 24, 2021, 7:00 AM), [https://www.voanews.com/a/usa\\_all-about-america\\_todays-democracy-isnt-exactly-what-wealthy-us-founding-fathers-envisioned/6201097.html](https://www.voanews.com/a/usa_all-about-america_todays-democracy-isnt-exactly-what-wealthy-us-founding-fathers-envisioned/6201097.html) [https://perma.cc/8G8X-G8YJ].

12. See Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 COLUM. L. REV. 1855 (2023).

13. *Id.* at 1873–74 (citation omitted).

democracy.<sup>14</sup> They believed that this excess was typified by, for example, Shays's Rebellion in western Massachusetts in 1786.<sup>15</sup> The reason that the Constitution (and most of the Framers) spoke of a "republican form of government" was because at the time very few persons were willing to embrace the identity of being a "democrat" and exhibit requisite faith in popular rule.<sup>16</sup> That would change, of course. Even by the beginning of the nineteenth century, "democracy" began its march from a term of opprobrium to a commitment to be embraced. "Popular sovereignty," a major theme of American political thought beginning with the Declaration of Independence and, presumably, enshrined in the opening words of the Preamble to the U.S. Constitution, was taken far more seriously in the states than it was by the fearful Framers in Philadelphia.<sup>17</sup>

Madison devoted a key paragraph in *Federalist* 63 to the proud demonstration that "the people" would play no role whatsoever in the actual process of decision-making.<sup>18</sup> Their role would be confined to selecting purported "representatives" who would make the decisions in their stead.<sup>19</sup> Notoriously, presidents would be selected by special "electors" who could be trusted to identify those fit to be president or vice president rather than by the general

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14. For an excellent overview of the shift of the use of "democracy" from a term of relative opprobrium to one embraced as fundamental to American political identity, see Morton J. Horwitz *Foreword: The Constitution of Change Legal Fundamentalism without Fundamentalism*, 107 HARV. L. REV. 30 (1993). See also JAMES T. KLOPPENBERG, *TOWARD DEMOCRACY: THE STRUGGLE FOR SELF-RULE IN EUROPEAN AND AMERICAN THOUGHT* (2016).

15. Summary of THE FEDERALIST NO. 55, NAT'L CONST. CTR., <https://constitution-center.org/the-constitution/historic-document-library/detail/james-madison-federalist-no-55-1788> [<https://perma.cc/G7PJ-WZ58>] (last visited Jan. 30, 2024) ("Following Shays' Rebellion in Massachusetts, Madison and his allies pushed for a new Constitution that might address the dangers of excessive democracy, including mob violence.").

16. Marci A. Hamilton, *Power, Responsibility, and Republican Democracy*, 93 MICH. L. REV. 1539, 1540 (1995).

17. See generally Joshua Miller, *The Ghostly Body Politic: The Federalist Papers and Popular Sovereignty*, 16 POL. THEORY 99 (1988).

18. THE FEDERALIST NO. 63, at 384 (James Madison) (Clinton Rossiter ed., 1961).

19. *Id.*

public.<sup>20</sup> One can certainly wonder if a constitution so indifferent to “democracy” could have been ratified by, say, the 1820s. During the 1820s the country was undergoing what would be called the “Jacksonian revolution” that displaced the model of elite non-partisan leadership envisioned (or fantasized) by the Founders with a far more robust model of popular government—at least so long as one confined the notion of the relevant public to white males.<sup>21</sup>

One way that state constitutions *did* track the federal Constitution, of course, was that almost all state constitutions mimicked national bicameralism by creating an “upper house” and a “lower house.” The upper house, usually called the senate, was decidedly less “representative” of the electorate in general than its “lower” counterpart. Most state constitutions adopted so-called “little federalism,” with which I grew up in North Carolina seven decades ago. My home county of about 30,000 people had the same one senator in the North Carolina legislature that Mecklenburg County (where Charlotte is located), which I think had only 200,000 people or so at the time, had. That disparity no longer exists, in large part because of *Reynolds v. Sims*.<sup>22</sup> Boldly declaring that the Constitution was committed to some notion of “majority rule” and even “effective representation,” the *Reynolds* Court invalidated the model of so-called “little federalism.”<sup>23</sup> The model simply does not exist anymore, I think much for the better.

I don’t like how North Carolina politics have gone recently, not least because of the obscenity of ruthless partisan gerrymandering, but there’s no doubt that the North Carolina Constitution, in many ways, is far more democratic than the U.S. Constitution. And I think that’s true as you march through all the states.

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20. THE FEDERALIST NO. 68, *supra* note 18, at 411 (Alexander Hamilton).

21. See, e.g., GERALD LEONARD & SAUL CORNELL, THE PARTISAN REPUBLIC: DEMOCRACY, EXCLUSION, AND THE FALL OF THE FOUNDERS’ CONSTITUTION, 1780S–1830S 214–21 (2019).

22. 377 U.S. 533 (1964).

23. *Id.* at 565–66.

I think that one of the deficiencies of legal education is that we don't set you to arguing about whether the Texas Constitution or the Alabama Constitution or the California Constitution—the constitution of wherever you might happen to live—is interestingly different from the U.S. Constitution and which is better. It's also worth noting that the odds are that the state you live in has had multiple constitutions. Each of the fifty states has had just short of three constitutions over its history. Montana's most recent constitution came along in 1972, as did Illinois's. New Jersey's was ratified in 1948. And, even if not entirely supplanted, the odds are truly overwhelming that your state constitutions have been amended far more frequently than the national constitution. Some people consider that a bug; I, of course, consider frequent amendment to be far more of a feature. The two oldest constitutions in the United States are those of Massachusetts and New Hampshire, dating back to 1780 and 1784, respectively. Yet both have been amended literally dozens of times, as distinguished from the national Constitution, which has not been formally amended in the lifetime of anyone under thirty, and if one goes back to the 26<sup>th</sup> amendment, in the past half-century.

I'm a big fan of *The Federalist Papers*, which I'm quite convinced nobody reads any longer. I'd be very curious—genuinely curious—how many of you in The Federalist Society, where James Madison is your avatar, have actually read *The Federalist Papers* and under what conditions you read them. Were you assigned them, or do you feel they are part of your general education whether or not they are assigned? But it is an important feature of state constitutions that they live up far, far more than the national Constitution does to the injunction of Alexander Hamilton in what is literally the first paragraph of *Federalist* 1, that We the People should engage in “reflection and choice” about how we are to be governed. Indeed, it is worth quoting his sentence in full:

It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.<sup>24</sup>

I want to argue that we should treat the 1787 Convention and ratifying conventions, for all their impressive display of “reflection and choice,” as also constituting important examples of “accident and force.” Think only of the fact that few members of the American public, including even most of those accepted as “citizens,” could participate in the actual deliberations and therefore exercise any genuine choice. And, even more obviously, there were literally hundreds of thousands of residents who were not accepted, even at the most formal level, as citizens entitled to so-called “virtual representation,” such as enslaved persons and members of Indigenous Nations. The all-important compromises with regard to slavery, for example, exemplified “force” far more than a conclusion that, when all is said and done, slavery was an admirable system that deserved to be protected. And, of course, elimination of chattel slavery at the national level required a brutal war that killed 750,000 people, whereas abolition occurred in many states relatively peacefully under state constitutional auspices.

My favorite state constitutions—there are thirteen or fourteen depending on how you count Oklahoma (which doesn’t obey its own constitution in this regard)—are the ones that require that the citizenry of the states be given the opportunity to vote up or down on calling a new state constitutional convention.<sup>25</sup> These elections usually occur at intervals of ten to twenty years. John Dinan, the author of an essential book, *The American State Constitutional Tradition*,

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24. THE FEDERALIST NO. 1, *supra* note 18, at 27 (Alexander Hamilton).

25. J.H. Snider, *Does the World Really Belong to the Living? The Decline of the Constitutional Convention in New York and Other US States, 1776-2015*, 6 AM. POL. THOUGHT 256, 268 (2017).

builds his study around the records of the more than 230 state conventions that have taken place over our history.<sup>26</sup> My favorite state in this regard is New Hampshire, which has had seventeen state constitutional conventions over the past two centuries, even as it has formally stuck with its 1784 constitution.<sup>27</sup> I really, really wish we had that at the national level, but we don't. And that turns me to looking, in particular, at two of *The Federalist Papers* that I'm quite confident are not assigned or read. I've done an informal poll among a number of teachers, including legal academics, political scientists, and historians, and I think it's a safe surmise that *The Federalist Papers*, for most students, let alone "general readers," have been reduced to the greatest hits of Numbers 10, 51, and 78. Anything beyond that is icing on the cake.<sup>28</sup>

But it does seem to me that everybody ought to read Numbers 62 and 63—both written, as it happens, by James Madison.<sup>29</sup> In Number 62, Madison calls the Senate and its equal allocation of voting power to each state an "evil."<sup>30</sup> He was right. He said, though, that the "lesser evil" of the Senate must be preferred to the far greater evil of Delaware and other small states walking from the convention and not getting a constitution at all.<sup>31</sup>

Identical logic, it should be noted, supported capitulation to the demands for protections of slavery. Gouverneur Morris made an eloquent speech denouncing the slave trade, which would be protected for twenty years under the Constitution; but he then ended up accepting it because, he, too, believed that without compromise

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26. JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* (2006).

27. Snider, *supra* note 25, at 278.

28. See Sanford Levinson, *Constructing a Modern Canon for The Federalist*, 1 J. AM. CONST. HIST. 313, 313–335 (2023), <https://jach.law.wisc.edu/levinson-constructing-a-modern-canon-for-the-federalist> [<https://perma.cc/YD3-CQHD>].

29. THE FEDERALIST NOS. 62, 63, *supra* note 18, at 376, 384 (James Madison).

30. THE FEDERALIST NO. 62, *supra* note 18, at 376 (James Madison).

31. *Id.*

the constitutional project might well be doomed.<sup>32</sup> So at least some of the “deliberation” and “choice” was carried out at the equivalent of gunpoint.<sup>33</sup> Philadelphia was not an example of the careful consideration and acceptance of ideas because of their substantive goodness. It was a rough-and-tough exercise in bargaining. The “force” that Delaware threatened, even if it was “exit” rather than the actually taking up arms, was sufficient to generate the Senate, much like threats by South Carolina regarding slavery.<sup>34</sup>

To be sure, I’m not a Founder basher. It may have made sense in 1787 to submit to the demands of Delaware and other small states like New Jersey and Connecticut (and Rhode Island if they had bothered to send a delegate to Philadelphia). If you believed that a constitution was needed to prevent a fragile United States from being attacked by countries and indigenous tribes, you, too, would have acquiesced. Is the same true regarding slavery, the Three-Fifths Compromise, the Fugitive Slave Clause, or the protection of the international slave trade until 1808?<sup>35</sup> Is it enough to note that the Constitution never formally acknowledges “property in man?”<sup>36</sup> Or must we pay attention not only to original public meaning, but also, and more importantly, the actual acts of Congress, like the Fugitive Slave Law of 1793?<sup>37</sup>

I’ve already alluded to *Federalist* 63 and its dismissal of a direct role for the people in governance.<sup>38</sup> “The true distinction between”

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32. *Notes on the Debates in the Federal Convention, July 11, 1787*, THE AVALON PROJECT, [https://avalon.law.yale.edu/18th\\_century/debates\\_711.asp](https://avalon.law.yale.edu/18th_century/debates_711.asp) [https://perma.cc/FU44-ASX9].

33. THE FEDERALIST NO. 1, *supra* note 18, at 27 (Alexander Hamilton).

34. See ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970) (explaining the power of parties to leave a negotiation).

35. U.S. CONST. art. I, §§ 2, 9; *id.* art. IV, § 2.

36. See SEAN WILENTZ, NO PROPERTY IN MAN: SLAVERY AND ANTISLAVERY AT THE NATION’S FOUNDING (2018).

37. Fugitive Slave Law of 1793, ch. 7, 1 Stat. 302, *invalidated by* U.S. CONST. amend. XIII.

38. THE FEDERALIST NO. 63, *supra* note 18, at 384–85 (James Madison).

the “democratic systems of ancient Greece and the American governments,” it says, “lies IN THE TOTAL EXCLUSION OF THE PEOPLE, IN THEIR COLLECTIVE CAPACITY, from any share” in actual governance.<sup>39</sup> The emphasis is Madison’s, not mine. For him, this exclusion was most definitely a feature to be proclaimed from the rooftops and presumably accepted by “the people” themselves.<sup>40</sup> Whatever notion of “popular sovereignty” underlies the national Constitution, the “sovereign people” are presumably envisioned as becoming what Thomas Hobbes described as a “sleeping sovereign,” left comatose after their initial act of *authorization* of a decidedly undemocratic governmental structure.<sup>41</sup> According to Bulman-Pozen and Seifter, though, *state* citizens always envisioned themselves as “stand[ing] apart from their representatives,” zealously preserving “popular self-rule”<sup>42</sup> by accepting the invitation set out in the Declaration of Independence to “alter or abolish” existing systems that were deemed inadequate to that purpose.<sup>43</sup>

But James Madison, perhaps, is just like most practicing politicians, not entirely consistent on any given issue. He changed his views over time, sometimes, perhaps, for reasons of political opportunism, other times because he was learning the bitter lessons of experience.<sup>44</sup> But what is so dismaying, with regard to the national Constitution, is that we don’t seem genuinely interested in learning the lessons of experience that Madison, like Hamilton, so eloquently invoked throughout *The Federalist*. The Amendment Clause<sup>45</sup> is itself testimony to the fact that they did not believe that they had written a perfect document in 1787 that would never be

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39. *Id.* (emphasis in original).

40. *Id.*

41. THOMAS HOBBS, DE CIVE 41 (R. Royston ed., 1651).

42. Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 COLUM. L. REV. 1855, 1878 (2023).

43. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

44. See, e.g., NOAH FELDMAN, THE THREE LIVES OF JAMES MADISON: GENIUS, PARTISAN, PRESIDENT 487 (2017).

45. U.S. CONST. art. V.



subject to continued “reflection and choice.”<sup>46</sup> Even though I am critical of the Amendment Clause for creating too many hurdles to amendment, unlike most state constitutions’ simpler processes, one should at least recognize that the Founders *did* envision the possibility of amendment.

My favorite single paragraph in all of *The Federalist* is in *Federalist* 14.<sup>47</sup> It reads:

Hearken not to the voice which petulantly tells you that the form of government recommended for your adoption is a novelty in the political world; that it has never yet had a place in the theories of the wildest projectors; that it rashly attempts what it is impossible to accomplish . . . But why is the experiment of an extended republic to be rejected, merely because it may comprise what is new? Is it not the glory of the people of America, that, whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience? . . . Had no important step been taken by the leaders of the Revolution for which a precedent could not be discovered, no government established of which an exact model did not present itself, the people of the United States might, at this moment have been numbered among the melancholy victims of misguided councils, must at best have been laboring under the weight of some of those forms which have crushed the liberties of the rest of mankind. Happily for America, happily, we trust, for the whole human race, they pursued a new and more noble course. They accomplished a revolution which has no parallel in the annals of human society. They reared the fabrics of governments which have no model on the face of the globe. They formed the design of a great Confederacy, *which it is incumbent on their successors to improve and perpetuate*.<sup>48</sup>

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46. THE FEDERALIST NO. 1, *supra* note 18, at 27 (Alexander Hamilton).

47. THE FEDERALIST NO. 14, *supra* note 18 (James Madison).

48. *Id.* at 99–100.

So, the lesson I take from both Hamilton and Madison is the importance of asking ourselves what is working well and what, sadly, is not. What sort of “evil” compromises that made sense in 1787 might not make sense today? Or what sort of entirely sensible solutions that might have made sense in 1787, such as the electoral college, might not make so much sense today?

If you look at state constitutions, you find that they are constantly being updated. In addition to the multiple state conventions that have occurred, many states allow their electorates to engage in so-called “initiatives and referenda” to do end runs around what they might accurately perceive as sclerotic legislatures committed only to maintaining an unsatisfactory—or worse—status quo. Many of my colleagues—I think, incorrectly—believe that it demonstrates what is wrong about state constitutions—that they have so many amendments and, even more particularly, that the *demos* view themselves as having a role to play in deciding what might be desirable constitutional change. There are dumb amendments, and there are good amendments. But it seems to me that one of the things state constitutions reveal is the ability of legislators, or the electorate in general, to engage in reflection and choice and to keep updating their state constitutions so they will serve their respective states better.

I mentioned my deep admiration of Nebraska’s 1934 decision to eliminate its senate and adopt a unicameral legislature. There is no reason whatsoever to believe that Nebraska has paid a cost, in terms of any important values, in rejecting bicameralism. Similarly, I thought that former Minnesota Governor Jesse Ventura, a “maverick” elected as an independent, was correct in suggesting that Minnesota would also benefit from eliminating its senate. But it continues to exist. Why? Surely, one reason is that Minnesota lacks the initiative and referendum that allowed the citizenry of Nebraska to take the decision into their own hands. It is a reality of American federalism that many states feature a truly “awakened”

(whether or not “woke”) electorate who believe that they indeed have the final say, as suggested by the Declaration of Independence, on how they wish to be governed.

We are estopped from doing that at the national level. One reason is cultural. We train our students—assuming they have not already been sufficiently socialized in secondary schools—to believe that the U.S. Constitution is super-duper special and that it is sacrilegious to suggest that it might have some grievous flaws. Alas, Madison can be quoted for this as well. In *Federalist* 49, attacking his friend Thomas Jefferson and his call for frequent conventions and reassessment of the Constitution, Madison proclaimed the importance of “veneration” and suggested that the 1787 Convention was an almost literally once-in-a-millennium occurrence, never to be repeated.<sup>49</sup> He obviously could not have known that there would be approximately 235 state constitutional conventions in the ensuing two centuries.

But, of course, even if we adopted a far more rational stance toward the Constitution, and subjected it to hard-nosed “reflection” that might suggest the necessity for making new choices to get us through the problems of the 21st century, we would come up against the problem that Article V offers so few genuine options, unlike many state constitutions. Professor Lori Ringhand, in her own comments in Austin, mentioned in passing the importance of initiatives and referenda.<sup>50</sup> Eighteen states allow for initiatives and referenda as mechanisms of achieving reform of their constitutions themselves.<sup>51</sup> So I think this is something extremely important to learn from American state constitutions. We should ask and vigorously debate whether Madison was correct in proclaiming that we

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49. THE FEDERALIST NO. 49, *supra* note 18, at 314 (James Madison).

50. Federalist Society, *Panel III: Unique Aspects of American Democracy [2023 Student Symposium]*, YOUTUBE, at 29:55 (Mar. 4, 2023), <https://www.youtube.com/watch?v=g4TIJLtaTao> [<https://perma.cc/2E9C-BA7M>].

51. *Initiated Constitutional Amendment*, BALLOTPEDIA, [https://ballotpedia.org/Initiated\\_constitutional\\_amendment](https://ballotpedia.org/Initiated_constitutional_amendment) [<https://perma.cc/9YPT-UZ7E>].

are well served by an exclusive reliance on representative democracy.<sup>52</sup> Might we not in fact be better off with some mix of representative democracy coupled with the ability of the *demos* to do end runs around a sclerotic legislature, a gridlocked legislature, a legislature that is plausibly viewed, wherever you are on the ideological spectrum, as simply unable to rise to meet the challenges of the day? While many states offer ways of responding to that, we do not have them at the national level in the United States.

It is time to conclude, but not before offering a perhaps surprising shout-out to Texas Governor Greg Abbott. In 2016, Governor Abbott submitted what he called the Texas Plan, accompanied by a ninety-page brief, on why we need a new constitutional convention.<sup>53</sup> And he proposed nine significant constitutional amendments.<sup>54</sup> Not surprisingly to anyone who knows my own political views, I do not agree with all of Governor Abbott's proposals. I probably, at the end of the day, do not agree with any of them. But some of them I certainly do agree are worth serious discussion. I am open minded on them. But what I really applaud Governor Abbott for doing is suggesting that we really should think about the possibility of holding a new constitutional convention and debating how to revise the Constitution in light of contemporary needs. He might begin his ninety pages by affirming the grandeur of the original document, but for me the takeaway is that he affirms the desirability of engaging in our own "reflection and choice."<sup>55</sup> I agree with him. I strongly support a new constitutional convention, and I have a variety of my own proposals on that. For whatever reasons, Governor Abbott has not returned to his attempt to be a modern "re-founder," perhaps because he received no genuine public

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52. THE FEDERALIST NO. 63, *supra* note 18 (James Madison).

53. OFF. TEX. GOVERNOR, RESTORING THE RULE OF LAW WITH STATES LEADING THE WAY (2016), [https://gov.texas.gov/uploads/files/press/Restoring\\_The\\_Rule\\_Of\\_Law\\_01082016.pdf](https://gov.texas.gov/uploads/files/press/Restoring_The_Rule_Of_Law_01082016.pdf) [<https://perma.cc/K59W-EJU6>].

54. *Id.* at 4.

55. THE FEDERALIST NO. 1, *supra* note 18, at 27 (Alexander Hamilton).

support from his fellow Republicans. Democrats, I believe unwisely, have generally adopted the policy of circling the wagons and proclaiming the wonderfulness of the Constitution instead of conceding that it has many aspects that may in fact contribute to the widespread perception of a dysfunctional and even illegitimate national government.

A final point: One of the things I would love to see a constitutional convention do is to repeal the 1842 Congressional Act that requires single-member districts in the House of Representatives.<sup>56</sup> I think that provision is at least as important as gerrymandering in destroying our democracy. Note that it's "merely" a congressional statute. It could be repealed, but all of us know it will not because incumbents are not going to vote away that which has placed them in political power. Just as the members of the Minnesota Senate were not about to vote themselves out of their own jobs or sinecures, so it is impossible, practically speaking, to imagine members of the House of Representatives, whatever their political party, deciding that, for example, the House in all states with more than, say, five representatives should be elected from multi-member districts with a process of proportional representation. Texas could easily be divided into six districts of six or seven representatives each, and proportional representation would assure that some Republicans would be elected from the largely blue large cities and some Democrats (or even Libertarians) elected from other parts of the state.

Unfortunately, only a national-level constitutional convention could break what is sometimes called the "two-party duopoly" over the House. However, if the United States nationally were like California (or many other states), I could stand at a street corner and ask you to sign a petition to repeal the 1842 Act. Our entire constitutional order might be transformed inasmuch as ordinary people might be taught, in effect, that they have some genuine

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56. Apportionment Act of 1842, ch. 47, § 2, 5 Stat. 491 (current version at 2 U.S.C. § 2a).

capacity to engage in “reflection and choice” about governance, quite independent of the particular choices they might make. Perhaps they would decide that the status quo is in fact preferable to changes that I (or Governor Abbott) might prefer. That, at least, might be said to involve genuine “consent by the governed” in a way that feeling trapped in what I sometimes call the “iron cage” of the 1787 Constitution (including the procedures of Article V) does not.

So these are my views on why one ought not to focus entirely on the U.S. Constitution as the instantiation of American democracy, whether one is a member of the Federalist Society or, as I am, a supporter of the American Constitution Society. All of us have a stake in constructing a constitution for the twenty-first century that might leave us anything other than sullen or hopeless about the capacity of the national government to respond to the challenges facing us. It is long past time for *all* of us to engage with one another about what sorts of constitutional reforms might be truly conducive to what the Declaration of Independence calls our collective “pursuit of happiness.” We might even settle for establishing a governmental system that elicits the support and confidence of a majority of Americans. That would be strikingly different from the present moment (October 2023), when the House of Representatives is without a Speaker and totally unable to function and when a hefty super-majority of the country believes that it is headed in the wrong direction.<sup>57</sup> Believing that venerating the 1787 Constitution, even as amended, will provide a cure, however understandable in terms of the role of the Constitution as American myth and symbol, is decidedly not the path to a cure for our deep national ills.

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57. See *Direction of Country Polls*, REAL CLEAR POLITICS, [https://www.realclearpolitics.com/epolls/other/direction\\_of\\_country-902.html](https://www.realclearpolitics.com/epolls/other/direction_of_country-902.html) [<https://perma.cc/W6Y6-EQRM>].



## WHAT DEMOCRACY IS NOT

DANIEL H. LOWENSTEIN\*

Democracy is what philosophers call an “essentially contested concept.” An essentially contested concept is a concept on whose meaning people agree in a broad and even nebulous way. When a political concept, in particular, is widely or universally thought of as desirable—such as, in today’s world, democracy, freedom, or equality—proponents of particular governing arrangements struggle to define the concept—democracy, for example—as including their favored arrangements and excluding competing arrangements. Thus, differences that seem on their surface to concern the meaning of the word “democracy” in most cases are actually struggles to advance particular and controversial political ideas. Proponents of particular political programs commonly put forth—or, more often, tacitly assume—their own specific definitions, which is why “democracy” became an essentially contested concept once democracy became a label that commanded nearly universal favor.<sup>1</sup>

In the classic conception, democracy is rule by “the people” or rule by “the many,” as opposed to rule by one (monarchy or tyranny) and rule by the few (aristocracy or oligarchy).<sup>2</sup> That definition is sufficiently broad and nebulous that it can stand more or less

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1. The idea of an essentially contested concept was first expounded in W.B. Gallie, *Essentially Contested Concepts*, 56 *PROC. OF THE ARISTOTELIAN SOC’Y* 167, 168–69 (1956). See also WILLIAM E. CONNOLLY, *THE TERMS OF POLITICAL DISCOURSE* 10–11, 35–36, 40 (1974) (applying Gallie’s idea to politics and giving a more formal and complete definition of “essentially contested concept”).

2. See, e.g., ARISTOTLE, *POLITICS* bk. III, at 77, 79–81 (B. Jowett trans., Oxford University Press ed. 1855).



unanimous agreement. It leaves open all questions about *how* a government can be or should be organized to effectuate the rule of the many, while also conforming to other considerations dictated by principle or prudence.

One particular set of governing arrangements, sometimes known as “plebiscitary democracy,” calls for decisions to be made directly according to the preference of the majority. Nothing in classical democratic theory requires simple majority rule.<sup>3</sup> It does fit within the classical definition, though by no means perfectly, but the same is true of many other conceptions of democracy, including the conception established by the United States Constitution.

By definition, there are more people in a majority than in a minority. But if a group of 1,001 people divides 501 to 500, it is a strain to call the former group “the many” and to call the latter “the few.” The 500 are among “the people,” who are supposed to rule according to the classical definition, as much as the 501. That example also assumes there are only two choices. If more than two possible courses of action are possible, there may be no stable majority. The eighteenth-century French writer Condorcet demonstrated that if there are three possible choices, *a*, *b*, and *c*, it is both possible and not at all uncommon that in a straight-up vote, *a* defeats *b*, *b* defeats *c*, and *c* defeats *a*.<sup>4</sup> Even if there are only two choices, majorities often fail to exist if some people abstain. If, as the plebiscitary definition of democracy implicitly assumes, only a majority can be “the many,” then reliance on pluralities necessarily means control by “the few.”

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3. See, e.g., ARISTOTLE, *supra* note 2, bk. IV, at 112 (“It must not be assumed . . . that democracy is simply that form of government in which the greater number are sovereign, for in oligarchies, and indeed in every government, the majority rules . . . we should rather say that democracy is the form of government in which the free are rulers, and oligarchy in which the rich; it is only an accident that the free are the many and the rich are the few.”).

4. KENNETH ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 92, 93 n.11, 95 (1951). There, Arrow famously elaborates on cyclical majorities, which originate in MARQUIS DE CONDORCET, *ESSAI SUR L'APPLICATION DE L'ANALYSE A LA PROBABILITE DES DECISIONS RENDUES A LA PLURALITE DES VOIX*, lxi (1785). For a summary and translation of the relevant passage of Condorcet's *Essai*, see Janet Barnett, *The French Connection: Borda, Condorcet, and the Mathematics of Voting Theory*, 1 GEN. EDUC. AND LIBERAL STUD. 1, 18 (2021).

Despite these concerns, a simple majority vote is often the most sensible way for a group to make decisions, particularly when a one-time decision must be made and the stakes are not too high for anyone. That simple majority votes should play a part in a complex democratic system is also sensible. For example, majority voting in the House of Representatives is a non-controversial feature of the American system. However, as the exclusive or predominant governing arrangement in a nation or subdivision, majoritarian democracy is subject to numerous serious objections, of which I will mention two—one specific and one general.

The specific objection is that if the make-up of a society enables a persistent majority to prevail over a persistent minority, then majority-rule permits tyrannical domination of the minority by the majority.<sup>5</sup> The general objection is that the plebiscitary idea is much too thin and abstract, because it places a simple arithmetical formula over all considerations of practical government. On a given question, there are likely to be other matters of principle or prudence not directly related to the question of rule by the many, and plebiscitary democracy makes no allowance for such considerations.

These objections and many others suggest that sole or even heavy reliance on direct majority rule is likely to have bad consequences. In addition, there are many reasons to doubt that plebiscitary government of a nation or large political subdivision is actually possible, even if it is desired. Again, I will mention only two.

First, the study of democracy in practice suggests that no matter how any large organization is structured, policies and actions will be determined by a small group of active participants. In an influential book, Robert Michels found this to be the case in European trade unions and political parties designed expressly to ensure actual control by the majority of the membership. Michels' empirical research showed that such organizations ended up in practice to be

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5. See, e.g., JOHN STUART MILL, *ON LIBERTY* 13 (2d ed. 1859) ("Like other tyrannies, the tyranny of the majority was at first, and is still vulgarly, held in dread[.]").

oligarchies. He referred to his finding as the “iron law of oligarchy.”<sup>6</sup>

Second, the well-known free-rider problem suggests that in political conflict in democracies, causes supported by small numbers of people often have the advantage over those with large numbers of supporters, creating a tendency opposite to majority rule. To keep matters simple, suppose in a conflict I am one of five people who stand to benefit from and favor outcome *A*, while the other 10,000 people in the constituency stand to benefit from and favor outcome *B*, and let us also assume that the outcome will be heavily influenced by which side can raise a million dollars. Assuming I and my four allies can each afford to contribute \$200,000, it is very likely that each of us will do so, for two reasons. First, I can see that my own \$200,000 by itself will make a big difference. Second, my giving or not giving will be entirely visible to the other four. Each of us can recognize that if any one of us declines to give, the likely consequence is that all of us will decline to give. Now suppose I am one of the 10,000 who prefer *B*. We will meet the goal if each of us contributes \$100. But most likely, very few of us will give. I will see, first, that my hundred dollars in itself is meaningless, and second, that because I am only one of 10,000, my individual action is very unlikely to influence what others do. True, I know that I would be better off giving my hundred dollars and having everybody else do so, but it is the second half of that proposition that makes me better off, and my control is limited to the first half. A few worthy souls will probably contribute \$100 each whether out of naiveté or a high sense of principle, but most of us will take a “free ride.” It follows that even if the formal institutions seem to favor majority rule, in practice decisions will often be counter to what the majority favors.

Despite these objections and others, the familiar use of majority voting in many daily situations gives simple majoritarianism at least a superficial appeal. In several contemporary debates on important subjects such as the electoral college, the composition of the

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6. ROBERT MICHELS, *POLITICAL PARTIES: A SOCIOLOGICAL STUDY OF THE OLIGARCHICAL TENDENCIES OF MODERN DEMOCRACY* 224–35 (Eden Paul & Cedar Paul trans., Batoche Books 2001) (1911).

United States Senate, redistricting, and judicial review, proponents of eliminating or modifying these institutions claim that the proponents' particular views—for example, replacement of the electoral college by a national popular vote or elimination of the Senate—are required by “democracy,” by which they mean plebiscitary democracy.

By taking this posture, they seek to place their opponents on the defensive, making them argue that other considerations supporting these opponents' own views are so strong as to justify seeming departures from democracy. Unwisely, opponents of plebiscitary positions in such debates tend tacitly to accept that starting point.<sup>7</sup>

Contrary to this tacit assumption that all too often underlies current political discourse, neither the United States nor other successful democracies are based predominantly on simple majority rule. The case for flexible application of the classical definition of democracy is made eloquently and persuasively in *The Federalist* by Hamilton, Madison, and Jay in their explanation of separation of powers and all the many other *non*-majoritarian provisions of the Constitution.

It is true that Madison's definition of democracy, set forth in *Federalist* 10, is close to though not identical with the modern concept of plebiscitary democracy. Madison distinguished between republics and democracies. As he understood them, he opposed the latter and supported the former. Madison's use of these terms does not support the tacit assumption I am challenging that only plebiscitary democracy is real democracy. On the contrary, Madison had in mind a concept similar to the classical definition of democracy when he championed the vague concept of the “Republican principle.”<sup>8</sup> He did not try to define it precisely but rather characterized it as overall rule by the people.<sup>9</sup> Within a generation or so,

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7. See, e.g., Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434, 438–39, 472 (1998) (detailing the drawbacks of plebiscitary democracy).

8. Robert A. Dahl, *James Madison: Republican or Democrat?*, 3 PERSPS. ON POLS. 439, 443 (2005).

9. See also ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 1–2 (Henry Reeve, trans., London, Saunders & Otley 1835) (defining democracy as a societal system in which “[t]he people is therefore the real directing power”).

American usage decisively adopted “democracy” to refer to governments like the one the Constitution had created.<sup>10</sup> In arguing for the classical definition, I advocate for the concept that Madison favored, though he did not call it “democracy.”

As for other successful democracies, they are if anything further from the plebiscitary form than the United States. Consider, for example, plebiscitary-based opposition to the electoral college. In fact, the electoral college is far closer to a majority (or at least plurality) choice than the parliamentary system that prevails in most other successful democracies.

My purpose is to make one simple point: the assumption that only plebiscitary forms are truly democratic is fallacious. It is an assumption that should be openly and directly contested by those supporting non-plebiscitary positions on the policy questions I have mentioned and others. Pointing out that the electoral college, the Senate, and judicial review are every bit as consistent with the idea of “rule by the people” as their elimination would be does not prove that their preservation is desirable. But it does force the debate to be conducted as it should be, on the specific pros and cons of different arrangements, and not on the false ground of which side in the debate is more “democratic.”

In a famous essay, Isaiah Berlin refers to an ancient adage that “the fox knows many things, but the hedgehog knows one big thing.”<sup>11</sup> Berlin interprets this adage to mark a deep difference between two kinds of thinkers: “[T]here exists a great chasm between those, on one side, who relate everything to a single central vision . . . in terms of which alone all that they are and say has significance—and on the other side, those who pursue many ends . . . connected, if at all, only in some *de facto* way.”<sup>12</sup> In the debates over democratic institutions, the plebiscitary majoritarians are

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10. Yascha Mounk, *American Is Not a Democracy*, THE ATLANTIC (Mar. 15, 2018), <https://www.theatlantic.com/magazine/archive/2018/03/america-is-not-a-democracy/550931/> [https://perma.cc/62L3-TR7P].

11. ISAIAH BERLIN, THE HEDGEHOG AND THE FOX: AN ESSAY ON TOLSTOY’S VIEW OF HISTORY 91 (Henry Hardy ed., 2d ed. 2013) (1953).

12. *Id.* at 2.

hedgehogs and those who incline more toward Madison's "Republican principle" are the foxes. I stand with the foxes.



## HOW FEDERALISM PROMOTES UNITY THROUGH DIVERSITY

ILYA SOMIN\*

Does federalism promote unity? In one obvious sense, the answer is surely “no.” Federalism necessarily reduces unity because it leads to divergence on at least some policy areas. If there were no significant policy differences between the various state and local governments, then there would be little point in having federalism in the first place.

But the diversity federalism creates can also help promote unity, by reducing the conflict that arises when the federal government has the power to impose one-size-fits-all policies throughout the country. Decentralizing authority can mitigate that conflict. It can also empower people to make better choices by “voting with their feet.” As a result, more people can live under policies that they prefer, and the choices they make are likely to be better-informed. There are some limitations to the idea that federalism can promote unity and better decision-making through diversity. But it has tremendous value, nonetheless.

First things first. Federalism *does* have a disunifying element. States pursue widely divergent policies on issues like education, economic regulation, antidiscrimination law,

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abortion, environmental concerns, and much else. A society where that happens is less unified—in the sense of having uniform national policies—than one where more issues are handled by the central government.

But, when different jurisdictions have divergent policies, that very diversity can help promote unity in the sense of reducing political conflict. That is because unity is harder to achieve if you have to agree on a wider range of issues. Obviously, in the present era of American politics, we have severe polarization between the left and the right, Democrats and Republicans.<sup>1</sup> Some have even compared the relationship between the red and the blue states to a “failing marriage.”<sup>2</sup> The obvious remedy for a failing marriage is divorce, in this case through secession or a break-up of the union.<sup>3</sup> But a less drastic, more realistic remedy is for the troubled couple to do fewer things together and spend more time apart.

One reason why our polarization has become so bad is that the federal government is so powerful that there is a fear that if the other side takes control of federal institutions, they can thereby also control vast areas of our lives and many aspects of society. Today, federal spending accounts for some 25% of GDP,<sup>4</sup> and federal regulation reaches almost every area of

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1. For overviews, see, for example, EZRA KLEIN, *WHY WE’RE POLARIZED* (2020); NOLAN MCCARTY, *POLARIZATION: WHAT EVERYONE NEEDS TO KNOW* (2019).

2. See, e.g., Megan McArdle, *Can This Political Union Be Saved?*, BLOOMBERG (Dec. 30, 2016), <https://www.bloomberg.com/view/articles/2016-12-30/can-this-political-union-be-saved> [<https://perma.cc/VJA2-QW73>].

3. For a defense of this approach, see CHRISTOPHER ZURN, *SPLITSVILLE USA: A DEMOCRATIC ARGUMENT FOR BREAKING UP THE UNITED STATES* (2023). For my critique of it, see Ilya Somin, Book Review, PUBLIUS: J. FEDERALISM (forthcoming 2024), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4657377](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4657377) [<https://perma.cc/GGB3-TK77>] (reviewing CHRISTOPHER F. ZURN, *SPLITSVILLE, USA: A DEMOCRATIC ARGUMENT FOR BREAKING UP THE UNITED STATES* (2023)).

4. *Federal Net Outlays as Percent of Gross Domestic Product*, FED. RESERVE BANK OF ST. LOUIS, <https://fred.stlouisfed.org/series/FYONGDA188S> [<https://perma.cc/4Z22-42EF>].

human activity, including even such things as the faucets, dishwashers, and other household appliances in our homes.<sup>5</sup>

If the feds had less power and controlled fewer aspects of our lives, the danger of domination by one party over the other would be less, and it would be easier to reconcile ourselves to having the “wrong” party in control of the White House or Congress. As an extra bonus, it might reduce voters’ tolerance for politicians—most obviously, Donald Trump—who deny election results when they lose, and attempt to retain power by force and fraud. It is psychologically easier to admit that your party lost if the consequences of defeat are less drastic.

Leaving more issues to the state or local level, or to the private sector, can help accomplish this. It reduces the need for nationwide agreement or consensus on issues. It also reduces the opportunities for a narrow percent to impose their will on the minority by using the power of the federal government.<sup>6</sup>

To return to the marriage analogy: Greater decentralization of power can help the troubled couple take some time apart without resorting to the extreme remedy of divorce. And more of the time they spend together can be devoted to issues they agree on, or at least don’t differ on as fundamentally as they do on some other things. There are some functions of the federal government on which there is considerable agreement, such as the need for an effective national defense or for a federal role in building some types of national infrastructure. The more we can confine federal authority to these relatively unifying issues, the lower the potential for conflict.

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5. See, e.g., Christian Britschgi, *How Federal Energy Regulations Make Dishwashers Worse*, REASON (Nov. 2022), <https://reason.com/2022/10/17/use-that-dishwasher/> [<https://perma.cc/VT9L-8LVR>].

6. For a more detailed discussion of how decentralization can reduce conflict, see Ilya Somin, *Voting with Our Feet*, NAT’L AFFS. (Sept. 20, 2021), <https://nationalaffairs.com/publications/detail/voting-with-our-feet> [<https://perma.cc/F6CG-PXRM>].

Even purely static federalism, where people rarely or never move between jurisdictions, can help mitigate conflict. It can achieve this to some extent because there is variation in policy based on the preferences of local majorities. As a result, people have less reason to fear the federal government, and more can live under policies they prefer.

But enabling people to vote with their feet by moving between different states and localities can empower them even more. If you dislike the policies of your state, but foot voting is relatively easy, you have the option of choosing from 49 others (plus several territories and Washington, DC), some of which might be more congenial. To the extent that power is decentralized to local governments, you might potentially have thousands of options,<sup>7</sup> and moving costs will often be lower than is the case with interstate moves. Moving from one locality to another in the same region is likely easier and cheaper than moving farther away to another state. The range of alternatives for foot voters is far wider than what you get by choosing among the Democrats and Republicans at the federal level.

While moving costs can make it difficult for some to take advantage of these opportunities, much can be done to mitigate that problem, including decentralization to the local level and to the private sector. Such devolution can greatly reduce the cost of mobility.<sup>8</sup>

Political decentralization combined with foot voting obviously cannot eliminate all sources of conflict. Among other things, many people may care about the policies in other

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7. There are some 89,000 local government jurisdictions in the United States. See ILYA SOMIN, *FREE TO MOVE: FOOT VOTING, MIGRATION, AND POLITICAL FREEDOM* 45 (Oxford Univ. Press rev. ed. 2022).

8. For more detailed discussion of how to address moving cost issues in foot voting, see *id.* at 49–53.

states for moral or ideological reasons, even if those policies have little effect on themselves and their families. For example, many pro-choice and pro-life advocates obviously care about abortion policy in states other than their own. But decentralization and foot voting can partly mitigate even these kinds of conflicts, because they can eliminate the chance that one's opponents can impose their preferences nationwide in one fell swoop. Moreover, many women in states with abortion restrictions can still access abortion by traveling to pro-choice blue states to have the procedure done.<sup>9</sup> This is itself a kind of foot voting, albeit less far-reaching (and also less difficult) than moving to another state permanently.<sup>10</sup>

In addition to reducing conflict and giving people a wider range of options, foot voting in a federal system has two other important advantages over conventional ballot-box voting at the federal level. One is the greater odds of being able to make a decisive choice. When you vote at the ballot box, the chance that your vote will make a difference to the outcome is infinitesimally small. In a presidential election, it's about 1 in 60 million, though varying somewhat by state.<sup>11</sup> Even in a state or local election, it is still very low.

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9. Early data suggests that such trips have offset a large fraction, perhaps as much as 75%, of the decline in abortions in states that have enacted restrictive regulations since the Supreme Court overturned the right to abortion in *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228 (2022). See Amelia Thomson-DeVeaux and Humera Lodhi, *The Dobbs Divide*, FIVETHIRTYEIGHT (June 15, 2023), <https://fivethirtyeight.com/features/abortion-trend-after-dobbs/> [<https://perma.cc/YM84-SS6H>] (noting that, since *Dobbs*, the number of abortions has gone down by about 92,000 in states with newly instituted or enforced restrictions, but gone up by about 69,000 in pro-choice states).

10. On this point, see Ilya Somin, *Abortion and Foot Voting in a Post-Dobbs America*, AUSTRALIAN OUTLOOK (Mar. 24, 2023), <https://www.internationalaffairs.org.au/australianoutlook/abortion-and-foot-voting-in-a-post-dobbs-america/> [<https://perma.cc/9PHP-VDBD>] (explaining how traveling out-of-state to get an abortion can be a kind of relatively low-cost foot voting).

11. For discussion of differing estimates, see ILYA SOMIN, DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER 75–76 & n.7 (Stanford Univ. Press rev. ed. 2016).

It is hard to argue that people have meaningful political choice when the odds of their decision making a difference to policy outcomes are so small. We certainly would not say you have meaningful freedom of speech if you have only a 1 in 60 million chance of determining what views you will express, or meaningful freedom of religion if you have only a 1 in 60 million chance of determining what faith you wish to practice (or if you want to practice one at all). The same goes for political choice: a 1 in 60 million chance of deciding which policies you wish to live under is barely a meaningful choice at all.<sup>12</sup>

But if you can vote with your feet, that's a choice that really will make a big difference in terms of the policies you live under. You have a high chance of making a difference if you can move from one state or locality to another.

That circumstance leads to the second major advantage of foot voting over ballot box voting: It creates much stronger incentives to make an informed choice. Most ballot box voters are what economists call "rationally ignorant."<sup>13</sup> They have very little incentive to learn about the issues at stake because there is so little chance it'll make a difference.

As a result, extensive evidence, including some that I have gathered in my own work,<sup>14</sup> shows that most voters know very little about what they're voting on. Only about a third of Americans can even name the three branches of our federal government—the executive, the legislative, and the judicial—and they know even less about the details of policy.<sup>15</sup>

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12. See SOMIN, *supra* note 7, at 16–44 (discussing the ramifications of inability to make a decisive choice for political freedom).

13. The idea of rational ignorance was first developed by ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 244–46 (1957). For an overview of the concept and its implications, see Ilya Somin, *Rational Ignorance*, in ROUTLEDGE INTERNATIONAL HANDBOOK OF IGNORANCE STUDIES 274 (Matthias Gross & Linsey J. McGoey eds., 2nd ed. 2022).

14. See SOMIN, *supra* note 11, at 17–46.

15. *Id.*

When people vote with their feet, they get better information. They seek out more of it.<sup>16</sup> They also do a better job of evaluating what they learn.<sup>17</sup> If you are like most people, you probably spent more time and effort seeking out information the last time you decided what television set to buy than the last time you decided who to back for president or governor or any other political office.

That is not because the TV is more complicated or deals with more important issues than the president does. It's that you know that the TV you pick is probably the one that will actually end up in your living room. But when you turn it on and you have the misfortune of seeing the president or some other powerful government official, your chance of affecting who that is or what policies they will pursue is infinitesimally small. Therefore, you most likely don't spend more than minimal time on that.

Empowering people to vote with their feet can further reduce conflict in a federal system, as well. It enables still more people to be in a situation where they at least generally like the policies that they're living under, and therefore, they have less need to fear their fellow citizens, including even those citizens who are on the other side politically.

There are some who worry that if we have too much foot voting, it will lead to a "big sort."<sup>18</sup> All the conservatives end up in red states, all the liberals in blue states, and we'll be even more polarized and even more divided. In that event, political conflict might actually increase.

Such fears are overblown because people's foot voting choices often do not track crude left-right differences. It turns

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16. *Id.* at 138–43.

17. *Id.* at 143–45.

18. See BILL BISHOP, *THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART* 8 (2008).

out, for instance, people like to foot-vote for places with relatively more job opportunities and lower taxes, which usually means red areas.<sup>19</sup> But they also like places that are more diverse and more tolerant, which are more likely to be blue. And if you look at a state like Texas, which is one of the states that has gained the most in migration from other states in recent years, the people moving to Texas during that time are about equally divided between Democrats and Republicans.<sup>20</sup> So it is simply not true that foot voting will necessarily result in all Republicans going to one place, all the Democrats to another, or anything close to it.

I admit the vision I have laid out does have some constraints and limitations. One critical one is that we still need to block states and localities from adopting policies that make it difficult or impossible for people to move.<sup>21</sup> The biggest and most significant of these is exclusionary zoning, which makes it difficult in many places or even impossible to build new housing in response to demand.<sup>22</sup> There's also the problem of immobile assets, such as property in land. We need centralized constitutional protection for them because they can't be moved out of jurisdictions that might oppress these kinds of interest.<sup>23</sup>

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19. This paragraph summarizes my more detailed discussion of this issue in SOMIN, *FREE TO MOVE*, *supra* note 7, at 162–64. See also SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE*, *supra* note 11, at 172–76.

20. Ilya Somin, *Who's Voting with their Feet for Texas and Why*, REASON (Dec. 21, 2021), <https://reason.com/volokh/2021/12/21/whos-voting-with-their-feet-for-texas-and-why/> [https://perma.cc/GQ8A-CPYH]; Tom Foster, *The Newest Texans Are Not Who You Think They Are*, TEX. MONTHLY (Dec. 2021), <https://www.texasmonthly.com/news-politics/newest-texans-who-are-they/> [https://perma.cc/X588-7L4S].

21. For a more detailed discussion of this issue, see SOMIN, *supra* note 7, at 152–64.

22. See *id.* at 52–53.

23. I have covered this issue in detail in Ilya Somin, *Federalism and Property Rights*, 2011 U. CHI. LEGAL F. 53 (2011) (Symposium on Governance and Power).

Federal enforcement of certain kinds of individual rights can facilitate both foot voting between states and foot voting in the private sector between private institutions.<sup>24</sup> The latter can sometimes be even more effective than foot voting between states because people often do not even have to physically move.<sup>25</sup> If, for instance, there is a school choice program where you can send your kids to either public or private schools as you wish, then you have much wider foot-voting options without even having to physically move to another jurisdiction.

Centralized enforcement of some types of individual rights can facilitate that kind of foot voting in various ways. For example, enforcement of freedom of religion and parental rights can empower people to vote with their feet for their preferred religious institutions, schools,<sup>26</sup> and child-raising arrangements. Judicial protection of constitutional property rights can facilitate freedom of movement and foot voting by enabling the construction of new housing and blocking the use of eminent domain to expel people from the communities where they wish to live.<sup>27</sup>

I also admit that foot voting is not the only consideration that should be a factor when we decide how centralized our polity should be, and which powers should be in the hands of the federal government as opposed to states or localities. Other factors are relevant as well. For example, there may be some issues which are so large-scale that they can only be

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24. For an overview of how federal judicial enforcement of individual rights can facilitate various types of foot voting, see Ilya Somin, *How Judicial Review Can Help Empower People to Vote with their Feet*, 29 GEO. MASON L. REV. 509 (2022) (Symposium on “Does the Will of the People Exist?”).

25. See SOMIN, *supra* note 7, at 81–90 (discussing this issue in more detail).

26. Cf. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (holding that parents have a right to send their children to private school).

27. See Somin, *supra* note 24, at 525–28.



effectively dealt with by the federal government or even only by international agreement. Climate change is an obvious example of the latter.

But the vast majority of political issues are not like that. If you believe that countries like Denmark, Switzerland or New Zealand can have their own health care policies, their own pension policies, their own education policies, and so forth, then the same is true of American states and, in some cases, also American cities, which are roughly the same size or even larger than these small countries. Most of the issues on our political agenda are not so large-scale that only the federal government can effectively deal with them.

We can decentralize a lot to the local or state level and therefore achieve greater unity through diversity and empower people to vote with their feet. And in some cases, we can empower them even further by devolving all the way to the level of the private sector where there is even more room for competition and choice. Federalism combined with foot voting cannot solve all our political problems. But it can reduce the incidence of dangerous conflict, while simultaneously enabling us to make better and more empowering choices about the policies we wish to live under.

# THE VALUE OF DISSENT

THE HON. PATRICK J. BUMATAY\*

## INTRODUCTION

It is a privilege to deliver this inaugural Spencer Abraham Address, which is named in honor of Secretary Abraham. Secretary Abraham served at the highest levels of American government, both as a United States Senator from Michigan and later as the Secretary of Energy under President George W. Bush.<sup>1</sup> But to Harvard Federalist Society members, we know him best as the “Founding Father” of the *Harvard Journal of Law & Public Policy*.<sup>2</sup> I proudly served as the Articles Editor for the JLPP.<sup>3</sup> Since its founding in 1978, the JLPP has been a clearinghouse for innovative and consequential scholarship. So thank you, Secretary Abraham, for your service to the country and to the Federalist Society.

For my address, I will discuss the value of dissent—a topic that has proven timely considering recent events at other prominent law

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\* Judge, United States Court of Appeals for the Ninth Circuit. These remarks were delivered during the Harvard Federalist Society Alumni Banquet on April 1, 2023, at the Sheraton Commander Hotel in Cambridge, Massachusetts. With thanks to Steven Burnett.

1. *Secretary of Energy Spencer Abraham*, GEORGE W. BUSH WHITE HOUSE ARCHIVES, <https://georgewbush-whitehouse.archives.gov/government/abraham-bio.html> [<https://perma.cc/UH6E-CEFF>] (last visited Sept. 21, 2023).

2. *About Harvard JLPP*, HARV. J.L. & PUB. POL’Y, <https://journals.law.harvard.edu/jlpp/about/> [<https://perma.cc/MM4F-EFYA>] (last visited Sept. 21, 2023).

3. PATRICK BUMATAY, S. COMM. ON THE JUDICIARY, QUESTIONNAIRE FOR JUDICIAL NOMINEES 4 (2019).

schools around the country. In particular, I want to discuss the role that judicial dissent plays in our constitutional system—how that role has developed since the Founding, the various functions it serves, and what it reflects about our society.

In my relatively short time on the bench, I’ve authored more than 50 dissents.<sup>4</sup> At times, I have asked myself—is my writing separately so often a good thing? Does it help shape the law? Or am I contributing to the division we see all too often today? To answer these questions, I looked at the history of dissenting opinions.

First, I will start with the English tradition. Second, I will trace its emergence in American law. Third, I will look at dissenting opinions in the modern Supreme Court. Along the way, I highlight some noteworthy Supreme Court dissents throughout history. After marshaling through this history, I will then address common arguments for and against vigorous dissents. In the end, I have come down on the side that respectful dissent opens important dialogue, inspires others, and strengthens our constitutional system.

## I. HISTORY

### *A. Seriatim Opinions in the British Tradition*

To understand our modern practice of dissenting opinions, we need to start with the English legal tradition. An important precursor to our Supreme Court was an English court called “The Court of King’s Bench”—a common law court dating back to the 12th century.<sup>5</sup> The Court of King’s Bench—always staffed with multiple judges—delivered its decisions orally and *seriatim*, Latin for “in

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4. An updated list of dissents is on file with the author.

5. MELVIN I. UROFSKY, *DISSENT AND THE SUPREME COURT: ITS ROLE IN THE COURT’S HISTORY AND THE NATION’S CONSTITUTIONAL DIALOGUE* 38 (2015).

series.”<sup>6</sup> In other words, the judges would take turns delivering their individual opinions orally in each case. These *seriatim* opinions created great complexity in the law, requiring a counting of “for” and “against” votes to determine the outcome of a case.<sup>7</sup> And you had to look to the vote count on the winning side to determine which line of reasoning prevailed and became precedent. Unanimity in judicial decisions then was not yet a common feature in our early legal tradition.

Further complicating matters, English courts didn’t publish official case reports until the 18<sup>th</sup> century.<sup>8</sup> Before then, lawyers sought, “to the best of their ability,” to record in writing the oral pronouncements of judges at trial and relay this as precedent for other lawyers.<sup>9</sup> According to one source, the scribes were actually law students, and their legal education consisted of recording the *seriatim* opinions.<sup>10</sup> If you think Westlaw searches are difficult, just imagine conducting research using other students’ handwritten notes!

Even after the appearance of official reporters, deciphering precedent remained an arduous task. The result was a general lack of clarity in the law.<sup>11</sup> It was not until 1756, while many of our Founding Fathers were studying law, that the new Lord Chief Justice of the King’s Court, Lord Mansfield, brought some order to the

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6. M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283, 292.

7. *Id.* at 298–99.

8. *Id.* at 293; UROFSKY, *supra* note 5, at 39.

9. Henderson, *supra* note 6, at 292.

10. M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent* 8 n.35 (John M. Olin Program in Law and Economics, Working Paper No. 363, 2007), [https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1217&context=law\\_and\\_economics](https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1217&context=law_and_economics) [https://perma.cc/X5G9-W3YA].

11. UROFSKY, *supra* note 5, at 39.

chaos.<sup>12</sup> Lord Mansfield sought to create a more consistent and reliable body of merchant law for the growing commercial classes, which had amassed considerable wealth during the expansion of the British Empire.<sup>13</sup> Mansfield's most important contribution was the replacement of *seriatim* opinions with one unified "opinion of the court." This reform allowed the justices to deliberate privately and reach a consensus, both on the overall outcome of a case and on the proper reasoning to get there. The decision was then delivered as the *unanimous* and *anonymous* "opinion of the court."<sup>14</sup> This model was profoundly successful and would later be emulated by other courts around the world—including here across the Atlantic.<sup>15</sup>

*B. The Early Supreme Court: The John Jay and Oliver Ellsworth Courts*

This was the world of law that America's Founding generation grew up in. Both *seriatim* decisions and unanimous "opinions of the court" had powerful supporters in early American society.<sup>16</sup> When Congress established the federal judiciary in 1789, no provision was made as to whether decisions were to be issued *seriatim* or as unanimous opinions of the court.<sup>17</sup> A seemingly esoteric matter now, the debate between *seriatim* and unanimous decisions would become a significant political issue in the first decades of the United States.<sup>18</sup> At its core, the debate reflected divergent attitudes toward the scope and power of the newly formed federal government.

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12. Henderson, *supra* note 6, at 294; UROFSKY, *supra* note 5, at 39–40.

13. Henderson, *supra* note 6, at 294–96, 299–300; UROFSKY, *supra* note 5, at 39–40.

14. Henderson, *supra* note 6, at 300; UROFSKY, *supra* note 5, at 39–40.

15. Henderson, *supra* note 6, at 303–04.

16. *See id.* at 304–08; UROFSKY, *supra* note 5, at 40–41.

17. *See* Judiciary Act of 1789, 1 Stat. 73.

18. *See generally* Henderson, *supra* note 6, at 303–25.

On one side was Jefferson, who advocated for *seriatim* decisions because they increased transparency and accountability.<sup>19</sup> *Seriatim* opinions showed that each judge had considered and understood the arguments, and the vote count provided a weight for each precedent. According to Jefferson, each judge should “[t]hrow himself in every case on God and his country,” arguing “both will excuse him for error and value him for honesty.”<sup>20</sup> Jefferson’s underlying motivation for preferring *seriatim* opinions was his fear of a powerful federal judiciary.<sup>21</sup> Jefferson viewed the courts as anti-democratic and recognized them as a threat to the decentralized, democratic Republic.<sup>22</sup> The confusing world of *seriatim* precedents, and the resulting lack of clarity, helped restrain the federal courts during these early years.

Under Chief Justice John Jay, the Supreme Court’s general practice was to issue decisions *seriatim*, and to announce a short summary of issues the Justices agreed on.<sup>23</sup> Under this regime, dissents received little attention, as the summaries emphasized points of agreement among the Justices, rather than their disagreements.<sup>24</sup>

Things began to change after 1796, when Oliver Ellsworth was appointed Chief Justice.<sup>25</sup> Ellsworth was an advocate for a stronger centralized government and a more powerful federal judiciary.<sup>26</sup> To augment federal power, Ellsworth favored the unanimous “opinions of the Court” developed by Lord Mansfield.<sup>27</sup> By issuing

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19. See *id.* at 294 n.38.

20. UROFSKY, *supra* note 5, at 53.

21. See Henderson, *supra* note 6, at 305.

22. *Id.* at 305–07.

23. *Id.* at 308–09.

24. UROFSKY, *supra* note 5, at 66.

25. Henderson, *supra* note 6, at 309.

26. *Id.* at 309–10.

27. *Id.* at 310.

decisions “for the Court” without dissent—now often called *per curiam* opinions—the power of the Court, and of the national government, would be increased.<sup>28</sup>

Under Chief Justice Ellsworth, more than 70% of the Court’s decisions were issued *per curiam*.<sup>29</sup> But many of these *per curiam* decisions occurred in simpler cases not involving issues of constitutional or statutory interpretation.<sup>30</sup> Among prominent decisions involving constitutional questions, half were delivered *seriatim* and half were issued *per curiam*.<sup>31</sup>

### C. The John Marshall Court (1801-1835)

This takes us to the Marshall Court. John Marshall served as Chief Justice for 34 years, starting in 1801.<sup>32</sup> Like his predecessor Oliver Ellsworth, Chief Justice Marshall also championed a strong federal government and a concomitant powerful federal judiciary.<sup>33</sup> He favored a unified voice for the Supreme Court, which he believed would give it greater authority and legitimacy.<sup>34</sup> As a member of the waning Federalist Party, Marshall was politically outnumbered on the Court, but he still proved effective at achieving much of his project to strengthen the Court.<sup>35</sup>

The Marshall Court issued over a thousand decisions, of which close to 93% were unanimous—a record unimaginable by today’s

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28. *Id.*

29. John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790-1945*, 77 WASH. U. L.Q. 137, 140 (1999).

30. *Id.* at 141–43.

31. *Id.* at 141.

32. Henderson, *supra* note 6, at 316.

33. *Id.* at 312–16, 320.

34. See Kevin M. Stack, *The Practice of Dissent in the Supreme Court*, 105 YALE L.J. 2235, 2238–40 (1996).

35. Henderson, *supra* note 6, at 311–13.

standards.<sup>36</sup> Under Marshall, most unanimous decisions were no longer delivered as anonymous *per curiam* opinions. Instead, they were signed and delivered by one Justice—almost always Marshall himself—as the “opinion of the Court.”<sup>37</sup>

Chief Justice Marshall was said to reach such frequent consensus through his personal charisma and sheer legal intellect.<sup>38</sup> According to legend, Chief Justice Marshall was so respected and esteemed by his colleagues that he even enlisted Justice Joseph Story—a renowned legal scholar himself—to do his Bluebooking! Marshall was once quoted as saying, “There, Story; that is the law of this case; now go and find the authorities.”<sup>39</sup>

It’s also worth noting that this was a different era—the Supreme Court Justices all lived together in a Washington boardinghouse for two months out of every year, eating, drinking, and deciding each case with little outside contact.<sup>40</sup> Perhaps the Justices were willing to forgo writing separately in many cases to preserve comity on the Court. Imagine what an amazing reality television show it would be if Justices did that today! I would definitely watch it.

Also, the Supreme Court’s docket looked very different in Chief Justice Marshall’s day. The modern practice of granting petitions for certiorari didn’t fully take shape until 1925.<sup>41</sup> In the Marshall era, the Court had mandatory jurisdiction over several common law

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36. UROFSKY, *supra* note 5, at 55 (placing the Marshall Court’s “nonunanimous rate” at “just over 7 percent”).

37. See Karl M. ZoBell, *Division of Opinion in the Supreme Court A History of Judicial Disintegration*, 44 CORNELL L. REV. 186, 193–94 (1959).

38. See Henderson, *supra* note 6, at 313–14.

39. Theophilus Parsons, *Distinguished Lawyers*, 2 ALB. L.J. 126, 126–127 (1870).

40. See Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN L. REV. 1, 1 (2010).

41. See generally Jonathan Sternberg, *Deciding Not to Decide: The Judiciary Act of 1925 and the Discretionary Court*, 33 J. SUP. CT. HIST. 1 (2008).



matters including property, family law, and contracts.<sup>42</sup> Those cases were often unanimous, which skews the Court's dissent rate from that time.<sup>43</sup>

Still, the Marshall Court was responsible for the emergence and development of the third model of judicial writing—a hybrid style with an authored majority opinion for the Court with other Justices having the option of writing separately, either in concurrence or dissent.<sup>44</sup> This is the model we see most often today. This “hybrid” approach was something of a compromise between Chief Justice Marshall and Justice William Johnson, a friend and political ally of Jefferson.<sup>45</sup> Justice Johnson was accustomed to delivering *seriatim* opinions from his time on South Carolina's highest court.<sup>46</sup> Drawing on that experience, Johnson became the first frequent dissenter in American history, authoring about half of the dissents written by the Marshall Court.<sup>47</sup>

Justice Johnson held a different perspective on why Chief Justice Marshall was so successful at building consensus on the Court. In a private letter to Jefferson in 1822, he called one of his fellow Justices “incompetent,” said another could “not be got to think or write,” and stated that still another was “slow.”<sup>48</sup> Johnson also told Jefferson that two of his other colleagues were “commonly estimated as one Judge.”<sup>49</sup> In Johnson's mind, the early unanimity of the Court was as much a product of his colleagues' shortcomings as it was Chief Justice Marshall's leadership.

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42. See Henderson, *supra* note 6, at 324 n.184.

43. *Id.* at 324.

44. Ginsburg, *supra* note 40, at 2–3.

45. ZoBell, *supra* note 37, at 197.

46. Donald G. Morgan, *Mr. Justice William Johnson and the Constitution*, 57 HARV. L. REV. 328, 333 (1944).

47. ZoBell, *supra* note 37, at 197.

48. UROFSKY, *supra* note 5, at 52.

49. *Id.*

Despite Justice Johnson's private sentiments, the tone of early dissenting opinions was quite respectful—almost forlorn. For instance, in 1805, Justice Bushrod Washington wrote the first dissent of the Marshall Court, explaining that:

"[I]n any instance where I am so unfortunate as to differ with this court, . . . I owe it in some measure to myself and to those who may be injured by the expense and delay [of dissenting] to sh[o]w at least that the opinion was not hastily or inconsiderately given."<sup>50</sup>

Similarly, when Justice Johnson dissented in an 1807 case, he began by declaring, "I have the misfortune to dissent from the majority of my brethren."<sup>51</sup>

This tone helped preserve civility among the Justices even as they disagreed. But by the end of Chief Justice Marshall's tenure, cracks were beginning to appear in the idealized picture of a unanimous, authoritative court as the Justices presided over increasingly volatile and politicized controversies related to slavery.<sup>52</sup>

#### *D. The Roger Taney Court (1836-1864)*

Upon John Marshall's retirement in 1835, Roger Brooke Taney took over as Chief Justice.<sup>53</sup> Chief Justice Taney was different from his predecessor in many respects. For one, Taney did not try to preserve the unified voice that Marshall worked so hard to achieve. During the three decades of the Taney Court, the frequency of

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50. *Id.* at 47.

51. *Id.*

52. *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825); *cf.* *Queen v. Hepburn*, 11 U.S. (7 Cranch) 290 (1813) (non-unanimous Court in freedom case).

53. *See Henderson*, *supra* note 6, at 316.

fractured decisions would double to around 15%—unprecedented in American history at that time.<sup>54</sup>

Indeed, the Court was not immune to the increasing polarization of the country. Compared to the apprehensive tone employed by dissenters on the Marshall Court, sharper language in separate opinions became more common in the decades before the Civil War. For example, in one case, Justice Daniel wrote that he was dissenting “chiefly to free [him]self . . . from the trammels of an assent . . . to . . . the untenable, and . . . the irrelevant positions” of the majority opinion.<sup>55</sup>

It was in the context of this declining civility and institutional cohesion, both on the Supreme Court and in the country at large, that the Taney Court would decide *Dred Scott v. Sandford*.<sup>56</sup> In that case, the Court held that black Americans, even those who were born free, could never be citizens of the United States. *Dred Scott* is notable for being a shameful mark on our country’s highest Court. But it also marked a turning point in the history of Supreme Court dissents. On top of Taney’s opinion, the Court produced six concurrences and two dissents.<sup>57</sup> In some ways, the case was so contentious within the Court that it inadvertently resurrected *seriatim* opinions.<sup>58</sup>

The most powerful of the dissents was authored by Justice Benjamin Robbins Curtis.<sup>59</sup> Justice Curtis—a Harvard Law graduate—had never been an anti-slavery advocate or abolitionist. In fact, he had supported the Fugitive Slave Law of 1850.<sup>60</sup> Still, to his credit,

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54. UROFSKY, *supra* note 5, at 55.

55. *Id.* at 65.

56. 60 U.S. 393 (1857).

57. *See id.*

58. UROFSKY, *supra* note 5, at 66–67.

59. *Dred Scott*, 60 U.S. at 564 (Curtis, J., dissenting).

60. UROFSKY, *supra* note 5, at 72.

Justice Curtis carefully refuted the majority's arguments, drawing upon historical, constitutional, and legal arguments.<sup>61</sup>

With his dissent in *Dred Scott*, Justice Curtis set a new standard for constitutional opinion-writing. Notably, he made the unprecedented decision to send copies of his dissent to the Boston press, to be published on the same day the decision was set to be delivered.<sup>62</sup> Justice Curtis's dissent then was perhaps the first instance of a judicial dissent being used as a vehicle to foster constitutional dialogue with the public.

Chief Justice Taney would never forgive Justice Curtis for his *Dred Scott* dissent, and hostility within the Court would compel Justice Curtis to resign in disgust six months later.<sup>63</sup> He remains perhaps the only Supreme Court justice known to resign over principle.

*E. The Great Dissenter: Justice John Marshall Harlan (1877-1911)*

We cannot discuss the history of judicial dissents without recounting the renowned "Great Dissenter," Justice John Marshall Harlan. Named after Chief Justice Marshall, Justice Harlan is most remembered as the lone dissenting voice in *Plessy v. Ferguson*.<sup>64</sup> That case upheld the odious principle that "separate but equal" was consistent with our Constitution.<sup>65</sup> This left black Americans to generations of segregation throughout this country.

In his seminal dissent in *Plessy*, Harlan wrote:

Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are

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61. See generally *Dred Scott*, 60 U.S. 393 (1857) (Curtis, J., dissenting).

62. UROFSKY, *supra* note 5, at 75.

63. *Id.* at 78.

64. 163 U.S. 537 (1896).

65. *Id.* at 552. (Harlan, J., dissenting).

equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land, are involved.<sup>66</sup>

He accurately predicted that *Plessy* would one day be condemned as one of the most “pernicious” decisions of the Supreme Court.<sup>67</sup>

For those who had fought so hard for progress and individual freedom, Harlan’s dissent was a small but significant consolation. Frederick Douglass wrote to Justice Harlan that his *Plessy* dissent was the greatest legal treatise in decades and that it “should be scattered like the leaves of autumn over the whole country, and be seen, read, and pondered upon by every citizen of the country.”<sup>68</sup>

To me, Justice Harlan’s dissent in *Plessy* embodies our nation’s highest ideals, and I consider him my model of judicial courage. It could not have been easy for Justice Harlan—a Kentuckian and even a former slaveholder himself—to be the Court’s lone dissenter on racial issues. But dissent he did—forcefully and eloquently. His dissent is now for the ages.

*F. The Modern Court (Justices Scalia and Ginsburg)*

Now, for the sake of time, I would like to fast forward to the modern era of the Supreme Court. The modern era can be characterized by the continued proliferation of dissents. From 1801 to 1940 (Chief Justices Marshall through Hughes) there were dissents in only 7% of the Court’s cases.<sup>69</sup> But from 1941 to 1997 (Chief Justices Stone

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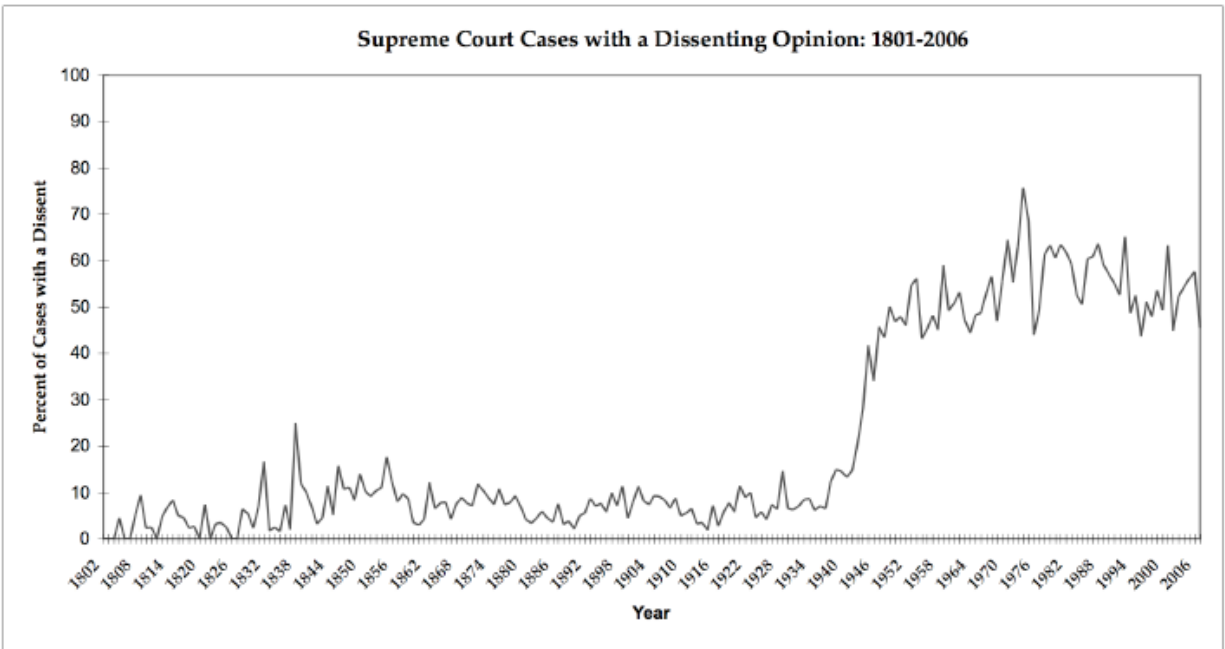
66. *Id.* at 559.

67. *Id.*

68. PETER S. CANELLOS, THE GREAT DISSENTER: THE STORY OF JOHN MARSHALL HARLAN, AMERICA’S JUDICIAL HERO 31 (2022).

69. Henderson, *supra* note 6, at 333 n.206.

through Rehnquist) 52% of the Court's cases produced dissenting opinions.<sup>70</sup>



Henderson, *supra* note 6, at 322 fig.2.

Indeed, we see so many separate writings on the Supreme Court these days that one might argue that we have witnessed a *de facto* return to *seriatim* decisions.<sup>71</sup>

As for individual dissenters, few would deny the impact that Justices Scalia and Ginsburg had on modern jurisprudence. While their majority opinions deserve study and respect, their powerful

70. *Id.*

71. *See id.* at 333–34.

and incisive dissents should be studied for how they moved both public opinion and the law.

I'd just like to highlight one dissent from each of them. I'll start with Justice Scalia. Perhaps his most prophetic was his lone dissent in *Morrison v. Olson*.<sup>72</sup> In that case, he called for the Independent Counsel Act to be struck down as unconstitutional. Who can forget Justice Scalia's timeless line about the affront to the separation of powers in that case? While the concentration of power in one branch often comes "in sheep's clothing," he said, "this wolf comes as a wolf."<sup>73</sup>

A few years ago, Justice Kagan called this "one of the greatest dissents ever written and every year it gets better."<sup>74</sup> Sure enough, Justice Scalia's view eventually won the day and Congress let the Independent Counsel Act expire in 1999.<sup>75</sup>

Justice Ginsburg was also able to spur Congressional action with her spirited dissent in *Ledbetter v. Goodyear*.<sup>76</sup> In that equal-pay case, Justice Ginsburg admonished the Court for "failing to comprehend or [being] indifferent to the insidious ways in which women can be victims of pay discrimination."<sup>77</sup> Justice Ginsburg later said she wrote that dissent with Congress in mind as the audience.<sup>78</sup> And

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72. 487 U.S. 654 (1988).

73. *Id.* at 699 (Scalia, J., dissenting).

74. Justice Kagan and Judges Srinivasan and Kethledge Offer Views from the Bench, STAN. LAW. (May 30, 2015), <https://law.stanford.edu/stanford-lawyer/articles/justice-kagan-and-judges-srinivasan-and-kethledge-offer-views-from-the-bench/> [<https://perma.cc/ANS7-BGUK>].

75. See 28 U.S.C. § 599.

76. 550 U.S. 618 (2007).

77. Oral Dissent of Justice Ginsburg at 4:00, *Ledbetter v. Goodyear Tire Rubber Co.*, 550 U.S. 618 (2007) (No. 05-1074), <https://www.oyez.org/cases/2006/05-1074> [<https://perma.cc/8UER-L3FA>].

78. Ginsburg, *supra* note 40, at 7.

again, Congress listened, later passing the “Lilly Ledbetter Fair Pay Act.”<sup>79</sup>

As these examples show, today’s dissents can become tomorrow’s binding law by influencing public discourse on issues that come before the Court.

## II. ANALYSIS

So what does this history tell us about the value of dissenting opinions? Should voicing dissent be embraced and encouraged? Or should it be discouraged as an affront to the legitimacy of the Court?

As I said at the outset, I come down on the side of vigorous dissent.

### A. *Arguments Against Dissents*

Opponents of judicial dissents generally argue that separate opinions weaken the Court’s authority by undermining the unity of its interpretation of the law.<sup>80</sup> One could argue that there are some areas of the law where, as Justice Brandeis famously said, “it is more important that the applicable rule of law be settled than it be settled right.”<sup>81</sup> A Supreme Court that decides cases unanimously would legitimize the nation’s laws and improve lower courts’ ability to interpret them consistently and coherently.

Some might also view dissenting judges as prioritizing the publication of their own opinions over working cooperatively with colleagues to craft unified precedent. Judges who dissent too often

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79. *Id.*

80. Matthew P. Bergman, *Dissent in the Judicial Process, Discord in Service of Harmony*, 68 DENV. L. REV. 79, 86-87 (1991).

81. Henderson, *supra* note 6, at 284; Ginsburg, *supra* note 40, at 7.



may undermine the weight of their words and damage the collegial atmosphere of their court. Frequent dissents might also damage a court's institutional legitimacy—especially when the majority and dissent split along partisan lines.

*B. Arguments in Favor of Dissents*

1. Legitimacy

On the other hand, proponents of dissenting opinions argue that they democratize the judiciary, making it more transparent to the public and thus strengthening its legitimacy and credibility.<sup>82</sup> In a healthy, engaged democracy, judicial decisions should result from rigorous and thoughtful legal analysis—not secret deliberations and facades of unanimity.<sup>83</sup> As Justice Frankfurter once said, “[u]nanimity is an appealing distraction,” but “a single Court statement on important constitutional issues is bound to smother differences that in the interest of candor and of the best interest of the Court ought to be expressed.”<sup>84</sup> Furthermore, no one could deny the critical role that many famous dissents have played in enhancing the legitimacy of the Court. As Justice Scalia said, “[d]issents augment, rather than diminish the prestige of the Court . . . . When history demonstrates that one of the Court’s decisions has been a truly horrendous mistake,” and I imagine Justice Scalia had *Dred Scott* and *Plessy* in mind, “it is comforting—and conducive of respect for the Court—to look back and realize, that at least some of the Justices saw the danger clearly, and gave voice, often eloquent voice, to their concern.”<sup>85</sup>

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82. Bergman, *supra* note 80, at 87–88.

83. See generally Stack, *supra* note 34, at 2247–59.

84. UROFSKY, *supra* note 5, at 341.

85. Antonin Scalia, *Dissents*, 13 OAH MAG. HIST. 18, 18–19 (1998).

## 2. Intra-court Dialogue

Dissents also promote dialogue between the members of a court. Being tested by contrary views allows judges to strengthen their own writings, thus improving the law. As Justice Ginsburg put it, “there is nothing better than an impressive dissent to lead the author of the majority opinion to refine and clarify her initial circulation.”<sup>86</sup> Reflecting on her 1996 opinion in *United States v. Virginia*, Justice Ginsburg remarked that “[t]he final draft was ever so much better than my first, second, and at least a dozen more drafts, thanks to Justice Scalia’s attention-grabbing dissent.”<sup>87</sup> I think most judges would attest to this benefit of separate opinions. Even when my colleagues have failed to persuade me to change my vote, I have often sharpened my majority opinions thanks to comments and suggestions from dissenters.

## 3. Dialogue with the Public and Other Branches

Dissents aren’t only useful as a mechanism for dialogue within a court, but they also have communicative value to the public. Some judges write lengthy dissents with an aim toward educating the country. Dissents can also guide lawmakers to act, as we’ve seen in the examples from Justices Scalia and Ginsburg.

## 4. Dialogue with the Future

Perhaps the most compelling justification for judicial dissents is the role they play in shaping constitutional dialogue across time. Many landmark dissents have been vindicated long after their authors’ lifetimes. We talked about Justice Harlan’s dissent in *Plessy* and Justice Curtis’s dissent in *Dred Scott*, but examples abound.

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86. Ginsburg, *supra* note 40, at 3.

87. *Id.*

Even if a dissenter does not live to see his or her views adopted as the law, the prospect of persuading future generations remains.

### III. PARTING THOUGHTS

There's much more to say about the value of dissent, but in the interest of time, I'll leave you with a few parting thoughts.

First, dissenting helps facilitate and foster dialogue, whether within the courts, between branches of government, or with the public. There may be a time and a place for silence and unanimity, but surely that's rarely the case when it comes to defending our Constitution.

Second, we cannot discount the costs of separate writings. Clarity, consistency, and the legitimacy of the courts may suffer. So we must choose our battles wisely. Of course, that means understanding the difference between trolling and dissenting. And it should go without saying—heckling is not productive dissent.

Third, there's a task for you all—it's your job to turn today's dissents into tomorrow's majority opinions. Originalism and textualism wouldn't have risen to prominence without the forceful dissents of Justices Scalia and Thomas and the work of younger generations of lawyers committed to demonstrating why these approaches lead to a more faithful interpretation of the Constitution and our laws.

Fourth, don't give up on civil discourse, and friendship with others you may disagree with. No matter how intense the difference of opinion, I see no reason why it should affect collegiality or common respect for others. And while I have vigorously dissented from my colleagues on the Ninth Circuit, that doesn't diminish my respect and admiration for them as jurists. As polarized as society may seem, note that this past term, 47% of cases decided by the Supreme

Court were 9–0.<sup>88</sup> And that’s with the Supreme Court taking on the hardest cases in the nation.

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I’ve mentioned Justices Scalia and Ginsburg as examples several times during this discussion. With your indulgence, I want to close with one last anecdote. It is well known that they vehemently disagreed about the law in many cases. But it is also well known that they regarded each other as the best of friends. Let their enduring friendship serve as a reminder that we should never let legal disagreements define our relationships. In remembering Justice Scalia, Justice Ginsburg alluded to a duet from the 2015 opera *Scalia/Ginsburg*, entitled “We are different. We are one.” “Yes,” she wrote, we are “different in our interpretation of written texts, but one in our reverence for the Constitution and [the Court].”<sup>89</sup> In the law, as in life, you will find that mutual respect and recognition of shared values will only refine your voice and make you a stronger lawyer and person.

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88. Adam Liptak, *Along With Conservative Triumphs, Signs of New Caution at Supreme Court*, N.Y. TIMES (July 1, 2023), <https://www.nytimes.com/2023/07/01/us/supreme-court-liberal-conservative.html> [<https://perma.cc/KZV3-S6NW>].

89. Press Release, Ruth Bader Ginsburg, Associate Justice, Supreme Court of the United States, Statements of the Supreme Court Regarding the Death of Antonin Scalia (Feb. 14, 2016), [https://www.supremecourt.gov/publicinfo/press/pr\\_02-14-16.pdf](https://www.supremecourt.gov/publicinfo/press/pr_02-14-16.pdf) [<https://perma.cc/VF5S-CJMN>].



# BOYCOTTS: A FIRST AMENDMENT HISTORY

JOSH HALPERN AND LAVI M. BEN DOR

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## BOYCOTTS: A FIRST AMENDMENT HISTORY

JOSH HALPERN\* AND LAVI M. BEN DOR\*\*

*Anti-boycott laws are more popular and pervasive today than ever before. More than half of U.S. states have “anti-BDS laws” that prohibit recipients of public contracts and state investment from boycotting the State of Israel. And almost as many have proposed or passed “anti-ESG” rules that restrict boycotts of fossil fuels, firearms, and other contested industries in similar ways. These controversial rules have triggered a fierce debate—and nationwide litigation—over whether the First Amendment includes a “right to boycott.”*

*This Article is the first to take up the question from a historical standpoint. Examining the boycott’s constitutional status from before the Founding to the present era, we find that state actors have consistently treated the boycott as economic conduct subject to governmental control, and not as expression presumptively immune from state interference. Before the Founding, the colonists mandated a strict boycott of Britain, which local governmental bodies enforced through trial proceedings and economic punishments. At common law, courts used the doctrine of conspiracy to enjoin “unjustified” boycotts and hold liable their perpetrators. And in the modern era, state and federal officials have consistently compelled*

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participation in the boycotts they approved, while prohibiting participation in the ones they opposed.

*The Article concludes that modern anti-boycott laws not only fit within, but improve upon, this constitutional tradition. As the Supreme Court's 1982 decision in NAACP v. Claiborne Hardware illustrates, the common-law approach risks violating the First Amendment if applied to restrict not only the act of boycotting or refusing to deal, but also the expressive activities that accompany such politically motivated refusals. Modern anti-boycott laws minimize that problem by surgically targeting the act of boycotting while leaving regulated entities free to say whatever they please. Hence, from the standpoint of history, these laws reflect First Amendment progress, not decay.*

Anti-boycott laws are on the rise and making waves. Since 2015, more than half of U.S. states have enacted so-called “anti-BDS” laws, which prohibit public entities from investing in or contracting with companies that boycott the State of Israel.<sup>1</sup> These laws respond directly to the Boycott, Divestment and Sanctions (“BDS”) movement—an international effort to levy pressure against Israel to extract policy concessions on Palestinian issues—and they convey a clear message to all BDS participants: “if you boycott against Israel, we [the State] will boycott you.”<sup>2</sup> And that is just the tip of the anti-boycott iceberg. In the past few years alone, nearly twenty states have proposed or enacted “anti-ESG” laws that impose similar restrictions on financial firms that “boycott” fossil fuels, firearms,

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1. See *infra* note 235 (collecting examples); Aila Slisco, *Companies Boycotting Israel Can't Do Business with These U.S. States*, NEWSWEEK (May 19, 2021), <https://www.newsweek.com/companies-boycotting-israel-cant-do-business-these-us-states-1593099> [<https://perma.cc/D2AA-TTHH>] (listing the states with anti-BDS laws).

2. Scott Powers, *Airbnb Drops Ban on Listings of Jewish-Owned Properties in West Bank*, FLA. POL. (Apr. 9, 2019), <https://floridapolitics.com/archives/293099-airbnb-drops-ban-west-bank/> [<https://perma.cc/WF2Q-W9CE>] (quoting Florida state representative Randy Fine); see also Gilad Edelman, *Cuomo and B.D.S.: Can New York State Boycott a Boycott?*, NEW YORKER (June 16, 2016), <https://www.newyorker.com/news/news-desk/cuomo-and-b-d-s-can-new-york-state-boycott-a-boycott> [<https://perma.cc/9V7A-8DWG>] (quoting then-New York Governor Andrew Cuomo as defending an anti-BDS policy on the grounds that “[i]f you boycott against Israel, New York will boycott you”).



and other contested industries.<sup>3</sup> These newer laws take aim at ESG—a movement to prioritize environmental, social, and corporate governance issues in investing—and convey a similar threat: “if you boycott Texas energy, then Texas will boycott you.”<sup>4</sup>

Perhaps unsurprisingly, this wave of anti-boycott legislation has spawned a fierce debate and a swell of litigation over whether companies have a First Amendment right to engage in politically motivated boycotts.<sup>5</sup> Should these anti-boycott rules be viewed as valid limits on economic discrimination, or instead as restrictions on expressive activity that are calculated to thwart disfavored messages?

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3. See, e.g., KY. REV. STAT. § 41.480 (fossil fuel boycott law); TEX. GOV'T CODE ANN. § 2274 (firearm boycott law); H. 3564, 125th Sess. (S.C. 2023) (proposed bill covering boycott of timber, mining, and agricultural industries); see also Brenna Goth, *State Lawmakers Push Texas-Style Business Penalties Against ESG*, BLOOMBERG LAW (Jan. 30, 2023), <https://news.bloomberglaw.com/esg/state-lawmakers-push-texas-style-business-penalties-against-esg> [<https://perma.cc/5T8W-WCTY>] (summarizing efforts in numerous state legislatures to enact such laws).

4. Mario A. Ariza & Mose Buchele, *Texas Stumbles in Its Effort to Punish Green Financial Firms*, NPR (Apr. 29, 2022), <https://www.npr.org/2022/04/29/1095137650/texas-stumbles-in-its-effort-to-punish-green-financial-firms> [<https://perma.cc/WUM7-SMXY>] (quoting Texas State Representative Phil King); see also Ross Kerber, Isla Binnie & Simon Jessop, *U.S. Finance Faces ESG Backlash, More To Come in 2023*, REUTERS (Dec. 27, 2022), <https://www.reuters.com/business/sustainable-business/us-finance-faces-esg-backlash-more-come-2023-2022-12-27/> [<https://perma.cc/KF8T-Z5J3>].

5. See Jacey Fortin, *She Wouldn't Promise Not to Boycott Israel, So a Texas School District Stopped Paying Her*, N.Y. TIMES (Dec. 18, 2018), <https://www.nytimes.com/2018/12/19/us/speech-pathologist-texas-israel-oath.html> [<https://perma.cc/FSU2-AZM9>] (“[A]t the federal level . . . congressional lawmakers . . . are considering legislation that would keep American companies from participating in boycotts. . . . In the meantime, the state-level battles continue” in courts and statehouses.). For a sampling of cases challenging the anti-BDS laws, see *Ark. Times LP v. Waldrip*, 988 F.3d 453 (8th Cir. 2021), *rev'd on reh'g en banc*, 37 F.4th 1386 (2022), *cert. denied*, 143 S. Ct. 774 (2023); *A&R Eng'g & Testing Inc. v. City of Houston*, 582 F. Supp. 3d 415 (S.D. Tex. 2022), *rev'd & rem'd*, 72 F.4th 685 (5th Cir. 2023); *Martin v. Wrigley*, 540 F. Supp. 3d 1220 (N.D. Ga. 2021), *aff'd*, No. 22-12827, 2023 WL 4131443, (11th Cir. 2023); *Amawi v. Pflugerville Indep. Sch. Dist.*, 373 F. Supp. 3d 717 (W.D. Tex. 2019), *vacated as moot sub nom. Amawi v. Paxton*, 956 F.3d 816 (5th Cir. 2020); *Jordahl v. Brnovich*, 336 F. Supp. 3d 1016, 1041–43 (D. Ariz. 2018), *vacated as moot*, 789 F. App'x 589 (9th Cir. 2020); *Koontz v. Watson*, 283 F. Supp. 3d 1007, 1021–22 (D. Kan. 2018). For the first-ever legal challenge to an anti-ESG law, see *Hope of Ky., LLC v. Cameron*, No. 322-CI-842 (Ky. Franklin Cir. Ct. Oct. 31, 2022).

Leading First Amendment scholars have lined up on both sides of that question.

Defenders of these laws maintain that “boycott” is just another term for the refusal to buy goods or services—a decision the law has long viewed as constitutionally unprotected under the First Amendment. Anti-boycott laws, they assert, should be treated no differently than other anti-discrimination, public-accommodations, and common-carrier rules, all of which compel commercial dealing without triggering heightened First Amendment scrutiny.<sup>6</sup> Hence, while the speech and expressive activities that precede and accompany a boycott may enjoy First Amendment protection, *the boycott itself*—that is, the act of refusing to deal with a particular counterparty—is not an inherently expressive act within the meaning of the First Amendment.

Critics of these laws rejoin with an appeal to precedent and the boycott’s “historical pedigree.”<sup>7</sup> Drawing on the Supreme Court’s decision in *NAACP v. Claiborne Hardware*, critics insist that the political boycott has become so “deeply embedded in the American political process” that it has come to acquire heightened protection under the First Amendment’s speech and assembly clauses.<sup>8</sup> So, even if anti-boycott laws are *conceptually* indistinguishable from

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6. See, e.g., Eugene Kontorovich, *Can States Fund BDS?*, TABLET MAG. (July 13, 2015), <https://www.tabletmag.com/sections/news/articles/can-states-fund-bds> [<https://perma.cc/YK79-725M>]; Brief of Profs. Michael C. Dorf, Andrew M. Koppelman, and Eugene Volokh as Amici Curiae in Support of Defendants-Appellees at 3–17, *Ark. Times LP v. Waldrip*, 988 F.3d 453 (8th Cir. 2021) (No. 19-1378) [hereinafter Dorf et al. Amicus Br.].

7. See, e.g., Brief of First Amendment Scholars as Amici Curiae in Support of Plaintiff-Appellant at 3, 9, 13, *Waldrip* (No. 19-1378) [hereinafter First Amendment Scholars Amicus Br.]; Amanda Shanor, *Laws Aimed at Silencing Political Boycotts of Israel are Categorically Different than Public Accommodations Laws*, TAKE CARE (Feb. 21, 2019), <https://takecareblog.com/blog/laws-aimed-at-silencing-political-boycotts-of-israel-are-categorically-different-than-public-accommodations-laws> [<https://perma.cc/694N-M832>]; see also Brad Kutner, *US Chamber’s CLO Defends Corporate Activism as Free Speech*, NAT’L L.J. (Nov. 11, 2022), <https://www.law.com/nationallawjournal/2022/11/11/us-chambers-clo-defends-corporate-activism-as-free-speech/> [<https://perma.cc/CJ2P-6F6S>].

8. First Amendment Scholars Amicus Br. at 3, 9–10 (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982)). We use the terms “defender” and “critic” to refer only to scholars’ views on the general *constitutionality* of anti-boycott laws.

other anti-discrimination laws, the critics still maintain that America's *history and traditions* have carved out the political boycott for special constitutional protection.<sup>9</sup>

That historical argument is vitally important to the modern debate over the constitutionality of anti-boycott laws. History and tradition have emerged as frequent—indeed dominant—modes of constitutional adjudication in the modern era, especially for a majority of the Justices on today's Supreme Court.<sup>10</sup> And yet, the historical record with respect to boycott regulation has largely evaded close scrutiny, with scholarly discussions limited almost exclusively to non-legal work focusing on *the politics of boycott movements*, rather than *the history of boycott regulation*.<sup>11</sup>

This Article begins to fill the scholarly void by taking up the historical inquiry through the prism of constitutional law. Its findings are straightforward: boycotts—no matter the motivation behind them—have long been treated as proscribable conduct, not sacrosanct expression. Government actors throughout U.S. history have regularly compelled compliance with the boycotts they support, while deterring or prohibiting participation in the ones they oppose. Until quite recently, no one appears to have seriously entertained the notion that these boycott regulations implicated, let alone abridged, the boycotters' First Amendment rights of speech, assembly, or association.

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9. Cf. Brief of American Unity Fund and Profs. Dale Carpenter and Eugene Volokh as Amici Curiae in Support of Respondents at 7, *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111) (acknowledging that economic conduct, though generally fair game for government regulation, may nonetheless be "covered by the Free Speech Clause when it is historically protected").

10. See Randy E. Barnett & Lawrence B. Solum, *Originalism After Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, 118 NW. U. L. REV. 433, 435 (2023).

11. See, e.g., LAWRENCE B. GLICKMAN, *BUYING POWER: A HISTORY OF CONSUMER ACTIVISM* (2009). The only near-exceptions of which we are aware are James Gray Pope, *Republican Moments: The Role of Direct Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 330–35 (1990), and Matthew C. Porterfield, *State and Local Foreign Policy Initiatives and Free Speech: The First Amendment as an Instrument of Federalism*, 35 STAN. J. INT'L L. 1, 28–31 (1999), each of which devotes a few pages to the possible First Amendment implications of colonial and revolutionary-era non-importation agreements. The relevant materials are discussed *infra* Sections II.A–B.

This history of governmental control over the boycott traces all the way back to the pre-Founding era, when the first Continental Congress mandated a boycott of British goods. The colonies enforced that mandate through certification requirements, much like the ones used by states to enforce their anti-boycott rules today. But unlike modern states, the colonies subjected those accused of violating the boycott mandate to full-blown trials and punished violators with severe sanctions.<sup>12</sup> A century later, judges at common law decided whether boycotters should be punished for engaging in civil and even criminal “conspiracies” based in large part on a judicial assessment of whether the boycotters’ ends were “justified.”<sup>13</sup> And in the late nineteenth and early twentieth centuries, U.S. courts employed the conspiracy laws to enjoin political boycotts of Chinese-owned business, just as America demanded that Chinese authorities impose reciprocal “suppression” of consumer boycotts in China aimed at American businesses.<sup>14</sup>

Boycott measures of the past fifty years follow a similar pattern, as governments have compelled compliance with the boycotts whose objectives they supported, while deterring or prohibiting participation in the ones they opposed. Throughout the 1980s, states and municipalities conditioned public investment, tax benefits, and contracts on compliance with the boycott of apartheid South Africa. Those same governments took the equal but opposite approach to boycotts of Israel: companies could access that same panoply of public benefits only by certifying that they would *not* join the boycott effort. These modern rules are notably less severe than some of their predecessors: rather than banning or compelling boycotts outright, they simply withhold benefits from those who fail to comply with the government’s preferred boycott policy. In doing so, they fortify the constitutional understanding, reflected throughout the country’s history, that boycotts are not speech or association and that governments enjoy broad latitude to control them, free from the constraints of the First Amendment. And while

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12. *Infra* Section II.A.

13. *Infra* Section II.B.

14. *Infra* Section II.C.

the legacy of compelling boycotting is admittedly older and deeper than the corresponding tradition of banning or deterring boycotts, both strands exist clearly in the historical record, reflecting a unified understanding of the boycott as economic coercion, not protected expression.

Indeed, the modern anti-boycott laws constitute a meaningful constitutional improvement over the common-law conspiracy regimes that preceded them. In *NAACP v. Claiborne Hardware*, the Supreme Court held that those older regimes violate the First Amendment if they are applied to restrict not only the act of boycotting itself, but also the explanatory speech and expressive activities that accompany the boycott.<sup>15</sup> Modern anti-boycott rules avoid that problem by focusing surgically on *the boycott itself*, while leaving regulated entities and the government's contractual counterparties completely free to engage in whichever expressive activities they please. Hence, despite contemporary criticism, these laws reflect First Amendment progress, not decay.

The structure of this Article is straightforward and largely chronological. After a note on methodology, it marches through the relevant history, in which state actors compelled the boycotts they favored and deterred the ones they opposed. The analysis concludes by observing that modern anti-boycott laws fit within, and improve upon, this longstanding tradition by adding an extra layer of protection for the expressive activities that often accompany boycotts.

#### I. THE ROLE OF HISTORY IN FIRST AMENDMENT ANALYSIS— AND THIS ARTICLE

History's normative place in constitutional analysis is deeply contested at every step. Scholars disagree at the threshold over whether and how much history should matter to the analysis; they diverge over which periods of history should matter most; and they disagree over the kinds of historical practices that should bear upon

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15. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913, 932–33 (1982).

the Constitution's meaning.<sup>16</sup> Our goal in this Article is to avoid these fraught debates and, instead, to offer a fundamentally descriptive account of how state actors viewed and treated the boycott from colonial times through the present. That said, we begin with a brief sketch of those debates to situate our descriptive analysis within the various normative frameworks.

The first and most fundamental debate in the scholarship concerns history's fundamental capacity to answer contested constitutional questions. Many "living" and "common-law" constitutionalists maintain that history and tradition cannot "provide the answers to the problems of today," but instead help, at most, to "frame the questions" of modern constitutional interpretation and to identify potential pathways along which the law might evolve.<sup>17</sup> By contrast, many originalists maintain that history can "constrain" the interpretive process by "provid[ing] relevant context that may disambiguate and enrich the semantic [original] meaning of the [Constitution's] text."<sup>18</sup>

But that latter camp is hardly uniform in its view of history. Originalist scholars disagree over which eras of history matter most to the interpretative analysis, and over which kinds of traditions deserve legal weight. To take just one pertinent example, scholars disagree over whether the Bill of Rights, as incorporated against the states by the Fourteenth Amendment, should be construed against the backdrop of pre-Founding historical practice, or instead against the prevailing understandings in 1868 when the Fourteenth Amendment was ratified.<sup>19</sup> And just as there is a debate about

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16. See Jamal Greene & Yvonne Tew, *Comparative Approaches to Constitutional History*, in *COMPARATIVE JUDICIAL REVIEW* 379, 384 (Erin F. Delaney & Rosalind Dixon eds., 2018) (noting the "long-standing normative debate over the place of historical argument in US constitutional interpretation").

17. John G. Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502, 533 (1964); accord David A. Strauss, *Do We Have a Living Constitution?*, 59 DRAKE L. REV. 973, 973–77 (2011).

18. Barnett & Solum, *supra* note 10, at 442, 446.

19. See, e.g., Kurt T. Lash, *Respeaking the Bill of Rights: A New Doctrine of Incorporation*, 97 IND. L.J. 1439, 1441 (2022) ("When the people adopted the Fourteenth Amendment, they readopted the original Bill of Rights, and did so in a manner that invested those original 1791 texts with new 1868 meanings. There is only one Freedom of Speech

where history ought to “start,” there is also a corresponding debate about where it ought to “end” in the analysis—and whether post-ratification historical practice can bear upon the Constitution’s meaning. According to one camp, the Constitution’s meaning was fixed entirely at ratification or shortly thereafter, and nothing that comes long after can bear upon its meaning.<sup>20</sup> Others have argued that early historical practice, in particular, is most likely to shed light on the Constitution’s original public meaning because it is closest in time to the enactment of the constitutional language.<sup>21</sup> And still others maintain that even somewhat later historical practices may “settle” interpretive questions, if they previously divided Americans of generations past.<sup>22</sup>

In addition to these temporal debates, scholars are similarly divided over the kinds of post-enactment traditions and practices that may inform the Constitution’s meaning. Some have suggested that entities as diverse as “Congress, the executive, state legislatures, common law courts, and maybe even juries” may contribute to “longstanding practice[s]” that fix the Constitution’s meaning,<sup>23</sup>

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Clause—the one the people spoke into existence in 1791 but then *respoke* in 1868.” (emphasis in original)); AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* at xiv, 223, 243 (1998) (similar); Richard H. Fallon Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1762–72 (2015) (describing the various methodological difficulties in identifying the relevant history); see also *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2138 (2022) (acknowledging the debate).

20. See, e.g., Vasana Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1168–69 (2003) (arguing that post-ratification sources only deserve weight if they come from the fifty years following ratification); cf. John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MARY L. REV. 1321, 1356 (2018) (taking the outlier view that the Constitution’s text had a fully determinate meaning when ratified).

21. See, e.g., Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. 1, 29–30 (noting that adherents of certain forms of the liquidation theory believe that “initial practice, which typically although not necessarily will be early practice,” is most useful to understanding the Constitution, and that later history is largely irrelevant).

22. See, e.g., William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 59–60 (2019).

23. Michael W. McConnell, *Lecture, Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1771–72 (2015). Note, too, that there is a debate over the *kinds of provisions* that may be “liquidated” through post-enactment historical practice. Some have argued

while others focus more narrowly on the federal branches in describing the kinds of state action that can meaningfully “liquidate” the Constitution’s meaning.<sup>24</sup> Hence, even for those who place considerable stock in historical analysis, there is relatively little agreement about which history matters most.

These normative uncertainties afflict the different methodologies in different ways and to different degrees. For flexible approaches like “constitutional pluralism,” the stakes are not terribly high and the problems are less acute, because the entire purpose of the method is to integrate new and diverse historical developments into the interpretive process.<sup>25</sup> But for more rigid originalist methodologies, there is considerable tension between the method’s focus on the original public meaning and a willingness to consider subsequent history in explicating the text’s meaning.<sup>26</sup>

That tension is especially sharp in the First Amendment context because, according to some leading First Amendment scholars, modern doctrine extends the protections of the First Amendment

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that “historical practice” plays a special role “in the separation of powers context,” because in that context, reliance “on past practice . . . does not typically raise concerns about the oppression of minorities or other disadvantaged groups the way that it does in some individual rights areas.” Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 416 (2012). By contrast, others maintain that the Constitution’s rights and structural provisions are necessarily interconnected, and that post-enactment history may broaden or contract the scope of the rights provisions. See Baude, *supra* note 22, at 49–51; McConnell, *supra*, at 1775–76.

24. Cf. Baude, *supra* note 22, at 16–18; Bradley & Siegel, *supra* note 21, at 25–31.

25. See, e.g., Richard H. Fallon Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1189 (1987) (explaining the process of “reflective equilibrium” by which constitutional interpretation integrates *new* historical inputs); Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753, 1753 (1994) (“Pluralistic theories of constitutional interpretation hold that there are multiple legitimate methods of interpreting the Constitution.”).

26. See Barnett & Solum, *supra* note 10, at 435 (acknowledging this tension); see also Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 1 (2015) (describing the “fixation thesis”); Lawrence B. Solum, *The Constraint Principle: Original Meaning and Constitutional Practice* 2–3 (Apr. 6, 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2940215](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940215) [<https://perma.cc/4BFW-M6RP>] (describing the “constraint principle”).



well beyond its original public meaning.<sup>27</sup> Under many of the leading originalist accounts of the First Amendment, it seems that boycotts, even if politically motivated, would not have been viewed as protected “speech” or “assembly” as the Founders conceived of those concepts.<sup>28</sup>

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27. See, e.g., Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 263 (2017) (arguing that “[a] huge swath of modern case law . . . falls outside of the First Amendment’s original legal ambit,” such that adhering to original meaning would require “a radical dismantling of speech doctrine”); Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2168–69 (2015) (similar).

28. A leading scholarly view is that the Free Speech Clause was originally understood to protect only “well-intentioned statements of one’s thoughts” and ban only “prior restraints,” and that it broadly permitted legislatures to abridge expressive conduct to “promote the public good.” Campbell, *supra* note 27, at 260, 263–64. By that account—and many others—the original Free Speech Clause did not enshrine a right to boycott, nor would it limit the government’s ability to impose ex-post consequences for participation in a boycott, as modern anti-boycott laws do. See, e.g., Lakier, *supra* note 27, at 2179 (arguing that the original First Amendment “provided to speakers almost-absolute protection against the prior restraint of speech or writing but only limited protection against after-the-fact punishment for what they uttered or wrote”); Eugene Volokh, *Symbolic Expression and the Original Meaning of the First Amendment*, 97 GEO. L.J. 1057, 1083 (2009) (arguing that “the original meaning of the First Amendment protects symbolic expression to the same extent that it protects spoken, written, and printed verbal expression,” but never suggesting that includes boycotts or other refusals to deal). For a more libertarian view, see Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 924 (1993), which postulates that the Free Speech Clause’s protection of expression was limited only by the rights of others.

The original Assembly Clause also would not have been understood to encompass an individual right to boycott under most, if not all, leading scholarly accounts. See, e.g., Nikolas Bowie, *The Constitutional Right of Self-Government*, 130 YALE L.J. 1652, 1729 (2021) (offering a historical account of the right to assemble as “the right to use government to solve [social] problems,” which might include “boycotts” or “throwing tea into the harbor,” but never suggesting that individuals had an individual right to deviate from the majority’s preferred boycott policy); Nicholas S. Brod, Note, *Rethinking a Reinvigorated Right to Assemble*, 63 DUKE L.J. 155, 162 (2013) (surveying the historical materials to show that “the right to peaceably assemble is best understood as an assembly right, one that protects in-person, flesh-and-blood gatherings like protests and demonstrations” (emphasis omitted)); Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543, 547 (2009) (arguing that assembly covers collective deliberation on issues of public and political importance); Jason Mazzone, *Freedom’s Associations*, 77 WASH. L. REV. 639, 713 (2002) (arguing that the assembly right can be exercised only to petition the government); see generally James M. Jarrett & Vernon A. Mund, *The Right of Assembly*, 9 N.Y.U. L.Q. REV. 1, 13 (1931) (arguing that the original Assembly Clause did not mean that the government had “surrendered [its] right to control assemblages of

From a normative standpoint, then, it is not entirely clear what weight, if any, “history and tradition” should carry in a modern First Amendment analysis of the boycott. But, for purposes of this Article, we can set that complexity aside. That is because our goal is more modest: to offer a fundamentally descriptive account of the ways in which state actors have viewed and regulated the boycott since before the Founding through the present day. Our starting place is not “abstract principles,” but instead concrete government “practices”—and the implied understandings that best explain them.<sup>29</sup> While much of that analysis will intersect with, and merit more or less weight under, various legal theories of the First Amendment, our focus is primarily on historical facts. That is why we need not, and do not, adopt or defend any particular view about what the Free Speech or Assembly Clause was originally understood to mean—or even what it should mean today.

Our approach will not satisfy a reader’s instinct for grand narratives and first principles, but it does seem to fit reasonably well with several of the Supreme Court’s most recent pronouncements on the role of history in the First Amendment context. In *Houston Community College Systems v. Wilson*,<sup>30</sup> for example, the Court took up the question of whether a governmental body violates the First Amendment by issuing a “purely verbal censure” against a public official for engaging in protected speech.<sup>31</sup> The case presented a doctrinal quandary of whether to view the “verbal censure” as an impermissible punishment for protected speech or as permissible counter-speech. Wilson answered that murky doctrinal question by reference to concrete historical practice: “When faced with a dispute about the Constitution’s meaning or application, long settled and established practice is a consideration of great weight. Often, a

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people in the interest of good order and the peace of society”). *But cf.* John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565, 576, 612 (2010) (advocating for a broad view of “assembly” that includes unpopular methods of political dissidence).

29. Marc O. DeGirolami, *Traditionalism Rising*, J. CONTEMP. LEGAL ISSUES (forthcoming 2024) (manuscript at 7), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4205351](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4205351) [<https://perma.cc/RUH5-LEQS>].

30. 142 S. Ct. 1253, 1258 (2022).

31. *Id.* at 1259 (citations omitted).

regular course of practice can illuminate or liquidate our founding document's terms and phrases."<sup>32</sup> Surveying examples from "colonial times" all the way through the present, at both the state and federal levels, the Court discerned a uniform historical practice of verbal censure that effectively "put at rest the question of the Constitution's meaning."<sup>33</sup> That affirmative evidence was especially powerful, the Court explained, because nothing in the historical record "suggest[ed] [that] prior generations thought an elected representative's speech might be 'abridg[ed]' by censure."<sup>34</sup>

The Court took a similarly favorable view of post-enactment history in *City of Austin v. Reagan National Advertising of Austin, LLC*,<sup>35</sup> when it held that regulations of off-premises advertising are not "subject to strict scrutiny" under the Free Speech Clause, in large part, because of "the Nation's history of regulating off-premises signs."<sup>36</sup> A central question in *City of Austin* concerned the meaning of the Supreme Court's prior decision in *Reed v. Town of Gilbert*, and whether *Reed*'s test for "content-based" restrictions was broad enough to encompass regulations of off-premises advertising.<sup>37</sup> In upholding the regulation, the Court explained that "*Reed* did not purport to cast doubt on [the Court's prior] cases" taking a narrower view of the kinds of restrictions that counted as content-based, "[n]or did *Reed* cast doubt on the Nation's history of regulating off-premises signs."<sup>38</sup> The Court acknowledged that such regulations "were not present in the founding era," but they did trace back to the 1800s and were ubiquitous at all levels of government "for the last 50-plus years."<sup>39</sup> It held that this "unbroken tradition of on-/off-premises distinctions counsel[ed] against" subjecting such regulations to strict scrutiny.<sup>40</sup> The dissent, advocating for a more

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32. *Id.* (citations omitted) (internal quotation marks omitted).

33. *Id.* at 1259–60 (internal quotation marks omitted).

34. *Id.* at 1260.

35. 142 S. Ct. 1464 (2022).

36. *Id.* at 1469, 1474–75.

37. *See generally* 576 U.S. 155 (2015).

38. *City of Austin*, 142 S. Ct. at 1474.

39. *See id.* at 1469, 1474–75.

40. *Id.* at 1475.

robust reading of *Reed*, criticized the majority's historical argument on the grounds that its "earliest example" traced back to the 1930s and that virtually all the rest postdated 1965.<sup>41</sup> But, critically, even the dissent agreed that "history and tradition" are, at the very least, "relevant to identifying and defining" doctrinal categories in the Free Speech Clause context.<sup>42</sup>

Cases like *Wilson* and *City of Austin* reflect the modern Supreme Court's broader commitment to resolving difficult conceptual and doctrinal questions by reference to the "historical understanding of the scope of the right" reflected in America's legal traditions.<sup>43</sup> That is the same methodology we apply here to the regulation of political boycotts: if textual, doctrinal, and conceptual arguments—under whatever legal theory of constitutional interpretation—leave room for doubt about the First Amendment's application, then history makes sense as a natural gap filler to resolve whether the boycott should be viewed as protected expression and association or as proscribable economic conduct.

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41. *Id.* at 1490 (Thomas, J., dissenting).

42. *Id.* (emphasis added).

43. *District of Columbia v. Heller*, 554 U.S. 570, 625 (2010); *see also* Barnett & Solum, *supra* note 10, at 455–78 (documenting this trend); *e.g.*, *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022) ("An analysis focused on original meaning and history, this Court has stressed, has long represented the rule rather than some exception within the Court's Establishment Clause jurisprudence." (internal quotation marks omitted)); *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2130, 2136–37 (2022) (reaffirming the role of "historical evidence about the reach of the First [and Second] Amendment's protections" in constitutional adjudication, and stressing that, although post-enactment history cannot defeat the Constitution's plain text, it has a clear role to play in "liquidating indeterminacies" in that text (cleaned up)); *cf.*, *e.g.*, *Lange v. California*, 141 S. Ct. 2011, 2022 (2021) (surveying "[t]he common law in place at the Constitution's founding" to help ascertain the scope of the Fourth Amendment); *cf.* *Biden v. Knight First Amdt. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1223–24 (2021) (Thomas, J., concurring) ("[R]egulations that might affect speech are valid if they would have been permissible at the time of the founding."); *Washington v. Glucksberg*, 521 U.S. 702, 702 (1997) (stressing history and tradition as a method of analysis); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557 (1995) (concluding that "[o]ur tradition of free speech" deems a parade fundamentally expressive because, "from ancient times," public expression of ideas through assemblies such as parades "[has] been a part of the privileges, immunities, rights, and liberties of citizens" (citations omitted)).

But regardless of what one might think about history's normative place in First Amendment analysis, our descriptive analysis still has important work to do in the current debate over modern anti-boycott laws.<sup>44</sup> That is because one side in that debate has already seized the mantle of history to defend its view.<sup>45</sup> Critics of anti-boycott laws insist that these laws are distinguishable from anti-discrimination and common-carrier regulations—which similarly restrict refusals to deal but do not enjoy First Amendment protections—because history and tradition set the boycott apart for special constitutional protection.<sup>46</sup> But as far as we are aware, no one has ever attempted to undertake a rigorous examination of the full “history and tradition” of boycott regulation.

In fairness, critics of modern anti-boycott laws have chronicled the many admirable boycotts in America's past, claiming that these laudable projects elevate the boycott for special First Amendment protection.<sup>47</sup> But that is not the inquiry envisioned by the Supreme Court's recent precedents, nor is it the one prescribed by any of the leading normative accounts canvassed above.<sup>48</sup> The relevant question, as a matter of precedent and interpretive common sense, is whether “legal doctrine and practice” have conceived of the boycott as legally protected expression, not whether boycotts have been used more for good or bad purposes.<sup>49</sup> The legal history, surveyed for the first time below, appears to answer the relevant constitutional question in the affirmative: modern anti-boycott laws are consistent with the robust tradition of boycott regulation.

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44. See, e.g., Br. in Opp. at 2–3, 8, *Ark. Times LP v. Waldrip*, 143 S. Ct. 774 (2023) (No. 22-379) [hereinafter *Waldrip* Opp. to Pet.] (citing an earlier draft of this Article to argue that Arkansas's anti-BDS law is constitutional because “[b]oycotting . . . has never been treated as speech” throughout history).

45. *Supra* notes 6–9 and accompanying text.

46. *Supra* notes 6–9 and accompanying text.

47. See, e.g., Brian Hauss, *The First Amendment Protects the Right to Boycott Israel*, ACLU (July 20, 2017), <https://www.aclu.org/blog/free-speech/first-amendment-protects-right-boycott-israel> [https://perma.cc/QJ9S-4EQP]. But see GLICKMAN, *supra* note 11, at 61, 103, 111 & 337 n.38 (describing how white people in the antebellum South instigated race-based boycotts to promote slavery and segregation).

48. See *supra* notes 16–43 and accompanying text.

49. *Supra* note 43.

Our historical treatment of the boycott is the most thorough to date, but it is by no means exhaustive. Several important questions exceed our scope. First, we do not address contemporary labor and antitrust statutes and the ways in which courts have viewed politically motivated boycotts under those laws. That is because these laws have already received significant scholarly attention in other contexts, and because our inquiry is more historical and backward-looking.<sup>50</sup> For our purposes, any protracted discussion of modern doctrine would have, at best, diminished marginal returns.

Second, we avoid the thorny issue of whether religiously motivated boycotts are protected under the First Amendment's Free Exercise Clause.<sup>51</sup> As with the modern labor and antitrust statutes, there exists a vast body of historical literature on whether the Free Exercise Clause was originally understood to compel exemptions from neutral and generally applicable laws.<sup>52</sup> Viewing this issue from the pro-exemption perspective, it is at least conceivable that, when a closely held corporation refuses to buy goods or services from a particular vendor for religious reasons, it does not engage in speech for purposes of the Free Speech Clause, but does engage in

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50. See, e.g., Catherine L. Fisk, *A Progressive Labor Vision of the First Amendment: Past as Prologue*, 118 COLUM. L. REV. 2057 (2018); John E. Coons, *Non-Commercial Purpose as a Sherman Act Defense*, 56 NW. U. L. REV. 705 (1962); cf. *FTC v. Superior Ct. Trial Laws. Ass'n*, 493 U.S. 411, 414 (1990) (holding that the First Amendment did not protect "a group of lawyers [who] agreed not to represent indigent criminal defendants . . . until the . . . government increased the lawyers' compensation"); *Int'l Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212, 226–227 (1982) (holding that a union's politically motivated secondary boycott of Soviet-sourced cargo violated the National Labor Relations Act and was not protected First Amendment expression).

51. Cf. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012) (describing the history behind the church autonomy doctrine and recognizing that a church's refusal to hire someone as clergy is categorically protected by the Free Exercise Clause, even if it violates an antidiscrimination statute).

52. The scholarly literature on this question is immense. For a sampling, compare Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990); Kurt T. Lash, *The Second Adoption of The Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106, 1111–14 (1994); and Stephanie H. Barclay, *The Historical Origins of Judicial Religious Exemptions*, 96 NOTRE DAME L. REV. 55 (2020) (defending the exemption thesis), with AKHIL REED AMAR, *THE BILL OF RIGHTS* 327 n.96 (1998) (arguing that the thesis "lack[s] textual and structural support" and "finds next to no [historical] support").

religious exercise for purposes of the Free Exercise Clause. As far as we are aware, no one has ever raised a Free Exercise challenge to an anti-boycott law in litigation. And while our historical findings might indirectly bear on the Free Exercise question, we focus solely on free speech—because that is the issue actually being litigated in courts and debated in legislatures across the country.<sup>53</sup>

## II. THE BOYCOTT IN EARLY AMERICAN LAW

Political boycotts have been a feature of American life since before the Founding.<sup>54</sup> And for just as long, they have been subject to rigorous governmental control. When the colonists agreed to undertake a mandatory boycott of British goods, colonial legislatures mandated compliance by putting violators on trial and imposing civil forfeiture or even criminal punishment. Shortly after the Founding, the Jefferson Administration picked up the thread and compelled Americans to boycott foreign merchants, insisting instead that they “Buy American.” And just as boycotts were compelled in furtherance of governmental policy objectives, so too were they proscribed. Courts deployed the common law of civil and criminal “conspiracy”—and the state statutes codifying those rules—to enjoin boycotts they deemed “unjustified,” including, among the most prominent examples, efforts to drive Chinese immigrants and their businesses out of the western United States.

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53. One final below-the-line caveat: the historical inquiry in this Article necessarily implicates difficult questions regarding the “level of generality” at which a potential constitutional right ought to be described. See Laurence Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1058 (1990). We define the right specifically and narrowly—as the “right to engage in a political boycott,” and not at a more general level as a “right to refuse to deal” or a “right to engage in symbolic inaction.” We do so because that is the formulation critics rely upon in litigation to evade the conceptual equivalence between anti-boycott laws and anti-discrimination laws generally. Cf. *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (opinion of Scalia, J.) (looking to “the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified”).

54. *Supra* note 47. The term “boycott” was not coined until 1880 in Ireland, after tenants in a rent dispute organized a “boycott” of their land agent, Captain Charles Cunningham Boycott. See GLICKMAN, *supra* note 11, at 115. That is why the particular term “boycott” makes no appearance in colonial- and Founding-era materials.

That landscape sits in considerable tension with an expressive view of the boycott. If boycotts were indeed inherently expressive, then the states and the federal government should not have been permitted to proceed as they have, compelling the boycotts with which they agreed and banning or deterring those whose objectives they detested. The best explanation for this early history is that the boycott was traditionally viewed as a tool of economic coercion subject to government control, and not as an inviolable method of individual expression or collective association.

A. *Compelled Boycotts at the Founding*

Critics of anti-boycott laws often cite the Revolutionary-era boycotts of the British as evidence that boycotts are a fundamentally expressive feature of our politics. Senator Rand Paul, for example, has argued that “boycotting is speech” because America was “founded with a boycott” and that the method of protest is “fundamental to our country.”<sup>55</sup> But a closer look at the early history reveals the opposite—that the Continental Congress, and the colonial governments that enforced its decisions, did not conceive of the boycott as a matter of free expression, presumptively immune from coercion or state influence. Instead, the colonists viewed their boycott of the British as an economic instrument that their governing democratic bodies had the authority to control and compel.<sup>56</sup>

In October 1774, the First Continental Congress passed the Articles of Association, charging the colonies to boycott British goods unless and until the Coercive Acts were repealed.<sup>57</sup> The signatories

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55. 165 CONG. REC. S828 (daily ed. Feb. 4, 2019) (statement of Sen. Rand Paul); *accord* Alice Sperry, *Anti-BDS Laws Could Upend the Constitutional Right to Engage in Boycott*, THE INTERCEPT (Nov. 29, 2021), <https://theintercept.com/2021/11/29/boycott-film-bds-israel-palestine/> [<https://perma.cc/W3Q2-8DS2>] (quoting ACLU attorney as claiming, “It would be shocking for a court to say that there is no right to participate in a political boycott, given the long history of boycotts in this country all the way back to the Boston Tea Party, the Montgomery Bus Boycott, boycott of apartheid South Africa. . . . This is a rich tradition.”).

56. *Cf. Hous. Cmty. Coll. Sys. v. Wilson*, 142 S. Ct. 1253, 1259 (2022) (holding that a form of government action did not intrude on free speech because it had been regularly used by states dating back “[a]s early as colonial times”).

57. ARTICLES OF ASSOCIATION OF 1774.



called for a “Non-importation, Non-consumption, and Non-exportation Agreement,”<sup>58</sup> under which individual colonies would “create their own administrative and judicial machinery and . . . impose their own penalties” on those who failed to comply.<sup>59</sup> In his leading history on the subject, Arthur Schlesinger explains that

[t]his machinery was to consist of a committee in every county, city and town, chosen by those qualified to vote for the representatives in the legislature. These committees were “attentively to observe the conduct of all persons touching this association,” and, in case of a violation, to publish “the truth of the case” in the newspapers, to the end that all such “enemies of the American liberty” might be universally contemned [sic] and boycotted.<sup>60</sup>

The precise mechanisms of enforcement varied among the colonies, but several operated in the mirror image of modern anti-boycott laws. Providence, for example, “facilitated the enforcement of the non-consumption regulation by requiring all dealers to show a certificate that the goods offered for sale conformed in every way to the specifications of the Association.”<sup>61</sup> In New York, the well-known merchant Abraham H. Van Vleck was compelled in 1775 to issue a public confession and apology for breaching the boycott—what he called “a most atrocious Crime against my Country.”<sup>62</sup> In Virginia, too, those who refused to join the boycott “could expect to be branded an ‘enemy of the country.’”<sup>63</sup> Connecticut authorized “committee[s] of inspection” to extract “a written confession of [a violator’s] guilt in violating this regulation and a promise to deposit

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58. *Id.* The term “boycott” had not yet been invented; it was coined a century later in Ireland. *Boycott*, ENCYCLOPEDIA BRITANNICA (Oct. 9, 2023), <https://www.britannica.com/topic/boycott> [<https://perma.cc/Q942-NYXC>].

59. ARTHUR MEIER SCHLESINGER, *THE COLONIAL MERCHANTS AND THE AMERICAN REVOLUTION, 1763-1776*, at 427 (1918).

60. *Id.*; see also DANA FRANK, *BUY AMERICAN: THE UNTOLD STORY OF ECONOMIC NATIONALISM* 8 (1999) (describing this as a call to “set up an official enforcement system”).

61. SCHLESINGER, *supra* note 59, at 486.

62. Abraham H. Van Vleck, *To the Public*. (1775), <https://www.loc.gov/resource/rbpe.10803200/> [<https://perma.cc/V7UN-9UH9>].

63. ROBERT MIDDLEKAUFF, *THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 1763-1789*, at 263-64 (rev. ed. 2005).

his surplus profit with the committee.”<sup>64</sup> Alternatively, the accused would undergo full trial “proceedings”: a formal summons, a charge, an invitation to defend himself, and a chance to present witnesses.<sup>65</sup> A guilty verdict required the defendant to “forfeit all commercial connections with the community.”<sup>66</sup>

These regimes were strictly enforced. Connecticut “universally adhere[d] to all the Resolves of Congress.”<sup>67</sup> New York’s Lieutenant Governor Cadwallader Colden declared that “the non importation association of the Congress is ever rigidly maintained in this Place.”<sup>68</sup> Similar sentiments were expressed in South Carolina; its General Committee noted that “the Association takes place as effectually as law itself . . . and that ministerial opposition is here obliged to be silent.”<sup>69</sup>

Opponents of the colonial boycott, much like the critics of boycott restrictions today, sometimes framed their opposition in terms of free expression and conscience. Josiah Martin, the last British Governor of North Carolina, complained that the local committees tasked with enforcing the Articles of Association were “forcing his Majesty’s subjects *contrary to their consciences* to submit to their unreasonable, seditious and chimerical Resolves.”<sup>70</sup> The Quakers in Pennsylvania similarly claimed that the boycotts “manifested great inattention to our religious principles . . . and the rules of Christian discipline” by requiring participation in what they considered subversive political acts.<sup>71</sup>

But the Continental Congress and local colonial associations paid such voices no heed and made no exception for pacifists or political dissenters. In his famous letter to Richard Henry Lee, George

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64. SCHLESINGER, *supra* note 59, at 487.

65. *Id.*

66. *Id.* at 488.

67. *Id.*

68. *Id.* at 493.

69. *Id.* at 529.

70. *Id.* at 525.

71. *Id.* at 496-97; *cf.* NOAH FELDMAN, *THE THREE LIVES OF JAMES MADISON: GENIUS, PARTISAN, PRESIDENT 19–21* (2017) (describing James Madison’s mixed reaction to the Quakers’ religiously motivated opposition to the non-importation agreements).

Mason defended the compelled colonial boycott against the charge that it was “infringing the Rights of others,” on the grounds that “[e]very Member of Society is in Duty bound to contribute to the Safety & Good of the Whole,” and that “those merchants who have conformed themselves to the opinion and interest of the country have some right to expect that *violators* of the Association shou[ld] *suffer* upon the Occasion.”<sup>72</sup> For Mason and others, the boycott was a tool of economic pressure, not a protected method of individual expression—which is why the decision to boycott (or not) was one for the political majority, based upon its assessment of the “safety and good of the whole,” and not for individual colonists.<sup>73</sup> In the colonial mind, the boycott was a form of economic coercion, calculated to “distress the various Traders & Manufacturers in Great Britain,” not a personal right of expression vested with the individual boycotter.<sup>74</sup>

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72. Letter from George Mason to Richard Henry Lee (June 7, 1770), in 1 THE PAPERS OF GEORGE MASON, 1725–1792, at 116, 118 (Robert A. Rutland ed., 1970) (emphasis in original).

73. PAULINE MAIER, FROM RESISTANCE TO REVOLUTION: COLONIAL RADICALS AND THE DEVELOPMENT OF AMERICAN OPPOSITION TO BRITAIN, 1765–1776, at 138 (1972) (ascribing to Samuel Adams, another prominent defender of the compelled boycott, the view that compelled boycotts were justified because “individuals were bound to act according to the common will of their fellow citizens or to leave”).

74. Letter from George Mason to George Washington (Apr. 5, 1769), *supra* note 72, at 99; MAIER, *supra* note 73, at 137 (describing the nonimportation association as a reflection not of “individual rights,” but instead of “the corporate rights of the community” to govern itself through “the associations’ right to coerce nonconformers”).

We are aware of only a single Founding-era source that has been interpreted by some to represent a contrary view of the boycott as constitutionally protected activity. Christopher Gadsden, a delegate to the First Continental Congress, argued in a letter that “every body of *English* freemen, in cases of extremity like ours, have an undeniable constitutional right besides, if they think it necessary for their preservation, to come into such a[] [nonimportation] agreement.” Letter from Christopher Gadsden to Peter Timothy (Oct. 26, 1769), in THE LETTERS OF FREEMAN, ETC.: ESSAYS ON THE NONIMPORTATION MOVEMENT IN SOUTH CAROLINA 57, 67 (R. Weir ed., 1977) (W. Drayton ed., 1771) (quoted in part in Pope, *supra* note 11, at 333, and Porterfield, *supra* note 11, at 30). Taken in context, Gadsden’s position fits neatly with the broader colonial conception of the boycott as a collective tool of public revolution, not an instrument of protected expression. For Gadsden, the “constitutional right” is one of a collective (a “body”) to exercise its combined economic power, “in cases of extremity” and when “necessary for [a people’s] preservation”—the exact opposite of a private right of expression.

The nonimportation associations thus evince a decidedly non-expressive view of the boycott. The First Continental Congress mandated a boycott; the colonies then used certification techniques to police their citizens for compliance; they held formal trials for the alleged violators; and, for the guilty, they issued formal punishments and prohibited economic associations.<sup>75</sup> That is roughly analogous to today's anti-boycott laws, under which states agree to deal only with those who decline to boycott Israel, ensure compliance through certification, and break off economic associations with violators. Indeed, the Articles of Association painted with a far broader brush than today's anti-boycott laws, applying equally to individuals and businesses and without exception for even *de minimis* trades and transactions.<sup>76</sup>

Of course, the analogy between the early nonimportation rules and modern anti-boycott laws is not perfect. For one thing, the Articles of Association were not "mandatory," strictly speaking, because the First Continental Congress lacked *de jure* legislative power. But it would be a mistake to overstate that formal distinction. First of all, each of the colonies implemented that Articles' mandate through political processes that were undisputedly

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75. ROBERT MIDDLEKAUFF, *THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 1763–1789*, at 188 (2005).

76. A number of anti-BDS laws, for instance, exempt individuals, small businesses, and low-value contracts from their purview. *E.g.*, ALA. CODE § 41-16-5(c) (exception for state contracts for less than \$15,000 or noncompliant businesses willing to accept at least 20% less than the lowest bid from a compliant firm); ARIZ. REV. STAT. ANN. §§ 35-393, 35-393.01(a) (law limited to "contract[s] with a value of \$100,000 or more" with companies with at least ten employees); CAL. PUB. CONT. CODE § 2010 (\$100,000 minimum); GA. CODE ANN. § 50-5-85(b) (exception for contracts worth less than \$100,000); KAN. STAT. ANN. § 75-3740e(c) (exclusion for deals worth no more than \$100,000 or entered into by sole proprietorships); KY. REV. STAT. ANN. § 45A.607(2) (carveout for individual contractors, companies with five or fewer employees, and contracts worth less than \$100,000); LA. STAT. ANN. § 39:1602.1(F) (same, except no sole-proprietor exception); MO. REV. STAT. § 34.600(2) ("This section shall not apply to contracts with a total potential value of less than one hundred thousand dollars or to contractors with fewer than ten employees."); OKLA. STAT. tit. 74, § 582(D) (exceptions for sole proprietors and deals worth \$100,000 or less); S.D. Exec. Order No. 2020-01, § 3 (limiting anti-boycott mandate to contracts worth at least \$100,000 with companies that have at least five employees).

coercive.<sup>77</sup> And, second, to quote Schlesinger, the text of the Articles “exposed its real character as a *quasi-law*, inasmuch as its binding force was not limited to those who accepted its provisions but was made applicable to ‘all persons.’”<sup>78</sup> The Articles were, in other words, “the first prescriptive act of a national Congress to be binding directly on individuals, and the efforts at enforcement of or compliance with [their] terms certainly contributed to the formation of a national identity.”<sup>79</sup> The local committees that enforced the nonimportation mandate—through economic isolation and more punitive measures—represented “new systems of colonial government . . . which were in many ways more democratic” than the existing colonial legislatures.<sup>80</sup> Indeed, President Abraham Lincoln explained in his First Inaugural Address that the Union was “much older than the Constitution[,]” having been “formed, in fact, by the Articles of Association in 1774” before being “matured” by the Declaration of Independence and the Articles of Confederation.<sup>81</sup> The germ of American democracy, then, was born from a system in which participation in a political boycott was not freely chosen, but instead was ordained from on high and vigorously enforced. And while there was no First Amendment at the time to constrain the decisions of the First Continental Congress and the state legislatures, freedom of speech as a natural right was certainly part of the prevailing legal culture.<sup>82</sup> That the same generation of founders embraced both the Free Speech Clause and the Articles of Association suggests that the values underlying the former were not undermined by the latter.

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77. *Supra* notes 59–73 and accompanying text.

78. SCHLESINGER, *supra* note 59, at 428.

79. DENNIS J. MAHONEY, *Association, The*, in 1 *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 132, 132–33 (Leonard W. Levy & Kenneth L. Karst eds., 2d ed. 2000); MAIER, *supra* note 73, at 135 (nonimportation bodies “increasingly exercised functions normally reserved to a sovereign state”).

80. FRANK, *supra* note 60, at 9.

81. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), [https://avalon.law.yale.edu/19th\\_century/lincoln1.asp](https://avalon.law.yale.edu/19th_century/lincoln1.asp) [<https://perma.cc/2ND3-HHC6>].

82. See Jud Campbell, *The Invention of First Amendment Federalism*, 97 *TEX. L. REV.* 517, 529–34 (2019).

Subsequent practice supplies little reason to think the First Amendment upended the colonial conception of the boycott. To the contrary, the earliest pieces of formal legislation in American history implicitly ratified the notion that the boycott could be regulated as economic conduct. Soon after the Founding, Congress—at President Thomas Jefferson’s urging—passed a succession of laws requiring Americans to boycott certain foreign nations. The Non-Importation Act prohibited Americans from importing most goods made from leather, silk, hemp, flax, tin, or flax that were made or sold in Britain.<sup>83</sup> Offenders faced forfeiture of their goods and fines thrice the value of the products.<sup>84</sup> Next came the Embargo Act of 1807, which similarly threatened hefty fines and forfeiture of the offending goods (and the vessels that carried them) for anyone who violated the mandatory boycott of all foreign imports.<sup>85</sup> Congress partly repealed the Embargo Act two years later through the Non-Intercourse Act, which permitted Americans to trade with some countries but still left intact the compelled boycotts of Britain and France.<sup>86</sup> Opponents of the bills decried “an invasion” of “the liberty of the people” and of their “civil rights” to dispose of property as they pleased.<sup>87</sup> But, as far as we are aware, the Congress that passed the laws never appears to have entertained the possibility that mandatory boycotts might somehow intrude on the freedom of speech or association.

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83. Non-Importation Act, Pub. L. No. 9-29, 2 Stat. 379 (1806).

84. *Id.*

85. Embargo Act of 1807, Pub. L. No. 10-5, 2 Stat. 451. The enforcement mechanisms did not originate in the Embargo Act itself but rather arose in two supplementary acts passed in subsequent months. Act of Jan. 8, 1808, Pub. L. No. 10-8, 2 Stat. 453; Act of Mar. 12, 1808, Pub. L. No. 10-33, 2 Stat. 473.

86. Non-Intercourse Act, Pub. L. No. 10-24, 2 Stat. 528 (1809).

87. WILLIAM J. WATKINS, JR., *RECLAIMING THE AMERICAN REVOLUTIONS: THE KENTUCKY AND VIRGINIA RESOLUTIONS AND THEIR LEGACY* 88 (2004); REUEL ROBINSON, *HISTORY OF CAMDEN AND ROCKPORT, MAINE* 136 (1907); *see also* Blakely Brooks Babcock, *The Effects of the Embargo of 1807 on the District of Maine* 9 (1963) (M.A. thesis, Trinity College) (on file at the University of Maine) (chronicling that objectors to the embargo accused the federal government of intruding on their “right of ‘acquiring property’, or of enjoying it and possessing it”).

The same held true for the “buycott,” the politically motivated decision to affirmatively patronize a particular firm. That practice has a pedigree in American politics nearly as old as the boycott,<sup>88</sup> and yet early state governments had no compunctions about telling Americans from whom they needed to buy and when. In one notable example, Henry Clay, a strong supporter of Jefferson’s embargo policies, “introduced a resolution” in Kentucky requiring state legislators to wear “homespun suits” made in the United States and boycott those made from “British broadcloth.”<sup>89</sup> That Clay and his fellow representatives believed they could *compel* Kentuckians (or at least members of the Kentucky legislature) to buy and wear American goods, and thus boycott British ones, underscores their view of the boycott and the buycott as economic acts, not protected expression. Clay’s proposal passed with overwhelming support; the more prominent of the two dissenters was Humphrey Marshall, an “aristocratic lawyer who possessed a sarcastic tongue” and whose opposition to the measure escalated into a duel with Clay.<sup>90</sup> But even Marshall, an attorney, never suggested that Clay’s proposition subverted his free-expression rights or compelled him to engage in speech with which he disagreed.

The lesson of the Clay anecdote should be clear, yet critics of anti-boycott laws consistently miss the point. Senator Paul (R-KY), for example, has tried to recruit this example as support for his critical view: “In my State,” he says, “Henry Clay was famous for passing legislation boycotting British goods so that people could wear American clothing. He actually fought a duel over that and became

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88. See GLICKMAN, *supra* note 11, at 69–72 (tracing the “buycott” back at least to the Free Produce movement of the 1820s, in which Quaker and free black abolitionists encouraged consumers to buy exclusively products made by “free labor”). For a more modern example, see Shauna Snow, *ACLU Starts a “Buycott” of TV Programs*, L.A. TIMES, Oct. 13, 1989 (describing campaign “in which members will be urged to go out of their way to buy the [favored] companies’ products”).

89. CLEMENT EATON, *HENRY CLAY AND THE ART OF AMERICAN POLITICS* 17 (1957); DAVID S. HEIDLER & JEANNE T. HEIDLER, *HENRY CLAY: THE ESSENTIAL AMERICAN* 71 (2010).

90. EATON, *supra* note 89, at 17.

famous and then became one of the most famous U.S. Senators.”<sup>91</sup> From that story, the Senator concludes that it is part of the American identity “that you should be allowed to boycott, that it is an extension of your speech, that it is an extension of the First Amendment.”<sup>92</sup> The history is mostly right, but the lesson is backwards. Clay was attempting to compel participation in the boycott preferred by the legislature, and he was willing to shoot and kill the leading holdout to preserve the boycott’s integrity. Rather than establishing the boycott as a mode of individual expression, these early events show that governments could and did mandate boycotts and buycotts as tools of economic policy.<sup>93</sup>

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Before moving on, it is worth observing that the great majority of the early historical examples concern compulsion of a political boycott, whereas modern anti-boycott laws involve deterrence or prohibition of the boycott. As a result, this earliest history cannot, in the Supreme Court’s words, “put at rest the question of the Constitution’s meaning” with respect to modern anti-boycott laws.<sup>94</sup> Still, the colonial examples are at least meaningfully probative for two fundamental reasons.

First, the colonial examples provide affirmative historical support for the doctrinal distinction—which underlies modern anti-boycott laws—between the unprotected economic act of boycotting (i.e., refusing to deal with) a particular counterparty, on the one hand, and the protected *expressive* activities that often precede and accompany the boycott, on the other. It is clear that the Founders and colonial

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91. Statement of Senator Rand Paul, *supra* note 55, 165 CONG. REC. at S828.

92. *Id.*

93. “Buy American” initiatives like Henry Clay’s cropped up repeatedly over the next two centuries. *See, e.g.*, Exec. Order No. 14,005, 86 Fed. Reg. 7475 (Jan. 25, 2021) (Biden Administration adopting preference for American-made goods in government procurement to replace those adopted by the Trump Administration); Exec. Order No. 13,788, 82 Fed. Reg. 18,837 (Apr. 18, 2017) (Trump Administration implementing similar measures); Buy American Act, Pub. L. No. 72-428, 47 Stat. 1520 (1933) (codified as amended at 41 U.S.C. §§ 8301–8305) (enacting similar policy).

94. *Hous. Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 476 (2022) (quoting *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819)) (internal quotation marks omitted).



governments had no compunctions about compelling boycotts and no sympathy for conscientious objectors—because boycotting, to them, was not speech. Several Founders, including Samuel Adams and George Mason, made clear their view that individuals had no expressive right to defy the binding majoritarian determinations of colonial assemblies with respect to the boycott.<sup>95</sup> At the same time, however, those same Founders recognized and defended a right to engage in certain expressive activities that preceded and sometimes accompanied the refusal to deal. Adams, for example, “justified” the colonial “conventions and committees for the purpose of regulating the economy” and boycotting the British as an exercise of the “right of the people ‘to assemble upon all occasions to consult measures for promoting liberty and happiness.’”<sup>96</sup> As Adams saw it, “a free and sensible People when they felt themselves injured . . . had a Right to meet together to consult for their own Safety”—that is, a right to assemble, to deliberate collectively, and to vote on their preferred boycott policy, free from British interference.<sup>97</sup> This Founding-era understanding presages the modern doctrinal distinction—between boycotts and antecedent expression—that harmonizes anti-boycott laws with the First Amendment.

*Second*, the colonial examples also force the critics of anti-boycott laws into an awkwardly asymmetric view of the First Amendment. The colonists and early legislatures, in their view, must have been

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95. See *supra* notes 72–73 and accompanying text.

96. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 323–24 (1969) (quoting Benjamin Rush’s Diary (Feb. 4, 1777), and a letter from Daniel of St. Thomas Jenifer to Governor Thomas Johnson, Jr. (May 24, 1779)).

97. L. F. S. Upton, *Proceedings of Ye Body Respecting the Tea*, 22 WM. & MARY Q. 287, 292–93 (1965); see also WOOD, *supra* note 96, at 312 (“It was this right of assembly that justified the numerous associations and congresses that sprang up during the Stamp Act crisis, all of which were generally regarded as adjuncts . . . of the constituted governments.”); WILLIAM S. POWELL, *NORTH CAROLINA THROUGH FOUR CENTURIES 171–73* (1989) (explaining that the North Carolina Provincial Congress justified its exercise of political authority against the British on the theory that it was “the right of the people, or their representatives, to assemble and petition the Crown for relief from their grievances”); MAIER, *supra* note 73, at 71–72 (similar); Pope, *supra* note 11, at 336–37 (describing the colonial-era connection between “the right of assembly” and the exercise of “popular sovereignty” (emphasis added)).

allowed to *compel* a boycott (as the colonists, the Jefferson administration, and the Clay-led legislature did), but they absolutely could not prohibit, deter, or even chill a boycott. To be fair, there is clearly an intuitive difference between *requiring* a person to purchase goods from a certain source and *prohibiting* them from buying from that source.<sup>98</sup> But, as we explain below, that distinction has been understood historically as a reflection of the freedom of *contract*, not of speech.<sup>99</sup> We have found no affirmative evidence in the historical record to suggest that this distinction bears any *First Amendment* significance, and the post-Founding history cuts decisively the other way. The most natural reading of the early sources, we think, is that the boycott—along with its close cousin, the boycott—was seen as a tool of economic coercion, and not as a fundamentally expressive act immune from governmental control. That is why the government could prevent people from buying British goods, as the First Continental Congress did, and why it could require that people “Buy American,” as the Jefferson-era Congress did indirectly and Henry Clay did outright.

It is also worth noting that the asymmetric view is incompatible with modern First Amendment doctrine, which treats compulsion and prohibition as two sides of the same unconstitutional coin. As the Supreme Court has explained, “[t]here is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees ‘freedom of speech,’ a term necessarily comprising the decision of both what to say and what *not* to say.”<sup>100</sup> In fact, compelled speech is ordinarily

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98. Cf. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 649–50 (2012) (Scalia, J., dissenting) (distinguishing, for purposes of the Commerce Clause, between forcing someone to buy a product they do not want and regulating participants who have voluntarily opted into a particular market).

99. See *infra* notes 253–254 and accompanying text.

100. *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 796–97 (1988); see also *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985) (“There is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.” (quoting *Est. of Hemingway v. Random House, Inc.*, 244 N.E.2d 250, 255 (N.Y. 1968)));

viewed as the more sinister of the two offenses against free expression, since it “coerce[s] [people] into betraying their convictions.”<sup>101</sup> If the Founders could compel a boycott, then modern First Amendment logic dictates that they could prevent one, too. Subsequent historical practice directly supports this view, and we turn to that evidence next.

### B. *Prohibited Boycotts as Common-Law Conspiracies*

Since the nineteenth century, American courts have held boycotters liable under the common law of “conspiracy” whenever they agreed to a boycott that interfered unjustifiably in the business enterprise of a third party.<sup>102</sup> By the end of the century, a majority of the states had codified conspiracy doctrines in their criminal codes.<sup>103</sup> Under these various laws, judges would determine whether a particular boycott was “justified,” so to speak, by “evaluat[ing] the social worth of the boycotters’ objective” and then balancing that value against the harms wrought upon the target of the boycott.<sup>104</sup> If the boycott was deemed to be “unjustified,” judges

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cf. *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (no practical difference between compulsion and prohibition of newspaper publication).

101. *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018) (“[A] law commanding ‘involuntary affirmation’ of objected-to beliefs would require ‘even more immediate and urgent grounds’ than a law demanding silence.” (quoting *W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 633 (1943))).

102. Albert J. Harno, *Intent in Criminal Conspiracy*, 89 U. PA. L. REV. 624, 643–44 (1941) (discussing *Mogul Steamship Co. v. McGregor*, 23 Q.B.D. 598 (1889), which held that combinations may be criminal if “the act agreed to ‘between the defendants must have been the intentional doing of some act to the detriment of the plaintiffs’ business without just cause or excuse’”); see also Joseph E. Ulrich & Killis T. Howard, *Injuries to Business Under the Virginia Conspiracy Statute: A Sleeping Giant*, 38 WASH. & LEE L. REV. 377, 387 (1981). The origins of this doctrine can be traced at least as far back as *Bromage v. Prosser*, 4 Barn. & C. 247, 255 (1825), which defined malice as a “wrongful act, done intentionally, without just cause or excuse.”

103. See ROBERT SAMUEL WRIGHT, *THE LAW OF CRIMINAL CONSPIRACIES AND AGREEMENTS* 237–52 (1887) (collecting statutes).

104. Note, *Protest Boycotts Under the Sherman Act*, 128 U. PA. L. REV. 1131, 1154–56 (1980); see also, e.g., *Plant v. Woods*, 57 N.E. 1011, 1014–15 (Mass. 1900) (holding, over a dissent from then-Chief Justice of the Supreme Judicial Court Oliver Wendell Holmes, that union defendants’ striking activity was unlawful: “The necessity [of the boycotters’ cause] is not so great . . . as compared with the right of the plaintiffs to be free from

would then issue injunctions against further boycotting activities and award damages for any economic harms that the target was forced to endure as a result of the unlawful boycott.<sup>105</sup> That body of law is difficult to square with an “expressive” view of the boycott, and instead suggests that the boycott was viewed as an economic tool that states—and even state-court judges—could freely regulate in their discretion.

The application of conspiracy laws to boycotts cropped up most often in the labor context, with the earliest cases revealing a deep hostility to union boycotts.<sup>106</sup> In *State v. Glidden*,<sup>107</sup> the first published American decision to use the term “boycott,” the Connecticut Supreme Court affirmed the convictions of a group of union sympathizers under the state’s criminal conspiracy laws.<sup>108</sup> The defendants passed out leaflets urging the public not to buy papers from or advertise with a publishing company that had refused to hire solely union members: “A word to the wise is sufficient, boycott the *Journal* and *Courier*!”<sup>109</sup> The court rejected the defendants’ claims that they had a right to advocate for the boycott, on the theory that such a right would subject “all business enterprises . . . to their dictation. No one is safe in engaging in business, for no one knows . . . whether law and justice will protect the business, or brute force, regardless of law, will control it.”<sup>110</sup> The boycott was so powerful an instrument, the court opined, that its freewheeling use would result in ever-escalating “abuses and excesses.”<sup>111</sup>

The next prominent decision in this area was *Crump v. Commonwealth*,<sup>112</sup> in which the Virginia Supreme Court took a similarly

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molestation, such as to bring the acts of the defendant under the shelter of the principles of trade competition.”).

105. *E.g.*, Ulrich & Howard, *supra* note 102, at 407 (damages); *Plant v. Woods*, 176 Mass. 492, 504 (Mass. 1900) (injunction).

106. See GARY MINDA, BOYCOTT IN AMERICA: HOW IMAGINATION AND IDEOLOGY SHAPE THE LEGAL MIND 35–37 (1999).

107. 8 A. 890 (Conn. 1887).

108. MINDA, *supra* note 106, at 36.

109. *Id.* (quoting *Glidden*, 8 A. at 898) (internal quotation marks omitted).

110. *Id.* (quoting *Glidden*, 8 A. at 894) (internal quotation marks omitted).

111. *Id.* at 36–37 (quoting *Glidden*, 8 A. at 894–95) (internal quotations marks omitted).

112. 6 S.E. 620 (Va. 1888).

hostile view of the boycott. That case, like *Glidden*, involved a conspiracy conviction arising from a union-organized boycott, in which the defendant and others had sent letters to patrons of a non-unionized printing firm threatening to “black list” all who violated the boycott.<sup>113</sup> The court condemned the tactic, describing the “essential idea of boycotting” as “a confederation . . . of many persons, whose intent is to injure another by preventing any and all persons from doing business with him, through fear of incurring the displeasure, persecution, and vengeance of the conspirators.”<sup>114</sup> The court thus declared boycotts “unlawful, and incompatible with the prosperity, peace, and civilization of the country; and, if they can be perpetrated with impunity by combinations of irresponsible cabals or cliques, there will be an end of government and of society itself.”<sup>115</sup>

To these state courts, the boycott reflected the use of a collective economic power—a kind of quasi-sovereign power—over which the government could and should exercise plenary control to prevent economic and societal harm. As then-Judge William Howard Taft observed, “Boycotts, *though unaccompanied by violence or intimidation*, have been pronounced unlawful in every state of the United States where the question has arisen, unless it be Minnesota.”<sup>116</sup>

But judicial perspectives on the union boycott were dynamic, evolving, and hardly uniform. As the historian E.P. Cheney recognized at the time,

[t]he criminality of [the boycott] has been looked upon quite differently by different judges. In cases in Wisconsin and Virginia . . . the boycott was condemned *in toto*, as a criminal conspiracy; while in cases in the New York state courts, and . . . in Connecticut,

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113. *Id.* at 622, 629.

114. *Id.* at 627.

115. *Id.* at 630.

116. *Thomas v. Cincinnati, N.O. & T.P. Ry. Co.*, 62 F. 803, 819 (C.C.S.D. Ohio 1894) (emphasis added). Boycotts were subsequently held unlawful in Minnesota as well. *Ertz v. Produce Exchange of Minneapolis*, 81 N.W. 737 (Minn. 1900).

the extent to which boycotts are legal and the point at which they become criminal are clearly and on the whole liberally defined.<sup>117</sup>

Indeed, some courts were particularly sympathetic to boycotts that were “motivated by the prospect of immediate economic gain for [the boycotters] themselves.”<sup>118</sup> It was appropriate, in their view, for workers to engage in a boycott, even if it caused some “incidental” damage to their employer, so long as their “primary purpose” was “to better the condition of the boycotters as laborers, and not to do irreparable injury” to their employer.<sup>119</sup> But even under that more defendant-friendly construction of the conspiracy laws, “broader or more attenuated motives” for boycotts “were [still] condemned as ‘malicious.’”<sup>120</sup>

This disuniformity evoked sharp critique from some nineteenth-century commentators and judges, concerned about the ways in which the conspiracy laws authorized judges to enjoin or punish boycotters based on their subjective, ad hoc assessments of the defendants’ objectives. But, as far as we are aware, none of the prominent critics ever suggested that the conspiracy laws ran afoul of the First Amendment. Most famous among them, Oliver Wendell Holmes Jr. wrote at length about the contested political judgments behind every application of the conspiracy statutes. Surveying a broad swath of decisions, Holmes reasoned that the ultimate “ground of decision” in the cases was “policy,” and that “judges with different economic sympathies” were deciding like cases

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117. E.P. Cheyney, *Decisions of the Courts in Conspiracy and Boycott Cases*, 4 POL. SCI. Q. 261, 273 (1889).

118. James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518, 544 (2004); cf. *Gompers v. Buck’s Stove & Range Co.*, 221 U.S. 418, 437 (1911) (noting split in authority among, on the one hand, courts holding that direct and secondary boycotts predicated on refusals to deal (or pressure on others to refuse to deal for fear of being boycotted themselves) were unlawful and, on the other, courts holding that “no boycott can be enjoined unless there are acts of physical violence, or intimidation caused by threats of physical violence”).

119. *Reardon, Inc., v. Caton*, 189 A.D. 501, 512–13 (N.Y. App. Div. 1919) (Jenks, P.J., concurring); see also, e.g., *Radio Station KFJH Co. v. Musicians Ass’n*, 220 P.2d 199, 204 (Kan. 1950) (“[I]t is the rule today that . . . the public interest in improving working conditions is of sufficient social importance to justify such peaceful labor tactics”).

120. Pope, *supra* note 118, at 544.

differently.<sup>121</sup> As a judge, Holmes pointed out repeatedly that courts were deeply divided “on the question of what shall amount to a justification” under the conspiracy laws because, in his view, the “true grounds of decision are considerations of policy” that “rarely are unanimously accepted.”<sup>122</sup> The legal writer Francis Wharton shared similar concerns, though he articulated them in due process-like terms:

“No man can know in advance whether any enterprise in which he may engage may not . . . become subject to prosecution. . . . Legislative and judicial compromises, which one court may view as essential to the working of the political machine, another court may hold to be indictable as a corrupt conspiracy.”<sup>123</sup>

Notably, none of these critiques sounded in principles of free speech or association.

In any event, conspiracy law survived these various objections, and its vague standards extended well into the twentieth century and far beyond labor disputes.<sup>124</sup> According to the First Restatement of Torts, for example, “[p]ersons who cause harm to another by a concerted refusal in their business to enter into or to continue business relations with him are liable to him for that harm . . . if their concerted refusal *is not justified under the circumstances*.”<sup>125</sup> The

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121. Oliver Wendell Holmes Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 8 (1894).

122. *Vegelahn v. Gunter*, 44 N.E. 1077, 1080 (Mass. 1896) (Holmes, J., dissenting); *accord Aikens v. Wisconsin*, 195 U.S. 194, 204 (1904) (Holmes, J.) (explaining that the “justification” for the concerted refusal to deal “may vary in extent according to the principle of policy” and “the end for which the act is done”).

123. 2 WHARTON’S AMERICAN CRIMINAL LAW 191 (8th ed. 1880).

124. *Compare* *A. S. Beck Shoe Corp. v. Johnson*, 274 N.Y.S. 946, 953 (Sup. Ct. 1934) (holding that a boycott’s goal of “having members of one race discharged in order to employ the members of another race will not justify this direct damage”), *with* *Green v. Samuelson*, 178 A. 109, 110–13 (Md. Ct. App. 1935) (goals related to racial equality may justify the boycott); *compare* *Gott v. Berea College*, 161 S.W. 204, 205–07 (Ky. Ct. App. 1913) (head of school not liable for directing his students not to patronize plaintiff’s restaurant), *with* *Hutton v. Walters*, 179 S.W. 134, 134–35, 137–38 (Tenn. 1915) (college president held liable for organizing a similar boycott).

125. RESTATEMENT (FIRST) OF TORTS § 765 (1939) (emphasis added).

commentary to that provision explains that the “[d]ecision in each case depends upon a comparative appraisal of the values of the object sought to be accomplished by the actors’ conduct.”<sup>126</sup> That balancing inquiry grants judges broad latitude to conclude that, “even though the interest sought to be advanced is laudable, the concerted refusal to deal is [still] not justified” because it is “prejudicial to a paramount social interest.”<sup>127</sup>

This body of law is difficult to square with a view of the boycott as protected First Amendment expression. Under the nineteenth-century landscape, state legislatures and judges could prohibit, enjoin, and penalize boycotting activities whenever they disagreed with the boycotters’ objectives and deemed those objectives “prejudicial” to the public good. We are aware of no evidence to suggest that this balancing analysis was informed by First Amendment considerations. The boycott enjoyed no special presumption of legality, and there is no indication in the case law that courts conducting anything remotely as exacting as modern “strict scrutiny” analysis in deciding whether an injunction was justified.<sup>128</sup> To the contrary, the ad hoc balancing reflected in the case law appears to have permitted judges with different values to reach dramatically different results in indistinguishable cases, based primarily on their particular conceptions of the public good.

In addition, if boycotts were indeed viewed as symbolic speech, then the ad hoc judicial balancing might itself be inconsistent with the First Amendment, as originally understood. According to Professor Jud Campbell, the Founders believed that the job of “assessing the public good—generally understood as the welfare of the

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126. *Id.* § 765 cmt. d; *see also, e.g.,* *Diaz v. Kay-Dix Ranch*, 9 Cal. App. 3d 588, 591–92 (1970) (“Whether there is justification is determined not by applying precise standards but by balancing, in the light of all the circumstances, the respective importance to society and the parties of protecting the activities interfered with on the one hand and permitting the interference on the other.”).

127. RESTATEMENT (FIRST) OF TORTS § 765 cmt. d.

128. *See, e.g.,* *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 799 (2011) (under modern doctrine, “restriction[s] on the content of protected speech” are presumed “invalid” unless shown to “pass[] strict scrutiny,” a “demanding standard” that is “rare[ly]” met (citation omitted)).



entire society — was almost entirely a *legislative task*, leaving very little room for judicial involvement,” and that “the boundaries of the freedom of opinion depended on political rather than judicial judgments.”<sup>129</sup> If boycotts were indeed speech, then “judges [would have] had no business” usurping the legislative role and “resolving [conspiracy] cases based on judicial assessments of the general welfare.”<sup>130</sup> The persistence and sustained enforcement of the conspiracy laws thus provides additional evidence that the boycott was understood to exist primarily in the realm of economic conduct, and not expression or association.<sup>131</sup>

### C. *Boycott Suppression in Sino-American Relations*

Relations between the United States and China in the late nineteenth and early twentieth centuries were marked by a series of high-profile political boycotts on both sides of the Pacific.<sup>132</sup> Labor groups in the western United States organized widespread boycotts of Chinese-owned laundromats and restaurants in furtherance of an anti-immigrant, anti-Chinese ideology. But that “expressive” purpose did not stop American courts from enjoining the boycotters under the conspiracy laws. Around the same time, anti-

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129. Campbell, *supra* note 27, at 253, 267, 287.

130. *Id.* at 267. But see Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 IND. L.J. 1, 32 (2011) (“Pragmatic [judicial] balancing seems more consistent with the framing-era meaning of free speech and a free press.”); David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 MD. L. REV. 429, 458 (1983) (“At a minimum, the freedom of speech meant that restrictions on speech are impermissible unless necessary to accomplish a legitimate function of government, and that the courts rather than the legislature should ultimately determine that necessity.”).

131. It is also worth noting that conspiracy-law judicial balancing would be inconsistent with modern doctrine if boycotts were indeed expression. See *United States v. Stevens*, 559 U.S. 460, 470 (2010) (explaining that “[t]he First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs” and that “[o]ur Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it”); see also *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (rejecting the notion of cost-benefit analysis in constitutional interpretation because “the First [Amendment] . . . is the very product of an interest balancing by the people”).

132. Sin-Kiong Wong, *The Making of a Chinese Boycott: The Origins of the 1905 Anti-American Movement*, 6 AM. J. CHINESE STUD. 123, 123–124 (1999).

Chinese U.S. immigration policy precipitated the Chinese Boycott of 1905, a collective effort by merchants and civil-society groups in China to shut down trade with their American counterparts. The State Department responded aggressively, insisting that Chinese authorities deploy force to suppress the boycott and promising to hold the Chinese government accountable for any economic injuries suffered by American businesses. Neither side of this story squares with an expressive view of politically motivated boycotts. Boycotts, both foreign and domestic, were seen not as matters of individual expression but rather as coercive instruments of politics subject to the sovereign's plenary control. And while it is, of course, true that foreign boycotts conducted on foreign soil would never have been regarded as constitutionally protected activities,<sup>133</sup> the broader historical narrative on both sides still clearly reflects a view of the boycott as a tool of economic coercion and not of speech.

### 1. Union Boycotts of Chinese-Owned Businesses

Around the turn of the nineteenth century, American labor unions mounted a systematic campaign to boycott Chinese-owned restaurants and laundries in the western United States.<sup>134</sup> An advocate argued—in terms both expressive and abhorrent—that “white citizens have as good a right to determine that they will not employ

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133. See *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 140 S. Ct. 2082, 2086 (2020) (“[I]t is long settled as a matter of American constitutional law that foreign citizens outside U. S. territory do not possess rights under the U. S. Constitution.”); *id.* at 2087 (applying that rule to the First Amendment). But cf. Nathan S. Chapman, *Due Process Abroad*, 112 NW. U. L. REV. 377, 381 (2017) (arguing that “the Constitution’s historical background and text and early American practice all strongly support the conclusion that the founding generation understood the Due Process Clause to apply to U.S. law enforcement against anyone, anywhere.”).

134. Gabriel J. Chin & John Ormonde, *The War Against Chinese Restaurants*, 67 DUKE L.J. 681, 693–94 (2018) (describing the American Federation of Labor’s 1914 resolution urging “affiliated membership to give their patronage to American laundries and restaurants” only); David E. Bernstein, *Lochner, Parity, and the Chinese Laundry Cases*, 41 WM. & MARY L. REV. 211, 265 & n.421, 292–93 nn.583–87 (1999) (chronicling boycott efforts in the West); Raymond Lou, *Chinese-American Agricultural Workers and the Anti-Chinese Movement in Los Angeles*, in *LABOR DIVIDED: RACE AND ETHNICITY IN THE UNITED STATES LABOR STRUGGLES, 1835–1960*, at 57–58 (Robert Asher & Charles Stephenson eds., 1990) (describing failed boycott efforts in Los Angeles).

Chinese laborers as another class has to combine and exclude white labor from their employ.”<sup>135</sup> Though such boycotts were rarely successful in pushing out Chinese-owned businesses,<sup>136</sup> they did on occasion have sufficient economic impact to expose the organizers to civil liability or injunctions under local conspiracy laws.<sup>137</sup>

The boycott in Butte, Montana in 1897 was among the most significant and successful of the anti-Chinese boycotts from this period.<sup>138</sup> It, too, was announced in decidedly expressive terms:

A general boycott has been declared upon all Chinese and Japanese restaurants, tailor shops and wash houses, by the Silver Bow Trades and Labor Assembly. All friends and sympathizers of organized labor will assist in this fight against lowering Asiatic standards of living and of morals.

America v. Asia, progress v. retrogress, are the considerations now involved. American manhood and American womanhood must be protected from competition with these inferior races and further invasions of industry and further reductions of the wages of native labor by the employment of these people must be strenuously resisted.<sup>139</sup>

The boycotters employed multiple tactics to spread the word: they displayed banners across the city that included anti-Chinese images and calls to boycott; approached citizens and pressed them not to patronize Chinese businesses; and successfully carried out

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135. *Notes and Comments*, DAILY DEMOCRAT, Apr. 2, 1886, at 2, <https://cdnc.ucr.edu/?a=d&d=SRPD18860402.2.13&e=-----en--20--1--txt-txIN-----11> [<https://perma.cc/TW57-EQYN>]; see also *Card to the Public*, TONOPAH BONANZA (Nev.), Jan. 17, 1903, at 6 (ad from union encouraging readers “to cease their patronage of Chinese restaurants, laundries, and all places where Chinese labor is employed, thus giving our own race a chance to live”).

136. Chin & Ormonde, *supra* note 134, at 698 (“Even when not enjoined, nonviolent boycotts were rarely wholly successful.”); Bernstein, *supra* note 134, at 292 (“Chinese laundries thrived throughout the West, even in cities where they faced organized boycotts.”).

137. Chin & Ormonde, *supra* note 134, at 695 n.69 (collecting examples).

138. Stacy A. Flaherty, *Boycott in Butte: Organized Labor and the Chinese Community, 1896–1897*, MONT. MAG. W. HIST., Winter 1987, at 34, 35.

139. *Id.* at 36 (quoting BUTTE SUNDAY BYSTANDER, Jan. 10, 1897). Note that “most of the Asians in Butte were Chinese.” *Id.* at 36–37 n.8.

secondary boycotts against all who were willing to do business with the Chinese.<sup>140</sup> That enterprise was justified in familiar terms: “[T]he guiding principle of the boycott,” the organizers insisted, was “that a man enjoys the privilege of patronizing whosoever he pleases; that he can solicit patronage for whoever may please him, or that he can divert patronage by moral suasion from whoever may displease him. . . .”<sup>141</sup> According to the boycotters, this “privilege” flowed directly from the proposition that “all shall enjoy equally the privileges of communication and intercourse. . . .”<sup>142</sup>

As noted, this boycott was unique in its success. Roughly 350 Chinese people were compelled to leave Butte in search of a less hostile environment to live and work.<sup>143</sup> But not all Chinese-owned businesses capitulated. Several restaurant owners and merchants struck back, filing a federal civil suit against the individuals and labor unions at the forefront of the racial boycott. Their complaint alleged, among other things, that these defendants were participating in an illegal “conspiracy” by calling upon “all persons” not to “patronize [Chinese] business” and then threatening to “place such patrons under a boycott” “if they . . . continue[d] to patronize such alien Chinese.”<sup>144</sup> As a remedy, the plaintiffs sought fifty thousand dollars in damages and an injunction against both the primary and secondary boycotts of Chinese businesses.<sup>145</sup>

The federal district court in Montana responded by entering an expansive TRO that barred the defendants from “boycotting [the plaintiffs],” “advising [potential patrons against] patronizing said complainants,” “causing to be carried through the streets of Butte

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140. *Id.* at 41.

141. *The Boycott—What Is It?*, BUTTE SUNDAY BYSTANDER, Mar. 27, 1897 at 4. A secondary boycott is a boycott of those who refuse to boycott the target of the primary boycott.

142. *Id.*

143. Letter from Ambassador Wu Ting-fang to David J. Hill, Acting Sec’y of State (July 6, 1901), in *Papers Relating to the Foreign Relations of the United States, with the Annual Message of the President Transmitted to Congress December 3, 1901*, Doc. 89, 124, U.S. DEP’T STATE OFF. HISTORIAN, <https://history.state.gov/historicaldocuments/frus1901/d89> [<https://perma.cc/VUK3-G8F7>].

144. *Id.* at 106–08 (reprinting the “Bill of complaint”).

145. *Id.* at 110–11.

[libelous] banners,” and picketing “in the vicinity of the places of business of the said complainants.”<sup>146</sup> But, even then, the boycotters refused to concede. Their union newsletters didn’t take “seriously” the possibility “that a court of the United States will interfere with the American citizens in the exercise of their inalienable and undeniable right to patronize with friends.”<sup>147</sup> They believed the TRO applied only to violent intimidation and that it could “not deprive us of our rights to patronize whom we please.”<sup>148</sup>

But the district court did not agree. After a special master issued findings of fact that confirmed the plaintiffs’ allegations, the court issued a permanent injunction categorically barring the defendants “from further combining or conspiring to injure or destroy the business of the [plaintiffs]; and from maintaining or continuing the boycott and conspiracy against said Chinese.”<sup>149</sup> Media reports described that final order as “sweeping,” “far reaching in effect,” and “calculated to make [the] Chinese immune from harm.”<sup>150</sup>

These events occupy a significant place in the history of conspiracy litigation. The Butte boycott was among the most systematic in the country, motivated by racial politics and ideology as much as economic self-interest, and largely devoid of violence.<sup>151</sup> Despite all that, the episode ended with a permanent injunction that flatly prohibited the boycott and subverted the boycotters’ asserted “right to patronize with friends.”<sup>152</sup> Indeed, after the district court declined

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146. *The Restraining Order*, BUTTE SUNDAY BYSTANDER, Apr. 24, 1897 (reprinting judicial order).

147. *That Temporary Restraining Order*, *supra* note 144.

148. *Trades and Labor Resolution*, BUTTE SUNDAY BYSTANDER, Apr. 24, 1897 (reprinting labor resolution).

149. Letter from Hum Fay et al. to Ambassador Wu Ting-fang (July 6, 1901), Exhibits C (findings of fact), E (permanent injunction), in *Papers Relating to the Foreign Relations of the United States, with the Annual Message of the President Transmitted to Congress December 3, 1901*, Doc. 89, 110, 127, U.S. DEP’T STATE OFF. HISTORIAN, <https://history.state.gov/historicaldocuments/frus1901/d89> [<https://perma.cc/VUK3-G8F7>].

150. *Decision in Boycott Case, Sweeping Injunction Against All Who Would Injure Chinese*, DAILY INTER MOUNTAIN, May 19, 1900, at 3.

151. Flaherty, *supra* note 138, at 47 (“The 1896-1897 boycott of Asians in Butte was unique in that there was little physical violence against Asians.”).

152. *That Temporary Restraining Order*, *supra* note 144.

to award damages, the Chinese Legation petitioned the highest ranking officials in U.S. State Department for just compensation to the victims.<sup>153</sup> The Secretary of State at the time, John Hay, placed the federal government's imprimatur on the court's injunction even as he denied the damages request. In his estimation, "the rights of the Chinese subjects mentioned were violated by the boycott," and the injunction was a fully justified and "adequate remedy" for their harm.<sup>154</sup> The judicial and political response to the Butte boycott provide yet another prominent example in which the boycott—even when inflected with politics or ideology—was viewed as proscribable conduct, and not sacrosanct expression or association.<sup>155</sup>

## 2. The Chinese Boycott of 1905

In 1905, the Shanghai Chamber of Commerce announced a sweeping boycott of U.S. products, kicking off a movement that would sweep quickly across China.<sup>156</sup> This was a popular, nongovernmental protest in response to the Chinese Exclusion Act, which prohibited virtually all Chinese immigration to the United States, and related encroachments on the rights of Chinese people already

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153. Letter from Ambassador Wu Ting-fang to David J. Hill, *supra* note 143 (transmitting Letter from Hum Fay et al. to Ambassador Wu Ting-fang, *supra* note 149).

154. Letter from John Hay, Sec'y of State, to Ambassador Wu Ting-fang (Dec. 4, 1901), in *Papers Relating to the Foreign Relations of the United States, with the Annual Message of the President Transmitted to Congress December 3, 1901*, Doc. 90, at 127–128, U.S. DEP'T STATE OFF. HISTORIAN, <https://history.state.gov/historicaldocuments/frus1901/d90> [<https://perma.cc/R9RV-35BG>].

155. While the Butte boycott litigation was the most prominent, it was hardly a one-off. In another well-known example from Cleveland, Ohio, labor unions picketed and boycotted two Chinese restaurants, the Golden Pheasant and the Peacock Inn, "on the ground that they are [run by] Chinamen and members of the yellow race, and that Americans should not patronize a Chinese restaurant, but should confine their patronage and support to restaurants operated by Americans or by white persons." *Park v. Hotel & Rest. Emp. Int'l Alliance*, (Locals Nos. 106, 107, 108, 167), 22 Ohio N.P.(n.s.) 257, 261 (Ct. Com. Pleas 1919). Owners of the Peacock Inn struck back with a civil suit, alleging that the unions' tactics amounted to a "common unlawful conspiracy and boycott against the plaintiffs." *Id.* at 259. In ruling for the plaintiffs, the court stressed not only that the manner and method of picketing was "coercive" and "intimidating," but also that the organized boycott, with its aim of "influencing of parties outside the combination not to deal with the plaintiff," violated the conspiracy laws. *Id.* at 282.

156. Wong, *supra* note 132, at 123.

in the country.<sup>157</sup> As former U.S. Secretary of State John W. Foster explained at the time, “the boycott movement owes its initiative, not to the Chinese government, but to individual and popular influence, and is almost entirely the outgrowth of the ill-feeling of the people who have been the victims of the harsh exclusion laws and the sufferers by the race hatred existing in certain localities and classes in the United States.”<sup>158</sup>

The U.S. government responded aggressively to this popular boycott movement. Within a month of the boycott’s announcement, the Ambassador to China, William Woodville Rockhill, demanded that Chinese political leadership “take prompt action to put a stop to the agitation,” and he reported back to his superiors that China had promised to pursue “prompt and radical action to suppress [the boycott].”<sup>159</sup> When that “radical action” failed to materialize, the Acting Secretary of State Alvey Augustus Adey advised that America would hold the Chinese government “responsible for any loss sustained by the American trade on account of any failure on the part of China to stop the present organized movement against the United States.”<sup>160</sup>

In response, Chinese leadership recommitted “to end[ing] the agitation by laying strong injunctions upon all classes.”<sup>161</sup> But when

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157. See ERIKA LEE, *AT AMERICA’S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882-1943*, at 24–30 (2003); Mark Kanazawa, *Immigration, Exclusion, and Taxation: Anti-Chinese Legislation in Gold Rush California*, 65 J. ECON. HIST. 779, 779–81, 784–87 (2005).

158. John Foster, *The Chinese Boycott*, ATL. MONTHLY, Jan. 1906, at 118, <https://sourcebooks.fordham.edu/eastasia/1906foster.asp> [<https://perma.cc/7HFG-E9V E>].

159. Letter from Ambassador William Woodville Rockhill to Sec’y of State (July 6, 1905), in *Papers Relating to the Foreign Relations of the United States, with the Annual Message of the President Transmitted to Congress December 5, 1905*, Doc. 218, U.S. DEP’T STATE OFF. HISTORIAN, <https://history.state.gov/historicaldocuments/frus1905/d218> [<https://perma.cc/BX3D-CLK9>].

160. Paraphrase of Telegram from Alvey Augustus Adey, Acting Sec’y of State to Ambassador William Woodville Rockhill (Aug. 5, 1905), in *Papers Relating to the Foreign Relations of the United States, with the Annual Message of the President Transmitted to Congress December 5, 1905*, Doc. 223, U.S. DEP’T STATE OFF. HISTORIAN, <https://history.state.gov/historicaldocuments/frus1905/d223> [<https://perma.cc/4TX3-E38E>].

161. Letter from Ambassador William Woodville Rockhill to Sec’y of State (Aug. 26, 1905), in *Papers Relating to the Foreign Relations of the United States, with the Annual*

the boycotts were nonetheless allowed to continue, Ambassador Rockhill delivered his sharpest warning yet:

My government is emphatically of [the] opinion . . . that it has been and still is the duty of the Imperial Government to completely put a stop to this movement, which is carried on in open violation of solemn treaty provisions . . . and is *an unwarranted attempt of the ignorant people to assume the functions of government and to meddle with international relations*.<sup>162</sup>

At that point, Chinese leadership finally paid heed and published an imperial edict “condemning boycotting of American goods and enjoining on the viceroys and governors the duty of taking effective action to stop it and prevent further agitation.”<sup>163</sup>

This story again reflects a “non-expressive” view of consumer boycotts. The Chinese consumer boycott targeting the United States was plainly motivated by politics, designed to convey disapproval of U.S. policy toward Chinese Americans and Chinese immigrants. And yet, the executive branch demanded that China take “radical steps” to suppress the boycott, just as its own courts were issuing sweeping anti-boycott injunctions to prevent white Americans from targeting Chinese-owned businesses at home. As Ambassador Rockhill’s final warning made clear, the State Department conceived of the boycott as an economic tool over which the sovereign could and should exercise control. Indeed, the Ambassador’s characterization of the boycott as an “unwarranted attempt of the

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*Message of the President Transmitted to Congress December 5, 1905, Doc. 232, U.S. DEP’T STATE OFF. HISTORIAN, <https://history.state.gov/historicaldocuments/frus1905/d232> [<https://perma.cc/P9HQ-HCVX>].*

162. Letter from Ambassador William Woodville Rockhill to Sec’y of State (Aug. 29, 1905), in *Papers Relating to the Foreign Relations of the United States, with the Annual Message of the President Transmitted to Congress December 5, 1905, Doc. 233, U.S. DEP’T STATE OFF. HISTORIAN, <https://history.state.gov/historicaldocuments/frus1905/d233> [<https://perma.cc/P64W-AELD>] (transmitting Letter from Ambassador William Woodville Rockhill to Prince Ch’ing (Aug. 27, 1905)) (emphasis added).*

163. Letter from Ambassador William Woodville Rockhill to Sec’y of State (Aug. 29, 1905), in *Papers Relating to the Foreign Relations of the United States, with the Annual Message of the President Transmitted to Congress December 5, 1905, Doc. 234, U.S. DEP’T STATE OFF. HISTORIAN, <https://history.state.gov/historicaldocuments/frus1905/d234> [<https://perma.cc/LX6E-LB5C>].*



ignorant people to assume the functions of government and to meddle with international relations” mirrors the views of the well-known British jurist, James Fitzjames Stephen, who argued forcefully that the popular boycotts reflected a fundamental “usurpation of the functions of government” that should be suppressed under the conspiracy laws.<sup>164</sup> So while it is of course possible that the United States could have been demanding that China do something the United States was not authorized to do at home, the historical context around the State Department’s demands plausibly suggests that restrictions on boycotts were deemed permissible on both sides of the Pacific—the United States was demanding *reciprocity*.

The government officials involved in these controversies do not appear to have even entertained the distinctly contemporary notion that a popular, politically motivated boycott ought to be protected against government intrusion as a core exercise of free expression. In fact, the U.S. went so far as to claim that China would *violate its bilateral treaty obligations* if it failed to suppress such a boycott.<sup>165</sup> As one scholar observed, “[t]he question of China’s obligation to put an end to the boycott appears not only to have been seriously raised by the United States, but to have been pressed to a satisfactory conclusion with marked persistence and vigor.”<sup>166</sup> It is precisely because those treaty obligations were bilateral that the Chinese could demand that the United States engage in reciprocal suppression of boycotts harmful to Chinese nationals on U.S. soil.

This persistent enforcement on both sides has led some international-law scholars to conclude that “the government is under the *duty* to prevent unauthorized interference by its nationals in the orderly conduct of diplomatic negotiations,” including through politically motivated boycotts, “and is responsible for injuries to

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164. James Fitzjames Stephen, *On the Suppression of Boycotting*, in 20 THE NINETEENTH CENTURY: A MONTHLY REVIEW 765, 769 (James Knowles ed., 1886); accord C.L. Bouve, *The National Boycott as an International Delinquency*, 28 AM. J. INT’L L. 19, 38 (1934) (describing the American view that China’s popular boycott reflected an “injection of these private activities into the sphere of foreign intercourse”).

165. Bouve, *supra* note 164, at 21.

166. *Id.*

foreigners resulting from such interference.”<sup>167</sup> Now, that was hardly the consensus view.<sup>168</sup> But the critical point, for our purposes, is that scholars and states were battling, not over whether governments *could* ban popular boycotts, but whether they *needed* to do so in service of their international-law duties. That entire debate presupposed a view of the boycott as conduct that states could—and perhaps should—regulate and control.<sup>169</sup> Even though foreign conduct on foreign soil is generally understood to fall outside the Constitution’s ambit,<sup>170</sup> the overall historical narrative still fits best with a fundamentally non-expressive view of the boycott.

### III. TWENTIETH CENTURY BOYCOTT LEGISLATION

The early legal history surveyed above indicates that state actors across the country sought repeatedly to both compel compliance with the boycotts they supported and deter participation in the boycotts they opposed.<sup>171</sup> Boycott legislation in the modern era fits with that tradition: governments pushed and prodded private companies into compliance with the boycott of apartheid-era South Africa, and they did precisely the opposite for the boycott of Israel. The key difference between these more recent laws and their earlier antecedents lies in the ever-expanding range of tools that governments have at their disposal to achieve their preferred policy outcomes. Modern governments, moving beyond the more rudimentary mandates and injunctions, have sought to divest from, or deny contracts and tax benefits to, companies that flout their preferred

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167. *Id.* at 39–40 (emphasis added).

168. See, e.g., H. Lauterpacht, *Boycott in International Relations*, 14 BRIT. Y.B. INT’L L. 125, 140 (1933) (imprudent to “impose upon states the duty to suppress peaceful boycott[s] of foreign goods”).

169. See Charles Cheney Hyde & Louis B. Wehle, *The Boycott in Foreign Affairs*, 27 AM. J. INT’L L. 3 (1933) (“[I]t may be well worth while for particular countries to endeavor to agree to use a certain measure of diligence to restrain the people within their respective territories from exercising, perhaps irreparably, their right to injure their common commercial interests through the weapon of combination. *The matter is, however, purely one of policy . . .*” (emphasis added)).

170. See *supra* note 133 and accompanying text.

171. *Supra* Sections II.A–C.

boycott policy.<sup>172</sup> But whatever the differences in method, the various approaches reflect a shared constitutional understanding that the boycott is an economic instrument subject to sovereign control, not a method of expression or association presumptively immune from regulation.

#### A. *Compelling Boycotts: Apartheid-Era South Africa*

Beginning in the 1970s, governments at all levels began pressuring individuals and companies to join the boycott of apartheid-era South Africa. Advocates for the boycott argued that American investment abroad was essentially subsidizing apartheid by “strengthen[ing] the [regime’s] economic and military self-sufficiency.”<sup>173</sup> The movement started at colleges and universities,<sup>174</sup> but it spread quickly to municipal and state governments across the country. By 1990, “26 states, 22 counties and over 90 cities had taken some form of binding economic action against companies doing business in South Africa.”<sup>175</sup> These policies were both tactical and

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172. We take as a given that conditioning public contracts, tax benefits, or investments on promising to engage in—or not to engage in—protected expression can violate the First Amendment. See *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 221 (2013). But see *id.* at 226 (Scalia, J., dissenting) (“[C]ompell[ing] as a condition of [government] funding the affirmation of a belief . . . is the reasonable price of admission to a limited government-spending program that each organization remains free to accept or reject.” (citation and emphasis omitted)).

173. S. COMM. ON FOREIGN RELS., 95TH CONG., U.S. CORPORATE INTERESTS IN SOUTH AFRICA 13 (Comm. Print 1978) (primarily authored by Dick Clark); see also Martha J. Olson, Note, *University Investments with a South African Connection: Is Prudent Divestiture Possible?*, 11 N.Y.U. J. INT’L L. & POL’Y 543, 544–51 (1979).

174. See Grace A. Jubinsky, *State and Municipal Governments React Against South African Apartheid: An Assessment of the Constitutionality of the Divestment Campaign*, 54 U. CIN. L. REV. 543, 544 (1985).

175. Richard Knight, *Sanctions, Disinvestment, and U.S. Corporations in South Africa*, in *SANCTIONING APARTHEID* (Robert E. Edgar, ed., 1990), <http://richardknight.homesite.com/files/uscorporations.htm> [<https://perma.cc/8RKT-VZW9>]; accord Stephen Kaufman, *Pressure to End Apartheid Began at Grass Roots in U.S.*, U.S. MISSION INT’L ORGS. GENEVA (Dec. 17, 2013), <https://geneva.usmission.gov/2013/12/17/pressure-to-end-apartheid-began-at-grass-roots-in-u-s/> [<https://perma.cc/X9DN-UBTL>]; see also Howard N. Fenton, *The Fallacy of Federalism in Foreign Affairs: State and Local Foreign Policy Trade Restrictions*, 13 NW. J. INT’L L. & BUS. 563, 564 (1993); Christine Walsh, *The Constitutionality of State and Local Governments’ Response to Apartheid: Divestment Legislation*, 13 FORDHAM URB. L.J. 763, 776 (1985).

expressive; they were designed “to condemn the South African system of apartheid and, if possible, to hasten its demise through economic pressure.”<sup>176</sup>

Governments promoted the boycott in two ways—by divesting public funds from companies that did business with South Africa or by conditioning public contracts on a company’s commitment not to do so.<sup>177</sup> Most of the laws addressed South Africa’s apartheid policies clearly and explicitly, thus codifying the popular (but hardly unanimous) political judgment that America should sever economic ties.<sup>178</sup> States enforced their rules, just as they do modern anti-boycott laws, by requiring the companies with whom they did business to certify their compliance with the state’s preferred boycott policy.<sup>179</sup>

At the federal level, Congress and President Reagan sparred repeatedly over the propriety of boycotting South Africa. Whereas

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176. Peter J. Spiro, Note, *State and Local Anti-South Africa Action as an Intrusion upon the Federal Power in Foreign Affairs*, 72 VA. L. REV. 813, 822 (1986).

177. *Id.* at 821; see also, e.g., *id.* at 821–22 & n.47 (citing, among other divestment policies, Pittsburgh, Pa., Ordinance No. 14 (Feb. 25, 1985), which banned city bodies from doing business with companies that have operations in South Africa and with their suppliers); N.Y.C., N.Y., Local Law No. 19 (Mar. 15, 1985) (allowing the city to refuse to grant a contract to the lowest bidder who fails to certify that it is not doing business in South Africa if another vendor who has completed an anti-apartheid certification submits a comparable or slightly worse bid).

178. See, e.g., CONN. GEN. STAT. § 3-13f (Supp. 1984) (divestment law); MASS. ANN. LAWS ch. 32, § 23(1)(d)(ii) (Michie/Law Co-op. Supp. 1984) (same); 1985 N.J. LAWS ACT 308 (divestment law focused on financial institutions); R.I. GEN. LAWS ch. 35-10 (same). But not every state followed that approach. Wisconsin, for example, passed a broadly worded statute that prohibited investment in any company that “practice[d] or condone[d] through its actions discrimination on the basis of race, religion, color, creed, or sex.” WIS. STAT. § 36.29(1) (Supp. 1984-1985). That law’s indeterminacies prompted Wisconsin’s Attorney General to issue an opinion clarifying the state’s position on its applicability to South Africa. Letter from Att’y Gen. Bronson La Follette to President Edwin Young (Jan. 31, 1978), *reprinted in* 67 Wis. Op. Att’y Gen. 20 (1978). This uncertainty surely undermined the statute’s purpose, which was to codify the legislature’s opposition to apartheid and its support for the boycott. Presumably, that is why few if any states followed Wisconsin’s lead.

179. See, e.g., MD. CODE ANN. art. 95, § 21 (Supp. 1984) (requiring financial institutions to certify to the state treasurer that they do not have any outstanding loans to South African government-controlled entities and ordering the treasurer not to deposit funds in any banks who failed to do so).

President Reagan hoped to persuade South Africa to abandon apartheid through “constructive engagement,”<sup>180</sup> Congress was adamant that applying economic pressure was the only path forward. In 1985, President Reagan sought to bridge that gap, ordering a boycott that applied to a handful of industries.<sup>181</sup> But for Congress, that was not enough. Overriding the President’s veto, it imposed a nationwide boycott by enacting the Comprehensive Anti-Apartheid Act of 1986, which banned the importation of currency, military equipment, and an array of natural resources from South Africa.<sup>182</sup> Congress followed up the next year with the Rangel Amendment to the Budget Reconciliation Act, which prohibited the IRS from giving American companies operating in South Africa credit for taxes paid in South Africa, effectively “double taxing” their South African profits.<sup>183</sup> The impact was so great that Mobil Corporation—then the biggest American company operating in South Africa—withdrawed from the country entirely as a result.<sup>184</sup>

While a majority of the country favored this political boycott, Americans were nonetheless divided on its merits. A vocal minority shared President Reagan’s preference for “constructive engagement” and even his (controversial and contested) moral stance that harsh sanctions were “repugnant” for their potential economic impact on the people of South Africa.<sup>185</sup> Yet, as far as we aware, it was

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180. Robert H. Jerry II & O. Maurice Joy, *Social Investing and the Lessons of South Africa Divestment: Rethinking the Limitations on Fiduciary Discretion*, 66 OR. L. REV. 685, 691 (1987); see also Joshua Michaels, *The Comprehensive Anti-Apartheid Act of 1986: Separation of Powers, Foreign Policy, and Economic Sanctions as a Tool of Social Justice*, 8 NW. INTER-DISC. L. REV. 153, 159–62 (2015).

181. Exec. Order No. 12,532, 50 Fed. Reg. 36,861 (Sept. 9, 1985).

182. Pub. L. No. 99-440, §§ 4, 301–304, 309, 317–323, 100 Stat. 1086, 1089, 1099–1100, 1102, 1104–1106 (1986).

183. Michaels, *supra* note 180, at 187.

184. *Id.* In 1991, President George H.W. Bush made the requisite findings to end the federal sanctions. Fenton, *supra* note 175, at 578.

185. JOHN F. LYONS, *AMERICA IN THE BRITISH IMAGINATION: 1945 TO THE PRESENT* 109 (2013); see also, e.g., Charles M. Becker, *The Impact of Sanctions on South Africa and Its Periphery*, 31 AFR. STUD. REV. 61, 64 (1988) (noting that, despite “general agreement in the West concerning [the] ultimate aim[]” of defeating apartheid, there was “disagreement over the long run effectiveness and hence desirability of sanctions,” which would be “gravely harmful . . . to the black majority” of South African residents); Stephen

never seriously suggested that the First Amendment deprived political majorities of the power to establish a uniform boycott policy with respect to South Africa and demand that everyone comply—even those who considered sanctions imprudent or those who wished to support the regime through business dealings.<sup>186</sup> There was no First Amendment right to boycott South Africa—presumably because the boycott laws regulated conduct, not expression.<sup>187</sup>

*B. Prohibiting Boycotts: Israel*

In the niche sphere of international-facing boycotts, modern Israel is the legislative mirror image of apartheid-era South Africa. In both cases, lawmakers deployed a virtually identical set of tools to promote their preferred boycott policy: the federal government assessed tax penalties and imposed civil and criminal penalties against violators of official boycott policy, while state and local governments threatened to withhold public contracts and investments to ensure compliance. The only difference in the two cases is

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Chapman, *Trade Sanctions: Morality and Policy*, CHI. TRIB. (Aug. 7, 1985) <https://www.chicagotribune.com/news/ct-xpm-1985-08-07-8502210466-story.html> [<https://perma.cc/H4KS-H8KB>] (noting that “it isn’t at all clear that trade sanctions will contribute to a good outcome” and arguing that sanctions have a “highly dubious” “moral stature” and do not “offer much hope of improving the lot of South Africa’s black majority”); James Barber & Michael Spicer, *Sanctions Against South Africa—Options for the West*, 55 INT’L AFFS. 385, 389–90 (1979) (similar).

186. See, e.g., Lynn Loshin & Jennifer Anderson, *Massachusetts Challenges the Burmese Dictators: The Constitutionality of Selective Purchasing Laws*, 39 SANTA CLARA L. REV. 373, 379–407 (1999) (addressing Supremacy Clause, Dormant Commerce Clause, and federal foreign affairs power objections, but not First Amendment arguments); see also John H. Chettle, *The Law and Policy of Divestment of South African Stock*, 15 L. & POL’Y INT’L BUS. 445, 515–26 (1983). Though we do not consider those other constitutional issues in this Article, we note that we have detected nothing in the history of boycott regulation to distinguish state laws from federal laws for First Amendment purposes.

187. South Africa was by no means the only target of state and local divestment laws. For additional examples, see Fenton, *supra* note 175, at 569 (discussing Michigan law requiring state-run educational institutions to divest from companies operating in the Soviet Union); *id.* at 568–69 (citing legislation from fourteen states and several localities that threatened divestment from firms operating in Northern Ireland that tolerated religious discrimination against Catholics); see also MASS. GEN. LAWS ANN. Ch. 32, § 23(2)(g)(iii), (2A)(h) (same); CONN. GEN. STAT. ANN. § 3-13g(c) (requirement to divest from firms doing business in Iran).

directional—governments deployed these tools to compel compliance with the boycotts of South Africa and to deter or prohibit participation in the boycotts of Israel.

### 1. A Brief History of the Oldest Boycott

The boycott of Jewish businesses in Israel is among the oldest and longest boycotts in world history.<sup>188</sup> Beginning in the 1890s, and especially throughout the 1920s and 1930s, Arab political associations in Mandatory Palestine passed and promoted a range of anti-Jewish boycott resolutions barring economic relations with the Jews of the area.<sup>189</sup> Arab merchants in Jerusalem—deploying the same tools as the American colonists of old—created committees to supervise and enforce the anti-Jewish boycott by imposing secondary boycotts on those who resisted.<sup>190</sup> And, in echoes of the anti-Chinese boycotts in the United States, their notices declared: “Don’t buy from the Jews, come and bargain with the Arab merchant . . . . We must completely boycott the Jews.”<sup>191</sup> In 1933, the Grand Mufti of Jerusalem, Mohammad Amin el-Husseini, expressed to the German consul in Jerusalem his support for anti-Jewish boycotts in Germany and reportedly pledged to promote similar efforts against Jews across the Arab world.<sup>192</sup> Reportedly, the Grand Mufti’s only request for Berlin was that German Jews “not be sent to

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188. See Eugene Kontorovich, *The Arab League Boycott and WTO Accession: Can Foreign Policy Excuse Discriminatory Sanctions?*, 4 CHI. J. INT’L L. 283, 285 (2003).

189. See GIL FEILER, FROM BOYCOTT TO ECONOMIC COOPERATION: THE POLITICAL ECONOMY OF THE ARAB BOYCOTT OF ISRAEL 21–24 (1998); AARON J. SARNA, BOYCOTT AND BLACKLIST: A HISTORY OF ARAB ECONOMIC WARFARE AGAINST ISRAEL 3 (1986) (noting boycotts in 1891, 1908, and 1911).

190. Kontorovich, *supra* note 188, at 286–87.

191. Ofer Aderet, *From the British Mandate to Ben & Jerry’s: 100 Years of Boycott and Israel*, HAARETZ (July 21, 2021), <https://www.haaretz.com/israel-news/.premium.TIME-LINE-from-the-british-mandate-to-ben-and-jerry-s-100-years-of-boycott-and-israel-1.10016885> [<https://perma.cc/N3RK-47DS>] (quoting a contemporaneous news article about the boycotts from 1925).

192. FRANCIS R. NICOSIA, THE THIRD REICH AND THE PALESTINE QUESTION 85–86 (1985).

Palestine.”<sup>193</sup> Calls for anti-Jewish boycotts in the Middle East continued up through 1939, after the start of World War II.<sup>194</sup>

Against that historical backdrop, the newly minted Arab League issued its first formal boycott against the Jews of Mandatory Palestine in 1945, still a few years prior to the formation of the modern State of Israel.<sup>195</sup> Its resolution declared “Jewish products and manufactured (goods) in Palestine shall be (considered) undesirable in the Arab countries” and called upon all Arabs to “refuse to deal in, distribute, or consume Zionist products and manufactured (goods).”<sup>196</sup> In the years that followed, the League established a Central Boycott Office in Cairo, a “complex, centralized boycott apparatus” that enforced not only the primary boycott of Israel, but also secondary and tertiary boycotts against non-Israeli companies that traded with Israel or with those that did business in Israel.<sup>197</sup> The boycott remains in place today, though a number of Arab League countries have since normalized trade relations with Israel and repudiated the boycott.<sup>198</sup>

Both its advocates and its critics have long described the Arab Boycott as a form of “economic warfare,” designed to isolate Israel politically and advance the League’s political interests in the region.<sup>199</sup> The former Commissioner General of the Central Boycott

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193. *Id.*

194. See FEILER, *supra* note 189, at 24.

195. *Id.*

196. Council of the Arab League, 2d Sess., *The Boycott of Zionist Goods and Products*, Res. 16, at 6 (Dec. 2, 1945); see also ANDREAS F. LOWENFELD, 3 TRADE CONTROLS FOR POLITICAL ENDS 99–113 (1977).

197. See Kontorovich, *supra* note 188, at 286–87; see also *Hearings on Multinational Corporations and United States Foreign Policy Before the Subcomm. on Multinational Corps. of S. Comm. on Foreign Rels.*, 94th Cong., pt. 11, at 214, 371–72 (1975); LEE E. PRESTON, TRADE PATTERNS IN THE MIDDLE EAST 51–52 (1970); Aderet, *supra* note 191.

198. See List of Countries Requiring Cooperation with an International Boycott, 86 Fed. Reg. 18,374, 18,374–75 (Apr. 8, 2021).

199. See Book Review, 82 MICH. L. REV. 1053, 1054 (1984) (reviewing KENNAN L. TESLIK, CONGRESS, THE EXECUTIVE BRANCH, AND SPECIAL INTERESTS: THE AMERICAN RESPONSE TO THE ARAB BOYCOTT OF ISRAEL (1982)); Henry J. Steiner, *International Boycotts and Domestic Order: American Involvement in the Arab-Israeli Conflict*, 54 TEX. L. REV. 1355, 1365 (1976); MUHAMMED KHALIL, 2 THE ARAB STATES AND THE ARAB LEAGUE, A DOCUMENTARY RECORD 161 (1962).



Office, Zuhair Aqil, described the boycott as “one of the Arab weapons in confronting the Zionist entity,”<sup>200</sup> and members of the Palestinian Liberation Organization insisted that the “war . . . between the Arab League countries and Israel . . . justifies the boycott,” which, “short of actual open fighting, has proven to be the most effective weapon in the hands of the Arabs[.]”<sup>201</sup> On the flipside, prominent opponents of the boycott, like Henry Kissinger, have called upon the League to take “steps to end [its] *economic warfare*” against Israel.<sup>202</sup>

As with the modern BDS movement, the most “politically volatile” aspect of the debate around the Arab Boycott is whether its stated refusal to deal with “Zionists” is equivalent to, or a proxy for, “religious discrimination” against Jews.<sup>203</sup> Defenders insist that the boycott “blacklists only those persons—whatever their religious, ethnic, or national identity—who maintain proscribed relations with Israel,” and that it does not target Diaspora Jews who lack the requisite economic ties to Israel.<sup>204</sup> Critics of the boycott reply that any distinction between the only Jewish nation and the Jewish people is analytically fraught and practically untenable.<sup>205</sup> In their view, a boycott that takes singular aim at the Jewish state and all who associate with it (disproportionately Jews), is anti-Semitic in all but name. In the words of former King Faisal of Saudi Arabia, one of the most prominent advocates for the Arab Boycott,

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200. FEILER, *supra* note 189, at 40.

201. MARWAN ISKANDER, *THE ARAB BOYCOTT OF ISRAEL* 55 (1966).

202. Bernard Gwertzman, *Kissinger Calls for an End of U.S.-Israel “Wrangling,”* N.Y. TIMES, May 10, 1976, at 1 (emphasis added).

203. Steiner, *supra* note 199, at 1366–67.

204. *Id.* at 1367 (describing this as a “hazy” boundary).

205. See *id.*; Donald L. Losman, *The Arab Boycott of Israel*, 3 INT’L J. MIDDLE E. STUD. 99, 109 (1972) (“Because the establishment and promulgation of the state of Israel is, in large part, due to the financial contributions of world Jewry, the anti-Israel campaign has taken on an anti-Semitic character.”); Robert Wistrich, *Anti-Zionism and Anti-Semitism*, 16 JEWISH POL. STUD. REV. 27, 28 (2004) (arguing that “the call for a scientific, cultural, and economic boycott of Israel” and the Arab states’ decades-long “policy of isolating the Jewish state and turning it into a pariah” are “virtually identical to the methods, arguments, and techniques of racist anti-Semitism”).

"Jews support Israel and we consider those who provide assistance to our enemies as our own enemies."<sup>206</sup>

## 2. Federal Regulation of the Arab Boycott

The debate over boycotts of Israel is as morally contested today as it was in the 1970s.<sup>207</sup> But as a political matter, bipartisan majorities across the country have coalesced on a view of the Israel boycott, not as a form of desirable social action, but as a form of economic discrimination, repugnant to American values and contrary to U.S. foreign policy interests. Government actors have consistently relied on that understanding in taking action against American companies that contributed to the Arab League's efforts.

In 1975, President Ford took the first decisive act against the Arab Boycott of Israel, directing the Secretary of Commerce to issue regulations prohibiting U.S. companies from "complying in any way with [discriminatory] boycott requests."<sup>208</sup> Discerning the anti-Semitic underpinnings of the boycott, President Ford announced his refusal to "countenance the translation of any foreign prejudice into domestic discrimination against American citizens."<sup>209</sup>

Congress acted on that commitment the following year and passed the bipartisan Ribicoff Amendment to the Tax Reform Act of 1976, which assessed a steep tax penalty against all who

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206. Losman, *supra* note 205, at 109–10.

207. Compare, e.g., *Confronting the Rise in Anti-Semitic Domestic Terrorism: Hearing Before the Subcomm. on Intel. & Counterterrorism of the H. Comm. on Homeland Sec.*, 116th Cong. 40 (2020) (statement of Eugene Kontorovich, Professor, Antonin Scalia L. Sch., Geo. Mason Univ.) (describing "[t]he campaign to 'boycott Israel'" as "seek[ing] to legitimize discriminatory refusals to deal with people or companies simply because of their connection to the Jewish state" and "a legitimization of bigotry"), with Note, *Wielding Antidiscrimination Law to Suppress the Movement for Palestinian Rights*, 133 HARV. L. REV. 1360, 1381 (2020) (pushing back on claims that present-day boycotts targeting Israel "constitute[] religious and national-origin discrimination" and are "conceptually discriminatory").

208. Statement by the President Announcing a Series of Administrative Actions and Legislative Proposals to Provide a Comprehensive Response to Discrimination Against Americans, 11 WEEKLY COMP. PRES. DOC. 1305 (Nov. 20, 1975).

209. *Id.*

“participate[] in or cooperate[] with” the Arab Boycott.<sup>210</sup> In 1977, Congress went a step further and banned outright American complicity in the Arab Boycott.<sup>211</sup> The Export Administration Amendments, which passed both houses by wide margins, direct the President to issue regulations prohibiting “any United States person . . . from taking or knowingly agreeing to” a boycott, “with intent to comply with, further, or support any boycott fostered or imposed by a foreign country against a country which is friendly to the United States.”<sup>212</sup> Violators are subject to potential criminal penalties, and companies are required to report any boycott requests they receive to the Commerce Department’s Office of Antiboycott Compliance.<sup>213</sup> For the past forty years, that scheme has been rigorously enforced and has consistently survived First Amendment challenge.<sup>214</sup>

President Carter’s signing statement to the Export Administration Amendments underscores all of the reasons these anti-boycott

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210. Pub. L. No. 94-455, §§ 1061–64, 90 Stat. 1649, 1649–1650 (1976) (codified at I.R.C. §§ 908, 952(a), 995(b)(1), 999). The first legislative response to the Arab League boycott actually came in 1965, when Congress announced that it was the policy of the United States “to oppose . . . boycotts . . . against other countries friendly to the United States.” Pub. L. No. 91-184, § 3(5), 83 Stat. 841 (1969) (codified at 50 U.S.C. app. § 2402(5) (Supp. V. 1975)) (expired September 1976); *see also* Steiner, *supra* note 199, at 1374.

211. Export Administration Amendments of 1977, Pub. L. No. 95-52, 91 Stat. 235 (1977).

212. 50 U.S.C. § 4842(a)(1)(A), (D); *see also* David Cain, *International Business Communication and Free Speech: Briggs and Stratton Corp. v. Baldrige*, 9 B.C. INT’L & COMPAR. L. REV. 131, 137 n.55 (1986). The law was reenacted without alteration in the Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (1979) (codified at 50 U.S.C. app. 2407). The law lapsed under a sunset provision, but its force and effect were preserved by subsequent Presidents acting under the National Emergencies Act and the International Economic Emergency Powers Act. MARTIN A. WEISS, CONG. RSCH. SERV., RL33961, ARAB LEAGUE BOYCOTT OF ISRAEL 6 n.18 (2015). The Export Administration Act of 1979 was ultimately repealed and replaced in 2018 by the John S. McCain National Defense Authorization Act, Pub. L. 115-232, §§ 1741–1781, 132 Stat. 1636, 2208–38 (2018), which included the Anti-Boycott Act of 2018, 50 U.S.C. § 4842.

213. 50 U.S.C. § 4842(b)(2); *cf.* Maurice Portley, *State Legislative Responses to the Arab Boycott of Israel*, 10 U. MICH. J.L. REFORM 592, 608 (1977).

214. *See, e.g.,* Briggs & Stratton Corp. v. Baldrige, 728 F.2d 915, 917–18 (7th Cir. 1984) (companies’ responses to Arab League questionnaires not protected by the First Amendment); Karen Mar. Ltd. v. Omar Int’l, Inc., 322 F. Supp. 2d 224, 227 (E.D.N.Y. 2004) (explaining the Export Administration Act “is a constitutional statute”).

measures have withstood constitutional scrutiny. Describing “boycotts” (the refusal to buy goods or services) as a form of “discrimination,” President Carter expressed his own political judgment that the Arab Boycott—though nominally focused solely on Israel—was in fact “aimed at Jewish members of our society.”<sup>215</sup> The boycott was a tool of economic influence, and the law reflected Congress’s political judgment that “the divisive issues in the Middle East, which give rise to current boycotts, can be resolved equally satisfactorily through a similar process of reasonable, peaceful cooperation.”<sup>216</sup> While former-President Carter appears to have reconsidered his private political views since leaving public office,<sup>217</sup> the underlying constitutional judgment cannot be so easily amended. Uniform historical practice confirms that political boycotts, especially of foreign nations, have always been viewed as regulable conduct, not inherent expression.

### 3. State Regulation of the Arab Boycott

The federal government was not the first to outlaw complicity in the Arab Boycott. Throughout the late 1970s and early ‘80s, thirteen states—New York, Connecticut, California, Florida, Illinois, Maryland, Massachusetts, Minnesota, New Jersey, North Carolina, Ohio, Oregon, and Washington—enacted similarly sweeping anti-boycott measures. New York’s law declared it “an unlawful discriminatory practice for any person to discriminate against, boycott or blacklist, or to refuse to buy from, sell to or trade with, any person, because of the race, creed, color, national origin or sex of such person, or of such person’s . . . business associates, suppliers or customers.”<sup>218</sup>

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215. President Jimmy Carter, Remarks on Signing into Law the Export Administration Amendments of 1977, THE AM. PRESIDENCY PROJECT, (June 22, 1977), <https://www.presidency.ucsb.edu/documents/export-administration-amendments-1977-remarks-signing-hr-5840-into-law> [https://perma.cc/C6F8-2YKL].

216. *Id.*

217. Press Release, Carter Ctr., President Carter Issues Statement on BDS Act of 2019 (Apr. 5, 2019), <https://www.cartercenter.org/news/pr/statement-045019.html> [https://perma.cc/ZF9V-LFRU] (opposing proposed federal legislation as violative of the “right of individuals to participate in boycotts as a form of political protest”).

218. N.Y. EXEC. LAW § 296(13) (McKinney 1980) (emphasis added).

Though Israel isn't mentioned by name, the law was broadly understood to be a "response to the Arab boycott,"<sup>219</sup> exposing anti-Israel boycotters to possible civil and criminal liability.<sup>220</sup> Massachusetts, too, made it "unlawful for any person doing business in the commonwealth . . . to refuse, fail or cease to do business in the commonwealth" when it reflects an "agreement" with "[any] foreign person" and is "based upon such [a] person's . . . national origin or foreign trade relationships."<sup>221</sup> In signing the bill, Governor Michael Dukakis explained that he wished to send "a clear and unequivocal message to those who submit to Arab pressure tactics that we will not stand for this type of blatant discrimination."<sup>222</sup>

The remaining laws varied in their details: some swept broadly across the entire economy,<sup>223</sup> others were restricted to particular

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219. Note, *The Constitutionality of New York's Response to the Arab Boycott*, 28 SYRACUSE L. REV. 631, 631, 653 (1977).

220. N.Y. PENAL LAW §§ 80.05(a), 80.10 (McKinney 1972) (misdemeanor fines, per N.Y. EXEC. LAW § 298(a)(3) (McKinney 1976)); see also Maurice Portley, *State Legislative Responses to the Arab Boycott of Israel*, 10 U. MICH. J.L. REFORM 592, 610 (1977) (citing Letter from Louis J. Lefkowitz, Att'y Gen. of N.Y., to Stanley Steingut, Speaker of the N.Y. State Assembly (Nov. 3, 1976) (clarifying that banks that comply with the Arab Boycott are violating New York's anti-boycott law)). It appears that few cases involving Israel have been litigated under the New York statute, either because of widespread compliance or because violations are difficult to detect. *But see* *Bibliotechnical Athenaeum v. Nat'l Lawyers Guild, Inc.*, No. 653668/2016 (N.Y. Sup. Ct. N.Y. Cnty. Mar. 30, 2017) (finding colorable claim under New York law by Israeli organization, Bibliotechnical Athenaeum, against National Lawyers Guild for refusing to sell it advertising space as part of an anti-Israel boycott).

221. Act of Aug. 18, 1976, 1976 Mass. Acts, ch. 297, at 394, 395.

222. *Massachusetts Law to Curb Arabs' Boycott Is Enacted*, N.Y. TIMES, Aug. 20, 1976, at A22.

223. See CONN. GEN. STAT. §§ 42-125a, 42-125c (1977) (deeming it state policy "to oppose . . . discriminatory boycotts . . . which are fostered or imposed by foreign persons, foreign governments or international organizations against any domestic individual on the basis of race, color, creed, religion, sex, nationality or national origin" and prohibiting knowing participation in such boycotts); MD. CODE ANN., COM. LAW §§ 11-101, 11-103 (1976) (announcing Maryland's "policy" to oppose "foreign discriminatory boycotts not specifically authorized by the law of the United States which are fostered or imposed by foreign persons," and deeming it "unlawful for a person to . . . [k]nowingly participate in," or "[k]nowingly aid or assist any other person in participating in," "a discriminatory boycott"); FLA. STAT. ANN. § 542.34 (West Supp. 1981) (forbidding blacklists and agreements requiring discrimination or refusal to deal with another person, including on the basis of "unlawful business associations," in order to comply with

kinds of business relationships,<sup>224</sup> and still others to particular economic sectors.<sup>225</sup> But all were predicated on a shared historical understanding of the boycott as a permissible object of regulation, not an inherently protected medium of expression. And, in the case of Israel, state officials legislated based on the political judgment that the Arab boycott of Zionism was wrongful discrimination, not desirable social action.

#### IV. PRESENT-DAY BOYCOTT REGULATION

Contemporary boycott laws mirror their twentieth-century counterparts, with political actors compelling compliance with the boycotts they support (Russia) while deterring participation in the ones they oppose (Israel). Today, consistent with centuries of American legal history, these boycott policies reflect a conception of the boycott as regulable economic conduct well outside the heartland of First Amendment expression or association.

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or support a foreign boycott); 29 ILL. COMP. STAT. ANN. §§ 91–96 (West Supp. 1981) (banning discrimination based on “any connection between [the target] and another entity”); MINN. STAT. ANN. § 3250.53 (West Supp. 1981) (deeming an unlawful “restraint of trade” the exclusion of persons from a business transaction based upon their engagement in “business in a particular country”); N.C. GEN. STAT. § 75B-2(1) (1977) (prohibiting “enter[ing] into any agreement . . . with any foreign government, foreign person, or international organization, which requires such person or the State to refuse, fail, or cease to do business in the State with any other person who is domiciled or has a usual place of business in the State, based upon such other person’s . . . national origin or foreign trade relationships”); OHIO REV. CODE ANN. § 133.01-99 (1976) (banning refusals “to buy from, sell to, or trade with” another person because the person is on a blacklist or is boycotted by a foreign country); OR. REV. STAT. § 30.860 (1977) (creating private cause of action against anyone who “boycott[s]” someone “because of foreign government imposed or sanctioned discrimination”); WASH. REV. CODE ANN. § 49.60.030 (West Supp. 1981) (enshrining “the right to engage in commerce free from any discriminatory boycotts or blacklists”); CAL. BUS. & PROF. CODE §§ 16721, 16721.5 (1976); see also Nina J. Lahoud, *Federal and New York State Anti-Boycott Legislation: The Preemption Issue*, 14 N.Y.U. J. INT’L L. & POL’Y 371, 402 n.132 (1982) (collecting laws).

224. See N.J. STAT. ANN. § 10:5–12 (West Supp. 1981) (employment); N.C. GEN. STAT. § 75B-2(4) (1977) (same).

225. See OHIO REV. CODE ANN. § 1129.11 (Anderson 1979) (repealed 1997) (financial institutions).

### 1. Compelling Boycotts: Russia's Invasion of Ukraine

Russia's invasion of Ukraine in early 2022 reinvigorated governments' historical power to compel boycotts. In the wake of the war's inception, several U.S. states declared that they would not contract with or invest in any company that refused to boycott the regime of Russian President Vladimir Putin.<sup>226</sup>

New York is a paradigm example. By executive order, Governor Katherine Hochul (1) prohibited state agencies from "contracting or investment with businesses . . . in Russia," (2) required bidders for state contracts to provide certifications regarding any Russia-related operations,<sup>227</sup> and (3) directed all state agencies to divest from any businesses headquartered in Russia.<sup>228</sup>

New York was far from alone in its efforts. At the federal level, President Joseph Biden prohibited any "new investment in the Russian Federation by a United States person."<sup>229</sup> California fortified that mandate by requiring state contractors to certify their compliance with federal boycott rules.<sup>230</sup> New Jersey took a similar course, with Governor Philip Murphy ordering a mandatory review of all

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226. For collections of many relevant state actions up to this point, see Liz Farmer, *A Guide to the State Pension Funds Divesting from Russia*, FORBES (Mar. 11, 2022, 9:31 AM), <https://www.forbes.com/sites/lizfarmer/2022/03/11/the-pension-plans-divesting-from-russia/?sh=1eb7cf3b2b04> [<https://perma.cc/E4HW-WHQ6>] (collecting examples); Sophie Quinton, *In Support of Ukraine, U.S. Governors Cut Economic Ties with Russia*, STATELINE (Mar. 3, 2022, 12:00 AM), <https://stateline.org/2022/03/03/in-support-of-ukraine-u-s-governors-cut-economic-ties-with-russia/> [<https://perma.cc/T6SX-GUNR>].

227. N.Y. Exec. Order No. 16 (Mar. 17, 2022), <https://www.governor.ny.gov/executive-order/no-16-prohibiting-state-agencies-and-authorities-contracting-businesses-conducting> [<https://perma.cc/ZAD6-N9UC>].

228. N.Y. Exec. Order No. 14 (Feb. 27, 2022), <https://www.governor.ny.gov/sites/default/files/2022-02/Executive%20Order%20No.%2014.pdf> [<https://perma.cc/N8W3-L9GF>].

229. Press Release, The White House, Prohibiting New Investment in and Certain Services to the Russian Federation in Response to Continued Russian Federation Aggression (Apr. 6, 2022), <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/04/06/prohibiting-new-investment-in-and-certain-services-to-the-russian-federation-in-response-to-continued-russian-federation-aggression/> [<https://perma.cc/P448-KR9E>].

230. Cal. Exec. Order No. N-6-22 (Mar. 4, 2022), <https://www.gov.ca.gov/wp-content/uploads/2022/03/3.4.22-Russia-Ukraine-Executive-Order.pdf> [<https://perma.cc/4FHF-54EB>].

existing state contracts with “businesses that invest directly” in companies owned by or affiliated with the Russian government.<sup>231</sup> As the governor’s order explained, all of those measures were consistent with states’ “long history of leveraging [their] economic power,” through mandatory boycott and divestment laws, “to further the[ir] values [and interests] throughout the world.”<sup>232</sup> A number of other governors, including those of Colorado, North Carolina, and Ohio, instructed state entities to work to divest assets from, and terminate contracts with, companies in Russia or Russian government-owned businesses.<sup>233</sup>

This flurry of regulatory activity presumed that boycotts are regulable conduct. If things were otherwise, politically motivated “buycotters” (*i.e.*, those who wish to support the Russian people through continued trade and investment) would be entitled to First Amendment exceptions. But no federal court has *ever* sustained a First Amendment challenge to sanctions regimes like these—because the decision whether or not to buy is generally regulable conduct, not protected speech or association.<sup>234</sup> It follows, then, that

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231. N.J. Exec. Order No. 291 (Mar. 2, 2022), <https://nj.gov/infobank/eo/056murphy/pdf/EO-291.pdf> [<https://perma.cc/AFP9-ZT3G>].

232. *Id.* (emphasis added).

233. N.C. Exec. Order No. 251 (Feb. 28, 2022), <https://governor.nc.gov/media/2959/open> [<https://perma.cc/ES8W-YMG5>]; Colo. Exec. Order No. D 2022 011 (Feb. 24, 2022), <https://www.colorado.gov/governor/sites/default/files/inline-files/D%202022%20011%20Ukraine%20EO.pdf> [<https://perma.cc/6RKB-Z5SG>]; Ohio Exec. Order No. 2022-02D (Mar. 3, 2022), <https://governor.ohio.gov/media/executive-orders/executive-order-2022-02d> [<https://perma.cc/L76F-ZQ4J>].

234. *See, e.g.*, *Clancy v. Geithner*, 559 F.3d 595, 605 (7th Cir. 2009) (sanctions statute governed “action,” which was not “inherently expressive,” even if plaintiff used it as a medium to “express his belief in peace and his protest against government action that would harm innocent Iraqi citizens”); *Karpova v. Snow*, 402 F. Supp. 2d 459, 472–73 (S.D.N.Y. 2005) (sanctions “reach[ed] only plaintiff’s actions—not her speech”), *aff’d*, 497 F.3d 262 (2d Cir. 2007); *see also* Brief of Eighteen Constitutional and Business Law Professors as Amici Curiae in Support of Appellant at 28–30, *A&R Eng’g & Testing, Inc. v. Scott*, 72 F.4th 685 (5th Cir. 2023) (No. 22-20047) (“If . . . decisions *not* to do business with people or companies associated with a particular country constitute speech indicating policy disapproval of that country, then . . . [t]hat would create a novel, broad—and intolerable—First Amendment carve-out to foreign sanctions laws” that does not exist in precedent.).



states may compel compliance with the boycotts they support, just as they may deter or ban participation in the ones they oppose.

## 2. *Deterring Boycotts: The BDS and ESG Movements*

Anti-boycott laws are more popular now than ever before. Since 2015, more than half of the states have passed anti-BDS rules requiring companies to abstain from boycotting Israel and entities that do business there as a condition of eligibility for state investments and government contracts.<sup>235</sup> And, in just the past three years, at least eighteen states have proposed or enacted copycat anti-ESG measures, imposing similar restrictions on companies that boycott fossil fuels, firearms, and other contested industries.<sup>236</sup>

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235. For investment laws, see, for example, ARIZ. REV. STAT. ANN. § 35-393.02 (2022) (encouraging divestment by state treasurer and retirement system from any company that “is participating in a boycott of Israel or that . . . has taken a boycott action” as part of a boycott of Israel); 40 ILL. COMP. STAT. ANN. 5 / §§ 1-110.16(a), (f) (2022) (requiring companies that boycott Israel to be placed on a “restricted companies” list, from which the state pension fund must divest); N.Y. Exec. Order No. 157 (June 5, 2016), <https://ogs.ny.gov/executive-order-157#:~:text=Executive%20Order%20No.,and%20Sanctions%20campaign%20against%20Israel> [<https://perma.cc/77R5-82SY>] (instructing state bodies to “divest their money and assets from any investment in” any company that “participate[s] in boycott, divestment, or sanctions activity targeting Israel”). For contracting laws, see, for example, FLA. STAT. § 287.135(2)(a) (2012) (“A company is ineligible to, and may not, bid on, submit a proposal for, or enter into or renew a contract with an agency or local governmental entity for goods or services . . . if, at the time of bidding on, submitting a proposal for, or entering into or renewing such contract, the company is on the Scrutinized Companies that Boycott Israel List . . . or is engaged in a boycott of Israel.”); NEV. REV. STAT. § 332.065(4) (2019) (prohibiting government agencies from contracting with businesses “unless the contract includes a written certification that the company is not currently engaged in, and agrees for the duration of the contract not to engage in, a boycott of Israel”); 37 R.I. GEN. LAWS § 37-2.6-3 (2016) (“A public entity shall not enter into a contract with a business . . . unless the contract includes a representation that the business is not currently engaged in, and an agreement that the business will not during the duration of the contract engage in, the boycott of any person, firm, or entity based in, or doing business with, a jurisdiction with whom the state can enjoy open trade . . .”).

236. See, e.g., KY. REV. STAT. ANN. § 41.480 (2022) (fossil fuel boycott law); TEX. GOV'T CODE ANN. § 2274 (2021) (firearm boycott law); H. 3564, 125th Sess. (S.C. 2023) (proposed bill covering boycott of timber, mining, and agricultural industries); see also Lance C. Dial et al., *2023 ESG State Legislation Wrap Up*, K&L GATES (July 25, 2023), <https://www.klgates.com/2023-ESG-State-Legislation-Wrap-Up-7-19-2023> [<https://perma.cc/L5H6-9RNU>]; Elizabeth S. Goldberg & Rachel Mann, *Update: Four More States*

The anti-ESG rules are still in their infancy, and it remains to be seen how they will be applied and the precise grounds on which they will be challenged.<sup>237</sup> The anti-BDS laws, by contrast, have been applied and challenged frequently, generating a litigation track record that lends itself to a more sustained and informed analysis. We therefore focus primarily on this latter category.

As their moniker suggests, the anti-BDS laws take aim at the BDS movement against Israel. Historically, the movement has been criticized for its singular focus on the Jewish State, for its unwillingness to accept Israel's right to exist as a Jewish state, and for its more transparently anti-Semitic antecedents.<sup>238</sup> Recent events vindicate those criticisms. In the aftermath of Hamas's October 7 attacks on Israel, leading proponents of BDS—including Students for Justice in Palestine and the Council on American-Islamic Relations—defended the largest genocide of Jews since the Holocaust, claiming that Israel was “entirely responsible” for the atrocities and that they were “happy to see” the perpetrators exercising their “right to self-

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*Move Toward Anti-ESG Regulations*, MORGAN LEWIS: ML BENEITS (Oct. 13, 2022), <https://www.morganlewis.com/blogs/mlbeneits/2022/10/update-four-more-states-move-toward-anti-esg-regulations> [<https://perma.cc/4DR7-7CRZ>] (identifying eighteen states that proposed or adopted anti-ESG legislation in 2022).

237. The Kentucky Bankers Association recently filed a lawsuit against the state's Attorney General, challenging his anti-ESG investigative demands, in part, on First Amendment grounds. See J. Paul Forrester & Matthew Bisanz, *The [First?] Battle Is Joined: Two Groups Sue the Kentucky Attorney General Over ESG Investigations*, MAYER BROWN (Nov. 18, 2022), <https://www.mayerbrown.com/en/perspectives-events/publications/2022/11/the-first-battle-is-joined-two-groups-sue-the-kentucky-attorney-general-over-esg-investigations> [<https://perma.cc/45AC-4GJK>] (citing Complaint for Declaration of Rights and for Injunctive Relief, *Hope of Ky., LLC v. Cameron*, No. 322-CI-842 (Ky. Franklin Cir. Ct. Oct. 31, 2022)). That litigation, which has been removed to federal court, appears to be the first of its kind and is still in its early stages.

238. *Supra* notes 1–2; see also, e.g., *Hearing on Rise in Anti-Semitic Domestic Terrorism*, *supra* note 207 (statement of Eugene Kontorovich); see also Marc A. Greendorfer, *The BDS Movement: That Which We Call a Foreign Boycott, by Any Other Name, Is Still Illegal*, 22 ROGER WILLIAMS U. L. REV. 1, 32–39 (2017); David M. Halbfinger et al., *Is B.D.S. Anti-Semitic? A Closer Look at the Boycott Israel Campaign*, N.Y. TIMES (July 27, 2019), <https://www.nytimes.com/2019/07/27/world/middleeast/bds-israel-boycott-antisemitic.html> [<https://perma.cc/X4QC-AD8F>].

defense” against Israel’s civilian population.<sup>239</sup> Major American cities and university campuses have in recent months seen an unprecedented rise in antisemitism,<sup>240</sup> as BDS activists across the country target Jews and Jewish-owned businesses—from Jerry Seinfeld’s comedy show in Syracuse to a falafel shop in Philadelphia—solely because of their Jewish and Israel identities and affiliations.<sup>241</sup> Increasingly, too, these BDS activists have deployed slogans like

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239. Peter Baker, *White House Disavows U.S. Islamic Group After Leader’s Oct. 7 Remarks*, N.Y. TIMES (Dec. 8, 2023), <https://www.nytimes.com/2023/12/08/us/politics/white-house-cair-nihad-awad.html> [<https://perma.cc/Q8W7-PY3S>] (quoting national executive director of Council on American-Islamic Relations (“CAIR”)); Madeline Halpert, *Growing Backlash Over Harvard Students’ Pro-Palestine Letter*, BBC NEWS (Oct. 10, 2023), <https://www.bbc.com/news/world-us-canada-67067565> [<https://perma.cc/CB59-PRL7>] (quoting from letter authored by Harvard Undergraduate Palestine Solidarity Committee and signed by groups including Harvard Law School Justice for Palestine); see also *Recent Campus BDS Victories*, NAT’L STUDENTS FOR JUSTICE IN PALESTINE, <https://nationalsjp.org/bds-victories> [<https://perma.cc/4GQP-75T6>] (last visited Dec. 15, 2023) (celebrating BDS successes by Students for Justice in Palestine college chapters); Press Release, Counsel on Am.-Islamic Relations, CAIR Says Fight Against Anti-BDS Laws Will Continue After SCOTUS Declines to Hear Arkansas Newspaper Case (Feb. 22, 2023), [https://www.cair.com/press\\_releases/cair-says-fight-against-anti-bds-laws-will-continue-after-scotus-declines-to-hear-arkansas-newspaper-case/](https://www.cair.com/press_releases/cair-says-fight-against-anti-bds-laws-will-continue-after-scotus-declines-to-hear-arkansas-newspaper-case/) [<https://perma.cc/PF9Y-TFFX>] (noting CAIR’s efforts to block anti-BDS laws in court and defend those who refuse to comply with them).

240. Rebecca Beitsch, *FBI Director Warns of “Historic” Antisemitism Level*, THE HILL (Oct. 31, 2023), <https://thehill.com/homenews/senate/4286146-fbi-director-warns-of-historic-antisemitism-levels/> [<https://perma.cc/UU68-LGXT>]; Kanishka Singh, *US Antisemitic Incidents Up About 400% Since Israel-Hamas War Began, Report Says*, REUTERS (Oct. 25, 2023), <https://www.reuters.com/world/us/us-antisemitic-incidents-up-about-400-since-israel-hamas-war-began-report-says-2023-10-25/> [<https://perma.cc/VPR6-98MV>]; see also *2022 FBI Hate Crimes Statistics*, U.S. DEP’T OF JUST. (Oct. 30, 2023), <https://www.justice.gov/crs/highlights/2022-hate-crime-statistics> [<https://perma.cc/GN8Q-R6XY>] (finding that more than half of all religion-based hate crimes in 2022 were committed against Jews).

241. Griffin Uribe Brown, *Hundreds March for Palestine Downtown, Protest Jerry Seinfeld Show*, DAILY ORANGE (Dec. 9, 2023), <https://dailyorange.com/2023/12/demonstrators-march-for-palestine-protest-jerry-seinfeld-show/> [<https://perma.cc/R7Y4-X378>]; Johnny Diaz, *White House Condemns Protest at Israeli Restaurant in Philadelphia*, N.Y. TIMES (Dec. 4, 2023), <https://www.nytimes.com/2023/12/04/us/white-house-philadelphia-protesters.html> [<https://perma.cc/KZJ2-MAFH>]; see also *BDS Activists are Refocused on Attacking Israeli, Jewish Businesses and Individuals*, ADL (Dec. 7, 2023), <https://www.adl.org/resources/blog/bds-activists-are-refocused-attacking-israeli-jewish-businesses-and-individuals> [<https://perma.cc/4UEC-RW2E>] (collecting examples).

“globalize the intifada”—a call for genocide against Israeli Jews—and, on numerous occasions, have accompanied those calls for violence with direct threats against and physical harassment of Jewish and Israeli Americans.<sup>242</sup>

Notably, Florida officials pointed to the October 7 massacre and its BDS apologists in explaining why their anti-BDS law was a critical means of “support[ing]” Florida’s “Jewish and Israeli” communities and “hold[ing] companies accountable for discriminating against Israel.”<sup>243</sup> And Florida is no outlier: thirty-seven states to date have passed anti-BDS rules to codify their support for Israel and their opposition to BDS’s methods and objectives.<sup>244</sup>

These laws state three principal aims: (1) preventing state funds from being used to subsidize a boycott of a critical U.S. ally, (2) promoting economic engagement with Israel, and (3) protecting Jews around the world, Israelis of all faiths, and Palestinians in Israel-controlled territories from BDS’s discriminatory effects. To take one example, Arkansas views the boycotts as a “tool[] of economic

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242. See, e.g., Madeline A. Hung & Joyce E. Kim, *Harvard Pro-Palestine Groups Organize “Week of Action,” Drawing Criticism for “Intifada” Chants*, HARV. CRIMSON (Dec. 4, 2023), <https://www.thecrimson.com/article/2023/12/4/pro-palestine-week-of-action/> [<https://perma.cc/L86J-UY59>]; Nick Mordowanec, *Map Showing U.S. Targets Sparks Fears of Attacks*, NEWSWEEK (Nov. 16, 2023), <https://www.newsweek.com/map-showing-us-targets-sparks-fears-attacks-1844560> [<https://perma.cc/WYX3-8CCZ>] (discussing map labeled “Globalize the Intifada: Zone of Operations” designating businesses in New York City as targets); Luke Tress, *Jewish Students Barricade in Cooper Union Library as Protesters Chant “Free Palestine,” On Day of Protest Across NYC Campuses*, JEWISH TELEGRAPHIC AGENCY: NY JEWISH WEEK (Oct. 26, 2023), <https://www.jta.org/2023/10/26/ny/jewish-students-barricade-in-cooper-union-library-as-protesters-chant-free-palestine-on-day-of-protest-across-nyc-campuses> [<https://perma.cc/GG99-F4G4>] (reporting on protestors “advocating a boycott of Israel” who surrounded a library and “pounded on the building’s doors and windows” while Jewish students sheltered inside).

243. Press Release, Governor Ron DeSantis, *Florida Places Morningstar-Sustainalytics on List of Scrutinized Companies that Boycott Israel* (Oct. 26, 2023), <https://www.flgov.com/2023/10/26/florida-places-morningstar-sustainalytics-on-list-of-scrutinized-companies-that-boycott-israel/> [<https://perma.cc/46CG-RCNA>].

244. *Anti-Semitism: State Anti-BDS Legislation*, JEWISH VIRTUAL LIBRARY, <https://www.jewishvirtuallibrary.org/anti-bds-legislation> [<https://perma.cc/5AUM-YBXQ>] (last visited Dec. 15, 2023); Zvika Klein, *New Hampshire Becomes 37th US State To Adopt Anti-BDS Law*, JERUSALEM POST (July 6, 2023), <https://www.jpost.com/international/article-749152> [<https://perma.cc/3ZLX-L7GR>].

warfare” that “discriminate[s] against Israel.”<sup>245</sup> Its anti-BDS law “implement[s] the United States Congress’s announced policy” of opposing boycotts against a “key all[y] and trade partner.”<sup>246</sup> Pennsylvania has deemed it “in the interest of the United States and the Commonwealth to stand with Israel”—which is “America’s dependable, democratic ally in the Middle East”—“by promoting trade and commercial activities and to discourage policies that disregard that interest.”<sup>247</sup> Louisiana has proclaimed that refusals to do business with Israel “with the goal of advancing the BDS campaign” “harm[] the Israel-Louisiana relationship,” which is “in the best interests of the people of Louisiana.”<sup>248</sup> It has also declared that Louisiana’s anti-BDS certification requirement for state contracts is “[c]onsistent with existing Louisiana non-discrimination provisions.”<sup>249</sup> And Missouri’s anti-BDS measure, known as the “Anti-Discrimination Against Israel Act,” defines impermissible “boycott[s] of the State of Israel” as including various “actions to discriminate against . . . the State of Israel.”<sup>250</sup>

These measures fit with the country’s historical boycott regulations because they target disfavored economic *conduct* but do not proscribe protected speech or association. While the laws may burden a boycotters’ methods and objectives—that is, the BDS movement’s campaign of discriminatory “economic warfare” designed to pressure people and companies to cut ties with Israel—they do *not* silence dissent or political debate on that subject. These laws train themselves solely to conduct by requiring covered entities to certify only that they will not boycott Israel (as enforced through denials of state funds to those who fail to make the certification, and revocations of funds or civil penalties for false certifications), while

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245. ARK. CODE ANN. § 25-1-501 (2017).

246. *Id.* at §§ 25-1-501(4)–(6); *accord* IOWA CODE § 12 J.1 (2016) (characterizing boycotts aimed at Israel as “threaten[ing] the sovereignty and security of [an] all[y] and trade partner[] of the United States”).

247. 62 PA. CONS. STAT. § 3602 (2017).

248. LA. STAT. ANN. §§ 39:1602.1(A)(4)–(5) (2019).

249. *Id.* § 39:1602.1(B)(1).

250. MO. REV. STAT. §§ 34.600(1)–(3) (2020).

leaving unfettered their right to express whatever viewpoints they please through any other medium.<sup>251</sup>

Indeed, these contemporary laws aren't merely consistent with past practice; they actually reflect a constitutional improvement over previous regimes. Prior methods of boycott regulation, particularly the use of the conspiracy laws, faced two interconnected challenges—one practical, the other constitutional—that anti-boycott laws are uniquely well-designed to address.

*First*, an isolated decision to boycott is extremely difficult to detect *ex ante* or police *ex post*. A single person or company might refuse to engage in a commercial transaction for myriad reasons, and it is difficult to say after the fact whether that refusal to deal reflected participation in a proscribed boycott or an entirely innocuous and lawful business decision. That is especially so for political boycotts, which, as a general matter, were historically far less prone to cause actual economic injury than facially tortious ones, and were thus more difficult to detect.<sup>252</sup>

*Second*, there are important countervailing rights-based interests at play whenever state actors seek to regulate a disfavored boycott. For one thing, anti-boycott regulation implicates the boycotters' "freedom to engage in business" and choose her trading partners.<sup>253</sup> That freedom of contract (not speech)—which is restricted by all manner of anti-discrimination, public-accommodations, and common-carrier laws—may arguably have counseled caution before judges entered anti-boycott injunctions designed to compel unwanted commercial dealings.<sup>254</sup> In addition, some courts recognized an expressive interest in explaining, defending, and advocating for the boycott, which presents yet another challenge in

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251. See, e.g., laws and executive orders cited at *supra* note 235.

252. Lauterpacht, *supra* note 168, at 139 ("No [law] can effectively compel the population of a country to buy goods from a foreign state."); HEATHER LAIRD, SUBVERSIVE LAW IN IRELAND, 1879–1920: FROM "UNWRITTEN LAW" TO THE DAIL COURTS 34 (2005).

253. RESTATEMENT (FIRST) OF TORTS § 762, cmt. a (1939) (describing the boycott right as derivative of the "liberty to acquire property").

254. See generally J.W.O., *The Boycott as a Weapon in Industrial Disputes*, 116 A.L.R. 484 (originally published in 1938) (collecting examples in which courts described and respected the freedom of contract).

separating out unprotected conduct (the boycott) from potentially protected expression (advocacy for the boycott).<sup>255</sup>

The conspiracy laws of old tackled the enforcement problem, but in a manner that aggravated the constitutional concerns. As the historian Heather Laird has explained, governments that lacked “a means to punish the communal act of boycotting” would “bypass[] the action or inaction of the [individual] boycotter and focus on a figure easier dealt with[:] the individual who . . . instigated the boycott.”<sup>256</sup> But shooting for the center also risked chilling protected expression, as the organizers often defended their boycotts through advocacy and expression, “tell[ing] the story of their wrongs . . . by word of mouth or with pen or print.”<sup>257</sup>

Modern anti-boycott laws are a First Amendment improvement because they operate more surgically than their common-law antecedents. For example, the anti-BDS laws specifically condition public contracts and investments only on a certification *not to boycott*

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255. See HARRY W. LAIDLER, *BOYCOTTS AND THE LABOR STRUGGLE: ECONOMIC AND LEGAL ASPECTS* 198 (1913) (“Boycotters have often contended that to prevent them from publishing notices of the boycotts, and otherwise announcing them in print, is an infringement of the freedom of the press.”). *But see* Transcript of Record at 377, *Gompers v. Buck’s Stove & Range Co.*, 70 Al. L. J. 8 (D.C. 1907) (No. 1990) (“All this [First Amendment worry] would have merit, if the act of the defendants in making such publication stood alone, unconnected with other conduct both preceding and following it. But it is not an isolated fact; . . . it is an act in a conspiracy to destroy plaintiff’s business, an act which has a definite meaning[.]”).

The law regarding whether and when speech soliciting unlawful conduct may itself be proscribed is notoriously fraught and riddled with “unresolved tension[s].” Benjamin Means, *Criminal Speech and the First Amendment*, 86 MARQ. L. REV. 501, 507–14, 526 (2002). Recently, in *United States v. Hansen*, the Supreme Court rejected a claim that a prohibition on “encourag[ing] or induc[ing]” unlawful presence in the United States was overbroad under the First Amendment, holding that the law passed muster because it prohibited only intentional solicitation or facilitation of unlawful conduct. 143 S. Ct. 1932, 1937 (2023). The Court took as a given that even “words [alone] may be enough” to constitute solicitation, and that criminalizing those words may be consistent with the First Amendment’s exception for “speech integral to unlawful conduct.” *See id.* at 1940–44, 1947–48.

256. LAIRD, *supra* note 252 (writing about Ireland’s Prevention of Crime Act of 1882, which mirrors many of the state conspiracy laws in the United States discussed, *supra*, in Section II.B).

257. *Marx & Haas Jeans Clothing Co. v. Watson*, 67 S.W. 391, 394 (Mo. 1902).

Israel or entities that do business in Israel. They apply evenly to all businesses that deal with the government—not merely the advocates or architects of BDS—and they leave intact everyone’s right to speak out and advocate for either side in the Israel-Palestinian conflict.<sup>258</sup> Moreover, the consequences of noncompliance are comparatively limited: those who insist on participating in the boycott are not fined or otherwise subject to legal sanction, but merely lose their access to certain privileges like state contracts or investments. Anti-BDS laws thus expand the buffer zone between regulated conduct and protected expression and offer even greater prophylactic protection to the speech that often accompanies political boycotts.<sup>259</sup> In that respect, these modern rules reflect a substantial constitutional improvement over the common-law traditions, in which judges enjoined boycotts they deemed “unjustified” and executive branch officials demanded “radical” suppression of foreign boycotts. From the long view of history, modern anti-boycott laws reflect free speech progress, not decline.<sup>260</sup>

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258. Courts have occasionally found that anti-BDS laws violate the First Amendment if their “catch-all” provisions are broad enough to cover protected advocacy as well as boycotting. *E.g.*, *Ark. Times LP v. Waldrup*, 988 F.3d 453 (8th Cir. 2021), *rev’d on reh’g en banc*, 37 F.4th 1386 (2022); *A&R Eng’g & Testing v. City of Houston*, 582 F. Supp. 3d 415 (S.D. Tex. 2022), *rev’d & rem’d*, 72 F.4th 685 (5th Cir. 2023). We take no position on the meaning or scope of any particular provision of state law.

259. Many anti-BDS laws also include prophylactic measures aimed at distancing the laws even further from conduct or expression even potentially implicating the First Amendment. *See, e.g.*, LA. STAT. ANN. § 39:1602.1(F) (restricting anti-boycott measure to contracts worth at least \$100,000 with companies that have at least five employees); R.I. GEN. LAWS § 37-2.6-4 (“[T]his section shall not apply to contracts with a total potential value of less than ten thousand dollars[.]”); *supra* note 76.

260. Today’s boycott regulations also improve on the common law of conspiracy from a rule-of-law perspective because they reassign the underlying policy judgments about which boycotts are “justified” from the judiciary to the elected political branches. For example, critics of anti-BDS laws argue that “BDS is not discriminatory” and that anti-BDS laws “cannot properly be viewed as combatting discrimination.” *Wielding Antidiscrimination Law*, *supra* note 207, at 1372–81. But that is a contested moral argument—one that has become even more contested in the wake of the October 7 terrorist attack and the ensuing worldwide wave of antisemitism—and it has been rejected by state governors and legislatures across the country. *See, e.g.*, *All 50 American Governors Sign Anti-BDS Statement*, JERUSALEM POST (May 18, 2017), <https://www.jpost.com/arab-israeli-conflict/all-50-american-governors-sign-anti-bds-statement-492085>



## V. A CODA ON CLAIBORNE

The Supreme Court's 1982 decision in *NAACP v. Claiborne Hardware Co.* has figured prominently in the debate over more recent anti-boycott laws. The petitioners in that case included black residents of Claiborne County, Mississippi, who had "place[d] a boycott on white merchants in the area" in protest of race discrimination.<sup>261</sup> Some affected merchants brought suit for damages and an injunction under the conspiracy laws.<sup>262</sup> After the merchants prevailed in the Mississippi Supreme Court, the U.S. Supreme Court reversed, holding that the conspiracy laws had been applied unconstitutionally to restrain the boycotters' speech rights.<sup>263</sup> The Court explained that the merchants' damages claims arose from a menu of protected activities: speeches, "nonviolent picketing," oral and print dissemination of the "names of boycott violators," and efforts to persuade others to join in through "personal solicitation."<sup>264</sup> All of that "speech, assembly, association, and petition," the Court reasoned, meant that "the boycott clearly involved constitutionally protected activity."<sup>265</sup> The Court explained, in noticeably broader terms, that "[t]he right of the States to regulate economic activity could *not* justify a complete prohibition against a nonviolent, politically motivated boycott."<sup>266</sup>

Since the first anti-BDS measure was enacted nine years ago, both sides in the constitutional debate have engaged in a protracted exegetical struggle over what *Claiborne* really means. Defenders of the laws read the case as focused on the expression that accompanies

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[<https://perma.cc/BB75-A9YB>]. Viewing boycotts as conduct, rather than speech, allows judges to defer to the consensus political judgment of elected officials.

261. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 889, 898–900 (1982).

262. *Id.* at 889–96.

263. *See id.* at 933–34.

264. *Id.* at 907, 909.

265. *Id.* at 911.

266. *Id.* at 914 (emphasis added).

the boycott, not the boycott itself,<sup>267</sup> while critics read the case more broadly as protecting the boycott itself from government control.<sup>268</sup>

Advocates for the narrow reading cite other precedents, like *International Longshoremen's Association v. Allied International, Inc.* and *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, which they claim are difficult to reconcile with a broad First Amendment right to boycott. In *International Longshoremen's Association*—a case decided the same Term as *Claiborne*—the Court rejected a First Amendment defense by union members who were sued for engaging in a purely political boycott of cargo shipped from the Soviet Union.<sup>269</sup> The Court dismissed their claim out of hand, reasoning that the union's "political" refusal to work was "designed not to communicate but to coerce" through economic pressure.<sup>270</sup> Defendants of the anti-boycott laws emphasize that the same Court that decided *Claiborne* could not have reached the result in *International Longshoremen's Association* if it broadly conceived of politically motivated boycotts as protected expression.<sup>271</sup>

Likewise, in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, the Court rejected the notion that private law schools have a First Amendment right to deny military recruiters access to campus.<sup>272</sup> The Court explained that to deny access was "not inherently expressive."<sup>273</sup> Rather, the refusal to deal with military recruiters was "expressive only because the law schools accompanied their conduct with speech explaining it," and "[t]he expressive component of a law school's actions is not created by the conduct itself but

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267. See, e.g., Dorf et al. Amicus Br., *supra* note 6, at 6–11; see also Ark. Times LP v. Waldrip, 37 F.4th 1386, 1392 (8th Cir. 2022) (en banc) ("*Claiborne* only discussed protecting expressive activities accompanying a boycott, rather than the purchasing decisions at the heart of a boycott.").

268. First Amendment Scholars Amicus Br., *supra* note 7, at 2–8; Appellant's Opening Br. at 16–22, *Waldrip* (No. 19-1378).

269. See Int'l Longshoremen's Ass'n v. Allied Int'l, 456 U.S. 212, 214–16, 224–26 (1982).

270. *Id.* at 224–26.

271. E.g., Dorf et al. Amicus Br., *supra* note 6, at 8–9; *Waldrip* Opp. to Pet., *supra* note 44, at 9–10.

272. See *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 64–66 (2006).

273. *Id.* at 64.

by the speech that accompanies it.”<sup>274</sup> Defenders of the anti-boycott laws maintain that refusal to host is conceptually indistinguishable from the “refusal to buy” that defines the boycott.<sup>275</sup>

Critics of the laws rejoin with contrary language from *Claiborne*. “The right of the States to regulate economic activity,” the Supreme Court explained there, “could *not* justify a complete prohibition against a nonviolent, politically motivated boycott.”<sup>276</sup> Indeed, *Claiborne* expressly distinguished between “unlawful conspiracies and constitutionally protected assemblies,” implicitly suggesting that the politically motivated boycott in that case was a constitutionally protected exercise in assembly.<sup>277</sup> As for *International Longshoremen’s Association* and *Rumsfeld*, the critics contend that neither case concerned the kinds of *consumer* boycotts at issue in *Claiborne* and restricted by the modern anti-boycott laws. They claim that *Claiborne* is the most on-point precedent and that its most straightforward reading ought to control: politically motivated boycotts are protected under the First Amendment.<sup>278</sup>

One notable feature of this debate is that neither side has approached the Supreme Court’s decision through the full lens of constitutional *history*—because, at least until now, no one had surveyed that history. Whatever the “best” reading of *Claiborne*’s text, only the narrower reading is consistent with the history and tradition of boycott regulation that preceded the case and which consistently conceived of the boycott as conduct, not expression. Construing precedent is, in the end, an “exercise [in] discretion informed by tradition.”<sup>279</sup> To fit *Claiborne* within this historical tradition, one must read the case as reflecting the distinct dangers in applying the

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274. *Id.* at 66.

275. *E.g.*, Dorf et al. Amicus Br., *supra* note 6, at 3–4, 12; Waldrip Opp. to Pet., *supra* note 44, at 14–18.

276. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 914 (1982) (emphasis added); Appellant’s Opening Br., *supra* note 276, at 16–22; accord First Amendment Scholars Amicus Br., *supra* note 7, at 2–8.

277. 458 U.S. at 888.

278. Petition for a Writ of Certiorari at 14, Ark. Times LP v. Waldrip, 143 S. Ct. 774 (2023) (No. 22-379).

279. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921).

conspiracy laws to political boycotts that bundle together issue advocacy and a concerted refusal to deal.<sup>280</sup> Modern anti-boycott laws thus circumvent the “*Claiborne* problem” because they focus only on the boycott, while leaving the ancillary expression untouched.

#### CONCLUSION

This Article’s primary contribution is to begin to trace more than two hundred years of legal history in which state actors compelled compliance with the boycotts they supported, while prohibiting participation in the ones they opposed. Our findings suggest that states have broad authority to regulate even politically motivated boycotts, in line with our nation’s history and traditions. Because scholars have not yet paid this subject careful attention, our findings are necessarily preliminary—and we hope they mark the start, not the end, of a broader scholarly investigation of boycott regulation throughout American history. But what we have uncovered casts serious doubt on the notion—advanced by critics of modern anti-boycott laws—that American legal history enshrines a fundamental, First Amendment right to boycott. To the contrary, history and tradition appear to cast the boycott as a form of economic discrimination that can be regulated like any other, consistent with the First Amendment.

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280. Cf. *City of Austin v. Reagan Nat’l Advert. of Austin*, 142 S. Ct. 1464, 1469, 1474–75 (2022).



# HISTORY, PUBLIC RIGHTS, AND ARTICLE III STANDING

OWEN B. SMITHERMAN

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## HISTORY, PUBLIC RIGHTS, AND ARTICLE III STANDING

OWEN B. SMITHERMAN\*

*For decades, legal academics have complained about a conflict between history and the doctrine of Article III standing. First in *Spokeo, Inc. v. Robins* (2016) and then notably in *TransUnion LLC v. Ramirez* (2021), Justice Clarence Thomas presented a halfway resolution. Justice Thomas grounded Article III standing in a historical distinction between private and public rights. Suits for violations of private rights would require no showing of concrete injury in fact. Suits for violations of public rights would require the injury in fact showing of special damage, a term borrowed from the public nuisance tort.*

*This Article questions the Thomas retention of injury in fact for public rights. Part I explains Justice Thomas's nuanced approach to Article III standing. Part II investigates old English and early American materials on special damage to flesh out the meaning of Justice Thomas's requirement for public rights standing. The upshot is a lack of historical consensus on the content of the special damage standard. The materials do not align on a precise standard, making it difficult, either as a matter of 1788 original meaning or later liquidation, to operationalize Justice Thomas's special damage requirement. Part III argues that there are good reasons to doubt that the requirement of special damage is constitutionally relevant to the original meaning of Article III. The Framers did not discuss special*

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*damage in connection to Article III. Most of the relevant cases are from state courts, which are not bound by Article III. The traditional rationale for the special damage requirement does not have constitutional significance. And it seems implausible that the Constitution incorporated a legal doctrine in such flux without textual indication. The Article concludes with a critique of the current Supreme Court's lack of concern for originalism in standing doctrine.*

## INTRODUCTION

Since the mid-twentieth century, the Supreme Court has self-consciously followed a formal doctrine of “standing,”<sup>1</sup> which requires plaintiffs in federal court to establish a “‘personal stake’ in the alleged dispute.”<sup>2</sup> To establish Article III standing, a plaintiff must prove the elements articulated in *Lujan v. Defenders of Wildlife*.<sup>3</sup> A plaintiff must show (1) that he suffered an injury in fact that is concrete and particularized, and actual or imminent, (2) that the injury was fairly traceable to the challenged conduct of the defendant, and (3) that the injury would likely be redressed by judicial relief.<sup>4</sup>

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1. See Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 169 (1992) (using a rough Lexis search for Supreme Court references to standing and finding that the first mention of it as an Article III limitation occurs in *Stark v. Wickard*, 321 U.S. 288 (1944)). But see Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 691 (2004) (arguing that the Court adhered to an “active law of standing” in the eighteenth and nineteenth centuries, even if the term “standing” was not used). Without picking a side, I only wish to note the period during which the Court has been nominally and formally constrained by what we today call “standing.”

2. *Raines v. Byrd*, 521 U.S. 811, 819 (1997) (citations omitted).

3. 504 U.S. 555, 560–61 (1992).

4. See *id.*



Many<sup>5</sup> (but not all<sup>6</sup>) academics have cast doubt on the originalist justification for modern standing doctrine. Sifting through old English and early American practices, they have concluded that there is little support for the modern requirements of standing,<sup>7</sup> especially the all-important injury in fact element.<sup>8</sup> However, these critiques have been largely ignored by the Supreme Court.

In *TransUnion LLC v. Ramirez* (2021),<sup>9</sup> the Supreme Court had a prime opportunity to engage with the historical criticism. As expected by many scholars, the Court stayed the course and even “doubled down” on injury in fact.<sup>10</sup> The five-justice majority

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5. See Sunstein, *supra* note 1; Robert J. Pushaw Jr., “Originalist” Justices and the Myth That Article III “Cases” Always Require Adversarial Disputes, 37 CONST. COMMENT. 259 (2022) (reviewing JAMES E. PFANDER, *CASES WITHOUT CONTROVERSIES: UNCONTESTED ADJUDICATION IN ARTICLE III COURTS* (2021)); James E. Pfander, *Public Law Litigation in Eighteenth Century America: Diffuse Law Enforcement In A Partisan World*, 92 FORDHAM L. REV. 469 (2023); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432 (1988); John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962 (2002); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988); Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show That Standing Doctrine is Looking for Answers in all the Wrong Places*, 97 MICH. L. REV. 2239 (1999); Raoul Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816 (1969); Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961).

6. See Woolhandler & Nelson, *supra* note 1 (disputing some of the historical claims of scholars in the previous footnote); Bradley S. Clanton, *Standing and the English Prerogative Writs: The Original Understanding*, 63 BROOK. L. REV. 1001 (1997) (same); see also Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777 (2004).

7. See *supra* note 5.

8. See *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 103 (1998) (Scalia, J.) (labelling injury in fact the “[f]irst and foremost” element of standing); see also Ernest A. Young, *In Praise of Judge Fletcher—And of General Standing Principles*, 65 ALA. L. REV. 473, 474 (2013) (referring to injury in fact as the “keystone of the Supreme Court’s current standing doctrine”).

9. 141 S. Ct. 2190 (2021).

10. See Elizabeth Earle Beske, *Charting a Course Past Spokeo and TransUnion*, 29 GEO. MASON L. REV. 729, 761 (2022). Note that, while this Article focuses on the Article III standing implications of *TransUnion*, the decision was also criticized, perhaps more, for its impact on privacy law. See Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, 102 B.U. L. REV. 793, 807, 840 (2022); Sojung Lee, *Give Up Your Face, and a Leg to Stand on Too: Biometric Privacy Violations and Article III Standing*, 90 GEO. WASH. L. REV. 795, 800

limited concrete injuries under Article III to “traditional tangible harms, such as physical harms and monetary harms,” as well as “[v]arious intangible harms,” including “harms specified by the Constitution” and “harms traditionally recognized as providing a basis for lawsuits in American courts.”<sup>11</sup> The majority also stressed its “responsibility to independently decide whether a plaintiff has suffered a concrete harm.”<sup>12</sup> Yes, “Congress may create causes of action for plaintiffs to sue defendants who violate [certain] legal prohibitions or obligations. But under Article III, an injury in law is not an injury in fact.”<sup>13</sup>

Four justices dissented from the majority’s holding.<sup>14</sup> But three of those appeared to agree on the requirement of a concrete injury in fact.<sup>15</sup> On that issue, *TransUnion* was 8–1.<sup>16</sup> The notable exception was Justice Clarence Thomas.

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(2022); Ignacio Cofone, *Privacy Standing*, 2022 U. ILL. L. REV. 1367, 1413–15 (2022); Peter Ormerod, *Making Privacy Injuries Concrete*, 79 WASH. & LEE L. REV. 101, 125–28 (2022).

11. *TransUnion*, 141 S. Ct. at 2204.

12. *Id.* at 2205.

13. *Id.*

14. *See id.* at 2214 (Thomas, J., dissenting, joined by Breyer, J., Sotomayor, J., and Kagan, J.); *id.* at 2225 (Kagan, J., dissenting, joined by Breyer, J., and Sotomayor, J.).

15. *See id.* at 2226 (Kagan, J., dissenting) (“I differ with Justice THOMAS on just one matter, unlikely to make much difference in practice. In his view, any ‘violation of an individual right’ created by Congress gives rise to Article III standing. . . . But in *Spokeo*, this Court held that ‘Article III requires a concrete injury even in the context of a statutory violation.’ . . . I continue to adhere to that view, but think it should lead to the same result as Justice THOMAS’s approach in all but highly unusual cases.”) (citations omitted).

16. Arguably, Justice Kagan’s dissent is the least cogent opinion in *TransUnion*. Prior to 2021, the concreteness inquiry was muddled. After the death of Justice Scalia in 2016, a short-handed Court had defined concreteness by oblique reference to synonyms and antonyms. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (“A ‘concrete’ injury must be ‘*de facto*’; that is, it must actually exist. . . . When we have used the adjective ‘concrete,’ we have meant to convey the usual meaning of the term—‘real,’ and not ‘abstract.’”) (citations omitted). In *TransUnion*, the Kavanaugh majority and the Thomas dissent tried to guide courts by founding concreteness on something more stable. Both chose history, although they used it in different ways. *Compare TransUnion*, 141 S. Ct. at 2204–05, *with id.* at 2216–18 (Thomas, J., dissenting). In contrast, Justice Kagan’s dissent rejected history, failed to give meaningful guidance on concreteness, and retained judicial authority to override congressional determinations regarding injury in fact. *See id.* at 2226 (Kagan, J., dissenting).

Following the approach he first laid out in *Spokeo, Inc. v. Robins* (2016),<sup>17</sup> Justice Thomas argued for a doctrinal reformation centered around a Founding Era distinction between private and public rights.<sup>18</sup> The specific boundaries of this distinction and its interaction with other references to public rights (like non-Article III adjudication) will be explored later.<sup>19</sup> For now, it suffices to say that private rights were “vested in discrete individuals” and public rights “belonged to the public as a whole.”<sup>20</sup> For suits based on private rights, a plaintiff would need only an injury in law (not an injury in fact).<sup>21</sup> This approach tracks much of the historical critique and, by dispensing with injury in fact, would expand the kinds of suits that could be brought in federal court. For suits based on public rights, a plaintiff would still need to show “special damage,” a term from public nuisance tort law that Justice Thomas connected to the Court’s modern injury in fact requirement.<sup>22</sup> As it agreed (partly) with both sides, the Thomas dissent might be construed as a sort of standing compromise between the academic critics and the Supreme Court.<sup>23</sup>

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17. 136 S. Ct. 1540, 1550–53 (2016) (Thomas, J., concurring).

18. See *TransUnion*, 141 S. Ct. at 2216–17 (Thomas, J., dissenting) (citing *Spokeo*, 136 S. Ct. 1540 (2016) (Thomas, J., concurring)).

19. See *infra* Part I.

20. See Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 566 (2007) (citing *Commonwealth v. McDonald*, 16 Serg. & Rawle 390, 394 (Pa. 1827) (jury charge of Duncan, J.)).

21. See *TransUnion*, 141 S. Ct. at 2217 (Thomas, J., dissenting).

22. See *id.*; see also *id.* at 2219–20 (discussing public rights cases like *Lujan v. Defenders of Wildlife* and *Summers v. Earth Island Institute*). Now, close readers of Justice Thomas’s *TransUnion* dissent will not find the “special” part of the phrase “special damage.” See *id.* at 2217 (“But where an individual sued based on the violation of a duty owed broadly to the whole community, such as the overgrazing of public lands, courts required ‘not only *injuria* [legal injury] but also *damnum* [damage].’”). However, Justice Thomas cited two sources for this proposition: his concurrence in *Spokeo* and the 1613 King’s Bench opinion in *Robert Marys’s Case* (1613) 77 Eng. Rep. 895; 9 Co. Rep. 111b (KB). In both sources, the term “damage” is accompanied by qualifiers such as “special” or “extraordinary.” See *Spokeo*, 136 S. Ct. at 1551–52; *Robert Marys’s Case*, 77 Eng. Rep. at 898–99.

23. Oddly enough, Justice Thomas concurred in *Spokeo* and dissented in *TransUnion*, even though the cases arguably involved the same private right under the Fair Credit Reporting Act. Admittedly, the kind of right in *Spokeo* was not presented as starkly as

Ultimately, the other eight justices rejected Justice Thomas's half-way approach to injury in fact. However, the Thomas approach is worthy of continued analysis for several reasons.

First, lower federal courts have struggled to apply *TransUnion*. The majority sought to clarify the scope of concreteness.<sup>24</sup> But inferior courts have repeatedly clashed over the muddiest part of the Supreme Court's decision—determining whether a claimed harm was “traditionally recognized as providing a basis for lawsuits in American courts.”<sup>25</sup> Respected judges with solid originalist credentials have divided over whether particular harms qualify under this section of *TransUnion*. In the D.C. Circuit, Judges Neomi Rao and Gregory Katsas spilled 22 pages of ink disagreeing over the concreteness of the federal government's refusal to recognize a plaintiff's expatriation.<sup>26</sup> In the Eleventh Circuit, Judges Britt Grant and Kevin Newsom fought intensely about how to apply *TransUnion* to a fact pattern quite similar to that in *TransUnion*.<sup>27</sup> That judges who

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in *TransUnion*, and the Court vacated and remanded for further consideration. See *Spokeo*, 136 S. Ct. at 1549–50. But the same kind of individual right seemed at issue in both cases. Indeed, Justice Ginsburg's dissent in *Spokeo* begins by referencing the same provision that Thomas discusses in his *TransUnion* dissent. Compare *Spokeo*, 136 S. Ct. at 1554 (Ginsburg, J., dissenting), with *TransUnion*, 141 S. Ct. at 2216 (Thomas, J., dissenting). Thanks to Thomas Bennett for pointing this out.

24. See *TransUnion*, 141 S. Ct. at 2204–07.

25. *Id.* at 2204.

26. Compare *Farrell v. Blinken*, 4 F.4th 124, 132–35 (D.C. Cir. 2021) (“The statutory right to expatriate in the 1868 Act as well as in the INA reflects a longstanding recognition that such a right is rooted in natural law and the principle of consensual government at the heart of our constitutional republic.”), with *id.* at 140–47 (Katsas, J., dissenting) (“[M]y colleagues conflate the statutory right to expatriate with executive recognition of a past expatriation. This approach is inconsistent with the INA's unambiguous text, longstanding historical practice, and Farrell's own theory of injury, each of which treats the two as different.”).

27. Compare *Hunstein v. Preferred Collection & Mgmt. Servs., Inc.*, 48 F.4th 1236, 1245–50 (11th Cir. 2022) (en banc) (“The fact that one plaintiff, Hunstein, has not pleaded injury under this statute does not show that no one else can or will. And the dissent's approach offers *no* line, principled or otherwise; the common law analogy collapses if we can rewrite a traditional tort to exclude an essential element.”), with *id.* at 1259–72 (Newsom, J., dissenting) (“Today's opinion empties the *Spokeo/TransUnion* ‘close relationship’ standard of all subtlety, adopts what is, in effect, the very ‘exact duplicate’ standard that the Supreme Court has forbidden and that we had earlier forsworn, places this Court on the wrong side of a 7-1 circuit split, and, in the doing, denies

reason from similar first principles and often agree cannot find their way to the same application of *TransUnion* may suggest issues with the underlying rule of decision.<sup>28</sup> And while the Thomas approach has also attracted criticism on workability,<sup>29</sup> Justice Thomas's distinction between private and public rights seems more manageable than the broad *TransUnion* reference to "American history and tradition."<sup>30</sup>

Second, while reading judicial tea leaves can be fraught, one could imagine a future where the Thomas approach gains more support on the Court. On the issue of injury in fact, Justice Thomas was effectively alone in *TransUnion*. But the debate over standing rages on. In December 2023, the Supreme Court decided *Acheson Hotels, LLC v. Laufer*,<sup>31</sup> a case about concrete injury in fact and ADA "tester" standing. While the majority opinion resolved the case on mootness grounds, Justice Thomas would have reached the standing issue.<sup>32</sup> In a solo concurrence, he reiterated that the "traditional distinction between public and private rights shapes the contours of the judicial power."<sup>33</sup> As he has done so in other areas of the law,

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Congress any meaningful ability to innovate, leaving it only to replicate and codify existing common-law causes of action.").

28. See Beske, *supra* note 10, at 766 ("From a pragmatic standpoint, *TransUnion* invites lower courts into uncharted territory; indeed, the decision is notable for the absence of any reliable metric for confining judicial discretion.").

29. See Thomas P. Schmidt, *Standing Between Private Parties*, 2024 WISC. L. REV. (forthcoming) (manuscript at 66–67) ("[T]he distinction between private rights and public rights, which is defined by reference to Blackstone's *Commentaries*, seems recondite and difficult to apply. Indeed, it does not seem a recipe for consistent and efficient adjudication to graft one notoriously complex and confusing doctrine—standing—onto another notoriously obscure distinction—public versus private rights."). Schmidt also points out the possibility of doctrinal confusion, given the relevance of public rights to non-Article III adjudication. See *id.* at 67 n.443 ("But using the same terminology for two Article III-related distinctions may generate confusion. . .").

30. *TransUnion*, 141 S. Ct. at 2204.

31. 144 S. Ct. 18 (2023).

32. *Id.* at 22 (Thomas, J., concurring in the judgment).

33. *Id.* at 25 n.2 (citing *Spokeo*, 136 S. Ct. at 1550 (Thomas, J., concurring)). I would also note that several amicus briefs in *Acheson Hotels* relied on the Thomas distinction between private and public rights, suggesting that litigants think it still important to address his theory of standing. See Brief of Amicus Curiae Center for Constitutional Responsibility in Support of Petitioner at 8–9, *Acheson Hotels, LLC v. Laufer*, 144 S. Ct.

Justice Thomas is unlikely to abandon his doctrinal views simply because he has not garnered a majority of the Court's support.<sup>34</sup>

Third, Justice Thomas's theory received meaningful support from the legal academy and the judiciary. In the five years between his *Spokeo* concurrence and *TransUnion* dissent, his distinction between private and public rights was commended by prominent federal courts scholars (like Professors William Baude<sup>35</sup> and James Pfander<sup>36</sup>) and federal appellate judges (like Chief Judge Jeffrey Sutton,<sup>37</sup> Judge Amul Thapar,<sup>38</sup> Judge Diane Wood,<sup>39</sup> and Judge

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18 (2023) (No. 22-429), 2023 WL 4030229 ("This distinction between suits that redress private injuries and those that advance the public interest traces to common law."); Brief for Amici Curiae Disability Rights Education & Defense Fund, et al. in Support of Respondent at 19 n.15, *Acheson Hotels, LLC v. Laufer*, 144 S. Ct. 18 (2023) (No. 22-429), 2023 WL 5353504 ("[ADA testers] are three-dimensional human beings with disabilities whose private rights are violated.") (citing Thomas's dissent in *TransUnion*).

34. Take the First Amendment. Justice Thomas has, for the better part of two decades, continued to adhere to his view that "the Establishment Clause resists incorporation against the States." See *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2095 (2019) (Thomas, J., concurring in the judgment) (citing four previous Thomas concurrences stretching all the way back to 2002).

35. See William Baude, *Standing in the Shadow of Congress*, 2016 SUP. CT. REV. 197, 227–28 (2016) ("One Justice on the *Spokeo* Court seemed to see the problem. Justice Thomas, who joined the majority opinion in full, wrote a concurring opinion that put forward a proposed rule that is both theoretically and historically consistent . . .").

36. See James E. Pfander, *Standing, Litigable Interests, and Article III's Case-or-Controversy Requirement*, 65 UCLA L. REV. 170, 215 (2018) ("Justice Thomas deserves credit for attempting to rationalize the law of standing by recognizing that the Court has applied its injury-in-fact requirement with varying force depending on the context.").

37. See *Huff v. TeleCheck Servs., Inc.*, 923 F.3d 458, 469 (6th Cir. 2019) ("[Justice Thomas's] theory deserves further consideration at some point. It seems to respect history and cuts a path in otherwise forbidding terrain.").

38. See *Springer v. Cleveland Clinic Emp. Health Plan Total Care*, 900 F.3d 284, 290–93 (6th Cir. 2018) (Thapar, J., concurring) ("Since the requirements of standing turn on whether the plaintiff seeks to vindicate a private or public right, the first step in any standing case is to classify the asserted right.") (repeatedly citing Justice Thomas's *Spokeo* concurrence).

39. See *Bryant v. Compass Grp. USA, Inc.*, 958 F.3d 617, 624 (7th Cir. 2020), as amended on denial of reh'g and reh'g en banc (June 30, 2020) ("Justice Thomas joined the majority's opinion, but he added a concurrence that drew a useful distinction between two types of injuries.").

Kevin Newsom<sup>40</sup>). After his defeat in *TransUnion*, Justice Thomas's approach to private rights was celebrated by standing critics like Professor Cass Sunstein.<sup>41</sup> After all, a halfway remedy is better than none at all. Some academics even sought to solidify Justice Thomas's theory in hopes of reconsideration by a future Court.<sup>42</sup> And some have used the Thomas distinction to resolve other federal courts questions.<sup>43</sup> At this point, the approach is sufficiently well-known to garner the label of the "private rights" school.<sup>44</sup>

Finally, and as most relevant to this Article, the Thomas approach to injury in fact has not been fully theorized. Justice Thomas distinguishes between suits based on private rights and suits based on public rights. Nearly all of the scholarly attention has gone to the issue of private rights, as was implicated in *Spokeo*, *TransUnion*, and *Thole v. U.S. Bank* (2020), a case with another Thomas standing opinion.<sup>45</sup> But important questions regarding public rights have gone unanswered. What does it mean for a plaintiff to show the "special damage" needed to pursue a public rights claim in federal court? What historical sources are relevant to this inquiry, and what do those sources say? How would the application of Justice Thomas's approach differ from current doctrine on Article III standing in public rights cases? And how do we know that these old English

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40. See *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1138 (11th Cir. 2021) (Newsom, J., concurring) ("My approach also resembles the rights-based approach advanced by Justice Thomas and others."). Note, however, that Judge Newsom grounded his approach in Article II, rather than in Article III. See *id.* at 1139.

41. See, e.g., Cass R. Sunstein, *Injury in Fact, Transformed*, 2021 SUP. CT. REV. 349, 352 (2021) ("As a matter of proper interpretation of the Constitution, that view is essentially right.") (citing Thomas's dissent in *TransUnion*).

42. See, e.g., Beske, *supra* note 10, at 785 (defending the Thomas *TransUnion* dissent against the majority's worry about Congress excessively privatizing public rights).

43. See Sarah Leitner, *The Private-Rights Model of Qui Tam*, 76 FLA. L. REV. (forthcoming 2024) (using the "traditional public-private rights framework of justiciability" to argue that the qui tam device "may only be used to assign the federal government's private-rights claims, and may not be used to assign public-rights claims at all.").

44. See Schmidt, *supra* note 29, at 3.

45. See *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1544–46 (2016); *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200–02 (2021); *Thole v. U. S. Bank N.A.*, 140 S. Ct. 1615, 1622 (2020) (Thomas, J., concurring).

and early American materials concerning the public nuisance tort are relevant to the original meaning of Article III?

This lack of clarity matters because standing doctrine determines real-life access to the federal courts. Consider *Sierra Club v. Morton* (1972).<sup>46</sup> In that case, the United States Forest Service sought to allow commercial development of Mineral King Valley.<sup>47</sup> Mineral King Valley is located in a national forest.<sup>48</sup> The Sierra Club sued the federal government under the APA to stop development.<sup>49</sup> For purposes of the Thomas distinction, *Morton* easily falls into the public rights category—the Sierra Club invoked laws governing a national forest held by the government for use by the people at large.<sup>50</sup> For injury in fact purposes, the Sierra Club relied on aesthetic injuries.<sup>51</sup> The Court accepted that injury in the abstract, despite the fact that it was aesthetic and not something more tangible like property, and despite the fact that it was widely shared by many people.<sup>52</sup> The Thomas approach to public rights and its focus on “special damage” would appear to change that standing analysis, altering access to the federal courts. But how, exactly?

In this Article, I make two arguments about the Thomas approach to public rights and Article III standing. Both start from original public meaning (OPM), a theory of constitutional interpretation that prioritizes the original meaning of the text of the Constitution when ratified.<sup>53</sup> While originalists and non-originalists often clash

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46. 405 U.S. 727, 731–32 (1972).

47. *See id.* at 728–29.

48. *See id.* at 728.

49. *See id.* at 729–30.

50. *See id.*; Nelson, *supra* note 20, at 566.

51. *See Morton*, 405 U.S. at 734.

52. *See id.* Note that the Court ultimately denied standing, not on conceptual grounds, but because the Sierra Club had not shown that any of its members would be affected by the proposed development. *See id.* at 735.

53. *See generally* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989). In this Article, I assume an originalist approach and do not attempt to justify it on normative grounds. For those interested, there are many good works advocating and criticizing originalism. I especially appreciate the works of Keith Whittington, *see, e.g.*, KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (1999), and Judge Easterbrook, *see, e.g.*, Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119 (1998).



over the interpretive toolkit<sup>54</sup> (and the merits of original meaning versus other originalist methodologies<sup>55</sup>), relevant OPM tools include linguistic intuition, contemporary dictionary definitions, corpus linguistics, and publicly available context like background facts and legal doctrine.<sup>56</sup> For this article, subsequent references to originalism invoke OPM.

While similarly originalist, my two arguments proceed in different fashions. My first argument engages Justice Thomas's approach in *Spokeo* and *TransUnion* on its own terms. I make two major assumptions: (1) that Justice Thomas is correct about how originalists should generally seek to interpret terms in Article III like "the judicial Power," and (2) that Justice Thomas is correct about the specific relevance of old English and early American public nuisance authorities to the original meaning of Article III. I examine these materials to understand the requirement that a hypothetical plaintiff show "special damage" to bring a public rights suit in federal court. As Professor Elizabeth Beske did with her article on identifying private rights,<sup>57</sup> I endeavor to flesh out the Thomas position for future debates. But in contrast with Beske's excellent piece, my work on

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54. *But see* Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 787 (2022) (arguing that originalism should be understood more as a standard that seeks rules for judging answers than a decision procedure that outlines the means for reaching said answers).

55. I use original meaning in this Article because that is what the originalists on the Court (previously led by Justice Scalia) most often employ. It is also what the Thomas argument in *Spokeo* seems to follow. *But see* Gregory E. Maggs, *Which Original Meaning of the Constitution Matters to Justice Thomas?*, 4 N.Y.U. J.L. & LIBERTY 494, 511 (2009) (arguing that Justice Thomas employs the method of "general original meaning," which looks to multiple originalist modalities including original intent, understanding, and meaning). In the battle over methodology, I have been most convinced by the original law theory of Stephen Sachs and William Baude, although more for their incorporation of original law outside the text of the Constitution and brilliant framing than positivist justifications. *See* Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 838 (2015) ("Our law is still the Founders' law, as it's been lawfully changed."); William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015); William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455 (2019).

56. *See generally* Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269 (2017).

57. *See* Beske, *supra* note 10, at 776.

behalf of the Thomas approach is unsuccessful. The relevant historical authorities may agree on the nominal requirement of “special” or “extraordinary” damage for the public nuisance tort. But the content of that legal element varies so greatly from case to case and across time that one cannot say that there was sufficient agreement on what special damage actually meant. Accordingly, these precedents cannot provide an adequate originalist rule of decision for modern disputes over public rights and Article III standing.

My second argument backtracks to challenge the second assumption from above. I explore a point made in passing by Judge Kevin Newsom<sup>58</sup>—why do we think that these old public nuisance tort materials have anything to do with the original meaning of Article III? The Founding debates mention neither these sources nor the broader private versus public rights distinction that Justice Thomas emphasizes. Most of the pertinent cases come from state courts, which are not bound by Article III. American courts did not discuss the special damage requirement in constitutional terms. Rather, early courts connected it to worries about trivial suits or overburdening defendants. Finally, it is possible that certain rules were integrated into Article III without explicit discussion. But the incoherency of the doctrine coupled with the lack of a specific textual hook makes the sub silentio incorporation of these materials into Article III less than plausible. For these reasons, originalists should probably reject a retention of injury in fact for public rights suits.

This Article proceeds as follows. Part I discusses the Thomas approach to injury in fact in *Spokeo* and *TransUnion*. Part II investigates the public nuisance tort in pre-Founding England and post-Founding America. I examine treatises (English and American) and cases (English, American federal, and American state). Upon review, the historical materials are not sufficiently aligned to provide an adequate rule of decision for modern disputes over public rights and Article III standing. Part III details why the historical understanding of the public nuisance tort and special damage is not

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58. See *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1126 (11th Cir. 2021) (Newsom, J., concurring).

relevant to the original meaning of Article III. The Article concludes with a critique of the current Supreme Court's lack of concern for originalism in standing doctrine.

# I. PUBLIC RIGHTS STANDING AND THE SPOKEO CONCURRENCE

Although Justice Thomas has discussed Article III standing and injury in fact in a number of opinions, his concurrence in *Spokeo* is most representative and formed the basis for later opinions. In *Spokeo*, Justice Thomas set up his approach in three moves.

First, citing an early dissent by Justice Scalia, he argued that constitutional standing follows from the "traditional, fundamental limitations upon the powers of common-law courts."<sup>59</sup> Those limitations can be ascertained by reference to the historical context of the American Founding.<sup>60</sup> Accordingly, Justice Thomas turned to the history.

Next, Justice Thomas identified and emphasized a historical distinction between private and public rights.<sup>61</sup> Here, a clarification is needed. The Supreme Court has considered whether a right is private or public in other contexts, including disputes over non-Article III adjudication<sup>62</sup> and the Seventh Amendment.<sup>63</sup> In *Spokeo*, Justice Thomas relied on Blackstone for a slightly different view of private versus public rights.<sup>64</sup> "'Private rights' are rights 'belonging to

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59. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1550–51 (2016) (Thomas, J., concurring) (citing *Honig v. Doe*, 484 U.S. 305, 340 (1988) (Scalia, J., dissenting)).

60. See *Honig*, 484 U.S. at 339–41 (Scalia, J., dissenting) (discussing relevant historical sources).

61. See *Spokeo*, 136 S. Ct. at 1551 (Thomas, J., concurring).

62. See, e.g., *Stern v. Marshall*, 564 U.S. 462, 488 (2011).

63. See, e.g., *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 51 (1989).

64. In *TransUnion*, Justice Thomas consciously distinguished between these two conceptions of public rights. See *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2217 n.2 (2021) (Thomas, J., dissenting) ("The 'public rights' terminology has been used to refer to two different concepts. In one context, these rights are "'take[n] from the public'" — like the right to make, use, or sell an invention — and "'bestow[ed] ... upon the'" individual, like a 'decision to grant a public franchise.' . . . Disputes with the Government over these rights generally can be resolved 'outside of an Article III court.' . . . Here, in contrast, the term 'public rights' refers to duties owed collectively to the community.")

individuals, considered as individuals.”<sup>65</sup> These could include “rights of personal security (including security of reputation), property rights, and contract rights.”<sup>66</sup> In contrast, public rights “involve[d] duties owed ‘to the whole community, considered as a community, in its social aggregate capacity.’”<sup>67</sup> These could include “‘free navigation of waterways, passage on public highways, and general compliance with regulatory law.’”<sup>68</sup>

Justice Thomas then made his final and most controversial move. He insisted that “[c]ommon-law courts imposed different limitations on a plaintiff’s right to bring suit depending on the type of right the plaintiff sought to vindicate.”<sup>69</sup> And he contended that this common-law distinction was, one might say, “baked” into the original meaning of Article III.<sup>70</sup>

In cases involving private rights (e.g., *Spokeo*, *Thole*, *TransUnion*), Justice Thomas asserted that a plaintiff need only allege a violation of his legal rights.<sup>71</sup> For support, he cited a 1765 King’s Bench

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(quoting *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1372–74 (2018)).

65. *Spokeo*, 136 S. Ct. at 1551 (Thomas, J., concurring) (citing 3 WILLIAM BLACKSTONE, COMMENTARIES \*2).

66. *Id.* (citing 1 WILLIAM BLACKSTONE, COMMENTARIES \*130–39).

67. *Id.* at 1551 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES \*5).

68. *Id.* (citing *Woolhandler & Nelson*, *supra* note 1, at 693). Caleb Nelson provided a more comprehensive account of public rights in a 2007 article. See Nelson, *supra* note 20. Like Justice Thomas, Nelson relied on Blackstone, but he also incorporated early American sources. See *id.* at 566–67 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES \*7 and *Lansing v. Smith*, 4 Wend. 9, 21 (N.Y. 1829) (Walworth, C.)). Public rights, which belonged to the “whole community, considered as a community, in its social aggregate capacity,” included at least three categories of legal interests: “(1) proprietary rights held by government on behalf of the people, such as the title to public lands or the ownership of funds in the public treasury; (2) servitudes that every member of the body politic could use but that the law treated as being collectively held, such as rights to sail on public waters or to use public roads; and (3) less tangible rights to compliance with the laws established by public authority ‘for the government and tranquillity of the whole.’” *Id.* at 566 (citations omitted).

69. *Spokeo*, 136 S. Ct. at 1551 (Thomas, J., concurring).

70. See *id.* at 1550–53.

71. See *id.* at 1551.

decision,<sup>72</sup> an 1838 circuit court decision,<sup>73</sup> a 2008 law review article by Professor F. Andrew Hessick,<sup>74</sup> and an amicus brief by private law scholars.<sup>75</sup> The last two sources (especially the Hessick article) exhaustively detail the history of private rights litigation, which seems to reject the requirement of showing “concrete” or “actual” damage beyond a legal violation.<sup>76</sup>

Turning to public rights, Justice Thomas asserted that “[g]enerally, only the government had the authority to vindicate a harm borne by the public at large.”<sup>77</sup> For example, he referenced the tradition of public criminal prosecutions in America.<sup>78</sup> However, he admitted of an exception to that rule, where a private plaintiff could “allege that the violation caused them ‘some extraordinary damage, beyond the rest of the [community].’”<sup>79</sup> In particular, Justice Thomas highlighted the public nuisance tort, which required the plaintiff show “special damage” before he could bring private suit on a public right.<sup>80</sup> Anticipating the critics’ objection, Justice Thomas addressed the *qui tam* exception to this rule briefly and only by quick reference to *Vermont Agency*.<sup>81</sup> And he cited several notable standing decisions in an attempt to show that his approach

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72. *Entick v. Carrington* (1765) 95 Eng. Rep. 807, 817; 2 Wils. K. B. 275, 291 (KB).

73. *Webb v. Portland Mfg. Co.*, 29 F. Cas. 506, 508 (C.C.D. Me. 1838) (No. 17,322).

74. F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 317–21 (2008).

75. Brief for Restitution and Remedies Scholars as Amici Curiae in Support of Respondent at 6–18, *Spokeo v. Robins*, 136 S. Ct. 1540 (2016) (No. 13-1339).

76. See Hessick, *supra* note 74, at 279–86; Brief for Restitution and Remedies Scholars, *supra* note 75, at 20–22.

77. *Spokeo*, 136 S. Ct. at 1551 (Thomas, J., concurring) (citing *Woolhandler & Nelson*, *supra* note 1, at 695–700).

78. *Id.* (citing *Woolhandler & Nelson*, *supra* note 1, at 695–700).

79. See *id.* (alteration in original) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES \*220).

80. See *id.* (citing 3 WILLIAM BLACKSTONE, COMMENTARIES \*220).

81. See *id.* at 1551 n.\* (“The well-established exception for *qui tam* actions allows private plaintiffs to sue in the government’s name for the violation of a public right.”) (citing *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773–74 (2000)). As discussed in the Conclusion, this exception may not be as well-established as Justice Thomas once thought.

to public rights would not wreak great damage to existing doctrine.<sup>82</sup>

For historical support of his public rights argument, Justice Thomas relied on a seminal 2004 law review article by Professors Ann Woolhandler and Caleb Nelson.<sup>83</sup> In the niche community of federal courts scholars, the article has some prominence.<sup>84</sup> It was intended to rebut the argument that the Court was “flatly wrong to claim historical support for a constitutional requirement of standing.”<sup>85</sup> Woolhandler and Nelson saw things differently. While they did not claim that “history *compels* acceptance of the modern Supreme Court’s vision of standing,” they argued at least that “history does not *defeat*” it.<sup>86</sup>

Woolhandler and Nelson discussed the same private versus public rights divide as Justice Thomas, with a similar (if not more built-out) explanation of *qui tam* actions.<sup>87</sup> Interestingly enough, Justice Thomas did not reach the same conclusion as Woolhandler and

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82. See *id.* at 1552–53 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221–223 (1974); *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 183–184 (2000); *Ex parte Levitt*, 302 U.S. 633, 634 (1937) (per curiam); *Summers v. Earth Island Institute*, 555 U.S. 488, 490, 496–97 (2009)).

83. See *id.* at 1551 (citing Woolhandler & Nelson, *supra* note 1).

84. See RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 152 (7th ed. 2015) (hereinafter *HART AND WECHSLER*) (citing the Woolhandler & Nelson piece as a prominent article in the history and Article III standing conversation); Robert J. Pushaw, Jr., *Fortuity and the Article III “Case”*: A Critique of Fletcher’s The Structure of Standing, 65 ALA. L. REV. 289, 292 n.14 (2013) (“Professor Winter’s monumental work greatly influenced my scholarship . . . However, I was prompted to rethink his (and my) position by Ann Woolhandler & Caleb Nelson.”) (citations omitted). Cass Sunstein, a longstanding critic of modern standing doctrine, cites Woolhandler and Nelson as representatives of the “minority view” that reads the standing history “differently.” Cass R. Sunstein, *In Memoriam: Justice Antonin Scalia*, 130 HARV. L. REV. 22, 23 n. 70 (2016); see also Sunstein, *supra* note 41, at 358 n.44 (“Woolhandler and Nelson make the most sustained effort to defend the idea that something like contemporary standing doctrine can find some roots in the Founding era and after.”).

85. See Woolhandler & Nelson, *supra* note 1, at 690.

86. *Id.* at 691.

87. See *id.* at 694; see also *id.* at 725–32 (discussing the history and relevance of *qui tam* actions).

Nelson with respect to private rights.<sup>88</sup> For Hessick specifically disagreed with Woolhandler and Nelson on the requirement of injury in fact for private rights suits.<sup>89</sup> And in *Spokeo*, Justice Thomas picked some from each source—relying on Hessick for private rights and Woolhandler and Nelson for public rights.

On public rights, Woolhandler and Nelson defended a general rule of no standing for private litigants. They emphasized the early American tradition of not allowing private control of criminal prosecutions.<sup>90</sup> This differed from contemporary English practice, where “although public officers remained in ultimate control of most criminal prosecutions . . . private individuals had considerable authority to initiate and prosecute criminal cases in the king’s name.”<sup>91</sup>

Woolhandler and Nelson also highlighted the public nuisance cases that Justice Thomas would later cite in *Spokeo*. These cases served a kind of “exception that proves the rule” role, where public rights standing was only allowed if a special damage or injury could be shown.<sup>92</sup> Citing many early American decisions (mostly from state courts), Woolhandler and Nelson contended that the common-law courts were uniform on this issue:<sup>93</sup> “[I]t was well established, both at law and in equity, that ‘an action will not lie in respect of a public nuisance, unless the plaintiff has sustained a

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88. Compare *Spokeo*, 136 S. Ct. at 1551 (Thomas, J., concurring) (“Historically, common-law courts possessed broad power to adjudicate suits involving the alleged violation of private rights, even when plaintiffs alleged only the violation of those rights and nothing more.”), with Woolhandler & Nelson, *supra* note 1, at 719–20 (“At the same time, other historical evidence casts doubt upon the idea that statutory rights to sue automatically sufficed to create constitutional ‘Cases’ or ‘Controversies,’ regardless of the real-world interests at stake.”).

89. See Hessick, *supra* note 74, at 283 n.38 (disagreeing with the Woolhandler & Nelson article about the need for an injury in fact beyond an injury in law).

90. See Woolhandler & Nelson, *supra* note 1, at 697–99.

91. *Id.* at 698.

92. See *id.* at 701–04.

93. See *id.* For later discussion of the materials cited by Woolhandler and Nelson, see *infra* Part II.B–C.

particular damage from it, and one not common to the public generally.”<sup>94</sup>

The Woolhandler and Nelson article is important, intriguing, and incomplete. It was not intended to provide the definitive, last word on original meaning and constitutional standing. The relevant question was “does history defeat standing?”, not “what is a detailed and worked-out originalist doctrine of standing?”<sup>95</sup> Woolhandler and Nelson did not write on a blank slate. They were responding to critics like Sunstein and Winter and Jaffe, who themselves were responding to a slowly built-out Supreme Court doctrine that was not self-consciously tied to original meaning. The point of the Woolhandler and Nelson article was to blunt the historical criticism, not to make a systematic argument in the affirmative.<sup>96</sup>

However, Justice Thomas used Woolhandler and Nelson’s article to construct a new, positive vision of Article III standing. And if one is considering a radical shift in constitutional doctrine, it is necessary to dig deeper. The remaining two Parts deal with two questions left open by Woolhandler and Nelson: (1) what did special damage precisely mean in 1788, and (2) are we sure that this legal doctrine is relevant to the original meaning of Article III?<sup>97</sup>

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94. See *id.* at 702 (quoting *Bigelow v. Hartford Bridge Co.*, 14 Conn. 565, 578 (Conn. 1842)).

95. See *id.* at 720 (“We do not claim that modern standing doctrine sprang fully formed from the Philadelphia Convention or that the constitutional nature of standing was universally appreciated from day one. But neither is the opposite true; the public/private distinction upon which modern standing doctrine rests does have historical support, and the notion that the Constitution incorporates that distinction even as against Congress does not contradict any determinate original understanding.”).

96. Put another way, their article works brilliantly as the fourth paragraph in the history and standing section in HART & WECHSLER. After the casebook recounts the arguments of critics like Sunstein and Winter, Woolhandler and Nelson are aptly cited to show that the historical record is messy. See HART AND WECHSLER, *supra* note 84, at 151–53.

97. As mentioned above, Woolhandler and Nelson do not only rely on public nuisance suits. They also highlight public criminal prosecutions and mandamus. See Woolhandler & Nelson, *supra* note 1, at 695–700, 708–12. In *Spokeo*, Justice Thomas references criminal prosecutions. See 136 S. Ct. at 1551–52 (Thomas, J., concurring). On my read,



## II. HISTORY OF PUBLIC NUISANCE TORT AND SPECIAL DAMAGE

This Part examines historical evidence about the public nuisance tort and special damage. I begin with English law, the origin of the public nuisance tort. I then move to early American law.

A few notes before diving into the history. To begin with, courts and commentators used a variety of similar sounding phrases in this context, including but not limited to “special damage,” “special injury,” “special grievance,” “particular damage,” “peculiar damage,” “extraordinary damage,” and so on. Whether a difference in wording between “special” and “extraordinary” damage makes a difference in the legal doctrine will be discussed later. At the threshold, it suffices to say that all of these phrases refer to the thing (whatever its exact content or nature) which an individual must show to bring a private action for the tort of public nuisance.

There is also the question of time period. This Article aims for the original meaning of Article III, which was ratified as part of the Constitution in 1788. So, what is the time period for historical analysis? A widely read American public nuisance decision from 1787 would surely have some relevance. But what about an English decision from 1535 or 1680? Moreover, what about the notion of “constitutional liquidation,” by which a textual indeterminacy in the Constitution can be settled through a course of deliberate practice?<sup>98</sup> Considering its general language and relative lack of discussion during the Convention or ratification debates,<sup>99</sup> the text of

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the critics have the stronger argument on those subjects. Regardless, I focus only on the public nuisance materials because much ink has already been spilled in the other areas.

98. See William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 13–21 (2019).

99. For one rough measure, I would note that *The Founder's Constitution*, a five-volume collection of original sources from the Founding period, contains far more material on Articles I and II than on Article III. See THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 2001) (1987). And those documents relevant to Article III largely deal with subjects other than the “judicial Power” or “Cases” or “Controversies,” like the inclusion of diversity jurisdiction or the relationship between the federal and state courts. See 4 THE FOUNDERS' CONSTITUTION 131–469 (Philip B. Kurland & Ralph Lerner eds., 2001) (1987). All of this is to say that historical material relevant to the modern doctrine of standing is hard to come by.

Article III seems ripe for liquidation.<sup>100</sup> Thus, an American decision from 1792 might be instructive. But what about an American decision from 1860? As Justice Barrett noted in her *Bruen* concurrence, the Supreme Court has not “conclusively determine[d] the manner and circumstances in which postratification practice may bear on the original meaning of the Constitution,” including the “unsettled question[]” of “[h]ow long after ratification may subsequent practice illuminate original public meaning.”<sup>101</sup>

In this Part, I set the following bounds. Since American lawyers were aware of and cited the full history of English public nuisance tort law, I begin with the first English case in 1535 and go until the early 1800s. English decisions issued after 1788 are not truly relevant or instructive on original meaning. But as several early American decisions relied on these later English cases, their discussion is necessary to understand the context and for liquidation purposes.

With respect to American law, I examine decisions issued through the early 1850s. Wider than one might prefer, this time period is partly required by the available materials. For the most part, the state judicial reporters did not commence until the early 1800s.<sup>102</sup> On the federal side, we have earlier reported decisions, at least for the Supreme Court.<sup>103</sup> But, given the constraints on federal jurisdiction, there are few early federal decisions about public nuisance torts (and none that I could find before 1838). In any event, this time period comports with that analyzed by Woolhandler and Nelson.<sup>104</sup> Note that, the more years between ratification and a piece of historical evidence, the less weight that particular evidence

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100. See Baude, *supra* note 98, at 13 (“The first premise of liquidation is an indeterminacy in the meaning of the Constitution.”).

101. *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2162–63 (2022) (Barrett, J., concurring).

102. See William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1555–56 n.204 (1984) (discussing early American case reporters). Thank you to Chris Moore for pointing this source out.

103. See *id.*

104. See Woolhandler & Nelson, *supra* note 1, at 700–03 (citing several of the cases I discuss below).

carries in the originalist analysis (although it might still be relevant for liquidation).

Lastly, I have gathered a large number of materials—English and American, treatises and cases. This Part does not discuss every single item. Rather, I highlight those materials which I believe most illustrative of the legal context.<sup>105</sup>

### *B. Early English Law and Special Damage*

English law gave birth to the public nuisance tort. But the doctrine was anything but clear from the beginning. The treatises seemed to go one way. The cases mostly went another way, with confusion. It was only after the Founding that the English doctrine began to clear up.

#### 1. The 1535 “anonymous” Case

The first English case for what we now call the public nuisance tort was decided in 1535.<sup>106</sup> At the outset, it should be noted that we do not have a full picture of this case. All we have is three paragraphs on one page of the Year Book, which served as the de facto reporter at that time.<sup>107</sup> The Year Book account was written in law French (requiring later English translation<sup>108</sup>), omitted the names of

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105. This screening process was more art than science. I emphasized cases that were often cited by others dealing with the same subject matter, cases that dealt with the application of a given rule to different fact patterns, and, in the American context, cases from different jurisdictions.

106. Y.B. Mich. 27 Hen. 8, Mich., f. 26, pl. 10 (1535).

107. Modern scholars are not overly confident in the trustworthiness and sufficiency of the Year Book system. See JOHN H. LANGBEIN ET AL., HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS, 179–87, 253–57 (2009) (discussing defects in the Year Book system and the eventual switch from the “gossipy informality of the Year Books” to more formal “nominate” reports) (internal citations omitted).

108. See, e.g., Jeremiah Smith, *Private Action for Obstruction to Public Right of Passage II*, 15 COLUM. L. REV. 142, 142–43 n.65 (1915) (translating the case into English). Subsequent cites of the 1535 case are to Smith’s 1915 English translation. See [https://www.bu.edu/phpbin/lawyearbooks/page.php?volume=11&first\\_page=567&last\\_page=567&id=22306](https://www.bu.edu/phpbin/lawyearbooks/page.php?volume=11&first_page=567&last_page=567&id=22306) [<https://perma.cc/D2TT-79FJ>] for a picture of the case page.

the parties (the case is now called “anonymous”),<sup>109</sup> and contained a cursory summary of the facts.<sup>110</sup> This much we know. An unnamed plaintiff brought suit against a defendant who had obstructed a highway.<sup>111</sup> The plaintiff used the highway to go back and forth from his house to his field.<sup>112</sup> The obstruction caused the plaintiff to suffer unspecified damage.<sup>113</sup>

The King’s Bench (one of the two most powerful civil courts in that day<sup>114</sup>) heard the case and issued two opinions. Chief Justice Baldwin wrote the majority and ruled against the plaintiff, holding that the defendant’s obstruction was (quoting a later English translation) a “nuisance common to all” of the King’s subjects.<sup>115</sup> Thus, it was only proper for the King to punish the defendant through criminal prosecution.<sup>116</sup> For if this one plaintiff had a private action against the defendant, everyone else would have the same and the defendant could be punished “100 times for the same case” (what later became known as the “multiplicity” objection).<sup>117</sup>

Justice Fitzherbert dissented. He agreed that the King could bring a criminal prosecution for common nuisance.<sup>118</sup> But he discussed another remedy. Where one plaintiff has “greater hurt, or annoyance, than anyone has,” that person could bring an action to recover damages “by reason of this special hurt.”<sup>119</sup> Justice Fitzherbert raised a hypothetical that later became known as the “stock

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109. See Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 *ECOLOGICAL L.Q.* 755, 791 n.159 (2001). I am grateful to Professor Antolini’s article for its discussion of the English case law on special damage. While I do not agree with all of the conclusions, her analysis was helpful as I developed my own opinions.

110. See Smith, *supra* note 108, at 142–43 n.65.

111. See *id.*

112. See *id.*

113. See *id.*

114. Alongside the Court of Common Pleas. See LANGBEIN ET AL., *supra* note 107, at 248–50.

115. Smith, *supra* note 108, at 142–43 n.65.

116. See *id.*

117. See *id.*; see also *infra* Part III.C.

118. See Smith, *supra* note 108, at 142–43 n.65.

119. See *id.*

example” of special damage.<sup>120</sup> Someone digs a ditch across a public road.<sup>121</sup> At night, a rider falls into the ditch with his horse because he cannot see, and he or his horse is “greatly damaged.”<sup>122</sup> According to Justice Fitzherbert, the rider would have a private action against the ditchdigger because the rider was “more damaged thereby than anyone else.”<sup>123</sup> The plaintiff in this case “had more enjoyment of this high way than anyone else had and therefore when it is stopped he has greater damage because he has no other way thence to his [field].”<sup>124</sup> Therefore, the action was proper.

Justice Fitzherbert’s dissent had a lasting impact on English law. However, the opinion contains at least one puzzle: the content of the special damage requirement is ambiguous.<sup>125</sup>

As referenced below,<sup>126</sup> there are three basic standards for special damage: difference-in-degree, difference-in-kind, and actual damage. Let me illustrate them by returning to the stock example. The offender digs a ditch across a public road. Everyone who wants to use that road is inconvenienced by the ditch. Everyone is forced to take extra effort and time to either walk around it or climb down and then up it.

The first standard, difference-in-degree, is connected to this common injury. The plaintiff need only show that he has suffered a greater amount of the injury he shares with the general public. Everyone incurs some inconvenience. But the plaintiff, because he is transporting precious goods using a horse-driven carriage, has to spend much more time and treasure, either slowly maneuvering

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120. See Antolini, *supra* note 109, at 796 n.170 (citing F.H. Newark, *The Boundaries of Nuisance*, 65 L.Q. REV. 480, 483–84 (1949)).

121. See Smith, *supra* note 108, at 142–43 n.65.

122. See *id.*

123. See *id.*

124. See *id.*

125. Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4 J. TORT L. 1, 14 (2011) lays out another puzzle that is less relevant but worth mentioning. Merrill capably argues that Fitzherbert did not intend to create a wholly new cause of action but was merely referring to the ability of a specially injured plaintiff to bring a standard negligence action. See *id.* It’s not clear that this theoretical distinction matters much in practice, see *id.* at 15, but it demonstrates again how the 1535 case is shrouded in confusion.

126. See *infra* Part II.B to III.C.

around, or reversing course and choosing a completely different route. The nature of the injury is similar, but the degree is greater.

The second standard, difference-in-kind, requires an injury different in kind from the common injury of inconvenience. For example, take the night rider who falls into the ditch and lames his horse. Everyone is inconvenienced by the ditch. But not everyone loses a mode of transportation. Such a plaintiff has a difference-in-kind injury. There are two versions of the difference-in-kind standard. The “weak” version of difference-in-kind would allow multiple plaintiffs to bring an action for the same different-in-kind injury—there could be two plaintiffs with injured steeds. The “strong” or “unique” version takes the multiplicity worry to the extreme. A plaintiff could only bring a private action if he suffered a unique injury shared with no other member of the public.

The difference-in-kind standard is plagued by multiple issues. To start, it is often difficult to distinguish difference-in-kind from difference-in-degree. A poke versus a punch, minor shoplifting versus major financial theft—we have different categories for things that are a matter of degree. The outcome could depend on the level of generality at which one frames the injury. It can also be difficult to distinguish between the strong and weak versions of the difference-in-kind standard. What makes an injury unique versus merely special? Assume the highway obstruction lames my horse and that of a companion. Can I argue that my injury is unique because my horse is the only horse that is mine, as there is only one of me and I have been injured in this way? Or does it matter that my horse is slightly different than every other lamed horse in some minor way? Again, the level of generality matters much.<sup>127</sup>

The third standard, actual damage, exchanges the line between degree and kind for another problem. The actual damage standard doesn’t ask about differences between the plaintiff’s injury and the

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127. Note also a defect common to both of the “difference” standards. One must determine the baseline—what and how much of an injury the public at large suffers—to determine whether the plaintiff’s injury is greater in degree or different in kind. The more injurious of a public baseline, the harder it will be for the individual plaintiff to prevail on special damage.

public's shared injury. Rather, it requires that the plaintiff suffer at least "this much" of an injury (however "this much" is defined). So, one could have an actual damage standard that required monetary or property damage. All other injuries, whether shared or not, would not suffice. Actual damage looks like modern-day injury in fact, which, while caring about comparative harm in theory,<sup>128</sup> institutes somewhat of an absolute bar in practice.<sup>129</sup> An actual damage regime could be very lenient or very strict, depending on where the bar is set.

Returning to Fitzherbert's dissent, one can plausibly read it in two ways. The hypothetical night rider in the stock example suffers a different-in-kind injury—his horse is lamed, while everyone else is merely inconvenienced. But the unnamed plaintiff in the actual case appears to suffer a different-in-degree injury, because he has "more enjoyment of this high way" than others and was thus inconvenienced more than the general public.<sup>130</sup> Of course, none of this is helped by sketchy facts, short opinions, and a stock example hypothetical which is arguably dicta in a dissenting opinion.

## 2. Early English Treatises

English treatise writers followed the lead of Fitzherbert's hypothetical. In his 1628 opus, Edward Coke cited the 1535 "anonymous" case:

For if the way be a common way, if any man be disturbed to go that way, or if a ditch be made overthwart the way so as he cannot go, yet shall he not have an action upon his case: and this the law

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128. Cf. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982) ("The Art. III aspect of standing also reflects a due regard for the autonomy of those persons likely to be *most directly affected* by a judicial order.") (emphasis added). See also Richard M. Re, *Relative Standing*, 102 GEO. L.J. 1191, 1195 (2014) ("Contrary to the case law's express aims, standing jurisprudence is not content to find adequate plaintiffs, as measured against some unchanging yardstick of factual harm. Instead, standing is often made available on a relative basis.").

129. See *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021) (limiting injury in fact to tangible and certain intangible injuries).

130. See Smith, *supra* note 108, at 142–43 n.65.

provided for avoiding of multiplicity of suits, for if any one man might have an action, all men might have the like.

But the law for this common nuisance hath provided an apt remedy, and that is by presentment in the leet or in the torne, unless any man hath a particular damage; as if he and his horse fall into the ditch, whereby he received hurt and loss, there for this special damage, which is not common to others, he shall have an action upon his case . . .<sup>131</sup>

In his 1736 *New Abridgment of the Law*, Matthew Bacon repeated in large part the same doctrine:

But it is clearly agreed, that common nuisances against the public are only punishable by a public prosecution; and that no action on the case will lie at the suit of the party injured; as this would create a multiplicity of actions, one man being as well entitled to bring an action as another; and therefore, in those cases, the remedy must be by indictment at the suit of the king.

But if by such a nuisance the party suffer a (a) particular damage, as if, by stopping up a highway with logs, &c. his horse throws him, by which he is wounded or hurt, an action lies. (b)<sup>132</sup>

However, Bacon's footnote (a) highlighted a distinction between two hypotheticals involving highway obstructions:

(a) But if a highway is stopped, that a man is delayed in his journey a little while, and by reason thereof he is damnified, or some important affair neglected; this is not such a special damage, for which an action on the case will lie; but a particular damage,

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131. See 1 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND § 56a (J. Moore, 1791) (1628) (citing 27 H. 8. 27.) (cleaned up). Coke also cited Williams's Case (1591) 77 Eng. Rep. 163; 5 Co. Rep. 72b (KB). In that case, an English lord sued a vicar for failing to celebrate a chapel service. The court would have allowed the action if the chapel was "private only for himself and his servants and family within the said manor," although the lord "only (and none of his family) should have the action." See *id.* at 164. But as the chapel was "public and common to all his tenants of the same manor," the lord could bring "no action on the case." *Id.* Otherwise, "every of his tenants might also have his action on the case as well as the lord himself, and so infinite actions for one default." *Id.*

132. 5 MATTHEW BACON, NEW ABRIDGEMENT OF THE LAW 798 (A. Strahan, 1832) (1736).



to maintain this action, ought to be direct, and not consequential; as, for instance, the loss of his horse, or some corporal hurt, in falling into a trench in the highway, &c.<sup>133</sup>

Bacon here raised a distinction between direct and consequential damage. As later decisions will show,<sup>134</sup> the word “consequential” is equivalent to “indirect,” especially in a temporal sense. The man who loses his horse is hurt directly and immediately. The man who is inconvenienced and later suffers damage on account of that is hurt consequentially. As with the divide between degree and kind, this line can get blurry.<sup>135</sup>

Finally in 1768, William Blackstone described an approach similar to that of Coke in the third volume of his *Commentaries on the Laws of England*.<sup>136</sup> Justice Thomas quoted part of this section in his *Spokeo* concurrence:<sup>137</sup>

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133. See *id.* at 798(a).

134. See *infra* Part II.A.3, II.B.3.

135. One might even argue that the direct damage requirement looks more like actual damage, because it does not focus on whether the damage a plaintiff experienced is more or less than that which the public experienced, but rather on whether the plaintiff shows a sufficient quantum of injury.

136. One necessary remark about Blackstone: many originalists view Blackstone as “the preeminent authority on English law for the founding generation.” *District of Columbia v. Heller*, 554 U.S. 570, 593–94 (2008) (citation omitted). Accordingly, the reader might be tempted to give epistemic priority to Blackstone’s understanding of special damage for purposes of American originalism. That would be wrong for two reasons. The *Commentaries* were first circulated in America in the 1770s. See PAUL M. HAMLIN, *LEGAL EDUCATION IN COLONIAL NEW YORK* 64 (1939). But as Martin Jordan Minot has persuasively argued, there is good reason to think that Blackstone’s American influence did not crest until the early 1800s. See Martin Jordan Minot, Note, *The Irrelevance of Blackstone: Rethinking the Eighteenth-Century Importance of the Commentaries*, 104 VA. L. REV. 1359, 1362 – 64, 1367 (2018). Other, earlier authorities like Coke, Hale, and Rolle were likely as influential or more on the Founding generation’s legal thinking. See *id.* at 1391–97. Blackstone’s view is relevant but not specially so. Beyond that, early American opinions on special damage spend far more time citing English or American decisions than they do citing Blackstone or other treatises. And when they do cite Blackstone, he is not given pride of place. See, e.g., *Harrison v. Sterett*, 4 H. & McH. 540, 548 (Md. Prov. 1774) (citing Blackstone next to Bacon, Coke, and many early English cases).

137. See *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1551–52 (2016) (Thomas, J., concurring) (citation omitted).

[T]he law gives no private remedy for anything but a private wrong. Therefore no action lies for a public or common nuisance, but an indictment only: because the damage being common to all the king's subjects, no one can assign his particular proportion of it; or, he could, it would be extremely hard, if every subject in the kingdom were allowed to harass the offender with separate actions. For this reason, no person, natural or corporate, can have an action [for] a public nuisance, or punish it; but only the king in his public capacity of supreme governor, and pater-familias of the kingdom.<sup>138</sup>

Yet this rule admits of one exception; where a private person suffers some extraordinary damage, beyond the rest of the king's subjects, by a public nuisance: in which case shall have a private satisfaction by action. As if, by means of a ditch dug across a public way, which is a common nuisance, a man or his horse suffer any injury by falling therein; there, for this particular damage, which is not common to others, the party shall have his action.<sup>139</sup>

Moving from the "anonymous" case (1535) to Coke (1628), Bacon (1736), and Blackstone (1768), the standard for special damage gets clearer. All three jurists stress Chief Justice Baldwin's worry about multiplicity. And while it's simplistic to count the frequency of the words like "more," "particular," "special," and "extraordinary,"<sup>140</sup> the heightened language and the references to the stock example seem to point to a difference-in-kind standard.

Even then, there is not complete alignment. Bacon discusses direct versus consequential damage, while Coke and Blackstone do not. The three treatises directionally agree on difference-in-kind. But Blackstone seems to point to a strong version of that standard (namely, "extraordinary damage, beyond the rest of the king's subjects"), whereby only unique injuries can support a private action.<sup>141</sup> Regardless, the treatises are only part of the legal context. Thus, I turn to the cases.

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138. 3 WILLIAM BLACKSTONE, COMMENTARIES \*219–20 (cleaned up).

139. *Id.* at \*220 (citing Coke Littleton 56a and *Williams's Case*) (cleaned up).

140. *But see* Antolini, *supra* note 109, at 793 (doing this kind of verbal tracking).

141. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES \*220.

### 3. Early English Cases

Since there is no shortage of relevant precedent, I have cabined my inquiry in this section to what some have called the “principal” or “orthodox” English cases on private actions for public nuisance.<sup>142</sup>

As an early Pennsylvania court observed, the English doctrine was far from consistent. “The general principle has been always agreed, that for an obstruction to a highway, which is a common nuisance, an action cannot be supported, but by a person who has suffered some *special damage*. But in the application of this rule to the different cases which have arisen, there have been decisions which are not to be reconciled.”<sup>143</sup>

In *Hart v. Basset* (1681), a highway obstruction delayed the plaintiff from carrying tithes (crops) to his barn, requiring “a longer and more difficult way.”<sup>144</sup> Reminded that “no one shall have an action for that which every one suffers,” the King’s Bench observed that the rule “ought not to be taken too largely.”<sup>145</sup> Since the plaintiff had “particular damage” in “labour and pains” associated with the alternate route, the private action was sustained.<sup>146</sup> Interestingly, the court referenced the stock example, remarking that the plaintiff’s damage “may well be of more value than the loss of a horse, or such damage as is allowed to maintain an action in such a case.”<sup>147</sup> The opinion is short, but *Hart* is best understood as embracing a difference-in-degree standard (coming close even to actual damage).

By contrast, in *Paine v. Partrich* (1692),<sup>148</sup> the defendant built a bridge that obstructed a public waterway. The plaintiff alleged the

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142. See Antolini, *supra* note 109, at 796 n.179 (listing authorities that emphasize the following decisions) (citations omitted).

143. See *Hughes v. Heiser*, 1 Binn. 463, 468 (Pa. 1808) (citing the following cases); see also *Pierce v. Dart*, 7 Cow. 609, 610 (N.Y. Sup. Ct. 1827) (“The English cases have fluctuated . . .”).

144. (1681) 84 Eng. Rep. 1194, 1194; T. Jones 156, 156 (KB).

145. *Id.* at 1195.

146. *Id.*

147. *Id.*

148. (1692) 90 Eng. Rep. 715, 715; Carthew 191, 191 (KB).

loss of the “liberty of the passage” and brought a private action.<sup>149</sup> The court rejected the suit, “chiefly to avoid multiplicity of actions.”<sup>150</sup> For if “it may be brought by the plaintiff, it may be maintainable by every person passing that way.”<sup>151</sup> Moreover, mere delay or inconvenience was not sufficient.<sup>152</sup> In its refusal of inconvenience, even significant inconvenience, *Paine* is likely best understood as rejecting a difference-in-degree standard.<sup>153</sup>

Two cases best demonstrate the tension in the doctrine: *Iveson v. Moore* (1699)<sup>154</sup> and *Chichester v. Lethbridge* (1738).<sup>155</sup> In *Iveson*, a coal merchant was impeded in the transportation of coal by the defendant’s highway obstruction, resulting in inconvenience.<sup>156</sup> The four justices on the King’s Bench split 2-2.<sup>157</sup> The precise contours of the disagreement are unclear—the opinions are lengthy and convoluted. The justices divided on whether the plaintiff had sufficiently shown that he suffered “more particular damage,”<sup>158</sup> but one could plausibly frame arguments as difference-in-degree or difference-in-

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149. *Id.* at 717.

150. *Id.*

151. *Id.*

152. It should also be noted that the court in *Paine* picked up on the direct versus consequential distinction that Bacon later emphasized. *See id.*

153. In *Hubert v. Groves*, the King’s Bench seemed to follow the rationale of *Paine* over that of *Hart*. (1794) 170 Eng. Rep. 308; 1 Esp. 148 (KB). The plaintiff, a coal and timber merchant, was impeded in his business by a highway obstruction which required a “circuitous and inconvenient way.” *Id.* at 308. Ostensibly, the merchant incurred more expense by this obstruction than the average member of the public, on account of his business. Without much discussion, the court denied the suit. *See id.* at 309. Even after the plaintiff moved for a new trial and cited *Hart*, the court refused the suit. *See id.* *Hubert* would seem to add more support to a difference-in-kind standard. But since *Hubert* is an English decision handed down six years after the Constitution’s ratification in 1788, it is not considered indicative of original meaning. *See Hughes v. Heiser*, 1 Binn. 463, 469 (Pa. 1808) (“Since the revolution, the case of *Hubert v. Groves* (shortly reported in 1 Esp. 148.) has been adjudged in express contradiction to *Hart v. Basset*. This case of *Hubert v. Groves*, is no authority here, and no further to be regarded than its intrinsic merit demands.”).

154. (1699) 91 Eng. Rep. 1224; 1 Ld. Raym. 486 (KB).

155. (1738) 125 Eng. Rep. 1061; Willes 71 (CP).

156. *Iveson*, 91 Eng. Rep. at 1226.

157. *See id.* at 1230.

158. *See id.* at 1229.

kind. The case was later heard by the Justices of the Court of Common Pleas and Barons of the Exchequer, who unanimously decided that the plaintiff's action was proper.<sup>159</sup> While short, that opinion likely points to difference-in-degree.<sup>160</sup>

In *Chichester*, a highway obstruction prevented the plaintiff from travelling back and forth in his coach.<sup>161</sup> The court quickly allowed the plaintiff's action on the ground of *Hart*.<sup>162</sup> But the case is useful for a reporter's note, which affirmed the general rule against public nuisance torts. At the same time, the reporter noted that "a question has frequently arisen whether the damage stated in each particular case were sufficient to bring it within the exception to the general rule; and this question has received various determinations according to the circumstances of each case."<sup>163</sup> In other words: We all agree on the general rule, but we disagree on how it works.

By the early 1800s, some resolution arrived. In *Rose v. Miles* (1815),<sup>164</sup> the plaintiff sought to ship goods over a public waterway, which was obstructed by the defendant. An alternative, more expensive route was required.<sup>165</sup> The seriatim opinions of the King's Bench easily held for the plaintiff.<sup>166</sup> The chief justice observed that the obstruction was "something substantially more injurious to [the plaintiff], than to the public at large, who might only have it in

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159. See *id.* at 1230. The statement of the combined Common Pleas + Exchequer body is not in the *Iveson* report but was later noted by the reporter in *Chichester*. See 125 Eng. Rep. at 1063 n.(a)1.

160. See *Chichester*, 125 Eng. Rep. at 1063 n.(a)1 ("But the Court (the King's Bench) being divided, the matter was reserved for the opinion of the rest of the Judges, who all agreed in the opinion of Turton J. and Gould J. that the action lay. The reason the Judges went upon was principally this, that it sufficiently appeared that the plaintiff must and did necessarily suffer a special damage more than the rest of the King's subjects by the obstruction of this way; because it was set forth that the only way to come to the coal pits from one part of the county was through this way, by which it must be understood, without any allegation of loss of customers, that the plaintiff did suffer particularly in respect to his trade by the plaintiffs [*sic*] wrong.").

161. See *id.* at 1062–63.

162. See *id.*

163. See *id.* at 1063 n.(a)1.

164. (1815) 105 Eng. Rep. 773, 773; 4 M. & S. 101, 101 (KB).

165. See *id.*

166. See *id.* at 774.

contemplation to use" the waterway.<sup>167</sup> Besides, "[i]f a man's time or his money are of any value, it seems to me that this plaintiff has shewn a particular damage."<sup>168</sup> Another justice remarked similarly that "[i]f this be not a particular damage, I scarcely know what is."<sup>169</sup> The court claimed to follow cases like *Paine*,<sup>170</sup> but it is more likely that *Rose* overruled those cases. In those earlier cases, plaintiffs had been inconvenienced in their travel and their suits were refused. Not so in *Rose*, which placed greatest emphasis on the expense that the plaintiff occurred (all three opinions cited that factor).<sup>171</sup> Accordingly, *Rose* is likely an actual damage case. This is confirmed by *Greasly v. Codling* (1824),<sup>172</sup> which followed *Rose*. The chief justice in *Greasly* characterized *Rose* as holding that "where any damage was incurred, an action would lie."<sup>173</sup>

In summary, what can we take away from the English sources? The Fitzherbert dissent in the 1535 case discusses two different standards for special damage. Later treatises seem to push towards a difference-in-kind standard, with uncertainty about a weak or strong version. The case law admits of its own fragmentation, with more decisions pushing towards difference-in-degree.<sup>174</sup> *Rose* and *Greasly* clean things up a bit.<sup>175</sup> But those cases came decades after

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167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 773–74.

171. *See id.*; *see also* *Pierce v. Dart*, 7 Cow. 609, 611 (N.Y. Sup. Ct. 1827) (suggesting that *Rose* settled the doctrine, at least for a time).

172. (1824) 130 Eng. Rep. 307; 2 Bing. 263 (CP).

173. *See id.* at 308.

174. I would count *Chichester*, *Iveson*, and *Hart* for difference-in-degree and *Paine* for difference-in-kind (*Hubert* is too late). I would note that later authorities would disagree over how to read these cases. Antolini also reads the English cases as more supportive of a difference-in-degree standard, *see* Antolini, *supra* note 109, at 796–800, whereas Jeremiah Smith read the same cases as supportive of an actual damage standard. *See* Smith, *supra* note 108, at 143–44. And as noted below, a number of state courts, which were informed about the English decisions, went towards a difference-in-kind standard. *See infra* Part II.B.3.

175. Although even then one can see post-*Rose* tension in English materials. In 1821, Robert Henley Eden seemed to endorse a difference-in-degree standard. *See* ROBERT HENLEY EDEN, A TREATISE ON THE LAW OF INJUNCTIONS 230–31 (1821) ("[F]or, as at law,

the Constitution's ratification in 1788, and they go in the new direction of an actual damage standard. At the very least, we can say that during the Founding, if we are to enter into the minds of those thinking about Article III and assume these English materials are relevant, it is hard to find a clean answer to this question of special damage.

### C. *Early American Law and Special Damage*

The English materials are conflicted and unclear. So, I turn to American law. Here also, there are a number of treatises and cases, both federal and state. I begin by discussing the treatises, which are either wholly or mostly unhelpful. Then, I turn to the federal cases, which are few, distant from the Founding, and unilluminating. Finally, I turn to the state cases, which I consider the most instructive on special damage in early American law. Unfortunately, the early state courts disagreed with each other.

#### 1. Early American Treatises

In the relevant period after ratification, the following three American treatises discussed public nuisance and special damage.<sup>176</sup> Of the three, only one is plausibly insightful into the special damage standard and not much at that.

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a party may have a private satisfaction by civil suit for that which is a public nuisance; so in equity, if there is a special grievance arising out of the common cause of injury which presses more upon particular individuals, than upon others not so immediately within the influence of it, it should seem that they would be entitled to the interference of a court of equity for the protection of their private rights."'). Twelve years later, Joseph Chitty leaned toward actual damage. See JOSEPH CHITTY, *THE PRACTICE OF THE LAW IN ALL ITS PRINCIPAL DEPARTMENTS* 3a (1833) ("Some public rights, however, are also sometimes private, so that any individual who happens to be particularly interested or injured in any sensible degree, may not only interfere and abate or remove the nuisance, and prosecute for the benefit of the community, but also may have his private remedy."); see *id.* at 11a (citing *Chichester* and *Greasly*).

176. During this time, a number of English treatises were published in American editions and some of these discussed special damage. See, e.g., EDEN, *supra* note 175, at 162–63. But since these American editions mostly reflected English doctrine, I do not include them as evidence of American Founding Era thought, even though they had some downstream influence on American courts. See *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. 518, 521 (1851) (citing EDEN).

Zephaniah Swift's 1795 work *A System of the Laws of the State of Connecticut* discussed the public nuisance tort, but Swift only mentioned the special damage requirement without explaining its content.<sup>177</sup> In his 1803 American edition of Blackstone's *Commentaries*, St. George Tucker made no change to the section on the public nuisance tort beyond adding a distinction between direct and consequential damage (which Bacon had emphasized earlier).<sup>178</sup> Finally, in his 1836 *Commentaries on Equity Jurisprudence*, Joseph Story seemed to embrace a direct (versus consequential) standard for special damage.<sup>179</sup> However, Story didn't take a position on difference-in-kind, difference-in-degree, or actual damage.<sup>180</sup> And written almost 50 years after ratification, his treatise is not first-rate evidence of original meaning.<sup>181</sup>

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177. See 2 ZEPHANIAH SMITH, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 87 (1795) ("No action lies in favour of a private person, for a public nuisance, unless he has sustained some special damage thereby; and then he may bring his action to recover such special damage.").

178. 4 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 220 n.\* (St. George Tucker ed., 1803) ("But the particular damage in this case must be direct, and not consequential, as by being delayed in a journey of importance.") (citation omitted). Beyond this comment, Tucker adds nothing else to the page on public nuisance tort actions.

179. 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 204 (1836) ("In the next place, a Court of Equity will not interfere merely upon the information of the Attorney General, but also upon the application of private parties, directly affected by the nuisance; whereas, at law, in many cases, the remedy is, or may be, solely through the instrumentality of the Attorney General.") (emphasis added).

180. Offhand, I would note that the discussion of public nuisance by Story and Eden as it relates to injunctions rebuts an isolated critique made of Justice Thomas's concurrence in *Spokeo*. While commending the *Spokeo* concurrence, James Pfander argued that it focused too much on common law and not enough on equity. See Pfander, *supra* note 36, at 216. However, we can see in Story and Eden that the rule about special damage was similar across law and equity. Thus, insofar as one thinks Justice Thomas is right about public rights, special damage, and standing, that *Spokeo* did not discuss equity should not impair the force of his argument.

181. Cf. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 856 (1995) (Thomas, J., dissenting) ("Despite the majority's citation of *Garcia* and *McCulloch*, the only true support for its view of the Tenth Amendment comes from Joseph Story's 1833 treatise on constitutional law. . . . Justice Story was a brilliant and accomplished man, and one cannot casually dismiss his views. On the other hand, he was not a member of the Founding



## 2. Early Federal Cases

From 1788 to the start of the Civil War, only a handful of federal court cases mentioned the public nuisance tort. Still fewer contained discussion of the special damage standard.

In *Barron v. Baltimore* (1833), the plaintiff sued the city of Baltimore in state court for losses related to a public works project.<sup>182</sup> The alleged effect of the city's actions was the additional depositing of material in the harbor in front of the plaintiff's wharf, which made the water around the wharf too shallow and reduced its value.<sup>183</sup> The plaintiff brought an action for public nuisance against the city. He won in front of a Maryland jury, lost in the state appellate courts, and appealed to the Supreme Court by asserting a federal constitutional claim.<sup>184</sup> The Court did not reach the public nuisance issue, but rejected subject matter jurisdiction on the basis that the Bill of Rights was not incorporated against the States.<sup>185</sup> As relevant here, the plaintiff's argument before the Court referenced special damage and was ambiguous between difference-in-degree and difference-in-kind.<sup>186</sup>

In *Mayor of Georgetown v. Alexandria Canal Co.* (1838), city officials sued a canal company for construction activities that allegedly injured the Georgetown channel and harbor.<sup>187</sup> The officials brought a public nuisance suit in federal circuit court—the parties appear to

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generation, and his Commentaries on the Constitution were written a half century after the framing.”).

182. 32 U.S. (7 Pet.) 243 (1833).

183. *See id.* at 243–44.

184. *See id.* at 244–46.

185. *See id.* at 250 (“In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in congress, and adopted by the states. These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.”).

186. *See id.* at 246 (“[O]n that head the plaintiff will contend that special damage is fully shown here, within the principle of the cases where an individual injury resulting from a public nuisance is deemed actionable, the wrong being merely public only so long as the loss suffered in the particular case is no more than all members of the community suffer.”) (emphasis added).

187. 37 U.S. (12 Pet.) 91, 92–93 (1838).

be diverse—and asked for an injunction to stay further construction.<sup>188</sup> The circuit court dismissed the suit.<sup>189</sup> On appeal, the Supreme Court affirmed the lower court.<sup>190</sup> In doing so, the Court cited Bacon and remarked on the special damage requirement:

If any particular individual shall have sustained special damage from the erection of it, he may maintain a private action for such special damage; because to that extent he has suffered beyond his portion of injury, in common with the community at large.<sup>191</sup>

The cursory discussion makes it harder to determine the applicable standard. Does suffering “beyond his portion of injury” refer to degree? Or is this a case where a difference in degree is severe enough to constitute a difference in kind? The reasoning looks most like difference-in-degree, but it is not clear.

In *Spooner v. McConnell* (1838), an Ohio federal circuit court entertained a bill in equity alleging a public nuisance.<sup>192</sup> The plaintiff, Lysander Spooner, asked the circuit court to enjoin the building of dams that would obstruct his navigation of the Ohio river.<sup>193</sup> Justice John McLean sat on the *Mayor of Georgetown* case and cited that decision.<sup>194</sup> But here, his reference to injury alone, without concern for a comparison to the public, reveals an actual damage standard:

If, in attempting to travel the road, he should be prevented from doing so, by the obstruction, he would have a right to bring his action at law for damages. And this is the only appropriate redress, which an individual, under such circumstances, can have.<sup>195</sup>

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188. *See id.* at 93–94.

189. *See id.* at 94.

190. *See id.* at 100.

191. *See id.* at 97–98.

192. 22 F.Cas. 939, 940–41 (C.C.D. Ohio 1838) (No. 13,245) (McLean, J.).

193. *See id.*

194. *See id.* at 954 (citation omitted).

195. *Id.* at 947. McLean’s standard seems like actual damage because it allows all who suffer the inconvenience of delay to bring an action (which would stand in direct contradiction to the foundational rule in the 1535 “anonymous” case).

In *Irwin v. Dixon* (1850), the Supreme Court considered another bill in equity alleging a public nuisance.<sup>196</sup> The Court cited *Mayor of Georgetown* and followed that decision with similarly ambiguous language:

And no remedy whatever exists in these cases by an individual, unless he has suffered some private, direct, and material damage beyond the public at large; as well as damage otherwise irreparable . . . . In cases of injury to individual rights by obstructions or supposed nuisances, an injunction is still less favored, and does not lie at all permanently, in England and most of the States, unless the injury is not only greater to the complainant than to others . . . .<sup>197</sup>

Finally, in *Pennsylvania v. Wheeling & Belmont Bridge Co.* (1851), the Supreme Court confronted a bill in equity for public nuisance in its original jurisdiction.<sup>198</sup> The Court cited many of the authorities previously referenced (Coke, Story, Eden, *Mayor of Georgetown*).<sup>199</sup> But while the Court repeatedly referenced “special injury,” “special damage,” and “special mischief,” neither the Court’s words nor the holding give any guidance on what those terms meant.

Thus, during a period that spanned multiple decades, the federal courts thrice gave any guidance about the special damage requirement. In two cases, the Supreme Court’s words are arguably ambiguous between difference-in-degree and difference-in-kind. In the third, a justice riding circuit leaned towards actual damage. The lack of robust precedent can be explained by the limited jurisdiction of the federal courts—public nuisance was not a federal cause of action and most of these cases were diversity. Yet, the scarcity remains, as well does the temporal distance between these precedents and 1788. Even putting those concerns to the side, one is left without clarity as to what the early federal courts thought about special damage.

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196. 50 U.S. (9 How.) 10 (1850).

197. *Id.* at 27–28 (internal citations omitted).

198. 54 U.S. 518 (1852).

199. *See id.* at 521 (citations omitted).

Given these defects, I turn to the final set of historical materials, early American state court decisions, which are of most use in discerning the original understanding.

### 3. Early State Cases

Recall the English reporter's note about special damage in *Chichester v. Lethbridge* (1738), which emphasized agreement on the rule and sharp division on its application.<sup>200</sup> The situation was little different in early state courts. In 1827, a New York court remarked that the American cases were not "exactly uniform."<sup>201</sup> Looking back at almost a century of American court decisions, H.G. Wood made a similar point in 1875:

It is easy to say "that a person may have an action to recover damages arising from a public nuisance, that are special and particular to him, and that are not a part of the common injury," but that does not afford the light needed. The question is, what damages are regarded as special and particular, and what are not, and this can be best answered by reference to what has been done and held by the courts in particular cases.<sup>202</sup>

The earliest reported "state" case is *Harrison v. Sterett*, a 1774 case in Maryland provincial court.<sup>203</sup> The defendant placed a large amount of "sand, earth, and stones" in a waterway, impeding the plaintiff's passage.<sup>204</sup> Most of the reported text records the arguments of the attorneys, who cited many of the English authorities from above.<sup>205</sup> The attorneys disagreed over everything: whether the damage must be direct or consequential, whether the damage must be different in kind or simply in degree, whether the complaint was sufficiently pled.<sup>206</sup> The court punted on the legal issues,

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200. (1738) 125 Eng. Rep. 1061, 1063 n.4; Willes 71, 74 n.4 (CP).

201. *Pierce v. Dart*, 7 Cow. 609, 611 (N.Y. Sup. Ct. 1827).

202. H.G. WOOD, A PRACTICAL TREATISE ON THE LAW OF NUISANCES IN THEIR VARIOUS FORMS; INCLUDING REMEDIES THEREFOR AT LAW AND IN EQUITY 690 (1875).

203. 4 H. & McH. 540 (Md. Prov. 1774).

204. *See id.* at 540–41.

205. *See id.* at 545–50 (citing, *inter alia*, the 1535 "anonymous" case, Coke, Bacon, and Blackstone).

206. *See id.*

leaving it up to the jury, which gave judgment for the plaintiff.<sup>207</sup> *Harrison* is notable because of its proximity to ratification.<sup>208</sup> It also serves as evidence, if only a single data point, of American disagreement over the special damage standard.

Over time, the state courts staked out various positions. Several embraced difference-in-kind. In *Barr v. Stevens* (1808), the plaintiffs challenged an alteration to the public roads.<sup>209</sup> A Kentucky appellate court rejected the suit, referencing the stock example from the 1535 case.<sup>210</sup> For multiplicity reasons, the court applied a difference-in-kind standard.<sup>211</sup> In *Dunn v. Stone* (1815), the plaintiff complained about a dam on a stream that interfered with his fishery business.<sup>212</sup> The North Carolina supreme court dismissed both a difference-in-degree<sup>213</sup> and a consequential damage standard.<sup>214</sup> In *Commonwealth v. Webb* (1828), the general court of Virginia emphasized the remedy of criminal prosecutions for injuries that could

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207. *See id.* at 550.

208. This proximity is particularly important because many of the below state court cases are decades from 1788.

209. 4 Ky. (1 Bibb) 292, 292–93 (Ky. 1808).

210. *See id.* at 293 (“As if a man fell trees in the highway, whereby it is stopped up to the annoyance of the passengers, it is a nuisance, common to all; a public nuisance, for which at the common law, he might be prosecuted by the Commonwealth, and punished; but a suit against him could not be maintained by a private individual who had only sustained the injury, common to all, of being turned out of the way: but if in attempting to ride over the trees felled in the road, an individual’s horse should be thrown, whereby either himself or his horse is wounded, he can maintain an action for this special damage.”).

211. *See id.* (“The reason why he cannot without special damage maintain an action for the nuisance against the wrongdoer is, that if one could sue, all might; which would be ruinous.”).

212. 4 N.C. 241 (N.C. 1815).

213. *See id.* at 242 (“This action cannot be supported without admitting, at the same time, the right of all such persons, even to the very source of the stream, to maintain similar actions. Their respective losses may vary in degree, but the principle of the action is equally applicable to them all; and if suits were thus multiplied, the inevitable consequence would be to overwhelm any individual against whom they might be brought . . .”).

214. *See id.* at 242–43 (requiring “special injury which is direct and not consequential”).

not clear a difference-in-kind bar.<sup>215</sup> In a series of 1840s decisions, Connecticut courts consistently followed a difference-in-kind standard.<sup>216</sup> The last of these decisions, *Seeley v. Bishop* (1848), viewed the difference-in-kind standard as self-evident—“too familiar to require a reference to authorities.”<sup>217</sup>

However, not all state courts saw it the same way. In *Hughes v. Heiser* (1808), the plaintiff was inconvenienced by the defendant’s obstruction of a waterway.<sup>218</sup> The Pennsylvania court noted the disagreement among English cases like *Hart*, *Iveson*, and *Chichester*.<sup>219</sup> The court allowed the action without picking a definite rule (although the suit could *not* clear a difference-in-kind standard because others could be similarly inconvenienced).<sup>220</sup> The Pennsylvania court also refused to cabin the public nuisance tort to direct special damage.<sup>221</sup> In *Stetson v. Faxon* (1837), the supreme judicial court of Massachusetts recounted the history of the public nuisance tort from 1535 up through *Rose* and *Greasly*.<sup>222</sup> The court vacillated

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215. *See* 27 Va. (6 Rand.) 726, 729 (Va. Gen. Ct. 1828) (“The necessity of thus restricting public prosecutions for nuisances, is strongly enforced by a rule of Law, which we find no where contradicted, that no private action can be maintained for a public nuisance, without special damage done to the party complaining. By special damage, we understand, an injury different in kind from that of which the public complains.”).

216. *See* *Bigelow v. Hartford Bridge Co.*, 14 Conn. 565, 577–78 (Conn. 1842) (“It is very clear, that a bill in equity will not be entertained for an injunction against a public nuisance, unless it shows that the plaintiff will sustain a special or peculiar damage from it, an injury distinct from that done to the public at large.”); *see also* *O’Brien v. Norwich & W. R. Co.*, 17 Conn. 372, 375 (Conn. 1845) (citing *Bigelow*); *Seeley v. Bishop*, 19 Conn. 128, 133 (Conn. 1848) (citing *O’Brien*).

217. *See Seeley*, 19 Conn. at 135.

218. 1 Binn. 463, 463–64 (Pa. 1808).

219. *See id.* at 468–69.

220. *See id.* at 469 (“There is no occasion, however, to decide to which of these cases the court inclines, because they think the case before them stronger than either. The plaintiff has averred that he had procured a large quantity of boards and timber, and made them into rafts to bring down the river; that he seized the opportunity of a flood, and did come down as far as the obstruction, and was there stopped by the obstruction. It is certain that he must have suffered special damage . . .”).

221. *See id.* (“It is certain that he must have suffered special damage, and the jury have found so; and if he has, it is immaterial whether it was immediate or consequential.”).

222. 36 Mass. 147, 154–59 (Mass. 1837) (“The general rule seems clear enough, but the difficulty arises from its application to the particular case.”).

between actual damage and difference-in-kind, appearing to land on actual damage.<sup>223</sup>

A set of New York State decisions illustrates the dissensus around difference-in-kind and the overall flux in the special damage doctrine. From 1822 to 1829, three New York courts issued four decisions that touched on every theory of special damage.<sup>224</sup>

In *Corning v. Lowerre* (1822), the defendant built a house on a public street, affecting the general right of passage and multiple plaintiffs' "enjoyment" and "value" of their nearby property.<sup>225</sup> The New York chancery court gave judgment for the plaintiffs and granted an injunction against the defendant.<sup>226</sup> Because the decision is so short, the special damage standard is not clear.<sup>227</sup> But it seems relevant that later federal courts cited *Corning* and arguably applied a

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223. There is some language that points towards difference-in-kind. See, e.g., *id.* at 161 ("We agree that the plaintiff must set forth a special damage. . . . He must fail unless he goes on and states that he has sustained a particular injury, different in its character from that which is common to all the citizens."). However, the citation of cases like *Rose* and *Greasly* and other language indicates the lurking standard of actual damage. See, e.g., *id.* at 160 ("Let those who suffer, have their actions. The question of damages may be safely [e]ntrusted to the jury. We mean to give no countenance for suits *de minimis*. But suppose that twenty men in the course of one night should fall into that ditch and receive injury, could it be maintained that each of them might not severally recover special damages, according to the extent of the actual injury received by each?"). 14 years later, the Massachusetts courts cleared up this confusion with a clear endorsement of difference-in-kind. See *Smith v. City of Boston*, 61 Mass. 254, 255–56 (Mass. 1851) ("But if he suffers a peculiar and special damage, not common to the public—as by driving upon such an obstruction in the night, and injuring his horse—he may have his private action against the party who placed it there. The damage complained of in this case, though it may be greater in degree, [as] consequence of the proximity of the petitioner's estates, does not differ in kind from that of any other members of the community who would have had occasion more or less frequently to pass over the discontinued highway.").

224. See *Corning v. Lowerre*, 6 Johns. Ch. 439 (N.Y. Ch. 1822); *Pierce v. Dart*, 7 Cow. 609, 611–12 (N.Y. Sup. Ct. 1827); *Lansing v. Smith*, 8 Cow. 146 (N.Y. Sup. Ct. 1828), *affirmed on other grounds*, 4 Wend. 9 (N.Y. 1829).

225. See *Corning*, 6 Johns. Ch. at 440.

226. See *id.*

227. See *id.* ("THE CHANCELLOR distinguished this case from that of *The Attorney-General v. The Utica Insurance Company*, (2 Johns. Ch. Rep. 371.) inasmuch as here was a special grievance to the plaintiffs, affecting the enjoyment of their property, and the value of it. The obstruction was not only a common or public nuisance, but worked a special injury to the plaintiffs.").

difference-in-degree standard.<sup>228</sup> In *Pierce v. Dart* (1827), the defendant erected a fence across a public highway, which resulted in expense and delay for the plaintiff.<sup>229</sup> The New York supreme court of judicature ran through the English and American precedents and chose to follow the then-recent English decision in *Rose*.<sup>230</sup> In doing so, it applied an actual damage standard.<sup>231</sup>

In *Lansing v. Smith*, the defendant constructed a basin in a public waterway.<sup>232</sup> Members of the public were inconvenienced by the obstruction, in that they would have to navigate around it.<sup>233</sup> The plaintiff suffered an injury greater and different in kind from the public, as he owned a dock near the basin, which lost half of its value because of the obstruction.<sup>234</sup> Accordingly, the plaintiff would seem to possess special damage under most standards.

The two highest New York courts of law both rejected the plaintiff's suit but on different grounds. In *Lansing v. Smith* (1828), the supreme court took a hard line on special damage. While professing to follow precedent,<sup>235</sup> the court applied the strong version of the difference-in-kind standard (wherein the plaintiff must have suffered a totally unique injury).<sup>236</sup> Since at least a few other people

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228. See, e.g., *Mayor of City of Georgetown v. Alexandria Canal Co.*, 37 U.S. 91, 99 (1838) (citing *Corning*).

229. See *Pierce v. Dart*, 7 Cow. 609, 611–12 (N.Y. Sup. Ct. 1827).

230. See *id.* at 610–11. Note that, while the supreme court of New York is currently a trial-level court, both in this case and in *Lansing* the supreme court of judicature heard appeals from a trial court.

231. See *id.* at 611 (“If a man’s time or money is valuable, it seemed to him, that this was a particular damage. Such seems to be the distinction deducible from a majority of the cases. In the case at bar, the plaintiff was certainly put to some expense. There was a delay, and labor in abating the nuisance, so that he might proceed on the road. True, the injury was trivial; and it is not difficult to see that the damages are excessive. But we cannot interfere on that ground where the action below is for a tort.”).

232. *Lansing v. Smith*, 8 Cow. 146 (N.Y. Sup. Ct. 1828), *affirmed on other grounds*, 4 Wend. 9 (N.Y. 1829).

233. See *id.* at 152.

234. See *id.* at 152–53, 168.

235. See *id.* at 157–67 (citing everything from *Coke* and *Williams’ Case* to *Hughes v. Heiser*).

236. See *id.* at 156 (“It must be conceded that there is nothing in the plaintiff’s case, so far as he complains of the *pier* and the *sloop lock*, to distinguish it from that of every other owner of a wharf within the basin; and all the proprietors of docks above the temporary



owned docks which also lost value, the court affirmed the trial court's nonsuit.<sup>237</sup>

On appeal in *Lansing v. Smith* (1829), the New York court for the correction of errors affirmed the supreme court on other grounds.<sup>238</sup> In dicta, the majority opinion disagreed with the lower court on special damage and expressed a strong preference for an actual damage regime (in particular, an expansive view of actual damage that included time, money, and labor).<sup>239</sup>

One final state case is worth mentioning. In *O.B. Farrelly & Co. v. City of Cincinnati* (1859), a Cincinnati court reviewed over 300 years of public nuisance tort precedent, from the 1535 Year Book case to

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bridges have sustained an equal injury with the plaintiff, in consequence of their erection. The injury, therefore, for which the plaintiff seeks remuneration, *is not peculiar to himself*. It has been equally felt by an hundred others, whose property is similarly situated. It is apparent also, that if the action is sustained, it may be repeated again and again, as long as the pier remains. One recovery only satisfies the damages which had accrued previous to the commencement of the suit."). The dissent in the above court of corrections later emphasized the strictness of the appellate court's standard. *See Lansing v. Smith*, 4 Wend. 9, 30 (N.Y. 1829) (S. Allen, dissenting) ("And upon the rule contended for, that if only a small portion of the community are injured it is not a special damage, *the number may be reduced to two or three persons, and under such a rule every proper avenue to justice may be closed.*") (emphasis added).

237. *See Lansing*, 6 Cow. at 168 ("This seems to me to be precisely the plaintiff's case. His damage consists in the depreciation of the value of his dock. He cannot rent it for more than half what it once produced him. This is the sole injury which he has proved himself to have sustained. Suppose the basin should render the streets contiguous to it, in its whole extent, unhealthy, so that the houses could not be rented at all, or at very reduced rates; could every landlord maintain an action against the defendant for the depreciation of his property, and the consequent diminution of his rent? That will hardly be contended; and yet, in principle, the cases are the same.").

238. *See Lansing*, 4 Wend. at 24 ("As to the alleged injury in consequence of the erection of the temporary bridges, I have arrived at the conclusion that there was no evidence in this case which could have authorized the jury to find the defendants guilty of erecting those bridges. The declaration is not properly framed to charge the defendants, as public officers, for neglect of duty in permitting the contractors employed in making the pier to construct the temporary bridges in an improper manner.").

239. *See id.* at 25 ("In such a case, if a person has sustained actual damage by the erection of the nuisance, whether direct or consequential, I am not prepared to say he can not [*sic*] maintain an action against the wrong doer. . . . But the opinion I have formed on this point is that every individual who receives actual damage from a nuisance may maintain a private suit for his own injury, *although there be many others in the same situation.*") (emphasis added).

subsequent English cases and the many early state cases.<sup>240</sup> While *O.B. Farrelly & Co.* is relatively late, it is useful for a few reasons.<sup>241</sup> Like *Iveson*, *Chichester*, *Hughes*, and *Pierce* before it, the opinion calls out the inconsistency and flux in the special damage standard.<sup>242</sup> But as important for Part III, it describes the special damage requirement multiple times not as a pseudo or proto-standing requirement but as an element of the cause of action for public nuisance.<sup>243</sup>

In summary, what can we take away from the American sources? The few treatises are unhelpful. The few federal court decisions are distant and unhelpful. Several state courts endorse difference-in-kind, but there are a number of courts that embrace other standards, with clear conflict even within individual states (for example, New York). The state courts discuss the same orthodox English cases but do not reach the same results.

#### *D. Historical Synthesis*

Imagine the above materials slotted into a year-by-year timeline from 1535 to the 1850s. Standing at 1788, and looking backwards, one would see: the 1535 “anonymous” case with a precedential dissent containing dicta about difference-in-kind and difference-in-degree, English treatises that embrace the difference-in-kind standard and gradually narrow the scope of special damage, English opinions that lean towards difference-in-degree and call out their doctrinal discord, and a 1774 Maryland provincial court record that depicts sharp division about special damage in the American colonies.

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240. 2 Disney 516, 522–37 (Super. Ct. Cin. 1859).

241. I would also note that Woolhandler and Nelson cite it in their article as indicative of early public nuisance doctrine. See Woolhandler & Nelson, *supra* note 1, at 701 n.60.

242. See *O.B. Farrelly & Co.*, 2 Disney at 537 (“This long list of cases shows the difficulty which sometimes arises in applying very simple rules to the varied concerns of life.”).

243. See *id.* at 519 (“Unless such damage is shown, there is no cause of action, and its existence is one of the facts constituting the cause of action. . . . As already stated, the right to maintain a private action depends on the existence of special damage.”) (internal quotation marks omitted).

What about looking forward from 1788? One would see: English decisions that resolve that country's doctrine in favor of actual damage, American treatises that provide no real guidance, a few federal court decisions that are distant and unclear, and many state court decisions, a number of which follow difference-in-kind, with some picking another standard, and deep division even within the same jurisdiction.<sup>244</sup>

Given the above materials, it is fair to say that the content of the special damage standard was not clear or definite in 1788. Was there liquidation? Under the approach proposed by William Baude, I would say no. Even assuming that liquidation would apply here (since no court discussed special damage as a matter of constitutional law),<sup>245</sup> there was not a regular course of practice in America up through the Civil War.<sup>246</sup> And there was no settlement where one side acquiesced and the public sanctioned that resolution.<sup>247</sup>

### III. SPECIAL DAMAGE AND ARTICLE III STANDING

One month before the Supreme Court decided *TransUnion*, the Eleventh Circuit decided *Sierra v. City of Hallandale Beach, Florida* (2021).<sup>248</sup> In a concurrence, Judge Kevin Newsom discussed some of the historical arguments for injury in fact.<sup>249</sup> At the end of one section, he alluded to the above public nuisance decisions:

To be sure, there is some historical support for something that approximates an injury-in-fact requirement, though not in so many words. The strongest evidence, it seems to me, comes from the common law of public nuisance. Courts have traditionally prohibited private individuals from suing for public nuisance

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244. Not to mention that most of the American precedents, outside of *Barr v. Stevens* (1808), *Hughes v. Heiser* (1808), and *Dunn v. Stone* (1815), are more than three decades from ratification.

245. Cf. Baude, *supra* note 98, at 17 ("And it was not enough for Madison that the practice be one of sheer political will; it must also be one of constitutional interpretation.").

246. *See id.* at 16–18.

247. *See id.* at 18–21.

248. *Sierra v. City of Hallandale Beach*, 996 F.3d 1110 (11th Cir. 2021).

249. *See id.* at 1115 (Newsom, J., concurring).

unless they can show “special injury.” In 1838, the Supreme Court explained “[t]he principle . . . that in case of public nuisance, where a bill is filed by a private person, asking for relief by way of prevention, the plaintiff cannot maintain a stand in a court of equity[,] unless he avers and proves some special injury.” . . . [I]mportantly, though, nothing the Court said linked the special-injury requirement to Article III, as opposed to the merits of the public-nuisance claim.<sup>250</sup>

Judge Newsom’s last sentence frames the question for this Part.<sup>251</sup> Looking to original meaning, is the special damage requirement linked to Article III, such that an originalist doctrine of standing should require special damage for private suits seeking to vindicate public rights? This Part argues ‘no’ for four reasons.

First, there was no discussion by the Framers of these public nuisance tort cases, special damage, or even the larger distinction between private and public rights.

Second, most of the significant public nuisance tort cases are from state court. Legal scholars disagree over the relevance of state court practices to the original meaning of Article III. Without entering into that debate, it seems enough here to observe that state courts historically have different constraints on their subject matter

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250. *See id.* at 1126 (Newsom, J., concurring) (citing *Mayor of City of Georgetown v. Alexandria Canal Co.*, 37 U.S. (12 Pet.) 91, 98–99 (1838)).

251. In *City of Hallandale Beach*, Judge Newsom ultimately endorsed a distinction between private and public rights based in Article II. *See id.* at 1139 (“But upon closer examination, I think that the rights-based approach moves in the right direction—except, I say, that its proper foundation is in Article II, not Article III.”). As he saw it, “an action to vindicate a public right” had an “inherently executive” character. *See id.* (internal quotation marks omitted). After all, the government is charged with administering public rights and the executive is the chief administrator. “[E]ven if Congress has given the plaintiff a cause of action,” a court could refuse to hear the case on the grounds that “Congress’s creation violates Article II’s vesting of the ‘executive Power’ in the President and his subordinates.” *See id.* In-depth discussion of his Article II theory is beyond the scope of this Article, which is focused on Article III. But, even if wrong, Newsom’s nuanced discussion of Article II makes more pragmatic sense than that of the *TransUnion* majority. The President’s executive power would seem to face a greater threat from suits over public rights entrusted to the government than suits between two private parties over private rights. For further discussion of Judge Newsom’s approach, *see* Jonathan H. Adler, *Standing Without Injury*, 59 WAKE FOREST L. REV. (forthcoming 2024).

jurisdiction. The lack of federal court precedent impairs the positive argument for the federal constitutional relevance of these cases.

Third, early American courts that discussed the special damage requirement did not connect it to the Constitution—whether federal or state—or more fundamental ideas about the separation of powers or the scope of judicial power. Rather, special damage served a role in protecting defendants and ensuring that the courts were not overly burdened with trivial suits.

Finally, the lack of clarity on the content of the special damage standard would seem to work against its significance. The fact that historical evidence is debated or unsettled does not destroy its originalist influence. But as no textual hook points towards the special damage standard or public nuisance tort, originalists should hesitate to infer the sub silentio incorporation of this doctrine into Article III.

#### *A. Absence of Discussion in Founding Era Materials*

Article III was little debated at the Founding. The drafting history at the Convention contains relatively little insight into the judicial branch.<sup>252</sup> What discussion that occurred at Convention and during the later ratification debates focused on certain hot-button topics like diversity jurisdiction<sup>253</sup> and the relationship of federal courts to state courts.<sup>254</sup> A theory of Article III standing in its modern form was not discussed.<sup>255</sup>

What about the subjects of public nuisance tort or special damage, or even the private versus public rights distinction? Using an online

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252. See, e.g., HART AND WECHSLER, *supra* note 84, at 1 (“For most of the delegates [at the Constitutional Convention], the judiciary was a secondary or even a tertiary concern.”).

253. See Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928) (detailing the vehement debate over diversity jurisdiction after the Convention and at the state conventions).

254. See HART AND WECHSLER, *supra* note 84, at 7–8 (discussing the lead up to the Madisonian Compromise at the Convention); Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 105–24 (1995) (discussing Convention and state convention debates).

255. See Sunstein, *supra* note 41, at 358.

search, I looked through the Federalist Papers,<sup>256</sup> the Anti-Federalist Papers,<sup>257</sup> Farrand's Records of the Constitutional Convention,<sup>258</sup> and Elliot's Debates<sup>259</sup> at the state ratifying conventions.<sup>260</sup> For the most part, these subjects were not mentioned, and the few occurrences are not relevant to the standing debate.<sup>261</sup> The Framers did not discuss these subjects, and if they did, they did not connect them to the scope of the federal judicial power.

### *B. Reliance on State Court Decisions*

As discussed in Part II, there are few early federal court decisions that build out the special damage standard. This is to be expected. There was and remains no federal cause of action for the public nuisance tort, thus no federal question jurisdiction. What remains is appellate jurisdiction for diversity cases (for example, *Mayor of*

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256. THE FEDERALIST PAPERS (Jacob E. Cooke ed., 1982).

257. THE COMPLETE ANTI-FEDERALIST (Herbert J. Storing ed., 1981).

258. THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., rev. ed. 1966).

259. THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott & Co. 1863).

260. Cf. Amy C. Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 367–68 (2006) (consulting the same sources to understand what the Framers had to say about the Supreme Court's "supervisory power."). I searched electronic versions of these sources using the following terms. For public nuisance, I searched the terms "public nuisance" and "common nuisance." For special damage, I searched the terms "special injury," "special damage," "extraordinary injury," "extraordinary damage," "grievous injury," "grievous damage," "particular injury," "particular damage," "peculiar injury," and "peculiar damage." For private and public rights, I searched "private right(s)" and "public right(s)."

261. For example, Federalist 51 mentions public rights, but in the context of needing checks and balances to ensure that "the private interest of every individual may be a sentinel over the public rights." THE FEDERALIST NO. 51 (James Madison); *see also* THE FEDERALIST NO. 10 (James Madison) ("To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed."); THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 596 [Elliot's Debates, Volume 4] ("[I]t certainly is not unreasonable that private rights should yield, on terms of just compensation, to the paramount rights of the public, so far, and to such extent, as the interest and welfare of the public may require . . .").

Georgetown) or original jurisdiction (for example, *Pennsylvania v. Wheeling & Belmont Bridge Co.*). The requirements for these jurisdictional hooks, like the amount-in-controversy or the presence of a state as a party, narrow the number of cases that come into federal court. Thus, state court decisions must and do make up most of the historical data points.

This reliance on state court precedent calls to mind a longstanding academic debate: to what extent should the practices of early state courts matter for our analysis of the original meaning of Article III and other parts of the federal Constitution? Recall that Justices Scalia and Thomas sought to build out the original meaning of open-ended terms in Article III by referring to then-contemporary judicial practices:

[C]ourts simply chose to refer directly to the traditional, fundamental limitations upon the powers of common-law courts, rather than referring to Art. III which in turn adopts those limitations through terms (“The judicial Power”; “Cases”; “Controversies”) that have virtually no meaning except by reference to that tradition.<sup>262</sup>

One could frame this language from *Honig* as a rebuttal to the previous section. “So what if the Framers didn’t explicitly map out Article III? We can simply look to ‘the traditional, fundamental limitations upon the powers of common-law courts.’” But which common-law courts? The answer is not obvious and often contested.<sup>263</sup>

As one example, consider the back-and-forth between Professors Bill Eskridge and John Manning over statutory interpretation at the Founding.<sup>264</sup> Eskridge thought the early state court decisions

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262. *Honig v. Doe*, 484 U.S. 305, 340 (1988) (Scalia, J., dissenting) (cited in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1551 (Thomas, J., concurring)).

263. HART AND WECHSLER notes this question as it specifically concerns the state precedents raised by Woolhandler and Nelson and federal standing doctrine. *See supra* note 84, at 153 (“How much weight should one give to the state court practice when the design of the federal government so frequently deviates from the state structural premises, including state structural premises about the judiciary?”).

264. *See* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001); William N. Eskridge, *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990 (2001); John F.

essential to understanding the backdrop against which the Framers wrote and interpreted the “judicial Power” in Article III.<sup>265</sup> In his view, the federal Constitution did not create a radically different system.<sup>266</sup> Manning disagreed, arguing that the structure of the new federal government was meaningfully dissimilar from that of the early states.<sup>267</sup> Manning contended that Article III was drafted, in part, as “a reaction against the practice of state courts.”<sup>268</sup> Other academics have also considered the practices of early state courts in interpreting other parts of the Constitution outside of Article III.<sup>269</sup>

Without entrenching myself on one side of that particular debate, I would observe this. State courts are not bound by the justiciability requirements of Article III, including standing.<sup>270</sup> Justice Thomas underlined this difference in his *TransUnion* dissent.<sup>271</sup> While the history of standing in state courts is beyond the scope of this article, academics have commented on the many ways that modern state

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Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648 (2001).

265. See Eskridge, *supra* note 264, at 1011–18.

266. See *id.*

267. See Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, *supra* note 264, at 1658–65; see *id.* at 1660 (“Several considerations, however, suggest that it is dangerous to use state court practice as a model for the framers’ and ratifiers’ understanding of ‘the judicial Power.’”).

268. See *id.* at 1663.

269. See, e.g., A.J. Bellia, *State Courts and the Interpretation of Federal Statutes*, 59 VAND. L. REV. 1501 (2006) (discussing the relevance of early state court interpretations of federal statutes to the original understanding of federalism and the Supremacy Clause).

270. See *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989) (“We have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability, even when they address issues of federal law, as when they are called upon to interpret the Constitution or, in this case, a federal statute.”) (citing numerous precedents).

271. See *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2224 n.9 (2021) (Thomas, J., dissenting) (“Today’s decision might actually be a pyrrhic victory for TransUnion. The Court does not prohibit Congress from creating statutory rights for consumers; it simply holds that federal courts lack jurisdiction to hear some of these cases. That combination may leave state courts . . . as the sole forum for such cases, with defendants unable to seek removal to federal court.”) (internal citations omitted).



doctrines on standing diverge from the federal doctrine.<sup>272</sup> The state court precedents are best seen as products of different justiciability regimes and thus of little evidentiary value for caching out the federal doctrine.

### C. Historical Rationale for Special Damage

In case after case, the modern Supreme Court has grounded Article III standing and the injury in fact requirement in the principle of separation of powers.<sup>273</sup> The *TransUnion* majority made this plain.<sup>274</sup> Standing doctrine restrains the judicial branch, ensuring “that federal courts exercise ‘their proper function in a limited and separated government.’”<sup>275</sup> In particular, standing doctrine prevents the judiciary from “infring[ing] on the Executive Branch’s Article II authority.”<sup>276</sup> The critics may and do disagree with this explanation. But one can easily see how the Court has connected the

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272. See F. Andrew Hessick, *Standing in Diversity*, 65 ALA. L. REV. 417, 425–26 n.57 (2013) (listing the many ways that state courts differ from federal courts on standing); Wyatt Sassman, *A Survey of Constitutional Standing in State Courts*, 8 KY. J. EQUINE, AGRIC., & NAT. RESOURCES L. 349 (2015) (same).

273. See *TransUnion*, 141 S. Ct. at 2203 (“The ‘law of Art. III standing is built on a single basic idea—the idea of separation of powers.’”) (citing *Raines v. Byrd*, 521 U.S. 811, 820 (1997)); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559–60 (1992) (“Obviously, then, the Constitution’s central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts.”); see also Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881 (1983) (“My thesis is that the judicial doctrine of standing is a crucial and inseparable element of that principle [the separation of powers], whose disregard will inevitably produce—as it has during the past few decades—an overjudicialization of the processes of self-governance.”).

274. *TransUnion*, 141 S. Ct. at 2207 (“In sum, the concrete-harm requirement is essential to the Constitution’s separation of powers.”).

275. *Id.* at 2203 (quoting John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L. J. 1219, 1224 (1993)).

276. *Id.* at 2207; see also *Lujan*, 504 U.S. at 577 (“If the concrete injury requirement has the separation-of-powers significance we have always said, the answer must be obvious: To permit Congress to convert the undifferentiated public interest in executive officers’ compliance with the law into an ‘individual right’ vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive’s most important constitutional duty . . . .”)

need for a doctrine of standing to fundamental notions about our system of government and the right to self-rule.<sup>277</sup>

The traditional justifications for special damage were not so elevated.<sup>278</sup> The Founders did not connect special damage to Article III; neither did the American courts.<sup>279</sup> Rather, early jurists linked the special damage requirement to practical considerations like the burden on defendants (multiplicity) or the effectiveness of the courts (triviality).<sup>280</sup> The multiplicity argument dates back to the 1535 case and Chief Justice Baldwin's concern for a defendant who is vulnerable to suit "100 times over" for the same offense.<sup>281</sup> The triviality argument worries that, without the filter of special damage, plaintiffs would "clog[] the dockets with a large number of 'trivial' suits, thus hindering the progress of more important litigation."<sup>282</sup> Courts were more concerned for those who suffered "great damage" and gave "no countenance for suits *de minimis*."<sup>283</sup>

Now, there was one structural argument for special damage—sovereignty.<sup>284</sup> A private action for public nuisance seeks to

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277. See *TransUnion*, 141 S. Ct. at 2207 ("[T]he choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch, not within the purview of private plaintiffs (and their attorneys). Private plaintiffs are not accountable to the people and are not charged with pursuing the public interest in enforcing a defendant's general compliance with regulatory law.").

278. Justice Barrett's recent concurrence in *Samia v. United States*, a Confrontation Clause case, explains why originalists should care about the explanations in historical sources. See *Samia v. United States*, 143 S. Ct. 2004, 2019 (2023) (Barrett, J., concurring in part and concurring in judgment) ("Like the federal cases, though, the state cases make no mention of the confrontation right. Same for the treatises cited by the Court . . . So for all we know, the cases cited by the Court and the treatises proceed from the premise that an ordinary hearsay rule, as opposed to a constitutional right, was on the line. That weakens the importance of these sources, because courts might have gone to greater lengths [to avoid violating] the State or Federal Constitution.") (alteration in original).

279. Neither did the state courts connect special damage to their respective state constitutions.

280. See Antolini, *supra* note 109, at 887–92 (discussing these considerations).

281. See Smith, *supra* note 108, at 142–43 n.65.

282. See Smith, *supra* note 108, at 5.

283. *Stetson v. Faxon*, 36 Mass. 147, 160 (Mass. 1837).

284. See Antolini, *supra* note 109, at 886–87.

vindicate a public right like the free navigation of public waterways. But public rights are normally maintained by the sovereign on behalf of “the people at large.”<sup>285</sup> Blackstone noted the sovereignty justification,<sup>286</sup> as did a few early state courts.<sup>287</sup>

Yet despite the occasional mention of sovereignty, multiplicity played by far the most prominent role. Many early courts relied on it as the sole justification for the special damage requirement.<sup>288</sup>

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285. See Nelson, *supra* note 20, at 566 (citing *Lansing v. Smith*, 4 Wend. 9, 21 (N.Y. 1829)).

286. See 3 WILLIAM BLACKSTONE, COMMENTARIES \*219–20 (“For this reason, no person, natural or corporate, can have an action [for] a public nuisance, or punish it; but only the king in his public capacity of supreme governor, and pater-familias of the kingdom.”) (cleaned up).

287. See, e.g., *Commonwealth v. McDonald*, 16 Serg. & Rawle 390, 394 (Pa. 1827) (“The distinction between public rights and private ones is quite natural. Every man must look to *his* rights; but in the case of public rights, when no individual has a prior right or interest, distinct from his fellows, where he can bring no action for public nuisance, acquiescence—silence—goes for nothing. No man wishes in such a case to single out himself, and to be the actor against his neighbor; what is every one’s concern, is no one’s concern . . . .”); *Seeley v. Bishop*, 19 Conn. 128, 135 (Conn. 1848) (“The public authorities alone can complain of nuisances, while they remain public or general; while individuals may sue for peculiar injuries sustained by themselves.”).

288. See, e.g., *Hart v. Basset* (1681) 84 Eng. Rep. 1194, 1194–95; *T. Jones* 156, 156 (KB) (“And this damage is not such for which an action will lie, for then every one who had occasion to go this way might have his action, which the law will not suffer for the multiplicity.”); *Barr v. Stevens*, 4 Ky. (1 Bibb) 292, 293 (Ky. 1808) (“The reason why he cannot without special damage maintain an action for the nuisance against the wrongdoer is, that if one could sue, all might; which would be ruinous.”); *Dunn v. Stone*, 4 N.C. 241, 242 (N.C. 1815) (“[I]f suits were thus multiplied, the inevitable consequence would be to overwhelm any individual against whom they might be brought, and thus lead to a severity of punishment utterly disproportioned to the offence, without affording to the public, that benefit, to which alone punishments can be legitimately directed. The law, with admirable wisdom, has interposed an effectual barrier against so fruitful a source of litigation and injustice . . . .”); *Sumner v. Buel*, 12 Johns. 475, 478 (N.Y. Sup. Ct. 1815) (“It is a well-settled rule, that no action will lie by an individual, for a public nuisance, unless he has sustained some special damage; and the reason assigned for it is, that it would create such a multiplicity of suits that the party might be ruined by the costs.”). But see *Lansing v. Smith*, 4 Wend. 9, 25 (N.Y. 1829) (“But the opinion I have formed on this point is that every individual who receives actual damage from a nuisance may maintain a private suit for his own injury, although there be many others in the same situation. The punishment of the wrong doer by a criminal prosecution will not compensate for the individual injury; and a party who has done a criminal act can not [*sic*] defend himself against a private suit by alleging that he has injured many

Such weight should matter to the larger inquiry. If early courts discussed special damage with structural undertones—like modern courts discuss standing doctrine—it might be plausible to say that special damage had unspoken constitutional relevance. Or as, Justice Scalia might say, that special damage was a “traditional, fundamental limitation[.]” on the judicial power.<sup>289</sup> But the multiplicity argument is about the liability of defendants to other private individuals. It is pragmatic and down-to-earth, about the relationship between adversarial parties. It therefore is difficult to argue for the implicit constitutional significance of special damage.<sup>290</sup>

#### *D. Instability of Special Damage Doctrine at the Founding*

As noted in Part II, the special damage doctrine suffered from a lack of clarity and consistency. This further weakens its originalist relevance to Article III.

Now, let me be clear about what I am not saying. I am not saying that originalism only works if the relevant historical materials are crystal clear in one direction. And I am not saying that the Constitution cannot incorporate or point to an unsettled or unbounded legal doctrine. Neither of these propositions are true, and I would point to two examples: the Second Amendment and the Privileges or Immunities Clause.

In *Heller* and *Bruen*, dueling Supreme Court opinions fought bitterly over original meaning.<sup>291</sup> The two sides disagreed on the import of history, and the disagreement continues today.<sup>292</sup> However,

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others in the same way, and that he will be ruined if he is compelled to make compensation to all.”).

289. *Honig v. Doe*, 484 U.S. 305, 340 (1988) (Scalia, J., dissenting).

290. Also, I would note the language in *O.B. Farrelly & Co.* characterizing special damage as an ordinary element of the public nuisance tort cause of action. *See* 2 Disney 516, 537 (Sup. Ct. Cin. 1859). As Judge Newsom noted in his *City of Hallandale Beach* concurrence, many modern courts do the same. *See* 996 F.3d at 1126 n.8 (Newsom, J., concurring) (citations omitted).

291. *See* *District of Columbia v. Heller*, 554 U.S. 570 (2008); *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

292. *See, e.g.*, William Baude & Robert Leider, *The General Law Right to Bear Arms*, 99 NOTRE DAME L. REV. (forthcoming 2024), available at

there are key differences between those cases and the present inquiry into special damage. To begin with, the Second Amendment opinions handled a greater volume of historical evidence.<sup>293</sup> There was much more history to analyze, especially that which was contemporaneous with the Founding<sup>294</sup> (and for *Bruen*, the passage of the Fourteenth Amendment<sup>295</sup>). Compare this to the special damage context, where English doctrine was inconsistent and the first useful federal decision is 50 years after ratification.<sup>296</sup> I would also contend that the historical material points more strongly in one direction for the Second Amendment than it does for the special damage standard.<sup>297</sup> Finally, even if the history is contested, the Second Amendment has a special, if obvious, advantage—text. The Constitution explicitly protects “the right of the people to keep and bear Arms.”<sup>298</sup> There is no text in Article III or the rest of the Constitution that points to the doctrine of special damage.

To reiterate, it is not incoherent doctrine alone that make me hesitant to read the special damage standard into Article III. It is incoherent doctrine *plus* the absence of related text that pushes me over

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[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4618350](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4618350); Darrell A. H. Miller & Joseph Blocher, *Manufacturing Outliers*, 2022 SUP. CT. REV. 49 (2023).

293. See, e.g., *Bruen*, 142 S. Ct. at 2135–36 (“Respondents appeal to a variety of historical sources from the late 1200s to the early 1900s. We categorize these periods as follows: (1) medieval to early modern England; (2) the American Colonies and the early Republic; (3) antebellum America; (4) Reconstruction; and (5) the late-19th and early-20th centuries.”).

294. See, e.g., *Heller*, 554 U.S. at 600–03 (discussing “analogous arms-bearing rights in state constitutions that preceded and immediately followed adoption of the Second Amendment.”).

295. See *Bruen*, 142 S. Ct. at 2135–36. But see *id.* at 2163 (Barrett, J., concurring) (noting that the Court avoided a decision on which time period (1791 or 1868) is relevant for purposes of incorporation).

296. See *Mayor of City of Georgetown v. Alexandria Canal Co.*, 37 U.S. 91 (1838).

297. Note that both sides in *Heller* (and *Bruen*) thought that history was on their side. Few scholars are willing to take the “history is ambiguous” view of the Second Amendment, probably because the comparably larger volume of relevant materials enables the formation of some view on the history. For one example, see J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 264–75 (2009).

298. U.S. CONST. amend. II.

the edge. Given constitutional text, I am willing to embrace a great amount of uncertainty in the original meaning.

The Privileges or Immunities Clause is another example. Justice Scalia once called that clause the “darling of the professoriate” for the many law review articles it had sparked.<sup>299</sup> Its original meaning has been debated since the ratification of the Fourteenth Amendment. Even some of those who voted on the clause did not know what it meant.<sup>300</sup> In the *Slaughter-House Cases*,<sup>301</sup> the Supreme Court nearly read the clause out of the Fourteenth Amendment. Yet, the text remained in Section One. Scholars continued to examine the history behind the clause and how it fits with the other parts of Section One of the Fourteenth Amendment. That work has resulted in multiple persuasive accounts of what the Privileges or Immunities Clause means.<sup>302</sup> These accounts disagree with each other, similar to the dueling opinions in *Heller* and *Bruen*. But what they agree is that the clause has some effect. After all, it’s in the text. Special damage, public nuisance, the private versus public rights divide . . . none of these are in the text.

Justices Scalia and Thomas might return to the *Honig v. Doe* refrain about the generalities of Article III, which can only be understood through contemporary practices. But it seems reasonable to ask that the judicial doctrines, if any, which were incorporated sub silentio into Article III, be ones that were generally agreed upon at

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299. See Transcript of Oral Argument at 3–4, *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (No. 08-1521).

300. See John C. Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1387 (1992) (“On June 8, 1866, as the Senate prepared to take its final vote on the proposed Fourteenth Amendment to the Constitution, Senator Reverdy Johnson of Maryland moved to delete the first part of the second sentence, the Privileges or Immunities Clause. He made the motion ‘simply because [he did] not understand what would be the effect of that.’ The motion was rejected without a recorded vote, and the Amendment passed with the clause intact.”) (alteration in original) (citing CONG. GLOBE, 39th Cong., 1st Sess. 3041 (1866)).

301. 83 U.S. (16 Wall.) 36 (1873).

302. See, e.g., ILAN WURMAN, *THE SECOND FOUNDING: AN INTRODUCTION TO THE FOURTEENTH AMENDMENT* (2020); RANDY BARNETT & EVAN D. BERNICK, *THE ORIGINAL MEANING OF THE 14TH AMENDMENT* (2021); William Baude, Jud Campbell, and Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. (forthcoming 2024).

the Founding. The special damage requirement for the public nuisance tort is not one of those doctrines.

Now, if the public nuisance tort was the only Founding-Era legal action that implicated a public right, it might have more relevance.<sup>303</sup> And we might be stuck trying to decide which 1820s New York State decision was most indicative of then-contemporary practice. But the public nuisance tort was not the only public rights action. Recall that, in the conception that Justice Thomas endorsed, public rights are those which belonged to the “whole community, considered as a community, in its social aggregate capacity.”<sup>304</sup> These rights include compliance with criminal or regulatory law, rights to public lands or government funds, and rights involving public roads or waterways.<sup>305</sup> A brief look at the Founding Era reveals many ways to assert such a public right in court. Informer actions like *qui tam* (pre-Founding English<sup>306</sup> and early American<sup>307</sup>) enabled disinterested third party “strangers” to bring actions against defendants who were not in compliance with the law. Prerogative writs like *mandamus* (pre-Founding English<sup>308</sup> and

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303. Assuming that one also bought into the constitutional significance of the private versus public rights distinction.

304. See Nelson, *supra* note 20, at 566 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES \*5).

305. See *id.* at 567

306. See HART AND WECHSLER, *supra* note 84, at 151 (“English law prior to the founding also authorized informers’ actions, which gave strangers financial inducements to prosecute unlawful conduct, and relators’ actions, which allowed private parties to bring actions against public authorities in the name of the Attorney General.”) (citations omitted); see also *Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 774–76 (2000) (discussing the “long tradition of *qui tam* actions in England”).

307. See Sunstein, *supra* note 1, at 175 (“*Qui tam* actions are familiar to American law . . . . In the first decade of the nation’s existence, Congress created a number of *qui tam* actions. Explicit *qui tam* provisions were allowed under many statutes, including those criminalizing the import of liquor without paying duties, prohibiting certain trade with Indian tribes, criminalizing failure to comply with certain postal requirements, and criminalizing slave trade with foreign nations.”) (citations omitted); see also *Vermont Agency*, 529 U.S. at 776–78 (“*Qui tam* actions appear to have been as prevalent in America as in England, at least in the period immediately before and after the framing of the Constitution.”).

308. See Jaffe, *supra* note 5, at 1269–75. Bradley Clanton has disputed the mainstream view, typified by Professor Jaffe and others, that *mandamus* was available to strangers.

early American<sup>309</sup>) enabled similar plaintiffs to sue officials for not obeying their public duties. It might have been restrictive, but the public nuisance tort was not the only public rights action in town.<sup>310</sup>

The doctrine of special damage was not generally agreed upon, it was not unique, and it is not in the text. Accordingly, it should not be a part of our constitutional law.

As a postscript, what happens to Justice Thomas's distinction between private and public rights if one disregards the public nuisance materials? The Thomas view of special damage and public rights is well characterized as 'the exception that proves the rule.' If the exception (standing only with special damage) is not constitutionally relevant, what happens to the rule? Perhaps the rule survives without the exception—simply no Article III standing for public rights suits in federal court. This partly depends on other issues not addressed in this Article. For example, criminal prosecution arguably involves a public right.<sup>311</sup> As mentioned in Part I,

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See Clanton, *supra* note 6. Even if Clanton is correct, mandamus still serves as another example of contemporary public rights litigation. *But see* Woolhandler & Nelson, *supra* note 1, at 707 (diminishing such actions as not "the purest possible case of public-rights litigation").

309. *See, e.g.,* People *ex rel.* Case v. Collins, 19 Wend. 56, 65 (N.Y. Sup. Ct. 1837) ("The power of this court to grant a mandamus, at the suit of the people to compel the commissioners of highways to perform their duty, has often been exerted, and cannot be questioned . . . In such cases the wrongful refusal of the officers to act is no more the concern of one citizen than another, like many other public offences. It is at least the right, if not the duty of every citizen to interfere and see that a public offence be properly pursued and punished, and that a public grievance be remedied.") (internal citations omitted). Woolhandler and Nelson contend that, by the Civil War, states were divided on whether the writ of mandamus required the plaintiff to plead private injury. *See* Woolhandler & Nelson, *supra* note 1, at 708–09 (citing state decisions on either side).

310. James Pfander has also noted the potential relevance of the *actio popularis*, an early Roman and then later Scottish form of suit. *See* James E. Pfander, *Standing to Sue: Lessons from Scotland's Actio Popularis*, 66 DUKE L.J. 1493 (2017). The Scottish *actio popularis* enabled any uninjured person to "pursue a claim on behalf of the public in cases in which a public delict or wrong might otherwise go unredressed." *Id.* at 1500. The Scottish experience with *actio popularis* cannot be said to have specifically "shaped developments in the United States," *id.* at 1563, but Pfander elsewhere argues for the general influence of Scottish practice on the federal judiciary. *See* James E. Pfander & Daniel D. Birk, *Article III and the Scottish Judiciary*, 124 HARV. L. REV. 1613, 1624 (2011).

311. *See* Woolhandler & Nelson, *supra* note 1, at 693 ("The penal law (which includes not only criminal law but also fines and forfeitures recoverable through civil process)



Woolhandler and Nelson emphasized the early American shift away from the English tolerance of private prosecutions.<sup>312</sup> If that shift had a constitutional dimension, then a standing distinction between private and public rights might survive. But if one dismisses the criminal prosecutions, the rule might fully collapse in absence of historical evidence connecting the distinction between the two categories of rights to Article III.<sup>313</sup>

### CONCLUSION

The October 2020 confirmation of Justice Amy Coney Barrett solidified a 6-3 conservative majority, with at least three justices who could be called strong originalists (Justices Thomas, Gorsuch, and Barrett). The originalists do not have a majority and sometimes disagree with one another on the history.<sup>314</sup> Still, their influence is palpable. Since the Barrett confirmation, the Court has overturned several non-originalists precedents<sup>315</sup> and attended more carefully to original meaning in certain areas of the law.<sup>316</sup>

Article III standing is not one of those areas. In *TransUnion*, the majority relied on history for one substantial move—requiring plaintiffs to identify “a close historical or common-law analogue for

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also defines various public rights.”) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES \*5).

312. *See id.* at 695–701.

313. This might affect other articles that base their analysis on the constitutional relevance of the private versus public rights distinction. *See, e.g.,* Leitner, *supra* note 43.

314. *Compare* Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028, 2032–36 (2023) (plurality opinion of Gorsuch, J.) (arguing that history permits Pennsylvania’s consent to general jurisdiction by registration statute), *with id.* at 2057–64 (Barrett, J., dissenting) (disagreeing).

315. *See* Dobbs v. Jackson Women’s Health Org., 142 S. Ct. 2228, 2242 (2022) (overruling *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)); *Groff v. DeJoy*, 143 S. Ct. 2279, 2289 (2023) (noting that *Kennedy v. Bremerton School Dist.*, 142 S. Ct. 2407, 2427 (2022) had overruled *Lemon v. Kurtzman*, 403 U.S. 602 (1971)).

316. *See* *Mallory*, 143 S. Ct. 2028 (personal jurisdiction); *Nat’l Pork Producers Council v. Ross*, 143 S. Ct. 1142 (2023) (Dormant Commerce Clause); *Tyler v. Hennepin Cnty., Minnesota*, 143 S. Ct. 1369 (2023) (Takings Clause); *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022) (Second Amendment).

their asserted [intangible] injury.”<sup>317</sup> The majority did not argue why “the book is closed.”<sup>318</sup> And it did not explain what it means to look to history or the common law, leaving many open questions. How difficult is this new standing requirement?<sup>319</sup> Or is it even new?<sup>320</sup> What time period is fair game for purposes of the history?<sup>321</sup> What does it mean to look to the common law? Is this state common law? If so, why is the entrance to the federal courthouse constrained by decisions of state court judges? And which state’s common law should we care about? If this is federal common law, is this before

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317. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021).

318. Cf. William Baude & Daniel Epps, 13 *Inner Sanctum*, DIVIDED ARGUMENT at 22:17 (2021), <https://www.dividedargument.com> [<https://perma.cc/5BWM-PBR5>].

319. Despite much academic furor, see, e.g., Erwin Chemerinsky, *What’s Standing After TransUnion LLC v. Ramirez*, 96 N.Y.U. L. REV. ONLINE 269 (2021), many lower courts have declined to radically change their standing doctrine post-*TransUnion*. See, e.g., *Laufer v. Naranda Hotels, LLC*, 60 F.4th 156, 170 (4th Cir. 2023) (“We cannot accept the Second Circuit’s interpretation of *TransUnion* because it cannot fairly be concluded that *TransUnion* overruled *Havens Realty*, *Public Citizen*, and *Akins* . . . . *TransUnion* is reconcilable with the earlier precedents . . . .”); *Bohnak v. Marsh & McLennan Cos., Inc.*, 79 F.4th 276, 288 (2d Cir. 2023) (“[W]e see nothing in *TransUnion* that overrides our analysis, and *McMorris* remains a touchstone.”); *Kelly v. RealPage Inc.*, 47 F.4th 202, 212 (3d Cir. 2022) (“But *TransUnion* did not cast doubt on the broader import of those decisions. In fact, the Court cited *Public Citizen* and *Akins* with approval, reaffirming their continued viability and putting *TransUnion* in context.”); *Campaign Legal Ctr. v. Scott*, 49 F.4th 931, 940 (5th Cir. 2022) (Ho, J., concurring in the judgment) (wondering if “there is any real cause for alarm” after *TransUnion*).

320. See Curtis A. Bradley & Ernest A. Young, *Standing and Probabilistic Injury*, 122 MICH. L. REV. (forthcoming 2024) (manuscript at 31–32) (“*TransUnion*’s references to the common law are thus not new, and whether *application* of the historical test has changed remains to be seen.”) (citations omitted).

321. For an example of how to examine intangible injuries, the majority in *TransUnion* cited a Seventh Circuit decision by then-Judge Barrett. See *TransUnion*, 141 S. Ct. at 2204 (citing *Gadelhak v. AT&T Services, Inc.*, 950 F.3d 458, 462 (7th Cir. 2020)). Judge Barrett analogized the claim in that case to the tort of intrusion upon seclusion. See *Gadelhak*, 950 F.3d at 462. Her authorities from history and the common law included the 1977 Restatement (Second) of Torts, a Connecticut state case from 1966, an Ohio state case from 1956, and a Texas state case from 1998. See *id.* (citations omitted). But these materials seem “far too late to inform” the original meaning of Article III. Cf. *Samia v. United States*, 143 S. Ct. 2004, 2018 (2023) (Barrett, J., concurring in part and concurring in judgment). It is also unclear why this specific time period is relevant. Cf. *id.* at 2019 (“The Court . . . does not suggest that the history is probative of original meaning. But nor does it explain why this seemingly random time period matters.”).

or after *Erie* was decided in 1938?<sup>322</sup> If we are referring to pre-*Erie* general common law,<sup>323</sup> then does anything from the Founding until 1938 work? If post-*Erie*, then what about the general law that federal courts continue to cite?<sup>324</sup> What if different sources conflict? Which common law wins?

In *Spokeo* and *TransUnion*, Justice Thomas offered a more historically attentive view. But the Thomas view of standing for public rights is like that of the *TransUnion* majority for all of Article III standing. Historical materials are used to fill in the content of a constitutional rule, with inadequate explanation as to why those materials require the rule in the first place. One cannot escape the feeling that, had the Supreme Court never developed modern standing doctrine, no scholar would read the Founding materials to otherwise require it.<sup>325</sup> And at least when it comes to the halfway Thomas approach, the history shouldn't sway the "cause-of-action" school<sup>326</sup> critics who previously thought injury in fact fully inconsistent with original meaning.

In her *Samia v. United States* (2023) concurrence, Justice Barrett gave words to this kind of methodological critique:

In suggesting anything more, the Court overclaims. That is unfortunate. While history is often important and sometimes dispositive, we should be discriminating in its use. Otherwise, we

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322. Compare *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("There is no federal general common law.") with *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938) ("For whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive.").

323. See, e.g., *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

324. See Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503 (2006).

325. Cf. RANDALL BRIDWELL & RALPH U. WHITTEN, *THE CONSTITUTION AND THE COMMON LAW* 97 (1977) (criticizing modern lawyers' "constant insistence that the language of the cases of the period and the writings about its jurisprudence actually means what one thinks it should mean by modern standards, rather than what it seems to mean as practiced by people of the period").

326. See Schmidt, *supra* note 29, at 2–3.

risk undermining the force of historical arguments when they matter most.<sup>327</sup>

When it comes to Article III standing, the Supreme Court's use of history has been sometimes dispositive and rarely discriminating. Despite recent signs,<sup>328</sup> one can only hope that an originalist revival is not far away.

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327. 143 S. Ct. 2004, 2020 (2023) (Barrett, J., concurring in part and concurring in the judgment).

328. Things may get worse before they get better. The Court recently decided *United States, ex rel. Polansky v. Exec. Health Res., Inc.*, 143 S. Ct. 1720 (2023), a case involving the False Claims Act and qui tam suits brought by unaffected third parties. In his dissent, Justice Thomas referenced the pedigree of the qui tam suit as a practice enacted by the First Congress and which duration "covers our entire national existence and indeed predates it." *See id.* at 1741 (Thomas, J., dissenting) (quoting *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 678 (1970)). Nevertheless, Justice Thomas wondered whether qui tam suits were "constitutionally problematic" and "inconsistent" with a unitary executive view of Article II. *See id.* at 1742 (Thomas, J., dissenting). In a concurrence joined by Justice Barrett, Justice Kavanaugh noted his agreement with Justice Thomas's critique of qui tam suits and his view that the Court should consider the Article II objection in a future case. *See id.* at 1737 (Kavanaugh, J., concurring). *United States, ex rel. Polansky* thus suggests three votes to override a wholly traditional practice—not on the basis of specific founding-era evidence about standing doctrine but on an extension of the unitary executive theory, itself contested on originalist grounds. *See* Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2020 SUP. CT. REV. 83 (2021) (discussing the scholarly debate over originalism and the unitary executive theory).



# LEGAL CHOICES: THE STATE CONSTITUTIONALITY OF SCHOOL VOUCHER PROGRAMS

THEODORE STEINMEYER\*

## INTRODUCTION

Wisconsin's state constitution requires that the state legislature provide a system of free, uniform public schools.<sup>1</sup> Wisconsin is not alone; every state's constitution contains a similar "education article" setting forth some requirement that the state legislature create a system of public schools.<sup>2</sup> There are some slight variations among them. Wisconsin, like fourteen other states, seeks "uniform" public schools.<sup>3</sup> Other states aim for "thorough and efficient" public schools,<sup>4</sup> or "efficient" and "high quality" public schools.<sup>5</sup> While the permutations go on, the theme remains consistent.

But Wisconsin is unique. In 1990, its state legislature passed the first modern "school voucher" program, the "Milwaukee Parental

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\*J.D. Candidate, Harvard Law School Class of 2024. I owe a debt of gratitude to Michael Bindas, for demonstrating how the law can protect families' right to educational choice. I would also like to thank the JLPP Notes Editors, for their insightful comments and feedback throughout the process. Finally, many thanks to my friends and family for the thoughtful discussions that uplifted this note.

1. WIS. CONST. art. X, § 3 ("The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable.").

2. Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 TEMP. L. REV. 1325, 1335-36 (1992).

3. Jamie Dycus, *Lost Opportunity: Bush v. Holmes and the Application of State Constitutional Uniformity Clauses to School Voucher Schemes*, 35 J.L. & EDUC. 415, 418 (2006).

4. See, e.g., OHIO CONST. art. VI, § 2; W. VA. CONST. art. XII, § 1.

5. See ILL. CONST. art. X, § 1.

Choice Program” (MPCP).<sup>6</sup> Under the MPCP, students whose family income is below a certain threshold can receive a voucher to spend on private school tuition.<sup>7</sup> When Wisconsin implemented the MPCP, roughly sixty percent of students enrolled in Milwaukee Public Schools (MPS) either would never graduate from high school, or would not graduate within six years.<sup>8</sup> A study conducted two decades after the MPCP’s creation found that participating students were experiencing a graduation rate seven percentage points higher than that of their peers enrolled in MPS.<sup>9</sup> In its first year, the

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6. *Empowering Parents by Advocating for High Quality Choice in Education*, SCH. CHOICE WIS., <https://schoolchoicewi.org/about/> [<https://perma.cc/D3JN-3UD9>].

7. *Milwaukee Parental Choice Program*, SCH. CHOICE WIS., <https://schoolchoicewi.org/programs/milwaukee-parental-choice-program/> [<https://perma.cc/CW4X-EX53>]. Note, the MPCP was the first modern school voucher program. Voucher programs have existed in Maine and Vermont since the mid-nineteenth century. See Josh Cuninghame, *School Choice: Vouchers*, NAT’L CONF. STATE LEGISLATURES, (Dec. 1, 2016), <https://www.ncsl.org/research/education/school-choice-vouchers.aspx> [<https://perma.cc/83SX-U5YX>]; Kirsten Goldberg, *Vermont’s ‘Tuitioning’ Is Nation’s Oldest Brand of Choice*, EDUC. WK., (May 18, 1988) <https://www.edweek.org/policy-politics/vermonts-tuitioning-is-nations-oldest-brand-of-choice/1988/05> [<https://perma.cc/MR4G-RDT6>]. These older voucher programs, however, existed largely out of necessity. Small towns in rural areas did not have enough students to support public high schools. “Modern” voucher programs, in contrast, are generally offered to students coming from low-income families or who live in districts with underperforming public schools. The modern programs supplement existing school systems.

8. *Davis v. Grover*, 480 N.W.2d 460, 470 (Wis. 1992).

9. Joshua M. Cowen et al., *School Vouchers and Student Attainment: Evidence from a State-Mandated Study of Milwaukee’s Parental Choice Program*, 41 POL’Y STUD. J. 147, 154 (2013); see also *Testimony Regarding H.B. 1033: What Research Tells Us About School Vouchers Before the Md. House of Delegates House Ways and Means Committee*, 430th Sess. (Md. 2013) (statement of Michael Q. McShane, Research Fellow, Am. Enter. Inst.) (describing the difference in graduation rates). It is also worth noting that the competitive pressures induced by the MPCP on MPS actually improved MPS students’ test scores. See Patrick J. Wolf, *The Comprehensive Longitudinal Evaluation of the Milwaukee Parental Choice Program: Summary of Second Year Reports*, SCHOLARWORKS@UARK (2009), <https://scholarworks.uark.edu/cgi/viewcontent.cgi?article=1053&context=scdp> [<https://perma.cc/VMR6-MAE9>]; Greg Forster, *A Win-Win Solution: The Empirical Evidence on School Vouchers 1–2*, THE FRIEDMAN FOUND. FOR EDUC. CHOICE (May 2016), <http://www.edchoice.org/wp-content/uploads/2016/05/A-Win-Win-Solution-The-Empirical-Evidence-on-School-Choice.pdf> [<https://perma.cc/YA43-KBMT>].

MPCP served only 341 students. In January 2023, it was serving over 28,000.<sup>10</sup>

And yet, there were some who opposed the program's creation. Two years after the MPCP was voted into law, voucher opponents argued before the Wisconsin Supreme Court that the program violated the state's education article, which obligates the state legislature to provide "district schools" that are "as nearly as uniform as practicable."<sup>11</sup> The legislature, voucher opponents argued, thus could not provide funds to schools that were not "uniform," such as the private schools that participated in the MPCP and offered their students a "different character of instruction" than traditional public schools would.<sup>12</sup>

In *Davis v. Grover*, the Wisconsin Supreme Court repudiated this argument with a holding that continues to shape the legal debate over voucher programs. Wisconsin's education article, the court explained, "clearly was intended to assure certain minimal educational opportunities for the children of Wisconsin."<sup>13</sup> It does not require the legislature to *only* provide these uniform schools. The MPCP, therefore, "merely reflects a legislative desire to do more than that which is constitutionally mandated."<sup>14</sup> The Wisconsin Supreme Court thus viewed its state constitution's education article as a floor, rather than a ceiling, on what the legislature should provide for the state's students.<sup>15</sup>

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10. Milwaukee Parental Choice Program, SCH. CHOICE WIS., <https://school-choicewi.org/programs/milwaukee-parental-choice-program/> [<https://perma.cc/YN83-8F56>].

11. *Davis*, 480 N.W.2d at 473 (citing WIS. CONST. art. X, § 3).

12. *Id.* at 474.

13. *Id.*

14. *Id.* The court also drew a distinction between the private schools that received public funds, and the "district schools" referenced in Wisconsin's education article. "In no case have we held that the mere appropriation of public monies to a private school transforms that school into a public school," the court wrote. *Id.*

15. Six years after *Davis*, the Wisconsin Supreme Court again reached this same conclusion. In *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1999), voucher opponents brought the same "education article" argument against the MPCP, which by then had grown to permit sectarian schools to participate. The court rejected this argument, writing that "[b]y enacting the amended MPCP, the State has merely allowed certain disadvantaged



Not all state supreme courts, however, would have reached this holding. In *Bush v. Holmes*,<sup>16</sup> the Florida Supreme Court found that the state's first statewide voucher program, the Opportunity Scholarship Program (OSP), contravened the education article in Florida's constitution, which requires the legislature to maintain a uniform system of free public schools.<sup>17</sup> The court, invoking *expressio unius*,<sup>18</sup> reasoned that by requiring the state legislature to provide uniform public schools, Florida's education article impliedly prohibited the legislature from doing *more* to promote education.<sup>19</sup>

Voucher opponents latched onto the Florida court's reasoning, invoking *Holmes* to challenge voucher programs in Arizona,<sup>20</sup>

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children to take advantage of alternative educational opportunities in addition to those provided by the State under the [education article]." *Id.* at 628.

16. 919 So.2d 392 (Fla. 2006).

17. FLA. CONST. art. IX, § 1(a) ("It is a paramount duty of the state to make adequate provision for the education of all children . . . . Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools.").

18. "*Expressio unius est exclusion alterius*" is a semantic canon of construction meaning "the expression of one thing implies the exclusion of another." *Bush v. Holmes*, 919 So.2d 392, 407 (Fla. 2006).

19. *Id.* at 407–08. *But see* Editorial Board, *Rotten Apples*, WALL ST. J. (May 4, 2006), <https://www.wsj.com/articles/SB114670180840643256> [<https://perma.cc/E22U-GZ66>] (describing *Holmes* as "one of the most absurd legal decisions in modern times").

20. *See* Appl. for Prelim. Inj., *Cain v. Horne*, 183 P.3d 1269 (Ariz. Ct. App. 2008), *vacated*, 202 P.3d 1178 (Ariz. 2009) (arguing that, under ARIZ. CONST. art. 11 § 1, the state legislature can only fund a singular, "general and uniform" public school system).

Indiana,<sup>21</sup> Nevada,<sup>22</sup> Ohio,<sup>23</sup> North Carolina,<sup>24</sup> and West Virginia.<sup>25</sup> These challenges have a unifying feature: they all contend that education articles in state constitutions constitute ceilings, rather than floors, on state legislatures' ability to promote education.

These challenges have also introduced related objections derived from education articles. One closely-related objection, the "diversion of funds" objection, argues that voucher programs divert funding away from public schools, undermining state legislatures' ability to fulfill the obligations set forth in their states' education articles. This argument is almost as longstanding as the *expressio unius* objection.<sup>26</sup> Voucher opponents first raised a "diversion of funds" argument against Ohio's "Cleveland Scholarship and Tuition Program" (the country's second-oldest modern voucher program).<sup>27</sup> They voiced the objection again in *Holmes*,<sup>28</sup> and continue levying it against voucher programs to this day.<sup>29</sup>

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21. See *Meredith v. Pence*, 984 N.E.2d 1213, 1220–1223 (Ind. 2013) (discussing how voucher opponents argued, under IND. CONST. art. 8 § 1, that the legislature can only fund a "general and uniform system of Common Schools.").

22. See *Schwartz v. Lopez*, 382 P.3d 886, 898 (Nev. 2016) (rejecting voucher opponents' argument, under NEV. CONST. art. 11 § 2, that the legislature can only fund "a uniform system of public schools.").

23. Plaintiffs' Memorandum at 33, *Columbus City School District v. Ohio*, No. 22 CV 67 (C.P. Franklin Cnty.) (filed Jul. 1, 2022) (arguing that the legislature could only fund a "thorough and efficient system of common schools").

24. Brief for Plaintiffs-Appellees at 59–62, *Hart v. State*, 774 S.E.2d 281 (N.C. 2015) (filed Feb. 2, 2015) (arguing that the legislature could only fund a "general and uniform system" of free public schools).

25. See Brief for Respondents at 4, 20, *State v. Beaver*, 887 S.E.2d 610 (W.Va. 2022) (filed Sep. 23, 2022) (arguing that the legislature could only fund a "system of thorough and efficient free schools").

26. The objection in *Davis* was an *expressio unius* objection (though the Wisconsin Supreme Court did not invoke this canon by name). The objection, like that in *Holmes*, reasoned that by prescribing one method that the legislature could use to promote education, the state's education article ruled out other available methods.

27. See Jan Resseger, *How the Nation's Two Oldest School Voucher Programs Are Working: Part I – Wisconsin*, NAT'L EDUC. POL'Y CTR. (Mar. 28, 2017), <https://nepc.colorado.edu/blog/how-nations> [<https://perma.cc/C7EV-BM6U>] (observing that the MPCP and CSTP are the country's two oldest voucher programs).

28. *Holmes*, 919 So.2d at 408–09.

29. The Ohio Supreme Court rejected the objection when it was first raised. See *Simmons-Harris v. Goff*, 711 N.E.2d 203, 212 (Ohio 1999) ("We fail to see how the School

Yet another related objection claims that voucher programs impose an unconstitutional condition upon students: to accept a voucher, students must forfeit their constitutional right to a public education. While this objection is newer than the other two, it has recently appeared in a challenge to West Virginia's Hope Scholarship Program.<sup>30</sup>

The future of constitutional litigation over school voucher programs will likely focus on state education articles, and in particular, the aforementioned "*expressio unius*," "diversion of funds," and "unconstitutional conditions" objections. Voucher opponents previously focused on the federal Constitution. Specifically, voucher opponents argued that the Establishment Clause barred states from offering vouchers that families could spend on tuition at sectarian schools.<sup>31</sup> But the Supreme Court foreclosed this argument in *Zelman v. Simmons-Harris*,<sup>32</sup> when it explained that government aid programs that are neutral with respect to religion and disperse funds in accordance with the independent decisions of citizens (such as parents' decisions about where to send their children) do not violate the Establishment Clause.<sup>33</sup>

As a result, voucher opponents have relied on *state* constitutions to challenge the programs. But still, the number of available objections has continued to dwindle. Voucher opponents used to invoke

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Voucher Program, at the current funding level, undermines the state's obligation to public education." ). Voucher opponents are currently raising a similar objection to Ohio's expanded "EdChoice" statewide voucher program. See Plaintiffs' Memorandum, *supra* note 23, at 21. Voucher opponents also recently raised this objection (unsuccessfully) against West Virginia's "Hope Scholarship" program. See *Beaver*, 887 S.E.2d at 630-31 (W. Va. 2022).

30. *Beaver*, 887 S.E.2d at 610. For another example of this challenge (brought against Arizona's "Empowerment Scholarship Accounts" program), see *Niehaus v. Huppenthal*, 310 P.3d 983, 989-90 (Ariz. App. 1st Div. 2013).

31. For examples of this objection, see *Jackson*, 578 N.W. at 607, 610-620; *Goff*, 711 N.E.2d at 207-211.

32. 536 U.S. 639 (2002).

33. *Id.* at 652 ("Where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause." ).

“Blaine Amendments,” state constitutional provisions (found in the constitutions of thirty-seven states)<sup>34</sup> that expressly prohibit the use of public funds for the aid of religious schools.<sup>35</sup> But the Supreme Court foreclosed this argument when, in *Espinoza v. Montana*<sup>36</sup> and *Carson v. Makin*,<sup>37</sup> it held that applying these amendments to neutral aid programs violates the Free Exercise Clause of the Constitution.<sup>38</sup> The Court explained in *Espinoza*, “When otherwise eligible recipients are disqualified from a public benefit ‘solely because of their religious character,’ we must apply strict scrutiny.”<sup>39</sup>

The legal challenges that remain available to voucher opponents, then, are objections under state constitutions’ education articles. To

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34. *Blaine amendments in state constitutions*, BALLOTPEDIA, [https://ballotpedia.org/Blaine\\_amendments\\_in\\_state\\_constitutions](https://ballotpedia.org/Blaine_amendments_in_state_constitutions) [https://perma.cc/JH3P-G58Z]. The states *without* Blaine amendments are: Arkansas, Connecticut, Iowa, Louisiana, Maine, Maryland, New Jersey, North Carolina, Ohio, Rhode Island, Tennessee, Vermont, and West Virginia.

35. Richard G. Bacon, *Rum, Romanism and Romer: Equal Protection and the Blaine Amendment in State Constitutions*, 6 DEL. L. REV. 1, 1 (2003). For examples of this objection, compare *Magee v. Boyd*, 175 So. 3d 79, 135 (Ala. 2015); *Oliver v. Hofmeister*, 368 P.3d 1270, 1277 (Okla. 2016); *Jackson*, 578 N.W.2d at 621-23 (rejecting Blaine amendment challenges), with *Cain v. Horne*, 202 P.3d 1178, 1185 (Ariz. 2009) (sustaining a Blaine amendment challenge).

36. 140 S. Ct. 2246 (2020).

37. 142 S. Ct. 1987 (2022).

38. It is worth noting as well that Blaine Amendments, though ostensibly encouraging neutrality towards religious institutions, were in fact designed to *suppress* Catholic education after waves of Irish-Catholic immigration fueled nativist backlash. See, e.g., Thomas Nast, *The American River Ganges*, HARPER'S WKLY. (Sep. 30, 1871) (describing the Vatican as “Tammany Hall” and referring to the Catholic Church as “The Political Roman Catholic Church”). When the amendments were drafted, public education was grounded in the country’s dominant religious teachings. See Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POLICY 551, 559 (2003). Thus, it was an “open secret” that condemnations of sectarian education were directed towards Catholics. See *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (“Consideration of the [Blaine] amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that ‘sectarian’ was code for ‘Catholic.’”).

39. *Espinoza*, 140 S. Ct. at 2260 (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017)); see also *Trinity Lutheran*, 137 S. Ct. at 2021 (“The Free Exercise Clause protects against laws that ‘impose[] special disabilities on the basis of religious status.’” (quoting *Emp. Div., Dep’t of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990))).

be sure, some state constitutions contain additional provisions that could predicate legal challenges to voucher programs (and some states have common law doctrines that may also permit such challenges).<sup>40</sup> But, because education articles appear in every state's constitution, voucher opponents likely will continue relying on them for legal fodder.

This paper will analyze and refute the *expressio unius*, diversion of funds, and unconstitutional conditions objections that voucher opponents currently raise against the programs.

### I. THE “*EXPRESSIO UNIUS*” OBJECTION

Despite the Florida Supreme Court's decision in *Holmes*, no other state high court has adopted an *expressio unius* interpretation of an education article. But voucher opponents continue to invoke the decision, perhaps because no state high court has expressly refuted *Holmes* either. The high courts of Indiana and Nevada each chose to distinguish *Holmes*;<sup>41</sup> the high courts of North Carolina and West Virginia omitted mention of *Holmes* entirely—though each recognized the “plenary” power of their state legislatures, commenting that state constitutions could only restrict this power by doing so expressly.<sup>42</sup> This section explains why *expressio unius* should not apply to state education articles, and how the Florida court erroneously reached the opposite conclusion.

#### A. Education Articles Are Floors, Not Ceilings

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40. For example, in *Davis*, voucher opponents argued that the MPCP was a “local bill,” prohibited by WIS. CONST. art. IV, § 18. 480 N.W.2d at 465–73. The court rejected this argument because the MPCP was a *statewide* voucher program (even though the program's title specified “Milwaukee,” the program was in fact available to families in any Wisconsin city meeting a certain population threshold). *Id.* at 472–73. Voucher opponents in *Davis* also argued that the MPCP violated Wisconsin's common law “public purpose” doctrine. *Id.* at 474. However, the court took as given that education is a public purpose, and argued that the MPCP retained the necessary quality controls to be permissible under the doctrine. *Id.* at 475–77.

41. *Meredith*, 984 N.E.2d at 1223–25; *Schwartz*, 382 P.3d at 898.

42. *Beaver*, 887 S.E.2d at 625; *Hart*, 774 S.E.2d at 287–88.

State legislatures, unlike Congress, have plenary power; they do not need to identify any authority within a constitution in order to legislate. Rather, they must avoid contravening any *limits* on their powers that are expressed or implied by the state or federal constitutions.<sup>43</sup> This distinction inheres in the federal Constitution, which restricts Congress to a set of enumerated powers and confers to the states all remaining powers.<sup>44</sup> But, as this section will argue, the distinction can also be justified on historical and prudential grounds. It is thus inappropriate to apply *expressio unius* to provisions in state constitutions, because doing so would imply that the provisions are grants of legislative authority. The best understanding of education articles, then, is that they impose *duties* on state legislatures, rather than maximum limits on legislative action.

Fueled by revolutionary spirit, Americans designed their state constitutions to prevent encroachments on liberty. Thus, Americans initially designed their state legislatures to have the same plenary power that the British parliament had,<sup>45</sup> empowering state legislatures in order to reduce the risk of tyranny posed by much-feared governors.<sup>46</sup> Americans then put their faith in federal and state constitutions to impose the necessary limits to prevent state legislatures from governing similarly tyrannically.<sup>47</sup>

This arrangement is sensible. If state legislatures' powers, like Congress's, were cabined to express grants of power, certain subjects would likely be exempt from regulation entirely. All it would take is for a Framers to overlook, or fail to anticipate, that a certain matter may be in need of regulation.<sup>48</sup> The matter could then fall

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43. Daniel B. Rodriguez, *State Constitutional Theory and Its Prospects*, 28 N.M. L. REV. 271, 292-93 (1998).

44. U.S. CONST. art. I §8.; U.S. CONST. amend. X.

45. See *Thorpe v. Rutland and Burlington R.R. Co.*, 27 Vt. 140, 142 (1854) ("It has never been questioned, so far as I know, that the American legislatures have the same unlimited power in regard to legislation which resides in the British parliament.").

46. Gordon S. Wood, *Foreword: State Constitution-Making in the American Revolution*, 24 RUTGERS L.J. 911, 914, 923 (1993).

47. *Id.*

48. Cf. *Nat'l Petroleum Refiners Ass'n v. F.T.C.*, 482 F.2d 672, 676 (D.C. Cir. 1973) ("[*Expressio Unius*] is increasingly considered unreliable . . . for it stands on the faulty

into a regulatory “no man’s land,” beyond the purview of both Congress and the state legislatures.

There are additional benefits to concentrating legislative power in state legislatures, which are modular and more localized than Congress. Enabling state governments to be sufficiently powerful and autonomous enables them to restrain federal abuses of power.<sup>49</sup> If state legislatures attempt to seize excessive power, their ability to do so is checked by the competitive pressures of a “mobile citizenry,”<sup>50</sup> an effect that is amplified when states can develop their own regulatory identities. Of course, interstate competition may lead to a “race to the bottom” on certain policies, particularly redistributive programs. But this problem is at least partially mitigated by Congress’s own ability to legislate.<sup>51</sup>

An overwhelming number of state high courts have recognized that state legislatures’ plenary power renders *expressio unius* inappropriate for interpreting legislative articles in state constitutions. For example, many state high courts have observed that *expressio unius* should not be applied with the same rigor in construing a state constitution as in construing a statute.<sup>52</sup> Similarly, other state

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premise that all possible alternative or supplemental provisions were necessarily considered and rejected by the legislative draftsmen.”).

49. See JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION: CASES AND MATERIALS 428 (4th ed. 2021) (citing THE FEDERALIST No. 28 (Alexander Hamilton)).

50. *Id.* (first quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991); then citing Michael W. McConnell, *Federalism: Evaluating the Founders’ Design* *Federalism: The Founders’ Design*, 54 U. CHI. L. REV. 1484, 1498–1500 (1987)).

51. For example, Congress can fund national social safety nets, as it deems necessary.

52. See, e.g., *Russ v. Commonwealth*, 60 A.169, 172 (Pa. 1905) (“The [state] Constitution allows to the Legislature every power which it does not positively prohibit.”); *Dean v. Kuchel*, 230 P.2d 811, 813 (Cal. 1951) (“The express enumeration of legislative powers is not an exclusion of others not named unless accompanied by negative terms.”); *State ex rel. Jackman v. Ct. Com. Pl. of Cuyahoga Cnty.*, 224 N.E.2d 906, 910 (Ohio 1967) (“Since the legislative power of the General Assembly is plenary, the judiciary must proceed with much caution in applying [*expressio unius*] to invalidate legislation.”); *Baker v. Martin*, 410 S.E.2d 887, 891 (N.C. 1991) (finding that *expressio unius* may be appropriate in interpreting statutes, but not when interpreting the state’s constitution); *Lyons v. Sec’y of Commonwealth*, 192 N.E.3d 1078, 1093 (Mass. 2022) (“Given the plenary power of the Legislature under our Constitution... we likewise proceed with great caution to consider application of [*expressio unius*] in the [state] constitutional

high courts have held that when there exists any doubt regarding the legislature's power to act, the doubt should be resolved in favor of the legislature.<sup>53</sup> Even state courts that would otherwise consider *expressio unius* to be "axiomatic," still apply safeguards against the canon when interpreting constitutional provisions.<sup>54</sup>

But, as voucher opponents might observe, education articles must still impose some *limitation* on state legislatures' power. Otherwise, they would constitute mere surplusage. Why say that a legislature can do *something*, if the legislature already has the power to do *everything*?<sup>55</sup> Nebraska's Supreme Court, in *Scott v. Flowers*,<sup>56</sup> made this argument when interpreting a state constitutional provision that the legislature "may provide for the safe-keeping, education, and employment of all children *under* the age of sixteen years, who . . . are growing up in mendicancy or crime."<sup>57</sup> The court read the provision to imply that the legislature did not have powers to commit children *above* the age of sixteen to reform schools, because "state constitutions are not grants of authority, but limitations of power."<sup>58</sup>

Education articles, however, impose a limitation on legislatures by *commanding* them—specifically, to provide some threshold amount of public education. To give some examples, Florida's

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context."); *Gangemi v. Berry*, 134 A.2d 1, 11 (N.J. 1957) ("Only those things expressed in such positive affirmative terms as plainly imply the negative of what is not mentioned will be considered as inhibiting the powers of the legislature.") (quoting *State v. Martin*, 30 S.W. 421, 424 (Ark. 1895)).

53. See, e.g., *Chiles v. Phelps*, 714 So.2d 453, 458 (Fla. 1998) ("Unless legislation be clearly contrary to some express or necessarily implied prohibition found in the Constitution, the courts are without authority to declare legislative Acts invalid."); *State Rd. Comm'n v. Kanawha Cnty. Ct.*, 163 S.E. 815, 817 (W. Va. 1932) ("The negation of the [state legislature's] power must be manifest beyond reasonable doubt.").

54. Compare *Dunham v. Morton*, 175 S.E. 787, 788 (W.Va. 1934) (declaring the use of *expressio unius* to be "axiomatic" in West Virginia courts), with *State v. Beaver*, 887 S.E.2d 610, 627 (W.Va. 2022) (noting that West Virginia courts should use caution when applying *expressio unius* to state constitutional provisions).

55. *Scott v. Flowers*, 84 N.W. 81, 83 (Neb. 1900), *on reh'g*, 85 N.W. 857 (Neb. 1901) (observing that framers are not presumed to do a "useless and idle thing").

56. *Id.* at 81.

57. NEB. CONST. art. 8 § 12 (1875) (amended 1920) (emphasis added).

58. *Flowers*, 84 N.W. at 83.



education article reads, "It is, therefore, a paramount *duty* of the state to make adequate provision for the education of all children."<sup>59</sup> Ohio's reads, "The general assembly *shall* make such provisions ... [to] secure a thorough and efficient system of common schools."<sup>60</sup> West Virginia's: "The Legislature *shall* provide, by general law, for a thorough and efficient system of free schools."<sup>61</sup> Even in *Flowers*, the Nebraska Supreme Court drew a contrast between the provision at issue, which used the permissive term "may," and the state's education article, which used the imperative term "shall" (and which the court thus described as a command).<sup>62</sup> In all fifty states, the effect of education articles is to make education a state legislative responsibility.<sup>63</sup> It is thus possible to simultaneously treat these articles as limits on legislatures' power, but not as *maximum* limits.

Framers of state constitutions are perfectly capable of cabining their legislative commands with express restrictions. For example, Florida requires its legislature to enact certain statutes regulating the purchase of handguns, but then adds that these statutes shall not apply to a "trade in of another handgun."<sup>64</sup> Ohio requires that its legislature authorize casino gaming at four casino facilities, but adds that the legislature cannot authorize gaming beyond these facilities.<sup>65</sup> Neither state's education article contains any similar express restrictions. If the framers of these states' constitutions

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59. FLA. CONST. art. IX, § 1(a) (emphasis added).

60. OHIO CONST. art. VI, § 2 (emphasis added).

61. W. VA. CONST. art. XII, § 1 (emphasis added).

62. 84 N.W. at 82–83 (citing NEB. CONST. art. IX § 1 (1875) (amended 1940)) ("The Legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years.").

63. Jon L. Mills, *Setting a New Standard for Public Education: Revision 6 Increases the Duty of the State to Make "Adequate Provision" for Florida Schools*, 52 FLA. L. REV. 329, 343 (2000) (citing a 50-state survey from Hubsch, *supra* note 2, at 1343–48) ("Though [education articles] differ widely, depending on the history of the provision and its intent and scope, the result is to make education a state legislative responsibility.").

64. FLA. CONST. art. I § 8.

65. OHIO CONST. art. XV, §§ 6(C)(1), (C)(6).

wished to include such restrictions, they presumably would have added them.<sup>66</sup>

Finally, it is worth noting that applying *expressio unius* to imperative provisions of state constitutions can yield absurd results. To illustrate: Florida's constitution provides that the legislature "shall" specify penalties for violations of racing "greyhounds or other dogs," because "the humane treatment of animals is a fundamental value."<sup>67</sup> Should the legislature thus be prohibited from regulating the racing of cats? Or consider Ohio, whose constitution requires that the state legislature foster and support institutes for the benefit of the "insane, blind, and deaf and dumb."<sup>68</sup> It strains credulity that this provision was written to bar the legislature from helping people who have other disabilities.

It also strains principles of statutory interpretation. *Expressio unius* has never been a binding rule. Even Justice Scalia, "an avowed devotee of the *expressio unius* canon," acknowledged that "[c]ontext establishes the conditions for applying the canon."<sup>69</sup> The use of *expressio unius* needs to make sense.<sup>70</sup>

So why, then, did Florida's Supreme Court endorse the *expressio unius* reading of the state's education article?

#### B. *The Florida Supreme Court Misread its Own Precedent in Holmes*

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66. Cf. MANNING & STEPHENSON, *supra* note 49, at 353 (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." (quoting 2A N. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46:06 (6th rev. ed. 2000))).

67. FLA. CONST. art. X, § 32.

68. OHIO CONST. art. VII, § 1.

69. MANNING & STEPHENSON, *supra* note 49, at 338 (quoting ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 107 (2012)).

70. See *NLRB v. Sw. Gen., Inc.*, 580 U.S. 288, 302 (2017) ("The *expressio unius* canon applies only when 'circumstances support[] a sensible inference that the term left out must have been meant to be excluded.'" (quoting *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81 (2002))); see also MANNING & STEPHENSON, *supra* note 49, at 339 (citing WILLIAM N. ESKRIDGE, JR., *INTERPRETING LAW* 79 (2016) (observing that if a parent told a child to stop "pinching" a sibling, this statement surely would not implicitly allow "biting" the same sibling))).

To justify its application of *expressio unius*, the Florida court turned to two of its precedents: *Weinberger v. Bd. Of Pub. Instruction*,<sup>71</sup> and *S & J Transp., Inc. v. Gordon*.<sup>72</sup> At first glance, these precedents actually seem to support the court's decision in *Holmes*. *Weinberger* held that "when the [Florida] Constitution prescribes the manner of doing an act, the manner prescribed is exclusive,"<sup>73</sup> and *Gordon* held that "where one method or means of exercising a power is prescribed in a constitution it excludes its exercise in other ways."<sup>74</sup> It would seem to follow, as the court wrote in *Holmes*, that Florida's education article "mandates that a system of free public schools is the manner in which the State is to provide a free education."<sup>75</sup> But the court ignored the relevant context that shaped how *Weinberger* and *Gordon* used the term "prescribed" in their holdings.

In *Weinberger*, "prescribed" referred to a very clear, *express* limitation on legislative power—not an *implied* limitation. There, the court held that a constitutional provision, "[a]ny bonds issued hereunder shall become payable . . . in annual installments," precluded a county board of public instruction from issuing bonds having more sporadic maturity dates.<sup>76</sup> A constitutional provision regulating "any bonds issued" is an affirmative restriction—it imposes a restriction upon all bond issuance. In its natural reading, this provision certainly "prescribed the manner" in which divisions of Florida's government could issue bonds.<sup>77</sup> Granted, it would make sense to apply *Weinberger* to Florida's education article if the article read, say: "All state support of education shall be in the form of administering public schools." But the article contains no such language that indicates an affirmative restriction.

In *Gordon*, the presumption of the state legislature's plenary power—the presumption which ordinarily would preclude the

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71. 112 So. 253, 256 (Fla. 1927).

72. 176 So.2d 69, 71 (Fla. 1965).

73. *Weinberger*, 112 So. at 256.

74. *Gordon*, 176 So.2d at 71.

75. 919 So.2d at 407 (quoting *Holmes v. Bush*, CV 99-3370, 2000 WL 526364, at \*5 (Fla. Cir. Mar. 14, 2000), *rev'd*, 767 So. 2d 668 (Fla. 1st Dist. App. 2000)).

76. *Weinberger*, 112 So. at 256 (citing FLA. CONST. art. XII § 17 (1924)).

77. *Id.*

application of *expressio unius*—was absent. The court in *Gordon* wrestled with an amendment in the state’s constitution granting Dade county “Home Rule” over local affairs.<sup>78</sup> The key question was whether a constitutional provision stating that “[The Home Rule Amendment] shall not limit, or be construed to limit, the power of the Legislature to enact . . . general laws which shall relate to Dade county and other one or more counties” enabled the legislature to pass legislation relating only to Dade County.<sup>79</sup> But Dade County had a constitutionally-protected right to legislate for itself. Constitutional provisions take precedence over ordinary state legislation, so unless the state constitution also gave a grant of power to the legislature to pass legislation relating to the county, the legislature would be unable to do so. In *Gordon*, in other words, Florida’s state legislature (like Congress) required an enumerated power to legislate. Thus, when the court wrote that “where one method or means of exercising a power is prescribed in a constitution it excludes its exercise in other ways,” it was operating with a presumption that those “other ways” were, by default, already off-limits.

This presumption was not present in *Holmes*. If a separate constitutional provision had stated, “Matters related to education fall beyond the legislature’s power, unless otherwise provided,” then the court’s application of *Gordon* would have been proper. But no such provision existed.

Next, the court in *Holmes* contended that its invocation of *expressio unius* was appropriate because Florida’s education article was not “clear and unambiguous.”<sup>80</sup> But this is circular reasoning. The education article was only ambiguous because of the existence of the *expressio unius* interpretation. The court, in effect, was creating the sort of binding interpretive rule that cannot support *expressio unius*: “if an *expressio unius* interpretation is available, use it.”

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78. *Gordon*, 176 So.2d at 71 (citing FLA. CONST. of 1885, art. VIII § 11) (“[The Home Rule Amendment] was intended to . . . give the electors of Dade County home rule or autonomy in affairs pertaining solely to Dade County.”).

79. *Id.* (citing FLA. CONST. of 1885, art. VIII § 11(5–6)).

80. *Holmes*, 919 So.2d at 408.

The court in *Holmes* also distinguished a prior decision, *Taylor v. Dorsey*,<sup>81</sup> in which it had concluded that *expressio unius* should not be applied to state constitutions' commands to legislatures. In *Taylor*, the Florida Supreme Court declined to apply *expressio unius* to a constitutional provision requiring the state legislature to ensure that the property of married women could be subject to claims in equity.<sup>82</sup> The court in *Taylor* actually distinguished *Weinberger*, explaining that the primary purpose of the provision at issue was not to "effect the adjudication of *all* claims against married women, but to require positive action on the part of the legislature."<sup>83</sup> The court, in other words, recognized that the imposition of a duty is a floor, rather than a ceiling, on legislative action.

In *Holmes*, the court summarily dismissed *Taylor* because, "unlike the constitutional provision at issue in *Taylor*, which had a narrow primary purpose, [Florida's education article] provides a comprehensive statement of the state's responsibilities regarding the education of the children."<sup>84</sup> That was the entirety of the court's explanation for dismissing *Taylor*. The court never explains why the supposed "narrow primary purpose" of the provision at issue in *Taylor* or the "comprehensive" responsibilities set forth in Florida's education article are valid grounds to distinguish *Holmes* from *Taylor*. And indeed, neither of these factors are.

First, the scope of the "primary purpose" behind a command is immaterial to whether the command implicitly bars additional (not-commanded) actions. If a command states, "Because Y is important, you must do X" then the command is satisfied if the commandee completes "X," regardless of the scope of "Y." For this reason, if the commandee does "X," but *also* actions "A," "B," and "C," the command is still satisfied, even if "Y" is extraordinarily broad.

Second, the comprehensive nature of the state legislature's responsibilities described in Florida's education article does not restrict the legislature to those responsibilities. If a command states

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81. 19 So. 2d 876 (1944).

82. *Id.* at 880, 882.

83. *Id.* at 882 (emphasis added).

84. *Holmes*, 919 So.2d at 408.

"You must do U, V, W, X" (which, assume is a "comprehensive" command) then the command is satisfied if the commandee completes "U," "V," "W," and "X." It does not matter whether the commandee *also* completes "A," "B," and "C." Similarly, if Florida's state legislature fulfills its responsibilities as set forth in the state's education article, it does not matter if the legislature also does more.

In sum, *Holmes* does not provide a cogent explanation for why the state legislature's plenary power does not extend to its responsibilities concerning education.

### C. Other State High Courts Can Distinguish *Holmes*

As noted earlier, no state high court has directly refuted the Florida Supreme Court's reasoning in *Holmes*. When courts invoke *Holmes*, they instead tend to *distinguish* the case. The *Holmes* court invited this treatment when it attempted to explain why *Davis*, the Wisconsin Supreme Court case holding that Wisconsin's education article does not preclude the state legislature from creating the MPCP, was inapposite.

In *Holmes*, the court argued that Florida's education article is unique. The second sentence of the article explains that the state has a "paramount duty" to "make adequate provision for [students'] education."<sup>85</sup> Its third sentence then follows: "[a]dequate provision shall be made by law for a uniform . . . high quality system of free public schools." To the Florida court, the article's combined sentence structure implies that the legislature has a paramount duty to provide a uniform system of free public schools.<sup>86</sup> In a footnote, the Florida court explained that Wisconsin's education article did not similarly state that the legislature's obligation to provide public schools was in service of an important duty.<sup>87</sup> The court did not elaborate further.<sup>88</sup>

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85. FLA. CONST. art. IX, § 1(a).

86. *Holmes*, 919 So.2d at 407.

87. *Id.* at 407 n.10 (quoting FLA. CONST. art. IX, § 1 and citing WIS. CONST. art. X, § 3).

88. Regardless of the reasoning that the Florida Supreme Court had in mind, a necessary inference is that the provision of vouchers offered no net value in helping the legislature provide a uniform, high quality system of free public schools. This of course, is false; Florida's voucher programs actually enhanced the quality of the state's public

Other state high courts took this reasoning as a license to distinguish *Holmes* by drawing narrow distinctions between their own states' education articles and Florida's.<sup>89</sup> The Indiana Supreme Court, for example, distinguished *Holmes* in two ways. First, the court observed that, like the Wisconsin Constitution, the Indiana Constitution contains no clause labeling the adequate provision of education as a "paramount" duty.<sup>90</sup> Second, the Indiana court observed that the state's education article contained *two* distinct duties: "to provide, by law, for a general and uniform system of Common Schools," and to "encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement."<sup>91</sup>

Although every state's education article imposes a duty upon the state's legislature to provide public schools, the Indiana Supreme Court demonstrated that there are at least two methods by which state courts can distinguish *Holmes*. First, a state court can claim

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schools. According to researchers from Harvard, Florida State, and the James Madison Institute, the mere threat of increased competition by private schools and other public schools caused many underperforming public school districts to improve. Editorial Board, *supra* note 19. For example, Florida public schools that were failing state standards (and whose students would therefore be eligible for vouchers) began improving their student test scores at a much faster rate relative to non-failing schools once the voucher program was implemented. Rajashri Chakrabarti, Staff Report, *Impact of Voucher Design on Public School Performance: Evidence from Florida and Milwaukee Voucher Programs*, FED. RESERVE BANK OF N.Y. (2008), [https://www.newyorkfed.org/medialibrary/media/research/staff\\_reports/sr315.pdf](https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr315.pdf) [<https://perma.cc/PH47-C2EV>]. At minimum, "[T]here is absolutely no evidence that the OSP prevents the legislature from making adequate provision for a public school system." *Holmes*, 919 So.2d at 423 (Bell, J., dissenting).

89. Earlier in its decision, the Florida court emphasized that the use of *expressio unius* is applicable to unclear statements. *Holmes*, 919 So.2d at 408. If one applies *expressio unius* to the Florida court's reasoning for distinguishing *Davis*, then the *only* reason why *Davis* was inapposite was because Wisconsin's education article did not describe the provision of district schools as a "paramount duty." By the court's own reasoning, its decision is only relevant for states whose constitutions elevate the provision of public schools to a heightened tier of duty.

90. *Meredith v. Pence*, 984 N.E.2d 1213, 1224 (Ind. 2013).

91. *Id.* (citing IND. CONST. art. VIII § 1). The Nevada Supreme Court, similarly, distinguished *Holmes* by observing that "the Nevada constitution contains two distinct duties set forth [in its education article]—one to encourage education through all suitable means and the other to provide for a uniform system of common schools." *Schwartz v. Lopez*, 382 P.3d 886, 898 (Nev. 2016) (citing NEV. CONST. art. 11 § 1–2).

that its state's education article does not impose any "paramount" duties. Second, a state court could find *another* legislative duty in its state constitution that providing voucher programs could plausibly fulfill.

To summarize, the *expressio unius* objection is mistaken because state legislatures have plenary power. The only state high court to decide otherwise misapplied its own precedents and gave other state high courts quick means to distinguish its reasoning.

## II. THE "DIVERSION OF FUNDS" OBJECTION

As the previous section discussed, the existence of a state legislature's support for voucher programs does not *inherently* contravene the legislature's duty to public education. But voucher opponents have a follow-up argument: funding the programs *could* contravene this duty, if the programs reached a certain size. This argument has occasionally found purchase in state courts. To illustrate, the Ohio Supreme Court, while rejecting the contention that Ohio's voucher program necessarily undermined the state's duty to provide a "thorough and efficient system of common schools,"<sup>92</sup> observed that a greatly expanded voucher program could theoretically divert enough funds to prevent the legislature from fulfilling this duty.<sup>93</sup>

This section will contend, however, that the "diversion of funds" objection misrepresents the mechanics of voucher programs, which generally increase public schools' total per-pupil funding. Further, this section will argue, courts lack the jurisdiction to mandate *how* states remedy funding deficiencies in public schools. To be sure, state governments incontrovertibly should remedy such funding deficiencies. But state legislatures—not state courts—should choose how to do so.

Public schools receive their funding from local, state, and federal sources. The exact division of this funding differs across states, but, on average, public schools receive 8% of their funding from federal

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92. OHIO CONST. art. VI, § 2.

93. See *Simmons-Harris v. Goff*, 711 N.E.2d 203, 212 n.2 (Ohio 1999).



sources, 47% from state sources, and 45% from local sources.<sup>94</sup> When public school districts lose students, via voucher programs or any other reason,<sup>95</sup> they generally retain all of their locally generated funding, as well as most of their federal funding.<sup>96</sup> Thus, while in absolute terms public schools' funding decreases as students leave, this funding actually *increases* on a per student basis.

Granted, one should consider that public schools also have fixed costs that are not easily reduced when a few students leave.<sup>97</sup> But estimates place these costs at about one-third of a school's total costs of educating a student.<sup>98</sup> Because, when a student departs, a school still typically retains over half of the funding it previously had to educate the student, a student's departure still usually increases public schools' *per student* net funding, even if the school continues to pay the fixed costs of educating that student.<sup>99</sup>

This argument, however, assumes that public schools can reduce their variable costs to account for student departures. Once schools make these changes, vouchers enable more financial resources per student. But for schools, these changes are painful in a very

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94. *Public School Revenue Sources*, NAT'L. CTR. FOR EDUC. STAT. (May 2022), <https://nces.ed.gov/programs/coe/indicator/cma/public-school-revenue> [<https://perma.cc/C9A9-KV4J>].

95. Plenty of policies cause students to leave public schools. For example, in the two years following the Covid-19 outbreak, 1.2 million students left public schools nationwide, in part because of families' frustration with mandated remote instruction. See Shawn Hubler, *With Plunging Enrollment, a 'Seismic Hit' to Public Schools*, N.Y. TIMES (May 17, 2022), <https://www.nytimes.com/2022/05/17/us/public-schools-falling-enrollment.html> [<https://perma.cc/PA47-UACX>]. However, no person would seriously argue that the resulting reduction in funding rendered remote learning unconstitutional.

96. Affidavit of Benjamin Scafidi in Support of Parent-Intervenors' Response to Plaintiffs' Motion for Preliminary Injunction at 28, *State v. Beaver*, 887 S.E.2d 610 (W.Va. 2022).

97. For example, the costs of maintaining the school and the salaries of certain personnel. See Heidi H. Erickson & Benjamin Scafidi, *An Analysis of the Fiscal and Economic Impact of Georgia's Qualified Education Expense (QEE) Tax Credit Scholarship Program* 43, EDUC. ECON. CTR. (Nov. 2020), <https://coles.kennesaw.edu/education-economics-center/docs/QEE-full-report.pdf> [<https://perma.cc/LW97-RGX7>].

98. *Id.* at 9.

99. This is a general rule, but there may be exceptions. For example, if a school's fixed costs are high enough, then it is possible that a student departure could reduce the school's per student net income.

meaningful way; they likely involve consolidating classrooms or retaining fewer personnel. The problem that voucher opponents must have in mind, then, is not that voucher programs reduce funding available for each student; it is that the programs force schools who lose students to make difficult changes. But if courts are to determine how state legislatures should promote public education, cutting voucher programs seems like a counterproductive answer.

Further, if voucher opponents had their way and courts could choose which budget items to slash, this might prove to be a pyrrhic victory. What next would be on the chopping block? A 1990 Brookings Institute study analyzed 220 relevant variables to explain what most affects school performance.<sup>100</sup> After surveying 60,000 students across 1,000 public and private high schools, its authors concluded that school autonomy from bureaucratic influences, including state and federal lawmakers and teachers' unions, is the most important prerequisite for school success.<sup>101</sup> Courts flexing the newfound power to mandate *how* legislatures promote public education might choose to start by slashing laws that nurture schools' attachment to bureaucratic forces.<sup>102</sup>

The manifest judicial overreach of such a response illustrates the deeper problem with the "diversion of funds" objection: a court can say that a particular level of funding for public schools is insufficient.<sup>103</sup> A court cannot, however, mandate *how* to fix this problem.

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100. JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* (1990). This study proved exceedingly influential in national debates over school choice, garnering the praise of George H.W. Bush and even the Wisconsin Supreme Court in *Davis*. See Dick M. Carpenter & Krista Kafer, *A History of Private School Choice*, 87 PEABODY J. EDUC., 336, 342 (2012); *Davis v. Grover*, 480 N.W.2d 460, 470-71 (Wis. 1992).

101. Chubb & Moe, *supra* note 100, at 20-22, 48.

102. It also bears noting that court-mandated funding lacks any discernible effect on improved school performance. See Eric A. Hanushek & Alfred A. Lindseth, *The Effectiveness of Court-Ordered Funding of Schools*, AM. ENTER. INST. (May 29, 2009), <https://www.aei.org/research-products/report/the-effectiveness-of-court-ordered-funding-of-schools/> [<https://perma.cc/UR3L-FNYV>].

103. See, e.g., *DeRolph v. State*, 728 N.E.2d 993, 1020-21 (Ohio 2000) (holding that the state was inadequately funding its public schools but permitting the legislature discretion in how to resolve this shortfall).

This intuition is supported by precedent. In *Baker v. Carr*,<sup>104</sup> the Supreme Court observed that certain “political” questions fall outside the boundaries of justiciability.<sup>105</sup> Questions that lack judicially discoverable and manageable standards or require complex policy determinations are best reserved for the legislature.<sup>106</sup> Even assuming that education articles offer manageable standards that judges can use to set requisite school funding levels,<sup>107</sup> a legislature’s strategy to meet these funding levels involves complex policy judgments.<sup>108</sup>

Voucher programs are merely another item on a state’s extensive balance sheet. A state may fund its voucher programs from a general treasury fund,<sup>109</sup> the same fund that the state would use to pay for roads or bridges. Why should deficiencies in public school funding be resolved through rescinding voucher programs, rather than other expenditures? It costs a state significantly less to provide a voucher to a student than to fund that student’s public education.<sup>110</sup>

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104. 369 U.S. 186, 209 (1962).

105. Though *Baker* was a federal case, state supreme courts also recognize the non-justiciability of political questions. See, e.g., *Harper v. Hall*, 886 S.E.2d 393, 415 (N.C. 2023).

106. *Baker*, 369 U.S. at 217.

107. Even this might be a bold assumption. Education articles generally do not offer clear standards for when a state legislature is fulfilling its obligations towards public education. As one state high court observed, “It would be a transparent conceit to suggest that whatever standards of quality courts might develop would actually be derived from the constitution.” *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1191 (Ill. 1996).

108. See *Conn. Coal. for Just. in Educ. Funding, Inc. v. Rell*, 990 A.2d 206, 261 (Conn. 2010) (“There is precedent for this court, having determined that a particular legislative scheme is unconstitutional, to leave the remedy to the legislative branch.”).

109. For example, West Virginia’s Hope Scholarship comes out of the state treasury. See W. Va. Code Ann. § 18-31-6 (West 2021).

110. See Michael Q. McShane, *School Choice Critics Try to Have it Both Ways*, AM. ENTER. INST. (Sep. 8, 2015), <https://www.aei.org/articles/school-choice-critics-try-to-have-it-both-ways/> [https://perma.cc/9QC3-HDY7]. In fact, average private school tuition is about one-third less than the cost it takes to educate a student in a public school. See Mark J. Perry, *Private School Tuition: 1/3 to 1/2 Less Than Publics*, AM. ENTER. INST. (Oct. 28, 2007), <https://www.aei.org/carpe-diem/private-school-tuition-13-to-12-less-than-publics/> [https://perma.cc/F9XB-C6EM].

Vouchers, thus, actually leave states with *more* money to spend, per student, on funding public schools.

Further, rescinding voucher programs does not necessarily lead to an increase in public school funding. For example, one year after *Holmes* rescinded Florida's Opportunity Scholarship program, Florida actually *reduced* its per pupil funding to public schools.<sup>111</sup> Public schools must be appropriately funded. But *how* a state finds these funds is, both descriptively and normatively, a political question.

One final observation: The weight of empirical evidence indicates that the competitive pressures induced by voucher programs improve public schools whose students are eligible for the programs.<sup>112</sup> Therefore, if it is truly appropriate for a court to prescribe particular remedies to improve public education, a court could, by the same token, also *mandate* that states provide voucher programs. The "diversion of funds" objection, in other words, is a risky gamble for voucher opponents.

The problem with the "diversion of funds" objection is thus twofold. First, voucher programs generally *increase*, not decrease, the amount of available funds per student enrolled in public schools. Second, regardless of the mechanics of voucher programs, deciding how to promote public education is a complex policy judgment best left to a legislature rather than a court.

### III. THE "UNCONSTITUTIONAL CONDITIONS" OBJECTION

Because students are entitled to a public education, voucher opponents also argue that vouchers entail an unconstitutional condition. Under the unconstitutional conditions doctrine, the

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111. 1999-2019: *The Political Agenda to Defund & Dismantle Florida Public Schools*, FUND EDUC. NOW (Oct. 5, 2019), <https://fundededucationnow.org/1999-2019-the-political-agenda-to-defund-dismantle-florida-public-schools/> [<https://perma.cc/B8FY-XKTC>].

112. A 2016 meta-analysis of the empirical research regarding voucher programs found that most studies confirm the programs' positive effects. These effects include (1) improved academic outcomes of program participants, (2) improved academic outcomes of affected public schools, (3) financial savings for taxpayers and public schools, (4) reduced racial segregation in schools, and (5) the promotion of civic values, including tolerance for the rights of others. Forster, *supra* note 9; see also Wolf, *supra* note 9; Editorial Board, *supra* note 19.

government cannot condition the provision of a discretionary benefit on an individual's forfeiture of a constitutional right.<sup>113</sup> To accept a voucher, the objection goes, recipients must forfeit their right to a public education.<sup>114</sup>

As an initial matter, the premise of this objection—that voucher recipients “forfeit” their right to public education—is wrong. A student's right to a public education derives from a state's obligation to provide this education. Even when a student accepts a voucher, the state still fulfills this obligation by also providing public schools. Students attending private schools will always have a public school available in the event that they choose to transfer. Thus, voucher opponents' unconstitutional conditions objection is flawed for the same reason as their *expressio unius* objection: all that a state education article requires is that a state offer public education; there is no implied limitation that the state cannot also offer a voucher.

But, for good measure, assume that voucher opponents are correct that students “forfeit” their right to public education by accepting a voucher. Even then, the unconstitutional conditions doctrine does not preclude a state's provision of vouchers. First, extending the doctrine to one's right to a public education creates irreconcilable obligations for a state government. Further, the principles undergirding the unconstitutional conditions doctrine do not extend to voucher programs. The doctrine exists to protect against coercion,<sup>115</sup> but vouchers *enable*—not coerce—a choice. Finally, even if a court chooses to evaluate voucher programs under the unconstitutional conditions doctrine, the programs still constitute a

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113. See Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989); *Frost v. R.R. Commn. of State of Cal.*, 271 U.S. 583, 593-94 (1926) (“[O]ne of the [state's] limitations is that it may not impose conditions which require the relinquishment of constitutional rights.”).

114. See, e.g., *Beaver*, 887 S.E.2d at 629; *Niehaus*, 310 P.3d at 989.

115. This Note does not use “coercion” to refer to an implied threat of the use of force. Cf. Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 12 (1988) (noting that constitutional conditions do not depend upon an implied threat of the use of force). Rather, “coercion” as used here describes an effect of a benefit where, in the absence of the benefit, the would-be beneficiary would *not* have preferred to surrender the right that would be subsequently abrogated by receipt of the benefit.

permissible conditional benefit under the Supreme Court's existing framework for the doctrine,

A. *Extending the Unconstitutional Conditions Doctrine to a State's Provision of Public Education Forces State Governments to Decide Between Irreconcilable Obligations*

The unconstitutional conditions doctrine applies to negative rights, rather than positive rights. Properly understood, a student's claim to public education is a positive right. To extend the unconstitutional conditions doctrine to a student's positive right to public education would force state governments to both ensure that all students receive a public education and enable all families to choose how to educate their children, objectives that can be in contradiction.

To begin, one's entitlement to public education is best understood as a *positive* right, whereas the unconstitutional conditions doctrine emerged to protect *negative* rights. Positive rights include claims to basic public services, like public education.<sup>116</sup> Negative rights are those that one would have in the absence of government, and they are rights *against* government regulation. To illustrate, the freedoms of speech and religion are negative rights. In the absence of government, one could still speak or worship as one pleased. These rights thus prevent the government from restricting one's speech or worship.

The history of the unconstitutional conditions doctrine demonstrates its intended application to protect *negative* rights. The *Lochner* court developed the doctrine to protect the economic liberties of corporations from government regulation.<sup>117</sup> A paradigmatic example of the early doctrine arose from *Frost & Frost Trucking Co. v. Railroad Commission of California*.<sup>118</sup> In *Frost*, the Supreme Court held

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116. For an overview of this traditional definition of negative and positive rights, see David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 864 (1986).

117. Louis W. Fisher, *Contracting Around the Constitution: An Anticommodificationist Perspective on Unconstitutional Conditions*, 21 U. PA. J. CONST. L. 1167, 1177 (2019).

118. 271 U.S. 583 (1926).

that California could not condition private carriers' public highway access on their conversion into common carriers, as such a condition infringed upon the carriers' autonomy.<sup>119</sup> The Warren Court subsequently expanded the doctrine to protect individual liberties,<sup>120</sup> such as freedom of speech and, famously in *Sherbert v. Verner*,<sup>121</sup> freedom of religion. In *Sherbert*, the court held that the government could not restrict one's religious exercise as a precondition for attaining unemployment compensation.<sup>122</sup> More recently, the court has held that the government cannot condition funding to non-profit organizations on the organizations' express endorsement of a particular message.<sup>123</sup> And indeed, generally when courts and commentators describe the doctrine, they explain that it prohibits the government from conditioning a *benefit* on an individual's forfeiture of a *right*,<sup>124</sup> a discursive distinction suggesting that the doctrine's typical application is not to a choice between a benefit and a positive right to another benefit.<sup>125</sup>

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119. *Id.* at 592, 599.

120. Fisher, *supra* note 117, at 1177.

121. 374 U.S. 398 (1963).

122. *Id.* at 403-06. Further, Carson v. Makin, the Supreme Court case foreclosing Blaine Amendment challenges to voucher programs, was itself an unconstitutional conditions case. 142 S. Ct. 1987 (2022). There, the Court held that Maine could not make private schools choose between maintaining their religious exercise and participating in the state's voucher program. *Id.* at 2002; Nicole Garnett, *Supreme Court Opens a Path to Religious Charter Schools*, EDUC. NEXT (Jan. 12, 2023), <https://www.education-next.org/supreme-court-opens-path-to-religious-charter-schools/> [<https://perma.cc/GYW3-XFEJ>] ("Carson itself is an unconstitutional conditions case. Although the court did not discuss the doctrine, it made clear that Maine could not condition participation on schools shedding their religious identity.").

123. See *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 221 (2013).

124. The language might also be "freedom" or "liberty" instead of "right."

125. See, e.g., Sullivan, *supra* note 113, at 1421-22 ("Unconstitutional conditions problems arise when government offers a benefit on condition that the recipient perform or forego an activity that a preferred constitutional right normally protects."); Adam B. Cox & Adam M. Samaha, *Unconstitutional Conditions Questions Everywhere: The Implications of Exit and Sorting for Constitutional Law and Theory*, 5 J. LEGAL ANALYSIS 61, 67 (2013) ("[T]he Supreme Court indicated that the sacrifice of constitutional rights could never be a condition for receiving a government benefit."); *Sherbert*, 374 U.S. at 405 ("Conditions upon public benefits cannot . . . inhibit or deter the exercise of First Amendment freedoms."); *Frost v. R.R. Comm'n of Cal.*, 271 U.S. 583, 594 (1926)

One might object that the unconstitutional conditions doctrine cannot be limited to negative rights per se, because negative and positive rights frequently overlap. Many positive rights can be construed as negative rights, and vice versa.<sup>126</sup> For example, the Sixth Amendment ensures that “the accused shall enjoy the right to a speedy trial,” but it could have equivalently read, “the government shall not deny the accused a speedy trial.”<sup>127</sup> Indeed, Justice Scalia once observed that if the difference between positive and negative rights is to matter in a given context, there must exist a separate legally significant difference between the two.<sup>128</sup>

But, these concerns are not entirely persuasive, particularly in the context of state-provided education. Surely there is some difference between a right that requires government action to exist, and a right that can exist even without government action.<sup>129</sup> While one might construe the Sixth Amendment’s guarantee of a speedy trial as either a negative or positive right, this ambiguity seems more related to the fact that the guarantee only applies once the government has already taken an affirmative step to restrict a person’s liberty. So, the guarantee is really a restriction on government action, framed as a grant of a service.<sup>130</sup> Conversely, if states are not actively taking steps to *prevent* students from obtaining an education, then state

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(holding that the state may not impose conditions on “a privilege” which require the relinquishment of a “right”).

126. See Currie, *supra* note 116, at 886–87.

127. See Phillip M. Kannan, *But Who Will Protect Poor Joshua DeShaney, A Four-year-old Child with No Positive Due Process Rights?*, 39 U. MEM. L. REV. 543, 567–68 (2009) (quoting U.S. CONST. amend. VI).

128. *Id.* (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1025–26 (1992)).

129. See Frank Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 866 (2001) (proposing that the test to distinguish negative and positive rights should be if the right would be automatically fulfilled in the absence of government).

130. For another example illustrating this point, see *Youngberg v. Romero*, 457 U.S. 307, 324 (1982). There, the Court was deciding whether the government must provide training or “habilitation” services to detained individuals that have disabilities. After first observing that the government ordinarily has no constitutional duty to provide such services, *id.* at 317, the Court held that the government does have a duty to provide such services to detainees “as an appropriate professional would consider reasonable to ensure [a detainee’s] safety and to facilitate his ability to function free from bodily restraints.” *Id.* at 324.



education articles cannot be construed as a safeguard against an existing affirmative action.

Turning to Justice Scalia's concern, there is also a legally significant difference between negative and positive rights in the context of education. Families have a positive right to send their children to a public school, but they also have a negative right to choose how to educate their children. This includes the choice to send their children to a private school or to homeschool them.<sup>131</sup> By implication, this also includes the right to accept a voucher, if offered. This right flows from the Constitution's Free Exercise Clause and Due Process Clause.<sup>132</sup> Pitting a family's positive and negative rights against one another would entail that the state's obligation to public school conflicts with the constitutionally guaranteed right of educational choice.<sup>133</sup> A state cannot simultaneously ensure that all of its students are receiving a public education while allowing students to receive their education elsewhere. There must be some sort of hierarchy between the obligations imposed by the federal and state constitutions—and there is, established by the Supremacy Clause. In this situation, a family's negative right to choose how to educate its children, protected by the federal Constitution, comes first.

In fact, because a family's negative right to choose how to educate its children and the family's positive right to send its children to public school may sometimes conflict, voucher opponents may wish to categorically extricate the unconstitutional conditions doctrine away from states' provision of public education. Just as accepting a voucher entails "forfeiting" one's right to a public school, enrolling in public school entails "forfeiting" one's right to choose a private school. But who would seriously argue that this tension deems public schools unlawful? The doctrine is simply out of place here.

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131. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925).

132. *Meyer v. Nebraska*, 262 U.S. 390, 399–402 (1923).

133. For further discussion on this point, see Jonathan Tavares, *Why Homeschooling Shouldn't Be Banned: The Resurgence of Home Education in the 21st Century*, 56 NEW ENG. L. REV. F. 11, 33 (2022).

Even if a court finds the negative rights versus positive rights distinction unpersuasive, there are certainly *some* situations where a citizen can surrender a right in exchange for a government benefit. After all, the government can constitutionally conduct transactions with private citizens. Yet, at least mechanically, such transactions would seem to run against the unconstitutional conditions doctrine; the government provides a discretionary government benefit (a payment of money) that individuals can only receive by forfeiting a right (their claim to their property). How can a court resolve this contradiction?

*B. The Unconstitutional Conditions Doctrine Exists to Prevent Coercion, but a Voucher Program Does Not Coerce Recipients—It Empowers Them*

The unconstitutional conditions doctrine is intended to prevent the government from doing indirectly that which it cannot do directly.<sup>134</sup> Specifically, it prevents against unlawful government coercion.<sup>135</sup> To illustrate, in *Sherbert*, the court rejected conditions on unemployment compensation that impeded religious expression because the effect of this condition was functionally to unlawfully regulate the protected religious expression.<sup>136</sup> Similarly, in *Frost*, the Court determined that California's conditions on corporations' highway usage were impermissible because they equated to unlawfully "compel[ling] the surrender" of constitutional rights.<sup>137</sup> In

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134. Sullivan, *supra* note 113, at 1415.

135. To be sure, courts also sometimes *permit* coercive conditions, provided that the state has requisite interests. See, e.g., *Garcetti v. Ceballos*, 547 U.S. 410, 426 (2006) (permitting a government agency to fire an employee for the content of his speech, because doing so was in the agency's interests as an employer). This Note's argument is that *when* courts prevent an unconstitutional condition, it is because the condition is coercive.

136. See *Sherbert v. Verner*, 374 U.S. 398, 398 (1963). In *Carson v. Makin*, also, the Court found that Maine's voucher program posed an unconstitutional condition by barring religious schools from participating, because "The Free Exercise Clause of the First Amendment protects against 'indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.'" 142 S. Ct. 1987, 1996 (2022) (quoting *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988)).

137. See *Frost v. R.R. Comm'n of Cal.*, 271 U.S. 583, 594 (1926).

every instance where the court has deemed a conditional benefit unconstitutionally exacting, the benefit incentivized the beneficiary to pursue an alternative that the beneficiary would otherwise not have preferred. In *Sherbert*, Adell Sherbert would have preferred to observe her Sabbath, but this was not allowed under South Carolina's unemployment compensation scheme. And in *Frost*, the private carriers would have preferred to remain private but for California's conditions on highway access.

But voucher programs, unlike the coercive programs struck down through the unconstitutional conditions doctrine, *empower* recipients. Families have a constitutionally protected right to choose where they send their children for an education.<sup>138</sup> Public schools are one such choice. There exist alternative schools, but they can be prohibitively expensive, whereas public school is free. Because a voucher does not affect the quality of the two options, it only impacts a family's decision about the education of a child if it sufficiently changes the family's financial situation. Which is to say, families who accept a voucher would have also preferred to attend an alternative school in the absence of the voucher. Thus, vouchers do not *coerce* a choice; they enable one.

Drawing a distinction between "coercive" conditional benefits and "empowering" is also sensible policy. Vouchers are designed to *help* the affected families. This cannot be said for the conditions on unemployment compensation in *Sherbert* or the restrictions on private carriers in *Frost*.<sup>139</sup>

Indeed, at least from a policy perspective, why would a court want to discourage conditional benefits that empower their recipients? Such benefits can give both the government and recipients flexibility. For example, suppose a state has a constitutional obligation to provide and administer quality public shelters for the

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138. See *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (protecting the rights of parents to choose who educates their children); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1923) (protecting the rights of parents to send their children to private school).

139. This argument also explains why a government can engage in transactions with its citizens. Provided that a transaction is truly voluntary, it faces no obstacle from the unconstitutional conditions doctrine.

homeless, and assume that the state has adequately fulfilled this obligation. Under voucher opponents' interpretation of the unconstitutional conditions doctrine, the state would be prohibited from *also* offering housing vouchers to the homeless, even if recipients could use the voucher to purchase safer housing, because living in this safer housing would entail *not* staying in the public homeless shelter, to which the recipient had a positive right. Who benefits from such an arrangement?

The unconstitutional conditions doctrine is thus legally and pragmatically out-of-place when it comes to voucher programs. But what if the doctrine applied? Would the programs then be in trouble?

C. *Even if the Unconstitutional Conditions Doctrine Applies, Vouchers Still Survive the Supreme Court's Test for Determining if a Conditional Benefit is Constitutional*

In *Dolan v. City of Tigard*,<sup>140</sup> the Supreme Court explained that the government may permissibly attach an otherwise unconstitutional condition to a discretionary benefit if (1) there exists an "essential nexus" between a legitimate state interest and the imposed condition,<sup>141</sup> and (2) there is "rough proportionality" between the exaction demanded by the condition and the expected impact of the benefit, meaning that the two are related in both nature and extent.<sup>142</sup>

Even if state governments require that students forfeit their right to public education in order to receive vouchers (and, again, there is no such requirement), this condition has an "essential nexus" to all kinds of government interests. States might not wish to pay for both private and public education for a singular student. States may perceive pedagogical value in having students attend only one school, rather than splitting their day across multiple schools. States may want public schools to fully confront the impacts of losing students to competitive nearby schools. Or simply, states may wish to

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140. 512 U.S. 374 (1994).

141. *Id.* at 374, 386 (citing *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987)).

142. *Id.* at 375, 391.

avoid the administrative nightmare of keeping track of students who switch between private and public schools throughout the day.

And there is far more than mere “rough proportionality” between the exaction demanded (sacrificing one’s claim to public education) and the expected impact of the benefit (a voucher to attend private school). While recipients lose one form of education, they gain the financial ability to receive another. What is more, a student would only accept a voucher if she believed the alternative source of education to be superior to the public option.

All to say, extending the unconstitutional conditions doctrine to invalidate voucher programs forces state governments into an untenable legal position, potentially jeopardizes the legality of public schools themselves, disempowers families, restricts the government’s ability to offer flexibility in its benefits, and simply does not align with existing Supreme Court precedent on the subject.

#### CONCLUSION

The ubiquity of education articles in state constitutions demonstrates the importance and necessity of public education. Indeed, this note is not intended to cast doubt upon the protections that state education articles provide for public schools. The point, however, is that state education articles do not offer these protections at the expense of *other* educational opportunities, like school voucher programs. These articles constitute a floor, rather than a ceiling, on how state legislatures can promote education. They do not require state legislatures to slash particular benefit programs. And they do not prevent state legislatures from enabling families to choose how to educate their children.

# COMPELLING COMPLIANCE: DISCIPLINING AGENCIES THROUGH STATUTORY DEADLINES

MARISA SYLVESTER\*

## INTRODUCTION

On May 11, 2005, drivers across America received an unpleasant surprise: an impending trip to the Department of Motor Vehicles.<sup>1</sup> As part of a broader package of anti-terrorism legislation, Congress enacted the REAL ID Act, establishing federal requirements for drivers' licenses and other identification cards.<sup>2</sup> The Act prohibited federal agencies from accepting noncompliant documents "for any official purpose,"<sup>3</sup> including "entering nuclear power plants," and, more relevant to the average American, boarding commercial aircrafts.<sup>4</sup> Thus, many Americans resigned themselves to a trip to the DMV before the statutory deadline, "3 years after the date of the enactment of this division," or May 11, 2008, when federal agencies would no longer accept noncompliant IDs.<sup>5</sup>

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1. Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005 (REAL ID Act), Pub. L. No. 109-13 tit. II § 202, 119 Stat. 312 (2005).

2. *Id.*

3. *Id.* § 202(a)(1).

4. *Id.* § 202(3).

5. *Id.* § 202(a)(1).

As the initial deadline's fifteenth anniversary approaches, anyone putting off their REAL ID update need not worry: The newest enforcement deadline for the Act is May 7, 2025.<sup>6</sup> Almost 20 years after the Act's passage and 17 years after its initial compliance deadline, federal agencies will follow its mandate and begin to reject non-compliant IDs. This example may seem extreme or anomalous. But it instead illustrates a troublingly common practice in administrative law: agencies consistently failing to meet Congressional deadlines for administrative action. In fact, data collected between 1995 and 2014 shows that federal agencies failed to meet over 1,400 of these statutory deadlines.<sup>7</sup> This amounts to over half of the congressionally imposed<sup>8</sup> deadlines issued during this period.<sup>9</sup>

These delays matter. Agency delay "saps the public confidence in an agency's ability to discharge its responsibilities and creates uncertainty for [regulated] parties."<sup>10</sup> It also deprives citizens of important public health and safety benefits flowing from regulatory regimes. For instance, the REAL ID Act's stated purpose included "establish[ing] and *rapidly* implement[ing]"<sup>11</sup> federal identification standards after recommendations and findings from the National Commission on Terrorist Attacks' 9/11 report.<sup>12</sup> Noting that almost all of the 9/11 hijackers fraudulently obtained U.S. identification documents, the Commission recommended that the federal government set nationwide standards to minimize the risk of other

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6. *DHS Announces Extension of REAL ID Full Enforcement Deadline*, U.S. DEP'T OF HOMELAND SEC. (Dec. 5, 2022), <https://www.dhs.gov/news/2022/12/05/dhs-announces-extension-real-id-full-enforcement-deadline> [<https://perma.cc/2RW9-HFAC>].

7. Scott Atherley, *Federal Agency Compliance with Congressional Regulatory Deadlines*, R STREET POLICY STUDY NO. 39, 1 (August 2015), <https://www.rstreet.org/wp-content/uploads/2018/04/RSTREET39-1.pdf> [<https://perma.cc/2CXJ-XPVT>].

8. For discussion of regulatory deadlines, or deadlines that agencies impose on themselves, see Mariah Mastrodimos, *Self-Imposed Agency Deadlines*, 75 STAN. L. REV. 675 (2023).

9. Atherley, *supra* note 7, at 1.

10. *Potomac Elec. Power Co. v. Interstate Com. Comm'n*, 702 F.2d 1026, 1034 (D.C. Cir. 1983).

11. REAL ID Act, Pub. L. No. 109-13 tit. II § 202, 119 Stat. 312 (2005) (emphasis added).

12. See generally Thomas Kean et al., THE 9/11 COMMISSION REPORT (July 22, 2004).

terrorist groups doing the same.<sup>13</sup> When Congress tasks federal administrative agencies with implementing such important policies for public safety, delays are especially disturbing.<sup>14</sup>

Fortunately, the Administrative Procedure Act supplies a remedy: Reviewing courts may “compel agency action unlawfully withheld or unreasonably delayed.”<sup>15</sup> Enforcement of statutory deadlines, however, does not always provide affected parties with relief. When agencies violate statutory deadlines, federal courts adopt one of two competing approaches. Some courts automatically order the agency to act,<sup>16</sup> but others exercise considerable discretion and apply a multi-factor balancing test in choosing whether to order agency action, in which a missed deadline is just one factor.<sup>17</sup>

This note seeks to situate APA § 706(1) and statutory deadlines<sup>18</sup> within the broader framework of administrative law and urge courts to take such deadlines seriously as a matter of congressional oversight. Strict construction of statutory deadlines should appeal to both sides of the fierce debate about the scope and size of administrative agencies, as this approach helps both to realize the benefits

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13. *Id.* at 390.

14. Other examples abound. *See, e.g., In re A Cmty. Voice*, 878 F.3d 779 (9th Cir. 2017) (regarding an EPA delay of over eight years in updating its regulation of lead paint dust after the American Academy of Pediatrics deemed its standards “obsolete,” as half of all children have blood lead levels above the CDC’s level of concern); *Ammonium Nitrate Safety Program*, U.S. CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY, <https://www.cisa.gov/resources-tools/programs/ammonium-nitrate-security-program#:~:text=The%20Ammonium%20Nitrate%20Security%20Program,to%20prevent%20the%20misappropriation%20or> [https://perma.cc/9TAK-ERP3] (describing the CISA’s program for regulating ammonium nitrate to ensure safety from terrorist attacks using it as an explosive, mandated in 2008 and not yet complete).

15. 5 U.S.C. § 706(1).

16. *See, e.g., Forest Guardians v. Babbitt*, 174 F.3d 1178 (10th Cir. 1999).

17. *See, e.g., Telecomms. Rsch. and Action Ctr. v. FCC (TRAC)*, 750 F.2d 70 (D.C. Cir. 1984).

18. APA § 706(1) also applies to cases in which an agency has withheld action absent a specific statutory deadline, as courts may nonetheless find such action “unreasonably delayed.” Such cases are beyond the scope of this paper.



of regulatory programs and to strengthen congressional control of agencies.<sup>19</sup>

Section I overviews the pre-APA practice of compelling delayed executive action. It will also provide an account of the legislative history of the APA, exploring § 706(1)'s historical meaning and relevance to statutory deadlines. Section II describes how statutory deadlines interact with § 706(1). This section includes a discussion of the Supreme Court's seminal case expounding the provision, *Norton v. Southern Utah Wilderness Alliance*.<sup>20</sup> Section III describes the two dueling lower court approaches to missed deadlines. Section IV describes possible reasons for agency delay and lays out normative arguments explaining why both skeptics and advocates of a robust administrative state should support the Tenth Circuit's strict constructionist approach to statutory deadlines. Finally, Section V explores an alternative, self-executing type of deadline called "hammer provisions" before concluding that judicial enforcement of standard deadline provisions is preferable.

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19. Savvy readers may, in light of the Court's standing doctrine, identify a problem with my REAL ID example, or APA § 706(1) challenges in general. The Court has consistently prohibited private plaintiffs from bringing suits based on "generalized grievances." See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 575 (1992) ("[A]n injury amounting only to the alleged violation of a right to have the Government act in accordance with law [is] not judicially cognizable."). While a plaintiff aggrieved that the REAL ID Act's benefits of increased security have not yet accrued would thus lack standing under this line of cases, it is easy to imagine scenarios in which regulated (or soon-to-be-regulated) parties could challenge an agency's failure to act based on the current or prospective monetary harms imposed by a statute or regulation. See *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200 (2021) (recognizing monetary harm as "traditionally recognized as providing a basis for a lawsuit in American courts," thus sufficient to confer standing). In other cases, creative plaintiff choices may satisfy standing's injury-in-fact requirement based on the costs to states of regulatory compliance. See, e.g., *Biden v. Nebraska*, 143 S. Ct. 2355, 2365–2366 (2023) (holding that the state of Missouri had standing to sue for an injunction of the Biden administration's student loan forgiveness plan based on the order's cost to its public loan service, MOHELA). While this paper does not purport to find standing for all possible challenges under APA § 706(1), I merely observe that the Court's standing doctrine may limit such challenges, but does not foreclose them entirely.

20. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55 (2004).

## I. PRE-APA PRACTICE AND LEGISLATIVE HISTORY

Judicial practice prior to the APA's enactment clearly authorized courts to compel certain types of action withheld by agencies and executive officers. The Supreme Court has long authorized mandamus as one such remedy available to courts in their equitable discretion.<sup>21</sup> The remedy required the right kind of executive inaction, however: It was available to compel performance of "a precise, definite act, purely ministerial, and about which the [officer] had no discretion whatsoever."<sup>22</sup> These cases gave rise to a "familiar" and related principle: courts may compel performance of such legal commands, but may not "control discretion" or mandate the content of its exercise.<sup>23</sup> When agencies failed to act pursuant to discretionary mandates, courts could order the agency "to take jurisdiction, not in what manner to exercise it."<sup>24</sup> These principles displayed concern about separating judicial power from agency discretion and respect for agency expertise when exercising such discretion.

Cases from around the time of the APA's enactment reflect this understanding of compelling agency action. In *Safeway Stores v. Brown*, Safeway Stores complained that the Office of Price Administration did not respond to its petitions about price controls within the statutorily specified response period.<sup>25</sup> Because the Administrator's response required him to exercise policy judgment, the Court "require[d] the Administrator to exercise his discretionary power . . . without any direction as to the manner in which his discretion should be exercised."<sup>26</sup> Violation of a statutory deadline regularly

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21. See, e.g., *Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 613-17 (1838); *Marbury v. Madison*, 1 Cranch 137, 141 (1803) ("And in the duties enjoined upon him by law...if he neglects or refuses to perform them, he may be compelled by mandamus.").

22. *Kendall*, 37 U.S. at 613.

23. *Interstate Com. Comm'n v. United States ex rel. Humboldt S.S. Co.*, 224 U.S. 474, 485 (1912).

24. *Id.* See also *Interstate Com. Comm'n v. New York, N.H., and H.R. Co.*, 287 U.S. 178, 204 (1932).

25. 138 F.2d 278 (Emer. Ct. App. 1943).

26. *Id.* at 280.

warranted judicial compulsion of agency action, although courts respected the agency's substantive discretion.<sup>27</sup> The legislative history of the APA indicates that its drafters intended to codify this approach to compelling agency action.

As early as 1929, concerns mounted about the fairness and efficacy of administrative law and adjudications.<sup>28</sup> As a result, President Franklin Delano Roosevelt commissioned then-Attorney General Robert Jackson, who would later serve on the Supreme Court, to "investigate the need for procedural reform in various administrative tribunals and to suggest improvements therein."<sup>29</sup> After the disruption of World War II and "painstaking" consideration, Congress passed the APA in 1946.<sup>30</sup> Four years later, then-Justice Jackson wrote for the Court that the Act "represent[ed] a long period of study and strife; it settle[d] long-continued and hard-fought contentions, and enact[ed] a formula upon which opposing social and political forces have come to rest."<sup>31</sup> This pronouncement is often invoked to urge courts to remain true to the legislative compromises behind the APA and interpret the Act accordingly.<sup>32</sup>

The Final Report from Jackson's Committee devotes little time to compulsion of delayed agency action, mentioning only that judicial review "is adapted chiefly to curbing excess of power, not toward compelling its exercise . . . the courts cannot, as a practical matter, be used for that purpose without being assimilated into the administrative structure."<sup>33</sup> This reflects the concern in historical case law that courts might, in compelling agency action, interfere too much

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27. For similar examples from the time of the APA's enactment, *see also* *Powers v. Bowles*, 144 F.2d 491 (Emer. Ct. App. 1944); *Am. Chain & Cable Co. v. FTC*, 142 F.2d 909 (4th Cir. 1944).

28. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 37-41 (1950)

29. DEAN ACHESON ET AL., DEP'T OF JUST., FINAL REPORT OF ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE iii (1941) [hereinafter FINAL REPORT].

30. *Wong Yang Sung*, 339 U.S. at 40.

31. *Id.*

32. *See, e.g., Vermont Yankee Nuclear Power Corp. v. Nat'l Res. Def. Council*, 435 U.S. 519, 523 (1978); Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1211 (2015).

33. FINAL REPORT, *supra* note 29, at 76.

with the agency's prerogative to determine the content thereof.<sup>34</sup> The Act's legislative history further demonstrates that the enacting Congress intended § 706(1)<sup>35</sup> to codify, not revolutionize, existing administrative law practices. The Senate Report on the Act includes an appendix from the Attorney General, stating that this section "declares the existing law concerning the scope of judicial review" and "is not intended to confer any nonjudicial functions or to narrow the principle of continuous administrative control."<sup>36</sup> That principle separated judicial review from making discretionary decisions committed to the agency by Congress.

Finally, the Attorney General's office issued a Manual to the Administrative Procedure Act in 1947.<sup>37</sup> The Manual sought to advise agencies about "the meaning of various provisions of the Act" and describe the government's position at the time.<sup>38</sup> Respecting § 706(1), Attorney General Tom Clark identified the remedies available to reviewing courts when compelling agency action.<sup>39</sup> The Department of Justice viewed the section as "codify[ing] these judicial functions."<sup>40</sup> In keeping with these long-extant practices, "the clause does not purport to empower a court to substitute its discretion for that of an administrative agency and thus exercise administrative duties . . . However . . . a court may require an agency to take action upon a matter, without directing how it shall act."<sup>41</sup>

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34. See, e.g., *ex rel. Humboldt S.S. Co.*, 224 U.S. at 485; *New York, N.H., and H.R. Co.*, 287 U.S. at 204.

35. Although many of these original sources refer to APA § 10(e) (as styled in the Act), I use the modern, codified citation to avoid confusion.

36. S. Rep. No. 79-752-79, at 230 (1945).

37. DEP'T OF JUST., ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (Wm. W. Gaunt & Sons, Inc., reprint ed. 1947) [hereinafter ATTORNEY GENERAL'S MANUAL]. See also *Vermont Yankee*, 435 U.S. at 546 (describing the manual as "a contemporaneous interpretation previously given some deference by this Court because of the role played by the Department of Justice in drafting the legislation").

38. ATTORNEY GENERAL'S MANUAL at 6.

39. *Id.* at 108 ("Orders in the nature of a writ of mandamus have been employed to compel an administrative agency to act, or to assume jurisdiction, or to compel an agency or officer to perform a ministerial or non-discretionary act.") (citations omitted).

40. *Id.*

41. *Id.*

APA § 706(1) conferred broad authority on courts to compel legally mandated action, so long as the court did not stray beyond the judicial power to dictate the substance of agency decisions. In doing so, the Act preserved and codified the state of the law in the decades preceding its enactment.

## II. APA § 706(1) AND STATUTORY DEADLINES

APA § 706(1) provides a cause of action for enforcement of statutory deadlines in federal court. In a seminal case expounding the provision, the Supreme Court considered when exactly it provides a remedy for agency failures to act.<sup>42</sup> *Norton v. Southern Utah Wilderness Alliance* involved a challenge to the Bureau of Land Management's land stewardship under a policy of "multiple use management."<sup>43</sup> Multiple use management required the Bureau to accommodate different types of land use, including several types of recreational, conservational, and wildlife concerns.<sup>44</sup> The plaintiffs challenged the Bureau's authorization of off-road vehicle (ORV) usage, claiming that it adversely impacted soil quality and disrupted animals and visitors in wilderness areas.<sup>45</sup> Because of this "classic land use dilemma of sharply inconsistent uses," the plaintiffs alleged that the Bureau was withholding statutorily mandated action to preserve the land for the conservation and wildlife uses specified by statute.<sup>46</sup> As such, the APA authorized the suit by providing a cause of action under § 706 to "compel agency action unlawfully withheld or unreasonably delayed."<sup>47</sup>

Justice Scalia, writing for a unanimous Court, began with the text of the APA. He first established that the Act allows suit by plaintiffs

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42. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 61 (2004).

43. *Id.* at 58 (citing 43 U.S.C. § 1702(c)).

44. See 43 U.S.C. § 1702(c) for a complete list of the uses to be accommodated in multiple use management (including range, timber, minerals, watershed, wildlife, and more).

45. *Norton*, 542 U.S. at 60.

46. *Id.*

47. 5 U.S.C. § 706(1).

“aggrieved by agency action,”<sup>48</sup> which the Act defines as “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or *failure to act*.”<sup>49</sup> Applying the canon of *ejusdem generis* to § 551(13), the Court concluded that “failure to act” under the APA “is properly understood to be limited . . . to a *discrete* action.”<sup>50</sup> This interpretation tracks the long history and precedent of allowing courts to compel ministerial, concrete agency actions, in accordance with the provision’s original meaning.

More importantly, Justice Scalia explained the appropriate scope of § 706(1) and what kinds of agency inaction can be compelled by courts. Because reviewing courts can only compel actions “unlawfully withheld,” “the only agency action that can be compelled under the APA is action legally *required*.”<sup>51</sup> Justice Scalia used, as the paradigmatic example of such a legally required action, “the failure to promulgate a rule or take some decision by a statutory deadline.”<sup>52</sup> This excluded the BLM’s discretionary, policy-laden, and programmatic choice regarding compliance with its statutory mandate.<sup>53</sup> The Court’s conclusion clearly authorizes lawsuits to compel action mandated by a statutory deadline under the APA. Unfortunately, the Supreme Court has not spoken about exactly how and when courts should compel such actions, creating a circuit split between two conflicting approaches.

### III. DUELING APPROACHES TO DEADLINE ENFORCEMENT

*Norton* merely outlines the contours of § 706(1)’s remedy: compelling agencies to perform discrete and legally mandated actions. The lower courts, however, remain divided about how to treat cases of missed statutory deadlines.

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48. 5 U.S.C. § 702.

49. *Norton*, 542 U.S. at 61–62 (citing 5 U.S.C. §§ 702, 551(13)) (emphasis in original).

50. *Id.* at 62–63 (emphasis in original).

51. *Id.* at 63.

52. *Id.*

53. *Id.* at 64–67.

The D.C. Circuit has announced “the hexagonal contours of a standard” to evaluate claims under APA § 706(1).<sup>54</sup> The court begins with the Delphic guidance that agency timelines “must be governed by a ‘rule of reason.’”<sup>55</sup> When Congress provides a deadline or timetable for the agency, this may “supply content for this rule of reason.”<sup>56</sup> Delays in agency actions respecting “human health and welfare” warrant less tolerance than agency actions affecting economic interests.<sup>57</sup> Courts will also consider whether enforcing a deadline may affect higher-priority agency actions and the “nature and extent of the interests prejudiced by delay;” an improper reason for delay need not be identified to rule it unreasonable.<sup>58</sup> This so-called test, known as the “TRAC factors,” affords minimal guidance to courts reviewing delayed agency action beyond their own discretion in weighing each element of the test.

Most circuit courts apply the TRAC factors in cases where plaintiffs bring unspecified claims of delay absent a statutory deadline. Going further, the D.C. Circuit<sup>59</sup> does so even when the agency has violated a statutory deadline, treating such a deadline as merely one persuasive factor in its balancing test.<sup>60</sup> As a matter of statutory interpretation, using the same test in these different situations collapses the two discrete categories identified in § 706(1): action “unlawfully withheld” and “unreasonably delayed.” D.C. Circuit’s approach raises particular concerns given its status in administrative

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54. *Telecomms. Rsch. and Action Ctr. v. FCC (TRAC)*, 750 F.2d 70, 80 (D.C. Cir. 1984).

55. *Id.* (citing *Potomac Elec. Power Co. v. ICC*, 702 F.2d at 1034).

56. *Id.*

57. *Id.*

58. *Id.*

59. Other circuits have followed its lead, including the Eighth Circuit. *See* *Org. for Competitive Mkts. v. U.S. Dep’t of Agric.*, 912 F.3d 455, 463 (8th Cir. 2018) (applying the TRAC factors in case of deadline violation and noting “war[iness] of becoming the ultimate monitor of Congressionally set deadlines”).

60. *See, e.g., In re Barr Laboratories, Inc.*, 930 F.2d 72, 75 (D.C. Cir. 1991) (finding that violation of a deadline “does not, alone, justify judicial intervention”); *In re United Mine Workers of Am. Int’l. Union*, 190 F.3d 545, 551 (D.C. Cir. 1999) (“Our conclusion that the Secretary has violated the deadline set forth in the Mine Act does not end the analysis . . . we must continue our analysis of the remaining TRAC factors.”).

law: Many statutes grant jurisdiction, often exclusively, to the D.C. Circuit for appellate review of agency actions and orders.<sup>61</sup> By weighing other factors alongside an agency's clear violation of a congressional mandate, the *TRAC* test does not appropriately regard the importance of statutory deadlines when violated.

An alternative approach limits reviewing courts' discretion to excuse agencies when they violate statutory deadlines. In *Forest Guardians v. Babbitt*, the Tenth Circuit distinguishes between actions "unlawfully withheld" and actions "unreasonably delayed."<sup>62</sup> Presence and violation of a statutory deadline indicates an "unlawfully withheld" action, in which case "neither the agency nor the court has any discretion" regarding compliance, and the court must order the agency to act.<sup>63</sup> In contrast, the court maintains equitable discretion when reviewing actions "governed only by general timing provisions," and can "decide whether agency delay is unreasonable."<sup>64</sup> Such cases adopt the *TRAC* approach to evaluate whether delay is reasonable. But in the presence of a missed deadline, the court attempts to realize clearly expressed congressional intention by ordering the agency to act. Following *Forest Guardians*, the Fourth and Ninth Circuits have adopted this interpretation.<sup>65</sup>

Textualists might imagine a third alternative to statutory deadline enforcement, construing statutory language that an agency "shall" act by a certain date as a 'use it or lose it' approach to agency power.<sup>66</sup> The argument would proceed as follows: Congress

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61. Eric M. Fraser et al., *The Jurisdiction of the D.C. Circuit*, 23 CORNELL J. L. & PUB. POL'Y 131, 143 (2013).

62. 174 F.3d at 1190 (10th Cir. 1999).

63. *Id.*

64. *Id.*

65. See, e.g., *Biodiversity Legal Found. v. Badgely*, 309 F.3d 1166, 1178 (9th Cir. 2002) ("The exercise of discretion is foreclosed when statutorily imposed deadlines are not met."); *South Carolina v. United States*, 907 F.3d 742, 760 (4th Cir. 2018) (adopting the *Forest Guardians* understanding that failure to meet a statutory deadline makes an action "unlawfully withheld" and holding that "the court must award injunctive relief to secure the agency's compliance").

66. Assuredly non-textualist scholars have also deemed this the "most plausible inference" when an agency acts after a deadline for that action: "[A]fter the date, the



commanded that the agency shall act within a given period, and courts must construe “shall” according to its plain meaning—typically, as a mandate.<sup>67</sup> Therefore, the combination of a deadline and mandatory language bars an inference that the agency can execute that mandate after the deadline passes.<sup>68</sup> However, the Supreme Court has repeatedly declined to enforce deadlines in this manner, calling them “jurisdictional.”<sup>69</sup> Instead, the Court requires a clear statement rule: Absent an express statement to the contrary, “courts should *not* assume that Congress intended the agency to lose its power to act” after passage of a deadline.<sup>70</sup> This requirement reflects the extremity of revoking<sup>71</sup> agency power: Such a remedy would often violate “the ‘great principle of public policy . . . which forbids that the public interests should be prejudiced’ when government neglects its duty.”<sup>72</sup> Because the Court does not strictly construe such jurisdictional deadlines, the two available treatments of missed deadlines remain the competing *TRAC* and *Forest Guardians* approaches. Of the two, *Forest Guardians* provides the more desirable doctrine.<sup>73</sup>

#### IV. NORMATIVE IMPLICATIONS OF DEADLINE ENFORCEMENT

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agency is acting in contravention of the legal authority for its action.” Jacob E. Gersen & Anne J. O’Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 955 (2008).

67. See, e.g., *City of Edmonds v. United States Dep’t of Labor*, 749 F.2d 1419, 1421 (9th Cir. 1984) (accepting this line of reasoning before the Supreme Court later foreclosed it).

68. *Id.* at 1423.

69. See, e.g., *Brock v. Pierce Cty.*, 476 U.S. 253 (1985); *Barnhart v. Peabody Coal Co.*, 537 U.S. 149 (2003); *Dolan v. United States*, 560 U.S. 605 (2010).

70. *Brock*, 476 U.S. at 260 (emphasis added).

71. Of course, a court could not formally revoke agency power, but could set precedent instructing courts to set aside agency actions taken after the deadline or issue other forms of injunctive relief preventing the agency from exercising some power after a statutory deadline elapses.

72. *Brock*, 476 U.S. at 260 (quoting *United States v. Nashville, C. & St. L. R. Co.*, 118 U.S. 120 (1886)).

73. Discussed further *infra* Section IV.

Agencies might miss a statutory deadline for a variety of reasons, often through no fault of their own. For instance, political changes—in Congress or in presidential administration—can account for agency delay. One can imagine a Congress very concerned with environmental issues passing a statute that includes regulatory deadlines to ensure the EPA acts quickly. If a new President is elected before the deadlines pass, his EPA appointees could share a different, deregulatory agenda. With this leadership, the agency might purposely drag its feet to avoid promulgating regulations. The President may even exert authority over the EPA by diverting executive branch attention and resources to other agencies. In extreme cases, this may constitute “an extralegal veto on duly enacted statutes.”<sup>74</sup> Alternatively, one can imagine the same Congress attempting to rapidly secure environmental regulations. However, an EPA-friendly President is elected, and control of Congress flips to a deregulatory or environmentally unfriendly majority. Such a Congress may subsequently appropriate less money to the EPA, stymieing the agency’s ability to act before the deadline passes.

Congress may also unintentionally impose impracticable deadlines on agencies based on a poor understanding of the time needed for the rulemaking process.<sup>75</sup> This puts agencies in the difficult position of choosing between complying with a deadline, issuing a rule of poor quality or susceptible to legal challenges, or ignoring the deadline altogether.<sup>76</sup> And finally, courts may worsen the

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74. Michael D. Sant’Ambrogio, *Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging*, 79 GEO. WASH. L. REV. 1381, 1396 (2011).

75. This problem has only grown more acute in the wake of judicial “paper hearing” requirements for even informal rulemakings, which induce agencies to take the utmost care to develop a thorough record to avoid problems during hard look review.

76. For a compelling argument that ignoring deadlines in such cases may not, in fact, be unlawful, see Cass R. Sunstein & Adrian Vermeule, *The Law of “Not Now:” When Agencies Defer Decisions*, 103 GEO. L. J. 157, 177–78, 194 (“If Congress has asked the agency to do something on a timeline that is unrealistic given the nature of the task and the necessities of the administrative process, there is a good argument that the agency’s decision to fail to meet the deadline is lawful. No less than a party to a

problem by imposing additional deadlines in § 706(1) cases. In one such case, where a plaintiff sought to compel 9 EPA rulemakings, the same District Court had compelled over 30 delayed EPA rulemakings just one year earlier.<sup>77</sup> Because the agency devoted its resources to the court-ordered rulemakings, it could not accomplish the ones the plaintiffs sought to compel. Logic would dictate that enforcing statutory deadlines poses little interpretive difficulty: “If, for example, a statute requires an agency to issue a rule by a specific date, the agency must comply with the requirement, even if it has competing priorities and even if it would much prefer not to.”<sup>78</sup> However, agency noncompliance and inconsistent court enforcement complicate the issue, requiring normative arguments between the competing approaches.

The *Forest Guardians* and *TRAC* approaches to violations of clear statutory deadlines implicate important questions about congressional oversight and the purpose of delegation to administrative agencies. Ultimately, both skeptics and proponents of a robust or empowered administrative state should support the Tenth Circuit’s approach to strict enforcement of statutory deadlines.

On one hand, jurisprudence surrounding administrative agencies “has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job” absent agency assistance.<sup>79</sup> Agencies undoubtedly possess advantages over courts in making complex decisions, especially in areas requiring highly

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contract, an agency has an ‘impossibility defense.’”). Such cases may be good candidates for the APA’s “good cause” exception to notice-and-comment rulemaking procedures, frequently invoked to justify procedural informalities when agencies face a statutory deadline. 5 U.S.C. § 553(b)(3)(B). Various courts have limited this exception to ensure that agencies do not “wait until the eve of a statutory . . . deadline, then raise up the ‘good cause’ banner and promulgate rules without following APA procedures.” *Council of S. Mountains, Inc. v. Donovan*, 653 F.3d 573, 581 (D.C. Cir. 1981). However, if Congress has imposed a genuinely impracticable deadline, delay should not be attributed to the agency and the good cause exception could apply.

77. *Cnty. In-Power and Dev. Ass’n v. Pruitt*, 304 F. Supp. 3d 212, 218 (D.D.C. 2018).

78. Sunstein & Vermeule, *supra* note 76, at 177.

79. *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

technical or scientific expertise.<sup>80</sup> For certain “intricate, labor-intensive task[s],” assignment by Congress “to an expert body is especially appropriate.”<sup>81</sup> Beyond these pragmatic concerns, commentators offer a variety of normative justifications to legitimate the administrative state, including reasoned decisionmaking, democratic accountability, the benefits of an energetic executive branch, technocratic decisionmaking, and balancing federal power in the modern era.<sup>82</sup> These values now hold more importance than ever in the absence of an active Congress. Given unprecedented political polarization and legislative gridlock, agencies solve the problem of congressional inaction, especially in response to rapidly changing factual circumstances.<sup>83</sup>

In contrast, opponents of a robust administrative state cite concerns about delegation of legislative power and agencies’ ability to bypass bicameralism and presentment in issuing substantive rules.<sup>84</sup> Proponents of such a strict nondelegation doctrine ground their argument in the Constitution’s three vesting clauses, which make “exclusive” grants of legislative, judicial, and executive power to Congress, the courts, and the President, respectively.<sup>85</sup> By this account, the exclusive delegation of lawmaking power to Congress acts as a “bulwark[] of liberty,” ensures clear democratic accountability, reasoned deliberation, and supermajority consensus

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80. See, e.g., *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., Occupational Safety & Health Admin.* (NFIB v. OSHA), 142 S. Ct. 661, 676 (2022) (Breyer, J., dissenting) (comparing Court’s lack of expertise to an agency’s consideration of risk, cost, and various policies to address “grave danger” of COVID-19).

81. *Mistretta*, 488 U.S. at 379.

82. See generally Adrian Vermeule, *Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State*, 130 HARV. L. REV. 2463 (2017).

83. See Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 8 (2014) (noting that “Congress’s capacity to react to changed circumstances by lawmaking has diminished sharply over time” and that “Congress is more ideologically polarized now than at any time in the modern regulatory era”).

84. See, e.g., *Gundy v. United States*, 139 S. Ct. 2116, 2133–35 (2019) (Gorsuch, J., dissenting), *Kisor v. Wilkie*, 139 S. Ct. 2400, 2437–39 (2019) (Gorsuch, J., concurring).

85. *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 67 (2015) (Thomas, J., concurring).

to pass law.<sup>86</sup> In addition to these constitutional concerns, strict constitutional nondelegation evinces skepticism about the administrative state. On this view, the individual and his liberty interests stand diametrically opposed to government, a David to the “goliath” of administrative law.<sup>87</sup> Most recently, these concerns have driven Justice Gorsuch’s crusade to revive the nondelegation doctrine, but administrative law has long reflected concern about “government of a bureaucratic character alien to our system.”<sup>88</sup>

Despite their differences, both sides of the agency empowerment or nondelegation debate should embrace the *Forest Guardians* approach to strict construction of statutory deadlines. On either account, the mainstream view of delegation<sup>89</sup> to administrative agencies situates them firmly within Article I, whether as tools Congress uses to serve the public interest or impermissible delegations of legislative power. Because they depend on congressional instruction, “an agency has literally no power to act . . . unless and until Congress confers power upon it.”<sup>90</sup> An agency’s organic statute thus provides the extent of that agency’s power, including through deadlines.

In contrast, the *TRAC* approach disregards explicit congressional statements that an agency must take action by a given date. The D.C. Circuit’s “use of *TRAC*’s balancing factors in cases where there are actual statutory deadlines is puzzling, [as] [t]he mere presence

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86. *Gundy*, 139 S. Ct. at 2133–34.

87. NEIL M. GORSUCH, *A REPUBLIC, IF YOU CAN KEEP IT* 83 (2019).

88. *Crowell v. Benson*, 285 U.S. 22, 57 (1932).

89. A less mainstream view of delegation to administrative agencies, wherein Congress exercises its legislative power in creating the agency, which then exercises executive power in carrying out its mandate, still supports a strict construction of statutory deadlines. See Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV., 1721 (2002) (advancing this position). The authors justify this view on the basis that “the content of the ‘executive’ power simply is the execution of validly enacted law,” from which it follows that “the substantive limitation is that the executive officer must act within the legal bounds that the statute itself sets.” *Id.* at 1730. When a statute provides a deadline for agency action, therefore, the deadline comprises part of the legal bounds of agency power that its officers must respect and act within.

90. *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986).

of a deadline seems to satisfy the test.”<sup>91</sup> In one representative case, the D.C. Circuit refused to compel compliance with a missed deadline so that it would not disrupt agency priorities, despite recognizing that “Congress clearly intended a faster track for generic drug applications.”<sup>92</sup> In doing so, the court ignored clear statutory directives to the FDA, encroaching on congressional control over administrative agencies by imposing its own interpretation of agency priorities through a balancing test.

Skeptics of the administrative state should appreciate the *Forest Guardians* approach to statutory deadlines for its commitment to honoring congressional direction of agencies and limiting their discretion. The Court has, at least once, honored a statutory deadline in this manner: “[I]n a statutory scheme in which Congress carefully prescribed a series of deadlines . . . we may not simply interject an additional [time] period . . . we must respect the compromise embodied in the words chosen by Congress.”<sup>93</sup> In areas requiring great substantive expertise or technical knowledge, deadlines represent one of the only feasible ways for a generalist Congress to exert any control over agencies.

Deadlines ensure congressional control by preventing two ways that an agency might disobey Congress. First, an agency might undergo “bureaucratic drift” over time, especially if administrations and political agendas change. Deadlines within the same presidential administration or congressional term might prevent this by allowing the enacting Congress to monitor agency compliance and know which President has appointed the agency heads.<sup>94</sup> In a similar vein, tight deadlines can prevent “legislative drift,” or the possibility that a future Congress will repeal or meaningfully amend the agency’s organic statute.<sup>95</sup> Even in areas beyond meaningful congressional expertise, deadlines thus ensure a level of

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91. Catherine Zaller, *The Case for Strict Statutory Construction of Mandatory Agency Deadlines under Section 706(1)*, 42 WM. & MARY L. REV. 1545, 1557 (2001).

92. *In re Barr Laboratories*, 930 F.2d 72, 76 (D.C. Cir. 1991).

93. *Mohasco Corp. v. Silver*, 447 U.S. 807, 825–26 (1980).

94. Gersen & O’Connell, *supra* note 66, at 935–36.

95. *Id.*

substantive control over agency action, assuaging skeptics' concerns about an unaccountable bureaucracy.

Proponents of a robust administrative state, while rightly skeptical about encroachments into agency priority-setting, should also advocate for strict construction of statutory deadlines as a means to ensure that public benefits actually accrue from agency action. Statutory deadlines achieve important objectives: accelerating decisionmaking, facilitating congressional oversight, and prompting the agency to make difficult—but necessary—decisions.<sup>96</sup> Agencies do not provide flexibility and technocratic competence absent action: "It is obvious that the benefits of agency expertise and creation of a record will never be realized if the agency never takes action."<sup>97</sup> A realistic view of administrative agencies recognizes their public-regarding goals and the benefits of agency action in the complex American federal government.

In the context of statutory deadlines, these benefits are particularly acute. One empirical survey showed deadlines are most commonly imposed on the EPA; other agencies topping the list for the most deadlines include the Departments of Agriculture, Transportation, and Health and Human Services.<sup>98</sup> These agencies make important rules regarding public health and welfare, thereby benefiting the public. Agency delays interfere with this scheme and "impose unintended costs on intended beneficiaries and unintended benefits on those intended to bear the costs of regulations."<sup>99</sup> For instance, a delay in EPA rulemaking under the Clean Air Act would impose the health and welfare costs of pollution on the public, while enabling regulated polluters to continue harmful emissions without consequences. Enforcing deadlines would help ensure that the public receives the regulatory benefits promised by Congress.

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96. Sidney A. Shapiro & Robert L. Glicksman, *Congress, The Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L. J. 819, 830 (1988).

97. *Telecomms. Rsch. and Action Ctr. v. FCC (TRAC)*, 750 F.2d 70, 79 (D.C. Cir. 1984).

98. Gersen & O'Connell, *supra* note 66, at 939.

99. Sant'Ambrogio, *supra* note 74, at 1399.

Of course, statutory deadlines will diminish an agency's discretion as its priorities necessarily change when Congress provides statutory deadlines. The Court's decision in *Heckler v. Chaney* expresses great concern for such discretion, making agency decisions not to bring enforcement actions presumptively unreviewable by courts.<sup>100</sup> Such decisions are unsuitable for review because they involve "balancing a number of factors which are peculiarly within [agency] expertise," including how and when to use limited resources, and the agency's control over its substantive agenda and priorities.<sup>101</sup> The TRAC test acknowledges similar concerns, including as its fourth factor "the effect of expediting delayed action on agency activities of a higher or competing priority."<sup>102</sup> As a result, proponents of a powerful administrative state might find that concerns about impeding upon an agency's discretion to set its own agenda outweigh the benefits of compelling action in violation of a statutory mandate.

The impact of compelling agencies to follow statutory mandates, however, does not exceed the amount that the Court has curbed agency discretion elsewhere. In *Massachusetts v. EPA*, the Court interpreted the Clean Air Act to require the EPA Administrator to regulate greenhouse gases upon a finding that they "endanger public health or welfare."<sup>103</sup> This statutory mandate provided "a direction to exercise discretion within defined statutory limits," and "[t]o the extent that this constrains agency discretion to pursue other priorities . . . this is the congressional design."<sup>104</sup> The decision not to bring an enforcement action, likened to prosecutorial discretion in *Heckler*,<sup>105</sup> preserves a level of agency freedom or discretion *within* its statutory mandate. In contrast, a deadline is rightly viewed as *part* of the statutory mandate, structuring the bounds within which the agency can exercise discretion about other

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100. 470 U.S. 821 (1985).

101. *Id.* at 831–32.

102. TRAC, 750 F.2d at 80.

103. 549 U.S. 497, 506 (2007) (quoting 42 U.S.C. § 7521(a)(1)).

104. *Id.* at 533.

105. 470 U.S. at 832.



matters. The Court has permitted such limits on discretion in *Massachusetts v. EPA*. As such, enforcing a clear mandate in the statute's text does not impermissibly interfere with agencies' autonomy, but merely gives effect to congressional boundaries of agency power.

Finally, the *TRAC* test allows courts to substitute their own judgment for that of the agency and of Congress in balancing highly manipulable factors to determine whether to enforce a statutory deadline. The *Forest Guardians* test actually preserves agency autonomy by providing clear guidelines within which agencies can act. Because its doctrine lacks structure, "courts can use the *TRAC* analysis to support virtually any conclusion they want to reach."<sup>106</sup> In contrast, *Forest Guardian* urges judicial restraint and provides clear guidance to agencies that courts will honor congressional intent, whereas the unpredictable *TRAC* test allows courts to weigh factors differently than both Congress and the agency.

## V. CONGRESSIONAL REMEDIES

Courts' failures to compel action that violates statutory deadlines suggest that Congress ought to turn elsewhere to exercise control over agency timelines. Throughout the 1980s, statutory deadlines became increasingly popular instruments of congressional control over agencies, given congressional concern about agency failures to act or to act promptly.<sup>107</sup> Amendments made during this period to the Resource Conservation and Recovery Act, Toxic Substances Control Act, the Superfund statute, the Clean Water Act, and other environmental statutes included countless deadlines for discrete agency actions.<sup>108</sup> Food and drug statutes also commonly include statutory deadlines, with the FDA often facing criticism for failing to regulate within them.<sup>109</sup>

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106. Sant'Ambrogio, *supra* note 74, at 1413.

107. Shapiro & Glicksman, *supra* note 96, at 827 (noting specifically congressional dissatisfaction with EPA delays during this period).

108. *Id.* at 829–30.

109. Elizabeth Magill, *Congressional Control Over Agency Rulemaking: The Nutrition Labeling and Education Act's Hammer Provisions*, 50 *FOOD AND DRUG L. J.* 150, 158–59 (1995).

One possible solution is so-called “hammer provisions,” or self-executing statutory clauses that ‘penalize’ agencies or impose some other substantive rule if the agency fails to act before the deadline.<sup>110</sup> The 1984 Hazardous Solid Waste Amendments (HSWA) to the Resource Conservation and Recovery Act (RCRA) present a paradigmatic example: The statute creates various “default” rules that become effective on a given date, unless the EPA Administrator makes rules providing otherwise by that date.<sup>111</sup> By setting a default rule that the agency might deem too harsh or too lenient, Congress can nudge the agency to regulate in a different way.<sup>112</sup> Such hammer provisions also avoid procedural challenges under the APA, as Congress has enacted the substantive rules later enforced against regulated parties.

Other types of hammer provisions do not include such “default” rules, but instead strip the agency of certain powers if the agency does not act before a given deadline. For instance, the Nutrition Labeling and Education Act required the FDA to propose certain rules about health claims, label contents within 12 months of its enactment, and issue final rules 12 months later.<sup>113</sup> The hammer provision then stated that failure to issue final rules within 24 months of the Act’s enactment would codify the proposed rules as final.<sup>114</sup>

Hammer provisions may provide an appropriate remedy in certain administrative contexts, but they increase the risk of agencies issuing poor final rules. The primary advantage of hammer provisions is their self-execution. Enacted by Congress, they “obviate litigation as the primary mechanism to enforce statutory

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110. *Id.* at 154 (1995).

111. *See, e.g.*, 42 U.S.C. §§ 6942(d)(1)-(2); 6924(f)(1)-(3) (requiring the EPA to make findings that land disposal of certain wastes does not harm human health and the environment within 32 months or the practice would be banned, doing the same for underground deep injection into wells if the EPA did not regulate the practice within 45 months of enactment).

112. There might be interesting behavioral economics implications here, as Congress must create a default rule that both is sufficiently ‘undesirable’ that it induces the agency to act, but is not so ‘undesirable’ that Congress would oppose it going into effect if the agency fails to act before the deadline.

113. Pub. L. No. 101-535 §§ 2(b)(1), 3(b)(1), 104 Stat. 2356, 2361.

114. *Id.* §§ 2(b)(2), 3(b)(2), 104 Stat. 2357, 2361-62.

deadlines.”<sup>115</sup> This reduces the cost and delay associated with bringing a challenge to compel agency action. However, hammer provisions also raise concerns about locking in bad policy when the agency cannot meet a deadline, perhaps through no fault of its own.<sup>116</sup> Because Congress often delegates to agencies tasks beyond its technical expertise, the “default rules” like those in the HWSA Amendments may be poorly written or fail to adequately address the problem at hand. Even the hammer provisions in the NLEA scheme could also lead to similarly poor-quality rules, if the agency rushes to make proposed rules that eventually become legally binding. Regulated parties and beneficiaries of an agency’s regulatory program could thus suffer in a world of hammer provisions. Furthermore, drafting hammer provisions would require a congressional consensus on these detailed rules, which may prove impossible to obtain.<sup>117</sup> As a result, hammer provisions likely do not solve the problem of inconsistent court enforcement of statutory deadline violations.

#### CONCLUSION

Agency delay should feature prominently in the modern administrative state and should trouble both its defenders and detractors. For the former, agency delays deprive the public of important, congressionally-promised benefits, often serving important public welfare goals. For the latter, delays present another example of agencies’ uncontrolled power, even when contrary to law. On this issue, both sides of the heated debate about administrative power ought to agree that courts should hold agencies to their deadlines rather than exercising discretion to let them off the hook. An analogy to *Chevron* may help illuminate when Congress should prioritize agency discretion over clear congressional mandates. When Congress has not addressed the issue and provided no deadline for agency action, courts may defer to the agency’s expertise and

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115. Magill, *supra* note 109, at 183.

116. See discussion *supra* Section IV.

117. See Freeman & Spence, *supra* note 83, at 8.

priority-setting discretion when evaluating whether to compel action, perhaps in a framework similar to *TRAC*. As in *Chevron*, however, “[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”<sup>118</sup> Congress can hardly express its intent more clearly than by assigning a specific deadline to an agency, and courts reviewing § 706(1) challenges should give effect to that intent. By honoring statutory deadlines, courts will ensure that the public receives the benefits promised by Congress in creating and delegating administrative agencies, and that those agencies truly respond to their statutory instructions, creating real accountability to Congress.

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118. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842–43 (1984).