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**SPEECH**

YOU ARE THE LAST LINE OF DEFENSE  
*Bari Weiss* .....289

**ARTICLES**

THE MEANING AND AMBIGUITY OF SECTION THREE OF THE  
FOURTEENTH AMENDMENT  
*Kurt T. Lash* .....309

DUE PROCESS AND THE STANDING DOCTRINE  
*Emile J. Katz* .....395

CITIZENSHIP AND SOLICITUDE: HOW TO OVERRULE  
*EMPLOYMENT DIVISION V. SMITH AND WASHINGTON V. DAVIS*  
*Christopher R. Green* .....465

**NOTE**

ORIGINAL UNDERSTANDING OF “BACKGROUND PRINCIPLES” IN  
*CEDAR POINT NURSEY V. HASSID*  
*Mary Catherine Jenkins & Juliette Turner-Jones* .....507

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## PREFACE

The *Harvard Journal of Law & Public Policy* is delighted to present Volume 47, Issue 2. This Issue, like every other, is the product of countless hours of work by the entire *JLPP* staff and the incredible authors who publish with us. It is hard to sufficiently express in words how much I appreciate the time, energy, and thought that our editors pour into each issue. And while everything at *JLPP* is truly a team effort, I would like to take this Issue's preface to specifically acknowledge the extraordinary efforts of one *JLPP* Editor in particular: our Deputy Editor-in-Chief, Eric Bush. Eric's relentless work ethic, organizational skills, and brilliance play a tremendous role in the successful completion of each Volume 47 issue. I could not have asked for a better partner in leading *JLPP* and am eternally grateful for everything he has done for the *Journal* this year.

\* \* \*

Before getting into the content of Issue 2, I'd like to share a couple exciting updates about the *Journal's* leadership. First, *JLPP* has added two new Harvard Law School faculty members to its Board of Advisors: Professor Adrian Vermeule, the Ralph S. Tyler, Jr. Professor of Constitutional Law, and Professor Steven Sachs, the Antonin Scalia Professor of Law. Both Professor Vermeule and Professor Sachs frequently contribute amazing scholarship to *JLPP*, support *JLPP's* work on Harvard Law School's campus (for example, by participating in *JLPP*-hosted symposia), and serve as mentors to the many *JLPP* Editors they have taught. Although Professors Sachs and Vermeule have effectively been advisors to the *Journal* and its staff for many years, we are honored to recognize their roles formally. Second, Andrew Hayes has been elected to serve as Editor-in-Chief of *JLPP* Volume 48. Andrew has already contributed so much to *JLPP* through his hard work, dedication, and thoughtful ideas—I know he is going to do a fantastic job as Editor-in-Chief.

\* \* \*

Now onto the content! Issue 2 begins with a speech written by Bari Weiss—it was delivered as the Barbara Olson Memorial Lecture at the 2023 Federalist Society National Lawyers Convention. In her remarks, Ms. Weiss describes a present-day crisis: an ideological movement that “replaces basic ideas of good and evil with a new rubric: the powerless (good) and the powerful (bad).” Ultimately, her speech encourages us to use our voices to defend the values that have made the United States the “freest” and “most tolerant society” in the world. Ms. Weiss’ speech moved many JLPP editors who attended the address live in Washington, D.C. We are lucky to publish a version of her thoughtful and timely speech in this Issue.

After Ms. Weiss’ remarks, Issue 2 features three articles. First, Professor Kurt Lash argues that the original understanding of Section Three of the Fourteenth Amendment remains historically unclear and textually ambiguous. Next, Emile Katz responds to critiques that Article III’s standing doctrine is “judicially-invented” by proposing an alternative Constitutional basis for the standing doctrine: the Due Process Clauses of the Fifth and Fourteenth Amendments. Finally, Professor Christopher Green contends that the Court’s one-size-fits-all compelling interest framework has strayed from “the original meaning of the Fourteenth Amendment’s guarantee of equal citizenship.” Green proposes that the Court instead “assess whether states can articulate adequate explanations for policies causing particular harms,” similar to how the Court assesses “arbitrary and capricious” agency action in administrative law cases.

Issue 2 concludes with a Note co-written by two of our own editors, Mary Catherine (Cook) Jenkins and Juliette Turner-Jones, about a 2021 Supreme Court decision, *Cedar Point Nursery v. Hassid*. Jenkins and Turner-Jones argue that *Cedar Point* provides originalist scholars an opportunity to re-examine the scope and contours of the background principles behind the Takings Clause of the Fifth Amendment.

\* \* \*

Thank you to all of our readers for your continued support of *JLPP*—I hope you enjoy Volume 47, Issue 2!

Hayley Isenberg  
*Editor-in-Chief*





## YOU ARE THE LAST LINE OF DEFENSE

BARI WEISS\*

When Gene Meyer gave me a list of the people who had previously given the Barbara Olson lecture, I was sure you guys had made a mistake in inviting me. I am not a lawyer or a legal scholar or a former attorney general. I have, in my time, edited dozens of op-eds about *Chevron* deference, but I'm still not quite sure what that means.

Nor am I a member of the Federalist Society. My parents, who probably couldn't afford the local country club, raised us on the Groucho Marx line: I don't want to belong to any club that would have me as a member.

Then there's the question of my politics. I hear you guys are conservative. Forgive me, then: I'd like to begin by acknowledging that we are standing on the ancestral, indigenous land of Leonard Leo. *ProPublica* tells me that Washington is his turf.

Then I googled Barbara Olson.

I had the privilege of editing some op-eds by Ted when I worked at the *Wall Street Journal*. I knew that his wife was murdered by al-Qaeda on 9/11.<sup>1</sup> But over the past weeks I spent time reading about Barbara herself.

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\* Bari Weiss is the founder and editor of *The Free Press*. Ms. Weiss delivered these remarks as the 22nd Annual Barbara K. Olson Memorial Lecture on November 10, 2023, at the Federalist Society National Lawyers Convention.

1. Tim O'Brien, *Wife of Solicitor General alerted him of hijacking from plane*, CNN (Sept. 12, 2001, 2:06 AM), <https://edition.cnn.com/2001/US/09/11/pentagon.olson/> [https://perma.cc/DB52-XPNP].

I read about a Texas girl, the daughter of German immigrants, who was ferociously independent.<sup>2</sup> I read about how she, a Catholic, wound up at Cardozo Law School at Yeshiva University.<sup>3</sup> And I read about how, when she was an intern at the Department of Justice, she was apparently the only person with enough *chutzpah* to personally serve papers to the PLO Mission at the UN telling them they were being expelled from the country because they were terrorists.<sup>4</sup>

I learned that she was on American Airlines flight 77 because she was headed to L.A. to be on Bill Maher's show . . . and because she had changed her flight to have a birthday dinner with Ted.<sup>5</sup>

And I learned that she had the composure and clarity and courage to call him not once but twice in those horrifying moments before the plane slammed into the Pentagon.<sup>6</sup>

There is a phrase Jews say to mourners when a person dies: may their memory be for a blessing. It is an expression of hope. It is so clear in the case of Barbara Olson—the way the force of her life and her character echoes on—that it is very much a blessing fulfilled.

To say that I am honored to give a lecture in the name of this exceptional woman would be an understatement.

It is also, since the massacre of October 7—a date that will be seared into the memory of civilized peoples, alongside September 11—profoundly fitting. I do not think it is a coincidence that Israel is the only country, outside of America, that is home to a 9/11 memorial bearing all of the victims' names.<sup>7</sup>

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2. Theodore B. Olson, *Innately American*, CARDOZO LIFE 34 (Spring 2002), <https://cardozo.yu.edu/sites/default/files/2020-06/Barbara%20Olson.pdf> [<https://perma.cc/M4DX-VQRF>].

3. *Id.*

4. *Id.* at 35.

5. *Remembering 9/11: Barbara Olson fought for life until her final minutes, now Ted Olson does too*, FOX 5 DC (Sept. 11, 2021), <https://www.fox5dc.com/news/remembering-9-11-barbara-olson-fought-for-life-until-her-final-minutes-now-ted-olson-does-too> [<https://perma.cc/7267-DQ7R>].

6. *Id.*

7. Leah Hakimian, *Did you know . . . how Jerusalem remembers 9/11?*, JERUSALEM POST (June 20, 2019, 1:40 PM), <https://www.jpost.com/israel-news/did-you-know-593131> [<https://perma.cc/P3D5-Y6KC>].

Of course that is what we must talk about tonight. The civilizational war we are in. The war that took the life of Barbara Olson and 3,000 other innocent Americans on that morning in September 2001. The war that came, hideously, across the border from Gaza into Israel on that Shabbat morning a month ago. The war that too many had foolishly thought was over.

The physical war currently raging in the Middle East—with its questions about the way to defeat Hamas and other members of the jihadist death cult; the kind of operation Israel should currently be prosecuting in Gaza; how America should abandon its fatal appeasement of Iran; and a hundred other similar strategic questions—that is a subject for another speech, one for which there are many more qualified people to deliver.

Tonight, I'd like to talk about the war of ideas and of conviction and of will that faces us as Americans. I want to talk about the stakes of that war. About how we must wage it—fearlessly and relentlessly—if we seek to build a world fit for our children, and if we want to save America itself.

\* \* \*

By the time Americans woke up on October 7, 2023, it was clear that what had unfolded while we slept was not like previous wars or battles Israel has fought in its 75-year history.<sup>8</sup> This was a genocidal pogrom. It was a scene out of the many places Jews had fled—a scene from the history of the Nazi Holocaust<sup>9</sup> and of the European pogroms<sup>10</sup> before that and of the Farhud,<sup>11</sup> the 1941 massacre of Jews in Baghdad, a city that, it's hard to believe now, was 40 percent

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8. Isabel Debre, *Gunfire, rockets and carnage: Israelis are stunned and shaken by unprecedented Hamas attack*, AP NEWS (last updated Oct. 7, 2023, 5:11 PM), <https://apnews.com/article/israel-palestinians-militants-hamas-war-gaza-rockets-captives-6870d4d97883e4807cea48cb5bb33a57> [<https://perma.cc/SD6W-NTEN>].

9. Michael Berenbaum, *Holocaust*, BRITANNICA (last updated Jan. 28, 2024), <https://www.britannica.com/event/Holocaust> [<https://perma.cc/LX9F-DCLK>].

10. *Pogroms*, HISTORY.COM (last updated Aug. 21, 2018), <https://www.history.com/topics/european-history/pogroms> [<https://perma.cc/VW9X-98MM>].

11. Sarah Ehrlich, *Farhud memories: Baghdad's 1941 slaughter of the Jews*, BBC NEWS (June 1, 2011), <https://www.bbc.com/news/world-middle-east-13610702> [<https://perma.cc/EQV8-FXXA>].

Jewish at the beginning of the twentieth century<sup>12</sup>—all of which remind us of Israel's necessity.

The Hamas terrorists came across the border into southern Israel on foot and on motorbike.<sup>13</sup> They came by truck and by car and by paraglider.<sup>14</sup> And they came with a plan. They came to Israel to murder and maim and mutilate anyone they could find. That is what they did.

These Cossacks had smartphones. They called their families to brag that they had murdered Jews.<sup>15</sup> *Dad, Dad, I killed ten Jews!* Others filmed the slaughter with GoPros.<sup>16</sup> Some used the cellphones of their victims to upload the footage of their torture and murder to their Facebook pages.<sup>17</sup> In all of this, the terrorists are euphoric. No one who has watched the unedited footage fails to note the glee of the butchers.

Some Israelis were literally disappeared on October 7—burned at such high heat that volunteers are still sifting through the bones and the remnant teeth to identify them.<sup>18</sup> But we know that more

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12. Ido Levy, *Reclaiming Iraq's Jewish Heritage*, FIKRA FORUM (Oct. 19, 2021), <https://www.washingtoninstitute.org/policy-analysis/reclaiming-iraqs-jewish-heritage#:~:text=By%20the%20early%2020th,portion%20of%20Mosul%27s%20populations> [https://perma.cc/4SCF-7US4].

13. Josef Federman & Issam Adwan, *Hamas surprise attack out of Gaza stuns Israel and leaves hundreds dead in fighting, retaliation*, AP NEWS (last updated Oct. 7, 2023, 11:32 PM), <https://apnews.com/article/israel-palestinians-gaza-hamas-rockets-airstrikes-tel-aviv-11fb98655c256d54ecb5329284fc37d2> [https://perma.cc/XA6D-FBMA].

14. *Id.*

15. *IDF publishes audio of Hamas terrorist calling family to brag about killing Jews*, TIMES OF ISRAEL (Oct. 25, 2023, 5:29 AM), <https://www.timesofisrael.com/idf-publishes-audio-of-hamas-terrorist-calling-family-to-brag-of-killing-jews/> [https://perma.cc/6YZJ-WKEH].

16. *New GoPro footage shows Hamas terrorists infiltrating Israel unopposed on Oct. 7*, TIMES OF ISRAEL (Jan. 9, 2024, 11:29 AM), <https://www.timesofisrael.com/new-gopro-footage-shows-hamas-terrorists-infiltrating-israel-unopposed-on-oct-7/> [https://perma.cc/Z2G4-XRRC].

17. Anna Schecter, *Why can't Facebook stop Hamas from posting grisly videos of the killing of Israeli civilians?*, NBC NEWS (Nov. 1, 2023, 8:46 AM), <https://www.nbcnews.com/news/investigations/cant-facebook-stop-hamas-posting-grisly-videos-killing-israeli-civilian-rcna122966> [https://perma.cc/52KC-K5NH].

18. Jeffrey Fleishman, *Inside the Israeli lab 'reassembling and reconnecting' the mangled bodies of the dead*, L.A. TIMES (last updated Nov. 16, 2023, 7:52 PM),

than 200 people are currently being held hostage by Hamas and that more than 1,400 were murdered in those terrible hours.<sup>19</sup> Among the dead are some thirty American citizens.<sup>20</sup> There are at least ten Americans among the hostages.<sup>21</sup>

All of which is why the immediate analogy the world reached for was to 9/11.

As with 9/11, the terrorists caught their victims by surprise on a clear blue morning.

As with 9/11, the spectacle and the savagery were the point.

As with 9/11, the terrorists notched points on their sadistic scoreboard, taking from us not just precious lives, but our sense of our safety and security. They changed something within us.

The difference between 9/11 and 10/7 — two massacres of innocent people, symbols to their killers of Western civilization — was the reaction to the horror.

The difference between 9/11 and 10/7 was that the catastrophe of 10/7 was followed, on October 8th, by a different kind of catastrophe. A moral and spiritual catastrophe that was on full display throughout the West before the bodies of those men and women and children had even been identified.

People poured into the streets of our capital cities to celebrate the slaughter.

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<https://www.latimes.com/world-nation/story/2023-11-16/la-fg-col1-israel-forensic-pathologist> [<https://perma.cc/M9DS-HM5S>].

19. Daniel Estrin, *Reaching hostages and prisoners, through Israeli and Palestinian radio*, NPR (Feb. 1, 2024, 11:36 AM), <https://www.npr.org/2024/02/01/1228133547/israel-gaza-war-palestinian-radio-messages-hostages-prisoners> [<https://perma.cc/X832-BLFT>].

20. *Israel-Hamas War in Gaza: Latest Update on Sunday, October 15*, BLOOMBERG NEWS (Oct. 15, 2023, 1:34 AM), <https://www.bloomberg.com/news/articles/2023-10-15/israel-latest-rockets-fired-at-tel-aviv-gaza-targets-attacked?embedded-checkout=true> [<https://perma.cc/U4DV-UW6Y>].

21. MJ Lee et al., *US has 'working list' of hostages they believe are likely to be released first by Hamas, source familiar says*, CNN (Nov. 22, 2023, 10:15 PM), <https://www.cnn.com/2023/11/22/politics/us-working-list-hostages-israel-hamas/index.html> [<https://perma.cc/P3GB-P7F3>].

In Sydney, crowds gathered at the Sydney Opera House cheering “gas the Jews.”<sup>22</sup> People rejoiced on the streets of Berlin<sup>23</sup> and London<sup>24</sup> and Toronto<sup>25</sup> and New York.<sup>26</sup>

Then came BLM Chicago using the paraglider—a symbol of mass death—as a symbol of freedom.<sup>27</sup> Then came posters across our campuses calling for Israel to burn.<sup>28</sup> Then came our own offices in New York City being vandalized with “Fuck Jews” and “Fuck Israel.”<sup>29</sup> Then came Harvard’s task force to create safe spaces for pro-Hamas students.<sup>30</sup>

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22. *Thousands in Australia join pro-Palestinian march over Gaza*, REUTERS (Oct. 21, 2023, 4:55 AM), <https://www.reuters.com/world/middle-east/thousands-australia-join-pro-palestinian-march-over-gaza-2023-10-21/>. [https://perma.cc/TFZ8-TVXL].

23. *Germany bans pro-Hamas activity, dissolves group that celebrated attack on Israel*, TIMES OF ISRAEL (Nov. 2, 2023, 2:56 PM), <https://www.timesofisrael.com/germany-bans-pro-hamas-activity-dissolves-group-that-celebrated-attack-on-israel/> [https://perma.cc/CX2T-PH58].

24. Sam Westrop, *Pro-Hamas Islamists Celebrate, and Gather in London, in the Wake of Israel Slaughter*, MIDDLE EAST FORUM (Oct. 7, 2023), <https://www.meforum.org/64944/pro-hamas-islamists-celebrate-and-gather-in> [https://perma.cc/VX5N-7W5K].

25. Adam Hummel, *Barbarism celebrated on Toronto streets*, TORONTO STAR (Oct. 11, 2023), [https://www.thestar.com/opinion/contributors/barbarism-celebrated-on-toronto-streets/article\\_3f380201-69ed-5393-b99a-2385a199863d.html](https://www.thestar.com/opinion/contributors/barbarism-celebrated-on-toronto-streets/article_3f380201-69ed-5393-b99a-2385a199863d.html) [https://perma.cc/7UJS-NMRJ].

26. *Chanting ‘700,’ pro-Palestinian activists in New York fete Hamas attack*, TIMES OF ISRAEL (Oct. 9, 2023, 5:09 AM), <https://www.timesofisrael.com/pro-palestinians-celebrate-hamas-attack-as-israel-supporters-rally-in-new-york/> [https://perma.cc/BM7W-EDLX].

27. David Propper, *BLM Chicago admits it ‘isn’t proud’ of deleted post showing paragliding terrorist after outrage*, N.Y. POST (Oct. 11, 2023), <https://nypost.com/2023/10/11/blm-chicago-admits-it-isnt-proud-of-deleted-post-of-hamas-paraglider/> [https://perma.cc/5U9S-HYVN].

28. Elle Reeve, *Protests, fear and pride: US college students reflect on how they’re impacted by Israel-Hamas war*, CNN (Nov. 4, 2023, 8:33 AM), <https://www.cnn.com/2023/11/04/us/us-students-impacted-by-israel-hamas-war/index.html> [https://perma.cc/HJ6W-CNRF].

29. Anthony Adragna, *Two lawmakers report office vandalism over their pro-Israel stances*, POLITICO (Nov. 28, 2023, 10:29 AM), <https://www.politico.com/live-updates/2023/11/28/congress/district-office-vandalism-landsman-valadao-israel-hamas-00128850> [https://perma.cc/3GS6-3LGX].

30. Michael Casey, *Harvard creates task forces on antisemitism and Islamophobia*, AP NEWS (Jan. 19, 2024, 3:28 PM), <https://apnews.com/article/israel-gaza-war-harvard->

Then, as thunder follows lightning, more dead Jews. An anti-Israel protester in Los Angeles killed a 69-year-old Jewish man for the apparent sin of waving an Israeli flag,<sup>31</sup> though NBC's initial headline made it hard to know: "Man dies after hitting head during Israel and Palestinian rallies in California, officials say."<sup>32</sup>

In lockstep, the social justice crowd—the crowd who has tried to convince us that words are violence—insisted that actual violence was actually a necessity. That the rape was resistance. That it was liberation.

University presidents—who leapt to issue morally lucid condemnations of George Floyd's killing or Putin's war on Ukraine—offered silence or mealy-mouthed pablum about how the situation is tragic and "complex" and how we need to think of "both sides" as if there is some kind of equivalence between innocent civilians and jihadists.<sup>33</sup>

But the most alarming of all were the young people who threw their support not behind the innocent victims of Hamas terrorism, but behind Hamas.

At George Washington University, a few miles from here, students projected the words "Glory to Our Martyrs" and "Free Palestine from the River to the Sea" in giant letters on campus buildings.<sup>34</sup>

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university-antisemitism-islamophobia-673307f2de8c1fc328743b8c5f084a3c  
[<https://perma.cc/2G7K-QQ46>].

31. Joel B. Pollak, *Report: 69-year-old Jewish Man Killed at Pro-Palestinian Rally in L.A.*, BREITBART (Nov. 6, 2023), <https://www.breitbart.com/middle-east/2023/11/06/report-65-year-old-jewish-man-killed-at-pro-palestinian-rally-in-l-a/> [<https://perma.cc/7NC3-K4LE>].

32. Jeffrey Clark, *NBC News changes headline after omitting man killed at pro-Palestinian protest was Jewish*, FOX NEWS (Nov. 7, 2023, 11:30 AM), <https://www.foxnews.com/media/nbc-news-changes-headline-omitting-man-killed-pro-palestinian-protest-jewish> [<https://perma.cc/X8TW-J5MD>].

33. Cheyenne Haslett et al., *Uproar over university presidents' remarks on antisemitism underscores tensions on campuses*, ABC NEWS (Dec. 8, 2023, 7:42 PM), <https://abcnews.go.com/US/uproar-university-presidents-remarks-antisemitism-underscores-tensions-campuses/story?id=105502845> [<https://perma.cc/NC9C-CL9M>].

34. Martin Weil & Susan Svrluga, *GWU suspends group over projection of pro-Palestinian slogans*, WASH. POST (Nov. 14, 2023, 10:10 PM), <https://www.washingtonpost.com>

At Cooper Union in Manhattan, Jewish students had to hide in the library from a mob pounding on the door.<sup>35</sup>

At Columbia, Professor Joseph Massad called the slaughter “awesome.”<sup>36</sup> At Cornell, Professor Russell Rickford said it was “energizing” and “exhilarating.”<sup>37</sup>

At Harvard, more than 30 student groups signed a petition that found a way to blame Jewish victims for their own deaths—saying that they “hold the Israeli regime entirely responsible for all unfolding violence.”<sup>38</sup>

At Princeton, hundreds of students chanted, “globalize the intifada” which can mean only one thing: open season on Jewish worldwide.<sup>39</sup>

At NYU, students held posters that read “keep the world clean” with drawings of Jewish stars in garbage cans.<sup>40</sup>

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/education/2023/11/14/gwu-images-palestinian-students-for-justice/ [https://perma.cc/V9JL-8EJT].

35. Luke Tress, *Jewish students locked in NYC’s Cooper Union as protesters chanted ‘Free Palestine’*, TIMES OF ISRAEL (Oct. 26, 2023, 5:46 PM), <https://www.timesofisrael.com/jewish-students-barricade-in-nycs-cooper-union-as-protesters-chant-free-palestine/> [https://perma.cc/QUA6-ACDQ].

36. Noah Bernstein, *Petition calling for removal of MESAAS professor Joseph Massad garners over 47,000 signatures*, COLUMBIA DAILY SPECTATOR (Oct. 17, 2023, 12:35 AM), <https://www.columbiaspectator.com/news/2023/10/17/petition-calling-for-removal-of-mesaas-professor-joseph-masad-garners-over-47000-signatures/> [https://perma.cc/7LSE-7WTU].

37. Jesse O’Neill, *Cornell University professor calls Hamas terror attack ‘exhilarating’ and ‘energizing’*, N.Y. POST (Oct. 16 2023, 4:13 PM), <https://nypost.com/2023/10/16/russell-rickford-says-hamas-terror-was-exhilarating-exciting/> [https://perma.cc/2ZE3-MH8Y].

38. J. Sellers Hill & Nia L. Orakwue, *Harvard Student Groups Face Intense Backlash for Statement Calling Israel ‘Entirely Responsible’ for Hamas Attack*, HARVARD CRIMSON (Oct. 10, 2023), <https://www.thecrimson.com/article/2023/10/10/psc-statement-backlash/> [https://perma.cc/PS72-GN7A].

39. Santhosh Nadarajah, *Princeton SJP Hosts “Walkout for Palestine,” Journalists Face Harassment*, PRINCETON TORY (Nov. 13, 2023), <https://www.theprinceton-tory.com/princeton-sjp-hosts-walkout-for-palestine-journalists-face-harassment/> [https://perma.cc/8L4A-6DMH].

40. Jen Smith, *EXCLUSIVE: NYU Investigating ‘Repugnant’ Students Who Held Anti-Semitic ‘Keep the World Clean’ Signs at Washington Square Park Protest*, DAILY MAIL (Oct. 25, 2023), <https://www.dailymail.co.uk/news/article-12672281/NYU-investigating-repugnant-students-held-anti-Semitic-world-clean-signs-Washington-Square-Park-protest.html> [https://perma.cc/FW9V-7S6M].



Hip, young people with pronouns in their bios are not just chanting the slogans of a genocidal death cult. They are tearing down the photographs of women and children who are currently being held hostage in the tunnels that run under the Gaza Strip.<sup>41</sup> They do so with pleasure. They laugh. They mock the 9-month-old baby who was stolen from his parents.<sup>42</sup>

In doing so, they are tearing down—or at least trying to tear down—the essence of our common humanity, or even the reality that hostages were taken at all. Or maybe it’s that they are trying to extinguish the memory of the hostages, who to them are not worth saving . . . or actually had it coming to them.

Or maybe—and I say this as the mother of a young child whose face I see in the face of every captive—they are trying to tear down the divine image that is at the root of our civilization’s conception of the dignity of every human life.

What could possibly explain this?

The easy answer is that the human beings who were slaughtered on October 7th were Jews. And that antisemitism is the world’s oldest hatred. And that in every generation someone rises up to kill us. “They tried to wipe us out, they failed, let’s eat” as the old Jewish joke goes.<sup>43</sup>

But that is not the whole answer. *Because the proliferation of anti-semitism, as always, is a symptom.*

When antisemitism moves from the shameful fringe into the public square, it is not about Jews. It is never about Jews. It is about everyone else. It is about the surrounding society or the culture or

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41. Katherine Rosman, *How Posters of Kidnapped Israelis Ignited a Firestorm on American Sidewalks*, N.Y. TIMES (Oct. 31, 2023), <https://www.nytimes.com/2023/10/31/nyregion/israel-gaza-kidnapped-poster-fight.html> [<https://perma.cc/W3NZ-BPEB>].

42. See Isabelle Stanley, *Vile Moment Smirking Woman Gives FINGER at Truck Bearing Image of Kidnapped Israeli Child in Manhattan—As Laughing Friend in Hijab Films Her*, DAILY MAIL (Oct. 19, 2023), <https://www.dailymail.co.uk/news/article-12649399/Vile-moment-smirking-woman-gives-FINGER-truck-bearing-image-kidnapped-Israeli-child-Manhattan-laughing-friend-hijab-films-her.html> [<https://perma.cc/64A5-ZPB2>].

43. Uri Pilichowski, *How Purim Celebrations Transition to Passover*, JERUSALEM POST (Mar. 19, 2022), <https://www.jpost.com/opinion/article-701751> [<https://perma.cc/XQ8D-J8ND>].

the country. It is an early warning system—a sign that the society itself is breaking down. That it is dying.

It is a symptom of a much deeper crisis—one that explains how, in the span of a little over 20 years since September 11th, educated people now respond to an act of savagery not with a defense of civilization, but with a defense of barbarism.

It was twenty years ago when I began to encounter the ideology that drives the people who tear down the posters. It was twenty years ago, when I was a college student, that I started writing about a nameless, then-niche worldview that seemed to contradict everything I had been taught since I was a child.

At first, things like postmodernism and postcolonialism and post-nationalism seemed like wordplay and intellectual games—little puzzles to see how you could “deconstruct” just about anything. What I came to see over time was that it wasn’t going to remain an academic sideshow. And that it sought nothing less than the deconstruction of our civilization from within.

It seeks to upend the very ideas of right and wrong.

It replaces basic ideas of good and evil with a new rubric: the powerless (good) and the powerful (bad). It replaced lots of things. Color blindness with race obsession. Ideas with identity. Debate with denunciation. Persuasion with public shaming. The rule of law with the fury of the mob.

People were to be given authority in this new order not in recognition of their gifts, hard work, accomplishments, or contributions to society, but in inverse proportion to the disadvantages their group had suffered, as defined by radical ideologues.

And so, as an undergraduate, I watched in horror, sounding alarms as loudly as I could. I was told by most adults I knew that yes, it wasn’t great, but not to be so hysterical. Campuses were always hotbeds of radicalism, they said. This ideology, they promised, would surely dissipate as young people made their way in the world.

They were wrong. It did not.

Over the past two decades, I saw this inverted worldview swallow all of the crucial sense-making institutions of American life. It

started with the universities. Then it moved beyond the quad to cultural institutions—including some I knew well, like *The New York Times*—as well as every major museum, philanthropy, and media company. It's taken root at nearly every major corporation. It's inside our high schools and our elementary schools.

And it's come for the law itself. This is something that will not come as a surprise to the Federalist Society. When you see federal judges shouted down at Stanford,<sup>44</sup> you are seeing this ideology. When you see people screaming outside of the homes of certain Supreme Court justices—causing them to need round-the-clock security—you are seeing its logic.<sup>45</sup>

The takeover of American institutions by this ideology is so comprehensive that it's now almost hard for many people to notice it—because it is everywhere.

For Jews, there are obvious and glaring dangers in a worldview that measures fairness by equality of outcome rather than opportunity. If underrepresentation is the inevitable outcome of systemic bias, then overrepresentation—and Jews are 2 percent of the American population<sup>46</sup>—suggests not talent or hard work, but unearned privilege. This conspiratorial conclusion is not that far removed from the hateful portrait of a small group of Jews divvying up the ill-gotten spoils of an exploited world.

But it is not only Jews who suffer from the suggestion that merit and excellence are dirty words. It is every single one of us. It is strivers of every race, ethnicity, and class. That is why Asian American success, for example, is suspicious. The percentages are off. The

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44. David Leonhardt, *Free Speech (or Not) at Stanford*, N.Y. TIMES (Mar. 24, 2023), <https://www.nytimes.com/2023/03/24/briefing/campus-free-speech.html> [https://perma.cc/FL2B-ENMQ].

45. Libby Cathey, *Security Tightened For Supreme Court Justices As Protests Extend to Alito's Home*, ABC NEWS (May 10, 2022), <https://abcnews.go.com/Politics/security-tightened-supreme-court-justices-protests-extend-alitos/story?id=84617908> [https://perma.cc/D3WC-86DE].

46. *The Size of the U.S. Jewish Population*, PEW RSCH. CTR. (May 11, 2021), <https://www.pewresearch.org/religion/2021/05/11/the-size-of-the-u-s-jewish-population/> [https://perma.cc/AP4P-FVSB].

scores are too high. The starting point, as poor immigrants, is too low. From whom did you steal all that success?

The weeks since October 7th have been a mark to market moment. In other words, we can see how deeply these ideas run. We see that they are not just metaphors.

*Decolonization* isn't just a turn of phrase or a new way to read novels. It is a sincerely held political view that serves as a predicate to violence.

If you want to understand how it could be that an editor of the Harvard Law Review could physically intimidate a Jewish student<sup>47</sup> or how a public defender in Manhattan recently spent her evening tearing down posters of kidnapped children,<sup>48</sup> it is because *they believe it is just*.

Their moral calculus is as crude as you can imagine: they see Israelis and Jews as powerful and successful and "colonizers," so they are bad; Hamas is weak and coded as people of color, so they are good. No, it doesn't matter that most Israelis are "people of color."

That baby? He is a colonizer first and a baby second. That woman raped to death? Shame it had to come to that, but she is a white oppressor.

\* \* \*

This is the ideology of vandalism in the true sense of the word—the Vandals sacked Rome. It is the ideology of nihilism. It knows nothing of how to build. It knows only how to tear down and to destroy.

And it has already torn down so very, very much. The civilization that feels as natural to us as oxygen? That takes thousands of years,

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47. *Israeli Harvard Business School Student Accosted and Harassed Amid Gaza 'Die-In' on Campus*, WASH. FREE BEACON (Oct. 21, 2023), <https://freebeacon.com/campus/israeli-harvard-business-school-student-accosted-and-harassed-amid-gaza-die-in-on-campus/> [https://perma.cc/TMW7-QEJC].

48. Sarah Rumpf-Whitten, *New York City Public Defender Resigns After Being Caught Tearing Down Israel-Hamas War Hostage Posters*, FOX NEWS (Nov. 7, 2023), <https://www.foxnews.com/us/new-york-city-public-defender-resigns-caught-tearing-down-israel-hamas-hostage-posters> [https://perma.cc/Y6M6-NXE9].

thousands of nudges of progress, thousands of risks, thousands of forgotten sacrifices to build up. But vandals can make quick work of all that.

Reagan used to say that freedom is never more than one generation from extinction.<sup>49</sup> The same can be said of civilization.

If there can be anything good that has come out of this nightmare that began on October 7th it is this: we have been shaken awake. We know the gravity of the stakes. And they are not theoretical. They are real.

So what do we do?

First: look. We must recover our ability to look and to discern accordingly. We must look past the sloganeering and the propaganda and take a hard look at what's in front of our eyes.

Look first at what just happened. At the barbarism that Hamas carried out.

Look at the reaction to it. Take stock of how profoundly the lies and the rot have traveled. How badly the forces of civilization are faring in this battle. How it is the most educated, the most pedigreed who have become the most morally confused. The suspect in the killing of Paul Kessler is a college professor.<sup>50</sup>

To see the world as it is, we must prize the distinctions between good and bad. Better and worse. Pain and not pain. Safety and danger. Just and unjust. Friends and enemies.

I do not need "context" to know that tying children to their parents and burning them alive is pure evil, just as I do not need a history lesson on the Arab-Israeli conflict to know that the Arab Israelis who saved scores of Jewish Israelis that day are righteous.

Look at your enemies and your allies.

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49. Ronald Reagan, Inaugural Address as Governor of California (Jan. 5, 1967), <https://www.reaganlibrary.gov/archives/speech/january-5-1967-inaugural-address-public-ceremony> [<https://perma.cc/72SB-B2NS>].

50. Richard Winton et al., *Moorpark Professor Arrested in Death of Jewish Protester Paul Kessler in Thousand Oaks*, L.A. TIMES (Nov. 16, 2023), <https://www.latimes.com/california/story/2023-11-16/moorpark-professor-arrested-in-death-of-paul-kessler> [<https://perma.cc/WFL6-YAFC>].

And I say this more to myself than *to you*. Many of you have no doubt understood this longer than I have. But for many people, friends and enemies are likely not who they thought they were before October 7th. Looking at who your friends and enemies are might mean giving up nice things. Giving up Harvard. Or the club. Or your *New York Times* subscription . . . wait, wrong crowd.

You get the point. The point is that things—that prestige—aren't the point of our lives. Harvard and Yale don't give us our value. We do. And something beyond ourselves. Something visible in those faces so many of our fellow citizens are determined to rip off the wall. And in the faces before me now.

In recognizing allies, I'll be an example. I am a gay woman who is moderately pro-choice. I know there are some in this room who do not believe my marriage should have been legal. And that's okay, because we are all Americans who want lower taxes.

But seriously: I am here because I know that in the fight for the West, I know who my allies are. And my allies are not the people who, looking at facile, external markers of my identity, one might imagine them to be. My allies are people who believe that America is good. That the West is good. That human beings—not cultures—are created equal and that saying so is essential to knowing what we are fighting for. America and our values are worth fighting for—and that is the priority of the day.

The other thing to look for is the good. Look hard for the good and don't lose sight of it.

New York coffee shop owner Aaron Dahan had all of his baristas quit when he placed an Israeli flag in the window and began fundraising for Magen David Adom—the Israeli Red Cross.<sup>51</sup>

But his café didn't close—quite the opposite. Suppliers sent him free shipments of beans and cups.<sup>52</sup> Community members picked

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51. Reuven Fenton et al., *Jewish NYC Cafe Owner Says Suppliers Stepped Up After Anti-Israel Baristas Walked Out, Donating Coffee Beans and Cups*, N.Y. POST (Nov. 8, 2023), <https://nypost.com/2023/11/08/metro/jewish-cafe-owner-reveals-generosity-of-suppliers-after-anti-israel-baristas-walked-out/> [<https://perma.cc/CV7L-RWC7>].

52. *Id.*

up shifts for free.<sup>53</sup> There were lines around the block to buy a cup of coffee.<sup>54</sup> The cafe made \$25,000 in a single day.<sup>55</sup>

Just this week, American cowboys from the Great Plains and the Rockies traveled to Israel to tend to the fields and animals of Israeli farmers who were killed in the past month.<sup>56</sup> This is the opposite of the cheap solidarity of standing with Hamas that we see across our campuses and city centers. This is the essence of the West—of the idea that free societies must stand together.

It is not just, as I believe James Woolsey said, that we are all Jews now.<sup>57</sup> The reverse is also true. Israel is a mirror for the West, and for the United States—whose founders saw a version of themselves in the biblical nation that also inspired modern Zionists whose grieving descendants today are looking toward America with gratitude, but also with alarm, sensing a shared struggle ahead.

Second: we—you—must enforce the law.

The wave of elected so-called “progressive prosecutors” has proven to be an immensely terrible thing for law and order in cities across America.<sup>58</sup> It turns out that choosing not to enforce the law doesn’t reduce crime. It promotes it.

It is no coincidence that many of the same activists who have pushed to “defund the police” are also now publicly harassing Jews. Everyone needs equal protection, not only of the law but from the forces of chaos and violence. In Brooklyn, there have been an unconscionable number of violent attacks against Orthodox Jews over

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53. *Id.*

54. *Id.*

55. *Id.*

56. Brianna Herlihy, *Real-life American Cowboys Ride In to Help Israeli Farmers Under Siege After Hamas Terror Attacks*, FOX NEWS (Nov. 13, 2023), <https://www.foxnews.com/us/american-cowboys-saddle-up-help-israeli-farmers-front-line-hamas-attack> [https://perma.cc/2955-BJDX].

57. R. James Woolsey, *Opinion, We Are All Jews*, JERUSALEM POST, Sept. 26, 2003.

58. Zack Smith & Charles Stimson, *Rogue Progressive Prosecutors Promote Lawlessness Not Reform*, HERITAGE FOUNDATION (Aug. 29, 2022), <https://www.heritage.org/crime-and-justice/commentary/rogue-progressive-prosecutors-promote-lawlessness-not-reform> [https://perma.cc/M5K8-QMEC].

the past decade, correctly identified as hate crimes.<sup>59</sup> But they are also simply crimes that, if the law were upheld, would be far less likely to happen—whatever their motivation.

Masking at a protest is illegal in many states so that it does not become an attempt at mass-intimidation, à la the KKK.<sup>60</sup> Now maybe that's a good idea—maybe it's a bad one. But in nearby Virginia, it happens to be the law.<sup>61</sup> And yet, as David Bernstein recently pointed out in Eugene Volokh's blog, at George Mason University's Fairfax campus nearly all the protesters at a recent Students for Justice in Palestine rally were masked and covered.<sup>62</sup> Were they punished for breaking the law? I suspect if they had we would have read about it.

The rallies would likely be less susceptible to erupting in violence if the attendants weren't hiding their faces. So don't allow selective enforcement of this law, or any others. If white supremacists can't do it, then neither can antifa or Hamas sympathizers.

Third: no more double standards on speech.

Public universities are constitutionally forbidden from imposing content-based restrictions on free speech. And yet, that's precisely what they've been doing.

Ask any conservative—and I now know a few—who's tried to speak at a public university and had a "security fee" imposed on them or had their speeches quietly moved off campus and into

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59. Dion J. Pierre, *'We've Never Seen Anything Like This': Orthodox Jews Disproportionate Victims of New York Hate Crimes, According to Report*, ALGEMEINER (Jan. 3, 2023, 5:20 PM), <https://www.algemeiner.com/2023/01/03/weve-never-seen-anything-like-this-orthodox-jews-disproportionate-victims-in-new-york-hate-crime-according-to-report/> [https://perma.cc/3KH6-DAQF].

60. Robert A. Khan, *Anti-Mask Laws*, FREE SPEECH CENTER (Sep. 19, 2023), <https://firstamendment.mtsu.edu/article/anti-mask-laws/> [https://perma.cc/F6U2-7XYN].

61. VA. CODE ANN. § 18.2-422 (2010).

62. David Bernstein, *Anti-Masking Laws and Selective Law Enforcement at George Mason University*, REASON: VOLOKH CONSPIRACY (Oct. 19, 2023, 10:23 PM), <https://reason.com/volokh/2023/10/19/anti-masking-laws-and-selective-law-enforcement-at-george-mason-university/> [https://perma.cc/8KW4-RXV8].



small, restrictive venues where there aren't brazen content-based restrictions on their speech imposed by public universities.<sup>63</sup>

Private universities can legally restrict speech. But their restrictions may not be enforced discriminatorily. And yet, they are.

Take Yale Law School. In 2021, law student Trent Colbert invited classmates to his "trap house," in his announcement of a "constitution day bash" hosted by FedSoc and the Native American Law Students Association.<sup>64</sup> It took 12 hours for administrators to process discrimination complaints, haul Colbert in for a meeting, and suggest his career was on the line if he didn't sign an apology they penned on his behalf.<sup>65</sup> The law school's dean also authorized a message condemning Colbert's language.<sup>66</sup> Why? Because *trap house* was a term some claimed had racist associations with crack houses.<sup>67</sup>

But when Jewish students wrote to that dean some two weeks after the Hamas attacks, detailing the antisemitic vitriol they have received, they got a formulaic reply from her deputy, directing them to student support services.<sup>68</sup>

For certain students, kid gloves. For others, the maw of whatever hate their classmates and professors can think of. The universities play favorites based on the speech they prefer, and the racial group

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63. Melanie Wilcox, *University Creates Administrative Nightmare with Exorbitant Security Fees for Riley Gaines Event, Students Claim*, CAMPUS REFORM (Oct. 5, 2023, 11:33 AM), <https://www.campusreform.org/article/university-creates-administrative-nightmare-with-exorbitant-security-fees-for-riley-gaines-event-students-claim/24076> [https://perma.cc/5ZYX-HYP8].

64. Aaron Sibarium, *A Yale Law Student Sent a Lighthearted Email Inviting Classmates to His 'Trap House.' The School Is Now Calling Him to Account.*, WASH. FREE BEACON (Oct. 13, 2021), <https://freebeacon.com/campus/a-yale-law-student-sent-a-lighthearted-email-inviting-classmates-to-his-trap-house-the-school-is-now-calling-him-to-account/> [https://perma.cc/6FYM-9UKN].

65. *Id.*

66. *Id.*

67. *Id.*

68. Aaron Sibarium, *Yale Law Students for Hamas*, WASH. FREE BEACON (Nov. 10, 2023), <https://freebeacon.com/campus/law-students-for-hamas/> [https://perma.cc/EKJ8-CGV4].

hierarchies they've established. It's a nasty game and they need to be called to account for it.

Fourth, accept that you are the last line of defense and fight, fight, fight.

If you study history and if you look at where Jews stand, for better and usually for worse, you will understand where a culture, where a country, where a civilization stands. Whether it's on the way up or whether it's on the way down. Whether it's expanding its freedoms. Or whether it's contracting them.

Where liberty thrives, Jews thrive. Where difference is celebrated, Jews are celebrated. Where freedom of thought and faith and speech are protected, Jews tend to be, too. And when such virtues are regarded as threats, Jews will be regarded as the same.

As goes Ohio, so goes the nation. The Jews—please don't quote me on this—are Ohio.

But nothing is guaranteed. The right ideas don't win on their own. They need a voice. They need prosecutors.

Time to defend our values—the values that have made this country the freest, most tolerant society in the history of the world—without hesitation or apology.

The leftist intellectual Sidney Hook, who broke with the Communists, and called his memoir *Out of Step*, used to implore those around him to “always answer an accusation or a charge”—to not let falsehood stand unchallenged.<sup>69</sup>

We have let far too much go unchallenged. Too many lies have spread in the face of inaction as a result of fear or politesse.

No more.

Do not bite your tongue. Do not tremble. Do not go along with little lies. Speak up. Break the wall of lies. Let nothing go unchallenged.

Our enemies' failure is not assured and there is no cavalry coming. We are the cavalry. We are the last line of defense. Our civilization depends on us.

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69. See generally SIDNEY HOOK, *OUT OF STEP: AN UNQUIET LIFE IN THE 20TH CENTURY* (1987).

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It is a very rare thing for me not to be sitting at a Shabbat dinner table on a Friday night as the sun sets. So I hope you'll allow me to close with a little bit of Torah.

Tomorrow in synagogue we will read the portion of the Torah where Abraham's wife, Sarah, dies, at the ripe old age of 127.<sup>70</sup> We read in the Bible that she died in Kiryat-arba—now Hebron—in the land of Canaan.<sup>71</sup> We read that when she passes, "Abraham proceeded to mourn for Sarah and to bewail her."<sup>72</sup>

And the very next verse goes like this: "Then Abraham rose from beside his dead, and spoke to the Hittites, saying, 'I am a resident alien among you; sell me a burial site among you, that I may remove my dead for burial.'"<sup>73</sup>

So that's the first thing Abraham does: he buys a plot of land to bury Sarah. The second thing: he finds Isaac a wife.

The late great Rabbi Jonathan Sacks, who I was blessed to know, tells us this about the sequence of events: "Abraham heard the future calling to him. Sarah had died. Isaac was unmarried. Abraham had neither land nor grandchildren. He did not cry out, in anger or anguish, to God. Instead, he heard the still, small voice saying: *The next step depends on you.* You must create a future that I will fill with My spirit. That is how Abraham survived the shock and grief."<sup>74</sup>

This is how generations of Jews have survived. This is how all of us survive.

I am so honored to be here speaking in this place, in honor of someone who stood up courageously for the things that mattered most, and who was murdered by enemies of all that we are fighting for.

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70. *Genesis* 23:1.

71. *Genesis* 23:2.

72. *Id.*

73. *Genesis* 23:3–4.

74. Jonathan Sacks, *A Call From The Future*, RABBI SACKS LEGACY TRUST, <https://www.rabbisacks.org/covenant-conversation/chayei-sarah/a-call-from-the-future/> [<https://perma.cc/8DXV-E7JV>].

May her memory be for a blessing. It is for me.

There is another phrase traditional Jews invoke when speaking of someone who has been murdered: *Hashem Yikom Dama*.<sup>75</sup> May God avenge her death.

We leave vengeance to God. But fighting is for all of us. Especially when there is something so precious worth fighting for.

Ted once said of Barbara that “Barbara was Barbara because America, unlike any place in the world, gave her the space, freedom, oxygen, encouragement, and inspiration to be whatever she wanted to be.”<sup>76</sup>

There is no place like this country. And there is no second America to run to if this one fails.

So let’s get up. Get up and fight for our future. This is the fight of—and for—our lives.

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75. Tzvi Freeman, *What Does HYD Stand For?*, CHABAD-LUBAVITCH MEDIA CENTER (Nov. 29, 2023), [https://www.chabad.org/library/article\\_cdo/aid/6194737/jewish/What-Does-HYD-Stand-For.htm](https://www.chabad.org/library/article_cdo/aid/6194737/jewish/What-Does-HYD-Stand-For.htm) [<https://perma.cc/5R9G-TY8D>].

76. Olson, *supra* note 2, at 35.

**THE MEANING AND AMBIGUITY OF  
SECTION THREE OF THE FOURTEENTH AMENDMENT**

KURT T. LASH

TABLE OF CONTENTS

INTRODUCTION .....	310
METHODOLOGY .....	322
I. "CIVIL OFFICE UNDER THE UNITED STATES," CONGRESSIONAL PRECEDENT, AND LEGAL AUTHORITY .....	323
II. FRAMING SECTION THREE .....	328
A. <i>The House Debates</i> .....	338
B. <i>House Passage</i> .....	346
C. <i>The Senate Debates</i> .....	347
D. <i>The Republican Caucus</i> .....	349
E. <i>Final Congressional Debates on Section Three</i> .....	352
F. <i>The Final House Debate</i> .....	359
G. <i>Public Commentary During Framing and Initial Passage</i> .....	360
III. RATIFICATION.....	363
A. <i>The Presidency and the Electors Clause</i> .....	367
B. <i>Blount's Case and Story's Analysis During the Ratification     Phase</i> .....	372
C. <i>The Need for Enabling Legislation</i> .....	374
D. <i>The Concerns of Thomas Chalfant</i> .....	375
E. <i>The 1867 Reconstruction Acts</i> .....	379
F. <i>Early Commentary</i> .....	391
G. <i>Section Three and the Election of 1872</i> .....	382
IV. ANALYSIS AND CONCLUSION .....	384
APPENDIX: THE PROPOSALS.....	390

## THE MEANING AND AMBIGUITY OF SECTION THREE OF THE FOURTEENTH AMENDMENT

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### INTRODUCTION

The Fourteenth Amendment established the constitutional conditions for the readmission of those states which had attempted to secede from the Union during the American Civil War. Section Three of that amendment, when enforced under the powers granted by Section Five, prevented the leaders of the recent rebellion from returning to Congress, holding any state level office, or receiving any appointment by Democrat President Andrew Johnson, absent congressional permission. Its focus, in other words, was on rebellious disruption of state level decisionmaking and the potentially disruptive appointments by President Johnson.<sup>1</sup> Whether

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1. Section Three reads in its entirety:

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section Three accomplishes anything more remains unclear as a matter of history and ambiguous as a matter of constitutional text.<sup>2</sup>

The text of Section Three does not expressly (1) apply to future rebellions or insurrections, (2) apply to persons elected as President of the United States, (3) apply to persons seeking to qualify as a candidate for the Presidency, or (4) indicate whether the enforcement of Section Three requires the passage of enabling legislation. And these are just some of the deep textual ambiguities of Section Three.<sup>3</sup>

Although scholars have attempted to resolve these ambiguities in a variety of ways, no work to date has presented a systematic investigation of the history of the framing and ratification of Section Three.<sup>4</sup> As a result, scholars (and judges) have been working in the historical dark, insufficiently informed about how the draft developed over months of debate, uninformed of the constitutional

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U.S. CONST. amend. XIV, § 3.

2. By “ambiguous,” I mean a word or phrase capable of more than one meaning. See Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 286 (2017).

3. A robust scholarly debate has emerged regarding the proper reading of Section Three terms such as “office” and “officer” and those who have “previously taken an oath . . . as an officer of the United States.” See, e.g., Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution Part I: An Introduction*, 61 S. TEX. L. REV. 309 (2022) (first article of a series published in the South Texas Law Review); William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. PA. L. REV. (forthcoming 2024); Josh Blackman & Seth Barrett Tillman, *Sweeping and Forcing the President into Section 3*, 28 TEX. REV. L. & POL. 350 (forthcoming 2024). See also Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 CONST. COMMENT. 87 (2021); Mark A. Graber, *Disqualification From Office: Donald Trump v. the 39th Congress*, LAWFARE (Feb. 23, 2023, 4:40 PM), <https://www.lawfaremedia.org/article/disqualification-office-donald-trump-v-39th-congress> [<https://perma.cc/HCS8-2XM6>]; Steven Calabresi, *President Trump Can Not Be Disqualified*, WALL ST. J. (Sept. 12, 2023, 4:30 PM), <https://www.wsj.com/articles/trump-can-not-be-disqualified-14th-amendment-calabresi-16657a1b> [<https://perma.cc/M3YR-Z7BT>]. Because these articles primarily involve a textual analysis that does not directly engage the framing and ratification history of Section Three, I take no position on their arguments or conclusions.

4. Professor Gerard N. Magliocca has explored some aspects of the legislative and ratification history. See Magliocca, *supra* note 3. His article, however, does not explore the drafting debates or the discussions of Section Three during the ratifying phase. Other works contain discussions of parts of the framing history, but do not do so in a comprehensive or systematic manner.

precedents against which the final draft would be understood, and without any understanding whatsoever of how ratifiers engaged the proposed text.

For example, since some prior drafts of Section Three expressly limited the provision to the “late rebellion,” some scholars claim that the absence of such language in the final draft means Section Three applies to future rebellions.<sup>5</sup> What has gone unrecognized, or undiscussed, is that there were multiple prior drafts of Section Three. Some of these drafts expressly declared that the provision would apply to future rebellions.<sup>6</sup> The final draft, however, omits any such reference, rendering the text ambiguous in regard to its application to future rebellions or insurrections.<sup>7</sup> Another prior draft of Section Three expressly declared “[n]o person shall be qualified or shall hold the office of President or Vice President of the United States.”<sup>8</sup> The final amendment omits both the reference to “qualif[ying]” and the reference to “the office of President or vice president.” Instead, the amendment expressly names only persons

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5. See Baude & Paulsen, *supra* note 3, at 10 n.12 (“Indeed, for what it is worth, the legislative history of Section Three confirms that this is what the authors of the Fourteenth Amendment did. Earlier drafts had limited the Section’s application to the ‘late insurrection.’ Later versions dropped this limitation and generalized Section Three’s application to ‘insurrection’ and ‘rebellion.’” (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2767–68, 2770, 2869, 2921 (1866)). See also Mark A. Graber, *Treason, Insurrection, and Disqualification: From the Fugitive Slave Act of 1850 to Jan. 6, 2021*, LAWFARE (Sept. 26, 2022, 8:01 AM), <https://www.lawfaremedia.org/article/treason-insurrection-and-disqualification-fugitive-slave-act-1850-jan-6-2021> [<https://perma.cc/6Z89-X8QR>] (“The original version of Section 3 would have disenfranchised in federal elections held before July 4, 1870, ‘all persons who voluntarily adhered to the late insurrection, giving it aid and comfort.’ Reps. Samuel McKee of Kentucky and James Garfield of Ohio proposed bans on officeholding that would have been limited to ‘all persons who voluntarily adhered to the late insurrection.’ The final version of Section 3, however, speaks of insurrections generally, making no reference to the ‘late insurrection.’ No public debate took place on this textual choice, but the plain inference is that past and present officeholders who engaged in any insurrection were disqualified from holding office in the present and future.”).

6. See *infra* notes 165–168 and accompanying text.

7. U.S. CONST. amend. XIV, § 3.

8. See CONG. GLOBE, 39th Cong., 1st Sess. 919 (1866) (emphasis added). See *infra* notes 57–67 and accompanying text.



serving as “Senator or Representative in Congress, or elector of President and Vice-President.”<sup>9</sup>

In sum, comparing the final draft of Section Three to the full set of prior drafts renders it unclear whether the drafters intended the final language to include the office of President of the United States, or to bar persons from seeking to “qualify” for that office. Future ratifiers following the framing debates in the daily newspapers could reasonably conclude that the framers had intentionally omitted the language of prior drafts.

Any framer or ratifier with legal training had particularly good reason to presume the final draft of Section Three did not include the office of President of the United States. Longstanding precedent and the leading legal authority excluded the President from the category of civil officers “under the United States.” In the impeachment proceeding of William Blount (“Blount’s Case”) in 1799, the Senate ruled that senators were not included in the Impeachment Clause’s reference to “[t]he President, Vice President and all civil officers of the United States.”<sup>10</sup> As Representative James A. Bayard, Sr. explained, “it is clear that a Senator is not an officer *under* the Government. The Government consists of the President, the Senate, and House of Representatives, and they who constitute the Government cannot be said to be under it.”<sup>11</sup> In his massively influential *Commentaries on the Constitution*, Justice Joseph Story agreed with Bayard’s argument, noting that “the enumeration of the president and vice president, as impeachable officers, was indispensable” because they were not constitutionally “civil officers of the United States.”<sup>12</sup>

Members of the Reconstruction Congress knew about Blount’s Case, and they repeatedly relied on Justice Story’s *Commentaries*

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9. U.S. CONST. amend. XIV, § 3.

10. See 8 ANNALS OF CONG. 2248–2318 (1799), <https://perma.cc/ME6Q-7TVD>. See also U.S. CONST. art. II, § 4 (impeachment clause).

11. See 8 ANNALS OF CONG. 2258 (1799).

12. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 259–260, § 791 (Boston, Hilliard, Gray & Co. 1833) (emphasis added).

during the Fourteenth Amendment drafting debates.<sup>13</sup> In the previous Congress, Senator Reverdy Johnson had reminded his colleagues that, according to Senator Bayard's argument in Blount's Case, "it is clear that a Senator is not an officer *under* the Government. The Government consists of the President, the Senate, and House of Representatives, and they who constitute the Government cannot be said to be under it."<sup>14</sup>

Given the likelihood that judges would accept the precedent of Blount's Case and Justice Story's authority on the matter, it would have been foolish to the point of negligence for the framers to expect that courts would read Section Three's reference to "any office, civil or military" as impliedly including the office of President of the United States. More plausibly, they accepted both precedent and legal authority and instead expressly named the apex political offices they specifically wanted to be covered by the clause: senators and representatives. The same holds true for any legally trained ratifier with a copy of Justice Story's Commentaries.

In addition to precedent and legal authority, any ratifier applying a commonsense approach to the text and structure of Section Three could have reasonably concluded it did not include the President of the United States. Section Three begins by expressly addressing the three apex political institutions of the federal government: the House, the Senate, and the electors of the President and Vice President of the United States. These express references to high federal offices are followed by a general catch-all provision covering "any office, civil or military, under the United States, or under any state." That structure intuitively suggests that high offices are expressly named, while the innumerable lower offices, including everything from postmaster to turnpike toll collector, are covered by the catch-all provision. Lawyers call this commonsense rule of construction *expressio unius est exclusio alterius* (the expression of one thing means the exclusion of others).<sup>15</sup>

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13. See *infra* notes 57–68 and accompanying text.

14. CONG. GLOBE, 38th Cong., 1st Sess. 329 (1864) (quoting Mr. Bayard).

15. See ANTONIN SCALIA, A MATTER OF INTERPRETATION 25–26 (1997) (canons such as *noscitur a sociis* and *expressio unius est exclusio alterius* are "commonsensical").

This intuitive approach to reading legal texts led one of the most sophisticated lawyers in the Senate to conclude that Section Three excluded the office of President. In a speech exploring the meaning and scope of Section Three, Senator and former United States Attorney General Reverdy Johnson remarked: “[former rebels] may be elected President or Vice President of the United States, and why did you omit to exclude them?”<sup>16</sup> When Senator Lot Morrill interrupted Senator Johnson and pointed to Section Three’s words, “or hold any office, civil or military, under the United States,”<sup>17</sup> Senator Johnson replied, “[p]erhaps I am wrong as to the exclusion from the Presidency; no doubt I am; but I was misled by noticing the specific exclusion in the case of Senators and Representatives.”<sup>18</sup>

What had “misled” Senator Johnson was the commonsense reading of Section Three according to the *expressio unius canon*. The former attorney general had made this “mistake” (if he was mistaken) as part of a carefully prepared speech specifically devoted to an analysis of Section Three and the rest of the Fourteenth Amendment. If the text and structure of Section Three “misled” the former Attorney General of the United States into thinking Section Three excluded the office of President of the United States, then ordinary ratifiers bringing the same commonsense approach to the text would have been just as easily “misled.” Nor would the public have known about Senator Morrill’s “correction”: although multiple newspapers published substantial portions of the framing debates, no newspaper seems to have reported the Johnson-Morrill exchange. In fact, no scholar has identified a single example of a ratifier describing Section Three as including the office of President.<sup>19</sup>

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16. CONG. GLOBE, 39th Cong., 1st Sess. 2899 (1866).

17. *Id.*

18. *Id.*

19. Although one scholar, John Vlahoplus, has claimed to have discovered a single example to the contrary, an examination of the original document does not support the claim. See *infra* notes 239–240 and accompanying text. It is possible, of course, that someone somewhere may have held this view. The discovery of scattered examples, however, would neither establish consensus in understanding or resolve textual ambiguity, especially in light of long-standing congressional precedent and legal authority to the contrary.

Despite text, structure, precedent, legal authority, and commonsense canons of interpretation, some scholars insist that Section Three cannot be reasonably read as excluding the office of President of the United States. Such an omission would be “absurd,” they insist, since it would allow rebels like Jefferson Davis to become President of the United States.<sup>20</sup> These claims reflect concerns of the present, not those in play at the time of the Fourteenth Amendment. No one during the framing debates referenced the need to prevent loyal Americans from electing the wrong person as the President of the United States. Nor is there any evidence that the ratifiers had any such concern. Instead, both framers and ratifiers discussed the very real need to prevent states from sending rebels like Jefferson Davis to Congress.<sup>21</sup>

Section Three addressed the serious risk of rebellious disruption of state-level decisionmaking, not the decisions of the American electorate as a whole. This is why the text expressly enumerated the state selected positions of senator, representative, and electors of the President and Vice President of the United States. Leaders of the recent rebellion would not be allowed to leverage their remaining local popularity into holding any of these key positions. Moderate Republicans believed this would make room for the restoration of a loyal political class in the former rebel states. As Senator Daniel Clark explained during the Section Three debates, once leading rebels were removed, “those who have moved in humble spheres [would] return to their loyalty and to the Government.”<sup>22</sup> Representative William Windom similarly believed that “if leading

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20. See Baude & Paulsen, *supra* note 3, at 111 (discussing the “seeming absurdity of the prospect of exclusion of the offices of President and Vice President”).

21. See e.g., *Information for the People. Proposed Amendment to the Constitution. The Union Republican Platform*, EVENING TEL. (Phila.), Sept. 26, 1866, at 4 (“The intention of [Section Three] is to give the offices to the Union men of the South, so that we shall have perpetual peace, and so that Jefferson Davis and other traitors like him shall never again control this Government, and thus endanger its liberties. *If those leading Rebels should continue to hold the offices in the South*, we shall have no peace, but, on the contrary, perpetual strife.”) (emphasis added); *Proposed Amendment to the Constitution. The Union Republican Platform*, SMYRNA TIMES (Del.), Oct. 10, 1866, at 2 (same).

22. CONG. GLOBE, 39th Cong., 1st Sess. 2771 (1866).

rebels are to be excluded from office, State as well as Federal, there is a reasonable probability that the loyal men of the South will control [local office].”<sup>23</sup>

In sum, far from absurd, it was perfectly reasonable to leave the national electorate unimpeded in their choice of President of the United States. The text targeted the only positions leading rebels could realistically hope to hold: the offices of senator, representative, presidential elector, presidential appointment, or state office. By targeting membership in the electoral college, rather than the office of President, Republicans prevented influential southern Democrats from joining their votes with their northern counterparts and electing an obstructionist Democrat President. The strategy worked. In the election of 1868, despite the scattered participation of former rebel officers as presidential electors, southern electors provided the votes necessary to give the election to the Republican Ulysses S. Grant.<sup>24</sup>

Finally, none of the multiple drafts of Section Three addressed whether the text could be enforced in the absence of congressional enabling legislation.<sup>25</sup> Instead, key framers insisted that the text was not self-executing. For example, Joint Committee member Thaddeus Stevens explained that Congress would have to pass enabling legislation since the Joint Committee’s draft of Section Three would “not execute itself.”<sup>26</sup> Once Congress had finalized the language of Section Three, Representative Stevens again noted the need for Congress to pass enabling legislation.<sup>27</sup> Newspapers published

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23. *Id.* at 3170.

24. *See, e.g.*, CHARLESTON DAILY NEWS (S.C.), Dec. 3, 1868, at 1 (reporting “The Alabama Presidential Electors met yesterday and cast eight votes for Grant and Colfax” and “The North Carolina Presidential electors met yesterday and cast the vote of the State for Grant and Colfax”).

25. A power granted under the Section Five of the Fourteenth Amendment.

26. CONG. GLOBE, 39th Cong., 1st Sess. 2544 (1866). Representative Stevens was a member of the Joint Committee on Reconstruction, which submitted the original draft of the Fourteenth Amendment. *See Joint Committee on Reconstruction, Membership* (1865–1867), reprinted in 2 THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS 24 (Kurt T. Lash ed., 2021).

27. CONG. GLOBE, 39th Cong., 1st Sess. 3148 (1866) (“I see no hope of safety unless in the prescription of proper enabling acts . . . [L]et us no longer delay; take what we can

both of Stevens' declarations.<sup>28</sup> At least some participants in the ratifying debates believed enabling legislation would be necessary,<sup>29</sup> and no one claimed otherwise. When Congress moved to enact such legislation, Senate Judiciary Chair Lyman Trumbull explained that doing so was necessary since the text "provides no means for enforcing itself."<sup>30</sup>

In sum, text, structure, congressional precedent, commonsense interpretation, and the available historical record all suggest it would have been reasonable for the ratifiers to understand Section Three as excluding the position of President of the United States.

It is, of course, textually possible to read Section Three as impliedly including the President in the phrase "any office, civil or military, under the United States."<sup>31</sup> It also is possible to read the text as permitting a single, low-level state official to disqualify a presidential candidate prior to any adjudicated guilt and in the absence of congressional enforcement legislation. It also is possible to read a clause created in response to a civil war involving millions of soldiers and causing the deaths of over 600,000 Americans as somehow applying to a future transient riot. But none of this is required by either the text or the historical record.

In fact, the only thing that is clear about the text of Section Three is that it accomplished the only purposes Reconstruction-era Republicans cared about: When combined with Section Five, Section Three empowered Congress to prevent leading rebels from returning to Congress, skewing local slates of presidential electors, or

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get now, and hope for better things in further legislation; in enabling acts or other provisions.").

28. See *Closing a Debate*, AMERICAN CITIZEN (Butler Pa.), May 30, 1866, at p. 1 (quoting Stevens' statement on the Joint Committee draft of Section Three that the section "will not execute itself."); *Proceedings of Congress*, CHICAGO TRIBUNE, (Ill.), June 14, 1866, at p. 1 (quoting Stevens' statement regarding the final draft of Section Three that he "saw no hope of safety unless in the prescription of proper enabling acts").

29. See *infra* notes 232–244 and accompanying text.

30. *Remarks of Mr. Trumbull*, CRISIS (Columbus, Ohio), May 5, 1869, at 2 (reporting on the Senate debates of April 8, 1869).

31. U.S. CONST. amend. XIV, § 3.

receiving appointments to federal or state offices absent permission from two-thirds of both Houses of Congress.

All else remains, at best, historically unclear or textually ambiguous.

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Part I presents the traditional understanding of the term “civil officer under the United States” at the time of the adoption of the Fourteenth Amendment. Even if people at the time commonly understood the President as holding an “office,” the background understanding of “civil office under the United States” was more complicated. According to the congressional precedent of Blount’s Case, the Impeachment Clause’s reference to all “civil officers of the United States” should not be read to include the office of senators.<sup>32</sup> According to Justice Story in his influential Commentaries, this was because none of the apex political offices of senator, representative, or President were “civil offices” of or “under” the United States.<sup>33</sup> This is why it was “indispensable” to enumerate the office of President of the United States in the Impeachment Clause, since this was not a “civil office” “under the United States.”<sup>34</sup> Members of the Thirty-Ninth Congress were aware of both Blount’s Case and Commentaries, and it is reasonable to presume they drafted Section Three understanding how the phrase would be likely read by legally trained ratifiers and courts of law.

Part II explores the framing history of Section Three. The historical evidence, much of which is presented here for the first time, reveals a variety of approaches to dealing with the issue of the rebels-in-waiting. The earliest draft, one proposed by Samuel McKee, expressly prohibited certain persons from qualifying or holding the office of the President of the United States if they had engaged in the past rebellion or any rebellion “hereafter.”<sup>35</sup> The final draft of Section Three maintained the ban on holding office but expressly

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32. See 8 ANNALS OF CONG. 2258 (1799).

33. STORY, *supra* note 12, at § 791.

34. *Id.*

35. CONG. GLOBE, 39th Cong., 1st Sess. 919 (1866).

named only the House, Senate and electors of the President and Vice President of the United States. All references to future rebellions were removed. Section Three's final language led one of the most respected lawyers in the House, Senator Reverdy Johnson, to presume that the office of the President was not included.<sup>36</sup> Although another member appears to have convinced Senator Johnson otherwise,<sup>37</sup> the exchange went unreported in the press, leaving the public in the position of making the same reasonable assumption as had Johnson.<sup>38</sup> They had good reason to do so: The commonsense rule of construction known as *expressio unius est exclusio alterius* suggests that the text of Section Three expressly names those apex political offices the framers meant to include.<sup>39</sup> The ratifiers could have also reasonably concluded that the text required enforcement legislation. As Representative Thaddeus Stevens had publicly declared regarding the Joint Committee's draft of Section Three, it would "not execute itself."<sup>40</sup>

Part III examines the public commentary on Section Three, both during its framing and during the ratification debates. Much of this section also contains previously unpublished historical evidence. During the public debates, not a single ratifier suggested that Section Three included the office of President of the United States. Instead, ratifiers focused on Section Three's exclusion of former rebels like Jefferson Davis from returning to Congress. The subject of future application rarely arose. On those rare occasions when it did, opinions differed. Some ratifiers believed that the text included future rebellions, while others criticized the provision's failure to address rebellions in the hereafter.

As far as enabling legislation was concerned, no one disagreed with Representative Stevens's point about the need for enabling legislation. Instead, in Stevens's home state of Pennsylvania, Representative Thomas Chalfant presumed that no person could

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36. *Id.* at 2899.

37. *Id.*

38. *Id.*

39. See SCALIA, *supra* note 15.

40. CONG. GLOBE, *supra* note 26.



properly be disqualified under Section Three except by way of a legislatively created tribunal.<sup>41</sup> In *Griffin's Case*,<sup>42</sup> Chief Justice Salmon Chase agreed and declared that no one could be disqualified from office in the absence of enabling legislation.<sup>43</sup> Only months after the ratification of the Fourteenth Amendment, Senator Lyman Trumbull supported the enactment of such legislation since, as he explained, the constitutional text “provides no means for enforcing itself.”<sup>44</sup>

Part IV analyzes the above evidence. I conclude that the historically verifiable public understanding of Section Three is quite narrow. The evidence overwhelmingly supports a reading of Section Three that applied to thousands of then-living rebels who realistically threatened to hijack the agenda of the Reconstruction Congress or receive ill-advised appointments by Democrat President Andrew Johnson. Beyond this narrow meaning, the text was capable of multiple reasonable interpretations, including whether it applied to candidates seeking to qualify for office, whether it applied to persons seeking the office of the President of the United States, whether it applied to future as well as past rebellions, and whether its enforcement required prior passage of enabling legislation. Although some commentators claim it would have been absurd not to prohibit former rebels like Jefferson Davis from being elected President of the United States,<sup>45</sup> there is no evidence any framer or ratifier feared such an unlikely possibility. Instead, Republicans prevented states from adding leading rebels to their slate of presidential electors. This, moderate republicans believed, would be sufficient.

The Article concludes with an appendix containing the textual precursors of Section Three of the Fourteenth Amendment.

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41. See discussion *infra* text accompanying notes 246–248.

42. 11 F. Cas. 7 (C.C.D. Va. 1869) (No. 5,815).

43. *Id.* at 26.

44. CRISIS, *supra* note 30.

45. See Baude & Paulsen, *supra* note 3, at 111 (discussing the “seeming absurdity of the prospect of exclusion of the offices of President and Vice President”).

## METHODOLOGY

A brief word about this paper's interpretive methodology. Constitutional amendments derive their authority not from the intentions of their framers, but from the considered judgment and approbation of their ratifiers. Accordingly, this essay seeks to recover the likely public understanding of Section Three of the Fourteenth Amendment. Regardless of one's view of originalist interpretation of the Constitution, constitutional scholars broadly concede the relevance of original public understanding.

Although originalist scholars often (though not always) distinguish the relevance of the original framers' intent from that of original public understanding, in the case of the Fourteenth Amendment the categories substantially overlap. Unlike the secret debates attending the drafting of the original Constitution, the framing debates on the Fourteenth Amendment were remarkably public. Newspapers across the United States, both local and national, published daily accounts of the congressional framing debates including, as we shall see, the various proposed drafts of Section Three. The public was informed of the arguments in favor of and in opposition to such drafts, and they were kept continuously up to date on whether radical or more moderate proposals had gained the upper hand.

It makes sense, therefore, that scholars have stressed the relevance of various drafts of Section Three, including the framers' decision to omit certain language found in early drafts.<sup>46</sup> These decisions inform not just the framers' evolving intentions, but also the public's likely understanding of the final draft, as they too knew what had been considered and ultimately omitted.

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46. See, e.g., Mark A. Graber, *Section Three of the Fourteenth Amendment: Our Questions, Their Answers* 14 (U. Md. Francis King Carey Sch. L. Legal Stud. Research Paper No. 2023-16, 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4591133](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4591133) [<https://perma.cc/TE9A-8FX9>] ("At the crucial stage of the drafting process, Republicans rejected language that spoke of 'the late rebellion' in favor of language that referred to 'insurrections and rebellions' more generally.").

Although Section Three scholarship often ranges across the entire field of American history, from the Founding to the twentieth century, I have focused my analysis on the framing and ratification debates. These are the most relevant discussions for determining the likely public understanding of the text at the time of its ratification in 1868. Although other Section Three scholars rely on post-ratification commentary,<sup>47</sup> I focus on what all scholars agree is the most relevant period for determining the original understanding of the Fourteenth Amendment.

I. “CIVIL OFFICE UNDER THE UNITED STATES,” CONGRESSIONAL PRECEDENT, AND LEGAL AUTHORITY

Section Three begins by listing the offices prohibited to certain persons absent congressional permission. According to the text, “No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State . . . .”<sup>48</sup> There is no debate over the meaning of the expressly enumerated offices of senator, representative, and presidential elector. The meaning and scope of the general catch-all reference to “office[s], civil or military, under the United States” is undefined.

Today, courts and commentators have little reason to distinguish the term “office” from “civil office” or offices “under the United States.” At the time of the Founding and during Reconstruction, however, these small differences in language made a critical difference in the legal meaning of constitutional texts.

In *Blount’s Case*,<sup>49</sup> for example, the Senate had to determine whether Tennessee Senator William Blount was a “civil officer”

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47. See, e.g., Baude and Paulsen, *supra* note 3, at 12 n. 22 and accompanying text (discussing as relevant statutes pass in 1872).

48. U.S. CONST. amend. XIV, § 3.

49. See 8 ANNALS OF CONG. 2248–2318 (1799). *Blount’s Case* created a precedent that prevails to this day—senators cannot be impeached. See Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 115 (1995) (“Further support for this officer/legislator distinction comes from the Impeachment Clause, which makes ‘all civil Officers of the United States’ subject to removal. In

subject to impeachment under Article II, Section Four. That clause declares:

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.<sup>50</sup>

Senator Blount’s defense counsel maintained that senators were not “civil officers” as that term was used in the Constitution. According to Representative James Asherton Bayard, Sr., “it is clear that a Senator is not an officer *under* the Government. The Government consists of the President, the Senate, and House of Representatives, and they who constitute the Government cannot be said to be under it.”<sup>51</sup> The Senate agreed and voted down a resolution stating that “Blount was a civil officer of the United States . . . and, therefore, liable to be impeached by the House of Representatives.”<sup>52</sup> Instead, the Senate dismissed the case for want of “jurisdiction.”<sup>53</sup>

In his influential Commentaries on the Constitution, Justice Story discussed Blount’s Case and the constitutional meaning of “civil officer.”<sup>54</sup> According to Story, the early Senate had likely concluded that “civil officers of the United States” were those who “derived their appointment from, and under the national government.”<sup>55</sup> “In

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the William Blount impeachment case in 1798, the Senate correctly rejected the idea that its members were ‘civil Officers’ within the meaning of the Constitution, and thus subject to impeachment.”) See also Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution Part IV: The “Office . . . Under the United States” Drafting Convention*, 62 S. TEX. L. REV. 455, 526–28 (2023) (discussing Blount’s Case).

50. U.S. CONST. art. II, § 4.

51. 8 ANNALS OF CONG. 2258 (1799).

52. *Id.* at 2318.

53. *Id.* at 2319.

54. See STORY, *Supra* note 12, at 259–60, §791.

55. *Id.* at 259. See also U.S. CONST. art. I, § 6, cl. 2 (“No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased [sic] during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”) (emphasis added).

this view,” Justice Story explained, “the enumeration of the president and vice president, as impeachable officers, was indispensable; for they derive, or may derive, their office from a source paramount to the national government.”<sup>56</sup>

The framers of the Fourteenth Amendment accepted the authority of Justice Story’s Commentaries, and they cited and quoted his work during congressional debates.<sup>57</sup> Members of the Reconstruction Congress were particularly aware of Blount’s Case and Justice Story’s analysis of it. In the Thirty-Eighth Congress, Senator Reverdy Johnson had reminded his colleagues that, according to Representative Bayard’s argument in Blount’s Case, “it is clear that a Senator is not an officer under the Government. The Government consists of the President, the Senate, and House of Representatives, and they who constitute the Government cannot be said to be under it.”<sup>58</sup> In 1868, Charles Sumner relied on Senator Bayard arguments in Blount’s Case, which Sumner described as having been “adopted by no less an authority than our highest commentator, Judge Story.”<sup>59</sup>

Republican usage in the Thirty-Ninth Congress was consistent with both the Blount precedent and Justice Story’s analysis. Although Republicans sometimes referred to the President as the

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56. STORY, *supra* note 12, at 259–60.

57. See, e.g., US House, Debate Continued, “Privileges and Immunities” Amendment, Speeches of John Bingham and Giles Hotchkiss, Vote to Postpone Consideration (Feb. 28, 1866), reprinted in 2 THE RECONSTRUCTION AMENDMENTS, *supra* note 26, at 115.

58. CONG. GLOBE, *supra* note 14, at 329.

59. CHARLES SUMNER, EXPULSION OF THE PRESIDENT: OPINION OF HON. CHARLES SUMNER, OF MASSACHUSETTS, IN THE CASE OF THE IMPEACHMENT OF ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES 5 (Washington, Gov’t Printing Off. 1868). For more ratification period commentary involving Blount’s Case and Justice Story’s analysis, see *infra* notes 62–68 and accompanying text. Not every member of Congress was certain Justice Story’s analysis was correct. For example, one month after the passage of the Fourteenth Amendment, a four-member committee issued a report in which they suggested Justice Story was “incautious” in his analysis of Blount’s Case. See CONG. GLOBE, 39th Cong., 1st Sess. 3940 (1866) (the “Conkling Report.”). The committee nevertheless left Justice Story’s analysis unchallenged and encouraged Congress to avoid making any new “precedent” on the issue. *Id.* (committee suggesting resolution). Congress accepted the committee’s recommendation. *Id.* at 3942 (accepting the committee’s recommendation). No newspaper published the report’s criticism of Justice Story’s analysis.

“chief executive officer of the Government,”<sup>60</sup> no Republican in the Thirty-Ninth Congress ever referred to the President of the United States as a “civil officer under the United States.” In fact, when Democrat President Andrew Johnson referred to himself as “chief civil executive officer of the United States,”<sup>61</sup> Republicans mocked his ignorance of constitutional terminology. According to Senator Jacob Howard, President Johnson had added “what is not contained in the Constitution or the laws of the land.”<sup>62</sup> Only a few days after denouncing President Johnson’s language, the punctilious Senator Howard co-authored the final version of Section Three.<sup>63</sup>

Blount’s Case remained in the public eye throughout the ratification period. What might seem an obscure precedent today was, at the time, directly relevant to debates over presidential impeachment<sup>64</sup> and whether Senator Benjamin Wade was a “civil officer” eligible to become president in the case of President Johnson’s impeachment and removal.<sup>65</sup> For example, on April 15, 1868, the Louisville Daily Journal published an extended editorial discussing whether the President was “an officer of the United States.”<sup>66</sup> In

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60. See CONG. GLOBE, 39th Cong., 1st Sess. 775 (1866) (Senator Roscoe Conkling quoting the report of Attorney General James Speed). Abraham Lincoln appointed Attorney General Speed, who continued in office for a short time under President Johnson.

61. *Id.* at 2551.

62. *Id.* Senator Howard would not have objected to President Johnson referring to himself as “chief executive officer.” After all, the Republican Attorney General James Speed used this phrase in official documents. See *id.* at 775. President Johnson’s error was his referring to the President of the United States as a “chief *civil* executive officer.” As Senator Howard noted, no such language existed in the Constitution, and it ran counter to congressional precedent and legal authority. See *id.*

63. See 2 THE RECONSTRUCTION AMENDMENTS, *supra* note 26, at 185.

64. See *supra* note 59.

65. See, e.g., *The Presidential Succession—Mr. Churchill’s Bill*, DAILY NAT’L INTELLIGENCER (D.C.), Apr. 8, 1868, at 2 (citing Blount’s Case and Justice Story’s analysis of the same); Editorial, *The Eligibility of the President Pro Tempore of the Senate to be Acting President*, DAILY NAT’L INTELLIGENCER (D.C.), Apr. 18, 1868, at 2 (discussing Senator Wade’s eligibility, and citing George Paschal, Joseph Story, and Francis Wharton’s position concerning Senator Blount’s Case); *Congressional—Senate*, THE EVENING STAR (D.C.), Dec. 6, 1867, at 1 (citing both Blount’s Case and Justice Story’s *Commentaries*).

66. *A Raking Shot at Some Accepted Doctrines*, LOUISVILLE DAILY J. (K.Y.), Apr. 15, 1868, at 1.

their essay, the editors expressly pointed to the Impeachment Clause and Justice Story's analysis of Blount's Case:

Is the President an officer of the United States? What is an officer of the United States? . . . Our answer is that an officer of the United States is one who derives his appointment from the government of the United States; and the answer, we think, is unanswerable. It is generally admitted. . . . Says the fourth section of the second article: "The President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors." Herein, be it noted, the President and Vice-President are not included among "civil officers of the United States", [sic] but on the contrary, are distinguished from them, the language of the Constitution being, "The President, Vice-President, and all civil officers of the United States," not, "The President, Vice President, and all other civil officers of the United States." The language implies that the President and Vice-President are not officers of the United States. It fairly admits of no other construction. In the words of Mr. Justice Story, it "does not even affect to consider them officers of the United States." See section 793 of Story's Commentaries. The argument is thus supported by the authority of the most celebrated commentator on the Constitution as well as by the language of the Constitution itself.<sup>67</sup>

In sum, at the time of the framing and ratification of the Fourteenth Amendment, the precedent of Blount's Case and Justice Story's analysis were accepted and well known both in and out of Congress.<sup>68</sup>

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67. *Id.*; see also John J. Connolly, Did *Anyone* in the Late 1860s Believe the President Was Not an Officer of the United States? (Dec. 20, 2023) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4658473](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4658473) [https://perma.cc/TY4J-NQN8].

68. In addition to Justice Story's *Commentaries*, see JOHN NORTON POMEROY, AN INTRODUCTION TO CONSTITUTIONAL LAW OF THE UNITED STATES 481 (New York, Hurd and Houghton 1868) ("In 1797, upon the trial of an impeachment preferred against William Blount, a Senator, the Senate decided that members of their own body are not 'civil officers' within the meaning of the Constitution. . . . The term 'civil officers' embraces, therefore, the judges of the United States courts, and all subordinates in the Executive Department."); GEORGE WASHINGTON PASCAL, THE CONSTITUTION OF THE UNITED

## II. FRAMING SECTION THREE

The Thirty-Ninth Congress who framed and passed the Fourteenth Amendment first met in December of 1865.<sup>69</sup> The Civil War had only recently ended and the country remained in mourning for the assassinated Abraham Lincoln. Although now-President Andrew Johnson had appointed provisional governments in the former rebel states, congressional Republicans refused to allow the return of representatives from the southern states.<sup>70</sup>

The ratification of the Thirteenth Amendment freed four million enslaved Americans. In doing so, however, it created an enormous political problem for congressional Republicans. These now-free Americans no longer would be counted as “three fifths” of a person for the purposes of determining state representation in the House of Representatives. At the next census, these Americans would count as a full five fifths, resulting in the congressional amplification of southern Democratic political power—the same rebels who had betrayed the country and caused the deaths of 600,000 Americans. Even more galling, the South had had the audacity to send former confederate civil and military leaders to Congress as their chosen state representatives, including the Vice President of the Confederacy, Alexander Stephens.<sup>71</sup>

The Republicans of the incoming Thirty-Ninth Congress responded by making two key moves at the beginning of the session. First, they refused to admit any representative from a former rebel

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STATES DEFINED AND CAREFULLY ANNOTATED 185 (2d ed., W.H. & O.H. Morrison 1876) (1868) (“A senator or representative in Congress is not such [sic] civil officer.”) (citing “Blount’s Trial” and Justice Story’s *Commentaries* sections 793 and 802). Paschal cites the two-volume version of Justice Story’s *Commentaries*, which contains the exact quote from the three-volume edition: “In this view, the enumeration of the President and Vice-President, as impeachable officers, was indispensable.” 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 559 (Thomas M. Cooley, ed., Boston, Little, Brown & Co. 4th ed. 1873) (1833).

69. See 2 THE RECONSTRUCTION AMENDMENTS, *Supra* note 26, at 5.

70. *Id.*

71. See ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877 196 (1988).



state.<sup>72</sup> Second, they created the fifteen-member Joint Committee on Reconstruction and tasked that committee with determining whether constitutional amendments should be adopted prior to the readmission of the southern states.<sup>73</sup>

Over the course of the first three months of 1866, the Joint Committee considered multiple strategies for dealing with the eventual return of southern representatives. One approach involved changing the method by which the Constitution apportioned representatives in the House.<sup>74</sup> This was supplemented by proposals to deny either the vote or federal office to any person who had participated in the rebellion. The latter approach first appeared in a proposed amendment offered by Representative Samuel McKee.

An Unconditional Unionist from Kentucky, Representative McKee had aligned himself with the radical wing of the Republican party.<sup>75</sup> On February 19, 1866, he submitted the following proposed amendment:

No person shall be qualified<sup>76</sup> or shall hold the office of President or Vice President of the United States, Senator or Representative in the national Congress, or any office now held under appointment from the President of the United States, and requiring the confirmation of the Senate, who has been or shall hereafter be

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72. See *US House, Opening Day of Thirty-Ninth Congress, Exclusion of Former Rebel States, Appointing Joint Committee on Reconstruction* (Dec. 4, 1865) reprinted in 2 *THE RECONSTRUCTION AMENDMENTS*, *supra* note 26, at 20–21.

73. See *US Senate, Appointing Joint Committee on Reconstruction* (Dec. 12, 1865), reprinted in 2 *THE RECONSTRUCTION AMENDMENTS*, *supra* note 26, at 23.

74. See *Joint Committee, Proposed Apportionment Amendment, Exclusion of "Insurgent States"* (Jan. 9, 1866), reprinted in 2 *THE RECONSTRUCTION AMENDMENTS*, *supra* note 26, at 33.

75. To the disgust of Kentucky Democrats. See *Letter to the Editor, Brilliant Democratic Victory—General Palmer's Military Interference Against Rebuked*, *DAILY ENQUIRER* (Cin.), Jan. 17, 1866, at 2 ("If the race for Congress could be run over, Samuel McKee, whose ultra radicalism at Washington has disgusted every body, would be beaten two thousand votes."); see also *Personal Characteristics of the Thirty-Ninth Congress (Washington Letter to the Troy Times)*, *MIRROR & FARMER* (Manchester, N.H.), Mar. 24, 1866, at 3 ("The most radical man from the border states is Samuel McKee of Kentucky.").

76. Newspapers read this term as meaning "nominated." See *Thirty-ninth Congress—1st Session: House of Representatives, Amendment*, *THE DAILY AGE* (Phila.), Feb. 20, 1866, at 1.

engaged in any armed conspiracy or rebellion against the Government of the United States, or has held or shall hereafter hold any office, either civil or military, under any pretended government or conspiracy set up within the same, or who has voluntarily aided, or who shall hereafter voluntarily aid, abet or encourage any conspiracy or rebellion against the Government of the United States.<sup>77</sup>

Representative McKee's proposal expressly named the office of President of the United States, prohibited being "qualified" for as well as "hold[ing]" the office, and applied to both past and future rebellions (those "hereafter"). This is followed by a general catch-all reference to "any office under appointment from the President of the United States."

Representative McKee apparently assumed that a general reference to participating in "conspiracy or rebellion" would not be read as applying to future events, so he included a specific reference to future rebellions—and did so three separate times. Note also that Representative McKee begins by expressly addressing each of the high federal branches of government and then moves to a general catch-all reference to appointed offices "under" the appointment of the President.

On March 3, 1866, Representative McKee delivered a lengthy speech explaining the meaning and scope of his proposal.<sup>78</sup> He condemned the idea that "red-handed traitors, if they have taken an oath to support the Constitution, have as much right to come into this Capitol and legislate for the people as the gallant soldier who

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77. CONG. GLOBE, 39th Cong., 1st Sess. 919 (1866). In his recent book, *Punish Treason, Reward Loyalty: The Forgotten Goals of Constitutional Reform after the Civil War* (2023), Professor Mark Graber paraphrases Representative McKee's proposal as "[n]o person shall be qualified or shall hold [various federal offices] who has been or shall hereafter be engaged in any armed conspiracy or rebellion against the United States." *Id.* at 152. In a recent paper, Professor Graber again presents a different but still severely edited version of Representative McKee's proposal. See Graber, *supra* note 46, at 22 (McKee's proposal "included 'the office of President or Vice President of the United States' as among the 'office(s) under the Government' to which he would disqualify former confederates").

78. CONG. GLOBE, 39th Cong., 1st Sess. 1162–1165 (1866).

bore the flag of his country amid the smoke and thunder of battle.”<sup>79</sup> He then reminded the House of the horrific crimes committed by the men who now demanded readmission to Congress:

Go tell it to the survivors of the twelve thousand heroes who in the low, flat marsh of Belle Isle, passed the terrible winter of 1863 and 1864, and the ghosts of the starved and freezing dead of that pen of misery will confront you with the living heroes; and if shame itself does not compel you to call back the assertion, then you have not the heart of a man.<sup>80</sup>

Representative McKee’s speech repeatedly stressed its application to still living mass-murderers who had led the rebellion against the Union. His amendment would ensure

that those, and those only, who are true to the nation, and who fight against treason, shall have the reward given them to rule the land, and by this prove that the hundreds of thousands who have gone down to their graves in the death-grapple with treason have not died in vain.<sup>81</sup>

“Let us adopt this amendment,” he declared, “and the men who have proved unfaithful, the men who made war upon us, can never assume control of this Government again.”<sup>82</sup> Newspapers across the country published Representative McKee’s proposed constitutional amendment.<sup>83</sup> Meanwhile, the House referred the proposal

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79. *Id.* at 1163.

80. *Id.*

81. *Id.*

82. *Id.* at 1164.

83. *See, e.g.*, BOS. DAILY ADVERTISER, Mar. 14, 1866, p. 4 (full proposal); THE EVENING POST (N.Y.C.), Mar. 3, 1866, at 4 (paraphrasing amendment as “no person should be qualified to hold the office of President or Vice President . . . who had voluntarily aided the rebellion, or who should hereafter be guilty of similar offences”); ALBANY EVENING J. (N.Y.), Mar. 3, 1866, at 3 (same); HARTFORD DAILY COURANT (Conn.), Mar. 5, 1866, at 3 (same). *See also* SEMI-WEEKLY TELEGRAPH (Salt Lake City, Utah), Feb. 22, 1866, at 2; IDAHO TRI-WEEKLY STATESMAN (Boise), Mar. 1, 1866, at 3 (“February 19-- . . . Mr. McKee introduced a joint resolution, amending the Constitution of the United States so as to exclude from all offices of Government those who have, or may hereafter, engage in rebellion or conspiracy against the Government.”); EVENING POST (N.Y.C.), Feb. 19, 1866, at 4; ALBANY EVENING J. (N.Y.), Feb. 20, 1866, at 1; ARGUS (Albany, N.Y.), Feb. 20, 1866,

to the Judiciary Committee, having already voted to allow members to send their proposed amendments directly to the Joint Committee on Reconstruction without the need for a referral vote.<sup>84</sup>

The Joint Committee, meanwhile, focused on other matters. The Committee's proposed amendment dealing with congressional apportionment had been defeated in a crossfire of conservative and radical criticism.<sup>85</sup> Joint Committee member John Bingham's proposed amendment protecting basic rights had been debated and returned to the Committee for redrafting.<sup>86</sup> By late April, the Joint Committee had failed to get the requisite two-thirds congressional approval for any of its proposed amendments.

A breakthrough came on April 21, 1866, when Joint Committee member Thaddeus Stevens asked the Committee to consider a draft constitutional amendment submitted by Republican activist Robert Dale Owen.<sup>87</sup> Owen's proposal bundled together several separate proposals into a single multi-sectioned amendment.<sup>88</sup> Although none of Owen's proposed sections dealt with the readmission of southern rebels, Owen also submitted a separate set of proposed supplementary bills ("provisos"), one of which disqualified former rebels from holding federal office:

Provided, That no person who, having been an officer in the army or navy of the United States, or having been a member of the Thirty-sixth Congress, or of the Cabinet in the year one thousand

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at 2; NEW YORK COM. ADVERTISER (N.Y.C.), Feb. 19, 1866, at 4.; JACKSON DAILY CITIZEN (Mich.), Feb. 19, 1866, at 1.; EVENING BULLETIN (S.F.), Feb. 20, 1866, at 3.

84. CONG. GLOBE, 39th Cong., 1st Sess. 919 (1866). See also H. JOURNAL, 39th Cong., 1st Sess. 205 (1866).

85. See 2 THE RECONSTRUCTION AMENDMENTS, *supra* note 26, at 7; US House, *Proposed Apportionment Amendment Referred Back to Joint Committee* (Jan. 30, 1866), reprinted in 2 THE RECONSTRUCTION AMENDMENTS, *supra* note 26, at 79.

86. US House, *Debate Continued, "Privileges and Immunities" Amendment, Speeches of John Bingham and Giles Hotchkiss, Vote to Postpone Consideration* (Feb. 28, 1866), reprinted in 2 THE RECONSTRUCTION AMENDMENTS, *supra* note 26, at 108.

87. See "News of Proposed Amendments in the Joint Committee on Reconstruction," *Chi. Trib.* (Apr. 16, 1866), reprinted in 2 THE RECONSTRUCTION AMENDMENTS, *supra* note 26, at 151; see also *id.* at 10.

88. See BENJAMIN BURNS KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 83-84 (New York, Negro Universities Press 1969) (1914).

eight hundred and sixty, took part in the late insurrection, shall be eligible to either branch of the national legislature until after the fourth day of July, one thousand eight hundred and seventy-six.<sup>89</sup>

Owen's "proviso" focused expressly and solely on protecting Congress ("either branch of the national legislature").<sup>90</sup> Although Owen's proviso would have prevented Jefferson Davis from returning to the Senate, it clearly allowed any former rebel, including Jefferson Davis, to hold the office of President. Either Owen did not care about a rebel President (not likely) or he trusted the American electorate enough not to worry about such a ludicrous possibility. Nor did Owen care about the future: his proposition was expressly limited to the "late insurrection."

The Joint Committee held a number of meetings discussing Owen's proposed amendment and his "provisos."<sup>91</sup> By April 23, Owen's original proviso had been substantially expanded. However, the text remained focused solely on participants in the "late rebellion" attempting to return to the "national legislature." Here is the "expanded" proviso:

Provided, That until after the fourth day of July, 1876, no persons shall be eligible to either branch of the National Legislature who is included in any of the following classes, namely:

First. Persons who, having been officers of the army or navy of the United States, or having been members of the 36th Congress, or having held in the year 1860 seats in the Cabinet, or judicial offices under the United States, did afterwards take part in the late insurrection.

Second. Persons who have been civil or diplomatic officers of the so-called confederate government, or officers of the army or navy of said government above the rank of colonel in the army and of lieutenant in the navy.

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89. *Id.* at 84. Stevens explained to the committee that Owen's "provisos" would be submitted separately as proposed legislation. *Id.* at 85.

90. *Id.* at 84.

91. See 2 THE RECONSTRUCTION AMENDMENTS, *supra* note 26, at 152–57.

Third. [Persons who mistreated prisoners of war.]

Fourth. Persons in regard to whom it shall appear that they are disloyal.<sup>92</sup>

Like Owen's original proposal, the Joint Committee draft prohibited Jefferson Davis from returning to "the national legislature," but it did not prevent Jefferson Davis, or any other rebel, from being elected President.

Interestingly, especially in light of the background precedent of Blount's Case, Massachusetts Representative George S. Boutwell apparently did not understand the phrase "civil or diplomatic officers of the so-called confederate government" to include the office of the Confederate President and Vice President. Accordingly, Representative Boutwell successfully moved that the Committee alter the proviso to expressly name the "President and Vice-President of the Confederate States of America."<sup>93</sup> The change suggests that the Joint Committee very much wanted the provision to apply to the Confederate Vice President Alexander Stephens (whom Georgia Democrats had audaciously chosen as their first post-Civil War senator).<sup>94</sup> The changes suggests that the Joint Committee wanted to make sure that precedents like Blount's Case did not exclude the "President and Vice President" of the Confederacy because they were not "civil officers."

The change shows how careful the Joint Committee was about drafting and it shows they were perfectly willing to expressly name the office of "President or Vice President" if they thought the matter was important. But nothing in the original or altered text suggests anyone in the Joint Committee thought it was important to prevent the unlikely election of either Jefferson Davis or Alexander Stephens as President of the United States.

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92. Kendrick, *supra* note 88, at 92.

93. *Id.* at 103.

94. Jefferson Davis was already covered by the original provision targeting members of the Thirty-Sixth Congress. Alexander Stephens had served as a Representative from Georgia during the Thirty-Fifth Congress.

On April 28, Committee member and New York Senator Ira Harris successfully proposed adding language to the official amendment prohibiting any persons who had aided the “late insurrection” from voting for congressional representatives or any presidential elector:

Until the fourth day of July, in the year 1870, all persons who voluntarily adhered to the late insurrection, giving it aid and comfort, shall be excluded from the right to vote for Representatives in Congress and for electors for President and Vice-President of the United States.<sup>95</sup>

This approach differs from that of the proviso by denying former rebels the right to vote, as opposed to denying them the right to hold office. This is also the first indication that the Joint Committee wanted to protect the office of the presidency from rebel disruption. Rather than choosing the proviso approach of denying former rebels the right to hold the office of President, they denied former rebels the right to vote for presidential electors.

Meanwhile, the Joint Committee continued to tinker with the “proviso.” By April 28, the Committee had finalized a draft proviso which declared:

[N]o person shall be eligible to any office under the Government of the United States who is included in any of the following classes, namely:

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95. Kendrick, *supra* note 88, at 104–105. The proposal had been initially drafted by the members of the New York Congressional Caucus. See ALBANY EVENING J. (N.Y.), Apr. 28, 1866, at 2. See also Earl M. Maltz, *The Entire Fourteenth Amendment* 60 n. 323 (Sept. 21, 2023) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4564980](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4564980) [<https://perma.cc/AEZ4-F3LT>]. As reported in the *National Aegis*, “The proposition was ordered to be presented to the Reconstruction Committee, as one generally acceptable to the New York delegation. It is said Senator Harris and Representative Conkling, and Mr. Boutwell of Massachusetts will urge its adoption.” *New Plan of Reconstruction*, NAT’L AEGIS (Worcester, Mass.), Apr. 28, 1866, at 3 (citing reports from “The Times’s Washington special”). After an initially unsuccessful vote, Iowa Senator James W. Grimes moved for reconsideration and the Committee adopted Senator Harris’s proposed addition to the Fourteenth Amendment. See Kendrick, *supra* note 8888, at 105.

1. The President and Vice-President of the Confederate States of America, so-called, and the heads of departments thereof.
2. Those who in other countries acted as agents of the Confederate States of America, so-called.
3. Heads of Departments of the United States, officers of the Army and Navy of the United States, and all persons educated at the Military or Naval Academy of the United States, judges of the courts of the United States, and members of either House of the Thirty-Sixth Congress of the United States who gave aid or comfort to the late rebellion.
4. Those who acted as officers of the Confederate States of America, so-called, above the grade of colonel . . . .
5. Those who have treated officers or soldiers or sailors of the Army or Navy of the United States, captured during the late war, otherwise than lawfully as prisoners of war.<sup>96</sup>

According to both Blount's Case and Justice Story's analysis in his Commentaries, the phrase "any office under the Government of the United States" included any presidentially appointed office in the national government.<sup>97</sup> Thus, the proviso would prevent President Johnson from continuing to issue ill-advised pardons and appointments.

Because the Journal of the Joint Committee does not include notes of their discussions, we do not know whether they thought the proviso's language impliedly included the office of President of the United States. Since the Committee had not left to implication whether the proviso included the office of President or Vice President of the Confederacy, it seems reasonable to think they would have been equally clear regarding the office of the nation's President. The proviso's language, however, remained ambiguous.

That same day, the Joint Committee voted to submit the following proposed five-sectioned amendment to the Constitution:

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96. Kendrick, *supra* note 88, at 119–120.

97. See *supra* text accompanying notes 54–68.



Sec. 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 2. Representatives shall be apportioned among the several States which may be included within this Union, according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But whenever, in any State, the elective franchise shall be denied to any portion of its male citizens not less than twenty-one years of age, or in any way abridged except for participation in rebellion or other crime, the basis of representation in such State shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens not less than twenty-one years of age.

Sec. 3. Until the 4th day of July, in the year 1870, all persons who voluntarily adhered to the late insurrection, giving it aid and comfort, shall be excluded from the right to vote for Representatives in Congress, and for electors for President and Vice-President of the United States.

Sec. 4. Neither the United States nor any State shall assume or pay any debt or obligation already incurred, or which may hereafter be incurred, in aid of insurrection or of war against the United States, or any claim for compensation for loss of involuntary service or labor.

Sec. 5. The Congress shall have power to enforce by appropriate legislation the provisions of this article.<sup>98</sup>

Neither the Committee's proposed amendment nor the attached proviso expressly applied to future rebellions (or, in the language of Representative McKee's draft, rebellions "hereafter"). The text, as well as the speeches that followed, focused on the leaders of the past rebellion. The overall goal, as explained in the Report of the Joint Committee on Reconstruction, was "the exclusion from

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98. Kendrick, *supra* note 88, at 117–18.

positions of public trust of, at least, a portion of those whose crimes have proved them to be enemies to the Union, and unworthy of public confidence.”<sup>99</sup> Although the Joint Committee’s explanation sounds broad enough to exclude a rebel from the office of President, the actual text proposed by the Committee did not. Instead, the Committee thought its purposes sufficiently achieved by prohibiting rebels from voting for congressional representatives and “electors for President and Vice President of the United States.”

A. *The House Debates*

On May 8, 1866, Representative Thaddeus Stevens introduced the proposed Fourteenth Amendment to the House of Representatives.<sup>100</sup> Representative Stevens lamented that the proposal “falls far short of my wishes,” but conceded that he “did not believe that nineteen of the loyal States could be induced to ratify any proposition more stringent than this.”<sup>101</sup> Section One allowed Congress to “correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all.”<sup>102</sup> Section Two, which Representative Stevens regarded as the “most important,” solved the problem introduced by the Thirteenth Amendment.<sup>103</sup> Representative Stevens believed that “[t]he effect of this provision will be either to compel the States to grant universal suffrage or so to shear them of their power as to keep them forever in a hopeless minority in the national Government, both legislative and executive.”<sup>104</sup>

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99. REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION 12 (S.F., Union State Central Committee 1866).

100. See *US House, Thaddeus Stevens Introduces Proposed Five-Section Fourteenth Amendment* (Apr. 30, 1866), in 2 THE RECONSTRUCTION AMENDMENTS, *supra* note 26, at 155.

101. See *US House, Proposed Fourteenth Amendment, Speech of Thaddeus Stevens Introducing the Amendment, Debate* (May 8, 1866), in 2 THE RECONSTRUCTION AMENDMENTS, *supra* note 26, at 158.

102. *Id.* at 159.

103. *Id.* at 160.

104. *Id.*

As for Section Three, Representative Stevens noted that section “may encounter more difference of opinion here.”<sup>105</sup> For his part, he thought it “too lenient” and “the mildest of all punishments ever inflicted on traitors.”<sup>106</sup> He would have “increased the severity of this section,” extending its application to 1876 and making it “include all State and municipal as well as national elections.”<sup>107</sup> Nevertheless, he insisted he would “move no amendment, nor vote for any, lest the whole fabric should tumble to pieces.”<sup>108</sup> Representative Stevens did not mention any concern about Section Three’s failure to address possible future rebellions, nor did he express any concern about the amendment’s protecting the presidency by way of the electoral college. Nor did any other member voice such concerns.

Several members were deeply critical of the proposed third section, though, for very different reasons. Representative Blaine wondered if the section could be reconciled with the numerous grants of Presidential pardons.<sup>109</sup> Representative William Finck mocked what he viewed as a baldly partisan proposal that made the “most wonderful discovery” that certain rebels are currently too dangerous to vote but that they will be “converted into a true and loyal citizen” two years after the next presidential election.<sup>110</sup>

Representative James A. Garfield echoed Representative Blaine’s concern about the possible conflict with previously issued pardons.<sup>111</sup> He could not accept an amendment that presumed that someone who was “not worthy to be allowed to vote in January of 1870” somehow became worthy “in July of that year.”<sup>112</sup> This, Representative Garfield noted, would be opposed as “purely a piece of political management in reference to a presidential election.”<sup>113</sup> He

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105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* See also CONG. GLOBE, 39th Cong., 1st Sess. 2460 (1866).

109. CONG. GLOBE, 39th Cong., 1st Sess. 2460 (1866).

110. *Id.* at 2461.

111. *Id.* at 2463.

112. *Id.*

113. *Id.*

also predicted that the provision would be unenforceable in the southern states absent “a military force at every ballot box in eleven States of the Union.”<sup>114</sup>

The drumbeat of criticism against the Joint Committee’s draft of Section Three was relentless. Representative Martin Russell Thayer objected that the third section “imperil[ed] the whole measure under consideration” by unduly delaying the restoration of political rights to southern voters.<sup>115</sup> Thayer agreed that it was “proper that you should fasten a badge of shame upon this great crime of rebellion by rendering ineligible to office under the United States those who have been leaders in the insurrection against the Government.”<sup>116</sup> But, he argued, “this third section goes much further.”<sup>117</sup> New York Democrat Benjamin Boyer denounced Section Three as so punitive that no “sane man” could expect the southern states to accept “such a degradation.”<sup>118</sup> It amounted to an unjust *ex post facto* law in conflict with the federalist vision of the Ninth and Tenth Amendments.<sup>119</sup>

Not every member was critical. Ohio Republican Robert Schenck, for example, supported the provision even if it might not have the precise language he would have preferred.<sup>120</sup> Schenck also brushed off criticism that the proposed text had only a brief period of operation. He stated:

It has also been objected that it is exceptional to incorporate into the Constitution any condition depending on lapse of time or a term of years—a period within or beyond which something is to be allowed or denied . . . Any gentleman familiar with the Constitution will recall the provision that the slave trade, existing at

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114. *Id.*

115. *Id.* at 2465.

116. *Id.*

117. *Id.*

118. *Id.* at 2466. Others echoed doubts about southern willingness to ratify an amendment with such a provision. *See id.* at 2503.

119. *Id.* at 2467.

120. *Id.* at 2470.

the time of its adoption, should be permitted to run on for twenty years, but might be forbidden at the end of that time.

There is no principle violated, nothing which should prevent us from making the exclusion for two, three, four, ten, or twenty years, or during the natural lives of the insurgents, who seek to be admitted again to the exercise of the elective franchise.<sup>121</sup>

Much of the criticism focused on the Electors Clause. Several members pointed out that this provision would be easily defeated by states that chose to appoint, rather than elect, presidential electors. Representative John Longyear, for example, noted that Section Three would be “easily evaded by appointing electors of President and Vice President through their Legislatures, as South Carolina has always done.”<sup>122</sup> Ohio Representative John Bingham agreed that, as written, the clause was “useless.”<sup>123</sup> Rebels could vote for state legislators, and those legislators could then simply appoint rebels to be electors for President and Vice President of the United States.<sup>124</sup> Newspaper essays echoed the same criticism, castigating the Joint Committee for their ignorance of how electors were chosen in the southern states.<sup>125</sup>

Representative McKee, who had previously submitted a draft to the House Judiciary Committee naming the office of President and covering both the past and future rebellions, now proposed a less expansive version of his earlier disqualification amendment:

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121. *Id.* at 2471.

122. *Id.* at 2537.

123. *Id.* at 2543.

124. *Id.* Ohio newspapers reported Bingham’s objections. See THE CLEVELAND DAILY PLAIN DEALER, May 17, 1866, at 3. A frustrated Representative Stevens castigated Representative Bingham for his opposition to Section Three. See CONG. GLOBE, 39th Cong., 1st Sess. 2544 (1866).

125. See, e.g., DAILY NATIONAL INTELLIGENCER (D.C.), May 5, 1866, at 2 (essay criticizing the Joint Committee for the “grossest ignorance of constitutional law” which allows states to appoint electors of the President and Vice President of the United States); *The Third Clause*, THE DAILY PICAYUNE (New Orleans), May 19, 1866, at 6 (“[T]his part of the proposed amendment could be annulled in practice by any state choosing to evade it.”).

All persons who voluntarily adhered to the late insurrection, giving aid and comfort to the so-called southern confederacy, are forever excluded from holding any office of trust or profit under the Government of the United States.<sup>126</sup>

Abandoning his earlier effort to expressly include future rebellions, Representative McKee now limited his proposal to participants in “the late insurrection.”<sup>127</sup> “By this means,” he explained, “we will affix the brand of treason upon the traitor’s brow; and there I would have it remain until the snows of winter covered their graves.”<sup>128</sup>

McKee also removed language in his earlier draft that had specifically named the office of the President of the United States. McKee did not claim that his new draft included the office of President. Instead, McKee explained that the purpose of his new draft was to prevent disloyal members of Congress from “com[ing] back and assum[ing] their places here again.”<sup>129</sup> Although McKee described his proposal as ensuring rebels voted for “none but those who have been loyal,”<sup>130</sup> McKee defined loyalty as a matter of political party. As McKee put it, “I desire that the loyal heart of the nation shall continue in power the great party which sustained our armies in the field.”<sup>131</sup>

McKee did not explain his reasons for removing his prior express reference to the office of President of the United States. It is possible he sought nothing more than to constitutionalize the phrase in the Joint Committee draft that “no person shall be eligible to any office under the Government of the United States.” Whatever his reasons, the language was just as ambiguous here as it was in the proviso.

If McKee was attempting to move the Joint Committee’s draft in a more radically expansive direction, he faced insurmountable headwinds from the majority of his congressional colleagues. The

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126. CONG. GLOBE, 39th Cong., 1st Sess. 2504 (1866).

127. *Id.* at 2504.

128. *Id.* at 2505.

129. *Id.*

130. *Id.*

131. *Id.*

general tendency during the first session of the Thirty-Ninth Congress ran away from more radical proposals and towards more moderate drafts that were more likely to secure the needed two-thirds vote.<sup>132</sup> This was particularly true for the Joint Committee's draft of Section Three. Massachusetts Republican Thomas Eliot viewed the proposal as accomplishing little beyond symbolic condemnation, and thus could be omitted entirely.<sup>133</sup> There was no reason to waste time debating its proper wording. As Mr. Eliot noted, "Mr. Speaker, this section is not vital to this amendment. It may be stricken out, and the affirmative value of the amendment will yet be retained."<sup>134</sup>

A quick and easy alternative involved replacing the proposed amendment with the proposed proviso. This would close the loophole in the Joint Committee's draft which allowed state legislatures to appoint presidential electors. And it had the additional advantage of applying language already hammered out by the Joint Committee. On May 10, Michigan Republican Fernando C. Beaman announced that he would "move to strike out the third section and insert in lieu thereof a section which I have taken in substance from the bill introduced from the committee by the gentleman from Pennsylvania [Stevens]."<sup>135</sup> Beaman's proposal basically tracked the Joint Committee's proviso:

No person shall hereafter be eligible to any office under the Government of the United States who is included in any of the following classes namely:

1. The president and vice president of the confederate States of America so called, and the heads of departments thereof.
2. Those who in other countries acted as agents of the confederate States of America so-called.

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132. See KURT T. LASH, *THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP* 81 (2014). See also EARL M. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–1869* 60 (1990).

133. CONG. GLOBE, 39th Cong., 1st Sess. 2511 (1866).

134. *Id.*

135. *Id.* at 2537.

3. Heads of Departments of the United States, officers of the Army and Navy of the United States, and all persons educated at the Military or Naval Academy of the United States, judges of the courts of the United States, and members of either House of the Thirty-Sixth Congress of the United States who gave aid and comfort to the late rebellion.<sup>136</sup>

This, Beaman explained, “would at least prevent the intrusion of arch traitor Jefferson Davis into the Senate of the United States, and would exclude permanently from this Hall the rebels who left it in 1861 for the field of blood.”<sup>137</sup> Beaman expressed no interest in preventing the unlikely event of electing Jefferson Davis as President of the United States. His effort was designed to prevent Jefferson Davis from either the Senate or the House (“this Hall”).

The Radical Republican Thaddeus Stevens did all he could to fight off criticism of his Committee’s draft of Section Three. Johnson declared the danger had nothing to do with someone like Jefferson Davis becoming President—the danger was rebel Democrats electing themselves to Congress where they would combine their votes with northern Democrats and disrupt Republican Reconstruction. Without Section Three, Stevens warned, “[t]hat side of the House will be filled with yelling secessionists and hissing copperheads. Give us the third section or give us nothing.”<sup>138</sup>

In response to John Bingham’s complaint that Section Three was unenforceable, Stevens reminded his colleagues that Section Three required the passage of enabling legislation. “[I]f this amendment prevails,” Stevens explained, “you must legislate to carry out many parts of it,” including legislation “for the purpose of ascertaining the basis of representation.”<sup>139</sup> So to in regarding to Section Three.

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136. *Id.*

137. *Id.*

138. *Id.* at 2544. Stevens, whose health was deteriorating, spoke in such a weak voice that his colleagues would leave their seats and gather around Stevens in order to hear him. This triggered objections on the Democratic side of House that “members are crowding the aisles on the other side and the open space in the center of the House so that we can neither see nor hear what is going on.” The Speaker then called on members to resume their seats. *Id.*

139. *Id.*



“It will not execute itself, but as soon as it becomes a law, Congress at the next session will legislate to carry it out both in reference to the presidential and all other elections as we have the right to do. So that objection falls to the ground.”<sup>140</sup> No one at that time, or any time prior to final passage, disagreed with Stevens’s declaration that the provision would not execute itself, or suggested it be re-drafted so that it could be enforced even in the absence of congressional legislation.

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An aside on whether the final language of Section Three rendered Stevens’s views on self-execution irrelevant.

Professors Will Baude and Michael Paulsen insist that the mandatory language of Section Three makes the provision self-executing, regardless of congressional legislation. According to these scholars,

“No person shall be” directly enacts the officeholding bar it describes where its rule is satisfied. It lays down a rule by saying what shall be. It does not grant a power to Congress (or any other body) to enact or effectuate a rule of disqualification. It enacts the rule itself. Section Three directly adopts a constitutional rule of disqualification from office.”<sup>141</sup>

Baude and Paulsen do not address Thaddeus Stevens’s statement about the Joint Committee’s draft, but their logic seems to equally apply to this draft. The draft that Stevens announced “will not execute itself” declared:

“[A]ll persons who voluntarily adhered to the late insurrection, giving it aid and comfort, shall be excluded from the right to vote for Representatives in Congress and for electors for President and Vice President of the United States.”<sup>142</sup>

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140. *Id.* Stevens would make the same point about the need for enabling legislation in regard to the final version of Section Three.

141. Baude and Paulsen, *supra* note 3, at 17–18.

142. CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866).

In terms of self-execution, there is no relevant difference between a text that declares “all persons who voluntarily adhered to the late insurrection . . . shall be excluded,” and one that declares “[n]o person shall be a Senator . . . [if they] engaged in insurrection or rebellion.” If the former “will not execute itself,” neither would the latter.

*B. House Passage*

Just prior to the final House vote, Ohio Republican James A. Garfield proposed substituting the embattled Section Three with a broad disqualification provision:

“All persons who voluntarily adhered to the late insurrection, giving aid and comfort to the so-called southern confederacy, are forever excluded from holding any office of trust or profit under the Government of the United States.”<sup>143</sup>

In an earlier speech, Garfield had objected to the Joint Committee’s decision to exclude rebels from voting for only a “limited period.”<sup>144</sup> Garfield would have preferred a provision which “forever” excluded rebels from “the right of elective franchise.”<sup>145</sup> Garfield’s last minute proposal applied “forever” but, instead of disenfranchising rebels, it excluded any participant in the rebellion from “holding any office of trust or profit under the Government of the United States.” Garfield did not explain the reasoning behind his latest proposal and it was quickly defeated. Congress instead immediately voted 128 to 37 to approve the Joint Committee’s draft in its entirety.<sup>146</sup> Debate then moved to the Senate.

At no time during the House debates on the Joint Committee draft of Section Three did any representative mention the need to prevent rebels from being elected President. The language in McKee’s initial draft targeting the office of the President disappeared without a trace—or a comment. Instead, debate focused on the actual danger of former rebels either being elected to one of the branches

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143. *Id.* at 2545.

144. *Id.* at 2463.

145. *Id.*

146. *Id.* at 2545.

of Congress or somehow influencing the selection of presidential electors. A widespread sense that the electoral college needed to be better secured ultimately prompted the adoption of an entirely new draft of Section Three.

C. *The Senate Debates*

On May 23, 1866, standing in for an ailing William Pitt Fessenden, Senator Jacob Howard of Michigan introduced the Joint Committee's proposed Fourteenth Amendment.<sup>147</sup> After describing and defending the first two sections, Howard addressed Section Three. "I did not favor [the third] section of the amendment in the committee," Howard admitted.<sup>148</sup> It would not prevent rebels from voting for state representatives or prevent state legislatures from choosing rebels as presidential electors.<sup>149</sup> Instead, Howard preferred a clause disqualifying from office "the great mass of the intelligent and really responsible leaders of the rebellion."<sup>150</sup>

Note Howard's concerns about the electoral college. He echoed concerns raised in the House that, as drafted, Section Three left open a loophole whereby states could appoint, rather than elect, presidential electors. The final draft of Section Three closed this loophole.

Howard's criticism of his own committee's proposal signaled open-season on Section Three. Member after member subsequently rose to complain about the third section. Mr. Wilson, for example, proposed striking out the third section altogether and replacing it with a new section barring from any office "under the United States" any person who resigns from federal office and then "takes part in rebellion," now or in the future:

"[N]o person who has resigned or abandoned or may resign or abandon any office under the United States, and has taken or may

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147. *Id.* at 2764–65.

148. *Id.* at 2767–68.

149. *See id.* at 2768.

150. *Id.*

take part in rebellion against the Government thereof, shall be eligible to any office under the United States or of any State.”<sup>151</sup>

Like McKee’s second proposal, Wilson’s proposal used language that, according to Blount’s Case and Story’s analysis, would include only appointed offices, and not include the offices of President, Senator, or Representative. Wilson’s proposal also reflected an effort to target only those who had played an especially culpable role in the rebellion. Other echoed this narrower focus on leading rebels. Mr. Wade, for example, proposed striking out the third section altogether and replacing it with a provision “excluding those who took any leading part in the rebellion from exercising any political power here or elsewhere.”<sup>152</sup> “I hope,” Wade continued, “another clause will be placed there by the amendment suggested by the Senator from New Hampshire.”<sup>153</sup>

The “Senator from New Hampshire,” was Daniel Clark. Clark proposed replacing Section Three with a draft barring from certain offices any person who “engaged in insurrection or rebellion” after having taken an oath to support the Constitution of the United States:

“No person shall be a Senator or Representative in Congress, or be permitted to hold any office under the Government of the United States, who, having previously taken an oath to support the Constitution thereof, shall have voluntarily engaged in any insurrection or rebellion against the United States, or given aid or comfort thereto.”<sup>154</sup>

Senator Clark’s provision accomplished the Republican’s repeatedly expressed goal of protecting Congress from the disruptive return of leading rebels. Clark’s draft did so, however, in a manner that complied with the precedent of Blount’s Case by expressly naming the offices of Senator and Representative.

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151. *Id.* at 2770.

152. *Id.* at 2769.

153. *Id.*

154. *Id.* at 2770.

Clark's proposal also omitted Wilson's express reference to future rebellions and instead targeted participants in the late rebellion. According to Clark, it was important to adopt something

looking toward the exclusion of many of those who participated in the rebellion from participation in the administration of our Government . . . . I much prefer that you should take the leaders of the rebellion, the heads of it, and say to them, "You never shall have anything to do with this Government" and let those who have moved in humble spheres return to their loyalty and to the Government.<sup>155</sup>

Although Senator Jacob Howard generally supported Clark's proposal, he suggested removing the term "voluntarily."<sup>156</sup> According to Howard,

Any person who has taken an oath to support the Constitution as a member of Congress or as a Federal officer must be presumed to have intelligence enough if he entered the rebel service to have entered it voluntarily. He cannot be said to have been forced into it by pressure.<sup>157</sup>

Clark accepted Howard's suggestion, noting that he would "adopt any other suggestion that seems proper in regard to this amendment. I throw it out merely as a general idea or proposition. It may not be satisfactory to all minds; it may need amendment; it may possibly go too far."<sup>158</sup>

Throughout these discussions, not a single member mentioned the need to prevent rebels from qualifying for, or holding, the office of the President of the United States. Instead, the proposals had moved from expressly naming the office of President (McKee) to general prohibitions on holding office (Wilson) and to a proposal expressly naming the offices of Senator and Representative, and offices "under the government of the United States" (Clark).

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155. *Id.* at 2771.

156. *Id.*

157. *Id.*

158. *Id.*

D. *The Republican Caucus*

At this point, it is helpful to pull back a bit and consider the various Republican factions in the Thirty-Ninth Congress. This is important in determining whether the final version should be read through the lens of a radical, moderate, or conservative Republican.

From the opening of the session, Radical Republicans had faced a series of defeats and forced retreats. The initial proposals to enfranchise black Americans had been repeatedly defeated in committee and on the floor.<sup>159</sup> Radicals outside Congress condemned the final draft of the Fourteenth Amendment as a total “surrender” and “the offspring of cowardice.”<sup>160</sup> The disenfranchisement provision, so passionately defended by Thaddeus Stevens (“[g]ive us the third section or give us nothing!”), was soon to be replaced with a less comprehensive and far milder prohibition—to the dismay of Thaddeus Stevens.<sup>161</sup>

Recognizing that Democrats would take advantage of Republican divisions if floor debate continued, Jacob Howard and his fellow Senate Republicans decided not to continue this discussion in the open chamber. Instead, over the next week (May 29–30, 1866), Republicans met in a series of private caucuses.<sup>162</sup> It was during these caucuses (reported on by multiple newspapers) that the final version of Section Three emerged.

There are no transcripts of the caucus debates. Newspaper reporters, however, attended the meetings and provided daily reports about the caucus debates and proposals. According to these reports, the only thing Republicans could agree on, at least initially, was the need to strike the entirety of Section Three and go back to the drawing board. According to one report,

[t]here was almost as much disagreement in the caucus as there was in the Senate. The difficulty seemed to be to agree upon a

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159. See MICHAEL LES BENEDICT, *A COMPROMISE OF PRINCIPLE* 182–83 (1974).

160. *Id.* at 182 (quoting Wendell Phillips and editor Joseph Medill, respectively).

161. See *infra* note 198 and accompanying text.

162. See BENEDICT, *supra* note 159, at 185. See also JOSEPH BLISS JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* 140–41 (1956).

proposition as a substitute for the third section of the constitutional amendment, the radical Senators insisting that all the leading rebels shall forever be disenfranchised from holding any federal office. The probabilities are that they will compromise by putting in a certain class of leading men who made themselves generally obnoxious.<sup>163</sup>

Reporters sensed a general desire to target a smaller segment of rebel leaders who had violated their oaths of office.<sup>164</sup> According to the *New York Herald*, “[t]he general opinion is that the restriction will extend to those who have held certain civil and military offices under the federal government.”<sup>165</sup>

When initial discussions failed to produce any consensus beyond the need to strike the current third section,<sup>166</sup> the caucus appointed a subcommittee comprised of the Republican Senators who served on the Joint Committee, William Pitt Fessenden, Jacob Howard, James Grimes, Ira Harris, and George Williams.<sup>167</sup> When this

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163. *Senatorial Caucus on Reconstruction*, CLEV. DAILY PLAIN DEALER, May 29, 1866, at 3 (citing reports from the “World”).

164. *Id.* (“Nearly all the Republicans agree that the third section of the proposed constitutional amendment will be stricken out in caucus, and the disenfranchisement of a specific class of rebels substituted in its place. It is also found upon discussion that a larger number of the of the members favor restricting this class as much as possible than was generally supposed two weeks ago.”).

165. *The Republican Senatorial Caucus*, N.Y. HERALD, May 29, 1866, at 1.

166. *Id.* (“Nearly all the republican Senators agree that the third section of the proposed constitutional amendment will be stricken out in caucus . . .”).

167. *Id.* (reporting that “discussion continued until late in the afternoon without arriving at any definite conclusion. The whole matter under consideration was finally referred by the caucus to the Senatorial portion of the Reconstruction Committee, consisting of Senators Fessenden, Grimes, Howard, Harris and Williams. Senator Johnson was also on the committee, but being a democrat he could not participate in the republican Senatorial caucus. . . . It is also found upon discussion that a larger number of the of the members favor restricting this class as much as possible, than was generally supposed two weeks ago. The general opinion is that the restriction will extend to those who have held certain civil and military offices under the federal government, although it is by no means improbable that it may turn upon those who have taken and violated certain oaths to the federal government”). See also CLEV. DAILY PLAIN DEALER, *supra* note 163, at 3 (“The whole matter was referred to the Senatorial portion of the Reconstruction Committee, consisting of Senators Fessenden, Grimes, Howard, Harris and Williams. Senator Johnson was also on the committee but being a Democrat he could

subcommittee returned, they submitted a draft of what became the final version of Section Three. According to Boston Daily Advertiser, although Fessenden delivered the work of the subcommittee, “he concedes to Messrs. Howard and Grimes the chief credit of its admirable phraseology.”<sup>168</sup> According to reports, “[w]hen perfected by two or three verbal changes, it was adopted by the unanimous vote of the caucus.”<sup>169</sup>

The final draft of the Fourteenth Amendment, including Section Three, represented a victory for congressional moderates. Stevens and the radicals had failed in the efforts to give black Americans an equal right to vote in Section Two, and Steven’s preferred version of Section Three had been removed and replaced by one with a far more narrow restriction on southern political power. As reported by the Philadelphia Inquirer, “[w]hile many would have desired more radical measures, they are willing to yield their desires for the sake of harmony in the Union [Republican] party and giving the President an opportunity to agree with Congress.”<sup>170</sup> According to Michael Les Benedict, all of the changes proposed by the caucus tilted in a conservative direction. As Benedict puts it, “[t]he radicals defeat was total.”<sup>171</sup>

#### *E. Final Congressional Debates on Section Three*

On May 29, the Senate continued its discussion of the proposed Fourteenth Amendment. Debate began with a successful motion by Reverdy Johnson to strike out the third section.<sup>172</sup> Jacob Howard

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not participate in the caucus.”). *See also The Senatorial Caucus*, ALBANY EVENING JOURNAL, May 29, 1866, at 2 (reporting the same).

168. *Reconstruction. The Plan of the Union Senators*, BOS. DAILY ADVERTISER, May 30, 1866, at 1. This same report describes the subcommittee as consisting of only Fessenden, Grimes and Howard. *See id.* (“Mr. Fessenden submitted the amendment to the Constitution as agreed to by the committee consisting of himself and Messrs. Grimes and Howard.”). It may be that the caucus authorized all three Joint Committee Senators to work on the amendment, but ultimately only these three did so.

169. *Id.*

170. *The Vote upon the Reconstruction Committee’s Amendment*, THE PHILA. INQUIRER, May 30, 1866, at 1.

171. BENEDICT, *supra* note 159, at 186.

172. *See Congressional Summary*, THE CLEV. DAILY PLAIN DEALER, May 30, 1866, at 1.



then introduced a number of proposed alterations to the Joint Committee's draft—alterations already reported by newspapers who had been following the work of the Republican Caucus.<sup>173</sup> As Howard explained,

The third section has already been stricken out. Instead of that section, or rather in its place, I offer the following: SEC 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof; but Congress may, by a vote of two thirds of each House, remove such disability.<sup>174</sup>

Unlike McKee's initial draft which expressly named the office of President of the United States, and unlike proposed drafts like Senator Wilson's, which contained nothing but a general reference to "offices under the United States," this final draft adopted the approach of Senator Clark and expressly named the offices of Senator and Representatives.

Section Three begins by expressly naming Senators, Representatives and electors of the President of the United States—positions involving the three apex political positions in the federal government. These expressly enumerated positions are followed by a general catch-all provision referring to "all offices, civil or military, under the United States." It was common at the time of the Fourteenth Amendment to refer to Senators, Representatives and electors as holding an "office."<sup>175</sup> Nevertheless, the framers did not leave the

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173. The public was aware of the new provision even before Howard introduced the changes. See *Thirty-Ninth Congress*, THE DAILY AGE (Phila.), May 30, 1866, at 1.

174. CONG. GLOBE, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 2869 (1866).

175. For the "office of Senator" see *In Memory of Senator Foot*, N.Y. TRIB., April 13, 1866, at 1 (reporting a speech by Charles Sumner delivered on April 12, 1866, noting that his late colleague Sen. Foot "was happy in the office of Senator"); see also VT. WATCHMAN & ST. J. (Montpelier), April 20, 1866, at 2 (reporting same speech); BOS. DAILY

inclusion of these positions to implication (as “civil offices”), but expressly named them as included offices.

Like the Joint Committee draft, the new version of Section Three expressly addressed presidential electors. However, instead of prohibiting rebels from voting for electors, the new draft prohibited leading rebels from serving as presidential electors (whether those electors were elected or appointed). This closed the loophole left open in the Joint Committee draft that so many members had complained about. Following these expressly named positions involving the three apex political positions in the federal government, the draft added a catch-all reference to “civil or military” offices “under the United States, or under any State.”

The language and structure of this new version prompted one of the most sophisticated lawyers in the House to presume the office of the President of the United States was excluded. In an extended speech discussing in detail every provision in the proposed Fourteenth Amendment, former United States Attorney General Reverdy Johnson noted:

I do not see but that any one of these gentlemen may be elected President or Vice President of the United States, and why did you omit to exclude them? I do not understand them to be excluded from the privilege of holding the two highest offices in the gift of the nation. No man is to be a Senator or Representative or an elector for President or Vice President—<sup>176</sup>

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ADVERTISER, July 31, 1866, at 1 (reporting news from N.H.) (“George G. Fogg of Concord will be appointed by Gov. Smyth to fill the vacancy in the office of Senator to be occasioned by the anticipated resignation of Senator Clark”); PHILA. INQUIRER, July 27, 1866, at 1 (reporting on U.S. Senate, July 26, 1866, that “the credentials of Mr. Patterson were returned to the Judiciary Committee, with instructions to inquire into his qualifications for the office of Senator.”). For the “office of Representative,” see *Official Proceedings of the Republican Convention*, CHIC. REPUBLICAN, June 14, 1866, at 8 (“[T]he Hon. Elihu B. Washburne was declared the unanimous nominee of the convention for the office of Representative in Congress.”). For the “office of presidential elector,” see LOUISVILLE DAILY COURIER, February 18, 1868, at 1 (reporting on Republican Convention in Louisville that “Resolved, That Col. W. A. Bullitt be recommended for the office of Presidential elector for this district.”).

176. CONG. GLOBE, 39th Cong., 1st Sess. 2899 (1866).

At this point, Republican Senator Lot Morrill interjected: “Let me call the Senator’s attention to the words ‘or hold any office, civil or military, under the United States.’”<sup>177</sup> Johnson then demurred, “Perhaps I am wrong as to the exclusion from the Presidency; no doubt I am; but I was misled by noticing the specific exclusion in the case of Senators and Representatives.”<sup>178</sup>

It is unclear whether Johnson really believed he had erred or was uninterested in debating the point and simply wanted to move on to more important points in his speech. Johnson planned on voting against the entire amendment, including Section Three, regardless of Morrill’s “correction.”<sup>179</sup> More likely, Johnson continued to believe that his original interpretation was the more natural reading of the clause.

Notice that Johnson does not blame his error on inattentiveness or an unduly casual reading of the clause. Neither seems likely given that he was delivering a prepared speech exploring in depth every provision in the Fourteenth Amendment. Instead of blaming himself, Johnson expressly blames the language and structure of Section Three: “I was misled by noticing the specific exclusion in the case of Senators and Representatives.”<sup>180</sup>

We already know that Johnson was familiar with Blount’s Case, and he was especially familiar with Bayard’s argument that “[t]he Government consists of the President, the Senate, and House of Representatives, and they who constitute the Government cannot

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177. *Id.*

178. *Id.* *But see* Graber, *supra* note 46, at 21–22 (partially quoting Johnson, but omitting Johnson’s explanation as to why he was misled).

179. CONG. GLOBE, 39th Cong., 1st Sess. 3042 (1866) (recording Johnson’s negative vote on Section Three and Johnson’s negative vote against the amendment as a whole).

180. *Id.* *But see* Graber, *supra* note 46, at 21–22 (partially quoting Johnson, but omitting Johnson’s explanation as to why he was misled).

be said to be under it,"<sup>181</sup> having quoted it to his colleagues in the previous Congress.<sup>182</sup>

But even apart from the familiar precedent of Blount's Case, commonsense suggested Section Three did not include the office of the President of the United States. The structure of the provision begins by naming the apex political positions of Senator and Representative, and the electors for the apex executive office of President and Vice President of the United States. These enumerated positions are then followed by a general catch-all phrase. This structure intuitively suggests that the drafters enumerated every apex positions they meant to include.

The latin phrase for this unitive reading of a legal text is *expressio unius est exclusio alterius*<sup>183</sup>—the inclusion of one thing means the exclusion of another. By specifically naming only the high offices of Senator and Representative, the text can be reasonably read as excluding unnamed high federal offices like that of the President and Vice President of the United States. As a trained lawyer, Reverdy Johnson would have known such a "well-established rule of construction."<sup>184</sup> Thus he was "misled" by the "specific exclusion in the case of Senators and Representatives."<sup>185</sup> Any member of the public applying the same commonsense approach to the text would have

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181. Argument of James Asherton Bayard, Sr. on Jan. 3, 1799. See 8 ANNALS OF CONG. 2258 (1799). No one in the Thirty-Ninth Congress would have considered a reference to "offices under the United States" to be any different than a reference to "offices under the Government of the United States." John Bingham, for example, expressly described section three as prohibiting any person who had violated their oath from "hold[ing] any office of trust or honor, either under the United States or any State in the Union". *Speech of Hon. John A. Bingham*, ALBANY EVENING J., September 5, 1866, at 1.

182. CONG. GLOBE, 38th Cong., 1st Sess. 329 (1864) (quoting Mr. Bayard).

183. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* 107 (2012) ("Negative-Implication Canon[:] The expression of one thing implies the exclusion of others (*expressio unius est exclusio alterius*)"); *Bittner v. United States*, 143 S. Ct. 713, 720–21 (2023); William Baude and Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1107–08 (2017); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1440 (1987).

184. Amar, *supra* note 183, at 1440.

185. CONG. GLOBE, 39th Cong., 1st Sess. 3042 (1866).

come to the same reasonable conclusion, even if they did not know the Latin.<sup>186</sup>

The inference is further supported by Section Three's general reference to "any office, civil or military, under the United States." This clearly included lower-level appointed offices in the federal government. It seems inappropriate to hide the highest office in the land in a general phrase that included the lowest offices in the land, while simultaneously believing it necessary to expressly enumerate not just members of the House and Senate but also locally selected electors of the President and Vice President of the United States. Such a reading violates the common canons of interpretation known as "noscitur a sociis" and "ejusdem generis" — generally meaning that "a word should be construed according to the company it keeps," and that it should be read to be "of the same nature" as surrounding terms.<sup>187</sup>

In sum, if the language and structure of Section Three "misled" the man that historians consider "the most respected constitutional lawyer in Congress,"<sup>188</sup> then it is quite likely that less learned ratifiers were similarly "misled." Nor would any ratifier have learned of Morrill's "correction" — this particular exchange with Johnson was not reported in the press.<sup>189</sup>

In terms of the text's application to future rebellions, the historical record is mixed. Missouri Senator John Henderson believed that "this section is so framed as to disenfranchise from office the leaders of the past rebellion as well as the leaders of any rebellion

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186. Given that many, if not most, of the ratifiers were either lawyers or participated in the drafting of legal texts, there is good reason they would be familiar this common rule of construction.

187. See SCALIA, *supra* note 15, at 25–26 (stating that canons such as *noscitur a sociis* and *expressio unius est exclusio alterius* are "commonsensical").

188. PHILLIP SHAW PALUDAN, *A PEOPLE'S CONTEST: THE UNION & CIVIL WAR 1861-1865* 29 (1996). See also Earl M. Maltz, *The Fourteenth Amendment as Political Compromise — Section One in the Joint Committee on Reconstruction*, 45 OHIO ST. L.J. 933, 957 (1984) (Reverdy Johnson was "[a] noted constitutional authority" who "remained a respected figure in the Senate.").

189. See, e.g., BOS. DAILY ADVERTISER, May 31, 1866, at 1 (noting Johnson's proposals but not his exchange about the inclusion of the President).

hereafter to come.”<sup>190</sup> Similarly, West Virginia Senator Peter Van Winkle believed that Section Three applied to “future insurrection as well as the present.”<sup>191</sup> Oddly, Van Winkel’s colleague, West Virginia Senator Waitman T. Willey, supported Section Three because “[i]t looks not to the past, but it has reference, as I understand it, wholly to the future. It is a measure of self-defense. . . . [I]t is intended to operate as a preventative of treason hereafter . . . .”<sup>192</sup> Upon hearing this, Delaware Senator William Saulsbury interjected,

[M]y friend from West Virginia . . . says that he means something in the future; he does not mean anything that has transpired. Now sir, what does this provision mean? Does it not mean, is it not intended to apply, to that which has transpired? Are you going, and is that the object of your legislation, to provide for some contingency in the future? Is it not apparent to everybody, does not everybody know that this is not a measure to have an operation in futuro, but it is a measure to have an operation in praesenti, to apply to existing cases?<sup>193</sup>

Had Congress the time and interest, they might have engaged in yet another round of redrafting in order to ensure better clarity. At this point in the debates, however, Senate Republicans had no interest in additional changes to Section Three. Every proposed alteration was shot down by almost the same unified Republican vote.<sup>194</sup> As the debates came to a close, Lyman Trumbull succinctly explained that the proposed text accomplished its very narrow purpose. In a statement published in multiple newspapers, Trumbull explained Section Three “is intended to put some sort of stigma, some sort of odium upon the leaders of this rebellion, and no other way is left to do it but by some provision of this kind.”<sup>195</sup> As did the

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190. CONG. GLOBE, 39th Cong., 1st Sess. 3035–36 (1866).

191. CONG. GLOBE, 39th Cong., 1st Sess. 2900 (1866).

192. CONG. GLOBE, 39th Cong., 1st Sess. 2918 (1866). These remarks do not appear to have been reported in press.

193. *Id.* at 2920. In his most recent paper, Graber quotes Willey, but not Saulsbury’s rejoinder. See Graber, *supra* note 46, at 16.

194. CONG. GLOBE, 39th Cong., 1st Sess. 2899–2900 (1866).

195. *Id.* at 2901. Paraphrased in *Congressional: Senate*, DAILY CONSTITUTIONAL UNION (D.C.), May 31, 1866, at 2 (“Mr. Trumbull said it was necessary to affix some stigma

vast majority of framers and ratifiers, Trumbull viewed Section Three in light of its application to participants in the past rebellion.

On June 8, the Senate voted in favor of the new version of Section Three and then passed the amendment as a whole.<sup>196</sup> It was left to the House to vote on final passage of the Fourteenth Amendment.<sup>197</sup>

*F. The Final House Debate*

On June 13, in his introductory remarks on the final draft, Thaddeus Stevens acknowledged his personal disapproval of Section Three. Lamented Stevens:

The third section has been wholly changed by substituting the ineligibility of certain high offenders for the disenfranchisement of all rebels until 1870. This I cannot look upon as an improvement. It opens the elective franchise to such as the States choose to admit. In my judgment it endangers the Government of the country, both State and national; and may give the next Congress and President to the reconstructed rebels. With their enlarged basis of representation, and exclusion of the loyal men of color from the ballot box, I see no hope of safety unless in the prescription of proper enabling acts, which shall do justice to the freedmen and enjoin enfranchisement as a condition-precedent.<sup>198</sup>

It is not clear why Stevens believed that the final draft might “give the next . . . President to the reconstructed rebels.” Stevens might have shared Reverdy Johnson’s initial understanding that the text did not include the office of the President, or he believed rebels might join with northern Democrats to defeat a Republican candidate, or both. Whatever the nature of his objections, Stevens believed they could be addressed through the passage of “enabling acts” that would give the vote to black Americans in the former rebel states. Stevens thus echoed his earlier assertion that the Joint Committee’s draft of Section Three would require enabling

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upon the leaders of the rebellion.”). *See also Congressional*, EVENING STAR (D.C.), May 31, 1866, at 1 (same).

196. *See* CONG. GLOBE, 39th Cong., 1st Sess. 3042 (1866).

197. *See* CONG. GLOBE, 39th Cong., 1st Sess. 3149 (1866).

198. CONG. GLOBE, 39th Cong., 1st Sess. 3148 (1866). *See also* 2 THE RECONSTRUCTION AMENDMENTS, *supra* note 26, at 219.

legislation since “it will not execute itself.”<sup>199</sup> Nothing in the final draft of Section Three lessened the original need for enabling legislation.<sup>200</sup>

G. *Public Commentary During Framing and Initial Passage*

All the above debates took place in public. Unlike the 1787 Philadelphia Convention, the framing of the Fourteenth Amendment was a remarkably public event. Newspaper reporters attended every congressional debate and generally published transcripts of major congressional speeches within days of their delivery.<sup>201</sup> For example, multiple newspapers published reports of McKee’s initial draft of Section Three.<sup>202</sup> The “private” Republican caucus that replaced the Joint Committee’s draft Section Three with their own draft was not “private” at all. At least not in the sense of the public not being informed of the subjects and proposals under discussion. As noted above, newspapers like the Herald and Plain Dealer kept close tabs on the activities of the Republican Caucus. Multiple newspapers reported that the Joint Committee’s disenfranchisement provision would be completely stricken out and replaced by a completely new section focused on disqualification for office.<sup>203</sup>

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199. See *supra* note 140 and accompanying text.

200. Those scholars who claim that the final draft is self-executing emphasize the mandatory nature of the disqualification: “No person shall be . . . .” See Baude and Paulsen, *supra* note 3, at 17 (“Section Three’s language is language of automatic legal effect . . . .”). But the Joint Committee draft that Stevens insisted could not execute itself contained the same mandatory language (“all persons . . . shall be excluded”). The more plausible explanation is that Stevens thought neither version could “execute itself.”

201. See 2 THE RECONSTRUCTION AMENDMENTS, *supra* note 26, at 6 (introductory notes).

202. See newspapers cited *supra* note 83.

203. See, e.g., *Senatorial Caucus on Reconstruction*, CLEV. DAILY PLAIN DEALER, May 29, 1866, at 3 (“The Herald says of the Senatorial Caucus yesterday: No definite conclusion was reached. The whole matter was referred to the Senatorial portion of the Reconstruction Committee, consisting of Fessenden, Grimes, Howard, Harris and Williams. Senator Johnson was also on the committee but being a Democrat he could not participate in the Caucus. Nearly all of the Republicans agree that the third section of the proposed constitutional will be stricken out in caucus, and the disenfranchisement of a specific class of rebels substituted in its place. It is also found upon discussion that a larger number of the members favor restricting this class as much as possible than was generally supposed two weeks ago. The general opinion is that the restriction will extend



When Senate Republicans completed and passed the new version of Section Three, newspapers apprised their readers of the substance and meaning of the new provisions. These accounts repeatedly described the text as dealing with the leaders of the past rebellion. According to the Chicago Republican,

The provisions of the several sections may be stated substantially thus: . . . No person shall hold any civil or military office under the United States or any State who, having previously taken an oath of office, has been engaged in the rebellion. Congress, however, by a vote of two thirds of each House, may remove this disability.<sup>204</sup>

The Galveston Texas “Flake’s Daily Bulletin” paraphrased the new Section Three as declaring “[n]o person shall be eligible [sic] to any Federal or State office who has previously taken the oath to support the Constitution of the United States, and shall have engaged in the rebellion, or given aid or comfort thereto. But Congress may, by two-thirds vote, remove such disability.”<sup>205</sup> The New Hampshire Patriot and Gazette praised the caucus for excising the Joint Committee’s radical approach. “In place of this iniquitous provision,” the newspaper reported, “they have inserted a section declaring all State and national officers who engaged in the rebellion, who had even sworn to support the constitution, to be ineligible to any office, State or national[,] civil or military — this disability to be removable by two-third vote of Congress.”<sup>206</sup> New York’s Evening

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to those who have held certain civil and military offices under the Federal Government, although it is by no means improbable that it may turn upon those who have taken and violated certain oaths to the Federal Government.”). Other newspapers reference the original Section Three as having been “stricken out” and replaced with a “substitute.” See, e.g., *The Reconstruction Propositions*, DAILY STATE GAZETTE (Trenton, N.J.), May 31, 1866, at 2; *Congressional News. Senate*, N.Y. COMMERCIAL ADVERTISER, May 30, 1866, at 1; *The Republican Senatorial Caucus*, N.Y. TRIB., May 30, 1866, at 1 (describing the third section as “stricken out” and “[t]he caucus adopted for this a section declaring that no person shall be a Senator or Representative”); *Thirty-ninth Congress. First Session. Senate. Reconstruction Resolution*, THE DAILY AGE (Phila., Pa.), May 30, 1866, at 1 (“Section three being stricken out, the following is proposed in lieu of it . . .”).

204. *The Senate Plan of Reconstruction*, CHI. REPUBLICAN, June 11, 1866, at 4.

205. D. Flanery, *Telegraphic*, FLAKE’S DAILY BULLETIN (Galveston), June 10, 1866, at 5.

206. *Reconstruction*, N.H. PATRIOT & GAZETTE, June 6, 1866, at 2.

Post noted that the Joint Committee's initial draft of Section Three had been "generally condemned by the country" and had been properly stricken from the amendment.<sup>207</sup> Instead, a new provision would be added

forbidding all who had previous to the rebellion taken an official oath to support the Constitution, and who afterwards engaged in rebellion, to hold any office whatever, either under the state or general governments. A proviso adds that two-thirds vote of Congress may repeal this section at any time.<sup>208</sup>

Again, all of these descriptions describe the text in terms that relate solely to the recent rebellion.

In fact, the editors of the *Evening Post* criticized the final draft because it applied only to the "late rebellion" and therefore lacked the kind of enduring principle more appropriate for a constitutional amendment:

What, then, is to be gained by incorporating this amendment in the Constitution—a measure of so temporary a character, by the acknowledgement of its authors, that they are ready to allow Congress to repeal it at any time? So grand and enduring an instrument should not be lightly amended; it should not contain among its provisions any merely temporary expedients. Whatever appears there should be for all time. The late rebellion and all that relates to it are only incidents, of which the Constitution need bear no trace.<sup>209</sup>

In sum, even before Congress officially sent the Fourteenth Amendment to the states for possible ratification, the American public had been well informed—for months—about the various drafts, the arguments in favor and in opposition to those proposals, the decision to strike the Joint Committee disenfranchisement

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207. *The Reconstruction Amendment*, EVENING POST (N.Y.C.), June 5, 1866, at 2.

208. *Id.*

209. *Id.* Although it is possible that the Post editors viewed the possible congressional lifting of the disability as making the clause "temporary," the full text suggests otherwise. According to the editors, it was because the measure was "of so temporary a character" that its framers were willing to allow Congress to "repeal it at any time." Congress had no power to "repeal it" if the clause included possible future rebellions.

proposal, and the decision to replace it with a disqualification provision. They also knew that the final draft was a less radical proposal than others Congress had considered, including the Joint Committee draft, and that it focused on a limited group of leaders of the late rebellion. Finally, they knew that, although some proposals expressly named the office of the President or expressly applied the provision to future rebellions, all of this language had been omitted from the final draft. As the public was concerned, no framer had expressed any interest in binding the office of the President and no framer had described the text as having done so.<sup>210</sup> Instead, the final text closed a publicly condemned loophole in the Joint Committee draft and secured the Presidency by way of a sufficiently trustworthy electoral college.<sup>211</sup>

### III. RATIFICATION

Initial public debate on the proposed Fourteenth Amendment coincided with the Fall congressional elections of 1866. Those elections became a kind of public referendum on the Fourteenth Amendment as Republicans and Democrats made the amendment a major part of their congressional campaign speeches.<sup>212</sup>

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210. In a speech delivered a few days after congressional passage of the Fourteenth Amendment, Indiana Congressman George Julian complained that “the plan reported by the joint committee leaves the ballot in their [rebel] hands. . . . Gen. Lee cannot be President of the United States, nor Governor of Virginia; but he can march to the polls . . . .” See *Radicalism The Nation’s Hope*, RIGHT WAY (Bos.), July 21, 1866, at 2. Although it seems Julian was addressing Section Three, he does not expressly say so. Again, one presumes at least a few people shared the same understanding of Lot Morrill. The paucity of such evidence, however, cannot sustain any claim that such was the consensus understanding.

211. Thus, whether one shared Morrill’s reading of Section Three as implicitly prohibiting a rebel from holding the office of the President, or whether one reasonably believed no loyal elector of the now-protected electoral college would cast their vote for a rebel traitor, one could still share the opinion of Representative George Julian of Indiana who believed that, under the recently passed Fourteenth Amendment, one way or another, “General Lee cannot be President of the United States.” See CONG. GLOBE, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 3210 (1866). Julian himself did not explain the basis of his opinion.

212. According to Eric Foner, “[m]ore than anything else, the election became a referendum on the Fourteenth Amendment. Seldom, declared the *New York Times*, had a political contest been conducted ‘with so exclusive reference to a single issue.’” FONER,

On the occasions that candidates specifically addressed Section Three, they generally focused on the need to punish the leaders of the past rebellion and prevent their disrupting Congress. As Michigan Senator Zachariah Chandler explained, Section Three established the principle that “a perjured rebel traitor is not fit to sit beside a loyal man in the Congress of the United States.”<sup>213</sup> John Sherman pointed out that Section Three disqualified “some 20,000 people in the Southern States. . . . They might be all whitewashed and reconstructed, but we did not want to see Toombs, Davis and Wigfall back in Congress again.”<sup>214</sup> Similarly, General John P. Shanks explained to an Indiana crowd that Section Three “provides that the men who have raised the arm of rebellion against the Government, shall not be admitted to the councils of the nation.”

There is no discoverable ratifier consensus regarding Section Three’s potential impact beyond the “late rebellion.” The vast majority of public comments addressed nothing more than the clause’s application to the still-living leaders of the rebellion and their particular responsibility for a catastrophic rebellion. As Indiana Governor Morton declared “these men have piled treason upon perjury, and covered treason with blood; I ask you whether you can trust them?”<sup>215</sup> John Bingham likewise defended the clause as necessary in light of the “great mass” of southern rebels seeking to reassert their political power. According to Bingham, Section Three ensured that oath-breakers who had “engaged in the late atrocious rebellion against the republic, shall ever hereafter except by the special grace of the American people, for good cause shown to them, and by special enactment, be permitted to hold any office of honor, trust or profit, either under the Government of the United States, or under

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*supra* note 71, at 267. See also Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part III: Andrew Johnson and the Constitutional Referendum of 1866*, 101 *GEO. L.J.* 1275, 1313–1327 (2013).

213. See Speech of Michigan Senator Zachariah Chandler (Oct. 22, 1866), in *SPEECHES OF THE CAMPAIGN OF 1866 IN THE STATES OF OHIO, INDIANA AND KENTUCKY, AS PUBLISHED IN THE CINCINNATI COMMERCIAL* (1866) at 56 (on file with author) (hereinafter “*SPEECHES*”).

214. *Speech of John Sherman* (Sept. 28, 1866), in *SPEECHES*, *supra* note 213 at 39.

215. *Speech of Gov. Morton*, Sept. 22, 1866, in *SPEECHES*, *supra* note 213 at 35.

the government of any State in the Union.”<sup>216</sup> The provision ensured that the American people would first be able to take “securities for the future” before restoring political power to “the population of those southern States lately in arms against the Government.” In Ohio, Governor Jacob Cox similarly noted that “[t]he third section of the amendment is that which provides for the disqualification for holding office of a class regarded as peculiarly responsible for the rebellion.”<sup>217</sup>

Southern opponents of the Fourteenth Amendment were equally unconcerned about future applications. They repeated the general Democratic Party insistence that it was inappropriate (if not unconstitutional) to propose amendments in the absence of all the states.<sup>218</sup> As far as the merits were concerned, most southern critics denounced Section Three as an *ex post facto* law<sup>219</sup> which wrongly interfered with the rights of local self-government. For example, a

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216. *Speech of John A. Bingham*, August 24, 1866, in *SPEECHES*, *supra* note 213 at 19.

217. *Ohio, Gov. Jacob Cox’s Message to the Legislature, Ratification of the Fourteenth Amendment* (Jan. 2 and 4 1867), reprinted in 2 *THE RECONSTRUCTION AMENDMENTS*, *supra* note 26, at 336. See also *W. Va., Gov. Arthur Boreman’s Message to the Legislature, Ratification of the Fourteenth Amendment* (Jan. 16, 1867), reprinted in 2 *THE RECONSTRUCTION AMENDMENTS*, *supra* note 26, at 339–40 (“The ruling spirits of the South determined no longer to submit to the government, and defied its authority and set up for themselves, within its jurisdiction, a separate and alien organization[.] Some claimed the right to do so under the constitution. . . Whatever the opinions of men in the South were, the triumph of the government has decided that they were engaged in a rebellion and are rebels, and are liable to be treated as such. In fact, thousands of them have themselves acknowledged this by suing for pardon as such.”).

218. See 2 *THE RECONSTRUCTION AMENDMENTS*, *supra* note 26, at 227.

219. See, e.g., *Mississippi, Legislative Committee Report, Rejection of the Fourteenth Amendment* (Jan. 30, 1867), reprinted in 2 *THE RECONSTRUCTION AMENDMENTS*, *supra* note 26, at 360 (the proposal is an “odious and tyrannical . . . *ex post facto* law”); *Texas, Senate Report and Rejection of Proposed Fourteenth Amendment* (Oct. 22, 1866), reprinted in 2 *THE RECONSTRUCTION AMENDMENTS*, *supra* note 26, at 285 (Section Three “is clearly *ex post facto*”); *New Jersey, Legislative Debates and Ratification*, reprinted in 2 *THE RECONSTRUCTION AMENDMENTS*, *supra* note 26, at 273 (the third section “provide[s] for an *ex post facto* law”). This had been Mr. Boyer’s objection during the congressional framing debates. See *US House, Proposed Fourteenth Amendment, Speech of Thaddeus Stevens Introducing the Amendment, Debate* (May 8, 1866), reprinted in 2 *THE RECONSTRUCTION AMENDMENTS*, *supra* note 26, at 168 (“Treason is undoubtedly a crime and may be punished, but by no bill of attainder or *ex post facto* law such as is provided in the amendment before the House.”).

North Carolina Committee Report on the proposed amendment warned that the

immediate practical effect . . . of the Amendment, if ratified, will be to destroy the whole machinery of our State Government, and reduce all our affairs to complete chaos, by throwing out nearly every public officer, even to Justices of the Peace and Constables, and it would be hardly possible to find enough men qualified to fill those various offices, and reorganize our State Government.<sup>220</sup>

Among the most common southern complaints about Section Three was its symbolic impact on the men who had recently fought on behalf of their state during the civil war. In his remarks encouraging the Florida Legislature to reject the amendment, Governor David Walker condemned the proposals' targeting of "those who sacrificed themselves to serve their State[.] And will their State now turn round and repay their devotion by putting a mark of infamy upon them?"<sup>221</sup> The Florida House similarly condemned the amendment's assault on southern honor, declaring "the Congress of the United States and the people of the North [have] not only pronounced us infamous, but offered to us the alternative of passing upon ourselves the same judgment, or submitting to fire, to

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220. *North Carolina, Gov. Jonathan Worth's Message to the Legislature, Joint Committee Report, Rejection of the Fourteenth Amendment* (Nov. 20 and Dec. 6, 1866), reprinted in 2 *THE RECONSTRUCTION AMENDMENTS*, *supra* note 26, at 311; see also *Florida, Legislative Committee Reports and Rejection of the Fourteenth Amendment* (Nov, 23, Dec. 1 and 3, 1866), reprinted in 2 *THE RECONSTRUCTION AMENDMENTS*, *supra* note 26, at 307 ("In the consideration of the third section your committee can but express their entire disapprobation. Sweeping in its disfranchisements, were it a portion of the supreme law of the land, the country would deprive itself of the use of some of the most gifted minds of the age. The States would be unable from the number of their own citizens to select for any official position those whom they knew and whom they could trust."); *New Hampshire, House Committee Report (Majority and Minority), Ratification of the Fourteenth Amendment*, reprinted in 2 *THE RECONSTRUCTION AMENDMENTS*, *supra* note 26, at 238 ("[T]he third section, without the semblance of a trial or conviction for treason, disqualifies for state as well as national office, a numerous class of persons, now thoroughly loyal, who, from their capacity, and from the confidence reposed in them by the people, could most effectually aid in the restoration of the fraternal relationships essential to a permanent re-union, and deprives the mass of the Southern people of their services to that end . . .").

221. H. 14, 2d Sess., at 17 (Fla. 1866).

sword and to destruction.”<sup>222</sup> The Arkansas Committee Report on the Amendment also spoke for the wounded honor of the Confederacy, declaring that “[t]he committee cannot consent thus to brand by thousands the people of the State, who have struggled in a cause dear to them, like patriots, who have yielded to the fate of war as brave and magnanimous people only can do.”<sup>223</sup>

Imposing such a “brand,” of course, was precisely one of the major purposes of Section Three. Lyman Trumbull had specifically described Section Three as “intended to put some sort of stigma, some sort of odium upon the leaders of this rebellion.”<sup>224</sup> The South’s reaction suggests that the text had hit its intended mark. This is yet another example of how Section Three was understood by both supporters and critics as specifically designed to target a particular group of living individuals. As Tennessee Governor William Brownlow explained:

The third section is intended to prevent that class of rebel leaders from holding office, who, by violating their official oaths, added one great offense to another. It is meant as a safeguard against another rebellion, by keeping out of power those who brought on and are mainly responsible for that through which we have just passed. These men, in law and justice, forfeited their lives and property, but a benign and merciful Government inflicts no other punishment or disability upon them than such as is necessary to prevent them from repeating their crime. No loyal citizen will object to this section.<sup>225</sup>

Brownlow is not referring to “another rebellion” sometime in the distant future, but one that might be brought on by the thousands of still living unrepentant rebels who were “responsible for that

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222. *Florida, Legislative Committee Reports and Rejection of the Fourteenth Amendment* (Nov. 23, Dec. 1 and 3, 1866), reprinted in 2 *THE RECONSTRUCTION AMENDMENTS*, *supra* note 26, at 306.

223. *Arkansas, Senate Committee Report, Rejection of the Fourteenth Amendment* (Dec. 10, 1866), reprinted in 2 *THE RECONSTRUCTION AMENDMENTS*, *supra* note 26, at 313.

224. *CONG. GLOBE*, 39th Cong., 1st Sess. 2901 (1866).

225. *Tenn., Gov. William Brownlow’s Proclamation and Address, Ratification* (July 4–19, 1866), reprinted in 2 *THE RECONSTRUCTION AMENDMENTS*, *supra* note 26, at 244.

through which we have just passed." "These men" had forfeited their right to office.

Very few ratifiers specifically addressed whether Section Three applied to future insurrections. Those that did came to different conclusions. Congressional candidate John Hannah reportedly told an Indianapolis crowd that Section Three "not only applies to the perjured officials who engaged in the recent rebellion, but to all such who, in time to come, may be guilty of a similar crime."<sup>226</sup> An essay in the *San Francisco Bulletin* similarly described the provisions of Section Three as being "prospective as well as retrospective."<sup>227</sup> A Minority Report authored by members of the Indiana Assembly, on the other hand, criticized Section Three because it applied only to the past rebellion:

[Section Three] disfranchises all of that class of persons therein named, who "shall have engaged in insurrection or rebellion against the United States, or given aid or comfort to the enemies thereof," but denounces no penalties against those who may hereafter commit the same act. . . . It would be difficult, in our opinion, to frame a law more thoroughly the offspring of passion, and less in accordance with sound policy and statesmanship.

But to place such a provision as this in the Constitution—the organic law which is designed to last for ages, affecting, as it does, past offenses and offenders only, and containing no guarantees for the future, and that must become obsolete at the end of the present generation, is an act of folly that vengeance and not statesmanship could sanction.<sup>228</sup>

The Indiana minority thus echoed the editors of the *Evening Post* who had objected to the proposal's "temporary" nature.<sup>229</sup> It is not clear whether the majority of the Indiana Assembly disagreed with the minority's understanding or whether the majority had no

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226. *Speech of John Hannah* (Aug. 25, 1866), in *SPEECHES*, *supra* note 213, at 22.

227. *California's Share in Reconstruction*, *EVENING BULLETIN* (S.F.), August 6, 1867, at 2.

228. *Ind., Gov. Oliver P. Morton's Message to the Legislature, Majority and Minority Committee Reports, Ratification of the Fourteenth Amendment* (Jan. 11, 18 and 23, 1867), reprinted in 2 *THE RECONSTRUCTION AMENDMENTS*, *supra* note 26, at 354.

229. See *supra* note 209 and accompanying text.



objection to a clause addressing only the past rebellion (or whether they found the matter not worth defeating the entire proposal regardless of the meaning of Section Three).<sup>230</sup>

Rather than meeting a theoretical future need, most advocates of Section Three believed it addressed a pressing and immediate problem posed by a still-living group of mass murderers. As Mr. Harrison declared during the Connecticut Senate Ratification Debates, “[t]he men who are to be disfranchised, are men who sustained the Andersonville and Salisbury prisons. They are the men who urged on the assassins at Fort Pillow! They are the men who sent spies to burn our cities and hounded on men to assassinate our beloved Lincoln.”<sup>231</sup> According to Tennessee Governor William Brownlow in his message to the state ratifying assembly,

These men, in law and justice, forfeited their lives and property, but a benign and merciful Government inflicts no other punishment or disability upon them than such as is necessary to prevent them from repeating their crime. No loyal citizen will object to this section.<sup>232</sup>

According to Brownlow, Section Three would prevent a future rebellion “by keeping out of power those who brought on and are mainly responsible for that through which we have just passed.”<sup>233</sup>

#### A. *The Presidency and the Electors Clause*

Scholars have yet to identify a single ratifier who described Section Three as applying to persons seeking the office of the President of the United States. Whether such a person exists, it is clear the issue was of little (or no) interest to the vast majority of ratifiers who discussed the third section of the Fourteenth Amendment. The

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230. The Indiana majority’s sole criticism about Section Three was that it should have used the word “and” instead of “or” “between the words ‘President’ and ‘Vice President.’” See *supra*, note 228, at 353.

231. *Connecticut Legislature*, COLUMBIAN WEEKLY REGISTER (New Haven), June 30, 1866, at 2.

232. *Tenn., Gov. William Brownlow’s Proclamation and Address, Ratification* (July 4–19, 1866), reprinted in 2 THE RECONSTRUCTION AMENDMENTS, *supra* note 26, at 244.

233. *Id.*

evidence, or lack thereof, is what one would expect if neither the Framers nor the ratifiers thought the possibility important enough to make it part of the Fourteenth Amendment.

Ensuring rebel leaders could not vote for the President of the United States as members of the Electoral College, on the other hand, was important. An 1868 newspaper essay in *The Daily Austin Republican* called for the enforcement of Section Three in order to prevent electors in the State of Texas from casting their votes for “Jefferson Davis for President and Alexander Stephens for Vice President . . . or worse.”<sup>234</sup>

Of course, it was far more likely that the southern states would return Jefferson Davis to Congress rather than convince the entire country to make him President. Accordingly, when Davis’s name came up during the ratification debates, it most often involved his possible return to the national legislature.<sup>235</sup> As T. F. Withrow warned an Iowa gathering, Section Three was essential because, otherwise, “Jefferson Davis [may] be made eligible to the Cabinet or Senate, after he is pardoned, as he probably will be[.]”<sup>236</sup> Others scoffed at even this possibility. Speaking in opposition to the Fourteenth Amendment, T. J. Smith, of Wentworth, New Hampshire, dismissed Republican claims “that unless this amendment is adopted, that same Jefferson Davis will get back into Congress[.]”<sup>237</sup> Note that both advocates and opponents used former Confederate President Jefferson Davis as someone who might potentially return

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234. See *What does it Mean?*, *DAILY AUSTIN REPUBLICAN* (Tex.), September 1, 1868, at 2.

235. Davis had served as Representative (1845–46) and Senator (1857–61) from Mississippi prior to the Civil War.

236. *Speech of Hon. T. F. Withrow*, *IOWA ST. DAILY REGISTER* (Des Moines), Sept. 1, 1866, at 2.

237. *Speech of Hon. T. J. Smith, of Wentworth*, *UNION DEMOCRAT* (Manchester, N.H.), July 31, 1866, at 2 (speaking about his objections to Section Three: “But do you not say, that unless this amendment is adopted, that same Jefferson Davis will get back into congress? What if he does? Is his intellect so to be feared?”). See also *Speech of Hon. T. J. Smith, of Wentworth*, *N.H. PATRIOT & GAZETTE* (Concord), August 8, 1866, at 1 (same).

to Congress, not someone who might potentially hold the office of President of the United States.<sup>238</sup>

Some scholars claim to have identified scattered examples of ratification-period commentary describing Section Three as barring certain persons from holding the office of President. Most of these claims are simply inaccurate. For example, John Vlahoplus claims to have discovered an 1866 newspaper article arguing that removing Section Three would leave “ROBERT E. LEE . . . as eligible to the Presidency as Lieut. General GRANT.”<sup>239</sup> In fact, the writer of that article is not referring to Section Three, but is simply criticizing the South’s belief that “a rebel is as worthy of honor as a Union soldier; that ROBERT E. LEE is as eligible to the Presidency as Lieut. General GRANT.”<sup>240</sup>

Nevertheless, one can find scattered examples of non-ratifiers who believed the text applied to the President.<sup>241</sup> Time and continued research no doubt will discover others. But absent evidence that the Framers and ratifiers held such a view, such scattered references are of little significance. One can find scattered references to the Amendment giving Black Americans the right to vote (not accomplished prior to Fifteenth Amendment), and to Republican insistence that the Bill of Rights bound the States even without the Fourteenth Amendment (not accomplished until the ratification of Section One).<sup>242</sup> One can find scattered references to almost anything. What this case requires are examples of Framers and ratifier testimony sufficient to support a claim of consensus understanding. Such a body of evidence does not exist.

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238. See also Speech of John Hannah (Aug. 25, 1866), in SPEECHES, *supra* note 213, at 21. (implying Section Three would prevent “Davis and Breckinridge, Toombs and Wigfall” from being “welcome[d] back to the councils of the nation”) (emphasis added).

239. See John Vlahoplus, *Insurrection, Disqualification, and the Presidency*, 13 BRIT. J. AM. LEGAL STUD. 237, 244 (2023).

240. See *Democratic Duplicity*, INDIANAPOLIS DAILY J., July 12, 1866, at 2.

241. See, e.g., *Speech by Maj. Gen. Rawlins at Galena*, CHI. TRIB., June 22, 1867, at 2, 4; *Rebels and Federal Officers*, GALLIPOLIS J. (Ohio), Feb. 21, 1867, at 2; *Shall We Have a Southern Ireland?*, MILWAUKEE DAILY SENTINEL, July 3, 1867, at 2.

242. See 2 THE RECONSTRUCTION AMENDMENTS, *supra* note 26, at 227–34.

To the extent that anyone at the time seriously worried about Jefferson Davis, their concerns focused on possible disloyal votes in the Electoral College or Davis's return to Congress. For example, T. F. Withrow warned an Iowa gathering that Section Three was essential because, otherwise, "Jefferson Davis [may] be made eligible to the Cabinet or Senate, after he is pardoned, as he probably will be."<sup>243</sup> Similarly, T. J. Smith dismissed Republican fears "that unless this amendment is adopted, that same Jefferson Davis will get back into Congress[.]"<sup>244</sup>

In sum, no Reconstruction Republican was concerned about the American people electing Jefferson Davis President of the United States, much less believed the Constitution must be amended to prevent such a possibility. The very idea was no more than a punchline to a joke.<sup>245</sup>

*B. Blount's Case and Story's Analysis During the Ratification Phase*

An additional explanation for the ratifiers' silence regarding Section Three and the office of President may be due to the on-going influence of the rule in Blount's Case and Story's analysis in his Commentaries. Public commentary throughout this period repeatedly cited both as establishing that the President did not hold a civil office under the United States. Viewed through the lens of precedent and legal authority, nothing about the text would have prompted a ratifier to consider its application to the office of the President.

Congressional and public commentary on Blount's Case preceded and accompanied the drafting and ratification of the Fourteenth Amendment. In the Thirty-Eighth Congress, Senator Reverdy Johnson reminded his colleagues that, according to Bayard's argument in Blount's Case, "it is clear that a Senator is not an officer *under* the Government. The Government consists of the

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243. IOWA ST. DAILY REGISTER, *supra* note 236, at 2,

244. UNION DEMOCRAT, *supra* note 237, at 2.

245. See, e.g., *Speech of Hon. John A. Bingham*, TIFFIN TRIB. (Ohio), July 18, 1872, at 1 (indicating a joke about "President" Davis elicited "[l]aughter" from the crowd).

President, the Senate, and House of Representatives, and they who constitute the Government cannot be said to be under it.”<sup>246</sup>

In 1866, Blount’s Case and Story’s commentary appeared repeatedly in American newspapers.<sup>247</sup> During the 1868 impeachment proceedings against Andrew Johnson, Charles Sumner relied on James Bayard Sr.’s arguments in Blount’s Case, which he reminded his colleagues had been “adopted by no less an authority than our highest commentator, Judge Story.”<sup>248</sup> During those same impeachment proceedings, an issue arose as to whether Senator Benjamin Wade was a “civil officer” eligible to become President in the case of President Johnson’s impeachment and removal—an issue that prompted another round of newspaper references to the importance of Blount’s Case and Story’s analysis.<sup>249</sup>

As noted earlier, shortly before the ratification of the Fourteenth Amendment, the Louisville Daily Journal reminded its readers that according to congressional precedent and legal authority, neither

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246. CONG. GLOBE, 38th Cong., 1st Sess. 329 (1864) (quoting Mr. Bayard). I have not discovered any newspaper reporting the committee’s view that Story had been “incautious.”

247. See, e.g., *The Impeachment Question*, CHICAGO REPUBLICAN, Oct. 25, 1866, at 4 (discussing the impeachment of “Senator Blount in 1799” and quoting Story’s analysis in his Commentaries); *Impeachment of the President*, WILMINGTON J. (N.C.), Oct. 25, 1866, at 4 (“Judge Story, in his commentaries on the Constitution, describes at length the formalities observed in trials for impeachment. . . . There have been in all five cases of impeachment since the beginning of our government, namely, that of Wm. Blount, 1799 . . . . The law of impeachment trials, as stated by Judge Story, is founded on the precedents furnished by these five cases.”); *Impeachment of the President*, W. MIRROR (Cambridge, Ind.), Oct. 18, 1866, at 4 (publishing the same article as WILMINGTON J. and attributing it to N.Y. WORLD); *Impeachment of the President*, LANCASTER INTELLIGENCER (Pa.), Oct. 17, 1866, at 1 (same).

248. See EXPULSION OF THE PRESIDENT. OPINION OF HON. CHARLES SUMNER, OF MASSACHUSETTS, IN THE CASE OF THE IMPEACHMENT OF ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES 5 (Washington, Gov’t Printing Off. 1868).

249. See, e.g., *The Presidential Succession—Mr. Churchill’s Bill*, DAILY NAT’L INTELLIGENCER (D.C.), Apr. 8, 1868, at 2 (citing Blount’s Case and Story’s analysis of same); Letter to the Editor, *The Eligibility of the President Pro Tempore of the Senate to be Acting President*, DAILY NAT’L INTELLIGENCER (D.C.), Apr. 18, 1868, at 2 (discussing Sen. Wade’s eligibility, and citing Paschal, Story and Wharton’s analysis of Blount’s Case); *Congress Today — Impeachment*, EVENING STAR (D.C.) Dec. 6, 1867, at 1 (citing both Blount’s Case and Story’s Commentaries).

the President nor Senators were “civil officers of the United States.”<sup>250</sup> According to the authors,

[The text of the Impeachment Clause] fairly admits of no other construction. In the words of Mr. Justice Story, it “does not even affect to consider them officers of the United States.” See section 793 of Story’s Commentaries. The argument is thus supported by the authority of the most celebrated commentator on the Constitution as well as by the language of the Constitution itself.<sup>251</sup>

In sum, at the time of the framing and ratification of the Fourteenth Amendment, the precedent of Blount’s Case and Story’s analysis were accepted and well known both in and out of Congress.<sup>252</sup> Any ratifier reading Section Three against the background of these well-known precedents and authorities would have reasonably concluded the provision did not impliedly (and erroneously) refer to the office of the President of the United States as a “civil officer under the United States.”

### C. *The Need for Enabling Legislation*

During the congressional framing debates, Thaddeus Stevens twice suggested Section Three would require enabling legislation.<sup>253</sup> In response to concerns that Section Three would be unenforceable, Stevens noted that both Section Three and other provisions in the proposed amendment would require enabling

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250. *Raking Shot*, *supra* note 66, at 1.

251. *Id.*; see also Connolly, *supra* note 67, at 3 (citing this and other related sources).

252. In addition to Story’s Commentaries, see POMEROY, *supra* note 68, at 481 (“In 1797, upon the trial of an impeachment preferred [sic] against William Blount, a Senator, the Senate decided that members of their own body are not ‘civil officers’ within the meaning of the Constitution . . . . The term ‘civil officers’ embraces, therefore, the judges of the United States courts, and all subordinates in the Executive department.”); PASCHAL, *supra* note 68, at 185 (“A senator or representative in Congress is not such civil officer.”) (citing “Blount’s Trial” and §§ 793 and 802 of the first volume of Story’s Commentaries). Here Paschal cites the two-volume version of Stories Commentaries which contains the exact quote from the three-volume edition: “In this view, the enumeration of the President and Vice-President, as impeachable officers, was indispensable . . . .” See 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 559 (Thomas M. Cooley ed., Boston, Little, Brown & Co. 4th ed. 1873) (1833).

253. See *supra* note 26, and accompanying text.

legislation. According to Stevens, “[i]t will not execute itself, but as soon as it becomes a law, Congress at the next session will legislate to carry it out both in reference to the presidential and all other elections as we have the right to do.”<sup>254</sup> After passage of the final version, Stevens again noted the necessity of “proper enabling acts.”<sup>255</sup>

Some might argue that Stevens’s statement about the Joint Committee draft was no longer operable after that draft was abandoned and replaced by the final version. However, in terms of self-execution, there is no relevant difference between the Joint Committee draft which declares “all persons who voluntarily adhered to the late insurrection . . . shall be excluded,”<sup>256</sup> and the final draft which declares “[n]o person shall be a Senator . . . [if they] engaged in insurrection or rebellion.” If the former was not self-executing, then neither was the latter.

#### D. *The Concerns of Thomas Chalfant*

The necessity and form of enabling acts arose during the ratification debates in Stevens’s home state of Pennsylvania. On January 30, 1867, during the Pennsylvania Ratification Debates, Mr. Thomas Chalfant spoke in opposition to the proposed Fourteenth Amendment.<sup>257</sup> During his extended remarks, Chalfant explored in detail the necessity and form of congressional enforcement of Section Three.

Chalfant began this portion of his remarks by pointing out that the text could be read as self-executing and automatically disqualifying certain persons without the need for any prior deliberation and judgement:

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254. CONG. GLOBE, 39th Cong., 1<sup>st</sup> Sess. 2544 (1866).

255. *US House, Proposed Fourteenth Amendment, Speech of Thaddeus Stevens, Vote and Passage of Amended Senate Version* (June 13, 1866), 2 THE RECONSTRUCTION AMENDMENTS, *supra* note 26, at 219.

256. KENDRICK, *supra* note 88, at 105.

257. *See* Hon. Thos. Chalfant, member from Columbia County, in the House, January 30, 1867, on Senate Bill No. 3 (the proposed amendment), in THE APPENDIX TO THE DAILY LEGISLATIVE RECORD CONTAINING THE DEBATES ON THE SEVERAL IMPORTANT BILLS BEFORE THE LEGISLATURE OF 1867 (George Bergner ed., 1867). Digitized copy on file with author.

[W]ho are they — what class of our citizens, by this section are rendered ineligible to office in the State or nation? You will observe that it is not those who have been legally convicted of the crime of treason (or, in the language of this section, of the crime of being engaged in insurrection or rebellion against the Government, or of giving aid and comfort to the enemies thereof).

No, no legal conviction is required before the disqualification attaches. If he has been guilty, he is disqualified for office, whether ever tried and convicted of the crime or not.<sup>258</sup>

At this point, Chalfant appears to share the “self-executing” interpretation of Section Three recently proposed by Professors William Baude and Michael Paulsen.<sup>259</sup> But Chalfant is not finished. He then declares that such a reading is ridiculous—of course there would have to be some kind of trial prior to a person’s disqualification: “But, you will say, and say properly, that in order to make this section of any effect whatever, the guilt must be established. I grant it. But here comes the difficulty. Here comes the danger.”<sup>260</sup>

Chalfant assumes his colleagues agree that disqualification under Section Three cannot take place absent some kind of a prior judgment regarding the person’s guilt. As he puts it, “in order to make this section of any effect whatever, the guilt must be established.” The text, however, did not establish any kind of tribunal, leaving the issue to be worked out down the road:

Look over this section carefully and tell me if you can find anything which requires that an individual shall not be ineligible to office until he has been tried and convicted of treason, or of the crime mentioned in said act, by a court of competent jurisdiction? There is nothing of the kind in it. How then is the person charged to be tried? Before what tribunal can he be required to appear to

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258. *Id.* at LXXX.

259. See Baude & Paulsen, *supra* note 3, at 17.

260. DAILY LEGISLATIVE RECORD, *supra* note 257.



meet the charge of treason or disloyalty? What opportunity is to be afforded to him to exculpate himself?<sup>261</sup>

The lack of textual guidance left the door open to some dangerous possibilities. By way of illustration, Chalfant proposed a hypothetical case in which someone appears before the House with his certificate of election, “but, as he about to take his oath, an honorable member rises in his place, and charges this member elect is ineligible under this section of the amendment by reason of his having given aid and comfort to the enemy during the rebellion.”<sup>262</sup> He continues, “Of course, this suspends all further proceedings until the question of guilt or innocence shall have been disposed of. But what court, what tribunal shall adjudicate the case?”<sup>263</sup>

Note that Chalfant presumed that Congress must “suspend[] all further proceedings” until a tribunal issues its decision. After all, all persons are innocent until proven guilty. As Chalfant explains, “[t]he house could only fairly try the charge and declare the applicant ineligible upon the proper evidence of his having been tried and convicted of the crime in a court of competent jurisdiction.”<sup>264</sup> But this, Chalfant suggests, could not possibly work. “Is it possible that the framers of the amendment intended to transform this legislative body into a criminal court, for the trial of its members on criminal charges, for crimes committed years before the election?”<sup>265</sup> Given current northern hostility towards the leaders of the rebellion, no person from the southern states could not possibly expect a fair trial from a Republican denominated partisan Congress.<sup>266</sup>

Chalfant then proposed a second hypothetical, this time supposing that a challenge might be raised to an elector of the President or Vice President of the United States. Again, Chalfant presumes his audience agrees that such a person could not be disqualified prior

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261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.* at LXXXI.

to a judgment by a competent tribunal. But “[w]hat court, what tribunal shall try the case? Shall the electoral college be constituted a criminal court to try one or twenty of its members on the charge of having given aid or comfort to the enemy during the rebellion?”<sup>267</sup> The danger of partisanship in such a case was unacceptably high. “Suppose the result of election for President or Vice President depended on the admission or rejection of any one member, what would be the chance in that body for a fair trial?”<sup>268</sup> Note that Chalfant’s hypothetical involving a presidential election involved a challenge to a Presidential elector, not a challenge to an elected President.

After posing a number of additional hypotheticals involving petty challenges to local postmasters and justices of the peace, Chalfant then considered the only possible solution to the raft of problems: Congressional enabling legislation.

“[S]omeone will answer that under the fifth section of this amendment Congress is authorized to provide, by appropriate legislation, for enforcing this amendment. . . . I can conceive of nothing, unless it be some act authorizing the appointment of a ‘commission’ to prescribe qualifications and investigate claims of all candidates and candidates for office. This would be one way.”<sup>269</sup>

This approach, however, was the most dangerous of all, for it would create “a court that can with impunity send forth the accused with the stigma of guilt indelibly stamped upon his character and not compelled to furnish him the means of self-vindication.”<sup>270</sup>

Chalfant concluded this portion of his remarks by warning Republicans that they would come to regret adopting the proposed amendment. “Tomorrow that same people, enlightened as to your designs, may hurl you from your proud position, and make you suppliants at the hands of those you have so wronged and persecuted.”<sup>271</sup>

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267. *Id.*

268. *Id.*

269. *Id.* at LXXXI

270. *Id.*

271. *Id.*

In sum, Chalfant presumed that every ratifier in the room agreed with him that that no person could properly be disqualified under Section Three prior to an adjudication by an impartial tribunal. In the hundreds of pages of debate in the Pennsylvania assembly, I have not found a single example of anyone who thought otherwise.

*E. The 1867 Reconstruction Acts*

The same month that Chalfant was criticizing Section Three for its lack of enforcement provisions in the Pennsylvania assembly, Thaddeus Stevens was pressing the House to enact the enabling legislation that he had previously insisted Section Three required. When the House passed the final version of Section Three in June of 1866, Stevens had called for enabling legislation that would give southern freedmen the right to vote. This would prevent undue rebel influence in the election of state representatives and selection of the state's presidential electors.<sup>272</sup> In early 1867, Stevens submitted a proposed "enabling act" that enfranchised black Americans in the southern states. According to Stevens, "if impartial suffrage is excluded in the rebel States then every one of them would be sure to send a solid rebel representative delegation to Congress, and cast a solid rebel electoral vote. They, with their kindred Copperheads of the North, would always elect the President and control Congress."<sup>273</sup>

A few months later, Congress passed the First and Second Reconstruction Acts. These acts required the former rebel states, as a condition of readmission, to hold new state constitutional conventions,

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272. See *supra* note 26 and accompanying text.

273. See CONG. GLOBE, 39th Cong., 2d Sess. 252 (1867); see also *House of Representatives, THE AGE*, (Phila.), Jan. 4, 1867, at 1. John Bingham opposed Stevens' bill on the grounds that it treated the southern states as conquered provinces and gave Congress perpetual oversight over state civil rights legislation. See *US House, Speech of John Bingham in Opposition to Bill for the Restoration of the Southern States, Exchange with Thaddeus Stevens* (Jan. 16, 1867), reprinted in 2 *THE RECONSTRUCTION AMENDMENTS*, *supra* note 26, at 348. Bingham successfully had the bill recommitted to the Joint Committee where a less radical proposal formed the basis of the two 1867 Reconstruction Acts. See *US House, Bill for the Restoration of the Southern States, Vote to Recommit to Committee on Reconstruction* (Jan. 28, 1867), reprinted in 2 *THE RECONSTRUCTION AMENDMENTS*, *supra* note 26, at 357–58.

establish new state governments, and ratify the Fourteenth Amendment—all accomplished by way of elections that included the votes of newly enfranchised freedmen.<sup>274</sup> The Acts also disenfranchised anyone otherwise disqualified from holding office under Section Three of the proposed Fourteenth Amendment.<sup>275</sup> Most of these reconstructed state governments subsequently ratified the Fourteenth Amendment, and their newly installed presidential electors provided the votes that put Republican candidate Ulysses S. Grant over the top in the presidential election of 1868.

The Reconstruction Acts provide an example of how the proper enforcement of Section Three could keep the presidency in loyal hands without having to disenfranchise the American people from choosing their President. A properly constructed electoral college sufficed. Here is how New York Governor Reuben E. Fenton described the Republican effort, just months before the official ratification of the Fourteenth Amendment:

It is well known that there was a large body of Union electors distributed throughout the South, consisting of those who were never in sympathy with the rebellion, and of those who, though numbered with the insurgents, were ready to accept the results of war and return to their old allegiance. These were, however, mainly powerless, because they were largely outnumbered by those with whom they shared the privilege of access to the polls. There was also a large body of men, composing two-fifths of the whole population, born on the same soil, equally true to the Government, and equally powerless, because they were disfranchised. If these two classes were allowed to act together in the use of the rights of our common manhood, it will be seen that the only obstacle was peaceably removed; as together, they outnumbered the rebel electors who prevented the work of reconstruction.<sup>276</sup>

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274. See 2 RECONSTRUCTION AMENDMENTS, *supra* note 26, at 231.

275. See *US Congress, First Reconstruction Act*, 14 Stat. 428 (Mar. 2, 1867), reprinted in 2 THE RECONSTRUCTION AMENDMENTS, *supra* note 26, at 388; *US Congress, Second Reconstruction Act*, 15 Stat. 2 (March 23, 1867), reprinted in 2 THE RECONSTRUCTION AMENDMENTS, *supra* note 26, at 391.

276. *Governor's Message*, N.Y. COM. ADVERTISER, Jan. 7, 1868, at 3, 4.

### F. Early Commentary

Although the 1867 Reconstruction Acts effectuated Section Three's protection of the electoral college, those acts did not create a process for determining whether a candidate was disqualified to run for office. Pennsylvania representative Chalfant had insisted on the need for such legislation, and the first and only Supreme Court Justice to opine on the meaning of Section Three agreed. In *Griffin's Case*,<sup>277</sup> Chief Justice Salmon Chase began his analysis of Section Three by noting that "it can hardly be doubted that the main purpose was to inflict upon the leading and most influential characters who had been engaged in the Rebellion, exclusion from office as a punishment for the offense."<sup>278</sup> Echoing Thaddeus Stevens and Thomas Chalfant, Chase then declared "it is obviously impossible to do this by a simple declaration . . . [I]t must be ascertained what particular individuals are embraced by the definition, before any sentence of exclusion can be made to operate."<sup>279</sup> As Chalfant had explained in detail, Chase also noted that "[t]o accomplish this ascertainment and ensure effective results, proceedings, evidence, decisions, and enforcements of decisions, more or less formal, are indispensable."<sup>280</sup> Since the text of Section Three is silent on these "indispensable" matters, "these can only be provided for by congress."<sup>281</sup>

In 1870, Congress passed an Enforcement Act that specifically included provisions enforcing the restrictions of Section Three.<sup>282</sup> In his remarks on the proposed legislation, Lyman Trumbull specifically noted that such legislation was necessary because Section Three could not enforce itself. Explained Trumbull:

[Section Three] declares certain classes of persons ineligible to office, being those who having once taken an oath to support the

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277. *In re Griffin*, 11 F. Cas. 7 (C.C.D. Va. 1869) (No. 5,815).

278. *Id.* at 26.

279. *Id.*

280. *Id.*

281. *Id.*

282. See *The Enforcement Bill and Repassage of the 1866 Civil Rights Act*, 16 Stat. 140 (May 31, 1870), reprinted in 2 THE RECONSTRUCTION AMENDMENTS, *supra* note 26, at 605.

Constitution of the United States, afterward went into rebellion against the Government of the United States. But notwithstanding that constitutional provision we know that hundreds of men are holding office who are disqualified by the Constitution. The Constitution provides no means for enforcing itself, and this is merely a bill to give effect to the fundamental law embraced in the Constitution.<sup>283</sup>

G. *Section Three and the Election of 1872*

Had Republicans understood Section Three as banning disloyal persons from holding the office of President of the United States, they had a perfect opportunity to make such an argument during the election of 1872. That year Republican candidate Ulysses S. Grant faced off against Democrat Horace Greeley. Both sides engaged in deeply partisan accusations against the other, with Greeley facing continued accusations of being a traitor to the United States.

The editor and publisher of the New York Tribune and a former member of the United States Congress,<sup>284</sup> Greeley had initially supported Andrew Johnson's lenient policies towards the South, and he supported efforts advancing national reconciliation. Most controversially, in 1867 Greeley had helped provide the bond releasing Jefferson Davis from prison.<sup>285</sup> The act infuriated Unionists across the country and prompted Greeley's fellow members of a private New York club to seek his removal for having provided "aid and comfort to Jefferson Davis," the man who was "the ruling spirit of

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283. CONG. GLOBE, 41<sup>st</sup> Cong., 1st Sess. 626 (1869); see also THE CRISIS (Columbus, Ohio), May 5, 1869, at 2 (emphasis added) (reporting on the debates of April 8, 1869). Baude and Paulsen claim that Congress may have been responding to the "erroneous" ruling in *Griffin's Case*. See Baude & Paulsen, *supra* note 3, at 20 & n.55, 46. Trumbull, however, expressly states that the text "provides no means for enforcing itself." See also *The Fourteenth and Fifteenth Amendments in the South*, Chi. Republican, Mar. 6, 1870, at 2 (regarding Section Three: "It is intimated that enforcing laws will be passed by the Congress now in session . . . . It is pretty certain that the enforcement of the amendment will require, not only stringent and complex laws, but Federal officials to execute them in those States whose populations are unfriendly to its provisions.").

284. Horace Greeley served as member of the House of Representatives from New York's 6th District from December 4, 1848 to March 3, 1849.

285. See FONER, *supra* note 71, at 503.

that band of conspirators who urged the Southern States into rebellion, as the chief enemy of the republic."<sup>286</sup>

When Greeley ran for president in 1872, Republicans tarred Greeley with accusations of supporting the confederate cause and being a traitor to the Union. The famous political cartoonist Thomas Nast published illustrations in *Harper's Weekly* depicting Greeley as shaking hands with John Wilkes Booth over Lincoln's grave,<sup>287</sup> and shaking hands with Confederate soldiers as they engaged in shooting down retreating Black union troops.<sup>288</sup> According to writer and civil rights advocate John Neal, Greeley was a traitor and rebel having given "aid and comfort" to "our enemies" during the Civil War.<sup>289</sup> Reminding his readers of Greeley's initial view that the seceding states should be allowed to depart in peace, Neal concluded, "Here, then, we have not only the right of secession, as understood by the Southern rebels, openly acknowledged by a candidate . . . for the Presidential chair, but the right of a considerable section to follow suit forever . . ."<sup>290</sup> Throughout the campaign, Republicans "wav[ed] the bloody shirt" and insisted that a vote for Greeley was a vote for the Ku Klux Klan.<sup>291</sup>

Nevertheless, despite their repeated claims that Greeley had given "aid and comfort" to the "enemies" of the United States who had engaged in insurrection and rebellion against the United States, no one seems to have raised a possible Section Three disqualification claim. This cannot be attributed to any punctilious legal conservatism on the part of Greeley's Republican critics—the illustrations of Thomas Nast were cruelly over the top in their associating Greeley with the late rebellion, and Neal's essay openly accuses Greeley of being guilty of aiding and abetting treasons against the United States. Yet no one seems to have viewed the recently

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286. See *Horace Greeley on Trial*, N.Y. HERALD, May 24, 1867, at 3.

287. Thomas Nast, *The Next in Order: Anything; or, Any Thing!* (illustration), in HARPER'S WEEKLY (Sept. 14, 1872), <https://bit.ly/45wa5tf> [<https://perma.cc/CUB8-X582>].

288. Thomas Nast, Illustration of Horace Greeley Shaking Hands with Confederate Soldier in HARPER'S WEEKLY, <https://bit.ly/3Msbs5N> [<https://perma.cc/49T6-PPNV>].

289. John Neal, *On to Richmond!*, PORTLAND DAILY PRESS (Me.), Aug. 31, 1872, at 2.

290. *Id.*

291. FONER, *supra* note 71, at 509.

adopted Section Three of the Fourteenth Amendment as having anything to do with Greeley's effort to qualify for the office of President of the United States. Either Republican partisans did not believe Section Three applied to anyone who had not joined the "late rebellion," or they did not believe that Section Three applied to persons running for the office of the President.

#### IV. ANALYSIS AND CONCLUSION

The core public understanding of Section Three is textually and historically clear. The ratifying public understood Section Three as targeting thousands of still living leaders of the recent rebellion and prohibiting those persons from returning to Congress, poisoning the electoral college, receiving a presidential appointment to federal office,<sup>292</sup> or joining the reconstructed governments of the southern states. Whether their disqualification would be temporary or life-long was up to Congress.

Beyond this, little else is clear. The text could be read as including persons seeking to hold the office of the President of the United States. But it also could reasonably be read according to the precedent of Blount's Case and protecting the office of the President only by way of the electoral college. The text could be read as including persons seeking to qualify as well as hold office, or it could be read as only involving the seating of certain persons ("holding" the office). The text could be read as declaring rules for both the present and future rebellions (rebellions "hereafter"). But it also could be read (and criticized) as failing to apply beyond the current crisis.<sup>293</sup>

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292. See, e.g., *Impeachment. Speech of Benjamin F. Butler, Delivered at the Brooklyn Academy of Music*, N.Y. TRIB., Nov. 24, 1866, at 8 ("I charge Andrew Johnson with improperly, wickedly and corruptly using and abusing the Constitutional power of pardons, for offenses against the United States, and in order to bring traitors and Rebels into places of honor, trust and profit under the Government of the United States, and to screen whole classes of criminals from the penalties of their crimes against the laws thereof.").

293. At least one lower court opinion suggested that a strict grammatical reading of Section Three's "perfect future" tense would have it apply only prospectively and not include *any* persons who violated their oaths prior to the ratification of the Fourteenth Amendment. See *Opinion of Judge Ballard. United States v. Thompson*, DAILY PICAYUNE



Finally, the text could be read as self-executing, but it also could be (and was) read as requiring enabling legislation. In short, on these key issues the text remains ambiguous<sup>294</sup>—it could be read either way.

And these are just some of the ambiguities of Section Three. As other scholars have pointed out, the text does not tell us what counts as a disqualifying event.<sup>295</sup> If ratifiers understood the text as applying only to the past Civil War, then there was no need to define “insurrection or rebellion.” Had more people believed the Clause would have future application, we may have had substantially more commentary on what kind of future insurrections might trigger the clause. John Hannah, for example, explained that Section Three applied not only to those “who engaged in the recent rebellion” but also “all such who, in time to come, may be guilty of

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(New Orleans), Oct. 16, 1870, at 6. According to Judge Ballard, such a strictly grammatical reading would “shock the common sense of the nation,” and that “the rules of just construction unite with all we know of the history of the adoption of amendment.” Ballard continues: “The history of the amendment is fresh in the memory of us all. There is hardly a child in the land who does not know it, and who does not know that the amendment was specially intended to disqualify from holding office those persons who had, as officers, taken an oath to support the constitution of the United States, and had engaged in the late rebellion.” *Id.* See also *Charge of Judge Emmons, of Mich., to the United States District Court Grand Jury, Nov. 30, 1870*, REPUBLICAN BANNER (Nashville), Dec. 4, 1870, at 3 (“Although the construction of this section of the Constitution [Section Three of the Fourteenth Amendment] will be given to you unqualifiedly and without the expression of doubt, it will of course be understood that every opinion now expressed will be open for reconsideration in the numerous cases now pending, and which are so soon to be argued before me. . . . Without perplexing you with difficult classifications or nice distinctions between political, judicial or executive officers, I charge you that it includes *all* officers. After some reflection, I can think of none which do not come within the description of the amendment. . . . The amendment and law apply to offenses committed before, as well as after the adoption of the one and the passage of the other. There has been much, and will undoubtedly be more, discussion of this question, but you will, without any hesitation, literally apply these provisions.”). My thanks to Gerard Magliocca for the pointer to these opinions.

294. Intentional ambiguity is a distinct possibility, given the ongoing division among radical and moderate Republicans on how to treat former rebel leaders in the midst of a last-minute rush to replace the Joint Committee’s original draft of Section Three.

295. See, e.g., *supra* note 3.

a similar crime.”<sup>296</sup> A truly “similar” crime would involve a militarized rebellion that placed thousands of soldiers into the field and caused the deaths of hundreds of thousands of people. Whether the ratifiers would understand future localized riots as triggering Section Three was never considered, much less vetted.

Some scholars try to resolve these ambiguities through the application of a kind of absurdity canon.<sup>297</sup> Framed in different ways, the basic idea is that, since it would have been absurd for the framers and ratifiers not to disqualify rebels from the office of the President of the United States, then the text must be read as doing so.<sup>298</sup>

There are multiple problems with this forced construction of an otherwise ambiguous text. If the public understood Section Three as applying only to the recent rebellion, then there was no need to address a disloyal President—no such person existed. To the extent that the framers and ratifiers worried about the Presidency, the only reasonable worry involved democratic capture of the Presidency—a concern expressly addressed by the Electors Clause which ensured that the leaders of the recent rebellion would play no role in the election of the nation’s President.

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296. John Hannah, *Speech of John Hannah* (Aug. 25, 1866), reprinted in SPEECHES, *supra* note 213, at 21 (emphasis added).

297. See, e.g., Baude & Paulsen, *supra* note 3, at 111 (stressing “the seeming absurdity of the prospect of exclusion of the offices of President and Vice President from triggering disqualification”); Graber, *supra* note 46, at 21 (“No one has ever advanced a commonsense reason why such an exemption [of the office of President] should exist.”); see also, Ilya Somin, *Why President Trump is an “Officer” who Can be Disqualified From Holding Public Office Under Section 3 of the 14th Amendment*, VOLOKH CONSPIRACY (Sept. 16, 2023), <https://reason.com/volokh/2023/09/16/why-president-trump-is-an-officer-who-can-be-disqualified-from-holding-public-office-under-section-3-of-the-14th-amendment/> [<https://perma.cc/SXJ4-Z2RD>] (arguing that it would be “absurd” to conclude that Section Three did not disqualify the President); Brief of Gerard N. Magliocca as *Amicus Curiae* in Support of Petitioners at 12, *Grove v. Republican Party of Minn.* 2023 WL 7221204 (Minn. Oct. 6, 2023) (No. A23-1354) (“Reading Section 3 to exclude the presidency would mean that leading Confederates such as Robert E. Lee and Jefferson Davis could not hold any office except the highest one. There is no historical support for that upside-down conclusion.”).

298. See, e.g., Baude & Paulsen, *supra* note 3, at 111; Graber, *supra* note 46, at 21; Magliocca, *supra* note 297, at 12.

Unlike their more radical counterparts, moderate Republicans believed most southerners would recover their loyalty to the United States once they were no longer under the sway of the leaders of the rebellion. As Senator Clark noted, once leading rebels were removed, “those who have moved in humble spheres [would] return to their loyalty and to the Government.”<sup>299</sup> Echoed Representative Windom, “if leading rebels are to be excluded from office, State as well as Federal, there is a reasonable probability that the loyal men of the South will control [local office].”<sup>300</sup> The electoral college itself, moreover, could be sufficiently secured by enabling legislation that gave freedmen in the southern states the right to vote. Congress did so, and the strategy worked in the election of 1868.

All of this helps explain why there are no discovered examples of any ratifier mentioning even the possible disqualification of persons seeking the office of the President: No one considered such disqualification to be necessary.<sup>301</sup> Rather than absurd, it seems most reasonable to resolve any textual ambiguity in a manner that leaves the election of the nation’s president to a properly constructed electoral college.<sup>302</sup> This reading matches the text and

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299. CONG. GLOBE, 39th Cong., 1st Sess. 2771 (1866).

300. CONG. GLOBE, 39th Cong., 1st Sess. 3170 (1866).

301. In 1872, six years after Congress passed the Fourteenth Amendment, John Bingham joked that Democrats’ criticism of the proposed amnesty bill must mean they wanted Jefferson Davis to be President. See TIFFLIN TRIB., *supra* note 245, at 2. Bingham’s off-hand joke, delivered years after passage and ratification, has little relevance to the original ratifiers’ understanding of Section Three.

302. Congress could count on a loyal electoral college through a variety of mechanisms. While the Fourteenth Amendment remained pending before the states, Congress passed the 1867 Reconstruction Acts. These acts allowed Black votes to join southern loyalists in voting for new constitutions and new state governments. These governments then voted to ratify the Fourteenth Amendment. See 2 THE RECONSTRUCTION AMENDMENTS, *supra* note 26, at 227–34 (discussing the ratification of the Fourteenth Amendment). No state that refused to ratify the Fourteenth Amendment would have their presidential electors counted in the national election. See *infra* note 303. Reconstructed states remained free to continue to allow the local electorate to vote for presidential electors, or, should that process become tainted with rebel interference, alter the rules for that electors would be appointed by the loyal and newly reconstructed state government. A number of reconstructed states chose the latter option. See, e.g., *Presidential Electors at the South*, BOS. DAILY J., Aug. 11, 1868, at 4 (discussing the movement towards legislative appointment of electors in Florida, Alabama, Arkansas and

historical evidence and has the added benefit of not disenfranchising loyal Americans from voting for their choice of President.<sup>303</sup>

As far as enabling legislation is concerned, every time the subject arose the speaker presumed the necessity of such legislation. This was the publicly announced understanding of Thaddeus Stevens, the view of Thomas Chalfant in the Pennsylvania ratifying debates, the view of Chief Justice Chase in *Griffin's Case*, and the view of Lyman Trumbull during the passage of the 1869 Enforcement Act. I have not discovered a single person who thought the text was self-executing and capable of disqualifying a candidate prior to some kind of adjudication. It would have been surprising to find otherwise, given the Republican commitment to due process—a concern reflected in the opening section of the Fourteenth Amendment itself.<sup>304</sup>

Days after the ratification of the Fourteenth Amendment, the editors of the *Pennsylvania Globe* summarized Section Three's central purpose of protecting Congress. According to the *Globe*, the third section targeted

leading rebels, such as those who have taken an oath to support the Constitution of the United States, and then engaged in the rebellion against the same. This section also precludes any of the

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Louisiana). This option advanced the reconstruction policies of the Republicans and was criticized by Democrats. See *A Fraud on the People*, N.H. PATRIOT & GAZETTE (Concord), August 19, 1868, at 1.

303. Republicans were especially aware of the importance of reliable electors as the country approached the 1868 presidential elections. Only weeks after the ratification of the Fourteenth Amendment, Congress adopted a joint resolution refusing to accept the electoral votes from any state that had not complied with the requirements of the Reconstruction Acts (including the ratification of the Fourteenth Amendment) and been readmitted to the Union. See CONG. GLOBE., 40th Cong., 2d Sess. 3926 (1868) (passing S. No. 139, excluding from the Electoral College votes of States lately in rebellion which shall not have been reorganized). The danger of a disloyal electoral college was real. Democrats were actively planning on combining the votes of their northern and southern members (loyal or otherwise), in an effort to gain a majority in the electoral college at the next election. See, e.g., *Southern Politics*, JAMESTOWN J. (N.Y.), July 27, 1866, at 2 (speaker at a Virginia convention raising such a possibility where “the tables would be turned” on northern Republicans and advising his hearers to “be prepared” for war.).

304. U.S. CONST. amend. XIV, § 1 (“nor shall any State deprive any person of life, liberty, or property, without due process of law.”).

said class from being a Senator or Representative in Congress, but Congress may by a vote of two-thirds of each House, remove such disability.<sup>305</sup>

The “justice” of such a provision “cannot be doubted” since “were we to permit them in Congress, without any guarantee of their penitence, we would have re-enacted a civil warfare for all the imaginary rights of the conquered Confederacy.”<sup>306</sup>

As this editorial illustrates, Section Three’s primary concern involved preventing the still living leaders of the rebellion from disrupting the Republican Reconstruction. There were only a limited number of ways this might foreseeably occur, and Section Three addressed them all. The text does not clearly address the office of the President of the United States because it did not need to, and Republicans had enough on their hands as it was.

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Whether Section Three applies to future events, to the office of the President, or is self-executing is historically unclear and textually ambiguous.

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305. See *Constitutional Amendment*, THE GLOBE (Huntingdon, Pa.), Aug. 5, 1868, at 2.

306. *Id.*

## APPENDIX: THE PROPOSALS

*McKee's Initial Proposal*

No person shall be qualified or shall hold the office of President or vice president of the United States, Senator or Representative in the national congress, or any office now held under appointment from the President of the United States, and requiring the confirmation of the Senate, who has been or shall hereafter be engaged in any armed conspiracy or rebellion against the government of the United States, or has held or shall hereafter hold any office, either civil or military, under any pretended government or conspiracy set up set up within the same, or who has voluntarily aided, or who shall hereafter voluntarily aid, abet or encourage any conspiracy or rebellion against the Government of the United States.

*The Owen Proviso*

No person who, having been an officer in the army or navy of the United States, or having been a member of the Thirty-Sixth Congress, or of the cabinet in the year one thousand eight hundred and sixty, took part in the late insurrection, shall be eligible to either branch of the national legislature until after the fourth day of July, one thousand eight hundred and seventy-six.

*Joint Committee Draft Amendment*

Until the 4th day of July, in the year 1870, all persons who voluntarily adhered to the late insurrection, giving it aid and comfort, shall be excluded from the right to vote for Representatives in Congress and for electors for President and Vice President of the United States.

*Joint Committee Proviso*

No person shall be eligible to any office under the Government of the United States who is included in any of the following classes, namely:

1. The President and Vice President of the Confederate States of America, so called, and the heads of departments thereof.
2. Those who in other countries acted as agents of the Confederate States of America, so-called.
3. The heads of Departments of the United States, officers of the Army and Navy of the United States, and all persons educated at the military or Naval Academy of the United States, judges of the courts of the United States, and members of either House of the thirty-sixth Congress of the United States who gave aid or comfort to the late rebellion.
4. Those who acted as officers of the Confederate States of America, so-called, above the grade of colonel . . .
5. Those who have treated officers or soldiers or sailors of the Army or Navy of the United States, captured during the late war, otherwise than lawfully as prisoners of war

*Joint Committee Draft Amendment*

Until the 4th day of July, in the year 1870, all persons who voluntarily adhered to the late insurrection, giving it aid and comfort, shall be excluded from the right to vote for Representatives in Congress and for electors for President and Vice President of the United States.

*McKee's Second Proposal*

All persons who voluntarily adhered to the late insurrection, giving aid and comfort to the so-called southern confederacy, are forever excluded from holding any office of trust or profit under the Government of the United States.

*Wilson Proposal*

No person who has resigned or abandoned or may resign or abandon any office under the United States and has taken or may take part in rebellion against the Government thereof, shall be eligible to any office under the United States or of any State.

*Clark Proposal*

No person shall be a Senator or Representative in Congress, or be permitted to hold any office under the Government of the United States, who, having previously taken an oath to support the Constitution thereof, shall have voluntarily engaged in any insurrection or rebellion against the United States, or given aid or comfort thereto.

*Beaman Proposal*

No person shall hereafter be eligible to any office under the Government of the United States who is included in any of the following classes, namely:

1. The president and vice president of the confederate States of America, so called, and the heads of departments thereof.
2. Those who in other countries acted as agents of the Confederate States of America, so-called.
3. Heads of Departments of the United States, officers of the Army and Navy of the United States, and all persons educated at the military or Naval Academy of the United States, judges of the courts of the United States, and members of either House of the Thirty-Sixth Congress of the United States who gave aid and comfort to the late rebellion.

*Garfield Proposal*

All persons who voluntarily adhered to the late insurrection, giving aid and comfort to the so-called southern confederacy, are forever excluded from holding any office of trust or profit under the Government of the United States.

*Final Draft of Section Three*

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having



previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two thirds of each House, remove such disability.



## DUE PROCESS & THE STANDING DOCTRINE

EMILE J. KATZ\*

*The standing doctrine undergirds every case litigated in federal court yet, despite its ubiquity, the doctrine is difficult to apply, cannot be derived from the plain meaning of Article III of the Constitution, and does not effectively serve the goals the Supreme Court has explained as its *raison d'être*. Accordingly, the standing doctrine has frequently been criticized as a policy-driven, judicially-invented, fabrication. This article posits that, appropriately understood, the standing doctrine is required by the Constitution's text—but by the Due Process Clauses of the Fifth and Fourteenth Amendments, not by Article III. The Due Process Clauses prohibit courts from depriving a person of "life, liberty, or property, without due process of law." As Justice Amy Coney Barrett has explained, *stare decisis* can often function similarly to preclusion, and consequently the application of *stare decisis* can deprive litigants of their life, liberty, or property rights without due process of law. This article proposes that standing resolves the due process issue identified by Justice Barrett by ensuring that litigants presently before a court are adequately representing potential future litigants and thereby providing those future litigants with due process. In short, the Due Process Clauses require courts to check for standing because otherwise the application of *stare decisis*—a legal principle tracing back to before the Founding—would*

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*deprive future litigants of their rights without due process of law. Viewing standing as a due process requirement both ties the doctrine to the Constitution's text and helps explain much of the Court's discussion of the standing doctrine's purpose. This article then discusses the implications that arise from reframing standing as a due process requirement rather than an Article III requirement. These include implications for courts' jurisdiction, the method of assessing standing, state courts, and the treatment of precedent.*

## INTRODUCTION

The standing doctrine undergirds every case litigated in federal court yet, despite its ubiquity, the doctrine is difficult to apply,<sup>1</sup> cannot be derived from the text of Article III of the Constitution,<sup>2</sup> and does not effectively serve the goals<sup>3</sup> the Supreme Court has explained as its *raison d'être*.<sup>4</sup> Recent Supreme Court case law has

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1. See William A. Fletcher, *The Structure of Standing* 98 YALE L.J. 221, 223 (1988) (describing the "apparent lawlessness of many standing cases" and their "wildly vacillating results"); *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1115–16 (11th Cir. 2021) (Newsom, J., concurring) (providing examples of the inconsistent results from assessing standing doctrine's injury-in-fact requirement).

2. Cass Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 166 (1992) (arguing that current standing doctrine "has no support in the text or history of Article III"); RICHARD H. FALLON, JR. ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 101 (7th ed. 2015) ("[T]he Constitution contains no Standing Clause."); *City of Hallandale Beach*, 996 F.3d at 1115 (Newsom, J., concurring) (arguing that standing doctrine is not grounded in the text of the Constitution).

3. The goals the Supreme Court has enumerated for standing include: "ensuring that litigants are truly adverse and therefore likely to present the case effectively, ensuring that the people most directly concerned are able to litigate the questions at issue, ensuring that a concrete case informs the court of the consequences of its decisions, and preventing the anti-majoritarian federal judiciary from usurping the policy-making functions of the popularly elected branches." Fletcher, *supra* note 1, at 222.

4. See Part IV, *infra*. Perhaps unsurprisingly, the Supreme Court has admitted that its justiciability doctrines "relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government." *Allen v. Wright*, 468 U.S. 737, 750 (1984) (emphasis added) (quoting *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1178–79 (1983) (Bork, J., concurring)).

only exacerbated these problems.<sup>5</sup> Thus, this article proposes a new, textually-tied, and easily applicable way to think about and analyze standing. The Supreme Court has traditionally explained that the “case or controversy” language in Article III of the Constitution requires that parties have standing. By contrast, this article argues that the Due Process Clauses of the Fifth and Fourteenth Amendments, rather than Article III, require courts to conduct a standing analysis.

In the United States, we have an “adversarial system of adjudication.”<sup>6</sup> In contrast to some courts in Europe, where judges act as investigators, in the United States judges are (at least in theory) neutral adjudicators.<sup>7</sup> United States judges decide only those legal issues properly presented by the parties in the case before them.<sup>8</sup> Consequently, it is the litigants’ responsibility to properly argue their side of the case. If they fail to do so, the court’s decision may be legally incorrect, or at least misguided. This would not be such a big problem if the court’s holding only affected the parties of that isolated case. But, because of *stare decisis*—the fundamental principle that courts must decide later cases based on the precedents set in earlier cases—earlier, poorly-decided, cases have serious adverse consequences for future litigants.<sup>9</sup>

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5. See generally Richard Pierce, *Standing Law Is Inconsistent and Incoherent*, YALE J. ON REGUL. NOTICE & COMMENT (2021), <https://www.yalejreg.com/nc/standing-law-is-inconsistent-and-incoherent/> [<https://perma.cc/7A5Y-CAK6>].

6. *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020).

7. See *United States v. Campbell*, 26 F.4th 860, 893 (11th Cir. 2022) (Newsom & Jordan, JJ., dissenting).

8. *Id.* at 872.

9. Binding precedent is a “precedent that a court must follow. For example, a lower court is bound by an applicable holding of a higher court in the same jurisdiction.” *Precedent*, BLACK’S LAW DICTIONARY (11th ed. 2019). The concept of *stare decisis* is an indelible part of our judicial system. See THE FEDERALIST No. 78, at 470 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (“To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them.”).

If a litigant can fail to properly argue his case, thereby causing a different later litigant to suffer adverse consequences, how can we claim that the later litigant has been afforded due process of law? Indeed, then Professor, later Justice Barrett has raised this issue, arguing that “the rigid application of precedent raises due process concerns, and, on occasion, slides into unconstitutionality” because it “deprives a litigant of the right to a hearing on the merits of her claims.”<sup>10</sup> This article proposes that standing resolves the due process issue identified by Justice Barrett because standing ensures that litigants presently before a court are adequately representing potential future litigants and thereby protecting those future litigants’ due process rights.<sup>11</sup>

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10. Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1012–13 (2003).

11. Although I believe this article is the first to explicitly tie standing doctrine to the Due Process Clauses of the Fifth and Fourteenth Amendments, the idea that standing serves a due process function has been noted before. In a 1979 article authored by Professor Lea Brilmayer, Brilmayer theorized that one of “three interrelated policies” of the Article III “case or controversy requirement” is to avoid the “unfairness of holding later litigants to an adverse judgment in which they may not have been properly represented.” Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the “Case or Controversy” Requirement*, 93 HARV. L. REV. 297, 302, 306–310 (1979). But, despite understanding that standing serves due process goals, Brilmayer analyzed standing as a requirement of Article III of the Constitution rather than, as this article proposes, solely a requirement of the Due Process Clauses. That difference has a number of implications for how standing is assessed. In 1980, Professor Mark V. Tushnet responded to Professor Brilmayer’s article, arguing that Brilmayer’s theory “fails to supply an adequate tool for analysis,” “does not reflect the sociological realities of litigation,” and “rests on an artificially stringent theory of precedent.” Mark V. Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698, 1698 (1980). As previously noted, unlike the Article III focus of Brilmayer and Tushnet’s articles, this article focuses on showing that standing is a requirement of the Due Process Clauses, not of Article III. This standing theory is not policy-based (as Brilmayer’s is, see *Brilmayer, supra*, at 315) but rather rests on the Constitution’s text. Furthermore, the implications that arise from viewing standing as a Due Process Clause requirement, rather than an Article III *jurisdictional* requirement, resolve some of the criticisms Tushnet leveled against Brilmayer’s article. This article sets forth an “adequate tool for analysis” taking into account Tushnet’s criticisms, reflects the “sociological realities of litigation,” and explains why precedent can present a due process concern. Additionally, it discusses some of the changes that have occurred in the discussion of standing since Brilmayer and Tushnet’s articles. Accordingly, I hope that this article can provide a valuable contribution to, and re-opening of, that earlier conversation between Brilmayer and Tushnet.

To understand how standing provides due process for future litigants, it's helpful to analogize the principle of precedent to the doctrines of claim and issue preclusion. Claim preclusion, or *res judicata*, is “[a]n affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions.”<sup>12</sup> Similarly, issue preclusion is “[t]he binding effect of a judgment as to matters actually litigated and determined in one action on later controversies between the parties involving a different claim from that on which the original judgment was based.”<sup>13</sup> Although they are different concepts, “precedent and preclusion can govern the same questions and apply under the same circumstances.”<sup>14</sup> The two concepts—precedent and preclusion—dictate whether a party can successfully litigate a case or an issue within a case. While precedent will not technically stop a litigant from bringing suit,<sup>15</sup> it can just as surely cause them to lose, leading to the same result. Indeed, then-Professor Barrett has said that “when viewed from the perspective of an individual litigant, *stare decisis* often functions like the doctrine of issue preclusion.”<sup>16</sup>

“[T]he Supreme Court has consistently affirmed the idea that due process generally prohibits courts from applying preclusion to someone who has not yet had her day in court.”<sup>17</sup> But, there are a few exceptions to the rule, such as class actions where class members are bound to the class representative’s judgment though they themselves were not present in court.<sup>18</sup> In those exceptional

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12. *Res Judicata*, BLACK’S LAW DICTIONARY (11th ed. 2019)

13. *Collateral Estoppel*, BLACK’S LAW DICTIONARY (11th ed. 2019).

14. Alan M. Trammel, *Precedent and Preclusion*, 93 NOTRE DAME L. REV. 565, 569 (2018).

15. See *Blonder-Tongue Laboratories, Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971).

16. Barrett, *supra* note 10, at 1012.

17. Trammel *supra* note 14, at 570; see also *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996) (recognizing a “deep-rooted historic tradition that everyone should have his own day in court”).

18. See 5 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶ 23.02 (2020); see also *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (“The class action is ‘an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.’” (citing *Califano v. Yamasaki*, 442 U.S. 682, 700–701 (1979))); FED. R. CIV.

circumstances the absent parties must be *adequately represented* before they can be bound by the court's judgment.<sup>19</sup> If the Due Process Clauses prohibit courts from applying *preclusion* to someone who has not had her day in court, how can courts apply binding *precedent* to a litigant, a process with the same result, when that litigant has also not had her day in court? The answer, I believe, is the standing doctrine.

The manner in which the Supreme Court and lower courts have explained standing demonstrates that courts already use the doctrine to ensure that the parties involved in litigation care sufficiently about the outcome of their cases, are devoting the resources and effort to that case necessary to win, and, in doing so, are implicitly protecting the due process rights of future litigants. The assumption in our adversarial system is that when each side is trying to win, the court will be presented with the best arguments and will come to the correct result.<sup>20</sup> And that correct result—called precedent—inures to the benefit of future litigants. Thus, the standing doctrine ensures that the parties presently before the court are adequately representing potential future litigants before those future litigants are bound by the court's precedent.

This article demonstrates that the standing doctrine serves to protect due process in the precedent context, is constitutionally required by the Due Process Clauses, and that courts have already used standing for this purpose even if they have not been explicit about doing so. Reframing the standing doctrine as a Due Process Clause requirement is important for multiple reasons. Tying the

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P. 23 (setting forth structure for class actions); *Int'l Ass'n of Machinists v. St.*, 367 U.S. 740, 794 (1961) (Black, J., dissenting) ("After all the class suit doctrine is only a narrow judicially created exception to the rule that a case or controversy involves litigants who have been duly notified and given an opportunity to be present in court either in person or by counsel.").

19. See FED. R. CIV. P. 23(a)(4) (requiring that "the representative parties will fairly and adequately protect the interests of the class"); see also *Hansberry v. Lee*, 311 U.S. 32, 42–43 (1940) ("It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties.")

20. See *Mackey v. Montrym*, 443 U.S. 1, 13 (1979).



doctrine to the Constitution's text helps prevent the courts from judicial policymaking and confines the courts to their proper role applying the plain meaning of the Constitution's text. Furthermore, reframing standing as a prudential device to serve due process values has jurisdictional implications, precedent implications, federalism implications, and implications for how courts should assess standing. Proving these claims, this Article proceeds in five Parts. Part I provides background on the current Article III standing doctrine and the criticisms of that doctrine. Part II provides background on the requirements of the Due Process Clauses. Part III explains how the application of precedent has changed over time and binds litigants. Part IV makes the case that the Due Process Clauses of the Fifth and Fourteenth Amendments require a standing doctrine. Finally, Part V discusses the implications of reconceptualizing the standing doctrine as a Due Process Clause requirement rather than an Article III requirement.

#### I. ARTICLE III STANDING DOCTRINE

Although this article proposes a new way to think about standing doctrine, to understand why reframing the doctrine is necessary it is important to first understand the existing doctrine and its problems. Thus, this Part provides a high-level overview of modern standing doctrine and describes common criticisms of the doctrine. It is by no means comprehensive because, to borrow Professor Robert Pushaw's quip, "current Supreme Court [standing] doctrine and legal scholarship . . . would require thousands of pages to summarize and analyze completely."<sup>21</sup> Nonetheless, I hope this Part will help those unfamiliar with the standing doctrine become sufficiently versed to understand this article and how its proposal fits into (or runs contrary to) the pre-existing doctrine and theory. Section A traces the history of the standing doctrine from its inception through recent case law. Section B summarizes four main

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21. Robert J. Pushaw Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 519 n.335 (1994).

criticisms of the standing doctrine in order to show why reframing the doctrine—the goal of this article—is necessary.

A. *Background Case Law*

According to the Supreme Court, a litigant must have standing because Article III, § 2 of the Constitution limits the federal courts' jurisdiction to "Cases" and "Controversies"—and only certain types of suits brought by certain types of litigants (that is, cases with litigants who have standing) count as such.<sup>22</sup> What criteria a litigant must satisfy to establish standing has shifted over time.

The idea that only certain litigants can bring "Cases" within the meaning of Article III § 2 seemingly began developing over a century after the Constitution's ratification.<sup>23</sup> Although it did not use the word "standing," the Supreme Court first hinted at the doctrine in the 1922 case, *Fairchild v. Hughes*.<sup>24</sup> In *Fairchild*, the Court held that a citizen who lived in a state with women's suffrage, had not brought "a case, within the meaning of § 2 of Article III of the Constitution," when the plaintiff challenged the validity of the Nineteenth Amendment's ratification.<sup>25</sup> The Court reasoned that the plaintiff's suit did not count as a case because the plaintiff's claim was not "brought before the court[s] for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress,

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22. See *Flast v. Cohen*, 392 U.S. 83, 94 (1968) ("The jurisdiction of federal courts is defined and limited by Article III of the Constitution. In terms relevant to the question for decision in this case, the judicial power of federal courts is constitutionally restricted to 'cases' and 'controversies.'").

23. See *Fletcher*, *supra* note 1, at 224–25 (describing how standing doctrine began to develop in the early nineteenth century in part due to the "growth of the administrative state and an increase in litigation to articulate and enforce public, primarily constitutional, values").

24. 258 U.S. 126 (1922). It is somewhat noteworthy that the Court didn't use the word standing because the term has been employed in the legal context since at least 1904. See *Standing*, A STANDARD DICTIONARY OF THE ENGLISH LANGUAGE 1749 (1904) ("A right or capacity to sue or maintain an action; as, a sufficient *standing* in court.").

25. See *Fairchild*, 258 U.S. at 129. The Nineteenth Amendment prohibits voting discrimination on the basis of sex. U.S. CONST. amend. XIX.

or punishment of wrongs.”<sup>26</sup> The Court continued by explaining that the plaintiff had only the general right “possessed by every citizen, to require that the Government be administered according to law,” and therefore had no particular interest in the case sufficient for him to challenge the amendment.<sup>27</sup> To summarize, when refusing to exercise jurisdiction, the Court focused on: (1) the procedure by which the plaintiff sued, and (2) the plaintiff’s stake in the outcome.

The following year, the Court decided *Massachusetts v. Mellon*<sup>28</sup> in which it held that it could review the constitutionality of a statute only where the plaintiff has alleged that he “has sustained or is immediately in danger of sustaining some direct injury as the result of [the statute’s] enforcement, and not merely that he suffers in some indefinite way in common with people generally.”<sup>29</sup> *Mellon* involved two consolidated suits brought by the state of Massachusetts and a private plaintiff to enjoin the Maternity Act—a statute appropriating funds with the goal of reducing maternal and infant mortality.<sup>30</sup> The Court held that neither Massachusetts nor the individual plaintiff had a real stake in the case because the statute imposed no burden on the state and the individual plaintiff’s interest in the case was “minute and indeterminable.”<sup>31</sup> Again, notice that like in *Fairchild*, the Court’s focus was on the plaintiffs’ stake in the outcome. Because neither plaintiff had a sufficient stake, the Court held that neither the state nor the private plaintiff could sue to enjoin the statute.<sup>32</sup> The Court reasoned that since there was no “Case” or “Controversy” before it, the separation of powers principle inherent in the Constitution

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26. *Fairchild*, 258 U.S. at 129 (quotation omitted).

27. *Id.*

28. This case was consolidated with *Frothingham v. Mellon*, 262 U.S. 447 (1923), and some refer to it using that name.

29. 262 U.S. 447, 488 (1923).

30. *Id.*

31. *Id.* at 482, 484–85, 487.

32. *Id.* at 488.

prohibited it from interfering with the actions of Congress.<sup>33</sup> However, although *Mellon* framed its decision as resting on the separation-of-powers principle in the Constitution, some scholars have argued that the Court's rule was non-constitutional and merely a matter of judicial restraint.<sup>34</sup> Accordingly, it's not clear that either *Fairchild* or *Mellon* intended to create a constitutional rule of standing.

Several decades later, the Court further expounded on the requirements for standing in *Flast v. Cohen*.<sup>35</sup> In *Flast*, the plaintiff sued the Secretary of Health, Education, and Welfare, arguing that by spending tax-derived funds on religious schools, the government violated the First Amendment's ban on the establishment of religion.<sup>36</sup> Prior to *Flast*, the Court had indicated that a taxpayer lacked standing to challenge legislation on the ground that it would raise taxes.<sup>37</sup> But, the Court in *Flast* clarified that litigants may sometimes have standing as taxpayers because a taxpayer may "have the requisite personal stake in the outcome, depending upon the circumstances of the particular case."<sup>38</sup> *Flast* explained that the focus of the standing inquiry is the litigant, not the issues to be adjudicated, because standing serves to ensure the "dispute sought to be adjudicated will be presented in an adversary context."<sup>39</sup>

Beginning in the 1970 case, *Association of Data Processing Service Organizations v. Camp*, the standing doctrine went through a significant change.<sup>40</sup> For the first time, the Court held that a plaintiff must have suffered an "injury in fact" to satisfy the case-or-

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33. *Id.* ("The general rule is that neither department may invade the province of the other, and neither may control, direct or restrain the action of the other.").

34. See *Flast*, 392 U.S. at 92 n.6 ("The prevailing view of the commentators is that *Frothingham* announced only a nonconstitutional rule of self-restraint.").

35. *Id.*

36. *Id.* at 85.

37. See *Mellon*, 262 U.S. at 486.

38. *Flast*, 392 U.S. at 101.

39. *Id.*

40. 397 U.S. 150, 154 (1970).

controversy requirement.<sup>41</sup> What made *Data Processing* such a dramatic change was that the Court disavowed looking at legal injuries—that is, whether a person’s legal right has been violated—and instead insisted that the relevant inquiry was whether “the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”<sup>42</sup> Before *Data Processing* it “was well-understood, and had been for decades, that a plaintiff could sue only for the violation of a legal right.”<sup>43</sup> In its holding in *Data Processing*, the Court set the groundwork for requiring that the plaintiff’s injury be of a specific type—regardless of the related legal right.

Then, in what’s considered the seminal standing case, *Lujan v. Defenders of Wildlife*, the Court further fleshed out the doctrine.<sup>44</sup> *Lujan* involved a challenge to a regulation issued by the Secretary of the Interior interpreting the geographic area to which a section of the Endangered Species Act of 1973 applied.<sup>45</sup> The plaintiffs contended that the Secretary’s regulation improperly interpreted the Act and sued the Secretary to enjoin his interpretation because the interpretation would have further endangered certain species outside of the United States.<sup>46</sup>

In the course of holding that the plaintiffs lacked standing to challenge the regulation, the Court explained that the “irreducible constitutional minimum” of standing is comprised of three elements.<sup>47</sup> “The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial

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41. *See id.* at 152; Fletcher, *supra* note 1, at 229–30.

42. *Data Processing*, 397 U.S. at 153.

43. *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1117 (11th Cir. 2021) (Newsom, J., concurring).

44. 504 U.S. 555 (1992); Sunstein, *supra* note 2, at 165 (“[T]he decision ranks among the most important in history in terms of the sheer number of federal statutes that it apparently has invalidated.”).

45. *Lujan*, 504 U.S. at 557–58.

46. *Id.* at 559.

47. *Id.* at 560.

decision.”<sup>48</sup> Critically, the Court explained that, to count as an “injury in fact,” the injury must be “(a) concrete and particularized” and “(b) actual or imminent, not ‘conjectural’ or ‘hypothetical.’”<sup>49</sup> Consequently, even though the plaintiffs sued pursuant to a lawfully enacted statute, because they had no immediate plans to benefit from the endangered species, the Court held that their injury was not “concrete and particularized,” or “actual or imminent” and, therefore, that they had not suffered an injury-in-fact.<sup>50</sup> In deciding that the plaintiffs lacked standing, the Court essentially rejected Congress’s attempt to confer on the plaintiffs a legal right to sue.<sup>51</sup>

The Court has recently doubled down on its injury-in-fact analysis in *Spokeo, Inc. v. Robins*<sup>52</sup> and *TransUnion LLC v. Ramirez*.<sup>53</sup> Both cases involved causes of action created by statute, the Fair Credit Reporting Act.<sup>54</sup> In these cases, the Court held that, to be “concrete,” a plaintiff’s injury must be similar to an injury recognized at common law, though courts are also instructed to take Congress’s judgment into account.<sup>55</sup> Essentially, even if the plaintiff is injured in some way, that injury only counts as “concrete” if the plaintiff can find a common law analogue for his or her cause of action, or if the injury is specified by the Constitution itself. But how similar the injury needs to be to a common law analogue is

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48. *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547 (2016) (citing *Lujan*, 504 U.S. at 560–61).

49. *Lujan*, 504 U.S. at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)).

50. *Id.* at 560, 564.

51. *Id.* at 576.

52. 136 S. Ct. 1540 (2016).

53. 141 S. Ct. 2190 (2021).

54. *Spokeo*, 136 S. Ct. at 1544; *TransUnion*, 141 S. Ct. at 2200.

55. *Spokeo*, 136 S. Ct. at 1549 (“[When determining concreteness] it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.”); *id.* (noting that, “[i]n determining whether an intangible harm constitutes injury in fact,” “the judgment of Congress play[s] [an] important role[.]”); *TransUnion*, 141 S. Ct. at 2200 (quoting *id.* at 1540) (“Central to assessing concreteness is whether the asserted harm has a ‘close relationship’ to a harm ‘traditionally’ recognized as providing a basis for a lawsuit in American courts.”).

anyone's guess.<sup>56</sup> It's also unclear how "traditional" the common law analogue must be.

In summary, current standing doctrine requires that in order to exercise jurisdiction, federal courts must first check whether a plaintiff has an injury-in-fact, meaning an injury that is similar to an injury for which the common law would have provided a remedy.

Further complicating the doctrine, the Supreme Court has held that there are additional, so-called "prudential," limitations on standing. The distinction between the constitutional and prudential standing requirements has not always been clear. For instance, in *Warth v. Seldin*, the Court held that, even if a litigant has an injury sufficient for constitutional standing, the Court may still refuse to hear that litigant's case if her harm is a "generalized grievance shared in substantially equal measure by all or a large class of citizens."<sup>57</sup> But in *Lexmark International, Inc. v. Static Control Components, Inc.*, the Court reversed course and explained that its earlier characterization of the bar on suits raising *generalized grievances* as prudential was inapt and that the bar on such suits was, in fact, jurisdictional.<sup>58</sup> The difference between prudential and constitutional standing is important because the Court has said that Congress may waive the requirement of prudential standing but it cannot do so with jurisdictional standing.<sup>59</sup> That said, the Court's trend of restricting the types of injuries that count as "concrete," and expanding the standing requirements that it deems constitutional—as opposed to merely prudential—has largely undermined the difference between constitutional and prudential standing.

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56. See *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1116–17, 1121 (11th Cir. 2021) (Newsom, J., concurring) (providing examples of inconsistent applications of the concreteness analysis). Compare *Hunstein v. Preferred Collection and Mgmt. Servs., Inc.*, 48 F.4th 1236, 1250 (11th Cir. 2022) (holding that plaintiff lacked Article III standing, *with id.* at 1272 (Newsom, J., dissenting) (stating that plaintiff satisfied test for Article III standing).

57. 422 U.S. 490, 499 (1975) (emphasis added).

58. 572 U.S. 118, 127 n.3 (2014).

59. *Warth*, 422 U.S. at 501.

B. *Criticism of Current Standing Doctrine Exemplifies Why it is Necessary to Reframe the Doctrine*

Prominent jurists and scholars have identified a number of problems with standing doctrine demonstrating that the doctrine—as currently applied—is unsound and merits reevaluation.<sup>60</sup> Accordingly, this section discusses especially noteworthy critiques to show why reframing the doctrine—as this article proposes to do—is necessary. The critiques of the standing doctrine generally fall into one of four categories.

First, and most importantly, the standing analysis is divorced from the Constitution’s text. As one prominent text puts it: “Despite the clarity with which the Court articulates the elements of standing, the Constitution contains no Standing Clause.”<sup>61</sup> Expressing the same idea in *Sierra v. City of Hallandale Beach*, Eleventh Circuit Judge Kevin Newsom observed that, “despite the oft-repeated invocations of it, nothing in Article III’s language compels our current standing doctrine, with all its attendant rules about the kinds of injuries—‘concrete,’ ‘particularized,’ ‘actual or imminent’—that suffice to make a ‘Case.’”<sup>62</sup> Judge Newsom notes that even Justice Scalia, *Lujan*’s author, formerly conceded that the Constitution’s text does not necessarily require the standing

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60. See, e.g., *Laufer v. Arpan LLC*, 29 F.4th 1268, 1284 (11th Cir. 2022) (Newsom, J., concurring), *vacated as moot*, 77 F.4th 1366 (11th Cir. 2023) (explaining that the Supreme Court’s recent decision in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), has only further confused the standing doctrine); *City of Hallandale Beach*, 996 F.3d at 1115 (Newsom, J., concurring) (explaining that the standing doctrine, and especially the injury-in-fact requirement, are not grounded in the Constitution’s text or history); *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1550–1552 (2016) (Thomas, J., concurring) (explaining that Article III does not require the same standing analysis for public and private rights cases); *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 971–73 (11th Cir. 2020) (Jordan, J., dissenting) (explaining that the modern standing inquiry is ahistorical); *Springer v. Cleveland Clinic Emp. Health Plan Total Care*, 900 F.3d 284, 290–91 (6th Cir. 2018) (Thapar, J., concurring) (expounding on the private versus public rights theory of standing).

61. FALLON, JR. ET AL., *supra* note 2, at 101.

62. 996 F.3d at 1122 (Newsom, J., concurring).



doctrine.<sup>63</sup> Judge Newsom explains that the most natural reading of Article III is that a “Case” exists when a person has a cause of action, meaning “(1) that his legal rights have been violated and (2) that the law authorizes him to seek judicial relief.”<sup>64</sup> The word “Case” does not require a person to have an injury-in-fact.<sup>65</sup> Because the Court’s injury-in-fact standard forces litigants to satisfy a higher burden than Article III requires, Judge Newsom concludes that the Court’s focus on injury-in-fact is atextual.

Similarly, Professor Steven L. Winter has argued that at the Founding a “Case” or “Controversy” within the meaning of Article III simply meant that “the matter before [the court] fit one of the recognized forms of action”—one of the numerous recognized procedures by which a legal claim could be made.<sup>66</sup> Winter therefore argues that whether a party suffered an injury-in-fact was not the primary metric by which the existence of a case or controversy was determined and that the injury-in-fact standard is inconsistent with the text of Article III.<sup>67</sup> If we think back to the Court’s opinion in *Fairchild* and its focus on the need for plaintiffs to bring cases through “regular proceedings as are established by law,” we can see that early standing cases seem to support Winter’s theory.<sup>68</sup>

The standing doctrine is also inconsistent with the text of Article I. As the Court articulated it in *Spokeo* and *TransUnion*, the injury-in-fact standard is particularly misguided because it effectively

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63. *Id.* (“[A]s [Justice Scalia] explained elsewhere, standing doctrine’s location in Article III was never ‘linguistically inevitable’; the Court used Article III’s case-or-controversy language to constitutionalize standing, at least in part, ‘for want of a better vehicle.’” (quoting Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983))).

64. *Id.*

65. *Id.*

66. Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1396–96 (1988).

67. *Id.* at 1396; see also *id.* at 1377 (“One legitimately may wonder how a constitutional doctrine now said to inhere in [A]rticle III’s ‘case or controversy’ language could be so late in making an appearance, do so with so skimpy a pedigree, and take so long to be recognized even by the primary academic expositors of the law of federal courts.”).

68. *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922).

prevents Congress from creating new rights that are dissimilar from those recognized at common law.<sup>69</sup> Article I of the Constitution confers Congress with the power to pass new laws and, at least in theory, create new rights.<sup>70</sup> Thus, the injury-in-fact requirement essentially reads Congress's right-creating power out of the Constitution.<sup>71</sup>

I agree with the above criticism that the current standing doctrine is inconsistent with the Constitution's text. Like Judge Newsom, it seems to me that Article III requires nothing more than a cause of action—a "Case"—in order to confer the federal courts with jurisdiction. For reasons I explain more fully in Parts IV and V, the due process theory of standing proposed by this article avoids the problems highlighted by Judge Newsom, Professor Winter, and others. First, analyzing standing as a Due Process Clause requirement connects the doctrine with the plain meaning of the Constitution's text. And second, framing standing as a Due Process Clause requirement, rather than as an Article III requirement,

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69. See Erwin Chemerinsky, *What's Standing After TransUnion LLC v. Ramirez*, 96 N.Y.U. L. REV. ONLINE FEATURES 269, 283 (2021) (referring to *TransUnion*, Chemerinsky explains that if the opinion is "read literally, the opinion holds that statutes can create rights which give rise to standing only if there was a historical or common law basis for recognizing the injury").

70. See U.S. CONST. art. I, § 8, cl. 1, cl. 18 ("The Congress shall have Power To . . . provide for the . . . general Welfare . . . And To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . ."); see also U.S. CONST. pmbl. ("We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."); *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2217 (2021) (Thomas, J., dissenting) (citing *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 972 (11th Cir. 2020) (Jordan, J., dissenting)) ("The First Congress enacted a law defining copyrights and gave copyright holders the right to sue infringing persons in order to recover statutory damages, even if the holder 'could not show monetary loss.'"); *Muransky*, 979 F.3d at 972 (Jordan, J., dissenting) ("It was also understood that Congress could create private rights by statute and that a plaintiff could sue based on a violation of that statutory right without regard to actual damages.").

71. *TransUnion*, 141 S. Ct. at 2218 (Thomas, J., dissenting) (arguing that the Court's injury-in-fact requirement does not "accord[] proper respect for the power of Congress and other legislatures to define legal rights").

allows courts to exercise jurisdiction over a “Case” regardless of whether the plaintiff has an injury-in-fact.

A second category of critique is that the standing doctrine is divorced from historical practice. The most prominent jurist to criticize the current standing analysis on this ground is Justice Thomas.<sup>72</sup> In his dissent in *Transunion*, Justice Thomas discusses evidence demonstrating that at the Founding whether a matter counted as an Article III case or controversy depended on whether an individual was asserting “his or her own rights.”<sup>73</sup> If a person was asserting his private rights, the matter counted as a case or controversy regardless of whether the party had suffered an injury-in-fact.<sup>74</sup> By contrast, if a person was trying to vindicate communal rights—that is, public rights—he needed to show an individual injury with actual damages.<sup>75</sup> Thus, Justice Thomas concluded, where Congress creates a right of action to vindicate private rights, an injury-in-fact analysis is unnecessary. Accordingly, Justice Thomas argues that the Court’s focus on injury-in-fact in private rights cases like *TransUnion* is inconsistent with Founding era historical practice and tradition.<sup>76</sup>

The historical criticism is not limited to Justice Thomas. In a legal realist critique, Professor Cass Sunstein has also argued that the standing doctrine is inconsistent with the history of Article III. According to Sunstein, the modern standing doctrine came from what “amounted to a largely revisionist reading of [A]rticle III” when certain jurists “favorably disposed toward the New Deal reformation developed doctrines of standing . . . largely to insulate agency decisions from judicial intervention” because they favored “the rise of regulation.”<sup>77</sup> Like Justice Thomas, Sunstein contends that the best interpretation of Article III’s “Case” or “Controversy”

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72. *Id.*

73. *Id.* at 2216.

74. *Id.* at 2216–18.

75. *Id.* at 2217.

76. *Id.* at 2216–18.

77. Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1436–38 (1988).

language “would recognize that Congress has the authority to define legal rights and obligations, and that it may therefore, by statute, create an injury in fact where, as far as the legal system was concerned, there had been no injury before.”<sup>78</sup>

I agree with Justice Thomas and Professor Sunstein that historical practice did not require plaintiffs to show an injury-in-fact. However, unlike Justice Thomas, it seems to me that historical practice demonstrates that an injury-in-fact analysis was not required even in public rights cases.<sup>79</sup> As explained above, so long as the plaintiff had a cause of action, there was a “Case” sufficient to confer the federal courts with jurisdiction. Whether or not it is *wise* to allow private litigants to vindicate communal rights is a question best left for Congress’s decision when crafting new causes of action.<sup>80</sup> For reasons further explained below, the due process standing theory proposed here is consistent with historical practice because it allows litigants to sue even without an injury-in-fact.

Third, the Supreme Court has said that the injury-in-fact requirement protects the separation of powers,<sup>81</sup> but the injury-in-fact requirement is applied even in cases that have no bearing on the separation of powers. In *TransUnion* the Court held that plaintiffs may not sue based on congressionally created private

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78. *Id.* at 1479.

79. See Winter, *supra* note 66, at 1396 (describing established legal proceedings recognized at the Founding, such as relator actions, that did not require a personal interest or injury-in-fact).

80. Some scholars have suggested that private litigants should not be able to sue to vindicate public rights because they are not politically accountable. See e.g., Tara Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 781–82 (2009). Be that as it may, it’s irrelevant whether private litigants are not politically accountable because the Constitution protects people *from the government, not from other private parties*. See Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 619 (1991) (“With a few exceptions, such as the provisions of the Thirteenth Amendment, constitutional guarantees of individual liberty and equal protection do not apply to the actions of private entities . . . One great object of the Constitution is to permit citizens to structure their private relations as they choose subject only to the constraints of statutory or decisional law.”); Stephen Jaggi, *State Action Doctrine*, OXFORD CONST. L. (Oct. 2017), <https://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e473> [<https://perma.cc/QB22-YCSV?type=standard>].

81. *United States v. Texas*, 143 S. Ct. 1964, 1969 (2023).

rights if the plaintiffs have not suffered an injury-in-fact similar to one recognized at common law.<sup>82</sup> But, as explained by Eleventh Circuit Judge Adalberto Jordan, cases “involving the alleged invasion of a congressionally created private right by a private party against another private party, do not implicate structural or institutional concerns.”<sup>83</sup> When a private plaintiff sues a private defendant based on a congressionally created right, if the plaintiff wins, the judgment does not affect the branches of government in any way. In deciding such cases, the court does not interfere with the actions of the executive branch or invalidate an act of Congress and thus, requiring that the parties have standing does nothing to protect the separation of powers because the court is not doing *anything* with respect to the other branches of government. Thus, as Judge Jordan says, private party cases like *TransUnion* “are exactly the type of cases suited for initial congressional judgment and ensuing judicial resolution.”<sup>84</sup>

I agree that the Court’s decision to refuse jurisdiction whenever it does not believe a plaintiff’s injury is sufficiently serious does not protect the separation of powers. Article III does not explicitly address the separation of powers because the separation of powers is a structural limitation. The Constitution contains vesting clauses delineating the powers of the respective branches of government. If adjudicating a case trenches on either the legislative power or the executive power, it would be the Vesting Clauses of Articles I and II, respectively, that check the Court’s role, not § 2 of Article III.<sup>85</sup> So long as courts have jurisdiction, they have an unflagging obligation to exercise it<sup>86</sup> and refusing to do so undermines the separation of

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82. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2219 (2021) (Thomas, J., dissenting).

83. *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 958 (11th Cir. 2020) (Jordan, J., dissenting).

84. *Id.*

85. *See e.g., Laufer v. Arpan LLC*, 29 F.4th 1268, 1290 (11th Cir. 2022) (Newsom, J., concurring) (positing that Article II may limit plaintiffs’ ability to litigate where doing so encroaches on the executive power).

86. *TransUnion*, 141 S. Ct. at 2216 (Thomas, J., dissenting) (“When a federal court has jurisdiction over a case or controversy, it has a ‘virtually unflagging obligation’ to exercise it.” (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S.

powers by removing the judiciary's role as a check on the other branches.<sup>87</sup> By contrast, tying standing to the Due Process Clauses—as proposed herein—clarifies the standing doctrine's role as the protection of future litigants from the effects of inadequate adversarialism and allows the courts to play their proper part in the separation of powers.

Fourth, the standing doctrine suffers from a workability/inconsistent application problem. In *Sierra v. City of Hallandale Beach* Judge Newsom points out how,

Despite nearly universal consensus about standing doctrine's elements and sub-elements, applying the rules has proven far more difficult than reciting them. Consider just the “concrete[ness]” component of the injury-in-fact requirement. Since *Spokeo* was decided, courts considering the same statute have found that seemingly slight factual differences distinguish the qualifyingly “concrete” from the disqualifyingly “abstract.”<sup>88</sup>

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800, 817 (1976)); *Cohens v. Virginia*, 19 U.S. 264, 404 (1821) (Marshall, C.J.) (The Court has “no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.”).

87. The role of the judiciary is to check the other branches by exercising their jurisdiction. See THE FEDERALIST No. 51, at 319 (James Madison) (Clinton Rossiter ed., 1961) (explaining that the Constitution's “great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract ambition.”); Robert J. Pushaw Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 396 (1996) (describing how legal giants like “Erwin Chemerinsky and Martin Redish” have explained that the Court's concept of justiciability actually “undermines separation of powers by restricting or barring the exercise of judicial review—the principal control against unconstitutional action by the political branches.”); Erwin Chemerinsky, *In Defense of Judicial Supremacy*, 58 WM. & MARY L. REV. 1459, 1461 (2017) (“The Constitution exists to limit government, and the limits are meaningful only if someone or something enforces them. Enforcement often will not happen without the judiciary.”); but see *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992) (stating that it would violate the separation of powers for the courts to act as “virtually continuing monitors of the wisdom and soundness of Executive action” (quotation omitted)).

88. *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1115 (11th Cir. 2021) (Newsom, J., concurring) (“We have held, for instance, that receiving an unwanted phone call in violation of the Telephone Consumer Protection Act is a concrete injury, but receiving an unwanted text message in violation of the Act is not.”).

Likewise, in an article written prior to his elevation to the bench, Ninth Circuit Judge William Fletcher explained that the “high level of generality” in the Court’s standing analysis causes “wildly vacillating results.”<sup>89</sup> According to Judge Fletcher, the results of the injury-in-fact analysis necessarily vacillate because there is no “non-normative way” to assess whether a plaintiff is injured.<sup>90</sup> Rather, any assessment of injury-in-fact turns on “impose[d] standards of injury derived from some external normative source.”<sup>91</sup> Thus, he argues that in a legal system, injury can only be defined by reference to particular legal rights, and that, therefore, “standing should simply be a question on the merits of [the] plaintiff’s claim.”<sup>92</sup> In other words, whether a person is injured or not ultimately depends on whether his legal rights have been violated—a merits question. But because the Court insists on injury-in-fact as the touchstone of the standing analysis, it must therefore sift which types of injuries it thinks are sufficiently “concrete.” Accordingly, Judge Jordan has argued that standing has essentially become “a policy question” that has “drifted from its beginnings and from constitutional first principles” because courts get to make case-by-case decisions about which injuries they think are important enough to let parties sue about.<sup>93</sup>

It’s evident that the current doctrine is hard to apply consistently. While the due process standing theory proposed here cannot completely eradicate the inconsistent results arising from judicial

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89. Fletcher, *supra* note 1, at 223.

90. *Id.* at 231.

91. *Id.* at 231. As explained above, the Court has more recently looked to injuries bearing a “close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts” as the external normative source that Judge Fletcher points to. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016).

92. Fletcher, *supra* note 1, at 223; *see also* Sunstein, *Standing After Lujan*, *supra* note 2, at 166 (agreeing with Judge Fletcher that relevant question for standing is “whether the law—governing statutes, the Constitution, or federal common law—has conferred on the plaintiffs a cause of action”).

93. *Muransky, v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 957–58 (11th Cir. 2020) (Jordan, J., dissenting); *see also* *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2224 (2021) (Thomas, J., dissenting) (“Ultimately, the majority seems to pose to the reader a single rhetorical question: Who could possibly think that a person is harmed when . . . ?”).

discretion, I believe that clarifying the source of the standing doctrine as the Due Process Clauses can help develop clearer guidelines for assessing standing.<sup>94</sup> Accordingly, Part V.D. below discusses ways that a due process-based standing theory could be applied consistently.

In addition to the above listed critiques, I believe that the current standing doctrine suffers another fundamental flaw: the Court's standing analysis does not advance the standing doctrine's Court-articulated purposes. The Court has explained that "the gist" of standing doctrine is ensuring the "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."<sup>95</sup> Yet, a plaintiff can satisfy the standing doctrine without truly being adverse to the defendant. Imagine a plaintiff with a *de minimis* injury or who only seeks nominal damages.<sup>96</sup> In such a case, the plaintiff may have little incentive to litigate vigorously and the defendant may have little incentive to defend. Consequently, the parties' efforts may not "sharpen the issues" as the Court desires. As discussed further below, because the current standing doctrine does not adequately ensure adversarialism, it may fail to provide the process required by the Due Process Clauses. If the Court truly wishes to ensure that the issues presented to it are sharpened by the adverseness of the parties, it needs a new method of assessing standing. This article proposes a new method in Part V.D. below.

Despite these criticisms—which have largely discredited the foundational premises of current standing doctrine—the doctrine has proven durable and the Court has continued to insist that standing is required by Article III of the Constitution.<sup>97</sup>

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94. I discuss this further in Part V.D.

95. *Baker v. Carr*, 369 U.S. 186, 204 (1962); *see also Massachusetts v. EPA*, 549 U.S. 497, 517 (2007).

96. *See e.g., Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802 (2021) (finding standing where the plaintiff only requested nominal damages and not compensatory damages).

97. *See e.g., TransUnion*, 141 S. Ct. 2190 at 2203 (2021).



## II. THE DUE PROCESS CLAUSES REQUIRE ADEQUATE REPRESENTATION

Because this article argues that standing is required by the Due Process Clauses, it's important to understand what due process entails. Thus, this Part discusses how courts afford litigants with due process using the preclusion context as an example.

The Constitution's two Due Process Clauses guarantee that neither the federal government nor the states will deprive a person of "life, liberty, or property, without due process of law."<sup>98</sup> In particular, the Supreme Court has explained that before a person is deprived of life, liberty, or property by a court, he or she must be afforded "notice and an opportunity to be heard."<sup>99</sup> That means, as

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98. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

99. *Missouri v. Jenkins*, 495 U.S. 33, 66 (1990) (Kennedy, J., concurring); *see also* *Richards v. Jefferson County*, 517 U.S. 793, 797 n.4 (1996).

The hearing requirement is consistent with the way due process was understood by the Founders. Several influential common law sources the Founders were familiar with exemplify that appearance in court with an opportunity to answer was part of, or tantamount to, due process. *See* *Liberty of Subject 1354*, 28 Edw. 3 c.3 (Eng.) ("That no Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, *without being brought in Answer by due Process of the Law.*" (emphasis added)); *Observance of due Process of Law 1368*, 42 Edw. 3 c.3 (Eng.) ("It is assented and accorded, for the good Governance of the Commons, that no Man be *put to answer without Presentment before Justices*, or Matter of Record, or by due Process and Writ original, according to the old Law of the Land: And if any Thing from henceforth be done to the contrary, it shall be void in the Law, and holden for Error." (emphasis added)); 2 WILLIAM BLACKSTONE, COMMENTARIES \*278–79 ("The next step for carrying on the suit, after suing out the original, is called the process; being the means of compelling the defendant *to appear in court.*" (emphasis added)); 1 WILLIAM BLACKSTONE, COMMENTARIES \*133–34 ("And it is enacted by the statute 5 Edw. III. c. 9. that no man shall be forejudged of life or limb, contrary to the great charter and the law of the land; and again, by statute 28 Edw. III. c. 3, that no man shall be put to death, *without being brought to answer by due process of law.*" (emphasis added)); THE GENERAL LAWS AND LIBERTIES OF NEW PLYMOUTH COLONY (June 1671), in THE COMPACT WITH THE CHARTER AND LAWS OF THE COLONY OF NEW PLYMOUTH: TOGETHER WITH THE CHARTER OF THE COUNCIL AT PLYMOUTH 241, 241 (Bos., Dutton & Wentworth 1836) ("[N]o person in this Government shall be endamaged in respect of Life, Limb, Liberty, Good name or Estate . . . but by virtue or equity of some express Law of the General Court of this Colony . . . or the good and equitable Laws of our Nation suitable for us, *being brought to Answer by due process thereof.*" (emphasis added)); CHARTER OF LIBERTIES AND PRIVILEGES [CONSTITUTION] (1683) (N.Y.), reproduced in 1

relevant here, that a person must have either had her day in court, or else must have been adequately represented by someone else in court, for a court's judgment to be binding on them.<sup>100</sup>

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CHARLES Z. LINCOLN, *THE CONSTITUTIONAL HISTORY OF NEW YORK* 95 (1906) (“That Noe man of what Estate or Condi[ti]on soever shall be putt out of his Lands or Tene-ments, nor taken, nor imprisoned, nor dis[in]herited, nor banished nor any way[s] d[e]stroyed without being brought to Answe[r] by due Course of Law.”); see also ILAN WURMAN, *THE SECOND FOUNDING: AN INTRODUCTION TO THE FOURTEENTH AMENDMENT 16–24* (2020) (explaining that as understood at the Founding, due process entailed following certain mandated procedures, in many instances including the right to appear before the Court). Sources from shortly after the ratification confirm the importance of a hearing. See, e.g., *Hecker v. Jarret*, 3 Binn. 404 (1811) (“It is contrary to the first principles of justice, to deprive a man of his rights without a hearing, or an opportunity of a hearing.”).

In an article by Max Crema and Lawrence Solum, arguing that the Fifth Amendment's Due Process Clause was originally understood to be narrow in scope, the authors state that early statutes protecting due process were “primarily concerned with protecting individuals from being judged in absentia without first being ‘brought to answer’ in the appropriate or ‘due’ manner.” Max Crema & Lawrence Solum, *The Original Meaning of Due Process of Law in the Fifth Amendment*, 108 VA. L. REV. 447, 499 (2022).

100. See *Taylor v. Sturgell*, 553 U.S. 880, 884 (2008) (“‘It is a principle of general application in Anglo- American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.’ . . . Several exceptions, recognized in this Court's decisions, temper this basic rule. In a class action, for example, a person not named as a party may be bound by a judgment on the merits of the action, *if she was adequately represented* by a party who actively participated in the litigation.” (quoting *Hansberry v. Lee*, 311 U. S. 32, 40 (1940)) (emphasis added)).

The Founders were also familiar with the concept of adequate representation, although more frequently in contexts outside of the courtroom. For instance, Blackstone relates that the reason laws were binding was “because every man in England is, in judgment of law, party to the making of an act of parliament, being present thereat by his representatives.” I WILLIAM BLACKSTONE, *COMMENTARIES* \*178. Similarly, Blackstone explained that acts of the English parliament did not generally extend to Ireland “because they do not send representatives to our parliament.” *Id.* at \*100. By contrast, “The town of Berwick upon Tweed” though “no part of the Kingdom of England, nor subject to the common law” was “subject to all acts of parliament, being represented by burgesses therein.” *Id.* at \*97.

A careful reading of the *Commentaries* demonstrates that adequate representation was also important in court. For instance, Blackstone explained that if a man became non compos—*i.e.*, insane and unable to care for his property—the lord chancellor could commit the non compos person to the care of another person with an aligned interest:

The method of proving a person *non compos* is very similar to that of proving him an idiot. The lord chancellor, to whom, by special authority from the king,

The Supreme Court has explained what does and does not count as adequate representation in several cases. For instance, in *Taylor v. Sturgell*, the Court held that a “virtually represented” non-party could not be bound by a judgment through res judicata (the doctrine barring parties from re-litigating cases that have been previously litigated).<sup>101</sup> The Court used the phrase “virtual representation” to mean a situation in which a non-party was “represented” by a previous party only through their shared interest in the outcome.<sup>102</sup> *Sturgell* involved a litigant’s request under the Freedom of Information Act for copies of technical documents related to a vintage airplane.<sup>103</sup> The Federal Aviation Administration refused to provide those documents so the litigant sued to obtain them.<sup>104</sup> The FAA asserted that res judicata barred the plaintiff’s suit because of a previous suit in which a different plaintiff sought the same documents and lost.<sup>105</sup> The FAA contended that the previous litigant who lost had “virtually

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the custody of idiots and lunatics is intrusted, upon petition or information, grants a commission in nature of the writ de idiota inquirendo, to enquire into the party's state of mind; and if he be found non compos, he usually commits the care of his person, with a suitable allowance for his maintenance, to some friend, who is then called his committee. However, to prevent sinister practices, the next heir is never permitted to be this committee of the person; because it is his interest that the party should die. But, it hath been said, there lies not the same objection against his next of kin, provided he be not his heir; for it is his interest to preserve the lunatic's life, in order to increase the personal estate by savings, which he or his family may hereafter be entitled to enjoy[t]. The heir is generally made the manager or committee of the estate, it being clearly his interest by good management to keep it in condition; accountable however to the court of chancery, and to the non compos himself, if he recovers; or otherwise, to his administrators.

*Id.* at \*294–95. Similarly, given the unfortunate legal status of married women at the time, “A woman indeed may be attorney for her husband; for that implies no separation from, but is rather a representation of, her lord.” *Id.* at \*430. As such, the focus of representation at the Founding was ensuring that the representative’s interests were aligned with the interests of the represented party.

101. See *Sturgell*, 553 U.S. at 880–90.

102. *Id.* at 888.

103. *Id.* at 880–90.

104. *Id.*

105. *Id.* at 885–90.

represented” the current litigant. The Court rejected that argument holding that a non-present party may only be bound in six specific situations—none of which include “virtual representation.”<sup>106</sup> That said, a party *may* be bound where they have been “adequately represented by someone with the same interests who was a party to the suit.”<sup>107</sup>

In contrast to the insufficient representation in *Sturgell*, class action procedures are one common example of a situation where the Court has found adequate representation to satisfy due process.<sup>108</sup> Class actions allow “[o]ne or more members of a class” to “sue or be sued as representative parties on behalf of all members” if the requirements of Federal Rule of Civil Procedure 23 are satisfied.<sup>109</sup> That is to say, when the requirements of Rule 23 are satisfied, the class action procedure allows courts to apply preclusion to class members who have not had their day in court because those absent class members were adequately represented by the class representatives. As relevant here, two of Rule 23’s requirements are that “the claims or defenses of the representative parties are typical of the claims or defenses of the class” and “the representative parties will fairly and adequately protect the interests of the class.”<sup>110</sup> Those requirements make sure that the class representatives’ interests are aligned with the interests of the rest of the class and that the class representatives will do a good job litigating on behalf of the other class members. Thus, the Court has permitted class actions because the process that they afford absent class members adequately protects the interests of those members

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106. *Id.* at 894–95.

107. *Id.* (emphasis added).

108. *See id.* at 894–95; *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) (“The class action is ‘an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.’”); 5 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* ¶ §23.02 (2020) (citing *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 155 (1982)); *Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 55 (3d Cir. 1994) (“The requirements of Rule 23(a) are meant to assure both that class action treatment is . . . fair to the absentees under the particular circumstances.”).

109. FED. R. CIV. P. 23(a).

110. FED. R. CIV. P. 23(a)(3)–(4).

and, consequently, the class action mechanism does not violate the Due Process Clause.<sup>111</sup>

In short, due process forbids a court from binding a person to the effects of a court's judgment where that person has not previously had her "day in court" or otherwise been "adequately represented" in court.<sup>112</sup>

Separately, because this article discusses standing from a first-principles standpoint, it would be incomplete without a discussion of the original meaning of the Fifth Amendment's Due Process Clause. The goal of this article is not a thoroughgoing exploration of the original meaning of the Due Process Clause but, fortunately, others have undertaken that task. A recent article authored by Max Crema and Professor Lawrence Solum argues that, as originally understood, the Fifth Amendment's Due Process Clause "requires that deprivations of life, liberty, or property must be preceded by process of law in [a] narrow and technical legal sense."<sup>113</sup> Specifically, that a court must proceed through formal processes—for example, personal service of process or some legally valid alternative such as service by publication—before depriving the litigant of certain rights. That has not been the traditional understanding of the Due Process Clause, but, if their originalist research is right, it begs the question, does precedent deprive litigants of "life, liberty, or property" without that mandated formal service of process? To answer, we'll need to understand the role of precedent: the subject of the next section.

### III. STARE DECISIS IS A FUNDAMENTAL LEGAL PRINCIPLE THAT CAN BIND FUTURE LITIGANTS

Stare decisis, or the application of binding precedent, can effectively bind litigants without the due process safeguards found in the preclusion context. This is so because courts must often apply the decisions in previously decided cases—binding precedent—to

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111. *See* *Hansberry v. Lee*, 311 U.S. 32, 43 (1940).

112. *Taylor v. Sturgell*, 553 U.S. 880, 894–95 (2008).

113. Crema & Solum, *supra* note 99, at 451.

the case presently before them even where the court believes that the precedent is legally incorrect.<sup>114</sup> Thus, even though the litigant currently before the court has not had a chance to make his or her best arguments (i.e., had her day in court), the court may rule against them based on a previous unrelated case in which they were not a party nor adequately represented.

Over time, our legal system developed a particular understanding and usage of *stare decisis*. The concept of legal precedent traces back at least to the sixteenth century.<sup>115</sup> Although precedent is not explicitly mentioned in the Constitution, the Founders were aware of the concept and considered it an integral part of the judicial process.<sup>116</sup> That said, precedent was not used at the Founding in precisely the same way it's used today. Prior to the early 1800s, precedent served as a method of deriving general principles of law rather than as a dispositive process. It was only when official case reporters became systematic and reliable—thus allowing attorneys and judges to find relevant case law—that courts began adopting strict rules of *stare decisis*.<sup>117</sup> *Stare decisis* is

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114. Phillip M. Kannan, *The Precedential Force of Panel Law*, 76 MARQ. L. REV. 755, 755–56 (1993).

115. See DANIEL H. CHAMBERLAIN, *THE DOCTRINE OF STARE DECISIS: ITS REASONS AND ITS EXTENT* 5 (1885); See also LAURENCE GOLDSTEIN, *PRECEDENT IN LAW* 9 (1987) (“The notion of precedent plays an important role in the jurisprudence of every Western legal system, and a *pivotal* role in systems rotten in the common law tradition.” (emphasis added)); NEIL DUXBURY, *THE NATURE AND AUTHORITY OF PRECEDENT* 32 (2008) (tracing English court’s reliance on precedent to the thirteenth century).

116. See THE FEDERALIST NO. 78, at 470 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.”); Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 579–80 (2001). Professor Fallon also argues that *stare decisis* is a constitutional doctrine. *Id.* at 588; see also Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 1997 (1994) (“[T]he precept that like cases should be treated alike [is] rooted both in the rule of law and in Article III’s invocation of the ‘judicial Power’.”).

117. See JOSEPH L. GERKEN, *THE INVENTION OF LEGAL RESEARCH* 67–80 (2016). The knowledge of Supreme Court precedents in the early years of the republic “depended in large part upon dissemination of its opinions by an unofficial system of private enterprise reporting whose hallmarks were delay, omission and inaccuracy, and

the “[d]octrine that, when a court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same; regardless of whether the parties and property are the same.”<sup>118</sup>

Through the years, stare decisis and precedent have taken on a fundamental role in the judicial process.<sup>119</sup> Although a litigant can theoretically argue that a court’s unfavorable precedent is wrong, in practice the result in a litigant’s case is essentially predetermined if precedent exists on a dispositive issue in her case because of vertical stare decisis and the prior panel precedent rule.<sup>120</sup> Vertical stare decisis requires lower courts to follow the holdings of a higher court.<sup>121</sup> And the prior panel precedent rule (sometimes called horizontal stare decisis) requires circuit court panels to adhere to the precedent set by an earlier panel of that circuit—even if the current panel disagrees with the earlier panel.<sup>122</sup> Every circuit has adopted a form of that rule.<sup>123</sup> Thus, the application of vertical and horizontal stare decisis binds parties by depriving them of the

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unmanageable expense.” See Craig Joyce, *Wheaton v. Peters: The Untold Story of the Early Reporters*, 1985 Y.B. 35, 36 (1985).

118. *Stare Decisis*, BLACK’S LAW DICTIONARY ABRIDGED (5th ed. 1983); see also *Stare Decisis*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“The doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation.”).

119. See generally BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 20 (1921); Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L. J. 787, 796 (2012) (explaining how the “law-of-the-circuit” or prior-panel-precedent rule began to solidify in the 1960s and 70s).

120. CARDOZO, *supra* note 119, at 21 (explaining that when a judge fashions a judgment for the litigants before her, she also “fashion[‘s] it for others,” and that “[t]he sentence of today will make the right and wrong of tomorrow.”); Mead, *supra* note 119, at 788 (“No matter how sympathetic the party or how clever the lawyer, most litigation is resolved by stare decisis, where the decisions of the past control the future.”).

121. *Precedent*, BLACK’S LAW DICTIONARY (11th ed. 2019).

122. See Kannan, *supra* note 114, at 755–56.

123. *Id.* (“[A]ll thirteen circuits, with the possible exception of the Seventh Circuit, have developed the interpanel doctrine: No panel can overrule the precedent established by any panel in the same circuit; all panels are bound by prior panel decisions in the same circuit.”).

ability to effectively argue their cases in court when the results of their cases are pre-determined by precedent.<sup>124</sup>

To be sure, there are situations where the circuit can overrule a prior panel's holding; a circuit's en banc panel is free to overrule prior precedent and, additionally, "[m]ost circuits allow a later panel to overturn an earlier decision if it was rejected by an intervening decision of a higher authority," that is, the Supreme Court.<sup>125</sup> But it is notably difficult to secure either en banc review or a writ of certiorari from the Supreme Court.<sup>126</sup> And, if no en banc review is granted, the law of the circuit remains whatever the earlier panel declared it to be. Therefore, even if a litigant can, *theoretically*, convince an en banc court to decide her case contrary to circuit precedent or convince the Supreme Court to overrule precedent, *in practice*, litigants' cases are decided by pre-existing precedent.<sup>127</sup>

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124. As Justice Barrett has explained, "the preclusive effect of precedent raises due process concerns, and, on occasion, slides into unconstitutionality" because it "deprives a litigant of the right to a hearing on the merits of her claims." Barrett, *supra* note 10, at 1012.

125. Mead, *supra* note 119, at 797–98; see also Alexandra Sadinsky, *Redefining En Banc Review in the Federal Courts of Appeals*, 82 *FORDHAM L. REV.* 2001, 2001 (2014) ("Hearing cases en banc allows the full circuit court to overturn a decision reached by a three-judge panel.").

126. See Sadinsky, *supra* note 125, at 2004–05.

127. Barrett, *supra* note 10, at 1014 ("The federal courts, particularly the courts of appeals, generally have taken an *inflexible* approach to stare decisis. Once precedent is set, a court rarely revisits it, even in the face of compelling arguments that the precedent is wrong."); *Smith v. Bayer Corp.*, 564 U.S. 299, 317 (2011) ("[O]ur legal system generally relies on principles of *stare decisis* and comity among courts to mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs."); *Taylor v. Sturgell*, 553 U.S. 880, 903 (2008) (responding to the FAA's concern's about repetitive litigation, the Court asserted that "stare decisis will allow courts swiftly to dispose of repetitive suits brought in the same circuit. Second, even when *stare decisis* is not dispositive, 'the human tendency not to waste money will deter the bringing of suits based on claims or issues that have already been adversely determined against others.'"). Taken together, case law and circuit rules show that Professor Tushnet *underestimates* the binding effect of precedent. See e.g., Tushnet, *supra* note 11, at 1722 ("Brilmayer's strong theory of precedent ignores the reality that a court today cannot commit a court tomorrow to a decision."). Contrary to Tushnet's assertion that precedent can't bind potential future litigants, real world evidence as well as court practice shows that it does.



Thus, as Professor Trammel explains, while “preclusion usually does not apply to nonparties, who have not yet benefited from their own ‘day in court,’ . . . precedent works the other way around. Binding precedent applies to litigants in a future case, even those who never had an opportunity to participate in the precedent-creating lawsuit.”<sup>128</sup>

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When assessing whether a government practice—here, application of the standing doctrine to the precedent context—affords a person due process, it’s useful to have a step-by-step framework. One helpful framework, laid out by Professor Erwin Chemerinsky, explains that “[a]ll procedural due process questions can be broken down into three sub-issues.”<sup>129</sup> Those sub-issues include (1) whether there was a “deprivation,” (2) whether that deprivation was of “life, liberty, or property,” and (3) whether the government’s process in depriving the individual was “inadequate.”<sup>130</sup> Applying Professor Chemerinsky’s three-step approach,<sup>131</sup> we can see that the rigid application of precedent may violate the Due Process Clause. First, when an argument is foreclosed because of precedent (and a litigant consequently loses her case), the government—here the courts—has caused a deprivation. And second, depending on the type of case, that deprivation is of the litigant’s life, liberty, or property interests: the litigant is unable to marshal new arguments to protect her rights and as a result her rights are taken away.<sup>132</sup> Thus, third, we must assess whether the government’s process—here, the court’s process—is adequate.<sup>133</sup> In terms of assessing what process is adequate, prominent-jurist Judge Henry J. Friendly explained that

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128. Trammel, *supra* note 14, at 565; Barrett, *supra* note 10, at 1012–13.

129. Erwin Chemerinsky, *Procedural Due Process Claims*, 16 *TOURO L. REV.* 871, 871 (2000).

130. *Id.*

131. *Id.*

132. Barrett, *supra* note 10, at 1055 (explaining that life, liberty, or property are at stake in every litigation).

133. Chemerinsky, *supra* note 129, at 888.

“[t]he required degree of procedural safeguards varies directly with the importance of the private interest affected and the need for and usefulness of the particular safeguard in the given circumstances and inversely with the burden and any other adverse consequences of affording it.”<sup>134</sup> Thus, it is important to keep in mind that, when assessing whether standing provides adequate process (discussed further below), we must consider the importance of the private interest being protected.

#### IV. THE ARGUMENT FOR STANDING AS DUE PROCESS

Having established (1) that due process prohibits courts from binding a party when that party has not had her day in court,<sup>135</sup> and (2) that judicial precedent can effectively bind parties without the safeguards found in the preclusion context,<sup>136</sup> I propose that the standing doctrine can serve—or already does serve, even if the Supreme Court has not made it explicit—as that due process safeguard, thereby ensuring that the application of precedent is consistent with due process.

A “party’s representation of a nonparty is ‘adequate’ for preclusion purposes only if, at a minimum: (1) The interests of the nonparty and her representative are aligned and (2) either the party understood herself to be acting in a representative capacity or *the original court took care to protect the interests of the nonparty.*”<sup>137</sup> For purposes of applying binding precedent to litigants before the court, the standing doctrine does the same thing; it ensures adequate representation in the precedential case—or at least it could be used that way. When a court ensures that a party has standing, they look

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134. Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1278 (1975).

135. See *supra* Part II.

136. See *supra* Part III; see also Barrett, *supra* note 10, at 1012; Max Minzner, *Saving Stare Decisis: Preclusion, Precedent, and Procedural Due Process*, 2010 BYU L. REV. 597, 612 (2010) (explaining that stare decisis may be inconsistent with due process).

137. *Taylor v. Sturgell*, 553 U.S. 880, 900 (2008) (citation omitted) (emphasis added); see also 1 WILLIAM BLACKSTONE, COMMENTARIES \*295 (“The heir is generally made the manager or committee of the estate, it being clearly his interest by good management to keep it in condition”).

to see whether the injury that the plaintiff is suing based on is “concrete.”<sup>138</sup> In theory, a plaintiff with a concrete injury will truly be adverse to the defendant. By ensuring that the litigants before it are sufficiently adverse, the court attempts to “t[ake] care to protect the interests” of nonparties who may be affected by its precedent in the future.<sup>139</sup>

Consequently, rather than the injury-in-fact and concreteness requirements somehow deriving from Article III, it makes more sense that standing serves to ensure the interests of the litigants presently before the court are aligned with the interest of future litigants—a due-process safeguard.

The implication is that if courts make sure that the parties in front of them have a real stake in prevailing, the adversarial process will work as it’s supposed to and the result will be fair to any later litigants who will be bound by the precedent. The Court’s requirement that plaintiffs have an actual injury and are seeking a remedy for that injury ensures that litigants will do all that they can to prevail. Likewise, a defendant who knows that a plaintiff is seeking a real remedy for a real injury is likely to do whatever it can to avoid liability. Accordingly, both parties try their best to win—the plaintiff to redress her injury and the defendant to avoid liability. By contrast, litigants without concrete injuries may not do their utmost to protect their rights and will therefore fail to adequately represent later parties who are actually injured—because their interests are not aligned. Real adverseness between the parties is critical in our system because it ensures that the court hears the most compelling argument on each side of the case and is

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138. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200 (2021).

139. Courts have an independent duty to assess their jurisdiction, but anyone, even the plaintiff or a nonparty, may contest standing. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (court is required to address standing even if neither side raises it); *Gray v. City of Valley Park, Mo.*, 567 F.3d 976, 982 (8th Cir. 2009) (plaintiff may raise a standing issue); *Stallworth v. Bryant*, 936 F.3d 224, 230 (5th Cir. 2019) (“[E]ven nonparty witnesses refusing to comply with a discovery order may challenge standing.”); *United States v. Windsor*, 570 U.S. 744, 755 (2013) (amicus curiae argued lack of standing). Thus, a nonparty who notices that a litigant lacks standing, and therefore will not adequately represent potential future litigants, may be able to raise that issue with the court.

thereby likely to reach the legally correct result.<sup>140</sup> Although courts can conduct their own legal research, “[u]nder the party presentation principle, American courts function in an ‘adversarial system of adjudication’ whereby ‘we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.’”<sup>141</sup> We do so because, “our legal tradition regards the adversary process as the best means of ascertaining truth and minimizing the risk of error.”<sup>142</sup>

But the premise that adverseness will beget the best result rests on the assumption that the judicial process will, in fact, be adverse. If parties are not truly adverse, they may not present the most compelling argument for their side and, worse, may collude to manipulate the court into creating precedent they prefer for policy reasons.<sup>143</sup> That bad precedent then affects all potential future litigants in situations with similar facts. Standing protects against that eventuality by ensuring that earlier litigants are truly adverse and doing everything possible to prevail.

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140. Perhaps in a European or Latin American court system where the judge acts as an inquisitor rather than as a neutral arbiter, it would not be necessary to ensure that the parties were sufficiently adverse. In that kind of system, the judge has the latitude to seek out the right answer themselves. But in the American system, judges must generally rely on the parties to raise the appropriate issues before the court. *See United States v. Campbell*, 26 F.4th 860, 893 (11th Cir. 2022) (Newsom & Jordan, JJ., dissenting).

141. *Id.* at 872 (Newsom & Jordan, JJ., dissenting) (quoting *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020)).

142. *Mackey v. Montrym*, 443 U.S. 1, 13 (1979).

143. “The presence of an improper representative on either side of the lawsuit may have consequences that far transcend the interests of the participants.” Owen M. Fiss, *Forward: The Forms of Justice*, 93 HARV. L. REV. 1, 25 (1979). It has been said that “some of the most famous constitutional decisions have come in what now seem to have been collusive cases.” CHARLES ALAN WRIGHT, *LAW OF FEDERAL COURTS*, 56 (4th ed. 1983) (citing *Fletcher v. Peck*, 10 U.S. 87 (1810), and *Dred Scott v. Sandford*, 60 U.S. 393 (1857)). Notably, *Peck* and *Dred Scott* were both decided before the development of modern standing doctrine—and, thus, the anti-collusion protection that doctrine provides.

Standing’s function in ensuring adverseness and clear presentation of the issues may help explain why the Court only requires one of the plaintiffs in a case to have standing. *See Massachusetts v. EPA*, 549 U.S. 497, 518 (2007). So long as one of the plaintiffs is adverse to the defendant and doing a good job of presenting the issues (thereby adequately representing potential future litigants), it does not matter if other litigants aren’t doing as good a job—the Court will still hear the arguments on either side.

In short, standing protects potential future litigants by ensuring that they are well-represented in court by current litigants and that, as much as possible, the Court comes to the correct legal result.<sup>144</sup> It does so in two ways: (1) it ensures that issues are presented clearly and arguments made persuasively so that the court gets the law right; and (2) it prevents parties from colluding or otherwise manipulating the court into making bad law. As to whether the process afforded by standing doctrine is “adequate,”<sup>145</sup> given that precedent is ultimately slightly less binding than preclusion, the adequate representation safeguard provided by standing seems sufficient in relation to the importance of the right to present arguments to the court.<sup>146</sup>

A. *Cases Where Courts Have Used Standing to Protect Due Process*

When looking at the way the Supreme Court and lower courts have described the standing doctrine, it is apparent that courts have

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144. See *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 542 (1986) (“[W]e have strictly adhered to the standing requirements to ensure that our deliberations will have the benefit of adversary presentation and a full development of the relevant facts.”). Standing also helps resolve tension inherent in the dual role of the federal courts. On the one hand, it is the court’s role to adjudicate individual cases as the parties litigate them, but, on the other hand, many have argued that courts have a role in making sure that the law is interpreted correctly and vindicating “constitutional or statutory policies.” *Campbell*, 26 F.4th at 897 (Newsom & Jordan, JJ., dissenting) (describing the views of “public law” commentators like Owen Fiss); see also Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 460 (2009) (explaining that the adversarial system and standing both “ensure that courts decide only those issues that are briefed and argued by stakeholders with an incentive to adequately represent their interests to the court, which in turn will produce better judicial decisions.”). Frost explains that “because federal judges operate within a common law system in which the precedent in one case establishes the law for all who follow, it is particularly important that they make accurate statements about the meaning of law.” *Id.* at 453.

145. Chemerinsky, *supra* note 129, at 871.

146. Friendly, *supra* note 134 (explaining that the “required degree of procedural safeguards varies directly with the importance of the private interest affected”). The exact contours of due process are situationally dependent. For instance, FED. R. CIV. P. 23(b)(2) “does not require that class members be given notice and opt-out rights” because “notice has no purpose when the class is mandatory, and that depriving people of their right to sue in this manner complies with the Due Process Clause.” *Wal-Mart v. Dukes*, 564 U.S. 338, 363 (2011).

already used standing to ensure that the litigants before them are in a position to adequately represent the interests of future litigants. Courts have been explicit that standing ensures that the best arguments are before the court<sup>147</sup> and that standing avoids the prospect of litigants using the courts to achieve preferred policy goals in a way that could harm future parties.<sup>148</sup> Stated differently, courts try to filter out litigants that will not do a good job representing future parties.

Starting with ensuring the clarity and potency of legal arguments. The Court has explained that standing is about making sure that the parties' arguments are clear and well-reasoned. Take *Baker v. Carr* as an example. *Baker* involved a Fourteenth Amendment challenge to Tennessee's decision not to redistrict voting districts following demographic changes.<sup>149</sup> Assessing whether the plaintiffs had standing to challenge Tennessee's failure to redistrict, the court used the hypophora, "Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete *adverseness which sharpens the presentation of issues* upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing."<sup>150</sup> Thus, in identifying the very essence or "main point" of standing,<sup>151</sup> the Court pointed to "sharpness" in "the presentation of issues."

The Court re-emphasized the importance of clarity to the standing analysis in *Flast v. Cohen*. There, the Court focused on whether the question underpinning the litigation "will be framed with the necessary specificity . . . and that the litigation will be

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147. See *Baker v. Carr*, 369 U.S. 186, 204 (1962); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 542 (1986).

148. See *Diamond v. Charles*, 476 U.S. 54, 62 (1986); *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970) (citation omitted and emphasis added); *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 403 (1980) ("The imperatives of a dispute capable of judicial resolution are *sharply presented issues* in a concrete factual setting and *self-interested parties vigorously advocating opposing positions.*" (emphasis added)).

149. *Baker*, 369 U.S. at 187.

150. *Id.* at 204 (emphasis added).

151. *Gist*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002) ("1: the ground or foundation of a legal action without which it would not be sustainable 2: the main point or material part (as of a question or debate): the pith of a matter: ESSENCE.").

pursued with the necessary vigor.”<sup>152</sup> If the issues are “pressed before the Court with . . . clear concreteness” and “precisely framed,” the Court can home in on discrete issues for decision.<sup>153</sup> And if those issues are litigated vigorously, the Court will—at least in theory—hear the best arguments on each side of the case. The *Flast* Court distinguished the plaintiff before it from the plaintiff in *Mellon* based on the fact that the plaintiff before it had pointed to a specific constitutional violation.<sup>154</sup> Because the plaintiff in *Flast* complained of the violation of a specific constitutional provision, he presented the Court with a clear issue and gave the Court “confiden[ce] that the questions will be framed with the necessary specificity” such that the Court could properly adjudicate the dispute.<sup>155</sup>

Several years later, in *Secretary of the State of Maryland v. Joseph H. Munson Co.*, the Court once again emphasized that ensuring clarity is the purpose of standing.<sup>156</sup> There, the Court was asked to determine whether a Maryland statute violated a plaintiff’s First and Fourteenth Amendment rights.<sup>157</sup> After Maryland conceded that the plaintiff had an injury sufficient to confer constitutional standing, the state nonetheless argued that prudential considerations cautioned against granting the plaintiff standing.<sup>158</sup> Explaining the purpose of prudential standing requirements, the Court stated that “[t]he [standing] limitation ‘frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy, and it assures the court that the issues before it will be concrete and sharply presented.’”<sup>159</sup> Because the plaintiff had a real stake in the case, had clearly presented the issues, and was acting as an “[a]dequate

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152. *Flast v. Cohen*, 392 U.S. 83, 106 (1968).

153. *Id.* at 96–97.

154. *Id.*

155. *Id.*

156. 467 U.S. 947, 955 (1984).

157. *Id.* at 952.

158. *Id.* at 955–56, 958.

159. *Id.* at 955 (citation omitted).

advocate” of third-party rights, the Court held that he had standing.<sup>160</sup> Although it referred to these as reasons for prudential standing, the Court cited *Baker*, a jurisdictional standing case.<sup>161</sup> Thus, the Court was either expressing that jurisdictional and prudential standing requirements serve the same purpose—ensuring that the issues are presented clearly—or confusing prudential and jurisdictional requirements. Whatever the case, the articulated purpose of standing was to avoid deciding cases where the issues were “cloudy” and not “sharply presented.”<sup>162</sup>

Similar to *Munson*, in *Gladstone Realtors v. Village of Bellwood*, the Court stated that “the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants *best suited to assert a particular claim.*”<sup>163</sup> The Court’s desire to find the best litigant to assert a particular claim before “deciding questions of broad social import”—that is, creating precedent—further emphasizes that standing is about getting the best arguments in front of the Court.

Moreover, discussing standing to challenge a statute on behalf of another, the Court has said that “[s]tanding doctrine embraces . . . the general prohibition on a litigant raising another person’s legal

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160. *Id.* at 958.

161. *Id.* at 955 (citing *Baker v. Carr*, 369 U.S. 186, 204 (1962)). In later cases the Court has reiterated that “concrete adverseness which *sharpens the presentation of issues*” is a jurisdictional standing requirement—not a prudential one. See *Camreta v. Greene*, 563 U.S. 692, 701 (2011) (emphasis added) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 101, 103 (1983)). “[T]he concern that the controversy be *concrete and sharply presented* is fully satisfied by ascertaining that the [defendant’s action] causes direct, specific, and concrete injury to the parties who petition for our review, and that the requisites of a case or controversy are also met.” *U.S. Dep’t of Lab. v. Triplett*, 494 U.S. 715, 731 (1990) (Marshall, J., concurring) (emphasis added) (quoting *ASARCO v. Kadish*, 490 U.S. 605, 623–624 (1989)) (internal quotation marks omitted).

162. *Munson*, 467 U.S. at 955 (quoting *United States v. Raines*, 362 U.S. 17, 22 (1960)). Relatedly, although not in the standing context, the Supreme Court has advised lower courts to “refrain from issuing an opinion that could reasonably be understood by lower courts and nonparties to establish binding circuit precedent” when “deciding an effectively raised claim according to a truncated body of law.” *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 100 n.5 (1991).

163. 441 U.S. 91, 99–100 (1979) (emphasis added).



rights.”<sup>164</sup> The reason for this is because the Court assumes “that the party with the right has the appropriate incentive” and that they will sue “with the *necessary zeal and appropriate presentation*.”<sup>165</sup> Yet, cases where the court has allowed third-party standing also show how the Court uses standing as an adequate-representation tool. *Munson’s* discussion of “*jus tertii*” standing demonstrates that standing serves to ensure that the parties present the issues clearly. *Jus tertii* standing is the right of a party to bring suit on another’s behalf in specific situations.<sup>166</sup> One of those situations is “where practical obstacles prevent a party from asserting rights on behalf of itself” and “the third party can reasonably be expected properly to *frame the issues and present them with the necessary adversarial zeal*.”<sup>167</sup> The Court’s focus on the third party’s ability to present the issues exemplifies the concern over clarity. This can also be seen in *Sullivan v. Little Hunting Park*, where the Court held that Sullivan, a white man who assigned his membership in a discriminatory private club to a Black man, could raise the rights of the Black assignee, when he sought an injunction against his expulsion from the club.<sup>168</sup> The Court held that even though Sullivan’s injury was the result of his attempt to vindicate the rights of minorities, he still had standing because he was “‘the only effective adversary’ of the unlawful restrictive covenant.”<sup>169</sup> The implication, then, is that the Court allowed Sullivan to sue because Sullivan had the best ability to clearly place the relevant issues before a court.

The above cases show that when assessing standing the underlying interest the Court is concerned about is whether the

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164. *Allen v. Wright*, 468 U.S. 737, 751 (1984). Although the requirement that plaintiffs must assert their own interests has been characterized as prudential, *see, e.g. Kowalski v. Tesmer*, 543 U.S. 125, 128–29 (2004), the Court has raised some doubts about that characterization, *see Lexmark Int’l v. Static Control Components, Inc.*, 572 U.S. 118, 127 n.3 (2014).

165. *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (emphasis added) (citing *Warth v. Seldin*, 422 U.S. 490, 500 (1975)).

166. *Munson Co.*, 467 U.S. at 956.

167. *Id.* (emphasis added).

168. 396 U.S. 229, 237 (1969); *see also Ziglar v. Abbasi*, 582 U.S. 120, 132 (2017) (limiting the holding of *Sullivan* in the realm of *Bivens* actions).

169. *Sullivan*, 396 U.S. at 237 (quoting *Barrows v. Jackson*, 346 U.S. 249, 259 (1953)).

litigants appearing before it are sufficiently interested such that they will present the best arguments and theories and help the Court come to the correct determination of the law—thereby ensuring that the public and potential future litigants receive the benefit of that correct decision.

Next, avoiding manipulation. One of the primary reasons for justiciability doctrines is to prevent parties from “colluding to invoke federal jurisdiction, not to resolve a genuine dispute but to secure a judicial ruling on a subject of interest to one or more of the litigants.”<sup>170</sup> Because courts must rely on the parties to frame the issues, parties may try to frame their issues or choose to litigate factually favorable cases in such a way that manipulates the ensuing precedent.<sup>171</sup> That’s a problem because courts exist to adjudicate disputes, not to set social policy, and allowing parties to manipulate precedent disadvantages future litigants.<sup>172</sup> Thus, courts use standing as a filter to prevent precedent manipulation and protect future litigants.

Going back to *Flast*. When it held that the plaintiff had standing despite his status as a taxpayer, the Court justified its decision in part on the fact “that the issues will be contested with the *necessary adverseness* . . . to assure that the constitutional challenge will be made in a form traditionally thought to be capable of judicial resolution.”<sup>173</sup> Or in other words, the litigation would ensure the “clash of adversary argument exploring every aspect of a multi-faced situation embracing conflicting and demanding interests.”<sup>174</sup>

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170. FALLON, JR., ET AL., *supra* note 2, at 81.

171. See Barrett, *supra* note 10, at 1025–26 (describing how repeat player litigants try to manipulate precedent in their favor); Frank B. Cross, *In Praise of Irrational Plaintiffs*, 86 CORNELL L. REV. 1, 9–15 (2000) (providing empirical evidence that repeat player litigants try to manipulate precedent in their favor).

172. *Diamond v. Charles*, 476 U.S. 54, 62 (1986). The Seventh Circuit has explained: “The main contemporary reason for having rules of standing . . . is to prevent kibitzers, bureaucrats, publicity seekers, and ‘cause’ mongers from wresting control of litigation from the people directly affected.” *Ill. Dep’t of Trans. v. Hinson*, 122 F.3d 370, 373 (7th Cir. 1997) (emphasis added) (citations omitted).

173. *Flast v. Cohen*, 392 U.S. 83, 106 (1968) (emphasis added).

174. *Id.* at 101 (quoting *United States v. Fruehauf*, 365 U.S. 146, 157 (1961)) (internal quotation marks omitted).

The adverseness of the parties was critical because “the emphasis in standing problems is on whether the party invoking federal court jurisdiction has ‘a personal stake in the outcome of the controversy,’ and whether the dispute touches upon ‘the legal relations of parties having adverse legal interests.’”<sup>175</sup> That’s why “inquiries into the nexus between the status asserted by the litigant and the claim he presents are essential to assure that he is a proper and appropriate party to invoke federal judicial power.”<sup>176</sup> When parties are adverse they, definitionally, are not colluding to manipulate precedent. By contrast, if parties are not adverse, they may collude and facilitate precedent that not only affects future litigants’ ability to prevail but also incidentally affects the actions of non-litigants who change behavior in conformity with precedent.

The focus on adverseness was reiterated in *Sierra Club v. Morton*. In *Sierra Club*, the plaintiff sought to enjoin the development of a ski resort for environmental reasons but the Court held that the plaintiff lacked standing because the plaintiff failed to allege that any of its members used the area where the resort was to be built.<sup>177</sup> The Court observed that “the question of standing depends upon whether the party has alleged such a ‘personal stake in the outcome of the controversy,’ as to ensure that ‘the dispute sought to be adjudicated will be presented in an adversary context.’”<sup>178</sup> Although the Court acknowledged that the plaintiff was *likely* adverse to the defendant in this case, it refused to make an exception from the rule requiring a plaintiff to show an individualized injury to itself as evidence of adverseness.<sup>179</sup> It reasoned that without requiring a plaintiff to show a real stake in the litigation, any interested party could file suit to “vindicate their own value preferences through the judicial process,” that is,

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175. *Id.* at 101 (citations omitted) (first quoting *Baker v. Carr* 369 U.S. 186, 204 (1961); and then quoting *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 241 (1937)).

176. *Flast*, 392 U.S. at 102.

177. *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972).

178. *Id.* at 732 (citations omitted) (first citing *Baker v. Carr*, 369 U.S. 186, 204 (1972); and then citing *Flast v. Cohen*, 392 U.S. 83, 101 (1968)).

179. *Sierra Club*, 405 U.S. at 735 n.8, 739.

precedent.<sup>180</sup> What mattered to the Court was that there be some way to assess whether the dispute “adjudicated will be presented in an adversary context.”<sup>181</sup>

Later cases have continued to dwell on the effects of allowing litigants without a real stake to sue. Recognizing that its decisions have broad ripples beyond the parties to a specific case, the Court in *Diamond v. Charles* held that standing “is not to be placed in the hands of ‘concerned bystanders,’ who will use it simply as a ‘vehicle for the vindication of value interests’” because the courts’ power “profoundly affect[s] the lives, liberty, and property of those to whom it extends.”<sup>182</sup> Thus, the Court recognized that standing serves to ensure that whoever the litigant is, they are litigating effectively for all those not before the Court—not colluding to set precedent. The following phrase from *Data Processing* highlights the point: “Certainly he who is ‘likely to be financially’ injured, may be a reliable private attorney general to litigate the issues of the public interest in the present case.”<sup>183</sup>

In *Valley Forge Christian College v. Americans United for Separation of Church & State*, the Court, explaining what it considered to be “implicit policies embodied in Article III,” sought to ensure that litigants wouldn’t manipulate precedent to set social policy.<sup>184</sup> The implicit policies include ensuring that “a concrete factual context conducive to a realistic appreciation of the consequences of judicial action” and consequent “confidence that [the Court’s] decision will not *pave the way for lawsuits which have some, but not all, of the facts of the case actually decided by the court.*”<sup>185</sup> It further noted that standing “reflects a due regard for the autonomy of those persons likely to be most directly affected by a judicial order.”<sup>186</sup> Hence, *Valley Forge*

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180. *Id.* at 740.

181. *Id.* at 732.

182. *Diamond v. Charles*, 476 U.S. 54, 62 (1986).

183. 397 U.S. 150, 154 (1970) (citation omitted and emphasis added); *but see* *Laufer v. Arpan LLC*, 29 F.4th 1268, 1290 (2022) (Newsom, J., concurring) (Plaintiffs cannot constitutionally act as “private attorney[s] general.” (quotation omitted)).

184. 454 U.S. 464, 472 (1982).

185. *Id.* at 472 (emphasis added).

186. *Id.* at 473.

shows how checking that the most relevant party is before the Court ensures that the precedent created by the Court will not be manipulated by interested parties without a real stake in the litigation. The Court's statements demonstrate that the Court is conscious of the practical effect of its precedent on the public and especially future litigants. Even though *Valley Forge* frames its reasoning in terms of Article III, its statements relate less to the Court's power than to the procedural effects of the Court's orders on the public and future litigants.

It is not traditionally considered a standing case, but *Lord v. Veazie*<sup>187</sup> is a particularly relevant example of the Court's concern with the adequacy of the litigants before it in ensuring that other parties are not improperly bound by precedent. In *Veazie*, the Court caught two parties colluding to try and convince the Court to answer a question of law that would "seriously affect[]" the rights of a third party.<sup>188</sup> Bear with me—the facts are complicated: Veazie had warranted his ownership of navigation rights in a particular river and conveyed those rights to Lord.<sup>189</sup> Lord sued Veazie so that the Court would have to rule on whether Veazie breached the warranty—and if it found that he hadn't, thereby set precedent establishing that Lord had rights in navigating the river.<sup>190</sup> Another party, Moor, submitted an affidavit to the Court claiming that he had a better claim to the river and that the "case was a feigned issue,"<sup>191</sup> got up collusively between the said Lord and Veazie, for

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187. 49 U.S. 251 (1850).

188. *Id.* at 255.

189. *Id.* at 252.

190. *Id.*

191. A "feigned issue" was a "proceeding in which the parties, by consent, ha[d] an issue tried by a jury without actually bringing a formal action" done when "a court either lacked jurisdiction or was unwilling to decide the issue." *Feigned issue*, BLACK'S LAW DICTIONARY (11th ed. 2019). I think it's more likely that Moore intended to accuse the parties of a feigned *action*—" [a]n action brought for an illegal purpose on a pretended right." *Feigned action*, BLACK'S LAW DICTIONARY (11th ed. 2019). Feigned issues were permitted in the early federal courts whereas feigned actions were not. See Stephen Sachs, *Feigned Issue in the Federal System* 1, 18–19 (Nov. 26, 2007) (unpublished manuscript) ([https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1032682](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1032682) [<https://perma.cc/LM4F-WQMC>]).

the purpose of prejudicing his (Moor's) rights, and obtaining the judgment of this Court upon principles of law affecting a large amount of property, in which he and others were interested."<sup>192</sup> The Court found Moor's assertions credible and held that, because "there [wa]s no real conflict of interest between them; that the plaintiff and defendant have the same interest," the lower court's judgment on the issue should be vacated.<sup>193</sup> Thus, not referencing Article III, the Court held that non-adverse parties were not permitted to litigate a case in such a way as to disadvantage other litigants.<sup>194</sup> The underlying principle wasn't about the Court's constitutional jurisdiction to hear non-adversarial or feigned issues, but rather about protecting third parties from the collusion of other litigants and the Court's resulting statements on "principles of law."<sup>195</sup>

On occasion, the Court has gotten close to acknowledging that finding the right litigant to prosecute a case protects due-process rights. For instance, in *Singleton v. Wulff*, a case in which two physicians sued to protect the rights of their patients, the Court found that the physicians had standing because they adequately represented the rights of their patients.<sup>196</sup> Discussing why the Court often rejects third-party standing, the Court explained that

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192. *Lord v. Veazie*, 49 U.S. (8 How.) 251, 252–53 (1850).

193. *Id.* at 255–56.

194. *Id.*

195. Another case about collusive suits that has been distinguished from standing, like *Flast v. Cohen*, 392 U.S. 83, 100 (1968) (distinguishing the standing requirement from the rule against friendly suits), but which, I contend, should be considered a standing case is *United States v. Johnson*, 319 U.S. 302 (1943). There the Court held that in "the absence of a genuine adversary issue between the parties," the "court may not safely proceed to judgment." *Id.* at 304. In *Johnson*, the Court determined that the defendant paid for the suit on behalf of the plaintiff and therefore vacated the judgment. *Id.* at 304. The concern in *Johnson* is the same as in other standing cases—the adverse-ness of the parties. See, e.g., *Geraghty*, 445 U.S. at 403 ("The imperatives of a dispute capable of judicial resolution [is] . . . *self-interested parties vigorously advocating opposing positions.*" (emphasis added)). And it appears that the government at the time considered it to be a standing case as it cited the constitution's case or controversy requirement. *Johnson*, 319 U.S. at 303. Cases like *Veazie* and *Johnson* should be considered standing cases.

196. *Singleton v. Wulff*, 428 U.S. 106, 117 (1976).

“[t]he courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them. *The holders of the rights may have a like preference, to the extent they will be bound by the courts’ decisions under the doctrine of stare decisis.*”<sup>197</sup> But, explaining that the rule against third-party standing “should not be applied where its underlying justifications are absent,” the Court stated that “the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter” and that in such instances standing should be afforded to the third party.<sup>198</sup> Thus, the Court implicitly acknowledged that the purpose of the rule was to protect potential future litigants not presently before the court.

Later, in *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*,<sup>199</sup> the Court came relatively close to conflating the role of precedent and preclusion. In the associational standing context, the Court wrote that assuring an association’s “adversarial vigor in pursuing a claim for which” its members have “Article III standing exists” was the point of the associational standing test and that “it is difficult to see a constitutional necessity for anything more.”<sup>200</sup> The Court explained that the requirement that “an association plaintiff be organized for a purpose germane to the subject of its member’s claim raises an assurance that the association’s litigators will themselves have a stake in the resolution of the dispute, and thus be in a position to serve as the defendant’s natural adversary.”<sup>201</sup> Then, while recognizing that preclusion and precedent are different, the Court maintained that an association must *adequately represent* its members’ stake in the

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197. *Id.* at 114 (emphasis added); *Powers v. Ohio*, 499 U.S. 400, 413–414 (1991) (same); see also *Nasir v. Morgan*, 350 F.3d 366, 376 (3d Cir. 2003) (“A ‘close’ relationship for third-party standing must allow the third-party plaintiff to operate ‘fully, or very nearly, as effective a proponent,’ of the potential plaintiff’s rights as would the plaintiff himself.”).

198. *Singleton*, 428 U.S. at 114–15.

199. 517 U.S. 544 (1996).

200. *Id.* at 556.

201. *Id.* at 555–56.

litigation to have standing—even though those members would not usually be preclusively bound by the judgment against the association.<sup>202</sup> The Court explained that standing can only exist if the association was sufficiently adversarial to the opposing party and adequately representing its members. In that way, the Court ensured that the parties before it were sufficiently adverse and not colluding to manipulate precedent in a way that would harm other potential litigants.

The connection between adversarialism and standing also shows how standing is a due process issue, not a jurisdictional one. The Court has stated that one purpose of standing doctrine is to ensure the existence of a “Case” and to avoid the resolution of hypothetical controversies and the issuance of advisory opinions.<sup>203</sup> But requiring that suits be adversarial is not logically related to the goal of avoiding advisory opinions. Even two parties who are not truly adverse may have the legal relationship between them changed based on a court’s ruling, and therefore the court’s ruling would not be advisory.<sup>204</sup> If adverseness were required to avoid advisory

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202. *Id.* at 557 n.6 (“The germaneness of a suit to an association’s purpose may, of course, satisfy a standing requirement without necessarily rendering the association’s representation adequate to justify giving the association’s suit preclusive effect as against an individual ostensibly represented. . . . In this case, of course, no one disputes the adequacy of the union . . . as an associational representative.” (citations omitted)).

203. See Fletcher, *supra* note 1, at 247; Sierra Club v. Morton, 405 U.S. 727, 733 n.3 (1972).

204. Courts currently entertain certain cases and grant judgments where the parties agree or where only one party appears. See *Consent Decree*, BLACK’S LAW DICTIONARY (11th ed. 2019); WRIGHT, *supra* note 143, at 56 (giving guilty pleas, default judgments, and naturalization orders as examples); RICHARD A. EPSTEIN, ANTITRUST CONSENT DECREES IN THEORY AND PRACTICE: WHY LESS IS MORE, at vii (2007) (“Many antitrust cases . . . are concluded by agreements between the government and the defendant firms that specify the firms’ future activities in detail; the agreements are then approved and adopted by the trial court (often with modifications) and thereby become legal decrees.”); *Consent judgment*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“In effect, a consent judgment is merely a contract acknowledged in open court and ordered to be recorded, but it binds the parties as fully as other judgments.”); *No contest*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“A criminal defendant’s plea that, while not admitting guilt, the defendant will not dispute the charge.”). In separate pieces, Professor Robert J. Pushaw, Jr. and Professor James Pfander argue that, as understood at the Founding, “Cases” included non-adversarial disputes. Both professors point to types of court



opinions, non-adversary court proceedings like consent decrees or guilty pleas would not be allowed. But they are. The only real reason for the Court to care about whether the parties are adverse is not to avoid advisory opinions, but rather to avoid opinions that will deprive future litigants of their ability to litigate without adequate process.<sup>205</sup>

Throughout US history, the courts have been an instrument by which interest groups seek to effect social change. Consider the historical, and growing role, of what is called “strategic” or “impact” litigation. Impact litigation is “the strategic process of selecting and pursuing legal actions to achieve far-reaching and lasting effects beyond the particular case involved.”<sup>206</sup> Implicitly, then, the goal of this type of litigation is to affect parties not presently before the relevant court.<sup>207</sup> There is nothing necessarily wrong with impact litigation if the judicial process is working as it is supposed to. But what happens when courts do not ensure that parties are actually adverse and vigorously pursuing the litigation? Consider the following examples in Part IV.B., below.

#### B. *The Current Doctrine’s Failures in Protecting Due Process*

There are a number of situations that arise under the current standing doctrine where the doctrine either makes exceptions to its usual requirements or somehow otherwise fails to ensure clarity and adversarialism. The potentially deleterious results in those

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proceedings that took place at the Founding without adversarial parties. See Pushaw, *supra* note 21, at 526; JAMES E. PFANDER, *CASES WITHOUT CONTROVERSIES: UNCONTESTED ADJUDICATION IN ARTICLE III COURTS 1–11*, 19, 150, 181–82 (2021).

205. I later explain why non-adversary proceedings *are* permitted. See *infra* Part V.

206. AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, CENTER FOR HUMAN RIGHTS AND HUMANITARIAN LAW, *IMPACT LITIGATION: AN INTRODUCTORY GUIDE 1* (2016), <https://www.wcl.american.edu/impact/initiatives-programs/center/publications/documents/impact-litigation-an-introductory-guide/> [<https://perma.cc/MV4Y-LNKK>]

207. *Id.* (“[S]trategic litigation cases are as much concerned with the effects that they will have on larger populations and governments as they are with the end result of the cases themselves.”); Susan Wnukowska-Mtonga, *The Real Impact of Impact Litigation*, 31 *FLA. J. INT’L L.* 121, 121–22 (2019) (explaining that impact litigation “not only affects the rights holder” but other, future, litigants as well).

situations demonstrate why standing is so important to protect due process rights.

First, allowing litigants to bring First Amendment overbreadth cases even where their own First Amendment rights have not been infringed. As explained earlier, federal courts generally prohibit a party from bringing a suit or raising a defense asserting the rights of a third-party.<sup>208</sup> In other words, an individual usually needs to show that her own rights have been infringed to bring or defend a lawsuit.<sup>209</sup> But, “the Court has altered its traditional rules of standing to permit—in the First Amendment area—‘attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.’”<sup>210</sup> The Court allows the exception because of the great risk that a free-speech-infringing law “may cause others not before the court to refrain from constitutionally protected speech or expression.”<sup>211</sup> Thus, the Court tries to protect the free speech rights of the entire community. But, in allowing plaintiffs without a real stake in the controversy to sue, the Court fails to make certain that those plaintiffs will do a good job litigating the case. Accordingly, First Amendment overbreadth litigation is an area that lacks the due process protection that I propose is usually afforded by the standing doctrine.

To show this, consider the following hypothetical. The curmudgeonly Claytown city council passes an ordinance prohibiting all live dancing performances. Then, knowing he will do a bad job, the city council pays Brian (who operates an obscene

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208. *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (“[T]he plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.”).

209. *Id.*

210. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965)) (“Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute’s very existence may cause others not before the court to refrain from constitutionally protected speech or expression.”).

211. *Id.*

dancing establishment) to sue to challenge the unconstitutional regulation on overbreadth grounds. The city ordinance can constitutionally be applied to Brian's establishment because obscene speech may be regulated under the First Amendment.<sup>212</sup> Brian's rights have not been infringed so he would not usually have standing,<sup>213</sup> but this is an overbreadth challenge, so the court says that is no problem.<sup>214</sup> Brian hates interpretive dance performances (like the annual Claytown interpretive dance festival) and so, even though he sues to enjoin the regulation, he intentionally bungles the lawsuit. Due to Brian's intentionally incoherent briefing, and Claytown's lawyer's excellent advocacy, the court is persuaded that Claytown's regulation is not overbroad and holds that the regulation is constitutional. The very next day, Emile, a world-renowned interpretive dancer scheduled to perform at Claytown's interpretive dance festival, files a lawsuit challenging the same regulation. Emile argues cogently and persuasively that the regulation violates his First Amendment rights. The court is convinced that Emile is right but, because it is bound by its own precedent,<sup>215</sup> rules against him.

What this hypothetical shows us is that, by failing to ensure that Brian was actually adverse to the city council's ordinance, the court failed to protect Emile from the binding effects of its precedent. As explained above, Emile was not present during *Brian v. Claytown City Council*, but he is bound by the decision nonetheless. Had the court required that Brian have standing—that is, required a litigant actually adverse to the city council—the court would have realized that the council's regulation violated the First Amendment and

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212. See *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68, 74–75, 77 (1981); *Roth v. United States*, 354 U.S. 476, 485 (1957).

213. *Warth*, 422 U.S. at 499.

214. See *Broadrick*, 413 U.S. 601, at 612.

215. See e.g., *United States v. Steele*, 147 F. 3d 1316, 1318 (11th Cir. 1998) (en banc) (“a panel cannot overrule a prior one's holding even though convinced it was wrong.”); see also Kannan, *supra* note 114, at 755–56; CARDOZO, *supra* note 119, at 151 (In situations where precedent has been established, judges “have nothing to do but stand by the errors of [their] brethren of the week before, whether [they] relish them or not.”).

Emile would have won his later suit had the city tried to enforce its regulation against him.

The doctrine allowing an assignee to claim an injury-in-fact based on an assignor's injury can raise a similar issue.<sup>216</sup> Imagine a hypothetical where a manufacturer sells a defective product—say, an exploding blender—to a large group of consumers. The manufacturer could offer to pay one of the badly injured blender users to assign his claim to a third-party of the manufacturer's choosing. The injured blender consumer would likely take the payment if it was more than they would be able to recover at trial. Then, the third-party (also paid off by the blender manufacturer) could incompetently sue the manufacturer, lose, and set a precedent harmful to all the other consumers.

Similarly, current standing doctrine may fail to protect future litigants' due process rights in the associational standing context. As Donald Simone has pointed out, "[a]n association is not, in every sense, the sum of its members," and consequently, "the possibility arises that when a court grants an association standing the association will fail to represent membership interests adequately."<sup>217</sup> This is so because the decisions of "an association's leadership do not necessarily reflect the views of its constituency."<sup>218</sup> Accordingly, "in a suit alleging employment discrimination, a union may adequately represent the interests of members who are female or who are members of a racial minority, but inadequately represent the interests of male or nonminority members."<sup>219</sup> Likewise, "a union may fail to advocate the interests of its officers when it pursues litigation on behalf of rank and file members."<sup>220</sup> Accordingly, if courts do not check whether the association litigant is adequately adverse on behalf of all its

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216. See *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000); *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 286 (2008).

217. Donald F. Simone, Note, *Associational Standing & Due Process: The Need for an Adequate Representation Scrutiny*, 61 B.U. L. REV. 174, 179 (1981).

218. *Id.*

219. *Id.* at 180.

220. *Id.* at 180–81.

members, standing cannot protect the interests of the potential future litigants whose interests were not represented.

Standing doctrine may also fail to protect future litigants when a litigant currently before the court who should have a serious incentive to advocate vigorously nonetheless chooses not to do so. Consider cases involving qualified immunity. In a stereotypical qualified immunity case, the plaintiff sues a government official, say, a police officer, for allegedly violating one of the plaintiff's constitutional rights.<sup>221</sup> However, the way in which the police officer allegedly violated the constitutional right was novel, and under current precedent, the police officer would be entitled to qualified immunity.<sup>222</sup> Because he is entitled to qualified immunity, the police officer may only half-heartedly litigate the constitutional violation and, instead, primarily rely on the defense of qualified immunity. Consequently, the Court might conclude that the police officer violated the plaintiff's constitutional right but that no relevant law existed at the time to show the police officer knew that his actions violated a right, and the police officer is let off the hook.<sup>223</sup> But then, when another police officer is alleged to have done the same thing, the Court assumes that the second police officer knew about the holding from the earlier case and therefore holds that officer liable. In that way, the second officer is held liable based on the precedent in a case to which the second officer was not a party. And, as the example shows, the second officer was not adequately represented in the creation of that precedent because the first officer was insulated from the adverse constitutional outcome by qualified immunity and consequently did not vigorously defend the constitutional issue.

Looking to a real case, the facts of *Hollingsworth v. Perry* shed light on how current doctrine does not always live up to its aspirations when a party who should, theoretically, have an incentive to

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221. See, e.g., *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

222. See *Safford Unified Sch. Dist. v. Redding*, 557 U.S. 364, 377–78 (2009).

223. See, e.g., *Camreta v. Greene*, 563 U.S. 692, 697–98 (2011) (describing a situation in which the Ninth Circuit held that government officials violated a Fourth Amendment right but that the officials were protected by qualified immunity).

vigorously litigate chooses not to.<sup>224</sup> In *Perry*, California had passed a ballot initiative called Proposition 8 amending the state constitution to “provide that ‘[o]nly marriage between a man and a woman is valid or recognized in California.’”<sup>225</sup> Plaintiffs—same-sex couples—sued, arguing that Proposition 8 violated the Federal Constitution.<sup>226</sup> At that point, the defendants, including “California’s Governor, attorney general, and various other state and local officials responsible for enforcing California’s marriage laws,” decided not to defend the constitutionality of the amendment—despite, theoretically, being the parties with the most relevant interest in defending the state’s laws.<sup>227</sup> So, the amendment’s proponents—who did want to defend its constitutionality—tried to intervene in the suit.<sup>228</sup> The district court allowed the intervention but ruled that the amendment was unconstitutional.<sup>229</sup> The government decided not to appeal.<sup>230</sup> Eventually, the suit reached the Supreme Court and the Court was required to address whether the amendment’s proponents had standing to challenge the district court’s judgment.<sup>231</sup> The Court held that, because the proponents did not have a direct stake in the

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224. *Hollingsworth v. Perry*, 570 U.S. 693 (2013).

225. *Id.* at 701.

226. *Id.*

227. *Id.*

228. *Id.* at 702. The intervention process was designed in part to rectify instances of inadequate representation. FED. R. CIV. P. 24 advisory committee’s note to 1966 amendment (“The general purpose of original Rule 24(a)(2) was to entitle an absentee, purportedly represented by a party, to intervene in the action if he could establish with fair probability that the representation was inadequate.”). Amicus curiae briefs can similarly help courts interpret the law correctly when parties have failed to address an important point. *See* SUP. CT. R. 37 (2022) (“An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court.”). Nevertheless, neither mechanism can completely resolve the due process issue created by stare decisis when the effected party was unaware or unable to intervene or file an amicus brief (*e.g.*, if the effected party was not yet alive, lacked resources to enter the litigation, or was simply unaware of the case).

229. *Perry*, 570 U.S. at 702.

230. *Id.*

231. *Id.* at 703–04. The Court has required litigants to satisfy the standing requirements “throughout the life of the lawsuit,” including on appeal. *See Wittman v. Pershuballah*, 578 U.S. 539, 543 (2016).

case, they lacked standing.<sup>232</sup> Because the Court applied its standing rules in a formulaic manner, without bothering to check which party had a real interest in prevailing—and thus assuring adversarialism—the Court allowed precedent to come into existence without the benefit of the adversarial process.<sup>233</sup> It thus failed to protect the interests of potential litigants who would want to rely on the amendment.<sup>234</sup>

This can also happen when litigants with serious injuries are filtered out of the adjudicatory process and only litigants with minor injuries—plaintiffs who cannot recover high damages—remain in the precedent-creating adjudicatory process. It stands to reason that a plaintiff who has an injury worth a significant sum in damages is likely to litigate more vigorously to acquire that award. And such high-value plaintiffs are likely to be able to engage vigorous counsel on a contingency fee due to the high amount of damages. However, defendants may decide not to risk a large judgment and try to settle with those plaintiffs. By contrast, plaintiffs with small injuries, and consequently small damages, may not be able to acquire counsel who will expend the necessary resources on their cases, and the defendants in those cases may be more willing to risk a small judgment. Thus, the very plaintiffs who are most likely to vigorously litigate with effective counsel—thereby adequately representing future parties—may be filtered out of precedent-creating adjudication. Consequently, the parties left in the process may not be best suited to adequately represent future litigants.

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232. *Perry*, 570 U.S. at 715.

233. *See id.* at 720–21 (Kennedy, J., dissenting) (Explaining that only allowing the State to defend the amendment would put its defense in the hands of the very “elected public officials [who] had refused or declined to adopt” the amendment in the first place) (quoting *Perry v. Brown*, 52 Cal. 4th 1116, 1140 (Cal. 2011)).

234. Another example can be found in *United States v. Windsor*, 570 U.S. 744 (2013). There, the plaintiff sued the United States arguing that the Defense of Marriage Act violated the Fifth Amendment. *Id.* at 751–52. The executive branch, who was the defendant, declined to defend the constitutionality of DOMA despite being the party with standing to do so, and consequently the amendment was declared unconstitutional. *Id.* at 752–53. When the Court does not check for adverseness in its standing analysis, it fails to provide the protection that due process requires.

C. *Inconsistencies in Current Article III Standing Doctrine*

I have already described some of the criticisms of standing doctrine in part I.B., but I would like to briefly address some inconsistencies in the current doctrine that demonstrate that standing cannot really be about Article III jurisdiction. These inconsistencies would be resolved if we thought of standing as a due process requirement instead.

First, allowing standing in pre-enforcement actions is inconsistent with statements the Supreme Court has made about standing doctrine. By their very nature, pre-enforcement actions involve no injury-in-fact. Yet, the Court allows the case to go forward because of the *risk* of future injury.<sup>235</sup> If injury-in-fact were necessary for the exercise of Article III jurisdiction, the Court would not have been able to make an exception for pre-enforcement actions.<sup>236</sup> I contend that the real reasoning for allowing standing in pre-enforcement actions is that the risk of injury is enough to spur litigants on to fight their hardest to win and, thereby, present the most compelling arguments to the Court. If the standing requirement was really about ensuring a traditional type of justiciable injury, pre-enforcement actions would not make any sense. But, because standing is really about ensuring that litigants will vigorously represent future parties, allowing standing in pre-enforcement actions makes sense when the Court has proof that the litigants will do their best to do so.

The Court's precedent addressing defendant/appellant standing also demonstrates that the real crux of standing is adequate representation, not the existence of an injury in fact. Defendants do

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235. See generally *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158–65 (2014) (holding that litigants have standing to challenge a statute before the statute has been applied to them if the threatened enforcement is sufficiently imminent).

236. Jurisdictional requirements are not waivable and courts must always assure themselves of their own jurisdiction. See *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011); *Gonzales v. Thaler*, 565 U.S. 134, 141 (2012) (“Subject-matter jurisdiction can never be waived or forfeited.”); *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94–95 (1998).



not usually have injuries, plaintiffs do.<sup>237</sup> So, if standing were merely about the plaintiff having a requisite injury, it would make no sense to require that defendants “possess a ‘direct stake in the outcome.’”<sup>238</sup> Yet, the Court has required that defendants have standing.<sup>239</sup> If we think about standing as ensuring that the parties are doing their best to prevail, then it makes good sense to require that the defendant has standing. If the defendant does not have a real stake in the litigation, then she will not necessarily do her best and fail to adequately represent future defendants. The requirement of defendant standing shows that what the Court really desires is adversarialism.

As explained in footnote 204, courts regularly exercise jurisdiction even where the parties are not adverse.<sup>240</sup> If standing were really an Article III jurisdictional requirement as the Supreme Court contends, the federal courts would not be able to order non-adversarial judgments like consent judgments, consent decrees, etc.<sup>241</sup> While it is true that processes like consent decrees and judgments are somewhat different than a usual case, their force and effect is still derived from the court’s exercise of jurisdiction.<sup>242</sup> The fact that the parties to a consent decree or judgment have agreed to the court’s jurisdiction makes no difference because “[p]arties may not, by agreement, confer subject-matter jurisdiction on a federal

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237. Of course, defendants may have an injury and decide to counterclaim, but that is not necessary for the Court to find standing.

238. *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013) (citation omitted).

239. *See id.* at 705.

240. *See Pushaw*, *supra* note 21, at 526 (providing examples of non-adversarial adjudications like consent decrees, consent judgments, bankruptcy hearings, and naturalization orders). “Article III limits federal courts to cases or controversies, but this limitation does not explicitly require that plaintiffs have a particular stake in the outcome. A case or controversy might exist quite apart from whether there is an injury, legal or otherwise, to the complainant.” Sunstein, *Standing and the Privatization of Public Law*, *supra* note 77, at 1474.

241. *Flast v. Cohen*, 392 U.S. 83, 101 (1968) (focusing on the importance of adverse parties in the standing analysis).

242. *See Jurisdiction*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“A court’s power to decide a case or issue a decree.” (emphasis added)). I explain why this is not a problem under the due process theory of standing in Part V.B. below.

court that would not otherwise have it.”<sup>243</sup> Thus, standing—as the Court has articulated it—cannot be jurisdictional, or else those types of judgments would be without force.<sup>244</sup>

Additionally, the Court’s focus on the “specificity”<sup>245</sup> and “sharp[ness]”<sup>246</sup> of the issues presented in standing cases does not seem relevant if the question of standing is jurisdictional. If standing were truly jurisdictional, as long as the plaintiff had an injury in fact recognized at common law, it wouldn’t matter how specifically or sharply the issues were presented because the Court would have jurisdiction.<sup>247</sup> If, instead, as I propose, standing is about ensuring adequate representation, the sharpness of issues is critical because the clarity of the issues will affect how effectively the Court will be able to come to the correct determination for future litigants.

The Supreme Court’s practice of appointing amicus curiae to defend the decision below also demonstrates the inconsistency of current standing doctrine because court-appointed amici often lack any injury-in-fact and yet are treated similarly to a party to the case. Take *Jones v. Hendrix* as an example.<sup>248</sup> There, the U.S. Office of the Solicitor General indicated that it would defend the Eighth Circuit’s judgment below but not the Eighth Circuit’s rationale.<sup>249</sup> Accordingly, the Court appointed Morgan Ratner as amicus curiae to argue in support of the Eighth Circuit’s reasoning.<sup>250</sup> Ratner had no specific stake in the outcome of the litigation, yet orally argued the case, and the Supreme Court adopted the position she

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243. *Consent jurisdiction*, BLACK’S LAW DICTIONARY (11th ed. 2019).

244. Jurisdictional requirements are not waivable, and courts must always assure themselves of their own jurisdiction. *See Henderson v. Shinseki*, 562 U.S. 428, 434 (2011).

245. *Flast*, 392 U.S. at 106.

246. *Id.* at 99

247. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021) (explaining that injury analysis focuses on “whether the alleged injury to the plaintiff has a ‘close relationship’ to a harm ‘traditionally’ recognized as providing a basis for a lawsuit in American courts”).

248. 143 S. Ct. 1857 (2023).

249. *Id.* at 1864.

250. *Id.*

advocated rather than the position of either party.<sup>251</sup> When appointing amicus curiae, the Court appears to implicitly recognize that injury-in-fact is not always necessary for adversarialism. By appointing an amicus curiae to argue a specific position, the Court ensures that position has been adequately represented before the Court issues a holding binding all future parties—a due process requirement.

Lastly, allowing non-injured parties to sue in the First Amendment overbreadth context is also inconsistent with the Court's statements about standing being jurisdictional. If standing were truly jurisdictional and an "irreducible constitutional minimum" as the Court has so vehemently asserted,<sup>252</sup> the Court wouldn't have been able to "alter[] its traditional rules of standing to permit—in the First Amendment area," parties without a stake in the litigation to sue.<sup>253</sup> Conversely, if standing is not jurisdictional but merely a due process issue, the Court could adjudicate those cases provided it ensures due process another way.

*D. Preemptively Addressing Issues with the Due Process Theory*

There are some natural rejoinders to the due process theory which I will attempt to address here.

First, one might ask, how can the application of stare decisis ever violate due process if it was applied at the Founding? There are two answers. One is that, as I explained in Part III, stare decisis wasn't always as rigid a command as it is today.<sup>254</sup> At the Founding, precedent was used more to establish legal principles than to determine the precise outcome of a case.<sup>255</sup> Strict stare decisis and the prior panel precedent rule only came about later.<sup>256</sup> Thus, stare decisis did not bind future litigants in the same way it does today.

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251. *Id.*

252. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

253. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

254. *See supra* Part III.

255. *See GERKEN*, *supra* note 117, at 67, 70.

256. *See id.*; *Mead*, *supra* note 119, at 795 (explaining that "[t]he adoption of a law-of-the-circuit rule is a relatively modern judicial phenomenon" (quotation omitted)).

Relatedly, the function of a judicial opinion has changed over time. During the Founding era, “[j]udicial opinions began as extemporaneous oral explanations rendered immediately at the close of proceedings” given for the benefit of the parties to the case.<sup>257</sup> But, as time went on:

Modern judge[s] address[ed] an opinion only incidentally to the parties and to the lawyers who argued the case. Especially for appellate judges, the primary audience is the readership of the published report. The main job is not explaining the outcomes to the immediate participants, but rather, generating precedents to guide future conduct and adjudication.<sup>258</sup>

Thus, the nature of the modern legal opinion affects future litigants in a way that earlier opinions and precedents did not.

A second answer is that even if the application of stare decisis at the Founding hadn’t been considered a violation of due process, that may have been because the courts were already protecting potential future litigants by making sure the parties before them were adverse. In other words, courts were already employing a proto-standing doctrine.<sup>259</sup>

A second rejoinder. It would be natural to ask, what about the Court’s focus on separation of powers when discussing standing?<sup>260</sup> Surely—some will say—standing doctrine serves to preserve the separation of powers principle in the Constitution? My answer is that Article III is not, by itself, precisely about the separation of powers—it says nothing about it. Rather, the separation of powers principle is found in the *structure* of the Constitution; each of the first three articles contains a vesting clause setting forth the powers

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257. John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 578 (1993).

258. *Id.* at 578 (emphasis added).

259. *See, e.g.*, *Lord v. Veazie*, 49 U.S. 251 (1850).

260. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983).

of the respective branches of government.<sup>261</sup> To the extent that adjudicating a case might somehow encroach on either the legislative power or the executive power, it's the Vesting Clauses of Articles I and II respectively that are the relevant constitutional provisions for assessing the Court's conduct, not § 2 of Article III.<sup>262</sup> The case-or-controversy jurisdiction in Article III § 2 is not a limit on the courts' ability to hear cases so long as they are in fact, definitionally, cases. And the "straightforward" reading of the word "Case," as understood at the Founding, simply means a situation where "a plaintiff has a cause of action, whether arising from the common law, emanating from the Constitution, or conferred by statute."<sup>263</sup> Insofar as the plaintiff has a cause of action, a court's decision to adjudicate that dispute does not violate the separation of powers because the judicial power is quintessentially, the power to adjudicate.<sup>264</sup> Indeed, a court's decision not to

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261. See U.S. CONST. art. I, II, & III; *Lujan*, 504 U.S. 559–60 (“[T]he 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.”).

262. As an aside, to the extent that Court rulings can trench on the powers vested in the legislature and executive under Articles I and II, the only reason the Court is able to have any substantial impact is because of *stare decisis*. Without *stare decisis*, each case would affect only the individual litigant and the government could enforce its regulations against the public at large notwithstanding those regulations having been found unconstitutional vis-a-vis the specific litigants in each case. See *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) (explaining that when the court grants injunctive relief, “the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding”); Amanda Frost & Samuel Bray, *One for all: Are nationwide injunctions legal?*, 102 JUDICATURE 70, 72 (2018) (“[C]ommon law courts and equity courts—before the Founding, at the Founding, and for most of U.S. history— . . . g[a]ve remedies *only for a party to the case.*” (emphasis added)). If the actions of the political branches were only affected with regard to a handful of litigants, it would not seriously undermine those branches' prerogatives. But *stare decisis* does exist and, consequently, when the government loses a case, it is effectively bound in all future cases and must change its conduct in relation to the entire public. To some extent, ensuring that litigants have standing minimizes the number of cases affecting the government's conduct at large, but that is only a side-effect of the doctrine, not its constitutional basis.

263. *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1122 (2021) (Newsom, J., concurring).

264. See *Judicial Power*, BLACK'S LAW DICTIONARY (11th ed. 2019) (“The authority vested in courts and judges to hear and decide cases and to make binding judgments on them; the power to construe and apply the law when controversies arise over what

adjudicate can be an abdication of the court's responsibility in checking the other branches of government and stopping them from governmental overreach.<sup>265</sup>

Furthermore, it seems to me that the Court has so often focused on the separation of powers when discussing standing only because so many standing cases involve challenges to government conduct.<sup>266</sup> But if we look at the application of standing doctrine in cases that do not involve the executive or legislative branches, we can see that it bears no inherent relationship to preserving the separation of powers.<sup>267</sup> Take *Spokeo*,<sup>268</sup> for example. Although the Court stated that standing “serves to prevent the judicial process from being used to usurp the powers of the political branches,”<sup>269</sup> the Court's *own* decision in that case obstructed the legislature's power: Congress had created a cause of action authorizing the plaintiff to sue, but the Court, finding that the plaintiff lacked an

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has been done or not done under it.”); 15 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE §101.02 (2020) (“[P]rivate rights’ model of adjudication . . . posits that the sole role of the federal judiciary is to adjudicate live disputes.”); Emile J. Katz, *The “Judicial Power” and Contempt of Court: A Historical Analysis of the Contempt Power as Understood by the Founders*, 109 CAL. L. REV. 1913, 1952 (2021) (“Taken together, the papers of the Federalists, the Anti-Federalists, and the notes of the various state conventions demonstrate that the people who wrote and informed Article III believed that judicial power referred to power of adjudication.”).

265. See THE FEDERALIST NO. 51 at 318–19 (James Madison) (Clinton Rossiter ed., 2003) (explaining that the Constitution's “great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract ambition.”); Chemerinsky, *In Defense of Judicial Supremacy*, *supra* note 87, at 1461 (“The Constitution exists to limit government, and the limits are meaningful only if someone or something enforces them. Enforcement often will not happen without the judiciary.”)

266. See, e.g., *Mellon*, 262 U.S. at 447 (challenging statute); *Flast v. Cohen*, 392 U.S. 83, 83 (1968) (challenging government's unconstitutional use of taxpayer funds); *Lujan*, 504 U.S. at 555 (challenging regulations issued by the Secretary of Interior).

267. See *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 958 (11th Cir. 2020) (Jordan, J., dissenting).

268. 136 S. Ct. 1540

269. *Id.* at 1547 (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013)).

injury in fact, refused to allow the plaintiff to do so.<sup>270</sup> Consider the counterfactual. If the Court had allowed the plaintiff to sue, as Congress intended, it would not have had any effect whatsoever on the political branches. Imagine a hypothetical involving a common-law right. Suppose I saw someone steal my girlfriend's backpack and decided to sue that person for the tort of trespass to chattels. Obviously, I would lose on the merits because I do not have a claim, but before it even got to the merits of my suit, a court would hold that I lacked standing to bring the case because I had no injury in fact and can't sue on behalf of my girlfriend.<sup>271</sup> While it is obviously true that I lack standing, whether or not I can sue to enforce my girlfriend's property rights has nothing to do with the separation of powers. Rather, it has everything to do with the fact that I'm not the appropriate party to vindicate my girlfriend's property rights—she is. Standing is about making sure the best litigant is before the Court, not about the separation of powers.

## V. IMPLICATIONS

There are several implications that arise from assessing standing as a due process requirement rather than as an Article III "Cases" or "Controversies" requirement.

### A. *The Jurisdictional Implication*

Because standing is required by the Due Processes Clauses, not Article III, standing shouldn't be considered jurisdictional. That means that courts should be able to address the merits of a case even if the litigants in that case do not have standing. That is because the Due Process Clauses have nothing to do with the

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270. See also *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2221 (2021) (Thomas, J., dissenting) ("In the name of protecting the separation of powers . . . this Court has relieved the legislature of its power to create and define rights.").

271. See *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) ("We have adhered to the rule that a party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975))).

jurisdiction of the federal courts, only with what the courts may do consistent with due process.

So, one might ask, if courts can hear the merits of a case even without standing, what is the purpose of standing doctrine? The answer is that even if a court can hear the merits of the case, the Due Process Clauses place other limits on the court.

*B. The Precedent Implication*

Under my view, due process prohibits courts from giving precedential effect to cases where litigants lack standing—it does not prohibit courts from adjudicating those cases *ab initio*.<sup>272</sup> In other words, the court’s ruling in a case where the court determined that the parties lacked standing could not be precedential in any future case even if a future case had the exact same facts. That outcome may sound surprising, but in many ways it is consistent with how the federal courts already function. At present, nearly all federal circuit courts of appeals maintain a rule stating that unpublished decisions of that circuit have no precedential value.<sup>273</sup> And the federal circuit courts have discretion to choose whether or not to issue a case for publication or not.<sup>274</sup> Given that courts of appeals already make the decision whether or not to publish—

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272. Another option, though perhaps hard to imagine, would be to get rid of the concept of binding precedent (including the prior panel precedent rule) entirely. That way, each litigant would have a fresh chance to make their arguments in court before being bound by a judgment. Indeed, some scholars have proposed the courts scrap the prior panel precedent rule as inconsistent with federal statutes anyway. Kannan, *supra* note 114, at 757 (“The interpanel rule is inconsistent with” statutes authorizing “appeals as of right.”) *but see* FALLON, Jr., *Et AL.*, *supra* note 2, at 588 (arguing that stare decisis has become part of the Judicial power); Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 MICH. L. REV. 1, 68 (2011) (arguing that stare decisis is permissible because of the Supremacy Clause). And then-professor Barret has argued that to avoid the due process problems inherent in binding precedent “[t]he courts of appeals should either eliminate the rule that prohibits one panel from overruling another, or change the en banc rules to add error correction as a basis for review.” Barret, *supra* note 10, at 1061.

273. Henry J. Dickman, *Conflicts of Precedent*, 106 VA. L. REV. 1345 (2020); Kannan, *supra* note 114, at 756 & n.7.

274. Most circuits have explicit standards for when to publish, but some do not. *Compare* 4TH CIR. LOC. R. 36 *and* 5TH CIR. R. 47.5.1, *with* 2ND CIR. R. *and* 7TH CIR. R. 32.1.



whether or not to give a case precedential effect—it is not unreasonable to make standing part of that process.<sup>275</sup> For example, circuit courts sometimes avoid binding potential future litigants in qualified-immunity cases when they hold an officer liable in an unpublished opinion. Unpublished opinions are not clearly established law and therefore do not give notice to future officers. Thus, future officer-defendants are not bound by that precedent and cannot be held liable.<sup>276</sup> If we view standing as a due process requirement, courts could still adjudicate cases in which the parties lack standing but avoid the due process concerns by leaving the ensuing decision unpublished. And I believe this is why non-adversary court processes like consent decrees or guilty pleas are currently permissible: they are not generally precedential, so they do not affect any future party.<sup>277</sup>

It is not only the circuit courts that would have to determine standing. The Supreme Court would have to as well (and with even more care given how Supreme Court decisions affect the entire country and are even more difficult to change). But the Supreme Court already does something similar by assessing the likely *precedential effect* of cases when granting certiorari. Supreme Court Rule 10 sets out criteria for what types of cases the Court will hear.<sup>278</sup> For instance, Rule 10 states that the Court will primarily grant a writ of certiorari when the case raises an issue that has created a circuit split or a split between the penultimate courts of different states.<sup>279</sup> Evidently, then, the Court chooses cases based on

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275. In 2004, decisions in 81% of cases before the federal courts of appeals were issued in unpublished form. See OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR, at 39 tbl. S-3 (2004), <http://www.uscourts.gov/judbus2004/tables/s3.pdf>. [<https://perma.cc/654N-RCUV>].

276. See, e.g., *Grissom v. Roberts*, 902 F.3d 1162, 1167–69 (10th Cir. 2018).

277. Tracy Hester, *Consent Decrees as Emergent Environmental Law*, 85 MO. L. REV. 687, 692 (2020) (Consent decrees “rarely act as a possible source of guidance or statement of legal principles to inform future judicial decisions. Effectively, consent decrees are discounted almost entirely as a source of organically persuasive legal guidance or precedential authority.”).

278. SUP. CT. R. 10.

279. *Id.*

how its precedent will unify the precedent of the states and circuit courts.

Insofar as Supreme Court precedent is sticky<sup>280</sup> and affects future litigants across the country,<sup>281</sup> the Supreme Court should be especially cautious of taking cases in which the parties are not sufficiently adverse or well-represented.

### C. *The Federalism Implication*

Another implication is that standing requirements would extend to state courts. At present, the Constitution is thought to require only that litigants have standing when suing in *federal* courts.<sup>282</sup> That is because Article III of the Constitution—the article modern standing doctrine is (in my view incorrectly) tied to—is about the jurisdiction of the federal courts, not the state courts. But if, as this article contends, standing is required by due process, state courts will need to ensure standing as well because the Fourteenth Amendment’s Due Process Clause applies to the states.<sup>283</sup>

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280. By sticky, I mean unlikely to change. The Supreme Court hears a small number of cases every year and, consequently, once it renders a decision on a topic, is unlikely to address that topic again in short order.

281. Supreme Court decisions are binding on all lower courts, and thus the magnitude of their consequence means that it is especially important to ensure that the issues in front of the Court are clear and unmanipulated. See U.S. CONST. art. III, § 2; *id.* art. VI, §2; 28 U.S.C. § 1254; FALLON, JR., ET AL., *supra* note 2; *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (“We reaffirm that if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls.” (cleaned up)); *United States v. Katzin*, 769 F.3d 163, 173 (3d Cir. 2014) (“[I]t is self-evident that Supreme Court decisions are binding precedent in every circuit.”); *United States v. Aguon*, 851 F.2d 1158, 1173 (9th Cir. 1988) (en banc) (Reinhardt, J., concurring) (“When the Supreme Court has spoken, its pronouncements become the law of the land.”), *overruled by* *Evans v. United States*, 504 U.S. 255 (1992).

282. See *Virginia v. Hicks*, 539 U.S. 113, 120 (2003).

283. U.S. CONST. amend XVI. See *Crema & Solum*, *supra* note 99. Indeed, one implication from *Crema and Solum’s* article is that the Fourteenth Amendment may require greater process from the states than the Fifth Amendment requires of the Federal government. On the other hand, “the operative language of the Fifth and Fourteenth Amendments is materially identical, and it would be incongruous for the same words to generate markedly different doctrinal analyses.” *Herederos De Roberto Gomez*

Ultimately, this should not be too large a change for state courts because most states already have a standing requirement based on their interpretations of their own constitutions.<sup>284</sup>

*D. The Method-of-Assessment Implication*

Perhaps the most important implication of reframing standing as a due process safeguard is that it raises the question whether an “injury in fact” should remain the standard for assessing a litigant’s standing. While it is true that ensuring that the plaintiff has an injury is likely a good heuristic for how adverse the parties really are, there are other ways of making sure that the two sides in litigation are doing their best to prevail. And sometimes the injury in fact threshold does not adequately filter out non-interested parties. Consider a party with a small monetary injury—the sort of injury that is traditionally thought to confer standing<sup>285</sup>—yet who does not really care about the suit.<sup>286</sup> Or, look to the facts of *Perry*, where the party with the requisite injury—there, the State—simply chose not to defend the litigation.<sup>287</sup> On the other hand, a person might have only an “ideological” or “psychic” injury—perhaps not

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Cabrera, LLC v. Teck Res. Ltd., 43 F.4th 1303, 1308 (11th Cir. Aug. 12, 2022), *cert. denied*, 143 S. Ct. 736 (2023).

284. See Wyatt Sassman, *A Survey of Constitutional Standing in State Courts*, KY. J. EQUINE, AGRIC., & NAT. RES. L. 349, 353 (2015–2016) (“An overwhelming majority of states apply some type of constitutional standing doctrine.”).

285. See Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine’s Dirty Little Secret*, 107 NW. U. L. REV. 169, 178–79 (2012) (“[T]he Court has said that ‘pocketbook’ or ‘walle’ injury always qualifies, but that mere ‘ideological’ or ‘psychic’ harm never does.”). A “relatively small economic loss—even an identifiable trifle—is enough to confer standing.” *Massachusetts v. U.S. Dep’t of Health & Hum. Servs.*, 923 F.3d 209, 222 (1st Cir. 2019) (citation omitted); *Halbig v. Burwell*, 758 F.3d 390, 396 (D.C. Cir. 2014) (same), *judgment vacated*, No. 14-5018, 2014 WL 4627181 (D.C. Cir. Sept. 4, 2014).

286. See Tushnet, *supra* note 11, at 1712 (“Hohfeldian plaintiffs . . . can be as unrepresentative as any other kind of plaintiff, and can induce the courts to adjudicate cases in ways that bind future courts and litigants to premature or abstract decisions.”). “Neither empirical, psychological, nor anthropological evidence has ever been cited to support” the assumption that an injury-in-fact will provide the only incentive to “litigate an issue fully.” 15 JAMES WM. MOORE ET AL., *Moore’s Federal Practice* §101.40[1][a] (2020).

287. See *Hollingsworth v. Perry*, 570 U.S. 693, 702 (2013).

enough to count for traditional standing<sup>288</sup>—and yet feel so strongly about the case and advocate so vigorously that they would be a particularly good representative for future litigants.<sup>289</sup> There is nothing inherently constitutional or old about using “injury in fact” to determine whether a party has standing.<sup>290</sup> Given that a bare-minimum injury might not be sufficient to ensure that litigants are actually adverse or doing their utmost to prevail, it behooves the Court to create a new standard for assessing a litigant’s standing.

I will admit that I do not have a perfect replacement for the injury-in-fact analysis to measure whether litigants will do their best to prevail. Even without a perfect determination, though, I think we can do better than the current standing doctrine—the method of which does not align with even its own stated goals. I do not purport to provide a definitive method here but hope to start a conversation about ways in which courts can better assess a party’s ability to effectively prosecute her case such that she adequately represents future litigants. It may be difficult to create a workable standard for assessing how well a current litigant will represent future litigants, but the modern standing doctrine that is currently used is a bad heuristic and equally unworkable. So courts may as well try to come up with something better.

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288. See, e.g., *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) (mere harm to an ideological interest is an insufficient injury to confer standing); *Valley Forge Christian Coll. v. Ams. United, for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982).

289. See Tushnet, *supra* note 11, at 1712 (“The sociology of litigation indicates that the public interest litigant, with an ongoing interest in the issue at stake, is often likely to be the most effective representative of the interests at stake.”). Employing an assessment that does not require a “Hohfeldian” plaintiff can resolve one of Tushnet’s criticisms of Brilmayer’s representation theory.

290. See *Fletcher*, *supra* note 1, at 229 (“Properly understood, standing doctrine should not require that a plaintiff have suffered ‘injury in fact.’”); Sunstein, *Standing After Lujan*, *supra* note 2, at 166 (explaining that “the view” that “Article III forbids Congress from granting standing to ‘citizens’ to bring suit” is “essentially an invention of federal judges, and recent ones at that” and, therefore, “should not be accepted by judges who are sincerely committed to the original understanding of the Constitution.”); *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1117 (11th Cir. 2021) (Newsom, J., concurring) (explaining that “‘Injury in fact’ is not a particularly old concept” and that the concept “made its first appearance in a Supreme Court opinion about 50 years ago—and thus about 180 years after the ratification of Article III.”).

One way that we might try to discern standards for assessing standing is by looking at how courts ensure adequate representation in the preclusion context. For instance, in class actions, Federal Rule of Civil Procedure 23 contains several requirements that class representatives, and their counsel, must satisfy in order to represent the class.<sup>291</sup>

Respecting whether the representative in a particular case is adequate, Rule 23 requires that courts assess whether “the claims or defenses of the representative parties are typical of the claims or defenses of the class” and whether “the representative parties will fairly and adequately protect the interests of the class.”<sup>292</sup> With regard to counsel, the assessing court “must consider [among other things] . . . the work counsel has done in identifying or investigating potential claims in the action; . . . counsel's experience in handling [past cases]; . . . counsel's knowledge of the applicable law; and . . . the resources that counsel will commit to representing the class.”<sup>293</sup>

Both standards can be used analogically to assess whether a litigant has standing and, thus, whether her case may be considered for precedential treatment. For instance, analogizing to Rule 23(a)(3), the court can determine whether the facts of the plaintiff's case are similar to facts likely to arise in the future. This would help ensure good law because it prevents general precedent being made based on an unusual or difficult set of facts. There is a reason why the common law-school adage, “bad facts make bad law”<sup>294</sup> or “hard cases make bad law” exists.<sup>295</sup> Requiring that the facts of a case be generally similar to facts in cases involving similar claims would help prevent strategic litigators from picking and choosing cases based on how favorable the facts are in a given case and

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291. See FED. R. CIV. P. 23.

292. FED. R. CIV. P. 23(a)(3)–(4).

293. FED. R. CIV. P. 23(g).

294. See, e.g., Eugene H. Soar, *McKinney v. Richtelli: Abandoning Parents and Presumptive Penalties*, 26 N.C. CENT. L. J. 155, 155 (2003-2004) (“The tired adage ‘bad facts make bad law’ is given new life in a recent decision by the North Carolina Supreme Court”).

295. Sepehr Shahshahani, *Hard Cases Make Bad Law? A Theoretical Investigation*, 51 J. LEGAL STUD. 133, 133(2021) (finding that “[w]hen a case raises concerns that are not reflected in doctrine, the court might distort the law to avoid a hardship”).

thereby shaping the law in a way that prejudices the usual case. As described above, the Court has explained that one purpose of standing is to ensure that the facts in a particular case are representative of future cases.<sup>296</sup>

Rule 23(g)'s counsel requirements would be even easier to apply analogically to the precedent context. A court need only look at how competent the attorney has been in the past or how well they seem to understand the particular area of law to assess whether the representative has chosen an attorney who will best represent them to prevail against the opposing party.

Aside from analogizing to Rule 23, it would be helpful for courts to ask, "do the litigants in this case actually *care* about the issue involved here?" Although it did so using the framework of the traditional standing analysis, this inquiry is essentially what the D.C. Circuit did in *American Society for Prevention of Cruelty v. Feld. Entertainment, Inc.*<sup>297</sup> *Feld* involved a plaintiff who sued to stop a circus from violating the Endangered Species Act by exploiting elephants.<sup>298</sup> After a bench trial, the district court held that the plaintiff's "allegations, if proven, would [have been] sufficient to establish Article III standing," but because it found that the plaintiff was "'essentially a paid plaintiff and fact witness' whose trial testimony, and particularly his claim that he had developed an attachment to the elephants, lacked credibility," it denied the plaintiff standing.<sup>299</sup> It found the following facts when determining that the plaintiff did not have a real stake in the outcome of the case:

[The plaintiff] complained publicly about the elephants' mistreatment only after he was paid by activists to do so, . . . had referred to one of the elephants as a 'bitch' and "killer elephant" who "hated" him; that he struggled to recall the names of the

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296. See *Valley Forge Christian Coll. v. Ams. United, for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (explaining that one of the purposes of standing is to ensure "confidence that [the Court's] decision will not pave the way for lawsuits which have some, but not all, of the facts of the case actually decided by the court").

297. 659 F.3d 13 (D.C. Cir. 2011).

298. *Id.* at 17.

299. *Id.* at 18.

elephants in two separate depositions; that he had failed to take advantage of multiple opportunities to visit the elephants outside of the circus; and that he was unable to identify the individual elephants on videotape, including one who had the “distinctive and unusual (for an Asian elephant) characteristic of a swayed back.”<sup>300</sup>

Thus, the district court essentially made a factual inquiry into whether the plaintiff indeed cared about the suit, found that he did not, denied standing, and the circuit court then affirmed its judgment.<sup>301</sup> The inquiry conducted in *Feld* can serve as an example for how courts may be able to assess how much a litigant cares about the outcome of her case, irrespective of whether she has an injury-in-fact. A factual inquiry to check whether the litigants actually care enough about prevailing would not drastically change the process of assessing standing because courts must already sometimes conduct evidentiary hearings to resolve factual disputes that bear on standing.<sup>302</sup>

*E. The Consolidating Constitutional and Prudential Standing Implication*

Lastly, thinking of standing as a due process requirement rather than a jurisdictional requirement would erase the fuzzy<sup>303</sup> division between jurisdictional standing requirements and prudential standing requirements. Like jurisdictional standing requirements, the prudential requirements are about ensuring that the best arguments are before the Court.<sup>304</sup> Thus, they serve the same purpose, and all standing requirements could be consolidated into

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300. *Id.* at 20.

301. *Id.* at 20–22.

302. See *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970); *Munoz-Mendoza v. Pierce*, 711 F.2d 421, 425 (1st Cir. 1983); *Disability Support All. v. Heartwood Enters., LLC*, 885 F.3d 543, 547 (8th Cir. 2018); *Bischoff v. Osceola Cnty., Fla.*, 222 F.3d 874, 881 (11th Cir. 2000).

303. The Court has not always been clear about whether certain requirements are prudential/policy-driven or constitutional. 15 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* §101.04 (2020) (“Additional uncertainty exists in the doctrine of justiciability because the doctrine has become a blend of constitutional requirements and policy considerations.” (citation omitted)).

304. *Sec'y of State of Md. v. Munson Co.*, 467 U.S. 947, 955 (1984).

one analysis meant to determine whether the parties are adequately adjudicating their case, and protecting potential future litigants, so that the case can be considered precedential.<sup>305</sup>

#### CONCLUSION

The Due Process Clauses of the Fifth and Fourteenth Amendments prohibit the government—including state and federal courts—from depriving persons of life, liberty, or property without due process of law. The effect of *stare decisis* can function to deprive future litigants of life, liberty, and property, and, thus, courts must ensure that when they publish a precedential ruling, they do so in a way that is consistent with due process. The way courts protect future litigants consistent with due process is by ensuring that the litigants presently before the court in a precedential case adequately represent future litigants. And the way that courts ensure adequate representation is by checking whether the litigants before them—both plaintiffs and defendants—are sufficiently adverse and competent to present the court with the best arguments on either side of the case. That is the gist of standing. Thus, standing is required by the Fifth and Fourteenth Amendments' Due Process Clauses.

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305. Because the standing requirements—both what has been termed “prudential” and what has been termed “jurisdictional”—are required by the Due Process Clauses, Congress could not waive any of the requirements, *see* *Warth v. Seldin*, 422 U.S. 490, 509–510 (1975), without providing a different method of ensuring due process.



**CITIZENSHIP AND SOLICITUDE:  
HOW TO OVERRULE *EMPLOYMENT DIVISION V. SMITH*  
AND *WASHINGTON V. DAVIS***

CHRISTOPHER R. GREEN

ABSTRACT

*This article looks to the original meaning of the Fourteenth Amendment's provisions on equal citizenship to defend an approach to the free exercise of religion distinct both from *Employment Division v. Smith* and the Sherbert-Yoder regime it replaced. Members of all religious groups are equally citizens: in the first Justice Harlan's words in *The Civil Rights Cases*, a "component part of the people for whose welfare and happiness government is ordained." Such citizens are entitled to equal solicitude from their state regarding even indirect costs of that state's laws. Just as trustees must affirmatively promote the interests of their beneficiaries, not merely avoid purposely harming them, states must affirmatively promote the interests of their citizens, not merely avoid targeting them for ill treatment. This obligation applies to all citizens no matter their religion or race. Contrary to *Smith*, therefore, the Fourteenth Amendment requires more than a no-religious-targeting rule. And contrary to *Washington v. Davis*, it requires more than a no-racial-targeting rule.*

*The Court was right in both *Smith* and *Washington*, however, that strict scrutiny for any law significantly affecting racial or religious groups would threaten chaos. A refusal to countenance any impact on religious practices, no matter how socially harmful, would allow religious citizens to be laws unto themselves. A refusal to countenance any disparate impact on racial groups would require racially discriminatory quotas that would themselves undermine equal citizenship. The Fourteenth Amendment requires a more nuanced assessment of the arbitrariness of the distinctions*

*in state law and the costs they impose than a one-size-fits-all “compelling state interest” framework can supply. Instead of focusing solely on explicit or purposeful classifications, the Court should focus directly on the existence of adequate explanations for policies causing particular harms. Such a focus would mirror the manner in which the Court assesses “arbitrary and capricious” agency action in cases like Citizens to Preserve Overton Park v. Volpe and Motor Vehicle Manufacturers’ Association v. State Farm Mutual Automobile Insurance Co. The trigger for such an inquiry would not be the nature of the classification at issue, but simply the existence of the impact on particular citizens’ interests, including economic interests. The Fourteenth Amendment requires states to offer an adequate explanation of why other citizens’ interests matter more than the interests of those suffering the burden, and it requires states to present their actual reasons for decisions, rather than hiding behind post-hoc judicial rationalizations as approved in Williamson v. Lee Optical. Such a requirement for reasoned attention to different interests fits how the law of trusts has long required trustees to explain themselves when they deal with multiple beneficiaries. Trustees need not always treat all of their beneficiaries precisely the same, but they must give “impartial attention” to all beneficiaries’ welfare, which in turn requires an adequate explanation of both differential treatment among, and differential impacts on, a trustee’s beneficiaries.*

**CITIZENSHIP AND SOLICITUDE:  
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INTRODUCTION

Change is coming soon to the free exercise of religion. Five justices in *Fulton v. City of Philadelphia*<sup>1</sup> indicated disagreement with the rule of *Employment Division v. Smith*<sup>2</sup> that unintentional burdens on religious exercise from general laws receive no special scrutiny. These justices differed, however, on what alternate rule to adopt. Justices Thomas, Alito, and Gorsuch would go back to the *Sherbert-Yoder* regime<sup>3</sup> that *Smith* itself replaced.<sup>4</sup> That regime required that laws unintentionally burdening religious practice—in *Sherbert*, the denial of unemployment compensation to those with religious objections to Saturday work, and in *Yoder*, compulsory schooling for the Amish—be justified by a compelling state interest. Justices Barrett and Kavanaugh, however, expressed dissatisfaction in *Fulton* with both *Smith* and *Sherbert-Yoder*.<sup>5</sup>

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1. 141 S. Ct. 1868 (2021).

2. *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872 (1990).

3. See generally *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

4. *Fulton*, 141 S. Ct. at 1883 (Alito, J., concurring in judgment). Justices Thomas and Gorsuch joined Justice Alito's opinion. *Id.*

5. *Id.* at 1883 (Barrett, J., concurring) ("In my view, the textual and structural arguments against *Smith* are more compelling. As a matter of text and structure, it is difficult

This article argues that the original meaning of the Fourteenth Amendment's guarantee of equal citizenship supports Justices Barrett and Kavanaugh's position.<sup>6</sup> Equal citizenship requires states to do more than cease explicit or purposeful discrimination against less-favored religious or racial groups; states must display equal *solicitude* for such groups' interests. Members of all religious groups are equally citizens of the United States and of their respective states: in the first Justice Harlan's words describing different racial groups, they are a "component part of the people for whose welfare and happiness government is ordained."<sup>7</sup> Citizens of less-favored religious groups—as well as groups or individual citizens who receive less favor because of their *lack* of religion—are entitled to equal consideration from their state regarding even indirect costs of that state's laws. Like trustees, states are required affirmatively to promote the interests of their citizens, not merely avoid targeting them for ill treatment. The same principle governs burdens on different racial groups. Contrary to *Smith*, therefore, the Fourteenth Amendment requires more than a no-religious-targeting rule. And contrary to *Washington v. Davis*,<sup>8</sup> it requires more than a no-racial-targeting rule. However, the Court was right in both *Smith* and *Washington* to worry that strict scrutiny for any law significantly affecting racial or religious groups would threaten chaos. A refusal to countenance *any* disparate impact on religious practices or racial groups would allow religious citizens to be a law unto themselves and would require racially discriminatory quotas that themselves undermine Fourteenth Amendment equal citizenship. The

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to see why the Free Exercise Clause—lone among the First Amendment freedoms—offers nothing more than protection from discrimination. . . . I am skeptical about swapping *Smith's* categorical antidiscrimination approach for an equally categorical strict scrutiny regime . . ."). Justice Kavanaugh joined Justice Barrett's opinion in full, and Justice Breyer joined it in all but the first paragraph. *Id.*

6. U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .").

7. *The Civil Rights Cases*, 109 U.S. 3, 61 (1883) (Harlan, J., dissenting).

8. 426 U.S. 229 (1976).

Fourteenth Amendment requires something more nuanced than a one-size-fits-all “compelling state interest” framework can supply.<sup>9</sup> Instead of focusing solely on explicit or purposeful classifications, the Court should assess whether states can articulate adequate explanations for policies causing particular harms, the way it does in administrative-law cases like *Citizens to Preserve Overton Park v. Volpe*<sup>10</sup> and *Motor Vehicle Manufacturers v. State Farm*.<sup>11</sup> The trigger for such an inquiry would not be the nature of the classification at issue, but simply the existence of the impact on particular citizens’ interests, including economic interests. The Fourteenth Amendment requires states to offer an adequate explanation of why other citizens’ interests matter more than the interests of those suffering the burden, and so states must present their actual reasons for decisions, rather than hiding behind post-hoc judicial rationalizations as approved in *Williamson v. Lee Optical*.<sup>12</sup> Further guidance is available from another area of law: the law of trusts and its treatment of multiple beneficiaries.

Other scholars have argued that the Constitution itself is a fiduciary instrument, creating the federal government and entrusting its officers with authority to promote beneficiaries’ interests, subject to traditional limits characteristic of trustees.<sup>13</sup> This article takes a slightly different tack by arguing that the Fourteenth Amendment,

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9. See *Sherbert*, 374 U.S. at 406.

10. 401 U.S. 402 (1971).

11. *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

12. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955) (“It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”); *Calcutt v. FDIC*, 143 S. Ct. 1317, 1318 (2023) (per curiam) (“It is ‘a simple but fundamental rule of administrative law’ that reviewing courts ‘must judge the propriety of [agency] action solely by the grounds invoked by the agency.’ . . . ‘[A]n agency’s discretionary order [may] be upheld,’ in other words, only ‘on the same basis articulated in the order by the agency itself.’” (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) and *Burlington Truck Lines, Inc., v. United States*, 371 U.S. 156, 169 (1962))).

13. See, e.g., GARY LAWSON & GUY SEIDMAN, “A GREAT POWER OF ATTORNEY”: UNDERSTANDING THE FIDUCIARY CONSTITUTION 7–8 (2017).

while neither creating the states nor entrusting them with authority, does impose upon them one of the duties of trustees. Specifically, the Fourteenth Amendment requires states to treat all citizens as equal beneficiaries. States and all their officers are entrusted with the resources of the state, not for their own benefit, and not just for the benefit of their favorite citizens, but for the benefit of all citizens. And that means that such officers are subject to the basic duty of fiduciaries with multiple beneficiaries: to give “fair and impartial attention to the interests of all the parties concerned.”<sup>14</sup> Trustees are not merely obligated to refrain from explicitly or implicitly *targeting* particular beneficiaries for worse treatment; they are affirmatively required to *pay attention to* all beneficiaries’ interests and to act fairly and impartially in light of those interests.

Administrative law offers a way to flesh out this requirement. The Department of Transportation was subject to a “searching and careful” review of whether it had given an adequate explanation as to why a particular route for I-40 was more important than the costs of that route on the Memphis Zoo,<sup>15</sup> and whether its weighing of costs and safety of air bags and automatic seatbelts was the “product of reasoned decisionmaking” about the “relevant factors.”<sup>16</sup> Though states are not directly analogous to federal administrators, such requirements offer a model for how the requirements of the Fourteenth Amendment could be implemented. States must give an adequate explanation for actions that impose impacts on racial or religious groups. Do those actions really reflect “fair and impartial attention to the interests of all the parties concerned”?<sup>17</sup> Are they products of “reasoned decisionmaking” about the “relevant factors”?<sup>18</sup>

Two preliminary comments are in order about the scope of this article. First, the Court and most commentators discussing whether

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14. THOMAS LEWIN, A PRACTICAL TREATISE ON THE LAW OF TRUSTS 500 (Sweet & Maxwell 12th ed. 1911) (1837).

15. *Overton Park*, 401 U.S. at 406, 416.

16. *State Farm*, 463 U.S. at 42, 52.

17. LEWIN, *supra* note 14.

18. *State Farm*, 463 U.S. at 42, 52.

and how to overrule *Smith* have focused on what the words “free exercise of religion” expressed in 1791.<sup>19</sup> This Article focuses instead on the Fourteenth Amendment, rather than the First. Why? Briefly, because the first word of the First Amendment is “Congress,” and the first Justice Jackson and the second Justice Harlan were right to be skeptical that the Fourteenth Amendment applied the Bill of Rights, as such, against the states. A total-incorporation approach to the rights of citizens takes insufficient account of the different responsibilities of the federal and state governments. As Justice Jackson’s dissent in *Beauharnais v. Illinois* explains, governments with different responsibilities are properly subject to different sorts of rights-based constraints.<sup>20</sup> For example, states which have a broader responsibility to deal with injuries to citizens’ reputations are properly subject to different limits with respect to speech than is the federal government, which has no such responsibility. This is particularly true in the case of constitutional rules governing disparate racial or religious impacts. Because the range of possible state action is far larger than the range of possible federal action, there are many more ways in which *state* officials might unwittingly impose large costs on minority racial or religious groups than there are for federal officials. This difference between federal and state functions and responsibilities might sometimes mean that the

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19. See, e.g., *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1896 (2021) (Alito, J., concurring in the judgment) (stressing “meaning in 1791”); Eric H. Wang, *To Prohibit Free Exercise: A Proposal for Judging Substantial Burdens on Religion*, 72 EMORY L.J. 723, 757–58 (2023) (focusing on 1791 meaning and not mentioning the Fourteenth Amendment); cf. Joshua L. Johnston, *A House Built on Sand: The Qualified Immunity Case for Keeping the Smith Doctrine*, 54 ST. MARY’S L.J. 885, 886 n.3 (2023) (stressing history back to 1791).

20. *Beauharnais v. Illinois*, 343 U.S. 250, 294–95 (1952) (Jackson, J., dissenting); see also *Roth v. United States*, 354 U.S. 476, 503–07 (1957) (Harlan, J., dissenting); *Zelman v. Simmons-Harris*, 536 U.S. 639, 678–80, 683–84 (2002) (Thomas, J., concurring); but see *First Nat’l Bank of Bos. V. Bellotti*, 435 U.S. 765, 780–81 n.16 (1978) (noting the Court’s rejection of the view that Justices Jackson and Harlan had “advanced forcefully,” but not answering their arguments); *McDonald v. City of Chicago*, 561 U.S. 742, 784 (2010) (Alito, J., plurality opinion) (noting that Justice Harlan had “fought a determined rear-guard action to preserve the two-track approach” but had not persuaded the Court, and again failing to answer Justices Jackson and Harlan’s argument about the difference between state and federal responsibilities).

restrictions that the First Amendment places on the federal government can afford to be much *broader* than the restrictions the Fourteenth Amendment places on states. *Beauharnais*, for instance, concerned a group defamation law. In that case Justice Jackson rightly argued that the states' responsibility for public safety was far broader in that setting than the federal government's.<sup>21</sup> It might therefore make sense for federal defamation law to be categorically excluded by the First Amendment, but for state defamation law not to be limited in the same way by the Fourteenth. On the other hand, even if the Free Exercise Clause itself is relatively narrow, applying only to religious targeting by Congress within its relatively narrow zone of responsibility, religious citizens may need a much more robust shield against *state* callousness to their interests, because there are so many more ways in which a state might be callous. States often confront disparate racial and religious effects, for instance, in health and labor policy. *Gibbons v. Ogden* noted in 1824 that states have exclusive responsibility for "health laws of every description."<sup>22</sup> Article I section 9 clause 1's references to Congress's limited powers to ban the slave trade after 1808, and to ban slavery itself in areas that had not yet become states, confirm a lack of congressional power over even the most offensive labor practices in existing states. Religious objections to labor and health laws are, of course, legion, as are such laws' racially disparate impacts. A different rule for religious rights might be more appropriate for a federal government whose responsibilities are few and defined than for state governments with residual authority—and responsibility—to promote their citizens' health, safety, welfare, and morals. Accordingly, none of the discussions in 1791 about the meaning expressed by "free exercise of religion" can adequately address the issues that states confront. The Fourteenth Amendment, not the First, is the proper focus for the constitutional obligations of states.

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21. *Beauharnais*, 343 U.S. at 288 (Jackson, J., dissenting). *Alexander v. South Carolina Conf. of the NAACP*, 144 S. Ct. 1221, 1260 & n.3 (2024) (Thomas, J., concurring in part and concurring in judgment).

22. 22 U.S. 1, 203 (1824).



Second, within the world of the Fourteenth Amendment, this article deals with equal citizenship, rather than equal protection. “Protection of the laws” is a limited, discrete entitlement that the Fourteenth Amendment requires states to supply equally to everyone subject to their laws, non-citizens included. Unlike the Privileges or Immunities Clause or the citizenship declaration, “equal protection of the laws” is not an entitlement to equal civil rights.<sup>23</sup> Like the scholarship of John Harrison,<sup>24</sup> David R. Upham,<sup>25</sup> Randy E. Barnett and Evan D. Bernick,<sup>26</sup> Ilan Wurman,<sup>27</sup> and Kurt T. Lash,<sup>28</sup> this article focuses on citizenship, not non-literal protection, as the core of Fourteenth Amendment equality. That scholarship makes clear that equal civil rights for citizens of all races, colors, and religious or political creeds was a common trope used to explain the Fourteenth Amendment during Reconstruction. Rather than recapitulate all of this evidence, this article will instead jump right to the issue of unintended impacts on racial and religious groups.

Part I of this article will review the arguments in *Washington v. Davis* and *Employment Division v. Smith*, especially the majority’s arguments that strict scrutiny for any impacts on religious or racial groups would lead to chaos or incoherence. The Court’s worries were well-founded, but the proper response is to reconsider the

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23. See Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. C.R.L.J. 1 (2008); Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. C.R.L.J. 219 (2009); CHRISTOPHER R. GREEN, EQUAL CITIZENSHIP, CIVIL RIGHTS, AND THE CONSTITUTION: THE ORIGINAL SENSE OF THE PRIVILEGES OR IMMUNITIES CLAUSE (2015); see also *United States v. Vaello Madero*, 142 S. Ct. 1539, 1551 n.4 (2022) (Thomas, J., concurring).

24. *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992).

25. *Interracial Marriage and the Original Understanding of the Privileges or Immunities Clause*, 42 HASTINGS CONST. L.Q. 213 (2015).

26. THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER & SPIRIT 152–155 (2021).

27. THE SECOND FOUNDING: AN INTRODUCTION TO THE FOURTEENTH AMENDMENT 93-103 (2020).

28. *The State Citizenship Clause*, 25 U. PA. J. CONST. L. 1097 (2024), available at <https://ssrn.com/paper=4196204> [<https://perma.cc/D6UY-VBJ4>].

entire tiers-of-scrutiny approach, rather than limiting its application to explicit or purposeful discrimination.

Part II considers three reasons why we should look to fiduciary multiple-beneficiary law to explain Fourteenth Amendment citizenship. First, the Fourteenth Amendment turns the reasoning of *Dred Scott v. Sandford*<sup>29</sup> on its head. To insist on the privileges of citizenship for the freedmen is to insist that American governments are not merely for the benefit of white men and their posterity. Second, citizenship had long defined the beneficiaries of the social contract as articulated by thinkers like Emer de Vattel<sup>30</sup> and John Adams.<sup>31</sup> Third, the Fourteenth Amendment's distinction between political and civil rights, repeatedly stated by Republicans in 1866 and made very explicit in Section Two of the Amendment, is properly modeled on a trustee-beneficiary relationship.

Part III explains how fiduciary multiple-beneficiary law works. Both at the time of the Fourteenth Amendment and today, such law was and is far more flexible and cost-sensitive than modern tiers of scrutiny allow, resembling how *Overton Park* and *State Farm* operate in administrative law today. Multiple-beneficiary law would, however, impose an affirmative obligation to attend to all citizen beneficiaries' interests, not merely require the government to refrain from intentional discrimination. It would also require that states explain and defend their *actual* reasons for serving the interests of some citizens and not others, rather than allowing states to justify their decisions only after the fact.

#### I. BACKGROUND TO *EMPLOYMENT DIVISION V. SMITH* AND *WASHINGTON V. DAVIS*

The Court held in 1963 and 1972 that burdens on religiously motivated conduct caused even by generally applicable statutes triggered special judicial scrutiny. *Sherbert v. Verner* in 1963 considered

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29. 60 U.S. (19 How.) 393 (1857).

30. EMER DE VATTEL, *THE LAW OF NATIONS* 217 (Béla Kapossy & Richard Whatmore eds., Liberty Fund 2008) (1797).

31. MASS. CONST. pmb1.

the denial of unemployment benefits to a plaintiff with a religious objection to working on Saturday. The Court held that a “burden on the free exercise of appellant’s religion” could be justified only by a “compelling state interest.”<sup>32</sup> *Wisconsin v. Yoder* in 1972 concerned the enforcement of a mandatory schooling law against the Amish. The Court elaborated, “A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion. . . . Where fundamental claims of religious freedom are at stake. . . . we must searchingly examine the interests that the State seeks to promote . . . .”<sup>33</sup> In 1990, however, after several earlier cases hinting that the *Sherbert-Yoder* rule was not as stringent as it initially seemed,<sup>34</sup> the Court held in *Employment Division v. Smith* that no heightened scrutiny was required for generally applicable laws. Only if regulations *target* religion are they suspect. Later cases have found purposeful targeting<sup>35</sup> and narrowed the scope of what counts as a generally applicable law,<sup>36</sup> but stopped just short of overruling *Smith*.

*Smith* analogized its rule to the holding of the 1976 case *Washington v. Davis*. In that case, the Court allowed the District of Columbia

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32. *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

33. *Wisconsin v. Yoder*, 406 U.S. 205, 220–21 (1972).

34. See *Gillette v. United States*, 401 U.S. 437 (1971) (allowing the military to allow conscientious-objector status only to categorical pacifists, not to those with religious objections to the Vietnam War in particular); *United States v. Lee*, 455 U.S. 252 (1982) (allowing Social Security taxes on the Amish); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (allowing the military to refuse an exemption to dress regulation for yarmulkes); *Bowen v. Roy*, 476 U.S. 693 (1986) (allowing refusal to accommodate a religious objection to Social Security numbers); *O’Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (allowing a prison to refuse to allow exemptions from work requirements for worship); *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988) (allowing timber-harvesting road through land sacred to several Native American tribes).

35. See, e.g., *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm’n*, 138 S. Ct. 1719 (2018).

36. See, e.g., *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (“[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise.”); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021).

to use a disparate-racial-impact-producing test for police officer hiring without satisfying heightened scrutiny.<sup>37</sup> Justice Scalia argued for the Court in *Smith*:

[R]ace-neutral laws that have the *effect* of disproportionately disadvantaging a particular racial group do not thereby become subject to compelling interest analysis under the Equal Protection Clause. [*Washington*.] Our conclusion that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest is the only approach compatible with these precedents.<sup>38</sup>

Surprisingly, none of the opinions in *Fulton*, in which a majority of the Court disagreed with *Smith*, mentioned this analogy.

In both *Smith* and *Washington* the Court shrank back from a contrary rule because of the prospect of chaos. *Smith* relied on the 1879 approval of anti-polygamy legislation in *Reynolds v. United States*.<sup>39</sup> In *Reynolds*, the Court explained:

Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship; would it be seriously

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37. *Washington v. Davis*, 426 U.S. 229, 248 (1976). Because the federal government was involved, the Court was not, strictly speaking, concerned about the Fourteenth Amendment as such, but rather about the Fifth Amendment due-process doctrines that mirror the Fourteenth Amendment in cases like *Bolling v. Sharpe*, 347 U.S. 497 (1954), and *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). As Justice Thomas has compellingly explained, this doctrine should be instead rooted in citizenship, rather than due process. *United States v. Vaello Madero*, 142 S. Ct. 1539, 1544–57 (2022) (Thomas, J., concurring). The Court extended *Washington* to the Fourteenth Amendment the next year in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977) (“Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.”). Disparate gender impacts from a veterans’ preference statute likewise receive no heightened scrutiny. *Pers. Adm’r v. Feeney*, 442 U.S. 256 (1979). This is the rule even for classifications like pregnancy that apply exclusively to one sex. *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974).

38. *Emp. Div., Dep’t of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 886 n.3 (1990) (internal citations omitted).

39. 98 U.S. 145 (1879). Specifically, the Court in *Smith* wrote that “the rule to which we have adhered ever since *Reynolds* plainly controls.” *Smith*, 494 U.S. at 882.

contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband; would it be beyond the power of the civil government to prevent her carrying her belief into practice? So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and, in effect, to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.<sup>40</sup>

The Court in *Washington* similarly shrank back from heightened scrutiny:

A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.<sup>41</sup>

In addition to this similarity in their rationales, *Smith* and *Washington* have also been subject to similar criticisms: chiefly, that they neglect the problem of governmental callousness or thoughtlessness toward minority religious or racial groups. District Judge J. Skelly Wright wrote a few years before *Washington* that “the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.”<sup>42</sup> In the context of disabilities, the Court has noted that the Congress that passed the Rehabilitation Act was not merely concerned with “invidious animus,” but also with “thoughtlessness

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40. *Id.* at 166–67; see *Smith*, 494 U.S. at 879 (following this reasoning).

41. *Washington*, 426 U.S. at 248.

42. *Hobson v. Hansen*, 269 F. Supp. 401, 497 (D.D.C. 1967).

and indifference.”<sup>43</sup> Critics of *Smith* make the same point that callousness and unconcern toward the costs that generally applicable laws impose can be disastrous for religious citizens. The “arbitrary quality of thoughtlessness” is a problem in both areas that one would expect a provision for equal citizenship, like the Fourteenth Amendment, to address.

At the same time, *Smith* and *Washington* were right to reject an approach that would demand that just *any* statute producing disparate impact on religious or racial groups must be narrowly tailored to a compelling interest. The Court rightly recognized that such an approach would breed chaos. In the case of religion, the Fourteenth Amendment could become a blueprint for anarchy, allowing every religious group to be a law unto itself. In the case of disparate racial impact, the Fourteenth Amendment could be put at war with itself, requiring racial quotas that themselves conflict with a constitutional demand for racial equality. Justice Scalia was wrong, however, to see a targeting rule as the only alternative to incoherence. The Court can take impacts on religious or racial groups into account without giving those religious or racial groups a veto or near-veto over almost any governmental policy producing such impacts. As explained below, such a middle way is familiar from long-standing fiduciary law and from modern administrative law.

Many of the justices on the Court have themselves noted problems with the tiers of scrutiny the Court has assembled. Prior to 1938, the Court asked one difficult question in equality cases: whether a particular classification, in a particular context, is arbitrary.<sup>44</sup> A “classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and

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43. *Alexander v. Choate*, 469 U.S. 287, 295 (1985).

44. *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *Gulf, Colo. & Santa Fe Ry. Co. v. Ellis*, 165 U.S. 150, 159 (1897); *Sunday Lake Iron Co. v. Wakefield*, 247 U.S. 350, 352 (1918); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920); *Sioux City Bridge Co. v. Dakota Cnty.*, 260 U.S. 441, 445 (1923); *Schlesinger v. Wisconsin*, 270 U.S. 230, 240 (1926); *Hartford Steam Boiler Inspection & Ins. Co. v. Harrison*, 301 U.S. 459, 461 (1937).

substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.”<sup>45</sup> But beginning with *United States v. Carolene Products*,<sup>46</sup> the Court gradually pieced together a new system. Some classifications get “strict scrutiny” and must be “narrowly tailored” to a “compelling state interest,”<sup>47</sup> others get “intermediate scrutiny” and must be “substantially related” to an “important state interest,”<sup>48</sup> and others get “rational basis scrutiny” and must only be “rationally related” to a (perhaps hypothetical) “legitimate state interest.”<sup>49</sup>

There are at least three strong reasons to abandon this tripartite scheme.<sup>50</sup> First, the new system replaces *one* difficult question—the arbitrariness of a particular distinction—with seven: how much scrutiny a particular distinction gets, and what counts as “narrowly tailored,” “compelling,” “substantial,” “important,” “rational,” and “legitimate.”

Second, as noted by many of the justices,<sup>51</sup> this approach treats all of the classifications in each of the three buckets as *equally* in need of justification. But the costs of such classifications are obviously

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45. *Royster Guano*, 253 U.S. at 415.

46. 304 U.S. 144, 152 n.4 (1938).

47. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Loving v. Virginia*, 388 U.S. 1 (1967); *Richmond v. Croson Co.*, 488 U.S. 469 (1989); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 143 S. Ct. 2141 (2023); *Graham v. Richardson*, 403 U.S. 365 (1971).

48. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *United States v. Virginia*, 518 U.S. 515 (1996); *Nguyen v. INS*, 533 U.S. 53 (2001); *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Michael M. v. Superior Court*, 450 U.S. 464 (1981).

49. See, e.g., *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985); *San Antonio v. Rodriguez*, 411 U.S. 1 (1973); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528 (1973); *Romer v. Evans*, 517 U.S. 620 (1996).

50. For other critiques, see, for example, Joel Alicea & John D. Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, NAT’L AFFS., Fall 2019, at 72; Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481 (2004); Michael Stokes Paulsen, *Medium Rare Scrutiny*, 15 CONST. COMMENT. 397 (1998).

51. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 452 (1985) (Stevens, J., concurring); *id.* at 460 (Marshall, J., concurring); *United States v. Windsor*, 570 U.S. 744, 793 (2013) (Scalia, J., dissenting).

quite varied. The gender-discrimination costs of male-only draft registration<sup>52</sup> and female-only 3.2 percent beer sales<sup>53</sup> are simply not on a par. The issues involved in presuppositions of male martial prowess and female moderation in alcohol consumption are very different. Likewise, the racial-discrimination costs of broader-than-necessary affirmative action<sup>54</sup> and Jim Crow segregation<sup>55</sup> are not identical. Even if affirmative action should face a significant justificatory hurdle, there seems little warrant other than blind formalism for thinking that hurdle should be precisely the *same* hurdle that segregation faced in *Brown*.

Third, Reconstruction Republicans gave the same analysis to classifications now receiving all three sorts of scrutiny—race, sex, and age discrimination, which receive strict, intermediate, and rational-basis scrutiny under current law. Republicans responded many times to Democratic charges that the Fourteenth Amendment would give the vote to the freedmen by pointing to women and children, who were citizens but not voters.<sup>56</sup> If the proper Fourteenth Amendment treatment of age or sex discrimination were categorically different from its treatment of race discrimination, this Republican argument would be a non sequitur. Women and children would have been properly denied the vote despite being citizens because of differences in the sort of classification involved, not the distinction between political and civil rights, as Republicans insisted. If the Fourteenth Amendment's adopters had thought there was a categorical difference between how the Amendment would affect racial discrimination, on the one hand, and sex or age discrimination, on the other, the door would have been left wide open for Fourteenth Amendment voting rights for the freedmen based on that different sort of scrutiny for racial classifications. Tiers of

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52. *Rostker v. Goldberg*, 453 U.S. 57, 59 (1981).

53. *Craig v. Boren*, 429 U.S. 190, 191–92 (1976).

54. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 470 (1989).

55. *Brown v. Bd. of Educ.*, 347 U.S. 483, 488 (1954).

56. For a list of instances, see Christopher R. Green, *Incorporation, Total Incorporation, and Nothing But Incorporation?*, 24 WM. & MARY BILL RTS. J. 93, 122–24 (2015).



scrutiny thus make a hash of the way the Amendment was discussed in 1866.

## II. CITIZENS AS BENEFICIARIES: OUR FIDUCIARY FOURTEENTH AMENDMENT

The cure for the tiers-of-scrutiny scheme, and for *Smith* and *Washington's* answers to the threshold question that scheme requires, is to see states as trustees and all of their citizens as their beneficiaries. Three sorts of evidence point toward the fiduciary law of multiple beneficiaries as the best way to implement Fourteenth Amendment equality: the particular context of the Fourteenth Amendment as a response to *Dred Scott v. Sandford*,<sup>57</sup> the general social-contract background of the concept of citizenship, and the Fourteenth Amendment's separation of political from civil rights prior to the Fifteenth Amendment.

### A. *Turning Dred Scott on its Head*

Chief Justice Taney argued in *Dred Scott* that only those treated as equals by the government could be considered citizens, because government was instituted for the benefit of all its citizens. Marital racial segregation implied the inferiority of African Americans, and inferiority implied a lack of citizenship. The key term in Taney's explanation of citizenship was "for": who was the government for? Just whose interests was it designed to promote? Taney reasoned:

It is true, every person, and every class and description of persons, who were at the time of the adoption of the Constitution recognized as citizens in the several States, became also citizens of this new political body; but none other; it was formed by them, and for them and their posterity, but for no one else.<sup>58</sup>

The Fourteenth Amendment turned this reasoning on its head. By establishing African American citizenship and the entitlement of the freedmen to the rights of citizenship, the Fourteenth

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57. 60 U.S. (19 How.) 393 (1857).

58. *Id.* at 406.

Amendment declared that states exist for the benefit of African Americans too, not just white citizens.

In 1858, Stephen Douglas explained his opposition to African American citizenship and its privileges in terms of his desire to limit the beneficiaries of American governments:

I ask you, are you in favor of conferring upon the negro the rights and privileges of citizenship? . . . For one, I am opposed to negro citizenship in any and every form. I believe this government was made on the white basis. . . . I believe it was made by white men, *for the benefit of white men and their posterity forever*, and I am in favour of confining citizenship to white men, men of European birth and descent, instead of conferring it upon negroes, Indians and other inferior races. . . . [T]he Republicans say that he ought to be made a citizen, and when he becomes a citizen he becomes your equal, with all your rights and privileges. . . . They assert the Dred Scott decision to be monstrous because it denies that the negro is or can be a citizen under the Constitution.<sup>59</sup>

Douglas repeated his “for the benefit of white men” line at the third debate in Jonesboro,<sup>60</sup> at the fourth debate in Charleston,<sup>61</sup> and in Congress in 1860.<sup>62</sup> Other Democrats like Senator Lazarus

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59. First Debate with Stephen A. Douglas at Ottawa, Ill., in 3 ABRAHAM LINCOLN, COLLECTED WORKS OF ABRAHAM LINCOLN 9–11 (Roy P. Basler ed., 1953) (emphasis added).

60. Third Debate with Stephen A. Douglas at Ottawa, Ill., in LINCOLN, *supra* note 59, at 112 (“I hold that a negro is not and never ought to be a citizen of the United States . . . . I hold that this government was made on the white basis, by white men, for the benefit of white men and their posterity forever, and should be administered by white men and none others.”); see CONG. GLOBE, 40th Cong., 2d Sess. 2450 (1868) (Representative James Beck quoting Douglas).

61. Fourth Debate with Stephen A. Douglas at Charleston, Ill., in LINCOLN, *supra* note 59, at 177–78 (“I say that this government was established on the white basis. It was made by white men, for the benefit of white men and their posterity forever, and never should be administered by any except white men . . . . I declare that a negro ought not to be a citizen, whether his parents were imported into this country as slaves or not, or whether or not he was born here. It does not depend upon the place a negro’s parents were born, or whether they were slaves or not, but upon the fact that he is a negro, belonging to a race incapable of self government, and for that reason ought not to be on an equality with white men.”).

62. CONG. GLOBE, 36th Cong., 1st Sess. 915 (1860) (“I have said over and over again . . . this Government was made by white men, on the white basis, for the benefit of white

Powell,<sup>63</sup> Representative Joseph Edgerton,<sup>64</sup> Senator Willard Saulsbury,<sup>65</sup> and Joint Committee on Reconstruction member Representative Andrew Jackson Rogers<sup>66</sup> used the same language in opposition to a host of Republican proposals during Reconstruction.

Republicans during Reconstruction made clear that the scope of the government's beneficiaries—whether government was for the benefit of white citizens only or for the freedmen too—was precisely the bone of contention between the parties. Senator Henry Wilson replied to Senator Saulsbury, describing his speech while in Delaware:

I laid down the broad principle that I would give to every man of any race, color, or condition the same rights and privileges that I possessed myself, or that anybody in the country possessed . . . I regarded every man before the law of my country my peer and my equal, whether he was a white man or a black man. I certainly laid down doctrines plain and clear, which the Senator had a right

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men and their posterity forever, and should be administered by white men, and by none other whatsoever."); *id.* at 920 ("This is a white man's government, made by white men for the benefit of white men, to be administered by white men and nobody else; and I should regret the day that we ever allowed anybody else to have a hand in its administration.").

63. CONG. GLOBE, 38th Cong., 1st Sess. app. 67 (1864) ("I believe that this is a Government of white men. I believe it was made by white men and for the benefit of white men; and I still believe that a white man is better than a negro.").

64. CONG. GLOBE, 38th Cong., 2d Sess. app. 80 (1865) ("We sir, are white men, exercising the powers of a Government made by white men, and our first duty is to use those powers for the benefit of white men and their posterity forever.").

65. CONG. GLOBE, 39th Cong., 2d Sess. 42 (1866) ("[Delaware] believes that this is a white man's Government and was made by white men for the benefit of white men . . .").

66. CONG. GLOBE, 39th Cong., 1st Sess. 196 (1866) ("The wisdom of ages, for more than five thousand years, and the most enlightened Governments that ever existed on the face of the earth have handed down to us that grand principle that all Governments of a civilized character have been and were intended especially for the benefit of white men and white women, and not for those who belong to the negro, Indian, or mulatto race."); *id.* app. 136 (describing President Andrew Johnson: "We have a pure man. We have a man who came from the humble walks of life, a man who has never been bound down by the aristocracy, a man who is the embodiment of civil liberty, who believes that this Government was made for the benefit of white men and white women.").

to understand meant giving to colored men all the rights and all the privileges of citizens of the United States.<sup>67</sup>

Representative Burt Van Horn replied to Representative Rogers:

The soldier who has aided in crushing out this wicked oppression upon the rights of honest labor, under whatever skin it may be found, and thus established forever in this land by his sufferings those sacred rights, will stand as ever before by the side of every citizen of the Republic, of whatever color, in defense of the rights for which he has fought. Again, the gentleman says this is a white man's Government; that it was intended, as all Governments have been, especially and exclusively for the benefit of white men and white women, and not for those who belong to the negro, mulatto, or Indian race. Our Government is one for all who come under its protection, or of whom it asks obedience and support. The black as well as the white pay taxes to support it, and aid in the defense of its honor and the execution of its laws . . . [T]he great struggle now closed has settled the question that the black man has "rights that the white man is bound to respect."<sup>68</sup>

Senator James Dixon elaborated on why government exists for the benefit of black men too:

It was no objection to my mind that the bill was intended for the benefit of black men. The fact cannot be denied that it was so intended. Was it not called the Freedmen's Bureau? Are white men freedmen? Was it not to feed and support the wards of the nation? . . . I voted for it with that understanding that it was for the benefit of black men; and I am ready now, by my vote here and elsewhere, and so are my constituents, to do anything, as much as any other people will do, to pay their money as freely and exert themselves as earnestly for the benefit of black men as for the benefit of white men. I place them on the same ground. I know no distinction in my feelings, in my sympathies, in my charities, between black men and white men. I have no preferences in that respect. There may be subjects on which I have preferences, but in the matter of kindness, of doing them a favor, of saving them from suffering, I should never ask whether the

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67. CONG. GLOBE, 39th Cong., 2d Sess. 42 (1866).

68. CONG. GLOBE, 39th Cong., 1st Sess. 284 (1866).

suffering man was a black man or a white man. It is enough for me to know that he is a man.<sup>69</sup>

The fact that opponents attacked the idea of extending citizenship to African Americans precisely because doing so would undermine the idea that government is for white men's benefit makes clear that citizens are government's beneficiaries. Imposition of such a duty was the point of the Fourteenth Amendment. As the first Justice Harlan put it, the point was to incorporate the freedmen as a "component part of the people for whose welfare and happiness government is ordained."<sup>70</sup>

### B. *Citizens in the Social Contract*

Outside the context of the Fourteenth Amendment, states have long used citizenship as a marker of those for whom they have a particular concern. While the English legal background usually spoke in terms of subjects, rather than citizens, the idea of a state as a commonwealth promoting the interests of all of its parts is very old indeed. Cicero wrote in the middle of the first century B.C. of the duty to "watch for the well-being of [one's] fellow-citizens," to "care for the whole body politic, and not, while they watch over a portion of it, neglect other portions," and not to "take counsel for a part of their citizens, and neglect a part."<sup>71</sup> Merely refraining from purposeful, intentional harm was obviously not enough for Cicero; he insisted on the duty to pay attention—to "watch over" and "take counsel for"—all citizens' interests. A slogan of Cicero's, *salus populi suprema lex esto*—the welfare of the people should be the supreme law—was widely quoted across Europe, and particularly in English law, beginning in the sixteenth century.<sup>72</sup> It even became

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69. *Id.* at 1040–41.

70. The Civil Rights Cases, 109 U.S. 3, 61 (1883) (Harlan, J., dissenting).

71. 1 CICERO, DE OFFICIIS, § 25, at 53–54, reprinted in ETHICAL WRITINGS OF CICERO: DE OFFICIIS; DE SENECTUTE; DE AMICITIA; AND SCIPIO'S DREAM (Andrew P. Peabody trans., Boston: Little, Brown, and Co. 1887) (44 BCE), accessible at <https://oll.libertyfund.org/titles/cicero-on-moral-duties-de-officiis> [<https://perma.cc/TP2W-EX2V>].

72. For the story of Cicero's enormous influence, and the widespread use of his *salus populi suprema lex esto* maxim, see PETER MILLER, DEFINING THE COMMON GOOD: EMPIRE, RELIGION, AND PHILOSOPHY IN EIGHTEENTH-CENTURY BRITAIN 21–87 (1994)

the epigraph for Locke's *Second Treatise on Government* and the motto of Missouri. Around 1549, during Edward VI's reign, those opposed to the enclosure of common land began to be called "commonwealth men." Edward Coke in the next century often invoked Cicero, and after the English Civil War the government called itself a commonwealth, a move later copied by Massachusetts, Pennsylvania, Virginia, and Kentucky. In 1866, Charles Sumner began his argument for universal suffrage by invoking the principle of the duty to promote the general welfare; after reviewing Plato, Aristotle, and Cicero, he said, "[T]here are two principles which all these philosophers teach us: the first is justice, and the second is the duty

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(tracing late-Renaissance and early-modern obsession with Cicero to Marc-Antoine Muret's 1582 lectures on Tacitus and Cicero).

For the influence of *salus populi suprema lex esto* in English law, see, for example, Bates's Case (1606) 145 Eng. Rep. 267, 271; Lane 23, 27; Tanistry's Case (1608) 80 Eng. Rep. 516, 520; Davis 28, 32; Keighley's Case (1609) 77 Eng. Rep. 1136, 1137; 10 Co. Rep. 139 a, 139 b; Attorney General v. Griffith (1613) 80 Eng. Rep. 1028, 1028; 2 Bulstrode 155, 155; Burrowes v. High-Commission Court (1615) 81 Eng. Rep. 42, 44; 3 Bulstrode 49, 52; Cole v. Foxman (1617) 74 Eng. Rep. 1000, 1000; Noy 30, 30; SAMUEL RUTHERFORD, LEX, REX: THE LAW AND THE PRINCE 119 (Robert Ogle & Oliver & Boyd ed. 1843) (1644) (calling it "the supreme and cardinal law to which all laws are to stoop" and erroneously attributing it, as John Selden did, to Rome's twelve tables); *id.* at 137 (calling it "one fundamental rule . . . like the king of planets, the sun, which lendeth star-light to all laws, and by which they are expounded."); Rex v. Carew (1682) 36 Eng. Rep. 1016, 1017; 3 Swans. 669, 670; Grand Opinion for the Prerogative Concerning the Royal Family (1717) 92 Eng. Rep. 909, 922; Fortescue 401, 431; Low v. Peers (1770) 97 Eng. Rep. 138, 142; Wilm. 364, 373 (calling it "the common law[s] . . . favourite dominant principle."); Campbell v. Hall (1774) 98 Eng. Rep. 848, 878; Lofft 665, 707-08; British Cast Plate Mfrs. v. Meredith (1792) 100 Eng. Rep. 1306, 1308; 4 T.R. 794, 797; Mayor and Burgesses of Lyme Regis v. Henley (1832) 110 Eng. Rep. 29, 33; 3 B. & AD. 77, 87; Feather v. Queen (1865) 122 Eng. Rep. 1191, 1195; 6 B. & S. 257, 268.

For American citations of the maxim, see License Cases, 46 U.S. 504, 632 (1847); West River Bridge v. Dix, 47 U.S. 507, 545 (1848); Passenger Cases, 48 U.S. 283, 298 (1849); *Ex Parte Milligan*, 71 U.S. 2, 81 (1866); Mississippi v. Johnson, 71 U.S. 475, 487 (1867); City of Richmond v. Smith, 82 U.S. 429, 434 (1873); Boston Beer Co. v. Massachusetts, 97 U.S. 25, 33 (1878); Butchers' Union Co. v. Crescent City Co., 111 U.S. 746, 752 (1884); United States v. Pac. R.R., 120 U.S. 227, 234 (1887); Leisy v. Hardin, 135 U.S. 100, 129, 145, 158 (1890); St. Louis & S.F. Ry. Co. v. Mathews, 165 U.S. 1, 24 (1897); Workman v. New York City, 179 U.S. 552, 585 (1900); Texas & New Orleans Ry. Co. v. Miller, 221 U.S. 408, 415 (1911); Omnia Com. Co. v. United States, 261 U.S. 502, 513 (1923); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 476 (1934).

of seeking the general welfare.”<sup>73</sup> Representative John Hubbard relied on Cicero as well: “[T]here is an old maxim of law in which I have very considerable faith, that regard must be had to the public welfare; and this maxim is said to be the highest law.”<sup>74</sup>

Emer de Vattel’s mid-eighteenth-century version of social contract theory built on Locke’s work from a few generations before. Vattel explained the social contract in terms of citizenship: “The citizens are the members of the civil society: bound to this society by certain duties, and subject to its authority, they equally participate in its advantages.”<sup>75</sup> Chief Justice Marshall quoted this passage for the Supreme Court in 1814 in explaining the federal government’s duties to U.S. citizens abroad during the War of 1812.<sup>76</sup> John Adams’s preamble to the Massachusetts Constitution of 1780 echoed the same idea: “The body politic is formed by a voluntary association of individuals; it is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.”<sup>77</sup> The first Justice Harlan relied heavily on this promise in explaining the government’s duties during a pandemic.<sup>78</sup> The responsibility of each nation-state for its citizens was a staple of mid-nineteenth-century international law. One treatise put it quite simply: “[E]ach state is the trustee of its citizens for public objects.”<sup>79</sup>

The Supreme Court explained the state’s duty to promote all citizens’ interests in an early dormant-commerce-clause case from 1837, *Mayor of New York v. Miln*:

[I]t is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness, and prosperity of its people, and to provide for its general welfare, by any and every

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73. CONG. GLOBE, 39th Cong., 1st Sess. 677 (1866).

74. *Id.* at 630.

75. VATTEL, *supra* note 30, bk. I, ch. XIV, § 212.

76. *The Venus*, 12 U.S. (8 Cranch) 253, 289 (1814).

77. MASS. CONST. pmbl.

78. *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905).

79. DANIEL GARDNER, *INSTITUTES OF INTERNATIONAL LAW* 484–85 (1860).

act of legislation which it may deem to be conducive to these ends . . . .<sup>80</sup>

The Court's explanation of the police power was important background for Reconstruction. Senator Willard Saulsbury quoted this passage in Congress as a warning against the implications of the Civil Rights Act of 1866.<sup>81</sup>

One phrase used repeatedly in Congress during the discussions of the Civil Rights Act of 1866 and the Fourteenth Amendment was "general good of the whole." It appeared in Justice Bushrod Washington's oft-quoted description of the fundamental rights of citizens in *Corfield v. Coryell*.<sup>82</sup> The phrase "general good of the whole" had a long history, however, as a description of the basic obligation of government. As Henry Clay put the point in 1842 with respect to bankruptcy laws (as put into the past tense by the reporter),

It was just, and it was the imperative duty of Congress to pass uniform laws upon the subject. The Constitution was an aggregate of power, of which the States stripped themselves, and vested it in the General Government for the general good of the whole, and in its parts . . . . [I]t was the duty of Congress to examine into the interests of all the states . . . . The Union was a family of States, and their fraternal affections, and their harmony, could only be preserved by mutual concessions . . . . Congress was bound to legislate without regard to sectional divisions, but for the entire country. If the exercise of the power over bankruptcy, then, was of vital interest to one State, and did not inflict serious injury on others, it was the duty of Congress to legislate upon it—weighing the interests of all . . . . It was their duty to act.<sup>83</sup>

Note particularly the congressional duty to *examine* the interests of states; merely staying ignorant was of course not enough for Clay.

The same year, Representative John Pope discussed the "general good" with respect to the tariff:

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80. 36 U.S. 102, 139 (1837).

81. CONG. GLOBE, 39th Cong., 1st Sess. 478–79 (1866).

82. 6 F. Cas. 546, 552 (E.D. Pa. 1825).

83. CONG. GLOBE, 27th Cong., 2d Sess. 185 (1842) (emphasis added).



He was opposed (continued Mr. P.) to the protection of manufactures, or any other branch of industry, for the special benefit of those engaged in it. We ought not to enrich one class, or give them extensive privileges, or a monopoly, at the expense of the rest of the community. No encouragement should be given to any branch of business for the sake of those engaged in it; but the question should ever be, will such encouragement clearly conduce to the general good of the whole community?<sup>84</sup>

Representative Richard Donnell—a Whig from North Carolina disagreeing sharply with a Democratic colleague from the same state—invoked the “general good” while discussing slavery in the territories in 1848:

As it would seem, therefore, that the same portion of territory cannot be made equally available to both sections of the Union, we can only in a partition hope for or obtain equality of participation. The application, however, of these and other principles relating to government, is a matter which addresses itself to the sound discretion of Government itself. In the application it must look to the general good of the whole, taking care never to sacrifice the interests of any section of the country, or of any individual of the community, unless the public welfare imperiously demands it.<sup>85</sup>

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84. CONG. GLOBE, 27th Cong., 2d Sess. app. 914 (1842).

85. CONG. GLOBE, 30th Cong., 1st Sess. app. 1060 (1848). Donnell’s comments about the principles’ inapplicability to courts anticipate Samuel L. Bray and Paul B. Miller’s criticisms in *Against Fiduciary Constitutionalism*, 106 VA. L. REV. 1479 (2020) of the use of fiduciary principles to interpret the Constitution. Earlier, Donnell had spoken generally of the one-of-a-kind nature of the government’s trust obligations:

I admit that the powers of government are a trust in the hands of those who constitute the legislative branch of the Government. But this is not a trust subject to the same rules which are established by courts of equity to govern the relations of the trustee to the *cestui que trust*. It is a trust *sui generis*, controlled by its own principles, and the trustee is the supreme power.

CONG. GLOBE, *supra*. After the portion quoted in the main text above, Donnell elaborated,

In the discharge of this trust the Government may err. It may even abuse its powers. But could its action be declared by our courts to be unconstitutional? On the contrary, it would be the abuse of a constitutional power; a violation of the principles of good government, and not the assumption of

Likewise, Moses Hampton considered the “general good when discussing navigation rights the same year:

[I]f the General Government has power to declare that these streams are public highways, and that all the citizens of the United States have the right to pass and repass upon them, I should like to know if it has not committed itself to keep these public highways in repair? It is that fact that enables the General Government to take toll on these waters, to erect custom-houses, and to receive money for licenses. It is because they have declared them to be highways, free and open for all the citizens of these United States. And as the States have surrendered their power to the General Government, it is bound in good faith to carry out the power for the general good of the whole.<sup>86</sup>

Discussing the Kansas-Nebraska Act, Representative Philip Phillips quoted Vattel and applied the trust analogy and the equal-beneficiaries principle to the territories:

Congress being the agent or trustee for the common good and benefit of the people of the several States, can pass no act, either in the disposition of the soil or in the government of the Territory, inconsistent with the rights of the beneficiaries in the trust, for it is a principle of the law of nations “that all the members of a community have an equal right to the use of the common property;” and this principle is no less strongly secured in the Constitution of our Union.<sup>87</sup>

This background of the nature of citizenship was well known to the Congress that passed the Fourteenth Amendment. Representative Samuel Moulton said in defense of the Civil Rights Act, “[I]t is also made the duty of Congress to guaranty to each state a

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unconstitutional power. The imagined rights of the North or the South are, at best, but rights of *imperfect* obligation.

*Id.*

86. CONG. GLOBE, 30th Cong., 1st Sess. 451 (1848).

87. CONG. GLOBE, 33d Cong., 1st Sess. app. 534 (1854). Representative Phillips’s translation of Vattel is slightly different from the 1797 translation used by the Liberty Fund edition, which translates as “corporation” the word Phillips quotes as “community.” “All the members of a corporation have an equal right to the use of its common property.” VATTEL, *supra* note 30, at 234.

republican form of government, and to provide for the common good and for the general welfare.”<sup>88</sup> Senator George Edmunds described the duty to respond to cholera:

It appears to me that this is a subject which concerns the general welfare of the people of the United States, irrespective of State or local organizations and irrespective of State boundaries. It concerns the general welfare, and therefore, in my judgment, it is the highest duty of the General Government to promote that general welfare if anything can be done by exercising its paramount authority over the subject.<sup>89</sup>

As in the debate over territorial slavery, Democratic arguments in 1866 were put in terms of the obligation of the federal government to serve the interests of citizens from all sections equally. Daniel Voorhees complained in familiar terms about protectionism’s putting the interests of sellers over consumers:

The European manufacturer is forbidden our ports of trade for fear he might sell his goods at cheaper rates and thus relieve the burdens of the consumer. We have declared by law that there is but one market into which our citizens shall go to make their purchases, and we have left it to the owners of the market to fix their own prices. The bare statement of such a principle foreshadows at once the consequences which flow from it. One class of citizens, and by far the largest and most useful, is placed at the mercy, for the necessities as well as luxuries of life, of the fostered, favored, and protected class to whose aid the whole power of the Government is given . . . I would rather be directly robbed than forced to assume, in the name of justice and right, the burdens and obligations of others more able to meet them than I am. Must the western people, because they are consumers and not manufacturers, be compelled by indirection to meet a large proportion of the debts of their fellow-citizens in other sections?<sup>90</sup>

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88. CONG. GLOBE, 39th Cong., 1st Sess. 631 (1866).

89. *Id.* at 2484.

90. CONG. GLOBE, 39th Cong., 1st Sess. 154 (1866).

Note particularly Voorhees's statement that the costs of protectionist tariffs were indirect; even facially neutral policies could run afoul of the obligation to serve all citizens' interests impartially.

Against this background, the imposition of African-American citizenship on the South had a well-understood meaning. The word "citizen" was the vehicle for demanding that the South—and of course other states in the Union—live up to its side of the social contract.<sup>91</sup>

C. *Civil v. Political Rights, Ownership v. Control, Beneficiaries v. Trustees*

A third reason to see the Fourteenth Amendment as the imposition of a fiduciary duty on states is its distinction between political and civil rights. As noted earlier, Republicans insisted over and over that the Amendment conveyed only civil rights, not political ones like voting.<sup>92</sup> Section Two of the Amendment imposed a House-representation penalty on states that restricted the voting rights of men over 21. This would make no sense if such restrictions were flat-out banned under Section One. John Bingham made this very point in his speech on the Amendment in the House: "The amendment does not give, as the second section shows, the power to Congress of regulating suffrage in the several States. The second section excludes the conclusion that by the first section suffrage is subjected to congressional law . . ."<sup>93</sup>

The distinction between rights of governmental consideration and rights to control the government has a long history. Solon, for instance, established laws giving certain basic rights to all Athenian

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91. Samuel Bray and Paul Miller have questioned whether fiduciary concepts had "crystallized" enough to be "operative in the minds of lawyers and politicians" of this era. And even if so, they have expressed doubt over the extent to which the fiduciary analogy had moved from the realm of political principle to being an actual legal constraint on government. See Bray & Miller, *supra* note 85, at 1519. But as the title of William Nelson's book makes clear, the Fourteenth Amendment was intended to be the vehicle for translating "political principle" into "judicial doctrine" by means of the constitutional text. See generally WILLIAM NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1988).

92. See *supra* note 56 and accompanying text.

93. CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866).

citizens in the early sixth century B.C. but reserving political control for those with certain levels of wealth. He “ma[de] all citizens equal under his own despotic sway.”<sup>94</sup> Five centuries later, Cicero’s principles of equal governmental concern for all citizens’ interests sat side by side with his approval of aristocratic political rights.<sup>95</sup> The English idea of a commonwealth had long coexisted alongside the idea that the monarch’s right to rule need not be put up to a vote.<sup>96</sup> The Putney debates of 1647 featured a sophisticated debate between the likes of Thomas Rainborough, who wanted voting rights for all Englishmen, and Cromwell’s son-in-law Henry Ireton, who resisted such voting rights because of the threat they would pose to property rights, but who insisted at the same time that Cromwell was bound to promote the commonwealth.<sup>97</sup> Edmund Burke’s 1774 explanation of why his constituents had no power to issue binding instructions to him as a member of Parliament hits a similar theme:

Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion. . . . Parliament is not a congress of ambassadors from different and hostile interests; which interests each must maintain, as an agent and advocate, against other agents and advocates; but parliament is a deliberative assembly of one nation, with one interest, that of the whole; where, not local purposes, not local prejudices, ought to guide, but the general good, resulting from the general reason of the whole.<sup>98</sup>

The French pioneered a useful terminological distinction between “passive citizenship” — the right to *be treated as an equal by* the government — and “active citizenship” — the right to *exert control over* the government. In rejecting Fourteenth Amendment political

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94. IVAN M. LINFORTH, *SOLON THE ATHENIAN* 57 (1919).

95. See CICERO, *supra* note 71.

96. See, e.g., EDMUND DUDLEY, *THE TREE OF COMMONWEALTH* (D.M. Brodie ed., Cambridge Univ. Press 1948) (1509); THOMAS SMITH, *DE REPUBLICA ANGLORUM: A DISCOURSE ON THE COMMONWEALTH OF ENGLAND* (L. Alston ed., Cambridge Univ. Press 1906) (1565).

97. See GEOFFREY ROBERTSON, *THE PUTNEY DEBATES: THE LEVELLERS* 69–93 (Verso 2018) (1647).

98. 1 *WORKS OF EDMUND BURKE* 446–48 (Henry G. Bohn ed., 1854) (1774).

rights as outside the concept of “civil rights,” its framers clearly constitutionalized merely passive citizenship: a citizenship of equal beneficiaries.

Chief Justice Morrison Waite’s opinion in *Minor v. Happersett*<sup>99</sup> explains this distinction at length. Writing for a unanimous Court, Chief Justice Waite argued that the Fourteenth Amendment did not give women the vote. Waite had joined the Court only after the catastrophe in the *Slaughter-House Cases*<sup>100</sup> had largely banished the idea of the rights of citizenship from the Court’s doctrine, but *Minor* represents one last sustained treatment of the idea of the rights of citizenship from the Court.<sup>101</sup> The Court echoed Vattel’s reasoning in *The Law of Nations* and Adams’s preamble for the Massachusetts Constitution:

The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association . . . . For convenience it has been found necessary to give a name to this membership. The object is to designate by a title the person and the relation he bears to the nation. For this purpose the words ‘subject,’ ‘inhabitant,’ and ‘citizen’ have been used, and the choice between them is sometimes made to depend upon the form of the government. Citizen is now more commonly employed, however, and as it has been considered better suited to the description of one living under a republican government, it was adopted by nearly all of the States upon their separation from Great Britain, and was

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99. 88 U.S. 162 (1875).

100. 83 U.S. 36 (1873).

101. Citizenship did appear very prominently, of course, in Justice Harlan’s dissents in *The Civil Rights Cases* and *Plessy v. Ferguson*, as well as Justice Bradley’s recapitulation of his *Slaughter-House* dissent in his concurrence in *Butchers’ Union Co. v. Crescent City Co.*, 111 U.S. 746 (1884), which later served as the chief precedent for *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), leading in turn to *Lochner v. New York*, 198 U.S. 45 (1905); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973); and *Obergefell v. Hodges*, 576 U.S. 644 (2015). But despite building on the *Slaughter-House* dissents, the Court has never again devoted significant attention to the scope of the privileges of Fourteenth Amendment citizenship, other than by dismissing the issue in *McDonald v. Chicago*, 561 U.S. 742, 758 (2010).

afterwards adopted in the Articles of Confederation and in the Constitution of the United States.<sup>102</sup>

The word “citizen,” then, plainly connotes the people whose general welfare the government is bound to promote. In requiring states to take such citizenship seriously, the Fourteenth Amendment required them to behave as a trustee with multiple beneficiaries. Indeed, the entire notion of a trust is based on a separation between one group with the power to control some resource—the trustees—and a second group in whose interests that power is to be exercised—the beneficiaries. Trust law is thus a natural model for a constitutional rule like the Fourteenth Amendment that gives equal civil rights to one set of people but allows political rights to be reserved for a smaller subset.

### III. TRUSTEESHIP, MULTIPLE BENEFICIARIES, AND “FAIR AND IMPARTIAL ATTENTION”

If citizens must be treated as beneficiaries by their states, what does that mean for our constitutional law? Much of this terrain has already been canvassed by Professors Gary Lawson and Guy Seidman, relying heavily on earlier work by Robert Natelson.<sup>103</sup> This article puts fiduciary law to a slightly different purpose, however, by arguing it is a requirement embodied in the idea of Fourteenth Amendment citizenship and imposed on states, rather than part of the nature of the Constitution itself. The idea here is not that the Fourteenth Amendment itself is a “great power of attorney” entrusting the states with power, but rather that the Amendment imposes a trust-like obligation on states. Special emphasis is also needed on multiple-beneficiary law at the time of Reconstruction, rather than at the initial Founding—though we will see that they are not very different.

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102. *Minor*, 88 U.S. at 165–66.

103. Lawson & Seidman, *supra* note 14, at 151–71, 205–09; see generally Robert G. Natelson, *The Constitution and Public Trust*, 52 BUFF. L. REV. 1077 (2004).

A. *English Multiple-Beneficiary Law*

*Rooke's Case*, reported by Edward Coke in 1598, prevented the commissioners of sewers from imposing taxation unequally, on a single landowner among the many benefitted by the sewer.<sup>104</sup> Justifying his decision, Coke referred to “cases of equality grounded on reason and equity.”<sup>105</sup> *Keighley's Case*, another case from Coke in 1609, also involved sewer commissioners with a duty to repair a wall. In the case of accidents, commissioners had a duty to spread the cost to all landowners, but more specialized taxation could be imposed given a particular reason:

If one is bound by prescription to repair a wall, &c. against the flowing of the sea, and there is no default in him, but by reason of the sudden and unusual increase of water the wall is broken, the commissioners of sewers ought to tax all who hold lands or tenements, or common of pasture, &c. or have or may have any loss, damage, &c. according to the quantity of their lands. If any fault is in him, and the danger is not inevitable, but he may well repair it, the commissioners may charge him only to repair it.<sup>106</sup>

Coke quoted Cicero's maxim: “The reason . . . is *pro bono publico*, for, [] *salus populi est supreme lex*.”<sup>107</sup> *Salus populi*—the welfare of the people—was understood to require impartial promotion of the interests of *all* the relevant people. Special reasons could justify a departure from such a rule, but an equal-distribution-of-costs rule was the default.

*Astry v. Astry*, from 1706, considered a widow with power to distribute her husband's estate “amongst his three children.”<sup>108</sup> The Court followed the rule from an earlier case in which the devise stated that the widow should distribute the estate “in such proportions as she should think fit.”<sup>109</sup> Despite this broad language of

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104. (1598) 77 Eng. Rep. 209, 209; 5 Co. Rep. 99 b, 99 b.

105. *Id.* at 210.

106. (1609) 77 Eng. Rep. 1136, 1136; 10 Co. Rep. 139 a, 139 a.

107. *Id.* at 1137.

108. (1706) 24 Eng. Rep. 124, 124; Prec. Ch. 256, 256.

109. *Id.*



discretion, “she must divide it amongst them equally, unless a good reason can be given for doing otherwise.”<sup>110</sup>

*Ord v. Noel*, from 1820, considered the duty of a trustee conducting a sale. Vice-Chancellor Sir John Leach set out a rule paraphrased repeatedly<sup>111</sup> in American statements of the law:

Every trust deed for sale is upon the implied condition that the trustees will use all reasonable diligence to obtain the best price; and that in the execution of their trust they will pay equal and fair attention to the interests of all persons concerned. If trustees, or those who act by their authority, fail in reasonable diligence—if they contract under circumstances of haste and improvidence—if they make the sale with a view to advance the particular purposes of one party interested in the execution of the trust, at the expense of another party, a Court of Equity will not enforce the specific performance of the contract, however fair and justifiable the conduct of the purchaser may have been.<sup>112</sup>

Notice particularly here the emphasis on “attention” and “diligence,” creating an affirmative duty to heed all beneficiaries’ interests.

#### B. *Multiple-Beneficiary Law During Reconstruction*

American trust law at the time of Reconstruction repeatedly used the phrase “fair and impartial attention” to describe the duty of trustees with multiple beneficiaries. Frequently a single beneficiary was called a “cestui que trust,” and multiple beneficiaries “cestuis que trust.” These sources all use very similar language. The Supreme Court of North Carolina, relying on *Ord* but changing “equal and fair” to “fair and impartial,” said in 1844:

Every trustee for sale, is bound by his office to bring the estate to a sale, under every possible advantage to the *cestui que trust*; and, when there are several persons interested, with a fair and impartial attention to the interest of all concerned. He is bound to

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110. *Id.*

111. See *infra* notes 112–117 and accompanying text.

112. (1820) 56 Eng. Rep. 962, 963; 5 Madd. 438, 440.

use, not only good faith, but also every requisite degree of diligence and prudence, in conducting the sale.<sup>113</sup>

Likewise, Thomas Lewin's treatise noted in 1837, "A trustee . . . will remember that he is bound by his office . . . with a fair and impartial attention to the interests of all the parties concerned."<sup>114</sup> Alexander Burrill's 1858 treatise parroted the North Carolina Supreme Court:

Every trustee to sell is bound by his office to bring the estate to a sale under every possible advantage to the *cestui que trust*, and, where there are several persons interested, with a fair and impartial attention to the interest of all concerned. He is bound to use not only good faith, but also every requisite degree of diligence and prudence in conducting the sale.<sup>115</sup>

An American Law Register note explained in 1863, "[A trustee's discretion] must be exercised with fair and impartial attention to the interests of all parties concerned."<sup>116</sup> The Supreme Court of Iowa said in 1864, "[The sheriff conducting a sale] should never forget that he is, for many purposes, the agent of *both* parties, in the execution of the power with which the law invests him. . . . [T]his discretion must be exercised with a fair and impartial attention to the interests of *all parties concerned*."<sup>117</sup> Jairus Ware Perry's treatise noted in 1872, "The trustees are bound by their office to sell the estate under every possible advantage for the beneficiaries, and if there are different *cestuis que trust*, they must act with a fair and impartial attention to the interest of all."<sup>118</sup>

Note particularly the stark difference between these rules and the purposeful-discrimination rule in *Smith* and *Washington*. A

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113. *Johnston v. Eason*, 38 N.C. (3 Ired. Eq.) 330, 334 (1844) (citations omitted).

114. THOMAS LEWIN, A PRACTICAL TREATISE ON THE LAW OF TRUSTS 500 (Sweet & Maxwell 12th ed. 1911) (1837).

115. ALEXANDER M. BURRILL, A TREATISE ON THE LAW AND PRACTICE OF VOLUNTARY ASSIGNMENTS FOR THE BENEFIT OF CREDITORS 506 (James L. Bishop & James Avery Webb eds., Beard Books 1999) (1858).

116. J.F.D., *Sales and Titles Under Deeds of Trust*, 2 AM. L. REG. 705, 713 (1863).

117. *Swortzell v. Martin*, 16 Iowa 519, 523 (1864).

118. JAIRUS WARE PERRY, A TREATISE ON THE LAW OF TRUSTS AND TRUSTEES 1320–21 (Raymond C. Baldes ed., 7th ed. 2008) (1872).

requirement of impartial *attention* means that more is required of a trustee than simple avoiding intentionally targeting beneficiaries for harmful treatment. They are required affirmatively to learn about beneficiaries' interests and promote them.

C. *Multiple-Beneficiary Law Today*

We turn finally to multiple-beneficiary law today. It has changed remarkably little from the sorts of rule articulated over three centuries ago in cases like *Astry*. Distinctions between beneficiaries are allowed as long as a good reason is given, but in the absence of such a reason, equal treatment is demanded. As modern portfolio theory has developed a more sophisticated understanding of the different investment needs of different beneficiaries, multiple-beneficiaries law has kept pace.<sup>119</sup> The basic obligation has not changed, however: a trustee must attend to, and promote, all beneficiaries' interests fairly and impartially. The Uniform Prudent Investor Act, approved by the National Conference of Commissioners on Uniform State Laws in 1995 and adopted in 1995, wholly or in part, by several states, requires, "If a trust has two or more beneficiaries, the trustee shall act impartially in investing and managing the trust assets, taking into account any differing interests of the beneficiaries."<sup>120</sup> Note particularly here the importance of paying attention as well as requiring flexibility with respect to beneficiaries' different interests. The Uniform Trust Code, approved in 2000, is similar: "If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests."<sup>121</sup> A comment amplifies the fact that equality is not always required: "The duty to act impartially does not mean that the trustee must treat the beneficiaries equally. Rather, the trustee must treat the

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119. See generally Frederic J. Bendremer, *Modern Portfolio Theory and International Investments Under the Uniform Prudent Investor Act*, 35 REAL PROP. PROB. & TR. J. 791 (2001) (analyzing "how the Uniform Prudent Investor Act has modernized the law of fiduciary investing while preserving the traditional fiduciary duties of the trustees.")

120. UNIFORM PRUDENT INVESTOR ACT § 6 (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1995).

121. UNIFORM TRUST CODE § 803 (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2018).

beneficiaries equitably in light of the purposes and terms of the trust.”<sup>122</sup> The Restatement (Third) of Trusts, adopted in 2001, similarly requires “due regard” for multiple beneficiaries’ interests: “A trustee has a duty to administer the trust in a manner that is impartial with respect to the various beneficiaries of the trust . . . . [T]he trustee must act impartially and with due regard for the diverse beneficial interests created by the terms of the trust.”<sup>123</sup> A comment explains the importance of attending properly to the complexities of different beneficiaries’ interests:

It would be overly simplistic, and therefore misleading, to equate impartiality with some concept of “equality” of treatment or concern—that is, to assume that the interests of all beneficiaries have the same priority and are entitled to the same weight in the trustee’s balancing of those interests. Impartiality does mean that a trustee’s treatment of beneficiaries or conduct in administering a trust is not to be influenced by the trustee’s personal favoritism or animosity toward individual beneficiaries, even if the latter results from antagonism that sometimes arises in the course of administration. Nor is it permissible for a trustee to ignore the interests of some beneficiaries merely as a result of oversight or neglect, or because a particular beneficiary has more access to the trustee or is more aggressive, or simply because the trustee is unaware of the duty stated in this Section.<sup>124</sup>

Again, we see the importance of the trustee devoting attention to the interests of all beneficiaries, not merely avoiding purposeful harm. Departures from identical treatment are allowed, but they must be justified.

*D. Administrative Law: A Better Cost-Sensitive Model for Assessing Arbitrariness*

As Professors Lawson and Seidman have noted, the demand in historic English multiple-beneficiaries law for an explanation of

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122. UNIFORM TRUST CODE § 803 cmt. (NAT’L CONF. OF COMM’RS ON UNIF. STATE L. 2023).

123. RESTATEMENT (THIRD) OF TRUSTS ch. 15 § 79 (AM. L. INST. 2007).

124. *Id.* ch. 15 § 79 cmt. b.

costs imposed on particular beneficiaries is strikingly similar to modern American administrative law.<sup>125</sup> This fits with the fact that before the tiers of scrutiny were constructed, arbitrariness was the central consideration in the Supreme Court's law of equality,<sup>126</sup> while a major portion of modern administrative law consists of assessing when agency action is "arbitrary" and "capricious."<sup>127</sup> *Astry's* demand for a "good reason" for a departure from a rule of equality is quite similar to the demand that *State Farm* puts on agencies.<sup>128</sup> The requirement that trustees devote attention to the particular circumstances of beneficiaries—and the costs that policies impose on them—is quite similar to the sort of inquiry the Court required in *Overton Park* with respect to the Memphis Zoo, which was obviously not targeted for purposeful harm, but whose connection to the rest of the park was merely seen as insufficiently important to change the path of I-40.<sup>129</sup> The administrative-law analogy is thus a natural cure for possible governmental callousness toward religious citizens—the "arbitrary quality of thoughtlessness"<sup>130</sup>—that sometimes lies behind laws of "general applicability." The Court elaborated in *State Farm*,

Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies: "We may not supply a reasoned basis for the agency's action that the agency itself has not given."<sup>131</sup>

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125. LAWSON & SEIDMAN, *supra* note 13, at 163–64.

126. *See supra* note 44.

127. 5 U.S.C. § 706(2)(A).

128. Compare *Astry v. Astry* (1706) 24 Eng. Rep. 124, 124; Prec. Ch. 256, 256, with *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

129. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 406–08 (1971).

130. *See supra* note 42–44 and accompanying text.

131. *State Farm*, 463 U.S. at 43 (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

The Court's final line here offers another advantage of an administrative-law model for Fourteenth Amendment equal citizenship: it provides an alternative to the excessive deference in cases like *Williamson v. Lee Optical, Inc.*, under which judges may rely on post-hoc rationalizations rather than the actual interest that motivated a legislature.<sup>132</sup> The Court recently reminded the Sixth Circuit in a summary reversal of this "simple but fundamental rule of administrative law."<sup>133</sup> As the Court explained in 1947,

[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.<sup>134</sup>

Just eight years later, however, the Court relied on what "might be thought . . . rational" in order to prevent judicial invalidation of an eyeglass cartel.<sup>135</sup> Six years later still the Court said, "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."<sup>136</sup> This is not what "fair and impartial attention" for all citizens' interests would require.<sup>137</sup> Lower production and higher prices are obviously in the interests of current sellers of a good or service, but states should be required to explain why the interests of other citizens are not as important. Why did the interests of consumers in lower prices, or the interests of possible competitor sellers seeking to offer a lower-cost alternative, not receive the same sort of attention as current sellers' interests? For addictive products like tobacco or painkillers, such a justification for regulation might succeed; a free market might produce a level

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132. 348 U.S. 483, 487–88 (1955).

133. *Calcutt v. FDIC*, 143 S. Ct. 1317, 1318 (2023) (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

134. *Chenery*, 332 U.S. at 196.

135. *Williamson*, 348 U.S. at 488.

136. *McGowan v. Maryland*, 366 U.S. 420, 426 (1961).

137. See *supra* Part III.B.

of consumption that does not serve the general welfare. For eyeglasses<sup>138</sup> or filled milk,<sup>139</sup> though, a credible explication is much harder to give. Requiring states to supply the justification at the time of regulation will sharpen their responsibility to serve at all times as trustees for the benefit of all of their citizens.

Besides offering a new way to promote entrepreneurial liberty and requiring courts to address the distributional consequences of protectionism, what would this approach mean for cases like *Washington v. Davis* and *Employment Division v. Smith*? Serious engagement with the costs of the lack of an exemption for sacramental peyote would demand more than Oregon presented to the Court in *Smith*. Particularly in light of the detailed findings of other courts and of the federal government that religious use of peyote had not been shown to be harmful,<sup>140</sup> the dissent in *Smith* was right that the state was required to do more than rely on its mere assumption otherwise.<sup>141</sup> Failing to explain why numerous other policymakers had gotten the issue wrong is analogous to the Department of Transportation's failure in *State Farm* to confront data that supported its earlier passive-restraint rule.<sup>142</sup> The state must "examine the relevant data and articulate a satisfactory explanation for its action."<sup>143</sup> In lieu of such an articulation, the litigants in *Smith* were entitled to an exemption and hence to unemployment benefits. *Washington v. Davis* poses a more difficult issue, because the merit of the particular test for police officers that produced a disparate racial impact was never litigated in detail. Also, because *Washington* involved the qualifications of public employees, rather than burdens imposed on

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138. See *Lee Optical of Okla. v. Williamson*, 120 F. Supp. 128, 135–39 (W.D. Okla. 1954).

139. See *Milnot Co. v. Richardson*, 350 F. Supp. 221, 225 (S.D. Ill. 1972) (glossing the Equal Protection Clause as banning "arbitrary or capricious distinctions" and finding obsolete the justifications for the act upheld in *United States v. Carolene Products*).

140. See *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 911–13 (1990) (Blackmun, J., dissenting).

141. See *id.* at 674–78 (Brennan, J., dissenting). Justices Marshall and Blackmun joined in Justice Brennan's opinion. *Id.*

142. 463 U.S. at 43–57.

143. *Id.* at 43.

citizens at large, the equal-citizenship issue is more complicated.<sup>144</sup> Citizens are entitled as such only to civil rights related to proper *treatment by the state*, not political rights to *serve on behalf of the state*.<sup>145</sup> The Fourteenth Amendment issue would thus be whether there was an adequate justifying explanation for the burdens that a racially less-balanced police force would place on the citizenry as a whole. The qualifying test might produce such benefits, but it would have to be litigated. Finally, *Village of Arlington Heights v. Metro Housing Corp.*,<sup>146</sup> the case that extended *Washington v. Davis* to the Fourteenth Amendment itself, poses very similar issues to those in *Williamson*. It is possible that a smaller quantity of lower-cost housing might somehow prevent externalities for surrounding home values, but before towns deny zoning permits on that basis, they must confront the data on the harms of exclusionary zoning.<sup>147</sup> Without a better response to this data than was supplied by Arlington Heights, developers should be able to build the sorts of homes that poor people particularly need.

#### CONCLUSION

Fourteenth Amendment citizenship is not a concept with sharply defined implications, and the tiers of scrutiny respond to an understandable urge to make results seem predictable and orderly. But we should resist the urge to make the Fourteenth Amendment's requirements more straightforward than they really are.<sup>148</sup> Enforcing

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144. 426 U.S. at 248.

145. See *supra* Part II.C.

146. 429 U.S. 252 (1977).

147. See, e.g., Joseph Gyourko & Raven Molloy, *Regulation and Housing Supply*, in 5B HANDBOOK OF REG'L. & URB. ECON. 1289 (Gilles Duranton et. al. eds., 2015); Richard D. Kahlenberg, *Tearing Down the Walls: How the Biden Administration and Congress Can Reduce Exclusionary Zoning*, CENTURY FOUND. (April 18, 2021), <https://tcf.org/content/report/tearing-walls-biden-administration-congress-can-reduce-exclusionary-zoning/> [<https://perma.cc/GV5P-UNW9>]; BERNARD H. SIEGAN, *LAND USE WITHOUT ZONING* (2021).

148. See ARISTOTLE, 1 THE NICOMACHEAN ETHICS ch. 3 (F.H. Peter trans., eCampusOntario Public Domain Core Collection 2022) (c. 322 BCE) ("We must be content if we can attain to so much precision in our statement as the subject before us admits of . . . [W]e must be content if we can indicate the truth roughly and in outline . . . [I]t



a requirement of impartial attention to all citizens' interests will require states, Congress, and the courts all to be much more concerned about the details of citizens' particular circumstances, and more careful about explaining their choices that impose costs on some citizens and not others. There will be many unclear cases in which courts should defer to the elected branches and in which Congress therefore has the power under Section Five to clarify what equal citizenship requires for states. But a retreat by the Court from the false promise of formalistic certainty in its tiers of scrutiny, and especially the extreme deference of hypothetical-rational-basis review, is the first step.

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is the mark of an educated man to require, in each kind of inquiry, just so much exactness as the subject admits of: it is equally absurd to accept probable reasoning from a mathematician, and to demand scientific proof from an orator.”), accessible at <https://pressbooks.library.torontomu.ca/nicomacheanethics/chapter/3-exactness-not-permitted-by-subject-nor-to-be-expected-by-student-who-needs-experience-and-training/> [https://perma.cc/94KW-6AX6].



## ORIGINAL UNDERSTANDING OF “BACKGROUND PRINCIPLES” IN *CEDAR POINT NURSERY V. HASSID*

MARY CATHERINE JENKINS & JULIETTE TURNER-JONES

### INTRODUCTION

Unless their children are angels, parents are familiar with the indignant cries of “she took my toy!”; “he broke it!”; or “she’s touching my toys!” These children must learn to share with their siblings. Property owners facing analogous injustices from their federal, state, and local governments, however, are not always required to share—at least, not without compensation. Instead, they can rely on the Fifth Amendment Takings Clause.<sup>1</sup> The Takings Clause entitles property owners to “just compensation” if the government “took” property through eminent domain,<sup>2</sup> if a governmental regulation “broke” or devalued property,<sup>3</sup> or—most recently—if a governmental regulation authorized others to merely “touch” or temporarily enter property.<sup>4</sup>

The idea that the Takings Clause requires compensation when a government uses the power of eminent domain is uncontroversial.<sup>5</sup>

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1. U.S. CONST. amend. V (“nor shall private property be taken for public use, without just compensation”).

2. See *Kelo v. City of New London*, 545 U.S. 469, 469 (2005).

3. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1031–32 (1992).

4. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 419 (1982); *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2063 (2021).

5. See *Kohl v. United States*, 91 U.S. 367 (1875) (establishing the federal eminent domain power); *Cedar Point*, 141 S. Ct. at 2071 (citing *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 321 (2002)); William Baude, *Rethinking the Federal Eminent Domain Power*, 122 *YALE L.J.* 1738, 1743 (2013). *But cf. id.* at

What is more controversial is the idea that the Takings Clause requires compensation when a government regulation results in property devaluation,<sup>6</sup> but this idea has received much discussion.<sup>7</sup> In such instances of “regulatory takings,”<sup>8</sup> courts apply a test from *Penn Central Transportation Co. v. New York City*<sup>9</sup> that requires landowners to satisfy a high bar to receive compensation. In a controversial move, the Supreme Court expanded the realm of compensable takings in its 2021 decision in *Cedar Point Nursery v. Hassid*.<sup>10</sup> Before *Cedar Point*, the Supreme Court had designated that a permanent physical occupation was a taking,<sup>11</sup> requiring compensation. But in *Cedar Point*, when considering a regulation that authorized union organizers to enter certain businesses, the Court held that even a temporary physical occupation was a per se taking requiring compensation.

The Court’s shift to a per se rule is significant because it means a landowner can receive “just compensation” without satisfying

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1741 (“At the Founding, the federal government was not understood to have the power to exercise eminent domain inside a state’s borders.”).

6. See William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 782 (1995) (arguing that *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) established a “new [regulatory] takings regime” that departed from the original understanding that the Takings Clause).

7. E.g., *id.*, John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996); Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211 (1996); Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549 (2003); Bernard Schwartz, *Takings Clause — “Poor Relation” No More?*, 47 OKLA. L. REV. 417, 420 (1994); William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 711 (1985).

8. See Kobach, *supra* note 7, at 1212 (defining regulatory takings as “nonacquisitive, nondestructive takings”) (internal quotation marks omitted).

9. 438 U.S. 104, 124 (1978).

10. 141 S. Ct. 2063 (2021).

11. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982) (holding that a state regulation requiring landlords to allow installation of a television cable on the outside of their buildings was a permanent physical occupation and thus a per se taking).

*Penn Central's* high bar required for regulatory takings.<sup>12</sup> For governments, the *Cedar Point* holding could pose a heavy financial burden if they must compensate landowners for temporary intrusions authorized under existing regulations. Due to this imposing financial burden, some have suggested that *Cedar Point* threatens existing civil rights regimes, which at first blush resemble the labor rights regulation at issue in *Cedar Point*.<sup>13</sup>

But *Cedar Point* also recognized three exceptions to its per se rule,<sup>14</sup> one of which is particularly expansive: “longstanding background restrictions on property rights.”<sup>15</sup> Writing for the majority, Chief Justice Roberts defined this exception as “background limitations [that] encompass traditional common law privileges to access private property.”<sup>16</sup> The opinion listed several examples, including entering private land for public or private necessity<sup>17</sup> or to enforce criminal law.<sup>18</sup> For governments, these background principles could alleviate otherwise staggering financial liability due to the *Cedar Point* rule.

While governments can rest assured that Chief Justice Roberts’s “background principles” exception will mitigate the broadness of the per se rule, the exception nevertheless poses several questions for originalists and legal academics. At first, the per se rule might seem untethered from original meaning, as governments in the Founding era rarely compensated for temporary intrusions. Upon further examination, it seems that *Cedar Point's* incorporation of background principles could align quite well with Founding-era

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12. This showing is required by the default test for regulatory takings, *Penn Cent. Transp. Co.*, 438 U.S. at 124. See Bethany R. Berger, *Eliding Original Understanding in Cedar Point Nursery v. Hassid*, 33 YALE J.L. & HUMAN. 307, 312 (2022).

13. See, e.g., Amy Liang, Comments, *Property Versus Antidiscrimination: Examining the Impacts of Cedar Point Nursery v. Hassid on the Fair Housing Act*, 89 U. CHI. L. REV. 1793, 1793 (2022).

14. See *Cedar Point*, 141 S. Ct. at 2078–80.

15. *Id.* at 2079.

16. *Id.*

17. *Id.* (citing Restatement (Second) of Torts § 196 (1964) (entry to avert an imminent public disaster)), *id.* § 197 (entry to avert serious harm to a person, land, or chattels), and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 n.16 (1992)).

18. *Id.* (citing Restatement (Second) of Torts §§ 204–205).

views on property, depending on how one defines “background restrictions.”

This Note argues that these principles are part of the original meaning of the Fifth Amendment, and then offers an originalist framework for deriving them. The Framers viewed provisions like the Takings Clause as “declaring” existing law that the American people already recognized as enforceable. When viewing the Takings Clause this way—as declarative of “general law”—it becomes apparent that the methodology of *Cedar Point* reflects the original understanding of the Fifth Amendment. In addition to confirming *Cedar Point*’s originalist pedigree, general law also informs the framework for how originalists can divine these background principles.

In Part I, this Note explains the jurisprudential lead-up to *Cedar Point* and examines how the majority concluded that a temporary physical occupation was a taking subject to the background principles exception. In Part II, this Note suggests a general law framework for deriving these background principles. This Note then applies the framework and derives three examples of background principles: the right to enter private businesses like common carriers, the right to enter for public purposes, and the right to enter unfenced land for the purposes of hunting, fishing, or grazing. It is important to note that these background principles are not comprehensive, but rather are representative examples derived from the general law of takings. In Part III, this Note uses these examples to demonstrate why *Cedar Point* likely does not threaten existing civil rights regimes, because background principles protect governmental ability to regulate many of these areas. And Part IV responds to two major criticisms of *Cedar Point*: that the exceptions swallow the rule and that the majority’s holding is not originalist. Although some have questioned whether *Cedar Point* is originalist, the “per se + background restrictions” rule is consistent with an original understanding of the Takings Clause. Thus, this Note’s originalist analysis of background principles is consistent with originalism and provides a principled way to apply the exception.

I. THE ROAD TO *CEDAR POINT NURSERY V. HASSID* AND THE  
“BACKGROUND PRINCIPLES” EXCEPTION

Before discussing the contours of *Cedar Point*'s “background principles” exception, it is helpful to understand the origins of the Court's incorporation of background principles into per se rules within property law jurisprudence. The below analysis describes the road to *Cedar Point* and its background principles exception before delving into Chief Justice Roberts's majority opinion, which provides a framework for this Note's subsequent analysis.

Background principles of the Takings Clause first appeared in Justice Scalia's majority opinion in *Lucas v. South Carolina Coastal Council*.<sup>19</sup> *Lucas* held that a regulation resulting in a total diminution of a property's economic value is a per se taking unless the regulation is warranted by background principles of property and nuisance law.<sup>20</sup> *Lucas*'s per se rule only applied to government regulations that resulted in a *total* diminution in value.<sup>21</sup> Requiring that the diminution in value be total meant that few regulatory takings would require compensation under *Lucas*.<sup>22</sup> For example, if a state regulation barred the growing of avocados in an area where a landowner was commercially farming avocados, that regulation could be financially devastating to the farmer-landowner. Despite the effective loss of the farmer-landowner's livelihood, a court might still conclude that under *Lucas* there was no compensable taking; the farmer could still plant another crop—soybeans, perhaps—or just sell the land.

Although the *Lucas* Court invoked this exception over three decades ago, we are still left without a clear definition of background principles. In particular, we are left without a clear *originalist* definition of background principles, because neither the Supreme

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19. 505 U.S. 1003 (1992).

20. *Id.* at 1029 (specifically, for limitations that “inhere in the title itself, in the restrictions that *background principles* of the State's law of property and nuisance already place upon land ownership,” *id.* (emphasis added)).

21. *Id.*

22. See Michael C. Blumm & Lucas Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 322 (2005).

Court<sup>23</sup> nor academics<sup>24</sup> have settled on a coherent definition. Despite the robust legal discussion regarding the exception’s potential effects,<sup>25</sup> few interrogated the nature of these background principles, nor how judges—specifically originalists—should apply the exception.

Enter *Cedar Point*. *Cedar Point* supplied an opportunity to reexamine *Lucas*’s open question: how to define background principles in property law. *Cedar Point* addressed a California state regulation<sup>26</sup> that granted labor organizations the “right to take access” to

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23. *Lucas* did not provide much instruction, with the majority noting that a state may avoid paying compensation for a regulation that “duplicate[s] the result that could have been achieved in the courts . . . under the State’s law of private [or public] nuisance . . . or otherwise.” *Lucas*, 505 U.S. at 1029. The opinion qualified “or otherwise” as “cases of actual necessity, to prevent the spreading of a fire, or to forestall other grave threats to the lives and property of others.” *Id.* n.16 (citations removed). Remanding the case, Justice Scalia counseled South Carolina that to win its case, it must “identify background principles of nuisance and property law that prohibit the uses he now intends in circumstances in which the property is presently found.” *Id.* at 1031–32.

24. See, e.g., Michael C. Blumm & J. B. Ruhl, *Background Principles, Takings, and Libertarian Property: A Reply to Professor Huffman*, 37 *ECOLOGY L.Q.* 805, 807 (2010).

25. See, e.g., Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 *HARV. L. REV.* 22, at 58–60 (1992) (analyzing *Lucas* as a way the Court resolved tension between rules, standards, categorization, and balancing); *Note: Neutral Rules of General Applicability: Incidental Burdens on Religion, Speech, and Property*, 115 *HARV. L. REV.* 1713, 1730–31 (2003) (writing that *Lucas* defined background principles narrowly and that background principles created a presumption of denying a property rights-holder recourse); Timothy M. Mulvaney, *Foreground Principles*, 20 *GEO. MASON L. REV.* 837, 839–40 (2013) (arguing that background principles result in an antiquated approach that lacks transparency); *id.* at 841 n.16 (collecting critical sources); see also, e.g., Louise A. Halper, *Why the Nuisance Knot Can’t Undo the Takings Muddle*, 28 *IND. L. REV.* 329, 329 (1995); Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 *STAN. L. REV.* 1433, 1436 (1993); Carol M. Rose, *The Story of Lucas: Environmental Land Use Regulation Between Developers and the Deep Blue Sea*, in *ENVIRONMENTAL LAW STORIES* 237, 268, 274–75 (Richard J. Lazarus & Oliver A. Houck eds., 2005).

26. CAL. CODE REGS., tit. 8 § 20900(e) (2024).



an agricultural employer's property to garner support for union activities.<sup>27</sup> The regulation mandated that agricultural employers "allow union organizers onto their property for up to three hours per day, 120 days per year."<sup>28</sup> Cedar Point Nursery sued, arguing that "the access regulation effected an unconstitutional per se physical taking under the Fifth and Fourteenth Amendments by appropriating without compensation an easement for union organizers to enter their property."<sup>29</sup> Both the district court<sup>30</sup> and the Ninth Circuit<sup>31</sup> found that the regulation did not constitute a per se taking. As the Ninth Circuit explained, unlike a per se taking, the California regulation did not "allow random members of the public to unpredictably traverse [the growers'] property 24 hours a day, 365 days a year."<sup>32</sup> Under the Ninth Circuit's reasoning, the statute neither deprived the agricultural employers of all economically beneficial use of their property nor imposed a permanent physical invasion.

The Supreme Court disagreed.<sup>33</sup> In a jurisprudential shift, the Court recognized a per se rule protecting the right to exclude even where a physical invasion is *temporary*. Writing for the majority, Chief Justice Roberts explained that "[t]he access regulation appropriates a right to invade the growers' property and therefore constitutes a *per se* physical taking."<sup>34</sup> Although the access regulation allowed only limited and temporary access, it appropriated "for the enjoyment of third parties the owners' right to exclude,"<sup>35</sup> which the Court emphasized as "one of the most essential sticks in the

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27. California adopted this regulation because the National Labor Relations Act excluded farmworkers from its protections. See Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 96 n.1 (2011).

28. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2069 (2021).

29. *Id.*

30. See Cedar Point Nursery v. Gould, 2016 WL 1559271, \*4–5 (E.D. Cal., Apr. 18, 2016).

31. See Cedar Point Nursery v. Shiroma, 923 F.3d 524, 530–31 (9th Cir. 2019).

32. *Id.* at 532.

33. See Cedar Point Nursery, 141 S. Ct. at 2080.

34. *Id.* at 2072.

35. *Id.*

bundle of rights that are commonly characterized as property.”<sup>36</sup> For Chief Justice Roberts, it was “insupportable” to distinguish between “an abrogation of the right to exclude in one manner if it extends for 365 days, but in an entirely different manner if it lasts for 364.”<sup>37</sup> By focusing on the right to exclude as a fundamental property interest, the Court concluded that both temporary and permanent physical invasions constitute a taking.<sup>38</sup>

Chief Justice Roberts then explained how the per se rule flowed from prior Takings Clause precedents. While previous cases emphasized the importance of “permanence,” subsequent rulings made clear that the “appropriation of a right to physically invade a property may constitute a taking ‘even though no particular individual is permitted to station himself permanently upon the premises.’”<sup>39</sup> The majority similarly distinguished *PruneYard Shopping Center v. Robins*,<sup>40</sup> in which the Court held that a regulation requiring a public shopping center to be open to the public did not constitute a taking.<sup>41</sup> While the shopping center in *PruneYard* was open to the public,<sup>42</sup> the agricultural business in *Cedar Point* was not: it

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36. *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979); *see also id.* at 180 (holding that the government cannot “take” the right to exclude without compensation); *Cedar Point*, 141 S. Ct. at 2074; *United States v. Causby*, 328 U.S. 256, 265 (1946) (holding low-flying aircrafts constituted an invasion and caused damages); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 423 (1982) (holding that permanent physical occupation constitutes a per se taking regardless of economic loss); *Nollan v. California Coastal Commission*, 483 U.S. 825, 828 (1987) (extending the Takings Clause to appropriations of easements); *Dolan v. City of Tigard*, 512 U.S. 374, 384 (holding that compelled dedication of easements for public use also constitutes a taking); *Horne v. Department of Agriculture*, 576 U.S. 350, 364–65 (2015) (applying the Takings Clause to a regulation requiring raisin growers to relinquish a portion of their crop).

37. *Cedar Point*, 141 S. Ct. at 2074.

38. *Id.*

39. *Id.* at 2075 (quoting *Nollan*, 483 U.S. at 832). Chief Justice Roberts analogized the regulation in *Cedar Point* to the easement in *Nollan*, writing “[w]hat matters is not that the easement notionally ran round the clock, but that the government had taken a right to physically invade the Nollans’ land.” *Id.*

40. 447 U.S. 74 (1980).

41. *Id.* at 75.

42. *Id.* at 74, 77, 88.

was private property.<sup>43</sup> As such, Cedar Point had the right to exclude while PruneYard did not.

The question remains: how did the Court derive a per se rule from a property owner's right to exclude? Chief Justice Roberts highlighted Founding-era principles to support the per se rule, writing that "as the Founders explained,"<sup>44</sup> the government must pay just compensation for temporary physical invasions to "help preserve individual liberty."<sup>45</sup> The majority emphasized that "[t]he Founders recognized that the protection of private property is indispensable to the promotion of individual freedom."<sup>46</sup> The Court quoted John Adams ("Property must be secured, or liberty cannot exist")<sup>47</sup> and Sir William Blackstone, who wrote that private property requires the right to exclude, which he defined as, "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."<sup>48</sup>

With this background, the majority emphasized that the right to exclude requires per se treatment because it is an inviolable stick in the property holder's bundle. It is not "an empty formality, subject to modification at the government's pleasure;"<sup>49</sup> rather, it is a fundamental element of property "that cannot be balanced away."<sup>50</sup> *Cedar Point* thus drew a bright line between the appropriation of the right to invade, which is a per se Fifth Amendment taking, and an

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43. *Cedar Point*, 141 S. Ct. at 2076–77. Chief Justice Roberts distinguished *NLRB v. Babcock & Wilcox Co.*, which held that courts should balance property rights and labor rights when labor regulations interfered with property rights. 351 U.S. 105, 113 (1956). Although *Babcock* regulations appeared like those in *Cedar Point*, the majority emphasized *Babcock* had not considered Takings Clause claims. See *Cedar Point*, 141 S. Ct. at 2076.

44. *Id.* at 2078.

45. *Id.*

46. *Id.* at 2071 (quoting *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002)).

47. *Id.* (citing *Discourses on Davila*, in 6 *WORKS OF JOHN ADAMS* 280 (C. Adams ed. 1851)).

48. *Id.* at 2072 (quoting 2 *WILLIAM BLACKSTONE, COMMENTARIES* \*2).

49. *Id.* at 2077.

50. *Id.*

access regulation like that of *PruneYard*, which should be assessed under the *Penn Central* balancing test.<sup>51</sup>

Had the opinion ended here, the breadth of *Cedar Point*'s holding would be almost unimaginable. Any temporary invasion of private property (and any regulation infringing upon a property owner's right to exclude) would be subject to the Takings Clause. Perhaps realizing this stunning scope, the Court established three carveouts to the per se rule. First, the Chief Justice distinguished a temporary trespass from a taking, noting that courts should analyze trespasses under tort law.<sup>52</sup> Second, the majority highlighted, “the government may require property owners to cede a right of access as a condition of receiving certain benefits.”<sup>53</sup> For example, the government may exercise legitimate police power to conduct health and safety inspections on private property as a condition for granting a license.<sup>54</sup> Third, the per se rule does not extend to physical invasions that are consistent with “the longstanding background restrictions on property rights.”<sup>55</sup>

Chief Justice Roberts proffered no explicit definition of these background restrictions, instead listing three common categories of principles. First, the government may assert a “pre-existing limitation upon the land owner's title”;<sup>56</sup> second, individuals may enter property in the event of public or private necessity;<sup>57</sup> and, third, individuals may enter property to effect an arrest, enforce criminal law,<sup>58</sup> or conduct a reasonable search.<sup>59</sup>

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51. *See id.* at 2085.

52. *Id.* at 2078.

53. *Id.* at 2079.

54. *See id.*

55. *Id.*

56. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028–29 (1992).

57. *Cedar Point*, 141 S. Ct. at 2079 (citing Restatement (Second) of Torts § 196 (1964) (entry to avert an imminent public disaster), *id.* § 197 (entry to avert serious harm to a person, land, or chattels), and *Lucas*, 505 U.S. at 1029 n.16).

58. *Id.* (citing Restatement (Second) of Torts §§ 204–205).

59. *Id.* (citing, e.g., *Sandford v. Nichols*, 13 Mass. 286, 288 (1816) and *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 538 (1967)).

Chief Justice Roberts categorized these exceptions as “background limitations [that] encompass traditional common law privileges to access private property.”<sup>60</sup> However, it remains unclear whether these three categories are comprehensive or merely illustrative. As Justice Breyer remarked in dissent,<sup>61</sup> the majority’s explanation of the background principles exception leaves more questions than answers. What are these background principles and from what source are they derived? Is this formulation of the takings-trespass exception distinct from background principles? Is the legitimate use of police power not also rooted in common law privileges to access private property? Are these background restrictions distinct from *Lucas*’s “very narrow set of such background principles,”<sup>62</sup> which were cabined to “the State’s law of property and nuisance”?<sup>63</sup>

This Note seeks to address the questions raised by Justice Breyer’s dissent and subsequent legal academics. Our analysis adds to the growing originalist scholarship that suggests that the Founders wrote certain constitutional provisions with the understanding that they incorporated unwritten general law and background principles.<sup>64</sup> The Takings Clause, like the entire Bill of Rights, was never considered the *source* of the right. Rather, the first ten amendments served merely as “confirmations of rights whose origins lay elusively elsewhere: in the authority of God or the law of nature, in the social contract men had formed long ago, or in immemorial custom.”<sup>65</sup> Therefore, in order to understand the *Cedar Point* background restrictions exception, one must look to what principles of

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60. *Id.*

61. *See id.* at 2088 (Breyer, J., dissenting).

62. *Id.*

63. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992).

64. *See* William Baude, Jud Campbell, & Stephen Sachs, *General Law and the Fourteenth Amendment*, STANFORD L. REV. (forthcoming 2023); Jud Campbell, *General Citizenship Rights*, 132 YALE L.J. 611, 611 (2023). Although Professor Campbell and others have brought more recent attention to this theory, it is not new.

65. JACK N. RAKOVE, *DECLARING RIGHTS: A BRIEF HISTORY WITH DOCUMENTS* 2–3 (1998).

property our Founders intended to enshrine in the Fifth Amendment.

## II. EVALUATING THE TAKINGS CLAUSE BACKGROUND PRINCIPLES

Taking *Cedar Point* to hold that the Takings Clause incorporates unwritten background principles, the next question is: “what was the common understanding of property rights at the Founding?” And in fact, the Founders’ generation considered property rights as the foundation of all other liberties.<sup>66</sup> To add contours to *Cedar Point*’s background principles exception, below, this Note provides historical analysis of property rights before and after the Founding. From English common law, this Note derives the principle that a taking must be (1) necessary, (2) taken by reasonable process, (3) for a public purpose, and (4) compensated. And from Founding-era documents and early state court decisions, this Note derives the principle that a property owners’ right is limited by obligations on common carriers, regulations facilitating navigability, and government inspection of private lands. While far from comprehensive, this Part breathes life into the background principles exception of *Cedar Point*’s per se rule.

### A. *English Common Law and Historical Background*

Although distinct from American takings law, English common law informed general law and thus provides evidence of the original understanding of the Takings Clause. English common law recognized strong protections against takings, requiring a government taking to have been necessary to the public, taken via a reasonable process, and compensated or somehow restored to its original value.

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66. Paul J. Larkin Jr., *The Original Understanding of Property in the Constitution*, 100 MARQ. L. REV. 1, 29–31 (2016).

Early echoes of the Takings Clause can be found as far back as the Magna Carta, which recognized an abstract right against uncompensated or arbitrary government takings.<sup>67</sup> Chapter 39 of the Magna Carta established: “No freeman is to be taken or imprisoned or disseised of his free tenement or of his liberties or free customs . . . save by lawful judgement of his peers or by the law of the land.”<sup>68</sup> The language that no man be “disseised of his free tenement” is more vague than the Takings Clause. But this was intentional: the Magna Carta was drafted in the English common law tradition.<sup>69</sup> The charter itself “declared fundamental English law, meaning that the rights and remedies it declared against the king formed part of the common law.”<sup>70</sup> Edward Coke, a champion of the Magna Carta, described Chapter 39 of the Magna Carta as declaring the ancient rights of Englishmen.<sup>71</sup> Instead of describing the right in extreme detail (akin to what one would see in modern agency regulation), these “declarations” merely “marked” and preserved existing ancient rights that were subsequently defined through the common law.

In the *Case of the King’s Prerogative on Salt-peter*, Coke illuminated the bounds of these ancient rights, explaining that when the Crown seizes property, it must show public necessity and restore the property’s original value.<sup>72</sup> In that case, Coke and the English Justices considered whether the King could dig for saltpeter on private lands to make gunpowder. They ruled that the King could do so only “according to the Limitations following for the necessary Defence of the Kingdom.”<sup>73</sup> In other words, the King’s ability was limited by necessity—necessity for providing for the public defense.

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67. Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 596 (2009).

68. Magna Carta ¶ 39.

69. Gedicks, *supra* note 67, at 598.

70. *Id.*

71. *Id.* at 606 (citing Coke’s *Second Institute*).

72. *The Case of the King’s Prerogative in Salt-peter*, 12 Coke R. 13 (1606).

73. *Id.*

This requirement unsurprisingly resembles the "public use" condition of our Fifth Amendment.<sup>74</sup> Applying this limitation in the *Salt-peter* case, the Justices ruled that the King was authorized to dig for saltpeter because it was necessary for national defense, but was not authorized to dig for gravel because the gravel was *not* for national defense but was simply to repair the "King's houses."<sup>75</sup> In addition, the King must leave the land "in so good Plight as [he] found it,"<sup>76</sup> in other words, "so Well and commodious to the Owner as they were before."<sup>77</sup> This requirement mirrors the Takings Clause's "just compensation" requirement: just as the English King was required to restore private land after using it for public necessity, the U.S. government must compensate landowners for land it takes.

As time went on, this respect for private property became embedded in English common law, especially in the works of John Locke and William Blackstone.<sup>78</sup> Locke's *Second Treatise of Government* emphasized the importance of property ownership, stating, "The great and chief end . . . [of men forming governments] is the preservation of their property."<sup>79</sup> Arbitrary *government* seizure of property thus directly undermined this goal. On this idea, Locke wrote: "[A] man's property is not at all secure . . . if he who commands those subjects [has the] power to take from any private man, what part he pleases."<sup>80</sup> While this theory of property would seem at first to preempt *any* government taking, Locke clarified that "even absolute power, where it is necessary, is not arbitrary by being absolute."<sup>81</sup> In other words, necessity provides an exception to the absolute prohibition on the government's taking of private property.

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74. See U.S. CONST. amend. V.

75. *The Case of the King's Prerogative in Salt-peter*, 12 Coke R. 13 (1606).

76. *Id.*

77. *Id.*

78. See Larkin, *supra* note 66, at 18.

79. JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 124 (1690).

80. *Id.* at § 138.

81. *Id.* at § 139.



William Blackstone's *Commentaries*—a work the Framers cited often<sup>82</sup>—further explicated English common law on property, emphasizing that takings must not be performed “in an arbitrary matter.”<sup>83</sup> Unlike Locke, however, Blackstone added that the legislature must give the property owner “a full indemnification,”<sup>84</sup> resembling the just compensation requirement in the Takings Clause.

But what does this historical analysis of English common law tell us about the Takings Clause? As discussed in Part IV below, there was little debate surrounding the ratification of the Takings Clause.<sup>85</sup> Some originalist scholars have opined that such a lack of debate indicates the declaratory nature of the Bill of Rights,<sup>86</sup> meaning that the Fifth Amendment merely declares what is already part of the natural or general law. If the text and language of the Takings Clause merely “marks” and declares a pre-existing right, one can only fully understand the contours of this right in the light of background principles. This view may seem novel, but it is not controversial. Constitutional scholars agree that, when designing the Constitution and the Bill of Rights, the Founders sought not to *establish* new fundamental principles of government, but “preserve the rule of law and the freedoms enjoyed by the Framers’ generation as Englishmen . . .”<sup>87</sup> Therefore, English common law can aid our understanding of the background principles undergirding the Takings Clause.

These principles of English common law bolster *Cedar Point*'s per se rule against temporary invasion of private property. As seen through the works of Coke, Locke, and Blackstone, property rights are meant to be *protected* by government and cannot be infringed unless the taking is necessary, non-arbitrary, and compensated or restored. These three factors justifying government takings sketch

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82. See Larkin, *supra* note 66, at 23.

83. 1 BLACKSTONE COMMENTARIES \*139.

84. *Id.*

85. See *infra* Part IV, pages and text accompanying notes 142–174.

86. See, e.g., Baude, Campbell, & Sachs, *supra* note 64.

87. Larkin, *supra* note 66, at 26.

the contours of Chief Justice Roberts’s *Cedar Point* “background restrictions” exception.

Regardless of the influence of English common law on the Court’s opinion, the question remains whether the Founders intended to enshrine these principles in the Bill of Rights, specifically the Takings Clause.

*B. The Framers’ Views on Takings*

Although some states provided takings protection prior to the Fifth Amendment’s ratification,<sup>88</sup> the Framers insisted upon recognizing a federal right in the federal Takings Clause, indicating they agreed with the centrality of this protection in English common law.

Two state constitutions and the Northwest Ordinance included takings clauses prior to the Fifth Amendment’s ratification. Vermont’s 1777 constitution was the first.<sup>89</sup> The clause read, “[W]henever any particular man’s property is taken for the use of the public, the owner ought to receive an equivalent in money.”<sup>90</sup> Massachusetts followed suit in 1780, including in its constitution that “whenever the public exigencies require, that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.”<sup>91</sup> Seven years later, the Northwest Ordinance required that “full compensation” be awarded to property owners whose land was taken in the name of “public exigencies.”<sup>92</sup> Other states adopted a more republican view in which

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88. See, e.g., MASS. CONST. of 1780, pt. I, art. X; VT. CONST. of 1777, ch. I, art. II; VT. CONST. of 1786, ch. I, art. II; PA. CONST. of 1790, art. IX, § 10; MD. CONST. of 1776, Decl. of Rts., art. XXI; N.H. CONST. of 1784, pt. I, arts. XII, XV; N.Y. CONST. of 1777, art. XIII; N.C. CONST. of 1776, Decl. of Rts., art. XII; N.J. CONST. of 1776; S.C. CONST. of 1776; see also DEL. CONST. of 1792, art. I, § 8 (including a takings clause shortly after Fifth Amendment ratification); JAC Grant, *The “Higher Law” Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67, 70 n.15 (1931) (noting that while Louisiana and Arkansas did not include a Takings Clause in their original constitutions, they eventually added one).

89. See Treanor, *supra* note 6, at 827.

90. VT. 1777 CONST. Chapter 1, § 2.

91. MASS. CONST. OF 1780, art. X, reprinted in Treanor, *supra* note 6.

92. Northwest Ordinance of 1787, art. 2.

taking property for public use was both allowed and encouraged.<sup>93</sup> For example, state courts in Pennsylvania and South Carolina relied on “ancient rights and principles,” permitting the uncompensated taking of land for public convenience.<sup>94</sup>

During ratification of the federal Constitution, no state ratifying conventions requested a Takings Clause.<sup>95</sup> Despite this absence of demand, James Madison insisted that the Bill of Rights include a Takings Clause.<sup>96</sup> After ratification of the Bill of Rights, Madison stated, “If there be a government then which prides itself in maintaining the inviolability of property . . . and yet directly violates the property . . . such a government is not a pattern for the United States.”<sup>97</sup> Madison’s language echoed the English common law: property is inviolable and must not be taken for public use without compensation.<sup>98</sup>

### C. Early State Courts

Early state court decisions limited the broad right against takings from the English common law.<sup>99</sup> Originalists find these state court decisions illuminating because property law was primarily left in the hands of the states at the time of the Founding, much as it is

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93. See Treanor, *supra* note 6, at 824.

94. See, e.g., *M’Clenachan v. Curwin*, 3 Yeates 362 (Pa. 1802); *Commonwealth v. Fisher*, 1 Pen. & W. 462 (Pa. 1830); *Lindsay v. Commissioners*, 2 S.C.L. (2 Bay) 38 (1796) (as cited in Treanor, *supra* note 6, at 824).

95. Treanor, *supra* note 6, at 834; see Maureen E. Brady, *The Domino Effect in State Takings Law: A Response to 51 Imperfect Solutions*, 2020 U. ILL. L. REV. 1455, 1458 (2020) (no state requested a Takings Clause in the Bill of Rights).

96. Treanor, *supra* note 6, at 835.

97. James Madison, *Property*, NAT’L GAZETTE, Mar. 27, 1792, in 14 THE PAPERS OF JAMES MADISON 267–68 (Robert A. Rutland et al. eds., 1983); see LOCKE, *supra* note 79.

98. See, e.g., Magna Carta ¶ 39; LOCKE, *supra* note 79, at ¶ 138 (“[I]t is a mistake to think that the supreme or legislative power of any commonwealth can do what it will, and dispose of the estates of the subject arbitrarily.”).

99. There is significant scholarly debate surrounding whether such state court decisions (and state constitutions) inform the contours of the general law itself or simply mark local regulations of the general law. The specificities of this academic debate are beyond the scope of this Note, but this Note asserts that these state constitutions inform the general law of Takings as it is seen by the Court today and, therefore, inform the *Cedar Point* background principles exception.

today.<sup>100</sup> Although few states adopted formal takings clauses, state courts held that eminent domain required just compensation, citing natural law, common law, and due process.<sup>101</sup> State decisions from the Founding generally added three limitations to the common law of takings: First, common carriers cannot exclude arbitrarily. Second, states may enter private property for “public purposes” such as inspection. Third, private property rights are secondary to navigability and access.

First, states almost uniformly adopted the English common law principle that innkeepers and common carriers could not exclude arbitrarily.<sup>102</sup> This duty was well established in English common law.<sup>103</sup> For example, *White’s Case*<sup>104</sup> required innkeepers to admit guests if the inn was not full.<sup>105</sup> Under English common law, “where-ever any subject takes upon himself a public trust for the benefit of the rest of his fellow-subjects, he is eo ipso bound to serve the subject in all the things that are within the reach and comprehension of such an office.”<sup>106</sup> Early American legal theorists readily adopted these principles. For instance, James Kent wrote that common carriers “are bound to do what is required of them . . . and [may not] refuse without some just ground.”<sup>107</sup> Joseph Story echoed this, writing that “[a]n innkeeper is bound . . . to take in all travelers

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100. See Brady, *supra* note 95, at 1466.

101. See *id.*

102. As discussed below, see *infra* Part III, a background principle that requires common carriers to serve without arbitrary exclusion should ameliorate concerns that the *per se* ruling of *Cedar Point* will undermine antidiscrimination laws like the Civil Rights Act. Because antidiscrimination by common carriers was deeply entrenched in background principles adopted at the Founding, legislation permitting discriminatory exclusion is still impermissible under the *Cedar Point* framework.

103. See Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1304–11 (1995–1996).

104. 2 Dyer 343 (1586) (cited in Singer, *supra* note 103, at 1304).

105. *Id.*

106. Singer, *supra* note 103, at 1306 (quoting Lord Holt’s dissent in *Lane v. Cotton*, 88 Eng. Rep. 1458 (K.B. 1701)); see also *Gisbourn v. Hurst*, 91 Eng. Rep. 220 (K.B. 1710) (defining common carrier). English law does, however, exempt places of entertainment from this duty. See Singer, *supra* note 103, at 1340.

107. *Id.* at 1312 (quoting 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 465 (1826–1830)).

and wayfaring persons.”<sup>108</sup> And state courts routinely upheld this duty to serve.<sup>109</sup>

Second, several early state statutes established a right to enter for certain public purposes.<sup>110</sup> Massachusetts, New Hampshire, and New York statutes established that private vessels could be inspected and searched.<sup>111</sup> Similarly, the Northwest Ordinance allowed government officers to enter a house upon oath or affirmation that goods subject to civil attachment were there.<sup>112</sup> This right to enter for “public purposes” resembles an early legitimate-police-power exception, much like that in the Fourth Amendment today.<sup>113</sup> And just because the Founders incorporated this police power in the text of the Fourth Amendment does not mean that it cannot exist in the background of the Fifth. Rather, it emphasizes how important it was to the Founders to enable legitimate police power.

Third, many states adopted riparian, hunting, and grazing exceptions to the right to exclude.<sup>114</sup> Some early American courts adopted the English common law approach in which riparian rights to use navigable rivers often superseded rights of those who owned property abutting a river.<sup>115</sup> Similarly, the founding documents of Massachusetts and New York established the preeminence of navigability over private property interests.<sup>116</sup> In 1842, the U.S. Supreme Court also emphasized the right to navigation in terms of fishing rights, emphasizing “the public and common right of fishery in

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108. *Id.*

109. *Id.* at 1315; *see also, e.g.*, *Adams v. Freeman*, 12 Johns. 408 (N.Y. Sup. Ct. 1815); *Wallen v. McHenry*, 22 Tenn. (3 Hum.) 245 (1842); *Kisten v. Hildebrand*, 48 Ky. (9 B. Mon.) 72, 74 (1848); *Dwight v. Brewster*, 18 Mass. (1 Pick.) 50 (1822); *Bennett v. Dutton*, 10 N.H. 481, 486 (1839); *Markham v. Brown*, 8 N.H. 523 (1837).

110. Berger, *supra* note 12, at 330–31 (2022).

111. Mass. Gen. Laws, ch. 8, § 4 (1791) (concerning the quality of “pot and pearl ashes”); Act of Dec. 29, 1828, § 6, 1828 N.H. Laws 325, 328–29 (same); N.Y. Rev. Stat., ch. 17, art. 10, § 185(6) (Duer 1846) (allowing inspectors to search vessels for hops).

112. *See* Berger, *supra* note 12, at 331.

113. *See* U.S. CONST. amend. IV.

114. *See, e.g.*, *McConico v. Singleton*, 9 S.C.L. (2 Mill) 244, 352–53 (1818).

115. *See* Berger, *supra* note 12; *see also, e.g.*, *Lay v. King*, 5 Day 72, 77 (Conn. 1811).

116. *See* Berger, *supra* note 12, at 326–27.

navigable waters, which has been so long and so carefully guarded in England, and which was preserved in every other colony founded on the Atlantic borders.”<sup>117</sup> State courts in New Hampshire, New Jersey, and Pennsylvania similarly followed this English common law principle.<sup>118</sup> Sometimes, state courts explicitly rejected English common law, but they were clear when doing so. For example, in 1856, the Mississippi Supreme Court rejected the English common law rule that grazing on unfenced land was a trespass.<sup>119</sup> The U.S. Supreme Court followed suit in 1890,<sup>120</sup> further enshrining this exception as part of the background exceptions to the right to exclude and thus to the Takings Clause.

*D. Synthesizing Background Principles Through Application to Cedar Point*

This evidence from English common law, writings of the Framers, and early state court decisions illustrates how originalists can synthesize background principles for the Takings Clause. English common law and early Founding-era documents illustrate the principle that property owners must be indemnified for government takings, and seizures are only permitted when necessary for a public benefit (i.e. defense). Early state court decisions narrowed this principle: they held that rights relating to common carriers, navigability, hunting, and grazing on unfenced land could trump the right of the property owner. As such, government regulations authorizing these actions did not constitute a taking. These state court decisions also emphasized the government’s ability to inspect private lands without violating the Takings Clause.

These background exceptions are by no means the only exceptions inherent in the Takings Clause. Such a comprehensive list is

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117. *Martin v. Waddell’s Lessee*, 41 U.S. 367, 414 (1842).

118. *Percy Summer Club v. Astle*, 145 F. 53 (C.C.D.C.N.H. 1906); *Arnold v. Mundy*, 6 N.J.L. 1, 78 (N.J. 1821); *Carson v. Blazer*, 2 Binn. 475, 477–78 (Pa. 1810) (as cited in Berger, *supra* note 12, at 327 n.161–63).

119. *Vicksburg & Jackson R.R. Co. v. Patton*, 31 Miss. 156, 184–85 (1856) (as cited in Berger, *supra* note 12, at 324).

120. *Buford v. Houtz*, 133 U.S. 320, 326 (1890) (as cited in Berger, *supra* note 12, at 324).

beyond the scope of this Note. But even this cursory review gives us insight into the logic of *Cedar Point*.

The Takings Clause emerged from a common law framework and should be read against that framework. The common law tradition was clear: government takings of private property, even in the name of necessity, require compensation unless certain factors are present. None of these factors were present in *Cedar Point*. Cedar Point Nursery was not a common carrier or public accommodation; the land belonged to a private company that did not open its land to the public. Cedar Point Nursery, likewise, did not inhibit any navigation or access to public lands; the California regulation did not pertain to navigability at all. Finally, the California regulation granted union organizers, not government inspectors,<sup>121</sup> the right to enter Cedar Point's private property. As such, based on the background principles divined by the majority in *Cedar Point* and in this Note, *Cedar Point's* holding is consistent with background common law principles inherent in the Takings Clause.

### III. IMPLICATIONS FOR ANTIDISCRIMINATION LAWS

*Cedar Point's* expansion of compensable takings has potentially significant implications for antidiscrimination and public accommodation laws. If the opinion had not included any exceptions, its holding would mean that any statute or regulation that requires some kind of temporary physical occupation—including, for example, workplace antidiscrimination laws<sup>122</sup>—could trigger *Cedar Point's* per se rule, requiring states to compensate all landowners who successfully allege *Cedar Point* claims.<sup>123</sup> Depending on how

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121. In dicta, the majority clarified that its holding would not extend to law enforcement searches of private property. See *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2080 (2021) (“Unlike a law enforcement search, no traditional background principle of property law requires the growers to admit union organizers.”).

122. See Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160, 197–98 (2021) (arguing that under *Cedar Point*, workplace antidiscrimination laws might be considered takings requiring compensation).

123. *Cedar Point* notes that regulations like health and safety inspection regimes would be considered constitutional exactions that are exempt from takings law. See *Cedar Point*, 141 S. Ct. at 1279.

much compensation a court would require for each temporary physical occupation, *Cedar Point*'s holding could make it financially impracticable for states or the federal government to enact legislation like the Fair Housing Act<sup>124</sup> (authorizing tenants a right of temporary occupation in rentals)<sup>125</sup> or the Civil Rights Act of 1964<sup>126</sup> (authorizing a right to access public accommodations without unlawful discrimination).<sup>127</sup>

Not only would this impose high financial burdens on governments, but it could also have concerning legal implications. For example, some have argued that if the Court were to recognize a *Cedar Point* taking in the Fair Housing Act's requirement that landlords not discriminate against protected classes,<sup>128</sup> the Court would effectively be recognizing a legal right to discriminate.<sup>129</sup> Likewise, with regard to the Civil Rights Act, *Cedar Point* may pave the way for hotel owners to receive compensation from the government if they successfully allege (however implausibly) that they have financially suffered because they could not discriminate against certain races,<sup>130</sup> as in the scenario in *Heart of Atlanta Motel v. United States*.<sup>131</sup>

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124. 42 U.S.C. §§ 3601–3619.

125. See Amy Liang, Comments, *Property Versus Antidiscrimination: Examining the Impacts of Cedar Point Nursery v. Hassid on the Fair Housing Act*, 89 U. CHI. L. REV. 1793, 1793 (2022).

126. 42 U.S.C. § 2000a.

127. See Liang, *supra* note 125, at 1793; Bowie, *supra* note 122, at 162 (arguing the majority in *Cedar Point* “embraced a version of [the defendant’s argument in *Heart of Atlanta Motel*]” and emphasizing that the holding could “make it financially impossible” for governments to enforce antidiscrimination and labor protection laws).

128. 42 U.S.C. § 3604.

129. See Liang, *supra* note 125, at 1796. Liang cautions this warning by recognizing the Supreme Court’s expressed desire not to overturn broad areas of regulation. See *id.* at 1796 & n.14.

130. 42 U.S.C. § 2000a (prohibiting discrimination on the ground of race in places of public accommodation, 42 U.S.C. § 2000a(a), and defining “any inn, hotel, motel, or other establishment which provides lodging to transient guests” as a place of public accommodation, 42 U.S.C. §§ 2000a(b)).

131. 379 U.S. 241, 243–44 (1964) (discussing the motel owner’s allegations). This would require a court to agree with a plaintiff that there was some financial loss requiring compensation from not being able to exclude certain races, which seems implausible. However, the specter of these lawsuits might be enough to deter some governments from legislating in this area absent an applicable exception.



Although these scenarios seem legally plausible under the *Cedar Point* per se rule, scholars who sound these doomsday alarms fail to account for one thing: the background restriction exception. The exceptions to *Cedar Point*'s per se rule—particularly the broad background principles exception—prevent such draconian outcomes and permit state and federal governments to continue enforcing public accommodation and antidiscrimination laws. While this argument depends on the breadth of the background principles exception, this Note argues that the exception encompasses the very general law principles that positive laws (such as the Civil Rights Act and the Fair Housing Act) were designed to protect.

The breadth of the background principles exception diminishes the strength and scope of *Cedar Point*'s per se rule. Therefore, the concern that *Cedar Point* threatens the scope of antidiscrimination laws and rights to access is generally overstated. Antidiscrimination laws and private property rights have existed since the late-sixteenth century.<sup>132</sup> They were first enshrined in English common law and subsequently adopted by the Framers. Thus, the racial discrimination by common carriers and public accommodations in the Jim Crow South were *deviations* from the background principle rather than the logical consequence of a property-owner centric Fifth Amendment. If background principles remain our North Star, *Cedar Point* should only bolster antidiscrimination statutes.

As discussed in Part II, the English common law recognized the duty of public accommodations and common carriers to serve without discrimination, and early state courts uniformly adopted this principle. For example, the 1859 Ohio case of *State v. Kimber*<sup>133</sup> held that a railroad conductor's forcible ejection of a "mulatto" woman was impermissible.<sup>134</sup> The judge held that it was the "duty [of] common carriers of passengers . . . to receive and convey all persons who apply for passage . . ." <sup>135</sup> Similar principles were found in

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132. See, e.g., *White's Case*, 2 Dyer 343 (1586) (cited in Singer, *supra* note 103, at 1304).

133. 3 Ohio Dec. Reprint 197 (Ct. Common Pleas 1859).

134. Singer, *supra* note 103, at 1335 (citing *State v. Kimber*, 3 Ohio Dec. Reprint 197 (Ct. Common Pleas 1859)).

135. *Id.*

*Munn v. Illinois*,<sup>136</sup> where the Supreme Court upheld this general principle that the state may regulate the use of private property when it is “a use in which the public has an interest.”<sup>137</sup>

But any student of American history knows that these background restrictions did not prevent decades of racial discrimination against African-Americans. Since the Supreme Court had not yet articulated a background restrictions exception in our property law jurisprudence, many states passed statutes *entitling* places of public accommodation to exclude African-Americans.<sup>138</sup> After decades of racial segregation, Congress passed the Public Accommodations Act in 1964<sup>139</sup> (as part of the Civil Rights Act of 1964), prohibiting discrimination or segregation in any public place of accommodation, including hotels, restaurants, movie theaters, and sports stadiums.<sup>140</sup> While a detailed comparison between each listed public place and background common law principles is beyond the scope of this Note, the similarity between the Public Accommodations Act and cases like *White’s Case* and *Lane v. Cotton* is striking.<sup>141</sup>

Reflecting upon this arc in property doctrine—from a robust public accommodations duty to serve, to the right to exclude rooted in racial discrimination, and back again—the concern that background principles would not preserve protection against discrimination in public accommodations is historically unsubstantiated. Background principles, as explicated in this Note, may actually be more protective against exclusionary practices than the limited positive law protections of the Public Accommodations Act.

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136. 94 U.S. 113 (1876).

137. *Id.* at 126.

138. See *Plessy v. Ferguson*, 163 U.S. 537, 548 (citing *Day v. Owen*, 5 Mich. 520 (Mich. 1858), *Railroad v. Miles*, 55 Pa. St. 209 (Pa. 1867), *Railway Co. v. Williams*, 55 Ill. 185 (Ill. 1870), and other cases referencing these laws).

139. 42 U.S.C. § 2000a (1964).

140. *Id.*; see *Singer*, *supra* note 103, at 1412, 1416.

141. While extending protection to places of entertainment is an aberration from English common law, this could simply illustrate the intentional use of positive law to override common law. See 42 U.S.C. § 2000a(b)(3) (prohibiting racial discrimination in places of entertainment).

IV. RESPONDING TO CRITICS OF *CEDAR POINT*

In its short life, *Cedar Point* elicited significant criticism. First, while some legal academics have wondered whether the background principles exception would actually limit the broad per se rule that temporary physical occupations are takings,<sup>142</sup> others have questioned whether the exceptions to the per se rule would swallow the rule altogether.<sup>143</sup> Many conservatives initially praised *Cedar Point* as a “boon to property owners” that removed the burden of satisfying the *Penn Central* balancing test for regulatory takings.<sup>144</sup> But this promise of protecting property owners’ rights will fall flat if courts broadly interpret exceptions to *Cedar Point*’s per se rule.

Second, many have criticized *Cedar Point* as un-originalist. Despite Chief Justice Roberts’s reliance on Founding-era documents, some legal academics have argued that a broad per se rule against temporary occupation is antithetical to our Founders’ understanding of property law. As explained below, *Cedar Point* is an originalist opinion and reflects a Founding-era practice of defining a sweeping rule and then limiting it with broad background principles.

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142. E.g., Liang, *supra* note 125, at 1793 (discussing impacts on the Fair Housing Act); Cristina M. Rodriguez, *Forward: Regime Change*, 135 HARV. L. REV. 1, 32 (2021); Bowie, *supra* note 122, at 162 (describing the *Cedar Point* exceptions as “some ad hoc exceptions”).

143. E.g., Karl E. Geier, *Keep out and Stay out: The Cedar Point Decision and the Landowner’s Sine Qua Non Right to Exclude Others (Maybe Sometimes Even a Government Official)*, 32 MILLER & STARR REAL ESTATE NEWSALERT 3, 5 (Sept. 2021). The response to *Lucas* was similar to that following *Cedar Point*, with landowner advocates praising how the decision could compensate landowners for costly regulations, and government regulations advocates warning that the decision could threaten helpful government regulations. See Blumm & Ritchie, *supra* note 22, at 321 (citing Michael C. Blumm, *Property Myths, Judicial Activism, and the Lucas Case*, 23 ENVTL. L. 907, 916 (1993)).

144. See, e.g., Jeremy S. Young, *U.S. Supreme Court Expands Definition of What Constitutes a Physical Taking*, 8 NAT’L L. REV. 110 (Apr. 20, 2023), <https://www.natlawreview.com/article/us-supreme-court-expands-definition-what-constitutes-physical-taking>; Berger, *supra* note 12, at 309 (2022) (characterizing *Cedar Point* as “a triumph of the conservative majority”).

A. *Scope of the Cedar Point Exceptions*

One major objection that many legal academics have raised about *Cedar Point* is that the broad background principles exception swallows *Cedar Point's* per se rule. Background exceptions to the Takings Clause are expansive, as evidenced by our incomplete survey of background principles in Part II. If background principles to the Takings Clause prevent places of public accommodation from excluding arbitrarily, or enable the state to invade private property under the legitimate use of police power (just to name a few applications), what, then, is left?

In reality, *Cedar Point's* holding is quite narrow. It merely establishes that a private business may exclude labor organizers. The background principles exception still requires these private businesses to permit government officials who seek to conduct inspections (which could extend to investigations of labor violations). The broad background principles exception may very well trump the per se rule, limiting *Cedar Point's* legacy to its narrow factual circumstances. In our view, while the announcement of *Cedar Point's* per se rule initially generated shockwaves, its precedential power will likely be minimal.

But the legacy of *Cedar Point* lies beyond its per se rule. *Cedar Point* invites originalists to reexamine how to faithfully interpret constitutional provisions like the Fifth Amendment, which incorporate unwritten background principles. Below, this Note defends why originalists can and should adopt this reading of *Cedar Point*.

B. *Defending The Originalist Reading*

Not everyone agrees that *Cedar Point* is an originalist decision. Although the *Cedar Point* majority characterized its decision as originalist, some have pointed out that the Takings Clause was ratified at a time when there were several significant limitations on the right to exclude.<sup>145</sup> Thus, critics contend, the broadness of a per se rule may not reflect the more limited original meaning of the Tak-

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145. See, e.g., Berger, *supra* note 12.

ings Clause. Although original evidence points to significant limitations on the right to exclude, the background principles exception properly incorporates these limitations.

One compelling critique of *Cedar Point* comes from Professor Bethany R. Berger,<sup>146</sup> who argued that *Cedar Point*'s per se rule is contrary to original understanding and original intent for the Takings Clause.<sup>147</sup> Berger characterized the Court's departure from original understanding as "flagrant," citing Founding-era examples of formal entitlements for the public to enter private land. These examples included state statutes like the Massachusetts Bay's 1641 Liberties Common,<sup>148</sup> constitutional provisions like the Vermont Constitution of 1777,<sup>149</sup> and state court holdings,<sup>150</sup> all of which recognized formal entitlements to temporarily occupy land without paying just compensation. Rather than question Professor Berger's evidence, this Note questions her conclusion. The central disagreement is this: does Berger's originalist evidence of entitlements to enter land undermine *Cedar Point*'s per se rule, or does this evidence simply flesh out the rule by illustrating some of the background principles that limit it?<sup>151</sup>

Contrary to Berger's claim, *Cedar Point* can stand as an originalist decision because it reflects a Founding-era practice of defining a broad rule and then limiting it with broad background principles. This background principles exception was not a happy mistake; rather, it is a key feature of the original understanding of the Takings

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146. Before writing her article, Professor Berger helped draft an amicus brief in *Cedar Point*. See Bethany Berger, Katherine Mapes, & Gwendolyn Hicks, *Amicus Brief of Legal Historians in Cedar Point v. Hassid* (Feb. 12, 2021), *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021).

147. Berger, *supra* note 12, at 331.

148. *Id.* at 309 (citing Massachusetts Bay's 1641 Liberties Common).

149. *Id.* at 323 (citing Vermont's 1777 Constitution).

150. *Id.* at 324 (citing the Mississippi Supreme Court's holding that protected the right to graze on unfenced land).

151. Berger acknowledged in her conclusion that the "background principles" exception in *Cedar Point* could be an "opportunity to affirm" these historic entitlements to temporarily enter private land, but this did not seem to form part of her central argument. See *id.* at 332.

Clause. The Takings Clause is representative of other broad enumerated constitutional rights in that it recognizes a broad right that is implicitly limited by background principles. If *Cedar Point* had declined to adopt a two-step structure where a per se rule was limited by background principles (perhaps by applying the default *Penn Central* balancing test), originalists would lose the benefit of a structure that reflects how the Founders understood the Takings Clause.

The Framers and ratifiers likely recognized that the Takings Clause enshrined background principles and general law that nuanced the basic declaration “[n]or shall private property be taken for public use, without just compensation.”<sup>152</sup> This follows the rhetorical pattern of Blackstone, who influenced the thinking of many Framers,<sup>153</sup> and whom the majority quoted in *Cedar Point*.<sup>154</sup> Blackstone initially described the broad “imagination” of property as containing the absolute right to exclude,<sup>155</sup> but then acknowledged numerous ways property rights are “less-than-absolute.”<sup>156</sup> The Founders seem to have adopted a rhetorical structure similar to that of Blackstone by enacting a broad Takings Clause but bounding it with background principles.

In particular, scholars of general law highlight that the Founders adopted certain constitutional provisions (particularly the Bill of Rights and the Fourteenth Amendment) expecting that unwritten general law and background principles would define the bounds of

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152. U.S. CONST. amend. V.

153. See Berger, *supra* note 12, at 314 (describing Blackstone as “essential legal reading for the founders”).

154. See *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021) (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES \*2).

155. 2 WILLIAM BLACKSTONE, COMMENTARIES \*2 (“[The right of property is] that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”).

156. David B. Schorr, *How Blackstone Became a Blackstonian*, 10 THEORETICAL INQ. L. 103, 107 (2009).

these provisions.<sup>157</sup> Under this lens, American citizens left a hypothetical state of nature and agreed to live in society with one another in a social compact.<sup>158</sup> However, they carried with them certain natural rights.<sup>159</sup> Natural rights, such as the freedom to own property,<sup>160</sup> were thus enforceable even if not enumerated.<sup>161</sup> The Framers' own words strongly support this reading. For example, James Madison declared to the First Congress that the Bill of Rights was a collection of "simple acknowledged principles" that citizens already possessed.<sup>162</sup> Madison further explained that the Takings Clause could educate society about property protection.<sup>163</sup> This included the right enshrined in the Takings Clause against uncompensated takings.<sup>164</sup>

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157. See Baude, Campbell, & Sachs, *supra* note 64; Campbell, *supra* note 64, at 165. Although Professor Campbell and others have brought recent attention to this theory, it is not new. See RAKOVE, *supra* note 65, at 2–3 ("[B]ills of rights were never regarded as the ultimate sources of the rights they protected. Rather, they were confirmations of rights whose origins lay elusively elsewhere.").

158. See Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 CONST. COMMENT. 85, 87–88 (2017).

159. *Id.*

160. See Eric R. Claeys, *Natural Property Rights: An Introduction*, 9 TEX. A&M J. PROP. L. 415, 447–48 (2023) (discussing property ownership as a natural right that can be limited by eminent domain, but only with the legal protections of public use and just compensation).

161. See Jud Campbell, *Natural Rights, Positive Rights, and the Right to Keep and Bear Arms*, 83 LAW & CONTEMP. PROBS. 31, 35 (2020).

162. Statement of James Madison (Aug. 15, 1789), in 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1270, 1270 (Charlene Bangs Bickford et al. eds., 1992). The original language of the Takings Clause read "No person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation." JAMES MADISON, AMENDMENTS TO THE CONSTITUTION (June 8, 1789), in 12 THE PAPERS OF JAMES MADISON 197, 204–05 (Charles F. Hobson et al. eds., 1979).

163. See Treanor, *supra* note 6, at 837 (citing JAMES MADISON, AMENDMENTS TO THE CONSTITUTION (June 8, 1789), in 12 THE PAPERS OF JAMES MADISON 197, 207 (Charles F. Hobson et al. eds., 1979)); RAKOVE, *supra* note 65, at 38 (describing how James Madison "dismissed [the Bill of Rights] as so many 'parchment barriers' to be admired, perhaps, in principle, but not relied upon in practice").

164. See Jud Campbell, *Constitutional Rights Before Realism*, 2020 U. ILL. L. REV. 1433, 1438 (2020); see also RAKOVE, *supra* note 65, at 38.

Additionally, records from the First Congress indicate there was little debate about the Takings Clause.<sup>165</sup> Notably, there were other issues that received significant debate, such as slavery<sup>166</sup> and presidential removal power.<sup>167</sup> Some might take this to mean that the Framers believed the right against uncompensated takings was absolute and not limited by background principles. But given the natural rights and general law framework that the Framers espoused, this simplistic view is not reflective of how the Framers understood this right. Importantly, the threat of uncompensated government takings was well known at the time of the Founding,<sup>168</sup> and early state courts largely adopted the English common law view that background principles nuance the broad property rights declared by the Takings Clause.<sup>169</sup> Instead of departing from this understanding, the Framers adopted text in the Fifth Amendment that closely resembles existing takings clauses in various states.<sup>170</sup> This

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165. See N.H. COGAN, *THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS* 361–72 (2d ed. 2016) (chronicling congressional debates over the eventual Fifth Amendment); Treanor, *supra* note 6, at 791 (“There are apparently no records of discussion about the meaning of the clause in either Congress or, after its proposal, in the states.”). Logically, this makes sense. The more controversial an amendment, the more debate. If the text demarcates general law the Founders agreed upon, one should expect little debate. See Campbell, *supra* note 161, at 40 (2020) (distinguishing between customary positivist rights, which were enumerated rights defined by historic common law, and new positivist rights, which generated more careful drafting and more debate); *id.* (citing the Establishment Clause as a new right that the First Congress “carefully drafted”).

166. See *Debate on Slave Trade*, 2 ANNALS OF CONG. 1197–205, 1450–74 (1790).

167. See *Debate on Removal*, 1 ANNALS OF CONG. 455–79 (1789).

168. Notably, uncompensated takings were proscribed in the Magna Carta, see Gedicks, *supra* note 67, at 596 (2009), and the English common law, see *supra* Part II, both of which were influential in state common law.

169. See *supra* Part II.

170. The Vermont 1777 constitution included the clause: “[W]henever any particular man’s property is taken for the use of the public, the owner ought to receive an equivalent in money.” VT. 1777 CONST. Chapter 1, § 2. The Massachusetts 1780 constitution stipulated: “whenever the public exigencies require, that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.” MASS. CONST. OF 1780, art. X, reprinted in Treanor, *supra* note 6. The Northwest Ordinance required that “full compensation” be awarded to property owners whose land was taken in the name of “public exigencies.” NORTHWEST ORDINANCE OF 1787, art. 2.



suggests a desire to ratify state law understandings of takings law into the federal Constitution, informing the Takings Clause through background principles.

Mainstream theories of originalism would support *Cedar Point* as an originalist decision because the decision follows the practice of the Framers. Original intentions originalism<sup>171</sup> would point out that the ratifiers of the Fifth Amendment intended that it draw from background principles to accomplish the purposes laid out in Madison's speech to the First Congress.<sup>172</sup> Original public meaning originalism<sup>173</sup> and original legal methods originalism<sup>174</sup> would highlight that the original public meaning of the Fifth Amendment is best understood as how the learned public or legal scholars would have read it—in the light of background principles.

Pragmatically, incorporating this originalist evidence into the background principles exception is helpful to lower courts and parties simply because they must abide by Supreme Court precedent. Even if, like *Berger*, they disagree with the originalist pedigree of the per se rule in *Cedar Point*, lower courts and parties must have a consistent way to apply the holding in *Cedar Point* as a matter of original law; interpreting original public meaning in the context of background principles would help them to be faithful originalists while still following Supreme Court precedent.

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171. See RAKOVE, *supra* note 65, at 38 (defining as “the view that the meaning of the text is determined by the intentions of its authors”).

172. See Treanor, *supra* note 6, at 837 (citing JAMES MADISON, AMENDMENTS TO THE CONSTITUTION (June 8, 1789), in 12 THE PAPERS OF JAMES MADISON 197, 207 (Charles F. Hobson et al. eds., 1979)).

173. See RAKOVE, *supra* note 65, at 33 (defining as “the view that the meaning of the text is determined by the conventional semantic meaning of the words and phrases at the time each provision was framed and ratified”); Jack M. Balkin, *The Construction of Original Public Meaning*, 31 CONST. COMMENT. 71 (2016) (expositing the theory).

174. Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory*, in THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 33 (Grant Huscroft & Bradley W. Miller, eds. 2011) (defining as “the view that the original meaning is the meaning that would have been derived given the methods of interpretation (and possibly also construction) that were employed at the time”); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009) (expositing the theory).

In conclusion, once one understands that the evidence of original public meaning sounds in the background principles exception rather than in the per se rule, *Cedar Point* stands as an originalist opinion.

#### CONCLUSION

Fervor over the background principles exception to the per se rule in *Cedar Point* exposed an area of originalist scholarship that has been neglected. In this vein, this Note suggests that three major principles exemplify the types of background principles that inform takings law: the right to enter private businesses, the right to enter for public purposes, and the right to enter unfenced land for specific public purposes (such as navigation, hunting, grazing, or fishing). Although commentators initially expressed concern that *Cedar Point* could lead to an erosion of civil rights and labor protections, this is not likely. Applying background principles that this Note would recognize as part of the Takings Clause to regimes like the Public Accommodations Act, an originalist would be hard-pressed to see *Cedar Point* as eviscerating these critical protections. While *Cedar Point*'s holding may have little practical impact, it provides a lens for more clearly understanding how the Founders conceived of background principles as limitations to legal rights that, at first glance, might appear unbounded.