

HISTORY, PUBLIC RIGHTS, AND ARTICLE III STANDING

OWEN B. SMITHERMAN

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OWEN B. SMITHERMAN*

*For decades, legal academics have complained about a conflict between history and the doctrine of Article III standing. First in *Spokeo, Inc. v. Robins* (2016) and then notably in *TransUnion LLC v. Ramirez* (2021), Justice Clarence Thomas presented a halfway resolution. Justice Thomas grounded Article III standing in a historical distinction between private and public rights. Suits for violations of private rights would require no showing of concrete injury in fact. Suits for violations of public rights would require the injury in fact showing of special damage, a term borrowed from the public nuisance tort.*

This Article questions the Thomas retention of injury in fact for public rights. Part I explains Justice Thomas's nuanced approach to Article III standing. Part II investigates old English and early American materials on special damage to flesh out the meaning of Justice Thomas's requirement for public rights standing. The upshot is a lack of historical consensus on the content of the special damage standard. The materials do not align on a precise standard, making it difficult, either as a matter of 1788 original meaning or later liquidation, to operationalize Justice Thomas's special damage requirement. Part III argues that there are good reasons to doubt that the requirement of special damage is constitutionally relevant to the original meaning of Article III. The Framers did not discuss special

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damage in connection to Article III. Most of the relevant cases are from state courts, which are not bound by Article III. The traditional rationale for the special damage requirement does not have constitutional significance. And it seems implausible that the Constitution incorporated a legal doctrine in such flux without textual indication. The Article concludes with a critique of the current Supreme Court's lack of concern for originalism in standing doctrine.

INTRODUCTION

Since the mid-twentieth century, the Supreme Court has self-consciously followed a formal doctrine of “standing,”¹ which requires plaintiffs in federal court to establish a “‘personal stake’ in the alleged dispute.”² To establish Article III standing, a plaintiff must prove the elements articulated in *Lujan v. Defenders of Wildlife*.³ A plaintiff must show (1) that he suffered an injury in fact that is concrete and particularized, and actual or imminent, (2) that the injury was fairly traceable to the challenged conduct of the defendant, and (3) that the injury would likely be redressed by judicial relief.⁴

1. See Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 169 (1992) (using a rough Lexis search for Supreme Court references to standing and finding that the first mention of it as an Article III limitation occurs in *Stark v. Wickard*, 321 U.S. 288 (1944)). But see Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 691 (2004) (arguing that the Court adhered to an “active law of standing” in the eighteenth and nineteenth centuries, even if the term “standing” was not used). Without picking a side, I only wish to note the period during which the Court has been nominally and formally constrained by what we today call “standing.”

2. *Raines v. Byrd*, 521 U.S. 811, 819 (1997) (citations omitted).

3. 504 U.S. 555, 560–61 (1992).

4. See *id.*

Many⁵ (but not all⁶) academics have cast doubt on the originalist justification for modern standing doctrine. Sifting through old English and early American practices, they have concluded that there is little support for the modern requirements of standing,⁷ especially the all-important injury in fact element.⁸ However, these critiques have been largely ignored by the Supreme Court.

In *TransUnion LLC v. Ramirez* (2021),⁹ the Supreme Court had a prime opportunity to engage with the historical criticism. As expected by many scholars, the Court stayed the course and even “doubled down” on injury in fact.¹⁰ The five-justice majority

5. See Sunstein, *supra* note 1; Robert J. Pushaw Jr., “Originalist” Justices and the Myth That Article III “Cases” Always Require Adversarial Disputes, 37 CONST. COMMENT. 259 (2022) (reviewing JAMES E. PFANDER, CASES WITHOUT CONTROVERSIES: UNCONTESTED ADJUDICATION IN ARTICLE III COURTS (2021)); James E. Pfander, *Public Law Litigation in Eighteenth Century America: Diffuse Law Enforcement In A Partisan World*, 92 FORDHAM L. REV. 469 (2023); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432 (1988); John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962 (2002); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988); Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show That Standing Doctrine is Looking for Answers in all the Wrong Places*, 97 MICH. L. REV. 2239 (1999); Raoul Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816 (1969); Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961).

6. See Woolhandler & Nelson, *supra* note 1 (disputing some of the historical claims of scholars in the previous footnote); Bradley S. Clanton, *Standing and the English Prerogative Writs: The Original Understanding*, 63 BROOK. L. REV. 1001 (1997) (same); see also Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777 (2004).

7. See *supra* note 5.

8. See *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 103 (1998) (Scalia, J.) (labelling injury in fact the “[f]irst and foremost” element of standing); see also Ernest A. Young, *In Praise of Judge Fletcher—And of General Standing Principles*, 65 ALA. L. REV. 473, 474 (2013) (referring to injury in fact as the “keystone of the Supreme Court’s current standing doctrine”).

9. 141 S. Ct. 2190 (2021).

10. See Elizabeth Earle Beske, *Charting a Course Past Spokeo and TransUnion*, 29 GEO. MASON L. REV. 729, 761 (2022). Note that, while this Article focuses on the Article III standing implications of *TransUnion*, the decision was also criticized, perhaps more, for its impact on privacy law. See Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, 102 B.U. L. REV. 793, 807, 840 (2022); Sojung Lee, *Give Up Your Face, and a Leg to Stand on Too: Biometric Privacy Violations and Article III Standing*, 90 GEO. WASH. L. REV. 795, 800

limited concrete injuries under Article III to “traditional tangible harms, such as physical harms and monetary harms,” as well as “[v]arious intangible harms,” including “harms specified by the Constitution” and “harms traditionally recognized as providing a basis for lawsuits in American courts.”¹¹ The majority also stressed its “responsibility to independently decide whether a plaintiff has suffered a concrete harm.”¹² Yes, “Congress may create causes of action for plaintiffs to sue defendants who violate [certain] legal prohibitions or obligations. But under Article III, an injury in law is not an injury in fact.”¹³

Four justices dissented from the majority’s holding.¹⁴ But three of those appeared to agree on the requirement of a concrete injury in fact.¹⁵ On that issue, *TransUnion* was 8–1.¹⁶ The notable exception was Justice Clarence Thomas.

(2022); Ignacio Cofone, *Privacy Standing*, 2022 U. ILL. L. REV. 1367, 1413–15 (2022); Peter Ormerod, *Making Privacy Injuries Concrete*, 79 WASH. & LEE L. REV. 101, 125–28 (2022).

11. *TransUnion*, 141 S. Ct. at 2204.

12. *Id.* at 2205.

13. *Id.*

14. *See id.* at 2214 (Thomas, J., dissenting, joined by Breyer, J., Sotomayor, J., and Kagan, J.); *id.* at 2225 (Kagan, J., dissenting, joined by Breyer, J., and Sotomayor, J.).

15. *See id.* at 2226 (Kagan, J., dissenting) (“I differ with Justice THOMAS on just one matter, unlikely to make much difference in practice. In his view, any ‘violation of an individual right’ created by Congress gives rise to Article III standing. . . . But in *Spokeo*, this Court held that ‘Article III requires a concrete injury even in the context of a statutory violation.’ . . . I continue to adhere to that view, but think it should lead to the same result as Justice THOMAS’s approach in all but highly unusual cases.”) (citations omitted).

16. Arguably, Justice Kagan’s dissent is the least cogent opinion in *TransUnion*. Prior to 2021, the concreteness inquiry was muddled. After the death of Justice Scalia in 2016, a short-handed Court had defined concreteness by oblique reference to synonyms and antonyms. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (“A ‘concrete’ injury must be ‘*de facto*’; that is, it must actually exist. . . . When we have used the adjective ‘concrete,’ we have meant to convey the usual meaning of the term—‘real,’ and not ‘abstract.’”) (citations omitted). In *TransUnion*, the Kavanaugh majority and the Thomas dissent tried to guide courts by founding concreteness on something more stable. Both chose history, although they used it in different ways. *Compare TransUnion*, 141 S. Ct. at 2204–05, with *id.* at 2216–18 (Thomas, J., dissenting). In contrast, Justice Kagan’s dissent rejected history, failed to give meaningful guidance on concreteness, and retained judicial authority to override congressional determinations regarding injury in fact. *See id.* at 2226 (Kagan, J., dissenting).

Following the approach he first laid out in *Spokeo, Inc. v. Robins* (2016),¹⁷ Justice Thomas argued for a doctrinal reformation centered around a Founding Era distinction between private and public rights.¹⁸ The specific boundaries of this distinction and its interaction with other references to public rights (like non-Article III adjudication) will be explored later.¹⁹ For now, it suffices to say that private rights were “vested in discrete individuals” and public rights “belonged to the public as a whole.”²⁰ For suits based on private rights, a plaintiff would need only an injury in law (not an injury in fact).²¹ This approach tracks much of the historical critique and, by dispensing with injury in fact, would expand the kinds of suits that could be brought in federal court. For suits based on public rights, a plaintiff would still need to show “special damage,” a term from public nuisance tort law that Justice Thomas connected to the Court’s modern injury in fact requirement.²² As it agreed (partly) with both sides, the Thomas dissent might be construed as a sort of standing compromise between the academic critics and the Supreme Court.²³

17. 136 S. Ct. 1540, 1550–53 (2016) (Thomas, J., concurring).

18. See *TransUnion*, 141 S. Ct. at 2216–17 (Thomas, J., dissenting) (citing *Spokeo*, 136 S. Ct. 1540 (2016) (Thomas, J., concurring)).

19. See *infra* Part I.

20. See Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 566 (2007) (citing *Commonwealth v. McDonald*, 16 Serg. & Rawle 390, 394 (Pa. 1827) (jury charge of Duncan, J.)).

21. See *TransUnion*, 141 S. Ct. at 2217 (Thomas, J., dissenting).

22. See *id.*; see also *id.* at 2219–20 (discussing public rights cases like *Lujan v. Defenders of Wildlife* and *Summers v. Earth Island Institute*). Now, close readers of Justice Thomas’s *TransUnion* dissent will not find the “special” part of the phrase “special damage.” See *id.* at 2217 (“But where an individual sued based on the violation of a duty owed broadly to the whole community, such as the overgrazing of public lands, courts required ‘not only *injuria* [legal injury] but also *damnum* [damage].’”). However, Justice Thomas cited two sources for this proposition: his concurrence in *Spokeo* and the 1613 King’s Bench opinion in *Robert Marys’s Case* (1613) 77 Eng. Rep. 895; 9 Co. Rep. 111b (KB). In both sources, the term “damage” is accompanied by qualifiers such as “special” or “extraordinary.” See *Spokeo*, 136 S. Ct. at 1551–52; *Robert Marys’s Case*, 77 Eng. Rep. at 898–99.

23. Oddly enough, Justice Thomas concurred in *Spokeo* and dissented in *TransUnion*, even though the cases arguably involved the same private right under the Fair Credit Reporting Act. Admittedly, the kind of right in *Spokeo* was not presented as starkly as

Ultimately, the other eight justices rejected Justice Thomas's half-way approach to injury in fact. However, the Thomas approach is worthy of continued analysis for several reasons.

First, lower federal courts have struggled to apply *TransUnion*. The majority sought to clarify the scope of concreteness.²⁴ But inferior courts have repeatedly clashed over the muddiest part of the Supreme Court's decision—determining whether a claimed harm was “traditionally recognized as providing a basis for lawsuits in American courts.”²⁵ Respected judges with solid originalist credentials have divided over whether particular harms qualify under this section of *TransUnion*. In the D.C. Circuit, Judges Neomi Rao and Gregory Katsas spilled 22 pages of ink disagreeing over the concreteness of the federal government's refusal to recognize a plaintiff's expatriation.²⁶ In the Eleventh Circuit, Judges Britt Grant and Kevin Newsom fought intensely about how to apply *TransUnion* to a fact pattern quite similar to that in *TransUnion*.²⁷ That judges who

in *TransUnion*, and the Court vacated and remanded for further consideration. See *Spokeo*, 136 S. Ct. at 1549–50. But the same kind of individual right seemed at issue in both cases. Indeed, Justice Ginsburg's dissent in *Spokeo* begins by referencing the same provision that Thomas discusses in his *TransUnion* dissent. Compare *Spokeo*, 136 S. Ct. at 1554 (Ginsburg, J., dissenting), with *TransUnion*, 141 S. Ct. at 2216 (Thomas, J., dissenting). Thanks to Thomas Bennett for pointing this out.

24. See *TransUnion*, 141 S. Ct. at 2204–07.

25. *Id.* at 2204.

26. Compare *Farrell v. Blinken*, 4 F.4th 124, 132–35 (D.C. Cir. 2021) (“The statutory right to expatriate in the 1868 Act as well as in the INA reflects a longstanding recognition that such a right is rooted in natural law and the principle of consensual government at the heart of our constitutional republic.”), with *id.* at 140–47 (Katsas, J., dissenting) (“[M]y colleagues conflate the statutory right to expatriate with executive recognition of a past expatriation. This approach is inconsistent with the INA's unambiguous text, longstanding historical practice, and Farrell's own theory of injury, each of which treats the two as different.”).

27. Compare *Hunstein v. Preferred Collection & Mgmt. Servs., Inc.*, 48 F.4th 1236, 1245–50 (11th Cir. 2022) (en banc) (“The fact that one plaintiff, Hunstein, has not pleaded injury under this statute does not show that no one else can or will. And the dissent's approach offers *no* line, principled or otherwise; the common law analogy collapses if we can rewrite a traditional tort to exclude an essential element.”), with *id.* at 1259–72 (Newsom, J., dissenting) (“Today's opinion empties the *Spokeo/TransUnion* ‘close relationship’ standard of all subtlety, adopts what is, in effect, the very ‘exact duplicate’ standard that the Supreme Court has forbidden and that we had earlier sworn, places this Court on the wrong side of a 7-1 circuit split, and, in the doing, denies

reason from similar first principles and often agree cannot find their way to the same application of *TransUnion* may suggest issues with the underlying rule of decision.²⁸ And while the Thomas approach has also attracted criticism on workability,²⁹ Justice Thomas's distinction between private and public rights seems more manageable than the broad *TransUnion* reference to "American history and tradition."³⁰

Second, while reading judicial tea leaves can be fraught, one could imagine a future where the Thomas approach gains more support on the Court. On the issue of injury in fact, Justice Thomas was effectively alone in *TransUnion*. But the debate over standing rages on. In December 2023, the Supreme Court decided *Acheson Hotels, LLC v. Laufer*,³¹ a case about concrete injury in fact and ADA "tester" standing. While the majority opinion resolved the case on mootness grounds, Justice Thomas would have reached the standing issue.³² In a solo concurrence, he reiterated that the "traditional distinction between public and private rights shapes the contours of the judicial power."³³ As he has done so in other areas of the law,

Congress any meaningful ability to innovate, leaving it only to replicate and codify existing common-law causes of action.").

28. See Beske, *supra* note 10, at 766 ("From a pragmatic standpoint, *TransUnion* invites lower courts into uncharted territory; indeed, the decision is notable for the absence of any reliable metric for confining judicial discretion.").

29. See Thomas P. Schmidt, *Standing Between Private Parties*, 2024 WISC. L. REV. (forthcoming) (manuscript at 66–67) ("[T]he distinction between private rights and public rights, which is defined by reference to Blackstone's *Commentaries*, seems recondite and difficult to apply. Indeed, it does not seem a recipe for consistent and efficient adjudication to graft one notoriously complex and confusing doctrine—standing—onto another notoriously obscure distinction—public versus private rights."). Schmidt also points out the possibility of doctrinal confusion, given the relevance of public rights to non-Article III adjudication. See *id.* at 67 n.443 ("But using the same terminology for two Article III-related distinctions may generate confusion. . .").

30. *TransUnion*, 141 S. Ct. at 2204.

31. 144 S. Ct. 18 (2023).

32. *Id.* at 22 (Thomas, J., concurring in the judgment).

33. *Id.* at 25 n.2 (citing *Spokeo*, 136 S. Ct. at 1550 (Thomas, J., concurring)). I would also note that several amicus briefs in *Acheson Hotels* relied on the Thomas distinction between private and public rights, suggesting that litigants think it still important to address his theory of standing. See Brief of Amicus Curiae Center for Constitutional Responsibility in Support of Petitioner at 8–9, *Acheson Hotels, LLC v. Laufer*, 144 S. Ct.

Justice Thomas is unlikely to abandon his doctrinal views simply because he has not garnered a majority of the Court's support.³⁴

Third, Justice Thomas's theory received meaningful support from the legal academy and the judiciary. In the five years between his *Spokeo* concurrence and *TransUnion* dissent, his distinction between private and public rights was commended by prominent federal courts scholars (like Professors William Baude³⁵ and James Pfander³⁶) and federal appellate judges (like Chief Judge Jeffrey Sutton,³⁷ Judge Amul Thapar,³⁸ Judge Diane Wood,³⁹ and Judge

18 (2023) (No. 22-429), 2023 WL 4030229 ("This distinction between suits that redress private injuries and those that advance the public interest traces to common law."); Brief for Amici Curiae Disability Rights Education & Defense Fund, et al. in Support of Respondent at 19 n.15, *Acheson Hotels, LLC v. Laufer*, 144 S. Ct. 18 (2023) (No. 22-429), 2023 WL 5353504 ("[ADA testers] are three-dimensional human beings with disabilities whose private rights are violated.") (citing Thomas's dissent in *TransUnion*).

34. Take the First Amendment. Justice Thomas has, for the better part of two decades, continued to adhere to his view that "the Establishment Clause resists incorporation against the States." See *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2095 (2019) (Thomas, J., concurring in the judgment) (citing four previous Thomas concurrences stretching all the way back to 2002).

35. See William Baude, *Standing in the Shadow of Congress*, 2016 SUP. CT. REV. 197, 227–28 (2016) ("One Justice on the *Spokeo* Court seemed to see the problem. Justice Thomas, who joined the majority opinion in full, wrote a concurring opinion that put forward a proposed rule that is both theoretically and historically consistent . . .").

36. See James E. Pfander, *Standing, Litigable Interests, and Article III's Case-or-Controversy Requirement*, 65 UCLA L. REV. 170, 215 (2018) ("Justice Thomas deserves credit for attempting to rationalize the law of standing by recognizing that the Court has applied its injury-in-fact requirement with varying force depending on the context.").

37. See *Huff v. TeleCheck Servs., Inc.*, 923 F.3d 458, 469 (6th Cir. 2019) ("[Justice Thomas's] theory deserves further consideration at some point. It seems to respect history and cuts a path in otherwise forbidding terrain.").

38. See *Springer v. Cleveland Clinic Emp. Health Plan Total Care*, 900 F.3d 284, 290–93 (6th Cir. 2018) (Thapar, J., concurring) ("Since the requirements of standing turn on whether the plaintiff seeks to vindicate a private or public right, the first step in any standing case is to classify the asserted right.") (repeatedly citing Justice Thomas's *Spokeo* concurrence).

39. See *Bryant v. Compass Grp. USA, Inc.*, 958 F.3d 617, 624 (7th Cir. 2020), as amended on denial of reh'g and reh'g en banc (June 30, 2020) ("Justice Thomas joined the majority's opinion, but he added a concurrence that drew a useful distinction between two types of injuries.").

Kevin Newsom⁴⁰). After his defeat in *TransUnion*, Justice Thomas's approach to private rights was celebrated by standing critics like Professor Cass Sunstein.⁴¹ After all, a halfway remedy is better than none at all. Some academics even sought to solidify Justice Thomas's theory in hopes of reconsideration by a future Court.⁴² And some have used the Thomas distinction to resolve other federal courts questions.⁴³ At this point, the approach is sufficiently well-known to garner the label of the "private rights" school.⁴⁴

Finally, and as most relevant to this Article, the Thomas approach to injury in fact has not been fully theorized. Justice Thomas distinguishes between suits based on private rights and suits based on public rights. Nearly all of the scholarly attention has gone to the issue of private rights, as was implicated in *Spokeo*, *TransUnion*, and *Thole v. U.S. Bank* (2020), a case with another Thomas standing opinion.⁴⁵ But important questions regarding public rights have gone unanswered. What does it mean for a plaintiff to show the "special damage" needed to pursue a public rights claim in federal court? What historical sources are relevant to this inquiry, and what do those sources say? How would the application of Justice Thomas's approach differ from current doctrine on Article III standing in public rights cases? And how do we know that these old English

40. See *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1138 (11th Cir. 2021) (Newsom, J., concurring) ("My approach also resembles the rights-based approach advanced by Justice Thomas and others."). Note, however, that Judge Newsom grounded his approach in Article II, rather than in Article III. See *id.* at 1139.

41. See, e.g., Cass R. Sunstein, *Injury in Fact, Transformed*, 2021 SUP. CT. REV. 349, 352 (2021) ("As a matter of proper interpretation of the Constitution, that view is essentially right.") (citing Thomas's dissent in *TransUnion*).

42. See, e.g., Beske, *supra* note 10, at 785 (defending the Thomas *TransUnion* dissent against the majority's worry about Congress excessively privatizing public rights).

43. See Sarah Leitner, *The Private-Rights Model of Qui Tam*, 76 FLA. L. REV. (forthcoming 2024) (using the "traditional public-private rights framework of justiciability" to argue that the qui tam device "may only be used to assign the federal government's private-rights claims, and may not be used to assign public-rights claims at all.").

44. See Schmidt, *supra* note 29, at 3.

45. See *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1544–46 (2016); *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200–02 (2021); *Thole v. U. S. Bank N.A.*, 140 S. Ct. 1615, 1622 (2020) (Thomas, J., concurring).

and early American materials concerning the public nuisance tort are relevant to the original meaning of Article III?

This lack of clarity matters because standing doctrine determines real-life access to the federal courts. Consider *Sierra Club v. Morton* (1972).⁴⁶ In that case, the United States Forest Service sought to allow commercial development of Mineral King Valley.⁴⁷ Mineral King Valley is located in a national forest.⁴⁸ The Sierra Club sued the federal government under the APA to stop development.⁴⁹ For purposes of the Thomas distinction, *Morton* easily falls into the public rights category—the Sierra Club invoked laws governing a national forest held by the government for use by the people at large.⁵⁰ For injury in fact purposes, the Sierra Club relied on aesthetic injuries.⁵¹ The Court accepted that injury in the abstract, despite the fact that it was aesthetic and not something more tangible like property, and despite the fact that it was widely shared by many people.⁵² The Thomas approach to public rights and its focus on “special damage” would appear to change that standing analysis, altering access to the federal courts. But how, exactly?

In this Article, I make two arguments about the Thomas approach to public rights and Article III standing. Both start from original public meaning (OPM), a theory of constitutional interpretation that prioritizes the original meaning of the text of the Constitution when ratified.⁵³ While originalists and non-originalists often clash

46. 405 U.S. 727, 731–32 (1972).

47. *See id.* at 728–29.

48. *See id.* at 728.

49. *See id.* at 729–30.

50. *See id.*; Nelson, *supra* note 20, at 566.

51. *See Morton*, 405 U.S. at 734.

52. *See id.* Note that the Court ultimately denied standing, not on conceptual grounds, but because the Sierra Club had not shown that any of its members would be affected by the proposed development. *See id.* at 735.

53. *See generally* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989). In this Article, I assume an originalist approach and do not attempt to justify it on normative grounds. For those interested, there are many good works advocating and criticizing originalism. I especially appreciate the works of Keith Whittington, *see, e.g.*, KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (1999), and Judge Easterbrook, *see, e.g.*, Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119 (1998).

over the interpretive toolkit⁵⁴ (and the merits of original meaning versus other originalist methodologies⁵⁵), relevant OPM tools include linguistic intuition, contemporary dictionary definitions, corpus linguistics, and publicly available context like background facts and legal doctrine.⁵⁶ For this article, subsequent references to originalism invoke OPM.

While similarly originalist, my two arguments proceed in different fashions. My first argument engages Justice Thomas's approach in *Spokeo* and *TransUnion* on its own terms. I make two major assumptions: (1) that Justice Thomas is correct about how originalists should generally seek to interpret terms in Article III like "the judicial Power," and (2) that Justice Thomas is correct about the specific relevance of old English and early American public nuisance authorities to the original meaning of Article III. I examine these materials to understand the requirement that a hypothetical plaintiff show "special damage" to bring a public rights suit in federal court. As Professor Elizabeth Beske did with her article on identifying private rights,⁵⁷ I endeavor to flesh out the Thomas position for future debates. But in contrast with Beske's excellent piece, my work on

54. *But see* Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 787 (2022) (arguing that originalism should be understood more as a standard that seeks rules for judging answers than a decision procedure that outlines the means for reaching said answers).

55. I use original meaning in this Article because that is what the originalists on the Court (previously led by Justice Scalia) most often employ. It is also what the Thomas argument in *Spokeo* seems to follow. *But see* Gregory E. Maggs, *Which Original Meaning of the Constitution Matters to Justice Thomas?*, 4 N.Y.U. J.L. & LIBERTY 494, 511 (2009) (arguing that Justice Thomas employs the method of "general original meaning," which looks to multiple originalist modalities including original intent, understanding, and meaning). In the battle over methodology, I have been most convinced by the original law theory of Stephen Sachs and William Baude, although more for their incorporation of original law outside the text of the Constitution and brilliant framing than positivist justifications. *See* Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 838 (2015) ("Our law is still the Founders' law, as it's been lawfully changed."); William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015); William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455 (2019).

56. *See generally* Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269 (2017).

57. *See* Beske, *supra* note 10, at 776.

behalf of the Thomas approach is unsuccessful. The relevant historical authorities may agree on the nominal requirement of “special” or “extraordinary” damage for the public nuisance tort. But the content of that legal element varies so greatly from case to case and across time that one cannot say that there was sufficient agreement on what special damage actually meant. Accordingly, these precedents cannot provide an adequate originalist rule of decision for modern disputes over public rights and Article III standing.

My second argument backtracks to challenge the second assumption from above. I explore a point made in passing by Judge Kevin Newsom⁵⁸—why do we think that these old public nuisance tort materials have anything to do with the original meaning of Article III? The Founding debates mention neither these sources nor the broader private versus public rights distinction that Justice Thomas emphasizes. Most of the pertinent cases come from state courts, which are not bound by Article III. American courts did not discuss the special damage requirement in constitutional terms. Rather, early courts connected it to worries about trivial suits or overburdening defendants. Finally, it is possible that certain rules were integrated into Article III without explicit discussion. But the incoherency of the doctrine coupled with the lack of a specific textual hook makes the sub silentio incorporation of these materials into Article III less than plausible. For these reasons, originalists should probably reject a retention of injury in fact for public rights suits.

This Article proceeds as follows. Part I discusses the Thomas approach to injury in fact in *Spokeo* and *TransUnion*. Part II investigates the public nuisance tort in pre-Founding England and post-Founding America. I examine treatises (English and American) and cases (English, American federal, and American state). Upon review, the historical materials are not sufficiently aligned to provide an adequate rule of decision for modern disputes over public rights and Article III standing. Part III details why the historical understanding of the public nuisance tort and special damage is not

58. See *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1126 (11th Cir. 2021) (Newsom, J., concurring).

relevant to the original meaning of Article III. The Article concludes with a critique of the current Supreme Court's lack of concern for originalism in standing doctrine.

I. PUBLIC RIGHTS STANDING AND THE *SPOKEO* CONCURRENCE

Although Justice Thomas has discussed Article III standing and injury in fact in a number of opinions, his concurrence in *Spokeo* is most representative and formed the basis for later opinions. In *Spokeo*, Justice Thomas set up his approach in three moves.

First, citing an early dissent by Justice Scalia, he argued that constitutional standing follows from the “traditional, fundamental limitations upon the powers of common-law courts.”⁵⁹ Those limitations can be ascertained by reference to the historical context of the American Founding.⁶⁰ Accordingly, Justice Thomas turned to the history.

Next, Justice Thomas identified and emphasized a historical distinction between private and public rights.⁶¹ Here, a clarification is needed. The Supreme Court has considered whether a right is private or public in other contexts, including disputes over non-Article III adjudication⁶² and the Seventh Amendment.⁶³ In *Spokeo*, Justice Thomas relied on Blackstone for a slightly different view of private versus public rights.⁶⁴ “‘Private rights’ are rights ‘belonging to

59. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1550–51 (2016) (Thomas, J., concurring) (citing *Honig v. Doe*, 484 U.S. 305, 340 (1988) (Scalia, J., dissenting)).

60. See *Honig*, 484 U.S. at 339–41 (Scalia, J., dissenting) (discussing relevant historical sources).

61. See *Spokeo*, 136 S. Ct. at 1551 (Thomas, J., concurring).

62. See, e.g., *Stern v. Marshall*, 564 U.S. 462, 488 (2011).

63. See, e.g., *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 51 (1989).

64. In *TransUnion*, Justice Thomas consciously distinguished between these two conceptions of public rights. See *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2217 n.2 (2021) (Thomas, J., dissenting) (“The ‘public rights’ terminology has been used to refer to two different concepts. In one context, these rights are “‘take[n] from the public’”—like the right to make, use, or sell an invention—and “‘bestow[ed] ... upon the’” individual, like a ‘decision to grant a public franchise.’ . . . Disputes with the Government over these rights generally can be resolved ‘outside of an Article III court.’ . . . Here, in contrast, the term ‘public rights’ refers to duties owed collectively to the community.”)

individuals, considered as individuals.”⁶⁵ These could include “rights of personal security (including security of reputation), property rights, and contract rights.”⁶⁶ In contrast, public rights “involve[d] duties owed ‘to the whole community, considered as a community, in its social aggregate capacity.’”⁶⁷ These could include “‘free navigation of waterways, passage on public highways, and general compliance with regulatory law.’”⁶⁸

Justice Thomas then made his final and most controversial move. He insisted that “[c]ommon-law courts imposed different limitations on a plaintiff’s right to bring suit depending on the type of right the plaintiff sought to vindicate.”⁶⁹ And he contended that this common-law distinction was, one might say, “baked” into the original meaning of Article III.⁷⁰

In cases involving private rights (e.g., *Spokeo*, *Thole*, *TransUnion*), Justice Thomas asserted that a plaintiff need only allege a violation of his legal rights.⁷¹ For support, he cited a 1765 King’s Bench

(quoting *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1372–74 (2018)).

65. *Spokeo*, 136 S. Ct. at 1551 (Thomas, J., concurring) (citing 3 WILLIAM BLACKSTONE, COMMENTARIES *2).

66. *Id.* (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *130–39).

67. *Id.* at 1551 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *5).

68. *Id.* (citing *Woolhandler & Nelson*, *supra* note 1, at 693). Caleb Nelson provided a more comprehensive account of public rights in a 2007 article. See Nelson, *supra* note 20. Like Justice Thomas, Nelson relied on Blackstone, but he also incorporated early American sources. See *id.* at 566–67 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *7 and *Lansing v. Smith*, 4 Wend. 9, 21 (N.Y. 1829) (Walworth, C.)). Public rights, which belonged to the “whole community, considered as a community, in its social aggregate capacity,” included at least three categories of legal interests: “(1) proprietary rights held by government on behalf of the people, such as the title to public lands or the ownership of funds in the public treasury; (2) servitudes that every member of the body politic could use but that the law treated as being collectively held, such as rights to sail on public waters or to use public roads; and (3) less tangible rights to compliance with the laws established by public authority ‘for the government and tranquillity of the whole.’” *Id.* at 566 (citations omitted).

69. *Spokeo*, 136 S. Ct. at 1551 (Thomas, J., concurring).

70. See *id.* at 1550–53.

71. See *id.* at 1551.

decision,⁷² an 1838 circuit court decision,⁷³ a 2008 law review article by Professor F. Andrew Hessick,⁷⁴ and an amicus brief by private law scholars.⁷⁵ The last two sources (especially the Hessick article) exhaustively detail the history of private rights litigation, which seems to reject the requirement of showing “concrete” or “actual” damage beyond a legal violation.⁷⁶

Turning to public rights, Justice Thomas asserted that “[g]enerally, only the government had the authority to vindicate a harm borne by the public at large.”⁷⁷ For example, he referenced the tradition of public criminal prosecutions in America.⁷⁸ However, he admitted of an exception to that rule, where a private plaintiff could “allege that the violation caused them ‘some extraordinary damage, beyond the rest of the [community].’”⁷⁹ In particular, Justice Thomas highlighted the public nuisance tort, which required the plaintiff show “special damage” before he could bring private suit on a public right.⁸⁰ Anticipating the critics’ objection, Justice Thomas addressed the *qui tam* exception to this rule briefly and only by quick reference to *Vermont Agency*.⁸¹ And he cited several notable standing decisions in an attempt to show that his approach

72. *Entick v. Carrington* (1765) 95 Eng. Rep. 807, 817; 2 Wils. K. B. 275, 291 (KB).

73. *Webb v. Portland Mfg. Co.*, 29 F. Cas. 506, 508 (C.C.D. Me. 1838) (No. 17,322).

74. F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 317–21 (2008).

75. Brief for Restitution and Remedies Scholars as Amici Curiae in Support of Respondent at 6–18, *Spokeo v. Robins*, 136 S. Ct. 1540 (2016) (No. 13-1339).

76. See Hessick, *supra* note 74, at 279–86; Brief for Restitution and Remedies Scholars, *supra* note 75, at 20–22.

77. *Spokeo*, 136 S. Ct. at 1551 (Thomas, J., concurring) (citing *Woolhandler & Nelson*, *supra* note 1, at 695–700).

78. *Id.* (citing *Woolhandler & Nelson*, *supra* note 1, at 695–700).

79. See *id.* (alteration in original) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *220).

80. See *id.* (citing 3 WILLIAM BLACKSTONE, COMMENTARIES *220).

81. See *id.* at 1551 n.* (“The well-established exception for *qui tam* actions allows private plaintiffs to sue in the government’s name for the violation of a public right.”) (citing *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773–74 (2000)). As discussed in the Conclusion, this exception may not be as well-established as Justice Thomas once thought.

to public rights would not wreak great damage to existing doctrine.⁸²

For historical support of his public rights argument, Justice Thomas relied on a seminal 2004 law review article by Professors Ann Woolhandler and Caleb Nelson.⁸³ In the niche community of federal courts scholars, the article has some prominence.⁸⁴ It was intended to rebut the argument that the Court was “flatly wrong to claim historical support for a constitutional requirement of standing.”⁸⁵ Woolhandler and Nelson saw things differently. While they did not claim that “history *compels* acceptance of the modern Supreme Court’s vision of standing,” they argued at least that “history does not *defeat*” it.⁸⁶

Woolhandler and Nelson discussed the same private versus public rights divide as Justice Thomas, with a similar (if not more built-out) explanation of *qui tam* actions.⁸⁷ Interestingly enough, Justice Thomas did not reach the same conclusion as Woolhandler and

82. See *id.* at 1552–53 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992); *Schlenger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221–223 (1974); *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 183–184 (2000); *Ex parte Levitt*, 302 U.S. 633, 634 (1937) (per curiam); *Summers v. Earth Island Institute*, 555 U.S. 488, 490, 496–97 (2009)).

83. See *id.* at 1551 (citing Woolhandler & Nelson, *supra* note 1).

84. See RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 152 (7th ed. 2015) (hereinafter *HART AND WECHSLER*) (citing the Woolhandler & Nelson piece as a prominent article in the history and Article III standing conversation); Robert J. Pushaw, Jr., *Fortuity and the Article III “Case”: A Critique of Fletcher’s The Structure of Standing*, 65 ALA. L. REV. 289, 292 n.14 (2013) (“Professor Winter’s monumental work greatly influenced my scholarship However, I was prompted to rethink his (and my) position by Ann Woolhandler & Caleb Nelson.”) (citations omitted). Cass Sunstein, a longstanding critic of modern standing doctrine, cites Woolhandler and Nelson as representatives of the “minority view” that reads the standing history “differently.” Cass R. Sunstein, *In Memoriam: Justice Antonin Scalia*, 130 HARV. L. REV. 22, 23 n. 70 (2016); see also Sunstein, *supra* note 41, at 358 n.44 (“Woolhandler and Nelson make the most sustained effort to defend the idea that something like contemporary standing doctrine can find some roots in the Founding era and after.”).

85. See Woolhandler & Nelson, *supra* note 1, at 690.

86. *Id.* at 691.

87. See *id.* at 694; see also *id.* at 725–32 (discussing the history and relevance of *qui tam* actions).

Nelson with respect to private rights.⁸⁸ For Hessick specifically disagreed with Woolhandler and Nelson on the requirement of injury in fact for private rights suits.⁸⁹ And in *Spokeo*, Justice Thomas picked some from each source—relying on Hessick for private rights and Woolhandler and Nelson for public rights.

On public rights, Woolhandler and Nelson defended a general rule of no standing for private litigants. They emphasized the early American tradition of not allowing private control of criminal prosecutions.⁹⁰ This differed from contemporary English practice, where “although public officers remained in ultimate control of most criminal prosecutions . . . private individuals had considerable authority to initiate and prosecute criminal cases in the king’s name.”⁹¹

Woolhandler and Nelson also highlighted the public nuisance cases that Justice Thomas would later cite in *Spokeo*. These cases served a kind of “exception that proves the rule” role, where public rights standing was only allowed if a special damage or injury could be shown.⁹² Citing many early American decisions (mostly from state courts), Woolhandler and Nelson contended that the common-law courts were uniform on this issue.⁹³ “[I]t was well established, both at law and in equity, that ‘an action will not lie in respect of a public nuisance, unless the plaintiff has sustained a

88. Compare *Spokeo*, 136 S. Ct. at 1551 (Thomas, J., concurring) (“Historically, common-law courts possessed broad power to adjudicate suits involving the alleged violation of private rights, even when plaintiffs alleged only the violation of those rights and nothing more.”), with Woolhandler & Nelson, *supra* note 1, at 719–20 (“At the same time, other historical evidence casts doubt upon the idea that statutory rights to sue automatically sufficed to create constitutional ‘Cases’ or ‘Controversies,’ regardless of the real-world interests at stake.”).

89. See Hessick, *supra* note 74, at 283 n.38 (disagreeing with the Woolhandler & Nelson article about the need for an injury in fact beyond an injury in law).

90. See Woolhandler & Nelson, *supra* note 1, at 697–99.

91. *Id.* at 698.

92. See *id.* at 701–04.

93. See *id.* For later discussion of the materials cited by Woolhandler and Nelson, see *infra* Part II.B–C.

particular damage from it, and one not common to the public generally.”⁹⁴

The Woolhandler and Nelson article is important, intriguing, and incomplete. It was not intended to provide the definitive, last word on original meaning and constitutional standing. The relevant question was “does history defeat standing?”, not “what is a detailed and worked-out originalist doctrine of standing?”⁹⁵ Woolhandler and Nelson did not write on a blank slate. They were responding to critics like Sunstein and Winter and Jaffe, who themselves were responding to a slowly built-out Supreme Court doctrine that was not self-consciously tied to original meaning. The point of the Woolhandler and Nelson article was to blunt the historical criticism, not to make a systematic argument in the affirmative.⁹⁶

However, Justice Thomas used Woolhandler and Nelson’s article to construct a new, positive vision of Article III standing. And if one is considering a radical shift in constitutional doctrine, it is necessary to dig deeper. The remaining two Parts deal with two questions left open by Woolhandler and Nelson: (1) what did special damage precisely mean in 1788, and (2) are we sure that this legal doctrine is relevant to the original meaning of Article III?⁹⁷

94. See *id.* at 702 (quoting *Bigelow v. Hartford Bridge Co.*, 14 Conn. 565, 578 (Conn. 1842)).

95. See *id.* at 720 (“We do not claim that modern standing doctrine sprang fully formed from the Philadelphia Convention or that the constitutional nature of standing was universally appreciated from day one. But neither is the opposite true; the public/private distinction upon which modern standing doctrine rests does have historical support, and the notion that the Constitution incorporates that distinction even as against Congress does not contradict any determinate original understanding.”).

96. Put another way, their article works brilliantly as the fourth paragraph in the history and standing section in HART & WECHSLER. After the casebook recounts the arguments of critics like Sunstein and Winter, Woolhandler and Nelson are aptly cited to show that the historical record is messy. See HART AND WECHSLER, *supra* note 84, at 151–53.

97. As mentioned above, Woolhandler and Nelson do not only rely on public nuisance suits. They also highlight public criminal prosecutions and mandamus. See Woolhandler & Nelson, *supra* note 1, at 695–700, 708–12. In *Spokeo*, Justice Thomas references criminal prosecutions. See 136 S. Ct. at 1551–52 (Thomas, J., concurring). On my read,

II. HISTORY OF PUBLIC NUISANCE TORT AND SPECIAL DAMAGE

This Part examines historical evidence about the public nuisance tort and special damage. I begin with English law, the origin of the public nuisance tort. I then move to early American law.

A few notes before diving into the history. To begin with, courts and commentators used a variety of similar sounding phrases in this context, including but not limited to “special damage,” “special injury,” “special grievance,” “particular damage,” “peculiar damage,” “extraordinary damage,” and so on. Whether a difference in wording between “special” and “extraordinary” damage makes a difference in the legal doctrine will be discussed later. At the threshold, it suffices to say that all of these phrases refer to the thing (whatever its exact content or nature) which an individual must show to bring a private action for the tort of public nuisance.

There is also the question of time period. This Article aims for the original meaning of Article III, which was ratified as part of the Constitution in 1788. So, what is the time period for historical analysis? A widely read American public nuisance decision from 1787 would surely have some relevance. But what about an English decision from 1535 or 1680? Moreover, what about the notion of “constitutional liquidation,” by which a textual indeterminacy in the Constitution can be settled through a course of deliberate practice?⁹⁸ Considering its general language and relative lack of discussion during the Convention or ratification debates,⁹⁹ the text of

the critics have the stronger argument on those subjects. Regardless, I focus only on the public nuisance materials because much ink has already been spilled in the other areas.

98. See William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 13–21 (2019).

99. For one rough measure, I would note that *The Founder's Constitution*, a five-volume collection of original sources from the Founding period, contains far more material on Articles I and II than on Article III. See THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 2001) (1987). And those documents relevant to Article III largely deal with subjects other than the “judicial Power” or “Cases” or “Controversies,” like the inclusion of diversity jurisdiction or the relationship between the federal and state courts. See 4 THE FOUNDERS' CONSTITUTION 131–469 (Philip B. Kurland & Ralph Lerner eds., 2001) (1987). All of this is to say that historical material relevant to the modern doctrine of standing is hard to come by.

Article III seems ripe for liquidation.¹⁰⁰ Thus, an American decision from 1792 might be instructive. But what about an American decision from 1860? As Justice Barrett noted in her *Bruen* concurrence, the Supreme Court has not “conclusively determine[d] the manner and circumstances in which postratification practice may bear on the original meaning of the Constitution,” including the “unsettled question[]” of “[h]ow long after ratification may subsequent practice illuminate original public meaning.”¹⁰¹

In this Part, I set the following bounds. Since American lawyers were aware of and cited the full history of English public nuisance tort law, I begin with the first English case in 1535 and go until the early 1800s. English decisions issued after 1788 are not truly relevant or instructive on original meaning. But as several early American decisions relied on these later English cases, their discussion is necessary to understand the context and for liquidation purposes.

With respect to American law, I examine decisions issued through the early 1850s. Wider than one might prefer, this time period is partly required by the available materials. For the most part, the state judicial reporters did not commence until the early 1800s.¹⁰² On the federal side, we have earlier reported decisions, at least for the Supreme Court.¹⁰³ But, given the constraints on federal jurisdiction, there are few early federal decisions about public nuisance torts (and none that I could find before 1838). In any event, this time period comports with that analyzed by Woolhandler and Nelson.¹⁰⁴ Note that, the more years between ratification and a piece of historical evidence, the less weight that particular evidence

100. See Baude, *supra* note 98, at 13 (“The first premise of liquidation is an indeterminacy in the meaning of the Constitution.”).

101. *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2162–63 (2022) (Barrett, J., concurring).

102. See William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1555–56 n.204 (1984) (discussing early American case reporters). Thank you to Chris Moore for pointing this source out.

103. See *id.*

104. See Woolhandler & Nelson, *supra* note 1, at 700–03 (citing several of the cases I discuss below).

carries in the originalist analysis (although it might still be relevant for liquidation).

Lastly, I have gathered a large number of materials—English and American, treatises and cases. This Part does not discuss every single item. Rather, I highlight those materials which I believe most illustrative of the legal context.¹⁰⁵

A. Early English Law and Special Damage

English law gave birth to the public nuisance tort. But the doctrine was anything but clear from the beginning. The treatises seemed to go one way. The cases mostly went another way, with confusion. It was only after the Founding that the English doctrine began to clear up.

1. The 1535 “anonymous” Case

The first English case for what we now call the public nuisance tort was decided in 1535.¹⁰⁶ At the outset, it should be noted that we do not have a full picture of this case. All we have is three paragraphs on one page of the Year Book, which served as the de facto reporter at that time.¹⁰⁷ The Year Book account was written in law French (requiring later English translation¹⁰⁸), omitted the names of

105. This screening process was more art than science. I emphasized cases that were often cited by others dealing with the same subject matter, cases that dealt with the application of a given rule to different fact patterns, and, in the American context, cases from different jurisdictions.

106. Y.B. Mich. 27 Hen. 8, Mich., f. 26, pl. 10 (1535).

107. Modern scholars are not overly confident in the trustworthiness and sufficiency of the Year Book system. See JOHN H. LANGBEIN ET AL., HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS, 179–87, 253–57 (2009) (discussing defects in the Year Book system and the eventual switch from the “gossipy informality of the Year Books” to more formal “nominate” reports) (internal citations omitted).

108. See, e.g., Jeremiah Smith, *Private Action for Obstruction to Public Right of Passage II*, 15 COLUM. L. REV. 142, 142–43 n.65 (1915) (translating the case into English). Subsequent cites of the 1535 case are to Smith’s 1915 English translation. See https://www.bu.edu/phpbin/lawyearbooks/page.php?volume=11&first_page=567&last_page=567&id=22306 [<https://perma.cc/D2TT-79FJ>] for a picture of the case page.

the parties (the case is now called “anonymous”),¹⁰⁹ and contained a cursory summary of the facts.¹¹⁰ This much we know. An unnamed plaintiff brought suit against a defendant who had obstructed a highway.¹¹¹ The plaintiff used the highway to go back and forth from his house to his field.¹¹² The obstruction caused the plaintiff to suffer unspecified damage.¹¹³

The King’s Bench (one of the two most powerful civil courts in that day¹¹⁴) heard the case and issued two opinions. Chief Justice Baldwin wrote the majority and ruled against the plaintiff, holding that the defendant’s obstruction was (quoting a later English translation) a “nuisance common to all” of the King’s subjects.¹¹⁵ Thus, it was only proper for the King to punish the defendant through criminal prosecution.¹¹⁶ For if this one plaintiff had a private action against the defendant, everyone else would have the same and the defendant could be punished “100 times for the same case” (what later became known as the “multiplicity” objection).¹¹⁷

Justice Fitzherbert dissented. He agreed that the King could bring a criminal prosecution for common nuisance.¹¹⁸ But he discussed another remedy. Where one plaintiff has “greater hurt, or annoyance, than anyone has,” that person could bring an action to recover damages “by reason of this special hurt.”¹¹⁹ Justice Fitzherbert raised a hypothetical that later became known as the “stock

109. See Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 *ECOLOGY L.Q.* 755, 791 n.159 (2001). I am grateful to Professor Antolini’s article for its discussion of the English case law on special damage. While I do not agree with all of the conclusions, her analysis was helpful as I developed my own opinions.

110. See Smith, *supra* note 108, at 142–43 n.65.

111. See *id.*

112. See *id.*

113. See *id.*

114. Alongside the Court of Common Pleas. See LANGBEIN ET AL., *supra* note 107, at 248–50.

115. Smith, *supra* note 108, at 142–43 n.65.

116. See *id.*

117. See *id.*; see also *infra* Part III.C.

118. See Smith, *supra* note 108, at 142–43 n.65.

119. See *id.*

example” of special damage.¹²⁰ Someone digs a ditch across a public road.¹²¹ At night, a rider falls into the ditch with his horse because he cannot see, and he or his horse is “greatly damaged.”¹²² According to Justice Fitzherbert, the rider would have a private action against the ditchdigger because the rider was “more damaged thereby than anyone else.”¹²³ The plaintiff in this case “had more enjoyment of this high way than anyone else had and therefore when it is stopped he has greater damage because he has no other way thence to his [field].”¹²⁴ Therefore, the action was proper.

Justice Fitzherbert’s dissent had a lasting impact on English law. However, the opinion contains at least one puzzle: the content of the special damage requirement is ambiguous.¹²⁵

As referenced below,¹²⁶ there are three basic standards for special damage: difference-in-degree, difference-in-kind, and actual damage. Let me illustrate them by returning to the stock example. The offender digs a ditch across a public road. Everyone who wants to use that road is inconvenienced by the ditch. Everyone is forced to take extra effort and time to either walk around it or climb down and then up it.

The first standard, difference-in-degree, is connected to this common injury. The plaintiff need only show that he has suffered a greater amount of the injury he shares with the general public. Everyone incurs some inconvenience. But the plaintiff, because he is transporting precious goods using a horse-driven carriage, has to spend much more time and treasure, either slowly maneuvering

120. See Antolini, *supra* note 109, at 796 n.170 (citing F.H. Newark, *The Boundaries of Nuisance*, 65 L.Q. REV. 480, 483–84 (1949)).

121. See Smith, *supra* note 108, at 142–43 n.65.

122. See *id.*

123. See *id.*

124. See *id.*

125. Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4 J. TORT L. 1, 14 (2011) lays out another puzzle that is less relevant but worth mentioning. Merrill capably argues that Fitzherbert did not intend to create a wholly new cause of action but was merely referring to the ability of a specially injured plaintiff to bring a standard negligence action. See *id.* It’s not clear that this theoretical distinction matters much in practice, see *id.* at 15, but it demonstrates again how the 1535 case is shrouded in confusion.

126. See *infra* Part II.B to III.C.

around, or reversing course and choosing a completely different route. The nature of the injury is similar, but the degree is greater.

The second standard, difference-in-kind, requires an injury different in kind from the common injury of inconvenience. For example, take the night rider who falls into the ditch and lames his horse. Everyone is inconvenienced by the ditch. But not everyone loses a mode of transportation. Such a plaintiff has a difference-in-kind injury. There are two versions of the difference-in-kind standard. The “weak” version of difference-in-kind would allow multiple plaintiffs to bring an action for the same different-in-kind injury—there could be two plaintiffs with injured steeds. The “strong” or “unique” version takes the multiplicity worry to the extreme. A plaintiff could only bring a private action if he suffered a unique injury shared with no other member of the public.

The difference-in-kind standard is plagued by multiple issues. To start, it is often difficult to distinguish difference-in-kind from difference-in-degree. A poke versus a punch, minor shoplifting versus major financial theft—we have different categories for things that are a matter of degree. The outcome could depend on the level of generality at which one frames the injury. It can also be difficult to distinguish between the strong and weak versions of the difference-in-kind standard. What makes an injury unique versus merely special? Assume the highway obstruction lames my horse and that of a companion. Can I argue that my injury is unique because my horse is the only horse that is mine, as there is only one of me and I have been injured in this way? Or does it matter that my horse is slightly different than every other lamed horse in some minor way? Again, the level of generality matters much.¹²⁷

The third standard, actual damage, exchanges the line between degree and kind for another problem. The actual damage standard doesn’t ask about differences between the plaintiff’s injury and the

127. Note also a defect common to both of the “difference” standards. One must determine the baseline—what and how much of an injury the public at large suffers—to determine whether the plaintiff’s injury is greater in degree or different in kind. The more injurious of a public baseline, the harder it will be for the individual plaintiff to prevail on special damage.

public's shared injury. Rather, it requires that the plaintiff suffer at least "this much" of an injury (however "this much" is defined). So, one could have an actual damage standard that required monetary or property damage. All other injuries, whether shared or not, would not suffice. Actual damage looks like modern-day injury in fact, which, while caring about comparative harm in theory,¹²⁸ institutes somewhat of an absolute bar in practice.¹²⁹ An actual damage regime could be very lenient or very strict, depending on where the bar is set.

Returning to Fitzherbert's dissent, one can plausibly read it in two ways. The hypothetical night rider in the stock example suffers a different-in-kind injury—his horse is lamed, while everyone else is merely inconvenienced. But the unnamed plaintiff in the actual case appears to suffer a different-in-degree injury, because he has "more enjoyment of this high way" than others and was thus inconvenienced more than the general public.¹³⁰ Of course, none of this is helped by sketchy facts, short opinions, and a stock example hypothetical which is arguably dicta in a dissenting opinion.

2. Early English Treatises

English treatise writers followed the lead of Fitzherbert's hypothetical. In his 1628 opus, Edward Coke cited the 1535 "anonymous" case:

For if the way be a common way, if any man be disturbed to go that way, or if a ditch be made overthwart the way so as he cannot go, yet shall he not have an action upon his case: and this the law

128. Cf. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982) ("The Art. III aspect of standing also reflects a due regard for the autonomy of those persons likely to be *most directly affected* by a judicial order.") (emphasis added). See also Richard M. Re, *Relative Standing*, 102 GEO. L.J. 1191, 1195 (2014) ("Contrary to the case law's express aims, standing jurisprudence is not content to find adequate plaintiffs, as measured against some unchanging yardstick of factual harm. Instead, standing is often made available on a relative basis.").

129. See *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021) (limiting injury in fact to tangible and certain intangible injuries).

130. See Smith, *supra* note 108, at 142–43 n.65.

provided for avoiding of multiplicity of suits, for if any one man might have an action, all men might have the like.

But the law for this common nuisance hath provided an apt remedy, and that is by presentment in the leet or in the torne, unless any man hath a particular damage; as if he and his horse fall into the ditch, whereby he received hurt and loss, there for this special damage, which is not common to others, he shall have an action upon his case . . .¹³¹

In his 1736 *New Abridgment of the Law*, Matthew Bacon repeated in large part the same doctrine:

But it is clearly agreed, that common nuisances against the public are only punishable by a public prosecution; and that no action on the case will lie at the suit of the party injured; as this would create a multiplicity of actions, one man being as well entitled to bring an action as another; and therefore, in those cases, the remedy must be by indictment at the suit of the king.

But if by such a nuisance the party suffer a (a) particular damage, as if, by stopping up a highway with logs, &c. his horse throws him, by which he is wounded or hurt, an action lies. (b)¹³²

However, Bacon's footnote (a) highlighted a distinction between two hypotheticals involving highway obstructions:

(a) But if a highway is stopped, that a man is delayed in his journey a little while, and by reason thereof he is damnified, or some important affair neglected; this is not such a special damage, for which an action on the case will lie; but a particular damage,

131. See 1 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND § 56a (J. Moore, 1791) (1628) (citing 27 H. 8. 27.) (cleaned up). Coke also cited Williams's Case (1591) 77 Eng. Rep. 163; 5 Co. Rep. 72b (KB). In that case, an English lord sued a vicar for failing to celebrate a chapel service. The court would have allowed the action if the chapel was "private only for himself and his servants and family within the said manor," although the lord "only (and none of his family) should have the action." See *id.* at 164. But as the chapel was "public and common to all his tenants of the same manor," the lord could bring "no action on the case." *Id.* Otherwise, "every of his tenants might also have his action on the case as well as the lord himself, and so infinite actions for one default." *Id.*

132. 5 MATTHEW BACON, NEW ABRIDGEMENT OF THE LAW 798 (A. Strahan, 1832) (1736).

to maintain this action, ought to be direct, and not consequential; as, for instance, the loss of his horse, or some corporal hurt, in falling into a trench in the highway, &c.¹³³

Bacon here raised a distinction between direct and consequential damage. As later decisions will show,¹³⁴ the word “consequential” is equivalent to “indirect,” especially in a temporal sense. The man who loses his horse is hurt directly and immediately. The man who is inconvenienced and later suffers damage on account of that is hurt consequentially. As with the divide between degree and kind, this line can get blurry.¹³⁵

Finally in 1768, William Blackstone described an approach similar to that of Coke in the third volume of his *Commentaries on the Laws of England*.¹³⁶ Justice Thomas quoted part of this section in his *Spokeo* concurrence:¹³⁷

133. See *id.* at 798(a).

134. See *infra* Part II.A.3, II.B.3.

135. One might even argue that the direct damage requirement looks more like actual damage, because it does not focus on whether the damage a plaintiff experienced is more or less than that which the public experienced, but rather on whether the plaintiff shows a sufficient quantum of injury.

136. One necessary remark about Blackstone: many originalists view Blackstone as “the preeminent authority on English law for the founding generation.” *District of Columbia v. Heller*, 554 U.S. 570, 593–94 (2008) (citation omitted). Accordingly, the reader might be tempted to give epistemic priority to Blackstone’s understanding of special damage for purposes of American originalism. That would be wrong for two reasons. The *Commentaries* were first circulated in America in the 1770s. See PAUL M. HAMLIN, *LEGAL EDUCATION IN COLONIAL NEW YORK* 64 (1939). But as Martin Jordan Minot has persuasively argued, there is good reason to think that Blackstone’s American influence did not crest until the early 1800s. See Martin Jordan Minot, Note, *The Irrelevance of Blackstone: Rethinking the Eighteenth-Century Importance of the Commentaries*, 104 VA. L. REV. 1359, 1362–64, 1367 (2018). Other, earlier authorities like Coke, Hale, and Rolle were likely as influential or more on the Founding generation’s legal thinking. See *id.* at 1391–97. Blackstone’s view is relevant but not specially so. Beyond that, early American opinions on special damage spend far more time citing English or American decisions than they do citing Blackstone or other treatises. And when they do cite Blackstone, he is not given pride of place. See, e.g., *Harrison v. Sterett*, 4 H. & McH. 540, 548 (Md. Prov. 1774) (citing Blackstone next to Bacon, Coke, and many early English cases).

137. See *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1551–52 (2016) (Thomas, J., concurring) (citation omitted).

[T]he law gives no private remedy for anything but a private wrong. Therefore no action lies for a public or common nuisance, but an indictment only: because the damage being common to all the king's subjects, no one can assign his particular proportion of it; or, he could, it would be extremely hard, if every subject in the kingdom were allowed to harass the offender with separate actions. For this reason, no person, natural or corporate, can have an action [for] a public nuisance, or punish it; but only the king in his public capacity of supreme governor, and pater-familias of the kingdom.¹³⁸

Yet this rule admits of one exception; where a private person suffers some extraordinary damage, beyond the rest of the king's subjects, by a public nuisance: in which case shall have a private satisfaction by action. As if, by means of a ditch dug across a public way, which is a common nuisance, a man or his horse suffer any injury by falling therein; there, for this particular damage, which is not common to others, the party shall have his action.¹³⁹

Moving from the “anonymous” case (1535) to Coke (1628), Bacon (1736), and Blackstone (1768), the standard for special damage gets clearer. All three jurists stress Chief Justice Baldwin's worry about multiplicity. And while it's simplistic to count the frequency of the words like “more,” “particular,” “special,” and “extraordinary,”¹⁴⁰ the heightened language and the references to the stock example seem to point to a difference-in-kind standard.

Even then, there is not complete alignment. Bacon discusses direct versus consequential damage, while Coke and Blackstone do not. The three treatises directionally agree on difference-in-kind. But Blackstone seems to point to a strong version of that standard (namely, “extraordinary damage, beyond the rest of the king's subjects”), whereby only unique injuries can support a private action.¹⁴¹ Regardless, the treatises are only part of the legal context. Thus, I turn to the cases.

138. 3 WILLIAM BLACKSTONE, COMMENTARIES *219–20 (cleaned up).

139. *Id.* at *220 (citing Coke Littleton 56a and *Williams's Case*) (cleaned up).

140. *But see* Antolini, *supra* note 109, at 793 (doing this kind of verbal tracking).

141. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES *220.

3. Early English Cases

Since there is no shortage of relevant precedent, I have cabined my inquiry in this section to what some have called the “principal” or “orthodox” English cases on private actions for public nuisance.¹⁴²

As an early Pennsylvania court observed, the English doctrine was far from consistent. “The general principle has been always agreed, that for an obstruction to a highway, which is a common nuisance, an action cannot be supported, but by a person who has suffered some *special damage*. But in the application of this rule to the different cases which have arisen, there have been decisions which are not to be reconciled.”¹⁴³

In *Hart v. Basset* (1681), a highway obstruction delayed the plaintiff from carrying tithes (crops) to his barn, requiring “a longer and more difficult way.”¹⁴⁴ Reminded that “no one shall have an action for that which every one suffers,” the King’s Bench observed that the rule “ought not to be taken too largely.”¹⁴⁵ Since the plaintiff had “particular damage” in “labour and pains” associated with the alternate route, the private action was sustained.¹⁴⁶ Interestingly, the court referenced the stock example, remarking that the plaintiff’s damage “may well be of more value than the loss of a horse, or such damage as is allowed to maintain an action in such a case.”¹⁴⁷ The opinion is short, but *Hart* is best understood as embracing a difference-in-degree standard (coming close even to actual damage).

By contrast, in *Paine v. Partrich* (1692),¹⁴⁸ the defendant built a bridge that obstructed a public waterway. The plaintiff alleged the

142. See Antolini, *supra* note 109, at 796 n.179 (listing authorities that emphasize the following decisions) (citations omitted).

143. See *Hughes v. Heiser*, 1 Binn. 463, 468 (Pa. 1808) (citing the following cases); see also *Pierce v. Dart*, 7 Cow. 609, 610 (N.Y. Sup. Ct. 1827) (“The English cases have fluctuated . . .”).

144. (1681) 84 Eng. Rep. 1194, 1194; T. Jones 156, 156 (KB).

145. *Id.* at 1195.

146. *Id.*

147. *Id.*

148. (1692) 90 Eng. Rep. 715, 715; Carthew 191, 191 (KB).

loss of the “liberty of the passage” and brought a private action.¹⁴⁹ The court rejected the suit, “chiefly to avoid multiplicity of actions.”¹⁵⁰ For if “it may be brought by the plaintiff, it may be maintainable by every person passing that way.”¹⁵¹ Moreover, mere delay or inconvenience was not sufficient.¹⁵² In its refusal of inconvenience, even significant inconvenience, *Paine* is likely best understood as rejecting a difference-in-degree standard.¹⁵³

Two cases best demonstrate the tension in the doctrine: *Iveson v. Moore* (1699)¹⁵⁴ and *Chichester v. Lethbridge* (1738).¹⁵⁵ In *Iveson*, a coal merchant was impeded in the transportation of coal by the defendant’s highway obstruction, resulting in inconvenience.¹⁵⁶ The four justices on the King’s Bench split 2-2.¹⁵⁷ The precise contours of the disagreement are unclear—the opinions are lengthy and convoluted. The justices divided on whether the plaintiff had sufficiently shown that he suffered “more particular damage,”¹⁵⁸ but one could plausibly frame arguments as difference-in-degree or difference-in-

149. *Id.* at 717.

150. *Id.*

151. *Id.*

152. It should also be noted that the court in *Paine* picked up on the direct versus consequential distinction that Bacon later emphasized. *See id.*

153. In *Hubert v. Groves*, the King’s Bench seemed to follow the rationale of *Paine* over that of *Hart*. (1794) 170 Eng. Rep. 308; 1 Esp. 148 (KB). The plaintiff, a coal and timber merchant, was impeded in his business by a highway obstruction which required a “circuitous and inconvenient way.” *Id.* at 308. Ostensibly, the merchant incurred more expense by this obstruction than the average member of the public, on account of his business. Without much discussion, the court denied the suit. *See id.* at 309. Even after the plaintiff moved for a new trial and cited *Hart*, the court refused the suit. *See id.* *Hubert* would seem to add more support to a difference-in-kind standard. But since *Hubert* is an English decision handed down six years after the Constitution’s ratification in 1788, it is not considered indicative of original meaning. *See Hughes v. Heiser*, 1 Binn. 463, 469 (Pa. 1808) (“Since the revolution, the case of *Hubert v. Groves* (shortly reported in 1 Esp. 148.) has been adjudged in express contradiction to *Hart v. Basset*. This case of *Hubert v. Groves*, is no authority here, and no further to be regarded than its intrinsic merit demands.”).

154. (1699) 91 Eng. Rep. 1224; 1 Ld. Raym. 486 (KB).

155. (1738) 125 Eng. Rep. 1061; Willes 71 (CP).

156. *Iveson*, 91 Eng. Rep. at 1226.

157. *See id.* at 1230.

158. *See id.* at 1229.

kind. The case was later heard by the Justices of the Court of Common Pleas and Barons of the Exchequer, who unanimously decided that the plaintiff's action was proper.¹⁵⁹ While short, that opinion likely points to difference-in-degree.¹⁶⁰

In *Chichester*, a highway obstruction prevented the plaintiff from travelling back and forth in his coach.¹⁶¹ The court quickly allowed the plaintiff's action on the ground of *Hart*.¹⁶² But the case is useful for a reporter's note, which affirmed the general rule against public nuisance torts. At the same time, the reporter noted that "a question has frequently arisen whether the damage stated in each particular case were sufficient to bring it within the exception to the general rule; and this question has received various determinations according to the circumstances of each case."¹⁶³ In other words: We all agree on the general rule, but we disagree on how it works.

By the early 1800s, some resolution arrived. In *Rose v. Miles* (1815),¹⁶⁴ the plaintiff sought to ship goods over a public waterway, which was obstructed by the defendant. An alternative, more expensive route was required.¹⁶⁵ The seriatim opinions of the King's Bench easily held for the plaintiff.¹⁶⁶ The chief justice observed that the obstruction was "something substantially more injurious to [the plaintiff], than to the public at large, who might only have it in

159. See *id.* at 1230. The statement of the combined Common Pleas + Exchequer body is not in the *Iveson* report but was later noted by the reporter in *Chichester*. See 125 Eng. Rep. at 1063 n.(a)1.

160. See *Chichester*, 125 Eng. Rep. at 1063 n.(a)1 ("But the Court (the King's Bench) being divided, the matter was reserved for the opinion of the rest of the Judges, who all agreed in the opinion of Turton J. and Gould J. that the action lay. The reason the Judges went upon was principally this, that it sufficiently appeared that the plaintiff must and did necessarily suffer a special damage more than the rest of the King's subjects by the obstruction of this way; because it was set forth that the only way to come to the coal pits from one part of the county was through this way, by which it must be understood, without any allegation of loss of customers, that the plaintiff did suffer particularly in respect to his trade by the plaintiffs [*sic*] wrong.").

161. See *id.* at 1062–63.

162. See *id.*

163. See *id.* at 1063 n.(a)1.

164. (1815) 105 Eng. Rep. 773, 773; 4 M. & S. 101, 101 (KB).

165. See *id.*

166. See *id.* at 774.

contemplation to use" the waterway.¹⁶⁷ Besides, "[i]f a man's time or his money are of any value, it seems to me that this plaintiff has shewn a particular damage."¹⁶⁸ Another justice remarked similarly that "[i]f this be not a particular damage, I scarcely know what is."¹⁶⁹ The court claimed to follow cases like *Paine*,¹⁷⁰ but it is more likely that *Rose* overruled those cases. In those earlier cases, plaintiffs had been inconvenienced in their travel and their suits were refused. Not so in *Rose*, which placed greatest emphasis on the expense that the plaintiff incurred (all three opinions cited that factor).¹⁷¹ Accordingly, *Rose* is likely an actual damage case. This is confirmed by *Greasly v. Codling* (1824),¹⁷² which followed *Rose*. The chief justice in *Greasly* characterized *Rose* as holding that "where any damage was incurred, an action would lie."¹⁷³

In summary, what can we take away from the English sources? The Fitzherbert dissent in the 1535 case discusses two different standards for special damage. Later treatises seem to push towards a difference-in-kind standard, with uncertainty about a weak or strong version. The case law admits of its own fragmentation, with more decisions pushing towards difference-in-degree.¹⁷⁴ *Rose* and *Greasly* clean things up a bit.¹⁷⁵ But those cases came decades after

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 773–74.

171. *See id.*; *see also* *Pierce v. Dart*, 7 Cow. 609, 611 (N.Y. Sup. Ct. 1827) (suggesting that *Rose* settled the doctrine, at least for a time).

172. (1824) 130 Eng. Rep. 307; 2 Bing. 263 (CP).

173. *See id.* at 308.

174. I would count *Chichester*, *Iveson*, and *Hart* for difference-in-degree and *Paine* for difference-in-kind (*Hubert* is too late). I would note that later authorities would disagree over how to read these cases. Antolini also reads the English cases as more supportive of a difference-in-degree standard, *see* Antolini, *supra* note 109, at 796–800, whereas Jeremiah Smith read the same cases as supportive of an actual damage standard. *See* Smith, *supra* note 108, at 143–44. And as noted below, a number of state courts, which were informed about the English decisions, went towards a difference-in-kind standard. *See infra* Part II.B.3.

175. Although even then one can see post-*Rose* tension in English materials. In 1821, Robert Henley Eden seemed to endorse a difference-in-degree standard. *See* ROBERT HENLEY EDEN, A TREATISE ON THE LAW OF INJUNCTIONS 230–31 (1821) ("[F]or, as at law,

the Constitution's ratification in 1788, and they go in the new direction of an actual damage standard. At the very least, we can say that during the Founding, if we are to enter into the minds of those thinking about Article III and assume these English materials are relevant, it is hard to find a clean answer to this question of special damage.

B. Early American Law and Special Damage

The English materials are conflicted and unclear. So, I turn to American law. Here also, there are a number of treatises and cases, both federal and state. I begin by discussing the treatises, which are either wholly or mostly unhelpful. Then, I turn to the federal cases, which are few, distant from the Founding, and unilluminating. Finally, I turn to the state cases, which I consider the most instructive on special damage in early American law. Unfortunately, the early state courts disagreed with each other.

1. Early American Treatises

In the relevant period after ratification, the following three American treatises discussed public nuisance and special damage.¹⁷⁶ Of the three, only one is plausibly insightful into the special damage standard and not much at that.

a party may have a private satisfaction by civil suit for that which is a public nuisance; so in equity, if there is a special grievance arising out of the common cause of injury which presses more upon particular individuals, than upon others not so immediately within the influence of it, it should seem that they would be entitled to the interference of a court of equity for the protection of their private rights.”). Twelve years later, Joseph Chitty leaned toward actual damage. See JOSEPH CHITTY, *THE PRACTICE OF THE LAW IN ALL ITS PRINCIPAL DEPARTMENTS* 3a (1833) (“Some public rights, however, are also sometimes private, so that any individual who happens to be particularly interested or injured in any sensible degree, may not only interfere and abate or remove the nuisance, and prosecute for the benefit of the community, but also may have his private remedy.”); see *id.* at 11a (citing *Chichester* and *Greasly*).

176. During this time, a number of English treatises were published in American editions and some of these discussed special damage. See, e.g., EDEN, *supra* note 175, at 162–63. But since these American editions mostly reflected English doctrine, I do not include them as evidence of American Founding Era thought, even though they had some downstream influence on American courts. See *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. 518, 521 (1851) (citing EDEN).

Zephaniah Swift's 1795 work *A System of the Laws of the State of Connecticut* discussed the public nuisance tort, but Swift only mentioned the special damage requirement without explaining its content.¹⁷⁷ In his 1803 American edition of Blackstone's *Commentaries*, St. George Tucker made no change to the section on the public nuisance tort beyond adding a distinction between direct and consequential damage (which Bacon had emphasized earlier).¹⁷⁸ Finally, in his 1836 *Commentaries on Equity Jurisprudence*, Joseph Story seemed to embrace a direct (versus consequential) standard for special damage.¹⁷⁹ However, Story didn't take a position on difference-in-kind, difference-in-degree, or actual damage.¹⁸⁰ And written almost 50 years after ratification, his treatise is not first-rate evidence of original meaning.¹⁸¹

177. See 2 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 87 (1795) ("No action lies in favour of a private person, for a public nuisance, unless he has sustained some special damage thereby; and then he may bring his action to recover such special damage.").

178. 4 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 220 n.* (St. George Tucker ed., 1803) ("But the particular damage in this case must be direct, and not consequential, as by being delayed in a journey of importance.") (citation omitted). Beyond this comment, Tucker adds nothing else to the page on public nuisance tort actions.

179. 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 204 (1836) ("In the next place, a Court of Equity will not interfere merely upon the information of the Attorney General, but also upon the application of private parties, directly affected by the nuisance; whereas, at law, in many cases, the remedy is, or may be, solely through the instrumentality of the Attorney General.") (emphasis added).

180. Offhand, I would note that the discussion of public nuisance by Story and Eden as it relates to injunctions rebuts an isolated critique made of Justice Thomas's concurrence in *Spokeo*. While commending the *Spokeo* concurrence, James Pfander argued that it focused too much on common law and not enough on equity. See Pfander, *supra* note 36, at 216. However, we can see in Story and Eden that the rule about special damage was similar across law and equity. Thus, insofar as one thinks Justice Thomas is right about public rights, special damage, and standing, that *Spokeo* did not discuss equity should not impair the force of his argument.

181. Cf. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 856 (1995) (Thomas, J., dissenting) ("Despite the majority's citation of *Garcia* and *McCulloch*, the only true support for its view of the Tenth Amendment comes from Joseph Story's 1833 treatise on constitutional law. . . . Justice Story was a brilliant and accomplished man, and one cannot casually dismiss his views. On the other hand, he was not a member of the Founding

2. Early Federal Cases

From 1788 to the start of the Civil War, only a handful of federal court cases mentioned the public nuisance tort. Still fewer contained discussion of the special damage standard.

In *Barron v. Baltimore* (1833), the plaintiff sued the city of Baltimore in state court for losses related to a public works project.¹⁸² The alleged effect of the city's actions was the additional depositing of material in the harbor in front of the plaintiff's wharf, which made the water around the wharf too shallow and reduced its value.¹⁸³ The plaintiff brought an action for public nuisance against the city. He won in front of a Maryland jury, lost in the state appellate courts, and appealed to the Supreme Court by asserting a federal constitutional claim.¹⁸⁴ The Court did not reach the public nuisance issue, but rejected subject matter jurisdiction on the basis that the Bill of Rights was not incorporated against the States.¹⁸⁵ As relevant here, the plaintiff's argument before the Court referenced special damage and was ambiguous between difference-in-degree and difference-in-kind.¹⁸⁶

In *Mayor of Georgetown v. Alexandria Canal Co.* (1838), city officials sued a canal company for construction activities that allegedly injured the Georgetown channel and harbor.¹⁸⁷ The officials brought a public nuisance suit in federal circuit court—the parties appear to

generation, and his Commentaries on the Constitution were written a half century after the framing.”).

182. 32 U.S. (7 Pet.) 243 (1833).

183. *See id.* at 243–44.

184. *See id.* at 244–46.

185. *See id.* at 250 (“In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in congress, and adopted by the states. These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.”).

186. *See id.* at 246 (“[O]n that head the plaintiff will contend that special damage is fully shown here, within the principle of the cases where an individual injury resulting from a public nuisance is deemed actionable, the wrong being merely public only so long as the loss suffered in the particular case is no more than all members of the community suffer.”) (emphasis added).

187. 37 U.S. (12 Pet.) 91, 92–93 (1838).

be diverse—and asked for an injunction to stay further construction.¹⁸⁸ The circuit court dismissed the suit.¹⁸⁹ On appeal, the Supreme Court affirmed the lower court.¹⁹⁰ In doing so, the Court cited Bacon and remarked on the special damage requirement:

If any particular individual shall have sustained special damage from the erection of it, he may maintain a private action for such special damage; because to that extent he has suffered beyond his portion of injury, in common with the community at large.¹⁹¹

The cursory discussion makes it harder to determine the applicable standard. Does suffering “beyond his portion of injury” refer to degree? Or is this a case where a difference in degree is severe enough to constitute a difference in kind? The reasoning looks most like difference-in-degree, but it is not clear.

In *Spooner v. McConnell* (1838), an Ohio federal circuit court entertained a bill in equity alleging a public nuisance.¹⁹² The plaintiff, Lysander Spooner, asked the circuit court to enjoin the building of dams that would obstruct his navigation of the Ohio river.¹⁹³ Justice John McLean sat on the *Mayor of Georgetown* case and cited that decision.¹⁹⁴ But here, his reference to injury alone, without concern for a comparison to the public, reveals an actual damage standard:

If, in attempting to travel the road, he should be prevented from doing so, by the obstruction, he would have a right to bring his action at law for damages. And this is the only appropriate redress, which an individual, under such circumstances, can have.¹⁹⁵

188. *See id.* at 93–94.

189. *See id.* at 94.

190. *See id.* at 100.

191. *See id.* at 97–98.

192. 22 F.Cas. 939, 940–41 (C.C.D. Ohio 1838) (No. 13,245) (McLean, J.).

193. *See id.*

194. *See id.* at 954 (citation omitted).

195. *Id.* at 947. McLean’s standard seems like actual damage because it allows all who suffer the inconvenience of delay to bring an action (which would stand in direct contradiction to the foundational rule in the 1535 “anonymous” case).

In *Irwin v. Dixion* (1850), the Supreme Court considered another bill in equity alleging a public nuisance.¹⁹⁶ The Court cited *Mayor of Georgetown* and followed that decision with similarly ambiguous language:

And no remedy whatever exists in these cases by an individual, unless he has suffered some private, direct, and material damage beyond the public at large; as well as damage otherwise irreparable In cases of injury to individual rights by obstructions or supposed nuisances, an injunction is still less favored, and does not lie at all permanently, in England and most of the States, unless the injury is not only greater to the complainant than to others¹⁹⁷

Finally, in *Pennsylvania v. Wheeling & Belmont Bridge Co.* (1851), the Supreme Court confronted a bill in equity for public nuisance in its original jurisdiction.¹⁹⁸ The Court cited many of the authorities previously referenced (Coke, Story, Eden, *Mayor of Georgetown*).¹⁹⁹ But while the Court repeatedly referenced “special injury,” “special damage,” and “special mischief,” neither the Court’s words nor the holding give any guidance on what those terms meant.

Thus, during a period that spanned multiple decades, the federal courts thrice gave any guidance about the special damage requirement. In two cases, the Supreme Court’s words are arguably ambiguous between difference-in-degree and difference-in-kind. In the third, a justice riding circuit leaned towards actual damage. The lack of robust precedent can be explained by the limited jurisdiction of the federal courts—public nuisance was not a federal cause of action and most of these cases were diversity. Yet, the scarcity remains, as well does the temporal distance between these precedents and 1788. Even putting those concerns to the side, one is left without clarity as to what the early federal courts thought about special damage.

196. 50 U.S. (9 How.) 10 (1850).

197. *Id.* at 27–28 (internal citations omitted).

198. 54 U.S. 518 (1852).

199. *See id.* at 521 (citations omitted).

Given these defects, I turn to the final set of historical materials, early American state court decisions, which are of most use in discerning the original understanding.

3. Early State Cases

Recall the English reporter's note about special damage in *Chichester v. Lethbridge* (1738), which emphasized agreement on the rule and sharp division on its application.²⁰⁰ The situation was little different in early state courts. In 1827, a New York court remarked that the American cases were not "exactly uniform."²⁰¹ Looking back at almost a century of American court decisions, H.G. Wood made a similar point in 1875:

It is easy to say "that a person may have an action to recover damages arising from a public nuisance, that are special and particular to him, and that are not a part of the common injury," but that does not afford the light needed. The question is, what damages are regarded as special and particular, and what are not, and this can be best answered by reference to what has been done and held by the courts in particular cases.²⁰²

The earliest reported "state" case is *Harrison v. Sterett*, a 1774 case in Maryland provincial court.²⁰³ The defendant placed a large amount of "sand, earth, and stones" in a waterway, impeding the plaintiff's passage.²⁰⁴ Most of the reported text records the arguments of the attorneys, who cited many of the English authorities from above.²⁰⁵ The attorneys disagreed over everything: whether the damage must be direct or consequential, whether the damage must be different in kind or simply in degree, whether the complaint was sufficiently pled.²⁰⁶ The court punted on the legal issues,

200. (1738) 125 Eng. Rep. 1061, 1063 n.4; Willes 71, 74 n.4 (CP).

201. *Pierce v. Dart*, 7 Cow. 609, 611 (N.Y. Sup. Ct. 1827).

202. H.G. WOOD, A PRACTICAL TREATISE ON THE LAW OF NUISANCES IN THEIR VARIOUS FORMS; INCLUDING REMEDIES THEREFOR AT LAW AND IN EQUITY 690 (1875).

203. 4 H. & McH. 540 (Md. Prov. 1774).

204. *See id.* at 540–41.

205. *See id.* at 545–50 (citing, *inter alia*, the 1535 "anonymous" case, Coke, Bacon, and Blackstone).

206. *See id.*

leaving it up to the jury, which gave judgment for the plaintiff.²⁰⁷ *Harrison* is notable because of its proximity to ratification.²⁰⁸ It also serves as evidence, if only a single data point, of American disagreement over the special damage standard.

Over time, the state courts staked out various positions. Several embraced difference-in-kind. In *Barr v. Stevens* (1808), the plaintiffs challenged an alteration to the public roads.²⁰⁹ A Kentucky appellate court rejected the suit, referencing the stock example from the 1535 case.²¹⁰ For multiplicity reasons, the court applied a difference-in-kind standard.²¹¹ In *Dunn v. Stone* (1815), the plaintiff complained about a dam on a stream that interfered with his fishery business.²¹² The North Carolina supreme court dismissed both a difference-in-degree²¹³ and a consequential damage standard.²¹⁴ In *Commonwealth v. Webb* (1828), the general court of Virginia emphasized the remedy of criminal prosecutions for injuries that could

207. *See id.* at 550.

208. This proximity is particularly important because many of the below state court cases are decades from 1788.

209. 4 Ky. (1 Bibb) 292, 292–93 (Ky. 1808).

210. *See id.* at 293 (“As if a man fell trees in the highway, whereby it is stopped up to the annoyance of the passengers, it is a nuisance, common to all; a public nuisance, for which at the common law, he might be prosecuted by the Commonwealth, and punished; but a suit against him could not be maintained by a private individual who had only sustained the injury, common to all, of being turned out of the way: but if in attempting to ride over the trees felled in the road, an individual’s horse should be thrown, whereby either himself or his horse is wounded, he can maintain an action for this special damage.”).

211. *See id.* (“The reason why he cannot without special damage maintain an action for the nuisance against the wrongdoer is, that if one could sue, all might; which would be ruinous.”).

212. 4 N.C. 241 (N.C. 1815).

213. *See id.* at 242 (“This action cannot be supported without admitting, at the same time, the right of all such persons, even to the very source of the stream, to maintain similar actions. Their respective losses may vary in degree, but the principle of the action is equally applicable to them all; and if suits were thus multiplied, the inevitable consequence would be to overwhelm any individual against whom they might be brought . . .”).

214. *See id.* at 242–43 (requiring “special injury which is direct and not consequential”).

not clear a difference-in-kind bar.²¹⁵ In a series of 1840s decisions, Connecticut courts consistently followed a difference-in-kind standard.²¹⁶ The last of these decisions, *Seeley v. Bishop* (1848), viewed the difference-in-kind standard as self-evident—“too familiar to require a reference to authorities.”²¹⁷

However, not all state courts saw it the same way. In *Hughes v. Heiser* (1808), the plaintiff was inconvenienced by the defendant’s obstruction of a waterway.²¹⁸ The Pennsylvania court noted the disagreement among English cases like *Hart*, *Iveson*, and *Chichester*.²¹⁹ The court allowed the action without picking a definite rule (although the suit could *not* clear a difference-in-kind standard because others could be similarly inconvenienced).²²⁰ The Pennsylvania court also refused to cabin the public nuisance tort to direct special damage.²²¹ In *Stetson v. Faxon* (1837), the supreme judicial court of Massachusetts recounted the history of the public nuisance tort from 1535 up through *Rose* and *Greasly*.²²² The court vacillated

215. *See* 27 Va. (6 Rand.) 726, 729 (Va. Gen. Ct. 1828) (“The necessity of thus restricting public prosecutions for nuisances, is strongly enforced by a rule of Law, which we find no where contradicted, that no private action can be maintained for a public nuisance, without special damage done to the party complaining. By special damage, we understand, an injury different in kind from that of which the public complains.”).

216. *See* *Bigelow v. Hartford Bridge Co.*, 14 Conn. 565, 577–78 (Conn. 1842) (“It is very clear, that a bill in equity will not be entertained for an injunction against a public nuisance, unless it shows that the plaintiff will sustain a special or peculiar damage from it, an injury distinct from that done to the public at large.”); *see also* *O’Brien v. Norwich & W. R. Co.*, 17 Conn. 372, 375 (Conn. 1845) (citing *Bigelow*); *Seeley v. Bishop*, 19 Conn. 128, 133 (Conn. 1848) (citing *O’Brien*).

217. *See Seeley*, 19 Conn. at 135.

218. 1 Binn. 463, 463–64 (Pa. 1808).

219. *See id.* at 468–69.

220. *See id.* at 469 (“There is no occasion, however, to decide to which of these cases the court inclines, because they think the case before them stronger than either. The plaintiff has averred that he had procured a large quantity of boards and timber, and made them into rafts to bring down the river; that he seized the opportunity of a flood, and did come down as far as the obstruction, and was there stopped by the obstruction. It is certain that he must have suffered special damage . . .”).

221. *See id.* (“It is certain that he must have suffered special damage, and the jury have found so; and if he has, it is immaterial whether it was immediate or consequential.”).

222. 36 Mass. 147, 154–59 (Mass. 1837) (“The general rule seems clear enough, but the difficulty arises from its application to the particular case.”).

between actual damage and difference-in-kind, appearing to land on actual damage.²²³

A set of New York State decisions illustrates the dissensus around difference-in-kind and the overall flux in the special damage doctrine. From 1822 to 1829, three New York courts issued four decisions that touched on every theory of special damage.²²⁴

In *Corning v. Lowerre* (1822), the defendant built a house on a public street, affecting the general right of passage and multiple plaintiffs' "enjoyment" and "value" of their nearby property.²²⁵ The New York chancery court gave judgment for the plaintiffs and granted an injunction against the defendant.²²⁶ Because the decision is so short, the special damage standard is not clear.²²⁷ But it seems relevant that later federal courts cited *Corning* and arguably applied a

223. There is some language that points towards difference-in-kind. *See, e.g., id.* at 161 ("We agree that the plaintiff must set forth a special damage . . . He must fail unless he goes on and states that he has sustained a particular injury, different in its character from that which is common to all the citizens."). However, the citation of cases like *Rose* and *Greasly* and other language indicates the lurking standard of actual damage. *See, e.g., id.* at 160 ("Let those who suffer, have their actions. The question of damages may be safely [e]ntrusted to the jury. We mean to give no countenance for suits *de minimis*. But suppose that twenty men in the course of one night should fall into that ditch and receive injury, could it be maintained that each of them might not severally recover special damages, according to the extent of the actual injury received by each?"). 14 years later, the Massachusetts courts cleared up this confusion with a clear endorsement of difference-in-kind. *See Smith v. City of Boston*, 61 Mass. 254, 255–56 (Mass. 1851) ("But if he suffers a peculiar and special damage, not common to the public—as by driving upon such an obstruction in the night, and injuring his horse—he may have his private action against the party who placed it there. The damage complained of in this case, though it may be greater in degree, [as] consequence of the proximity of the petitioner's estates, does not differ in kind from that of any other members of the community who would have had occasion more or less frequently to pass over the discontinued highway.").

224. *See Corning v. Lowerre*, 6 Johns. Ch. 439 (N.Y. Ch. 1822); *Pierce v. Dart*, 7 Cow. 609, 611–12 (N.Y. Sup. Ct. 1827); *Lansing v. Smith*, 8 Cow. 146 (N.Y. Sup. Ct. 1828), *affirmed on other grounds*, 4 Wend. 9 (N.Y. 1829).

225. *See Corning*, 6 Johns. Ch. at 440.

226. *See id.*

227. *See id.* ("THE CHANCELLOR distinguished this case from that of *The Attorney-General v. The Utica Insurance Company*, (2 Johns. Ch. Rep. 371.) inasmuch as here was a special grievance to the plaintiffs, affecting the enjoyment of their property, and the value of it. The obstruction was not only a common or public nuisance, but worked a special injury to the plaintiffs.").

difference-in-degree standard.²²⁸ In *Pierce v. Dart* (1827), the defendant erected a fence across a public highway, which resulted in expense and delay for the plaintiff.²²⁹ The New York supreme court of judicature ran through the English and American precedents and chose to follow the then-recent English decision in *Rose*.²³⁰ In doing so, it applied an actual damage standard.²³¹

In *Lansing v. Smith*, the defendant constructed a basin in a public waterway.²³² Members of the public were inconvenienced by the obstruction, in that they would have to navigate around it.²³³ The plaintiff suffered an injury greater and different in kind from the public, as he owned a dock near the basin, which lost half of its value because of the obstruction.²³⁴ Accordingly, the plaintiff would seem to possess special damage under most standards.

The two highest New York courts of law both rejected the plaintiff's suit but on different grounds. In *Lansing v. Smith* (1828), the supreme court took a hard line on special damage. While professing to follow precedent,²³⁵ the court applied the strong version of the difference-in-kind standard (wherein the plaintiff must have suffered a totally unique injury).²³⁶ Since at least a few other people

228. See, e.g., *Mayor of City of Georgetown v. Alexandria Canal Co.*, 37 U.S. 91, 99 (1838) (citing *Corning*).

229. See *Pierce v. Dart*, 7 Cow. 609, 611–12 (N.Y. Sup. Ct. 1827).

230. See *id.* at 610–11. Note that, while the supreme court of New York is currently a trial-level court, both in this case and in *Lansing* the supreme court of judicature heard appeals from a trial court.

231. See *id.* at 611 (“If a man’s time or money is valuable, it seemed to him, that this was a particular damage. Such seems to be the distinction deducible from a majority of the cases. In the case at bar, the plaintiff was certainly put to some expense. There was a delay, and labor in abating the nuisance, so that he might proceed on the road. True, the injury was trivial; and it is not difficult to see that the damages are excessive. But we cannot interfere on that ground where the action below is for a tort.”).

232. *Lansing v. Smith*, 8 Cow. 146 (N.Y. Sup. Ct. 1828), *affirmed on other grounds*, 4 Wend. 9 (N.Y. 1829).

233. See *id.* at 152.

234. See *id.* at 152–53, 168.

235. See *id.* at 157–67 (citing everything from *Coke* and *Williams’ Case* to *Hughes v. Heiser*).

236. See *id.* at 156 (“It must be conceded that there is nothing in the plaintiff’s case, so far as he complains of the *pier* and the *sloop lock*, to distinguish it from that of every other owner of a wharf within the basin; and all the proprietors of docks above the temporary

owned docks which also lost value, the court affirmed the trial court's nonsuit.²³⁷

On appeal in *Lansing v. Smith* (1829), the New York court for the correction of errors affirmed the supreme court on other grounds.²³⁸ In dicta, the majority opinion disagreed with the lower court on special damage and expressed a strong preference for an actual damage regime (in particular, an expansive view of actual damage that included time, money, and labor).²³⁹

One final state case is worth mentioning. In *O.B. Farrelly & Co. v. City of Cincinnati* (1859), a Cincinnati court reviewed over 300 years of public nuisance tort precedent, from the 1535 Year Book case to

bridges have sustained an equal injury with the plaintiff, in consequence of their erection. The injury, therefore, for which the plaintiff seeks remuneration, *is not peculiar to himself*. It has been equally felt by an hundred others, whose property is similarly situated. It is apparent also, that if the action is sustained, it may be repeated again and again, as long as the pier remains. One recovery only satisfies the damages which had accrued previous to the commencement of the suit.”). The dissent in the above court of corrections later emphasized the strictness of the appellate court's standard. *See Lansing v. Smith*, 4 Wend. 9, 30 (N.Y. 1829) (S. Allen, dissenting) (“And upon the rule contended for, that if only a small portion of the community are injured it is not a special damage, *the number may be reduced to two or three persons, and under such a rule every proper avenue to justice may be closed.*”) (emphasis added).

237. *See Lansing*, 6 Cow. at 168 (“This seems to me to be precisely the plaintiff's case. His damage consists in the depreciation of the value of his dock. He cannot rent it for more than half what it once produced him. This is the sole injury which he has proved himself to have sustained. Suppose the basin should render the streets contiguous to it, in its whole extent, unhealthy, so that the houses could not be rented at all, or at very reduced rates; could every landlord maintain an action against the defendant for the depreciation of his property, and the consequent diminution of his rent? That will hardly be contended; and yet, in principle, the cases are the same.”).

238. *See Lansing*, 4 Wend. at 24 (“As to the alleged injury in consequence of the erection of the temporary bridges, I have arrived at the conclusion that there was no evidence in this case which could have authorized the jury to find the defendants guilty of erecting those bridges. The declaration is not properly framed to charge the defendants, as public officers, for neglect of duty in permitting the contractors employed in making the pier to construct the temporary bridges in an improper manner.”).

239. *See id.* at 25 (“In such a case, if a person has sustained actual damage by the erection of the nuisance, whether direct or consequential, I am not prepared to say he can not [*sic*] maintain an action against the wrong doer But the opinion I have formed on this point is that every individual who receives actual damage from a nuisance may maintain a private suit for his own injury, *although there be many others in the same situation.*”) (emphasis added).

subsequent English cases and the many early state cases.²⁴⁰ While *O.B. Farrelly & Co.* is relatively late, it is useful for a few reasons.²⁴¹ Like *Iveson*, *Chichester*, *Hughes*, and *Pierce* before it, the opinion calls out the inconsistency and flux in the special damage standard.²⁴² But as important for Part III, it describes the special damage requirement multiple times not as a pseudo or proto-standing requirement but as an element of the cause of action for public nuisance.²⁴³

In summary, what can we take away from the American sources? The few treatises are unhelpful. The few federal court decisions are distant and unhelpful. Several state courts endorse difference-in-kind, but there are a number of courts that embrace other standards, with clear conflict even within individual states (for example, New York). The state courts discuss the same orthodox English cases but do not reach the same results.

C. Historical Synthesis

Imagine the above materials slotted into a year-by-year timeline from 1535 to the 1850s. Standing at 1788, and looking backwards, one would see: the 1535 “anonymous” case with a precedential dissent containing dicta about difference-in-kind and difference-in-degree, English treatises that embrace the difference-in-kind standard and gradually narrow the scope of special damage, English opinions that lean towards difference-in-degree and call out their doctrinal discord, and a 1774 Maryland provincial court record that depicts sharp division about special damage in the American colonies.

240. 2 Disney 516, 522–37 (Super. Ct. Cin. 1859).

241. I would also note that Woolhandler and Nelson cite it in their article as indicative of early public nuisance doctrine. See Woolhandler & Nelson, *supra* note 1, at 701 n.60.

242. See *O.B. Farrelly & Co.*, 2 Disney at 537 (“This long list of cases shows the difficulty which sometimes arises in applying very simple rules to the varied concerns of life.”).

243. See *id.* at 519 (“Unless such damage is shown, there is no cause of action, and its existence is one of the facts constituting the cause of action. . . . As already stated, the right to maintain a private action depends on the existence of special damage.”) (internal quotation marks omitted).

What about looking forward from 1788? One would see: English decisions that resolve that country's doctrine in favor of actual damage, American treatises that provide no real guidance, a few federal court decisions that are distant and unclear, and many state court decisions, a number of which follow difference-in-kind, with some picking another standard, and deep division even within the same jurisdiction.²⁴⁴

Given the above materials, it is fair to say that the content of the special damage standard was not clear or definite in 1788. Was there liquidation? Under the approach proposed by William Baude, I would say no. Even assuming that liquidation would apply here (since no court discussed special damage as a matter of constitutional law),²⁴⁵ there was not a regular course of practice in America up through the Civil War.²⁴⁶ And there was no settlement where one side acquiesced and the public sanctioned that resolution.²⁴⁷

III. SPECIAL DAMAGE AND ARTICLE III STANDING

One month before the Supreme Court decided *TransUnion*, the Eleventh Circuit decided *Sierra v. City of Hallandale Beach, Florida* (2021).²⁴⁸ In a concurrence, Judge Kevin Newsom discussed some of the historical arguments for injury in fact.²⁴⁹ At the end of one section, he alluded to the above public nuisance decisions:

To be sure, there is some historical support for something that approximates an injury-in-fact requirement, though not in so many words. The strongest evidence, it seems to me, comes from the common law of public nuisance. Courts have traditionally prohibited private individuals from suing for public nuisance

244. Not to mention that most of the American precedents, outside of *Barr v. Stevens* (1808), *Hughes v. Heiser* (1808), and *Dunn v. Stone* (1815), are more than three decades from ratification.

245. Cf. Baude, *supra* note 98, at 17 ("And it was not enough for Madison that the practice be one of sheer political will; it must also be one of constitutional interpretation.").

246. *See id.* at 16–18.

247. *See id.* at 18–21.

248. *Sierra v. City of Hallandale Beach*, 996 F.3d 1110 (11th Cir. 2021).

249. *See id.* at 1115 (Newsom, J., concurring).

unless they can show “special injury.” In 1838, the Supreme Court explained “[t]he principle . . . that in case of public nuisance, where a bill is filed by a private person, asking for relief by way of prevention, the plaintiff cannot maintain a stand in a court of equity[,] unless he avers and proves some special injury.” . . . [I]mportantly, though, nothing the Court said linked the special-injury requirement to Article III, as opposed to the merits of the public-nuisance claim.²⁵⁰

Judge Newsom’s last sentence frames the question for this Part.²⁵¹ Looking to original meaning, is the special damage requirement linked to Article III, such that an originalist doctrine of standing should require special damage for private suits seeking to vindicate public rights? This Part argues ‘no’ for four reasons.

First, there was no discussion by the Framers of these public nuisance tort cases, special damage, or even the larger distinction between private and public rights.

Second, most of the significant public nuisance tort cases are from state court. Legal scholars disagree over the relevance of state court practices to the original meaning of Article III. Without entering into that debate, it seems enough here to observe that state courts historically have different constraints on their subject matter

250. *See id.* at 1126 (Newsom, J., concurring) (citing *Mayor of City of Georgetown v. Alexandria Canal Co.*, 37 U.S. (12 Pet.) 91, 98–99 (1838)).

251. In *City of Hallandale Beach*, Judge Newsom ultimately endorsed a distinction between private and public rights based in Article II. *See id.* at 1139 (“But upon closer examination, I think that the rights-based approach moves in the right direction—except, I say, that its proper foundation is in Article II, not Article III.”). As he saw it, “an action to vindicate a public right” had an “inherently executive” character. *See id.* (internal quotation marks omitted). After all, the government is charged with administering public rights and the executive is the chief administrator. “[E]ven if Congress has given the plaintiff a cause of action,” a court could refuse to hear the case on the grounds that “Congress’s creation violates Article II’s vesting of the ‘executive Power’ in the President and his subordinates.” *See id.* In-depth discussion of his Article II theory is beyond the scope of this Article, which is focused on Article III. But, even if wrong, Newsom’s nuanced discussion of Article II makes more pragmatic sense than that of the *TransUnion* majority. The President’s executive power would seem to face a greater threat from suits over public rights entrusted to the government than suits between two private parties over private rights. For further discussion of Judge Newsom’s approach, see Jonathan H. Adler, *Standing Without Injury*, 59 WAKE FOREST L. REV. (forthcoming 2024).

jurisdiction. The lack of federal court precedent impairs the positive argument for the federal constitutional relevance of these cases.

Third, early American courts that discussed the special damage requirement did not connect it to the Constitution—whether federal or state—or more fundamental ideas about the separation of powers or the scope of judicial power. Rather, special damage served a role in protecting defendants and ensuring that the courts were not overly burdened with trivial suits.

Finally, the lack of clarity on the content of the special damage standard would seem to work against its significance. The fact that historical evidence is debated or unsettled does not destroy its originalist influence. But as no textual hook points towards the special damage standard or public nuisance tort, originalists should hesitate to infer the sub silentio incorporation of this doctrine into Article III.

A. Absence of Discussion in Founding Era Materials

Article III was little debated at the Founding. The drafting history at the Convention contains relatively little insight into the judicial branch.²⁵² What discussion that occurred at Convention and during the later ratification debates focused on certain hot-button topics like diversity jurisdiction²⁵³ and the relationship of federal courts to state courts.²⁵⁴ A theory of Article III standing in its modern form was not discussed.²⁵⁵

What about the subjects of public nuisance tort or special damage, or even the private versus public rights distinction? Using an online

252. See, e.g., HART AND WECHSLER, *supra* note 84, at 1 (“For most of the delegates [at the Constitutional Convention], the judiciary was a secondary or even a tertiary concern.”).

253. See Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928) (detailing the vehement debate over diversity jurisdiction after the Convention and at the state conventions).

254. See HART AND WECHSLER, *supra* note 84, at 7–8 (discussing the lead up to the Madisonian Compromise at the Convention); Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 105–24 (1995) (discussing Convention and state convention debates).

255. See Sunstein, *supra* note 41, at 358.

search, I looked through the Federalist Papers,²⁵⁶ the Anti-Federalist Papers,²⁵⁷ Farrand's Records of the Constitutional Convention,²⁵⁸ and Elliot's Debates²⁵⁹ at the state ratifying conventions.²⁶⁰ For the most part, these subjects were not mentioned, and the few occurrences are not relevant to the standing debate.²⁶¹ The Framers did not discuss these subjects, and if they did, they did not connect them to the scope of the federal judicial power.

B. Reliance on State Court Decisions

As discussed in Part II, there are few early federal court decisions that build out the special damage standard. This is to be expected. There was and remains no federal cause of action for the public nuisance tort, thus no federal question jurisdiction. What remains is appellate jurisdiction for diversity cases (for example, *Mayor of*

256. THE FEDERALIST PAPERS (Jacob E. Cooke ed., 1982).

257. THE COMPLETE ANTI-FEDERALIST (Herbert J. Storing ed., 1981).

258. THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., rev. ed. 1966).

259. THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott & Co. 1863).

260. Cf. Amy C. Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 367–68 (2006) (consulting the same sources to understand what the Framers had to say about the Supreme Court's "supervisory power."). I searched electronic versions of these sources using the following terms. For public nuisance, I searched the terms "public nuisance" and "common nuisance." For special damage, I searched the terms "special injury," "special damage," "extraordinary injury," "extraordinary damage," "grievous injury," "grievous damage," "particular injury," "particular damage," "peculiar injury," and "peculiar damage." For private and public rights, I searched "private right(s)" and "public right(s)."

261. For example, Federalist 51 mentions public rights, but in the context of needing checks and balances to ensure that "the private interest of every individual may be a sentinel over the public rights." THE FEDERALIST NO. 51 (James Madison); see also THE FEDERALIST NO. 10 (James Madison) ("To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed."); THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 596 [Elliot's Debates, Volume 4] ("[I]t certainly is not unreasonable that private rights should yield, on terms of just compensation, to the paramount rights of the public, so far, and to such extent, as the interest and welfare of the public may require . . .").

Georgetown) or original jurisdiction (for example, *Pennsylvania v. Wheeling & Belmont Bridge Co.*). The requirements for these jurisdictional hooks, like the amount-in-controversy or the presence of a state as a party, narrow the number of cases that come into federal court. Thus, state court decisions must and do make up most of the historical data points.

This reliance on state court precedent calls to mind a longstanding academic debate: to what extent should the practices of early state courts matter for our analysis of the original meaning of Article III and other parts of the federal Constitution? Recall that Justices Scalia and Thomas sought to build out the original meaning of open-ended terms in Article III by referring to then-contemporary judicial practices:

[C]ourts simply chose to refer directly to the traditional, fundamental limitations upon the powers of common-law courts, rather than referring to Art. III which in turn adopts those limitations through terms ("The judicial Power"; "Cases"; "Controversies") that have virtually no meaning except by reference to that tradition.²⁶²

One could frame this language from *Honig* as a rebuttal to the previous section. "So what if the Framers didn't explicitly map out Article III? We can simply look to 'the traditional, fundamental limitations upon the powers of common-law courts.'" But which common-law courts? The answer is not obvious and often contested.²⁶³

As one example, consider the back-and-forth between Professors Bill Eskridge and John Manning over statutory interpretation at the Founding.²⁶⁴ Eskridge thought the early state court decisions

262. *Honig v. Doe*, 484 U.S. 305, 340 (1988) (Scalia, J., dissenting) (cited in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1551 (Thomas, J., concurring)).

263. HART AND WECHSLER notes this question as it specifically concerns the state precedents raised by Woolhandler and Nelson and federal standing doctrine. See *supra* note 84, at 153 ("How much weight should one give to the state court practice when the design of the federal government so frequently deviates from the state structural premises, including state structural premises about the judiciary?").

264. See John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001); William N. Eskridge, *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990 (2001); John F.

essential to understanding the backdrop against which the Framers wrote and interpreted the “judicial Power” in Article III.²⁶⁵ In his view, the federal Constitution did not create a radically different system.²⁶⁶ Manning disagreed, arguing that the structure of the new federal government was meaningfully dissimilar from that of the early states.²⁶⁷ Manning contended that Article III was drafted, in part, as “a reaction against the practice of state courts.”²⁶⁸ Other academics have also considered the practices of early state courts in interpreting other parts of the Constitution outside of Article III.²⁶⁹

Without entrenching myself on one side of that particular debate, I would observe this. State courts are not bound by the justiciability requirements of Article III, including standing.²⁷⁰ Justice Thomas underlined this difference in his *TransUnion* dissent.²⁷¹ While the history of standing in state courts is beyond the scope of this article, academics have commented on the many ways that modern state doctrines on standing diverge from the

Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648 (2001).

265. See Eskridge, *supra* note 264, at 1011–18.

266. See *id.*

267. See Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, *supra* note 264, at 1658–65; see *id.* at 1660 (“Several considerations, however, suggest that it is dangerous to use state court practice as a model for the framers’ and ratifiers’ understanding of ‘the judicial Power.’”).

268. See *id.* at 1663.

269. See, e.g., A.J. Bellia, *State Courts and the Interpretation of Federal Statutes*, 59 VAND. L. REV. 1501 (2006) (discussing the relevance of early state court interpretations of federal statutes to the original understanding of federalism and the Supremacy Clause).

270. See *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989) (“We have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability, even when they address issues of federal law, as when they are called upon to interpret the Constitution or, in this case, a federal statute.”) (citing numerous precedents).

271. See *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2224 n.9 (2021) (Thomas, J., dissenting) (“Today’s decision might actually be a pyrrhic victory for TransUnion. The Court does not prohibit Congress from creating statutory rights for consumers; it simply holds that federal courts lack jurisdiction to hear some of these cases. That combination may leave state courts . . . as the sole forum for such cases, with defendants unable to seek removal to federal court.”) (internal citations omitted).

federal doctrine.²⁷² The state court precedents are best seen as products of different justiciability regimes and thus of little evidentiary value for cashing out the federal doctrine.

C. Historical Rationale for Special Damage

In case after case, the modern Supreme Court has grounded Article III standing and the injury in fact requirement in the principle of separation of powers.²⁷³ The *TransUnion* majority made this plain.²⁷⁴ Standing doctrine restrains the judicial branch, ensuring “that federal courts exercise ‘their proper function in a limited and separated government.’”²⁷⁵ In particular, standing doctrine prevents the judiciary from “infring[ing] on the Executive Branch’s Article II authority.”²⁷⁶ The critics may and do disagree with this explanation. But one can easily see how the Court has connected the

272. See F. Andrew Hessick, *Standing in Diversity*, 65 ALA. L. REV. 417, 425–26 n.57 (2013) (listing the many ways that state courts differ from federal courts on standing); Wyatt Sassman, *A Survey of Constitutional Standing in State Courts*, 8 KY. J. EQUINE, AGRIC., & NAT. RESOURCES L. 349 (2015) (same).

273. See *TransUnion*, 141 S. Ct. at 2203 (“The ‘law of Art. III standing is built on a single basic idea—the idea of separation of powers.’”) (citing *Raines v. Byrd*, 521 U.S. 811, 820 (1997)); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559–60 (1992) (“Obviously, then, the Constitution’s central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts.”); see also Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881 (1983) (“My thesis is that the judicial doctrine of standing is a crucial and inseparable element of that principle [the separation of powers], whose disregard will inevitably produce—as it has during the past few decades—an overjudicialization of the processes of self-governance.”).

274. *TransUnion*, 141 S. Ct. at 2207 (“In sum, the concrete-harm requirement is essential to the Constitution’s separation of powers.”).

275. *Id.* at 2203 (quoting John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L. J. 1219, 1224 (1993)).

276. *Id.* at 2207; see also *Lujan*, 504 U.S. at 577 (“If the concrete injury requirement has the separation-of-powers significance we have always said, the answer must be obvious: To permit Congress to convert the undifferentiated public interest in executive officers’ compliance with the law into an ‘individual right’ vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive’s most important constitutional duty”)

need for a doctrine of standing to fundamental notions about our system of government and the right to self-rule.²⁷⁷

The traditional justifications for special damage were not so elevated.²⁷⁸ The Founders did not connect special damage to Article III; neither did the American courts.²⁷⁹ Rather, early jurists linked the special damage requirement to practical considerations like the burden on defendants (multiplicity) or the effectiveness of the courts (triviality).²⁸⁰ The multiplicity argument dates back to the 1535 case and Chief Justice Baldwin's concern for a defendant who is vulnerable to suit "100 times over" for the same offense.²⁸¹ The triviality argument worries that, without the filter of special damage, plaintiffs would "clog[] the dockets with a large number of 'trivial' suits, thus hindering the progress of more important litigation."²⁸² Courts were more concerned for those who suffered "great damage" and gave "no countenance for suits *de minimis*."²⁸³

Now, there was one structural argument for special damage—sovereignty.²⁸⁴ A private action for public nuisance seeks to

277. See *TransUnion*, 141 S. Ct. at 2207 ("[T]he choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch, not within the purview of private plaintiffs (and their attorneys). Private plaintiffs are not accountable to the people and are not charged with pursuing the public interest in enforcing a defendant's general compliance with regulatory law.").

278. Justice Barrett's recent concurrence in *Samia v. United States*, a Confrontation Clause case, explains why originalists should care about the explanations in historical sources. See *Samia v. United States*, 143 S. Ct. 2004, 2019 (2023) (Barrett, J., concurring in part and concurring in judgment) ("Like the federal cases, though, the state cases make no mention of the confrontation right. Same for the treatises cited by the Court . . . So for all we know, the cases cited by the Court and the treatises proceed from the premise that an ordinary hearsay rule, as opposed to a constitutional right, was on the line. That weakens the importance of these sources, because courts might have gone to greater lengths [to avoid violating] the State or Federal Constitution.") (alteration in original).

279. Neither did the state courts connect special damage to their respective state constitutions.

280. See Antolini, *supra* note 109, at 887–92 (discussing these considerations).

281. See Smith, *supra* note 108, at 142–43 n.65.

282. See Smith, *supra* note 108, at 5.

283. *Stetson v. Faxon*, 36 Mass. 147, 160 (Mass. 1837).

284. See Antolini, *supra* note 109, at 886–87.

vindicate a public right like the free navigation of public waterways. But public rights are normally maintained by the sovereign on behalf of “the people at large.”²⁸⁵ Blackstone noted the sovereignty justification,²⁸⁶ as did a few early state courts.²⁸⁷

Yet despite the occasional mention of sovereignty, multiplicity played by far the most prominent role. Many early courts relied on it as the sole justification for the special damage requirement.²⁸⁸

285. See Nelson, *supra* note 20, at 566 (citing *Lansing v. Smith*, 4 Wend. 9, 21 (N.Y. 1829)).

286. See 3 WILLIAM BLACKSTONE, COMMENTARIES *219–20 (“For this reason, no person, natural or corporate, can have an action [for] a public nuisance, or punish it; but only the king in his public capacity of supreme governor, and pater-familias of the kingdom.”) (cleaned up).

287. See, e.g., *Commonwealth v. McDonald*, 16 Serg. & Rawle 390, 394 (Pa. 1827) (“The distinction between public rights and private ones is quite natural. Every man must look to *his* rights; but in the case of public rights, when no individual has a prior right or interest, distinct from his fellows, where he can bring no action for public nuisance, acquiescence—silence—goes for nothing. No man wishes in such a case to single out himself, and to be the actor against his neighbor; what is every one’s concern, is no one’s concern”); *Seeley v. Bishop*, 19 Conn. 128, 135 (Conn. 1848) (“The public authorities alone can complain of nuisances, while they remain public or general; while individuals may sue for peculiar injuries sustained by themselves.”).

288. See, e.g., *Hart v. Basset* (1681) 84 Eng. Rep. 1194, 1194–95; *T. Jones* 156, 156 (KB) (“And this damage is not such for which an action will lie, for then every one who had occasion to go this way might have his action, which the law will not suffer for the multiplicity.”); *Barr v. Stevens*, 4 Ky. (1 Bibb) 292, 293 (Ky. 1808) (“The reason why he cannot without special damage maintain an action for the nuisance against the wrongdoer is, that if one could sue, all might; which would be ruinous.”); *Dunn v. Stone*, 4 N.C. 241, 242 (N.C. 1815) (“[I]f suits were thus multiplied, the inevitable consequence would be to overwhelm any individual against whom they might be brought, and thus lead to a severity of punishment utterly disproportioned to the offence, without affording to the public, that benefit, to which alone punishments can be legitimately directed. The law, with admirable wisdom, has interposed an effectual barrier against so fruitful a source of litigation and injustice”); *Sumner v. Buel*, 12 Johns. 475, 478 (N.Y. Sup. Ct. 1815) (“It is a well-settled rule, that no action will lie by an individual, for a public nuisance, unless he has sustained some special damage; and the reason assigned for it is, that it would create such a multiplicity of suits that the party might be ruined by the costs.”). But see *Lansing v. Smith*, 4 Wend. 9, 25 (N.Y. 1829) (“But the opinion I have formed on this point is that every individual who receives actual damage from a nuisance may maintain a private suit for his own injury, although there be many others in the same situation. The punishment of the wrong doer by a criminal prosecution will not compensate for the individual injury; and a party who has done a criminal act can not [*sic*] defend himself against a private suit by alleging that he has injured many

Such weight should matter to the larger inquiry. If early courts discussed special damage with structural undertones—like modern courts discuss standing doctrine—it might be plausible to say that special damage had unspoken constitutional relevance. Or, as Justice Scalia might say, that special damage was a “traditional, fundamental limitation[]” on the judicial power.²⁸⁹ But the multiplicity argument is about the liability of defendants to other private individuals. It is pragmatic and down-to-earth, about the relationship between adversarial parties. It therefore is difficult to argue for the implicit constitutional significance of special damage.²⁹⁰

D. Instability of Special Damage Doctrine at the Founding

As noted in Part II, the special damage doctrine suffered from a lack of clarity and consistency. This further weakens its originalist relevance to Article III.

Now, let me be clear about what I am not saying. I am not saying that originalism only works if the relevant historical materials are crystal clear in one direction. And I am not saying that the Constitution cannot incorporate or point to an unsettled or unbounded legal doctrine. Neither of these propositions are true, and I would point to two examples: the Second Amendment and the Privileges or Immunities Clause.

In *Heller* and *Bruen*, dueling Supreme Court opinions fought bitterly over original meaning.²⁹¹ The two sides disagreed on the import of history, and the disagreement continues today.²⁹² However,

others in the same way, and that he will be ruined if he is compelled to make compensation to all.”).

289. *Honig v. Doe*, 484 U.S. 305, 340 (1988) (Scalia, J., dissenting).

290. Also, I would note the language in *O.B. Farrelly & Co.* characterizing special damage as an ordinary element of the public nuisance tort cause of action. *See* 2 Disney 516, 537 (Sup. Ct. Cin. 1859). As Judge Newsom noted in his *City of Hallandale Beach* concurrence, many modern courts do the same. *See* 996 F.3d at 1126 n.8 (Newsom, J., concurring) (citations omitted).

291. *See* *District of Columbia v. Heller*, 554 U.S. 570 (2008); *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

292. *See, e.g.*, William Baude & Robert Leider, *The General Law Right to Bear Arms*, 99 NOTRE DAME L. REV. (forthcoming 2024), available at

there are key differences between those cases and the present inquiry into special damage. To begin with, the Second Amendment opinions handled a greater volume of historical evidence.²⁹³ There was much more history to analyze, especially that which was contemporaneous with the Founding²⁹⁴ (and for *Bruen*, the passage of the Fourteenth Amendment²⁹⁵). Compare this to the special damage context, where English doctrine was inconsistent and the first useful federal decision is 50 years after ratification.²⁹⁶ I would also contend that the historical material points more strongly in one direction for the Second Amendment than it does for the special damage standard.²⁹⁷ Finally, even if the history is contested, the Second Amendment has a special, if obvious, advantage—text. The Constitution explicitly protects “the right of the people to keep and bear Arms.”²⁹⁸ There is no text in Article III or the rest of the Constitution that points to the doctrine of special damage.

To reiterate, it is not incoherent doctrine alone that makes me hesitant to read the special damage standard into Article III. It is incoherent doctrine *plus* the absence of related text that pushes me over the edge. Given constitutional text, I am willing to embrace a great amount of uncertainty in the original meaning.

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4618350; Darrell A. H. Miller & Joseph Blocher, *Manufacturing Outliers*, 2022 SUP. CT. REV. 49 (2023).

293. See, e.g., *Bruen*, 142 S. Ct. at 2135–36 (“Respondents appeal to a variety of historical sources from the late 1200s to the early 1900s. We categorize these periods as follows: (1) medieval to early modern England; (2) the American Colonies and the early Republic; (3) antebellum America; (4) Reconstruction; and (5) the late-19th and early-20th centuries.”).

294. See, e.g., *Heller*, 554 U.S. at 600–03 (discussing “analogous arms-bearing rights in state constitutions that preceded and immediately followed adoption of the Second Amendment.”).

295. See *Bruen*, 142 S. Ct. at 2135–36. But see *id.* at 2163 (Barrett, J., concurring) (noting that the Court avoided a decision on which time period (1791 or 1868) is relevant for purposes of incorporation).

296. See *Mayor of City of Georgetown v. Alexandria Canal Co.*, 37 U.S. 91 (1838).

297. Note that both sides in *Heller* (and *Bruen*) thought that history was on their side. Few scholars are willing to take the “history is ambiguous” view of the Second Amendment, probably because the comparably larger volume of relevant materials enables the formation of some view on the history. For one example, see J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 264–75 (2009).

298. U.S. CONST. amend. II.

The Privileges or Immunities Clause is another example. Justice Scalia once called that clause the “darling of the professoriate” for the many law review articles it had sparked.²⁹⁹ Its original meaning has been debated since the ratification of the Fourteenth Amendment. Even some of those who voted on the clause did not know what it meant.³⁰⁰ In the *Slaughter-House Cases*,³⁰¹ the Supreme Court nearly read the clause out of the Fourteenth Amendment. Yet, the text remained in Section One. Scholars continued to examine the history behind the clause and how it fits with the other parts of Section One of the Fourteenth Amendment. That work has resulted in multiple persuasive accounts of what the Privileges or Immunities Clause means.³⁰² These accounts disagree with each other, similar to the dueling opinions in *Heller* and *Bruen*. But what they agree is that the clause has some effect. After all, it’s in the text. Special damage, public nuisance, the private versus public rights divide . . . none of these are in the text.

Justices Scalia and Thomas might return to the *Honig v. Doe* refrain about the generalities of Article III, which can only be understood through contemporary practices. But it seems reasonable to ask that the judicial doctrines, if any, which were incorporated sub silentio into Article III, be ones that were generally agreed upon at

299. See Transcript of Oral Argument at 3–4, *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (No. 08-1521).

300. See John C. Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1387 (1992) (“On June 8, 1866, as the Senate prepared to take its final vote on the proposed Fourteenth Amendment to the Constitution, Senator Reverdy Johnson of Maryland moved to delete the first part of the second sentence, the Privileges or Immunities Clause. He made the motion ‘simply because [he did] not understand what would be the effect of that.’ The motion was rejected without a recorded vote, and the Amendment passed with the clause intact.”) (alteration in original) (citing CONG. GLOBE, 39th Cong., 1st Sess. 3041 (1866)).

301. 83 U.S. (16 Wall.) 36 (1873).

302. See, e.g., ILAN WURMAN, *THE SECOND FOUNDING: AN INTRODUCTION TO THE FOURTEENTH AMENDMENT* (2020); RANDY BARNETT & EVAN D. BERNICK, *THE ORIGINAL MEANING OF THE 14TH AMENDMENT* (2021); William Baude, Jud Campbell, and Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. (forthcoming 2024).

the Founding. The special damage requirement for the public nuisance tort is not one of those doctrines.

Now, if the public nuisance tort was the only Founding-Era legal action that implicated a public right, it might have more relevance.³⁰³ And we might be stuck trying to decide which 1820s New York State decision was most indicative of then-contemporary practice. But the public nuisance tort was not the only public rights action. Recall that, in the conception that Justice Thomas endorsed, public rights are those which belonged to the “whole community, considered as a community, in its social aggregate capacity.”³⁰⁴ These rights include compliance with criminal or regulatory law, rights to public lands or government funds, and rights involving public roads or waterways.³⁰⁵ A brief look at the Founding Era reveals many ways to assert such a public right in court. Informer actions like *qui tam* (pre-Founding English³⁰⁶ and early American³⁰⁷) enabled disinterested third party “strangers” to bring actions against defendants who were not in compliance with the law. Prerogative writs like *mandamus* (pre-Founding English³⁰⁸ and

303. Assuming that one also bought into the constitutional significance of the private versus public rights distinction.

304. See Nelson, *supra* note 20, at 566 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *5).

305. See *id.* at 567

306. See HART AND WECHSLER, *supra* note 84, at 151 (“English law prior to the founding also authorized informers’ actions, which gave strangers financial inducements to prosecute unlawful conduct, and relators’ actions, which allowed private parties to bring actions against public authorities in the name of the Attorney General.”) (citations omitted); see also *Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 774–76 (2000) (discussing the “long tradition of *qui tam* actions in England”).

307. See Sunstein, *supra* note 1, at 175 (“*Qui tam* actions are familiar to American law . . . In the first decade of the nation’s existence, Congress created a number of *qui tam* actions. Explicit *qui tam* provisions were allowed under many statutes, including those criminalizing the import of liquor without paying duties, prohibiting certain trade with Indian tribes, criminalizing failure to comply with certain postal requirements, and criminalizing slave trade with foreign nations.”) (citations omitted); see also *Vermont Agency*, 529 U.S. at 776–78 (“*Qui tam* actions appear to have been as prevalent in America as in England, at least in the period immediately before and after the framing of the Constitution.”).

308. See Jaffe, *supra* note 5, at 1269–75. Bradley Clanton has disputed the mainstream view, typified by Professor Jaffe and others, that *mandamus* was available to strangers.

early American³⁰⁹) enabled similar plaintiffs to sue officials for not obeying their public duties. It might have been restrictive, but the public nuisance tort was not the only public rights action in town.³¹⁰

The doctrine of special damage was not generally agreed upon, it was not unique, and it is not in the text. Accordingly, it should not be a part of our constitutional law.

As a postscript, what happens to Justice Thomas's distinction between private and public rights if one disregards the public nuisance materials? The Thomas view of special damage and public rights is well characterized as 'the exception that proves the rule.' If the exception (standing only with special damage) is not constitutionally relevant, what happens to the rule? Perhaps the rule survives without the exception—simply no Article III standing for public rights suits in federal court. This partly depends on other issues not addressed in this Article. For example, criminal prosecution arguably involves a public right.³¹¹ As mentioned in Part I,

See Clanton, *supra* note 6. Even if Clanton is correct, mandamus still serves as another example of contemporary public rights litigation. *But see* Woolhandler & Nelson, *supra* note 1, at 707 (diminishing such actions as not "the purest possible case of public-rights litigation").

309. *See, e.g.,* *People ex rel. Case v. Collins*, 19 Wend. 56, 65 (N.Y. Sup. Ct. 1837) ("The power of this court to grant a mandamus, at the suit of the people to compel the commissioners of highways to perform their duty, has often been exerted, and cannot be questioned . . . In such cases the wrongful refusal of the officers to act is no more the concern of one citizen than another, like many other public offences. It is at least the right, if not the duty of every citizen to interfere and see that a public offence be properly pursued and punished, and that a public grievance be remedied.") (internal citations omitted). Woolhandler and Nelson contend that, by the Civil War, states were divided on whether the writ of mandamus required the plaintiff to plead private injury. *See* Woolhandler & Nelson, *supra* note 1, at 708–09 (citing state decisions on either side).

310. James Pfander has also noted the potential relevance of the *actio popularis*, an early Roman and then later Scottish form of suit. *See* James E. Pfander, *Standing to Sue: Lessons from Scotland's Actio Popularis*, 66 DUKE L.J. 1493 (2017). The Scottish *actio popularis* enabled any uninjured person to "pursue a claim on behalf of the public in cases in which a public delict or wrong might otherwise go unredressed." *Id.* at 1500. The Scottish experience with *actio popularis* cannot be said to have specifically "shaped developments in the United States," *id.* at 1563, but Pfander elsewhere argues for the general influence of Scottish practice on the federal judiciary. *See* James E. Pfander & Daniel D. Birk, *Article III and the Scottish Judiciary*, 124 HARV. L. REV. 1613, 1624 (2011).

311. *See* Woolhandler & Nelson, *supra* note 1, at 693 ("The penal law (which includes not only criminal law but also fines and forfeitures recoverable through civil process)

Woolhandler and Nelson emphasized the early American shift away from the English tolerance of private prosecutions.³¹² If that shift had a constitutional dimension, then a standing distinction between private and public rights might survive. But if one dismisses the criminal prosecutions, the rule might fully collapse in absence of historical evidence connecting the distinction between the two categories of rights to Article III.³¹³

CONCLUSION

The October 2020 confirmation of Justice Amy Coney Barrett solidified a 6-3 conservative majority, with at least three justices who could be called strong originalists (Justices Thomas, Gorsuch, and Barrett). The originalists do not have a majority and sometimes disagree with one another on the history.³¹⁴ Still, their influence is palpable. Since the Barrett confirmation, the Court has overturned several non-originalist precedents³¹⁵ and attended more carefully to original meaning in certain areas of the law.³¹⁶

Article III standing is not one of those areas. In *TransUnion*, the majority relied on history for one substantial move—requiring plaintiffs to identify “a close historical or common-law analogue for

also defines various public rights.”) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *5).

312. See *id.* at 695–701.

313. This might affect other articles that base their analysis on the constitutional relevance of the private versus public rights distinction. See, e.g., Leitner, *supra* note 43.

314. Compare Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028, 2032–36 (2023) (plurality opinion of Gorsuch, J.) (arguing that history permits Pennsylvania’s consent to general jurisdiction by registration statute), with *id.* at 2057–64 (Barrett, J., dissenting) (disagreeing).

315. See Dobbs v. Jackson Women’s Health Org., 142 S. Ct. 2228, 2242 (2022) (overruling Roe v. Wade, 410 U.S. 113 (1973) and Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992)); Groff v. DeJoy, 143 S. Ct. 2279, 2289 (2023) (noting that Kennedy v. Bremerton School Dist., 142 S. Ct. 2407, 2427 (2022) had overruled Lemon v. Kurtzman, 403 U.S. 602 (1971)).

316. See Mallory, 143 S. Ct. 2028 (personal jurisdiction); Nat’l Pork Producers Council v. Ross, 143 S. Ct. 1142 (2023) (Dormant Commerce Clause); Tyler v. Hennepin Cnty., Minnesota, 143 S. Ct. 1369 (2023) (Takings Clause); New York State Rifle & Pistol Ass’n, Inc. v. Bruen, 142 S. Ct. 2111 (2022) (Second Amendment).

their asserted [intangible] injury.”³¹⁷ The majority did not argue why “the book is closed.”³¹⁸ And it did not explain what it means to look to history or the common law, leaving many open questions. How difficult is this new standing requirement?³¹⁹ Or is it even new?³²⁰ What time period is fair game for purposes of the history?³²¹ What does it mean to look to the common law? Is this state common law? If so, why is the entrance to the federal courthouse constrained by decisions of state court judges? And which state’s common law should we care about? If this is federal common law, is this before

317. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021).

318. Cf. William Baude & Daniel Epps, 13 *Inner Sanctum*, DIVIDED ARGUMENT at 22:17 (2021), <https://www.dividedargument.com> [<https://perma.cc/5BWM-PBR5>].

319. Despite much academic furor, see, e.g., Erwin Chemerinsky, *What’s Standing After TransUnion LLC v. Ramirez*, 96 N.Y.U. L. REV. ONLINE 269 (2021), many lower courts have declined to radically change their standing doctrine post-*TransUnion*. See, e.g., *Laufer v. Naranda Hotels, LLC*, 60 F.4th 156, 170 (4th Cir. 2023) (“We cannot accept the Second Circuit’s interpretation of *TransUnion* because it cannot fairly be concluded that *TransUnion* overruled *Havens Realty*, *Public Citizen*, and *Akins*. . . . *TransUnion* is reconcilable with the earlier precedents. . . .”); *Bohnak v. Marsh & McLennan Cos., Inc.*, 79 F.4th 276, 288 (2d Cir. 2023) (“[W]e see nothing in *TransUnion* that overrides our analysis, and *McMorris* remains a touchstone.”); *Kelly v. RealPage Inc.*, 47 F.4th 202, 212 (3d Cir. 2022) (“But *TransUnion* did not cast doubt on the broader import of those decisions. In fact, the Court cited *Public Citizen* and *Akins* with approval, reaffirming their continued viability and putting *TransUnion* in context.”); *Campaign Legal Ctr. v. Scott*, 49 F.4th 931, 940 (5th Cir. 2022) (Ho, J., concurring in the judgment) (wondering if “there is any real cause for alarm” after *TransUnion*).

320. See Curtis A. Bradley & Ernest A. Young, *Standing and Probabilistic Injury*, 122 MICH. L. REV. (forthcoming 2024) (manuscript at 31–32) (“*TransUnion*’s references to the common law are thus not new, and whether *application* of the historical test has changed remains to be seen.”) (citations omitted).

321. For an example of how to examine intangible injuries, the majority in *TransUnion* cited a Seventh Circuit decision by then-Judge Barrett. See *TransUnion*, 141 S. Ct. at 2204 (citing *Gadelhak v. AT&T Services, Inc.*, 950 F.3d 458, 462 (7th Cir. 2020)). Judge Barrett analogized the claim in that case to the tort of intrusion upon seclusion. See *Gadelhak*, 950 F.3d at 462. Her authorities from history and the common law included the 1977 Restatement (Second) of Torts, a Connecticut state case from 1966, an Ohio state case from 1956, and a Texas state case from 1998. See *id.* (citations omitted). But these materials seem “far too late to inform” the original meaning of Article III. Cf. *Samia v. United States*, 143 S. Ct. 2004, 2018 (2023) (Barrett, J., concurring in part and concurring in judgment). It is also unclear why this specific time period is relevant. Cf. *id.* at 2019 (“The Court . . . does not suggest that the history is probative of original meaning. But nor does it explain why this seemingly random time period matters.”).

or after *Erie* was decided in 1938?³²² If we are referring to pre-*Erie* general common law,³²³ then does anything from the Founding until 1938 work? If post-*Erie*, then what about the general law that federal courts continue to cite?³²⁴ What if different sources conflict? Which common law wins?

In *Spokeo* and *TransUnion*, Justice Thomas offered a more historically attentive view. But the Thomas view of standing for public rights is like that of the *TransUnion* majority for all of Article III standing. Historical materials are used to fill in the content of a constitutional rule, with inadequate explanation as to why those materials require the rule in the first place. One cannot escape the feeling that, had the Supreme Court never developed modern standing doctrine, no scholar would read the Founding materials to otherwise require it.³²⁵ And at least when it comes to the halfway Thomas approach, the history shouldn't sway the "cause-of-action" school³²⁶ critics who previously thought injury in fact fully inconsistent with original meaning.

In her *Samia v. United States* (2023) concurrence, Justice Barrett gave words to this kind of methodological critique:

In suggesting anything more, the Court overclaims. That is unfortunate. While history is often important and sometimes dispositive, we should be discriminating in its use. Otherwise, we

322. Compare *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("There is no federal general common law.") with *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938) ("For whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive.").

323. See, e.g., *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

324. See Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503 (2006).

325. Cf. RANDALL BRIDWELL & RALPH U. WHITTEN, *THE CONSTITUTION AND THE COMMON LAW* 97 (1977) (criticizing modern lawyers' "constant insistence that the language of the cases of the period and the writings about its jurisprudence actually means what one thinks it should mean by modern standards, rather than what it seems to mean as practiced by people of the period").

326. See Schmidt, *supra* note 29, at 2–3.

risk undermining the force of historical arguments when they matter most.³²⁷

When it comes to Article III standing, the Supreme Court's use of history has been sometimes dispositive and rarely discriminating. Despite recent signs,³²⁸ one can only hope that an originalist revival is not far away.

327. 143 S. Ct. 2004, 2020 (2023) (Barrett, J., concurring in part and concurring in the judgment).

328. Things may get worse before they get better. The Court recently decided *United States, ex rel. Polansky v. Exec. Health Res., Inc.*, 143 S. Ct. 1720 (2023), a case involving the False Claims Act and qui tam suits brought by unaffected third parties. In his dissent, Justice Thomas referenced the pedigree of the qui tam suit as a practice enacted by the First Congress and which duration “covers our entire national existence and indeed predates it.” *See id.* at 1741 (Thomas, J., dissenting) (quoting *Walz v. Tax Comm’n of City of New York*, 397 U.S. 664, 678 (1970)). Nevertheless, Justice Thomas wondered whether qui tam suits were “constitutionally problematic” and “inconsistent” with a unitary executive view of Article II. *See id.* at 1742 (Thomas, J., dissenting). In a concurrence joined by Justice Barrett, Justice Kavanaugh noted his agreement with Justice Thomas’s critique of qui tam suits and his view that the Court should consider the Article II objection in a future case. *See id.* at 1737 (Kavanaugh, J., concurring). *United States, ex rel. Polansky* thus suggests three votes to override a wholly traditional practice—not on the basis of specific founding-era evidence about standing doctrine but on an extension of the unitary executive theory, itself contested on originalist grounds. *See* Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2020 SUP. CT. REV. 83 (2021) (discussing the scholarly debate over originalism and the unitary executive theory).