NEW YORK UNIVERSITY ANNUAL SURVEY OF AMERICAN LAW

VOLUME 75
ISSUE 2

NEW YORK UNIVERSITY SCHOOL OF LAW
ARTHUR T. VANDERBILT HALL
Washington Square
New York City

New York University Annual Survey of American Law
is in its seventy-fifth year of publication.

L.C. Cat. Card No.: 46-30523
ISSN 0066-4413

New York University Annual Survey of American Law is published biannually at 110 West 3rd Street, New York, New York 10012. Subscription price: $30.00 per year (plus $4.00 for foreign mailing). Single issues are available at $16.00 per issue (plus $1.00 for foreign mailing). For regular subscriptions or single issues, contact the *Annual Survey* editorial office. Back issues may be ordered directly from William S. Hein & Co., Inc., by mail (2350 North Forest Rd., Getzville, NY 14068), phone (800-828-7571), fax (716-883-8100), or email (order@wshein.com). Back issues are also available in PDF format through HeinOnline (http://heinonline.org).

Manuscripts: The *Annual Survey* invites the submission of unsolicited manuscripts. Text and citations should conform to the 20th edition of *A Uniform System of Citation*. Please enclose an envelope with return postage if you would like your manuscript returned after consideration.

Editorial Office: 110 West 3rd Street, New York, N.Y. 10012
(212) 998-6540
(212) 995-4032 Fax
http://www.annualsurveyofamericanlaw.org

For what avail the plough or sail
Or land or life, if freedom fail?
EMERSON

NEW YORK UNIVERSITY ANNUAL SURVEY OF AMERICAN LAW

2020–2021 BOARD OF EDITORS

SUMMARY OF CONTENTS

ARTICLES

NOTES

THE PRESIDENT'S IMMIGRATION POWERS: MIGRATORY LABOR AND RACIAL ANIMUS

*MICHAEL H. LEROY**

Since the nation's founding, presidents have been motivated by racial animus while using executive powers over migratory labor. Early presidents enforced the Constitution's fugitive slave provision. They explored diplomacy to deport free blacks to Africa. From the 1880s through 1940s, presidents acted on the racial animus of workers by restricting laborers from China and Japan, and later, Europe. Franklin Delano Roosevelt's internment order—based more on anti-Japanese sentiments of Californians and their elected leaders than military necessity—resulted in the coerced labor of Japanese Americans, to the benefit of bigoted farm owners.

Against this backdrop, I examine President Donald Trump's immigration orders that affect employment relationships. Twenty lawsuits have been filed: They challenge the travel ban; rescission of DACA (Deferred Action for Childhood Arrivals), DAPA (Deferred Action for Parents of Americans), and TPS (Temporary Protected Status); covert vetting for citizenship petitions (Controlled Application Review and Resolution Program, or CARRP); and presidential obstruction of MAVNI (Military Accessions Vital to the National Interest), a program for foreigners in the military to gain citizenship.

I quantified results for first-round and subsequent rulings: (1) the Administrative Procedure Act and Due Process Clause were cited, respectively, in 75% and 70% of cases; (2) jurisdiction was found in 96% of the cases; (3) in 77% of the cases involving a request for an injunction, courts granted some form of relief; (4) overall, plaintiffs won all or part of 89% of the rulings.

I conclude that President Trump's approach to migratory labor follows numerous presidents who acted on racial animus prior to 1965, when the Immigration and Nationality Act was enacted. The results suggest that Pres-

* Professor, School of Labor and Employment Relations, and College of Law, University of Illinois at Urbana-Champaign. I am grateful for access to primary research materials provided online by Gerhard Peters and The American Presidency Project and by the University of Virginia Miller Center; and materials from Prof. Caroline Szylowicz, Kolb-Proust Librarian and Curator of Rare Books and Manuscripts, University of Illinois at Urbana-Champaign and Four Rivers Cultural Center, Ontario, Oregon. I thank students in my experimental course, "Immigration and Race: Inequality in Labor," and Andrew Weaver, Richard Newman, Jim Schultz, and Annalisa Roncone for insights and manuscript improvements. Most of all, I am grateful to Janet LeRoy.

ident Trump has overreached in using executive immigration powers, violating statutory and constitutional requirements. In view of judicial deference to executive actions in immigration matters, the results signify new limits to presidential powers.

> I received, in the last year of my entering into the administration of the general government, a letter from the governor of Virginia . . . on the means on procuring some such asylum to which these people might be occasionally sent. I proposed to him the establishment of Sierra Leone, in which a private company in England had already colonized a number of negroes. . . .[1]
>
> —President Thomas Jefferson

> [I]f the average family in which there are children contained but two children the nation as a whole would decrease in population so rapidly that in two or three generations it would very deservedly be on the point of extinction, so that the people who had acted on this base and selfish doctrine would be giving place to others with braver and more robust ideals. . . . [A] race that [practiced] such doctrine—that is, a race that practiced race suicide—would thereby conclusively show that it was unfit to exist, and that it had better give place to people who had not forgotten the primary laws of their being.[2]
>
> —President Theodore Roosevelt (comparing low birth rate among whites to other races)

> There are citizens of the United States, I blush to admit, born under other flags but welcomed under our generous naturalization laws to the full freedom and opportunity of America, who have poured the poison of disloyalty into the very arteries of our national life . . .[3]
>
> —President Woodrow Wilson

1. Letter from Thomas Jefferson, President of the U.S., to John Lynd (Jan. 21, 1811), *in* FIRST ANNUAL REPORT, AM. SOC'Y FOR COLONIZING THE FREE PEOPLE OF COLOR OF THE U.S. 13 (Washington, D.C., D. Rapine 1818), https://archive.org/stream/ASPC0001932500#page/n11/mode/2up [https://perma.cc/C8EK-GB5E].

2. Theodore Roosevelt, Speech Before the National Congress of Mothers: On American Motherhood (Mar. 13, 1905), *in* THE WORLD'S FAMOUS ORATIONS (William Jennings Bryan & Francis Whiting Halsey eds., Online ed., Bartleby.com 2003) (1906), https://www.bartleby.com/268/10/29.html [https://perma.cc/NJ8M-ZJMV]. Roosevelt was referring to whites when he urged families to have more children. *See* THOMAS G. DYER, THEODORE ROOSEVELT AND THE IDEA OF RACE 150 (La. State Univ. Press 1992) ("The sheer bulk of Roosevelt's writing and speaking on the entire issue demonstrated that he considered race suicide of great importance to the survival of 'white civilization.'").

3. President Woodrow Wilson, Third Annual Message (Dec. 7, 1915).

> We have people coming into the country, or trying to come in —we're stopping a lot of them. . . . You wouldn't believe how bad these people are. These aren't people, these are animals, and we're taking them out of the country at a level and at a rate that's never happened before.[4]
>
> —President Donald Trump

I. INTRODUCTION

A. Overview

Although presidents have issued 5,884 executive orders,[5] courts have invalidated only a few.[6] A President has plenary powers over immigration, an outgrowth of Article II powers to conduct foreign affairs and to faithfully execute laws. Courts often decline jurisdiction in challenges to immigration actions.[7]

4. Julie Hirschfeld Davis, *Trump Calls Some Unauthorized Immigrants 'Animals' in Rant*, N.Y. TIMES (May 16, 2018), https://www.nytimes.com/2018/05/16/us/politics/trump-undocumented-immigrants-animals.html [https://perma.cc/NRW4-UA8A].

5. *The American Presidency Project*, UNIV. OF CAL. SANTA BARBARA, https://www.presidency.ucsb.edu/documents/app-categories/written-presidential-orders/presidential/executive-orders [https://perma.cc/XCB4-3G7X] (last visited Dec. 4, 2018). There is a discrepancy between the number of executive orders catalogued in the database and the present count of executive orders, which exceeds 13,000. The American Presidency Project explains "that our collection of executive order texts is complete beginning with the administration of Harry S. Truman through the present. For the period of time prior to 1945 . . . the collection is not complete—although it includes all documents published in official presidential compilations. The archives of the American Presidency Project continue to grow as we obtain and digitize original texts." The earliest executive orders were not numbered. This may also explain the discrepancy. The first executive order in the database, issued by President John Q. Adams, officially announced the death of Thomas Jefferson and John Adams. *See* John Q. Adams, Executive Order [on the death of Thomas Jefferson] (July 11, 1826), THE AMERICAN PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/node/200526 [https://perma.cc/J245-8SA9] (last visited Sept. 30, 2019).

6. *E.g.*, Jecker v. Montgomery, 54 U.S. 498, 515 (1851) (holding that presidential order establishing a prize court in a foreign land, where the U.S. Navy captured a ship that was dealing with an enemy, was not upheld because the court was neither established by the Constitution or act of Congress). More recently, *see* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), and Korematsu v. United States, 323 U.S. 214 (1944), *overruled by* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

7. *But see* Ramos v. Nielsen (*Ramos I*), No. 18-cv-01554-EMC, 2018 WL 3109604, at *1 (N.D. Cal. June 25, 2018) (reviewing challenge to immigration-based executive order).

For nearly 300 years, people have come from around the world to the United States for work. Some as slaves, some as indentured servants—involuntary and voluntary—some as Mexican peons or Chinese coolies,[8] some as free people seeking refuge or asylum, some who unlawfully entered the United States as children or adults, and others with an employment visa. Most have been people of color (and for significant periods of American history, some Europeans have been treated like people of color).[9]

There are good reasons not to refer to these dislocated people as "immigrants." That term refers to a person's voluntary intention to make a permanent residence in the United States.[10] The voluntary element does not apply to slaves, forcibly removed from Africa and resettled in America. The Constitution referred to their journey as a "migration."[11] The permanence element does not apply to Central Americans and Haitians who have Temporary Protected Status (TPS). However, many have resided continuously in the United States since the 1990s, they have been approved to work, and now face deportation from President Trump. Despite the differing circumstances, however, these examples bear many similarities to how we typically understand what it means to be an immigrant. Over time, they have worked, set down roots, married and raised families, and established a permanent and voluntary presence. Whatever their legal status and length of presence in the United States, foreigners have caused recurring economic insecurity for American workers, particularly when immigration has been framed in racial terms. For these reasons, I use the term "migratory labor," which applies to people who have come to work in America under a wide variety of circumstances, and references their role

8. I use this term for Chinese labor with reservations because of its derogatory history. Nonetheless, the word cannot be avoided in recalling the racial discrimination directed at Chinese immigrants and their descendants. *E.g.*, *In re* Chang, 344 P.3d 288, 288 (2015) (granting Hong Yen Chang, a native of China who graduated from Columbia Law School, posthumous admission to the California bar).

9. *E.g.*, MANFRED BERG, POPULAR JUSTICE: A HISTORY OF LYNCHING IN AMERICA 128 (2011); James Pula, *American Immigration Policy and the Dillingham Commission*, 37 POLISH AM. STUD. 5, 18-19 (1980) (citing a U.S. Immigration Commission dictionary of races that classified Poles by "their physical inheritance [insofar] as they resemble the 'Eastern' or Slavic race more than that of northwestern Europe") (internal quotation omitted).

10. Dandamudi v. Tisch, 686 F.3d 66, 70 (2d Cir. 2012) (discussing "immigrant" and "nonimmigrant" and how this distinction relates to permanent and temporary residency).

11. HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 18 (2007).

once arriving in the United States as opposed to their motivation for immigration.

I use empirical analysis to measure judicial review of President Trump's anti-immigrant orders, proclamations, and policies. These employment-related actions include the travel ban largely affecting Muslims, the "Hire American" executive order revising the H-1B visa, rescissions of President Barack Obama's Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans (DAPA) actions that allowed certain unlawful immigrants to qualify for temporary employment permits, and similar rescissions of TPS (Temporary Protected Status) for a wide range of long-time residents from Central American and other countries. These immigration actions, which either directly or indirectly affect the labor market in the United States, are challenged in twenty different cases, some that consolidate several lawsuits. As of this writing, the Trump Administration has lost most rulings. The emerging trend suggests that the President has overreached with respect to his constitutional authority while precipitating precedents that limit presidential powers.

My study only begins here: I analyze this emerging trend through a long historical lens. President Trump's racially tinged approach compares to actions taken by other presidents. I begin by exploring the Constitution, specifically the provisions which institutionalized slavery. I then examine presidential action relating to migratory labor, beginning with George Washington. Twelve presidents owned slaves, one of whom traded in slaves while in office.[12] Some early presidents believed that neither free black people nor slaves could assimilate in white America and used their office to pursue deportation of black people to Africa.[13] Other presidents used their Article II powers to enforce the fugitive slave provisions of the Constitution.[14]

The Civil War led to the abolition of slavery, but peonage and other forms of debt labor soon took its place. These newer servitudes exploited migrants of color—initially, Chinese and Mexican

12. Gleaves Whitney, *Slaveholding Presidents*, HAUENSTEIN CTR. FOR PRESIDENTIAL STUD. (July 19, 2006), https://scholarworks.gvsu.edu/cgi/viewcontent.cgi?article=1021&context=ask_gleaves [https://perma.cc/QB6Q-J9V8].

13. *See* Henry Noble Sherwood, *The Formation of the American Colonization Society*, 2 J. NEGRO HIST. 209, 217 (1917).

14. WALTER H. MAZYCK, GEORGE WASHINGTON AND THE NEGRO 118-120 (1932).

workers.[15] Additionally, White workers who felt threatened by the otherness of these foreigners[16] organized unions and even a political party.[17] In time, their racial animus traveled to the White House, where presidents gave voice and action to their intolerance.[18] From 1875 through 1952, Congress enacted racially-tinged immigration laws[19] that excluded, restricted, and catalogued foreigners who competed in labor markets with white Americans.[20]

Presidents rarely stood against these laws. Occasionally, presidents were political agents for white workers who advocated immigration restrictions to preserve racial purity, superiority, separation, and exclusion.[21] In one jarring example, an executive order forcibly removed Japanese American citizens from their homes and jobs and led to their incarcerated labor.[22]

My study concludes: (1) President Trump's approach to immigration follows numerous presidents whose treatment of migratory labor was motivated by racial animus; (2) most of President Trump's immigration orders that affect employment fall outside the Constitution's Article II powers over foreign affairs, and many courts have not dismissed lawsuits that challenge these actions; and (3) as courts adjudicate President Trump's immigration orders and policies relating to employment, presidential powers over immigration erode significantly.

B. Organization of This Article

Part II examines President Trump's immigration orders and administrative actions and their effects on migratory labor.[23] Part II.A puts the President's broad immigration powers into context.[24]

15. 1 A DIGEST OF THE INTERNATIONAL LAW OF THE UNITED STATES 249 (Francis Wharton, ed. 2d. 1887).

16. Heong v. United States, 112 U.S. 536, 566 (1884).

17. SAMUEL GOMPERS & HERMAN GUTSTADT, MEAT VS. RICE: AMERICAN MANHOOD AGAINST ASIATIC COOLIEISM: WHICH SHALL SURVIVE? 14 (1902).

18. *E.g.*, Wilson, *supra* note 3.

19. Page Act of 1875, Pub. L. No. 43–141, 18 Stat. 477 (1875); Chinese Exclusion Act of 1882, Pub. L. No. 47-126, 22 Stat. 58 (1882); Geary Act, ch. 60, § 1, 27 Stat. 25 (1892) (repealed 1943); Immigration Act of 1924, ch. 190, § 11(a) , 43 Stat. 153, 159–160 (1924), Emergency Quota Act of 1921, Pub. L. No. 67–5, ch. 8, 42 Stat. 5 (1921), Immigration and Nationality Act of 1952, 8 U.S.C. § 1251(a)(6)(C) (1952).

20. *Infra* notes 198–203.

21. *Infra* notes 213, 228, and 256–257.

22. *Infra* note 293.

23. *Infra* notes 40–122.

24. *Infra* notes 51–56.

Part II.B[25] examines three areas where this President's actions have affected employment: (1) the President's executive orders, specifically the "travel ban"[26] and a "Hire America" policy that regulates H-1B visas;[27] (2) the administration's work-related immigration policies, including the termination of two deferred enforcement programs—DACA[28] and DAPA[29]—and the rescission of TPS for Central Americans and Haitians;[30] (3) this administration's practices—distinguished from its policies—that implicate the same employment authorization effect.[31] Part II.C analyzes litigation data for the cases in Part II.B.[32] Subpart (1) explains how the sample was created.[33] Subpart (2) provides data and fact findings.[34] Table A shows the laws used by plaintiffs to challenge the President's actions.[35] Table B shows how often (1) courts invoke or deny jurisdiction, (2) plaintiffs win, and (3) courts issue or continue injunctions.[36] I conclude this discussion with four key fact findings.[37]

Parts III through V put these findings in historical context. Part III covers the founding of the republic,[38] Part IV explores the modern era of federal regulation of immigration,[39] and Part V focuses on the contemporary period, running from 1952 through 2016.

Part VI synthesizes the two tracks of my analysis—one trained on President Trump, the other exploring how presidents since Washington enforced policies for migratory labor. My main conclusion is that President Trump's xenophobic approach has many historical precedents but is incompatible with current immigration law.

25. *Infra* notes 57–114.
26. *Infra* notes 57–67.
27. *Infra* notes 68–74.
28. *Infra* notes 75–82.
29. *Infra* notes 83–86.
30. *Infra* notes 87–95.
31. *Infra* notes 98–113.
32. *Infra* notes 115–122.
33. *Infra* notes 115–117.
34. *Infra* pp. 22–25.
35. *Infra* p. 23.
36. *Infra* p. 24.
37. *Infra* pp. 22–25.
38. *Infra* notes 123–170.
39. *Infra* notes 171–306.

II.
PRESIDENT TRUMP'S IMMIGRATION ORDERS AND ACTIONS AFFECTING EMPLOYMENT

The idea that many presidents have harbored racial animus is hard to accept. Reverential myths cloud our perceptions of these honored leaders—George Washington never told a lie, Thomas Jefferson pioneered equality, Theodore Roosevelt was progressive, Woodrow Wilson, an intellectual, was above bigotry, and Franklin Roosevelt, champion of liberalism, reluctantly interned Japanese Americans at the military's insistence. There is some truth to these portrayals but much distortion. Also, it may be uncomfortable to associate these highly regarded presidents with President Trump, especially due to his racist tweets and pronouncements.[40] But all these presidents, in different degrees, succumbed to racial bias in using their powers against migratory laborers. What is more worrisome is that few courts have curbed a President's immigration powers when used for racially invidious purposes. The Constitution is my starting point for understanding this abyss in checks and balances.

A. Presidential Immigration Powers

Executive orders and presidential proclamations are enigmas because they lack explicit statutory authority. But while the Constitution makes no mention of them, the Constitution mandates policies for citizenship,[41] immigration,[42] and race[43]—policies that

40. *E.g.*, Peter Baker, *Trump Fans the Flames of a Racial Fire*, N.Y. TIMES (July 14, 2019), https://www.nytimes.com/2019/07/14/us/politics/trump-twitter-race.html [https://perma.cc/LRW7-X7J6] (comparing Trump's "Go Back Home" tweetstorm against four dark-skinned Congresswomen to his "birther" conspiracy theory attacking Barack Obama, his 2015 campaign attack on Mexican "rapists" coming across the border, his assertion that Haitian immigrants "all have AIDS" and African visitors would never "go back to their huts" and his statement that were "very fine people on both sides" of the Charlottesville white nationalist rally); Josh Dawsey, *Trump Derides Protections for Immigrants from 'Shithole' Countries*, WASH. POST (Jan. 12, 2018), https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html [https://perma.cc/E9MM-RFZM] (reporting President Trump as saying "Why are we having all these people from shithole countries come here?" He reportedly continued, "Why do we need more Haitians? Take them out.").

41. U.S. CONST. art. I, § 2, cl. 2 (explaining eligibility standard for House of Representatives includes requirement of U.S. citizenship for seven years); U.S. CONST. art. I, § 3, cl. 3 (eligibility standard for House of Representatives includes requirement of U.S. citizenship for nine years); U.S. CONST. art. II, § 1, cl. 5 (eligibility standard for House of Representatives includes requirement of a "natural

undeniably favored white people because of how the Three-Fifths Clause gave slave states outsized influence in the national politics. Article II confers unilateral authority on the President on a variety of matters—to serve as commander in chief, grant reprieves and pardons, and fill vacancies in the executive branch—but does not grant any power explicitly related to involuntary migration (slaves), voluntary immigration (colonists who fled religious persecution), or labor.[44] The constitutional hook for the President's authority over foreign affairs is the power to "take Care that the Laws be faithfully executed"[45] and to conduct foreign affairs by appointing[46] and receiving[47] ambassadors.

Facing ambiguity on the limits of his executive powers, President George Washington assumed a power to declare a policy of neutrality in a war between France, England, and other nations.[48]

born citizen, or a citizen of the United States, at the time of the adoption of this Constitution.").

42. U.S. CONST. art. I, § 8 (granting Congress power to "establish a uniform rule of naturalization"). This power grew out of the perceived failings of the Articles of Confederation, which granted to states the power to naturalize citizens—a practice that created differential standards across states, but more deeply, a power with "extraterritorial ramifications" that undermined federal power). Michael T. Hertz, *Limits to the Naturalization Power*, 64 GEO. L.J. 1007, 1012 (1976).

43. The Constitution counted three-fifths of all slaves and certain Indians toward each state's population for purposes of apportioning seats in the House of Representatives. U.S. CONST. art. I, § 2, stating:

> Representatives and direct Taxes shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

This concept, as it applied to slaves, carried over from the Confederation Congress, who used this ratio for national taxation. Howard A. Ohline, *Republicanism and Slavery: Origins of the Three-Fifths Clause on the United States Constitution*, 28 WM. & MARY Q. 563, 563 (1971).

44. *See* U.S. CONST. art. II, § 2. Congress has authority under the Constitution to enact laws that regulate commerce among the states. U.S. CONST. art. I, § 8. The constitutionality of this power as it relates to labor and employment was upheld in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 49 (1937) (holding that Congress had authority to enact the National Labor Relations Act).

45. *Id.* The interrelationship between the "Take Care" Clause and the President's role as Commander-in-Chief is examined in Brian Finucane, *Presidential War Powers, the Take Care Clause, and Article 2(4) of the U.N. Charter*, 105 CORNELL L. REV. (forthcoming 2020).

46. U.S. CONST. art. II., § 2.

47. *Id.*

48. *See* A Proclamation by President George Washington (Apr. 22, 1793), *in* 1 COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1914, 148–49 (James D. Richardson, ed., 1897).

Ever since, there has been little reason to doubt that a President has plenary powers over foreign affairs, and by implication, regulation of U.S. borders.[49]

The Supreme Court did not review executive policy actions such as administrative adjudications until 1902.[50] Since then, judicial review has continued to expand and now extends to proclamations, a policy tool that functions like an order.[51] Courts consider whether an order or action: (1) serves a function explicitly or inherently part of Article II of the Constitution;[52] (2) executes a power delegated by Congress in a statute;[53] (3) conforms to a Supreme

49. *See, e.g.*, Fiallo v. Bell, 430 U.S. 787, 792 (1977) ("[T]he power to expel or exclude aliens [i]s a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.") (quoting Shaughnessy v. Mezei, 345 U.S. 206, 210 (1953)). *See also* Kenneth R. Mayer, *Executive Orders and Presidential Power*, 61 J. POL. 445 (1999); William D. Howell, *Unilateral Action and Presidential Power: A Theory*, 29 PRESIDENTIAL STUD. Q. 850 (1999); RICHARD E. NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN (1990); Christopher Deering & Forrest Maltzman, *The Politics of Executive Orders: Legislative Constraints on Presidential Power*, 52 POL. RES. Q. 767, 767–68 (1999). For more on presidential proclamations, *see* Brandon Rottinghaus & Jason Maier, *The Power of Decree: Presidential Use of Executive Proclamations, 1977–2005*, 60 POL. RES. Q. 338, 340 (2007).

50. Am. Sch. of Magnetic Healing v. McAnnulty, 187 U.S. 94, 96 (1902) (reviewing Postmaster General's bar of fraudulent advertising for medical treatments). Subtle distinctions and gray areas marked out by executive actions, such as executive orders, proclamations, signatures on Cabinet-level policy documents and more, are analyzed in William D. Neighbors, *Presidential Legislation by Executive Order*, 37 U. COLO. L. REV. 105, 107 (1964) ("[I]ssuance of executive orders was a haphazard operation both as to form and procedure [until 1935.]").

51. Courts also review presidential proclamations. *E.g.*, Wyoming v. Franke, 58 F. Supp. 890 (D. Wyo. 1945).

52. *E.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319–320 (1936) ("[W]e are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.").

53. *E.g.*, Stark v. Wickard, 321 U.S. 288, 310 (1944) ("The responsibility of determining the limits of statutory grants of authority . . . is a judicial function entrusted to the courts by Congress."); Hirabayashi v. United States, 320 U.S. 81 (1943) (upholding an executive order on grounds that Congress authorized this action); Dames & Moore v. Regan, 453 U.S. 654, 688 (1981) (upholding executive orders that nullified attachments of Iranian funds as part of implementing a hostage release agreement with Iran, citing congressional acquiescence to the President's action).

Court precedent;[54] (4) reflects the intent of constitutional framers in the Federalist Papers;[55] and (5) maintains separation of powers.[56]

B. President Trump's Immigration Orders, Proclamations, and Administrative Actions

1. Executive Orders and Proclamations Relating To Migratory Labor

Travel Ban: Issued by President Trump in the first week of his administration, Executive Order 13,769 banned entry of virtually all persons from seven Muslim countries.[57] Among its effects on migratory labor, the order "affected prospective employment relationships by denying states and private employers the ability to sponsor medical and science interns from the affected countries."[58] After the order was enjoined,[59] a new order was issued—again, with effects on employment relationships.[60] The Supreme Court partially

54. Exec. Order No. 9250, 7 Fed. Reg. 7871 (Oct. 6, 1942).

55. The most expansive defense of a President's power to issue executive orders is Justice Vinson's dissenting opinion in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 667 (1952) (holding that plant seizure pursuant to Exec. Order 10,340 was unconstitutional exercise of presidential power).

56. *See* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 138 (1951) (ruling that President Truman's Executive Order 9835, creating a Loyalty Review Board and authorizing the Attorney General to designate certain groups as subversive, was unconstitutional). Justice Burton concluded:

> The doctrine of administrative construction never has been carried so far as to permit administrative discretion to run riot. If applied to this case and compounded with the assumption that the President's Executive Order was drafted for him by his Attorney General, the conclusion would rest upon the premise that the Attorney General has attempted to delegate to himself the power to act arbitrarily.

Id.

57. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) (restricting admissions of aliens from Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen). As a presidential candidate, Donald Trump repeatedly suggested that Muslims posed a threat to the U.S. and proposed a "Muslim ban." *See* Trump v. Hawaii, 138 S. Ct. 2392, 2435–36 (2018) (Sotomayor, J., dissenting).

58. Washington v. Trump (*Washington II*), 847 F.3d 1151, 1159–1160 (9th Cir. 2017) (University of Washington's sponsorship of medical and science interns affected by entry-bar).

59. Washington v. Trump (*Washington I*), No. C17–0141JLR, 2017 WL 462040 at *2 (W.D. Wash. Feb. 15, 2017).

60. Trump v. Int'l Refugee Assistance Project (*Trump I*), 137 S. Ct. 2080, 2088 (2017) (ruling on Exec. Order No. 13,780 ("EO–2"), by narrowing district court's injunction to apply, *inter alia*, to "a worker who accepted an offer of employment from an American company").

denied enforcement of this revised order in *Trump v. International Refugee Assistance Project*.[61]

The President won a decisive ruling for his third attempt at categorically barring entry to millions of foreigners in *Trump v. Hawaii*.[62] Narrower than the two previous iterations, this ban was issued as a proclamation rather than an order.[63] It minimized employment effects by narrowing its scope to people with no prior relationship to the United States.[64]

Following these cases, President Trump issued Executive Order 13,815, labelled EO-4, and a related memorandum that resumed the refugee admission program but with additional "extreme vetting."[65] In apparent disregard of the Supreme Court's ruling, the administration denied entry to people with bona fide prior relationships to the United States, including employees of U.S. entities.[66] Relying on *Trump v. Hawaii*, a district court enjoined

61. *Id.* (denying enforcement to Section 2(c) of the order insofar as it applied to foreign nationals who had a credible claim of a bona fide relationship with a person or entity in the United States, including an employment relationship).

62. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2440 n.5 (2018) (Sotomayor, J., dissenting) ("President Trump is not exercising his discretionary authority to determine the admission or exclusion of a particular foreign national. He promulgated an executive order affecting millions of individuals on a categorical basis."). While the ruling upheld the ban and rejected arguments concerning presidential animus, the Court overruled *Korematsu*. *Id.* at 2423 (referring to Roosevelt's Executive Order 9066 as a "morally repugnant order"). By using this case as an occasion to overrule Korematsu, the majority opinion seemed to imply that moral arguments against President Trump's travel ban did not meet the extreme threshold of repugnance.

63. *Id.* (holding that the President suspended entry under Proclamation No. 9645).

64. *Id.* at 2422–2423. By its express terms, the proclamation improved "screening and vetting protocols and procedures associated with visa adjudications and other immigration processes" for people seeking entry from Chad, Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen. *See* Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017).

65. Exec. Order No. 13,815, § 3(a), 82 Fed. Reg. 50055 (Oct. 27, 2017); Memorandum from Rex W. Tillerson, Sec'y, Dep't of State, Elaine Duke, Acting Sec'y, Dep't of Homeland Sec., and Dan Coats, Dir., Nat'l Intelligence to President Donald Trump on Resuming the United States Refugee Admissions Program with Enhanced Vetting Capabilities (Oct. 23, 2017). On January 25, 2017, President Trump discussed his plans to implement "extreme vetting" of people seeking entry into the United States, without defining this term. Hawaii v. Trump (*Hawaii I*), 241 F. Supp. 3d 1119, 1126 (D. Haw. 2017).

66. Doe v. Trump (*Doe III*), 288 F. Supp. 3d 1045, 1061 (W.D. Wash. 2017). Iraqi militants kidnapped and raped Ms. Doe and warned her to stop working for Americans or face death. *Id.* She was four years into an application and vetting process at the time that Executive Order 13,815 barred her from completing the final stages for the refugee admissions process. *Id.*

the order to the extent that it affected refugees with bona fide relationships to the United States.[67]

"Hire American" and H-1B Visas: On April 18, 2017, the President issued Executive Order 13,788. Titled "Buy American and Hire American,"[68] the order applies to the United States technology workforce.[69] It states a policy to award H-1B visas to the most skilled or highest paid petitioners.[70] The industry has complained that the regulation—which applies to a large migratory labor market[71]—hinders employers who are seeking to hire these workers.[72] A proposed rule related to the order would significantly restrict hiring by limiting H-1B to "the most-skilled or highest-paid petition beneficiaries."[73] Beneath its surface appeal to merit, the policy was based on, and promulgated shortly after, a *60 Minutes* program that blamed Indian workers for taking jobs from Americans.[74]

67. *Id.* at 1086 (ruling that the order and memorandum were subject to the notice and comment requirements of the Administrative Procedure Act for rulemaking, and the Secretary of Homeland Security lacked authority to suspend indefinitely a nondiscretionary statutory duty under the INA).

68. Exec. Order No. 13,788, 82 Fed. Reg. 18837 (Apr. 18, 2017) [hereinafter *Buy American and Hire American*]. The order was issued on April 18, 2017, less than a month after CBS aired a 60 Minutes segment titled "You're Fired." *Sixty Minutes: Are U.S. Jobs Vulnerable to Workers with H-1B Visas?* (CBS television broadcast Mar. 19, 2017).

69. *Buy American and Hire American*, *supra* note 68, at § 1(c).

70. *Buy American and Hire American*, *supra* note 68, at § 5(b).

71. U.S. Dep't of Homeland Security, 2015 Y.B. of Immig. Statistics, 65 (2016), https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_2015.pdf [https://perma.cc/FA45-3E2S] (showing "temporary workers in specialty occupations (H1B)" totaled 537,450 in 2015).

72. *See* David J. Bier, Opinion, *America Is Rejecting More Legal Immigrants Than Ever Before*, N.Y. Times (Nov. 15, 2018) (finding that Department of Homeland Security rejected 11.3 percent of requests to the immigration agency, including petitions for work permits, marking the highest rate of denial on record).

73. *See* Registration Requirement for Petitioners Seeking to File H-1B Petitions on Behalf of Cap-Subject Aliens, 83 Fed. Reg. 62406 (proposed Dec. 3, 2018) (to be codified at 8 C.F.R. pt. 214). For analysis of the complex new rule, see Stuart Anderson, *New H-1B Rule Likely Unlawful and More Costly For Employers*, Forbes (Dec. 10, 2018), https://www.forbes.com/sites/stuartanderson/2018/12/10/new-h-1b-rule-likely-unlawful-and-more-costly-for-employers/#46f46f13a2d3 [https://perma.cc/L9TX-XVHT].

74. The White House held a press briefing just a month after the *60 Minutes* segment aired. At the April 17, 2017 briefing an unidentified "Senior Administration Official" cited this TV show as a major talking point:

> So 80 percent receive less than the median wage, and only 10 percent receive the median wage. And so only 5 percent were categorized at the highest wage tier of the four wage tiers that are in place for the H1B guest worker visa. The result of that is that workers are often brought in well below market rates to replace American workers, again, sort of violating the principle of the pro-

2. Policies: Rescission of Deferred and Protected Status and EB-5 Limits

Previous presidents over the past thirty or more years used executive power to provide temporary legal status for migrants whose circumstances were dire but who did not meet asylum or refugee criteria under immigration laws. President Trump rescinded these actions, and several lawsuits have challenged his administration's rescission orders. Additionally, the President has affected the employment of migratory labor by limiting a work-related visa known as EB-5.[75]

DACA: The Trump administration has taken steps to terminate President Barack Obama's DACA policy,[76] including the elimination of work authorization.[77] However, these steps have not taken the administration very far. In *Batalla Vidal v. Nielsen*, a case that involved executive action to deny employment authorization to DACA recipients, the court ruled that these immigrants, and states, have standing.[78] The *Batalla* court also enjoined the rescission of the DACA policy because that policy likely violated the Administrative Procedure Act (APA) and the Fifth Amendment Due Process Clause.[79] In a subsequent ruling on equal protection, the court found that the Secretary of Homeland Security had no racial animus but recognized that the President may have directed the policy

---

gram, which is supposed to be a means for bringing in skilled labor, and instead you're bringing in a lot of times workers who are actually less skilled and lower paid than the workers that they're replacing.

And we've all seen high-profile examples of this, and I'm sure that many of you are aware — and President Trump has been a leader in calling attention to this effort.

Press Release, Senior Administration Official, The White House Press Briefing Room (Apr. 17, 2017) (on file with the White House).

75. *See infra* note 96.

76. Memorandum from Elaine C. Duke, Acting Sec'y, Dep't of Homeland Sec. to James W. McCament, Acting Dir., U.S. Citizenship and Immigration Servs, Thomas D. Homan, Acting Dir., U.S. Immigr. and Customs Enf't, Kevin K. McAleenan, Acting Comm'r, U.S. Customs and Border Prot., Joseph B. Maher, Acting Gen. Counsel, Ambassador James D. Nealon, Assistant Sec'y, Int'l Engagement, Julie M. Kirchner, Citizenship and Immigr. Servs. Ombudsman (Sept. 5, 2017) (on file with Homeland Security).

77. *Id.* (stating that DHS will "reject all DACA initial requests and associated applications for Employment Authorization Documents filed after the date of this memorandum").

78. Batalla Vidal v. Duke (*Vidal I*), 295 F. Supp. 3d 127, 150 (E.D.N.Y. 2017) (reporting the employment aspect of the rescission action).

79. Batalla Vidal v. Nielsen (*Vidal III*), 291 F. Supp. 3d 260 (E.D.N.Y. 2018).

with a "constitutionally suspect" purpose.[80] The rescission policy led to other lawsuits.[81] Those cases are now consolidated for review by the Supreme Court.[82]

DAPA: President Trump's DHS also rescinded the DAPA Program,[83] an Obama-era policy which granted deferral status for three years to parents of DACA eligible children and young adults. After twenty-six states filed a lawsuit to challenge DAPA, a Texas district court enjoined it.[84] The consequence of that injunction was later felt when a magistrate in *J-M-C-B v. Nielsen* dismissed a lawsuit

80. *Id.* at 278 (stating, "whether—and, if so, for how long—any Executive action disproportionately affecting a group the President has slandered may be considered constitutionally suspect").

81. *See* Coyotl v. Kelly, 261 F. Supp. 3d 1328, 1341 (N.D. Ga 2017) (holding jurisdiction-stripping provisions of federal law do not apply); Inland Empire—Immigrant Youth Collective v. Nielsen (*Inland I*), No. EDCV 17–2048 PSG (SHKx), 2018 WL 1061408 (C.D. Cal. Feb. 26, 2018) (enjoining revocation of EAD and DACA status); Texas v. United States, 328 F. Supp. 3d 662 (S.D. Tex. 2018); Medina v. U.S. Dep't of Homeland Sec. (*Medina I*), No. C17-218-RSM-JPD, 2017 WL 2954719 (W.D. Wash. Mar. 14, 2017) (DACA-recipient's arrest and detention did not preclude jurisdiction); NAACP v. Trump (*NAACP I*), 321 F. Supp. 3d 143 (D.D.C. 2018) (DACA rescission affecting 689,800 enrollees was a major policy decision and therefore reviewable); NAACP v. Trump (*NAACP II*), 298 F. Supp. 3d 209 (D.D.C. 2018); NAACP v. Trump (*NAACP III*), 315 F. Supp. 3d 457, 473 (D.D.C. 2018) (holding DHS rescission of DACA "was both subject to judicial review and arbitrary and capricious"); Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec. (*Regents I*), No. C 17-05211 WHA, 2017 WL 4642324 (N.D. Cal. Oct. 17, 2017) (ordering DHS to complete record under ADA for DACA-rescission); Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec. (*Regents II*), 875 F.3d 1200 (9th Cir. 2017) (denying government's motion to stay order); *In re* United States, 138 S. Ct. 443 (2017) (granting government's motion to stay order); Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec. (*Regents III*), 279 F. Supp. 3d 1011 (N.D. Cal. 2018) (holding court had jurisdiction to enjoin rescission policy); Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec. (*Regents IV*), 908 F.3d 476 (9th Cir. 2018) (enjoining DHS from using estopped from using DACA-recipient personal information); CASA de Maryland v. U.S. Dep't of Homeland Sec., 284 F. Supp. 3d 758 (D. Md. 2018) (federal government estopped from using information provided by participants for immigration enforcement).

82. McAleenan v. Vidal, 139 S. Ct. 2773 (2019).

83. *See* Memorandum on Rescission of November 20, 2014 Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA"), U.S. Dep't of Homeland Sec. (June 25, 2017), https://www.dhs.gov/sites/default/files/publications/DAPA Cancellation Memo.pdf [https://perma.cc/XVW6-AL94].

84. *See* Texas v. United States, 86 F. Supp. 3d 591, 677 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd*, 136 S. Ct. 2771 (2016).

that challenged the Trump administration's rescission of DAPA as moot.[85] A judge adopted the magistrate's findings and order.[86]

TPS: DHS terminated temporary status for 300,000 migrants from Haiti, Sudan, Nicaragua, and El Salvador, but this termination was also soon enjoined by the courts.[87] In *Ramos v. Nielsen*, the district court dismissed the Agency's jurisdiction argument,[88] and enjoined the termination.[89] In a subsequent ruling, the *Ramos* court noted that the "information sought by the Secretary coincides with racial stereotypes—i.e., that non-whites commit crimes and are on the public dole."[90] The court based its injunction partly on a finding of the President's racial animus.[91]

Plaintiffs from El Salvador, Haiti, and Guatemala prevailed in *Centro Presente v. United States Department of Homeland Security*.[92] In

85. J-M-C-B v. Nielsen (*J-M-C-B I*), No. 03:16-CV-02150-AC, 2018 WL 3797566 (D. Or. May 30, 2018). In June 2017, Secretary of Homeland Security John F. Kelly rescinded the 2014 DAPA Memorandum. *See* U.S. Dep't of Homeland Sec., *supra* note 83.

86. J-M-C-B v. Nielsen (*J-M-C-B II*), No. 3:16-cv-02150-AC, 2018 WL 3795221, at *1 (D. Or. Aug. 8, 2018), *appeal filed*, No. 18-35744, 2019 WL 1087494 (Jan. 24, 2019).

87. *See* Termination of the Designation of Haiti for Temporary Protected Status, 83 Fed. Reg. 2648, 2648 (Jan. 18, 2018); Termination of the Designation of El Salvador for Temporary Protected Status, 83 Fed. Reg. 2654, 2654 (Jan. 18, 2018); Termination of the Designation of Nicaragua for Temporary Protected Status, 82 Fed. Reg. 59636, 59636 (Dec. 15, 2017); Termination of the Designation of Sudan for Temporary Protected Status, 82 Fed. Reg. 47228, 47228 (Oct. 11, 2017). TPS rescission status means, in part, that these individuals cannot secure work authorization in the U.S. *See* Ramos v. Nielsen (*Ramos III*), 336 F. Supp. 3d 1075, 1108–09 (N.D. Cal. 2018).

88. Ramos v. Nielsen (*Ramos I*), No. 18-cv-01554-EMC, 2018 WL 3109604, at *1 (N.D. Cal. June 25, 2018) (citing McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 492 (1991) (jurisdiction-stripping applies to "a single act rather than a group of decisions or a practice or procedure employed in making decisions.")). The Court also allowed plaintiffs to present proof that President Trump's statement could be construed as "evidence of racial bias animus against non-white immigrants, and that he thereafter influenced and tainted DHS's decision-making process with regard to TPS." *Id.* at *2. Moreover, the court found that the "prohibition on racial animus under the Due Process clause's Equal Protection guarantee applies to executive action in the immigrant context." *Id.* (citation omitted).

89. *Ramos III*, 336 F. Supp. 3d at 1107-09 (holding that judicial review was not precluded and granting preliminary injunction).

90. *Id.* at 1105.

91. Ramos v. Nielsen (*Ramos II*), 321 F. Supp. 3d 1083, 1132 (N.D. Cal. 2018).

92. Centro Presente v. U.S. Dep't of Homeland Sec., 332 F. Supp. 3d 393, 414–16 (D. Mass. 2018). The court ruled on three separate but related policy decisions made by the Secretary of Homeland Security: the decision of January 18, 2018 to terminate El Salvador's TPS designation, effective September 9, 2019; the decision of November 20, 2017 to terminate Haiti's TPS designation, effective July

denying the Agency's motion to dismiss, the court found enough evidence of racial animus behind the rescission decisions to apply heightened scrutiny.[93] These actions were found, in the alternative, to lack a rational basis.[94] The court also denied the motion to dismiss President Trump as a defendant.[95]

EB-5 Limits: Congress created the EB-5 visa in 1990, allowing affluent investors to be eligible for lawful permanent residence if they met financial criteria and created a certain number of new jobs in the United States.[96] Until recently, the State Department did not count children of investors against the cap of EB-5 visas. Plaintiffs in *Wang v. Pompeo* have alleged that the Trump administration is unlawfully capping EB-5 visas by counting children and spouses of EB-5 principals against the annual cap.[97] The district court denied the motion for an injunction.[98]

3. Blocking Petitions for Naturalization and Adjustment of Status

In addition to implementing programmatic policies as just discussed—that is, immigration actions that affect large numbers of people defined by a broad characteristic—President Trump's administration has restricted the ability of foreigners to qualify for a specific type of visa or immigration status. My study examines lawsuits that involve these executive branch actions. *Wagafe v. Trump*[99] and *Jafarzadeh v. Nielsen*[100] challenge an allegedly covert immigra-

22, 2019; and the decision of May 4, 2018 to terminate Honduras' TPS designation, effective January 5, 2020. *See Id.* at 402–404.

93. *See Id.* at 415, finding that "the combination of a disparate impact on particular racial groups, statements of animus by people plausibly alleged to be involved in the decision-making process, and an allegedly unreasoned shift in policy sufficient to allege plausibly that a discriminatory purpose was a motivating factor in a decision."

94. Distinguishing this case from *Trump v. Hawaii*, the court concluded: "In this case, by contrast, there is no justification, explicit or otherwise, for Defendants' switch to focusing on whether the conditions that caused the initial designation had abated rather than a fuller evaluation of whether the country would be able to safely accept returnees." *See Id.* at 416.

95. *Id.* at 418-19.

96. Immigration Act of 1990 ("The 1990 Act"), Pub. L. No. 101-649, § 121, 104 Stat. 4978, 4989–90 (codified as amended at 8 U.S.C. § 1153(b)(5)).

97. Feng Wang v. Pompeo, 354 F. Supp. 3d 13, 17 (D.D.C. 2018).

98. *Id.* at 28.

99. Wagafe v. Trump (*Wagafe I*), No. C17-0094-RAJ, 2017 WL 2671254 (W.D. Wash. June 21, 2017). Wagafe did not specifically allege how he learned of the secret screening program but he waited three and a half years for action on his application for naturalization after he met all the criteria for citizenship. *Id.* at *3. Wagafe alleged that CARRP's vetting process is secret. *Id.* at *1.

100. Jafarzadeh v. Nielsen, 321 F. Supp. 3d 19 (D.D.C. 2018).

tion program called Controlled Application Review and Resolution Program. Generated within the executive branch, CARRP enables immigration officials to deny petitions for citizenship or adjustment of status on national security grounds, even when a petitioner meets all criteria under the Immigration and Nationality Act (INA).[101] CARRP is alleged to be a screening process with no congressional approval[102] that uses overbroad criteria, such as donations to Muslim charities, to indicate who is a national security threat.[103] Plaintiffs also claim that the program usurps Congress's exclusive power to set uniform naturalization laws.[104] In the main case, the *Wagafe* court has certified a class,[105] although litigation has been bogged down over the government's motions to protect evidence from discovery.[106]

In *Kirwa v. U.S. Dep't of Defense*, the plaintiff, along with a class of other immigrants, challenged the Trump administration's decision to block non-citizens in the Army's Selected Reserve program from completing applications for expedited citizenship.[107] In the case at bar, the military refused to issue a form to certify a petitioner's military duty status.[108] Petitioners alleged that this paperwork obstruction exposes them to loss of jobs and deportation.[109] Citing a likely violation of the APA, the district court in *Kirwa v. U.S. Dep't of Defense* granted injunctive relief.[110] The court

101. *Wagafe I*, 2017 WL 2671254, at *1 (Plaintiffs alleging that USCIS officers are directed to deny or delay an application as long as possible if a CARRP criteria is met).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at *16.

106. Wagafe v. Trump (*Wagafe II*), No. C17-94 RAJ, 2018 WL 1737939 (W.D. Wash. Apr. 11, 2017).

107. Kirwa v. U.S. Dep't of Def. (*Kirwa III*), 285 F. Supp. 3d 257, 263-64 (D.D.C. 2018) (involving MAVNI program [Military Accessions Vital to the National Interest], started in 2008, and in effect through early 2017, that allowed more than 10,000 military enlistees to become naturalized citizens via an expedited process). The Defense Department has added a "slow-walk" step for processing an application by inserting an open-ended step for "Background Investigation and Suitability Vetting." *Id.*

108. *Id.* at 264–65. The court certified a class and issued a restraining order. *Id.* at 263.

109. Kirwa v. U.S. Dep't of Def. (*Kirwa I*), 285 F. Supp. 3d 21, 43 (D.D.C. 2018) ("[E]very day of delay leaves plaintiffs in limbo and in fear of removal. . . . Plaintiffs live in constant fear that they will lose their work or student visas, or be discharged, deported, and subject to harsh punishment in their country of origin for joining a foreign military.").

110. *Id.* at 38–42.

found that changes in certifying honorable service were arbitrary and capricious,[111] guidelines were impermissibly retroactive,[112] and petitioners suffered irreparable harm.[113] The court ordered a preliminary injunction and certified a class.[114]

C. Data Analysis

1. The Sample

For this study I read the 5,884 executive orders issued by every President from Washington to Trump that were catalogued in The American Presidency Project.[115] To analyze the judicial review of President Trump's orders and related actions, I read the executive orders issued by Trump which were catalogued in The American Presidency Project. Because this source reflected some delay in posting executive actions, I supplemented my search by using Westlaw's electronic database. I used a variety of keyword searches, such as "immigration" and "Trump"—or, in place of the President, "Department of Homeland Security." This generated instances that did not involve a presidential order but were still catalogued in The American Presidency Project: specifically, the lawsuits over MAVNI and CARRP.[116]

For a case to be included in the tally, it had to involve an immigration policy of President Trump or his administration. I excluded ordinary cases where a person challenged a removal order. The case also had to touch on some aspect of employment, whether it be a rescission policy that ends EADs, a ban that denies entry to people with jobs or work-related visas, or administrative rules for employment visas.

For these qualifying cases, I recorded the: (1) law or laws at issue; (2) plaintiffs' residency status, as stated in the case; (3) type of federal court (district, appeals, or Supreme Court); (4) whether the holding hinged on procedural issues, substantive issues, or both; (5) ruling on jurisdiction (finding jurisdiction, finding no jurisdiction, or not applicable); (6) injunction (denied, granted in part, granted in whole, or not applicable); and (7) winner (plaintiff entirely, plaintiff in part, or United States entirely). To capture

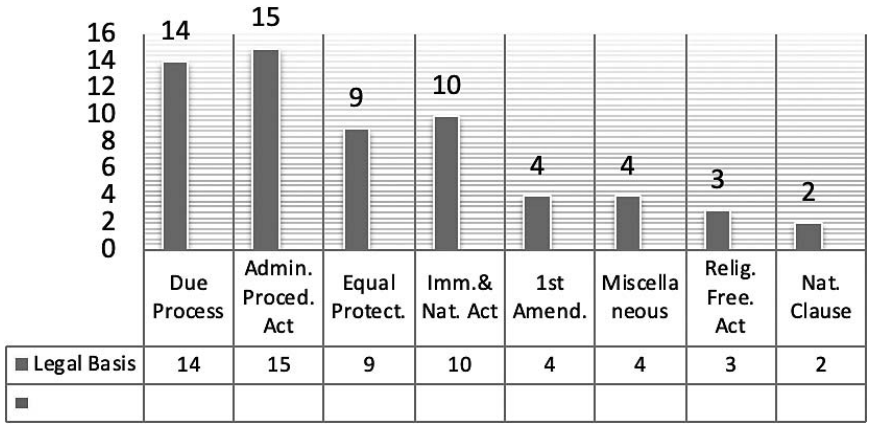
111. *Id.* at 39.
112. *Id.* at 40.
113. *Id.* at 44.
114. *Id.*
115. *See* UNIV. OF CAL. SANTA BARBARA, *supra* note 5.
116. My initial focus was limited to executive orders but expanded to also include: (a) presidential letters; (b) annual addresses to congress; diplomatic communications; cabinet minutes; and executive branch directives.

multiple rounds of litigation, I repeated this pattern for "Court II" through "Court V." The executive orders, proclamations, and agency actions in this sample generated more than one ruling by the same district court—for example, a judge's adoption of a magistrate's findings, or a motion to alter an injunction. I did not code cases, however, that involved technical or procedural issues such as motions for reconsideration, *en banc* hearings and protective orders for information. In other words, these narrow procedural motions did not constitute a new round of litigation but simply an extension of one round. I therefore excluded these rulings to avoid skewing data for more substantive issues. My sample contains 40 court rulings that conform to these specific criteria.[117]

117. *Vidal I*, 295 F. Supp. 3d 127, 150 (E.D.N.Y. 2017); Batalla Vidal v. Nielsen (*Vidal II*), 279 F. Supp. 3d 401 (E.D.N.Y. 2018); Batalla Vidal v. Nielsen (*Vidal III*), 291 F. Supp. 3d 260 (E.D.N.Y. 2018); Centro Presente v. U.S. Dep't of Homeland Sec., 332 F. Supp. 3d 393 (D. Mass. 2018); Coyotl v. Kelly, 261 F. Supp. 3d 1328 (N.D. Ga. 2017); Doe v. Trump (*Doe I*), 328 F. Supp. 3d 1185 (W.D. Wash. 2018); Doe v. Trump (*Doe II*), No. 18-35015, 2018 WL 1774089 (9th Cir. Mar. 29, 2018); *Doe III*, 288 F. Supp. 3d 1045 (W.D. Wash. 2017); Feng Wang. v. Pompeo, 354 F. Supp. 3d 13 (D.D.C. 2018); *Hawaii I*, 241 F. Supp. 3d 1119 (D. Haw. 2017); Hawaii v. Trump (*Hawaii II*), 245 F. Supp. 3d 1227 (D. Haw. 2017); Hawaii v. Trump (*Hawaii III*), 859 F.3d 741 (9th Cir. 2017); *Inland I*, No. EDCV 17–2048 PSG (SHKx), 2017 WL 5900061 (C.D. Cal. Nov. 20, 2017); Inland Empire-Immigrant Youth Collective v. Nielsen (*Inland II*), No. EDCV 17–2048 PSG (SHKx), 2018 WL 1061408 (C.D. Cal. Feb. 26, 2018); *In re* United States, 138 S. Ct. 443 (2017); Jafarzadeh v. Nielsen, 321 F. Supp. 3d 19 (D.D.C. 2018); *J-M-C-B I*, No. 03:16-CV-02150-AC, 2018 WL 3797566 (D. Or. May 30, 2018); *J-M-C-B II*, No. 3:16-cv-02150-AC, 2018 WL 3795221 (D. Or. Aug. 8, 2018); *Kirwa I*, 285 F. Supp. 3d 21 (D.D.C. 2018); Kirwa v. U.S. Dep't of Def (*Kirwa II*), 315 F. Supp. 3d 266 (D.D.C. 2018); *Kirwa III*, 285 F. Supp. 3d 257 (D.D.C. 2018); *Medina I*, No. C17-218-RSM-JPD, 2017 WL 2954719 (W.D. Wash. Mar. 14, 2017); Medina v. U.S. Dep't of Homeland Sec. (*Medina II*), No. C17-0218RSM, 2017 WL 5176720 (W.D. Wash. Nov. 8, 2017); *NAACP I*, 321 F. Supp. 3d 143 (D.D.C. 2018); *NAACP II*, 298 F. Supp. 3d 209 (D.D.C. 2018); *NAACP III*, 315 F. Supp. 3d 457 (D.D.C. 2018); *Ramos I*, No. 18-cv-01554-EMC, 2018 WL 3109604 (N.D. Cal. June 25, 2018); *Ramos II*, 321 F. Supp. 3d 1083 (N.D. Cal. 2018); *Ramos III*, 336 F. Supp. 3d 1075 (N.D. Cal. 2018); Texas v. United States, 328 F. Supp. 3d 662 (S.D. Tex. 2018); *Regents I*, No. C 17-05211 WHA, 2017 WL 4642324 (N.D. Cal. Oct. 17, 2017); *Regents II*, 875 F.3d 1200 (9th Cir. 2017); *Regents III*, 279 F. Supp. 3d 1011 (N.D. Cal. 2018); *Regents IV*, 908 F.3d 476 (9th Cir. 2018); *Wagafe I*, No. C17-0094-RAJ, 2017 WL 2671254 (W.D. Wash. June 21, 2017); *Wagafe II*, No. C17-94 RAJ, 2018 WL 1737939 (W.D. Wash. Apr. 11, 2018); *Washington I*, No. C17–0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 15, 2017); *Washington II*, 847 F.3d 1151 (9th Cir. 2017); Washington v. Trump (*Washington III*), 858 F.3d 1168 (9th Cir. 2017); *Trump I*, 137 S. Ct. 2080, 2088 (2017).

2. Data and Fact Findings

There were 20 first-round rulings, 11 second-round rulings, 5 third-round rulings, 1 fourth-round ruling, and 1 fifth-round ruling (38 rulings in total).

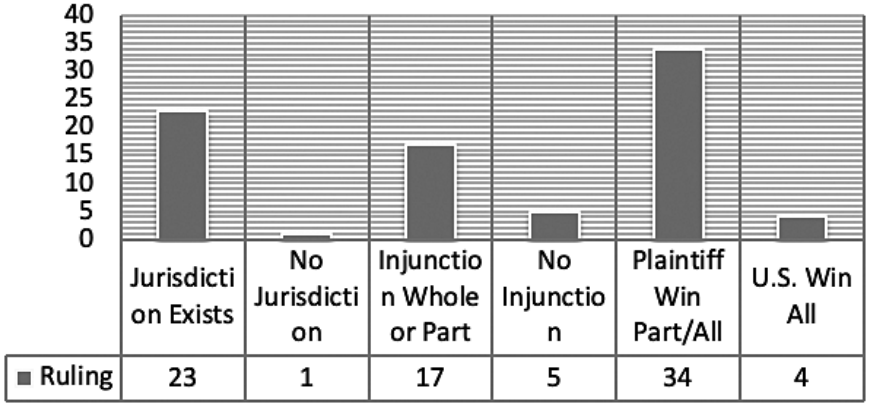


Fact Finding 1 (Table A): The APA and the Fifth Amendment's Due Process Clause were the most common laws that plaintiffs used to challenge President Trump's orders and policies. In the 20 first-round rulings, the APA was cited in 15 cases (75%), while the Due Process Clause was cited in 14 cases (70%). These statistics have several implications: the orders and policies (1) were drafted and implemented hastily or without regard to the legal interests of plaintiffs,[118] (2) harmed or potentially harmed employment interests so much as to implicate a constitutional right,[119] and (3) overlapped or conflicted to such a degree with a statute that notice and comment or other APA requirements were triggered.[120]

118. *Hawaii I*, 241 F. Supp. 3d at 1126 ("The first Executive Order [No. 13,769] was issued without a notice and comment period and without interagency review.").

119. *Regents IV*, 908 F.3d at 509 ("DAPA would make 4.3 million otherwise removable aliens eligible for lawful presence, employment authorization, and associated benefits. . . ." (quoting Texas v. United States, 809 F.3d 134, 181 (5th Cir. 2015))), *cert. granted*, 139 S. Ct. 2779 (2019).

120. *Inland II*, 2018 WL 1061408, at *3 ("No additional notice or explanation was provided, and [DACA-recipient] was not provided a chance to respond.").



Fact Finding 2 (Table B): Courts ruled that they had jurisdiction in 23 of the 24 cases (95.9%) where the Trump administration raised this procedural defense. This finding is important and unexpected because some immigration cases find that a statute strips courts of jurisdiction.[121] One might think that the administration's jurisdiction arguments would be able to rely on robust defenses such ripeness, standing, political questions, and justiciability because of how quickly the lawsuits were filed. However, the administration's jurisdiction arguments fell flat. What the data indicate is that the courts were able to find jurisdiction because of these broadly-written policies and had such widespread effects that they presented a significant likelihood of one, if not several, legal violations, caused injuries which were more real than speculative, and used presidential powers in unprecedented ways that raised separation-of-powers or other constitutional issues.

Fact Finding 3 (Table B): In 17 out of 22 injunction rulings (77.2%), courts granted motions to enjoin or to maintain injunctions.[122] This finding means that the orders and policies: (1) were drastic as to their immediate effects and scale of injury; (2) had no notice-and-comment or other buffer for courts to consider in the context of exhaustion of administrative process; or (3) had potentially irreversible consequences, such as deportation.

Fact Finding 4 (Table B): In 34 out of 38 cases (89.4%), plaintiffs won all or part of the ruling. This success rate is noteworthy because courts rarely interfere with presidential immigration orders and actions.

121. *See, e.g.*, Jilin Pharmaceutical USA, Inc. v. Chertoff, 447 F.3d 196 (3d Cir. 2006).

122. *Id.* at 196.

President Trump's orders and policies, coupled with his racially inflammatory tweets and campaign rallies, seem unprecedented—but what does this prove, if anything? How do his executive orders and actions relate to immigration statutes? Are presidents willing instruments of Congress, reluctant enforcers of immigration laws, or defiant obstacles to congressional will? I take up these questions in Part III. I start with original language in the Constitution to provide historical context.

III.
CONSTITUTIONAL REGULATION OF SLAVE MIGRATION AND IMPORTATION: PRESIDENTIAL ACTIONS

Strangers and immigrants were never welcomed in the American colonies. Communities enacted laws to exclude sojourners.[123] In this forbidding landscape, slavery was accommodated in states that opposed it,[124] and brutally enforced elsewhere.[125] Among varieties of coerced labor,[126] slavery was the most severe, with no hope of freedom.[127] African slavery amounted to involuntary migration,[128] founded on race.[129]

123. William Quigley, *Five Hundred Years of English Poor Laws, 1349-1834: Regulating the Working and Nonworking Poor*, 30 AKRON L. REV. 73, 104 (1996) (localities took care of their own poor, not newly arrived strangers). Community exclusion was evident well into the twentieth century; Note, *Depression Migrants and the States*, 53 HARV. L. REV. 1031 (1940) (38 states required a year of residence to qualify a person for legal settlement).

124. *E.g.*, Prigg v. Pennsylvania, 41 U.S. 539 (1842) (holding that state law that gradually abolished right to abduct runaway slaves was unconstitutional as applied to a man who was hired to seize a woman who escaped slavery in Maryland).

125. *E.g.*, Jordan v. State, 22 Ga. 545 (Ga. 1857) (affirming murder conviction of a slave owner who whipped a thirteen-year-old slave girl so severely that she was cut to the bone on her thigh). Georgia law allowed the legislature to mitigate penalties for owners who killed slaves who put down an insurrection or caused death accidentally while administering "moderate correction." *Id.* at 557.

126. Quigley, *supra* note 123 (analyzing four types of involuntary servitude that were less severe than slavery).

127. Jarman v. Patterson, 23 Ky. 644, 645–46 (Ky. 1828) ("Slaves, although they are human beings, are by our laws placed on the same footing with living property of the brute creation. However deeply it may be regretted, and whether it be politic or impolitic, a slave by our code, is not treated as a person, but (negotium), a thing, as he stood in the civil code of the Roman Empire.").

128. Alden T. Vaughan, *The Origins Debate: Slavery and Racism in Seventeenth-Century Virginia*, 97 VA. MAG. HIST. & BIOGRAPHY 311, 340 n.40 (1989) (examining Virginia statutes showing degrees of involuntary servitude by place of origin); *see also* Scott v. Sandford, 60 U.S. 393, 407–08 (1857) (defending imposition of slavery on "that unfortunate race" because "[t]he opinion thus entertained and acted

By the time the Constitution was drafted, slave importation peaked in the American colonies. The high mark was reached in 1740 through 1760, with migration of 430,000 Africans.[130] This background informed the drafters' inclusion of rules for American nativity and slavery. The founders embraced or tolerated racial superiority.[131] This was essential to their creation of interdependent chattel rights and political advantages to slave ownership.

The qualification standard for U.S. presidents offers a starting point for understanding this office's powers. Only "a natural born Citizen" is eligible.[132] John Jay, who proposed this idea, feared foreign subversion.[133] Alexander Hamilton said as much in *Federalist No. 68*.[134] This requirement still stands, and the result is that 19.8 million naturalized citizens are disqualified from being President.[135] Within this large population, most appear to be Asian or

upon in England was naturally impressed upon the colonies they founded on this side of the Atlantic. And, accordingly, a negro of the African race was regarded by them as an article of property, and held, and bought and sold as such, in every one of the thirteen colonies which united in the Declaration of Independence, and afterwards formed the Constitution of the United States").

129. George M. Frederickson, *Toward a Social Interpretation of the Development of American Racism*, *in* 1 KEY ISSUES IN THE AFRO-AMERICAN EXPERIENCE 407–08 (Daniel M. Fox et al. eds., 1971) ("[S]ocietal racism—the treatment of blacks as if they were inherently inferior for reasons of race—dates from the late seventeenth and early eighteenth century. . . . the catalyst was fear.")

130. Philip D. Curtin, *The Slave Trade and the Atlantic Basin: Intercontinental Perspectives*, *in* 1 KEY ISSUES IN THE AFRO-AMERICAN EXPERIENCE 74, 93 (Daniel M. Fox et al. eds., 1971). The "total number of immigration from Africa [was] about 430,000." *Id.* at 92.

131. Charles H. Wesley, *Negro Suffrage in the Period of Constitution-Making, 1787–1865*, 32 J. NEGRO HIST. 143, 144–147 (1947).

132. U.S. CONST. art. II, § 5.

133. Jill A. Pryor, *The Natural-Born Citizen Clause and Presidential Eligibility: An Approach for Resolving Two Hundred Years of Uncertainty*, 97 YALE L.J. 881, 888 n.37. (1988). Letter from John Jay to George Washington (July 25, 1787), *in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 61 (Max Farrand ed., 1911) ("[W]hether it would not be wise & seasonable to provide a . . . strong check to the admission of Foreigners into the administration of our national Government; and to declare expressly that the Command in chief of the american [sic] army shall not be given to, nor devolve on, any but a natural born Citizen.").

134. A foreign-born author, Alexander Hamilton, warned of foreign interference with domestic affairs by "deadly adversaries of republican government" who sought "to gain an improper ascendant in our councils" by "a creature of their own to the chief magistracy of the Union." THE FEDERALIST NO. 68 (Alexander Hamilton).

135. Ana Gonzalez-Barrera & Jens Manuel Krogstad, *Naturalization Rate Among U.S. Immigrants Up Since 2005, with India Among the Biggest Gainers*, PEW RES. CTR (Jan. 18, 2018). Talented public figures, ranging from Alexander Hamilton, Henry Kissinger, and Arnold Schwarzenegger to Madeleine Albright and Ariana Huf-

Hispanic, indicating that the Constitution has disparate impact by race in regard to the nation's highest office.[136] This rule gave room to a "birther" theory that falsely suggested that the first black President was illegitimately elected.[137]

The Constitution also perpetuated racial bias by giving outsized political power to slaveholders through the Three-Fifths Compromise.[138] Although slaves had no right to vote, slaveholding states counted black captives as three-fifths of a person, resulting in twenty representatives and presidential electors.[139] Additionally, the Three-Fifths Compromise gave an advantage to states that allowed the importation and sale of captive migrants in their ports and markets for use as laborers. This provision created a perverse incentive for states to enhance their political influence over the presidency.[140]

Article II, Section 9 of the Constitution reinforced the connection between human trafficking and the presidential election, stating: "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight."[141] Written to last twenty-one years, the provision allowed slave states to grow a breeding stock of enslaved Africans. Once 1808 was reached and slave importation was constitutionally subject to termination, a native-born generation of slaves would reach sexual maturity. Not only did this provision favor slave traders and owners, it also added to the electorate in slave states for presidents. In the meantime, ports of slave-owning states could be used for the "importation" of Africans and others—essentially, a human trafficking policy that was constitutionally sheltered.

---

fington, have been constitutionally barred from office. Richard Skinner, *The Constitution's "Natural-Born" Defect*, Vox (Apr. 15, 2019, 4:40 PM), https://www.vox.com/mischiefs-of-faction/2019/4/15/18308338/natural-born-citizen-us-president [https://perma.cc/3AQE-A2JM].

136. *See* Jeffrey S. Passel, Pew Res. Ctr, Growing Share of Immigrants Choosing Naturalization: Part IV (2007) (finding in 2005 that, among naturalized citizens, 4.0 million came from South and East Asia, 1.6 million came from Mexico, and 2.8 million from Latin America (exclusive of Mexico), compared to 2.8 million from Europe and Canada. Another 0.7 million came from the Middle East, and 0.4 million from "other."). These data are not reported by race but imply that most naturalized citizens are not white.

137. *See infra* note 170.

138. *See supra* note 43.

139. Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 Mich. L. Rev. 1323 (1952).

140. *Id.*

141. U.S. Const. art. I, § 9.

The prerequisites for President, combined with state requirements of citizenship and suffrage, disqualified free blacks, women, and a significant group of white men from the presidency.[142] Three years after the Constitution was drafted, the Naturalization Act of 1790 restricted citizenship to "a free white person."[143] Though not in express terms, the law denied naturalization to slaves when it added that "no person, heretofore proscribed by any state, shall be admitted as a citizen."[144] The law limited the right of becoming citizens "to aliens being free white persons."[145]

Together, the Constitution and the Naturalization Act of 1790 severely limited political participation on grounds of nativity and race. This combination created conditions that resulted in twelve of the first eighteen presidents being slave owners.[146] Ownership of human chattel was not a passive experience. George Washington, for example, sold an unruly slave prior to his time in office.[147] Following the Revolutionary War, he pressed British authorities to return slaves that the British took from Americans.[148]

Presidents not only owned slaves, but, at times, they also used diplomacy to affect the migration of blacks. George Washington—an ambivalent slaveholder while in office[149]—used his Article II powers on behalf of Georgia to pursue a fugitive slave accord with

142. Wesley, *supra* note 130, at 147.

143. *See* An Act to Establish a Uniform Rule of Naturalization Act, ch. 3, 1 Stat. 103-104 (1790) (repealed 1795).

144. *Id.*

145. *Id.*

146. *See* Whitney, *supra* note 12 (reporting that eight presidents owned slaves while President (indicated with asterisks here). The estimated slave owning totals are: George Washington* (between 250–350); Thomas Jefferson* (about 200); James Madison* (more than 100); James Monroe* (about 75); Andrew Jackson* (fewer than 200); Martin Van Buren (one); William Henry Harrison (eleven); John Tyler* (about 70); James Polk* (about 25); Zachary Taylor* (fewer than 150); Andrew Johnson (probably eight); and Ulysses S. Grant (probably five)).

147. Letter from George Washington Bearing on the Negro to Captain John Thompson (July 2, 1766), *in* 2 J. NEGRO HIST. 411, 411–412 (1917) ("Sir: With this letter comes a Negro (Tom), which I beg the favour of you to sell, in any of the Islands you may go to, for whatever he will fetch and bring me in return for him . . . . That this fellow is both a rogue and a runaway . . . .").

148. *Id.* at 414 ("Whether this conduct is, consonant to, or how far it may be deemed an infraction of the treaty, is not for me to decide. I cannot, however, conceal from you, that my private opinion is, that the measure is totally different from the letter and spirit of the treaty . . . .").

149. Kenneth Morgan, *George Washington and the Problem of Slavery*, 34 J. AM. STUD. 279 (2000) (the President owned 317 slaves in 1790, though he treated them with paternalism and disliked splitting their families).

Spain in 1791.[150] As slaves crossed the border to the Spanish possession of Florida, state officials complained to Washington that they had '"never been able to reclaim them.'"[151]

Early presidents used quasi-immigration powers. Thomas Jefferson signed a law in 1807 to prohibit importation of slaves.[152] Nonetheless, he bought slaves while he was President.[153] President James Madison owned slaves.[154] However, he admonished Congress to bar further importation of slaves.[155] When Madison ratified the Treaty of Ghent, ending hostilities with Britain in 1815, he pledged to promote the "entire abolition" of slavery.[156] The United States believed this referred to slaves taken by the British; but the British disagreed, prompting other presidents pressed to return this human property.[157] President James Monroe, who partly operated his plantations with slaves,[158] negotiated to repatriate enslaved workers.[159]

150. MAZYCK, *supra* note 14, at 118–20. For a broader view of how America's early political leaders viewed slavery, an essential resource is MATTHEW T. MELLON, EARLY AMERICAN VIEWS ON NEGRO SLAVERY (1934).

151. MAZYCK, *supra* note 14, at 118.

152. Act of Mar. 2, 1807, Pub. L. No. 9–22, 2 Stat. 426 (1807).

153. Howard Temperley, *Jefferson and Slavery: A Study in Moral Perplexity*, *in* REASON AND REPUBLICANISM: THOMAS JEFFERSON'S LEGACY OF LIBERTY 91 (Gary L. McDowell & Sharon L. Noble eds., 1997). Jefferson bought ten slaves while in office. FAWN M. BRODIE, THOMAS JEFFERSON: AN INTIMATE HISTORY 21, 26 (1974).

154. JEFF BROADWATER, JAMES MADISON: A SON OF VIRGINIA AND A FOUNDER OF THE NATION 188 (2012) (Madison instructed his overseer to treat his slaves with "humanity and kindness").

155. In a message from the President of the United States, delivered to the House of Representatives by Edward Coles, President Madison stated:

> Among the commercial abuses under the American flag . . . it appears that American citizens are influential in carrying on a traffic in enslaved Africans, equally in violation of the laws of humanity, and in defiance of the laws of their own country.

H. JOURNAL, 11th Cong., 2d. Sess. 435 (1810).

156. Peace and Amity (Treaty of Ghent), U.K.-U.S., art. X, Dec. 24, 1814, 8 Stat. 218.

157. Arnett G. Lindsay, *Diplomatic Relations between the United States and Great Britain Bearing on the Return of Negro Slaves, 1783–1828*, 5 J. NEGRO HIST. 391, 411–14 (1920).

158. Gerard W. Gawalt, *James Monroe, Presidential Planter*, 101 VA MAG. HIST. & BIOGRAPHY 251, 264 (1993).

159. S. EXEC. DOC. NO. 18-371 (1824) ("I[, James Monroe,] transmit to the Senate, for their constitutional advice with regard to its ratification, a convention for the suppression of the African slave trade, signed at London . . . by the Minister of the United states . . . .").

In these discussions, the United States justified slavery without shame.[160] The British and United States submitted the question to arbitration before the Emperor of Russia in 1822 but that process broke down.[161] Finally, under the slave-owning acumen of President Jackson, the United States government offered to settle the dispute for money.[162] Jackson's commercial success, prior to becoming President, included slave trading.[163] He bought and sold slaves while President.[164]

What is clear is that presidents had a vested interest in their diplomacy to secure repayment for slaves taken by the British in the War of 1812. Even John Quincy Adams, an abolitionist President, found himself in the awkward position of paying appropriations to incarcerate slaves who were seized on the open seas.[165]

Slaveholding also created fear of revolts. After a slave insurrection in Haiti, President Washington's government advanced $726,000 to French whites in St. Domingue, enabling them to purchase arms and supplies to suppress black independence.[166] Later, President Martin Van Buren and former President John Quincy Adams were involved in a diplomatic row over a slave insurrection on a Spanish ship that arrived in a New York port.[167]

---

160. H.R. Doc. No. 16-342 (1821). Monroe's message appeared to endorse the pro-slavery view of a Spanish minister, stating:

> Sir: the introduction of negro slaves into America was one of the earliest measures adopted by the august ancestors of the King . . . for the improvement and prosperity of those vast dominions, very shortly after their discovery. The total inaptitude of the Indians to various useful but painful labors, the result of their ignorance of all the conveniences of life, and the imperfect progress in civil society, made it necessary to have recourse to strong and active laborers for breaking up and cultivating the earth.

Id. (words of Don Luis de Onis to Secretary of State).

161. Peace and Amity (Treaty of Ghent), U.K.-U.S., art. X, Dec. 24, 1814, 8 Stat. 218.

162. *Id.*

163. John Spencer Bassett, The Life of Andrew Jackson 66 (1911). Jackson had armed encounters with government agents who insisted on seeing proof that he had title to certain slaves. *Id.*

164. Mark R. Cheathem, *Andrew Jackson, Slavery, and Historians*, 9 Hist. Compass 326, 331 (2011).

165. S. Doc. No. 20-340 (1827) (presenting a detailed statement of appropriated expenditures to enforce the Act of March 3, 1819).

166. Donald R. Hickey, *America's Response to the Slave Revolt in Haiti, 1791–1806*, 2 J. Early Republic 361, 364–65 (1982).

167. Iyunolu Folayan Osagie, The Amistad Revolt: Memory, Slavery, and the Politics of Identity in the United States and Sierre Leone xii (2003); *see also* United States v. Libellants of the Schooner Amistad, 40 U.S. 518 (1841) (hold-

The Constitution's effect in producing slaveholding presidents also tied them to a deportation issue: whether the United States should forcibly remove slaves to Africa. To that end, various deportation groups were active, including the American Colonization Society, formed in 1817.[168] Two presidents were involved in diplomatic efforts to colonize American slaves to Africa.[169]

In sum, the Constitution has shaped the presidency along racial lines. This effect is subtle today but has been exploited in an elaborate "birther" conspiracy about the nation's first black President.[170] Today, twenty million naturalized citizens—mostly nonwhite—are ineligible to be President because they were born outside the United States. The original Constitution set the course for a presidency that for much of the next 230 years was institutionally inclined to translate the racial animus of white Americans, particularly workers, into immigration restrictions. In this context,

---

ing that President Adams used his powers as Commander-in-Chief to carry out legislation to block slave trading); S. DOC. NO. 20-340.

168. Henry Noble Sherwood, *The Formation of the American Colonization Society*, 2 J. NEGRO HIST. 209, 217 (1917).

169. *See* Letter from Thomas Jefferson, *supra* note 1. President Monroe, who was actively engaged with the American Colonization Society, dispatched two emissaries to England and then on to Africa to explore resettlement of American slaves. Early Lee Fox, The American Colonization Society 1817-1840, 52-53 (1919) (unpublished Ph.D. Dissertation, Johns Hopkins University) (on file with the Library of Congress).

170. *See Birther Bills: Alive and Dead in State Legislatures*, DAILY KOS (Apr. 19, 2011), https://www.dailykos.com/stories/2011/4/19/968301/- [https://perma.cc/GTS9-UC2H] (reporting that "birther" bills were introduced in at least fourteen states legislatures: Arizona, Missouri, Nebraska, Oklahoma, Texas, Connecticut, Georgia, Indiana, Maine, New Hampshire, Arkansas, Tennessee, and Montana). *See also* Richard Ruelas, *How Arizona Became Ground Zero for 'Birthers'*, REPUBLIC (Oct. 20, 2016), https://www.azcentral.com/story/news/local/arizona-best-reads/2016/10/16/how-arizona-became-ground-zero-birthers/91924322/ [https://perma.cc/A6WM-FNLD]; Jan Moller, *Gov. Jindal Will Sign 'Birther' Bill If It Reaches His Desk*, TIMES PICAYUNE (Apr. 19, 2011), https://www.nola.com/news/politics/article_9e226450-b3d1-5912-a59a-1c0fc7a659f4.html [https://perma.cc/RM2P-CKBH]; Tim Murphy, *Oklahoma Birther Bill One Step Closer to Becoming Law*, MOTHER JONES (Apr. 8, 2011), https://www.motherjones.com/politics/2011/04/oklahoma-birther-bill-one-step-closer-becoming-law/ [https://perma.cc/B4NF-AYUS]; Elizabeth Crisp, *Missouri House Approves "Birther" Bill*, ST. LOUIS POST-DISP. (March 28, 2012), https://www.stltoday.com/news/local/govt-and-politics/missouri-house-approves-birther-bill/article_cd2808da-7920-11e1-8076-001a4bcf6878.html [https://perma.cc/HJ7J-7A42]; Melissa Jeltsen, *NH Birther Bill Backer: "I Don't Know" Where Obama Was Born*, TALKING POINTS MEMO (March 11, 2011), https://talkingpointsmemo.com/dc/nh-birther-bill-backer-i-don-t-know-where-obama-was-born [https://perma.cc/Q6JE-AXXW].

President Trump's racially themed immigration messages should not surprise. He is a byproduct of a flawed Constitution.

IV.
CHINESE, JAPANESE, OTHER ASIANS, AND EUROPEANS: THE PRESIDENT'S ROLE IN EXCLUSIONARY ACTIONS

The modern era of federal immigration began in 1862 with a law to regulate Chinese workers,[171] a significant source of migratory labor. American policy through 1952 was a multi-layered accretion of restrictions mostly aimed at protecting white workers from competition with foreign labor. Alongside this development, presidents amplified xenophobic rants of labor leaders and politicians. In this section, I explore how immigration shifted from state to federal control and analyze the statutory exclusion of Chinese laborers and executive enforcement of these racial restrictions. I conclude by analyzing how presidents implemented these restrictions.

A. Transition of Immigration Controls from States to the Federal Government

Under Article II, Section 2 of the Constitution, the President has the "Power, by and with the Advice and Consent of the Senate, to make Treaties."[172] The exercise of this power from 1862 to 1943 led to the exclusion of the Chinese and Japanese, and eventually most other nationality groups except those from the United Kingdom and northern Europe.

Before the 1860s, states exercised immigration powers because the federal government had few immigration laws. The Constitution referred to slave "migration" and "importation," but the Supreme Court interpreted this language as a form of commerce.[173] States enacted immigration laws, called "passenger

171. M. Foster Farley, *The Chinese Coolie Trade 1845-1875*, 3 J. ASIAN & AFR. STUD. 257, 257 (1968) (citing Edgar Holden, Coolie Trade, 29 HARPER'S MAG. 2, 2 (June 1864)) (the term "coolie" referred to the lowest class of laborers from eastern countries).

172. U.S. CONST. art. II, § 2.

173. *Id.* at art. I, § 9. The text in Article II, Section 9 shows the Framers' conflicted understanding of slavery in the context of migratory labor, alternately referring to "Migration or Importation." Groves v. Slaughter, 40 U.S. 449, 505 (1841) (noting that "[t]he transportation of slaves from a foreign country, before the abolition of that traffic, was subject to this commercial power"). *See also* New York v. Compagnie Generale Transatlantique, 107 U.S. 59, 89 (1883) ("The two words

laws," to bar entry of convicts,[174] which were intended for "the better settlement and relief of the poor,"[175] but were really concerned with how migrants found work in order to avoid becoming public charges.

States also attempted to discourage immigration by making the steerage industry bear the cost of bringing unemployed aliens. For example, beginning in 1824, New York required shipmasters arriving from foreign ports to list names, ages, and occupations of every passenger,[176] a policy that linked immigration and work. The states then used this reporting requirement to levy a per capita fee for the support of foreign paupers but were ultimately thwarted by the Supreme Court.[177]

Federal immigration laws began with Abraham Lincoln. He dispatched Anson Burlingame to negotiate a treaty with China[178] (known as the Burlingame Treaty), which achieved a new level of amity and provided for free immigration between the two countries.[179]

'migration' and 'importation' refer to the different conditions of this race as regards freedom and slavery. When the free black man came here he migrated; when the slave came he was imported. The latter was property, and was imported by his owner as other property, and a duty could be imposed on him as an import.").

174. *See* Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102, 112–13 (1837) (Virginia, South Carolina, Georgia, New Hampshire, Massachusetts, and New York enacted "passenger laws" that regulated immigration between 1788 and 1791).

175. *Id.* at 103 n.4. So-called passenger laws were enacted in the U.S. starting in 1819 to prevent overloading of immigrant ships and to provide for more humane conditions. *See* Hans-Jürgen Grabbe, *European Immigration to the United States in the Early National Period, 1783–1820*, 133 PROC. AM. PHIL. SOC'Y 190, 204 (1989).

176. *Miln*, 36 U.S. at 142 (sustaining the law as a constitutional exercise of the state's police powers).

177. Passenger Cases, 48 U.S. (7 How.) 283, 452 (1849). Justice Wayne believed that only Congress had constitutional power to regulate commerce with foreign nations, and found the state laws in conflict with that enumerated power.

178. David L. Anderson, *Aaron Burlingame: American Architect of the Cooperative Policy in China, 1861–1871*, 1 DIPLOMATIC HIST. 239 (1977).

179. *See generally* A Treaty of Peace, Amity and Commerce, Between the United States and China, Dec. 21, 1858, 12 Stat. 1023, *amended by* Additional Articles to the Treaty Between the United States and China, U.S.-China, Oct. 19, 1868, 16 Stat. 739. Article XVIII allowed hiring of Chinese persons to assist in the teaching of languages of the Empire. *Id.* Article V (as amended) stated that the United States and Emperor of China recognize "the mutual advantage of the free migration and emigration of their citizens and subjects respectively . . . for the purposes of curiosity, of trade, or as permanent residents." *Id.*

Soon, however, the unrestricted migration of Chinese laborers spurred worker protests.[180] Completion of the transcontinental railroad threw these laborers into competition with Americans.[181] White laborers chafed for an immigration ban.[182] Their pleas hardened into bigotry.[183] Unions also protested Chinese laborers.[184] Eventually, American workers formed a political party.[185] They succeeded in passing laws to exclude "Orientals."[186]

180. *See generally* MARY ROBERTS COOLIDGE, CHINESE IMMIGRATION (1909); ELMER C. SANDMEYER, THE ANTI-CHINESE MOVEMENT IN CALIFORNIA (1939); LUCILLE EAVES, A HISTORY OF CALIFORNIA LABOR LEGISLATION (1910); Terry E. Boswell, *A Split Labor Market Analysis of Discrimination Against Chinese Immigrants, 1850–1882*, 51 AM. SOC. REV. 352, 356 (1986) ("[W]hite workers and white small business owners formed a political alliance in the Democratic Party to secure national anti-Chinese state action").

181. *See* HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 17 (2007); *see also* Boswell, *supra* note 180, at 365–66 (detailing the labor force participation of Chinese Workers for railroads).

182. *See* Heong v. United States, 112 U.S. 536, 566 (1884) (describing the reaction of white workers to the influx of Chinese laborers: "Successful competition with them was, therefore, impossible, for our laborers are not content, and never should be, with a bare livelihood for their work").

183. For a stark example, see GOMPERS & GUTSTADT, *supra* note 17, at 14 ("For many years it has been impossible to get white persons to do the menial labor performed by Chinese and Japanese—It is Mongolian's labor and not fit for whites." In the agricultural districts a species of help has been created, known as the blanket man. White laborers seldom find permanent employment; the Mongolian is preferred. During harvest time the white man is forced to wander from ranch to ranch and find employment here and there for short periods of time, with the privilege of sleeping in the barn or haystacks. He is looked upon as a vagabond, unfit to associate with his employer or to eat from the same table with him. The negro slave of the South was housed and fed, but the white trash of California is placed beneath the Mongolian.").

184. SIDNEY ROGER DANIELS, THE POLITICS OF PREJUDICE 16–18 (1962). This attitude carried on for more than fifty years, marked by labor leader Samuel Gompers' ugly endorsement of the Chinese Exclusion Act. Herbert Hill, *Anti-Oriental Agitation and the Rise of Working Class*, 10 SOC'Y 43, 51 (1973) (quoting labor leaders Samuel Gompers and Herman Gutstadt that the "Yellow Man found it natural to lie, cheat and murder").

185. A comprehensive treatment appears in PHILIP S. FONER, THE WORKINGMEN'S PARTY OF THE UNITED STATES 25–36 (1984).

186. *See In re* Tiburcio Parrott, 1 F. 481 (C.C.D. Cal. 1880) (involving a California statute that criminalized employment of Chinese labor by a corporation). The law was declared unconstitutional:

> [T]the law is void, as not being a reasonable, bona fide, or constitutional exercise of the power to alter and amend the general laws under which corporations in this state have been formed; that it would be equally invalid if the proscribed class had been Irish, Germans, or Americans; that the corporations

Before this prejudice could metastasize across the nation, presidents were already airing racially tinged immigration grievances before Congress.[187] Diplomacy also changed from the time of Lincoln, with less regard for outcast groups. Jews and Mormons experienced the change from presidential tolerance to indifference.[188]

---

have a constitutional right to utilize their property, by employing such laborers as they choose, and on such wages as may be mutually agreed upon. . . .

Id. at 493; *see also* Baker v. Portland, 2 F. Cas. 472, 474 (C.C.D. Or. 1879) (striking down Oregon law that prohibited the employment of Chinese laborers on public works projects) ("True, this act does not undertake to exclude the Chinese from all kinds and fields of employment. But if the state, notwithstanding the treaty, may prevent the Chinese or the subjects of Great Britain from working upon street improvements and public works, it is not apparent why it may not prevent them from engaging in any kind of employment or working at any kind of labor.").

187. *See* Ulysses S. Grant, First Annual Message (Dec. 6, 1869) (transcript available at the National Archives) ("In this connection I advise such legislation as will forever preclude the enslavement of the Chinese upon our soil under the name of coolies, and also prevent American vessels from engaging in the transportation of coolies to any country tolerating the system."); *see also* President Ulysses S. Grant, Sixth Annual Message (Dec. 7, 1874) (transcript available at the National Archives) ("[T]he great proportion of the Chinese immigrants who come to our shores do not come voluntarily, . . . but come under contracts with headmen, who own them almost absolutely. In a worse form does this apply to Chinese women. Hardly a perceptible percentage of them perform any honorable labor, but they are brought for shameful purposes. . . ."); President Chester A. Arthur, Third Annual Address (Dec. 4, 1883) (transcript available at the National Archives) ("Question has arisen touching the deportation to the United States from the British Islands . . . of persons unable there to gain a living and equally a burden on the community here. Such of these persons as fall under the pauper class as defined by law have been sent back in accordance with the provisions of our statutes.").

188. Initially, presidential diplomacy advocated for the interests of Jews. President Martin Van Buren's Secretary of State, John Forsyth, instructed a U.S. diplomat:

> In 1840, at the time of mistreatment of Jews at Damascus, our "charge d'affaires at Constantinople was instructed to interpose his good offices on behalf of the oppressed and persecuted race of the Jews in the Ottoman dominions, among whose kindred are found some of the most worthy and patriotic of our own citizens."

1 A DIGEST OF THE INTERNATIONAL LAW OF THE UNITED STATES, *supra* note 15. The Digest also reports: "The joining by a consul of the United States, in a Mohammedan country, with consuls from other powers in a protest against the conviction and execution of a Jew for blasphemy, meets with the approval of the Government of the United States." *Id.*

The retreat from benevolence coincided with anti-Chinese sentiments. President Rutherford B. Hayes's Secretary of State, William Evarts, instructed an American diplomat that if "a citizen of the United States has been broken up in his business at St. Petersburg simply for the reason that he is a Jew" then the Russian government should be told that "the religion professed by one of its citizens has no relation whatever to that citizen's right to the protection of the United States." *Id.* at 434, § 206. Secretary Evarts instructed another diplomat: "The increase of Mor-

These diplomatic embers signaled a broader presidential shift from protecting minorities to tolerating abuses against them.

B. The Chinese Laborer: Exclusion and Restrictions

The long period of restricting Chinese workers began with the Coolie Act,[189] an 1862 law that gave presidents power to inspect and seize passenger ships in U.S. ports.[190] Later, the Page Act of 1875 barred immigration of women from China, Japan and other Asian nations for the purpose of prostitution.[191] As anti-immigrant fever rose across the country, President Rutherford Hayes named James Burrell Angell to renegotiate the Burlingame Treaty.[192] The resulting Angell Treaty ended unrestricted Chinese labor migration to the United States and made China responsible for curbing emigration to the United States.[193] However, while Hayes agreed to some changes to the immigration system, he blocked harsher measures. In 1879, he vetoed the Fifteen Passenger Bill because it conflicted with U.S. treaty obligations.[194] This did not dissuade Congress,

mon emigration to the United States from Austria is an evil to which the Austrian Government may be properly turned, asking such measures of repressing emigration as may be practicable." *Id.* at 519.

189. Act of Feb. 19, 1862 (Act of 1862), ch. 27, 12 Stat. 340 (regulating transportation of "inhabitants or subjects of China, known as 'coolies'"), *repealed by* Pub. L. No. 93-461, 88 Stat. 1387 (1974). At the same time, peonage occurred in the New Mexico territory. *E.g.*, Jaremillo v. Romero, 1 N.M. 190, 192–93 (N.M. 1857) (suit alleging that a household servant, apparently a Mexican national, abandoned her service to a New Mexico territorial citizen without paying off her labor servitude).

190. Act of 1862 at ch. 7 § 6.

191. Page Act of 1875, Pub. L. No. 43-141, 18 Stat. 477, § 1 (1875).

192. H.R. Res. 282, 112th Cong. (2011) (expressing "the regret of the House of Representatives for the passage of discriminatory laws against the Chinese in the United States, including the Chinese Exclusion Act," and including specifically: "Whereas in 1878, the House of Representatives passed a resolution requesting that President Rutherford B. Hayes renegotiate the Burlingame Treaty so Congress could limit Chinese immigration to the United States").

193. Treaty Regulating Immigration from China, China-U.S., May 9, 1881, 22 Stat. 826. The preamble to the treaty referred to the "increasing immigration of Chinese laborers to the territory of the United States, and the embarrassments consequent upon such immigration"—and apparent reference to "ill treatment" of the Chinese and the U.S. government's commitment to "devise measures for their protection." *Id.* at art. III. The treaty also provided discretion to the United States to "regulate, limit, or suspend such coming or residence" of Chinese laborers. *Id.* at art. I.

194. Rutherford B. Hayes, Veto Message Regarding Immigration Legislation to the House of Representatives (Mar. 1, 1879) (transcript available at the Miller Center at the University of Virginia) (the bill set a maximum of fifteen Chinese passengers to be brought into the U.S. on a ship).

which presented the Chinese Exclusion Act of 1882 to President Chester Arthur.[195] President Arthur vetoed the bill because it barred Chinese immigration for twenty years.[196]

From 1882 through 1907, the federal government injected itself into the regulation of ports (previously the domain of states) to further control immigration into the country. I highlight these general developments before discussing how these policies and procedures were applied to migratory labor.

Beginning with the Immigration Act of 1882, Congress gave the President broad immigration powers to levy a head tax;[197] exclude "idiots, insane persons, paupers" and other undesirable people and appoint a superintendent of immigration;[198] conduct admission and deportation inquiries by executive branch officers and boards of inquiry;[199] hold administrative hearings "separate and apart from the public";[200] issue registration certificates to new arrivals;[201] exclude "defective persons";[202] deport alien prostitutes;[203] create the Bureau of Immigration;[204] consolidate administrative control of naturalization in the new Agency;[205] provide exclusive federal jurisdiction over naturalization;[206] and enlarge the President's discretion to protect American workers from

195. Chinese Exclusion Act of 1882, Pub. L. No. 47-126, 22 Stat. 58 (1882). While commonly referred to as the Chinese Exclusion Act of 1882, contemporaries called it the Chinese Restriction Act. *See* Beth Lew-Williams, *Before Restriction Became Exclusion: America's Experiment in Diplomatic Immigration Control*, 83 PAC. HIST. REV. 24, 26 (2014).

196. Chester A. Arthur, Veto of the Chinese Exclusion Act to the Senate (Apr. 4, 1882) (transcript available at the Miller Center at the University of Virginia).

197. *See* Immigration Act of 1882, Pub. L. No. 47-376, § 1, 22 Stat. 214, 214 (1882) (creating duty of 50 cents per each foreigner entering on a ship).

198. *See* Immigration Act of 1891, Pub. L. No. 51-551, § 1, 26 Stat. 1084, 1085 (1891). The law also expanded excluded groups to all contract laborers, people with contagious diseases, idiots, convicts, and polygamists. *See id.* The law also provided for a presidential power to appoint a superintendent of immigration. *See id.* at § 7.

199. Act of Mar. 3, 1902, 32 Stat. 1213, §25, 57 Cong. Ch. 1012 (1903).

200. *Id.*

201. Immigration Act of 1906, Pub. L. No. 59-338, § 1, 34 Stat. 596, 596 (1906).

202. Act of Feb. 27, 1907, Pub. L. 59-96, § 2, 34 Stat. 898, 898-900 (1907) (excluding "idiots, imbeciles, feeble-minded persons, epileptics, insane persons, and persons who have been insane within five years previous," as well as paupers and beggars).

203. *Id.* at § 3.

204. Immigration Act of 1906 § 1.

205. *Id.*

206. *Id.*

detrimental labor conditions.[207] Courts upheld these broad delegations of power to presidents and immigration officials, including laws that mixed executive and judicial power by allowing Article II immigration judges to adjudicate petitions to avoid removal.[208]

Congress strengthened the executive branch's authority over immigrants. Acting under an amendment to the Chinese Exclusion Act of 1882,[209] President Arthur's customs officials in San Francisco prevented all Chinese from landing, even Chinese workers who had a right to be in the United States.[210] Upon taking office in 1885, President Grover Cleveland denounced Chinese workers as a "servile class to compete with American labor."[211] Congress further restricted Chinese workers in the Alien Contract Labor Law, which

207. *Id.* (President may refuse entry to the United States if holder of a passport is a detriment to "labor conditions").

208. *E.g.*, Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892) (holding that no other tribunal, unless expressly authorized, can review an immigration officer's fact findings); Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889) ("[P]ower of the government to exclude foreigners from the country whenever, in its judgment, the public interests require such exclusion, has been asserted in repeated instances, and never denied by the executive."); Lem Moon Sing v. United States, 158 U.S. 538, 545 (1895) ("[P]ower of congress, therefore, to expel, like the power to exclude, aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers."); Wong Wing v. United States, 163 U.S. 228, 234–35 (1896) ("[I]t is within the constitutional power of congress to deport both of [Chinese laborers] . . . and to commit the enforcement of the law to executive officers."); United States v. Gue Lim, 176 U.S. 459, 464 (1900) ("This court has already sustained the power of Congress to provide for excluding or expelling Chinese . . . ; also the power to intrust the final determination of the facts upon which the individual is to be expelled, to an executive officer."); Li Sing v. United States, 180 U.S. 486 (1901) (Congress "can devolve the power and duty of identifying and arresting such persons upon executive or subordinate officials"); Lee Lung v. Patterson, 186 U.S. 168, 176 (1902) ("[J]urisdiction is given to the collector over the right of the alien to land, and necessarily jurisdiction is given to pass on the evidence presented to establish that right"); Kaoru Yamataya v. Fisher, 189 U.S. 86 (1903) ("[T]he power to exclude or expel aliens belonged to the political department of the government, . . . and no other tribunal . . . was at liberty to re-examine the evidence on which he acted, or to controvert its sufficiency.").

209. Act of July 5, 1884, ch. 220, 23 Stat. 115 (July 5, 1884).

210. Problems involved certain laborers who had left for China before return certificates were issued, as well as with Chinese merchants arriving from ports outside of China—and the local customs officer who strictly construed the certificate law, while playing to anti-immigration supporters. LUCY SALYER, CHEW HEONG V. UNITED STATES, FEDERAL TRIALS AND GREAT DEBATES 3 (2006).

211. "The laws should be rigidly enforced which prohibit the immigration of a servile class to compete with American labor, with no intention of acquiring citizenship, and bringing with them and retaining habits and customs repugnant to our civilization." Grover Cleveland, First Inaugural Address (Mar. 4, 1885) (transcript available at the Miller Center at the University of Virginia).

prohibited recruitment organizations and trafficking gangs from paying passage for foreigners to work in the United States.[212]

Over the next three years, hostility toward migratory workers exploded. President Benjamin Harrison, when accepting his party's presidential nomination in 1888, denounced foreign labor.[213] A month later, Congress passed the Scott Act.[214] This draconian law provided for removal of any Chinese laborer who could not produce a certificate of legal residency.[215] When the law went into effect, approximately 30,000 Chinese laborers were overseas.[216] Just days after the Scott Act became law, a worker with proper paperwork before the law was returned to the United States from China; however, the customs officer refused to accept his papers. The resulting Supreme Court case, *Chae Chan Ping v. United States*, was a landmark decision.[217] It recognized Congress' absolute power to regulate immigration, including reneging on a treaty by denying admission to aliens.[218] The Court repeated the mob animus against Chinese people, describing them as "vast hordes of people crowding in upon us,"[219] and "a different race . . . dangerous to [America's] peace and security."[220]

212. Alien Contract Labor Law (Foran Act), ch. 164, 23 Stat. 332 (1885). The law prohibited any entity or person from prepaying for passage of a foreigner to work in the U.S. *Id.* at § 1. It made exceptions for skilled workers to immigrate. *Id.* at § 5. For additional background, see Samuel P. Orth, *The Alien Contract Labor Law*, 22 AM. POL. SCI. Q. 49, 54–55 (1907).

213. Letter from Benjamin Harrison Accepting the Presidential Nomination (Sept. 11, 1888) (on file with The American Presidency Project) (tying tariffs to immigration restrictions: "Legislation prohibiting the importation of laborers under contract to serve here will, however, afford very inadequate relief to our working people if the system of protective duties is broken down").

214. Scott Act, Pub. L. No. 50-1064, 22 Stat. 54 (1888).

215. *Id.* at § 12.

216. *See* Gabriel J. Chin, *Chae Chan Ping and Fong Yue Ting: The Origins of Plenary Power*, *in* IMMIGRATION STORIES 7 (David A. Martin & Peter H. Schuck eds., 2005) (approximately 30,000 Chinese laborers were temporarily overseas when the law changed).

217. Chae Chan Ping v. United States, 130 U.S. 581 (1889) (upholding federal authority to enact a law that contradicted the Burlingame Treaty of 1868, which allowed for Chinese laborers to enter the U.S.).

218. *Id.* at 609 ("The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.").

219. *Id.* at 606.

220. *Id.*

The Geary Act of 1892 imposed even harsher restrictions.[221] Chinese residents were required to carry a permit in the United States[222] and non-compliance was punishable by deportation or one year in prison with hard labor.[223] Even Chinese residents who had never traveled outside the United States could be deported.[224] In the absence of a permit, a Chinese laborer who sought to prove lawful residency could only use a "credible white witness."[225] When Chinese laborers were detained without a court hearing, the Supreme Court, despite three impassioned dissents, upheld the law in *Fong Yue Ting v. United States*.[226] The Geary Act also introduced a major institutional change: courts were bypassed entirely in immigration matters, and the executive branch was vested with unreviewable authority to deport aliens.[227]

221. Geary Act, ch. 60, § 1, 27 Stat. 25 (1892) (repealed 1943); *see also* Fong Yue Ting v. United States, 149 U.S. 698 (1893) (upholding Section 6, a provision that required Chinese aliens to obtain certificates of residency). Thus, the law significantly expanded the regulation of Chinese laborers beyond international travel to include mere residency. The law was enforceable by arrest and deportation if a Chinese alien had no certificate or violated any other law. The Court denied Fong Yue Ting's appeal for a writ of habeas corpus.

222. Geary Act § 6.

223. *Id.* at § 4. (describing the "punishment for illegal residence").

224. Wong Wing v. United States, 163 U.S. 228, 235 (1896).

225. Geary Act § 6.

226. *Fong Yue Ting*, 149 U.S. 698 (upholding section 6 of the Geary Act, thus denying Fong Yue Ting's appeal for a writ of habeas corpus). Justice Brewer's dissenting opinion laid bare the basic unfairness of the Geary Act:

> Again, a person found without such certificate may be taken before a United States judge. What judge? A judge in the district in which the party resides or is found? There is no limitation in this respect. A Chinese laborer in San Francisco may be arrested by a deputy United States marshal, and taken before a judge in Oregon; and, when so taken before that judge, it is made his duty to deport such laborer, unless he proves his innocence of any violation of the law, and that, too, by at least one credible white witness. And how shall he obtain that (white) witness? No provision is made in the statute therefor.

Id. at 741–42 (Brewer, J., dissenting).

227. Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895) (upholding the Geary Act against a Chinese merchant who was denied re-entry even though by treaty he was allowed to enter the U.S. to conduct business). The Court stated:

> The power of congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, *and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention*, is settled by our previous adjudications.

Id. (emphasis added). *But see Wong Wing*, 163 U.S. at 228 (striking down Section 6 as unconstitutional, as applied to Chinese laborers who were sentenced to hard labor without having a judicial hearing).

During his inaugural address in 1897, President William McKinley cast foreigners as a public menace, and demanded that "our gates must be promptly and tightly closed."[228] He issued the first executive order pertaining to immigration and labor conditions, barring Chinese workers from Hawaii.[229] Meanwhile, his administration's insulting treatment of a Chinese minister, as well as other frictions, soured whatever good will remained with China.[230]

C. Japanese, All Asians, and Europeans: Broader Racial Exclusion

The strained treaty relationship with China carried over to the Presidency of Theodore Roosevelt. Brought to office after an anarchist murdered McKinley, Roosevelt's first address to Congress depicted the attack—which was carried out by the son of Polish immigrants[231]—as an assault on the working man. This played into Roosevelt's plea for Congress to broaden immigration restrictions beyond China.[232]

In the Immigration Act of 1903, Congress specifically introduced race in a questionnaire to be completed at a disembarkation

228. President William McKinley, First Inaugural Address (March 4, 1897) (transcript available at the Miller Center at the University of Virginia).

229. 2 MESSAGES AND PAPERS OF WILLIAM MCKINLEY (Sept. 2, 1899), *in* A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1902 (George Raywood Devitt ed., 1904), http://www.gutenberg.org/files/14446/14446-8.txt [https://perma.cc/NL4Y-UYZS] ("Of the Chinese Exclusion Laws in the Hawaiian Islands under the clause in said Resolution restricting the emigration of Chinese to the Islands").

230. The Gresham-Yang Treaty of 1894 superseded the Scott Act, transferring control of Chinese registration and exclusion on a treaty basis. *See* Act of Mar. 17, 1894, 28 Stat. 1210, Treaty Series 51. Under McKinley, the treaty unraveled. Soon after he took office, the Chinese minister notified the State Department that Americans were abusing his countrymen. He cited a particularly insulting incident in New York City. George E. Paulsen, *The Abrogation of the Gresham-Yang Treaty*, 40 PAC. HIST. REV. 457, 461–62 (1971). As Chinese ministerial carriages passed through the streets, a mob pelted them with stones and dirt. Police did nothing to avert the attack. As this was the second occurrence, Wu Ting-fan complained to the Secretary of State. In reply, McKinley's government could muster no more warmth than to say that "Federal authorities are powerless under our complicated system of government." *Id.* at 462.

231. Leon Czolgosz was born in Detroit, Michigan according to the Buffalo, New York booking of the assassin. *See* LINDSAY RECKSON, WILLIAM VANDER WEYDE, LEON F. CZOLGOSZ, MCKINLEY ASSASSIN 1, 4 (2016).

232. *Id.* at 4 ("I earnestly recommend to the Congress that in the exercise of its wise discretion it should take into consideration the coming to this country of anarchists or persons professing principles hostile to all government and justifying the murder of those placed in authority.").

port.[233] The Naturalization Act of 1906 required aliens to "speak the English language" for admission.[234] The Immigration Act of 1907[235] combined anti-immigrant sentiment with the rising popularity of eugenics by excluding people with physical and psychological disabilities.[236] During this period, academic studies reinforced prejudicial treatment of foreigners.[237] The 1907 act also created an immigration commission,[238] which later advocated for nationality quotas while voicing racial intolerance.[239]

Despite the anti-immigrant sentiment which drove the exclusion of Chinese immigrants from the country, the resulting labor shortages were filled with immigrants from a different country: Japan.[240] A contract labor system brought 30,000 émigrés from Japan

233. Act of Mar. 3, 1903, ch. 1012, 32 Stat. 1213 (regulating the immigration of aliens into the United States).

234. Naturalization Act of 1906, ch. 3592, 34 Stat. 596, *repealed by* Nationality Act of 1940, ch. 876, 54 Stat. 1137.

235. Act of Feb. 20, 1907, Pub. L. 59-96, § 2, 34 Stat. 898, 898-900 (1907) (excluding for admission "idiots, imbeciles, feeble-minded persons, epileptics, insane persons, and persons who have been insane within five years previous" as well as paupers, beggars, and persons with tuberculosis).

236. *Id.* at § 2.

237. *E.g.*, Henry W. Farnam, *The State and the Poor*, 3 POL. SCI. Q. 282, 293 (1888) ("[T]he foreign-born may be said to make a somewhat heavier drain, in proportion to their numbers, upon the commonwealth, than the native-born population. Yet the native-born mothers are found to have on an average 3.52 children apiece, while the foreign-born have 4.91. Thus, the very element which sends the largest contingent into the jails and workhouses is also most active in recruiting the coming generation."); Frank Fetter, *Social Progress and Race Degeneration*, 28 FORUM 228, 237 (1899) ("[T]he benefits of social progress are being neutralized by race degeneration"); JOHN R. COMMONS, RACES AND IMMIGRANTS IN AMERICA 212–13 (1906) ("The line between inferior and superior . . . races appears to be the line between the temperate and tropical zones . . . . The children of all the temperate zones are eligible to the highest American civilization and it only needs that they be 'caught' enough.").

238. Immigration Act of 1906, Pub. L. No. 59-338, § 39, 34 Stat. 596, 909 (1906).

239. *Infra* note 254.

240. Raymond Leslie Buell, *The Development of the Anti-Japanese Agitation in the United States*, 37 POL. SCI. Q. 604, 606 (1922) (explaining that the Chinese exclusion law spurred California farmers to seek "Negroes, Mexicans, Filipinos, Hindus, Porto-Ricans and Japanese"). By one account, the labor shortage caused farmers to idle 568,943 acres. *Id.* Banks holding mortgages were harmed by "farm lands that could not be made productive because Chinese labor had been driven out." *Id.* The new supply of labor was created in large part because of a burdensome tax policy that Japan initiated to end its feudalistic agriculture system. *See* Keith Aoki, *No Right to Own: The Early Twentieth-Century Alien Land Laws as a Prelude to Internment*, 19 B. C. THIRD WORLD L. J. 37, 44 (1998); *see also* DANIELS, *supra* note 184; Clayton D. Laurie, *"The Chinese Must Go": The United States Army and the Anti-Chinese*

to Hawaiian plantations[241] to substitute the lost Chinese laborers.[242] From Hawaii, workers migrated to Washington and California, with the result that more than 90,000 Japanese were in the continental United States by 1907.[243] Conflicting conditions—the importation of Japanese laborers and the fearful reactions on them—led Roosevelt to adopt conflicting positions across foreign and domestic policy.

Seeking to avoid conflict with Japan, Roosevelt pressured the San Francisco Board of Education to stop segregating Asian children.[244] In an address to Congress and the nation, he warned Americans to avoid anti-Japanese outbursts.[245] At times, however,

Riots in Washington Territory, 1885–1886, 81 PAC. NW. Q. 22, 24 (1990); ROBERT B. RHODE, BOOMS AND BUSTS ON BITTER CREEK: A HISTORY OF ROCK SPRINGS, WYOMING 44–63 (1987).

241. DANIELS, *supra* note 185, at 5. The early stages of this migration appear in *In re Gip Ah Chan*, 6 Haw. 25, 29 (Haw. 1870).

242. DANIELS, *supra* note 185; *see also* Christopher Hu, *Transplanting Servitude: The Strange History of Hawaii's U.S. Inspired Contract Labor Law*, 49 STAN. J. INT'L L. 274, 285 n.85 (2013) ("Between 1882 and 1892, the composition of the workforce shifted further: The Japanese replaced the Chinese as the most numerous ethnic group on the plantations.").

243. U.S. IMMIGRATION, S. DOC NO. 61-747, at 624 (3d Sess. 1910).

244. After local citizens formed a Japanese and Korean Exclusion League, the San Francisco school board passed a policy on October 11, 1906 to segregate Asian students. This put Roosevelt in the middle of a bitter dispute, local and international in scope. *See* Joyce Kuo, *Excluded, Segregated and Forgotten: A Historical View of the Discrimination of Chinese Americans in Public Schools*, 5 ASIAN L.J. 181, 206–08 (1998). Roosevelt instructed his emissary, Victor Metcalf:

> I had a talk with the Japanese Ambassador before I left for Panama; . . . and then told him that in my judgment the only way to prevent constant friction between the United States and Japan was to keep the movement of the citizens of each country into the other restricted as far as possible to students, travelers, business men, and the like; that inasmuch as no American laboring men were trying to get into Japan what was necessary was to prevent all immigration of Japanese laboring men—that is, of the Coolie class—into the United States. . . .

Letter from President Theodore Roosevelt, to Victor Metcalf, Sec'y of Commerce and Labor (1906) (on file with the Theodore Roosevelt Center at Dickinson State University), https://history.hanover.edu/courses/excerpts/260gentlemen.html [https://perma.cc/S9LY-6YMB].

245. In his annual message, Roosevelt told Congress: "I ask fair treatment for the Japanese as I would ask fair treatment for Germans or Englishmen, Frenchmen, Russians, or Italians. I ask it as due to humanity and civilization. I ask it as due to ourselves because we must act uprightly toward all men." He added: "I am prompted to say this by the attitude of hostility here and there assumed toward the Japanese in this country." President Theodore Roosevelt, Sixth Annual Message (Dec. 3, 1906) (transcript available at the Miller Center at the University of Virginia).

Roosevelt's letters revealed prejudice against Japanese people.[246] Roosevelt temporarily quelled domestic tensions by reaching a "Gentleman's Agreement" in 1907 with Japan to limit entry of their laborers.[247] But Executive Order 589, a later order which categorically banned the entry of Japanese laborers from outside the continental United States, demonstrated Roosevelt's sympathy to anti-Japanese sentiment.[248]

Anti-European sentiment was also growing at this time.[249] President William Howard Taft spoke against "outbursts of race feeling

246. Referring to Japanese immigration Roosevelt confided: "This whole Japanese business is very puzzling. I suppose because there are such deep racial differences that it is very hard for any of us of European descent to understand or be understood by them." DYER, *supra* note 2, at 135 ("This whole Japanese business . . . is very puzzling. . . . I suppose because there are such deep racial differences that it is very hard for any of us of European descent to understand or be understood by them."); *see also* Letter from President Theodore Roosevelt, to Senator Philander Knox (1909) (on file with the Library of Congress) ("In Hawaii the trouble is primarily due to the shortsighted greed of the sugar planters and of the great employers generally, who showed themselves incapable of thinking of the future of their children and anxious only to make fortunes from estates tilled by coolie labor. Accordingly, they imported, masses of Chinese laborers and, then masses of Japanese laborers . . . . To permit the Japanese to come in large numbers into this country would be to cause a race problem and invite and insure a race contest. It is necessary to keep them out.").

247. For specific attribution of President Roosevelt's role in the Gentlemen's Agreement, see ROGER DANIELS, NOT LIKE US: IMMIGRANTS AND MINORITIES IN AMERICA 1890–1924, 74–75 (Chicago 1997); MARION T. BENNETT, AMERICAN IMMIGRATION POLICIES: A HISTORY 25 (1963).

248. S. DOC. NO. 63–173 at 530 (1913) ("I hereby order that such citizens of Japan or Korea, to-wit: Japanese or Korean laborers, skilled and unskilled, who have received passports to go to Mexico, Canada or Hawaii, and come therefrom, be refused permission to enter the continental territory of the United States."). The order cited "An Act to regulate the immigration of aliens into the United States," approved Feb. 20, 1907. *Id.*

249. The skin-color of immigrants from Southern Italy caused some Americans to question their "membership in the white race." MANFRED BERG, POPULAR JUSTICE: A HISTORY OF LYNCHING IN AMERICA 128 (2011). Between 1886 and 1910, at least 29 Italian men were lynched in the South. *Id.* Slavic immigrants were the subject of damning stereotypes, compared at times to Chinese and Jews for being overly thrifty. Karel D. Bicha, *Hunkies: Stereotyping the Slavic Immigrants, 1890–1920*, 2 J. AM. ETHNIC HIST. 16, 23 (1982). Rather than restrict Europeans by a formula, the literacy test emerged as a policy favorite for immigration opponents: "They argued that such a test would cut in half the influx from southern and eastern Europe, without seriously interfering with the older immigration from the more literate areas of Europe." John Higham, *American Immigration Policy in Historical Perspective*, 21 L. & CONTEMP. PROBS. 213, 221 (1956).

among our people against foreigners of whatever nationality."[250] And while Taft vetoed a bill for an immigration literacy test, his correspondence with Congress regarding the literacy test indicated that "undesirable" immigrants from "southern Italy, among the Poles, the Mexicans and the Greeks" should not be admitted.[251]

World War I nearly halted immigration to the United States.[252] Public outcry grew, nevertheless, for more restrictions. The Dillingham Commission, established by Congress in 1907 as the Immigration Commission,[253] concluded after four years of intensive data gathering that many Eastern and Southern Europeans were inferior workers compared to their Northern counterparts.[254] President Woodrow Wilson agreed. As a scholar, Wilson had published a book that singled out the "sturdy stocks of North Europe" for contributing to America's early success while disparaging "multitudes of men of the lowest class from the south of Italy and men of the meaner sort out of Hungary and Poland."[255] As a politician, he described America's breeding stock as the best of God's creation.[256] Southern European nations "were disburdening themselves of the more sordid and hapless elements of their population."[257]

250. William Howard Taft, Inaugural Address (March 4, 1909) (transcript available at Yale Law School Library) (requesting federal legislation to preempt local laws that interfered with treaty obligations).

251. 49 CONG. REC. 3156 (1913) (statement of President Taft) ("For the reasons stated in Secretary Nagel's letter to me, I cannot approve that test."). Secretary Nagel's believed a literacy test would be discriminatory: It would be "based upon a fallacy in undertaking to apply a test which is not calculated to reach the true and to find relief from a danger that really does not exist." *See* JAMES LANGLAND, THE DAILY NEWS ALMANAC AND REG. ALMANAC 239 (1914).

252. USCIS HISTORY OFFICE AND LIBRARY, OVERVIEW OF INS HISTORY 6 (2012).

253. Edith Abbott, *Federal Immigration Policies, 1864–1924*, 2 U.J. BUS. 133, 151 (1924) (immigration commission presented 41 volumes of data in 1911, along with numerous proposals to restrict immigration).

254. ABSTRACTS OF REPORTS OF THE IMMIGRATION COMMISSION, S. DOC. NO. 61–747 at 644–54 (1911); *see also* REPORTS OF THE IMMIGRATION COMMISSION, STATISTICAL REVIEW OF IMMIGRATION, S. DOC. NO. 61–756 (1920). The Dillingham Commission issued a 42-volume report with statistical overviews and other analyses of topics related to immigrant occupations. *See* James S. Pula, *American Immigration Policy and the Dillingham Commission*, 37 POLISH AM. STUD. 5, 8 (1980).

255. WOODROW WILSON, A HISTORY OF THE AMERICAN PEOPLE 212–13 (1902).

256. Hans Vought, *Division and Reunion: Woodrow Wilson, Immigration, and the Myth of American Unity*, 13 J. AM. ETHNIC HIST. 24, 28–29 (1994). In a speech to the Har Sinai Temple on Thanksgiving in 1910, Wilson quoted '"the old New England divine William Stoughton on the subject of God sifting the nations of the world to plant the choicest seed in America, and he went on to say, 'And so, apparently God is sifting the nations yet to plant seed in America.'" *Id.* at 40.

257. *Id.* at 29.

However, there were instances where Wilson thought that Congress went too far in closing America's gates. He vetoed legislation in 1916 which would require a literacy test per the Dillingham Commission's recommendation, believing it contradicted American values and history.[258] Congress, acting against a backdrop of racial and ethnic animus directed at Central and Southern Europeans, overrode his veto in the Immigration Act of 1917.[259] The new law also applied to a global swath of immigrants from the "Asiatic Barred Zone."[260] The law's unwelcoming message discouraged immigration.[261]

The 1920s capped decades of escalating immigration restrictions.[262] Americans were fed a steady diet of fear mongering that permissive immigration was diluting their breeding stock.[263] Eugenics served as a pseudo-scientific basis for these fears.[264] Anti-immi-

258. EXEC. OFFICE OF THE PRESIDENT, VETO MESSAGE (Jan. 28, 1915), https://www.presidency.ucsb.edu/documents/veto-message-0. [https://perma.cc/3469-PESK].

259. Immigration Act of 1917, 39 Stat. 874 (1917) (current version at 8 U.S.C. § 12 (1952)). An example of an argument made for the law appears in JEREMIAH W. JENKS & W. JETT LAUCK, THE IMMIGRATION PROBLEM 24–25 (1911) (complaining that before 1883 ninety-five percent of immigrants came from England, Ireland, Scotland, Wales, Belgium, Denmark, France Germany, Norway, Sweden, the Netherlands, and Switzerland; however, from 1883 to 1904, 81 percent came from Austria-Hungary, Bulgaria, Greece, Italy, Montenegro, Poland, Portugal, Rumania, Russia, Serbia, Spain, Syria and Turkey).

260. Entry was denied to all immigrants from India, Burma, Siam, the Malay States, Arabia, Afghanistan, part of Russia, and most of the Polynesian Islands. Immigration Act of 1917 § 3 (phrased in terms of map coordinates defining the "Continent of Asia").

261. *See* Henry Pratt Fairchild, *The Literacy Test and Its Making*, 31 Q. J. ECON. 447, 451 (1917) ("The whole aim of the laws is to keep out the undesirables").

262. Claudia Goldin, *The Political Economy of Immigration Restriction in the United States, 1890 to 1921*, *in* THE REGULATED ECONOMY: A HISTORICAL APPROACH TO POLITICAL ECONOMY 255 (Claudia Goldin & Gary D. Libecap eds. 1994).

263. Madison Grant, a lawyer and leading eugenicist in the early 1900s, promoted the view that the nation's "blood" was over 93% Nordic in 1790 but was diminishing since that time in quantity and quality as a superior breeding stock. Madison Grant, *The Racial Transformation of America*, 219 N. AM. REV. 343, 351 (1924). He was especially concerned about the lower intelligence of immigrants from Eastern and Southwestern Europe. *Id.* at 352. *See generally* MADISON GRANT, THE PASSING OF THE GREAT RACE (1916).

264. Eugenic selection for immigration policy can be found in *Restriction of Immigration: Hearing on H.R. 5, H.R. 101, and H.R. 561 Before the H. Comm. on Immigration and Naturalization*, 68th Cong. 1 (1925) (statement of Harry H. Laughlin) ("There was an American race and an American culture of 1860, and this race and culture is being modified to some degree by the changed racial character of the immigration of the last two generations. (U)nlimited immigration of races and types which have contributed very small percentages to making of the original

gration groups, unsated without the literacy test, began to push for retrogressive quotas—limits that used census figures of nationality groups in the United States to calculate tiny percentages of allowable new immigration for that nationality.[265]

In 1921, Congress acted on public hysteria against non-white immigrants[266] and enacted these retrogressive quotas in the Emergency Quota Act.[267] President Warren Harding signed the bill into law.[268] Congress then made these temporary measures permanent in the Immigration Act of 1924 and further capped immigration from three percent of the nationality group's presence in the 1910 census to two percent of that group's presence in 1890.[269] While the 1924 law focused primarily on Europeans who had recently immigrated,[270] Congress held special hearings for additional restrictions on the Japanese.[271] And in a demonstration of how much

American people would supplant our fundamental race complex, and with the new race would come other cultures, languages, and traditions for the country.").

265. The concept behind this is set forth in detail in *Hearings Before the Comm. on Immigration and Naturalization*, 66th Cong. 5–71 (1919) (statement of Rev. Sidney L. Gulick, Secretary, Exec. Comm. of the Nat'l Comm. for Constructive Immigration Legislation) ("We ought to admit no more than we can Americanize." *Id.* at 6. He therefore proposed that new entrants be limited 3% to 10% "of those who have become American citizens of that particular group.").

266. *See* LOTHROP STODDARD, THE RISING TIDE OF COLOR AGAINST WHITE WORLD SUPREMACY (1920) (portraying a world dominated by rapidly multiplying yellow, brown, and black people that threatened to end the white race's domination of civilization). Stoddard concluded: "People as they are wholly or mostly by whites, they have become parts of the race-heritage, which should be defended to the last extremity no matter if the costs involved are greater than the mere economic value." *Id.* at 226.

267. Emergency Quota Act of 1921, Pub. L. No. 67-5, ch. 8, 42 Stat. 5 (1921).The law used the 1910 census as a baseline for nationality quotas. Based on those numbers, the total number of immigrants admitted could not exceed 3% of the number of residents from that same country living in the U.S. *Id.* at § 5; *see* Proclamation No. 1872, 46 Stat. 2984 (Mar. 22, 1929).

268. Warren G. Harding, Second Annual Message (Dec. 8, 1922) ("Before enlarging the immigration quotas we had better provide registration for aliens, those now here or continually pressing for admission, and establish our examination boards abroad, to make sure of desirables only."); *see also Smuggled Aliens Concern Harding*, N.Y. TIMES, June 16, 1923, at 1.

269. Immigration Act of 1924, ch. 190, § 11(a), 43 Stat. 153, 159–160 (1924) (the two percent limit set to the 1890 census).

270. *Id.*

271. *A Bill to Limit the Immigration of Aliens into the United States, and for Other Purposes: Hearings on S. 2576 Before the S. Comm. on Immigration*, 68th Cong. 76 (1924) ("California is now suddenly awakening to the situation thus developing. For years it enjoyed and greatly benefited by the advantages of cheap, docile, efficient Asiatic labor. No small part of her prosperity has been made possible by Chinese and Japanese labor on railroads, roads, and ranches. California is now

Congress wished to be involved in curtailing the flow of immigrants into the country, both the 1921 and 1924 bills gave specific and detailed instructions to the executive branch for enforcement.[272]

The quota laws of the 1920s aligned Congress and the co-ordinate branches in hostility toward Asians.[273] President Calvin Coolidge joined other presidents who failed to take a moral stand against the implementation of those racial policies.[274] The Supreme Court offered no resistance. *Takao Ozawa v. United States* exposed the hypocrisy behind the idea that a literacy test was intended to admit foreigners who could assimilate.[275] Ozawa was highly literate and fully assimilated,[276] and yet his petition for naturalization was denied for one reason: he was not white.[277] Nevertheless, the Court upheld the decision to refuse his petition. *United States v. Bhagat Singh Thind* yielded a similar result for a Hindu from Punjab who sought citizenship though naturalization.[278] The Court endorsed the legislative policy that "a white person, within the meaning of this section . . . is entitled to naturalization; otherwise not."[279] Justice Sutherland's opinion in *Bhagat Singh* typified main-

discovering that Japanese labor is no longer cheap or servile."); *see also id.* at 5 (testimony of V.S. McClatchy) (March 11, 1924) ("Of all the races ineligible to citizenship under our law, the Japanese are the least assimilable and the most dangerous to this country." He continued: "They do not come to this country with any desire or any intent to lose their racial or national identity. They come here specifically and professedly for the purpose of colonizing and establishing here permanently the proud Yamato race. They never cease to be Japanese.").

272. Emergency Quota Act of 1921, Pub. L. No. 67-5, ch. 8, § 7, 42 Stat. 5 (1921) (requiring the Secretary of Labor to publish each month the number of arriving immigrants by nationality and publishing monthly reports).

273. *See* Ozawa v. United States, 260 U.S. 178 (1922); United States v. Bhagat Singh Thind, 261 U.S. 204 (1923); *In re* Hidemitsu Toyota v. United States, 45 U.S. 563 (1925); Exec. Order No. 4359-A, 22 C.F.R. 79, 141 (1925). In Section 139, Coolidge's executive order expressly stated that a policy to enforce the Ozawa and Thind rulings that would exclude naturalization to Japanese and Hindus.

274. *See* President Calvin Coolidge, First Annual Address (Dec. 6, 1923) (on file with the American Presidency Project).

275. *Ozawa*, 260 U.S. at 178.

276. *Id.* at 189 (Ozawa lived in the U.S. for 20 years, graduated from the high school in Berkeley, California, attended the University of California for three years, educated his children in the U.S., attended American churches, and spoke English in his home).

277. *Id.* at 198. Justice Sutherland's opinion ruled that Japanese were ineligible for citizenship because they were not "free white persons" within the meaning of the Naturalization Act of 1906: "The appellant . . . is clearly of a race which is not Caucasian and therefore belongs entirely outside the zone on the negative side." *Id.*

278. *Bhagat Singh Thind*, 261 U.S. at 204.

279. *Id.* at 207.

stream thought of policy leaders, including American presidents: "It may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, but the average man knows perfectly well that there are unmistakable and profound differences between them today."[280] Lower courts decided immigration cases under similarly crude racial theories.[281] As a result of the 1924 act, whose quotas went into effect in 1927,[282] 85 percent of quotas were allocated to people from Northern and Western European nations.[283] President Herbert Hoover set annual quotas by nationality in Proclamation No. 1872, preferring immigrants from the United Kingdom while excluding almost all people from nonwhite nations.[284]

The galloping pace of legislation finally slowed to a trickle,[285] so much so that from 1931 to 1936, the United States had net emi-

280. *Id.* at 209.

281. *E.g.*, *In re* Ahmed Hassan, 48 F. Supp. 843, 845–46 (E.D. Mich. 1942) ("Of course, when an individual applying for citizenship has a skin of a different color than is usual for the members of the group from which he claims to come, a strong burden of proof then rests upon him to show by the usual methods of proving genealogy that he is in fact a member of that group. After the individual has been traced into his group, the second question which the court must answer is whether the members of the group as a whole are white persons as Congress understood the term in 1790 when it first enacted the statute. In deciding this latter question, the test is . . . what groups of peoples then living in 1790 with characteristics then existing were intended by Congress to be classified as 'white persons.' Applying these principles the court finds that petitioner is an Arab and that Arabs are not white persons within the meaning of the act.").

282. Immigration Act of 1924, Pub. L. No. 68–139, 43 Stat. 153 (1924).

283. *See* Mae M. Ngai, *The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924*, 86 J. AM. HIST. 67, 67 n.1 (1999).

284. Proclamation No. 1872, 46 Stat. 2984 (Mar. 22, 1929) (setting annual quota limits of 100 for Afghanistan, Albania, Andorra, Arabian peninsula, Armenia, Australia, Bhutan, Bulgaria, Cameroon (British), Cameroon (French), China, Danzig, Egypt, Ethiopia, Iceland, India, Iraq, Japan, Liberia, Liechtenstein, Luxemburg, Monaco, Morocco (French and Spanish Zones and Tangier), Muscat (Oman), Nauru, Nepal, New Zealand, New Guinea, Palestine, Persia, Ruanda and Urundi, Samoa, San Marino, Siam, South Africa, South West Africa, Tanganyika, Togoland, Togoland (French mandate), and Yap and other Pacific Islands. Other nations were allotted: Austria 1,413; Belgium 1,304; Czechoslovakia 2,874; Denmark 1,181; Estonia 116; Finland 569; France 3,086; Germany 25,957; Great Britain and Northern Ireland 65,721; Greece 307; Hungary 869; Irish Free State 17,853; Italy 5,802; Lithuania 386; Netherlands 3,153; Norway 2,377; Poland 6,524; Portugal 1440; Rumania 295; Russia 2,784; Spain 252; Sweden 3,314; Switzerland 1,707; Syria and Lebanon 123; Turkey 226; and Yugoslavia 845).

285. Pub. L. No. 89-236, 79 Stat. 911 (1934) (allowing foreign-born children of American mothers and alien fathers to apply for naturalization and simplified the naturalization process for foreign-born husbands of American women); The Nationality Act of 1940, Pub. L. No. 76–853, 54 Stat. 1137 (1940) (specifying stan-

gration.[286] However, sentiment about immigrants began to manifest internally, especially against immigrants from Japan. In multiple states, laws were passed to prohibit the "Japanese race" from owning land.[287] When Japan attacked Pearl Harbor, ostensible concerns about national security and the threat posed by Japanese nationals and Japanese Americans became actionable.[288] Three weeks after the attack on Pearl Harbor, a leader of the Los Angeles Chamber of Commerce pressed the Army to round up American citizens of Japanese descent, an idea that Lt. Gen. DeWitt—the commander who eventually carried out Roosevelt's infamous evacuation order—dismissed as morally repugnant and counter-productive.[289] But by early 1942, when DeWitt reported on

dards for naturalization with regard to race, ethnicity and oral English competency); The Magnuson Act of 1943, Pub. L. No. 78–199, 57 Stat. 600 (1943) (repealing the Chinese Exclusion Act of 1882).

286. *See* David Fellman, *The Alien's Right to Work*, 22 MINN. L. REV. 137, 137 n.3 (1938) (from 1931–1936 immigration totaled 256,538 compared to emigration of 359,680, a difference of 103,142); Goldin, *supra* note 262, at 239 (reporting that the Emergency Quota Act of 1921 reduced immigration from Southern and Eastern Europe, which averaged 730,000 per year before World War I (1905–1914), to 20,000 persons per year).

287. *See* People v. Morrison, 13 P.2d 803, 804 (Cal. App. 1932) (upholding criminal conspiracy conviction of an American citizen and Japanese alien for violating Alien Land Law's prohibition of ownership by aliens), *rev'd by* 218 Cal. 287 (1933), *rev'd by* 291 U.S. 82, 95 (1934) ("admixture of oriental blood might be too slight for his race to be apparent to the eye," resulting in violation of due process for lack of clear knowledge of criminal intent); *see also* Edwin E. Ferguson, *The California Alien Land Law and the Fourteenth Amendment*, 35 CAL. L. REV. 61, 87 n.141, 142 (1947) (in addition to California, Arkansas and Wyoming statutes prohibited land ownership by persons of Japanese descent and by ineligible aliens; and Indiana, Minnesota, Pennsylvania, and South Carolina imposed acreage-ownership restrictions for non-citizens).

288. National security was the ostensible justification for Executive Order 9066. Exec. Order No. 9066, 7 Fed. Reg. 1406 (Feb. 19, 1942). While this rationale had practical appeal, the internment order deflected blame for failure to fortify American defenses: "The truth—that defense arrangements on Hawaii, . . . and elsewhere, were needlessly woeful—was conveniently forgotten." *Id.*; *see also* Max Everest-Phillips, *The Pre-War Fear of Japanese Espionage: Its Impact and Legacy*, 42 J. CONTEMP. HIST. 243, 249 (2007).

289. J.L. DEWITT, FINAL REPORT: EVACUATION OF THE JAPANESE FROM THE WEST COAST 115–116 (1943) (by December 13, 1941, the Justice Department had interned 595 Japanese aliens). DeWitt stated:

> I thought that thing out to my satisfaction. . . . If we go ahead and arrest the 93,000 Japanese, native born and foreign born, we are going to have an awful job on our hands and are very liable to alienate the loyal Japanese from disloyal. . . . I'm very doubtful that it would be common sense procedure to try and intern or to intern 117,000 Japanese in this theater . . . .
>
> . . .

his meeting with the California governor, many Californians were vehemently opposed to anyone of Japanese descent remaining in their midst.[290]

Bigotry against the Japanese, however, did not displace bigotry against other groups of immigrants and people of color. Despite the articulated national security risks posed by those of Japanese descent, California state leaders proposed to relocate Japanese Americans only as far as a remote part of the state "to avoid having to replace the Japanese with Mexican and Negro laborers who might otherwise have to be brought into California in considerable numbers."[291] In other words, prominent Californians envisioned forcibly relocating Japanese Americans and their immigrant parents and grandparents while keeping them close enough to provide labor.

This chronology shows that immigration policies were deeply racialized by the time of President Franklin Roosevelt's Presidency. His infamous Japanese internment policy, embodied in Executive Order 9066,[292] authorized the Secretary of War "to prescribe mili-

> . . . I don't think it's a sensible thing to do . . . . I'd rather go along the way we are now . . . rather than attempt any such wholesale internment . . . . An American citizen, after all, is an American citizen. And while they all may not be loyal, I think we can weed the disloyal out of the loyal and lock them up if necessary.

Id. at 116–17.

290. *Id.* at 125 ("I had a conference yesterday with the Governor . . . with a view to removal of the Japanese from where they are now living to other portions of the state. And the Governor thinks it can be satisfactorily handled without having a resettlement somewhere in the central part of the United States and removing them entirely from the state of California. As you know the people out here are very much disturbed over these aliens, the Japanese being among them, and want to get them out of the several communities.").

291. *Id.* at 125 ("[L]oss of employment and income due to anti-Japanese agitation by and among Caucasian Americans, continued personal attacks by Filipinos and other racial groups, denial of relief funds to desperately needy cases, cancellation of licenses for markets, produce houses, stores, etc., by California State authorities, discharges from jobs by the wholesale, [and] unnecessarily harsh restrictions on travel including discriminatory regulations against all Nisei preventing them from engaging in commercial fishing.") (quoting a Navy report).

Id. at 126.

292. While laying out plans for Roosevelt's Executive Order 9066, Secretary of War Henry Stimson made a diary entry on February 27, 1942, expressing grave concern that the President's evacuation order would amount to exclusion by a "racial characteristic" that "will make a tremendous hole in our constitutional system." GODFREY HODGSON, THE COLONEL: THE LIFE AND WARS OF HENRY STIMSON, 1867–1950, at 259 (1990) ("The second generation Japanese can only be evacuated either as part of a total evacuation, giving access to areas only by permits, or by frankly trying to put them out on the ground that their racial characteristics are

tary areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded."[293] However, the order was motivated by racial animus, widely embraced in California, and communicated to a President who was willing to act on popular prejudice. Senior military and political officials who effectuated the policy realized that the substance of Executive Order 9066 amounted to a violation of the Constitution[294] and sought to avoid any legal landmines by omitting any reference to race or nationality group and using neutral sounding words depicting an internal threat to national security.[295]

The order forced Japanese American owners to leave businesses, employees to leave jobs, students to leave schools, and residents to abandon their homes.[296] It also played to concerns that "brown men" were undercutting white workers for farming jobs.[297]

---

such that we cannot understand or trust even citizen Japanese. The latter is the fact but I'm afraid it will make an awful hole in our constitutional system.").

293. Exec. Order No. 9066, 7 Fed. Reg. 1406 (February 19, 1942). The order used "excluded" a second time, in reference to people who were judged to pose a military threat, stating:

> The Secretary of War is hereby authorized to provide for residents of any such area who are *excluded* therefrom, such transportation, food, shelter, and other accommodations as may be necessary, in the judgement of the Secretary of War or the said Military Commander, and until other arrangements are made, to accomplish the purpose of this order (emphasis added).

Id.

294. *See* HODGSON, *supra* note 294.

295. Exec. Order No. 9066, *supra* note 293.

296. *See* MINE OKUBO, CITIZEN 13660 (1946) (offering a personal account of the evacuation experience. The order resulted in the internment of "all persons of Japanese ancestry" from the West Coast area, formally known as the Western Command area of the United States). It affected 112,353 residents who lived in the Western Defense Command states of Arizona, California, Oregon, and Washington—essentially, 89% of the 126,947 U.S. residents of Japanese ancestry in the 1940 census. Thomas N. Tyson & Richard K. Fleischman, *Accounting for Interned Japanese-American Civilians During World War II*, 33 ACCT. HISTORIANS J. 167, 168 (2006). Two-thirds were Americans by birth. *Id.*; *see also* Lauren Cohen et al., *Resident Networks and Corporate Connections: Evidence from World War II Internment Camps*, 72 J. FIN 207, 222 (2017) (reporting a map of the internment camps, and chart of arrival dates and camp census figures).

297. *See* Korematsu v. United States, 323 U.S. 214, 239 n.12 (1944) ("Special interest groups were extremely active in applying pressure for mass evacuation (citation omitted). Mr. Austin E. Anson, managing secretary of the Salinas Vegetable Grower-Shipper Association, has frankly admitted that "We're charged with wanting to get rid of the Japs for selfish reasons. We do. It's a question of whether the white man lives on the Pacific Coast or the brown men. They came into this valley to work, and they stayed to take over . . . . They undersell the white man in the markets . . . . They work their women and children while the white farmer has to

Paradoxically, once in internment camps, Japanese Americans worked on farms as imprisoned laborers.[298]

Korematsu v. United States upheld Executive Order 9066 as a valid exercise of presidential power.[299] The majority opinion reasoned that Congress had enacted legislation in aid of the order, and therefore both branches had constitutionally exercised their war powers.[300] Although the Court was not unanimous in its ruling, there was little recognition of the racial motivations behind the order. Justice Jackson believed the order used an "urgent need" to violate individual liberty.[301] Only Justice Frank Murphy's dissent characterized the order as racially biased.[302] The order was re-

pay wages for his help. If all the Japs were removed tomorrow, we'd never miss them in two weeks, because the white farmers can take over and produce everything the Jap grows. And we don't want them back when the war ends, either.") (alteration in the original) (internal citations omitted); *see also* Eric L. Muller, *Apologies or Apologists—Remembering the Japanese American Internment in Wyoming*, 1 WYO. L. REV. 473, 477 (2001) (reporting a letter written in April 1942 by Wyoming Governor Nels Smith in reply to a constituent: "I could very clearly visualize the West Coast Japanese percolating into our State, a few at a time, gradually taking over jobs which by right should be done by our own citizens . . . ."); James McDonald, Note, *Democratic Failure and Emergencies: Myth or Reality?*, 93 VA. L. REV. 1785, 1819 (2007) (Idaho Attorney General Bert Miller called for putting "all Japanese . . . in concentration camps [ ] for the remainder of the war, and [argued] that no attempt should be made to provide work for them. We want to keep this a white man's country").

298. Karl Lillquist, *Farming the Desert: Agriculture in the World War II—Era Japanese-American Relocation Centers*, 84 AGRICULTURAL HIST. 74, 85 (2010) ("loyal evacuees from Tule Lake enhanced Minidoka's agricultural programs upon their arrival"); *see also* Tyson & Fleischman, *supra* note 296, at 196 (reporting that evacuees had their wages in camps capped after being forcibly removed).

299. *Korematsu*, 328 U.S. at 218. The order was rescinded, effective on January 2, 1945 by a military proclamation. *See U.S. Approves End to Internment of Japanese Americans*, HIST., https://www.history.com/this-day-in-history/u-s-approves-end-to-internment-of-japanese-americans [https://perma.cc/6C8Q-72ZP] (last visited Dec. 13, 2019)

(Major General Henry C. Pratt issued Public Proclamation No. 21, declaring that Japanese American "evacuees" from the West Coast could return to their homes). This was likely the result of *Ex parte* Endo, 323 U.S. 283 (1944), where the Supreme Court ruled that the War Relocation Authority had acted beyond its power and could not detain citizens against whom no charges had been made. More recently, President Gerald Ford also rescinded the order. *See* Proclamation 4417, 41 Fed. Reg. 7741 (Feb. 20, 1976).

300. *Korematsu*, 328 U.S. at 217–18.

301. *Id.* at 243 (Jackson, J., dissenting) (beginning with a core principle; "[n]ow, if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable").

302. *Id.* at 236-37 (Murphy, J., dissenting) (stating that the order was founded "mainly upon questionable racial and sociological grounds, and on grounds of

scinded, effective on January 2, 1945 by a military proclamation.[303] Nonetheless, Japanese Americans experienced ongoing discrimination in the education system and labor markets.[304]

Although it is difficult to pinpoint a paradigm shift between hostility and openness to migratory labor, legislation in the 1940s indicated that there was a changing perspective on the subject of foreign labor. Legislation to repeal laws that excluded Chinese workers marked a thaw in the long era of immigration restrictions: while a bill was pending before Congress in 1943, President Roosevelt implored lawmakers to "correct a historic mistake."[305] The Magnuson Act—formally, the 1943 Chinese Exclusion Repeal—was passed by Congress on December 17, 1943.[306] The new law only highlighted the failure of many presidents to resist a biased approached to immigration. From the Page Act of 1875 through the repeal of Chinese exclusion laws in 1943, presidents offered little resistance to these harsh laws. During these presidencies, the pulse of xenophobia intensified. Justifications varied: immigrants were genetically inferior; their "amalgamation" with native whites threatened America's racial purity; they were clannish and isolated by their peculiar customs; they spoke in foreign tongues—but the

disloyalty"). Justice Murphy also assailed the war-time justification for the order, recounting that "misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices—the same people who have been among the foremost advocates of the evacuation this legalization of racism." *Id.* at 239.

303. The order was not officially rescinded until President Ford issued Proclamation No. 4417, 41 Fed. Reg. 7741 (Feb. 19, 1976).

304. State officials in Arkansas barred Japanese internees from enrolling at state universities and colleges and opposed efforts to integrate these displaced people in the state's labor force. *See* Russell E. Bearden, *One State's Reaction to Wartime Internment*, 38 J. WEST 14, 14–16 (1999). Nonetheless, Japanese Americans experienced ongoing discrimination. Aimee Chin, *Long-Run Labor Market Effects of Japanese American Internment during World War II on Working-Age Male Internees*, 23 J. LAB. ECON. 491, 505 (July 2005). The study concludes that interruption of careers and performance of menial labor in camps stunted human capital development for these workers. *Id.* at 515–20. Twenty-five years after male internees were incarcerated their annual earnings were 9%–13% lower than a control group of Japanese Americans in Hawaii. *Id.* at 505. Adolescent internees also suffered from the loss of human capital attributable to three years of exclusion from the labor force. Their wages lagged behind white, native-born Americans until 1960, and for adults, these adverse effects were measurable through 1970. Molly Malloy Cooper, Japanese American Wages, 1940–1990 (2003) (unpublished PhD dissertation, Ohio State University) (on file with Ohio State University).

305. President Franklin D. Roosevelt, Message to Congress on Repeal of the Chinese Exclusion Laws (Oct. 11, 1943) (on file with the American Presidency Project).

306. Pub. L. No. 78-199, 57 Stat. 600, 600-01 (1943).

one persistent theme behind restriction and exclusion was the perceived threat posed by immigrants to Americans' wages and working conditions.

V.
REPLACING RACIAL EXCLUSION WITH DIVERSITY: IMMIGRATION AND NATIONALITY ACT OF 1965 AND BEYOND

Following World War II, America's emergence as a global power changed the nation's perspective on immigration. The transformation was gradual and culminated with passage of the Immigration and Nationality Act (INA) in 1965. This Part shows how presidents of both parties led this sea change. Before the INA, Harry Truman and Dwight Eisenhower used executive orders to challenge immigration quotas that served as race filters. From the passage of the INA until 2016, presidents used their immigration powers in new and forceful ways to increase the racial and ethnic diversity of immigrants. Often, their actions and policies created temporary legal access to jobs. As Part II.B demonstrates, however, President Trump's policies and actions have essentially negated the common approaches taken by Democratic and Republican presidents who have taken actions under the 1965 INA.

A. Executive Orders and Congressional Overhaul Before The INA

President Harry Truman appeared to recognize that the post-World War II period, which had recast America as a global superpower, also required analysis of new immigration values and policies. In 1951, Executive Order 10,129 created a Commission on Migratory Labor, and linked immigration policy to labor market conditions by directing the Commission to investigate the "social, economic, health, and educational conditions of migratory workers."[307] The Commission's report was a call to the public's conscience and sense of pragmatism.[308] A year later, Congress created

307. Exec. Order No. 10,236, 16 Fed. Reg. 3,607 (Apr. 27, 1951) (directing Commission to investigate the "social, economic, health, and educational conditions among migratory workers, both alien and domestic, in the United States . . . .").

308. PRESIDENT'S COMM'N ON MIGRATORY LABOR, MIGRATORY LABOR IN AMERICAN AGRICULTURE 2 (1951) ("There is nothing wrong or immoral in employing foreign workers in American agriculture when there are mutual advantages in doing so."). The report estimated that one million migratory laborers from Mexico resided in the U.S. without legal status. *Id.*

the H-2 visa for temporary workers.[309] Truman's Executive Order 10,392 created a new commission, the Commission on Immigration and Naturalization, with a broader mandate to overhaul the nation's racial approach to immigration.[310] In 1953, the Commission issued *Whom Shall We Welcome*, a report that advocated for more open immigration.[311] Eisenhower expressed similar values. He actively urged Congress to end racial quotas and open America's gates to certain refugees.[312] On the matter of race he lamented, "The immigration laws presently require aliens to specify race and ethnic classification in visa applications. These provisions are unnecessary and should be repealed."[313] However, nothing came of this plea. President Lyndon Johnson went one step further and proposed a bill to Congress that did away with the several discriminatory bars on Asian immigration and created visa preferences for workers who could fill certain in-demand positions.[314]

In this period, Congress enacted immigration reforms, most notable the McCarran-Walter Act of 1952. The law straddles the di-

309. The Immigration and Nationality Act of 1952, 8 U.S.C. § 1251 (1952). For historical perspective, see ANDORRA BRUNO, CONG. RESEARCH SERV., R44306, THE H-2B VISA AND THE STATUTORY CAP: IN BRIEF 1 (2018), https://fas.org/sgp/crs/homesec/R44306.pdf [https://perma.cc/ZQ2Q-A7LX]. *See also* Mary Lee Hall, *Defending the Rights of H-2A Farmworkers*, 27 N. J. INT'L L. & COM. REG. 521 (2002).

310. Exec. Order No. 10,392, 17 Fed. Reg. 8,061 (Sept. 4, 1952) (establishing the President's Commission on Immigration and Naturalization).

311. PRESIDENTIAL COMM'N ON IMMIGRATION & NATURALIZATION, WHOM SHALL WE WELCOME xii–xiv (1953) ("1. America was founded on the principle that all men are created equal, that differences of race, color, religion, or national origin should not be used to deny equal treatment or equal opportunity. 2. America has historically been the haven for the oppressed of other lands. 3. American national unity has been achieved without national uniformity. 4. Americans have believed in fair treatment for all. 5. America's philosophy has always been one of faith in our future and belief in progress. 6. American foreign policy seeks peace and freedom, mutual understanding, and a high standard of living for ourselves and our world neighbors.").

312. President Dwight D. Eisenhower, Special Message to the Congress on Immigration Matters (Feb. 8, 1956) (on file with the American Presidency Project) (urging modification of the 1924 and 1952 immigration laws and suggesting higher quota limits).

313. *Id.* ("The inequitable provisions relating to Asian spouses and adopted children should be repealed.").

314. President Lyndon B. Johnson, Special Message to the Congress on Immigration, (Jan. 13, 1965) (on file with the American Presidency Project) (proposing a bill that would allocate visas unfilled by countries to be filled where they are needed, thereby eliminating the discriminatory "Asia-Pacific Triangle," broadening admission to include non-quota visas to parents of citizens, and allowing a visa preference for workers with lesser skills who can fill specific needs in short supply).

vide between America's racially restricted immigration policies and the current model that is premised on diversity of nationality. Bigotry motivated the law.[315] Breaking with past presidents who signed or acquiesced to biased immigration laws, President Truman vetoed the bill, using powerful language.[316] Nevertheless, Congress enacted the law over his continuing disapproval.[317]

Despite its racial motivations, the McCarran-Walter Act made significant advances over past laws. The act replaced a patchwork of immigration statutes, executive orders, and related actions with a comprehensive codification.[318] More significantly, the law adopted the literal terms of the Fourteenth Amendment's birthright citizenship section, eliminating race as a potential disqualification.[319] It also repealed numerous immigration laws—many premised on racial bias—from the 1880s through 1930s.[320] The law also enacted a key mechanism of immigration law which survives to today: congres-

315. Immigration and Nationality Act of 1952, 8 U.S.C. § 1251(a)(6)(C). The bill's sponsor said:

> However, we have in the United States today hard-core, indigestible blocs which have not become integrated into the American way of life, but which, on the contrary are its deadly enemies. Today, as never before, untold millions are storming our gates for admission and those gates are cracking under the strain.

99 CONG. REC. 1518 (1953) (statement of Sen. McCarran).

316. President Harry Truman, Veto of Bill to Revise the Laws Relating to Immigration, Naturalization, and Nationality (June 25, 1952) (on file with the American Presidency Project) ("I have long urged that racial or national barriers to naturalization be abolished.").

317. Truman expounded on his reasons for vetoing the bill:

> Today, we are "protecting" ourselves as we were in 1924, against being flooded by immigrants from Eastern Europe. . . . We do not need to be protected against immigrants from these countries–on the contrary we want to stretch out a helping hand, to save those who have managed to flee into Western Europe, to succor those who are brave enough to escape from barbarism, to welcome and restore them against the day when their countries will, as we hope, be free again . . . . These are only a few examples of the absurdity, the cruelty of carrying over into this year of 1952 the isolationist limitations of our 1924 law. In no other realm of our national life are we so hampered and stultified by the dead hand of the past, as we are in this field of immigration.

318. Marion T. Bennett, *The Immigration and Nationality (McCarran-Walter) Act of 1952, as Amended to 1965*, 367 ANNALS AM. ACAD. POL. & SOC. SCI. 127, 128 (1966).

319. 8 U.S.C. § 301(a)(1) ("The following shall be nationals and citizens of the United States at birth: (1) a person born in the United States, and subject to the jurisdiction thereof . . . .").

320. *Id.* at § 403.

sional delegation to the President of the power to suspend immigration for nationality groups.[321]

B. Executive Orders and Actions in the Age of Diversity: 1965 Through 2016

The INA set a new course.[322] The law abolished a 90-year reign of biased immigration laws, by phasing out national origin quotas,[323] and creating visa preference categories for skills and family relationships with citizens or U.S. residents.[324] By abolishing racial and national barriers, the INA altered America's demographic mix.[325] In the place of quotas and other measures based on race, the law created visa preference categories for skills and family relationships with U.S. citizens or residents.[326]

Societal animus against immigrants did not vanish with passage of the INA, but presidents began using the law's discretionary powers furtively to promote immigration. Gerald Ford, in a Cabinet meeting, apparently allowed Vietnamese immigrants to enter the U.S. This action, taken in 1975 and recorded in White House min-

321. Section 212(f), authorizing the President to "suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate." *Id.* at § 212(f). Only President Trump invoked this power in broad terms. This happened in Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017). Other presidents narrowly applied this power. KATE MANUEL, CONG. RESEARCH SERV., CRS 7-57-5700, EXECUTIVE AUTHORITY TO EXCLUDE ALIENS: IN BRIEF 6-10 (2016).

322. Immigration and Nationality Act of 1965, Pub. L. No. 89–236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.). For background, see David M. Reimers, *An Unintended Reform: The 1965 Immigration Act and Third World Immigration to the United States*, 3 J. AM. ETHNIC HIST. 9 (1983).

323. *See* 111 CONG. REC. 24,501 (1965) (statement of Sen. Clark) ("[N]ational origins quotas and the Asian-Pacific [sic] triangle provisions are irrational, arrogantly intolerant, and immoral."); 111 CONG. REC. 21,768 (1965) (statement of Rep. Addabbo) ("[N]ational origins system is discriminatory, and it gives a bad image to our friends overseas."); 111 CONG. REC. 21,792 (1965) (statement of Rep. Brademas) ("[The Bill] will repeal the Asia-Pacific triangle which has too long been an insult to those of oriental ancestry.").

324. Harry N. Rosenfield, *The Prospects for Immigration Amendments*, 21 L. & CONTEMP. PROBS. 401, 413–16 (1956).

325. Twenty years after the law was enacted, new immigrants were disproportionately concentrated in cities—particularly in New York, Los Angeles, Chicago, San Francisco, and Miami, where 46% of this new population settled. Roger Waldinger, *Immigration and Urban Change*, 1989 ANN. REV. SOC. 211, 212 (1989). By the late 1970s, petitions from Asians for naturalization outpaced all other groups. *See* Dorothee Schneider, *Naturalization and United States Citizenship in Two Periods of Mass Migration: 1894–1930, 1965–2000*, 21 J. AM. ETHNIC HIST. 50, 67–68 (2001).

326. *Infra* note 324.

utes, remained classified until 1990.[327] Jimmy Carter resettled new migrants from Cuba and Haiti to a federal fort in Puerto Rico in Executive Order 12,244.[328] Although published, the order seemed intentionally misleading: phrased as a sanitation rule, it relocated Haitians and Cubans to locations where their asylum claims would likely be processed far from potential protesters and media reporting.

More generally, Republican and Democratic presidents used executive powers under the INA in subtle but similar ways to promote pluralistic immigration.[329] The tool of choice was typically deferred action.[330] At times, presidents implemented deportation deferral policies.[331] Sometimes presidents implemented these policies through an administrative agency.[332] Deferral typically applied

327. *See* The White House, Notes of the Cabinet Meeting (Apr. 29, 1975) (on file with the Gerald R. Ford Presidential Library) ("The President reiterated that a total of 43–45000 South Vietnamese will have been evacuated.").

328. Exec. Order 12,246, 45 Fed. Reg. 68,367 (Oct. 15, 1980). In oblique terms, the order designated Fort Allen in Puerto Rico as a place for the immediate relocation and temporary housing of Haitian and Cuban nationals. *Id.* It also provided for the immediate relocation of Haitian and Cuban nationals in Florida to the island and suspended federal water safety and environmental laws for this purpose. *Id.*

329. The subtlety reflected each President's willingness to achieve foreign policy and related immigration objectives by working within the framework of various immigration statutes. A detailed analysis appears in RUTH ELLEN WASEM, CONG. RESEARCH SERV., 97-810 EPW, CENTRAL AMERICAN ASYLUM SEEKERS: IMPACT OF 1996 IMMIGRATION LAW (1997).

330. Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 484 (1999) (To ameliorate a harsh and unjust outcome, the INS may decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation. This commendable exercise in administrative discretion, developed without express statutory authorization, originally was known as nonpriority and is now designated as deferred action . . . .") (quoting 6 C. GORDON, S. MAILMAN, & S. YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 72.03 [2][h] (Matthew Bender, Rev. Ed. 1998)).

331. Memorandum from Sec'y of Homeland Sec. Janet Napolitano on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [https://perma.cc/KYK6-WG8K].

332. *E.g.*, 160 CONG. REC. H8636 (daily ed. Dec. 4, 2014) ("The Implementation of the Family Fairness Policy—Providing For Voluntary Departure under 8 CFR 242.5 and Employment Authorization under 8 CFR 274a.12 for the Spouses and Children of Legalized Aliens (section 245a and section 210)" Decision Memo to Gene McNary, Comm'r, Immigr. Nat'y Serv. (Feb. 8, 1990)); Memorandum from Sec'y of Homeland Sec. Jeh Johnson to Leon Rodriguez on Policies for Apprehension, Detention, and Removal of Undocumented Immigrants (Nov. 20,

to migrants who failed to qualify for legal status—for example, as refugees or asylees—and were therefore deportable.

At times, Congress provided a direct mechanism for presidents to defer immigration action—for example, the Extended Voluntary Departure program (EVD).[333] In effect until 1990, EVD allowed the executive branch to authorize the temporary presence of people of a designated nationality.[334] Because the power was discretionary, its use was opaque[335] and ambiguous.[336] This status created doubts for EVD recipients about their legal authorization to work, which placed these recipients in a weakened bargaining position.[337] Nonetheless, EVD actions allowed presidents to address acute humanita-

2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [https://perma.cc/7XZ3-H4XG].

333. *E.g.*, Act of Nov. 2, 1966, Pub. L. No. 89-732, 80 Stat. 1161 (adjusting the status of Cuban refugees to lawful permanent residents); Act of Oct. 23, 1977, Pub. L. No. 95-145, 91 Stat. 1223 (applying to aliens from Cambodia, Laos, and Vietnam). *See generally* 8 U.S.C. § 1103(a) (authorizing Attorney General to establish such regulations and perform such other acts as he deems necessary to carry out his authority).

334. *See* Hotel & Rest. Emps. Union, Local 25 v. Smith, 846 F.2d 1499, 1501 (mem.) (D.C. Cir. 1988) ("In contrast with asylum, which is a statutory exemption from deportation for individual aliens, Extended Voluntary Departure (EVD) is a discretionary suspension of deportation proceedings applicable to particular groups of aliens."); *see also* Lynda J. Oswald, *Extended Voluntary Departure: Limiting the Attorney General's Discretion in Immigration Matters*, 85 MICH. L. REV. 152, 158 n.40 (1986); RUTH ELLEN WASEM & KARMA ESTER, CONG. RESEARCH SERV., RS20844, TEMPORARY PROTECTED STATUS: CURRENT IMMIGRATION POLICY AND ISSUES 3 (2010) (reporting that President Carter granted EVD status to Nicaraguans (July 1979 to September 1980), Iranians (April 1979 to December 1979), and Ugandans (June 1978 to September 1986); President Reagan granted EVD status to Poles (July 1984 to March 1989); and presidents, on a case-by-case basis involving petitions, have granted EVD status for individuals from Lebanon, Cambodia, Cuba, Chile, Czechoslovakia, Dominican Republic, Hungary, Laos, Rumania, and Vietnam, allowing them to remain in the U.S. Important to note, a grant of EVD status allowed people to work lawfully in the U.S.).

335. *See* Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 246–52 (2010). The INS had secretly used "Operating Instructions" in non-public communications to apply criteria—often humanitarian—to defer deportations. *Id.*

336. *See* Cecilia Menjivar, *Liminal Legality: Salvadoran and Guatemalan Immigrants' Lives in the United States*, 111 AM. J. SOC. 999, 1008 (2006) ("'liminal legality' is characterized by its ambiguity, as it is neither an undocumented status nor a documented one, but may have the characteristics of both").

337. *Hotel & Rest. Emps. Union*, 846 F.2d at 1262 (Union attempting to organize hotel workers argued that this status "subjects Salvadoran aliens to employer pressure to remain silent or else be reported for deportation, and that their resulting unwillingness to press their grievances against their employers hinders the union's activities").

rian needs when nationality groups could not qualify as refugees or asylees.[338]

The Immigration Act of 1990 gave presidents a new tool to protect migrants: Temporary Protected Status (TPS).[339] While TPS was not expressly created to be a substitute for EVD, it has had a similar effect: it allows presidents to grant migrants a haven when they fail to qualify for refugee status but flee dangerous political situations or natural disasters.[340]

TPS was enacted for migrants from El Salvador, granting one year of lawful residency.[341] Presidents extended TPS status for Salvadorans from 1990 through 2016, when the Obama administration granted an 18-month extension.[342] These extensions typically provided renewal of employment authorization.[343]

Presidents have significantly broadened TPS to other nationalities without congressional action and have also unilaterally reduced the number of designated countries. Various attorneys general, in consultation with the State Department, have used TPS for migrants from eleven countries.[344] Like Salvadorans, these foreign na-

338. 8 U.S.C. § 1158; 8 U.S.C. § 1231; 8 U.S.C. § 1101(a)(42). Presidents in the current period have issued specialized orders and actions to respond to humanitarian migrants who are not eligible for asylum or refugee status. *See* WASEM & ESTER, *supra* note 334, at 2. A few cases involve an aspect of employment. A notable case is *Hotel and Restaurant Employees Union*. A union claiming to represent Salvadoran hospitality-industry workers who resided illegally in the U.S. sued the Attorney General to suspend all deportation proceedings and to be granted "Extended Voluntary Departure" ("EVD") status. *Hotel & Rest. Emps. Union*, 846 F.2d at 1262; *see also* Gurbisz v. U.S. Immigr. Nat'y Serv., 675 F. Supp. 436 (N.D. Ill. 1987) (bakery employee from Poland petitioned for EVD); Carrillo v. Mohrman, 832 F. Supp. 1412 (D. Idaho 1989) (petition for EVD by seasonal agricultural workers from Mexico).

339. Immigration Act of 1990, Pub. L. No. 101–649, 104 Stat. 4978 (1990). Acting under 8 U.S.C. § 1254a the President may grant TPS to aliens who flee violence, natural disasters, or other calamities but do not qualify as refugees. Todd Howland et al., *Safe Haven for Salvadorans in the Context of Contemporary International Law A Case Study in Equivocation*, 29 SAN DIEGO L. REV. 671, 672 (1992).

340. 8 U.S.C. § 1254a. For an excellent overview of TPS, see MATTHEW ROONEY & LAURA COLLINS, GEORGE W. BUSH INST., DEPORTING SALVADORANS MAY LEAD TO ECONOMIC DECLINE (2018).

341. LISA SEGHETTI, CONG. RESEARCH SERV., RS20844, TEMPORARY PROTECTED STATUS: CURRENT IMMIGRATION POLICY AND ISSUES 3 (2015).

342. *See* Extension of the Designation of El Salvador for Temporary Protected Status, 81 Fed. Reg. 44,645 (July 8, 2016); Extension of the Designation of El Salvador for Temporary Protected Status, 78 Fed. Reg. 32,418-01 (May 30, 2013).

343. Extension of the Designation of El Salvador for Temporary Protected Status, 81 Fed. Reg. at 44645.

344. SEGHETTI, *supra* note 341, at 3, tbl. 1 (El Salvador TPS, 204,000; Guinea TPS, 2,000; Haiti, 50,000; Honduras TPS, 61,000; Liberia TPS, 4,000; Nepal TPS,

tionals have been allowed to apply for work authorization.[345] President Obama and President Trump used their discretionary power, however, to terminate TPS for certain foreign nationals.[346]

Another discretionary power, called Deferred Enforced Departure (DED), remains in force. DED quietly emerged as a temporary, discretionary administrative tool in 1990.[347] It emanates from the President's power to conduct foreign relations but has no statutory basis.[348] DED has been used five times.[349] The sole

10,000–25,000; Nicaragua TPS, 2,800; Sierra Leone TPS, 2,000; Somalia TPS, 270; South Sudan TPS, 300–500; Sudan TPS, 600; and Syria TPS, 5,000). As of March 2018, the U.S. Department of Justice listed the following as TPS countries: Angola, Bosnia-Hercegovina, Burundi, El Salvador, Guinea, Guinea-Bissau, Haiti, Honduras, Kosovo, Province of, Kuwait, Lebanon, Liberia, Montserrat, Nepal, Nicaragua, Rwanda, Sierra Leone, Somalia, South Sudan, Sudan, Syria, and Yemen. TEMPORARY PROTECTED STATUS, U.S. DEP'T OF JUSTICE, https://www.justice.gov/eoir/temporary-protected-status [https://perma.cc/DRE3-BCDV] (last visited Oct. 24, 2019).

345. TEMPORARY PROTECTED STATUS, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, https://www.uscis.gov/humanitarian/temporary-protected-status [https://perma.cc/D56M-MWU9] (last visited Oct. 24, 2019).

346. During President Barack Obama's term, USCIS terminated TPS status for nationals from nations ravaged by Ebola—Guinea, Sierra Leone, and Liberia. Six Month Extension of TPS Benefits Before Termination of Guinea's Designation of TPS, 81 Fed. Reg. 66064 (Sept. 26, 2016); Six Month Extension of TPS Benefits Before Termination of Sierra Leone's Designation of TPS, 81 Fed. Reg. 66054 (Sept. 26, 2016); Six Month Extension of TPS Benefits Before Termination of Designation of Liberia's TPS, 81 Fed. Reg. 66059 (Sept. 26, 2016). President Trump's USCIS has massively expanded TPS terminations. *See* Termination of the Designation of El Salvador for Temporary Protected Status, 83 Fed. Reg. 2654 (Jan. 18, 2018) (El Salvadorans); Termination of the Designation of Haiti for Temporary Protected Status, 83 Fed. Reg. 2648 (Jan. 18, 2018) (Haitians); Termination of the Designation of Nicaragua for Temporary Protected Status, 82 Fed. Reg. 59636 (Dec. 15, 2017) (Nicaraguans); Termination of the Designation of Sudan for Temporary Protected Status, 82 Fed. Reg. 47228 (Oct. 11, 2017) (Sudanese).

347. For the date of origin, see 38.2 DEFERRED ENFORCED DEPARTURE, U.S. CITIZENSHIP & IMMIGRATION SERVICES, https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-16606/0-0-0-16764.html [https://perma.cc/3LN3-AXK7] (last visited Oct. 24, 2019).

348. *Id.* (explaining that DED is a temporary, discretionary, administrative stay of removal. It applies to people from designated countries, and thereby differs from individual deportation decisions); s*ee* Benjamin M. Haldeman, Note, *Discretionary Relief and Generalized Violence in Central America: The Viability of Non-Traditional Applications of Temporary Protected Status and Deferred Enforced Departure*, 15 CONN. PUB. INT. L.J. 185, 188 n.5 (2016) (citing USCIS, "Adjudicator's Field Manual," § 38.2(a) (2014)).

349. 38.2 DEFERRED ENFORCED DEPARTURE, U.S. CITIZENSHIP & IMMIGRATION SERVICES, https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-16606/0-0-0-16764.html [https://perma.cc/3LN3-AXK7] (last visited Oct. 24, 2019).

remaining group, Liberians, will lose DED status on March 30, 2020.[350]

Apart from using their powers over TPS, EVD, and DED, presidents have also delegated deferral authority to subordinate officials, though these actions have no official denomination. President Ronald Reagan's administration broadened the use of deferred action in 1981 by enabling beneficiaries to apply for work authorization.[351] In 1987, Reagan's Attorney General signed an order to defer deportation of 200,000 Nicaraguans.[352] The action also directed the Immigration and Naturalization Service (INS) to expedite work authorization applications.[353] In an action that may have been a blueprint for DACA, Reagan's INS Director announced a discretionary policy to allow minor children to remain after a statute legalized the presence of their parents but not them.[354] George H.W. Bush's INS Commissioner, Gene McNary, expanded this family unification policy by deferring deportation for unlawfully present spouses and children of legal aliens.[355] Later, the INS authorized

350. As of 2018, only one nationality group, Liberians, has DED status (expiring March 31, 2019). *Id.* DED court cases are rare. *But see* Shuaibu v. Gonzales, 425 F.3d 1142 (8th Cir. 2005) (upholding grant of deferred enforcement departure for a Liberian).

351. Documentary Requirements: Nonimmigrants; Waivers; Admission of Certain Inadmissible Aliens; Parole; Revision of Border Crossing Card Procedures, 46 Fed. Reg. 25080, 25081 (May 5, 1981). This regulation remains in effect. 8 C.F.R. § 274a.12(c)(14) (2018); *see also id.* at § 274a.12(a)(11) (allowing work authorization for persons "whose enforced departure from the United States has been deferred").

352. President Reagan shielded 200,000 Nicaraguans from deportation in July 1987. *See Immigration Rules Are Eased for Nicaraguan Exiles in the U.S.*, N.Y.TIMES (July 8, 1987), https://timesmachine.nytimes.com/timesmachine/1987/07/09/869787.html?action=click&contentCollection=Archives&module=LedeAsset&region=ArchiveBody&pgtype=article&pageNumber=8 [https://perma.cc/P7GC-ND3N].

353. Immigration and Reform Control Act of 1986 (Simpson-Mazolli Act), Pub. L. No. 99-603, 100 Stat. 3445 (1986) (codified at 8 U.S.C. § 1324). The law requires employers to review documents that establish an employee's eligibility for employment. *Id.* at § 1324a(b).

354. In October 1987, President Reagan legalized the presence of children who unlawfully immigrated with their families. He acted after a problem emerged with "split-eligibility" for families under the 1986 Immigration Reform and Control Act. *See* AMERICAN IMMIGRATION COUNCIL, REAGAN-BUSH FAMILY FAIRNESS: A CHRONOLOGICAL HISTORY 2 (2014). In 1989, this executive action was codified. *See* Helen Dewar, *Senate Votes Protection for Aliens' Kin*, WASH. POST, July 13, 1989, at A4.

355. Memorandum from Gene McNary, Comm'r, Immigr. Nat'y Serv., to Immigr. Nat'y Serv. Reg'l Comm'rs, Family Fairness: Guidelines for Voluntary Departure Under 8 CFR 242.5 for the Ineligible Spouses and Children of Legalized Aliens (Feb. 2, 1990), *reprinted in* 67 No. 6 Interpreter Releases 153 app. I, at

employment of these deferral recipients.[356] Bill Clinton used deferred enforcement through his Attorney General to permit Central Americans to remain in the U.S.[357] Similarly, his administration issued a press release in 1997, referring to DED for Haitians.[358]

While modern presidents have relied on opacity to advance the INA's global immigration aims, they also resorted to highly visible executive orders to assert their political values. President Bush used his executive powers in 1989 to legalize the presence of Chinese nationals after the Tiananmen Square crackdown.[359] President Obama, following a longstanding practice,[360] used the Department of Homeland Security to announce deferred enforcement in a policy known as Deferred Action for Childhood Arrivals (DACA).[361] His Secretary of Homeland Security announced another deferral policy, Deferred Action for Parents of Americans (DAPA), for parents of U.S. citizens or legal permanent residents who have resided

164–65 (Feb. 5, 1990) (stating that deportation would be deferred for ineligible aliens who had not been convicted of a felony or three misdemeanors).

356. 160 CONG. REC. H8636 (daily ed. Dec. 4, 2014) (citing Decision Memo to Gene McNary, Comm'r, Immigr. Nat'y Serv., The Implementation of the Family Fairness Policy—Providing For Voluntary Departure under 8 CFR 242.5 and Employment Authorization under 8 CFR 274a.12 for the Spouses and Children of Legalized Aliens (section 245a and section 210) (Feb. 8, 1990)).

357. In 1993, President Clinton's administration extended by 18 months the DED reprieve granted by President Bush's administration to 200,000 Salvadoran refugees. *See* Elston Carr, *Salvadorans Welcome Extension*, L.A. TIMES (May 30, 1993), http://articles.latimes.com/1993-05-30/news/ci-41689_1_salvadoran-refugees [https://perma.cc/FVM9-MFRX]; *see also* WASEM & ESTER, *supra* note 336, at 6.

358. Press Release, Office of the Press Secretary of the White House, Deferred Enforced Departure (DED) for Haitians (Dec. 23, 1997), https://clintonwhitehouse6.archives.gov/1997/12/1997-12-23-fact-sheet-on-deferred-enforced-departure-for-haitians.html. [https://perma.cc/29NT-CM8E] (DED granted to serve the foreign policy interest in stabilizing a democratic government in Haiti). The statement also recounted that President Bush granted DED three times (for nationals from China, Kuwait, and Salvadorans who had previously registered for TPS). *Id.*

359. President George H.W. Bush shielded Chinese nationals after the Tiananmen Square crackdown. *See* Exec. Order No. 12,711, 55 Fed. Reg. 13897 (Apr. 13, 1990) (giving temporary protection to 80,000 Chinese nationals). Section 3(c) addressed employment, stating that "authorization for employment of such PRC nationals through January 1, 1994." *Id.* at 13898.

360. Shoba Sivaprasad Wadhia, *In Defense of DACA, Deferred Action, and the DREAM Act*, 91 TEX. L. REV. 59, 64 (2012) ("Prosecutorial Discretion Actions Like DACA Have Been Part of the Immigration System for at Least Thirty-Five Years"); *see* The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others, 38 Op. O.L.C. 1, 5 (2014) (deferred action used by immigration officials "over the years to temporarily prevent the removal of undocumented aliens").

361. *See supra* note 331.

in the country for at least the last five years and who lack a criminal record.[362] DHS also promulgated two rules for H-1B visas: one authorized a process for spouses of H-1B visas to be employed,[363] and the other extended by two years an employment training period for foreign students with advanced STEM degrees granted by U.S. universities.[364]

Beginning with Truman and continuing through Obama, presidents of both parties consistently used executive powers to reverse America's history of immigration laws and presidential actions that favored white citizens and insulated labor markets from competition. While Congress has added legislation since the 1980s to address immigration, they have let thorny issues fester. On the one hand, they enacted a law in 1997 to create a path to permanent residency for more than 450,000 asylees from Nicaragua, Russia, and other nations.[365] On the other hand, that action was unusual.

362. Secretary of Homeland Security Jeh Johnson announced the Deferred Action for Parents of Americans (DAPA) policy, which granted deferred action of removal to certain parents of U.S. citizens and lawful permanent residents. *See* Memorandum from Jeh Johnson, Sec'y of Homeland Sec. to Leon Rodriguez on Policies for Apprehension, Detention, and Removal of Undocumented Immigrants, *supra* note 332. DAPA was established in 2014 and would have applied to parents of U.S. citizens and lawful permanent residents (Green Card holders). *Id.* Criteria for deferred action included:

> [1] have, on [November 20, 2014], a son or daughter who is a U.S. citizen or lawful permanent resident; [2] have continuously resided in the United States since before January 1, 2010; [3] are physically present in the United States on [November 20, 2014], and at the time of making a request for consideration of deferred action with USCIS; [4] have no lawful status on [November 20, 2014]; [5] are not an enforcement priority as reflected in the November 20, 2014 Policies for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum; and [6] present no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate.

Id. at 4. DAPA includes eligibility for recipients "to apply for work authorization for the period of deferred action." *Id.* DAPA was enjoined as a violation of the Administrative Procedure Act. *See* Texas v. United States, 86 F. Supp. 3d 591, 677 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd*, 136 S. Ct. 2771 (2016).

363. *See* Employment Authorization for Certain H-4 Dependent Spouses, 80 Fed. Reg. 10284 (Feb. 25, 2015) (codified at 8 C.F.R. §§ 214.2, 274a) (the "H-4 Rule"), upheld in Save Jobs USA v. U.S. Dep't of Homeland Sec., 105 F. Supp. 3d 108 (D.D.C. 2015).

364. *See* DHS's 2016 regulation extending the OPT Program by an additional twenty-four months for eligible STEM students (2016 OPT Program Rule), 81 Fed. Reg. 13040 (Mar. 11, 2016) (codified at 8 C.F.R. §§ 214, 274a); *see also* Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec., 892 F.3d 332 (D.C. Cir. 2018) (reversing district court's dismissal of union's claim for opposing DHS's motion to dismiss).

365. Nicaraguan Adjustment and Central Relief Act, Pub. L. No. 105-100, 111 Stat. 2160 (1997). From 1999–2017, USCIS received 211,044 NACARA petitions

Even when a bipartisan majority in the Senate tried to comprehensively address major immigration and border security issues,[366] the House of Representatives refused to consider legislation.[367] For most of the time since the 1980s, presidents used their powers to fill the void created by congressional inaction. They used their opaque powers to avoid deporting migrants who had temporary or unlawful status.

By 2016, the synergistic pattern of congressional inertness and discreet presidential actions burst into open conflict. Apart from Donald Trump's intolerance,[368] his diagnosis that the immigration system is broken raises several questions: How long can status quo arrangements last for temporary and deferred-enforcement migrants? Forever? Many beneficiaries have been in the United States for two decades without legal status. On the other hand, can racial animus justify termination of reprieves from deportation? Is his approach unique or consistent with historical uses of presidential power? And ultimately, what are the limits of presidential power over immigration? I address these matters in my conclusions.

---

and granted 184,169 of these requests. *See* ASYLUM DIV., U.S. CITIZENSHIP & IMMIGR. SERVS., NACARA CUMULATIVE REPORT, 6-21-99 THROUGH 08-31-17 (2017). NACARA granted amnesty to asylees from Nicaragua, Cuba, Guatemala, El Salvador, and Russia. *See* Eli Coffino, *A Long Road to Residency: The Legal History of Salvadoran and Guatemalan Immigration to the United States with a Focus on NACARA*, 14 CARDOZO J. INT'L & COMP. L. 177, 191 (2006).

366. In May 2006, the Senate passed the Comprehensive Immigration Reform Act of 2006 by a 62–36 margin. The bill included provisions to improve border security with fencing, vehicle barriers, surveillance technology and more personnel. It also created a new temporary worker visa category and provided a path to legal status for certain immigrants who were unlawfully in the U.S. *See* Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. § 2 (2006).

367. *Id.* The Senate bill was never taken up by the House. Instead, the House in December 2005 passed a separate bill with greater focus on border security and enforcement, the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005. *See* H.R. 4437, 109th Cong. § 1 (2005). That bill proposed tougher measures employment eligibility verification; immigration fraud; and immigration enforcement authority at state and local levels but had no provision for a guest worker program or legalization of immigrants. Instead of taking up the Senate bill in the summer of 2006, the House of Representatives held "field hearings" on immigration. Carle Hulse, *House Adds Hearings on Immigration*, N.Y. TIMES (June 21, 2006), https://www.nytimes.com/2006/06/21/washington/21immig.html [https://perma.cc/W8ZM-7W3K].

368. *See, e.g.*, Baker, *supra* note 40.

VI.
CONCLUSION

The history of presidential immigration powers divides into two periods. The longest time, running from George Washington to Franklin Roosevelt, was largely marked by restrictions and exclusions arising from racial animus directed at migratory laborers. The most recent time began with Truman and ended with Obama. Early presidents enforced the Constitution's fugitive slave provision. They explored diplomacy to deport free black peoples to Africa. From the 1880s through 1940s, presidents acted with Congress to restrict laborers from China, then Japan, and eventually all of Asia, and severely limit the flow of poor "nonwhite" European immigrants. Immigrants were blamed for lowering standards for American workers. Roosevelt's order caused American citizens to lose their jobs and instead work while incarcerated. Truman and Eisenhower explicitly challenged the racial bias in this long history and used their limited powers to move the nation toward a more pluralistic approach to immigration—one that would befit the ideals of American democracy. They set the tone for a comprehensive overhaul of immigration policies.

Passage of the 1965 Immigration and Nationality Act marked a watershed. Thereafter, the nation undertook ambitious policies to promote immigration from all parts of the world. Presidents of both parties, except Richard Nixon, embraced this sweeping legislation. They used executive orders and other administrative powers to permit entry to hundreds of thousands of people displaced by war, political upheaval, and natural disasters. They used prosecutorial discretion to extend the stay of these temporary migrants and created a legal mechanism for their lawful employment. After an amnesty law was passed in 1986, presidents of both parties used their powers to create temporary legal status for children, and eventually, for parents. Family unification was more important to presidents such as Ronald Reagan, George H.W. Bush, and Barack Obama than using their powers to deport large numbers of family members.

Against this backdrop, I examine President Donald Trump's immigration orders that affect employment relationships. His presidency is premised on the theme of "America First." This is not new: My research shows that it parallels the substance and tone of presidents from the 1880s through the 1940s. Trump offers a clear alternative to the pluralistic vision and structure of the 1965 Immigration and Nationality Act. For now, however, that law re-

mains in effect—and this explains, in brief, why courts variously restrain his anachronistic immigration actions.

What do my findings and historical analysis mean for the foreseeable future? First, when President Trump uses presidential powers for immigration, he often conflates national security with job security for Americans. In doing so, he loses sight of the Immigration and Nationality Act of 1965. He also misunderstands that immigration law embeds significant employment regulations, including registration obligations and work privileges for undocumented individuals in the DACA program and recipients of TPS status. At a minimum, he is obligated by the Administrative Procedure Act to provide a formal notice and comment process for some of these actions. This study's finding that plaintiffs relied heavily on the APA and the Fifth Amendment's Due Process Clause signifies that President Trump appears to have expanded presidential immigration powers in ways that implicate individual rights under the Constitution and other U.S. laws, such as the Immigration and Nationality Act.

Second, President Trump is eroding executive powers over immigration. He is careless in using executive orders to change immigration policies that are codified as law. As a result, he has undermined common jurisdiction defenses that presidents usually assert with success. His haste to implement orders has affected individuals and their employers, including people who are authorized to work under the INA. His actions have caused harm with little or no process. Some courts have sharply rebuked the President's callow, impatient, and damaging actions by ordering injunctions. A few have explicitly suggested that he acted with racial or religious animus. To the extent that these cases become precedents, future courts might apply strict scrutiny to presidential immigration actions, as they do for legislative enactments. This would amount to a major concession of executive power.

Third, courts have closely scrutinized his immigration policies that affect employment. They have enjoined most of his actions. This pattern is unprecedented, though it is observable mostly at the district and appellate court levels. The open question is whether the Supreme Court will allow these lower court rulings to stand or will modify them—perhaps to the point of entirely reversing them. Certainly, the Court can apply deferential precedents from the age of racial animus. On the other hand, a conservative majority on the Court overruled *Korematsu* in *Trump v. Hawaii*. The majority did not need to take this strong measure to decide the case, but it signaled some inclination to limit bias in a President's use of Article II pow-

ers. Whether the Supreme Court, Congress, or voters have the most influence on presidential immigration powers is an unsettled question, but America is at a crossroads.

ONE SEQUIN AT A TIME: LESSONS ON STATE CONSTITUTIONS AND INCREMENTAL CHANGE FROM THE CAMPAIGN FOR MARRIAGE EQUALITY

*LEONORE F. CARPENTER & ELLIE MARGOLIS**

"And now, I'm just trying to change the world, one sequin at a time."

—Lady Gaga[1]

* Professor Carpenter is an Associate Professor of Law and Professor Margolis is a Professor of Law at Temple University, James E. Beasley School of Law. Both authors thank Ivana Alexander for her able research assistance, Temple Law School for its financial and administrative support, and David S. Cohen and Katie Eyer for their excellent comments on earlier drafts of this article. Professor Carpenter thanks her co-author, Ellie Margolis, for her perennial insight, wisdom, and good humor. She also thanks her spouse, Tiffany Palmer, her daughter, Eleanor Palmer, and her dog, Penny Carpenter-Palmer, for putting up with her during the writing process. Professor Margolis thanks her co-author, Lee Carpenter, for the discussions and commiseration that inspired us to write this article.

1. Vince Vega, *Meet Lady Gaga*, MYX (Jan 6. 2009), https://myx.abs-cbn.com/features/13170/miguel-escuetas-blue-monday [https://perma.cc/T8YZ-DWW3].

INTRODUCTION

When Brett Kavanaugh was nominated to the Supreme Court, civil rights groups raised the alarm, opposing his appointment for fear of the effect on civil rights progress.[2] Women's rights groups rallied outside the Supreme Court protesting Kavanaugh's nomination.[3] The NAACP issued a report opposing the nomination because Kavanaugh posed "a severe threat to civil rights."[4] The Lawyers' Committee on Civil Rights issued a long report, assessing Kavanaugh's record and concluding that it "raises serious concerns that he would weaken voter, anti-discrimination and environmental protections, limit reproductive rights and access to quality healthcare and insulate the President and the Government from the rule of law."[5] A coalition of more than 200 national civil rights organizations, under the umbrella of The Leadership Conference on Civil

2. Justice Kavanaugh's appointment faced substantial opposition due to the credible allegation of sexual misconduct by three women. *See Everything on Brett Kavanaugh, the Senate Vote and the Fallout*, N.Y. TIMES (Oct. 2, 2018), https://www.nytimes.com/2018/10/02/us/politics/kavanaugh-news-fbi-investigation.html [https://perma.cc/N48F-FWMT]. Additionally, many organizations opposed his nomination because of his record on civil rights issues. This article is concerned with the latter.

3. Tramon Lucas, *Women's Rights Organizations Object to Kavanaugh Nomination*, ASSOCIATED PRESS (Aug. 22, 2018), https://apnews.com/dd93769fee0f43509ea1d8263729bef9 [https://perma.cc/TF79-YF8F].

4. *Brett Kavanaugh Poses a Severe Threat to Civil Rights: The Senate Must Reject His Nomination*, NAACP (Aug. 31, 2018), https://www.naacp.org/wp-content/uploads/2018/09/NAACPKavanaughTPs.pdf [https://perma.cc/L9JH-2HHX].

5. LAW.' COMM. FOR C.R. UNDER L., REPORT ON THE NOMINATION OF JUDGE BRETT KAVANAUGH AS AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT 15–16 (2018), https://lawyerscommittee.org/wp-content/uploads/2018/08/Lawyers-Committee-Report-On-Judge-Kavanaugh.pdf [https://perma.cc/52HE-93G8].

and Human Rights, issued a statement opposing the nominations because "he would be the fifth and decisive vote to undermine many of our core rights and legal protections."[6]

Kavanaugh was nominated to replace Justice Anthony Kennedy, who announced his retirement on June 27, 2018.[7] At his announcement a lament rose among those on the political left because, for the better part of three decades, Kennedy was a key swing vote in cases protecting reproductive freedom, voting rights, and the rights of LGBTQ people.[8] The prospect of replacing Justice Kennedy with an even more conservative Justice legitimately stoked the fear that the Supreme Court would be unfriendly to civil rights claims for decades to come. As the Court's 2019 term progressed, court watchers saw the first signs that the Court was willing to overturn longstanding precedent, rolling back the civil rights progress of the late twentieth and early twenty-first centuries.[9]

It is no surprise that groups committed to the protection and expansion of civil rights and other progressive causes fear an increasingly conservative Supreme Court. Decades of decisions, including *Brown v. Board of Education*,[10] *Loving v. Virginia*,[11] *Roe v. Wade*,[12] *Frontiero v. Richardson*,[13] *Lawrence v. Texas*,[14] *Obergefell v. Hodges*,[15] and *Texas v. Johnson*,[16] fostered the conventional wisdom that federal court cases are an effective means of expanding individual rights through, among others, Equal Protection and Due Process claims under the Fourteenth Amendment to the U.S.

6. *Oppose the Confirmation of Brett Kavanaugh to the Supreme Court of the United States*, LEADERSHIP CONF. ON CIV. & HUM. RTS. (Sept. 3, 2018), https://civilrights.org/resource/oppose-the-confirmation-of-brett-kavanaugh-to-the-supreme-court-of-the-united-states/ [https://perma.cc/RU2S-X9KW].

7. Amy Howe, *Anthony Kennedy, Swing Justice, Announces Retirement*, SCOTUSBLOG (June 27, 2018, 2:23pm), https://www.scotusblog.com/2018/06/anthony-kennedy-swing-justice-announces-retirement/ [https://perma.cc/8H25-HU72].

8. *Id.*

9. *See generally* Todd Ruger, *'A Court Without a Middle': Supreme Court Term Signals Changes Ahead*, ROLL CALL (June 28, 2019), https://www.rollcall.com/news/congress/supreme-court-term-signals-bigger-changes-ahead [https://perma.cc/MWS3-3GZF].

10. 347 U.S. 483 (1954).

11. 388 U.S. 1 (1967).

12. 410 U.S. 113 (1973).

13. 411 U.S. 677 (1973).

14. 539 U.S. 558 (2003).

15. 135 S. Ct. 2584 (2015).

16. 491 U.S. 397 (1989).

Constitution.[17] Nevertheless, two things remain true, even in the face of so many important Supreme Court decisions expanding and defining civil rights protections. First, the Supreme Court has not been as consistently reliable an engine for progressive social change as many people tend to believe.[18] And second, despite the role federal claims play in the public imagination, federal court is not the only viable site for rights advocacy in a federalist system.

While federalism has generally been associated with conservative causes,[19] there is nothing inherently conservative about the relationship between the federal government and the states.[20] A basic tenet of our federalist system of government is that state and federal courts both have the ability to protect constitutional rights, and state constitutions may provide different and more extensive rights than those in the U.S. Constitution.[21] State constitutions are not just cloned versions of the U.S. Constitution.[22] They differ in origin, in language, and in underlying political philosophy.[23] The differences in politics, economy, and social structures in the eighteenth,

17. *See, e.g.*, Michele L. Jawando & Sean Wright, *Why Courts Matter*, CTR. AM. PROGRESS (Apr. 13, 2015), https://www.americanprogress.org/issues/courts/reports/2015/04/13/110883/why-courts-matter-2/ [https://perma.cc/38CC-6854].

18. For example, while the Court famously expanded individual rights under Chief Justice Earl Warren during the 1950s and 1960s, those rights were eroded during the 1970s and 1980s by the Burger and Rehnquist Courts. *See* Hon. John Christopher Anderson, *The Mysterious Lockstep Doctrine and the Future of Judicial Federalism in Illinois*, 44 LOY. U. CHI. L.J. 965, 967–68 (2013) (noting concerns that, following Warren's tenure, the Court was becoming hostile to individual rights claims).

19. Erwin Chemerinsky, *Reconceptualizing Federalism*, 50 N.Y. L. SCH. L. REV. 729, 734 (2006); *see* Heather K. Gerken & Joshua Revesz, *Progressive Federalism: A User's Guide*, DEMOCRACY: J. OF IDEAS (Spring 2017), available at https://democracyjournal.org/magazine/44/progressive-federalism-a-users-guide/ [https://perma.cc/M57Q-8RYU].

20. The term "states' rights" became synonymous with the political right during the 1950s and 1960s as conservatives turned to the states to fight the dismantling of Jim Crow laws and the Warren Court's expansion of civil rights. Gerken & Revesz, *supra* note 19. By the 1980s, "states' rights" were firmly connected to conservative ideology in the public imagination. Ernest A. Young, *The Conservative Case for Federalism*, 74 GEO. WASH. L. REV. 874, 874 (2006). This remains true today. Gerken and Revesz, *supra* note 19.

21. Stewart G. Pollock, *Adequate and Independent State Grounds As A Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977 (1985).

22. G. Alan Tarr, *State Constitutional Design and State Constitutional Interpretation*, 72 MONT. L. REV. 7, 8 (2011).

23. *Id.*

nineteenth, and twentieth centuries all contributed to significant variation in individual state constitutions.[24]

State constitutions not only vary greatly from each other, but also from the U.S. Constitution—in age, in origin, and in language.[25] Some state constitutions pre-date the U.S. Constitution,[26] while the majority were adopted over the course of the nineteenth and twentieth centuries.[27] State courts can interpret their own state constitutional provisions and state legislatures have plenary authority to enact legislation without the constraints the U.S. Constitution places on Congress.[28] Thus, while states are often overlooked as sites for rights advancement, there is great potential for locating rights in state constitutions that go beyond those specified in the U.S. Constitution.

As great as the potential is for locating new or more robust rights in state constitutions, that potential has not yet become fully realized. In 1961, Justice William Brennan gave a lecture in which he asserted that state constitutions were independent sources of fundamental rights, separate from those protected by the U.S. Constitution.[29] This was the start of the New Judicial Federalism movement, as state court judges and academics began to take up the call to establish rights through state constitutions.[30] The movement grew during the 1980s, gaining the attention of some academics and judges, but never fully took hold, and federal civil rights litigation remained central in the public imagination."[31] In recent years, as conservatives have consolidated power in the federal government, and most particularly at the Supreme Court, progressives are once again turning to a more robust federalism at the state and

24. *Id.* at 10.

25. *See generally* ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS (1st ed. 2009).

26. *Id.* at 36–39.

27. Tarr, *supra* note 22, at 9.

28. WILLIAMS, *supra* note 25, at 247. Note that while state legislatures play an important role in regulating conduct and expanding rights, this article will focus exclusively on the role played by courts.

29. Justice Brennan first articulated this idea in a 1961 speech and subsequently made it famous in his 1977 article, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). *See* Ann M. Lousin, *Justice Brennan's Call to Arms-What Has Happened Since 1977?*, 77 OHIO ST. L.J. 387, 387–88 (2016) (citing William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions As Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986)).

30. WILLIAMS, *supra* note 25, at 113–114.

31. See *infra* Section I.A.

local level.[32] As Yale Law School Dean and Professor Heather Gerken has noted, "[I]t is a mistake to equate federalism's past with its future."[33]

This article will consider the potential of state courts for civil rights advocacy at a time when opportunities for civil rights advancement in the federal courts may be shrinking rather than expanding. In particular, we will focus on judicial federalism and the ability of state courts to find state constitutional rights that go beyond the floor set by the U.S. Constitution. Because many attorneys and advocates do not come to their work with a grounding in state constitutional law, Part I will provide an overview of judicial federalism, reviewing its history, obstacles and the potential to establish rights under state constitutions.

Next, Part II will examine a period of a little less than a decade in the fight for marriage equality as a lesson in the efficacy of state constitutional law strategies at a time when federal courts seem closed to a particular kind of rights claim. Part II describes in detail the years immediately following the Supreme Court's decision in *Bowers v. Hardwick*,[34] which appeared to foreclose the possibility of winning a marriage equality argument under the U.S. Constitution. During a time in which LGBTQ rights advocates knew that the Supreme Court would be completely hostile to marriage equality claims, they turned to state courts and formed a strategy that leveraged carefully crafted state constitutional claims to achieve incremental marriage equality wins. Along the way, advocates learned valuable lessons about how to lay the groundwork for court success, how to select jurisdictions in which to bring claims, and how to avoid the pitfalls of court wins that are too easily undone by popular will. Part III will consider the lessons drawn from the marriage cases and the implications for other kinds of rights advocacy.

PART I.
JUDICIAL FEDERALISM: REINVIGORATING OF THE POWER OF STATE CONSTITUTIONS THROUGH STATE COURTS

It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a labora-

32. *See* Heather Gerken, *A New Progressive Federalism*, DEMOCRACY: J. OF IDEAS (Spring 2012), available at https://democracyjournal.org/magazine/24/a-new-progressive-federalism/ [https://perma.cc/ZS8T-7QYD].

33. *Id.*

34. 478 U.S. 186 (1986).

tory; and try novel social and economic experiments without risk to the rest of the country.[35]

The idea of states as laboratories of democracy is built in to the structure of federal constitutionalism and reflected in the Tenth Amendment, which provides that any powers not specifically delegated to the federal government are reserved for the states.[36] The relatively limited reach of the federal government and broad grant of power to the states encourages competition and experimentation in governance and the protection of rights.[37] This is at the heart of the potential for a progressive judicial federalism movement.

While federalism has always had the potential to advance liberal as well as conservative agendas, until recently, the term "states' rights" has primarily been associated with conservative, libertarian, and racist political agendas.[38] Southern states invoked states' rights to oppose the civil rights movement of the 1950s and 1960s.[39] For the last forty years, conservatives have sought to limit federal power over state and local governments as liberals sought to expand the regulatory power of the federal government.[40] There is nothing inherent in federalism that favors liberal or conservative causes, however, and in the judicial arena, the groundwork for a more progressive federalism has already been laid.[41]

A. Development of the "New Judicial Federalism"

The first major wave of state courts establishing rights beyond those secured in the U.S. Constitution took place in the 1970s and 1980s, as both state and federal courts recognized the ability of state courts to make these decisions.[42] The movement was spurred on by

35. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

36. U.S. CONST. amend. X.

37. *See* Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 6 (2010) (identifying the generally accepted benefits of federalism).

38. *See, e.g.*, Gerken, *supra* note 32; Ilya Somin, *How Liberals Learned to Love Federalism*, WASH. POST (July 12, 2019), https://www.washingtonpost.com/outlook/how-liberals-learned-to-love-federalism/2019/07/12/babd9f52-8c5f-11e9-b162-8f6f41ec3c04_story.html?fbclid=IwAR1QDsjB0G0D—bjN7fxBACD4Xe6p8lEc-ADo9QoHHO183yCKVjtdzPGe5k&utm_term=.1151093993f7 [https://perma.cc/4HMX-YVHM].

39. Robert A. Schapiro, *Not Old or Borrowed: The Truly New Blue Federalism*, 3 HARV. L. & POL'Y REV. 33, 33 (2009).

40. *See* Somin, *supra* note 38.

41. *See, e.g.*, Gerken, *supra* note 32; Young, *supra* note 20, at 875.

42. Robert F. Williams, *Introduction: The Third Stage of The New Judicial Federalism*, 59 N.Y.U. ANN. SURV. AM. L. 211, 213–14 (2003). There were some important

Supreme Court Justice William Brennan's now-famous Harvard Law Review article, *State Constitutions and the Protection of Individual Rights*.[43] Justice Brennan urged state courts to independently interpret the individual rights guarantees in their own constitutions, especially in areas where the Supreme Court's interpretation of the U.S. Constitution was narrow.[44] This call was taken up by numerous judges and academics, starting the movement dubbed "New Judicial Federalism."[45]

The movement was advanced significantly by the Supreme Court's decision in *PruneYard Shopping v. Robins*,[46] which held that state courts are free to adopt rights that are more expansive than those established in the U.S. Constitution, and the decision in *Michigan v. Long*,[47] which clarified that the Supreme Court will not review state supreme court decisions that are clearly based on an "adequate and independent state ground" such as an independent interpretation of the state constitution.[48] Following on these decisions, as well as decisions from California and New Jersey courts establishing rights under state constitutions, the New Judicial Federalism movement seemed poised to see in an expansion of state constitutional rights.[49]

B. Challenges to Judicial Federalism

Despite great early enthusiasm, the New Judicial Federalism movement was not as robust as it initially seemed it might be. Critics argued that the push for state constitutionalism was an instrumentalist attempt to advance a progressive agenda and avoid unpopular federal precedent.[50] But just as "states' rights" are not inherently conservative, there is nothing inherently liberal about state constitutions and the rights they protect.[51] Laws that reflect conservative

state cases before this, such as California's anti-miscegenation case, *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948) (unofficially reported as *Perez v. Lippold*), however scholars generally credit the first wave as beginning in the 1970s.

43. Brennan, *supra* note 29.

44. *Id.* at 493.

45. Williams, *supra* note 42, at 212 (citing G. Alan Tarr, *Understanding State Constitutions*, 65 TEMP. L. REV. 1169 (1998)).

46. 447 U.S. 74, 81 (1980).

47. 463 U.S. 1032 (1983).

48. *Id.* at 1041–42.

49. Williams, *supra* note 42, at 213–15.

50. *See* Hon. Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. REV. 1307, 1313 (2017).

51. JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 176–77 (2018).

values and laws that reflect liberal values can just as easily be challenged—state constitutions merely provide an additional avenue for those challenges.[52] Concern about instrumentalism slowed the development of state constitutionalism, as did the difficulty of stepping out from under the shadow of federal constitutionalism, backlash, and general lack of understanding of the potential that state constitutions can have.

1. Reluctance to Exercise Independent State Interpretation

Faced with interpreting state constitutional provisions for the first time, state court judges can use all the tools available in any legal analysis, such as text, history, political information, and related precedent.[53] As a legal matter, state judges are not required to consider federal precedent.[54] There is no question that state courts have the final authority to interpret their own constitutions.[55] And equally, the state courts are free to adopt rights that are more expansive than those established in the U.S. Constitution.[56] But the idea that "constitutional law" is the law of the U.S. Constitution as interpreted by the Supreme Court of the United States loomed so large that, for decades, state court judges didn't even contemplate locating independent rights in their own constitutions.[57] State courts have deferred to federal constitutional doctrine in two important ways. First, they have often deferred to federal jurisprudence when interpreting state constitutions. And second, they have often deferred to the federal constitutional claim itself, choosing to resolve mixed state and federal constitutional cases by resolving the

52. *Id.*

53. Hon. Randall T. Shepard, *The Renaissance in State Constitutional Law: There Are A Few Dangers, but What's the Alternative?*, 61 ALB. L. REV. 1529, 1530 (1998). *See also* State v. Jewett, 500 A.2d 233, 235 (Vt. 1985) (outlining the approaches to state constitutional interpretation using historical, textual, comparison to similar jurisdictions, and analysis of social and economic information).

54. Lawrence Gene Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 959 (1985).

55. Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism,* 28 HASTINGS CONST. L.Q. 93, 100 (2000).

56. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 74 (1980). *See also* Liu, *supra* note 50, at 1313 (arguing that there is no legal barrier to state court judges identifying state constitutional rights more expansively than those identified in the federal constitution).

57. *See* Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 11–12 (1995) ("Many of us had grown so federalized, so used to the Supreme Court of the United States as the fount of constitutional wisdom, that we barely remembered that our state even had a constitution.").

federal claim and failing to address the state claim at all. These two forms of federal deference have often combined to create a sort of brake on the acceleration of independent state constitutional jurisprudence.

When state constitutional provisions appear substantially similar to those in the U.S. Constitution, state courts are not obligated to interpret their own constitutional provisions to be coextensive with the federal provisions. However, state judges have struggled over whether and when to diverge.[58] Faced with lawsuits asserting rights under both the federal and state constitutions, the majority of state court judges have adhered to federal standards at least to some degree.[59] The unstated premise when state court judges use federal precedent is that U.S. Supreme Court interpretation of federal constitutional rights is presumptively correct for interpreting analogous state constitutional provisions.[60]

State courts interpreting their own constitutional provisions to be consistent with equivalent federal provisions is called the "lockstep" approach.[61] Wisconsin Supreme Court Justice Shirley Abrahamson identified this approach in 1985, noting that "[s]ome states appear to be adopting, apparently in perpetuity, all existing or future United States Supreme Court interpretations of a federal constitutional provision as the governing interpretation of the parallel state constitutional provision."[62] A majority of state courts use the lockstep method, not only finding that their state constitutional provisions have the same meaning as federal provisions, but also using U.S. Supreme Court jurisprudence to analyze claims.[63]

A number of other states use the deferential "interstitial" approach, in which the court first ascertains whether the claim can be resolved under the U.S. Constitution. If the federal claim protects

58. Liu, *supra* note 50, at 1312.

59. WILLIAMS, *supra* note 25, at 140–50.

60. *Id.* at 135.

61. Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 339–40 (2011). For a detailed review of the lockstep approach and the many permutations it takes, see WILLIAMS, *supra* note 25, at 193–210. *See also* Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & M. L. REV. 1499, 1502 (2005) (noting that a clear majority of cases follow, rather than diverge from, federal constitutional doctrine).

62. Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1166 (1985).

63. Blocher, *supra* note 61, at 339–40. *See also* Williams, *supra* note 61, at 1502 (noting that a clear majority of cases follow, rather than diverge from, federal constitutional doctrine).

the asserted right, the state court will not reach the state constitutional claim.[64] If the U.S. Constitution does not protect the right being asserted, then the court can look to the state constitution to fill the gaps.[65] Under the interstitial approach, courts place the burden on the party advancing a state claim to show that the state constitutional provision calls for a separate analysis because of its language, history, or intent.[66] The courts that use this method identify the circumstances, or factors, that justify interpreting the state constitution more broadly than the U.S. Constitution and analyze whether those circumstances are present in the case before the court.[67] The factor method has been critiqued by a number of scholars for creating a presumption of correctness for federal precedent despite no basis for doing so.[68] Nonetheless, state courts continue to use this method, and some have even refused to consider state constitutional claims if the factors were not properly briefed and argued.[69]

In interpreting state constitutional provisions with no federal analog, state judges should face no constraint in methodology. Nonetheless, some state courts interpret even these independent provisions using the "doctrinal vocabulary" developed for federal constitutional analysis by the U.S. Supreme Court.[70] State court judges facing independent interpretation of their own constitutions have to contend with a lack of precedent for independent analysis, existing precedent that defers to or parallels federal precedents and the "gravitational pull" of U.S. Supreme Court precedent.[71] Thus, despite the lack of constraint on state interpretation, state court judges have been hesitant to do so.

Not all states have been uniform in their approaches, adopting different approaches at different times and with different types of claims, but the general resistance to exercise independent state constitutional analysis has obviously slowed the development of judicial federalism.

64. SUTTON, *supra* note 51, at 182 (citing State v. Sanchez, 350 P.3d 1169, 1173 (N.M. 2015)). States including California, Connecticut, Illinois, New Jersey, Pennsylvania, and Washington have used this approach. *Id.*

65. Blocher, *supra* note 61, at 340.

66. Lousin, *supra* note 29, at 393.

67. WILLIAMS, *supra* note 25, at 146.

68. Liu, *supra* note 50, at 1314–15.

69. WILLIAMS, *supra* note 25, at 152 (citing Forbes v. City of Seattle, 785 P.2d 431, 433–43 (Wash. 1990) (and multiple additional cases)).

70. Blocher, *supra* note 61, at 339 (2011) (quoting Hans A. Linde, *E Pluribus––Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 186 (1984)).

71. SUTTON, *supra* note 51, at 184–185.

2. Political Backlash

Another factor that slowed the growth of judicial federalism was backlash to some of the independent decisions made by state courts. This backlash occurred through the political process, in which voters expressed objection through both judicial elections and state constitutional amendment.

In some states with judicial elections, judges who participated in independent state constitutional interpretation have been challenged and critiqued on that basis.[72] This had an obvious chilling effect on judges' willingness to extend constitutional protections into new territory in states where judges are chosen through the electoral process.

Backlash also took the form of state constitutional amendments designed to reverse decisions in which state courts established state constitutional rights that went beyond the limits of the U.S. Constitution.[73] In comparison to the U.S. Constitution, state court constitutions are easier to change to varying degrees, resulting in a greater likelihood that a state constitution could be changed to undo a state judicial interpretation.[74] Not only did this reversal slow the progress of establishing rights through state constitutions, but knowledge of the possibility could affect a court's willingness to establish rights beyond the federal floor.

The ease of changing state constitutions means that state constitutions have been more responsive to political concerns at different points in history.[75] While this malleability created potential for identifying rights not protected by the U.S. Constitution, it also posed some unique challenges to state court judges in interpreting their own constitutions, since a state constitution can be changed to undo a state judicial interpretation.[76] State court judges became aware of the possibility that their decisions could be overturned by

72. Williams, *supra* note 42, at 217 (noting that campaigns were mounted against judges associated with independent state interpretations in California and Oregon).

73. *Id.* at 216. *See infra* Section II.C.1 at 122-31.

74. Tarr, *supra* note 22, at 15 (stating that while the federal constitution has remained largely the same and has been amended only 27 times in over 200 years, state constitutions have been changed or amended an average of once for every year since their adoption).

75. Lawrence Schlam, *State Constitutional Amending, Independent Interpretation, and Political Culture: A Case Study in Constitutional Stagnation*, 43 DEPAUL L. REV. 269, 277–79 (1994).

76. Tarr, *supra* note 22, at 15.

voters through the constitutional amendment process.[77] Some scholars have suggested that there is a correlation between the ease or difficulty of amending the state constitution and court's willingness to establish rights independent of those guaranteed by the U.S. Constitution.[78]

3. Lack of State Constitutional Knowledge

One of the biggest obstacles to developing state constitutional law to expand rights has been judges' and lawyers' lack of familiarity with state constitutional claims.[79] Judicial interpretation of state constitutional provisions protecting individual and collective rights is a relatively new development in American legal history. Although state constitutions were originally intended to be the primary vehicle for protecting individual rights, over time the U.S. Constitution replaced them in this role.[80] At the start of the new judicial federalism movement, very few state supreme courts had interpreted the provisions of their own constitutions asserting the rights of the people extending beyond those protected in the U.S. Constitution, and state constitutional law continues to be underdeveloped to this day.[81] Until the late twentieth century, judicial interpretation of state constitutional rights provisions received virtually no scholarly treatment and was not taught in law schools.[82]

77. Robert F. Williams, *Old Constitutions and New Issues: National Lessons from Vermont's State Constitutional Case on Marriage of Same-Sex Couples*, 43 B.C. L. REV. 73, 101–03 (2001). Chief Judge Amestoy noted this paradox in the context of guaranteeing the right legal recognition of same-sex unions. *Id.* at 102 (citing Baker v. State, 744 A.2d 864, 888 (Vt. 1999)).

78. *See, e.g.*, Schlam, *supra* note 75, at 270–71 (1994). The ease of amending state constitutions poses additional obstacles to judges, who must interpret amended provisions in light of how they were changed from previous versions. The changes to state constitutions over time mean that state court judges must also reconcile provisions that may reflect the different political perspectives at the time of adoption. Finally, when judges are inclined to look to analogous provisions from other states for guidance, they must take into account the differences in origin and interpretation of the provision in each originating state. *See also* Tarr, *supra* note 22, at 15.

79. Hon. Goodwin Liu, *State Courts and Constitutional Structure*, 128 YALE L.J. 1304, 1304 (2019) (noting that state constitutional provisions "remain unfamiliar to and often ignored by lawyers, scholars, and judges.").

80. Blocher, *supra* note 61, at 331.

81. Loretta H. Rush & Marie Forney Miller, *Cultivating State Constitutional Law to Form A More Perfect Union-Indiana's Story*, 33 NOTRE DAME J.L. ETHICS & PUB. POL'Y 377, 379 (2019).

82. Justice Robert F. Utter, *The Practice of Principled Decision-Making in State Constitutionalism: Washington's Experience*, 65 TEMP. L. REV. 1153, 1155 (1992).

At least one state court judge has acknowledged that analyzing a state constitutional provision that has never been subject to judicial scrutiny can be daunting, given the breadth of information that might be necessary to determine its meaning.[83] The combination of lack of expertise in state constitutional interpretation and familiarity with federal constitutional interpretation likely also contributed to reluctance to engage in independent state constitutional analysis.[84]

Public awareness of state constitutions was low at least until the 1980s, and many lawyers were also ill-informed about state constitutions and brought few claims on that basis.[85] In cases challenging the validity of state or local laws, lawyers tend to bring only a federal claim, even where a claim could be made under the state constitution.[86] Courts in many states will not reach the state constitutional issue if it is not clearly presented as a distinct claim.[87] In addition, not all state courts will analyze the state claim before proceeding to the federal claim.[88] As reflected by the lockstep approach, many judges do not think it appropriate or are not willing to develop an independent state constitutional jurisprudence.

As a result of all these challenges, scholars in the 1990s declared the accomplishments of the New Judicial Federalism movement to be modest at best, and some went so far as to call it a failure.[89] Despite this grim pronouncement, there has been progress and a slow move towards a progressive judicial federalism.

C. Judicial Federalism: Looking Forward

Despite the criticisms, state courts have not stopped the project of interpreting their own constitutions and, over time, the potential

83. *See* Shepard, *supra* note 53, at 1540.

84. Blocher, *supra* note 61, at 339; *see also* Liu, *supra* note 79, at 1315.

85. Shepard, *supra* note 53, at 1533–34; *see also* Linde, *supra* note 70, at 166.

86. *See* SUTTON, *supra* note 51, at 8 (noting the rarity of dual federal and state challenges during his 15 years on the federal bench and 3 years as State Solicitor of Ohio). *See also* James Gardner, *The Failed Discourse of State Constitutions*, 90 MICH. L. REV. 761, 780 (1992) (noting the infrequency of state constitutional claims in state courts); Erwin Chemerinsky, *Two Cheers for State Constitutional Law*, 62 STAN L. REV. 1695, 1700 (2010) (noting that states do not have a tradition of using their state constitutions to provide rights because of the infrequency of state constitutional claims).

87. Williams, *supra* note 42, at 220 (citing cases from Arizona, Arkansas, Connecticut, Idaho, Illinois, Indiana, Texas, Vermont, Washington, and Wyoming).

88. Lousin, *supra* note 29, at 390.

89. Liu, *supra* note 50, at 1311 (citing Daniel B. Rodriguez, *State Constitutional Theory and Its Prospects*, 28 N.M. L. Rev. 271, 271 (1998) and Gardner, *supra* note 86).

for interpreting state constitutions to provide more expansive rights than those in the U.S. Constitution has become more widely understood and accepted.[90]

Despite the obstacles, some jurists have embraced judicial federalism. While some state courts have protected civil rights under their own constitutions using federal frameworks, others have gone even further and conducted fully independent analysis. A number of academics and judges have called for state court judges faced with both federal and state claims to resolve the case under the state claim first.[91] This approach, dubbed the "primacy" approach, was first embraced by Hans Linde while a law professor and put into practice when he became a justice on the Oregon Supreme Court.[92] Using the primacy approach, the court engages in federal constitutional analysis only after denying relief to the claimant on independent state constitutional grounds.[93]

Primacy treats the state constitution as an independent source of fundamental rights, not dependent on federal constitutional interpretation.[94] Under this approach, courts look first to their own constitutional text, state history, and structure, with federal law assuming the role of persuasive authority, equivalent to the precedent in other state courts.[95] As Washington Supreme Court Justice Robert F. Utter has suggested, under the primacy model, "federal law and analysis are not presumptively correct."[96] The advantage of the primacy approach is that even in claims that may succeed under the federal provision, state judges are able to diverge from federal precedent and articulate rights in a way that may be broader or otherwise freer from constraints imposed by federal law.

After the initial backlash to the judicial federalism movement, a number of state courts began to express willingness to independently locate rights in state constitutions. Some recent examples include the Pennsylvania Supreme Court striking down a congressional redistricting plan under the Pennsylvania Constitu-

90. Williams, *supra* note 42, at 219.

91. Schlam, *supra* note 75, at 288–89. To date, Oregon, Maine, and New Hampshire have adopted this approach on a regular basis, while other courts have done so occasionally. *See* SUTTON, *supra* note 51, at 179.

92. SUTTON, *supra* note 51, at 178–179; WILLIAMS, *supra* note 25, at 140–41.

93. Jack L. Landau, *Some Thoughts About State Constitutional Interpretation*, 115 PENN ST. L. REV. 837, 837–38 (2011).

94. Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025, 1027–28 (1985).

95. *Id.*

96. *Id.*

tion[97] and the Kansas Supreme Court establishing a right to abortion under the Kansas Constitution's Bill of Rights.[98] In some states, the courts have developed jurisprudence on the meaning of state constitutional provisions guaranteeing access to public education, to the degree that "today education is a fully evolved state constitutional right."[99]

State courts have increasingly become willing to deviate from federal constitutional analysis, even where federal precedent is well-developed.[100] For example, the Arkansas Supreme Court developed an independent analysis of the exclusionary rule, despite previously indicating it would follow the Supreme Court's Fourth Amendment interpretation.[101] Several state courts diverged from federal Equal Protection analysis and developed their own framework for analyzing claims under state equality clauses.[102] In addition, some state courts have developed independent constitutional analysis in the area of privacy, particularly in cases involving the impact of technology on privacy concerns.[103]

Courts engaging in independent analysis contribute to a more robust body of state constitutional law and enrich constitutional jurisprudence.[104] As more courts engage in independent analysis, a more developed body of precedent is then available, not only to other states, but also the U.S. Supreme Court.[105] In identifying state constitutional rights that are more extensive than those provided in the U.S. Constitution, state courts enhance the protection of civil liberties.[106] Thus the promise of progressive federalism grows.

The development of judicial federalism over the past decades shows, at least theoretically, that advocates might be able to turn to state courts to seek expansion of recognized rights and recognition of new rights. Despite the reluctance of some courts, there is no legal or procedural obstacle to asking courts to resolve state consti-

97. League of Women Voters of Pa. v. Commonwealth, 175 A.3d 282 (Pa. 2018).

98. Hodes & Nauser v. Schmidt, 440 P.3d 461 (Kan. 2019).

99. Derek Black, *Unlocking the Power of State Constitutions with Equal Protection: The First Step Toward Education As A Federally Protected Right*, 51 WM. & M. L. REV. 1343, 1349 (2010).

100. Williams, *supra* note 42, at 221.

101. *Id.* (citing State v. Sullivan, 74 S.W.3d 215, 222 (Ark. 2002)).

102. *Id.* at 222 (pointing to Indiana, Vermont, Minnesota, Alaska, and Idaho as examples).

103. Lousin, *supra* note 29, at 405.

104. Rush & Miller, *supra* note 81, at 380–81.

105. *Id.* at 381.

106. *Id. See also* SUTTON, *supra* note 51, at 179.

tutional claims. But what does it actually look like in practice to turn away from a hostile Supreme Court and attempt to expand rights protections in state court? As rights advocates, we know the most famous stories behind the most well-known civil rights campaigns brought in federal court—the *Roes*, the *Browns*, and the *Obergefells*. What we tend to know less about are the rights campaigns that either began in state courts or ran their entire courses there.

This article offers a snapshot of a little over a decade in the campaign for marriage equality as an example of what it looks like when judicial federalism is put to the test in the real world. As the following section describes, marriage equality advocates in the period between *Bowers v. Hardwick*[107] and *Goodridge v. Dep't of Health*[108] (1986–2004) used an incremental, state-by-state strategy that deliberately avoided a hostile federal landscape and instead used innovative approaches to state constitutional law to pry open the door to relationship recognition for same-sex couples. This is by no means the only example of a successful state constitutional law strategy, but it is a recent one, and one in which an initial reliance on state-by-state victories led to an almost shockingly swift nationalization of the recognition of the right of same-sex couples to marry.

PART II.
THE CAMPAIGN FOR MARRIAGE EQUALITY – 1991-2004

In the years immediately following the U.S. Supreme Court's gratuitously hostile ruling in *Bowers v. Hardwick*, LGBTQ rights litigators managed to continue to advance the rights of their community by shifting from federal litigation to a nearly exclusive focus on state constitutional law. It is that shift, the thinking that accompanied it, and the first three cases that arose from it—*Baehr v. Lewin*, *Baker v. State*, and *Goodridge v. Dep't. of Public Health*—that is the focus of this section.

A. In the Shadow of Bowers

In the 1970s and 1980s, the nascent[109] legal arm of the LGBTQ rights movement recognized that sodomy laws posed an enormous

107. 478 U.S. at 186 (1986).

108. 798 N.E.2d 941 (Mass. 2003).

109. Lambda Legal Defense and Education Fund was founded in 1973, which was also the year that the ACLU began its first project devoted to sexual privacy. ACLU's LGBT Rights Project was formally founded in 1984. *See* Patricia A.

obstacle to the legal equality of members of the LGBTQ community. This was not simply because they created conditions in which community members could be jailed for engaging in private, consensual sexual conduct—although that would have been bad enough. Rather, the continued criminalization of many forms of non-procreative sexual conduct relegated LGBTQ people to the role of "status criminals" who, as de facto outlaws, could be subjected to various forms of legal discrimination.[110] Thus, litigators in the 1970s and 1980s sought out a case with a straightforward fact pattern through which sodomy laws could be definitively ruled unconstitutional.[111]

In 1986, the Supreme Court dealt a severe blow to the movement when it issued its decision in *Bowers v. Hardwick*, a case that

Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1584–1587 (1993). GLAD, the organization that brought the Vermont, Massachusetts, and Connecticut same-sex marriage challenges, was founded in 1978. *History*, GLAD, https://www.glad.org/about/history/ [https://perma.cc/TNR2-R233] (last visited Dec. 4, 2019). The National Center for Lesbian Rights, which litigated the California same-sex marriage case, was founded in 1977. *Mission & History*, NAT'L CTR. FOR LESBIAN RTS., http://www.nclrights.org/about-us/mission-history/ [https://perma.cc/7RKZ-H3KW] (last visited Dec. 4, 2019).

110. Associating homosexuals with sodomy and thus with criminal activity had been at the core of earlier governmental action against gay men and lesbians. Raids on gay bars were often justified on grounds that criminal activity might result where gay persons congregate. The 1950 Senate Subcommittee report recommending that all homosexuals be dismissed from government service relied in large part on the fact that same-sex sexual conduct was both criminal and immoral. Persons who engaged in such conduct were presumed to be morally weak and thus unfit for employment in responsible positions. So long as consensual same-sex sodomy remained a crime, these justifications for discrimination against gay people were more difficult to attack. The role played by sodomy laws in anti-gay discrimination in the 1980s was much the same as in earlier decades. It was not the risk of prosecution for sodomy that concerned gay men and lesbians. Rather, it was the risk of being branded as a criminal once one's sexual orientation became known. So long as gay men and lesbians were presumed to engage in acts of criminal sodomy, employers could argue that they should not be forced to hire criminals and landlords could argue that they should not be forced to rent to criminals. Cain, *supra* note 109, at 1587–88 (internal citations omitted).

111. *See* Ellen Ann Andersen, *The Stages of Sodomy Reform*, 23 T. MARSHALL L. REV. 283, 297–98 (1998) (internal citations omitted) ("Some members of the ACLU's Georgia affiliate began searching for a good test case to challenge Georgia's sodomy law in 1977. They did not find one until Michael Hardwick was arrested in 1982. During the five intervening years, they were unable to find a single instance of a conviction for sodomy that was not the result of a plea bargain agreement in which a more serious charge (such as rape) was dismissed in return for a guilty plea on the sodomy charge. As it turns out, in fact, Michael Hardwick was the first person to be arrested in the State of Georgia for adult, private, consensual same-sex conduct in nearly 50 years.").

advocates had hoped would give the Court a vehicle to announce that sodomy statutes violated the U.S. Constitution.[112] *Bowers* was brought by a Georgia ACLU affiliate attorney, and became a focal point of litigation strategy discussion for the newly-formed Ad Hoc Task Force to Challenge Sodomy Laws.[113] *Bowers* determined that the 14th Amendment did not require states to legalize various forms of private, consensual sexual conduct.[114]

The holding of *Bowers* alone would have been a dramatic loss for LGBTQ advocates. But the majority opinion was exceptionally demoralizing. It reframed the issue—which, given the language of the challenged statute *should* have been a broad question about sexual freedom regardless of sexual orientation[115]—as the very narrow, and at the time much more farfetched-seeming, question of whether the U.S. Constitution requires states to legalize *gay sex* specifically.[116] By framing the issue so narrowly, the majority opinion

112. Bowers v. Hardwick, 478 U.S. 186, 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

113. Cain, *supra* note 109, at 1613 ("By 1985, the Task Force had become an official project of Lambda Legal Defense and Education Fund. National meetings of gay rights litigators included Wilde and attorneys from other ACLU affiliates in states possessing sodomy statutes. Wilde credited the Lambda project with providing a 'legal think tank and a central place to discuss constitutional theory and litigation strategies.'") (internal citations omitted). The Ad Hoc Task Force represents an early manifestation of a decision by nationally focused LGBTQ rights litigators to coordinate across organizations. That approach has persisted to this day—each year, attorneys from groups representing LGBTQ litigants gather at a Roundtable where national strategy is discussed and debated. *See* Kevin M. Cathcart, *The Sodomy Roundtable: How Dispelling Discriminatory Sex Laws Led to Marriage Equality*, OUT (June 23, 2016), https://www.out.com/art-books/2016/6/23/sodomy-roundtable-how-dispelling-discriminatory-sex-laws-led-marriage-equality [https://perma.cc/A7ZZ-JJLH].

114. "[W]e granted the Attorney General's petition for certiorari questioning the holding that the sodomy statute violates the fundamental rights of homosexuals. We agree with petitioner that the Court of Appeals erred, and hence reverse its judgment." *Bowers*, 478 U.S. at 189.

115. The challenged Georgia statute did not prohibit only same-sex sexual conduct. Rather, the challenged provision provided that: "(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another . . . . (b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years . . . ." Thus, the statute forbade oral or anal intercourse *regardless of the gender of the participants*. *Id.* at 188 n.1.

116. According to the majority, "The issue presented is whether the Federal Constitution confers a fundamental right *upon homosexuals* to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time." *Id.* at 190 (emphasis added). Justice Blackmun's strong dissent, joined by Justices Marshall, Brennan, and Stevens, devotes most of its content to a critique of the majority's framing, noting that "the

rhetorically cut off LGBTQ people from the broader community of Americans whose sexual practices diverge from the strictly procreative, and then emphatically rejected the idea that Constitutional principles might afford that unique—and reviled—group any dignity.[117]

LGBTQ rights litigators understood the Court's decision in *Bowers* to mark a very serious setback in the fight for LGBTQ equality. That decision made it abundantly clear that the majority of the U.S. Supreme Court was not receptive to even the most basic liberty or equality claims of LGBTQ Americans. Thus, any federal litigation seemed likely to dead-end. Movement lawyers sought, there-

---

Court's almost obsessive focus on homosexual activity is particularly hard to justify in light of the broad language Georgia has used. Unlike the Court, the Georgia Legislature has not proceeded on the assumption that homosexuals are so different from other citizens that their lives may be controlled in a way that would not be tolerated if it limited the choices of those other citizens." *Id.* at 200 (Blackmun, J., dissenting).

117. Chief Justice Burger's concurrence doubled down on this framing, and seems drafted entirely to underscore the contempt with which the 1986 iteration of the Supreme Court viewed LGBTQ Americans' claims of equality and liberty. It is worth reading in its entirety, so we offer the reader its entire text here:

> I join the Court's opinion, but I write separately to underscore my view that in constitutional terms there is no such thing as a fundamental right to commit homosexual sodomy. As the Court notes, *ante*, at 2844, the proscriptions against sodomy have very "ancient roots." Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeao-Christian moral and ethical standards. Homosexual sodomy was a capital crime under Roman law. *See* Code Theod. 9.7.6; Code Just. 9.9.31. *See also* D. Bailey, Homosexuality and the Western Christian Tradition 70–81 (1975).
>
> During the English Reformation when powers of the ecclesiastical courts were transferred to the King's Courts, the first English statute criminalizing sodomy was passed. 25 Hen. VIII, ch. 6. Blackstone described "the infamous *crime against nature*" as an offense of "deeper malignity" than rape, a heinous act "the very mention of which is a disgrace to human nature," and "a crime not fit to be named." 4 W. Blackstone, Commentaries. The common law of England, including its prohibition of sodomy, became the received law of Georgia and the other Colonies. In 1816 the Georgia Legislature passed the statute at issue here, and that statute has been continuously in force in one form or another since that time. To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.
>
> This is essentially not a question of personal "preferences" but rather of the legislative authority of the State. I find nothing in the Constitution depriving a State of the power to enact the statute challenged here.

Bowers, 478 U.S. at 196–97 (Burger, C.J., concurring).

fore, to regroup and attempt to find workarounds to this new and very daunting obstacle, and new goals toward which to strive.[118]

The decision to turn the movement's attention to relationship recognition litigation was hardly reached by consensus. Rather, the question of whether same-sex marriage ought to be a goal of the movement had been in contest for decades. Some in the movement were of the opinion that the goal of sexual liberation was fundamentally at odds with a goal of attaining legal relationships identical in structure to those of monogamous straight people. Others believed that recognition of same-sex relationships was a vital part of the basic dignity of community members.[119]

To further complicate matters, the federal courts had been emphatically closed to same-sex marriage litigation since long before *Bowers v. Hardwick* shut the door on federal claims to a constitutional right to queer sexual privacy. In 1970, Jack Baker and Michael McConnell had attempted to obtain a marriage license in Hennepin County, Minnesota, and had been turned away.[120] They sued in state court, alleging that the refusal to issue them a license violated their constitutional rights. They lost all the way to the Minnesota Supreme Court, which examined their claims and found that "in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex."[121] But even though the couple recalls that one of the Minnesota Supreme Court Justices turned his chair around in disgust during oral argument on the couple's claims,[122] at least that court *examined* those claims. When the couple brought their appeal to the U.S. Supreme Court in 1972, they received even more dismissive treatment—an

118. Cain, *supra* note 109, at 1617 ("*Hardwick* was a major setback in the fight to end discrimination against gay men and lesbians. As a result, gay rights litigators, in the post-*Hardwick* era, have been forced to develop constitutional arguments that circumvent the *Hardwick* holding.").

119. *See, e.g.*, Tom B. Stoddard, *Why Gay People Should Seek the Right to Marry*, OUT/LOOK, Fall 1989, at 9 (advocating, despite the historically oppressive nature of marriage, for the inclusion of the right to marry as a pillar of the gay rights movement); Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK, Fall 1989, at 9 (arguing that same-sex marriage is a patriarchal institution that undermines the goals of the gay and lesbian civil rights movement).

120. Erik Eckholm, *The Same-Sex Couple Who Got a Marriage License in 1971*, N.Y. TIMES (May 16, 2015), https://www.nytimes.com/2015/05/17/ us/the-same-sex-couple-who-got-a- marriage-license-in-1971.html [https://perma.cc/2TSB-JZVJ].

121. Baker v. Nelson, 191 N.W.2d 185, 187 (Minn. 1971).

122. Eckholm, *supra* note 120.

unsigned, one-sentence opinion that stated merely, "The appeal is dismissed for want of a substantial federal question."[123]

B. Considering State Courts as a Strategy for Progressive Change

Clearly, if LGBTQ people wanted their relationships recognized, they would have to go to state courts to make that happen, at least for the foreseeable future. But experts were unsure in the late 1980s and early 1990s whether state court litigants would be any more successful than Baker and McConnell had been before the U.S. Supreme Court in 1972.[124] Mary Bonauto, who has directed New England regional advocacy group GLAD's (GLBTQ Advocates and Defenders) Civil Rights Project since 1990 (and who acted as counsel on same-sex marriage litigation in Vermont, Massachusetts, and Connecticut, and ultimately argued *Obergefell v. Hodges* before the U.S. Supreme Court)[125] has generously chronicled her recollections of movement strategizing in several transcribed speeches and journal articles. She recalls that she and other experts believed that public opinion in the early and mid 1990s had not yet advanced to a point where marriage litigation would likely find success in a state court.[126] According to Bonauto, GLAD had consequently "turned down requests for representation in such cases several times."[127]

But beneath the reasonable hesitance around the selection of same-sex marriage as a marquee goal of the LGBTQ rights movement, litigators in the 1980s and 1990s could hear a steady hum of need emanating from Americans experiencing legal erasure of their most vital relationships. Bonauto explains, "My own experience with GLAD's intake calls demonstrated over and over again that many of the people who called us with legal problems could

123. Baker v. Nelson, 409 U.S. 810, 810 (1972), *overruled by* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

124. A tiny number of state courts had already weighed in on this issue around the same time as *Baker v. Nelson* was decided (and gay couples had lost). *See, e.g.*, Jones v. Hallahan, 501 S.W.2d 588 (Ky. Ct. App. 1973); Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974).

125. *Mary Bonauto Biography*, GLAD, https://www.glad.org/staff/mary-bonauto/ [https://perma.cc/SY6Z-9TUB] (last visited Dec. 9, 2019).

126. Mary L. Bonauto, *Goodridge in Context*, 40 HARV. C.R.-C.L. L. REV. 1, 21–22 (2005) ("The real question was when would LGBT people denied marriage rights get a fair hearing in court, in the legislature, and in public opinion in Massachusetts. As the above history shows, with each passing year, the increase in support for ending discrimination against LGBT people by non-LGBT people became phenomenal. This increase was essential because, as Rev. Dr. Martin Luther King, Jr. explained, no minority can succeed without the assistance of the majority.") (internal citations omitted).

127. *Id.* at 21.

trace their problems to nonrecognition of their relationships."[128] Bonauto's hesitancy to bring relationship recognition litigation was in tension with her acknowledgement that "[t]he bottom line was that most state laws providing protections and responsibilities used marital status as a factor and the private sector often imitated what it saw in the state government. GLAD could and did litigate around the edges, but many important protections were simply off-limits to LGBT families without marriage and without the appellation of 'spouse.'"[129]

C. Bringing Litigation in State Courts: Hawaii, Vermont, and Massachusetts

1. Hawaii: Victory, Then Defeat

The question of whether to litigate toward marriage equality was partially answered by individual litigants in Hawaii, who in 1991 decided to bring a marriage lawsuit using state constitutional theories.[130] Lawyers at national LGBTQ rights groups were not united in support of the litigation, but ultimately Evan Wolfson, then at Lambda Legal, joined the litigation as counsel.[131] That case, which began its life as *Baehr v. Lewin* but was finally retired, several years later, as *Baehr v. Mikke*,[132] demonstrates both the promises and pitfalls of state constitutional litigation, and provides important lessons for progressives today.

---

128. *Id.*

129. *Id.* at 22 (internal citations omitted).

130. William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1638 (1997).

131. Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567, 569 n.6 (1995) (quoting co-counsel Evan Wolfson, who had long supported marriage equality as a movement goal, "*Baehr* was initially brought in 1991 by Honolulu attorney Daniel R. Foley of the law firm of Partington & Foley, after national organizations such as Lambda proved internally deadlocked and unwilling to take the case. Lambda remained supportive and involved behind the scenes, filed an amicus brief, and, after a change in ideology and regime, was again invited to enter the case. I am now co-counsel with Dan Foley."). *See also The Freedom to Marry in Hawaii: A Victory 20 Years in the Making*, FREEDOM TO MARRY BLOG (Nov. 9, 2013), http://www.freedomtomarry.org/blog/entry/20-years-in-the-making-hawaii-stands-on-the-verge-of-the-freedom-to-marry [https://perma.cc/756C-N6Y6].

132. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993), *superseded by state constitutional amendment* HAW. CONST. art. I, § 23.

The Hawaii litigants challenged the state's marriage law, which did not permit same-sex marriage,[133] using the Hawaii Constitution as their primary weapon. The litigants charged that the state marriage statute violated provisions of the Hawaii Constitution which either do not exist in the U.S. Constitution at all, or are articulated differently.[134] First, the plaintiffs alleged that the marriage law violated a specific provision in the Hawaii Constitution that expressly provides a right to privacy that is subject to strict scrutiny when curtailed.[135] The litigants also alleged a violation of the Hawaii Constitution's equal protection clause, which, although containing similar language to the Fourteenth Amendment, is different in that it makes specific mention of the term "civil rights" and enumerates specific protected classes, in which "sex" is included.[136]

133. *Id.* at 44 ("Rudimentary principles of statutory construction render manifest the fact that, by its plain language, HRS § 572–1 restricts the marital relation to a male and a female.").

134. *Id.*

135. HAW. CONST. art. I, § 6 (1978) ("The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest."). *See generally* Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1424–25 (1992) (internal citations omitted) ("The states of Montana (1972), Alaska (1972), California (1972), Hawaii (1978) and Florida (1980) all took the not insignificant step of grafting Griswold-Roe type privacy provisions onto their own state constitutions, locking that right into place so that it became insulated from future federal upheaval. Montana and Hawaii went so far as to include 'compelling state interest' language a-la-Griswold-Roe, essentially constitutionalizing the multiple-tiered standard of judicial scrutiny developed under the Fourteenth Amendment, making that an explicit component of their own constitutional jurisprudence. Thus, ironically, Roe-type privacy is now more secure under a number of state constitutions than it is in the federal system which created it.").

136. HAW. CONST. art. I, § 5 (1978) ("No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry."). A number of state constitutions have equality clauses that differ from the Equal Protection Clause of the Fourteenth Amendment. Several states adopted a version of the Equal Rights Amendment modeled on the proposed federal amendment, which prohibits sex discrimination. Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination*, 36 RUTGERS L.J. 1201, 1201–02 (2005). Many other state constitutions have some version of an "equal privileges" clause, including Arizona, Arkansas, California, Connecticut, Indiana, Iowa, Kentucky, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Texas, and Washington. These clauses express a vision of equality, prohibiting government from granting privileges that do not equally benefit all. Shannon Mariotti, *The New Progressive Federalism: Common Benefits, State Constitutional Rights, and Democratic Political Action*, 41 NEW POL. SCI. 98, 107 (2019).

The Hawaii marriage litigation was initially successful. In 1993, the Hawaii Supreme Court made history in *Baehr v. Lewin* when, in a plurality opinion, it ruled that the state statute preventing same-sex couples from marrying was "presumed to be unconstitutional" under the state constitution's rights provision unless it could be shown that the statute could satisfy strict scrutiny.[137] In so doing, the opinion carefully examined both the state privacy right claim and the state equal protection claim. The opinion's treatment of both claims provides fascinating insights into the way in which some state courts approach the relationship between state constitutions and enmeshed federal doctrine.

First, the Hawaii litigants were not successful in persuading the court that the fundamental right to privacy inexorably led to a fundamental right to same-sex marriage. The *Baehr* court first examined the intent of the participants in Hawaii's constitutional convention in including the right-to-privacy provision, noting that the participants had explained the inclusion as a sort of cementing of the unenumerated right that had been established by federal Constitutional doctrine.[138] The *Baehr* court reasoned that, since the privacy right had been firmly rooted in federal doctrine, and there was no Hawaii doctrine that addressed the contours of the fundamental right to marry, it should therefore look to federal constitutional doctrine for guidance.[139] The court then acknowledged that federal case law had established that marriage is a fundamental right that flows from the right to privacy, but then declined to inter-

137. *Baehr*, 852 P.2d at 48.

138. *Id.* at 55 (quoting Comm. Whole Rep. No. 15, 1 Proceedings, at 1024 (internal citations omitted)) (asserting the stated purpose as follows: "By amending the Constitution to include a separate and distinct privacy right, it is the intent of your Committee to insure that privacy is treated as a fundamental right for purposes of constitutional analysis. . . . This right is similar to the privacy right discussed in cases such as *Griswold v. Connecticut . . . Eisenstadt v. Baird, . . . Roe v. Wade,* etc. It is a right that, though unstated in the federal Constitution, emanates from the penumbra of several guarantees of the Bill of Rights. Because of this, there has been some confusion as to the source of the right and the importance of it. As such, it is treated as a fundamental right subject to interference only when a compelling state interest is demonstrated. By inserting clear and specific language regarding this right into the Constitution, your Committee intends to alleviate any possible confusion over the source of the right and the existence of it.").

139. *Baehr*, 852 P.2d at 55 ("The issue in the present case is, therefore, whether the 'right to marry' protected by article I, section 6 of the Hawaii Constitution extends to same-sex couples. Because article I, section 6 was expressly derived from the general right to privacy under the United States Constitution and because there are no Hawaii cases that have delineated the fundamental right to marry, this court . . . looks to federal cases for guidance.").

pret its own constitutional provision to include a fundamental right to *same-sex* marriage, a variety of marriage that the court could not imagine was in the minds of the U.S. Supreme Court when it had articulated the right in the first place.[140] Thus, with respect to the privacy claim, the Hawaii Supreme Court leaned heavily on federal doctrine in the absence of its own developed jurisprudence on the meaning and scope of the right to marry.

The *Baehr* litigants were, however, successful in making their equal protection argument in large part due to the Hawaii Constitution's textual diversion from the language of the 14th Amendment. As noted above, Article 1, Section 5 differs from the U.S. Constitution in that it enumerates specific protected classes, in which "sex" is included alongside race, religion, and ancestry.[141] In addition, the Hawaii Constitution contains a separate Equal Rights Amendment, not present in the U.S. Constitution.[142] For this claim, the Hawaii Supreme Court had to make two determinations: 1) whether the restriction of legal marriage to opposite-sex couples only amounted to a sex-based classification, and if so, 2) the appropriate level of scrutiny to which sex-based classifications ought to be subject.

The Hawaii Supreme Court was able to confidently hold that the restriction of marriage to opposite-sex couples amounted to a sex-based classification, asserting that "[r]udimentary principles of statutory construction render manifest the fact that, by its plain language, [the marriage statute] restricts the marital relation to a male and a female."[143] Next, the *Baehr* court analyzed whether sex-based classifications were subject to heightened or strict scrutiny under the Hawaii Constitution—a question that had remained unresolved. In so doing, the court again closely examined federal doctrine, this time the U.S. Supreme Court's fractured decision in *Frontiero v. Richardson*, in which members of the Court had disagreed on the level of scrutiny that ought to apply to sex-based classifications.[144]

140. *Id.*

141. HAW. CONST. art. I, § 5 (1978) ("No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.").

142. HAW. CONST. art. I, § 3 (1978) ("Equality of rights under the law shall not be denied or abridged by the State on account of sex. The legislature shall have the power to enforce, by appropriate legislation, the provisions of this section.").

143. *Baehr*, 852 P.2d at 60.

144. 411 U.S. 677 (1973).

In order to resolve the issue, the Hawaii court engaged in an unusual kind of thought experiment as to how the members of the Supreme Court hearing *Frontiero* would likely have voted had the Equal Rights Amendment been ratified at the time. It ultimately concluded that, had the U.S. Constitution contained an Equal Rights Amendment like the one in the Hawaii Constitution, the *Frontiero* plurality that had voted in favor of strict scrutiny would have been a robust majority.[145] The court thus remanded the case for further findings of fact on whether the state could proffer reasons for the sex-based classification that would pass strict scrutiny.[146]

Initially, national LGBTQ rights groups were thrilled by the victory in *Baehr* and readied themselves to attack Hawaii's justifications for restricting marriage to opposite-sex couples on remand.[147] According to Bonauto, the outcome buoyed her sense of the possible. "It was a turning point for me. I believed that the battle for marriage was 'on' and we had to win or we might never have another chance in my lifetime."[148] National advocates believed that the next wave of litigation was likely to involve couples who would travel to Hawaii, marry, and then sue in their home states for recognition of

145. *Baehr*, 852 P.2d at 64 (the *Baehr* court found that, under their reading of Justice Powell's concurrence in *Frontiero* in conjunction with the plurality opinion, "had the Equal Rights Amendment been incorporated into the United States Constitution, at least seven members (and probably eight) of the *Frontiero* Court would have subjected statutory sex-based classifications to 'strict' judicial scrutiny.").

146. *Id.* at 68.

147. It has been common for decades for national LGBTQ rights groups to collaborate on litigation. Since the early 1980s, LGBTQ rights movement lawyers have gathered twice a year at the LGBT Civil Rights Litigators' Roundtable, which is co-organized by Lambda Legal, GLAD, ACLU, and the National Center for Lesbian Rights. The purpose of the Roundtable is to coordinate litigation campaigns around LGBTQ rights, and to collaborate with other LGBTQ impact litigators regarding litigation strategy and issue prioritization. It is a critical mechanism for agenda setting within the LGBT rights movement. *See* Nancy D. Polikoff, *Updating the LGBT Intracommunity Debate Over Same-Sex Marriage: Equality and Justice for Lesbian and Gay Families and Relationships*, 61 RUTGERS U. L. REV. 529, 535 (2009). This close collaboration often results in efficient cooperative effort in specific litigation efforts, where one group will represent a litigant (usually as co-counsel with a firm or local counsel) while others will co-author amicus briefs in support of the litigation. *See* Mary L. Bonauto, *Equality and the Impossible-State Constitutions and Marriage*, 68 RUTGERS U. L. REV. 1481, 1491–92 (2016) ("Dan Foley in Hawaii, now joined on appeal by Evan Wolfson from Lambda Legal, was working toward a trial on the State's justifications in the state courts.").

148. Bonauto, *supra* note 147, at 1491–92.

those marriages.[149] It was then that a state constitutional strategy began to take shape, as rights groups began to investigate which states would be the most promising ones in which to launch a first wave of marriage recognition litigation. Some states in New England began to attract particular attention, for reasons that will be explained further *infra*.[150]

However, even as the *Baehr* litigants were preparing to return to the trial court for further factfinding, a fierce national backlash erupted that had both statewide and national repercussions. At the federal level, Congress—horrified by the prospect of legally wed same-sex couples suing for marriage recognition nationally[151]—introduced the federal Defense of Marriage Act, which had two purposes. According to the House Report on the legislation, "the first [purpose] is to defend the institution of traditional heterosexual marriage. The second is to protect the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions, free from any federal constitutional implications that might attend the recognition by one State of the right for homosexual couples to acquire marriage licenses."[152] DOMA contained two operative sections. The provision known as Section 2 explicitly permitted states to refuse to acknowledge same-sex mar-

149. *Id.* at 1492 ("Many in the movement anticipated that couples would go to Hawaii and return home. But unlike others who married elsewhere, we assumed we would have to challenge public and private discrimination against those marriages. As part of a national research project involving the LGBTQ legal groups and lawyers, GLAD collaborated with attorneys in the six New England states to examine the legal and policy landscape in each state and determine how to tee up a recognition case.").

150. *Id.* ("As part of a national research project involving the LGBTQ legal groups and lawyers, GLAD collaborated with attorneys in the six New England states to examine the legal and policy landscape in each state and determine how to tee up a recognition case. GLAD, and some of those attorneys, also took a deeper look that included state constitutional analyses and history. It is fair to say that I fell seriously in love with the Massachusetts Constitution at that point. The big picture from some of the New England states was encouraging.").

151. The House Report on the proposed legislation gets across very plainly the degree of dread that the Hawaii litigation invoked in the hearts of Congress. *See* H.R. REP. NO. 104-664, at 2 (1996), *as reprinted in* 1996 U.S.C.C.A.N. 2905, 2906 ("H.R. 3396 is a response to a very particular development in the State of Hawaii. As will be explained in greater detail below, the state courts in Hawaii appear to be on the verge of requiring that State to issue marriage licenses to same-sex couples. The prospect of permitting homosexual couples to 'marry' in Hawaii threatens to have very real consequences both on federal law and on the laws (especially the marriage laws) of the various States.").

152. *See* H.R. REP. NO.104-664, at 2 (1996), *as reprinted in* 1996 U.S.C.C.A.N. 2905, 2906.

riages entered into validly elsewhere, and the provision known as Section 3 defined "marriage" for all federal purposes as being a union exclusively of one man and one woman.[153] DOMA was passed into law in 1996.[154]

At the state level, the reaction to *Baehr* was similarly one of shock and an immediate attempt to shore up the institution of marriage as open only to heterosexual couples. As Professor Jane Schacter notes,

> The nationalization of the conflict was highly successful. In 1995, two years after the Baehr decision and before the Hawaii trial court had even ruled on remand, Utah passed a law declaring marriages between same-sex couples to be void. Between 1995 and November 2003 . . . an additional thirty-six states followed Utah's lead and passed measures restricting marriage for same-sex couples in one way or another, and the measures generally passed by wide margins. The dominant form was a statute, passed by a state legislature, that defined marriage within the state as between one man and one woman, banned recognition of any same-sex marriage performed in an-

153. David W. Dunlap, *Congressional Bills Withhold Sanction of Same-Sex Unions*, N.Y. TIMES (May 9, 1996), https://www.nytimes.com/1996/05/09/us/congressional-bills-withhold-sanction-of-same-sex-unions.html?searchResultPosition=3 [https://perma.cc/R6UC-HX5F] ("State-by-state skirmishes over prospective marriage rights for lesbians and gay men escalated into a national battle today with the introduction in Congress of bills that would deny Federal recognition of same-sex marriages if they were ever legalized. The bills, introduced by Senator Don Nickles, Republican of Oklahoma, and Representative Bob Barr, Republican of Georgia, would also absolve states of the obligation to recognize same-sex marriages performed in other states. That gets to the heart of conservatives' concern that if Hawaii sanctions same-sex marriage in the next few years—which is considered a possibility because of a pending court case there—gay couples from around the nation will fly to the islands to be wed legally and then return to their home states to claim the benefits of civil marriage.").

154. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996). Section 3 of DOMA was codified at 1 U.S.C.A. § 7 ("In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.") and overruled by U.S. v. Windsor, 570 U.S. 744 (2013). Section 2 of DOMA was codified at 28 U.S.C.A. § 1738C ("No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.") and overruled by Obergefell v. Hodges, 135 S. Ct. 2584, 2584 (2015).

> other state, or did both. A few of these initial measures diverged from the norm: a handful were constitutional amendments enacted by voters, and five others were either statutory or constitutional measures that went beyond marriage per se to impose broader restrictions on partner recognition.[155]

But in the face of this furious backlash, Hawaii courts were still tasked with determining whether their state's ban on same-sex marriage could satisfy strict scrutiny. In late 1996, after DOMA had already been signed into law, a Hawaii trial court determined that the State of Hawaii had in fact failed to justify its sex-based classification under strict scrutiny, and held the state's prohibition on same-sex marriage to be unconstitutional under the Hawaii Constitution.[156]

That victory, however, was short-lived. In order to understand the series of events that undid the litigation win in *Baehr*, one ought to possess a basic knowledge of how state constitutions can be changed by popular vote. States have a wide variety of methods for amending their constitutions, and all but one involve a popular vote.[157] State constitutions can be revised[158] and amended through methods ranging from constitutional conventions through voter-generated initiatives.[159] The most common method of amendment is amendment proposed by the state legislature and ratified by popular vote.[160] Another eighteen states allow constitutional amend-

155. Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153, 1185–86 (2009) (internal citations omitted).

156. Baehr v. Miike, No. CIV. 91-1394, 1996 WL 694235, at *22 (Haw. Cir. Ct. Dec. 3, 1996), *aff'd*, 87 Haw. 34, 950 P.2d 1234 (1997), and r*ev'd*, 92 Haw. 634, 994 P.2d 566 (1999), *for text, see* No. 20371, 1999 WL 35643448 (Haw. Dec. 9, 1999).

157. *See* WILLIAMS, *supra* note 25, at 26 (noting that only Delaware allows for constitutional amendment without a vote of the people).

158. Revision refers to the process of replacing the entire constitution, rather than amending a discrete portion of it. Revisions are accomplished via constitutional convention, voter initiation, or some combination. Some state constitutions require periodic review for the necessity of revision. G. Alan Tarr & Robert F. Williams, *Foreword: Getting from Here to There: Twenty-First Century Mechanisms and Opportunities in State Constitutional Reform*, 36 RUTGERS L.J. 1075, 1076–78 (2005). Voters can call for constitutional convention through a referendum, though since the 1990s, these referenda have largely failed. Robert F. Williams, *Why State Constitutions Matter*, 45 NEW ENG. L. REV. 901, 904–05 (2011).

159. John Dinan, *The Political Dynamics of Mandatory State Constitutional Convention Referendums: Lessons from the 2000s Regarding Obstacles and Pathways to Their Passage*, 71 MONT. L. REV. 395, 395 (2010).

160. At least 90% of state constitutional amendments have been proposed by the legislative mechanism. Between 1996 and 2003, voters ratified 655 amendments, seventy-six percent of all those proposed by legislatures. Tarr & Williams,

ment through direct voter initiative, requiring voters to obtain sufficient signatures to place the amendment on the ballot.[161]

Amending or revising the Hawaii State Constitution is a relatively simple process as compared to some state constitutional amendment processes,[162] and can be accomplished by a proposal from a constitutional convention or by the legislature that is then referred to the public for a vote.[163] If the legislature wishes to put an amendment to the public for a vote, they must first pass the language through both houses by a two-third majority.[164] The public may then vote on the amendment in the next general election, where a majority of all votes cast is sufficient to pass the amendment.[165]

The year after the trial court held the Hawaii same-sex marriage prohibition to be unconstitutional, the Hawaii legislature (which had struggled with the question of how to approach the issue)[166] proposed a state constitutional amendment that would reserve the power to define marriage for the legislature, thus taking the question out of the hands of the judiciary.[167] The legislature

supra note 158, at 1092. A few states allow amendments proposed by a constitutional commission, convened in a variety of different methods. *Id.* at 1094–97 (identifying temporary commissions, permanent commissions and periodic required commissions all as means of proposing constitutional amendments in various states).

161. *Id.* at 1100–01 (identifying a wide variety of approaches involving number and distribution of signatures and the time frames in which the process must be accomplished).

162. Compare with the process for amending the Massachusetts Constitution, *infra* Section II.C.iii.

163. HAW. CONST. art. XVII, § 1 (1978).

164. HAW. CONST. art. XVII, § 3 (1978) ("[t]he legislature may propose amendments to the constitution by adopting the same, in the manner required for legislation, by a two-thirds vote of each house on final reading at any session, after either or both houses shall have given the governor at least ten days' written notice of the final form of the proposed amendment, or, with or without such notice, by a majority vote of each house on final reading at each of two successive sessions").

165. This is slightly different in a special election. HAW. CONST. art. XVII, § 2 (1978) ("The revision or amendments shall be effective only if approved at a general election by a majority of all the votes tallied upon the question, this majority constituting at least fifty per cent of the total vote cast at the election, or at a special election by a majority of all the votes tallied upon the question, this majority constituting at least thirty per cent of the total number of registered voters.").

166. *See* Jane Gross, *After a Ruling, Hawaii Weighs Gay Marriages*, N.Y. TIMES (Apr. 25, 1994), https://www.nytimes.com/1994/04/25/us/after-a-ruling-hawaii-weighs-gay-marriages.html?searchResultPosition=5 (describing debate in Hawaii regarding same-sex marriage after initial ruling in Baehr) [https://perma.cc/B8AU-PAPS].

167. Haw. Sess. Laws H.B. 117 (1998).

passed the amendment, which was then put to the voters and passed in November of 1998 by a wide margin.[168] The next year, the Hawaii Supreme Court, which had stalled in its enforcement of marriage equality pending the outcome of the amendment process, officially ended the *Baehr* litigation by admitting that the passage of the constitutional amendment had rendered Hawaii's same-sex marriage ban constitutional.[169]

2. Vermont and Massachusetts: Regrouping from Hawaii

i. Strategizing Around State Constitutions

In the wake of Hawaii, advocates regrouped and began to consider how to keep momentum going, while still avoiding a trip to the U.S. Supreme Court that could set the movement back by decades. According to Mary Bonauto, advocates concluded that "the movement's only real option, although it felt bold or even perilous at the time, was to file a carefully chosen case, or cases, premised on state constitutional claims. This would allow us to cabin the litigation to a particular state where we had the best chance of success, and then this 'breakthrough' would show the rest of the nation what it looked like when same-sex couples were able to join in marriage."[170] Bonauto hoped "that judicial wins would lead to other wins, including legislative victories. Over time, we would develop a patchwork where some states allowed marriage, even as others didn't, and get to a point where we could ask for a national resolution. As the final arbiter in our national system, that most likely means the Supreme Court, because people should be treated equally by their government, and have this freedom of choice nationwide, no matter where they live."[171]

In the quote above, Bonauto suggests that certain states' constitutions were more amenable to marriage equality claims than others. There are two important reasons why a state's constitution

168. Steven A. Holmes, *The 1998 Elections: State by State—West; Hawaii,* N.Y. TIMES (Nov. 5, 1998), https://www.nytimes.com/1998/11/05/us/the-1998-elections-state-by-state-west-hawaii.html?searchResultPosition=9 [https://perma.cc/JK78-ZJTX]. Litigation in Alaska that was initially successful, but at an earlier stage than Hawaii's, fell prey that same year to a state constitutional amendment banning same-sex marriage. *See generally The Freedom to Marry in Alaska,* FREEDOM TO MARRY, http://www.freedomtomarry.org/states/alaska (last visited Feb. 6, 2020) [https://perma.cc/4SN9-WUE8].

169. Baehr v. Miike, No. 20371, 1999 WL 35643448, at *1 (Haw. Dec. 9, 1999).

170. Bonauto, *supra* note 147, at 1494.

171. Mary Bonauto & James Esseks, *Marriage Equality Advocacy from the Trenches,* 29 COLUM. J. GENDER & L. 117, 120 (2015).

might offer an especially good chance at advancing such a claim. First, a constitution might contain rights provisions that differ textually from the U.S. Constitution. A number of state constitutions do include rights provisions different from those found in the U.S. Constitution. This includes states that adopted close analogs to the 1776 Pennsylvania Constitution's Common Benefits Clause,[172] and numerous other state constitutions that contain some variant of an "equal privileges" clause.[173] Those provisions could be construed by state courts to offer protections greater than that of the U.S. Constitution and thus would be promising in an environment in which the U.S. Constitution had only once, and very recently, been seen to provide even the most minimal protections to LGBTQ citizens.[174]

Second, a state judiciary might use an interpretive approach to the rights provisions in its constitution that is not in lockstep with the U.S. Supreme Court. As described *supra*, some state judiciaries give great (and sometimes inexplicable) deference to federal rights jurisprudence, while others have a more independent judicial philosophy. Given the reticence of the Supreme Court in the 1980s and 1990s to interpret the U.S. Constitution to afford equality and dignity to LGBTQ people, advocates needed to find jurisdictions whose courts would not feel compelled to treat LGBTQ people with disdain simply because federal doctrine seemed to permit it.

The strategy that Bonauto outlines also assumes the necessity of holding gains. If *Baehr* had taught the movement one lesson, it was that even a creative litigation strategy built on a provision of a state constitution that differed from the U.S. Constitution would not create lasting change if it sparked a backlash. The ability to quell that backlash involved two components. First, advocates would need to select jurisdictions where amending the state constitution was as difficult as possible. As noted *supra*, on one end of the spectrum, some state constitutions can be easily amended by a simple ballot initiative.[175] In other states, the proposed amendment must be approved by the legislature before a popular vote. Others have

172. Mariotti, *supra* note 136, at 100–101.

173. *Id.*

174. Romer v. Evans, 517 U.S. 620 (1996).

175. LGBTQ populations had already experienced the use of ballot initiatives to deny them rights and roll back legislative gains, so the community was already aware of the danger of states with an easy initiative and referendum process. For a thorough exploration of the interplay between anti-LGBTQ ballot initiatives and the advancement of LGBTQ rights, *see* Nan D. Hunter, *Varieties of Constitutional Experience: Democracy and the Marriage Equality Campaign*, 64 UCLA L. Rev. 1662, 1676 (2017).

even more restrictive requirements for amendment.[176] A preferable jurisdiction would be one where amending the state constitution could not be achieved simply by placing an initiative on the ballot and subjecting it to a vote in the next general election.

Second, advocates would need to embark on a public education campaign before litigation was filed that would explain the harms being wrought on real people by marriage inequality. Hopefully, that campaign would create supporters of the campaign who would help to blunt the effects of campaigns to undo litigation gains. These supporters would ideally consist of ordinary, civically engaged citizens, but also state legislators. Those legislators would serve as a bulwark against marriage equality opponents' attempts to influence legislators to propose constitutional amendments that might undo marriage equality litigation gains.

With this rubric in place, LGBTQ rights advocates were able to develop a plan forward—and that plan ran straight through New England.

ii. Litigating in Vermont

Mary Bonauto documented the reasons for litigators' identification of Vermont as a jurisdiction in which marriage litigation could be successful. At the outset, she noted, advocates observed that the state's judicial and legislative branches seemed to be friendly to the LGBTQ community. The judiciary had already made favorable rulings on behalf of LGBTQ couples.[177] And importantly, the Vermont state legislature was unlikely to attempt to undo favorable litigation. It had taken an early stand on behalf of LGBTQ people, repealing its sodomy law, enacting a statewide nondiscrimination law, including sexual orientation as a protected class in its state hate crimes law, and refusing to pass a "mini-DOMA" even after federal DOMA was signed into law.[178]

Vermont also had a mobilized LGBTQ community that was willing to engage in significant legwork to change public opinion in favor of marriage equality before the first pleading was ever filed. As

176. After decades of making the amendment process easier, the pendulum swung and states began to make the citizen-initiated amendment process more difficult. *See* John Dinan, *Twenty-First Century Debates and Developments Regarding the Design of State Amendment Processes*, 69 ARK. L. REV. 283, 293–94 (2016).

177. Bonauto, *supra* note 147, at 1499 ("In 1993, at a time of widespread ignorance about gay people as parents, Vermont's Supreme Court decided the first appellate case approving of second-parent adoption, allowing unmarried same-sex couples to both be legal parents of their children") (citing *In re* B.L.V.B., 628 A.2d 1271 (Vt. 1993)).

178. *Id.* at 1499–500.

Beth Robinson, an attorney-activist and Vermonter who was an architect of the Vermont litigation strategy[179] observed, "All the great case citations in the world won't get you to your goal if the political and educational context is wrong. Judges don't live in a vacuum, and every judicial decision is subject to some sort of political response, whether it be statutory, executive, or constitutional. It's not enough to win the battle of the case if you go on to lose the war."[180]

Of vital importance to the analysis was the question of Vermont's state constitution, including the text of the document itself, the state's constitutional jurisprudence, and the ease with which it could be amended. First, the text of the constitution itself figured heavily into advocates' identification of Vermont as a favorable jurisdiction. The Vermont State Constitution includes a vital component not present in the U.S. Constitution—the Common Benefits Clause. The Common Benefits Clause asserts that the purpose of government is for the good of the whole, rather than of specific individuals or classes of individuals.[181] Modeled after the clause in the radically democratic 1776 Pennsylvania constitution (which in turn drew on the Virginia Declaration of Rights),[182] Vermont's Common Benefits Clause reads as follows:

179. Robinson is currently a Vermont Supreme Court Justice. *See generally Honorable Beth Robinson*, VERMONT JUDICIARY, https://www.vermontjudiciary.org/people/honorable-beth-robinson [https://perma.cc/M39P-5EKJ].

180. Beth Robinson, *The Road to Inclusion for Same-Sex Couples: Lessons from Vermont*, 11 SETON HALL CONST. L.J. 237, 241 (2001).

181. G. Alan Tarr, *Constitutional Theory and State Constitutional Interpretation*, 22 RUTGERS L.J. 841, 856 (1991).

182. The Pennsylvania Constitution of 1776 was drafted twelve years before the federal constitution and is considered by historians to be the most radically democratic of the Revolutionary War era state constitutions, fostering a highly egalitarian approach to government. THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES 3 (Ken Gormley et al. eds., 2004). The Declaration of Rights in the 1776 Pennsylvania Constitution became the model for similar declarations in other state constitutions. *Id. See also* Williams, *supra* note 77, at 81. The Pennsylvania Common Benefits Clause was written to ensure both that government is obligated to provide for "common benefit" of the people and that no people should receive privileges beyond those extended to the general community. *See* Baker v. State, 744 A.2d 864, 875 (1999) (citing Va. Declaration of Rights art. IV). *See also* Mariotti, *supra* note 136, at 105. The Pennsylvania Clause provides "[t]hat Government is, or ought to be, instituted for the common benefit, protection and security of the people, nation, or community; and not for the particular emolument or advantage of any single man, family, or set of men, who are a part only of that community; And that the community hath an indubitable, unalienable and, indefeasible right to reform, alter, or abolish government in such manner as shall be by that community judged most conducive to the public weal." PA. CONST. of 1776 Declaration of Rights, art. V.

> That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community; and that the community hath an indubitable, unalienable, and indefeasible right, to reform or alter government, in such manner as shall be, by that community, judged most conducive to the public weal.[183]

In addition to the constitution itself, advocates were also impressed by Vermont's broad approach to state constitutional interpretation, which permits historical analysis, the adoption of interpretations of similar provisions by "sibling" jurisdictions, and use of economic and sociological materials.[184] They were also heartened by Vermont's acknowledgements that the Vermont Constitution predated the U.S. Constitution and that its judiciary rejected the theory of original intent as an interpretive approach.[185]

The Vermont Constitution, advocates also noted, is not as easy to amend as some other state constitutions—including the Hawaii Constitution. Hawaii requires single passage through both houses by a two-thirds majority[186] and then a public vote on the amendment in the next general election, in which a majority of all votes cast is sufficient for passage.[187] Vermont, on the other hand, only permits constitutional amendments to be introduced once every four years.[188] Amendments must be proposed by the Vermont Sen-

183. VT. CONST. ch. I, art. VII.

184. Bonauto, *supra* note 147, at 1499–500 (citing State v. Jewett, 500 A.2d 233, 233 (Vt. 1985)).

185. *Id.* at 1500.

186. HAW. CONST. art. XVII, § 3 (1978) ("[t]he legislature may propose amendments to the constitution by adopting the same, in the manner required for legislation, by a two-thirds vote of each house on final reading at any session, after either or both houses shall have given the governor at least ten days' written notice of the final form of the proposed amendment, or, with or without such notice, by a majority vote of each house on final reading at each of two successive sessions").

187. HAW. CONST. art. XVII, § 2 (1978).

188. "At the biennial session of the General Assembly of this State which convenes in A.D. 1975, and at the biennial session convening every fourth year thereafter, the Senate by a vote of two-thirds of its members, may propose amendments to this Constitution, with the concurrence of a majority of the members of the House of Representatives with the amendment as proposed by the Senate. A proposed amendment so adopted by the Senate and concurred in by the House of Representatives shall be referred to the next biennial session of the General Assembly; and if at that last session a majority of the members of the Senate and a majority of the House of Representatives concur in the proposed amendment, it shall be the duty of the General Assembly to submit the proposal directly to the voters of the state. Any proposed amendment submitted to the voters of the state in accordance

ate and approved by a two-thirds majority of that body before being referred to the House for passage by a majority.[189] If approved once by both houses, the proposed amendment must be approved by a simple majority again in the *next* biennial legislative session before being put to the voters.[190] It is thus baked into the process that amending the Vermont Constitution takes *at least*[191] two years and two different legislatures. Not only does this process provide more opportunities for a proposed amendment to fail, as Bonauto notes, the slow pace of amendment "would give us time to complete the litigation before facing any possible amendment proposal."[192] Advocates decided that Vermont would be the next step. And as it turned out, all of the ingredients identified above proved vital to the success of the first litigation in the history of the United States that actually resulted in marital benefits being offered to same-sex couples.

As a first phase to the execution of the Vermont strategy, grassroots activists in Vermont held off on litigation. As Beth Robinson recalled, "[I]n 1995 we actually passed up the opportunity to take on a freedom to marry case. Instead, along with a number of other committed volunteers, we formed the Vermont Freedom to Marry Task Force. For a year and a half before the *Baker* litigation came along, Task Force volunteers took every opportunity to speak to churches, civic associations, gay and lesbian organizations, community leaders, and anyone else willing to offer us an open mind and a chance to engage."[193]

By 1997, marriage equality advocates decided that it was time to file. In July 1997, Beth Robinson and Robinson's law partner Susan Murray at Langrock, Sperry & Wool—a Vermont firm with deep community ties—sued Vermont with co-counsel Mary Bonauto and GLAD on behalf of three same-sex couples who were denied marriage licenses from their town clerks.[194] The couples sought "a declaratory judgment that the refusal to issue them a license violated

with this section which is approved by a majority of the voters voting thereon shall become part of the Constitution of this State." VT. CONST. ch. II, § 72.

189. *Id.*

190. *Id.*

191. Assuming that the amendment is first proposed in a second year of a two-year legislative session that also corresponds with the four-year cycle for proposed amendments, and that the next legislature approves that amendment in the next year.

192. Bonauto, *supra* note 147, at 1501.

193. Robinson, *supra* note 180, at 241–242.

194. *Id.* at 243.

the marriage statutes and the Vermont Constitution."[195] Among other arguments, the plaintiffs made an argument based on Vermont's Common Benefits Clause. The crux of the Common Benefits argument was that the provision was violated by a marriage law that reserved the panoply of rights and protections afforded to married couples to heterosexual couples only.[196] The couples lost at trial and, by 1999, the case had come before the Vermont Supreme Court.

The Vermont Supreme Court, given this opportunity, did not shy away from an opportunity to explore the power of its state constitution to recognize rights possibly less readily identified under the U.S. Constitution and its accompanying jurisprudence. In fact, after dispensing with a single statutory construction argument, the *Baker* court determined that it would resolve the entire matter under an analysis of the state's Common Benefits Clause, noting that "[a]lthough plaintiffs raise a number of additional arguments based on both the United States[197] and the Vermont Constitutions, our resolution of the Common Benefits claim obviates the necessity to address them."[198]

The *Baker* majority[199] began its analysis by stressing that "it is the Common Benefits Clause of the Vermont Constitution we are construing, rather than its counterpart, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution."[200] It then laid forceful claim to a separate intellectual birth-

195. Baker v. State, 744 A.2d 864, 867–68 (Vt. 1999).

196. *Id.* at 870 ("[Plaintiffs] note that in denying them access to a civil marriage license, the law effectively excludes them from a broad array of legal benefits and protections incident to the marital relation, including access to a spouse's medical, life, and disability insurance, hospital visitation and other medical decision making privileges, spousal support, intestate succession, homestead protections, and many other statutory protections.").

197. It is unclear what the Vermont Supreme Court refers to here, as the plaintiffs' opening appellate brief records the issues presented for review to the Supreme Court as follows: "(1) Do Vermont's marriage statutes, construed in light of their purposes and constitutional limitations, require Appellee towns to issue marriage licenses to the Appellants? (2) Does the Vermont Constitution permit the State to deny Appellants the freedom to marry their respective chosen partners?" *See* Mary Bonauto et al., *The Freedom to Marry for Same-Sex Couples: The Opening Appellate Brief of Plaintiffs Stan Baker Et Al. in* Baker Et Al. v. State of Vermont, 5 MICH. J. GENDER & L. 409, 415 (1999).

198. *Baker*, 744 A.2d at 870.

199. This article will focus on the majority opinion in Baker only. For a thorough treatment of Baker's two concurrences, see Lawrence Friedman and Charles H. Baron, Baker v. State *and the Promise of the New Judicial Federalism*, 43 B.C. L. REV. 125, 147 (2001).

200. *Baker*, 744 A.2d at 870.

right, asserting that it was "altogether fitting and proper that we do so."[201] The court then noted that the Common Benefits clause was almost a century older than the Fourteenth Amendment and reminded readers that the Vermont Constitution itself is "not a mere reflection of the federal charter. Historically and textually, it differs from the United States Constitution. It predates the federal counterpart, as it extends back to Vermont's days as an independent republic. It is an independent authority, and Vermont's fundamental law."[202]

Having thus justified divergence from federal constitutional analysis, the *Baker* majority called for a system of analyzing Common Benefits claims that differs from federal Equal Protection doctrine. It held that courts ought to "first define that 'part of the community' disadvantaged by the law," then "examine the statutory basis that distinguishes those protected by the law from those excluded from the state's protection," and last, "look next to the government's purpose in drawing a classification that includes some members of the community within the scope of the challenged law but excludes others."[203] In so doing, the *Baker* majority rejected adherence to the familiar framework of tiered levels of scrutiny, and also declined to use a highly deferential form of rational basis review.

With respect to tiered scrutiny, the majority held that:

> The concept of equality at the core of the Common Benefits Clause was not the eradication of racial or class distinctions, but rather the elimination of artificial governmental preferments and advantages . . . . The language and history of the Common Benefits Clause thus reinforce the conclusion that a relatively uniform standard, reflective of the inclusionary principle at its core, must govern our analysis of laws challenged under the Clause. Accordingly, we conclude that this approach, rather than the rigid, multi-tiered analysis evolved by the federal courts under the Fourteenth Amendment, shall direct our inquiry under Article 7.[204]

In this context, the majority rejected the deferential form of rational basis review that would be familiar to most attorneys.[205] In-

201. *Id.*

202. *Id.* (quoting State v. Badger, 450 A.2d 336, 347 (1982)).

203. *Id.* at 878–79.

204. *Id.* at 876–78.

205. As Katie Eyer points out, "the canonical account of rational basis review is a bleak one for those challenging the constitutionality of government action: a doctrine which is extraordinarily deferential and will virtually never result in gov-

stead, the *Baker* majority described a kind of sliding scale, in which the intensity of scrutiny is never zero, but becomes more searching the more onerous the distinction. The court held that:

> We must ultimately ascertain whether the omission of a part of the community from the benefit, protection and security of the challenged law bears a reasonable and just relation to the governmental purpose. Consistent with the core presumption of inclusion, factors to be considered in this determination may include: (1) the significance of the benefits and protections of the challenged law; (2) whether the omission of members of the community from the benefits and protections of the challenged law promotes the government's stated goals; and (3) whether the classification is significantly underinclusive or overinclusive.[206]

The *Baker* majority then engaged in the analysis that it had described. It found that anyone wishing to enter into a marriage with a person of the same sex was prohibited from doing so based on the plain language of Vermont's marriage statute.[207] Next, it examined the state's proffered reason for excluding same-sex couples from marriage, which the state described as "furthering the link between procreation and child rearing."[208] The majority found a significant logical disconnect between the rationale and the law itself, noting that many opposite-sex couples (who were permitted to marry) did *not* have children, while many same-sex couples (who were not permitted to marry) *did*.[209] Finally, it balanced the state's rationale against the importance of the benefits being withheld from same-sex couples, finding that "[t]he legal benefits and protections flowing from a marriage license are of such significance that any statutory exclusion must necessarily be grounded on public concerns of

ernment action being overturned." Katie R. Eyer, *The Canon of Rational Basis Review*, 93 Notre Dame L. Rev. 1317, 1319 (2018). However, she also posits that this "canonical account" is incomplete and inaccurate, and that federal rational basis review doctrine is actually far more complex, variable, and presents greater possibility than the conventional wisdom allows. *Id.*

206. *Baker*, 744 A.2d at 878–79.

207. *Id.* at 868 (finding that, "[a]lthough it is not necessarily the only possible definition, there is no doubt that the plain and ordinary meaning of 'marriage' is the union of one man and one woman as husband and wife.").

208. *Id.* at 881.

209. *Id.* The state also made the strange sub-argument that, because same-sex couples might have to resort to assisted reproductive methods in order to become parents, permitting them to marry would weaken the perception that procreation and child rearing were linked. *Id.* at 882. The court was unimpressed with the logic of this argument, noting that the primary consumers of assisted reproductive technology are heterosexual couples—who were permitted to marry. *Id.*

sufficient weight, cogency, and authority that the justice of the deprivation cannot seriously be questioned."[210] The *Baker* court concluded that, "[c]onsidered in light of the extreme logical disjunction between the classification and the stated purposes of the law—protecting children and 'furthering the link between procreation and child rearing'—the exclusion falls substantially short of this standard."[211]

The fact that the Vermont Supreme Court had held that it violated the state constitution to withhold the benefits of marriage from same-sex couples was a major win for marriage equality advocates. However, the remedy required by the Vermont Supreme Court fell short of the goal of full marriage equality. The court did not require that the state issue marriage licenses. Instead, it gave an edict to the Vermont Legislature to come up with *some* kind of a solution that would give identical rights and benefits to same-sex couples—but that solution did *not* have to be marriage per se.[212] The Vermont Legislature took the court's invitation and enacted the nation's first civil union law, under which same-sex couples could enjoy all of the rights and responsibilities of marriage while still being prohibited from the *name*.[213]

iii. Litigating in Massachusetts

Following *Baker*, LGBTQ rights advocates had to determine how to keep momentum going, while avoiding the kind of massive backlash and serial setbacks that the Hawaii litigation had sparked. According to Mary Bonauto, advocates considered several criteria, including the organization and mobilization of the Commonwealth's LGBTQ community, the relative friendliness of the branches of state government to LGBTQ concerns, the text of its constitution, the judiciary's approach to interpreting it, and the ease—or lack thereof—with which the Massachusetts Constitution could be revised or amended.

Massachusetts was a jurisdiction whose LGBTQ community was well-organized and visible. Non-LGBTQ Massachusetts residents,

210. *Id.* at 884.

211. *Id.*

212. *Baker*, 744 A.2d at 847 ("We hold that the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law. That the State could do so through a marriage license is obvious. But it is not required to do so.").

213. Carey Goldberg, *Vermont Gives Final Approval to Same-Sex Unions*, N.Y. TIMES (Apr. 26, 2000), https://www.nytimes.com/2000/04/26/us/vermont-gives-final-approval-to-same-sex-unions.html [https://perma.cc/VB3M-D4GF].

Bonauto recounted, were aware that they had LGBTQ friends and neighbors, and Massachusetts media considered LGBTQ-centered topics to be "legitimate and newsworthy issues."[214] In addition, the Massachusetts LGBTQ community was unafraid to openly advocate for its issues in the courts and in the community, and legal organizations had raised awareness by "sharing the stories of families harmed by the denial of marriage rights and developing educational materials for distribution to non-lawyers."[215] In terms of social and political climate, "the Commonwealth of Massachusetts was as ready as any place in the country to struggle fairly with the question of whether LGBT people should be denied marriage rights."[216]

Additionally, where concerns of the LGBTQ community were raised, all of the branches of Massachusetts government had proven themselves fairly amenable to addressing them. In 1989, far before it was politically expedient to do so, the Massachusetts legislature (called the General Court) had passed a law forbidding discrimination on the basis of sexual orientation.[217] In 1993, it had again protected LGBTQ people, this time in the context of schools.[218] And it had regularly blocked advancement of bills that would have statutorily limited marriage to one man and one woman.[219] Bonauto also pointed out the concern shown toward the LGBTQ community by Massachusetts' executive branch during the 1990s, including the governor, the state police, and the Massachusetts Bay Transit Authority.[220] And importantly, Massachusetts courts were not afraid to be on the forefront of case law establishing the rights of same-sex parents.[221]

Massachusetts' constitution is different from the U.S. Constitution in a few relevant respects. Like Vermont's constitution, the Massachusetts Constitution contains liberty and equality guarantees that differ textually from those in the U.S. Constitution and are arranged differently within the document.[222] The Massachusetts Con-

214. Bonauto, *supra* note 126, at 9.

215. *Id.* at 9–10.

216. *Id.* at 10.

217. *Id.*

218. *Id.* at 11.

219. *Id.* at 18–19.

220. Bonauto, *supra* note 126, at 11–13.

221. *Id.* at 14 (citing Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993); Adoption of Susan, 619 N.E.2d 323 (Mass. 1993)).

222. *See* Lawrence Friedman, *Ordinary and Enhanced Rational Basis Review in the Massachusetts Supreme Judicial Court: A Preliminary Investigation*, 69 ALB. L. REV. 415, 416 n.6 (2006) ("Compare MASS. CONST. pt. I, art. I ('All men are born free and equal'), MASS. CONST. pt. I, art. VI ('No man, nor corporation or association of

stitution contains a broad Declaration of Rights that includes the provision that "[a]ll people are born free and equal and have certain natural, essential and unalienable rights; among which may be . . . seeking and obtaining their safety and happiness."[223] As in Hawaii's Constitution, this section of the Massachusetts Constitution also enumerates specific protected classes and includes sex within those classes, requiring that "[e]quality under the law shall not be denied or abridged because of sex, race, color, creed or national origin."[224] Taken together, LGBTQ advocates were interested in how those provisions "speak to equality, anti-privileging, liberty, and due process."[225]

When it came to the state constitutional interpretation question, advocates "believed in the Massachusetts Constitution as a strong guarantee of individual rights and privacy."[226] They determined that Massachusetts' Supreme Judicial Court had historically "interpreted the Declaration of Rights robustly, including in criminal defense, jury selection, free speech, effective assistance of counsel, sex discrimination, and reproductive justice contexts."[227] Marriage equality advocates were also interested in Massachusetts because of its specific approach to rational basis review. Although Massachusetts courts interpreting the equality provisions of the Massachusetts Constitution typically use the familiar federal tiered-

men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community . . . .'), MASS. CONST. pt. I, art. VII ('Government is instituted for the common good; for the protection, safety, prosperity and happiness of the people; and not for the profit, honor or private interest of any one man, family or class of men . . . .'), MASS. CONST. pt. I, art. X ('Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws.'), *and* MASS. CONST. pt. I, art. XII ('And no subject shall be arrested, imprisoned, despoiled or deprived of his property, immunities or privileges, put out of the protection of the law, exiled or deprived of his life, liberty or estate, but by the judgment of his peers, or the law of the land.'), *with* U.S. CONST. amend. XIV, § 1 ('No State shall. . . deny to any person within its jurisdiction the equal protection of the laws.')").

223. MASS. CONST. pt. I, art. I.

224. *Id.*

225. Bonauto, *supra* note 147, at 1502–03.

226. Bonauto, *supra* note 126, at 25.

227. Bonauto, *supra* note 147, at 1503.

scrutiny framework,[228] they have not been constrained by a highly deferential form of rational basis review[229]:

> Rational basis in Massachusetts is not an empty exercise: to determine whether a law is arbitrary or capricious, or has become so, requires reviewing courts to "look carefully at the purpose to be served" by challenged laws and to sustain those laws only when 'an impartial lawmaker could logically believe that the classification would serve a legitimate purpose that transcends the harm to members of the disadvantaged class.[230]

The Massachusetts Constitution is also difficult to amend and the process is complex. Under Massachusetts' system, either the legislature or a group of citizens propose the amendment.[231] If proposed by citizens, it is then referred to the Attorney General to ensure that the proposed amendment is not improper in form or substance.[232] If appropriate, the Attorney General then refers the matter to the Secretary of the Commonwealth, who then prepares signature forms. Proponents of the amendment must then collect about 80,000 signatures, and only then is the proposed amendment referred to the legislature.[233] Proposed constitutional amendments must then be voted for by 25% of both houses in two consecutive legislative sessions before the amendment can be voted on by the

228. Friedman, *supra* note 222, at 416–17 ("Though the provisions of the Massachusetts Declaration of Rights express the commitment to equality differently than the Equal Protection Clause of the Fourteenth Amendment, the Massachusetts courts have traditionally applied the federal equal protection framework when addressing claims raised under the state constitution.") (internal citations omitted).

229. *See Id.* at 415.

230. Bonauto, *supra* note 126, at 26 (citing English v. New Eng. Med. Ctr., 541 N.E.2d 329, 333 (Mass. 1989) (quoting Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 452 (1985) (Stevens, J., concurring))).

231. MASS. CONST. art. XLVIII, pt. IV ("Section 1. Definition. - A proposal for amendment to the constitution introduced into the general court by initiative petition shall be designated an initiative amendment, and an amendment introduced by a member of either house shall be designated a legislative substitute or a legislative amendment.").

232. MASS. CONST. art. XLVIII (improper amendment topics include many topics involving the contraction or restricting of individual rights, as well as those specifically reversing decisions of the judiciary).

233. Office of Attorney General Maura Healey, *The Initiative Petition Process*, https://www.mass.gov/info-details/the-initiative-petition-process [https://perma.cc/D5K8-DRNB] (last visited Dec. 9, 2019).

general public.[234] The Massachusetts government website makes it plain to readers that this process is, by necessity, quite slow.[235]

The difficulty of amending the Massachusetts Constitution was an important strategic consideration for advocates because anti-marriage activists had begun to organize around a state constitutional amendment banning marriage equality; advocates knew that even if an amendment had not been proposed before litigation was filed, one would certainly be forthcoming within a very short time after a suit was initiated.[236] In the post-*Baehr*, post-*Baker* era, then, the decision of where to file would increasingly be affected by whether one could beat the buzzer; winning litigation would show the state's residents that the world would not stop spinning upon the achievement of marriage equality *before* a state constitutional amendment would preclude that world from ever coming into being.[237]

In April 2001, the state constitutional race began when GLAD filed *Goodridge v. Department of Public Health* in a Massachusetts state trial court in Boston.[238] Predictably, anti-LGBTQ activists in the state began the constitutional amendment process almost immedi-

234. *Id.*

235. *Id.* ("[A] proposed constitutional amendment submitted in August of 2019 would have to be approved by 25% of legislators in 2020 and 2021 before appearing on the ballot in November 2022.").

236. Bonauto, *supra* note 126, at 26–27 (internal citations omitted) ("Another factor sped the timing of the decision to litigate: we knew we would soon be on the defense in a constitutional amendment campaign. The Massachusetts Citizens Alliance, later known as Massachusetts Citizens for Marriage, was planning to come straight at the marriage issue with a citizen initiative to place an anti-LGBT marriage amendment on the ballot by November 2004. In order for the measure to advance, it needed the support of 50 of 200 legislators in a joint session. At GLAD, we knew no ballot campaign on marriage had yet been won and we assumed the issues would be framed in a way favorable to our opponents, putting LGBT people and families on the defense. In short, we calculated that the signature gathering process would succeed, that 50 or more legislators would support it, and that we would likely be facing a ballot measure in 2004.").

237. The strategic use of constitutional amendments reached critical mass just in time for the 2004 presidential election, when Republicans successfully used anti-marriage initiatives to drive Republican voters to the polls in critical swing states. In that year, eleven state constitutional amendments were on the ballot, and all but two passed by at least 60% margins. *See* James Dao, *Same-Sex Marriage Issue Key to Some GOP Races*, N.Y. TIMES (Nov. 4, 2004), https://www.nytimes.com/2004/11/04/politics/campaign/samesex-marriage-issue-key-to-some-gop-races.html [https://perma.cc/Y496-DUB8].

238. Julie Flaherty, *Massachusetts: Gay-Marriage Lawsuit Filed*, N.Y. TIMES (Apr. 13, 2001), https://www.nytimes.com/2001/04/13/us/national-briefing.html?searchResultPosition=5 [https://perma.cc/G64H-GGNM].

ately thereafter.[239] The *Goodridge* litigation involved fourteen plaintiffs from different areas of Massachusetts.[240] The plaintiffs' lives together told sympathetic, broadly relatable stories of long, committed relationships, mutual care of children and elderly parents, gainful employment, and community service.[241] All had attempted to obtain marriage licenses and were denied the ability to do so by town and city clerks who interpreted the Commonwealth's marriage law (which did not expressly prohibit same-sex marriage) as restricting marriage to heterosexual couples exclusively.[242]

The *Goodridge* plaintiffs made two major arguments. First, they argued that the county clerks already had the power to issue marriage licenses because the marriage laws of the Commonwealth did not explicitly prohibit same-sex marriage. Second, they made the argument that the Commonwealth's denial of their right to marry offended the numerous provisions in the Massachusetts Constitution that address liberty and equality principles. Regarding the state constitutional claims, plaintiffs alleged violation of articles 1, 6, 7, 10, 12, and 16, and Part II, c. 1, § 1, art. 4, of the Massachusetts Constitution.[243] At trial, the court dismissed all claims against the state, and the matter was directly appealed to the Massachusetts Supreme Judicial Court, which agreed to hear the case.[244]

239. Bonauto, *supra* note 126, at 20 (quoting H.B. 4840, 182d Leg., Reg. Sess. (Mass. 2002)) ("The amendment, which came to be known as H.B. 4840, provided that: 'It being the public policy of this Commonwealth to protect the unique relationship of marriage in order to promote, among other goals, the stability and welfare of society and the best interests of children, only the union of one man and one woman shall be valid or recognized as a marriage in Massachusetts. Any other relationship shall not be recognized as a marriage or its legal equivalent, nor shall it receive the benefits or incidents exclusive to marriage from the Commonwealth, its agencies, departments, authorities, commissions, offices, officials and political subdivisions. Nothing herein shall be construed to effect an impairment of a contract in existence on the effective date of this amendment.'").

240. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 949 (Mass. 2003).

241. Complaint, Goodridge v. Dep't of Pub. Health, 2001 WL 35920963 (Mass. Super. 2001) (No. 01-1647 A).

242. *Id. See also Goodridge*, 798 N.E.2d at 952 ("nothing in [the] licensing law specifically prohibits marriages between persons of the same sex").

243. Complaint, *Goodridge*, 2001 WL 35920963 (Mass. Super. 2001) (No. 01-1647 A). *See also Goodridge*, 798 N.E.2d at 950.

244. *Goodridge*, 798 N.E.2d at 951 (noting that the trial court had held that "the marriage exclusion does not offend the liberty, freedom, equality, or due process provisions of the Massachusetts Constitution, and that the Massachusetts Declaration of Rights does not guarantee 'the fundamental right to marry a person of the same sex,'" and further, that the Legislature's interest in safeguarding procreation was rationally related to prohibiting same-sex marriage).

The Supreme Judicial Court first dispensed with the statutory construction argument, holding that "the undefined word 'marriage' . . . confirms the General Court's intent to hew to the term's common-law and quotidian meaning concerning the genders of the marriage partners."[245] It then moved on to the state constitutional claims.

The sections of the Massachusetts Constitution invoked by the *Goodridge* plaintiffs and analyzed by the court[246] provide broad liberty and equality guarantees. Most are part of the constitution's Declaration of Rights. Article 1 provides a broad statement of rights that specifies certain protected classes.[247] Article 6 declares an anti-privilege philosophy.[248] Article 7 is analogous to the Vermont Common Benefits Clause and is worded similarly.[249] Article 10 provides, in relevant part: "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws . . . ."[250] The *Goodridge* plaintiffs also identified Part II, Article 4, as embodying due process guarantees that were offended by the same-sex marriage policy.[251]

245. *Id.* at 952–53.

246. Although the plaintiffs invoked articles 12 and 16, the court declined to rule based on them, so they will not be discussed here. *Id.* at 950 n.8.

247. "All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin." MASS. CONST. pt. 1, art. I.

248. "No man, nor corporation, or association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public" MASS. CONST. pt. 1, art. VI.

249. "Government is instituted for the common good; for the protection, safety, prosperity, and happiness of the people; and not for the profit, honor, or private interest of any one man, family or class of men: Therefore the people alone have an incontestable, unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity and happiness require it." MASS. CONST. pt. 1, art. VII.

250. MASS. CONST. pt. 1, art. X.

251. In their Motion for Summary Judgment at trial, the plaintiffs identified as relevant the section of Part 2, Article 4 that "provides in part that the General Court has power 'to make, ordain, and establish, all manner of wholesome and reasonable Orders, laws, statutes and ordinances. . . so as the same be not repugnant to or contrary to this Constitution, as they shall judge to be for the good and welfare of this Commonwealth, and for the government and ordering thereof, and of the subjects of the same'" Plaintiff Motion For Summary Judgement at n.8, *Goodridge*, 2001 WL 35920963 (No. 01-1647 A).

The *Goodridge* majority began its state constitutional analysis by noting that the plaintiffs had raised claims that sounded in both liberty and equality principles and by acknowledging the significant overlap in the two concepts.[252] The court then went on to stress the importance of the liberty interest in marrying, noting that, "[b]ecause civil marriage is central to the lives of individuals and the welfare of the community, our laws assiduously protect the individual's right to marry against undue government incursion."[253] The court then concluded that the right to marry, if it is to mean anything, must logically contain within it the right to marry the person of one's choosing. In so deciding, the *Goodridge* court invoked not only the U.S. Supreme Court in *Loving v. Virginia*, but also the California Supreme Court's decision in *Perez v. Sharp*.[254]

Having laid that groundwork for the liberty interest at stake, the Massachusetts Supreme Judicial Court, like the Vermont Supreme Court in *Baker*, unequivocally declared its own power to diverge from federal jurisprudence, even though it was not relying (as had the Vermont court) on a provision that significantly diverges from the U.S. Constitution. The court asserted:

> The Massachusetts Constitution protects matters of personal liberty against government incursion as zealously, and often more so, than does the Federal Constitution, *even where both Constitutions employ essentially the same language*. That the Massachusetts Constitution is in some instances more protective of individual liberty interests than is the Federal Constitution is not surprising. Fundamental to the vigor of our Federal system of government is that 'state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution.[255]

The court then went on to explain the standards for rational basis review in Massachusetts in both the equal protection and due process contexts, since it considered the two analyses to be inextricably linked in the same-sex marriage context. In Massachusetts, the court observed, due process rational basis analysis "requires that statutes 'bear[ ] a real and substantial relation to the public health,

252. *Goodridge*, 798 N.E.2d at 953.

253. *Id.* at 957.

254. *Id.* at 958 (citing Perez v. Sharp, 198 P.2d 17, 17 (Cal. 1948) and Loving v. Virginia, 388 U.S. 1, 6 (1967)).

255. *Id.* at 959 (emphasis added) (internal citations omitted).

safety, morals, or some other phase of the general welfare.' "[256] The rational basis test for equal protection claims in Massachusetts requires that "an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class."[257]

Having set out those standards, the Massachusetts Supreme Judicial Court then analyzed—and eviscerated—the Commonwealth's proffered reasons for the prohibition on same-sex marriage, and did so using a rational basis review standard.[258] Those reasons were "(1) providing a 'favorable setting for procreation'; (2) ensuring the optimal setting for child rearing, which the department defines as 'a two-parent family with one parent of each sex'; and (3) preserving scarce State and private financial resources."[259]

First, the *Goodridge* majority flatly rejected the Commonwealth's foundational premise that, as the appellate court had held, the "primary purpose" of marriage is procreation.[260] The majority noted a host of logical inconsistencies inherent in that argument, including the fact that couples are not required to demonstrate fertility in order to wed, the fact that a marriage is still valid in the Commonwealth even if unconsummated, and the Commonwealth's public policy of facilitating access to assisted reproductive technology regardless of the marital status of the would-be parents.[261] As the majority put it, "[t]he 'marriage is procreation' argument singles out the one unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage."[262]

The *Goodridge* majority was equally unimpressed with the Commonwealth's second rationale that restricting marriage to opposite-sex couples ensured an "optimal setting" (i.e. a family with married heterosexual parents) for child-rearing. The majority observed that the Commonwealth had actually enacted public policies that cut

256. *Id.* at 960 (quoting Coffee–Rich, Inc. v. Commissioner of Pub. Health, 204 N.E.2d 281 (Mass. 1965)).

257. *Id.* (quoting English v. New England Med. Ctr., 541 N.E.2d 329 (Mass. 1989)).

258. The majority did not find it necessary to decide whether to use a heightened form of scrutiny because it found that the Commonwealth's proffered reasons for denying marriage to same-sex couples did not pass rational basis review. 798 N.E.2d at 961.

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.* at 962.

directly against this rationale, including striving to eliminate the stigma of illegitimacy and constructing family law principles that do not privilege marriage, sexual orientation, or gender.[263] The majority also stated the obvious—that prohibiting same-sex couples from marrying does absolutely nothing to encourage opposite-sex couples to wed—and thus concluded that there was no rational relationship between the marriage statute and the proferred reason for its exclusion of same-sex couples.[264]

Finally, the *Goodridge* majority rejected the Commonwealth's assertion that the same-sex marriage prohibition conserved state resources. Again, the majority did not offer this rationale much deference and felt free to draw its own conclusion that the Commonwealth's premise that same-sex couples tended to be less financially dependent upon one another (and thus less in need of the financial benefits that marriage provides) was simply without basis in fact.[265]

After disposing of the Commonwealth's primary rationales (and several ancillary rationales advanced by various *amici*), the majority struck down the marriage prohibition, stating:

> The marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason. The absence of any reasonable relationship between, on the one hand, an absolute disqualification of same-sex couples who wish to enter into civil marriage and, on the other, protection of public health, safety, or general welfare, suggests that the marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual.[266]

The *Goodridge* decision was a 4-3 vote, and the majority opinion drew both a concurrence and three separate dissents. Notably, Justice Sosman's dissent pointedly disagreed with the majority's approach to rational basis review and essentially accused the majority of intellectual dishonesty, asserting that "[a]lthough ostensibly applying the rational basis test to the civil marriage statutes, it is abundantly apparent that the court is in fact applying some undefined stricter standard to assess the constitutionality of the marriage statutes' exclusion of same-sex couples."[267]

263. 798 N.E.2d at 963.

264. *Id.* at 1001.

265. *Id.* at 964.

266. *Id.* at 968.

267. *Id.* at 980 (Sosman, J., dissenting). Professor Lawrence Friedman has suggested that Massachusetts state courts actually use an "enhanced" form of rational basis review when the government action "implicate[s] or restrict[s] an in-

The Massachusetts story does not end there, however. The *Goodridge* court granted a period of 180 days to "permit the Legislature to take such action as it may deem appropriate in light of [its] opinion."[268] Recall that in Hawaii, the legislature had responded to *Baehr* by passing a state constitutional amendment through the legislature to be put to the voters. In Vermont, the state legislature did not block the effect of *Baker* through an amendment, but also labored to create a solution that stopped short of full marriage equality. In Massachusetts, however, the interplay between the legislature and the judiciary resulted in a different, and history-making, solution.

The Massachusetts legislature was not necessarily excited about becoming the first state to offer full and equal marriage rights to same-sex couples. Consequently, members of the Massachusetts Senate proposed a bill that would, like Vermont, offer same-sex couples civil unions, but not full marriage equality.[269] The Senate then did something that students of federal law might be confused by: it asked for—and received—an advisory opinion from the Massachusetts Supreme Judicial Court as to the constitutionality of the proposed civil unions bill.[270] The Massachusetts Constitution, as it turns out, is one of only a handful of state constitutions that permits advisory opinions.[271] It specifically provides that "[e]ach branch of the legislature, as well as the governor or the council, shall have authority to require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions."[272]

In February 2004, the Massachusetts Supreme Judicial Court issued its advisory opinion, rejecting the civil unions bill. The court was unequivocal in its rejection of a two-track system of marriage rights, asserting:

> Because the proposed law by its express terms forbids same-sex couples entry into civil marriage, it continues to relegate same-

terest that the courts deem important but that does not rise to the level of a fundamental personal interest." Friedman, *supra* note 222, at 418 (explaining why the Massachusetts Supreme Judicial Court's ruling in *Goodridge* was consistent with past cases employing this "enhanced" rational basis review).

268. 798 N.E.2d at 970.

269. *In re* Opinions of the Justices to the Senate, 802 N.E.2d 565, 566 (Mass. 2004).

270. *Id.*

271. *See generally* Jonathan D. Persky, *"Ghosts That Slay": A Contemporary Look at State Advisory Opinions*, 37 CONN. L. REV. 1155, 1166 (2005) (identifying advisory opinions as an experiment in democracy initiated by Massachusetts).

272. MASS. CONST. pt. 2, ch. 3, art. II.

> sex couples to a different status. The holding in *Goodridge*, by which we are bound, is that group classifications based on unsupportable distinctions, such as that embodied in the proposed bill, are invalid under the Massachusetts Constitution. The history of our nation has demonstrated that separate is seldom, if ever, equal.[273]

The legislature had voted down a proposed state constitutional amendment, so no such option would be presented to voters in 2004.[274] Opponents of full marriage equality were still trying to push through an amendment when the advisory opinion was issued, but understood that the lengthy amendment process meant that it would not be presented to voters until long after the 180 day stay in the original *Goodridge* decision had expired.[275] A round of furious legal maneuvering ensued, all of which proved fruitless, and on May 17, 2004, Tanya McCloskey and Marcia Kadish became the first same-sex couple to legally marry in the United States.[276]

Obviously, the litigation campaign for marriage equality did not end on the steps of Cambridge City Hall with Tanya McCloskey and Marcia Kadish's spring wedding. In the years immediately following *Goodridge*, marriage equality advocates continued to push state courts, with spotty success. The New Jersey Supreme Court answered the marriage equality challenge by holding for the plaintiffs but, like Vermont, ruling that civil unions were sufficient.[277] Washington, New York, and Maryland handed litigants devastating losses.[278] But the state constitutional tide turned in 2008, when California's highest court overturned the state's marriage ban[279] and

273. *In re* Opinions of the Justices to the Senate, 802 N.E.2d 565, 566 (Mass. 2004).

274. For details on the procedure that led to the failure of the amendment, see Bonauto, *supra* note 126, at 20–21.

275. *Id.* at 52. Opponents of marriage equality fought for years more to bring a constitutional amendment before the public for a vote, but once couples were permitted to marry, support in the legislature waned and the issue eventually died. *See generally* Anthony Michael Kreis, *Stages of Constitutional Grief: Democratic Constitutionalism and the Marriage Revolution*, 20 U. PA. J. CONST. L. 871, 918–921 (2018).

276. Victoria Whitley-Berry, *The 1st Legally Married Same-Sex Couple "Wanted to Lead by Example"*, NAT'L PUB. RADIO (May 17, 2019), https://www.npr.org/2019/05/17/723649385/the-1st-legally-married-same-sex-couple-wanted-to-lead-by-example [https://perma.cc/9TEN-AUZM].

277. Lewis v. Harris, 908 A.2d 196 (N.J. 2006).

278. Andersen v. King Cty., 138 P.3d 963 (Wash. 2006); Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006); Conaway v. Deane, 932 A.2d 571 (Md. 2007).

279. *In re* Marriage Cases, 183 P.3d 384, 419–29 (Cal. 2008) (finding the right to marry could not be denied to same-sex couples under the California Constitution's privacy and equality clauses). As discussed further *infra*, the California judi-

the Connecticut Supreme Court ruled that the state's civil union law was insufficient.[280] And in 2009, the Iowa Supreme Court became the first in the nation to rule unanimously in favor of marriage equality.[281] By this point, state legislatures had begun to proactively take up marriage equality and civil union legislation.[282] Public opinion on same-sex marriage finally reached a tipping point in 2011, where a greater share of Americans favored same-sex marriage than opposed it.[283]

It was just at the moment of that national tipping point that the marriage equality litigation campaign became a federal one. In 2009, Edith Windsor's same-sex partner died, and even though they had been legally married in New York, Windsor found herself the recipient of a $363,053 federal estate tax bill, since DOMA's Section 3 required that she be taxed under federal law as though she was a legal stranger to the decedent and not her widow.[284] Edith Windsor challenged DOMA in federal court, and in June 2013, the U.S. Supreme Court finally struck down DOMA's requirement that the federal government ignore valid same-sex marriages.[285] The *Windsor* decision unleashed a flood of federal litigation that sought to once and for all locate a right to same-sex marriage in the U.S. Constitution. By 2015, the Court had done so in *Obergefell v. Hodges*.[286]

Since *Windsor* and *Obergefell*, the focus of attention given to the marriage equality movement has tended to be placed on those U.S. Supreme Court cases and their outcomes. But to tell the story of marriage equality without including the state constitutional law

cial victory led to a state constitutional amendment, which led to a flurry of litigation that ultimately resulted in the U.S. Supreme Court's decision in *Hollingsworth v. Perry*, which essentially resolved nothing beyond the question of whether proponents of a California initiative have standing to defend that initiative on appeal. 570 U.S. 693, 715 (2013).

280. Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008) (finding the civil union statute violated the Due Process and Equal Protection clauses of the Connecticut Constitution).

281. Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009) (using federal Equal Protection analysis to invalidate the state marriage statute under the Iowa Constitution's Equal Protection Clause).

282. *See generally A Timeline of the Legislation of Same-Sex Marriage in the U.S.*, GEORGEOWN L. LIB., https://guides.ll.georgetown.edu/c.php?g=592919&p=4182201 [https://perma.cc/8VMY-LW73] (last visited Jan. 14, 2020).

283. *Attitudes on Same Sex Marriage*, PEW RES. CTR. (May 14, 2019), https://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/ [https://perma.cc/KE5U-E6BM].

284. United States v. Windsor, 570 U.S. 744, 744 (2013).

285. *Id.*

286. 135 S. Ct. 2584 (2015).

cases that came first fundamentally misapprehends how such a significant change occurred. That incomplete story inaccurately places the U.S. Supreme Court at the vanguard of rights recognition and again buries the critical role of incremental changes based on state constitutional law. In fact, the momentum created by *Baehr*, *Baker*, and *Goodridge*—both the state constitutional litigation and the public education efforts that accompanied the litigation—reshaped the legal landscape and public opinion, thus facilitating the federal suits that followed. Without the era of state constitutional marriage equality litigation, the *Windsor* and *Obergefell* Courts would likely have operated in 2013 and 2015 in a political environment in which same-sex marriage was still so farfetched as to be virtually unthinkable. Instead, when the Court heard those cases they were confronted, at least in part, by plaintiffs who were *already validly married*.[287] The importance of that fact should not be overlooked.

PART III.
LESSONS LEARNED FROM MARRIAGE EQUALITY

The new lineup of the Supreme Court may present challenges to rights litigators across a broad spectrum of issues. As the Court issues opinions that may become increasingly conservative, progressive advocates may find themselves in a position quite similar to that faced by LGBTQ rights litigators post-*Bowers*. However, as marriage equality advocates demonstrated, significant gains may be made using state court strategies in precisely those political moments. The marriage equality campaign's strategy in the period described *supra* should be instructive to anyone considering how to successfully leverage a state-based litigation campaign for progressive change in an era with an indifferent or hostile Supreme Court. Broken down, that campaign required both a big-picture, nationalized strategy combined with a surgical choice of specific jurisdictions in which to launch litigation.

The marriage equality strategy initially required a shift in thinking. Instead of deliberately driving *towards* the Supreme Court with the hope of making wholesale change nationally, the strategy deliberately *avoided* that moment. There are two reasons why this

287. This was true in *Windsor*, where Edith Windsor and her deceased partner had married in New York after marriage equality became available in that state through legislation. *Windsor*, 570 U.S. at 744. It was also true for some of the plaintiff couples in *Obergefell*, a case which consolidated several circuit-level appeals. Some of the *Obergefell* plaintiffs were validly married in marriage equality states, but could not have those marriages recognized in the states in which they currently resided. *Obergefell*, 135 S. Ct. at 2594–2595.

makes sense. First, as many observers have pointed out, the Supreme Court has historically been deeply uncomfortable in a position at the vanguard of social change.[288] Thus, even where federal constitutional doctrine may provide a clear path to victory, the Court is often unwilling to be the first to walk it. And second, incremental wins—although bearing the obvious and massive downside of leaving individuals in conservative states behind—also give fence-sitters an opportunity to become less resistant to social change before that change becomes ubiquitous.[289]

Next, the marriage equality strategy envisioned a steady building of progress that turned on a few early litigation victories in certain promising states. The strategy then envisioned that those initial victories would spur further shifts in public opinion as a world containing the reality of same-sex marriage continued to spin mostly normally for the rest of society. And that, advocates hoped, might encourage friendly legislatures to begin a new phase of affirmative state legislation that would establish marriage equality without the need for litigation.

If successful, the end result after several years of incremental progress would be a nation in which a growing number of states affirmatively embraced marriage equality, a shrinking percentage of the populace opposed it, and an environment that was closer to what the Court had faced when it finally took cert in *Loving* than when it had refused to do so a decade earlier in *Naim v. Naim*.[290] The Court, then, would be tasked not with undertaking a massive social experiment, but instead with securing the rights of those citi-

288. For example, in 1955 the Supreme Court refused to hear *Naim v. Naim*, a case that challenged Virginia's anti-miscegenation statute. 350 U.S. 891 (1955) (vacating an earlier grant of certiorari due to alleged inadequacies in the record and failure of parties to bring the constitutional questions properly before the Court). The Court waited a dozen years before revisiting the same statute in *Loving v. Virginia*, 388 U.S. 1, 6 (1967). As Kenji Yoshino put it, "[i]n other words, the Court waited for the nation to catch up with a principle it had already embraced. At the time *Naim* was decided, fewer than half the states permitted interracial marriage. By the time *Loving* was decided, thirty-four states did so. The Court was much more comfortable washing out the sixteen outliers than in taking out a majority of the states." Kenji Yoshino, *The Paradox of Political Power: Same-Sex Marriage and the Supreme Court*, 2012 UTAH L. REV. 527, 539 (2012).

289. Famously, Justice Ruth Bader Ginsburg has suggested that *Roe v. Wade*, 410 U.S. 113 (1973), might have been decided in too sweeping a manner. *See* Debra Cassens Weiss, *Justice Ginsburg:* Roe v. Wade *Decision Came Too Soon*, ABA J.: DAILY NEWS (Feb. 13, 2012, 12:29 PM), http://www.abajournal.com/news/article/justice_ginsburg_roe_v._wade_decision_came_too_soon [https://perma.cc/8HS5-P3SK].

290. 350 U.S. 891 (1955), *cert. denied*, 350 U.S. 891 (1955).

zens in the most conservative states who faced oppression that had come to seem backward and increasingly anomalous.

This strategy proved to be a very successful one, providing key initial victories that kept the conversation on marriage equality going, showing the nation what a world with same-sex marriage looked like, and holding off on a single gamble at the Supreme Court that could have easily become a loss on the scope of *Bowers*. We suggest that advocates wishing to advance a progressive litigation agenda in this new era should take the following important lessons from this phase of the marriage equality movement.

A. Lay the Groundwork, and Understand Your Amendment Process

First and foremost, advocates today who are considering a state constitutional strategy must gain a deep understanding of two interlinked conditions in any state in which they are considering litigation: public opinion toward the litigation aims and the ease of amendment of the state's constitution. No matter how favorable the language of the state constitution, an unpopular judicial decision that can be easily reversed through voter amendment will undermine the rights advocates seek to establish. Thus, neither opinion polls nor relative difficulty of amendment should be considered without the other.

As Mary Bonauto put it, "State-specific analysis had to accompany . . . more general points. Where did we have the best chance to win in court, gain public support, and block any negative legislation or ballot measure? Even before filing, what public education capacity could we develop and with whom?"[291] She noted:

> [W]e started litigation under state constitutions, some of which are more rights-protective than the U.S. Constitution, and where state courts would not have to worry about whether they were in or out of step with the Supreme Court. And for GLAD, it's always been extremely important to make sure that all three branches of government and the all-important 'court of public opinion' participated in the discussion. Not just when the case was filed, but beforehand.[292]

The Hawaii experience offers a rich lesson in the importance of gauging the state's culture and attitudes before plunging into litigation that might prove arduous, costly, and ultimately destabilizing or even damaging, while netting no tangible benefit to the plaintiffs themselves. Marriage equality litigators learned a hard les-

291. Bonauto, *supra* note 147, at 1495.

292. Bonauto & Esseks, *supra* note 171, at 120.

son when the court victory in *Baehr* came too early for a state legislature and public that was insufficiently supportive of the aims of the litigation.

They learned that same lesson again, but even more painfully, in 2008. In that year, California's Supreme Court ruled that a state statute banning same-sex marriage violated the California Constitution, even though California allowed same-sex couples to enter into marriage-like domestic partnerships.[293] However, California's constitution is notoriously amendment-friendly and may be initiated without legislative involvement.[294] Therefore, anti-marriage activists could leverage a populist anti-same-sex-marriage initiative strategy in a state with a pro-LGBTQ state government but soft popular support for same-sex marriage.[295] And in fact, they did exactly that, in an outrageously expensive and bitter initiative campaign that ended up costing somewhere between $70 and $85 million dollars,[296] and which resulted in a short-lived victory for anti-marriage activists.

The proposed amendment, known as Proposition 8, passed with about 52% of the vote, but was immediately challenged in a spate of both state and federal litigation.[297] The federal litigation challenged the constitutionality of Proposition 8, and a federal district court found that the marriage prohibition violated the U.S. Constitution.[298] That case ended with a whimper when the Supreme Court determined that the group who had appealed the District Court's ruling lacked standing to do so.[299] Consequently, marriage equality finally arrived permanently in California in

293. *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008).

294. *See* Connor O'Mahony, *If a Constitution is Easy to Amend, Can Judges be Less Restrained? Rights, Social Change, and Proposition 8*, 27 HARV. HUM. RTS. J. 191, 198 (2014) (discussing how the "hyper-malleability" of California's Constitution led to the passage of Proposition 8).

295. At the time, only about 44% of Californians supported same-sex marriage. Sonja Petek, *Just the FACTS: Californians' Attitude Toward Same Sex Marriage*, PUB. POL'Y INST. OF CAL. (July 2014), https://www.ppic.org/publication/californians-attitudes-toward-same-sex-marriage/ [https://perma.cc/R54A-RCB5].

296. O'Mahony, *supra* note 294, at 211.

297. *Timeline: Proposition 8*, L.A. TIMES (Nov. 30, 2012), https://www.latimes.com/local/la-prop8-timeline-story.html [https://perma.cc/CX2A-LTWC].

298. *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 1004 (N.D. Cal. 2010). The State of California refused to defend Proposition 8 when it was challenged. *See, e.g.*, Attorney General's Answer to Complaint in Intervention, *Perry*, 704 F.Supp.2d 921 (N.D. Cal. 2009) (No. 09-CV-2292 VRW) (admitting in Answer that "Proposition 8 violates the federal constitutional rights of lesbians and gay men by denying them marriage licenses").

299. Hollingsworth v. Perry, 570 U.S. 693, 715 (2013).

2013—five years and probably close to $100 million after the California Supreme Court had issued its ruling.[300]

Less-than-majority support for same-sex marriage mattered less in Vermont and Massachusetts, at least in part, because their state constitutions are more difficult to amend than California's. Thus, the kind of public education campaign that is required in a state with a difficult amendment process might be a bit different, focusing less on gaining support over a majority threshold and more on reducing the intensity of opposition and building whatever support can reasonably be gained. But the public education campaigns, particularly the one in Vermont, were seen by advocates as crucial to the success of the litigation campaign. Recall that before litigating in Vermont, activists spent almost two years building a public education campaign.

Progressive advocates should identify the ease of amendment of their respective state constitutions, and weigh that factor against popular support for their cause. If advocates decide to litigate in a particular state, they are well-advised to work with state and local grassroots activists to engage in a public education and messaging campaign well before litigation is filed.

B. Look for Provisions That Don't Exist in the U.S. Constitution

As the Hawaii and Vermont litigation demonstrates, provisions in state constitutions that have no U.S. Constitutional analog can be incredibly useful to rights litigators. As advocates gain familiarity with state constitutions, they may find irrelevant-seeming provisions that actually make excellent advocacy tools.

It is not hard to identify state constitutional provisions with no federal analog. In addition to provisions like the common benefits clauses that predate the U.S. Constitution, many state constitutions contain rights provisions developed long after the U.S. Constitution was ratified. Examples include equal rights amendments, which were modeled on the proposed federal Equal Rights Amendment[301] and an explicit right to privacy, adopted in reaction to federal Supreme Court jurisprudence.[302] Many state constitutional rights provisions are significantly more detailed than those in the

300. *Timeline of California's Prop 8*, NBC L.A., https://www.nbclosangeles.com/news/local/timeline-california-proposition-8-212382141.html [https://perma.cc/8ZMC-NWZ5] (last visited June 25, 2014).

301. Wharton, *supra* note 136, at 1201–02.

302. *See generally* Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1424–25 (1992) (internal citations omitted).

federal Constitution.[303] For example, state provisions addressing the relationship between church and state contain much more detailed guidance than the general language in the First Amendment to the United States Constitution.[304] Thus, while some state constitutional rights provisions appear similar to the federal Bill of Rights, the variety in type and language of many provisions can be wide-ranging and significant, with great potential for supporting rights claims.

C. Understand Your State's Interpretive Approach

Advocates should also familiarize themselves with a state judiciary's interpretive approach to its constitution. Of particular importance is the question of whether the state is willing to independently analyze provisions with analogs in the U.S. Constitution and, if not, the degree to which the court adheres to federal constitutional jurisprudence. A state court that acts in lockstep with the Supreme Court may arrive at very different results than a state court that exercises independent judgment while using the federal vocabulary. The importance of knowing your state's approach is plainly illustrated by *Goodridge*. Superficially, that court engaged in a traditional, tiered-scrutiny analysis, where it applied rational basis review that *sounded* much like that engaged in by federal courts. And yet, Massachusetts courts appears to, at least occasionally, treat rational basis review with a level of rigor that exceeds at least the traditional conception of federal rational basis review. Understanding this might have been the difference between deciding to litigate in Massachusetts and deciding that its likely reliance on rational basis review meant certain defeat. Identifying the state court's interpretive approach should play an important role in both deciding to bring the case and crafting arguments with the greatest likelihood of success.

CONCLUSION

While bringing federal civil rights litigation is challenging, incrementally building a national movement based on state constitutional litigation may be even more daunting. It requires an understanding of multiple constitutions, multiple approaches to interpretation, and multiple structures for amending those constitutions. It also requires an understanding of the social and political conditions on the ground in multiple jurisdictions.

303. Tarr, *supra* note 181, at 852–853.
304. *Id.*

But despite its difficulties, state constitutional litigation *can* provide a method for building incremental change and public awareness of issues in a political environment in which a big win at the Supreme Court simply isn't coming. When the Supreme Court recently invoked the political question doctrine to avoid ruling on whether and when partisan gerrymandering violates the U.S. Constitution, many non-lawyers (and even some lawyers) lamented that the ruling was the end of the line for representative democracy.[305] Yet that ruling did not undo an earlier Pennsylvania Supreme Court case that found partisan gerrymandering unconstitutional under the Free and Equal Elections Clause of the Pennsylvania Constitution[306]—in fact, it made that decision into a blueprint for other states to follow.[307]

State constitutional litigation can also provide a means for locating rights that are widely recognized, but not protected under the U.S. Constitution. The right to an education, for example, while not included in the U.S. Constitution,[308] *is* considered a fundamental human right, and is included in both the 1948 Universal Declaration of Human Rights[309] and many state constitutions.[310] Public education advocates have pushed vigorously in state courts for both equal access to education and a baseline level of educational adequacy under their state constitutions.[311]

State constitutions can also provide an important backstop in the event that the Supreme Court rolls back existing precedent protecting civil rights. Civil rights advocates increasingly fear that the Court has become more willing to ignore *stare decisis* and overturn

305. Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

306. League of Women Voters v. Commonwealth, 178 A.3d 737, 824–25 (Pa. 2018).

307. Jonathan Lai, *U.S. Supreme Court: Partisan gerrymandering is a political issue that federal courts can't touch*, PHILA. INQUIRER (June 27, 2019), https://www.inquirer.com/politics/pennsylvania/supreme-court-gerrymandering-decisions-affect-pa-20190627.html [https://perma.cc/RR8K-ZPC2].

308. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).

309. *See generally Right to Education*, U.N. EDUC., SCI. AND CULTURAL ORG., https://en.unesco.org/themes/right-to-education [https://perma.cc/9QVM-YCGN].

310. For a useful 50-state chart, see Emily Parker, *Constitutional Obligations for Public Education*, https://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf [https://perma.cc/K5YV-CNK4].

311. Dana Goldstein, *How Do You Get Better Schools? Take the State to Court, More Advocates Say*, N.Y. TIMES (Aug. 21, 2018), https://www.nytimes.com/2018/08/21/us/school-segregation-funding-lawsuits.html [https://perma.cc/D25S-NE3Y].

existing precedent in a number of areas touching on civil rights.[312] Chief among these fears is the fear that the court will undo or at least scale back *Roe v. Wade*[313] to the point that women will lose federal protection for reproductive freedom.[314] Yet this same year, the Kansas Supreme Court found the right to abortion was protected by section 1 of the Kansas Constitution's Bill of Rights—and some other state courts have held comparably.[315] Thus, even were the Supreme Court to reverse *Roe* entirely, state courts could, in some places, remain a bulwark in retaining women's right to choose whether to continue a pregnancy.

And in some constitutions, rights can be found that are unique to the state's history. In 2019, for example, the Hawaii Supreme Court found that the State was required under its own constitution to make all reasonable efforts to provide access to Hawaiian immersion education.[316] There is little hope of locating such a right in the U.S. Constitution, but Hawaii's experiences with colonialist erasure of indigenous culture led its Supreme Court to not only require that such an education be made more widely available, but to open its opinion with the following quote: "The language of a people is an inextricable part of the identity of that people. Therefore, a revitalization of a suppressed language goes hand in hand with a revitalization of a suppressed cultural and political identity."[317]

For all of these reasons, there is real hope for progress to be found in the strategy of, in the immortal words of Lady Gaga, "chang[ing] the world one sequin at a time" through state constitu-

312. Robert A. Klain, *We Need to Prepare for a Complete Reversal of the Role the Supreme Court Plays in Our Lives*, WASH. POST (June 11, 2019, 5:22 PM), https://www.washingtonpost.com/opinions/we-need-to-prepare-for-a-complete-reversal-of-the-role-the-supreme-court-plays-in-our-lives/2019/06/11/b492d894-8c5b-11e9-adf3-f70f78c156e8_story.html [https://perma.cc/QKN7-AKYR].

313. Roe v. Wade, 410 U.S. 113 (1973).

314. Editorial, Roe v. Wade *is at Risk. Here's How to Prepare*, N.Y. TIMES (Jan. 21, 2019), https://www.nytimes.com/2019/01/21/opinion/roe-wade-abortion.html [https://perma.cc/D8GN-WTT5].

315. Hodes & Nauser v. Schmidt, 440 P.3d 461, 461 (2019).

316. Clarabal v. Dep't of Educ., 145 Haw. 69 (2019). *See also* HAW. CONST. art. X, § 4 (1978) ("The State shall promote the study of Hawaiian culture, history and language. The State shall provide for a Hawaiian education program consisting of language, culture and history in the public schools. The use of community expertise shall be encouraged as a suitable and essential means in furtherance of the Hawaiian education program.").

317. *Clarabal*, 145 Haw. at 69 (quoting Shari Nakata, *Language Suppression, Revitalization, and Native Hawaiian Identity*, 2 CHAP. DIVERSITY & SOC. JUST. F. 14, 15 (2017)).

tional litigation.[318] The authors ask that advocates considering rights litigation think beyond the federal courts and the currently bleak-seeming political moment. As the marriage equality movement teaches us, even in the darkest of times rights advocacy can continue to advance incrementally, and that incremental change can build into something truly ground-shaking, in a remarkably short period of time.

318. Vega, *supra* note 1.

INJURY-IN-FACT, HISTORICAL FICTION: CONTEMPORARY STANDING DOCTRINE AND THE ORIGINAL MEANING OF ARTICLE III

MICHAEL FREEDMAN

Justice Scalia had a problem. Under the False Claims Act, Congress had authorized private citizens to sue in their individual capacity to vindicate fraud on the United States, rewarding successful plaintiffs with a portion of the judgment. The Supreme Court had granted certiorari in the case of *Vermont Agency of Natural Resources v. United States ex rel. Stevens* to determine whether the Constitution permitted Congress to authorize such private prosecutions.[1] Suddenly, two different strands of Justice Scalia's jurisprudence seemed to be in direct conflict.[2]

On the one hand, Justice Scalia was outspoken in his belief that the Constitution authorized federal courts to adjudicate lawsuits only if the defendant's unlawful conduct had caused the plaintiff an "injury-in-fact."[3] Over the course of Justice Scalia's tenure, the Court had solidified this belief into an expansive body of laws governing justiciability–the doctrine of standing.[4] The False Claims Act, however, seemed to waive this requirement, allowing plaintiffs to sue and recover damages for fraud against the government, even if the fraud had not injured them personally.[5]

On the other hand, Justice Scalia had long maintained that judges should interpret constitutional provisions in accordance with the meaning ascribed to them at the time they were ratified.[6] To that end, founding-era law was replete with statutes that authorized uninjured plaintiffs to sue and collect damages for violations of commercial law.[7] More so, such statutes were enacted

1. Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 771–78 (2000).

2. *See* Steven L. Winter, *What if Justice Scalia Took History and the Rule of Law Seriously?*, 12 DUKE ENVTL. L. & POL'Y F. 155, 164 (2001).

3. *See generally* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

4. F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 290–99 (2008) (summarizing the development of contemporary standing doctrine).

5. 31 U.S.C.A § 3730(b) (West 2010).

6. *See* Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1921 (2017) ("Justice Scalia was the public face of modern originalism. Originalism maintains both that constitutional text means what it did at the time it was ratified and that this original public meaning is authoritative.").

7. *See, e.g.*, Act of Mar. 22, 1794, ch. 11, §§ 2, 4, 1 Stat. 347, 349 (informer for informers against violators of slave trade laws); Act of May 8, 1792, ch. 36, § 5, 1 Stat. 275, 277–78; Act of July 31, 1789, ch. 5, § 29, 1 Stat. 44–45 (informer for informers against violators of customhouse regulation). *See generally* Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 296–97 n.104 (1989).

and enforced without any apparent constitutional objection by members of the founding generation.[8]

In the face of this conflict, Justice Scalia dodged. Applying a previously-unannounced legal fiction, Justice Scalia, writing for the Court, held that plaintiffs suing under the False Claims Act had been assigned the government's claim—the injury to the government rendering the suit justiciable.[9]

The Court's conclusion raises a number of difficult questions about the limits of standing doctrine and the injury-in-fact requirement. If a plaintiff could gain standing to sue a defendant because (1) the defendant had injured the United States through fraud, and (2) the United States had assigned its claim to the plaintiff, could any injured party assign their claim to an uninjured plaintiff?[10] It is well settled that the United States is injured when its laws are violated.[11] Were there any limits on the United States' ability to assign claims for violations of public law to private litigants?[12] Would it be constitutional, for instance, for the Federal Trade Commission to assign its claim against a company engaged in unfair trade practices to a plaintiff uninjured by such practices?

These questions do not necessarily suggest the Court got *Stevens* wrong. They do show, however, that the Court could not resolve the tension between its standing doctrine and the long history of constitutionally uncontroversial qui tam statutes in the

8. *See* Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 175–77 (1992).

9. Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 773 (2000) ("We believe, however, that adequate basis for the relator's suit for his bounty is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor.").

10. *Compare, e.g.*, Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 285–86 (2008) (holding that, under *Stevens*, when a payphone operator assigns their claim against a long-distance carrier for monies owed to a collection firm, the firm has standing to sue the carrier even where the firm will not receive a portion of the judgement), *with APCC Servs.*, 544 U.S. at 300–01 (Roberts, C.J., dissenting) (arguing that *Stevens* does not apply when the assignee will not receive a portion of the judgement).

11. *See, e.g.*, *Stevens*, 529 U.S. at 771 ("It is beyond doubt that the complaint asserts an injury to the United States . . . the injury to its sovereignty arising from violation of its laws (which suffices to support a criminal lawsuit by the Government) . . . .").

12. *Compare* Myriam E. Gilles, *Representational Standing:* U.S. ex rel. Stevens *and the Future of Public Law Litigation*, 89 CALIF. L. REV. 315, 342 (2001) ("It seems safe to say that assignment may form the basis of representational standing only where the government's claim seeks to vindicate a proprietary injury."), *with* Sunstein, *supra* note 8, at 232–34 (arguing that Congressional assignment of cash bounties will cure standing problems in the context of citizen suits generally). R

United States and England without announcing a potentially wide-ranging exception to standing doctrine's injury-in-fact requirement. This is symptomatic of a larger tension between the Court's rhetoric regarding standing doctrine and the history of English and U.S. law. On the one hand, the Court's rhetoric surrounding standing doctrine suggests the doctrine has deep roots in English law and U.S. history.[13] On the other hand, although the vast majority of founding-era private lawsuits in both England and the United States were undoubtedly brought by plaintiffs vindicating a private injury, no authoritative body in either country ever explicitly held that injury-in-fact was a universal prerequisite to judicial relief.[14]

In this Note, I suggest a simpler resolution to this tension than that offered by the *Stevens* Court: standing doctrine is a modern invention rooted in neither English nor U.S. legal history.[15] The

13. *See, e.g.*, Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 150 (1951) ("[A] court will not decide a question unless the nature of the action challenged, the kind of injury inflicted, and the relationship between the parties are such that judicial determination is consonant with what was, generally speaking, the business of the Colonial courts and the courts of Westminster when the Constitution was framed."); *see also* James E. Pfander, *Scalia's Legacy: Originalism and Change in the Law of Standing*, 6 BRIT. J. AM. LEGAL STUD. 85, 101–07 (2017).

14. *See* Sunstein, *supra* note 8, at 178. R

15. Several scholars have already weighed in on this debate. On one side, Professors Louis Jaffe and Raoul Berger both produce a number of examples wherein English and early American courts seem to permit uninjured plaintiffs to bring suit. *See* Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 823–24 (1969); Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1270 (1961). Examining this evidence, both Jaffe and Burger conclude that an "injury-in-fact" requirement would have been a foreign concept to members of the founding generation. Berger, *supra*, at 837–40; Jaffe, *supra*, at 1269–82. Professors Stephen Winter and Cass Sunstein both capitalize on Jaffe and Berger's research in their criticism of the Court's (then) emerging commitment to a constitutionalized injury-in-fact requirement. Sunstein, *supra* note 8, at 170–80; Stephen L. Winter, *The Metaphor of* R *Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1418–25 (1988). Following Jaffe and Berger, three papers emerged to defend the historical pedigree of an injury-in-fact requirement. First, Bradley Clanton argues that the English King's Bench would not issue its prerogative writs at the behest of a "stranger" and, on that basis, concludes that English law disallowed suits by uninjured plaintiffs. Bradley S. Clanton, *Standing and the English Prerogative Writs: The Original Understanding*, 63 BROOK. L. REV. 1001, 1009–10 (1997). Second, Professors James Leonard and Joanne Brant argue that an injury-in-fact requirement is consistent with the original meaning of Article III because such a requirement is necessary to actualize the Founders' vision for separation of powers. *See* James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, the Injury-in-Fact Rule, and the Framers' Plan for Federal Courts of Limited Jurisdiction*, 54 RUTGERS L. REV. 1, 33–91 (2001). Finally, an article by Professors Ann

founding generation would not have been familiar with a constitutional requirement that plaintiffs demonstrate injury-in-fact for their suit to be justiciable. Although many causes of action historically available to private plaintiffs required them to prove injury to succeed on the merits of their claim, that requirement was a function of the positive law governing their cause of action, not a constitutional background principle of justiciability.

In the following sections, I show that contemporary standing doctrine is inconsistent with the Constitution as it was understood at the time of ratification. In Part I, I refine my research question, defining both the concept of "original meaning" and "contemporary standing doctrine," and developing a theory about what evidence might indicate whether the former was consistent with the latter. In Part II, I turn to English and U.S. legal history to show that contemporary standing doctrine is inconsistent with the original meaning of Article III. In the first sub-section, I examine the practices of founding-era English courts and Parliament, which informed the founding generation's understanding of judicial power. I show that, in at least some circumstances, a typical member of the founding generation would have believed that Parliament could create, and English courts could adjudicate, causes of action brought by uninjured plaintiffs. In the second sub-section, I examine constitutional ratification debates surrounding the scope of the federal courts' powers to adjudicate lawsuits. I find that the debates are ambiguous, shedding little light on the role of standing during the founding era. Likewise, in the third sub-section, I find that the text of Article III, as it would have been understood in the founding era, neither clearly conveys nor clearly refutes the proposition that federal judicial power extended only to suits brought by injured plaintiffs. Lastly, in the fourth sub-section, I examine eighteenth and nineteenth-century U.S. law. I conclude that the founding generation would not have understood Article III to dictate a universal bar to suits by uninjured plaintiffs. In the course of this analysis, I specifically examine and reject the thesis that separation of powers concerns would have spurred a founding-era interpreter to read an injury-in-fact requirement into Article III. Finally, in Part III, I challenge the reasoning put forth in papers by Professors Leonard and Brandt, and Professors Woolhandler and

Woolhandler and Caleb Nelson argues that although formal standing doctrine may be a relatively recent invention, early U.S. courts consistently employed various justiciability principles to limit judicial relief to injured plaintiffs. *See* Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689 (2004).

Nelson, which concluded that standing doctrine was not inconsistent with the original meaning of Article III. Ultimately, I conclude that an injury-in-fact requirement, whatever its prudential merits, is a modern invention rather than one rooted in the Constitution's original meaning.

Analysis of the Court's misconception about the history of standing doctrine is relevant in the modern era because societal changes and new technology require the courts to regularly grapple with new forms of injury that test the limits of established doctrines of justiciability.[16] The Court looks to historical justiciability principles to inform its approach to new theories of injury, drawing on historical nuisance cases to develop modern rules about distributing information on the internet,[17] or Elizabethan informer statutes to evaluate the validity of modern qui tam actions.[18] Thus, even if the Court does not plan to reconsider the basic tenets of standing doctrine anytime soon, the debate surrounding standing doctrine's historical pedigree has important implications for how standing evolves to meet challenges of the modern era.

As a final note, although my purpose is to show that the original meaning of Article III is inconsistent with contemporary standing doctrine, I take no position on whether inconsistency with original meaning renders a legal doctrine per se unconstitutional. I do not need to. Even though originalists are noteworthy for their belief that the original meaning of the Constitution is controlling regardless of other interpretive considerations (e.g., precedent, policy, morality),[19] most other widely accepted methodologies at least consider original meaning as an analytical factor.[20] As such,

16. *See, e.g.*, Microsoft Corp. v. U.S. Dep't of Justice, 233 F. Supp. 3d 887, 899 (W.D. Wash. 2017) (evaluating whether Microsoft has standing to challenge restrictions on its ability to inform users of its cloud products that the government has searched their data); Righthaven LLC v. Wolf, 813 F. Supp. 2d 1265, 1268–73 (D. Colo. 2011) (evaluating standing in a digital patent troll case); Miles L. Galbraith, Comment, *Identity Crisis: Seeking a Unified Approach to Plaintiff Standing for Data Security Breaches of Sensitive Personal Information*, 62 AM. U. L. REV. 1365, 1381–85 (2013) (discussing plaintiffs' standing in data breach cases).

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

18. *See* Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 774–78 (2000).

19. DENNIS J. GOLDFORD, THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM 139 (2005).

20. *See* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12–13 (1991) (describing non-originalist methodologies that take into account original meaning); *see also* Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 24–25 (2009) ("Not a single self-identifying non-originalist of whom I'm aware

analyzing the Constitution's original meaning is worthwhile under almost any theory of constitutional interpretation. With this in mind, I leave debates about the implications of my conclusion for the Court's justiciability doctrine for another day and turn to the history itself.

I.
DEVELOPING A RESEARCH QUESTION

To examine historical evidence probative of Article III's original meaning, it is necessary to first develop a conceptual framework for analyzing such evidence. To that end, asking whether or not contemporary standing doctrine is consistent with the original meaning of Article III requires us to first answer three subsidiary questions: (1) What does it mean to speak of the Constitution's "original meaning"?; (2) What is "contemporary standing doctrine"?; and (3) What evidence is probative of whether the two are consistent? In this part, I address each question before synthesizing the answers into a research question.

A. Defining "Original Meaning"

For purposes of this inquiry, when I refer to the original meaning of a constitutional provision, I am referring to the meaning a reasonable interpreter would have ascribed to the provision around the time the provision was ratified.[21] To be sure, this is not the only way to frame an inquiry into the original meaning of the Constitution. Others have asked about the "intention," the "purpose," and the "understanding" of the framers.[22] Nonetheless, I ask about the hypothetical findings of a reasonable, founding-era interpreter for two reasons.

First, a consensus has emerged among originalist scholars that conceptualizing the original meaning of a constitutional provision as the provision's "original public meaning" is the most methodologically defensible way to define original meaning.[23] According

argues that original meaning has no bearing on proper judicial constitutional interpretation."); *see generally* Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1754 (2015).

21. *See* Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1127–33 (2003).

22. *See, e.g.*, Fallon, Jr., *supra* note 20, at 1763–65 (surveying originalist methodology). R

23. *See* Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 247–55 (2009); *see also* Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99 VA. L. REV. 493, 574 (2013); Kesavan & Paulsen, *supra* note 21, at 1134–48. R

to this theory, the idea of original meaning, by definition, presupposes that constitutional text can have an objective meaning distinct from the meaning subjectively imparted to it by any individual interpreter.[24] It follows then that a text's public meaning—the meaning that would most likely be ascribed to the text by a reasonable interpreter familiar with the language and context in which the text was situated—does not tie a text's meaning to the interpretation of an individual or a discrete group.[25] Thus, conceptualizing the original meaning of a constitutional provision as the provision's original public meaning is the only analytic framework that recognizes a distinction between the meaning of constitutional text itself and the subjective interpretation of a particular figure or group.[26] By contrast, conceptualizing the Constitution's original meaning as the meaning intended or understood by the founders or ratifiers implicitly rejects the idea that the constitutional text has objective meaning distinct from the subjective meaning of particular interpreters.

Second, I dedicate only one paragraph to the above analysis because, to the extent that the existence or wisdom of this consensus is debatable, the debate is not worth joining. As Professor Michael McConnell notes, "For all of the attention given to the difference between 'original public meaning' originalism, and originalism based on the understandings of the framers and ratifiers, no one has identified nontrivial examples of actual constitutional interpretation that turn on the distinction."[27] Thus, for the purpose of my analysis, original public meaning of a constitutional provision refers to the meaning a reasonable interpreter would have ascribed to the provision at the time the provision was ratified.

B. Defining Contemporary Standing Doctrine

I define standing doctrine as a justiciability doctrine that holds a lawsuit is justiciable only if the plaintiff has suffered an injury that is both traceable to the defendant's conduct giving rise to liability and redressable through a mode of relief the court may legally issue.

24. *See, e.g.*, Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 551–53 (1994).

25. *See, e.g.*, Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 108–11 (2001).

26. *See* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 397–98 (2002).

27. Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1758 (2015).

The Supreme Court solidified contemporary standing doctrine in the 1992 case, *Lujan v. Defenders of Wildlife*.[28] In *Lujan*, the plaintiffs accused the government of violating the Endangered Species Act, which required federal government agencies to consult with the Secretary of the Interior or Commerce before taking action that might harm an endangered species. The Department of the Interior interpreted the Act to require consultation only for projects on U.S. soil or the high seas. When the federal government, pursuant to this interpretation, authorized funding for overseas hydroelectric projects without consulting either Secretary, the plaintiff environmentalists brought suit under the Act's citizen suit provision, which authorized anyone to sue to enjoin violations of the Act.[29] The plaintiffs argued that the Act must be interpreted to apply to government action worldwide, asking the Court to require the Secretary to promulgate a new rule to that effect.

The Supreme Court ordered the suit dismissed, finding that adjudication of the suit would exceed the judiciary's powers under Article III. The majority reasoned that, although the Constitution grants the judiciary power to adjudicate "cases" and "controversies," it limits that power to "cases" and "controversies" that "are of the judicial sort."[30] According to the majority: "One of those landmarks, setting apart the cases and controversies that are of the justiciable sort referred to in Article III . . . is the doctrine of standing."[31] The majority held that the "irreducible constitutional minimum of standing contains three elements": (1) "the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actually or imminent," (2) "there must be causal connection between the injury and the conduct complained of," and (3) "it must be likely as opposed to merely speculative that the injury will be 'redressed by a favorable decision.' "[32]

Under this framework, the Court drew two conclusions. First, it found that federal courts lacked jurisdiction to hear the plaintiffs' suit because the plaintiffs failed to show they suffered a particular-

28. Lujan v. Defs. of Wildlife, 504 U.S. 555, 555 (1992).

29. *Id.* at 555, 559.

30. *Id.* at 559–60 (1992) ("To be sure, [Article III] limits the jurisdiction of federal courts to 'Cases' and 'Controversies,' but an executive inquiry can bear the name 'case' (the Hoffa case) and a legislative dispute can bear the name 'controversy' (the Smoot-Hawley controversy). 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.").

31. *Id.* at 560.

32. *Id.* at 560–61.

ized injury as a result of the government's failure to consult with the Department of the Interior.[33] Second, the Court rejected plaintiffs' argument that their suit was justiciable even without injury because the Endangered Species Act authorized any citizen to challenge the Secretary's failure to consult. According to the majority, Congress lacked the power to authorize suits by uninjured plaintiffs.[34] Ever since, *Lujan* has stood for the proposition that the Constitution requires private plaintiffs seeking relief in federal court to show that they have suffered a concrete injury, traceable to the defendant's unlawful conduct and redressable by a court.

Moreover, standing doctrine not only requires a plaintiff to show injury, it also prescribes limits on an adequate injury for the purposes of Article III. Since *Lujan*, the Court has held that to satisfy the injury-in-fact requirement, a plaintiff's injury must meet four criteria. It must be: (1) an invasion of a legally protected interest, (2) concrete, (3) particularized rather than general, and (4) actual or imminent rather than conjectural or hypothetical.[35] Because these limits are derived from the Constitution, no law can create a cause of action that allows plaintiffs to sue absent an injury satisfying all four requirements.[36] This is why the *Lujan* Court found that the plaintiffs' suit was non-justiciable despite the Endangered Species Act's citizen suit provision. The Court found that Congress lacked the power to authorize courts to adjudicate suits by an uninjured plaintiff.

Since *Lujan*, the Court has consistently stated that standing doctrine is the product of the Constitution's division of powers between an executive, legislative, and judicial branch.[37] As Professor Heather Elliott details, the Court has primarily relied on three justifications for why standing doctrine is necessary to effectuate separa-

33. *Id.* at 562–67.

34. *Lujan*, 504 U.S. at 571–73.

35. *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016).

36. *See id.* at 1547–48; Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997) ("It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.").

37. *See* Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 663 (1993) ("The doctrine of standing is an essential and unchanging part of the case-or-controversy requirement of Article III which itself defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded.") (internal citation and quotation marks omitted); Allen v. Wright, 468 U.S. 737, 752 (1984) ("[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers."); Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 461–63 (2008); Linda Sandstrom Simard, *Standing Alone: Do We Still Need the Political Question Doctrine?*, 100 DICK. L. REV. 303, 318–23 (1996).

tion of powers.[38] First, the Court has argued that resolution of disputes involving uninjured parties is simply not an exercise of judicial power.[39] In particular, the Court has emphasized that an injury is necessary to ensure that a lawsuit is adversarial and the parties have incentive to oppose each other.[40] Second, the Court has argued that if an injury is common to most or all of the citizenry, it is the type of problem the Constitution has charged the political branches, not the courts, with addressing.[41] Third, the Court has held that if Congress could authorize any person to sue to remedy violations of federal law, it would effectively usurp the executive branch's role by allowing any citizen to ask the courts to second-guess every executive interpretation or implementation of that law.[42]

Thus, for the purposes of this Note, standing doctrine has three core elements. First, standing doctrine holds that courts may not adjudicate lawsuits unless the plaintiff has suffered an injury that constitutes the invasion of a legally protected right and is concrete, particularized, actual or imminent, traceable to the unlawful conduct of the defendant, and redressable through means available to the court. Second, because standing doctrine is a constitutional

38. Elliott, *supra* note 37, at 461–63. R

39. *Id.* at 469; *see* Flast v. Cohen, 392 U.S. 83, 94–95 (1968) ("Embodied in the words 'cases' and 'controversies' are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process."); *see also* Massachusetts v. EPA, 549 U.S. 497, 516 (2007).

40. Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 80 (1978) ("There are good and sufficient reasons for this prudential limitation on standing when rights of third parties are implicated—the avoidance of the adjudication of rights which those not before the Court may not wish to assert, and the assurance that the most effective advocate of the rights at issue is present to champion them."); Baker v. Carr, 369 U.S. 186, 204 (1962) ("Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing.").

41. Elliot, *supra* note 37, at 477–82; *see* Warth v. Seldin, 422 U.S. 490, 500 (1975) ("Without such limitations [on standing] . . . the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions . . . ."); *Allen*, 468 U.S. at 756 ("Recognition of standing in such circumstances would transform the federal courts into no more than a vehicle for the vindication of the value interests of concerned bystanders." (quoting United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 687 (1973)). R

42. Elliot, *supra* note 37, at 493–96; *see* Lujan v. Defs. of Wildlife, 504 U.S. 555, 576–78 (1992). R

limit, Congress lacks the power to create a cause of action for a plaintiff that cannot meet the requirements for an injury-in-fact. Third, such limits on the judiciary's ability to adjudicate lawsuits and Congress's ability to authorize them stem from the separation of power into executive, legislative, and judicial branches.

C. Establishing a Research Question

The above analysis yields two important conclusions on which I can construct my research questions. First, the original meaning of a constitutional provision is best conceptualized as the meaning a hypothetical reasonable interpreter would ascribe to the provision around the time it was ratified. Second, constitutional standing doctrine holds that courts can adjudicate, and Congress can authorize, lawsuits only if plaintiffs have suffered an injury-in-fact that consists of a particular, concrete, actual or imminent invasion of a legally protected right that is both traceable to the defendant's conduct and redressable by the court. Thus, standing doctrine is consistent with the Constitution's original meaning only if a reasonable interpreter reading the Constitution around the time of ratification would have understood the Constitution to so limit the jurisdiction of federal courts.

To determine whether a hypothetical interpreter would have ascribed such meaning to the Constitution requires answering two related questions: (1) What are the relevant constitutional provisions that might have expressed an injury-in-fact requirement to a founding-era interpreter?; and (2) What evidence is probative of how a founding-era interpreter would have interpreted those provisions?

With regard to the first question, Article III of the Constitution outlines the power of the judicial branch. Thus, if the Constitution denied federal courts the power to hear cases lacking an injured plaintiff, it must be true that some combination of words in Article III must have conveyed such a limit to a founding-era interpreter.[43]

Article III extends the "judicial power" to a discrete set of enumerated "cases" and "controversies,"[44] yet contains no express limit on the power of federal courts to adjudicate suits by uninjured plaintiffs. If a founding era interpreter would have read Article III

43. *Cf.* ROBERT H. BORK, THE TEMPTING OF AMERICA 144 (1990) ("All that counts is how the words used in the Constitution would have been understood at the time. The original understanding is thus manifested in the words used and in secondary materials, such as debates at the [ratifying] conventions, public discussion, newspaper articles, dictionaries in use at the time, and the like.").

44. U.S. CONST. art. III, § 2.

to contain such a limit, the limit must be derived from the fact the judiciary is granted only the use of "judicial power," and only over "cases" and "controversies." Thus, to determine whether standing doctrine is consistent with the original meaning of Article III, we must ask whether a founding-era interpreter would have understood the terms "judicial power" in relation to "cases" and "controversies" to denote only power to resolve disputes involving injured parties.

With regard to the second question, four types of evidence are probative of how a founding-era interpreter would have interpreted Article III's grant of "judicial power" to "cases" and "controversies." The first is English law. Although the founders did not adopt English law wholesale, the founding generation's understanding of legal concepts was primarily based in English law.[45] Thus, whether the terms "judicial power," "case," and "controversy," as used in English law, implied a bar to adjudication of suits by uninjured plaintiffs is probative of whether a founding era interpreter would have found Article III to mandate similar limits on the power of the U.S. judiciary. The second is evidence from debates over the power and jurisdiction of the judicial branch at the constitutional and ratifying conventions. If those debates show there was clear intent on the part of the founding generation to either permit or forbid adjudication of suits by uninjured plaintiffs, it would suggest that the words in Article III would have signaled such a limit to a founding-era interpreter.[46] The third is the ordinary meaning of the words "judicial power," "case," and "controversy" at the time of ratification. I will examine whether the plain meaning of the words themselves in

45. *See* Brian J. Moline, *Early American Legal Education*, 42 WASHBURN L.J. 775, 786–92 (2004); *see also* Andrew Tutt, *Treaty Textualism*, 39 YALE J. INT'L L. 283, 292–94 (2014).

46. The reason for this, in essence, is that the founders themselves were reasonable people in the founding era. If they intended the Constitution to permit or forbid suits by uninjured plaintiffs, they would have chosen language that would convey such a bar to a reasonable person. This conclusion in turn creates a presumption that the words in the Constitution would have held such a meaning. This presumption is obviously rebuttable—writers are not always successful at conveying their intended meaning—but it serves as a reasonable starting point for analysis. *See* John F. Manning, *Textualism and the Role of* The Federalist *in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337, 1341–42 (1998) ("Even if we cannot know the actual intent of the legislature, we can at least charge each legislator with the intention 'to say what one would be normally understood as saying, given the circumstances in which one said it.' Ascribing that sort of objectified intent to legislators offers an intelligible way to hold legislators accountable for the laws they have passed, whether or not they have any actual intent, singly or collectively, respecting its details. Textualists subscribe to this theory of intent.").

the founding era would have led a founding-era interpreter to interpret Article III as a bar on adjudication of suits by uninjured plaintiffs. The fourth and final category of probative evidence is the practice of Congress and state and federal courts following the Constitution's ratification.

Finally, I want to be clear: asking whether Article III was originally understood to permit courts to hear suits by uninjured plaintiffs is not the same as asking whether injury was, as a matter of course, irrelevant to the appropriateness of judicial relief. Standing doctrine holds that injury-in-fact is a constitutional prerequisite for federal jurisdiction.[47] The cause of action under which a plaintiff seeks relief will inevitably require the plaintiff to make additional showings. Thus, there is no question that the vast majority of causes of action available to founding-era plaintiffs would have required them to demonstrate that they had been injured by the defendant's conduct. For example, a property owner needed to show they owned the property in question in order to sue for trespass, and a plaintiff would have to show they were party to a contract in order to sue for breach. This Note, however, asks whether Article III was understood by members of the founding generation to require *every* plaintiff to show injury, or whether the relevance of injury was a function only of the substantive law underlying a claim.

Synthesizing the above analysis, my research question is as follows: Taking into account the (A) practice of English courts, (B) pre-ratifying debates, (C) founding-era plain meaning of the Constitution's words, and (D) post-ratification decisions by Congress and courts in the United States, is it more likely than not that a reasonable person interpreting the Constitution around the time of ratification would have understood the fact that Article III grants federal courts only "judicial power" over "cases" and "controversies" to mean that the federal judiciary has the power to adjudicate lawsuits only if the plaintiff had suffered an injury traceable to the defendant's unlawful conduct and redressable by the court? As the following pages will show, the answer to this question is "no."

47. *See Lujan*, 504 U.S. at 560 (describing standing as an "irreducible constitutional minimum").

II.
STANDING DOCTRINE AND THE ORIGINAL MEANING OF ARTICLE III

A. English Law

At the time of the founding, nothing akin to standing doctrine existed in English law. Although the founders did not adopt the practices of the English judiciary wholesale, English law informed their understanding of legal concepts generally[48] and of the role of the courts in particular.[49] Therefore, the lack of any historical antecedents to standing doctrine in founding-era English law suggests (though not definitively) that a founding-era interpreter would not have understood Article III's grant of "judicial power" over "cases" and "controversies" to convey anything akin to standing doctrine.

This section proceeds in two parts. In the first part, I examine the structure of the founding-era English government. There, I argue that, because founding-era English courts were inferior to, not co-equal with, Parliament, standing doctrine could not have existed at English law. Parliamentary supremacy over the courts would have precluded legal doctrine limiting Parliament's ability to authorize uninjured plaintiffs to seek judicial relief. In the second section, I show that English courts did in fact entertain suits by uninjured plaintiffs. Specifically, King's Bench writs of prohibition and information in the nature of quo warranto could be issued at the behest of plaintiffs that lacked a stake in the underlying controversy.

1. Parliamentary Supremacy and the Structure of English Governance

Unlike in the United States, where sovereignty is vested in the people, the sovereignty of founding-era England was vested in Parliament. Thus, Parliament was largely empowered to create whatever substantive law it saw fit.[50] This principle was articulated by Lord Coke, who claimed that Parliament was "so transcendent and absolute, that it cannot be confined, either for causes or per-

48. *See* Moline, *supra* note 45. R

49. *See* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 27–28 (2001) ("In short, English law undoubtedly informed their understanding of the government they were forging. Hence, if the equity of the statute reflected a settled common law understanding of what judges do when they implement statutes, it may supply probative evidence of the Founders' own understanding of 'the judicial Power.'"); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 400–07 (1996).

50. *See* THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 337 (5th ed. 1956); Tyrrell Williams, *The Source of Authority for Rules of Court Affecting Procedure*, 22 WASH. U. L.Q. 459, 489–91 (1937).

sons, within any bounds."[51] Similarly, Blackstone stated that "the legislature, being in truth the sovereign power, is always of equal, always of absolute authority: it acknowledged no superior upon earth."[52]

This "absolute authority" included the power to control access to judicial relief. For instance, in the eighteenth century, Parliament created numerous causes of actions that had not existed at common law,[53] including rights in labor,[54] bankruptcy,[55] and patent infringement.[56] Moreover, a founding-era jurist would have likely understood Parliament to possess the power not only to create new causes of action, but to alter the jurisdiction of English courts. First, the English courts were not a co-equal branch of government, and thus, did not possess a separate base of power that Parliament could not alter.[57] Second, Parliament altered the jurisdiction of English courts without any apparent controversy in the nineteenth century by passing the Chancery Amendment Act of 1858.[58] The Act gave courts of equity the right to assign damages along with equitable remedies in cases where they otherwise had jurisdiction.[59] If Parliament had been thought to lack the ability to alter the jurisdiction of English courts in the late eighteenth century, the validity of such changes would have been at least challenged in the nineteenth century.[60]

51. 4 EDWARD COKE, THE INSTITUTES OF THE LAWS OF ENGLAND 36 (1634).

52. 1 WILLIAM BLACKSTONE, COMMENTARIES *90.

53. *See* Suja A. Thomas, *A Limitation on Congress: "In Suits at Common Law"*, 71 OHIO ST. L.J. 1071, 1097 (2010).

54. *See generally* Frauds by Workmen Act 1748, 22 Geo. 2, c.27 (Eng.).

55. Bankrupts Act 1705, 5 Ann., c. 4, (Eng.).

56. Copyright Act 1710, 8 Ann., c. 21 (Eng.).

57. S*ee* Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 814 (2001).

58. Chancery Amendment Act 1858, 21 & 22 Vict. c. 27 (Eng.); *see* Thomas, *supra* note 53, at 1098. R

59. Chancery Amendment Act 1858, 21 & 22 Vict. c. 27 (Eng.); H. Tomás Gómez-Arostegui, *Prospective Compensation in Lieu of a Final Injunction in Patent and Copyright Cases*, 78 FORDHAM L. REV. 1661, 1699 (2010).

60. To be sure, one should not impute the belief that Parliament had limitless power to create causes of action to a hypothetical founding-era constitutional interpreter. By the time of the founding, England had experienced numerous debates about "fundamental law," or "unwritten constitution," limiting Parliament's power. Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 856 (1978). In the landmark *Dr. Bonham's Case*, Lord Coke remarked that "when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void." Thomas Bonham v. Coll. of Physicians [1610] 77 Eng. Rep. 647, 652 (C.P.). This sentiment was repeated by

Thus, the structure of English governance would not have facilitated the sort of background principle that could serve as a genuine antecedent to modern standing doctrine. If one had asked a founding-era English jurist whether Parliament had the power to create a cause of action that did not require a plaintiff to show injury, the answer almost certainly would have been "yes." Who would have stopped Parliament? On what grounds? As a result, to the extent that the structure of English law would have informed a founding-era interpreter's understanding of Article III, it is unlikely that interpreter would have understood English courts to be limited by any principles rendering suit by uninjured plaintiffs universally non-justiciable.

2. Informer Actions, Prerogative Writs, and the Practice of English Courts

Even if Parliament possessed the power to create a cause of action for an uninjured plaintiff, if Parliament never actually exercised whatever power it might have had to create causes of action for uninjured plaintiffs, and if English courts otherwise did not hear suits from uninjured plaintiffs, it could still be true that the terms "judicial power," "case," and "controversy" may have implied a bar to such suits. However, two areas of English law—the in-

Coke's successor, Lord Chief Justice Hobart, who remarked in *Day v. Savadge* that "an act of parliament made against natural equity, as to make a man judge in his own cause, is void in itself." Day v. Savadge [1614] 80 Eng. Rep. 235 (K.B.). Such sentiments were also present in eighteenth-century political debates. *See* 7 Parl. Hist. Eng. (1811) col. 349 (UK). ("an act of parliament may be void of itself"); 16 Parl. Hist. Eng. (1813) col. 178 (UK). (arguing that taxation without representation was "contrary to the fundamental laws of our nature.").

However, it is unlikely that a founding-era jurist would have understood these debates to apply to Parliament's ability to alter the jurisdiction of English courts. First, the existence of such limits was hardly a settled principle of English law. *See* Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1129 (1987) ("These ideas were those of the opposition party in England, and thus were never accepted by those who held power in that country."). For instance, Blackstone, commenting on Justice Hobart, noted that "I should conceive that in no case whatever can a judge oppose his own opinion and authority to the clear will and declaration of the legislature. His province is to interpret and obey the mandates of the supreme power of the state." 4 WILLIAM BLACKSTONE, COMMENTARIES *41; see BLACKSTONE, *supra* note 52, at *160 (describing Parliament as having "sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding of laws . . . ."). And second, to the extent that such limits did exist, they would have limited Parliament's ability to infringe on specific rights of individuals or of the King. *See* Sherry, *supra*, at 1128–34. There is, by contrast, no evidence that principles of fundamental law were ever understood to control general justiciability questions. R

former action and prerogative writs of the King's Bench—suggest that English courts did in fact evaluate lawsuits brought by uninjured plaintiffs.

a. The Informer Action

English courts frequently heard suits brought under common informer actions. The informer action was a cause of action created by Parliament that authorized individuals to sue, in their individual capacity, those who violated certain types of laws.[61] The informer did not need to show that they were personally harmed by the defendant's breach of the law, only that (a) such a breach had occurred, and (b) the law permitted them to sue to rectify it.[62] In his *History of English Law*, William Holdsworth noted the widespread use of these statutes, writing: "The number of statutes old and new, to which the public at large was encouraged to enforce obedience to a statute by a promise of a share of the penalty imposed for disobedience was very large."[63] Blackstone described such action in his *Commentaries*, writing that "[s]uch penalties are given by particular statutes, to be recovered on an action popular . . . ."[64]

The history of informer statutes predates England itself and spans to the time of the founding.[65] A law issued in 695 by King Wihtred of Kent offered a bounty to anyone who informed the King of a freeman working on the Sabbath.[66] The 1318 Statute of York offered bounties in exchange for the prosecution of public corruption.[67] One study found that during the reign of Elizabeth I, the vast majority of suits brought to enforce the apprenticeship statutes were brought by professional informers.[68] Around the time of the founding, informer actions were used to enforce restrictions on religious dissenters,[69] economic regulations,[70] public safety,[71] and

61. *See* J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539, 565 (2000).

62. Winter, *supra* note 15, at 1406. R

63. 4 WILLIAM HOLDSWORTH, HISTORY OF ENGLISH LAW 356 (1924).

64. BLACKSTONE, *supra* note 52, at *438. R

65. *See generally*, Beck, *supra* note 61. R

66. *See* FREDERICK ATTENBOROUGH, THE LAWS OF THE EARLIEST ENGLISH KINGS 27 (1963).

67. Statute of York 1318, 12 Edw. 2, c. 5 (Eng.).

68. *See* MARGARET GAY DAVIES, THE ENFORCEMENT OF ENGLISH APPRENTICESHIP: A STUDY IN APPLIED MERCANTILISM 1563–1642, at 18–19 (1956).

69. Sunday Observance Act 1780, 21 Geo. 3, c. 49, § 1 (Eng.) (fines for businesses open on the Sabbath).

70. Gold and Silver Thread Act 1741, 15 Geo. 2, c. 20 (Eng.).

71. Fires Prevention Act 1785, 25 Geo. 3, c. 77 (Eng.) (fines for improper boiling of tar).

anti-corruption measures.[72] In fact, informer actions were the primary enforcement mechanism of founding-era English commercial law because the English government lacked the capacity to monitor England's growing commercial sector without private relators.[73]

Of particular note is that, by the Elizabethan period, there was considerable frustration among English jurists (and undoubtedly English businesses) about widespread abuse of the informer action.[74] Detractors complained about the ease with which such suits could be brought and, by extension, used to harass.[75] Among the many outspoken critics of the practice was Lord Coke himself, who referred to "the vexatious informer" as "viperous Vermin."[76] The King and Parliament responded to such widespread complaints by increasing the quantity and specificity of requirements an informer had to meet to collect their bounty.[77] There is no evidence, however, that any serious consideration was given to eliminating the action entirely. This suggests that laws permitting suits by an uninjured plaintiff were not considered to be in tension with some other accepted element of English law, otherwise, the many opponents of informer actions would have likely explicitly noted such tension.

One law review article by Bradley Clanton argues that the existence of the informer action does not suggest widespread acceptance of an English court's ability to adjudicate suits by uninjured plaintiffs.[78] Clanton contends that because informers obtained a property right in their allotted portion of a bounty upon a successful prosecution of their suit, informers constituted interested parties.[79] But standing doctrine does not require just that parties be interested in the lawsuit; it requires that they suffer an *injury* as a result of the defendant's conduct. This is a very different thing. Even if Clanton is correct, uninjured plaintiffs could still sue in founding-era English courts, at least where they served to gain some benefit from successful prosecution of the suit. This would still refute the notion that English courts practiced something akin to modern standing doctrine, which requires not only that plaintiffs

72. Levy of Fines Act 1822, 3 Geo. 4, c. 46, § 10 (Eng.) (fining public officials who failed to properly levy fines).

73. HOLDSWORTH, *supra* note 63, at 354–55; Beck, *supra* note 61, at 573–79. R

74. *See* Beck, *supra* note 61, at 575–79. R

75. *Id.* at 579–585.

76. 3 EDWARD COKE, THE INSTITUTES OF THE LAWS OF ENGLAND 194 (1797).

77. *See* Beck, *supra* note 61, at 585–90; HOLDSWORTH, *supra* note 63, at 457. R

78. *See* Clanton, *supra* note 15, at 1038–40. R

79. *Id.* at 1040 ("The legal right to bring the action or information was given by statute, and by commencing the action the informer obtained a vested property right in the penalty provided for in the statute.").

have an interest in winning the suit, but that the interest be connected to an injury traceable to a defendant's conduct.[80] If an interest alone was all that was required, standing issues could be remedied whenever a plaintiff showed that they stood to gain from a successful prosecution—certainly through government rewards but possibly also through third party bounties or even reputational advantages—regardless of whether or not they were injured by the defendant. Such a minimalist conception of standing, even if historically accurate, would not serve as a historical antecedent to *Lujan* and its progeny. Thus, the widespread use of informer actions suggests that English courts were not limited to suits by injured plaintiffs.

b. The Writs of Prohibition and Information in the Nature of Quo Warranto

The second area of English legal practice that demonstrates the ability of uninjured plaintiffs to bring suit is the prerogative writs of the King's Bench.[81] The prerogative writs were a product of political changes in English governance resulting from England's turn from absolute monarchy toward constitutional monarchy in the aftermath of the Glorious Revolution.[82] The accompanying reduction in the King's supervisory power over the English government allowed English courts, specifically the King's Bench, to take up such a supervisory role themselves.[83] By the time of the founding, the King's Bench had accumulated substantial power to supervise both inferior courts and government officials performing administrative functions.[84] To accomplish this, the King's Bench

80. *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982) ("[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.'") (quoting Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91, 99 (1979)).

81. *See generally* Edward Jenks, *The Prerogative Writs in English Law*, 32 YALE L.J. 523 (1923); *see also* James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1442–49 (2000).

82. *See* Pfander, *supra* note 81, at 1446–47. R

83. For a history of the development of the prerogative writs, *see id.*

84. Some of this authority was more theoretical than exercised. For instance, although it was theoretically possible for the King's Bench to take a case from the Chancery via a writ of prohibition, the power was never used. *See* 1 CHARLES M. GRAY, THE WRIT OF PROHIBITION: JURISDICTION IN EARLY MODERN ENGLISH LAW, at liii (1st ed. 1994).

utilized a slate of "prerogative writs"—Lord Mansfield's words[85]—which included writs of:

- Habeas corpus, which allowed the court to evaluate the legal justifications for a prisoner's confinement[86]
- Prohibition, which directed either a lower common law court or a non-common law court to refrain from exercising jurisdiction over a case[87]
- Mandamus, which directed lower courts or government officials to take some action required by law[88]
- Certiorari, which directed a lower court to send the records of a trial proceeding to the King's Bench for decision[89]
- Quo warranto (or its later equivalent, the "Information in the Nature of Quo Warranto"), which allowed the King's Bench to determine the legitimacy of an officeholder to a franchise.[90]

Because these writs were used to secure the public interest as well as the rights of individuals, courts would occasionally issue them at the behest of an uninjured plaintiff when doing so would be in the public interest. Two of these prerogative writs, prohibition and the information in the nature of quo warranto, best demonstrate this point.

The first is the writ of prohibition. In founding-era England there were four distinct court systems: common law courts, courts of equity, ecclesiastical courts, and admiralty courts.[91] Each had jurisdiction over different kinds of suits.[92] At the time of the founding, if the King's Bench determined that another court was adjudicating a lawsuit outside that court's jurisdiction, the King's Bench could issue a writ of prohibition, prohibiting the court from adjudicating the suit.[93]

85. *See* S.A. de Smith, *The Prerogative Writs*, 11 CAMBRIDGE L.J. 40, 45–48 (1951).

86. PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 1–2 (Harvard Univ. Press 2010).

87. 2 CHARLES M. GRAY, THE WRIT OF PROHIBITION: JURISDICTION IN EARLY MODERN ENGLISH LAW 1–2, 161 (1st ed. 1994).

88. James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward A First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 917, 917 n.63 (1997).

89. S.A. de Smith, *The Prerogative Writs*, 11 CAMBRIDGE L.J. 40, 45–48 (1951).

90. 3 WILLIAM BLACKSTONE, COMMENTARIES *263–64.

91. Daniel Klerman, *Jurisdictional Competition and the Evolution of the Common Law*, 74 U. CHI. L. REV. 1179, 1185–87 (2007).

92. *Id.*

93. GRAY, *supra* note 84, at viii. R

Thus, a founding-era jurist would have understood that both the parties to the suit and the public-at-large had an interest in the outcome of a writ of prohibition, the latter being a broad public interest in maintaining the correct lines of jurisdiction.[94] In 1695, the House of Lords articulated this public interest:

> The reason of prohibition in general, that they were to preserve the Right of the King's Crown and Courts, and the ease and Quiet of the subject, that twas the Wisdom and Policy of the Law, to support both best preserved, when every Thing runs in its right Channel, according to the Original jurisdiction of every Court, that by the Same Reason one Court might allowed to encroach another might, which could produce nothing but Confusion and Disorder in Administration of Justice.[95]

This principle was most clearly articulated when a plaintiff sought to prohibit a lawsuit they themselves had initiated.[96] Although defendants in such suits argued that a plaintiff should not be permitted to prohibit lawsuits they themselves had brought in the wrong court, the King's Bench categorically rejected this argument. Whatever the interests of the party seeking prohibition, the government had its own interest in ensuring courts stayed within their proper jurisdiction.[97] In *Pyper v. Barnably*, Pyper sought to prohibit a suit he had brought in ecclesiastical court. When the defendant claimed that a plaintiff could not prohibit his own suit, the court reasoned that "[i]f the Court Christian will hold plea in derogation of the common law, the Court *ex officio* ought to restrain their proceedings."[98] Similarly, in *Worts v. Clyfton*, the King's Bench upheld self-prohibition, reasoning that "if this court hath knowledge *by any means* that the Spiritual Court meddles with temporal trials, they ought to grant a prohibition."[99]

Thus, it is likely that if a plaintiff sought a writ of prohibition to prohibit a lawsuit that did not injure them but prohibition was otherwise appropriate, the Kings Bench would issue the writ in order to vindicate the public's interest in maintaining jurisdictional lines. To be sure, this theory is somewhat difficult to test because the ma-

94. *See id.* at 1–2.

95. Oldys v. Domville [1695] 15 Lds. Jo. 701 (HL).

96. For a broad discussion on the topic of self-prohibition *see* GRAY, *supra* note 84, at 161–75. R

97. *See* GRAY, *supra* note 84, at 161. R

98. Pyper v. Barnably, H. 41 Eliz. Q.B. Add. 25,230 f.47b.

99. Worts v. Clyfton, M. 12 Jac. K.B. Croke Jac. 350 (emphasis added).

jority of prohibitions were sought by injured parties.[100] However, this theory was validated by Lord Coke in his *Institutes of the Laws of England*. There, Coke explained that "the king's courts that may award prohibition, being informed either by the parties themselves, *or by any stranger*, that any court temporal or ecclesiastical doth hold plea of that (whereof they have not jurisdiction) may law-fully prohibit the same, as well after judgement and execution, as before."[101]

Clanton challenges the relevance of the writ of prohibition to the injury-in-fact requirement's historical pedigree.[102] Clanton argues that the term "stranger," as used by Coke, denoted parties who, although neither plaintiff nor defendant, had an interest in the outcome of the original lawsuit.[103] However, he reaches this conclusion through an exceedingly selective examination of the evidence. For one thing, English legal dictionaries are consistent in defining "stranger," as someone who is not "privy or party to an act."[104] Enumerated examples include "a stranger to judgement is he to whom a judgement doth not belong; and herein it is directly contrary to party or privy"[105] and "as a stranger to a deed denotes a person who has nothing to do therewith."[106] In my research I could not find one founding-era dictionary in which "stranger" generally denoted an interested party.[107] Clanton does cite a number of English authorities that describe strangers to fines as having "either a present or future right" or "an apparent possibility of right."[108] But he provides no evidence that this definition extends to other contexts. Indeed, the number of eighteenth-century dictionaries defining stranger without reference to any future right defeats this proposition. Finally, Clanton's theory outright ignores the interest in public administration that animated writs of prohibition. To the extent that a party needed an interest to bring a writ of prohibition, there is contemporaneous authority describing the interest of all

100. Most writs of prohibition were issued to parties claiming to have been improperly sued in ecclesiastical court. *See* GRAY, *supra* note 84, at xviii. R

101. 2 EDWARD COKE, THE INSTITUTES OF THE LAWS OF ENGLAND 602 (1797).

102. *See* Clanton, *supra* note 15, at 1009-20. R

103. *See id.* at 1015.

104. *See, e.g.*, *Stranger*, NOMO-LEXIKON: A LAW-DICTIONARY (1670); *Stranger*, THE STUDENT LAW DICTIONARY (1740); *Stranger*, COWELL'S LAW DICTIONARY (1727); *Stranger*, A NEW LAW DICTIONARY (1739); *Stranger*, A COMPENDIOUS AND COMPREHENSIVE LAW DICTIONARY (1816).

105. NOMO-LEXIKON: A LAW-DICTIONARY, *supra* note 104. R

106. THE STUDENT LAW DICTIONARY, *supra* note 104. R

107. *See* A NEW LAW DICTIONARY, *supra* note 104. R

108. Clanton, *supra* note 15, at 1015 (citing A NEW LAW DICTIONARY, *supra* note 104, and THOMAS WOOD, AN INSTITUTE OF THE LAWS OF ENGLAND 245 (3d ed. 1724)). R R

English subjects in maintaining proper boundaries of jurisdiction.[109] Thus, although it is true that the vast majority of prohibition suits were brought by a party to the suit, legal authorities show that a concrete stake in the underlying lawsuit was not essential to obtaining a writ of prohibition.

The second prerogative writ accessible to an uninjured plaintiff was the information in the nature of quo warranto.[110] By the founding, under the statute of 9 Ann. c. 20, a relator with leave from the court could prosecute, in the name of the Attorney General, anyone who unlawfully held a public position in a franchise, city, borough, or town corporation.[111] In *Rex v. Brown*, the court considered whether defendant-councilmen were disqualified from office by having failed to receive the sacrament within twelve months of the election (as required by law).[112] Despite one judge's observation that "it does not appear here that the party making the application has any connection with the corporation," the court granted the information. The court explained:

> Where the application is made merely to disturb the local peace of corporations, it is right to enquire into the motives of the party to see how far he is connected with the corporation. But the ground on which this application is made to enforce a general Act of Parliament, which interests all the corporations in the kingdom; and therefore, *it is no objection that the party applying is not a member of the corporation.*[113]

Clanton argues that the information in the nature of quo warranto, at least as authorized by 9 Ann., is not evidence that English courts could hear suits by uninjured parties. Clanton contends that because such actions were styled as lawsuits between the Attorney General and a defendant, and because the government is injured by breaches of the law, the suit was not technically brought by an uninjured party.[114] The problem with this argument is that it assumes English law was concerned enough about preventing suits by uninjured plaintiffs to require relators to sue in the name of the Attorney General rather than their own, but not concerned enough

109. *See supra* notes 94–98 and accompanying text. R

110. *See Quo Warranto and Private Corporations*, 37 YALE L.J. 237 (1927).

111. *See* Berger, *supra* note 15, at 823 (citing 9 Ann. c. 20). The original common law writ of quo warranto was, by the time of the founders, supplanted in English law by the statutorily modified "information in the nature of quo warranto," which was more flexible in its requirements and criminal in nature. *See Quo Warranto and Private Corporations*, *supra* note 110, at 238–39. R R

112. Rex v. Brown, (1790) East. 29 Geo. 3, B. R.

113. *Id.* (emphasis added).

114. Clanton, *supra* note 15, at 1035. R

about uninjured plaintiffs to prevent them from suing at all. This would have been a strange set of priorities, and a simpler explanation exists. The statute of 9 Ann. c. 20 requires citizens to bring an information in the nature of quo warranto in the name of the Attorney General, rather than their own, because an information in the nature of quo warranto was originally a writ issued only at the request of the Crown.[115] Use of the name of the Attorney General in suits brought under 9 Ann. was just another in a long line of legal fictions designed to expand the utility of an existing writ without creating a new one.[116] In other words, it is more likely that an information in the nature of quo warranto was styled as a lawsuit between the Attorney General and the defendant because of the writ's history, and not because of any desire on the part of the framers of 9 Ann. to exclude uninjured plaintiffs.

3. Summary of Standing Under English Law

From the above analysis we can draw the following conclusions. It is more likely than not that a founding-era interpreter of Article III would have understood Parliament to possess the power to create a cause of action that did not require the plaintiff to show an injury-in-fact. Furthermore, that interpreter would have been aware that English courts could entertain suits by uninjured plaintiffs in at least an action pursuant to an informer statute, a suit for prohibition, and an information in the nature of a quo warranto. As a result, that interpreter would not have understood the terms "judicial power," "case," or "controversy," at least in the context of English law, to imply a limit on power to adjudicate a suit by an uninjured plaintiff.

This is an important conclusion, but not the end of the matter, as the United States did not adopt English governance wholesale. Unlike the English judiciary, the U.S. judiciary is one of three coequal branches of government in a system based around separation of powers.[117] So even if the English concept of judicial power did not bar suits by uninjured plaintiffs, it is possible that a founding-

115. *See generally Discretion in Quo Warranto Against a Public Corporation*, 35 HARV. L. REV. 73 (1921).

116. *See* Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 120 n.270 (2007) (collecting examples of legal fictions in English Law designed to reuse existing writs for new purposes).

117. *See* Manning, *supra* note 49, at 28–29 ("The U.S. Constitution . . . built on its own carefully designed system of separated powers and checks and balances. Accordingly, one must always ask whether a particular English legal practice, however relevant it may seem on preliminary examination, conforms to the often distinctive structural assumptions underlying the U.S. Constitution."). R

era observer would have understood "judicial power" to denote such a bar when read in the context of the new U.S. system of governance.[118] Thus, to fully evaluate whether standing doctrine is consistent with the original meaning of Article III, we must examine how U.S. judicial power was conceived, discussed in the Constitution, and practiced following ratification.

B. Pre-Ratification Debates

The discussion and debate leading to the final version of the Constitution can be a valuable tool for deriving the Constitution's original public meaning. The founders' specific intent is an object of analysis distinct from original public meaning.[119] Nonetheless, the former is probative of the latter because one can assume that the founders chose language that would convey their intended meaning to a reasonable interpreter.[120] Thus, if the framers intended Article III to prohibit or permit uninjured plaintiffs to bring suit in Article III courts, that intent provides evidence that the Constitution's language did in fact convey such intent around the time of the founding.

Unfortunately, however, there was no meaningful discussion at either the Constitutional Convention or any of the ratifying conventions that could reasonably be characterized as an attempt to discuss standing.[121] Although the founders debated the jurisdiction of the federal judiciary at length, there is only one recorded discus-

118. *Cf.* Lujan v. Defs. of Wildlife, 504 U.S. 555, 576 (1992) ("Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those 'Cases' and 'Controversies' that are the business of the courts rather than of the political branches.").

119. *See* Barnett, *supra* note 25, at 108–11. R

120. *See* Moline, *supra* note 45; *see* Tutt, *supra* note 45; Saikrishna B. Prakash, *Unoriginalism's Law Without Meaning*, 15 CONST. COMMENT. 529, 537 (1998) ("[T]he framers' or ratifiers' comments about a particular phrase or provision are often a fairly good reflection of what that phrase or provision commonly was understood to mean."); *see also* Kesavan & Paulsen, *supra* note 21, at 1187–89 (arguing that Constitution's Secret Drafting History is a useful guide to the Constitution's original public meaning because the founders would have chosen words and phrases that a reasonable founding-era interpreter would have understood to reflect their intended meaning). R R

121. *See* Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1150 (1993) ("The constitutional barrier to standing relied on in Defenders is Article III's 'case or controversy' requirement. As has been much noted, the Framers gave almost no indication of what the phrase meant.").

sion of the type of cases courts could hear within their jurisdiction. It reads:

> Mr Madison doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising Under the Constitution, & whether it ought not to be limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not be of this nature ought not to be given to that Department.
>
> The motion of Docr. Johnson was agreed to nem: con: it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature.[122]

Thus, the pre-ratification debates tell us only that participants of the Constitutional Convention conceived of judicial power as the power to decide cases "of a judiciary nature." This, of course, raises the question—what does "judicial" mean in the context of the Constitution? Without discussion from the framing of Article III that clearly speaks to the matter, the pre-ratification debates are ambiguous regarding standing and the original meaning of Article III.

C. The Text of Article III

The Constitution is a written document, so its founding-era meaning is, in essence, what a founding-era interpreter would ascribe to its words.[123] If the plain meaning of the Constitution's words clearly permitted or forbade courts from adjudicating suits by uninjured plaintiffs, that would provide nearly dispositive guidance on standing doctrine. Like the pre-ratification debates, however, the founding-era plain meaning of Article III's terms does not speak to the existence of standing doctrine.[124]

Article III extends the "judicial power" of the United States to certain categories of "cases" or "controversies."[125] However, the founding-era definitions of these terms are ambiguous on standing doctrine. One founding-era dictionary defines "judicial" as "accord-

122. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (Farrand ed. 1911).

123. Michael Stokes Paulsen, *The Text, the Whole Text, and Nothing but the Text, So Help Me God: Un-Writing Amar's Unwritten Constitutio*n, 81 U. CHI. L. REV. 1385, 1386–87 (2014).

124. *See* Flast v. Cohen, 392 U.S. 83, 94 (1968) ("In terms relevant to the question for decision in this case, the judicial power of federal courts is constitutionally restricted to 'cases' and 'controversies.' As is so often the situation in constitutional adjudication, those two words have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government.").

125. U.S. CONST. art. III § 2.

ing to the regular order, methods, or directions of a court of law."[126] Another wrote: "belonging to the distribution of public justice."[127] The definition of "case" is similarly referential: "a legal demand of one's right" that "implies a recovery of, or restitution to something"; or "[t]he form of a suit given by law for recovery of that which is one's due."[128] English legal dictionaries did not have a separate definition for "controversy."[129]

The ambiguity stems from the fact that founding-era definitions for "judicial" and "case" are referential rather than descriptive. Rather than outlining the parameters of what is and is not judicial or what is and is not a case, the definitions invoke whatever the reader would have understood to be the business of courts. Thus, the plain meaning of the terms neither clearly conveys, nor clearly contradicts, the hypothesis that a founding-era interpreter would have read Article III's grant of judicial power over cases or controversies to suggest a prohibition on adjudication of suits by uninjured plaintiffs.

D. Congress and Courts in the United States

The practice of Congress, as well as state and federal courts, in the eighteenth and nineteenth centuries suggests that founding-era interpreters did not understand Article III to bar judicial adjudication of suits by uninjured plaintiffs. In this section, I show that this conclusion is supported by two distinct types of historical evidence. In the first sub-section, I show that decisions by Congress and the Supreme Court, institutions that were affirmatively bound by the limits of Article III, suggest that decisionmakers within those institutions did not read Article III to limit judicial relief to injured plaintiffs. I begin by discussing the first Congress's adoption of informer actions, which, like their English counterparts, authorized private relators to sue to vindicate illegal behavior that did not injure them personally. I then discuss that in *Union Pacific Railroad Company v. Hall*, the Supreme Court acknowledged that writs of mandamus could be issued at the behest of uninjured plaintiffs. In the second sub-section, I show that a series of state court decisions issuing writs at the behest of uninjured parties suggests that a founding-era in-

126. *Judicial*, A NEW GENERAL ENGLISH DICTIONARY (16th ed. 1777).

127. *Judicial*, A NEW AND COMPETE DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1775).

128. *Case*, 4 A NEW LAW DICTIONARY 3 (1797).

129. John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 221–22 (1997).

terpreter would not have understood adjudication of suits by uninjured plaintiffs to be antithetical to the practice of judicial power.

1. Congressional and Supreme Court Decisions

Article III limits the respective powers of both Congress and the Supreme Court by prescribing the powers of the Court and thereby implicitly prohibiting Congress from granting any greater power to the Court.[130] Thus, decisions by Congress and the Supreme Court regarding the Court's power demonstrate how reasonable decisionmakers in these institutions interpreted Article III. In this sub-section, I will show that (i) Congress's creation of informer actions in the eighteenth century and (ii) the Supreme Court's issuance of a writ of mandamus to an uninjured plaintiff in the nineteenth century suggest that the Constitution was not originally understood to bar suits by uninjured plaintiffs.

a. Congressional Creation of Informer Actions

Like the English Parliament, the early Congress created informer actions to give uninjured informers a cause of action and a bounty to enforce compliance with the law.[131] The first Congress created a customhouse informer statute, allowing informers to sue customhouses that did not post fee and duty schedules.[132] The second Congress approved regulations for awarding costs to common informers.[133] The third Congress created informer suits to enforce regulations of the slave trade.[134] Similarly, in the 1790s, Congress created *qui tam* actions allowing civil suits enforcing liquor import laws,[135] postal laws,[136] and Indian trading laws.[137]

What is truly telling about these statutes is that their legitimacy was never questioned on constitutional grounds.[138] Given their historical unpopularity in England,[139] if the Constitution appeared to founding-era interpreters to provide a viable argument against the enforcement of such suits, such an argument would likely be part of

130. *See supra* Part II.C.

131. *See* Winter, *supra* note 15, at 1407–08. R

132. Act of July 31, 1789, ch. 5, § 29, 1 Stat. 29, 45.

133. Act of May 8, 1792, ch. 36, § 5, 1 Stat. 275, 277.

134. Act of Mar. 22, 1794, ch. 11, §§ 2, 4, 1 Stat. 347, 349.

135. Act of Mar. 3, 1791, ch. 15, § 44, 1 Stat. 199, 209.

136. Act. of Feb. 20, 1792, ch. 7, § 25, 1 Stat. 232, 239.

137. Act of May 19, 1796, ch. 30, § 18, 1 Stat. 469, 474.

138. Sunstein, *supra* note 8, at 176. ("[I]f the stranger suit was thought constitutionally problematic, in all probability some constitutional concern would have been voiced about the qui tam action or the informers' action."). R

139. See *supra* notes 69–72 and accompanying text. R

the historical record. Yet, there is no evidence that such objections were raised, suggesting that the founding generation did not perceive anything controversial, let alone unconstitutional, about Congress's ability to create causes of action for uninjured plaintiffs.

b. *Union Pacific Railroad Company v. Hall*

In the 1875 case, *Union Pacific Railroad Company v. Hall*, a group of Iowa merchants requested a writ of mandamus compelling the Union Pacific Railroad to fulfill its statutory obligation to utilize a particular railway line between Iowa and Nebraska.[140] The railroad objected, asserting that mandamus was improper when the plaintiff had "no interest other than such as belonged to others engaged in employments like theirs, and the duty they seek to enforce by the writ is a duty to the public generally."[141] The court conceptualized the dispositive question as "whether a writ of mandamus to compel the performance of a public duty may be issued at the instance of a private relator." To answer the question, the Supreme Court looked to English precedent and concluded that "a private individual, without any allegation of special injury to himself" could obtain mandamus, and that "private persons may move for a mandamus to enforce a public duty, not due to the government as such . . . ."[142] Importantly, the mandamus in *Hall* was authorized pursuant to a statute "which confers upon the proper Circuit Court of the United States jurisdiction to hear and determine all cases of mandamus to compel the United Pacific Railroad Company to operate its road as required by law."[143] Thus, it implicitly raised the question of whether Congress could create a cause of action for an uninjured plaintiff. The Court in *Hall*, in contrast to the Court in *Lujan*, answered in the affirmative.

To be sure, it would be fair to note that *Hall* was decided almost 100 years after the Constitution was ratified, so its probative value regarding the beliefs of a founding-era interpreter is limited. That said, *Hall* retains some probative value for three reasons. First, *Hall*'s characterization of mandamus was uncontroversial among the Justices. (A single Justice dissented on other grounds.) Second, neither the parties to the lawsuit nor the Court considered separation of powers. Third, discussion of separation of powers remains absent in subsequent state decisions citing *Hall* as persuasive au-

140. Union Pac. R.R. Co. v. Hall, 91 U.S. 343, 343 (1875).

141. *Id.* at 354.

142. *Id.* at 354–55.

143. *Id.* at 343 (citing Act of Mar. 3, 1873, § 4, 17 Stat. 509).

thority for the existence of public rights mandamus.[144] These three aspects of *Hall* indicate that, at least in 1875, the notion of a private litigant suing for mandamus to enforce public rights was not understood to meaningfully implicate separation of powers concerns. Thus, either a reasonable founding-era interpreter could have reached the same conclusion, or conventional interpretation of Article III shifted so thoroughly between 1787 and 1875 that an understanding of judicial power foreign to a founding-era interpreter had become uncontroversial to a nineteenth-century one. While the latter is by no means impossible, in the context of all the other evidence cited about early U.S. enforcement of public rights, it is less likely than the former.

2. State Court Issuance of Writs to Uninjured Plaintiffs

A series of eighteenth and early nineteenth-century state court decisions also suggests that members of the founding generation would not have understood Article III's grant of "judicial power" over "cases" and "controversies" to implicitly forbid adjudication of suits by uninjured plaintiffs. Founding-era state courts were not bound by Article III; however, how state court judges understood their own power is nonetheless probative of how members of the founding generation understood what was and was not the business of courts.

Firstly, state courts empowered to exercise the prerogative writs of the King's Bench occasionally granted them at the behest of uninjured plaintiffs. Two telling examples involve the issuance of writs of certiorari in state court.[145] In the 1794 case, *State v. Justices of Middlesex*, the Supreme Court of New Jersey issued a writ of certiorari at the behest of electors who were challenging the integrity of an election meant to fix the location of a jail and a courthouse.[146] The plaintiffs in Middlesex claimed no individualized injury, in-

144. *See* State v. Mobile & M. Ry. Co., 59 Ala. 321, 324–25 (1877); State *ex rel.* Flowers v. Bd. of Educ. of Columbus, 35 Ohio St. 368, 376 (1880); State *ex rel.* Hart v. Burke, 33 La. Ann. 498, 510 (1881); State *ex rel.* Winterburg v. Demaree, 80 Ind. 519, 523 (1881); Castle v. Kapena, 5 Haw. 27, 35 (1883).

145. Certiorari was another of the King's Bench's prerogative writs used to remove proceedings from an inferior court (or, more specifically, the documents connected with those proceedings) for review. *See* HALLIDAY, *supra* note 86, at 77 and accompanying text. R

146. State v. Justices of Middlesex, 1 N.J.L. 283 (1794); *see* Gregory v. Jersey City, 34 N.J.L. 390, 400 (Sup. Ct. 1871) (citing State v. Justices of Middlesex, 1 N.J.L. at 283, for the proposition that "Writs of certiorari, to review the proceedings of municipal corporations, have been sued out by prosecutors whose rights have not been directly affected . . . .").

stead seeking certiorari on the theory that the method by which the votes had been counted was unlawful.[147] In its decision, the court made no individualized finding of injury, and noted that the issue would be better handled by the state legislature.[148] But the court still agreed to grant the writ, holding that it had the power to grant certiorari in cases concerning an injury to the entire community.[149] Similarly, in *State v. Tee Corporation*, a New Brunswick resident asked the court for a writ of certiorari compelling the return of a corporate bylaw to test its validity.[150] The defendant argued that the court should not grant certiorari at the behest of an individual who was not affected by the bylaw in question. The court ignored the argument and issued the writ.[151]

Grants of mandamus by courts in New York and Illinois reflect a similar dynamic. In the 1837 case, *People ex rel. Case v. Collins*, a group of road commissioners sought to compel a road opening in an adjoining town.[152] Despite the plaintiff's lack of injury, the Supreme Court of New York permitted the suit, reasoning that "[i]n matter of mere public right . . . [i]t 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."[153] Similarly, in *People ex rel. Blacksmith v. Tracy*, the Supreme Court of New York issued a writ of mandamus to remove "intruders" from the Tonawanda reservation.[154] The court recognized that "[plaintiff] John Blacksmith . . . shows no title either to appear as a relator, or to claim the relief prayed for."[155] But the court responded by noting that "[i]n a matter of public right, any citizen of the state may be a relator in an application for a mandamus (when that is the appropriate remedy), to enforce the execution of the common law, or of an act of the legislature."[156]

Likewise, *Pike County Commissioners v. People ex rel. Metz* involved a suit heard by the Illinois Supreme Court concerning the fourth of four installments of money allocated by the Illinois Legislature to a commissioner appointed to improve the navigability of a certain

147. *Justices of Middlesex*, 1 N.J.L. at 284.
148. *Id.* at 285–86.
149. *Id.* at 291.
150. *See* State v. Tee Corp., 1 N.J.L. 393 (1795).
151. *Id.*
152. 19 Wend. 56, 65 (N.Y. Sup. Ct. 1837).
153. *Id.*
154. People *ex rel.* Blacksmith v. Tracy, 1 How. Pr. 186, 186–87 (N.Y. Sup. Ct. 1845).
155. *Id.* at 189.
156. *Id.*

Pike County creek.[157] The plaintiff-commissioner had drawn the first three installments, but had been unable to obtain the fourth because the Pike County Commissioners, believing they had discretionary power over the fund, had used the money elsewhere.[158] The plaintiff asked the Illinois Supreme Court for a writ of mandamus compelling the commissioners to produce the funds, and the commissioners sought dismissal on the grounds that "the relator has not such an interest in the fund sought to be recovered."[159] The court rejected the commissioners' argument, reasoning: "[W]here the object is the enforcement of a public right, the People are regarded as the real party, and the relator need not show that he has *any legal interest* in the result. It is enough that he is interested, as a citizen, in having the laws executed, and the right in question enforced . . . ."[160]

The rulings in *Justices of Middlesex*, *Collins*, *Tracy*, and *Metz* provide evidence that a founding-era interpreter would not have understood Article III's grant of judicial power over cases and controversies to imply a bar to suits by uninjured plaintiffs. They do so despite the fact that the decisions came about in state courts, whose power was derived from state constitutions, not the Federal Constitution. This is the case for three reasons.

First, as noted in Part II.B, the meaning that an interpreter would ascribe to the terms "judicial power," "case," and "controversy" would have depended on the interpreter's preconceived understanding of what was and was not the business of courts. To that end, state courts, while not Article III courts, were courts nonetheless. The scope of their power was informed by founding-era jurists' pre-conceived notions about what courts do. Thus, founding-era state court decisions are probative of the role courts were understood to play in society more broadly, at least when the decision does not turn on some feature unique to the judiciary of the state in question. And as discussed above, the decisions by the New Jersey, New York, and Illinois courts turned on analysis of common law governing writs of mandamus and certiorari, not on state law. Therefore, the fact that the courts issued writs at the behest of uninjured plaintiffs without any apparent concern that, by doing so, they were not acting like a court, suggests members of the founding generation would not have understood adjudication of suits by uninjured plaintiffs to be antithetical to the concept of judicial power

157. Pike Cty. Comm'rs v. People *ex rel.* Metz, 11 Ill. 202, 204–05 (1849).
158. *Id.* at 205.
159. *Id.* at 206–07.
160. *Id.* at 208 (emphasis added).

over cases and controversies. As a result, the cases listed above suggest that a founding-era interpreter of Article III would not have read Article III's grant of judicial power over cases and controversies to imply a bar to suits by uninjured plaintiffs.

Second, both the *Metz* court (Illinois) and the *Collins* court (New York) were located in states where power was explicitly divided between executive, legislative, and judicial branches of government.[161] If the belief that an injury-in-fact requirement was necessary to effectuate separation of powers were common among founding-era jurists, one would have expected separation of powers concerns to animate the New York and Illinois courts' analyses. Not only was there no such discussion, but it does not appear that any party even raised the argument that the vesting of legislative, judicial, and executive power into different branches of state government required the state judiciary to apply an injury-in-fact requirement. This suggests that an injury-in-fact requirement was not understood, at the time of the founding, to flow logically from separation of powers concerns.

Third, in each case, the court's analysis turned on the court's consideration of the intrinsic properties of the writ in question. This is significant because, at minimum, a founding-era interpreter of the Constitution would have assumed that federal courts had the power to issue the Kings Bench's prerogative writs, at least where Congress had authorized it to do so.[162] If it were shown that that same observer would have conceptualized some of the prerogative writs to allow for judicial relief to uninjured parties—something the above cases suggest—it would stand to reason that a founding-era interpreter would have understood federal courts to have at least

161. ILL. CONST. art. II, § 1 (1848) ("The powers of the government of the state of Illinois shall be divided into three distinct departments, and each of them be confided to a separate body of magistracy, to-wit: Those which are legislative, to one; those which are executive, to another, and those which are judicial, to another."). N.Y. CONST. art. III, § 1 ("The legislative power of this state shall be vested in the senate and assembly."); N.Y. CONST. art. IV, § 1 ("The executive power shall be vested in the governor . . . ."); Laurel A. Rigertas, *Lobbying and Litigating Against "Legal Bootleggers" – the Role of the Organized Bar in the Expansion of the Courts' Inherent Powers in the Early Twentieth Century*, 46 CAL. W. L. REV. 65, 78 n.61 (2009) ("New York did not have an explicit separation of powers provision, but that concept is reflected in the structure of its subsequent constitutions starting in 1821.").

162. *See* Edward A. Hartnett, *Not the King's Bench*, 20 CONST. COMMENT. 283, 293 (2003) ("Implicitly, however, [Marbury] indicates that whether the Supreme Court is empowered to issue a particular prerogative writ depends, in the first instance, on whether Congress authorized it to do so."). *See generally* James E. Pfander, Marbury*, Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 COLUM. L. REV. 1515, 1568 (2001).

some power to grant relief to uninjured plaintiffs when authorized by Congress.

A critic could fairly note that even if New York and Illinois courts believed mandamus could be issued at the behest of an uninjured plaintiff, and even if New Jersey courts accepted that certiorari could be granted to cure a "generalized grievance," such interpretations were not universal among the states. Indeed, by the middle of the nineteenth century, Michigan, Massachusetts, and Pennsylvania each rejected the proposition that an uninjured plaintiff could access mandamus to enforce a public right.[163] The reasoning of these decisions, however, still supports the proposition that the founding generation did not think either judicial power or separation of powers implied a bar to suits by uninjured plaintiffs.

The Pennsylvania, Michigan, and Maine courts' rejection of mandamus was premised not on any general justiciability principle precluding suits by uninjured plaintiffs, but on each court's assessment of the intrinsic properties of the writ as informed by English case law.[164] In other words, the court did not rule against the plaintiff on the basis of a general background principle dictating what suits courts could or could not hear, but because they found that the particular mandamus required a showing of injury. This implies the absence of a background principle akin to modern standing doctrine at the time these decisions were made.

Moreover, like New York and Illinois, the governments of Michigan, Maine, and Pennsylvania were characterized by separation of executive, legislative, and judicial branches at the time their respective high courts rejected public rights mandamus.[165] If founding-era jurists would have generally understood separation of powers issues to be implicated by the ability of uninjured plaintiffs to bring suit, such issues would have at least been raised by a party arguing for rejection of citizen mandamus. However, no such argument was ever addressed.[166]

163. *See* Heffner v. Commonwealth *ex rel.* Kline, 28 Pa. 108, 112 (1857); People *ex rel.* Russell v. Inspectors of the State Prison, 4 Mich. 187, 188–89 (1856); Sanger v. Cty. Comm'rs, 25 Me. 291, 296 (1845).

164. *See Heffner*, 28 Pa. at 112; *Russell*, 4 Mich. at 188-89; *Sanger*, 25 Me. at 296.

165. *See* ME. CONST. art. III; MICH. CONST. art. III § 2; PA. CONST. art. I; *id.* art. II; *id.* art. V.

166. Also noteworthy is the fact that the Massachusetts Supreme Judicial Court later reversed course and explicitly approved of public rights mandamus and prohibition in response to rulings by the Supreme Court and the King's Bench respectively. Attorney Gen. v. City of Boston, 123 Mass. 460, 478 (1877) (citing Union Pac. R.R. v. Hall, 91 U.S. 343, 355 (1875) and Forster v. Forster, [1871] 4 B. & S. 187, 199). If it had been understood that separation of judicial

Thus, even if the appropriateness of issuing mandamus to an uninjured plaintiff was openly in dispute, the forgoing state court decisions suggest the dispute was over the nature of the substantive law. This in turn suggests that founding-era conceptions of judicial power or separation of powers would not have spurred a founding-era interpreter to find an injury-in-fact requirement in Article III.

E. Summary of Standing Doctrine and the Original Meaning of Article III

In summary, history suggests that standing doctrine would have been as foreign to a founding-era interpreter of Article III as to an English jurist. Although the separation of federal power into an executive, legislative, and judicial branch created a U.S. government very different from that of England, there is no persuasive evidence suggesting that such separation brought with it anything akin to our modern injury-in-fact requirement. In fact, the opposite is suggested by the creation of qui tam and informer actions by the first three Congresses, the state and federal courts' practice of granting prerogative writs to private plaintiffs to enforce public rights, and the sheer lack of evidence that founding-era jurists saw a connection between the substantive requirement that plaintiff show injury and anything related to separation of powers. Thus, it is that a founding-era interpreter would have read Article III to contain anything akin to an injury-in-fact requirement.

III.
A RESPONSE TO THE ORIGINALIST DEFENDERS OF STANDING DOCTRINE

In contrast to my conclusion, two sets of authors have defended the notion that standing is consistent, or at least not inconsistent, with the Constitution's original meaning. Professors James Leonard and Joanne Brant argue that standing doctrine is consistent with the framers' vision for separation of powers. Professors Ann Woolhandler and Caleb Nelson argue that standing doctrine is not inconsistent with the Constitution's original meaning because U.S. courts have always applied some form of constitutionalized justiciability constraints in order to limit judicial relief to injured parties. Although both sets of authors suggest members of the

power from executive and legislative power (which the Massachusetts Constitution required) required courts to abstain from cases involving uninjured plaintiffs, decisions by federal and English courts should not have been sufficient to spur the change absent an accompanying change to the Massachusetts Constitution.

founding generation believed limiting judicial relief to injured plaintiffs was desirable in at least some situations, they do not show that members of the founding generation understood the Constitution to mandate such limits as a general principle of justiciability.

A. Response to Leonard and Brant

Professors Leonard and Brant argue that an injury-in-fact requirement is consistent with the Constitution's original meaning because it "effectuates the Framers' limited concept of the judicial function and their plan for a separation of powers."[167] Their argument consists of two parts. First, Leonard and Brant use historical evidence to show the framers' desire to ensure separation of powers generally, and specifically the executive's ability to enforce the laws "according to political considerations. . . [with] intervention [by the courts] only to protect the rights of individuals."[168] Second, they argue that an injury-in-fact requirement is necessary to actualize this vision.[169] They conclude that a "fair reading of the proceedings of the Constitutional Convention and the contemporary legal environment makes it more likely than not that the Framers envisioned that the federal courts would be limited, as a constitutional matter, to cases where individual plaintiffs brought their own grievances for resolution and relief."[170]

This argument is flawed in that—whatever the theoretical merits of Leonard and Brant's belief that an injury-in-fact requirement is necessary to effectuate separation of powers—they present no evidence that such a belief was widely held by members of the founding generation. To make their case, Leonard and Brant look to three Supreme Court decisions that they claim demonstrate that the founding generation not only hoped to effectuate separation of powers, but chose to do so in part by requiring private plaintiffs to prove injury. None of the three examples they cite are persuasive on the point.

First, Leonard and Brant cite *Hayburn's Case*.[171] In *Hayburn's Case*, Attorney General Edmund Randolph sought a writ of manda-

167. Leonard & Brant, *supra* note 15, at 38. R

168. *Id.* at 63. *But see* Berger, *supra* note 15, at 832–36 (arguing that any incentive on the part of the founders to create a limit on the justiciability of lawsuits against the government as a means of fostering separation of powers would have been outweighed by the founders' desire to maximize checks on the political branches' ability to act outside the law). R

169. Leonard & Brant, *supra* note 15, at 63–90. R

170. *Id.* at 47–48.

171. Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792).

mus compelling circuit courts to comply with an act of Congress[172] empowering them to determine and certify pension amounts for Revolutionary War veterans. The circuit courts had refused to hear the cases because their decisions would not be binding if the Secretary of War had the option to reject the conclusion and certify the case to Congress.[173] Randolph sued, without claiming to represent any particular party, and the Court deadlocked on whether the Attorney General could sue *ex officio*.[174] Leonard and Brant infer from the Court's doubts about Randolph's ability to sue without a client that the Court was concerned with the justiciability of a suit without an injured plaintiff.[175]

Historical evidence refutes such an inference. Both the scant court reporting[176] and contemporaneous extrinsic evidence[177] indicate that the Justices' analysis was focused on whether the Attorney General had supervisory power over lower courts. In other words, the Court viewed the dispositive issue to be the authority of the Attorney General, not the justiciability of the suit. Additionally, the Court did not seem to believe that the case turned on a constitutional question. Instead, the Court was concerned about whether Randolph had obtained authorization from the President and

172. *Id.* at 408; Act of Mar. 23, 1792, ch. 11, 1 Stat. 243 (repealed in part and amended in part by Act of Feb. 28, 1793, ch. 17, 1 Stat. 324).

173. Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561, 591–92 (1989).

174. *Hayburn's Case*, 2 U.S. (2 Dall.) at 409.

175. Leonard & Brant, *supra* note 15, at 69 ("But without either client, Randolph's petition for mandamus would have lacked the necessary personal injury."). R

176. Bloch, *supra* note 173, at 601 ("The Supreme Court minutes and docket sheet suggest that the Court focused on the Attorney General's authority and not the justiciability of the controversy or the propriety of mandamus as a remedy.") (citing 1 DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES 157, 203 (M. Marcus & J. Perry eds. 1985)); Erwin C. Surrency, ed., *The Minutes of the Supreme Court of the United States, 1789–1806: August Term 1792 to February Term 1794*, 5 AM. J. LEGAL HIST. 166, 170–71 (1961) ("The Court proceeded to hear the Attorney General in relation to the powers and extent of his office . . . . [The] Court being divided in their opinions on the subject of the Attorney Generals authority ex officio to move the Court for a mandamus to the circuit Court for the Pennsylvania district, to correct the error complained of in the case of William Haybern [sic], the writ prayed for cannot issue."). R

177. *See* Bloch, *supra* note 173, at 601–03 (citing FED. GAZETTE, Aug. 18, 1792 (describing the proceedings as concerning whether "it was part of the duty to Attorney General of the United States, to superintend the actions of the inferior courts . . . .")); Letter from Edmund Randolph to James Madison (Aug. 12, 1792), *reprinted in* 14 THE PAPERS OF JAMES MADISON 348–49 (R. Rutland & T. Mason eds., 1983) ("Mr. Jay asked me, if I held myself officially authorized to move for a mandamus."). R

whether the suit was consistent with the mandates of the Judiciary Act.[178] Thus, the decision in *Hayburn's Case* is not indicative of a founding-era belief akin to modern standing doctrine.

Second, Leonard and Brant cite the Court's 1793 refusal to render, at then Secretary of State Thomas Jefferson's request, an advisory opinion related to U.S. neutrality towards England and France.[179] The Justices responded to Jefferson's request with a letter to President Washington, stating in part that:

> [Secretary Jefferson's questions] encroach on the lines of separation drawn by the Constitution between the three departments of the government. These being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been purposely as well as expressly united to the executive departments.[180]

Leonard and Brant read the Court's response to indicate that the Court was unwilling to answer legal questions absent an injured plaintiff.[181] However, although one can infer a wide range of possible motives from the Court's refusal to render an advisory opinion,[182] there is nothing to suggest lack of an injured plaintiff was particularly high among them. The text of the Court's letter highlights the "extra-judicial" nature of the request. As a result, there is no affirmative evidence to indicate the Justices' concerns would extend to an actual adversarial lawsuit.[183] Thus, the Court's decision cannot be said to signal anything about the founding generation's thoughts on suits by uninjured plaintiffs.

Third, Leonard and Brant cite a passage in *Marbury v. Madison* in which Chief Justice Marshall writes:

178. *See* Bloch, *supra* note 173, at 604 (citing GAZETTE U.S., Aug. 25, 1792, at 99, col. 1). R

179. Leonard & Brant, *supra* note 15, at 71–76. R

180. Letter from Chief Justice John Jay and Associate Justices to President George Washington (Aug. 8, 1793), *reprinted in* 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 1763–1826, at 488–89.

181. Leonard & Brant, *supra* note 15, at 68–69. R

182. William R. Casto, *The Early Supreme Court Justices' Most Significant Opinion*, 29 OHIO N.U. L. REV. 173 (2002) (surveying opinions on the significance of Jay's letter).

183. *Id.* at 201 ("The only absolute rule that can be teased out of their 1793 letter to President Washington, is that the President is not empowered to require the federal judiciary to provide an advisory opinion.").

> It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the court is, solely to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion.[184]

Leonard and Brant, like the *Lujan* Court,[185] seize on the language "solely to decide on the rights of individuals" as evidence that "the jurisdiction of the Court was limited to giving relief to individual grievances and excluded review of the general performance of executive functions."[186]

However, this conclusion is belied by the very next sentence, where Marshall further defines exactly what he is saying courts could not do. The sentence reads in part:

> But, if this be not such a question; if so far from being an intrusion into the secrets of the cabinet . . . if it be no intermeddling with a subject over which the Executive can be considered as having exercised any control; what is there in the exalted station of the officer which shall bar a citizen from asserting in a court of justice his legal rights . . . .[187]

Thus, in context, Marshall was noting the existence of a class of claims the judiciary cannot hear because it concerns issues "over which the executive can be considered as having exercised any control."[188] This principle of justiciability is distinct from standing because it concerns claims the courts cannot evaluate under any circumstances, whereas standing concerns claims that the courts can evaluate, but delineates who can and cannot bring such claims. In other words, Marshall's acknowledgment that the courts could not hear suits over decisions delegated exclusively to the Executive Branch does not speak to the conditions under which courts can and cannot adjudicate questions that are within its power to decide. Thus, it does not speak to anything akin to modern standing doctrine.

This conclusion is bolstered by the fact that, prior to *Lujan*, the "solely to decide" language of *Marbury* was not cited by any court, state or federal, in reference to a plaintiff's standing to sue.[189] This

184. Marbury v. Madison, 5 U.S. 137, 170 (1803).

185. Lujan v. Defs. of Wildlife, 504 U.S. 555, 576 (1992).

186. Leonard & Brant, *supra* note 15, at 84–85. **R**

187. *Marbury*, 5 U.S. at 170.

188. *Id.*

189. In fact, the language was cited in a federal court's opinion for the first time in 1950, in *Coates v. United States*, 181 F.2d 816, 818 (8th Cir. 1950), which one

is noteworthy because standing is, by definition, relevant to nearly every case. If Marshall had been describing a universal principle of justiciability through his "solely to decide" language, one would have expected the language to be cited for something akin to standing doctrine at least once between 1803 and the *Lujan* decision in 1992. By contrast, *Lujan* itself, which Leonard and Brant claim convey an analogous sentiment to their reading of *Marbury*, has been cited 21,553 times in the seventeen years between the decision and the writing of this Note. All to say, none of the examples Leonard and Brant provide constitute affirmative evidence that a founding-era constitutional interpreter would have understood the Constitution's separation of powers to warrant an injury-in-fact requirement.

B. Response to Woolhandler and Nelson

Professors Woolhandler and Nelson take the more modest position "that history does not defeat standing doctrine; the notion of standing is not an innovation, and its constitutionalization does not contradict a settled historical consensus about the Constitution's meaning."[190] Woolhandler and Nelson's argument consists of three components. First, they note that in a number of areas of eighteenth and nineteenth-century law, U.S. courts denied relief to uninjured plaintiffs alleging illegal conduct by the defendant, but allowed the same conduct to be prosecuted by either the government or an injured plaintiff.[191] Second, they explain that courts justified such denials on constitutional grounds.[192] Third, they claim that constitutional grounds used by the courts can be fairly characterized as antecedents to modern standing doctrine.[193]

Woolhandler and Nelson fail to prove this third claim. While they cite five Supreme Court decisions in which the Court dismisses a suit by an uninjured plaintiff on constitutional grounds, none of the grounds can be fairly characterized as an antecedent to modern standing doctrine.[194]

---

would not expect if it was expressing a constitutionalized rule of justiciability relevant to literally every lawsuit.

190. Woolhandler & Nelson, *supra* note 15, at 691. **R**

191. *Id.* at 693–713.

192. *Id.* at 713–31.

193. *Id.* at 731–32.

194. There is arguably a second issue, namely that four of the five cases cited by Woolhandler and Nelson were decided after the Civil War. The most recent of which was decided closer to today than the summer of 1787. The precise nature of this problem begs a complicated historiographic question: how recently can one look for evidence regarding the original meaning of the Constitution? However, this is not a question I intend to answer here because even if each case cited by

Woolhandler and Nelson's first example is the same "solely to decide on the rights of individuals" language from *Marbury*.[195] As discussed above, such language cannot be considered an antecedent to modern standing doctrine because it concerns the sort of claims courts cannot hear regardless of whether the plaintiff is injured or uninjured.[196]

Their second example is *Georgia v. Stanton*, in which the state of Georgia asked the Supreme Court to enjoin federal government enforcement of the Reconstruction Act, arguing that it would "annul and totally abolish the existing State government."[197] The Court denied relief, reasoning:

> [T]hese matters, both as stated in the body of the bill, and, in the prayers for relief, call for the judgment of the court upon political questions, and, upon rights, not of persons or property, but of a political character, will hardly be denied. For the rights for the protection of which our authority is invoked, are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a State, with all its constitutional powers and privileges. No case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill, in a judicial form, for the judgment of the court.[198]

According to Woolhandler and Nelson, "the Supreme Court's comments on this point reflected its understanding that private plaintiffs had to assert concrete private rights."[199] However, Georgia lost because the *Stanton* Court rejected its legal arguments, not because it failed to show an injury. In other words, it was not that Georgia failed to show some prerequisite necessary to bring its claims, it is that the claims themselves were not the sort of claims the Court believed could render a statute unconstitutional. This is a legal conclusion distinct from a dismissal on standing grounds, which concerns a specific plaintiff's ability to bring their claims and not the validity of the claims themselves.[200] Thus, like the *Marbury*

Woolhandler and Nelson was probative of the original meaning of Article III, the constitutional law exposed in each case does not serve as a historical antecedent to modern standing doctrine.

195. Woolhandler & Nelson, *supra* note 15, at 712 (citing Marbury v. Madison, 5 U.S. 137, 169 (1803)). R

196. *See supra* text accompanying notes 30–31. R

197. Georgia v. Stanton, 73 U.S. 50, 54 (1867).

198. *Id.* at 77.

199. Woolhandler & Nelson, *supra* note 15, at 713. R

200. Anticipating this objection, Woolhandler and Nelson contend that "[t]he problem the Justices were discussing was not that the legal issues raised by

language, the *Stanton* court's decision is not an antecedent to contemporary standing doctrine because it deals only with the sort of claims a court cannot evaluate regardless of plaintiff's injury.

Their third example is *New Hampshire v. Louisiana*.[201] *New Hampshire* concerned the ability of New York and New Hampshire to sue Louisiana in the Supreme Court[202] to recover damages from Louisiana's default on bonds owned by citizens of the two plaintiff states. Because the Eleventh Amendment prevented the bond-holding citizens from suing Louisiana directly in federal court,[203] New York and New Hampshire allowed the citizens to assign their claims to their respective state before seeking recovery in federal court. When the two states sued, the Supreme Court held that the Eleventh Amendment barred the suit because New York and New Hampshire had no interest in the suit distinct from that of their citizen bond-holders.[204]

To Woolhandler and Nelson, this decision demonstrates a historical antecedent to standing doctrine because it shows that "injuries to another private party did not ordinarily suffice to give states standing" and that "states generally could not bring cases to vindicate the private rights of their citizens."[205] Although the latter state-

the plaintiffs were nonjusticiable, but simply that the plaintiffs were not proper parties to litigate those issues because they did not have the right sort of interests at stake." Woolhandler & Nelson, *supra* note 15, at 715. To justify this conclusion, they note that the Court agreed to consider the constitutionality of the Reconstruction statutes when evaluating writs of habeas corpus from plaintiffs detained pursuant to those statutes. *Id.* (citing *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868) and *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866)). However, this argument assumes that if a court deems one set of arguments about why a statute is unconstitutional to be nonjusticiable, but finds another set of arguments justiciable, the first determination cannot be considered a dismissal on political questions grounds. This makes no sense. The political questions doctrine concerns which legal claims a court can and cannot evaluate, not which statutes the court can and cannot review. Here, the Court found Georgia's argument that the Reconstruction statutes were unconstitutional because they infringed on Georgia's sovereignty to be nonjusticiable, but found the *Milligan* and *McCardle* plaintiffs' arguments that the Reconstruction statutes were unconstitutional because they authorized unconstitutional detention to be justiciable. The latter determination is not a reason the former determination is not a political questions decision. R

201. New Hampshire v. Louisiana, 108 U.S. 76, 91 (1883).

202. The case concerned the states' ability to sue pursuant to the Court's original jurisdiction over suits between states. *See* U.S. CONST. art. III § 2.

203. U.S CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . . .").

204. *New Hampshire*, 108 U.S. at 91.

205. Woolhandler & Nelson, *supra* note 15, at 715–16. Although New Hampshire and New York are rarely referred to as "private parties," Woolhandler and R

ment is surely correct, its truth stems from a constitutional principle distinct from an injury-in-fact requirement. New York and New Hampshire "could not bring cases to vindicate the private rights of their citizens" because the statutes were a transparent attempt to circumvent the Eleventh Amendment.[206] Even though a lack of a distinct interest—or injury—to the state was dispositive, it was dispositive because it demonstrated that the suit was not really a case between states (thus, violating the Eleventh Amendment), not because it was not a case at all (thus, violating Article III).[207] Therefore, the basis for the *New Hampshire* Court's decision is not an antecedent to modern standing doctrine because the outcome of the suit turned on the Eleventh Amendment, not Article III.

Woolhandler and Nelson's fourth example is *Williams v. Hagood*.[208] In that case, a plaintiff asked the Court to enjoin a pair of South Carolina laws, arguing that they unconstitutionally interfered with obligations of a contract to which he was a party. The Court declined, reasoning:

> His bill does not aver that he has been injured, or will be injured, by this legislation, or by any act or neglect of the comptroller-general or the county treasurer. It does not aver that the comptroller-general has neglected or refused to perform every duty imposed upon him by the statute under which the revenue-bond scrip was issued . . . . The question presented to the court is, therefore, merely an abstract one; such a one as no court can be called upon to decide, and the bill shows no equity in the complainant.[209]

Woolhandler and Nelson correctly note that the *Williams* suit was dismissed because he failed to show an injury. But they wrongly conclude that this is evidence of standing doctrine in the late nineteenth century.

Nelson refer to them as such here because "[s]tates were allowed to use the Supreme Court's original jurisdiction primarily to pursue claims for property, breach of contract, or the like—civil claims of the same sort that an ordinary private litigant might assert." *Id.* at 713.

206. *New Hampshire*, 108 U.S. at 88–89 ("The language of the [Eleventh] amendment is, in effect, that the judicial power of the United States shall not extend to any suit commenced or prosecuted by citizens of one state against another state. No one can look at the pleadings and testimony in these cases without being satisfied, beyond all doubt, that they were in legal effect commenced and are now prosecuted solely by the owners of the bonds and coupons.").

207. *See* John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1987 (1983).

208. Williams v. Hagood, 98 U.S. 72 (1878).

209. *Id.* at 74–75.

Contrary to Woolhandler and Nelson's conclusion, there is an important distinction between the Court's dismissal of Williams's suit and a modern-day dismissal on standing grounds. Although the Court dismissed Williams's suit because he failed to show injury, failure to show injury was fatal to his case not because of a constitutional background principle requiring all private plaintiffs to show injury, but because the specific vehicle for his suit, a bill in equity, required a showing of injury as a matter of substantive law.[210] As a result, *Williams* says nothing about whether an uninjured plaintiff can bring suit when the law underlying their claim does not require the plaintiff to show injury. So even though *Williams* does invoke the general principle that the Court evaluate a constitutional question if the plaintiff presents no law potentially entitling them to relief,[211] it does not suggest that such a law must incorporate an injury-in-fact requirement.

Finally, Woolhandler and Nelson cite the 1911 case, *Muskrat v. United States*.[212] In *Muskrat*, the Court struck down a law which authorized four individuals to initiate lawsuits against the United States in the Court of Claims to determine the "validity" of a 1906 statute increasing the number of Cherokee citizens sharing in the distribution of Cherokee lands.[213] The law gave several authorized challengers—all Cherokee citizens whose shares of land distribution were reduced by the addition of more beneficiaries—authority to sue the United States to determine whether the law constituted an unconstitutional taking. The Court struck down the statute, finding that the authorized challenge to the redistribution law was not a

210. *See id.* at 72–75. ("Where a bill shows no equity in the complainant, and contains no averment that he has been injured by certain statutes of a State, this court will not pass upon an abstract question . . . . [T]he bill shows no equity in the complaint. Hence it was properly dismissed in the court below, and it must be dismissed here, but without prejudice to the complainant's right to bring and prosecute another suit, when he shall be in a condition to exhibit any equity in himself."); *see also* the following decisions citing *Williams* as authority on the necessary showing for a bill in equity: McCabe v. Atchison, Topeka & Santa Fe Ry. Co., 235 U.S. 151, 162 (1914); Street v. Shipowners' Ass'n of Pac. Coast, 299 F. 5, 9 (9th Cir. 1924); Mahr v. Norwich Fire Ins. Soc'y, 23 Abb. N. Cas. 436, 451 (N.Y. Sup. Ct. Mar. 1889). *Cf.* Am. Fed'n of State, Cty. & Mun. Emp. v. Dawkins, 104 So. 2d 827, 830 (Ala. 1958) ("Equity will not entertain a suit merely to vindicate an abstract principle of justice or to determine a dispute which involves neither benefit to be gained nor injury suffered.").

211. Marbury v. Madison, 5 U.S. 137, 138 (1803).

212. Muskrat v. United States, 219 U.S. 346, 348 (1911).

213. *Id.* (citing 34 Stat. at L. 137, chap. 1876).

justiciable controversy because the defendant, the United States, had no material interest in the suit's outcome.[214]

Woolhandler and Nelson contend that *Muskrat* represents a historical antecedent to modern standing doctrine. I disagree for two reasons. First, the *Muskrat* plaintiffs had all the components necessary to satisfy modern standing doctrine: they suffered (1) an injury in the forum of a reduction in property owed to them (2) traceable to the challenged act that (3) would be redressable via an injunction. Had the Court intended to enforce a rule akin to standing doctrine, it would not have dismissed the suit. Second, the animating concern of the *Muskrat* Court was the fact that the defendant, the United States, had no material interest in the outcome of the suit,[215] a concern that the Court has explicitly held is unrelated to concerns about whether the plaintiff has suffered an injury-in-fact.[216] Whether a defendant has a material interest in a lawsuit's outcome turns on whether a judgment for the plaintiff would adversely affect the defendant's interest. And whether a judgment for the plaintiff would adversely affect the defendant's interest is unrelated to whether the plaintiff has been injured.[217] For instance, the government is no less adversarial to an uninjured plaintiff seeking to enjoin its policies than an injured one.[218] Thus, the underlying logic of the *Muskrat* decision—that the defendant and the plaintiff must be adverse parties— is not an antecedent to standing doctrine.

214. *Id*. at 361. ("[The United States] has no interest adverse to the claimants. The object is not to assert a property right as against the government, or to demand compensation for alleged wrongs because of action upon its part. The whole purpose of the law is to determine the constitutional validity of this class of legislation, in a suit not arising between parties concerning a property right necessarily involved in the decision in question, but in a proceeding against the government in its sovereign capacity, and concerning which the only judgment required is to settle the doubtful character of the legislation in question.").

215. *See generally id*.

216. *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 486, (1982) ("[S]tanding is not measured by the intensity of the litigant's interest or the fervor of his advocacy.").

217. To be sure, the Court has occasionally argued that the injury-in-fact requirement is necessary to ensure the *plaintiff* has an appropriate stake in the lawsuit. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 204 (1962) ("Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions?"). I am not sure I agree, *see* Elliott, *supra* note 37, at 474–75, but regardless, this is a different theory than the one articulated in *Muskrat* or any other case said to be indicative of the original meaning of Article III. R

218. *E.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

C. Summary of Response to the Originalist Defenders of Standing Doctrine

Neither Leonard and Brant nor Woolhandler and Nelson provide evidence that standing doctrine is consistent with the original meaning of Article III. To make such a case, these authors would have had to cite some instance where a plaintiff lost due to failure to show injury, and the loss was the result of a constitutional background principle of justiciability. Although the two sets of authors cite a combined seven decisions by the Supreme Court—*Hayburn's Case*, Jefferson's request for an advisory opinion on U.S. neutrality, *Marbury*, *Stanton*, *New Hampshire*, *Williams*, and *Muskrat*—none meet both criteria. In both *Hayburn's Case* and *Williams,* the Court dismissed a lawsuit that lacked an injured plaintiff, yet dismissal was not based on any constitutional background principle of justiciability. Conversely, Jefferson's request for an advisory opinion, *Marbury*, *Stanton*, *New Hampshire*, and *Muskrat* all concern constitutional principles of justiciability, but none concern the need for plaintiffs to prove injury. As a result, to the extent that the decisions cited by Leonard and Brant and Woolhandler and Nelson are probative of the original meaning of Article III, they do not suggest that a constitutionalized injury-in-fact requirement was included in that meaning.

CONCLUSION

In conclusion, I find it less likely than not that a founding-era interpreter of the Constitution would have found, in the language of Article III, a restriction on the ability of federal courts to adjudicate lawsuits brought by uninjured plaintiffs. A founding-era interpreter would have interpreted Article III's grant of judicial power over cases and controversies to the judicial branch with reference to the practice of English courts, which possessed "judicial power" to hear "cases" brought by uninjured plaintiffs. Moreover, although the Constitution created a substantially different style of governance than that of England, there is no evidence that those changes brought with them an injury-in-fact requirement where none existed in English law. After all, the first three Congresses passed seemingly uncontroversial legislation authorizing relator and qui tam actions by uninjured plaintiffs. Additionally, early nineteenth-century state court decisions and a late nineteenth-century Supreme Court decision issued prerogative writs to plaintiffs vindicating public rights without any apparent concern that issuing the

writs was not a valid act of judicial power or violated principles of separation of powers.

The most plausible reading of the historical evidence suggests that the founding generation understood federal courts to possess the power to adjudicate suits by uninjured plaintiffs. Article III itself would have been understood to neither preclude federal jurisdiction over a case whenever the plaintiff lacked an injury, nor prevent lawmakers from authorizing uninjured plaintiffs to sue. To be sure, throughout the history of the United States, plaintiffs frequently lost because they were unable to prove that they had been injured. However, these losses stemmed from the substantive law underlying the plaintiff's claim, or from the application of constitutional provisions that required the plaintiff to prove injury given the particulars of the case, but that did not require all plaintiffs to prove injury in all cases. Thus, although an injury-in-fact requirement has become an essential part of the Court's contemporary justiciability doctrine, such a requirement is not consistent with the original meaning of Article III.

REGULATING THE FINTECH REVOLUTION: HOW REGULATORS CAN ADAPT TO TWENTY-FIRST CENTURY FINANCIAL TECHNOLOGY

AARON C. F. SALERNO

INTRODUCTION

The FinTech Revolution, which describes the rapid adoption of financial technology ("FinTech") by non-traditional financial services firms, presents numerous challenges to regulators trying to ef-

fectively manage and preserve stability in the marketplace. This Note will attempt to answer the important open question of how these innovations fit into the overall regulatory structure. Part I provides an overview of the historical development of FinTech from the Industrial Revolution to the present, examining the characteristics of the FinTech Revolution and the factors which contributed to its rise. Part II provides a survey of the current FinTech market and regulatory structure and analyzes the need for changing the current approach to regulation. Building off of this analysis, Part III provides a proposal for how regulators should adapt to the FinTech Revolution by developing what this Note refers to as "smart regulation." While the overall focus is on the U.S. regulatory system, this Note draws from foreign regulatory experiences, principally those from Europe and Asia, to inform its analysis.

I.
A HISTORY OF FINTECH: FROM EVOLUTION TO REVOLUTION

The development of FinTech has transformed the market for financial services and the global economy. Although interest from academics and policymakers is relatively recent, FinTech has always been a key element of the post-Industrial Revolution economy. This Part discusses the development of financial technology and the macroeconomic factors that catalyzed the "FinTech Revolution," providing historical context for the analysis that follows.

A. What is FinTech?

FinTech has become a popular term to describe "an economic industry composed of companies that use technology to make financial systems more efficient."[1] The origin of the term itself is popularly attributed to Citigroup during the 1990s as part of the Financial Services Technology Consortium, a project aimed toward facilitating technological collaboration.[2] However, FinTech's ety-

1. Brendan McManus, *What is Fintech?*, WHARTON FINTECH BLOG (Feb. 2, 2018), https://www.whartonfintech.org/blog-archive/2016/2/16/what-is-fintech [https://perma.cc/A5J4-QFLS]*; Cf.* Patrick Schueffel, *Taming the Beast: A Scientific Definition of Fintech*, 4 J. INNOVATION MGMT. 32, 45 (2016) (suggesting a narrower definition limited to a "*new* financial industry that applies technology to improve financial activities") (emphasis added).

2. *See, e.g.*, John L. Douglas and Reuben Grinberg, *Old Wine in New Bottles: Bank Investments in Fintech Companies*, 36 REV. BANKING & FIN. L. 667, 669 (2017); Marc Hochstein, *Fintech (the Word, That Is) Evolves*, AM. BANKER (Oct. 5, 2015, 7:12 PM), https://www.americanbanker.com/opinion/fintech-the-word-that-is-evolves

mology might be more appropriately attributed to Manufacturers Hanover Trust Company, a predecessor to JPMorgan Chase, one of Citigroup's "Big Four" rivals.[3] As early as 1972, the term "FINTECH" appeared in a scholarly article by the bank's vice president detailing models used to solve the bank's daily problems.[4] Whatever its origin, by 2015 the word had grown beyond industry circles and into colloquial language.[5]

B. The Rise of FinTech

Although the term itself may be attributed to the latter part of the twentieth century, the history of financial technology far predates it. From the appearance of the abacus in Babylonia[6] to the debut of securities in fourteenth-century Italian city-states,[7] the history of finance is a history of innovation. However, what distinguishes the history of FinTech from its superset history of finance is the speed of innovation that occurred after the Industrial Revolution. Technological advancements such as the invention of the telegraph in 1838 and the laying of the first successful transatlantic cable in 1866 provided the infrastructure needed for the global fi-

[https://perma.cc/BB86-9V82]; Atul Monga, *Fintechnification: The Evolution of Financial Services*, GRANT THORNTON: INSIGHTS (July 21, 2016), https://www.grantthornton.co.uk/insights/fintechnification-the-evolution-of-financial-services/ [https://perma.cc/D7Y2-CQ8G].

3. Manufacturers Hanover Trust Company was acquired in 1992 by Chemical Bank, which later acquired Chase Manhattan Bank in 1996. Chase became the nominal surviving corporation and later merged with J.P. Morgan & Co. to form JPMorgan Chase & Co. *See* Michael Quint, *Manufacturers Hanover Fades Out*, N.Y. TIMES (June 22, 1992), https://www.nytimes.com/1992/06/22/business/manufacturers-hanover-fades-out.html [https://perma.cc/2MY5-SDU8]; *Our History*, JPMORGAN CHASE & CO., https://www.jpmorganchase.com/corporate/About-JPMC/our-history.htm [https://perma.cc/MH9E-PBS5] (last visited Oct. 21, 2019).

4. Schueffel, *supra* note 1, at 36.

5. *See, e.g.*, *Fintech,* GOOGLE TRENDS, https://trends.google.com/trends/explore?date=all&q=fintech [https://perma.cc/ZBA4-LP8Z] (last visited Feb. 3, 2018); Bob Bryan, *The 10 Hot New Financial Buzzwords You Need to Know*, BUS. INSIDER (Dec. 4, 2015), http://www.businessinsider.com/the-10-hot-new-financial-buzzwords-you-need-to-know-201–2 [https://perma.cc/2LX6-89RB].

6. *See Abacus*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/technology/abacus-calculating-device [https://perma.cc/4E26-99KR] (last visited Feb. 18, 2018).

7. *See* B. MARK SMITH, A HISTORY OF THE GLOBAL STOCK MARKET: FROM ANCIENT ROME TO SILICON VALLEY 12 (2003).

nancial system we see today.[8] The ability to transmit information quickly across the globe facilitated rapid financial market integration. As John Maynard Keynes wrote in *The Economic Consequences of the Peace*:

> The inhabitant of London could order by telephone, sipping his morning tea in bed, the various products of the whole earth, in such quantity as he might see fit, and reasonably expect their early delivery upon his doorstep; he could at the same moment and by the same means adventure his wealth in the natural resources and new enterprises of any quarter of the world, and share, without exertion or even trouble, in their prospective fruits and advantages.[9]

These innovations during the nineteenth century established the first era in FinTech's history. This period, which continued into the twentieth century, was largely characterized by incumbent financial institutions utilizing technology to support their operations—often in proximity to regulators.[10]

The 2008 Global Financial Crisis (GFC) marked a notable shift in FinTech's history and the commencement of a new era—the FinTech Revolution. This new stage has been characterized by an increase in the use of financial technology by non-licensed and non-traditional financial companies to compete directly with incumbent licensed financial institutions.[11] Now, a decade into this new era, academics and policymakers alike are questioning how today's FinTech fits in with the current financial regulatory structure. With this overview in mind, FinTech's bifurcated history is examined in more depth below, with Subpart 1 exploring its early historical developments and Subpart 2 analyzing the post-GFC factors that brought about the FinTech Revolution.

1. The Emergence of FinTech: From Industrial Revolution to the GFC

The Industrial Revolution led to a leap in globalization that gave rise to the first stage of FinTech. While the nineteenth century

8. Eilene Zimmerman, *The Evolution of Fintech*, N.Y. TIMES (Apr. 6, 2016), https://www.nytimes.com/2016/04/07/business/dealbook/the-evolution-of-fintech.html [https://perma.cc/NW3K-BGPK].

9. JOHN MAYNARD KEYNES, THE ECONOMIC CONSEQUENCES OF THE PEACE 6 (1920).

10. *See* Dirk A. Zetzsche et al., *From FinTech to TechFin: The Regulatory Challenges of Data-Driven Finance* (Eur. Banking Inst., Working Paper No. 6, 2017) [hereinafter *From FinTech to TechFin*].

11. *See id.* at 7; *see also* Douglas W. Arner et al., *The Evolution of FinTech: A New Post-Crisis Paradigm*, 47 GEO. J. INT'L L. 1271, 1286 (2016) (discussing FinTech 3.0).

was marked by the emergence of FinTech's foundational technology, such as the telegraph and transatlantic cable discussed above, the twentieth century saw FinTech's rapid market expansion. During the post-war era, the financial markets were introduced to a number of communication innovations, including real-time electronic stock delivery[12] and the telex network, a precursor to the fax machine, which set the next stage of financial technology development.[13] Digitalization continued: Texas Instruments launched the first handheld electronic calculator in 1967[14] and NASDAQ was established in 1971, marking the transition from physical to electronic trading in the United States.[15] Meanwhile, consumer financial services were revolutionized with the appearance of the first modern credit cards from Diners Club in 1950[16] and the first automated teller machine (ATM) from Barclays in 1967.[17] In 1983, online banking was established in the United Kingdom[18] and by the end of the century more than 90% of U.S. banking transactions were conducted over the internet.[19]

The financial market's increasing integration during this period led to the establishment of a number of collaborative efforts amongst and between financial institutions and governments. In 1918, the Federal Reserve (the "Fed") established Fedwire, which connected the Fed's regional banks by telegraph and allowed for a centralized funds transfer system between financial institutions.[20] In 1970, the Clearing House Interbank Payments System (CHIPS) was

12. *See, e.g.*, Zimmerman, *supra* note 8 (noting the introduction of the Quotron by Quotron Systems in 1960); *Instinet*, INVESTOPEDIA (Aug. 15, 2018), https://www.investopedia.com/terms/i/instinet.asp [https://perma.cc/E4CX-QP2Q] (describing Instinet as "Wall Street's oldest electronic communications network").

13. Zimmerman, *supra* note 8 (discussing the global telex network in 1966).

14. *Electronic Calculator Invented 40 Years Ago*, NAT'L PUB. RADIO (Sept. 30, 2007), https://www.npr.org/templates/story/story.php?storyId=14845433 [https://perma.cc/E4CX-QP2Q].

15. Thomas Puschmann, *Fintech*, 59 BUS. & INFO. SYS. ENGINEERING 69, 70 (2017).

16. Jay MacDonald & Taylor Tompkins, *The History of Credit Cards*, CREDITCARDS.COM (July 11, 2017), https://www.creditcards.com/credit-card-news/history-of-credit-cards.php [https://perma.cc/MU8Y-TMZX].

17. Linda Rodriguez McRobbie, *The ATM is Dead. Long Live the ATM!*, SMITHSONIAN MAG. (Jan. 8, 2015), https://www.smithsonianmag.com/history/atm-dead-long-live-atm-180953838/ [https://perma.cc/4QF4-DX6C].

18. SANDY CHORON & HARRY CHORON, MONEY: EVERYTHING YOU NEVER KNEW ABOUT YOUR FAVORITE THING TO FIND, SAVE, SPEND, & COVET 22 (2011).

19. *Id.* at 23.

20. *Fedwire and National Settlement Services*, FED. RES. BANK OF N.Y. (Mar. 2015), https://www.newyorkfed.org/aboutthefed/fedpoint/fed43.html [https://perma.cc/8HA7-Q5Qc].

established in the United States,[21] followed by the Society for Worldwide Interbank Financial Telecommunications (SWIFT) three years later, which was established to facilitate cross-border financial communications.[22] The twentieth century also saw the first major international collaborative effort among banking regulators in response to the rise of FinTech. After a series of financial disturbances, including the collapse of Herstatt Bank in 1974, the central bank governors of the Group of Ten countries[23] established the Basel Committee on Banking Supervision to enhance financial stability in the increasingly integrated global banking system.[24]

While this period included a rapid expansion of financial technology in the global economy, as mentioned before, this technology was largely developed or used by incumbent financial institutions that operated within a series of governmental and self-regulatory frameworks.[25] While FinTech startups such as Bloomberg Terminals[26] and PayPal existed at the time,[27] these firms represented the exception rather than the norm. However, after the economy emerged from the GFC, such characterization no longer remained true.

2. The FinTech Revolution

The 2008 GFC had a large, transformational impact on the FinTech market that set the stage for the FinTech Revolution. During this period, new actors rapidly emerged as a wave of new investments, talent, and opportunities entered the market. Three factors heavily influenced this shift: (1) changes in public perception of the financial industry, (2) new labor market shifts to technology firms, and (3) reduced barriers of entry into the FinTech market.

21. *CHIPS*, FED. RES. BANK OF N.Y. (Apr. 2002), https://www.newyorkfed.org/aboutthefed/fedpoint/fed36.html [https://perma.cc/EH6E-R2YW].

22. Susan V. Scott & Markos Zachariadis, *Origins and Development of SWIFT, 1973–2009*, 54 BUS. HIST. 462, 466 (2012).

23. Belgium, Canada, France, Germany, Italy, Japan, Sweden, Switzerland, the Netherlands, the United Kingdom, and the United States. *G10*, BANK FOR INT'L SETTLEMENTS, https://www.bis.org/list/g10publications/index.htm [https://perma.cc/KT9T-QFPH] (last visited Oct. 21, 2019).

24. *History of the Basel Committee*, BANK FOR INT'L SETTLEMENTS (Dec. 30, 2016), https://www.bis.org/bcbs/history.htm [https://perma.cc/S84H-NLTH].

25. Zetzsche, *supra* note 10, at 6–7.

26. *See, e.g.*, Harry McCracken, *How the Bloomberg Terminal Made History–And Stays Ever Relevant*, FAST COMPANY (Oct. 6, 2015), https://www.fastcompany.com/3051883/the-bloomberg-terminal [https://perma.cc/6GCQ-S88J].

27. *See, e.g.*, Mark Odell, *Timeline: The Rise of PayPal*, FIN. TIMES (Sept. 30, 2014), https://www.ft.com/content/86432398-4897-11e4-9d04-00144feab7de [https://perma.cc/VB38-6PUW].

Together, these converging forces brought about the next era of FinTech's history.

The dramatic breakdown of public confidence in traditional financial institutions, brought on by the GFC, was instrumental in the FinTech Revolution. The collapse of Lehman Brothers—then the fourth-largest investment bank experiencing the largest bankruptcy in U.S. history[28]—shattered public perception of the financial industry. No longer were banks and incumbent financial institutions associated with stability and trust. In 2009, less than a quarter (22%) of Americans expressed confidence in banks—down from 53% just five years prior.[29] On the other hand, technology firms such as PayPal, Google, Amazon, and Apple benefited from public confidence levels above 50%.[30] This shift in public perception opened the door for startups and technology firms to offer financial services to segments of the population who previously viewed incumbent financial institutions as the only ones with the experience and legitimacy to handle their money.[31]

The effects of the GFC on the labor market also contributed to broader structural shifts in the FinTech market. Many of those who worked on Wall Street before the GFC changed careers to join technology firms, including Ruth Porat, former CFO at Morgan Stanley, who left for the same position at Google's parent company, Alphabet;[32] Michael Evans, former vice chairman and head of Asia at Goldman Sachs, who left to become president of Alibaba;[33] and Anthony Noto, former head of Goldman Sachs' technology, media

28. ROSALIND Z. WIGGINS ET AL., YALE PROGRAM ON FIN. STABILITY, The Lehman Brothers Bankruptcy A: Overview 1 (2014).

29. Andrew Dugan, *Confidence in U.S. Banks Low but Rising*, GALLUP (June 22, 2015), http://news.gallup.com/poll/183749/confidence-banks-low-rising.aspx?utm_source=Economy&utm_medium=newsfeed&utm_campaign=tiles&_ga=2.140366643.1054986099.1517777649-569239598.1517777649 [https://perma.cc/R8QB-2GSF].

30. *Survey Shows Americans Trust Technology Firms More Than Banks and Retailers*, MEDICI (June 25, 2015), https://gomedici.com/survey-shows-americans-trust-technology-firms-more-than-banks-and-retailers/ [https://perma.cc/A2DE-4LGA].

31. Arner et al., *supra* note 11, at 1286.

32. *Three Goldman Bankers Leave for Uber as Tech World Raids Wall Street Talent*, CNBC (Nov. 25, 2015, 7:07 AM), https://www.cnbc.com/2015/11/25/three-goldman-bankers-leave-for-uber-as-tech-world-raids-wall-street-talent.html [https://perma.cc/9EV3-X6W8].

33. *Id.*

and telecom group, who left to become CFO of Twitter[34] and later CEO of SoFi.[35]

These departures in the post-GFC market were not abnormal. Since the GFC, the relative prestige of working on Wall Street has fallen,[36] with Wall Street salaries falling behind those at Silicon Valley tech firms.[37] Furthermore, tech firms often provide for larger revenue sharing among employees through stock-based compensation plans,[38] which have the potential to be very lucrative in an industry notable for its rapid growth. These market shifts have also impacted the amount of new talent entering the labor market. For example, after the GFC, the number of Harvard Business School graduates entering technology firms increased nearly threefold in just five years.[39] These labor market conditions have provided rising startups and technology firms the talent and human capital necessary to enter the financial services industry and compete directly against traditional financial institutions.

The proliferation of open information and lower technology costs have catalyzed this new era of FinTech's history by lowering barriers to entry. Information is more prevalent today than ever before, owing to the emergence of the World Wide Web nearly three decades ago.[40] Open-access research and education, coupled with open-source and open-access software, has removed barriers to human capital and to platforms necessary to develop apps and new technologies.[41] Demographic shifts toward younger generations that embrace technology and the growing use of smartphones for

34. Trusha Chokshi, *Why Silicon Valley Wants Wall Street's Best*, CNBC (July 30, 2014, 12:08 PM), https://www.cnbc.com/2014/07/30/careers-bankers-leave-wall-street-for-technology-industry.html [https://perma.cc/ZKV6-KNEA].

35. Press Release, Social Finance Inc., SoFi Names Anthony Noto Chief Executive Officer (Sept. 27, 2018), https://www.sofi.com/press/sofi-names-anthony-noto-chief-executive-officer/ [https://perma.cc/H39U-MVAL].

36. Jonnelle Marte, *More Leaving Wall Street for Tech*, MARKETWATCH (Oct. 9, 2013), https://www.marketwatch.com/story/support-group-for-frustrated-bankers-2013-10-08 [https://perma.cc/S8L2-7E47].

37. *See Tech Firms Shell Out to Hire and Hoard Talent*, ECONOMIST (Nov. 5, 2016), https://www.economist.com/news/business/21709574-tech-firms-battle-hire-and-hoard-talented-employees-huge-pay-packages-silicon-valley [https://perma.cc/UEY5-82N8].

38. *Id.*

39. Chokshi, *supra* note 34.

40. *The Birth of the Web*, CERN, https://home.cern/topics/birth-web [https://perma.cc/8676-U4AQ].

41. *E.g.*, massive open online courses (MOOCs), which provide open access education across the web; GitHub, which provides a repository of software version control; and freeware development tools such as Android Studio and Xcode, which allow individuals to develop apps for Android software and iOS, respectively.

financial services now allow FinTech firms to reach a market of millions of consumers instantly.[42]

Additionally, the digitalization that began during the latter part of the twentieth century has also reduced barriers to entry by reducing the need for costly physical infrastructure. For example, cloud computing, in which one firm sells their excess computing capacity to another firm over the internet, now allows startups and other FinTech firms to minimize their upfront information technology (IT) infrastructure costs.[43] All three factors discussed above have facilitated the rapid rise of new entrants into today's FinTech market.

II.
THE CURRENT FINTECH MARKET AND REGULATORY FRAMEWORK

Because the FinTech Revolution has been a highly transformative and disruptive force on the financial services market, the question of how FinTech innovation fits into the parameters of the current regulatory framework has become salient. This Part analyzes the current economic environment for the FinTech industry, starting with a review of the FinTech market's products and services, firms, business models, and size. Next, this Part surveys the federal and state regulatory systems faced by FinTech firms operating in the U.S. economy. Finally, this Part examines the current state of regulators' wait-and-see approach to the FinTech Revolution. From this examination, this Part concludes that policymakers must adapt their regulatory models to preserve stability in the financial markets.

A. The Current FinTech Market

Today's FinTech market has grown to be an incredibly diverse economic ecosystem. In addition to infrastructure technologies, including cryptocurrencies and blockchain, FinTech encompasses such products and services as payment and money transfers, peer-to-peer lending, equity crowdfunding, money management, insur-

42. *See* BD. OF GOVERNORS OF THE FED. RESERVE SYS., CONSUMERS AND MOBILE FINANCIAL SERVICES 2016 (Mar. 2016), https://www.federalreserve.gov/econresdata/consumers-and-mobile-financial-services-report-201603.pdf [https://perma.cc/2N4H-CAMT].

43. *What is Cloud Computing?*, MICROSOFT AZURE, https://azure.microsoft.com/en-us/overview/what-is-cloud-computing/ [https://perma.cc/U6A4-7NWZ] (last visited Oct. 21, 2019).

ance, and much more.[44] In 2017, an Ernst & Young (EY) study found that one in three digitally active consumers used FinTech products and services, with payment services accounting for the largest share, followed by insurance, and then savings and investments.[45]

As mentioned before, it is not the use of new technology as applied to these financial services that makes the FinTech Revolution distinct, but *who* is providing these financial services. PricewaterhouseCoopers divides FinTech market participants into four distinct categories: the As, Bs, Cs, and Ds:

> [The] As are large, well-established financial institutions such as Bank of America, Chase, Wells Fargo, and Allstate. . . . Bs are big tech companies that are active in the financial services space but not exclusively so, such as Apple, Google, Facebook, and Twitter. . . . Cs are companies that provide infrastructure or technology that facilitates financial services transactions. . . . Ds are disruptors: fast-moving companies, often startups, focused on a particular innovative technology or process.[46]

All of these actors make up the larger FinTech ecosystem, but it is the rapid emergence of the Bs and Ds into financial services that distinguishes the FinTech Revolution. Today there are thousands of FinTech startups (a.k.a. Ds),[47] including dozens of so-called "unicorns" (private companies valued at over $1 billion),[48]

44. *See* Ryan Browne, *Everything You've Always Wanted to Know About Fintech*, CNBC: THE FINTECH EFFECT (Oct. 2, 2017, 3:11 PM), https://www.cnbc.com/2017/10/02/fintech-everything-youve-always-wanted-to-know-about-financial-technology.html [https://perma.cc/D4T3-TQUG]; DELOITTE, FINTECH BY THE NUMBERS: INCUMBENTS, STARTUPS, INVESTORS ADAPT TO MATURING ECOSYSTEM (2017), https://www2.deloitte.com/content/dam/Deloitte/us/Documents/financial-services/us-dcfs-fintech-by-the-numbers-web.pdf [https://perma.cc/Q99Z-ELP2]; *An Introduction to Fintech: Key Sectors and Trends*, S&P GLOBAL MARKET INTELLIGENCE (2016), https://www.spglobal.com/marketintelligence/en/documents/an-introduction-to-fintech-key-sectors-and-trends.pdf [https://perma.cc/4PMC-EDZE].

45. EY, EY FINTECH ADOPTION INDEX 2017: THE RAPID EMERGENCE OF FINTECH 3 (2017), http://www.ey.com/Publication/vwLUAssets/ey-fintech-adoption-index-2017/$FILE/ey-fintech-adoption-index-2017.pdf [https://perma.cc/H87M-BPCZ] [hereinafter EY FINTECH ADOPTION].

46. *Q&A: What is FinTech?*, PWC (Apr. 2016), https://www.pwc.com/us/en/financial-services/publications/viewpoints/assets/pwc-fsi-what-is-fintech.pdf [https://perma.cc/8B4L-YLC2].

47. *See Innovations in Payments: The Future of FinTech*, BNY MELLON (2015), https://www.bnymellon.com/us/en/our-thinking/innovation-in-payments-the-future-is-fintech.jsp [https://perma.cc/9HSD-BHD4].

48. *See* Oscar Williams-Grut, *The 27 Fintech Unicorns From Around the World, Ranked by Value*, BUS. INSIDER (Aug. 1, 2016, 2:00 AM), http://www.businessinsider.com/fintech-unicorns-ranked-by-value-2016-7 [https://perma.cc/HG42-CNLF].

which are capable of competing directly with incumbent financial institutions. In addition to startups, tech firms that have leveraged their technology and data to add financial services to their value chain (a.k.a. Bs) have also begun to transform the market for financial services.[49] Today these actors operate largely through three business models, which both compete and partner with one another:

> The first model involves technology firms that provide financial services directly to customers through the use of mobile platforms and other innovations. . . . These FinTech firms do not rely on banks to deliver their products and services, and often compete directly with banks and other traditional financial institutions. . . . The second model covers banks and other traditional financial services providers which have adapted and developed FinTech solutions to improve the delivery of their financial services. . . . The third model involves partnerships and similar relationships between nonbank FinTech firms and traditional banks to deliver financial services. This model often combines the innovation and user experience focus of FinTech firms with the risk management skills, deep customer relationships and other strengths of traditional banks.[50]

Given the breadth of FinTech market participants and their products and services, perhaps it is unsurprising that there is not yet consensus as to the exact size of the FinTech market. *Forbes* reported a market valuation of $870 billion across more than 1,000 FinTech firms.[51] Meanwhile, FinTech's transactional value has been estimated at over $1.2 trillion.[52] Despite any disagreement over its size, it is agreed that the FinTech market has grown at an excep-

49. *See* Zetzsche, *supra* note 10, at 3 (citing Ryan Shea, *Fintech Versus Techfin: Does Technology Offer Real Innovation or Simply Improve What is Out There?*, THOMSON REUTERS (July 26, 2016), https://www.refinitiv.com/perspectives/ai-digitalization/fintech-versus-techfin-technology-offer-real-innovation-simply-improve/ [https://perma.cc/TWR9-UK45]).

50. Gerald Tsai, Dir., Fintech and Applications, Fin. Inst. Supervision and Credit, Fed. Reserve Bank of S.F., Remarks at the 4th Bund Summit on Fintech (July 9, 2017), https://www.frbsf.org/our-district/press/leadership-speeches/2017/july/fintech-us-regulatory-response/ [https://perma.cc/8544-KVLU].

51. Jeb Su, *The Global Fintech Landscape Reaches Over 1000 Companies, $105B in Funding, $867B in Value: Report*, FORBES (Sept. 28, 2016, 4:13 PM), https://www.forbes.com/sites/jeanbaptiste/2016/09/28/the-global-fintech-landscape-reaches-over-1000-companies-105b-in-funding-867b-in-value-report/#3e66835126f3 [https://perma.cc/JCW3-HXH6].

52. *See FinTech: Highlights*, STATISTA, https://www.statista.com/outlook/295/109/fintech/united-states# [https://perma.cc/Z7AR-N2VC] (last visited Feb. 9, 2018) [hereinafter STATISTA].

tionally fast rate. Since 2013, over $40 billion has been invested in startups alone.[53] Between 2014 and 2015, the larger FinTech economy saw investments more than double from $17.8 billion to more than $38 billion.[54] FinTech market penetration is also expected to gain momentum, with more than half of global consumers adopting FinTech services in the coming years.[55] It is the rapid growth and massive size of the FinTech market that warrants the attention of regulators and prompts the question of how FinTech fits into the overall regulatory framework.

B. The Current U.S. Regulatory Framework

The U.S. financial regulatory system is an incredibly complex structure characterized by its overlapping dual federal-state framework, which includes ten federal regulatory bodies and fifty state jurisdictions, each with its own rules and regulatory agencies.[56] As then-Comptroller of the Currency John D. Hawke, Jr. noted in 2003: "[T]he current bank regulatory structure offends all of our aesthetic and logical instincts. It's complicated; it's irrational; it probably has inefficiencies; and it takes a great deal of explaining. It's the product of historical accident, improvisation, and expediency, rather than a methodically crafted plan."[57]

Fifteen years later, the patchwork of U.S. financial regulations has only grown more complicated. Most notably, in response to the GFC, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank).[58] At over 2,300 pages covering sixteen separate titles, Dodd-Frank substantially reformed the U.S. financial system, including adding thirteen new federal offices to the regulatory framework.[59]

53. *See* PwC, Global FinTech Report 2017 3 (2017), https://www.pwc.com/gx/en/industries/financial-services/assets/pwc-global-fintech-report-2017.pdf [https://perma.cc/V2CY-EZFQ].

54. Su, *supra* note 51.

55. EY FinTech Adoption, *supra* note 45, at 7.

56. *See* Falguni Desai, *The Fintech Boom And Bank Innovation*, Forbes (Dec. 14, 2015), https://www.forbes.com/sites/falgunidesai/2015/12/14/the-fintech-revolution/#458b7ddd249d [https://perma.cc/LU9T-BUEX]; *see also* Marc Labonte, Cong. Res. Serv., R44918, Who Regulates Whom? An Overview of the U.S. Financial Regulatory Framework (2017).

57. Karol K. Sparks, The Keys to Banking Law: A Handbook for Lawyers 20 (2d ed. 2017).

58. Pub. L. No. 111-203, 124 Stat. 1376 (2010).

59. See Sparks, *supra* note 57, at 41. Such new agencies include the Bureau of Consumer Financial Protection; Financial Stability Oversight Council; Federal Insurance Office; Offices of Minority and Women Inclusion; Investor Advisory Committee; Office of Credit Ratings; Credit Rating Agency Board; Office of Financial

These regulations can cost the world's largest financial institutions up to $4 billion a year[60] and present a serious challenge to new FinTech entrants, who enter the market without the long-standing financial regulatory compliance culture of incumbent financial institutions.[61] Navigating this complex assemblage of state and federal statutes and administrative rules has left many FinTech firms in a regulatory framework which feels both over- and under-inclusive. This is a consequence of both federalism in the U.S. banking system and the decision by many regulatory bodies to regulate through enforcement of existing rules rather than developing new provisions specifically tailored for FinTech.[62]

1. FinTech in the Federal Regulatory System

There remains a great deal of uncertainty around how FinTech firms fit into the larger financial oversight structure.[63] Without a clearly established federal regulatory scheme, the U.S. economy cannot fully realize the potential of the FinTech Revolution. With regards to FinTech wealth management and financial planning services, regulators have struggled to develop policies for data control and security for nontraditional financial actors.[64] Concerns also remain over what fiduciary duties FinTech firms may owe to those whose data they process.[65] For example, while banks have fiduciary duties to protect their clients' information, the reach of such duties becomes complicated with the introduction of FinTech in-

Literacy; Office of Financial Research; Office of Housing Counseling; Office of Fair Lending and Equal Opportunity; and the Office of Financial Protection for Older Americans. *Id.*

60. *See* PWC, *supra* note 53, at 13.

61. *See, e.g.*, Kristin Broughton, *The Good Reason Why Banks Make Bad Fintech Partners*, AM. BANKER (Nov. 3, 2017), https://www.americanbanker.com/news/the-good-reason-why-banks-make-bad-fintech-partners [https://perma.cc/5TTG-N8WP].

62. *See* GEORGETOWN UNIV. CTR. FOR FIN. MKTS. AND POLICY, THE COMPLEX REGULATORY LANDSCAPE FOR FINTECH: AN UNCERTAIN FUTURE FOR SMALL AND MEDIUM-SIZED ENTERPRISE LENDING 13 (2016), http://www3.weforum.org/docs/WEF_The_Complex_Regulatory_Landscape_for_FinTech_290816.pdf [https://perma.cc/EMQ8-T9SW].

63. *See* Richard Magrann-Wells, *Fintech Firms Hurt by Lack of Regulatory Clarity*, AM. BANKER (July 18, 2016, 9:30 AM), https://www.americanbanker.com/opinion/fintech-firms-hurt-by-lack-of-regulatory-clarity [https://perma.cc/JRJ8-PQLM].

64. *See* Lamont Black et al., *Promise and Peril: Managing the Uncertainty of Rapid Innovation and a Changing Economy*, FED. RESERVE BANK OF CHI. (2017), https://www.chicagofed.org/publications/chicago-fed-letter/2017/388 [https://perma.cc/5SBJ-GFXE].

65. Zetzsche, *supra* note 10, at 25.

termediaries who move and store that information outside of consumers' view.[66] The rise of FinTech cross-border lending and payment services also raises concerns about the legal validity and jurisdictional enforceability of smart contracts which underlie such transactions.[67] Furthermore, the advent of cryptocurrencies has also raised questions of federal regulation. For example, raising capital via digital currencies "may be considered a sale of securities, commodities, or the presale of a product, or some combination thereof."[68] These are just a few examples of how FinTech currently operates in a state of regulatory ambiguity.

Although FinTech firms are not directly regulated by any federal bank regulatory agency, in the sense that they are not subject to any direct supervision or examination,[69] such firms do not operate entirely outside the current regulatory framework. Some FinTech firms are indirectly supervised through their relationships with incumbent financial institutions. For example, as a consequence of Know Your Customer (KYC) regulations imposed by the U.S Financial Crimes Enforcement Network (FinCEN),[70] banks which underwrite and take deposits from FinTech firms have passed along those regulatory requirements to their FinTech partners.[71] This indirectly forces some FinTech firms to establish procedures for complying with the Bank Secrecy Act/Anti-Money Laundering (BSA/AML) laws, placing at least some of the FinTech market under the jurisdiction of federal regulators, such as FinCEN and the U.S. Treasury Department's Office of Foreign Assets Con-

66. Black et al., *supra* note 64.

67. *See* FIN. STABILITY BD., FINANCIAL STABILITY IMPLICATIONS FROM FINTECH 19 (June 27, 2017), http://www.fsb.org/wp-content/uploads/R270617.pdf [https://perma.cc/4ATY-NZ26].

68. *Examining Opportunities and Challenges in the Financial Technology ("Fintech") Marketplace: Hearing Before the Subcomm. on Fin. Insts. & Consumer Credit of the H. Comm. on Fin. Servs.*, 115th Cong. 5 (2018) (statement of Brian Knight, Dir., Program on Financial Regulation and Senior Research Fellow, Mercatus Center at George Mason University).

69. CTR. FOR REG. STRATEGY, AMERICAS, DELOITTE, THE EVOLVING FINTECH REGULATORY ENVIRONMENT: PREPARING FOR THE INEVITABLE 2 (2017), https://www2.deloitte.com/content/dam/Deloitte/us/Documents/regulatory/us-aers-the-evolving-fintech-regulatory-environment.pdf [https://perma.cc/QB3X-6BSQ] [hereinafter EVOLVING FINTECH].

70. *See generally* Dan Ryan, *FinCEN: Know Your Customer Requirements*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (Feb 7, 2016), https://corpgov.law.harvard.edu/2016/02/07/fincen-know-your-customer-requirements/#1 [https://perma.cc/8TVY-HEEK].

71. *See* EVOLVING FINTECH, *supra* note 69.

trol (OFAC).[72] Furthermore, FinTech firms which directly or indirectly provide financial services to consumers may be subject to the jurisdiction of the Consumer Financial Protection Bureau (CFPB), as such consumer laws are applied based on the products or services offered, rather than the kind of institution providing such products or services.[73] As the market still operates largely in the twilight of federal regulation, a major concern for FinTech investors,[74] investments are discouraged and the U.S. market may be failing to realize the full benefits of FinTech innovation.

2. FinTech in the State Regulatory System

States have traditionally played a leading role in regulating lending, including interest and fee limitations.[75] However, the cross-border characteristics of financial technology mean that FinTech firms are disadvantaged by inefficient state-by-state regulations that their bank competitors do not face.[76] For example, nationally-chartered banks and federally-insured state-chartered banks are able to lend nationwide, while FinTech firms must be licensed in every state in which they do business.[77] Furthermore, federally-chartered and insured banks are able to export their home states' interest laws to out-of-state borrowers, while FinTech firms are governed by the *borrowers'* home state interest regulations.[78] FinTech firms are likewise disadvantaged for money transmission services relative to their bank competitors. Whereas banks are often exempt from state money transmittal statutes, FinTech firms must obtain a license for each state in which they provide services.[79]

---

72. *Id.*

73. *See* Joseph E. Silvia, *Regulating FinTech*, NAT'L L. REV. (Dec. 24, 2016), https://www.natlawreview.com/article/regulating-fintech [https://perma.cc/NX2J-8J2B].

74. *See* Nicholas Elliott, *Where Fin-Tech Is Struggling with Regulation*, WALL ST. J.: RISK AND COMPLIANCE J. (Nov. 24, 2015, 2:57 PM), http://blogs.wsj.com/riskandcompliance/2015/11/24/where-fin-tech-is-struggling-with-regulation/ [https://perma.cc/Q8BT-TEE5].

75. Brian R. Knight, Federalism and Federalization on the Fintech Frontier 9–10 (Mar. 2017) (unpublished manuscript) (on file with the Mercatus Center at George Mason University), https://www.mercatus.org/system/files/mercatus-knight-federalism-fintech-v1.pdf [https://perma.cc/KAN5-MLM2].

76. Brian R. Knight, Modernizing Financial Technology Regulations to Facilitate a National Market 1 (July 2017) (unpublished manuscript) (on file with the Mercatus Center at George Mason University).

77. *See id.* at 1–2.

78. *See id.*

79. Kevin V. Tu, *Regulating the New Cashless World*, 65 ALA. L. REV. 77, 86–87 (2013).

This state-by-state approach to regulation may not have been a major impediment to financial services in an earlier time of our nation's history, but in the era of the FinTech Revolution such fragmented regulatory structure impedes the introduction of new financial service models.[80] This risks depriving the U.S. market of financial innovation benefits, such as improved access to financial services and greater market liquidity.[81] Across the fifty state jurisdictions, licensing requirements vary widely, including which activities prompt licensure and what standards are needed to be qualified as compliant.[82] This variation imposes significant transaction costs onto FinTech firms who face the uncertain question of whether their products and services fall within a particular state's laws. Such firms may be forced to choose among: (1) bearing the cost of possibly unnecessary licensing and compliance programs, (2) foregoing licensing and risking penalties in the event a state regulator deems their activities to be within the purview of the relevant statute(s), or (3) postponing the development of financial services innovation until there is greater regulatory clarity.[83] In any event, this fragmentation inhibits the expansion of the FinTech Revolution and deprives the U.S. market of its potential benefits.

C. Examining the Status Quo: Regulating Through Inaction

Before examining ways regulators may adapt to new financial technology, found in Part III, it is worth analyzing the current state of regulation in more depth. Although the current framework presents FinTech firms with uncertainty and market fragmentation, inefficiency alone does not necessarily call for new regulation. In fact, it is worth discussing the argument for *inaction*: resisting regulation until the FinTech Revolution matures and regulators can better assess the full breadth of its impact before diverting resources to legislative action or rule promulgation.

80. *See* Lalita Clozel, *State Regulators Balk at OCC Fintech Charter*, AM. BANKER (Aug. 19, 2016), https://www.americanbanker.com/news/state-regulators-balk-at-occ-fintech-charter [https://perma.cc/PU3P-V4AT] (discussing the debate between advocates for a national chartering scheme and state-by-state regulation).

81. *See, e.g.*, Laura Noonan, *Banks Use Fintech to Make Up for Lost Time on Financial Inclusion*, FIN. TIMES (April 23, 2019), https://www.ft.com/content/091c9dd0-4b36-11e9-bde6-79eaea5acb64 [https://perma.cc/ZGT6-Y24H]; Andy Kearns, *5 Ways Fintech is Helping the Unbanked and Underbanked Population in 2018*, MEDIUM (May 2, 2018), https://medium.com/fintech-weekly-magazine/5-ways-fintech-is-helping-the-unbanked-and-underbanked-population-in-2018-54f22417d0b1 [https://perma.cc/BXN6-F7RH].

82. *See* Knight, *supra* note 76, at 17.

83. Tu, *supra* note 79, at 109–110.

If regulators respond too early to innovation, they risk regulating it out of existence by imposing prohibitive regulatory costs before such innovation has had a chance to gain a market foothold. Laissez-faire economic principles have been applied to financial technology in the past and, in the context of online banking, with success. Online banking was introduced to the United States in 1980.[84] However, just three years later the technology was abandoned,[85] and it wasn't until the mid-1990s that it was successfully relaunched to American consumers.[86] Even at the turn of the twenty-first century, regulation as applied specifically to online banking was still in its infancy.[87] That delay in regulatory response highlights the defining characteristic of a wait-and-see approach to regulation. Although we might speculate as to the impact of regulation on consumer adoption of the technology, it would have been a waste of resources had regulators responded to the initial introduction of online banking. This example lends support to the proposition that regulators should wait until an innovation has passed some market-based critical mass threshold—which indicates its permanency—before acting.

While online banking may have benefited from a wait-and-see model, today's FinTech market has already developed to a level of economic maturity that demonstrates it is here to stay. As discussed earlier, the FinTech market encompasses hundreds of firms,[88] including dozens of "unicorns,"[89] all of which contribute to a transactional valuation north of one trillion dollars.[90] Therefore, although innovation can benefit from regulatory inaction until a new technology has surpassed some threshold measurement, the FinTech Revolution has convincingly surpassed such a threshold.

Furthermore, a wait-and-see approach may have worked in a period where innovation and consumer adoption of new technology was slower, but it appears out of place in the face of an eco-

84. Zimmerman, *supra* note 8.

85. *Id.*

86. Arner et al., *supra* note 11, at 1307.

87. *See, e.g.*, David C. Chou & Amy Y. Chou, *A Guide to the Internet Revolution in Banking*, 17 INFO. SYS. MGMT. 47, 51 (2000) (discussing open legal questions for internet banking); David Carse, Deputy Chief Exec., H.K. Monetary Auth., Keynote Address at the Symposium on Applied R&D: Enhancing Global Competitiveness in the Next Millennium 4 (Oct. 8, 1999), https://www.bis.org/review/r991012c.pdf [https://perma.cc/8KUM-JEA9] ("[O]ur approach to the regulation and supervision of e-banking is still at an early stage.").

88. Su, *supra* note 51.

89. *See* Williams-Grut, *supra* note 48.

90. *See* STATISTA, *supra* note 52.

nomic movement characterized by both rapid firm growth and market penetration. Take, for example, China, which initially adopted a laissez-faire approach to FinTech only to discover that the world's fourth biggest money market fund, Alibaba's Yu'e Bao, had developed in its backyard within just nine months.[91] Today Yu'e Bao is the largest money market fund in the world.[92]

Yu'e Bao shows how a non-traditional financial institution went from "too-small-to-care" to "too-big-to-fail" within the space of nine months. This exponential growth represents a direct challenge to the otherwise more gradual approach towards regulating innovations and stakeholders because it has skipped the "too-large-to-ignore" phase when regulators would have started to contact and request compliance of said entity.[93]

Given this new market dynamism, the wait-and-see or laissez-faire approach to regulating no longer seems appropriate for the times. If the FinTech Revolution is to facilitate expansive market growth in new firms and technology, then policymakers must adapt their regulatory models to preserve stability in the financial markets. The question remains, however, as to what the new approach to regulation should resemble.

III.
TOWARD SMART REGULATION

Regulation can be described as a chase, where innovation leads and regulation follows. However, as the pace of such innovation in the financial sector quickens, the lag between economic activity and regulatory response increases the risk of financial instability. This Part analyzes how regulators may adapt to rapid financial technology innovation by developing "smart regulation." Smart regulation, as the term is used in this Note, refers to dynamic and flexible regulatory frameworks, which "focus attention on legal instruments that foster technological innovation while providing safeguards against technological risks."[94] This Part describes FinTech smart regulation as developing in three stages: (1) a testing and piloting environ-

91. *See* Dirk Zetzsche et al., *Regulating a Revolution: From Regulatory Sandboxes to Smart Regulation* 15 (Univ. of Lux. Working Paper No. 2017-006, 2017).

92. Yifan Xie & Chuin-Wei Yap, *Meet the Earth's Largest Money-Market Fund*, WALL ST. J. (Sept. 13, 2017), https://www.wsj.com/articles/how-an-alibaba-spinoff-created-the-worlds-largest-money-market-fund-1505295000 [https://perma.cc/VKD2-8TDR].

93. Arner et al., *supra* note 11, at 1310 (footnotes omitted).

94. REGULATING TECHNOLOGICAL INNOVATION: A MULTIDISCIPLINARY APPROACH 52 (Michiel A. Heldeweg & Evisa Kica eds., 2011).

ment wherein regulators examine innovations in financial services, (2) an expansion of the regulatory environment through special charters for FinTech firms, and (3) the adoption of financial technology by regulators to better monitor the market and inform decision making.[95] From one stage to the next, regulatory complexity increases, as does the operational space for FinTech. This Part examines these stages in turn, addressing each stage's respective potential, limitations, and challenges.

A. Testing the Bounds: From Threshold Exemptions to Regulatory Sandboxes

The first stage of developing smart regulation is the construction of testing environments in which FinTech firms may be able to pilot their products and services within regulatory safe harbors. The two main approaches governments have used in this endeavor are threshold exemptions and sandboxes, each with respective advantages and drawbacks.

1. Threshold Approaches to FinTech

Several countries have taken steps toward incorporating threshold approaches into their regulatory structure by exempting FinTech firms that fall below some measurement of market size. For example, in the United Kingdom's crown dependency of Jersey, digital currency exchanges with an annual turnover of less than £150,000 are exempt from registration requirements.[96] Likewise in Australia, firms providing financial services for low volume, non-cash payment facilities[97] do not need to comply with certain regulatory requirements.[98] These policies are intended to provide new firms, which because of their size pose a *de minimis* threat to economic stability, with the benefit of regulatory breathing room to

95. This paper builds off of the premise of four stages of smart regulation articulated in Zetzsche et al., *supra* note 91, at 56.

96. Zetzsche et al., *supra* note 91, at 20.

97. "Low value non-cash payment facility" means a non-cash payment facility in relation to which all of the following apply: (a) the total amount available for making non-cash payments under all facilities of the same class issued by that issuer and held by any person at any one time does not exceed $1,000; (b) the total amount available for making non-cash payments under all facilities of the same class issued by that issuer does not exceed $10,000,000 at any time; (c) the facility is not a component of another financial product. *ASIC Corporations (Non-cash Payment Facilities) Instrument 2016* (Cth) reg 211 (Austl.).

98. *Id.*; *see also* Zetzsche et al., *supra* note 91, at 19.

test out new business models and technology before having to invest in compliance programs.[99]

However, while threshold approaches may provide small firms with some regulatory relief and thus promote innovation, benefits to this approach will be narrow. For example, space for regulatory relief under a threshold model will be inherently limited. Additionally, given the FinTech Revolution's rapid firm growth and market penetration,[100] the window of time that firms exist under threshold bars will likely be shortened. Such shortened windows of time may potentially lead to inefficient allocations of resources in establishing legal thresholds. Therefore, while threshold exemptions may allow regulators to promote FinTech innovation while safeguarding stability, the limitations associated with said approach suggest it would be best when coupled with another testing policy.

2. Regulatory Sandboxes

Countries across the globe have responded to demand for smart regulation of FinTech by implementing regulatory testing environments known as "sandboxes." In the context of finance, a sandbox creates an environment for FinTech innovators to test new products or services with greater flexibility or even exemption from existing regulation.[101] The concept comes from the world of software development, where a sandbox describes a closed testing environment designed for experimenting safely with web or software projects.[102] By allowing new financial products and services to operate in the real world under limited conditions, firms will be

99. *See, e.g.*, DAVID W. PERKINS ET AL., CONG. RESEARCH SERV., IF11195, FINANCIAL INNOVATION: REDUCING FINTECH REGULATORY UNCERTAINTY 1 (2019), ("If policymakers determine that particular regulations are unnecessarily burdensome or otherwise ill-suited to a particular technology, they might exempt companies or products that meet certain criteria from such regulations.").

100. *See, e.g.*, discussion on Alibaba's Yu'e Bao, *supra* Part II.

101. *See* EY, AS FINTECH EVOLVES, CAN FINANCIAL SERVICES INNOVATION BE COMPLIANT? 10 (2017), http://www.ey.com/Publication/vwLUAssets/ey-the-emergence-and-impact-of-regulatory-sandboxes-in-uk-and-across-apac/$FILE/ey-the-emergence-and-impact-of-regulatory-sandboxes-in-uk-and-across-apac.pdf [https://perma.cc/TH2J-DU4Q].

102. *See What is a Regulatory Sandbox?*, BBVA (Nov. 20, 2017), https://www.bbva.com/en/what-is-regulatory-sandbox [https://perma.cc/BZX9-D2SG]; *see also* FIN. CONDUCT AUTH., REGULATORY SANDBOX (2015), https://www.fca.org.uk/publication/research/regulatory-sandbox.pdf [https://perma.cc/JD9P-B399]; John M. Casanova et al., *FinTech and Regulatory Sandboxes in the UK, Hong Kong and Singapore*, SIDLEY AUSTIN: SIDLEY UPDATE (Sept. 6, 2017), https://www.sidley.com/-/media/update-pdfs/2017/09/20170901—banking-and-financial-services-update.pdf [https://perma.cc/6RC5-J362].

incentivized to invest in innovative technologies without fear of regulatory reprisal for non-compliance. Meanwhile, regulators benefit from observing firms operating within sandboxes to better incorporate technologies into the broader regulatory system.

First launched in the United Kingdom,[103] FinTech sandboxes are now operational in more than a dozen countries.[104] Although each jurisdiction's sandboxes vary somewhat, they generally include the following design components: (1) eligibility requirements, (2) time-bound restrictions, (3) operational parameters, and (4) termination provisions. First, regulators assess applications from firms to determine whether their products or services meet the eligibility requirements for the sandbox. This may include whether the applicant fits within the sandbox's objective (e.g., financial inclusion such as targeting financially excluded or underserved populations or communities)[105] or whether the product or service is already covered under existing laws.[106] Second, the time period in which firms may operate within the sandbox is typically limited, with periods ranging from six to twenty-four months (although extensions are possible).[107] Third, while firms within sandboxes are exempt from certain regulations, they are nonetheless still required to operate within certain parameters, which may include compliance with certain risk management and soundness regulations or limitations placed on the number of retail clients.[108] Often testing firms must also provide compensation arrangements in the event of losses.[109] Finally, sandboxes typically specify when a firm's participation in the sandbox may be terminated (e.g., non-compliance with the operational parameters or voluntary withdrawal by the firm from the program).[110]

While sandboxes offer a great deal of potential benefits, including reducing the time and cost of getting innovations to the

103. *See* EY, *supra* note 101, at 4, 13.

104. *See* Zetzsche et al., *supra* note 91, at 27.

105. *See* Ivo Jenik & Kate Lauer, *Regulatory Sandboxes and Financial Inclusion* 6 (Oct. 2017) (working paper) (on file with Consultative Group to Assist the Poor), http://www.cgap.org/sites/default/files/Working-Paper-Regulatory-Sandboxes-Oct-2017.pdf [https://perma.cc/7JZC-CMEV].

106. *See* Zetzsche et al., *supra* note 91, at 32.

107. *See id.* at 35.

108. *See, e.g.*, Jenik & Lauer, *supra* note 105, at 3; Zetzsche et al., *supra* note 91, at 40–41.

109. *See, e.g.*, Jenik & Lauer, *supra* note 105, at 3 (discussing compensation funds); Zetzsche et al., *supra* note 91, at 42 (discussing professional indemnity insurance).

110. *See* Zetzsche et al., *supra* note 91, at 37–38.

marketplace and enabling greater communication between regulators and FinTech firms, the programs are not without their drawbacks. For one, firms who are accepted into the sandbox initiatives may receive an unfair advantage over those who are rejected. This is particularly true if the selection criteria is vaguely defined and nontransparent, thus raising the risk of selection bias and favoritism. However, regulators can reduce this risk by articulating clear, objective guidelines for admission to the sandbox program.

Furthermore, the case-by-case admissions process and size of sandboxes means they do not benefit from the economies of scale found in rulemaking or legislation.[111] However, the added cost of establishing and maintaining regulatory sandboxes may be offset by the value of information obtained from such programs, which can be used to develop more efficient regulations when such innovations are incorporated from the sandbox into the broader regulatory scheme. Therefore, the potential benefits of sandboxes are best realized when regulators take the lessons learned from the experimentation stage and apply them to the second stage of smart regulation's development: special charters.

B. Establishing Special Purpose Charters for Non-Depository Institutions

In the United States, a discussion regarding special purpose charters for FinTech firms has already developed. In 2015, then-Comptroller of the Currency Thomas J. Curry announced an initiative for developing a regulatory framework to respond to innovations in the financial sector by incorporating FinTech into the federal banking system.[112] The following year, the Office of the Comptroller of the Currency (OCC), the independent bureau of the U.S. Department of the Treasury charged with chartering, regulating, and supervising national banks,[113] published a white paper outlining its intention to allow certain FinTech firms to apply for special purpose national bank (SPNB) charters.[114] Doing so would provide FinTech firms clarity in operating similarly to banks under

111. *See id.* at 40.

112. *See* Thomas J. Curry, Comptroller of the Currency, Remarks Before the Federal Home Loan Bank of Chicago (Aug. 7, 2015), https://www.occ.gov/news-issuances/speeches/2015/pub-speech-2015-111.pdf [https://perma.cc/8J4S-KC3C].

113. *About Us*, OFF. OF THE COMPTROLLER OF THE CURRENCY, https://www.occ.gov/about/what-we-do/mission/index-about.html [https://perma.cc/ZD3J-BYNG].

114. OFF. OF THE COMPTROLLER OF THE CURRENCY, EXPLORING SPECIAL PURPOSE NATIONAL BANK CHARTERS FOR FINTECH COMPANIES (2016) [hereinafter OCC December 2016 Report], https://www.occ.gov/topics/responsible-innovation/

full-service charters and bring FinTech firms under OCC's uniform supervision.[115] Such a proposal would allow qualifying FinTech firms to enjoy all the powers granted by the National Bank Act,[116] which would both resolve the legal ambiguity issues at the federal level and allow FinTech firms to lend nationwide unhampered by state-by-state licensure requirements.

1. Limitations of Special Purpose National Bank Charters

While the OCC's proposal is a promising start, it is not without its limitations. First, due to the requirements and costs to obtain and maintain such charters, the OCC's proposal may only be available to larger, more established FinTech firms. At least one critic has argued this would disadvantage smaller companies and disturb the balance of the marketplace.[117] This objection could be resolved if the OCC modified its SPNB charter program into tiers based on each applicant's size. Several nations in Asia, including South Korea, India, and China, have introduced tiered licensing models as a means of encouraging innovation in the banking sector while balancing oversight and regulatory costs.[118] Such a modification would allow smaller FinTech firms to receive the benefits of a national charter while being exempt from certain regulatory requirements until they grow and assume more regulatory oversight.

A second limitation of the SPNB charter is that many FinTech firms might not provide services which fit neatly within the traditional requirements necessary to acquire such charters.[119] Under the OCC's view, a special purpose national bank may limit its activities to either fiduciary activities or to at least one of the following three core banking functions: receiving deposits, paying checks, or lending money.[120] Therefore, the OCC may wish to issue new guidance for non-depository FinTech firms which have developed ser-

comments/special-purpose-national-bank-charters-for-fintech.pdf [https://perma.cc/BZD6-SQ5C].

115. *Id.* at 2.

116. 12 U.S.C. § 38 (1874).

117. *See* Hannah Levitt, *OCC's Fintech Charter Plan Draws Debate*, MARKETWATCH (June 23, 2017), https://www.marketwatch.com/story/occs-fintech-charter-plan-draws-debate-2017-06-23 [https://perma.cc/WQ9M-NJRR].

118. *See* Arner et al., *supra* note 11, at 130–36.

119. *See* Perianne Boring, *You Down With OCC–FinTech Firms See Promise In Special Bank Charter*, FORBES (Jan. 27, 2017), https://www.forbes.com/sites/perianneboring/2017/01/27/you-down-with-occ-fintech-firms-see-promise-in-special-bank-charter/#33e356b32e17 [https://perma.cc/C9KL-9KRH].

120. *See* OCC DECEMBER 2016 REPORT, *supra* note 114, at 3 (citing 12 C.F.R. § 5.20(e)(1)).

vices that have evolved beyond traditional banking functions. Additionally, it is unclear how the OCC may modernize capital requirements to fit with new FinTech business models which significantly differ from depository institutions. This may be particularly relevant for firms with significant percentages of assets in the form of cryptocurrencies. Although the OCC has acknowledged such concerns through its comment process, it remains unclear what alternative approaches it may use to determine appropriate capital requirements for SPNB chartered companies.[121]

2. Legal Challenges to Special Purpose National Bank Charters

While the OCC's proposal for a SPNB charter has garnered the support of a number of FinTech firms and the American Banking Association,[122] state banking regulators have responded with hostility and legal challenges.[123] These lawsuits allege non-depository institutions are not engaged in the "business of banking" and therefore cannot be chartered without explicit authorization from Congress.[124] It is worth noting that special purpose charters are not new—they are already issued by the OCC to non-depository institutions, including trust banks, credit card banks, and bankers' banks.[125] However, for those institutions, the OCC operates alongside explicit congressional authorization.[126] The OCC argues that explicit congressional authorization is not a prerequisite. Rather, the National Bank Act grants the bureau broad authority for issuing charters and interpreting "the business of banking," which, as discussed above,[127] it views as extending beyond receiving deposits.[128]

The OCC has already faced legal defeats on the issue from a district court ruling, which held the National Bank Act "unambiguously requires that . . . only depository institutions are eligible to

121. *See* OFF. OF THE COMPTROLLER OF THE CURRENCY, OCC SUMMARY OF COMMENTS AND EXPLANATORY STATEMENT: SPECIAL PURPOSE NATIONAL BANK CHARTERS FOR FINANCIAL TECHNOLOGY COMPANIES 10–11 (2017), https://www.occ.gov/topics/responsible-innovation/summary-explanatory-statement-fintech-charters.pdf [https://perma.cc/N7KY-UY37] [hereinafter OCC MARCH 2017 COMMENTS].

122. *See, e.g.*, Boring, *supra* note 119; Levitt, *supra* note 117.

123. *See, e.g.*, Conf. of Bank Supervisors v. Off. of the Comptroller of the Currency, No. 17-CV-00763, 2017 WL 1488257 (D.D.C. Apr. 30, 2018); Vullo v. Off. of the Comptroller of the Currency, No. 1:17-CV-03574, 2017 WL 6512245 (S.D.N.Y. Dec. 12, 2017).

124. Complaint at *3, *Conference of Bank Supervisors,* 2017 WL 1488257; Complaint at *2–3, *Vullo*, 2017 WL 6512245.

125. *See* OCC MARCH 2017 COMMENTS, *supra* note 121, at 14.

126. *Id.*

127. *See* OCC DECEMBER 2016 REPORT, *supra* note 114.

128. *Id.*

receive national bank charters from OCC."[129] This issue will likely be litigated for many years to come—although there is reason to believe the OCC may ultimately triumph. The Supreme Court has already found the phrase "business of banking" to be ambiguous and, if the Comptroller's interpretation is reasonable, such interpretation would be accorded "controlling weight."[130] However, to the extent such lawsuits do present a serious threat to the proposal, Congress could respond by granting the OCC explicit authorization as a means of preempting any further legal challenges.[131]

C. RegTech: Seizing Financial Technology for Regulators

In order to regulate effectively in the rapidly transforming financial services market, regulators will need to match the technological development of FinTech with a similar degree of technological development in the regulatory system. Regulatory technology ("RegTech") offers such a solution. Large financial institutions—which, in response to the post-GFC regulatory requirements, began to heavily invest in risk management and compliance systems—have been the main driver in the development of RegTech.[132] Much of the attention on RegTech has been focused on its promise to lower compliance costs for companies.[133] How-

129. Vullo v. Off. of the Comptroller of the Currency, 378 F. Supp. 3d 271 (S.D.N.Y. 2019).

130. NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 257 (1995) (citing Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984)).

131. Although Congress could respond by granting explicit authorization to the OCC, there has yet to form a broad consensus of how Congress would address FinTech regulation. *Compare* Financial Services Innovation Act, H.R. 6118, 114th Cong. (2016) (requiring federal regulators to create a Financial Services Innovation Office to encourage innovation in the financial industry and permitting Covered Persons to petition regulators for an alternative compliance plan) *with* Press Release, Senator Jeff Markley, Ranking Member, U.S. Senate Comm. on Banking, Hous. and Urban Affairs (Minority Office), Brown, Merkley Push Back on OCC's Plan for Financial Technology Charter (Jan. 9, 2017), https://www.merkley.senate.gov/news/press-releases/brown-merkley-push-back-on-occs-plan-for-financial-technology-charter [https://perma.cc/B76X-UYVH].

132. *See, e.g.*, Zetzsche, *supra* note 10, at 8; Douglas W. Arner, Ja'nos Barberis & Ross P. Buckley, *FinTech, RegTech and the Reconceptualization of Financial Regulation*, 37 NW. J. INT'L L. & BUS. 371, 384–85 (2017).

133. *See, e.g.*, DELOITTE, THE FUTURE OF REGULATORY PRODUCTIVITY, POWERED BY REGTECH 4 (2017), https://www2.deloitte.com/content/dam/Deloitte/us/Documents/regulatory/us-regulatory-future-of-regulatory-productivity-powered-by-regtech.pdf [https://perma.cc/4NCV-JUS7]; KPMG, THE NEXUS BETWEEN REGULATION AND TECHNOLOGY INNOVATION: HOW FINANCIAL SERVICE FIRMS CAN GAIN GREATER STRATEGIC ADVANTAGE, REDUCE COSTS, AND HARMONIZE COORDINATION 2

ever, this section focuses on RegTech's potential as used by governments to meet the challenges of regulating in the FinTech Revolution. The idea is to develop network systems between financial service firms and regulators as part of the licensing process to monitor and analyze large volumes of financial data in real time.[134] By allowing more effective monitoring of compliance and reporting data, RegTech promises to help regulators map out contagion in the financial markets, quickly identify systematic risks, and better manage future economic crises.[135]

The use of technology by governments to monitor and enforce regulation is not a new concept. For example, the Securities and Exchange Commission (SEC) has been actively involved in using regulatory technology since the 1980s to monitor securities trades.[136] However, similar to FinTech, RegTech is not the concept of technology's application in a particular field, but rather the *degree* and *kind* of its application. Stated differently, new advances in technology, such as artificial intelligence (AI) and big data, now present regulators with the opportunity to adapt the regulatory system into a framework to capture, manage, and analyze large volumes of real-time market transactions. One of the most promising areas for regulators to use this aggregation of data is BSA/AML and KYC laws. By monitoring compliance in real-time, regulators would be better able to detect suspicious transactions and quickly direct resources to investigate.[137] Furthermore, regulators could use data collected from RegTech along with agent-based models (ABMs) to simulate the economic consequences of proposed policy changes.[138] ABMs are already used in traffic control, epidemiology, and even battlefield conflict analysis, and are now starting to be

(Apr. 2017), https://assets.kpmg.com/content/dam/kpmg/us/pdf/2017/03/reg-tech-pov2.pdf [https://perma.cc/EDX3-G2KL]; Elena Mesropyan, *RegTech Companies in the US Driving Down Compliance Costs to Enable Innovation*, MEDICI (Feb. 25, 2017), https://gomedici.com/regtech-companies-in-us-driving-down-compliance-costs-innovation/; [https://perma.cc/8XWY-ZQVN].

134. *See* Arner, Barberis & Buckley, *supra* note 132, at 374.

135. *See* Stefano Battiston et al., *Complexity Theory and Financial Regulation*, 351 SCI. 818 (2016), http://science.sciencemag.org/content/sci/351/6275/818.full.pdf [https://perma.cc/E6WM-7NLT].

136. *See* Arner, Barberis & Buckley, *supra* note 132, at 397.

137. *See id.* at 398; *see also* DOUGLAS W. ARNER ET AL., CFA INST. RSCH. FOUND., FINTECH AND REGTECH IN A NUTSHELL, AND THE FUTURE IN A SANDBOX 15 (2017), https://www.cfapubs.org/doi/pdf/10.2470/rfbr.v3.n4.1 [https://perma.cc/X4DJ-KNEL].

138. GOV'T CHIEF SCI. ADVISER ON FINTECH, GOV'T OFF. FOR SCI., FINTECH FUTURES: THE UK AS A WORLD LEADER IN FINANCIAL TECHNOLOGIES 49 (2015) [hereinafter GOS Report], https://www.gov.uk/government/uploads/system/uploads/

developed within academia to analyze economic systems as well.[139] Similar to how modeling and data analytics are used in other complex systems, such as environmental ecosystems and social networks, RegTech may offer regulators a new method of stress-testing financial systems.[140]

The development of such a system comes with a number of challenges, most notably regulators' own ability to manage and process such increased amounts of data[141] and to balance innovation and regulation.[142] In 2015, the United Kingdom's Government Office for Science published a report outlining steps governments may take toward developing RegTech systems while addressing these concerns.[143] To modernize regulatory infrastructure, governments should invest in data mining analytic tools, which use algorithms to identify anomalies, patterns, and correlations within large data sets and then develop predictive models.[144] Furthermore, governments may wish to invest in new visualization tools to allow policymakers to better analyze data drawn from multiple sources.[145] These investments should also be complemented with new training and educational programs for regulators.

In developing new data reporting requirements, regulators must also balance the need for new regulatory oversight, the consequential costs imposed on financial service firms, and the desire to promote innovation. Regulators can reduce reporting costs and improve efficiency for the financial services market through simplification and harmonization initiatives. For example, regulators could collaborate with other jurisdictions to harmonize reporting stan-

attachment_data/file/413095/gs-15-3-fintech-futures.pdf [https://perma.cc/CY75-RGJA].

139. Battiston et al., *supra* note 135, at 819.

140. *See id.* at 81–89.

141. *See* Arner, Barberis & Buckley, *supra* note 132, at 404 ("From a technological standpoint, the development of RegTech is not a major challenge. The primary limitation may instead come from the regulators' own ability to handle and process the increased amount of data generated through technology.").

142. *See* GOS REPORT, *supra* note 138, at 49 ("There is the possibility that financial regulation and requests for increasing amounts of data are hindering the capacity of traditional financial institutions to operate and more importantly innovate.").

143. *Id.*

144. *Id.* at 50; *see generally* Alexander Furnas, *Everything You Wanted to Know About Data Mining but Were Afraid to Ask*, ATLANTIC (Apr. 3, 2012), https://www.theatlantic.com/technology/archive/2012/04/everything-you-wanted-to-know-about-data-mining-but-were-afraid-to-ask/255388/ [https://perma.cc/CJG4-X5EA].

145. GOS REPORT, *supra* note 138, at 50.

dards, implement standardized compliance tagging, and share information between regulators with overlapping jurisdictions.[146] Furthermore, regulators should make a concerted effort to engage with FinTech actors on issues where either side feels efficiency can be improved. For example, companies may propose new, more cost-effective ways to collect data, while regulators can promote the development and use of uniform compliance systems, such as open-source tools.

RegTech offers regulators a new model of interacting with regulated market participants and ensuring financial stability within the marketplace. Just as FinTech has been utilized by private actors to transform the financial services market, RegTech offers regulators a means to adapt the existing regulatory framework to respond to the challenges posed by rapid and continuous financial innovation.

CONCLUSION

A decade into the FinTech Revolution, the question of how the U.S. regulatory system will accommodate new innovations in the financial services market remains to be answered. While FinTech is not new, the growth of financial products and services being offered by non-traditional financial firms presents new challenges to regulators in managing and protecting market stability. The rapid growth and market penetration which characterizes the FinTech Revolution has demonstrated that regulators can no longer remain inactive and must take necessary steps to adapt the regulatory system to meet the challenges of an increasingly decentralized and innovative financial market. Governments around the globe have already begun to take steps toward developing smart regulatory systems to balance innovation and the preservation of market soundness. By drawing on these experiences, U.S. regulators can better integrate FinTech into the American financial regulatory framework, thereby ensuring the U.S.'s economic competitiveness and ability to realize the full benefits of financial innovation.

146. *Id.* at 49.