Four Reasons the Supreme Court Should Reconsider its Article III Standing Doctrine

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INTRODUCTION

On May 6, 2021, an extraordinary, 25-page concurring opinion was published in a decision by the U.S. Court of Appeals for the 11th Circuit[1] that provided the following four reasons the Supreme Court should reconsider its long-standing doctrine that Article III of the Constitution prevents federal courts from hearing civil cases unless plaintiffs show that their claims arise out of "injury-in-fact."[2] The doctrine is (1) incoherent in theory and unworkable in practice,[3] (2) manipulable to serve policy-driven decisions,[4] (3) inconsistent with historical practices in the Founding Era,[5] and (4) not grounded in the text of Article III.[6]

These four critiques were not novel in 2021 in the world of academic legal scholarship,[7] but it was extraordinary for such an explicit and sweeping attack

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[1] *See* Sierra v. City of Hallandale Beach, Florida, 996 F.3d 1110, 1112–14 (11th Cir. 2021) (holding that a deaf plaintiff had suffered an "injury-in-fact" because videos on a city's official website were posted without closed captioning); *id.* at 1115–40 (Newsom, J., concurring). We are indebted to the detailed analysis and assessment of Judge Newsom's work in Jonathan H. Adler, *Standing Without Injury*, WAKE FOREST L. REV. (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4565122 [https://perma.cc/2S9T-6L3Z].

[2] *See Sierra*, 996 F.3d at 1121–26.

[3] *Id.* at 1121.

[4] *Id.* at 1126–29. *See also* Kevin C. Newsom, *Remarks of Judge Kevin C. Newsom*, 47 HARV. J.L. & PUB. POL'Y Issue 3 (forthcoming 2024) (*TransUnion*'s approach leaves too much to judges' discretion) [on file with *OSLJ*].

[5] *Id.* at 1123.

[6] *Id.* at 1121–23.

[7] *See, e.g.*, Gene R. Nichol, Jr., *Rethinking Standing*, 72 CALIF. L. REV. 68 (1984); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988); William A. Fletcher, *The Structure of Standing*, 98 YALE L. J. 221 (1988); Susan Bandes, *The Idea of a Case*, 43 STAN. L. REV. 227 (1990); Glenn H. Reynolds, *Penumbral Reasoning on the Right*, 140 U. PA. L. REV. 1333, 1337–40 (1992); Cass R.

on a doctrine considered to be a major legacy of Justice Antonin Scalia to be authored by one of the current federal judiciary's leading conservative intellectuals: Judge Kevin Newsom.[8] During the presidency of Donald Trump, Judge Newsom was twice announced as a potential nominee to the Supreme Court.[9] A former articles editor of the *Harvard Law Review*,[10] Judge Newsom (while a practitioner) authored a substantial article on constitutional history in the *Yale Law Journal*.[11] He is a frequent speaker at events sponsored by the Federalist Society,[12] and in the 2023-24 academic year is teaching courses about the federal courts at both Yale[13] and Stanford[14] law schools.

Judge Newsom's concurrence further had particular force because he wrote from the perspective of a judge who has attempted to apply faithfully the Court's standing doctrine and has only reluctantly come to the conclusion that the doctrine is fatally flawed.[15]

Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 472–90 (1996); Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies – And Their Connections to Substantive Rights*, 92 VA. L. REV. 623 (2006); William Baude, *Standing in the Shadow of Congress*, 2016 SUP. CT. REV. 197, 199 (2017); James E. Pfander, *Standing, Litigable Interests, and Article III's Case-Or-Controversy Requirement*, 65 UCLA L. REV. 170, 173 (2018).

[8] *See* Adler, *supra* note 1.

[9] Press Release, White House, President Donald J. Trump's Supreme Court List (Nov. 17, 2017), https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trumps-supreme-court-list/ [https://perma.cc/P7A6-5V3B]; *Trump Says Justice Kennedy's Replacement Will Come From List of 25*, CBS NEWS (June 27, 2018), https://www.cbsnews.com/news/trumps-supreme-court-justice-list-justice-kennedy-retirement-president-replace-list-of-25-2018-06-27/ [https://perma.cc/WU75-46CK].

[10] *Kevin Newsom*, BALLOTPEDIA, https://ballotpedia.org/Kevin_Newsom [https://perma.cc/JG62-TGPP].

[11] *See generally* Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 YALE L. J. 643 (2000).

[12] *Hon. Kevin C. Newsom*, FEDERALIST SOC'Y, https://fedsoc.org/contributors/kevin-newsom [on file with *OSLJ*], (last visited Apr. 26, 2024).

[13] *Kevin Christopher Newsom, Visiting Lecturer in Law*, YALE L. SCH., https://law.yale.edu/kevin-christopher-newsom [https://perma.cc/974R-6YE9] (last visited Apr. 26, 2024).

[14] *Kevin Newsom, Lecturer in Law*, STAN. L. SCH., https://law.stanford.edu/directory/kevin-newsom/ [https://perma.cc/PX9K-55ZH] (last visited Apr. 26, 2024).

[15] Sierra v. City of Hallandale Beach, Florida, 996 F.3d 1110, 1115 (11th Cir. 2021) (Newsom, J., concurring)("I write separately to explain why, following several pretty unsatisfying encounters with it, I've come to doubt that current standing doctrine—and especially its injury-in-fact requirement—is properly grounded in the Constitution's text and history, coherent in theory, or workable in practice. . . . It has taken me a while to come to this conclusion."). *Id.* at 1117 ("In deciding cases . . . I've come to the view—reluctantly, but decidedly—that our Article III standing jurisprudence has jumped the tracks."). A year before *Sierra* another 11th Circuit judge, Adalberto Jordan, wrote an extended critique of the Supreme Court's standing doctrine that made many of the same points as Judge Newsom's

The need for and potential possibility of changing the Court's Article III standing doctrine was reinforced less than two months after Judge Newsom's concurrence was published, when Justice Thomas also launched an attack on the injury-in-fact requirement, in *TransUnion LLC v. Ramirez*.[16] In an unusual move, Justice Thomas joined three liberal members of the Court –Justices Breyer, Sotomayor, and Kagan–by dissenting from a decision that denied standing to plaintiffs claiming under a statute specifically authorizing consumers to sue for credit reporting violations even in the absence of actual damages.[17] Justice Thomas wrote the following:

> TransUnion violated several provisions of the Fair Credit Reporting Act (FCRA) that entitle consumers to accuracy in credit-reporting procedures; to receive information in their credit files; and to receive a summary of their rights. Yet despite Congress' judgment that such misdeeds deserve redress, the majority decides that TransUnion's actions are so insignificant that the Constitution prohibits consumers from vindicating their rights in federal court. *The Constitution does no such thing*.[18]

Parts I – III of this essay briefly review judicial decisions and legal scholarship that support or provide perspective on the first three reasons why the Court should reconsider its Article III standing doctrine, with an emphasis on decisions and scholarship from 2021 to the present. These parts particularly benefit from the first author's attendance in September 2023 at a conference on Article III Standing hosted by the Constitutional Law Institute at the University of Chicago Law School.[19] Part IV is a more extended analysis of the fourth

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Sierra concurrence. *See* Muransky v. Godiva Chocolatier, Inc., 979 F.3d 917, 983–84 (11th Cir. 2020) (Jordan, J., dissenting) (saying "there has been profound confusion about current standing doctrine" and hoping that "the Supreme Court will step in to sort out the doctrinal incoherence").

[16] TransUnion LLC v. Ramirez, 594 U.S. 413, 443–51 (2021) (Thomas, J., dissenting). Justice Thomas specifically cited both Judge Newsome's *Sierra* concurrence and Judge Jordan's *Muransky* dissent in his *TransUnion* dissent. *Id.* at 452–60.

[17] *See generally Ramirez*, 594 U.S. 413.

[18] *Id.* at 442–43 (Thomas, J., dissenting) (emphasis added). While joining Justice Thomas's dissent, Justice Kagan wrote separately on behalf of herself, Justice Breyer, and Justice Sotomayor, saying that she "continue[d] to adhere to . . . the view" that Article III requires a "concrete injury," even in the context of a statutory violation, but that commitment to the injury-in-fact requirement may be open to reconsideration, especially in light of the subsequent standing cases. *Id.* at 462.

[19] Judge Newsom was a keynote speaker at this conference. The following papers presented at the conference are cited in this essay. See generally Adler, *supra* note 1; Rachel Bayefsky, *Public-Law Litigation at a Crossroads: Article III Standing and 'Tester' Plaintiffs*, 99 N.Y.U. L. REV. ONLINE 128 (2024), https://www.nyulawreview.org/online-features/public-law-litigation-at-a-crossroads-article-iii-standing-and-tester-plaintiffs/[https://perma.cc/39DZ-HFE5]; Sarah Leitner, *The Private-Rights Model of* Qui Tam, FLA. L. REV. (forthcoming 2024), https://ssrn.com/abstract=4558341 [https://perma.cc/V7KC-ZRMY]; Thomas Schmidt, *The Other Side of Standing*, 2024 WISC. L. REV. 1 (2024); Owen B. Smitherman, *History, Public Rights, and Article III Standing*, 47

reason, the failure of standing doctrine to be grounded in the text of Article III, drawing on interdisciplinary law-linguistics collaboration in which the authors have participated on this issue going back to 2019.

I. REASON ONE: INCOHERENT IN THEORY, UNWORKABLE IN PRACTICE

In his *Sierra* concurrence, Judge Newsom supported his conclusion that the "injury-in-fact" requirement is unworkable in practice by reviewing a number of cases that reached opposite conclusions about standing based on facts that seem identical[20] or only trivially different.[21] He also illustrated "the challenge (and consternation) of trying to distinguish the 'concrete' from the 'abstract,' the 'particularized' from the 'generalized'" he "experienced firsthand" while trying to apply the "injury-in-fact" requirement in five different appellate cases where he authored the majority opinion.[22]

The unworkability of current standing doctrine has most recently been laid bare by a 3-3 circuit split that is probably unprecedented in American legal history.[23] As described by Justice Amy Coney Barrett, writing for the Court in *Acheson Hotels LLC v Laufer*,[24] the respondent in that case, Deborah Laufer,

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HARV. J.L. & PUB. POL'Y 167 (2024); Julia Mahoney & Ann Woolhandler, *State Standing After* Biden v Nebraska, 2023 SUP. CT. REV. (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4528538 [https://perma.cc/SF8Q-69NZ].

[20] Sierra v. City of Hallandale Beach, Florida, 996 F.3d 1110, 1116 (11th Cir. 2021) (Newsom, J., concurring)

> [T]he Second and Sixth Circuits have held that any plaintiff who receives an objectively misleading debt-collection letter in violation of the Federal Debt Collection Practices Act suffers a concrete injury . . . We [the 11th Circuit], by contrast, have joined the D.C. Circuit in holding there is no concrete injury unless the letter actually misled the plaintiff herself.

[21] *Id.*

> We have held, for instance, that receiving an unwanted phone call in violation of the Telephone Consumer Protection Act is a concrete injury, but receiving an unwanted text message in violation of the Act is not. . . . Likewise, while we have held that printing 10 digits of a customer's credit card on a receipt in violation of the Fair and Accurate Credit Transactions Act does not give rise to a concrete injury, another circuit has held that printing 16 digits does.

[22] *Id.* at 1116–17 (listing and summarizing generally Flat Creek Transp., LLC v. Fed. Motor Carrier Safety Admin., 923 F.3d 1295 (11th Cir. 2019); Gardner v. Mutz, 962 F.3d 1329 (11th Cir. 2020); *In re* Breland, 989 F.3d 919 (11th Cir. 2020); Hunstein v. Preferred Collection & Mgmt. Servs., Inc., 994 F.3d 1341 (11th Cir. 2021); Losch v. Nationstar Mortg. LLC, 995 F.3d 937 (11th Cir. 2021)).

[23] *See infra* notes 26–27 and accompanying text.

[24] Acheson Hotels, LLC v. Laufer, 601 U.S. 1, 2 (2023).

"has singlehandedly generated a circuit split. The Second, Fifth, and Tenth Circuits have held that she lacks standing; the First, Fourth, and Eleventh Circuits have held that she has it."[25] Not only are the facts in each of the six appellate decisions the same – a disabled person with no plans to stay at a given hotel nonetheless sues under the Americans with Disabilities Act for failure to provide accessibility information on the hotel website – but the identity of the plaintiff is the same.[26] And, as Justice Barrett writes, "the circuit split is [still] very much alive," because the Court dismissed *Acheson Hotels* as moot, thus not resolving the issue of Laufer's standing.[27]

II. REASON TWO: EASILY MANIPULABLE TO SERVE POLICY-DRIVEN DECISIONS

In concluding that the Court's standing doctrine is easily manipulable to serve policy driven decisions, Justice Newsom's *Sierra* concurrence makes an analogy to substantive due process that surely would have been painful to Justice Scalia.[28]

> [The] most glaring defect [of substantive due process] is its incompatibility with the constitutional text. . . . Unmoored from the constitutional text, [substantive due process] doctrine drifted to open sea, and searching for landmarks, courts turned to common-law tradition and (far worse) their own policy and ethical intuitions. . . . Standing doctrine, I'm sorry to say, seems little different. . . . As a doctrine born largely of judicial creativity, perhaps it's no surprise that standing mimics substantive due process in application . . . [L]acking any meaningful textual anchor, the Supreme Court has—for want of any other limit—directed courts to consult the common law. . . . [W]hen reference to the common law is altogether untethered from the governing text, it can invite manipulable, policy-driven cherry-picking—as, I

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[25] *Id.* at 3. The 11th Circuit decision regarding *Laufer* was authored by Judge Newsom, who wrote for the court saying that under existing precedent, including *Sierra*, Laufer had standing but then also writing a concurring opinion critiquing current standing doctrine, building on his *Sierra* concurrence, and suggesting that while under his approach to Article III Laufer did have a "Case," her type of "tester" litigation might violate the authority given to the executive under Article II. Laufer v. Arpan LLC, 29 F.4th 1268, 1270, 1283–84 (11th Cir. 2022) (Newsom, J., concurring). For a detailed analysis of how Judge Newsom's Article II standing approach might affect various types of cases, see Adler, *supra* note 1.

[26] *Laufer*, 601 U.S. at 3–4. For a detailed history and analysis of the *Laufer* cases, see Bayefsky, *supra* note 19, at 139–47.

[27] *Laufer*, 601 U.S. at 3–5 (following disciplinary action taken against Laufer's attorney, she voluntarily dismissed her lawsuit against Acheson Hotels). *But see id.* at 5–14. Justice Thomas, concurring, would have reached the merits and concluded that Laufer lacked standing, based on the distinction he has been developing over a series of cases between public rights and private rights, discussed below in Part III. See *infra* notes 40–47 and accompanying text.

[28] Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1126 (11th Cir. 2021) (Newsom, J., concurring).

> fear, it may both when tackling the question whether a right is sufficiently important to qualify for substantive-due-process protection and when deciding whether a plaintiff has suffered an "injury in fact."[29]

Four high-profile decisions issued in the last two weeks of the Court's 2022-23 term significantly featured the issue of standing.[30] Application of the standing doctrine played a critical role in two decisions affecting governmental policy on a national scale.[31] In *United States v. Texas*, a lower court decision invalidating Biden administration immigration guidelines was reversed not on the merits, but only on the ground that the plaintiffs, the states of Texas and Louisiana, lacked standing:

> Article III of the Constitution confines the federal judicial power to "Cases" and "Controversies." Under Article III, a case or controversy can exist only if a plaintiff has standing to sue—a bedrock constitutional requirement that this Court has applied to all manner of important disputes. . . . Article III standing is "not merely a troublesome hurdle to be overcome if possible so as to reach the 'merits' of a lawsuit which a party desires to have adjudicated; it is a part of the basic charter promulgated by the Framers of the Constitution at Philadelphia in 1787.[32]

Justice Samuel Alito, dissenting, clearly thought the majority had manipulated standing doctrine to reach a desired outcome: "settled law . . . leads ineluctably to the conclusion that Texas has standing."[33]

In contrast, in *Biden v. Nebraska*, a state was found to have standing: to successfully challenge the Biden administration student loan forgiveness program.[34] Justice Elena Kagan, joined by Justices Sotomayor and Jackson, argued that the majority had stretched standing doctrine beyond credible limits in order to be able to invalidate the Biden loan forgiveness program.[35]

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[29] *Id.* at 1127–29 ("The question whether a party has been 'injured' is inescapably value-laden."). Judge Newsom acknowledges prior academic critiques making a similar analogy between substantive due process and standing doctrine. See generally *id.* (referencing generally William Baude, *Standing in the Shadow of Congress*, 2016 SUP. CT. REV. 197 (2017); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992)).

[30] *See generally* 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (owner of website design company faced credible threat of sanctions for refusing same-sex wedding clients and thus had standing to challenge state anti-discrimination law); Haaland v. Brackeen, 599 U.S. 255 (2023) (foster parents, adoptive parents and State of Texas all lacked standing to challenge Indian Child Welfare Act); Biden v. Nebraska, 143 S. Ct. 2355 (2023). *See also* United States v. Texas, 599 U.S. 670, 674–75 (2023).

[31] *See infra* notes 32–35 and accompanying text.

[32] United States v. Texas, 599 U.S. 670, 675 (2023).

[33] *Id.* at 709–10 (Alito, J., dissenting).

[34] *See generally* Biden v. Nebraska, 143 S. Ct. 2355 (2023).

[35] *Id.* at 2385–88. (Kagan, J., dissenting).

> No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies. . . . A court may address the legality of a government action only if the person challenging it has standing—which requires that the person have suffered a "concrete and particularized injury."[36]

A leading expert on standing, Ann Woolhander, and her co-author, Julia Mahoney, have offered a harsh critique of *Biden v Nebraska*, as creating the appearance that the Court "is willing to distort its precedents . . . to find standing for states bent on undermining the current administration's agenda."[37] In reviewing *Biden v. Nebraska* and other cases from the 2022-23 term in which one or more states have claimed standing to challenge Biden administration policies, William Baude and Samuel Bray conclude:

> The legal system has been approaching a point of exhaustion and futility . . . . As soon as a presidential administration does something that matters, it will be sued immediately by a coalition of states whose attorneys general are of the opposite political party . . . and point to downstream costs they may suffer from the federal policy, which is easy to do because every important federal policy will lead to costs *somewhere* . . . This is bad law and bad democracy. It cannot go on forever.[38]

III. REASON THREE: INCONSISTENT WITH HISTORICAL PRACTICES IN THE FOUNDING ERA

Judge Newsom's *Sierra* concurrence referenced three kinds of "suits that courts routinely heard in the years surrounding the Founding . . . [as showing] that the original understanding of the term 'Case' included no stand-alone requirement of a factual injury": suits for nominal damages, *qui tam* actions, and criminal prosecutions.[39]

Historical evidence of suits for nominal damages in the Founding Era was a central point in Justice Thomas' *TransUnion* dissent, in which he argued that a statutory right for a consumer to recover "the sum of any actual damages sustained by the consumer as a result of the failure *or damages of not less than $100 and not more than $1,000*"[40] for violation of the Fair Credit Reporting Act was sufficient to create standing.[41] However, Justice Thomas read this history

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[36] *Id.* at 2385–86 (Kagan, J., dissenting).

[37] Mahoney & Woolhandler, *supra* note 19, at 34.

[38] William Baude & Samuel L. Bray, *Comments: Proper Parties, Proper Relief*, 137 HARV. L. REV. 153, 173–74 (2023); *See also* Robert J. Pushaw, Jr.*, The Court Continues to Confuse Standing: The Pitfalls of Faux Article III "Originalism,"* 31 GEORGE MASON L. REV. (forthcoming 2024), https://ssrn.com/abstract=4622557 [https://perma.cc/G4LH-HV3G].

[39] Sierra v. City of Hallandale Beach, Florida, 996 F.3d 1110, 1123 (11th Cir. 2021).

[40] 15 U.S.C. § 1681n(a)(1)(A) (emphasis added).

[41] TransUnion LLC v. Ramirez, 594 U.S. 413, 447–49 (2021) (Thomas, J., dissenting).

narrowly as only supporting a suit to enforce private rights, not claims he characterized as "public rights," a distinction he had been developing in prior concurring opinions:[42] "At the time of the founding, whether a court possessed judicial power over an action with no showing of actual damages depended on whether the plaintiff sought to enforce a right held privately by an individual or a duty owed broadly to the community."[43]

The argument that the Court's standing doctrine is inconsistent with historical practices in the Founding Era was well developed in the academic literature prior to Judge Newsom's *Sierra* concurrence and the Justice Thomas dissent in *TransUnion*.[44] Legal scholarship concurrent with and subsequent to *Sierra* and *TransUnion* has only further reinforced this argument.[45]

In *History, Public Rights, and Article III Standing*, Owen Smitherman comprehensively reviews public nuisance tort law in England prior to the American Revolution and in early American cases.[46] He concludes that this history is not only inconsistent with traditional standing doctrine but does not even support Justice Thomas' effort to retain the "injury-in-fact" requirement for claims involving "public rights."[47]

On the other hand, Sarah Leitner, in *The Private-Rights Model of Qui Tam*, argues that Founding Era *qui tam* practice—in which an individual with no personalized injury could bring a suit on behalf of the government and receive a share of the judgment—can be reconciled with Justice Thomas' view that historical practice can only support waiver of the "injury-in-fact" requirement for private rights claim.[48]

Thomas Schmidt finds in historical tradition a different private-public distinction for standing doctrine: not between types of rights but as to the identity of the defendant: "historical tradition undermines the claim that Article III imposes limits on the sorts of legal rights that Congress can relegate to private enforcement. . . . There should be virtually no Article III limit on Congress's (or

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[42] *See* Spokeo, Inc. v. Robins, 578 U.S. 330, 344–46 (2016) (Thomas, J., concurring); Thole v. U.S. Bank N.A., 590 S. Ct. 538, 548–49 (2020) (Thomas, J., concurring). Justice Thomas would have relied on this distinction to deny standing in Acheson Hotels LLC v. Laufer, 601 U.S. 1, 11 n.2 (2023) (Thomas, J., concurring).

[43] *Ramirez*, 594 U.S. at 446.

[44] *See, e.g.*, Winter, *supra* note 7, at 1394–1409; Sunstein, *supra* note 7, at 168–79; Bradley S. Clanton, *Standing and the English Prerogative Writs: The Original Understanding*, 63 BROOKLYN L. REV. 1001, 1008 (1997); James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 YALE L. J. 1346, 1391 (2015).

[45] *See infra* notes 46–50 and accompanying text.

[46] *See generally* Smitherman, *supra* note 19.

[47] *Id.*

[48] *See generally* Leitner, *supra* note 19 (suggesting this reconciliation can be accomplished by viewing *qui tam* actions as only asserting government claims that are analogous to private rights claims, like contract enforcement and trespass).

the states') power to recognize new injuries that can be vindicated against private parties."[49]

In his 2021 book, *Cases without Controversies*, James Pfander extensively documents the point that "members of the First Congress of the United States promptly assigned the adjudication of uncontested matters to the federal courts," giving as examples naturalization proceedings, arrest and search warrants, prize and salvage cases in admiralty law, and veteran pension claims.[50]

IV. REASON FOUR: NOT GROUNDED IN THE TEXT OF ARTICLE III

TransUnion is just the latest in a long line of Supreme Court cases in which the Court has looked directly at Congressional statutes that explicitly give private parties the right to enforce such statutes and told Congress that Article III prevents Congress from doing so. Writing for the Court in *TransUnion*, Justice Kavanaugh said: "[C]ongress may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is. . . [W]e cannot treat an injury as 'concrete' for Article III purposes based only on Congress's say-so."[51]

In the seminal standing case of *Lujan v Defenders of Wildlife*, a decision authored by Justice Scalia, the Court invoked Article III to deny several environmental groups the right to enforce the Endangered Species Act, despite a provision allowing "any person [to] commence a civil suit . . . to enjoin any person . . . who is alleged to be in violation of" the act.[52] In *Thole v U.S. Bank N.A*. the Court held that Article III denied retirees the right to sue in federal court for violation of a subchapter of the Employee Retirement Income Security Act imposing fiduciary duties on retirement plan managers, despite a provision permitting participants, beneficiaries, or fiduciaries to bring suit "to enjoin any act or practice which violates any provision of this subchapter."[53] In *Spokeo Inc. v Robins*, like *TransUnion*, the Court blocked a lawsuit to enforce the Fair Credit Reporting Act by a person alleging that a website had disseminated incorrect information about him.[54]

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[49] Schmidt, *supra* note 19.

[50] JAMES E. PFANDER, CASES WITHOUT CONTROVERSIES: UNCONTESTED ADJUDICATION IN ARTICLE III COURTS 33–48 (2021); *see also* Robert J. Pushaw Jr., *"Originalist" Justices and the Myth That Article III "Cases" Always Require Adversarial Disputes*, 37 CONST. COMMENT. 259, 264–65 (2022) (reviewing JAMES E. PFANDER, CASES WITHOUT CONTROVERSIES: UNCONTESTED ADJUDICATION IN ARTICLE III COURTS (2021)).

[51] TransUnion LLC v. Ramirez, 594 U.S. 413, 426 (2021) (quoting Hagy v. Demers & Adams, 882 F.3d 616, 622 (6th Cir. 2018) and Trichell v. Midland Credit Mgmt., Inc., 964 F.3d 990, 999, n. 2 (11th Cir. 2020)).

[52] Lujan v. Defenders of Wildlife, 504 U.S. 555, 570 (1992).

[53] Thole v. U.S. Bank, 590 U.S. 538, 550 (2020).

[54] Spokeo, Inc. v. Robins, 578 U.S. 330, 340 (2016).

In defying the will of Congress in these cases, the Court does not claim some kind of inherent power to exercise judicial self-restraint,[55] but instead consistently says in effect "the text made us do it" - as Justice Kavanaugh insisted in *TransUnion:* "[I]f the law of Article III did not require plaintiffs to demonstrate a 'concrete harm' . . . [s]uch an expansive understanding . . . would flout constitutional text . . . ."[56]

The text that forces the Court to defy Congress is, the Court claims, the word "Cases" in Article III.[57] The bedrock principle for interpreting the words of the Constitution is that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning."[58] However, one can read all of the Court's explanations of its Article III standing doctrine without ever finding any effort by the Court to investigate what was the "normal and ordinary meaning" of "Cases" in Article III when the Constitution was ratified.

Even a cursory review of the relevant constitutional text, Article III (Section 2), shows problems with the interpretation of Article III as limiting federal judicial power to "injured plaintiff litigation."[59]

> Section 2.
> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.
> In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.
> The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

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[55] Compare doctrines of prudential standing in Lexmark Intern., Inc. v. Static Control Components, 572 U.S. 118, 125–28 (2014) and Louis Michael Seidman, *The Secret Life of the Political Question Doctrine*, 37 J. MARSHALL L. REV. 441, 445 (2004).

[56] TransUnion LLC v. Ramirez, 594 U.S. 413, 428 (2021).

[57] United States v. Texas, 599 U.S. 670, 675 (2023) (the Court refers to both "Cases" and "Controversies," a point discussed below).

[58] District of Columbia v. Heller, 554 U.S. 570, 576 (2008) (quoting United States v. Sprague, 282 U.S. 716, 731 (1931)).

[59] *See* U.S. CONST. art. II, § 2.

The first problem is that the opening phrase "all cases, in law and equity, arising under this Constitution, [and] the laws of the United States" undoubtedly includes criminal cases arising under federal law, yet criminal cases involve no "injured plaintiff" and do not require showing "concrete injury."[60]

The second problem is the use of "cases" in the third paragraph: "cases of impeachment."[61] Impeachment does not involve an injured plaintiff or concrete injury and is not even litigation.

The third problem is that Article III's use of "cases" for the initial categories of judicial power is followed by a switch to "controversies" for the later categories. The Supreme Court carelessly refers all the time to "cases and controversies" as if the terms were synonyms in Article III without ever acknowledging or justifying that assumption.[62]

Judge Newsom, in *Sierra*, decided that "current Article III standing can't be correct . . . as a matter of text,"[63] by concluding that "There is a far more natural and straightforward reading of the word "Case" than one that turns on the existence of an 'injury in fact': An Article III "Case" exists so long as – and whenever – a plaintiff has a cause of action . . . whenever he can show (1) that his legal rights have been violated and (2) that the law authorizes him to seek judicial relief."[64] Judge Newsom said that "[t]his 'cause of action'-based understanding of the term 'Case' follows directly" from its ordinary meaning, citing the definition of "case" as "[a] cause or suit in court" in Webster's American Dictionary, published in 1828.[65]

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[60] *Id.* For differing perspectives on this issue, see Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show that Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239, 2246–51 (1999) and Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 695 (2004).

[61] *See* U.S. CONST. art. II, § 2.

[62] Robert Pushaw has argued that, when the Constitution was drafted and ratified, the word "case" referred "to a cause of action . . . in which the judge's primary role was to answer . . . [a] legal question. . . . A dispute between parties was a usual—but not necessary—ingredient of a 'case.'" Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Function of Federal Courts*, 69 NOTRE DAME L. REV. 447, 448–50, 470–75, 494–98 (1994). In contrast, a "controversy" meant a "bilateral dispute . . . with any legal exposition incidental." *Id.* at 450. Thus, according to Pushaw, "the term 'case' provides no constitutional support for application of standing [doctrine]." *Id.* The Constitution uses "cases" in Article III, says Pushaw, to empower federal courts "to declare the law in matters of national and international importance." *Id.* at 449. *See generally* Pfander, *supra* note 7; JAMES E. PFANDER, CASES WITHOUT CONTROVERSIES: UNCONTESTED ADJUDICATION IN ARTICLE III COURTS (2021).

[63] Sierra v. City of Hallandale Beach, Florida, 996 F.3d 1110, 1121 (2021) (Newsom, J., concurring). *See also* Newsom, *supra* note 6 (far better to tether Article III doctrine to "the objectively verifiable original meaning of the written text").

[64] *Sierra*, 996 F.3d at 1122.

[65] *Id.* at 1122–23 (Judge Newsom's Sierra concurrence also cited two cases from the 19th century as evidence of "traditional usage in the courts" indicating that "case" and "cause" were used a synonyms).

We, however, believe that there is a better method than recourse to dictionaries to investigate the "ordinary meaning" of words in the Founding Era: corpus linguistics.

A. *Linguistic Analysis of "Cases" in the Context of Article III*

Corpus linguistics is a methodology for doing linguistic research by accessing large digitized data collections of actual language use taken from many sources. Not only is this method a more valid and reliable way of ascertaining "ordinary meaning" than recourse to dictionary definitions, corpus linguistics allows investigation into meaning of complete phrases, while dictionaries focus on words in isolation.[66]

Going back to 2019, a law-linguistics research team that includes the authors of this essay has been investigating the original ordinary meaning of "Cases" in Article III using two very large data sets of texts written during the Founding Era, both available for free on the internet: Founders Online created by the National Archives[67] and the Corpus of Founding Era American English (COFEA).[68] This team reached the conclusion that "cases" in the Article III phrase "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties" can be interpreted far more broadly than "injured plaintiff litigation,"[69] – perhaps not even be limited to "case as cause of action," as proposed by Judge Newsom.[70]

This analysis began with a well-accepted theory in linguistics that some nouns – notably including "case" – can function as "shell nouns." When "case" is used as a shell noun, it does not bring a specific inherent meaning – like "courtroom litigation" or "court decision" – to the context but instead forms a "shell" around additional content, usually a complex chunk of information

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[66] *See generally* Clark D. Cunningham & Ute Römer-Barron, *Did January 6 Defendants (Including Donald Trump) "Otherwise Obstruct" an Official Proceeding? Linguistic Analysis for the Fischer Case Before the Supreme Court*, GA. ST. U. COLLEGE OF LAW LEGAL STUDIES RESEARCH PAPER, https://ssrn.com/abstract=4709559 [https://perma.cc/7C98-WVLU] (2024) [on file with *OSLJ*].

[67] *Founders Online*, NAT'L ARCHIVES, https://founders.archives.gov/ [https://perma.cc/6XSW-PAZU] (last visited Apr. 27, 2024).

[68] *Corpus of Founding Era American English*, BYU L. L. & CORPUS LINGUISTICS, https://lawcorpus.byu.edu/ [https://perma.cc/V27K-JGW9] (last visited Apr. 27, 2024).

[69] *See generally* Haoshan Ren et al., "*Questions Involving National Peace and Harmony" or "Injured Plaintiff Litigation"? The Original Meaning of 'Cases' in Article III of the Constitution*, 36 GA. ST. L. REV 535 (2020) [hereinafter *Original Meaning of Cases*]; Suppl. Br. for the Law & Linguistics Research Team as Amicus Curiae, Wright v. Spaulding, 939 F.3d 695 (6th Cir. 2019), http://www.clarkcunningham.org/JP/Wright-web/Wright-SupplementalAmicusBrief-22Aug2019.pdf [https://perma.cc/T2JY-WJXZ] (on file with OSLJ).

[70] *See infra* notes 124–30 and accompanying text for discussion of the questions presented to justices of the Supreme Court by President George Washington.

provided in the nearby context.[71] The research team found extensive evidence in both the Founders Online and COFEA data sets that "case" was frequently used as a shell noun in the Founding Era.

Take for example this letter written by James Madison in 1805 when he served as Secretary of State in the Jefferson administration:

> In all cases *where there may be no special grounds for suspecting an escape of the offender, by the departure of the vessel of war, or the removal of him beyond the reach of your warrant*, you are to take no step towards applying the extraordinary force authorized by the law, until you shall receive such further directions as the President shall, in consequence of your report, think proper to be given. . . .
> Whatever may be the result of these proceedings, you are, without delay, to transmit a full and exact report thereof to this department; and even to report for the information of the President, any important circumstance which may occur in the course of them; particularly in cases *where there may possibly be time for his directions thereon to be received and pursued*.[72]

The shell content in each example is italicized and is notably complex, especially in the first example. The meaning of "cases" is clearly different in the first and second example, even though occurring in the same short letter, because the shell content is different for each use of "cases."[73] Looking at the second example, it is particularly clear that "cases" does not bring any inherent meaning to the sentence; the italicized shell content is necessary to give meaning to the word.[74] If the shell content is removed, the concluding phrase "particularly in cases" no longer makes sense.[75]

When shell noun theory is brought to the reading of Article III, Section 2, then "cases" can be understood as having a different meaning in each context of use, constructed through its combination with accompanying words. Thus "cases of impeachment" in the final sentence of Section 2 can refer to a process that is not litigation at all.[76] The *first* use of "cases" in the second paragraph can refer only to two grants of judicial power – (a) where a state is a party and (b) affecting ambassadors, other public ministers and consuls – while the *second* use of "cases" in that paragraph has a completely different referent – all "other cases" not referenced by the first use, mixing together subject matter and party-based grants of judicial power.[77]

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[71] *See generally* HANS-JÖRG SCHMID, ENGLISH ABSTRACT NOUNS AS CONCEPTUAL SHELLS: FROM CORPUS TO COGNITION (2000).

[72] JAMES MADISON, CIRCULAR LETTER TO THE MARSHALS (1805) (emphasis added), https://founders.archives.gov/documents/Madison/02-09-02-0465 [https://perma.cc/7S9R-CDEZ].

[73] *Id.*

[74] *See* SCHMID, *supra* note 71, at 3.

[75] *See id.* at 8.

[76] *See id.*

[77] *Id.*

B. *Linguistic Analysis of "Cases" Corroborated by Drafting History of Article III*

The records of the Constitutional Convention strongly suggest that the drafters of the Constitution were using "all cases arising . . . " as a shell noun phrase, not as a limited reference to "injured plaintiff litigation."[78]

On July 18, 1787, the Convention unanimously approved the following resolution presented by James Madison: "the jurisdiction of the national Judiciary shall extend to cases arising under laws passed by the general Legislature, and to such other questions as involve the National peace and harmony."[79]

This resolution used a phraseological structure that was common in the Founding Era: "<a> and such other <b>."[80] Consider this example from a 1793 publication: "The second plowing . . . will be turned upwards, and . . . may be planted with *potatoes* or *such other vegetables* as may best suit the judicious husbandman's inclination."[81]

Use of this structure indicates that <a> is a specific example of a broader category <b>. The syntax cannot be reordered to say "planted with vegetables or such other potatoes."[82]

Therefore, the July 18 resolution would, presumably, have been understood by the delegates who adopted it as indicating that "cases arising under laws" was a specific example of a broader grant of judicial power over "questions as involve the National peace and harmony."[83] The term "questions," like "cases" is recognized by linguists as a commonly occurring shell noun.[84]

The language of the July 18 resolution can support reading the first clause of Section 2 as having the same meaning as:

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[78] For a complete review of the drafting history of Article III, see *Original Meanings of Cases*, *supra* note 69, at 569–98.

[79] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 39 (Max Farrand ed., 1966) [hereinafter *Records II*].

[80] *See, e.g.*, *infra* notes 81–84.

[81] JOHN SPURRIER, THE PRACTICAL FARMER 33 (1793) (emphasis added).

[82] *See, e.g.*, George Washington, *General Orders, 29 April 1782*, FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Washington/99-01-02-08284 [https://perma.cc/4RCY-ALDR] ("[I]ssue to the *first and Second Massachusetts Brigades, the third Regiment of* Artillery and *such other Corps* or parts of Corps as may occasionally be Stationed at West Point.") (emphasis added); Alexander Hamilton, *The Defence No. XXV, [18 November 1795]*, FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Hamilton/01-19-02-0087 [https://perma.cc/2TDN-DFV7] ("France must agree by Treaty to open all her Ports in the west Indies, to give us a Right to import into them *Flour, Bread, Tobacco*, and *such other articles* as Great Britain shall permit.") (emphasis added).

[83] To use "cases" as a subcategory of "questions involving national peace and harmony," is consistent with Pushaw's theory that "cases" is used in Article III to empower federal courts "to declare the law in matters of national and international importance." Pushaw, *supra* note 62, at 449.

[84] *See generally* SCHMID, *supra* note 71.

> The judicial power shall extend to all *questions*, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all *questions* affecting ambassadors, other public ministers and consuls;--to all *questions* of admiralty and maritime jurisdiction . . . .[85]

In the Founding Era, extending judicial power to address questions arising outside the narrow context of a litigated case would not have seemed to be a strange notion.[86] For example, the Massachusetts Constitution of 1780, largely drafted by John Adams[87] and well known to the delegates at the Convention,[88] provided: "Each branch of the legislature, as well as the governor and council, shall have authority to require the opinions of the justices of the supreme judicial court, upon important questions of law . . ."[89]

On July 27, 1787, the Convention adjourned until August 6, so that a Committee of Detail "might have time to arrange, and draw into method & form the several matters which had been agreed to by the Convention as a

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[85] See *Records II*, *supra* note 79, at 146–47 for original language. As discussed below, President Washington and his cabinet took the position that the judicial power did extend to "questions . . . arising under . . . treaties," in fact 29 very specific, carefully drafted questions. *See infra* notes 124–33 and accompanying text. For an analysis of the significance, if any, of adding the phrase "in law and equity," which was carried over into the final draft of Article III, see *Original Meaning of Cases*, *supra* note 69, at 592–97.

[86] *See infra* notes 106–14 and accompanying text.

[87] MASS. CONST. of 1780, https://constitutioncenter.org/the-constitution/historic-document-library/detail/massachusetts-constitution [https://perma.cc/TS7C-N9ES]; *see generally John Adams & the Massachusetts Constitution*, MASS.GOV, https://www.mass.gov/guides/john-adams-the-massachusetts-constitution. [https://perma.cc/Z4ME-ZS39].

[88] Many provisions of the U.S. Constitution appear to have been based on the 1780 Massachusetts Constitution. See, for example, Article VIII, the impeachment provision in the 1780 Massachusetts Constitution:

> The senate shall be a court, with full authority to hear and determine all impeachments made by the house of representatives, against any officer or officers of the commonwealth, for misconduct and maladminstration in their offices; but, previous to the trial of every impeachment, the members of the senate shall, respectively, be sworn truly and impartially to try and determine the charge in question, according to the evidence. Their judgment, however, shall not extend further than to removal from office, and disqualification to hold or enjoy any place of honor, trust, or profit under this commonwealth; but the part so convicted shall be, nevertheless, liable to indictment, trial, judgment, and punishment, according to the laws of the land.

See John Adams & the Massachusetts Constitution, MASS.GOV, https://www.mass.gov/guides/john-adams-the-massachusetts-constitution [https://perma.cc/Z4ME-ZS39].

[89] MASS. CONST. of 1780, pt. II, ch. 3, art II.

Constitution for the United States."[90] The July 18 resolution was one of the "matters which had been agreed to by the Convention" referred to this Committee.[91] The draft reported back to the Convention by the committee became the template for the Constitution.[92]

An important document from the Convention records is "what is evidently the first draft of a constitution based specifically upon the resolutions the convention had adopted,"[93] in the handwriting of one of the members of the Committee of Detail, the very influential delegate Edmund Randolph (Governor of Virginia and later America's first Attorney General).[94] This document strongly indicates that Randolph considered "cases" and "questions" as equivalent terms for defining the grant of judicial power because he took the language of the July 18 resolution --- "jurisdiction … shall extend … to such other questions as involve the National peace and harmony" and rewrote it as "jurisdiction . . . shall extend . . . to such other cases, as the national legislature may assign, as involving the national peace and harmony."[95]

As the title suggests, the Committee of Detail was not supposed to change the substance of the resolutions referred to it but rather to integrate them into a single document, a proposed constitution.[96] It therefore seems unlikely that Randolph's handwritten redraft of the jurisdictional grants was intended to accomplish a major reduction in the grant of judicial power by changing the word "questions" to "cases."[97]

Randolph used the phrase "to such other cases, as the national legislature may assign, as involving the national peace and harmony"[98] – the beginning of a shell noun phrase we would suggest – to introduce this list of jurisdictional grants:

> [as involving the national peace and harmony]
> [a] in the collection of revenue
> [b] in disputes between citizens of different states
> [c] in disputes between a State & a Citizen or Citizens of another State
> [d] in disputes between different states; and
> [e] in disputes, in which subjects or citizens of other countries are concerned

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[90] George Washington, *Diary Entry: 27 July 1787*, FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Washington/01-05-02-0002-0007-0027 [https://perma.cc/HZW3-RQPB].

[91] *Id. See generally Records II*, *supra* note 79.

[92] *See id.*

[93] MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 125 (1913).

[94] *Id.*

[95] *Records II*, *supra* note 79, at 144–47.

[96] *Id.* at 144. *See generally* FARRAND, *supra* note 93.

[97] *See* FARRAND, *supra* note 93, at 125.

[98] *Original Meaning of Cases*, *supra* note 69, at 576.

[f] & in Cases of Admiralty Jurisd[ictio]n[99]

Jurisdictional grants [b] to [f], all described in Randolph's draft as "cases involving the national peace and harmony," were all included in the Committee's final version of a proposed constitution, received by the reconvened Convention on August 6, 1787.[100] However, for the first time in the constitutional drafting process, a distinction between "cases" and "controversies" was used.[101] In the Committee's proposal the phrase "controversies between" preceded jurisdictional grants [b] to [e], while retaining the phrase "cases of admiralty."[102] The Committee's proposal dropped the phrase "as involving the national peace and harmony."[103]

There is intriguing evidence that "cases arising" continued to be used to refer to more than "injured plaintiff litigation" in the brief debates that occurred in late August 1787 over amendments to the Committee of Detail's proposed section on judicial power.[104] The most controversial amendment was to change cases "arising under laws" to cases "arising *under this constitution* and laws."[105]

According to James Madison's notes of the Convention, when this amendment was offered he expressed "doubt[] 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*."[106] Madison further recorded that he said, "The right of expounding the Constitution in *cases not of this nature* ought not to be given to that Department."[107]

These reported comments by Madison are not offered to "prove the original intent of the Framers."[108] As Madison himself wrote more than forty years after

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[99] *Records II*, *supra* note 79, at 144–47 (indentations as in original handwritten document, bracketed letters added).

[100] *Original Meaning of Cases*, *supra* note 69, at 577.

[101] *Id.* at 568–69.

[102] *Id.* at 578.

[103] *See id.*

[104] *See id.* at 538.

[105] *Records II*, *supra* note 79, at 430 (emphasis added).

[106] JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 475 (ed. 2007) (emphasis added).

[107] *Id.* (emphasis added). These statements attributed to Madison in his own notes of the Convention are regularly quoted in support of current standing doctrine as if they are authoritative explications of the meaning of "cases" in Article III. *See, e.g.,* Daimler Chrysler Corp. v. Cuomo, 547 U.S. 332, 342 (2006); TransUnion LLC v. Ramirez, 594 U.S. 413, 424 (2021). However, at this moment in the debate Madison is *opposing* the inclusion of the phrase "cases arising under the Constitution" in Article III because to his understanding the phrase went "too far" and was *not* "limited to cases of a Judiciary Nature." *See* MADISON, *supra* note 106, at 475.

[108] Antonin Scalia, *Original Meaning*, *in* SCALIA SPEAKS 180, 183 (Christopher J. Scalia & Edward Whelan eds., 2017)(distinguishing between public meaning of constitutional text for those who ratified the Constitution and original intent of Framers).

the Convention: "the only authoritative intentions were those of the people of the States, as expressed thro[ugh] the Conventions which ratified the Constitution."[109] According to Madison, what was said at the Constitutional Convention is only "presumptive evidence of the general understanding at the time of the language used."[110]

In the spirit of Madison's statement, his reported comments indicate at least two things about his own "general understanding at the time of the language used": (1) if there were "cases of a judiciary nature" there were also "cases not of this nature", and (2) the phrase "cases arising under the Constitution" was not limited to "cases of a judiciary nature."[111]

Even though Madison reportedly expressed these "doubts" to his fellow delegates, the Convention nonetheless adopted the amendment extending judicial power to "cases arising under the Constitution."[112] That, however, is not quite the end of the story. Edmund Randolph famously refused to sign the Constitution, taking the position that it should not be ratified until "all ambiguities of expression . . . be precisely explained … [including] limiting and defining the judicial power."[113]

At the convention convened in Virginia to ratify the Constitution, which Randolph chaired, he further explained his position:

> [T]here are defects in its construction, among which may be objected *too great an extension of jurisdiction*. . . . It is ambiguous in some parts, and unnecessarily extensive in others. It extends to all cases in law and equity arising under the Constitution. What are these cases of law and equity? *Do they not involve all rights, from an inchoate right to a complete right*, arising from this Constitution? . . I would have thought it more safe, if it had been more clearly expressed. *What do we mean by the words arising under the Constitution? What do they relate to? I conceive this to be very ambiguous*.[114]

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[109] Letter from James Madison to Martin L. Hurlbut (May 1, 1830), in *The Papers of James Madison*, FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Madison/99-02-02-2034 [https://perma.cc/6G9F-UUBX].

[110] *Id.*; Scalia, *supra* note 108, at 180, 183.

[111] MADISON, *supra* note 106, at 475.

[112] Madison's convention notes go on to say that the motion to include cases arising under the Constitution "was agreed to nem : con :," the Latin abbreviation for 'no-one contradicting,' "it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature." MADISON, *supra* note 106, at 475. What weight, if any, to give to this rather cryptic sentence is discussed in *Original Meaning of Cases*, *supra* note 69, at 582–87.

[113] 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 127 (Max Farrand ed. 1966) (letter to Speaker of the Virginia House of Delegates dated Oct. 10, 1787); *Original Meaning of Cases*, *supra* note 69, at 597.

[114] 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 571–72 (Jonathan Elliot, ed., 1836) (emphasis added). William Grayson's remarks immediately preceding Randolph's speech to the Virginia Ratifying

If – as the Court has so confidently assumed -- it was clear to those who drafted and ratified the Constitution that "cases" in Article III could only refer to injured plaintiff litigation to remedy "concrete harm," it is hard to understand how someone as intimately involved in both processes as Randolph could fear that "cases arising" could be understood as involving "inchoate rights" and was dangerously ambiguous.[115]

C. *Linguistic Analysis of "Cases" Supported by 1793 "Advisory Opinion Case"*

When the Supreme Court explains and justifies its standing doctrine, it typically invokes the "well established rule against advisory opinions" and the decision in *TransUnion* is no exception: "Under Article III, federal courts do not adjudicate hypothetical or abstract disputes. . . . [F]ederal courts do not issue advisory opinions. . . . [A] federal court may resolve only a 'real controversy with real impact on real persons.'"[116]

Interestingly, the Court also consistently cites as the earliest authority for the "rule against advisory opinions" a document that is not a reported decision of the Supreme Court but instead a letter dated August 8, 1793, from "Chief-Justice Jay and Associate Justices" to President George Washington, found in "The Correspondence and Public Papers of John Jay."[117] In our view, the historical documents that provide the context for this 1793 letter actually support an interpretation of "cases arising" in Article III that is broader than "injured plaintiff litigation," indeed broad enough to include "advisory questions."[118]

One of the most challenging dilemmas of President Washington's second term was maintaining neutrality in the war between Great Britain and the revolutionary government of France.[119] On July 12, 1792, a "Cabinet Opinion on Foreign Vessels and Consulting the Supreme Court" was issued over the names of Thomas Jefferson (Secretary of State), Alexander Hamilton (Secretary of the Treasury), and Henry Knox (Secretary of War).[120] The Opinion stated in part:

Convention are also of importance: "My next objection to the federal judiciary is, that it is not expressed in a definite manner. The jurisdiction of all cases arising under the Constitution and the laws of the Union is of stupendous magnitude. It is impossible for human nature to trace its extent. It is so vaguely and indefinitely expressed, that its latitude cannot be ascertained." *Id.* at 565.

[115] *Id.* at 572.

[116] TransUnion LLC v. Ramirez, 594 U.S. 413, 423 (2021).

[117] *See, e.g.*, Flast v. Cohen, 392 U.S. 83, 96 n.14 (1968) ("The rule against advisory opinions was established as early as 1793." (citing 3 H. JOHNSTON, CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 486–89 (1891))).

[118] *See* text accompanying notes 123-135.

[119] *See* Robert J. Pushaw, Jr., *Why the Supreme Court Nevers Gets Any Dear John Letters: Advisory Opinions in Historical Perspective*, 87 GEO. L.J. 473, 488 (1998).

[120] Washington's cabinet had only four members. *Cabinet Members*, GEORGE WASHINGTON'S MOUNT VERNON,

> At a meeting of the heads of the departments at the President's [office?] on summons from him, and on consideration of various representations from the Ministers Plenipotentiary of France & Great Britain on the subject of vessels arming & arriving in our ports, and of prizes it is their opinion that letters be written to the said Ministers informing them that the Executive of the U.S., desirous of having done what shall be strictly comformeable [sic] to the treaties of the U.S. and the laws respecting *the said cases* has determined to refer *the questions arising therein* to persons learned in the laws . . . That letters be addressed to the Judges of the Supreme court [sic] of the U.S. requesting their attendance at this place on Thursday the 18th instant to give their advice on certain matters of public concern which will be referred to them by the President.[121]

"Cases" is used in this Cabinet Opinion as a shell noun that refers back and incorporates prior content, forming a shell around the phrase "the subject of vessels arming & arriving in our ports, and of prizes."[122] "Said cases" is understood as a concise way of referencing this content; "cases" has no specific meaning on its own in this context apart from that content. "Said cases" did not refer to "cases" in the sense of litigation.[123]

Implementing the Cabinet Opinion, on July 18, 1793, Jefferson prepared 29 questions for President Washington to submit to the Supreme Court justices.[124] He began with this question:

> 1. Do the treaties between the U.S. & France give to France or her citizens a right, when at war with a power with whom the U.S. are at peace, to fit out originally in & from the ports of the U.S., vessels armed for war, with or without commission?[125]

In six of the following questions, Jefferson used the phrase "in the case supposed."[126] "Case" again is used as a shell noun to refer back and incorporate prior content, here the full text of Question One. A "question" arising under

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https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/cabinet-members/ [https://perma.cc/2XKZ-WPWZ]. Attorney General Edmund Randolph's name did not appear on this opinion. *Id.*

[121] *Cabinet Opinion on Foreign Vessels and Consulting the Supreme Court, 12 July 1793*, FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Washington/05-13-02-0143 [https://perma.cc/FH9T-RMUM] (citing 13 THE PAPERS OF GEORGE WASHINGTON, PRESIDENTIAL SERIES 214–16 (Christine Sternberg Patrick, ed., 2007)) (emphasis added).

[122] *Id.*

[123] *Id.*

[124] *Enclosure Questions for the Supreme Court, 18 July 1793*, FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Washington/05-13-02-0164-0002 [https://perma.cc/92AH-LVSS] (citing 13 THE PAPERS OF GEORGE WASHINGTON, PRESIDENTIAL SERIES 214–16 (Christine Sternberg Patrick, ed., 2007)). The full text of all 29 questions is attached as Appendix 1.

[125] *Id.*

[126] *Id.*

treaties is thus referred to as a "case."[127] In two of these six questions, "case" is used again at the conclusion as a noun encompassing different shell content.[128]

> 6. Do the treaties aforesaid prohibit the U.S. from permitting *in the case supposed*, the armed vessels belonging to a power at war with France, or to the citizens or subjects of such power to come within the ports of the U.S. there to remain as long as they may think fit, except *in the case of their coming in with prizes made of the subjects or property of France*?[129]
> 8. Do they oblige the U.S. to permit France, *in the case supposed*, to sell in their ports the prizes which she or her citizens may have made of any power at war with her, the citizens or subjects of such power; or exempt from the payment of the usual duties, on ships & merchandize, the prizes so made, *in the case of their being to be sold within the ports of the U.S.*?[130]

"Case" as used at the end of Questions 6 and 8 once again needs the shell content (in both instances provided in the immediately following context) before the word has useful meaning.

> On July 19, 1793 Jefferson provided the following status report to Washington:
>
> Th[omas] Jefferson with his respects to the President has the honor to inform him that Judges Jay & Wilson called on him just now and asked whether the letter of yesterday pressed for an answer. they [sic] were told the cases would await their time, & were asked when they thought an answer might be expected: they said they supposed in a day or two.[131]
>
> Jefferson refers to the 29 questions delivered to the justices as "the cases."[132]

It seems apparent that George Washington -- who presided at the Constitutional Convention -- and his cabinet -- which included Alexander Hamilton, who signed the Cabinet Opinion and served on the Convention's Committee on Style that finalized the Constitution – chose to handle the treaty dispute with France as if the federal judicial power under Article III did extend to deciding questions "arising under treaties."[133]

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[127] *See, e.g.*, *id.*
[128] *Id.*
[129] *Id.*
[130] *See supra* note 124 and accompanying text.
[131] Thomas Jefferson, *To George Washington from Thomas Jefferson, 19 July 1793*, FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Washington/05-13-02-0168 [https://perma.cc/9YY8-PYB4] (emphasis added) (referencing 13 THE PAPERS OF GEORGE WASHINGTON, PRESIDENTIAL SERIES 251 (Christine Sternberg Patrick, ed., 2007)).
[132] *Id.*
[133] *See Original Meaning of Cases*, *supra* note 69, at 596.

By letter of August 8, 1793, Chief Justice Jay and four associate justices declined to answer any of the 29 questions, using discreet and courteous language.[134] Although the Supreme Court in the last century has consistently cited this letter as an authoritative interpretation of Article III,[135] in fact the letter makes no mention of Article III. Instead the Justices refer generally to the principle of separation of powers, to the "impropriety" of deciding questions presented in an "extra-judicial" way, and to Article II, Section 2, as setting forth expressly a method for the president to "require" opinions from principal officers of his executive departments. [136]

There was no indication in this letter that the justices were denying Washington's request because the questions did not constitute a "case arising under treaties" within the meaning of Article III. Indeed, the letter does not mention Article III at all.[137]

There is a fine irony to the Court's reliance on the 1793 letter to President Washington to bolster its standing doctrine. The Court insists throughout its standing cases that the judicial power under Article III can only be exercised in adversarial litigation in which a plaintiff demonstrates "concrete harm,"[138] yet the 1793 letter is regularly cited by the Court as an authoritative judicial interpretation of Article III even though the Supreme Court justices in 1793 were only presented with "questions arising under treaties."[139]

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[134] *Id.* at 604.

[135] *See, e.g.*, Flast v. Cohen, 392 U.S. 83, 96 (1969) ("[T]he rule against advisory opinions . . . confines federal courts to the role assigned them by Article III); United Public Workers America v. Mitchell, 330 U.S. 75, 89 (1947) ("As is well known the federal courts established pursuant to Article III of the Constitution do not render advisory opinions."); JOHNSTON, *supra* note 118, at 489 ("For adjudication of constitutional issues 'concrete legal issues, presented in actual cases, not abstractions' are requisite.").

[136] JOHNSTON, *supra* note 118, at 489. The full text of the letter is attached as Appendix 2.

[137] Thomas Jefferson, *To George Washington from Thomas Jefferson, 19 July 1793*, FOUNDERS ONLINE, NATIONAL ARCHIVES, https://founders.archives.gov/documents/Washington/05-13-02-0168 [https://perma.cc/9YY8-PYB4] (emphasis added) (referencing 13 THE PAPERS OF GEORGE WASHINGTON, PRESIDENTIAL SERIES 251 (Christine Sternberg Patrick, ed., 2007)).

[138] TransUnion LLC v. Ramirez, 594 U.S. 413, 414 (2021).

[139] *See Original Meaning of Cases*, *supra* note 69, at 596.

V. APPENDIX ONE

Enclosure Questions for the Supreme Court, 18 July 1793

Founders Online, National Archives, https://founders.archives.gov/documents/Washington/05-13-02-0164-0002 [Original source: The Papers of George Washington, Presidential Series, vol. 13, 1 June–31 August 1793, ed. Christine Sternberg Patrick. Charlottesville: University of Virginia Press, 2007, pp. 243–247.]

Do the treaties between the U.S. & France give to France or her citizens a *right*, when at war with a power with whom the U.S. are at peace, to fit out originally in & from the ports of the U.S., vessels armed for war, with or without commission?

If they give such a *right*, does it extend to all manner of armed vessels, or to particular kinds only? if the latter, to what kinds does it extend?

Do they give to France, or her citizens, in the case supposed, a right to refit, or arm anew vessels, which before their coming within any port of the U.S. were armed for war, with or without commission?

If they give such a right, does it extend to all manner of armed vessels, or to particular kinds only? if the latter, to what kinds does it extend? does it include an *augmentation* of force, or does it only extend to replacing the vessel in statu quo?

Does the 22d article of the Treaty of commerce, in the case supposed, extend to vessels armed for war on account of the *government* of a power at war with France, or to merchant armed vessels belonging to the subjects or citizens of that power (viz.) of the description of those which, by the English, are called Letters of marque ships, by the French 'batiments armés en marchandize et en guerre'?

Do the treaties aforesaid prohibit the U.S. from permitting in the case supposed, the armed vessels belonging to a power at war with France, or to the citizens or subjects of such power to come within the ports of the U.S. there to remain as long as they may think fit, except in the case of their coming in with prizes made of the subjects or property of France?

Do they prohibit the U.S. from permitting in the case supposed vessels armed on account of the government of a power at war with France, or vessels armed for merchandize & war, with or without commission on account of the subjects or citizens of such power, or any vessels other than those commonly called privateers, to sell freely whatsoever they may bring into the ports of the U.S. & freely to purchase in & carry from the ports of the U.S. goods, merchandize & commodities, except as excepted in the last question?

Do they oblige the U.S. to permit France, in the case supposed, to sell in their ports the prizes which she or her citizens may have made of any power at war with her, the citizens or subjects of such power; or exempt from the payment of the usual duties, on ships & merchandize, the prizes so made, in the case of their being to be sold within the ports of the U.S.?

Do those treaties, particularly the Consular convention, authorize France, as of right, to erect courts within the jurisdiction of the U.S. for the trial & condemnation of prizes made by armed vessels in her service?

Do the laws & usages of nations authorize her, as of right, to erect such courts for such purpose?

Do the laws of Neutrality, considered relatively to the treaties of the U.S. with foreign powers, or independantly of those treaties permit the U.S. in the case supposed, to allow to France, or her citizens the privilege of fitting out *originally*, in & from the ports of the U.S. vessels armed & commissioned for war, either on account of the government, or of private persons, or both?

Do those laws permit the U.S. to extend the like privilege to a power at war with France?

Do the laws of Neutrality, considered as aforesaid, permit the U.S. in the case supposed, to allow to France or her citizens, the privilege of refitting, or arming anew, vessels which before their coming within the U.S. were armed & commissioned for war? may such privilege include an *augmentation* of the force of such vessels?

Do those laws permit the U.S. to extend the like privilege to a power at war with France?

Do those laws, in the case supposed, permit merchant vessels of either of the powers at war, to arm in the ports of the U.S. without being commissioned? may the privilege be rightfully refused?

Does it make any difference in point of principle, whether a vessel be armed for war, or the force of an armed vessel be augmented, in the ports of the U.S. with *means* procured in the U.S. or with means brought into them by the party who shall so arm or augment the force of such vessel? if the first be unlawful, is the last lawful?

Do the laws of neutrality, considered as aforesaid, authorize the U.S. to permit to France, her subjects or citizens, the sale within their ports of prizes made of the subjects or property of a power at war with France, before they have been carried into some port of France & there condemned, refusing the like privilege of her enemy?

Do those laws authorize the U.S. to permit to France the erection of courts within their territory & jurisdiction, for the trial & condemnation of prizes, refusing that privilege to a power at war with France?

If any armed vessel of a foreign power at war with another, with whom the U.S. are at peace, shall make prize of the subjects or property of it's enemy within the territory or jurisdiction of the U.S. have not the U.S. a right to cause restitution of such prize? are they bound or not by the principles of neutrality so to do, if such prize shall be within their power?

To what distance, by the laws & usages of nations, may the U.S. exercise the right of prohibiting the hostilities of foreign powers at war with each other, within rivers, bays, & arms of the sea, & upon the sea along the coasts of the U.S.?

Have vessels armed for war under commission from a foreign power, a right, without the consent of the U.S. to engage, within their jurisdiction, seamen or souldiers for the service of such vessels, being citizens of that power, or of another foreign power, or citizens of the U.S.?

What are the articles, by name, to be prohibited to both or either party?

To what extent does the *reparation* permitted in the 19. Article of the treaty with France, go?

What may be done as to vessels armed in our ports before the President's proclamation? and what as to the prizes they made *before* and *after*?

May we, within our own ports, sell ships to both parties, prepared merely for merchandize? may they be pierced for guns?

May we carry either or both kinds to the ports of the belligerent powers for sale?

Is the principle that free bottoms make free goods, & enemy bottoms make enemy goods, to be considered as now an established part of the law of nations?

If it is not, are nations with whom we have no treaties, authorized by the law of Nations to take out of our vessels enemy passengers, not being souldiers, & their baggage?

May an armed vessel belonging to any of the belligerent powers follow *immediately* merchant-vessels, enemies, departing from our ports, for the purpose of making prizes of them? if not, how long ought the former to remain after the latter has sailed? and what shall be considered as the place of departure, from which the time is to be counted? and how are the facts to be ascertained?

VI. APPENDIX TWO

To George Washington from Supreme Court Justices, 8 August 1793
Founders Online, National Archives
https://founders.archives.gov/documents/Washington/05-13-02-0263.
[Original source: The Papers of George Washington, Presidential Series, vol. 13, 1 June–31 August 1793, ed. Christine Sternberg Patrick. Charlottesville: University of Virginia Press, 2007, pp. 392–393.]

Sir

We have considered the previous Question stated in a Letter written to us by your Direction, by the Secretary of State, on the 18th of last month.

The Lines of Separation drawn by the Constitution between the three Departments of Government—their being in certain Respects checks on each other—and our being Judges of a court in the last Resort—are Considerations which afford strong arguments against the Propriety of our extrajudicially 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 limited to executive Departments.

we [sic] exceedingly regret every Event that may cause Embarrassment to your administration; but we derive Consolation from the Reflection, that your Judgment will discern what is Right, and that your usual Prudence, Decision and Firmness will surmount every obstacle to the Preservation of the Rights, Peace, and Dignity of the united States. We have the Honor to be, with perfect Respect, Sir, your most obedient and most h[um]ble servants

John Jay
James Wilson
John Blair
Ja[mes] Iredell
Wm Paterson