

# THE EVOLUTION OF STANDING AND THE NEED FOR FOUNDATIONAL REALISM: A HISTORICAL INQUIRY FROM *HAYBURN* TO *HARVARD*

## ABSTRACT

*This Note traces the Supreme Court's evolving approach to standing—from the early, unresolved procedural issues raised in Hayburn's Case to today's pivotal decisions, such as Students for Fair Admissions v. Harvard—and argues that the modern three-pronged standing test (“injury in fact,” “traceability,” and “redressability”) lacks firm constitutional grounding. The author shows how the Court's selective citation of precedent fosters the impression that contemporary restrictions on judicial power have a robust historical foundation. However, neither Article III, the Convention, ratification debates, nor over a century of Supreme Court jurisprudence mention concepts such as “standing,” “injury in fact,” “traceability,” “redressability,” or limiting judicial power to “adversarial disputes.” This Note argues that contemporary standing doctrine, purportedly anchored in Article III's “case or controversy” clause, has become increasingly discretionary and ideologically driven due to its reliance on a patchwork of politically charged cases that distance it from both constitutional text and historical foundations.*

*Building on scholarship suggesting that standing derives more from judicial policy preferences than constitutional text, the author proposes an alternative interpretive methodology called “Foundational Realism.” Grounded in Scottish Enlightenment philosopher Thomas Reid's emphasis on self-evident first principles and informed by the Framers' historically documented understandings, Foundational Realism calls for a more transparent, historically anchored, and philosophically coherent assessment of constitutional questions. Through close readings of seminal cases—including TransUnion v. Ramirez—the author illustrates how Foundational Realism would realign Article III jurisdiction with Congress's legislative judgments about legal harms, particularly in areas like consumer protection. Ultimately, the Note argues that this approach would mitigate the appearance of bias in the Court's doctrinal maneuvers, restore trust in the judiciary's impartiality, and ensure that the Constitution's commitment to equal justice is upheld in practice rather than merely aspired to in theory.*

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## INTRODUCTION

This Note examines how the selective application of precedent in the Supreme Court's standing cases has created a loosely grounded discretionary test that reinforces systemic rights disparities and fosters a perception of bias in judicial decision-making.<sup>1</sup> The Framers' emphasis on

1. See generally Tracey E. George & Robert J. Pushaw, Jr., *How is Constitutional Law Made?*, 100 MICH. L. REV. 1265 (2002) (book review) (criticizing the apparent "intellectual sloppiness or unstated political motives" across many of the Court's doctrinal cases involving constitutional law).

an apolitical and impartial judiciary was no mere afterthought;<sup>2</sup> judicial integrity was believed essential to maintain public trust.<sup>3</sup> Such integrity ensures that justice is administered fairly and without bias, reinforcing confidence in a legal system that applies equally to all, regardless of status or influence.<sup>4</sup> While the Court has made numerous efforts to assure the public of its impartiality, particularly in socially sensitive cases decided on “standing” grounds,<sup>5</sup> a closer examination of its selective reliance on precedent and the resulting outcomes suggests otherwise.<sup>6</sup>

Article III makes no mention of “standing,” “injury in fact,” “traceability,” “redressability,” or the restriction of judicial power to “adversarial disputes.”<sup>7</sup> These concepts were also absent from the Convention, the Ratification debates, and over a century of Supreme Court jurisprudence.<sup>8</sup> Despite these absences, numerous Court opinions assert the

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2. See THE FEDERALIST No. 80 (Alexander Hamilton) (emphasizing that an “impartial” national judiciary should preside over cases involving the “privileges and immunities of citizens of the several States” to prevent “bias inauspicious to the principles” of the Union and to ensure the “maintenance of that equality . . . to which the citizens of the [U]nion will be entitled” (internal quotations omitted)).

3. See THE FEDERALIST No. 5 (John Jay) (warning that “[d]istrust naturally creates distrust” and “invidious jealousies and uncandid imputations” can erode the government’s goodwill); THE FEDERALIST No. 10 (James Madison) (noting that complaints of government instability, disregard for justice, and factionalism lead to a “prevailing and increasing distrust of public engagements” and “alarm for private rights”). See generally JUD. CONF. OF THE U.S., STRATEGIC PLAN FOR THE FEDERAL JUDICIARY 9 (2020), [https://www.uscourts.gov/sites/default/files/federaljudiciary\\_strategicplan2020.pdf](https://www.uscourts.gov/sites/default/files/federaljudiciary_strategicplan2020.pdf) [<https://perma.cc/WX55-UU7N>] (“The ability of courts to fulfill their mission and perform their functions is based on the public’s trust and confidence in the judiciary.”).

4. See THE FEDERALIST No. 78 (Alexander Hamilton) (emphasizing the critical role of judicial integrity in preventing legislative overreach, safeguarding against “unjust and partial laws,” preserving “public and private confidence,” and preventing the “universal distrust and distress” fostered by a spirit of injustice).

5. See *All. for Hippocratic Med. v. U.S. Food & Drug Admin.*, 117 F.4th 336, 342 (5th Cir. 2024) (Ho, J., concurring) (declaring on remand that “[e]very member of our court agrees that we apply the same Article III principles whether you’re black or white, Republican or Democrat, environmentalist or evangelical” (internal quotations omitted) (quoting *Jackson Mun. Airport Auth. v. Harkins*, 98 F.4th 144, 148 (5th Cir. 2024) (Ho, J., concurring))). But see generally Sheldon Whitehouse, *A Right-Wing Rout: What the “Roberts Five” Decisions Tell Us About the Integrity of Today’s Supreme Court*, AM. CONST. SOC’Y (Apr. 2019), <https://www.acslaw.org/wp-content/uploads/2019/04/Captured-Court-Whitehouse-IB-Final.pdf> [<https://perma.cc/7VG7-UXG7>] (contrasting Chief Justice Roberts infamous “balls and strikes” comment with a catalogue of seventy-three Roberts Court partisan majority opinions—joined only by the five conservative members of the Court, against liberal dissenters).

6. See generally Elise C. Boddie, *The Sins of Innocence in Standing Doctrine*, 68 VAND. L. REV. 297 (2015); Brandon Garrett, Note, *Standing While Black: Distinguishing Lyons in Racial Profiling Cases*, 100 COLUM. L. REV. 1815, 1815–46 (2000); Ryan Guilds, Comment, *A Jurisprudence of Doubt: Generalized Grievances As a Limitation to Federal Court Access*, 74 N.C. L. REV. 1863 (1996); Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422 (1995); Robert G. Schwemm, *Standing to Sue in Fair Housing Cases*, 41 OHIO ST. L.J. 1 (1980).

7. See U.S. CONST. art. III.

8. See Robert J. Pushaw, Jr., *The Court Continues to Confuse Standing: The Pitfalls of Faux Article III “Originalism,”* 31 GEO. MASON L. REV. 893, 917 (2024).

necessity of these concepts as Constitutional requirements.<sup>9</sup> Over the past fifty years, the Court has developed its nebulous doctrine of Article III standing with limited constitutional basis.<sup>10</sup> This doctrine now requires a plaintiff to demonstrate: (1) that he suffered an “injury in fact” that is “concrete,” “particularized,” and “actual or imminent”;<sup>11</sup> (2) that the injury was “likely caused” by the defendant; and, (3) that the injury would likely be “redressed” by judicial relief.<sup>12</sup>

Contrary to the Court’s contemporary standing doctrine, which treats Article III “Cases” and “Controversies” as synonymous, the Framers used both terms deliberately to reflect distinct meanings: “Controversies” referred to a variety of disputes between specific parties, while “Cases” encompassed viable legal actions allowing a party to seek the vindication of

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9. See, e.g., *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181, 198 (2023) (stating “[b]efore turning to the merits, we must assure ourselves of our jurisdiction”) (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009)); *Whitmore ex rel. Simmons v. Arkansas*, 495 U.S. 149, 155 (1990) (“To establish an Art. III case or controversy, a litigant first must clearly demonstrate that he has suffered an ‘injury in fact.’”); see also *TransUnion, LLC v. Ramirez*, 594 U.S. 413, 423 (2021) (recounting the precedential and “historic” basis of the Court’s modern standing doctrine); John G. Roberts, Jr., Comment, *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1221 (1993) (faulting court critics who claim “historical scholarship has shown that the injury requirement is not constitutionally based,” for failing to realize that “injury in fact” is “after all, a requirement of Article III” before stating “[a] response to the historical scholarship is beyond the scope of this Comment”); *id.* at 1220 (noting “it may be worthwhile to recall that the Supreme Court for some time has recognized standing as a constitutionally based doctrine designed to implement the Framers’ concept of ‘the proper—and properly limited—role of the courts in a democratic society’” (citing *Allen v. Wright*, 468 U.S. 737, 750 (1984))). But see, e.g., JAMES E. PFANDER, *CASES WITHOUT CONTROVERSIES: UNCONTESTED ADJUDICATION IN ARTICLE III COURTS* (2021); Robert J. Pushaw, Jr., *Article III’s Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 447–50, 470–517 (1994) (outlining a historical review of Article III standing from the founding until the mid-twentieth century).

10. As the remainder of this Note will illustrate, much of the complexity surrounding standing stems from the Court’s increasing difficulty in distinguishing current cases from factually similar precedents, often resulting in broader or narrower interpretations of standing depending on the parties and issues involved. These distinctions are frequently shaped by the Court’s inclination to address the substantive legal issues at stake. Complexity bias may also contribute to this phenomenon—a cognitive tendency to overvalue complexity, assuming it indicates greater credibility or significance. This bias arises from our propensity to perceive straightforward ideas or ambiguous situations as inherently intricate, leading to an unnecessary attribution of complexity. See generally Samuel G.B. Johnson, J.J. Valenti & Frank C. Keil, *Simplicity and Complexity Preferences in Causal Explanation: An Opponent Heuristic Account*, 113 COGNITIVE PSYCH. 101222 (2019); Miguel Pina e Cunha & Arménio Rego, *Complexity, Simplicity, Simplexity*, 28 EUR. MGMT. J. 85, 85–94 (2010).

11. An injury in fact can be either tangible or intangible, but a statute “identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016) (finding the party exercising federal jurisdiction could not “allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III”).

12. *TransUnion*, 594 U.S. at 423 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)).

a legal right in federal court.<sup>13</sup> This deliberate distinction is crucial to understanding the original role of federal courts under Article III, which extended beyond resolving disputes to addressing legal questions in non-adversarial contexts<sup>14</sup>—an aspect largely negated by today’s standing doctrine.<sup>15</sup>

Given the body of evidence to the contrary, it is unlikely that the modern Court has merely overlooked or misunderstood this distinction.<sup>16</sup> If that were the case, one would expect to see either a consistent trajectory of legal reasoning or a lack of coherence altogether. Instead, the doctrine’s development appears to mirror shifts in the Court’s composition and the political, social, and ideological leanings of the Justices, often producing outcomes that reflect the Court’s level of sympathy toward a plaintiff’s or class of plaintiffs’ substantive claims.<sup>17</sup>

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13. U.S. CONST. art. III; see *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) (delineating and describing the differences between “Cases” and “Controversies” in a suit against the State of Georgia wherein the State contended it could not be a party to a suit brought by a private party in federal court); see also Pushaw, *supra* note 8, at 896, 917–20; PFANDER, *supra* note 9.

14. See *Chisholm*, 2 U.S. (2 Dall.) at 432 (“[T]he Courts of the United States must receive . . . all their authority, as to the manner of their proceeding, from the Legislature only. This appears . . . one of those cases, with many others, in which an article of the Constitution cannot be effectuated without the intervention of the Legislative authority.”); Pushaw, *supra* note 8; PFANDER, *supra* note 9.

15. Compare *Spokeo*, 578 U.S. at 341 (holding a statute “identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right[.] Article III standing requires a concrete injury even in the context of a statutory violation”), and *TransUnion*, 594 U.S. at 426 (“Congress’s creation of a statutory prohibition or obligation and a cause of action does not relieve courts of their responsibility to independently decide whether a plaintiff has suffered a concrete harm under Article III . . .”), with *TransUnion*, 594 U.S. at 453–54 (Thomas, J., dissenting) (“The 1970s injury-in-fact theory has now displaced the traditional gateway into federal courts. This approach is remarkable in both its novelty and effects. Never before has this Court declared that legal injury is *inherently* insufficient to support standing. And never before has this Court declared that legislatures are constitutionally precluded from creating legal rights enforceable in federal court if those rights deviate too far from their common-law roots. . . . [T]his Court has relieved the legislature of its power to create and define rights.” (citations and footnotes omitted)), and *Chisholm*, 2 U.S. (2 Dall.) at 433 (“If therefore, this Court is . . . the organ of the *Constitution and the law*, not of the Constitution only, in respect to the manner of its proceeding, we must receive our directions from the Legislature . . . and have no right to constitute ourselves an *officina brevium*, or take any other short method of doing what the Constitution has chosen . . .” (emphasis added)).

16. Compared to other constitutional clauses and articles with largely ambiguous language inviting interpretative flexibility, Article III stands out as notably straightforward in its plain text and ordinary meaning. See U.S. CONST. art. III.

This clarity is reinforced by a significant body of early case law. See, e.g., *Chisholm*, 2 U.S. (2 Dall.) at 419; *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304 (1816); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821); *Osborn v. Bank of U.S.*, 22 U.S. (9 Wheat.) 738 (1824).

17. History has shown conservative Justices are more likely to find an injury redressable for favored parties like private corporations, but less likely for disfavored plaintiffs, such as those in civil rights (like *Warth v. Seldin*, 422 U.S. 490 (1975)) and environmental cases, whereas liberal Justices generally take the opposite approach. See Pushaw, *supra* note 8, at 894; George & Pushaw, *supra* note 1, at 1274–80 (discussing the role that ideology has played in analyzing how Justices have decided

Standing has played a pivotal role in many of the Roberts Court's landmark cases, most of which have been decided along ideological lines.<sup>18</sup> Conservative Justices on the Roberts Court have consistently granted or denied standing in situations that favor large corporations or align with their ideological preferences, often at the expense of civil rights, environmental, and consumer protections.<sup>19</sup> For instance, in *Students for Fair Admissions Inc. v. Harvard*, the Court granted standing to an association formed solely to challenge affirmative action in admissions, ultimately prohibiting race-based considerations.<sup>20</sup> Similarly, in *TransUnion, LLC v. Ramirez*<sup>21</sup> and *Spokeo, Inc. v. Robins*,<sup>22</sup> the Court denied plaintiffs standing despite congressional legislation to the contrary, significantly weakening credit reporting regulations and undermining consumer protections. By contrast, liberal Justices on the Roberts Court have often dissented, finding standing in cases aimed at upholding these protections and not in those that sought to dismantle them.<sup>23</sup> While this ideological divide is not surprising, what

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standing issues); Whitehouse, *supra* note 5 (discussing Roberts Court decisions made along party lines); Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1742–44, 1754–63, 1770–75, 1786–87 (1999) (presenting empirical evidence that federal courts have arrived at opposite results in standing cases with identical facts); *see also* Warth, 422 U.S. at 518 (Douglas, J., dissenting); *id.* at 519–20 (Brennan, J., dissenting). *See generally* James F. Spriggs II, Paul J. Wahlbeck & Forrest Maltzman, *The Burger Court Opinion-Writing Database* (2011), <http://supremecourttopinions.wustl.edu> [https://perma.cc/Q669-7GMR].

18. The conservative wing has granted standing in civil rights cases that reduced protections in areas like education, abortion, and voting rights. *See* Sheldon Whitehouse, *Knights-Errent: The Roberts Court and Erroneous Fact-Finding*, 84 OHIO ST. L.J. 837 (2023) (arguing that the Supreme Court's recent fact-finding in cases like *Shelby County v. Holder*, 570 U.S. 529, 536 (2013), and *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), violates traditional separation of powers by encroaching on trial court functions, resulting in erroneous conclusions that serve partisan interests and undermine judicial restraint, while proposing reforms to address this growing threat to constitutional balance); Sheldon Whitehouse, *Conservative Judicial Activism: The Politicization of the Supreme Court Under Chief Justice Roberts*, 9 HARV. L. & POL'Y REV. 195 (2015) (arguing that the Roberts Court has engaged in extreme judicial activism favoring a pro-corporate agenda at the expense of democratic institutions and individual rights, eroding public confidence in the Court as Americans overwhelmingly perceive its decisions as ideologically driven and biased toward corporations); *see also supra* note 17 and accompanying text.

19. This is in line with a historic trend among conservative Justices. *See* Alan B. Morrison, *Selective Judicial Activism in the Roberts Court*, in AM. CONST. SOC'Y SUP. CT. REV. (6th ed. 2012), <https://www.acslaw.org/wp-content/uploads/2023/11/Morrison-Selective-Judicial-Activism.pdf> [https://perma.cc/T5NW-CTG3]; *supra* notes 17–18.

20. 600 U.S. 181 (2023).

21. 594 U.S. 413 (2021).

22. 578 U.S. 330, 341 (2016).

23. *See, e.g., Harvard*, 600 U.S. at 318 (Sotomayor, J., dissenting); *TransUnion*, 594 U.S. at 460 (Kagan, J., dissenting); *see also* Whitehouse, *supra* note 5. However, Justices frequently shift their positions between cases for other reasons, nonetheless influenced by the weight of the substantive legal issues and desired outcomes, underscoring the thesis that standing analyses often hinge on the Justices' ideological preferences. *Compare Harvard*, 600 U.S. at 199–202 (citing *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)) (relying on associational standing), and *Harvard*, 600 U.S.

stands out is the distinct selection of cases the Justices choose to support their arguments.

This Note argues that the Court has adjusted its interpretation of judicial powers across various contexts to incorporate discretionary tests largely shaped by the prevailing ideology of its contemporaneous majority. Part I reviews the history of standing cases that form the foundation of modern standing jurisprudence, analyzing how the Court's approach has emphasized procedural considerations while often avoiding civil rights and race-related issues. Part II examines some of the Court's most oft-cited standing decisions more closely. Part III highlights overlooked historical cases offering similar doctrinal benefits without the implications of those in Part II. Finally, Part IV introduces Foundational Realism, a novel canon of constitutional interpretation derived in large part from the work of Scottish philosopher Thomas Reid, and proposes an alternative approach to the subjective interpretations that have plagued standing jurisprudence.

## I. THE EVOLUTION OF STANDING

On March 23, 1792, Congress passed the Invalid Pensions Act, tasking federal courts with evaluating the eligibility of Revolutionary War veterans for pensions and disability benefits arising from their military service.<sup>24</sup> Under the Act's original structure, courts would evaluate a veteran's petition and recommend an award to the Secretary of War, who would review the military records and either accept or reject the court's assessment, with any rejections sent to Congress for final determination.<sup>25</sup>

Many judges were quick to express concerns regarding the constitutionality of the Act's process. In a letter to President Washington in early April 1792, Chief Justice Jay, Justice Cushing, and District Court Judge Duane voiced these concerns; but, unwilling to declare an early act of Congress unconstitutional, upset the President, or fail the war veterans,

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at 231–87 (Thomas, J., concurring) (forgoing any mention of associational standing), and *Spokeo*, 578 U.S. at 330 (Alito, J.) (finding no standing in a case alleging violations of the Fair Credit Reporting Act), with *TransUnion*, 594 U.S. at 442 (Thomas, J., dissenting), and *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 397–405 (2024) (Thomas, J., concurring) (raising concerns with associational standing), and *Denial of Writ of Certiorari, Parents Protecting Our Child., UA v. Eau Claire Area Sch. Dist.*, 145 S. Ct. 14 (2024) (No. 23-1280) (Alito, J., dissenting) (noting in a dissent from denial of certiorari, joined by Thomas, “I am concerned that some federal courts are succumbing to the temptation to use the doctrine of Article III standing as a way of avoiding some particularly contentious constitutional questions”).

24. Invalid Pension Act of 1792, ch. 11, §§ 2, 3, 1 Stat. 243.

25. *Id.* §§ 2, 4. See generally Max Farrand, *The First Hayburn Case, 1792*, 13 AM. HIST. REV. 281 (1908) (compiling an extensive record of *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792)).

these figures instead proposed serving as commissioners under the Act's process rather than in their official judicial capacities.<sup>26</sup>

On April 11, 1792, before any action could be taken to address the judges' concerns, William Hayburn filed a claim under the Invalid Pensions Act in the Pennsylvania Circuit Court, which declined to hear his case and directed him to take his petition directly to Congress.<sup>27</sup> Hayburn's effort to

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26. The Judges expressed concern that the Invalid Pensions Act improperly assigned them nonjudicial duties by subjecting their decisions to review by the executive and legislative branches. See Letter from Chief Justice John Jay, Justice William Cushing & Judge James Duane to President George Washington (Apr. 5, 1792), reprinted in 1 AM. STATE PAPERS 49 (Washington D.C., Gales & Seaton 1834) (No. 30). The letter is appended in an unnumbered footnote at the end of *Hayburn's Case*, 2 U.S. (2 Dall.) at 410 (“[B]y the Constitution, neither the Secretary at War, nor any other Executive officer, nor even the Legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court.”). See generally Maeva Marcus & Robert Teir, *Hayburn's Case: A Misinterpretation of Precedent*, 1988 WIS. L. REV. 527 (providing an overview of all relevant historical accounts surrounding *Hayburn's Case*).

Despite their constitutional concerns, some judges were reluctant to refuse action on such an important matter as providing pensions to disabled Revolutionary War veterans. As they explained, “the objects of this act are exceedingly benevolent, and do real honor to the humanity and justice of Congress,” and they sought to show “high respect for the National Legislature.” *Hayburn's Case*, 2 U.S. (2 Dall.) at 410. To balance these considerations, the judges devised a compromise: they would act as commissioners, or voluntary agents of the federal government, rather than in their official judicial roles. See Marcus & Teir, *supra* note 26, at 531; Farrand, *supra* note 25, at 281–82 (noting that the duties under the Act were not judicial in nature and stating, “[t]hat neither the legislative nor the executive branches can constitutionally assign to the judicial any duties, but such as are properly judicial, and to be performed in a judicial manner . . . . That as the objects of this act are exceedingly benevolent . . . [the judges] will execute this act in the capacity of commissioners” (internal quotations and citation omitted)).

Other justices, like Justice James Wilson, a dominating personality of the court at the time, and Justice Blair were less willing to bend their beliefs. Sometime before April 5, 1792, Attorney General Edmund Randolph encountered Justice Wilson on the street in Philadelphia, and Justice Wilson voiced concerns, shared by himself and Justice Blair, with the act. Justice Wilson was a prominent figure at both the Federal Convention and the Pennsylvania State Convention, whereupon ratification of the Constitution he famously asserted that judges, as independent guardians of constitutional authority, must out of duty declare laws inconsistent with the Constitution “null and void,” emphasizing that “the power of the constitution predominates” over any contrary acts of Congress. JOHN BACH MCMASTER & FREDERICK D. STONE, *PENNSYLVANIA AND THE FEDERAL CONSTITUTION, 1787–1788*, at 354 (1888); Letter from Attorney General Edmund Randolph to President George Washington (Apr. 5, 1792), reprinted in 1 AM. STATE PAPERS, *supra*, at 77 (No. 45).

27. Justice Wilson, Justice Blair and District Court Judge Peters wrote to President Washington after declining Hayburn's petition and shared their discomfort in refusing to act under the Invalid Pensions Act. Letter from Chief James Wilson, Justice John Blair & Judge Richard Peters to President George Washington (Apr. 18, 1792), <https://founders.archives.gov/documents/Washington/05-10-02-0174> [<https://perma.cc/CGL8-Y24E>] (“Upon due consideration, we have been unanimously of opinion, that, under this act, the Circuit Court, held for the Pennsylvania District could not proceed . . . . To be obliged to act contrary either to the obvious Directions of Congress or to a constitutional Principle, in our Judgement equally obvious, excited Feelings in us, which we hope never to experience again.”).

Record of this first case is relatively minimal, but Max Farrand noted that some available reporting expressed general disappointment, such as Bache's *General Advertiser* of April 20, 1792, which commented on calls for impeachment: “Never was the word ‘impeachment’ so hackneyed . . . [A]s if . . . Congress were wrapped up in the cloak of infallibility . . . and that it was damnable heresy and

secure his pension continued,<sup>28</sup> and ultimately reached the Supreme Court in August 1792, when Attorney General Edmund Randolph sought a writ of mandamus to compel the lower court to act.<sup>29</sup> The Court, divided over whether Randolph could present the case without presidential authorization, declined to proceed.<sup>30</sup> Rather than pursue President Washington's authorization, Randolph refiled the case later that day as personal counsel for Hayburn, prompting the Court to consider the merits but to delay its ruling until the next term.<sup>31</sup> However, before the Court reconvened, Congress amended the Invalid Pensions Act in 1793, and addressed the judicial concerns by shifting administrative duties to the Secretary of War and the Attorney General.<sup>32</sup> The amendment rendered further judicial action unnecessary, and as a result, the Supreme Court never issued a final decision in *Hayburn's Case*.<sup>33</sup>

The story continued a year later when the United States sued Yale Todd to recover funds improperly paid to him under a pension awarded by Chief Justice Jay, Justice Cushing, and Judge Law, acting as commissioners under the revised Act. The Court ruled against Todd but avoided issuing a formal opinion on the Act's constitutionality, simply stating, "Judgement be Entered for the Plaintiff."<sup>34</sup> While the original records are missing, correspondence among the Justices suggests their decision likely stemmed

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sacrilege to doubt the constitutional orthodoxy of any decision of theirs . . . ." See Farrand, *supra* note 25, at 285. Fenno's *Gazette of the United States* for May 9, 1792, lamented that "the humanity of Congress has been thwarted by the action of the judges," while Freneau's *National Gazette* for April 23, 1792, acknowledged that the judges had "in a delicate manner passed sentence of unconstitutionality on the invalid law" and noted that the word "impeachment" was mentioned several times in the House, though no motion followed. See *id.* at 285.

28. Hayburn addressed Congress on April 13, 1792, requesting relief, and noting that the circuit court had refused to take his case. Congress took no action at that time and instead referred him to a committee. 3 ANNALS OF CONG. 556–58 (Apr. 13, 1792) ("This being the first instance in which a court of justice had declared a law of Congress to be unconstitutional, the novelty of the case produced a variety of opinions with respect to the measures to be taken on the occasion.").

29. *Hayburn's Case*, 2 U.S. (2 Dall.) at 409.

30. See Marcus & Teir, *supra* note 26, at 535 ("The first question that arose was independent of the main question [justification of the lower court's action], viz. Whether it was part of the duty of the attorney general of the United States, to superintend the decisions of the inferior courts, and if to him they appeared improper, to move the supreme court (sic) for a revision." (quoting FED. GAZETTE (Philadelphia), Aug. 18, 1792)).

31. At this point, the Court must have agreed this was a case it could hear, because it then entertained arguments on the merits of the original mandamus petition. The Justices, likely unwilling to offend Congress by outwardly pronouncing the law unconstitutional, but seemingly forced into deciding on the merits, agreed to hold the motion under advisement until the next term. See Marcus & Teir, *supra* note 26, at 539; Farrand, *supra* note 25, at 283–84.

32. Act of Feb. 28, 1793, ch. 11, 1 Stat. 324.

33. See Marcus & Teir, *supra* note 26, at 540 (noting that "the way in which Dallas, in his published Supreme Court Reports, juxtaposed the procedural motion with the argument on the merits compounded the confusion for future interpreters of *Hayburn's Case*").

34. See Farrand, *supra* note 25, at 282–83.

from the conclusion that the earlier practice of judges acting as commissioners, later codified in the revised legislation, was no longer tenable.<sup>35</sup>

The first mention of *Hayburn's Case* and Yale Todd comes nearly sixty years later in *United States v. Ferreira*.<sup>36</sup> In *Ferreira*, the Court dismissed a challenge to a judgment awarding damages under statutes enforcing the 1819 treaty in which Spain ceded Florida to the United States, citing a lack of jurisdiction.<sup>37</sup> Chief Justice Taney<sup>38</sup> reasoned that the process created by Congress, which tasked federal judges with verifying and adjusting claims under the treaty, was not a judicial function but rather an administrative role akin to that of commissioners.<sup>39</sup> To support his conclusion that such nonjudicial duties fell outside the scope of Article III judicial power, Taney relied exclusively on *Hayburn's Case* and Yale Todd.<sup>40</sup> By invoking these cases to justify his dismissal of *Ferreira* on jurisdictional grounds, Taney effectively elevated what were otherwise advisory opinions from unresolved cases to citable precedent,<sup>41</sup> and embedded them into the foundations of standing doctrine and the principles of judicial power under Article III.

Although Taney relied exclusively on what were effectively advisory opinions from *Hayburn's Case* and Yale Todd to dismiss *Ferreira* for lack

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35. *See id.*

36. Chief Justice Taney ordered the Court to append the Justices' letters from the footnotes in *Hayburn's Case* and a paraphrase of Yale Todd's record to the end of *Ferreira*; the note on Yale Todd does not purport to be a verbatim account of the original record and it is impossible to tell how much of it is part of the original record versus Taney's own interpretation. 54 U.S. (13 How.) 40, 52 (1852) ("Note by the Chief Justice, Inserted by Order of the Court").

37. *Ferreira*, 54 U.S. (13 How.) at 52.

38. A staunch supporter of Andrew Jackson, Taney was first appointed as his Attorney General. After two failed nominations, Jackson successfully appointed Taney as Chief Justice in 1836. Taney's tenure marked the first significant conservative shift in the Supreme Court. *See generally* Alvin J. Schumacher, *Roger B. Taney*, BRITANNICA (Mar. 13, 2025), <https://www.britannica.com/biography/Roger-B-Taney> [<https://perma.cc/8PKC-YKR6>].

In *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV, Taney dismissed for lack of jurisdiction, holding that because Scott was a slave, he was not a citizen, and thus had no right to sue in the first place. The ruling sparked outrage and was a significant factor in leading to the Civil War. *But see generally* David T. Hardy, *Dred Scott, John San(d)ford, and the Case for Collusion*, 41N. KY. L. REV. 37 (2014) (discussing the possibility of jurisdictional manipulation in *Dred Scott*).

39. *Ferreira*, 54 U.S. (13 How.) at 47.

40. Taney concluded that the 1792 Invalid Pensions Act "was not [in the] judicial power within the meaning of the Constitution, and was, therefore, unconstitutional and could not lawfully be exercised by the courts." *Id.* at 53. Taney emphasized that subjecting judicial decisions to executive and legislative review violated the separation of powers. *Id.*

41. *See* Marcus & Teir, *supra* note 26, at 534.

of jurisdiction,<sup>42</sup> he later cited the same cases in *Gordon v. United States*<sup>43</sup> to explicitly support a seemingly contradictory conclusion—that Article III prohibits the Court from issuing advisory opinions.<sup>44</sup> Once again relying solely on *Hayburn’s Case* and Yale Todd, Taney concluded in *Gordon* that the Court could not act under a statute requiring it to certify opinions to the Secretary of the Treasury, as final authority rested with Congress, thus the proposed arrangement violated the Constitution’s allocation of judicial power.<sup>45</sup>

The Court next relied on *Hayburn’s Case*, *Gordon*, and *Ferreira* fifty years later in *Muskrat v. United States*, a pivotal standing case, this time to assert that federal jurisdiction required the presentation of an adversarial dispute.<sup>46</sup> The facts of *Muskrat* trace back nearly eighty years to December

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42. Taney relied on *Hayburn’s Case* and Yale Todd in the affirmative to conclude that the tribunal established under the act of Congress was “not a judicial one” but rather conferred authority akin to “that of a commissioner to adjust certain claims against the United States,” and its decisions constituted an “award of a commissioner” rather than “the judgment of a court of justice,” which could not be appealed to the federal courts. *Ferreira*, 54 U.S. (13 How.) at 47.

43. 117 U.S. 697, 702 (1864) (“[N]or can Congress authorize or require this Court to express an opinion on a case where its judicial power could not be exercised, and where its judgment would not be final and conclusive upon the rights of the parties . . .”).

44. An interesting contrast emerges from the fact that while *Hayburn’s Case* has been cited in fifty-six Supreme Court decisions, it has appeared in 2,230 rulings by the U.S. Court of Appeals for Veterans Claims—often to support conclusions diametrically opposed to those in the Court’s cases but in line with Taney’s conclusions in *Ferreira*. See, e.g., *Brown v. McDonough*, No. 23-1585, 2024 WL 4597005, at \*1 (Vet. App. Oct. 29, 2024) (“The creation of a special court solely for veterans, and other specified relations, is consistent with congressional intent as old as the Republic.” (citing *Hayburn’s Case*, 2 U.S. (2 Dall.) 409 (1792))).

45. *Gordon*, 117 U.S. at 702. *But see* Marcus & Teir, *supra* note 26, at 540 (compiling historical evidence suggesting Taney misinterpreted these cases and that the Court’s decision in *Hayburn’s Case* primarily concerned whether Attorney General Randolph required explicit presidential authorization to proceed, rather than the Court’s ability to issue advisory opinions). Nevertheless, *Hayburn’s Case*, alongside *Gordon* and *Ferreira*, has been frequently cited as precedent for judicial restraint in several of the Court’s most consequential constitutional cases.

This evolution, which required the presence of adverse parties, effectively bifurcated and reinterpreted *Hayburn’s Case*, establishing that the Court must have both a justiciable issue and a litigant with proper standing—a practice that has persisted to this day. See *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 150–51 (1951) (Frankfurter, J., concurring) (declaring the jurisdictional need for both a litigant with proper standing and a justiciable issue before the court (citing *Muskrat v. United States*, 219 U.S. 346 (1911))). *But see* Marcus & Teir, *supra* note 26, at 541 (noting that Randolph proceeded once more after the Invalid Pension Act was amended, yet again without an interested party and was heard by the court, but he abandoned his motion as only two of the five Justices were present and it seemed he was likely to receive an adverse outcome) (citing Letter from Attorney General Edmund Randolph to Secretary of War Henry Knox (Aug. 9, 1793), *reprinted in* 1 AM. STATE PAPERS, *supra* note 26, at 78 (No. 47)); see also *Steel Co. v. Citizens for Better Env’t*, 523 U.S. 83, 109 (1998) (relying on *Hayburn’s Case* and *Muskrat* as foundational precedent in a holding that denied plaintiff’s standing because “none of the relief sought by respondent would likely remedy its alleged injury in fact . . .”).

46. 219 U.S. at 357.

29, 1835,<sup>47</sup> when a small faction<sup>48</sup> within the Cherokee Nation signed the Treaty of New Echota,<sup>49</sup> which became the legal basis for the Cherokee

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47. Also in 1835, Jackson further solidified his vision for states' rights by appointing his Attorney General, Roger Taney, as Chief Justice of the Supreme Court to replace John Marshall. Taney, like Jackson, was a staunch advocate for limiting federal power in favor of states, marking a jurisprudential shift in the Court. See *The Taney Court, 1836–1864*, SUP. CT. HIST. SOC'Y, <https://supremecourthistory.org/history-of-the-courts/taney-court-1836-1864/> [<https://perma.cc/UA83-3V2R>].

48. The "Treaty Party," (also known as the "Ridge Party") including Elias Boudinot, believed Cherokee removal was inevitable and sought to secure rights for their nation by agreeing to a treaty. See Treaty of New Echota, Dec. 29, 1835, 7 Stat. 478; see also Supplementary Articles to Treaty of New Echota, Mar. 1, 1836, 7 Stat. 488. Elias Boudinot was born Gallegina Uwati ("Buck Watie"), brother of Stand Watie, nephew of Major Ridge and cousin of John Ridge, all prominent Cherokee leaders. See *Gallegina Uwati / Elias Boudinot*, GENI (Feb. 26, 2025), <https://www.geni.com/people/Gallegina-Uwati-Elias-Boudinot/6000000001636586636> [<https://perma.cc/5TEK-NTT5>]; Angela F. Pulley, *Elias Boudinot*, NEW GA. ENCYCLOPEDIA (July 13, 2018), <https://www.georgiaencyclopedia.org/articles/history-archaeology/elias-boudinot-ca-1804-1839> [<https://perma.cc/2FJG-S2SY>].

In 1817, Gallegina Uwati was invited to attend the American Board of Commissioners for Foreign Missions school in Cornwall, Connecticut under sponsorship by Congressman Elias Boudinot. *Id.*; Farrand, *supra* note 25, at 284. Congressman Elias Boudinot sponsored many Black and Indian children at boarding schools in Connecticut and was an avid arguer in favor of rights for both groups. Congressman Boudinot was an attorney, who in 1780 represented the plaintiffs in a New Jersey Supreme Court case, *Holmes v. Walton*, considered the earliest case addressing judicial power and unconstitutional legislation. Austin Scott, *Holmes vs. Walton: The New Jersey Precedent*, 4 AM. HIST. REV. 456, 456–69 (1899). Given this experience, Congressman Boudinot attended the *Hayburn's Case* hearings, and reported to Congress during Hayburn's 1792 presentation to Congress seeking reprieve from his earlier denial. Farrand, *supra* note 25, at 284.

Gallegina Uwati's relationship with Congressman Boudinot had such a profound effect on him that he asked the Congressman for permission to change his own name to Elias Boudinot. Rachel Purvis, *Maintaining Intact Our Homogeneousness: Race, Citizenship, & Reconstructing Cherokee* (2012) (Ph.D. dissertation, Univ. of Miss.), <https://grove.olemiss.edu/cgi/viewcontent.cgi?article=2414&context=etd> [<https://perma.cc/RRD6-W9K9>]. Elias Boudinot went on to start the Cherokee Phoenix, the Cherokee Nation's first newspaper; he also birthed a son William Penn Boudinot. *Id.* William Penn Boudinot was later denied land rights and citizenship by the "Loyal Cherokee" because of his participation in the Civil War on the side of the confederacy—this was eventually annulled by the Cherokee Treaty of 1866. On the way back from the Cherokee Nation after the treaty was signed, Frank Boudinot was born. Indian Pioneer Hist. Project for Okla., *Frank J. Boudinot Interview*, OKGENWEB (2002), <https://www.okgenweb.net/pioneer/ohs/boudinot-frankj.htm> [<https://perma.cc/72SW-PTCP>]. Frank Boudinot went on to represent David Muskrat in his Supreme Court case; he was also later denied attorney fees for his involvement in the case. *Cherokee Nation v. Whitmire*, 223 U.S. 108 (1912). This Note is the first known publication revealing this fortuitous connection between *Hayburn's Case* and *Muskrat*.

49. The Treaty Party formed in the wake of *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), when the Court held that it lacked jurisdiction to hear the Cherokee Nation's case against Georgia. The Court ruled that the Cherokee Nation was a "domestic dependent nation," rather than a foreign nation under the Article III "controversy" clause, and thus could not sue. *Id.* However, the decision left open the possibility of ruling in favor of the Cherokee "in a proper case with proper parties." *Id.* Such was the case in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), which followed, and reversed course by invalidating Georgia's law requiring non-Natives to obtain a state license to reside on Native lands, establishing the doctrine of tribal sovereignty and affirming federal authority over Native affairs through treaties. *Id.*

Despite *Worcester's* recognition of Cherokee sovereignty, President Andrew Jackson refused to enforce the decision. Facing the Nullification Crisis in South Carolina and fearing that upholding *Worcester* might push Georgia into rebellion alongside South Carolina, Jackson instead pledged to evict

Removal, widely remembered today as the Trail of Tears.<sup>50</sup> This treaty ceded the Cherokee homeland in the southeastern United States, requiring their relocation westward to lands granted in fee simple and confirmed by a U.S. patent.<sup>51</sup> Although the Cherokee initially held their allotted lands as communal property, the Treaty of July 19, 1866 authorized the Secretary of the Interior to survey and divide the land at the Cherokee National Council's request.<sup>52</sup> In 1901, the Council requested such a division,<sup>53</sup> leading to the Allotment Act of 1902, which provided individual Cherokees with fee simple titles, subject to lease restrictions.<sup>54</sup>

Subsequent legislation, including the Allotment Acts of 1904 and 1906, imposed federal control over land alienation, leasing, and rights of way.<sup>55</sup> The 1904 Act allowed the Secretary of the Interior to grant pipeline easements, while the 1906 Act prohibited full-blood Indians from alienating their land for twenty-five years without congressional approval and required federal authorization for most leases.<sup>56</sup> In response, David Muskrat traveled

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the Cherokee, famously stating, "John Marshall has made his decision; now let him enforce it." See Stephen Breyer, Associate Justice, U.S. Supreme Court, *Guardian of the Constitution: The Counter Example of Dred Scott*, Supreme Court Historical Society Annual Lecture (June 1, 2009), [https://www.supremecourt.gov/publicinfo/speeches/sp\\_06-01-09.html](https://www.supremecourt.gov/publicinfo/speeches/sp_06-01-09.html) [<https://perma.cc/Z8X7-3GM7>]; Stephen Breyer, Associate Justice, U.S. Supreme Court, University of Pennsylvania Law School Commencement Remarks (May 19, 2003), [https://www.supremecourt.gov/publicinfo/speeches/sp\\_05-19-03.html](https://www.supremecourt.gov/publicinfo/speeches/sp_05-19-03.html) [<https://perma.cc/H9HT-B2YH>].

50. Order No. 25 from Winfield Scott, General, U.S. Army (May 17, 1838) (on file with the Library of Congress).

51. Transcript of Record at 1–5, *Muskrat v. United States*, 219 U.S. 346 (1911) (Nos. 330, 331).

52. CHEROKEE NATION CONST. OF 1839, art. I, § 2 (amended 1866). ("The lands of the Cherokee Nation shall remain common property until the National Council shall request the survey and allotment of the same, in accordance with the provisions of Article 20th of the Treaty of 19th of July, 1866, between the United States and the Cherokee Nation."); see also Treaty with the Cherokees, July 19, 1866, 14 Stat. 799, art. 20 ("Whenever the Cherokee National Council shall request it, the Secretary of the Interior shall cause the country reserved for the Cherokees to be surveyed and allotted among them, at the expense of the United States.").

53. Letter from Ethan Hitchcock, Sec'y of Interior, to U.S. House of Representatives (Apr. 16, 1902), [https://www.govinfo.gov/content/pkg/SERIALSET-04361\\_00\\_00-152-0552-0000/pdf/SERIALSET-04361\\_00\\_00-152-0552-0000.pdf](https://www.govinfo.gov/content/pkg/SERIALSET-04361_00_00-152-0552-0000/pdf/SERIALSET-04361_00_00-152-0552-0000.pdf) [<https://perma.cc/8AXA-P8KC>] (transmitting a memorial from the Cherokee National Council Session of 1901).

54. An Act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of the town sites therein, and for other purposes, ch. 1375, 32 Stat. 716 (1902); see Transcript of Record at 71 app. B, *Muskrat v. United States*, 219 U.S. 346 (1911) (Nos. 330, 331).

55. An act authorizing the Secretary of the Interior to grant rights of way for pipe lines through Indian lands, ch. 505, 33 Stat. 65 (1904); An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory and for other purposes, ch. 1876, 34 Stat. 137 (1906); see also Transcript of Record at 24, *Muskrat*, 219 U.S. 346 (Nos. 330, 331).

56. The Act of 1906 incorporates "Regulations of July 7, 1906" that were "governing the leasing and sale of lands allotted to or inherited by full blood Indians of the Five civilized tribes." Section 19 of the 1906 Act stated, any "Indian . . . shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years . . . unless such restriction shall . . . be removed by Act of Congress." Section 20 of the 1906 Act stated, "all leases and rental contracts,

to Washington to address Congress and object to the manner of land allotment and division,<sup>57</sup> particularly allocations to “intermarried citizens” and others he deemed ineligible, including claims by babies born after the 1902 Act, “white families,” “old missionary families,” and “freedmen.”<sup>58</sup>

While Muskrat and his colleagues raised their concerns at Congress about the implications of these policies on Cherokee land rights and sovereignty,<sup>59</sup> William Brown filed claims in court alleging similar violations of constitutional rights.<sup>60</sup> Rather than address Muskrat’s concerns directly, and before the Court could address Brown’s claims, Congress intervened, and passed the Indian Appropriations Act in 1907, which explicitly granted federal court jurisdiction to hear constitutional challenges from specific named petitioners, including Brown, Muskrat, and others, regarding Acts passed since 1902.<sup>61</sup>

With this jurisdictional amendment, Muskrat, Brown, and their fellow petitioners filed suit in the Court of Claims, merging their cases into *Musktrat v. United States*.<sup>62</sup> The Court of Claims ruled that Congress retained control over unallotted tribal lands as part of its trust responsibilities and dismissed the argument that the Acts constituted an unconstitutional taking.<sup>63</sup> The court emphasized that tribal lands were held

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except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads . . . shall be in writing and subject to approval by the Secretary of the Interior and shall be absolutely void and of no effect without such approval.” Section 22 of the 1906 Act stated, “all conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe.” See *supra* note 55 and accompanying text.

57. Although beyond the scope of this paper, but warranting further research, it appears David Muskrat passed away in the early months of 1907. His obituary declared him president of the Katowah Society and noted his death “has been felt as a severe loss to fullblood Cherokees.” The obituary recognizes his “many trips to Washington for [the Cherokee],” that were “always faithful and true and worked to retain the Cherokee Nation as a distinct and separate people.” It continues that “[h]is word was law to his people and he had the greatest influence among them,” as evidenced by the fact that it was “under his guidance and advice that many of the fullbloods took their lands in allotment although opposed to accepting statehood and the change in tribal government.” *Cherokee Leaders See New Politics*, MUSKOGEE PHOENIX (Oklahoma), July 31, 1907, at 2.

58. *Second Session of the Senators*, MUSKOGEE TIMES-DEMOCRAT (Oklahoma), Nov. 15, 1906, at 8.

59. See *supra* note 48 and accompanying citations.

60. Brown filed claims in response to congressional Acts passed in 1904 and 1906, which he argued violated his constitutional rights. These Acts allowed for land allotments and directed revenues from rights-of-way to tribal funds rather than individual landowners, prompting allegations of a Fifth Amendment takings violation. Transcript of Record at 9, 11–12, *Musktrat v. United States*, 219 U.S. 346 (1911) (Nos. 330, 331).

61. Transcript of Record at 166, 169, 174–79, 217, 414, *Musktrat v. United States*, 219 U.S. 346 (1911) (Nos. 330, 331).

62. 219 U.S. 346.

63. *Musktrat v. United States*, 44 Ct. Cl. 137 (1909).

for the collective benefit of the tribe, and allottees, even as U.S. citizens, had no vested property rights that Congress could not regulate.<sup>64</sup>

The Cherokee plaintiffs appealed to the Supreme Court under the jurisdictional authority granted by the 1907 Act.<sup>65</sup> However, despite Congress having authorized this litigation, the United States, represented by government attorneys, raised a procedural argument.<sup>66</sup> Relying on precedent set forth in *Gordon, Ferreira, and Hayburn's Case*, the government contended that the Court lacked jurisdiction because the case did not involve an actual adversarial dispute.<sup>67</sup> The Supreme Court agreed, dismissing the case on jurisdictional grounds and avoiding the substantive constitutional issues raised by the Cherokee plaintiffs.<sup>68</sup> This procedural maneuver left the petitioners' valid constitutional concerns unaddressed, undermining their efforts to resolve significant grievances, circumventing justice and leaving the petitioners without redress.<sup>69</sup> While Congress ostensibly empowered the Court to resolve this dispute, the Court relied on *Hayburn's Case*, through both *Gordon and Ferreira*, to introduce a new prerequisite for federal jurisdiction—the adverse party requirement.<sup>70</sup>

The *Hayburn* line of cases, including *Muskrat*, were later invoked in two seminal opinions, *Tutun v. United States*<sup>71</sup> and *Ashwander v. Tennessee Valley Authority*,<sup>72</sup> both authored by Justice Brandeis (concurrence in *Ashwander*), further entrenching the Court's holdings as a basis for the

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64. See Transcript of Record at 214, *Muskrat v. United States*, 219 U.S. 346 (1911) (Nos. 330, 3331) (“[T]hey are uneducated and unable to speak the English language and have never before owned alienable lands, and without governmental supervision are incompetent to represent and protect themselves in the sale or leasing of their allotted lands.”); Transcript of Record at 367, *Tiger v. W. Inv. Co.*, 221 U.S. 286 (1911) (No. 515) (“The Indians whom the Act of April 26, 1906, classifies as incompetents and legislates for as such, are full-blood Indians and therefore presumably the most incompetent of this incompetent race.”); *Id.* at 368 (“It may be reasonably presumed that Congress had before it abundant evidence of the incompetency of the full-blood Indians as a class.”); *id.* at 368 (“The Court of Claims expressly finds as to the full-blood Cherokees, that: they are uneducated and unable to speak the English language and have never before owned alienable lands, and without governmental supervision are incompetent to represent and protect themselves in the sale or leasing of their allotted lands.”); *id.* at 404 (“[I]t should be recalled that United States citizenship is not an unmingled blessing to the members of an incompetent and uneducated race[.]”).

65. Transcript of Record at 11, *Muskrat v. United States*, 219 U.S. 346 (1911) (Nos. 330, 331).

66. *Id.*

67. *Id.* at 424–30.

68. Federal court was the only venue to which the parties could avail. Since the Court dismissed the case, there was no other venue in which they could bring their claims. *Cf.* *Muskrat v. United States*, 219 U.S. 346 (1911).

69. See *id.*

70. There is no indication that *Hayburn's Case* was about adverseness. See *supra* note 45 and accompanying text.

71. 270 U.S. 568 (1926).

72. 297 U.S. 288 (1936).

principles of adversarial parties and justiciable disputes.<sup>73</sup> These principles underscored a commitment to judicial restraint and the importance of separating constitutional questions from statutory ones unless absolutely necessary. An often-overlooked element of *Ashwander* is Brandeis's explicit acknowledgment that these considerations were court-created, prudential rules rather than constitutional mandates.<sup>74</sup> This distinction highlights Brandeis's intent to provide guiding principles for judicial restraint rather than rigid jurisdictional bars,<sup>75</sup> a nuance that has either been lost to negligence, or willfully disregarded in subsequent adoptions of his reasoning.<sup>76</sup>

The start of this trend can be largely attributed to the explosion of federal legislation during the New Deal (1933–1937), and the appointment of Justice Brandeis's close friend, Justice Frankfurter, to the bench in 1938,

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73. In *Tutun*, a case regarding naturalization proceedings, Brandeis declared “[i]f the proceedings were not a case or controversy within the meaning of article 3, § 2, this delegation of power upon the courts would have been invalid.” 270 U.S. at 576 (citing *Hayburn’s Case*, 2 U.S. (2 Dall.) 409 (1792); *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1851); *Muskraat*, 219 U.S. 346). In *Ashwander*, stockholders of a power company filed a breach of contract suit against a federal utility company, which in turn advanced a broader constitutional challenge to a congressional program developing the Wilson Dam. At the outset of his concurrence—widely regarded as the first elaboration of the doctrine of Constitutional avoidance—Brandeis asserted that the Court “has restricted the exercise of [judicial review] by rigid insistence that the jurisdiction of federal courts is limited to actual cases and controversies; and that they have no power to give advisory opinions.” 297 U.S. at 346–47, n.4 (Brandeis, J., concurring) (citing *Hayburn’s Case*, 2 U.S. (2 Dall.) 409; *Ferreira*, 54 U.S. (13 How.) 40; *Gordon v. United States*, 117 U.S. 697 (1864); *Muskraat*, 219 U.S. 346)); *see also id.* at 346 (“It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.”); *INS v. Chadha*, 462 U.S. 919, 939 (1983) (noting it was “contended that this is not a genuine controversy but ‘a friendly, non-adversary, proceeding’” (quoting *Ashwander*, 297 U.S. at 346 (Brandeis, J., concurring))). *But see generally* PFANDER, *supra* note 9, at 100–01 (noting that Brandeis was focused on “narrow[ing] the law-saying power of conservative federal courts,” in *Ashwander*, when he articulated broad principles of judicial restraint aimed at limiting the federal judiciary’s reach by advocating doctrines like standing and non-adjudication of collusive, fictitious suits. Brandeis specifically stated these were self-imposed rules of the Court—rather than direct constitutional mandates under Article III—and were only meant to avoid unnecessary constitutional rulings and maintain respect for state courts, agency decisions, and Congress’s policymaking authority).

74. 297 U.S. at 341 (Brandeis, J., concurring) (“The obstacle is not procedural. It inheres in the substantive law, in well settled rules of equity, and in the practice in cases involving the constitutionality of legislation.”); *id.* at 346 (“The Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.”).

75. *See supra* note 73; PFANDER, *supra* note 9, at 100–01.

76. *See, e.g., Moody v. NetChoice, LLC*, 603 U.S. 707, 749 (2024) (Jackson, J., concurring in part) (citing *Ashwander*, 297 U.S. at 288, 346–47 (Brandeis, J., concurring)) (addressing constitutionality of state laws infringing social-media platforms First Amendment rights); *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 353 (2022) (Roberts, C.J., concurring) (citing *Ashwander*, 297 U.S. at 288, 347 (Brandeis, J., concurring)) (overturning constitutional rights to abortion).

replacing Justice Cardozo.<sup>77</sup> During his time on the bench (1939–1962), Justice Frankfurter cemented standing as a constitutional mandate, arguing that Article III’s “case or controversy” requirement limited federal courts to adjudicating personal legal injuries recognized by common law, statute, or the Constitution.<sup>78</sup>

Through the 1950s and 1960s, the largely liberal Warren Court (1953–1969) applied these newly established standing principles with flexibility, as seen in cases like *Baker v. Carr*,<sup>79</sup> where it allowed plaintiffs alleging systemic injuries, such as unequal electoral apportionment, to bring novel claims under the Equal Protection Clause.<sup>80</sup> The use of standing to expand access to federal courts shifted dramatically under the conservative Burger Court (1969–1986).<sup>81</sup> Slowly, but surely, the Burger Court adopted and built upon the same principles heralded by Frankfurter, but increasingly applied them in ways that restricted access to the courts, limiting the scope of standing and constraining pathways for plaintiffs to bring systemic claims.<sup>82</sup>

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77. Felix Frankfurter, OYEZ, [https://www.oyez.org/justices/felix\\_frankfurter](https://www.oyez.org/justices/felix_frankfurter) [<https://perma.cc/XC8P-M4TA>] (“Justice Felix Frankfurter was the most controversial justice of his time.”); see also Pushaw, *supra* note 8, at 896 n.25 (citing William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 224–228 (1988)) (noting the practical need for docket control became acute during the New Deal era, and further that “[s]tanding doctrine also served other purposes, most notably shielding liberal federal and state regulatory legislation, which was being administered by new administrative agencies, from attacks in federal court”).

78. In *Coleman v. Miller*, he articulated his vision of standing as essential to maintaining the historical separation of powers, a perspective that gained full acceptance by the 1950s. 307 U.S. 433, 460–70 (1939) (Frankfurter, J., concurring). Frankfurter’s influence reoriented standing doctrine away from equitable discretion and toward constitutional necessity, prioritizing the judiciary’s restraint in addressing politically sensitive issues. See Pushaw, *supra* note 8, at 896 n.27 (citing *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 149–60 (1951) (Frankfurter, J., concurring)) (noting Frankfurter “baldly asserted that Article III’s drafters used the words ‘Cases’ and ‘Controversies’ interchangeably to restrict standing to plaintiffs who could show a personal ‘legal injury’ to an interest recognized at common law, in a federal statute, or by the Constitution[]” and effectively “implemented the Constitution’s historical separation-of-powers framework” through his vision of standing, which has since been largely adopted by the Court).

79. 369 U.S. 186, 204–10 (1962).

80. Despite retention of the “legal injury” test for standing, the Warren Court did not apply it rigidly against plaintiffs whose alleged injuries were widely shared. See, e.g., *Baker*, 369 U.S. 186 (1962) (granting standing to urban Tennessee voters challenging the state’s apportionment of electoral districts through novel claims alleging that the overrepresentation of rural districts violated the Equal Protection Clause). *But see id.* at 298–300 (Frankfurter, J., dissenting) (arguing that such malapportionment affected all voters equally and therefore did not satisfy Article III’s requirement for an individualized legal injury, characterizing the claim as a generalized political grievance).

81. Throughout this period, Justices Black, Douglas, Harlan, Warren, and Stewart were replaced by conservative leaning Justices Powell, Rehnquist, Burger, and O’Connor.

82. This doctrinal shift under the Burger Court, building on the foundations laid by Frankfurter and the 1920s cases, marked a significant departure from the more pragmatic approach of earlier eras. Over the course of the Burger Court, standing was effectively transformed from a judicially managed prudential tool into a constitutional gatekeeping mechanism, shaping the judiciary’s role in addressing societal concerns as it simultaneously introduced the individualized “injury in fact,” “fairly traceable,”

In *Warth v. Seldin*,<sup>83</sup> a group of predominantly Black and Latino plaintiffs from Rochester, New York challenged the neighboring town of Penfield's zoning policies as racially discriminatory, alleging they excluded low- and moderate-income individuals and impeded community integration.<sup>84</sup> In a 5-4 decision, the Court held that the plaintiffs lacked standing due to their failure to demonstrate any direct injury or redressability.<sup>85</sup> Writing for the majority, Justice Powell<sup>86</sup> emphasized that no developers had submitted plans for low-income housing,<sup>87</sup> and even if such housing were built, the plaintiffs might still be unable to afford it.<sup>88</sup> As such, Powell concluded the plaintiffs lacked a "present interest in any Penfield property," faced only a "remote possibility" of benefitting from

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and "redressability" requirements. The evolving focus on individualized harm and judicial restraint often foreclosed challenges to critical issues, such as civil rights, environmental protections, and governmental transparency, leaving plaintiffs increasingly burdened by procedural hurdles. *See, e.g.*, *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152–54 (1970) (introducing "injury in fact"); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617–19 (1973) (introducing "fairly traceable" and "redressability"); *see also* Pushaw, *supra* note 8, at 906; Pierce, *supra* note 17 (outlining the role that shifts in the political ideologies of the Court have had on standing).

83. 422 U.S. 490 (1975).

84. *Id.* at 493–98, 514–15.

85. *Id.* at 502–18.

86. Justice Powell wrote for the majority, joined by Chief Justice Burger, and Justices Stewart, Blackmun, and Rehnquist. Justice Powell famously told colleagues he had never met a homosexual—he in fact had met several. Debra Cassens Weiss, *Justice Who Said He Never Met a Homosexual Actually Had Several Gay Law Clerks*, ABA J. (June 10, 2013, 6:08 PM), [https://www.abajournal.com/news/article/justice\\_who\\_said\\_he\\_never\\_met\\_a\\_homosexual\\_actually\\_had\\_several\\_gay\\_law\\_cle](https://www.abajournal.com/news/article/justice_who_said_he_never_met_a_homosexual_actually_had_several_gay_law_cle) [https://perma.cc/SV8K-ML2A].

87. *Contra* Transcript of Record at 193–95, *Warth v. Seldin*, 422 U.S. 490 (1975) (No. 73-2024) (Robert J. Warth affidavit) (stating he had submitted a proposal to the Penfield zoning commission and did not pursue litigation until after the commission first delayed and then indefinitely postponed the hearing).

88. *Id.* The portion of the opinion linking redressability to Article III requirements was dicta, *id.* at 498–501, and relied heavily on *Linda R.S. v. Richard D.*, 410 U.S. 614, 614–19 (1973), which itself pulled much of its reasoning from cases relying on *Muskrat*. This dictum was later cited and turned into holding by the landmark modern-standing case, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571–78 (1992). *But see Linda R.S.*, 410 U.S. at 622 (Blackmun, J., dissenting) (stating "[t]he standing issue now decided by the Court is, in my opinion, a difficult one with constitutional overtones," and the Court had "no reason to decide th[e] question in the absence of a live, ongoing controversy," based on their recent decision in *Gomez v. Perez*, 409 U.S. 535 (1973), that invalidated the law in question); *O'Shea v. Littleton*, 414 U.S. 488, 504–05 (1974) (Blackmun, J., concurring in part) (citing *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792); *Muskrat v. United States*, 219 U.S. 346, 360–61 (1911)) (noting that when the Court concludes there is no standing "it follows, it seems to me, that we are precluded from considering any other issue presented for review," and that any of the Court's additional discussion of the question whether a case for equitable relief was stated amounts to an advisory opinion that, "we are powerless to render"); *but see also* Pushaw, *supra* note 8, at 908 (noting that history shows conservative Justices are more likely to find that an injury can be redressed for favored parties like private corporations, but less likely for disfavored plaintiffs, such as those in civil rights).

court intervention, and failed to present “specific, concrete facts” of personal harm or demonstrate redressability.<sup>89</sup>

Like most 5-4 standing cases, *Warth* was decided along ideological lines. However, it stands out for the particularly pointed and candid rebukes from its dissenters, who directly accused the conservative majority of distorting standing doctrine to mask their hostility toward minority civil rights plaintiffs.<sup>90</sup> Justice Douglas argued that the majority was weaponizing standing to block marginalized plaintiffs from accessing the courts, accusing them in his opening paragraph of approaching the case “with antagonistic eyes” shaped by “strong tides of opinion” on issues of race and class.<sup>91</sup> Justice Brennan similarly criticized the majority of erecting “technical barriers” to deny plaintiffs the opportunity to challenge “purposeful, conscious scheme[s]” of exclusionary zoning designed to exclude low-income and minority residents.<sup>92</sup> Brennan further asserted that by dismissing the case on procedural grounds, the Court, driven by “an indefensible hostility to the claim on the merits,” had effectively “turn[ed] the very success of the allegedly unconstitutional scheme into a barrier to a lawsuit seeking its invalidation.”<sup>93</sup>

Less than two years after *Warth*, the Court adopted a markedly different approach in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, despite a strikingly similar fact pattern.<sup>94</sup> In *Arlington*

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89. *Warth*, 422 U.S. at 502–18. *But see generally* Spriggs et al., *supra* note 17, at No. 73-2024, Letter from Justice Powell to Chief Justice Rehnquist (June 6, 1975) (indicating an awareness of the likely outcome acknowledging “[m]y clerks all think I have narrowed the law of standing (and so do some of our Brothers)”).

90. *Warth*, 422 U.S. at 518–19 (Douglas, J., dissenting); *id.* at 519–30 (Brennan, J., dissenting).

91. *Id.* at 518–19 (Douglas, J., dissenting) (asserting that while the “mounting caseload of federal courts is well known,” procedural barriers such as standing should not be used as a docket management system, especially in “cases such as this one reflect[ing] festering sores in our society” which show “[s]tanding has become a barrier to access to the federal courts, must [sic] as ‘the political question’ was in earlier decades”).

92. *Id.* at 520, 523, 530 (Brennan, J., dissenting) (classifying the majority opinion as one that merely “purports to be a ‘standing’ opinion”).

93. *Id.* at 523, 528.

94. 429 U.S. 252 (1977). *Compare id.* at 255–62, and Spriggs et al., *supra* note 17, at No. 75-616, Letter from Justice Blackmun to Justice Powell Re: *Arlington Heights* (Dec. 7, 1976) (stating he is close to joining the majority but noting, “I must confess that I am troubled by [plaintiff’s] standing. Perhaps what you have done is the best possible way to handle it. [Plaintiff] Ransom’s situation, however, is thin. He lived in a 3-person household, with his mother and son, and their combined income was apparently too high to qualify for Lincoln Green. He also testified (page 324 of the transcript) that he never really sought housing in Arlington Heights but that he would ‘probably’ move to Lincoln Green if it were built. I had hoped that plaintiff Maldonado would prove to be a better subject for standing, but my hopes are not fulfilled. I merely ask whether it would be better to go off on a *ius tertii* basis.”), *with Warth*, 422 U.S. at 506 (“[T]he record is devoid of any indication that these projects, or other like projects, would have satisfied petitioners’ needs at prices they could afford, or that, were the court to remove the obstructions attributable to respondents, such relief would benefit petitioners. Indeed, petitioners’

*Heights*, minority plaintiffs alleged that the village's denial of their rezoning request was racially discriminatory and violated the Equal Protection Clause.<sup>95</sup> Justice Powell, again writing for a 4-3 majority, granted standing only to rule against the plaintiffs, holding they failed to prove discriminatory intent under the new standard established in *Washington v. Davis*.<sup>96</sup>

Powell distinguished *Arlington Heights* from *Warth* by citing to evidence in the record, something he chose not to do in *Warth*, to show the plaintiffs in *Arlington Heights* had submitted a specific project proposal, thereby reducing the need for any "undue speculation."<sup>97</sup> While Powell acknowledged uncertainties such as securing financing and federal subsidies, he deemed these inherent of any housing development and insufficient to negate standing, concluding that the plaintiffs' injury was "likely to be redressed by a favorable decision."<sup>98</sup> This approach sharply contrasted with *Warth*, wherein the Court denied standing on similarly speculative grounds.<sup>99</sup> By granting standing in *Arlington Heights*, the Court effectively sidestepped its precedent in *Warth*, only to apply the more stringent *Davis* intent standard, thereby raising the evidentiary burden for future plaintiffs challenging exclusionary zoning.<sup>100</sup>

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description of their individual financial situations and housing needs suggest precisely the contrary—that their inability to reside in Penfield is the consequence of the economics of the area housing market, rather than of respondents' assertedly illegal acts."), and *supra* note 87.

95. See *Arlington Heights*, 429 U.S. at 254–60 (noting "MHDC planned to build 190 clustered townhouse units for low- and moderate-income tenants[,] [t]he Village denied the rezoning request[,] and that "the District Court held that the petitioners were not motivated by racial discrimination or intent to discriminate against low-income groups when they denied rezoning, but rather by a desire 'to protect property values and the integrity of the Village's zoning plan'"").

96. *Id.* at 261–62 ("Here there can be little doubt that MHDC meets the constitutional standing requirements. . . . When a project is as detailed and specific as Lincoln Green, a court is not required to engage in undue speculation as a predicate for finding that the plaintiff has the requisite personal stake in the controversy."); *id.* at 268–69. *But see* Spriggs et al., *supra* note 17, at No. 75-616, Letter from Justice White to Justice Powell Re: *Arlington Heights* (Dec. 6, 1976) ("I shall write separately in this case. I do not agree that the Court should reconsider the applicable standard and then do the fact-finding here in the first instance. I also have doubts about the standard you have fashioned."); *id.* at No. 75-616, Letter from Chief Justice Burger to Justice Powell Re: *Arlington Heights* (Jan. 3, 1977) ("I am generally with you on the merits here, but it seems that Byron makes a pretty good case for remand rather than final decisions here. I assume you considered his views before you wrote."); *id.* at No. 75-616, Letter from Chief Justice Burger to Justice Powell Re: *Arlington Heights* (Jan. 6, 1977) ("I join even though I would be comfortable with Byron's remand.").

97. *Arlington Heights*, 429 U.S. at 260–61. *But see supra* notes 87, 94, 96.

98. *Arlington Heights*, 429 U.S. at 262.

99. *Warth*, 422 U.S. at 504 (citing *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973)) ("Petitioners must allege facts from which it reasonably could be inferred that . . . there is a *substantial* probability that they would have been able to purchase or lease in Penfield and that, if the court affords the relief requested, the asserted inability of petitioners will be removed." (emphasis added)); *see also supra* notes 94, 96.

100. *Arlington Heights*, 429 U.S. at 270 ("Respondents simply failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision."). *But see id.* at

In *City of Los Angeles v. Lyons*,<sup>101</sup> Adolph Lyons, a twenty-four-year-old Black man, sued the LAPD after being placed in a chokehold during a routine traffic stop,<sup>102</sup> seeking to enjoin the LAPD's use of chokeholds on non-threatening individuals.<sup>103</sup> In a 5-4 decision, the Court ruled that Lyons lacked standing to seek injunctive relief because he failed to demonstrate both a "real and immediate threat," or "credibly allege that he faced a realistic threat" of future harm.<sup>104</sup> Justice White, writing for the majority, emphasized that establishing standing for equitable relief required a "*reality* of the threat of repeated injury," not merely a "likelihood of a recurrence."<sup>105</sup>

Justice Marshall, in a vigorous dissent, criticized the majority for imposing an unreasonable high standing requirement that obstructed judicial oversight of government practices disproportionately harming minority communities.<sup>106</sup> He emphasized that the LAPD's chokehold policy posed an ongoing threat, particularly to Black men, citing evidence that a disproportionate number of those killed by the practice were African American.<sup>107</sup> Marshall argued that, by dismissing Lyons's claim on standing grounds, the Court abdicated its responsibility to address systemic abuses

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272 (White, J., dissenting) (criticizing the Court for interpreting *Davis* to apply "a legal standard nowhere mentioned in *Davis*," especially considering that the Court of Appeals rendered its decision in *Arlington Heights* before *Davis* was handed down); cf. *McCleskey v. Kemp*, 481 U.S. 279 (1987) (Powell, J.) (citing *Arlington Heights* for the principle that statistical evidence must show a "stark" pattern to prove discriminatory intent; but, rejecting claims by McCleskey, a Black death row inmate, who presented a comprehensive study of 2,500 Georgia homicide cases showing black defendants were 4.3 times more likely to receive the death penalty if their victim was white, because the evidence failed to demonstrate racial bias "particular" to *his* case).

101. 461 U.S. 95 (1983). The Court had earlier denied certiorari in *City of Los Angeles v. Lyons*, 449 U.S. 934 (1980), a decision in which Justices White, Powell, and Rehnquist published a dissent, but by 1983 the composition of the court had changed when President Reagan appointed Justice O'Connor to replace Justice Stewart.

102. Lyons was pulled over because one of his taillights was out. LAPD officers approached Lyons's car with drawn revolvers and instructed him to put his hands on his head, which he complied with. During the interaction, an officer applied a chokehold and handcuffed Lyons, maintaining the hold until Lyons lost consciousness. Upon regaining consciousness, Lyons had urinated and defecated himself and began spitting up dirt and blood. He was then issued a traffic citation and released. 461 U.S. at 114-15 (Marshall, J., dissenting).

103. *Id.* at 97-100.

104. *Id.* at 105-06 n.7, 109.

105. *Id.* at 107 n.8.

106. *Id.* at 130 (Marshall, J., dissenting).

107. The record included evidence presented to the District Court through affidavits, depositions, and government records, establishing the deadly consequences of LAPD's chokehold policy. Between 1975 and 1980, ten deaths were attributed to chokehold use. After the Court of Appeals stayed the preliminary injunction in 1980, four additional deaths occurred before a further stay was granted pending a petition for certiorari, with two more deaths following before certiorari was granted. In total, sixteen individuals died from LAPD chokeholds, and seventy-five percent were Black men—despite Black men comprising only nine percent of the city's population. *Id.* at 115-16 nn.3-4.

and allowed discriminatory policies to persist unchallenged.<sup>108</sup> He contended that the majority's approach overlooked the realities of racially motivated police violence and distorted standing doctrine to avoid addressing constitutional violations.<sup>109</sup>

In *Allen v. Wright*, parents of Black public-school children sued the Internal Revenue Service (IRS), arguing its failure to enforce exemption requirements against racially discriminatory private schools enabled those schools to retain tax-exempt status, which undermined public school desegregation and limited their children's access to integrated education.<sup>110</sup> The plaintiffs contended that by granting tax exemptions to segregated private schools, the IRS was encouraging white flight from integrated public schools to segregated private schools, effectively perpetuating a system of racial segregation.<sup>111</sup> In a 5-3 decision,<sup>112</sup> the Court, with Justice O'Connor writing for the majority, held that the plaintiffs lacked standing. The Court reasoned that the alleged injuries were not sufficiently traceable to the IRS's actions, as they depended on the independent decisions of private individuals and institutions, making the causal link too indirect to satisfy the standing requirements.<sup>113</sup>

This approach contrasted sharply with earlier cases like *Norwood v. Harrison*<sup>114</sup> and *Gilmore v. City of Montgomery*,<sup>115</sup> in which the Court had recognized standing for plaintiffs challenging indirect government support

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108. Marshall noted "it will rarely be easy to decide with any certainty at the outset of a lawsuit that no equitable relief would be appropriate under any conceivable set of facts that [the plaintiff] might establish in support of his claim." *Id.* at 131. He criticized the Court's approach as "wholly inconsistent with well established standing principles" and clashing with the "long-standing conception of the remedial powers of a court." *Id.*

109. The decision in *Lyons* marked a significant narrowing of standing doctrine, particularly for plaintiffs seeking to challenge systemic racial discrimination through injunctive relief. By requiring a near-certain likelihood of future personal harm, the Court made it exceedingly difficult for individuals to contest practices that, while causing widespread harm, might not imminently recur against a specific plaintiff. This approach contrasts sharply with cases where speculative injuries satisfied standing, especially in commercial litigation involving corporate or governmental plaintiffs. *See id.*; *see also* Spriggs et al., *supra* note 17, at No. 81-1064, Justice Brennan Memorandum to the Conference (Nov. 10, 1982) (noting the case should instead be moot, as "[p]etitioners have suspended the very policy against which respondent sought injunctive relief . . . and respondent has represented to us that he is willing to forego the relief he had already obtained," as such, "because the issues in this case are important and controversial, we would be much better served waiting to resolve them in a real case that merits our review, rather than reaching out to render a decision in a controversy whose continuing existence can barely be perceived").

110. 468 U.S. 737, 746 (1984).

111. *Id.* at 745; Boddie, *supra* note 6, at 350.

112. Justice Marshall was ill and took no part in the consideration or decision of the case. *Private Schools Backed on Tax-Exempt Status*, N.Y. TIMES, July 4, 1984, at B5.

113. *Allen*, 468 U.S. at 757-58.

114. 413 U.S. 455 (1973).

115. 417 U.S. 556 (1974).

of segregation.<sup>116</sup> Justice Brennan, in a pointed dissent, argued that the majority's stringent interpretation of "traceability" erected unnecessary procedural barriers, effectively insulating government policies that perpetuated racial inequality from judicial review.<sup>117</sup> By denying standing on the basis of an insufficient causal connection, the Court limited the ability of plaintiffs to challenge systemic discrimination, signaling a shift toward a more restrictive standing doctrine that narrowed the judiciary's role in addressing the indirect but substantial effects of government actions on racial equality.<sup>118</sup>

## II. NARROWING STANDING IN *TRANSUNION* TO ROLL BACK CONSUMER PROTECTIONS, WHILE BROADENING STANDING IN *HARVARD* TO END AFFIRMATIVE ACTION IN HIGHER EDUCATION ADMISSIONS

The Supreme Court continues to reshape the contours of Article III standing doctrine. In 2021, a 5-4 majority in *TransUnion LLC v. Ramirez*,<sup>119</sup>

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116. See *Allen*, 468 U.S. at 771–78, (Brennan, J., dissenting) (discussing *Norwood* and *Gilmore*, where the Court recognized the causal link between government aid to discriminatory private schools and the harm to plaintiffs seeking desegregation, and noting the standing inquiry "should not differ" in the present case); *id.* at 786–88, 793–94 (Stevens, J., dissenting) (noting the Court has employed "exactly this causation analysis in the same context at issue here—subsidies given [to] private schools that practice racial discrimination," like in *Gilmore* when the Court "easily recognized the causal connection between official policies that enhanced the attractiveness of segregated schools and the failure to bring about or maintain a desegregated public school system," and *Norwood* when the Court "concluded that the provision of textbooks to discriminatory private schools has a significant tendency to facilitate, reinforce, and support private discrimination" (internal quotations and citation omitted)).

117. See *id.* at 767 (Brennan, J., dissenting) ("The Court's attempt to obscure the standing question must be seen, therefore, as no more than a cover for its failure to recognize the nature of the specific claims raised by the respondents in these cases."); *id.* at 782 ("By interposing its own version of pleading formalities between the respondents and the federal courts, the Court not only has denied access to litigants who properly seek vindication of their constitutional rights, but also has ignored the important historical role that the courts have played in the Nation's efforts to eliminate racial discrimination from our schools."); see also *id.* at 775 n.6 ("Even if the Court were correct in its conclusion that there is an insufficient factual basis alleged in the complaint, the proper disposition would be to remand in order to afford the respondents an opportunity to amend their complaint."); *id.* at 770–71 n.3 ("[T]he Court has mischaracterized this claim of injury by misreading the complaint filed by the respondents."); Spriggs et al., *supra* note 17, at No. 81-757, Letter from Justice Stevens to Justice O'Connor Re: *Allen* (Apr. 10, 1984) ("[E]ven if we resolve all doubts in construing the complaint in favor of the plaintiff, I am still inclined to think there is standing."). But see generally *id.* at Letter from Chief Justice Rehnquist to Justice O'Connor Re: *Allen* (May 30, 1984) ("Dear Sandra: I join - even unto the 27th page!").

118. See *Allen*, 468 U.S. at 782–83 (Brennan, J., dissenting) ("What is most disturbing about today's decision, therefore, is not the standing analysis applied, but the indifference evidenced by the Court to the detrimental effects that racially segregated schools, supported by tax-exempt status from the Federal Government, have on the respondents' attempt to obtain an education in a racially integrated school system."); see also *id.* at 767 ("In so doing, the Court displays a startling insensitivity to the historical role played by the federal courts in eradicating race discrimination from our Nation's schools—a role that has played a prominent part in this Court's decisions" from *Brown v. Board of Education*, 347 U.S. 483 (1954), through *Bob Jones University v. United States*, 461 U.S. 574 (1983)).

119. 594 U.S. 413 (2021).

ruled that plaintiffs cannot establish standing based solely on statutory violations without demonstrating “tangible harm,” thereby narrowing the scope of standing for those seeking redress for federal statutory violations.<sup>120</sup> Justice Thomas, writing in dissent, criticized the majority for deviating from historical standing principles and undermining Congress’s authority to define legal rights and remedies.<sup>121</sup> Thomas noted that courts have long recognized that the infringement of private rights, such as property rights or contractual rights, constitutes an injury in itself.<sup>122</sup> He asserted that the majority’s requirement of a separate showing of “concrete harm” beyond the violation of a legal right is a novel development that lacks historical support.<sup>123</sup> Thomas emphasized that the Fair Credit Reporting Act (FCRA) was enacted specifically to address the precise harms suffered by the plaintiffs and urged deference to Congress’s determination of what constitutes a legally cognizable injury.<sup>124</sup> He warned that requiring harm beyond statutory violations undermines Congress’s ability to establish enforceable legal rights in federal courts, encroaches on legislative authority, and disrupts the constitutional balance.<sup>125</sup>

In 2023, the Supreme Court ruled in *Students for Fair Admissions v. Harvard* that race-conscious admissions practices at Harvard and the University of North Carolina violated the Equal Protection Clause, effectively bringing an end to the use of such policies.<sup>126</sup> Chief Justice Roberts, delivering the opinion of the 6-3 majority, underscored the Court’s

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120. In *TransUnion*, a class of plaintiffs sued the company under the FCRA for incorrectly flagging them as potential terrorists or drug traffickers on their credit reports. They claimed TransUnion failed to ensure the accuracy of their information, provide complete disclosures, and include a summary of their rights—all statutory violations providing them with a cause of action. *Id.* at 417–22. The Court ruled that only plaintiffs whose credit reports were shared with third parties suffered a concrete injury sufficient for standing. For others, the Court held that inaccurate information in TransUnion’s internal database, without dissemination, did not constitute concrete harm under Article III. The majority emphasized that plaintiffs must show tangible or intangible harm, as a statutory violation alone is insufficient. *Id.* at 425–33 (citing *Allen*, 468 U.S. 737; *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983); *Muskrat v. United States*, 219 U.S. 346 (1911)).

121. *TransUnion*, 594 U.S. at 454 (Thomas, J., dissenting) (“[N]ever before has this Court declared that legislatures are constitutionally precluded from creating legal rights enforceable in federal court if those rights deviate too far from their common-law roots. According to the majority, courts alone have the power to sift and weigh harms to decide whether they merit the Federal Judiciary’s attention.”).

122. *See id.* at 449 (“While the Court today discusses the supposed failure to show ‘injury in fact,’ courts for centuries held that injury in law to a private right was enough to create a case or controversy.”).

123. *See id.* at 453 (“The 1970s injury-in-fact theory has now displaced the traditional gateway into federal courts. This approach is remarkable in both its novelty and effects.”).

124. *Id.* at 448.

125. *Id.*; *see also id.* at 458 (“[S]etting aside everything already mentioned—the Constitution’s text, history, precedent, financial harm, libel, the risk of publication, and actual disclosure to a third party—one need only tap into common sense to know that receiving a letter identifying you as a potential drug trafficker or terrorist is harmful.”).

126. 600 U.S. 181 (2023).

inherent obligation to assess standing, invoking *Muskra*t to emphasize that Article III confines judicial authority to “Cases” or “Controversies.”<sup>127</sup> This constitutional limitation, he explained, ensures that federal courts exercise their jurisdiction solely to resolve genuine disputes requiring judicial intervention.<sup>128</sup>

Chief Justice Roberts outlined the requirements for standing, emphasizing that a plaintiff must demonstrate an injury in fact that is concrete, traceable to the defendant’s conduct, and likely to be redressed by a favorable decision, citing *Spokeo, Inc. v. Robins*.<sup>129</sup> Roberts further noted that an organization may establish standing either by demonstrating an injury suffered in its own right or by representing members who have incurred such injuries, citing *Warth*.<sup>130</sup> However, instead of analyzing the case under *Warth*—a case directly involving the Equal Protection Clause—Roberts applied the “three-part test for organizational standing” from *Hunt v. Washington State Apple Advertising Commission*,<sup>131</sup> a case arising under

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127. *Harvard*, 600 U.S. at 199 (citing *Muskra*t v. United States, 219 U.S. 346, 351, 359 (1911)). Roberts also references *Summers v. Earth Island Institute*, 555 U.S. 488, 499 (2009) (neglecting to note that this portion of *Summers* relies exclusively on cases that each cite back to *Warth*, *Lyons*, *Allen*, *Tutum*, and *Muskra*t), and *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 123, 133 (2011) (omitting that this portion of *Winn* was directly quoting *Allen*).

128. *Harvard*, 600 U.S. at 198–201. The majority was sure to give special attention to the standing analysis in *Harvard*, perhaps because of the cases’ tenuous roots. *Harvard* was effectively brought before the Court by Edward Blum, the founder of Students for Fair Admissions. Blum, a prominent conservative litigant, has orchestrated numerous Supreme Court test cases aimed at dismantling affirmative action programs. Notably, his efforts include *Shelby County v. Holder*, 570 U.S. 529 (2013) (striking down Section 5 of the Voting Rights Act of 1965 as unconstitutional). Blum has devoted most of his adult life to orchestrating litigation designed to challenge and dismantle affirmative action programs perceived as favoring minority groups. See Lulu Garcia-Navarro, *He Worked for Years to Overturn Affirmative Action and Finally Won. He’s Not Done.*, N.Y. TIMES (July 8, 2023), <https://www.nytimes.com/2023/07/08/us/edward-blum-affirmative-action-race.html> [<https://perma.cc/JRB4-JWQL>]; see also Joint Appendix at 1047, 1049–51, 1053, *Students for Fair Admissions, Inc., v. Univ. of N.C.*, No. 21-707 (U.S. May 2, 2022), 2022 WL 2964595 (Deposition of Edward Blum) (“When the Supreme Court granted cert. in *Fisher One*, a number of us started having conversations about the benefit of a membership organization that—whose mission would be to oppose the use of race and ethnicity in the admissions process.”); *id.* (noting that on the filing date SFFA had only “45 or 50 members,” but SFFA began giving presentations throughout California and the organization grew from “around 12 to 1500 up to 20,000” members).

129. *Harvard*, 600 U.S. at 199 (citing *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016)) (omitting that this portion of *Spokeo* is citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Warth v. Seldin*, 422 U.S. 490 (1975); *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)).

130. *Id.* at 199 (citing *Warth*, 422 U.S. at 511).

131. 432 U.S. 333 (1977).

the Commerce Clause.<sup>132</sup> Notably, Roberts fails to acknowledge that the “*Hunt* organizational test” is entirely derived from *Warth*.<sup>133</sup>

### III. SELECTIVE *STARE DECISIS* AND THE COURT’S OVERLOOKED OPINIONS

The Supreme Court has constructed a jurisprudential framework that often serves to disadvantage marginalized minority groups while giving latitude to more privileged majority litigants.<sup>134</sup> This system, shaped by misinterpretations of *Hayburn’s Case* and rulings influenced by prevailing social and cultural divides, continues to erode public trust in the judiciary.<sup>135</sup>

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132. By invoking *Hunt*, Roberts analogized the commercial interests of Washington apple growers in an interstate commerce dispute to the interests of SFFA’s members challenging affirmative action policies in college admissions. *Harvard*, 600 U.S. at 199–202 (citing *Hunt*, 432 U.S. at 333, 343). This approach sidestepped a direct examination of precedent related to the Equal Protection Clause and standing, such as *Warth*. *Contra* *Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 139 (2005) (Roberts, J.) (“Discretion is not whim, and limiting discretion according to legal standards helps promote *the basic principle of justice that like cases should be decided alike.*” (emphasis added)).

133. *Harvard*, 600 U.S. at 199–202 (citing *Hunt*, 432 U.S. at 333, 343); *see Hunt*, 432 U.S. at 342–43 (citing *Warth*, 422 U.S. 490). Similarly, Justice Thomas, in his fifty-seven-page concurrence, failed to address the issue of standing, including any discussion of associational standing. *Harvard*, 600 U.S. at 231–87 (Thomas, J., concurring). *But see* *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 397–405 (2024) (Thomas, J., concurring) (discussing ad nauseum his concerns with associational standing, noting it “raises constitutional concerns by relaxing both the injury and redressability requirements” for standing, and “upsets other legal doctrines,” stating he has “serious doubts that an association can have standing to vicariously assert a member’s injury” and noting “the Court should address whether associational standing can be squared with Article III’s requirement”); *id.* at 405 (“[T]he Court consistently applies the doctrine, discussing only the finer points of its operation.”).

134. The Court considered eighteen racial affirmative action cases between 1974 (when the Court began considering affirmative action cases outside of the school desegregation context) and 1995. *Spann*, *supra* note 6, at 1460. In each of the fourteen of those cases that involved constitutional challenges to an affirmative action program under the Equal Protection Clause, Chief Justice Rehnquist and Justices O’Connor, Scalia, and Kennedy either voted against the racial minority or were not on the Court when the case was decided. *Id.* at 1479 n.304; *see, e.g.*, *Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 667–68 (1993) (finding white contractors who had not submitted project proposals had standing to challenge the constitutionality of an affirmative action program designed to allocate a minor proportion of available funds to minority contractors and distinguishing the case from *Warth* by stating “*Warth* did not involve an allegation that some discriminatory classification prevented the plaintiff from competing on an equal footing in its quest for a benefit”). *See generally* *Spann*, *supra* note 6, at 1459–61. *But see* *United Jewish Orgs. of Williamsburg, Inc. v. Carey*, 430 U.S. 144 (1977) (upholding a New York legislative apportionment scheme in compliance with the Voting Rights Act, Chief Justice Rehnquist found for the Black defendants, increasing their voting strength by diluting the voting strength of the Hasidic Jewish community); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894 (1983) (“There is, I think, a functional relationship, which can best be described by saying that the law of standing roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest of *the majority itself.*”).

135. *Hayburn’s Case* lacked a ruling, yet it has been consistently cited to assert limits on advisory opinions. *See* *Marcus & Teir*, *supra* note 26, at 545–46 (noting “*Hayburn’s Case* has become a symbol

Concepts like “injury in fact,” “traceability,” and “redressability”—absent from the Constitution and early jurisprudence—have effectively become little more than gatekeeping mechanisms.<sup>136</sup>

Unfortunately, the Court continues to selectively apply these precedents, disregarding the historic inequities underlying them. For instance, cases like *Hayburn’s Case* and *Muskrat*, cited by the Court to assert that standing doctrine has deep historical roots, could be substituted with equally ancient precedents that are free from misinterpretations and potential perceived biases.<sup>137</sup> On the other hand, cases like *Warth* and *Arlington Heights* reveal inconsistencies: the former denied standing to minority plaintiffs, while the latter granted it—only to set the stage for the Court to later impose stricter evidentiary standards for discrimination claims.<sup>138</sup> Similar patterns emerge in civil rights cases like *Allen* and *Lyons*, where standing doctrine developed to restrict access to justice, revealing a troubling tendency for such procedural barriers to undermine substantive equality.<sup>139</sup> In *TransUnion*, the

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for judicial restraint, but a closer look at its background and facts reveals that the early Court may have had contrary principles in mind[.]” and that perhaps if “Attorney General Randolph had gone to President Washington and sought authorization to proceed and then been permitted by the Court to bring his mandamus motion (something Randolph himself believed he had the power to do all along), the ‘case or controversy’ requirement might look very different today[.]” (citations omitted)).

136. See *supra* notes 6, 8, 88, 134 and accompanying text; see, e.g., *TransUnion, LLC v. Ramirez*, 594 U.S. 413, 451 (2021) (Thomas, J., dissenting) (citing *Warth v. Seldin*, 422 U.S. 490, 500 (1975)); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973) (introducing “traceability” and finding mother lacks standing to seek criminal prosecution of father for nonpayment of child support because while prosecution would punish father, it might not result in payment of child support); *Allen v. Wright*, 468 U.S. 737, 739–40, 751–53, 756–59 (1984) (clarifying that “traceability” was distinct from “redressability” in finding Black families lacked standing to sue for IRS policies that provided financial support and incentives which perpetuated discrimination in schooling). But compare, e.g., *Linda R.S.*, 410 U.S. 614, and *Warth*, 422 U.S. 490, with *Orr v. Orr*, 440 U.S. 268, 282–83 (1979) (finding a divorcing husband had standing to challenge a state law under the Equal Protection Clause that granted alimony only to wives, regardless of whether he was ultimately awarded alimony), and *Northeastern Fla. Chapter of the Associated Gen. Contractors*, 508 U.S. at 656, 658, 666 (granting white contractors standing to challenge a city ordinance favoring minority-owned businesses in contract awards under the Equal Protection Clause, even though the contractors’ bids failed for unrelated reasons and they incurred no economic loss).

137. See *Osborn v. Bank of U.S.*, 22 U.S. (9 Wheat.) 738, 819 (1824) (borrowing from Blackstone, Chief Justice John Marshall noted a dispute did not have to exist for a “case” to arise, rather a “case” arose if “a party assert[ed] his rights in the form prescribed by law”); *In re Sanborn*, 148 U.S. 222 (1893) (holding that findings by the Court of Claims are advisory and not appealable to the Supreme Court, and refusing to enforce contracts between a discredited attorney and an Indian tribe, emphasizing that the relevant “enactments,” intended to shield tribes from “improvident and unconscionable contracts,” do not impose a legal obligation on the United States to ensure tribal compliance).

138. Nevertheless, *Warth* is one of the Court’s most frequently cited standing decisions. But compare *supra* note 87, with *Northeastern Fla. Chapter of the Associated Gen. Contractors*, 508 U.S. 656 (finding standing for white contractors without project proposals).

139. In addition to *Warth—Lyons* and *Allen* are cited much more frequently than cases with similar fact patterns in which the Court found non-minority plaintiffs had standing. Compare *Rizzo v. Goode*, 423 U.S. 362, 371 (1976) (denying minority police trainees standing, but noting that the standing

Court narrowed standing to deny relief to consumers harmed by inaccurate credit reporting, undermining congressional intent and consumer protections.<sup>140</sup> Conversely, in *Harvard*, the Court expanded standing to dismantle affirmative action policies, signaling a willingness to reinterpret doctrine when it serves certain ideological goals.<sup>141</sup>

#### IV. FOUNDATIONAL REALISM: AN ALTERNATIVE FRAMEWORK FOR INTERPRETATION

The preceding analysis illuminates how the seemingly objective doctrine of standing, ostensibly grounded in Article III's "case or controversy" requirement, has been employed with increasing discretion, yielding outcomes that appear more responsive to prevailing judicial philosophies than to consistent legal principles. This selective invocation of precedent, particularly evident in cases concerning hot-button social issues, reveals a standing jurisprudence that has become unmoored from any constitutional text or historical understanding. To address this doctrinal instability and the potential perception of ideological skew it can foster, this Note proposes a novel interpretive framework—Foundational Realism.

Foundational Realism offers a distinct approach to constitutional interpretation, addressing perceived limitations in Textualism, Originalism, and Living Constitutionalism. Textualism and Originalism attempt to ground interpretation in objective readings of legal texts and historical contexts, yet these approaches are easily undermined by subjective understandings of linguistic usage and selective or ambiguous historical sources.<sup>142</sup> Living Constitutionalism, acknowledging the need for legal

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requirements would have been satisfied had the plaintiffs alleged "any plan or policy by petitioners express or otherwise showing their authorization or approval of such misconduct"), *with Allee v. Medrano*, 416 U.S. 802, 815–16 (1974) (finding unionized plaintiffs had standing based on a theory of sufficient threat from "persistent pattern of police misconduct"), and *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 505, 517–18 (1939) (holding that a deliberate police policy of denying public meeting permits, among other actions, was sufficient to establish standing for union members).

140. *But see supra* notes 15, 121–25 and accompanying text.

141. *See supra* notes 23, 94–100, 132–33 and accompanying text.

142. *See supra* note 15. Compare Roberts, *supra* note 9, at 1232 ("The Court's recognition that injury in fact is a requirement of Article III ensures that the courts will more properly remain concerned with tasks that are, in Madison's words, 'of a Judiciary nature.'" (quoting James Madison, Notes on the Constitutional Convention (Aug. 27, 1787), in 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (Max Farrand ed., rev. ed. 1966) [hereinafter FARRAND'S RECORDS])), and Scalia, *supra* note 134, at 881–82 ("I suggest that courts need to accord greater weight than they have in recent times to the traditional requirement that the plaintiff's alleged injury be a particularized one . . . ."), *with U.S. CONST. art. III.*, and *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 332 (1827) (Marshall, C.J., concurring in part and dissenting in part) (repeating in regard to constitutional interpretation "what ha[d] been already said more at large, and is all that can be necessary" that the Constitution's "provisions are neither to be

evolution, can risk turning constitutional meaning into a reflection of shifting societal mores rather than a principled, durable standard.<sup>143</sup> By contrast, Foundational Realism tethers constitutional interpretation to Thomas Reid’s Scottish Enlightenment “common-sense” epistemology,<sup>144</sup> a grounding expressly reflected in the Framers’ writings and incorporated into early American jurisprudence.<sup>145</sup> The approach seeks to harness Reid’s fundamental “first principles” of knowledge and reason, and connect them to the historically grounded legal assumptions of the American Founding.<sup>146</sup>

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restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers”), and *supra* notes 1–4, 13–19, 23, and FARRAND’S RECORDS, *supra* note 142, at 430–31 (“Mr. Govr. Morris wished to know what was meant by the words ‘In all the cases before mentioned it [jurisdiction] shall be appellate with such exceptions,’ whether it extended to matters of fact as well as law--and to cases of Common law as well as Civil law. Mr. Wilson. The Committee he believed meant facts as well as law & Common as well as Civil law. The jurisdiction of the federal Court of Appeals had he said been so construed[.]”).

143. See Ethan J. Leib, *The Perpetual Anxiety of Living Constitutionalism*, 24 CONST. COMMENT. 353, 360–62 (2007).

144. At its most basic level, Foundational Realism is a variant of philosophical realism, which posits that objective truths exist independently of perception, and directly responds to what was perceived as inherent shortcomings of the skeptic philosophies of those such as David Hume. See generally NICOLAS RESCHER, *THE REALM OF FACTS: ASPECTS OF PHILOSOPHICAL REALISM* (2020); HENRY BABCOCK VEATCH, *INTENTIONAL LOGIC: A LOGIC BASED ON PHILOSOPHICAL REALISM* (1952).

145. See VanHorne’s Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 308 (Patterson, Circuit Justice, C.C.D. Pa. 1795) (“The Constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the Legislature, and can be revoked or altered only by the authority that made it.”); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) (“That the people have an original right to establish . . . such principles . . . on which the whole American fabric has been erected. . . . The principles . . . established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and . . . designed to be permanent. This original and supreme will organizes the government, and assigns, to different departments, their respective powers.”); THE FEDERALIST No. 78 (Alexander Hamilton) (“A constitution is, in fact, and must be regarded by the judges, as a fundamental law.”); *id.* (“It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.”).

146. THOMAS REID, *AN INQUIRY INTO THE HUMAN MIND ON THE PRINCIPLES OF COMMON SENSE* 32 (Derek R. Brookes ed., Edinburgh Univ. Press 1997) (1764) (“The evidence of sense, the evidence of memory, and the evidence of the necessary relations of things, are all distinct and original kinds of evidence, equally grounded on our constitution: none of them depends upon, or can be resolved into another. To reason against any of these kinds of evidence, is absurd; nay, to reason for them, is absurd. They are first principles; and such fall not within the province of Reason, but of Common Sense.”).

In many ways, Foundational Realism operationalizes the core insights of “neo-Federalism” and builds upon the structural commitments that make the scholarship on the subject by Professors Amar and Pushaw so attractive to self-proclaimed originalists. The “neo-Federalist” approach seeks to recover the Founders’ intended “architecture,” like Amar’s two-tiered view of Article III. Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985); see also *id.* at 208–09 n.9 (setting forth the paper’s necessary assumptions and principles). Adding to this approach, Foundational Realism supplies a repeatable, three-step decision tree, that enables translating that historic architecture into contemporary doctrine. Compare *id.*, and PFANDER, *supra* note 9 (supplying thorough analysis of historic primary sources), with *infra* Section IV.B.

### A. Foundational Realism's Historic Basis

The Scottish Enlightenment, through figures like Adam Smith, Francis Hutcheson, David Hume, and Lord Kames, profoundly influenced the Founding Fathers, most notably, James Madison, Thomas Jefferson, James Wilson, Alexander Hamilton, and John Marshall.<sup>147</sup> Madison, often considered the “Father of the Constitution,” drew heavily from Hume on factions.<sup>148</sup> Jefferson, principal author of the Declaration of Independence, was imbued with principles of the Scottish Enlightenment through his education at the College of William and Mary.<sup>149</sup> Wilson, a key figure at the Constitutional Convention, had a first-hand connection to this intellectual

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Foundational Realism also resolves Pushaw’s methodological critique of Amar by effectively subsuming his two-step neo-Federalist protocol—isolating original meaning and adjusting it for contemporary administration—within a disciplined and repeatable framework grounded in Reid’s common-sense epistemology. Compare, e.g., Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393 (1996), and Robert J. Pushaw, Jr., *The Court Continues to Confuse Standing: The Pitfalls of Faux Article III “Originalism,”* 31 GEO. MASON L. REV. 893, 917 (2024) (citing PFANDER, *supra* note 9) (“My main insights have been independently confirmed and refined by James Pfander in a thorough historical analysis.”), with *infra* Sections IV.B–D.

My aim is that Foundational Realism enriches both originalist and neo-Federalist scholarship in two principal respects: (1) by mandating methodological transparency, see *infra* Section IV.B.3, and (2) by introducing a burden of proof that shifts to those interpretations that depart from settled common-sense axioms, requiring such proponents offer more compelling justifications, see *infra* Section IV.B.2.

147. This is in large part because many of the nation’s foremost universities and founding father alma maters—namely College of New Jersey (Princeton University), King’s College (Columbia), William and Mary, and College of Philadelphia (University of Pennsylvania)—followed a Scottish curriculum, while many educated Scotsmen emigrated to North America at this time and served as tutors or instructors at universities. See William Ewald, *James Wilson and the Scottish Enlightenment*, 12 U. PA. J. CONST. L. 1053, 1057–59 nn.8–10 (2010); see also *id.* at 1054 (noting Wilson and Madison were two of the most vocal participants at the constitutional convention). See generally Daniel N. Robinson, *The Scottish Enlightenment and the American Founding*, 90 SCOT. PHIL. 170 (2007); Daniel Walker Howe, *Why the Scottish Enlightenment Was Useful to the Framers of the American Constitution*, 31 COMPAR. STUD. SOC’Y & HIST. 572 (1989); Roy Branson, *James Madison and the Scottish Enlightenment*, 40 J. HIST. IDEAS 235 (1979).

148. Hume’s insights on factions and the dangers of unchecked popular passions are clearly echoed in Madison’s arguments within *The Federalist No. 10*, a revelation first brought to light, and oft-cited since, by Douglass Adair in 1957. See Douglass Adair, “*That Politics May Be Reduced to a Science*”: David Hume, James Madison, and the Tenth Federalist, 20 HUNTINGTON LIBR. Q. 343, 345–46 (1957); see also Edmund S. Morgan, *Safety in Numbers: Madison, Hume, and the Tenth Federalist*, 49 HUNTINGTON LIBR. Q. 95 (1986); James Conniff, *The Enlightenment and American Political Thought: A Study of the Origins of Madison’s Federalist Number 10*, 8 POL. THEORY 381 (1980).

149. Though John Locke’s influence on the Scottish Enlightenment is clear, recent scholarship suggests that many key philosophical concepts in the Declaration of Independence, often attributed directly to Locke, were more likely the result of Jefferson’s study of contemporary Scottish enlightenment thinkers, who further distilled and refined Locke’s teachings. See GARRY WILLS, *INVENTING AMERICA: JEFFERSON’S DECLARATION OF INDEPENDENCE* (1978). William and Mary’s first president, Rev. James Blair, was a Scottish minister who ensured the school was embedded with a Scottish curriculum. Moreover, one of Jefferson’s most revered teachers at William and Mary was William Small, also a Scot. See Ewald, *supra* note 147, at 1057 n.8.

movement as the only Framer born and educated in Scotland.<sup>150</sup> Hamilton, the only other delegate at the convention as consistently nationally minded as Wilson,<sup>151</sup> borrowed directly from Thomas Reid in *The Federalist No. 31*.<sup>152</sup> Marshall had three short stints of schooling, the first by James Thompson, his Scottish tutor, and the last a brief stint at William and Mary.<sup>153</sup> In line with the religious components underlying the Scottish Enlightenment, Reid suggested God gave humans the ability to discern objective truths, his epistemics and philosophical realism emphasized common sense and first principles based on these discernible truths, and thus to ignore inherent understandings would be in direct violation of God's will.<sup>154</sup>

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150. Wilson was one of only six founders to sign both the Declaration of Independence and the Constitution. He spoke more frequently than any other delegate at the Convention, aside from Gouverneur Morris, and is considered by many scholars to be either second to or on par with James Madison in terms of his influence on the Constitution's formation. *See, e.g.,* SAMUEL H. BEER, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* 360 (1993); MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 197 (1913).

151. It is also worth noting Hamilton was tutored by Scots and attended Columbia, which taught a Scottish curriculum. *See* Ewald, *supra* note 147, at 1060.

152. Much has been written about the influence of Hume and Locke on Hamilton. However, in his *Federalist* contributions, Hamilton references Locke only once, and this is the first known paper to point out that Hamilton borrowed entire passages from Thomas Reid. *Compare* THE FEDERALIST No. 31 (Alexander Hamilton) ("Of this nature are the maxims in geometry, that 'the whole is greater than its part; things equal to the same are equal to one another; two straight lines cannot enclose a space; and all right angles are equal to each other.'"), *with* THOMAS REID, *ESSAYS ON THE INTELLECTUAL POWERS OF MAN* 40 (Derek R. Brookes ed., Edinburgh Univ. Press 2002) (1785) ("Thus mathematicians, before they prove any of the propositions of mathematics, lay down certain axioms, or common principles, upon which they build their reasonings. And although those axioms be truths which every man knew before; such as, That the whole is greater than a part, That equal quantities added to equal quantities make equal sums; yet, when we see nothing assumed in the proof of mathematical propositions, but such self-evident axioms, the propositions appear more certain, and leave no room for doubt or dispute.").

153. 1 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 53, 57 (1916).

154. *See* REID, *supra* note 146, at 312–13; REID, *supra* note 152 at 12. At the time, there was no broad school of atheistic thought. *See* THE STUDENT'S POCKET DICTIONARY 264 (Thomas Mortimer ed., London, J. Johnson 1789) ("Knutzen, Matthias, of Holstein, the only person on record, who openly professed and taught Atheism. It is said he had about 1000 disciples in different parts of Germany. What became of him finally is not known: lived after 1674."). While Reid based his foundations on rights prescribed to man by God, "the Author," "the Creator," the "Governor of the world," this is not to be confused or misappropriated by natural law theorists positing this as affirmation of a foundation inherently reliant on Christian monotheism. REID, *supra* note 152, at 114–15 ("The light began to dawn at last; a spirit of enquiry sprang up, and men got the courage to doubt of the dogmas of ARISTOTLE, as well as of the decrees of Popes. The most important step in the reformation of religion was to destroy the claim of infallibility, which hindered men from using their judgment in matters of religion: And the most important step in the reformation of philosophy was to destroy the authority, of which ARISTOTLE had so long had peaceable possession."); *id.* at 462 ("Thus, if the notion of sanctity is annexed to an object, it is no longer a laughable matter; and this visor must be pulled off before it appears ridiculous. Hence we see, that notions which appear most ridiculous to all who consider them coolly and indifferently, have no such appearance to those who never thought of them, but under the impression of religious awe and dread."); *id.* at 509 ("But, in all ages, those who have been unfriendly to the principles of religion, have made attempts to weaken the force of the argument for the existence and perfections of

### B. *The Core Tenets of Foundational Realism*

Foundational Realism operates through three closely related tenets, each built upon Reid's epistemology. These tenets collectively provide a framework that ensures constitutional interpretation remains anchored in enduring first principles, historically grounded meanings, and rigorous reasoning. Unlike approaches that prioritize judicial discretion or policy-driven analysis, Foundational Realism insists that any legal interpretation must be justified through a combination of historical fidelity, philosophical coherence, and empirical validation. By integrating these elements, Foundational Realism seeks to preserve the integrity of constitutional adjudication while maintaining a disciplined approach to legal reasoning—one that resists the distortions introduced by ideological trends or contemporary political pressures.

#### 1. *Grounding in Enduring First Principles*

Under Foundational Realism, interpretation begins by grounding textual meaning on two levels of foundational understandings.<sup>155</sup> Thomas Reid emphasized certain self-evident truths underlie all rational inquiry.<sup>156</sup> These “self-evident truths” can be referred to as Level 1—or Reid's fundamental first principles. Such fundamental first principles include the existence of the self,<sup>157</sup> the reality of the external world,<sup>158</sup> and the reliability of our senses when used properly.<sup>159</sup> They also include belief in other minds,<sup>160</sup>

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the Deity, which is founded on this principle. That argument has got the name of the argument from final causes; and as the meaning of this name is well understood, we shall use it.”); see also JAMES WILSON, LECTURES ON LAW pt. I, ch. I (1790–91), reprinted in 1 COLLECTED WORKS OF JAMES WILSON 323, 325 (Kermit L. Hall & Mark David Hall eds., 2007) (“Let it be known, that, before the doctrine of toleration was published in Europe, the practice of it was established in America. A law in favour of religious freedom was passed in Maryland, as early as the year one thousand six hundred and forty nine. . . . [W]ith the enlightened principles of a man and a christian, [Lord Baltimore] had the fortitude, to declare, that he never would assent to the repeal of a law, which protected the natural rights of men, by ensuring to every one freedom of action and thought.”).

155. See REID, *supra* note 152, at 17–39.

156. See REID, *supra* note 146, at 108, 194–96; REID, *supra* note 152, at 37–49, 68.

157. REID, *supra* note 152, at 41 (“I shall take it for granted, that I *think*, that I *remember*, that I *reason*, and, in general, that I really perform all those operations of mind of which I am conscious.”).

158. *Id.* at 476 (“That those things do really exist which we distinctly perceive by our senses, and are what we perceive them to be.”).

159. See *id.* at 67–68.

160. See *id.* at 56–71.

continuity of personal identity,<sup>161</sup> and agent causation.<sup>162</sup> As Reid explains, these truths are “no sooner understood than they are believed,”<sup>163</sup> and their denial leads to “absurdity.”<sup>164</sup>

Upon these Level 1 moral and epistemic axioms stands the Constitution’s historically documented meaning,<sup>165</sup> which we can describe as Level 2—derived legal understandings.<sup>166</sup> Concepts like popular sovereignty, the separation of powers, federalism, and enumerated individual rights are not random historical artifacts, but rather legal expressions of Reid’s foundational truths.<sup>167</sup> This explains why the Constitution channels legislative power into elected assemblies, prohibits indefinite executive or judicial lawmaking, and reserves ultimate sovereignty to the people themselves.

Where textual or historical ambiguities arise, the Foundational Realist looks to the confluence of: (a) original meaning as evidenced by Founding-era records and (b) the fundamental reasonableness demanded by Reid’s first principles.<sup>168</sup> Judicial or legislative departures that square neither with the text’s historical context nor with rational fundamentals have little claim

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161. *Id.* at 42 (“Every man has an immediate and irresistible conviction, not only of his present existence, but of his continued existence and identity, as far back as he can remember.”); *see id.* at 262–79.

162. REID, *supra* note 152, at 478 (“Another first principle, I think, is, That we have some degree of power over our actions, and the determinations of our will.”).

163. *See supra* note 146 and accompanying text; REID, *supra* note 152.

164. *See* REID, *supra* note 146, at 33 (“If there are certain principles, as I think there are, which the constitution of our nature leads us to believe, and which we are under a necessity to take for granted in the common concerns of life, without being able to give a reason for them; these are what we call the principles of common sense; and what is manifestly contrary to them, is what we call absurd.”).

165. *Id.* at 17 (“Mathematicians having had the wisdom to define accurately the terms they use, and to lay down, as axioms, the first principles on which their reasoning is grounded. Accordingly we find no parties among mathematicians, and hardly any disputes.”); *id.* at 18 (“But that definitions may not be sought, where no definition can be given, nor logical definitions be attempted, where the subject does not admit of them, it may be proper to lay down some general principles concerning definition, for the sake of those who are less conversant in this branch of logic.”).

166. *Id.* at 47 (“Every branch of human knowledge hath its proper principles, its proper foundation and method of reasoning; and, if we endeavour to build it upon any other foundation, it will never stand firm and stable. Thus the historian builds upon testimony, and rarely indulges conjecture. The antiquarian mixes conjecture with testimony; and the former often makes the larger ingredient.”).

167. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”); U.S. CONST. pmb. (“We the People . . .”); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1578, at 698 (1833) (“It was founded upon the general maxim of requiring a separation of the different departments of government, as most conducive to the preservation of public liberty and private rights.”); JAMES WILSON, LECTURES ON LAW pt. I, ch. II (1790–91), *reprinted in* 1 COLLECTED WORKS OF JAMES WILSON 347 (Kermit L. Hall & Mark David Hall eds., 2007).

168. REID, *supra* note 152, at 57 (“We may find that point of view which presented things to the author of the system, in the light in which they appeared to him. This will often give a consistency to things seemingly contradictory, and some degree of probability to those that appeared most fanciful.”).

to legitimacy.<sup>169</sup> This emphasis on “foundational understandings” ensures that interpretation of a constitutional text is not merely an exercise in historical exploration or philosophical speculation. Rather, it connects the original meaning of the text to rational first principles that are themselves grounded in self-evident truths about human nature and reason.<sup>170</sup>

## 2. *Empirical Validation and the Burden of Proof*

Although Foundational Realism emphasizes certain axiomatic truths, it does not rest on intuition.<sup>171</sup> A second core tenet is that constitutional interpretation must proceed through practical reason and prudence, mindful of historical context.<sup>172</sup> This resonates with Reid’s stress on experience, observation, and deference to common sense.<sup>173</sup>

Contemporary interpretive questions must consider historical and linguistic context, focused on how ordinary and legal language was understood when enacted.<sup>174</sup> This process necessarily draws on evidence from the time of the text’s adoption: language usage, grammatical conventions, and legal-philosophical assumptions.<sup>175</sup> This is not to claim that the historical context freezes meaning in time; rather, the context

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169. *Id.* at 192 (“Whatever can be inferred from these common informations, by just and sound reasoning, is true and legitimate philosophy: But what we add to this from conjecture is all spurious and illegitimate.”).

170. As Reid cautioned, systems that mingle conjecture with proof are only as sound as their weakest speculative links:

A great part of them, however, are, as he candidly acknowledges, conjectures and hints only; yet these are mixed with the propositions legitimately proved, without any distinction. Corollaries are drawn from them, and other propositions grounded upon them, which, all taken together, make up a system. A system of this kind resembles a chain, of which some links are abundantly strong, others very weak. The strength of the chain is determined by that of the weakest links; for if they give way, the whole falls to pieces, and the weight, supported by it, falls to the ground.

REID, *supra* note 152, at 79.

171. *Id.* at 528 (“Men are prone to be led too much by authority in their opinions.”).

172. See REID, *supra* note 146, at 122 (“In every chain of natural causes, the highest link is a primary law of nature; and the highest link which we can trace, by just induction, is either this primary law of nature, or a necessary consequence of it.”).

173. REID, *supra* note 152, at 536 (“Mens judgments are often perverted by their affections and passions. This is so commonly observed, and so universally acknowledged, that it needs no proof nor illustration.”).

174. JAMES WILSON, LECTURES ON LAW pt. II, ch. XI (1790–91), *reprinted in* 2 COLLECTED WORKS OF JAMES WILSON 211 (Kermit L. Hall & Mark David Hall eds., 2007) (“The character of an opinion, like the character of a man, may be illustrated by tracing its history and pedigree.”).

175. See REID, *supra* note 152, at 538–39 (“Language must have many imperfections when applied to philosophy, because it was not made for that use. In the early periods of society, rude and ignorant men use certain forms of speech, to express their wants, their desires, and their transactions with one another. Their language can reach no farther than their speculations and notions; and if their notions be vague and ill defined, the words by which they express them must be so likewise.”).

clarifies how fundamental legal concepts (Level 2) were originally articulated and rationalized.<sup>176</sup>

Foundational Realism incorporates a presumption of validity and requisite burden of proof favoring the existing or historically grounded interpretation that best aligns with first principles, unless compelling evidence demonstrates that the original understanding is inapplicable or contrary to reason.<sup>177</sup> Reid recognized the fallibility of human inquiry but insisted on the reliability of common sense beliefs.<sup>178</sup> Consequently, if an interpretive claim directly contradicts well-established historical usage or core Reidian principles (Levels 1 and 2), the claimant bears a heavy burden to prove the text was intended or should be understood otherwise.<sup>179</sup> This requirement goes beyond simply offering an alternative reading; it must show that such a reading better fits both the constitutional text and the fundamental epistemic and moral truths on which the American legal order is predicated.

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176. Reid castigated the uncritical adoption of fashionable opinions, likening it to intellectual beggary. To underscore the need for independent judgment rather than borrowed consensus, Reid wrote:

As there are persons in the world of so mean and abject a spirit, that they rather chuse to owe their subsistence to the charity of others, than by industry to acquire some property of their own; so there are many more who may be called mere beggars with regard to their opinions. Through laziness and indifference about truth, they leave to others the drudgery of digging for this commodity; they can have enough at second hand to serve their occasions. Their concern is not to know what is true, but what is said and thought on such subjects; and their understanding, like their clothes, is cut according to the fashion. This distemper of the understanding has taken so deep root in a great part of mankind, that it can hardly be said that they use their own judgment in things that do not concern their temporal interest; nor is it peculiar to the ignorant; it infects all ranks. We may guess their opinions when we know where they were born, of what parents, how educated, and what company they have kept. These circumstances determine their opinions in religion, in politics, and in philosophy.

REID, *supra* note 152, at 529.

177. See REID, *supra* note 146, at 3 (“But I hope the candid and discerning Few, who are capable of attending to the operations of their own minds, will weigh deliberately what is here advanced, before they pass sentence upon it. To such I appeal, as the only competent judges. If they disapprove, I am probably in the wrong, and shall be ready to change my opinion upon conviction. If they approve, the Many will at last yield to their authority, as they always do.”).

178. REID, *supra* note 152, at 563 (“That man, and probably every created being, is fallible; and that a fallible being cannot have that perfect comprehension and assurance of truth which an infallible being has, I think ought to be granted. It becomes a fallible being to be modest, open to new light, and sensible, that by some false bias, or by rash judging, he may be misled.”); *Id.* at 564 (“It is granted then, that human judgments ought always to be formed with an humble sense of our fallibility in judging. This is all that can be inferred by the rules of logic from our being fallible.”).

179. See REID, *supra* note 146, at 39 (“But if he puts a different meaning upon the word, without observing it himself, or giving warning to others; he abuses language, and disgraces philosophy, without doing any service to truth: as if a man should exchange the meaning of the words *daughter* and *cow*, and then endeavour to prove to his plain neighbour, that his cow is his daughter, and his daughter his cow.”).

Reid's epistemic fallibilism encourages conscientious openness to new historical evidence or more refined philosophical arguments.<sup>180</sup> If substantial evidence emerges indicating that our current reading of the text undermines Reidian first principles or distorts historical meanings, revision becomes necessary. Still, Foundational Realism is designed to resist ad hoc or purely policy-driven reinterpretations:<sup>181</sup> mere disagreement with an outcome is insufficient to carry the requisite burden of proof.

### 3. *Transparent Application*

Under Foundational Realism, the final tenet is to articulate one's interpretive conclusion in a transparent and reasoned manner. Citing the relevant constitutional text, the historical context, and the philosophical foundation in Reid's first principles demonstrates how the interpretation follows from: (1) a sound understanding of Reidian epistemology, (2) the historically grounded legal concepts of the Founders, and (3) a fair reading of the text's language.

This process also demands acknowledgment of alternative plausible readings.<sup>182</sup> In other words, if an interpretation veers from the text's

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180. See REID, *supra* note 152, at 40 (“That we ought to admit of no other causes of natural effects, but such as are true, and sufficient to account for the effects.”); *Id.* at 51 (quoting Isaac Newton that “[n]o more causes, nor any other causes of natural effects ought to be admitted, but such as are both true, and are sufficient for explaining their appearances”).

181. See *id.* at 529 (“The love of truth is natural to man, and strong in every well-disposed mind. But it may be overborn by party-zeal, by vanity, by the desire of victory, or even by laziness. When it is superior to these, it is a manly virtue, and requires the exercise of industry, fortitude, self-denial, candour, and openness to conviction.”).

182. As a check on speculative interpretation, Reid begins from common-sense facts that resist argument—like a shared belief in an external world—which any theory must fit, not explain away:

And that all mankind have a fixed belief of an external material world, a belief which is neither got by reasoning nor education, and a belief which we cannot shake off, even when we seem to have strong arguments against it, and no shadow of argument for it, is likewise a fact, for which we have all the evidence that the nature of the thing admits. These facts are phenomena of human nature, from which we may justly argue against any hypothesis, however generally received. But to argue from a hypothesis against facts, is contrary to the rules of true philosophy.

See REID, *supra* note 146, at 76. From that premise, Reid draws the rule that hypotheses must give way when they collide with facts:

There is such proneness in men of genius to invent hypotheses, and in others to acquiesce in them, as the utmost which the human faculties can attain in philosophy, that it is of the last consequence to the progress of real knowledge, that men should have a clear and distinct understanding of the nature of hypotheses in philosophy, and of the regard that is due to them. Although some conjectures may have a considerable degree of probability, yet it is evidently in the nature of conjecture to be uncertain. In every case the assent ought to be proportioned to the evidence; for to believe firmly, what has but a small degree of probability, is a manifest abuse of our understanding.”).

REID, *supra* note 152, at 48.

historically grounded sense or from first principles of reason and morality, it must meet a high burden of justification.<sup>183</sup> This transparency compels interpreters to identify and defend each link in the reasoning chain, ensuring that courts and citizens alike can evaluate the legitimacy of the conclusion.<sup>184</sup>

### *C. Advantages of Foundational Realism Over Other Approaches*

Originalists and Textualists aim to anchor interpretation in historical meaning and the Constitution's text. Yet questions persist about which historical sources to credit, how to parse contradictory evidence, and whether outdated norms can overshadow deeper first principles. Foundational Realism addresses these challenges by employing Reid's framework of *self-evident truths* and by placing the burden of proof on departures from historically grounded usage that aligns with these truths, thereby avoiding the pitfalls of subjectivity in originalism and textualism.

Living Constitutionalists raise legitimate concerns about ensuring the Constitution remains responsive to contemporary realities. Foundational Realism similarly acknowledges the potential for revision in light of new evidence and arguments, embracing Reid's epistemic humility. At the same time, it maintains a strong presumption in favor of historically grounded interpretations that rest on enduring moral and epistemological foundations, avoiding the hazard of reducing constitutional meaning to evolving social preferences alone. Foundational Realism retains constitutional stability, without freezing it in time.

By demanding explicit connections to both Reidian first principles and historically accepted legal concepts, Foundational Realism requires interpreters to articulate and justify each analytical move with transparent

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183. In Reid's framework, plausible, principle-conforming readings set the baseline; any interpretation that strays from the text's historical sense or first principles bears a heavy justificatory burden and must overcome a steep presumption against departure:

We trace the consequences of that supposition in a train of reasoning; and if we find any of its necessary consequences to be manifestly absurd, we conclude the supposition from which it followed to be false; and therefore its contradictory to be true. There is hardly any proposition, especially of those that may claim the character of first principles, that stands alone and unconnected. It draws many others along with it in a chain that cannot be broken. He that takes it up must bear the burden of all its consequences; and if that is too heavy for him to bear, he must not pretend to take it up.

REID, *supra* note 152, at 463–64.

184. See REID, *supra* note 146, at 194 (“[W]e should take no man's word until we had positive evidence that he spoke truth. His testimony would, in this case, have no more authority than his dreams; which may be true or false, but no man is disposed to believe them, on this account, that they were dreamed. It is evident, that, in the matter of testimony, the balance of human judgment is by nature inclined to the side of belief; and turns to that side of itself, when there is nothing put into the opposite scale.”).

and disciplined reasoning. This militates against results-driven jurisprudence or opaque judicial reasoning. Insofar as courts and scholars uphold a standard of rigorous proof and clear exposition, the interpretive process gains legitimacy—rooted not just in tradition or policy, but in reason.

#### *D. Chisholm v. Georgia: A Historic Illustration of Foundational Realism*

Justice Wilson’s opinion in *Chisholm v. Georgia* shows how a Reidian approach to constitutional interpretation can play out in practice.<sup>185</sup> *Chisholm* involved the question of whether a state could claim sovereign immunity from suits by private citizens. Wilson rejected Georgia’s claim, and his reasoning exemplifies the three tenets of Foundational Realism.<sup>186</sup>

##### *1. Grounding in Foundational Understandings*

Wilson began with a principle central to the Founding: true sovereignty resides in the people, not in artificial abstractions like “States.”<sup>187</sup> In a passage referencing Reid, Wilson emphasized that the rhetorical invocation of “States” as supreme was a “perverted use” of words, ignoring the foundational notion—rooted in human nature and reason—that legitimate authority stems from individuals’ moral agency.<sup>188</sup>

##### *2. Reasoned Application and Historical Context*

Wilson surveyed examples from ancient Greece, European monarchies, and English law to show that “sovereign immunity,” as claimed by Georgia,

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185. Introducing his analysis “by the principles of general jurisprudence” in *Chisholm*, Justice Wilson framed the inquiry in Reidian terms:

I am, first, to examine this question by the principles of general jurisprudence. What I shall say upon this head, I introduce by the observation of an original and profound writer, who, in the philosophy of mind, and all the sciences attendant on this prime one, has formed an aera not less remarkable, and far more illustrious, than that formed by the justly celebrated Bacon, in another science, not prosecuted with less ability, but less dignified as to its object; I mean the philosophy of matter. Dr. Reid, in his excellent enquiry into the human mind, on the principles of common sense, speaking of the sceptical and illiberal philosophy, which under bold, but false, pretensions to liberality, prevailed in many parts of Europe before he wrote . . . .

2 U.S. (2 Dall.) 419, 453–54 (1793).

186. *See id.*

187. *Id.* at 455–59.

188. *Id.* at 454 (“The perverted use of *genus* and *species* in *logic*, and of *impressions* and *ideas* in *metaphysics*, have never done mischief so extensive or so *practically* pernicious, as has been done by *States* and *sovereigns*, in *politics* and *jurisprudence*; in the politics and jurisprudence even of those, who wished and meant to be free.”).

was neither a universal nor an inevitable principle.<sup>189</sup> This appeal to history and tradition reflected Reid’s insistence on examining real-world experience: if the concept of unassailable state sovereignty had no solid historical or philosophical basis, Georgia bore the burden of proving otherwise. Wilson then turned to the text of the Constitution, noting that Article III explicitly extends judicial power to controversies “between a State and Citizens of another State.”<sup>190</sup>

### 3. *Transparent Justification*

Wilson openly walked through each step, acknowledging that “sovereignty” is “totally unknown” to the Constitution in the sense Georgia alleged.<sup>191</sup> The state is “the inferior contrivance of man,” whereas the individual—“the workmanship of his all perfect Creator”—is the ultimate source of political authority.<sup>192</sup> Drawing on constitutional text, historical usage, and Reidian principles concerning the moral primacy of persons, Wilson concluded that Georgia’s immunity argument could not survive.<sup>193</sup> *Chisholm*, thus showcases a Reidian form of common-sense constitutional interpretation—one that is historically aware and transparently articulated.

### E. *TransUnion v. Ramirez: Through the Lens of Foundational Realism*

*TransUnion* epitomizes the Supreme Court’s difficulty in harmonizing its modern standing doctrine with the Constitution’s text and historical practice.<sup>194</sup> In a 5-4 decision, the Court elevated its own “concreteness” requirement over Congress’s judgment and ruled that thousands of consumers flagged as terrorists or traffickers lacked standing unless they could show a “concrete” harm beyond the statutory violation—thereby overriding the legislature’s determination that misleading credit files alone constitute a legal injury.<sup>195</sup> Justice Thomas dissented, arguing that early American courts recognized statutory “legal injury” as independently

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189. *Id.* at 455–66.

190. *Id.* at 466 (quoting U.S. CONST. art. III, § 2, cl. 1).

191. *Id.* at 453–66.

192. *Id.* at 455.

193. *Id.* at 453–66.

194. 594 U.S. 413, 421–22 (2021).

195. *Id.* The act of labeling an injury “purely statutory” would not, without more, invalidate its justiciability—especially where historical practice shows that legal rights created by legislatures were routinely vindicated in courts absent a distinct, extra-statutory showing of “tangible harm.” *See id.* at 460–61 (Kagan, J., dissenting) (noting the historical practice of courts’ willingness to redress legal injuries authorized by legislatures).

sufficient to form a justiciable “case,” and accusing the majority of diverging from that core historical principle.<sup>196</sup>

A Foundational Realist approach—rooted in Reid’s core first principles, informed by Professors Amar, Pfander, and Pushaw’s Article III scholarship, and consistent with Justice Thomas’s dissent—would produce a different outcome. At Level 1, Foundational Realism recognizes that individuals have a basic right not to be defamed or subjected to false allegations.<sup>197</sup> At Level 2, it acknowledges Congress’s broad constitutional authority to define new private rights under Article I (including commercial regulations) and to grant federal courts jurisdiction to hear violations of such rights.<sup>198</sup> Thus, this framework rejects the modern “concreteness” test as extra-textual, concluding instead that Article III does not require more than a statutory right of action.<sup>199</sup> Where Congress validly legislates to remedy intangible but real harms, courts should honor that legislative prerogative unless clear historical or textual evidence commands otherwise.

### 1. *A Foundational Realist Regrounding*

The text of Article III empowers federal courts to hear all “Cases” arising under federal law.<sup>200</sup> Historically, a party could bring a “Case” by alleging a violation of an individual right recognized by the legislature, without demonstrating an additional, judge-made test of “concreteness.”<sup>201</sup> As Justice Thomas explains, “legal injury” has traditionally encompassed the

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196. Justice Thomas further accused the majority of ignoring the Founders’ understanding that legal injury, established by Congress, can suffice to form an Article III “case.” *Id.* at 449 (Thomas, J., dissenting) (“While the Court today discusses the supposed failure to show ‘injury in fact,’ courts for centuries held that injury in law to a private right was enough to create a case or controversy.”).

197. This is a foundational principle of human interaction, recognized across cultures and legal systems:

For in a settled state of government, the party grieved ought to complain for every injury done him, in the ordinary course of the law. And as to its publication, the law had taken so great care of men’s reputations, that if one maliciously repeats it, or sings it in the presence of another, or delivers the libel or a copy of it over, to scandalize the party, he is to be punished as a publisher of a libel. He said it was likewise evident, that libelling was an offence against the law of God.

*The Trial of John Peter Zenger*, 17 Howell’s St. Tr. 675 (1735).

198. U.S. CONST. art. I, § 8; *see also* 15 U.S.C. § 1681p. Article III, in turn, empowers federal courts to hear “cases” arising under those laws. U.S. CONST. art. III, § 2. Contrary to the modern Court’s narrow focus, Article III’s “cases” encompass not only adversarial disputes but also *uncontested proceedings* where a party seeks recognition of a legal right in a form prescribed by law. *See generally* Pushaw, *supra* note 8; PFANDER, *supra* note 9; Pushaw, *supra* note 9.

199. *See generally* Pushaw, *supra* note 8; PFANDER, *supra* note 9; Pushaw, *supra* note 9.

200. U.S. CONST. art. III, § 2. Article III’s language—extending the “judicial Power” to all “Cases” and “Controversies”—does not itself demand a separate showing of “concrete harm.” *Id.*; *see also* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 431 (1793) (rejecting the notion that a suit failed unless there was some additional factual harm beyond a legal dispute under Article III).

201. *See generally supra* notes 7–15 and accompanying text.

breach of a private right—whether rooted in the common law or newly created by statute.<sup>202</sup> In *TransUnion*, Congress itself had prescribed both the legal right and the form of action, granting consumers the power to sue for violations of mandated credit-reporting standards.<sup>203</sup> Yet the majority recast the inquiry into a search for extrinsic, tangible harm.<sup>204</sup>

The plaintiffs in *TransUnion* brought their cause of action under the Fair Credit Reporting Act (FCRA). By enacting the FCRA, Congress explicitly aimed to protect individuals from reputational and practical harms arising from inaccurate credit files.<sup>205</sup> It defined violations, such as failing to ensure “maximum possible accuracy” or providing incomplete disclosures, as actionable injuries, and gave consumers a statutory cause of action.<sup>206</sup> *TransUnion* involved more than 8,000 consumers labeled as potential terrorists or serious criminals. Of those, 1,853 had that false designation disseminated to third-party creditors over a seven-month period, while the remaining 6,332 had inaccurate files but no confirmed dissemination. The district court found *TransUnion*’s conduct “willful” and awarded statutory and punitive damages, reflecting the gravity of mislabeled terrorist flags and inadequate disclosures.<sup>207</sup> The Ninth Circuit affirmed that all class members had standing under the FCRA because *TransUnion*’s reckless actions exposed every member to real, concrete risks of reputational and informational harm.<sup>208</sup> But the Supreme Court, in a 5-4 opinion by Justice

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202. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 446–47 (Thomas, J., dissenting). The Constitution does not specify that intangible injuries must mimic a narrowly circumscribed historical analogue or mirror the common law. *Cf.* *Osborn v. Bank of U.S.*, 22 U.S. (9 Wheat.) 738, 817 (1824) (“These words seem to the Court to admit of but one interpretation. They cannot be made plainer by explanation. They give, expressly, the right ‘to sue and be sued,’ ‘in every Circuit Court of the United States,’ and it would be difficult to substitute other terms which would be more direct and appropriate for the purpose.”); *id.* at 819 (“That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares, that the judicial power shall extend to all cases arising under the constitution, laws, and treaties of the United States.”); *see also Chisholm*, 2 U.S. (2 Dall.) at 433 (Iredell, J., dissenting) (with respect to modes of proceeding, courts “must receive [their] directions from the Legislature” and may not constitute an “officina brevium”).

203. *See* 15 U.S.C. § 1681 *et seq.*

204. *TransUnion*, 594 U.S. at 417 (“To have Article III standing to sue in federal court, plaintiffs must demonstrate, among other things, that they suffered a concrete harm. No concrete harm, no standing.”). *Contra* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2120 (2016) (book review) (“In my view . . . Article I assigns Congress . . . the power to make laws. Article III grants the courts the ‘judicial Power’ to interpret those laws in individual ‘Cases’ and ‘Controversies.’ When courts apply doctrines that allow them to rewrite the laws (in effect), they are encroaching on the legislature’s Article I power.”).

205. 15 U.S.C. § 1681.

206. 15 U.S.C. § 1681n; *see also* 15 U.S.C. § 1681c; 15 U.S.C. § 1681e.

207. *Ramirez v. Trans Union, LLC*, No. 12-cv-00632, 2016 WL 6070490, at \*5 (N.D. Cal. Oct. 17, 2016), *aff’d sub nom. Ramirez v. TransUnion LLC*, 951 F.3d 1008 (9th Cir. 2020), *rev’d and remanded*, 594 U.S. 413.

208. *See Ramirez*, 951 F.3d 1008.

Kavanaugh, held that only the 1,853 individuals whose inaccurate reports were disseminated had standing to sue, effectively barring the rest for lacking a “concrete” harm.<sup>209</sup>

A Foundational Realist analysis would begin by asking whether the FCRA-created private right itself—accurate credit reporting and complete disclosure—was violated, rather than engaging a modern, extra-textual “concreteness” requirement. Historically, a “case” arose when a party asserted “a right in the form prescribed by law,” irrespective of whether the harm took a tangible form or even whether an adverse party opposed the claim. As Professors Pfander and Pushaw have shown in their scholarship, early federal courts often reviewed statutory rights in areas like patent enforcement, penal actions, and naturalization, without demanding proof of an additional “common-law” or “tangible” harm. Therefore, the *TransUnion* plaintiffs—alleging breaches of the FCRA’s accuracy and disclosure provisions—plainly presented a justiciable “Case” under Article III’s original meaning, absent any need for the Court’s newly expanded “concreteness” test.<sup>210</sup>

## 2. Congress’s Constitutional Authority to Define Rights

Foundational Realism underscores legislative supremacy in defining and expanding private rights. Under Article I, Congress has the power to regulate interstate commerce, a broad domain that unquestionably includes credit reporting,<sup>211</sup> and may determine that willful inaccuracies or inadequate file disclosures constitute actionable injuries. As such, when Congress utilizes its Article I powers to regulate interstate commerce by creating a private right of action, as it did in the FCRA, courts should presume its validity, enforcing the legislatively defined injury unless it demonstrably violates the Constitution’s structure.<sup>212</sup>

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209. *TransUnion*, 594 U.S. at 417.

210. Simply put, Congress had made the judgment that false terrorist alerts or faulty credit-file mailings are legally cognizable harms to consumers. *See id.* at 458 (Thomas, J., dissenting) (“But even setting aside everything already mentioned—the Constitution’s text, history, precedent . . . one need only tap into *common sense* to know that receiving a letter identifying you as a potential drug trafficker or terrorist is harmful.”) (emphasis added). *See generally supra* notes 7–15 and accompanying text.

211. *But compare supra* note 204, with *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 555 (2012) (“The Framers gave Congress the power to *regulate* commerce, not to *compel* it, and for over 200 years both our decisions and Congress’s actions have reflected this understanding.”), and Brett M. Kavanaugh, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, 89 NOTRE DAME L. REV. 1907, 1923 (2014) (“[I]n exercising its own independent judgment when analyzing the Constitution, the Court will focus intently on the precise words of the constitutional text.”).

212. *See supra* note 204 and accompanying text; Kavanaugh, *supra* note 204, at 2118 (“If the text is sufficiently clear, the text usually controls. The text of the law is the law.”); *id.* at 2120.

The *TransUnion* majority did not question Congress’s authority to regulate consumer reporting agencies, nor did it say the FCRA was unconstitutional. Yet, by grafting on a “concreteness” filter, the Court effectively rewrote the statute,<sup>213</sup> denying standing to thousands of consumers who had suffered the precise injury Congress intended to remedy: the dissemination or existence of false and damaging credit information. Justice Thomas’s dissent properly points out that such a rule is unsupported by the text of Article III or early American practice: if Congress says the violation of a private statutory right—like being falsely flagged as a drug trafficker or terrorist—merits redress, courts traditionally enforced it.<sup>214</sup>

From a Foundational Realist perspective, the party challenging established first principles—whether *TransUnion* or the Justices in the majority—bears the burden of proving that Congress exceeded its Article I authority in defining and enforcing the private rights set forth in the FCRA.<sup>215</sup> Instead, the Court shifted that burden to plaintiffs, requiring them to prove an extra-textual “concrete” harm beyond the statutory violations delineated by Congress. This approach disregarded the clear harm and remedial objectives set forth by Congress in the FCRA.<sup>216</sup>

### 3. *Transparent Judicial Analysis Consistent with First Principles*

The hallmark of Foundational Realism is a candid, step-by-step analysis, rooted in the text, history, and structural principles of the Constitution.<sup>217</sup> Justice Thomas’s dissent shows precisely that kind of transparent reasoning.<sup>218</sup> It walks through centuries of jurisprudence (including “defamation per se” and “legal injury” rules) and explains why intangible statutory violations—especially those labeling individuals as terrorists—are “real” harms recognized at law.<sup>219</sup> The dissent also probes the separation-of-powers question, finding that allowing consumers to sue for intangible,

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213. *Contra* Kavanaugh, *supra* note 204, at 2120.

214. *See TransUnion*, 594 U.S. at 453–54 (Thomas, J., dissenting) (“Never before has this Court declared that legal injury is *inherently* insufficient to support standing.”); *supra* note 8.

215. *See supra* Section IV.B.2.

216. 15 U.S.C. § 1681n.

217. *See supra* Section IV.B.

218. *But see* Pushaw, *supra* note 8, at 905 (disagreeing with Justice Thomas’s conclusion that private parties claiming a violation of their public rights must show an individualized “injury in fact,” arguing that this doesn’t align with historical evidence).

219. *See TransUnion*, 594 U.S. at 447–50 (Thomas, J., dissenting); Pushaw, *supra* note 8; PFANDER, *supra* note 9.

statutorily defined injuries does not undermine but rather honors Congress's decision to identify and remedy reputational harm in the credit industry.<sup>220</sup>

A Foundational Realist majority would have asked three fundamental questions: Does Article III's text or Founding-era practice require "concreteness" beyond the violation of a statutorily defined private right? The answer, as Justice Thomas and the historical record demonstrate, is no. Did Congress exceed its constitutional authority to "regulate commerce" by defining the FCRA violation as an actionable injury? Again, the answer is no. Regulating credit reporting falls squarely within Congress's Commerce Clause power.<sup>221</sup> Could Congress confer federal court jurisdiction based on defined breaches of these FCRA duties—accurate reporting and full disclosure? Given the broad commerce power and the recognized private-right tradition, the answer must be yes. Rather than answering these questions consistently with historical practice, the Court in *TransUnion* relied exclusively on an expanded interpretation of its novel "concreteness" requirement, effectively foreclosing relief for thousands of class members while simultaneously increasing the gap between contemporary standing doctrine and a true constitutional basis. In contrast, Foundational Realism treats legislative judgments about intangible or risk-based harms as presumptively valid, requiring a clear textual or structural justification before displacing them.

#### 4. *Implications for Standing Doctrine Post-TransUnion*

Through a Foundational Realist lens, *TransUnion* reveals the practical and doctrinal hazards of court-imposed "tests" unmoored from the Framers' text or early American judicial practice.<sup>222</sup> By entrenching yet another filter—"concreteness"—the decision nullifies suits that Congress intended for federal adjudication, narrowing the path to justice for plaintiffs, weakening statutory enforcement, and eroding legislatively conferred private rights.

With a Foundational Realist twist—drawing on the works of Professors Amar, Pfander, and Pushaw—Justice Thomas's dissent provides a blueprint for returning standing doctrine to its historical footing.<sup>223</sup> Rather than applying the malleable and ahistorical "injury-in-fact" requirement, courts

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220. *TransUnion*, 594 U.S. at 454 (Thomas, J., dissenting) ("In the name of protecting the separation of powers, this Court has relieved the legislature of its power to create and define rights." (citations omitted)).

221. See *supra* note 211 and accompanying text.

222. *TransUnion*, 594 U.S. at 453 (Thomas, J., dissenting) ("The 1970s injury-in-fact theory has now displaced the traditional gateway into federal courts.").

223. See generally Pushaw, *supra* note 8; PFANDER, *supra* note 9; Pushaw, *supra* note 9.

should: (1) ask whether the plaintiff has a “litigable interest,” meaning a legally recognized claim of right in proper form; (2) acknowledge Congress’s authority to define new private rights; (3) rely on Article III’s inherent limitations to exclude only fictitious, collusive, or purely public suits; and (4) dispense with extra-constitutional “concreteness” rules in favor of assessing whether the alleged harm falls within the category of private rights recognized by law.

In short, a Foundational Realist reading confirms that *TransUnion* should have upheld standing for all 8,185 class members—both those whose false alerts were disseminated and those whose flagged files remained incompletely disclosed. These individuals asserted a private statutory right, conferred by Congress, to accurate credit information—exactly the kind of legally protected interest the Framers envisioned federal courts would enforce. By imposing extra-textual hurdles, the majority diluted Congress’s Article I power and sidestepped the historical understanding of Article III “Cases.” In contrast, Foundational Realism realigns standing doctrine with its constitutional moorings, ensuring that plaintiffs whose statutory rights have been violated enjoy meaningful access to justice, consistent with enduring principles of text, history, and common-sense interpretation.

##### 5. *Further Observations*

Foundational Realism draws on the rich legacy of the Scottish Enlightenment to propose a disciplined, historically informed, and philosophically grounded approach to constitutional adjudication. Much of the Founding generation—James Wilson in particular, but also John Witherspoon, who taught James Madison and other key leaders—absorbed Thomas Reid’s emphasis on common sense realism, the moral sense, and the trustworthiness of basic human faculties. This intellectual lineage offers a constructive alternative to the stark dichotomies sometimes posed between Originalism, Textualism, and Living Constitutionalism.

In practice, Foundational Realism calls on judges and scholars to: (1) identify foundational principles (Level 1) by clarifying which aspects of human existence and morality are genuinely self-evident; (2) recognize derived legal understandings (Level 2) shaped by the Constitution and demonstrate their connection to universal first principles; (3) apply these principles carefully to the factual and historical context of the case, presuming continuity with standard usage unless compelling reasons justify a departure; and (4) provide transparent, reasoned explanations that explicitly outline interpretive steps and acknowledge credible alternative readings.

By respecting the Constitution's historically grounded commitments while also remaining open to legitimate developments in knowledge and societal application, Foundational Realism fosters interpretive stability without stasis. Just as Thomas Reid's common-sense philosophy balanced everyday experience with earnest reflection on ultimate truths, so too does Foundational Realism seek to interpret the Constitution in a manner that neither betrays its fundamental design nor encases it in a rigid dogma. If the Founding generation embraced "common sense" for both practical and philosophical reasons, then a return to a Reidian-infused interpretive methodology may help courts navigate the tension between continuity and change, tradition and reason, text and context, in a manner faithful to both the Constitution's letter and its enduring spirit.

#### CONCLUSION

The Court must reckon with its standing contradictions, as the history of standing doctrine's creation weighs against its professed commitment to impartiality and equal justice.<sup>224</sup> Without such reckoning, the judiciary cannot honestly claim it is a place where all, regardless of status or circumstance, are afforded the opportunity to be heard. This is more than procedural housekeeping; it is the fragile thread that binds public trust to the rule of law, a thread that frays with every refusal to look inward.

To address this issue, this Note proposes a novel canon of interpretation called Foundational Realism. This framework emphasizes the importance of establishing first principles, supporting them with thorough empirical evidence, and presenting them transparently. By adhering to these principles, the judiciary can interpret the Constitution in a manner that is both faithful to its original meaning and consistent with universal principles of human understanding. A faithful and consistent interpretation of the Constitution is essential to ensuring that the judiciary acts as a neutral arbiter, protecting the rights of all individuals and upholding the rule of law.

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224. Compare *TransUnion*, 594 U.S. at 423 ("Therefore, we start with the text of the Constitution. Article III confines the federal judicial power to the resolution of 'Cases' and 'Controversies.' For there to be a case or controversy under Article III, the plaintiff must have a 'personal stake' in the case—in other words, standing." (citing *Raines v. Byrd*, 521 U.S. 811, 819 (1997))), and *TransUnion*, 594 U.S. at 423 ("To demonstrate their personal stake, plaintiffs must be able to sufficiently answer the question: 'What's it to you?'" (citing Scalia, *supra* note 134, at 882)), with Scalia, *supra* note 134, at 894 ("There is, I think, a functional relationship, which can best be described by saying that the law of standing roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest of the majority itself.").

A neutral judiciary is crucial for maintaining public trust and confidence in the legal system.

A Foundational Realist approach to standing would require the Court to prioritize the Constitution's core principles, such as the separation of powers and the protection of individual rights. It would also demand a more rigorous examination of historical evidence and a greater willingness to consider the impact of its decisions.<sup>225</sup> By adopting a more principled and consistent approach to standing, the Court can help to ensure that justice is administered fairly and equally, thereby restoring public trust in the judiciary and upholding the integrity of the Constitution.

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225. Rather than citing *Hayburn's Case* or *Muskrat* as if they conclusively mandated an adversarial test, courts would be prompted to ask whether those cases actually reflect the Framers' choice to use "Cases" and "Controversies" distinctly, as well as whether subsequent expansions—such as in *Warth* or *Lyons*—are consistent with the document's structure and intent. By compelling judges to justify every element of injury, traceability, and redressability with historical proof and transparent reasoning, Foundational Realism would curb the selective, outcome-driven invocations of precedent that have distorted modern standing jurisprudence. In doing so, it would offer a means to resolve key discrepancies across the standing lineage and renew public confidence in a doctrine rooted in constitutional principle rather than shifting ideological currents. *See generally* Pushaw, *supra* note 8, at 917–33.

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