

CIVIL WAR II: THE CONSTITUTIONALITY OF CALIFORNIA'S TRAVEL BANS

*Beckett Cantley**

*Geoffrey Dietrich***

Abstract

California, along with a few other states leaning toward the liberal side of America's political system, enacted a series of laws banning state-funded or state-sponsored travel to other states identifying more as conservative. While other states enacted these mandates through gubernatorial executive orders, California legislated its ban. Multiple states have attempted Supreme Court challenges to California's law under the Court's Article III original jurisdiction. Yet, the Court twice declined the opportunity to hear the issue. Justice Thomas and Justice Alito wrote extensive dissents against the majority's rejection, arguing that the Court must exercise its jurisdiction in controversies between the states. This Article analyzes the Court's history of original jurisdiction cases and seeks to answer why the Court likely did not address the constitutionality of California's laws. Further, this Article analyzes whether California's statute is unconstitutional under Article I of the U.S. Constitution and the Dormant Commerce Clause. Finally, this Article concludes with an analysis of possible likely outcomes of California's laws and other states' reactions.

INTRODUCTION	438
I. ARTICLE III'S DISCRETIONARY PRECEDENT	441
A. <i>Cohens v. Virginia</i>	441
B. <i>Louisiana v. Texas</i>	443
C. <i>Massachusetts v. Missouri</i>	445
D. <i>Ohio v. Wyandotte Chemicals Corp.</i>	446
E. <i>Arizona v. New Mexico</i>	448
F. <i>Maryland v. Louisiana</i>	449
G. <i>Texas and Arizona's Place Within the Precedent</i>	452

* Professor Beckett Cantley, University of California, Berkeley, B.A. 1989; Southwestern University School of Law, J.D. cum laude 1995; and University of Florida, College of Law, LL.M. in Taxation 1997. Teaches International Taxation at Northeastern University and is a shareholder in Cantley Dietrich, P.C. Professor Cantley would like to thank Melissa Cantley and his law clerk, Leela Orbidan, for their contributions to this Article.

** Geoffrey Dietrich, Esq. U.S. Military Academy at West Point, B.S. 2000; Brigham Young University Law School, J.D. 2008. Shareholder in Cantley Dietrich, P.C.

II.	THE ARTICLE I ALTERNATIVE	455
A.	<i>Exceptions to Facially Discriminatory Statutes, Applied to California’s Ban</i>	456
III.	POWER BY THE PEOPLE: THE LIKELY OUTCOME	458
	CONCLUSION.....	460

INTRODUCTION

“Two households, both alike in dignity . . . from ancient grudge break to new mutiny.”¹ Much like the Houses of Montague and Capulet, the individual states within the United States often find themselves diametrically opposed to each other’s political views. While America’s political divide has undeniably grown deeper over the years, it seems to be widening at a staggering pace recently. Of late, this higher level of political grudge appears in the form of California’s legislation banning state-funded or state-sponsored travel to twenty-two sister states.² At the forefront of this political showdown is Texas. California and Texas are not only America’s two most populous states, but they are also economic and political giants sitting on fundamentally opposite ends of the political spectrum. Sharing a history of fiery disagreements and political clashes, the two states are the exemplification of a country so dangerously divided it is almost reminiscent of a Shakespeare play. The scene opens with California, a Democrat exemplar, escalating historically political disagreements to the economic stage by prohibiting state-funded or state-sponsored travel to any state failing to meet California’s civil rights standards regarding sexual orientation, gender identity, or gender expression.³ Unsurprisingly, the Republican stronghold of Texas is cast as the villain by California and thus made the top of California’s list of travel ban states.⁴ The metaphorical stage is now set.

If California were a nation, it would be one of many nations banning state-funded travel to countries with whom they have political hostilities.⁵

1. WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 1, prologue, l. 1–3.

2. See Levon Kalanjian, *The Beginning of an Economic Civil War: The Unconstitutionality of State-Implemented Travel Bans*, 22 U. PA. J. CONST. L. 409, 411 (Feb. 2020) (“California was the first state to enact a statute . . . banning its employees, the nation’s largest state-employed workforce, from using state funds to travel to . . . states . . . that have discriminatory laws relating to sexual orientation, gender identity, and gender expression.”).

3. *Id.*; *Texas v. California*, 141 S. Ct. 1469, 1473 (2021) (Alito, J., dissenting).

4. See Kalanjian, *supra* note 2, at 411, 421 (listing Texas as one of the many states subject to California’s travel ban).

5. See generally *United Nations Security Council Consolidated List*, UNITED NATIONS (July 26, 2022), <https://www.un.org/securitycouncil/content/un-sc-consolidated-list> [<https://perma.cc/FU8Y-RGHC>] (listing all regimes subject to sanctions and other measures by the United Nations Security Council).

The United States has similar bans for Venezuela, Cuba, and North Korea, just to name a few.⁶ But California is not an independent nation. It is only a state, albeit an influential one, and its legislative lashings are setting an exceedingly dangerous precedent for the nation as a whole. The image of an America in which each state freely imposes state-funded travel bans to other states with whom they have political disagreements is a somber picture to imagine, and one that questions the textual meaning and purpose of a *United States*.

With the days of both Texas's and California's independent nationhood long past, their legislative and ideological clash must be confined to the limits of the U.S. Constitution and federal law. However, when Texas challenged California's bans in the U.S. Supreme Court, the motion for leave to file a bill of complaint was denied, despite the Court's majority consisting of Republican justices.⁷ This Article examines Supreme Court precedent in deciding cases under its original and exclusive jurisdiction of controversies between two or more states.⁸ Additionally, this Article analyzes the possibility of the Court hearing such controversies under the Dormant Commerce Clause instead.⁹ Ultimately, the question is not whether the Supreme Court *can* resolve this inter-state brawl, but whether it *will* choose to do so or instead let the people seek out their own resolutions.

As of August 2022, California's travel ban prohibits state-sponsored or state-funded travel to twenty-two states, effectively targeting roughly 44% of the nation.¹⁰ Although the Texas challenge is the most recent, Arizona's motion for leave to file a bill of complaint on this same issue was denied by the Supreme Court in February of 2020.¹¹ Justice Thomas

6. See *Treasury and Commerce Implement Changes to Cuba Sanctions Rules*, U.S. DEP'T OF THE TREASURY (June 4, 2019), <https://home.treasury.gov/news/press-releases/sm700> [<https://perma.cc/9GRA-P8ED>] (describing the national security measures taken by the United States against Cuba).

7. *Texas*, 141 S. Ct. at 1473 (majority opinion); see Oriana Gonzales & Danielle Alberti, *The Political Leanings of the Supreme Court Justices*, AXIOS (June 24, 2022), <https://www.axios.com/supreme-court-justices-ideology-52ed3cad-fcff-4467-a336-8bec2e6e36d4.html> [<https://perma.cc/DSD2-KFD2>] (identifying the political ideologies of the U.S. Supreme Court Justices, with a negative number indicating a more liberal judicial philosophy and a positive number indicating a more conservative judicial philosophy).

8. See 28 U.S.C. § 1251(a) (West 2022) ("The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States."); see also U.S. CONST., art. III, § 2, cl. 2 ("In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction.").

9. See U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

10. Soumya Karlamangla, *Why California Bans State-Funded Travel to Nearly Half of States*, THE NEW YORK TIMES (July 19, 2022), <https://www.nytimes.com/2022/07/19/us/california-state-funded-travel-bans.html> [<https://perma.cc/7D8X-HNCE>].

11. See *Arizona v. California*, 140 S. Ct. 684, 684 (2020).

and Justice Alito disagreed with the interpretations of the majority, which reads Article III's "[i]n all Cases . . . in which a State shall be [a] Party, the supreme Court shall have original Jurisdiction" to mean that the Court *may* have original jurisdiction.¹² Justice Thomas explained that if the Court does not exercise jurisdiction over a controversy between two states, then the complaining state has no judicial forum in which to seek relief.¹³ Yet, in five years of these issues being brought to the Court, Justice Thomas and Justice Alito have failed to persuade other Supreme Court Justices to hear these inter-state issues. Justice Thomas previously held a different opinion, but now "has since come to question" that opinion and believes the Court should accept Arizona's and Texas's invitation to reconsider its discretionary approach.¹⁴ This Article will review the Court's discretionary approaches, comparing Texas and Arizona's precedent. If Article III is not enough for the Court to exercise jurisdiction, this Article explores the alternative of raising the issue through Article I's Dormant Commerce Clause instead.

The U.S. Constitution grants Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."¹⁵ Although the Commerce Clause only addresses the power given to Congress, the Supreme Court has long recognized that the Commerce Clause also limits states from enacting statutes affecting interstate commerce.¹⁶ This limitation on state power is known as the Dormant Commerce Clause. The Clause's purpose is to prevent a state from "retreating into economic isolation or jeopardizing the welfare of the Nation as a whole" by burdening the flow of commerce across state borders.¹⁷ If any of the affected states were to bring challenges to California's bans through the Dormant Commerce Clause, it could give the Court a window to hear cases in an area with which the Court has a history of frequent involvement. As author Levon Kalanjian warns, these unanswered issues may escalate to an economic civil war between the states.¹⁸ However, it is likely that citizens and U.S. businesses in particular will be at the forefront of either convincing the Court to hear these issues or resolving them through alternative means, like legislation. This Article explores those possibilities as well.

12. *Id.* (Thomas, J., dissenting) (quoting U. S. CONST., art. III, § 2, cl. 2.).

13. *Id.*

14. *Id.*

15. U.S. CONST. art. I, § 8, cl. 3.

16. Kalanjian, *supra* note 2, at 425.

17. *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179–80 (1995).

18. Kalanjian, *supra* note 2, at 415.

I. ARTICLE III'S DISCRETIONARY PRECEDENT

The Supreme Court's discretion to hear cases is wide. Under 28 U.S.C.A. § 1254, the Supreme Court may review cases from a court of appeals by either granting a writ of certiorari to review a party's petition in any civil or criminal case, or by certifying questions of law from the courts of appeals.¹⁹ Not every petition is granted a writ of certiorari, and the Supreme Court can deny certifications for questions of law. Similarly, 28 U.S.C.A. § 1257 gives the Court the ability to review decisions from the highest court of any state.²⁰ Article III of the U.S. Constitution states that, "[i]n all Cases . . . in which a State shall be [a] Party, the Supreme Court shall have original Jurisdiction."²¹ The Court also has exclusive power to hear disputes between two states, which leaves no other court in the country to opine on cases brought between the states.²² There are also protections in place against the Court exercising jurisdiction to hear a case when it should not. The Supreme Court is the only court in the country which can hear cases between California and the states on California's travel ban list. Thus, the question becomes whether the Court has mandatory jurisdiction over cases when the Supreme Court has declined to do so. In America's relatively brief existence, the Court has addressed this issue many times. However, as the Arizona and Texas cases demonstrate, there is still disagreement on the Court's duty in these kinds of cases.

A. *Cohens v. Virginia*

In *Cohens v. Virginia*,²³ the parties, one of which was the State of Virginia, sought to have their claims heard by the Supreme Court, so they asked the Court to exercise its original jurisdiction instead of its appellate jurisdiction. The case placed a question of law before the Supreme Court,²⁴ arriving at the Supreme Court through a writ of error in which one party accused the lower courts of misinterpreting the U.S. Constitution. It was argued that in circumstances in which a case can be heard by the Court through either of the two methods, then the Court must exercise original jurisdiction to hear the case.²⁵ The Court extensively analyzed when it should or must hear a case brought under the Court's

19. 28 U.S.C.A. § 1254 (West 2022).

20. *Id.* § 1257.

21. U.S. CONST. art. III, § 2, cl. 2.

22. 28 U.S.C.A. § 1251 (West 2022).

23. 19 U.S. (6 Wheat.) 264, 375–80 (1821).

24. *Id.* at 375–77.

25. *See id.* at 349 (“[I]t is said, that admitting the Court has jurisdiction (where a State is a party, still that jurisdiction must be original, and not appellate; because the constitution declares, that in cases in which a State shall be party, the Supreme Court shall have original jurisdiction, and in all other cases, appellate jurisdiction.”).

original jurisdiction. Ultimately, the Court declined to exercise original jurisdiction.²⁶

Chief Justice Marshall, writing for the Court, stated, “It is most true that this Court will not take jurisdiction if it should not: but equally true, that it must take jurisdiction if it should.”²⁷ He opined that, unlike the legislature, the judiciary cannot, “avoid a measure because it approaches the confines of the Constitution.”²⁸ Chief Justice Marshall further stated that the Court “[w]ith whatever doubts, with whatever difficulties, a case may be attended” must still hear and decide the case.²⁹ He was adamant that the Court cannot avoid questions out of a simple preference not to address them.³⁰ However, Article III does not extend the judicial power to every violation of the Constitution which may possibly take place, only to a case in law or equity.³¹ So with this language, it is puzzling when the Supreme Court turns away cases in law or equity in which it has original jurisdiction, as it did with Texas and Arizona. While quarrels between states are to be expected, these disputes often come at a cost to the American people. In *Cohens*, Chief Justice Marshall wrote that American people “believe[] a close and firm Union to be essential to their liberty and to their happiness” and are “taught by experience, that this Union cannot exist without a government for the whole.”³² He opined that Americans are also taught that “this government [is] a mere shadow, that must disappoint all of their hopes, unless invested with large proportions of that sovereignty which belongs to independent States.”³³

In *Cohens*, the Court acknowledged that states have a degree of independence to enact their own laws, while still operating within the constitutional constraints designed to protect against abuse of power by any state.³⁴ The California travel ban may potentially be such an abuse of power. In many other instances, the Court had little restraint in deciding when states have stepped over the line, but the Court’s decision not to do so with the travel ban issue is noteworthy and yet not completely unfounded. However, *Cohens* primarily addressed the Court’s appellate jurisdiction. Other precedent is more enlightening on the Court’s decision not to take on the assignment to rule in the Texas and Arizona cases.

26. *See id.* (“[I]f the jurisdiction in this class of cases be concurrent, it cannot be exercised originally in the Supreme Court.”).

27. *Id.* at 404.

28. *Cohens*, 19 U.S. (6 Wheat.) at 404.

29. *Id.*

30. *Id.*

31. *Id.* at 405.

32. *Id.* at 380.

33. *Cohens*, 19 U.S. (6 Wheat.) at 380.

34. *Id.* at 380–81.

B. Louisiana v. Texas

Nearly a century after *Cohens*, the Supreme Court reluctantly decided to hear *Louisiana v. Texas*. The Governor of Louisiana asked the Court for leave to file a bill of complaint against the State of Texas, its Governor, and its Health Officer.³⁵ Louisiana was permitted to file the bill of complaint because the Court decided that it was the best course of action for the case.³⁶ Demurrer to the bill was sustained, and then subsequently dismissed.³⁷ The case concerned two lines of railroad, the Southern Pacific and the Texas & Pacific.³⁸ The railroads ran directly from New Orleans through Louisiana and Texas, and into other states and territories of the United States and Mexico.³⁹ The Texas Legislature enacted laws granting the Texas Governor and Health Officer extensive power “over the establishment and maintenance of quarantines against infectious or contagious diseases, with authority to make rules . . . for the detention of vessels, . . . and property coming into the state from places infected, or deemed to be infected, with such diseases.”⁴⁰ At the time, Texas was increasingly concerned about viruses, like yellow fever, spreading through the import of various goods from port cities, including New Orleans.⁴¹

Yellow fever first appeared in the United States in the 1700s and rampaged through cities for nearly two hundred years, killing hundreds and sometimes thousands of people in a single summer.⁴² The virus was especially devastating for Eastern seaports and Gulf Coast cities.⁴³ The cause of the spread was unknown and occurred in epidemic proportions. In August of 1899, “a case of yellow fever was officially declared to exist in the city of New Orleans.”⁴⁴ In response, Texas immediately placed an embargo on all interstate commerce between the City of New Orleans and Texas, consequently prohibiting “all common carriers entering the state of Texas from bringing into the state any freight or passengers, or even

35. *Louisiana v. Texas*, 176 U.S. 1, 2 (1900).

36. *Id.*

37. *Id.*

38. *Id.* at 2.

39. *Id.* at 3.

40. *Louisiana*, 176 U.S. at 3.

41. See generally JO ANN CARRIGAN, *THE SAFFRON SCOURGE: A HISTORY OF YELLOW FEVER IN LOUISIANA, 1796-1905 passim* (June 1961) (describing the spread of yellow fever around the United States, including into Texas, and the response by states).

42. See *Major American Epidemics of Yellow Fever (1793-1905)*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/fever-major-american-epidemics-of-yellow-fever/> [<https://perma.cc/L542-DGVB>] (last visited Aug. 15, 2022) (reporting that 8,000 or more individuals died in New Orleans from a yellow fever outbreak in Summer 1853).

43. *Id.*

44. *Louisiana*, 176 U.S. at 4.

the mails of the United States coming from the City of New Orleans.”⁴⁵ Louisiana accused Texas of trying to destroy commerce from New Orleans, taking “away the trade of the merchants and business men of the city,” and transferring that trade to “rival business cities in the state of Texas.”⁴⁶ The question before the Court was whether the Texas law granting the Governor such extensive power over commerce constituted a controversy between the states.⁴⁷ The Court decided that a mere “maladministration” of the laws of a state, to the injury of the citizens of another state, does not constitute a controversy between states, and is therefore not justiciable in the Supreme Court.⁴⁸

Primarily, the Court looked to Article III of the U.S. Constitution to adjudicate the *Louisiana* case. Clauses 1 and 2 of Article II read as follows:

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to *controversies between two or more states*; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states; and between a state, or the citizens thereof, and foreign states, citizens, or subjects.

In all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.⁴⁹

The Court interpreted the words “controversies between two or more states” to mean that “the Framers of the Constitution intended that they should include something more than controversies over territory or jurisdiction.”⁵⁰ In the Court’s words, Louisiana’s complaint did not plead enough facts to show that Texas had “authorized or confirmed the alleged action of her health officer as to make it her own, or from which it necessarily follows that the two states are in controversy within the

45. *Id.*

46. *Id.* at 5.

47. *Id.* at 12.

48. *Id.* at 22.

49. *Louisiana*, 176 U.S. at 14 (citing U.S. CONST. art. III, § 2, cl. 1, 2) (emphasis added).

50. *Id.* at 15.

meaning of the Constitution.”⁵¹ In his concurrence, Justice Harlan noted that the Court has often declared that “the states have the power to protect the health of their people” through regulations.⁵² Since Louisiana’s complaint was brought against not just Texas, but also the Health Officer and the Governor, the Supreme Court could not deem that this was a suit between two states, and dismissed Louisiana’s bill.⁵³ With this case, the Court began unveiling a pattern of preference in avoiding exercising its jurisdiction on issues between two states.

C. Massachusetts v. Missouri

Several decades later, the Supreme Court opined on an estate and tax related controversy between two states in *Massachusetts v. Missouri*.⁵⁴ Massachusetts filed a motion for leave to file the proposed bill of complaint against Missouri asking the Court for an adjudication concerning the right of the respective states to impose inheritance taxes on transfers of the same property.⁵⁵ The Supreme Court, predictably, denied the Massachusetts motion.⁵⁶ Unlike the Texas and Arizona cases, the Court provided insight into its decision in *Massachusetts*.

The Court found that Massachusetts’s proposed bill of complaint did not present a justiciable controversy between the states: “To constitute such a controversy, it must appear that the complaining state suffered a wrong through the action of the other state, furnishing ground for judicial redress.”⁵⁷ Otherwise, it appear that the state is asserting a right against the other state which is susceptible to judicial enforcement.⁵⁸ Massachusetts’s prayer for relief was for the Supreme Court to determine which state had jurisdiction to impose inheritance taxes on transfers of property covered by trusts which were created by deceased residents of Massachusetts, including securities held by trustees in Missouri.⁵⁹ The Court held that Missouri did not harm Massachusetts by claiming a right to recover taxes from the trustees or in proceedings for collection of taxes.⁶⁰ When both states have individual claims, one of them exercising their rights should not impair the rights of the other.⁶¹ The Court decided to deny the bill of the proposed complaint, reasoning that the claims could be litigated in state courts in either Massachusetts or Missouri and thus

51. *Id.* at 22–23.

52. *Id.* at 23 (Harlan, J., concurring).

53. *Id.* at 23 (majority opinion).

54. 308 U.S. 1, 1 (1939).

55. *Id.* at 13, 15.

56. *Id.* at 20.

57. *Id.* at 15.

58. *Id.*

59. *Massachusetts*, 308 U.S. at 15.

60. *Id.*

61. *Id.*

the Supreme Court did not need to exercise its original jurisdiction over the matter.⁶²

Article III Section 2 grants the Supreme Court original jurisdiction in cases where a “state is a party, . . . [meaning] those cases in which, . . . jurisdiction might be exercised in consequence of the character of the party.”⁶³ Here, the Supreme Court did not think that Missouri would close its courts to a civil action brought by Massachusetts to recover the alleged tax due from the trustees.⁶⁴ However, the Attorney General of Missouri argued against Massachusetts filing such an action in Missouri state courts or a Missouri federal district, saying that such a suit would present a justiciable case or controversy, therefore requiring adjudication from the Supreme Court instead.⁶⁵ The Court reasoned that any objections that the courts in one state will not entertain suit to recover taxes due to another state’s claim goes to the merits of the case, not the jurisdiction, and therefore raises a question district courts are competent to decide.⁶⁶ As a result, the Court avoided yet another instance in which it was asked to settle a question of law between two states.

D. Ohio v. Wyandotte Chemicals Corp.

The 1970s saw the continuation of many liberal movements that started in the 1960s.⁶⁷ For example, when Americans voiced a growing concern about the environment, the country legislated the National Environmental Policy Act, the Clean Air Act, and the Clean Water Act all within one decade.⁶⁸ With this national trend in the background, the State of Ohio moved for leave to file a bill of complaint seeking to invoke the Supreme Court’s original jurisdiction against citizens of other states regarding the pollution of Lake Erie from mercury dumping.⁶⁹ The Court denied the motion.⁷⁰

Although the Supreme Court has original and exclusive jurisdiction over suits between states, for suits between a state and citizens of another state, the Court is granted original jurisdiction but not exclusivity.⁷¹ The Court stated that while Ohio’s complaint does state a cause of action falling within the compass of original jurisdiction, the Court nevertheless

62. *Id.* at 19.

63. *Id.* (quoting *Cohens v. Virginia*, 19 U.S. 264, 398–99 (1821)).

64. *Massachusetts*, 308 U.S. at 20.

65. *Id.*

66. *Id.*

67. *The 1970s*, HISTORY.COM (July 30, 2010), https://www.history.com/topics/1970s/1970s-1#section_2 [<https://perma.cc/R36J-6SNA>].

68. *Id.*

69. *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 494 (1971).

70. *Id.* at 505.

71. *Id.* at 495.

declined to exercise that jurisdiction.⁷² The Court explained that it had jurisdiction and the complaint on its face revealed the existence of a genuine case or controversy between one state and citizens of another.⁷³ Previously, the Court declined to review similar cases if a party sought to embroil the tribunal in political questions.⁷⁴ Although the question in *Wyandotte* did not involve the political question doctrine and the Court could hear the case, the Court looked to policy rationales to deny Ohio's motion.⁷⁵

The Court recognized that it is a "time-honored maxim of the Anglo-American common-law tradition that a court possessed of jurisdiction generally must exercise it."⁷⁶ Yet, the Court was convinced of changes in the American legal system and American society, which make it untenable, as a practical matter, for the Court to adjudicate all or most legal disputes arising "between one State and a citizen or citizens of another even though the dispute may be one over which the Court does have original jurisdiction."⁷⁷ Primarily, the Court noted that its responsibilities in the American legal system have evolved to bring "matters to a point where much would be sacrificed, and little gained by [the Court] exercising original jurisdiction over issues bottomed on local law" and not federal law.⁷⁸

The Court based its reasoning on an analysis of the Court's structure and general functions. The Court explained that it is "structured to perform as an appellate tribunal" but is ill-equipped for fact-finding in original jurisdiction cases.⁷⁹ While it is true that the Court most commonly exercises its appellate powers, it is clear the Court is not structured for information-gathering in original jurisdiction cases. It has declined multiple opportunities to exercise original jurisdiction in cases like *Wyandotte*.

The Court further clarified that its denial to hear the case was backed by more than just a lack of structural capability. Its decision was compounded by the fact that, for every case in which it might be called upon to determine the facts and apply unfamiliar legal norms, it would unavoidably reduce the attention the Court could give to matters of federal law and national import.⁸⁰ Stated in simpler words: the Court did not want to spend its time and judicial resources on such matters. Because the Court "found even the simplest sort of interstate pollution case an

72. *Id.*

73. *Id.* at 495–96.

74. *Wyandotte*, 401 U.S. at 496.

75. *Id.* at 495–96.

76. *Id.* at 496–97.

77. *Id.* at 497.

78. *Id.*

79. *Wyandotte*, 408 U.S. at 498.

80. *Id.*

extremely awkward vehicle to manage” and the case was extraordinarily complex, the Court decided not to burden itself with the fact-finding required to adjudicate Ohio’s claims.⁸¹ The Court’s policy analysis of the ever-changing American judicial system and its preference for appellate jurisdiction foreshadowed its decision to decline Arizona’s and Texas’s bills decades later.

E. Arizona v. New Mexico

Just a few years later, the Supreme Court once again denied a state’s motion for leave to file a bill of complaint, this time against another state. The Court denied Arizona’s request to invoke the Supreme Court’s original jurisdiction when Arizona sought declaratory judgement against New Mexico’s electrical energy tax.⁸² Arizona argued that the tax was unconstitutionally discriminatory and a burden upon interstate commerce, that the tax denied Arizona due process and equal protection under the law in violation of the Fourteenth Amendment, and that the tax abridged the privileges and immunities secured by the U.S. Constitution.⁸³ Regardless, the Supreme Court thought that a state court would be a more appropriate forum.⁸⁴

The State of Arizona (as a consumer) and its citizens (as consumers) regularly purchased electrical energy generated by three Arizona utilities operating generating facilities within New Mexico.⁸⁵ In 1975, New Mexico passed the Electrical Energy Tax Act, which imposed a tax on the generation of electricity.⁸⁶ The Supreme Court explained: “The tax is nondiscriminatory on its face: it taxes all generation regardless of what is done with the electricity after its production. However, the 1975 Act provides a credit against gross receipts tax liability in the amount of the electrical energy tax paid for electricity consumed in New Mexico.”⁸⁷

Other states consuming energy produced within New Mexico, including Arizona, did not receive such credit.⁸⁸ Arizona argued that (1) the economic incidence and burden of the electrical energy tax fell upon the state and its citizens and that (2) the tax discriminated, as intended, against the citizens of Arizona.⁸⁹ The three Arizona utilities involved chose not to pay the new tax and instead sought a declaratory judgement

81. *Id.* at 504–05.

82. *Arizona v. New Mexico*, 425 U.S. 794, 795, 798 (1976).

83. *Id.* at 795.

84. *Id.*

85. *Id.* at 794.

86. *Id.*

87. *New Mexico*, 425 U.S. at 794–95.

88. *Id.* at 795.

89. *Id.*

in an action filed in the District Court for Santa Fe County.⁹⁰ That action raised the same constitutional concerns as the State of Arizona had in the instant case.⁹¹

In deciding whether to grant Arizona's motion, the Supreme Court noted that its original jurisdiction should be invoked sparingly.⁹² The Court considered the seriousness and dignity of the claim and whether there was another forum available with jurisdiction over the named parties in which the issues could be litigated and in which appropriate relief could be had.⁹³ In this case, the Court was persuaded to deny Arizona's motion because of the pending action before the New Mexico Supreme Court, which was an appropriate forum for the dispute.⁹⁴ Further, the U.S. Supreme Court found it wise to wait to hear the case on appeal if the state court held the energy tax unconstitutional. If the tax was held unconstitutional, then Arizona would be vindicated, and if it was held constitutional, the issues could be appealed to the Court through the direct appeal process.⁹⁵ Accordingly, the Court chose not to exercise original jurisdiction because it felt the state courts were able to adjudicate the issues and were the better forum for addressing Arizona's claims.⁹⁶

F. *Maryland v. Louisiana*

In 1981, the Supreme Court finally chose to exercise original jurisdiction in *Maryland v. Louisiana*.⁹⁷ Several states, joined by the United States and several pipeline companies, challenged the constitutionality of Louisiana's "First-Use Tax" imposed on certain uses of natural gas brought into Louisiana.⁹⁸ Due to the nature of the case participants, a Special Master was appointed to facilitate the handling of the suit.⁹⁹ The Special Master filed a report, but exceptions to the Master's Report were filed as well.¹⁰⁰ Justice White, writing for the Supreme Court, held that:

(1) the individual states, as major purchasers of natural gas whose cost increased as a direct result of the tax, were directly affected in a real and substantial way so as to justify the exercise of the Court's original jurisdiction; (2)

90. *Id.*

91. *Id.*

92. *New Mexico*, 425 U.S. at 795.

93. *Id.*

94. *Id.* at 797.

95. *Id.*

96. *Id.*

97. 451 U.S. 725, 737 (1981).

98. *Id.* at 731–34.

99. *Id.* at 734.

100. *Id.* at 734–35.

jurisdiction was also supported by the individual states' *parens patriae*; and (3) the case was an appropriate exercise of the Court's exclusive jurisdiction even though state court actions were pending in Louisiana.¹⁰¹

After establishing the Court's intention to exercise original jurisdiction, the Court found the First-Use Tax to be unconstitutional under the Commerce Clause.¹⁰² The analysis of the tax's constitutionality under the Commerce Clause will be discussed later in this Article.

Louisiana argued that the states lacked standing to bring the suit under the Court's original jurisdiction and that the bare requirements for exercising original jurisdiction were not met.¹⁰³ The Special Master rejected both arguments.¹⁰⁴ The Court agreed with the Special Master.¹⁰⁵ In order to constitute a true controversy between two or more states under the Court's original jurisdiction,

[I]t must appear that the complaining State has suffered a wrong through the action of the other State . . . or is asserting a right against the other State which is susceptible of judicial enforcement according to the accepted principles of the common law or equity systems of jurisprudence.¹⁰⁶

Rejecting Louisiana's arguments that the tax was imposed on pipeline companies and not directly on consumers, the Court reasoned that standing to sue "exists for constitutional purposes if the injury alleged 'fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.'"¹⁰⁷ In the instant case, the First-Use Tax was "clearly intended to be passed on to the ultimate consumer," despite it being imposed on pipeline companies.¹⁰⁸ The Court found it "clear that the plaintiff States, as major purchasers of natural gas whose cost has increased as a direct result of Louisiana's imposition of the First-Use Tax, are directly affected in a 'substantial and real' way so as to justify their exercise of this Court's jurisdiction."¹⁰⁹

101. *Id.* at 737, 739–45.

102. *Maryland*, 451 U.S. at 760.

103. *Id.* at 735–36.

104. *Id.* at 735.

105. *Id.*

106. *Id.* at 735–36 (quoting *Massachusetts v. Missouri*, 308 U.S. 1, 15 (1939)) (internal quotations omitted).

107. *Maryland*, 451 U.S. at 736 (1981) (quoting *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 41–42 (1976)).

108. *Id.*

109. *Id.* at 737.

The Court also found support for exercising jurisdiction “by the ‘States’ interest as *parens patriae*.”¹¹⁰ States cannot “enter a controversy as a nominal party in order to forward the claims of individual citizens.”¹¹¹ However, a state can “act as the representative of its citizens in original actions where the injury alleged affects the general population of a State in a substantial way.”¹¹² The Court held that the states “alleged substantial and serious injury to their proprietary interests as consumers of natural gas as a direct result of the allegedly unconstitutional actions of Louisiana.”¹¹³ Further, such a direct injury is reinforced “by the States’ interest in protecting its citizens from substantial economic injury presented by imposition of the First-Use Tax.”¹¹⁴ The Court explained, “[I]ndividual consumers cannot be expected to litigate the validity of the First-Use Tax given that the amounts paid by each consumer are likely to be relatively small.”¹¹⁵ Instead, the states should represent their citizens in such litigation—a point which supported the Court’s choice to exercise original jurisdiction.¹¹⁶

The Court deemed the case appropriate for exercise of its exclusive jurisdiction, despite similar claims pending in state courts.¹¹⁷ The Court elaborated that it determines whether exclusive jurisdiction is appropriate by weighing “not only ‘the seriousness and dignity of the claim,’ but also ‘the availability of another forum with jurisdiction over the named parties.’”¹¹⁸ Exclusive and original jurisdiction are exercised sparingly.¹¹⁹ In choosing to exercise exclusive jurisdiction, the Court distinguished *Maryland* from *New Mexico*. Specifically, in *New Mexico*, it was “uncertain whether Arizona’s interest as a purchaser of electricity had been adversely affected,” but in *Maryland*, the adverse effect upon the plaintiff states’ interests were far more certain.¹²⁰ The issue in the *New Mexico* case did not “sufficiently implicate the unique concerns of federalism forming the basis of [the Court’s] original jurisdiction.”¹²¹ In *Maryland*, the magnitude and effect of the tax was far greater because the anticipated 150 million dollars in annual tax was being passed on to millions of American consumers in over thirty states, exactly as

110. *Id.*

111. *Id.*

112. *Maryland*, 451 U.S. at 737.

113. *Id.* at 739.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Maryland*, 451 U.S. at 739–45.

118. *Id.* at 740.

119. *Id.* at 739.

120. *Id.* at 743.

121. *Id.*

intended.¹²² The Supreme Court was willing to set the *Maryland* case apart from precedent and justify the use of original jurisdiction. Therefore, when examining recent actions brought by Arizona and Texas, the question becomes: why did the claims of Arizona and Texas fall within the Court's pattern of refusing to exercise original jurisdiction rather than the approach followed in *Maryland*?

G. *Texas and Arizona's Place Within the Precedent*

In denying Texas and Arizona's motions for leave to file a bill of complaint, the Court did not provide its reasoning for denial as it did in *Maryland*, *Wyandotte*, *New Mexico*, *Massachusetts*, *Cohens*, and *Louisiana*. Although Justice Thomas and Justice Alito wrote detailed dissents on why the Court should hear the cases, there was little insight into the majority's decision-making. However, with decades of precedent explaining the need to exercise original jurisdiction sparingly,¹²³ perhaps the Court's reasoning is not needed. Following the analysis of prior case law, Texas and Arizona's claims would be first judged on their "seriousness and dignity."¹²⁴ Essentially, the two states would have to show that they are directly and negatively affected by California's travel bans.¹²⁵ The states also would need to persuade the Court that the injury alleged affects the general population of their states in a substantial way.¹²⁶ Finally, the states would have to show that there is no other forum that could adjudicate the claims.¹²⁷

Turning to the first point, the states would illustrate their alleged injury: California law bans state-funded travel to over twenty-two states, except under limited circumstances.¹²⁸ Specifically, California will not:

Approve a request for state-funded or state-sponsored travel to a state that . . . has enacted a law that voids or repeals, or has the effect of voiding or repealing, existing state or local protections against discrimination on the basis of sexual orientation, gender identity, or gender expression, or has enacted a law that authorizes or requires discrimination against same-sex couples or their families or on the basis of sexual orientation, gender identity, or gender expression, including any law that creates an exemption to antidiscrimination laws in order to permit discrimination

122. *Maryland*, 451 U.S. at 744.

123. *Id.* at 739; *Arizona v. New Mexico*, 425 U.S. 794, 795 (1976).

124. *Maryland*, 451 U.S. at 740; *Arizona*, 425 U.S. at 795.

125. *Maryland*, 451 U.S. at 737.

126. *Id.*

127. *Arizona*, 425 U.S. at 795.

128. CAL. GOV'T CODE § 11139.8(b)(2) (West 2022).

against same-sex couples or their families or on the basis of sexual orientation, gender identity, or gender expression.¹²⁹

The travel ban has exceptions, which include travel for: litigation; meeting contractual obligations; complying with the federal government committee appearances; participating in meetings or training required by a grant or required to maintain grant funding; completing job-required training necessary to maintain licensure or similar standards; and protecting the public health, welfare, or safety.¹³⁰

Given these exceptions, when does California's travel ban actually apply? It is difficult to imagine an instance where state-funded travel would be banned given the relatively lengthy list of exceptions. California intended the ban to frame the state as a leader in protecting civil rights and preventing discrimination, but even LGBTQ groups accuse California of using the ban as "a cheap political trick to make some headlines for vote-hungry politicians in the blue state."¹³¹ The law's extensive exceptions also make it difficult for the plaintiff-states to illustrate their injury.

College sports provide the most likely example of state injury, but even that has proven difficult. In 2017, California's ban included travel to the State of Tennessee.¹³² That same year, the UCLA Men's Basketball Team made it to the "Sweet 16" in the NCAA Tournament.¹³³ According to the ban, California should have refused to let the team play in the game against Kentucky held in Tennessee, unless the game was moved to another state not on the travel ban list, since UCLA is a state-funded school.¹³⁴ Instead, California used "non-state" funds to send the team to Tennessee.¹³⁵ Non-state funds are comprised of money that comes from donations and other resources.¹³⁶ California keeps these "non-state" funds separate from state funds.¹³⁷

Essentially, when travel does not fit into one of California's many exceptions, the state will still find a way to permit the travel if there is

129. *Id.*

130. *Id.* § 11139.8(c).

131. Cyd Zeigler, *California's Travel Ban to Anti-LGBTQ States is a Political Trick*, LGBTQNATION (Apr. 5, 2019), <https://www.lgbtqnation.com/2019/04/californias-travel-ban-anti-lgbtq-states-political-trick-heres-actually-works/> [<https://perma.cc/DJV6-N2FA>].

132. *Id.*

133. *Id.*; Paul Kasabian, *Sweet 16 2017: Complete Schedule, Updated Bracket and Predictions*, BLEACHER REP. (Mar. 23, 2017), <https://bleacherreport.com/articles/2699547-sweet-16-2017-complete-schedule-updated-bracket-and-predictions> [<https://perma.cc/P9FF-CZ 5R>].

134. Zeigler, *supra* note 131; Kasabian, *supra* note 133.

135. Zeigler, *supra* note 131.

136. *Id.*

137. *Id.*

substantial state interest.¹³⁸ Imagine the following hypothetical: Texas or Arizona host a major sports tournament, California denies funding for its own public university team to travel and compete in the tournament, and the denial causes the tournament to be moved to another state simply to accommodate California's travel ban. One can then imagine the plethora of economic and political injuries to Texas or Arizona. However, a dilemma like this hypothetical has yet to happen. And the U.S. Supreme Court will not exercise its original jurisdiction in a case in which a state's injuries are unclear.¹³⁹ The complaints filed by Texas and Arizona demonstrate the exact type of cases the Court detailed as its preference to avoid in *Wyandotte*.¹⁴⁰

Next, it would have been difficult for the Supreme Court to find that the alleged injury affected the general population of Arizona and Texas.¹⁴¹ The California travel ban does not target state-funded business with the plaintiff-states or individual businesses or people within the plaintiff-states.¹⁴² Additionally, the travel ban does not in any way restrict the flow of goods or people between California and these states.¹⁴³ Aside from knowing the state received California's stamp of disapproval, citizens of Texas and Arizona are not affected by California's travel ban. In *Maryland*, Louisiana's tax affected more than thirty different states, and the burden of the tax was directly passed to the taxpayers in those states.¹⁴⁴ Although there are many states on California's travel ban list,¹⁴⁵ the burden of California's law is not upon the people of those states.

Finally, the Supreme Court likely denied the plaintiff-states' request for adjudication under original jurisdiction in *Arizona v. California* and *Texas v. California* because the states can challenge California's laws in another forum.¹⁴⁶ In *New Mexico*, the Court mentioned its preference of hearing the case on appeal upon the plaintiff-state's loss in defendant-state's courts.¹⁴⁷ In *Maryland*, the Court did not think that a state forum was more appropriate for the claims because it was abundantly clear that

138. *See id.* ("So when they want to get around the law, they make sure those 'separate' funds are used.")

139. *E.g.*, *Louisiana v. Texas*, 176 U.S. 1, 22–23 (1900) (explaining that mere "maladministration" of state laws is not enough to establish that one state has injured another state and that a controversy exists).

140. *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 497–99 (1971).

141. *Arizona v. California*, 140 S. Ct. 684, 684 (2020); *Texas v. California*, 141 S. Ct. 1469, 1469 (2021).

142. CAL. GOV'T CODE § 11139.8(b)(2) (West 2022).

143. *Id.*

144. *Maryland v. Louisiana*, 451 U.S. 725, 733, 744 (1981).

145. *Karlamangla*, *supra* note 10.

146. *Massachusetts v. Missouri*, 308 U.S. 1, 60 (1939); *Arizona v. New Mexico*, 425 U.S. 794, 796 (1976); *Maryland*, 451 U.S. at 737.

147. *New Mexico*, 425 U.S. at 796.

the interests of the plaintiff-states were adversely affected.¹⁴⁸ The same is not true in the *Arizona* and *Texas* cases. The Court likely aligned the plaintiff-states' claims with those in *New Mexico*. Even Justice Alito, writing in the dissent for *Texas*, mentioned that the Court would likely reverse if a lower court found in favor of California.¹⁴⁹ Perhaps filing in a different forum is a path the current plaintiff-states should contemplate.

It is clear a controversy exists between two states in both *Arizona* and *Texas*. It is also clear the controversy is mostly political, based solely on California's condemnation of a number of states in the nation who will not align with California's political ideals. The Court can invoke the political question doctrine when there is a lack of judicially manageable standards which prevent the case from being decided on the merits.¹⁵⁰ Although the Court did not explicitly invoke the doctrine, California's politically charged statutory language could have added to the Court's reluctance to exercise original jurisdiction. Ultimately, the Court had a long list of precedent supporting the decision to decline exercising original jurisdiction in both *Texas* and *Arizona*. While actual injury to the travel ban states is not abundantly clear, the plaintiff-states should consider challenging California's law under Article I instead of Article III in federal court.

II. THE ARTICLE I ALTERNATIVE¹⁵¹

The Constitution grants Congress the power to "regulate Commerce with foreign Nations, and among the several states, and with the Indian tribes."¹⁵² The U.S. Supreme Court has long recognized that the Commerce Clause also restricts states from enacting law which may affect interstate commerce.¹⁵³ This limit on state power is often referred to as the Dormant Commerce Clause. The Dormant Commerce Clause prevents economic protectionism by prohibiting states from enacting laws designed to benefit in-state economic interests as the expense of out-of-state competitors.¹⁵⁴ State-implemented travel bans are likely to affect interstate commerce, since their sole purpose is to cause negative economic impact on the targets of the ban. Although the earlier discussion about the travel ban's exceptions and practice raise questions as to

148. *Maryland*, 451 U.S. at 743.

149. *Texas v. California*, 141 S. Ct. 1469, 1469 (2021) (Alito, J., dissenting).

150. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

151. The Article I analysis to California's travel bans has been analyzed in great detail in scholarship by Levon Kalanjian. Section III in this Article is simply a summary of the thorough analysis presented in Kalanjian's writing. See Kalanjian, *supra* note 2.

152. U.S. CONST. art. I, § 8, cl. 3.

153. See *Healy v. Beer Inst.*, 491 U.S. 324, 326 n.1 (1989) ("This Court long has recognized that this affirmative grant of authority to Congress also encompasses an implicit or 'dormant' limitation on the authority of the States to enact legislation affecting interstate commerce.").

154. *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–38 (2007).

whether the California law is truly effective, there are still colorable arguments supporting the law's interference with interstate commerce.

The U.S. Supreme Court's approach for analyzing the Dormant Commerce Clause is a balancing test in which the burden on interstate commerce may not be greater than the benefits to the state.¹⁵⁵ The weight of the balancing depends on whether a state statute is facially discriminatory or facially neutral.¹⁵⁶ State statutes are facially neutral if they treat their residents and other states' residents alike, although the statute may still affect interstate commerce.¹⁵⁷ Facially neutral statutes only violate the Dormant Commerce Clause if the burdens they impose on interstate trade are clearly excessive in relation to local benefits.¹⁵⁸ State statutes that distinguish between residents in their jurisdiction and residents outside their jurisdiction are facially discriminatory.¹⁵⁹ Since California's travel ban explicitly names other states, the statute is facially discriminatory. Even though the ban is facially discriminatory, there are three exceptions to when states may pass facially discriminatory laws, outlined below.

A. *Exceptions to Facially Discriminatory Statutes, Applied to California's Ban*

Facially discriminatory statutes are generally deemed unconstitutional but can still be upheld under three exceptions: (1) Congress authorized them; (2) they serve a legitimate state or local purpose; or (3) the state is acting as a market participant.¹⁶⁰ Below is an analysis of these three exceptions as applied to California's travel ban.

The first exception is Congressional authorization. It is clear from the statute language that California is not relying upon any kind of congressional authority. When Congress permits states to regulate commerce in ways that would otherwise be impermissible, authorization must be unmistakably clear.¹⁶¹ The legislative history behind California's travel ban clearly shows there was no Congressional authorization to enact such a ban.¹⁶² The legislative history shows reliance upon *Obergefell v. Hodges* to support validation of the ban.¹⁶³ This Supreme

155. *S. Pac. Co. v. Arizona*, 325 U.S. 761, 783–84 (1945).

156. *See* *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 331 (2007) (“To determine whether a law violates the dormant Commerce Clause, the Court first asks whether it discriminates on its face against interstate commerce.”).

157. *Or. Waste Sys., Inc. v. Dep't of Env't Quality of State of Or.*, 511 U.S. 93, 98–99 (1994).

158. *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

159. *Id.*

160. *S. Pac. Co.*, 325 U.S. at 769.

161. *Kalanjian*, *supra* note 2, at 435.

162. *Id.*

163. *Id.*

Court case upheld marriage equality for LGBTQ individuals,¹⁶⁴ but there is no mention of anything close to the possibility of states enacting travel bans for state-funded travel.¹⁶⁵ In summary, “Congress did not grant California the authority to prohibit other states from discriminating against LGBTQ individuals.”¹⁶⁶ Thus, California’s travel ban law fails the first exception for facially discriminatory statutes.

Second, for facially discriminatory statutes to be constitutional, they must serve a legitimate local purpose. States must show not only that the regulation serves a legitimate local purpose, but also that the local purpose could not be achieved by any other nondiscriminatory means.¹⁶⁷ Essentially, California would have to prove their clearly punitive travel ban serves a local purpose which could not otherwise be achieved.¹⁶⁸ The California legislative history lists two reasons for enacting the statute: (1) to prevent the use of state funds to benefit a state that does not adequately protect the civil rights of certain classes of people; and (2) to prevent a state agency from compelling an employee to travel to an environment in which he or she may feel uncomfortable.¹⁶⁹ However, punishing other states for not meeting California’s civil rights standards does not serve a local purpose in California.¹⁷⁰ On the one hand, California may argue that the law protects state employees who could experience—or fear—LGBTQ discrimination in travel ban states. On the other hand, critics argue that the travel ban does little to protect LGBTQ interests and does “nothing more than exacerbate political divisions.”¹⁷¹ Even if California argues that the statute protects its state employees, California ignores the fact that it must prove there are no other nondiscriminatory alternatives.¹⁷² California’s legislative history indicates that the statute was not developed to protect state employees and that other alternatives were not considered. Instead, the legislative history makes it abundantly clear that California intended the statute to punish other states.¹⁷³

The final exception is if a state acts as a market participant, rather than a market regulator.¹⁷⁴ For example, if a city law specifies that construction projects funded by the city must employ a percentage of city residents, then the law does not violate the Dormant Commerce Clause because by funding the city projects the government is acting as a

164. *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015).

165. *Kalanjian*, *supra* note 2, at 435.

166. *Id.*

167. *Id.* at 436.

168. *Id.*

169. *Id.*

170. *Kalanjian*, *supra* note 2, at 439.

171. *Id.* at 440.

172. *Id.*

173. *Id.* at 443.

174. *Id.* at 444.

participant.¹⁷⁵ However, if a state is selling timber and its laws require the successful bidder to partially process the timber within the state before shipping, then this law goes further than simply burdening the market in which it operates.¹⁷⁶ California could attempt to argue that the Dormant Commerce Clause does not apply because the state government is participating in the market for travel. But because the ban imposes restrictions intended to reach beyond California by banning commercial transactions in target states, this argument fails, and the Dormant Commerce Clause applies.

California's travel bans are facially discriminatory and are therefore unconstitutional under Article I of the Constitution. Only the U.S. Congress can regulate the nation's commerce, not the individual states.¹⁷⁷ There is a long history of restricting states from enacting laws that interfere with federal commerce or benefit in-state economic interest by discriminating against other out-of-state actors. California's ban on state-funded travel openly discriminates against almost half of the country by banning state-funded travel to states with whom California disagrees over standards regarding treatment of the LGBTQ community.¹⁷⁸ The desire to be a leading state in the protection of LGBTQ civil rights does not fit into any of the three exceptions that would allow California to enact such a law. California's ban was not authorized by Congress. It serves no local purpose. No nondiscriminatory alternatives were ever discussed or considered. California, in enacting the statute, is acting as a market regulator and not as a market participant. That is unconstitutional.

This analysis leaves critics with disagreements in predicting how, when, or whether California's unconstitutional travel ban will be addressed. Some believe that other states will follow California's example and enact similarly discriminatory laws until the country is entwined in a social and economic civil war.¹⁷⁹ The less dramatic and more likely outcome is a continued lack of enforcement of the statutes, or a demand in statutory change from residents of the states who are legislating such bans.

III. POWER BY THE PEOPLE: THE LIKELY OUTCOME

As previously explained, the U.S. Supreme Court is unlikely to intervene on behalf of states that have found themselves on California's travel ban. The states will likely need to bring their claims in other forums first and then pursue the appeals route to the U.S. Supreme Court. Given the extensive list of exceptions and lack of enforcement in practice, the

175. Kalanjian, *supra* note 2, at 444–45.

176. *Id.* at 446.

177. U.S. CONST. art. I, § 8, cl. 3.

178. Karlamangla, *supra* note 10.

179. Kalanjian, *supra* note 2, at 446.

overarching economic effect (and therefore success) of California's ban is, at best, unclear. It is still disheartening to see that one of our states opted to single out twenty-two sister states seemingly without reason. There are a few consequences that may result from such actions.

The first possibility is other states will enact retaliatory bans or similar bans against states with whom they disagree politically. California's first bans were seen in 2017, and in the past few years, several other states and territories have legislated travel bans.¹⁸⁰ Although New York issued executive orders in 2015 similarly banning state-funded travel to Indiana for LGBTQ discrimination issues,¹⁸¹ and several other states joined New York in banning state-funded travel to North Carolina for its controversial "bathroom law,"¹⁸² there is little indication that these bans have actually achieved their purpose of negatively impacting the economies of the targeted states. For example, it is calculated that Indiana lost about \$60 million in revenue after passing an anti-gay law.¹⁸³ Notably, this loss of revenue stemmed from a cut in tourism and the migration of businesses out of Indiana, not because of a lack of state-funded travel from places like California.¹⁸⁴

Further, when corporations or businesses condemn perceived anti-gay state laws, the ramifications are much more profound than any ban on state-funded travel. California state-funded travel likely has very limited presence in the Texas economy, and so its effect is similarly unnoticed. However, when companies like Apple make business decisions while considering states' laws impacting its LGBTQ population, the results would be felt much more profoundly than the loss of California's state-funded travel. Additionally, if corporations were to act in this arena, they would not be challenging the U.S. Constitution in the same way as California. Yet, Texas has not lost business because of its anti-discrimination laws. On the contrary, Texas has seen an explosion of

180. In 2018, Washington, Minnesota, New York, Vermont, and California had bans against traveling to Mississippi, which passed a law "protecting religious organizations from government interference should they choose to deny services to members of the LGBT community based on their beliefs." Ginger O'Donnell, *Several States Restrict Travel to Those with Anti-LGBTQ Laws*, INSIGHT INTO DIVERSITY (Feb. 12, 2018), <https://www.insightintodiversity.com/several-states-restrict-travel-to-those-with-anti-lgbtq-laws/> [<https://perma.cc/J8BW-WFNS>].

181. Brian Sharp, *Rochester Joins NY in Banning Travel to Indiana in Protest of New Law*, DEMOCRAT & CHRONICLE (Mar. 31, 2015), <https://www.democratandchronicle.com/story/news/2015/03/31/travel-ban-indiana-rochester-new-york-religious-freedom-law/70730584/> [<https://perma.cc/QQE9-96J6>].

182. O'Donnell, *supra* note 180.

183. Neal Broverman, *Indiana Took \$60 Million Hit After Passing Antigay Law*, ADVOCATE (Jan. 26, 2016), <https://www.advocate.com/religion/2016/1/26/indiana-took-60-million-hit-after-passing-antigay-law> [<https://perma.cc/DC3P-YN4A>].

184. *Id.*

migration of California businesses to Texas.¹⁸⁵ Though these business migrations are linked to lower housing costs, lower tax rates, and fewer regulations, it is still noteworthy that Texas's LGBTQ laws did not deter California tech giants from moving operations to the red state.¹⁸⁶ Texas's experience with tech migration may be unique compared with the other states on California's ban list, but it remains unclear whether California's ban has influenced any state's economy in a substantial way. All things considered, California's legislation purpose is less of an attempt to weaken Texas's or other states' economies and more of an attempt to pander to voters within California.

The true danger of California's travel ban stems from power-hungry and vote-hungry politicians' dedication to making headlines. The ban provides such a plethora of exceptions that its actual effect is severely curtailed to the point of virtual nonexistence. Meanwhile, the political chatter surrounding the law only grows. With such minimal economic effect, even if all the states decide to pass similar laws, then the only thing achieved is more of the political animosity already so prevalent between the two political parties. Another possible consequence is that the law will largely go unenforced, as it is now, and its purpose will diminish and subside out of the nation's attention. A third possible consequence is a challenge to the statute's constitutionality from within California or a repeal of the statute through the legislature. Of the possible outcomes, an economic civil war is truly unlikely. This is a political game with very little economy in the equation. A political civil war might be a different story.

CONCLUSION

California's travel ban now effectively targets about 44% of the nation by prohibiting state-sponsored or state-funded travel to twenty-two sister states.¹⁸⁷ Other states have followed California's example.¹⁸⁸ The challenges to the ban came from the States of Texas and Arizona, which would ordinarily place the cases within the original jurisdiction of the Supreme Court. However, the Supreme Court declined the opportunity to adjudicate the matter in both cases. The Court has a history of avoiding political questions¹⁸⁹ and exercising its original jurisdiction only in extremely limited circumstances.¹⁹⁰ Based on the analysis of Article I,

185. Jean Folger, *Why Silicon Valley Companies Are Moving to Texas*, INVESTOPEDIA (Dec. 17, 2020), <https://www.investopedia.com/why-silicon-valley-companies-are-moving-to-texas-5092782> [<https://perma.cc/5ZFT-3EKB>].

186. *Id.*

187. Karlamangla, *supra* note 10.

188. O'Donnell, *supra* note 180.

189. *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 496 (1971).

190. *Arizona v. New Mexico*, 425 U.S. 794, 795 (1976).

California's statute is facially discriminatory. It does not fall within one of the exceptions, so the law is unconstitutional.¹⁹¹ With the Supreme Court refusing to hear arguments brought by Texas or Arizona, the states will need to seek another path to Supreme Court adjudication.

If the states desire a judicial ruling on the issues, they should find other forums in which to challenge California's law and then appeal any unfavorable decision to the Supreme Court. However, the judicial path may prove problematic for the states, as the lack of true economic effect makes it difficult if not impossible to argue actual damages. California's law failed to impact the economies of the target states, but it succeeded in widening the political divide in the nation. It is no secret that for the past few years, Americans have lived in an increasingly divided country. As LGBTQ organizations have noted, the travel ban does little to promote equality for LGBTQ individuals in red states.¹⁹² Instead, California's legislation serves as a political platform for politicians' reelection campaigns. From a birds-eye-view, the result is something of a Shakespearean play: it's funny, it's tragic, and it's oh-so-dramatic. Hopefully, the nation can end the narrative of the travel ban as a Shakespearean comedy with a happy ending, instead of a Shakespearean tragedy currently looming on the horizon for a divided and weary nation with our collective patience wearing thin.

191. *S. Pac. Co. v. Arizona*, 325 U.S. 761, 769 (1945).

192. Kalanjian, *supra* note 2, at 440.

