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### Charting a Course past Spokeo and TransUnion

Elizabeth Earle Beske

American University Washington College of Law, [beske@wcl.american.edu](mailto:beske@wcl.american.edu)

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CHARTING A COURSE PAST *SPOKEO* AND *TRANSUNION*

By

Elizabeth Earle Beske<sup>1</sup>

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INTRODUCTION

No one would defend Article III standing as coherent or tidy. From various points on the ideological spectrum, it has become canon to decry standing as “incoherent”<sup>2</sup> and “radically

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<sup>1</sup> Associate Professor, American University Washington College of Law. I am deeply indebted to Will Baude, Mike Carroll, and Amanda Frost for their helpful comments on earlier versions of this draft and to Riley Steele for his invaluable research assistance.

<sup>2</sup> F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 276 (2008); see also Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 228 (1990) (characterizing the Court’s Article III jurisprudence as “an array of conflicting case doctrines uninformed by a common vision”); Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1132 (2009) (noting that “the doctrine is widely regarded to be a mess”).

unsatisfying.”<sup>3</sup> At the same time, though most accept standing’s recent provenance,<sup>4</sup> it is commonplace to feel stuck with it, too.<sup>5</sup> Standing crops up everywhere but mutates, manifesting itself differently across subject-matter areas,<sup>6</sup> advancing diffuse separation of powers objectives,<sup>7</sup> and frustrating the effort to devise unifying principles.<sup>8</sup> Bluntly, it’s a mess.

Nowhere is the incoherence more pronounced than in the Roberts Court’s examination of Congress’s power to create litigable rights. The Court’s latest contributions, *Spokeo v. Robins*<sup>9</sup> and *TransUnion LLC v. Ramirez*,<sup>10</sup> charge federal courts with the unmoored task of examining statutory rights, comparing them to common law analogues, and using little more than intuition to assess whether they address “real” harms.<sup>11</sup> This Article will undoubtedly join a chorus of voices criticizing the Court’s approach. It demonstrates that Justice Thomas’s proposed distinction between public and private rights is analytically superior, the *TransUnion* majority rejects it based on the false assumption that it has no limiting principle, and the Court already has a way out of this mess in hand.

In *Spokeo v. Robins*, the Court vacated and remanded a case asserting claims under the Fair Credit Reporting Act so the Ninth Circuit could determine whether a company’s publication of inaccurate information about plaintiff, concededly particularized, had inflicted “concrete,” “real harm” that “actually exist[ed].”<sup>13</sup> Congress’s say-so did not suffice; a misprinted zip code, the Court suggested, would technically violate the statute but fail to meet the Article III

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<sup>3</sup> Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. LAW REV. 301, 304 (2002). See also Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PA. L. REV. 309, 311 (1995) (“Most scholars who have considered the Supreme Court’s standing doctrine have tried to demonstrate that the picture—at least as painted by the Supreme Court—is wrong.”).

<sup>4</sup> See Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 179 (1992) (describing standing’s emergence “in the 1920s and 1930s”); John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1009 (2002) (contending that “[t]here was no doctrine of standing prior to the middle of the twentieth century”); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988) (tracing standing to the second half of the twentieth century). But see Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 712, 732-33 (2004) (demonstrating early American courts’ reluctance to permit private litigants to vindicate the public interest); William Baude, *Standing in the Shadow of Congress*, 2016 S. CT. L. REV. 197, 198 (2017) (noting that early cases “featured [the] basic intuition that invasion of legal rights was necessarily an injury” but that “the language of modern standing doctrine did not appear until the twentieth century”).

<sup>5</sup> See Hessick, *supra* note \_\_, at 31 (speculating that the Court requires injury in fact because “it is firmly entrenched in the law”); Heather Elliott, *Congress’s Inability to Solve Standing Problems*, 91 B.U. LAW REV. 159, 160-61 (2011); (noting that the Court “seems unlikely to undertake reconstruction of the doctrine in the near- or medium-term”); Radha A. Pathak, *Statutory Standing and the Tyranny of Labels*, 62 OKLA. L. REV. 89, 91 (2009) (observing that the doctrine of constitutional standing appears to be “here to stay”).

<sup>6</sup> See Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1061 (2015) (describing standing’s fragmentation into “a multitude of varied, complexly related subdoctrines”).

<sup>7</sup> See Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 461-63 (identifying three different separation-of-powers justifications for the Article III standing inquiry).

<sup>8</sup> See Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1742 (1999) (lamenting the absence of “a doctrinal algorithm . . . to predict judicial decisions” in the standing area).

<sup>9</sup> 136 S. Ct. 1540 (2016).

<sup>10</sup> 141 S. Ct. 2190 (2021).

<sup>11</sup> See *infra* notes \_\_ and accompanying text.

<sup>13</sup> See *id.* at 1548-49.

standard.<sup>14</sup> The Court offered lower courts meager instruction on how to conduct the concreteness inquiry. It invited them to compare statutory violations to harms recognized at common law and, while describing Congress’s judgment on the question as “instructive and important,”<sup>15</sup> suggested they should give it little-to-no deference.

Justice Thomas joined the majority but wrote separately to make a nuanced point that held out fleeting promise of clarity.<sup>16</sup> He proposed to distinguish “private” rights—“those belonging to individuals”—from “public” rights shared by the community writ large.<sup>17</sup> At common law, the violation of a private right was actionable even in the absence of damage.<sup>18</sup> Justice Thomas proposed that, where Congress creates a private right, a court should assume there is a litigable injury without further inquiry into harm.<sup>19</sup> Only where plaintiff seeks to vindicate public rights, he suggested, do separation-of-powers concerns require plaintiff to demonstrate concrete and particularized harm, the telltale “injury-in-fact.”<sup>20</sup> In *Thole v. U.S. Bank, N.A.*,<sup>21</sup> Justice Thomas again pressed this distinction and picked up the agreement of Justice Gorsuch.<sup>22</sup> In *Uzuegbunam v. Preczewski*,<sup>23</sup> the Court reaffirmed the common-law principle, allowing a lawsuit raising First Amendment claims where the only relief sought was nominal damages of one dollar.<sup>24</sup> No one doubted that plaintiff had suffered a constitutionally sufficient injury-in-fact.<sup>25</sup> Though the plaintiff sought to vindicate a private constitutional right, not a private statutory right, the eight-to-one decision by Justice Thomas cited all the same cases and again underscored that, where there is “a clear violation of a right,” damage is presumed.<sup>26</sup> Writing shortly after *Spokeo*, which he termed a “misstep,”<sup>27</sup> Professor William Baude saw in Justice Thomas’s approach a “glimmer of hope.”<sup>28</sup> Professor Baude noted that Justice Thomas’s proposal, while promising, was “not yet fully developed.”<sup>29</sup> Neither Justice Thomas nor the

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<sup>14</sup> *See id.* at 1550.

<sup>15</sup> *Id.*

<sup>16</sup> Justice Thomas drew on the work of F. Andrew Hessick, Ann Woolhandler, and Caleb Nelson in formulating this approach. *See* Hessick, *supra* note \_\_; Woolhandler & Nelson, *supra* note \_\_.

<sup>17</sup> *Spokeo*, 136 S. Ct. at 1551-52 (Thomas, J., concurring) (citing 3 W. Blackstone, Commentaries \*2). Professors Woolhandler and Nelson, on whom Justice Thomas relied, *see id.* at 1551, defined private rights as rights “held by discrete individuals” and remediable by individual compensation or injunctions designed to avert private loss. Woolhandler & Nelson, *supra* note \_\_, at 693. Professor Hessick, also cited by Justice Thomas, described private rights as individually-held rights with origins at common law, in acts of the legislature, and in the Constitution. *See* Hessick, *supra* note \_\_, at 15-16.

<sup>18</sup> *See Spokeo*, 136 S. Ct. at 1551 (Thomas, J., concurring).

<sup>19</sup> *See id.* at 1553 (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1975); *Tenn. Elec. Power Co. v. TVA*, 306 U.S. 118, 137-38 (1939)).

<sup>20</sup> *See id.* at 1551.

<sup>21</sup> 140 S. Ct. 1615 (2020).

<sup>22</sup> *See id.* at 1622-23 (Thomas, J., concurring).

<sup>23</sup> 141 S. Ct. 792 (2021).

<sup>24</sup> *See id.* at 801-02.

<sup>25</sup> *See id.* at 798.

<sup>26</sup> *Id.* at 799 (citing *Webb v. Portland Mfg. Co.*, 29 F. Cas. 506, 508 (D. Me. 1838)).

<sup>27</sup> Baude, *supra* note \_\_, at 227.

<sup>28</sup> *Id.* at 198.

<sup>29</sup> *Id.* at 198.

scholarship on which he relied had resolved the “important and hard question: Under what circumstances can Congress privatize a previously public right?”<sup>30</sup>

The *Spokeo* majority did not adopt Justice Thomas’s proposed distinction, but neither did it preclude it. Lower courts largely confined themselves to the majority approach post-*Spokeo*, struggling in their effort to find common-law analogues and divine “real” harm.<sup>31</sup> Instructed by *Spokeo* that there is “no such thing as an anything-hurts-so-long-as-Congress-says-it-hurts theory of Article III injury,”<sup>32</sup> lower courts instead engaged in what one judge characterized as an “I know it when I see it” approach to standing,<sup>33</sup> substituting their own “value-laden judgments” for the policy determinations of Congress.<sup>33</sup> Several judges urged Justice Thomas’s proposed distinction as the better way forward.<sup>34</sup>

It was not to be. In *TransUnion LLC v. Ramirez*, a five-to-four Supreme Court compounded the problem and stubbornly refused to budge, solidifying the *Spokeo* majority approach and slamming the door on Justice Thomas’s proffered distinction. During a routine credit check, TransUnion, a credit reporting agency, had informed a car dealer that plaintiff’s name was on a terrorist watch list.<sup>36</sup> When he requested his credit file thereafter, TransUnion sent mailings that violated requirements in the Fair Credit Reporting Act<sup>37</sup> designed to inform consumers of their rights.<sup>38</sup> Plaintiff sought to represent a class of people who had suffered similar treatment, and the parties stipulated that TransUnion had divulged the reports of only

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<sup>30</sup> *Id.* at 230.

<sup>31</sup> *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 925 (11th Cir. 2020) (*en banc*) (“A lot of ink has been spilled to explain what concrete means, but the best word may also be the simplest—‘real.’”). Courts have split in their interpretations regarding violations of the Fair & Accurate Credit Transactions Act (FACTA), 15 U.S.C. § 1601. *Compare, e.g., Muransky*, 979 F.3d at 931 (rejecting analogy between FACTA and common-law breach of confidence), *with Kamal v. J. Crew Grp., Inc.*, 918 F.3d 102, 114 (3d Cir. 2019) (accepting analogy between FACTA and the tort of “unreasonable publicity”); *Jeffries v. Volume Servs. America, Inc.*, 928 F.3d 1059, 1064–65 (accepting analogy between FACTA and common-law breach of confidence). They have likewise split on violations of the Telephone Consumer Protection Act of 1991, 47 U.S.C. §227 (TCPA). *Compare Salcedo v. Hanna*, 936 F.3d 1162, 1172–1173 (11th Cir. 2019) (rejecting plaintiff’s argument that receipt of an unwanted text message represented concrete harm after distinguishing it from common law torts of intrusion on seclusion, trespass, nuisance, and conversion) *with Cranor v. 5 Star Nutrition, LLC*, No. 19-51173, 2021 WL 2133433, \*3 (5th Cir. May 26, 2021) (accepting analogy between receipt of unwanted text messages and invasion of privacy); *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 462 (7th Cir. 2020) (Barrett, J.) (same); *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017) (accepting analogy to common law intrusion upon seclusion).

<sup>32</sup> *Hagy v. Demers & Adams*, 882 F.3d 616, 622 (6th Cir. 2018).

<sup>33</sup> *Muransky*, 979 F.3d at 957 (Jordan, J., dissenting). Another judge noted that “inter- and intra-circuit tensions and conflicts” were “no surprise”; post-*Spokeo*, he lamented, “our Article III standing jurisprudence has jumped the tracks.” *Sierra v. City of Hallandale Beach, FL*, 996 F.3d 1110, 1116–17 (11th Cir. 2021) (Newsom, J., concurring).

<sup>34</sup> *See Muransky*, 979 F.3d at 958 (characterizing Justice Thomas’s approach as “[t]he better way to understand standing”); *Springer v. Cleveland Clinic Employee Health Plan Total Care*, 900 F.3d 284, 290–91 (6th Cir. 2018) (Thapar, J., concurring) (endorsing Justice Thomas’s approach); *Bryant v. Compass Grp. USA, Inc.*, 958 F.3d 617, 624 (7th Cir. 2020) (applying Justice Thomas’s rubric); *Zink v. First Niagara Bank, N.A.*, 206 F. Supp. 3d 810, 816 (W.D.N.Y. 2016) (characterizing Justice Thomas’s approach as offering “a reasonable (to me, at least) resolution to the confusion”). Judge Newsom likewise endorsed Justice Thomas’s dichotomy between private and public rights, *see Sierra*, 996 F.3d at 1136, but argued that standing doctrine was so incoherent that restrictions on Congress’s ability to confer standing to enforce public rights should be grounded in Article II, not Article III.

<sup>36</sup> *See id.* at 2201–02.

<sup>37</sup> 15 U.S.C. § 1681 *et seq.*

<sup>38</sup> 141 S. Ct. at 2200, 2202.

one-fifth of the members of the putative class to third parties.<sup>39</sup> The Court found that these class members had suffered concrete injury.<sup>40</sup> However, it concluded that the class members whose reports had *not* been provided to third parties could not analogize their claimed injury to injuries at common law and thus had not suffered concrete harm.<sup>41</sup> Justice Thomas argued for four in dissent that, because these were private, not public rights, the *Spokeo* concreteness inquiry should not apply.<sup>42</sup> The majority decisively rejected his approach.<sup>43</sup> Drawing such a distinction, the Court harrumphed, “would cast aside decades of precedent” and invite congressional manipulation, permitting Congress to “give all American citizens an individual right” to rights enjoyed in the aggregate.<sup>44</sup> Justice Thomas’s approach, the Court suggested, had no limiting principle; Congress would clothe public rights in private garb and a hapless Court, incapable of policing principled distinctions itself, would watch a multitude of separation-of-powers sins ensue.<sup>45</sup>

If *Spokeo* was a “misstep,” *TransUnion* is a face plant. The Court’s concreteness inquiry provides scant guidance to lower courts, invites them to substitute their own policy preferences for legislative will in frustration of the separation of powers, significantly curtails the deferential review of economic legislation the Court has employed since the New Deal, and circumscribes Congress’s ability to act proactively to prevent harms in the first place and react to novel challenges. This Article contends that Justice Thomas’s proffered distinction between public and private rights averts these evils and is consistent with the treatment of private rights at common law and the 8-1 decision in *Uzuegbunam*.

Moreover, the Court has a limiting principle at hand that will prevent Congress from conferring on all of us “individual” rights to public goods like the continued existence of the Nile crocodile.<sup>46</sup> For two decades, in a related line of implied-right-of-action and Section 1983 cases—*Alexander v. Sandoval*<sup>47</sup> and *Gonzaga University v. Doe*<sup>48</sup>—the Court has employed a textual approach to ascertaining whether Congress has created a private right. *Sandoval* rejected plaintiff’s invitation to infer an implied private right of action to enforce regulations promulgated under Title VI.<sup>49</sup> As a threshold and ultimately dispositive step, the Court scoured the statute for “rights-creating” language focused on the protection of a discrete class of individuals and did not find it.<sup>50</sup> *Gonzaga* examined when a plaintiff could sue a state university to enforce a statutory right under Section 1983.<sup>51</sup> The Court again made the search for the existence of a personal right

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<sup>39</sup> *See id.* at 2202.

<sup>40</sup> *See id.* at 2200, 2208-09.

<sup>41</sup> *See id.* at 2210. The Court also ruled out injury-in-fact with respect to the format of the mailings, concluding that plaintiff’s claim presented a bare procedural violation. *See id.* at 2213.

<sup>42</sup> *See id.* at 2217 (Thomas, J., dissenting).

<sup>43</sup> *See id.* at 2218 n.3.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Cf. Sunstein, supra* note \_\_\_, at 205 (arguing that nothing in Article III would preclude this).

<sup>47</sup> 532 U.S. 275 (2001).

<sup>48</sup> 536 U.S. 273 (2002).

<sup>49</sup> 532 U.S. at 288-89.

<sup>50</sup> *Id.* at 288.

<sup>51</sup> 536 U.S. at 276.

an outcome-determinative first step, clarifying that only “an unambiguously conferred right”—not broad or vague “benefits” or “interests”—suffices.<sup>52</sup> This Article demonstrates that the *Sandoval/Gonzaga* inquiry provides an approach, grounded in statutory text rather than judicial preference, for a threshold stop to determine whether the violation of a statute gives rise to litigable injury. Its focus on an “*individual* entitlement” and requires a class of expressly identified “beneficiaries”—thus, an identified subset of individuals, not the public as a whole.<sup>53</sup> Rights-creating language, a beneficiary class, and the particularization requirement can do the work and return federal courts to their proper lane. The *TransUnion* Court need not have thrown up its hands.

Part I canvasses standing and its purported mission to vindicate the separation of powers and concludes that, though several separation-of-powers constructs underlie standing, a core, oft-repeated purpose has been to keep judges out of decision-making better suited to the political process. Part II demonstrates that the *Spokeo* and *TransUnion* concreteness inquiry dramatically transgresses this separation-of-powers principle and has left federal judges thrashing around in the deep end of the political pool. In insisting upon “real” harm, the Court has sharply curtailed the array of approaches Congress has to address the problems of our modern era, effectively hamstringing its efforts at prevention. The *Spokeo/TransUnion* concreteness inquiry invites the insertion of judicial policy preferences and cannot be squared either with the separation-of-powers underpinnings of standing doctrine or the rational basis scrutiny to which the post-New Deal Court normally subjects ordinary legislation.

Part III identifies a ready textual mechanism for differentiating between public and private rights in the *Sandoval/Gonzaga* approach that emerges in the Court’s private-right-of-action cases. These cases require rights-creating language that focuses on an identified class of beneficiaries. Using this mechanism, Justice Thomas’s public/private rights dichotomy represents a workable and principled solution that does not, as the *TransUnion* majority suggests, hand Congress a blank check to run roughshod over the separation of powers. Quite the contrary, Justice Thomas’s approach is consistent with history, keeps unelected judges from decision-making better suited to the political sphere, and is susceptible of limits. Robust enforcement of the particularization requirement insists that plaintiff herself suffer a violation. In short, we are in a mess, but there’s a way out, and this Article flags that the Court has a map already in hand.<sup>54</sup>

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<sup>52</sup> *Id.* at 283.

<sup>53</sup> *Id.* at 286-87. See *infra* notes \_\_\_ and accompanying text.

<sup>54</sup> Some standing cases involving statutory rights present challenges whether or not one accepts the public/private rights dichotomy or the *Spokeo/TransUnion* status quo, and this Article lamentably can offer no magic trick for harmonizing all of it. Informational standing, which two commentators termed standing doctrine’s “dirty little secret,” Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine’s Dirty Little Secret*, 107 NW. U. L. REV. 169, 169 (2012), sits uneasily with the particularization requirement the Court has insisted on in other standing contexts and is hard to fit within any framework that eschews standing for generalized grievances. This Article reserves for another day the question whether informational statutes confer public rights in the sense of *Stern v. Marshall*, 564 U.S. 462 (2011), that might more optimally and appropriately find vindication in non-Article III tribunals. Congress’s ability to authorize *qui tam* relators to bring suit on behalf of the United States, too, is in tension with the public/private dichotomy, but the Court has upheld it as an assigned interest buffeted by its historical pedigree. See *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773-778 (2000). Finally, this Article chooses to join commentators who see *Massachusetts v. EPA* as a case distinguished by the

## I. The Road to *Spokeo*: Doctrinal and Theoretical Development

Modern standing doctrine reflects a decades-long tug of war over different conceptions of the judicial function.<sup>55</sup> An early private rights model of litigation, under which individuals generally could litigate violations of private rights but not broadly shared public rights, gave way under the Warren Court to a public rights model that permitted many more stakeholders into federal courts. The Burger, Rehnquist, and Roberts Courts developed a more robust standing inquiry in the Warren Court’s wake as a mechanism for easing the federal judiciary back toward the private rights model. This Part briefly traces *Spokeo* and *TransUnion*’s antecedents and explores the different conceptions of separation of powers that underlie the Court’s standing jurisprudence, concluding that the modern Court has tied standing inextricably to the separation of powers and that an oft-articulated, core purpose of standing doctrine is to keep the federal courts from intruding into the political process.

### A. The Private and Public Rights Models

The distinction between public and private rights at common law is a well-accepted feature of our landscape. Blackstone devoted a whole book to each. He described private rights as “private or civil rights belonging to individuals, considered as individuals.”<sup>56</sup> Public rights, in contrast, represented “rights and duties due to the whole community, considered as a community in its social aggregate capacity.”<sup>57</sup> Professors Ann Woolhandler and Caleb Nelson chronicle that in the early republic “the requirements of public control over public rights and private control over private rights predominated in American law.”<sup>58</sup> The vindication of widely-shared public

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involvement of sovereign interests, presenting facets that set it apart from the main run of *Spokeo* and *TransUnion* cases. See, e.g., Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1, 40-41 (2011); Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L. J. 2023, 2036-39 & n.51, 2062-63 (2008); Kathryn A. Watts & Amy J. Wildermuth, *Massachusetts v. EPA: Breaking New Ground on Issues Other Than Global Warming*, 102 NW. U. L. REV. 1029, 1030-31, 1036 (2008).

<sup>55</sup> Scholars have debated whether standing as an Article III requirement is a mid-twentieth-century phenomenon. See Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921-2006*, 62 STAN. L. REV. 591, 594 (2010) (“[E]ven the most basic question of the origins of the standing doctrine eludes scholars.”). Compare Woolhandler & Nelson, *supra* note \_\_, at 712 (finding in pre-twentieth century cases “the general notion that public officers pursue public rights and private parties pursue private rights”); *id.* at 732 (arguing that “standing doctrine has a far longer history than its modern critics concede”); with Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1374 (1988) (arguing that, for the first 150 years, the Framers, Congress, and the Court were “oblivious” to the idea that standing is a constitutional requirement and that standing is “a distinctly twentieth century product”); Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show That Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239, 2241 (1999) (observing that many scholars have described the injury-in-fact requirement as “a relatively recent invention”); Sunstein, *supra* note \_\_, at 169-170 (noting, in 1992, that “the injury-in-fact test played no role in administrative and constitutional law until the past quarter century”).

<sup>56</sup> William Blackstone, 3 COMMENTARIES \*2.

<sup>57</sup> William Blackstone, 4 COMMENTARIES \*5.

<sup>58</sup> Woolhandler & Nelson, *supra* note \_\_, at 695. Woolhandler and Nelson acknowledge that *qui tam* statutes represent an exception to the general pattern but contend that critics of standing doctrine who have pointed to *qui tam* statutes “have perhaps exaggerated the extent of federal *qui tam* litigation.” *Id.* at 728. But see Hartnett, *supra* note \_\_, at 2243 (“Current standing doctrine and deeply rooted *qui tam* practice are on a collision course.”).

rights was traditionally the province of the government or the political process.<sup>59</sup> Individuals could resort to courts to enforce their private rights,<sup>60</sup> and, as Professor Andrew Hessick documents, actions for violation of private rights were sustained even in the absence of demonstrable harm.<sup>61</sup> As the Court reaffirmed in *Uzuegbunam v. Preczewski*,<sup>62</sup> at common law, it was an “incontrovertible” proposition that, “every injury imports damage,” and if no other damage is established, the plaintiff “is entitled to a verdict for nominal damages.”<sup>63</sup>

The private rights model, under which private litigants could sue to vindicate their private—but not public—rights, found early support in *Marbury v. Madison*, with Chief Justice Marshall committing the federal courts to examining the law not abstractly but as a byproduct of fielding the private claims of litigants with real, live disputes.<sup>64</sup> Thus, the Court’s first question and point of departure was whether Marbury had a personal right to his commission, and it proceeded further only upon answering that question in the affirmative.<sup>65</sup> The *Marbury* Court’s embrace of a private rights model and analogy to “ordinary” common law litigation was likely born of necessity due to “strong ambivalence about the propriety of judicial review in a democratic society.”<sup>66</sup> The fraught political climate after the election of 1800 made Marshall’s

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<sup>59</sup> See Woolhandler & Nelson, *supra* note \_\_, at 696.

<sup>60</sup> See *id.* at 697.

<sup>61</sup> See Hessick, *supra* note \_\_, at 282-83. See also *Spokeo v. Robins*, 136 S. Ct. 1540, 1551 (2016) (Thomas, J., concurring) (“In a suit for the violation of a private right, courts historically presumed that the plaintiff suffered a *de facto* injury merely from having his personal, legal rights invaded.”).

<sup>62</sup> 141 S. Ct. 792 (2021).

<sup>63</sup> *Id.* at 799 (quoting Justice Story’s opinion in *Webb v. Portland Mfg.*, 29 F. Cas. 506, 507-508 (D. Me. 1838)).

<sup>64</sup> 5 U.S. (1 Cranch) 137, 163 (1803). Scholars have debated *Marbury*’s embrace of the private rights model, with some finding more scattered breadcrumbs supporting the Court’s “special function” of articulating the contours of federal law. Compare Henry P. Monaghan, *Constitutional Adjudication: The Who and the When*, 82 YALE L.J. 1363, 1365-66 (1973) (describing *Marbury* as the “crucible” for the entrenchment of the private rights model); Pfander, *supra* note \_\_, at 1541 (characterizing *Marbury* as typifying “nineteenth century, private law litigation,” with constitutional claims arising “incidentally in the course of litigating private claims”); Martin H. Redish & Sopan Joshi, *Litigating Article III Standing: A Proposed Solution to the Serious (But Unrecognized) Separation of Powers Problem*, 162 U. PA. L. REV. 1373, 1375 (2014) (finding in *Marbury* recognition that courts’ “traditional adjudicatory role was limited to the resolution of real private disputes) with Richard H. Fallon, Jr., *Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 CAL. L. REV. 1, 8 (2003) (arguing that *Marbury* has a “special-functions face” and a “prudential face,” in addition to its “private-rights face”); Robert J. Pushaw, Jr., *Article III’s Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 500-501 (1994) (arguing that Marshall’s “extensive (and perhaps unnecessary) discussion of judicial review as part of the Court’s law declaration function . . . undercuts the popular notion that he viewed constitutional exposition as incidental to dispute resolution”); Winter, *supra* note \_\_, at 1416 (arguing that “*Marbury*’s assertion of the power of judicial review followed naturally from the affirmation of the public rights model of mandamus power over executive officials”); Martin H. Redish, *The Passive Virtues, The Counter-Majoritarian Principle, and the “Judicial-Political” Model of Constitutional Adjudication*, 22 CONN. L. REV. 647, 653 (1990) (arguing that language in *Marbury* embracing the private rights model needs to be contextualized).

<sup>65</sup> *Marbury*, 5 U.S. (1 Cranch) at 167-68. See Woolhandler & Nelson, *supra* note \_\_, at 711 (noting that *Marbury* “highlighted the need for private relators to allege private injury”). But see Girardeau A. Spann, *Expository Justice*, 131 U. PA. L. REV. 585, 591 (1983) (arguing that *Marbury* embraces a special-function role rather than a dispute-resolution model because, in concluding that it lacked jurisdiction, “the Court also lacked jurisdiction to opine as to otherwise pertinent principles of law”).

<sup>66</sup> Monaghan, *supra* note \_\_, at 1366.

course perilous.<sup>67</sup> Indeed, Professor Henry Monaghan opines that “frequent judicial intervention in the political process” in that era would have engendered “such widespread political reaction” as to “destroy[]” the federal courts.<sup>68</sup>

Early twentieth century cases reflected the Court’s reluctance to permit individual litigants to advance widely-shared, generalized grievances better suited to the political arena. In *Fairchild v. Hughes*,<sup>69</sup> a plaintiff who had unsuccessfully fought ratification of the Nineteenth Amendment brought his cause to the courts, seeking a declaration that the amendment was unconstitutional and void.<sup>70</sup> The Supreme Court concluded that plaintiff’s interest was “not such as to afford a basis” for the suit.<sup>71</sup> Plaintiff claimed no personal wrongs; he simply asserted “the right, possessed by every citizen, to require that the Government be administered according to law.”<sup>72</sup> In other words, he sought to enforce what Blackstone would have termed a public right. The following year, in *Frothingham v. Mellon*,<sup>73</sup> the Court rejected a taxpayer’s challenge to a statute designed to reduce maternal and infant mortality.<sup>74</sup> The taxpayer’s “minute and indeterminable” interest was “shared with millions of others,” and the issue was “essentially a matter of public and not of individual concern.”<sup>75</sup> The Court held that, to permit suit where plaintiff “suffers in some indefinite way in common with people generally” would allow federal courts to usurp the role of the legislature, “an authority which plainly we do not possess.”<sup>76</sup>

The modern story arc of standing begins with the Warren Court’s free-wheeling turn away from this paradigm and ends with an about-face under the Burger, Rehnquist, and Roberts Courts thereafter. Alongside the emergence of the administrative state in the middle of the twentieth century came an awareness that statutes did not just regulate targets but had beneficiaries who were stakeholders in their enforcement as well.<sup>77</sup> In the “generous sixties and seventies,” the Warren Court increasingly expanded the pool of plaintiffs to permit these beneficiaries, the “consumers, users of the wilderness, competitors, air breathers, and water drinkers” to sue to compel enforcement of statutes where they were at least arguably within its

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<sup>67</sup> See BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF THE PRESIDENTIAL DEMOCRACY* 6 (2005) (describing “a decade of grim institutional struggle between the men of 1800 and the men of 1787—between the president, whose mandate from the People was backed by Congress, and the Court, whose mandate was backed by a piece of paper”); *id.* at 8 (*Marbury* was part of “a large strategic retreat”).

<sup>68</sup> Monaghan, *supra* note \_\_\_, at 1366..

<sup>69</sup> 258 U.S. 126 (1922).

<sup>70</sup> *See id.* at 127.

<sup>71</sup> *Id.* at 129.

<sup>72</sup> *Id.*

<sup>73</sup> 262 U.S. 447 (1923).

<sup>74</sup> *See id.* at 487.

<sup>75</sup> *Id.* *See also* Ex parte Levitt, 302 U.S. 633 (1937) (rebuffing a challenge to Justice Hugo Black’s confirmation, noting the challenger “has merely a general interest common to all members of the public”).

<sup>76</sup> *Frothingham*, 262 U.S. at 488-89. Professor Monaghan calls *Frothingham* “the classic judicial expression of the ‘private rights’ model.” Monaghan, *supra* note \_\_ [Who & When], at 1367.

<sup>77</sup> *See* Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1433 (1988). *See also* Jonathan R. Siegel, *Zone of Interests*, 92 GEO. L.J. 317, 321-22 (2004) (observing that the Court offered little early guidance on the source or application of the zone of interests test).

“zone of interest.”<sup>78</sup> In *Flast v. Cohen*,<sup>79</sup> moreover, an 8-1 Court carved an exception to *Frothingham*’s “impenetrable barrier” against taxpayer standing, permitting any aggrieved, tax-paying citizen to challenge congressional appropriations as violations of the Establishment Clause.<sup>80</sup> So pronounced was the expansion of the litigant pool that Professor Louis Jaffe could remark, in 1972, that, while it might appear “anomalous” for an individual to press public rights, “we are becoming more and more familiar with the judicial enforcement of public or group interests at the suit of individuals and groups who may or may not be direct beneficiaries of the judgment.”<sup>81</sup> In 1977, Professor Abram Chayes observed that “the dominating characteristic of modern federal litigation is that lawsuits do not arise out of disputes between private parties about private rights.”<sup>82</sup> The Court coined “injury in fact” to expand the pool of potential plaintiffs by disaggregating the right to sue from the literal violation of a statute,<sup>83</sup> creating what Professor Hessick termed a “quasi-public model of standing.”<sup>84</sup>

Backlash ensued. In 1983, then-Judge Antonin Scalia inveighed against the “overjudicialization of the processes of self-governance,”<sup>85</sup> urging a return to “judges’ proper business—‘solely, to decide on the rights of individuals.’”<sup>86</sup> By 1988, Professor Cass Sunstein detected “[r]ecent and still quite tentative innovations in the law of standing” that “have started to push legal doctrine in the direction of . . . a private-law model.”<sup>87</sup> Four years later, *Lujan v. Defenders of Wildlife*<sup>88</sup> repurposed the injury-in-fact requirement as a mechanism for circumscribing the ranks of potential litigants, permitting suit under a broad citizen-suit

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<sup>78</sup> Patricia M. Wald, *The D.C. Circuit: Here and Now*, 55 G.W. L. REV. 718, 719 (1987); see also Hessick, *supra* note \_\_, at 292-93 (describing the Warren Court’s abandonment of the private rights model because it limited the Court’s ability to oversee administrative agencies); Sunstein, *supra* note \_\_, at 1443-44 (grounding Warren Court’s model in need for “judicial checks” on regulatory capture, unlawful failure to regulate, and a desire to protect regulatory beneficiaries who might face impediments in the political process).

<sup>79</sup> 392 U.S. 83 (1968).

<sup>80</sup> *Id.* at 85, 88. Professor Fallon cites *Frothingham* and *Flast* as textbook examples of the private and public rights models, respectively. See Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 658 n. 82 (2006).

<sup>81</sup> Louis L. Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768, 774 (1972). See also Monaghan, *supra* note \_\_ [Who & When], at 1369-71 (noting, in 1973, the weakening of the private rights model and an emergent belief in “constitutional litigation as ‘public actions,’ which may or may not involve private rights”).

<sup>82</sup> Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1977); see also Fletcher, *supra* note \_\_, at 227 (noting surge in litigation during the Warren Court era “by litigants who were not individually affected by the conduct of which they complained in any way markedly different from most of the population”). By 1982, Professor Chayes was presciently noting “countertendencies” and a “broad change in political mood.” Abram Chayes, *The Supreme Court 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 7 (1982).

<sup>83</sup> *Assoc. of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152 (1970).

<sup>84</sup> Hessick, *supra* note \_\_, at 294; see also Lee & Ellis, *supra* note \_\_, at 177 (noting that the *Data Processing* Court separated litigable injury in fact from legal harm); Rachel Bayefsky, *Constitutional Injury and Tangibility*, 59 WM. & MARY L. REV. 2285, 2296 (2018) (rooting the injury-in-fact requirement in the effort to “liberalize the law of standing”).

<sup>85</sup> Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK L. REV. 881, 881 (1983).

<sup>86</sup> *Id.* at 884 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)).

<sup>87</sup> Sunstein, *supra* note \_\_, [Standing and the Privatization] at 1433.

<sup>88</sup> 504 U.S. 555 (1992).

provision only where the injury “affect[ed] the plaintiff in a personal and individual way” and plaintiff was himself “among the injured.”<sup>89</sup> To contemporaneous commentators, Justice Scalia’s majority opinion signified a “dramatic” regression to the private rights model that portended the invalidation of “the large number of statutes in which Congress has attempted to use the ‘citizen-suit’ device as a mechanism for controlling unlawfully inadequate enforcement of the law.”<sup>90</sup>

Despite *Lujan*’s signaled shift, the Court moved in fits and starts thereafter, and the rule against generalized grievances soon blurred. In *Federal Election Commission v. Akins*,<sup>91</sup> the Court found standing when plaintiffs, a group of voters, challenged the FEC’s conclusion that American Israel Public Affairs Committee (AIPAC) was not subject to donor and expenditure disclosure requirements under a federal statute.<sup>92</sup> The Court concluded that Congress had sought to ensure that voters received information related to these campaign activities and thus had squarely prevented the harm they alleged.<sup>93</sup> To the government’s argument that this was a generalized grievance, and over a bitter Justice Scalia dissent, the Court responded that prior cases had rejected “abstract and indefinite” interests like “seeing that the law is obeyed”; here, in contrast, although plaintiffs’ claimed deprivation of information was “widely shared,” it was also “concrete.”<sup>94</sup> In *Massachusetts v. EPA*,<sup>95</sup> the Court found that the Commonwealth of Massachusetts had standing to challenge the EPA’s rejection of a petition for rulemaking to regulate greenhouse gases.<sup>96</sup> The Court concluded that Massachusetts had asserted an enforceable procedural right and noted that “rising seas” were “swallow[ing] Massachusetts’ coastal land.”<sup>97</sup> That the cited risks were “widely shared,” the Court found, did not mean Massachusetts lacked a litigable injury.<sup>98</sup>

While leaving *Akins* and *Massachusetts v. EPA* intact, subsequent cases have reemphasized the requirement that plaintiff face harm distinct from that suffered by the public at

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<sup>89</sup> *Id.* at 560 n. 1, 563.

<sup>90</sup> Sunstein, *What’s Standing*, *supra* note \_\_\_ at 164-65. *See also* Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1166 (1993) (characterizing *Lujan* as part of “a broader agenda” to roll back the public litigation model); *The Supreme Court, 1991 Term Leading Cases – Standing – Congressional Power to Define Judicially Cognizable Injuries*, 106 HARV. L. REV. 308, 313 (1992) (describing *Lujan* as “an important turning point in standing doctrine”); Seth Davis, *The Private Rights of Public Governments*, 94 NOTRE DAME L. REV. 2091, 2097 (2019) (describing return over past four decades to a private rights model).

<sup>91</sup> 524 U.S. 11 (1998).

<sup>92</sup> *See id.* at 20-21. The *Akins* Court relied on two pre-*Lujan* cases to reaffirm informational standing. *See id.* at 21 (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) and *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989)). Interestingly, *Lujan* cited neither.

<sup>93</sup> *See Akins*, 524 U.S. at 22.

<sup>94</sup> *Id.* at 24. Commentators initially saw in *Akins* “the suggestion that Congress can overcome the barrier to ‘generalized grievances.’” Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 616 (1999); *see also* Kimberly N. Brown, *What’s Left Standing? FECA Citizen Suits and the Battle for Judicial Review*, 55 U. KAN. L. REV. 677, 691 (2007) (arguing that, after *Akins*, short of allowing suit for “[p]ure distaste in government activity,” Congress “can define ‘injuries’ that are cognizable notwithstanding that the public as a whole suffers them”).

<sup>95</sup> 549 U.S. 497 (2007).

<sup>96</sup> *See id.* at 521.

<sup>97</sup> *Id.* at 522.

<sup>98</sup> *Id.*

large. In *Hein v. Freedom from Religion Foundation*<sup>99</sup> and *Arizona Christian School Tuition Organization v. Winn*,<sup>100</sup> the Court circumscribed taxpayer standing to precise *Flast v. Cohen*<sup>101</sup> facts, effectively putting that case in a box.<sup>102</sup> In *Summers v. Earth Island Institute*,<sup>103</sup> the Court rejected an environmental group’s effort to prevent the U.S. Forest Service from exempting certain forest projects from the notice-and-comment process.<sup>104</sup> The Court, per Justice Scalia, underscored that the injury-in-fact requirement kept federal courts from fielding generalized grievances, requiring that plaintiff demonstrate a “real need” “to warrant *his* invocation of federal-court jurisdiction.”<sup>105</sup> Without citing *Akins*, the Court sharply rejected plaintiffs’ claim that their inability to file comments itself represented litigable procedural injury.<sup>106</sup> Congress could not create standing by legislating procedural rights *in vacuo*, untethered to individual concrete injury; “the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute.”<sup>107</sup>

Since *Lujan*, the Court has stepped away from the Warren Court’s public rights model of adjudication, but—though it has agreed on the litany of adjectives that modifies the injury-in-fact requirement<sup>108</sup>—its enforcement of the requirement has reflected an internal struggle over when and under what circumstances plaintiffs can assert widely shared grievances. Since 2007, the trend has been to require individual and differentiated injury. *Akins* and *Massachusetts v. EPA* remain on the books but seemed to be outliers even before the Court’s change in personnel.<sup>109</sup>

## B. Separation-of-Powers Purposes of Standing

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<sup>99</sup> 551 U.S. 587 (2007).

<sup>100</sup> 563 U.S. 125 (2011).

<sup>101</sup> 392 U.S. 83 (1968).

<sup>102</sup> 551 U.S. at 593, 615 (opinion of Alito, J.). *Hein* had no majority opinion. Justice Scalia and Justice Thomas concurred in the judgment in *Hein* and urged that *Flast* be overruled. *See id.* at 618 (Scalia, J., concurring in the judgment); *see also id.* at 636 (“generalized grievances affecting the public at large have their remedy in the political process”). After *Winn*, leading commentators suggested that the Court had engaged in “stealth” overruling of *Flast*. RICHARD H. FALLON, JR. *ET AL.*, *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 130 (7th ed. 2015).

<sup>103</sup> 555 U.S. 488 (2009).

<sup>104</sup> *See id.* at 495-97.

<sup>105</sup> *Id.* at 493 (emphasis original).

<sup>106</sup> *See id.* at 496-97.

<sup>107</sup> *Id.* at 497. In *Lexmark International Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014), the Court reaffirmed in dicta that cases in which plaintiff “seek[s] relief that no more directly and tangibly benefits him than it does the public at large . . . do not present constitutional ‘cases’ or ‘controversies,’” thus anchoring the injunction against generalized grievances more firmly in Article III. *Id.* at 127 n. 3.

<sup>108</sup> *See* Craig Konnoth & Seth Kreimer, *Spelling Out Spokeo*, 165 U. PA. L. REV. ONLINE 47, 47-48 (2016) (remarking that the Court’s over one hundred cases turning on injury in fact have “festoon[ed] the bedrock with adjectives”).

<sup>109</sup> *See* Kimberly N. Brown, *Justiciable Generalized Grievances*, 68 MD. L. REV. 221, 233 (noting that *Akins* “has largely been considered *sui generis*, confined to voter cases involving requests for information” and that “its irreconcilability with *Lujan* has invited relitigation of the literal *Akins* holding even in cases brought under the FECA”); *id.* at 223 (calling the *Massachusetts v. EPA* case “a stunner” that contravened the Court’s injunction against fielding generalized grievances); Metzger, *Federalism and Federal Agency Reform*, *supra* note \_\_, at 40-41 (describing *Massachusetts v. EPA* as an “outlier” and noting that the Court offered “little clarification” of how *Massachusetts*’ state status affected the inquiry”).

If standing doctrine is contentious within the Court itself and universally maligned in the academy, why put ourselves through it? Article III standing, the Court has repeatedly instructed, “is built on a single basic idea—the idea of separation of powers.”<sup>110</sup> Given the serpentine doctrinal development over the past several decades, it is perhaps unsurprising that the Justices’ agreement on this point masks several discrete concepts. Professor Heather Elliott has identified three different separation-of-powers functions purportedly served by standing doctrine, which she termed “the concrete-adversity function,” “the pro-democracy function,” and the “anticonscription function.”<sup>111</sup> Understanding the various interests served by—or at least claimed by—standing doctrine helps contextualize the Court’s moves in *Spokeo* and *TransUnion*.

The concrete-adversity function is a Warren-Era construct in which standing operates to ensure that federal courts decide cases presented in an adversarial posture.<sup>112</sup> It thus promotes better decision-making. Requiring that plaintiff have a personal stake contributes to “concrete adverseness which sharpens the presentation of issues.”<sup>113</sup> In *Flast v. Cohen*, the Court explained that the standing question “[did] not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of government.”<sup>114</sup> Still, *Flast* elsewhere described standing as “a device used by the Court to avoid judicial inquiry into questions of social policy and the political wisdom of Congress.”<sup>115</sup> Ensuring that cases arrived in an adversarial, sharp posture fostered good decision-making while itself helping to keep the federal courts in their lanes.

The pro-democracy function of standing protects the integrity of the political process more overtly by diverting generalized grievances away from the unelected federal courts.<sup>116</sup> In then-Judge Scalia’s classic formulation, standing excludes courts from the “undemocratic role of prescribing how the other two branches should function in order to serve the interest of *the majority itself*.”<sup>117</sup> The courts are for individuals facing unique harm or minorities in need of protection; “the majority needs no protection from itself.”<sup>118</sup> A robust standing inquiry, the Court explained, thus withdraws from “unelected judges [the] general authority to conduct oversight of decisions of the elected branches of government.”<sup>119</sup> While focused on protecting other branches, the pro-democracy function also reflects concern for the federal courts’ institutional legitimacy

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<sup>110</sup> *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021); *Raines v. Byrd*, 521 U.S. 811, 820 (1997); *Allen v. Wright*, 468 U.S. 737, 752 (1984).

<sup>111</sup> Elliott, *supra* note \_\_, at 460. Elliott argued that standing doctrine “is ill-suited to most of the functions it is asked to serve.” *Id.* at 463. Professor Maxwell Stearns has identified an additional separation-of-powers interest served by standing: it erects hurdles and thereby “substantially reduces the extent to which litigants can force the creation of positive law in federal courts” as a way around legislative inertia. Maxwell L. Stearns, *Standing Back From the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309, 1319 (1995).

<sup>112</sup> *See id.* at 469-70.

<sup>113</sup> *Baker v. Carr*, 369 U.S. 186, 204 (1962).

<sup>114</sup> 392 U.S. 83, 100 (1968). Then-Judge Scalia derided the *Flast* articulation of the purpose of standing, *see* Scalia, *supra* note \_\_, at 892, and its zenith certainly preceded the Rehnquist Court.

<sup>115</sup> *Id.* n. 22.

<sup>116</sup> *See* Elliott, *supra* note \_\_, at 477.

<sup>117</sup> Scalia, *supra* note \_\_, at 894 (emphasis original).

<sup>118</sup> Jonathan R. Siegel, *What If the Universal Injury-in-Fact Test Already Is Normative?*, 65 ALA. L. REV. 403, 410 (2013).

<sup>119</sup> *California v. Texas*, 593 U.S. \_\_ (2021) (slip op., at 9).

given the “countermajoritarian difficulty,”<sup>120</sup> the age-old struggle to reconcile an unelected judiciary with its power to displace the work of the legislative branch. Thus, Alexander Bickel argued in 1962 that standing “cushions the clash between the Court and any given legislative majority.”<sup>121</sup>

Finally, standing’s anticonscription function erects high walls around Article II, barring Congress from enlisting the federal courts as “virtually continuing monitors of the wisdom and soundness of Executive action.”<sup>122</sup> The villain in this context is the citizen-suit provision, the unwitting pawn is the federal courts, and the hero is the unitary executive, which concentrates all executive power in the office of the President and insulates the executive branch from legislative encroachment.<sup>123</sup> Under this view of standing, Congress must be stopped from “convert[ing] the undifferentiated public interest in executive officers’ compliance with the law into an ‘individual right’ vindicable in the courts,”<sup>124</sup> for doing so trammels on presidential prerogative. The issue frequently arises in situations of agency non-enforcement. As then-Judge Scalia put it, in the absence of particularized individual harm, barring suit is “a good thing,” because “lots of once-heralded programs ought to get lost or misdirected, in vast hallways or elsewhere,” and “we judges, in the seclusion of our chambers, may not be *au courant* enough to realize it.”<sup>125</sup>

Professor Elliott persuasively argues that standing has traditionally done a poor job at actually serving any of these functions.<sup>126</sup> As the next part shows, with *Spokeo* and *TransUnion*, the Roberts Court has elevated the anticonscription function at the expense of the pro-democracy function, abandoning the pretense of keeping federal courts out of the political process.

## II. A Misstep, Then a Caren

Into this already-confused area, with its vacillating conception of the judicial function, its tough-to-square precedents on generalized grievances, and its multiple conceptions of the separation-of powers backstory, dropped *Spokeo v. Robins* in 2016. *Spokeo* returned the Court to the vexing question when, exactly, “statutes creat[e] legal rights, the invasion of which creates

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<sup>120</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 115 (1962).

<sup>121</sup> *Id.*

<sup>122</sup> Elliott, *supra* note \_\_\_, at 493 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992)). Professor Lisa Schultz Bressman noted this as a singular feature in regulatory cases, where “the standing requirement blunts a different sort of clash—one between the Court and any given presidential administration.” Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1682 (2004).

<sup>123</sup> See Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165 (1992) (explaining Unitary Executive theorists’ view that the Vesting Clause and the Take Care Clause “creat[e] a hierarchical, unified executive department under the direct control of the President” and that “the President alone possesses *all* of the executive power”); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 550 (1994) (arguing that “originalist textual and historical arguments for the unitary Executive, taken together, firmly establish the theory”).

<sup>124</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992).

<sup>125</sup> Scalia, *supra* note \_\_\_, at 897.

<sup>126</sup> See Elliott, *supra* note \_\_\_, at 500.

standing.”<sup>128</sup> While the Court had repeatedly said Congress could create enforceable rights,<sup>129</sup> it had also invalidated congressional efforts to do so.<sup>130</sup> *Spokeo* presented the Court with an opportunity to reconcile these two contradictory impulses by clearly demarcating when congressional efforts to create enforceable rights did and did not comport with Article III.<sup>131</sup>

The Court had shied away from the fight four years before. In *First American Financial Corp. v. Edwards*,<sup>132</sup> a home purchaser brought suit alleging that her title insurer’s payment of money to a title company in exchange for an exclusive referral agreement violated provisions of the Real Estate Settlement Procedures Act of 1974 (RESPA)<sup>133</sup> barring kickbacks.<sup>134</sup> In addition to imposing criminal penalties, the statute authorized anyone charged for settlement services that violated its provisions to file a civil action and receive damages of three times any settlement charges paid.<sup>135</sup> The Ninth Circuit joined two sister circuits in concluding that plaintiff had standing even though the violation had not resulted in any overcharge, noting that the statute did not require such a showing and that legislative history reflected Congress’s concern with the impartiality of the referring entity.<sup>136</sup>

The Supreme Court granted certiorari in the absence of a circuit split.<sup>137</sup> At argument, plaintiff’s counsel contended that the statute gave her the “right to a conflict-free transaction” and analogized her injury to a breach of the duty of loyalty.<sup>138</sup> Several members of the Court appeared skeptical. Justice Scalia characterized the alleged injury as “philosophical” and questioned “whether it is the function of courts to provide relief to people who haven’t been injured.”<sup>139</sup> Justice Kennedy protested that it was “circular” to say plaintiff “was entitled to it and, therefore, it’s an injury.”<sup>140</sup> Chief Justice Roberts suggested that plaintiff was attempting to assert only an “injury-in-law,” not the requisite injury-in-fact.<sup>141</sup> Commentators saw the case as “the sleeper case of the Term.”<sup>142</sup>

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<sup>128</sup> *Lujan*, 504 U.S. at 578 (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)).

<sup>129</sup> *See, e.g.*, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982) (concluding that Congress had conferred a legal right to truthful information about available housing and permitting suit by “tester” who had no intention of obtaining housing).

<sup>130</sup> *See Summers v. Earth Island Inst.*, 555 U.S. 488, 496-97 (2009); *Lujan*, 504 U.S. at 562-67.

<sup>131</sup> *See Baude, supra* note \_\_, at 197 (calling this “one of the harder questions of [the Court’s] intricate law of standing to sue”).

<sup>132</sup> 567 U.S. 756 (2012).

<sup>133</sup> 12 U.S.C. § 2607.

<sup>134</sup> *See Edwards v. First Am. Corp.*, 610 F.3d 514, 517 (9th Cir. 2010).

<sup>135</sup> 12 U.S.C. § 2607(a), (b).

<sup>136</sup> *See Edwards*, 610 F.3d at 517-18.

<sup>137</sup> 564 U.S. 1018 (2011).

<sup>138</sup> *First Am. Fin. Corp. v. Edwards*, No. 10-708, Supreme Court Oral Argument Transcript at 26, 32.

<sup>139</sup> *Id.* at 44-45.

<sup>140</sup> *Id.* at 47.

<sup>141</sup> *Id.* at 54.

<sup>142</sup> Pamela S. Karlan, *Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 61 (2012); *see also* Kevin Russell, *First American Financial v. Edwards: Surprising End to a Potentially Important Case*, SCOTUSblog (June 28, 2012, 7:00 PM), <https://www.scotusblog.com/2012/06/first-american-financial-v-edwards-surprising-end-to-a-potentially-important-case/>.

On the last day of the term, seven months after argument, the Court unceremoniously dismissed the case as improvidently granted.<sup>143</sup> Because Justice Thomas was the only Justice in the December sitting who had not had a majority assignment, Court watchers inferred that the responsibility to write had initially fallen on him.<sup>144</sup> Commentators noted that the lengthy delay between argument and dismissal made it unlikely the Court had unearthed a “vehicle problem” precluding resolution of the case on the merits,<sup>145</sup> leading some to speculate that the Court simply could not agree on the answer.<sup>146</sup>

In *Spokeo*, the Court carved itself another opportunity. The case involved what opponents characterized as a “no-injury” class.<sup>147</sup> *Spokeo* framed the question presented as “[w]hether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm.”<sup>148</sup> The case generated thirty-one *amici curiae* briefs, an unusually high figure far exceeding the average of thirteen per case for that term.<sup>149</sup>

#### A. The *Spokeo* Majority

The facts were straightforward and uncontested. *Spokeo* is a people-search engine that aggregates personal information and provides it to subscribers, including businesses who want to seek out information about prospective employees.<sup>150</sup> *Spokeo* compiled a profile of Thomas Robins describing him as an affluent family man in his 50s with a graduate degree.<sup>151</sup> Each of these facts was allegedly incorrect.<sup>152</sup> Robins filed a federal class action complaint alleging that *Spokeo* was a consumer reporting agency whose publication of inaccurate information violated the Fair Credit Reporting Act of 1970 (FCRA).<sup>153</sup> The FCRA provides that “[a]ny person who willfully fails to comply with any requirement [of the Act] with respect to any consumer is liable to that consumer” for actual damages or statutory damages of \$100-\$1000 per violation, as well as attorneys’ fees and the possibility of punitive damages.<sup>154</sup> Robins alleged several violations of the FCRA, some particular to him and some not. He claimed that *Spokeo* had violated disclosure requirements,<sup>155</sup> had failed to follow reasonable procedures to assure the accuracy of his

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<sup>143</sup> 567 U.S. 756 (2012).

<sup>144</sup> See Ruth Bader Ginsburg & Linda Greenhouse, *A Conversation with Justice Ginsburg*, 122 YALE L.J. ONLINE 283, 300 (2013).

<sup>145</sup> See Karlan, *supra* note \_\_ at 58; Baude, *supra* note \_\_ at 211.

<sup>146</sup> See Baude, *supra* note \_\_, at 211. See also Russell, *supra* note \_\_ (noting the Court may have dismissed “because it could not reach agreement on a workable constitutional test”); Jonathan S. Massey, *The Two that Got Away: First American Financial Corp. v. Edwards and Kiobel v. Royal Dutch Petroleum Co.*, 7 CHARLESTON L. REV. 63, 73-74 (2012) (characterizing Court as “closely divided” at oral argument).

<sup>147</sup> Patricia W. Hatamyar Moore, *Spokeo v. Robins: The Illusory “No-Injury Class” Reaches the Supreme Court*, 2 ST. THOMAS J. OF COMPLEX LITIG. 1, 2-3 (2016) (describing catchphrase as a “well-orchestrated attack against the class action and plaintiffs’ class-action lawyers”).

<sup>148</sup> Brief for Petitioner at *i*, *Spokeo, Inc. v. Robins*, No. 13-1339 (U.S. July 2, 2015).

<sup>149</sup> See Anthony J. Franze & R. Reeves Anderson, *In Unusual Term, Big Year for Amicus Curiae at the Supreme Court*, Nat. L.J., Sept. 21, 2016.

<sup>150</sup> *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1110 (9th Cir. 2017).

<sup>151</sup> See *Spokeo v. Robins*, 136 S. Ct. 1540, 1546 (2016).

<sup>152</sup> See *id.*

<sup>153</sup> 84 Stat. 1127, 15 U.S.C. § 1681 *et seq.*

<sup>154</sup> *Id.* § 1681n(a).

<sup>155</sup> *Id.* § 1681b(b)(1).

reports,<sup>156</sup> had failed to issue required notice to providers and users of information,<sup>157</sup> and had not posted required toll-free telephone numbers.<sup>158</sup>

The district court dismissed for want of standing, noting that Robins had not connected the statutory violation to any actual harm but had merely expressed concern that the inaccuracies might jeopardize his employment prospects.<sup>159</sup> The Ninth Circuit reversed, noting that the statutory cause of action established liability for willful violations without requiring actual harm.<sup>160</sup> Turning to the Article III inquiry, the court concluded that Robins satisfied the injury-in-fact requirement by alleging a violation of “*his* statutory rights,” which were individualized and personal to him, rather than collective.<sup>161</sup>

The Supreme Court vacated and remanded in a 6-2 opinion by Justice Alito.<sup>162</sup> The Court concluded that, while Robins’ injury may have been unique to him, and thus “particularized,” the Ninth Circuit had missed a step by failing to inquire whether the injury was also “concrete.”<sup>163</sup> Particularization, the Court explained, is necessary, but “not sufficient.”<sup>164</sup> Concreteness, a key constitutional ingredient, imposes the additional requirement that an injury, whether tangible or intangible, be “*de facto*”—that is, that it “actually exist.”<sup>165</sup>

The Court broke new ground in making concreteness a discrete requirement<sup>166</sup> but gave lower courts few bearings for ascertaining when tougher-to-recognize intangible injuries were sufficiently “concrete” to comport with the Constitution.<sup>167</sup> The Court indicated that, because Article III’s case-or-controversy requirement derives from historical practice, a statutory harm that bears a “close relationship” to traditional common law harm would likely pass constitutional muster.<sup>168</sup> The Court’s invited comparison to common law analogues did not, however, indicate what degree of proximity or similarity was required. In the absence of common law parallels, the Court suggested that Congress’s input would be “instructive and important”; the Court repeated its *Lujan* observation that Congress could “elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate at law.”<sup>169</sup> When Congress did so,

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<sup>156</sup> *Id.* § 1681e(b).

<sup>157</sup> *Id.* § 1681e(d).

<sup>158</sup> *Id.* § 1681j(a).

<sup>159</sup> No. CV10-05306, 2011 WL 11562151 (C.D. Cal. Sept. 19, 2011), *reinstating* No. CV10-05306, 2011 WL 597867 (Jan. 27, 2011).

<sup>160</sup> *See* *Robins v. Spokeo, Inc.*, 742 F.3d 409, 412 (9th Cir. 2014).

<sup>161</sup> *Id.* at 414 (emphasis original).

<sup>162</sup> *See* *Spokeo v. Robins*, 136 S. Ct. 1540, 1545 (2016). The case was argued on November 2, 2015 and handed down on May 16, 2016, after the February 13, 2016 death of Justice Scalia.

<sup>163</sup> *Id.* at 1548.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> Prior to *Spokeo*, the Court had treated the phrase “concrete and particularized” as a single question. *See* Bayefsky, *supra* note \_\_, at 2298-99; Konnoth & Kreimer, *supra* note \_\_, at 51.

<sup>167</sup> *See* Bayefsky, *supra* note \_\_, at 2303 (noting that “*Spokeo* left to federal appellate and district courts the task of filling in the details of the concreteness inquiry”).

<sup>168</sup> 136 S. Ct. at 1549.

<sup>169</sup> *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992)).

these would suffice, and the Constitution would not require any showing of *additional* harm.<sup>170</sup> However, the Court offered little guidance for how to populate this category. While Congress could confer rights designed to avert risks of harm, rather than actual harm, the Court noted that the “bare procedural violation, divorced from any concrete harm” was insufficient.<sup>171</sup> At bottom, *Spokeo* charged lower courts with undertaking an independent analysis of the “materiality” of harm; the Court cited an incorrect zip code as a paradigmatic example of constitutional harmlessness, presumably no matter what Congress had to say on the matter.<sup>172</sup>

And with that, the Court sent the case back to the Ninth Circuit for a redo.<sup>173</sup> Contemporaneous commentary called the opinion “a punt,”<sup>174</sup> “an M.C. Escher painting [that] keeps on begging questions and sending the reader around and around in impossible loops.”<sup>175</sup> It left clear marching orders for lower courts—find concrete injury or dismiss—and only the vaguest of instructions to seek out common law analogues and trust their guts, and it suggested this exercise applied on a one-size-fits-all basis to all congressionally-conferred rights.

## B. Justice Thomas’s Disaggregation of Public and Private Rights

Though joining the majority opinion, Justice Thomas wrote separately to suggest that the analysis of congressionally-conferred rights ought to be different depending on whether the right was “private” or “public.” Drawing on the work of Professors Woolhandler, Nelson, and Hessick,<sup>176</sup> he observed that, in cases where individuals seek to vindicate rights they possess as individuals rather than in the aggregate, allegation of violation had been enough at common law without any additional showing of harm.<sup>177</sup> It is only where a litigant claims violation of a public right, a duty owed to the whole community without differentiation, that plaintiff’s path to litigation requires some showing of “extraordinary damage, beyond the rest of the [community].”<sup>178</sup> The injury-in-fact requirement, he explained, is designed to filter out, and indeed “often stymies[,] a private plaintiff’s attempt to vindicate the infringement of *public*

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<sup>170</sup> *Id.* at 1549-50 (citing *Fed. Election Comm’n v. Akins*, 524 U.S. 11, 20-25 (1998)).

<sup>171</sup> *Id.* (citing *Clapper v. Amnesty Int’l USA*, 568 U.S. 398 (2013)).

<sup>172</sup> *Id.* at 1550. *See also* Konnoth & Kreimer, *supra* note \_\_, at 56 (observing that the Court “retains the authority to veto harms that are insufficiently ‘concrete’ or ‘real’ in its view”).

<sup>173</sup> On remand from the Supreme Court, the Ninth Circuit concluded that Thomas Robins had suffered a concrete injury in fact. *See Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1114-17 (9th Cir. 2017). The Supreme Court denied Spokeo’s subsequent petition for certiorari. *See Spokeo, Inc. v. Robins*, 138 S. Ct. 931 (2018).

<sup>174</sup> Allison Grande, *High Court’s Spokeo Punt Sets Bar for Class Action Injuries*, Law360 (May 16, 2016, 11:24 PM), <https://www.law360.com/articles/796883/high-court-s-spokeo-punt-sets-bar-for-class-action-injuries>. *See also* Jamal Greene, *The Age of Scalia*, 130 HARV. L. REV. 144, 171 (2016) (observing that *Spokeo* “did no more than punt the case back to the Ninth Circuit”); William S.C. Goldstein, Note, *Standing, Legal Injury Without Harm, and the Public/Private Divide*, 92 N.Y.U. L. REV. 1571, 1574 (2017) (noting that the Court “punted”).

<sup>175</sup> Daniel Solove, *Spokeo, Inc. v. Robins: When Is a Person Harmed by a Privacy Violation?*, G.W. L. REV. ON THE DOCKET (May 18, 2016), <https://www.gwlr.org/spokeo-inc-v-robins-when-is-a-person-harmed-by-a-privacy-violation/>.

<sup>176</sup> *See Spokeo v. Robins*, 136 S. Ct. 1540, 1551-52 (2016) (Thomas, J., concurring) (citing Woolhandler & Nelson, *supra* note \_\_, at 693, 695-700); *id.* at 1553 (citing Hessick, *supra* note \_\_, at 317-21).

<sup>177</sup> *See id.*

<sup>178</sup> *Id.* (citing 3 Blackstone \*220).

rights.”<sup>179</sup> Where plaintiff satisfies the injury-in-fact requirement by demonstrating unique harm, the existence of “special, individualized damage [has] the effect of creating a private action for compensatory relief to an otherwise public-rights claim.”<sup>180</sup> Without it, only the government has authority to take action.<sup>181</sup>

To Justice Thomas, then, the searching injury-in-fact inquiry dictated by the *Spokeo* majority applies when an individual asserts the infringement of a public right. Where a private plaintiff seeks to vindicate private rights, even those created by Congress, “the concrete-harm requirement does not apply as rigorously.”<sup>182</sup> Justice Thomas cited *Carey v. Phipus*,<sup>183</sup> which approved a nominal damages remedy for violations of private procedural due process rights in the absence of actual injury, to underscore that, where private rights are concerned, the mere fact of violation, not the presence of concrete harm, is enough to sustain a lawsuit.<sup>184</sup> He noted that actions to vindicate private rights give rise to “generally no danger” that courts would “police the activity of the political branches or, more broadly, that the legislative branch has impermissibly delegated law enforcement authority from the executive to a private individual.”<sup>185</sup> The separation-of-powers purposes of standing, in other words, are not implicated.

Where statutory rights are concerned, then, Justice Thomas suggested that a first-tier categorization of the asserted rights is in order. In *Spokeo*, Robins claimed violations that arguably fell into each category. Some asserted violations—like Spokeo’s alleged breach of the requirement to post a toll-free telephone number by which consumers could request free annual disclosures—looked like violations of duties owed to the public writ large.<sup>186</sup> In the absence of some showing that Robins had suffered concrete and particular harm from this violation, Robins’ claim ought not to proceed.<sup>187</sup> But Robins had also connected breaches of the procedures prescribed in the statute to the publication of inaccurate information about him.<sup>188</sup> Justice Thomas argued that, if Congress had created “a private duty owed personally to Robins to protect *his* information, then the violation of the legal duty suffices for Article III injury in fact.”<sup>189</sup> He charged the Ninth Circuit on remand with examining whether Congress’s scheme had created a private duty owed to individual consumers.<sup>190</sup> He gave no instruction how this inquiry was to proceed, and how, precisely, to do this remains an unanswered question.<sup>191</sup>

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<sup>179</sup> *Id.* at 1552.

<sup>180</sup> *Id.* Interestingly, this private action is implied.

<sup>181</sup> *See id.*

<sup>182</sup> *Id.* at 1552.

<sup>183</sup> 435 U.S. 247 (1978).

<sup>184</sup> *Spokeo*, 136 S. Ct. at 1552.

<sup>185</sup> *Id.* at 1553 (citing Hessick, *supra* note \_\_\_, at 317-21).

<sup>186</sup> *See id.* at 1553.

<sup>187</sup> *See id.* Note that, in Justice Thomas’s view, a showing of particularized, concrete harm satisfying the *Spokeo* inquiry would convert this claimed violation of a public right *into* a private right. *See id.* at 1551.

<sup>188</sup> *See id.* at 1546.

<sup>189</sup> *Id.* at 1554.

<sup>190</sup> *See id.* at 1553-54.

<sup>191</sup> *See* Baude, *supra* note \_\_\_, at 198 (noting that “Justice Thomas’s proposal is not yet fully developed”); *id.* at 230 (observing that Justice Thomas does not answer the question, “[w]hen and how can Congress convert a legal duty that might traditionally have seemed public into a private one?”).

### C. Lower Courts Post-*Spokeo*

Lower federal courts post-*Spokeo* have struggled mightily with its dictated concreteness inquiry.<sup>192</sup> Issues have arisen prominently in connection with consumer protection and data privacy. In addition to the Fair Credit Reporting Act (FCRA)<sup>193</sup> context, the *Spokeo* concreteness inquiry has emerged in cases involving the Fair & Accurate Credit Transactions Act (FACTA),<sup>194</sup> the Fair Debt Collection Practices Act (FDCPA),<sup>195</sup> the Telephone Consumer Protection Act (TCPA),<sup>196</sup> the Video Privacy protection Act (VPPA),<sup>197</sup> and the Cable Communications Policy Act (CCPA).<sup>198</sup> A brief examination of FACTA, FDCPA, and TCPA cases illustrates that the concreteness inquiry left the lower federal courts at sea between *Spokeo* and *TransUnion*.

#### a. FACTA

In FACTA, Congress took aim at “[t]he crime of identity theft—in which a perpetrator assumes the identity of a victim in order to obtain financial products and services or other benefits in the victim’s name,” which Congress found had reached “almost epidemic proportions” by the early 2000s.<sup>199</sup> Concluding that receipts provided criminals “easy access” to credit and debit information,<sup>200</sup> Congress prohibited merchants from printing “more than the last 5 digits of the card number . . . upon any receipt provided to the cardholder at the point of the sale or transaction.”<sup>201</sup> Congress allowed consumers to sue any person who willfully violated this truncation requirement for “any actual damages sustained by the consumer . . . or damages of not less than \$100 and not more than \$1,000” and “such amount of punitive damages as the court may allow.”<sup>202</sup> FACTA initially imposed liability for printing anything other than the final five digits of a receipt. Four years after its passage, in response to hundreds of lawsuits, Congress passed the Clarification Act, which retroactively eliminated liability for merchants who printed credit card expiration

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<sup>192</sup> The leading treatise flags “persisting obscurity of doctrine in this area” after *Spokeo* and observes that, “[w]ithout an adequate explanation” for the insistence that Article III limits congressional efforts to confer standing, “future application of the ‘concrete injury’ requirement will remain an unsatisfactory exercise.” 13B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE JURISDICTION § 3531.13 (3d ed. 2021).

<sup>193</sup> 15 U.S.C. § 1681 *et seq.*

<sup>194</sup> 15 U.S.C. § 1601 *et seq.* See *infra* notes \_\_\_ and accompanying text.

<sup>195</sup> 15 U.S.C. § 1692 *et seq.* See *infra* notes \_\_\_ and accompanying text.

<sup>196</sup> 47 U.S.C. § 227 *et seq.* See *infra* notes \_\_\_ and accompanying text.

<sup>197</sup> 18 U.S.C. § 2710 *et seq.* See *Eichenberger v. ESPN, Inc.*, 876 F.3d 979, 983-84 (9th Cir. 2017) (concluding that disclosures of online behavior in violation of VPPA represented concrete harm based on analogy to invasion of privacy tort); *Perry v. CNN, Inc.*, 854 F.3d 1336, 1340-41 (same); *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262, 274 (3d Cir. 2016) (same).

<sup>198</sup> 47 U.S.C. § 551(e). See *Braitberg v. Charter Commc’ns, Inc.*, 836 F.3d 925, 930-31 (8th Cir. 2016) (finding that plaintiff had not suffered a concrete injury in cable company’s retention of his personal information and rejecting analogy to common-law invasion of privacy); *Gubala v. Time Warner Cable, Inc.*, 846 F.3d 909, 911 (7th Cir. 2017) (same).

<sup>199</sup> H.R. Rep. No. 108-263, at 25 (2003).

<sup>200</sup> S. Rep. No. 108-166, at 3 (2003).

<sup>201</sup> 15 U.S.C. § 1681c(g).

<sup>202</sup> 15 U.S.C. § 1681n(a)(1)(A), (a)(2).

dates on receipts while otherwise complying with all other requirements.<sup>203</sup> The Clarification Act reflected Congress’s view that some technical FACTA violations imposed no risk of harm and expressly sought to “limit[] abusive lawsuits that do not protect consumers but only result in increased cost to business and potentially increased prices to consumers.”<sup>204</sup>

Courts confronted with FACTA violations have pored over various common-law analogues in an effort to discern concrete harm and have not agreed on how closely statutory injury needs to match them. In *Kamal v. J. Crew Group, Inc.*,<sup>205</sup> the Third Circuit rejected the analogy to traditional privacy harms like unreasonable publicity and breach of confidence; because those torts require disclosure to a third party and FACTA does not, the court could not find “the requisite ‘close relationship.’”<sup>206</sup> In *Jeffries v. Volume Services America, Inc.*,<sup>207</sup> the D.C. Circuit accepted the analogy to a common-law breach of confidence, reasoning that FACTA established a relationship of trust between merchant and consumer that required the merchant to safeguard certain information.<sup>208</sup> The court acknowledged that common-law breach of confidence required disclosure to a third party, while FACTA did not, but saw a sufficiently “close relationship” to a traditional common-law harm to “weigh[] in favor of concreteness.”<sup>209</sup> The *en banc* Eleventh Circuit agreed with the Third Circuit in *Muransky v. Godiva Chocolatier, Inc.*,<sup>210</sup> which rejected an initial panel decision siding with *Jeffries*.<sup>211</sup> The court questioned whether the breach of confidence tort had a solid-enough common-law pedigree, flagging a student note from 1982 characterizing it as “an emerging tort.”<sup>212</sup> However, the court spared itself the “arcane evaluation of [the] tort’s origins” because it concluded that, in any event, FACTA harm and the harm suffered in a breach of confidence were too different—a breach of confidence, but not FACTA, required disclosure to a third party and some showing of a confidential relationship.<sup>213</sup>

If the courts were “hammering square causes of action into round torts” in their fumbling quest for common law analogues,<sup>214</sup> they fared no better when they reached the second step of the *Spokeo* inquiry, under which they are instructed to examine Congress’s judgment of concreteness and then second-guess it. The *Muransky* court rejected plaintiff’s invitation to defer to Congress, noting that, “[a]lthough that approach would simplify our job, it is inconsistent with

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<sup>203</sup> 15 U.S.C. §1681n(d). The Clarification Act eliminated liability for the period between December 4, 2004 and June 3, 2008 only.

<sup>204</sup> Pub. L. 110-241 § 2(b), 122 Stat. 1565 (2007).

<sup>205</sup> 918 F.3d 102, 114 (3d Cir. 2019).

<sup>206</sup> *Id.*

<sup>207</sup> 928 F.3d 1059 (D.C. Cir. 2019).

<sup>208</sup> *See id.* at 1064-65.

<sup>209</sup> *See id.* at 1065.

<sup>210</sup> 979 F.3d 917 (11th Cir. 2020) (*en banc*).

<sup>211</sup> *See Muransky v. Godiva Chocolatier, Inc.*, 922 F.3d 1175, 1185 (11th Cir. 2019) (vacated and superseded by 979 F.3d 917 (11th Cir. 2020)).

<sup>212</sup> *Muransky*, 979 F.3d at 931 (citing Alan B. Vickery, Note, *Breach of Confidence: An Emerging Tort*, 82 COLUM. L. REV. 1426, 1452-54 (1982)).

<sup>213</sup> *Id.* at 932.

<sup>214</sup> *Id.* at 931.

*Spokeo* and with what the Constitution demands of us.”<sup>215</sup> Taking that independent look, the Eleventh Circuit concluded that a receipt that listed the first six digits of the customer’s credit card number, though a violation of the statute, did not cause concrete harm because the first six digits simply identified the issuer, and that was not so bad.<sup>216</sup> The court was unpersuaded by argument that Congress had modified FACTA in the Clarification Act and left liability for disclosing the first six digits intact, and it rejected plaintiff’s claim that disclosing his credit card issuer heightened his exposure to “phishing” inquiries.<sup>217</sup> Finally, the court noted that most other circuits had agreed<sup>218</sup> and that the outlier D.C. Circuit had confronted a receipt with all sixteen digits of the consumer’s credit card number—“significantly different facts.”<sup>219</sup> In dissent, Judge Jordan communicated discomfort with the unmoored line-drawing exercise the inquiry demanded of them, asking if printing sixteen out of sixteen digits is enough for a lawsuit, “why not 15? And if not 15, then why not 14, 13, etc.?”<sup>220</sup>

#### b. FDCPA

The FDCPA context reflects similar disarray. Congress passed and the President signed the FDCPA in 1977.<sup>221</sup> Congress cited “abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors” that contributed “to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.”<sup>222</sup> The Act imposes requirements on debt collectors to make prescribed disclosures to consumers and to refrain from harassment, abuse, false or misleading representations, and certain specified unfair practices.<sup>223</sup> In addition to providing for enforcement actions by the Federal Trade Commission,<sup>224</sup> the Act authorizes suit by “any person” against any debt collector “who fails to comply with any provision of this subchapter with respect to” that person, permitting actual damages and such additional damages as a court might allow up to \$1000.<sup>225</sup>

Since *Spokeo*, circuit courts have fractured over what violations of FDCPA are and are not actionable under Article III, particularly where plaintiffs have alleged inadequate

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<sup>215</sup> *Id.* at 932. “[E]ven if Congress had explicitly stated in the text of the statute that that every FACTA violation poses a material risk of harm,” the court reasoned, “deciding whether a given risk of harm meets the materiality threshold is an independent responsibility of federal courts.” *Id.* at 933.

<sup>216</sup> *See id.* at 934.

<sup>217</sup> *See id.*

<sup>218</sup> *See, e.g.,* *Kamal v. J. Crew Grp., Inc.*, 918 F.3d 102, 106, 119 (3d Cir. 2019); *Noble v. Nevada Checker Cab Corp.*, 726 Fed. App’x 582, 583-84 (9th Cir. 2018); *Katz v. Donna Karan Co.*, 872 F.3d 114, 117, 121 (2d Cir. 2017). The Sixth Circuit recently agreed. *See Thomas v. TOMS King (Ohio), LLC*, 997 F.3d 629, 636 (6th Cir. 2021) (“Plaintiff has not advanced the ball because she does not explain how knowledge of the card issuer, the card type, and the first six digits creates or at least enables actual harm or a material risk of harm”).

<sup>219</sup> *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 935 (11th Cir. 2020) (*en banc*) (citing *Jeffries v. Volume Servs. Am., Inc.*, 928 F.3d 1059, 1066 (D.C. Cir. 2019)).

<sup>220</sup> *Id.* at 969 (Jordan, J., dissenting).

<sup>221</sup> Pub. L. 95-109, 91 Stat. 874 (1977) (codified as amended at 15 U.S.C. §§ 1692-1692p).

<sup>222</sup> *Id.* § 802(a).

<sup>223</sup> *See id.* §§ 805-808.

<sup>224</sup> *See id.* § 814.

<sup>225</sup> *Id.* § 813(a).

disclosures.<sup>226</sup> The Sixth Circuit concluded in *Hagy v. Demers & Adams*<sup>227</sup> that a debt collector’s failure to disclose that it was a debt collector in a communication with a debtor did not impose a concrete injury.<sup>228</sup> Six months later, a different panel of the same court held in *Macy v. GC Services*<sup>229</sup> that a debt collector’s failure to disclose that it owed the debtor information only if the debtor asked *in writing* did represent an actionable injury-in-fact.<sup>230</sup> The court required no additional showing of harm, reasoning that a consumer who requested information orally, rather than in writing, might unintentionally waive the FDCPA’s protections during the thirty-day response window.<sup>231</sup> The Seventh Circuit, per then-Judge Barrett, disagreed on materially indistinguishable facts in *Casillas v. Madison Avenue Associates, Inc.*,<sup>232</sup> conceding that “the Sixth Circuit . . . sees things differently than we do.”<sup>233</sup> The court acknowledged there might be abstract risk of waiver to consumers who only disputed a debt orally within the prescribed period but concluded that plaintiffs—who had pled no actual plans to dispute their debt—had shown no actual harm beyond a bare procedural violation.<sup>234</sup> Chief Judge Wood, writing for two colleagues, dissented from denial of *en banc* consideration.<sup>235</sup> She argued that Congress had created the in-writing requirement to protect consumers, not out of administrative convenience, and in losing that protection, plaintiff had suffered concrete harm that required no additional showing.<sup>236</sup> Two months later, a different panel of the Seventh Circuit in *Lavallee v. Med-1 Solutions, LLC*<sup>237</sup> distinguished *Casillas* when a plaintiff claimed that, instead of receiving *incomplete* disclosures required by section 1692g(a), it had not received any.<sup>238</sup> The panel did not require plaintiff to demonstrate additional harm, and plaintiff certainly would not have satisfied them if it had, having not even opened the deficient emails within the prescribed period.<sup>239</sup>

### c. TCPA

Cases construing the Telephone Consumer Protection Act<sup>240</sup> likewise reflect lower courts’ struggles implementing *Spokeo*. Enacted in 1991, the TCPA responds to Congress’s concern that “[u]nrestricted telemarketing . . . can be an intrusive invasion of privacy” and a “nuisance.”<sup>241</sup> The TCPA prohibits anyone from using an “automatic telephone dialing system or

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<sup>226</sup> See generally Jason R. Smith, Comment, *Statutes and Spokeo: The Case of the FDCPA*, 87 U. CHI. L. REV. 1695, 1710-15 (discussing the circuit split).

<sup>227</sup> 882 F.3d 616 (6th Cir. 2018).

<sup>228</sup> See *id.* at 622-24.

<sup>229</sup> 897 F.3d 747, 761 (6th Cir. 2018)

<sup>230</sup> See *id.* at 761.

<sup>231</sup> See *id.* at 758.

<sup>232</sup> 926 F.3d 329, 335 (7th Cir. 2019).

<sup>233</sup> *Id.* at 335.

<sup>234</sup> See *id.* at 336.

<sup>235</sup> See *id.* at 339 (Wood, C.J., dissenting). Pursuant to Seventh Circuit rules, because it created a circuit split, the draft opinion circulated among all active judges before it issued, and a majority did not vote to rehear the case. See *id.* at 336, n. 4.

<sup>236</sup> See *id.* at 342 (Wood, C.J., dissenting).

<sup>237</sup> *Lavallee v. Med-1 Solutions, LLC*, 932 F.2d 1049 (7th Cir. 2019).

<sup>238</sup> See *id.* at 1053.

<sup>239</sup> See *id.*

<sup>240</sup> 47 U.S.C. § 227 *et seq.*

<sup>241</sup> Telephone Consumer Protection Act of 1991, Pub. L. 102-243, § 2(5), (10) (1991).

an artificial or prerecorded voice” where a person is charged for the call<sup>242</sup>; bars using “an artificial prerecorded voice to deliver a message” to “any residential telephone line” without prior consent<sup>243</sup>; and makes it “unlawful for any person . . . to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement.”<sup>244</sup> While the 1991 statute did not anticipate the advent of text messaging, the FCC has promulgated regulations implementing the TCPA that define “call” to encompass “both voice calls and text calls to wireless numbers.”<sup>245</sup> The TCPA creates a private right of action authorizing “[a] person” to file suit based on violations of the Act or its regulations “to enjoin such violation,” to “recover for actual monetary loss,” or to “receive \$500 in damages for each such violation.”<sup>246</sup>

Circuit courts have split on the question whether receipt of an unsolicited text message using an automatic telephone dialing system or prerecorded voice represents actionable injury-in-fact. In so doing, they have demonstrated just how unmoored the inquiry can be. In *Salcedo v. Hanna*,<sup>247</sup> the Eleventh Circuit concluded that receipt of a single unwanted text message was not concrete harm.<sup>248</sup> The court distinguished prior circuit precedent holding that receipt of a single junk fax represented cognizable harm because a fax, unlike a text, rendered the machine unavailable during transmission and could potentially entail printing costs.<sup>249</sup> The court noted that cellphones are frequently silenced and taken outside the home, and thus “present[] less potential for nuisance and home intrusion.”<sup>250</sup> Turning to the quest for common law analogues, the court rejected the comparison to the tort of intrusion upon seclusion because that tort required substantial harm, whereas it characterized the asserted harm before it as “isolated, momentary, and ephemeral.”<sup>251</sup> The court likewise rejected the analogy to nuisance, which required an infringement on real property.<sup>252</sup> While the court described its inquiry as “qualitative, not quantitative,” it rejected plaintiff’s argument that he had suffered concrete harm in wasted time, noting disdainfully that that kind of harm would entail “at the very least, more than a few seconds.”<sup>253</sup>

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<sup>242</sup> 47 U.S.C. § 227(b)(1)(A).

<sup>243</sup> *Id.* § 227(a)(5).

<sup>244</sup> *Id.* § 227(b)(1)(C).

<sup>245</sup> In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 18 FCC Rcd. 14014, 14115 (2003). *See also* *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 156 (2016) (deeming it “undisputed” that a text message qualifies as a call within the meaning of the statute).

<sup>246</sup> 47 U.S.C. § 227(b)(3).

<sup>247</sup> 936 F.3d 1162 (11th Cir. 2019).

<sup>248</sup> *See id.* at 1173. Before turning to the question whether Congress *could* permit a right of action for receipt of a single unwanted text message, the Eleventh Circuit expressed doubt as to whether Congress *had*. The court observed that Congress had amended the TCPA without specifically addressing text messages and characterized congressional silence as at best “tacit approval” of the FCC’s regulations. *Id.* at 1169.

<sup>249</sup> *See id.* at 1167-68 (distinguishing *Palm Beach Golf Center-Boca, Inc. v. John G. Sarris, D.D.S.*, 781 F.3d 1245, 1252 (11th Cir. 2015) and *Florence Endocrine Clinic, PLLC v. Arriva Med., LLC*, 858 F.3d 1362, 1366 (11th Cir. 2017)).

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 1171.

<sup>252</sup> *See id.*

<sup>253</sup> *Id.* at 1173.

Other circuits have reached contrary conclusions,<sup>254</sup> and two expressly declined to follow the Eleventh Circuit’s reasoning. Notably, their searches for common law analogues have borne different fruit. In *Cranor v. 5 Star Nutrition, LLC*,<sup>255</sup> the Fifth Circuit permitted standing based on an unwanted text message and found the analogy to common law public nuisance compelling.<sup>256</sup> Although traditionally the sovereign would address a public nuisance, a private citizen could sue if he could show particularized harm.<sup>257</sup> Plaintiff wanted “to use our Nation’s telecommunications infrastructure without harassment” and had alleged personal harm not suffered by the public at large.<sup>258</sup> The court charged *Salcedo* with “misunderstand[ing] *Spokeo*”<sup>259</sup> and urged that the focus ought to be on types of harms, not “the substantiality of the harm.”<sup>260</sup> In *Gadelhak v. AT&T Services, Inc.*,<sup>261</sup> the Seventh Circuit agreed in an opinion by then-Judge Barrett. The court found compelling the analogy to the tort of “intrusion upon seclusion.”<sup>262</sup> Rejecting the Eleventh Circuit’s reasoning, the Seventh Circuit observed that, while common law offers guidance, “it does not stake out the limits of Congress’s power to identify harms deserving a remedy.”<sup>263</sup> Though “[a] few unwanted automated text messages may be too minor an annoyance to be actionable at common law,” the court held that Congress could choose to make that harm legally cognizable.<sup>264</sup>

#### D. *TransUnion* Entrenches the *Spokeo* Approach and Rejects the Thomas Distinction

In the aftermath of *Spokeo*, across numerous statutory contexts, lower courts have thus disagreed as to common law analogues, parted company over the required level of similarity to identified analogues, and reached different results on identical or nearly identical facts. Individual judges have become increasingly vocal about the problematic nature of the dictated inquiry. As Circuit Judge Jordan flagged in his dissent in *Muransky*, “[t]hat we need to resolve what is essentially a policy question to determine the boundaries of our subject-matter jurisdiction reminds us how far standing doctrine has drifted from its beginnings and from constitutional first principles.”<sup>265</sup> Circuit Judge Newsom wrote a lengthy concurrence in which he “hope[d] to show that our current Article III standing doctrine can’t be correct—as a matter of text, history, or logic.”<sup>266</sup>

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<sup>254</sup> See *Melito v. Experian Mktg. Solutions, Inc.*, 923 F.3d 85, 93 (2d Cir. 2019); *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017); *Sussino v. Work Out World*, 862 F.3d 346, 351 (3d Cir. 2017).

<sup>255</sup> No. 19-51173, 2021 WL 2133433, at \*3 (5th Cir. May 6, 2021).

<sup>256</sup> See *id.* at \*4.

<sup>257</sup> See *id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at \*5.

<sup>260</sup> *Id.* The *Cranor* court continued, “*Salcedo*’s focus on the substantiality of an alleged harm threatens to make this already difficult area of law even more unmanageable. We therefore reject it.” *Id.*

<sup>261</sup> 950 F.3d 458 (7th Cir. 2020).

<sup>262</sup> *Id.* at 462.

<sup>263</sup> *Id.* at 462-63.

<sup>264</sup> *Id.* at 463.

<sup>265</sup> *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 957-58 (11th Cir. 2020) (*en banc*) (Jordan, J., dissenting).

<sup>266</sup> *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1121 (11th Cir. 2021) (Newsom, J., concurring).

Despite these calls and the evident disarray, the Court doubled down on the *Spokeo* approach in *TransUnion LLC v. Ramirez*<sup>267</sup> and specifically rejected Justice Thomas’s proposed dichotomy between private and public rights. In response to a routine credit check at a car dealership, TransUnion informed the dealer that the name of the prospective purchaser, Sergio Ramirez, was on the Office of Foreign Assets Control’s terror watch list.<sup>268</sup> The dealer refused to sell him the car.<sup>269</sup> The following day, Ramirez called TransUnion to request his credit information, and TransUnion sent two mailings in response.<sup>270</sup> The first mailing, which did not mention the terror alert, purported to include his complete credit file and the summary of rights the statute required.<sup>271</sup> The second mailing, which arrived the following day, alerted Ramirez that his name was on the watch list but did not include the summary of rights informing him how to clear his name.<sup>272</sup> This second notification prompted Ramirez to cancel a previously-scheduled trip abroad.<sup>273</sup>

As in *Spokeo*, Ramirez filed suit under Section 1681n(a) of the Fair Credit Reporting Act,<sup>274</sup> asserting that TransUnion had failed to “follow reasonable procedures to assure maximum possible accuracy” of his reported information,<sup>275</sup> had failed to “clearly and accurately disclose . . . [a]ll information in the consumer’s file” upon request,<sup>276</sup> and had failed to include, “with each written disclosure” provided to him the statutorily-required “summary of rights.”<sup>277</sup> Ramirez sought to certify a class consisting of 8185 people who had likewise asked TransUnion for their credit information and to whom TransUnion had likewise disclosed their inclusion on a terror list by way of a separate mailing that lacked a summary of rights.<sup>278</sup> This class, in turn, consisted of two discrete groups—1853 people whose credit reports, including the alerts, TransUnion had shared with creditors, and 6332 people whose credit reports and alert status TransUnion had not disseminated to any third party.<sup>279</sup> The district court certified the class and held that all 8,185 members had standing.<sup>280</sup> A split panel of the Ninth Circuit affirmed.<sup>281</sup>

The Supreme Court reversed in a 5-4 decision authored by Justice Kavanaugh.<sup>282</sup> The Court began by reaffirming standing doctrine’s critical role in restricting federal courts to “their

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<sup>267</sup> 141 S. Ct. 2190 (2021).

<sup>268</sup> *Id.* at 2201.

<sup>269</sup> *See id.*

<sup>270</sup> *See id.* at 2201-02.

<sup>271</sup> *See id.* at 2201.

<sup>272</sup> *See id.* at 2201-02.

<sup>273</sup> *See id.* at 2202.

<sup>274</sup> 84 Stat. 1127, as amended, 15 U.S.C. § 1681 *et seq.*

<sup>275</sup> *Id.* § 1681e(b).

<sup>276</sup> *Id.* § 1681g(a)(1).

<sup>277</sup> *Id.* § 1681g(c)(2).

<sup>278</sup> *TransUnion*, 141 S. Ct. at 2202.

<sup>279</sup> *See id.*

<sup>280</sup> *See Ramirez v. TransUnion LLC*, No. 12-cv-00632-JSC, 2016 WL 6070490, at \*5 (Oct. 17, 2016).

<sup>281</sup> *See Ramirez v. TransUnion LLC*, 951 F.3d 1008, 1025 (9th Cir. 2020).

<sup>282</sup> *See TransUnion*, 141 S. Ct. at 2214.

proper function in a limited and separated government.”<sup>283</sup> Federal courts, the Court explained, “do not possess a roving commission to publicly opine on every legal question” and “do not exercise general legal oversight of the Legislative and Executive Branches, or of private entities.”<sup>284</sup> Rather, they operate in the context of “a real controversy with real impact on real persons.”<sup>285</sup> The Court repeated the *Spokeo* instruction that lower courts “should assess whether the alleged injury to the plaintiff has a ‘close relationship’ to a harm ‘traditionally’ recognized as providing a basis for a lawsuit in American courts.”<sup>286</sup> The Court clarified that this analogue need not be “an exact duplicate” but implored caution, lest courts “loosen Article III based on contemporary, evolving beliefs about what kinds of suits should be heard in federal courts.”<sup>287</sup> As in *Spokeo*, Congress’s views were “instructive,” but the Court made clear that Congress creating a right and cause of action “does not relieve courts of their responsibility to independently decide whether a plaintiff has suffered a concrete harm.”<sup>288</sup> An “injury in law,” the Court stressed, “is not an injury in fact.”<sup>289</sup> To allow Congress to authorize suits by “unharmed” plaintiffs would violate not only Article III, but “also would infringe on the Executive Branch’s Article II authority,” displacing the enforcement discretion of Executive Branch actors.<sup>290</sup>

Unlike in *Spokeo*, the *TransUnion* Court then proceeded to apply these principles to the case at hand, going claim by claim because “standing is not dispensed in gross.”<sup>291</sup> Beginning with the assertion that TransUnion did not have “reasonable procedures” in place to ensure class members were not labeled as potential terrorists, the Court differentiated between the 1853 class members whose reports were shared with third parties and the 6332 class members whose reports had not been disseminated.<sup>292</sup> As to the first group, the Court accepted the analogy to common law defamation, even though the alert was merely misleading rather than false,<sup>293</sup> because “[t]he harm from being labeled a ‘potential terrorist’ bears a close relationship to the harm from being labeled a ‘terrorist.’”<sup>294</sup> As for the second group, however, the analogy faltered due to the absence of publication, an apparently key common law ingredient.<sup>295</sup> “The mere presence of an inaccuracy in an internal credit file,” the Court explained, “if it is not disclosed to a third party,

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<sup>283</sup> *Id.* at 2203 (quoting John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1224 (1993)). The Court later stated that “the concrete-harm requirement is essential to the Constitution’s separation of powers.” *Id.* at 2207.

<sup>284</sup> *Id.* at 2203.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.* at 2204.

<sup>287</sup> *Id.*

<sup>288</sup> *Id.* at 2205. The Court tipped its hat to Judge Katsas for “rightly” stating, “we cannot treat an injury as ‘concrete’ for Article III purposes based only on Congress’s say-so.” *Id.* (quoting *Trichell v. Midland Credit Mgmt., Inc.* 964 F.3d 990, 999 n.2 (11th Cir. 2020)).

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* at 2207.

<sup>291</sup> *Id.* at 2208.

<sup>292</sup> *See id.*

<sup>293</sup> Truth was a defense to common law defamation. *See* RODNEY A. SMOLLA, *LAW OF DEFAMATION* § 5:2 (2021).

<sup>294</sup> *TransUnion*, 141 S. Ct. at 2209.

<sup>295</sup> *See id.*

causes no concrete harm.”<sup>296</sup> The Court also rejected the argument that this group faced a constitutionally sufficient risk of future harm. The Court noted that plaintiffs sought damages, not prospective relief, and found they had not demonstrated that abstract exposure to a risk was itself a compensable harm.<sup>297</sup>

The Court treated the claims related to the mailings in tandem, characterizing them as mere challenges to “format” that represented “bare procedural violation[s] divorced from any concrete harm,” even as to the 1853 class members.<sup>298</sup> The Court made short work of the argument that the violations deprived plaintiffs of needed information about how to challenge the terror alert and enhanced the risk plaintiffs would not be able to correct their credit files before disclosure, noting that plaintiffs had not alleged that the format of materials they received actually confused or distressed them.<sup>299</sup> The Court likewise rejected the argument, advanced by the United States as *amicus curiae*, that plaintiffs had suffered an “informational injury.”<sup>300</sup> The Court concluded that plaintiffs had not alleged they failed to receive information; they claimed only that the information came in the wrong format.<sup>301</sup>

Justice Thomas, joined by Justices Breyer, Sotomayor, and Kagan, wrote the principal dissent. He reprised his *Spokeo* concurrence, arguing that a plaintiff asserting the violation of a private right need not show additional harm and that the distinction between private and public rights “mattered not only for traditional common-law rights, but also for newly created statutory ones.”<sup>302</sup> Turning to application, he concluded that all three of the statutory requirements created “duties . . . owed to individuals, not the community writ large.”<sup>303</sup> He observed that Congress had provided a right of action where a consumer reporting agency breaches a duty owed to a particular consumer, and only “that individual (not all consumers) may sue the agency.”<sup>304</sup> The Court’s conclusion to the contrary, he charged, was “remarkable in both its novelty and effects”: “In the name of protecting the separation of powers, . . . this Court has relieved the legislature of its power to create and define rights.”<sup>305</sup> “Weighing the harms caused by specific facts and choosing remedies,” he argued, “seems to me like a much better fit for legislatures and juries than for this Court.”<sup>306</sup>

Justice Kagan likewise dissented, joined by Justice Breyer and Sotomayor. She flagged the irony in the Court’s professed dedication to separation of powers, noting that “[t]he Court

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<sup>296</sup> *Id.* at 2210.

<sup>297</sup> *See id.* at 2210-11. The Court observed that plaintiffs had not argued this risk gave rise to emotional injury. *See id.* at 2211.

<sup>298</sup> *Id.* at 2213 (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016)).

<sup>299</sup> *See id.* at 2213-14.

<sup>300</sup> *Id.* at 2214 (rejecting an argument advanced in Brief for the United States as Amicus Curiae Supporting Neither Party, *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021) No. 20-297, 2021 WL 598517, at \*25).

<sup>301</sup> *See id.* at 2214.

<sup>302</sup> *Id.* at 2217 (Thomas, J., dissenting).

<sup>303</sup> *Id.* at 2218.

<sup>304</sup> *Id.* at 2219.

<sup>305</sup> *Id.* at 2221.

<sup>306</sup> *Id.* at 2224.

here transforms standing law from a doctrine of judicial modesty into a tool of judicial aggrandizement.”<sup>307</sup> She indicated her continued belief that “Article III requires a concrete injury even in the context of statutory violation,” but she argued that Congress’s determination of harms and risks merited deference.<sup>308</sup> For that reason, she indicated that she and Justice Thomas would get to the same result on standing in all but the “highly unusual” case “when Congress could not have *reasonably* thought that a suit will contribute to compensating or preventing the harm at issue.”<sup>309</sup>

The Kavanaugh majority lashed back at Justice Thomas’s proffered approach in footnotes, claiming that its rejection of the concreteness requirement “would cast aside decades of precedent articulating that requirement” and would “largely outsource Article III to Congress.”<sup>310</sup> The Court charged that Justice Thomas’s theory would permit easy evasion of core separation-of-powers principles, as Congress could confer on all Americans “individual rights” to plainly public goods, like clean air and clean water.<sup>311</sup> Without federal courts reaching independent calls on the existence of harm, the Court suggested, Congress would be able to permit suit simply to “enforc[e] general compliance with regulatory law”—something Article III forbade.<sup>312</sup> The Court thus decisively rejected Justice Thomas’s proposed reorientation of standing doctrine, positing that the distinction between private and public rights would invite lawless congressional machinations that it would be powerless to police.

#### E. Core Problems with the *Spokeo/TransUnion* Concreteness Inquiry

*Spokeo* and *TransUnion* dictate a concreteness inquiry that is profoundly flawed. Because a central point of this Article is that Justice Thomas’s proposal is superior and susceptible of principled limits, this section canvasses the inherent difficulties with the Court’s approach, focusing primarily on *TransUnion* because it both entrenches the *Spokeo* methodology and demonstrates its application.

##### a. The Inquiry Lacks Administrable Standards

From a pragmatic standpoint, *TransUnion* invites lower courts into uncharted territory; indeed, the decision is notable for the absence of any reliable metric for confining judicial discretion. The Court has long boasted that it “exercise[s] the utmost care” lest its decisions be infused by “the policy preferences of Members of this Court.”<sup>313</sup> *TransUnion* leaves lower courts little else in their quest for “close relationships” to common law analogues. Certainly, they cannot look at what the Court *does* to discern a pattern. With respect to the 1853 class members whose terror watch list alerts were disclosed to third parties, for example, the Court found a

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<sup>307</sup> See *id.* at 2225 (Kagan, J., dissenting).

<sup>308</sup> *Id.* at 2226 (internal quotations omitted).

<sup>309</sup> *Id.* (emphasis supplied). Justice Kagan, in other words, would have applied rational basis scrutiny to Congress’s determination of harms.

<sup>310</sup> *Id.* at 2207 n.3.

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

compelling analogy in the tort of defamation.<sup>314</sup> That a disparaging fact is literally true defeats a common law defamation action,<sup>315</sup> and TransUnion offered in defense that it had published “true information” in flagging them as people with names on the terror watch list because each class member’s first and last names were in fact on it.<sup>316</sup> The Court was unfazed by this departure from common law; requiring a “close relationship,” after all, did not mean requiring “an exact duplicate.”<sup>317</sup> The Court concluded that truthfully labeling someone a “potential terrorist”—which would *not* have been actionable defamation at common law—was “sufficiently close” to the harm of falsely labeling someone an actual terrorist to represent an actionable new harm.<sup>318</sup>

With respect to the remaining 6332 class members, however, the Court became a common law purist. TransUnion stood at the ready to tell potential creditors these class members were potential terrorists, but no creditors had run credit reports on them during the relevant period. As a result, TransUnion had not “published” any disparaging information. This departure from the common law, in contrast to falsity, was fatal to their claim of harm: “A letter that is not sent does not harm anyone, no matter how insulting the letter is. So too here.”<sup>319</sup> The Court offered no principle by which to distinguish required elements of common law defamation that are dispensable (like falsity) and required elements of common law defamation that are indispensable (like publication), thus leaving lower courts at sea going forward, supplied with little more than intuition.

b. The Court Sacrifices One Separation-of-Powers Value for Another

Next, on its own terms, *TransUnion* purported to safeguard the separation of powers, but this is only partly true. The case deployed one of Professor Elliott’s identified separation-of-powers interests, the anticonscription function, in service of the demolition of another, the pro-democracy function.<sup>320</sup> The Court justified the concreteness requirement as an essential ingredient to prevent Congress from “authoriz[ing] virtually any citizen to bring a statutory damages suit against virtually any defendant who violated virtually any federal law.”<sup>321</sup> The case instructs that commitment to a private rights model in which plaintiffs suffer actual harm keeps the judiciary from infringing on the enforcement discretion of the Executive Branch.<sup>322</sup>

But in its very clear requirement that federal judges measure any private right created by Congress against the common law and their own intuition, *TransUnion* allows unelected judges to run roughshod over the legislative power, thus surrendering any devotion to the pro-democracy function of standing. “Separation of powers,” now-Chief Justice Roberts wrote in a

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<sup>314</sup> *TransUnion*, 141 S. Ct. at 2208.

<sup>315</sup> See *Milkovich v. Lorain J. Co.*, 497 U.S.1, 11 (1990) (“Since the latter half of the 16<sup>th</sup> century, the common law has afforded a cause of action for damage to a person’s reputation by the publication of false and defamatory statements.”) (citing LAURENCE HOWARD ELDREDGE, *THE LAW OF DEFAMATION* 5 (1978)).

<sup>316</sup> Reply Brief of Petitioner at 8, *TransUnion LLC v. Ramirez*, No. 20-297.

<sup>317</sup> *TransUnion*, 141 S. Ct. at 2209.

<sup>318</sup> *Id.*

<sup>319</sup> *Id.* at 2210.

<sup>320</sup> See *supra* notes \_\_\_ and accompanying text.

<sup>321</sup> *TransUnion*, 141 S. Ct. at 2206.

<sup>322</sup> See *id.*

1993 law review article cited twice by the Court, “is a zero-sum game.”<sup>323</sup> In enacting the FCRA, Congress sought to promote “fairness, impartiality, and a respect for the consumer’s right to privacy” in recognition that consumer reporting agencies had assumed “a vital role in assembling and evaluating consumer credit and other information on consumers.”<sup>324</sup> *TransUnion* charged federal courts, not Congress, with ascertaining what harms are and are not bad enough to target, and in doing so, committed the courts to the value-laden enterprise of determining how to advance this legislative goal. In dismissing Congress’s determination that consumers ought to get the entirety of their files upon request and information about how to dispute inaccuracies with each communication as mere “format,” for example, the Court effectively said that these requirements do not advance the ball and are not worth enforcing. That may or may not be true, but such decisions have long been understood to be Congress’s call. In waving the separation-of-powers flag in support of its holding, the Court picks and chooses from among separation-of-powers values, preferring protection of the Executive Branch over reinforcement of “the proper—and properly limited—role of the courts in a democratic society.”<sup>325</sup>

c. *Lochner* Redux?

The concreteness inquiry dictated by *Spokeo* and entrenched in *TransUnion* has no textual basis in Article III, and federal judges are apparently left to their own devices in giving it content. This Article is not the first to suggest that this enterprise smacks of substantive due process.<sup>326</sup> To the extent that substantive due process involves the unmoored and atextual insertion of judicial policy preferences to displace the work of the legislature, the charge is both fair and supported by the prior two sections.<sup>327</sup> However, there is a subtler point worth flagging, too: With the robust new concreteness inquiry, the Court has undermined its commitment to rational basis scrutiny of economic legislation. The cry of “*Lochnerization*,” in other words, might have more to it than mere abstraction.

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<sup>323</sup> Roberts, *supra* note \_\_, at 1230. Roberts served as Principal Deputy Solicitor General during the term in which the Office of the Solicitor General argued and briefed *Lujan v. Defenders of Wildlife*.

<sup>324</sup> 15 U.S.C. § 1681.

<sup>325</sup> *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

<sup>326</sup> See Elliott, *supra* note \_\_, at 171-72 (noting that “[s]ome critics . . . argue that standing doctrine verges on the abuses of the *Lochner* era”); Fletcher, *supra* note \_\_, at 233 (contending that “one may even say that the ‘injury in fact’ test is a form of substantive due process”); Baude, *supra* note \_\_, at 223-24 (observing that standing doctrine after *Spokeo* “invites courts either to fashion constitutional limits out of nothing, or to say that only interests protected by the common law satisfy Article III requirements—both paths that have proven unworkable in the substantive due process context”); Matthew Tokson, *The TransUnion Case and the Lochnerization of Standing Doctrine*, Dorf on Law (June 29, 2021, 10:24 AM), <http://www.dorfonlaw.org/2021/06/the-transunion-case-and-lochnerization.html> (arguing that, like *Lochner*, modern standing is intended to thwart legislatures and protect corporate interests). See also *Sierra v. City of Hallandale Beach, FL*, 996 F.3d 1110, 1128 (11th Cir. 2021) (Newsom, J., concurring) (“As a doctrine born largely of judicial creativity, perhaps it’s no surprise that standing mimics substantive due process in application too.”).

<sup>327</sup> See Tokson, *supra* note \_\_ (describing “*Lochnerization*” of standing as use of standards with “no basis in the Constitution’s text” that permits the Court to give effect to its “apparent antipathy toward consumer plaintiffs”). Judge Fletcher flagged in 1988 that “the ‘injury-in-fact’ requirement cannot be applied in a non-normative way.” Fletcher, *supra* note \_\_, at 231. He argued that, in ascertaining whether plaintiff had suffered an injury in fact, the Court was “impos[ing] standards of injury derived from some external normative source.” *Id.*

During the *Lochner* Era,<sup>328</sup> the Supreme Court invoked laissez faire economic principles and “liberty of contract” to invalidate a series of progressive labor reforms at the state and federal level.<sup>329</sup> The Court’s views were out of step with the public and contemporaneously unpopular.<sup>330</sup> The Court premised its decisions on the idea that the Constitution was more than its text; in addition to specifically enumerated rights, the Constitution also allegedly protected unenumerated natural rights against legislative incursion.<sup>331</sup> Freed from the requirement of a textual anchor for constitutional content, the Court found a ready outlet for its libertarian distrust of regulation, deeming freedom of contract “the general rule and restraint the exception,” to be permitted only in “exceptional circumstances.”<sup>332</sup> As Professor John Harrison recounts, the Justices in this period were “quite willing to form their own judgments as to the relationship between means and ends”<sup>333</sup>—in other words, to police a statute’s “*internal coherence and fit*.”<sup>334</sup>

The *Lochner* approach to economic legislation would not survive the Great Depression, and its repudiation was swift.<sup>335</sup> In 1937, the Court switched course and embraced deferential

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<sup>328</sup> The era takes its name from *Lochner v. New York*, 198 U.S. 45 (1905), in which the Supreme Court struck down state laws limiting the number of hours bakers could work weekly. *See id.* at 68-69. In the 1920s, an aggressive wing of Harding appointees limited interference with liberty of contract to five discrete areas, thus formalizing the doctrine further. *See Adkins v. Children’s Hosp.*, 262 U.S. 525, 546-48 (1923).

<sup>329</sup> Though *Lochner* itself scrutinized state legislation, the Court used a similar approach to federal programs. *See, e.g., Adkins*, 262 U.S. at 557-59. The Court was constrained to moor the enforcement of rights not enumerated in the Constitution in the Due Process Clause, rather than the Privileges or Immunities Clause, because of the *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1872).

<sup>330</sup> *See* Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1392 (2001) (noting that, during the *Lochner* Era, “the courts constantly ran afoul of the two great political movements of the time: Populism and Progressivism”).

<sup>331</sup> *See* David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 35-36 (2003).

<sup>332</sup> *Adkins*, 261 U.S. at 546. As Professor Mila Sohoni recounts, “private ordering, if not sacrosanct, was certainly privileged.” Mila Sohoni, *The Trump Administration and the Law of the Lochner Era*, 107 GEO. L.J. 1323, 1333 (2019); *see also* Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1461-63 (2015) (describing *Lochner* as predicated on “ideals of private ordering and government neutrality with regard to distribution of resources and entitlements”). The *Lochner*-Era Court did not confine itself to economic regulation; indeed, the Court of this period also recognized the fundamental liberty of parents to direct the upbringing of their children. *See Pierce v. Soc. Of Sisters*, 268 U.S. 510, 534 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

<sup>333</sup> John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 499 (1997).

<sup>334</sup> John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 12 (2014).

<sup>335</sup> Today, *Lochner* has a firm place in “the anticanon.” Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 417 (2011); *see also* Jack M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1017 (1998) (including *Lochner* in “an ‘anti-canon’ of cases that any theory worth its salt must show are wrongly decided”); Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527, 528 (2015) (characterizing it as an “article of faith” that *Lochner* “was obviously and irredeemably wrong”); David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 373 (2003) (observing that *Lochner* “would probably win the prize, if there were one, for the most widely reviled decision of the last hundred years”). However, disagreement about its flaws abounds. *See* Rebecca L. Brown, *The Art of Reading Lochner*, 1 N.Y.U. J. OF LAW & LIBERTY 570, 571-73 (2005) (describing, among *Lochner*’s charged sins, judicial activism, judicial usurpation of the legislative function, and judicial incorporation of a particular ideological point of view); *see also* Strauss, *supra* note \_\_, at 374 (“The striking thing about the disapproval of *Lochner*, though, is that there is no consensus on why it is wrong.”). To conservatives, *Lochner*’s vice may lie in its invalidation of legislation on the basis of rights not found in the Constitution. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 11 (1972) (arguing that “substantive due process . . . is and always has been an improper doctrine”). *But see* Strauss,

review for economic regulations, holding that “[e]ven if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment.”<sup>336</sup> Since the New Deal, the Court has committed itself to highly deferential rational basis review for ordinary economic legislation. In *United States v. Carolene Products Co.*,<sup>337</sup> the Court famously held that “regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.”<sup>338</sup> Even if the legislative product is “a needless, wasteful requirement,” the Court underscored, “it is for the legislature, not the courts, to balance [its] advantages and disadvantages.”<sup>339</sup> The Court has insisted that “[t]he day is gone” when it uses the Due Process Clause to strike down economic laws “because they may be unwise, improvident, or out of harmony with a particular school of thought.”<sup>340</sup> In *United States v. Comstock*,<sup>341</sup> the Roberts Court reaffirmed that Congress, in pursuing valid ends, “must also be entrusted with ample means for their execution.”<sup>342</sup> Where Congress’s end is legitimate, “the relevant inquiry is simply ‘whether the means chosen are ‘reasonably adapted’ to [its] attainment.’”<sup>343</sup>

To be sure, not every means that Congress chooses to advance a permissible end is authorized under the Constitution; constitutional side constraints prevent Congress from violating other provisions of the Constitution.<sup>344</sup> Means that are themselves unconstitutional can

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*supra* note \_\_, at 380 (observing that the rejection of “unenumerated rights” has never been accepted by a majority of the Court). Conservative critics situate modern substantive due process cases founded on privacy and dignity along the same continuum. See Bork, *supra* note \_\_, at 11; see generally Colby & Smith, *supra* note \_\_, at 560-64 (collecting sources). John Hart Ely observed that “it is impossible candidly to regard *Roe* as the product of anything else” besides “the philosophy of *Lochner*.” John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 939 (1973). Liberals, for their part, are more likely to charge *Lochner* with protecting the “wrong” rights or to see it as resting on flawed economic assumptions. See Brown, *supra* note \_\_, at 577; see also Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 882 (1987) (criticizing *Lochner* for choosing an inherently non-neutral status quo as its constitutional baseline). In *Planned Parenthood v. Casey*, 505 U.S. 833, 860-62 (1992), the joint opinion distinguished its decision to uphold *Roe* from its repudiation of *Lochner* because *Lochner*-Era cases “rested on fundamentally false assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare.” *Id.* at 861-62.

<sup>336</sup> *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937).

<sup>337</sup> 304 U.S. 144 (1938).

<sup>338</sup> *Id.* at 152-53.

<sup>339</sup> *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487 (1955). Line-drawing, in particular, was quintessentially a legislative function, and Congress could create a standard that was overinclusive, underinclusive, or both, because “perfection is by no means required.” *Vance v. Bradley*, 440 U.S. 93, 108 (1979) (quoting *Phillips Chem. Co. v. Dumas Sch. Dist.*, 361 U.S. 376, 385 (1960)).

<sup>340</sup> *Lee Optical*, 348 U.S. at 488. Although *Lee Optical* represented a challenge to a state law, the Court has likewise employed rational basis scrutiny to laws passed by Congress, as *Carolene Products* reflects. See 304 U.S. at 152-53.

<sup>341</sup> 560 U.S. 126 (2010).

<sup>342</sup> *Id.* at 133 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 408 (1819)).

<sup>343</sup> *Id.* at 135 (quoting *Gonzalez v. Raich*, 545 U.S. 1, 37 (2005)). As Dean Manning recounts, “[b]etween 1937 and 1992, the Court almost never met an exercise of the commerce power it did not like.” Manning, *supra* note \_\_, at 12. Despite its restriction on Congress’s ability to reach non-economic, purely local activity under the Commerce Clause thereafter, see *United States v. Lopez*, 514 U.S. 549, 566-68 (1995) and *United States v. Morrison*, 529 U.S. 598, 612-13 (2000), the Court left the post-New Deal approach intact, permitting Congress “to use the sharpest of rules or the loosest of standards” in furtherance of a legitimate end. See Manning, *supra* note \_\_, at 15, 30 & n. 184.

<sup>344</sup> See *Comstock*, 560 U.S. at 134; see also *McCulloch*, 17 U.S. at 421.

never be “reasonably adapted”<sup>345</sup> and thus can never be “proper” exercises of the Necessary and Proper Clause. Specific constitutional constraints obviously operate to restrict Congress’s choice of means. Thus, Congress cannot protect the credit of adherents of one religion while ignoring the risks that befall others; to do so would clearly violate the First Amendment.<sup>346</sup> In recent years, as Dean John Manning recounts, the Court has increasingly recognized structural side constraints, as well, and because these are more loosely tied to constitutional text, they afford judges far more discretion.<sup>347</sup> Congress cannot, for example, commandeering state governments in its effort to protect consumer credit.<sup>348</sup> Nor can Congress use conditional grants to enlist state participation if the grant is “coercive.”<sup>349</sup> These new side constraints, inferred from constitutional interstices rather than constitutional text, have allowed the Court “[to feel] free to displace Congress’s implementation strategies on the basis of abstract structural inferences about which reasonable people can doubtless differ.”<sup>350</sup>

With *Spokeo* and *TransUnion*, the Court has again done precisely that, bringing robust scrutiny of economic legislation back into the mix by deploying Article III as a side constraint that necessitates robust-but-unmoored judicial scrutiny of means. Congress, in passing legislation to protect consumer credit information, plainly advances a permissible end, well within its powers under the Commerce Clause.<sup>351</sup> In denying standing to the 6332 *TransUnion* class members whose alert status *TransUnion* did not divulge, the Court is circumscribing the way Congress can go about that end, prohibiting Congress from opting to confer on individuals specific rights, enforceable in federal court, to protect their credit information. Lower courts have taken note and used Article III as a mechanism for means-invalidation, circumscribing Congress’s efforts to deter identity theft by barring receipts that contain more than five digits of a consumer’s credit card number;<sup>353</sup> to protect consumers against unfair debt collection by requiring that debt collectors provide certain information about their rights to verify debts;<sup>355</sup> and to protect people against annoying robocalls and texts by allowing recipients of a single unwanted text to file suit.<sup>356</sup> Line-drawing, the Court has reminded, “is peculiarly a legislative task,” and courts are charged with “disregard[ing] the existence of other methods of allocation that we, as individuals perhaps would have preferred.”<sup>357</sup> Article III now has the federal courts very much back in the game of making calls about the wisdom and propriety of legislative ends

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<sup>345</sup> *Comstock*, 560 U.S. at 135.

<sup>346</sup> *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 696 (1994).

<sup>347</sup> See Manning, *Foreword, supra* note \_\_, at 31-32.

<sup>348</sup> *Murphy v. NCAA*, 138 S. Ct. 1461, 1476-77 (2018).

<sup>349</sup> *Nat’l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 582 (2012) (opinion of Roberts, C.J., joined by Breyer and Kagan, JJ.) (indicating that Congress may not threaten so much of a state’s budget that it amounts to “economic dragooning”).

<sup>350</sup> Manning, *Foreword, supra* note \_\_, at 48.

<sup>351</sup> The statute regulates persons or things in interstate commerce. *Cf. United States v. Morrison*, 529 U.S. 598, 608-09 (2000) (canvassing the categories of activity Congress can reach under the Commerce Clause).

<sup>353</sup> *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 920-21 (11th Cir. 2020) (*en banc*).

<sup>355</sup> *Casillas v. Madison Ave. Assocs.*, 926 F.3d 329, 331-32 (7th Cir. 2019). The *TransUnion* Court cited then-Judge Barrett’s opinion favorably. See *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203, 2205, 2214 (2021).

<sup>356</sup> *Salcedo v. Hanna*, 936 F.3d 1162, 1165 (11th Cir. 2019).

<sup>357</sup> *Schweiker v. Wilson*, 450 U.S. 221, 234-35 (1981) (quoting *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976)).

and means. Post-*Spokeo* and *TransUnion*, Article III now justifies a substantial erosion of the rational basis scrutiny to which the Court has committed itself since 1937.

d. The Nature of the Inquiry Leads to Substantive Biases

This robust judicial scrutiny, moreover, is by no means neutral. Circumscribing litigants to harms analogous to those at common law or recognizably “real” to federal judges prioritizes a wait-and-see approach that limits Congress’s ability to step into the fray before harm ensues, and it arguably reflects the Court’s increasing disdain for the class action mechanism.<sup>358</sup>

Sometimes, a harm has such dire consequences that a legislature might opt to ensure it never happens. Take identity theft, for example. The rise of the internet and increased competition in the financial sector by 2003 had “create[d] a target-rich environment for today’s sophisticated criminals, many of whom are organized and operate across international borders.”<sup>359</sup> The Fair and Accurate Credit Transactions Act of 2003 (FACTA)<sup>360</sup> took aim at this “epidemic” of identity theft in several ways.<sup>361</sup> First, FACTA sought to empower consumers and thus to enhance the effectiveness of consumer-initiated measures by providing free access to credit reports and required disclosures.<sup>362</sup> Second, it sought to enlist the support of financial institutions “by requiring them to develop procedures to ‘red flag’ identity theft.”<sup>363</sup> Finally, it required merchants to truncate credit card information on receipts “to limit the number of opportunities for identity thieves to ‘pick off’ key card account information.”<sup>364</sup> Upon signing FACTA into law, President George W. Bush credited Congress with “taking the offensive against identity theft,” a crime whose harm could lead to months or even years of individual harm.<sup>365</sup> He observed that the truncation requirement, barring businesses from printing more than the final five digits of customers’ credit card numbers, would “help prevent identity theft before it occurs.”<sup>366</sup>

Because Congress sought to stop harm from happening in the first place, it obviously could not rely on an exclusively remedial compensation scheme; instead, it provided statutory penalties for willful violations of FACTA, holding businesses liable for “actual damages sustained by the consumer . . . of not less than \$100 and not more than \$1,000.”<sup>367</sup> This

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<sup>358</sup> It also hobbles Congress’s efforts to respond to modern problems that may have sparse or strained common law analogues. *See generally* Leah Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1438-40 (2017) (noting that Congress frequently enacts legislation to respond to changed facts, novel problems, and new industries); Daniel Townsend, *Who Should Define Injuries For Article III Standing?*, 68 STAN. L. REV. ONLINE 76, 82 (2015) (observing that “it will at times be difficult to analogize new injuries to past injuries”).

<sup>359</sup> S. Rep. No. 108-166, at 8 (2003). In 2020, the FTC received nearly 1.4 million reports of identity theft, about twice as many as in 2019. *See* <https://www.ftc.gov/news-events/press-releases/2021/02/new-data-shows-ftc-received-2-2-million-fraud-reports-consumers>.

<sup>360</sup> P.L. 108-159, 117 Stat. 1952 (2003).

<sup>361</sup> *See* H.R. Rep. No. 108-263, at 25 (2003).

<sup>362</sup> *See id.* at 22.

<sup>363</sup> *Id.*

<sup>364</sup> S. Rep. 208-266, at 13.

<sup>365</sup> Credit Transactions Act Signing, C-SPAN (Dec. 4, 2003), <https://www.c-span.org/video/?179442-1/credit-transactions-act-signing>.

<sup>366</sup> *Id.*

<sup>367</sup> 15 U.S.C. § 1681n(a)(1)(A).

mechanism supplemented enforcement by the Federal Trade Commission<sup>368</sup> and arguably offered advantages; an individual who receives a receipt violating the truncation requirement has informational superiority over government monitors.<sup>369</sup> Combined with the class action mechanism,<sup>370</sup> statutory damages incentivized litigation and thereby heightened the deterrent against a practice that Congress thought contributed significantly to consumer risk.<sup>371</sup>

At the same time, the availability of class actions for statutory damages under FACTA generated controversy. To some, these litigation incentives “create[d] the potential for absurd liability and overdeterrence.”<sup>372</sup> Class certification could transform “unenforceable negative-value claims” into “an industry-changing event.”<sup>373</sup> Some commentators questioned whether the costs imposed by FACTA outweighed its benefits and charged that allowing the aggregation of statutory damage claims “warp[ed] the purpose” of FACTA.<sup>374</sup> In response to criticism, Congress enacted the Credit and Debit Card Receipt Clarification Act of 2007,<sup>375</sup> which retroactively eliminated liability for merchants who printed credit card expiration dates on receipts between December 4, 2004 and June 3, 2008.<sup>376</sup> Congress credited testimony of experts that “proper truncation of the card number, . . . regardless of the inclusion of the expiration date,” adequately prevented identity theft and sought to limit “abusive lawsuits that do not protect

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<sup>368</sup> See 15 U.S.C. § 1681s(a).

<sup>369</sup> See Stephen B. Burbank *et al.*, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 638, 663-64 (2013) (observing that litigant-enforcers’ “proximity to violations gives them inside information” that “far exceeds what the administrative state could achieve through monitoring, even under the most optimistic budget scenarios”); Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 8 (2002) (noting private actors’ “key resource of inside information”); Zachary D. Clopton, *Redundant Public-Private Enforcement*, 69 VAND. L. REV. 285, 309, 315 (2016) (explaining that “under-enforcement may result if the relevant agent lacks the necessary information”).

<sup>370</sup> Fed. R. Civ. P. 23(b)(3).

<sup>371</sup> See Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 MO. L. REV. 103, 110-11 (2009) (observing that statutory damages, when combined with the class action mechanism, offset disincentives to suit).

<sup>372</sup> *Id.* at 111. See also Burbank *et al.*, *supra* note \_\_, at 678 n. 171 (“In combination with class actions, statutory damages can create massive liability, inefficiently high levels of private enforcement pressure, and overdeterrence.”); Michael E. Chaplin, *What’s So Fair About the Fair and Accurate Credit Transactions Act?*, 92 MARQ. L. REV. 307, 309 (2008) (calling FACTA “a source of seemingly endless litigation with minimal benefit to the litigants, but which provides plaintiffs’ attorneys with a potential windfall”). *But see* Daniel R. LeCours, Note, *Steering Clear of the “Road to Nowhere”: Why the BMW Guideposts Should Not Be Used to Review Statutory Penalty Awards*, 63 RUTGERS L. REV. 327, 344-45 (2010) (arguing that “critics’ characterization of the issues at stake in FACTA is patently one-sided” in its exclusive focus on “potentially devastating liability to defendants”).

<sup>373</sup> Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of Shady Grove*, 159 U. PENN. L. REV. 17, 19 (2010). See also Richard Marcus, *Revolution v. Evolution in Class Action Reform*, 325 F.R.D. 1301, 1310 (2018) (“One might say the synergy between penalty claims and the class action enables plaintiff lawyers to use the litigation nuclear weapon to kill a gnat.”).

<sup>374</sup> Scheuerman, *supra* note \_\_, at 105-06, 115. See also J. Patrick Redmon, Comment, *Plausibly Willful—Tightening Pleading Standards in FACTA Credit Card Receipt Litigation Where Only an Expiration Date is Present*, 94 N.C. L. REV. 1314, 1317 (2016) (arguing that “the willingness of courts to apply great scrutiny to FACTA cases is a welcome development”).

<sup>375</sup> Pub. L. No. 110-241, 122 Stat. 1565 (codified as amended at 15 U.S.C. § 1681n(d)).

<sup>376</sup> See *id.* § 3.

consumers but only result in increased cost.”<sup>377</sup> Critics charged this as “a less than satisfying response.”<sup>378</sup>

This Article takes no side in the policy debate as to whether FACTA represents a measured response to the problem of identity theft or an ill-considered legislative overcorrection. It simply flags that, under the *Spokeo/TransUnion* concreteness inquiry, which mandates either demonstrable harm or “material risk of future harm,”<sup>379</sup> a suit alleging the breach of the truncation requirement—the prevention measure lauded by President Bush for stopping the harms *before* they occur—will likely be rejected as insufficiently concrete and thus “too soon” in the main run of cases. The Court’s standing requirements thus have the effect of constraining Congress to a reactive or nearly-reactive approach, thereby curbing its options in responding to big societal problems.<sup>380</sup> The prophylactic of eliminating the “‘golden ticket’ for fraudsters and identity thieves”<sup>381</sup> thus is toothless. The result, of course, sharply limits the pool of potential plaintiffs, all but eliminating the statutory damage mechanism for plaintiffs whose harms have not come to fruition. By means of Article III, the Court has achieved what statutory critics sought but did not get in the Clarification Act.<sup>382</sup>

### III. Charting a New Course

The Court’s concreteness inquiry thus provides little guidance to lower courts, invites them to substitute their own policy preferences for the will of Congress in frustration of the separation of powers, significantly curtails the deferential review of economic legislation employed since 1937, and circumscribes Congress’s ability to decide when harms are so harmful that they should not be allowed to happen. It is not ideal. At the same time, the Court has slammed the door on Justice Thomas’s proposed alternative approach, suggesting that it would give rise to even greater evil. With respect, the Court is wrong. Justice Thomas’s approach is consistent with history and properly moored in statutory text rather than judicial intuition. This

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<sup>377</sup> *Id.* § 2(a)(6).

<sup>378</sup> Chaplin, *supra* note \_\_, at 313; *see also* Scheuerman, *supra* note \_\_, at 105 n. 11 (noting limited nature of Congress’s response).

<sup>379</sup> *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2210 (2021).

<sup>380</sup> *See* Credit Transactions Act Signing, C-SPAN (Dec. 4, 2003), <https://www.c-span.org/video/?179442-1/credit-transactions-act-signing> (recounting the story of a man who was still fighting the effects of identity theft two years after its discovery).

<sup>381</sup> FED. TRADE COMM’N, SLIP SHOWING? FEDERAL LAW REQUIRES ALL BUSINESSES TO TRUNCATE CREDIT CARD INFORMATION ON RECEIPTS (2007), <https://www.ftc.gov/tips-advice/business-center/guidance/slip-showing-federal-law-requires-all-businesses-truncate>.

<sup>382</sup> A cynic might be forgiven for situating the *TransUnion* and *Spokeo* concreteness inquiry amid the Court’s other holdings reflecting hostility to class actions. *See* Richard D. Freer, *Front-Loading, Avoidance, and Other Features of the Recent Supreme Court Class Action Jurisprudence*, 48 AKRON L. REV. 721, 723 (2015) (observing that the ledger of defendant wins at the Supreme Court is “fuller” and that “recent case law does not augur well for plaintiffs”); Elizabeth J. Cabraser, *The Class Abides: Class Actions and the “Roberts Court,”* 48 AKRON L. REV. 757, 759-60 (2015) (“Plaintiffs’ counsel and consumer advocates, not without reason, have tended to see the currently-configured Supreme Court as hostile to class actions.”); Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 734-35 (2013) (summarizing increasing restrictions on the class action mechanism). Data confirm that “the Roberts Court is indeed highly pro-business,” which is consistent with the Court harboring a jaundiced view of consumer protection lawsuits in the abstract. Lee Epstein, *et al.*, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1449 (2013); *see also* Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 70 (2017) (describing the Roberts Court’s pro-business tilt).

Part demonstrates that the Court’s lack of confidence in its own ability to police the distinction between public and private rights is unwarranted.

#### A. Analytical Clarity of the Public/Private Right Dichotomy

As Part I recounts, Justice Thomas’s proposed disaggregation of public and private rights has solid support in history, with Blackstone and the common law in accord that the distinction between rights possessed by individuals as individuals and rights possessed by the public in the aggregate had legal significance.<sup>383</sup> The trespasser who set foot onto Blackacre faced legal exposure for violating the owner’s private right even if she did not trample the blackberries. This principle found acceptance in England and the United States by the nineteenth century, so much so that Justice Story, riding circuit, deemed it “incontrovertible” by 1838.<sup>384</sup>

Notably, it also has support on the current Court. Four of the five Justices in the *TransUnion* majority joined the Court’s eight-to-one decision this term in *Uzuegbunam v. Preczewski*, which confirmed that proof of damage is unnecessary where plaintiff asserts the violation of a private right. *Uzuegbunam* involved a college student’s First Amendment challenge after a college security officer stopped him from distributing religious materials outside a campus free speech zone.<sup>386</sup> Though the plaintiff had suffered no measurable damages, there was no dispute that he had suffered an injury in fact.<sup>387</sup> Determining that his legal injury was redressable by an award of nominal damages, the Court observed that violations of private rights may be litigated even if plaintiff “does not lose a penny by reason of the [violation]” because “every injury imports a damage.”<sup>388</sup> *Uzuegbunam* presented a clear violation of a private right and thus did not require precise consideration of the public-private rights distinction. In making the point that proof of additional damage was not necessary, though, Justice Thomas’s majority opinion relied extensively on the same line of cases he cited in his *Spokeo* concurrence and *TransUnion* dissent.<sup>389</sup>

Though the Court thus appears to agree that violations of *some* private rights require no additional proof of harm, the Court’s “one-size-fits-all standing doctrine”<sup>390</sup> collapses this distinction when it comes to rights created by Congress. But there is no principled justification for dispensing with the common law rule based on the source of the private right.<sup>391</sup> Congress

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<sup>383</sup> See *supra* notes \_\_\_ and accompanying text.

<sup>384</sup> *Webb v. Portland Mfg. Co.*, 29 F. Cas. 506, 508-09 (D. Me. 1838).

<sup>386</sup> See *id.* at 797.

<sup>387</sup> See *id.*

<sup>388</sup> *Id.* at 799 (quoting Lord Holt’s dissent in *Ashby v. White*, 92 Eng. Rep. 126, 137 (1703), which later was followed “in many subsequent cases,” *Embrey v. Owen*, 155 Eng. Rep. 579, 585 (1851)).

<sup>389</sup> See *Uzuegbunam*, 141 S. Ct. at 798-800; *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2217-18 (2021) (Thomas, J., dissenting); *Spokeo v. Robins*, 136 S. Ct. 1540, 1551-52 (2016).

<sup>390</sup> Hessick, *supra* note \_\_\_, at 277.

<sup>391</sup> As Justice Thomas observed in his *TransUnion* dissent, the First Congress gave copyright holders the right to sue upon infringement for statutory damages, even where they could not show monetary loss, thus reflecting early understanding of this principle. *TransUnion*, 141 S. Ct. at 2217 (Thomas, J., dissenting).

either is allowed to create private rights, as the Court has oft reminded us,<sup>392</sup> or it is not. If Congress can create private rights that did not exist at common law, they logically ought to be treated like private rights.<sup>393</sup>

## B. Concerns About Manipulability of the Threshold Classification Are Misplaced

The *TransUnion* majority rejected Justice Thomas's proposed dichotomy in this context, even in the same term in which eight members of the Court embraced the private rights principle in *Uzuegbunam*, out of concern that unless the concreteness requirement applies across the board to all rights created by Congress, "little or nothing" would "constrain Congress from freely creating causes of action for vast classes of *unharmed* plaintiffs to sue any defendants who violate any federal law."<sup>394</sup> The concreteness inquiry, the Court intimated, thus acts as a fortification. Obviously, the Court's misgivings reflect profound distrust of Congress. So too, though, the *TransUnion* Court manifested distrust in itself, betraying a lack of confidence that it could find and enforce a principled distinction between statutorily-created public and private rights. Believing itself powerless, the *TransUnion* Court threw up its hands; the high defensive wall was apparently necessary to prevent Congress from exploiting any dichotomy and enlisting the courts in efforts "simply to enforce general compliance with regulatory law."<sup>395</sup>

The Court's professed inability to discern when Congress has created a valid private right is difficult to square with a two-decade-old adjacent line of cases. Since 2001 and 2002, the Court has believed itself capable of identifying private rights in federal statutes through analysis of statutory text. The implied right of action cases follow the traditional arc of heady Warren Court expansion followed by Rehnquist Court contraction. In 1964's *J.I. Case Co. v. Borak*,<sup>396</sup> the Warren Court held that section 14(a) of the Securities and Exchange Act,<sup>397</sup> which authorized prospective relief for misleading proxy statements, contained an implied right of action for damages.<sup>398</sup> Considering itself Congress's partner in crime,<sup>399</sup> the Court deemed it "the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose."<sup>400</sup> The Court reined itself in with a four-factor test a decade later in *Cort*

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<sup>392</sup> See *Spokeo*, 136 S. Ct. at 1549 (observing that Congress can create legally cognizable, injuries that were previously inadequate at law); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992) (affirming that the injury required by Article III "may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing'"); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982) (same); *Warth v. Seldin*, 422 U.S. 490, 514 (1975) (same). See also *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring) ("In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, and I do not read the Court's opinion to suggest a contrary view.").

<sup>393</sup> As Justice Thomas noted, "this understanding accords proper respect for the power of Congress and other legislatures to define legal rights." *TransUnion*, 141 S. Ct. at 2218 (Thomas, J., dissenting).

<sup>394</sup> *TransUnion*, 141 S. Ct. at 2206 n.2.

<sup>395</sup> *Id.* at 2207 n.3.

<sup>396</sup> 377 U.S. 426 (1964).

<sup>397</sup> See 15 U.S.C. § 78n(a).

<sup>398</sup> See *Borak*, 377 U.S. at 432-33.

<sup>399</sup> See Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 20 (2006) (noting that the Warren Court "portrayed itself as Congress's partner, rather than its subordinate, believing that it could create implied rights of action for statutory violations without regard to Congress's intent").

<sup>400</sup> *Borak*, 377 U.S. at 433.

*v. Ash*,<sup>401</sup> and grounded the inquiry in congressional intent in *Cannon v. University of Chicago*.<sup>402</sup> By 1994, the Court rejected implied aiding and abetting liability under Rule 10b-5 in *Central Bank of Denver v. First Interstate Bank of Denver*,<sup>403</sup> reasoning that “the text of the statute controls our decision.”<sup>404</sup> With *Alexander v. Sandoval*,<sup>405</sup> the Court’s effort to inter *Borak* was complete, and the Court expressly rejected any effort to “revert . . . to the understanding of private causes of action that held sway 40 years ago.”<sup>406</sup>

Justice Scalia’s majority opinion in *Sandoval* dictated a two-step inquiry for finding implied rights of action in federal statutes that was closely tethered to statutory text. First, a court should look for “rights-creating” language to assess whether Congress intended to create an individual right “on a particular class of persons.”<sup>407</sup> The statute’s emphasis bore on the inquiry; the Court indicated that statutes that focused primarily on regulated entities or regulating agencies, rather than the class of protected individuals, revealed no intent to create an individual right.<sup>408</sup> Upon finding intent to create an individual right, the Court next instructed, a court should scour the statute for evidence that Congress intended (but apparently had neglected) to create a private remedy.<sup>409</sup> In *Sandoval* itself, the Court answered the first question in the negative. There was “no evidence anywhere in the text to suggest that Congress intended to create a private right.”<sup>410</sup> As such, the Court never got to step two. *Sandoval* represented “a significant departure from [the Court’s] previous implied private remedy jurisprudence,”<sup>411</sup> anchoring the Court’s analysis squarely in text and forswearing judicial efforts to pitch in to help advance a statute’s unstated purposes.

A year later, in *Gonzaga v. Doe*,<sup>412</sup> the Court confronted the question under what circumstances 42 U.S.C. § 1983, which creates an express statutory right of action against state actors for violations of federal law, permits plaintiffs to sue raising violations of other federal statutes.<sup>413</sup> Rejecting plaintiff’s claim that anyone within a statute’s beneficiary zone ought to be

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<sup>401</sup> 422 U.S. 66, 78 (1975).

<sup>402</sup> 441 U.S. 677, 696-97 (1979) (finding an implied right of action based on Congress’s use of identical language from a different statute in which the Court had already implied a private remedy).

<sup>403</sup> 511 U.S. 164, 173 (1994).

<sup>404</sup> *Id.*

<sup>405</sup> 532 U.S. 275 (2001).

<sup>406</sup> *Id.* at 287.

<sup>407</sup> *Id.* at 288-89.

<sup>408</sup> *See id.* at 289.

<sup>409</sup> *See id.* at 290-91.

<sup>410</sup> *Id.* at 291.

<sup>411</sup> *Leading Cases*, 115 HARV. L. REV. 497, 507 (2001).

<sup>412</sup> 536 U.S. 273 (2002).

<sup>413</sup> In *Maine v. Thiboutot*, 448 U.S. 1 (1980), the Court held that § 1983 permitted suits against state officials for violation of federal statutes. *See id.* at 4. Prior to *Gonzaga*, the Court had held that the Medicaid Act created an enforceable right because it was “intend[ed] to benefit the putative plaintiff.” *Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498, 509 (1990). In *Blessing v. Freestone*, 520 U.S. 329 (1997), the Court created a three-pronged test for determining whether a statute creates a right enforceable through Section 1983. The first prong, that “Congress must have intended that the provision in question benefit the plaintiff,” *id.* at 340, gave rise to confusion that *Gonzaga* attempted to clarify. *Gonzaga*, 536 U.S. at 282. The Court later reflected that *Gonzaga* “plainly repudiate[d] the ready implication of a § 1983 action that *Wilder* exemplified.” *Armstrong v. Exceptional Child Ctr.*, 575 U.S. 320, 330 n. \* (2015).

able to sue under Section 1983, the Court concluded that nothing “short of an unambiguously conferred right” would support a lawsuit under the statute.<sup>414</sup> The Court underscored that “it is *rights*, not the broader or vaguer ‘benefits’ or ‘interests,’ that may be enforced” under Section 1983.<sup>415</sup> Given Section 1983, the putative plaintiff had a cause of action in hand, so the implied right of action cases were not directly implicated. Nonetheless, the Court flagged that “the inquiries overlap in one meaningful respect—in either case we must first determine whether Congress *intended to create a federal right*.”<sup>416</sup> In both the Section 1983 context and the implied right of action context, the Court said, the inquiry would be identical, and courts would be charged with determining “whether or not Congress intended to confer individual rights upon a class of beneficiaries.”<sup>417</sup>

Turning to that question, the *Gonzaga* Court asked whether the Family Educational Rights and Privacy Act<sup>418</sup> (FERPA)’s nondisclosure provisions created enforceable rights and found they did not. The Court indicated that the statute had to be framed “in terms of the persons benefited” and flagged Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 as exemplars phrased “with an *unmistakable focus* on the benefited class.”<sup>419</sup> The Court concluded that FERPA, in contrast to these models, simply addressed and imposed obligations on the Secretary of Education and thus was “two steps removed from the interests of individual students and parents.”<sup>420</sup> As such, the Court concluded that it “clearly does not confer the sort of ‘*individual* entitlement’ that is enforceable under § 1983.”<sup>421</sup> The Court buttressed this conclusion by noting that FERPA had an “aggregate” focus rather than a concern with individual needs.<sup>422</sup> Regulated institutions could avoid sanction through “substantial” compliance with the act’s requirements.<sup>423</sup> Implicitly, then, Congress was willing to abide minor instances of noncompliance, a finding that again suggested Congress’s primary concern was not with individual instances of injury.

Taken together, the *Sandoval/Gonzaga* rights inquiry involves what one commentator called a “terminology prong” and a “focus prong,”<sup>424</sup> and both have the effect of curbing the kind of congressional manipulation the *TransUnion* majority feared. First, courts should look for rights-creating language that, like the Title VI and Title IX exemplars, confers a positive (entitlement to) or negative (freedom from) right on an identifiable class of beneficiaries. The

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<sup>414</sup> *Gonzaga*, 536 U.S. at 283.

<sup>415</sup> *Id.*

<sup>416</sup> *Id.* (emphasis original).

<sup>417</sup> *Id.* at 285.

<sup>418</sup> 20 U.S.C. § 1232g.

<sup>419</sup> *Gonzaga*, 536 U.S. at 284 (emphasis original). Title VI and Title IX are both framed in passive voice, thus emphasizing the victims of any illegality. *See* Title VI, 42 U.S.C. § 2000d (“No person in the United States shall . . . be subjected to discrimination . . . on the basis of race, color, or national origin”); Title IX, 20 U.S.C. § 1681(a) (“No person in the United States shall, on the basis of sex, be subjected to discrimination under any education program or activity receiving Federal financial assistance”).

<sup>420</sup> *Gonzaga*, 536 U.S. at 287 (emphasis original).

<sup>421</sup> *Id.* at 275 (emphasis original).

<sup>422</sup> *Id.* at 288.

<sup>423</sup> *See id.*

<sup>424</sup> Amanda B. Hurst, *Gonzaga’s Ghosts*, 86 TENN. L. REV. 289, 312 (2019).

Court has repeatedly emphasized the beneficiary “class,”<sup>425</sup> thus negating the impression that Congress can confer a right on the population writ large or the universe,<sup>426</sup> and lower courts have taken note. Thus, in *Long Term Care Pharmacy Alliance v. Ferguson*,<sup>427</sup> the First Circuit rejected a claimed private right in provisions of the Medicaid Act where the provision “mentions no category of entity or persons specially protected.”<sup>428</sup> The court reexamined pre-*Gonzaga* precedent permitting suit and deployed the “two touchstones in *Gonzaga*’s analysis,” that a statute has to use rights-creating language and identify a “discrete class of beneficiaries.”<sup>429</sup> The Tenth Circuit agreed in *Mandy R. ex rel. Mr & Mrs. R. v. Owens*,<sup>430</sup> reasoning that the provision in question “never establishes an ‘identifiable class’ of rights-holders” but referred to recipients only “in the aggregate, as members of ‘the general population in the geographic area.’”<sup>431</sup> “[W]ithout ... an identifiable class,” the court reasoned, “no enforceable federal right is created.”<sup>432</sup>

Turning to the “focus prong,” the Supreme Court has suggested that the object of a provision is important. Statutes primarily focused on the regulator or regulated entity, rather than the intended beneficiary class, generally do not give rise to private rights.<sup>433</sup> A statute that is set

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<sup>425</sup> See *Gonzaga*, 536 U.S. at 285; *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 119 (2005); see also *Cannon v. Univ. of Chicago*, 441 U.S. 677, 689 (1979) (requiring that statute be enacted “for the benefit of a special class of which the plaintiff is a member”).

<sup>426</sup> See Sasha Samberg-Champion, Note, *How to Read Gonzaga: Laying the Seeds of a Coherent Section 1983 Jurisprudence*, 103 COLUM. L. REV. 1838, 1880 (2003) (“In *Gonzaga*’s aftermath, provisions must create specific rights for specific individuals or groups, not set out broad duties that, depending on the facts of a given case, could conceivably benefit many distinct groups of plaintiffs in different ways.”).

<sup>427</sup> 362 F.3d 50 (1st Cir. 2004).

<sup>428</sup> *Id.* at 56; accord *Westside Mothers v. Olszewski*, 454 F.3d 532, 543 (6th Cir. 2006) (finding no right where provision’s language failed to “focus[] on a specific class of beneficiaries”); *Levin v. S.C. Dept. of Health & Human Servs.*, No. 3:12-cv-0007-JFA, 2015 WL 4545931, at \*5 (D.S.C. July 28, 2015) (finding no enforceable right where Congress referenced the “general population”).

<sup>429</sup> *Long Term Care*, 362 F.3d at 57. Compare *Colon-Marrero v. Velez*, 813 F.3d 1, 18 (1st Cir. 2016) (finding an enforceable right under the Help America Vote Act, which “specifies a discrete class of beneficiaries— ‘registrants’”); *Mendez v. Brown*, 311 F. Supp. 2d 134, 140 (D. Mass. 2004) (finding a private right in a different provision of the Medicaid Act that, unlike the provision at issue in *Long Term Care*, “identifies a ‘discrete class of beneficiaries’”).

<sup>430</sup> 464 F.3d 1139 (10th Cir. 2006).

<sup>431</sup> *Id.*

<sup>432</sup> *Id.*

<sup>433</sup> See *Gonzaga*, 536 U.S. at 287. Some members of the Court have complained that it has muddied the doctrine. See *Gee v. Planned Parenthood of Gulf Coast, Inc.*, 139 S. Ct. 408, 409 (2018) (Thomas, J., joined by Alito, J. and Gorsuch, J., dissenting from denial of certiorari). However, lower courts have had ample opportunity to sort through this text-based approach. Compare, e.g., *Johnson v. City of Detroit*, 446 F.3d 614, 623 (6th Cir. 2006) (concluding that Lead-Based Paint Poisoning Prevention Act focuses on the regulator, rather than on individual tenants, and thus does not confer individual rights); *Midwest Foster Care & Adoption Ass’n v. Kincade*, 712 F.3d 1190, 1197 (8th Cir. 2013) (finding that provisions of the Adoption Assistance and Child Welfare Act of 1980 focused on regulated entities rather than protected individuals and thus did not create enforceable individual rights); *Long Term Care Pharm. Alliance v. Ferguson*, 362 F.3d 50, 58 (1st Cir. 2004) (concluding statute that failed to identify a discrete class of beneficiaries lacked rights-creating language), with *Ball v. Rodgers*, 492 F.3d 1094, 1107 (9th Cir. 2007) (concluding that statute’s prominent use of the term “individuals” signified congressional intent to create an enforceable right); *Harris v. Olszewski*, 442 F.3d 456, 461 (6th Cir. 2006) (finding statute that gave “any individual eligible for medical assistance” free choice of providers unambiguously conferred an individual entitlement); *S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 603 (5th Cir. 2004) (finding that Medicaid Act language that stating that “[a]

up to serve aggregate and systemic goals is less likely to confer a right on individuals.<sup>434</sup> An aggregate, as opposed to individual, focus is indicated where a regulated entity need only substantially comply with a standard. A statute that tolerates some noncompliance is “not concerned with ‘whether the needs of any particular person have been satisfied,’”<sup>435</sup> which “counsels against the creation of individually enforceable rights.”<sup>436</sup>

While *Sandoval* reflects concern for the proper judicial function, *Gonzaga* interprets the language of Section 1983. For present purposes, the key is that, taken together, *Sandoval* and *Gonzaga* demonstrate that it is possible to create and administer a focused, text-based inquiry to determine the existence of a statutory private right. The *TransUnion* Court’s suggestion that it would not be able to differentiate public rights from private rights or that Congress might by sleight of hand convert public rights into “private rights” that permit anyone and everyone to sue therefore directly contradicts these cases and reflects a misplaced lack of confidence.

### C. Application to the FCRA Provisions at Issue in *Spokeo* and *TransUnion*

Applying the *Sandoval/Gonzaga* approach in the context of the FCRA provisions at issue in *Spokeo* and *TransUnion* illustrates its potential utility in distinguishing private and public rights.<sup>437</sup> Robins and Ramirez both claimed violations of the FCRA requirement that consumer reporting agencies “follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom [a consumer] report relates.”<sup>438</sup> In findings, Congress characterized the responsibilities of consumer reporting agencies as “grave” and required that they act fairly, impartially, and respectfully of consumer’s right to privacy.<sup>439</sup> Congress used the word “right,” imposed specific, individual-focused obligations, and allowed suit against any person “who willfully fails to comply with any requirement . . . with respect to any consumer.”<sup>440</sup> In affording a remedial mechanism to any individual as to whom a credit agency breached its obligation, Congress sought far more than “substantial compliance.” Employing the *Sandoval/Gonzaga* approach, Congress unambiguously bestowed on individual consumers a private right that reporting agencies use reasonable procedures to safeguard the substantive accuracy of their records.<sup>441</sup>

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State Plan must provide . . . to all individuals” created individual rights); *Sabree ex rel. Sabree v. Richman*, 367 F.3d 180, 189-90 (3d Cir. 2004) (same).

<sup>434</sup> See *Gonzaga*, 536 U.S. at 288. See also *Arrington v. Helms*, 438 F.3d 1336, 1345 (11th Cir. 2006) (concluding that a “substantial conformity” requirement was consistent with an aggregate focus, not an individual focus).

<sup>435</sup> *Gonzaga*, 536 U.S. at 288.

<sup>436</sup> *Midwest Foster Care*, 712 F.3d at 1200. See also *Planned Parenthood of Greater Texas v. Kauffman*, 981 F.3d 347, 373 (5th Cir. 2020) (finding no enforceable right because substantial-compliance regime had an “aggregate focus”).

<sup>437</sup> See *supra* notes \_\_\_ and accompanying text.

<sup>438</sup> 15 U.S.C. § 1681e(b). See First Amended Compl. ¶ 63, *Robins v. Spokeo*, No. 2:10-cv-5306-ODW-AGR (Feb. 17, 2011); Compl. ¶ 28-43, *Ramirez v. TransUnion LLC*, No. 3:23-cv-00632-JSC (Feb. 9, 2012).

<sup>439</sup> 15 U.S.C. § 1681(a)(4).

<sup>440</sup> *Id.* § 1681n(a).

<sup>441</sup> The analysis ought to proceed in a similar fashion with respect to the TCPA, which likewise focuses on consumer privacy, uses the word “right,” and emphasizes the effects of transgressions on individual recipients. See 47 U.S.C. § 227. Similarly, the credit card truncation requirement of FACTA specifically focuses on individual cardholders and is aimed at the protection of individual consumers. See 15 U.S.C. § 1681.

The same analysis likely applies to the reporting requirements challenged by Ramirez when he received two incomplete mailings after he requested his credit file. The statute requires the consumer reporting agency to “clearly and accurately disclose to the consumer . . . [a]ll information in the consumer’s file at the time of the request”<sup>442</sup> and mandates that, “with each written disclosure by the agency to the consumer,” the agency include a summary of the consumer’s rights to dispute the information.<sup>443</sup> The provision focuses less on the regulated entity than on the material to which the consumer is entitled, and significantly, the trigger for the obligations is the individual consumer’s request. The statute again imposes a requirement with respect to each request and is not framed in terms of substantial compliance. These provisions, too, would appear to confer a private right on the requesting consumer.

Robins’ claim that Spokeo violated regulations implementing 15 U.S.C. § 1681j(a)(1)(C), which required credit agencies to post a toll-free numbers on their website, serves as a useful counterpoint.<sup>444</sup> The purpose of the regulation is to create a streamlined process by which customers can access information to request annual file disclosures.<sup>445</sup> The regulation is almost entirely centered on the regulated entity, outlining a series of expectations that its contact information be readily available and easily understandable.<sup>446</sup> Most tellingly, the regulation requires that consumer reporting agencies have “adequate capacity” to accept requests “from the reasonably anticipated volume of consumers contacting the nationwide specialty consumer reporting agency.”<sup>447</sup> This language is analogous to the “substantial compliance” standard in FERPA in that it seemingly tolerates individual instances in which consumer requests go unanswered or capacity is insufficient. The *Gonzaga* Court held that such an aggregate, rather than individual, focus “cannot make out the requisite congressional intent to confer individual rights.”<sup>448</sup>

As scrutiny of the FCRA provisions at issue in *Spokeo* and *TransUnion* reflects, the *Sandoval/Gonzaga* text-based analysis permits threshold differentiation between statutory requirements that focus on regulators or regulated entities and statutory requirements that reflect congressional intent to create and confer rights on a discrete class of beneficiaries. A congressional attempt to permit any person to sue alleging a general violation of law would not pass muster under the *Sandoval/Gonzaga* analysis, which requires specific rights-creating language and demonstrated solicitude for individuals, rather than good-enough aggregate compliance. The inquiry folds in the requirement that a right settle on a particular group, which can admittedly be large—all debtors whose data are mishandled, all telephone-owners receiving unwanted messages—but does not encompass everyone. The *TransUnion* majority’s concern

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<sup>442</sup> 15 U.S.C. § 1681g(a)(1).

<sup>443</sup> *Id.* § 1681g(c)(2).

<sup>444</sup> See First Amended Compl. ¶ 74-75, *Robins v. Spokeo*, No. 2:10-cv-5306-ODW-AGR (Feb. 17, 2011).

<sup>445</sup> 16 C.F.R. § 610.3(a). The FTC rescinded these regulations in April 2012 after the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010), transferred regulatory authority to the newly-created Consumer Financial Protection Bureau. See 77 Fed. Reg. 22200-01 (Apr. 13, 2012).

<sup>446</sup> See, e.g., 16 C.F.R. § 610.3(a)(1)(ii) (requiring that toll-free number be published “in any telephone directory in which any telephone number for the nationwide specialty consumer reporting agency is published”); *id.* § 610.3(a)(1)(iii) (requiring that toll-free number be “clearly and prominently posted on any website”).

<sup>447</sup> *Id.* § 610.3(a)(2)(i).

<sup>448</sup> *Gonzaga Univ. v. Doe*, 536 U.S. 273, 289 (2002).

that its flawed concreteness inquiry is a necessary bulwark against congressional manipulation thus misses the mark. Justice Thomas’s distinction between statutory public and private rights is consistent with history and with *Uzuegbunam*. This Article demonstrates that, contrary to the *TransUnion* majority’s protestations, it is also administrable in the context of congressionally-created rights.

## CONCLUSION

For a moment after *Spokeo*, it was possible to see Professor Baude’s “glimmer of hope” for approaching clarity in Justice Thomas’s proposed disaggregation of public and private rights in the injury-in-fact inquiry.<sup>449</sup> Indeed, though lower courts reflected post-*Spokeo* disarray, Justice Thomas appeared to be gaining ground. In *Uzuegbunam*, he cited all the same cases and commanded seven colleagues for the proposition that the violation of a private legal right required no showing of additional harm. Three months later, however, *TransUnion* demonstrated that any promise of clarity was illusory. *TransUnion* went all-in on the *Spokeo* approach where rights created by Congress are concerned and expressly rejected Justice Thomas’s proffered distinction.

*TransUnion* will dramatically unsettle the doctrine. It leaves lower courts—already grumbling about the injury-in-fact inquiry after *Spokeo*—rudderless, left to substitute their own policy preferences for the outcome of the political process. Though brandishing a separation-of-powers flag, *TransUnion* unironically commits federal courts to quintessentially legislative policy calls. In the name of structural side constraints inferred, not stated, in the Constitution, *TransUnion* upends the Court’s eight-decade commitment to rational basis scrutiny of economic legislation post-*Lochner*. In a world in which novel problems abound, it circumscribes Congress’s ability to act preventatively and sends reviewing courts on quests for nineteenth-century search images. .

*TransUnion* instructs that we need to be in this place to avert congressional manipulation; its concrete wall is the only defense against Congress conferring private rights to sue for anything and everything, thereby clogging the courts with abstractions and generalized grievances and trammeling upon the enforcement prerogatives of the Executive Branch. Lost utterly in this conversation is the Court’s text-based, two-decades-old approach to the identification of congressionally-conferred individual rights in *Sandoval* and *Gonzaga*. This Article flags this approach, demonstrates its utility in differentiating between different kinds of FCRA provisions challenged in *Spokeo* and *TransUnion*, and urges that it answers Professor Baude’s “important and hard question,”<sup>450</sup> supplying the Court a ready limiting principle.

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<sup>449</sup> Baude, *supra* note \_\_, at 197.

<sup>450</sup> *Id.* at 230.