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ARTICLE III'S CONSTRAINTS ON THE LEGISLATIVE POWER

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ABSTRACT

Article III's heightened concreteness standard for statutory harms takes federal judges deep into legislative terrain, jeopardizing statutory damage provisions and confining Congress to post hoc solutions rather than preemptive strikes. The Supreme Court has insisted that creating a cause of action is a legislative function. At the same time, its recent standing cases instruct lower federal courts to permit suit on statutory injuries only when they find actual harm that bears a tight connection to injuries recognized at common law. This new harm requirement rests uneasily with countless statutes featuring statutory damage provisions that are in place precisely because damages are difficult to quantify. For decades, and as

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*recently as 2004, the Court has seen the decision to require or forego proof of actual damage as an exclusively legislative call, but Article III now dictates another direction. The Court's conclusion that "mere" risk of harm, without more, cannot give rise to a damages action makes a normative choice and, with scarce fanfare, deprives Congress of decades-old tools in the regulation of risk. After *TransUnion v. Ramirez*, Congress is powerless to avoid harm by financially incentivizing limits to exposure. When President George W. Bush signed the Fair and Accurate Credit Transaction Act (FACTA) in 2003, barring merchants from including patrons' entire credit card numbers on point-of-sale receipts, he praised Congress; the statute, with its various enforcement mechanisms, including private suit, would help prevent identity theft before it occurs. But after *TransUnion*, nearly every court has said that plaintiffs receiving non-compliant receipts lack an injury in fact sufficient to sue under the statute. Receipts land in pockets and trashcans; the FTC is hard-pressed to learn of violations. If these plaintiffs cannot sue, how do you keep credit card information from getting into the hands of would-be identity thieves? Despite the Court's professed deference to the legislative function, it is using Article III's case or controversy requirement to remove sharp tools from Congress's regulatory arsenal and, in effect, deciding when we can act in relation to harm.*

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INTRODUCTION

“[C]reating a cause of action is a legislative endeavor.”¹ Or so the Supreme Court has repeatedly assured us. It involves a range of policy considerations, including “‘economic and governmental concerns,’ ‘administrative costs,’ and the ‘impact on governmental operations systemwide.’”² This “quintessentially legislative choice” is one for which federal judges are ill suited.³ There is a method to the Constitution’s madness; weighing and balancing costs and benefits of over- and underenforcement is tricky stuff best suited for the democratically responsive bodies in our system. Allowing federal judges to wade into this space causes “tension” with “the Constitution’s separation of legislative and judicial power.”⁴ “[T]he Judiciary’s authority to do so at all,” the Supreme Court has reminded us, “is, at best, uncertain.”⁵

This seems straightforward enough until you look at what the Court is doing with Article III standing. Whether a plaintiff has standing and whether a plaintiff has a cause of action are not identical concepts, though many have argued that they should be.⁶ Even if we posit their distinctness, though, standing’s focus on whether a plaintiff has suffered injury implicates “an essential element” of a cause of action.⁷ When federal judges conclude that a plaintiff has not suffered a concrete injury in fact, they are likewise presuming that the plaintiff cannot establish an entitlement to

1. *Egbert v. Boule*, 142 S. Ct. 1793, 1802 (2022). “[C]ause of action” here means a legal entitlement to sue. *Id.*

2. *Id.* (quoting *Ziglar v. Abbasi*, 582 U.S. 120, 134 (2017)).

3. *Elhady v. Unidentified CBP Agents*, 18 F.4th 880, 883 (6th Cir. 2021).

4. *Egbert*, 142 S. Ct. at 1802 (quoting *Hernandez v. Mesa*, 140 S. Ct. 735, 741 (2020)).

5. *Id.* at 1803.

6. *See, e.g., Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1122-23, 1131-32 (11th Cir. 2021) (Newsom, J., concurring) (arguing that Article III’s “Case” is synonymous with cause of action, a merits-based concept). *See generally* Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claims for Relief*, 83 YALE L.J. 425, 427-28 (1974) (arguing that standing, traditionally seen as an “access barrier,” should more appropriately be understood as a question whether plaintiff is entitled to relief on the merits); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223-24 (1988) (contending that the concept of standing as a threshold inquiry should be set aside and that the inquiry should turn on whether Congress has given plaintiff a cause of action to enforce a legal duty).

7. Albert, *supra* note 6, at 428.

relief on the merits. Put simply, when Congress has created a federal right of action for plaintiff X to sue if defendant Y affects him in some specific way, and a federal judge says no—in fact, plaintiff X is not *really* legally affected enough to sue—the court has rejected the underlying right of action as well, even if that right of action is the product of measured legislative decision-making and even if Congress has balanced all the relevant benefits and costs. In other words, the doctrine of standing makes an indelible mark on Congress's ability—its quintessentially “legislative” ability—to decide when and where causes of action should exist.

At the same time as it waxes downright poetic about the legislative function in right of action cases,⁸ the Court in *TransUnion LLC v. Ramirez* has taken Article III standing requirements up several notches and actively curtailed Congress's ability to respond to modern problems.⁹ After decades reassuring us that Congress can absolutely, positively, no doubt create new rights and that violation of those rights give rise to actionable injury,¹⁰ the Supreme Court appears to have quietly retracted that suggestion where federal courts are concerned. But it is not just federal courts. More and more states, tethering their doctrine to Article III as a matter of state law, have adopted similar standards.¹¹ *TransUnion* involved

8. This Article uses “cause of action” and “right of action” interchangeably.

9. 141 S. Ct. 2190, 2203-04 (2021).

10. See *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016) (“Thus, we said in *Lujan* that Congress may ‘elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate at law.’” (alteration in original) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 578 (1992)); *Lujan*, 504 U.S. at 578 (acknowledging Congress's ability to make actionable rights that were not recognized at common law, such as living in a racially integrated community); *id.* at 580 (Kennedy, J., concurring) (“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.”). The Court has made good on these assurances on occasion. See, e.g., *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1982) (allowing tester standing under the Fair Housing Act after noting that actionable injuries may exist “solely by virtue of ‘statutes creating legal rights, the invasion of which creates standing’” (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975))); *Pub. Citizen v. U.S. Dep't of Just.*, 491 U.S. 440, 449 (1989) (permitting standing when agency denied request for information authorized by the Freedom of Information Act); *FEC v. Akins*, 524 U.S. 11, 20 (1998) (concluding that plaintiffs have standing to contest denial of information sought under the Federal Election Campaign Act given that Congress “intended to authorize this kind of suit”).

11. See, e.g., *Southam v. Red Wing Shoe Co.*, 343 So. 3d 106, 111-13 (Fla. Dist. Ct. App. 2022) (finding federal law “persuasive” and extensively applying *TransUnion*); *Hoosier Contractors, LLC v. Gardner*, 212 N.E.3d 1234, 1238-46 (Ind. 2023) (using federal standing cases to interpret the Indiana Constitution's separation-of-powers clause, which “fulfills a

federal courts deeply in the inquiry into what harms are actionable and instructed lower courts to credit injury only when they perceive tight connections between new statutory injuries and injuries recognized at common law.¹² In a post-*TransUnion* world, lower courts know to reject the “anything-hurts-so-long-as-Congress-says-it-hurts” approach to injury in fact.¹³ To pursue damages, private plaintiffs need actual harm that judges can spot. Wallet and physical injuries certainly count.¹⁴ Intangible injuries count if—but apparently only if—they resemble harms judges can find in dusty torts treatises.¹⁵ Unacceptable *risk* that has not yet culminated in harm can never support a claim for damages.¹⁶

The Court’s standing cases will have a profound impact on legislative choice. We are left with a scheme that permits the national legislature to create post hoc, compensation-oriented mop-ups after injuries have occurred and leaves no room for preemptive strikes. This Article argues that ascertaining when risks are intolerable

similar function” (quoting *Pence v. State*, 652 N.E.2d 486, 488 (Ind. 1995)); *Corozzo v. Wal-Mart Stores, Inc.*, 531 S.W.3d 566, 573-76 (Mo. Ct. App. 2017) (applying federal case law in a Fair Credit Reporting Act (FCRA) standing inquiry after acknowledging the court was not bound by Article III). At least one state court has recently found no standing to pursue a federal statutory claim because a speculative risk of future injury is insufficiently concrete without citing to Article III cases. See *Fausett v. Walgreen Co.*, No. 131444, 2025 WL 3237846, at *9-10 (Ill. Nov. 20, 2025). See generally Thomas B. Bennett, *The Paradox of Exclusive State-Court Jurisdiction over Federal Claims*, 105 MINN. L. REV. 1211, 1234-37 (2021) (flagging pre-*TransUnion* disuniformity in state concepts of standing and predicting that enforcement of federal rights in state court would proceed haphazardly after *Spokeo*). Obviously, there will be some state courts in which plaintiffs can sue to vindicate federal statutory rights that are boxed out of federal court. See *Guracar v. Student Loan Solutions, LLC*, 332 Cal. Rptr. 3d 742, 750-51, 755-56 (Ct. App. 2025) (allowing suit under the FDCPA to proceed in state court absent a showing of concrete harm); *Kenn v. Eascare, LLC*, 226 N.E.3d 318, 324-28 (Mass. App. Ct. 2024) (finding standing for a FCRA suit under state law); see also *Case v. Wilmington Trust, N.A.*, 703 S.W.3d 274, 288 (Tenn. 2024) (differentiating between concepts of standing under federal and Tennessee law in context of state cause of action). In many more states, though, courts seem to be moving closer to federal standards.

12. See *TransUnion*, 141 S. Ct. at 2204.

13. *Hagy v. Demers & Adams*, 882 F.3d 616, 622 (6th Cir. 2018); see also *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 999 & n.2 (11th Cir. 2020) (“[W]e cannot treat an injury as ‘concrete’ for Article III purposes based only on Congress’s say-so.”).

14. See *TransUnion*, 141 S. Ct. at 2204; see also *FDA v. All. for Hippocratic Med.*, 144 S. Ct. 1540, 1556 (2024) (“An injury in fact can be a physical injury, a monetary injury, an injury to one’s property, or an injury to one’s constitutional rights, to take just a few common examples.”).

15. See *TransUnion*, 141 S. Ct. at 2204.

16. See *id.* at 2211.

and actionable is a legislative call. In all but preventing Congress from acting upon risks of harm before they occur, the Court has used Article III to insinuate itself into the legislative process in violation of the separation of powers. The impact on the modern legislative toolbox is palpable.

Consider the Fair and Accurate Credit Transactions Act of 2003 (FACTA), which addressed the problem of identity theft.¹⁷ Technological advancement and the expansion of the internet had, by 2003, created “a target-rich environment for today’s sophisticated criminals, many of whom are organized and operate across international borders.”¹⁸ To combat this issue, Congress sought to stop merchants from printing receipts that provided “easy access” to consumers’ credit card information.¹⁹ FACTA barred the printing of receipts containing “more than the last 5 digits of the card number” at the point of sale²⁰ and empowered consumers given noncompliant receipts to sue for actual damages or statutory damages up to \$1,000.²¹ President George W. Bush applauded Congress at the signing ceremony for stopping identity theft “before it occurs.”²² “Slips of paper most people throw away,” he reasoned, “should not hold the key to their savings and financial secrets.”²³

But wait. After *TransUnion*, can this scheme work? Is it possible to prevent harm before it occurs by authorizing suits in federal court? Some harms, such as identity theft, have catastrophic consequences that inspire us to overcorrect. We will spend resources to avoid *ever* encountering them, and exposure to risk of harm may *itself* be perceived as injury. When Congress determines that we should never encounter a harm and thus seeks to ban intolerable proximity to harm, what tools are at its disposal? Point-of-sale receipts land in pockets, on sidewalks, and in the trash. Although

17. See Pub. L. No. 108-159, 117 Stat. 1952 (2003) (codified as amended in scattered sections of titles 15 and 20 of the United States Code).

18. S. REP. NO. 108-166, at 8 (2003). I previously discussed this example in Elizabeth Earle Beske, *The Court and the Private Plaintiff*, 58 WAKE FOREST L. REV. 1, 44-47 (2023).

19. S. REP. NO. 108-166, at 3.

20. 15 U.S.C. § 1681c(g)(1).

21. 15 U.S.C. § 1681n(a)(1)(A), (2).

22. *Credit Transactions Act Signing*, at 10:39 (C-SPAN, Dec. 4, 2003), <https://www.c-span.org/program/white-house-event/credit-transactions-act-signing/122177> [<https://perma.cc/RF8P-AUCR>].

23. *Id.* at 11:14.

the Federal Trade Commission has the statutory authority to enforce FACTA,²⁴ it will be hard-pressed to learn of a merchant's violation. The only realistic way to keep credit card numbers from would-be identity thieves is to incentivize private parties to detect noncompliance by offering them a bounty to notice. Yet after *TransUnion*, Congress is powerless to authorize these private suits in federal court because federal judges will not let them.²⁵ Federal courts are charged with sniffing out harm, and if they are not satisfied (and they have not been), suits cannot proceed.²⁶

Obviously, the Court's tethering of harm to common law harm stifles Congress's ability to respond to novel problems. But it is even more alarming that the Court has told us that risk of harm, *in itself*, cannot be actionable harm even when the legislature says it is. This takes unelected judges far into the realm of legislative choice. Article III, it appears, dictates that we must wait until we fall off the cliff; we cannot take precautionary measures to avoid the precipitous drop. Even if society is willing to incur costs to overprotect against—or to prevent—harm, Article III apparently makes a normative choice, taking sides in the debate about *when* we act in relation to harm. This is difficult to harmonize with the Court's 8-1 conclusion in *Uzuegbunam v. Preczewski*—decided the same term as *TransUnion*—that a party whose right is invaded can establish Article III standing “without furnishing any evidence of actual damage.”²⁷ Juxtaposing *Uzuegbunam* against *TransUnion*, the Court apparently has concluded that only Congress is confined to the creation of second-tier rights and ex post solutions—the ability

24. See 15 U.S.C. § 1681s.

25. See *TransUnion LLC v. Ramierz*, 141 S. Ct. 1290, 2205 (2021).

26. Indeed, this is what post-*TransUnion* lower courts have uniformly concluded. See, e.g., *Locklear v. NTY Franchise Co.*, No. 23-CV-00261, 2023 WL 6972983, at *2 (E.D.N.C. Oct. 23, 2023) (remanding to state court given plaintiff's claimed FACTA digit-truncation violation did not amount to an injury in fact); *Kamel v. Hibbett, Inc.*, No. 22-cv-01096, 2022 WL 2905446, at *2 (C.D. Cal. July 22, 2022) (“The law is clear that certain FACTA or FCRA violations alone are insufficient to confer standing.”); *Blanco v. Bath & Body Works, LLC*, No. 22 CV 01207, 2022 WL 1908980, at *3 (N.D. Ill. June 3, 2022) (finding plaintiff's claim “amounts to nothing more than the theoretical risk of a future harm that is too speculative to amount to an injury in fact”); *Heuer v. Smithsonian Inst.*, 619 F. Supp. 3d 202, 211 (D.D.C. 2022) (concluding that giving plaintiff a receipt that violated FACTA did not constitute an injury in fact).

27. 141 S. Ct. 792, 800 (2021) (quoting 1 THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 71 n.a (7th ed. 1880)).

to act only after injury has occurred.²⁸ Why is that? And how do we square it with the Court's professed adherence to legislative supremacy and its earnest rejection of judicial policymaking?²⁹

The Court's new approach to injury in fact has already engendered much criticism in the academy.³⁰ Joining the chorus, this Article flags that the Court's new direction in standing circumscribes legislative choice in two key areas and has a clear normative valence. First, it changes the operation of statutory damage provisions—those proxies for actual harm that pervade the U.S.

28. *Contrast id.* at 802 (“Because ‘every violation [of a right] imports damage,’ nominal damages can redress Uzuegbunam’s injury even if he cannot or chooses not to quantify that harm in economic terms.” (alteration in original) (citations omitted)), *with TransUnion*, 141 S. Ct. at 2204-06 (“[I]f the law of Article III did not require plaintiffs to demonstrate a ‘concrete harm,’ Congress could authorize virtually any citizen to bring a statutory damages suit against virtually any defendant who violated virtually any federal law.”).

29. “If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and [their] own imaginations, we would risk amending statutes outside the legislative process reserved for the people’s representatives.” *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020).

30. Cass Sunstein likened *TransUnion* to a modern-day *Lochner* in its use of “common-law baselines ... to strike down actions by the democratic branches of government.” Cass R. Sunstein, *Injury in Fact, Transformed*, 2021 SUP. CT. REV. 349, 371. Jacob Phillips called *TransUnion* a deviation from *Lujan* that “improperly replaced the legislative branch with the judicial branch as the arbiter of whether a harm deserves legal redress.” Jacob Phillips, *TransUnion, Article III, and Expanding the Judicial Role*, 23 FEDERALIST SOC’Y REV. 186, 201 (2022). Richard Fallon has cited *TransUnion* as an example of the Court ignoring originalist arguments altogether. See Richard H. Fallon, Jr., *Selective Originalism and Judicial Role Morality*, 102 TEX. L. REV. 221, 250 (2023). Jonathan Siegel called out *TransUnion* as “a highly significant restriction” that is “thwarting the will of Congress.” Jonathan R. Siegel, *The New Standing Problem and Its Legislative Solution*, 109 IOWA L. REV. 299, 315-16 (2023). Siegel proposes that Congress convert existing statutory damages into *qui tam* provisions to avoid the strictures of *TransUnion*. See *id.* at 329-31. Erwin Chemerinsky identified *TransUnion* as “a potentially drastic limit” that “aggrandizes the judicial role, minimizes the legislative power, and ultimately undermines the ability of the federal courts to enforce many laws.” Erwin Chemerinsky, *What’s Standing After TransUnion LLC v. Ramirez*, 96 N.Y.U. L. REV. ONLINE 269, 270, 272 (2021), <https://nyulawreview.org/online-features/whats-standing-after-transunion-llc-v-ramirez/> [<https://perma.cc/D6HT-5U4P>]. Peter Ormerod has observed that *TransUnion* set aside the separation-of-powers concerns that previously animated standing law and confers on the executive branch “a near monopoly on the enforcement of federal law” that has “no grounding in history, text, or common sense.” Peter Ormerod, *Making Privacy Injuries Concrete*, 79 WASH. & LEE L. REV. 101, 134-35 (2022). I have previously argued that *TransUnion*’s use of common law analogues to identify actionable rights was unnecessary given adjacent lines of cases in which the Court had used statutory text and structure to ascertain whether Congress had created enforceable personal rights. See Elizabeth Earle Beske, *Charting a Course Past Spokeo and TransUnion*, 29 GEO. MASON L. REV. 729, 776-85 (2022).

Code when ascertaining the precise extent of damages is often too difficult. This cannot be squared with *Uzuegbunam*, in which the Court professed understanding that some actionable harms do not result in recognizable or easily measurable harm.³¹ Second, the Court all but eliminates proactive and preemptive approaches to harm, in significant tension with decades of professed deference to the legislative process. The optimal response to risks—whether they are immediate, whether they have a long latency, or whether they pose uncertain dangers—is not a new question, and it did not emerge with *TransUnion* in 2021. For over a century, the public, policymakers, and experts have battled over the existence and magnitude of risk and the appropriate responses, if any, to risk.³²

While the Court has told us for decades that determining our comfort with risk and setting optimal exposure levels are both Congress's call,³³ and the Court has consistently deferred to Congress on the use of private rights of action as a legislative tool,³⁴ now, quite abruptly, we have a dramatic change of course. Article III, it appears, does not permit Congress, in its exercise of Article I legislative authority, to draw certain lines: Congress is now powerless to determine that exposure to risk *in itself* is an intolerable, compensable act.³⁵ This decision may have the effect of hamstringing congressional efforts to prevent certain modern harms, and its source in a provision of the Constitution confining the federal judiciary to certain kinds of "Cases" and "Controversies" would have occasioned surprise in Philadelphia in the summer of 1787.

Part I sets out the concept of legislative supremacy, describing the post-*Lochner* commitment to deference that purports to be the Court's principal approach to legislation and demonstrating that, at least on paper, the Court both believes itself to be very deferential and has imposed few substantive fetters on Congress's authority to

31. 141 S. Ct. at 800.

32. See, e.g., Dan M. Kahan, Paul Slovic, Donald Braman & John Gastil, *Fear of Democracy: A Cultural Evaluation of Sunstein on Risk*, 119 HARV. L. REV. 1071, 1071-72 (2006) (reviewing CASS R. SUNSTEIN, LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE (2005)) (describing intense public and expert disagreement); Cass R. Sunstein, *Beyond the Precautionary Principle*, 151 U. PA. L. REV. 1003, 1020-22 (2003) (describing "paralyzing" conflicts over issues such as global warming, nuclear power, and genetic modification of food).

33. See *infra* Parts I.D-I.E.

34. See *id.*

35. See *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2211-12 (2021).

create rights of action under Article I. This is the story the Court tells itself, at least.

Part II charts the journey from *Lujan* to *TransUnion*, following the saga on Congress's ability to create rights, the violation of which gives rise to Article III standing. This Part demonstrates that, in significant tension with the conclusions drawn in Part I, the Court has wrested from Congress both the authority to define injury and the flexibility to determine when, in relation to perceived harm, it is appropriate to act. This Part makes the case that *TransUnion* diverges from and is in significant tension with *Lujan*. Moreover, this Part juxtaposes *TransUnion* against *Uzuegbunam* and concludes that the Court's current case law places the statutory rights created by Congress at a considerable disadvantage when compared to the rights protected at common law. This Part concludes that *TransUnion*'s requirement of actual damage does not square with the Court's willingness to permit suits for rights violations absent actual damages in other contexts.

Finally, Part III makes the case that *TransUnion* presents two sizeable but insufficiently appreciated problems going forward. First, *TransUnion* poses considerable difficulty for all statutory damage provisions, which, by definition, exist apart from considerations of actual harm. Second, *TransUnion* permits post hoc responses to injuries but eliminates Congress's most effective ways to pursue preemptive strikes. Article III, then, apparently jumps into the fray and asserts itself substantively in the debate over risk regulation. In the modern age, Congress will often wish to define proximity to intolerable harm as a harm *in itself*, and yet the Court's new standing doctrine circumvents the legislative process and removes sharp tools—at times, the sharpest tools—from Congress's toolbox. At bottom, the Court may *say* it is deferential to the legislative process, and it may tell us that “the people's representatives”³⁶ make the policy calls and are the proper body to balance benefits against costs.³⁷ It may repeatedly incant that the Constitution allows Congress to create actionable rights different from

36. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020).

37. *See Egbert v. Boule*, 142 S. Ct. 1793, 1802-03 (2022).

those at common law.³⁸ An examination of what the Court is actually doing, however, tells a different story.

I. LEGISLATIVE SUPREMACY POST-*LOCHNER*

Since 1937, the Court has taken a deferential approach to the handiwork of the legislative branch in most cases, upholding statutes so long as they are rationally related to a legitimate objective.³⁹ Brief discussion of the nondeferential rubric that preceded the modern era starts us off and provides the foil; the Court has spent nearly a century pointedly rejecting such intrusions into the legislative domain.⁴⁰

38. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 578 (1992) (“Nothing in this contradicts the principle that “[t]he ... injury required by Art. III may exist solely by virtue of “statutes creating legal rights, the invasion of which creates standing.”” (citations omitted) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975))).

39. In *United States v. Carolene Products Co.*, decided a year later, the Court indicated that it would ordinarily overturn an act of Congress only if it lacked a rational basis. 304 U.S. 144, 152 (1938). The Court dropped its famous Footnote 4 to reserve the possibility of “more exacting judicial scrutiny” for legislation involving “discrete and insular minorities,” fundamental rights, and restrictions on the political process. *Id.* at 152 n.4.

40. See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2248 (2022) (describing *Lochner* as a “discredited decision[.]” characterized by “freewheeling judicial policymaking”); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 690-91 (1999) (describing *Lochner* as a “discredited” case that “sought to impose a particular economic philosophy upon the Constitution”). The charge that the Court is again pursuing the path of *Lochner* frequently surfaces in disgruntled dissents. See, e.g., *Obergefell v. Hodges*, 576 U.S. 644, 694 (2015) (Roberts, C.J., dissenting) (likening the majority’s approach to “the unprincipled tradition of judicial policymaking” characterized by *Lochner*); *Coll. Sav. Bank*, 527 U.S. at 701 (Breyer, J., dissenting) (contending that majority’s approach, similar to that in *Lochner*, would “deprive Congress of necessary legislative flexibility”).

A. *What They Absolutely, Positively No Longer Do:
The Lochner Era*

During the *Lochner* Era,⁴¹ the Court routinely invoked “liberty of contract,” which it situated in the Fifth and Fourteenth Amendments’ Due Process Clauses,⁴² to invalidate state and federal legislation regulating wages, hours, and circumstances of employment.⁴³ While it was fine with legislatures passing statutes safeguarding public morals,⁴⁴ the Court embraced existing free-market allocations of wealth and power and repeatedly thwarted government efforts to regulate the labor market.⁴⁵

41. The era’s name hails from *Lochner v. New York*, which struck down a New York law setting maximum hours for bakery workers because it violated workers’ and shop owners’ “liberty of contract.” 198 U.S. 45, 58-59, 61 (1905). Although *Lochner* itself involved state law and the Fourteenth Amendment’s Due Process Clause, *see id.* at 53, the Court applied a similarly nondeferential approach to acts of Congress under the Fifth Amendment. *See Adkins v. Child. ’s Hosp. of D.C.*, 261 U.S. 525, 560-61 (1923) (concluding that act of Congress setting minimum wages for workers in the District of Columbia violated the Fifth Amendment’s Due Process Clause), *overruled by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

42. U.S. CONST. amends. V, XIV.

43. *See, e.g.*, *Allgeyer v. Louisiana*, 165 U.S. 578, 593 (1897) (invalidating a Louisiana statute for violating the right of Louisiana residents to contract with out-of-state entities for insurance); *Adair v. United States*, 208 U.S. 161, 172 (1908) (invoking liberty of contract to strike an act of Congress that barred carriers engaged in interstate commerce from firing unionized employees), *overruled in part by* *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941); *Coppage v. Kansas*, 236 U.S. 1, 26 (1915) (striking a Kansas statute barring the firing of unionized employees under Fourteenth Amendment), *overruled in part by* *Phelps Dodge Corp.*, 313 U.S. 177 (1941); *N.Y. Life Ins. Co. v. Dodge*, 246 U.S. 357, 376-77 (1918) (striking a Missouri statute governing contracts with out-of-state insurers).

44. *See, e.g.*, *Crane v. Campbell*, 245 U.S. 304, 307 (1917) (upholding an Idaho statute barring the sale of liquor for personal use); *Muller v. Oregon*, 208 U.S. 412, 422-23 (1908) (concluding that an Oregon statute regulating hours of female employees passed constitutional muster given the State’s compelling interest in protecting maternal health).

45. *See* Mila Sohoni, *The Trump Administration and the Law of the Lochner Era*, 107 GEO. L.J. 1323, 1330-33 (2019); *see also* Matthew J. Lindsay, *The Presumptions of Classical Liberal Constitutionalism*, 102 IOWA L. REV. ONLINE 259, 281 (2017), <https://ilr.law.uiowa.edu/sites/ilr.law.uiowa.edu/files/2023-01/Lindsay.pdf> [<https://perma.cc/8LSA-RE6S>] (discussing the Court’s propensity to dismiss labor laws because laborers “equal in intelligence and capacity” could assert their rights “without the protecting arm of the state”); AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION* 561 n.26 (2012) (observing that the *Lochner*-Era Court rejected efforts to “shift economic surplus from employers to employees” and thus favored labor over capital); HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 14 (1993) (observing the Court’s distinction between “legitimate” regulations on health and safety and “illegitimate social and economic legislation”).

To patrol these boundaries, the *Lochner*-Era Court monitored legislation closely,⁴⁶ requiring that regulations demonstrate a “direct relation” to ends that the Court determined were “appropriate and legitimate.”⁴⁷ Rules limiting bakers’ hours interfered with the constitutionally protected liberty of bakers and shop owners to negotiate longer days, and the Court summarily rejected any justification for such legislation grounded in safety or public welfare.⁴⁸ While health-based reasons *might* have worked, the Court did not see enough danger to be persuaded. The Court needed “more than ... the possible existence of some small amount of unhealthiness” to justify the incursion on liberty; otherwise, we would all be “at the mercy of legislative majorities”⁴⁹ and their “meddlesome interferences.”⁵⁰

Simultaneously (and relatedly), the Court patrolled a second front, monitoring Congress’s efforts to legislate under the Commerce Clause. Again, the Court shut down the regulation of wages, hours, and conditions of employment.⁵¹ The Court permitted Congress to regulate “direct” effects on interstate commerce—such as contracts to buy and sell goods moving across state lines—but not to reach “indirect” effects such as conditions of manufacturing⁵² or mining.⁵³ When Congress, focusing on interstate shipments, sought to prohibit movement of goods produced under specific labor conditions, the Court was quick to call foul.⁵⁴ Prohibiting an item’s movement in commerce in an effort to regulate the underlying hours and

46. See Lindsay, *supra* note 45, at 281.

47. *Lochner v. New York*, 198 U.S. 45, 57-58 (1905).

48. See *id.* at 57.

49. *Id.* at 59.

50. *Id.* at 61.

51. The Court was fine with efforts to regulate morality. See *The Lottery Case*, 188 U.S. 321, 356 (1903) (allowing Congress to bar the interstate transportation of lottery tickets because “the suppression of nuisances injurious to public health or morality” is a vital role for government).

52. See *United States v. E.C. Knight Co.*, 156 U.S. 1, 16 (1895), *abrogated by* *Swift & Co. v. United States*, 196 U.S. 375 (1905).

53. See *Carter v. Carter Coal Co.*, 298 U.S. 238, 304 (1936).

54. See *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918) (rejecting congressional effort to regulate child labor by barring certain products from interstate commerce), *overruled by* *United States v. Darby*, 312 U.S. 100 (1941); *Adair v. United States*, 208 U.S. 161, 176 (1908) (invalidating congressional statute barring antiunion activity because it lacked connection to interstate commerce), *overruled by* *Lincoln Fed. Lab. Union v. N.W. Iron & Metal Co.*, 335 U.S. 525 (1949).

conditions of production, the Court declared—unironically, given its *Lochner* cases—trenched on “a purely state authority.”⁵⁵

The accusation of “*Lochnerism*” to criticize developments in other eras and areas surfaces a lot.⁵⁶ For purposes of this Article, salient facets of these cases are the Court’s distinct lean toward a particular substantive, antiregulatory outcome,⁵⁷ its blithe disregard for the purposes of legislation;⁵⁸ and its comfort directly jumping in and overriding the legislative work product. The Court has spent the intervening decades assuring us that it no longer does this.

B. Decades of Deference

1. Due Process

The Court’s sharp scrutiny of economic legislation would not survive the Great Depression and New Deal.⁵⁹ Thereafter, the Court committed itself to a far more deferential approach to economic legislation in *United States v. Carolene Products Co.*⁶⁰ In the Filled Milk Act of 1923, Congress criminalized the shipment, in interstate commerce, of milk compounded with any substance other than milk

55. *Hammer*, 247 U.S. at 276.

56. “We call the theory that judges can read their will into the Constitution ‘*Lochnerism*.’” Ian Millhiser, *The Most Incompetent Branch*, 23 GEO. MASON L. REV. 507, 508 (2016). Some scholars posit the specific return of special protection for economic rights. See, e.g., Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORN. L. REV. 527, 531 (2015). Others find hints of *Lochner* in adjacent places. See, e.g., Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1471-77 (2015) (arguing that businesses claiming religious exemptions are wedded to a market baseline and resisting redistribution, just like the *Lochner* plaintiffs); Sohoni, *supra* note 45, at 1326 (noting that the Trump administration’s nationalism, protectionism, deregulation, and libertarian values “resemble[] [those] advanced in the Supreme Court’s *Lochner*-Era jurisprudence”).

57. See Sepper, *supra* note 56, at 1460; Sohoni, *supra* note 45, at 1350.

58. See Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 877-79 (1987).

59. In 1937, key swingman Justice Owen Roberts changed his vote and reversed course. See Daniel E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?*, 2 J. LEGAL ANALYSIS 69, 70 (2010); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 397-400 (1937), *overruled by Adkins v. Child’s Hosp.*, 261 U.S. 525 (1934). In an extensive empirical analysis, Ho and Quinn document that Roberts’s sharp leftward shift began early in the 1936 Term but was temporary in duration. See Ho & Quinn, *supra*, at 72, 85, 94. They reject the “naive” assumption that he responded to FDR’s court-packing plan and instead suggest he may have been influenced by the 1936 “landslide” election. *Id.* at 103.

60. See 304 U.S. 144, 152, 154 (1938).

fat.⁶¹ *Carolene Products*, indicted for violating the Act, challenged it as being outside Congress's commerce power and as a violation of the Fifth Amendment's Due Process Clause.⁶²

With newfound resolve, the Court rejected this challenge outright.⁶³ Congress had free rein under the Commerce Clause to prohibit the shipment of goods deemed injurious.⁶⁴ Although Congress had made findings as to the harms of filled milk, it did not need to do so, as "the existence of facts supporting the legislative judgment is to be presumed" unless the regulation was "of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators."⁶⁵ While there might be circumstances warranting greater scrutiny, none applied to ordinary economic legislation.⁶⁶ It might be "debatable" whether filled milk should be regulated, but "that decision was for Congress."⁶⁷

The Court gave a fulsome elaboration of this standard in *Williamson v. Lee Optical of Oklahoma, Inc.* in 1955, which involved a state statute.⁶⁸ Oklahoma enacted a law that disadvantaged opticians and provided an economic bounty to optometrists and ophthalmologists.⁶⁹ The district court concluded the statute was neither reasonable nor necessary to protect Oklahomans' eyesight.⁷⁰ Agreeing that it might be "a needless, wasteful requirement," the Court said that call was for the Oklahoma legislature to make.⁷¹ Gone were the days when the Court would strike economic

61. Filled Milk Act of 1923, Pub. L. No. 67-513, 42 Stat. 1486.

62. *See Carolene Prods. Co.*, 304 U.S. at 146-47.

63. *See id.* at 154.

64. *See id.* at 147-48.

65. *Id.* at 152.

66. Here, the Court dropped Footnote 4, which laid out circumstances when "the presumption of constitutionality" might not hold sway. *Id.* at 152 n.4. More exacting scrutiny, the Court explained, might be appropriate when legislation touched upon "a specific prohibition" in the Constitution, when legislation restricted the political processes, and when legislation was directed at religious, national, racial, or other "discrete and insular minorities." *Id.*

67. *Id.* at 154.

68. 348 U.S. 483, 488 (1955).

69. *See id.* at 486. The statute required that people who were not optometrists and ophthalmologists and wanted to fit, repair, or replace glasses (that is, opticians) could proceed only with a written prescription from an optometrist or ophthalmologist. *Id.* at 485.

70. *See id.* at 486.

71. *Id.* at 487.

regulations because they were “unwise, improvident, or out of harmony with a particular school of thought.”⁷²

In the decades since, the Court has upheld regulations that are “to some extent both underinclusive and overinclusive, and hence the line drawn by Congress imperfect,”⁷³ because “perfection is by no means required.”⁷⁴ Deferential review, the Court has insisted, is necessary “to preserve to the legislative branch its rightful independence and its ability to function.”⁷⁵ Rational basis scrutiny has proved to be a low bar.

2. Commerce

At the same time as it adopted a presumption of constitutionality for economic legislation under the Due Process Clause, the Court dramatically relaxed its approach to evaluating Congress’s powers under the Commerce Clause. The Court set aside the notion that Congress could reach only items moving in interstate commerce, not their underlying manufacture.⁷⁶ The Court subsequently held that Congress could prevent the movement of goods in interstate commerce that were produced under suboptimal working conditions.⁷⁷ Finally, the New Deal trilogy’s capstone, *Wickard v. Filburn*, permitted Congress to reach purely intrastate production of wheat for home consumption on the theory that a farmer’s decision to forgo

72. *Id.* at 487-88.

73. *Vance v. Bradley*, 440 U.S. 93, 108 (1979).

74. *Id.* (quoting *Phillips Chem. Co. v. Dumas Sch. Dist.*, 361 U.S. 376, 385 (1960); *see, e.g.*, *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 314-15 (1993) (“On rational-basis review, a classification in a statute such as the Cable Act comes to us bearing a strong presumption of validity.” (citing *Lyng v. Auto. Workers*, 485 U.S. 360, 370 (1988))); *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (“[T]he fact the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.”); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952) (“[W]e do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare.”).

75. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 365 (1973) (quoting *Carmichael v. S. Coal Co.*, 301 U.S. 495, 510 (1937)).

76. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 40-41 (1937). The Court likewise extended this holding to coal mining. *See Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 276-81 (1981).

77. *See United States v. Darby*, 312 U.S. 100, 117-18 (1941). This case expressly overruled *Hammer v. Dagenhart*. *Id.* at 116-17. For a discussion of *Hammer*, *see supra* notes 54-55 and accompanying text.

the market was an economic transaction that, when aggregated across the nation, could substantially affect interstate commerce.⁷⁸ As in the due process context, the Court employed a rational basis test to evaluate challenges to Congress's power.⁷⁹

The expanded conception of Congress's Commerce Clause powers undergirded the Civil Rights Act of 1964.⁸⁰ In *Heart of Atlanta Motel, Inc. v. United States*, the Court approved Congress's conclusion that discrimination in public accommodation placed burdens on interstate commerce.⁸¹ The Court was untroubled by the absence of congressional findings or by the fact that Congress's articulated goal was the not-obviously-commercial vindication of "the deprivation of personal dignity that surely accompanies denials of equal access to public establishments."⁸² *Katzenbach v. McClung*, which approved the application of the Civil Rights Act to bar discrimination in restaurants open to the public, followed suit.⁸³ "The power of Congress in this field is broad and sweeping," the Court reasoned, and when Congress does not violate express constitutional limitations, the Court should not interfere.⁸⁴

78. See 317 U.S. 111, 125, 127-29. Decades later, the Court referred to *Wickard* as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity." *United States v. Lopez*, 514 U.S. 549, 560 (1995).

79. Compare, e.g., *Hodel*, 452 U.S. at 277 ("[W]hen Congress has determined that an activity affects interstate commerce, the courts need inquire only whether the finding is rational."), with, e.g., *Vance*, 440 U.S. at 97 ("[W]e will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.")

80. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241. The enacted statutes could not be premised on Congress's Fourteenth Amendment enforcement authority due to the state action requirement. See *The Civil Rights Cases*, 109 U.S. 3, 13 (1883) ("[U]ntil some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity: for the prohibitions of the amendment are against State laws and acts done under State authority.")

81. 379 U.S. 241, 252-53 (1964).

82. *Id.* at 250, 252 (quoting S. REP. NO. 88-872, at 16 (1964)).

83. See 379 U.S. 294, 303-05 (1964).

84. *Id.* at 305.

C. *"The New Federalism"*⁸⁵ and the Modern Era

Guided by the rational basis test, the Court invariably upheld congressional action under the Commerce Clause through the mid-1990s.⁸⁶ At that point, limits on national legislative power, this time animated by principles of federalism, resurfaced.⁸⁷ In 1995, the Rehnquist Court jolted law students and academics alike with *United States v. Lopez*, which held that Congress had exceeded its Commerce Clause authority in enacting the Gun-Free School Zone Act.⁸⁸ Though precedents had permitted Congress to regulate channels and instrumentalities of commerce and intrastate activity with a substantial effect on commerce,⁸⁹ a statute barring simple possession of a gun in a school zone was "in no sense an economic activity."⁹⁰ With firm resolve but without overruling a single precedent, the Court declared that boundaries to Congress's commerce power existed and proceeded to draw one.⁹¹

Five years later, the Court reaffirmed *Lopez*'s line drawing in *United States v. Morrison*, which invalidated provisions of the Violence Against Women Act that permitted a civil right of action on the basis that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity."⁹² *Morrison* again left all precedents intact, distinguishing, rather than confining, cases such as *Wickard*.⁹³ *Gonzales v. Raich*, decided in 2005, quelled any doubts

85. In 1995, Daniel Farber described "the New Federalism" as "the emerging conservative theory of federalism" that involved "reverence toward state sovereignty and protectiveness toward traditional state functions." Daniel A. Farber, *The Constitution's Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding*, 94 MICH. L. REV. 615, 616, 618 (1995).

86. See Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 682 (1995).

87. See *United States v. Lopez*, 514 U.S. 549, 566-68 (1995).

88. *Id.* at 561.

89. See *id.* at 558-59.

90. *Id.* at 567.

91. See *id.* at 558-66. Keeping the status quo intact was an important part of the puzzle for two necessary members of the majority, Justices Kennedy and O'Connor. Joined by Justice O'Connor, Justice Kennedy wrote separately to emphasize that the Court's holding, though necessary, was "limited." *Id.* at 568 (Kennedy, J., concurring). He then cited the New Deal cases, *Wickard*, *Heart of Atlanta*, and *Katzenbach v. McClung*, and noted that "[t]hese and like authorities are within the fair ambit of the Court's practical conception of commercial regulation and are not called into question by our decision today." *Id.* at 573-74.

92. 529 U.S. 598, 613, 627 (2000); see 34 U.S.C. § 12361(c).

93. See *Morrison*, 529 U.S. at 610-11.

about the persistence of the *Wickard* aggregation principle.⁹⁴ The Court reaffirmed that assessing whether regulated activities taken in the aggregate substantially affected interstate commerce was not its job; instead, the Court had to only determine whether Congress had a “rational basis” for so concluding.⁹⁵

At the end of the day, a common feature of these decisions is that they pointedly left key precedents, such as *Wickard*, alone.⁹⁶ Ultimately, even contemporary commentators shelved their shock and predicted that *Lopez* would prove neither “epochal” nor “radical.”⁹⁷ Certainly, *Lopez* and *Morrison* signify that there are outer boundaries to what the Commerce Clause permits.⁹⁸ However, it now seems clear they do not do a lot of work. When Congress acts within its conventional commerce power, the Court has indicated it will continue to apply rational basis review, under which its respect for the outcome of the legislative process purports to be profound.⁹⁹

94. 545 U.S. 1, 17-18 (2005). Lino Graglia concluded that *Raich* returns us to the post-1937, pre-*Lopez* status quo, with an “exception for cases involving the regulation of clearly non-economic conduct that is not part of a larger regulatory scheme.” Lino A. Graglia, *Lopez, Morrison, and Raich: Federalism in the Rehnquist Court*, 31 HARV. J.L. & PUB. POL’Y 761, 784-85 (2008).

95. *Gonzales*, 545 U.S. at 22. Most recently, the Court tinkered with the commerce power in *National Federation of Independent Business v. Sebelius*, in which five Justices (Chief Justice Roberts and four very peeved dissenters unhappy with his resolution of a different question) intimated that Congress could not enact the Affordable Care Act’s (ACA) individual mandate that forces the purchase of health insurance under the Commerce Clause because that clause permits Congress to regulate only *activity*, not *inactivity*. 567 U.S. 519, 561 (2012) (Roberts, C.J., dictum); *see id.* at 652-55 (Scalia, J., dissenting). Again, this analysis left all precedents intact; Chief Justice Roberts distinguished *Wickard*, which, in his view, involved the regulation of activity: “The farmer in *Wickard* was at least actively engaged in the production of wheat.” *Id.* at 553 (Roberts, C.J., dictum).

96. *Compare Sebelius*, 567 U.S. at 553 (finding that the ACA’s individual mandate is valid under Congress’s taxation power instead of on Commerce Clause grounds), *with Gonzales*, 545 U.S. at 20-22 (using the aggregation principle from *Wickard*), *and Morrison*, 529 U.S. at 610 (distinguishing *Wickard*), *and Lopez*, 514 U.S. at 560 (same).

97. Louis H. Pollak, *Foreword: Reflections on United States v. Lopez*, 94 MICH. L. REV. 533, 550 (1995); *see also* Sanford Levinson, *For Whom Is the Heller Decision Important and Why?*, 13 LEWIS & CLARK L. REV. 315, 322-23 (2009) (noting that the much-ballyhooed “revolution” suggested by *Lopez* “turned out to be relatively unimportant”); Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORN. L. REV. 1, 3-4 (2003) (“[O]ne might just as reasonably conclude that the practical, doctrinal, and jurisprudential consequences of what is sometimes called the Court’s ‘New Federalism’ are both slight and exaggerated.” (footnote omitted)).

98. *See Lopez*, 514 U.S. at 567-68; *Morrison*, 529 U.S. at 612-13, 627.

99. *See, e.g., United States v. Comstock*, 560 U.S. 126, 134-35 (2010) (holding Congress

D. The Court's Reaffirmation of Legislative Supremacy in Creating Rights of Action

In recent years, the Court has proclaimed from the hilltops that this deferential stance applies to the creation of rights of action, decisively repudiating its own prior habit of creating rights of action by judicial implication.

It was not always so. The activist Warren Court was fond of identifying Congress's purpose and figuring out how it could help.¹⁰⁰ Thus, in *J.I. Case Co. v. Borak*, the Court created a private right of action to enforce securities fraud under section 14(a) of the Securities Exchange Act of 1934 when Congress had not.¹⁰¹ 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."¹⁰² The *Borak* Court saw its right of action as "a necessary supplement" to enforcement efforts of the Securities and Exchange Commission.¹⁰³ It mattered little that Congress had almost certainly thought through the question of appropriate remedies; the Court assumed that *more* enforcement was an invariable good and created

can act when it has a rational basis for concluding the statute implements the Commerce power). Continued deference is the takeaway of lower federal courts. *See, e.g.*, *Ohio v. EPA*, 98 F.4th 288, 308 (D.C. Cir. 2024) (subjecting statute to "traditional rational basis review" in the face of a Commerce Clause challenge); *Hernández-Gotay v. United States*, 985 F.3d 71, 78-80 (1st Cir. 2021) (concluding that Congress had a rational basis in determining cockfighting exhibitions in Puerto Rico substantially affected interstate commerce); *United States v. Hill*, 927 F.3d 188, 203 n.6 (4th Cir. 2019) ("[R]eadily determin[ing] that a rational basis exists to conclude that bias-motivated assaults that interfere with ongoing commercial activity have a substantial effect on interstate commerce in the aggregate."); *United States v. Durham*, 902 F.3d 1180, 1198 (10th Cir. 2018) (stating that courts need only decide whether Congress had a rational basis); *Am. Stewards of Liberty v. Dep't of the Interior*, 370 F. Supp. 3d 711, 732-35 (W.D. Tex. 2019) (rejecting argument that intervening cases had changed the rational basis standard).

100. This approach is often called purposivism. Paraphrasing Max Radin, Harvard Provost Manning (decidedly a textualist) described purposivism as the belief that, "in our constitutional system, courts have responsibility for seeing that a statute's apparent purposes are fulfilled." John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 97 (2006) (citing Max Radin, *A Short Way with Statutes*, 56 HARV. L. REV. 388, 394-95 (1942)).

101. 377 U.S. 426, 431-33 (1964).

102. *Id.* at 433. In this regard, the Warren Court "portrayed itself as Congress's partner, rather than its subordinate." Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 20 (2006).

103. *Borak*, 377 U.S. at 432.

other channels where it could conjure them. The Court proceeded in subsequent years to find additional private rights of action under the Voting Rights Act¹⁰⁴ and for plaintiffs facing sex discrimination in violation of Title IX.¹⁰⁵

In the same spirit, in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, the Court created a private right of action directly under the Constitution in the absence of a congressional statute addressing constitutional violations by federal actors.¹⁰⁶ A parallel statutory remedy against state officers, section 1983, had existed since 1871,¹⁰⁷ and the Court acted out of concern that there was a remedial gap.¹⁰⁸ The Court permitted *Bivens* to sue and recover damages for the Fourth Amendment violation—even without a statutory remedy¹⁰⁹—because it was the right thing to do: “For people in *Bivens*’ shoes, it is damages or nothing.”¹¹⁰ The Court extended the implied constitutional remedy twice more over the next decade, permitting a female congressional staffer to sue under the Fifth Amendment for sex discrimination¹¹¹ and allowing parents to sue under the Eighth Amendment when federal prison officials gave their son inadequate medical care, which resulted in his death.¹¹²

104. See *Allen v. State Bd. of Elections*, 393 U.S. 544, 554-57 (1969) (finding that the private parties were entitled to bring suit under the Voting Rights Act of 1965 despite acknowledging that “[t]he Voting Rights Act does not explicitly grant or deny private parties authorization to seek a declaratory judgment that a State has failed to comply with the provisions of the Act”); Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (codified as amended at 52 U.S.C. § 10304).

105. See *Cannon v. Univ. of Chi.*, 441 U.S. 677, 709 (1979) (“Not only the words and history of Title IX, but also its subject matter and underlying purposes, counsel implication of a cause of action in favor of private victims of discrimination.”), *abrogated by* *Medina v. Planned Parenthood S. Atl.*, 145 S. Ct. 2219 (2025); Education Amendments of 1972, Pub. L. No. 92-318, §§ 901-03, 86 Stat. 373-75 (codified as amended at 20 U.S.C. §§ 1681-1683).

106. 403 U.S. 388, 397 (1971).

107. An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes (Civil Rights Act of 1871), Pub. L. No. 42-22, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983).

108. See Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials’ Individual Liability Under Bivens*, 88 GEO. L.J. 65, 70-71 (1999).

109. *Bivens*, 403 U.S. at 397.

110. *Id.* at 410 (Harlan, J., concurring).

111. See *Davis v. Passman*, 442 U.S. 228, 248-49 (1979).

112. See *Carlson v. Green*, 446 U.S. 14, 16-18 (1980).

As the Warren Era receded, the Court sharply retreated from the idea that remedial supplementation was constitutionally appropriate. This phenomenon corresponded with the Court's increasing embrace of textualism and rejection of the notion that congressional purpose could ever be discernible.¹¹³ At the same time, there was growing concern that "aggressive purposivism" led courts to overstep boundaries on their own power.¹¹⁴ In the statutory context, the death knell came in *Alexander v. Sandoval* in 2001.¹¹⁵ *Sandoval* concerned a claimed private right of action under regulations promulgated under Title VI of the Civil Rights Act of 1964.¹¹⁶ In rejecting the plaintiff's claim, the Court explained it would find a private right of action only if it found textual clues signifying a congressional intent to create one.¹¹⁷ Henceforth, the Court would apply a two-step, statute-focused inquiry for finding private rights of action, in which it would search first for language communicating congressional intent to create a private right, followed by an inquiry into whether Congress intended to create a private remedy.¹¹⁸ Finding neither rights-creating language in Title VI nor language signifying Congress's intent to create a private remedy under the regulations, the Court declined to infer one.¹¹⁹

The Court's rejection of *Bivens* was a longer time coming but no less emphatic. After decades of gradual retreat, *Egbert v. Boule* dealt the de facto final blow in 2022.¹²⁰ An inn owner on the U.S.-Canadian border filed a *Bivens* action charging U.S. Border Patrol Agents with Fourth and First Amendment violations.¹²¹ The Court deemed the situation sufficiently different from *Bivens*, given its

113. See Manning, *supra* note 100, at 73-75. William Eskridge coined the term "new textualism" to describe the approach of newly appointed Justice Scalia in 1990. See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623-24 (1990).

114. Molot, *supra* note 102, at 24.

115. See 532 U.S. 275, 286 (2001). Provost Manning pinpoints the rise of "new textualism" to the close of the twentieth century, timing that maps well to *Sandoval*. See Manning, *supra* note 100, at 73.

116. *Sandoval*, 532 U.S. at 278; Civil Rights Act of 1964, Pub. L. No. 88-352, § 602, 78 Stat. 252-53 (codified as amended at 42 U.S.C. § 2000d).

117. See *Sandoval*, 532 U.S. at 286-87. The Court determined that it could begin and end its search for congressional intent by examining the statute's "text and structure." *Id.* at 288.

118. See *id.* at 289.

119. See *id.* at 289-93.

120. 142 S. Ct. 1793, 1809 (2022).

121. See *id.* at 1800, 1802.

border security context, that the case was not settled by precedent.¹²² Whether to create a cause of action in the absence of a statute, in the Court's view, was a straightforward "no." The Court reasoned that we are "[n]ow long past the 'heady days in which this Court assumed common-law powers to create causes of action.'"¹²³ The Court asked itself "whether there is *any* rational reason (even one) to think that *Congress* is better suited to 'weigh the costs and benefits of allowing a damages action to proceed.'"¹²⁴ Answering its own question in the affirmative, the Court declared that the question of an appropriate remedy is for Congress, and "the courts cannot second-guess that calibration" by imposing remedies of their own creation.¹²⁵

As of *Egbert*, the Court has decisively rejected a role for the courts in creating causes of action because doing so oversteps boundaries and trenches upon the legislative prerogative. Legislative choice involves "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective."¹²⁶ Permitting a damages cause of action necessitates "balancing interests and often demands compromise."¹²⁷ The Court has stepped away from its *Borak*-Era belief that more enforcement is invariably a good. As Justice Scalia put it, a final law or regulation "is often the result of compromise among various interest groups, resulting in a decision to go so far and no farther."¹²⁸ Creating a damage remedy when Congress has not created one "may upset the careful balance of interests struck by the lawmakers."¹²⁹

122. *See id.* at 1804-06.

123. *Id.* at 1802 (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring)).

124. *Id.* at 1805 (quoting *Ziglar v. Abbasi*, 582 U.S. 120, 136 (2017)).

125. *Id.* at 1807. The Court refrained from overruling *Bivens* outright. *See id.* at 1803. However, the Court had previously suggested that *Bivens* and its two extensions would be limited to situations presenting identical facts. *See Ziglar*, 582 U.S. at 139-40.

126. *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam).

127. *See Hernandez v. Mesa*, 140 S. Ct. 735, 742 (2020); *see also Beske*, *supra* note 18, at 16-17 (describing the Court's evolved commitment to legislative supremacy in this area).

128. *E. Associated Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57, 68-69 (2000) (Scalia, J., concurring).

129. *Hernandez*, 140 S. Ct. at 742.

E. Putting It Together

When the nine Justices look themselves in the mirror, each sees a deferential jurist who respects the legislative process. Most have scoffed at *Lochner*¹³⁰ and signed onto an opinion citing *Wickard* with approval.¹³¹ Though some have joined opinions confirming outer boundaries to the commerce power, each opinion has been at pains to preserve ordinary *Wickard* deference and all other existing precedents.¹³² The Court's approach to matters within Congress's wheelhouse—things solidly in the interstate commerce basket—is now, and for virtually ninety years has been, a clear policy of deference. Moreover, of all the various permutations of legislation to which a court can possibly defer, the Court in recent years has repeatedly singled out the power to create rights of action as distinctly legislative and uniquely worthy of this deference.¹³³ As the line of cases culminating in *Egbert* makes plain, the Court professes

130. See, e.g., *Obergefell v. Hodges*, 576 U.S. 644, 694 (2015) (Roberts, C.J., dissenting) (criticizing the majority opinion for joining “the unprincipled tradition of judicial policymaking that characterized discredited decisions such as *Lochner v. New York*”); *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 355 (2007) (Thomas, J., concurring) (“The Court’s negative Commerce Clause jurisprudence, created from whole cloth, is just as illegitimate as the ‘right’ it vindicated in *Lochner*.”); *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2248 (2022) (Alito, J.) (mentioning “discredited decisions such as *Lochner v. New York*”); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018) (Gorsuch, J.) (referencing “*Lochner*’s sin”); *Confirmation Hearing on the Nomination of Brett Kavanaugh to be Circuit Judge for the District of Columbia Circuit Before the S. Comm. on the Judiciary*, 109th Cong. 46 (2006) (statement of Brett Kavanaugh) (referring to *Lochner* as one of “the worst moments in the Supreme Court’s history”); *Confirmation Hearing on the Nomination of Hon. Amy Coney Barrett to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 116th Cong. 322 (2020) (statement of Hon. Amy Coney Barrett, U.S. Court of Appeals for the Seventh Circuit) (describing *Lochner* as a case that “thwart[ed] the will of the people without warrant in the Constitution”). Justice Kagan does not appear to have done explicit scoffing, though some see her dissent in *Janus v. American Federation of State, County, and Municipal Employees, Council 31* as a veiled accusation that the majority is engaging in *Lochnerism*. See 138 S.Ct. 2448, 2501 (2018) (Kagan, J., dissenting) (accusing the majority of “weaponizing the First Amendment ... to intervene in economic and regulatory policy”); see also Kate Andrias, *Janus’s Two Faces*, 2018 SUP. CT. REV. 21, 29-30 (likening Kagan’s dissent to a charge of *Lochnerism*).

131. See, e.g., *Sackett v. EPA*, 143 S. Ct. 1322, 1351 (2023) (Thomas, J., concurring, joined by Gorsuch, J.); *Taylor v. United States*, 579 U.S. 301, 306 (2016) (Alito, J., joined by Roberts, C.J., and Sotomayor & Kagan, JJ.). Justices Kavanaugh and Jackson have not joined an opinion citing *Wickard* as of March 2026.

132. See *supra* notes 95-96 and accompanying text.

133. See *supra* Part I.D.

to be very serious in its belief that deciding how to solve problems and, if necessary, allow plaintiffs to file suit, involves “a host of considerations that must be weighed and appraised,” including the balancing of various costs and benefits and the consideration of the public’s appetite for risk.¹³⁴ For a majority of the Court, it seems settled, after *Egbert*, that this is a matter for the legislative branch.¹³⁵

II. THE ROBERTS COURT’S TIGHTENING OF STANDING DOCTRINE, PARTICULARLY IN THE CONTEXT OF STATUTORY RIGHTS

Even as the Court has disavowed intrusion upon Congress’s balancing of costs and benefits in creating (or not creating) rights of action, it has been doing something different in the standing context. Standing is a much-maligned doctrine,¹³⁶ with criticism coming from left and right.¹³⁷ Scholars have tried and failed to introduce coherence in this area;¹³⁸ the Court has blithely soldiered on.

134. *Ziglar v. Abbasi*, 582 U.S. 120, 135-36 (2017) (quoting *Bush v. Lucas*, 462 U.S. 367, 380 (1983)).

135. See *Egbert v. Boule*, 142 S. Ct. 1793, 1802-03 (2022).

136. See, e.g., Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1063 (2015) (calling standing doctrine a “mixture of complexity and lack of articulate explanation”); Heather Elliott, *Associations and Cities as (Forbidden) Pure Private Attorneys General*, 61 WM. & MARY L. REV. 1329, 1334-35 (2020) (lamenting “the bankruptcy of standing doctrine”); Daniel A. Farber, *A Place-Based Theory of Standing*, 55 UCLA L. REV. 1505, 1508 (2008) (calling standing doctrine a “doctrinal swamp”); 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) (“[S]tanding remains one of the most contested areas of federal law, with criticisms of the doctrine nearing the number of commentators.”); Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1132 (2009) (observing that standing doctrine is “widely regarded to be a mess”); F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORN. L. REV. 275, 276 (2008) (describing standing law as “incoherent and confusing”); Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 304 (2002) (calling the implementation of standing law “radically unsatisfying”); Eugene Kontorovich, *What Standing Is Good for*, 93 VA. L. REV. 1663, 1665 (2007) (“Scholars almost unanimously regard [standing] as incoherent at best, a veil for ideological manipulations at worst.” (footnotes omitted)). I have previously characterized *TransUnion LLC v. Ramirez* as a “face plant.” Beske, *supra* note 30, at 735.

137. See Richard M. Re, *Relative Standing*, 102 GEO. L.J. 1191, 1195 (2014).

138. See Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1742 (1999) (lamenting his inability to provide students “a doctrinal algorithm that they can use to predict judicial decisions with a reasonable degree of confidence”); Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine’s Dirty Little Secret*, 107 NW. U. L. REV. 169,

A. *Lujan v. Defenders of Wildlife*

Leapfrogging standing's origin story,¹³⁹ this Part begins with *Lujan v. Defenders of Wildlife*, a 6-3 decision confirming that the doctrine of standing limits Congress, as well as federal courts.¹⁴⁰ The Secretary of the Interior promulgated a rule that changed the interpretation of the Endangered Species Act to require agency consultation regarding the effects of funded projects on endangered species only in the United States and on the high seas, not internationally.¹⁴¹ Conservation organizations, relying on affidavits from members who had traveled abroad to endangered animals' habitats in the past and had plans to return, filed suit seeking declaratory relief and an injunction reinstating the agency's prior interpretation.¹⁴² The Court, per Justice Scalia, found that none of the plaintiffs had suffered an actionable injury in fact.¹⁴³ Because the individual plaintiffs had only "some day" intentions—not concrete plans—to revisit the international areas home to species threatened by agency-funded projects, their asserted injury was not sufficiently "imminent."¹⁴⁴ The Court made short work of the plaintiffs' other theories. In rejecting the theory that anyone who used part of an ecosystem had standing if a portion of it was

175 (2015) (concluding that two variants of standing doctrine cannot be reconciled and that the Court should frankly acknowledge it applies two different tiers).

139. The debate on standing's origins is robust. *See, e.g.*, Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 691 (2004) (arguing that modern standing doctrine has historical antecedents); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1437 (1988) (arguing that progressive New Deal judges developed the standing doctrine to insulate the regulatory process from legal intrusion); Ernest A. Young, *Standing, Equity, and Injury in Fact*, 97 NOTRE DAME L. REV. 1885, 1890-91 (2022) (agreeing that the concept of injury emerged to protect the regulatory state); Ho & Ross, *supra* note 136, at 595-97 (arguing that empirical data does not support Sunstein's "insulation thesis").

140. 504 U.S. 555, 577 (1992). Although he did not cite himself, Justice Scalia, author of the majority opinion, clearly drew upon his earlier scholarship articulating a separation-of-powers theory of standing. *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 886 (1983) (describing standing as "a limit upon even the power of Congress to convert generalized benefits into legal rights").

141. *See Lujan*, 504 U.S. at 558-59.

142. *See id.* at 559.

143. *See id.* at 562-67.

144. *Id.* at 564.

disturbed, the Court noted that prior cases had required that a plaintiff use (and suffer injury in) the particular area affected.¹⁴⁵ The Court similarly rebuffed the “animal nexus” and “vocational nexus” theories, which claimed that people with a personal or professional interest in a particular animal suffered an injury if a project imperiled its population.¹⁴⁶ It was “pure speculation and fantasy[] to say that anyone who observes or works with an endangered species, anywhere in the world,” is harmed by a particular project with which they lack a solid connection.¹⁴⁷

The plaintiffs’ final claim was that the citizen suit provision of the Endangered Species Act, which conferred on “any person” the right to file suit to enjoin violations of the Act, itself created a “procedural injury” sufficient to permit their suit.¹⁴⁸ The Court saw this as nothing but a generalized grievance; the plaintiffs were not pointing to any harm to “a separate concrete interest of theirs,” such as the deprivation of a hearing or the requirement of an environmental impact statement before a project was built abutting their property.¹⁴⁹ The Court observed that it had “consistently held” that generalized grievances could not support a suit in federal court, and the fact that the plaintiffs had a statutory provision in pocket did not change the calculus¹⁵⁰: “To permit Congress to convert the undifferentiated public interest in executive officers’ compliance with the law into an ‘individual right’ vindicable in the courts,” the Court reasoned, would be to let Congress “transfer from the President to the courts the Chief Executive’s most important constitutional duty, to ‘take Care that the Laws be faithfully executed.’”¹⁵¹

Lujan thus held fast to the Court’s rejection of suits airing generalized grievances against the government and stated that Congress was powerless to circumvent that restriction through citizen suit provisions. The Court reassured, though, that Congress

145. *See id.* at 565-66.

146. *See id.* at 566-67.

147. *Id.* at 567. Writing for only a plurality, Justice Scalia went on to flag that, in addition to failing the injury-in-fact requirement, the plaintiffs could not show redressability. *See id.* at 568-69.

148. *Id.* at 571-72.

149. *See id.* at 572-78.

150. *Id.* at 573-76.

151. *Id.* at 577 (quoting U.S. CONST. art. II, § 3).

could “elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law,”¹⁵² flagging specifically the interest in living in a racially integrated community and the protection of a company’s competitive interests.¹⁵³ In its discussion of procedural injuries, moreover, the Court suggested that tethering a procedural defect to a *particularized claim*—such as a failure to conduct required environmental studies when asserted by an adjacent property owner—might pass muster.¹⁵⁴ Congress could broaden the category of injury via statute, but it could not “abandon[] the requirement that the party seeking review must himself have suffered an injury.”¹⁵⁵ As of *Lujan*, at least, the Court’s paramount concern was that Congress’s creation of enforceable rights might permit enforcement of generalized grievances; when a plaintiff’s problem was individual and particularized, the Court suggested, a suit ought to be able to proceed.

B. Standing Under Congressional Statutes Between Lujan and Spokeo

The analytical clarity suggested in *Lujan*—generalized grievances nonactionable, particularized injuries actionable—hit a few snags thereafter. In *FEC v. Akins*, the plaintiffs filed suit under section 437g(a)(8)(A) of the Federal Election Campaign Act, which permitted “any person” to sue in the event that their complaint regarding a “violation of this ... chapter” was dismissed or disregarded by the FEC,¹⁵⁶ after the FEC rejected their complaint seeking classification of the American Israel Public Affairs Committee (AIPAC) as a political action committee.¹⁵⁷ The plaintiffs sought to compel AIPAC’s compliance with the statute’s recordkeeping and donor, contribution, and expenditure disclosure requirements, which they

152. *Id.* at 578 (first citing *Trafficante v. Met Life Ins. Co.*, 409 U.S. 205, 208-12 (1972); and then citing *Hardin v. Ky. Utils. Co.*, 390 U.S. 1, 6 (1968)).

153. *See id.*

154. *See id.* at 571-73.

155. *Id.* at 578 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972)).

156. 2 U.S.C. § 437g(a)(1), (8)(A) (1994) (originally enacted as Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, §§ 208(a), 314(a)(1)(A), 314(a)(9), 88 Stat. 1263, 1279, 1284-85).

157. *See* 524 U.S. 11, 18 (1998).

claimed the statute gave them access to, and they needed to cast an informed vote.¹⁵⁸ In a 6-3 decision, Justice Breyer concluded that the plaintiffs had standing.¹⁵⁹ Key to the Court's analysis was the existence of a statutory right to the claimed information.¹⁶⁰ The Court was untroubled by the argument that these plaintiffs were claiming violation of a right shared by everyone, which looked like *Lujan's* constitutionally-suspect generalized grievance.¹⁶¹ In *impermissible* generalized grievance cases, the Court explained, the alleged harm was both widely shared and "of an abstract and indefinite nature," such as the interest in seeing that the law is obeyed.¹⁶² Here, in contrast, the injury, though widely shared, was "sufficiently concrete."¹⁶³ Bitterly dissenting, Justice Scalia faulted the Court for overlooking the requirement of particularization.¹⁶⁴ "If today's decision is correct," he complained, "it is within the power of Congress to authorize any interested person to manage (through the courts) the Executive's enforcement of any law that includes a requirement for the filing and public availability of a piece of paper."¹⁶⁵

The Court's less-than-rigid adherence to the *Lujan* line continued in *Massachusetts v. EPA*, in which a group of states, local governments, and private organizations, again suing under a citizen suit provision, claimed that the EPA had violated the Clean Air Act by

158. *See id.* at 20.

159. *See id.* at 26. The Court had a solid foundation for this conclusion in a 1989 pre-*Lujan* case. *See* Pub. Citizen v. U.S. Dep't of Just., 491 U.S. 440, 449 (1989) (finding informational injury in suit alleging violation of statute requiring access to advisory committee minutes without any additional showing of harm). Still, if *Lujan* changed the game in 1992, the *Akins* reaffirmation of informational standing conferred by statute is important. *See Akins*, 524 U.S. at 25-26.

160. *See Akins*, 524 U.S. at 21-23. In this respect, the Court distinguished *United States v. Richardson*, a Vietnam War-Era case in which the plaintiffs claimed access to information regarding the CIA's expenditures under the Constitution's Accounts Clause. 418 U.S. 166, 167-68 (1974). The plaintiffs in that case predicated their claim on taxpayer standing, *see id.* at 169-70, whereas the *Akins* plaintiffs had the benefit of a statute that sought "to protect [them] from the kind of harm they sa[id] they ... suffered," *see Akins*, 524 U.S. at 22.

161. *See Akins*, 524 U.S. at 23.

162. *See id.* at 23-24.

163. *Id.* at 24-25.

164. *See id.* at 35 (Scalia, J., dissenting).

165. *Id.* at 36. Observing the difficulty of squaring *Akins* with *Lujan*, Lee and Ellis maintain that the Court has quietly tolerated creation of a second, easier tier of review for informational injury statutes. Lee & Ellis, *supra* note 138, at 174.

refusing to regulate certain greenhouse gases.¹⁶⁶ In a 5-4 decision authored by Justice Stevens, the Court found that Massachusetts had standing, explaining that “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.”¹⁶⁷ The Court concluded that Congress had given the plaintiffs a “procedural right” to protect concrete interests and, consequently, the State could sue “without meeting all the normal standards of redressability and immediacy.”¹⁶⁸ The Court referenced the “special solicitude” it afforded Massachusetts given its sovereign interests,¹⁶⁹ and Chief Justice Roberts repeatedly flagged the murkiness of this new concept in his dissent.¹⁷⁰

The *Lujan* line reemerged the following Term in *Summers v. Earth Island Institute*, in an opinion authored by Justice Scalia.¹⁷¹ Environmental groups filed suit seeking to enjoin the U.S. Forest Service from exempting timber-salvage projects from the notice and comment procedure used for bigger land management decisions.¹⁷² Adverting to *Lujan*, the plaintiffs indicated that one member “had repeatedly visited the Burnt Ridge site” and “had imminent plans

166. See 549 U.S. 497, 510-14 (2007).

167. *Id.* at 516 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 580 (1992)).

168. *Id.* at 517-18.

169. *Id.* at 520.

170. See *id.* at 536, 538, 540 (Roberts, C.J., dissenting). Commentators agree that *Massachusetts v. EPA* watered down the requirements of standing, at least where states are concerned. See, e.g., William Baude & Samuel L. Bray, Comment, *Proper Parties, Proper Relief*, 137 HARV. L. REV. 153, 165 (2023) (“What is clear about *Massachusetts v. EPA* is that it reflected a lax judicial attitude toward state standing.”); Seth Davis, *The Private Rights of Public Governments*, 94 NOTRE DAME L. REV. 2091, 2101 (2019) (“*Massachusetts v. EPA* portended a shift in public law litigation toward state standing.”); Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1, 68 (2011) (describing the case’s treatment of standing as “notably lenient”). The case spawned a rise in state challenges to federal action, and Baude and Bray argue that “the cumulative effect of the *Massachusetts v. EPA* era has been stunning.” Baude & Bray, *supra*, at 173. Recently, though, things are shifting; Baude and Bray flagged the Court’s seeming about-face in the October 2022 Term. See *id.* at 174. The Court did not rely on, or even favorably cite to, the case in either *Biden v. Nebraska*, or *United States v. Texas*. See *id.* at 174-75. Katherine Mims Crocker recently concluded that “special solicitude as a doctrinal matter has rarely if ever controlled a decision’s outcome.” Katherine Mims Crocker, *Not-So-Special Solicitude*, 109 MINN. L. REV. 815, 822 (2024).

171. 555 U.S. 488, 490-93 (2009).

172. See *id.* at 490.

to do so again.”¹⁷³ During the pendency of the lawsuit, however, disputes with respect to that site settled.¹⁷⁴ Although the Court suggested (and the government conceded) that the plaintiff might have had standing with respect to Burnt Ridge had that litigation not settled, the Court rejected standing for the remaining sites, as to which no individuals claimed any particularized harm.¹⁷⁵ The Court likewise denied the plaintiffs’ claim that the statute that created the notice and comment procedure generated an enforceable “procedural right” that would permit suit, citing *Lujan* for the proposition that only procedural rights protecting “[an individual’s] concrete interests” satisfied Article III.¹⁷⁶ Again, the constitutional defect was permitting “citizen suits to vindicate the public’s non-concrete interest in the proper administration of the laws.”¹⁷⁷ The Court’s intimation that more specific affidavits regarding a member’s intent to use an actively litigated site might support standing again suggests that the major problem was a lack of particularization.

C. Spokeo

Until *Spokeo, Inc. v. Robins*,¹⁷⁸ action in the standing space had surfaced almost entirely in the context of suits by individuals or groups against the government.¹⁷⁹ The Court’s basic insight—that suits were possible when individuals had suffered unique harm but not sustainable when they urged only generalized interests in the government’s adherence to law—made sense in this context.¹⁸⁰ Actions seeking to vindicate generalized grievances were best suited for resolution in the political process and, if permitted, might represent an end run around the Article II enforcement authority of

173. *Id.* at 494.

174. *See id.*

175. *See id.* at 494-95.

176. *Id.* at 496. (quoting *Lujan v. Defs of Wildlife*, 504 U.S. 555, 572 n.7 (1992))

177. *Id.* at 497 (quoting *Lujan* 504 U.S. at 581 (Kennedy, J., concurring)).

178. 578 U.S. 330, 333-34 (2016).

179. *See* Thomas P. Schmidt, *Standing Between Private Parties*, 2024 WIS. L. REV. 1, 7 (2024). An exception is a case like *Havens Realty Corp. v. Coleman*. 455 U.S. 363 (1982); *see Crocker, supra* note 170, at 838 n.121.

180. *See* *FEC v. Akins*, 524 U.S. 11, 23-24 (1998).

the executive branch.¹⁸¹ *Spokeo* reflected a sea change of sorts in that it applied the same standing requirements to a suit in which a private plaintiff sued a private defendant.¹⁸² By definition, the disfavored interest in keeping the government compliant with the law was entirely absent from the case.

In *Spokeo*, plaintiff Thomas Robins contended that Spokeo, an internet “people search engine[,]” published inaccurate information about him in violation of the Fair Credit Reporting Act (FCRA), which provided a right to sue and statutory damages.¹⁸³ The Ninth Circuit noted that Robins had alleged a violation of *his* rights, which implicated his personal interest in the publication of accurate information, and found standing to proceed.¹⁸⁴ A 7-2 Supreme Court vacated and remanded, concluding that the Ninth Circuit had considered particularization, a necessary-but-not-sufficient aspect of the standing equation, but ignored concreteness.¹⁸⁵ A concrete injury, whether tangible or intangible, “must actually exist.”¹⁸⁶ In defining concrete injury, the Court instructed lower courts to examine the resemblance to traditionally recognized intangible harms.¹⁸⁷ Congress’s input could be “instructive and important,” but its conferral of a right did not automatically give rise to an actionable, concrete injury.¹⁸⁸

The Court noted that the risk of harm could lead to an actionable injury and put forward slander per se as an example of a tort traditionally permitted even when harms might be “difficult to prove or measure.”¹⁸⁹ Congress could, in some circumstances, create similar public rights whose violation might be actionable absent “any *additional* harm beyond the one Congress has identified.”¹⁹⁰ Aside from the slander example, the Court gave little guidance on how to populate this category. In the case before it, the Court

181. *See id.* at 23.

182. *See Spokeo*, 578 U.S. at 333, 338.

183. *Id.* at 333-36; *see* Fair Credit Reporting Act, Pub. L. No. 91-508, §§ 616-18, 84 Stat. 1127, 1134 (1970) (codified as amended at 15 U.S.C. §§ 1681n-1681p).

184. *See Spokeo*, 578 U.S. at 336-37.

185. *See id.* at 334, 339-40.

186. *Id.* at 340.

187. *See id.* at 340-41.

188. *Id.* at 341.

189. *Id.* at 341-42.

190. *Id.* at 342.

suggested, a “bare procedural violation ... may result in no harm,” and the Court remanded so the Ninth Circuit could consider whether the alleged violations gave rise to “a degree of risk sufficient to meet the concreteness requirement” in the first instance.¹⁹¹

Though he joined the opinion in full, Justice Thomas wrote separately to flag the distinction between private rights, possessed by individuals, and public rights, as to which the requirements of standing had a more rigorous application.¹⁹² Justice Thomas noted that, when private rights were concerned, the common law generally had not required proof of injury after the plaintiff demonstrated a violation.¹⁹³ “Thus,” he explained, “when one man placed his foot on another’s property, the property owner needed to show nothing more to establish a traditional case or controversy.”¹⁹⁴ In such a case, nominal damages alone might suffice.¹⁹⁵ Public rights, in contrast, were shared in the aggregate and were nonparticularized, and generally, “only the government had the authority to vindicate” them.¹⁹⁶ A private plaintiff was permitted to assert a violation of a public right only upon an additional showing of “special, individualized damage.”¹⁹⁷

To Justice Thomas, then, the Ninth Circuit’s task on remand was one of classification. If the Ninth Circuit determined that Congress had conferred a private right on Robins to assure the accuracy of his personal information, “then the violation of the legal duty [would] suffice[] for Article III injury in fact.”¹⁹⁸ Justice Thomas’s conception of the inquiry provided more leeway to Congress and permitted less second-guessing of Congress’s assessment of the magnitude, quality, or degree of actionable harm. His understanding also did not differentiate between harm and risk of harm.¹⁹⁹

191. *Id.* at 342-43.

192. *See id.* at 343-46 (Thomas, J., concurring).

193. *Id.* at 344.

194. *Id.*

195. *See id.* at 347.

196. *Id.* at 345.

197. *Id.*

198. *Id.* at 349.

199. On remand, the Ninth Circuit asked whether Congress had enacted the FCRA to protect individuals’ concrete interests and, if so, whether violation of the FCRA’s procedural rights actually harmed or presented a risk of harm to those interests. *See Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1113 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 931 (2018). It concluded that

D. Uzuegbunam

At this point, a short but critical diversion is required to follow a case that engaged the concepts Justice Thomas brought into *Spokeo*. In *Uzuegbunam v. Preczewski*, decided the same term as *TransUnion*, the Court confronted a standing question in the context of a First Amendment violation.²⁰⁰ Campus police stopped Chike Uzuegbunam, a student at Georgia Gwinnett College, from distributing religious materials at a campus plaza, explaining that he could do so only with a permit in two small designated “free speech zone[s].”²⁰¹ After obtaining the required permit, Uzuegbunam began speaking and distributing materials in the designated zones but was again stopped by campus police due to complaints by passersby.²⁰² He filed suit against the school seeking nominal damages and an injunction against continued enforcement of the policy.²⁰³ During the pendency of his suit, the college abandoned the challenged policies, thus mooting Uzuegbunam’s claim for prospective relief.²⁰⁴ The district court dismissed the suit for lack of standing because Uzuegbunam’s remaining claim sought only nominal damages, not compensatory damages, and the Eleventh Circuit affirmed.²⁰⁵ The case squarely presented an issue that

Congress had sought to protect consumers from the dissemination of inaccurate information—a concrete interest. *See id.* at 1113-14. Because the potential implications of inaccurate information were dire, the Ninth Circuit found that “Congress might choose to protect against such harms without requiring any additional showing of injury.” *Id.* at 1114. The Ninth Circuit did not require that defendants have disseminated inaccurate information to sustain a lawsuit: “Congress could have seen fit to guard against [the] threat” of such dissemination and permitted before-the-injury lawsuits. *Id.* Although the Ninth Circuit did not specifically take up Justice Thomas’s private right-public right distinction, its conclusion fell in line with Thomas’s dichotomy. *Compare id.* at 1113-14 (classifying the right asserted as a private right), *with Spokeo*, 578 U.S. at 343-49 (Thomas, J., concurring) (requiring remand to determine whether Congress created a private duty owed to the plaintiff). Having isolated the congressional intent to benefit individuals and found particularization on the facts, the Ninth Circuit required no further proof of harm. *See Spokeo*, 867 F.3d at 1113, 1118. The Supreme Court denied *Spokeo*’s subsequent petition for certiorari. *See Spokeo, Inc. v. Robins*, 138 S. Ct. 931 (2018).

200. *See* 141 S. Ct. 792, 797 (2021).

201. *Id.* at 796-97.

202. *See id.* at 797.

203. *See id.*

204. *See id.*

205. *See id.*

Justice Thomas had touched on in his *Spokeo* concurrence: Do nominal damages—essentially an acknowledgment that the plaintiff had suffered no compensable harm—suffice for Article III standing?

In an opinion authored by Justice Thomas, the Court answered “yes,” reversing 8-1.²⁰⁶ The Court began by asserting that there was “no dispute” that Uzuegbunam could establish both injury-in-fact and causation.²⁰⁷ The question was whether a federal court could redress an injury if *all* it could do was pay out nominal damages.²⁰⁸ In canvassing cases at common law, the Court found ample precedent from both England and the colonies for the proposition that quantifiable damages were not required in the event of legal injury.²⁰⁹ Justice Story deemed the principle laid down by Lord Holt—that “every injury imports a damage” and a plaintiff can prevail “even if he ‘does not lose a penny by reason of the [violation]’”—an “incontrovertible” proposition, and in ensuing decades, other courts considered the principle “decisively settled.”²¹⁰ Recognition of nominal damages made sense given the prominence of “noneconomic rights” at the time; permitting suit for nominal damages in the face of injury avoided preferring wallet injury over important, but less quantifiable, nonpecuniary injury.²¹¹ “Despite being small,” the Court reasoned, “nominal damages are certainly concrete.”²¹² The Court rejected the dissent’s complaint that its ruling would compel federal courts to weigh in every time someone asked for a dollar, noting that “[i]t remains for the plaintiff to establish the other elements of standing (such as a particularized injury)” and to “plead a cognizable cause of action.”²¹³

In the parlance of Justice Thomas’s *Spokeo* dichotomy, Uzuegbunam’s harm was a private harm: He suffered legal injury the moment campus police silenced him, and notably, every court

206. *See id.* at 802.

207. *Id.* at 797.

208. *Id.*

209. *See id.* at 798-99.

210. *Id.* at 799 (first quoting *Ashby v. White*, 92 Eng. Rep. 126, 137 (1703); then quoting *Webb v. Portland Mfg. Co.*, 29 F. Cas. 506, 508-09 (Me. Cir. Ct. 1838) (No. 17,322); and then quoting *Parker v. Griswold*, 17 Conn. 288, 304 (1845)).

211. *Id.* at 800.

212. *Id.* at 801.

213. *Id.* at 802.

in the chain considered that a settled matter.²¹⁴ The question of injury in fact was so easy that courts skipped over the quantum and quality of harm and asked only if they could redress his legal injury if they could not monetize it. The only vexing question was whether, given the unquantifiability of his injury, a federal court could meaningfully “resolve” this legal problem.²¹⁵ Unsurprisingly, Justice Thomas’s majority opinion in *Uzuegbunam* was entirely consistent with his concurrence in *Spokeo*. In both cases, Justice Thomas posited that particularized violations of private rights were actionable.²¹⁶ In neither case did he require an assessment of *how much* harm the plaintiff had to sustain to suffer an actionable injury in fact.²¹⁷ Notably, in *Uzuegbunam*, seven of his colleagues did not require that assessment either.²¹⁸

E. TransUnion

The waters muddied several months later. In the very same term as *Uzuegbunam*, the Court both tightened the concrete injury inquiry in the context of statutory rights and demonstrated how lower courts should apply it. When Sergio Ramirez attempted to purchase a car in 2011, the routine credit check the dealer ran with TransUnion, a credit reporting agency, revealed that his name was on the Treasury Department’s Office of Foreign Assets Control (OFAC) list of “specially designated nationals” who pose a risk to America’s national security.²¹⁹ The dealer refused to go through with the sale, and Ramirez felt constrained to cancel a planned

214. *See id.* at 797.

215. *See id.* at 803 (Roberts, C.J., dissenting).

216. *Compare id.* at 802 (majority opinion) (“[E]very violation [of a right] imports damage” (second alteration in original) (quoting *Webb v. Portland Mfg. Co.*, 29 F. Cas. 506, 509 (Me. Cir. Ct. 1838))), *with Spokeo*, 578 U.S. at 347 (Thomas, J., concurring) (“Our contemporary decisions have not required a plaintiff to assert an actual injury beyond the violation of his personal legal rights to satisfy the ‘injury-in-fact’ requirement.”).

217. *Compare Uzuegbunam*, 141 S. Ct. at 797 (holding that there was no dispute as to whether the plaintiff suffered an injury in fact), *with Spokeo*, 578 U.S. at 348 (Thomas, J., concurring) (“A plaintiff seeking to vindicate a statutorily created private right need not allege actual harm beyond the invasion of that private right.”).

218. *Uzuegbunam*, 141 S. Ct. at 796-97.

219. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2201 (2021). I have previously criticized this case. *See Beske, supra* note 18, at 33-38; *Beske, supra* note 30, at 761-78.

foreign trip while he resolved the issue.²²⁰ Ramirez called TransUnion to request a copy of his credit file, and TransUnion responded with two mailings sent on consecutive days.²²¹ The first mailing included Ramirez's credit file and the required summary of rights but failed to mention the OFAC alert.²²² The second mailing informed Ramirez that his name was on the OFAC list but did not include the required summary of rights.²²³ Ramirez filed suit against TransUnion, alleging three violations of the FCRA: (1) failure to follow procedures to ensure the accuracy of information in his file, (2) failure to give him all the information in his file when he requested it, and (3) failure to provide him a summary of rights with each mailing.²²⁴ Ramirez sought to certify a class consisting of people to whom TransUnion had sent a notification between January 1 and July 26, 2011, that resembled Ramirez's second mailing.²²⁵ The parties stipulated that this class consisted of 8,185 members and agreed that TransUnion had disclosed the OFAC alert status of 1,853 members of this group to third parties.²²⁶

A 5-4 Supreme Court, per Justice Kavanaugh, rejected standing on the first claim for the 6,332 putative class members whose inclusion on the list had not been disclosed to third parties and rejected standing for all 8,185 class members on claims two and three.²²⁷ The Court observed that, per *Spokeo*, its analysis of intangible harms should begin with "history and tradition" and, specifically, whether the statutory harms bear a "close relationship" to harms traditionally recognized at common law.²²⁸ The Court noted that it did not need to see "an exact duplicate" of the injury but cautioned that some family resemblance was necessary to avoid "loosen[ing] Article III based on contemporary, evolving beliefs

220. See *TransUnion*, 141 S. Ct. at 2201-02.

221. See *id.*

222. See *id.* at 2201.

223. See *id.* at 2201-02.

224. See *id.* at 2202. Ramirez alleged violations of 15 U.S.C. §§ 1681e(b), 1681g(a)(1), and 1681g(c)(2). See *id.*

225. See *TransUnion*, 141 S. Ct. at 2202.

226. See *id.*

227. See *id.* at 2214.

228. *Id.* at 2204 (first quoting *Sprint Commc'n Co. v. APCC Servs., Inc.*, 554 U.S. 269, 274 (2008); then quoting *Spokeo v. Robins*, 578 U.S. 330, 341 (2016)).

about what kinds of suits should be heard in federal courts.”²²⁹ Congress was not free, the Court explained, to permit “*unharmed* plaintiffs” to file suit.²³⁰ Again, the Court’s primary concern was that it not allow suits advancing the “public interest that private entities comply with the law.”²³¹

Turning to the particulars, the Court concluded that Ramirez’s first claim—that TransUnion failed to use proper procedures to safeguard the accuracy of his information—bore a resemblance to common law defamation.²³² With respect to the 1,853 people whose inaccurate credit reports had been disclosed to third parties, the Court found the requisite “close relationship” for there to be a concrete injury.²³³ Somewhat perplexingly, the Court proceeded to find some elements of common law defamation to be unimportant and others to be critical. Thus, the Court rejected TransUnion’s argument that the analogy was inapt because reporting that the name “Sergio Ramirez” was on the OFAC list was literally true.²³⁴ An “exact duplicate” of the common law falsity element was not needed, the Court reasoned; reporting that *a* Ramirez was on the list was misleading and “sufficiently close” to the common law tort.²³⁵

The 6,332 putative class members whose inclusion on the list TransUnion had not disclosed to third parties, however, required different treatment.²³⁶ The Court found the common law publication element indispensable and could locate no common law analogue for the notion that the mere existence of inaccurate information in a file amounts to actionable harm.²³⁷ Adverting to the proverbial tree falling in the forest, the Court concluded that inaccurate data that exists in a file but is not seen by others

229. *Id.*

230. *Id.* at 2207.

231. *Id.* at 2206.

232. *See id.* at 2208-09. As Eleventh Circuit Judge Newsom observed, it bears mention that the privacy-related torts identified by the Court here “didn’t materialize until the late nineteenth century, at the earliest—and in any event long after the Founding.” *Laufer v. Arpan LLC*, 29 F.4th 1268, 1287 (11th Cir. 2022).

233. *TransUnion*, 141 S. Ct. at 2209.

234. *See id.*

235. *Id.*

236. *See id.*

237. *See id.* at 2209-10.

occasions no actionable harm.²³⁸ At this point, having found a common law analogue that worked in some cases (the 1,853 people in Ramirez’s precise situation) but not in others (the 6,332 whose data TransUnion had not shared) and having found some of its elements unimportant (falsity) and others vital (disclosure), the Court’s analysis seemed to run more on vibes than textual analysis of the statute or one-to-one matchups with historical patterns.

The Court proceeded to reject the plaintiffs’ argument that misleading and erroneous information in their credit files—even if unshared—gave rise to an inappropriate and actionable *risk* of harm. The Court found “persuasive” TransUnion’s argument that, in a suit seeking damages, “the mere risk of future harm, standing alone, cannot qualify as a concrete harm.”²³⁹ The Court provided a simple example to demonstrate the point: If, on the way home from work, a woman encounters a reckless driver, she is exposed to risk.²⁴⁰ If she makes it home safely, “that would ordinarily be cause for celebration, not a lawsuit.”²⁴¹ The Court observed that, because the 6,332 people whose data had not been published had not shown that the risks actually materialized, they lacked standing to seek damages.²⁴² Even if the risk of harm itself were actionable harm, the Court noted, the 6,332 putative class members had not shown it; the “risk of dissemination to third parties” in the case was too speculative.²⁴³

Turning to Ramirez’s second and third allegations regarding the content of the two mailings, the Court found no ready common law analogue and concluded that none of the plaintiffs had “demonstrate[d] that they suffered any harm *at all* from the formatting violations.”²⁴⁴ Thus, the Court saw no indication that the plaintiffs were “confused, distressed, or relied on the information in any way.”²⁴⁵ Lacking such allegations, the Court saw merely “bare

238. *See id.* (“[I]f inaccurate information falls into’ a consumer’s credit file, ‘does it make a sound?’”(quoting *Owner-Operator Indep. Drivers Ass’n v. U.S. Dep’t of Transp.*, 879 F.3d. 339, 344 (D.C. Cir. 2018))).

239. *Id.* at 2210-11.

240. *Id.* at 2211.

241. *Id.*

242. *See id.*

243. *Id.* at 2212.

244. *Id.* at 2213.

245. *Id.*

procedural violation[s], divorced from any concrete harm.”²⁴⁶ This, the Court concluded, would not do. The Court proceeded to reject the United States’ argument as *amicus curiae* that the plaintiffs had suffered an “informational injury” within the meaning of *FEC v. Akins*.²⁴⁷ The plaintiffs had received all the information the statute entitled them to; they were merely complaining about the format in which they had received it.²⁴⁸ Moreover, the plaintiffs had identified no “downstream consequences” from failing to receive information, and “[a]n ‘asserted informational injury that causes no adverse effects cannot satisfy Article III.’”²⁴⁹

Justice Thomas, joined by Justices Breyer, Sotomayor, and Kagan, dissented. In his view, the key feature that justified a finding of standing for all the plaintiffs, with respect to all three claims, was that they were asserting private rights rather than rights owed to the public at large.²⁵⁰ As he had in *Uzuegbunam*, Thomas argued that, when a defendant violates a plaintiff’s private right, the plaintiff has standing to sue even without demonstrating damage or loss.²⁵¹ This principle, he contended, was well settled at the founding and had application even to rights created by statute, as in the first Copyright Act, which permitted statutory damages even if the copyright holder “could not show monetary loss.”²⁵² Given

246. *Id.* (alteration in original) (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016)).

247. *Id.* at 2214 (first citing *FEC v. Akins*, 524 U.S. 11, 24 (1998); and then citing *Pub. Citizen v. Dep’t of Just.*, 491 U.S. 440 (1989)).

248. *See id.*

249. *Id.* (quoting *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 1004 (11th Cir. 2020)). This “downstream consequences” language has sent lower courts into a veritable tizzy over the continued viability of tester standing, initially recognized by the Court in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 375-76 (1982). *See, e.g.*, *Laufer v. Naranda Hotels, LLC*, 60 F.4th 156, 170 (4th Cir. 2023) (concluding that *Havens Realty* survives *TransUnion* and explicitly parting company with other circuits); *Laufer v. Acheson Hotels, LLC*, 50 F.4th 259, 271 (1st Cir. 2022) (holding that *TransUnion* did not curtail *Havens Realty*), *vacated*, 144 S. Ct. 18 (2023); *Harty v. W. Point Realty, Inc.*, 28 F.4th 435, 444 (2d Cir. 2022) (holding that for informational standing, a plaintiff must show “downstream consequences” after *TransUnion*); *Laufer v. Looper*, 22 F.4th 871, 880-81 (10th Cir. 2022) (rejecting informational standing when plaintiff could not show “downstream consequences”). The Supreme Court granted certiorari to resolve the split but dismissed on other grounds. *See Acheson Hotels, LLC v. Laufer*, 144 S. Ct. 18, 21-22 (2023).

250. *See TransUnion*, 141 S. Ct. at 2217 (Thomas, J., dissenting).

251. *See id.* (citing *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 798-99 (2021)).

252. *Id.* (quoting *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 972 (11th Cir. 2020) (Jordan, J., dissenting)).

this history and tradition, Thomas argued that when an act set forth statutory damages for the violation of a private right, there is “no doubt” that a plaintiff can recover that amount “without any specific showing of loss.”²⁵³ The key feature of the standing inquiry in private rights cases, per Justice Thomas, is recognizing a private right and demonstrating its particularized infraction.²⁵⁴ In taking a different path, Justice Thomas charged, the majority “relieved the legislature of its power to create and define rights.”²⁵⁵

Thomas charged that the majority’s statements about risk had “all but eliminat[ed] the risk-of-harm analysis.”²⁵⁶ He found this inconsistent with *Spokeo*, which had held that risk of harm could be concrete enough for damages and specifically remanded to the Ninth Circuit so it could make that determination.²⁵⁷ The idea that risk mattered only for injunctive relief, he concluded, “is thus squarely foreclosed by *Spokeo* itself.”²⁵⁸

F. Taking Stock and Assessing Impact

Before examining *TransUnion*’s impact upon specific kinds of legislative choice, a couple of quick points are in order. First, the *TransUnion* Court apparently created a different, heightened standard for statutory rights. While suits charging violations of a private right with a common law or constitutional pedigree may proceed absent any inquiry into the extent, or even existence, of actual injury, as *Uzuegbunam* reflects,²⁵⁹ federal judges must find harm—quantifiable harm that is good-enough harm—to allow a suit in

253. *Id.* at 2218 (quoting T. COOLEY, LAW OF TORTS 271 (1874)).

254. *See id.* at 2217-18.

255. *Id.* at 2221.

256. *Id.* at 2222.

257. *See id.* at 2222-23 (citing *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341-43 (2016)).

258. *Id.* Though she joined Justice Thomas’s dissent in full, Justice Kagan, joined by Justices Breyer and Sotomayor, wrote separately to flag that she continued to believe a showing of concrete injury was a necessary step in statutory cases but that Congress was the appropriate entity to decide what harms and risk of harms were worth pursuing, and that Congress’s judgment on this point merited deference. *See id.* at 2226 (Kagan, J., dissenting). Only when there is no reasonable connection between a lawsuit and the prevention of compensation for harm should a federal court override a congressional authorization to sue. *See id.*

259. *See Uzuegbunam*, 141 S. Ct. at 799.

federal court based upon private rights created by Congress.²⁶⁰ Second, the Court offered no justification for this difference in treatment save its suspicion that Congress might otherwise hoodwink courts into permitting suits to vindicate generalized grievances.²⁶¹ The Court anchored its concern in *Lujan*, noting that failing to police congressionally created harms might result in serious separation-of-powers issues.²⁶² And yet, inspection of *Lujan* reflects that it cannot bear this weight and that the separation-of-powers concerns raised by *Lujan* barely surface, if at all, when private citizens sue other private parties.²⁶³

1. A Different Standard for Private Rights Created by Congress

In the same Term, the Court apparently signed off on two standards—one for private rights at common law, and one for private rights created by Congress. In his *Spokeo* concurrence, Justice Thomas distinguished two kinds of rights.²⁶⁴ First, there are private rights, those “belonging to individuals, considered as individuals.”²⁶⁵ These he contrasted with public rights, which are “duties owed ‘to the whole community, considered as a community, in its social aggregate capacity.’”²⁶⁶ Generally, the government vindicates public rights; an individual is permitted to do so only upon showing some additional, individualized, and “concrete” harm.²⁶⁷

Uzuegbunam dealt with private rights, and all members of the Court apparently accepted this without engaging the question.²⁶⁸

260. See *TransUnion*, 141 S. Ct. at 2205.

261. See *id.* at 2206.

262. See *id.* (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 576-77 (1992)).

263. See *id.* at 2217, 2220 (Thomas, J., dissenting).

264. See *Spokeo*, 578 U.S. 330, 344-45 (2016) (Thomas, J., concurring). Professor Hessick had previously urged this distinction, arguing that the Court’s use of the injury-in-fact standard in private rights cases was ahistorical and incoherent. See Hessick, *supra* note 136, at 277-78.

265. *Spokeo*, 578 U.S. at 344 (Thomas, J., concurring) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *2).

266. *Id.* at 345 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *5).

267. *Id.*

268. See *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802 (2021) (noting that “Uzuegbunam experienced a completed violation of his constitutional rights when respondents enforced their speech policies against him”); *id.* at 802 (Kavanaugh, J., concurring) (agreeing that a request

Justice Thomas explained for an 8-1 Court in *Uzuegbunam* that at common law, “every legal injury necessarily cause[d] damage”—damage the law presumed without any showing of actual harm.²⁶⁹ Thus, at common law, there was no need to demonstrate actual harm when a bank delayed payment of a check by a single day or for breach of contract.²⁷⁰ Citing Justice Story, the Court found it well established at common law that “[t]he law tolerates no farther inquiry than whether there has been the violation of a right.”²⁷¹ The Court reasoned that permitting recovery absent a showing of actual damage was “unsurprising”: “A contrary rule would have meant, in many cases, that there was no remedy at all for those rights, such as due process or voting rights, that were not readily reducible to monetary valuation.”²⁷²

The *TransUnion* Court rejected Justice Thomas’s posited distinction between suits seeking vindication of public rights, which require a showing of individual harm, and suits seeking vindication of private rights, which do not, when the right is created by Congress.²⁷³ Justice Thomas and his three *TransUnion* codissenters argued that a plaintiff who demonstrated a violation of a private right and particularization could proceed with a lawsuit, regardless of whether the right stems from common law or from a statute.²⁷⁴ Although every member of the Court, save Chief Justice Roberts,

for nominal damages can satisfy Article III redressability because it vindicates a private right); *id.* at 802-03 (Roberts, J., dissenting) (noting petitioners sought to challenge college speech restrictions but had not alleged actual damages). In both *Spokeo* and *Uzuegbunam*, Justice Thomas relied on the same case—*Webb v. Portland Manufacturing Co.*, 29 F. Cas. 506, 508 (Me. Cir. Ct. 1838) (No. 17,332)—for the proposition that proof of a violation of the right, and nothing more, suffices for injury in fact. *Spokeo*, 578 U.S. at 344-45 (Thomas, J., concurring) (stating this standard applies to private rights); *Uzuegbunam*, 141 S. Ct. at 799, 802 (stating this was the standard for the right at issue in the case before the Court).

269. *Uzuegbunam*, 141 S. Ct. at 798. The case focused on redressability, not injury in fact, but standing is of course jurisdictional. All members of the Court assumed Mr. Uzuegbunam had suffered an injury without making further inquiries.

270. *See id.* (first citing *Barker v. Green* (1824) 130 Eng. Rep. 327; 2 Bing. 317; then citing *Hatch v. Lewis* (1861) 175 Eng. Rep. 1145, 1150, 1153; 2 F. & F. 467, 479, 485-86; then citing *Dods v. Evans* (1864) 143 Eng. Rep. 929, 930-31; 15 C.B. (N.S.) 621, 624, 627; and then citing *Marzetti v. Williams* (1830) 109 Eng. Rep. 842, 843, 845-47; 1 B. & Ad. 415, 417-18, 423-28).

271. *Id.* at 800 (alteration in original) (quoting *Webb*, 29 F. Cas. at 508-09).

272. *Id.*

273. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207 n.3 (2021). Justice Thomas urged the distinction in his dissent. *See id.* at 2217-18 (Thomas, J., dissenting).

274. *See id.* at 2217-18, 2220.

seemed to agree that this was the case for private rights in *Uzuegbunam*, four members of the *Uzuegbunam* majority jumped ship when the same issue surfaced in the context of rights created by Congress.²⁷⁵ The *TransUnion* majority did not cite *Uzuegbunam*, much less wrestle with any difference in treatment.²⁷⁶ The notion that the violation of a private right does not require actual injury makes intuitive sense to the Court when the private rights are not creatures of statute.²⁷⁷ When Congress has created the right, however, this intuition evidently disappears.

2. Why Subject Private Rights Created by Congress to a Different Standard?

What accounts for this difference in treatment? The *TransUnion* Court seemed principally concerned about congressional manipulation of the individual rights concept to sneak general grievance suits—the kind barred in *Lujan*—into federal courts through a side door.²⁷⁸ In other words, the Court seemed worried that Congress could all too easily use the “private right” ruse to allow suits that are really just dressed-up public rights suits into federal court.²⁷⁹ Thus, the *TransUnion* majority charged “[t]he lead dissent” with allowing suit “so long as Congress frames a defendant’s obligation to comply with regulatory law as an obligation owed to *individuals*.”²⁸⁰ This manipulation, the Court feared, would take federal courts out of their lanes and into the province of the executive branch, the entity properly charged with “pursuing the public interest in enforcing a defendant’s general compliance with regulatory law.”²⁸¹ To avert this, the Court proceeded to create an actual harm requirement only for private rights created by Congress.²⁸² Whereas *Lujan* confirmed that Congress, too, had to adhere to

275. Compare *id.* at 2205 (majority opinion), with *Uzuegbunam*, 141 S. Ct. at 801-02.

276. See *TransUnion*, 141 S. Ct. at 2200-14. Justice Thomas cited his *Uzuegbunam* majority in his *TransUnion* dissent. See *id.* at 2217-18 (Thomas, J., dissenting).

277. See *id.*

278. See *id.* at 2206 (majority opinion).

279. See *id.*

280. *Id.* at 2207 n.3.

281. *Id.* at 2207.

282. See *id.* at 2205.

Article III restrictions,²⁸³ the *TransUnion* Court seemingly concluded that Article III's requirements ought to be far *higher* where Congress is concerned.²⁸⁴

But nothing in *Lujan* requires this. Indeed, *Lujan*—concerned lest rights created by Congress get preferential treatment in the standing inquiry—insisted “there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right.”²⁸⁵ Fearing congressional manipulation, *TransUnion* purported to be banging the *Lujan* drum,²⁸⁶ but its evaluation strayed from the analysis that *Lujan* suggested. First and foremost, while *Lujan*'s primary objective was certainly to keep generalized grievance suits out of federal court, the case did not contemplate or involve suits *between* private parties at all.²⁸⁷ Similar to most of the Supreme Court's standing cases to come before it,²⁸⁸ the suit at issue in *Lujan* involved a private plaintiff suing the government.²⁸⁹

This bears emphasis. *Lujan* saw separation of powers in black and white. Quoting *Marbury*, the Court reminded that “[t]he province of the court ... is, solely, to decide on the rights of individuals.”²⁹⁰ “Vindicating the *public* interest (including the interest in Government observance of the Constitution and laws),” on the other hand, “is the function of Congress and the Chief Executive.”²⁹¹ In *Lujan*, private individuals sued the government to compel it to enforce a law.²⁹² *Lujan* saw the proposed lawsuit before it—and the broad citizen suit provision the plaintiffs argued permitted it—as an effort to divert courts from their day jobs (deciding individual

283. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573, 576 (1992).

284. *TransUnion*, 141 S. Ct. at 2205. I have elsewhere argued that a Court concerned about congressional manipulation could have used the decades-old text-based techniques for identifying private rights suggested in *Gonzaga University v. Doe*, 536 U.S. 273, 287 (2002), and *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). See Beske, *supra* note 30, at 779-81, 783.

285. See *Lujan*, 504 U.S. at 576.

286. See *TransUnion*, 141 S. Ct. at 2206-07.

287. See *Lujan*, 504 U.S. at 573-74.

288. See Schmidt, *supra* note 179, at 7.

289. See *Lujan*, 504 U.S. at 559.

290. *Id.* at 576 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)).

291. *Id.*

292. See *id.* at 559. It is not surprising that “Congress has been more likely to enact incentives for private enforcement when the opposing political party controls the executive branch.” Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 682 (2013).

rights) into the business of other branches (making enforcement decisions).²⁹³ The concrete injury requirement, *Lujan* explained, was designed to circumvent this ploy: to prevent Congress from “convert[ing] the undifferentiated public interest in executive officers’ compliance with the law into an ‘individual right’ vindicable in the courts.”²⁹⁴ *TransUnion* cites this page.²⁹⁵

But when private actors are suing private actors, do these separation-of-powers monsters lurk under the bed?²⁹⁶ Mr. Ramirez, the *TransUnion* plaintiff, was not trying to prod any government actor to do anything.²⁹⁷ In authorizing Ramirez to sue *TransUnion* for mishandling his information or sending him incomplete information, moreover, Congress was not circumventing nonenforcement by the FTC.²⁹⁸ As Professor Hessick spoke of private rights suits generally, “the plaintiff is invoking the courts not to vindicate the rights of the majority, but to vindicate the plaintiff’s personal rights from the imposition of the majority.”²⁹⁹ And if, hearkening back to *Lujan*—which in turn brought us back to *Marbury*—the province of federal courts is deciding “the rights of individuals,” it is hard to see what separation-of-powers principles are offended once we decide that Congress has conferred an

293. See Leah M. Litman, *Taking Care of Federal Law*, 101 VA. L. REV. 1289, 1296, 1346 (2015).

294. *Lujan*, 504 U.S. at 577.

295. See 141 S. Ct. 2190, 2206 (2021).

296. Others have made similar points. See, e.g., Schmidt, *supra* note 179, at 51-53 (noting that *TransUnion* relies on cases involving suits against the government, not private suits); *The Supreme Court, 2020 Term—Leading Cases—Article III Standing—Separation of Powers—Class Actions—TransUnion v. Ramirez*, 135 HARV. L. REV. 333, 339-40 (2021) (contending that claims similar to those brought in *TransUnion* do not threaten Article II authority and that conclusions reached in *TransUnion* do not serve separation-of-powers purposes of standing doctrine); F. Andrew Hessick, *The Separation-of-Powers Theory of Standing*, 95 N.C. L. REV. 673, 702-04 (2017) (arguing that none of the separation-of-powers concerns raised by the Supreme Court are implicated by “suits by private individuals seeking to vindicate private rights”); see also Phillips, *supra* note 30, at 204-05 (arguing that *TransUnion* does not protect the separation of powers because it merely shifts cases to state courts).

297. See *TransUnion*, 141 S. Ct. at 2208.

298. See *id.* at 2218-19. Indeed, the FTC enforces public rights, not private rights. See *Haaland v. Brackeen*, 143 S. Ct. 1609, 1640 (2023). For the FTC to bring suit against *TransUnion*, it “must articulate an interest apart from the interests of particular private parties.” *Alfred L. Snapp & Son v. Puerto Rico ex rel. Baez*, 458 U.S. 592, 607 (1982).

299. Hessick, *supra* note 136, at 318.

individual right.³⁰⁰ Federal courts adjudicating individual rights are coloring within the lines, lines we have understood to be in place since 1803.³⁰¹

Even if we set aside these very different postures of the *Lujan* and *TransUnion* suits, though, *Lujan* still fails to support the *TransUnion* result. *Lujan* said that suits premised on procedural rights, such as the failure to obtain an environmental impact statement (a legal violation), can proceed when they are asserted by adjacent property owners (particularization).³⁰² That is it. The Court did not suggest that the plaintiffs needed to additionally demonstrate harm caused by acid rain, toxic fumes, or radioactive sludge on the adjacent land; adjacency was enough and was “quite different from ... standing for persons who have no concrete interests affected—persons who live (and propose to live) at the other end of the country.”³⁰³ *Lujan* emphasized that Congress could broaden the category of injury via statute but could not “abandon[] the requirement that the party seeking review must himself have suffered an injury.”³⁰⁴ Again, the key *Lujan* distinction was injuries suffered by everyone versus injuries unique to this plaintiff.³⁰⁵ Nowhere in *Lujan* did a qualitative or quantitative analysis of the *extent* of—or even the actual existence of—injury, once particularized, sneak into the picture. Even *Lujan* seemed satisfied by simple particularization.³⁰⁶ For several reasons, then, *TransUnion* ratcheted up the requirements for the kinds of harms Congress is permitted to pursue and did so without precedent.

300. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 576 (1992) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)); see Hessick, *supra* note 136, at 318-20 (arguing that redressing violations of individual rights is the federal courts' core function, and standing principles impeding that themselves violate separation-of-powers principles).

301. See *Lujan*, 504 U.S. at 576 (citing *Marbury*, 5 U.S. (1 Cranch) at 170).

302. See *id.* at 572.

303. *Id.* at 572 n.7.

304. *Id.* at 578 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 738 (1975)).

305. The *Lujan* Court noted that in mass tort situations, there could be many plaintiffs, and Article III would still be satisfied. See *id.* at 563, 572-74.

306. Cf. *id.* at 560-61.

III. ARTICLE III'S SUBSTANTIVE INCURSIONS ON THE LEGISLATIVE PREROGATIVE

TransUnion thus does not emanate from *Lujan* and is hard to justify as a soldier in the separation-of-powers wars. In requiring actual harm and in barring outright the idea of risk-of-harm as harm, moreover, the Court has made some normative legislative choices that require amplification. First, in mandating a threshold inquiry into the existence of “real” harm, *TransUnion* adds a new step in statutory damage actions,³⁰⁷ even for statutes that courts have long understood to allow recovery without proof of actual injury.³⁰⁸ Second, in requiring “actual” harm and concluding that exposure to a risk of harm can only support injunctive relief, not damages,³⁰⁹ the Court has circumscribed Congress’s options in responding to problems. If Congress can only authorize damages after harm has befallen us, the Court has committed Congress to a post hoc compensation model and taken substantive sides in the battle over risk regulation.

A. Statutory Damages

TransUnion requires actual harm in statutory cases—either harm that sufficiently resembles common law harms or harm that federal judges believe is harmful, as opposed to “not remotely harmful.”³¹⁰ In so doing, the Court has cast into sharp relief cases in which plaintiffs seek statutory damages, rather than compensatory damages. Statutory damages, preset penalties for statutory violations, are a longstanding legislative tool.³¹¹ The Copyright Act of 1790 required infringers to pay a per page fixed sum whose proceeds were split between the copyright owner and the government.³¹² It drew upon the 1710 Statute of Anne in Britain, which

307. See *TransUnion*, 141 S. Ct. at 2205-06.

308. See *id.* at 2205.

309. See *id.* at 2211.

310. *Id.* at 2205 (quoting *Hagy v. Demers & Adams*, 882 F.3d 616, 622 (6th Cir. 2018)).

311. See Sande Buhai, *Statutory Damages: Drafting and Interpreting*, 66 U. KAN. L. REV. 523, 543-45 (2018).

312. See Copyright Act of May 31, 1790, ch. 15, § 2, 1 Stat. 124, 124-25.

required infringers to pay a penny per sheet found in their custody.³¹³ Congress has used statutory damages provisions in a broad swath of statutes since.³¹⁴

The Supreme Court has frequently referenced the existence of statutory damage provisions and has never questioned their validity. In 1919, the Supreme Court enforced statutory damages under the Copyright Act, holding that a plaintiff was entitled to no less than \$250 for each of seven discrete acts of infringement.³¹⁵ In *Holster v. Gatco* in 2010, the Court vacated the lower court decision and remanded the case for reconsideration of whether a New York ruling barring class actions for statutory damages was “substantive” when applied to suits seeking statutory damages under the Telephone Consumer Protection Act (TCPA).³¹⁶ In 2016, the Court assumed the TCPA applied not merely to telephone calls but also to text messages and noted in passing that a successful plaintiff suing under the Act is entitled to their “‘actual monetary loss’ or \$500 for each violation, ‘whichever is greater.’”³¹⁷ In the October 2023 Term, the Court held that the Copyright Act permits the award of damages for all timely claims under the statute.³¹⁸ As it had countless times before, the Court did not bat an eye in stating that these damages included recovery under the Act’s “statutory damages” provisions.³¹⁹

313. See Statute of Anne 1709, 8 Ann. c. 21, § 2; Buhai, *supra* note 311, at 528-29. Siegel notes that the Copyright Act of 1790 applied the statutory penalty whether or not the infringing work was distributed, which calls into question whether a copyright holder in such a case would suffer concrete, actionable harm after *TransUnion*. See Siegel, *supra* note 30, at 315.

314. See, e.g., Truth in Lending Act § 130, 15 U.S.C. § 1640(a)(1), (2); Telephone Consumer Protection Act of 1991 § 3(a), 47 U.S.C. § 227(c)(5); Fair Debt Collection Practices Act § 613, 15 U.S.C. § 1692k(a); AntiCybersquatting Consumer Protection Act § 1000(a)(9), 15 U.S.C. § 1125(d); Cable Communications Policy Act of 1984 § 2, 47 U.S.C. § 551(f)(2)(A); Stored Communications Act § 4005, 18 U.S.C. § 2707(c); Fair and Accurate Credit Transactions Act § 312(f), 15 U.S.C. § 1681n(a).

315. See *L.A. Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100, 106-09 (1919).

316. See 559 U.S. 1060, 1060-61 (2010) (Scalia, J., concurring). The Court did so after it issued its opinion in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, 559 U.S. 393 (2010). *Id.* at 1060 (majority opinion).

317. *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 156 (2016) (citing 47 U.S.C. § 227(b)(1)(A)(iii)).

318. See *Warner Chappell Music, Inc. v. Nealy*, 144 S. Ct. 1135, 1137 (2024).

319. *Id.* at 1139.

Statutory damages often serve as a proxy when damages are difficult to quantify.³²⁰ Thus, the Supreme Court in 1899 attributed the inclusion of statutory damages in the Copyright Act to “the inherent difficulty of always proving by satisfactory evidence what the amount [of damage] is which has actually been sustained.”³²¹ Statutory damages, the Eighth Circuit explained, “are designed precisely for instances where actual harm is difficult or impossible to calculate.”³²²

Statutory damages also play a role in encouraging lawsuits and sanctioning a defendant’s conduct,³²³ one that courts have frequently recognized.³²⁴ To the extent they aim at least in part to foster litigation, noncompensatory remedies such as statutory damages have vocal critics.³²⁵ Most policy choices do. Professor Scheuerman,

320. See, e.g., *Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 110 n.27 (2d Cir. 2012) (noting that plaintiff in a trademark counterfeiting case needs statutory damages because “proving actual damages in these cases [is] extremely difficult if not impossible” given that “counterfeiters’ records are frequently nonexistent”); *Vallies v. Sky Bank*, 591 F.3d 152, 158-59 (3d Cir. 2009) (observing that actual damages under the Truth in Lending Act, which requires a consumer to prove loss in reliance on inaccurate disclosures, “are extremely difficult to establish” (quoting 141 CONG. REC. 26758, 26898 (1995) (statement of Sen. Corrine Mack))).

321. *Brady v. Daly*, 175 U.S. 148, 157 (1899).

322. *Cap. Recs., Inc. v. Thomas-Rasset*, 692 F.3d 899, 908 (8th Cir. 2012); accord *Warner Bros. Inc. v. Dae Rim Trading, Inc.*, 877 F.2d 1120, 1126 (2d Cir. 1989).

323. See *Buhai*, *supra* note 311, at 528.

324. See *Sony BMG Music Ent. v. Tenenbaum*, 719 F.3d 67, 71 (1st Cir. 2013) (sanctioning conduct); *Energy Intel. Grp., Inc. v. Kayne Anderson Cap. Advisors, L.P.*, 948 F.3d 261, 273-74 (5th Cir. 2020) (sanctioning conduct); *Purtle v. Eldridge Auto Sales, Inc.*, 91 F.3d 797, 800 (6th Cir. 1996) (encouraging lawsuits); *Parker v. Time Warner Ent. Co.*, 331 F.3d 13, 22 (2d Cir. 2003) (encouraging lawsuits). In *F.W. Woolworth Co. v. Contemporary Arts*, for example, the Supreme Court noted that statutory damages were available under the Copyright Act, “[e]ven for uninjurious and unprofitable invasions of copyright” to “discourage wrongful conduct” and “vindicate the statutory policy.” 344 U.S. 228, 233 (1952). The Fifth Circuit observed that statutory damages may be imposed as a means “to encourage private attorneys general.” *Perrone v. Gen. Motors Acceptance Corp.*, 232 F.3d 433, 436 (5th Cir. 2000). In a similar vein, the Eighth Circuit characterized statutory damages under the Truth in Lending Act as “explicitly a bonus to the successful ... plaintiff, designed to encourage private enforcement of the Act, and a penalty against the defendant, designed to deter future violations.” *Dryden v. Lou Budke’s Arrow Fin. Co.*, 630 F.2d 641, 647 (8th Cir. 1980). See generally *Burbank et al.*, *supra* note 292, at 677-78 (observing that statutory damages can act as a “bounty” incentivizing litigation and filling enforcement gaps).

325. See, e.g., *Burbank et al.*, *supra* note 292, at 678 n.171 (“In combination with class actions, statutory damages can create massive liability, inefficiently high levels of private enforcement pressure, and overdeterrence.”); Sheila Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 MO. L. REV. 103, 114-15 (2009) (arguing

for example, has noted that, in tandem with the class action, statutory damage provisions “can result in absurd liability exposure” and windfalls to classes “whose actual damages are often nonexistent.”³²⁶ Louder voices, outside academia, have focused not on statutory damages per se but on the so-called litigation “explosion” they can facilitate.³²⁷ Beginning in the 1980s, the campaign against the plaintiffs’ bar began to take on an overtly political cast, and the Reagan Administration “capitalized on the convenient narrative that lawyers were destroying America.”³²⁸ The Republican Party platform included an antilawsuit agenda from 1992 through 2016.³²⁹ Vice President Dan Quayle told the American Bar Association in 1991 that “the United States has too many lawyers, too many lawsuits and too many excessive damage awards.”³³⁰

Despite contentiousness in the political arena, though, statutory damage provisions have been humdrum features of the legal landscape. Perhaps picking up on the scholarly critiques, the Ninth

that aggregating statutory damage claims leads to overdeterrence); *see also* Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 106 (2005) (“[T]he desirability of authorizing private actions involves difficult policy judgments and is likely to depend on a number of context-specific factors.”).

326. Scheuerman, *supra* note 325, at 104; *see also* Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, 102 B.U. L. REV. 793, 817 (2022) (characterizing class action suits as “the equivalent of a shake down, with companies paying the lawyers to go away”); Siegel, *supra* note 30, at 315-16 (“Of course, as a policy matter, one might or might not agree with any given provision for statutory damages.”).

327. Critics invoked the term “litigation explosion” repeatedly during the 1980s. *See* Marc S. Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 3-5 (1986) (discussing popular perception that rampant litigation is a widespread problem); *Hold Down Awards to Ease the Crisis*, USA TODAY, June 6, 1986, at 12A, col. 1; *see also* Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 383 (describing President Reagan’s vow to reverse the “explosion”).

328. Gilles, *supra* note 327, at 374-75.

329. *See* REPUBLICAN PARTY, REPUBLICAN PARTY PLATFORM OF 1992, *reprinted in* The Am. Presidency Project (Aug. 17, 1992), <https://www.presidency.ucsb.edu/documents/republican-party-platform-1992> [<https://perma.cc/P9Q2-WAE5>]; REPUBLICAN PARTY, 2012 REPUBLICAN PARTY PLATFORM, *reprinted in* The Am. Presidency Project (Aug. 27, 2012), <https://www.presidency.ucsb.edu/documents/2012-republican-party-platform> [<https://perma.cc/6PEL-2SML>]; REPUBLICAN PARTY, 2016 REPUBLICAN PARTY PLATFORM, *reprinted in* The Am. Presidency Project (July 18, 2016), <https://www.presidency.ucsb.edu/documents/2016-republican-party-platform> [<https://perma.cc/8BW8-XTM9>].

330. David Margolick, *Address by Quayle on Justice Proposals Irks Bar Association*, N.Y. TIMES, Aug. 14, 1991, at A1; *see* Beske, *supra* note 18, at 59-60 (describing politicization of tort reform).

Circuit recently held that huge aggregations of statutory damages, “in ... extreme circumstances, [might be] subject to constitutional due process limitations.”³³¹ Outer limits on sizable damage awards will probably pick up steam, just as constitutional limits previously took hold with respect to punitive damages.³³² But whether statutes do or do not require proof of actual damages has always been seen as a legislative decision—Congress’s call. Before *TransUnion*, courts understood statutory damages to be available even when a plaintiff offered no proof of actual harm.³³³

Sometimes, of course, a statute specifically requires actual damages.³³⁴ In *Doe v. Chao*, the Supreme Court interpreted the statutory damages provision of the Privacy Act of 1974, which permitted recovery of “actual damages sustained ... but in no case shall a person entitled to recovery receive less than the sum of \$1,000,”³³⁵ to require proof of actual damage.³³⁶ The Court based its conclusion on “a straightforward textual analysis,” noting that the provision referenced “actual damages” and limited the guaranteed minimum to “person[s] entitled to recovery.”³³⁷ In so doing, the Court specifically distinguished language in the Tax Reform Act of 1976, which had text that was “far different.”³³⁸ Lower courts construing other statutory damage provisions have likewise distinguished language

331. *Wakefield v. ViSalus, Inc.*, 51 F.4th 1109, 1121 (9th Cir. 2022).

332. *See BMW of N. Am. v. Gore*, 517 U.S. 559, 574-75 (1996); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416-17 (2003).

333. *See, e.g., Baker v. G.C. Servs. Corp.*, 677 F.2d 775, 777, 781 (9th Cir. 1982) (finding that plain language of the Fair Debt Collection Practices Act permitted statutory damages without proof of actual damages).

334. *See, e.g., 35 U.S.C. § 284* (allowing damages for patent and trademark violations sufficient “to compensate for the infringement”).

335. 5 U.S.C. § 552a(g)(4)(A).

336. *Doe v. Chao*, 540 U.S. 614, 620-21 (2004).

337. *Id.* at 620. The Court had to grapple with § 552a(g)(1)(D) of the statute, which said that whenever the agency failed to comply with the statute “in such a way as to have an adverse effect on an individual, the individual may bring a civil action against the agency.” 5 U.S.C. § 552a(g)(1)(D). Did this permit suit without damage? No, the Court concluded; this is only a provision that “identif[ies] a potential plaintiff who satisfies the injury-in-fact and causation requirements of Article III standing.” *Doe*, 540 U.S. at 624. So, in 2004, the Court said that an agency’s failure to comply with the statute plus some specified “adverse effect,” short of actual damage, satisfied the injury-in-fact requirement. *Id.* Ahem. We will just have to leave that there.

338. *Doe*, 540 U.S. at 626; 26 U.S.C. § 6110(j)(2)(A).

of the Privacy Act from that of other statutes.³³⁹ The inquiry has always been textual and grounded in the language of the statute and Congress's perceived intent. In *Doe*, the Privacy Act's \$1,000 minimum applied to "actual damages sustained."³⁴⁰ The Driver's Privacy Protection Act, the Third Circuit found, "contains no such 'critical limiting' language."³⁴¹ In examining the Stored Communications Act, another court concluded that "a plain reading of the statute, and the legislative history associated with the statute," made clear that there, Congress did not intend proof of actual damages.³⁴²

The statute at issue in *TransUnion*, the FCRA, itself featured a statutory damages provision that prior courts had concluded did not require proof of actual damages,³⁴³ so *TransUnion* very obviously changed this landscape. After *TransUnion*, examining the text and history of a statutory damage provision and ascertaining whether Congress did or did not intend to permit recovery without proof of actual harm, which the Court had done as recently as 2004 in *Doe v. Chao*,³⁴⁴ is beside the point. Under Article III, at the inception of a case a federal court must now satisfy itself—regardless of Congress's intent—that the plaintiff has put forth concrete, actionable harm before a suit may proceed. This requires courts to isolate the plaintiff's alleged statutory violation and compare it to harms

339. See, e.g., *Pichler v. UNITE*, 542 F.3d 380, 398-99 (3d Cir. 2008) (construing the Driver's Privacy Protection Act); *In re Hulu Priv. Litig.*, No. C 11-03764, 2013 WL 6773794, at *10 (N.D. Cal. Dec. 20, 2013) (construing the Video Privacy Protection Act); *Blanco v. El Pollo Loco, Inc.*, No. SACV 07-54 JVS/RNBX, 2007 WL 1113997, at *3 & n.6 (C.D. Cal. Apr. 3, 2007) (construing the FCRA); *Follman v. Vill. Squire, Inc.*, 542 F. Supp. 2d 816, 822-23 (N.D. Ill. 2007) (construing the Fair and Accurate Credit Transactions Act). But see *Vista Mktg., LLC v. Burkett*, 812 F.3d 954, 965-66 (11th Cir. 2016) (applying *Doe* to the Stored Communications Act); *Van Alstyne v. Elec. Scriptorium, Ltd.*, 560 F.3d 199, 205 (4th Cir. 2009) (applying *Doe* to the Stored Communications Act).

340. *Doe*, 540 U.S. at 620; 5 U.S.C. § 552a(g)(4)(A).

341. *Pichler*, 542 F.3d at 398 (quoting *Doe*, 540 U.S. at 626).

342. *Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, LLC*, 759 F. Supp. 2d 417, 428 (S.D.N.Y. 2010).

343. See 15 U.S.C. § 1681n(a); *Beaudry v. TeleCheck Servs., Inc.*, 579 F.3d 702, 705-06 (6th Cir. 2009); *Ramirez v. Midwest Airlines, Inc.*, 537 F. Supp. 2d 1161, 1168 (D. Kan. 2008); *Arcilla v. Adidas Promotional Retail Operations, Inc.*, 488 F. Supp. 2d 965, 974 (C.D. Cal. 2007); *In re Farmers Ins. Co.*, 738 F. Supp. 2d 1180, 1226 (W.D. Okla. 2010); see also *Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1313 (11th Cir. 2009) (assuming that plaintiffs without proof of harm could seek statutory damages).

344. See *Doe*, 540 U.S. at 620-21.

traditionally recognized at common law—though they need not find an “exact duplicate” in doing so.³⁴⁵ Failing that, *TransUnion* implies that federal courts must make an unmoored assessment of whether an injury is “real,” “actually exist[s],” or is something that is “not remotely harmful.”³⁴⁶ What had previously been a policy debate playing out in the political arena is no longer; Article III’s case or controversy requirement has stepped in and now dictates the answer.

To see how this plays out, consider the Fair Debt Collection Practices Act (FDCPA), which targets abusive consumer debt collection practices and allows recovery of “any actual damage[s]” or “such additional damages as the court may allow, but not exceeding \$1,000” for violations.³⁴⁷ Before *TransUnion*, courts examining statutory text had concluded that the FDCPA, like the FCRA, does not require proof of actual harm.³⁴⁸ After *TransUnion*, the Sixth Circuit confronted a consumer’s challenge in *Ward v. National Patient Account Services Solutions* to a debt collector’s voice messages identifying itself as “NPAS” instead of “NPAS, Inc.”³⁴⁹ This misidentification violated the statute and allegedly caused the plaintiff to send return communication to “NPAS Solutions,” a different entity.³⁵⁰ The plaintiff filed suit, claiming that the defendant had failed to identify itself as a debt collector and failed to disclose its true name and identity, in violation of three provisions of the FDCPA.³⁵¹

Prior to *TransUnion*, the Sixth Circuit had held that a plaintiff could show injury in fact under the FDCPA by linking an FDCPA violation to an interest protected by the statute.³⁵² Thus, plaintiffs who could tie a violation to the statute’s goal of protecting

345. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021).

346. *Id.* at 2204-05 (first quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016); and then quoting *Hagy v. Demers & Adams*, 882 F.3d 616, 622 (6th Cir. 2018)).

347. 15 U.S.C. § 1692k(a)(1)-(2)(A).

348. *See, e.g.*, *Keele v. Wexler*, 149 F.3d 589, 593 (7th Cir. 1998); *Baker v. G.C. Servs. Corp.*, 677 F.2d 775, 781 (9th Cir. 1982); *Santoro v. Aargon Agency, Inc.*, 252 F.R.D. 675, 682 (D. Nev. 2008).

349. 9 F.4th 357, 359 (6th Cir. 2021).

350. *Id.* at 360.

351. *Id.*; 15 U.S.C. §§ 1692d(6), 1692e(11), (14).

352. *See Macy v. GC Servs. Ltd. P’ship*, 897 F.3d 747, 755-56 (6th Cir. 2018).

consumers against unfair and deceptive collection practices³⁵³ demonstrated “a material risk of harm to a congressionally recognized interest,” and their suit could proceed.³⁵⁴ The *Ward* court concluded, however, that *TransUnion* had “abrogated” that holding, eliminating “mere risk of future harm” as a compensable harm and requiring it to look not to the purposes of the FDCPA but to common law.³⁵⁵

Turning to that inquiry, the *Ward* court examined the analogues *Ward* brought to the table—including “invasion of privacy” and, specifically, “intrusion upon seclusion”—and found itself unpersuaded.³⁵⁶ The court explained that intrusion upon seclusion requires some intentional encroachment upon “solitude or seclusion” or improper sharing of his personal information with a third party, which *Ward* had not shown.³⁵⁷ The court found that *Ward*’s confusion could not be a concrete harm and that he had not asserted any harm from the receipt of the voice messages in his complaint.³⁵⁸ As a result, the court had no difficulty concluding that *Ward*’s claims were not “concrete” enough to permit suit.³⁵⁹ Without harm, *Ward*’s FDCPA action could not proceed.³⁶⁰

Now obviously, the difference between “NPAS” and “NPAS, Inc.” is pretty minor, and *Ward*’s claim may not sound particularly compelling. What is important, though, is that the court would

353. See S. REP. NO. 95-382, at 1 (1977) (stating that the purpose of the Act “is to protect consumers from a host of unfair, harassing, and deceptive debt collection practices”).

354. *Macy*, 897 F.3d at 759. This approach was similar to that taken by the Ninth Circuit on remand in *Spokeo*. See *supra* note 201 and accompanying text.

355. *Ward v. Nat’l Patient Acct. Servs. Sols.*, 9 F.4th 357, 361 (6th Cir. 2021).

356. *Id.* at 362.

357. *Id.*

358. *Id.* at 363.

359. *Id.*

360. See *id.* This is not to say plaintiffs invariably lose—for example, federal circuit courts appear to have coalesced around the conclusion that receipt of a single unwanted text message is sufficient injury in fact to permit an action under the TCPA. See, e.g., *Drazen v. Pinto*, 74 F.4th 1336, 1345 (11th Cir. 2023) (en banc); *Ward v. NPAS, Inc.*, 63 F.4th 576, 581 (6th Cir. 2023); *Lupia v. Mediacredit, Inc.*, 8 F.4th 1184, 1192 (10th Cir. 2021); *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 463 (7th Cir. 2020); *Krakauer v. Dish Network, LLC*, 925 F.3d 643, 653 (4th Cir. 2019); *Melito v. Experian Mktg. Sols.*, 923 F.3d 85, 93 (2d Cir. 2019); *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017); *Susinno v. Work Out World, Inc.*, 862 F.3d 346, 351 (3d Cir. 2017). But to get there, the courts took common law analogues out of their tool kits and concluded that receipt of that message was *close enough* to the age-old tort of intrusion upon seclusion to proceed. See, e.g., *Drazen*, 74 F.4th at 1344.

have reached the same result using this reasoning no matter what the debt collector had said once its focus turned away from the content of the message. The debt collector might have completely misrepresented the debtor's legal rights,³⁶¹ but that does not make the call any more of an intrusion upon Ward's seclusion. The statute's goal of protecting consumers against "unscrupulous debt collectors" is no longer relevant.³⁶² Without a common law analogue, there is no actionable harm and thus no lawsuit under the FD CPA.

As this post-*TransUnion* case reflects, there is a new threshold test in town, one that applies irrespective of Congress's intentions regarding the necessity of proving actual damages under a statute and irrespective of the interests Congress intended to further in enacting the statute. Though the *raison d'être* for statutory damages is to sub in *when injury is difficult to find*, and the Court told us that the question whether a statute requires proof of actual damage necessitates analysis of statutory text as recently as 2004, Article III now leads us in another direction. The new inquiry will reduce the number of cases we can expect in federal court. Moreover, in applying common law privacy torts to *Ward*—examining whether NPAS barged in on the plaintiff's seclusion or not³⁶³—we seem to have altogether lost the plot of preventing consumer deception. After *TransUnion*, Article III's injury-in-fact requirement adds an unexpected new facet to all statutory damage actions, one that seems to disregard statutory text and purpose entirely and, what is more, seems to take a side—unintentionally or not—in the policy debate on whether certain consumer lawsuits are a good thing or a bad thing.

361. See S. REP. NO. 95-382, at 2 (1977), as reprinted in 1977 U.S.C.C.A.N. 1695, 1696 (characterizing a debt collector's "misrepresentation of a consumer's legal rights" as "[c]ollection abuse" and a "serious national problem").

362. *Id.*

363. *Ward*, 9 F.4th at 363.

B. Unacceptable Risk as Harm

1. Risk Regulation and the Political Arena

As the *Ward* court recognized, *TransUnion* permits a plaintiff to pursue damages only for current, manifest harms.³⁶⁴ The *TransUnion* court's holding that Congress cannot say that exposure to risk is itself harm³⁶⁵—that we must wait until the harm materializes to find actionable harm—ignores modern conceptions of injury. Moreover, the Court's determination that Congress cannot authorize private lawsuits seeking damages—often the most effective mechanism for injury prevention³⁶⁶—until after harm occurs,³⁶⁷ consigns Congress to an early-twentieth-century approach to modern problems and inappropriately brings Article III onto the field of a battle that has waged for decades in the political arena.

Debates over risk regulation did not materialize out of nowhere in 2021. In the late nineteenth century, a reactive, post hoc compensation system generally worked: Tort law comprised a body of norms and rules, “grounded in ordinary morality, for resolving disputes over alleged wrongs committed by *A* against *B*.”³⁶⁸ Early twentieth century industrialization stressed this system. The emergence of the administrative state brought complexity, and scholars and jurists fought pitched battles over the optimal balance between compensating faultless victims and keeping tort liability manageable.³⁶⁹ As life became more complex, *Palsgrafian* problems of proximate cause led scholars “gallop[ing] off in all directions, in

364. *See id.* at 361.

365. *See* *TransUnion LLC v. Ramirez*, 141 S. Ct. 2209, 2211 (2021).

366. *See infra* notes 392-98 and accompanying text.

367. *See TransUnion*, 141 S. Ct. at 2207.

368. John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 521 (2003).

369. *See* G. Edward White, *The Emergence and Doctrinal Development of Tort Law, 1870-1930*, 11 U. ST. THOMAS L.J. 463, 524, 527 (2014); G. EDWARD WHITE, TORT LAW IN AMERICA 146, 164-65 (1980). Writing in 1959, Dean Leon Green described a “colorful battle” and “conflict raging” between members of the American Law Institute charged with drafting the Torts Restatement “in their attempt to corral the wild doctrine of proximate cause.” Leon Green, *Tort Law Public Law in Disguise*, 38 TEX. L. REV. 1, 9 (1959). To many, in setting objective standards of reasonableness, tort law transformed from private law to public law, permitting “judges and juries to regulate behavior on a forward-looking basis.” Goldberg, *supra* note 368, at 524.

a tangle of duty, negligence, foresight, hindsight, direct and intervening causes, the division and classification of interests and injuries, liability without fault or in excess of fault, social policy, ... and everything else.”³⁷⁰

The post-World War II period witnessed an uptick in the public’s perception of ambient dangers,³⁷¹ and the tort system of post hoc compensation, already strained, seemed ill-equipped to keep up. Atomic testing brought suspicion that strontium-90 had invaded the milk supply,³⁷² raising fears of cancer that prompted scientists to stockpile children’s baby teeth.³⁷³ Publication of Rachel Carson’s *Silent Spring* in 1962 cast a spotlight on the risks of pesticides.³⁷⁴ Americans learned that medicines could harm, not just heal, and the nation came within a hair’s breadth of allowing thalidomide, a drug ultimately linked to severe birth defects, on the market.³⁷⁵ Ralph Nader argued that major auto manufacturers were playing fast and loose with safety standards.³⁷⁶ A 1969 oil spill caused three million barrels of crude oil to seep into the Pacific, with its toll “blink[ing] on TV screens nationwide: beaches painted black, birds with feathers plastered in oily muck, and the corpses of seals and dolphins washing in with the tides.”³⁷⁷

Amidst all this, the reactive approach of traditional tort law seemed ill-equipped to respond. Torts require proof of causation, and few plaintiffs could meet that burden.³⁷⁸ Moreover, long latency

370. William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 1-2 (1953). White called torts by the Second World War “a shapeless mass; ... its rules in a constant state of change; its boundaries uncertain.” WHITE, *supra* note 369, at 145-46.

371. See William Boyd, *Genealogies of Risk: Searching for Safety, 1930s-1970s*, 39 ECOLOGY L.Q. 895, 915 (2012).

372. See SIDNEY A. SHAPIRO & ROBERT L. GLICKSMAN, RISK REGULATION AT RISK 3 (2003).

373. See Walter Sullivan, *Babies Surveyed for Strontium 90*, N.Y. TIMES, Nov. 25, 1961, at A2.

374. See SHAPIRO & GLICKSMAN, *supra* note 372, at 3.

375. See *id.* Dr. Frances Kelsey, a reviewer for the FDA, singlehandedly kept thalidomide off the market even though several other countries had approved it. See Morton Mintz, ‘Heroine’ of FDA Keeps Bad Drug Off of Market, WASH. POST, July 15, 1962, at A1.

376. See RALPH NADER, UNSAFE AT ANY SPEED: THE DESIGNED-IN DANGERS OF THE AMERICAN AUTOMOBILE (1965), as reprinted in 101 AM. J. PUB. HEALTH 254, 256 (2011).

377. Christine Mai-Duc, *The 1969 Santa Barbara Oil Spill That Changed Oil and Gas Exploration Forever*, L.A. TIMES (May 20, 2015, at 18:38 PT), <https://www.latimes.com/local/lanow/la-me-ln-santa-barbara-oil-spill-1969-20150520-htm1story.html> [<https://perma.cc/DQ3A-LXRQ>].

378. See Douglas A. Kysar, *The Public Life of Private Law: Tort Law as a Risk Regulation*

periods meant problems with statutes of limitation.³⁷⁹ This prompted Congress to act across several contexts to begin regulating risks,³⁸⁰ shifting to “[r]egulation based on ... *ex ante* collective danger rather than *ex post* individual injury.”³⁸¹ For example, the Clean Air Act authorized the EPA Administrator to promulgate regulations of fuel additives if regulators concluded they would “endanger the public health or welfare.”³⁸² The D.C. Circuit characterized this as a precautionary statute.³⁸³ “When one is endangered,” the court reasoned, “harm is *threatened*; no actual injury need ever occur.”³⁸⁴ Congress likewise passed statutes addressing workplace safety,³⁸⁵ toxic substances,³⁸⁶ household poisons,³⁸⁷ and flammable fabrics,³⁸⁸ among other perceived dangers, all in an effort to regulate exposure to risk before harm occurred.³⁸⁹

Congress frequently buttressed these statutes with private enforcement mechanisms.³⁹⁰ Among other things, private enforcement

Mechanism, 9 EUR. J. RISK REG. 48, 53-54 (2018) (describing weaknesses of the tort system in addressing many modern environmental, health, and safety risks); Bert Black & David E. Lilienfeld, *Epidemiologic Proof in Toxic Tort Litigation*, 52 FORDHAM L. REV. 732, 738 (1984) (noting that most toxic tort cases involve long incubation or latency periods and occur “in the absence of any identifiable exposure”).

379. See Kysar, *supra* note 378, at 53-54; Richard A. Epstein, *The Temporal Dimension in Tort Law*, 53 U. CHI. L. REV. 1175, 1215-16 (1986) (noting for some chemicals and drugs, “the length and regularity of the latency period make it quite possible that *all* such cases will arise after the period has run”).

380. See SHAPIRO & GLICKSMAN, *supra* note 372, at 3-4.

381. John S. Applegate, *The Perils of Unreasonable Risk: Information, Regulatory Policy, and Toxic Substances Control*, 91 COLUM. L. REV. 261, 273 (1991).

382. 42 U.S.C. § 7545(c)(1).

383. See *Ethyl Corp. v. EPA*, 541 F.2d 1, 13 (D.C. Cir. 1976) (en banc).

384. *Id.* (“[I]ndeed, the very existence of such precautionary legislation would seem to *demand* that regulatory action precede, and, optimally, prevent, the perceived threat.”).

385. Occupational Safety & Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified at 29 U.S.C. §§ 651-678).

386. Toxic Substances Control Act, Pub. L. No. 94-469, 90 Stat. 2003 (1970) (codified at 15 U.S.C. §§ 2601-2629).

387. Poison Prevention Packaging Act of 1970, Pub. L. No. 91-601, 84 Stat. 1670 (codified at 15 U.S.C. §§ 1471-1477).

388. Flammable Fabrics Act, ch. 164, 67 Stat. 111 (1953) (codified at 15 U.S.C. §§ 1191-1204).

389. See Peter Huber, *The Old-New Division in Risk Regulation*, 69 VA. L. REV. 1025, 1025-26 (1983).

390. See Pamela H. Bucy, *Private Justice and the Constitution*, 69 TENN. L. REV. 939, 940 (2002); Luke P. Norris, *The Promise and Perils of Private Enforcement*, 108 VA. L. REV. 1483, 1493 (2022); Sean Farhang, *Legislating for Litigation: Delegation, Public Policy, and*

provisions incentivize people with inside information about wrongdoing to speak up.³⁹¹ Permitting private actors to sue can be particularly useful when violations might otherwise evade notice.³⁹² FACTA, with which this Article started, is a great example. The FTC cannot learn that a merchant is giving customers receipts disclosing too many digits of their credit card numbers on its own; the only way to stop this practice is to incentivize consumers to detect noncompliance.³⁹³ To keep would-be identity thieves from getting this information—a key source of identity theft at that time³⁹⁴—it is private enforcement or nothing. Private enforcement has, over time, become a signature feature of the regulatory landscape, leaving an imprint on civil rights, securities, and consumer protection, among other fields.³⁹⁵

To be sure, private enforcement—such as statutory damages—has no shortage of critics. Setting aside folks who dislike lawsuits generally,³⁹⁶ Sean Farhang divides these criticisms into two broad groups.³⁹⁷ The first, which he terms the “democratic critique,” is that

Democracy, 106 CALIF. L. REV. 1529, 1533 (2018) [hereinafter *Legislating for Litigation*]; see also SEAN FARHANG, *THE LITIGATION STATE* 5 (2010) (recounting “explosion” of private lawsuits enforcing public statutes since the Nixon Administration). Bucy contended that “[t]he public regulatory world ha[d] no choice but to embrace private justice.” Bucy, *supra* note 390, at 940.

391. See Bucy, *supra* note 390, at 940-41; see also David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 619 (2013) (“[P]rivate enforcement leverages private information, expertise, and resources while serving to check ‘capture’ of public enforcement agencies by regulated parties.”).

392. See Stephenson, *supra* note 325, at 108; Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 192 (2000). When private parties have superior information about violations, it is efficient to permit private enforcement. See Zachary D. Clopton, *Redundant Public-Private Enforcement*, 69 VAND. L. REV. 285, 316 (2016).

393. The point of the Act was to “tak[e] the offensive against identity theft” by preventing it altogether. *Credit Transactions Act Signing*, *supra* note 22, at 00:38-01:46.

394. “Credit-based identity theft emerged as a significant problem in the 1980s, hitting epidemic proportions only in the 1990s.” Lynn M. LoPucki, *Did Privacy Cause Identity Theft?*, 54 HASTINGS L.J. 1277, 1278 (2003).

395. See Norris, *supra* note 390, at 1494-95; see also Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1403 (1998) (observing that “the vast majority of important civil rights cases” were brought by private parties); J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1140 (2012) (“[O]ur system relies heavily and explicitly on enforcement by private parties to achieve public regulatory objectives.”).

396. See, e.g., Margolick, *supra* note 330 (describing how the United States has too many lawyers and excessive damage awards).

397. See Farhang, *Legislating for Litigation*, *supra* note 390, at 1541-45.

private enforcement hands too much regulatory policymaking or enforcement discretion to unelected, and thus politically unaccountable, judges.³⁹⁸ The second, which he calls the “public policy critique,” is that judges are generalists, rather than specialists, whose piecemeal decision-making generates suboptimal policy outcomes.³⁹⁹ In other work, Farhang grounds the debate over private enforcement in American political polarization and the conflict between Congress and the executive branch over control of the federal bureaucracy.⁴⁰⁰ The important point for purposes of this Article is not to show which side of these various debates has the better of any argument; it is simply to highlight that there *are* longstanding arguments.

Where we draw the line with respect to risk, too, is politically fraught.⁴⁰¹ Regulation imposes costs and involves stakeholders.⁴⁰² As Judge Calabresi classically observed, “Our society is not committed to preserving life at any cost.”⁴⁰³ We drive cars, drink wine, fly planes, and build bridges despite statistical loss of life. “A decision balancing lives against money or convenience,” moreover, “is not purely an economic one.”⁴⁰⁴ Issues of this sort instead “lend themselves to political determination” and must be decided “in whatever political way our society chooses to decide moral questions.”⁴⁰⁵ Unsurprisingly, the past several decades have witnessed “a prolonged tussle” over risk regulation play out in the political arena.⁴⁰⁶

398. *See id.* at 1541-43.

399. *See id.* at 1544-45.

400. *See* FARHANG, *THE LITIGATION STATE*, *supra* note 390, at 5.

401. *See* Kahan et al., *supra* note 32, at 1094 (“Highly charged disputes about risk occupy a conspicuous position in American political life.”).

402. *See, e.g.*, Howard Latin, *Good Science, Bad Regulation, and Toxic Risk Assessment*, 5 *YALE J. ON REG.* 89, 89 (1988) (“Regulation of toxic substances is an extremely complex, uncertain, and controversial enterprise.”). Douglas Kysar and James Salzman describe stakeholders in the environmental field as “two warring camps, both politically and ideologically entrenched on opposite ends of the environmental battlefield.” Douglas A. Kysar & James Salzman, *Environmental Tribalism*, 87 *MINN. L. REV.* 1099, 1102 (2003).

403. Guido Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 *HARV. L. REV.* 713, 716 (1965).

404. *Id.*

405. *Id.* at 717. Justice Breyer put the trade-offs accessibly: “[I]magine how much we would willingly pay for a slightly safer car, a car that would reduce auto deaths by, say, 5 percent, to 47,500. Would we pay an extra \$1,000 for such a car?” STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 13 (1993).

406. Gregory C. Keating, *Is Cost-Benefit Analysis the Only Game in Town?*, 91 *S. CAL. L.*

On one side are those who tolerate less risk and favor regulation to a safe level or regulation to the extent feasible, which comes at considerable cost.⁴⁰⁷ On the other are those who support standards requiring risk reduction that expressly take account of costs.⁴⁰⁸ Again, the point here is only to flag the fact of debate. Lots of debate—debate over private enforcement in the abstract and debate over what level of risk we are willing to abide. And the risks and new regulatory challenges—artificial intelligence, cryptocurrency, and self-driving vehicles, to name a few—keep mounting.⁴⁰⁹

The Court has long seen Congress's choices on where to draw lines regarding risk as political decisions. Take the regulation of benzene, a toxic industrial byproduct with possible long-term exposure links to leukemia.⁴¹⁰ Section 6(b)(5) of the Occupational Safety and Health Act of 1970 (OSH Act) requires the Secretary of Labor to set standards for toxic materials assuring that “no employee” with regular occupational exposure “will suffer material impairment of health or functional capacity.”⁴¹¹ The statute requires that the standards be “reasonably necessary or appropriate to provide safe or healthful employment.”⁴¹² In 1979, after a proposed standard and public hearings, the Occupational Safety and Health Review Commission (OSHRC) issued a final rule reducing permissible workplace exposure of benzene to one part benzene vapor per million parts (ppm) of air over an eight-hour day.⁴¹³ The agency

REV. 195, 208 (2018). Keating pinpoints the tussle's onset to the early 1980s. *See id.*

407. An example is section 408 of the Federal Food, Drug, and Cosmetic Act, which requires the EPA to set tolerable levels for pesticide residue on food for human consumption that ensure it will be “safe.” 21 U.S.C. § 346a(b)(2)(A).

408. *See* PETER H. SCHUCK, WHY GOVERNMENT FAILS SO OFTEN 45 (2014).

409. *See, e.g.*, Margot E. Kaminski, *Regulating the Risks of AI*, 103 B.U. L. REV. 1347, 1394-1403 (2023) (canvassing obstacles to regulating artificial intelligence); Hilary J. Allen, *Fintech and Technosolutionism*, 98 S. CAL. L. REV. 761, 811-18 (2025) (describing challenges of regulating fintech, including regulatory capture and the argument that technological complexity requires rejection of traditional solutions); Kristin N. Johnson, *Decentralized Finance: Regulating Cryptocurrency Exchanges*, 62 WM. & MARY L. REV. 1911, 1916-20 (2021) (describing ways that our existing regulatory framework insufficiently addresses challenges of cryptocurrency exchanges); Matthew T. Wansley, *Regulation of Emerging Risks*, 69 VAND. L. REV. 401, 403 (2016) (flagging uncertain risks of fracking, e-cigarettes, and self-driving vehicles).

410. *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 619 (1980).

411. 29 U.S.C. § 655(b)(5).

412. *Id.* § 652(8).

413. *See* 29 C.F.R. § 1910.1028(c) (1979).

determined that, with respect to carcinogens like benzene, “no safe level of exposure exists” without “clear proof establishing such a level.”⁴¹⁴

This standard would have required industry capital investments of \$266 million, first-year operating costs of \$187 to \$205 million, and recurring annual costs of \$34 million.⁴¹⁵ Industries facing these costs immediately filed a petition for review, which the Fifth Circuit granted, vacating the challenged regulation.⁴¹⁶ A divided Supreme Court affirmed in “the Benzene case,” with three separate opinions comprising the 5-4 majority.⁴¹⁷

The issue, simplified, was whether the OSH Act’s requirement that the Secretary set “reasonably necessary or appropriate” standards assuring employees do not “suffer material impairment” meant standards subjecting employees to *no workplace risks* or required a finding that a particular substance presented a *significant risk* requiring reasonably necessary limits.⁴¹⁸ Writing for three, Justice Stevens found it clear that “the statute was not designed to require employers to provide absolutely risk-free workplaces.”⁴¹⁹ Chief Justice Burger agreed, concluding that the statute did not require the Agency to regulate “insignificant or *de minimis* risks.”⁴²⁰ Justice Powell concurred that the statute required the agency to regulate only “significant risk.”⁴²¹ Justice Marshall, dissenting for four, read the statute differently, arguing that it prioritized worker safety over cost and contained no significant risk limitation, thus permitting the Agency’s reading.⁴²²

All in, though they disagreed on the answer, every Justice agreed where to look, and this is the key point: It was for Congress to make the call regarding our country’s comfort with risk exposure. Every member of the Court evaluated what the Agency had done in light of their reading of the statute. The Court understood that it was

414. *Indus. Union Dep’t*, 448 U.S. at 624.

415. *See id.* at 628-29 (citing 43 Fed. Reg. 5934 (1978)).

416. *See Am. Petroleum Inst. v. Occupational Safety & Health Comm’n*, 581 F.2d 493, 504-05 (5th Cir. 1978).

417. *Indus. Union Dep’t*, 448 U.S. 607.

418. *Id.* at 641-42.

419. *Id.* at 641.

420. *Id.* at 663-64 (Burger, C.J., concurring).

421. *Id.* at 665 (Powell, J., concurring in part and concurring in the judgment).

422. *Id.* at 689-90, 707 (Marshall, J., dissenting).

Congress that drew the line—and presumably faced the political exposure—determining whether we wanted totally risk-free workplaces (an expensive and politically provocative proposition) or action only in the face of significant risk (a less expensive proposition). At least in 1980, it was clear that Congress was the appropriate entity to determine our comfort risk, decide when we act relative to a risk, and calculate what level of safety we as a society are willing to purchase.

2. *Back to TransUnion*

Fast forward, and *TransUnion* holds that, according to Article III, Congress is powerless—ever—to declare that exposure to “risk of harm” is itself a compensable injury in fact.⁴²³ Let us go back to the example Justice Kavanaugh provides to support this. A motorist recklessly drives home, exposing another car and driver to risk of harm.⁴²⁴ If the risky driver manages to make it home, and the other driver escapes injury, Justice Kavanaugh tells us we should celebrate, rather than sue.⁴²⁵ He invites our agreement, but do not be so quick to assent. His example features particularization (the driver in harm’s way) and also a punchline: The absence of harm is both knowable and known. This, then, involves no groundwater contaminants, asbestos, mold, or lead paint. Or benzene. If exposed to benzene, you *may* ultimately suffer harm. We do not know how it will turn out.

Before *TransUnion*, all this was the province of the legislature. Drawing the line at one ppm is expensive, as industry challengers made abundantly clear, but no one in the Benzene majority suggested Congress lacked power to authorize such a limit.⁴²⁶ They simply told us, in the real case, that Congress had not.⁴²⁷ The OSH Act lacks a private right of action for employees to sue their employers directly for noncompliance.⁴²⁸ Before *TransUnion*, all

423. See *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2210 (2021).

424. *Id.* at 2211.

425. See *id.*

426. See *Indus. Union Dep’t*, 448 U.S. at 651-53.

427. *Id.*

428. See *Jeter v. St. Regis Paper Co.*, 507 F.2d 973, 976-77 (5th Cir. 1975); *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1235-36 (D.C. Cir. 1981); *Byrd v. Fieldcrest*

courts saw that as a regulatory choice; after reviewing the text and legislative history of the statute, every court to address the issue concluded that Congress had considered a private right of action but determined it did not want to interfere with state workers' compensation schemes.⁴²⁹ *TransUnion* now holds that Congress had no other choice: It lacks the ability to authorize these private lawsuits, ever.⁴³⁰

So, if Congress were to decide that steelworkers should not be exposed to five ppm of benzene because that level poses an unacceptable risk of leukemia down the road, and society is willing to pay for that level of safety, Congress is not permitted to create a damages cause of action for steelworkers who are now exposed to benzene beyond that level at the workplace. Suits would be possible only decades later, when those steelworkers succumb to leukemia (assuming some mechanism exists for overcoming their causation problems). This particular federal legislative option for a steelworker currently exposed to a risk that our political system might determine to be intolerable is off the table altogether.

Similarly, say Congress were to decide that the social costs of identity theft are staggering and one relatively easy fix would be to stop merchants from handing out paper receipts stamped with customers' credit card numbers (which might fall into the hands of thieves). One efficient way to do this might be for Congress to ban the practice and provide a bounty for consumers who detect (and suffer the risks of) noncompliance. Congress can no longer do that. The harms of identity theft are purely speculative at the point of sale; when the noncompliant receipt changes hands, the consumer faces only a statistical risk. No matter how good an idea Congress (and the President) may think preemptive action is, and despite the

Mills, Inc., 496 F.2d 1323, 1323 (4th Cir. 1974); see also MARK A. ROTHSTEIN, OCCUPATIONAL SAFETY & HEALTH LAW § 21:2, at 782-83 (collecting cases). However, courts have held that violations of OSHA regulations can be negligence per se—that is to say, “irrefutable evidence that particular conduct is unreasonable.” *Pratico v. Portland Terminal Co.*, 783 F.2d 255, 265 (1st Cir. 1985).

429. See *Pratico*, 783 F.2d at 266; *Frohlick Crane Serv. v. Occupational Safety & Health Rev. Comm'n*, 521 F.2d 628, 631 (10th Cir. 1975); see also FARHANG, THE LITIGATION STATE, *supra* note 390, at 3 (“It is a legislative choice to rely upon private litigation in statutory implementation.”); *id.* at 4 (situating that legislative choice in a conflict between American political institutions).

430. See *TransUnion*, 141 S. Ct. at 2225 (Kagan, J., dissenting).

Court's affirmation that the task of creating a cause of action is legislative and not the federal courts' business,⁴³¹ the "Cases" or "Controversies" language of Article III dictates that risk-as-harm is not actionable, compensable harm and these kinds of measures are out of Congress's toolbox, for good.⁴³²

Thankfully, the *Lochner* Era is behind us, and the case is decisively relegated to the anticanon.⁴³³ That was an era when, as described in Part I above,⁴³⁴ the Court had a distinct lean toward a particular substantive outcome, it manifested disregard for the purposes of legislation, and it felt comfortable overriding the legislative work product. As the Justices will reassure you, the Court no longer does this.⁴³⁵

CONCLUSION

The Court has frequently, even recently, reminded us that creating a cause of action is a legislative function, but its recent case law on standing's injury-in-fact requirement takes Article III deeply into legislative terrain. *TransUnion's* heightened standard for statutory harms challenges the operation of statutes with statutory damage provisions, making some questionably operational and possibly unrecognizable, and circumscribes Congress's ability to prevent harm before it occurs, thus confining Congress to post hoc, clean up solutions. The Court's conclusion that "mere" risk of harm, without more, cannot give rise to a damages action makes a normative choice and deprives Congress of meaningful, decades-old tools in the regulation of risk. We may all agree that standing too close to the cliff's edge is perilous. We may convince our legislators that action is warranted and that we are willing to pay for it. However, the Court has told us that we have limited ex ante

431. See *Doe v. Chao*, 540 U.S. 614, 622 (2004).

432. See *TransUnion*, 141 S. Ct. at 2207; U.S. CONST. art. III, § 2.

433. See Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 417 (2011).

434. See, e.g., Sepper, *supra* note 56, at 1460 (arguing businesses claiming religious exemptions share similarities with *Lochner*-Era plaintiffs); Sohoni, *supra* note 45, at 1350 (noting the Trump administration's values resemble *Lochner*-Era jurisprudence).

435. See, e.g., *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 355 (2007) (Thomas, J., concurring) ("The Court's negative Commerce Clause jurisprudence, created from whole cloth, is just as illegitimate as the 'right' it vindicated in *Lochner*."); *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 525 (2018) (referencing "*Lochner's* sin").

remedies when folks push us past our agreed-upon line to the ledge; instead, we must await the fall. The Court tells us, moreover, that Article III is the culprit.