SITTING THIS ONE OUT: STANDING DOCTRINE AFTER *TRANSUNION V. RAMIREZ*

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ABSTRACT

The Federal Constitution limits the matters a federal court may adjudicate as well as the types of parties who may seek redress. In determining "who" may access federal courts, the doctrine of standing is meant to ensure that only plaintiffs with a sufficient stake in a justiciable controversy are able to seek relief. Thus, access to the federal judiciary is limited to those who have suffered an injury capable of redress through judicial action. Sufficient injuries may be tangible, such as those involved in a tort, or intangible, such as a breach of a consumer protection or public disclosure statute. This Article discusses how the Supreme Court's decision in *TransUnion v. Ramirez* marks a dramatic deviation from modern standing jurisprudence and reflects an inadequate understanding of intangible privacy harms. More importantly, the *TransUnion* decision demonstrates that the Court's binary classification between intangible and tangible harms is insufficient to address the realities of consumer data and significantly diminishes the ability of consumers to protect against the misuse of their data. The outcome is an inconsistent enforcement regime in which state courts with broad enough standing doctrines are the sole forum to hear claims where intangible privacy harms are at issue.

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[1] University of Denver Sturm College of Law, J.D. Candidate 2023. The ABA Antitrust Division awarded an earlier version of this article a second-place distinction in the Harvey Saferstein Consumer Protection Essay Contest. I would like to thank Professor Rebecca Aviel for her insightful comments and guidance in writing this Note. Many thanks also to *The Denver Law Review* staff for their thoughtful edits and suggestions and to Professors Martin Katz and K.K. DuVivier for their encouragement in writing this piece. I am especially grateful to my wife, Jessica Murphy, and children, Austin and Kennedy Murphy, for their constant support and inspiration.

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INTRODUCTION

The Constitution extends the judicial power of federal courts to hear "Cases" and "Controversies."[2] Vague by its terms, courts created justiciability doctrines to determine what matters federal courts may decide. Of those doctrines, standing ensures a plaintiff is the proper party to seek adjudication while preserving the separation of powers, judicial efficiency, and effective litigation.[3]

Standing requires a party to show they suffered an injury traceable to the defendant that the court can redress.[4] Injuries, such as those involving physical or economic harm, are often apparent because of their tactile nature.[5] However, Congress may also use its legislative powers to define

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[2] U.S. CONST. art. III, § 2.
[3] William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 222 (1988).
[4] Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).
[5] Rachel Bayefsky, *Constitutional Injury and Tangibility*, 59 WM. & MARY L. REV. 2285, 2316 (2018).

legal duties owed to individuals that do not implicate tangible harms. Examples of these duties are often found in consumer protection statutes like the Telephone Consumer Protection Act, prohibiting unsolicited phone calls and text messages.[6] Congress has also established public-disclosure duties establishing a right to certain information, such as campaign contributions under the Federal Election Campaign Act of 1971.[7] A breach of these legal duties has long sufficed to confer standing so that the individual may vindicate their individual right.[8] This type of injury in law is referred to as an intangible injury.

The Supreme Court in *TransUnion v. Ramirez*[9] held for the first time in our Nation's history that a legal injury defined by Congress is inherently insufficient to confer standing.[10] In *TransUnion*, the Court did not hold the law at issue as unconstitutional. Instead, the Court determined the federal judiciary was an inappropriate forum to address violations under the Fair Credit Reporting Act (FCRA) when those injuries are intangible.[11]

Relying primarily on *Spokeo v. Robins*,[12] a suit also brought under the FCRA, the *TransUnion* Court further limited its deference to Congress's ability to define novel injuries. By disregarding Congress's role as factfinder, the Court yielded an opinion with an inadequate understanding of data privacy and the harms Congress intended to prevent by enacting the FCRA.[13] The FCRA regulates the handling of consumer information by credit agencies through various procedural requirements to ensure the accuracy, fairness, and privacy of consumers' credit reports.[14] The FCRA, by its terms, does not require dissemination of incorrect information prior to a plaintiff bringing an action against a credit agency.[15] The Court, holding that publication is necessary for standing, failed to recognize the importance of the inevitable distribution of incorrect credit reports once published on TransUnion's public servers. The business model of a credit agency depends upon generating revenue through the distribution of reports to businesses.[16]

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[6] 47 U.S.C. § 227(b).
[7] 52 U.S.C. § 30109(a)(4)(C).
[8] Fletcher, *supra* note 2, at 222.
[9] TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021).
[10] *Id.* at 2205.
[11] *Id.* at 2224 n.9.
[12] Spokeo, Inc. v. Robins, 578 U.S. 330 (2016).
[13] Daniel J. Solove & Danielle Keats Citron, *Standing and Privacy Harms: A Critique of TransUnion v. Ramirez*, 101 B.U. L. REV. ONLINE 62, 62–63 (2021).
[14] 15 U.S.C. § 1681.
[15] *Id.* § 1681(n)(a); *id.* § 1681(e)(b).
[16] TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2201 (2021).

Once the data rests on a publishable database, the injury is not merely incipient; it is inexorable.[17] Further, once disseminated to third parties, the incorrect data is often impossible to retract.[18] Thus, the injury occurs the moment the credit agency intends to monetize the false information.

TransUnion illustrates that the Court's binary classification between intangible and tangible harms is insufficient to address the realities of consumer data. The combination of risk and intent is arguably a tangible injury. However, if this is an argument the Court is unwilling to accept, this comment suggests that even if the injury is considered intangible, the combination of risk, intent, and eventual harm to consumers is sufficiently concrete to confer Article III standing.

This comment will first review the evolution of standing doctrine, focusing on the elements at issue in *TransUnion*, that of injury in fact, and its requirement of concreteness. Under the gleam of history, the article next details the Court's reasoning. Finally, the comment will conclude that the Court in *TransUnion* deviated from modern standing jurisprudence and the historical understanding of the "Cases" and "Controversies" that the Constitution empowered the Court to hear.[19] The Court, in reaching a conclusion largely without precedent, utilized a patchwork of tenuous analogies to the enforcement of public rights. The artifacts of this departure are evident in the decision's anomalous effects. While the Court restricts federal jurisdiction over many FCRA claims, individuals may continue to bring federal actions to state courts, leading to inconsistent enforcement of the FCRA.[20] Ultimately, the Court's decision fails to achieve its stated goal of ensuring the separation of powers.

I. LEARNING TO STAND

A. Background

Conceptually, standing appears straightforward. Under Article III of the Constitution, federal courts determine if a plaintiff has the right to

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[17] *See* discussion *infra* Section III.E.

[18] *See* Brief for Respondent at 16, TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021) (No. 20-297) ("TransUnion conceded during discovery that its recordkeeping practices prevented total and reliable identification of when, and to whom, it had sold [credit report data].").

[19] U.S. CONST. art. III, § 2.

[20] *TransUnion*, 141 S. Ct. at 2224 n.9.

judicial relief for a particular cause of action.[21] In modern jurisprudence, this requires showing that the plaintiff: (1) has suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent; (2) the injury is fairly traceable to the challenged conduct of the defendant; and (3) a favorable judicial decision will redress the injury.[22] However, the doctrine's definitional simplicity belies a history of consternation by jurists and academics alike. Professor Vining noted it was impossible to read a standing decision "without coming away with a sense of intellectual crisis."[23] Others have called it a "large-scale conceptual mistake" that has led to "serious confusion."[24] Even the Supreme Court has confessed that "[w]e need not mince words when we say that the concept of Article III standing has not been defined with complete consistency."[25]

Some of the confusion originates from a lack of constitutional clarity. The Constitution never references "standing" by name, nor was it a term of art at its writing.[26] It is a judicial construct of relatively recent origin.[27] The judiciary's power established in Article III grants federal courts the authority to hear "Cases" and "Controversies."[28] However, the Founding Fathers were not judicious in communicating the scope of either term.[29] In the Court's earliest interpretation, the phrase collectively referred to civil and criminal disputes.[30] Later, the Court expounded the underlying judicial power as "the right to determine actual controversies arising between adverse litigants."[31]

The question remained: What determines an actual controversy? As late as 1939, an actual controversy was one based on a "legal right — one of property, one arising out of contract, one protected against tortious

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[21] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 61 (Rachel E. Barkow et al. eds., 6th ed. 2019)
[22] Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).
[23] CHEMERINSKY, s*upra* note 20, at 61 (quoting JOSEPH VINING, LEGAL IDENTITY 1 (1978)).
[24] Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 167, 214 (1992).
[25] Valley Forge Christian Coll. v Ams. United for Separation Church & State, 454 US 464, 475 (1982).
[26] Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement*, 78 YALE L.J. 816, 818 (1969).
[27] *Id.*
[28] U.S. CONST. art. III, § 2.
[29] Berger, *supra* note 25, at 818.
[30] Sunstein, *supra* note 23, at 168 (citing Chisholm v. Georgia, 2 U.S. 419, 431–32 (1793)) (noting that "cases" referred to both civil and criminal disputes, whereas the idea of "controversies" was limited to civil disputes).
[31] Muskrat v. U.S., 219 U.S. 346, 361 (1911).

invasion, or *one founded on a statute which confers a privilege*."[32] If a legal right, strictly defined, was not invaded, the suit was dismissed for lack of standing. However, this bright-line rule swayed under the weight of legislatively conferred standing and the growth of the administrative state.

B. Injury in Fact

The growth of congressionally created citizen suits allowing actions against the government compounded the lack of constitutional guidance.[33] In particular, the Administrative Procedure Act (APA), passed in 1946, transformed private actions against federal administrative agencies. The APA provided, in part, that "[a] person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[34] Prior to the passage of the APA, courts often dismissed actions challenging legislative and administrative acts because the right to bring an action was not established under law.[35] The APA, therefore, conferred standing where it was not perceived to exist before.[36]

Attempting to define an aggrieved party under the APA's right to judicial review, the Court adopted the concept of an injury in fact in a pair of cases released on the same day: *Association of Data Processing Service Organizations, Inc. v. Camp* (*ADP*) and *Barlow v. Collins*.[37] In both cases,

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[32] Sunstein, *supra* note 23, at 181 (1992) (quoting Tenn. Elec. Power Co. v. TVA, 306 U.S. 118, 137 (1939)) (emphasis added).
[33] *Id.* at 193.
[34] 5 U.S.C. § 702 (1988).
[35] Sunstein, *supra* note 23, at 179–81. (noting also that in these cases there was no common law right at issue nor did the relevant constitutional provision, if applicable, create a right of action).
[36] *Id.* at 181.
[37] 397 U.S. 150 (1970); 397 U.S. 159 (1970). The injury-in-fact phrase has two possible originations. The first is Kenneth Davis' administrative law treatise. 3 Kenneth C. Davis, Administrative Law Treatise § 22.02, at 211–13 (1958). There, Professor Davis posited that a person is "adversely affected" under the APA when she suffers an injury "in fact." Sunstein, *supra* note 23, at 185–86 (quoting 3 Kenneth C. Davis, Administrative Law Treatise § 22.02, at 211-13 (1958)). The second possibility is the Court's decision in *Kernan v. American Dredging Co. See* 355 U.S. 426, 438–39 (1958). In analyzing the application of the Federal Employment Liability Act to a seamen's death, the Court noted that under traditional tort law a "violation of a statutory duty creates liability only when the statute was intended to protect those in the position of the plaintiff from the type of injury in fact incurred." *Id.* at 438.

the lower courts dismissed the suits for lack of standing. The Court overturned the lower courts' rulings and granted standing for the plaintiffs.[38]

In *ADP*, the plaintiffs brought an action against the Comptroller of the Currency of the United States, citing possible losses of profit resulting from the Comptroller's ruling allowing national banks to enter the competitive data processing business.[39] The Court held that the first inquiry in determining if a party is aggrieved is "whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise."[40] Here, the Court stated that there "can be no doubt . . . petitioners have satisfied [the injury-in-fact] test" because they "*might* entail some future loss of profits."[41] Notably, the Court made no probability requirement, and the mere risk of harm was sufficient.[42] Further, the Court held that "[w]here statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action."[43]

Therefore, the *ADP* Court's injury-in-fact standard intended to "expand[] the types of personal stake(s) which are capable of conferring standing on a potential plaintiff" rather than restrict those plaintiffs suitable for judicial relief.[44] In *ADP*, the Court listed "aesthetic," "conservational," "recreational," "economic," and "spiritual" as acceptable injuries in fact.[45] These injuries ensured that the party was "a reliable private attorney to litigate the issues of the public interest . . . ."[46] Later, in *U.S. v. SCRAP*, the Supreme Court articulated that any "identifiable trifle" sufficed to confer standing.[47] However, doctrinal developments during the late 1970s would utilize the injury-in-fact test to significantly restrict standing.

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[38] *ADP*, 397 U.S. at 157; *Barlow*, 397 U.S. at 165.

[39] *ADP*, 397 U.S. at 153 (1970). The opinion also elaborated a zone-of-interests test in determining standing. That test is not investigated in this comment.

[40] *Id.*

[41] *Id.* at 152 (emphasis added).

[42] *Id.*

[43] *Id.*

[44] Linda R.S. v. Richard D., 410 U.S. 614, 616–17 (1973) (quotations removed). *See also* F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 295 (2008).

[45] *ADP*, 397 U.S. at 154.

[46] *Id.*

[47] U.S. v. SCRAP, 412 U.S. 669, 689 n.14 (1973) (quoting Kenneth Culp Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 613 (1968)).

C. Concrete Injury

Modern standing doctrine requires an injury in fact that is "concrete and particularized."[48] Confusingly, in its earliest usage, the word "concrete" referred to "concrete adverseness" which was used to define the requirement for an adversarial proceeding consistent with the notion of a controversy.[49] The use of the phrase "concrete injury" to describe injury-in-fact first appeared in a footnote in *Sierra Club v. Morton*,[50] where the Court denied standing because the plaintiff lacked an individualized harm.[51] However, over the next two years, majority opinions would still use concrete in terms of adverseness.[52] Finally, in a pair of cases released the same day, *U.S. v. Richardson* and *Schlesinger v. Reservists Committee to Stop the War*, "concrete injury" would make its above-the-line debut in a majority opinion.[53] In both cases, the Court denied standing to vindicate the "generalized interest of all citizens in constitutional governance."[54] The Court also held that requiring a concrete injury ensured suits brought before the court were appropriate for judicial resolution because a personal stake was present beyond a mere interest in the outcome.[55]

In both *Richardson* and *Schlesinger*, there was no underlying statutory authority to bring a suit. Instead, the parties attempted to persuade the Court to create private rights of action where none existed. It was uncertain if an explicit grant of standing, such as the right to judicial review in the APA, would have made the crucial difference in the Court's concrete injury analysis. In cases before and after *Richardson* and *Schlesinger*, the Court implied the congressional creation of a statutory right might confer

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[48] *Lujan*, 504 U.S. at 560.

[49] *See* Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, 300 U.S. 227, 240–41 (1937) ("The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests.").

[50] Sierra Club v. Morton, 405 U.S. 727 (1972).

[51] *Id.* at 740 n.16 (noting De Tocqueville's observation that judicial review is effective because it is not supported by partisan factions "but is exercised only to remedy a particular concrete injury.").

[52] *See* Linda R.S. v. Richard D., 410 U.S. 614, 616 (1973) ("The threshold question which must be answered is whether the appellant has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.") (internal quotations removed).

[53] United States v. Richardson, 418 U.S. 166 (1974); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974).

[54] *Schlesinger*, 418 U.S. at 217.

[55] *Id.* at 220–21.

standing on its own.[56] However, in *Lujan v. Defenders of Wildlife*,[57] Justice Scalia would decidedly limit that deference.

D. Lujan v. Defenders of Wildlife

Prior to joining the Court, Justice Scalia acknowledged that Article III was a tool to ensure separation of powers.[58] Thus, the injury-in-fact test safeguards the judiciary's constitutional role by restricting federal courts to hearing only those disputes that have been "traditionally amenable to, and resolved by, the judicial process."[59] Justice Scalia formalized his philosophy in *Lujan* when the Court denied standing despite a provision in the Environmental Species Act (ESA) conferring the right to judicial review.[60]

The ESA allowed "any person [to] commence a civil suit on his own behalf" against a party violating one of its provisions, including the federal government.[61] The Defenders of Wildlife, a wildlife conservation organization, and the Humane Society of the United States claimed that the U.S. funding of development projects in Aswan, Egypt, and Mahaweli, Sri Lanka, would endanger threatened species.[62] Members from both organizations testified that prior trips to the area created a personal interest in the protection of local animal species.[63] The organizations claimed the development projects would harm those interests.[64] However, none of the members had definite plans to travel to the region.[65] The Court determined the injury was not sufficiently imminent because "'some day' intentions—without any description of concrete plans, or indeed even any specification

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[56] *See infra* note 70.
[57] Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992).
[58] Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983). *See also* Allen v. Wright, 468 U.S. 737, 752 (1984) ("More important, the law of Art. III standing is built on a single basic idea—the idea of separation of powers.").
[59] F. Andrew Hessick, *The Separation-of-Powers Theory of Standing*, 95 N.C. L. REV. 673, 684–85 (2017) (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998)).
[60] *Lujan*, 504 U.S. at 578.
[61] *Id.* at 571–72 (citing 16 U.S.C. § 1540(g)).
[62] *Id.* at 563.
[63] *Id.* at 563–64.
[64] *Id.*
[65] *Id.* at 564.

of when the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require."[66]

The Court emphasized the boundary of federal courts extended to deciding the "rights of individuals."[67] Here, the Court explicitly invoked the notion of public and private rights.[68] Public rights belong to the individual as part of the public, so an injury resulting from violating a public right is shared collectively.[69] In contrast, private rights are those belonging to the individual, considered as an individual.[70] Historically, this included the traditional concerns of property and contract but have also included those rights created by statute.[71] In Scalia's separation-of-powers thesis, the power to vindicate public rights resides solely in the legislative and executive spheres.[72] Allowing Congress to transmogrify a public right into a private one through statute would infringe on the President's authority to "take Care that the Laws be faithfully executed."[73]

Further, the Court in *Lujan* found the enforcement of a public right by an unharmed private individual to be the functional equivalent of a general grievance.[74] In modern standing doctrine, general grievances are insufficient to confer standing because the injury is shared with the public and is not specific to the individual.[75] Granting standing for general

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[66] *Id.*

[67] *Lujan*, 504 U.S. at 576 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803) ("The province of the court is, solely, to decide on the rights of individuals.")).

[68] *Id.*

[69] 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (1st ed. 1765). Further, public rights are "devised by human laws for the purposes of society and government, which are called . . . [the] bod[y] politic." *Id.*

[70] 1 *id.* at 119 (1st ed. 1765).

[71] *See* Warth v. Seldin, 422 U.S. 490, 514 (1975) ("Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute."); *see also* Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973) ("in the absence of a statute expressly conferring standing, federal plaintiffs must allege some threatened or actual injury . . . ."); Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 212 (1972) ("But with that statute purporting to give all those who are authorized to complain to the agency the right also to sue in court, I would sustain the statute insofar as it extends standing to those in the position of the petitioners in this case.").

[72] *Lujan*, 504 U.S. at 576.

[73] U.S. CONST. art. II, § 3; *see Lujan*, 504 U.S. at 576.

[74] *Lujan*, 504 U.S. at 572–73.

[75] Frothingham v. Mellon, 262 U.S. at 487, 488 (1923) ("The party who invokes the power [of judicial review] must be able to show . . . that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.").

grievances also violates the separation of powers because "[v]indicating the public interest is the function of the Congress and the Chief Executive."[76] Therefore, a public right does not become an individual right by a legislative pronouncement that the right belongs to each individual.[77] This is a critical feature of the holding.

Lujan marked the first time the Court denied standing when there was a statutory cause of action.[78] In his majority opinion, Justice Scalia relied on cases that all involved statutes lacking explicit congressional authorization for citizen suits.[79] Justice Kennedy's concurring opinion highlighted this ambiguity when he reiterated Congress's power in defining statutory rights, noting, "Congress [retains] the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."[80]

After *Lujan*, Congress no longer had the authority to confer standing *carte blanche* where a public right was at issue. However, until *Spokeo, Inc. v. Robins*,[81] this logic did not extend to Congress's articulation of individual rights. In fact, in a footnote, the *Lujan* Court noted that procedural rights may be sufficient as long as there existed some threat to a concrete interest.[82]

E. Spokeo, Inc. v. Robins

Spokeo ushered in new uncertainty in Congress's perceived authority to articulate novel private injuries. In *Spokeo*, plaintiff Robins alleged that Spokeo disseminated inaccurate personal information regarding age, marital status, and education history in violation of the Fair Credit

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[76] *Lujan*, 504 U.S. at 556.
[77] *Id.* at 578.
[78] Sunstein, *supra* note 23, at 211.
[79] *Lujan*, 504 U.S. at 575. *Compare* United States v. Richardson, 418 U.S. 166, 196 (1974) (J. Powell, concurring) ("In sum, I believe we should limit the expansion of federal taxpayer and citizen standing in the absence of specific statutory authorization . . . ."), *with Lujan*, 504 U.S. at 575.
[80] *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring).
[81] Spokeo, Inc. v. Robins, 578 U.S. 330 (2016).
[82] *Lujan*, 504 U.S. at 574 ("We do not hold that an individual cannot enforce procedural rights; he assuredly can, so long as the procedures in question are designed to protect some *threatened concrete interest* of his that is the ultimate basis of his standing.") (emphasis added).

Reporting Act.[83] While Robins alleged an unknown third party requested the information, he did not allege a concrete harm beyond the FCRA violation.[84] The Ninth Circuit held that the breach of the FCRA provision concerned an individual right that affected his personal interest.[85] Justice Alito, writing for the majority, rejected the Ninth Circuit's analysis as incomplete, holding that the lower court's observation concerned particularization and not concreteness.[86] An injury in fact must be both concrete and particularized.[87] The Court did not foreclose standing for Robins but rather remanded the case back to the Ninth Circuit to determine if Robins had suffered a concrete injury.[88]

Concrete, however, is not synonymous with tangible.[89] The Court acknowledged intangible harms may be adequate if the "alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[90] The Court reiterated Justice Kennedy's concurrence in *Lujan* that Congress has the authority to define injuries that did not exist previously.[91] However, the opinion confusingly couches the affirmation by stating, "[A] plaintiff [does not] automatically satisfy the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize to sue to vindicate that right."[92] Justice Thomas concurred but clarified the gap in the majority's holding, noting, "A plaintiff seeking to vindicate a statutorily created *private* right need not allege actual harm beyond the invasion of that private right."[93]

In Justice Thomas' view, requiring the Ninth Circuit to analyze the concreteness of Robins' claim ensured that the underlying FCRA provision established a private duty owed to Robins personally and not generally to

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[83] *Spokeo*, 578 U.S. at 333. *See* 15 U.S.C. § 1681e(b) (requiring credit agencies to "follow reasonable procedures to assure maximum possible accuracy" of their reports.). The Act also states that reporting agencies who "fail[] to comply with any requirement [of the Act] with respect to any consumer is liable to that consumer." 15 U.S.C. § 1681n(a).
[84] *Spokeo*, 578 U.S. at 335–36.
[85] *Id.* at 339–40.
[86] *Id.*at 340.
[87] *Id.*
[88] *Id.* at 343.
[89] *Id.* at 340.
[90] *Id.* at 341.
[91] *Id.*
[92] *Id.*
[93] *Id.* at 348 (Thomas, J., concurring) (emphasis added).

all citizens.[94] Justice Thomas founded his concurrence on the history of common law and the distinction residing between public and private rights. Traditionally, common-law courts required a heightened showing for violations of a public right.[95] However, in Justice Thomas's view, Congress can create private rights and grant standing based "simply on the violation of those private rights."[96] Under this construction, the violation of a private right is a sufficiently concrete and particularized injury in fact.

Spokeo left lower courts confused. Courts should look to history and the judgment of Congress when intangible injuries are at issue, but the Court was silent as to the manner of that inspection and the necessity or sufficiency of either element.[97] Courts should also ensure the injury entails, at a minimum, a risk of real harm to the plaintiff.[98] Finally, while Congress cannot individualize a public right by legislative pronouncement, Congress may elevate and define private injuries, including procedural violations, that did not exist before.[99] In *Lujan*, standing due to the "deprivation of a procedural right" required only a *threat* to "some concrete *interest*."[100] In *Spokeo*, the Court held that "Article III standing requires a concrete *injury* even in the context of a statutory violation," and declared "bare procedural violation[s]" inherently insufficient "to satisfy the injury-in-fact requirement."[101]

The application proved as confusing as the opinion.[102] It was unclear if the Court merely chose to innocuously rephrase *Lujan's* established doctrine or if the majority intended a shift from the threat to a concrete interest to an actual concrete injury. Appellate courts vacillated between Thomas's public and private rights distinction and a strict requirement of an injury in fact, leading to illogical and inconsistent outcomes.[103]

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[94] *Id.* at 348–49 (Thomas, J., concurring).
[95] *Id.* at 345.
[96] *Id.* at 348 (Thomas, J., concurring).
[97] *Id.* at 340.
[98] *Id.* at 341.
[99] *Id.*
[100] *Lujan*, 504 U.S. at 573 n.8 (emphasis added).
[101] *Spokeo*, 578 U.S. at 341 (emphasis added).
[102] *See infra* note 103.
[103] *Compare* Cordoba v. DIRECTV, LLC, 942 F.3d 1259, 1270 (11th Cir. 2019), *with* Salcedo v. Hanna, 936 F.3d 1162, 1169–70 (11th Cir. 2019) (an unwanted telephone call is a concrete injury, but a text message is not). *Compare* Cohen v. Rosicki, Rosicki & Assocs., P.C., 897 F.3d 75, 81–82 (2d Cir. 2018) *with* Trichell v. Midland Credit Mgmt., Inc., 964 F.3d 990, 1001–02 (11th Cir. 2020) (receiving a debt collection letter is a

The *TransUnion* decision would decidedly resolve this divide.[104]

II. *TRANSUNION V. RAMIREZ*

A. Facts

Mr. Ramirez submitted an application to finance the purchase of a Nissan Maxima from a car dealership in California.[105] As part of the financing due diligence, the dealership ran a credit check.[106] The credit report provided by TransUnion, a consumer credit reporting agency, contained an alert that read: "***OFAC ADVISOR ALERT - INPUT NAME MATCHES NAME ON THE OFAC DATABASE."[107]

OFAC is the U.S. Treasury Department's Office of Foreign Assets Control.[108] Under the USA Patriot Act, OFAC maintains a list of individuals who threaten national security.[109] Business transactions with those persons are generally unlawful and carry significant penalties.[110] TransUnion's service purports to alert businesses if a person's name matches that of someone on the OFAC list.[111] TransUnion does not actually conduct the match.[112] Rather, the process is outsourced to a third party, Accuity Inc. TransUnion sends customer data to Accuity who then conducts the analysis and indicates the match according to TransUnion's prescribed methodology.[113]

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concrete injury under the Federal Debt Collection Practices Act in some cases but must actually be read in others). *Compare* Dutta v. State Farm Mut. Ins., 895 F.3d 1166 (9th Cir. 2018) *with* Loving v. Se. Pa. Transp. Auth. 903 F.3d 312 (3d Cir. 2018) (where the circuits split on whether the failure to provide an employee with a copy of their credit report was a sufficiently concrete injury.).

[104] TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021).

[105] *Id.* at 2201.

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id. See also* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act, Pub. L. No. 107-56, 115 Stat. 272.

[110] *TransUnion*, 141 S. Ct. at 2201.

[111] *Id.*

[112] Brief for Respondent at 4, TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021) (No. 20-297).

[113] *Id.*

The OFAC Name Screen Alert is aptly titled, as TransUnion indicates a match based solely on similar names.[114] TransUnion does nothing to confirm additional identifying information despite the OFAC list containing at least one supplemental field of information in addition to the individual's name, such as e-mail, date of birth, or physical address.[115] Further, an identical match is unnecessary.[116] TransUnion's methodology required only a first initial and last name to flag an alert, which is uniquely deficient compared to other credit agencies.[117] Further, an exact match of last names was unnecessary; the Name Screen Alert required only a similar spelling.[118] Unsurprisingly, a partial name match increases false positives where TransUnion incorrectly indicates an individual is a possible terrorist.[119]

Unbeknownst to Mr. Ramirez, his name was similar to that of someone in OFAC's database.[120] A salesperson at the Nissan dealership informed Mr. Ramirez that Nissan would not sell him the car because his name was on a terrorist list.[121] Certain he was not, Mr. Ramirez requested a copy of his credit report.[122] TransUnion responded with a copy of his credit file and the statutorily mandated summary of rights.[123] The credit file did not mention the OFAC alert.[124] However, the next day, Mr. Ramirez received a letter acknowledging the OFAC alert.[125] Additionally, this "courtesy letter" lacked the summary of rights required by statute, merely

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[114] *TransUnion*, 141 S. Ct. at 2201.
[115] Brief for Respondent at 4, TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021) (No. 20-297).
[116] *TransUnion*, 141 S. Ct. at 2201.
[117] Brief for Respondent at 4, TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021) (No. 20-297).
[118] Ramirez v. TransUnion LLC, 951 F.3d 1008, 1019 (9th Cir. 2020) (noting that "Cortez" would match with "Cortes"). TransUnion's process carries the overt potential of discriminatory impact on foreign names. Consider Arabic names transliterated into Latin characters. There are at least fourteen different variations on the spelling of Muhammad and that does not take into account unique spellings such as Mahoma, Maome, and Mahoma. Jennifer Meierhans & Rob England, *Baby Names: Is Muhammad the Most Popular?*, BBC NEWS (Sept. 26, 2018) https://www.bbc.com/news/uk-england-45638806.
[119] *TransUnion*, 141 S. Ct. at 2201.
[120] *Id.* at 2201–02. *See* 31 C.F.R. pt. 501, app. A (2020).
[121] *TransUnion*, 141 S. Ct. at 2201.
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.* at 2201–02.

informing Mr. Ramirez he was a potential match and not that TransUnion disseminated the OFAC alert to a third party as part of a credit inquiry.[126]

B. Procedural History

Mr. Ramirez commenced an action against TransUnion requesting statutory and punitive damages for three violations of the FCRA.[127] The FCRA creates a cause of action making liable "[a]ny person who willfully fails to comply with any requirement [of the FCRA]."[128] Notably, the defendant is liable only to "that consumer" affected by the willful lack of compliance.[129] First, Ramirez alleged that in offering the OFAC Name Screen, TransUnion failed to "follow reasonable procedures to assure maximum possible accuracy."[130] Second, TransUnion failed to accurately disclose "[a]ll information in the consumer's file at the time of the request."[131] Third, TransUnion violated Section 1681g(c)(2) of the FCRA by not providing a summary of rights "with each written disclosure."[132]

Mr. Ramirez certified a class of 8,185 individuals that TransUnion incorrectly identified as potential matches with the OFAC list.[133] Of those, TransUnion provided credit reports with OFAC alerts to third parties for 1,853 class members.[134] After a jury trial, the trial court awarded each class member $984.22 in statutory damages and $6,353.08 in punitive damages, totaling $60 million.[135] On appeal, the Ninth Circuit affirmed standing for

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[126] *Id.*

[127] *Id.* at 2202. Acknowledging the banking system is "dependent upon fair and accurate credit reporting," Congress passed the Fair Credit and Reporting Act to govern the creation and use of credit reports. 15 U.S.C. § 1681. The purpose of the legislation was perhaps best articulated in its original title: "A Bill to Protect Consumers Against Arbitrary or Erroneous Credit Ratings, and the Unwarranted Publication of Credit information." CHI CHI WU , ARIEL NELSON, ELIZABETH DE ARMOND, CAROLYN L. CARTER, RICHARD RUBIN, CHARLES DELBAUM, PERSIS YU, LEN BENNETT, ELIZABETH HANES, & SARAH BOLLING MANCINI, NATIONAL CONSUMER LAW CENTER, FAIR CREDIT REPORTING ch. 1.4.2 (9th ed. 2017) https://library.nclc.org/fcr/010402-0.

[128] 15 U.S.C. § 1681(n)(a).

[129] *Id.*

[130] *Id.* § 1681e(b).

[131] *Id.* § 1681g(1)(1).

[132] *Id.* § 1681g(c)(2).

[133] *TransUnion*, 141 S. Ct. at 2202 (representing a class of those persons in the United States to whom TransUnion sent a mailing, between January 1, 2011, and July 26, 2011, alerting their presence as a possible OFAC match).

[134] *Id.*

[135] *Id.*

all class members for the three causes of action.[136] The U.S. Supreme Court granted certiorari.

C. Opinion of the Court

Justice Kavanaugh authored the Court's majority opinion.[137] Chief Justice Roberts and Justices Alito, Gorsuch, and Barrett joined.[138] The Court affirmed the Ninth Circuit's decision for the 1,853 class members (including Ramirez) who had their credit reports disseminated to third parties with the OFAC Name Alert.[139] However, the Court held that the remaining 6,332 members did not suffer a concrete harm because TransUnion did not share their credit reports with third-party businesses.[140] Therefore, those remaining plaintiffs lacked standing, reversing the Ninth Circuit's decision.[141] For the remaining two claims, failing to accurately disclose the consumers' presence on the OFAC list and not providing a summary of rights, the Court concluded all 8,185 class members except Ramirez failed to demonstrate harm resulting from the violations.[142] Accordingly, the Court reversed and remanded for further proceedings.[143]

Justice Kavanaugh's opinion once again grounded the Court's standing doctrine in the separation of powers.[144] The basic requirement for a case or controversy, the Court noted, is a "personal stake" such that the plaintiff can answer the question, "What's it to you?"[145] The plaintiff answers this question by showing "(i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief."[146] In the Court's view, the requirement of a

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[136] *Id.*
[137] *Id.* at 2199.
[138] *Id.*
[139] *Id.* at 2214.
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id.* at 2203. The Court cites *Raines v. Byrd* that the "law of Art. III standing is built on a single basic idea—the idea of separation of powers." 521 U.S. 811, 820 (1997).
[145] *Id.* (quoting Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881, 882 (1983).
[146] *TransUnion*, 141 S. Ct. at 2203 (affirming *Lujan*).

concrete and particularized injury ensures federal courts decide only the "rights of individuals" that are "of a Judiciary Nature."[147]

Justice Kavanaugh identified the question before the Court as one of concreteness.[148] A concrete injury, he observed, is "real, and not abstract."[149] Invoking *Spokeo*, the Court acknowledged that intangible harms might be concrete if the harm provided a basis for lawsuits in American courts.[150] The common law analog need not be exact, but the Court warned that *Spokeo* was not an invitation to loosen Article III standards "based on contemporary, evolving beliefs about what kinds of suits should be heard in federal courts."[151] On this point, the Court found Congress's input instructive, but the legislature may not "enact an injury into existence . . . to transform something that is not remotely harmful into something that is."[152] Therefore, the majority impliedly asserted standing analysis for statutory harms is the same, regardless of the underlying right's status as public or private: "No concrete harm, no standing."[153] Thus, an invasion of a statutory duty, by itself, lacks sufficient concreteness.

More pointedly, the Court observed, "an injury in law is not an injury in fact."[154] The Court illustrated this principle by providing an analogy.[155] Justice Kavanaugh described a scenario where two individuals, a resident of Maine and a resident of Hawaii, filed federal lawsuits against a company that polluted a Maine citizen's land.[156] The Maine citizen would have a viable claim, but the suit brought by the resident of Hawaii, the Court asserted, would not proceed because there is no concrete harm.[157] Allowing otherwise would not only violate Article III but would also "infringe on the Executive Branch's Article II authority."[158]

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[147] *Id.* (internal quotations omitted).
[148] *Id.* at 2204.
[149] *Id.* (citing Spokeo, Inc. v. Robins, 578 U.S. 330, 340 (2016)).
[150] *Id.*; *see infra* note 237 and related text (explaining the significance of removing English courts from the language in *Spokeo*).
[151] *TransUnion*, 141 S. Ct. at 2204.
[152] *Id.* at 2205 (quoting Hagy v. Demers & Adams, 882 F.3d 616, 622 (CA6 2018) (Sutton, J.)).
[153] *Id.* at 2200, 2214.
[154] *Id.* at 2205.
[155] *Id.* at 2206.
[156] *Id.*
[157] *Id.*
[158] *Id.* at 2207.

Justice Kavanaugh first analyzed Ramirez's claim that TransUnion failed to "follow reasonable procedures."[159] The Court bifurcated its analysis into two groups, class members whose false OFAC alerts were disseminated by TransUnion to third parties and class members whose alerts were not disseminated to third parties.[160] Justice Kavanaugh quickly addressed the 1,853 plaintiffs who had their reports shared with third parties, holding that they suffered a harm that was sufficiently similar to the tort of defamation, a reputational harm under common law.[161]

The impact of the Court's decision lies in the analysis of the remaining 6,332 class members and whether an incorrect OFAC alert in a credit file held by TransUnion constitutes a concrete injury when not disseminated to a third party. Quoting the Restatement of Torts, the Court concluded that publication is "essential to liability" in a suit for defamation.[162] "The mere existence of inaccurate information in a database," the Court added, does not amount to a concrete injury.[163] Returning to the analogical well, the Court compared incorrect information in a database to a defamatory letter stored in a desk drawer.[164] If the letter is never sent, then it "does not harm anyone."[165]

The class members contended that dissemination to Accuity, a third-party vendor responsible for the mailings, constituted publication.[166] For support, they cited cases and authorities asserting publication occurs once the "defamatory statement is read by *any* comprehending person."[167] A comprehending person includes those individuals implicated through intra-corporate communication.[168] In a footnote, the Court dismissed the argument as "unavailing" because "[m]any American courts did not traditionally recognize intra-company disclosures as actionable

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[159] *Id.* at 2208 (citing 15 U.S.C. § 1681e(b)).
[160] *Id.*
[161] *Id.*
[162] *TransUnion*, 141 S. Ct. at 2209 (citing Restatement of Torts § 577, cmt. a, at 192) (Am. L. Inst. 1977)).
[163] *Id.*
[164] *Id.* at 2210.
[165] *Id.*
[166] Brief for Respondent at 28, TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021) (No. 20-297).
[167] *Id.* (citing Ostrowe v. Lee, 175 N.E. 505, 505 (N.Y. 1931) (Cardozo, C.J.)) (emphasis added).
[168] *Id.* 28–29 (referencing Bacon v. Mich. Cent. R.R. Co., 21 N.W. 324, 326 (Mich. 1884)); Restatement (Second) of Torts § 577 cmt. i (Am. L. Inst. 1977)).

publications."[169] The Court also held that there was no evidence that "the document was actually read and not merely processed."[170]

Next, the Court addressed the plaintiffs' contention that the risk of future harm from the OFAC classification is a sufficiently concrete harm. There, the plaintiffs relied on *Spokeo*, holding that a "material risk of harm" can sometimes "satisfy the requirement of concreteness."[171] The Court limited this application of risk-based harm, highlighting that the language used in *Spokeo* cited *Clapper v. Amnesty International USA*,[172] which involved a claim for injunctive relief.[173] Justice Kavanaugh held that the forward-looking nature of injunctive relief distinguishes its application in a suit for retrospective damages.[174] Once again, the Court provided an analogy to illustrate that without actual harm, there is no injury in fact.[175] The Court articulated a scenario where a reckless driver is a quarter-mile behind a woman driving home.[176] The risk the woman is exposed to by the reckless driver does not materialize, and she makes it home safely.[177] Under the Court's injury-in-fact analysis, this would not be a cause of action but rather a "cause for celebration."[178]

The Court determined that the class members did not present evidence that they were harmed by exposure, the risk of exposure, or by some other injury related to the risk (such as an emotional injury).[179] They did not demonstrate a likelihood that dissemination, either purposefully or accidentally, would occur.[180] Additionally, it was not evident the 6,332 plaintiffs were cognizant of their incorrect OFAC status.[181] For these reasons, the Court concluded the 6,332 class members did not suffer a concrete harm.[182]

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[169] *TransUnion*, 141 S. Ct. at 2210 n.6.
[170] *Id.* n.6 (quoting Restatement (First) of Torts § 559, Comment a, p. 140 (Am. L. Inst. 1938) for the proposition that there must be evidence that the statement was brought "to the perception of another.").
[171] *Id.* at 2210 (citing Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016)).
[172] Clapper v. Amnesty Int'l USA, 568 U.S. 398 (2013).
[173] *TransUnion*, 141 S. Ct. at 2210.
[174] *Id.*
[175] *Id.* at 2211.
[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] *Id.* at 2212.
[180] *Id.*
[181] *Id.*
[182] *Id.* at 2213.

The remainder of the Court's opinion addressed the two remaining claims that TransUnion neither provided consumers with a complete credit file nor included the summary of rights disclosure with the OFAC alert.[183] The Court again held that the plaintiffs had not articulated that they suffered any harm, emotional or otherwise, or that they even opened the mailings and were aware of the mistakes.[184] Justice Kavanaugh was also unconvinced that the plaintiffs would have attempted to correct the misleading reports had TransUnion delivered them in a statutorily acceptable manner.[185] Finally, the majority rejected plaintiffs' contention that the formatting error created a risk that the plaintiffs could not correct the error before dissemination.[186] Reiterating the Court's position expressed earlier, the risk of harm by itself is not sufficient to confer standing.[187] Therefore, the Court concluded, the 8,185 class members, except Ramirez, did not suffer a concrete harm.[188]

D. Justice Thomas' Dissenting Opinion

Justice Thomas authored a dissenting opinion.[189] Justices Breyer, Sotomayor, and Kagan joined.[190] Justice Thomas first reviewed the history of TransUnion's OFAC Name Screen Alert.[191] In 2005, a consumer brought a complaint against TransUnion under similar circumstances.[192] An OFAC alert flagged a consumer's credit report while purchasing a car.[193] The jury awarded actual and punitive damages and took the unusual step of handwriting a note stating TransUnion should "completely revam[p]" its business practices.[194] As the appellate court in the present suit noted,

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[183] *Id.*
[184] *Id.* at 2213–14.
[185] *Id.* at 2214.
[186] *Id.*
[187] *Id.* at 2213.
[188] *Id.* at 2214. Note that TransUnion did not contest Ramirez's standing so the lower court's decisions remain undisturbed. *See id.* at 2213 n.8.
[189] *Id.* at 2214 (Thomas, J., dissenting).
[190] *Id.*
[191] *Id.*
[192] *Id.* at 2215.
[193] *Id.*
[194] *Id.*

TransUnion "made surprisingly few changes" over the past decade.[195] Quite unsurprisingly to Justice Thomas, someone else sued.[196]

Justice Thomas rooted his dissent in the same history evoked in his *Spokeo* concurrence.[197] In his reading of early common law, the key to understanding whether judicial power exists to hear an action was to consider the relationship between the type of right asserted and the damages shown.[198] In the 1700's, if an individual brought an action for a private right such as trespass on his land, merely alleging that the violation occurred was sufficient to bring the action; there was no requirement to show an injury or actual damage.[199] In contrast, when an individual commenced a suit for the breach of a duty owed to the community at large, courts required that a plaintiff demonstrate damages.[200] This distinction, he asserted, was present both in common law actions and those based on statute.[201]

As an example, Justice Thomas recited a patent infringement case where the defendant claimed that solely "making a machine cannot be an offense, because no action lies, except for actual damage."[202] The Court overruled the defendant's objection, stating "that where the law gives an action for a particular act, the doing of that act imports of itself a damage to the party. Every right imports some damage."[203] In Justice Thomas's view, "[C]ourts for centuries [have] held that injury in law to a private right was enough to create a case or controversy."[204] Here, the FCRA created three duties and prescribed a remedy when a company breaches a duty

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[195] Ramirez v. TransUnion LLC, 951 F.3d 1008, 1021 (9th Cir. 2020).
[196] TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2215 (2021).
[197] *Id.* at 2216–18.
[198] *Id.* at 2217.
[199] *Id.* (citing 3 W. Blackstone, Commentaries on the Laws of England 2 (J. Chitty ed. 1826)); *see id.* at 5.
[200] *Id.* (citing Robert Marys's Case, 9 Co. Rep. 111b, 112b, 77 Eng. Rep. 895, 898–899 (K. B. 1613)).
[201] *Id.*
[202] *Id.* (quoting Whittemore v. Cutter 29 F.Cas. 1120, 1121 (CC Mass. 1813)).
[203] *Id.* (quoting *Whittemore*, 29 F.Cas. at 1121).
[204] *Id.* at 2218. Justice Thomas also cites Cooley noting when "a statute fixes a minimum of recovery . . ., there would seem to be no doubt of the right of one who establishes a technical ground of action to recover this minimum sum without any specific showing of loss." THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 271 (1879). *See also TransUnion*, 141 S. Ct. at 2221 ("The law tolerates no farther inquiry than whether there has been the violation of a right.") (citing Webb v. Portland Mfg. Co., 29 F.Cas. 506, 508 (No. 17,322) (CC Me. 1838)).

regarding a particular consumer.[205] Only the consumer affected by the breach may bring an action.[206] This was not a public right.[207]

Poignantly, Justice Thomas classified the majority's "[n]o concrete harm, no standing" statement as a "pithy catchphrase." In his determination, this statement accomplished what no other Court had before it, declaring that "a legal injury is inherently insufficient to support standing."[208] Justice Thomas reviewed the history of standing decisions, illustrating how the Court's decisions appeared to turn on whether a public or private right was at issue.[209] *Spokeo* seemed to carry the proposition forward, but *TransUnion*, "remarkable in both its novelty and effects," constitutionally precludes legislatures "from creating legal rights enforceable in federal court" when there is not a sufficiently similar common-law root.[210] Justice Thomas lamented that the majority stripped Congress of its power to create and define rights under the guise of separation of powers.[211]

Finally, Justice Thomas attacked the majority's theory that *Spokeo* foreclosed a risk of harm assessment in all cases but those involving injunctive relief.[212] Most importantly, Justice Thomas contended that the majority flatly ignored the outcome of *Spokeo*.[213] There, the Court remanded the case to the Ninth Circuit to determine if the alleged violations "entail a degree of risk sufficient to meet the concreteness requirement."[214] *Spokeo*, like *TransUnion*, was a case for damages under the FCRA and not for injunctive relief.[215] Therefore, in Justice Thomas's view, the outcome in *Spokeo* forecloses the majority's limitations in a risk of harm analysis.[216]

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[205] TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2218 (2021).
[206] *Id.*
[207] *Id.* at 2218–19.
[208] *Id.* at 2221 (emphasis original).
[209] *Id.* at 2219–21 (citing Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992)); Summers v. Earth Island Inst., 555 U.S. 488 (2009)).
[210] *Id.* at 2221.
[211] *Id.*
[212] *Id.* at 2222.
[213] *Id.*
[214] *Id.* (quoting Spokeo, Inc. v. Robins, 578 U.S. 330, 342–43 (2016)).
[215] *Id.*
[216] *Id.* at 2223.

E. Justice Kagan's Dissenting Opinion

Justice Kagan's dissent largely aligned with Justice Thomas's view.[217] She first addressed the notion posited by the majority that the risk of dissemination is too speculative for a concrete harm.[218] As a practical matter, Justice Kagan did not find it speculative that a company in the business of providing credit reports will, in fact, provide credit reports.[219] She did, however, differ with Justice Thomas's assertion that any violation of an individual right created by statute confers standing. She read *Spokeo* to require a concrete injury even in the context of statutory violations.[220] By her own admission, this was probably a distinction without a difference because, outside of highly unusual cases, courts should give deference to Congress's statutory determination of what constitutes a harm.[221] As she noted, "[t]oday's decision definitively proves" that.[222]

III. ANALYSIS

The Court in *TransUnion* denied standing to plaintiffs who sought to enforce the breach of a private legal duty that resulted in an intangible harm.[223] In reaching its conclusion, the Court addressed three issues. First, is it constitutionally permissible for Congress to create a legal duty owed by credit agencies to an individual? Second, does the Constitution grant Congress the authority to create a private enforcement action to vindicate the breach of that duty and the consequent intangible harm? And finally, do federal courts have jurisdiction under Article III to hear these suits? In a remarkable decision, the Court never questions Congress's authority, impliedly answering the first two possible issues in the affirmative. Regarding standing, however, the Court determined that federal courts do not have jurisdiction to hear claims brought under constitutionally permissive statutes.[224]

TransUnion is exceptional in both the path the Court takes to its destination and the resulting consequences to the enforcement of individual rights. This analysis will first discuss the Court's reluctance to address

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[217] *Id.* at 2225.
[218] *Id.*
[219] *Id.*
[220] *Id.* at 2226.
[221] *Id.*
[222] *Id.*
[223] *Id.* at 2214.
[224] *Id.* at 2221 (Thomas, J. dissenting).

Congress's authority to create individual rights as opposed to public rights. The comment will then address the implied assumptions and misconceptions present in the Court's analysis, such as the notion of singularity in data storage. Next, the article will contend that, for the class members denied standing, the presence of their information on a publishable database is sufficiently concrete for an injury in fact. Finally, the article will conclude by highlighting anomalies created by the Court's decision. Specifically, the Court's holding allows for an inconsistent application of federal law because states are now the exclusive forum to hear FCRA violations when plaintiffs incur intangible harms that lack a common-law analog.

A. Separation of Powers and Public Rights

The Court's injury-in-fact analysis turned on whether the intangible harms suffered by the class members were sufficiently concrete. The presence of a concrete harm, the majority notes, is essential to the Constitution's separation of powers.[225] Justice Kavanaugh invoked Madison to articulate the jurisdictional limit of federal courts to hear those matters "of a Judiciary Nature."[226] Under Article III, those matters are limited to the "rights of individuals" and not vindicating the public interest.[227]

However, as Professor Berger meticulously detailed, Madison's knowledge of English courts likely governed his notion of what was "of a Judiciary Nature" when he made that statement at the Constitutional Convention.[228] That history provides several causes of action where a personal or antecedent injury was not a prerequisite, including writs of prohibition, certiorari, *qui tam*, and *quo warranto*.[229] Indeed, these statutes

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[225] *Id.* at 2207.

[226] *Id.* at 2203 (quoting 2 Records of the Federal Convention of 1787, p. 430 (M. Farrand ed. 1966)).

[227] *TransUnion*, 141 S. Ct. at 2203 (quoting Marbury v. Madison, 5 U.S. 137 (1803)).

[228] Berger, *supra* note 25, at 817.

[229] *See id.* at 817–21. A writ of prohibition was used in English common law to manage a court's use of excessive jurisdiction. *Id.* at 819. A *qui tam* action, sometimes called an informer action, allowed private individuals to bring suits against private and government officials often with rewards attached. *Id.* at 825–26. *Quo warranto* actions allowed a person to bring an action against a public official to show authority. *Id.* at 823. *See also* Jaffe, L. L., *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1269 (1961).

allow strangers to bring causes of action.[230] Moreover, these suits often vindicated public rights, acknowledging that, at the time of the founders, an individual seeking redress for a public harm was not uncommon.[231]

In a footnote, the Court dismisses this robust historical context claiming that "until the 20th century, Congress did not *often* afford federal 'citizen suit'-style causes of action to private plaintiffs who did not suffer concrete harms."[232] Interestingly, the Court appeals to frequency rather than constitutionality. While Congress may not have "often" conferred citizen suit privileges, the presence of such privileges implies acceptance by the founders as constitutionally permissive.[233] Further, similar statutes are scattered throughout American history in *qui tam* actions like informer statutes and the more recent False Claims Act.[234] As recently as 2000, the Court has explicitly granted standing for similar causes of action.[235]

Perhaps, for this reason, the *TransUnion* Court narrowed its holding in *Spokeo* that courts should look to common law analogs "in early English or American courts" when analyzing intangible harms.[236] In *TransUnion*, the Court removes the reference to English courts. Intangible injuries are now limited to those bearing a close relationship to those traditionally recognized solely in "American" courts.[237] Instead of acknowledging or

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[230] Berger, *supra* note 25, at 823 (quoting Lord Reading that "a stranger to a suit can obtain [a writ of] prohibition . . . and I see no reason why he should not in a proper case obtain an information of *quo warranto*.").

[231] Berger *supra* note 25, at 837–39. *See also* Vermont Agency of Nat. Res. v. U.S. *ex rel.* Stevens, 529 U.S. 765, 766–77 (2000) ("[I]mmediately after the framing, the First Congress enacted a considerable number of informer statutes. Like their English counterparts, some of them provided both a bounty and an express cause of action; others provided a bounty only.").

[232] *TransUnion*, 141 S. Ct. at 2206 n.1 (emphasis added).

[233] Sunstein, *supra* note 23, at 173–74. *See* Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens, 529 U.S. 765, 776, (2000). *See also TransUnion*, 141 S. Ct. at 2220 n.4 (Thomas, J., dissenting) ("Six statutes [enacted by the First Congress] imposed penalties and/or forfeitures for conduct injurious to the general public and expressly authorized suits by private informers, with the recovery being shared between the informer and the United States[.]") (quoting Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L. J. 341, 342 n.3 (1989)).

[234] *See* Slave Trade Act of 1794, 3rd Congr. sess. I, ch. 11 (March 22, 1794) (illustrating an early informer statute that provided a bounty to public, non-governmental informers for the value of the seized ship). *See also* False Claims Act, 31 U.S.C. §§ 3729–33.

[235] *Vermont Agency*, 529 U.S. at 778 ("When combined with the theoretical justification for relator standing discussed earlier, it leaves no room for doubt that a *qui tam* relator under the [False Claims Act] has Article III standing.").

[236] Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016).

[237] *TransUnion*, 141 S. Ct. at 2200.

explaining the departure from its previous approach, the Court simply hammers home the new limitation to American courts by repeating it no less than nine times.[238]

Further confounding matters for future courts, it is unclear what comprises a traditionally recognized harm. In *TransUnion*, class members contended that dissemination to a third-party vendor constituted publication in terms of a defamation suit.[239] To support their contention, they offered several common law decisions from state courts as well as support from the Restatement (Second) of Torts.[240] Justice Thomas also offered additional illustrations.[241] However, the Court was unpersuaded, holding that "[*m*]*any* American courts" did not acknowledge intra-corporate dissemination as a publication.[242]

Considering the precedents offered by Ramirez and Justice Thomas, the appeal to frequency will undoubtedly lead to diverse interpretations in lower courts. How many holdings are necessary to meet this threshold? Why are "many" holdings even required? In other areas where the Court has sought textual linkages to the time of the founding, it has not required "many" decisions on a matter.[243]

B. Deference to Congress

The *TransUnion* decision instructs courts to give an indefinite but diminishing weight to Congress's determination of what constitutes an intangible harm.[244] In *Spokeo*, the Court noted that "Congress is well positioned to identify intangible harms . . . [because] its judgement *is also*

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[238] *Id.* at 2204, 2206, 2208, 2209, 2213. In *Spokeo*, the Court cited *Vermont Agency of Natural Resources* for the proposition that Courts should look to English common law. 529 U.S. 765, 775–77. There, the Court used early English and American common law as justification for the False Claims Act, a modern *qui tam* action, which allowed for unharmed private parties to bring a civil action against any person for certain violations against the federal government. *See id.*; 31 U.S.C. § 3730(b)(1). The *TransUnion* Court removes this phrasing as well as all references to *Vermont Agency*.

[239] *TransUnion*, 141 S. Ct. at 2223.

[240] Brief for Respondent at 28, TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021) (No. 20-297).

[241] *TransUnion*, 141 S. Ct. at 2223 nn.6–8.

[242] *Id.* at 2210 n.6 (emphasis added).

[243] *See* Torres v. Madrid, 141 S. Ct. 989, 997 (2021) (relying on a singular case, the *Countess of Rutland*, to determine that seizures at a distance were recognized at the time of the founding).

[244] *TransUnion*, 141 S. Ct. at 2205.

instructive and important."[245] The Court in *TransUnion* attenuates the persuasiveness of Congress's judgement by stating that "Congress's views *may be* '*instructive*,'" subtlety removing reference to "importance."[246] It is now unclear when and how much courts should rely on congressional determinations. Here, the Court takes a significant departure from prior decisions.

At the beginning of the opinion, the Court recalled *Allen v. Wright*,[247] reminding the reader that the case or controversy requirement is "built on a single basic idea—the idea of separation of powers."[248] However, context is everything. Justice O'Connor, in overturning the lower court's grant of standing, emphasized the importance of a congressionally created individual right.[249] The appellate court's reasoning in granting standing relied, in part, on a prior case, *Norwood v. Harrison*.[250] In *Norwood*, students in Mississippi brought a class action enjoining the state's school textbook program.[251] Essential to the distinction with *Allen* was that Mississippi violated a desegregation order by distributing textbooks to schools regardless of their racially discriminatory policies.[252] The schoolchildren who brought the suit still received textbooks and were, therefore, not claiming an injury beyond the enforcement of the desegregation order.[253] Justice O'Connor acknowledged that in *Norwood* the children had standing because "[t]he interest acquired was judicially cognizable . . . *it was a personal interest, created by law*."[254] Here, the Court noted, that "[r]espondents in this lawsuit . . . have no injunctive rights against the IRS . . . ."[255]

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[245] Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016) (emphasis added).
[246] *TransUnion*, 141 S. Ct. at 2204 (emphasis added).
[247] Allen v. Wright, 468 U.S. 737 (1984).
[248] *TransUnion*, 141 S. Ct. at 2203 (citing Raines v. Byrd, 521 U.S. 811, 820 (1997)).
[249] *Allen*, 468 U.S. at 763 ("The interest acquired was judicially cognizable because it was a personal interest, created by law, in having the State refrain from taking specific actions.").
[250] Norwood v. Harrison, 413 U.S. 455 (1973).
[251] *Id.* at 457–58.
[252] *Id.* at 457.
[253] *Id.*
[254] Allen v. Wright, 468 U.S. 737, 763 (1984) (emphasis added).
[255] *Id.* This wasn't the only defect present in the appellate court's analysis. The Court also found the claimed injury to the children's education not fairly traceable to the government's conduct. *Id.* at 756–57. Further, it was unclear whether withdrawal of the tax exemption would redress the purported injury. *Id.* at 758.

Justice O'Connor also cited *Warth v. Seldin* for this same proposition.[256] In *Warth*, the Court stated, "[t]he actual or threatened injury required by [Article] III may exist *solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'*"[257] The relationship between standing and separation of powers as articulated by the Court in *Allen* and *Warth* provided deference to Congress's authority to create an individual right.[258] The violation of that right was sufficient to confer standing to the individual if Congress provided a cause of action.[259] Indeed, there is a clear history in standing jurisprudence that Congress may create and define rights or duties and prescribe a subsequent action for individuals when those rights are violated.[260]

However, the *TransUnion* Court employed a tactic similar to Scalia in *Lujan*, camouflaging statements of precedent with citations to *Spokeo*[261] and to those appellate courts interpreting *Spokeo* in a manner acceptable to the majority.[262] When the Court invoked earlier decisions, the parallels with *TransUnion* were either lacking or involved the enforcement of a public right.[263] With those citations exhausted, the Court's attempt at analogical

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[256] *Id.*

[257] Warth v. Seldin, 422 U.S. 490, 500 (1975) (emphasis added). *See also* Linda R.S. v. Richard D., 410 U.S. 614, 617 n. 3; Sierra Club v. Morton, 405 U.S. 727, 732 (1972).

[258] *Id.*

[259] *See supra* note 70.

[260] *See* Linda R.S., 410 U.S. at 617 ("we have steadfastly adhered to the requirement that, at least in the absence of a statute expressly conferring standing, federal plaintiffs must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction."). *See also* Havens Realty Corp. v. Coleman 455 U.S. 363 (1982); U.S. Parole Comm'n v. Geraghty 445 U.S. 388 (1980): Sierra Club v. Morton, 405 U. S. 727, 732 (1972); Trafficante v. Metro. Life Ins. Co., 409 U. S. 205, 212 (1972) (White, J., concurring).

[261] The Court cites *Spokeo* 21 times by this author's count. *See TransUnion*, 141 S. Ct. at 2200(x2), 2204(x7), 2205(x3), 2206, 2208, 2210(x2), 2211(x3), 2213(x2).

[262] *See id.* at 2205 (quoting Judge Katsas in Trichell v. Midland Credit Mgmt., Inc., 964 F.3d 990, 999 n. 2 (D.C. Cir. 2020)); *id.* (quoting then-Judge Barrett in Casillas v. Madison Ave. Assocs., Inc., 926 F.3d 329, 332 (7th Cir. 2019); *id.* at 2209 (quoting Judge Tatel in Owner-Operator Indep. Drivers Ass'n, Inc. v. U.S. Dep't of Transp., 879 F.3d 339, 344–45 (D.C. Cir. 2018)); *id.* (quoting Judge Colloton Braitberg v. Charter Commc'ns, Inc., 836 F.3d 925, 930 (8th Cir. 2016)). While some of the appellate courts got it right, the logic the Court extends from *Spokeo* to *TransUnion* was clearly not the understanding of Justices Thomas and Kagan. If it had been, the 6–2 majority opinion *Spokeo* would have likely been a plurality.

[263] For example, the opinion opines the responsibility of courts, in the face of congressional action, to independently review whether the concrete-harm requirement has been met.

reasoning yielded a series of disanalogies inconsistent with the facts of *TransUnion* and data privacy.[264]

C. Private Rights

Whether Congress has the authority to confer standing to private parties to vindicate public rights represents an interesting debate between the originalist perspectives of Professor Berger and the modern court.[265] However, it is a conversation wholly unrelated to the facts in *TransUnion*, which, properly understood, reveal plaintiffs who are seeking to vindicate rights of an individual nature. The Court's recurrent insistence to the contrary is in conflict with the basic elements of the FCRA.[266]

The plaintiffs alleged TransUnion failed to follow reasonable procedures to maximize accuracy, inaccurately disclosed consumers' credit files, and did not provide a summary of rights with the inaccurate disclosure.[267] The FCRA creates a cause of action making parties liable for infractions to "that consumer," and only that consumer, affected by the infraction.[268] Therefore, a third party could not vindicate the breach of a duty owed to a different consumer or the public generally. The FCRA, by its terms, does not grant private parties the authority to enforce "general compliance with regulatory law," as the Court seems to worry.[269] The

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TransUnion, 141 S. Ct. at 2205. To support this proposition, the Court states that "Congress's enactment of a law regulating speech [does not] relieve[] courts of their responsibility to independently decide whether the law violates the First Amendment." *Id.* (citing United States v. Eichman, 496 U.S. 310, 317–318 (1990)). However, Ramirez did not contend that the creation of a statutory right by Congress somehow precluded the Court from a constitutional inquiry. Further, the Court in *TransUnion* did not hold the statutes constitutionally impermissible. *See also id.* (citing Muskrat v. U.S., 219 U.S. 346, 361 (1911) for a similar proposition).

[264] *See infra* sections III.C, III.D, III.E.

[265] Berger, *supra* note 25, at 817–23.

[266] *See TransUnion*, 141 S. Ct. at 2206 ("if 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."); *id.* at 2205 (analogizing the present facts to an environmental suit brought by an unharmed Hawaii resident for a Maine pollution event); *id.* (framing the class members as vindicating a "public interest that private entities comply with the law . . . ."); *id.* at 2207 (portraying the class members as "[p]rivate plaintiffs [who] are not accountable to the people and are not charged with pursuing the public interest in enforcing a defendant's *general compliance with regulatory law*.").

[267] *Id.* at 2202.

[268] 15 U.S.C. § 1681(n)(a).

[269] *TransUnion*, 141 S. Ct. at 2207.

provisions at issue in FCRA were entirely related to the enforcement of an individual's rights.

The Court, however, justifies its decision through a series of analogies to public rights. The majority first attempts to equate the FCRA citizen-suit provision to a lawsuit enforcing compliance with a federal environmental statute.[270] In this hypothetical, a factory pollutes a Maine citizen's land.[271] A resident of Hawaii files a claim alleging the violation of a federal environmental law.[272] The Court notes that Article III precludes the Hawaii resident's suit because the plaintiff is uninjured.[273]

This analogy mirrors the one the Court used in *Allen v. Wright*.[274] There are a few shortcomings with the efficacy of the analogy. First, it is unclear if a statute provides the Hawaii resident with a cause of action. As noted earlier, the court in *Allen* recognized the importance of Congress's authority to create a personal interest.[275] Second, admitting that Article III would not confer standing to the hypothetical plaintiff does not further the Court's argument in *TransUnion*. In the FCRA, Congress created a legal duty owed to individuals and an accompanying mechanism to vindicate a breach of that duty.[276] Only the consumers affected by the breach were conferred a right to a judicial remedy.[277] The Court's analogical reasoning fails from a lack of relevant similarities.

A more apt analogy would be a scenario where Congress passed a statute regulating shipping requirements for toxic waste. A company decides to forgo the mandated protective measures and transports open-air containers of toxic sludge in violation of the regulation. Fortunately, a citizen notices the infringement and brings a cause of action under a citizen-suit provision. Unfortunately, the *TransUnion* decision holds this suit deficient for lack of standing because the shipper has yet to formally injure

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[270] *Id.* at 2205.
[271] *Id.*
[272] *Id.*
[273] *Id.*
[274] Allen v. Wright, 468 U.S. 737, 756 (1984) (noting that if "[a] black person in Hawaii could challenge the grant of a tax exemption to a racially discriminatory school in Maine" then federal courts would transform into nothing more than "a vehicle for the vindication of the value interests of concerned bystanders.").
[275] *See infra* Section III.B.
[276] Fair Credit Reporting Act, 15 U.S.C. § 1681.
[277] *Id.* § 1681n(a).

the dutiful citizen.[278] Under *TransUnion*, this would be the same outcome if the citizen were a landowner allowing the truck across her property. Not to worry, suggests the Court, "time will eventually reveal whether the risk materializes in the form of actual harm."[279] However, what the Court's reasoning fails to consider is that the injury the statute intends to avoid is a permanent harm. Congress, in its determination, understood that creating a legal right establishing a duty of care was the only manner to prevent intractable damage to a consumer's personal data.

D. To Thine Own Selves Be True

In concluding that inaccuracies contained in non-disseminated credit reports are insufficiently concrete, the Court is also inattentive to the critical nuances and realities of data management and network infrastructure implicit in the FCRA legislation. The Courts in *Spokeo* and *Lujan* reinforced a risk of harm as being sufficient for standing.[280] However, the *TransUnion* court found that the mere risk of dissemination was too speculative to meet the concreteness requirement.[281]

The Court ultimately fails to distinguish between information that is securely removed from public view and that which is being actively marketed for distribution to any willing buyer. During the seven-month class period, TransUnion disseminated twenty-five percent of the class members to third parties.[282] Publication of the incorrect information was an inexorable reality that TransUnion actively pursued.[283] This combination of risk and intent is sufficient for a concrete injury.

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[278] The Court appears overtly concerned with infringing the powers of the Executive Branch rather than specifically addressing the ability of a Hawaii resident to vindicate a private right statutorily conferred by Congress. *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2207 (2021) ("A regime where Congress could freely authorize unharmed plaintiffs to sue defendants who violate federal law not only would violate Article III but also would infringe on the Executive Branch's Article II authority.").

[279] *TransUnion*, 141 S. Ct. at 2211.

[280] Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016); see Lujan v. Defs. of Wildlife, 504 U.S. 555, 584 n.2 (1992) (noting that aesthetic risks occurring in the future are sufficient for standing).

[281] *TransUnion*, 141 S. Ct. at 2212.

[282] *Id.*

[283] Ramirez v. TransUnion LLC, 951 F.3d 1008, 1033 (9th Cir.). The class period was between January and July 2011. *Id.* at 1022. Extrapolating from a single data point is difficult, but the rate is illustrative that a significant portion of the class would be exposed within two years.

A recurrent theme in the opinion is the use of singularity in the Court's analogies, one letter in a drawer,[284] one reckless driver,[285] and one database.[286] However, there is never a single credit file locked from public view in an air-gapped desk drawer.[287] The world of cloud computing and data storage often require multiple versions of a particular data set across various locales.[288]

The consequences of this reality are the increased likelihood of exposure, purposefully or otherwise, and the difficulty of correcting errors.[289] Unfortunately, companies are often unaware of the location and composition of their data.[290] In many instances, it is impossible to find and remove incorrect data even within a single corporate entity.[291]

The knowledge gap is evident in the Court's analogy to a defamatory letter.[292] In this hypothetical, the Court likens a credit file stored on a server to a defamatory letter locked in a desk drawer.[293] The letter, the Court concludes, does not harm anyone.[294] In its singular view of data assets, the

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[284] *TransUnion*, 141 S. Ct. at 2210.

[285] *Id.*

[286] *Id.* at 2209.

[287] For example, the 3-2-1 backup methodology recommends three copies of data on two different storage types with one copy off-site. SCOTT ARUNDALE & TASHI TRIEU, DATA MANAGEMENT IN PRACTICE 88 (2015).

[288] For example, backups are typically recommended as a best practice. *See* CHANDRAMOULI, RAMASWAMY & PINHAS, DORON, NIST SPECIAL PUBLICATION 800-209 SECURITY GUIDELINES FOR STORAGE INFRASTRUCTURE 31 (Oct. 2020). Reasons for backups include restoring data after equipment failure or a breach or compromise. *See id.* at 2. There often exist multiple point-in-time snapshots to revert a database to a pre-compromise state. *Id.* at 16. As compromises are unknown events, companies typically make numerous backups. For security and practicality, companies may locate these backups in multiple physical locations with multiple third parties. *Id.* at 31. Additionally, data may require access by additional third parties contracted to perform analysis or other services. Third parties, such as Accuity Inc. used by TransUnion to perform the OFAC screen, will also have redundancy practices.

[289] *See* Vincent Manancourt, *"Millions of people's data is at risk" — Amazon Insiders Sound Alarm Over Security*, POLITCO (Feb. 24, 2021), https://www.politico.eu/article/data-at-risk-amazon-security-threat.

[290] *Id.* (quoting a whistleblower that "Amazon has grown so fast, it doesn't know what it owns . . . They don't know where their data is at, so they don't know if they are protecting it correctly.").

[291] *Id.* ("If you wanted to do a 'right to be forgotten,' it would be next to impossible for Amazon to identify all of the places where your data resides within their system . . . .") (quoting former U.S.-based employee).

[292] *TransUnion*, 141 S. Ct. at 2210.

[293] *Id.*

[294] *Id.*

Court assumes access to a credit report is somehow limited in a measured manner. For the letter-in-a-drawer analogy to withstand scrutiny, a myriad of copies must exist in innumerable desks around the country that would allow *instant* access by *any* paying customer who walks up to the desk drawer and reads the letter. The key to unlocking the drawer is solely monetary.

Moreover, the drafter of the letter and owner of the desks, TransUnion, actively wants anyone and everyone to purchase access to the letter. The letter is a product for sale to as many customers as TransUnion can theoretically attract. It rests not in a desk securely locked from view but in a desk accessible by anyone who has purchased a subscription.[295] Thus, the defamatory letter is more akin to a libelous article printed in a newspaper awaiting purchase at a newsstand by anyone with the tender and time to spare.

Possibly more worrisome was TransUnion's inability to perform the simple request of identifying the parties who had requested OFAC alerts.[296] They were "unable to electronically search [their own] database."[297] Subscribers to TransUnion's service had real-time access that was instantaneous and on-demand.[298] It is disturbing when the provider of a defamatory report cannot accurately track the report's dissemination, but such is what the Court supports.

Faithfully completing the newsstand analogy, an eager newsy hawks the newspaper on a busy street. Unfortunately, the subject of the libelous article must wait until the newsstand sells a copy rather than prevent its sale. However, once it is sold, judicial relief may still prove difficult because neither the newspaper nor the salesperson can identify the party who purchased the publication, eliminating the possibility of containing the adverse effects of the article's distribution.

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[295] *Id.* ("In cases such as these where allegedly inaccurate or misleading information sits in a company database, the plaintiffs' harm is roughly the same, legally speaking, as if someone wrote a defamatory letter and then stored it in her desk drawer.").

[296] Brief for Respondent at 16, TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021) (No. 20-297).

[297] *Id.*

[298] *Id.* ("As subscribers to TransUnion's system, they too would have had instantaneous, on-demand access to the entire class's OFAC data.").

E. Not Your Father's Oldsmobile[299]

The Court's reckless driver analogy perhaps best illustrates the inadequacy of the Court's singular view of data and its focus on public rights. The Court posits that a "woman" driver who remains a quarter mile in front of a reckless driver does not suffer a concrete injury unless there is an accident.[300] Problematically, this analogy bears little semblance to the world of data privacy and the FCRA claims at issue.

The reckless driver is presumably driving their own car or at least a car not belonging or connected to the innocent woman driver.[301] However, that portrayal is not faithful to the realities of consumer data as managed and sold by TransUnion. Rather, TransUnion manufacturers the equivalent of numerous facsimiles of an individual's car, down to the paint, license plate, and vehicle identification number. But a reasonably accurate facsimile of the consumer is not at the helm of the copy-cat car; TransUnion has incorrectly inserted a reckless driver bearing an exact resemblance to the consumer. Unaware it is a mistake, the world will now identify the reckless driver as the consumer and apportion the collateral consequences that accompany the informational and reputational harm upon her. Again, it is imperative to realize that TransUnion wants the world to see the consumer's car with the reckless driver. That is TransUnion's business model. TransUnion is actively marketing and positioning the reckless driver to any and all buyers as if it were the truth.

Congress understood these harmful implications and took a pragmatic approach to the issue. Understanding that privacy and informational harms are challenging to redact once TransUnion presents the innocent driver to the world as incautious, Congress sought to make it a violation for TransUnion to place the reckless driver in the consumer's duplicate car while it idled in the garage. Understanding the repercussions of mistaken identity, or in this case, being labeled a possible terrorist, Congress provided an enforcement action for an aggrieved party.[302] As Justice Kagan noted, it is not speculative that a credit report company will

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[299] Paying homage to the 1988 Oldsmobile advertising campaign that is now taught in marketing courses as a cautionary tale that marked the beginning of the brand's demise. The slogan is incomplete. It informs what an Oldsmobile is not but not what an Oldsmobile is. Similarly, the Court attempted to use a car analogy to show what standing is not but fails to translate it to the facts at hand.

[300] *TransUnion*, 141 S. Ct. at 2211.

[301] *Id.*

[302] 15 U.S.C. § 1681(n)(a).

continue selling credit reports.[303] It is an assured inevitability. Reckless drivers will continue driving recklessly. Unsurprisingly, companies who recklessly handle consumers' data will continue to do so as well.[304]

Regardless of the harm's tangibility, the violation of a duty created by Congress should be sufficient for a concrete injury. For the class members in *TransUnion*, the presence of a credit report in violation of the FCRA on a publishable database that is immediately accessible by any and all customers should constitute an injury in fact.[305]

F. Argument From Anomaly[306]

The Supreme Court's decision creates an immediate anomaly. Federal courts are now the sole arbiters of what constitutes an injury while lacking the benefit of factfinding. On the one hand, the *TransUnion* decision appears to constrain Congress's ability to pass laws articulating novel injuries, especially when intangible or risk-based harms are present. However, the Court did not declare the FCRA unconstitutional when intangible harms are implicated. Congress retains the authority to establish a duty and define the class of persons to enforce it, regardless of the harm's tangibility. After *TransUnion*, however, when the underlying injury is intangible and not similar to a traditional common-law action in American courts, state courts with sufficiently broad standing requirements are the only forums available to plaintiffs to vindicate their rights.[307]

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[303] *TransUnion*, 141 S. Ct. at 2225.

[304] *See supra* notes 191–95, and accompanying text.

[305] To answer the Court's question of "What's it to you?" one need look no further than the effects of an OFAC classification. *TransUnion*,141 S. Ct. at 2203 (quoting Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881, 882 (1983)). The harm of an OFAC classification has been likened to "a virtual financial death penalty." Brief for Respondent at 16, TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021) (No. 20-297) (quoting JUAN C. ZARATE, TREASURY'S WAR: THE UNLEASHING OF A NEW ERA OF FINANCIAL WARFARE 7 (2013)). Individuals on this list have difficulty participating in society, "buy[ing] groceries, receiv[ing] medical care, or engag[ing] in a simple financial transaction without a license from the Treasury Department." *Id.* (quoting Jennifer Daskal, *Pre-Crime Restraints: The Explosion of Targeted, Noncustodial Prevention*, 99 CORNELL L. REV. 327, 339 (2014)).

[306] Rephrasing the inductive argument strategy used by the Court: argument from analogy.

[307] *See TransUnion*, 141 S. Ct. at 2224 n.9 (Thomas, J., dissenting) ("The Court does not prohibit Congress from creating statutory rights for consumers; it simply holds that federal courts lack jurisdiction to hear some of these cases. That combination may leave state

The Court's effective holding is that federal courts are an inappropriate forum to hear suits when the violation of a legal right results in an intangible injury. It is immaterial that the congressionally created legal right and associated remedy are constitutional. Revisiting the Court's pollution analogy in Maine, the Court does not suggest that Congress lacks the authority to create a duty enforceable by a plaintiff from Hawaii.[308] The Court holds only that a state court is the appropriate venue to hear the suit. If Congress has the authority to establish a duty, it is incongruous that Article III would preclude enforcement of that duty in federal courts.

Further, the anomaly tends to undermine the Court's reliance on the separation of powers as the philosophical pillar buttressing the decision. The Court claimed that the ability of plaintiffs to bring actions for intangible injuries would "infringe on the Executive Branch's Article II authority."[309] However, the decision does not preclude enforcement of the FCRA for those members denied standing. Instead, the holding merely transforms select state judiciaries into the sole forum for remediation. If federal judicial enforcement infringed on the Executive Branch's powers, it is illogical that state enforcement of the FCRA would not as well.[310]

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courts . . . as the sole forum for such cases, with defendants unable to seek removal to federal court."). State courts are courts of general jurisdiction and may hear any controversy (federal or state in origin) unless the action is proscribed by state law, solely allocated to federal court jurisdiction (e.g. bankruptcy, patent, and criminal), or limited by the Due Process Clause of the Fourteenth Amendment. *See* Bankruptcy Cases and Proceedings 28 U.S.C. § 1334 (noting exclusive federal jurisdiction for bankruptcy cases); Pennoyer v. Neff, 95 U.S. 714, 732–733 (1878) ("A judgment rendered in violation of due process is void in the rendering State and is not entitled to full faith and credit elsewhere."). FCRA claims are not solely limited to federal jurisdiction. A prospective plaintiff filing an FCRA claim may, therefore, take an FCRA claim directly to state court as long as the particular state's standing doctrine is sufficiently broad. While the defendant may try and remove the suit to federal court, the plaintiff, in a reversal of roles, will argue the factors set forth in *TransUnion* that the federal court lacks jurisdiction under Article III. The federal court would then remand the suit back to state court. For a recent example of this dynamic post-*TransUnion*, *see* Sharena King v. PeopleNet Corp., No. 21 CV 2774, 2021 WL 5006692, at *1 (N.D. Ill. Oct. 28, 2021) (arguing the factors in *TransUnion* to remand the case back to state court).

[308] *TransUnion*, 141 S. Ct. at 2205–06.

[309] *Id.* at 2207. *But see* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 n.4 (1998) ("[O]ur standing jurisprudence, . . . though it may sometimes have an impact on Presidential powers, derives from Article III and not Article II.").

[310] It is possible this is the first decision in a multi-step judicial process and the Court may next address the infringement on Article II's executive powers.

Finally, the *TransUnion* decision engenders inconsistent enforcement. Standing doctrines vary in scope from state to state.[311] Some states' standing doctrines mirror that of federal courts, while many allow access to a broader range of suits than currently permissive under Article III.[312] Therefore, the scope of a citizen's enforcement capabilities will vary based on the standing doctrine of their respective state constitutions. The unequal protection of legal rights due to the vagaries of states' standing doctrine is as illogical as it is problematic.[313]

CONCLUSION

TransUnion significantly diminishes the ability of consumers to protect the misrepresentation and misuse of their data. The decision is a departure from the historical notions of judicial authority and is incongruent with the rationales underpinning modern standing doctrine. Substantively, the Court's lack of deference to Congress yielded an opinion deficient in data privacy and its associated harms. The decision, through conflicting logic, creates inconsistencies in application and enforcement that will reverberate through other areas of law for years to come.

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[311] *See* Wyatt Sassman, *A Survey of Constitutional Standing in State Courts*, 8 KY. J. EQUINE AGRIC. & NAT. Resources L. 349 (2015) (for a comprehensive guide to standing doctrines in the United States).

[312] *Id.*

[313] For future research, there may be a drafting solution when Congress crafts future provisions similar to those in the FCRA. *See TransUnion*, 141 S. Ct. at 2207 n.3 If *qui tam* provisions are still constitutional, it is possible Congress could reshape current legislation and create a "concrete private interest in the outcome of a suit against a private party for the government's benefit, by providing a cash bounty for the victorious plaintiff." Lujan v. Defs. of Wildlife, 504 U.S. 555, 573 (1992). *See also* Sierra v. City of Hallandale Beach, Fla., 996 F.3d 1110, 1125 (11th Cir. 2021) (Newsom, J., concurring).