WHAT'S STANDING AFTER *TRANSUNION LLC V. RAMIREZ*

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The Supreme Court for decades has said that Congress, by statute, may create rights and that the infringement of those rights is a sufficient injury to allow standing to sue in federal court. But in TransUnion LLC v. Ramirez*, in June 2021, the Court said that federal laws creating rights may be a basis for standing only if the right protected is one for which there is "a close historical or common-law analogue." This principle, if followed, would mean that countless federal laws—ranging from the Freedom of Information Act to civil rights statutes to environmental laws to the prohibition of child labor—could not be enforced in federal court because they create statutory rights that did not exist historically or at common law. Such an approach would be a radical, undesirable change in the law, particularly as a matter of separation of powers. Congress always has had the authority, and should have the power, to create enforceable rights by statute.*

INTRODUCTION

Perhaps intentionally, or maybe inadvertently, the Supreme Court's June 2021 decision in *TransUnion LLC v. Ramirez*[1] has the potential to dramatically restrict standing to sue in federal courts to enforce federal statutes. For decades, the Supreme Court has held that Congress, by statute, can create rights that would not otherwise exist, and that the infringement of these rights is a sufficient injury to permit standing to sue in federal court. For example,

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1 141 S. Ct. 2190 (2021).

in 1975, in *Warth v. Seldin*, the Court stated: "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."[2]

But in *TransUnion*, the Court apparently held that standing is permitted under a federal law only if the right protected is one for which there is "a close historical or common-law analogue."[3] The Court rejected standing to sue to enforce the Fair Credit Reporting Act, even though the statute creates a right to accurate information in credit reports and expressly authorizes suits to enforce the law.[4] Writing for the majority, Justice Kavanaugh stressed that the rights contained in the statute were not ones that had been protected at common law or historically recognized.[5]

Such an approach to standing significantly changes the law and places in doubt the ability to sue to enforce countless federal laws, ranging from the Freedom of Information Act to civil rights statutes, to environmental laws, to even the prohibitions of child labor in the Fair Labor Standards Act.[6] The Court's decision, if taken literally, would mean that a federal law creating a legal right may be enforced in federal court only if it safeguards a right that was protected historically or at common law. Never does the Court indicate what would be enough to show "historical" protection if there was not a common-law analogue. The result is a potentially drastic limit on the ability of Congress to create rights that are enforceable in federal courts.

The Freedom of Information Act provides an easy example of the potential implications of *TransUnion*. The federal Freedom of Information Act, adopted in 1966, states that every person has the right, unless the document fits into a specific exemption, to every document possessed by the federal government.[7] The Act authorizes suit by any person whose request has been denied. There was no common-law right to access documents; nor is there a constitutional right. Congress, through legislation, created this statutory right, and its infringement has always been deemed an injury sufficient for

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2 422 U.S. 490, 514 (1975).

3 141 S. Ct. at 2204; *see infra* text accompanying notes 62–77.

4 As explained below, the Court allowed those whose credit reports had been circulated with inaccurate information to sue, but not those whose information had not been circulated. The Court came to this conclusion notwithstanding a statute—the Fair Credit Reporting Act—which created a right and authorized a cause of action in all such circumstances. *See infra* text accompanying notes 71–75.

5 *See* 141 S. Ct. at 2205, 2209, 2212–13 (holding that, because "the mere existence of inaccurate information" has "no historical or common-law analog" as a concrete injury, the plaintiffs whose information was not circulated to third parties had not suffered concrete harm and thus were ineligible for Article III standing (quoting Owner-Operator Indep. Drivers Ass'n v. U.S. Dep't of Transp., 879 F.3d 339, 344–45 (D.C. Cir. 2018)).

6 *See* discussion *infra* Part III; *infra* notes 110–14 and accompanying text.

7 *See* 5 U.S.C. § 552.

standing.[8] I cannot find a single case where a federal court has questioned the standing of a person to challenge the denial of a Freedom of Information Act request.

But after *TransUnion*, it is unclear whether suits to enforce the Freedom of Information Act still will be allowed. Because there was neither a common-law right to access documents nor a tradition of such a right before the statute, it is questionable whether suits to enforce it are allowed under Justice Kavanaugh's approach. That would be a radical change in the law as to this statute, especially breathtaking if one considers all the federal laws that create rights that have been found to be the basis for standing.

Consider another example: the Family and Medical Leave Act of 1993 (FMLA).[9] The Act entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons with the continuation of health insurance coverage under the same terms and conditions as if the employee had not taken leave. In other words, it creates a right to unpaid leave from work for reasons of family and medical care. The Act also authorizes suits when there are violations.[10] In fact, the Supreme Court has held that this provision overrides sovereign immunity and that even state governments can be sued for violations.[11] But like the Fair Credit Reporting Act, the FMLA, by statute, created rights that did not exist at common law and were not historically protected. Under *TransUnion*, it is questionable whether anyone would be able to sue when there are violations of the FMLA.

There is a way to read the holding of *TransUnion* more narrowly as denying standing to enforce federal statutes only in those instances where the Court does not perceive a sufficient harm to the plaintiffs. The majority states that Congress cannot "us[e] its lawmaking power to transform something that is not remotely harmful into something that is."[12] But that then raises the question of how the Court will decide, apart from history and the common law, which rights created by federal law involve sufficient harms for standing. Congress in the Fair Credit Reporting Act clearly deemed false information in credit reports and the failure to follow procedures to ensure accuracy sufficiently detrimental to permit standing. Will standing to enforce federal laws depend on how justices or lower-court judges assess the

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8 *See* Warth v. Seldin, 422 U.S. 490, 500 (1975) (explaining generally that injury for Article III standing may result from violation of statutorily created legal rights).

9 29 U.S.C. § 2601.

10 *Id.* § 2617.

11 *See* Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 726–27, 740 (2003) (explaining that Congress has the power to abrogate state sovereign immunity and holding that the FMLA is a valid exercise of that power).

12 TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2205 (2021) (quoting Hagy v. Demers & Adams, 882 F.3d 616, 622 (6th Cir. 2018)).

importance of the statutory right?

Part I of this article reviews the well-established law that Congress can create rights, the infringement of which is sufficient for standing. Part II looks at *TransUnion*, and the Court's prior decision in *Spokeo, Inc. v. Robins*[13] to discuss how the Court has limited Congress's power to create statutory rights that are the basis for standing. Part III examines the implications of *TransUnion* and the large number of federal laws whose enforcement is now in doubt. At the very least, *TransUnion* is going to lead to a great deal of litigation as defendants sued for violating a myriad of federal statutes will argue that those laws, like the Fair Credit Reporting Act, cannot be enforced in federal court. Finally, Part IV explains why the Court is wrong in limiting the ability of Congress to create rights that are the basis for standing. Although the Court in *TransUnion* invokes separation of powers as the basis for its decision,[14] in reality, the decision undermines separation of powers by greatly constraining congressional power to create judicially enforceable rights. The conclusion is that the Court should abandon this new restriction as to which federal laws can be enforced in the federal courts, or at the very least it should broadly define its rule so as to permit almost all federal laws creating rights to be enforceable.

The *TransUnion* decision and its potential ramifications are of great importance for many reasons. Most obviously, the ability of plaintiffs to sue to enforce countless federal statutes is now in doubt. Underlying this issue is the question of the proper relationship of the Supreme Court and Congress when it comes to determining standing to sue and, more generally, to defining federal court jurisdiction. *TransUnion LLC v. Ramirez* reflects a Court that has taken an approach that aggrandizes the judicial role, minimizes the legislative power, and ultimately undermines the ability of the federal courts to enforce many laws.

I
STANDING, INJURY, AND FEDERAL STATUTES

Article III, Section 2 of the Constitution defines the judicial power in terms of nine categories of "Cases" and "Controversies" that can be heard in federal courts.[15] The Supreme Court has interpreted these words as giving rise to a series of limits on the federal judicial power.[16] Perhaps the most important of these restrictions is standing to sue, which focuses on whether

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13 136 S. Ct. 1540, 1545 (2016) (restricting standing to sue under the Fair Credit Reporting Act).

14 141 S. Ct. at 2203; *see also infra* notes 121–23 and accompanying text.

15 U.S. CONST. art. III, § 2, cl. 1.

16 *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 42 (8th ed. 2021) (describing justiciability and the law of standing).

the plaintiff is the proper party to bring a matter to the court for adjudication.[17] The Court has said that the Constitution imposes three requirements that must be met in order for there to be standing.[18] First, the plaintiff must allege that she has suffered, or imminently will suffer, an injury. Second, the plaintiff must allege that the injury is fairly traceable to the defendant's conduct. Third, the plaintiff must allege that a favorable federal court decision is likely to redress the injury.

TransUnion focuses on the first of these three requirements: that a plaintiff allege and prove that she has been or imminently will be injured. The Supreme Court has described this principle as requiring that "[t]he plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'"[19]

Many different types of harms have been deemed sufficient to meet the injury requirement. As Justice Frankfurter once wrote, "[a] litigant ordinarily has standing to challenge governmental action of a sort that, if taken by a private person, would create a right of action cognizable by the courts. Or standing may be based on an interest created by the Constitution or a statute."[20]

For example, injury to rights recognized at common law—property, contracts, and torts—always have been regarded as sufficient for standing purposes.[21] And no one disputes that the violation of a person's constitutional

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17 *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 498 (1975) ("In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.").

18 *See* California v. Texas, 141 S. Ct. 2104, 2113 (2021) ("The Constitution gives federal courts the power to adjudicate only genuine 'Cases' and 'Controversies.' That power includes the requirement that litigants have standing. A plaintiff has standing only if he can 'allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'" (citation omitted) (first quoting U.S. CONST. art. III, § 2, cl. 1; and then quoting DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 342 (2006))); *see also* Bennett v. Spear, 520 U.S. 154, 167 (1997) (articulating the constitutional requirements for standing); Ne. Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville, 508 U.S. 656, 663 (1993) (same).

19 City of Los Angeles v. Lyons, 461 U.S. 95, 101–02 (1983); *see also* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) ("[By injury in fact we mean] an invasion of a legally protected interest which is (a) concrete and particularized and (b) 'actual or imminent, not "conjectural" or "hypothetical."'" (citations omitted) (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990))); McConnell v. FEC, 540 U.S. 93, 225 (2003) (stating that the injury must be both "concrete" and "actual or imminent"). For an argument challenging "injury" as a constitutional requirement, see F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 299 (2008) (describing the recent creation of an injury requirement).

20 Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 152 (1951) (Frankfurter, J., concurring) (citation omitted).

21 Tenn. Elec. Power Co. v. Tenn. Valley Auth., 306 U.S. 118, 137–38 (1939).

rights also is an injury sufficient for standing.[22] Additionally, as Justice Frankfurter observed, violations of rights created by statute always have been deemed sufficient for standing purposes.[23] The Supreme Court has long stated that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute."[24]

To be clear, this is not Congress authorizing lawsuits in the absence of an injury. Congress could not do so because injury is a constitutional requirement for standing and cannot be eliminated by federal law. Rather, as has long been recognized, Congress is creating a statutory *right*, and the infringement of that right is deemed an injury sufficient for standing.

Trafficante v. Metropolitan Life Insurance was an important case in recognizing that violation of a statutory right meets the standing requirement.[25] In *Trafficante*, two white residents of an apartment complex were accorded standing to challenge the owner's discrimination against Black applicants in violation of the Civil Rights Act of 1968.[26] The Supreme Court concluded that the statute created a right to be free from the adverse consequences of racial discrimination and accepted the plaintiffs' claim that they were injured in being deprived of the right to live in an integrated community.[27] The "language of the Act," the Court found, "is broad and inclusive. Individual injury or injury in fact to petitioners . . . is alleged here. What the proof may be is one thing; the alleged injury to existing tenants by exclusion of minority persons from the apartment complex is the loss of important benefits from interracial associations."[28] Many decisions have repeatedly reaffirmed that standing exists under the Civil Rights Act of 1968 because the law created a statutory right to interracial association.[29]

For example, in *Havens Realty Corp. v. Coleman*, the issue was whether

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22 *See Joint Anti-Fascist Refugee Comm.*, 341 U.S. at 152 (1951) (Frankfurter, J., concurring) ("A litigant ordinarily has standing to challenge governmental action of a sort that, if taken by a private person, would create a right of action cognizable by the courts. Or standing may be based on an interest created by the Constitution or a statute." (citation omitted)).

23 *See id.*; *see also* Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973) (providing that, even if no injury would exist in the absence of a statute, invasion of a statutorily created right creates standing).

24 *Linda R.S.*, 410 U.S. at 617 n.3; *see also* Warth v. Seldin, 422 U.S. 490, 514 (1975). For an argument that Congress is inherently limited in its ability to solve standing problems, see Heather Elliott, *Congress's Inability to Solve Standing Problems*, 91 B.U. L. REV. 159 (2011).

25 409 U.S. 205 (1972).

26 42 U.S.C. § 3604; *Trafficante*, 409 U.S. at 212.

27 *Trafficante*, 409 U.S. at 208, 209–10.

28 *Id.* at 209–10.

29 *See, e.g.*, Havens Realty Corp. v. Coleman, 455 U.S. 363, 376, 382 (1982); Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 103–04, 112 (1979); *see also* Oti Kaga, Inc. v. S.D. Hous. Dev. Auth., 342 F.3d 871, 881 (8th Cir. 2003) (holding that a corporation has third-party standing under the Fair Housing Act because Congress's statutes create legal rights that, if invaded, create standing even if there would be no injury in the absence of the statute).

a Black "tester"—someone who tries to rent to see if there is discrimination—had standing to sue under the federal law to challenge race discrimination in housing even though she had no intent to actually rent the property.[30] The Court concluded that she had standing because there was an injury to her statutory rights to truthful and nondiscriminatory information:

> Congress has thus conferred on all "persons" a legal right to truthful information about available housing. This congressional intention cannot be overlooked in determining whether testers have standing to sue. As we have previously recognized, "[t]he actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing . . . .'" . . . In the instant case, respondent Coleman—the black tester—alleged injury to her statutorily created right to truthful housing information. . . . If the facts are as alleged, then respondent has suffered "specific injury" from the challenged acts of petitioners, and the Art. III requirement of injury in fact is satisfied.[31]

It is crucial to note that in both *Trafficante* and *Coleman*, the rights at issue did not exist at common law, nor were they traditionally recognized by the courts. These rights which conferred standing existed solely by virtue of the federal statute. Nor was there any other injury claimed except for the violation of the statutory rights at issue.

The Court's subsequent standing decisions repeatedly reaffirmed that Congress retains broad authority to create injuries that are the basis for standing. In *FEC v. Akins*, the Court held that Congress, by statute, could create a right to information and that the denial of such information was an injury adequate to satisfy Article III.[32] In that case, a group of voters brought suit challenging a decision by the Federal Election Commission that the American Israel Public Affairs Committee (AIPAC) is not a "political committee" subject to regulation and reporting requirements under the Federal Election Campaign Act of 1971 (FECA).[33] That statute authorizes suit by any person "aggrieved" by a Federal Election Commission decision.[34]

The Court granted standing and concluded that Congress had created a right to information about political committees and that the plaintiffs were denied the information by virtue of the Federal Election Commission's decision. Justice Breyer, writing for the Court, explained: "The 'injury in fact' that respondents have suffered consists of their inability to obtain information—lists of AIPAC donors . . . and campaign-related contributions and expenditures—that, on respondents' view of the law, the statute requires that

30 455 U.S. 363 (1982).
31 *Id.* at 373–74 (citations omitted) (quoting Warth v. Seldin, 422 U.S. 490, 500 (1975)).
32 524 U.S. 11, 21 (1998).
33 *Id.* at 13.
34 52 U.S.C. § 30109(a)(8)(A) (detailing enforcement of FECA).

AIPAC make public."[35] In other words, the statute created a novel right to information, and its alleged infringement was deemed sufficient to meet Article III and to allow standing under the broad citizen-suit provision for any aggrieved person. As with the example of the Freedom of Information Act mentioned earlier, the statute created a right to information and the infringement of the right is itself the injury for standing purposes.

There is an important, though often overlooked distinction, between statutory provisions that create rights and those that authorize causes of action. A federal law can, and often does, contain both. Sometimes, however, a federal law authorizes suits to enforce its provisions, but the underlying right is found to be missing. In *Lujan v. Defenders of Wildlife*, the plaintiffs sued under the federal Endangered Species Act to challenge a change in government policy with regard to the application of that statute.[36] The Act said that "any person may commence a civil suit" to enjoin a violation of its provisions.[37] The Supreme Court held that the plaintiffs lacked standing because they could not show that they personally were injured. In other words, this was a law that did not create a statutory right; it just authorized civil suits. To sue, the plaintiff would have to assert another injury apart from a claim that the Endangered Species Act was violated.

Another example of this is 42 U.S.C. § 1983, which authorizes civil suits for money damages or injunctive relief against those acting under color of state law for violations of the Constitution and laws of the United States. The statute creates a cause of action, but it does not create any rights.[38] Those come from the Constitution and other federal laws.

Alternatively, a law might create a right, but not a cause of action to enforce that right. The Federal Educational Records Privacy Act, according to the Supreme Court, is such a law.[39] It creates a right to privacy for students' educational records, but it does not authorize civil suits to enforce it. Many federal statutes take this approach, and the issue frequently arises as to whether a private right of action can be inferred from the statutory

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35 *Akins*, 524 U.S. at 21; *see* Cass R. Sunstein, *Informational Regulation and Informational Standing:* Akins *and Beyond*, 147 U. PA. L. REV. 613, 638–43 (1999) (assessing whether the Court's decision in *Akins* was correct and ultimately agreeing with the Court).

36 504 U.S. 555, 557–58 (1992). For an excellent analysis of the importance of this case, see Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992).

37 16 U.S.C. § 1540(g).

38 *See* Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 508 (1990) (citing 42 U.S.C. § 1983) (explaining that § 1983 is merely a cause of action and requiring plaintiff to show violation of an additional enforceable right).

39 *See* Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g (declaring certain "rights" of parents and students in the educational context); Gonzaga Univ. v. Doe, 536 U.S. 273, 279, 281 (2002) (holding that FERPA does not create any rights that can be enforced in court).

language.[40] The Supreme Court has been very reluctant to create causes of action for statutes that do not expressly include them.[41]

And then there are the many federal statutes that create both a right and authorize suits to enforce it. As explained earlier, the Freedom of Information Act is a paradigmatic example of this kind of statute. The statutes mentioned above in cases like *Trafficante*, *Havens*, and *Akins* are also of this sort. So, as discussed in the next section, is the Fair Credit Reporting Act, which was at focus in *TransUnion.* It is this myriad of federal laws—that create both legal rights and authorize suits for their enforcement—that the Court's decision addressed.

II
LIMITING STANDING TO ENFORCE FEDERAL STATUTES

The Fair Credit Reporting Act regulates the consumer reporting agencies that compile and disseminate personal information about consumers. The law requires that consumer reporting agencies "follow reasonable procedures to assure maximum possible accuracy" in consumer reports.[42] It provides that consumer reporting agencies must disclose to consumers all information in their file at the time of request. The Act also compels reporting agencies to "provide to a consumer, with each written disclosure by the agency to the consumer," a "summary of rights" prepared by the Consumer Financial Protection Bureau.[43] Importantly, the Act creates a cause of action for consumers to sue and recover damages for certain violations, establishing statutory rights and authorizing causes of action to sue for their infringement.[44]

The Court initially addressed standing under this law in *Spokeo, Inc. v. Robins.*[45] Spokeo owned and operated a website that provided in-depth reports containing personal information about individuals.[46] Thomas Robins alleged that his Spokeo profile was filled with inaccuracies, including about

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40 *See* CHEMERINSKY, *supra* note 16, at 432–42 (outlining some of the Supreme Court's jurisprudence in this area, and explicating the courts justifications for its various approaches).

41 *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (determining that there is no private right of action to enforce Title VI of the 1964 Civil Rights Act); Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (emphasizing that courts will create a private right of action only if Congress clearly indicated its desire to do so); *see also* Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1317 (1982) (criticizing the courts reluctance to create private rights of action to enforce federal statutes).

42 15 U.S.C. § 1681e(b).

43 *Id.* § 1681g(c)(2).

44 *Id.* §§ 1681n–1681p (creating a cause of action for consumers to sue offenders in any court of competent jurisdiction).

45 136 S. Ct. 1540 (2016). For an excellent analysis of this decision, see William Baude, *Standing in the Shadow of Congress*, 2016 SUP. CT. REV. 197.

46 *Spokeo*, 136 S. Ct. at 1544.

his employment, his marital status, and whether he had children. Robins sued Spokeo for violating the Fair Credit Reporting Act.[47] The law, among other things, authorizes victims of "willful[]" violations to recover statutory damages of "not less than $100 and not more than $1,000."[48]

The issue before the Court was whether Robins had standing to sue for Spokeo's violations of the Fair Credit Reporting Act. The Ninth Circuit held that Robins had standing because Congress created a right by statute, and the infringement of that statutory right was sufficient for standing.[49] But the Supreme Court, in a 6–2 decision, reversed and remanded the case.[50] Notably, the Court did not change the law as to Congress's powers to create rights that are the basis for standing, reaffirming that Congress can create rights whose infringement is sufficient for standing to sue in federal courts. The Court approvingly quoted Justice Kennedy's concurring opinion in *Lujan v. Defenders of Wildlife* that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."[51]

But the majority also held, in an opinion by Justice Alito, that in order to have an injury sufficient for standing it must be "particularized" and "concrete."[52] Such language is, of course, familiar, and has appeared in many Supreme Court standing decisions.[53] The difference here, though, is that never before had the Court treated these as two distinct requirements. The Court said that "[f]or an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way,'" and the Court found that Robins met this requirement.[54]

Even so, the Court concluded that a particularized injury was not enough by itself to confer standing. That injury must also be a "concrete harm," which the Court felt that the Ninth Circuit had not considered.[55] The issue for this case on remand, and for all other civil litigation in federal courts, is what it meant for an injury to be "concrete." The Court said:

> "[C]oncrete" injury must be "*de facto*"; that is, it must actually exist.

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47 *Id.* (citing Fair Credit Reporting Act of 1970 (FCRA), 15 U.S.C. §§ 1681–1681x).

48 15 U.S.C. § 1681n(a)(1)(A).

49 Robins v. Spokeo, Inc., 742 F.3d 409, 413 (9th Cir. 2014), *rev'd*, 136 S. Ct. 1540 (2016).

50 *Spokeo*, 136 S. Ct. at 1550.

51 *Id.* at 1549 (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring)).

52 *Id.* at 1548.

53 *E.g.*, City of Los Angeles v. Lyons, 461 U.S. 95, 101 (1983) ("Plaintiffs must demonstrate a 'personal stake in the outcome' in order to 'assure that concrete adverseness which sharpens the presentation of issues' necessary for the resolution of constitutional questions." (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)); Allen v. Wright, 468 U.S. 737, 756, 763 (1984) (discussing the "concrete injury" requirement); Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) (requiring a "concrete and particularized" injury); Hollingsworth v. Perry, 570 U.S. 693, 704 (2013) (same).

54 *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560 n.1).

55 *Id.* at 1550.

> When we have used the adjective "concrete," we have meant to convey the usual meaning of the term—"real," and not "abstract." Concreteness, therefore, is quite different from particularization. "Concrete" is not, however, necessarily synonymous with "tangible." Although tangible injuries are perhaps easier to recognize, we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete.[56]

The Court said that in deciding whether an intangible injury is concrete, "both history and the judgment of Congress play important roles," stressing that the origins of the case-or-controversy standing requirement are "grounded in historical practice."[57] An important consideration in this analysis, therefore, is "whether an 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."[58]

This definition of "concrete" gives little guidance to lower courts. Despite the Court's treatment of "particularized" and "concrete" as distinct requirements for there to be an injury sufficient for standing, the difference between these two requirements is unclear. Lower courts and scholars—as well as my students—have been perplexed by Justice Alito's definition of concrete.[59] Additionally, what does it mean to say that concrete means "'real,' and not 'abstract'"?[60] Moreover, the Court for the first time suggested, without elaboration, that it matters whether the right in question has "a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[61] But the Court did not elaborate what this means or how it is to be determined. Nor did it explain why Congress is limited in creating rights to just those that previously have traditionally been recognized in English or American courts.

The Court returned to this definition of "concrete" as it took on the issue of standing under the Fair Credit Reporting Act in *TransUnion*.[62] TransUnion is a credit reporting agency that compiles personal and financial information about individuals and creates consumer reports that are sold to entities that request information about the credit of consumers.[63] In 2002, TransUnion introduced an add-on product called OFAC Name Screen Alert. When a business opted into the OFAC alert, TransUnion would conduct its credit check and use third-party software to compare a consumer's name

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56 *Id.* at 1548–49 (citations omitted).

57 *Id.* at 1549.

58 *Id.*

59 Professor Baude was similarly perplexed and said: "But as to what more, exactly, was required, the Court was somewhat mysterious." Baude, *supra* note 45, at 215.

60 Rachel Bayefsky, *Constitutional Injury and Tangibility*, 59 WM. & MARY L. REV. 2285, 2299–300 (2018) (criticizing the "concreteness" requirement in *Spokeo v. Robins*).

61 *Spokeo*, 136 S. Ct. at 1549.

62 TransUnion v. Ramirez, 141 S. Ct. 2190 (2021).

63 *Id.* at 2200–02 (discussing the facts).

against a list maintained by the United States Department of Treasury's Office of Foreign Assets Control (OFAC). This list contained the OFAC's known terrorists, drug traffickers, and other serious criminals. If a consumer's first and last name matched a first and last name of someone on OFAC's list, then TransUnion would place an alert on the report to indicate a consumer was a potential "match" to an OFAC name. TransUnion at the time did not compare any data other than first and last names.

Sergio Ramirez learned the hard way that he was one of these individuals. Ramirez visited a car dealership in 2013 to purchase a vehicle. His credit check at the dealer returned an OFAC advisor alert. Due to a match on the terror list, the dealer refused to sell to Ramirez. Ramirez then called TransUnion to request a copy of his credit file, which was mailed to him. However, the first mailing did not include the OFAC alert, and the second mailing with the OFAC alert did not include a summary of his rights.

A class action suit was brought on behalf of 8,185 individuals with OFAC alerts in their credit files, including Ramirez, against TransUnion under the Fair Credit Reporting Act for failing to use reasonable procedures to ensure their credit files were accurate.[64] The class claimed reputational harm based on these inaccurate credit files, as well as two claims relating to formatting defects in mailings sent by TransUnion to the class members. Prior to trial, a subgroup of the class had their misleading reports with OFAC alerts provided to third parties, while the remainder of the class did not have their erroneous files disseminated to third parties during that time period.

The Supreme Court, in a 5–4 decision, ruled that this latter group lacked standing to sue, notwithstanding that the federal statute created specific rights that were violated and expressly authorized suits.[65] Justice Kavanaugh, joined in the majority by Chief Justice Roberts and Justices Alito, Gorsuch, and Barrett, reiterated that, to have Article III standing to sue in federal court, plaintiffs must demonstrate that they suffered a "concrete" harm.[66] The Court again emphasized that a concrete harm is assessed based on whether it has a "close relationship" to a harm traditionally recognized as providing a basis for a lawsuit in American courts, declaring:

> What makes a harm concrete for purposes of Article III? As a general matter, the Court has explained that "history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider." And with respect to the concrete-harm requirement in particular, this Court's opinion in *Spokeo v. Robins* indicated that courts should assess whether the alleged injury to the plaintiff has a "close relationship" to a harm "traditionally" recognized as providing a basis for a

64 *Id.* at 2202.
65 *Id.* at 2214.
66 *Id.*

> lawsuit in American courts. *That inquiry asks whether plaintiffs have identified a close historical or common-law analogue for their asserted injury*.[67]

The Court then spoke of the role of Congress in creating rights that are the basis for standing:

> In determining whether a harm is sufficiently concrete to qualify as an injury in fact, the Court in *Spokeo* said that Congress's views may be "instructive." . . . But even though "Congress may 'elevate' harms that 'exist' in the real world before Congress recognized them to actionable legal status, it may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is." Importantly, this Court has rejected the proposition that "a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right."[68]

Justice Kavanaugh's opinion defends the view that it is for the courts, not Congress, to decide if a statute confers a right sufficient for standing, noting that "the concrete-harm requirement is essential to the Constitution's separation of powers," even if "it would be more efficient or convenient to simply say that a statutory violation and a cause of action suffice to afford a plaintiff standing.[69] Ultimately, the majority affirms that the Constitution dictates the need for such a stringent approach to standing, not whether such an approach is "efficient, convenient, [or] useful."[70]

The Court applied this standard to find that the class members whose reports were disseminated to third parties suffered a concrete injury in fact under Article III,[71] analogizing the reputational harm suffered to that of defamation, a cause of action recognized at common law.[72] But the other class members, the Court found, did not have standing because the credit reporting agencies did not disseminate their information.[73] In other words, even though the Fair Credit Reporting Act created a right and that right was infringed, that was not sufficient for standing. And, as Justice Kavanaugh concluded,

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67 *Id.* at 2204 (emphasis added) (citations omitted) (first quoting Sprint Comms. Co. v. APCC Servs., Inc., 554 U.S. 269, 274 (2008); and then quoting Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016)).

68 *Id.* at 2204–05 (citations omitted) (first quoting *Spokeo*, 136 S. Ct. at 1549; then quoting Hagy v. Demers & Adams, 882 F.3d 616, 622 (6th Cir. 2018); and then quoting *Spokeo*, 136 S. Ct. at 1549).

69 *Id.* at 2207.

70 *Id.* ("But as the Court has often stated, 'the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.'" (quoting INS v. Chadha, 462 U.S. 919, 944 (1983))).

71 *Id.* at 2209.

72 *Id.* at 2208.

73 *Id.* at 2212–13.

"[n]o concrete harm, no standing."[74] Nor was the Court persuaded by the possible future harms that could arise from having inaccurate information in a credit report.[75]

Justice Thomas wrote a dissent joined by Justices Breyer, Sotomayor, and Kagan—a combination of justices that has not been seen very often—arguing that the violation of a statutory right is sufficient for standing:

> "[S]tatutes creat[e] legal rights, the invasion of which creates standing." And this understanding accords proper respect for the power of Congress and other legislatures to define legal rights. . . . In light of the history, tradition, and common practice, our test should be clear: So long as 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.[76]

Thomas further noted that "[n]ever before has this Court declared that legal injury is *inherently* insufficient to support standing. And never before has this Court declared that legislatures are constitutionally precluded from creating legal rights enforceable in federal court if those rights deviate too far from their common-law roots."[77] In the eyes of Justice Thomas, the majority seems to ask, "[w]ho could possibly think that a person is harmed [in this situation]?" "The answer," the dissent notes, "is, of course, legion: Congress, the President, the jury, the District Court, the Ninth Circuit, and four Members of this Court."[78]

Justice Kagan wrote a separate dissent, joined by Justices Breyer and Sotomayor, which echoed the key point made by Justice Thomas: Never before had the Court limited standing to sue to enforce a statutory right based on whether it is one that existed at common law. "The Court here transforms standing law," she chastised, "from a doctrine of judicial modesty into a tool of judicial aggrandizement. It holds, for the first time, that a specific class of plaintiffs whom Congress allowed to bring a lawsuit cannot do so under Article III."[79]

III
THE IMPLICATIONS

TransUnion holds that it is not enough for a plaintiff to sue to enforce a right created by a federal statute that expressly authorizes a right of action to sue in federal court. The Court articulates criteria as to when a statute

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74 *Id.* at 2214.

75 *Id.* at 2211.

76 *Id.* at 2218 (Thomas, J., dissenting) (citation omitted) (quoting Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982)).

77 *Id.* at 2221.

78 *Id.* at 2224–25.

79 *Id.* at 2225 (Kagan, J., dissenting).

creating a right can be a basis for standing: "[T]he alleged injury to the plaintiff" must have "a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts. That inquiry asks whether plaintiffs have identified a close historical or common-law analogue for their asserted injury."[80]

If read literally, the opinion holds that statutes can create rights which give rise to standing only if there was a historical or common law basis for recognizing the injury. I assume that if the plaintiff has another injury—such as a monetary loss—that would provide a sufficient independent basis for standing to sue to enforce a federal law. But where the only injury is the violation of a statutory right, standing will exist under *TransUnion* only if it is deemed to be a right that was protected historically or at common law.[81] It is hard to overstate how dramatic this could be in limiting the ability to sue under federal laws if the Supreme Court follows this in the future. In the Introduction, I mentioned the examples of the Freedom of Information Act and the Family and Medical Leave Act as statutes that create rights which had no historical or common-law analogue.[82]

To further illustrate the implications of *TransUnion*, consider the ramifications for civil rights laws. As mentioned earlier, in *Trafficante v. Metropolitan Life Insurance* and *Havens Realty Corp. v. Coleman*, the Court allowed standing to enforce the Fair Housing Act based on its view that Congress created a right to interracial association.[83] But there was no such common-law right and none historically has been recognized. Nor was there an economic loss to the plaintiffs or any other injury that could be a basis for standing. It is hard to see how *Trafficante* and *Havens* remain good law after *TransUnion*.

To pick a more dramatic example, Title II of the Civil Rights Act of 1964[84] prohibits places of public accommodation, hotels and restaurants, from discriminating on the basis of race.[85] There was no common-law prohibition against such racial discrimination nor, sadly, was there any such tradition before the law was adopted. The same could be said of Title VII, which prohibits employment discrimination based on race, sex, or religion. Perhaps

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80 *Id.* at 2204 (majority opinion) (citation omitted) (quoting Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016)).

81 *Id.*

82 *See supra* text accompanying notes 7–11.

83 Trafficante v. Metro. Life Ins., 409 U.S. 205, 209–10 (1972); Havens Realty Corp. v. Coleman, 455 U.S. 363, 376, 382 (1982); *see also* Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 103–04 (1979).

84 Civil Rights Act of 1964, 42 U.S.C. § 2000a.

85 *See* Heart of Atlanta Motel v. United States, 379 U.S. 241, 247 (1964) (upholding application of Section II of the 1964 Civil Rights Act in places of public accommodation); Katzenbach v. McClung, 379 U.S. 294, 298 (1964) (upholding Section II of the 1964 Civil Rights Act).

the Court will draw a distinction and allow suits under statutes when there also is an alleged economic harm, which generally would be present in claims for employment discrimination. Even this, though, is not clear from the Court's opinion in *TransUnion*. But where the injury is a dignitary one, such as often would be the case when there is discrimination by places or public accommodation, or for denial of a right to interracial association, *TransUnion* creates doubts as to whether standing will be allowed. This would undermine the enforcement of many federal civil rights laws because they all recognize harms that tragically were not protected under the common law or historically.

Another example of a civil-rights statute where enforcement would be in doubt is the Religious Freedom Restoration Act (RFRA).[86] Prior to RFRA's passage, in *Employment Division v. Smith*, the Court held that the Free Exercise Clause of the First Amendment could not be used to challenge a neutral law of general applicability.[87] Justice Scalia's majority opinion stressed that there was no history of providing constitutional exceptions to general laws on account of religious beliefs.[88] Congress adopted RFRA to override *Employment Division v. Smith* and to create a statutory right to strict scrutiny when the government substantially burdens religion.[89] In *City of Boerne v. Flores*, the Supreme Court held that the Act was unconstitutional as applied to state and local governments because it created a new right that did not exist under the Constitution, and that expanding the scope of rights was beyond Congress's powers under section five of the Fourteenth Amendment.[90] RFRA then, by the Court's analysis, created a statutory right that did not exist under the Constitution, historically, or at common law. *City of Boerne* declared RFRA unconstitutional only as applied to state and local governments.[91] The Court thus far has assumed that the Act created a statutory right sufficient for standing for suits against the federal government and has upheld claims under it.[92] Yet under the Court's approach in *TransUnion*, standing to enforce this law is questionable.

The implications of *TransUnion* apply to a myriad of federal statutes. For example, what about the provisions of the Fair Labor Standards Act that

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86 42 U.S.C. §§ 2000bb–2200bb-4.

87 494 U.S. 872, 879 (1990).

88 *Id.* at 878–79.

89 *See* 42 U.S.C. § 2000bb(a)(4)–(5) (noting the findings that led Congress to enact RFRA).

90 *See* 521 U.S. 507, 511, 536 (1997) (drawing a distinction between enforcing a constitutional right and changing one and subsequently holding that Congress exceeded its authority under the Fourteenth Amendment when it enacted RFRA).

91 *See id.* at 536 ("RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.").

92 *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 690–91 (2014) (declaring the contraceptive mandate under the Affordable Care Act to violate RFRA for employers in close corporations who have a religious objection to contraception).

limit the number of hours a child can work?[93] Unfortunately, there was no limit on the use of child labor historically or at common law.[94] Of course, the minimum wage provisions of the Fair Labor Standards Act also create a right by statute that did not exist historically or at common law. The Court, though, might say those provisions are different because infringements involve a monetary harm. But the prohibitions on use of child labor are not about remedying an economic harm and they had no "close analogue" historically or at common law.

Or consider the example of suits under the Administrative Procedures Act (APA), such as to enforce the requirements for notice-and-comment rulemaking. In many APA cases, the Court has allowed litigants to sue agencies without raising any concerns about standing.[95] But now it would seem that the plaintiff also must show a "concrete injury," one that is closely analogous to a harm recognized at common law or historically. Unless the plaintiff can show an economic injury, there would not be standing to bring claims challenging violations of the APA.

There are multiple examples of statutes where federal courts have allowed standing to enforce rights created by federal statutes that otherwise would not exist. Here are a few illustrations where lower federal courts have allowed standing based solely on the violation of rights created by statute:

- A defendant's failure to give recruited workers written notice of the existence of a strike is an injury to a right created by the Farm Labor Contractor Registration Act, which therefore confers standing to sue in court under prior precedent.[96]
- Employment "testers" have standing to sue an employer for racial discrimination under Title VII because Congress, by statute, created a right to be free from racial discriminatory practices in employment regardless of whether there was a bone fide interest in employment.[97]
- Congress, through 15 U.S.C. § 78p, gave securities issuers a legally protected interest in proscribed short-swing profits; an investor's ongoing financial interest in recovering short-swing profits pursuant to § 78p(b) was enough to satisfy injury-in-fact for standing. This was

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93 *See* SARAH A. DONOVAN & JON O. SHIMABUKURO, CONG. RSCH. SERV., R44548, THE FAIR LABOR STANDARDS ACT (FLSA) CHILD LABOR PROVISIONS 1 (2016), https://fas.org/sgp/crs/misc/R44548.pdf (describing the restrictions on child labor in the FLSA).

94 *See* RUSSELL FREEDMAN, KIDS AT WORK: LEWIS HINE AND THE CRUSADE AGAINST CHILD LABOR 1–2 (1994) (describing two million children under sixteen working in the fields and in manufacturing).

95 *See, e.g.*, Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199 (2015) (allowing suit challenging whether the Department of Labor violated the APA when it issued an interpretive rule without notice-and-comment procedures); Long Island Care at Home v. Coke, 551 U.S. 158 (2007) (allowing suit challenging whether the Department of Labor enacted a rule following proper procedures under the APA).

96 Alvarez v. Longboy, 697 F.2d 1333, 1338 (9th Cir. 1983).

97 Kyles v. J.K. Guardian Sec. Servs. Inc., 222 F.3d 289, 294, 298 (7th Cir. 2000).

possible because Congress can create legally protected rights by statute, the invasion of which creates standing, even though no injury would exist without the statute.[98]

- Plaintiff sued a fitness company under the Telephone Consumer Protection Act for sending a prerecorded call and message to her cellular phone in violation of the Act. The court found there was standing because Congress, by statute, created a cause of action and plaintiff suffered a concrete injury, the call and message, which Congress specifically identified as such.[99]
- Plaintiff brought suit against a retailer for violating the Fair and Accurate Credit Transactions Act of 2003 (FACTA), alleging the retailer gave her a receipt with four digits of her credit card and the card's expiration date in violation of the FACTA. The court held there was standing to sue because the plaintiff alleged an injury that had been legally created by statute. Congress, by passing FACTA, created a legally protected interest in having certain credit card information omitted from receipts.[100]
- Class action plaintiffs sued Dish Network for violating the Telephone Consumer Protection Act (TCPA) by contacting persons on the Do-Not-Call registry. The court found the class members all met Article III standing requirements. Because the injury Congress identified in the TCPA—persistent unwanted calls to personal telephone numbers—was meant to protect particular and concrete privacy interests of individuals, it met the demands of Article III standing. The plaintiff's alleged injury under this provision conferred standing.[101]

There are countless examples of federal court decisions allowing standing based on federal statutes creating rights where there is no common-law or historical analogue of such rights. Whether the Court meant to call into question the enforcement of all of these laws is unclear, but there is no doubt that the language of Justice Kavanaugh's majority opinion does just that.

IV

THE FUNDAMENTAL FLAWS WITH THE COURT'S DECISION IN *TRANSUNION*

The fundamental flaw in the Court's approach in *TransUnion* is that Congress, by statute, should be able to create rights sufficient for standing and that are enforceable in federal courts. Such an understanding had been the law for decades before this decision and, as Justice Thomas pointed out in dissent, never before had the Court limited Congress in this way.[102] No

98 Donoghue v. Bulldog Invs. Gen. P'ship, 696 F.3d 170, 175, 179 (2d Cir. 2012).
99 Susinno v. Work Out World Inc., 862 F.3d 346, 351 (3d Cir. 2017).
100 Korman v. Walking Co., 503 F. Supp. 2d 755, 759 (E.D. Pa. 2007).
101 Krakauer v. Dish Network, L.L.C., 925 F.3d 643, 652–53 (4th Cir. 2019).
102 TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2220–21 (2021) (Thomas, J., dissenting).

one ever has disputed that it is within the power of Congress, in exercising its authority under the Constitution, to create rights by statute. Indeed, the Ninth Amendment says that the rights in the Constitution are not exhaustive, clearly implying a legislative power to create rights.[103]

There is no reason why Congress in creating legal rights should be limited to what was regarded as an injury at common law or historically. Today, we recognize many things as serious harms that would not have been thought of as such then. Discrimination based on race, sex, religion, or sexual orientation are injuries that were not recognized historically or at common law.[104] Environmental harms are seen as injuries in ways that they were not a century ago, let alone at common law. Or to return to the example from the prior Part, at common law there was no restriction on the use of child labor.[105] Congress should not be limited in its ability to recognize rights and to have them be enforceable just because they did not exist in English or American law in 1787.

There are many other ways in which the Court's reasoning was flawed in *TransUnion*. First, the Court offers no reason why the only harms that satisfy the injury requirement are those that had been recognized historically or at common law. Congress has created enforceable legal rights since the earliest days of American history. Justice Thomas gives the example of intellectual property laws: "The First Congress enacted a law defining copyrights and gave copyright holders the right to sue infringing persons in order to recover statutory damages, even if the holder 'could not show monetary loss.'"[106] In fact, as Justice Thomas remarks, "courts for centuries held that injury in law to a private right was enough to create a case or controversy."[107]

The focus on the common law in defining the rights that can be enforced by statute is even more perplexing when one realizes that the idea of standing as a constitutional limit on the federal judicial power was not articulated until the twentieth century.[108] And the injury requirement did not appear in

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103 *See* U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

104 *See* Romer v. Evans, 517 U.S. 620, 627–28 (1996) ("The common-law rules, however, proved insufficient in many instances, and it was settled early that the Fourteenth Amendment did not give Congress a general power to prohibit discrimination in public accommodations. In consequence, most States have chosen to counter discrimination by enacting detailed statutory schemes." (citation omitted)).

105 *Cf.* Hammer v. Dagenhart, 247 U.S. 251, 275 (1918) (noting that states could "limit[] the right to . . . employ children" via statute), *overruled on other grounds by* United States v. Darby, 312 U.S. 100 (1941).

106 *TransUnion*, 141 S. Ct. at 2217 (Thomas, J., dissenting) (quoting Muransky v. Godiva Chocolatier, Inc., 979 F.3d 917, 972 (11th Cir. 2020) (Jordan, J., dissenting)).

107 *Id.* at 2218.

108 *Frothingham v. Mellon*, 262 U.S. 447 (1923), is generally regarded as the Court's first decision about standing, CHEMERINSKY, *supra* note 16, at 100. For an argument that standing has

Supreme Court decisions until the early 1970s. As Professor Hessick explained:

> The absence of any mention of an injury-in-fact requirement for over one hundred years after the adoption of the Constitution suggests that the requirement is not essential to the exercise of the federal judicial power. If injury in fact is fundamental to ensuring the balance of power, one would expect the Court to have adopted the injury-in-fact requirement long before 1970.[109]

The Court's approach, then, requires looking at common law and history to answer a question that did not even exist when that law developed.

Second, the Supreme Court has long been willing to recognize injuries as sufficient for standing even though they were not found in the Constitution or a statute or at common law. *TransUnion* is inconsistent with these decisions and, if taken seriously by the Court, calls them into question. In *Lujan*, for example, the Court conceded that the "desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purposes of standing."[110] The Court has consistently recognized that aesthetic harms are sufficient for standing.[111] In *Bennett v. Spear*, the Court held that possible diminution of water allocations as a result of application of the Endangered Species Act was a sufficient injury for standing.[112] In *Massachusetts v. EPA*, the Court ruled that the harms from global warming are sufficient to permit a state to sue the federal Environmental Protection Agency for failure to promulgate regulations to deal with greenhouse gas emissions.[113] The Court has held that the loss of the right to sue in the forum of one's choice is an injury sufficient to convey standing.[114]

In *Clinton v. City of New York*, an important decision that declared the line-item veto unconstitutional, the Court found that a change in market

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a longer historical pedigree, albeit under a different doctrine, see Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689 (2004) (defending the historical basis of standing).

109 Hessick, *supra* note 19, at 299.

110 Lujan v. Defs. of Wildlife, 504 U.S. 555, 562–63 (1992).

111 *See, e.g.*, United States v. Students Challenging Regul. Agency Procs. (SCRAP), 412 U.S. 669, 686 (1973) (noting that injury-in-fact is not limited to economic harms and acknowledging that aesthetic well-being can be deserving of legal protection through the judicial process). In theory, the Court might analogize environmental harms to the common law of nuisance protected under property law, but it has not done so and should not need to in order to recognize the injury.

112 520 U.S. 154, 167–68 (1997).

113 549 U.S. 497, 521–23 (2007).

114 *See* Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund, 500 U.S. 72, 77 (1991) (allowing plaintiffs standing to challenge removal of a case from state to federal court, even though plaintiffs lacked standing to challenge the government's action, which was the basis for the lawsuit); *see also* Asarco v. Kadish, 490 U.S. 605, 617–18 (1989) (holding that a state court decision can create an injury, and therefore be the basis for standing, even if plaintiffs initially would have lacked standing to sue in federal court).

conditions was a sufficient injury to meet the standing requirement.[115] President Clinton used the line-item veto to cancel a tax provision that would have benefited sellers in a transaction, but not a cooperative that was purchasing their company. Nonetheless, the Court concluded that the cooperative had suffered an injury because of the change in market conditions.

More recently, in *Trump v. Hawaii*, the Court allowed standing to challenge President Trump's "travel ban"—his exclusion of immigration from designated countries—for family members who said that they were being kept from being with relatives.[116] The Court did not rule on the plaintiffs' claim of a dignitary injury based on President Trump's avowed desire to ban immigration by Muslims, but instead focused on the real-world injury of family separation:

> The three individual plaintiffs assert [a] concrete injury: the alleged real-world effect that the Proclamation has had in keeping them separated from certain relatives who seek to enter the country. We agree that a person's interest in being united with his relatives is sufficiently concrete and particularized to form the basis of an Article III injury in fact.[117]

None of these can be said to be injuries recognized at common law or historically. This is significant because it shows that the Court's conclusion in *TransUnion*—that injuries must be recognized at common law or historically—is inconsistent with a large body of cases. It shows how radical it would be to limit injuries in the way suggested by Justice Kavanaugh's opinion. And if the Court were truly to follow what it said in *TransUnion*, it would put all of these cases in doubt.

Third, allowing the Court to pick and choose which rights created by statute should be regarded as sufficiently important is undesirable. Justice Kavanaugh's opinion in *TransUnion* suggests that this might be what the Court is going to do. Justice Kavanaugh said that Congress "may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is."[118] But how is the Court to decide which rights created by Congress are sufficiently important so that their violation meets the injury requirement and which are not "remotely harmful"? In the context of *TransUnion*, being falsely labeled a terrorist and having credit reporting agencies not follow the procedures mandated by Congress certainly seems more than "remotely harmful."[119] Congress, in adopting the Fair Credit Reporting Act, thought that false

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115 524 U.S. 417, 433 (1998).

116 138 S. Ct. 2392, 2416 (2018).

117 *Id.* (citations omitted).

118 TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2205 (2021).

119 *See id.* at 2224–25 (Thomas, J., dissenting) (noting that "Congress, the President, the jury, the District Court, the Ninth Circuit, and four members of this Court" believe that TransUnion harmed plaintiffs).

information in credit reports is harmful and thus created statutory rights and protections. It is troubling for the Court to pick and choose among rights created by Congress based on the justices' subjective preferences about what they care about. It is especially disturbing when this is done by justices who in their constitutional jurisprudence stress wanting a method of interpretation that seeks to minimize judicial discretion.[120]

Finally, as a matter of separation of powers, Congress should be able to create rights whose infringement is an injury sufficient to confer standing. The Court in *TransUnion* began with an oft-uttered statement in its opinions: "The 'law of Art. III standing is built on a single basic idea—the idea of separation of powers.'"[121] But how does limiting Congress's ability to create judicially enforceable rights advance separation of powers? Quite the contrary, the Court is undermining separation of powers by restricting the powers of Congress to create legally enforceable rights.

The Court offers little explanation for how its ruling advances separation of powers beyond a claim that limiting standing inherently does this. Nor is it intuitive why restricting the power of Congress and the President, who signed the Fair Credit Reporting Act into law, enhances separation of powers. Separation of powers is about each branch performing its constitutional functions. The view of Justice Thomas and the dissenters is that it is Congress's role, by statute, to be able to create rights the infringement of which is sufficient for standing.[122] From this perspective, it is the Court that is violating its command that separation of powers doctrine define the scope of standing in federal court.

The Court's unstated assumption is that restricting standing inherently serves separation of powers by limiting the judicial role. In a dissenting opinion urging a narrow view of who has standing to bring a case to federal court, Justice Scalia wrote that the "'law of Art. III standing is built on a single basic idea—the idea of separation of powers.' It keeps us minding our own

120 *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1822–23 (2020) (Kavanaugh, J., dissenting) ("Title VII is not a general grant of authority for judges to fashion an evolving common law . . . . And under the separation of powers, Congress—not the courts—possesses the authority to amend or update the law . . . ."); Dep't of Com. v. New York, 139 S. Ct. 2551, 2578, 2583–84 (2019) (Thomas, J., concurring in part and dissenting in part) ("The Court . . . offends the presumption of regularity we owe the Executive. . . . The Court's decision could even implicate separation-of-powers concerns insofar as it enables judicial interference with the enforcement of the laws."); Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1932 (Alito, J., concurring in part and dissenting in part) ("DACA presents a delicate political issue, but that is not our business.").

121 *TransUnion*, 141 S. Ct. at 2203 (majority opinion) (quoting Raines v. Byrd, 521 U.S. 811, 820 (1997)).

122 *See id.* at 2218–19 (Thomas, J., dissenting) (noting that the *TransUnion* plaintiffs have a sufficient injury to sue in federal court because they fall within the scope of the private right of action created by Congress under FCRA).

business."[123]

But such an argument begs the question of the appropriate role of the federal courts. Courts, of course, should "mind their own business." That, though, requires defining what their business is. The proper role of the federal courts has to be determined based on the purposes the federal judiciary should serve. If the business of the federal courts is enforcing the Constitution and federal statutes, that is what the doctrines defining federal court jurisdiction should facilitate. One cannot assume, as Justice Scalia does, that separation of powers is best served by restricting the courts' role. Less judicial review is not inherently better from a separation-of-powers perspective. Doctrines that facilitate the courts' function of enforcing federal laws advance the federal courts' proper role in the system of separation of powers. Doctrines that limit this authority then undermine separation of powers. If one starts with the premise that Congress has the constitutional power to create legally enforceable rights—which seems unassailable—then the Supreme Court's refusing to enforce them greatly undermines, not advances, separation of powers.

CONCLUSION

Perhaps the Court did not really mean what it said in *TransUnion* that federal laws are enforceable only if they protect a right that is closely analogous to one protected historically or at common law. But until the Court clarifies this, defendants sued for violating a myriad of federal laws have every reason to argue that the plaintiff lacks standing.

In light of reliance interests in the statutory rights which have originated entire lines of jurisprudence, and of the separation of powers concerns in having the judiciary limit the power of Congress to confer rights of action in the name of judicial restraint, the Court should abandon the path it began in *Spokeo* and embraced in *TransUnion*. It should instead return to what the law previously had been: Congress, by statute, may create rights whose infringement is a sufficient harm for standing. Failing this, the Court should take a very broad perspective of what laws meet its criteria and at the very least create a strong presumption in favor of allowing federal court enforcement of federal laws. If nothing else, the Court, and lower courts, should see the holding of the case as being narrow and denying standing only when the claim presented, in the words of Justice Kavanaugh's majority opinion, is not "remotely harmful."

123 Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2695 (2015) (Scalia, J., dissenting) (citation omitted) (quoting Allen v. Wright, 468 U.S. 737, 752 (1984)).