TRANSUNION'S TRANSFORMATION OF ARTICLE III STANDING AND THE IMPLICATIONS POST-*DOBBS*

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ABSTRACT

Over the past half-century, the Supreme Court has engaged in a trend of inserting new requirements into standing doctrine, the constitutional doctrine limiting federal court jurisdiction. As a result, fewer and fewer plaintiffs are able to recover for injuries suffered. Through its decision in *TransUnion LLC v. Ramirez*, the Supreme Court further narrowed standing doctrine by preventing individuals from bringing suit in federal court to enforce rights created by Congress if the rights deviate too far from those traditionally recognized as providing the basis for a lawsuit. This Comment explores the consequences of *TransUnion* through the lens of the rights impacted by *Dobbs v. Jackson Women's Health Organization* and suggests an avenue through which Congress can combat the impingement on its power to recognize new rights and injuries.

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INTRODUCTION

Article III of the Constitution of the United States limits the jurisdiction of the federal courts to lawsuits that constitute "cases" and "controversies."[1] Based on these words, the Supreme Court created standing doctrine as a tool for determining the constitutionality of adjudicating lawsuits brought before federal courts.[2] While the Founders established the boundary for the federal judiciary's power in the "cases" and "controversies" language, the Supreme Court's introduction of standing doctrine as an enforcement mechanism for the constitutional limitation on judicial power lagged behind by nearly a century and a half.[3] Over the past half-century, the Supreme Court has engaged in a trend of imposing new requirements that narrow standing doctrine, and thus, permit fewer and fewer plaintiffs to recover for injuries suffered.[4]

TransUnion LLC v. Ramirez[5] is the latest example of the Supreme Court tightening standing doctrine. TransUnion, a credit reporting agency, "maintains a list of 'specially designated nationals' who threaten America's national security" and puts alerts on the credit reports of consumers whose names potentially match a name on the list.[6] Sergio Ramirez discovered his credit report contained an alert when he attempted to purchase a car from a Nissan dealership and a salesman told him that "Nissan would not sell the car to him because his name was on a 'terrorist list.'"[7] The Fair Credit Reporting Act ("FCRA") requires credit reporting agencies, like TransUnion, to "'follow reasonable procedures to assure maximum possible accuracy' in consumer reports" and provides consumers with a private right of action to sue "[a]ny person who willfully fails to comply with any" FCRA requirement.[8] Thus, Ramirez sued on the private right of action provided by FCRA and alleged that, among other violations, TransUnion "failed to use reasonable procedures to ensure the accuracy of [his] credit files."[9]

1. U.S. CONST. art. III, § 2, cl. 1.
2. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).
3. *See* Massachusetts v. Mellon, 262 U.S. 447 (1923).
4. *See, e.g., Lujan,* 504 U.S. at 555; Spokeo, Inc. v. Robins, 578 U.S. 330 (2016).
5. TransUnion LLC v. Ramirez*,* 141 S. Ct. 2190 (2021).
6. *Id.* at 2201.
7. *Id.*
8. *Id.* at 2201–02.
9. *Id.* at 2200.

Ramirez certified a class of 8,185 members whose credit files wrongfully contained a national security threat alert.[10] However, only 1,853 class members could demonstrate TransUnion had distributed their misleading credit reports to third-party businesses during the period of time relevant for the class action lawsuit.[11] After the District Court found all class members had Article III standing, the jury returned a verdict for the plaintiffs and awarded more than $60 million in damages.[12] The U.S. Court of Appeals for the Ninth Circuit affirmed the District Court's ruling and approved a damages award of approximately $40 million.[13] The Supreme Court reversed the judgment of the Ninth Circuit and held that only the 1,853 class members who could demonstrate the distribution of their misleading credit reports to third party businesses "ha[d] demonstrated concrete reputational harm and thus have Article III standing to sue on the reasonable-procedures claim."[14]

Part I of this comment discusses the historical development of standing doctrine that led to the *TransUnion* decision, the drastic doctrinal changes resulting from the *TransUnion* decision, and how *TransUnion* interacts with other areas of the law. *Lujan v. Defenders of Wildlife* solidified the three elements of standing (injury, traceability, and redressability)[15] and *Spokeo, Inc. v. Robins* significantly limited the types of injuries the Court will recognize.[16] In *TransUnion*, the Court further narrowed the injury element of standing doctrine and violated the separation of powers principle in the process by holding that the judiciary, rather than the legislature, shall ultimately determine which injuries are recoverable.[17]

Part II of this comment critiques the flawed reasoning the Court utilized to reach its decision in *TransUnion*, analyzes the impact of the decision, and proposes a course of action for Congress to take in response. In addition to incongruously invoking the separation of powers principle to justify

10. *Id.* at 2202.
11. *Id*. at 2202.
12. *Id.* at 2202.
13. *Id.* at 2200.
14. *Id.* at 2200.
15. *See* Lujan v. Defs. Of Wildlife*,* 504 U.S 555, 560–61 (1992).
16. Spokeo, Inc. v. Robins, 578 U.S. 330, 339–41 (2016).
17. *See TransUnion*, 141 S. Ct. at 2210–13. *See also* Daniel J. Solove & Danielle Keats Citron, Standing and Privacy Harms: A Critique of *TransUnion v. Ramirez*, 101 B.U. L. REV. ONLINE 62, 63 (2021) ("the Court's rejection of legislative recognition of harm in statutes is a profound usurpation of legislative power.").

impinging upon legislative power,[18] the Court also employed an example intended to explain the decision that, upon closer examination, demonstrates its impracticability. Part II also explains the consequences of *TransUnion* through the example of the rights impacted by *Dobbs v. Jackson Women's Health Organization* and provides an avenue through which Congress can combat the limitation on its power to recognize new rights and injuries.

I. HISTORY

A. Lujan v. Defenders of Wildlife

The Supreme Court slowly developed the elements of standing doctrine on an ad-hoc basis,[19] which Justice Scalia's majority opinion compiled into a three-part test in *Lujan v. Defenders. of Wildlife*.[20] The first element, injury in fact, requires that the plaintiff suffered an injury which is "(a) concrete and particularized . . . and (b) actual or imminent, not 'conjectural' or hypothetical.'"[21] The second and third elements require the injury to be "fairly trace[able] to the challenged action of the defendant," and likely to be "redressed by a favorable decision."[22] Although these elements cannot be found in the Constitution, the Court derived them from the Article III cases and controversies requirement, and thus, refers to them as the constitutional elements which the plaintiff bears the burden of proving.[23]

Lujan reshaped standing doctrine not only by establishing the constitutional elements of standing, but also by "invalidat[ing] an Act of Congress on the ground that it unconstitutionally conferred standing upon someone who did not meet the requisite injury requirements" for the first time.[24] Before *Lujan*, the Court recognized the question of whether the plaintiff "is a 'proper party to request an adjudication of a particular issue'"

18. *See id.* at 70 ("Ironically, the Court aggrandizes the power of the Judiciary in the name of 'separation of powers' and the standing doctrine, which is designed to limit the power of the courts.").

19. *See, e.g.,* Ass'n of Data Processing Serv. Org., Inc. v. Camp, 397 U.S. 150 (1970) (Supreme Court established the injury in fact element of standing doctrine).

20. *See Lujan,* 504 U.S. at 560–61.

21. *Id.* at 560.

22. *Id.* at 560–61 (quoting Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 38–42 (1976)).

23. *See id.* at 561.

24. RICHARD H. FALLON, JR. ET AL., Hart and Wechsler's The Federal Courts and The Federal System 144 (7th ed. 2015).

as one within the power of Congress to determine,[25] and, as such, the "injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'"[26] However, the *Lujan* Court identified a problem with absolute deference to Congress' creation of legal rights:

> To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed."[27]

Thus, standing doctrine, as shaped by the Court, aims to resolve two conflicting separation of powers issues.[28] On the one hand, the cases and controversies language places an obligation on federal courts to refrain from impinging upon the power of the legislative and executive branches. On the other hand, to ensure Congress does not encroach upon the power of the Executive, Justice Scalia asserted federal courts must also constrain Congress' power to create private rights of action.[29]

Justice Kennedy's *Lujan* concurrence offers a solution in which the federal judiciary can abide by Article III's limitation of the judicial power while respecting the power of its co-equal branches. While Justice Kennedy recognized Congress' "power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before,"[30] he clarified that "Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit" in order to refrain from impinging upon the Executive's power.[31] Thus, for a plaintiff to meet the concrete and particularized sub-element of the injury in fact requirement, it must fall within the class of persons entitled to bring suit, as determined and

25. Sierra Club v. Morton, 405 U.S. 727, 732 n.3 (1972).
26. Warth v. Seldin, 422 U.S. 490, 500–01 (1975).
27. *Lujan,* 504 U.S. at 577 (quoting U.S. Const. art. II, § 3).
28. Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 460 (2008).
29. *Lujan,* 504 U.S. at 577.
30. *Id.* at 580 (Kennedy, J., concurring).
31. *Id.*

identified by Congress.[32] The Court seemed to apply Justice Kennedy's solution in a few subsequent decisions.[33] However, the Court eventually adopted a much more stringent test in *Spokeo, Inc. v. Robins*[34] that encroaches upon legislative power far more than the Kennedy test.

B. Spokeo, Inc. v. Robins

Spokeo, a consumer reporting agency, operates a "people search engine" in which an individual can input a person's name and obtain information about the person.[35] Through its people search engine, Spokeo retained and disseminated false information about Robins, and Robins utilized the private right of action provided by FCRA to file a class action against Spokeo.[36] The Supreme Court reversed the Ninth Circuit's holding that the plaintiffs had standing and remanded for reconsideration because the Ninth Circuit failed to consider the "concreteness" element in the standing analysis.[37]

Before *Spokeo*, the Court interpreted *Lujan's* "concrete and particularized"[38] sub-element of injury in fact to require an inquiry into whether the injury "affect[s] the plaintiff in a personal and individual way."[39] However, the *Spokeo* Court divorced the word "concrete" from the word "particularized" and insisted each term constituted a separate sub-element for the injury in fact requirement.[40] According to Justice Alito's majority opinion in *Spokeo*, the term "particularized" encompasses the

32. *Id.*

33. *See* Massachusetts v. EPA, 549 U.S. 497, 516-17 (2007) (citing and relying upon Justice Kennedy's *Lujan* concurrence); Bradford C. Mank, *Standing and Global Warming: Is Injury to All Injury to None?*, 35 ENV'T. L. 1, 63-64 (2005) ("In the 1988 Akins decision, the Court appeared to follow Justice Kennedy's [*Lujan* concurrence] approach.").

34. Spokeo, Inc. v. Robins, 578 U.S. 330 (2016).

35. *Id.* at 333.

36. *Id.*

37. *Id.* at 342.

38. Lujan v. Defs. Of Wildlife*,* 504 U.S 555, 560 (1992).

39. Before *Spokeo*, "concreteness was not generally treated as a requirement for standing independent of particularity." Rachel Bayefsky, *Constitutional Injury and Tangibility*, 59 WM. & MARY L. REV. 2285, 2298 (2018).

40. *Spokeo*, 578 U.S. at 340. While Justice Alito cites four cases to support his claim that the Court has clarified the requirement that "an injury in fact must be both concrete and particularized," *see Spokeo*, 578 U.S. at 340, Justice Ginsburg points out that in the four cases cited by Justice Alito, "and many others, opinions do not discuss the separate offices of the terms 'concrete' and 'particularized.'" *Id.* at 352 (Ginsburg, J., dissenting).

individualized requirement the Court previously attributed to the phrase "concrete and particularized."[41] Creating this distinction allowed the Court to inject new legal meaning into the term concrete: "real and not abstract."[42]

Describing concrete as "real" failed to clarify what the new concreteness sub-element required of lower courts. Thus, the majority created a test for determining whether a harm is concrete.[43] According to this test, a harm must either have: (1) "a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit" or (2) been defined by Congress.[44] However, Congress' role in identifying and elevating intangible harms does not mean 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. Article III standing requires a concrete injury even in the context of a statutory violation.[45]

Despite relying on Justice Kennedy's concurrence in its opinion,[46] the *Spokeo* Court departed from Justice Kennedy's solution by finding that even if Congress "identif[ies] the injury it seeks to vindicate and relate[s] the injury to the class of persons entitled to bring suit,"[47] the Court can still reject standing based on its determination that the injury Congress identified is not concrete enough.[48] Thus, although standing doctrine is intended to safeguard the legislative and executive branches from unconstitutional judicial encroachment, the *Spokeo* Court gave the judicial branch veto power over legislative determinations of new injuries in the name of protecting the separation of powers.

In his concurring opinion, Justice Thomas qualified that the majority's concreteness test only applies when Congress "authorize[s] private plaintiffs to enforce public rights."[49] Justice Thomas noted that standing doctrine exists to prevent "the judiciary's entanglement in disputes that are

41. *Spokeo*, 578 U.S. at 339.
42. *Id.* at 340.
43. *Id.* at 341.
44. *Id.*
45. *Id.*
46. *Id.*
47. Lujan v. Defs. of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part).
48. *See Spokeo*, 578 U.S. at 341.
49. *Id.* at 348 (Thomas, J., concurring). Blackstone described public rights as "rights and duties due to the whole community, considered as a community, in its social aggregate capacity." *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *5.

primarily political in nature,"[50] and this separation of powers concern generally is not present in a suit by a private party "alleging that another private party violated his private rights.[51] Thus, according to Justice Thomas, when Congress "create[s] new private rights and authorize[s] private plaintiffs to sue based simply on the violation of those private rights,"[52] those plaintiffs are not required to demonstrate concrete harm.[53] In *Uzuegbunam v. Preczewski*[54] the Court adopted the theory Justice Thomas laid out in his *Spokeo* concurrence in which "the violation of an individual right gives rise to an actionable harm" regardless of whether it would be considered concrete.[55] However, the following year, the Court rejected Justice Thomas' interpretation in *TransUnion LLC v. Ramirez*.[56]

C. TransUnion LLC v. Ramirez

In *Spokeo*, the Court remanded the case for the Ninth Circuit to consider the concreteness inquiry separately from the particularized inquiry.[57] However, the Court failed to supply the Ninth Circuit with further instruction on how to apply the new test.[58] The vague *Spokeo* test resulted in confusion and a lack of uniformity among federal courts — "lower courts have disagreed as to common law analogues, parted company over the required level of similarity to identified analogues, and reached different results on identical or nearly identical facts."[59] In *TransUnion*, the Court provided a slightly more robust explanation of the new *Spokeo* test, but, in doing so, effectively altered the test.[60]

50. *Spokeo*, 578 U.S. at 344 (Thomas, J., concurring).
51. *Id.* at 347. Blackstone defined private rights as "private or civil rights belonging to individuals, considered as individuals." 3 WILLIAM BLACKSTONE, COMMENTARIES *2.
52. *Spokeo*, 578 U.S. at 348 (Thomas, J., concurring).
53. *See id.* at 344–46.
54. Uzuegbunam v. Preczewski, 141 S. Ct. 792 (2021).
55. *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2218 (2021) (Thomas, J., dissenting).
56. *Id*. at 2205 (majority opinion).
57. *See Spokeo*, 578 U.S. at 341.
58. *See id.* at 340–43.
59. Elizabeth Earle Beske, *Charting A Course Past Spokeo and TransUnion*, 29 GEO. MASON L. REV. 729, 761 (2022).
60. *See TransUnion*, 141 S. Ct. at 2204–05.

Congress passed the Fair Credit Reporting Act[61] in 1970 to provide consumers with a private right of action to sue any entity that violated their rights under FCRA.[62] In passing this law, Congress determined "[a]ny person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer."[63] Congress recognized the injurious nature of *any* violation of FCRA, meaning that a credit reporting agency's failure to "use reasonable procedures to ensure the accuracy of their credit files," is, in Congress' judgment, an injury in and of itself.[64] The plaintiffs in *TransUnion* sued TransUnion for failure to use reasonable procedures to ensure the accuracy of their credit files. While the credit files of all plaintiffs contained inaccurate information, the Court found only the plaintiffs whose false credit files were disseminated suffered a concrete injury cognizable in federal court.[65]

In reaching this conclusion, the Court abided by *Spokeo*'s instruction to evaluate whether the congressionally recognized injury underlying the plaintiffs' cause of action was sufficiently concrete to confer standing. The Court acknowledged the two-prong test laid out in *Spokeo*,[66] however, its application of the *Spokeo* test rendered the second prong ineffectual. While recognizing "Congress' views may be 'instructive'"[67] for determining "whether a harm is sufficiently concrete to qualify as an injury in fact,"[68] Justice Kavanaugh, writing for the majority, insisted "Congress' creation of a statutory prohibition or obligation and a cause of action does not relieve courts of their responsibility to *independently* decide whether a plaintiff has suffered a concrete harm under Article III."[69]

In *TransUnion*, the majority considered whether plaintiffs' claims demonstrated an injury "with a close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts."[70] The Court did not defer to legislative judgment on whether the harm at issue was

61. 15 U.S.C. § 1681.
62. *See TransUnion*, 141 S. Ct. at 2201.
63. 15 U.S.C. § 1681n(a).
64. *TransUnion*, 141 S. Ct. at 2200.
65. *See id.* at 2208–10.
66. *See id.* at 2204.
67. *Id.* (quoting Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016)).
68. *Id.* at 2204.
69. *Id.* at 2205 (emphasis added).
70. *Id*. at 2213.

sufficiently concrete to confer standing but limited its analysis to the historical analog prong of *Spokeo*'s test, effectively rendering this prong the determinative factor.[71] In omitting the second prong of the *Spokeo* test, which required deference to congressional judgment, the Court replaced Congress' policy judgments with that of federal courts, a blatant violation of the separation of powers principle.[72] By altering the *Spokeo* test, the Court was able to hold "[t]he mere presence of an inaccuracy in an internal credit file, if it is not disclosed to a third party, causes no concrete harm," even if Congress recognizes a harm.[73] In departing from the *Spokeo* test, Justice Kavanaugh created a new test (the "*TransUnion* test") under which federal courts will determine whether a claimed injury is sufficiently concrete, and thus whether it confers standing, by considering whether the injury bears "a close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts."[74]

By rejecting a deferential standard and only upholding a private right of action if the claimed injury bears a close relationship to a traditionally recognized harm, the Court co-opted Congress' power to define new injuries, and appointed the federal courts as the proper body for determining which types of injuries should be recoverable. Thus, the Court has "charge[d] federal courts with the unmoored task of examining statutory rights, comparing them to common law analogues, and using little more than intuition to assess whether they address 'real' harms,"[75] when, as the Founders recognized, the legislature is far better suited for making such determinations. The four dissenting justices criticized the majority's misappropriation of legislative power.[76] As Justice Thomas noted in his dissent,

Th[e majority's] approach is remarkable in both its novelty and effects. Never before has this Court declared that legal injury is inherently insufficient to support standing. And never before has this Court declared

71. *See* Solove & Citron, *supra* note 17, at 66 ("In essence, for the majority in *TransUnion*, the test for whether an injury is sufficiently 'concrete' . . . is how close it approximates injury recognized by courts in the past.").

72. "The Court's concreteness inquiry provides scant guidance to lower courts [and] invites them to substitute their own policy preferences for legislative will in frustration of the separation of powers." Beske, *supra* note 59, at 735.

73. *TransUnion*, 141 S. Ct. at 2210.

74. *Id.* at 2213.

75. Beske, *supra* note 59, at 732.

76. *See TransUnion*, 141 S. Ct. at 2224–25 (Thomas, J., dissenting).

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]

D. Dobbs v. Jackson Women's Health Organization

TransUnion is not the only recent Supreme Court decision in which the Court took unprecedented steps and unjustifiably overstepped its powers to limit Americans' rights. In *Dobbs v. Jackson Women's Health Organization*,[78] the Supreme Court abolished a fundamental constitutional right for the first time[79] by overturning *Roe v. Wade*[80] and finding the constitution does not protect the right to abortion. While the *Dobbs* majority distinguished the right to abortion from other rights rooted in Fourteenth Amendment substantive due process doctrine, like same-sex marriage, and claimed *Dobbs* does not jeopardize those rights,[81] the reasoning supporting the Court's holding applies to rights like same-sex marriage, and thus imperils them as well.[82] Justice Thomas explicitly named this threat by denouncing substantive due process and the rights secured by the doctrine in his concurring opinion.[83]

In response to *Dobbs*, Congress passed the Respect for Marriage Act,[84] legislation that provides protection for the right to same-sex and interracial marriage. However, Congress has not passed legislation protecting the right to abortion.[85] *TransUnion* raises concerns about the private enforceability

77. *Id.* at 2221.

78. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

79. Michelle Banker & Alison Tanner, *Dobbs v. Jackson Women's Health Organization: The Court Takes Away A Guaranteed Nationwide Right to Abortion*, NAT'L WOMEN'S L. CTR. (July 12, 2022), https://nwlc.org/resource/dobbs-v-jackson-womens-health-organization-the-court-takes-away-a-guaranteed-nationwide-right-to-abortion/ [https://perma.cc/RQJ7-VJ3A].

80. Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

81. *Dobbs*, 142 S. Ct. at 2261.

82. "The lone rationale for what the majority does today is that the right to elect an abortion is not 'deeply rooted in history' . . . [t]he same could be said, though, of most of the rights the majority claims it is not tampering with." *Id.* at 2319 (Breyer, J., dissenting).

83. *See id.* at 2301 (Thomas, J., concurring) ("we should reconsider all of this Court's substantive due process precedents, including *Griswold, Lawrence, and Obergefell*").

84. Respect for Marriage Act, Pub. L. No. 117-228, 136 Stat 2305 (2022).

85. *See* Amy B. Wang & Eugene Scott, *House passes bills to codify abortion rights and ensure access*, WASH. POST (July 15, 2022, 1:42PM), https://www.washingtonpost.com/politics/2022/07/15/house-abortion-roe-v-wade/

of the Respect for Marriage Act and for any future congressional action securing rights, including rights currently and previously protected by substantive due process.

II. ANALYSIS

In his majority opinion in *TransUnion*, Justice Kavanaugh engaged in intellectual inconsistencies while attempting to provide more direction to lower courts to aid in their application of the *Spokeo* concreteness test. Justice Kavanaugh cited the privacy torts "disclosure of private information" and "intrusion upon seclusion" as examples of traditionally recognized harms.[86] Ironically, a closer analysis of the development of these privacy torts proves the traditional analogue approach illogical and untenable.

In the wake of Louis Brandeis and Samuel Warren's famous Harvard Law Review article,[87] some states began to recognize privacy torts.[88] However, the disclosure and seclusion torts Justice Kavanaugh referenced did not gain universal legitimacy and uniformity until they were enshrined in the Second Restatement of Torts in 1977.[89] It is no coincidence that these torts came into existence in the 20th century. Technological and societal changes prompted judges and scholars to develop privacy torts to address the new concerns that arose.[90] In short, the law adapted to social changes, as it must to avoid becoming obsolete.

[https://perma.cc/7FJ3-T32F].

86. TransUnion v. Ramirez, 141 S. Ct. 2190, 2204 (2021).

87. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

88. *See* Neil M. Richards & Daniel J. Solove, *Prosser's Privacy Law: A Mixed Legacy*, 98 CAL. L. REV. 1887, 1892 (2010) (noting the recognition of privacy torts in the late 19th and early 20th century in California, New York, and Georgia).

89. *See id.* at 1906.

90. The Warren and Brandeis article, the first recorded recognition of an American right to privacy, was written in response to concerns about "new cameras that could take pictures instantaneously" and how this new technology "blurred settled lines between public and private." NEIL RICHARDS, INTELLECTUAL PRIVACY: RETHINKING CIVIL LIBERTIES IN THE DIGITAL AGE 16 (2015).

In his influential dissenting opinion in *Olmstead v. United States*,[91] Justice Brandeis recognized the principle that lawmaking must be able to adapt to the changing world. According to Justice Brandeis, the Supreme Court

> has repeatedly sustained the exercise of power by Congress . . . over objects of which the fathers could not have dreamed . . . [G]eneral limitations on the powers of government . . . do not forbid the United States or the states from meeting modern conditions by regulations which a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive.[92]

Technological advances unimaginable to Brandeis and Warren in 1890 have changed the consumer landscape, and Congress adopted FCRA to meet modern needs and allow consumers to recover for new kinds of privacy injuries. However, the *TransUnion* test prevents Congress from providing consumers with the ability to enforce these rights by determining they lack Article III standing if their injuries do not resemble traditional harms.

The *TransUnion* test violates the principle Justice Brandeis articulated – that Congress must be able to pass laws that conform to the needs of modern conditions. Although Justice Kavanaugh cited privacy torts as an example of traditional harms that meet the *TransUnion* test,[93] these torts were not recognized a century ago.[94] If the *TransUnion* historical analogue test applied to an early 20th century Congress that wanted to create a private right of action permitting suit for privacy harms we now recognize under the "traditional" disclosure and intrusion torts, the Court would likely determine Congress could not confer standing for such a novel kind of injury.[95] Thus, the example Justice Kavanaugh utilized to explain the

91. Olmstead v. United States, 277 U.S. 438 (1928).
92. *Id.* at 472 (Brandeis, J., dissenting) (internal quotations omitted).
93. TransUnion v. Ramirez, 141 S. Ct. 2190, 2204 (2021).
94. Richards & Solove, *supra* note 88, at 1892–95.
95. Justice Kavanaugh committed a further error in his opinion by confusing the type of harm relevant in *TransUnion*. In applying the *Spokeo* concreteness test, Justice Kavanaugh considered whether the plaintiffs' "injury bears a 'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts – namely, the reputational harm associated with the tort of defamation." *TransUnion*, 141 S. Ct. at 2209. Based on the comparison to defamation law, Justice Kavanaugh concluded the plaintiffs who could not demonstrate that their misleading credit reports had been distributed did not suffer a harm to their reputation, and thus lacked a concrete injury necessary to

historical analogue test epitomizes the type of contemporary legal developments the test forbids, and therefore, demonstrates its impracticality.

Despite its flaws, the *TransUnion* test remains intact, and the Supreme Court has yet to clarify how "traditional" an analog must be to meet the Court's stringent injury in fact standard.[96] The Court's restriction on Congress' ability to recognize new injuries implicates many areas of the law, including abortion and marriage equality rights rooted in substantive due process. Several conservative justices, like Justice Thomas in his *Dobbs* concurring opinion, have espoused the illegitimacy of substantive due process.[97] These justices assert that the rights secured under substantive due process cannot be found in the text of the Constitution, and thus can only be protected legitimately by a legislative act.[98] Based in part on this reasoning, the *Dobbs* Court held the Constitution does not protect the right to abortion, and thus the right can only be secured by legislative action. Although the *Dobbs* Court returned the issue of abortion to the legislature,[99] the Court's

establish standing. *Id*. at 2200. However, the Court erred in comparing this FCRA action to defamation law. FCRA's statement of purpose does not mention defamation or protection of reputation, however, it explicitly cites a "respect for the consumer's right to privacy" as a purpose of the law. Fair Credit Reporting Act, 15 U.S.C. § 1681(a)(4) (1982). Thus, the proper historical analogue would have been to a privacy tort, rather than the tort of defamation. Therefore, the type of harm the Court should have evaluated was emotional harm rather than reputational harm. Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, 102 B.U. L. Rev. 793, 843 (2022) ("The Restatement (Second) of Torts clearly indicates that plaintiffs [bringing a privacy tort claim] can recover for emotional distress alone.")

96. As Justice Thomas noted in his *TransUnion* dissent, "it was not until 1970 . . . that this Court even introduced the 'injury in fact.'" *TransUnion*, 141 S. Ct. at 2219 (Thomas, J., dissenting). Thus, it is unclear whether the injury in fact requirement itself would be old enough to meet the traditional analogue component of the injury in fact test.

97. *See, e.g.,* United States v. Carlton, 512 U.S. 26, 40 (1994) (Scalia, J., concurring) ("I believe that the Due Process Clause guarantees no substantive rights.").

98. *See, e.g.,* Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 979–81 (1992) (Scalia, J., concurring), overruled by Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022). Despite these justices' disdain for substantive due process, which is rooted in their belief that substantive rights were not conferred in the constitutional text, some of the same justices remain steadfast in their commitment to the injury in fact element of standing, even though this requirement lacks explicit reference in the Constitution. Scholars have indicated the inconsistency of justices discrediting substantive due process while "[t]he concreteness inquiry dictated by *Spokeo* and entrenched in *TransUnion* [also] has no textual basis in Article III." Beske, *supra* note 59, at 768; *See also* William Baude*, Standing in the Shadow of Congress*, 2016 S. CT. REV. 197, 223–24 (2016) (*Spokeo*'s injury in fact test "invites courts either to fashion constitutional limits out of nothing, or to say that only interests protected by the common law satisfy Article III requirements--both paths that have proven unworkable in the substantive due process context.").

99. *See Dobbs*, 142 S. Ct. at 2277.

TransUnion decision, rendered just one year before *Dobbs*, may be read to limit Congress' power to recognize a right to abortion.

The *Dobbs* decision increased the urgency for congressional action enshrining the rights the Fourteenth Amendment guarantees.[100] However, *TransUnion* raises concerns about whether the Court will recognize Congress' power to confer a private right of action to enforce substantive due process rights. According to *TransUnion*, if Congress recognizes a new right and provides a private right of action through which individuals could sue a party that violates such a right, the individual only has standing to sue if the harm suffered has a close relationship to a traditionally recognized harm, as determined by federal courts.[101] Thus, in the span of one year, the Court revoked the right to abortion by asserting the right does not exist in the Constitution, and thus can only be secured by the legislature, *and* limited Congress' ability to recognize such a right.

After *Dobbs* ignited fears the Court would also overturn *Obergefell v. Hodges*,[102] the Supreme Court case recognizing the right to same-sex marriage, Congress passed the Respect for Marriage Act to provide protection for the marriage rights secured under substantive due process.[103] Under the Respect for Marriage Act, no state or federal government can deny "full faith and credit to any public act, record, or judicial proceeding of any other State pertaining to a marriage between 2 individuals, on the basis of the sex, race, ethnicity, or national origin of those individuals."[104] The law confers a private right of action upon "any person who is harmed by a violation" of the law.[105] However, Congress failed to articulate the type of harm a violation of the Respect for Marriage Act would cause.

It is critical that Congress adapt to the changes imposed by *TransUnion* and state the exact harms a violation of the Respect for Marriage Act would result in and directly tie the injuries to harms traditionally recognized by the courts. Although the *TransUnion* Court shirked its obligation to defer to legislative judgment, Congress can make it more difficult for the Court to reject a congressionally recognized harm if it explicitly explains, in the text of the statute, the harm's ties to traditionally recognized injuries. The more

100. *See* Wang & Scott, *supra* note 85.
101. TransUnion v. Ramirez, 141 S. Ct. 2190, 2204 (2021).
102. Obergefell v. Hodges, 576 U.S. 644 (2015).
103. Respect for Marriage Act, Pub. L. No. 117-228, 136 Stat 2305 (2022).
104. *Id.*
105. *Id.*

guidance Congress provides the Court in applying the *TransUnion* test, the less leeway the Court has to determine a harm does not bear a close relationship to a traditionally recognized harm. Thus, by outlining the harms an individual would suffer due to a violation of the Respect for Marriage Act and explaining why those injuries bear a close relationship to a traditionally recognized harm, Congress maximizes the probability that federal courts will recognize plaintiffs' ability to enforce their rights.

While Congress succeeded in passing legislation providing protection for same-sex marriage, it has failed to do the same for the right to abortion.[106] Even if proponents of a federal abortion right could overcome the significant political obstacles[107] and establish such a right, *TransUnion* could prevent private enforcement. Thus, if Congress were to pass legislation protecting the right to abortion, it must proactively provide a roadmap that would lead the Court to find many traditionally recognized harms would flow from a violation of the right. Congress can create this roadmap by (1) articulating the specific harms a violation of the right to abortion could result in and (2) explaining how those harms are either traditionally recognized or bear a close relationship to traditionally recognized harms. By satisfying the *TransUnion* test within the text of the statute, Congress makes it more difficult for the Court to deny standing.

If Congress were to recognize a right to abortion, many harms could flow from a violation of that right. Professor Anita Bernstein outlines some potential harms: emotional harm, economic harm, severe physical pain, morbidity, and mortality.[108] The *Roe* Court similarly recognized compulsory birth may force upon a person "a distressful life and future," "psychological harm," "mental and physical" harm, and the "stigma of unwed" parenthood.[109] Since courts have traditionally recognized these harms in contexts outside of a violation of a right to an abortion, a doctrinally consistent court would recognize these harms as concrete and recoverable injuries that pass the *TransUnion* test. Thus, if Congress passes a right to abortion, it must take more care in crafting the private right of action section than it did in the Respect for Marriage Act. Congress must

106. *See* Wang & Scott, *supra* note 85.
107. *See id.*
108. Anita Bernstein, *Common Law Fundamentals of the Right to Abortion*, 63 BUFF. L. REV. 1141, 1149–54 (2015).
109. *Roe,* 410 U.S. at 153.

enumerate every harm it can conceive of flowing from a violation of the right to abortion and explain how those harms have been traditionally recognized by the courts and are thus sufficiently concrete to confer standing.

While the *TransUnion* test raises concerns for reproductive justice advocates, it may also pose issues for opponents of reproductive justice. In 2021, the Texas legislature passed the Heartbeat Act[110] which creates a private right of action for "[a]ny person, other than an officer or employee of a state or local governmental entity" in Texas to bring a civil action against any person who "(1) performs or induces an abortion in violation of this subchapter; (2) knowingly engages in conduct that aids or abets the performance or inducement of an abortion . . . or (3) intends to engage in the conduct described by Subdivision (1) or (2)."[111] While this type of law may succeed in state courts with less stringent standing requirements, if Congress passed a similar law, *TransUnion* would likely prevent its success in conferring a private right of action. It would be difficult for Congress to (1) articulate a concrete and particularized harm that one would suffer due to a stranger's performance (or the aiding and abetting of) an abortion and (2) tie that injury to a harm the courts have traditionally recognized.

Thus, *TransUnion* poses new obstacles to the implementation of legislative policy preferences, regardless of where they fall on the political spectrum. However, the Court's application of the *TransUnion* test may vary based on the policies at stake. As Professor Mark Lemley warns,

[T]he Court has begun to implement the policy preferences of its conservative majority in a new and troubling way: by simultaneously stripping power from every political entity except the Supreme Court itself. The Court of late gets its way, not by giving power to an entity whose political predilections are aligned with the Justices' own, but by undercutting the ability of any entity to do something the Justices don't like.[112]

Thus, while the injuries recognized by laws like the Heartbeat Act bear a far more attenuated relation to traditional harms than those resulting from the violation of a marriage equality or abortion right, the Supreme Court

110. TEX. HEALTH & SAFETY CODE ANN. §§ 171.201-171.212 (WEST 2021).
111. *Id.*
112. Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97 (2022).

may not rely on a straightforward application of the *TransUnion* test to decide which injuries to recognize as cognizable in federal courts.

CONCLUSION

Article III standing doctrine has endured a tumultuous road resulting in amorphous and unclear requirements. In the late 20th century, the Court acknowledged the messy doctrine was developed on an ad hoc basis and attempted to clean it up by comprehensively clarifying the requirements.[113] As of late, the Court has invented new requirements that have altered the standing analysis while purporting the new restrictions have existed all along.[114] As a result, lower federal courts are rife with discord as they attempt to implement the vague traditional analogue test.[115]

The *Lujan* Court had condensed the standing requirements into a three-part test: (1) injury in fact; (2) traceability; and (3) redressability.[116] The Court described the injury in fact sub-elements as "(a) concrete and particularized . . . and (b) actual or imminent."[117] Before *Spokeo*, the Court maintained that the "concrete and particularized"[118] sub-element of injury in fact required federal courts to consider whether the injury "affect[s] the plaintiff in a personal and individual way."[119] However, the *Spokeo* Court severed the word "concrete" from the word "particularized" and insisted each term constitutes a separate sub-element for the injury in fact requirement.[120] In doing so, the Court inserted meaning into the term concrete and created a new requirement for an alleged harm to meet the injury in fact standard: it must bear (1) "a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit" or (2) have been defined by Congress.[121]

Although the *Spokeo* Court accorded deference to Congress' judgment regarding the concreteness of an injury, Justice Kavanaugh's majority

113. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).
114. Spokeo, Inc. v. Robins, 578 U.S. 330, 334 (2016); TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2205 (2021).
115. *See* Beske, *supra* note 59, at 759–60.
116. *Lujan,* 504 U.S. at 560–61.
117. *Id*. at 560.
118. *Id.*
119. *Id.* at 606 n.1.
120. Spokeo, Inc. v. Robins, 578 U.S. 330, 340 (2016).
121. *Id*. at 340–41.

opinion in *TransUnion* asserted the Court has a "responsibility to independently decide whether a plaintiff has suffered a concrete harm under Article III," and this determination is achieved by considering whether the alleged injury bears a close relationship to a traditionally recognized harm.[122] Thus, if a harm does not meet this traditional analogue test, according to the Court, a plaintiff does not have standing to sue based on that harm. By applying the *Spokeo* test in this manner, the *TransUnion* Court effectively eliminated the deferential prong of the test and effectively replaced Congress' policy judgments with that of the federal courts.

The *TransUnion* test not only violates separation of powers principles, but also prevents the law from adapting to meet the needs of modern conditions. Under the *TransUnion* test, if Congress wanted to allow individuals to enforce a right via a private right of action, and if the alleged injury flowing from the violation of that right is not analogous to a traditionally recognized harm, the Court would bar recovery. This development in standing doctrine raises concerns for Congress' ability to create new rights like the substantive due process rights eliminated or threatened by *Dobbs*. Thus, unless and until the Court departs from the *TransUnion* decision, it is critical that Congress adapt to the changes imposed by (1) stating the exacts harms that flow from the violation of a law it passes and (2) directly tying the injuries to harms traditionally recognized by the courts.

122. *Id.* at 341; TransUnion v. Ramirez, 141 S. Ct. 2190, 2205 (2021).