

THE COURT AND THE PRIVATE PLAINTIFF

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INTRODUCTION

Two seemingly irreconcilable story arcs have emerged from the Supreme Court over the past decade. First, the Court has definitively taken itself out of the business of creating private rights of action under statutes and the Constitution, decrying such moves as relics of an “*ancien regime*.”¹ Thus, the Court has slammed the door on its own ability to craft rights of action under federal statutes² and put *Bivens*,³ which recognized implied constitutional remedies, into an ever-smaller box.⁴ The Court has justified these moves as necessary to keep judges from overstepping their bounds and wading into the province of the legislative branch.⁵ Federal judges, we are told, should not be in the business of creating private rights of action. It is for Congress, not courts, to “weigh and appraise” the costs of imposing “new substantive legal liability,”⁶ and “the proper role of the judiciary” is to “apply, not amend, the work of the People’s representatives.”⁷

1. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017) (quoting *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001)).

2. This work started under the Rehnquist Court. See *Sandoval*, 532 U.S. at 293. While *Sandoval* left open the prospect that, with sufficient evidence of congressional intent to create both a right and remedy, a court might be able to find an implied cause of action, the Roberts Court recently held that “private rights of action to enforce federal law must be created by Congress.” *Comcast Corp. v. Nat’l Ass’n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1015 (2020) (quoting *id.* at 286–87).

3. 403 U.S. 388 (1971).

4. See *Egbert v. Boulé*, 142 S. Ct. 1793, 1809 (2022).

5. See *Abbasi*, 137 S. Ct. at 1857 (noting that expanding *Bivens* is a “disfavored” activity).

6. *Id.* (citing *Bush v. Lucas*, 462 U.S. 367, 390 (1983)).

7. *Henderson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1726 (2017).

At the same time—and without apparent irony—a seemingly different approach to the work of Congress has surfaced in the standing context. With comparable zeal, the Court has invoked the injury-in-fact requirement as a mechanism for curtailing congressional efforts to create actionable private rights. The Court has largely constrained Congress to the creation of rights that are analogous to rights that existed at common law and has charged federal judges with determining independently when violations of statutory rights are close enough to common law harms to be actionable.⁸ A plaintiff brandishing a statutory right must run the gauntlet to satisfy federal judges that its violation gives rise to harm that sufficiently resembles a common law harm⁹ and either has happened already, is “certainly impending,” or, at a minimum, is “credibly threat[ened].”¹⁰ Even if a plaintiff can satisfy the heightened imminence requirement by demonstrating a credible *risk* of harm, the Court has limited the plaintiff facing imminent-though-not-yet-materialized injury to prospective relief.¹¹ As this Article demonstrates, the Roberts Court’s robust approach to the injury-in-fact requirement embeds federal judges in the scrutiny of legislative ends and means. In finding harm, moreover, federal courts are circumscribing *when* and *how* the legislature may respond to problems. This approach prefers reactive solutions to preemptive strikes and dramatically shrinks the pool of eligible plaintiffs. And yet, these are the same policy choices recent implied right-of-action cases have told us are suited to the legislative branch, not the judicial branch.

Confusion here is forgivable. The Court justifies each of these moves—disdaining a role for itself in the creation of rights of action while *at the same time* carving out a significant role for itself in policing express statutory rights—in the name of separation of powers. Separation of powers compels the Court to eschew “freewheeling judicial policymaking” and to respect its own “place.”¹² Yet, Article III standing, “built on a single basic idea—the idea of separation of powers,”¹³ limits federal courts to the adjudication of harms that they alone are empowered to recognize. The Court frequently waves the separation of powers banner in service of very

8. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016); *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021).

9. *See Spokeo, Inc.*, 136 S. Ct. at 1549; *TransUnion LLC*, 141 S. Ct. at 2204.

10. *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 401 (2013).

11. *TransUnion LLC*, 141 S. Ct. at 2210–11.

12. *Pereida v. Wilkinson*, 141 S. Ct. 754, 766–67 (2021).

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

different objectives.¹⁴ In the context of private rights of action, the Roberts Court has invoked separation of powers both to constrain and to embolden the federal courts.

This superficial tension, however, masks a common thread. Sixteen years ago, Professor Andrew Siegel documented the various ways in which the Rehnquist Court, in seemingly unrelated lines of cases, manifested a hostility to litigation.¹⁵ At that time, Siegel resisted the impulse to ground this hostility in antipathy to “tort plaintiffs, employment discrimination complainants, trial lawyers, or any of the other favorite targets of modern right-wing politics.”¹⁶ This Article examines the work product of a different Court and casts a more jaundiced eye—finding a through line in the Roberts Court’s allegiance to the executive branch, and in particular, to the “unitary executive”; its antipathy to the damage-seeking civil plaintiff; and its increased aversion to big, proactive legislative solutions to modern problems. Federal courts cannot create causes of action for private plaintiffs. Congress, it appears, can only create causes of action for private plaintiffs in federal court in a narrow set of circumstances, patrolled closely by federal courts. The common theme is that the Court is throwing down obstacles to certain kinds of legal claims, particularly those that enlist private plaintiffs in regulatory enforcement, impose costs on business, and interfere with the free market. The Roberts Court is achieving, through purportedly neutral rules, litigation reform that found little success in the political branches.

Part I of this Article examines the Court’s efforts to sideline itself from the creation of implied rights of action under statutes and the Constitution and demonstrates the Court’s consistently cited rationale that it is the role of Congress, not courts, to balance the costs and benefits of permitting lawsuits to proceed. Part II canvases the Court’s recent standing cases patrolling congressional efforts to create novel private rights of action and argues that—in clear tension with the implied right of action cases—these cases have handed federal courts relatively unmoored authority to circumscribe how Congress addresses modern problems. Finally, Part III finds in these seemingly irreconcilable cases the Roberts Court’s common impulse of sidelining the damage-seeking civil plaintiff, both to keep private plaintiffs from occupying a substantive role in law enforcement—and

14. I draw on Professor Heather Elliott’s insight that the Court invokes at least three different conceptions of the separation of powers in support of standing doctrine. See Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 461 (2008).

15. See Andrew Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court’s Jurisprudence*, 84 TEX. L. REV. 1097, 1116 (2006).

16. *Id.*

thus wresting control of law enforcement from the Executive Branch—and to keep litigation costs and burdensome regulation of business under control. Like the Rehnquist Court before it, the Roberts Court may chafe at the idea of civil lawsuits generally. This Article looks at the specific context of statutory causes of action and posits that the Roberts Court’s instincts have a political valence and that the Court is invoking ostensibly neutral separation-of-powers principles to achieve what proponents of litigation reform could not attain through the legislative process.

I. IMPLIED RIGHTS OF ACTION AND THE SEPARATION OF POWERS

To understand the Court’s efforts to sideline itself from a participatory role in the creation of statutory and constitutional rights of action, this Part begins with a brief description of the *ancien regime*¹⁷ to which it reacted. From there, this Article will examine both the Rehnquist Court’s and, more vehemently, the Roberts Court’s rejections of that construct and explore the Court’s proffered separation-of-powers rationales for doing so.

A. *Implied Rights of Action Under Federal Statutes*

1. *Implied Rights of Action Under Statutes in the Before-Times*

If the Civil Rights Era Congress was something of a superhero,¹⁸ the Warren Court, too, donned capes. During the Civil Rights era, Congress would pass bold legislation to address a problem, and the Court believed itself both capable of discerning Congress’s specific objectives and adept at calling all hands on deck to assist the cause. Where the Court could identify a remedial gap, it stepped into the breach, believing it “the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose.”¹⁹ Thus, in *J.I. Case Co. v. Borak*, a shareholder brought an action seeking damages and the rescission of J.I. Case’s merger with the American Tractor Company based on misrepresentations that

17. This is the Court’s terminology. See *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017) (quoting *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001)).

18. See generally Thomas F. Burke, *The Rights Revolution Continues: Why New Rights Are Born (And Old Rights Rarely Die)*, 33 CONN. L. REV. 1259, 1260 (2001) (noting surge in creation of new rights in 1960s); Joy Moses, *Revisiting the War on Poverty: How Policy Can Better Shape the Income and Wages of Families with Children*, 18 UDC/DCSL L. REV. 78, 79 (2015) (describing “bold solutions” pursued in the 1960s in the march for justice); CASS SUNSTEIN, *AFTER THE RIGHTS REVOLUTION, RECONCEIVING THE REGULATORY STATE* 24–25 (1990) (noting that Congress in the 1960s used “rhetorical power” of the Civil Rights era to address many modern problems, including the environment, the plight of workers, and consumers).

19. *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964).

violated the SEC's proxy rules.²⁰ Congress admittedly had not created a private right of action to enforce Section 14(a) of the Securities Exchange Act of 1934.²¹ Looking at the legislative history, however, the Court determined that Congress had sought to protect shareholders in the exercise of their voting rights by ensuring that they had access to complete, non-misleading information.²² The unanimous Court created a private right of action as "a necessary supplement" to SEC enforcement efforts.²³

Borak was the high-water mark. In *Cort v. Ash*,²⁴ a decade later, the Court began its retreat, identifying four factors that bore on whether to imply a right of action and tethering its inquiry more directly to legislative intent.²⁵ *Cort* channeled what in *Borak* looked like unfettered judicial discretion, and the Court ultimately did not permit the plaintiff to sue.²⁶ The implied right of action device, though, lived to see another day—in part because Congress had increasingly made clear its awareness of the Court's activities.²⁷ In *Cannon v. University of Chicago*,²⁸ the Court found an implied right of action for private plaintiffs challenging sex discrimination under Title IX of the Education Amendments of 1972.²⁹ The Court felt "especially justified" because Title IX tracked language in Title VI in which the Court had already found an implied private remedy.³⁰ A bonus provision allowed attorneys' fees to prevailing parties in private actions.³¹ This statutory feature prompted even then-Associate Justice Rehnquist to grumpily conclude that Congress had assumed that the federal courts would fashion whatever remedies might be appropriate, though he counseled reluctance with respected to statutes enacted going forward.³²

2. *Contraction: Decisive Retreat from Implied Statutory Rights*

20. *Id.* at 427.

21. *See id.* at 431.

22. *Id.*

23. *Id.* at 432.

24. 422 U.S. 66 (1975).

25. *See id.* at 78; Jonathan A. Marcantel, *Abolishing Implied Private Rights of Action Pursuant to Federal Statutes*, 39 J. LEGIS. 251, 257 (2013) (observing that, though *Cort* did not purport to overrule *Borak*, subsequent cases suggested that it had).

26. *See Cort*, 422 U.S. at 85.

27. Marcantel, *supra* note 25, at 261.

28. 441 U.S. 677 (1979).

29. *Id.*; *See* 20 U.S.C. §§ 1681–83.

30. *Cannon*, 441 U.S. at 697–98.

31. *Id.* at 699.

32. *Id.* at 718 (Rehnquist, J., concurring).

of Action.

As the Warren Era waned, the approach to implied statutory rights of action came under intense scrutiny. Dissenting in *Cannon*, Justice Powell urged the rest of the Court to “reappraise our standards.”³³ He argued that the Court’s implied-right-of-action cases represented “judicial assumption of the legislative function.”³⁴ A court examining the purposes of a legislative scheme and figuring out whether a private right of action would be a useful supplement was impermissibly “decid[ing] for itself what the goals of a scheme should be, and how those goals should be advanced.”³⁵ Our system, he argued, made the formulation of legislative policies, programs, and projects “the exclusive province of the Congress.”³⁶ In wresting that function from Congress, moreover, the Court helped Congress avoid responsibility for hard decisions and deprived those affected negatively by a private enforcement regime of recourse through the political process.³⁷

Justice Powell wrote only for himself in *Cannon*.³⁸ As Seth Davis recounts, though, this was a “turning point,” after which the law took “a Powellian swerve.”³⁹ In *Central Bank of Denver v. First Interstate Bank of Denver*,⁴⁰ a 5-4 Court rejected an implied private right of action for aiding and abetting liability under Section 10(b) of the Securities Exchange Act of 1934,⁴¹ even though lower courts had assumed its existence for decades and none of the parties had raised the question.⁴² The Court grounded its decision in the text and

33. *Id.* at 730 (Powell, J., dissenting).

34. *Id.* at 732.

35. *Id.* at 740.

36. *Id.* at 744.

37. *Id.* at 743.

38. Then-Associate Justice Rehnquist was sympathetic to Justice Powell’s sentiments. A month later, he wrote the majority opinion in *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979), declining to recognize an implied right of action against accountants for improper audits and certifications under the 1934 Act. *See id.* at 567. Justice Scalia, who joined the Court in 1986, argued that *Touche Ross* had “effectively overruled” *Cort v. Ash*, by deeming the intent factor determinative. *Thompson v. Thompson*, 484 U.S. 174, 189 (1988) (Scalia, J., concurring in the judgment).

39. Seth Davis, *Implied Public Rights of Action*, 114 COLUM. L. REV. 1, 11–12 (2014).

40. 511 U.S. 164 (1994).

41. *See id.* at 191.

42. *See id.* at 192 (Stevens, J., dissenting) (“[A]ll 11 Courts of Appeals to have considered the question have recognized a private cause of action against aiders and abettors under § 10(b) and Rule 10b–5.”); Mark J. Loewenstein, *The Supreme Court, Rule 10B-5 and the Federalization of Corporate Law*, 39 IND. L. REV. 17, 26–27 (2005) (noting that the case was decided “against a long history of recognition of aide and abettor liability” and that the Court had raised the issue

structure of the Act and rejected the *Borak*-era assumption that additional liability was invariably good.⁴³ Even if liability for aiders and abettors might expand the civil remedy, “it [did] not follow that the objectives of the statute are better served,” because secondary liability exacts costs.⁴⁴

*Alexander v. Sandoval*⁴⁵ dealt the coup de grace, with a 5-4 Court, through Justice Scalia, rejecting the plaintiff’s effort to find an implied right of action for disparate racial impact under Title VI of the Civil Rights Act and its accompanying regulations.⁴⁶ Private rights of action, the Court explained, “must be created by Congress.”⁴⁷ Statutory intent to create both a private right and a private remedy are “determinative”: “Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.”⁴⁸ Turning to the text and structure of the statute, the Court saw no rights-creating language and no congressional intent to create a private right of action.⁴⁹ Its work, therefore, was done. *Alexander v. Sandoval* sounded a death knell for *Borak*-style purposive analysis, the perception of the Court as Congress’s partner-in-crime, and the belief that more enforcement was an unmitigated good.⁵⁰

B. *Implied Rights of Action Directly Under the Constitution*

1. *The Freewheeling 1960s and Thereafter*

During the period in which it found implied rights of action under statutes, the Warren Court felt equally comfortable crafting private rights of action without them. In *Bivens*, the Court fashioned a civil damages remedy for violations of the Fourth Amendment by federal

sua sponte); Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 SUP. CT. REV. 429, 510 (observing that the Court dodged issues raised by the parties to reach a question “which even the petitioner thought was settled”). Although the *Central Bank of Denver* Court rejected aiding and abetting liability, it notably said nothing to call into question the bigger fish—implied private rights of action for direct violations of 10b-5—and the Court has reaffirmed the existence of such rights of action absent statutory authority consistently since. *See, e.g.*, *Goldman Sachs Grp. v. Ark. Tchr. Ret. Sys.*, 141 S. Ct. 1951, 1958 (2021); *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 267 (2014); *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 37 (2011).

43. *Central Bank*, 511 U.S. at 184.

44. *Id.* at 188.

45. 532 U.S. 275 (2001).

46. *Id.* at 293.

47. *Id.* at 286.

48. *Id.* at 286–87.

49. *See id.* at 288–89.

50. *See* Anthony J. Bellia Jr., *Justice Scalia, Implied Rights of Action, and Historical Practice*, 92 NOTRE DAME L. REV. 2077, 2081 (2017).

officers.⁵¹ A statutory remedy for similar violations by state officers had existed since 1871,⁵² but Congress had not created a comparable remedy against federal officers.⁵³ Bivens had been subject to an invasive, degrading search by federal agents, manacled in his home in front of his wife and children over Thanksgiving weekend.⁵⁴ Because he was innocent, the exclusionary remedy was of no use.⁵⁵ “For people in Bivens’ shoes,” the Court reasoned, “it is damages or nothing.”⁵⁶ So, the Court stepped into the breach. Without a statute, the Court determined it had *carte blanche* to act unless there were “special factors counseling hesitation.”⁵⁷ Notably, the Court found “no explicit congressional declaration that persons injured by a federal officer’s violation of the Fourth Amendment may *not* recover money

51. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 397 (1971).

52. *See* 42 U.S.C. § 1983.

53. *See Bivens*, 403 U.S. at 399, 406.

54. *See* James E. Pfander, *The Story of Bivens v. Six Unknown-Named Agents of the Federal Narcotics Bureau*, in *FEDERAL COURTS STORIES* 275, 280 (Vicki C. Jackson & Judith Resnik eds., 2010).

55. *See Bivens*, 403 U.S. at 410.

56. *Id.* When the Court decided *Bivens*, state tort remedies were also available for prospective plaintiffs, but the Court rejected the federal officers’ argument that this remedial mechanism sufficed. *See id.* at 390–92. The Westfall Act of 1988 preempted state tort claims against federal officers acting within the scope of their employment; therefore, this alternative is no longer availing. *See* Carlos M. Vazquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the Bivens Question*, 161 U. PA. L. REV. 509, 566 (2013) (acknowledging that the Westfall Act is widely understood to preempt state claims but arguing, pre-*Ziglar v. Abbasi*, that this counseled in favor of “a robust approach to the recognition of *Bivens* claims”).

57. *Bivens*, 403 U.S. at 396. There is abundant legal scholarship on the source of the original *Bivens* remedy, much of it beyond the scope of this project. *See, e.g.*, Henry Paul Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 23–24 (1975) (characterizing *Bivens* as constitutional “common law” that filled in a gap in the statutory framework but was not part of “an indispensable remedial dimension of the underlying guarantee”); Thomas S. Schrock & Robert C. Welch, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117, 1135–36 (1978) (arguing that *Bivens* is a constitutional decision that prevents the Fourth Amendment from becoming a “mere form of words”); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1796 (1991) (seeing *Bivens* and other constitutional remedies as structural safeguards that keep government “generally within constitutional bounds”); James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 131–38 (arguing that by subsequent legislation, and in particular, the Westfall Act, Congress has ratified the *Bivens* remedy and given it a legislative pedigree). *See generally*, RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 775, 777 (7th ed. 2015) (canvassing the debate).

damages from the agents.”⁵⁸ Perceiving no restriction, the Court jumped in, relying on *Borak*’s conception of the judicial role for inspiration.⁵⁹

The Court extended the *Bivens* damages remedy twice thereafter, each time reaffirming that it could act so long as Congress had not explicitly displaced the remedy.⁶⁰ In *Davis v. Passman*,⁶¹ the Court allowed a *Bivens* action to redress violations of the Equal Protection component of the Fifth Amendment Due Process Clause after a member of Congress had allegedly fired an employee on the basis of sex.⁶² The Court rejected the argument that Congress’s decision to exempt itself from the anti-sex-discrimination provisions of Title VII⁶³ ought to counsel hesitation.⁶⁴ In *Carlson v. Green*,⁶⁵ the Court allowed a *Bivens* action to redress violations of the Eighth Amendment’s proscription against cruel and unusual punishment.⁶⁶ The Court rejected the argument that the Federal Tort Claims Act (“FTCA”) provided an adequate alternative remedy and reasoned that “without a clear congressional mandate we cannot hold that Congress relegated respondent exclusively to the FTCA remedy.”⁶⁷

58. *Bivens*, 403 U.S. at 397 (emphasis added).

59. *See id.* (citing *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964)).

60. Though the Court authorized *Bivens* actions in only three contexts, a 2010 empirical study concluded that “all the points on the continuum indicate greater success” for the *Bivens* action in lower federal courts than generally assumed. Alexander A. Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 846 (2010).

61. 442 U.S. 228 (1979).

62. *See id.* at 248–49.

63. 42 U.S.C. § 2000e–16.

64. *See Davis*, 442 U.S. at 247.

65. 446 U.S. 14 (1980).

66. *See id.* at 23. Fallon describes *Carlson* as “the high-water mark for constitutional tort actions.” FALLON, *supra* note 57, at 950. *See also* Stephen I. Vladeck, *The Disingenuous Demise and Death of Bivens*, 2020 CATO SUP. CT. REV. 263, 273 (same).

67. *See Carlson*, 446 U.S. at 23. The Court specifically noted that in amending the FTCA in 1974, Congress made clear in legislative history that it saw the FTCA as a complement to *Bivens*, not a substitute. *See id.* at 19–20 (citing S. Rep. No. 93–588 (1973)). Congress expressly permitted suits against federal officers for “violation of the Constitution”—in other words, *Bivens*—in the Westfall Act of 1988. 28 U.S.C. §1346(b). This ratification may explain why the Roberts Court has put *Bivens* in a box rather than overruling it outright. *See generally* James E. Pfander, Iqbal, *Bivens*, and the Role of Judge-Made Law in Constitutional Litigation, 114 PENN ST. L. REV. 1387, 1406 (2010) (“This explicit preservation of the *Bivens* remedy deserves greater attention in debates over the action’s legitimacy.”).

2. *Resounding Modern Rejection of Bivens*

Carlson would be the Court's last extension of the *Bivens* remedy. Thereafter, the Court rejected the next twelve proposed *Bivens* extensions it encountered.⁶⁸ Retraction took place along several fronts,⁶⁹ with the Court increasingly finding situations in which alternative remedies, though imperfect, were good enough to preclude a *Bivens* inference⁷⁰ and repurposing *Bivens*'s "special factors counseling hesitation" to give rise to whole areas in which *Bivens* remedies were precluded altogether.⁷¹

The initial retreat found alternative remedies sufficient to displace *Bivens*, though Congress's decision to withhold remedies—and thus, the absence of any remedy—eventually gained force as a means of precluding *Bivens* as well. In *Bush v. Lucas*,⁷² the plaintiff, a NASA engineer, sought to file a *Bivens* action claiming retaliation in violation of his First Amendment rights.⁷³ Noting that the inquiry involved federal personnel policy and that Congress had crafted an elaborate remedial scheme,⁷⁴ the Court rejected *Bivens* because "Congress is in a better position to decide whether or not the public interest would be served" by a damages remedy.⁷⁵ In *Schweiker v. Chilicky*,⁷⁶ the Court declined to permit a *Bivens* action alleging due-process violations in the denial of social security disability benefits.⁷⁷ Although the congressionally sanctioned remedy did not permit

68. See *Egbert v. Boulé*, 142 S. Ct. 1793, 1804 (2022); *Hernández v. Mesa*, 140 S. Ct. 735, 749–50 (2020); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1865 (2017); *Minneci v. Pollard*, 565 U.S. 118, 131 (2012); *Hui v. Castaneda*, 559 U.S. 799, 812–13 (2010); *Wilkie v. Robbins*, 551 U.S. 537, 562 (2007); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70–72 (2001); *FDIC v. Meyer*, 510 U.S. 471, 484–86 (1994); *Schweiker v. Chilicky*, 487 U.S. 412, 429 (1988); *United States v. Stanley*, 483 U.S. 669, 683–84 (1987); *Bush v. Lucas*, 462 U.S. 367, 380–81 (1983); *Chappell v. Wallace*, 462 U.S. 296, 305 (1983).

69. At the same time, the Court developed a robust qualified immunity doctrine, permitting officers sued under *Bivens* and Section 1983 to evade liability unless their actions violated clearly established law of which a reasonable person would have been aware. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Fallon observed that juxtaposition of recent *Bivens* and qualified immunity cases yields a "dominant pattern . . . of judicial hostility to official or governmental liability for constitutional torts." FALLON, *supra* note 57, at 957.

70. See, e.g., *Ziglar*, 137 S. Ct. at 1865; *Minneci*, 565 U.S. at 131; *Hui*, 559 U.S. at 812–13.

71. See *Chappell*, 462 U.S. at 298–300 (citing *Bivens*, 403 U.S. at 396); *Stanley*, 483 U.S. at 683.

72. 462 U.S. 367 (1983).

73. See *id.* at 371.

74. See *id.* at 380–81, 388.

75. *Id.* at 390.

76. 487 U.S. 412 (1988).

77. See *id.* at 420.

claims of unconstitutional procedure, the Court concluded that, “[w]hen the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms,” a *Bivens* remedy should not lie.⁷⁸

Simultaneously, the Court found “special factors counseling hesitation” could exempt whole areas from *Bivens* altogether.⁷⁹ In *Chappell v. Wallace*,⁸⁰ decided the same day as *Bush*,⁸¹ a unanimous Court denied a *Bivens* remedy to five enlisted men who charged their military superiors with racial discrimination in violation of the Equal Protection component of the Fifth Amendment.⁸² The *Chappell* Court emphasized Congress’s role in regulating the military and found courts “ill-equipped” to make policy determinations that the imposition of liability would entail.⁸³ In *United States v. Stanley*,⁸⁴ the Court clarified that *Chappell* was not limited to matters presenting chain-of-command concerns.⁸⁵ *Stanley* involved covert, involuntary administration of the drug LSD to a soldier who thought he was volunteering for an experiment on protective equipment.⁸⁶ The Court concluded that “congressionally uninvited intrusion into military affairs by the judiciary is inappropriate.”⁸⁷ The Court deemed it “irrelevant” to its special factors analysis that plaintiff might otherwise lack a remedy.⁸⁸ The Court subsequently invoked “special factors” to preclude *Bivens* actions against federal agencies⁸⁹ and private corporations.⁹⁰

78. *Id.* at 423. *Schweiker* assumed significance in Congress’s failure to provide a remedy, thus making every proposed extension of *Bivens* thereafter immediately suspect. See George D. Brown, “Counter-Counter-Terrorism via Lawsuit”—*The Bivens Impasse*, 82 S. CAL. L. REV. 841, 860 (2009).

79. *Bivens v. Six Unknown Named Agents of Fed. Narcotics*, 403 U.S. 388, 396 (1971).

80. 462 U.S. 296 (1983).

81. *Bush v. Lucas*, 462 U.S. 367 (1983).

82. *Chappell*, 462 U.S. at 299, 305. The Court had previously held in *Feres v. United States*, 340 U.S. 135 (1950), that the Federal Tort Claims Act did not permit tort actions by members of the military, see *id.* at 146, so denial of a *Bivens* remedy left plaintiffs with no legal recourse.

83. *Chappell*, 462 U.S. at 305.

84. 483 U.S. 669 (1987).

85. See *id.* at 680–81.

86. See *id.* at 671.

87. *Id.* at 683.

88. *Id.*

89. See *FDIC v. Meyer*, 510 U.S. 471, 486 (1994). The Court cited the “potentially enormous financial burden for the Federal Government” that allowing suits against federal agencies would entail and “[left] it to Congress to weigh the implications of such a significant expansion of Government liability.” *Id.*

90. See *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 71 (2001).

While the Rehnquist Court withdrew from *Bivens* gradually, the Roberts Court sounded a full-scale retreat. In *Ziglar v. Abbasi*,⁹¹ the Court shut down *Bivens* claims in all but mirror-images of the factual contexts presented in *Bivens*, *Carlson*, and *Davis*.⁹² In *Abbasi*, the plaintiffs—six men of Arab or South Asian descent detained after September 11, 2001—filed a *Bivens* action against three high-level Executive Branch officials and two wardens at federal facilities seeking damages for violations of the Fourth Amendment and the equal-protection component of the Fifth Amendment.⁹³ The Court, per Justice Kennedy, characterized *Bivens*, its two extensions, and *Borak* as relics whose logical underpinnings had “los[t] their force.”⁹⁴ Citing cases repudiating the implied statutory right of action, the Court called for “similar caution” with respect to implied constitutional remedies and declared that “expanding the *Bivens* remedy is now a ‘disfavored’ judicial activity.”⁹⁵ Whether to create a cause of action, the Court reasoned, involves the weighing of policy and “should be committed to ‘those who write the laws,’ rather than ‘those who interpret them.’”⁹⁶

The *Abbasi* Court set out a two-step inquiry for whether to permit a *Bivens* action to proceed. First, a court should determine whether a case asks for extension of *Bivens* into a “new” context.⁹⁷ “If the case is different in a meaningful way” from the three recognized *Bivens* applications, the Court instructed, “then the context is new.”⁹⁸ Meaningful differences might involve the ranks of officers, constitutional rights asserted, or the extent of disruption should judges step in.⁹⁹ If a case asks for extension into a “new” *Bivens* context, the next step is “special factors analysis.”¹⁰⁰ That inquiry

91. 137 S. Ct. 1843 (2017).

92. *See id.* at 1848. Daniel Rice and Jack Boeglin cite the Roberts Court’s *Bivens* retreat as an example of what they call “confining by implication”: “[A]nnouncing an abnormally restrictive doctrinal test that nominally keeps a principle alive, but that leaves virtually no room for operation in new factual settings.” Daniel B. Rice & Jack Boeglin, *Confining Cases to Their Facts*, 105 VA. L. REV. 865, 882 (2019).

93. *Abbasi*, 137 S. Ct. at 1853–54.

94. *Id.* at 1855.

95. *Id.* at 1856–57 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009)).

96. *Id.* at 1857 (citing *Bush v. Lucas*, 462 U.S. 367, 380 (1983)).

97. *Id.* at 1859.

98. *Id.*

99. *See id.* at 1859–60.

100. *Id.* at 1860. In the hands of some lower courts, the “special factors” inquiry has become almost tautological. *See, e.g.*, *Oliva v. Nivar*, 973 F.3d 438, 444 (5th Cir. 2020). Thus, in *Oliva v. Nivar*, the Fifth Circuit determined that “the separation of powers is itself a special factor.” *Id.* Congress had not conferred a right of action against individual officers for excessive force claims in

requires a court to consider “whether the Judiciary is well suited, absent congressional instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed.”¹⁰¹ In *Abbasi* itself, the Court found multiple reasons to stay its hand, as the action challenged broad national security policy and would impose significant litigation costs on the executive branch.¹⁰²

On the heels of *Abbasi* came *Hernández v. Mesa*¹⁰³ and, most recently, *Egbert v. Boulé*,¹⁰⁴ both of which amplified *Abbasi*’s shut-it-down approach. In *Hernández*, a 5-4 Court determined that parents of a fifteen-year-old Mexican citizen shot and killed on Mexican soil by a US Border Patrol Agent standing in the United States could not proceed under *Bivens*.¹⁰⁵ The cross-border shooting presented a new context,¹⁰⁶ and multiple factors counseled restraint.¹⁰⁷ In a concurrence joined by Justice Gorsuch, Justice Thomas urged that “the time has come to consider discarding the *Bivens* doctrine altogether.”¹⁰⁸

With *Egbert*, Justice Thomas effectively did just that, though he stopped short of saying so outright.¹⁰⁹ Plaintiff Boulé, who owned an inn abutting the Canadian border, challenged the actions of a US Border Patrol Agent who knocked him to the ground in the inn’s parking lot and reported him to the IRS when he complained.¹¹⁰ Justice Thomas authored an opinion for the Court that rejected both of the plaintiff’s *Bivens* claims.¹¹¹ The key question, he reminded, is “who should decide whether to provide for a damages remedy,

the FTCA. *Id.* The “silence of Congress”—presumably always a feature in an implied right of action case—ended the inquiry. *Id.*

101. *Abbasi*, 137 S. Ct. at 1857–58. As Rice and Boeglin note, a court is rarely going to conclude that judges are well suited for this role. See Rice & Boeglin, *supra* note 92, at 884; Vladeck, *supra* note 66, at 275–76 (noting that the Court’s prescribed special factors analysis “will, in almost all cases, militate in favor of judicial passivity”).

102. See *Abbasi*, 137 S. Ct. at 1860–61. For a survey of post-*Abbasi*, pre-*Egbert* scholarship on the retraction of *Bivens*, see WILLIAM BAUDE ET AL., 2022 SUPPLEMENT TO HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 104–05.

103. 140 S. Ct. 735 (2020).

104. 142 S. Ct. 1793 (2022).

105. *Hernández*, 140 S. Ct. at 739–40.

106. See *id.* at 743.

107. See *id.* at 745 (foreign policy); *id.* at 746–47 (border security); *id.* at 749 (pattern of congressional inaction).

108. See *id.* at 750 (Thomas, J., concurring).

109. The Court might have felt sheepish had it overruled *Bivens* directly, having denied certiorari on Petitioner’s question 3, “Whether the Court should reconsider *Bivens*.” See *Egbert v. Boulé*, 142 S. Ct. 457 (2021) (mem.); Petition for Writ of Certiorari at 1, *Egbert v. Boulé*, 142 S. Ct. 1793 (2022) (No. 21-147).

110. See *Egbert*, 142 S. Ct. at 1800–02.

111. See *id.* at 1804.

Congress or the courts?”¹¹² “If there is a rational reason to think that the answer is ‘Congress’—as it will be in most every case, no *Bivens* action may lie.”¹¹³ *Egbert* collapsed the *Abbasi* two-step analysis into a single question: “[W]hether there is *any* rational reason (even one) to think that *Congress* is better suited to ‘weigh the costs and benefits of allowing a damages action to proceed.’”¹¹⁴ The answer, the Court made clear, was invariably “yes.”¹¹⁵ After setting up a standard no plaintiff could meet, the Court lost little time holding that the plaintiff had fallen short.¹¹⁶ The case involved national security at the border, and “the Judiciary is comparatively ill suited to decide whether a damages remedy against any Border Patrol agent is appropriate.”¹¹⁷ The Court likewise barred the plaintiff’s First Amendment retaliation claim and, tellingly, rejected an analogy to *Davis v. Passman*, one of the two extensions of *Bivens*.¹¹⁸ Even if there were parallels, “*Passman* carries little weight because it predates our current approach.”¹¹⁹ In converting the *Abbasi* two-step analysis into a single question, dictating that the answer to that question is “yes,” and characterizing *Bivens* and its progeny as inconsistent with the current analytic framework, the Court left little room for even garden-variety, factually identical *Bivens/Davis/Carlson* claims going forward.

C. The Separation of Powers Justifications for Rejecting Implied Rights of Action

In the statutory and constitutional contexts, the Court thus has decisively rejected a role for itself in creating rights of action. The modern approach tips its hat to “legislative supremacy”—the idea that only those who are accountable to the electorate should be making rules governing primary conduct.¹²⁰ Each time, the Court has justified its conclusions expressly in separation-of-powers terms and has said the correct answer to “‘who should decide’ . . . most often will be Congress.”¹²¹ The Constitution confers legislative power on

112. *Id.* at 1803 (citing *Hernández*, 140 S. Ct. at 750).

113. *Id.* (citing *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857–58 (2017)).

114. *Id.* at 1805 (citing *Abbasi*, 137 S. Ct. at 1858).

115. *Id.* at 1807.

116. *Id.* at 1806.

117. *Id.* at 1805.

118. *See id.* at 1807–08.

119. *Id.* at 1808.

120. Explicit embrace of legislative supremacy coincided with the decline of the implied right of action. *See* William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319, 320 (1989) (“In the 1980s, legislative supremacy has become a shibboleth with bite.”).

121. *Hernández v. Mesa*, 140 S. Ct. 735, 750 (2020).

Congress;¹²² when a court permits an implied claim for damages on the basis that it furthers the law's purpose, "the court risks arrogating legislative power."¹²³ Not only is it beyond the scope of federal courts' constitutional authority, creating rights of action exceeds judicial acumen.¹²⁴ As Sixth Circuit Judge Amul Thapar explained after *Hernández*, whether to "bless a cause of action" is "a quintessentially legislative choice," and "our commission does not award us . . . the license—or the competence—to tackle such a thorny task."¹²⁵

Explicit in the Court's calculus is that permitting damages actions involves tradeoffs.¹²⁶ Whether to act, when to act, and how to act involve legislative judgment, and "[n]o law 'pursues its purposes at all costs.'"¹²⁷ The Court has recognized that "almost every statute might be described as remedial in the sense that all statutes are designed to remedy some problem."¹²⁸ But some remedies may be a bridge too far. As Dean Manning put it, "[l]egislators may compromise on a statute that does not fully address a perceived mischief, accepting half a loaf to facilitate a law's enactment."¹²⁹ Legislative choice, the Court has explained, involves "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective."¹³⁰ Rejection of implied rights of action is a

122. U.S. CONST. art. I, § 1.

123. *Hernández*, 140 S. Ct. at 741.

124. See *Egbert*, 142 S. Ct. at 1802–03.

125. *Elhady v. Unidentified CBP Agents*, 18 F.4th 880, 883 (6th Cir. 2021). See also *Egbert*, 142 S. Ct. at 1803 (citation omitted) ("Unsurprisingly, Congress is far more competent than the Judiciary to weigh such policy considerations."); *Schweiker v. Chilicky*, 487 U.S. 412, 441 (1988) (Brennan, J., dissenting) (noting that "Congress . . . is far more capable than courts of apprising itself of such matters through 'factfinding procedures such as hearings that are not available to the courts.'" (quoting *Bush v. Lucas*, 462 U.S. 367, 389 (1983))).

126. See *Wyeth v. Levine*, 555 U.S. 555, 601 (2009) ("Federal legislation is often the result of compromise between legislators and 'groups with marked but divergent interests.'" (quoting *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93 (2002))).

127. *Hernández*, 140 S. Ct. at 741–42 (citations omitted).

128. *CTS Corp. v. Waldburger*, 573 U.S. 1, 12 (2014).

129. John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 104 (2006). Manning posits that legislators have made a deliberate choice. See *id.* at 96. However, it is equally plausible that the legislature simply has not thought it through. Challenging the Manning view, Daniel Meltzer called it "fruitless" to imagine concerted legislative action when legislative outcomes more likely involve some members "punting," some members failing to reach any consensus, and other members having little awareness of an issue. Daniel J. Meltzer, *Preemption and Textualism*, 112 MICH. L. REV. 1, 17 (2013); see also Robert A. Katzmann, *Statutes*, 87 N.Y.U. L. REV. 637, 650–55 (2012) (describing abundant pressures and demands in the legislative process).

130. *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam). The Court's understanding of the legislative process mirrored that expressed by

repudiation of the core *Borak* premise that any move that facilitates a presumed purpose of Congress is the right move.¹³¹ Quite the contrary, the modern Court has espoused the view that “it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute’s primary objective must be the law.”¹³² Congress, in this area, is king and gets to make these calls—at least that is what the Court has instructed in its implied right of action cases.¹³³

II. STANDING AND THE SEPARATION OF POWERS

While celebrating Congress’s primacy in making these key policy choices—and disclaiming a role for itself—the Court has deployed standing doctrine and, particularly, the requirements of an impending and concrete injury in fact, to a dramatically different end. Standing is justifiably maligned.¹³⁴ Court observers have struggled

Frank Easterbrook: “Almost all statutes are compromises, and the cornerstone of many a compromise is the decision, usually unexpressed, to leave certain issues unresolved.” Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 540 (1983).

131. *Borak*’s demise coincided with the rise of “new textualism” and its concomitant “intent skepticism” under the Rehnquist Court. See John F. Manning, *Inside Congress’s Mind*, 115 COLUM. L. REV. 1911, 1912 (2015); Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 290 (1989) (“The idea of legislative intent . . . is notoriously slippery.”).

132. *Rodriguez*, 480 U.S. at 526; see also *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1073 (2018) (observing, in a unanimous opinion by Justice Kagan, that the Court “has long rejected” that notion).

133. See *Hernández*, 140 S. Ct. at 747 (“It would be ‘anomalous to impute . . . a judicially implied cause of action beyond the bounds [Congress has] delineated for [a] comparable express caus[e] of action.’” (alterations in original) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 736 (1975))); *Egbert*, 142 S. Ct. at 1802–03; *Ziglar*, 137 S. Ct. at 1848.

134. See, e.g., Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1063 (2015) (calling standing a “mixture of complexity and lack of articulate explanation”); Richard Re, *Relative Standing*, 102 GEO. L.J. 1191, 1195 (2014) (“[I]t is hard to find a scholarly treatment of standing that does not remark on the doctrine’s apparent incoherence.”); Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1132 (2009) (observing that standing doctrine is “widely regarded to be a mess”); F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 276 (2008) (decrying standing as “incoherent”); Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 304 (2002) (calling standing “radically unsatisfying”); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223 (1988) (flagging standing cases’ “apparent lawlessness” and “wildly vacillating results”); John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1010 (2002) (“Describing [standing] doctrine concisely is difficult because the cases are such a jumbled mess.”). I previously have characterized the Court’s

to superimpose some meta-rules and order;¹³⁵ the Court has scarcely tried.¹³⁶

After brief background, this Part analyzes the Roberts Court's most recent standing cases in the context of Congress's creation of litigable rights—in other words, the express rights of action the Court has told us Congress is uniquely empowered under the Constitution to create. This Part demonstrates that in its standing cases, the Roberts Court's approach to legislative prerogative has been far from deferential and that the Court's insistence on imminent and concrete injury in fact has prevented Congress from choosing a proactive, rather than reactive, approach to solving problems. Congress, in this area, is not king—at least that is what the Court has recently instructed.

A. *Evolution of the Injury-in-Fact Requirement as a Limitation on Congress*¹³⁷

Commentators dispute the origins of standing doctrine.¹³⁸ Eighteenth and nineteenth century courts distinguished between public rights shared by society at large and private rights held by identifiable individuals.¹³⁹ Generally, public officers prosecuted offenses against collective rights in the name of the people writ large; private plaintiffs were limited to the vindication of private rights

latest standing case, *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), as a “face plant.” Elizabeth Earle Beske, *Charting a Course Past Spokeo and TransUnion*, 29 GEO. MASON L. REV. 729, 735 (2022).

135. See, e.g., Nichol, *supra* note 134, at 302–03 n.4 (citing literature critiquing the Supreme Court's treatment of standing).

136. See Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1742 (1999) (lamenting his inability to provide students “a doctrinal algorithm that they can use to predict judicial decisions with a reasonable degree of confidence”).

137. Standing has three well-known components, the requirement of concrete and particularized injury in fact, causation, and redressability. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). This Part focuses primarily on injury in fact, which the Court has described as the “first and foremost” of the three elements, because the most recent standing cases that form the basis for my argument focus exclusively on that prong as well. See *Trump v. New York*, 141 S. Ct. 530, 534–35 (2020); *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021); *Spokeo v. Robins*, 578 U.S. 330, 338–39 (2016).

138. See Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921-2006*, 62 STAN. L. REV. 591, 594 (2010).

139. See Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 695 (2004); Henry P. Monaghan, *Jurisdiction Stripping Circa 2020: What The Dialogue (Still) Has to Teach Us*, 69 DUKE L.J. 1, 38 (2019) (describing public rights as rights held “by the general public *in gross* rather than by any specific individuals).

unless they could demonstrate that the violation of a public right caused them unique harm.¹⁴⁰ The “non-Hohfeldian”¹⁴¹ or ideological plaintiff was not a regular feature of the early legal landscape.¹⁴²

Standing doctrine as such clearly emerged by the mid-twentieth century. Steven Winter argued that standing developed as “a calculated effort” on the part of liberal judges who sought to insulate progressive legislation from judicial interference during the *Lochner* era.¹⁴³ By preventing any person disgruntled by passage of a law from suing, these judges kept unwanted challenges to progressive legislation off the docket.¹⁴⁴ Daniel Ho and Erica Ross found empirical support for this hypothesis, observing that in the 1930s and

140. See Woolhandler & Nelson, *supra* note 139, at 697, 701–02; Hessick, *supra* note 134, at 279. But see Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 819–20 (1969) (arguing that “courts in Westminster” permitted litigants to sue public officials acting in excess of their jurisdiction without demonstrating unique personal harm); Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1035 (1968) (observing that the prerogative writ jurisdiction in pre-1787 England could be set in motion by “a stranger to the official action”); Randy Beck, *Qui Tam Litigation Against Government Officials: Constitutional Implications of a Neglected History*, 93 NOTRE DAME L. REV. 1235, 1239 (2018) (flagging the “centuries-old” practice of authorizing qui tam relators to litigate generalized grievances and arguing that this tradition undermines any suggestion that the Executive Branch has an exclusive role in enforcement of public rights).

141. The term “Hohfeldian plaintiff” derives from a classic article, see Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 31 (1913), and was coined by Louis Jaffe. See Jaffe, *supra* note 140, at 1033.

142. See Woolhandler & Nelson, *supra* note 139, at 712. Henry Monaghan anchored this “private rights model” in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), noting that Chief Justice Marshall started by finding Madison had violated Marbury’s vested right, thus committing the federal courts to adjudication and law elaboration incident to resolving an actual dispute involving individualized harm. Henry Paul Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1366 (1973) (citing *Marbury*, 5 U.S. (1 Cranch) at 162).

143. Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1455–56 (1988). Cass Sunstein agreed. See Cass Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1436–38 (1988). Others thought standing emerged more organically. For William Fletcher, for example, modern standing doctrine evolved initially as a byproduct of the burgeoning administrative state, which presented vexing questions of oversight and control unanswerable by common law formulations. See Fletcher, *supra* note 134, at 225–26.

144. See Winter, *supra* note 143, at 1455–56; Hessick, *supra* note 134, at 276 (agreeing that standing developed “principally at the hands of Justices Brandeis and Frankfurter in an effort to protect progressive legislation from judicial attack”).

early 1940s, progressive Justices disproportionately denied standing and conservative Justices disproportionately approved it.¹⁴⁵

Whether or not liberal Justices deliberately invented standing, they had certainly abandoned its rigid application by the Warren Era.¹⁴⁶ The administrative state was on solid footing after World War II, the Court was recognizing more and more individual rights, and a robust public interest bar emerged.¹⁴⁷ In this climate, champions of lax standing rules prevailed,¹⁴⁸ and the requirement of injury in fact became “so diluted that even the most trivial interest” sufficed.¹⁴⁹ The pool of potential plaintiffs expanded to include regulatory beneficiaries as well as regulatory targets, among them “consumers, users of the wilderness, competitors, air breathers, and water drinkers”¹⁵⁰—anyone arguably within a statute’s “zone of interests.”¹⁵¹ The burgeoning litigant pool signaled a drift away from the private rights model of litigation. Thus, in 1972, Louis Jaffe noted that “we are becoming more and more familiar with the judicial enforcement of public or group interests at the suit of individuals and

145. Ho & Ross, *supra* note 138, at 596.

146. See Monaghan, *supra* note 142, at 1379 (observing, in 1973, that standing now forecloses judicial review “only infrequently and erratically”). Elizabeth Magill describes an intermediate step, signaled by *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940). See Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1139–42 (2009). Magill shows that, before 1970, standing proceeded along two tracks, and litigants could sue either by showing a legal wrong (a private law model) or by pointing to statutory authorization to sue to vindicate the public interest (a public law model). See *id.* at 1136, 1139.

147. See Ho & Ross, *supra* note 138, at 645–47; Fletcher, *supra* note 134, at 227–28 (observing dramatic rise in public interest litigation in the 1960s and 1970s and its effect on standing doctrine).

148. See Monaghan, *supra* note 142, at 1382–83.

149. *Id.* at 1382. Ho and Ross document that, by 1950, the political valence of rigid standing requirements “reversed entirely,” with liberals uniformly more likely to favor standing, and conservatives more likely to deny it. Ho & Ross, *supra* note 138, at 596.

150. Patricia M. Wald, *The D.C. Circuit: Here and Now*, 55 GEO. WASH. L. REV. 718, 719 (1987); see also Monaghan, *supra* note 142, at 1380 (observing in 1973 that the Court increasingly permitted standing to people asserting “broad and diffuse interests” and claiming that the Court had permitted “the public action for some time”).

151. *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970). Magill characterizes *Data Processing* as a “seismic shift.” Magill, *supra* note 146, at 1160. The case introduced the term “injury in fact,” retired the concept of “legal wrong,” and announced that anyone asserting an interest arguably within “zone of interests” protected by a statute could sue. *Id.* at 1162–63. Where previously, a competitor could sue only given specific legislative authorization to act in the public interest, see *Sanders Bros.*, 309 U.S. 470 (1940), after *Data Processing*, a legal right to sue was unnecessary, see Magill, *supra* note 146, at 1163.

groups who may or may not be direct beneficiaries of the judgment.”¹⁵²

Inevitably, the tides turned. Then-Judge Scalia, writing in 1983, supplied the intellectual underpinnings for a markedly different approach, arguing that robust enforcement of the injury-in-fact requirement was vital to protecting the separation of powers and that congressional blessing of the ideological plaintiff was no talisman.¹⁵³ Standing, he argued, “roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority.”¹⁵⁴ At the same time, it excludes them “from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest of *the majority itself*.”¹⁵⁵ Scalia urged a return to the private rights model, deeming “concrete injury” the “indispensable prerequisite of standing.”¹⁵⁶ Per Scalia, Article III imposed limits not merely on judges but on Congress, which he argued should not be able to confer litigable rights on a group “so broad that it embraces virtually the entire population.”¹⁵⁷ To permit Congress to do this, Scalia contended, would take unelected judges impermissibly into the political arena.¹⁵⁸

In *Lujan v. Defenders of Wildlife*,¹⁵⁹ Justice Scalia found the opportunity to enshrine much of this prior work in law.¹⁶⁰ Congress had permitted “any person” to sue in the event of violations of the Endangered Species Act of 1973.¹⁶¹ The Act required federal agencies to consult on funded projects to ensure they would not jeopardize

152. Louis L. Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768, 774 (1972). Lax as its rules were generally during this period, the Court was particularly apt to accept the basis for standing where Congress had conferred an express right to sue. See Monaghan, *supra* note 142, at 1376. Even those inclined to caution about the ideological plaintiff agreed that such actions could proceed with congressional authorization. *Id.* (agreeing with *Flast v. Cohen*, 392 U.S. 83, 131–32 (1968) (Harlan, J., dissenting)). Writing at a time when he lamented it “no longer possible to conclude that injury in fact is a constitutional prerequisite,” Monaghan argued that federal courts should not entertain “ideological” suits unless Congress explicitly so authorized. *Id.*

153. See Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894–95 (1983).

154. *Id.* at 894.

155. *Id.*

156. *Id.* at 895.

157. *Id.* at 896.

158. See *id.* at 896–97.

159. 504 U.S. 555 (1992).

160. See *id.* at 573–74.

161. 16 U.S.C. § 1540(g).

endangered or threatened species.¹⁶² A group of plaintiffs challenged the Secretary of the Interior's restriction of the consultation requirement to projects undertaken in the United States or on the high seas.¹⁶³ A 6-3 Court, via Justice Scalia, methodically denied each individual plaintiff's asserted injury in fact.¹⁶⁴ The Court then rejected the argument that the citizen suit provision, by which Congress had specifically allowed "any person" to sue, might constitute a back door into court.¹⁶⁵ Congress could not "legislatively pronounce" that public rights "belong to each individual who forms part of the public" and thereby escape the strictures of Article III.¹⁶⁶ If courts, acting at the invitation of Congress, could ignore the concrete injury requirement, "they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch."¹⁶⁷ Congress could certainly "creat[e] legal rights, the invasion of which creates standing."¹⁶⁸ However, to permit Congress to "convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts" would allow Congress "to transfer from the President to the courts the Chief Executive's most important constitutional duty" of enforcing the laws under Article II's Take Care Clause.¹⁶⁹

162. 16 U.S.C. § 1536(a)(2).

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

164. *See id.* at 562–63. Plaintiffs had framed their alleged harm in various ways. Two had previously traveled to Egypt and Sri Lanka, areas of critical habitat to the Nile Crocodile and Asian Elephant, respectively, and attested that they hoped someday to go back. *See id.* at 563–64. The Court found their claim of harm to be insufficiently imminent given the absence of specific plans. *See id.* at 564. Plaintiffs proposed that a person using a part of a "contiguous ecosystem" was harmed if any other part of that ecosystem faced harm. *Id.* at 565. The Court said the only cognizable harm was to people using a specific area actually affected by the challenged activity. *See id.* at 565–66. The Court likewise rejected plaintiffs' arguments that anyone with an interest in studying endangered animals or a professional interest in endangered animals could sue, concluding that it was "pure speculation and fantasy" to assert that anyone who works with a species "is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection." *Id.* at 566–67.

165. *Id.* at 572–73.

166. *Id.* at 578.

167. *Id.* at 576.

168. *See id.* at 578.

169. *Id.* at 577. Article II of the Constitution requires the President to "take Care that the Laws be faithfully executed." U.S. CONST. Art. II, § 3. For an interesting discussion of the original meaning of the Take Care Clause that concludes it was intended to impose fiduciary obligations on the President, *see* Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2119 (2019). *See also* Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PENN. L. REV. 1835, 1838 (2016) (arguing that the Court uses the Clause "as a placeholder for more abstract

The Court vacillated in its bar against the assertion of generalized grievances thereafter, and Justice Scalia did not run the table. The Court permitted a group of voters to challenge the FEC's decision not to classify the American Israel Public Affairs Committee ("AIPAC") as a "political committee" subject to disclosure requirements in *FEC v. Akins*.¹⁷⁰ Suing under a broad citizen suit provision,¹⁷¹ the plaintiffs claimed the absence of disclosures hindered their ability to evaluate candidates for public office, a claim that any prospective voter might likewise have been able to assert.¹⁷² Over a bitter Scalia dissent, the Breyer majority rejected the FEC's claim that the suit involved an impermissible "generalized grievance."¹⁷³ Problematic generalized grievances, the Court explained, are "abstract and indefinite," like "common concern for obedience to law."¹⁷⁴ That a widely-shared grievance could be vindicated through the political process "[did] not, by itself, automatically disqualify an interest for Article III purposes."¹⁷⁵ In *Massachusetts v. EPA*,¹⁷⁶ a 5-4 Court permitted Massachusetts to challenge the EPA's failure to regulate greenhouse gases under the Clean Air Act¹⁷⁷ over the dissent's protest that the problem of global warming was so widely shared it "may ultimately affect nearly everyone on the planet."¹⁷⁸

and generalized reasoning about the appropriate role of the President in a system of separation of powers").

170. 118 S. Ct. 1777, 1781 (1998).

171. 2 U.S.C. § 437g(a)(8).

172. *See Akins*, 118 S. Ct. at 1784.

173. *Id.* at 1785.

174. *Id.*

175. *Id.* at 1786. Evan Tsen Lee and Josephine Mason Ellis characterized the informational standing cases as standing doctrine's "dirty little secret" that cannot be squared with what the Court has said elsewhere about generalized grievances. Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret*, 107 NW. U. L. REV. 169, 169 (2012); *see also* Daniel A. Farber, *A Place-Based Theory of Standing*, 55 UCLA L. REV. 1505, 1536 (2008) (characterizing *Akins* as "the decisive blow to Justice Scalia's theory of standing"); Kimberly N. Brown, *What's Left Standing? FECA Citizen Suits and the Battle for Judicial Review*, 55 U. KAN. L. REV. 677, 680 (2007) (noting that both *Lujan* and *Akins* were brought under citizen suit provisions, and "[a]lthough the Supreme Court purported to apply the identical standard for Article III standing in both, it reached precisely opposite results"). *But see* Michael E. Solimine, *Congress, Separation of Powers, and Standing*, 59 CASE W. RES. L. REV. 1023, 1056 (2009) (arguing that *Lujan* and *Akins* "seem more reconcilable than thought by some scholars, given that the citizen-suit statute in the latter case had different language and a richer jurisprudential meaning giving context to the operative language").

176. 549 U.S. 497 (2007).

177. *See id.* at 521.

178. *Id.* at 535, 541 (Roberts, C.J., dissenting). Scholars have seen the outcome in this case as dependent on Massachusetts' participation and the state's

Along the way, the Court opaquely suggested that, where Congress accorded an individual “a procedural right to protect his concrete interests,” he can assert that right “without meeting all the normal standards for redressability and immediacy.”¹⁷⁹

With *Summers v. Earth Island Institute*,¹⁸⁰ Justice Scalia’s position regained momentum, as the Court rejected an environmental group’s challenge to a US Forest Service decision exempting certain projects from the notice-and-comment process.¹⁸¹ Deeming the injury-in-fact requirement a “hard floor of Article III jurisdiction that cannot be removed by statute,”¹⁸² the Court required litigants to demonstrate “such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction.”¹⁸³ Scalia’s *Summers* majority did not cite *Akins* or *Massachusetts v. EPA* and thus made no attempt to reconcile any doctrinal tension.¹⁸⁴

B. The Roberts Court’s Contributions: Imminence, Concreteness, and Remedy

The Roberts Court inherited a meandering standing inquiry that was already subject to criticism on all fronts, and its early encounters in *Massachusetts v. EPA* and *Summers* reflected traditional battle lines drawn by the Rehnquist Court before it in *Lujan* and *Akins*. The Justices could agree on the three “irreducible” minima of injury in

sovereign interests. *See, e.g.*, Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1, 40–41 (2011); Kathryn A. Watts & Amy J. Wildermuth, *Massachusetts v. EPA: Breaking New Ground on Issues Other Than Global Warming*, 102 NW. U. L. REV. 1029, 1030–31, 1036 (2008). The Court has been increasingly solicitous of state standing in recent years, and two cases on the October 2022 docket will provide an opportunity for further development of the doctrine. *See* *United States v. Texas*, No. 22-58 (argued Nov. 29, 2022); *Biden v. Nebraska*, No. 22-506 (argued Feb. 28, 2023). Increased opportunities for states to step into the fray in the face of Executive non-enforcement may fuel the Court’s disdain for the damage-seeking private plaintiff, though they are in tension with the Court’s preference for a Unitary Executive. *See* discussion *infra* Section III.A.

179. *See* *Massachusetts v. EPA*, 549 U.S. 497, 517–18 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 n.7 (1992)). Writing shortly after the opinion was issued, Jody Freeman and Adrian Vermeule deemed this portion of the opinion “deeply threatening to the views of standing held by the four Justices in dissent, especially Justice Scalia, who believes Congress’s power to create statutory rights is ultimately limited by Article III requirements.” Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 69.

180. 555 U.S. 488 (2009).

181. *See id.* at 496.

182. *Id.*

183. *Id.* at 488 (citing *Warth v. Seldin*, 422 U.S. 490, 498–99 (1975)).

184. *Summers*, 555 U.S. 488.

fact, causation, and redressability,¹⁸⁵ and they all accepted that the standing requirement advanced separation of powers.¹⁸⁶ Frequently, the Court framed this as a mechanism for ensuring the “proper—and properly limited—role of the courts in a democratic society.”¹⁸⁷ However, in the early Roberts years, superficial agreement masked profound struggles over generalized grievances.

By 2023, the wishy-washiness of the aughts is in rear view. The Court has recently tightened the requirements necessary to show injury in fact. First, it has put firmer reins on situations in which litigants can file suit in anticipation of harm.¹⁸⁸ Litigants suing before harm occurs must show that it is “certainly impending”¹⁸⁹ or, at a minimum, that there is a “substantial risk”¹⁹⁰ that it will eventuate. New precedent confirms the Court intends this standard to have sharp teeth.¹⁹¹ The Court has strongly suggested, moreover, that the risk of harm, even if imminent, cannot support an action for damages.¹⁹² Finally, the Court has heightened the requirement that an asserted injury in fact be “concrete.”¹⁹³ In cases directed specifically at the power of Congress to create rights and rights of action, the Court has abjured the idea of independent procedural rights and put federal courts in charge of determining that the injuries litigants claim, concededly particularized, are “real.”¹⁹⁴

185. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992); *see also Massachusetts v. EPA*, 549 U.S. 497, 540 (2007) (reciting the three elements).

186. As Heather Elliott demonstrates, though, agreement as to the separation-of-powers function of standing masks three discrete concepts. *See Elliott, supra* note 14, at 460–63.

187. *Summers*, 555 U.S. at 492–93 (citing *Warth*, 422 U.S. at 498); *see also Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 133 (2011) (noting that standing “maintains the public’s confidence in an unelected but restrained Federal Judiciary”); *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 598 (2007) (describing standing as “fundamental to the judiciary’s proper role in our system”).

188. *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013); *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014).

189. *Clapper*, 568 U.S. at 409.

190. *SBA List*, 134 S. Ct. at 2341.

191. *See Trump v. New York*, 141 S. Ct. 530, 535 (2020) (per curiam) (finding, in a 6-3 decision, that case “is riddled with contingencies and speculation that impede judicial review”).

192. *See infra* note 415 and accompanying text.

193. *See infra* notes 265–68 and accompanying text.

194. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021); *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016).

1. *Imminence*

While the Court has long included “imminence” among the litany of words it uses to describe the requisite injury-in-fact,¹⁹⁵ *Clapper v. Amnesty International USA*¹⁹⁶ raised the bar by stating repeatedly that alleged harm must be “certainly impending.”¹⁹⁷ *Clapper* involved a challenge to provisions of the Foreign Intelligence Surveillance Act (“FISA”) Amendments of 2008,¹⁹⁸ which expanded the power of the executive branch to conduct surveillance of foreign persons located abroad.¹⁹⁹ Amnesty International and other groups brought suit claiming they regularly communicated with individuals located in areas that were a “special focus” of the government’s counterterrorism efforts and that the stepped-up surveillance heightened their costs in violation of several provisions of the Constitution.²⁰⁰ The district court held that the plaintiffs lacked standing.²⁰¹ A unanimous Second Circuit panel reversed.²⁰²

In a 5-4 decision authored by Justice Alito, the Court reversed again.²⁰³ Anchoring the standing inquiry in “the judiciary’s proper role in our system,” the Court reasoned that standing was a vital safeguard “to prevent the judicial process from being used to usurp the powers of the political branches.”²⁰⁴ Twelve times in the opinion, the Court stated that, to satisfy Article III, the plaintiffs had to demonstrate their asserted injury was “certainly impending.”²⁰⁵ Although this standard, which the Court characterized as “well established,”²⁰⁶ had roots in previous opinions,²⁰⁷ Justice Breyer

195. See, e.g., *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983); *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

196. 568 U.S. 398 (2013).

197. *Id.* at 402.

198. 50 U.S.C. § 1881(a).

199. See *Clapper*, 568 U.S. at 404–05.

200. See *id.* at 406–07.

201. See *Amnesty Int’l v. McConnell*, 646 F. Supp. 2d 633, 645 (S.D.N.Y. 2009).

202. See *Amnesty Int’l USA v. Clapper*, 638 F.3d 118, 134, 138 (2d Cir. 2011).

203. See *Clapper*, 568 U.S. at 402.

204. *Id.* at 408.

205. *Id.* at 401, 402, 409, 410, 414, 416, 417, 422.

206. *Id.* at 401.

207. See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564–65 n.2 (1992) (“Although ‘imminence’ is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is ‘certainly impending.’”); *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (“A threatened injury must be ‘certainly impending’ to constitute injury in fact.”); *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979) (holding that plaintiff must demonstrate a “realistic danger of sustaining a direct injury,” a standard satisfied

charged in dissent that prior references often “described a sufficient, rather than a necessary, condition for jurisdiction.”²⁰⁸ Breyer cited other cases that had required something more akin to a “reasonable probability,”²⁰⁹ “realistic,”²¹⁰ or “genuine”²¹¹ threat of harm. In response, Justice Alito dropped a footnote begrudgingly admitting that prior cases had not required literal certainty and that, even if a “substantial risk” of injury was relevant or different from the “certainly impending” standard, plaintiffs could not show that either.²¹² Above the line, the majority’s repeated invocation of the “certainly impending” standard was relentless.²¹³

On the facts of *Clapper*, the Court concluded that the plaintiffs’ claim to future injury rested on “a highly attenuated chain of possibilities”—that the government would target people with whom they communicate, that the government would seek to use the new provisions rather than older sections of the enabling statute in justification, that the Foreign Intelligence Surveillance Court serving as a gatekeeper would permit the government to proceed, and that the surveillance would actually capture plaintiffs’ own communications.²¹⁴ This “speculative chain,” the Court found, “[d]id not establish that injury based on potential future surveillance is certainly impending.”²¹⁵ The Court made short work of the plaintiffs’ argument that they had already suffered injury because they had taken costly measures to avoid surveillance.²¹⁶ The plaintiffs could not “manufacture standing merely by inflicting harm on themselves

where it is “certainly impending”); *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923) (stating that “one does not have to await the consummation of threatened injury to obtain preventive relief” and “[i]f the injury is certainly impending, that is enough”).

208. *Clapper*, 568 U.S. at 432 (Breyer, J., dissenting).

209. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 153 (2010).

210. *Davis v. FEC*, 554 U.S. 724, 734 (2008).

211. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007).

212. *Clapper*, 568 U.S. at 414–15 n.5. Justice Breyer’s criticism likely swayed someone in Alito’s fragile majority. See Bradford Mank, *Clapper v. Amnesty International: Two or Three Competing Philosophies of Standing Law?*, 81 TENN. L. REV. 211, 215 (2014). Mank suspects the wavering vote on this point was Justice Kennedy. See *id.* at 215–16 n.20.

213. *Clapper*, 568 U.S. at 401–02, 409–10, 414, 416, 417, 422.

214. *Id.* at 410. As Mank notes, even if plaintiffs could learn that parties with whom they communicated were under surveillance, they would not be able to prove their own communications were incidentally acquired without actual government disclosure. Mank, *supra* note 212, at 230. The Court thus created an insurmountable obstacle to suit.

215. *Clapper*, 568 U.S. at 414.

216. See *id.* at 415–16. Daniel Solove and Danielle Citron argue that the *Clapper* Court “failed to understand risk” and to differentiate between reasonable measures and pretextual ones. Daniel J. Solove & Danielle Keats Citron, *Risk and Anxiety: A Theory of Data Breach Harms*, 96 TEX. L. REV. 737, 776 (2018).

based on their fears of hypothetical future harm that is not certainly impending.”²¹⁷

The following year, in *Susan B. Anthony List v. Driehaus*,²¹⁸ the *Clapper* majority and dissent found common ground, unanimously recognizing imminent injury in a pre-enforcement challenge to a criminal statute.²¹⁹ An Ohio statute criminalized “false statements concerning the voting record of a candidate or public official” during the course of political campaigns and permitted “any person acting on personal knowledge” to file a complaint with the state election commission,²²⁰ which ultimately could culminate in a criminal referral.²²¹ Susan B. Anthony List (“SBA List”) publicly characterized then-Rep. Steve Driehaus’s vote for the Affordable Care Act²²² as a vote “FOR taxpayer-funded abortion.”²²³ Driehaus filed a complaint under the statute, and the election commission found probable cause to proceed.²²⁴ SBA List filed suit in federal court seeking to enjoin enforcement of the statute under the First and Fourteenth Amendments.²²⁵ The district court stayed the action pending completion of state proceedings.²²⁶ When Driehaus lost his race, he withdrew his complaint, thus terminating the state action against SBA List.²²⁷ SBA List amended its federal complaint, claiming that it “intend[ed] to engage in substantially similar activity in the future” and that its speech and associational rights were “chilled and burdened” because it could be hauled back before the commission on the complaint of anyone.²²⁸ The district court dismissed the suit as non-justiciable.²²⁹ The Sixth Circuit affirmed on ripeness grounds.²³⁰

217. *Clapper*, 568 U.S. at 416. The Court was unperturbed that the covert nature of the surveillance program might preclude any litigant from making the requisite showing: that “no one would have standing” if plaintiffs could not “is not a reason to find standing.” *Id.* at 420; *see also* Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1944 (2013) (“Plaintiffs can only challenge secret government surveillance they can prove, but the government isn’t telling.”).

218. 573 U.S. 149 (2014).

219. *Id.* at 151–52, 159.

220. OHIO REV. CODE (2022).

221. *Id.* § 3517.21(B)(9).

222. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in scattered sections of 42 U.S.C.).

223. *SBA List*, 573 U.S. at 154.

224. *See id.*

225. *Id.*

226. *See id.* at 154–55.

227. *See id.* at 155.

228. *Id.*

229. *Susan B. Anthony List v. Driehaus*, No. 1:10-cv-720, 2011 WL 3296174, at *5–6 (S.D. Ohio Aug. 1, 2011).

230. *Susan B. Anthony List v. Driehaus*, 525 F. App’x 415, 423 (6th Cir. 2013).

A unanimous Court, per Justice Thomas, reversed the Sixth Circuit's opinion, finding the standing and ripeness requirements satisfied.²³¹ The Court served up both standards referenced in *Clapper*, holding that an allegation of future injury suffices if the threatened injury is “certainly impending” or if there is “substantial risk” that harm will occur.²³² Given SBA List's announced intention to violate the statute and the “credible threat of enforcement,” the Court had no trouble permitting the pre-enforcement challenge.²³³ The Court emphasized the commission's previous attempt to enforce the statute against SBA List and the heightened likelihood of future prosecution given that “any person” could file a complaint.²³⁴

In squaring the austerity of *Clapper* and comparative laxness of *SBA List*, commentators initially focused on their factual contexts—*Clapper* involved national security, an area in which the Court traditionally proceeds cautiously, and *SBA List* turned on the planned violation of a criminal statute.²³⁵ In *SBA List*, a key factor triggering operation of the challenged law was obviously within plaintiff's control, which made the anticipated harm less speculative.²³⁶ The only variable was whether the government was likely to prosecute, and its prior history of doing so made that threat credible.²³⁷

In *Trump v. New York*,²³⁸ the Court returned to the imminence inquiry in a domestic context, and the rigor of the standard it

231. *SBA List*, 573 U.S. at 168.

232. *Id.* at 158. Some commentators saw this as confirmation that the “certainly impending” language was not intended to be absolute. See Daniel A. Fiedler, *Standing Underwater*, 85 GEO. WASH. L. REV. 1554, 1573 (2017). Of course, this concession was also presumably necessary to keep the fifth *Clapper* vote and the *Clapper* dissenters on board.

233. See *SBA List*, 573 U.S. at 161–62.

234. *Id.* at 164. The Court went on to conclude that prudential ripeness factors were satisfied. See *id.* at 167–68.

235. See, e.g., Richard H. Fallon, Jr., *How to Make Sense of Supreme Court Standing Cases—A Plea for the Right Kind of Realism*, 23 WM. & MARY BILL RTS. J. 105, 119 (2014) (“Looking to the future, I believe *Clapper* both fits and gives legal significance to a now-explicit pattern: lower courts should demand especially persuasive showings of likely future injury in order to establish standing to seek injunctive relief against national security policies (other than injunctions against criminal prosecutions).”).

236. See *SBA List*, 573 U.S. at 162.

237. *SBA List* fits neatly within a long line of cases, beginning with *Ex parte Young*, 209 U.S. 123 (1908), in which the Court has permitted pre-enforcement review of state criminal statutes rather than requiring that parties break the law and assert constitutional claims as defenses in enforcement proceedings. *Id.* at 165. Cf. *Poe v. Ullman*, 367 U.S. 497, 508–09 (1961) (finding challenge to a Connecticut statute criminalizing contraception non-justiciable given the absence of enforcement over eight decades).

238. 141 S. Ct. 530 (2020) (per curiam).

employed suggests that, outside of pre-enforcement challenges like that in *SBA List*, heightened scrutiny for imminence is the new norm.²³⁹ President Trump issued a memorandum to the Secretary of Commerce during the 2020 census directing him to exclude “from the apportionment base aliens who are not in lawful immigration status.”²⁴⁰ Various plaintiffs brought suit claiming the memorandum would chill groups from responding to the census, thereby degrading the census data and compelling them to spend money on outreach.²⁴¹ By the time the Court heard the case, the census had concluded, and the risk of chilling responses had subsided.²⁴² Before the Court, plaintiffs instead claimed harm due to “the threatened impact of an unlawful apportionment on congressional representation and federal funding.”²⁴³ In a 6-3, unsigned opinion, the Court held that standing and closely linked ripeness issues precluded the suit.²⁴⁴ The Court found the case “riddled with contingencies and speculation.”²⁴⁵ Although the President had ordered the Secretary to exclude undocumented immigrants, the Secretary only had to act “to the extent practicable” and “to the extent feasible.”²⁴⁶ The Court thought it unlikely, in the time available, that the government would be able to exclude all 10.5 million undocumented immigrants from the census data.²⁴⁷ That the plaintiffs could not tell the Court to the number the projected impact on apportionment or funding was dispositive; at this stage, the case required too much “guesswork” to support a finding of imminent injury, “making any prediction about future injury just that—a prediction.”²⁴⁸

With *Trump v. New York*, the Court has recommitted to a lofty bar for imminent injuries. Outside of the criminal enforcement context, the Court requires plaintiff both to demonstrate that an injury is certain or near certain to occur and to communicate some sense of its likely magnitude.

239. *See id.* at 535–36.

240. 85 Fed. Reg. 44680 (2020).

241. *Trump*, 141 S. Ct. at 534.

242. *See id.*

243. *Id.* at 534–35.

244. *See id.* at 536–37.

245. *Id.* at 535.

246. *Id.* (citing 85 Fed. Reg. 44680).

247. *See id.* at 536.

248. *Id.* Joined by two colleagues in dissent, Justice Breyer charged that the claimed injury was “unusually straightforward.” *Id.* at 538 (Breyer, J., dissenting). The government had announced its intent to enforce the policy “to the full extent” and conceded “it was already feasible” to exclude tens of thousands of undocumented immigrants in ICE detention centers. *Id.* at 539 (Breyer, J., dissenting). The Biden administration rescinded the policy, so the census data ultimately reflected the whole population. *See* Cristina M. Rodríguez, *Foreword: Regime Change*, 135 HARV. L. REV. 1, 151 (2021).

2. *Concreteness and Remedy for Risk of Harm*

While *Lujan* placed limitations on Congress’s ability to confer standing on “any person,” the Court reassured it was still the case that Congress could “creat[e] legal rights, the invasion of which creates standing,”²⁴⁹ even where no such rights existed at common law. The point of *Lujan* was that Congress cannot confer “individual” rights on *everyone*, thereby transmuting public rights into litigable private rights and circumventing Article III limitations on the power of federal courts.²⁵⁰ A citizen suit provision, in other words, is not a golden ticket that permits courts to toss the revitalized private rights model out the window. In *Spokeo, Inc. v. Robins*²⁵¹ and *TransUnion LLC v. Ramirez*,²⁵² the Roberts Court confronted the question *when*, precisely, Congress could create “new” legal rights without running afoul of this core *Lujan* principle.²⁵³

a. *Spokeo, Inc. v. Robins*

Spokeo, an online information aggregator, assembles personal data from publicly available sources and sells it to subscribers, including businesses evaluating pools of job applicants.²⁵⁴ Spokeo arguably qualifies as a “consumer reporting agency” subject to the Fair Credit Reporting Act of 1970 (“FCRA”),²⁵⁵ which requires such agencies to “follow reasonable procedures to assure maximum possible accuracy” of the information they share.²⁵⁶ The FCRA provides that any agency that “willfully fails to comply” with the Act’s requirements with respect to an individual faces liability either for actual damages or a prescribed statutory penalty.²⁵⁷

Spokeo’s profile page for plaintiff Thomas Robins indicated he was a middle-aged, married-with-children, affluent person with a

249. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 578 (1992) (citing *Warth v. Seldin*, 422 U.S. 490, 500 (1975)).

250. *See id.*

251. 578 U.S. 330 (2016).

252. 141 S. Ct. 2190 (2021).

253. The Court had had a previous opportunity to answer the question four years before *Spokeo*, but it dismissed the case as improvidently granted on the last day of the term. *See First Am. Fin. Corp. v. Edwards*, 567 U.S. 756 (2012). Some Court watchers speculated that the Court found itself unable to answer the question. *See* Pamela S. Karlan, *Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 61 (2012); Kevin Russell, *First American Financial v. Edwards: Surprising End to a Potentially Important Case*, SCOTUSBLOG (June 28, 2012, 7:00 PM), <https://www.scotusblog.com/2012/06/first-american-financial-v-edwards-surprising-end-to-a-potentially-important-case/>.

254. *See Spokeo, Inc.*, 578 U.S. at 333.

255. *See* 15 U.S.C. §§ 1681–1681x. The Supreme Court assumed this for purposes of the case. *See Spokeo, Inc.*, 578 U.S. at 335 n.4.

256. 15 U.S.C. § 1681e(b).

257. *Id.* § 1681n(a).

graduate degree and a decent job.²⁵⁸ This report inflated his “age, marital status, wealth, education level, and profession.”²⁵⁹ Robins filed a class action under the FCRA claiming that these errors “harmed his employment prospects at a time when he was out of work.”²⁶⁰ He cited numerous FCRA violations, including that Spokeo had failed to follow reasonable procedures to ensure the accuracy of his information, had failed to issue required notice to providers and users of information, and had failed to post required toll-free numbers on its website.²⁶¹ The district court denied standing,²⁶² and the Ninth Circuit reversed on the basis that the statute conferred a right specific to him and did not require a showing of actual harm.²⁶³ The case made it up to the Supreme Court on Spokeo’s framed question: “Whether Congress may confer Article III standing on a plaintiff who suffers no concrete harm.”²⁶⁴

The 6-2 Court, in an opinion by Justice Alito, vacated and remanded, instructing the Ninth Circuit to consider whether Robins’s injury, concededly particularized, was “concrete.”²⁶⁵ Though it need not be “tangible,” the Court explained, a concrete injury “must actually exist.”²⁶⁶ The Court offered a couple of pointers for how to recognize “actual” intangible injuries. First, an intangible harm that has “a close relationship” to harms recognized at common law is sufficiently concrete.²⁶⁷ Second, while Congress’s views are “instructive and important,” a court should bring to bear independent judgment.²⁶⁸ By way of example, the Court cited an incorrect zip code, which technically violated the statute, but in the Court’s estimation, would never amount to concrete harm.²⁶⁹

Justice Thomas joined the opinion but wrote separately to advance his view that a threshold classification of the asserted rights was in order; the concreteness requirement applied to “public rights”—rights owed the whole community in the aggregate—which an individual ordinarily cannot assert (both before and certainly after

258. *See Spokeo, Inc.*, 578 U.S. at 336.

259. *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1111 (9th Cir. 2017).

260. *Id.*

261. *See Spokeo, Inc.*, 578 U.S. at 335–36.

262. *Spokeo, Inc. v. Robins*, No. CV10-05306, 2011 WL 11562151 (C.D. Cal. Sept. 19, 2011), *reinstating Spokeo, Inc. v. Robins*, No. CV10-05306, 2011 WL 597867 (C.D. Cal. Jan. 27, 2011).

263. *See Robins v. Spokeo, Inc.*, 742 F.3d 409, 412 (9th Cir. 2014).

264. Petition for a Writ of Certiorari at i, *Spokeo*, 578 U.S. 330 (No. 13-1339).

265. *See Spokeo*, 578 U.S. at 339–40. Prior to this case, it was not clear that the concreteness and particularization requirements were distinct.

266. *Id.* at 340.

267. *Id.* at 341.

268. *Id.*

269. *See id.* at 342.

Lujan) absent some showing of individualized, special harm.²⁷⁰ It did not apply to private rights.²⁷¹ Under the common law, courts presumed a right to sue if plaintiff could demonstrate a violation of a private right without requiring any demonstration of injury.²⁷² The injury-in-fact requirement, Justice Thomas argued, was a mechanism the Court had developed for winnowing out assertions of rights whose protection lay in the hands of public officers.²⁷³ Congress could create new private rights.²⁷⁴ Therefore, Justice Thomas suggested, there was a threshold question as to what kind of rights were at issue that might obviate a concreteness inquiry.²⁷⁵

b. *TransUnion, LLC v. Ramirez*

The *Spokeo* concreteness inquiry left circuit courts in considerable disarray.²⁷⁶ The courts disagreed over *which* common law analogues to examine,²⁷⁷ how closely a “new” right had to match

270. *See id.* at 345–46 (Thomas, J., concurring).

271. *See id.* at 344.

272. *See id.* at 344–45.

273. *See id.* at 346–47. The Court subsequently approved this distinction in an 8-1 opinion authored by Justice Thomas, albeit not in the context of a right created by Congress. *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 798 (2021) (noting that common law courts presumed that every violation of a private right caused damage and liberally awarded nominal damages in the absence of other demonstrable harm).

274. *See Spokeo*, 578 U.S. at 348 (Thomas, J., concurring).

275. *See id.* On remand, the Ninth Circuit did not take up Justice Thomas’s dichotomy, instead proceeding straightaway with concreteness. *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1110 (9th Cir. 2017). It had “little difficulty” concluding that interests protected by the FCRA were “real” given “the ubiquity and importance of consumer reports in modern life.” *Id.* at 1114. Next, understanding the Supreme Court’s opinion to require some qualitative examination “of the *nature*” of the inaccuracies at issue, the court concluded the inaccuracies about Robins were more likely to harm him than an incorrect zip code because the aggregate story they told might suggest to prospective employers that he was overqualified. *See id.* at 1116–17. The Court denied Spokeo’s petition for certiorari. *See Spokeo, Inc. v. Robins*, 138 S. Ct. 931 (2018).

276. *See Beske, supra* note 134, at 755–60 (analyzing lower courts’ various approaches under several federal statutes); Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, 102 B.U. L. REV. 793, 804 (2022) (“In the wake of *Spokeo*, courts issued a contradictory mess of decisions regarding privacy harm and standing.”).

277. *Compare, e.g., Salcedo v. Hanna*, 936 F.3d 1162, 1171, 1173 (11th Cir. 2019) (concluding receipt of a single unwanted text message in violation of the Telephone Consumer Protection Act of 1991 (TCPA), 47 U.S.C. §227, was not concrete harm after comparing it with common law tort of intrusion upon seclusion), *with Cranor v. 5 Star Nutrition, L.L.C.*, 998 F.3d 686, 692 (5th Cir. 2021) (finding that receipt of an unwanted text message was concrete harm under the TCPA after comparing it to common law public nuisance).

up with a right recognized at common law,²⁷⁸ and when something felt harmful enough.²⁷⁹ Individual judges called on the Court to rethink the doctrine.²⁸⁰

In *TransUnion LLC v. Ramirez*,²⁸¹ a 5-4 Court doubled down. Sergio Ramirez had visited a dealership intending to purchase a car.²⁸² When the dealership ran a routine credit check, the credit report issued by TransUnion indicated that his name was on a list maintained by the Treasury Department's Office of Foreign Assets Control ("OFAC") consisting of terrorists, drug traffickers, and other serious criminals.²⁸³ Ramirez called TransUnion to request a copy of his credit file and received a file and summary of rights that did not mention the OFAC alert.²⁸⁴ The following day, he received a second mailing disclosing the OFAC alert.²⁸⁵ The second mailing did not include a required summary of Ramirez's rights or information about how to remove the alert.²⁸⁶

278. *Compare, e.g., Kamal v. J. Crew Grp., Inc.*, 918 F.3d 102, 114 (3d Cir. 2019) (rejecting analogy between statutory right under Fair and Accurate Credit Transactions Act of 2003 (FACTA), Pub. L. No. 108-159, 117 Stat. 1952 (2003) and common law breach of confidence because common law tort required disclosure to a third party, and FACTA did not), *and Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 932 (11th Cir. 2020) (en banc) (same), *with Jeffries v. Volume Servs. Am., Inc.*, 928 F.3d 1059, 1064-65 (D.C. Cir. 2019) (accepting analogy between FACTA and common law breach of confidence because relationship was close enough).

279. *Compare, e.g., Muransky*, 979 F.3d at 934 (concluding that receipt including first six digits of consumer's credit card in violation of FACTA did not cause concrete harm because first six digits merely identified the issuer), *with Jeffries*, 928 F.3d at 1067 (concluding that receipt printing all sixteen digits represented concrete harm). *See also Muransky*, 979 F.3d at 969 (Jordan, J., dissenting) (noting that en banc majority distinguished *Jeffries* on basis that receipt included sixteen digits, but asking, if sixteen is harm enough, "why not 15? And if not 15, then why not 14, 13, etc.?).

280. *See Muransky*, 979 F.3d at 957-58 (Jordan, J., dissenting) (lamenting "how far standing doctrine has drifted from its beginnings and from constitutional first principles"); *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1121 (11th Cir. 2021) (Newsom, J., concurring) (arguing that "our current Article III standing doctrine can't be correct—as a matter of text, history, or logic").

281. 141 S. Ct. 2190, 2197 (2021). I have previously discussed this case at length. *See Beske, supra* note 134, at 761-76.

282. *See TransUnion*, 141 S. Ct. at 2201.

283. *See id.*

284. *See id.*

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

286. *See id.*

Ramirez filed suit against TransUnion raising three violations of the FCRA,²⁸⁷ the same statute at issue in *Spokeo*.²⁸⁸ He claimed that TransUnion had failed to follow reasonable procedures to ensure his file was accurate;²⁸⁹ had failed to provide all of his information on request, given that the first mailing did not include the OFAC alert;²⁹⁰ and had failed to include the requisite summary of rights in the second mailing.²⁹¹ Ramirez sought to certify a class of all people to whom TransUnion had sent similar mailings between January 1, 2011, and July 26, 2011, and the parties stipulated the class consisted of 8,185 members, only 1,853 of whom had had their erroneous inclusion on OFAC's list shared with third parties during the relevant period.²⁹² The district court certified the class, and a jury rendered a verdict for plaintiffs.²⁹³ A split panel of the Ninth Circuit affirmed as to standing and class certification.²⁹⁴

The Supreme Court, per Justice Kavanaugh, concluded that only those members of the class whose credit files TransUnion had disclosed to third parties had standing to pursue TransUnion's failure to follow reasonable procedures.²⁹⁵ That Congress had created statutory obligations and conferred a cause of action was the start, not the end, of the inquiry.²⁹⁶ The Court reminded that "we cannot treat an injury as 'concrete' for Article III purposes based only on Congress's say-so."²⁹⁷ To permit Congress to authorize *unharmful* plaintiffs to sue would both violate Article III and infringe on the authority of the Executive Branch under Article II.²⁹⁸

As instructed by *Spokeo*, the Court then scoured "history and tradition" to look for a "close relationship" to harms recognized historically or at common law.²⁹⁹ The Court found a potential analogue in common law defamation.³⁰⁰ With respect to the 1,853 class members whose erroneous files TransUnion had given to third parties, the Court deemed the analogy compelling.³⁰¹ The Court

287. 15 U.S.C. §§ 1681–1681x.

288. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 333 (2016).

289. *See* 15 U.S.C. § 1681e(b).

290. *See id.* § 1681g(a)(1).

291. *See id.* § 1681g(c)(2).

292. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2202 (2021).

293. *See id.*

294. *See Ramirez v. TransUnion LLC*, 951 F.3d 1008, 1017 (9th Cir. 2020).

295. *TransUnion LLC*, 141 S. Ct. at 2214.

296. *Id.* at 2205.

297. *Id.* (quoting *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 999 n.2 (11th Cir. 2020)).

298. *See id.* at 2207.

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

300. *See id.* at 2208 (citing *Spokeo*, 578 U.S. at 341).

301. *See id.* at 2209.

rejected TransUnion’s argument that common law defamation was inapposite because it required falsity, and the description of Ramirez as a potential match was technically true.³⁰² In searching for the requisite “close relationship” to common law harm, the Court explained, it did not require “an exact duplicate.”³⁰³

The remaining 6,332 class members, however, did not have an injury sufficient to confer standing.³⁰⁴ The “mere existence” of a misleading OFAC alert in a file, the Court reasoned, was like the proverbial tree falling in the forest: without someone on the receiving end of the information, it made no sound and thus inflicted no actionable harm.³⁰⁵ Though it had dispensed with the common law defamation element of falsity, the Court determined that satisfaction of the common law “publication” requirement was critical.³⁰⁶ In the absence of publication, all this group of plaintiffs had was a “*risk of future harm*.”³⁰⁷ The Court had several reasons for rejecting the claim that such risk itself gave rise to standing, and the first is most important.³⁰⁸ Plaintiffs had sought damages, not injunctive relief.³⁰⁹ The Court found “persuasive” TransUnion’s argument that not until the future harm actually materialized could plaintiffs establish standing to pursue damages.³¹⁰ The Court thus strongly suggested that statutory damages cannot apply to probabilistic harms going forward—damages are only appropriate when the plaintiff has already suffered harm.³¹¹ Apart from that, the Court was unconvinced that there was a credible risk of disclosure to third parties during the key timeframe.³¹² Finally, the Court deemed it significant that these plaintiffs had not presented evidence that they even knew of the OFAC alerts.³¹³

302. *See id.*

303. *Id.*

304. *See id.* at 2212.

305. *See id.* at 2209 (citing *Owner-Operator Indep. Drivers Ass’n v. U.S. Dep’t of Transp.*, 879 F.3d 339, 344 (D.C. Cir. 2018)).

306. *Id.* at 2209 (citing RESTATEMENT OF TORTS § 577 cmt. a (AM. L. INST. 1938)).

307. *Id.* at 2210.

308. *See infra* notes 297–303 and accompanying text.

309. *See TransUnion LLC*, 141 S. Ct. at 2210–11.

310. *See id.* at 2210–11.

311. *Id.* at 2213, 2214.

312. *See id.* at 2212.

313. *See id.* This observation is in tension with the class certification of individuals “to whom Trans Union sent a letter similar to the March 1, 2011 letter Plaintiff received regarding the OFAC Alert.” *Ramirez v. Trans Union, LLC*, 301 F.R.D. 408, 417 (N.D. Cal. 2014). By definition, these plaintiffs had received notice of their inclusion on the list. *See TransUnion LLC*, 141 S. Ct. at 2216 (Thomas, J., dissenting).

Turning to claims of insufficient information in the first mailing and inadequate material in the second, the Court denied standing across the board.³¹⁴ The plaintiffs had not demonstrated the requisite “close relationship” between technical format defects in the mailings and “harm traditionally recognized as providing a basis for a lawsuit in American courts.”³¹⁵ The plaintiffs presented no evidence of confusion or distress from the mailings, and the Court characterized their claims as “bare procedural violation[s], divorced from any concrete harm.”³¹⁶ The Court was similarly unmoved by the United States’ argument as *amicus curiae* that plaintiffs had suffered “informational injury” within the meaning of *FEC v. Akins*.³¹⁷ The plaintiffs had not claimed they failed to receive information required by the statute; they claimed merely to have received it in the wrong format.³¹⁸ In any event, the Court noted, “plaintiffs have identified no ‘downstream consequences’ from failing to receive the required information.”³¹⁹ The Court concluded that “[a]n asserted informational injury that causes no adverse effects cannot satisfy Article III.”³²⁰

314. In the concluding paragraph of the opinion, Justice Kavanaugh says that “none of the 8,185 class members other than the named plaintiff Ramirez suffered a concrete harm” due to the format of the mailings. *TransUnion LLC*, 141 S. Ct. at 2214. The conclusion’s suggestion that Ramirez had standing to pursue these claims was surely a mistake; the only distinction between Ramirez and fellow class members noted by the Court in the body of the opinion is that he alleged he opened the mailings. *See id.* at 2213. The remainder of the Court’s discussion—that the formatting violations lacked a close relationship to common law harms and that plaintiffs had not demonstrated confusion or distress—would apply with equal force to Ramirez. *Id.*

315. *Id.*

316. *Id.* at 2213 (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016)).

317. *Id.* at 2214. For discussion of *Akins*, see *supra* notes 170–175 and accompanying text.

318. *See TransUnion LLC*, 141 S. Ct. at 2214.

319. *Id.* at 2214 (citing *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 1004 (11th Cir. 2020)).

320. *Id.* at 2214 (quoting *Trichell*, 964 F.3d at 1004). This sentence places in some doubt the continued viability of the Court’s informational and “tester” standing cases, which did not turn on any concrete demonstration of adverse effects. The *TransUnion* majority did not grapple with the effects of its decision on cases like *FEC v. Akins*, 524 U.S. 11 (1998) (allowing informational standing) or *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 374 (1982) (permitting Black “tester” to sue under federal housing law upon receiving false information even when he had no intention of renting or purchasing property). Subsequent to *TransUnion*, a circuit split has developed regarding the continued viability of “tester” standing under *Havens*. Compare *Laufer v. Arpan LLC*, 29 F.4th 1268, 1274–75 (11th Cir. 2022) (concluding that “tester” standing survives *TransUnion*) and *Laufer v. Acheson Hotels LLC*, 50 F.4th 259, 270–71 (1st Cir. 2022) (same), with *Harty v. West Point Realty, Inc.*, 28 F.4th 435, 444 (2d Cir.

Dissenting for himself and three colleagues, Justice Thomas reprised the distinction between private and public rights from his *Spokeo* concurrence.³²¹ Because TransUnion had violated rights possessed individually by Ramirez and others in the class, not rights owed to the public writ large, plaintiffs had no obligation to demonstrate harm.³²² “Never before,” Thomas lamented, “has this Court declared that legal injury is *inherently* insufficient to support standing.”³²³

C. Standing and Legislative Prerogative: The Upshot of the Roberts Court Raising the Bars

The Roberts Court has elevated the imminence requirement for litigants to establish a risk of harm under Article III and at the same time suggested that damage remedies are not available until the harm actually materializes. With respect to harm generally, the Court has dictated a judge-driven inquiry into what harms are sufficiently “actual” and “real” to give rise to Article III standing. This Part examines the implications of these tougher standards. For framing purposes, Subpart 1 begins with a brief overview of the rational-basis scrutiny the Court purports to use when examining legislation passed under the Commerce power and finds a broad commitment to deference consistent with what the Court has said in the *Sandoval* and *Bivens* contexts.³²⁴ Subpart 2 examines an illustrative modern statutory scheme with several routine statutory features—a problem, an approach, and an enforcement mechanism—all of which require a delicate balance of costs and benefits to which the Court has long pledged deference. Subpart 3 then demonstrates the impact of the Roberts Court’s heightened injury-in-fact requirements on this type of statutory scheme, concluding that the Article III inquiry involves judges in the scrutiny of legislative ends and means and has the effect of preferring reactive, rather than proactive, solutions to modern problems. By means of Article III and in the name of limitations on its own power, the Court has devised

2022) (concluding that, after *TransUnion*, there is no “tester” standing absent proof of downstream harm). The Court cited *Havens* approvingly in *FEC v. Ted Cruz for Senate*, 142 S. Ct. 1638, 1647 (2022); however, it again made no effort to reconcile the doctrinal tension.

321. The majority’s rejection of this approach is hard to square with its decision the preceding year in *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802 (2021), which dispensed with the requirement of actual harm in a nonstatutory private rights case. See WILLIAM BAUDE ET AL., *supra* note 102, 25.

322. See *TransUnion LLC*, 141 S. Ct. at 2218 (Thomas, J., dissenting).

323. *Id.* at 2221.

324. I focus on the Commerce power because it permits Congress to regulate private conduct and thus constitutes the main anchor for legislative activity in this sphere.

substantive constraints on policy choices that, in other contexts, it has described as the quintessence of the legislative function.

1. *Conventional Constraints on the Commerce Power and Legislative Choice*

To understand the impact of the new standing requirements, it is useful to have a baseline understanding of how the Court approaches challenges to ordinary economic legislation generally.

During the *Lochner* era,³²⁵ the Court had a limited view of what the Commerce Clause permitted Congress to do³²⁶ and gave itself free rein to evaluate and second-guess Congress's pursuit of ends and selected means.³²⁷ This hostility to economic regulation gave way during the Great Depression, beginning with Justice Owen Roberts's

325. The era derives its name from *Lochner v. New York*, 198 U.S. 45 (1905), which invoked "liberty of contract" under the Fourteenth Amendment to invalidate a New York law regulating the number of hours that bakers could work weekly. *Id.* at 61, 64. Although *Lochner* involved state regulation, not Congress's exercise of power under the Commerce Clause, the Court's approach to state and federal economic regulation during this period reflected similar hostility to legislative interference with the market, and the repudiation of *Lochner* came in tandem with a far more deferential understanding of Congress's Commerce Clause powers. See Beske, *supra* note 134, at 770–71. While *Lochner* retains its firm spot in "the anticanon," see Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 417–18 (2011), this Article will sidestep the considerable scholarship debating its sins, see, e.g., Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874 (1987) (arguing that the principal defect in *Lochner* was the Court's baseline assumption that any deviation from the existing distribution of wealth and entitlements violated "neutrality"); Gary Peller, *The Classical Theory of Law*, 73 CORNELL L. REV. 300, 302 (1988) (noting routine criticism of *Lochner* complains that the justices imposed their own values, unmoored from constitutional text); see generally Rebecca L. Brown, *The Art of Reading Lochner*, 1 NYU J.L. & LIBERTY 570 (2005) (canvassing the debate). Some modern scholars have forecast *Lochner's* resurgence. See, e.g., Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527, 531 (2015) (claiming that the modern conservative legal movement "is ready, once again, to embrace *Lochner*" and its "robust judicial protection for economic rights"); DAVID E. BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM 125 (2011) (contending that *Lochner* was "unfairly maligned").

326. See, e.g., *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895) (holding that the Commerce Clause did not give Congress power to regulate manufacturing, which affects commerce "only incidentally and indirectly"); *Carter v. Carter Coal Co.*, 298 U.S. 238, 303–04 (1936) (rejecting statute that regulated labor conditions at mines because mining is "purely local in character").

327. See John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 499 (1997); Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 499 (2010) (describing "close judicial scrutiny of legislative ends and means" as a characteristic feature of the *Lochner* era).

famous “switch in time” in 1937.³²⁸ The New Deal “trilogy” of Commerce Clause cases followed, with the Court abandoning restrictions on Congress’s ability to regulate manufacturing³²⁹ and permitting the legislature to prevent movement in commerce of goods produced under substandard labor conditions.³³⁰ In *Wickard v. Filburn*, the Court allowed Congress to regulate wheat grown for home consumption—an intrastate activity—because farmers growing their own wheat, when aggregated, exerted a “substantial effect on interstate commerce” by influencing market demand.³³¹ The Court pledged broad deference to economic legislation in *United States v. Carolene Products Co.*,³³² holding that, even in the absence of express findings, “the existence of facts supporting the legislative judgment is to be presumed.”³³³ Legislation passed muster under the Commerce Clause so long as it had a rational basis—an inquiry satisfied if there was “any state of facts either known or which could reasonably be assumed [that] affords support for it.”³³⁴ Moreover, legislation could be underinclusive, overinclusive, or unwise; “perfection,” the Court avowed, “is by no means required.”³³⁵

In 1995, the Rehnquist Court ushered in the modern era, invalidating the Gun Free School Zones Act of 1990³³⁶ and finding limitations inherent in the Commerce Clause itself precluded Congress from reaching intrastate, noneconomic activity that lacked a “substantial” effect on interstate commerce.³³⁷ A “revolutionary”³³⁸

328. See *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398–400 (1937) (overruling *Adkins v. Children’s Hosp.*, 261 U.S. 525 (1923)).

329. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 40–41 (1937).

330. See *United States v. Darby*, 312 U.S. 100, 117–18 (1941).

331. 317 U.S. 111, 125 (1942). This is the aggregation principle.

332. 304 U.S. 144, 152 (1938).

333. *Id.* See John Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 12 (2014) (observing that post-New Deal Court “all but renounced” authority “to police a statute’s *internal* coherence and fit”).

334. *Carolene Prods.*, 304 U.S. at 154. The Court’s deference extended even to legislation that, though connected to commerce, primarily advanced other social ends. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964) (upholding provisions of the Civil Rights Act of 1964); *Katzenbach v. McClung*, 379 U.S. 294, 301–02 (1964) (same).

335. *Vance v. Bradley*, 440 U.S. 93, 108–09 (1979) (quoting *Phillips Chem. Co. v. Dumas Sch. Dist.*, 361 U.S. 376, 385 (1960)).

336. 18 U.S.C. § 922(q)(1)(A).

337. *United States v. Lopez*, 514 U.S. 549, 565, 567 (1995).

338. Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: In Defense of *United States v. Lopez*, 94 MICH. L. REV. 752, 752 (1995). Calabresi also characterized it as “long overdue.” *Id.* See also Seth P. Waxman, *Foreword: Does the Solicitor General Matter?*, 53 STAN. L. REV. 1115, 1125 (2001) (describing *Lopez* as “a shock of surprise . . . in the way that any sudden reverse in a long, steady march must be”).

opinion characterized by contemporaneous “shock,”³³⁹ *United States v. Lopez* was more noteworthy for declaring the existence of limits than it was for displacing any precedents.³⁴⁰ Thus, the Court described “three broad categories that Congress may regulate under its commerce power” and proceeded to fit every post-1937 case save the case at bar within them.³⁴¹ Five years later, the Court invalidated the Violence Against Women Act³⁴² in *United States v. Morrison*,³⁴³ thus signifying that *Lopez* was not an anomaly.³⁴⁴ Despite express congressional findings linking gender-motivated violence to commerce, the Court concluded that such crimes “are not, in any sense of the phrase, economic activity.”³⁴⁵ Even so, *Morrison* pointedly left precedent intact.³⁴⁶ *Gonzalez v. Raich*,³⁴⁷ decided in 2005, confirmed the continued vitality of the *Wickard* aggregation principle.³⁴⁸ At the end of the day, nearly three decades after *Lopez*, Deborah Jones Merritt’s 1995 forecast that “*Lopez* is a narrow decision that will invalidate few congressional acts”³⁴⁹ has held up fairly well.³⁵⁰

In 2012, five justices signaled an additional limit on the Commerce power when they agreed that the Affordable Care Act’s

339. Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 129.

340. Justice Kennedy, joined by Justice O’Connor in concurrence, supplied the necessary vote in the 5-4 decision. *Id.* at 550. He emphasized that “the legal system as a whole” had “an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point.” *Id.* at 574 (Kennedy, J., concurring). See Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 712 (1995) (noting that the Court’s fear of leaving Congress’s commerce power completely unbounded “may have been the most influential [factor] of all in *Lopez*”); Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of Lopez, or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369, 372 (“But far from repudiating six decades of commerce clause jurisprudence, Chief Justice Rehnquist was careful to describe what *Lopez* did not do.”).

341. *Lopez*, 514 U.S. at 558.

342. 42 U.S.C. § 13981.

343. 529 U.S. 598 (2000).

344. See *id.* at 613–14.

345. *Id.*

346. See *id.* at 610.

347. 545 U.S. 1 (2005).

348. See *id.* at 17–18.

349. Merritt, *supra* note 339, at 692.

350. Richard Pildes flags *Lopez* as a “boundary-enforcing decision” that “drew an inherently vague line whose central importance was to express the principle that Congress’s powers were not without limit.” Richard H. Pildes, Free Enterprise Fund, *Boundary-Enforcing Decisions, and the Unitary Executive Branch Theory of Government Administration*, 6 DUKE J. CONST. L. & PUB. POL’Y. (SPEC. ISSUE) 1, 9–10 (2010).

“individual mandate”³⁵¹ impermissibly regulated “inactivity,” rather than “activity.”³⁵² Again, Chief Justice Roberts distinguished (and thus preserved) *Wickard* and *Raich*, which he described as involving the “preexisting economic activity” of producing wheat and growing marijuana, respectively.³⁵³ A decade later, it is still perhaps too soon to know how broadly to take the activity/inactivity line, because the Court has had nothing more to say on the issue.³⁵⁴

Structurally, though we entered the modern era in 1995 with *Lopez*, followed by *Morrison* and *NFIB*, these cases imposed largely symbolic limits at the margins and have not had a broader, transformative compass.³⁵⁵ The post-1937 notion that Congress enjoys plenary authority to regulate interstate commerce, along with the deferential rational basis scrutiny to which courts subject its work product, remains materially intact—at least in theory.³⁵⁶

351. 26 U.S.C. § 5000A.

352. See *NFIB v. Sebelius*, 567 U.S. 519, 558, 561 (2012) (Roberts, C.J., in a portion of the opinion in which he wrote only for himself); *id.* at 652–55 (Scalia, J., dissenting for four Justices). Because Chief Justice Roberts held for a majority of the Court that the individual mandate was a constitutional tax, this portion of the opinion was arguably dicta. *Id.* at 574. For an interesting discussion of this point, see Lawrence B. Solum, *How NFIB v. Sebelius Affects the Constitutional Gestalt*, 91 WASH. U. L. REV. 1, 21–34 (2013).

353. See *NFIB*, 567 U.S. at 557; *id.* at 647–48 (Scalia, J., dissenting) (observing that even in *Wickard*, the farmer grew wheat, thus making that case distinguishable).

354. In 2021, a lower court invoked the concept to stay a regulation, and the Supreme Court affirmed that stay on other grounds. See *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 617 (5th Cir. 2021) (reasoning that “[a] person’s choice to remain unvaccinated and forgo regular testing is noneconomic inactivity”), *aff’d on other grounds*, *NFIB v. Dep’t of Lab.*, 142 S. Ct. 661 (2022) (per curiam). Thomas Schmidt flags *BST Holdings* as a “notably non-minimalist opinion[]” that contributes to “a growing, inchoate sense in both the legal academy and the legal community more broadly that lower courts are overreaching in various ways.” Thomas P. Schmidt, *Judicial Minimalism in the Lower Courts*, 108 VA. L. REV. 829, 896 n.349 (2022).

355. See *supra* notes 336–54 and accompanying text.

356. See *infra* notes 359–63 and accompanying text. Obviously, in passing legislation pursuant to its Commerce Clause power, Congress lacks power to violate other provisions of the Constitution. See Frederick Schauer, *The Annoying Constitution: Implications for the Allocation of Interpretive Authority*, 58 WM. & MARY L. REV. 1689, 1694 (2017). Thus, even if Congress is regulating interstate commercial transactions and acting indisputably in pursuit of legitimate ends under Article I, it cannot do so by preferring adherents of one religion to another or by forcibly quartering soldiers in one’s home during peacetime. See *id.* In addition to these textually enumerated restrictions, the Court has increasingly deployed what Dean Manning calls a “new structuralism” to find “specific limitations on congressional power from relatively high-level inferences about federalism and, to a lesser extent, separation of powers.” Manning, *supra* note 333, at 31.

2. *Illustrative Statutory Scheme: The Fair and Accurate Credit Transactions Act*

Implicit in the rational basis scrutiny to which courts have subjected economic legislation since the New Deal is the idea that Congress is “the appropriate representative body through which the public makes democratic choices among alternative solutions to social and economic problems.”³⁵⁷ Congress, rather than the courts, has resources to seek out facts and opinions and to weigh the costs and benefits of various courses of action.³⁵⁸ Subject to constitutional constraints, our system lets Congress decide both what objects are worth pursuing and how best to pursue them.³⁵⁹ If the “end be legitimate,” then “all the means which are appropriate, which are plainly adapted to that end, and which are not prohibited” are on the table.³⁶⁰ “[T]he closeness of the relationship between the means adopted and the end to be attained,” the Roberts Court has reassured, “are matters for congressional determination alone.”³⁶¹ In short, within certain parameters, Congress gets to identify the “what” and the “how.”

So, too, legislative choice involves a “when.” Some harms are inconvenient, but the costs of preventing them are prohibitive. A rational legislature might opt either to ignore them altogether or to provide an after-the-fact remedy, either in whole or in part. Other harms, in contrast, may involve injuries so big, intolerable, or irremediable that a legislature may want to act *before* they occur to prevent them altogether.³⁶² Proactive measures, in that case, may be worth the additional cost. To use a fanciful example, imagine Congress is regulating where someone places you vis-à-vis the edge of a steep cliff. Congress will surely prefer to prevent you from falling if it is cost effective to do so. But where best to draw the line? Congress may want to bar placement over the edge (certain harm) or teetering on the brink (near-certain harm). Instead, Congress may rationally want to create a buffer zone—for example, “placement at least ten feet from the edge.” Congress can choose to act out of an abundance of caution to create virtual certainty you will not fall. Someone who

357. *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981).

358. See Stuart Minor Benjamin, *Proactive Legislation and the First Amendment*, 99 MICH. L. REV. 281, 334 (2000).

359. *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 421 (1819).

360. *Id.*

361. *United States v. Comstock*, 560 U.S. 126, 135 (2010) (citing *Burroughs v. United States*, 290 U.S. 534, 547–48 (1934)).

362. See Benjamin, *supra* note 358, at 285 (noting many areas in which legislatures might seek to act proactively and observing that legislatures are better suited than courts to “survey the landscape as they see fit, obtain information from any source by a variety of means, hold hearings on any subject that interests them, and seek to influence the course of future events”).

pushes you to four feet from the edge may violate the statute and subject you to increased risk of harm. However, because you are still four feet away, we cannot predict with certainty that you *will* fall. Congress chose to proceed cautiously, and that undoubtedly came at increased cost, perhaps sacrificing your view of the valley below. The theory of our system is that Congress has both superior resources and constitutional authority to assess these risks and costs and gets to decide where, relative to the ledge, and when, relative to the injury, to take action.

Returning to the real world, consider identity theft. By 2003, the Senate observed that “[t]he burgeoning use of the Internet and advanced technology, coupled with increased investment and expansion” had given rise to “a target-rich environment for today’s sophisticated criminals, many of whom are organized and operate across international borders.”³⁶³ Millions of Americans have suffered identity theft and “the difficult, time consuming, and potentially expensive task of repairing the damage that ha[d] been done to their credit, their savings, and their reputation.”³⁶⁴ In response, Congress enacted the Fair and Accurate Credit Transactions Act of 2003 (“FACTA”).³⁶⁵ Concluding that receipts containing credit card information gave criminals “easy access” to their credit and debit information,³⁶⁶ Congress prohibited merchants from printing “more than the last 5 digits of the card number . . . upon any receipt provided to the cardholder at the point of the sale or transaction.”³⁶⁷ At the signing ceremony, President George W. Bush applauded Congress for “help[ing] to prevent identity theft before it occurs.”³⁶⁸

Although the statute authorized the Federal Trade Commission (“FTC”) to enforce FACTA,³⁶⁹ one key mechanism Congress included in its effort to prevent identity theft was the private suit.³⁷⁰ Congress

363. S. REP. NO. 108-166, at 8 (2003).

364. *Id.*

365. Pub. L. No. 108-159, 117 Stat. 1952 (2003) (codified as amended in scattered sections of 15 and 20 U.S.C.).

366. S. REP. NO. 108-166, at 3 (2003).

367. 15 U.S.C. § 1681c(g)(1).

368. *Credit Transactions Act Signing*, C-SPAN (Dec. 4, 2003), <https://perma.cc/RF8P-AUCR>.

369. 15 U.S.C. § 1681s.

370. Congress has enacted many statutes that follow the FACTA model. For example, in the Telephone Consumer Protection Act of 1991 (“TCPA”), 47 U.S.C. § 227, Congress responded to concerns about intrusive telemarketing by prohibiting prerecorded voice messages and texts without prior consent. *Id.* § 227(b)(1)(B). The TCPA supplemented FCC enforcement with a right to sue in state court—or in federal court upon satisfaction of the requirements of diversity jurisdiction—to recover \$500 for every violation. *See id.* § 227(b)(3). In the Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. § 1692, Congress responded to “abundant evidence of the use of abusive, deceptive, and unfair debt collection

allowed any consumer knowingly given a noncompliant receipt to sue the merchant for actual damages or statutory damages up to \$1,000 and permitted “such amount of punitive damages as the court may allow” in the event of willful noncompliance.³⁷¹ Because Congress sought to *prevent* harm, statutory damages were by definition not compensatory, and actual injury due to identity theft had not materialized.³⁷² Yet Congress permitted only those given noncompliant receipts—and accordingly subject to some increased risk of identity theft—to file suit.³⁷³ Thus, the private right of action was not a citizen suit provision like that at issue in *Lujan*,³⁷⁴ permitting “any person” to file suit in the event of statutory violation.³⁷⁵

Augmenting public enforcement with private suits by directly affected individuals has obvious benefits; however, the private suit mechanism also has its detractors. Private enforcement has a special role to play where violations are difficult to detect.³⁷⁶ In the FACTA context, a merchant hands a noncompliant receipt to a customer, not the FTC, and unless the customer is motivated to act, the receipt will find a place in a pocket or nearby trash can. In a real sense, then, the goal of keeping noncompliant receipts from the hands of would-be identity thieves *depends* on motivating consumers to notice.³⁷⁷ At the

practices” that contributed to “personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy,” *id.* § 1692(a), by authorizing suit by “any person” against “any debt collector who fails to comply with any provision of this subchapter with respect to [that] person” for actual or statutory damages up to \$1000. *Id.* § 1692k(a). This suit provision was in addition to enforcement authority by the Federal Trade Commission. *Id.* § 1692l.

371. 15 U.S.C. §§ 1681n(a)(1)(A), (a)(2).

372. *Id.*

373. *Id.*

374. *See* *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 571–72 (1992).

375. *See* 42 U.S.C. § 6972. Pamela Bucy calls the kind of private right of action permitted in FACTA a “‘hybrid’ private justice action[,]” noting that it resembles a compensatory “victim” model because it is “available only for victims” but that it permits suit even in the event of “minimal harm.” Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 17 (2002). Other examples of “‘hybrid’ private justice actions” are found in the Racketeer Influenced and Corrupt Organizations (“RICO”) Act, 18 U.S.C. §§ 1961–68, and the Computer Fraud and Abuse Act, 18 U.S.C. § 1030. *Id.*

376. *See* Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 788 (2011); Bucy, *supra* note 375, at 5 (observing that, because private actors have access to inside information about violations, “private justice is not just one option for addressing economic banditry in a global, computerized world; it is the best option”).

377. *See* Citron & Solove, *supra* note 276, at 797 (observing that government enforcers “have limited resources so they can only bring a handful of actions each year”); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 108

same time, private suits—particularly given the class action mechanism—can impose huge costs and give rise to overdeterrence.³⁷⁸ A single class action risks bankrupting a company.³⁷⁹

Whether and when to permit a private action thus involves a delicate balance. Within four years of FACTA, facing criticism after a barrage of FACTA lawsuits, Congress tinkered with the formula and passed the Credit and Debit Card Receipt Clarification Act of 2007 (“Clarification Act”), which retroactively eliminated liability for merchants whose only transgression was printing credit card expiration dates.³⁸⁰ After hearings, Congress concluded that “proper truncation of the card number, . . . regardless of the inclusion of the expiration date, prevents a potential fraudster from perpetrating identity theft.”³⁸¹ Congress found that pending lawsuits relating only to expiration date issues lacked a “consumer protection benefit” and “increased cost to business and potentially increased prices to consumers.”³⁸² To the chagrin of some, Congress opted to leave the five-digit limitation otherwise intact.³⁸³ The Clarification Act reflects

(2005) (observing that “private parties—especially those who are directly affected by a potential defendant’s conduct—often are better positioned than the public agency to monitor compliance and uncover violations of the law”); Luke P. Norris, *The Promise and Perils of Private Enforcement*, 108 VA. L. REV. 1483, 1488 (2022) (noting that private enforcement is frequently justified because public enforcers lack “information, resources, or political will” to act); *see also* Jon D. Michaels & David L. Noll, *Vigilante Federalism*, 107 CORNELL L. REV. (forthcoming 2023) (manuscript at 6–7) (describing traditional private enforcement mechanisms that incentivize private parties to act). Stephenson weighs these efficiency gains against the risks of excessive enforcement, interference with public enforcement, and concerns about public accountability. *See* Stephenson, *supra*, at 114; Stephen B. Burbank et al., *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 663–64 (2013) (noting that directly affected private plaintiffs’ “proximity to violations gives them inside information”).

378. *See* Burbank et al., *supra* note 377, at 678 n.171 (“In combination with class actions, statutory damages can create massive liability, inefficiently high levels of private enforcement pressure, and overdeterrence.”); Citron & Solove, *supra* note 276, at 817 (“Many class actions become the equivalent of a shake down, with companies paying the lawyers to go away.”); David Freeman Engstrom, *Private Enforcement’s Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. 1913, 1925 (2014) (noting critics’ view that private enforcers will over enforce, “even where the *social* costs incurred . . . exceed any benefit”).

379. *See* Citron & Solove, *supra* note 276, at 817.

380. Pub. L. No. 110-241, § 3(a), 122 Stat. 1565, 1566 (2008) (codified as amended at 15 U.S.C. § 1681n(d)).

381. *Id.* § 2(a)(6).

382. *Id.* §§ 2(a)(7), (b).

383. *See* Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 MO. L. REV. 103, 105 n.11 (2009) (lamenting that the Clarification Act “does not apply to receipts that failed to

Congress’s political incentives to monitor costs and course correct if the cost-to-benefit ratio looks skewed in practice.³⁸⁴ Like the decisions what to target and when to act, the choice among various enforcement mechanisms involves consideration of costs and benefits—again, a task for which legislatures are comparatively well suited.³⁸⁵

3. *Impact on this Model of the Court’s Heightened Standing Requirements*

FACTA and other statutes like it³⁸⁶ are useful to demonstrate the impact of the heightened injury-in-fact standards, which have allowed the federal courts to play a substantive hand in managing Congress’s legislative prerogatives that far outpaces the deferential scrutiny to which the Court has otherwise professed fidelity.³⁸⁷

Before assessing the impact of these requirements, a preliminary point is in order: Article III standing requirements only govern a plaintiff’s ability to file suit in federal court.³⁸⁸ As Justice Thomas flagged in his *TransUnion* dissent, the majority opinion did not bar Congress from creating statutory rights; “it simply [held] that federal courts lack jurisdiction” where injuries were not concrete.³⁸⁹ Because Article III is no impediment to suit in state court,³⁹⁰ plaintiffs can theoretically file suit to enforce these federal statutory rights in a

truncate the credit card number, and numerous ‘credit card number’ suits remain pending”); Michael E. Chaplin, *What’s So Fair About the Fair and Accurate Credit Transactions Act?*, 92 MARQ. L. REV. 307, 309 (2008) (calling FACTA “a source of seemingly endless litigation with minimal benefit to the litigants, but which provides plaintiffs’ attorneys with a potential windfall”) (citing Lawrence W. Schonbrun, *The Class Action Con Game*, 20 REGUL. 50, 53 (1997)).

384. Congress has made these political calculations in other contexts. When private shareholders suits under the securities laws seemed too costly, for example, Congress passed the Private Securities Litigation Reform Act (“PSLRA”), Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified as amended in scattered sections of 15 U.S.C.), adopting a heightened pleading standard, 15 U.S.C. §§ 77z-1(a)(2)(A), 78u-4(b)(1), (2), deferring discovery until after a trial court’s ruling on motions to dismiss, *see id.* § 78u-4(b)(3)(B), and abolishing joint and several liability, *see id.* § 78u-4(f)(2)(A).

385. *See* Stephenson, *supra* note 377, at 121 n.99 (“Congress is in a better position than the courts to determine the proper means for enforcing federal law, and therefore in a better position to determine whether private enforcement suits are appropriate.”).

386. *See, e.g.*, 15 U.S.C. § 78u-4(b)(1), (2); 31 U.S.C. § 3730(b)(2).

387. *See* discussion *infra* Subparts II.C.3.a–c.

388. *See* Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CAL. L. REV. 411, 434–35 (2018).

389. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2224 n.9 (2021) (Thomas, J., dissenting).

390. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989).

state forum.³⁹¹ This may or may not be true—but even if so, the potential availability of a state forum is no panacea. State standing rules frequently mirror federal standing rules.³⁹² Nearly half of the states have adopted the *Lujan* injury-in-fact requirement on which *Spokeo* and *TransUnion* built.³⁹³ Thus, even though *some* states may permit suits to proceed, many others will not. As a result, whatever the Court does in the standing space *practically* delimits the availability of federal and state fora, which functionally “robs many plaintiffs of any effective remedy.”³⁹⁴

a. The Heightened Imminence Requirement

Instructed by *Clapper*, lower courts have used the heightened “certainly impending” standard to bar plaintiffs from asserting injury unless they are teetering on the brink of harm.³⁹⁵ In ruling out federal suits unless plaintiff is imminently about to fall off the cliff, the Court has thus curtailed Congress’s ability to decide when risks merit legislative action.³⁹⁶

The FACTA context is illustrative. In *Muransky v. Godiva Chocolatier, Inc.*,³⁹⁷ the plaintiff filed suit under FACTA seeking to represent a class of people who had received point-of-sale receipts from Godiva Chocolatier displaying more than the last five digits of their credit card numbers.³⁹⁸ Even though Congress had drawn the

391. I say “theoretically” because if Congress is trenching on the Executive Branch and usurping its enforcement authority, it is hard to see the Court allowing litigants to freely pursue these same claims in state court. *See* Clopton, *supra* note 388, at 438 (“It would be odd to protect executive authority by denying Congress the ability to create private actions in federal court but allow Congress to create private actions in state court instead.”). In other words, Article III may not prevent the actions from proceeding, but Article II just might. *See generally* Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PENN. J. CONST. L. 781, 784–85 (2009) (arguing that standing should be grounded in Article II and seen as a mechanism for circumscribing private incursions on executive enforcement discretion).

392. *See* Thomas B. Bennett, *The Paradox of Exclusive State-Court Jurisdiction over Federal Claims*, 105 MINN. L. REV. 1211, 1231 (2021).

393. *See id.* at 1233.

394. *Id.* at 1234. In North Carolina, which has comparatively liberal standing requirements, a state court rejected a FACTA case, citing *Spokeo*. *See* Miles v. Co. Store, No. 16-CVS-2346, slip op. at 2–3 (N.C. Super. Ct. Nov. 16, 2017). Bennett concluded that, “[f]or most residents of, say, North Carolina, FACTA’s prohibition on including full credit card numbers on receipts might as well not exist.” Bennett, *supra* note 392, at 1239.

395. Bennett, *supra* note 392, at 1220.

396. *Id.*

397. 979 F.3d 917 (11th Cir. 2020) (en banc).

398. *See id.* at 922.

line at five digits,³⁹⁹ the Eleventh Circuit, sitting en banc, declined to “simply defer” to Congress by according “blind, unreviewable deference if it seeks to protect against a risk of actual harm.”⁴⁰⁰ Muransky had argued that the court should defer to congressional judgment as to when the risk was significant enough to warrant action.⁴⁰¹ The court refused “to abandon [its] judicial role”: “[D]eciding whether a given risk of harm meets the materiality threshold is an independent responsibility of federal courts.”⁴⁰² The court found that Muransky had not sufficiently demonstrated that a six-digit, noncompliant receipt subjected him to real risk.⁴⁰³ Because he was alleging little more than a “bare procedural violation, divorced from any concrete harm,” his claim of imminent injury did not pass constitutional muster.⁴⁰⁴ The Third Circuit rejected a similar FACTA claim based on receipts that printed the first six and last four digits of a consumer’s credit card.⁴⁰⁵ Rejecting the plaintiff’s claim that this subjected him to risk of harm, the court found any threat to rest on a “highly speculative chain of future events”⁴⁰⁶: “[the plaintiff] loses or throws away the receipt, which is then discovered by a hypothetical third party, who then obtains the six remaining truncated digits along with any additional information required to use the card, such as the expiration date, security code or zip code.”⁴⁰⁷ The Second Circuit agreed, concluding that inclusion of the first six digits simply indicated the credit card issuer, and the court could see no risk of harm in that.⁴⁰⁸

The Supreme Court has instructed that real harm must be “imminent” and that federal courts are not to defer to the judgment of Congress on that point.⁴⁰⁹ As FACTA cases reflect, by means of the imminence requirement, federal courts have sharply curtailed a mechanism designed to avert injury and have second-guessed the risk-reward calculus conducted by Congress.⁴¹⁰ The federal courts—not Congress—are effectively deciding the “when” question.

399. 15 U.S.C. § 1681c(g)(1).

400. *Muransky*, 979 F.3d at 928.

401. *See id.* at 932.

402. *Id.* at 933.

403. *See id.* at 934.

404. *Id.* (citing *Spokeo v. Robins*, 578 U.S. 330, 341 (2016)).

405. *See Kamal v. J. Crew Grp., Inc.*, 918 F.3d 102, 106, 107 (3d Cir. 2019).

406. *Id.* at 116 (internal quotation marks omitted).

407. *Id.*

408. *Katz v. Donna Karan Co.*, 872 F.3d 114, 120 (2d Cir. 2017).

409. *Muransky*, 979 F.3d at 925.

410. *See, e.g., Thomas v. Toms King (Ohio), LLC*, 997 F.3d 629, 635 (6th Cir. 2021); *Whisman v. Designer Brands Inc.*, No. 21-21708-CIV, 2021 WL 2389544, at *2 (S.D. Fla. June 11, 2021).

b. Remedy for the Risk of Harm

Separately from the imminence assessment, the *TransUnion* majority strikingly found “persuasive” petitioner’s suggestion that “mere risk of future harm” cannot justify standing to pursue damages unless the risk itself causes “a *separate* concrete harm.”⁴¹¹ This conclusion appears to imperil any statutory scheme designed to *prevent* harm that relies on non-compensatory statutory damages, like FACTA. This is how lower courts have construed it. The Seventh Circuit, like its sister circuits, has read *TransUnion* to preclude damages for asserted “risks” altogether, reasoning that after *TransUnion*, “[a] plaintiff seeking money damages has standing to sue in federal court only for harms that have in fact materialized.”⁴¹² Even if a plaintiff can satisfy a court that a risk is sufficiently imminent, then, plaintiff will be relegated to forward-looking relief.⁴¹³

Eliminating damage remedies for private plaintiffs whose harms are “certainly impending” will have a pronounced effect in curtailing private enforcement.⁴¹⁴ An increase in available monetary damages typically causes a sharp uptick in the frequency of lawsuits,⁴¹⁵ and the reverse is also true.⁴¹⁶ Plaintiffs who have no possible damage

411. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2210, 2211 (2021).

412. *Pierre v. Midland Credit Mgmt., Inc.*, 29 F.4th 934, 938 (7th Cir. 2022). *See also* *Maddox v. Bank of N.Y. Mellon Tr. Co.*, 19 F.4th 58, 64 (2d Cir. 2021); *Ward v. Nat’l Patient Acct. Servs. Sols., Inc.*, 9 F.4th 357, 361 (6th Cir. 2021); *Fleming v. ProVest Cal. LLC*, No. 21-CV-04462, 2021 WL 6063565, at *4 (N.D. Cal. Dec. 22, 2021).

413. This restriction will affect certain areas of the law acutely. As Citron and Solove note, the requirement of harm “emerges as a gatekeeper in privacy cases,” and the downstream consequences of data breaches “are often hard to determine in the here and now.” Citron & Solove, *supra* note 276, at 796–97.

414. *See* Peter Ormerod, *Making Privacy Injuries Concrete*, 79 WASH. & LEE L. REV. 101, 138 (2022) (observing that “few data-breach victims seek injunctive relief”); Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 58 (1982) (“[U]nder the American system, the plaintiff will bring suit if and only if his expected judgment would be at least as large as his legal costs.”); Sean Farhang, *Public Regulation and Private Lawsuits in the American Separation of Powers System*, 52 AM. J. POL. SCI. 821, 822 (2008) (noting that “a prospective plaintiff will proceed with litigation when a case’s expected monetary value . . . if tried is positive”).

415. *See* Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853, 896–97 (2014); Lemos, *supra* note 376, at 795; David L. Noll, *Regulating Arbitration*, 105 CAL. L. REV. 985, 1017–18 (noting that private statutory enforcement is dependent on financial incentives); Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 GEO. L.J. 1001, 1017 (1986) (increasing monetary returns to successful plaintiffs increases the likelihood of suit).

416. *See* Frances Kahn Zemans, *Fee Shifting and the Implementation of Public Policy*, 47 L. & CONTEMP. PROBS. 187, 188 (1984) (noting that plaintiffs are

award when they are subject to risk will have inadequate incentive to sue.⁴¹⁷ In eliminating damage remedies where the plaintiff is placed within what Congress has deemed an intolerable zone of risk, the Court prefers reactive responses to harm over proactive efforts to eliminate it.⁴¹⁸ Despite Congress's articulated goal of preventing injury altogether,⁴¹⁹ the Court has removed enforcement incentives by the primary parties aware of the violation and thus stymied efforts at prophylactic legislation.⁴²⁰ Again, the Court, by Article III sleight of hand, places federal courts in the thick of determining how best to pursue a legitimate end, thereby trenching on the legislative function.

c. Concreteness

Finally, the concreteness inquiry, too, is marked by several facets that cumulatively circumscribe legislative choice and permit the injection of judicial policy preferences. For starters, tethering new harms to common law analogues is itself questionable and arbitrary. The common law is “esoteric, arcane, and impenetrable to nonlawyers; it gives free rein to judicial discretion and policymaking; and it is changeable rather than definite.”⁴²¹ Limiting Congress to harms that resemble harms at common law constrains congressional response to problems vaster and more complicated than eighteenth and nineteenth-century lawyers could possibly have envisioned. The world has changed. As Leah Litman notes, “[t]o take just a few examples, nuclear weapons, the Internet, telephones, genetically modified food, and driverless cars (or even just cars) did not exist in the first fifty years of the United States.”⁴²² The Court's insistence that the only actionable harms are those with close common law analogues imposes a curious threshold subject-matter restriction on what ends, otherwise legitimate and within the ambit of Article I, Congress is permitted to pursue.

The Court's blueprint for how to conduct the inquiry into common law analogues, moreover, is no clear flowchart. In *TransUnion*, the

discouraged from taking legal action on claims involving small sums or equitable relief).

417. See Lemos, *supra* note 376, at 790 (observing that, where relief “is likely to come in the form of an injunction rather than damages,” individuals may lack incentive to file suit); Note, *Toward Greater Equality in Business Transactions: A Proposal to Extend the Little FTC Acts to Small Businesses*, 96 HARV. L. REV. 1621, 1624 (1983) (same).

418. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2206 (2021).

419. FTC, 40 YEARS OF EXPERIENCE WITH THE FAIR CREDIT REPORTING ACT 38 (2011).

420. See Beske, *supra* note 134, at 774–75.

421. Anita S. Krishnakumar, *The Common Law as Statutory Backdrop*, 136 HARV. L. REV. 608, 610 (2022).

422. Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1439 (2017).

Court found a common law analogue in defamation and then confusingly determined that one of its requirements was unnecessary (falsity) while another was indispensable (publication).⁴²³ Lower courts are predictably at sea.⁴²⁴ For example, in the Telephone Consumer Protection Act of 1991 (“TCPA”),⁴²⁵ Congress took aim at “[u]nrestricted telemarketing” that it found could be “an intrusive invasion of privacy” and a “nuisance.”⁴²⁶ The TCPA barred prerecorded messages on residential phone lines without consent,⁴²⁷ and the FCC extended this to voice calls and text calls to wireless numbers.⁴²⁸ The TCPA created a private right of action for recipients of unwanted voice calls and texts, permitting recovery for “actual monetary loss” or statutory damages of \$500 for each violation.⁴²⁹

Lower courts searching for common law analogues to assess the concreteness of harm under the TCPA have reached different conclusions. In *Cranor v. 5 Star Nutrition, L.L.C.*,⁴³⁰ the Fifth Circuit allowed standing based on a single unwanted text message after finding an analogy to common law public nuisance.⁴³¹ In *Gadelhak v. AT&T Services, Inc.*,⁴³² the Seventh Circuit (via then-Judge Barrett) likewise found standing but based it on the analogy to the tort of “intrusion upon seclusion.”⁴³³ The Eleventh Circuit also examined

423. See *TransUnion LLC*, 141 S. Ct. at 2208–10. Circuit Judge Newsom put it nicely: “[W]hen reference to the common law is altogether untethered from the governing text, it can invite manipulable, policy-driven cherry-picking.” *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1129 (11th Cir. 2021) (Newsom, J., concurring).

424. Erwin Chemerinsky, *What’s Standing After TransUnion LLC v. Ramirez*, 96 N.Y.U. L. REV. ONLINE 269, 279 (2021), <https://www.nyulawreview.org/online-features/whats-standing-after-transunion-llc-v-ramirez/>.

425. 47 U.S.C. § 227.

426. See Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(5), (10), 105 Stat. 2394, 2394 (1991).

427. 47 U.S.C. § 227(b)(1)(A)–(C).

428. See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 68 Fed. Reg. 44144, 44165 (July 25, 2003) (to be codified at 47 C.F.R. pts. 64, 68); *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 156 (2016) (deeming it “undisputed” that a text message qualifies as a call within the meaning of the statute).

429. 47 U.S.C. § 227(b)(3)(A)–(B). The Act provides for treble damages for willful violations. *Id.* § 227(b)(3)(C). As the Supreme Court recently noted, “[t]he Act responded to a torrent of vociferous consumer complaints about intrusive robocalls.” *Barr v. Am. Ass’n. of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2344 (2020).

430. 998 F.3d 686 (5th Cir. 2021).

431. See *id.* at 692.

432. 950 F.3d 458 (7th Cir. 2020).

433. *Id.* at 462. See also *Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 650 (4th Cir. 2019) (“Put simply, the TCPA affords relief to those persons who, despite efforts to avoid it, have suffered an intrusion upon their domestic peace”).

common law intrusion upon seclusion in *Salcedo v. Hanna*.⁴³⁴ However, the court rejected the analogy, concluding that the common law tort required substantial harm, not harm that was “isolated, momentary, and ephemeral.”⁴³⁵ As the TCPA context demonstrates, drawing analogies to common law harms is no scientific exercise.

In second-guessing statutory harms, as *TransUnion* instructs, lower courts have frequently scoffed that they are insufficiently “real” to satisfy the concreteness requirement. Effectively, lower courts have construed *TransUnion* to permit only “big-enough” harms.⁴³⁶ In *Salcedo*,⁴³⁷ for example, the Eleventh Circuit concluded that receipt of an unwanted text message—“like walking down a busy sidewalk and having a flyer briefly [waved] in one’s face”—was “[a]nnoying, perhaps, but not a basis for invoking the jurisdiction of the federal courts.”⁴³⁸ In *Muransky v. Godiva Chocolatier, Inc.*,⁴³⁹ the same court concluded that because a FACTA-compliant receipt, including only the final five digits of a consumer’s credit card company, had no “intrinsic worth, . . . it makes little sense to suggest that receipt of a noncompliant receipt itself is a concrete injury.”⁴⁴⁰ The court reasoned that “no one’s identity is stolen at the moment a receipt is printed with too many digits.”⁴⁴¹ In *Ward v. National Patient Account Services Solutions, Inc.*,⁴⁴² the plaintiff sued under the Fair Debt Collection Practices Act⁴⁴³ (“FDCPA”) when a collection agent left a voice message on plaintiff’s answering machine identifying itself as “NPAS” rather than “NPAS, Inc.”⁴⁴⁴ Plaintiff claimed confusion, alleging that he had sent a cease-and-desist letter to “NPAS Solutions, LLC,” a completely unrelated entity.⁴⁴⁵ The Sixth Circuit found no ready common law analogues⁴⁴⁶ and rejected plaintiff’s argument that his evident confusion after the receipt of a single voice message could amount to actionable harm.⁴⁴⁷

The concreteness inquiry launches the federal judiciary on a standardless quest focusing on common law analogues and federal

434. 936 F.3d 1162 (11th Cir. 2019).

435. *Id.* at 1171.

436. Recent Case, *TransUnion LLC v. Ramirez*, 135 HARV. L. REV. 333, 340 (2021).

437. 936 F.3d 1162 (11th Cir. 2019).

438. *Id.* at 1172.

439. 979 F.3d 917 (11th Cir. 2020) (en banc).

440. *Id.* at 929.

441. *Id.* at 930.

442. 9 F.4th 357 (6th Cir. 2021).

443. 15 U.S.C. § 1692e(11).

444. *Ward*, 9 F.4th at 359–60.

445. *See id.*

446. *See id.* at 362.

447. *See id.* at 363.

judges' spidey sense⁴⁴⁸ of the "realness" of harm. In charging federal courts, not Congress, with the determination what harms are harmful enough to pursue, the Court leaves considerable room for unelected judges to second-guess the outcome of the legislative process.

d. Summing Up

By means of its recent standing handiwork, the federal courts are in the thick of it assessing legislative responses to economic problems that are squarely within Congress's wheelhouse under Article I. The Court has reserved the definition of actionable harm for the federal courts, insistently denying any deference to Congress in the definition of what harms to pursue. At the same time, the Court has given lower courts few standards to guide this inquiry and thus left ample room for the insertion of judicial policy preferences. The Court's penchant for harms with common law analogues has stifled ingenuity in response to novel problems. The Court's requirement that any actionable harm have *already happened* in order to permit a suit for damages, moreover, sharply curtails the most effective mechanism in Congress's toolkit for preventing harms before they occur, thus putting a heavy thumb on the scale for post hoc responses over preemptive strikes. In short, the Roberts Court's recent injury-in-fact cases have situated federal judges smack in the middle of core policy determinations that Congress, with its fact-finding power and responsiveness to its electorate, is best suited to navigate and constitutionally charged with addressing. Where the creation of private rights of action is concerned, the federal courts, not Congress, are calling the substantive shots.

III. FINDING A THROUGH LINE

On the one hand, as demonstrated in Part I, the Court's implied right of action cases are a paeon to legislative supremacy. Judges have no role to play; any incursion they make by creating rights of action usurps the legislative function. On the other hand, as reflected in Part II, the Court's standing cases have deeply embedded federal judges in policy decisions about what problems are addressable via private litigation, when they are remediable, and what the remedial scheme ought to look like. These lines of cases reflect contradictory conceptions of the judicial and legislative roles in our constitutional scheme, and one could certainly inveigh against that inconsistency.

For my purposes, though, the more interesting point is to identify their common denominator: Each line of cases has the pronounced

448. "Spidey sense," derived from the *Spider-Man* comic books, "is generally used to mean a vague but strong sense of something being wrong, dangerous, suspicious, or a security situation." Johnny Hoffa, *Spidey Sense*, URB. DICT. (Mar. 23, 2008), <https://www.urbandictionary.com/define.php?term=Spidey%20sense>.

effect of circumscribing opportunity for the damage-seeking private plaintiff. I am not the first to note the Roberts Court's particular disdain for private lawsuits,⁴⁴⁹ and in this context, we see the Court saying and doing sharply contradictory things, nearly simultaneously, in its eagerness to drive down their number. This Part roots the Roberts Court's recent activity in three overlapping impulses—the Court's devotion to the unitary executive, its disdain for the plaintiffs' bar generally, and its increasing preference for deregulation. This Part observes that, though couched in neutral separation-of-powers principles, the Roberts Court's recent handiwork entrenches obstacles to lawsuits that proponents of litigation reform frequently struggled to achieve in the political arena.

A. *The Court's Preference for Public Over Private Enforcement*

The Roberts Court has embraced the “unitary executive” theory, which holds that “the ‘executive Power’—all of it—is ‘vested in a President,’ who must ‘take Care that the Laws be faithfully executed.’”⁴⁵⁰ Under the unitary executive theory, the Constitution “gives Congress no power whatsoever to create subordinate entities that may exercise ‘the executive power’ until and unless the President delegates that power in some fashion.”⁴⁵¹ The doctrine finds roots in Alexander Hamilton's *Federalist No. 70*, which champions a single executive whose power should not be destroyed “either by vesting it in two or more magistrates of equal dignity and authority; or by vesting it ostensibly in one man, subject, in whole or in part, to the control and co-operation of others.”⁴⁵² In the Reagan Administration, the theory took hold, manifesting itself initially in an unsuccessful challenge to the independent counsel provision of the post-Watergate

449. See Erwin Chemerinsky, *Closing the Courthouse Doors*, 90 DENV. U. L. REV. 317, 318 (2012) (recounting how the pro-business Roberts Court “is closing the courthouse doors to those who want to sue corporations”); *id.* at 322 (observing that the Roberts Court is likewise “slam[ming] the courthouse doors shut to those who have suffered serious injuries at the hands of the government”); Clopton, *supra* note 388, at 423; Brooke D. Coleman, *Endangered Claims*, 63 WM. & MARY L. REV. 345, 358–60 (2021).

450. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2191 (2020) (quoting U.S. CONST. art. II, § 1, cl. 1; *id.* art. II, § 3). Professor Shugerman characterizes this exclusivity language as “semantic drift” that is not part of the Constitution itself. See Jed Handelsman Shugerman, *Vesting*, 74 STAN. L. REV. 1479, 1483 (2022). In a study of contemporaneous dictionaries, Shugerman concluded that the word “vest” was not understood at the founding to connote exclusivity. See *id.* at 1521–29.

451. Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 581 (1994).

452. THE FEDERALIST NO. 70, at 424 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Ethics in Government Act of 1978 (“EIGA”)⁴⁵³ in *Morrison v. Olson*.⁴⁵⁴ After losing the initial battle, unitary executive proponents ultimately won the war.⁴⁵⁵ On the current Court, Chief Justice Roberts and Justice Alito, veterans of the Reagan Justice Department, have long been strong adherents.⁴⁵⁶ In *Seila Law LLC v. Consumer Financial Protection Bureau*,⁴⁵⁷ Justices Thomas, Gorsuch, and Kavanaugh joined them in the Chief’s strongly-worded majority opinion affirming that “[t]he entire ‘executive Power’ belongs to the President alone.”⁴⁵⁸ Over the past decade, the Court has articulated “the most expansive vision of presidential power . . . in perhaps ninety years.”⁴⁵⁹

In its strictest form, the unitary executive theory holds that congressional action that doles executive power out to others is unconstitutional.⁴⁶⁰ Law enforcement is at the “core” of executive

453. Pub. L. No. 95-521, § 601(a), 92 Stat. 1824, 1867–73.

454. 487 U.S. 654, 685–96 (1988). *Morrison* was a 7-to-1 decision with Justice Scalia in dissent.

455. See *Edmond v. United States*, 520 U.S. 651, 653, 661–62 (1997) (analyzing under the Appointments Clause, post-*Morrison*, the constitutionality of having Congress authorize the United States Secretary of Transportation to appoint civilian members to the Coast Guard Court of Criminal Appeals); see also The Federalist Society, *The Great Dissent: Justice Scalia’s Opinion in Morrison v. Olson*, YOUTUBE (Oct. 7, 2018), https://www.youtube.com/watch?v=gk8IKBWrTqw&feature=emb_imp_woyt.

456. Jeffrey Rosen notes that “[d]uring the Reagan administration, a group of younger conservatives, which included Chief Justice Roberts and Justice Alito, . . . asserted a theory of the unitary executive which said that the President had to have the power to fire any executive officer.” Jeffrey Rosen, *The Roberts Court & Executive Power*, 35 PEPP. L. REV. 503, 504 (2008). In a November 2000 speech to the Federalist Society, then-Judge Alito said, “The [P]resident has not just some executive powers, but the executive power—the whole thing.” Jess Bravin, *Judge Alito’s View of the Presidency: Expansive Powers*, WALL ST. J. (Jan. 5, 2006, 12:01 AM), <https://www.wsj.com/articles/SB113642811283938270>.

457. 140 S. Ct. 2183 (2020).

458. *Id.* at 2197. Justice Barrett signed on the following term to *Collins v. Yellen*, 141 S. Ct. 1761 (2021), which invalidated a removal restriction on the director of the Federal Housing Finance Agency and found *Seila Law* “all but dispositive.” *Id.* at 1738.

459. Pildes, *supra* note 350, at 1.

460. See Andrew Coan & Nicholas Bullard, *Judicial Capacity and Executive Power*, 102 VA. L. REV. 765, 788 (2016). Interestingly, Professor Litman flagged another line of cases where some outspoken unitary executive proponents on the Court were comfortable with states opting for “more rigorous” enforcement in the face of “[t]he Executive’s policy choice of lax federal enforcement” of immigration laws. Leah M. Litman, *Taking Care of Federal Law*, 101 VA. L. REV. 1289, 1311 (2015) (quoting *Arizona v. United States*, 567 U.S. 387, 427–28 (2012) (Scalia, J., concurring in part and dissenting in part)). So too, the Court’s receptivity to state standing—to be clarified in the October 2022 Term—is in tension with unitary executive principles. See *supra* note 178.

power,⁴⁶¹ and the Court's standing cases reflect vigilance lest private enforcement represent a congressional parceling out of executive enforcement discretion.⁴⁶² While private and public enforcement have long coexisted in statutory schemes,⁴⁶³ efforts to enlist private citizens in law enforcement trench on the executive particularly when the executive has decided *not* to enforce the law.⁴⁶⁴ This age-old political tug-of-war typically manifests in periods of divided government.⁴⁶⁵ Not surprisingly, a president is more likely to decline to enforce a statutory scheme that conflicts with his policy preferences.⁴⁶⁶ By the same token, Congress is empirically more likely to enact statutory enforcement schemes that incentivize private litigants when Congress and the President are at odds ideologically.⁴⁶⁷ *TransUnion* celebrated the Executive Branch's "choice of how to prioritize and how aggressively to pursue legal

461. Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1046 (2013).

462. Then-practitioner John Roberts characterized separation of powers as "a zero-sum game": "[i]f one branch unconstitutionally aggrandizes itself, it is at the expense of one of the other branches." John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1230 (1993).

463. See Bucy, *supra* note 375, at 7 (noting existence of private rights of action "in almost every area of life that law seeks to regulate").

464. See Andrias, *supra* note 461, at 1034 (noting that nonenforcement "has proved to be an important tool for advancing the presidential agenda"). Deregulation, the rise of the unitary executive theory, and Scalia's re-theorizing of standing doctrine coincided during the Reagan Administration. The Reagan Administration began a calculated plan of non-enforcement of existing statutes and regulations, see Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 MICH. L. REV. 1195, 1209 (2014), and the Court responded by finding an agency's refusal to act presumptively unreviewable, see *Heckler v. Chaney*, 470 U.S. 821, 832–33 (1985). Reluctance to enforce—whether by depriving an agency of resources for enforcement, failing to staff it, or busying it with more menial tasks—is a species of "structural deregulation." Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585, 594–615 (2021); see also Daniel T. Deacon, Note, *Deregulation Through Nonenforcement*, 85 N.Y.U. L. REV. 795, 796 (2010) (arguing that deregulation through nonenforcement decreases accountability).

465. See Freeman & Jacobs, *supra* note 464, at 653.

466. See Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 685–87 (2014). The Trump Administration made a "sharp turn toward nonenforcement." Myriam Gilles & Gary Friedman, *The New Qui Tam: A Model for the Enforcement of Group Rights in a Hostile Era*, 98 TEX. L. REV. 489, 498 (2020).

467. See Farhang, *supra* note 414, at 824, 834; Thomas F. Burke, LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICA 14–15 (2004) (describing private litigation as a means of insulating implementation of public policy from political enemies).

actions against defendants who violate the law.”⁴⁶⁸ In its preference for public over private enforcement, the Roberts Court has put standing jurisprudence to use to keep Congress’s ability to outsource law enforcement to non-executive branch actors in check.⁴⁶⁹ Private plaintiffs, the Court has instructed, “are not accountable to the people and are not charged with pursuing the public interest in enforcing a defendant’s general compliance with regulatory law.”⁴⁷⁰

Though the Court’s professed concern is with Congress assigning *public* law enforcement to non-executive actors, the *TransUnion* Court afforded the executive exceedingly wide berth by applying its concreteness requirements to each and every statutory right.⁴⁷¹ Tellingly, the Court rejected Justice Thomas’s proffered distinction between private litigants asserting public rights, who need to show concrete harm, and private litigants asserting private rights, who by longstanding tradition have not.⁴⁷² Believing itself incapable of policing the distinction and fearful of congressional manipulation, the Court overcorrected, declaring its blunt concreteness requirement, policed by the federal judiciary, a necessary bulwark in all cases of statutorily created rights and rights of action to make double-sure that private suits “to enforce general compliance with regulatory law”—encroachments on executive power—never happen.⁴⁷³

468. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207 (2021). The Court has only flirted with grounding standing in Article II. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992). Recently, Circuit Judge Newsom argued that Article II provides the limit that prevents Congress from giving “to anyone but the President and his subordinates a right to sue on behalf of the community and seek a remedy that accrues to the public.” *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1136 (11th Cir. 2021) (Newsom, J., concurring). If the doctrine were anchored more clearly in Article II, then suits could not proceed in state court, either. See *supra* notes 391–92 and accompanying text.

469. The President’s ability to refuse enforcement of a statute altogether is far from clear under the Constitution. Freeman and Jacobs argue that this exceeds the bounds of “faithfully” executing the law and contend that the President’s “duties to superintend and to protect . . . imply a commensurate duty not to destroy.” Freeman & Jacobs, *supra* note 464, at 634. Gillian Metzger finds in the “Take Care Clause” a constitutional duty to supervise that gives the President not just a right, but a *duty* to supervise the law’s execution. Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1880 (2015).

470. *TransUnion LLC*, 141 S. Ct. at 2207.

471. *Id.* at 2207–14.

472. See *id.* at 2207 n.3. Justice Thomas argued that, at common law, an individual suing for a violation of private rights “needed only to allege the violation.” *Id.* at 2217 (Thomas, J., dissenting).

473. *Id.* at 2207 n.3 (majority opinion). I have previously argued that the *TransUnion* Court ignored a readily available line of cases, beginning with *Alexander v. Sandoval*, that had adopted a text-based approach to identifying private rights. See Beske, *supra* note 134, at 779–86.

B. The Court's Corollary Preference for Underenforcement

In tandem with preferring public over private enforcement, the Court appears to harbor a general preference for *underenforcement*, born of hostility to the plaintiffs' bar. Beginning in the 1980s, in reaction to the expansion of rights and remedies that characterized the Warren Court Era, corporations and their allies began "mournfully reciting the woes of a legal system in which Americans, egged on by avaricious lawyers, sue too readily, and irresponsible juries and activist judges waylay blameless businesses at enormous cost to social and economic well-being."⁴⁷⁴ Dismay about the scourge of lawsuits became an overtly political call, and the Reagan Administration seized upon "the convenient narrative that lawyers were destroying America."⁴⁷⁵ By 1991, Vice President Dan Quayle was decrying "too many lawyers, too many lawsuits, and too many excessive damage awards."⁴⁷⁶ From 1992 through 2016, the Republican Party Platform prominently featured an anti-lawsuit agenda.⁴⁷⁷

Tort reform notably failed to win much traction in Congress,⁴⁷⁸ but the Reagan and Bush Administrations' dramatic transformation of the federal bench ultimately bore fruit.⁴⁷⁹ During this period, "the

474. Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 719 (1998). While anecdotes about out-of-control litigiousness and concomitant cultural decline are pervasive, Thomas Burke found evidence to support it "surprisingly scarce." Burke, *supra* note 467, at 3. Burke concludes that business interests "conjured a litigation 'crisis' for their own political ends." *Id.*

475. Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 375.

476. David Margolick, *Address by Quayle on Justice Proposals Irks Bar Association*, N.Y. TIMES, Aug. 14, 1991, at A1.

477. See *Republican Party Platform of 1992*, reprinted in THE AM. PRESIDENCY PROJECT (Aug. 17, 1992), <https://www.presidency.ucsb.edu/documents/republican-party-platform-1992>; *2012 Republican Party Platform*, reprinted in THE AM. PRESIDENCY PROJECT (Aug. 27, 2012), <https://www.presidency.ucsb.edu/documents/2012-republican-party-platform>; *2016 Republican Party Platform*, reprinted in THE AM. PRESIDENCY PROJECT (July 18, 2016), <https://www.presidency.ucsb.edu/documents/2016-republican-party-platform>.

478. See Terry Carter, *Piecemeal Tort Reform*, 87 A.B.A. J. 50, 51 (2001) (noting that, in 2001, tort reform proponents had "fail[ed] repeatedly since 1983 to get broad legislation through Congress"); Gilles, *supra* note 475, at 387–88 (describing legislative success in tort reform as "elusive" and noting that the anti-lawsuit legislative agenda failed to advance under the George W. Bush Administration); *id.* at 389 ("For all the *sturm und drang* that attended the anti-lawsuit movement from the Reagan through Bush II presidencies, little substantive reform was enacted.")

479. See Gilles, *supra* note 475, at 381–82 (describing how "conservative revolution" in the courts offset "legislative failures").

Senate unblinkingly confirmed a record number of lower court judges who shared the President's commitment to rolling back the 'litigation explosion.'"⁴⁸⁰ Myriam Gilles described the nominations of Chief Justice Roberts and Justices Alito, Thomas, Scalia, and Kennedy as the "greatest achievements" of the Reagan and two Bush Administrations, in advancing "the anti-lawsuit agenda."⁴⁸¹

The product of this movement, the Roberts Court, empirically "the most pro-business Court since World War II,"⁴⁸² has consistently thrown down impediments to the damage-seeking civil plaintiff.⁴⁸³ The Roberts Court's willingness to eliminate implied rights of action while at the same time delimiting the pool of potential plaintiffs with standing to enforce clearly conferred statutory rights is consistent with its moves across a wide swath of other areas.⁴⁸⁴ In recent years, the Court has raised the bar for pleading requirements under Rule 8;⁴⁸⁵ tightened the commonality requirements for class actions under Rule 23;⁴⁸⁶ and limited the number of jurisdictions in which a plaintiff can subject a corporate defendant to suit, thus restricting shopping for plaintiff-friendly fora.⁴⁸⁷ The Court has earnestly promoted arbitration over the civil lawsuit, enforcing provisions in boiler-plate consumer contracts requiring arbitration and waiving the right to proceed via collective or class action,⁴⁸⁸ even where doing so would prevent vindication of substantive claims by requiring individual plaintiffs to bear unrecoverable costs.⁴⁸⁹ The Court's implied right of action and standing cases fit well within a broader pattern of using

480. *Id.* at 383.

481. *Id.* at 389.

482. Stephen M. Feldman, *Is the Constitution Laissez-Faire? The Framers, Original Meaning, and the Market*, 81 BROOK. L. REV. 1 (2015); *see also* Lee Epstein et al., *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1472 (2013) (concluding after quantitative analysis of all post-war business cases through 2011 that "the Roberts Court is much friendlier to business than either the Burger or Rehnquist Courts"). Epstein and his colleagues also found that Chief Justice Roberts, Justice Alito, and Justice Thomas rank in the top five Supreme Court Justices friendliest to business between 1946–2011. *See id.* at 1449–50, 1472.

483. *See* Gilles, *supra* note 475, at 400–01.

484. *See infra* notes 487–91.

485. *See* *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009); *Bell Atl. v. Twombly*, 550 U.S. 544, 554–56 (2007).

486. *See* *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349–50 (2011).

487. *See* *Bristol-Myers Squibb Co. v. Sup. Ct. of Cal.*, 137 S. Ct. 1773, 1781–82 (2017); *Daimler AG v. Bauman*, 134 S. Ct. 746, 761 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 926–29 (2011).

488. *See* *Viking River Cruises, Inc. v. Moriana*, No. 20-1573, slip op. at 18–20 (June 15, 2022); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011).

489. *See* *Am. Express Co. v. Ital. Colors Rest.*, 133 S. Ct. 2304, 2309–12 (2013).

procedure and ostensibly non-substantive rules to achieve restrictions on damage actions that were unattainable in the political arena. In particular, the *TransUnion* Court's requirement that a plaintiff's harm has already materialized as a threshold for damages will sharply delimit the pool of incentivized potential plaintiffs.⁴⁹⁰ In this area, as in others, the Roberts Court's manifest hostility to civil lawsuits is an apparent impetus to judicial action.

C. Connection to Laissez Faire, Deregulatory Impulses

The final related thread supporting the Roberts Court's aversion to the damage-seeking civil plaintiff is its laissez faire, deregulatory agenda, which likewise has roots in its pro-business inclinations. In 2017, Gillian Metzger flagged the increasing prominence of anti-administrativist voices on the Court and "a resurgence of the antiregulatory and antigovernment forces that lost the battle of the New Deal."⁴⁹¹ Metzger chronicled varied political, academic, and judicial efforts to defang the administrative state, which on the Court manifested in shored-up emphasis on the President's removal power, a revived focus on the nondelegation doctrine, and a reticence to invoke *Chevron* deference to agency interpretations of their governing statutes.⁴⁹² As of 2017, Metzger saw the Court as an active participant in this movement; replacement of Justices Kennedy and Ginsburg with Justices Kavanaugh and Barrett have subsequently made that more pronounced.⁴⁹³

Again, in the political arena, the success of the deregulatory effort has been mixed at best. President Trump rode into town vowing to dismantle the deep state, requiring the repeal of two regulations for each proposed new regulation, and capping the cost of all new regulations at "no greater than zero."⁴⁹⁴ President Biden issued an Executive Order revoking these policy orders within hours of his inauguration in 2021.⁴⁹⁵ Trump's Acting Director of the Consumer Financial Protection Bureau ("CFPB"), Mick Mulvaney, changed the CFPB's mission statement to commit the agency to deregulation.⁴⁹⁶

490. See *supra* Subpart II.B.2.b.

491. Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 2 (2017).

492. See *id.* at 17–31.

493. See Ronald Brownstein, *Brett Kavanaugh Is the Antidote to Corporate America's Worries About Trump*, ATL., July 12, 2018; Adam Feldman, *Empirical SCOTUS: A Comprehensive Look at Judge Amy Coney Barrett*, SCOTUSBLOG (Oct. 9, 2020, 3:31 P.M.), <https://www.scotusblog.com/2020/10/empirical-scotus-a-comprehensive-look-at-judge-amy-coney-barrett/>.

494. Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Feb. 3, 2017).

495. Exec. Order No. 13,992, 86 Fed. Reg. 7049 (Jan. 20, 2021).

496. See Catherine Rampell, *How Mick Mulvaney Is Dismantling a Federal Agency*, WASH. POST

The 2022 CFPB mission is back to “enforc[ing] Federal consumer financial law fairly and consistently” and “educat[ing] and empower[ing] consumers making financial decisions.”⁴⁹⁷ Conservatives have been trying to pass the Regulations from the Executive in Need of Scrutiny Act (“REINS Act”), under which agency rules with significant economic impact cannot go into effect without affirmative congressional approval by joint resolution of Congress, since 2009 to no avail.⁴⁹⁸ The Regulatory Accountability Act, which sought to impose onerous hearing requirements for agency rulemaking, foundered in the Senate in 2017.⁴⁹⁹

In this area, as in others, the Roberts Court has advanced the ball even where political efforts have faltered. Thus, the REINS Act, which sought to involve Congress directly before any significant, costly regulations go into effect,⁵⁰⁰ languished in Congress even as the judge-made “major questions doctrine,” under which the Court requires “clear congressional authorization” before it reads into a statute congressional intent to confer on agencies big, transformative authority to regulate, entered stage right.⁵⁰¹ Again, the Roberts Court has found ways to achieve by means of seemingly neutral rules victories that eluded the anti-administrativists in the political sphere.

Hostility to the private lawsuit—particularly when it assumes class-action form, as is often the case with statutes like FACTA and the TCPA⁵⁰²—is consistent with this anti-administrativist, deregulatory drive. The push against the administrative state aims

(Jan. 25, 2018), https://www.washingtonpost.com/opinions/mick-mulvaney-cant-legally-kill-the-cfpb-so-hes-starving-it-instead/2018/01/25/4481d2ce-0216-11e8-8acf-ad2991367d9d_story.html/.

497. CONSUMER FINANCIAL PROTECTION BUREAU, STRATEGIC PLAN FY 2022-2026, https://files.consumerfinance.gov/f/documents/cfpb_strategic-plan_fy2022-fy2026.pdf.

498. Representative Geoff Davis (R-KY) first introduced the bill in 2009. See H.R. 3765, 111th Cong. (2009). Most recently, Sen. Rand Paul (R-KY) reintroduced it in 2021 in the Senate. See S. 68, 117th Cong. (Jan. 27, 2021).

499. H.R. 5, 115th Cong. (2017).

500. The REINS Act may have a problem under *INS v. Chadha*, 462 U.S. 919 (1983), which held that the legislative veto violated the Constitution’s requirements of bicameralism and presentment. See *id.* at 956–59.

501. In the Court’s most recent invocation of the major questions doctrine, *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), the Court relied on it to find that Congress had not clearly communicated authority for the EPA to regulate greenhouse gases under the Clean Air Act. See *id.* at 2610–14. Mila Sohoni charges the Court’s recent major questions cases with making a “momentous” change to administrative law without providing “a meaningful constitutional justification.” Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 266 (2022). She notes that in the guise of statutory interpretation, the Court has dramatically affected the separation of powers. See *id.* at 262–63.

502. See sources cited *supra* note 380.

to eliminate regulations that impose high compliance costs on business.⁵⁰³ The civil plaintiff raises the prospect of “regulation by litigation,” defined as “the threat of a catastrophic loss in litigation to coerce agreement to forward-looking, substantive regulatory provisions in a settlement.”⁵⁰⁴ While private litigation can serve important deterrence, compensation, and accountability goals,⁵⁰⁵ it may also over deter and “defy meaningful political, democratically accountable control.”⁵⁰⁶ As noted, figuring out the optimal balance is typically seen as a question for political actors.⁵⁰⁷ In the debate over private enforcement and its costs and benefits, though, the Roberts Court has used the requirement of injury in fact to take sides.⁵⁰⁸ By delimiting the pool of damage-seeking plaintiffs to those already suffering what the federal courts determine is big-enough harm, the Court has stepped into the breach, sharply curbing the roster of potential plaintiffs and minimizing the impact of class action suits that might impose industry-wide costs outside of the regulatory process.

CONCLUSION

The Roberts Court has taken federal judges out of the business of creating rights of action out of deep respect for the legislative function. Congress, not the courts, is the proper entity to weigh the costs and benefits of litigation and to determine whether a plaintiff has a federal right to sue. These political choices are the rightful task of a politically responsive branch of government, not the unelected,

503. See Metzger, *supra* note 491, at 13 (quoting President Donald J. Trump, Remarks in Joint Address to Congress (Feb. 28, 2017), <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-joint-address-congress/> (recounting anti-administrative talking points about reining in “out-of-control bureaucracy” that imposes “costly, ‘job-crushing’ regulations”).

504. Bruce Yandle et al., *Bootleggers, Baptists & Televangelists: Regulating Tobacco by Litigation*, 2008 U. ILL. L. REV. 1225, 1240. Engstrom notes that “private enforcers may not just be patient, dutiful sentinels moving against isolated bouts of illegality” but may also wield power “to set industry-wide rules via litigated judgments and settlements that might otherwise be achieved via legislation or administrative rulemaking.” Engstrom, *supra* note 378, at 1935. As Deborah Rhode observes, litigation can “step[] in where politicians and government regulators have feared to tread.” Deborah L. Rhode, *Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution*, 54 DUKE L.J. 447, 466 (2004).

505. See Rhode, *supra* note 504, at 466.

506. *Id.*

507. See *supra* Part I.C; see generally Rhode, *supra* note 504, at 472–81 (discussing various reform proposals).

508. F. Andrew Hesssick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 276–77 (2008).

life-tenured federal judiciary, against whom the public has no proper recourse. On this, the Court has been emphatically clear.

At the same time, in a different line of cases, the Court has enlisted federal courts full bore in the substantive policing of rights and rights of action created by Congress in the name of enforcing Article III's constraints on the judicial power. On the pretext of keeping courts in their lanes, the Court has instructed lower federal courts that only certainly impending injuries are actionable, and even then, only for prospective relief, not damages. The Court has charged lower federal courts with comparing statutory rights to rights recognized at common law and communicated that they must find a tight correspondence between new rights and those we have recognized for centuries in order to permit a private lawsuit to proceed. Where the dictates of Article III standing are concerned, the Court has made clear that deference to Congress is a no-go. Although the Court has framed these instructions neutrally, they have had the pronounced substantive effect of constraining private enforcement to a reactive, rather than proactive role in achieving congressional policy objectives. Because private enforcement is often either the most effective or only mechanism for achieving Congress's goals, the Court's heightened standing requirements have the effect of directing when and how Congress can act in response to problems Article I indisputably empowers Congress to address.

The Court's unironic, simultaneous embrace of two different models of the judicial and legislative function, this Article submits, has a recognizable through line in its hostility to the damage-seeking private plaintiff. This Article finds three related impulses that underlie this aversion. First, the Roberts Court's commitment to the unitary executive translates to deep suspicion of any efforts to enlist private plaintiffs in law enforcement, which a majority of the Court perceives to be inroads on executive enforcement prerogatives. Second, the Court's pro-business bent inclines it to underenforcement generally, and an approach limited to private plaintiffs who have already suffered what federal courts deem to be big-enough harm circumscribes the plaintiff pool and thus lowers potential costs. Finally, the Court's increasingly anti-administrativist predisposition gives rise not only to hostility to regulation but discomfort with litigation that can serve as its functional equivalent. While battles over presidential power, litigation reform, and deregulation play out frequently without resolution in the political arena, the Roberts Court has quietly deployed ostensibly neutral rules and the separation of powers to profound substantive effect.