NOTE

WHAT'S ORIGINALISM AFTER *TRANSUNION*?: PICKING AN ORIGINALIST APPROACH THAT GETS STANDING BACK ON TRACK

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INTRODUCTION

One of the most delightful things about following Supreme Court decisions is that sometimes the voting "fault lines" surprise us—that is, they shirk expectations.[1] In 2021's *TransUnion LLC v. Ramirez*,[2] the fault lines were so unexpected as to be puzzling. The majority lineup was normal enough. Self-avowed originalist[3] Justice Kavanaugh wrote for himself and four of the Court's conservatives: Justices Gorsuch, Barrett, Alito, and Chief Justice Roberts. But meanwhile, reliable originalist Justice Thomas dissented, joined by Justices Breyer, Kagan, and Sotomayor. And Justice Thomas dissented on originalist grounds. While the liberal Justices also wrote separately explaining their own views, the case raises an interesting question: why do originalists seem to

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1 *Compare, e.g.*, Yates v. United States, 135 S. Ct. 1074 (2015) (Chief Justice Roberts joining Justice Ginsburg's plurality opinion), *with id.* at 1091 (Kagan, J., dissenting) (Justices Scalia and Thomas joining Justice Kagan's dissenting opinion).

2 141 S. Ct. 2190 (2021).

3 *See* Sydney Black, *What We Know So Far: Kavanaugh's Claim to Originalism not Borne out*, *in* Tonja Jacobi & Matthew Sag, *Is Justice Kavanaugh an Originalist?*, SCOTUS OA (June 14, 2019), https://scotusoa.com/kavanaugh-originalist/ [https://perma.cc/UWJ8-6SV5].

disagree? Better yet, why do they seem to disagree on *standing*? Isn't standing boring? At first blush, it's not the hottest topic under the sun.

This Note argues that not only is standing fascinating and contested, but it is so important that the Court should reconsider standing doctrine in appropriate future cases. While the *TransUnion* case came and went without much kerfuffle outside of legal circles,[4] standing does not find itself sailing smoothly. As noted, perhaps the Court's most reliable originalist[5] just dissented from a case that largely restates the current law on standing. And Justice Kagan, perhaps the Court's most influential liberal,[6] wrote that after *TransUnion*, standing jurisprudence "needs a rewrite."[7] Given the current makeup of the Court, any reconsideration of standing doctrine might, as a practical matter, require convincing one or more additional originalist Justices. But even

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4 *Cf.* Erwin Chemerinsky, *What's Standing After* TransUnion LLC v. Ramirez, 96 N.Y.U. L. REV. ONLINE 269 (2021). That being said, people both inside and outside of legal circles have recognized standing's importance. In part due to cases turning on standing, the so-called "shadow-docket" debate has reached epic proportions, spreading at least so far as the broader politico community. *See* Louis Jacobson, *The Supreme Court's 'Shadow Docket': What You Need to Know*, POLITIFACT (Oct. 18, 2021), https://www.politifact.com/article/2021/oct/18/supreme-courts-shadow-docket-what-you-need-know/ [perma.cc/576E-T82M]; Mike Fox, *Supreme Court Shadow Docket Leaves Reasoning in the Dark, Professors Say*, U. VA. SCH. L. (Sept. 22, 2021), https://www.law.virginia.edu/news/202109/supreme-court-shadow-docket-leaves-reasoning-dark-professors-say [perma.cc/K5QA-QKCE]. Senate Democrats have jumped on the issue, too. *See* Nate Raymond, *Senate Democrats Target Supreme Court 'Shadow Docket' After Texas Abortion Decision*, REUTERS (Sept. 29, 2021, 9:27 PM), https://www.reuters.com/legal/government/senate-democrats-target-supreme-court-shadow-docket-after-texas-abortion-2021-09-29/ [perma.cc/SHS3-K9ZE].

5 *See* Samuel Marcosson, *Colorizing the Constitution of Originalism: Clarence Thomas at the Rubicon*, 16 MINN. J. L. & INEQ. 429, 448 (1998) ("[H]e has marked out a clear constitutional vision and has hewed consistently to it.").

6 *See* Adam Winkler, *The Coming of the Kagan Court: Why Elena Kagan Is the Most Influential Liberal Justice*, SLATE (Oct. 6, 2013, 11:45 PM), https://slate.com/news-and-politics/2013/10/elena-kagan-is-the-most-influential-liberal-justice.html [https://perma.cc/5BL7-PFUK].

7 *TransUnion*, 141 S. Ct. at 2225 (Kagan, J., dissenting). Progressives are not thrilled by the current standing doctrine. *See, e.g.*, Daniel J. Solove & Danielle Keats Citron, *Standing and Privacy Harms: A Critique of* TransUnion v. Ramirez, 101 B.U. L. REV. ONLINE 62, 64 (2021) (saying that federal standing doctrine is "actually a concoction of the Court from the 1970s"); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 167 (1992); Mark Joseph Stern, *The Supreme Court's Conservatives Issued a Decision Too Extreme for Clarence Thomas*, SLATE (June 25, 2021, 4:10 PM), https://slate.com/news-and-politics/2021/06/transunion-kavanaugh-thomas.html [https://perma.cc/6RCW-43JR]; *see also* Steve Vladeck (@steve_vladeck), TWITTER (June 25, 2021, 10:24 AM), https://twitter.com/steve_vladeck/status/1408430790871035910?s=20 [https://perma.cc/VH76-77DP] ("The decision is a remarkable assertion of *judicial* power to second-guess the legislature's articulation of injuries and harms."). This Note's title is inspired in part by Cass Sunstein's article, cited above in this footnote.

among originalists, accounts of standing do not sail smoothly: there are at least two originalist approaches that both support, albeit in different ways, a revised approach to standing.[8] Thus, this Note attempts to probe the differences between the available originalist accounts of standing and offer a way forward.

Part I lays out the law of standing and necessary background. Part II first summarizes the saga of Justice Thomas's and Judge Kevin Newsom's separate writings on standing and then explores each opinion's method and sources.[9] Part III attempts to parse and resolve the differences between each judge's originalist approach to standing. That Part also concludes that, perhaps out of (seemingly uncharacteristic) respect for precedent and for practical reasons, Justice Thomas holds back from matching Judge Newsom's comparatively aggressive style—and that despite differing styles as well as a "location" disagreement, the two judges' approaches would require overturning the same cases. Part IV briefly explores implications and suggests that while Judge Newsom gets the law right, if the Court gets the chance to overturn *TransUnion*, it should employ Justice Thomas's more targeted style.

I. BACKGROUND

Standing keeps courts in their constitutional "lane."[10] As Justice Byron White wrote, "[t]hese principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment

8 *See infra* Parts II and III; *see also* Alison Frankel, *Justice Thomas' Reframing of Article III Standing Is Catching on in Circuit Courts*, REUTERS (May 12, 2021, 4:26 PM), https://www.reuters.com/business/legal/justice-thomas-reframing-article-iii-standing-is-catching-circuit-courts-2021-05-12/ [https://perma.cc/9ZUQ-PPJ6] (noting that even before the *TransUnion* dissent and close in time to Judge Newsom's *Sierra* concurrence, a Sixth Circuit judge hinted at support for Justice Thomas's approach).

9 If nothing else, this Part will hopefully make this Note useful as a case study of originalist opinion writing styles.

10 GianCarlo Canaparo, *Why Standing Matters*, FEDERALIST SOC'Y: FEDSOC BLOG (June 25, 2021), https://fedsoc.org/commentary/fedsoc-blog/why-standing-matters/ [https://perma.cc/7HXX-J8TE]; *see* Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 466 (2016) (Roberts, C.J., concurring) ("Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not. The Judiciary's role is limited 'to provid[ing] relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm.'" (alteration in original) (quoting Lewis v. Casey, 518 U.S. 343, 349 (1996))).

on the validity of the Nation's laws."[11] To that end, standing supports the structural separation of powers.[12]

To show standing in federal court, Supreme Court doctrine states that the plaintiff must satisfy a basic three-prong test. The plaintiff must show:

1. *Injury in fact*: she has suffered an injury that is concrete, particularized, and actual or imminent;
2. *Fair traceability*: the injury was likely caused by the defendant;
3. *Redressability*: the injury is redressable by a court.[13]

The first prong is also known as "actual injury." Where did this test come from? Judges seem to agree[14] that something like the concrete injury test follows from the text of Article III. The text permits Congress to give federal courts jurisdiction over "Cases" and "Controversies."[15] While the text does not otherwise explain what a case or

11 Broadrick v. Oklahoma, 413 U.S. 601, 610–11 (1973) (citing Younger v. Harris, 401 U.S. 37, 52 (1971)).

12 *See* Gundy v. United States, 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., dissenting) ("'[T]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates.'" (quoting THE FEDERALIST NO. 47, at 302 (James Madison) (Clinton Rossiter ed., 1961))); *TransUnion*, 141 S. Ct. at 2207 ("A regime where Congress could freely authorize *unharmed* plaintiffs to sue defendants who violate federal law not only would violate Article III but also would infringe on the Executive Branch's Article II authority."); Spokeo, Inc. v. Robins, 578 U.S. 330, 344 (2016) (Thomas, J., concurring) ("These limitations [on standing] preserve separation of powers by preventing the Judiciary's entanglement in disputes that are primarily political in nature."); Raines v. Byrd, 521 U.S. 811, 819–20 (1997); *see also* John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L. J. 1219 (1993) (defending Justice Scalia's majority opinion in *Lujan* on the grounds that it was based on the premise that Article III requires an injury in fact for standing in federal court); Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting). The majority in *TransUnion* reasoned that private plaintiffs are not accountable to the people in pursuing the public interest in the general enforcement of regulatory law. *TransUnion*, 141 S. Ct. at 2207 (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 577 (1992)).

13 *TransUnion*, 141 S. Ct. at 2203 (citing *Lujan*, 504 U.S. at 560–61). The majority characterizes the first prong as "injury in fact," though that is a main point of departure for Justice Thomas and Judge Newsom, which this Note focuses on. *See id.* The majority cites to Justice Scalia's pithy explanation that demonstrating standing requires one to answer the question, "What's it to you?" *Id.* (citing Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983)).

14 *See* Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1116 (11th Cir. 2021) (Newsom, J., concurring) (noting the "nearly universal consensus about standing doctrine's elements and sub-elements"); *see also TransUnion*, 141 S. Ct. at 2203 ("Article III confines the federal judicial power to the resolution of 'Cases' and 'Controversies.' . . . [A] plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." (citing *Lujan*, 504 U.S. at 560–61)).

15 U.S. CONST. art. III, § 2.

controversy is or what the "judicial Power" is, we do know that when a federal court does have jurisdiction, it has a "virtually unflagging" obligation to exercise that power.[16] But the "Power" does not extend to just any violation that might take place; a "right" under federal law or the Constitution must be asserted.[17] There is a difference between a "Case" and an abstract question; the difference is, in part, whether the question is concrete.[18] Recent Supreme Court precedent says concreteness turns on whether an injury has a "'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts—such as physical harm, monetary harm, or various intangible harms including . . . reputational harm."[19] In particular, *Spokeo* explains that history and tradition serve as a guide to whether plaintiffs have a concrete injury that falls into that "intangible" bucket.[20] For example, abridgement of free speech or of free exercise of religion are intangible harms that are traditionally recognized as getting a plaintiff into court.[21] Congress's clear intention to grant a right of action can be "instructive"—that is, Congress may "elevate" certain harms to satisfy concrete injury—but they may not do so with "something that is not remotely harmful."[22] And Congress's grant "does not relieve courts of their responsibility" to decide on their own whether plaintiffs' alleged harms are concrete.[23] Separation of powers explains this guide rail: if Congress could authorize courts to entertain unharmed plaintiffs' suits, that would infringe upon the Executive Branch's prerogative to determine "how to prioritize and how aggressively to pursue" cases against defendants who have broken the law.[24]

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16 Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976).

17 U.S. CONST. art. III, § 2.; Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 405 (1821).

18 *See* Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 40 (1976); s*ee also, e.g.*, Summers v. Earth Island Inst., 555 U.S. 488, 493 (2009); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220–21 (1974).

19 *TransUnion*, 141 S. Ct. at 2200 (quoting Spokeo, Inc. v. Robins, 578 U.S. 330, 340–41 (2016)). As Justice Kavanaugh's majority opinion quipped, "No concrete harm, no standing." *Id.*

20 *Spokeo*, 578 U.S. at 340–41.

21 *Transunion*, 141 S. Ct. at 2204.

22 *Id.* at 2204–05 (quoting Hagy v. Demers & Adams, 882 F.3d 616, 622 (6th Cir. 2018)).

23 *Id.* at 2205; *see also id.* ("Article III grants federal courts the power to redress harms that defendants cause plaintiffs, not a freewheeling power to hold defendants accountable for legal infractions." (quoting Casillas v. Madison Ave. Assocs., Inc., 926 F.3d 329, 332 (7th Cir. 2019))).

24 *Id.* at 2207. The majority also notes that "[p]rivate plaintiffs 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." *Id.* (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 577 (1992)).

As recently as 2016, the Court has accepted that Congress is "well positioned to identify intangible harms that meet minimum Article III requirements."[25] And as recently as 2021, the Court has recognized that some suggest they ditch the concrete harm requirement. But they declined to take up that suggestion.[26]

However, the Court has stressed that "concrete" does not necessarily mean "tangible."[27] Further, they note that sometimes the law lets plaintiffs assert standing even without something more than what Congress said counts as harm. That is, a "bare procedural" violation might be sufficient, *if* it is the type of violation that the common law has traditionally permitted.[28]

That being said, some precedents suggest that bare injuries to statutory rights can support standing, "even where the plaintiff would have suffered no judicially cognizable injury in the absence" of that law.[29] *Trafficante v. Metropolitan Life Insurance Co.* concluded that a violation of the Civil Rights Act of 1968, having created a right to be free of certain racial discrimination, gave the plaintiffs standing to sue.[30] Thus, it seems Congress *can* create statutory rights, the bare violation of which is a harm sufficient for concreteness and standing; as Erwin Chemerinsky has noted, the question is "how far" Congress can expand standing.[31] For instance, he says, if the Clean Power Act says "any person" can sue to enforce pollution regulations,[32] does that create standing? *Lujan v. Defenders of Wildlife*[33] says it does not—at least not without an additional showing of individual concrete harm. As Dean Chemerinsky says, "[t]he relationship between *Lujan* and *Trafficante* is unclear."[34] Lower judges called out for clarity from the Supreme

25 *Spokeo*, 578 U.S. at 341.

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

27 *Spokeo*, 578 U.S. at 340 (first citing Pleasant Grove City v. Summum, 555 U.S. 460 (2009); and then citing Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993)).

28 *See id.* at 341.

29 Warth v. Seldin, 422 U.S. 490, 514 (1975) (citing Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973)).

30 409 U.S. 205, 211–12 (1972); *see also, e.g.*, Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982).

31 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 71 (4th ed. 2011).

32 42 U.S.C. § 7604(a) (2018).

33 504 U.S. 555, 562–67 (1992).

34 CHEMERINSKY, *supra* note 31, at 71.

Court,[35] and in an effort to clear up standing and ground it in original meaning, Justice Thomas wrote separately in *Spokeo*.[36]

Another case from the 2021 Term is also worth mentioning, because at first it seemed to vindicate Justice Thomas's approach:[37] *Uzuegbunam v. Preczewski*.[38] As Professor Beske recently noted, "[n]o one doubted that plaintiff had suffered a constitutionally sufficient injury-in-fact," and "the 8–1 decision by Justice Thomas cited all the same cases and again underscored that damage is presumed where there is a clear violation of a right."[39] Ultimately, though, despite Justice Thomas's *Uzuegbunam* majority opinion employing the same originalist approach as his separate writing in *Spokeo*, the outcome proved limited to the facts. Academics had thought the Court was working toward clarity in standing. But the "glimmer of hope" that the *Uzuegbunam* opinion offered was dashed when *TransUnion* came down a few months later.[40]

While excellent commentators have analyzed Justice Thomas's general approach and even the originalist basis for his *Spokeo* concurrence,[41] this Note distinguishes itself by focusing on *TransUnion*, by comparing his approach to Judge Newsom's, and by zeroing in on

35 *See* Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1116 (11th Cir. 2021) (Newsom, J., concurring).

36 *See* Spokeo, Inc. v. Robins, 578 U.S. 330, 343 (2016) (Thomas, J., concurring).

37 *See infra* Parts II and III.

38 141 S. Ct. 792 (2021).

39 Elizabeth Earle Beske, *Charting a Course past* Spokeo *and* TransUnion, 29 GEO. MASON L. REV. 729, 733 (2022). While others, such as Professor Dorf, noted that *Uzuegbunam* also followed *Spokeo*'s common-law focus, it at least reflects Justice Thomas's more forgiving view of injury in fact. *See* Michael C. Dorf, *Founding-Era Common Law's Relevance to Original Meaning*, DORF ON L. (Aug. 6, 2021, 1:25 PM), http://www.dorfonlaw.org/2021/08/founding-era-common-laws-relevance-to.html [https://perma.cc/KS79-NW2D].

40 Beske, *supra* note 39, at 733 (quoting William Baude, *Standing in the Shadow of Congress*, 2016 SUP. CT. REV. 197, 197–98 (2016)).

41 *See* Baude, *supra* note 40; Beske, *supra* note 39; CHEMERINSKY, *supra* note 31. For a Note analyzing the varying levels of generality employed by the dueling originalists in *TransUnion*, see Jason Altabet, Note, TransUnion v. Ramirez*: Levels of Generality and Originalist Analogies*, 45 HARV. J.L. PUB. POL'Y 1077 (2022). For commentary on originalist approaches to standing, including references to *TransUnion* and Judge Newsom's Eleventh Circuit concurrence, see Jacob Phillips, *TransUnion, Article III, and Expanding the Judicial Role*, 23 FED. SOC. REV. 186 (2022). For an originalist deep-dive into historical sources relating to constitutional standing, see Robert J. Pushaw Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447 (1994). For further comment by Professor Pushaw on more recent standing developments, see Robert J. Pushaw Jr., *'Originalist' Justices and the Myth that Article III 'Cases' Always Require Adversarial Disputes*, (Pepp. U. Legal Stud. Rsch. Paper No. 2021/25), https://ssrn.com/abstract=3934668 [https://perma.cc/3BWA-RD4U]. For an inquiry into standing and injury in fact from an equity standpoint, see Ernest A. Young, *Standing, Equity, and Injury in Fact*, 97 NOTRE DAME L. REV. 1885 (2022).

which cases each one might require overruling. That being said, this Note will focus on the law of standing.

II. JUSTICE THOMAS AND JUDGE NEWSOM AS MODELS OF ORIGINALIST ACCOUNTS OF STANDING

A. Opinions

This Section will lay out recent opinions by Justice Thomas and Judge Newsom as models of originalist approaches to standing doctrine.

1. Justice Thomas concurs in *Spokeo*

Standing doctrine has only been constitutionalized since the 1970s.[42] Our story, however, begins in earnest in 2016: the year Justice Thomas concurred in *Spokeo, Inc. v. Robins*.[43] The Court held in *Spokeo* that the injury-in-fact prong requires a plaintiff to allege an injury that is both "concrete *and* particularized," because the Constitution separates the tripartite powers and the text limits the judicial power to "Cases" and "Controversies."[44] The Court said that tangible harm can

42 *See* Kelsey McCowan Heilman, Comment, *The Rights of Others: Protection and Advocacy Organizations' Associational Standing to Sue*, 157 U. PA. L. REV. 237, 248 n.59 (2008) (citing John E. Bonine, *Broadening "Standing to Sue" for Citizen Enforcement*, *in* 2 FIFTH INTERNATIONAL CONFERENCE ON ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT 249, 257 (Jo Gerardu & Cheryl Wasseman eds., 1999)); *see also* Solove & Citron, *supra* note 7, at 64 ("[C]urrent standing doctrine—specifically the injury in fact requirement—is actually a concoction of the Court from the 1970s."). Solove and Citron add that *Spokeo* "made a significant turn, and *TransUnion* pushes even further into this new territory." *Id.* at 65.

43 Spokeo, Inc. v. Robins, 578 U.S. 330, 343 (2016) (Thomas, J., concurring).

44 *Id.* at 340 (majority opinion). The Court also noted that "it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Id.* at 341 (citing Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 775–77 (2000)). One might wonder whether the phrases zeroed in on by the *Spokeo* Court, which come from Justice Scalia's opinion in *Lujan*, are meant to be understood as separate sub-requirements *within* injury-in-fact in the first place. At least three phrases the majority quotes from *Lujan*—"concrete and particularized," "actual or imminent," and "conjectural or hypothetical"—might well be some version of "hendiadys," a conjunctive figure of speech on which Professor Bray has compellingly shed light, or even just a "doubling" used for mere emphasis. *Id.* at 339 (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992)); *see* Samuel L. Bray, *"Necessary and Proper" and "Cruel and Unusual": Hendiadys in the Constitution*, 102 VA. L. REV. 687, 701 (2016).

satisfy concreteness, and in some cases intangible harms can. The Court explains that both analogousness to intangible injury "traditionally" recognized as judicially cognizable, as well as Congress's judgment, are "instructive," but it leaves the lower court to apply those dual considerations on remand.[45]

Justice Thomas joined the Court's opinion but also wrote separately to argue that modern standing doctrine still differentiates between private plaintiffs who sue to allege a violation of their *own* rights, versus private plaintiffs who sue to allege a violation of *public* rights.[46] He argued that the separation of powers considerations are different in the private sphere[47] and that, consistent with the *Spokeo* majority's position about the history of what common-law courts have accepted, common-law courts "imposed different limitations on a plaintiff's right to bring suit depending" whether it was private or public.[48] Justice Thomas cites Professors Woolhandler and Nelson, who argue that history does not defeat standing doctrine and who give a relatively positive light to critics of modern standing doctrine, such as Cass Sunstein.[49] He also cites an old English case to show that courts historically "presumed that the plaintiff suffered a *de facto* injury merely from having his personal, legal rights invaded. Thus, when one man placed his foot on another's property, the property owner needed to show nothing more to establish a traditional case or controversy."[50] Justice Thomas

45 *Spokeo*, 578 U.S. at 341 ("Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right . . . . This does not mean, however, that the risk of real harm cannot satisfy the requirement of concreteness.").

46 *Spokeo*, 578 U.S. at 343 (Thomas, J., concurring).

47 *Id.* at 344 ("These limitations [on standing] preserve separation of powers by preventing the judiciary's entanglement in disputes that are primarily political in nature. This concern is generally absent when a private plaintiff seeks to enforce only his personal rights against another private party.").

48 *Id.*

49 *Id.* (citing Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 689–91 (2004). Professors Woolhandler and Nelson note that Sunstein believes there is a constitutional requirement for a private right of action, but there is not a constitutional requirement for a private injury. Woolhandler & Nelson, *supra* note 49, at 691 n.9 ("As a matter of text and history, the best reading of the Constitution is that no one can sue without some kind of cause of action." (quoting Cass R. Sunstein, *Informational Regulation and Informational Standing:* Akins *and Beyond*, 147 U. PA. L. REV. 613, 639 (1999))).

50 *Spokeo*, 578 U.S. at 344 (Thomas, J., concurring) (citing Entick v. Carrington (1765) 95 Eng. Rep. 807, 817; 2 Wils. K.B. 274, 291). Justice Thomas also notes here that many "traditional remedies for private-rights causes of action," like those for trespass or infringement of intellectual property, do not depend on an allegation of damages besides the fact that his private legal right was violated. *Id.*; *see also* Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154 (Wis. 1997).

then distinguishes public rights, saying that in contrast to private rights cases, common-law courts *have* traditionally required a further showing of injury there. He quotes William Blackstone's commentaries, which say there is a distinction of public wrongs from private, and Justice Thomas details that even in limited cases where plaintiffs could sue for public wrongs, they *did* have to show individual harm.[51]

Justice Thomas proceeds to cite modern precedent to show it does "not require[] a plaintiff to assert an actual injury beyond the violation of his personal legal rights to satisfy the 'injury-in-fact' requirement."[52] He also cites a law review article to support his argument that separation of powers concerns are not at stake when a plaintiff sues to vindicate private rights because there is no danger that the party is trying to "police the activity of the political branches or, more broadly, that the Legislative Branch has impermissibly delegated law enforcement authority from the Executive to a private individual."[53] His final move in the *Spokeo* concurrence is to say that the alleged violation in that case was public, and therefore the plaintiff, Robins, had no standing to sue for public violations because he did not show individual harm.[54] However, Justice Thomas cautioned, it is arguable that one of Robins's claims perhaps does rest on a privately held right, and if on remand the lower court were to find that is true—that is, if Congress actually gave Robins a private right protecting his individual information—then that alone would count as Article III injury in fact.[55] That is why he signs on to the majority's remand.

2. Judge Newsom concurs in *Sierra*

Fast forward a few years to May 2021. Perhaps inspired in part by Justice Thomas's relatively short concurrence, Judge Kevin Newsom of the Eleventh Circuit Court of Appeals wrote a lengthier concurrence in the injury-in-fact case, *Sierra v. City of Hallandale Beach*.[56] His first major point sounds a lot like the *Spokeo* concurrence: "[A] plaintiff thus has what we have come to call 'standing,' whenever he has a legally cognizable cause of action, regardless of whether he can show a

51 *Spokeo*, 578 U.S. at 344–45 (Thomas, J., concurring) ("'Private rights' are rights 'belonging to individuals, considered as individuals.'" (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *2)).

52 *Id.* at 347 (citing Carey v. Piphus, 435 U.S. 247, 266 (1978)).

53 *Id.* (Thomas, J., concurring) (citing F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 317–21 (2008)).

54 *Id.* at 348–49.

55 *Id.* at 348.

56 996 F.3d 1110, 1115 (11th Cir. 2021) (Newsom, J., concurring).

separate, stand-alone factual injury."[57] The second major point sounds new: Judge Newsom says that "Article II's vesting of the 'executive Power' in the President and his subordinates prevents Congress from empowering private plaintiffs to sue for wrongs done to society in general or to seek remedies that accrue to the public at large."[58] True, Justice Thomas had also mentioned separation of powers as a limiting principle in public rights cases. But Judge Newsom would house the limit in Article II, not Article III. This means that for Judge Newsom, Congress can elevate harms to concrete injury except when doing so would infringe upon the Executive Power.[59] So the original meaning of Article II would limit Article III power, rather than just the original meaning of Article III itself.

Another distinct feature of the *Sierra* concurrence is that Judge Newsom quickly presses on the three "irreducible"[60] elements of standing: (1) injury in fact, that is (2) fairly traceable to the defendant's actions, and that is (3) redressable ("likely to be redressed by a favorable judicial decision.")[61] Notwithstanding "nearly universal consensus" over standing's elements, he says, applying the elements has proven difficult.[62] Judge Newsom also sets out to define an Article III "Case[]"[63] as existing whenever a plaintiff has a cause of action.[64] For our purposes, a cause of action is the right to sue, whether it comes from the common law, is granted straight from the Constitution, or—especially pertinent here—is conferred by congressional statute.[65]

Because of how difficult it has become to decide cases following *Spokeo*, Judge Newsom expands upon what Justice Thomas started. The Supreme Court's "Article III standing jurisprudence has jumped the tracks," and Judge Newsom announces that he will make the "case against current standing doctrine."[66] At the outset, he emphasizes how new the "injury in fact" concept is: "It made its first appearance . . .

57 *Id.*

58 *Id.*

59 *See id.* at 1133–39.

60 *Id.* at 1115 (quoting Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982)).

61 *Id.* (quoting Spokeo, Inc. v. Robins, 578 U.S. 330, 338 (2016)).

62 *Id.* at 1116 (collecting cases that show incompatible decisions).

63 U.S. CONST. art. III, § 2.

64 *Sierra*, 996 F.3d at 1122 (Newsom, J., concurring).

65 *See* Alexander v. Sandoval, 532 U.S. 275, 286 (2001). Judge Newsom cites *Sandoval* for its description of a cause of action. That is, a plaintiff's "legal rights have been violated" and "the law authorizes him to seek judicial relief." *Sierra*, 996 F.3d at 1122 (citing *Sandoval*, 532 U.S. at 286).

66 *Sierra*, 996 F.3d at 1117 (Newson, J., concurring).

about 180 years after the ratification of Article III."[67] He proceeds to track how the concept evolved. Judge Newsom argues that in *Association of Data Processing Service Organizations, Inc. v. Camp*,[68] a 1970 case, the Court expanded the category of who can sue to include parties who were merely injured in fact, and not necessarily *also* injured in law (at least under the APA).[69] In other words, factual injury had become a sufficient condition. However, in *Warth v. Seldin*, the factual injury became a constitutional requirement,[70] and *Lujan v. Defenders of Wildlife* affirmed it as a requirement—not a sufficient condition, but a necessary one.[71] As Judge Newsom tells it, *Spokeo* essentially reiterated what the Court said in *Warth* and *Lujan*: "A plaintiff does not 'automatically satisf[y] the injury-in-fact requirement,' . . . 'whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.' . . . Rather, the Court held, any statutorily defined injury must independently satisfy Article III's requirement of 'concreteness.'"[72] But Judge Newsom criticizes the Court, as it has not offered much guidance as to how judges can apply concreteness. For example, he specifically challenges the *Spokeo* majority's fixation on similarity to a traditional common-law tort.[73]

3. Justice Thomas dissents in *TransUnion*

However, when Justice Thomas answers the volley a few months later in his *TransUnion* dissent, he seems to say his approach is consistent with the majority's chosen test. For example, he quotes the Court's *Spokeo* precedent (presumably a portion with which he agreed,

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67 *Id.*; *see also* Heilman, *supra* note 42, at 248 n.59 ("The constitutionalization of the standing doctrine happened under the Burger Court and has been characterized at least in part as an attempt to unburden packed federal dockets and to bar judicial interference with progressive legislation."). Professor Bonine noted at the time that the U.S. is nearly alone in that its high court has rejected the legislative branch's attempt to grant a right of action—the permission to sue in court. Bonine, *supra* note 42, at 257.

68 397 U.S. 150 (1970).

69 *Sierra*, 996 F.3d at 1117 (Newsom, J., concurring).

70 422 U.S. 490, 499–500 (1975). Alongside this case, Judge Newsom also cites *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 38–39 (1976).

71 504 U.S. 555 (1992).

72 *Sierra*, 996 F.3d at 1120 (Newsom, J., concurring) (alteration in original) (citation omitted) (quoting Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016)).

73 *Id.* at 1121. Judge Newsom cites an Eleventh Circuit case in order to demonstrate a lower court applying this concept. The dissent in that case is telling. *See* Muransky v. Godiva Chocolatier, Inc., 979 F.3d 917, 957–58 (11th Cir. 2020) (Jordan, J., dissenting) ("That we need to resolve what is essentially a policy question to determine the boundaries of our subject-matter jurisdiction reminds us how far standing doctrine has drifted from its beginnings and from constitutional first principles.").

despite concurring in that case) to argue that the degree of risk that class members faced in *TransUnion* was "sufficient to meet the concreteness requirement."[74] The *TransUnion* majority had reiterated the *Spokeo* test and emphasized a few phrases from the *Spokeo* majority opinion to argue that "*[c]entral* to assessing concreteness is whether the asserted harm has a 'close relationship' to a harm *traditionally* recognized as providing a basis for a lawsuit in American courts—such as physical harm, monetary harm, or various intangible harms," including reputational harm.[75] And in fairness, Justice Kavanaugh's *TransUnion* majority opinion focuses on text and history, too.[76] His approach may be squared with a version of originalism that allows using other methodologies that at least do not contradict originalism, or one that allows reliance on precedent even when it contradicts originalism.[77] To be sure, Justice Kavanaugh's opinion ably summarizes the relevant precedent. Perhaps he is focused more on "adjudication" here than "law pronouncement," and that would also be a legitimate counterargument.

As for Justice Thomas, contesting the importance of those stray phrases would have been reasonable, as the *Spokeo* majority called the traditional relationship inquiry "instructive" rather than "central."[78] In *Spokeo*, the plaintiff had alleged that Spokeo, a consumer reporting agency, violated his statutory right to fair credit reporting by posting inaccurate information about him online. The Fair Credit Reporting Act required consumer reporting agencies to follow certain procedures laid out in the statute, including ensuring accuracy, and it gave

74 TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2222 (2021) (Thomas, J., dissenting) (quoting *Spokeo*, 578 U.S. at 343).

75 *Id.* at 2200 (majority opinion) (emphasis added) (quoting *Spokeo*, 578 U.S. at 340–41).

76 *Id.* at 2203 ("[W]e start with the text of the Constitution"); *id.* at 2206 ("Such an expansive understanding of Article III would flout constitutional text, history, and precedent.").

77 *See* William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2354–56 (2015).

78 *Spokeo*, 578 U.S. at 341. It seems odd that the *TransUnion* majority hangs its hat on those stray phrases given that *Spokeo* did not pretend to argue that the traditional relationship inquiry (that is, whether an alleged intangible harm has a "close relationship" to a harm traditionally recognized as giving one the basis to sue in English or American courts) is the only relevant inquiry. In fact, in the very next sentence after it lays out the traditional relationship inquiry, *Spokeo* also mentions another "instructive" inquiry: Congress's judgment. *Id.* As the *Spokeo* majority notes, "Congress may 'elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.'" *Id.* (alteration in original) (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 578 (1992)). In this light, it's understandable that Justice Thomas feels his view aligns better with *Spokeo* than it does the *TransUnion* majority.

a right to sue to any individual "with respect to" whom any person violates the Act.[79] Thus, the facts raised questions about the traditional relationship inquiry.

But rather than contest the importance of the phrases the *TransUnion* majority purports to be central, Justice Thomas instead contends that common sense makes it clear that "receiving a letter identifying you as a potential drug trafficker or terrorist *is* harmful."[80] Rather than call for a new approach that would wipe out decades of precedents, he instead turns the tables on the *TransUnion* majority, calling *their* application "novel[]."[81] And he quotes several precedents to support his contention that "[n]ever before has this Court declared that legal injury is *inherently* insufficient to support standing."[82] Further, Justice Thomas engages directly with the *TransUnion* majority's emphasis on similarity to a common-law harm, as he compares TransUnion's publication of an "OFAC" alert[83] to vendors that printed and sent the information with the historically accepted harm of libel.[84] That being said, Justice Thomas eventually quotes Judge Newsom—"I see no way to engage in this 'inescapably value-laden' inquiry without it 'devolv[ing] into [pure] policy judgment'"[85]—and concludes that legislatures and juries are better suited to "weigh[] the harms" and "choos[e] remedies."[86]

Perhaps, then, the difference in citation approach lies mostly in a difference in strategy. Regardless, where Justice Thomas quotes precedent to undercut the majority, Judge Newsom quotes them to show where the precedents themselves went wrong.

B. Method and Sources

There are various ways to do originalism.[87] Setting aside labels for the moment, this Section will first examine in an unadorned fashion

79 *Spokeo*, 578 U.S. at 336 (quoting 15 U.S.C. § 1681n(a) (2012)).

80 *TransUnion*, 141 S. Ct. at 2223 (Thomas, J., dissenting) (emphasis added).

81 *Id.* at 2221.

82 *Id.* For example, he quotes *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 578 (1992). *TransUnion*, 141 S. Ct. at 2221 n.5 (Thomas, J., dissenting) ("Nothing in this contradicts the principle that the injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing" (quoting *Lujan*, 504 U.S. at 578)).

83 "OFAC" stands for "Office of Foreign Assets Control," and the subject of an OFAC alert has had their name placed on a list of highly undesirable people, including terrorists and drug traffickers. *TransUnion*, 141 S. Ct. at 2215 (Thomas, J., dissenting).

84 *Id.* at 2223–24.

85 *Id.* at 2224 (alterations in original) (quoting Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1129 (11th Cir. 2021) (Newsom, J., concurring)).

86 *Id.*

87 *See, e.g.*, Baude, *supra* note 77, at 2354–56.

the ways that Justice Thomas and Judge Newsom lay out their originalist arguments. In other words, in this Section we will note the moves and citations that someone with a basic legal understanding would notice, even if they are not particularly expert in originalism or constitutional methodology. Neither judge explicitly announces that he will embark on an "originalist" journey, although Judge Newsom does reference the "original understanding" of the word "Case."[88] Nonetheless, each judge takes a subtly different originalist approach, the comparison of which will illustrate not only what standing can look like going forward on a largely originalist Supreme Court, but also what originalism can do going forward.

1. Style

Both judges begin, unapologetically, with the text. Judge Newsom announces it explicitly: "I start, as always, with the text."[89] Justice Thomas dives into the text without telling you that he is doing so, but several pages later, he refers back to everything that preceded it as including "text" and "history."[90] This may seem like splitting hairs, but when aggregated with other instances, it demonstrates one of the biggest differences in his style here.

Judge Newsom spends some time setting the stage. In order to elaborate on key textual definitions, he proceeds to cite the leading federal-courts casebook[91] as well as a then-Judge Scalia law review article from the 1980s.[92] The article advocates using Article III as a "vehicle" for standing, but Judge Newsom rejects the idea that judges should look for a vehicle that the text does not establish, and ultimately uses

88 *Sierra*, 996 F.3d at 1123 (Newsom, J., concurring).

89 *Id.* at 1121. As we will see, Justice Kavanaugh's majority opinion in *TransUnion* is similarly explicit: "[W]e start with the text of the Constitution." *TransUnion*, 141 S. Ct. at 2203.

90 *See TransUnion*, 141 S. Ct. at 2216, 2223 (Thomas, J., dissenting). After reciting the facts, the first thing he does in the first paragraph is quote Article III: "[t]his power 'shall extend to *all* Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.'" *Id.* at 2216 (quoting U.S. CONST. art. III, § 2).

91 *See Sierra*, 996 F.3d at 1121 (Newson, J., concurring) (citing RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 101 (7th ed. 2015)).

92 *See id.* at 1122 (explaining that standing doctrine's location in Article III was "for want of a better vehicle" (quoting Scalia, *supra* note 13, at 882)). Judge Newsom suggests that perhaps Justice Scalia, who penned the majority opinion in *Lujan*, was looking for a vehicle at the time. *See id.*

the article to contrast with his "more natural and straightforward" reading of the word "Case."[93]

Next, Judge Newsom dives into *Webster's*, both the first and second editions. He cites the first edition (published in 1828) for the early-American usage and the second edition (published in 1944) for the more current usage.[94] After the raw text, the dictionaries appear to be his definitional starting point. This contrasts with the *TransUnion* dissent, which only cites an etymological dictionary, just once, and in a footnote as a supplement to a broader point.[95] Judge Newsom is not satisfied by just the dictionary definition: he cites old Supreme Court cases (and an old New York high-court case) that bolster that definition.[96] He does all this to show that, "as a matter of plain text, a plaintiff who has a legally cognizable cause of action has a 'Case' within the meaning of Article III."[97]

Ultimately, Judge Newsom's opinion style reads more like "law pronouncement," while Justice Thomas's opinion—despite being a dissent—reads more like adversarial "adjudication" on party-presented facts in a precedential court system.[98]

2. Citations

While exploring the meaning of text, Judge Newsom appears to cite cases for two distinct reasons. The first reason is definitional,

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93 *See id.* Similarly, he also uses the article to show that Justice Scalia himself recognized that standing doctrine's location in Article III was not "linguistically inevitable." *Id.* (quoting Scalia, *supra* note 13, at 882).

94 *See id.* at 1122–23. He does not cite the third, more controversial, edition. *See generally, e.g.*, HERBERT C. MORTON, THE STORY OF WEBSTER'S THIRD: PHILLIP GOVE'S CONTROVERSIAL DICTIONARY AND ITS CRITICS (1994); Phillip A. Rubin, *War of Words: How Courts Can Use Dictionaries in Accordance with Textualist Principles*, 60 DUKE L.J. 167, 181–84 (2010) (noting, for example, controversy over the edition's descriptive approach versus the more traditional prescriptive approach).

95 *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2218 n.3 (2021) (Thomas, J., dissenting) (noting that the etymology of the word "injury," stemming from "*injuria*," which meant the negation of a right (citing THE BARNHART DICTIONARY OF ETYMOLOGY 529 (Robert K. Barnhart, ed., 1988))).

96 *Sierra*, 996 F.3d at 1123 (Newsom, J., concurring) (citing Bylew v. United States, 80 U.S. (13 Wall.) 581, 595 (1871)); Muskrat v. United States, 219 U.S 346, 356 (1911); Kundolf v. Thalheimer, 12 N.Y. 593, 596 (1855)).

97 *Sierra*, 996 F.3d at 1123 (Newsom, J., concurring).

98 *See, e.g.*, Jeffrey M. Anderson, *The Principle of Party Presentation*, 70 BUFF. L. REV. 1029, 1045–49 (2022). That being said, Judge Newsom writes in the "adjudication" style where appropriate. For example, in an Eleventh Circuit "sequel" to *Sierra*, he writes both the majority opinion and a concurrence, applying *TransUnion* as precedent in the majority opinion while expanding upon his originalist views in the concurrence. *See* Laufer v. Arpan LLC, 29 F.4th 1268, 1283 (11th Cir. 2022) (Newsom, J., concurring).

which confirms the traditional usage of a given word. That is what he did with "Case," and it is analogous to looking at a dictionary. The other reason is for historical context, which serves to *confirm* the definitional usages in dictionaries and older cases. For example, Judge Newsom cites contemporaneous or near-contemporaneous cases[99] to get evidence regarding the kinds of suits that courts would entertain around the time of the Founding.[100] He does not say so explicitly, but all this is apparently done to determine the original public meaning.

Furthermore, just as Justice Thomas is willing to cite Judge Newsom's original work collecting sources, Judge Newsom is willing to cite a trustworthy contemporary who collected sources.[101] Finally, for good measure, he cites a law review article which explains how the U.S. has standing to prosecute crimes.[102]

Meanwhile in *TransUnion*, as soon as Justice Thomas finishes walking through the minimal text at hand—Article III, Sections 1 and 2—he turns to cases decided near the time of the Founding. He does not turn immediately to a dictionary, nor does he turn to a treatise. One might assume at first blush that those cases are definitional, like the first type in *Sierra*. But that does not appear to be the case. Instead, Justice Thomas appears to turn directly to the second type of case-citing: historical context. The cases he cites do not strictly define the word "Case." Instead, they demonstrate a more general idea: namely, that the scope of judicial power depends upon "whether an individual asserts his or her own rights."[103] Further, Justice Thomas cites to the Blackstone treatise to buttress his reading of what those cases said at the time of the Founding.[104] The bottom line is that "courts for

99 *Sierra*, 996 F.3d at 1123 (first citing Robinson v. Byron (1788) 30 Eng. Rep. 3, 3; 2 Cox, 5, 5; and then citing Marzetti v. Williams (1830) 109 Eng. Rep. 842, 846; 1 B. & AD. 415, 425). He also cites early American cases that "followed suit," including a case from Justice Story riding circuit. *Id.* at 1124 ("[E]very violation imports damage; and if no other be proved, the plaintiff is entitled to a verdict for nominal damages." (quoting Webb v. Portland Mfg. Co., 29 F. Cas. 506, 509 (C.C.D. Me. 1838)).

100 *Sierra*, 996 F.3d at 1123 (Newsom, J., concurring). As a secondary matter, he turns to the "sorts of suits that courts routinely heard in the years surrounding the Founding" to "*further* support[]" his reading of the term. *Id.* (emphasis added).

101 *Id.* at 1124 (citing Muransky v. Godiva Chocolatier, Inc., 979 F.3d 917, 972 (11th Cir. 2020) (Jordan, J., dissenting) (collecting sources and rejecting the argument that no claim could lie without a showing of actual damages)).

102 *See id.* at 1125 (citing Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show that Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239, 2246–49 (1999)).

103 TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2217 (2021) (Thomas, J., dissenting) (citing Entick v. Carrington (1765) 95 Eng. Rep. 807, 817; 2 Wils. K.B. 274, 291).

104 *Id.* (citing 3 WILLIAM BLACKSTONE, COMMENTARIES *2; 4 *id.* at *5).

centuries held that injury in law to a private right was enough to create a case or controversy."[105]

3. Location of limitations

The two originalists line up on a lot so far, but they may have a "location" disparity. When it comes to *limits* on citizens suing, Judge Newsom decidedly locates that boundary in Article II. Justice Thomas is less explicit about picking an article, but he appears to locate that boundary in Article III.

Neither judge says that Congress has unlimited authority to empower private citizens to sue over absolutely anything. Justice Thomas talks about Article III's limitations and argues throughout the dissent that the public-private distinction is what will keep citizens from suing over any issue and for any remedy without sometimes showing harm. "It would exceed *Article III*'s limitations if, at the behest of Congress and in the absence of any showing of concrete injury, we were to entertain citizen suits to vindicate the *public's* nonconcrete interest in the proper administration of the laws."[106] However, Judge Newsom, just a few months earlier, said instead: "[D]ifferent rules probably govern suits brought by private and public plaintiffs, but those rules flow from *Article II*, not Article III."[107] Despite the fact that Justice Thomas cited Judge Newsom several times, he did not cite him on this issue, so on this point their approaches may differ.

Both judges mention separation-of-powers concerns. But, Judge Newsom says, it's wrong to say that those concerns "limited the *judiciary*'s power, rather than *Congress*'s power to confer on private plaintiffs the ability to perform what is, in effect, an executive function."[108] He rinses, then repeats the originalist process. He quotes Article II, Section 1, and—without missing a beat—proceeds to back himself up with a traditional reading from an early case.[109] Judge Newsom proceeds to make the public-private distinction within Article II, otherwise like Justice Thomas's distinction within Article III. He cites the same Woolhander and Nelson article on standing[110] that Justice Thomas cited, as

105 *TransUnion*, 141 S. Ct. at 2218 (Thomas, J., dissenting).

106 *Id.* at 2220 (emphasis added) (quoting Summers v. Earth Island Inst., 555 U.S. 488, 497 (2009)).

107 *Sierra*, 996 F.3d at 1125 n. 7 (Newsom, J., concurring) (emphasis added).

108 *Id.* at 1133.

109 *Id.* (quoting Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 329–30 (1816) (Story, J.) (discussing the "construction" of the phrase "the executive power shall be vested in a president of the United States of America")). It is debatable whether this is of the first type or second type of case citation.

110 *Id.* (citing Woolhander & Nelson, *supra* note 49, at 696).

well as Blackstone, who distinguished between private and public wrongs.[111] After references to Locke, Montesquieu, and a law review article, he concludes that "at its core, the 'executive power' entailed the authority to bring legal actions on behalf of the community for remedies that accrued to the public generally."[112]

4. Precedent

Curiously, Justice Thomas in *TransUnion* seems to suggest that his approach is more consistent with precedent than the majority's.[113] For example, he calls the majority's approach novel. He also says the majority is the one that is moving away from previous cases. On closer inspection, the point seems more empirical than methodological. "Never before has this Court declared that legal injury is *inherently* insufficient to support standing," he says.[114] He also takes issue with the justification for what he calls a departure from precedent—the separation of powers rationale cuts the opposite direction from what the majority says it does. "In the name of protecting the separation of powers . . . this Court has relieved the legislature of its power to create and define rights."[115] However, none of this should imply that Justice Thomas takes a less-than-originalist approach. He allows original public meaning to square with precedent.

He goes on to say that the *Spokeo* majority made contradictory statements. That is, the majority first moves away from previous cases by saying that a plaintiff does not automatically show an injury in fact just because a statute purports to authorize that citizen to sue and vindicate that right, albeit in another breath assuring that Congress can "identify intangible harms that meet minimum Article III requirements," which in "*some* circumstances [can] constitute injury in fact."[116] In retrospect, reconciling these contradictory statements has "proved to be a challenge"; here, Justice Thomas cites Judge Newsom's *Sierra* concurrence where it collects examples of inconsistent

111 *Id.* at 1134 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES *2; 4 *id.* at *5–7).

112 *Id.* (first citing JOHN LOCKE, TWO TREATISES OF GOVERNMENT 124–26 (Thomas I. Cook ed., 1947) (1689); then citing BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 69 (Frank Neuman ed., 1952) (1748); and then citing Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 743–52 (2003)).

113 *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2219–20 (2021) (Thomas, J., dissenting).

114 *Id.* at 2221.

115 *Id.* (citation omitted).

116 *Id.* at 2220 (quoting Spokeo, Inc. v. Robins, 578 U.S. 330, 341–42 (2016) (emphasis added)).

decisions.[117] He then quotes his own concurrence from *Thole v. U.S. Bank*, saying, "'[t]he historical restrictions on standing' offer considerable guidance."[118] Justice Thomas's approach comports with the theory that before *TransUnion*, despite the difficulty following *Spokeo*, lower courts could still look to historical considerations for guidance. Now, though, because "the majority holds that the mere violation of a personal legal right is *not*—and never can be—an injury sufficient to establish standing,"[119] it seems that going forward his originalist approach must try to overturn *TransUnion*'s holding.

One way to square Justice Thomas's outcome with a theory is that because he concurred in *Spokeo*, the holding is the only part that should survive. If *TransUnion* were overturned, another case matching *Spokeo*'s facts came up, and Justice Thomas managed to write the majority opinion, he would not have to copy and paste the *Spokeo* majority's opinion. The parts unessential to the holding would become dicta, and the new reasoning behind standing doctrine would come from Justice Thomas himself. At that time, the *Spokeo* concurrence would become the presumptive prevailing reasoning,[120] if not the holding. Thus, he does not need to pare back precedent well into the twentieth century or even to before *Lujan*, because the *Spokeo* result was correct.[121] And this theory does make sense of Justice Thomas's *TransUnion* dissent; the first two times that he quotes *Spokeo* favorably are to cite his own concurrence,[122] and the next two times he cites *Spokeo* are to show the above-discussed contradiction that makes reconciling two of the majority's statements "a challenge."[123] The Article II-Article III limitation tussle could also account for the apparent difference in approach, since Judge Newsom houses the limitation on statutory grants of standing in Article II, while Justice Thomas houses it in Article III.

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117 *Id.* (citing *Sierra*, 996 F.3d at 1116–17 (Newsom, J., concurring)).

118 *Id.* (alteration in original) (quoting Thole v. U.S. Bank N.A., 140 S. Ct. 1615, 1622 (2020) (Thomas, J., concurring)).

119 *Id.* at 2219.

120 *See generally* Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 BROOK. L. REV. 219 (2010); Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1263 (2006); Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953 (2005).

121 Part III will further investigate, among other things, what case each opinion would require going back to.

122 *TransUnion*, 141 S. Ct. at 2217 (Thomas, J., dissenting). Both citations explained the distinction between public and private rights and argue that historically, public rights *absque injuria* lacked standing whereas private rights *absque injuria* did not.

123 *Id.* at 2220.

Although Justice Thomas can say that, yes, Article III does limit standing, and it does sometimes require actual harm, it is unclear whether it would be even easier for him than for Judge Newsom to keep *Spokeo*. Perhaps Justice Thomas's approach comports with *Spokeo*'s judgment (if not its decisional theory),[124] and perhaps Judge Newsom's approach comports with Judge O'Scannlain's approach to particularization when *Spokeo* first reached the Ninth Circuit.[125] Given *Spokeo*'s remand order and the ambiguity Justice Thomas expressed about what the remand might find (as noted in subsection II.A.1 above), Judge Newsom's approach can probably accommodate *Spokeo*'s judgment.

Whatever the reason for the possible Article II-Article III contrast, aside from that contrast, it is contestable whether there is any other daylight between Judge Newsom's and Justice Thomas's opinions. For example, as the next Part suggests, both Justice Thomas's and Judge Newsom's approach might accommodate *Lujan*'s result.

The next Part will aim to make resolution possible between the disparate approaches,[126] including by accounting for where departures from precedent would be necessary if one were to take up one or the other approach.

III. WHICH CASE(S) MUST WE OVERTURN?

Each approach requires only minimal departures from precedent as such. However, while Justice Thomas appears to suggest his approach is the more faithful application of *Spokeo*, Judge Newsom does no such thing. Since Judge Newsom is concurring, he has still faithfully applied Supreme Court precedent. But that is not what he suggests the Court should do going forward. Instead, he argues that Supreme Court standing precedent has "jumped the tracks,"[127] that *Lujan* and *Spokeo* have proven "difficult to apply in practice and (at least arguably) incoherent in theory," and that "our current Article III standing doctrine can't be correct—as a matter of text, history, or logic."[128] It does not seem far-fetched to suggest that Judge Newsom sounds like he

124 *See* Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1934 (2017).

125 Robins v. Spokeo, Inc., 742 F.3d 409, 413 (9th Cir. 2014), *vacated and remanded*, 578 U.S. 330 (2016) (arguing that Robins alleged "Spokeo violated *his* statutory rights, not just the statutory rights of other people" and that his interests were sufficiently "concrete and particularized").

126 That is, at least, a resolution for originalist scholars and judges.

127 Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1117 (11th Cir. 2021) (Newsom, J., concurring).

128 *Id.* at 1121.

wants to go so far back as to overrule *Lujan* and perhaps beyond. However, as noted above, it is also not clear that Judge Newsom's approach requires overturning *Lujan*.

Judge Newsom does poke at *Lujan* though—he says that it "misstepped"[129]—and it does seem interesting that he is the one poking at precedent, while Justice Thomas is the one being careful about it. Justice Thomas is supposedly notorious for being the Justice most willing to overturn precedent.[130] By one scholar's recent count, Justice Thomas had written more than 250 separate opinions calling for reconsideration of various precedents.[131] Besides, one might think the circuit court would be the one waiting on the Supreme Court's change in precedent, while the Supreme Court would be the one thought leading and giving lower courts more direction. And in practice, that is certainly the case: Justice Thomas and the other Justices may overturn the Court's own standing precedents, while Judge Newsom joined a majority opinion that faithfully applied binding precedent before he said more in a concurrence. But it raises the question: Justice Thomas has chosen this approach, despite otherwise being in the better position to overturn Supreme Court precedent, and despite being the one whom commentators expect to say something like, "This Court's jurisprudence on this question has been divorced from the original public meaning for 50 years. I would overturn the precedent and return to history." This Note aims to highlight this and other phenomena driving the difference between these two originalists' approaches so that future scholars may inquire more closely into the implications for originalism as a methodology, and as a result it spends little time squarely considering the compatibility of originalism and precedent.

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129 *Id.* at 1131.

130 *See, e.g.*, Adam Liptak, *Precedent, Meet Clarence Thomas. You May not Get Along.*, N.Y. TIMES (Mar. 4, 2019), https://www.nytimes.com/2019/03/04/us/politics/clarence-thomas-supreme-court-precedent.html [https://perma.cc/JX8C-QPSK] (asserting that Justice Thomas "tries to unearth the original meaning of the Constitution, and he has no use for precedents that have veered from that original understanding"); *see also, e.g.*, Gamble v. United States, 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring) ("When faced with a demonstrably erroneous precedent, my rule is simple: We should not follow it.").

131 Liptak, *supra* note 130. For extended discussion of reconsidering precedents under originalism, see generally, e.g., Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921 (2017); Randy Barnett, *Trumping Precedent with Original Meaning*, 22 CONST. COMMENT 257 (2005); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT 289 (2005); John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U.L. REV. 803 (2009); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. PUB. POL'Y 23, 27–28 (1994); William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2358–59 (2015); Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U.L. REV. 923, 927 n.79 (2009).

A. Where Each Approach Overlaps with Precedent

Justice Thomas's *TransUnion* dissent overlaps with most of the Court's precedent. Concreteness or injury in fact has something to do with standing analysis. Or, at least, harm does. We may have to do some close reading when he says: "[I]t is worth pausing to ask why 'concrete' injury in fact should be the *sole* inquiry."[132] This quotation suggests that his approach does not depart from the idea that concreteness has at least something to do with the standing framework. But he quotes Judge Newsom's comment that "180 years after the ratification of Article III" is when the Court introduced the modern injury in fact requirement.[133]

The originalists' approaches comport with *Spokeo*'s statement that "Congress is well positioned to identify intangible harms that meet minimum Article III requirements" and with *Spokeo*'s statement that "the violation of a procedural right granted by statute *can be* sufficient in some circumstances to constitute injury in fact."[134] And there are some other components common to both originalist approaches that the *TransUnion* precedent probably does not contradict. For example, federal public rights have to be enforced either by (a) private individuals with particularized harm or (b) the federal government. "[O]ne who brings a criminal prosecution wields executive authority,"[135] and therefore the decision whether to prosecute belongs exclusively to the President and his subordinates.[136] Plus, both opinions comport with the *TransUnion* majority in that they discuss standing as a limit on the judicial power.[137] Further, Judge Newsom at least agrees that Congress cannot create just any right to sue: "None of this means, of course, that Congress can create any cause of action it wants or throw open the courthouse doors to any plaintiff it wants—limited only by its

132 TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2219 (2021) (Thomas, J., dissenting) (emphasis added).

133 *Id.* (quoting *Sierra*, 996 F.3d at 1117 (Newsom, J., concurring)).

134 *See id.* at 2220 (quoting Spokeo, Inc. v. Robins, 578 U.S. 330, 341–342 (2016)).

135 *Sierra*, 996 F.3d at 1133 (Newsom, J., concurring) (citing Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2200 (2020)).

136 *Id.* (citing United States v. Nixon, 418 U.S. 683, 693 (1974)).

137 *See Spokeo*, 578 U.S. at 344 (Thomas, J., concurring) ("These limitations [on standing] preserve separation of powers by preventing the Judiciary's entanglement in disputes that are primarily political in nature."); *TransUnion*, 141 S. Ct. at 2207 ("A regime where Congress could freely authorize *unharmed* plaintiffs to sue defendants who violate federal law not only would violate Article III but also would infringe on the Executive Branch's Article II authority."); *Sierra*, 996 F.3d at 1131 (Newsom, J., concurring).

imagination."[138] Thus, he added: "Statutory authorizations to sue may yet raise separation-of-powers concerns."[139]

B. Where Each Approach Departs from Precedent

Judge Newsom and Justice Thomas depart from standing cases in a Venn diagram of ways that overlap and ways that differ. Both originalists depart from the idea that injury-in-fact is the exclusive way to have standing.[140] As outlined above, both judges depart from the *TransUnion* majority's approach to statutory grants of a cause of action. Furthermore, both depart from the *TransUnion* majority's statement that "under Article III, an injury in law is not an injury in fact."[141] Both depart from the idea that "[f]or standing purposes, therefore, an important difference exists between (i) a plaintiff's statutory cause of action to sue a defendant over the defendant's violation of federal law, and (ii) a plaintiff's suffering concrete harm because of the defendant's violation of federal law."[142] For example, Justice Thomas contradicted that idea when he said that a "statute that creates a private right and a cause of action, however, *does* gives [sic] plaintiffs an adequate interest in vindicating their private rights in federal court."[143] Judge Newsom showed he joined Justice Thomas in that departure when he said, "In other words, whether someone has suffered an 'injury' depends on whether he has a cause of action: a 'legal right' that has been violated, 'for which the law provides a remedy.'"[144]

Next, there is daylight between Justice Thomas's *TransUnion* concurrence and the *Spokeo* majority. Justice Thomas gently says that *Spokeo* "built on" previous precedents' approach: "Based on a few sentences" from *Lujan* and another case, the Court asserted that it does not follow that a plaintiff satisfies the injury-in-fact requirement just because a statute grants a person that right and "purports to authorize that person . . . to vindicate that right."[145] Despite that daylight, because the *Spokeo* judgment was right, Justice Thomas does not have to

138 *Sierra*, 996 F.3d at 1131 (Newsom, J., concurring).

139 *Id.*

140 *TransUnion*, 141 S. Ct. at 2219 (Thomas, J., dissenting).

141 *Id.* at 2205 (majority opinion).

142 *Id.*

143 *Id.* at 2220 (Thomas, J., dissenting) (citing Thole v. U.S. Bank N.A., 140 S. Ct. 1615, 1622 (2020) (Thomas, J., concurring)).

144 *Sierra*, 996 F.3d at 1129–30 (Newsom, J., concurring) (quoting *Injury*, BLACK'S LAW DICTIONARY 905 (10th ed. 2014)).

145 *TransUnion*, 141 S. Ct. at 2220 (Thomas, J., dissenting) (quoting Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016)).

depart from it as precedent.[146] The narrowest possible move for him on that point would be to overturn *TransUnion*.

Besides the fact that Justice Thomas joined the *Lujan* majority, certain elements make that case distinguishable. In *Lujan*, Congress had included in the Endangered Species Act of 1973 (ESA) a "citizen-suit" provision that purported to confer, on *any* citizen, standing to sue and to enjoin a person or agency violating it.[147] In addition, the ESA gave all persons a procedural right (in other words, a purely legal right) to the EPA's following the procedure laid out by the statute.[148] Thus, the legal right in *Lujan* is far less particularized than the legal right in *TransUnion*, and Justice Thomas's dissenting approach may well find no Article III basis for conferring standing so broadly.[149]

Meanwhile, Judge Newsom goes back quite a bit further to express outright disagreement with the approaches in precedent: "*Lujan* and *Spokeo* misstepped."[150] But does his approach necessarily require overturning *Lujan*? As Judge Newsom wrote, "Article II's vesting of 'executive Power' in the President, on the other hand, straightforwardly explains the result in *Lujan*."[151] Because the plaintiffs challenged a government policy against which they sought a remedy accruing "to society at large," he says, Framing-era evidence suggests such a challenge is "executive" in nature.[152] In turn, and in order to distinguish *Lujan*, one who employs Judge Newsom's approach might also cite the lack of particularization called for by the ESA citizen-suit provision; after all, particularization (or the lack thereof) is what separates executive enforcement from a legal harm accrued to an individual. In other words, when a litigant has particularized legal harm, *Lujan*'s separation-of-powers rationale doesn't necessarily apply.

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146 *But cf. id.* at 2207 n.3 (majority opinion) (arguing that Justice Thomas's view on concreteness "would cast aside decades of precedent articulating that requirement").

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

148 *Id.*

149 *See TransUnion*, 141 S. Ct. at 2217 (Thomas, J., dissenting) ("Key to the scope of the judicial power, then, is whether an individual asserts his or her own rights. At the time of the founding, whether a court possessed judicial power over an action with no showing of actual damages depended on whether the plaintiff sought to enforce a right held privately by an individual or a duty owed broadly to the community.").

150 Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1131 (11th Cir. 2021) (Newsom, J., concurring).

151 *Id.* at 1137. Furthermore, Judge Newsom's approach as elaborated in the Eleventh Circuit standing sequel, *Arpan*, does seem to comport with *Lujan*. Concurring with himself there, he calls *Lujan* perhaps the "quintessential example of a suit that ran afoul of Article II's vesting of executive authority," despite the *Lujan* majority hanging its hat on Article III. Laufer v. Arpan LLC, 29 F.4th 1268, 1289 (11th Cir. 2022) (Newsom, J., concurring).

152 *Laufer*, 29 F.4th at 1289 (quoting *Sierra*, 996 F.3d at 1137 (Newsom, J., concurring)).

As Judge Newsom himself suggests, it is at least possible that "*Lujan* itself could be so narrowly construed," even though "subsequent cases haven't adopted"[153] a narrowing reading.[154] He does not mention which cases, but maybe he just means lower-court cases, as he did mention that lower courts have had a hard time applying the Court's standing precedent.[155] If any future Supreme Court cases on point come out the wrong way (perhaps due to using the wrong decisional theory), then those would be vulnerable under Judge Newsom's approach. Judge Newsom does say that his theory of standing is "*exactly* the same conclusion that one would reach from" "the early cases decided under" Article III.[156] Thus, just like Justice Thomas's approach doesn't require overturning *Lujan*, neither does Judge Newsom's.

Whether any cases between *Lujan* and *Spokeo* would need to be overturned given the right factual scenarios is a matter of application. Take for example *Raines v. Byrd*, a case brought by individual members of Congress alleging the Line Item Veto Act was unconstitutional.[157] As Justice Souter wrote in concurrence, it is "fairly debatable whether this injury is sufficiently 'personal' and 'concrete' to satisfy the requirements of Article III."[158] Because Judge Newsom does not contest whether an injury must be particularized, *Raines* can be squared with any subsequent case that is supported by his *Sierra* concurrence's reasoning. *Raines* simply applied the generally accepted test and came out a certain way; it may have cited *Lujan*, but *Lujan*'s dicta about statutory grants of standing were not necessary to the *Raines* Court's decision. A Justice employing the Judge Newsom approach could consider whether any given case satisfied his Article II-limited theory.

Oddly enough, despite notable differences in style and substance, both originalists' approaches to what they see as the Supreme Court's protracted missteps on standing would most obviously require overturning exactly one case: *TransUnion*. In other words, among precedents between *Lujan* (which started the necessary-not-sufficient

153 *Sierra*, 996 F.3d at 1119 n.2.

154 *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring) (construing standing requirements narrowly).

155 *Sierra*, 996 F.3d at 1121 (Newsom, J., concurring) ("The net result—as the disparate court-of-appeals caselaw shows—has been a doctrine that is difficult to apply in practice and (at least arguably) incoherent in theory.").

156 *Id.* at 1131. However, in the Eleventh Circuit sequel mentioned above, *Arpan*, Judge Newsom suggested that while *Arpan* came out correctly under the Supreme Court's current Article III standing doctrine, it may not have come out correctly under his Article II standing theory. *See* Laufer, 29 F.4th at 1295–97 (Newsom, J., concurring).

157 521 U.S. 811, 814 (1997).

158 *Id.* at 830 (Souter, J., concurring in the judgment).

requirement of actual harm in statutory damages cases) and *Spokeo* (which applied *Lujan* and made no bones about what it was doing), and among cases cited by Justice Thomas, Judge Newsom, and the *TransUnion* Court, the most recent statutory harm case that comes out the wrong way is *TransUnion*. Doubtless, however, even if we take Justice Thomas's unexpectedly pro-precedent approach, many cases would be re-contextualized, including *Lujan* and *Spokeo*.

C. Theoretical Coherence

Judge Newsom's "say what the law is" style feels the most intellectually satisfying. But maybe it's too much to ask for satisfyingly styled Supreme Court doctrine in every single area of the law all at once. Maybe the best thing originalists can do right now is to reframe correct judgments as having been originalist all along. It doesn't mean they're lying; it means that like Justice Thomas, they respect precedent more than some legal journalists think.[159]

Justice Thomas's concurrence in *Dobbs v. Jackson Women's Health Organization* serves to confirm this Note's casting of his precedent jurisprudence. On a list of substantive due process cases he would revisit, he did not list *Loving v. Virginia*[160]—perhaps because the Equal Protection Clause offers a correct originalist explanation. So maybe when the judgment is defensible on originalist grounds, an originalist judge need not overturn a case or mention that it needs revisiting. Could it be the same with *Spokeo*? That theory fits Justice Thomas's approach, including in his *Gamble* concurrence. After all, his *TransUnion* dissent does not mention that *Spokeo* should be revisited—presumably because the judgment is correct.[161]

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159 *See* Liptak, *supra* note 130; *see also* Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 938 (2009) ("Confining 'Originalism' (in its focal meaning) to the view that original meaning must trump all other considerations is misleading.").

160 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring) (citing *Griswold*, *Lawrence*, and *Obergefell* as cases the Court should reconsider but not citing *Loving v. Virginia*, 388 U.S. 1 (1967)). *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965); Lawrence v. Texas, 539 U.S. 558 (2003); Obergefell v. Hodges, 576 U.S. 644 (2015).

161 *See* Will Baude & Dan Epps, *Character Sketches*, DIVIDED ARGUMENT, at 35:00 (June 28, 2022), https://www.dividedargument.com/episodes/character-sketches/ [https://perma.cc/2Z8W-9QX4] (Baude suggesting it is possible that Justice Thomas thinks the judgment of *Loving* was correct on originalist Equal Protection grounds even though the case's reasoning was different). For a full explanation of Justice Thomas's views on precedent, see *Gamble v. United States*, 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring) ("When faced with a demonstrably erroneous precedent, my rule is simple: We should not follow it.").

Does Justice Thomas respect precedent more than we thought? Or does he only seem to exercise heightened deference when five votes turn on it? That question remains open, and while for academic purposes it does seem to matter, for advocates' purposes it may matter little. Either way, the originalist task of accepting a case's judgment but not its decisional theory is not new. Then-Professor Amy Coney Barrett explained how Justice Scalia often did just that: "He thus drew a line between 'decisional theory,' which he felt free to reject, and application of that theory to particular facts, which he felt constrained to follow."[162] Justice Scalia's adherence to non-originalist-reasoned precedent and simultaneous rejection of non-originalist reasoning applied, for example, in substantive due process cases.[163]

IV. IMPLICATIONS AND CONCLUSION

Is it possible that each judge successfully carved out the most appropriate and useful role in his own sphere? Justice Thomas sits on the Supreme Court; it makes sense that he has to play precedent battles, choose where he wants to redefine and square old cases in light of new cases rather than outright overturning them, and explain why majorities are wrong on their own terms even taking some of their assumptions for granted. Meanwhile, Judge Newsom sits on a visible Court of Appeals; he exerts influence, is able to spend more time per case than a district judge, and yet he does not have to play all the same games as a Supreme Court Justice.

A. Originalism as a Methodology

If originalists can make real headway on recontextualizing standing precedents in light of history and text-based reasoning rather than the dicta of yore, or outright overturning standing precedents, they might look to other areas of the law and attempt to improve decisional theory there, like in freedom of speech, particularly in such categorical exceptions as defamation.[164]

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162 Barrett, *supra* note 124, at 1934 (citing Am. Trucking Ass'ns v. Smith, 496 U.S. 167, 204 (1990) (Scalia, J., concurring in the judgment)); *see also* Ruggero J. Aldisert, *Precedent: What It Is and What It Isn't; When Do We Kiss It and When Do We Kill It?*, 17 PEPP. L. REV. 605, 607 (1990) ("The doctrine is not *stare dictis*. It is not 'to stand by or keep to what was said.' The doctrine is not *stare rationibus decidendi* or 'keep to the *rationes decidendi* of past cases.' Rather, a case is only important for what it decides: for 'the what,' not for 'the why,' and not for 'the how.'").

163 Barrett, *supra* note 124, at 1935–36.

164 *See* Berisha v. Lawson, 141 S. Ct. 2424–25 (2021) (Thomas, J., dissenting from denial of certiorari). For a somewhat related originalist argument against the tiers of scrutiny,

Assuming that Justice Thomas's approach does include recasting old precedents in an originalist light as described above, it is not clear whether the implications of such a method for originalism are always positive. If originalists fail to "characterize precedents in ways that critics could accept as honest, transparent, and fair,"[165] then the result could be counterproductive. However, as long as the Court can characterize precedents like *Lujan* and *Spokeo* in terms most Justices can accept, then any blowback should be minimized.

B. Other Implications

Standing is directly at issue in President Biden's partial student loan forgiveness program.[166] Furthermore, the Court's standing decisions will have ripple effects on other areas of the law and on interest groups—including class action groups,[167] environmental advocacy groups,[168] cities,[169] and corporations.[170] Class actions in particular will feel the impact of *TransUnion*, not only because the facts of the case clearly implicate class actions but also because class action cases are likely to draw scrutiny from federal courts in the first place[171] and are structurally vulnerable to attacks based on standing.[172] Furthermore,

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including in freedom of speech cases, see Joel Alicea & John D. Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, NAT'L AFF. (2019), https://www.nationalaffairs.com/publications/detail/against-the-tiers-of-constitutional-scrutiny/ [https://perma.cc/E2AC-BD66].

165 Jeffrey Rosen, *Originalism, Precedent, and Judicial Restraint*, 34 HARV. J.L. & PUB. POL'Y 129, 135 (2011). Rosen continues, "[T]he public still needs to believe that judges are not on an ideological crusade, using clever chess moves to get their preferred results by any means necessary." *Id.*

166 *See* Annie Nova, *GOP Challenges to Biden's Student Loan Forgiveness Plan Put Debt Relief in Jeopardy*, CNBC (Oct. 3, 2022, 3:08PM), https://www.cnbc.com/2022/10/03/challenges-to-bidens-student-loan-forgiveness-plan-put-relief-at-risk.html [perma.cc/6A43-36YE].

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

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

169 Kaitlin Ainsworth Caruso, *Associational Standing for Cities*, 47 CONN. L. REV. 59 (2014).

170 Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95, 96 (2014); *see also* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

171 *See* Lindsay Breedlove, *Under the Magnifying Glass: Class Action Settlements Experiencing Increased Scrutiny Nationwide*, A.B.A. J. (Oct. 22, 2019), https://www.americanbar.org/groups/litigation/committees/class-actions/practice/2019/class-action-settlements-experiencing-increased-scrutiny/ [perma.cc/HLG5-7A6P].

172 *See* Stern, *supra* note 7 (noting that the decision will have an "especially outsize [sic] impact on class action lawsuits, which allow multiple victims to band together and pursue violations of federal law collectively," and that "*TransUnion* 'may be particularly damaging to victims of privacy and environmental harms,' whose injuries can be harder to quantify"); *see also* Rick Marcus, *Divided Supreme Court Limits Article III Standing in Class Actions for Violation of Statutory Directives*, U.C. HASTINGS LAW: IN BRIEF & ON POINT (June 25, 2021), https://sites.uchastings.edu/onpoint/2021/06/25/rick-marcus-on-transunion-llc-v-

commentators have picked up on the potential privacy harms stemming from *TransUnion*, which they argue strikes a "major blow" to the enforcement of privacy laws, while others argue the *TransUnion* decision will be a win for small businesses.[173] It is conceivable that this could affect religious organizations' standing in what is called "associational standing,"[174] especially if progressive states pass laws seeking to curtail certain elements of free exercise in response to Texas's S.B.8 bill allowing private rights of action against abortion providers.[175] As Professors Woolhander and Nelson wrote in 2004, in words that now sound prescient, "Standing doctrines . . . often operated to protect individual citizens against inequitable enforcement of the law by private adventurers."[176] In addition, which originalist approach the Court employs may soon determine how the Court resolves the current circuit split on "tester" cases' stigmatic injury problem; in turn, that will affect how civil rights advocates can protect against discrimination and how disabled people can enforce statutory requirements on companies they patronize.[177]

Given that Justice Kagan is likely the liberal justice who is most open to engaging originalist or textualist interpretations,[178] advocates seeking to overturn *TransUnion* might do well to employ Justice

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ramirez/ [perma.cc/2P7E-NRLD] ("[T]he Court has made a number of decisions that were unfriendly to the plaintiff side in class actions. This might be viewed as another example . . . . Still, given creative pleading and remaining wriggle room under Federal Rule of Civil Procedure 23, this need not be a major setback for the plaintiff class action bar.").

173 Solove & Citron, *supra* note 7, at 62; *see also* Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, 102 B.U. L. REV. 793, 800 (2022) ("Through harm requirements, courts have made the enforcement of privacy laws difficult and, at times, impossible."). However, the National Federation of Independent Business called plaintiffs' defeat in the Supreme Court an "important victory for small businesses." TransUnion v. Ramirez*: U.S. Supreme Court Curtails Frivolous Class-Action Litigation*, NFIB (July 13, 2021), https://www.nfib.com/content/legal-blog/money/transunion-v-ramirez-u-s-supreme-court-curtails-frivolous-class-action-litigation/ [perma.cc/CPB4-XDPJ].

174 *See, e.g.*, Heilman, *supra* note 42, at 239–40; Brendan T. Beery, *Free Exercise Standing: Extra-Centrality as Injury in Fact*, 93 ST. JOHN'S L. REV. 579, 582–83 (2019).

175 *See* Whole Woman's Health v. Jackson, 142 S. Ct. 522 (2021). The Court declined to issue an injunction against Texas because "proof of a more concrete injury" was needed. *Id.* at 538.

176 Woolhandler & Nelson, *supra* note 49, at 732.

177 Catherine Cole, *A Standoff:* Havens Realty v. Coleman *Tester Standing and* TransUnion v. Ramirez *in the Circuit Courts*, 45 HARV. J.L. PUB. POL'Y 1033, 1035–41, 1043–46 (2022). Acheson Hotels has filed a now-pending petition for cert in a case involving a ubiquitous tester litigant, Laufer. *See* Petition for Writ of Certiorari, Acheson Hotels, LLC v. Laufer, 2022 WL 16838117 (Nov. 15, 2022) (No 22-429).

178 *See* Harvard Law School, *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE, at 08:28 (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg&t/ [https://perma.cc/J6G5-DTHK] (stating that "we're all textualists now").

Thomas's more targeted originalist approach. And it is not difficult to imagine that this Court, one that as a unit exercises judicial restraint,[179] might invoke standing as a narrower decisional theory in a future case deciding laws resembling S.B.8.

CONCLUSION

The practical and theoretical stakes are high for originalists. Originalist scholars might in general keep working to reconcile precedent and the originalist methodology itself; regarding standing, they might spend some time thinking through whether or not the Court should characterize *Lujan* and *Spokeo* as comporting with a future case overturning *TransUnion*.

As noted above, perhaps there is room to take lessons from both Justice Thomas's approach and Judge Newsom's approach. The Supreme Court should heed Judge Newsom's call to reconsider its standing jurisprudence and should consider his Article II approach. And when the time comes, it should heed Justice Thomas's standing opinion style: in the next appropriate case, the Court only has to overrule *TransUnion*.

179 *See* Joseph S. Diedrich, *Article III, Judicial Restraint, and this Supreme Court*, 72 SMU L. REV. 235, 237–38 (2019); Rosen, *supra* note 165, at 130–31.