




12-2023

## Converse-Osborn: State Sovereign Immunity, Standing, and the Dog-Wagging Effect of Article III

Carlos M. Vázquez  
Georgetown University Law Center

Follow this and additional works at: <https://scholarship.law.nd.edu/ndlr>

 Part of the [Civil Procedure Commons](#), [Constitutional Law Commons](#), and the [Jurisprudence Commons](#)

### Recommended Citation

Carlos M. Vázquez, *Converse-Osborn: State Sovereign Immunity, Standing, and the Dog-Wagging Effect of Article III*, 99 *Notre Dame L. Rev.* 717 ().

Available at: <https://scholarship.law.nd.edu/ndlr/vol99/iss2/6>

This Article is brought to you for free and open access by the Notre Dame Law Review at NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized editor of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

# CONVERSE-OSBORN: STATE SOVEREIGN IMMUNITY, STANDING, AND THE DOG- WAGGING EFFECT OF ARTICLE III

*Carlos M. Vázquez\**

“[T]he legislative, executive, and judicial powers, of every well constructed government, are co-extensive with each other . . . . [T]he judicial department may receive from the Legislature the power of construing every . . . law [which the Legislature may constitutionally make].”<sup>1</sup> Chief Justice Marshall relied on this axiom in *Osborn v. Bank of the United States* to stress the breadth of the federal judicial power: the federal courts must have the potential power to adjudicate any claim based on any law Congress has the power to enact.<sup>2</sup> In recent years, however, the axiom has sometimes operated in the opposite direction: if the federal courts lack the constitutional power to adjudicate cases based on certain types of substantive federal statutes, the legislature must lack the power to enact the statute in the first place.<sup>3</sup> This converse operation of the *Osborn* axiom is reflected in the Court’s decisions on the Eleventh Amendment and state sovereign immunity over the past two decades, culminating in the recent decisions in *Allen*

---

© 2023 Carlos M. Vázquez. Individuals and nonprofit institutions may reproduce and distribute copies of this Article in any format at or below cost, for educational purposes, so long as each copy identifies the author, provides a citation to the *Notre Dame Law Review*, and includes this provision in the copyright notice.

\* Scott K. Ginsburg Professor of Law, Georgetown University Law Center. I am grateful to William Buzbee, Richard Fallon, Vicki Jackson, Richard Re, and David Vladeck for helpful comments, and to Megan Bechtel, Gavin Landgraf, and Shaun Rogers for helpful research assistance.

1 *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 818 (1824).

2 *See id.* at 818–19. Marshall was paraphrasing Alexander Hamilton, who wrote in *The Federalist No. 80*: “If there are such things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative may be ranked among the number.” THE FEDERALIST NO. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

3 I refer to a “substantive” federal statute because, of course, Article III limits Congress’s power to confer jurisdiction on the federal courts. This Article concerns how purportedly jurisdictional doctrines have been transformed into limits on Congress’s power to enact nonjurisdictional statutes.

*v. Cooper*<sup>4</sup> and *PennEast Pipeline Co. v. New Jersey*.<sup>5</sup> Recent standing decisions, including most recently *TransUnion LLC v. Ramirez*,<sup>6</sup> may reflect a similar doctrinal trajectory in the Court's standing jurisprudence.

The Eleventh Amendment is, by its terms, a limitation of the jurisdiction of the federal courts. Until the Court's 1999 decision in *Alden v. Maine*,<sup>7</sup> it was widely believed that sovereign immunity did not protect states from being sued in state courts. The Court's precedents, in turn, established that Congress had the power to impose primary and remedial obligations on states.<sup>8</sup> Although the Eleventh Amendment prevented enforcement of the states' remedial obligations in federal court, the obligations were thought to be enforceable in state courts, subject to Supreme Court review.<sup>9</sup> In *Alden*, the Court held that states also enjoy a constitutional immunity from being sued by private parties in their own courts without their consent.<sup>10</sup> The *Alden* holding suggested that the immunity reflected in the Eleventh Amendment was not merely an immunity from the jurisdiction of the federal courts, but an immunity from being subjected to certain forms of liability.<sup>11</sup> As I argue below, the Court's post-*Alden* decisions, including its recent decisions in *Allen v. Cooper* and *PennEast Pipeline Co. v. New Jersey*, confirm that the states' sovereign immunity is an immunity from congressionally imposed damage liability to private parties.<sup>12</sup> Thus, a constitutional provision that purports to limit the jurisdiction of the federal courts has been read to reflect a constitutional limit on Congress's substantive legislative power.

The Court's recent decision in *TransUnion LLC v. Ramirez* may reflect a similar doctrinal trajectory in the context of Article III standing.<sup>13</sup> Article III imposes outer limits on the power of federal courts to adjudicate cases at the behest of persons who have not suffered an "injury in fact."<sup>14</sup> *TransUnion* involved claims under the Federal Credit Reporting Act (FCRA), in which Congress had imposed on certain

---

4 140 S. Ct. 994 (2020).

5 141 S. Ct. 2244 (2021).

6 141 S. Ct. 2190 (2021).

7 527 U.S. 706 (1999).

8 See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985).

9 See generally Carlos Manuel Vázquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683 (1997).

10 527 U.S. at 754.

11 See Carlos Manuel Vázquez, *Sovereign Immunity, Due Process, and the Alden Trilogy*, 109 YALE L.J. 1927, 1930 (2000).

12 140 S. Ct. 994 (2020); 141 S. Ct. 2244 (2021).

13 141 S. Ct. 2190 (2021).

14 *Id.* at 2204.

entities a damage liability towards certain individuals.<sup>15</sup> The Court held that some of the plaintiffs lacked standing to seek such damages in federal court because they had not suffered a “concrete” enough injury.<sup>16</sup> Justice Thomas’s dissent noted that the majority’s decision was a pyrrhic victory for the defendant because the plaintiffs could turn around and sue in state court, where Article III standing limits do not apply.<sup>17</sup> It is true that standing limits based on Article III do not apply in the state courts.<sup>18</sup> But this Article argues that the most plausible explanation for the Court’s holding is that Congress lacks the power to entitle persons to damage relief if they have not suffered an Article III injury in fact. If Congress had validly given the plaintiffs a right to damages from the defendant, and that right could be enforced in state courts, then the plaintiffs’ failure to receive the damages they claimed the defendant owed them would itself have been a sufficient “injury in fact” to support their standing in federal court. *TransUnion* can be reconciled with the well-established principle that a legal right to money is a sufficient interest to confer standing only if the decision is interpreted as holding that Congress lacks the power to create the right to damages it created in FCRA. But that means standing doctrine is not merely jurisdictional. If understood as holding that Congress in FCRA did not validly create the plaintiffs’ right to damages because their injuries were insufficiently concrete, *TransUnion* would stand as another example of ostensibly jurisdictional doctrines operating as a limit on Congress’s substantive legislative power.

Scholars have been almost unanimous in disapproving of the Court’s approach to both doctrines. My previous work on state sovereign immunity falls in this category.<sup>19</sup> This Article mostly seeks to understand the Court’s conceptualization of these two doctrines, not to defend or criticize it. Nevertheless, my thesis adds to the existing critiques of the Court’s current approach to both doctrines. The portion of this Article focusing on state sovereign immunity refines and updates my prior critiques of the Court’s decisions. With respect to standing, this Article advances a new critique. The Court in *TransUnion* did not expressly frame its holding as resting on Congress’s lack of power to create a damage remedy,<sup>20</sup> much less point to a constitutional provision other than Article III as the source of that limit. The only remotely plausible source is Article II: creating a damage remedy would

---

15 *Id.* at 2200.

16 *Id.* at 2214.

17 *Id.* at 2224 n.9 (Thomas, J., dissenting).

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

19 See articles cited *supra* notes 9, 11; *infra* notes 42, 205.

20 *But cf. infra* text accompanying note 202 (noting *TransUnion*’s negative implication that its standing holding denies Congress the power to create certain “causes of action”).

empower the courts to intervene at the behest of private plaintiffs seeking to enforce the liability, which would in turn impinge upon the executive's exclusive power to vindicate the public interest. But this rationale seems inapplicable to the *TransUnion* situation. More importantly, the Article II rationale deduces limits on Congress's substantive power from concerns about the propriety of judicial intervention. The jurisdictional tail thus wags a substantive dog. (Indeed, all examples of the *Converse-Osborn* phenomenon share this dog-wagging feature.) The upside-down logic necessary to sustain the Court's doctrine is itself suggestive that something is seriously amiss.

More broadly, this Article's explication of the *Converse-Osborn* phenomenon as reflected in the state sovereign immunity and standing cases illustrates the centrifugal tendencies of doctrinal innovations in the jurisdictional field. Because of the close and complex interrelationship between substance, remedy, and jurisdiction, innovations in one doctrinal area eventually require corresponding adjustments in the other areas, lest the original innovation become a pyrrhic victory (to borrow Justice Thomas's term). For some Justices and commentators, such broader effects may well have been anticipated and intended all along; for others, the tales told here should be taken as cautionary ones, evoking images of camels' noses.

#### I. STATE SOVEREIGN IMMUNITY AS A LIMIT ON CONGRESS'S SUBSTANTIVE LEGISLATIVE POWER

The Constitution does not mention state sovereign immunity. Relying on Article III's grant of federal jurisdiction over cases "between a State and Citizens of another State"<sup>21</sup> the Supreme Court in *Chisholm v. Georgia* held that the state of Georgia could be sued in federal court by a citizen of South Carolina to recover a contractual debt.<sup>22</sup> The decision is said to have created a "shock of surprise" that quickly resulted in the ratification of the Eleventh Amendment.<sup>23</sup> By its terms, that amendment only addresses the jurisdiction of the *federal* courts. It reads, in its entirety, that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."<sup>24</sup>

---

21 U.S. CONST. art. III, § 2, cl. 1.

22 See 2 U.S. (2 Dall.) 419, 480 (1793).

23 *Hans v. Louisiana*, 134 U.S. 1, 11 (1890).

24 U.S. CONST. amend. XI.

Although scholars have argued that the Eleventh Amendment, properly understood, establishes a “simple” regime,<sup>25</sup> the Supreme Court’s doctrine on the subject is anything but. In his dissenting opinion in *Atascadero State Hospital v. Scanlon*, Justice Brennan took the position that the Amendment has no bearing at all on cases “arising under” federal law.<sup>26</sup> He argued that the amendment’s effect was simply to repeal the clauses of Article III that authorized federal jurisdiction over cases against a state by a citizen of another state or by citizens or subjects of a foreign state.<sup>27</sup> On this reading, the amendment left untouched the clause of Article III conferring jurisdiction over cases “arising under” federal law. This reading would have fully aligned the federal judicial power with the federal legislative power. The Court at one point split 4–4 on whether to adopt the so-called diversity interpretation of the Eleventh Amendment, with newly appointed Justice Scalia reserving judgment on the question (which he described as a complex one).<sup>28</sup>

Justice Scalia ultimately rejected the diversity interpretation in *Pennsylvania v. Union Gas Co.*, largely for reasons of stare decisis.<sup>29</sup> But Justice Scalia was writing in dissent in *Union Gas* because the majority had aligned the federal judicial power with the federal legislative power in a different way: it held that, even if the Amendment applied to cases “arising under” federal law, Congress has the power to abrogate the states’ immunity pursuant to its Article I powers.<sup>30</sup> The *Union Gas* holding was short-lived, however. In *Seminole Tribe of Florida v. Florida*, the Court overruled *Union Gas* and held that Congress lacks the power to abrogate Eleventh Amendment immunity pursuant to “antecedent” constitutional provisions.<sup>31</sup> *Seminole Tribe* thus rejected both the diversity interpretation of the Eleventh Amendment and the power of Congress to abrogate the states’ immunity under Article I. (The Court reaffirmed, however, that Congress retains the power to abrogate Eleventh Amendment immunity under the Fourteenth Amendment.)<sup>32</sup>

*Seminole Tribe* created an apparent gap between the federal legislative power and the federal judicial power, as the Court held that the

---

25 See William Baude & Stephen E. Sachs, *The Misunderstood Eleventh Amendment*, 169 U. PA. L. REV. 609, 662 (2021).

26 See 473 U.S. 234, 260, 260–61 (1985) (Brennan, J., dissenting).

27 See *id.* at 286–87.

28 *Welch v. Tex. Dep’t of Highways & Pub. Transp.*, 483 U.S. 468, 495–96 (1987) (Scalia, J., concurring in part and concurring in judgment).

29 491 U.S. 1, 30 (1989) (Scalia, J., concurring in part and dissenting in part).

30 *Id.* at 23 (majority opinion).

31 517 U.S. 44, 66 (1996) (quoting *Union Gas*, 491 U.S. at 42 (Scalia, J., concurring in part and dissenting in part)).

32 *Id.* at 65–66.

federal courts lack the power to adjudicate cases arising under some federal statutes that Congress has the power to enact. But, because the amendment merely affords states an immunity from the jurisdiction of the *federal* courts, it was believed that the amendment did not prevent Congress from imposing primary obligations on the states under Article I or subjecting states to remedies in favor of private individuals—even retrospective remedies such as damages. Such remedies, it was believed, would be obtainable in state courts, subject to Supreme Court review. Accordingly, after the Court reversed *Union Gas* in *Seminole Tribe*, the plaintiffs in *Alden v. Maine*, who had sued the state of Maine in federal court seeking accrued overtime wages under the Fair Labor Standards Act (FLSA), voluntarily dismissed their federal suit and re-filed in state court.<sup>33</sup> Acting under Article I, Congress had specifically authorized a damage remedy against states in the FLSA.<sup>34</sup> Since the Eleventh Amendment only restricts the jurisdiction of the lower federal courts, the plaintiffs believed they could obtain the federally conferred remedy in the state courts. Under *Testa v. Katt* and related cases,<sup>35</sup> they argued, the state courts were required to entertain their claims.<sup>36</sup> And, because the Eleventh Amendment does not constrain the appellate jurisdiction of the Supreme Court,<sup>37</sup> it was thought that the Supreme Court had the power to reverse any state court decision denying the relief required by the statute. This is what Professor Vicki Jackson dubbed the “forum allocation” theory of the Eleventh Amendment, according to which the Amendment’s function is to channel federal claims against the states to the state courts, subject to Supreme Court review.<sup>38</sup>

When *Alden v. Maine* reached the Supreme Court, the Court rejected the forum-allocation theory, holding that states are constitutionally protected from being subjected by Congress to suit in their own courts.<sup>39</sup> The Court recognized that the Eleventh Amendment’s text limits only the federal judicial power, but it found that the amendment reflected a broader constitutional immunity immanent in the structure of the Constitution.<sup>40</sup> *Alden* thus established that state sovereign immunity was not purely a matter of federal jurisdiction. Precedents

---

33 *Alden v. Maine*, 527 U.S. 706, 712 (1999).

34 See 29 U.S.C. § 216(b) (2018); *Alden*, 527 U.S. at 712.

35 See *Testa v. Katt*, 330 U.S. 386, 394 (1947); see also *McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 233–34 (1934).

36 Brief for Petitioners, *Alden*, 527 U.S. 706 (No. 98-436), 1999 WL 9767, at \*32–34.

37 *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 26–31 (1990); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 405–07 (1821).

38 Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 15 (1988).

39 527 U.S. at 712.

40 *Id.* at 713, 722–23.

interpreting a constitutional provision addressed to federal judicial power were repurposed to limit state suability in state as well as federal courts.

Although the Court held in *Alden* that states were immune from suit by private individuals in their own courts as well as federal courts, the Court did not say that Congress lacked the power under Article I to obligate the states to pay overtime wages. The Court recognized that the states were under such an obligation, and it expressed confidence that the states would comply with that obligation without compulsion.<sup>41</sup> Clearly, therefore, the Court did not understand the state's sovereign immunity as disabling Congress from imposing affirmative obligations on states under Article I—such as the obligation to pay overtime wages.<sup>42</sup> The Court in *Alden* also recognized that these obligations may be enforced by private parties through suits against state officials for prospective relief under *Ex parte Young*, and even suits for retrospective relief under certain circumstances.<sup>43</sup> And the Court recognized that the states' sovereign immunity did not protect them from suits by the United States seeking overtime wages on behalf of the employees,<sup>44</sup> as authorized by the FLSA.<sup>45</sup> But the Court held that the employees' right of action for overtime wages created by the FLSA could not be enforced through a suit in federal court or the states' own courts absent the states' consent,<sup>46</sup> a holding that could be understood as establishing that states enjoy an immunity from congressionally imposed damage remedies towards private parties.<sup>47</sup>

At the time of the *Alden* decision, the employees had one other possible forum in which to claim their federally created remedy (if it existed). In *Nevada v. Hall*, the Court had held that states were not constitutionally protected from being sued in the courts of sister states.<sup>48</sup> Thus, in theory, a private party could sue a state on a federal cause of action in the courts of another state. If the federally created cause of action were valid, then presumably the Supremacy Clause, as interpreted in *Testa*, would require the courts of sister states to

---

41 *Id.* at 754–57.

42 *But see* Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817, 1820 (2010) (arguing that the Eleventh Amendment immunizes states from congressionally imposed affirmative obligations towards private parties); *but cf.* Carlos M. Vázquez, *The Unsettled Nature of the Union*, 123 HARV. L. REV. F. 79 (2011) (disputing this claim).

43 *Alden*, 527 U.S. at 747.

44 *Id.* at 759–60.

45 29 U.S.C. § 216(c) (2018).

46 *Alden*, 527 U.S. at 755.

47 *See* Vázquez, *supra* note 11 (advancing this interpretation of *Alden*).

48 440 U.S. 410 (1979), *overruled by* Franchise Tax Bd. of Ca. v. Hyatt, 139 S. Ct. 1485 (2019).



entertain the federal suits.<sup>49</sup> *Nevada v. Hall* did not intimate that states were under such an obligation—indeed, it suggested that it was up to each state to decide whether to entertain suits against sister states in its courts.<sup>50</sup> But *Nevada v. Hall* was a suit arising under state law, not federal law, and thus the Supremacy Clause was inapplicable. A regime in which the federal obligation of the states could be enforced only in the courts of sister states would have been a strange one indeed, but at least it would have preserved the possibility of maintaining the federally created cause of action in the absence of their consent. But that possibility was closed off by the Court's recent decision in *Hyatt*, which overruled *Nevada v. Hall*.<sup>51</sup> States are now constitutionally protected from being sued in federal court, in their own courts, and in the courts of sister states.<sup>52</sup>

The fact that private parties have no court in which to maintain their congressionally created remedy against the states does not, strictly speaking, mean that Congress lacks the power to create the remedy. The Court continues to refer to the states' immunity as merely an immunity from being sued in court.<sup>53</sup> Scholars too have regarded a state's immunity as merely an immunity from personal jurisdiction.<sup>54</sup> On this view, Congress under Article I can, for example, prohibit states from infringing copyrights and subject states to damage liability in favor of the copyright holder. Sovereign immunity does not negate the liability; it just prevents the liability from being enforced in any court without the states' consent.

But it is open to question whether a liability that is enforceable only if the state consents is a legal liability at all. Such a liability would be entirely hortatory, and the Founders distinguished law from mere admonition.<sup>55</sup> The Court's recent decision in *California v. Texas*, among many others, appears to reflect the view that a judicially

---

49 See *Testa v. Katt*, 330 U.S. 386, 394 (1947).

50 440 U.S. at 426.

51 *Hyatt*, 139 S. Ct. at 1490.

52 See *id.*

53 See, e.g., *Allen v. Cooper*, 140 S. Ct. 994, 1000–01 (2020) (referring to state sovereign immunity as bearing on whether a court may “entertain a suit against a nonconsenting State,” *id.* at 1000).

54 See *Baude & Sachs*, *supra* note 25, at 610.

55 See, e.g., THE FEDERALIST NO. 15, at 110 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“It is essential to the idea of a law that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will, in fact, amount to nothing more than advice or recommendation.”); THE FEDERALIST NO. 33, at 204 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“A LAW, by the very meaning of the term includes supremacy. It is a rule which those to whom it is prescribed are bound to observe. . . . It would otherwise be a mere treaty, dependent on the good faith of the parties, and not a government, which is only another word for POLITICAL POWER AND SUPREMACY.”).

unenforceable obligation is not a legal obligation at all.<sup>56</sup> Texas (among other plaintiffs) challenged the constitutionality of the Affordable Care Act's (ACA) individual mandate, which required individuals to obtain health insurance.<sup>57</sup> The Court had earlier concluded that the "mandate" was a tax, and on this basis upheld the ACA as an exercise of Congress's power to tax for the general welfare.<sup>58</sup> When Congress zeroed out the "tax," Texas argued that the mandate could no longer be upheld under the taxing power and thus that the ACA was unconstitutional.<sup>59</sup> The Court avoided the question by holding that Texas lacked standing.<sup>60</sup> Texas had argued that the mandate continued to require individuals to obtain health insurance, and that the state would suffer a number of financial injuries when they did so.<sup>61</sup> The Court rejected Texas's standing argument, holding that, in the absence of any mechanism for enforcing the "mandate," the decision by individuals to obtain health insurance was not "traceable" to the ACA.<sup>62</sup> The Court's conclusion that an individual's decision to obtain health insurance could not be attributed to a federal law instructing her to do so if the law does not include a mechanism for enforcing the mandate would appear to reflect the Court's understanding that a norm-subject's decision to comply with a norm cannot be attributed to a law purporting to impose a duty on a norm-subject in the absence of a mechanism by which the norm may be enforced against the norm-subject. In other words, an obligation that depends for its efficacy on the goodwill of the obligor is not a legal one.

Be that as it may, two more recent Supreme Court decisions confirm that the Court understands state sovereign immunity as an immunity from substantive damage liability, not just an immunity from judicial jurisdiction.

#### A. *Allen v. Cooper*

In *Allen v. Cooper*, the Court recognized that Congress, in enacting the Copyright Act, had clearly prohibited states from infringing copyrights, obligated them to pay damages in the event of infringement, and subjected them to suit in federal court.<sup>63</sup> The Court held that

---

56 141 S. Ct. 2104 (2021) (holding that the plaintiffs challenging the Affordable Care Act's "mandate" to buy health insurance lacked standing because there was no way to enforce the mandate).

57 *Id.* at 2112.

58 Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

59 *California v. Texas*, 141 S. Ct. at 2112.

60 *Id.* at 2112.

61 *Id.* at 2116–17.

62 *Id.* at 2118–19.

63 140 S. Ct. 994, 1001–02 (2020).

Congress's abrogation of Eleventh Amendment immunity was invalid and hence the state was immune from the plaintiffs' suit.<sup>64</sup> If sovereign immunity protects states solely from the jurisdiction of the courts, then the statute would have been valid under Article I insofar as it prohibited states from infringing copyrights *and* insofar as it obligated states to pay damages if they infringed a copyright. But the Court's analysis in *Allen* raises doubts about whether the Court regarded the statute as valid insofar as it imposed damage liability on the states.

In *Seminole Tribe*, the Court upheld Congress's power to abrogate the state's sovereign immunity pursuant to Section 5 of the Fourteenth Amendment.<sup>65</sup> In *Allen v. Cooper*, the Court considered whether Congress's abrogation of the states' immunity in the Copyright Act was valid under Section 5.<sup>66</sup> The Court recognized that copyrights are a form of property.<sup>67</sup> The Court went on to consider whether the abrogation of state sovereign immunity could be sustained under the Fourteenth Amendment's Due Process Clause, which prohibits states from depriving persons of property without due process of law.<sup>68</sup> Prior caselaw, which the Court did not question, established that a state violates the Due Process Clause when it intentionally deprives a person of property without providing a prior hearing and fails to afford a post-deprivation remedy that compensates her for her loss.<sup>69</sup> But the Court found that the Copyright Act's abrogation of sovereign immunity was not "congruent and proportional" to the requirements of the Due Process Clause for two reasons.<sup>70</sup> First, Congress had authorized damages even for negligent copyright violations, while the Due Process Clause prohibits only intentional deprivations of property.<sup>71</sup> Second, Congress had abrogated the state's immunity without evidence that states were infringing copyrights and failing to provide postdeprivation remedies.<sup>72</sup>

If the Court had understood the states' sovereign immunity to bear only on the states' amenability to the jurisdiction of courts, however, the Court would have considered the Copyright Act to be valid

---

64 *See id.*

65 *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 59 (1996).

66 140 S. Ct. at 1004–07.

67 *See id.* at 1004; *see also id.* at 1008 (Thomas, J., concurring in part and concurring in judgment).

68 *Id.* at 1004–07 (majority opinion).

69 *See Zinerman v. Burch*, 494 U.S. 113, 127–28 (1990). The Court accepted these propositions in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999). The Court in *Allen* largely relied on its analysis in *Florida Prepaid*. *See Allen*, 140 S. Ct. at 1004–07.

70 *Allen*, 140 S. Ct. at 1000.

71 *Id.* at 1004–05.

72 *Id.* at 1006–07.

under Article I insofar as it obligates the state to pay damages even for *unintentional* copyright infringements. If so, the copyright holder would have had a right not only to be free from copyright infringement, but also to receive damages in the event of infringement, whether intentional or not. Under the Court's analysis in *Alden*, the latter right should be enforceable in a suit by the United States. And it should be enforceable in a suit by the copyright holder against state officials for prospective relief, and even, in appropriate cases, in a suit against state officials for retrospective relief. In analyzing whether the abrogation of sovereign immunity in the Copyright Act could be sustained under the Due Process Clause, however, the Court did not consider the state's deprivation of the right to be free from—and to receive damages for—unintentional infringement by the state. The Court did not consider whether a legal claim to such damages could itself constitute a property right for purposes of the Due Process Clause.<sup>73</sup>

If the copyright holder had a valid claim for damages against states that unintentionally infringe patents, then the due process case for upholding the abrogation of state sovereign immunity in the Copyright Act would have been far stronger than the Court recognized. If the Copyright Act's provision entitling copyright holders to damages for unintentional infringements were valid under Article I, then Congress's authorization of federal jurisdiction to claim those damages in federal court would appear to have been precisely congruent and proportional to the states' due process obligation not to deprive copyright holders of their right to receive damages from the state.<sup>74</sup> The state could satisfy due process by creating a state procedure whereby copyright holders could enforce the states' (by hypothesis valid) damage liability in state courts or administrative agencies. But the state would appear to be guilty of a violation of due process when it fails to provide

---

73 That a damage claim constitutes a property right is more than plausible. See *Dames & Moore v. Regan*, 453 U.S. 654, 688 (1981) (leaving open whether Executive Order suspending claims against Iran was a taking of property requiring just compensation under the Takings Clause); see also *Am. Int'l Grp., Inc. v. Islamic Republic of Iran*, 657 F.2d 430, 446 (1981) (finding that the Court of Claims has "continually implied" that a cancellation of private claims by settlement would constitute a taking of property); *Aris Gloves, Inc. v. United States*, 420 F.2d 1386, 1391 (Ct. Cl. 1970) (finding that a taking occurs whenever the government "deprives" the owner of his property interest including claims); *Walker v. Bossier Med. Ctr.*, 873 So. 2d 841, 845 (La. Ct. App. 2004) ("It is well settled that the right to file a damage suit in tort is a vested property right protected by the guarantees of due process."), *vacated on other grounds*, 894 So. 2d 1095 (La. 2005) (per curiam); *Green v. Liberty Mut. Ins.*, 352 So. 2d 366, 369 (La. Ct. App. 1977) ("The right to file a damage suit in tort is a vested property right."); cf. *Loucks v. Standard Oil Co.*, 120 N.E. 198, 201 (N.Y. 1918) (Cardozo, J.) ("A right of action is property.")

74 Cf. *United States v. Georgia*, 546 U.S. 151, 158 (2006) ("[N]o one doubts [Congress's power under Section 5 to create] private remedies against the States for *actual* violations of [the Constitution].").

either a predeprivation hearing or a postdeprivation procedure for claiming the damages to which the Copyright Act entitles copyright holders.

Perhaps the Court did not believe that copyright holders had a property right to damages *because* states cannot be sued without their consent in either federal or state courts. In *Dames & Moore v. Regan*, the petitioners' claim that the Algiers Accords deprived them of a property right by suspending their claims against Iran was grounded in part on the argument that Congress had withdrawn Iran's sovereign immunity from such suits.<sup>75</sup> In *Allen*, the Court may have reasoned that copyright holders cannot have a property right to damages if they have no forum in which to enforce the claim without the states' consent.<sup>76</sup> If so, however, the Court's reasoning is based on the view that state sovereign immunity negates the existence of the right to damages—thus proving my point that the states' sovereign immunity is more than just a procedural protection from the jurisdiction of courts. The lack of a judicial mechanism for enforcing the obligation vitiates the legal force of the remedial obligation.

The Court might respond that the absence of a judicial enforcement mechanism vitiates its status as a “property” right, but not its legal force. It may insist that not all legal obligations create correlative property rights. Perhaps. But the Court's failure to even discuss the issue, notwithstanding substantial support for the proposition that a right to damages is a property right,<sup>77</sup> suggests that the Court did not believe that Congress had acted constitutionally when it endowed copyright holders with the remedy of damages for copyright infringements, whether intentional or unintentional.<sup>78</sup>

---

<sup>75</sup> 453 U.S. at 684.

<sup>76</sup> This argument is in tension with the Court's rejection of the “bitter with the sweet” approach to procedural due process. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). Then-Justice Rehnquist once contended procedural limitations specified by a statute establishing a right to an entitlement are built into the definition of any claimed “property” right in the entitlement, and thus that the procedures set forth in the statute by definition cannot violate due process. *See id.* at 559 (Rehnquist, J., dissenting) (quoting *Arnett v. Kennedy*, 416 U.S. 134, 151–52 (1974)). The Court resoundingly rejected this approach to procedural due process. *Id.* at 541 (majority opinion). By a parity of reasoning, it would seem that the copyright holder's lack of a right of action to enforce the liability in court is not built into the individual's property right to damages.

<sup>77</sup> *See supra* note 73.

<sup>78</sup> This does not explain why the Court did not consider the fact that the Copyright Act prohibited states from engaging in unintentional infringement in its discussion of whether the abrogation was congruent and proportional. *See Allen v. Cooper*, 140 S. Ct. 994, 1006–07 (2020). The Court acknowledged that copyrights are property, *id.* at 1004, and presumably it is a property right despite the state's immunity from damage suits because the right may be enforced through suits against state officials for prospective relief. If Congress has the power under Article I to impose an obligation not to infringe a copyright even

If the Court understood that the states' immunity negated the existence of the underlying remedial right, its understanding finds some support in Founding-era materials. Among the Founding-era sources on which the Court has heavily relied in concluding that the Constitution entitles states to sovereign immunity is Alexander Hamilton's statement in *The Federalist* that the Constitution would not deprive the states of their immunity:

[T]here is no color to pretend that the State governments would, by the adoption of [the Constitution], be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will.<sup>79</sup>

Hamilton thus equated the states' entitlement to sovereign immunity with their freedom from any substantive liability. Because the states are entitled to sovereign immunity, the law confers "no right of action" without their consent, which means that an individual's contract with a state is not legally "binding." Hamilton's statement could have been cited in support of the diversity interpretation of the Eleventh Amendment: since the Constitution *does* impose binding legal obligations on states, and empowers Congress to impose others and to subject states to damage remedies, it might have been thought to follow that the states' sovereign immunity does not extend to federally imposed obligations. According to Marshall in *Osborn* and Hamilton in *The Federalist*, the federal government's power to render states liable to individuals in damages must be paired with a power to subject the states to suit on such claims in federal court. But the axiom can also be deployed in the opposite direction: if the states are entitled to immunity with respect to federal claims, Congress lacks the power to subject the states to damage liability.<sup>80</sup> *Allen v. Cooper* appears to rest on the Court's

---

unintentionally, presumably the copyright holder's property right encompasses a right to be free from unintentional infringement, and that right may also be enforced prospectively. Thus, even if the right to damages is not a property right because of the lack of an enforcement mechanism, it is unclear why the right to be free from unintentional discrimination is not a property right. Is it because equity would not enjoin unintentional conduct? Again, one would have expected the issue to be discussed.

79 THE FEDERALIST NO. 81, at 488 (Alexander Hamilton) (Clinton Rossiter ed., 1961). This passage was quoted, *inter alia*, in *Hans v. Louisiana*, 134 U.S. 1, 13 (1890); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 92 (1996) (Stevens, J., dissenting); and *Alden v. Maine*, 527 U.S. 706, 717 (1999).

80 *Cf. Kawanakoa v. Polybank*, 205 U.S. 349, 353 (1907) ("A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and

understanding that a state's entitlement to sovereign immunity reflects its freedom from the underlying liability, not just its freedom from having to answer a complaint in court.

### B. *PennEast Pipeline Co. v. New Jersey*

It would be surprising if freedom from having to answer a complaint in court were the hill the states had chosen to die on. In primitive societies, right holders employed self-help mechanisms to enforce their rights.<sup>81</sup> Requiring right holders to make use of judicial procedures in enforcing their legal rights was an important advance in the development of legal systems based on the rule of law. The obligation to employ judicial procedures in enforcing legal rights is, if anything, a restriction *on the right holder*, not on the obligor. "To regulate and curtail [self-help mechanisms] is one of the primordial functions of civilisation."<sup>82</sup> If judicial mechanisms are unavailable to enforce legal liabilities, the perverse consequence would appear to be a reversion to self-help. Of course, the law might prohibit persons to whom the state is legally liable from making use of self-help mechanisms as well. But, if the existence of judicial recourse was the original justification for precluding self-help mechanisms, then the unavailability of judicial mechanisms to enforce a legal right would seem to justify renewed recourse to self-help. Unless recognition of sovereign immunity were to have the perverse result of reviving extralegal mechanisms to enforce rights, such immunity must be accompanied by a prohibition of self-help. But, if sovereign immunity also precludes self-help mechanisms, then it would be more than just an immunity from judicial jurisdiction. This would be yet another reason to understand the immunity as a negation of the remedial right itself.

These musings may seem tangential to the question at hand, but the Court itself brought up the connection between self-help and state sovereign immunity in its recent decision in *PennEast Pipeline Co. v. New Jersey*.<sup>83</sup> The issue was whether states are entitled to sovereign immunity from condemnation proceedings initiated by private parties.<sup>84</sup> A federal statute authorized private parties to initiate such proceedings against states.<sup>85</sup> The Court held that the states had waived their sovereign immunity from such proceedings as part of the constitutional

---

practical ground that there can be no legal right as against the authority that makes the law on which the right depends.").

81 F.H. LAWSON, REMEDIES OF ENGLISH LAW 1 (2d ed. 1980).

82 *Id.*

83 141 S. Ct. 2244 (2021).

84 *Id.* at 2251–52.

85 15 U.S.C. § 717f(h) (2018).

plan.<sup>86</sup> The Court began by noting that it was well established that the federal government has the power to exercise eminent domain over land owned by states and that this power can be delegated to private parties.<sup>87</sup> The Court reasoned that the existence of an eminent domain power against state property that can be delegated to private parties entailed a right of private parties to bring condemnation proceedings against states.<sup>88</sup> In so holding, the Court seemed to embrace the Marshall/Hamilton view of a 1:1 correspondence between substantive liability and judicial power: “An eminent domain power that is incapable of being exercised amounts to no eminent domain power at all.”<sup>89</sup>

The Court also noted that, “[i]f private parties authorized by the Federal Government were unable to condemn States’ property interests, then that would leave delegates with only one constitutionally permissible way of exercising the federal eminent domain power: Take property now and require States to sue for compensation later.”<sup>90</sup> This self-help mechanism had historically been available in England and the early colonies,<sup>91</sup> and it had previously been upheld by the Court.<sup>92</sup> Apparently agreeing that making self-help the only mechanism for enforcing legal rights would be perverse from a rule-of-law perspective, the Court found it “difficult to see how [allowing only up-front entry] would vindicate the principles underlying state sovereign immunity.”<sup>93</sup>

For the Court, therefore, the premise that states were subject to an eminent domain power that can be exercised by private delegates entailed the conclusion that the states were not entitled to sovereign immunity from condemnation proceedings initiated by private parties. Notice, however, that this reasoning should have led to a different conclusion in *Allen v. Cooper* if the Court had understood the states to be under a legal obligation to pay damages for infringement. Conversely, to say that states are entitled to sovereign immunity is to say that they are not subject to the eminent domain power at the behest of private delegates or to the obligation to pay damages for copyright infringement. That the *PennEast* majority embraced this reasoning (at least with respect to eminent domain) is shown by its discussion of the position of the dissenting Justices.<sup>94</sup> The dissenters would have held that

---

86 141 S. Ct. at 2251–52.

87 *Id.*

88 *Id.* at 2259–60.

89 *Id.* at 2260–61.

90 *Id.* at 2260.

91 *Id.* at 2255 (“Those vested with the power could either initiate legal proceedings to secure the right to build, or they could take property up front and force the owner to seek recovery for any loss of value.”).

92 *Id.*

93 *Id.* at 2260.

94 *See id.* at 2259–60.



states were entitled to immunity from condemnation actions at the behest of private delegates.<sup>95</sup> The dissent “decline[d] to say whether Congress could authorize a certificate holder to take possession of state property through upfront entry,”<sup>96</sup> but the majority clearly believed that a negative answer was entailed by the dissenters’ position that states were immune from condemnation actions: such self-help mechanisms, in the majority’s view, “would almost certainly meet the same fate as traditional condemnation actions under the dissent’s analysis.”<sup>97</sup>

\* \* \*

In sum, the trajectory of the Court’s Eleventh Amendment cases illustrates how a provision framed solely as a limitation on the jurisdiction of federal courts can come to be understood to reflect a more general limitation on Congress’s substantive legislative power. Consistent with Marshall and Hamilton’s axiom that the judicial power must be coextensive with the legislative, in combination with their distinction between law and mere admonition,<sup>98</sup> the Court has equated the states’ freedom from being sued on federal claims with the states’ freedom from being subjected to remedies at the behest of private parties. In the cases declining to recognize an immunity because doing so would negate the right, the Court applied the *Osborn* axiom as intended. The cases recognizing the immunity, on the other hand, reflect the axiom’s converse operation, deducing from the states’ (jurisdictional) immunity their freedom from the (remedial) obligation established by Congress.

## II. STANDING AS A LIMITATION ON CONGRESS’S SUBSTANTIVE LEGISLATIVE POWER

The Court’s decision in *TransUnion* may reflect the Court’s deployment of Article III as a similar limit on Congress’s substantive legislative power. Standing doctrine is based on Article III’s limitation of the federal judicial power to certain “cases” and “controversies.” Being based on Article III, standing doctrine limits only the jurisdiction of federal courts. It is not generally understood to limit the jurisdiction of state courts or Congress’s power to create substantive rights or remedies. *TransUnion* does not expressly reject the foregoing propositions, but the decision retains even a veneer of plausibility only if read

---

95 *Id.* at 2265–66 (Barrett, J., dissenting).

96 *Id.* at 2261 (majority opinion).

97 *Id.*

98 *See supra* note 55 and accompanying text.

as a holding that the “injury in fact” requirement is a limit on Congress’s power to create substantive remedies.

The claim that standing doctrine is (or should be) linked to the merits is hardly novel. It has become “commonplace” for scholars to argue that standing is best understood as determining who has a right under the substantive law in question.<sup>99</sup> This claim is usually advanced as a prescriptive argument, and it seeks to draw conclusions about standing from premises about substantive law: the courts *should* find standing whenever the plaintiff is claiming a substantive right under federal law. Professor Fallon has developed the related but distinct argument that standing doctrine reflects the Court’s concerns about the appropriateness of certain remedies.<sup>100</sup> Fallon’s claim is largely descriptive. As he draws conclusions for standing doctrine from propositions about substantive rights and remedies, he describes his claim as the “Remedial Influences on Justiciability” thesis.<sup>101</sup>

I find the arguments of these scholars persuasive, but my claim approaches the link between jurisdiction and remedies from the opposite direction. My claim is that the Court is relying on standing doctrine to support conclusions about substantive remedies. My argument might thus be described as the “Justiciability Influences on Remedies” thesis. Nevertheless, my analysis reaches the same conclusion: standing doctrine is best understood as about the existence of a right of action, not merely federal jurisdiction. My claim is that the Court’s decision in *TransUnion* confirms that the Court now understands standing doctrine in this way.

Standing doctrine limits Congress’s power to grant jurisdiction to federal courts.<sup>102</sup> But it has not, so far, been thought to limit Congress’s ability to create damage liability. If Congress creates a substantive remedy but the remedy is not enforceable in federal court, then in theory the defendant is subject to the liability that Congress has created, and the remedy can be enforced in state courts. Justice Thomas’s dissenting opinion in *TransUnion* makes this point explicitly.<sup>103</sup> The dissenters’ position in *TransUnion* that the majority’s holding does not preclude enforcement in state court is similar to the claim of the

---

99 See Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 639 (2006). The locus classicus is William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 233–34 (1988). See also Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425, 450–56 (1974).

100 See Fallon, *supra* note 99, at 643.

101 *Id.* at 635–36.

102 See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 576 (1992).

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

proponents of the “forum-allocation” thesis about state sovereign immunity that the Court rejected in *Alden v. Maine*.<sup>104</sup> My claim is that the majority’s holding in *TransUnion* is plausible only if understood as a holding that Congress lacked the power to create the remedy the plaintiffs were seeking. If I am right, the plaintiff would be unable to seek the remedy in state court. Thus, just as *Alden* rejected the forum-allocation view of state sovereign immunity, *TransUnion* implicitly rejects the forum-allocation view of standing.

#### A. Spokeo, *TransUnion*, and the Application of Standing Limits to Damage Claims

The Court has held that, at an “irreducible . . . minimum,” Article III requires a plaintiff to show that she “ha[s] suffered an ‘injury in fact’—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) ‘actual or imminent, not “conjectural” or “hypothetical.””<sup>105</sup> While noting that this requirement had been articulated in cases presenting *constitutional* challenges to government action (or inaction), the Court in *Lujan* held that it also limits Congress’s ability to authorize “citizens suit[s]” to enforce federal *statutes*.<sup>106</sup> The Court acknowledged that “[t]he . . . injury required by Art. III may exist solely by virtue of ‘statutes creating legal rights, the invasion of which creates standing.’”<sup>107</sup> But, while Congress may “elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law,”<sup>108</sup> it may not “convert the undifferentiated public interest in executive officers’ compliance with the law into an ‘individual right’ vindicable in the courts.”<sup>109</sup> Even if citizens are authorized by Congress to seek prospective relief in federal court, they may not do so unless they will suffer a concrete and particularized injury as a result of the challenged conduct.

The Court in *Lujan* observed that, if “the plaintiff is himself an object of the action (or forgone action) at issue[,] . . . there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.”<sup>110</sup> The difficult standing issues arise “[w]hen . . . a plaintiff’s asserted injury arises from the government’s allegedly unlawful regulation (or

104 See *Alden v. Maine*, 527 U.S. 706, 758 (1999); Jackson, *supra* note 38.

105 *Lujan*, 504 U.S. at 560–61 (footnote omitted) (citations omitted) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)).

106 *Id.* at 576, 576–77.

107 *Id.* at 578 (alteration in original) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)).

108 *Id.*

109 *Id.* at 577.

110 *Id.* at 561–62.

lack of regulation) of *someone else*.”<sup>111</sup> But, in its recent decision in *TransUnion LLC v. Ramirez*, the Court applied the analytical framework developed in *Spokeo, Inc. v. Robins* and found jurisdiction lacking even though the plaintiffs were themselves the objects of the defendant’s actions.

*Spokeo* and *TransUnion* were unusual standing cases in that the plaintiff was seeking damages rather than prospective relief. The plaintiffs claimed that the defendants had violated the Fair Credit Reporting Act (FCRA),<sup>112</sup> which imposes a number of requirements on consumer reporting agencies, including the obligation to “follow reasonable procedures to assure maximum possible accuracy” in consumer reports, to disclose to the consumer, upon request, “[a]ll information in the consumer’s file at the time of the request,” and to “provide to a consumer, with each written disclosure . . . [a] summary of rights” prepared by the Consumer Financial Protection Bureau.<sup>113</sup> The Act also provides that “[a]ny person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable” for actual damages or for statutory damages of \$100 to \$1,000 as well as punitive damages and attorney’s fees.<sup>114</sup> The plaintiff in *Spokeo* was a consumer who claimed that the defendant, a consumer reporting agency, had violated the obligations the FCRA imposed on the defendant with respect to him.<sup>115</sup> Since the plaintiff was the object of the defendant’s unlawful conduct, there should have been (to quote *Lujan*) “little question” that he had standing. The Ninth Circuit held that *Robins* had standing because “*Spokeo* violated *his* statutory rights, not just the statutory rights of other people,” and because his “personal interests in the handling of his credit information are individualized rather than collective.”<sup>116</sup> But the Supreme Court reversed. The Court acknowledged that *Robins* had suffered a “particularized” injury, but it stressed that, to confer standing, the injury must also be “concrete.”<sup>117</sup> “A ‘concrete’ injury must be ‘*de facto*’; that is, it must actually exist.”<sup>118</sup> It must also be “real” and not “abstract.”<sup>119</sup> Because the Ninth Circuit had not sufficiently determined

---

111 *Id.* at 562.

112 *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1544 (2016); *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200 (2021).

113 15 U.S.C. §§ 1681e(b), 1681g(a)(1), (c)(2) (2018).

114 *Id.* § 1681n(a) (2018).

115 *Spokeo*, 136 S. Ct. at 1546.

116 *Robins v. Spokeo, Inc.*, 742 F.3d 409, 413, 413–14 (9th Cir. 2014).

117 *Spokeo*, 136 S. Ct. at 1548.

118 *Id.* (citing *de facto*, BLACK’S LAW DICTIONARY (9th ed. 2009)).

119 *Id.* (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 472 (Philip Babcock Gove ed. 1971); THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 305 (Jess Stein & Laurence Urdang eds. 1967)).

that Robins had suffered a “concrete” injury, the Court remanded for further consideration of that issue.<sup>120</sup>

In *TransUnion*, the Court for the first time applied the *Spokeo* analytical framework to the facts of a case.<sup>121</sup> The lower court in *TransUnion* had certified a class of 8,185 persons, each of whom was the object of the defendant’s violations of the obligations the FCRA imposed on the agency, and each of whom had been awarded damages under the Act.<sup>122</sup> The Court upheld the judgment with respect to 1,853 of them, holding that they had suffered a sufficiently concrete injury.<sup>123</sup> But it reversed the judgment in favor of the other 6,332 class members on the ground that they had failed to show that they had suffered a concrete injury.<sup>124</sup>

According to the Court, in inquiring whether a plaintiff has suffered a “concrete” injury, the court “asks whether plaintiffs have identified a close historical or common-law analogue for their asserted injury.”<sup>125</sup> “*Spokeo* does not require an exact duplicate in American history and tradition. But *Spokeo* is not an open-ended invitation for federal courts to loosen Article III based on contemporary, evolving beliefs about what kinds of suits should be heard in federal courts.”<sup>126</sup> The 1,853 class members who were found to have standing had had their erroneous personal information disseminated to third parties.<sup>127</sup> They had thus suffered an injury to an interest that was analogous to one protected by the common law: a harm to their reputations. But the other 6,332 class members had not suffered a reputational harm because the defendant had not disseminated their personal information.<sup>128</sup> Nor had these class members suffered a concrete injury as a result of what the Court characterized as the defendant’s failure to provide the relevant information to them in the format required by the statute.<sup>129</sup> The defendant’s violation of this statutory duty did not harm them because, inter alia, “[t]he plaintiffs presented no evidence that, other than Ramirez [the named plaintiff], ‘a single other class member so much as *opened* the dual mailings,’ ‘nor that they were confused, distressed, or relied on the information in any way.’”<sup>130</sup>

---

120 See *id.* at 1550.

121 *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200 (2021).

122 See *id.*

123 *Id.* at 2214.

124 See *id.*

125 *Id.* at 2204.

126 *Id.*

127 See *id.* at 2208.

128 See *id.* at 2209–13.

129 See *id.* at 2213.

130 *Id.* (quoting *Ramirez v. TransUnion LLC*, 951 F.3d 1008, 1039, 1041 (9th Cir. 2020) (McKeown, J., concurring in part and dissenting in part)).

B. *The Dissenters' Position and the Forum-Allocation View of Standing*

Justice Thomas wrote a dissenting opinion, which was joined by Justices Breyer, Sotomayor, and Kagan.<sup>131</sup> In the dissenters' view, a plaintiff has standing if the defendant has violated an obligation imposed by law and owed to her.<sup>132</sup> Historically, plaintiffs had always been regarded as having standing to maintain "private right[]" claims based purely on their "legal injury," even if unaccompanied by a factual injury.<sup>133</sup> As Justice Thomas explained, the injury-in-fact requirement was developed by the Court in the 1970s as a way to *expand* standing in actions to enforce public rights—rights owed by government to the general public rather than to an individual.<sup>134</sup> In the dissenters' view, the Court in *TransUnion* transformed a doctrine designed to expand standing into one that limits standing even for a type of claim that had never before been thought to raise standing issues.<sup>135</sup>

Relying on the conventional view of standing as merely a limitation on the jurisdiction of federal courts, the dissenters also maintained that the majority's holding "might actually be a pyrrhic victory for" the defendant:

The Court does not prohibit Congress from creating statutory rights for consumers; it simply holds that federal courts lack jurisdiction to hear some of these cases. That combination may leave state courts—which "are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law"—as the sole forum for such cases, with defendants unable to seek removal to federal court. By declaring that federal courts lack jurisdiction, the Court has thus ensured that state courts will exercise exclusive jurisdiction over these sorts of class actions.<sup>136</sup>

---

131 *Id.* at 2214 (Thomas, J., dissenting).

132 *See id.* at 2218.

133 *See id.* at 2221. In *Uzuegbunam v. Preczewski*, decided earlier in the Term, the Court relied on similar reasoning when it held that, "for the purpose of Article III standing, nominal damages provide the necessary redress for a completed violation of a legal right." 141 S. Ct. 792, 802 (2021). The majority in *TransUnion* did not attempt to reconcile its holding with *Uzuegbunam*. *See also infra* notes 167–170 and accompanying text (discussing *Uzuegbunam* further).

134 *See TransUnion*, 141 S. Ct. at 2219 (Thomas, J., dissenting). This argument had been developed by Professor Hessick, *see* F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 293 (2008), whose work Justice Thomas cited in his concurring opinion in *Spokeo*. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1553 (2016) (Thomas, J., concurring).

135 *See TransUnion*, 141 S. Ct. at 2216–21 (Thomas, J., dissenting).

136 *Id.* at 2224 n.9 (citations omitted) (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989)) (citing Thomas B. Bennett, *The Paradox of Exclusive State-Court Jurisdiction over*

The dissent thus reflects the view that standing doctrine is merely a limit on federal jurisdiction. The majority did not deny this (at least not directly).

If the dissenters are correct, the state courts not only may but *must* entertain federal claims, at least in certain circumstances. The *Testa* line of cases, as accepted by eight Justices in *Haywood v. Drown*, holds that the Supremacy Clause requires state courts to entertain federal claims at least if they have jurisdiction to entertain analogous claims under state law.<sup>137</sup> Under this standard, state courts would have to entertain FCRA claims if they have jurisdiction under state law to entertain similar consumer protection laws under state law, and if their jurisdiction is not limited by standing rules similar to those applicable in federal court.

The majority opinion in *Haywood* went even further, interpreting the concept of an “analogous” claim so broadly as to read that limitation out of the standard.<sup>138</sup> The Court held that state courts were required to entertain actions under § 1983 seeking damages against state corrections officials even though such officials were immune from damage claims in state court.<sup>139</sup> It was enough that “New York’s constitution vests the state supreme courts with general original jurisdiction and the ‘inviolable authority to hear and resolve all causes in law and equity.’”<sup>140</sup> On this reasoning, state courts of general jurisdiction would be required to entertain FCRA suits even if the state does not have a consumer protection law similar to the FCRA. This conclusion is supported by the Court’s statement in *Testa v. Katt* that “a state court cannot ‘refuse to enforce the right arising from the law of the United States because of conceptions of impolicy or want of wisdom on the part of Congress,’”<sup>141</sup> and its statement in *Haywood* that “[t]he suggestion that [an] act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline

---

*Federal Claims*, 105 MINN. L. REV. 1211 (2021)); see also Zachary D. Clopton, *Justiciability, Federalism, and the Administrative State*, 103 CORNELL L. REV. 1431, 1443–44 (2018).

137 556 U.S. 729, 737–38 (2009); *id.* at 767–76 (Thomas, J., dissenting). Ironically, Justice Thomas was the sole Justice to deny that states courts are required by the Supremacy Clause to entertain federal causes of action if they have jurisdiction over analogous state-law claims. See *id.* at 760–61. *But cf. infra* text accompanying notes 143–45 (noting that the Court unanimously endorsed the *Haywood* holding in *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368 (2012)).

138 For further discussion of *Haywood*, see Carlos M. Vázquez & Stephen I. Vladeck, *The Constitutional Right to Collateral Post-Conviction Review*, 103 VA. L. REV. 905 (2017).

139 *Haywood*, 556 U.S. at 741–42.

140 *Id.* at 739 (citation omitted) (quoting *Pollicina v. Misericordia Hosp. Med. Ctr.*, 624 N.E.2d 974, 977 (N.Y. 1993)).

141 330 U.S. 386, 393 (1947) (quoting *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 222 (1916)).

jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist.”<sup>142</sup> If a state does not give its courts jurisdiction over the sorts of consumer protection claims involved in *TransUnion*, that is likely because its legislature has not enacted a consumer protection law of that sort. The state legislature’s failure to enact such a law reflects a state policy on the subject that diverges from the federal policy.

Although only five Justices embraced this position in *Haywood*, the Court unanimously endorsed it in a subsequent case involving a statute very similar to the FCRA.<sup>143</sup> *Mims v. Arrow Financial Services* involved a federal statute that established a private right of action under the Telephone Consumer Protection Act (TCPA) and provided, in § 227(b)(3), that the action may be brought in “in an appropriate court of [a] State,” “if [such an action is] otherwise permitted by the laws or rules of court of [that] State.”<sup>144</sup> In *Mims*, the Court wrote:

The Supremacy Clause declares federal law the “supreme law of the land,” and state courts must enforce it “in the absence of a valid excuse. . . . An excuse that is inconsistent with or violates federal law is not a valid excuse: The Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source.” Without the “if otherwise permitted” language, there is little doubt that state courts would be obliged to hear TCPA claims.<sup>145</sup>

Although the issue in *Mims* was whether the federal courts possessed jurisdiction over the TCPA claims, the Court’s discussion of *Testa* was not dictum.<sup>146</sup> The Court relied on this reading of *Testa* in explaining why § 227(b)(3) did not implicitly make state jurisdiction exclusive. According to the defendants, the provision would have been surplusage had it not been intended to give state courts exclusive jurisdiction over TCPA claims, since state courts would presumptively have possessed concurrent jurisdiction even without that provision.<sup>147</sup> The Court rejected the argument on the ground that the provision had the effect of empowering the states to deny their courts jurisdiction over TCPA claims; in the absence of the provision, the Supremacy Clause

---

142 556 U.S. at 736 (second alteration in original) (quoting *Second Emps.’ Liab. Cases*, 223 U.S. 1, 57 (1912)).

143 *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368 (2012).

144 47 U.S.C. § 227(b)(3) (2018); *Mims*, 565 U.S. at 370.

145 *Mims*, 565 U.S. at 382 n.12 (citations omitted) (first quoting *Howlett v. Rose*, 496 U.S. 356, 370 n.16, 371 (1990); and then quoting § 227(b)(3)) (citing *Testa*, 330 U.S. at 394).

146 *See id.*

147 *Id.* at 381–82.



would have required state courts to entertain such claims.<sup>148</sup> The latter proposition was thus central to the Court's resolution of the main question before it.

As described in *Mims*, the state courts' Supremacy Clause obligation to entertain TCPA claims is not dependent on their having jurisdiction over analogous state-law claims. Nor would it seem to matter if a state constitutionally limited its courts' jurisdiction to "cases" and "controversies" and defined those terms exactly as the Court defines the terms as used in Article III. The state courts' obligation to entertain federal claims is imposed by the Supremacy Clause, and the obligations that clause imposes on state courts apply "any Thing in *the Constitution* or Laws of any State to the Contrary notwithstanding."<sup>149</sup> A state constitutional policy against entertaining claims that cause certain types of injury would appear to be no more acceptable under the Supremacy Clause than a state statutory policy against recognizing such claims. If we assume that the right of action Congress created in FCRA is a valid one, then the state courts are required to entertain FCRA claims notwithstanding standing limitations in their constitutions.

If my Supremacy Clause analysis is correct and the state courts are under a duty to entertain FCRA claims even if a federal court would lack jurisdiction for lack of standing, then it would furthermore appear that the Supreme Court would have appellate jurisdiction over any case in which the state court refused to entertain the claim. It is true that standing doctrine limits the jurisdiction of the Supreme Court as well as that of the lower federal courts. But the Supreme Court may review cases from the state courts in certain circumstances even if the lower federal courts would have lacked jurisdiction over the case as originally brought in state court for lack of standing. Specifically, the Court has held that the "injury in fact" needed to support standing on appeal to the Supreme Court may arise as a result of the state court decision itself. If "state proceedings end[] in a . . . judgment adverse to petitioners," the state court's disposition is itself "an adjudication of legal rights which constitutes the kind of injury cognizable in this Court on review from the state courts."<sup>150</sup>

If the Supremacy Clause does require the state courts to entertain the FCRA suit, even though the plaintiff would not have been able to maintain the suit in federal court, the state court's dismissal of the suit on the ground that its courts lack jurisdiction over the case would itself constitute a concrete injury to the plaintiff, enabling her to seek review

---

148 *Id.* at 382 & n.12.

149 U.S. CONST. art. VI, cl. 2 (emphasis added).

150 *ASARCO Inc. v. Kadish*, 490 U.S. 605, 618 (1989).

in the U.S. Supreme Court. This would be the case whether the state court dismissed the suit because the state does not give its courts jurisdiction over analogous state-law claims or because the plaintiff lacks standing under state constitutional rules relating to standing. Our analysis above led us to conclude that the state courts are required to entertain the suit despite the state courts' lack of jurisdiction under state law. The state courts' denial to the plaintiffs of their right under federal law to maintain the claim in state court is straightforwardly a concrete injury supporting standing to seek Supreme Court review.

In sum, if the dissent in *TransUnion* is correct in its view that Congress had the power to create the FCRA cause of action (something the majority does not directly deny), and if the injury-in-fact requirement limits only the jurisdiction of the federal courts, then, under current doctrine, state courts not only may but must entertain the cause of action. If they fail to do so, the U.S. Supreme Court may grant certiorari and reverse the state courts' dismissal of the case. The plaintiffs will be able to obtain the damages to which Congress entitled them. On this view, standing doctrine would merely serve to steer FCRA litigation to the state courts and defer federal court involvement to the appellate stage, just as Eleventh Amendment immunity, on the forum-allocation view, served to steer damages claims against the states to the state courts, subject to review in the Supreme Court.

### C. *Standing as a Limit on Federal Legislative Power*

The regime described in the previous section is the exact same regime the Court rejected with respect to state sovereign immunity. We saw above that, rather than accepting that the Supremacy Clause requires state courts to entertain suits that could not be maintained in federal court, the Court held that state sovereign immunity prevails over the state courts' obligation under the Supremacy Clause to entertain federal claims. In *Alden*, the Court held that states are constitutionally entitled to immunity from suit in their own courts<sup>151</sup> and, in *Hyatt*, that they are entitled to immunity from suit in the courts of their sister states.<sup>152</sup> As discussed above, *Allen v. Cooper* and *PennEast v. New Jersey* confirm that the Supreme Court believes that Congress lacks the power to give private parties a damage remedy against states (in the absence of a valid abrogation or an exception to immunity).<sup>153</sup>

I have little doubt that the Court will reject the forum-allocation regime with respect to standing as well. In the standing context, the most plausible way to reject the forum-allocation regime of *TransUnion*

---

151 See *Alden v. Maine*, 527 U.S. 706, 759–60 (1999).

152 *Franchise Tax Bd. of Ca. v. Hyatt*, 139 S. Ct. 1485, 1497 (2019).

153 See *supra* Sections I.A–B.

would be to reconceive the requirement of an injury in fact not as a limit on the jurisdiction of the federal courts, but as a limit on Congress's power to create a cause of action for damages. Although none of the opinions in *TransUnion* framed the holding that way, this would appear to be the only way to explain the majority's conclusion that some of the plaintiffs in that case lacked standing.

In enacting the FCRA, Congress not only authorized the federal courts to adjudicate FCRA claims, it also, separately, created a legal liability of consumer reporting agencies towards consumers who were the objects of the agencies' violations of the FCRA's substantive provisions. The statute provides that

[a]ny person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of . . . any actual damages sustained by the consumer as a result of the failure or damages of not less than \$100 and not more than \$1,000.<sup>154</sup>

If the defendant had indeed violated the FCRA's provisions imposing primary obligations on it, each of the class members in *TransUnion* was entitled to a minimum of \$100 from it. The Court did not explain why the defendant's failure to provide the minimum \$100 which the plaintiffs claimed was due and owing to them did not constitute these class members' injury in fact.

That a plaintiff's right to receive money from the defendant is straightforwardly a concrete interest sufficient to confer standing led Professor Sunstein to argue that Congress could respond to *Lujan* by establishing a right to a bounty for successful litigants.<sup>155</sup> "The qui tam action and the informers' action seem to be decisive precedents in favor of this conclusion. In both of these actions, a bounty was provided, and it would be most adventurous to say that these arrangements violated Article III."<sup>156</sup> But in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*<sup>157</sup> (written by *Lujan*'s author), the Court held that a qui tam relator's right to a bounty is insufficient to confer standing.<sup>158</sup> The Justices in *TransUnion* may have thought *Vermont Agency* foreclosed the argument that the plaintiffs' right to receive damages from the defendant was sufficient to confer standing. But *Vermont Agency* is distinguishable. In rejecting the argument that the relator's entitlement to

154 15 U.S.C. § 1681n(a) (2018).

155 Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 223–24 (1992).

156 *Id.* at 233 (footnote omitted).

157 529 U.S. 765 (2000).

158 *See id.* at 772–73. The Court upheld the standing of the qui tam relator on the alternative ground that the relator was suing as partial assignee of the United States. *Id.* at 773.

the bounty was an injury in fact, the Court rested on what can be described as an antibootstrapping argument. Relying on earlier decisions holding that a right to attorney's fees cannot confer standing, the Court wrote that "an interest that is merely a 'byproduct' of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes."<sup>159</sup> The Court also noted that "the 'right' [the relator] seeks to vindicate does not even fully materialize until the litigation is completed and the relator prevails."<sup>160</sup>

But the consumer's right to damages under the FCRA is not merely a byproduct of the litigation. To the contrary, the litigation is a byproduct of the liability. As noted, the FCRA imposes a liability on the agency in favor of the consumer. It later *separately* authorizes the courts to adjudicate the case. The section of the FCRA conferring judicial jurisdiction provides that "[a]n action to enforce any liability created under this subchapter may be brought in any appropriate United States district court, without regard to the amount in controversy, or in any other court of competent jurisdiction."<sup>161</sup> The liability thus *precedes* the litigation; the litigation is brought "*to enforce*" the liability.<sup>162</sup> The consumer's right to at least \$100 is thus unlike the relator's right to the bounty, or a litigant's right to attorney's fees, which exists only as a result of the litigation, and only if the plaintiff prevails.

The Court in *Vermont Agency* also relied on Blackstone in rejecting standing based on the relator's entitlement to a bounty.<sup>163</sup> Blackstone wrote that "no particular person, A or B, has any right, claim or demand, in or upon [the bounty], till after action brought," and that the bounty constituted an "inchoate imperfect degree of property . . . [which] is not consummated till judgment."<sup>164</sup> But Blackstone *himself* distinguished a relator's right to a bounty from a plaintiff's right to damages conferred by law. With respect to the latter,

the injured party has unquestionably a vague and indeterminate right to some damages or other, the instant he receives the injury; and the verdict of the jurors, and judgment of the court thereupon, do not in this case so properly vest a *new* title in him, as fix and ascertain the *old* one; they do not *give*, but *define*, the right.<sup>165</sup>

---

159 *Id.*

160 *Id.*

161 15 U.S.C. § 1681p (2018).

162 *Id.* (emphasis added).

163 *See* *Vt. Agency*, 529 U.S. at 773 & n.3.

164 *See id.* at 773 n.3 (alterations in original) (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES \*437).

165 BLACKSTONE, *supra* note 164, at \*438; *see also id.* ("[S]trictly speaking the primary right to a satisfaction for injuries is given by the law of nature, and the suit is only the means of ascertaining and recovering that satisfaction . . .").

The consumer's right to damages under the FCRA is, prior to judgment, indeterminate as to the precise amount owed. But, unlike the usual right to damages, FCRA actually provides for a *minimum* level of recovery of \$100. The right under the FCRA is thus *less* "vague and indeterminate" than the usual right to damages.<sup>166</sup>

Earlier in the Term, in *Uzuegbunam v. Preczewski*, the Court recognized that even a right to nominal damages is not a "byproduct" of litigation.<sup>167</sup> The majority distinguished nominal damages from a right to attorney's fees and costs, noting that the latter are "merely a 'by-product' of a suit that already succeeded, not a form of redressability," while "nominal damages are redress, not a byproduct."<sup>168</sup> Even Chief Justice Roberts, dissenting in *Uzuegbunam*, recognized that the right to nominal damages precedes and is independent of the litigation. He took the position that "[w]here a plaintiff asks only for one dollar, the defendant should be able to end the case by giving him a dollar, without the court needing to pass on the merits of the plaintiff's claims."<sup>169</sup> The defendant owes the plaintiff the amount for which the statute makes him liable, whether or not a suit is brought—and, indeed, the defendant can avoid the suit altogether by paying him that amount before litigation is commenced. If the right to one dollar is sufficient to support standing, then *a fortiori* so is a right to \$100.<sup>170</sup>

*Vermont Agency* included dicta to the effect that "[t]he interest [necessary to confer standing] must consist of obtaining compensation for, or preventing, the violation of a legally protected right."<sup>171</sup> It might thus be argued that a plaintiff's legally conferred right to money from the defendant confers standing only if the money compensates the plaintiff for a *prior* injury to a "legally protected right."<sup>172</sup> But FCRA did legally protect the plaintiffs' right. Nor is it tenable to claim that a plaintiffs' right to receive money from the defendant can support standing only if the money compensates for an injury that would qualify as an "injury in fact" under Article III. For example, if the government enacts a law entitling persons to disability benefits and the government fails to pay the amount owing, the beneficiary has standing to seek the amount in court even though the money does not compensate

---

166 *See id.*

167 141 S. Ct. 792 (2021).

168 *Id.* at 801 (quoting *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 107 (1998)).

169 *Id.* at 808 (Roberts, C.J., dissenting).

170 None of the opinions in *TransUnion* discussed *Uzuegbunam*, perhaps because the latter decision involved the redressability component of standing, not the injury-in-fact component. As discussed in the text above, however, the Court's analysis of whether nominal damages are a byproduct of the litigation is directly relevant to whether a defendant's failure to satisfy a monetary liability is itself an injury in fact.

171 *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772–73 (2000).

172 *Id.*

her for a prior injury caused by the government.<sup>173</sup> Nor does the fact that the defendant disputes the claimant's entitlement to the money, or the amount owing, negate the claimant's standing to seek the money in court. It is the claim of a legal entitlement to the money that confers standing, and it is for the court to determine whether the plaintiff's claim is well founded.<sup>174</sup> As discussed above, it is at least arguable that a damage claim is a property right (at least for purposes of the Takings Clause).<sup>175</sup> If it is a property right, its deprivation would certainly suffice to confer standing—indeed, the Constitution itself would require a remedy. But, more importantly, standing doctrine has never required that a litigant seeking to maintain an action in federal court establish that she has been denied a property right.<sup>176</sup> The failure to pay money legally due and owing is an “injury in fact” even if it is not a property right.

Recognizing that Congress's creation of a right to damages gives the right holder standing to seek those damages in court would not afford Congress an easy way around the *Lujan* holding (a concern that likely drove the Court to rule in *Vermont Agency* that a qui tam relator's right to money upon successfully litigating the case did not support standing). Entitling the first person to successfully litigate an action against the agency to a bounty would of course allow easy circumvention of *Lujan*. But enactment of a “citizen damage” provision would be expensive and present huge administrative burdens.<sup>177</sup> Assume that Congress entitled all citizens to \$5 if the EPA violates its obligations under the Endangered Species Act. Every citizen would have an entitlement of the specified amount of money, a right that would exist

---

173 See, e.g., *Edelman v. Jordan*, 415 U.S. 651 (1974).

174 The Court has, indeed, recognized that a flow of expected *future* benefits conferred by law constitutes a property right for purposes of the due process clause. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 261–62, 262 n.8 (1970).

175 See *supra* note 73.

176 For this reason, Blackstone's statement that a qui tam relator's bounty is merely an “inchoate imperfect degree of property . . . [which] is not consummated till judgment,” quoted by the Court in *Vermont Agency*, was beside the point. *Vi. Agency*, 529 U.S. at 773 n.3 (alterations in original) (quoting 2 BLACKSTONE, *supra* note 164, at \*437).

177 Even the Texas legislature did not create such a scheme in its notorious Heartbeat Law (SB8), Texas Heartbeat Act, ch. 62, 2021 Tex. Gen. Laws 125–35. This statute entitled any person (other than a public official) to bring an action against any person who performs or aids and abets the performance, or intends to perform or aid and abet the performance of a prohibited abortion. *Id.* at 127–29. If the plaintiff prevails, she is entitled to a minimum of \$10,000. *Id.* at 127. Even though the statute refers to this money as “damages,” it is clear that it is a bounty for successfully litigating the case, not a pre-litigation right to damages. Section 171.208(c) provides that “a court may not award relief under this section . . . if the defendant demonstrates that the defendant previously paid the full amount of statutory damages . . . in a previous action for that particular abortion.” *Id.* at 128. Thus, only the first person to successfully sue is entitled to the money.

prior to and independent of successfully litigating the case. Once the first plaintiff demonstrates that the agency violated the obligation and the finding was upheld on appeal, all other citizens would be able to sue to obtain the money owed to them without necessarily having to demonstrate the agency's violation of the statute.<sup>178</sup> Perhaps Congress could lower the expense and avoid the administrative problems by giving a right to damages only to one entity (say, the Defenders of Wildlife) or entities that fulfill certain requirements (say, NGOs whose mission is to protect wildlife). But this strategy for obtaining judicial review of agency action could easily be thwarted by the agency by simply paying the specified right holders the specified amount of money before the litigation, as the Chief Justice suggested in *Uzuegbunam*.

Justice Thomas's conclusion that the plaintiffs in *TransUnion* had standing did not focus specifically on their right to receive money from the defendants. The dissenters made a broader argument based on the plaintiff's possession of a private right vis-à-vis the defendant. Earlier, the Court in *Uzuegbunam* assimilated nominal damages to compensatory damages and held that the former satisfies the redressability requirement.<sup>179</sup> Though not necessary to support standing, a right to damages is surely sufficient for that purpose.<sup>180</sup> The dissenters came close to recognizing this when they cited *Cooley on Torts* for the proposition that "[s]o long as a 'statute fixes a minimum of recovery . . . , there would seem to be no doubt of the right of one who establishes a technical ground of action to recover this minimum sum without any specific showing of loss.'"<sup>181</sup>

The recognition that a plaintiff's right to receive money from the defendant is enough of an interest to support standing—in other words, that the defendant's failure to satisfy the liability is an injury in fact—should have led the Court to conclude that all of the plaintiffs had standing to maintain the suit. In light of the well-established principle that a plaintiff has standing to maintain a suit seeking money due and owing from the plaintiff, the Court's standing holding in

---

178 Even though the doctrine of nonmutual collateral estoppel does not apply against the United States, see *United States v. Mendoza*, 464 U.S. 154, 162 (1984), a court's holding that the agency violated the law, once upheld on appeal, will be a binding precedent within the circuit.

179 See *supra* text accompanying notes 167–70.

180 Cf. Fallon, *supra* note 99, at 669–70 (“[I]n *Akins*, the force of Justice Scalia’s [objection to standing] would decline, if not disappear entirely, if Congress had created a right to damages rather than injunctive relief.” *Id.* at 669.).

181 *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2218 (2021) (Thomas, J., dissenting) (second alteration in original) (quoting THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS: OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 271 (Chicago, Callaghan & Co. 1880)).

*TransUnion* must have been based on the proposition that Congress's creation of a right of action for damages in favor of litigants who did not suffer an injury in fact was not valid. The alternative reading of *TransUnion* as accepting the validity of the damage liability but rejecting federal court jurisdiction would not only violate the *Osborn* axiom, it would also require the Court to distinguish cases holding that a claim to government benefits suffices to confer standing.

The Court might, of course, gerrymander a distinction between the two kinds of rights to receive money: for example, in the case of government benefits, the right to damages is the primary obligation imposed on the defendant by the law, whereas the damage liability Congress imposed on the defendant in FCRA is a secondary obligation—an obligation arising from the defendant's violation of a primary obligation. The Court might hold that a right to money is sufficient to confer standing if imposed as a primary obligation but not if imposed as a secondary obligation. In the case of secondary obligations to pay money, the Court might hold, the cause of action needs to be “pierced” and the court needs to ask whether the defendant's violation of the primary obligation caused it an “injury in fact” independent of the right to the money damages. But this tailor-made rule would conflict with the Court's professed approach to standing, according to which standing focuses on the nature of the injury, not the reason the obligation was imposed. Whether the obligation is imposed as a primary or a secondary obligation, the plaintiff's injury is her failure to receive money she claims is legally due and owing. To conclude that a plaintiff who is entitled by law to receive a minimum amount of money from the defendant lacks standing to seek such money in federal court would require Olympic-level analytical gymnastics.

#### D. *TransUnion and Claims Under State or Foreign Law*

Understanding *TransUnion* as a holding about Congress's power to entitle the plaintiffs to damages also avoids some doctrinal anomalies. Suppose FCRA had been enacted by a state legislature instead of Congress. Assume the plaintiffs had sued in federal court on the basis of diversity of citizenship. Would the Court hold that the federal courts lack jurisdiction to entertain the action because the plaintiffs did not suffer an injury in fact? Does it make sense to deny a federal forum, and thus require that the case be adjudicated in state court, just because the cause of action created by the state legislature does not compensate for an injury that would satisfy standing rules developed in Article III cases? The Founders gave Congress the power to authorize federal jurisdiction in suits between citizens of different states because it recognized that state courts would be biased in favor of their own citizens. The possibility of bias arises in damage cases based on state



law whether or not the damages compensate for Article III injuries in fact. (Indeed, there may be *greater* reason to fear bias in such cases.) Yet, if the lack of an injury in fact means the case cannot be brought in federal court, a state-law suit between diverse parties would have to be brought in the biased state court just because the damages do not compensate for an injury in fact.

The posited hypothetical is far from fanciful. Since the *TransUnion* decision, a number of federal courts have dismissed state-law damages actions on the ground that the plaintiffs' injuries were insufficiently connected to the defendants' alleged conduct to satisfy Article III's "injury-in-fact" or "traceability" requirements.<sup>182</sup> The courts were not claiming that, under *TransUnion*, state legislatures lack the power to create damage liability for injuries that do not meet the Article III standard. To do so would transform standing doctrine into a font of state tort law—or, to be more precise, a font of federal limits on state tort law (for example, limits on the states' ability to adopt more expansive notions of proximate cause).<sup>183</sup> These decisions stand instead for the proposition that these claims may not be adjudicated in federal court. But relegating such claims to state court despite diversity jurisdiction would deprive the parties of the unbiased forum that Congress promised them, as contemplated by Article III itself. If the state-law right to damages is valid, the defendant's failure to satisfy the liability would itself be a concrete injury giving rise to standing.

Consider also *Estados Unidos Mexicanos v. Smith & Wesson*, in which the Government of Mexico alleged that, under Mexican law, gun

---

182 See, e.g., *Dinerstein v. Google, LLC*, 73 F.4th 502, 508 (7th Cir. 2023) (denying standing for a suit under the Illinois Consumer Fraud and Deceptive Business Practices Act because plaintiff failed to sufficiently allege an injury in fact); *Maddox v. Bank of N.Y. Mellon Tr. Co.*, 19 F.4th 58, 64 (2d Cir. 2021) (denying standing to plaintiff mortgagors who allege that a bank violated state law by failing to timely record the satisfaction of their mortgages because the mortgagors did not suffer concrete harm); *Doe I v. Apple Inc.*, No. 19-cv-03737, 2021 WL 5774224, at \*6–7 (D.D.C. Nov. 2, 2021) (denying standing for plaintiffs' state-law claims because they failed to show a causal connection between their alleged injuries related to Cobalt mining and defendants' participation in the cobalt supply chain); *Warehouse Invs., L.L.C. v. Affiliated FM Ins. Co.*, No. 21-cv-00174, 2021 WL 6752241, at \*4 (S.D. Iowa Aug. 23, 2021) ("Because standing has a federal constitutional dimension, 'the rule [is] that "[i]n a diversity case, a court will not address a plaintiff's claims unless the plaintiff meets the 'case or controversy' requirements of article III of the Constitution *and* also has standing to sue under the relevant state law.'" (alterations in original) (quoting *W. Heritage Ins. Co. v. Asphalt Wizards*, 795 F.3d 832, 836 (8th Cir. 2015))); see also *Weiss v. Gov't Emps. Ins. Co.*, No. 22-cv-03036, 2023 WL 6305736, at \*2 (E.D.N.Y. July 31, 2023) ("And it is now settled that 'plaintiffs cannot establish Article III standing by relying entirely on a statutory violation.'" (quoting *Maddox*, 19 F.4th at 64)).

183 Cf. *Paul v. Davis*, 424 U.S. 693, 701 (1976) (rejecting "a reading [that] would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States").

manufacturers were liable in damages for injuries caused by the sale and use of their products in Mexico in the circumstances alleged in the complaint.<sup>184</sup> The gun manufacturers moved to dismiss on standing grounds, arguing that standing was lacking because the Mexican government's injury was not traceable to the conduct of the defendants, as required by Article III.<sup>185</sup> Their argument could not have been that Mexican law requires the sort of showing of proximate cause traditionally required by the common law. Instead, the argument was that, if Mexican law does authorize damages for such (allegedly) remote injuries, the suit cannot be maintained in federal court under Article III. The suit must instead be brought in state court. But the purpose of alienage jurisdiction—like diversity jurisdiction—is to protect out-of-state litigants from state court bias. This purpose is fully implicated (perhaps more so) in cases alleging remote injuries, yet the gun manufacturers' understanding of *TransUnion* requires such cases to be brought in state court rather than federal court.

The more sensible view is that, in cases brought under state or foreign law, the plaintiff's claim to money that the law requires the defendants to pay them is the injury that confers standing. The failure to receive the money to which the law entitles the plaintiff is the injury that confers standing. If so, then a valid cause of action for damages established by federal law would also satisfy the standing requirement. On this view, *TransUnion* is plausible only if understood as a holding about Congress's power to create a right of action for damages, not about the federal courts' power to adjudicate a validly created right to damages. The 6,332 class members whose claims were dismissed could not rely on their right to damages conferred by FCRA § 1681p because Congress lacked the power to entitle them to such damages. On this view, Article III's "injury-in-fact" requirement limits Congress's power to confer substantive remedies. If so, then the Court held that Congress may create such remedies only for injuries closely analogous to the types of remedies recognized by the common law.

### *E. Standing as Remedial Law*

If *TransUnion* were so understood, the Court would need to explain the source and the nature of this limit on Congress's power to create damage liability for the type of injury involved in *TransUnion*. *TransUnion* cannot stand for the proposition that Congress's power to create a liability of one private party to another is limited to

---

184 *Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc.*, 633 F. Supp. 3d 425, 439, 441 (D. Mass. 2022).

185 *Id.* at 439; see also Joint Memorandum of Law in Support of Defendants' Motions to Dismiss at \*1, \*10, *Smith & Wesson*, 633 F. Supp. 3d 425 (No. 21-cv-11269).

authorizing compensation for an injury to traditional common-law interests or “close historical or common-law analogue[s].”<sup>186</sup> Congress has long authorized punitive damages, or actions for treble damages, which go beyond compensating for injuries, and the Court has never suggested that such damages are unconstitutional.<sup>187</sup> If *TransUnion* is read to impose a limit on Congress’s legislative power, the relevant limit is about the types of injuries that can *trigger* a claim to damages, not about the amounts that the plaintiff may recover.

The Court has found limits on the power to create a right to damages in the Due Process Clause. For example, in *BMW of North America, Inc. v. Gore*, the Court held that the Due Process Clause places limits on the extent of punitive damages that may be awarded in a case.<sup>188</sup> We may grant that the Due Process Clause also prohibits Congress from requiring one private person to pay money to another private person for no reason. But it is a giant leap to conclude from that premise that Congress can only subject private persons to liabilities for injuries analogous to traditional common-law injuries. As the dissent in *TransUnion* notes, “never before has [the] Court declared that legislatures are constitutionally precluded from creating legal rights enforceable in federal court if those rights deviate too far from their common-law roots.”<sup>189</sup>

Absent stronger historical or doctrinal support for the proposition that the Due Process Clause disables Congress from creating liabilities for injuries that do not correspond to those traditionally protected by the common law, we must find the source of Congress’s disability in standing doctrine itself—but understood to be based on a constitutional provision other than Article III. *TransUnion* itself suggests the source. As the majority wrote: “The ‘law of Art. III standing is built on a single basic idea—the idea of separation of powers.’”<sup>190</sup> The Court located the separation-of-powers function of standing in Article III, describing it in broad terms and linking it to Article III’s vesting of the federal courts with “judicial” power.<sup>191</sup> But other cases explain the

---

186 *TransUnion*, 141 S. Ct. at 2204.

187 See, e.g., Clayton Act, 15 U.S.C. § 15(a) (2018); Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964(c) (2018).

188 517 U.S. 559 (1996).

189 *TransUnion*, 141 S. Ct. at 2221 (Thomas, J., dissenting). For a prescient pre-*TransUnion* discussion of a possible link between the Court’s standing doctrine and substantive due process, and a defense of Justice Thomas’s approach, as first explained in *Spokeo*, see William Baude, *Standing in the Shadow of Congress*, 2016 SUP. CT. REV. 197.

190 141 S. Ct. at 2203 (quoting *Raines v. Byrd*, 521 U.S. 811, 820 (1997)).

191 See *id.* (“Under Article III, federal courts do not adjudicate hypothetical or abstract disputes. Federal courts do not possess a roving commission to publicly opine on every legal question. Federal courts do not exercise general legal oversight of the legislative and executive branches, or of private entities. And federal courts do not issue advisory opinions.

separation-of-powers function of standing doctrine in more precise terms, which suggest a different constitutional source.

In *Lujan v. Defenders of Wildlife*, the Court concluded that the plaintiffs lacked standing even though Congress had enacted a statute granting all citizens the right to seek declaratory or injunctive relief for violations of the Endangered Species Act. In invalidating the citizen suit provision, the Court explained:

Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those “Cases” and “Controversies” that are the business of the courts rather than of the political branches. “The province of the court,” as Chief Justice Marshall said in *Marbury v. Madison*, “is, solely, to decide on the rights of individuals.” Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive. . . . To permit Congress to convert the undifferentiated public interest in executive officers’ compliance with the law into an “individual right” vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive’s most important constitutional duty, to “take Care that the Laws be faithfully executed.” It would enable the courts, with the permission of Congress, “to assume a position of authority over the governmental acts of another and co-equal department,” and to become “virtually continuing monitors of the wisdom and soundness of Executive action.” We have always rejected that vision of our role.<sup>192</sup>

On this theory, the concrete injury requirement serves to distinguish those claimed violations of law that may be challenged in court by private individuals from those that may only be challenged by the executive branch. Standing limits, on this view, protect the executive branch’s exclusive power under the “Take Care” clause to determine whether certain claimed violations of law will be challenged in court. Standing limits having this function are best understood to have their constitutional source in Article II, where that clause is located.

If the standing limits recognized in *Lujan* protect the executive’s exclusive power to determine whether to “[v]indicat[e] the public

---

As Madison explained in Philadelphia, federal courts instead decide only matters ‘of a Judiciary Nature.’” (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (Max Farrand ed. 1966)).

<sup>192</sup> 504 U.S. 555, 576–77 (1992) (citations omitted) (first quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803); then quoting U.S. CONST. art. II, § 3; then quoting *Massachusetts v. Mellon*, 262 U.S. 447, 489 (1923); and then quoting *Allen v. Wright*, 468 U.S. 737, 760 (1984)).

interest,”<sup>193</sup> then standing limits should preclude litigation in the state courts as well as the federal courts. After all, the federal executive’s exclusive power to determine when to vindicate the public interest would be equally impaired by a private suit in the state courts as by a suit in the federal courts. But a doctrine based on Article III would limit only the federal courts. Locating these limits in Article II would require their application in the state as well as federal courts. So understood, *Lujan* held that Congress lacks the power to create a private right of action for declaratory or injunctive relief against federal agencies if the challenged conduct did not harm a concrete injury as defined by standing doctrine. And *TransUnion* extended this holding to rights of action for damages.

The theory that standing doctrine has its source in Article II has been the subject of considerable scholarship. Some scholars criticize the theory;<sup>194</sup> others defend some form of the theory.<sup>195</sup> But the idea that locating the doctrine in Article II makes the doctrine substantive rather than jurisdictional—in other words, that the doctrine denies Congress the power to create a private right of action rather than just the power to authorize federal jurisdiction—has been largely overlooked.<sup>196</sup> This aspect of the Article II standing theory has probably remained under the radar because the theory has thus far been implicated primarily in suits against federal agencies under waivers of sovereign immunity that extend only to actions in federal court. In theory, such challenges can also be brought as suits against state officials seeking declaratory or injunctive relief, which are not barred by sovereign immunity, but such suits are generally brought in federal court, and, if brought in state court, can be removed to federal court.<sup>197</sup> Indeed,

---

193 *Id.* at 576 (emphasis omitted).

194 See, e.g., William W. Buzbee, *Standing and the Statutory Universe*, 11 DUKE ENV'T L. & POL'Y 247, 283–84 (2001); David M. Driesen, *Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication*, 89 CORNELL L. REV. 808, 874–75 (2004); Sunstein, *supra* note 155, at 213.

195 See, e.g., Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 821 (2009); Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793, 1794 (1993).

196 *But cf. infra* notes 199–202 and accompanying text (noting that the Court itself has referred to the standing issue as being about the existence of rights of action). Professor Grove argues that standing should be understood to be grounded in both Article II and Article III, and she notes in passing that adding Article II as a source has the benefit of making it relevant to state as well as federal courts. See Grove, *supra* note 195, at 833–84. She leaves fuller consideration of that issue for another day.

197 28 U.S.C. § 1442 (2018). If a federal official removes to federal court a case as to which the plaintiff lacks Article III standing, however, then (if standing were regarded as purely a matter of federal jurisdiction) the proper disposition would be to remand the action to state court. That this appears not to have happened itself suggests that standing has not been viewed as purely a matter of federal jurisdiction.

whether state courts have the constitutional power to enjoin federal officials is unsettled.<sup>198</sup> Given the uncertainty about whether such suits can proceed in state court, it is understandable that the substantive nature of “Article II standing” (and thus its applicability to state court actions) has gone largely unnoticed.

The Court’s extension of its standing doctrine to damage suits against private defendants brings this issue to the surface. The fact that Congress itself created a right of the plaintiffs to receive money from the defendants raises the question of why the failure to receive that money is not itself an injury in fact that supports standing. A federally created right to receive money is sufficient to give the right holder standing to seek such money in federal court, as shown by the cases involving government benefits. Indeed, such a right has been understood to be a property right. And it seems clear that a right to damages created by state or foreign law should be sufficient to confer standing in federal court in a case brought under diversity or alienage jurisdiction. *TransUnion* is thus best understood as resting on the notion that Congress lacked the power to impose on the defendant the obligation to pay damages to persons who have not suffered a concrete injury. Absent another plausible basis for concluding that Congress lacks such a power, the *TransUnion* holding is best understood to rest on Article II. A right to damages entails a right to seek the damages in court, but a right to seek damages in court (state or federal) infringes the executive’s exclusive power to determine when and whether to vindicate the public interest.

So understood, *TransUnion* supplies strong—indeed, irresistible—support for the Fletcherian view that standing is a matter of whether the plaintiffs have a right of action,<sup>199</sup> and that, in cases arising under federal law, the plaintiffs’ lack of standing should disable them from suing in state as well as federal court.<sup>200</sup> Indeed, although both *Lujan* and *TransUnion* rely on Article III and present their holdings as being about federal jurisdiction, both also at times describe the question before them as whether plaintiffs have a “right of action” or

---

198 See RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 436 (7th ed. 2015). The better view is that there is no constitutional impediment to such suits. See Richard S. Arnold, *The Power of State Courts to Enjoin Federal Officers*, 73 *YALE L.J.* 1385, 1386 (1964). Otherwise, if Congress had declined to create lower federal courts, there would have been no way to challenge federal executive action in court. For a similar defense of the constitutional power of state courts to entertain habeas petitions against federal officials, see Vázquez & Vladeck, *supra* note 138, at 943–44. For present purposes, however, the salient point is that the power of state courts to entertain such cases is in doubt.

199 See Fletcher, *supra* note 99.

200 See William A. Fletcher, *The “Case or Controversy” Requirement in State Court Adjudication of Federal Questions*, 78 *CALIF. L. REV.* 263, 265 (1990).

“cause of action.”<sup>201</sup> In the context of suits against federal agencies for injunctive relief, the concepts of right of action and federal jurisdiction may seem coextensive and interchangeable, but, in the context of damages actions between private parties, the concepts are clearly distinct. *TransUnion* is thus best understood to have confirmed that standing is not (just) a matter of federal jurisdiction, and is thus, in the end, not based (just) on Article III. Indeed, that the Court in *TransUnion* understood its holding as tantamount to denying that Congress had the power to create the right of action it created in the FCRA (insofar as it granted a remedy to the class members who lacked standing) is the clear negative implication of its statement that “if there were no concrete-harm requirement, the requirement of a particularized injury would do little or nothing to constrain Congress from freely *creating causes of action* for vast classes of *unharmed* plaintiffs to sue any defendants who violate any federal law.”<sup>202</sup>

This reading of *TransUnion* also supports our earlier conclusion that federal courts *would* have jurisdiction over a diversity suit under a state-level FCRA, and over an action brought by aliens under a foreign law that creates a right to damages for a nonconcrete injury or a concrete injury insufficiently traceable to the defendant to satisfy the Court’s standing requirements. Suits based on state or foreign law do not implicate the executive’s exclusive enforcement powers.

If standing doctrine is based solely on Article II, it would not prevent a federal court from entertaining an action brought under a state law authorizing declaratory relief regarding the validity of a state law under the state constitution, or the interpretation of state laws, at the behest of plaintiffs who have not suffered a concrete injury. Under the conventional (Article III) view, standing doctrine would limit federal jurisdiction in such cases. But if standing limits serve to protect the exclusive enforcement powers of the federal executive branch, there would not seem to be a reason to conclude that federal courts are constitutionally precluded from entertaining such cases. Of course, the federal courts could have jurisdiction over such cases only on the basis

---

201 See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 566 (1992) (“To say that the Act protects ecosystems is not to say that the Act creates (if it were possible) rights of action in persons who have not been injured in fact . . . .”); *id.* at 580 (Kennedy, J., concurring in part and concurring in judgment) (“As Government programs and policies become more complex and farreaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition.”); *id.* (“The Court’s holding that there is an outer limit to the power of Congress to confer rights of action is a direct and necessary consequence of the case and controversy limitations found in Article III.”); see also *infra* text accompanying note 202 (noting *TransUnion*’s statement implying that its standing holding denies Congress the power to create certain “causes of action”).

202 *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2206 n.2 (2021) (first emphasis added).

of diversity or alienage jurisdiction, and Congress can always deny the federal courts such jurisdiction if it believes that adjudicating such cases is a waste of judicial resources. Moreover, states that authorize such suits are likely to do so only if brought by domiciliaries of the state, thus precluding diversity or alienage jurisdiction. If a diversity or alienage case does arise, perhaps the Court would reject federal court jurisdiction on the theory that Article III places limits on federal court jurisdiction over and above those imposed by Article II. The conclusion that *Lujan/TransUnion* standing is based on Article II does not mean that Article III does not separately impose additional standing limits. But to preclude jurisdiction over the posited state-law claim, these separate limits would have to be based on concerns other than protecting the executive's exclusive power to vindicate the public interest. A standing doctrine that would preclude jurisdiction over the posited state-law claim seems hard to square with the Court's statement that "[t]he 'law of Art. III standing is built on a single basic idea—the idea of separation of powers,'"<sup>203</sup> but maybe the Court would find that standing doctrine is also built on ideas of federalism. In any event, the additional Article III limits should not preclude federal jurisdiction over suits based on state or foreign laws that authorize damages.

#### F. *State Sovereign Immunity Redux*

Recognizing that standing limits in cases like *Lujan* and *TransUnion* are based on Article II reveals some additional similarities between standing and state sovereign immunity. As we saw above, when sovereign immunity applies (and cannot be abrogated), Congress may not create a private right of action for damages against the states. Congress may, however, authorize the federal executive branch to sue the states and recover the money owed to the individuals. Thus, in *Alden*, the Court recognized Congress's power to authorize the executive to sue the states under FLSA to obtain the overtime wages due the employees. Under this theory, Congress might have the power to authorize the executive branch to sue states for negligent copyright infringement under the Copyright Act and even to obtain the damages to which the Copyright Act purports to entitle the copyright holders. Perhaps it can even require the executive to pay the damages over to the copyright holders. The copyright holders themselves lack a right to such damages because their access to the damages depends on the executive branch's willingness to bring suit. As discussed in Section I.A, this may be the reason the copyright holders do not have a property right in the damages. Given the immunity, the statute simply authorizes the

---

203 *Id.* at 2203 (quoting *Raines v. Byrd*, 521 U.S. 811, 820 (1997)).



executive to obtain damages on the copyright holders' behalf. Because the damages will be paid to them only if the executive branch deems the case sufficiently important to warrant their enforcement resources, the copyright holder cannot be said to have a legal right to the damages, much less a property right. But access to the damages via the executive branch remains a theoretical possibility.

Similarly, if the lack of a concrete injury means that the FCRA plaintiffs lack Article II standing, Congress's establishment of a right of action for damages is not valid. But, if the right of action is invalid solely because it interferes with the executive branch's exclusive enforcement power, then Congress should be able to empower the executive branch to bring suit against the defendant *on behalf of* the plaintiffs, and to obtain for them the money to which Congress meant to entitle them. Here, too, the plaintiffs lack a legal right to the money, but they may have an alternative route to the money via the executive. Perhaps Congress would even have the power to create a mechanism whereby the individuals in question could maintain an action against the defendant if the executive branch approves. If the standing doctrine merely protects the executive's exclusive authority to vindicate the public interest, such a mechanism might be valid.

\* \* \*

To argue that the Court has transformed jurisdictional doctrines into limitations on Congress's power to create remedies is not, of course, to endorse the Court's decisions in either the state sovereign immunity or standing context. There is much to be said for the diversity interpretation of the Eleventh Amendment. Justice Scalia's rejection of this interpretation in *Union Gas* was based not only on *stare decisis*, but also on his recognition that sovereign immunity does not meaningfully hamper the enforcement of the federal obligations of the states in federal court:

Of course federal law can give, and has given, the private suitor many means short of actions against the State to assure compliance with federal law. He may obtain a federal injunction against the state officer, which will effectively stop the unlawful action and may obtain money damages against state officers, and even local governments, under 42 U.S.C. § 1983.<sup>204</sup>

As Justice Scalia's analysis implies, sovereign immunity is tolerable, from a rule-of-law perspective, only because it does not preclude enforcement of federal obligations through suits against state

---

204 *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 34 (1989) (Scalia, J., concurring in part and dissenting in part) (citations omitted) (first citing *Ex parte Young*, 209 U.S. 123, 160 (1908); and then citing *Monell v. Dep't of Soc. Servs. of N.Y.C.*, 436 U.S. 658 (1978)).

officers.<sup>205</sup> From this perspective, state sovereign immunity is properly understood as a matter of form and not substance. Thus, Congress should be able to give the plaintiffs in *Alden* a right of action to obtain their overtime wages by permitting a suit for such damages against a state officer and eliminating any qualified immunity the officer would otherwise enjoy.<sup>206</sup> Similarly, Congress should be able to give copyright holders a right of action to obtain damages for negligent copyright infringement against state officers. If so, then the copyright holder would have a property right against the officer, if not against the state itself. Officer suits thus offer an alternative route to aligning the federal judicial power with the federal legislative power. If a suit against the officer is not adequate to protect the rights that Congress validly created, the Court should find a waiver of immunity in suits arising under federal law to have been implicit in the constitutional plan. The Court's recent decisions in *PennEast* and *Torres v. Texas Department of Public Safety* point the way.<sup>207</sup>

With respect to standing, scholars have persuasively argued that, “[a]s far as constitutional law is concerned, the injury-in-fact test was made up out of whole cloth.”<sup>208</sup> As noted, scholars have also persuasively criticized the notion that Article II supports the Court's standing doctrine.<sup>209</sup> Even the defenders of standing doctrine “do not claim that history compels acceptance of the modern Supreme Court's vision of standing.”<sup>210</sup> *TransUnion* itself has been the subject of trenchant criticism.<sup>211</sup>

This Article's main purpose is to understand the Court's understanding of standing doctrine, not to criticize it. But this Article's analysis does add to the many reasons to rethink the doctrine. I have shown

205 See Carlos Manuel Vázquez, *Eleventh Amendment Schizophrenia*, 75 NOTRE DAME L. REV. 859, 871 (2000).

206 Official immunity is understood to be a matter of federal common law. See, e.g., *Boyle v. United Techs. Corp.*, 487 U.S. 500, 505 (1988). As such, it can be narrowed or eliminated by Congress. *But cf.* Vázquez, *supra* note 205, at 864–65 (pointing to some indications that the Court may regard this immunity as grounded in part in the Constitution).

207 See *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244 (2021); *Torres v. Tex. Dep't of Pub. Safety*, 142 S. Ct. 2455, 2468 (2022) (noting and endorsing *PennEast's* holding that, when the Federal Government's power is “complete,” “no State may frustrate its exercise by claiming immunity”).

208 See Cass R. Sunstein, *Injury in Fact, Transformed*, 2021 SUP. CT. REV. 349, 349.

209 See sources cited *supra* note 194.

210 Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 691 (2004) (emphasis omitted).

211 See, e.g., Elizabeth Earle Beske, *Charting a Course Past Spokeo and TransUnion*, 29 GEO. MASON L. REV. 729, 765–76 (2022); Erwin Chemerinsky, *What's Standing After TransUnion LLC v. Ramirez*, 96 N.Y.U. L. REV. ONLINE 269, 272 (2021); Daniel J. Solove & Danielle Keats Citron, *Standing and Privacy Harms: A Critique of TransUnion v. Ramirez*, 101 B.U. L. REV. ONLINE 62, 62 (2021); Sunstein, *supra* note 208, at 352 n.18.

that the Court's failure to regard the plaintiffs' right to damages in *TransUnion* as sufficient to give them standing to seek the damages is plausible only if the Court is understood to have held that Congress lacked the power to create their right to damages. And the only remotely plausible basis for concluding that Congress lacked the power to create their right to damages is based on the notion that standing doctrine protects the executive's exclusive right to determine when to vindicate the public interest. But the Court did not explain why denying a judicial forum to persons who have been the direct victims of the defendant's violation of federal law are seeking to vindicate the public interest, as distinguished from their own private right. Whether a suit between private parties for damages can ever violate Article II is questionable.<sup>212</sup> But, even if such suits can sometimes implicate Article II, it remains to be explained why a suit by the very objects of the challenged action does.

If Article II is the basis for concluding that Congress lacked the power to create a damage remedy against the plaintiffs, it is only because of the Court's understanding of the sorts of claims it is proper for the courts to intervene in. If so, then the jurisdictional tail is wagging the remedial dog. As with the other examples of the *Converse-Osborn* principle, deducing the lack of a remedial power from concerns about the propriety of judicial intervention seems intuitively backwards. The upside-down logic of the purported basis for denying Congress a right to create damages is itself a sign that something is amiss.

#### CONCLUSION

In a series of state sovereign immunity cases beginning with *Alden v. Maine*, the Court transformed an immunity of states from the jurisdiction of the federal courts into an immunity from being subjected by Congress to damage liability towards individuals. The Court in *Alden* rejected the forum-allocation interpretation of the Eleventh Amendment, according to which Congress can subject states to damage liability, which the states are obligated to enforce in their own courts, subject to review by the Supreme Court. The Court's recent decisions in *Allen v. Cooper* and *PennEast Pipeline Co. v. New Jersey* complete that transformation. These cases confirm that the Eleventh Amendment, though written as a limitation on the federal judicial power, is merely reflective of a broader constitutional immunity enjoyed by the states—an immunity from being subject to damage liability in favor of private individuals. *PennEast* applied the *Osborn* axiom as intended and

---

212 See Sunstein, *supra* note 208, at 367 n.99 (“In *TransUnion* itself, Article II could not possibly be relevant. The case involved a suit between private parties!”).

denied the immunity. *Allen* reflects the *Osborn* axiom in its converse operation.

The Court's decision in *TransUnion* may signal a similar doctrinal move in the context of standing. The Court held that consumers whose information is handled by consumer reporting agencies in violation of a federal statute lack standing to maintain an action in federal court to recover the damage liability Congress created in their favor. Standing limitations are based on Article III and in theory apply only in the federal courts. The dissenters expressed the view that the congressionally created liability can be recovered in the state courts. If so, then *TransUnion* replicates the forum-allocation theory in the context of standing.

The Court is likely to reject the forum-allocation view here as well, in this case by holding that Congress lacks the power to create a liability for injuries that lack a close common-law analogue. This may, indeed, be the only plausible explanation for the Court's standing holding in *TransUnion*. It is well established that a right of the plaintiff to receive money from the defendant is sufficient to support the plaintiffs' standing to maintain an action seeking to collect such money, if the defendant does not voluntarily satisfy the claimed liability. If so, then the Court's holding that some plaintiffs in *TransUnion* lacked standing despite Congress's conferral of a right to receive damages from the defendant must be based on the notion that Congress lacked the power to create the liability. The most likely constitutional basis for disabling Congress from creating the plaintiffs' right to damages is Article II: allowing Congress to create a right to damages would allow Congress to empower the courts to intervene in a case in a way that would infringe upon the executive's exclusive right to vindicate the public interest. Exactly how allowing the plaintiffs in *TransUnion* to maintain an action for damages would infringe this exclusive executive power, however, is elusive.

