TRANSUNION V. RAMIREZ: LEVELS OF GENERALITY AND ORIGINALIST ANALOGIES

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ABSTRACT

In TransUnion v. Ramirez, *the Court entrenched a "close relationship" test for defining concrete injuries under Article III's injury-in-fact requirement. In order to assess concreteness, courts must attempt to analogize a plaintiff's harm to a harm traditionally recognized by English or American courts. Without a close relationship to a traditional harm, plaintiffs may not maintain their action in federal court.*

This test necessarily raises an important question: how analogous is analogous enough? By varying the level of generality, a possibly analogous traditional harm might be sufficiently, or insufficiently, close to a plaintiff's current harm. The more generally one is willing to view a traditional harm, the more likely the close relationship test will be satisfied. The more specifically one views a traditional harm, the less likely the plaintiff's harm will suffice. In TransUnion *itself, Justice Kavanaugh's majority opinion simultaneously used a rather specific level of generality for certain questions of similarity, leading to a rejection of various claims under the close relationship test, and a general, more forgiving, level for another question, allowing certain claims to continue. Justice Thomas, in dissent, uniformly used a highly general level and accordingly concluded that all of plaintiffs' claims were sufficiently analogous.*

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The uneven application of levels of generality in TransUnion *helpfully illustrates the problem of unsystematic application of levels of generality in legal analogies. The issue is present in many parts of legal reasoning, from the definition of rights to whether prior precedent is binding or merely persuasive. But varying levels of generality are particularly problematic when present in originalist analysis. Originalism purports to be a formalist, discretion-limiting, method of constitutional interpretation. But the ability to switch between levels of generality when describing and applying historical cases and practices inserts significant discretion. By recognizing and better systematizing the levels of generality used for originalist analogies, judges, practitioners, and scholars can better and more faithfully apply originalism.*

INTRODUCTION

Is a hot dog a sandwich?[1] That age-old question has dogged many an undergraduate dorm room. The debate can take many forms, ranging from raw intuitions about how surprised one would be to show up at a sandwich shop that only sells hot dogs[2] to empirical evaluation of linguistic usage.[3]

In many respects, the question boils down to one of generality. Certainly, defining a sandwich as only bacon, lettuce, and tomato on two pieces of rye bread would be too specific. But what about two separate pieces of bread with a filling?[4] That level of specificity eliminates the hot dog. How about merely bread and a filling?[5] Under that level of generality, the hot dog qualifies as a sandwich. Or what about just an edible outside and a filling (allowing for the newly popular lettuce wrap sandwiches alongside the traditional hot dog)?[6]

In *TransUnion v. Ramirez*,[7] the Court wrestled with a more legal, less humorous, question of generality. There, the Justices examined whether failure to maintain reasonable procedures before labeling a class of plaintiffs potential terrorists in a credit report database

1. *Cf.* Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116, 117 (S.D.N.Y. 1960) ("The issue is, what is chicken?").

2. Alternatively, would you ever ask your friend to get you "whatever sandwich looks good" and be happy with a hot dog?

3. *Cf.* Lawrence M. Solan & Tammy Gales, *Corpus Linguistics as a Tool in Legal Interpretation*, 2017 BYU L. REV. 1311 (2018).

4. *See Sandwich*, MERRIAM-WEBSTER ONLINE, https://www.merriam-webster.com/dictionary/sandwich [https://perma.cc/YHX7-HKEF] (last visited Mar. 19, 2022).

5. *See id.* (including as one definition "one slice of bread covered with food" or including a "split roll"). Consider as well whether that means pizza is a kind of sandwich.

6. *See* Lexi, *How to Make a Lettuce Wrap Sandwich (Low Carb!)*, LEXI'S CLEAN KITCHEN (Apr. 4, 2018), https://lexiscleankitchen.com/lettuce-wrap-sandwich/ [https://perma.cc/TLR3-W269].

7. 141 S. Ct. 2190 (2021).

was *similar enough* to the traditional harm of defamation to be an injury-in-fact.

The Court, splitting 5–4, rejected the claims of most class plaintiffs because their harms were not similar enough to that traditional injury. The Court explained that, to have a concrete injury-in-fact for standing purposes, a plaintiff's injury must have a "close relationship" to traditionally recognized harms in English or American courts.[8] Without such a relationship, federal courts have no jurisdiction over the action.[9] The majority dismissed most plaintiffs' claims because their harms failed this close relationship test, that is, they were not analogous enough to traditional harms.[10]

The Court's close relationship requirement provides a helpful lens for evaluating the important issue of levels of generality for legal analogies. This Comment first reviews the basic facts and implications of *TransUnion*. It then explores the various, conflicting levels of generality used in Justice Kavanaugh's majority opinion as well as the level of generality in Justice Thomas's dissenting opinion. Finally, this Comment reviews how levels of generality are a lurking presence in various parts of legal reasoning and—importantly—in current originalist reasoning.

This Comment argues that unsystematic analysis of levels of generality gives judges significant discretion to arrive at favored outcomes even in the confines of purportedly formalist and nondiscretionary doctrines like originalism. Accordingly, faithfully originalist jurists must be careful to apply rules of generality systematically when looking to historical analogies.

I. THE *TRANSUNION* DECISION

In *TransUnion*, a class of plaintiffs sued the credit reporting company TransUnion under the theory that the firm had "failed to

8. *Id.* at 2200.
9. *See id.*
10. *Id.*

use reasonable procedures to ensure the accuracy of their credit files."[11] Specifically, plaintiffs were incorrectly listed in TransUnion's files as "potential[ly]" being on "a [government-made] list of 'specially designated nationals' who threaten America's national security,"[12] sometimes known as the "OFAC list."[13] TransUnion erroneously listed the plaintiffs because the company failed to perform any due diligence when linking credit files to the OFAC list.[14] Any person with the same first and last name as an individual on the OFAC list would be labeled by TransUnion as "a potential match" to the terrorist database.[15] And "TransUnion did not compare any data other than first and last names. . . . [This] generated many false positives."[16]

For lead plaintiff Sergio Ramirez, TransUnion's practices led to a whole lot of hassle and humiliation.[17] At a car dealership, the salesman rejected Mr. Ramirez's attempt to purchase a vehicle, informing Ramirez that he appeared on a "terrorist list."[18] Mr. Ramirez immediately contacted TransUnion and demanded a copy of his credit file.[19] Shortly thereafter, Mr. Ramirez received a mailing from TransUnion with his report, sans any mention of the OFAC list, alongside a "statutorily required summary of rights."[20] He then separately received a second mailing, this time telling him that he was a match for the OFAC list, but without the summary of rights.[21] After cancelling a planned trip out of the country, and with

11. *Id.*
12. *Id.* at 2201.
13. *Id.* The list was created by the Treasury Department's Office of Foreign Assets Control ("OFAC"). *Id.*
14. *See id.*
15. *Id.* (internal quotation marks omitted).
16. *Id.*
17. *See id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 2201–02.

the help of a lawyer, Mr. Ramirez's efforts led TransUnion to remove the link between him and the OFAC list.[22]

Not content with that result alone, Mr. Ramirez filed a class action lawsuit in the U.S. District Court for the Northern District of California.[23] He and his class members solely pursued theories under the federal Fair Credit Reporting Act.[24] Specifically, the suit claimed that TransUnion failed to: (1) "follow reasonable procedures to ensure the accuracy of information in his credit file[;]" (2) provide an OFAC list alert in its mailing; and (3) provide the statutorily required summary of rights.[25]

The district court held a jury trial that ended with victory on all three claims for Mr. Ramirez and his class.[26] The jury awarded each class member $984.22 in statutory damages and then punitive damages of $6,353.08.[27] The Ninth Circuit affirmed, save for reducing the punitive damages for each class member to $3,936.88.[28]

The Supreme Court reversed in a five-Justice majority opinion written by Justice Kavanaugh. In his opinion, Justice Kavanaugh cited *Spokeo, Inc. v. Robins*,[29] a recent opinion that also considered the circumstances under which plaintiffs with intangible injuries have standing to sue for damages.[30]

In *Spokeo*, the Court explained that a statutory cause of action alone is insufficient to establish a concrete injury-in-fact for an interested plaintiff.[31] Rather, federal courts must independently consider whether the harm protected by the statute is constitutionally

22. *Id.* at 2202.
23. *Id.*
24. 15 U.S.C. § 1681 *et seq*.
25. *TransUnion*, 141 S. Ct. at 2202.
26. *Id.*
27. *Id.*
28. *Id.* (citing 951 F.3d 1008 (9th Cir. 2020)).
29. 578 U.S. 330 (2016).
30. *Id.* at 339.
31. *Id.*

cognizable under Article III—with deference to Congress's choice.[32] The Court stated that "it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts," although it tempered that position with the observation that "because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important."[33]

In *TransUnion*, *Spokeo*'s "instructive" suggestion became a firm constitutional requirement. The *TransUnion* Court explained that "[c]entral to assessing concreteness is whether the asserted harm has a 'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts."[34] As Justice Thomas explained in his dissent, the majority's reasoning ensures that Congress has much less of an "instructive and important" role than originally recognized for determining whether a harm is *concrete*.[35] Instead, the Court held that Congress may merely "elevate harms that exist in the real world" to legally cognizable status, while courts "independently decide whether a plaintiff has suffered a concrete harm."[36]

Thus, to determine whether there was a sufficiently concrete harm for the various *TransUnion* plaintiffs, the Court was required to consider whether any traditionally recognized harm had a close relationship to a harm asserted by the plaintiffs.[37] The majority and dissenters split on all three of the plaintiffs' claims.

The majority held that only class members who had their credit reports disseminated could bring suit on the reasonable procedures

32. *Id.* at 340–41.

33. *Id.* at 341.

34. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2200, 2213 (2021) (citing *Spokeo*, 578 U.S. at 340–41).

35. *See id.* at 2220–21 (Thomas, J., dissenting).

36. *Id.* at 2205 (majority opinion) (internal quotation marks omitted).

37. *Id.* at 2208.

claim, because publication had been a historically required element for defamation actions.[38] At the same time, the majority rejected TransUnion's argument that all the claims should have been dismissed given that TransUnion's statements calling plaintiffs "potential" terrorists was not false.[39] Despite falsity being historically required for defamation actions, the Court explained that the new cause of action need not be an "exact duplicate" of the traditional one.[40] Finally, the majority held that no one other than the lead plaintiff had standing on the other two claims.[41] In dissent, Justice Thomas first argued that the majority's "close relationship" test has no basis in history or the Constitution and then asserted that, even under the majority's test, all plaintiffs had a sufficiently concrete harm for all three claims.[42]

II. LEVELS OF GENERALITY IN JUSTICE KAVANAUGH'S MAJORITY OPINION AND JUSTICE THOMAS'S DISSENT

The opinions by Justice Kavanaugh and Justice Thomas offer helpful illustrations of levels of generality in legal analogies—particularly, their evaluations of whether the harm from TransUnion's failure to take "reasonable procedures in internally maintaining the credit files" has a sufficiently close relationship to a traditional harm.[43] Justices Kavanaugh and Thomas both reasoned that the "close relationship" at issue for the reasonable procedures claim

38. *Id.* at 2209–10.

39. *Id.* at 2209.

40. *Id.*

41. *Id.* at 2213–14.

42. *Id.* at 2214–26 (Thomas, J., dissenting). Justice Kagan, joined by Justices Sotomayor and Breyer, wrote an additional dissenting opinion expanding on their concerns regarding the close relationship test and separating from Justice Thomas in regards to public versus private rights. *Id.* at 2225–26 (Kagan, J., dissenting).

43. *Id.* at 2208 & n.5 (majority opinion).

could be to the harm "associated with the tort of defamation."[44] To evaluate closeness, the Justices needed to compare and contrast historical harms with plaintiffs' stated injury: were the plaintiffs' harms sufficiently analogous to the traditional harm from defamation?

On appeal, both parties agreed that only 1,853 of the 8,185 class members had their credit reports disseminated outside of TransUnion.[45] This was a crucial concession for Justice Kavanaugh's majority. The Court noted that "[p]ublication is 'essential to liability' in a suit for defamation."[46] Accordingly, the majority held that plaintiffs who never had their information published could not establish a close enough relationship to the traditional harm associated with defamation.[47] No dissemination meant no traditional liability, and thus no concrete injury.

Consider the level of generality required for this conclusion. Since the close relationship test is an "analog[y]" requirement,[48] a plaintiff must provide the Court with a traditionally recognized harm similar enough to the plaintiff's own harm. The level of generality used by the Court determines how close the comparison need be. The more specific the level of generality, the harder it will be to analogize between the traditional harm and your harm. The more general the level, the easier it will be to analogize.

Given that the Court relied on defamation, it would be helpful to look to the First Restatement of Torts—cited by both majority and dissent in *TransUnion*. It states that defamation traditionally

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44. *Id.* at 2208 (citing Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016)); *see id.* at 2222 (Thomas, J., dissenting). Justice Kavanaugh's analysis strictly focused on comparing the plaintiffs' harms to the harm associated with traditional defamation. Justice Thomas, while citing to defamation, was much more willing to describe the concreteness of plaintiffs' harm in terms disconnected from strict reference to defamation.

45. *Id.* at 2208–09 (majority opinion).

46. *See id.* at 2209–10 (citation omitted).

47. *See id.*

48. *See id.* at 2204 ("[I]dentif[y] a close historical or common-law analogue.").

consisted of "an [(1)] unprivileged [(2)] publication of [(3)] false and defamatory matter [(4)] of another" that includes (5) special harm or is actionable per se.[49] Justice Kavanaugh posited that for traditional defamation, "the basis of the action . . . was the loss of credit or fame, and not the insult." Thus the historically required element of "publication of words" is also required for statutory causes of action relying on defamation for the close relationship test.[50]

Looking at just that conclusion, one would reasonably think that the majority established the close relationship test at quite a specific level of generality: if an element historically required for recovery is missing, then the new statutory harm is insufficiently similar to the traditional harm. Whether or not it is correct as a constitutional matter, such an analysis would have the virtue of clear consistency.

Yet, in the very same opinion, the Court *rejected* the contention that the disseminated material must also be false, which was also a traditionally required element of defamation.[51] Explaining this conclusion, the Court stated:

> [W]e do not require an exact duplicate. The harm from being labeled a "potential terrorist" bears a close relationship to the harm from being labeled a "terrorist." In other words, the harm from a misleading statement of this kind bears a sufficiently close relationship to the harm from a false and defamatory statement.[52]

It is justified to feel a bit of whiplash looking back and forth between that passage and the conclusion regarding dissemination. If one were merely to read the falsity portion of the opinion, it would seem clear that the close relationship test is set at a fairly

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49. RESTATEMENT (FIRST) OF TORTS § 558 (Am. L. Inst. 1938); *see TransUnion*, 141 S. Ct. at 2222 (Thomas, J. dissenting) (citing RESTATEMENT (FIRST) OF TORTS § 569 (Am. L. Inst. 1938)).

50. *TransUnion*, 141 S. Ct. at 2209 (majority opinion) (quoting JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 474 (5th ed. 2019)).

51. *Id.* at 2208–09 (citing RESTATEMENT (FIRST) OF TORTS § 559 (Am. L. Inst. 1938)).

52. *Id.* at 2209.

high level of generality. If something is similar enough to the traditional harm, then it is good enough for a concrete injury. You need not establish every traditionally required element. After all, being misleading is not all that dissimilar from falsity, if viewed generally enough.

Consider what the result would have been if the high level of generality used for the falsity element were applied to the publication element. It is true that TransUnion had not actually published its report to the employers, banks, and car dealers of some class members. But TransUnion is an important and readily accessible credit reporting database. It had labeled each plaintiff in its database as a potential terrorist. Historically, having defamatory information placed even in an unknown publication satisfied the publication requirement.[53] Using a high level of generality, the harm from placement in an unknown publication seems similar to the harm from placement in a major credit reporting database, even if not an "exact duplicate."[54] If "potential terrorist" is similar enough to "terrorist," why is "readily accessible to over 65,000 businesses"[55] not similar enough to "published, but in an unknown magazine"?[56]

The generality inquiry is even further muddled by footnote six of the opinion, in which the Court waved away an alternative publication argument. The plaintiffs claimed that when the potential

53. *See* RESTATEMENT (FIRST) OF TORTS § 577 (Am. L. Inst. 1938); Ostrowe v. Lee, 256 N.Y. 36, 38 (1931) (Cardozo, C.J.) (explaining that, under New York law, even if a defamatory statement is only read by a single individual, like a "compositor in a printing house" or a "copyist" it has been "published"); *cf.* Hellar v. Bianco, 244 P.2d 757, 759 (Cal. Dist. Ct. App. 1952) (holding that a statement on the wall of a men's bathroom had been published for defamation purposes).

54. *See TransUnion*, 141 S.Ct. at 2209.

55. *See A Powerful, Global Presence*, TRANSUNION, https://www.transunion.com/global-presence (last visited Mar. 28, 2022) [https://perma.cc/YJ2B-YH66].

56. One way of conceptualizing the similarity: in both, the plaintiff merely awaits the danger of having someone important to them read the defamatory material. In traditional defamation, an action is triggered the moment one person reads the statement, no matter how unrelated to the plaintiff, *see supra* note 53; for the TransUnion plaintiffs, it is any of TransUnion's many customers ordering up a credit report.

terrorist alert was placed in TransUnion's internal files, the information was "published" internally.[57] The Court rejected the argument, stating "[m]any American courts did not traditionally recognize intra-company disclosures as actionable publications" and thus there was an insufficiently close relationship.[58] Accordingly, the Court acknowledged that *some* courts traditionally *did* recognize intra-company disclosures as enough.[59] This raises the crucial question of how many courts need to have accepted or rejected a traditional element.[60] Furthermore, it is important to remember that the close relationship test is ostensibly about whether the harm experienced is sufficiently similar to a traditional harm. The very fact that some courts did not require "public" disclosure chips away at the Court's conclusion that harm is not close enough if it does not involve an immediate loss of public credit and reputation.[61] To reach its conclusion, the Court necessarily employed an unexplained, specific level of generality.

Justice Thomas picked up on this theme in dissent, mostly eliding the element-by-element inquiry. In the first instance, Justice Thomas would set the level of generality at a very high level—although Justice Thomas did not phrase his analysis in precisely that

57. *TransUnion*, 141 S. Ct. at 2210 n.6. The Court held that the argument was waived, but reached the merits of it regardless.

58. *Id. But see Ostrowe*, 256 N.Y. at 38. The Court similarly rejected a risk of future harm argument because there was no evidence either of dissemination or of the likelihood of dissemination. *See TransUnion*, 141 S. Ct. at 2210–13.

59. *See, e.g.*, *Ostrowe*, 256 N.Y. at 38.

60. *Cf.* Michael Ramsey, *James Cleith Phillips & Jesse Egbert: A Corpus Linguistic Analysis of 'Foreign Tribunal'*, THE ORIGINALISM BLOG (Mar. 21, 2022, 6:13 AM), https://originalismblog.typepad.com/the-originalism-blog/2022/03/james-cleith-phillips-jesse-egbert-a-corpus-linguistic-analysis-of-foreign-tribunalmichael-ramsey.html [https://perma.cc/8E28-W7UR] (questioning, in the context of a textualist analysis, whether "seldom" contemporaneous use of the term "foreign tribunal" to mean a private arbitration body and usual use to refer to a government tribunal is simply "another way of saying that 'foreign tribunal' could include both a court and a [sic] [private] entity conducting arbitration" since even occasional use suggests linguistic coverage of the infrequently invoked concept).

61. *See TransUnion*, 141 S. Ct. at 2209.

way. Instead, Justice Thomas simply explained that the harm from defamation did not require a "loss of reputation" at all.[62] He appealed to "common sense" to understand that the plaintiffs' harms appear to be rather like traditionally recognized harms.[63] He noted that having the information sit in TransUnion's database entailed a degree of risk that alone is like the harm from defamation.[64] And, when Justice Thomas did move to focus on the element of publication, he noted that TransUnion had submitted the information to a third party data storage firm, which would historically suffice for publication.[65]

Furthermore, Justice Thomas explained that the class's other two claims (based on TransUnion's failure to provide an OFAC list alert or the statutorily required summary of rights) were similar enough to the traditional harm of "unlawful withholding of requested information."[66] The majority, on the other hand, held that without "'downstream consequences' from failing to receive the required information," there was no close relationship to a traditional harm.[67] Neither Justice Thomas, nor the majority, ever provided an element-by-element inquiry like the one used for the reasonable procedures question.

In sum, Justice Kavanaugh's majority gave little explanation for sometimes requiring deep specificity (publication required) and other times accepting a general fit (harm like that of false information). The Court also failed to explain the similarity required for specific elements within a traditional cause of action, as illustrated

62. *Id.* at 2222 (Thomas, J., dissenting) (quoting RESTATEMENT (FIRST) OF TORTS § 569 (Am. L. Inst. 1938)).

63. *Id.* at 2223–24.

64. *Id.* at 2222–23.

65. *Id.* (explaining that submitting a defamatory statement to telegraph companies or even stenographers would be enough for publication).

66. *Id.* at 2221.

67. *Id.* at 2213–14 (majority opinion).

by its rejection of the internal publication theory. Meanwhile, Justice Thomas consistently invoked a general level of analysis, but without detailing why a uniformly general, rather than specific, level was most appropriate. Under Justice Thomas's general fit standard, all of the plaintiffs would have had standing. Under Justice Kavanaugh's differing levels of generality, only a plaintiff whose information was disseminated had standing.

III. THE PROBLEM OF UNSYSTEMATIC LEVELS OF GENERALITY IN LEGAL REASONING AND ORIGINALIST ANALOGIES

The unexplained and unchallenged variations in levels of generality in the *TransUnion* opinion, and Justice Thomas's unexplained choice to keep his analysis uniformly general, is illustrative of the danger presented by unsystematic application of levels of generality. Yet, this problem is even more damaging when inserted into purportedly formalist methods of legal reasoning, like originalism. There, unexplained changes in level of generality can introduce relatively unseen, and even unconscious, discretion.

Of course, the idea that lawyers and judges need to grapple with levels of generality for analogies is not novel. The topic has been most thoroughly explored in the context of substantive due process.[68] There, legal academics have discussed the important role that levels of generality play for the scope of judicially defined

68. *See, e.g.*, Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990); Girardeau A. Spann, *Constitutionalization*, 49 ST. LOUIS U. L.J. 709 (2005); Thomas A. Bird, *Challenging the Levels of Generality Problem: How* Obergefell v. Hodges *Created a New Methodology for Defining Rights*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 579 (2016); *cf.* Alan K. Chen, *The Intractability of Qualified Immunity*, 93 NOTRE DAME L. REV. 1937, 1938 (2018) (discussing the conceptual challenge of identifying "the appropriate level of generality at which 'clearly established constitutional rights' are articulated"). Levels of abstraction in original intentions originalism were also discussed by Professor Ronald Dworkin and Judge Robert Bork in the early days of originalism's rise. *Compare* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (Macmillan, 1990), *with* Ronald Dworkin, *Bork's Jurisprudence*, 57 U. CHI. L. REV. 633, 660–67 (1990); *see also* Peter J. Smith, *Originalism and Level of Generality*, 51 GA. L. REV. 485 (2017).

rights. "For instance, did the Court in *Griswold v. Connecticut* recognize the narrow right to use contraception or the broader right to make a variety of procreative decisions?"[69] Such a distinction is relevant because, in the next case, a judge must determine whether *Griswold* reaches a state regulation that, perhaps, bans gene editing for fetuses. If *Griswold* is about contraception, the precedent is at most persuasive, but if *Griswold* is about procreative decisions, it may be binding.

While this generality problem was most meaningfully explored in the rights context, it necessarily arises *whenever* judges or lawyers are called upon to use analogical reasoning for precedent. This is, as Justice Scalia once said, "the technique—or the art, or the game—of 'distinguishing' earlier cases. It is an art or a game, rather than a science, because what constitutes the 'holding' of an earlier case is not well defined and can be adjusted to suit the occasion."[70] This discretion allows the clever judge to reach "the desirable result for the case at hand," by "distinguish[ing] precedents, or narrow[ing] them" to reach the desired result.[71] Alternatively, a judge can construe a precedent broadly so that she is purportedly "bound" by the prior precedent.

Yet, even though the problem has long since been identified in various contexts, there is surprisingly little rigor in judicial opinions on the question of *why* a particular level of generality is proper. In fact, despite receiving occasional attention, rules of generality are

69. Tribe & Dorf, *supra* note 68, at 1058 (footnote omitted).

70. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the U.S. Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 7 (Amy Gutmann ed., 1997).

71. *Id.* at 39. For example, in the very context of *TransUnion*, at least one prominent law professor has suggested taking an extremely specific view of the case's applicability to "narrow the *TransUnion* ruling" and avoid having it dramatically reshape standing law. *See* Cass Sunstein, *Injury In Fact, Transformed* (Mar. 12, 2022) (unpublished manuscript), at 18, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4055414.

not systematically applied. Justice Kavanagh can plausibly construe the element of publication specifically and the element of falsity more generally, only a few pages apart, without much or any explanation. Furthermore, Justice Thomas can plausibly construe the entire enterprise at a high level of generality. And both Justices talk past each other because neither is prepared with a clear reason for why *their* level of generality is *systematically* correct.[72]

Perhaps, to a reader of this piece, one or the other Justice's argument intuitively seems right. "Of course defamation hinged on disclosure to the entire public, where is the harm otherwise?" Alternatively, "of course calling someone a potential terrorist in a major credit reporting database is sufficiently like historic defamation." But without systematic rules, levels of generality are merely governed by intuitions regarding why one thing "seems" like or dislike the other. Yet, this appeal to raw intuition is exactly the type of discretion that advocates of originalism and textualism reject in other contexts.

This Comment will conclude by mentioning two common ways originalists use analogies for which levels of generality can cause issues. These practices are associated with an originalism that at least considers historic practices and expectations as evidence of original meaning.[73] If one looks to "using framing-era understandings and practices as a means of fleshing out the meaning of constitutional text," then that person would likely use the following two types of originalist analogies.[74]

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72. *Cf. Stanford Encyclopedia of Philosophy*, JOHN RAWLS: 2.4 REFLECTIVE EQUILIBRIUM, https://plato.stanford.edu/entries/rawls/ [https://perma.cc/P8UR-YTVL]. Consider philosopher John Rawls' theory that a proper philosophical theory would seek to encompass as much of one's varied philosophical beliefs as possible. Similarly, to argue that one's level of generality is systematically correct, one could try to encompass as many intuitive conclusions about the "right" answers as possible for different comparative questions.

73. Lawrence Rosenthal, *Originalism in Practice*, 87 IND. L.J. 1183, 1190 (2012).

74. *Id.* at 1191; *see* District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008) (looking to "longstanding" practice and analysis to determine that felons, the mentally ill, and

The first set of originalist analogies involves relying on old opinions to help better understand the meaning of various constitutional provisions. This use of cases implicates the same problems inherent in any precedent-based constitutional interpretation.[75] The difference here, however, is that originalist analysis will often look to state and federal cases, not for precedent, but rather to understand the meaning of a constitutional provision.

In *District of Columbia v. Heller*,[76] for example, the Court relied on state cases written after the ratification of the Constitution to understand whether the Second Amendment protects an individual right to own and carry firearms for self-defense.[77] The Court's analysis demonstrates the dangers of unsystematic application of levels of generality.

In trying to understand the Second Amendment, the majority ended up taking a consistently general view of cases emphasizing an expansive right—embracing not just specific facts and stated conclusions, but also general principles (even when the case relied

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"sensitive places" regulations are unprotected by the Second Amendment). Even amongst originalists, there is significant disagreement regarding whether and how to use original practices. *See, e.g.*, Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 580–82 (2006); Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569 (1998). Generally, even those who use original practices only purport to use them to uncover semantic meaning. *See* Antonin Scalia, *Response*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, at 123 (Amy Gutmann ed., 1997). The theoretical contours of the debate continue to evolve, however. For example, in recent years, Professors Will Baude and Stephen Sachs have argued that originalists must uncover and apply Founding-era interpretive legal norms. *See* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079 (2017).

Whatever the exact details, if one's originalist methodology relies on historical evidence, it will invariably implicate the levels of generality problem discussed in this Comment.

75. *See supra* note 68.

76. 554 U.S. 570 (2008).

77. *Id.* at 610–15.

on a state, rather than the federal, constitution).[78] By contrast, the Court often took a specific view of cases that would have indicated a narrower reading of the Second Amendment, by cabining them to specific facts, taking a strict view of stated conclusions, and even looking to other cases from the same court that were decided differently.[79] Furthermore, cases whose general principles and statements were relied on earlier in the opinion were viewed more narrowly when the Court came to the question of whether some "presumptively lawful regulatory measures" would be available.[80] For his part, Justice Breyer's dissent read cases indicating a lesser right to bear arms as having principles of general application, while reading disfavored cases to have narrow applicability (for example, by waving them off as cases involving state constitutions).[81]

To combat this problem, originalists must be careful to ensure that they are not reading certain cases more generally than other cases, at least not without good reason. Furthermore, they should be wary of the unique problems associated with using these kinds of cases. Even beyond the usual problems with levels of generality in constitutional reasoning,[82] these cases are often centuries old. Accordingly, facts may be so outdated that the context-differences alone offer a facially compelling rationale to distinguish disfavored cases—but one must be careful to apply that reasoning categorically, not just to cases that are counter to one's priors. And, given that the cases are not binding, it is easy to skip over opinions unhelpful to the position that one is most sympathetic to. Thus, one must take care to avoid the ease of generalizing favorable cases and

78. *See, e.g.*, *id.* at 612–13 (relying on a Georgia Supreme Court case that struck down an open carry ban on pistols) (citing Nunn v. State, 1 Ga. 243, 251 (1846)).

79. *See, e.g.*, *id.* at 613 (distinguishing a Tennessee Supreme Court case that upheld a concealed carry ban) (citing Aymette v. State, 21 Tenn. 154 (1840)).

80. *See id.* at 626–27 & n.26. *Compare id.* (listing lawful curtailments of the right to bear arms), *with id.* at 612–13 (relying on the statement that "the right of the whole people . . . to keep and bear *arms* of every description . . . shall not be *infringed*, curtailed, or broken in upon, in the smallest degree") (quoting *Nunn*, 1 Ga. at 251).

81. *See, e.g.*, *id.* at 687–89 (Breyer, J., dissenting).

82. *See supra* note 68.

narrowing contrary ones when seeking to understand the scope of constitutional provisions.

The second type of originalist analogy involves the use of historical state and federal practices. Justice Scalia in *Heller*, for example, invoked "longstanding prohibitions" when defending the constitutionality of firearm prohibitions for the mentally ill and felons, as well as "sensitive places" regulations.[83] More broadly, originalists may find themselves turning to traditional practices to make sense of indeterminate constitutional text and supplement semantic analyses.

To provide an easy example, consider the widespread regulation of gunpowder at the time of the Founding.[84] These laws restricted everything from how one could buy gunpowder to the manner by which one could store their gunpowder, to how gunpowder could be transported, and even to whether gunpowder could be loaded into a firearm in a public place.[85] If original practices are relevant, then one must consider how applicable gunpowder regulation is to other forms of firearm regulation. The *Heller* majority, concerned with the direct regulation of firearms, construed the importance of gunpowder regulations narrowly, describing them merely as "fire-safety laws" with little relevance at all.[86] Meanwhile, Justice Breyer's *Heller* dissent construed the laws at a higher level of generality, considering them to be important evidence that the ability to bear arms was unquestionably burdened by public safety concerns around the time of the Founding.[87] Once again, the two opinions exhibit differing levels of generality with little explanation as to why.

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83. *Heller*, 554 U.S. at 626–27 (majority opinion).

84. Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 510–11 (2004).

85. *Id.* at 510–12 (collecting state laws).

86. *Heller*, 554 U.S. at 632.

87. *Id.* at 684–87 (Breyer, J., dissenting).

To put a finer point on it, consider a hypothetical law regulating ammunition storage and sale. What would be the import of historic gunpowder regulations on such a case? In the 1700s and 1800s, one of the "things" that made a gun work was gunpowder. Today, guns generally use "nitrocellulose," a kind of "smokeless gun powder" that is part of the average bullet.[88] An originalist who puts value in traditional practices might look at gunpowder regulations and determine whether they provide insight into ammunition regulations.

If construed at a high level of generality, old gunpowder laws and new bullet regulations are similar. If the relevant comparison is what propelled the bullet then and now, then modern ammunition essentially contains replacement gunpowder. If that level of generality is accepted, prior regulation of gunpowder could help to define the contours of the Second Amendment in favor of ammunition regulation. On the other hand, a more specific view would say that gunpowder was special, because, when concentrated, gunpowder would raise significant fire-safety concerns.[89] Therefore, regulation of gunpowder has little bearing on the question of ammunition (so long as the ammunition does not create the same extreme risk of explosion and fire).

The purpose of the gunpowder regulations could also be subject to these levels of generality. Are the regulations generalizable as "public safety" measures,[90] defining traditional limitations on the Second Amendment for compelling public safety needs? Or, alternatively, are these regulations once again narrowed to addressing specific existential concerns about fire-safety, thus having little import for regulation of modern ammunition?

These questions are important because they should be answered consistently, across originalist inquiries. "[W]hat's good for

88. Mike V., *Do Guns Still Use Gunpowder?*, EVERYDAY CONCEALED CARRY, https://everydaycarryconcealed.com/do-guns-still-use-gunpowder/ [https://perma.cc/D7C7-36G2] (last visited Mar. 29, 2022).

89. *See Heller*, 554 U.S. at 632 (majority opinion).

90. Cornell & DeDino, *supra* note 84, at 512.

the goose is good for the gander."[91] To the extent that originalism aspires to be a formalist, less discretion-laden response to alternative constitutional interpretative methods, its practitioners must be careful to identify and remedy practices that inject new discretion. This is particularly true for issues like levels of generality, which might not be readily apparent without thoughtful reflection.

CONCLUSION

The opinions in *TransUnion* demonstrate the problems inherent in unsystematic application of levels of generality in legal analogies. Due to the importance of analogies in the law, issues associated with levels of generality are definitionally present throughout legal work. However, given originalism's role as a formalist and discretion-limiting method of constitutional interpretation, it is particularly important that practices enabling discretion are identified and then limited, standardized, or at least made transparent. By identifying and thoughtfully approaching the selection of levels of generality, judges, practitioners, and scholars can better and more faithfully apply originalism.

91. E.E.O.C. v. Waffle House, 534 U.S. 279, 314 (2002) (Thomas, J., dissenting).