

ERIE AND CONTEMPORARY FEDERAL COURTS DOCTRINE

JACK GOLDSMITH*

Justice Alito has written many important federal courts opinions but (like most Justices) does not have a distinctive federal courts jurisprudence. He has written most extensively in this field on standing, but his opinions on that topic do not yield a particular theory of standing or even a clear pattern of decision making.¹ His dissent in *Ortiz* is a commanding statement of the differences between judicial and executive power in the context of the Court's appellate jurisdiction—but it garnered only one other vote.² Justice Alito has, along with Justice Thomas, persistently challenged the Court's practice of exercising discretion to decline to decide cases within its exclusive original jurisdiction under 28 U.S.C. § 1251(a).³

* Learned Hand Professor of Law, Harvard Law School. Thanks to Dominic Solari for outstanding research assistance, and to Richard Fallon, Larry Lessig, Cass Sunstein, and Adrian Vermeule for comments.

1. Justice Alito's standing opinions for the Court include *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013); and *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587 (2007). His concurring and dissenting opinions on standing include *Texas v. California*, 141 S. Ct. 1469 (2021) (Alito, J., dissenting); *June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103 (2020) (Alito, J., dissenting); *United States v. Windsor*, 570 U.S. 744 (2013) (Alito, J., dissenting); *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019) (Alito, J., dissenting); *Collins v. Yellen*, 141 S. Ct. 1761 (2021); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010); *Horne v. Flores*, 557 U.S. 433 (2009); *Davis v. FEC*, 554 U.S. 724 (2008).

2. *Ortiz v. United States*, 138 S. Ct. 2165 (2018) (Alito, J., dissenting).

3. See *Texas v. California*, 141 S. Ct. 1469 (2021) (Alito, J., dissenting, joined by Justice Thomas); *Texas v. Pennsylvania*, 141 S. Ct. 1230 (2020) (statement by Alito, J., dissenting, joined by Justice Thomas); *Arizona v. California*, 140 S. Ct. 684 (2020) (Thomas, J., dissenting, joined by Justice Alito); *Nebraska v. Colorado*, 577 U.S. 1211 (2016) (Thomas, J., dissenting, joined by Justice Alito).

And he has taken a notable interest in the Alien Tort Statute (ATS), especially in questioning *Sosa*'s embrace of a federal common law power to recognize novel causes of action under the ATS.⁴

Justice Alito has also highlighted the ways that a federal courts chestnut, *Erie Railroad Co. v. Tompkins*, alters how other federal courts doctrines operate compared to an eighteenth and nineteenth century baseline.⁵ In this brief essay I will summarize Justice Alito's takes on *Erie*'s significance; ask how *Erie* fits with the Court's historically inflected constitutional jurisprudence; and then raise questions about how principled the Court has been, and how principled it can be, in its treatment of the common law post-*Erie* in other federal courts contexts.

I.

Simplifying quite a bit, *Erie* held that federal courts sitting in diversity jurisdiction lack the authority to develop their own judge-made common law tort rules and thus must apply state common law tort rules. In part, to continue to simplify, this was because the Court declared that the "general common law" that it had applied for 150 years—a law that ostensibly was neither federal law nor state law—no longer existed.⁶ With general common law no longer an option, the Court determined that it lacked authority to recognize, develop, or apply any common law tort rule other than

4. See *Nestle USA, Inc. v. Doe*, 141 S. Ct. 1931, 1950 (2021) (Alito, J., dissenting) (discussing *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)); *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018) (Alito, J., concurring in part and concurring in the judgment); *Kiobel v. Royal Dutch Petro. Co.*, 569 U.S. 108 (2013) (Alito, J., concurring). Justice Alito has written many other notable federal courts opinions, including *Hernandez v. Mesa*, 140 S. Ct. 735 (2020) (declining to extend *Bivens* to cross-border shootings); *Kansas v. Colorado*, 556 U.S. 98 (2009) (avoiding ruling on Congress's authority to regulate remedies in Supreme Court original jurisdiction cases but electing to follow Congress's established district court procedures); and *FAA v. Cooper*, 566 U.S. 284 (2012) (inclusion of "actual damages" in Federal Privacy Act did not waive sovereign immunity for suits alleging "mental and emotional distress" because the term was ambiguous and so presumption of immunity prevails).

5. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

6. *Id.* at 78 ("There is no federal general common law.").

the one that prevailed in the state.⁷ But following *Erie*, the Court made clear that federal courts possessed the power to develop a “new” and genuinely *federal* common law if that law was in some sense authorized by the Constitution or a federal statute.⁸

It is hard to exaggerate what a radical decision *Erie* was at the time, or how extensively it upended what we today call the field of federal courts. Indeed, eighty-five years after *Erie* was decided, we are very much still working out its implications, as some of Justice Alito’s opinions make clear.

Consider Justice Alito’s opinion in *Jesner*, a case that held that foreign corporations cannot be defendants in ATS suits.⁹ Justice Alito concurred to explain why he believed that the ATS’s original purpose—to “avoid diplomatic friction”—informed the separation of powers that supported the majority’s rule.¹⁰ Along the way he explained why *Erie* posed a “problem” for how the ATS was originally designed to operate:

According to *Sosa*, when the First Congress enacted the ATS in 1789, it assumed that the statute would “have practical effect the moment it became law” because the general common law “would provide a cause of action for [a] modest number of international law violations.” That assumption, however, depended on the continued existence of the general common law. And in 1938—a century and a half after Congress enacted the ATS—this Court rejected the “fallacy” underlying the general common law, declaring definitively that “[t]here is no federal general common law.” *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 79 (1938). That left

7. This is, I think, the meaning of the Court’s statements: “Thus the doctrine of *Swift v. Tyson* is, as Mr. Justice Holmes said, ‘an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.’ In disapproving that doctrine we . . . merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States.” *Id.* at 79–80.

8. See Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).

9. See *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1408–12 (2018) (Alito, J., concurring in part and concurring in the judgement).

10. *Id.* at 1410.

the ATS in an awkward spot: Congress had not created any causes of action for the statute on the assumption that litigants would use those provided by the general common law, but now the general common law was no more.¹¹

The Court in *Sosa* resolved this problem by trying to approximate the 1789 operation of the ATS through the judicial development of narrow post-*Erie* federal common law causes of action that aimed to mirror the law of nations that courts applied as general common law in 1789.¹² In *Jesner* and again in *Nestle*, Justice Alito expressed sympathy for the view that *Sosa* was wrong on the ground that, after *Erie*, Congress, rather than the Court, should provide the cause of action in ATS cases.¹³

Justice Alito made a similar point in his majority opinion in *Hernandez*, which denied a *Bivens* claim based on a cross-border shooting.

Analogizing *Bivens* to the work of a common-law court, petitioners and some of their *amici* make much of the fact that common-law claims against federal officers for intentional torts were once available. But *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), held that “[t]here is no federal general common law,” and therefore federal courts today cannot fashion new claims in the way that they could before 1938. See [*Alexander v. Sandoval*, 532 U.S. 275, 287 (2001)] (“Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals”).

11. *Id.* at 1409 (some internal citations omitted).

12. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729–733 (2004).

13. This is the position argued by Justice Scalia in dissent in *Sosa*, by Justice Gorsuch in concurrence in *Jesner*, and is the direction the Court has been moving since *Sosa*. Justice Alito stated in *Jesner* that “[f]or the reasons articulated by Justice Scalia in *Sosa* and by Justice Gorsuch today, I am not certain that *Sosa* was correctly decided.” *Jesner*, 138 S. Ct. at 1409. See also *Nestle USA, Inc. v. Doe*, 141 S. Ct. 1931, 1951 (2021) (Alito, J., dissenting) (noting that “Part III of Justice Thomas’s opinion and Part II of Justice Gorsuch’s opinion make strong arguments that federal courts should never recognize new claims under the ATS” and should instead defer to Congress, but declining to reach the issue because it was not raised).

With the demise of federal general common law, a federal court's authority to recognize a damages remedy must rest at bottom on a statute enacted by Congress, *see id.* at 286 ("private rights of action to enforce federal law must be created by Congress"), and no statute expressly creates a *Bivens* remedy. Justice Harlan's *Bivens* concurrence argued that this power is inherent in the grant of federal question jurisdiction, *see* 403 U.S. at 396 (majority opinion); *id.* at 405 (opinion of Harlan, J.), but our later cases have demanded a clearer manifestation of congressional intent, *see* [Ziglar v. Abbasi, 137 S. Ct. 1843, 1856–58 (2017)].¹⁴

For Justice Alito a related issue arose in *Maine Community Health Options v. United States*.¹⁵ There the Court interpreted a provision in the Affordable Care Act (ACA) to allow insurance companies to bring a Tucker Act suit for damages to recover their ACA-related losses. Justice Alito argued in dissent that this holding was in tension with the Court's modern requirement of a plain statement to recognize a cause of action. Along the way he stated:

One might argue that the assumptions underlying the enactment of the Tucker Act justify our exercising more leeway in inferring rights of action that may be asserted under that Act. When the Tucker Act was enacted in 1887, Congress undoubtedly assumed that the federal courts would "[r]ais[e] up causes of action," *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001), in the manner of a common-law court. At that time, federal courts often applied general common law. But since *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), the federal courts have lacked this power. Yet the "money- mandating" test that the Court applies today, bears a disquieting resemblance to the sort of test that a common-law court might use in deciding whether to create a new cause of action. To be sure, *some* of the claims asserted under the Tucker Act, most notably contract claims, are governed by the new federal common law that applies in limited areas involving "uniquely federal interests." *Boyle v. United Technologies*

14. *Hernandez v. Mesa*, 140 S. Ct. 735, 742 (2020).

15. 140 S. Ct. 1308, 1331–35 (2020) (Alito, J., dissenting).

Corp., 487 U.S. 500, 504 (1988). And the recognition of an implied right to recover on such claims is thus easy to reconcile with the post-*Erie* regime. There may also be some sharply defined categories of claims that may be properly asserted simply as a matter of precedent. But the exercise of common-law power in cases like the ones now before us is a different matter.¹⁶

II.

These cases, and many like them, raise questions about the modern conservative Court's posture toward *Erie* and separation of powers.

Erie is among the most dramatically anti-originalist opinions in Supreme Court history.¹⁷ The Framers assumed, and the Supreme Court for a very long time believed (and held), that federal courts can and should apply what came to be known as "general common law" (or "general law") in certain suits in federal court in the absence of authorization from the Constitution or a federal statute. What Holmes described in 1928 as a "fallacy" was the firm belief and consistent early practice of the Court. Federal courts were obliged to apply a non-state, non-federal "transcendental body of law outside of any particular State," the content of which federal courts could determine in "their independent judgment" regardless of the non-statutory law rule that prevailed in state courts.¹⁸ There is some question about how broad this general

16. *Id.* (some internal citations and cross-references omitted).

17. It is also among the most radical and unexpected. The Court had been applying the 20th century version of the *Swift* doctrine right up to the term that *Erie* was decided, and none of the parties asked the Court to reconsider the general common law regime. Yet the Court overruled *Swift* and, in the process, as Justice Jackson once noted, in effect "declared that thousands of decisions of federal courts, which are no longer subject to correction, were wrongly decided." ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 273 (1941).

18. *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 532–36 (1928) (Holmes, J., dissenting).

common law was at the founding.¹⁹ And there is a question about how far into the nineteenth and twentieth centuries this non-positivistic conception of law prevailed.²⁰ But there is no doubt that the conception of law that *Erie* said did not “exist” did in fact exist at the founding and for a long time thereafter. And the eighteenth and nineteenth century versions of practically every federal courts doctrine assumed its validity.

Explanations abound for why the Court did what it did in *Erie*. An important one is that the background conception of the nature of the common law, and of the need for positive sources of law, had changed dramatically since the founding. Without getting into disputes here about the scope of these changes, it is clear that common law at the founding “was perceived as more natural than it is for us today – natural in the sense of being derived from nature and thus being something all people could reason about and, if they reasoned carefully enough, come to view in the same way.”²¹ It is also clear that courts at the founding applied many pockets of law, including general common law, without consideration of, or even the need for, some sovereign authorization to do so.²² By the time of *Erie*, these understandings about the nature of the common law had been rejected and replaced by the idea that “law in the sense in which courts speak of it today does not exist without some definite authority behind it.”²³ *Erie* in effect “overruled a particular way of looking at law” and replaced it with another.²⁴ The federalism and

19. At its core was the law merchant, the law maritime, and the law of nations. These categories later expanded dramatically. See generally TONY ALLAN FREYER, HARMONY & DISSONANCE: THE SWIFT AND ERIE CASES IN AMERICAN FEDERALISM (1981).

20. See Jack Goldsmith & Steven Walt, *Erie and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673, 682–83 (1998).

21. LAWRENCE LESSIG, FIDELITY & CONSTRAINT: HOW THE SUPREME COURT HAS READ THE AMERICAN CONSTITUTION 223 (2019).

22. William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1515, 1517–21 (1984).

23. *Black & White Taxicab & Transfer Co.*, 276 U.S. at 533 (Holmes, J., dissenting).

24. *Guar. Tr. Co. v. York*, 326 U.S. 99, 101 (1945).

separation of powers alterations in *Erie*, the implications of which we are still trying to figure out, followed from these changes.²⁵

Erie is a challenge to originalism and related historically minded constitutional theories of interpretation because so many constitutional and subconstitutional law doctrines at the founding rested on a conception of general law (and non-positivistic sources of law more generally) that the Court rejected in *Erie*, and because this rejection led the Court to craft many doctrines—the most obvious of which is the post-*Erie* federal common law—that would have been unrecognizable at the founding and that are unjustifiable today on originalist terms. The conservative Court is now in the process of rethinking and pushing back on a slew of innovative New Deal structural constitutional law doctrines, but not a single Justice has suggested that *Erie* should be rethought. Indeed, as Justice Alito’s comments above make plain, the Court, including the conservatives on the Court, has accepted the radical non-originalist change in *Erie* and are still working out the non-originalist implications for many federal courts doctrines.²⁶

III.

The question is whether the Court is working out these non-originalist implications in a principled or coherent way.

The Court’s main move after *Erie* has been to reconceptualize pre-*Erie* general common law to require application either of state law or federal common law, depending on the circumstances. *Erie* itself

25. For a full account of the conceptual and material changes that led to the Court’s massive change of direction in *Erie*, see LESSIG, *supra* note 21, and previous writings.

26. Many originalist scholars, by contrast, have grasped *Erie*’s challenge to originalism and questioned the validity of the decision and its rejection of general common law. See, e.g., Anthony J. Bellia Jr. & Bradford R. Clark, *General Law in Federal Court*, 54 WM. & MARY L. REV. 655 (2013); Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503 (2006); Caleb Nelson, *A Critical Guide to Erie Railroad Co. v. Tompkins*, 54 WM. & MARY L. REV. 921 (2013); Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527 (2019); Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813 (2012). They have not, in my view, adequately grappled with how thoroughly *Erie* corrupts originalist and related historical approaches to federal courts doctrines.

ruled that courts in private diversity tort cases must apply state law, including state law as articulated by state courts, in place of general common law. In other contexts, the Court in the decades after *Erie* took a generous attitude toward its new federal common law powers.²⁷ It also, relatedly, took a generous attitude toward the Court's power to imply federal causes of action.²⁸

In more recent decades, however, the Court has come to view its post-*Erie* federal common law powers as a threat to Congress's lawmaking prerogatives. It has significantly narrowed the circumstances in which it will recognize or craft new federal common law rules.²⁹ And it has insisted that only Congress, and not the Court, can supply a cause of action in statutory and many constitutional contexts.³⁰

In short, the Court in these and other contexts has argued, especially in recent decades, that the elimination of general common law in *Erie* means that it should defer to Congress in the creation, or not, of new federal law and new federal causes of action. The common pattern in these newer cases is that the Court narrows access to federal court.

But in other federal jurisdiction contexts, the Court has taken something close to the opposite approach, albeit also in the service of narrowing access to federal court. The law of standing is a remarkable example.

The Court has recently come to view the common law as the touchstone for standing. Justice Thomas—who more than anyone else on the Court is responsible for this development—explained in

27. See, e.g., *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943).

28. See, e.g., *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971); *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964).

29. See, e.g., *Rodriguez v. FDIC*, 140 S. Ct. 713 (2020); *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994).

30. See, e.g., *Hernandez v. Mesa*, 140 S. Ct. 735 (2020); *Alexander v. Sandoval*, 532 U.S. 275 (2001). For an early insightful account of the Court's use of *Erie* to justify these constrictions of judge-made causes of action, see George D. Brown, *Of Activism and Erie: The Implication Doctrine's Implications for the Nature and Role of the Federal Courts*, 69 IOWA L. REV. 617 (1984).

his *Spokeo* concurrence that “[t]he judicial power of common law courts was historically limited depending on the nature of the plaintiff’s suit.”³¹ This is right as far as it goes. Just as common law causes of action required various types of proof, they also sometimes were available only for certain types of plaintiffs. As Justice Thomas has said, “common-law courts possessed broad power to adjudicate suits involving the alleged violation of private rights, even when plaintiffs alleged only the violation of those rights and nothing more,” but they “required a further showing of injury for violations of ‘public rights’ owed to the whole community (such as passage on public highways).”³² Federal courts applied these common law causes of actions guided by general common law or state law.

One might have thought that after *Erie*, this cause-of-action-centered structure governing who can sue in federal court would have been replaced by whatever types of cause of action survived *Erie*. This should have meant that private causes of action such as in *Erie* would be governed by state law (as opposed to general common law or federal common law). It also should have meant that Congress could supplement or replace common law causes of action (including matters previously governed by general common law) as it saw fit, as long as it acted within its Article I powers. And indeed, this is how things worked until recently. Before and for many decades after *Erie*, Congress often supplemented the common law to create new causes of action. And what came to be called standing was satisfied when a plaintiff met the requirements of the congressional cause of action.³³ There was nothing like an

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

32. *Id.* at 344.

33. *See, e.g., FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972); *Warth v. Seldin*, 422 U.S. 490 (1975); *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). *See also TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2217 (2021) (Thomas, J., dissenting) (“The First Congress enacted a law defining copyrights and gave copyright holders the right to sue infringing persons in order to recover statutory damages, even if the holder ‘could not show monetary loss.’”).

Article III standing limitation on Congress's ability to create new causes of action.³⁴

But the Court has gone in a quite different direction in recent years. In the 1970s it developed an "injury-in-fact" test for standing. The Court in the 1990s began to question whether and when violation of a congressional right could constitute an injury-in-fact. A seminal case was *Lujan*, which invalidated a global citizen-suit provision.³⁵ Then in 2016, the Court in *Spokeo*, through Justice Alito, identified two factors that were "instructive" in answering whether violation of a congressional right could constitute an injury-in-fact. The first factor was "whether [the 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."³⁶ The second factor was the "judgment" of Congress, which the Court explained was "also

34. See Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988). Caleb Nelson and Ann Woolhandler have shown that some limitations on common law causes of action in the nineteenth century against federal and state governmental officials sometimes had a constitutional dimension. Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689 (2004). But they rest their tentative historical case for Article III limits on Congress's ability to recognize interests and create causes of action unknown at common law primarily on *Muskrat v. United States*, 219 U.S. 346 (1911). *Muskrat* involved a statute that authorized four individuals to sue the United States "to determine the [constitutional] validity" of an earlier statute that had altered property rights on designated Native American land. The Court ruled that the authorized suit sought an impermissible advisory opinion because the Court's judgment would have been "no more than an expression of opinion upon the validity of the acts in question" and because the United States as designated defendant had "no interest adverse to the claimants." *Id.* at 361–62. Even taking *Muskrat* for all it is worth for modern standing doctrine, which isn't much, it provides no conceivable basis for the Court's broad new Article III limitation on new congressional causes of action in the private rights context. See discussion of *TransUnion*, *infra* note 42. Justice Thomas, who has relied on the work of Nelson and Woolhandler in developing his theory of standing, see *Spokeo*, 578 U.S. at 344 (Thomas, J., concurring), has recognized this latter point. See *TransUnion*, 141 S. Ct. at 2214 (Thomas, J., dissenting).

35. *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992). See also *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009); *Raines v. Byrd*, 521 U.S. 811 (1997).

36. *Spokeo*, 578 U.S. at 341 (citing *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 775–77 (2000)) (emphasis added).

instructive and important.”³⁷ The Court did not make clear why history and congressional action mattered, how the two factors related to one another, or which was more important.³⁸

From *Lujan* through *Spokeo*, the Court followed a meandering path on statutory standing and failed to make clear when violation of a federal statutory right counted as an injury-in-fact.³⁹ But in 2021, the Court in a decisive new majority made the common law the dispositive touchstone for congressional standing under Article III. In *TransUnion* (which Justice Alito joined), the Court ruled that a statutory right’s “close relationship” to traditional common law suits was not just relevant (as in *Spokeo*) but “central” and indeed dispositive of whether plaintiff alleged a concrete injury-in-fact.⁴⁰ And it reduced Congress’s conferral of a cause of action from “relevant” (as in *Spokeo*) to something that warranted “due respect” but that in the end was deemed irrelevant.⁴¹ On these premises, the Court held that Article III invalidated Congress’s creation of various personal rights to the proper treatment of private data because the plaintiffs lacked any “historical or common-law analogue for their asserted injury.”⁴²

Justice Thomas explained in dissent why the Court, in the name of nineteenth century practice, was unfaithful to that practice. The

37. *Id.*

38. Many viewed *Spokeo* as a compromise decision to avoid a 4-4 split in light of Justice Scalia’s death that Term.

39. See William Baude, *Standing in the Shadow of Congress*, 2016 SUP. CT. REV. 197 (2016).

40. *TransUnion*, 141 S. Ct. at 2200.

41. *Id.* at 2205.

42. *Id.* at 2204. The Court ruled specifically that Congress cannot give private parties a right to truthful information in the files of credit reporting firms, absent publication to third-parties, because the alleged harms (being identified within the firm as a possible terrorist, and not receiving statutorily guaranteed notice protections), were not ones “with a close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts.” *Id.* at 2213. For accounts of why the “common law analogue” limitation in *TransUnion* has dramatic implications for the law of standing and for Congress’s ability to create new rights more generally, see Cass Sunstein, *Injury In Fact, Transformed*, 2021 SUP. CT. REV. 349 (2022); Erwin Chemerinsky, *What’s Standing After TransUnion LLC v. Ramirez*, 96 N.Y.U. L. REV. 269 (2021).

common law defined rights to sue, but the common law was not the only institution that defined rights to sue.⁴³ “Congress and other legislatures” also had the power “to define legal rights.”⁴⁴ Courts “for centuries held that injury in law to a private right” —including ones created by Congress—“was enough to create a case or controversy.”⁴⁵ In a private lawsuit like *TransUnion*, that should have been the end of the matter, Justice Thomas correctly concluded. This conclusion should have been especially obvious because the Court had so often emphasized, by reference to *Erie*, that Congress was supreme, vis-à-vis federal courts, in creating new causes of action.

IV.

TransUnion does not directly implicate *Erie* or *Erie* problems. However, a slew of other federal courts doctrines that rely on the common law to inform the scope of “the Judicial power” or “Cases” and “Controversies” in Article III—including the scope of the federal injunctive power, state sovereign immunity, and federal officer suits—do directly implicate *Erie* questions. Together they demonstrate that the Court’s turn toward history and the common law to inform the contemporary meaning of Article III cannot work without consideration of the non-originalist impact of the non-originalist decision in *Erie*—a requirement that poses a serious challenge to the originalist project across many federal courts doctrines.

Consider the fate of *Ex parte Young*.⁴⁶ The Court and the academy are remarkably confused about the legal basis for and proper scope of the vital injunctive power recognized in that case.⁴⁷ Efforts to

43. He might also have added that the common law that the Court made the touchstone of standing was not stable in its definition of legal rights.

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

45. *Id.*

46. 209 U.S. 123 (1908).

47. See *Green Valley Special Util. Dist. v. City of Schertz*, 969 F. 3d 460, 494–502 (5th Cir. 2020) (Oldham, J., concurring).

clarify the doctrine are being fought largely on the ground of historical practice. To simplify a great deal: on one prominent view, *Ex parte Young* was grounded in the nineteenth century equitable power to issue anti-suit injunctions.⁴⁸ On another prominent view, *Ex parte Young* was grounded in the common law tradition of administrative control through public actions.⁴⁹ (There are other views.)

Whatever the right answer to this debate is, assuming there is a coherent one, that answer cannot inform the proper post-*Erie* exercise of *Ex parte Young* until one figures out (a) the precise source of authority for courts to apply *Ex parte Young*-like injunctions prior to *Erie* (general common law, inherent equitable power under Article III, the Process Acts, no authority at all, something else?) and then (b) how that legal basis was altered by *Erie*. The answer to question (a) remains elusive even today. Question (b) does not have a principled answer in the post-*Erie* case law—the answer might plausibly be state law, federal common law, Article III, a federal statute, or something else.⁵⁰ And whatever that answer is to (b), it cannot be an answer that is true in any meaningful sense to the founding or nineteenth century practice.

In short, *Erie* stands as a major obstacle to the originalist project of reimagining *Ex parte Young* and many other federal courts doctrines. Which is why, I believe, so many originalist scholars seek to question the validity of *Erie* and to argue for the persistence of general common law.⁵¹ I think these arguments fail, but lack space here to explain why.

48. See John Harrison, *Ex Parte Young*, 60 STAN. L. REV. 989 (2008); see also *Whole Women's Health v. Jackson*, 142 S. Ct. 522, 540 (2021) (Thomas, J., concurring); *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 262 (2011) (Kennedy, J., concurring).

49. James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of Ex parte Young*, 72 STAN. L. REV. 1269 (2020).

50. Harrison's imaginative and influential reconstruction of *Ex parte Young* devotes a conclusory sentence and footnote to this issue. See Harrison, *supra* note 48, at 1014 & n. 103.

51. See *supra* note 26.

