

TRANSUNION, ARTICLE III, AND EXPANDING THE JUDICIAL ROLE*

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In 2021’s *TransUnion v. Ramirez*, the Supreme Court confirmed that Article III standing requires a claimant to show not only a legal injury, but also an injury-in-fact that is concrete and particularized. There are many critics of modern Article III jurisprudence, especially the requirement of a concrete and particularized factual injury in addition to the legal injury. These critics tend to focus on either the lack of textual support for the doctrine or the relationship between the judicial and executive branches, particularly with regard to the regulatory function of executive agencies. This article critiques Article III jurisprudence for the way it has altered the separation-of-powers framework as it pertains to the relationship between the judicial and legislative branches.

The Court’s seminal decision in *Lujan v. Defenders of Wildlife* emphasized the central importance of the separation of powers in explicating the famous test for Article III standing. This article first addresses *Lujan*’s explanation that the Article III injury-in-fact requirement is meant to protect the Constitution’s separation-of-powers framework, then briefly examines post-*Lujan* Article III jurisprudence, culminating in *TransUnion*. Next, the article addresses some of the major critiques—academic and judicial—of modern Article III jurisprudence. Finally, the article argues that *TransUnion* has skewed the Constitution’s separation of powers by expanding judicial authority beyond that contemplated by our constitutional framework, thus arrogating to courts a legislative role.

“It is emphatically the province and duty of the Judicial Department to say what the law is”¹—no more, but also no less. Pursuant to Article III’s

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¹ *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

standing requirements and the separation-of-powers structure they protect, if adjudicating a dispute would invade the exclusive province of the executive branch, then, to paraphrase Alison Krauss, courts say it best when they say nothing at all. But it is the role of the People’s representatives in Congress to identify their constituents’ rights and interests and proscribe behavior that violates those private rights. Where Congress has done so, litigants possess standing to see vindication of those private rights, and for courts to decline to adjudicate such cases usurps the legislative prerogative of determining whether a right vindicable in federal court should exist. Article III jurisprudence has over time transformed “Cases . . . [and] Controversies” from a jurisdictional limitation protecting the executive to a provision expanding the power of the judiciary to assume a legislative role—from *preventing* encroachment upon the executive branch to *requiring* encroachment upon the legislative branch. When it comes to the constitutional separation-of-powers framework, *TransUnion* is a battering ram, not a fortress. But even accepting *TransUnion*’s premise that to allow the vindication of private rights in the absence of a factual injury would encroach upon the executive branch’s authority, preventing federal courts from adjudicating such violations does not protect the executive; it merely consigns such alleged encroachment to state courts, which have plenary jurisdiction and are not constrained by Article III.

I. THE ADVENT AND TRANSFORMATION OF THE ARTICLE III “INJURY-IN-FACT” REQUIREMENT

A. Lujan’s *Protection of the Constitution’s Separation-of-Powers Framework*

Under modern Article III jurisprudence, to establish standing to sue, the claimant must show an injury-in-fact. The term did not exist prior to 1970, before which plaintiffs could sue only for *legal* injuries.² In *Association of Data Processing Service Organizations v. Camp*, data processors objected to a

² Modern standing doctrine more generally began taking shape earlier in the 20th century, in what Professor Cass Sunstein persuasively argues was an attempt to insulate “New Deal legislation from frequent judicial attack.” Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 179 (1992). Or, as Professor Robert Pushaw pithily puts it, the “Cases and Controversies” language was “coopted by Progressives led by Justice Brandeis and his collaborator Felix Frankfurter who sought to restrict federal court jurisdiction to prevent private parties (especially corporations) from attacking liberal regulatory legislation.” Robert J. Pushaw, “Originalist” Justices and the Myth that Article III “Cases” Always Require Adversarial Disputes (forthcoming), available at <https://ssrn.com/abstract=3934668>.

regulation opening the data processing market to banks.³ The claimants sustained no legal injury—no tort, breach of contract, statutory violation, etc.—but did sustain a factual injury: economic loss from increased competition. The Court held Article III expands jurisdiction beyond common law standing—where legal injuries were both sufficient and necessary—by conferring jurisdiction over factual injuries even absent a legal injury.⁴ As Judge Kevin Newsom explains in a recent concurring opinion, the introduction of the injury-in-fact concept “was an effort to expand, rather than contract” federal court jurisdiction.⁵ Far from holding that Article III requires an injury-in-fact *in addition to* a legal injury, the Court held that a factual injury confers Article III jurisdiction *even in the absence of* a legal injury. Nothing in the opinion suggested the Court was substituting factual injuries for legal injuries as the sine qua non of constitutional standing. Over the subsequent decade, however, the Court gradually transformed the injury-in-fact element from an expansion to a contraction of common law standing, but without much doctrinal explanation.⁶

Enter Justice Antonin Scalia’s towering *Lujan* opinion, which supplied the missing doctrinal explanation: Constitutional limits on standing, in addition to common law legal standing requirements, are necessary to protect the separation of powers established by the fundamental constitutional structure.⁷ Requiring a factual injury prevents Congress from usurping the executive’s authority to enforce generally applicable laws and giving it to the public. Congress can, per *Lujan*, “elevate to legally cognizable status those injuries that were already concrete but previously inadequate at law,”⁸ so long as they are personal to the plaintiff. For example, Congress can grant individuals the right to sue a company for dumping toxic waste on their own property, but

³ 397 U.S. 150 (1970).

⁴ *Id.* at 152.

⁵ *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1118 (11th Cir. 2021). Judge Newsom argues on originalist grounds that the constitutional limit on jurisdiction has been misidentified from the beginning, and that jurisdictional constraints do not sound in Article III at all. While Judge Newsom takes a different road, he arrives at a similar conclusion to that of this article: The legislative branch has the constitutional authority to create legally vindicable private rights.

⁶ *See, e.g., Warth v. Seldin*, 422 U.S. 490 (1975) (clarifying that the “injury-in-fact” concept introduced in *Data Processing* does not emanate from the APA statutory language, but is instead part of the constitutional floor but without explaining why Article III requires factual injuries).

⁷ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992).

⁸ *Sierra*, 996 F.3d at 1120 (citing *Lujan*, 504 U.S. at 578).

not for dumping toxic waste on someone else's property.⁹ Within our constitutional framework, responsibility for creating modern legal rights in a rapidly developing society and prescribing redress for violations of private rights lies with those who make laws, not those who interpret or enforce them.¹⁰ So *Lujan* establishes (or confirms, depending on how you look at it) the constitutional framework: Congress creates both private and public rights, the executive enforces public rights, and the courts adjudicate private rights.

But post-*Lujan* standing jurisprudence has distorted this framework by giving courts the ability to effectively veto legislation that creates private rights enforceable in federal courts. To see how this jurisprudence strays from *Lujan* requires a closer look at *Lujan* itself. Justice Scalia established the familiar test: Article III standing requires an injury-in-fact that is "(a) concrete and particularized and (b) actual or imminent," fairly traceable to the defendant, and redressable by a court.¹¹ How did Article III's mention of "Cases" and "Controversies" become a concrete and particularized and actual or imminent and redressable injury that is traceable to the defendant? The reason, according to Justice Scalia, is that the standing requirements emanate not from the actual text of Article III, but from the constitutional separation-of-powers framework as a whole—indeed, the Court only used the cases and controversies language "for want of a better vehicle."¹²

To see how post-*Lujan* jurisprudence has distorted that opinion's delineation of the separation of powers, the critical question is why "concrete and particularized" is a single subpart rather than two distinct subparts—why is it not (a) concrete, (b) particularized, and (c) actual or imminent? Later cases—including *TransUnion*—construe the injury-in-fact requirement as if it is a three-part subtest, not as a two-part subtest as it is written in *Lujan*. This is a distortion of *Lujan*.

⁹ *Lujan*, 504 U.S. at 578; see also *id.* at 561-62 (noting that "to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue").

¹⁰ See generally *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-28 (2014) (given the "separation-of-powers principles underlying" Article III, courts can no more "limit a cause of action that Congress has created" than they can "recognize a cause of action that Congress has denied"); *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973) (recognizing that Congress has constitutional authority to "creat[e] legal rights, the invasion of which creates standing, even though *no injury* would exist without the statute") (emphasis added); *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1553 (2016) (Thomas, J., concurring) (same).

¹¹ *Lujan*, 504 U.S. at 560.

¹² Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983).

Lujan involved legislation requiring federal agencies to consult with the Secretary of the Interior to ensure “any action” by the agency did not threaten endangered species.¹³ The Secretary issued a regulation requiring consultation only on actions within the United States or on the high seas, but not on actions taken overseas.¹⁴ Several organizations sued to enjoin the Secretary to require consultation on actions taken overseas.¹⁵ The plaintiffs argued they had a cognizable interest because they wanted to observe endangered species, and the Secretary’s more lenient interpretation of the legislation threatened that ability. Justice Scalia agreed that even the mere “desire to . . . observe an animal species . . . is undeniably a cognizable interest for purpose of standing,” but he explained that, to satisfy Article III, a litigant must have actually been prevented from observing the animal species.¹⁶ The claimants were attempting to establish standing based merely on the possibility of a future prevention. But while that would be a particularized and concrete harm were it to occur, that it *could* occur was conjectural.¹⁷ In other words, what prevented standing was not the “concrete and particularized” requirement, but rather the “actual or imminent” requirement, which prevents courts from issuing “advisory opinions.”¹⁸

Because the harm of being prevented from seeing a species was not actual or imminent, the claimants could only establish standing if the interest in faithful execution of laws by itself conferred standing. And this is where the “concrete and particularized” requirement, which is meant to protect constitutional separation of powers, kicks in:

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.”¹⁹

In other words, because an “*undifferentiated* public interest” in the executive’s “compliance with the law” is not a particularized interest, it is also not a

¹³ *Lujan*, 504 U.S. at 558.

¹⁴ *Id.* at 558-59.

¹⁵ *Id.* at 559.

¹⁶ *Id.* at 563.

¹⁷ *Id.* at 564.

¹⁸ *E.g.*, Florida Audubon Soc. v. Bentsen, 94 F.3d 658, 663 (D.C. Cir. 1996) (the purpose of requiring that an injury be “actual or imminent” is to “reduce the possibility” that courts will render an advisory opinion “by deciding a case in which no injury would have occurred at all”).

¹⁹ *Lujan*, 504 U.S. at 577 (cleaned up).

concrete harm; the two factors are inextricable. Congress cannot circumvent this reality by prescribing a particularized *remedy* via courts to what remains a generalized *harm*.²⁰

On the other hand, standing “may exist solely by virtue of ‘statutes creating legal rights, the invasion of which creates standing,’” because it is within Congress’s authority to “elevat[e] to the status of legally cognizable concrete, *de facto* injuries that were previously inadequate at law.”²¹ And this is true even where “no injury” occurred other than a violation of the litigant’s statutory right.²² When “the plaintiff is himself an object of the action (or foregone action) . . . , there is ordinarily little question that the action or inaction has caused him injury.”²³ This is because “the province of the court is to decide on the rights of individuals,” not to “vindicat[e] the public interest.”²⁴ Properly understood, then, *Lujan* protects the separation of powers in two ways. It protects Congress’s legislative function of weighing public policy concerns and creating private rights and remedies by holding justiciable all cases involving factual or legal harms to specific plaintiffs. At the same time, it prevents Congress from usurping the executive’s role of ensuring general conformance with the law by requiring that alleged harms be concrete and particularized.²⁵

Thus, “concrete and particularized” is combined as a single subpart because the two are inextricably linked. The invasion of a *public* interest is not concrete precisely because it is an “undifferentiated”—i.e., not particularized—interest. But if the undifferentiated, non-concrete harm is accompanied by an additional harm particular to the litigant, such harm *is* concrete.

²⁰ *Id.* at 576.

²¹ *Id.* at 578 (quoting *Warth*, 422 U.S. at 500).

²² *Id.* (quoting *Linda R. S.*, 410 U.S. at 617 n.3).

²³ *Id.* at 562.

²⁴ *Id.* at 576 (cleaned up).

²⁵ To crystallize this principle, imagine a hypothetical where Congress proscribes internet service providers from selling consumers’ private information. Assume that an ISP sells Jim’s information, but not Bob’s. Bob and Jim both have an interest in ISPs not breaking the law, which is the generalized, undifferentiated public interest. Bob and Jim also both have a particular interest in ISPs not selling their own personal information, which is the private right protected by the statute. Here, their public right was equally violated, but only Jim’s private right was. So, under *Lujan*, Congress could make a cause of action available to Jim for the sale of Jim’s information, but not to Bob for the sale of Jim’s information. Even if the ISP sold the information to someone who immediately deleted it and thus no factual injury occurred, Jim would still have standing under *Lujan* because, as the Court pointed out, Congress can create private rights “the invasion of which creates standing,” even if “no injury” occurs other than the statutory violation. 509 U.S. at 578 (quoting *Linda R. S.*, 410 U.S. at 617, n.3).

Even the inability to observe an animal is a concrete harm because it is particular for the claimant. But an alleged failure of the executive to ensure general conformance with the law is not. Invasions of private interests are inherently particularized and thus almost certainly concrete. Even if the harm that results from the invasion of a private interest would have been insufficient at common law to state a cognizable cause of action,²⁶ Congress can elevate such harm to the status of legally cognizable by creating a statutory cause of action. As such, under *Lujan*, a harm is not concrete unless it is particularized, while a harm that is particularized is almost always concrete.²⁷ *Lujan's* joining of these requirements with a conjunctive as a single subpart is not sloppy drafting; the two concepts are inextricably linked.

B. The Post-Lujan Decoupling of Particularity and Concreteness

The relationship between particularity and concreteness was revisited in 2016 in *Spokeo v. Robins*. There, the Supreme Court reversed the Ninth Circuit because it had only addressed particularity notwithstanding that the Supreme Court had “made it clear time and time again that an injury in fact must be both concrete *and* particularized.”²⁸ But while it is true that previous Supreme Court cases literally used the phraseology “concrete and particularized,” the cases Justice Samuel Alito cited in the majority opinion do not support the implication that the two terms are separable, nor that particularization is “necessary” but not “sufficient” as he claimed.²⁹ In *Susan B. Anthony*

²⁶This does not mean those litigants would have lacked standing under common law—indeed, a court cannot dismiss a case for failure to state a cognizable claim unless the court possesses jurisdiction to adjudicate the merits. And dismissal for failure to state a claim is an adjudication on the merits. So if, at common law, a litigant alleged intrusion upon seclusion based on receiving one or two unwanted telemarketing calls, it would be dismissed for failure to state a claim, precisely because courts would possess jurisdiction to adjudicate and dismiss the claim. And if Congress passes a law stating that one or two unwanted telemarketing calls give rise to a cause of action (which it did), it is not conferring jurisdiction—courts already possessed jurisdiction over such allegations—but merely lessening the threshold for what gives rise to a cause of action.

²⁷It might seem that this position makes “concrete” a redundant requirement. I do not think that it does, however, for reasons explained by the “almost always” modifier: Concrete carries with it the connotation of “not abstract.” So, for example, a uniquely intense desire to see a specific law enforced is too abstract to satisfy Article III even if it is particularly felt by certain groups or individuals. See *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 485-86 (1982) (the “psychological consequence” felt by litigants with a unique desire to see the separation of church and state enforced is insufficient because Article III standing does not depend on “the intensity of the litigant’s interest or the fervor of his advocacy”).

²⁸*Spokeo*, 136 S. Ct. at 1548 (emphasis in original).

²⁹*Id.*

List v. Driehaus, the Court found constitutional standing was established because the injury was sufficiently imminent, and it did not address concreteness or particularity at all.³⁰ Less relevant still is *Sprint Communications v. APCC Services*, where an injury-in-fact “clearly” occurred, and the Court merely addressed whether assigning a cause of action is constitutionally permitted.³¹ And the barrier to standing in *Massachusetts v. EPA* was that the injury—loss of coastal lands—failed to satisfy Article III’s traceability and “actual or imminent” requirements.³² To the extent Chief Justice John Roberts addressed the “concrete and particularized” requirement in that case, it was merely to note the general topic at issue—global warming—is the type of undifferentiated, non-particular harm usually insufficient for Article III standing.³³ Far from suggesting that loss of property is particular but not concrete (or vice versa), however, Chief Justice Roberts assumed it is a constitutionally sufficient harm and pivoted to analyzing whether it was actual or imminent.³⁴

Be that as it may, Justice Alito’s *Spokeo* opinion posited that concreteness and particularity are independent requirements, and it said concreteness is not about whether the injury is “undifferentiated” and “generalized,” but rather whether it “actually exists” and is “real.”³⁵ Justice Alito said courts should consult history and the judgment of Congress to determine whether a harm “actually exists” and is “real.”³⁶ Making concreteness turn on whether a harm “actually exists” is odd given the separate requirement that the injury also be “actual or imminent.” There is little explanation of the redundancy, or how a claimed injury can be “actual” within the meaning of subpart (b) but not “actually exist” within the meaning of subpart (a).³⁷ So while *Spokeo*

³⁰ 573 U.S. 149 (2014).

³¹ 554 U.S. 269, 274 (2008).

³² 549 U.S. 497, 541-46 (2007).

³³ *Id.* at 541.

³⁴ The last case cited in *Spokeo*’s discussion, *Summers*, is a closer call at first glance. The Court explained that a procedural right which protects a substantive, concrete interest is sufficient for Article III, while a procedural right divorced from any substantive interest is not. *Summers v. Earth Island Inst.*, 555 U.S. 488, 496-97 (2009). But even here, far from distinguishing between particularity and concreteness, *Summers* combines them into one analysis: Because procedural rights are afforded without differentiation to the public, violations of them are neither concrete nor particular absent an underlying substantive injury. See *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2220 (2021) (Thomas, J., dissenting) (citing *Summers*, 555 U.S. at 497).

³⁵ *Spokeo*, 136 S. Ct. at 1548.

³⁶ *Id.* at 1549.

³⁷ “Actual” in the context of “actual or imminent” means something like “already happened”—in other words, the injury must have actually happened or it must be shortly forthcoming. At issue

decoupled the particularity and concreteness requirements, what that decoupling meant practically was unclear, especially given that Justice Alito maintained that Congress can elevate concrete harms to the status of legally vindicable.³⁸ And Justice Clarence Thomas's concurring opinion appeared to clarify that the nature of the right invaded (public or private) is virtually dispositive.³⁹ This lack of clarity and seeming inconsistency led to significant jurisprudential divergence in lower courts.

Following *Spokeo*, there emerged in lower courts three approaches to analyzing whether a harm is sufficiently concrete that Congress may make it legally vindicable. Some jurists privileged the judgment of Congress over identifying a historical analogue.⁴⁰ A second group did the opposite, focusing on whether the alleged harm was sufficiently analogous to common law harms to determine whether it merited redress.⁴¹ Third, some followed Justice Thomas's guidance that the critical question is instead whether the invaded right is public or private, thereby implicitly questioning *Spokeo*'s dicta.⁴² The first two approaches both adopt *Spokeo*'s test, but they differ over which prong to emphasize: some courts privilege Congress's determination (with a nod to ensuring it is not completely divorced from traditionally recognized injuries), while others privilege common-law analogues (with a

in *Spokeo* was the statutory right to accurate credit reports. By remanding, the Court appeared to implicitly suggest that while the injury was "actual" in that it had unquestionably already occurred, it might not "actually exist" within the meaning of the "concrete" requirement.

³⁸ *Spokeo*, 136 S. Ct. at 1549.

³⁹ *Id.* at 1551-53.

⁴⁰ *See, e.g.*, *Jeffries v. Volume Servs. Am.*, 928 F.3d 1059, 1068-70 (D.C. Cir. 2019) (Rogers, J., concurring); *Melito v. Experian Mktg. Solutions, Inc.*, 923 F.3d 85, 92-93 (2d Cir. 2019) (Hall, J.); *Susinno v. Work Out World Inc.*, 862 F.3d 346, 350-52 (3d Cir. 2017) (Hardiman, J.); *In re Horizon Healthcare Servs. Data Breach Litig.*, 846 F.3d 625, 638-40 (3d Cir. 2017) (Jordan, J.).

⁴¹ *See, e.g.*, *Salcedo v. Hanna*, 936 F.3d 1162, 1171-72 (11th Cir. 2019) (Branch, J.); *Hagy v. Demers & Adams*, 882 F.3d 616, 621-23 (6th Cir. 2018) (Sutton, J.); *Frank v. Autovest, LLC*, 961 F.3d 1185, 1187-90 (D.C. Cir. 2020) (Griffith, J.). While Judge Jeffrey Sutton's opinion explicitly found Congress intended to vindicate a particular interest while finding it unworthy of such protection, the other two did not. But all three emphasized that the judiciary's supposed independent duty to assess whether a harm is sufficiently cognizable overrides Congress's judgment on that question, making it is difficult to see how congressional judgment could be relevant at all.

⁴² *See, e.g.*, *Springer v. Cleveland Clinic Empl. Health Plan Total Care*, 900 F.3d 284, 290-93 (6th Cir. 2018) (Thapar, J., concurring); *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 970-73 (11th Cir. 2020) (Jordan, J., dissenting); *Bryant v. Compass Grp. USA, Inc.*, 958 F.3d 617, 624 (7th Cir. 2020) (Wood, C.J.); *Sierra*, 996 F.3d at 1138 (Newsom, J., concurring) (while opining that standing doctrine should be grounded in Article II, noting that such approach "resembles the rights-based approach advanced by Justice Thomas and others"); *Buchholz v. Tanick*, 946 F.3d 855, 872-74 (6th Cir. 2020) (Murphy, J., concurring).

mostly theoretical acknowledgement that congressional judgment can be instructive). Keep in mind that in analyzing whether they have jurisdiction, courts must assume the plaintiff's allegations are correct (i.e., that a statutory violation occurred). Therefore, the relevant analysis is not of the statutory text, but rather of legislative intent.⁴³ So if Congress outlaws placing unwanted telemarketing calls, for example, the question for these courts is what harm Congress intended to prevent by outlawing unwanted telemarketing calls, and whether that harm has a sufficient common-law analogue.⁴⁴ The "private rights" approach of the third group, by contrast, ignores legislative intent altogether and analyzes instead whether the invaded right is particularized (private) or undifferentiated (public).

The private v. public approach is consistent with the separation of powers as delineated in *Lujan*. If the right allegedly invaded is private, then courts adjudicate the dispute because it is the province of the court "to decide on the rights of individuals."⁴⁵ If the right allegedly invaded is a public right, then courts do not adjudicate the dispute because "[v]indicating the public interest" is the province of the executive and Congress.⁴⁶ By contrast, the first approach (in theory) and the second approach (in practice) are inconsistent with the separation of powers as delineated in *Lujan*. By making courts the arbiters of whether a private right is important enough to merit legal vindication, these approaches prevent Congress from exercising its legislative prerogative to "creat[e] legal rights, the invasion of which creates standing, even though *no injury* would exist without the statute."⁴⁷

This divergence led to *TransUnion*. Justice Brett Kavanaugh, writing for the Court, and Justice Thomas, writing for a four-Justice dissent, presented sharply different interpretations of *Lujan* and of Article III. According to the Court, the critical issue in determining whether an alleged injury is concrete

⁴³ Otherwise, that a violation occurred would conclusively establish Congress's judgment on the matter, and there would be no need to attempt to discern congressional judgment. *See generally Salcedo*, 936 F.3d at 1168-69 n.6 (considering legislative history, findings, and committee reports to discern Congress's judgment while clarifying that "[w]e are not suggesting that legislative history should play a role in *statutory interpretation*. Salcedo's allegation is undisputedly a violation of the statute . . .") (emphasis added).

⁴⁴ *Compare Salcedo*, 936 F.3d at 1170-72 (receiving an unwanted text message does not have a sufficiently close relationship to any common-law analogues) *with Gadelhak v. AT&T Servs.*, 950 F.3d 458, 462-63 (7th Cir. 2020) (disagreeing with *Salcedo* and holding that receiving unwanted text messages is sufficiently similar to the common-law tort of intrusion upon seclusion).

⁴⁵ *Lujan*, 504 U.S. at 576.

⁴⁶ *Id.*

⁴⁷ *Linda R. S.*, 410 U.S. at 617 n.3 (emphasis added).

is whether a court believes it is sufficiently analogous to a traditionally redressable injury.

C. TransUnion's Conception of Article III Requirements

Though *Spokeo's* vagueness permitted jurisprudential divergence, *TransUnion* does not.⁴⁸ Like *Spokeo*, *TransUnion* addressed Article III standing in the context of the Fair Credit Reporting Act. *TransUnion* was a class action in which the plaintiff class was composed of 8,185 individuals who received credit reports that falsely flagged them as potential terrorists or drug traffickers; a jury rendered a verdict in favor of the class.⁴⁹ For 1,853 of the class members, *TransUnion* sent the false credit reports to third-party businesses.⁵⁰ For the remaining class members, the credit reports were sent only to them.⁵¹

Writing for the Court, Justice Kavanaugh held that the 1,853 class members whose reports were disseminated to third parties possessed Article III standing because the resulting harm was “closely related” to the “reputational harm associated with the tort of defamation.”⁵² The remaining class members, however, did not possess Article III standing because they were the only ones who received their false credit reports.⁵³ The lack of publication to third parties was fatal for purposes of Article III because it rendered the claimed injury too different from the only possible common law analogue.⁵⁴

In arriving at this conclusion, the Court confirmed that particularity and concreteness are separate and distinct requirements. Congress's judgment that a harm merits a legal remedy “may be instructive,” it said, but it is insufficient if the court determines that the harm is not concrete.⁵⁵ And if the judicial and legislative branches disagree as to whether a harm merits redress, it is the legislative branch that must bow.⁵⁶ This, at least for now, concludes the jurisprudential debate. Although at common law the invasion of a private right was by itself sufficient to establish jurisdiction, that is no longer the case,

⁴⁸ *TransUnion*, 141 S. Ct. 2190.

⁴⁹ *Id.* at 2201.

⁵⁰ *Id.* at 2200.

⁵¹ *Id.*

⁵² *Id.* at 2208.

⁵³ *Id.* at 2209.

⁵⁴ *Id.* at 2209-10.

⁵⁵ *Id.* at 2205.

⁵⁶ *Id.*

at least as it pertains to *statutory* private rights.⁵⁷ In such contexts, litigants must now allege and eventually show not only an invasion of their private rights, but also that such invasion caused enough damage to satisfy a judge that the case is worth adjudicating.

II. CRITIQUES OF MODERN ARTICLE III JURISPRUDENCE

Modern Article III jurisprudence in general and *TransUnion* in particular have been subject to criticism, including from originalist scholars and jurists. Under the logic of most such criticisms, however, *TransUnion* merely exacerbates a preexisting flaw in Article III jurisprudence created by *Lujan*. Such criticisms focus on history, tradition, and/or the specific text of Article III, especially the terms “Cases” and “Controversies.” My position, however, is that *Lujan* correctly observed that the specific “Cases” and “Controversies” terminology in Article III is subservient to the overarching separation-of-powers structure contemplated by the Constitution as a whole. Under this theory, *TransUnion* is a deviation from, not a continuation of, *Lujan*. At the very least, *TransUnion* results in a significant—perhaps radical—change in the role traditionally reserved to Congress that *Lujan* did not.

Justice Thomas’s fiery dissent in *TransUnion* is an example of an originalist (although not textualist) critique focusing on the history of jurisdictional limitations and how Article III would have been understood by the Framers. Building on his *Spokeo* concurrence, Justice Thomas argued that “[a]t the time of the founding, whether a court possessed judicial power over an action with no showing of actual damages depended on whether the plaintiff sought to enforce” private rights or community-based rights—a distinction that applied equally to common-law and statutorily created rights.⁵⁸ As such, he continued, quoting Justice Joseph Story, “where the law gives an action for a particular act, the doing of that act imports of itself a damage to the party” because “[e]very violation of a right imports some damage.”⁵⁹ For example, a trespass on property need not cause any damage to the property owner—the

⁵⁷ The Court has not yet addressed post-*TransUnion* whether common-law legal injuries—trespass, breach of contract, etc.—where there is no factual injury, but the litigant would at common law have been entitled to nominal damages, remain legally cognizable. But it is difficult to see in theory how Article III could require a factual injury for statutory causes of action, but not for common law causes of action.

⁵⁸ *TransUnion*, 141 S. Ct. at 2217.

⁵⁹ *Id.*

trespass is by itself the harm.⁶⁰ Even if the trespasser simply cuts across the property as a shortcut and causes no additional harm whatsoever, the property owner can vindicate the invasion of his right in court, usually for \$1.00 in nominal damages.⁶¹ Vindication of public rights, however, was different: At common law, “where an individual sued based on the violation of a duty owed broadly to the whole community . . . courts required ‘not only *injuria* [legal injury] but also *damnum* [damages].”⁶²

Justice Thomas criticized the majority’s theory as “remarkable in both its novelty and effects.”⁶³ Never before had the Court pronounced that the “concrete and particularized” requirement was even relevant in the context of private rights; rather, the invasion of a private right was itself the harm, and no further analysis was necessary.⁶⁴ Justice Thomas wryly noted that, given *Lujan*’s dicta that the “inability to observe an animal” for “aesthetic purposes” is a concrete injury, perhaps class members should have claimed “an aesthetic interest in viewing an accurate report.”⁶⁵

Justice Thomas’s critique is mostly unrelated to overarching separation-of-powers principles,⁶⁶ but rather is based on originalist grounds. As he put it, “[t]he principle that the violation of an individual right gives rise to an actionable harm was widespread at the founding, in early American history, and in many modern cases.”⁶⁷ Furthermore:

In light of this history, tradition, and common practice, our test should be clear: So 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.”⁶⁸

Other originalist critiques—with more of a focus on the constitutional text than Justice Thomas’s dissent—come from Professor Robert Pushaw and Judge Newsom. Building on a previous article, Professor Pushaw recently explained that while Article III’s term “Controversies” assumes an adversarial

⁶⁰ *Id.*

⁶¹ See generally *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802 (2021) (holding that nominal damages alone are sufficient to maintain standing and observing that “Article III is worth a dollar”).

⁶² *TransUnion*, 141 S. Ct. at 2217 (brackets in original, citations omitted).

⁶³ *Id.* at 2221.

⁶⁴ *Id.* at 2217.

⁶⁵ *Id.* at 2224.

⁶⁶ Although not entirely so. See *id.* at 2221.

⁶⁷ *Id.* at 2218.

⁶⁸ *Id.* (quoting T. Cooley, *Law of Torts*, *271).

process, “Cases” arise anytime a party “assert[s] his rights in a form prescribed by law” and are “centered on law, not parties.”⁶⁹ We have centuries of experience with “non-adversarial cases, such as naturalization, various bankruptcy and trust proceedings, warrants, consent decrees, and prerogative writs like habeas corpus.”⁷⁰ This is consistent with Judge Newsom’s discussion in his *Sierra v. Hallandale Beach* concurrence, issued just before *TransUnion* was decided in 2021.⁷¹ He argued there that, “as a matter of plain text” and how the word would have been publicly understood at the time, “case” is simply synonymous with “cause of action.”⁷² He pointed out that, even by itself, the fact that litigants at the time of and after the passage of Article III could bring suit for nominal damages even in the absence of factual injury precludes the possibility that Article III limited jurisdiction to cases involving factual injury.⁷³

Another category of criticism focuses on administrative law (particularly environmental law) and the relationship between the judicial and executive branches. (This is perhaps unsurprising, given that, until *Spokeo*, the Supreme Court’s Article III jurisprudence emanated almost entirely from administrative and environmental regulations.) For example, Professor Cass Sunstein argues that modern Article III jurisprudence, including *TransUnion*, is inextricably linked to a misinterpretation of the Administrative Procedure Act (APA) and functions mainly as an anti-regulatory device. In his view, current doctrine is meant to subvert the APA, which itself governs jurisdiction for suits emanating from executive agency action.⁷⁴ Historically, standing jurisprudence was an atextual and unmoored *expansion* of the APA, which provided for judicial review of allegations that a person suffered “legal wrong because of agency action, or [was] adversely affected or aggrieved by agency action *within the meaning of a relevant statute*.”⁷⁵ Yet the Supreme Court held

⁶⁹ Pushaw, *supra* note 2, at 3-6.

⁷⁰ *Id.*

⁷¹ *Sierra*, 996 F.3d at 1121 (arguing that “our current Article III standing doctrine can’t be correct—as a matter of text, history, or logic”).

⁷² *Id.* at 1123-24. Judge Newsom pointed out that this cuts both ways. If a legal cause of action exists, factual injury is unnecessary; if a legal cause of action does not exist, factual injury is insufficient. *Id.* at 1124 (observing the common-law principle of *damnum absque injuria*, meaning that “[t]here must not only be loss, but it must be injuriously brought about by a violation of the legal rights of others”).

⁷³ *Id.*

⁷⁴ Cass R. Sunstein, *Injury In Fact, Transformed* (March 11, 2022) (preliminary draft), available at <https://ssrn.com/abstract=4055414>.

⁷⁵ *Id.* at 4.

in *Data Processing* that a person who “is *in fact* adversely affected may obtain judicial review.”⁷⁶ The Court simply added a factual injury as jurisdictionally sufficient under the APA, which significantly broadened plaintiffs’ ability to challenge agency actions. But then, according to Professor Sunstein, beginning with *Lujan*, one wrong was replaced by the opposite wrong, as the Court began using the new injury-in-fact concept as an excuse to constitutionalize standing so as to subvert, rather than expand, the APA.⁷⁷ Under Professor Sunstein’s reading, *TransUnion* is simply a continuation of this anti-regulatory program; but rather than reserving constitutionalized standing to limit challenges to executive agency action, *TransUnion* applies the jurisdictional limitations to subvert regulations of private parties. Like Judge Newsom and Professor Pushaw (and perhaps Justice Thomas), Professor Sunstein perceives *TransUnion* as an expansion of, not a deviation from, the logic of *Lujan*.⁷⁸

There is much to commend in these analyses and critiques of the Court’s standing jurisprudence. Judge Newsom’s explication of the meaning of “Cases” and “Controversies” seems unassailable. But I disagree with his argument (or at least its necessary implication) that *Lujan* was therefore wrong on the merits. In fact, presumably Justice Scalia would not necessarily disagree with Judge Newsom’s textual analysis, given his observation that the “Cases” and “Controversies” language was picked “for want of a better vehicle.”⁷⁹ In any event, my position is that courts do indeed have jurisdiction over all “Cases” and “Controversies” as those words are interpreted by Judge Newsom—so long as the exercise of jurisdiction is consistent with the traditionally recognized roles of the branches within our separation-of-powers framework. And it is worth noting that Judge Newsom’s conception of the proper separation of powers—including maintaining Congress’s role of creating legally vindicable rights—mirrors Justice Scalia’s in *Lujan*; Judge Newsom simply thinks Article II’s Vesting Clause is the better vehicle for rooting standing requirements in the Constitution. Even more than Judge Newsom, Professor Pushaw trains much of his criticism on *Lujan*. And while I take his point that *Lujan* both protected the executive’s role and arguably expanded the judiciary’s role, the latter was incidental to, and necessitated by, the former. Post-

⁷⁶ *Id.* at 8 (emphasis added).

⁷⁷ *Id.* at 16-17.

⁷⁸ Professor Sunstein notes, however, that *Lujan* “could easily be read as a narrow ruling.” *Id.* at 11.

⁷⁹ Scalia, *supra* note 12, at 882.

Lujan jurisprudence, by contrast, does the latter without even doing the former, as I explain below.

In my view, *Lujan* properly identified and enforced the roles of the three branches contemplated by our separation-of-powers system, and it correctly held that courts have jurisdiction over “Cases” and “Controversies” only if the exercise of that jurisdiction does not invade the province of the executive branch. The problem is that post-*Lujan* jurisprudence, culminating with *TransUnion*, has skewed this delineation of separation of powers. The doctrine purports to prevent Congress from usurping an executive power, but it really requires courts to usurp a legislative power—and fails even on its own terms at protecting the executive branch.

III. *TRANSUNION* AND THE EXPANSION OF JUDICIAL AUTHORITY

TransUnion established that an invasion of a statutorily created private right is insufficient by itself to establish Article III standing. The case was wrongly decided for three reasons. First, it decoupled particularity and concreteness and thus required courts to make “inescapably value-laden”⁸⁰ judgments concerning whether a right is worth protecting in court; such judgment calls are more appropriate for the legislative branch. Second, although *Lujan* made clear that the purpose of the injury-in-fact requirement was to protect the constitutional separation of powers, *TransUnion*’s limitation on standing does not protect the executive branch; it simply guarantees that *state* courts will adjudicate alleged invasions of statutorily created private rights rather than federal courts. Third, *TransUnion* improperly replaced the legislative branch with the judicial branch as the arbiter of whether a harm deserves legal redress; according to *TransUnion*, it is the role of the court not merely to say what the law is, but also to say whether it should exist.

A. Decoupling Particularity and Concreteness

TransUnion decoupled particularity from concreteness in the context of private rights and held that courts should determine whether an invasion of a particularized private right is sufficiently concrete for purposes of Article III. This decoupling means that rather than agreeing with *Lujan* that a right that is particularized to an injured person is by definition concrete, the Court sees concreteness as a distinct inquiry that goes to whether a particularized harm is sufficiently *important* to merit redress in court. To use the facts in

⁸⁰ *TransUnion*, 141 S. Ct. at 2224 (Thomas, J., dissenting) (citing *Sierra*, 996 F.3d at 1129).

TransUnion, Congress judged that sending someone a credit report falsely stating they are a potential terrorist or drug dealer is an invasion of their right sufficiently serious to be redressable in court. According to the *TransUnion* Court, however, it is for *courts* to determine whether such harm merits redress, using guidance from common-law causes of action.

As Justice Thomas pointed out in his dissent, for the Court to hold that “courts alone have the power to sift and weigh harms to decide whether they merit the Federal Judiciary’s attention” is “remarkable in both its novelty and effects.”⁸¹ It is this decoupling and authorizing courts to independently determine whether conduct is sufficiently harmful that requires “value-laden” judgment calls.⁸² And as Judge Newsom pointed out, giving courts the ability—indeed, the responsibility—to evaluate what private rights should be vindicable in court mirrors the development of “substantive due process” jurisprudence.⁸³ Just as the Supreme Court decided that the Due Process Clause was not merely a procedural constraint on the executive and judicial branches but also a substantive limitation on the legislative branch, the Court has now decided that Article III is a constraint not on the judiciary, but on Congress’s authority to create substantive rights.⁸⁴ *TransUnion* is a clear example of this. The Court suggested that for a person to receive a credit report falsely asserting they are potentially a terrorist or drug trafficker is “not remotely harmful.”⁸⁵ The dissent disagreed, asserting that “one need only tap into common sense to know that receiving a letter identifying you as a potential drug trafficker or terrorist is harmful.”⁸⁶ Presumably Congress agrees with the dissent, and that is why it created a legally vindicable private right. For the Court to disagree and decline to allow for such vindication is to apply a policy-based value judgment.

The Court failed to confront this reality. Consider the hypotheticals Justice Kavanaugh used to explain why particularity and concreteness must be

⁸¹ *Id.* at 2221.

⁸² *Id.* at 2224 (citing *Sierra*, 996 F.3d at 1129) (arguing it is impossible to “go about picking and choosing” which harms are “sufficiently ‘concrete’ and ‘real’” without such inquiry “devolv[ing] into [pure] policy judgment”).

⁸³ *Sierra*, 996 F.3d at 1127-29.

⁸⁴ *Id.* at 1128; *see also TransUnion*, 141 S. Ct. at 2221 (“In the name of protecting the separation of powers, this Court has relieved the legislature of its power to create and define rights.”) (citation omitted).

⁸⁵ *TransUnion*, 141 S. Ct. at 2205 (quoting *Hagy v. Demers & Adams*, 882 F.3d 616, 622 (6th Cir. 2018)).

⁸⁶ *Id.* at 2223.

analyzed as independent and distinct requirements. First, Justice Kavanaugh used a hypothetical where pollutants are dumped on the home of a Maine citizen.⁸⁷ Both the Maine citizen and a Hawaii citizen who learns of the pollution sue the defendant.⁸⁸ According to Justice Kavanaugh, preventing the Hawaii plaintiff from filing suit is an example of how the “concrete harm principle operates in practice.”⁸⁹ This is an odd example: Obviously, dumping toxic pollutants on someone’s land causes a concrete harm.⁹⁰ The problem with the Hawaii plaintiff’s claim is not concreteness, but that she was not the one who particularly sustained the (indisputably concrete) harm. Justice Kavanaugh argues that because “[t]he violation did not personally harm the plaintiff in Hawaii,” she could only be suing to enforce “general conformance with the law,” which is not a basis for Article III standing.⁹¹ Recall, however, that the reason a litigant cannot sue to enforce general conformance with the law is because it is an undifferentiated interest held by the public at large.⁹² Indeed, Justice Kavanaugh specifically noted that the Hawaii plaintiff would not be suing “to remedy any harm to herself.”⁹³ Even in arguing concreteness is independent from particularity, Justice Kavanaugh could not avoid implicitly acknowledging the two are linked.⁹⁴

Justice Kavanaugh’s choice to not use examples of particularized invasions of *private* rights brought by the person whose right was invaded is conspicuous. In *Lujan* and in Justice Kavanaugh’s hypotheticals, where the issue is generally enforcing compliance with regulatory laws, there is no judgment call—it is not that a personalized harm is not quite serious enough under a separate concreteness analysis, but that a personalized harm does not exist at

⁸⁷ *Id.* at 2205.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 2206 (“The [Maine] lawsuit may of course proceed in federal court because the plaintiff has suffered concrete harm to her property.”).

⁹¹ *Id.* at 2205-06.

⁹² *Lujan*, 504 U.S. at 576-77 (noting that it is the “province of the court” to “decide on the rights of individuals,” while “[v]indicating the public interest . . . is the function of Congress and the Chief Executive”) (citation omitted).

⁹³ *Id.* at 2206.

⁹⁴ The same is true of the second hypothetical, which imagines a law providing a right “to clean air and clean water, as well as a cause of action to sue and recover \$100.00 in damages from any business that violates any pollution law anywhere in the U.S.” *Id.* at 2207 n.3. As before, polluting someone’s property constitutes a concrete harm, and the reason any unaffected person cannot file suit to remedy such harm is that they were not the ones who suffered it. And so once again, Justice Kavanaugh pivots back to the public/private distinction in which, far from being independent, concreteness and particularity are inextricably linked. *Id.*

all. In other words, either Article III standing is analyzed in terms of the nature of the right—whether it is particularized (private) or undifferentiated (public)—such that concreteness and particularity are linked as one subpart, or it is unavoidably a “value-laden” judgment call, and the question is simply whose judgment matters: Congress or the courts? By decoupling concreteness and particularity and requiring courts to decide whether a particularized invasion of a private right is sufficiently harmful (i.e., concrete), *TransUnion* holds that it is for the courts to make these policy-based judgment calls. And by declining to analyze examples of invasions of private rights, Justice Kavanaugh avoided admitting that’s what the Court was holding.

B. State Courts Get Ready, There’s a Case a-Comin’

Time and again, the Supreme Court has reiterated that the “law of Art. III standing is built on a single basic idea—the idea of separation of powers.”⁹⁵ *TransUnion* claims that its limitation on Article III standing is necessary to protect the executive branch from encroachment by the legislative branch. But does the case even succeed on its own terms? Justice Kavanaugh’s opinion notes that the standalone concrete-harm requirement in particular “is essential to the Constitution’s separation of powers” because to permit “unharmed plaintiffs to sue defendants who violate federal law not only would violate Article III but also would infringe on the Executive Branch’s Article II authority.”⁹⁶ But that is not true where purely private rights are concerned. Precluding claimants from seeking vindication in federal court for violations of statutorily created rights does not mean the choice of “how aggressively to pursue legal actions against defendants who violate the law” will be left to “the discretion of the Executive Branch.”⁹⁷ It merely means that state courts will adjudicate these alleged violations.

State courts “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.”⁹⁸ As Justice Thomas pointed out in dissent, *TransUnion* leaves state courts “as the sole forum” for many statutory causes of action, “with defendants unable to seek removal to federal court.”⁹⁹ This is ironic given that it was

⁹⁵ *Raines v. Byrd*, 521 U.S. 811, 820 (1997) (internal quotation marks omitted).

⁹⁶ *TransUnion*, 141 S. Ct. at 2207. It is worth noting that the primary way the executive’s power is protected against legislative encroachment is the executive’s power to veto legislation passed by Congress.

⁹⁷ *Id.*

⁹⁸ *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989).

⁹⁹ *TransUnion*, 141 S. Ct. at 2223 n.9.

businesses who pushed for passage of the Class Action Fairness Act (CAFA)¹⁰⁰ to make it easier for defendants to get into federal court to avoid local bias, constrain out-of-control attorney fee awards, and ensure uniformity.¹⁰¹ Now, *TransUnion*, which Justice Thomas called a “pyrrhic victory” for the company,¹⁰² means that for many class actions, CAFA is irrelevant—defendants will be unable to remove the cases for lack of jurisdiction. Indeed, this has already started occurring.¹⁰³ Similarly, after the Eleventh Circuit held that receipt of an unwanted text message does not suffice for Article III standing, several district courts remanded cases alleging such claims back to state court.¹⁰⁴

Declining to adjudicate statutory causes of action does not protect separation of powers by ensuring the choice as to whether to enforce a law against private parties is left to the executive branch. It merely changes which court will be adjudicating the case. This is not an interesting side-effect—it fundamentally undercuts the *TransUnion* Court’s reasoning. *TransUnion* did not justify its holding through textual or historical analysis. Instead, it appealed to the overall framework of how the Constitution contemplates government will function and how powers will be separated among the branches. The fact that the majority’s approach creates a gaping flaw in the framework strongly indicates—dispositively so, in my view—that it is not the approach contemplated by the Constitution’s drafters.

In any case, the *TransUnion* Court’s approach to standing fails to achieve its stated purpose of protecting the executive branch’s role and authority. *TransUnion* does not prevent litigants from suing to vindicate their private, statutorily created rights—it merely changes the forum.

¹⁰⁰ Because of the relatively small damages, most statutorily-created causes of action are litigated as class actions.

¹⁰¹ David Marcus, Eric, *The Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247 (2007).

¹⁰² *TransUnion*, 141 S. Ct. at 2223 n.9.

¹⁰³ See, e.g., *Lagrisola v. North Am. Fin. Corp.*, No.: 21cv1222 DMS (WVG), 2021 U.S. Dist. LEXIS 192140 (S.D. Cal. Oct. 5, 2021); *Voss v. Quicken Loans LLC*, No. 1:20-cv-756, 2021 U.S. Dist. LEXIS 161380 (S.D. Oh. Aug. 26, 2021).

¹⁰⁴ See, e.g., *Mittenthal v. Fla. Panthers Hockey Club, Ltd.*, No. 20-60734-CIV-ALTMAN/Hunt, 2020 U.S. Dist. LEXIS 123127 (S.D. Fla. July 10, 2020); *Jenkins v. Simply Healthcare Plans, Inc.*, 479 F. Supp. 3d 1282, 1286 (S.D. Fla. 2020).

C. From Deference to Usurpation

The Court's holding in *TransUnion* also forces judges to assume a legislative role. As Justice Scalia explained, albeit in the context of "prudential" standing:

We do not ask whether in our judgment Congress *should* have authorized [a] suit, but whether Congress in fact did so. Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied . . . it cannot limit a cause of action that Congress has created. . . .¹⁰⁵

In our tripartite government, it is Congress that has the authority to enact laws creating rights and protecting against harms and—if it so chooses—prescribing remedies.¹⁰⁶ As such, courts should hesitate to “substitute [their] judgment for Congress’s” on whether an alleged harm is vindicable.¹⁰⁷

Yet, under *TransUnion*, not only are courts permitted to do so, they must. If a court does not consider a harm sufficient for Article III, through reference to history and tradition and common-law analogues—and, theoretically, congressional judgment¹⁰⁸—it must decline to exercise jurisdiction and dismiss the claim. If the court and Congress conflict on whether a harm is sufficient to give a plaintiff her day in court, it is the court's judgment that prevails.¹⁰⁹ As a result, courts must assume a power traditionally reserved to the People's representatives: identifying harms and creating rights to protect against such harms in an evolving society.

Note that *TransUnion* specifically asserts that to allow Congress to create legally vindicable private rights unaccompanied by what courts deem to be a sufficiently serious injury “*not only* would violate Article III *but also* would infringe on the Executive Branch's Article II authority.”¹¹⁰ Under *Lujan*, a

¹⁰⁵ *Lexmark Int'l*, 572 U.S. at 128.

¹⁰⁶ *E.g.*, *Warth*, 422 U.S. at 500 (“The actual or threatened injury required by Art. III may exist solely by virtue of ‘statutes creating legal rights, the invasion of which creates standing. . . .’”).

¹⁰⁷ *Jeffries*, 928 F.3d at 1070 (Rodgers, J., concurring) (cleaned up).

¹⁰⁸ *Spokeo* mentioned the latter as one of the factors courts should consider. *TransUnion*, however, having determined there was not a sufficient common-law analogue, did not evaluate congressional judgment at all. It is unclear, then, how congressional judgment is relevant under *TransUnion*, if at all.

¹⁰⁹ *TransUnion*, 141 S. Ct. at 2205 (although a court can consult congressional judgment, it must “independently decide whether a plaintiff has suffered a concrete harm under Article III”).

¹¹⁰ *Id.* at 2207 (emphasis added). This is incorrect even on its terms. As *Lujan* observed, “the province of the court is to decide on the rights of individuals.” 504 U.S. at 576 (quoting *Marbury* 5 U.S. 137) (cleaned up).

court cannot exercise jurisdiction if doing so would encroach upon the exclusive authority of the executive branch. But *TransUnion* makes clear that even if it doesn't, Article III is a freestanding check on legislative authority to create private legal rights that can be *violated* by Congress. In the new regime established by *TransUnion*, the question of whether developments in technology, society, and culture necessitate new private rights and obligations between citizens resides with the judicial, not the legislative branch—it is for courts to make these “inescapably value-laden inquiry . . . into pure policy judgments.”¹¹¹

This directly contradicts *Lujan*, which observed that Congress can create legal rights “the invasion of which creates standing” and approvingly cited *Linda R.S.*,¹¹² where the Court had explicitly noted this principle is true even where there is “no injury” (other than the statutory violation).¹¹³ *TransUnion* overturned *Linda R.S.*, notwithstanding that it was approvingly cited in *Lujan*. Now, Congress cannot create legal private rights the invasion of which creates standing even where no additional injury occurs; it cannot even determine what counts as an injury that confers standing. Under *TransUnion*, as Justice Thomas noted in dissent, “courts alone have the power to sift and weigh harms to decide whether they merit the Federal Judiciary’s attention. In the name of protecting the separation of powers . . . this Court has relieved the legislature of its power to create and define rights.”¹¹⁴ *Lujan* observed that “the province of the court is, solely, to decide on the rights of individuals.”¹¹⁵ But now, if the individual’s right is created by Congress and a court adjudges the right insufficiently important, the court cedes its province. Article III is a limit on the judicial power, yet it “has somehow been transformed into a check on the *legislature’s* authority to pass substantive laws that create enforceable rights.”¹¹⁶ Pronouncing that the judicial branch has the final authority to determine what is and is not a harm sufficient to merit recourse against a lawbreaker for violating a private right is not to apply Article III, but to ignore Article I.

¹¹¹ *TransUnion*, 141 S. Ct. at 2221 (brackets removed) (quoting *Sierra*, 996 F.3d at 1129).

¹¹² 504 U.S. at 578.

¹¹³ *Linda R. S.*, 410 U.S. at 617 n.3.

¹¹⁴ *TransUnion*, 141 S. Ct. at 2221.

¹¹⁵ 504 U.S. at 576 (quoting *Marbury*, 5 U.S. 137) (cleaned up).

¹¹⁶ *Sierra*, 996 F.3d at 1128.

IV. CONCLUSION

Justice Thomas called the *TransUnion* decision “remarkable” and predicted that it will have a novel and far-reaching effect. But it may not have much of an impact long term: Courts have been willing to find that what seem to be inconsequential annoyances nevertheless constitute cognizable harms: a single unwanted phone call, too many digits of a credit card on a receipt, etc. Finding as a threshold matter that such harms are concrete allowed those courts to rule on the cases before them and, in so doing, to recognize that it is the role of the judiciary “to apply, not amend”—nor ignore—“the work of the People’s representatives.”¹¹⁷ It remains to be seen whether, after *TransUnion*, courts will be as willing to do so. As courts wrestle with how to interpret and apply *TransUnion*, it is worth considering that for courts to find a lack of Article III standing in the context of statutorily-created private rights—and therefore to decline to say what the law is in such cases—is to usurp legislative authority and to ignore the very separation-of-powers principle that Article III standing requirements are designed to enforce.

Other Views:

- *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), available at https://www.supremecourt.gov/opinions/20pdf/20-297_4g25.pdf.
- Cass R. Sunstein, *Injury In Fact, Transformed*, 2021 SUP. CT. REV. 349 (2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4055414.
- Thomas B. Bennett, *The Paradox of Exclusive State-Court Jurisdiction Over Federal Claims*, 105 MINN. L. REV. 1211 (2021), available at <https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=4259&context=mlr>.
- Brief for Washington Legal Foundation as Amicus Curiae Supporting Petitioner, *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), available at https://www.supremecourt.gov/DocketPDF/20/20-297/168397/20210208134135338_WLF%20Amicus%20-%20TransUnion%20v.%20Ramirez.pdf.

¹¹⁷ *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1726 (2017).