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ONE STEP FORWARD, THREE STEPS BACK: *TRANSUNION* AND ITS IMPLICATIONS FOR STANDING, SEPARATION OF POWERS, AND PRIVACY RIGHTS

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INTRODUCTION

Near the end of its 2020−21 term, the Supreme Court released its opinion in a seminal case known as *TransUnion LLC v. Ramirez*.[1] The case is another in a long line in which the Court has developed the modern doctrine of standing. *TransUnion* contained two essential holdings: it confirmed that Article III's injury-in-fact requirement

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[1] 141 S. Ct. 2190 (2021).

cannot be satisfied by a mere showing of a statutory violation;[2] and it requires a showing of a common law analogue to establish that the alleged intangible harm suffered constitutes an injury-in-fact.[3] In so holding, *TransUnion* has three significant, negative implications: first, it reflects another step by the Court away from the original meaning of Article III standing; second, it harms the separation of powers by shifting the power to define rights and injuries away from Congress and towards federal courts; and third, it presents a serious threat to privacy rights by limiting plaintiffs' ability to seek remedies when those rights are violated.

This Note will discuss the court's decision in *TransUnion* and elaborate on these three negative implications. Part I recapitulates the Supreme Court's holding in *TransUnion*. Part II discusses how *TransUnion* reflects the Court's continued drift from the original understanding of Article III standing, first by offering an argument as to what the original meaning of Article III standing is, and then by explaining how the Supreme Court's modern standing doctrine—with *TransUnion* being the most recent and decisive step—has moved away from that original meaning. Parts III and IV discuss two serious implications of the Court's move in *TransUnion* farther away from the original understanding of Article III standing: Part III explains the separation-of-powers consequences and Part IV explores the harm to privacy rights. Finally, Part V provides some suggestions for addressing the effects of *TransUnion*.

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[2] *Id.* at 2205 ("[A]n injury in law is not an injury in fact.").

[3] *Id.* at 2200 ("Central to assessing concreteness is whether the asserted harm has a "close relationship" to a harm traditionally recognized as providing a basis for a lawsuit in American courts . . . .").

I. AN OVERVIEW OF *TRANSUNION*

In *TransUnion* a class of 8,185 individuals sued TransUnion, a credit reporting agency, in federal court under the Fair Credit Reporting Act (FCRA). The Act "require[s] that consumer reporting agencies adopt reasonable procedures . . . with regard to the confidentiality, accuracy, relevancy, and proper utilization of [consumer credit]."[4] It also states that "[a]ny person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer . . . ."[5]

The plaintiffs in *Transunion* filed a class action suit claiming that TransUnion violated the FCRA by improperly labeling them terrorists in its database. According to the plaintiffs, the improper labeling violates the FCRA in three ways: first, that TransUnion failed to follow reasonable procedures and thus ensure that their credit reports contained accurate information; second, that TransUnion failed to provide the plaintiffs with all the information in their credit file upon request; and third, that TransUnion failed to provide a summary of their rights along with each written disclosure.[6] All 8,185 class members were improperly labeled as terrorists in the database, but only 1,853 of the 8,185 class members had this improper labeling then disclosed, as their credit reports had been disseminated by TransUnion to potential creditors.[7]

The majority held that only those 1,853 of the 8,185 class members had standing to sue TransUnion because even though all of the class members had suffered a statutorily-created harm, such a harm alone was insufficient to confer Article III standing.[8] The Court distinguished between "a plaintiff 's statutory cause of action to sue a

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[4] 15 U.S.C. § 1681(b).

[5] *Id.* § 1681n(a).

[6] *TransUnion*, 141 S. Ct. at 2202.

[7] *Id.* Disclosure here occurred when a credit check was run and the credit report appeared with a warning that the individual was labeled as a terrorist. *Id.*

[8] *Id.* at 2200, 2205.

defendant over the defendant's violation of federal law" and "a plaintiff's suffering concrete harm because of the defendant's violation of federal law."[9] Accordingly, the Court held that an injury-in-law is not necessarily tantamount to an injury-in-fact and is therefore insufficient to establish Article III standing.[10] In determining whether a plaintiff has suffered an injury under Article III, the Court implied that plaintiffs must identify "a close historical or common-law analogue for their asserted injury."[11]

According to the Court, the 1,853 members of the class who had their information disseminated to potential creditors had suffered a harm analogous to defamation, which it considered a harm traditionally recognized at common law.[12] The Court held that the remaining plaintiffs who had merely been improperly labeled as terrorists but not had their information disseminated did not have standing.[13] This is because these plaintiffs had not yet suffered a harm analogous to defamation since their information had not yet been shared and thus did not satisfy the required common law analogue to show that they had suffered an injury in fact. [14]

On its surface the Court's opinion in *TransUnion* may be inconsequential. The case, after all, is merely another step in the Court's trajectory towards developing a modern standing doctrine.[15]

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[9] *Id.* at 2205.
[10] *Id.*
[11] *Id.* at 2204.
[12] *Id.* at 2209.
[13] *Id.*
[14] *Id.* at 2209−13.
[15] As noted in Part II.B.3, the Court in *Spokeo* stated that "it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Spokeo, Inc. v. Robins*, 578 U.S. 320, 341 (2016). *TransUnion* may therefore be viewed as a mere clarification of *Spokeo*. *E.g.*, Elizabeth Vandesteeg & Lauren Wiley, *U.S. Supreme Court Clarifies Spokeo with TransUnion Decision*, JD SUPRA (Aug. 26, 2021) [https://perma.cc/MUD4-3RFR].

But a deeper investigation into the case reveals the serious potential implications of the decision. In *TransUnion*, the Supreme Court took a further and more decisive step away from the original meaning of standing under Article III. Such a shift creates separation of powers concerns and threatens privacy rights.

II. *TRANSUNION* AND THE COURT'S SHIFT AWAY FROM THE ORIGINAL MEANING OF ARTICLE III STANDING

The Court's decisions in *TransUnion* and other recent standing cases demonstrate its creation of a modern standing doctrine that differs greatly from the original understanding of the authority of federal courts under Article III. At the Founding, a plaintiff had standing wherever a violation of a constitutional right or a private right granted by Congress could be shown, meaning that "injuries-in-law" would suffice for Article III standing.[16] But in developing modern standing doctrine, the Supreme Court has distinguished "injuries-in-law," or statutory violations, from "injuries-in-fact," the latter of which must be shown to establish Article III standing. Today, statutory violations by themselves no longer satisfy Article III standing requirements. Thus, the Court, in developing its modern standing doctrine through cases like *TransUnion*, has largely abandoned the original understanding of "cases and controversies" in Article III.

A. STANDING AT THE FOUNDING

The common understanding at the Founding was that a violation of a statutory right was sufficient to confer Article III standing. There are three sources of evidence for this proposition. First, "cases and controversies" was originally understood to encompass any action alleging a violation of a legal right. Second, early English and

[16] *See generally*, Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992); *see also* William Baude, *Standing in the Shadow of Congress*, 2016 SUP. CT. REV. 197, 199–203.

American common law practices show that plaintiffs were only required to allege a statutory violation to sue in court. And third, qui tam actions demonstrate that Congress could grant rights by passing statutes, the violation of which would confer Article III standing.

1. "Cases" and "Controversies" in Article III Includes Violations of Statutory Rights Granted by Congress

The root of standing doctrine comes from Article III of the Constitution, which provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State,--between Citizens of different States,--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.[17]

Federal court jurisdiction in Article III thus extends to "cases [and] controversies."

The phrase "cases and controversies" was made intentionally broad and was originally understood to encompass any action in which an individual seeks redress for a violation of a legal right granted by Congress.

"Cases and controversies" implies a broad meaning. At the Constitutional Convention, the language in Article IIII originally

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[17] U.S CONST. art. III, § 2.

stated that the "jurisdiction of the national Judiciary shall extend to cases arising under laws passed by the general Legislature, and to such other questions as involve the National peace and harmony."[18] While this language was later changed to the language that appears in the Constitution today, it does not seem as though that change was intended to limit the jurisdiction of the court.[19] "Cases and controversies" thus implies a fairly broad scope of judicial power.

Additionally, "cases and controversies" has been broadly defined to include any suit based on a statutory violation. Webster's Dictionary defined a "case" as a "[a] cause or suit in court" and states that it is "nearly synonymous with cause . . . ."[20] And "cause" is defined as a "suit or action in court . . . by which he seeks his right or his supposed right."[21] Additionally, the Supreme Court in *Muskrat v. United States* stated that Justice Marshall's definition of a "case" in *Marbury v. Madison* included "a suit according to the regular course of judicial procedure.'"[22] Justice Marshall himself also defined a case as consisting of "a party who asserts his rights in the form prescribed by law."[23] Thus, the plain text of "cases and controversies" in Article III includes an action that allows an individual to seek a remedy for a legal right violated.

Based on the text of Article III, a right could be anything defined by the Constitution or Congress. Article III defines these cases as including those "arising under the constitution" and those arising

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[18] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 39 (Max Farrand ed., 1911).

[19] Although Records from the Federal Convention indicate that the language changed, there was no mention of doing so in an effort to limit the judiciary's jurisdiction. *Id.* at 430-32, 576.

[20] *Case*, WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).

[21] *Cause*, *id.*

[22] Muskrat v. United States, 219 U.S. 346, 356 (1911). The "regular course of judicial procedure" is further explored in in the next section, which discusses how statutory violations giving rise to a suit were considered sufficient bases for standing at the time of the founding.

[23] Osborn v. Bank of U.S, 22 U.S. (9 Wheat.) 738, 819 (1824).

under "the Laws of the United States."[24] It is unclear why a distinction should be made between Article III standing and standing conferred by Congress when Article III itself states that the Supreme Court has jurisdiction to hear cases that arise under the laws passed by Congress. If more was required, one would think that a qualifier would be included to limit the judiciary's ability to hear cases to only certain laws. But that does not appear in Article III. Rather, all that is suggested is that the Court may hear cases and controversies, including those which arise under the laws of the United States. Alexander Hamilton endorsed this understanding when he wrote: "It seems scarcely to admit of controversy, that the judiciary authority of the union ought to extend to these several descriptions of cases . . . [t]o all those which arise out of the laws of the United States, passed in pursuance of their just and constitutional powers of legislation."[25] Thus, the language of Article III supports the view that federal court authority exists wherever an individual asserts a violation of a legal right that has been granted by Congress.

2. English and American Common Law Demonstrate that Statutory Violations Could Satisfy Standing

The standing requirements of English and American common-law courts also demonstrate a common understanding at the Founding that a violation of a statutory right was sufficient to confer standing.[26] English common law did not require plaintiffs to show a harm separate from the violation of a legal right when seeking relief from

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[24] U.S. CONST., art. III, § 2.

[25] THE FEDERALIST NO. 80 (Alexander Hamilton).

[26] While English and American common law courts were not bound by Article III standing requirements, looking at such cases is still considered helpful in discerning what the original meaning of a constitutional provision is. *See, e.g.*, Myers v. United States, 272 U.S. 52, 233-34 (1926) (looking at English common law to determine the original meaning of the President's removal power under the Constitution).

courts.[27] According to Blackstone, a party in England could seek relief even though "no actual suffering is proved."[28] In one English common law case, a violation of property rights did not require anything more than a showing of one man stepping onto the property of another.[29] English courts were even allowed to grant discretionary relief to strangers who had not suffered any concrete harm but were still permitted by statute to sue.[30]

American common-law courts have traditionally required a plaintiff to show only an injury-in-law to bring suit in court.[31] One New Jersey case specifically denied the argument that the court could not provide a remedy "unless he will previously lay some cause before them tending to show that he is or may be affected by the operation of the by-law . . . ."[32] And other state courts similarly allowed individuals to bring suits on behalf of others without showing any specific harm to themselves.[33] Courts did not require any specific injury-in-fact and instead found that a legal injury itself may satisfy standing because "[e]very violation of a right imports some damage."[34]

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[27] See 3 WILLIAM BLACKSTONE, COMMENTARIES *120–24; 1 THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 166 (9th ed. 1920) ("Wherever the breach of an agreement or the invasion of a right is established, the English law infers some damage to the plaintiff.").

[28] 3 BLACKSTONE, *supra* note 27, at *120.

[29] F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 281 (2008).

[30] *See* Sunstein, *supra* note 16, at 171−72 (discussing practices in early England and American with respect to standing).

[31] *See* Entick v. Carrington (1765) 95 Eng. Rep. 807, 817; 2 Wils. K.B. 275, 291.

[32] State v. Corp. of New Brunswick, 1 N.J.L. 450, 451 (1795).

[33] State v. Justices of Middlesex, 1 N.J.L. 283, 294 (1794); Zylstra v. Corp. of Charleston, 1 S.C.L. (1 Bay) 382, 398 (1794).

[34] Whittemore v. Cutter, 29 F. Cas. 1120, 1121 (C.C.D. Mass. 1813) (No. 17,600); *see also* Muransky v. Godiva Chocolatier, Inc., 979 F.3d 1175, 1198-99 (11th Cir. 2019) (Jordan, J., concurring) (collecting cases); Warth v. Seldin, 422 U.S. 490, 500 (1975) ("The actual or threatened injury required by Art. III may exist solely by virtue of statutes

3. Federal Statutes Show that Article III Standing Could Exist Solely Through a Statutory Violation

Federal statutes authorizing qui tam actions further demonstrate that a showing of a statutory violation was all that was required to confer Article III standing. Statutes authorizing qui tam actions granted citizens the right to "bring suits against offenders of the law."[35] In other words, these statutes allowed an individual with no personal stake in a matter to file a claim in federal court based solely upon the violation of a federal law.[36] Qui tam actions were a common part of English law as well as American law.[37] In fact, the First Congress passed several statutes authorizing qui tam statutes, showing the common understanding that Congress had the power to grant such rights to individuals and allow them to vindicate those rights in federal court. Federal courts at the time of the Founding did not take issue with statutes authorizing qui tam actions, and the Supreme Court notably did not raise standing concerns when qui tam actions were filed before it.[38]

Even today, qui tam actions continue to exist, and the Supreme Court continues to allow them. The Court's treatment of qui tam actions seems to rest in large part upon the acknowledgement that such actions clearly fall within the original meaning of "cases and controversies" under Article III. Take the False Claims Act, for example. The False Claims Act allows qui tam actions by "authoriz[ing] private individuals to adopt the government's cause of action and sue

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creating legal rights, the invasion of which creates standing.") (internal quotation marks omitted).

[35] Sunstein, *supra* note 16, at 175.

[36] *Id.*

[37] Vt. Agency of Nat. Res. v. United States ex rel. Stevens, 529 U.S. 765, 775−76 (2000).

[38] The Laura, 114 U.S. 411 (1885); Marvin v. Trout, 199 U.S. 212 (1905); United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943).

on behalf of the United States."[39] And the Supreme Court, in cases like *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, has allowed the violation of such provisions to satisfy Article III standing requirements.[40] According to the Court, standing in these qui tam actions exists because the FCA essentially assigns the government's claims to qui tam plaintiffs by allowing them to sue.[41] Given that the government can establish the injury-in-fact requirements of Article III, qui tam plaintiffs therefore also satisfy Article III standing requirements.[42] This reasoning seems shaky at best, especially considering the Court's unwillingness to allow statutory violations to satisfy standing requirements in both *Lujan v. Defenders of Wildlife*[43] and *Allen v. Wright*,[44] which both involved statutes allowing individuals to sue for violations of a law, even where the violations caused the plaintiffs no particular harm.[45]

Rather than the assignment rationale, what really seems to be driving the Court's decision in *Stevens* is the "long tradition of qui tam actions in England and the American Colonies."[46] The Court discusses at great length the history of qui tam statutes and actions when explaining why a statutory violation in this case satisfies Article III standing.[47] And it specifically recognizes that qui tam actions at the time of the Founding were considered "cases and controversies

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[39] Thomas R. Lee, *The Standing of Qui Tam Relators Under the False Claims Act*, 57 U. CHI. L. REV. 543, 543 (1990).

[40] *Stevens*, 529 U.S. at 771–78.

[41] *Id.* at 772–73.

[42] *Id.*

[43] 504 U.S. 555 (1991).

[44] 468 U.S. 737 (1984).

[45] See discussion in Part III.A for more information on these cases. Like the statute in *Stevens*, the statutes in both *Lujan* and *Allen* "assign" the executive power of general enforcement of the laws to individuals. But unlike in *Stevens*, the Court did not employ an assignment rationale in *Lujan* and *Allen* but rather held that such a shifting of the power of general enforcement from the executive to individuals violated the separation of powers. *Lujan*, 504 U.S. at 577; *Allen*, 468 U.S. at 750, 752, 759, 761.

[46] *Stevens*, 529 U.S. at 774.

[47] *Id.* at 774–78.

of the sort traditionally amenable to, and resolved by, the judicial process."[48] The Supreme Court has thus acknowledged that statutes could confer Article III standing at the Founding.

Article III's text, traditional practice by English and American courts, and the history and current survival of qui tam actions all suggest that the violation of rights created and defined statutorily by Congress was commonly understood as sufficient means for establishing standing in federal courts. Consequently, injuries-in-law satisfy Article III standing under its original meaning.

B. THE SUPREME COURT'S DEVELOPMENT OF MODERN STANDING DOCTRINE

While the original meaning of Article III allows injuries-in-law to satisfy standing requirements, federal courts do not adhere to such a rule today. To understand how we have drifted from the original constitutional conception of standing, it is worth revisiting how and why our interpretation of standing under Article III evolved into the standing doctrine that brought us to *TransUnion*.

Through the development of modern standing doctrine, the Supreme Court has moved away from the original understanding of federal court jurisdiction under Article III by creating a distinction between injuries-in-law and injuries-in-fact. At first, the Court allowed a showing of an injury-in-fact as a means, other than showing injury-in-law, to satisfy standing. The Court thus introduced the concept of injury-in-fact to broaden the ways a plaintiff could show Article III standing. As the following section explains, the Court transformed a showing of injury-in-fact from an additional means for satisfying Article III standing to a requirement for satisfying Article III standing. The Court has since continued to narrow the means by

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[48] *Id.* at 774.

which a plaintiff can establish standing by further distinguishing injuries-in-law from injuries-in-fact, a distinction that did not exist at the Founding. *TransUnion* is yet another step by the Supreme Court in defining modern standing doctrine and moving away from Article III's original meaning.

1. Using Injury-in-Fact to Broaden Article III Standing

For a while, the Supreme Court's standing doctrine aligned with the original understanding of Article III by requiring only a showing of an injury-in-law. For example, the Court in *Tennessee Electric Power Co. v. TVA*[49] held that a plaintiff did not have standing "unless the right invaded is a legal right."[50] And in *FCC v. Sanders Bros. Radio Station*, the Court recognized Article III standing for a plaintiff alleging an injury based on a violation of the 1934 Communications Act.[51] The plaintiff in *Sanders Bros.* submitted an application to move its broadcasting station to a different city in order to prevent its competitor from interfering with the plaintiff's business and services.[52] The FCC (defendant) rejected plaintiff's application, which plaintiff then disputed under Section 402 of the 1934 Communications Act, which provided a private right of action and conferred standing on "any person aggrieved or whose interests are adversely affected" by the FCC's decision to grant or deny a licensing application.[53] The defendant argued that the plaintiff did not have standing under Section 402 to sue, but the Court disagreed, recognizing that "[i]t is within the power of Congress to confer such standing."[54]

The injury-in-law requirement, however, made it difficult to bring cases against federal officers or agencies. In particular,

[49] 306 U.S. 118 (1939).
[50] *Id.* at 137.
[51] 309 U.S. 470, 476–77 (1940).
[52] *Id.* at 471–72.
[53] *Id.* at 472-73.
[54] *Id.* at 477.

plaintiffs could not effectively challenge statutes that limited competition because there was no recognized legal interest to freedom of competition.[55] Recognizing this bar against plaintiffs bringing claims in federal court, the Supreme Court introduced injury-in-fact as another means for establishing Article III standing. Injury-in-fact made its first appearance in *Association of Data Processing Service Organizations, Inc. v. Camp*.[56] In *Data Processing*, the plaintiffs were unable to show a violation of a legal right, the standard required by *Tennessee Electric Power* and *Sanders Bros*.[57] The Court allowed a showing of economic and noneconomic harm, outside of just a violation of a legal right, to satisfy the standing requirement.[58] In other words, it allowed the plaintiffs to establish Article III standing by showing that they had suffered injury-in-fact instead of the formerly required injury-in-law. Even then, the injury-in-fact requirement was only sufficient because the Court deemed that the "general policy" of the relevant statute encompassed persons like the plaintiffs, and thus there was no clear intent by Congress to withhold judicial review in a matter like this.[59] Thus, the Court in *Data Processing* allowed plaintiffs who could not actually establish a statutory violation to establish Article III standing nonetheless by showing that they had suffered an injury-in-fact which fell "within the zone of interests to be protected or regulated by the statute . . . in question."[60] In doing so, the Court essentially used the injury-in-fact requirement as a substitute for the typical requirement of showing injury-in-law, thereby relaxing Article III standing requirements so that more plaintiffs could bring

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[55] Robert Marquis, *The Zone of Interests Component of the Federal Standing Rules: Alive and Well after All*, 4 U. ARK. LITTLE ROCK L. REV. 261, 263-65 (1981).

[56] 397 U.S. 150 (1970).

[57] *Id.* at 152−53.

[58] *Id.* at 151−54.

[59] *Id.* at 157.

[60] *Id.* at 153.

claims in federal court. In other words, the changing standing doctrine was rolled out as a welcome mat, not a 'keep out' sign.

2. Using Injury-in-Fact to Limit Article III Standing

Following *Data Processing*, a steady stream of Supreme Court cases has transformed the understanding of injury-in-fact from an additional avenue for establishing Article III standing to a constitutional requirement in itself. In *Lujan v. Defenders of Wildlife*[61] the Court used the injury-in-fact requirement to address separation-of-powers concerns. *Lujan* involved a private right of action granted by Congress in the Endangered Species Act to sue federal agencies that fail to properly comply with the Act.[62] The Court, concerned that this statute divested general statutory enforcement authority away from the Executive and towards the public, held that the private parties lacked Article III standing because they failed to show an injury in fact.[63] The Court further stated that the "requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute."[64] Thus, the Court held an injury-in-fact to be a requirement rather than an additional means for establishing Article III standing.

With the development of a separate "injury in fact," distinct from an "injury in law" came a test for determining when a harm constitutes injury-in-fact. The *Lujan* Court defined an injury in fact as an "invasion of a legally-protected interest which is . . . concrete and particularized" and "actual or imminent."[65] But while a showing of injury-in-fact was now required for Article III standing, the Court qualified that "[n]othing in this contradicts the principle that '[t]he . . . injury required by Art. III may exist solely by virtue of "statutes

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[61] 504 U.S. 555 (1991).
[62] *Id.* at 557-58.
[63] *Id.* at 573.
[64] Summers v. Earth Island Inst., 555 U.S. 488, 497 (2009).
[65] *Lujan*, 504 U.S. at 560.

creating legal rights, the invasion of which creates standing.'"'"[66] Thus, the Court suggested that statutory violations could still satisfy the injury-in-fact requirement.

The Court seemed to contradict this principle, however, in *Spokeo v. Robins*,[67] when it recognized that a violation of a statutory right does not automatically qualify as injury-in-fact.[68] In *Spokeo*, the plaintiff alleged that the defendant's search engine violated the FCRA for gathering and disseminating false information about the plaintiff.[69] The Court rejected the Ninth Circuit's holding that the violation of a statutory right was by itself sufficient to confer standing.[70] In doing so, it undermined *Lujan*'s suggestion by instead stating that what Congress does when granting a statutory right is "elevat[e] to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law."[71] By implying that Congress can only create injuries-in-law, not injuries-in-fact, the Court modified statutory violations from being a means to satisfy the injury-in-fact requirement[72] to merely "instructive and important" means for determining whether there is injury-in-fact.[73] Injury-in-fact thus became not only a requirement for Article III standing, but also one that must exist entirely separate from injury-in-law.

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[66] *Id.* at 578 (internal citations omitted).

[67] Spokeo, Inc. v. Robins, 578 U.S. 330 (2016).

[68] *Id.* at 341.

[69] *Id.* at 336.

[70] *Id.* at 336-37, 343.

[71] *Id.* at 341.

[72] Lujan v. Defs. of Wildlife, 504 U.S. 555, 578 (1992).

[73] *Spokeo*, 578 U.S. at 340-41 ("In determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles . . . [I]t is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit . . . .").

3. TransUnion *Reflects the Court's Latest Step in its Development of Modern Standing Doctrine*

The *TransUnion* decision took modern standing doctrine farther away from the original meaning of Article III standing in two important ways. First, it confirmed what the Court in *Spokeo* implied: Article III standing requires a showing of injury-in-fact and injury-in-law, and Congress's granting of a statutory right satisfies the latter but not the former.[74] Although *Spokeo* implied that a statutory violation by itself could not constitute a concrete harm and thus could not satisfy the injury-in-fact requirement, the Court did not explicitly state that, leaving some room for uncertainty. *TransUnion* has now provided certainty. In *TransUnion*, the Court made clear that "an injury in law is not an injury in fact."[75] It stated that injury-in-fact requires that the plaintiff suffer a concrete injury beyond just a statutory violation.[76] An independent showing of "concreteness" is central to the standing inquiry.

Second, the *TransUnion* Court went beyond the Court's decision in *Spokeo* when it stated that identifying a close relationship to a common law analogue would be central to determining whether an intangible harm is concrete. The Court in *Spokeo* noted that identifying a common law analogue is "*instructive*" when "consider[ing] whether an alleged intangible harm" is concrete and thus may qualify as injury-in-fact,[77] but it did not elevate this showing to the status of a requirement. The Court in *TransUnion* took this a step further and stated that determining "whether the asserted harm has a 'close relationship' to a harm traditionally recognized as providing a basis

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[74] TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2205 (2021).

[75] *Id.*

[76] *Id.* ("Congress's creation of a statutory prohibition or obligation and a cause of action does not relieve courts of their responsibility to independently decide whether a plaintiff has suffered a concrete harm under Article III . . . .").

[77] *Spokeo*, 578 U.S. at 341 (emphasis added).

for a lawsuit in American courts" is "*[c]entral* to assessing concreteness."[78]

Although *TransUnion* cites *Spokeo* for this assertion, it was far from clearly established law: "central," as used in *TransUnion,* is a much stronger word than "instructive," which was used in *Spokeo* and provides that the Court will treat the common-law analogy as a requirement for finding standing in future cases. Thus, while *Spokeo* seems to consider common law analogues as merely helpful in showing concreteness, *TransUnion* suggests that a common law analogue is required to show concreteness. This change to the landscape of modern standing doctrine is significant and should not be overlooked. As discussed further in Part III, the common law analogue seriously undermines Congress's ability to effectively recognize new rights and grant private rights of action, a power Congress was originally understood to have at the Founding. In effecting such a change, the Court has thus shifted standing doctrine even farther away from its original understanding.

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As this Note has shown, contemporary standing doctrine is quite different from that suggested by the original meaning and early practice of federal court jurisdiction under Article III. At the time of the Founding, Article III was understood only to require a plaintiff to show a violation of a legal right. Statutory violations thus sufficed to confer standing. But with the development of the injury-in-fact requirement, the Court has reinterpreted Article III to require more. *TransUnion* is just the Court's latest step in moving farther away from Article III standing's original meaning by (i) solidifying that a statutory violation (by itself) will not satisfy the injury-in-fact requirement

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[78] *TransUnion*, 141 S. Ct. at 2200 (emphasis added).

and (ii) requiring courts independently to determine whether injury-in-fact exists by directing courts to scrutinize plaintiffs' claims for a showing of a common-law analogue.

III. *TRANSUNION'S* IMPLICATIONS FOR SEPARATION OF POWERS

By limiting Congress's power to pass laws allowing citizens effectively to vindicate their rights, *TransUnion* threatens the separation of powers. Prior Supreme Court cases have modified standing requirements and restricted Congress's power to grant private rights of action, particularly in cases based on potential threats to the separation of powers. *TransUnion* relies on the separation-of-powers concerns articulated in those cases—but ignores the context in which they arose—in holding that statutory violations by themselves are insufficient to confer Article III standing. In doing so, the Court in *TransUnion* actually harms the separation of powers instead of protecting it.

A. PRIOR SUPREME COURT CASES MODIFIED STANDING DOCTRINE IN THE INTEREST OF THE SEPARATION OF POWERS

In prior Supreme Court cases, the Court cited a concern for preserving the separation of powers as the underlying reason for requiring injury-in-fact. In *Allen v. Wright*,[79] the Supreme Court noted that "Art[icle] III standing is built on . . . the idea of separation of powers."[80] The plaintiffs in *Allen* challenged IRS guidelines requiring schools to demonstrate that they had adopted racially nondiscriminatory policies in order to receive tax exemptions.[81] The plaintiffs claimed that such guidelines, which merely require the adoption and recognition (but not the implementation) of a nondiscrimination

[79] 468 U.S. 737 (1984).
[80] *Id.* at 752.
[81] *Id.* at 739-41.

policy, still allowed private schools possibly engaged in racial discrimination to receive tax exemptions from the IRS.[82] This, according to the plaintiffs, violated the Internal Revenue Code, which denied tax-exempt status to racially discriminatory private schools.[83] The Court held that the statutory violation in this case was insufficient to confer standing because the alleged harm was not particularized; rather it was a general grievance against the government.[84] The Court stated that the separation of powers prevents Congress from allowing an individual to sue the government for a general violation of the law (without any showing of a particular harm to the individual) because the Constitution grants the power of general enforcement of federal laws to the Executive Branch.[85]

The Court similarly relied on separation-of-powers concerns in denying a statutory violation's sufficiency to establish standing in *Lujan*.[86] There, an environmental group challenged a regulation by a federal agency, claiming that it violated the Endangered Species Act.[87] The Act required federal agencies to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species . . . ."[88] And it provided individuals the right to sue for violations of this requirement.[89] Thus, the Act essentially allowed individuals to enforce regulatory agency procedures.

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[82] *Id.* at 744-45.

[83] *Id.* at 740.

[84] *Id.* at 755-56.

[85] *Id.* at 761 ("[T]he idea of separation of powers . . . counsels against recognizing standing in a case brought . . . not to enforce specific legal obligations whose violation works a direct harm . . . but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties.").

[86] Lujan v. Defs. of Wildlife, 504 U.S. 555 (1991).

[87] *Id.* at 558-59.

[88] *Id.* at 558.

[89] *Id.* at 559.

Such a right, the Court recognized, would violate the separation of powers.[90] Consequently, the Court refused to find that the statutory violation in this case was sufficient to establish Article III standing.

The separation-of-powers concerns underlying the Court's decisions in *Allen* and *Lujan* are fairly clear. The Constitution provides that the Legislative Branch makes laws and that the Executive Branch "take care that the laws be faithfully executed."[91] Consequently, "[v]indicating the public interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive."[92] By granting individuals a right to sue government agencies for general violations of the law, the statutes in both *Allen* and *Lujan* divested the power to enforce public rights from the Executive to individual citizens. This created a separation-of-powers issue. In both cases, the Court responded to these separation-of-powers concerns by finding that a mere statutory violation, an injury-in-law, was not enough to confer standing; it instead required a showing of injury-in-fact, specifically that the injury must be particularized. The Court thus reconfigured Article III standing and added the injury-in-fact requirement as a means to address separation of powers concerns.[93]

B. *TRANSUNION* FURTHER MODIFIES STANDING DOCTRINE TO LIMIT CONGRESS'S LEGISLATIVE POWERS AND THREATEN THE SEPARATION OF POWERS

By improperly relying on the separation-of-powers concerns underlying the decisions in *Allen* and *Lujan*, *TransUnion* strips Congress of an essential power, thereby creating the exact risk to the separation of powers that the Court in those cases sought to avoid.

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[90] *Id.* at 576-77.

[91] U.S. CONST. art. I, § 1; *id.* art. II, § 3.

[92] *Lujan*, 504 U.S. at 576.

[93] For more on this, see generally Tara Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781 (2009).

TransUnion did not present the same separation-of-powers concerns that the Court recognized in *Allen* and *Lujan*. Article III standing in *Allen* and *Lujan* was not satisfied because the alleged injuries were neither concrete nor particularized but rather a generalized grievance. This differs from *TransUnion* in which the FCRA created a particularized harm rather than a generalized grievance[94] by recognizing a particular duty owed to consumers with respect to credit reporting. Unlike *Allen* and *Lujan*, the statute in *TransUnion* does not grant individuals any general enforcement powers which belong to the Executive. Consequently, allowing a plaintiff to establish standing solely by showing a statutory violation does not present the same potential threats to the separation of powers that the statutes in *Allen* and *Lujan* did.

Despite this significant distinction, the majority in *TransUnion* still cited the separation of powers as an underlying concern for its decision. The Court called the concrete-injury requirement "essential to the Constitution's separation of powers."[95] And it stated that statutory violations by themselves could not satisfy the injury-in-fact requirement because this would potentially allow Congress to draft legislation in a manner that would "authorize plaintiffs who have not suffered concrete harms to sue in federal court simply to enforce general compliance with regulatory law."[96]

The problem with this hypothetical concern is that it is just that: hypothetical. Congress in this case had not granted a right to enforce general compliance with a regulatory law, like it had previously done in *Allen* and *Lujan*. It instead granted a private right of action for those who suffered after TransUnion failed to use "reasonable procedures to ensure the accuracy of their credit files" in violation of a

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[94] 15 U.S.C. § 1681n(a) ("Any person who willfully fails to comply" with such duties "with respect to any consumer is liable to that consumer . . . .").

[95] TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2207 (2021).

[96] *Id.* at 2207 n.3.

statute.[97] Thus, the Court's decision rests upon separation-of-powers concerns from *Lujan* and *Allen*—concerns that simply do not exist in *TransUnion*. In doing so, the Court in *TransUnion* imposed a strict injury-in-fact requirement in *anticipation of potential* separation-of-powers threats based upon *Lujan* and *Allen*, which applied a strict injury-in-fact requirement to address *existing* separation-of-powers concerns.

In its attempt to preemptively prevent threats to the separation of powers, the Court in *TransUnion* actually harms it. While separation-of-powers concerns may prevent Congress from granting individuals the right to general enforcement of the laws, it does not prevent individuals from suing for violations of their private rights. Congress has the power to protect citizens' private rights by passing legislation.[98] And it depends on courts to expound upon the meaning of these laws for them to be effective.[99] So when the Court in *TransUnion* held that a statutory violation can never by itself satisfy the injury in fact requirement, even in cases where the statute protects a private right rather than granting a right of general enforcement, it stripped Congress of an essential power to define individuals' private rights. In doing so, the Court created the exact risk to the separation of powers that it sought to avoid.[100]

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[97] *Id.* at 2200; *see also* 15 U.S.C. § 1681n(a).

[98] *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 81, 84 (Richard H. Cox ed., Harlan Davidson 1965); U.S. CONST. art. I, § 8.

[99] THE FEDERALIST NO. 22 (Alexander Hamilton) ("Laws are a dead letter without courts to expound and define their true meaning and operation.").

[100] Justice Thomas has proposed a restructuring to the Court's current standing doctrine that would limit the potential threat to the separation of powers in *Lujan* and *Allen* while maintaining Congress's power to grant private rights. According to Justice Thomas, the solution lies in recognizing a distinction between public and private rights. In cases where a plaintiff seeks to "vindicate a public right embodied in a federal statute," the Court's current injury-in-fact requirements would apply. But where a plaintiff seeks to "vindicate a statutorily created private right," the mere showing of a statutory violation would be sufficient to establish Article III standing. This is an

IV. *TRANSUNION*'S IMPLICATIONS FOR PRIVACY RIGHTS

Although the Court in *TransUnion* did not specifically discuss privacy rights, its imposition of a common-law analogue requirement will have a significant effect on the protection of privacy rights. Privacy rights already protected by the Fourth Amendment likely will not be affected, but statutorily recognized privacy rights, particularly those relating to data, will. And even though plaintiffs may be able to vindicate privacy rights granted by statutes in state courts, *TransUnion* will still affect their ability to seek and obtain remedies for violations of their privacy rights by eliminating the ability to vindicate these rights in federal courts.

A. *TRANSUNION* WILL LIKELY NOT AFFECT BASELINE FOURTH AMENDMENT RIGHTS

It is unlikely that *TransUnion* will affect cases involving privacy invasions that qualify as Fourth Amendment violations. The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ."[101] Although the word "privacy" does not appear in the amendment, the Supreme Court has interpreted the Fourth Amendment as protecting an individual's "reasonable expectation of privacy."[102]

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interesting solution but given the Court's outright refusal to adopt it in both *Spokeo* and *TransUnion*, it likely is not a solution that will be embraced by the Court at any point in the near future. For more on this discussion, see generally Spokeo, Inc. v. Robins, 578 U.S. 330, 344-46 (2016) (Thomas, J., concurring); *TransUnion*, 141 S. Ct. 2190, 2217-18 (2021) (Thomas, J., dissenting).

[101] U.S. CONST., amend IV.

[102] Carpenter v. United States, 138 S. Ct. 2206, 2217 (2018); *see also* Katz v. United States, 389 U.S. 347, 360−61 (Harlan, J. concurring) (explaining the "reasonable expectation of privacy" test).

Alleged Fourth Amendment violations have historically satisfied the Article III standing requirements. Prior to *TransUnion*, The Supreme Court concluded in multiple cases that Fourth Amendment violations were sufficient to confer standing.[103] And the Court in *TransUnion* even recognized that "traditional harms may also include harms specified by the Constitution itself."[104] Because Fourth Amendment violations are themselves considered traditional harms, any government violations of a person's reasonable expectation of privacy qualify as injury-in-fact. Consequently, the Court's *TransUnion* decision likely will not change individuals' ability to obtain remedies for privacy violations that are already illegal under the Fourth Amendment.

B. *TRANSUNION*'S EFFECT ON STATUTORILY RECOGNIZED PRIVACY RIGHTS

However, *TransUnion* will have serious implications for modern privacy rights not protected by the Fourth Amendment. The Fourth Amendment only protects individuals from government invasions of reasonable expectations of privacy; it does not extend to

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[103] Rakas v. Illinois, 439 U.S. 128, 143 (1978) (stating that the "capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place."). While the Supreme Court in *Clapper v. Amnesty International* did not find standing because harm had not materialized and was not sufficiently imminent, Justice Breyer stated that "[n]o one here denies that the Government's interception of a private telephone or e-mail conversation amounts to an injury that is 'concrete and particularized.'" 568 U.S. 398, 423 (2013) (Breyer, J., dissenting). Consider *In re Directives to Yahoo! Inc, Pursuant to Section 105b of the Foreign Intelligence Surveillance Act*, where the United States Foreign Intelligence Surveillance Court found that a company had standing because the surveillance in question violated the plaintiff's "reasonable expectation of privacy," and thus the Fourth Amendment. No. 105B(g): 07-01, at 55-56 (FISA Ct. Apr. 25, 2008) [https://perma.cc/7CTS-P8PY].

[104] TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2204 (2021).

invasions of privacy by private actors.[105] Consequently, any additional federally protected privacy rights must be granted statutorily by Congress. While Congress may pass laws protecting individuals' privacy rights, *TransUnion* now requires an additional showing of a "'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts" for a plaintiff to sue in federal court.[106] *TransUnion*'s effect on privacy rights thus depends on two things: First, whether privacy torts are considered part of traditional common law. And second, whether harms caused by modern privacy violations are "closely related" to a harm traditionally recognized at common law.

1. Whether Privacy Torts Are Traditionally Recognized at Common Law

Although it is unclear what exactly qualifies as "a harm traditionally recognized as providing a basis for a lawsuit in American courts,"[107] privacy torts likely fall under this category. The Court in *TransUnion* did not define what makes a common law tort "traditional." Is it one that existed at the time of the Founding? Could it be a tort that developed over time but now is considered well-established in common law? Must it be at least 100 years old? These unanswered questions demonstrate the gaps left by the Court in *TransUnion* for determining whether a traditional common-law analogue exists for an intangible harm.

Privacy torts were not recognized in common law until the 1900s, but using analogical reasoning we can deduce that they likely qualify

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[105] United States v. Jacobsen, 466 U.S. 109, 113 (1984) (stating that the Fourth Amendment protection "proscrib[es] only governmental action; it is wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.'").

[106] *TransUnion*, 141 S. Ct. at 2200.

[107] *Id.*

as traditional harms. The Court in *TransUnion* may not have defined what qualifies as a traditional harm, but it did provide a list of intangible harms it considered concrete. Among them were the "disclosure of private information, and intrusion upon seclusion."[108] These are recognized privacy harms developed during the 20th century.[109] So it seems that privacy torts qualify as traditional harms and thus could be used as common-law analogues to establish standing for other intangible harms.

2. Whether Harms Arising from Modern Privacy Violations are Closely Related to Traditionally Recognized Harms

But even if the Court recognizes privacy torts as traditional harms, the question remains as to whether new types of privacy violations that arise due to technological advancements will actually satisfy the requirement of a "close relationship" to these traditional harms.[110] This largely stems from uncertainty as to what "close relationship" actually means. One example of this uncertainty is the disagreement among lower courts with respect to standing and the Telephone Consumer Protection Act (TCPA).

The TCPA "generally prohibits robocalls to cell phones and home phones."[111] It provides:

> It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States . . . to initiate any telephone call to any residential telephone line using an artificial or

[108] *Id.* at 2204.

[109] Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, 102 B.U. L. REV. 793, 807-10 (2022).

[110] *TransUnion*, 141 S. Ct. at 2200 ("Central to assessing concreteness is whether the asserted harm has a "close relationship" to a harm traditionally recognized as providing a basis for a lawsuit in American courts . . . .").

[111] Barr v. Am. Ass'n of Political Consultants, Inc., 140 S. Ct. 2335, 2343 (2020).

> prerecorded voice to deliver a message without the prior express consent of the called party.[112]

The TCPA grants a private right of action for violations of the Act.[113] Further, Congress passed the TCPA specifically to protect individuals from the nuisance and privacy invasions brought about by robocalls.[114]

Whether violations of the TCPA are sufficient to confer standing has been an issue at controversy among lower courts, especially since the Supreme Court's decision in *Spokeo*, in which the Court suggested that a common-law analogue is "instructive" when determining the concreteness of "an alleged intangible harm."[115] The federal appellate circuits have split over whether alleged privacy violations arising from an unwanted automated text message violating the TCPA are harms sufficient to confer Article III standing. In particular, courts disagree over whether such privacy violations are "closely related" to the traditional privacy harms recognized at common law. The Seventh Circuit has concluded that a close relationship does exist.[116] In a decision by then-Judge Barrett, the Seventh Circuit noted that the recognized interests of privacy by Congress in the TCPA are sufficiently analogous to a traditional harm in common law, "intrusion upon seclusion," to confer standing.[117] But the Eleventh Circuit has concluded the opposite.[118] In its opinion in *Salcedo v. Hanna*, the Eleventh Circuit held that an unwanted text message in violation of

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[112] 47 U.S.C § 227(b).

[113] 47 U.S.C § 227(c).

[114] *Barr*, 140 S. Ct. at 2344 (citing Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394–95) ("In enacting the TCPA, Congress found that banning robocalls was 'the only effective means of protecting telephone consumers from this nuisance and privacy invasion.'").

[115] Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016).

[116] Gadelhak v. AT&T Servs., Inc., 950 F.3d 458, 462−63 (7th Cir. 2020).

[117] *Id*. at 462.

[118] Salcedo v. Hanna, 936 F.3d 1162, 1169−70, 1173 (11th Cir. 2019).

the TCPA was not sufficiently analogous to the tort of intrusion upon seclusion because it "differ[s] in the kind and degree of harm."[119]

The difference between the Eleventh Circuit and Seventh Circuit's opinions stems from their understanding of what constitutes a "close relationship." While the Eleventh Circuit looked at both the kind and degree of harm to determine whether there was a close relationship between the alleged harm and harms recognized at common law,[120] the Seventh Circuit stated that the alleged harm must only have a close relationship in kind to a harm recognized at common law.[121] The uncertainty regarding a "close relationship" thus may lead to some courts recognizing Article III standing and others denying Article III standing for certain privacy rights violations. This, in turn, will create confusion amongst plaintiffs about whether they can actually seek redress in federal courts for certain privacy rights violations.

TransUnion's "close relationship" requirement is particularly problematic for the protection of data privacy because data breaches involve a type of harm different in nature from the harm traditionally recognized by privacy torts. Traditional privacy torts recognized a harm based on unauthorized public exposure.[122] But with data privacy, an individual may be harmed by the mere failure of the data holder properly to maintain their private information, even if that information has not been disseminated in any way.[123] Consequently, harms from violations of data privacy rights may not be sufficiently analogous to the harms recognized by traditional privacy torts.

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[119] *Id.* at 1172.

[120] *Id.*

[121] *Gadelhak*, 950 F.3d at 462.

[122] Alicia Solow-Niederman, *Beyond the Privacy Torts: Reinvigorating a Common Law Approach for Data Breaches*, 127 YALE L.J.F., 614, 619 (2018) (citing RESTATEMENT (SECOND) OF TORTS § 652D (AM. L. INST. 1977) (public disclosure of embarrassing private facts); *id.* § 652B (intrusion upon seclusion); *id.* § 652E (false light)).

[123] *Id.* at 621-22.

Without a sufficient common law analogue, plaintiffs will struggle to seek redress in federal court for data privacy violations. A clear example of this is in *TransUnion* itself, where the Court held that the plaintiffs who had been mislabeled as terrorists but whose credit reports had not yet been shared did not have standing to sue because they had not shown a common law analogue for their alleged injury.[124] Thus, *TransUnion* may have foreclosed the option for plaintiffs to seek redress in federal court for data privacy violations unless their information has already been shared.

Ultimately, even if an invasion of privacy constitutes a traditional harm, it may still not be enough to address the harms of privacy invasions as they appear in society today because they may not be sufficiently analogous. A core feature of the common law is that it develops over time. While privacy torts existed a century ago, the rapid development of technology has brought about new types of privacy violations and harms, such as violations of data privacy and violations of privacy recognized under the TCPA. Consequently, modern privacy harms may not be sufficiently analogous to the traditional privacy torts. And by requiring a "close relationship" to a traditional harm recognized at common law, the Court in *TransUnion* made it harder for plaintiffs to seek redress for these newer privacy harms in federal court.

C. STATE COURTS AS A POTENTIAL BUT NOT GUARANTEED SOURCE OF REDRESS

The Supreme Court's decision in *TransUnion*, though it may limit the forum options available, does not leave plaintiffs without any means to seek redress for violations of privacy rights that may not satisfy the injury-in-fact requirement. *TransUnion* did not prohibit

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[124] TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2209 (2021).

Congress from creating private rights of action for any identified harm; rather, it held that a violation of a statutory right created by Congress does not automatically confer federal court jurisdiction.[125] Thus, *TransUnion* does not bar plaintiffs from seeking vindication of a statutorily-granted federal right in state courts, which are not bound by Article III's cases and controversies language and therefore not subject to the standing requirements articulated by the Supreme Court.[126]

While *TransUnion* theoretically may not inhibit plaintiffs from suing in state court, it may in practice have that effect. The Supreme Court's standing requirements are not binding on state courts, but some states impose constitutional standing requirements similar to those imposed federally. Notably, a minority of states have adopted modern Article III standing requirements as interpreted by the Supreme Court.[127] If these states also adopt the Court's decision in *TransUnion*, a plaintiff could be barred from seeking redress for certain privacy violations in those states as well. Thus, *TransUnion* may still indirectly limit the possibility of vindicating private rights in any court.

V. WHERE DO WE GO FROM HERE: POTENTIAL NEXT STEPS TO ADDRESS SOME OF *TRANSUNION*'S IMPLICATIONS

As discussed in the sections above, *TransUnion* has wide-ranging effects on modern standing doctrine, privacy rights, and the separation of powers. So, where do we go from here?

There may be some ways to counteract the potential harms of *TransUnion*. With respect to its effect on modern standing doctrine,

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[125] *Id.* at 2205.

[126] *Id.* at 2224 n.9 (Thomas, J. dissenting) (quoting ASARCO Inc. v. Kadish, 490 U. S. 605, 617 (1989) (stating 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.")).

[127] Wyatt Sassman, *A Survey of Constitutional Standing in State Courts*, 8 KY. J. EQUINE, AGRIC., & NAT. RES. L. 349, 353 (2015).

the Court can at least take steps to stop moving farther from the original understanding of Article III. As for the separation-of-powers concerns underlying its current standing doctrine, the Court may be able to better address these concerns through a lens of non-delegation rather than standing. Lastly, Congress may be able to work around the restrictions imposed by *TransUnion* and better protect privacy rights by changing the way it frames legislation.

A. THE COURT SHOULD STOP MOVING FARTHER AWAY FROM THE ORIGINAL MEANING OF ARTICLE III STANDING

As discussed in Part II, the Supreme Court's modern standing doctrine differs from the original understanding of Article III. While those at the founding originally understood statutory violations as sufficient grounds for Article III standing, that is not the perception of standing that federal courts have today. And with each new case involving Article III standing, including *TransUnion*, the Court moves farther away from that original understanding by requiring a separate showing of injury-in-fact.

The ship to return to the original meaning of Article III standing has likely sailed. But there is one thing the Court can do to stop shifting away from the original meaning of "Cases and Controversies": stop removing from Congress the power to define harms. With every modern standing case, the Court limits Congress's ability to define injuries more and more. Though *TransUnion* takes another step in limiting Congress's power, it still leaves open several questions. These include: what makes a harm "traditional"? What does it mean for an intangible injury to be closely related to traditional harm? And, perhaps most importantly, what role can Congress play in defining these ambiguous terms?

While it decisively shut many doors for Congress to grant Article III standing statutorily, the Court did leave a sliver of an opening for Congress by allowing it to identify common law analogues in statutes to establish that the harm qualifies as injury-in-fact. This could

leave Congress with some power to create and recognize injuries. How meaningful this power is, however, depends on how deferential the Court is when evaluating the common-law analogues Congress identifies in a statute. The more deferential, the more influence Congress retains in recognizing harms that satisfy Article III standing requirements. While the Court in *TransUnion* did note that federal courts must "independently decide whether a plaintiff has suffered a concrete harm under Article III,"[128] courts could still approach that independent evaluation task with great deference to Congress. This would, in turn, allow for at least some preservation of the original meaning of standing. But if the Court continues down its path of limiting Congress' power and chooses a less deferential approach, it will only push modern standing doctrine farther away from the original meaning of "cases and controversies."

B. USING PRINCIPLES OF NON-DELEGATION RATHER THAN STANDING TO ADDRESS SEPARATION OF POWERS CONCERNS

Rather than addressing the separation of powers through standing doctrine, there may be a better way for the Court to preserve it: the lens of nondelegation. Under a nondelegation regime, courts would recognize that laws passed by Congress that attempt to transfer the Executive power to enforce federal law to individuals are improper delegations of power.[129] This would change the inquiry from a question of whether the plaintiff's claim constitutes a "case" to whether Congress' statutory grant violates the President's powers under Article II.[130] This method would properly address the separation-of-powers concerns underlying the Court's decisions in both *Lujan* and *Allen* by finding that statutes divesting general

[128] *TransUnion*, 141 S. Ct. at 2205.

[129] Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1132 (11th Cir. 2021) (Newsom, J., concurring).

[130] *Id.*

enforcement powers from the Executive to individuals are unconstitutional delegations of power. It would also prevent the separation of powers concerns created by the Court in *TransUnion* by removing separation of powers questions from the Court's modern standing doctrine entirely. In doing so, the Court would no longer have to limit Congress's power to grant private rights in the name of the separation of powers. A nondelegation approach to separation-of-powers questions may therefore allow the Court to protect that key constitutional principle better than it has through standing doctrine.

The Court has already embraced this approach in one case, *Zivotofsky v. Kerry*.[131] *Zivotofsky* involved the § 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003 which provided that "[f]or the purposes of the . . . issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel."[132] The plaintiff, who was a United States citizen born in Jerusalem, sued to vindicate the statutory right granted to him to have his passport list Israel as his place of birth.[133] The Court concluded that the statute in question was unconstitutional because its clear purpose was to "infringe on the [executive's] recognition power."[134] It did not even consider whether the plaintiff had standing to sue, though arguably no injury existed beyond the statutory violation itself.[135] *Zivotofsky* demonstrates that the Court can address

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[131] 576 U.S. 1 (2015).

[132] Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350, 1366 (2002).

[133] *Zivotofsky*, 576 U.S. at 8.

[134] *Id.* at 31-32.

[135] William Baude, *Standing in the Shadow of Congress*, 2016 SUP. CT. REV. 197, 219 ("Perhaps some members of the Court thought that standing in *Zivotofsky* was permissible because there was a concrete injury apart from the statutory right. But it is hard to see what that would be."). The D.C. Circuit did inquire into the standing question,

separation-of-powers concerns through a nondelegation principle rather than Article III standing. By doing so, the Court can simplify its standing doctrine while still preserving the separation of powers.

It is worth noting that nondelegation is not a vibrant doctrine. Even *Zivotofsky* is not a clear nondelegation case, as the Court did not base its decision on a nondelegation doctrine, though it certainly seemed to implicitly rely on it. But the principle of nondelegation has gained momentum on the Court. Several Justices have shown interest in reviving this doctrine.[136] While it is not the most probable solution, nondelegation is a possible path to resolving separation-of-powers concerns underlying the Court's modern standing doctrine.

C. HOW CONGRESS CAN WORK AROUND *TRANSUNION* BY CHANGING HOW IT DRAFTS LEGISLATION

Through the development of standing doctrine and the advent of an injury-in-fact requirement, the Court has limited Congress's ability to enact statutes protecting the rights of citizens, like privacy rights. But Congress may be able to work around these restrictions by adjusting how it drafts legislation.

Modern standing cases demonstrate how the Court has limited Congress's ability *directly* to recognize injuries that satisfy Article III standing while also leaving a potential path for Congress *indirectly* to recognize injuries that would confer Article III standing. *Lujan* provided that Congress may ''elevat[e] to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in

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and it found that standing exists solely through the existence of a statutory violation. Zivotofsky ex rel. Ari Z. v. Sec'y of State, 444 F.3d 614, 619 (D.C. Cir. 2006) ("His allegation that Congress conferred on him an individual right to have 'Israel' listed as his place of birth on his passport and on his Consular Birth Report is at the least a colorable reading of the statute. He also alleges that the Secretary of State violated that individual right. This is sufficient for Article III standing.").

[136] *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2131-32 (2019) (Gorsuch, J., dissenting).

law."[137] The Court reaffirmed this understanding in *Spokeo,* and even adopted language from Justice Kennedy's concurrence in *Lujan*, that ''Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.'"[138] But the Court in *TransUnion* restricted this power of Congress when it stated that while Congress may elevate a harm that already existed but was not yet recognized by Congress as an actionable legal claim, "it may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is."[139] What *TransUnion* solidifies, then, is that Congress's recognition of a statutory right is insufficient to confer Article III standing. Congress only has the power to recognize an injury-in-law that was not previously recognized. It cannot create an injury-in-fact, which must exist independent of the statutory violation for Article III standing to attach.

While Congress may not be able directly to satisfy the injury-in-fact requirement by granting a statutory right, it may be able to do so indirectly by identifying common-law analogues for a statutory violation. The Court in *Spokeo* and again in *TransUnion* recognized that Congress's grant of a statutory right is "instructive and important"[140] because it is "well positioned to identify intangible harms that meet minimum Article III requirements."[141] And the Court in *TransUnion* stated that determining "whether the asserted harm has a 'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts" is "central" to assessing the required

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[137] Lujan v. Defs. of Wildlife, 504 U.S. 555, 578 (1992).

[138] Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016) (citing *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring)).

[139] TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2205 (2021) (citing Hagy v. Demers & Adams, 882 F.3d 616, 622 (6th Cir. 2018) (Sutton, J.)).

[140] *Spokeo*, 578 U.S. at 341.

[141] *TransUnion*, 141 S. Ct. at 2200 (quoting *Spokeo*, 578 U.S. at 341.).

element of concreteness for standing.[142] Thus, Congress may be able to recognize a harm's "concreteness" by "identif[ying] a modern relative of a harm with long common roots."[143] This could be done by including language within the statute identifying the harm Congress seeks to recognize as a legally cognizable injury and relating it to a harm that is similar in kind to one that is already actionable at common law.[144]

1. Application to Privacy Rights

In the context of protecting privacy rights, this may mean identifying traditional privacy torts as common law analogues in statutes. The Court in *TransUnion* already suggested that privacy torts (like inclusion upon seclusion) could be traditional common law analogues. Congress may be able to protect some of these new and evolving privacy harms arising due to technological advancements by explicitly mentioning traditional privacy torts in its statutes.

The TCPA demonstrates how Congress can draft legislation to recognize a new privacy harm as an injury-in-fact by identifying a common law analogue. The TCPA generally prohibits robocalls.[145] This statutory violation, by itself, would not be considered sufficient to establish Article III standing under *TransUnion*. But in the TCPA, Congress specifically recognized that this statute was passed because such calls are a nuisance and an invasion of privacy.[146] Congress identified a common law analogue for the harm it sought to elevate

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[142] *TransUnion,* 141 S. Ct. at 2200.

[143] Gadelhak v. AT&T Servs., Inc., 950 F.3d 458, 462 (7th Cir. 2020).

[144] *See id*. at 463 ("A few unwanted automated text messages may be too minor an annoyance to be actionable at common law. But such texts nevertheless pose the same kind of harm that common law courts recognize—a concrete harm that Congress has chosen to make legally cognizable.").

[145] Barr v. Am. Ass'n of Political Consultants, Inc., 140 S. Ct. 2335, 2343 (2020).

[146] 47 U.S.C. § 227 note (1991) (Congressional Statement of Findings) (finding 10).

to a legally cognizable injury, which may be sufficient to establish that the alleged harm is injury-in-fact.[147]

It is unclear whether this method would be a sufficient way for Congress to circumvent the restrictions placed on it by the Court in *TransUnion*. After all, Congress's grant of a statutory right is only "instructive" and "important"; it is not dispositive.[148] And the Court noted in *TransUnion* that whether there is injury-in-fact is a separate question from whether a statute has been violated.[149] The Court thus required an independent inquiry by federal courts to determine whether the harm identified is "has a "close relationship" to a harm "traditionally" recognized as providing a basis for a lawsuit in American courts."[150] And as noted in Part IV.B, the Eleventh Circuit in *Salcedo* denied Article III standing when it independently determined that the common law analogue provided in the TCPA was not actually "closely related" to the harm brought about by the violation of the statute.[151] Thus, even if Congress identifies a common law analogue in a statute, it may not be enough for it to circumvent *TransUnion*'s restrictions and adequately protect privacy rights.

CONCLUSION

TransUnion is problematic for a number of reasons. First, it drives a wedge further between modern standing doctrine and Article III standing's original meaning. Second, it threatens the separation of powers by limiting Congress's power to grant private rights of action and pass meaningful laws. And third, it poses a risk to

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[147] *Gadelhak*, 950 F.3d at 462 (noting, in drafting the TCPA, "Congress identified a modern relative of a harm with long common law roots" and thus a plaintiff alleging harm based upon a violation of the law had Article III standing to sue).

[148] Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016).

[149] TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2205 (2021).

[150] *Id.* at 2204.

[151] Salcedo v. Hanna, 936 F.3d 1162, 1169-72 (11th Cir. 2019).

statues providing private rights of action to remedy privacy harms through its requirement of a common law analogue.

But like it or not, *TransUnion* is now the law. Policymakers and courts should commit to addressing *TransUnion*'s problematic elements. One potential step is quite easy: The Court should stop restricting Congress's power to grant private rights. Secondly, the Court could address separation-of-powers concerns through a lens of non-delegation rather than separation of powers. In doing so, the Court would be able to protect the separation of powers while simplifying its standing doctrine. And lastly, Congress could adjust how it drafts legislation to circumvent *TransUnion's* restrictions and better protect privacy rights. All these suggestions are feasible from within the current standing doctrine framework.

TransUnion is not the first, and likely will not be the last, case to have such serious implications for modern standing doctrine, the separation of powers, and privacy rights. Over the past fifty years, the Court has slowly developed the modern standing doctrine as it exists today. *TransUnion* is just one step in the Court's efforts to redefine Article III standing. That means that there will likely be more cases following *TransUnion* that will continue to push and challenge standing doctrine. Those cases could turn out to be further challenges to the vindication of private rights or opportunities for the Court to correct course. The Court should first and foremost rethink what it has already wrought with *TransUnion*.