Line of Best Fit: Understanding Emerging Article III Standing Doctrine Through Environmental Law

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ABSTRACT

TransUnion LLC v. Ramirez *poses a threat to the regulatory state. Just how existential that threat is, however, has been the subject of extensive academic debate. On the one hand, its reverberations threaten to reach every area of statutory law—ratcheting up the requirements to assert Article III standing by forcing litigants to analogize their injuries-in-fact to claims that could have been brought at the common law and historically. On the other hand, the Court has not made clear just how close a fit is required between the factual injury and the common-law comparator, leaving a glimmer of the status quo open. In its wake, scholars and lower courts have scrambled to answer the question—some taking a ruthless and literal approach and others acting like it is business as usual. This Article seeks to quell some of the agita surrounding the fate of Article III standing and the statutory cases that hang in the balance, by turning to the unlikely source of environmental law.*

Rather than serve as the death knell many have feared, TransUnion*'s analogical requirement is not the obstacle it seems for environmental litigants, and likely many other statutory dependent areas of law. Environmental law, heavily reliant on congressionally-created injuries, seems particularly vulnerable to this latest constitutional hurdle. Environmental plaintiffs have long faced stringent standards, asserting factual injuries from a Court fearful of the unharmed private attorney general model of claims. Through the last three decades of standing doctrine, the Court has held environmental plaintiffs to a higher standard of demonstrating harm to ensure the litigant herself has a concrete interest and is not merely an officious intermeddler. By raising the bar to assert Article III standing in environmental law, the Court unwittingly primed environmental plaintiffs for this latest battle.*

Turning to private law, the Article disaggregates the harm and misconduct components of relevant torts like private nuisance and trespass and asks whether the setbacks experienced by statutory plaintiffs are similar to the

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common law complaints, and—accepting the gauntlet thrown by TransUnion*—asks how similar they really need to be to get litigants into federal court. Taking a step back from environmental law, the Article concludes by offering a path forward for statutory plaintiffs attempting to assert Article III standing in the face of a Court that is increasingly hostile to the regulatory state.*

TABLE OF CONTENTS

INTRODUCTION

In 2021, outside of the spotlight trained on 2022's landscape altering decisions, Justice Kavanaugh writing for the majority held in *TransUnion LLC v. Ramirez* that in order to establish the first prong of Article III standing, injury-in-fact, plaintiffs must demonstrate that the injury they experienced had a close relationship with a harm "traditionally recognized as providing a basis for a lawsuit in American courts."[1] The Court held that Congress' views are "merely instructive" when it creates causes of action for novel injuries. Courts must independently establish whether the plaintiff has suffered a concrete harm. What counts? Traditional, tangible injuries like physical and monetary harms, certainly, and

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

intangible harms so long as they have the requisite "close relationship." Building on precedent,[2] the Court formally redefined Article III standing—reinforcing its position that Congress is constrained in its ability to confer standing by statutes that "identify and elevate intangible harms" and, even more worrisome, requiring a common-law basis to satisfy the injury-in-fact component of Article III standing.

TransUnion, if taken at its word, threatens the regulatory state.[3] Even if some of its broadest language is taken with a grain of salt, the decision continues the Court's trend toward a regressive approach to standing doctrine.[4] Before environmental law existed as a cohesive doctrinal sphere, environmental litigants relied on the common law[5] and were susceptible to the shortcomings intrinsic to ex post liability regimes.[6] In search of a more satisfactory framework, the formative environmental statutes shifted the incentive structure to an ex ante, prophylactic approach and defined new injuries that had not existed at common law—specifically injuries incurred by the environment and people who are subjected to pollution, commonly referred to as breathers, as a result of government underenforcement and polluters. Requiring common-law analogues for Article III standing threatens both rationales—narrowing the scope of injuries to those that existed at common law and reducing the prophylactic impact by insisting on more traditional injuries-in-fact. But this is where the Court has landed.

How then to proceed? One approach is simply to reject the Court's approach to standing, which critics characterize as regressive and deceptively binary in purporting to draw a sharp distinction between tangible and intangible harms.[7] Others have questioned the Court's insistence that Congress cannot recognize

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2. *See* Spokeo, Inc. v. Robins, 578 U.S. 330 (2016) (holding that plaintiffs must distinguish between concreteness and particularization in their injuries-in-fact).

3. *See* Erwin Chemerinsky, *What's Standing After* TransUnion LLC v. Ramirez*?*, 96 N.Y.U. L. REV. ONLINE 269, 270 (2021) ("Such an approach to standing significantly changes the law and places in doubt the ability to sue to enforce countless federal laws, ranging from the Freedom of Information Act to civil rights statutes, to environmental laws, to even the prohibitions of child labor in the Fair Labor Standards Act.").

4. *See, e.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992); *see also* Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612 (discussing how incoherent standing doctrine has evolved in line with judicial political philosophies).

5. *See, e.g.* Denise E. Antolini & Clifford L. Rechtschaffen, *Common Law Remedies: A Refresher*, 38 ENV'T L. REP. 10114, 10114 (2008) (discussing litigants' reliance on trespass, nuisance, negligence, and strict liability claims).

6. Richard L. Revesz & Lewis Kornhauser, *Regulation of Hazardous Wastes*, *in* THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 239 (Peter Newman ed., 1998) (discussing the limitations of an ex post liability scheme in the context of the Superfund statute such as the inability to transmit incentives as to several key components of the statutory regime that a prospective liability regime could incentivize).

7. *See* Rachel Bayefsky, *Constitutional Injury and Tangibility*, 59 WM. & MARY L. REV. 2285, 2290–91 (2018) (arguing that "the line between tangible and intangible harm is not a deep-seated or clear-cut feature of empirical reality, but a contextually sensitive boundary that reflects normative principles about which kinds of harm should count for standing purposes").

new legal injuries.[8] This Article takes a different tack, inspired by the urgency of the problem that faces litigants attempting to invoke federal law at a moment of existential environmental crisis.

Accepting for purposes of analysis the current Court's approach, this Article argues, for the first time, that plaintiffs suing for environmental harms are, against all odds, well-poised to meet the Court's demand for common-law antecedents. The Court has long held environmental plaintiffs to a higher threshold for demonstrating injury-in-fact, requiring a re-orientation from the public (statutory) harm to the private (common law) harm. In other bodies of law, statutes frequently protect private interests. But in environmental law, plaintiffs have had to articulate what this Article calls "anthropocentric injuries-in-fact" in addition to the legal harm defined by statute. The types of "setbacks" alleged by environmental litigants—like harm to aesthetic, recreational, and conservational interests, as well as the imposition of risk of physical harm— already rely on private rather than public interests.[9] By doing so, environmental litigants "solve" for the private attorney general problem that the Court continues to grapple with in other areas of law, like consumer privacy. As a result, factual harms asserted by environmental plaintiffs tend to be fundamentally analogous to the sorts of injuries that have historically served as a basis for the common law tort and property claims in American courts.[10]

This Article identifies a "line of best fit" to explain the optimal relationship between a factual injury and its common law comparator.[11] It begins by carving out three distinct eras of Article III standing in environmental law, arriving at the current post-*TransUnion* reality in which lower courts are left to fill the void of how to assess fit. Part II then posits that environmental claims are actually safer than they first appear, because they have been implicitly meeting *TransUnion*'s demands for the last thirty years. And more than that, they can provide clues as to what fit between factual injuries and the common law the Court is seeking. Part II develops a typology of tangible and intangible injuries-in-fact frequently asserted by environmental plaintiffs and demonstrates their parallels to common-law torts. Part III concludes by tackling the typologies in Part II where the fit between the factual injury and the common law comparator is less than perfect, a situation *TransUnion* anticipated and endorsed. It then provides reasons courts should feel comfortable finding these relationships sufficient, based on a novel balancing test

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8. *See, e.g.*, Chemerinsky, *supra* note 3, at 270.

9. This Article refers to the term "setback" to refer to the specific type of harm experienced by a plaintiff. *See* John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 943 (2010) ("In [the plaintiff's] eyes the defendant's wrong is mistreating her or interfering with some aspect of her well-being (or failing to protect or assist her in ways that would have prevented her from suffering a certain kind of setback).").

10. *See* discussion *infra* Part II.

11. This Articles relies on the concept of a "line of best fit" to describe the relationship between common-law comparator claims and injuries-in-fact required by TransUnion.

that puts three factors into conversation with each other: (1) whether the setback falls within the genre of injuries recognized at the common law; (2) whether policy reasons for narrowing the common-law claim fall away in the statutory context; (3) and congressional intent. Finally, Part III surveys the post-*Spokeo* and *TransUnion* landscape, and argues that the inquiry the Court now demands is whether an injury is *similar in kind* to a comparator tort. This middle ground aligns with the opinions themselves and the Court's anxieties that have motivated much of the narrowing of Article III standing doctrine and threatened the regulatory state.

I. THE DEAD HAND COMES FOR ARTICLE III STANDING

> A bay is a noun only if water is dead. When *bay* is a noun, it is defined by humans, trapped between its shores and contained by the word. But the verb *wiikwegamaa*—to be a bay—releases the water from bondage and lets it live. "To be a bay" holds the wonder that, for this moment, the living water has decided to shelter itself between these shores, conversing with cedar roots and a flock of baby mergansers. Because it could do otherwise—become a stream or an ocean or a waterfall, and there are verbs for that too. To be a hill, to be a sandy beach, to be a Saturday, all are possible verbs in a world where everything is alive.[12]

Article III standing requires (1) an injury-in-fact—an actual or imminent injury that is concrete and particularized; (2) a causal connection between the injury and conduct complained of; and (3) redressability if the plaintiff receives a favorable decision.[13] At issue here is the first and arguably the gnarliest of all the prongs, injury-in-fact. Part I develops three distinct eras of Article III standing in environmental law. It traces the development of standing rules from the relatively more plaintiff-friendly dawn of environmental law in the 1970s to the restrictive paradigm shift in the 1990's following the Court's decision in *Lujan*, to the more extreme pronouncements within the last decade in *Spokeo* and *TransUnion*. In each era, courts have grappled with how to define harm and what kinds of harms asserted should count for the purposes of asserting standing, refracted through the lens of separation of powers.

Before diving into the weeds of the first era of environmental standing, it's useful to glimpse backwards, when standing in environmental law and at large was hardly the stern barrier to the judiciary that it is today. The constitutional requirements in Article III are themselves insubstantial—extending judicial power to all cases arising under the Constitution and federal laws and to all controversies that involve various permutations of government and private actors.[14] English and early American private law required a *cause of action*, rather than an *injury-in-fact*, which could be derived from the common law (infringement of a private

12. ROBIN WALL KIMMERER, BRAIDING SWEETGRASS 55 (2013).
13. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–62 (1992).
14. U.S. CONST. ART. III. § 2.

harm) or a writ (infringement of a public harm).[15] In the traditional, private law model of standing for a situation in which *B sues A for an injury*, the only relevant question was whether *A* owed *B* a duty and, if so, whether he violated that duty. Generally speaking, only *B*, as opposed to bystander *C*, could bring suit.[16]

As public law developed, the Administrative Procedure Act ("APA") codified the "cause of action" conception of standing, allowing suits when a common law interest or Congress had provided a statutory cause of action regardless of a personal legal injury.[17] Several precedents for the modern citizen suit existed at this point: the writ of prohibition, the petition for mandamus, the qui tam action, and the informer's action, all of which deputized private citizens as agents of the executive: allowing private citizens to enforce laws even when they lacked a concrete or particularized interest that made them a special messenger of the claim.[18]

Either way, it is clear is that the three-pronged structure, while born out of Article III, is based on prudential overlays and is relatively modern.[19] Whereas the full history is outside the scope of this Article, the modern tripartite test has its roots in *Allen v. Wright*, in which parents of Black public school children sued the Internal Revenue Service for failing to deny tax-exempt status to private schools that maintained racially discriminatory admissions policies. Faced with complex questions regarding stigmatic injuries and causation, the Court solidified the contemporary test.[20] Although there was a trail of breadcrumbs leading up to *Association of Data Processing Service Organizations v. Camp*, the 1970 case is considered the modern source of the crucial injury-in-fact requirement that came to haunt the litigants in *TransUnion*.[21] The *Data Processing* Court distinguished between legal injuries, which it said were core to the substantive *merits* of a claim, and factual injuries, which it equated to the case or controversy test set out in Article III.[22] Plaintiffs' factual injuries were adequate when there was an economic or non-economic stake, including aesthetic, recreational, conservational, and spiritual interests.[23] Whereas litigants up until *Data Processing* needed to establish a legal injury, now they had to first prove a factual injury, returning to the legal merits once they had gained entry to the judicial system.

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15. *See, e.g.*, Cass Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 170–71.

16. *See* Cass Sunstein, *Standing and the Privatization of Public Law*, 1435.

17. *See* Sunstein *supra* note 15 at 181–82.

18. *Id.* at 183.

19. *Id.* at 169–70 ("if we are to impose additional standing requirements, we must do so on the basis not of text but of history").

20. *See* 468 U.S. 737, 751 (1984) ("The injury alleged must be, for example, 'distinct and palpable,' and not 'abstract' or 'conjectural' or 'hypothetical.' The injury must be 'fairly' traceable to the challenged action, and relief from the injury must be 'likely' to follow from a favorable decision.") (citations omitted).

21. *See generally*, 397 U.S. 150-51 (1970); Sunstein, *supra* note 15, at 169.

22. *See* Ass'n of Data Processing Serv., 297 U.S. 150, 151.

23. *Id.* at 154 (citing Scenic Hudson Pres. Conf. v. FPC, 354 F.2d 608, 616 (2d Cir. 1965)).

A. PERMISSIVE STANDING: 1960s–1992

The first era of modern environmental standing began slightly before the passage of the formative environmental statutes.[24] Relying on the APA's grant of standing for plaintiffs who "suffer[ed] legal wrong[s] because of agency action, or [were] adversely affected or aggrieved by agency action within the meaning of a relevant statute,"[25] courts began finding standing for regulatory beneficiaries who sued for government underenforcement as well as regulated entities who suffered from statutory enforcement. In the 1965 case, *Scenic Hudson Preservation Conference v. Federal Power Commission*, conservationist organizations and towns sought judicial review of the Federal Power Commission's decision to grant Consolidated Edison a license to construct a hydroelectric project on the banks of the Hudson River.[26] The Commission was required to evaluate the dam's effect on the public's recreational, historic, and scenic resources under the Federal Power Act even if a project was otherwise economically feasible.[27] The Second Circuit held that petitioners had standing to obtain review despite their lack of claimed economic interest, which "the Constitution does not require."[28] The project's potential devastation of "the conservation of natural resources, the maintenance of natural beauty, and the preservation of historic sites," was sufficient to grant standing.[29]

In 1970, Congress began to pass the statutes that carved out the field of environmental law. Many of them included a citizen-suit provision, which authorized private attorneys general to sue to enforce the statutes.[30] In these cases, citizens did not need to have a personal stake in the matter, and instead could sue as a representative for the "public interest in environmental protection."[31] It was widely

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24. *See generally*, Clean Air Act, 42 U.S.C. § 7401 (1970); Clean Water Act, 33 U.S.C. § 1251 (1972); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 (1980); Endangered Species Act, 16 U.S.C. § 1531 (1973); Resource Conservation and Recovery Act, 42 U.S.C. § 6901 (1976); Toxic Substances Control Act, 15 U.S.C. § 2601 (1976); National Environmental Policy Act, 42 U.S.C. § 4321 (1970).

25. Administrative Procedure Act, 5 U.S.C. § 702 (2018).

26. *See* 354 F.2d 608, 611 (2d Cir. 1965).

27. *Id.* at 614 (citing Namekagon Hydro Co. v. Fed. Power Com., 216 F.2d 509, 511–12 (7th Cir. 1954)).

28. *Id.* at 615.

29. *Id.* at 614.

30. *See, e.g.*, Clean Air Act, 42 U.S.C. § 7604 ("Any person may commence a civil action on his own behalf – against any person (including the United States . . .) who is alleged to have violated . . . or to be in violation of an emission standard or limitation under this chapter or an order issued by the Administrator or a State with respect to such a standard or limitation, against the Administrator where there is alleged failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator or against any. Person who proposes to construct or constructs any new or modified major emitting facility without a permit. . ."); Clean Water Act, 33 U.S.C. § 1365; Resource Conservation and Recovery Act, 42 U.S.C. § 6972; Endangered Species Act, 16 U.S.C. § 1540(g).

31. *See e.g.*, David Sive, *Environmental Standing*, 10 NATURAL RESOURCES & ENV'T 49, 51 (1995); *see also* Peter A. Alpert, *Citizen Suits Under the Clean Air Act: Universal Standing for the Uninjured Private Attorney General?* 16 ENV'T AFF. 283, 294 n.93 (1988).

(if briefly) accepted that Congress had the authority to grant standing to plaintiffs through citizen-suit provisions who otherwise demonstrated mere generalized grievances, thus overcoming prudential barriers, but not the constitutional requirement to demonstrate a case or controversy.[32] Despite this authority, the judiciary routinely, though inconsistently, took issue with these novel causes of action and superimposed the injury-in-fact requirement under the auspices of Article III.[33] Even for universal grants of standing such as the relevant provision under the Clean Air Act ("CAA"), circuit courts wavered between requiring a factual injury and allowing the newly created legal injury to stand alone.[34]

In this first period of statutory environmental standing, courts were receptive to environmental plaintiffs who invoked the citizen-suit provisions Congress had included in most of the formative environmental statutes. After all, these statutes were, in part, intended to add coverage where the common law had left glaring gaps, such as providing prophylactic intervention for environmental harms that injured the public (or the environment itself) at large, but not the individual bringing suit.[35] In this era, nature itself came close to having standing.[36]

However, some decisions foreshadowed the era that followed. In *Sierra Club v. Morton*, the Court found that the Sierra Club lacked standing to preliminarily enjoin a Disney-backed ski resort in the Mineral King Valley under the APA because it had not adequately demonstrated injury-in-fact beyond displeasure among members of the organization.[37] Decided on the same day as *Data Processing*, in which the Court found a sufficient economic injury-in-fact, the Court held that the plaintiffs in *Morton* were not personally injured by the potential loss of their "aesthetic and environmental well-being,"[38] though it also made

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32. *See, e.g.*, Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973) (holding that without an express conferral of standing by statute, federal plaintiffs must demonstrate injury in fact); Alpert, *supra* note 31, at 299 ("Congress may grant a right to sue for plaintiffs who 'otherwise would be barred by prudential standing rules.' Although it is clear that Congress may not go beyond the article III limits, it is unclear as to where these limits lie.") (citations omitted).

33. *See* Alpert, *supra* note 31, at 313.

34. *See id.*; Nat. Res. Def. Council v. EPA, 481 F.2d 116 (10th Cir. 1973); Nat. Res. Def. Council v. EPA, 507 F.2d 905 (9th Cir. 1974). *But see* Metro. Wash. Coal. for Clean Air v. D.C., 511 F.2d 809 (D.C. Cir. 1975).

35. *See, e.g.*, Robert V. Percival, *Regulatory Evolution and the Future of Environmental Policy*, U. CHI. LEGAL F. 159, 160 (1997) ("[T]he transformation of American environmental law during the 1970s was a product of a remarkable burst of federal legislation adopted in response to perceived inadequacies of the common law and frustration with the failure of decentralized approaches to environmental protection.").

36. *See, e.g.*, Metro. Wash. Coal. for Clean Air, 511 F.2d at 814 (holding that plaintiffs had standing under the CAA's citizen suit provision); Nat. Res. Def. Council v. Train, 510 F.2d 692, 699–700 (D.C. Cir. 1974) (noting how the CAA's citizen suit provision marked a paradigm shift in standing doctrine, intended to widen "citizen access to the courts" yet still assuring it was cabined and extended the same view to the Clean Water Act). *See also* Sierra Club v. Morton, 405 U.S. 727, 741–42 (1972) (Douglas, J., dissenting) ("Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation.").

37. Sierra Club, 405 U.S. at 734-35, 740.

38. *Id.* at 734-35.

clear that it would continue to honor this genre of injuries.[39] It is worth noting that the suit was brought under the National Environmental Protection Act ("NEPA") by way of the APA, because NEPA lacks a citizen-suit provision. The relevant provision in the APA provides standing to a "person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action,"[40] which is textually distinct from the universal grant of standing in the CAA that does not require the aggrieved to be adversely affected.[41] The Court seized on this statutory interpretation to require a showing of adversity by demonstrating injury-in-fact,[42] but subsequent courts have demanded factual injuries even where express universal grants of standing were provided.[43]

Despite a growing trend of requiring injury-in-fact, "environmental standing and environmental law flowered between *Scenic Hudson I* and *Lujan I*."[44] A year after *Sierra Club v. Morton*, the Court reached its highwater mark for environmental standing in *United States v. Students Challenging Regulatory Agency Procedures*. A group of law students commenced a suit under NEPA, challenging the Interstate Commerce Commission's order that allowed a 2.5% surcharge on freight shipments for failure to include an adequate environmental analysis.[45] The

39. *Id.* at 738.

40. Administrative Procedure Act, 5 U.S.C. § 702 (2018).

41. 42 U.S.C. § 7604(a) ("Except as provided in subsection (b), *any person* may commence a civil action on his own behalf (1) against any person against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation.") (emphasis added); *see also* Roger A. Greenbaum & Anne S. Peterson, *The Clean Air Act Amendments of 1990: Citizen Suits and How They Work*, 2 FORD. ENV'T. L. REV. 79, 90 (2011) ("In decisions dealing with citizen standing under the Clean Air Act, injury-in-fact has proved the most elusive of the three parameters. Some courts have concluded that no injury-in-fact is required under section 304(a)."); Friends of the Earth v. Carey, 535 F.2d 165, 172–73 (holding that injury-in-fact is not required under the CAA).

42. *See* David N. Cassuto, *The Law of Words: Standing, Environment, and Other Contested Terms*, 28 HARV. ENV'T L. REV. 79, 99 (2004).

43. *See, e.g.*, *id.* at 86 ("The language of the Clean Water Act's citizen suit provision . . . suggests that I should be able to sue. The Court however, has repeatedly held otherwise, finding that prospective plaintiffs must allege a cognizable injury-in-fact in order to file suit."); Alpert, *supra* note 31, at 313 ("Despite the universal grant of standing embodied in section 304 of the Clean Air Act, some courts have denied standing to certain plaintiffs bringing citizen suits under the Clean Air Act.").

44. Sive, *supra* note 31, at 51–52 ("Between *SCRAP I* and *Lujan*, the Supreme Court did not issue any opinions examining environmental standing itself in much detail.").

45. United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 675–76 (1973) (arguing that "failure to suspend the surcharge would . . . discourage the use of 'recyclable materials, and promote the use of raw materials that compete with scrap, thereby adversely affecting the environment by encouraging unwarranted mining, lumbering, and other extrractive [sic] activities"). SCRAP has been described as "[t]he zenith of the relaxation of the injury-in-fact requirement[]." *See also* WILLIAM H. RODGERS, ENVIRONMENTAL LAW 104 (3d ed. 1994); Francisco Benzoni, *Environmental Standing: Who Determines the Value of Other Life?*, 18 DUKE ENV'T L. & POL'Y F. 347, 366 n.82 (2008).

Supreme Court found that the environmental appellees had standing by alleging that their members "used the forests, streams, mountains, and other resources," in the potentially affected area, distinguishing this claim from *Sierra Club v. Morton*, because there, petitioners failed to connect the alleged injury in the area of the ski resort to its members.[46] The Court did acknowledge the tenuous causal pathway between the surcharge and environmental degradation, but dismissed the fear that the harm would never materialize as a problem for the merits of the case, underscoring the inevitability of the injury and diffuse effects throughout the entire country.[47]

B. *LUJAN*: 1992–2016

Although the seeds of *Lujan* were arguably planted in *Sierra Club v. Morton*, the Court's decision still came as a shock to regulated beneficiaries and environmental organizations.[48] The case surrounded a regulatory change promulgated by the Department of the Interior ("DOI"), which cabined the Endangered Species Act's ("ESA") reach to actions within the United States and on the high seas. Defenders of Wildlife sued, asserting standing on the basis of two members, Joyce Kelly and Amy Skilbred, who had travelled to Egypt and Sri Lanka respectively to observe the Nile crocodile, Asian elephant and leopards.[49] Although both women intended to return to view the endangered animals, neither had booked travel or could articulate a specific date they intended to visit.[50] There were three main holdings: (1) that Defenders of Wildlife failed to assert an adequate injury-in-fact because Kelly and Skilbred's travel was not imminent; (2) that their injuries, even if they eventually incurred them, would not necessarily be redressable given the funding structure of the program and; (3) that the ESA's citizen-suit provision was unconstitutional as invoked by plaintiffs because it allowed them to assert a generalized grievance – that the statutory scheme was ultimately harmful to endangered species, though not especially harmful to Kelly or Skilbred.[51]

Although the holdings regarding injury-in-fact and redressability were relatively routine, the official gutting of Congress' universal grants of standing changed the game, rebalancing the previously understood structure of our tripartite government in the name of safeguarding separation of powers. To arrive at

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46. SCRAP, 412 U.S. at 684–85.

47. *Id.* at 689–90.

48. The counsel for Defenders of Wildlife in *Lujan* "accused the Supreme Court of putting environmental attorneys 'out of business.'" Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENV'T L. & POL'Y F. 39, 40 (2001).

49. Lujan v. Defs. of Wildlife, 504 U.S. 555, 563 (1992).

50. *Id.* at 564.

51. *Id.* at 572 ("Rather, the [Court of Appeals] held that the injury-in-fact requirement had been satisfied by congressional conferral upon *all* persons of an abstract, self-contained noninstrumental 'right' to have the Executive observe the procedures required by law.").

the final holding, Justice Scalia invoked several seminal twentieth-century cases including *Fairchild v. Hughes* and *Massachusetts v. Mellon*, in which the Court had denied standing for generalized grievances asserted on behalf of all American taxpayers where plaintiffs lacked particularized injuries.[52] None of the precedent cited involved an express and universal grant of standing, but rather attempts by an aggrieved taxpayer and a state, respectively, to challenge constitutional amendments and statutes.[53] Despite the Court's efforts to make *Lujan*'s final holding seem like an inevitable conclusion based on precedent and common-sense separation of powers concerns, it came as a sucker punch.[54]

In *Lujan*, which brought about the second era of environmental standing, the Court made clear that congressionally-created legal injuries—even ones that provided universal causes of action—were empty vessels without particularized, concrete injuries-in-fact. Gone was the prospect of a heyday of eco-centric cases where concerned citizens sued on behalf of an endangered species or to enforce ozone emissions standards in the southern basin of California despite living in New York.[55] Now, a plaintiff had to reorient her case and plead an anthropocentric, self-specific injury-in-fact. Frequently, courts denied standing where there arguably was actual harm to the environment,[56] and, occasionally, they allowed standing in cases where there was none. [57] In other words, any semblance of standing for nature itself ceased to exist.

In the end, *Lujan* did not serve as a death knell for environmental plaintiffs. Since *Sierra Club v. Morton*, plaintiffs have regularly pled economic and non-economic injuries-in-fact in addition to establishing legal rights violations. *Lujan* did, though, pose new barriers and fundamentally sever legal and factual injuries in a way that caused doctrinal inconsistencies,[58] some of which even allowed for

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52. *See* Lujan, 504 U.S. at 574 (citing Fairchild v. Hughes, 258 U.S. 126, 129–30 (1922) (holding that plaintiff lacked standing under the Nineteenth Amendment to institute a suit in federal court); Massachusetts v. Mellon, 262 U.S. 447 (1923) (holding in a taxpayer suit challenging the propriety of certain federal expenditures that plaintiff lacked standing because there was no danger of sustaining an injury); Valley Forge Christian Coll. v. Am. United for Separation of Church and State, 454 U.S. 464, 483 (1982); United States v. Richardson, 418 U.S. 166, 171–77 (1974).

53. *See supra* note 52 and accompanying text.

54. Sunstein, *supra* note 15, at 211 ("If standing depends on positive law, decisions denying standing without an express grant are hardly authority for cases with an express grant. Indeed, in some of these cases the Court expressly suggested that such a grant could make a critical difference.").

55. *See* Sunstein, *supra* note 15, at 226 ("But it is equally clear that *Lujan* forecloses 'pure' citizen suits. In these suits, a stranger with an ideological or law-enforcement interest initiates a proceeding against the government, seeking to require an agency to undertake action of the sort required by law.").

56. *See, e.g.*, Lujan, 504 U.S. at 564.

57. *Compare* Friends of the Earth, Inc. v. Laidlaw Env'l Servs. (TOC), Inc., 528 U.S. 167, 181 (2000) (holding that "[t]he relevant showing for purposes of Article III standing, [], is not injury to the environment but injury to the plaintiff"), *with* Lujan, 504 U.S at 564 (holding that plaintiffs' interest in the endangered species formerly protected by federal law lacked injuries-in-fact).

58. *See* Benzoni, *supra* note 45, at 370 ("The severing of injury-in-fact from legal injury transformed the court's legal inquiry not into simple factual inquiry but rather into an extraordinarily complex metaphysical inquiry—an inquiry into the ultimate and more general nature of entities."); *see also id.* at

more lenient standing requirements for environmental plaintiffs. For example, plaintiffs suing to enforce a NEPA provision—like execution of an adequate environmental impact statement—would, prior to *Lujan*, typically assert informational or procedural harms under the APA to demonstrate standing.[59] After *Lujan*, these types of injuries no longer sufficed alone, and courts began requiring substantive harms even for procedural claims.[60] But overall, litigants pivoted, invoking physical and economic harms when the injury was "tangible," and aesthetic, recreational, conservational harms, and risk of physical harm when the injury was "intangible."

Though some environmental citizen suits prevailed after *Lujan*, an already muddled standing doctrine became more incoherent. A more logical doctrine would grant standing whenever there is a cause of action, thereby linking standing to the legal injury asserted.[61] The Court's insistence on the separation of legal and factual injuries, in the hopes of restricting judicial review to plaintiffs who suffered "actual" harm in the name of separation of powers, has led to a disjunctive body of judge-made law on which injuries suffice and which do not. When judges deem an injury-in-fact sufficient, even when the underlying legal injury is weak, plaintiffs can obtain standing.[62] In *Friends of the Earth v. Laidlaw*, the Court granted standing to plaintiffs who asserted a fear of chemical contamination, despite an objective lack of harm to the environment.[63] Scholars have contrasted *Laidlaw*'s flexible application of injury-in-fact with *Lujan*'s more literal approach,[64] but both are borne of a "judicial system that forces plaintiffs to argue in terms of harm to themselves."[65] What then is the cipher for which injuries are sufficient to establish standing?[66]

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366 ("But the primary problem is the Court's doctrine of standing itself. The divorce of the Article III, and especially the injury-in-fact requirement, from any statutory cause of action—that is, making standing an independent threshold question—not only untethers standing from its historical and constitutional bounds and imposes value theory that is highly contested, it is also conceptually untenable (and results in the 'looseness' and 'manipulability' that the Chief Justice refers to).").

59. Defs. Of Wildlife v. Lujan, 911 F.2d 117, 121 (8th Cir. 1990) ("When we apply the Ninth Circuit's procedural injury analysis here, we are persuaded that the Act is a statute imposing statutory duties which create "correlative procedural rights in a given plaintiff, the invasion of which is sufficient to satisfy the requirement of injury in fact in article III.") (quoting Fernandez v. Brock, 840 F.2d 622, 630 (9th Cir. 1988)).

60. *See, e.g.*, Colo. Env't Coal. v. Lujan, 803 F. Supp. 364, 367–68 (D. Colo. 1992) (finding procedural and informational standing on the pre-condition of establishing that a member of the Coalition used the area regularly); Region 8 Forest Serv. Timber Purchaser's Council v. Alcock, 993 F.2d 800, 810–11 (11th Cir. 1993) (denying environmental plaintiffs standing on procedural grounds under NEPA because plaintiffs presented generalized grievances rather than particularized, concrete injuries).

61. *See, e.g.*, Benzoni, *supra* note 45, at 353–54.

62. *E.g.*, Laidlaw, 528 U.S. at 184–85.

63. *Id.* at 181-85.

64. *See* Adler, *supra* note 48, at 51–57.

65. *See* Benzoni, *supra* note 45, at 365.

66. *Id.* at 361 ("It is inevitable, indeed logically necessary, that we rely on some standard to distinguish between what counts as an injury and what does not. This is a value-laden, normative inquiry.").

C. *SPOKEO* & *TRANSUNION*: 2016–PRESENT

The Court in *Spokeo* and *TransUnion* picked up where *Lujan* left off by attempting to answer the question of which injuries-in-fact are sufficient to establish Article III standing. Taken optimistically, *Spokeo* and *TransUnion* flesh out what had remained implicit from *Lujan* to *Laidlaw* to *Massachusetts v. EPA*, all of which stumbled their way towards what suffices as injury-in-fact. Taken less optimistically, *Spokeo* and *TransUnion* represent the Court's latest attempts at gatekeeping regulatory beneficiaries who rely on congressionally-created legal injuries as their causes of action. The cases draw a clear line. If the factual injury is tangible, it is sufficiently concrete to pass constitutional muster because it is assumed to be analogous to common-law claims. But if the injury is intangible, plaintiffs must demonstrate that their injury is fundamentally similar to one traditionally recognized as the basis for lawsuits in American courts.

The *Spokeo* Court made clear that the Article III requirements of concreteness and particularity were two distinct prongs of analysis, and the *TransUnion* Court elaborated on how to establish concreteness on its own. Both cases involved class action suits under the Fair Credit Reporting Act of 1970 ("FRCA"),[67] alleging that the defendants released inaccurate information about the plaintiffs.[68] In *Spokeo*, a party requested background information on Thomas Robins, the named plaintiff, and received incorrect demographic data on him. The Ninth Circuit initially determined that Robins had standing to sue because he had suffered a particularized, statutory harm. Namely, this violation of FCRA violated "*his* statutory rights, not just the statutory rights of other people."[69] It collapsed the analysis of particularized and concrete to one inquiry, holding that Robins' claim satisfied both prongs because he had a stake in how the company handled his individual credit information, rather than a mere generalized grievance.[70]

The Supreme Court reversed, making clear that Robins' individuated injury was no longer sufficient; although his claim was particularized, it was not concrete, despite a congressionally-created cause of action.[71] The Court, however, was not concrete about how plaintiffs were supposed to prove concreteness. Tangible harms appear to be in safe harbor, but whether intangible harms are worthy of Article III standing is dependent on a combination of "history and the judgment of Congress."[72] In the years between *Spokeo* and *TransUnion*, lower courts differed in their attempts to do the homework the Court had left them:

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67. *See generally* Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 (1970).

68. TransUnion v. Ramirez, 141 S. Ct. 2190, 2202 (2021); Spokeo, Inc. v. Robins, 578 U.S. 330, 336 (2016).

69. Robins v. Spokeo, Inc., 742 F.3d 409, 413 (9th Cir. 2014).

70. *See id.*

71. Spokeo, 578 U.S. at 340–43 (2016).

72. *Id.* at 340; Jon Romberg, *Trust the Process: Understanding Procedural Standing Under* Spokeo, 72 OKLA. L. REV., 517, 524 (2020).

define concreteness. Some placed more emphasis on historical common-law analogues whereas others elevated congressional intent.[73] Some simply considered *Spokeo* to validate certain substantive statutory violations as concrete injuries that did not require an additional showing of injury.[74]

TransUnion provided an answer—albeit an unsatisfactory one—to the debate raging in the lower courts about how to assess concreteness.[75] In *TransUnion*, Sergio Ramirez, attempting to buy a Nissan Maxima in Dublin, California, learned that TransUnion's new add-on software, Name Screen, had compared his name to the U.S. Treasury Department's Office of Foreign Assets Control ("OFAC") list, which designates terrorists, drug traffickers, and other people deemed to pose threats to national security. It had found a potential match. Name Screen only compares first and last names and as one might guess, thousands of names are held by both a verified person on the OFAC list and American citizens without criminal records. Ramirez sued TransUnion for three FCRA violations and certified a class of 8,185 members.[76] Of that group, TransUnion had only sent 1,853 credit reports to third parties. For the remaining 6,332 class members, TransUnion files contained misleading OFAC alerts, but these alerts had not been provided to any third parties. Plaintiffs attempted to assert standing based on the risk of future harm, which they characterized as a concrete injury. The Court held that the 1,853 class members whose misinformation was actually disseminated had a concrete injury and thus Article III standing, whereas the 6,332 plaintiffs whose misinformation lay dormant in their credit files, did not.[77]

Part of the Court's pronouncement in *TransUnion* was familiar: the Court explained, again, that although Congress is free to create causes of action under statutes like FCRA, plaintiffs must also demonstrate that the statutory violation caused them to suffer a *concrete* harm. According to the Court, the majority of plaintiffs had done nothing more than rely on FCRA's consumer cause of action.

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73. Jacob Phillips, TransUnion*, Article III, and Expanding the Judicial Role*, 23 FEDERALIST SOC'Y REV. 186, 9 ("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. 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.").

74. *See, e.g.*, Townsend v. Cochran, 528 F.Supp. 3d 209, 217 (S.D.N.Y. 2021) ("The holding in *Spokeo* requiring showing 'actual harm' beyond violation of the statue does not extend to substantive rights created by statute. The interpretation and application of *Spokeo* by the Second Circuit, and multiple district courts in this Circuit support this conclusion.").

75. *See* CONSUMER FINANCE LITIGATION AND CLASS ACTION DEFENSE, BLANK ROME, *How SCOTUS Clarified the Spokeo Standard of "Concrete" Harm Necessary to Establish Article III Standing, and What It Means for the Future of Class Actions* 1–2 (June 30, 2021) (citing Townsend v. Cochran, No 20-CV-01210, 2021 WL 1165142, at *8 (S.D.N.Y. Mar. 25, 2021)), https://perma.cc/L6CM-N2EB (clarifying that plaintiffs must allege concrete harms beyond substantive violations of statutes, even if those violations bear a close relationship to harms traditionally recognized at common law).

76. TransUnion v. Ramirez, 141 S. Ct. 2190, 2200 (2021).

77. *Id.* at 2208–09.

Of course, since 1992, if not earlier, environmental litigants were aware of this dual injury-in-law and injury-in-fact requirement.

But the remainder of the analysis in *TransUnion* indicated that things were not business as usual. First, prior to *Spokeo*, plaintiffs suing a federal agency or other entity for a statutory violation only would have needed to demonstrate that they had a *particularized* interest in that violation—that somehow this violation affected them more because they were, for example, geographically proximate to the source of pollution.[78] But the inquiry mainly ended there, with courts frequently collapsing concrete and particularized into one factor.[79] Plaintiffs were not expected to demonstrate that the violation also caused concrete harm or material risk of harm.[80] The Court in *TransUnion* illustrated this distinction with a resurrected hypothetical from *Allen v. Wright*.[81] A factory pollutes the land of a nearby citizen in Maine. He had a concrete interest to bring federal suit. The same factory pollutes that same land, but this time a plaintiff in Hawaii files suit against the Maine-based factory. Both plaintiffs have a statutory cause of action, but only the person in Maine has Article III standing.

TransUnion goes further, relying on the differentiation between particularized and concrete injuries. Although under *Lujan*, the homeowner in Maine would have an easier time establishing standing, in *TransUnion* that particularized interest, demonstrated in this hypothetical by geographic proximity, was no longer sufficient. The unlucky 6,332 class members who were denied standing did not forget to assert an injury-in-fact. They did not just point to *TransUnion*'s statutory violation and call it a day. Instead, they argued that they faced a real risk of harm, which had sufficed in *Spokeo*, despite the lack of third-party exposure, and argued that this constituted a *Lujan*-style particularized injury-in-fact. But the Court rejected it. Even though those 6,332 plaintiffs were squarely in "Maine territory," their injuries lacked historical or common-law analogues.[82] Without tracking the elements of a common-law tort, the particularized injury-in-fact was not concrete. The 1,853 successful plaintiffs' injuries-in-fact, on the other hand,

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78. Philips, *supra* note 73, at 521.

79. *See, e.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 563 (1992) (evaluating plaintiffs' injuries-in-fact for particularity (as well as imminence), but not concreteness: "'But the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured'") (quoting Sierra Club v. Morton, 405 U.S. 727, 734 (1972)).

80. Jon Romberg, *Trust the Process: Understanding Procedural Standing Under* Spokeo, 72 OKLA. L. REV. 517, 521–22 ("In other words, the Court held that plaintiffs need not show that the agency's failure to comply with the mandated procedure caused or risked causing them any additional, real-world harm."); Lujan, 504 U.S. at 572 n.7 ("Thus under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.").

81. TransUnion v. Ramirez, 141 S. Ct. 2190, 2205–06 (2021).

82. *Id.* at 2204.

were sufficiently similar to the tort of defamation, which requires third-party publication.[83] Without that key common-law element (exposure to a third party), "the mere existence of inaccurate information," could not "amount[] to concrete injury."[84] The majority paid lip service to Congress's continuing ability to "'elevate' harms that 'exist' in the real world before Congress recognized them to actionable legal status,"[85] but it made clear that a concrete harm bearing resemblance to common-law claims would be required going forward. Whereas *Lujan* threatened citizen-suit provisions by making clear that more than a bare procedural harm was required, *TransUnion*, at its worst, gutted Congress of its ability to elevate injuries beyond anything that had already existed at the common law.[86] Though some scholars and practitioners have attempted to limit *TransUnion*'s reach, most recognize it for what it is—an affront to public rights.[87]

Despite providing some clarity on which intangible injuries-in-fact give rise to standing, *TransUnion* did not outline the parameters of what is sufficiently analogous to the common law to establish concrete injury. Lower courts have tried to fill the void.[88] Some, like the Eleventh Circuit, have taken a literal and ruthless approach, demanding that the comparator harm track all the "essential" elements of the common-law claim and resisting any efforts by plaintiffs that involve "hammering square causes of action into round torts."[89] When an essential element is missing, the Eleventh Circuit has found the harms insufficiently related.[90] For example, it has held that exposure of private information to a third party is essential for a successful breach of confidence suit at common law, even when the relevant statute did not require such exposure.[91] Without third-party exposure, the court found no injury and characterized the claim as a bare procedural harm.[92]

Other circuits have engaged *TransUnion* differently, primarily by insisting that their precedents are compatible with the Court's new framework. In *Environment Texas Citizen Lobby v. ExxonMobil*, the Fifth Circuit acknowledged *TransUnion* and the risk that a future case could overrule existing precedent, but held that until

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83. *Id.* at 2209 (citing RESTATEMENT (SECOND) OF TORTS § 577 cmt. a (AM. L. INST. 1965)).

84. *Id.*

85. *Id.* at 2205.

86. *See* Chemerinsky, *supra* note 3, at 286–87.

87. *See, e.g.*, *id.* at 283–84.

88. Daniel Rockey, *How Courts Are Applying* TransUnion *Ruling to Privacy Suits*, LAW360 (Aug. 8, 2022) (citing Lupia v. Medicredit, Inc., 8 F.4th 1184, 1193 (10th Cir. 2021)), https://perma.cc/5UDF-QNHD, ("Some courts have treated *TransUnion* as little more than a speed bump, finding that even a loose comparison to a common law claim will suffice."). *But see* IC v. Zynga Inc. (reflecting the decision of a "majority of courts" to "require[] plaintiffs alleging a privacy violation to allege an injury of a kind that would be actionable under the common law.").

89. *Id.*; *see, e.g.*, Nicklaw v. CitiMortgage, Inc., 839 F.3d 998, 1003 (11th Cir. 2016).

90. Hunstein v. Preferred Collection & Mgmt. Servs., 48 F.4th 1236, 1242 (11th Cir. 2022) ("Although an 'exact duplicate' of a traditionally recognized harm is not required, the new allegations cannot be missing an element "essential to liability" under the comparator tort.").

91. *See, e.g.*, Muransky v. Godiva Chocolatier, Inc., 979 F.3d 917, 932 (11th Cir. 2020).

92. *See id.* at 932–34.

that day came, the demand for a concrete injury was nothing new under the sun, and that requiring environmental litigants to assert an injury-in-fact in the vein that that they have since *Lujan* would remain sufficient.[93] This cabined reading of *TransUnion* is aspirational at best. If the Court really meant to do nothing more than require the standard recitation of factual injuries plaintiffs have been asserting since the '90s, there would have been no need for *Spokeo* or *TransUnion*. The Court in *Lujan* was "willing to recognize injuries as sufficient for standing *even though they were not found* in the Constitution or a statute or at common law."[94] The aesthetic, recreational, and conservational injuries thrown about in most citizen-suit environmental cases are not obviously related to common-law claims.[95] And given that *TransUnion* demands more from the factual injuries than *Lujan* and its antecedents, there is no assurance that courts will continue to honor the modal environmental "injuries-in-fiction." There is nothing to suggest that the trend of increasingly restrictive Article III standing doctrine is enjoying its zenith.[96] In short, environmental citizen-suits appear to be more vulnerable than ever. Having hung on for dear life since their inception in 1970, some fear that they have met their maker.[97] What the Court will demand of these common-law analogues is not entirely clear, but the next Part will demonstrate that although environmental claims may seem the most vulnerable to this new requirement, they actually provide a path forward for courts attempting to ascertain what the "line of best fit" might be for a Court hungry for strict separation of powers.

II. ENVIRONMENTAL LAW AS THE KEY TO MODERN ARTICLE III STANDING

> Those who contemplate the beauty of the earth find reserves of strength that will endure as long as life lasts. There is something infinitely healing in the repeated refrains of nature—the assurance that dawn comes after night, and spring after winter.[98]

Appearances notwithstanding, environmental claimants will be able to establish standing more or less on the same terms as under *Lujan*, not because the Court's more recent decisions are merely *Lujan* in new clothing, but because

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93. 968 F.3d 357 (5th Cir. 2020), *vacated and rehearing en banc granted*, 61 F.4th 1012 (5th Cir. 2023) (per curiam). The day may be coming yet. The Fifth Circuit has granted rehearing en banc to reassess the relaxed standing rules the panel deployed to assess Article III standing under the CAA. *See* Env't Tex. Citizen Lobby, 61 F.4th at 1012; Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp., 61 F.4th 1012 (5th Cir. 2023) (per curiam) (granting rehearing en banc).

94. Chemerinsky, *supra* note 3 at 288 (emphasis added).

95. *Id.* (discussing the injuries the Court has recognized that are not found in the Constitution, in statutes, or at common law like aesthetic harms, changes in market conditions, and family separation).

96. Some practitioners claim that *Spokeo* increased the threshold for Article III standing for environmental claims. *See* Brent A. Rosser & Kate Perkins, *Article III Standing Still Proving to be a Formidable Defense to Environmental Citizen Suits*, THE NICKEL REPORT (last accessed Oct. 18, 2022), https://perma.cc/6URM-GCK8.

97. *See generally* Chemerinsky, *supra* note 3.

98. RACHEL CARSON, THE SENSE OF WONDER 56 (HarperCollins Publishers EPub ed. 2011).

(1) environmental plaintiffs are no strangers to asserting concrete factual injuries on top of their statutory harms; and (2) because the factual harms that plaintiffs have gravitated towards—aesthetic, recreational, and conservational to name a few—are closely related to the harms that have long given rise to traditional, common-law torts that have served as the basis for lawsuits in American courts for centuries. Though environmental law was forged from the common law—primarily trespass, negligence, and nuisance suits— the passage of the hallmark environmental statutes has decreased reliance on common law claims.[99] With the bulk of federal environmental law now reliant on statutes, and congressionally-created causes of action, the field seems especially susceptible to additional upsets in how injuries-in-fact are treated. That said, environmental plaintiffs have long superimposed injuries-in-fact onto their statutory claims. Whereas in *TransUnion*, the class members labored to provide factual injuries in addition to the statutory violations, prior to *Spokeo*, this was not always the case in the area of consumer privacy law.[100] The familiarity that the environmental bar has with pleading factual injuries, and the general ease that environmental plaintiffs have enjoyed post-*Lujan* and even post-*Spokeo* and *TransUnion* in asserting standing, indicates that standard environmental injuries-in-fact may already be passing muster under the latest test. Aesthetic, recreational, and conservational harms in addition to risk of physical harm are fundamentally analogous to the common-law causes of action from which environmental law was forged. This Part develops a novel typology of injuries-in-fact to understand the analogues for both tangible and intangible harms and then demonstrates which common-law analogues are a best fit for each type of injury. Plaintiffs should make these analogies and the underlying rationale explicit in their pleadings, rather than relying on courts to do the legwork, and the following sections provide a blueprint.

Importantly, *TransUnion* does not limit plaintiffs to a direct duplication of the common-law claim, and neither should the proposed line of best fit. Every tort can be distilled to its two core components: (1) the harm it covers and (2) the misconduct. It is completely consistent with *TransUnion* to separate those two components, and for Article III purposes, concern ourselves only with whether the injury itself (not the intent needed to cause that injury) could serve as the requisite basis. In *TransUnion*, the harm was insufficient because the harm component in

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99. *See generally* Richard J. Lazarus, *The Greening of America and the Graying of United States Environmental Law: Reflections on Environmental Law's First Three Decades in the United States*, 20 VA. ENV'T L.J. 75, 77 ("Ten years later . . . the legal landscape transformed completely. There were hundreds of pages of federal environmental protection statutes, and thousands of pages of federal regulations and less formal agency regulatory guidance. There was also a federal environmental agency . . . which was primarily responsible for the implementation of the host of newly enacted environmental protection laws.").

100. *See* Brett Watson & Karl Riley, *FDCPA Rulings Show* Spokeo*'s Influence, 5 Years Later*, LAW360 (May 25, 2021), https://perma.cc/86PZ-3RMW (discussing how cases under the Fair Debt Collection Practices Act, plaintiffs frequently invoked bare procedural violations).

comparator tort of defamation requires publication for a harm to actually occur.[101] Plaintiffs were not inherently harmed by the mere existence of inaccurate information in files that might never see the light of day. Battery requires merely a harmful contact with a person—it does not require that a harm be demonstrated like the higher bar set for negligence claims.[102] Although preserving the misconduct component—intent—is sensible at common law to reduce the risk of transforming any bump on the subway platform into a litigable offense, the Court in *TransUnion* (and before) is mostly concerned with ensuring that plaintiffs are the actual party in interest. In other words, that they have suffered a distinct harm that sets them apart from the concerned Hawaiian citizen concerned with whether the United States government is enforcing its own laws. Requiring the harm component alone and setting aside misconduct makes sense in the standing context, especially because plaintiffs must still demonstrate causation and redressability on the merits. In a post-*TransUnion* case, *In re E.I. Dupont de Nemours & Company C-8 Personal Injury Litigation*, the Sixth Circuit agreed, finding that plaintiff, who filed a nationwide class action on behalf of every person the United States with elevated levels of per and polyfluoroalkyl substances ("PFAS") in their blood, suffered a harm analogous to battery.[103] The court recognized that the common law, after all, "regarded even minor intrusions as cognizable."[104] The following sections proceed with this bifurcated framework in mind.

A. TANGIBLE HARMS

The Court in *TransUnion* spilled little ink on tangible harms, making clear that they would "readily qualify as concrete injuries."[105] Justice Thomas's concurrence in *Spokeo* provides the backdrop for this dichotomy, which highlights that Article III incorporates a historic distinction that limited judicial power when private plaintiffs assert claims vindicating public rights.[106] There is no such limitation on judicial power when an individual asserts private rights belonging to them as an individual, under the umbrellas of personal security, property rights, and contract rights. Although tangible injuries are not equivalent to private law claims, because they are supporting statutory causes of action, the types of harm that qualify are the same kinds of harms that plaintiffs would invoke at common law. The most relevant tangible injuries for environmental standing are physical and economic harms. Although *TransUnion* adds no obstacles to plaintiffs with obvious tangible injuries-in-fact, but that is because the Court takes for granted that tangible injuries bear a sufficient resemblance to traditional common-law

101. *See* TransUnion v. Ramirez, 141 S. Ct. 2190, 2209 (2021) (citing Restatement of Torts § 577, cmt. a).

102. RESTATEMENT (SECOND) OF TORTS § 13 (AM. L. INST. 1965).

103. No. 22-0305, 2022 U.S. App. LEXIS 25452, at * 14 (6th Cir. Sept. 9, 2022).

104. *Id*. (citing Cranor v. 5 Star Nutrition, L.L.C., 998 F.2d 686, 693 (5th Cir. 2021)).

105. *See id*. at 2204.

106. *Id*. at 343–50 (Thomas, J. concurring).

harms. It is then worth exploring what those common-law claims would be in the context of environmental law.

Environmental plaintiffs frequently assert physical and economic injuries to themselves and their properties when invoking citizen-suit statutes that bear resemblance to common-law torts. Take the CAA case, *Utah Physicians for a Healthy Environment v. Diesel Power Gear, LLC*, in which plaintiffs complained that the defendant manipulated its vehicle parts to defeat emission control devices.[107] The suit involved a statutory violation of the State Implementation Plan and physical harms to members of the plaintiff organization including "impaired vision, reduced lung capacity, sinus irritation, and coughing spells . . ." [108] The Tenth Circuit easily found standing.[109] Relying on the bifurcated harm and misconduct approach articulated earlier, we can turn to factually similar cases at common law to demonstrate that the physical harm the statutory plaintiffs in *Utah Physicians* experienced was sufficiently analogous to the harm component of the tort of negligence. One such analogous common law case is *Ivory v. International Business Machines Corporation*. [110] There, the defendant company owned a machine manufacturing facility in Broome County, New York, which used trichlorethylene ("TCE") to clean the machine components, which defendant was long aware had been turning into vapors and contaminating areas around the facility. Plaintiffs, Thomas and Timothy Ivory, brought a class action suit against the company alleging negligence (and other common-law torts like private nuisance and trespass), alleging their diagnoses of non-Hodgkin's lymphoma and kidney cancer resulted from prolonged TCE exposure and the state court agreed.[111] Returning to *Utah Physicians*, there is no question that physical injury is a tangible injury sufficiently similar to the physical harm covered by the tort of negligence. Plaintiffs' observable, direct physical injuries raise no eyebrows under the *TransUnion* test.

Property damage will be discussed in the next section more extensively but suffice it to say that the judiciary sees a difference between intangible and tangible intrusions. The next section will focus on the subset of trespass cases concerned with intangible intrusions, which are more common in the environmental context. But in terms of tangible intrusions, the main focus of trespass at common law requires the intentional entering or failing to remove something from another's land. The unlawful entry is itself the harm, and no additional harm, is required.[112] In *Ivory*, Thomas and Timothy Ivory also sued for trespass for the chemical

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107. Utah Physicians for a Healthy Env't v. Diesel Power Gear, LLC, 221 F.4th 1229 (10th Cir. 2021) (finding sufficient grounds for Article III standing based on members' uncontested adverse health effects from increased air pollution in the area as a result of defendant's activities).

108. *Id.* at 1240.

109. *Id.*

110. 116 A.D.3d 121 (N.Y. Ap. Div. 2014).

111. *Id.* at 125–26.

112. RESTATEMENT (FOURTH) OF PROPERTY § 1.4 (AM. L. INST. 2021).

contamination of their groundwater. The court held that defendants were liable because they had knowledge of subterranean conditions that facilitated the passage of toxins onto plaintiffs' personal properties.[113] So, like physical injuries, tangible intrusions will continue to pass muster.

B. INTANGIBLE HARMS

The concrete harm test in *TransUnion* poses a far greater hurdle to plaintiffs asserting *intangible* injuries. Prior to *Spokeo* and *TransUnion*, the Court repeatedly emphasized that intangible or non-economic factual injuries, specifically aesthetic, recreational, and conservational injuries, count as injuries for purposes of standing analysis.[114] One hopeful interpretation of *TransUnion* is that, given how long these non-economic injuries have successfully formed the basis for Article III standing, the Court won't bat an eye when plaintiffs continue to rely on them.

A more realistic outlook includes the possibility that the Court may demand articulations of injuries beyond the typical aesthetic, recreational, or conservational harms. But even in that worst case scenario—where plaintiffs are expected to dig for common-law analogues— environmental regulatory beneficiaries on the whole may be in safe harbor. Not because the landscape has remained static, but because the landscape at large has shifted *towards* the higher standard that environmental plaintiffs have been meeting for decades since *Lujan* and before. These factual injuries are, as will be discussed below, closely related to the sorts of injuries recognized by common-law claims long entertained in American courts. The classification system does not disaggregate between aesthetic, recreational, and conservational injuries, but rather between the property interests implicated by each. Whereas federal environmental legislation sought to vindicate the public interest, the relevant common-law claims at bottom are based on property rights.[115]

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113. Ivory, 116 A.D. at 129 (noting that intangible trespass claims for the vapor intrusion and air emissions were not viable in this jurisdiction).

114. *See, e.g.*, Scenic Hudson Pres. Conf. v. Fed. Power Comm'n, 354 F.2d 608, 616 (2nd Cir. 1965) (finding standing for plaintiffs suing under the Federal Power Act who asserted aesthetic, conservational, and recreational interests in the power development project at issue); Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 154 (1970) ("That interest, at times, may reflect 'aesthetic, conservational, and recreational' as well as economic values.") (citing Scenic Hudson Pres. Conf. 354 F.2d at 616); Off. of Commc'n of United Church of Christ v. FCC, 359 F.2d 994, 1000–06 (D.C. Cir. 1966).

115. ROGER E. MEINERS, STACIE THOMAS, & BRUCE YANDLE, BURNING RIVERS, COMMON LAW, AND INSTITUTIONAL CHOICE FOR WATER QUALITY, *in* THE COMMON LAW AND THE ENVIRONMENT: RETHINKING THE STATUTORY BASIS FOR MODERN ENVIRONMENTAL LAW 54, 78 (Roger E. Meiners & Andrew P. Morriss eds., 2000).

1. Possessory Interest

The first category of intangible injuries-in-fact involves an adverse effect on plaintiff's use or enjoyment of property in which the plaintiff enjoys a *possessory interest*. The adverse effect typically occurs through the production of odor, noise, smoke or other invisible physical intrusions; aesthetic or visual disturbances; or emotional disturbances. In this category, plaintiffs may have any number of property interests ranging from total possession (fee simple) to bespoke usage rights (easement), but the dispositive aspect is that the plaintiff has a possessory property interest in the area at issue. The dominant judicial view is that invisible intrusions like smoke are not actionable as trespass, because there has been no traditional physical invasion. Thus, invisible intrusions should be grouped together with odor, noise, and vibrations.[116] However, there are a subset of trespass cases that allow trespass claims. Regardless, plaintiffs with a possessory interest can always rely on the broader tort of private nuisance.

Physical setbacks (harms experienced by plaintiffs) in the possessory interest category, even though the intrusion may be minute and invisible, are directly analogous to the harms anticipated by trespass to land and private nuisance. A plaintiff hoping to bring a citizen suit claim under the CAA could complain of seeing, smelling, or otherwise experiencing the effects of microscopic intrusions of covered pollutants. This is precisely what the Environment Texas Citizen Lobby and the Sierra Club did in their suit against ExxonMobil on behalf of their members who lived near Baytown, Texas, home to an Exxon petroleum plant.[117] To assert Article III standing, which was ultimately granted, plaintiffs claimed that they saw smoke and haze coming from the plant onto their respective properties (in addition to a number of other categorically distinct injuries). A paradigmatic injury-in-fact of this type would characterize a nearby plant's particulate matter emissions as an invisible intrusion onto plaintiff's property. This might of course require a bit of evidentiary legwork on the part of plaintiffs. But the argument that such intrusions amount to trespass has been routinely made in the arena of common law, to which we now turn.

The common-law analogues in trespass and private nuisance for the intrusion of so-called invisible emissions are well-established. Beginning with trespass, the weaker of the two analogues, in *Martin v. Reynolds Metals Company*, plaintiffs alleged that Reynolds Metals Company's operation of an aluminum reduction plant caused the deposition of fluoride particles on their land, making it inhospitable for their livestock, which became poisoned by ingesting the invisible fluoride particulates. The substance that plaintiffs claimed had accumulated on their land—

116. RESTATEMENT (FOURTH) OF PROPERTY § 1.1 cmt. f (AM. L. INST., Tentative Draft No. 1, 2020) ("By contrast, the entry or presence on land of microscopic particles that are not arranged so as to form a touchable, observable, discrete entity traditionally has not been regarded by the courts as a tangible thing.").

117. Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp., 47 F.4th 408 (5th Cir. 2022).

a byproduct of purifying aluminum by an electrolytic process—was invisible to the naked eye. But visible or not, the court agreed that the harm suffered by the plaintiff constituted a direct trespass—Reynolds Metals Company's had entered or caused entry of a tangible thing or person onto land in other's possession.[118] Returning to the bifurcated lens established earlier in Part II, the only relevant component of the tort is the harm. Even though trespass requires intent to establish tortious misconduct, the post-*TransUnion* Court should concern itself with harm alone, with the historical context that trespass does not require harm to the land or economic loss to establish a prima facie trespass case.[119] The intrusion onto a possessory interest alone suffices.

The Fourth Restatement on Property's latest draft grapples with "intangible-matter cases,"[120] pointing out that the bulk of case-law does *not* recognize "sound waves, gases, electromagnetic waves, and airborne microscopic particles of dust," to serve as the basis for liability given the ubiquity of such occurrences and the floodgates such a prospect would open. When courts uphold trespass in such cases, they have typically required *actual* harm unlike in traditional trespass actions.

However, courts have considered a sub-set of trespass claims sufficient when the plaintiff demonstrates only the harm of physical intrusion, rather than economic or property damage in addition. The court in *Martin* acknowledged that the size of the particles in question defied traditional understandings of trespass (after all, the Restatement itself now limits the definition of trespass to *tangible* intrusions), but then turned to the character of the invasion itself. Trespass is any intrusion "which invades the possessor's protected interest in exclusive possession, whether that intrusion is by visible or invisible pieces of matter or by energy."[121] Twenty years later, the court in *Borland v. Sanders Lead Co.* agreed.[122] The Borlands owned 159 acres of land on which they raised cattle and grew crops, including a sprawling pecan orchard. In 1968, the Sanders Lead Company began recovering lead from old car batteries by smelting them down. The Borlands sued the company in trespass, claiming that the smelting process caused lead particulates and sulfoxide gases to accumulate in deposits on their property. The court found that there had been a direct trespass on the Borlands' property despite the intangible nature of the intrusion.[123] It also recognized the floodgates fear articulated decades later in the Fourth Restatement on Property,

118. RESTATEMENT (FOURTH) OF PROPERTY § 1.1(a) (AM. L. INST., Tentative Draft No. 2, 2021).

119. *Id.* § 1.4.

120. *Id.* § 1.1.

121. Reynolds Metals Co., 221 Or. 86 at 94 (P. 2d 1959); *see also* Young v. Fort Frances Pulp & Paper Co., 17 Ont Wkly Notes 6 (Canada 1919) (holding the deposit of soot and carbon from a mill onto plaintiff's land was a direct trespass); Bedell v. Goulter, 199 Or. 344 (P.2d 1953) (finding trespass resulted from the vibration of soil and concussion of air).

122. *See* Borland v. Sanders Lead Co., 369 So. 2d 523 (Ala. 1979).

123. *Id.* at 529–30.

noting that more than a *de minimis* concern would be needed to establish a trespass for intangible emissions, which the court felt was more than satisfied.[124]

Environmental plaintiffs wishing to assert standing by reference to intangible intrusions into their possessory interest could point to direct trespass as a suitable common-law analogue. Again, focusing on the harm component of the tort, for invisible intrusions, plaintiffs would need to demonstrate an actual harm, not just establish an intrusion, something akin to poisoned cattle or wilting crops. Requiring a higher threshold for intangible intrusions makes sense because courts have a reasonable fear of plaintiffs with de minimis and thus not actual, concrete harms remedying their problems in federal court. Although this may restrict some plaintiffs from asserting environmental claims who merely experienced transient smoke or haze that did not cause (or who could not prove) any appreciable damage, this should not be a major concern. As this section will show, plaintiffs in that boat can analogize instead to private nuisance for those types of invisible setbacks. In fact, private nuisance is likely the stronger analogy, given the majority opinion that intangible intrusions do not pass muster to establish the tort of trespass.

Plaintiffs who experienced an invisible physical intrusion who are *unable* to demonstrate actual harm and plaintiffs whose use or enjoyment of property they enjoy a possessory interest in[125] has deteriorated as a result of aesthetic, olfactory, or auditory disturbances should analogize to private nuisance rather than trespass. In the statutory case, *Environment Texas Citizen Lobby*, some plaintiffs living near ExxonMobil's Baytown, Texas plant asserted these kinds of harms. One member, Sharon Sprayberry, frequently saw "flares, smoke, and haze," from her home.[126] Another member, Marilyn Kingman, complained of chemical odors at home that caused her to limit her grandchildren's outdoor activities.[127] The court accepted these harms as sufficient to establish injury-in-fact.[128] Common-law courts have long recognized noxious odors, smoke, and intrusive noises as the kinds of traditional setbacks recognized by private nuisance claims.[129] Compared

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124. *Id.*

125. RESTATEMENT (FOURTH) OF PROPERTY § 2.4 (AM. L. INST. 2021).

126. Env't Tex. Citizen Lobby, Inc., 47 F.4th at 415, *vacated* prior to rehearing, 61 F.4th 1012 (5th Cir. 2023) (rehearing by the court en banc was granted and pursuant to Fifth Circuit Rule 41.3, the prior opinions were vacated).

127. *Id.* at 427.

128. *See* Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp., No. H-10-4969, 2017 U.S. Dist. LEXIS 72213, at *30–31 (S.D. Tex. April 26, 2017) ("In this case, four members of either Environment Texas or Sierra Club testified. As detailed supra . . . while living or visiting near the Complex during the time period at issue . . . at least one of these members experienced the following, inter alia: allergies; respiratory problems; the smell of pungent odors . . . visions of flares, smoke and haze. In addition, at least one of these members was worried about the risk of explosion after seeing flares and worried about his or her health after seeing flares, smoke, and haze.").

129. RESTATEMENT (FOURTH) OF PROPERTY § 2.1, illus. 2(i) (AM. L. INST., Tentative Draft 3, 2021); *see also* Aldred's Case, 9 Co. Rep. 57 Eng. Rep. 816 (1610) (finding odors from a nearby hog sty to constitute private nuisance); Transcontinental Gas Pipe Line Corp. v. Gault, 198 F.2d 196 (4th Cir.

to trespass, private nuisance does not require exclusion from land but rather a resulting diminishment of enjoyment from another actor's activity, which can and typically does include nonphysical interferences.[130]

In addition to the type of harm asserted, the act creating the nuisance must *substantially* and *unreasonably* interfere with the use and enjoyment of land in the other's possession.[131] An activity is *unreasonable* when it "renders the land . . . unavailable or insecure for ordinary use or enjoyment" for a non-trivial period of time (typically continually).[132] Additionally, failure to exercise reasonable care typically supports a finding of unreasonable interference even in the absence of other factors.[133] Finally, actual physical harm is not necessary, especially because "sounds, smells, and vibrations" typically do not inflict physical damage. Nuisance claims can succeed as long as the interference is more than transitory. This differentiates nuisance from trespass and makes it a more viable analogue for environmental plaintiffs suing for typical statutory violations. Finally, the act must also be substantial, meaning beyond the baseline level of disturbance and inconvenience intrinsic to the social contract. Substantial is frequently equated with the temporality dimension of the interference. Fleeting annoyances typically do not pass muster, whereas ongoing ones may be substantial.[134]

Many statutory factual harms asserted by regulatory beneficiaries are analogous to private nuisance claims at common law. In *Environment Texas Citizen Lobby*, ExxonMobil amassed 16,386 days of emissions violations, which seems easily characterized as substantial based on magnitude alone. Furthermore, the smoke and chemical odors diminished the enjoyment of plaintiffs' properties—forcing them inside and in some cases inspiring relocation, an interference that would violate the locality rule for a city home to 80,000 people.[135] In a comparable case at common law, *Freeman v. Grain Processing Corporation*, residents of Muscatine, Iowa filed a nuisance suit against the Grain Processing Corporation, which had been operating its corn wet milling facility in the area for decades.

1952) (holding that noise and odors were sufficient grounds to assert a private nuisance claim); Carrigan v. Purkhiser, 466 A.2d 1243 (D.C. Cir. 1983) (holding that odors from dogs constituted private nuisance).

130. Whereas trespass typically requires intent and private nuisance does not, this distinction as to the misconduct portion of the torts is irrelevant given the focus on harm in this Article.

131. RESTATEMENT (FOURTH) OF PROPERTY § 2.1 (AM. L. INST., Tentative Draft 3, 2021).

132. *Id.*, § 2.2. What makes an activity unreasonable frequently involves factors such as whether there is a statutory violation, whether there are abnormally dangerous activities, and something referred to as the "locality rule" which asks whether the activity is unreasonable for a given *situs*. This locality rule should not justify nuisances in a locality that is otherwise under-resourced and subjected to locally undesirable land uses but is meant to set a general baseline for a given setting.

133. *Id.* § 2.1.

134. *See, e.g.*, Adkins v. Thomas Solvent, Co., 440 Mich. 293, 308 (1992) ("In temporal terms, nuisance normally required some degree of permanence. If the asserted interference was 'temporary and evanescent,' there was no actionable nuisance.") quoting F.H. Newark, *The Boundaries of Nuisance*, 65 L.Q.R 480, 487-88 (1949).

135. *See* Env't Tex. Citizen Lobby, Inc., 47 F.4th at 415.

They asserted that the plant generated smoke, the particulate matter of which settled on their properties, and generated foul odors resembling "burned corn" or "rotten eggs" and hazes,[136] all of which affected the use and enjoyment of their properties, forcing them to remain indoors. Much like in *Environment Texas Citizen Lobby*, the smoke and dust occurred daily and plaintiffs asserted that the odor had lasted for years.[137] An email from a senior process engineer for Grain Processing Corporation revealed that the plant's dryers caused "the neighborhood [to be] so smoky across the street that it was fairly hard to see, not to mention breathe."[138] The court ultimately held that plaintiffs had established a common-law nuisance claim, demonstrating that a statutory case with a similar factual injury as the basis for standing would have a solid claim to this comparator tort.[139]

Having established that unreasonable and substantial odors, noises, and other invisible intrusions like smoke and particulate matter can constitute private nuisance claims at common law, the question of whether aesthetic setbacks count as well emerges. Aesthetic setbacks are one of the more common injuries-in-fact asserted by statutory environmental plaintiffs. They are, however, typically *not* recognized by common-law courts as private nuisances.[140] The Fourth Restatement of Property acknowledges that there is some case law finding a private nuisance for aesthetic injuries but takes the normative stance that they *should not* count, at least absent evidence of a malicious desire to harm the plaintiff.[141]

So far, the types of injuries-in-fact that environmental plaintiffs assert have had a roughly one-to-one mapping with common-law analogues. But that efficiency is hardly required by the Court. So how much deviation is allowed? Aesthetic injuries are contemplated by the Restatement and rejected on the grounds that people do not enjoy a right to be free from what is aesthetically unpleasant.[142] The types of interferences that nuisance law seeks to protect against are conditions that block or hinder one's actual use of their land, and aesthetic injuries fall short. The ALI's stance on aesthetic setbacks as insufficient substrates for private nuisance claims is rational and even preferable in the context of an isolated private claim for damages or equitable relief. Though one could (and some have) argued that collapsing aesthetic injuries into the same

136. Freeman v. Grain Processing Corp., 895 N.W.2d 105, 110 (Iowa 2017). An expert modeler, testifying on behalf of plaintiffs, demonstrated that the plant dispersed volatile organic compounds, particulate matter, and sulfur dioxide. Each compound acted as a proxy for odor, smoke, and haze. *Id.*

137. *Id.* at 110.

138. *Id.* at 109-10.

139. *Id.*

140. RESTATEMENT (FOURTH) OF PROPERTY § 2.1 cmt. k (AM. L. INST., Tentative Draft 3, 2021) ("Courts have generally resisted, and in any event should resist, the invocation of nuisance law by members of a community to exclude broad classes of persons deemed 'undesirable.'").

141. Myrick v. Peck Electric Co., 164 A.3d 658 (Vt. 2017) (discussing a failed judicial trend towards the recognition of aesthetic nuisance with an exception for malice like in the case of a spite fence).

142. RESTATEMENT (FOURTH) OF PROPERTY § 2.1 cmt. k (AM. L. INST., Tentative Draft 3, 2021).

bucket as moral and so-called status injuries, is reductive as best,[143] this Article takes the position that the Restatement's judgment, which is followed by most if not all common-law courts, is perhaps normatively frustrating for the person who has to set his sights daily on his neighbor's atrocious sculpture, but descriptively correct.

However, this historical limitation precluding most aesthetic nuisance suits should *not* serve as a limitation in the context of Article III standing under *TransUnion*, and thus far, it has not.[144] The majority in *TransUnion* required a *close* historical or common-law analogue, which need not be an "exact duplicate,"[145] but instead included all the necessary harm elements to assert the comparator tort.[146] Although *TransUnion* found that the statutory harm was insufficiently similar to the tort of defamation to create standing, the Court did not provide explicit insight into how much similarity is sufficient.[147] But *TransUnion* and its progeny's focus[148] has been the basic doctrinal ingredients of the common-law harm, setting aside the misconduct component.[149]

The question then becomes, is *TransUnion*'s test capacious enough to allow aesthetic injuries to survive? In a hypothetical environmental case, an aesthetic harm that serves as an unreasonable and substantial interference with use and enjoyment has met all of the doctrinal building blocks in a way that the plaintiffs' harms in *TransUnion*, *Hunstein*, and *Muransky* did not. Instead of failing to prove an element of the comparator harm itself (like third party disclosure, essential to preventing a tree falling in the forest paradigm), the court might quibble with the *character* of the setback itself, noting that even though the plaintiff has demonstrated an unreasonable and substantial nuisance, that because that nuisance is aesthetic in character, it fails.

But the concerns that led to the cabined conception of harm at common law fall away or at least subside in the statutory context. First, the judiciary and the ALI have been hesitant to allow remedies for aesthetic harms because of their

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143. *See, e.g.*, Robert Broughton, *Aesthetics and Environmental Law: Decisions and Values*, 7 LAND & WATER REV. 451 (1972); Raymond Robert Coletta, *The Case for Aesthetic Nuisance: Rethinking Traditional Judicial Attitudes*, 48 OH. ST. L.J. 141, 141–42 (1987) ("This judicial reluctance to recognize an action in nuisance based on aesthetic consideration is . . . based on a fundamental error. By equating aesthetics with beauty, courts have predetermined their rejection of aesthetic nuisance actions.").

144. *See, e.g.*, WildEarth Guardians v. Hoover, No. CV 16-65-M-DWM, 2016 U.S. Dist. LEXIS 157272 (D. Mont. Nov. 14, 2016).

145. TransUnion v. Ramirez, 141 S. Ct. 2190, 2209 (2021).

146. *Id.* ("Since the basis of the action for words was the loss of credit or fame, and not the insult, it was always necessary to show a publication of the words.") (quoting J. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 474 (5th Ed. 2019)).

147. TransUnion, 141 S. Ct. at 2209.

148. *See, e.g.*, Hunstein., 48 F.4th 1236, 1242 (11th Cir. 2022); Muransky, 979 F.3d at 932.

149. In TransUnion and in the Eleventh Circuit's worst-case-scenario interpretations in Muransky and Hunstein, the plaintiffs failed for want of a key doctrinal element in proving the comparator tort. *See supra* note 148.

subjectivity and lack of requisite oppression.[150] However, in statutory cases, the remedy is an injunction of the statutory violation—like reducing the particulate matter emissions to the federally prescribed level—and payment of civil penalties to the U.S. Department of Treasury, rather than a remedy of the aesthetic nuisance itself.[151] That the haze over plaintiff's property would dissipate is a happy byproduct of that equitable and monetary relief. So, the concerns that exist at common law that caution common-law judges from finding aesthetic injuries sufficient do not exist in the statutory context.

However, common-law courts do sometimes recognize aesthetic injury as the basis for a private nuisance suit.[152] Furthermore, courts are more generous when "unsightliness is coupled with additional harms . . . such as pollution or a physical invasion."[153] In a post *TransUnion* case, *Glynn Environmental Coalition, Inc. v. Sea Island Acquisition, LLC*, the Eleventh Circuit recognized that "[a] person can suffer an injury from the unsightly nature of the private property under well-settled tort law, even if he cannot always prevail on his underlying claim."[154] In other words, despite the existence of an aesthetic injury, there may not always exist a cause of action to *avenge* it given the articulated judicial concerns about subjectivity. Again, although that limitation makes some sense at common law, in a statutory environmental suit, not only does an aesthetic injury exist, but the statute provides the cause of action that was missing at common law.

Second, *TransUnion* left open the avenue of weighing congressional intent. Although common-law courts have mostly rejected aesthetic injuries as the basis for private nuisance claims, Congress recognized that the environmental statutes were, in part, remediating aesthetic harms.[155] These aesthetic harms, like haze,

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150. *See* RESTATEMENT (FOURTH) OF PROPERTY § 2.1 cmt. k (AM. L. INST. 2021) ("With few exceptions, courts in the United States have declined to recognize claims for purely aesthetic nuisances divorced from standard forms of actionable interference with use and enjoyment.").

151. *See, e.g.*, Ronald H. Rosenberg, *Doing Morre or Doing Less for the Environment: Shedding Light on EPA's "Stealth" Method of environmental Enforcement*, 35 ENV'T AFFAIRS 175, 178 n.14 (2008) ("[C]ivil penalties paid by defendants do not become the property of EPA, but rather . . . are paid into the U.S. Treasury.").

152. *See, e.g.*, Alison v. Smith, 695 P.2d 791, 794 (Colo. App. 1984) ("[L]egitimate but unsightly activity such as the accumulation of debris on land or the operation of a junkyard or auto salvage business may become a private nuisance if it is unreasonably operated so as to be unduly offensive to its neighbors.") (citing Mahoney v. Walter, 157 W.Va. 882 (1974)).

153. Wernke v. Halas, 600 N.E.2d 117 n.6 (Ind. Ct. App. 1992).

154. Glynn Env't Coal., Inc. v. Sea Island Acquisition, LLC, 26 F.4th 1235, 1243 (11th Cir. 2022).

155. *See generally* Steve Novick & Bill Westerfield, *Whose SIP Is it Anyway? State-Federal Conflict in Clean Air Act Enforcement*, 18 WILLIAM & MARY ENV'T L. & POL'Y REV. 245, 261 n.99 (1994) ("The 1970 Amendments empowered EPA to establish primary (or more stringent) standards for the protection of human health, and secondary standards for the protection of agriculture, ecosystems, and aesthetic values.") (citing 42 U.S.C. § 7409); Arnold W. Reitze, *Visibility Protection Under the Clean Air Act*, 9 GEO. WASH. J. ENERGY & ENV'T L. 127, 150 (2019) ("EPA . . . was willing to accept this compromise in a regulation designed to protect aesthetic values."); D. Michael Rappoport & John F. Cooney, *Visibility at the Grand Canyon: Regulatory Negotiations Under the Clean Air Act*, 24 ARIZ. ST. L.J. 627, 629 (1992) ("Section 169A, unlike other parts of the Clean Air Act, addresses aesthetic considerations (views) and does not protect human health or other aspects of the environment.").

flares, and cloudy bodies of water, were proxies for the underlying pollutive harms that spurred the environmental movement in the 1960s and led to the passage of the statutes to begin with. They were not mere trifles, like an unsightly car parked in a driveway or a displeasing boat garage, but symptoms of a deeper existential malady and an expression of desire for a healthy earth. These aesthetic injuries were proxies of the kind of oppressive requisite harm that the tort sought to acknowledge. Given the already robust doctrinal underpinning of aesthetic private nuisance as a comparator tort and the lack of the same distinct concerns regarding equitable relief, courts should be more willing than in other situations to turn their ears towards congressional intent.[156]

2. Non-Possessory Interest

One of the more common injuries-in-fact asserted by environmental plaintiffs in citizen-suit claims involves a second category of intangible injuries-in-fact in which, unlike the first category, plaintiffs lack any possessory interest. The types of setbacks that were typical in the first category—odors, noises, smoke, invisible intrusions like chemicals, and aesthetic concerns—remain. But the environmental degradation in the second category is occurring on either public land or another's private property that is enjoyed by the public at large.

Take *Sierra Club v. Franklin County Power of Illinois, LLC*, in which the Sierra Club brought suit under the CAA's citizen suit provision to require Franklin County Power to obtain a permit to operate in an area already meeting federal air quality requirements.[157] A member of the Sierra Club, Barbara McCasson, described the aesthetic and recreational harms she would experience if this facility were able to operate without a permit and thus deplete the air quality already enjoyed in the region. For every year since 1987 she and her family visited the area to fish, camp, kayak, and enjoy the beauty of Rend Lake, which is three miles from the where the plant would have been built. Rather than turn to private nuisance like in the prior Section, the Sierra Club would point instead to the comparator tort of public nuisance.

In many ways, establishing a traditional public nuisance claim at common law resembles the assertion of Article III standing. Although the basic framework is similar to private nuisance: an activity that creates an unreasonable interference with a right common to the general public, the difficulties arise when a private plaintiff wants to protect that public right instead of the government.[158] Originally, only the relevant governmental entity could bring public nuisance

156. *See* TransUnion v. Ramirez, 141 S. Ct. 2190, 2204 (2021) ("Courts must afford due respect to Congress's decision to impose a statutory prohibition or obligation on a defendant, and to grant a plaintiff a cause of action to sue over the defendant's violation of that statutory prohibition or obligation.").

157. Sierra Club v. Franklin Cty. Power of Ill., 546 F.3d 918 (7th Cir. 2008).

158. RESTATEMENT (SECOND) OF TORTS § 821B (AM. L. INST. 1965) ("Interference with the public health, public safety, public peace, public comfort or convenience, or proscribed by statute, ordinance, or administrative regulation.").

suits by exerting its parens patriae authority to protect public rights.[159] Once the tort became available for private attorneys general, the same floodgates and finality fears that pervade much of standing doctrine today regarding bare procedural harms emerged.

In response, courts require private citizens wishing to vindicate their fellow citizens' public rights to prove a special injury that is different in kind and degree from the general public.[160] Relying on a sixteenth century case that deeply rooted the special injury and different in kind tests in history,[161] the standard response by the judiciary when confronted with plaintiffs asserting an injury that is also suffered by the majority of the public has been that the plaintiff's injury is generalized. In other words, they have a cause of action, but lack standing. Sounds familiar.

In 1970, there was a concerted effort by the ALI to shake off public nuisance's ancient confines, using the Second Restatement of Torts as its vehicle to meager success.[162] Although few cases actually took the Restatement up on its liberalization of public nuisance doctrine,[163] it remains the text of the treatise today. At the time, environmental law was blossoming as a new statutory field and, squarely in the first era, federal standing law was catching up to allow private attorneys general to take full advantage of the new citizen-suit clauses. A large faction of ALI members felt public nuisance should be a modern tool to attack the environmental ills that were dawning on the collective conscience.[164] The ALI revised Section 821B to stop categorizing public nuisance as only a criminal interference and substituted it with the concept of unreasonableness, with the goal of making the tort available to environmental plaintiffs.[165]

More importantly, section 821C, which details who can sue for a public nuisance, provided two paths for obtaining standing. The first path, when seeking damages, was to demonstrate a special injury, different in kind from injury to the general public. The second path, when seeking *injunctive relief*, allowed standing for public nuisance when a plaintiff had standing to sue as a member of the general public as a "citizen in a citizen's action."[166] The environmental law community heralded the ALI's revisions to Section 821C as a victory, but only one state

159. *See, e.g.*, Mark A. Rothstein, *Private Actions for Public Nuisance: The Standing Problem*, 76 W.VA. L. REV. 453, 453 (1974) ("Where a nuisance is injurious to the public, the government has the right to sue for its abatement.")

160. RESTATEMENT (SECOND) OF TORTS § 821C (AM. L. INST. 1965).

161. Y.B. Mich. 27 Hen. 8, Mich., f. 26, pl. 10 (1535).

162. Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOLOGY L.Q. 755, 828 ("The rebellion would mark a doctrinal watershed—the pinnacle of the attempt to harmonize private plaintiffs' access to public nuisance with emerging public law principles.").

163. *See* Akau v. Olohana, 65 Haw. 383 (1982) (holding that whether the plaintiff was injured in fact was more important than the strict different-in-kind test many states were constricted by and that the ALI had endorsed this test in § 821C(2)(c)).

164. Antolini, *supra* note 162, at 839.

165. *Id.* at 844 n.467.

166. RESTATEMENT (SECOND) OF TORTS § 821C(2)(c) (AM. L. INST. 1965).

officially adopted the Restatement's approach, and few courts re-tooled their approach.[167] What does this mean for plaintiffs in a post-*TransUnion* world?

Public nuisance, the ever-elusive tort (is it even a tort?),[168] although troubled, remains a common-law analogue for environmental plaintiffs asserting standing under citizen-suit provisions. There are two roads to follow. First, statutory litigants can point to the Second Restatement's liberalized understanding of *who* can sue in public nuisance under Section 821C, which Hawaii officially adopted and other courts have relied on.[169] 821C collapses the standing threshold for public nuisance into a generalized Article III standing inquiry. Courts have been hesitant to adopt this approach, but this is likely because of the unpopular scope of standing under citizen-suits, which in the first era was concerned with pure legal injury with courts erratically requiring injuries-in-fact.[170] However, with the consistent and growing burden to demonstrate an adequately concrete and particularized factual injury, courts should rest easy that adopting Section 821C(2)(c) would not allow plaintiffs to assert bare procedural harms.[171] In other words, the public nuisance tort boils down to a tautology with the standard Article III standing inquiry. Plaintiffs would still need to demonstrate a sufficient factual injury. But in cases like *Sierra Club v. Franklin County Power of Illinois, LLC*, McCasson's aesthetic and recreational injuries would be sufficient because under 821C(2)(c) she would have been able to sue in public nuisance. As a final note, the history surrounding the passage of the Second Restatement of Torts is clear on this point. The goal and the outcome were to align public nuisance with statutory environmental law.[172]

The second road may be more palatable for the post-*TransUnion* judiciary. Let's assume that courts, when looking to public nuisance as the relevant comparator tort, will require the traditional special injury and different-in-kind requirements that the courts of yore have demanded. What kinds of special injuries can private citizens rely on in their quest to sue in public nuisance? The most settled

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167. *See* Akau, 65 Haw. at 388 ("We hold, therefore, that a member of the public has standing to sue to enforce the rights of the public even though his injury is not different in kind from the public's generally, if he can show that he has suffered an injury in fact . . . ."); Antolini, *supra* note 162, at 856 ("Ultimately, a survey of case law since the *Restatement* rebellion thirty years ago confirms that only one court—the Hawai'i Supreme Court in *Akau*—has ever expressly adopted the proposed change to the special injury rule/different-in-kind test for public nuisance cases.").

168. *See generally* Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4(2) J. TORT L. 1 (2011) (querying whether public nuisance is a private action or a public action and what the implications of each would mean).

169. RESTATEMENT (SECOND) OF TORTS § 821C(2)(c) (AM. L. INST. 1965).

170. *See supra* section I.A.

171. *See* Animal Legal Def. Fund v. Lucas, No. 2:19-40, 2022 U.S. Dist. LEXIS 198282, at *10 (W. D. Penn. Nov. 1, 2022) ("[I]ndicating that the special injury analysis [for public nuisance] *is identical to Pennsylvania's prudential standing* analysis, which in turn looks to federal law for guidance, and that federal law recognizes injury based upon harm to recreational and aesthetic interests.") (emphasis added); *see also* Kuhns v. City of Allentown, 636 F. Supp. 2d 418 (E.D. Pa. 2009).

172. Freeman v. Grain Processing Corp., 848 N.W.2d 58, 66–68 (Iowa 2014) ("The availability of nuisance theory to address environmental harms was endorsed by the Restatement (Second) of Torts . . . .").

special injury is suffered by a person who is proximally near the interference.[173] Although proximity alone is insufficient to establish a concrete injury,[174] it increases a plaintiff's probability of success. For some environmental plaintiffs, this clean analogue to public nuisance will suffice because of their nearby property interests. Courts have been particularly resistant to non-property owners suing in public nuisance.[175] However, the more common kind of factual injury asserted in statutory cases, and by far, the harder common-law claim to demonstrate in public nuisance is when a private citizen lacks proximity to the nuisance, but derives some special value from the public right. Consider Barbara McCasson, who merely vacationed near the site of the proposed power plant but did not have a possessory interest in the property. Were her aesthetic and recreational harms different in kind from her fellow Rend Lake campers?

The Restatement clarifies that the different-in-kind requirement does not simply mean the degree of interference, painting a picture of two commuters, one who travels by a public highway monthly and one who travels by it twelve times per day. In the event of an obstruction on the road, the more frequent traveler does not have a sufficient special injury despite the greater magnitude of interference he experiences. However, it concedes that the person who travels regularly on this road must have an internal reason for doing so, one that is particularized in his own psyche that is not common to the community.[176] This type of difference-in-kind injury could amount to significant interference sufficient to uphold a public nuisance action in tort.

Courts have recognized public nuisance suits by plaintiffs without possessory interests based on their special injuries. In *Collins v. Tri-State Zoological Park of Western Maryland, Inc*., the district court allowed a public nuisance claim against a private zoo when Constance Collins, a member of People for the Ethical Treatment of Animals, described the personal harm she suffered upon seeing the animals living in dangerous conditions and eating rotten food.[177] She was emotionally attached to the animals and suffered greatly after witnessing this abuse at a zoo, open to other members of the public, given that she claimed to derive personal, recreational, educational and aesthetic benefits from being the presence of

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173. Kjellander v. Smith, 652 S.W.2d 595, 600 (12th Cir. 1983) ("It has been held that an abutting owner – and we think that means an owner of a leasehold estate, as we have here—has rights *not peculiar to the public at large, but which are particular and peculiar to himself by virtue of the relation of his lot to the alley which it abuts*.") (citing Dipp v. Rio Grande Produce, Inc., 330 S.W.2d 700, 701 (8th Cir. 1959)).

174. Tex. Auto Salvage, Inc. v. D D Ramirez, Inc., No. 13-19-00500-CV, 2021 Tex. App. LEXIS 8334, at *29 (13th Cir. Oct. 14, 2021) ("[W]e reject [the] implication that proximity to a public nuisance, alone, is enough to establish a special injury.") (citing Persons v. City of Fort Worth, 790 S. W.2d 865, 867–69 (Tex. App. 1990)).

175. *See generally* Antolini, *supra* note 162, at 864 (reflecting on the restrictions for private plaintiffs suing under public nuisance).

176. Perhaps this is just a matter of degree in the end. Barbara McCasson returned to the lake year after year and so likely had her own internal reasons for doing so, that made her a legitimate plaintiff.

177. *See* No. 1:20-cv-01225-PX, 2021 U.S. Dist. LEXIS 223927 (D. Md. Nov. 19, 2021).

the animals. The district court held that the zoo's business operations constituted a public nuisance and that Collins averred sufficient facts to assert a special injury, different in kind from the general public.[178]

Although these special injuries centered around the treatment of animals, the Second Restatement of Torts makes clear that its list of unreasonable interferences should not be taken to exclude "aesthetic values or established principles of conservation of natural resources . . . ."[179] The Fourth Restatement of Property also indicates that "[s]ome decisions recognizing private-nuisance liability for aesthetic harms may be more accurately cast as privately actionable claims for public nuisance."[180] Environmental plaintiffs suing under the citizen-suit provisions and the APA should be prepared to articulate why their aesthetic or recreational injury is different in kind from the general public. Post-*TransUnion* cases, like *Glynn Environmental Coalition v. Sea Island Acquisition* in 2022, in which plaintiffs asserted non-possessory interests in properties where there was an alleged statutory violation, have so far passed Article III muster.[181] In *Glynn*, suing under the CWA's citizen-suit provision, a district court found that an environmentalist who regularly visited an area of wetlands to recreate and enjoy their natural beauty, had standing despite never having stepped foot or used the wetland. The court found that the deprivation of her aesthetic pleasure from viewing the unmolested wetlands, was particularized enough, or one might say different in kind, even if the area was enjoyed by many.[182] In other words, post-*TransUnion* courts have been allowing non-possessory intangible factual injuries to pass muster, because implicitly plaintiffs are making sufficient analogies to common-law comparators like public nuisance.

3. Risk of Physical Harm

Having dealt with past injuries, we return to the question of whether risk of physical harm survives *TransUnion*. In *TransUnion*, the unsuccessful plaintiffs attempted to assert standing by characterizing the errors in their credit files as creating an unreasonable risk of harm. The majority held that although a substantial and imminent risk of harm is typically sufficient to establish standing for plaintiffs seeking *injunctive* relief, it is inadequate when seeking damages.[183] The Court characterized a risk that never materializes as a happy occurrence—something to

178. *See also* Animal Legal Def. Fund v. Lucas, No. 2:19-40, 2022 U.S. Dist. LEXIS 198282 (W.D. Penn. Nov. 1, 2022) (granting plaintiff's motion for reconsideration regarding the public nuisance claim, given plaintiff's demonstration of its special injury even if other visitors might be equally upset).

179. RESTATEMENT (SECOND) OF TORTS § 821B cmt. e (AM. L. INST. 1965).

180. RESTATEMENT (FOURTH) OF PROPERTY § 2.1 cmt. k (AM. L. INST., Tentative Draft 3, 2021).

181. Sea Island Acquisition, LLC, 26 F.4th at 1235.

182. *Id.* at 1241.

183. TransUnion v. Ramirez, 141 S. Ct. 2190, 2198 (2021); *see also* Spokeo v. Robins, 578 US. 330 (2016).

celebrate rather than litigate.[184] In statutory environmental cases, injunctive relief (and civil penalties), not personal damages, are sought, so *TransUnion*'s prohibition on risk of harm constituting a concrete harm should not apply.[185]

Second, even where monetary damages were sought, this is just the standard *TransUnion* holding in a slightly different package: risk of harm only constitutes a concrete injury when the comparator tort would have contemplated risk of said harm. For example, the plaintiffs in *Spokeo* pointed to libel as a tort where risk of harm suffices. As long as there was evidence of publication, there was a risk of harm sufficient to establish injury for libel (in other words the reputational harm is presumed even if not demonstrated), but merely having a discrepancy in one's credit file, like the 6,332 plaintiffs whose information was never released to the OFAC the way Sergio Ramirez's was, did sufficiently tee up the harm such that there was no risk. In other words, to establish whether risk of harm is sufficiently concrete, plaintiffs would need to demonstrate that the comparator tort contemplates that the risk of future harm alone establishes an injury.[186] The torts of libel and slander per se consider an unactualized reputational harm sufficient as long there is evidence of publication.

Returning to environmental claims, where risk of physical harm is asserted, this can be further disaggregated into (1) injuries in which there was a behavioral change on the plaintiff's part, (2) injuries in which there was no behavioral change, but there was a documented sub-cellular change, and (3) injuries in which there was no behavioral change but there was an undesirable exposure that may have catapulted the plaintiff into a new statistical risk group. The question is what comparator torts are available for each category and whether the *fit* is sufficient under the *TransUnion* analysis.

In the first category, plaintiffs exhibit a behavioral change due to the risk of physical harm. Returning to *Environment Texas Citizen Lobby*, plaintiffs stated that as a result of the Baytown Plant's 16,000 days of CAA violations, they "refrained from outdoor activities."[187] In *Natural Resources Defense Council v. Illinois Power Resources, LLC*, plaintiffs alleged that the defendant fell out of compliance with CAA provisions, causing at least one NRDC member to keep her windows closed to reduce particulate matter exposure. In both cases, plaintiffs changed their behavior on their own properties in response to the substantial and unreasonable interference to avoid physical harm even if that harm never materialized in a measurable way. The plants' activity invaded members' interests in the private use and enjoyment of their land. Private nuisance fits the bill. This

184. *Id.* at 2211.

185. *See* TransUnion, 141 S. Ct. 2190 at 2210–11.

186. The TransUnion majority explains that "a plaintiff's knowledge that he or she is exposed to a risk of future physical, monetary, or reputational harm could cause its own current emotional or psychological harm." *See id.* 2211 n.7. One rudimentary way to identify torts that allow for risk of harm would be to identify ones that allow for general rather than special damages.

187. *See* Env't Tex. Citizen Lobby, Inc., 47 F.4th at 415.

was precisely the case at common law. In *Baptiste v. Bethlehem Landfill Company*, The Baptistes, homeowners in Freemansburg, Pennsylvania, sued the owner of a solid waste disposal facility and landfill in private nuisance.[188] The Third Circuit agreed that the "sickening odors" which prevented residents from using "their swimming pools, spend[ing] time on their porches, host[ing] guests (due to embarrassment), or play[ing] in their yards with their children or pets," could constitute a private nuisance claim, despite being derived from a fear of exposure to hydrogen sulfide gas, rather than a definitive physical injury.[189] It is useful to return to the discussion at the beginning of Part II that divorced the harm or setback from the misconduct portion of the tort. The harm that private nuisance seeks to redress is a loss of enjoyment in the property, which a legitimate fear of exposure could induce.

In the second and third categories, plaintiffs do not exhibit any behavioral changes, but are able to demonstrate that they (1) experienced a sub-cellular change even if they did not yet manifest as an outward disease[190] or (2) that they moved into a higher statistical category of risk. In both cases, the plaintiff is at a higher risk of experiencing illness, so the two types of injury are really just different articulations of the same kind: increased risk of future disease. There are of course some differences. Some plaintiffs may be able to demonstrate detectable chromosomal aberrations, genetic mutations, or other biomarkers as a result of carcinogenic exposures. Others may have no demonstrable sub-cellular aberrations but can instead point to established causal pathways between the level of exposure and a probabilistic outcome. Risk in this sense is both the probability of the harm materializing and the magnitude if it does. In neither case is eventual observable illness inevitable nor is the manifestation of the harm present. But scholars and courts have understood that risk of physical harm—whether sub-cellular or statistical—is an objective setback because, for example, "the person exposed to radiation is now in a class of people with a higher risk of developing cancer, and thus is doing substantially less well in life."[191]

In both cases, there is a single common-law analogue: medical monitoring. Under the so-called toxic torts umbrella, plaintiffs commonly turn to negligence suits.[192] However, courts have routinely rejected mere *risk* of physical harm as a setback deserving remedy in standalone negligence claims, with the exception of loss of chance cases.[193] Actual harm is required. An alternative cause of action

188. 965 F.3d 214, 218 (3d Cir. 2020).

189. *Id.* at 218.

190. Albert C. Lin, *The Unifying Role of Harm in Environmental Law*, 2006 WIS. L. REV. 897, 955.

191. *Id.*

192. Anthony Roisman, Martha Judy & Daniel Stein, *Preserving Justice: Defending Toxic Tort Litigation*, 15 FORDHAM ENV'T. L. REV. 191, 197 (2004) ("Negligence is the most commonly pled cause of action in toxic tort cases.").

193. Rhodes v. E.I. DuPont de Nemours & Co., 657 F. Supp. 2d 751 (S.D.W.V. 2009) (holding that plaintiffs, exposed to perfluorooctanoic acid (PFOA) from a DuPont facility in West Virginia, could not support their underlying negligence claim for lack of actual physical injury, despite recognizing their

has emerged to address this gap in the common-law, borne out of the emergence of modern exposure injuries and the latency inherent to many of them: medical monitoring claims.[194] In such claims, plaintiffs lack an outward manifestation of disease, but seek to obtain medical monitoring testing to detect the injury should it occur as a result of their exposure.[195] Although not all jurisdictions acknowledge medical monitoring for *risk* of injury, many state and federal courts have recognized such claims and acknowledged that risk of physical injury can serve as the requisite setback.[196]

Many courts also recognize medical monitoring as a tort or cause of action in and of itself, whereas others recognize it as an award of damages.[197] In *Donovan v. Philip Morris USA, Inc.*, the Supreme Court of Massachusetts, certifying a question from the District Court of Massachusetts, affirmed that risk of physical harm would satisfy "the element of injury," to establish the tort of medical monitoring.[198] The court further enumerated that a plaintiff would need to demonstrate that the defendant's negligence caused the plaintiff to be exposed to a hazardous substance that "substantially increased the risk of serious disease, illness, or injury," by pointing to at least subcellular changes.[199] Furthermore, there must be an effective medical test to detect early manifestations of the disease, treatment that if given at an early stage could reduce the risk of death or a severe presentation, evidence that the diagnostic medical examinations are necessary to detect that disease, and verification of the monetary value of the tests.[200] In *Rhodes v. E.I. DuPont de Nemours & Company*, the court held that plaintiffs exposed to PFOA as a result of DuPont's negligence did not need to prevail on their underlying negligence claim (which had failed for want of actual harm) to establish an independent medical monitoring claim.[201] The court in *Rhodes* interpreted precedent, which required "tortious conduct" as a pre-requisite, to mean a relaxed injury requirement for the underlying negligence. In other words, the question is

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non-trivial exposure and heightened risk based on blood serum levels of PFOA and scientifically proven causal pathways); *see also* Matsuyama v. Birnbaum, 452 Mass. 1, 3 ("We conclude that recognizing loss of chance in the limited domain of medical negligence advances the fundamental goals and principles of our tort law.").

194. *See* Donovan v. Philip Morris USA, Inc., 455 Mass. 215, 225 (2009).

195. Sean P. Wajert, *Medical Monitoring in the US: An Update for Life Science Companies*, THOMAS REUTERS PRACTICAL LAW (2008).

196. Stella v. LVMH Perfumes and Cosmetics USA Inc., 2009 U.S. Dist. LEXIS 22948 (N.D. Ill. March 23 2009); Meyer ex rel Coplin v. Fluor Corp., 2006 Mo. App. LEXIS 499 (E.D. Mo. April 18, 2006).

197. *See* Wajert, *supra* note 195.

198. Donovan, 455 Mass. at 225.

199. *Id.* at 226.

200. *Id.* (citing Sullivan v. Old Colony St. Ry., 197 Mass. 512, 516 (1908)). Note that jurisdictions differ on this recipe for medical monitoring. For example, some do not require the cure or beneficial treatment. *See* Wajert, *supra* note 195.

201. Rhodes v. EI DuPont de Nemours & Co., 657 F. Supp. 2d 751 (2009) (citing Bowers v. Westinghouse Elec. Corp., 206 W.Va. 133 (1999)).

not whether the defendant caused harm through a breach of duty, but whether "the defendant has breached a duty that could cause harm . . . ."[202]

Although there is a strong basis for medical monitoring as a cause of action to serve as a common-law analogue for risk of physical harm, the policy concerns that limit the claim's reach at common law are less convincing in the context of Article III standing for statutory claims. Following the Supreme Court's disapproval of medical monitoring in *Metro-North Commuter Railroad Company v. Buckley*, many of the already hesitant jurisdictions began rejecting independent medical monitoring claims. They pointed to the utility of a physical injury, which they argued served several inter-related administrability functions like eliminating the floodgates fear of litigation and reducing the risk of fraud because this involved monetary damages.[203] Many jurisdictions have grappled with these concerns and found medical monitoring claims to be administrable and valuable. Nonetheless, the standing context does not invoke the same worries. Even if countless people suffered from the risk of harm, the motivation to sue for monetary damages that exists in tort falls aside when the relief requested is injunctive or in the form of civil penalties. Recognizing medical monitoring as a suitable common-law analogue for risk of physical harm in the statutory context is administrable. It also gets at the real question the *TransUnion* majority posed, which is whether plaintiffs suffered a *setback* recognized as a basis for traditional suits. Risk of physical harm is such a setback and courts should continue to allow risk to serve as a sufficient injury-in-fact.

4. Emotional Injury

This penultimate Section explores whether emotional injuries survive under *TransUnion* given the common law's allergy to them. The typologies laid out so far center on physical injury, but environmental plaintiffs frequently invoke emotional harms. There are two distinct types of emotional injuries asserted. The first is when plaintiffs assert fear of exposure to a chemical or pollutant in statutory claims separate from any known exposure or physical injury. This is distinct (though related) from risk of physical harm, in which plaintiffs provided evidence to establish sufficient exposure such that future illness is probable.

The second type of emotional injury is implicitly embedded within assertions of aesthetic, recreational, and conservational injuries. In *Glynn Environmental Coalition v. Sea Island Acquisition, LLC*, the district court, which found standing, noted one member's appreciation for the area's "natural aesthetic beauty" as dispositive.[204] In *Pit River Tribe v. U.S. Forest Service*, the Pit River Tribe sued the Bureau of Land Management, alleging a NEPA violation by approving a

202. *Id.* at 777.

203. Rhodes, 657 F. Supp. 2d at 774 (citing Metro-North Commuter R.R. Co. v. Buckley, 521 U.S. 424 (1997)); *see also* Donovan, 455 Mass. at 225.

204. Sea Island Acquisition, LLC, 26 F.4th at 1239.

geothermal plant's construction in the Medicine Lake Highlands in California.[205] The court agreed that the Pit River Tribe's spiritual interest in the landscape was sufficient to assert Article III standing.[206] In *WildEarth Guardians v. Hoover*, the court found standing where plaintiff members asserted a "spiritual interest in bobcats, wolves, and other non-target animals."[207]

Finally, consider *Juliana v. United States*, a youth-led climate impact litigation case challenging the federal government for its failure to mitigate the climate crisis despite fifty years of knowledge that carbon dioxide was linked to global warming.[208] Although the Ninth Circuit did not find Article III standing on redressability grounds, it did affirm the district court's holding that plaintiffs had successfully asserted valid injuries-in-fact.[209] Plaintiffs asserted varying climate related injuries, but several claimed they suffered "psychological trauma as [a] result of fossil-fuel induced climate change caused by federal defendants."[210] The court further acknowledged that plaintiffs' "emotional injuries from acute and chronic exposure to climate change . . . to empathic identification with others who are harmed by climate change, to profound fears about future harm . . ."[211] constituted concrete setbacks sufficient to support Article III standing. By invoking spiritual injuries as well as aesthetic, recreational, and conservation injuries, especially when the interest is non-possessory, plaintiffs are describing a deeper existential grief at the loss of their environment. This is precisely the loss that Congress recognized when it enacted various environmental statutes.[212]

The common law is often resistant to independent claims of emotional distress, in part because of the subjective nature and difficult proof of such claims, but there are two viable comparator torts that statutory plaintiffs asserting each type of emotional fear can point to respectively. For plaintiffs alleging fear of exposure or pollution, the most analogous comparator tort is the negligent infliction of emotional distress.[213] For the more existential emotional injuries asserted in the

205. Pit River Tribe v. U.S. Forest Service, 469 F.3d 768, 772 (9th Cir. 2006).

206. *Id.* at 779 (holding that the Pit River Tribe had a well-documented spiritual, cultural, and religious interest in the Medicine Lake Highland and Timber Mountain areas sufficient to assert standing).

207. WildEarth Guardians, No. CV 16-65-M-DWM 2016 U.S. Dist. LEXIS 157272 at *6–7 (D. Mont. Nov. 14, 2016).

208. 339 F. Supp. 3d 1062, 1071–72, *rev'd*, 947 F.3d 1159, 1168 (9th Cir. 2020) (holding that plaintiffs lacked Article III standing on redressability grounds, but affirming the district court's findings that plaintiffs adequately established injury and causation).

209. Juliana, F.3d at 1168.

210. Juliana, F.3d at 1088–89 (citing Levi Decl. ¶ 5; Victoria Decl. ¶ ¶ 8–10, 16–18; Jayden Decl. ¶ 42; Nicholas Decl. ¶ 4, 7, 17).

211. *Id.* at 1088.

212. *See, e.g.*, Ash Council Memo, Memorandum for the President. (April. 29, 1970) https://perma.cc/W4PZ-R79J ("Our National Government is neither structured nor oriented to sustain a well-articulated attack on the practices which debase the air we breathe, the water we drink and the land that grows our food. Indeed, the present departmental structure for dealing with environmental protection defies effective and concerted action.").

213. *See* RESTATEMENT (THIRD) OF TORTS § 46 (AM. L. INST. 2010) (defining negligent infliction of emotional harm as when an actor's negligent conduct causes serious emotional harm to another).

cases above, plaintiffs can point to a sub-set of trespass claims that allow for sentimental damages for the loss of special chattel property like domesticated animals. Although the common law has been slow to recognize independent emotional torts, it has long recognized "parasitic" emotional claims attached to claims for physical or property damage.[214] Furthermore, the Court in *TransUnion* did not limit the historical inquiry to what common law torts could be asserted at the founding. The common law is by nature an incrementally evolving body of law that has slowly come to recognize emotional harm as society has progressed and the injuries suffered and recognized at law have become more complex.

Negligent infliction of emotional distress is a controversial tort with as many versions as there are critiques. For jurisdictions that recognize the tort, several require some manifestation of physical harm.[215] In friendlier jurisdictions, emotional setbacks are sufficient as long as the defendant owed the plaintiff a duty of care, which it then breached causing only emotional harm.[216] The duty owed to plaintiffs is defined as one of the three: (1) reasonably foreseeable harm to cause emotional distress; (2) zone of danger for physical harm; or, as discussed earlier, (3) physical injury in addition to the emotional distress.[217] In New York, courts have recognized negligent infliction of emotional distress claims in cases where medical providers accidentally exposed plaintiffs to HIV, even without evidence that the plaintiff had contracted the virus, as long as the method of exposure was scientifically accepted and the source of exposure was HIV-positive.[218]

Recently, the U.S. District Court for the District of Columbia found the tort to be a sufficient analogue for the emotional harms suffered by Congressman Eric Swalwell following the riots on January 6, 2021, at the U.S. Capitol for the purposes of Article III standing, holding that, "Emotional harm is sufficiently concrete to establish Article III standing for claims asserted under 42 U.S.C. 1985 AND 1986." *See* Thompson v. Trump, 590 F. Supp. 3d 46, 71 (D.D.C. 2022).

214. *See, e.g.*, Barney v. Magenis, 135 N.E. 142, 144 (Mass. 1922); *see also* Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1058 (1936) ("We have seen how extensively mental and emotional distress have been recognized as recoverable elements of damage parasitic upon another, often purely nominal, cause of action, and sporadically even where no other element of damage was present.") (citation omitted).

215. *See* Robert J. Rhee, *A Principled Solution for Negligent Infliction of Emotional Distress Claims*, 36 ARIZ. ST. L.J. 805, 815, 815 n.48 (2004) ("Some modern courts still adhere to the physical manifestation rule.") (citing Brueckner v. Norwich Univ., 730 A.2d 1086, 1092–93 (Vt. 1999)).

216. *See* Ornstein v. New York City Health & Hosps. Corp., 10 N.Y.3d 1, 6 (2008) (citing Johnson v. State of New York, 37 N.Y.2d 378, 381 (1975)); Kennedy v. McKesson Co., 58 N.Y.2d 500, 506 (1983); *see also* Eric Scott Fisher, Potter v. Firestone *and the Infliction of Emotional Distress*, 30 TORT & INS. L. J. 1071, 1073 n.21 (1995) ("The following jurisdictions have abolished the physical injury requirement: Alabama, California, Connecticut, Hawaii, Maine, Missouri, Montana, Nebraska, New Jersey, North Carolina, Ohio, Oregon, Texas, and Washington.").

217. *See* RESTATEMENT (THIRD) OF TORTS § 46 (AM. L. INST. 2010).

218. *See* Ornstein, 10 N.Y.3d; *see also* Bishop v. Mount Sinai Med. Ctr., 247 AD.2d 329, 332 (N.Y. App. Div. 1998) (holding that to maintain a cause of action for damages related to the fear of contracting HIV or AIDS, a plaintiff who has not tested positive must demonstrate that the source of blood or fluids they were exposed to was HIV-positive).

Even though courts have struggled to adapt the tort to toxic exposure claims,[219] fearing a flood of litigation, some jurisdictions have paved a way forward. In *Potter v. Firestone Tire & Rubber Co.*, the defendant disposed of solvents from a landfill it had contracted with in several domestic water wells.[220] The trial court and California Court of Appeal held that plaintiffs need not demonstrate that they were likely to develop cancer, but that their fear of developing it following exposure was adequate.[221] On review at the Supreme Court of California, the majority laid out the elements of negligent infliction of emotional distress, which were "parasitic" to a claim in negligence.[222] Recovery was available if emotional distress arose out of the defendant's breach of legal duty, that distress was proximately caused by the breach, and the breach threatened physical injury not just property damage.[223]

This framework is of considerable value in the statutory injury-in-fact context. Consider that the legal duty arises out of the statutes themselves, just as it did in *Potter*.[224] Plaintiffs would need to demonstrate, as was the case here, that that statutory violation led to their exposure of suspected carcinogens or toxins and led to "their fear of suffering the very harm which the Legislature sought by statute to avoid."[225] Finally, in the case of exposures to carcinogens and toxins, serious physical injury is threatened. Justice Baxter also clarified that California did not require physical injury or impact, even for the parasitic claim attached to negligence, because it found that requirement no more useful a proxy for actual harm than a guarantee of serious emotional distress.[226] To address the threat of serious injury, the court required a "more-likely than not" threshold for development of the disease, which it felt stemmed the tide of potential "cancerphobia" litigation.[227] Not all statutory environmental plaintiffs who experience genuine fear from exposure to covered toxins will meet the evidentiary standards required at common law, but those who do stand a reasonable chance at establishing a concrete injury under this balancing test.

Turning to the second kind of emotional harm invoked for standing purposes, as expressed through aesthetic, recreational, religious, and spiritual interests, a distant common-law cousin could be palatable under *TransUnion.* There is a

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219. *See, e.g.*, DiStefano v. Nabisco, 2 A.D.3d 484, 485 (N.Y. App. 2003) (affirming appellate court's holding that plaintiff would need to demonstrate a clinical manifestation of volatile organic compound contamination).

220. 863 P.2d 795 (Cal. 1993).

221. *Id.* at 804.

222. *Id.* at 809–10.

223. *Id.* at 807–08.

224. *Id.* at 808 ("Firestone did violate a duty imposed on it by law and regulation to dispose of toxic waste only in a class I landfill and to avoid contamination of underground water.").

225. *Id.*

226. *Id.* at 809 (finding that the requirement for physical injury was simultaneously overinclusive and underinclusive and "encourage[ed] extravagant pleading and distorted testimony") (quoting Molien v. Kaiser Found. Hospitals, 27 Cal. 3d 916, 928 (1980)).

227. *See* Fisher, *supra* note 216 at 1078–79.

small body of tort law concerned with how damages are calculated when a tortfeasor negligently or intentionally kills or wounds a plaintiff's pet. This is not an independent cause of action but rather subsidiary to a property-related tort like trespass, conversion, or negligence. In *Martinez v. Robledo*, Eliseo Martinez, Jr. sued his neighbor, Enrique Robledo, on behalf of himself and his children, after their two-year-old German shepherd freed himself from Martinez's yard and began barking at Robledo's dog, though was physically separated from him. Robledo then shot the dog resulting in the amputation of its rear leg.[228]

In the same consolidated suit, Margaret Workman took her nine-year-old golden retriever to the veterinarian for surgery during which the dog sustained complications at great cost to the owner. In both cases, the pet owners sued for negligence or conversion and argued that damages should not be restricted to the animals' market value, but should factor in that "pets are and should be treated as fundamentally more significant than mere personal property."[229] The court pointed to special valuation of pets by statutes: animal cruelty is considered a felony, and state and federal pet evacuation legislation post-Hurricane Katrina allows pets to accompany humans in shelters. Because "animals are special, sentient beings, [] unlike other forms of property, animals feel pain, suffer and die," and the "Legislature's historical solicitude for the proper care and treatment of animals, and the array of criminal penalties for the mistreatment of animals, as well as the reality that animals are living creatures, the usual standard recovery for damaged personal property—market value—is inadequate when applied to injured pets."[230] The underlying rationale was that the purpose of tort law is to make plaintiffs as whole as possible.[231]

This final common-law analogue may be less of a fit than the prior comparator torts and a court wishing to be faithful to *TransUnion* may be less comfortable with it. However, *TransUnion* is asking courts to hold plaintiffs to a higher standard to demonstrate harm, ensuring that they have a concrete interest and are not some officious intermeddler. Plaintiffs with profound emotional injuries on behalf of the land and environmental resources shared by everyone suffer a concrete harm, one that is easily recognized when the damage is inflicted on chattels. But the courts in these cases have gone further to tease apart the harm differential between damage to one's sofa and the death of one's beloved dog. Although the common law has long struggled with intangible harms, it takes emotional injuries similar to the ones articulated in environmental statutory cases seriously, as the kinds of setback deserving of relief.

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228. 210 Cal. Rptr. 3d 921,922-23 (Cal. Ct. App. 2012).

229. *Id.* at 923.

230. *Id.* at 926-27; *see also* McCallister v. Sappingfield, 144 P. 432, 434 (Or. 1914).

231. *Id.* at 926; *see also* Kimes v. Grosser, 195 Cal.App.4th 1556 (2011); Jankoski v. Preiser Animal Hosp., Ltd., 510 N.E.2d 1084 (Ill. App. Ct. 1987); Robin Cheryl Miller, *Damages for Killing or Injury Dog*, 61 AMER. LAW. REPS. 635 (1998).

5. Informational Injuries

Finally, environmental regulated beneficiaries frequently assert informational injuries.[232] In *TransUnion*, the class also asserted informational injuries, complaining that formatting defects in certain mailings sent by TransUnion deprived them of their right to receive information as required by statute.[233] The majority held that "plaintiffs have not demonstrated that the format of TransUnion's mailings caused them a harm with a close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts."[234] The majority appears to have left open the possibility of asserting a successful informational injury—one that is not a bare procedural harm—and points to seminal cases like *Akins* and *Public Citizen* to bolster its sympathies for this kind of setback.[235] But this seems optimistic at best and disingenuous at worst. In *Akins* and *Public Citizen*, the Court recognized informational injuries when plaintiffs were denied information subject to "sunshine laws" entitling members of the public to specific information. Mere formatting, the majority pointed out, did not a public-disclosure violation make. But that skirts the point.

Lower courts have picked up on the logical inconsistency (that even the injuries asserted in *Akins* and *Public Citizen* likely do not have comparator torts), and a circuit split has developed. In *Laufer v. Naranda Hotels, LLC*, the Fourth Circuit held in an American with Disabilities Act ("ADA") case that a tester had standing based on their informational injury, which caused stigmatic harm, expressly dispensing with the analogical test demanded by the *TransUnion* majority.[236] Three other circuits however have concluded that informational injuries cannot survive *TransUnion* for lack of a historical or common-law analogue.[237]

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232. *See* Randall S. Abate & Michael J. Myers, *Broadening the Scope of Environmental Standing: Procedural and Informational Injury-in-Fact After* Lujan v. Defenders of Wildlife, 12 UCLA J. ENV'T L. 345, 346 ("Although substantive injury has received the most attention in the courts and has been the principal vehicle through which the doctrine of environmental standing has evolved, there also has been a growing recognition of procedural and informational injury in the courts in recent years."). This frequently arises in the context of NEPA claims for failure to produce an adequate environmental impact statement or environmental analysis.

233. *See* TransUnion v. Ramirez, 141 S. Ct. 2190, 2213 (2021). Plaintiffs also separately argued that the formatting violations created a risk of future harm, but the Court brushed this analysis aside by pointing out that only monetary damages were sought.

234. *Id.*

235. FEC v. Akins, 524 U.S. 11 (1998) (holding that denial of recordkeeping and disclosure requirements mandated under the Federal Election Campaign Act was a sufficiently concrete injury); (Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440 (1989) (holding that the American Bar Association's denial of public interest groups' request for information about judicial nominees in violation of the Federal Advisory Committee Act, constituted a concrete injury-in-fact).

236. *See* Laufer v. Naranda Hotels, LLC; Thomas Nielson, Recent Case: Laufer v. Naranda Hotels, LLC, Harv. L. Rev. Blog (March 8, 2023), https://perma.cc/ZLJ2-FYBY; Catherine Cole, *A Standoff:* Havens Realty v. Coleman *Tester Standing and* TransUnion v. Ramirez *in the Circuit Courts* (Note), 45 HARV. J. L. & PUB. POL'Y 1033 (2022).

237. The Supreme Court vacated and remanded after the case became moot. Laufer v. Naranda Hotels, LLC, 144 S. Ct. 18. The case has since produced a circuit split with the Second, Fifth, and Tenth

The Court has long disallowed stigmatic injuries on their own to suffice, without equal protection concerns,[238] and only began recognizing such injuries in the wake of congressionally-created harms under statutes like the ADA and the Civil Rights Act. Scholars in other areas of law will need to make their best case for informational injuries under the line of best fit test, but this appears the most tenuous of all the injuries under *TransUnion* if the Court demonstrates logically consistency.

III. A LINE OF BEST FIT

Despite the Court's latest barrier to asserting Article III standing for regulatory beneficiaries, environmental cases provide some insights into what the line of best fit looks like. The line of best of fit, here, is used to describe how close the fit between the injury-in-fact and the common-law analogue is based on *TransUnion* and the cases that have followed. The question posed by *TransUnion* is: When is the relationship between a factual injury and a common-law analogue sufficient? The Court provides safe harbor for injuries with a close relationship to common law analogues including "reputational harms, disclosure of private information, and intrusion upon seclusion,"[239] but still leaves lower courts wanting more. Scholars who have engaged with the challenges *TransUnion* presented or who have grappled with Court's inconsistent injury-in-fact doctrine tend to interrogate the Court's rationale undergirding standing doctrine.[240] This Article stays clear from the third rail of what Article III standing *should be* and which injuries *should* count, and instead takes stock of the doctrine as is to chart a course forward across all areas of law.

The Article began with environmental law, a bar where regulatory beneficiaries have long been aware of the mandate to go beyond congressionally-created causes of action and provide particularized, concrete factual injuries. Part II made the case that the bulk of factual injuries at the environmental bar already have deeply rooted common-law analogues. The Court has so far shown little appetite to invalidate injuries-in-fact brought by regulatory beneficiaries under environmental statutes based on the test created in *Spokeo* and fleshed out in *TransUnion*. Although the sample size is small, this Article suggests that the reason environmental standing has not suffered too many blows yet is twofold. First,

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Circuits finding that plaintiff lacked standing and the First, Fourth, and Eleventh Circuits finding that plaintiff had successfully asserted standing.

238. *See* Allen v. Wright, 468 U.S. 737, 757 n.22 (1984) ("The stigmatic injury thus requires identification of some concrete interest with respect to which respondents are personally subject to discriminatory treatment. That interest must independently satisfy the causation requirement of standing doctrine."); Rachel Bayefsky, *Psychological Harm and Constitutional Standing*, 81 BROOK. L. REV. 1555, 1572–73 (2016).

239. TransUnion v. Ramirez, 141 S. Ct. 2190, 2204 (2021).

240. *See generally* Bayefsky, *supra* note 7, at 2292 ("As a doctrinal matter, this Article argues against an entrenchment of the distinction between tangible and intangible harm as the law develops.").

other areas of law have long aimed at protecting individual interests, whereas environmental law exists to vindicate the public good. As a result of the mismatch between who suffers the harm and who brings the claim, the bulk of modern standing doctrine has emerged from environmental cases, with the Court eager to restrain intermeddlers. As a result of the acute standing issues that regulatory beneficiaries have been confronted with, there has been more occasion for them to develop a mature body of standing law than in other areas—one that closely resembles the Supreme Court's latest requirements. Second, the factual injuries that environmental plaintiffs developed—aesthetic, recreational, and conservational—articulate private harms that served as the basis of lawsuits in American courts. They had to be that way, because the entire purpose of those factual injuries was to reorient statutory violations focused on the environment to private individual harms. Part III will attempt to articulate a "line of best fit" for the Court's Article III standing requirements that goes beyond environmental law and is ultimately trans-substantive. To do so, Part III relies on (1) the typological exercise and relevant factors identified in Part II; (2) existing post-*TransUnion* case law across subject areas; and (3) the larger policy concerns motivating the *TransUnion* majority.

A. GOLDILOCKS AND THE THREE BEARS: WHAT MAKES AN ANALOGUE JUST RIGHT?

Part II showed that there was a spectrum of sufficiently analogous relationships between factual injuries and comparator torts. Although several of these relationships were essentially one-to-one mappings, the *TransUnion* majority was clear that a perfect fit between the injury and the analogue are not required.[241] And for what it's worth, a plain reading of *analogous* implies differences between the statutory harm and the basis for a traditional claim, despite fundamental similarities. Nevertheless, there exists this neat category of mappings where the fit between the injury and the analogue is a ten out of ten. The remainder of this Section focuses on the pairings with a lower fit, which can be further categorized into three groups: (1) the statutory setback is outside the scope of the common-law tort or an element is missing; (2) the common-law tort is less established; and (3) parasitic analogues. This section also asks what is the line of best fit that the Court will ultimately tolerate if less than perfect.

1. Imperfect Setbacks & Missing Elements

When plaintiffs assert a factual injury that tracks the harm elements (though not the misconduct elements) of a comparator tort, courts can still find the injury concrete. This is true even if the injury relies on a setback that, although similar in kind to harms recognized at common law, was itself historically excluded. For example, in the environmental context, aesthetic setbacks are not recognized as a

241. TransUnion v. Ramirez, 141 S. Ct. 2190, 2209 (2021).

basis for asserting private nuisance actions.[242] However, aside from the type of setback, factual injuries based on aesthetic injuries track the common-law elements for private nuisance: (1) plaintiff has a possessory interest in the land; and (2) defendant performed an act that substantially and unreasonably interfered with the plaintiff's use and enjoyment of her property. Furthermore, although aesthetic harms are not recognized as the basis for private nuisance claims, the common law recognizes other injuries in the same *genre* as aesthetic harm, like olfactory and auditory harms.[243] In other words, aesthetic injuries are similar in kind to the types of private nuisance injuries actionable at common law. Moreover, Congress contemplated aesthetic harms and the restoration of natural resources and landscapes when passing and amending the relevant statutes.[244] Finally, many of the policy reasons for foreclosing the possibility of private nuisance suits based on non-malicious aesthetic interferences fall away or become de minimis concerns in the statutory context.

Rather than re-hash the specifics to aesthetic setbacks itself, this Section seeks to provide overarching factors for lower courts faced with similar situations: when the harm elements of the common-law comparator tort track except that the setback itself is an imperfect match or when another element is missing or strained. Despite not being a perfect fit, many statutory scenarios in this category are sufficient for courts to find Article III standing. The first factor is to assess whether the statutory setback asserted is within the genre that the common-law claim recognizes, meaning that the setback is characterized by similarities in form, style, or subject matter.[245] In *Rand v. Travelers Indemnification Company*, a post-*TransUnion* case, the defendant automatically disclosed plaintiff's driver's license information to a third-party group of cybercriminals.[246] The court found standing under the Driver's Privacy Protection Act, based on the tort of public disclosure of private information, which condemns giving publicity to a matter concerning another's private life.[247] The court noted that it was not clear that the statutory setback at issue "sufficiently resemble[d] the type of loss in privacy

242. *See supra* section I.B.1.

243. It is worth interrogating what is meant here by the genre of a setback. Think of a genre as a category of a kind of harm that encompasses all the individual harms that would be indexed together even if they differ in some ways. Harms that are in the same genre share critical characteristics. For example, obnoxious odors and noises are in the same genre as aesthetic injuries because all are sensory-based intrusions that interfere with enjoyment. These are distinct from the genre of physical harms which includes both property-based and person-based injuries. Economic harms are yet another distinct genre, because the harm is to the pocketbook rather than to the land, body, or senses.

244. *See* A. Dan Tarlock, *Environmental Law: Then and Now*, 32 WASH. UNIV. J. L. & POL'Y 1, 4 (2010) ("Respect for the beauty of nature and the need for scientific management laid the foundation for the modern environmental movement."). In addition, "These concerns were also fomented by the country's postwar affluence, which gave the American public a taste for beauty and recreation, and the release of social reform energy from the anti-Vietnam War movement." *Id.* at 5.

245. See *infra* note 249 and accompanying text.

246. Rand v. Travelers Indem. Co., 637 F. Supp. 3d 55, 62–63 (S.D.N.Y. 2022).

247. *Id.* at 66.

protected by the tort of public disclosure"[248] because the group of cybercriminals were not tantamount to the public. Nevertheless, it acknowledged that *TransUnion* did not mandate duplication and that plaintiff's setback was within the genre protected by the comparator tort.[249] There is no perfect formula for establishing whether a setback falls within the genre protected at common law, but where there is doubt, courts can turn to the remaining indicia: congressional intent and policy reasons.

TransUnion makes clear that although Congress is not permitted to independently create a cause of action from thin air, its views remain instructive, and courts should defer to the congressional intent motivating novel causes-of-action for previously unrecognized de facto injuries. Some scholars believe that *TransUnion*'s real contribution to the dialogue on Article III standing was to pay lip service to congressional intent while eviscerating the legislature's authority. That may turn out to be true, but the majority opinion leaves enough of a crack open to consider congressional intent for now. If a setback is outside the traditional coverage of a common-law tort, or, going further—the factual injury does not track another element of the tort—courts should consider looking to Congress for guidance on whether the fit is sufficient.

In *Utah Physicians for a Healthy Environment v. Diesel Power Gear, LLC*, plaintiff alleged that the defendant violated the CAA.[250] The plaintiff organization pointed to negligence as the comparator tort, though recognized that its claim did not fully satisfy the requirements for the cause of action. In particular, Defendant argued that pollution from its sources is a small fraction of the total pollution in the Wasatch Front in Utah, and that this broke the causation prong of plaintiff's claim.[251] The Tenth Circuit pointed to *TransUnion*'s deference (however narrow) toward congressional intent and argued that this was especially important when a "plaintiff's claim is similar to a common-law cause of action but does not satisfy the requirements for that cause of action because of considerations that do not apply to the statutory claim."[252] There were multiple actors that caused the local pollution, and although the statute provided a cause of action against each, negligence, defined by the Third Restatement of Torts, does not allow a cause of action if that actor's conduct was trivial contribution.[253] Despite

248. *Id.*

249. *See also* Al-Ahmed v. Twitter, Inc. 603 F.Supp.3d 857 (N.D. Cal. 2022) (finding a sufficient relationship between Al-Ahmed's statutory harm and a common law analogue based on the hacking of his Twitter account, despite it not being clear that the information at issue was sufficiently private). *But see* I.C. v. Zyna, Inc. 600 F. Supp. 3d 1034 (N.D. Cal. 2022) (finding that privacy injuries were not sufficiently analogous to common-law privacy torts because only basic contact information was disclosed from Facebook, as compared with highly offensive informational disclosure like that in *TransUnion*, otherwise every data breach would confer standing).

250. *See* Utah Physicians for a Healthy Env't, 21 F.4th at 1239.

251. *Id.* at 1242.

252. *Id.* at n.10.

253. RESTATEMENT (THIRD) OF TORTS § 36 (AM. L. INST. 2010).

the imperfect fit, the court acknowledged that many of the common-law policy concerns fell away, and requiring a perfect match between statutory injury and common-law harm would "amount to major surgery on the CAA's citizen-suit provision."[254] The fit was close enough.

Finally, when the fit is imperfect, for either of the reasons articulated above, courts should assess whether the policy reasons the common-law tort developed as it did remain relevant in the statutory context. Returning to *Utah Physicians for a Healthy Environment*, in which defendants argued that plaintiffs could not link its small contributions to greenhouse gas emissions to harms in the locality and thus could not analogize to the tort of negligence, the Tenth Circuit disagreed.[255] The Restatement cabined common-law negligence to non-trivial contributions because of policy concerns including "fairness, equitable-loss distribution, and administrative costs."[256] The Tenth Circuit reasoned that those concerns drop away in the statutory context in which the defendant violated a statute. Whereas allowing damages for a "trivial" harm at common law may not have been palatable, requiring the defendant to pay civil penalties and enjoin their activity, based on its statutory violation, was reasonable.[257]

Several of the analogues discussed in Part II faced similar challenges.[258] Courts are frequently wary of medical monitoring—either as a standalone or parasitic tort—fearing that without a physical manifestation of injury, the floodgates concern would be realized and the risk of fraud would increase. Part II discussed how, in the Article III standing context, these concerns diminish considerably. Without monetary damages paid to the plaintiff, the financial motivation driving an uptick in litigation and fraud would not present the same challenges. Similarly, the policy concerns surrounding aesthetic private nuisances are not as salient in the standing context. Restrictions on common-law torts were frequently borne out of the incentive structure and remedies awarded. However, the claims discussed throughout are based on violations of federal statutes, and are thus immune, or at least more resilient, to the many ways the common law could be exploited for personal gain. As a final note, the factors developed in this section are not meant to overcome all shortcomings between factual injuries and comparator torts. Like any balancing test, they are meant to guide courts when there is a less than perfect fit.

2. Controversial Torts & Parasitic Analogues

Although the prior section discussed what courts might do in the case of an imperfect match between an injury-in-fact and a common-law analogue, this section queries what courts might do when faced with a controversial comparator

254. Utah Physicians for a Healthy Env't, 21 F.4th at 1243, 1243 n.10.
255. *Id.* at 1242–43.
256. *Id.* at 1243 n.10.
257. *Id.*
258. *See supra* Part II.

tort or one that lacks an independent cause of action. Not all torts are created equal. Some go unquestioned for centuries.[259] Others, like the torts for negligent infliction of emotional distress and public nuisance, have more tortured histories.[260] Although all jurisdictions recognize these torts, the doctrine is hardly consistent and plaintiffs litigating under the respective umbrellas are frequently mistrusted, painted as fraudsters or distractions.[261] Whereas the two torts discussed here are not exhaustive of the list of claims on less stable footing than, say, battery, courts should rest assured that although jurisdictions have struggled to define and cabin them as they evolved, both are deeply rooted in harms recognized by courts. Additionally, many of the concerns raised about these so-called controversial torts, as in the previous section, decrease in magnitude in the statutory context.

Finally, as for parasitic analogues—common-law claims which are dependent on the proof and assertion of another claim—courts have several options. In Part II this arose in relation to medical monitoring claims, sentimental damages for the loss of special chattel property like domesticated animals, and negligent infliction of emotional distress. Courts evaluating plaintiffs' claims to Article III standing based on a comparison to parasitic tort have a couple of options. First, they can turn towards jurisdictions which recognize independent causes of action as evidence that historically, the tort in question has served as the basis for common-law claims. Second, courts can acknowledge that the federal statute provides the underlying cause of action to which a dependent tort could attach. In *Glynn Environmental Coalition, Inc. v. Sea Island Acquisition, LLC*, the Eleventh Circuit acknowledged that "[a] person can suffer an injury from the unsightly nature of the private property under well-settled tort law, even if he cannot always prevail on his underlying claim."[262] This acknowledged the reality of the aesthetic injury although it was made clear that a tort like private nuisance might not be available

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259. *See, e.g.*, Kenneth J. Vandevelde, *A History of Prima Facie Tort: The Origins of a General Theory of Intentional Tort,* 19 HOFSTRA L. REV. 447 (1990) (describing the straightforward history of intentional torts); *see also* Symposium, Kenneth S. Abraham & G. Edward White, *How An Old Tort Became New: The Case of Offensive Battery*, DEPAUL L. REV. (2023) (describing how battery was left unchanged in three successive restatements).

260. Timothy Sandefur, *"Public Nuisance"— A "Legal Garbage Can"*, GOLDWATER INST. (Oct. 14, 2020), https://perma.cc/ME4E-AUYB ("'Public nuisance,' in fact, is a term so vague that some 80 years ago, the famous law professor William Prosser called it 'a legal garbage can'—meaning that it's so loosely defined that almost anything can be declared a 'public nuisance.' . . . But over the years, lawyers and judges have rendered it so vague and poorly understood that nobody today really knows if it even qualifies as a crime or not . . . ."); *see also* Rhee, *supra* note 215, at 806–07 ("Although mental injuries can be as real and severe as physical ones, the law dealing with this interest is anything but principled or uniform.").

261. *See, e.g.*, Robert J. Rhee, *A Principled Solution for Negligent Infliction of Emotional Distress Claims*, 36 ARIZ. STATE L.J. 805, 806, 808 (2004) (describing negligent infliction of emotional distress as one of the most "controversial and least uniform fields of tort law" and the judiciary's fear of "opening the floodgates to fraudulent, frivolous, and perhaps even marginal lawsuits").

262. Sea Island Acquisition, LLC, 26 F.4th at 1243.

to plaintiffs seeking relief. When it comes to standing, however, the statute provides the missing cause-of-action, although still analogizing to the common-law for the underlying injury.[263] In a post-*TransUnion* case, *Farrell v. Blinken*, the D.C. Circuit held that Farrell, a U.S. citizen and naturalized Swiss citizen had standing despite that the common-law analogue it pointed to never served as an independent cause of action.[264] The plaintiff challenged a certificate of loss of nationality, which he requested to relinquish his U.S. citizenship when he performed the expatriating act of obtaining Swiss citizenship.[265] The D.C. Circuit found that he had standing based on the common-law analogue of right to election, which allowed early settlers in the post-Revolution United States to determine their country of allegiance.[266] Invoking Thomas Jefferson's and James Madison's writings on the right of expatriation, the court cited case after case that recognized the "inherent and inalienable right of man to change his home and allegiance."[267] The dissent pointed out, however, that no common-law court ever treated the right of election as the *basis for a lawsuit*, but despite this lack of a perfect fit to an existing analogue, the majority recognized that even if the right of election did not constitute a cause of action, it satisfied a "type of harm presumed to constitute an injury in fact."[268]

B. POST-*TRANSUNION* STATE OF AFFAIRS

The excavation of the past sections provides a substantial amount of intel on what the line of best fit is to describe, if not the ideal relationship between factual injuries and their common-law analogues, then the level of fit that the Court will tolerate. In order to put some meat on the proverbial bones, it is useful to look at the state of affairs post-*TransUnion* to see what analogues are in and which ones are out. The bulk of the recent caselaw that grapples with both *TransUnion* and *Spokeo* is predictably in the area of consumer privacy law. Most of these cases followed *TransUnion* to a tee, holding that the tort of defamation or public disclosure of private information were sufficient analogues, even if as mentioned earlier, the type of information was either not as private as the tort might require or

263. To be clear, this is not the same scenario as when a plaintiff asserts negligence per se as his common-law analogue by reference to the violation of the federal statute and then fails to develop the remainder of the tort including causation and damages. *See, e.g.*, Thorne v. Pep Boys Manny Moe & Jack, Inc., 980 F.3d 879, 890 (3d Cir. 2020) ("As for negligence per se, that doctrine is not a historical recognition of either of Thorne's alleged harms. It merely 'establishes, by reference to a statutory scheme, the standard of care appropriate *to the underlying tort*.'") (quoting In re Orthopedic Bone Screw Prods. Liab. Litig., 193 F.3d 781, 790 (3d Cir. 1999)).

264. 4 F.4th 124 (D.C. Cir. 2021).

265. *Id.* at 126.

266. *Id.* at 133 ("This offers a 'close historical or common-law analogue' for the right to expatriate now recognized by Congress.").

267. *Id.* at 134.

268. *Id.* at 132.

the third-party disclosure was not as public as the tort might have anticipated.[269] An investigation beyond these paradigmatic cases reveals both a panoply of approaches that at first blush yields little consistency. But on closer inspection, there are several ordering principles that can be extracted and built off of the lessons from environmental law.

There are two ends of the spectrum and then a heaping of caselaw in the middle. By and large the Eleventh Circuit has taken (and took prior to *TransUnion*) a literal approach to the test. Whereas the Eleventh Circuit claims not to require duplicates, the court usually finds common-law analogues inadequate when any "essential element" is missing.[270] This was the case in *Hunstein v. Preferred Collection and Management Services*. Richard Hunstein alleged that a collection agency disclosed his personal information to a commercial mail vendor, which sent him a letter on behalf Johns Hopkins All Children's Hospital reminding him of the terms of his medical debt.[271] He characterized this third-party disclosure as a concrete injury analogous to the tort of public disclosure, which demands that someone "give[] publicity to a matter concerning the private life of another . . . ."[272] The majority, in its unyielding element-by-element approach, found that the disclosure to a private company (without evidence even of disclosure to an individual employee, though Hunstein argued that this was inevitable once Preferred Collection had the information) as opposed to the public, was fatal to Hunstein's claim.[273] At the other end of the spectrum are cases like *Environment Texas Citizen Lobby v. ExxonMobil*, which acknowledged the gauntlet thrown by the *TransUnion* majority, but have clung to a strict *Lujan*-style analysis to assess whether plaintiff had asserted a concrete injury, rather than exploring potential common-law analogues.[274] As discussed in Part I, this defiant stance is sure to fail.[275] An honest reading of *TransUnion* and assessment of the policies motivating the decision must fall in between these approaches.

Beyond the circuits calling for a perfect fit and the ones dispensing with it, there is a middle ground calling for a fit somewhere in between, that aligns with

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269. *See, e.g.*, Hunstein, 48 F.4th at 1242; Muransky, 979 F.3d at 931-32; Aponte v. Northeast Radiology, P.C., No. 21 CV 5883, 2022 U.S. Dist. LEXIS 87982 (S.D.N.Y. May 16, 2022) (finding failure to protect electronic private health information sufficiently analogous to the tort of public disclosure of private information); Rand v. Travelers Indem. Co., No. 21 CV 10744 (VB), 2022 U.S. Dist. LEXIS 196029, at *10–11 (S.D.N.Y. Oct. 26, 2022) (holding the same for a violation under the Driver's Privacy Protection Act); In re USAA Data Sec. Litig., 621 F. Supp. 3d 454 (S.D.N.Y. 2022) (same); Garey v. Farrin 35 F.4th 917 (4th Cir. 2022) (finding standing for claim under the DPAA because of sufficient analogue to invasion of privacy).

270. *See* Hunstein, 48 F.4th at 1248; Muransky, 979 F.3d. at 931–34.

271. *See* Hunstein, 48 F.4th at 1257 (Newsom, J., dissenting).

272. RESTATEMENT (SECOND) OF TORTS § 652D (AM. L. INST. 1965).

273. Hunstein, 48 F.4th at 1248–49 (claiming that it could not "convert the tort of public disclosure into a tort of private disclosure").

274. Again, this case is up for rehearing en banc by the Fifth Circuit to address precisely this question.

275. *See* Hunstein, 48 F.4th at 1257 (Newsom, J. dissenting).

the analysis done in Part II and the balancing test developed in section III.A and *Spokeo* and *TransUnion* themselves. Judge Newsom, writing for the *Hunstein* dissent, cast doubt on the majority's claim that the case was an "exercise in simplicity."[276] Judge Newsom seemingly had a bone to pick and focused his entire dissent on fit.[277] The question was not whether an essential element was missing, as it was in *TransUnion* where class members alleged no disclosure to a third-party whatsoever. Instead, it was whether the third-party disclosure, which had occurred, was sufficiently public.[278] Anything beyond that, he critiqued, would be an invocation of the exact duplicate standard that the majority in *TransUnion* explicitly rejected.[279] Pointing to Black's Law Dictionary's definition of an element, the dissent argued that "essential" is a redundant modifier.[280] All elements are essential to the proof of a tort at common law. By requiring an essential element, the *Hunstein* majority was requiring statutory plaintiffs to prove each element of the comparator tort.[281] This is an exact duplicate, not an analogue. If all elements are essential, then the *TransUnion* majority could not have meant an element-by-element standard.[282] In fact in *TransUnion*, the Court rejected the defendant's argument that the tort of defamation failed for lack of proof of falsity, an element required by the Restatement, as opposed to merely misleading information.[283] A better approach would be, as the dissent suggests and many circuits which do not require a perfect fit take, a similar in kind framework, which asks not if every element is met, but whether the injury is similar *in kind* to the types of setbacks invoked at common law.[284]

Other circuits have also adopted the dissent's approach in *Hunstein*, requiring a version of this framework. On remand, the Ninth Circuit in *Robins v. Spokeo, Inc*. evaluated the fit between the statutory harm under FCRA and the torts of defamation and libel.[285] Spokeo reported that Robins was married with children, that

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276. *Id*. at 1256.

277. *Id*. at 1258 ("The majority and I disagree about how close is 'close enough,' and about how the 'close enough' question should be evaluated, and ultimately, about whether Hunstein's publicity-related allegations satisfy the 'close enough' standard. That disagreement is narrow, but it is profound.").

278. *Id*.

279. TransUnion v. Ramirez, 141 S. Ct. 2190, 2209 (2021).

280. *See* Hunstein, 48 F.4th at 1261 (Newsom, J., dissenting).

281. *See id*. at 1257–58.

282. *Id*. at 1261 ("What elements of a common-law claim *aren't* 'essential to liability'? Isn't essentiality what makes an 'element' an element? *Black's* confirms what we already know: An 'element is [a] constituent part of a claim that must be proved for the claim to succeed.").

283. *Id*. at 1262 ("The majority acknowledges, as it must, that the Court in *TransUnion* held that for purposes of comparing the class members' alleged harms to defamation . . . *misleading* information was close enough, element-wise, to *false* information.").

284. *Id*. at 1264; *see, e.g*., Robins v. Spokeo, 867 F.3d 1108 (9th Cir. 2017); Krakauer v. Dish Network, LLC, 925 F.3d 643, 652–53 (4th Cir. 2019); Cranor v. 5 Star Nutrition, LLC, 998 F.3d 686, 690 (5th Cir. 2021).

285. 867 F.3d at 1115 ("But the Supreme Court observed 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,' not that Congress may recognize a de facto intangible harm only when

he was middle-aged, and employed with a graduate degree, when in reality he was unemployed and actively seeking a job. The court found it easy to imagine the material risk of harm from companies obtaining this false information.[286] Although this was not exactly the harm recognized at common law, it was "similar *in kind* to others that have traditionally served as the basis for lawsuit[s]."[287]

In *Gadelhak v. AT&T Services*, the Seventh Circuit took a similar approach when faced with allegations from Chicago resident Ali Gadelhak. Gadelhak, claiming that AT&T sent her five text messages asking survey questions, sued under the Telephone Consumer Protection Act ("TCPA"). Acknowledging that five unwanted text messages may not have amounted to a common-law action for intrusion upon seclusion, the Seventh Circuit held that "such texts nevertheless pose the same *kind* of harm that common law courts recognize . . . ."[288] Similarly, in *Cranor v. 5 Start Nutrition, LLC*, the Fifth Circuit held that robo-texts, which are violations under the TCPA, are sufficiently analogous to the common-law tort of public nuisance to find a concrete injury sufficient to assert standing.[289] During a commercial transaction, Lucas Cranor provided the company with his cell phone number and subsequently received unsolicited text messages for several months, despite attempts to opt out. The court concludes that "Cranor's injury 'ha [d] a close relationship to' common law public nuisance," because he endeavored to use "our Nation's telecommunications infrastructure without harassment," much like "someone who wants to use another piece of infrastructure like a road or bridge without confronting a malarial pond, obnoxious noises, or disgusting odors."[290] Furthermore, the court found that Cranor suffered a sufficiently different in-kind injury as compared with the public at large.[291] Finally, recalling *In re E.I. Dupont de Nemours & Company C-8 Personal Injury Litigation*, the Sixth Circuit held that plaintiffs seeking medical monitoring for per- and polyfluoroalkyl elevation in their blood, was contingent on recognition of an underlying comparator tort.[292] Even though the plaintiff's exposure to the chemical substances was not

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its statute exactly tracks the common law."); *see also* Gadelhak v. AT&T Servs., 950 F.3d 458, 462–63 (7th Cir. 2020) ("[W]e are meant to look for a 'close relationship' in kind, not degree. In other words, although the common law offers guidance, it does not take out the limits of Congress's power to identify harms deserving a remedy.") (citation omitted).

286. *See* Robins, 867 F.3d at 1117 ("It does not take much imagination to understand how inaccurate reports on such a broad range of material facts about Robins's life could be deemed a real harm.").

287. *Id.* at 1115.

288. *Id.* at 463.

289. 998 F.3d 686, 692 (5th Cir. 2021). The court acknowledged that the Second, Third, Seventh, and Ninth Circuits had all found the statutory violation sufficiently analogous to nuisance and invasion of privacy, but noted that the Eleventh Circuit, had taken its trademark stricter stance. *Id.* at 689–90.

290. *Id.* at 692 (citing Commonwealth v. Allen, 148 Pa. 358, 23 A. 1115, 1116 (Pa. 1892)).

291. *Id.*

292. In re E.I. Dupont de Nemours & Co. C-8 Pers., No. 22-0305, 2022 U.S. App. LEXIS 25452, *14–15 (6th Cir. Sept. 9, 2022).

intentional, the court found the tort of battery sufficiently analogous despite not tracking the common law element-for-element.[293]

Cases following *Spokeo* and *TransUnion* have taken many routes with some courts adopting a strict interpretation that Justice Kavanaugh himself took pains to avoid, and others behaving like business as usual. Although courts in the middle are far from consistent in their approach to assessing the fit between common-law analogues and statutory harms, many take a more flexible approach that accesses the spirit of the test, asking whether the injury is similar in kind, rather than a duplicate of the comparator tort. This is a different articulation of the same test extracted from Part II, which was to separate the harm from the misconduct portions of the tort, and ask whether this type of harm, or the genre the harm was catalogued under, was recognized at common law. The final section looks towards one additional clue as to why a fit less than ten but greater than zero is correct: the Court's policy concerns.

C. COURT'S MOTIVATIONS

This final section builds off of sections III.A and B, which made inroads to assess a potential line of best fit, and acknowledges that the Court in *Spokeo* and *TransUnion* was motivated by an age-old concern of separation of powers. This is nothing new. A robust understanding of standing doctrine must always be refracted through a lens of separation of powers.[294] The judiciary, from time immemorial, claims to be wary of treading on executive and legislative toes through judicial review, and so narrows the access path to the federal courts in the hopes that resolution comes in an alternative form. Of course, a different reading of this is that the judiciary is eager to deprive the legislature of its power, minimizing the significance of congressionally-created injuries and giving itself the normative authority to decide what kinds of injuries count or not, despite little guidance from history.[295]

However, let us take them at their word. The judiciary cares about the separation of powers in the conventional sense: "In sum, the concrete-harm requirement is essential to the constitution's separation of powers."[296] The Court is reiterating the orthodoxy behind *Lujan* and *Spokeo* and countless cases that came before to limit access to federal courts to situations in which we find a "real controversy

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293. *Id.* at *14 (citing TransUnion v. Ramirez, 141 S. Ct. 2190, 2204 (2021)) ("He analogizes his claim to battery, which may very well provide a 'common-law analogue for [his] asserted injury.'").

294. *See, e.g.*, Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 460 (2008) ("The Supreme Court has stated that standing "is built on a single basic idea—the idea of separation of powers").

295. TransUnion v. Ramirez, 141 S. Ct. 2190, 2221 (2021) (Thomas, J. dissenting) ("According to the majority, 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.").

296. *Id.* at 2207.

with real impact on real persons."[297] Whereas the underlying motivations may have unsavory implications for, say, environmental beneficiaries hoping to see their day in court, *TransUnion* interpreted faithfully and against a backdrop of separation of powers, does not threaten the existence of the regulatory state as the Eleventh Circuit would have it. Instead, feeling threatened by plaintiffs *without* a personal stake in the matter to enforce legislation as private attorneys general, as the administrative state expands, it seeks a line of best fit between harms that courts know to be concrete and ones of which they are more skeptical.

This may well be a small move. The Court hitches its wagon to the common law. However, it does not provide temporal limits on which common law injuries count, thus providing an ever-evolving, even if at a tortoise's pace, body of law. It is not entirely clear then what the dimensions the Court hoped to provide are. Litigants will always be able to point to innovations in the common law, even recent ones like medical monitoring and negligent infliction of emotional distress, because society and, thus, the courts incrementally progress. If the Court believed itself to be achieving stasis through this move, its choice of horses for the standing wagon is an odd one. Instead of a radical departure from the past,[298] we might think that the Court felt the need to make clear, in new words and with a new test, that plaintiffs cannot sue for bare procedural harms—standing 101 for environmental plaintiffs, but perhaps not for others.

CONCLUSION

This story began with environmental law clinging on for dear life. And it ends with statutory law in a much more confident posture. Environmental law, which at first appeared to be one of the more vulnerable bars given its dependence on congressionally-created injuries and its departure from the common law, served as a north star in the end. Although plaintiffs in other areas like consumer protection were accustomed to asserting procedural injuries because they assumed that those were sufficiently particularized, environmental plaintiffs were under no such illusions. Instead, for over thirty years, they have asserted factual injuries above and beyond the statutory violation. It was clear to regulatory beneficiaries that a slam dunk violation of the CAA was insufficient to assert standing. Geographical proximity helped demonstrate a particularized harm, but even then, an environmental harm itself unrelated to a plaintiff was meaningless at the threshold stage. Plaintiffs became adept at re-orienting cases about the land, water, air, and animals to the concrete harms they suffered as a result. And so were born aesthetic, recreational, and conservational harms. In other areas of law, because the regulatory beneficiaries were people themselves, not the environment

297. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2103 (2019) (Breyer, J., concurring).

298. *See* Chemerinsky, *supra* note 3, at 269 (Perhaps intentionally, or maybe inadvertently, the Supreme Court's June 2021 decision in *TransUnion LLC v. Ramirez* has the potential to dramatically restrict standing to sue in federal courts to enforce federal statutes.").

at large or some other separate entity, it was easier to assert a bare procedural harm where no actual injury had occurred. It makes sense then that environmental law, after decades devoted to crafting factual injuries focused on private harm, remains a beacon as litigants grapple with heightened standards for Article III standing.

The *TransUnion* majority was far from clear about what line of best fit accurately describes the relationship between factual injuries and common-law analogues. But environmental cases, with their well-developed factual injuries, offer a solution to the equation. The factual injuries that environmental litigants assert all have close relationships with harms that traditionally served as the basis for lawsuits in American courts. Even if the statutory harms themselves lack obvious analogues, the factual injuries bear close resemblances to traditional torts like trespass, public and private nuisance, and negligent infliction of emotional distress.

Although the matches are imperfect, they have been and should remain close enough fits. Section III.A developed a balancing test that courts can use, based on environmental law, to assess fit—looking at whether the setback is within the same genre as common-law claims (or in other words, is similar in kind), whether the policies limiting the doctrine at common-law diminish in the statutory context, and whether there is evidence of congressional intent to recognize this type of setback. Section II.B then takes a wider lens to sample the post *Spokeo* and *TransUnion* caselaw and assess how courts are treating fit. The similar in-kind approach, taken up by the Ninth Circuit in *Spokeo* on remand and the *Hunstein* dissent in the Eleventh Circuit and in many sister circuits and district courts, emerges as the most faithful reading of *TransUnion*'s requirements, rejecting the need for duplicates and looking instead to the type of injury sustained. In the end, the heightened, anthropocentric standing requirements for environmental regulatory beneficiaries have shielded plaintiffs from the Court's latest gatekeeping attempt. Beyond saving itself alone, environmental law charts a trans-substantive path for courts looking for a best fit approach faithful to the latest standing doctrine, as well as for litigants trying to make their way into federal court.