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Constitutional Injury and Tangibility

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CONSTITUTIONAL INJURY AND TANGIBILITY

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ABSTRACT

The Supreme Court, in the 2016 case Spokeo, Inc. v. Robins*, announced a framework for determining whether a plaintiff had alleged an injury that would permit entry into federal court. The Court indicated that a plaintiff, in order to have constitutional standing, needed to suffer harm that was "concrete" or "real." In explaining how courts could ascertain whether an alleged harm was concrete, the Court created a category of "intangible" harm subject to a distinctive, and arguably more demanding, concreteness inquiry than "tangible" harm, a category that seemingly includes only physical or economic harm. In particular,* Spokeo *directed courts to inquire into whether an intangible harm bears a sufficiently close*

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relationship to a historically recognized cause of action and into whether such a harm has been elevated by congressional action to the level of cognizability. Since Spokeo*, federal courts have wrestled with how to operationalize the Supreme Court's statements on intangible harm and standing. Beneath the growing body of doctrine lie fundamental questions about which values are at stake in categorizing harm into tangible and intangible varieties; whether the advancement of these values is justified; and whether, if so, this advancement is best accomplished through the conceptual tools that federal courts have applied to the task.*

This Article investigates and challenges the principles underlying the categorizations of harm outlined in Spokeo*, particularly the distinction between tangible and intangible harm. This Article argues that this distinction, and the* Spokeo *Court's emphasis on the "concreteness" of harm more broadly, reflect an effort to identify a set of uncontroversially pressing human interests that would justify access to judicial proceedings. These interests are often conceptualized in terms of those commensurable with money, quantifiable, or susceptible to evidentiary proof. Yet this approach invites courts to make contestable normative judgments about essential human interests in a way that risks undermining judicial legitimacy, and it obscures the internal complexity and contextual specificity of physical and economic harm. For example, economic loss, as well as pain and suffering resulting from physical harm, are treated as intangible in certain legal contexts, and the damage resulting from economic and physical harm cannot always be readily proven or valued at a given point in time. The Supreme Court's emphasis on concreteness and its invocation of tangibility, this Article contends, are not needed in order to achieve a nuanced balance between competing features of standing doctrine: concerns about the separation of powers and the efficient administration of justice, on the one hand, and concerns about access to the federal courts and judicial legitimacy, on the other. Rather, courts should eschew concreteness as a factor in the standing inquiry independently of whether harm is adequately particularized. Moreover, particularity can fruitfully be understood, in statutory cases, in terms of whether the legal provision under which a plaintiff is suing defines the scope of potential plaintiffs with sufficient specificity.*

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INTRODUCTION

The Supreme Court's most recent foray into constitutional standing doctrine, the 2016 case *Spokeo, Inc. v. Robins*,[1] left many questions unresolved. Constitutional standing doctrine has long required plaintiffs seeking to enter federal court to allege that they have suffered an "injury in fact," or a "concrete and particularized" harm,[2] that is "fairly traceable to the challenged conduct of the defendant" and is "likely to be redressed by a favorable judicial decision."[3] In *Spokeo*, the Court considered the circumstances under which plaintiffs' allegations of statutory violations could give rise to injury in fact. The plaintiff in *Spokeo*, Thomas Robins, alleged that defendant Spokeo, a consumer reporting agency, violated the Fair Credit Reporting Act by disseminating inaccurate information about Robins—information that, however, may not have adversely affected his credit standing.[4] The Supreme Court held that Robins had to show not only that he had suffered a "particularized" harm, but also that this harm was "concrete" in the sense of "actual[ ]" or "real."[5] The Court did not decide whether Robins's harm was concrete, but rather remanded to the Ninth Circuit to make that determination.[6] The Court also did not settle the more general issue of which kinds of harms plaintiffs need to allege in order to show that they have suffered a "concrete" injury stemming from a statutory violation.

The narrowness of *Spokeo*'s holding should not obscure the fact that *Spokeo* announced a framework for evaluating standing claims that, though building on prior case law, placed emphasis on a distinctive set of categories. In particular, the Supreme Court in *Spokeo* distinguished between *tangible* and *intangible* harm.[7] Though the Court indicated that intangible harm could be concrete, the Court also applied a specific inquiry to guide the determination

1. 136 S. Ct. 1540 (2016).

2. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

3. *Spokeo*, 136 S. Ct. at 1547 (citing Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000); *Lujan*, 504 U.S. at 560-61).

4. *See id.* at 1545-46.

5. *Id.* at 1548.

6. *Id.* at 1550.

7. *See id.* at 1549.

of whether a given intangible harm was cognizable.[8] This inquiry involved, the Court stated, consideration of whether the plaintiff's alleged harm bore a sufficiently close relationship to a historically recognized cause of action and of whether Congress had "elevat[ed]" the harm to the level of cognizable injury.[9] More broadly, the *Spokeo* Court focused on concreteness as a requirement for cognizable injury, independent of whether harm was particularized, in a more direct and explicit way than ever before.[10]

In the wake of *Spokeo*, federal courts have wrestled with how to operationalize the Supreme Court's pronouncements on the cognizability of intangible harm. Courts have come to an array of conclusions regarding the cognizability of harms ranging from inadequate protection of personal information,[11] to the receipt of unsolicited phone calls and text messages,[12] to the violation of state procedural rules for debt collection.[13] The Ninth Circuit's August 2017 decision on remand in *Spokeo* typifies courts' efforts to provide further structure to the standing inquiry in cases of intangible harm. According to the Ninth Circuit, drawing on a previous Second Circuit case,

> In evaluating Robins's claim of harm, we thus ask: (1) whether the statutory provisions at issue were established to protect his concrete interests (as opposed to purely procedural rights), and if so, (2) whether the specific procedural violations alleged in this case actually harm, or present a material risk of harm to, such interests.[14]

Applying this inquiry, the Ninth Circuit decided that Robins's alleged harm of having inaccurate information disseminated about him was, in fact, concrete.[15] The Supreme Court has permitted this

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8. *See id.*

9. *Id.* (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 578 (1992)).

10. *See infra* Part I.A.

11. *See In re* Horizon Healthcare Servs. Inc. Data Breach Litig., 846 F.3d 625, 629 (3d Cir. 2017).

12. *See* Van Patten v. Vertical Fitness Grp., LLC, 847 F.3d 1037, 1043 (9th Cir. 2017).

13. *See* Lyshe v. Levy, 854 F.3d 855, 856 (6th Cir. 2017).

14. Robins v. Spokeo, Inc., 867 F.3d 1108, 1113 (9th Cir. 2017) (drawing on the Second Circuit's formulation in *Strubel v. Comenity Bank*, 842 F.3d 181 (2d Cir. 2016)), *cert. denied*, 138 S. Ct. 931 (2018).

15. *See id.* at 1117.

decision to stand, denying certiorari in a renewed appeal by Spokeo on January 22, 2018.[16]

The concepts of "intangible" harm and "concrete" interests are now part of the standing landscape, helping to play the role of gatekeeper to the federal courts. In evaluating the coherence and plausibility of contemporary standing doctrine, it is instructive to examine the function that these concepts serve and the aims advanced by their inclusion in the standing analysis. This Article investigates the principles underlying the distinction between tangible and intangible harm, as well as the relationship between these categories and "concreteness." Even critics of the Court's constitutional standing jurisprudence tend either not to focus on tangibility—which, after all, assumed particular prominence only recently in *Spokeo*—or to take for granted the distinction between tangible and intangible harm.[17] This Article argues, by contrast, that the line

16. Spokeo, Inc. v. Robins, 138 S. Ct. 931 (2018) (mem.).

17. For examples of critiques of standing doctrine that predated the invocation of tangibility in *Spokeo* and mention tangibility not at all or in passing, see Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 463 (2008); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 230-31 (1988); and Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 188-89 (1992). For examples of discussions of standing that mention tangibility without problematizing the distinction between tangible and intangible harm, see Julie E. Cohen, *Law for the Platform Economy*, 51 U.C. DAVIS L. REV. 133, 179 (2017) ("Plaintiffs asserting intangible harms often have difficulty establishing the requisite injury."); F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 313 (2008) ("[I]n public rights cases ... the plaintiff must demonstrate that the injury is material and tangible."); Margot E. Kaminski, *Standing After Snowden: Lessons on Privacy Harm from National Security Surveillance Litigation*, 66 DEPAUL L. REV. 413, 415 (2017) ("Courts are almost uniquely disinclined to recognize intangible harms in the area of privacy law."); Eugene Kontorovich, *What Standing Is Good For*, 93 VA. L. REV. 1663, 1667 (2007) ("Why should inchoate injuries be less justiciable than tangible ones?"); Seth F. Kreimer, *"Spooky Action at a Distance": Intangible Injury in Fact in the Information Age*, 18 U. PA. J. CONST. L. 745, 753 (2016) (arguing that the Supreme Court regularly adjudicates cases involving injuries to "intangible" informational interests); Suzette M. Malveaux, *The Modern Class Action Rule: Its Civil Rights Roots and Relevance Today*, 66 U. KAN. L. REV. 325, 385 (2017) ("*Spokeo* permits named plaintiffs to collectively pursue claims under federal statutes—including civil rights—when they suffer intangible harms, so long as those harms are concrete."); Daniel J. Solove & Danielle Keats Citron, *Risk and Anxiety: A Theory of Data Breach Harms*, 96 TEX. L. REV. 737, 773 (2018) ("[T]here is a robust basis in the law to recognize the intangible nature of data-breach harms."); and Lauren E. Willis, Spokeo *Misspeaks*, 50 LOY. L.A. L. REV. (forthcoming 2018) (manuscript at 106-07). Rare references to the nature of the distinction between tangible and intangible harm appear in the work of Gene R. Nichol and Felix T. Wu. Nichol has stated that "[i]f the lines between the tangible and the intangible often turn in circles, we may be expecting too much from them." Gene R. Nichol, Jr., *Standing for Privilege: The Failure of*

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.

More specifically, "tangible" harm in the constitutional standing context is frequently understood by courts and commentators to refer to physical or economic harm,[18] as distinct from everything else, including being hindered in the exercise of religion,[19] suffering "aesthetic" harm when the environment is damaged,[20] or undergoing a violation of privacy.[21] Yet certain economic interests, such as securities, intellectual property rights, and contract rights, are described as intangible in a variety of legal settings, and economic loss is viewed as intangible in the contexts of property insurance and negligence law.[22] Additionally, the pain and suffering arising

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Injury Analysis, 82 B.U. L. REV. 301, 338 (2002). Wu, in critiquing *Spokeo*'s effects on standing law with particular reference to the context of privacy violations and highlighting difficulties with "a free-standing concreteness requirement," has indicated that the Court's "shift" in *Spokeo* "is in turning to an inquiry in which the issue of tangibility even arises in the first place." Felix T. Wu, *How Privacy Distorted Standing Law*, 66 DEPAUL L. REV. 439, 439, 452 (2017). This Article, while drawing from insights in the literature, engages in a more in-depth inquiry into the nature and implications of the distinction between tangible and intangible harm, as well as into *Spokeo*'s treatment of concreteness as an independent feature of the standing analysis.

18. *See, e.g.*, Craig Konnoth & Seth Kreimer, *Spelling Out* Spokeo, 165 U. PA. L. REV. ONLINE 47, 52 (2016) ("[T]angible injuries apparently embrace what Justice Scalia referred to as 'Wallet Injury' to the value of economic interests, including intellectual property rights, along with physical interference." (footnote omitted)); Solove & Citron, *supra* note 17, at 755 ("Data-breach harms ... are not tangible like broken limbs and destroyed property."); *see also* Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 642 (2007) (Souter, J., dissenting) ("In the case of economic or physical harms, of course, the 'injury in fact' question is straightforward.... [I]ntangible harms must be evaluated case by case."); Cottrell v. Alcon Labs., 874 F.3d 154, 167 (3d Cir. 2017) (referring to "tangible, economic harm"); Church v. Accretive Health, Inc., 654 F. App'x 990, 995 (11th Cir. 2016) (per curiam) (referring to "tangible economic or physical harm that courts often expect").

19. *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016) (citing a free exercise case, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), as an example of a case in which harm was intangible and yet still concrete).

20. *See, e.g.*, Gene R. Nichol, Jr., *Rethinking Standing*, 72 CALIF. L. REV. 68, 75 (1984) ("The Court, in giving standing to environmental claims, relied on injuries that were not only intangible, but also subjective in the sense that they necessarily depended upon the psychological makeup of the plaintiff.").

21. *See, e.g.*, *In re* Horizon Healthcare Servs. Inc. Data Breach Litig., 846 F.3d 625, 639-40 (3d Cir. 2017) (referring to the unauthorized dissemination of personal information as an "intangible harm").

22. *See infra* Part II.B.2.

from physical damage, which represents a key component of the injury involved in inflicting physical harm, is often considered intangible.[23]

The categorization of economic and physical harm as tangible in the standing context does not, therefore, follow inevitably from the nature of tangibility. Rather, this Article contends, the distinction between tangible and intangible harm reflects an effort to identify a set of uncontroversially legitimate human interests that would justify courts in reordering the status quo. These interests are often conceptualized in terms of those commensurable with money, quantifiable, or susceptible to evidentiary proof. Yet this approach results in a highly contestable portrayal of essential human interests and detracts from the legitimacy of judicial decisions about cognizability. *Spokeo*'s invocation of tangibility and its emphasis on concreteness more broadly—this Article argues—are not needed in order to achieve an appropriate balance between concerns about the separation of powers and the efficient administration of justice, on the one hand, and concerns about access to the federal courts and judicial legitimacy, on the other. Instead, courts should move away from treating concreteness as a factor in constitutional standing doctrine independent of whether harm is adequately particularized. Moreover, courts can fruitfully understand particularity in statutory cases in terms of whether the legal provision under which a plaintiff is suing defines the scope of potential plaintiffs with sufficient specificity.

The analysis here has both doctrinal and theoretical implications. The Supreme Court's decision in *Spokeo*, as some commentators have noted, suggests that tangibility is "a sufficient but not a necessary condition" for concreteness[24] or that "[t]angible injuries ... more easily pass the concreteness test than intangible injuries."[25] As a doctrinal matter, this Article argues against an entrenchment of the distinction between tangible and intangible harm as the law develops. It also challenges the Supreme Court's insistence on concreteness as a requirement for injury in fact independently of particularity. As a theoretical matter, this Article extends the

23. *See infra* Part II.B.2.

24. Konnoth & Kreimer, *supra* note 18, at 51-52; *see also id.* at 62.

25. Gregory R. Manring, Note, *It's Time for an Intervention!: Resolving the Conflict Between Rule 24(a)(2) and Article III Standing*, 85 FORDHAM L. REV. 2525, 2535 (2017).

critique that injury in fact is a normative criterion, not a factual one;[26] the same is true, the Article argues, of the categorization of harm as tangible or intangible for the purposes of undertaking the injury-in-fact inquiry. Further, this Article counters the tendency to treat economic and physical harm as firmly established and similar in nature across different contexts, and it questions the value of criteria such as commensurability with money, quantifiability, and susceptibility to evidentiary proof as metrics in evaluating cognizability. These criteria are not needed, the Article suggests, in order to promote fit between standing doctrine and the underlying values that this doctrine furthers.

While drawing on insights from the extensive scholarly literature critiquing the Supreme Court's standing doctrine,[27] this Article focuses on a concept that has been the subject of little critical scrutiny—the idea of tangibility invoked in *Spokeo*—and considers the development of standing jurisprudence following the recent *Spokeo* decision.[28] This Article also highlights the less "solid" dimensions of

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26. *See* Fletcher, *supra* note 17, at 231; Nichol, *supra* note 17, at 304-05; Sunstein, *supra* note 17, at 188-89.

27. *See* sources cited *supra* note 17; *see also, e.g.*, Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1070-71 (2015); Hessick, *supra* note 17, at 277; Nichol, *supra* note 17, at 305.

28. For other articles that have addressed the landscape of standing post-*Spokeo*, see, for example, William Baude, *Standing in the Shadow of Congress*, 2016 SUP. CT. REV. 197; Henry E. Hudson, Christopher M. Keegan & P. Thomas DiStanislao, III, *Standing in a Post*-Spokeo *Environment*, 30 REGENT U. L. REV. 11 (2017); Kaminski, *supra* note 17; Konnoth & Kreimer, *supra* note 18; Bradford C. Mank, *Data Breaches, Identity Theft, and Article III Standing: Will the Supreme Court Resolve the Split in the Circuits?*, 92 NOTRE DAME L. REV. 1323, 1353-63 (2017); Michael T. Morley, Spokeo*: The Quasi-Hohfeldian Plaintiff and the Non-Federal Federal Question*, 25 GEO. MASON L. REV. (forthcoming 2018); Fred O. Smith, Jr., *Undemocratic Restraint*, 70 VAND. L. REV. 845, 892-97 (2017); Solove & Citron, *supra* note 17; Willis, *supra* note 17; Wu, *supra* note 17; William S.C. Goldstein, Note, *Standing, Legal Injury Without Harm, and the Public/Private Divide*, 92 N.Y.U. L. REV. 1571 (2017); Joshua Scott Olin, Note, *Rethinking Article III Standing in Class Action Consumer Protection Cases Following* Spokeo v. Robins, 26 U. MIAMI BUS. L. REV. 69 (2017); Leading Cases, *Justiciability—Class Action Standing*—Spokeo, Inc. v. Robins, 130 HARV. L. REV. 437 (2016); and Recent Cases, *Standing—Class Actions—Ninth Circuit Allows Fair Credit Reporting Act Class Action to Proceed Past Standing Challenge.*—Robins v. Spokeo, Inc., *867 F.3d 1109 (9th Cir. 2017)*, 131 HARV. L. REV. 894 (2018). A previous article I wrote examined psychological harm as a basis for constitutional injury in fact, reviewed various "intangible" injuries cognized by courts, and endorsed a "particularity inquiry" as part of a test for analyzing the cognizability of psychological harm. *See* Rachel Bayefsky, *Psychological Harm and Constitutional Standing*, 81 BROOK. L. REV. 1555 (2016). That article, however, did not critically interrogate the distinction between tangible and intangible harm, evaluate courts' post-*Spokeo* understanding

apparently tangible economic and physical harm, rather than focusing solely on the reality of intangible harm. Further, this Article identifies and challenges the role of certain characteristics—commensurability with money, quantifiability, and susceptibility to evidentiary proof—in constitutional standing doctrine. The aim is thus to unsettle intuitions about recently invoked categories in the Supreme Court's standing jurisprudence—tangibility and concreteness—while exploring the principles affecting these doctrinal moves.

This Article has the following structure. Part I illuminates the conceptual basis of the courts' turn to concreteness and tangibility in constitutional standing doctrine. It notes that clear understandings of these concepts are absent from the case law, and it identifies principles, related to the separation of powers and the conservation of judicial resources, that underlie the emergence of concreteness as a standalone requirement for injury in fact. This Part then highlights *Spokeo*'s application of a distinctive inquiry to intangible as distinct from tangible harm. It argues, drawing on cases from federal appellate and district courts following *Spokeo*, that the inquiry into whether intangible harm is concrete presents a challenge for the legitimacy of judicial standing determinations.

Given that tangibility now plays a role in standing doctrine, Part II focuses on the meaning and function of this concept. Part II critically interrogates the distinction between tangible and intangible harm, as well as the relevance of this distinction to the aims of standing doctrine. The categorization of harm as tangible or intangible in the standing context, this Part indicates, represents a normatively imbued effort to identify uncontroversially legitimate human interests that would justify judicial intervention. In making the tangible/intangible distinction, however, standing doctrine fails to reflect the complex and contextual nature of physical and economic harm, and it places undue emphasis on concepts, such as commensurability with money, quantifiability, and susceptibility to evidentiary proof, that are ill-suited for a role in the constitutional standing analyis.

Part III lays out implications of the foregoing analysis of tangibility and concreteness for standing doctrine. This Part argues that courts assessing injury in fact can strike an appropriate balance

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of "concreteness," or challenge concreteness as a basis for injury in fact.

between concerns about the separation of powers and resource constraints, on the one hand, and access to judicial redress in the federal courts, on the other, by inquiring into whether harm is particularized but not into whether harm is independently concrete. The Part then highlights advantages and drawbacks of different conceptions of particularity. It contends that particularity can plausibly be understood in statutory cases in terms of whether the statutory provision under which a plaintiff is suing defines the scope of potential plaintiffs with sufficient specificity.

In sum, the Article examines concepts underlying constitutional standing doctrine in its current form and argues that the federal courts should veer away from the treatment of concreteness and tangibility found in *Spokeo*.

I. CONCRETENESS AND TANGIBILITY IN CONSTITUTIONAL STANDING DOCTRINE

A. Concreteness as a Prerequisite for Injury in Fact

Constitutional standing doctrine raises the question of which kinds of cases are suited for adjudication in the federal courts—and which kinds of litigants are equipped to participate in these cases. As a doctrinal matter, constitutional standing doctrine has been rooted in Article III's limitation of the federal judicial power to "[c]ases" and "[c]ontroversies."[29] Courts' interpretations of this limitation have shifted over time. In the first half of the twentieth century, courts required private plaintiffs to have a "legal right" to sue, "one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege."[30] The "legal right" approach fell out of favor with the advent of "injury in fact" as the metric of a plaintiff's individualized interest in a lawsuit for standing purposes. The Supreme Court, in the 1970 case *Association of Data Processing Service Organizations v. Camp* (*ADAPSO*), stated that the standing question raised the

29. U.S. CONST. art. III, § 2, cl. 1. For discussions of the history of modern standing doctrine, see, for example, Fallon, *supra* note 27, at 1064-68; Hessick, *supra* note 17, at 290-99; Sunstein, *supra* note 17, at 168-97; and Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689 (2004).

30. Tenn. Elec. Power Co. v. Tenn. Valley Auth., 306 U.S. 118, 137-38 (1939).

issue not of whether a plaintiff had a "legal interest," but "whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise."[31] The standard articulation of the injury-in-fact requirement is now that "a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'"[32]

The injury-in-fact requirement may have initially served to liberalize the law of standing by permitting plaintiffs to allege that a particular course of conduct had injured them "in fact" even if they could not show that they possessed an individual legal right infringed by the challenged conduct.[33] But the injury-in-fact requirement began, in the 1970s, to be interpreted more restrictively.[34] Judicial concerns about the separation of powers spurred this development in significant part.[35] The injury requirement, courts indicated, restricted courts to their constitutional role of adjudicating disputes among individuals—preventing courts from generally policing the legality of executive and legislative action, and barring private individuals from inappropriately exercising the executive branch's enforcement role.[36] Remedial concerns also seem to have factored into courts' interpretations of the injury requirement; for example, courts may be reluctant to determine that a plaintiff has standing to seek an injunction that is perceived as intrusive.[37] In

31. 397 U.S. 150, 152-53 (1970).

32. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016) (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992)).

33. *See* Hessick, *supra* note 17, at 289-90.

34. *See* Fallon, *supra* note 27, at 1066 & n.19; Hessick, *supra* note 17, at 289-90; Nichol, *supra* note 20, at 74-75.

35. *See* Allen v. Wright, 468 U.S. 737, 752 (1984); Hessick, *supra* note 17, at 289-90; Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 890-93 (1983); Sunstein, *supra* note 17, at 194-95.

36. *See Allen*, 468 U.S. at 759-61; Warth v. Seldin, 422 U.S. 490, 498-500 (1975); Elliott, *supra* note 17, at 462-63; F. Andrew Hessick, *The Separation-of-Powers Theory of Standing*, 95 N.C. L. REV. 673, 684-85 (2017). Further, Tara Grove has argued that the injury-in-fact requirement could prevent the executive branch from impermissibly delegating enforcement discretion to private plaintiffs. *See* Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 808 (2009). For further discussion of separation-of-powers rationales for standing doctrine, see *infra* Part III.

37. *See, e.g.*, *Allen*, 468 U.S. at 761 (invoking reasons grounded in the separation of powers not to "recogniz[e] standing in a case brought ... to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties" via injunctive relief). As Richard

addition, courts have cited "the scarce resources of the federal courts" to justify standing doctrine.[38] One way to understand this point is that the federal courts' resources should be devoted to those cases in which the need for judicial intervention is clearest because plaintiffs have suffered a genuine injury.[39]

Arguments in favor of injury in fact, especially those based on the proper role of the branches of government, frequently suggest a concern with "particularity," or attention to whether a plaintiff's alleged injury "affect[s] the plaintiff in a personal and individual way"[40] and is distinct from one "shared with 'all members of the public.'"[41] One rationale for the particularity requirement is that harms affecting a wide swath of the population would be better addressed by the legislative and executive branches, which respond to majoritarian concerns, than by the judiciary, which ought to concern itself with individual rights.[42] The focus on particularity also dovetails with remedial issues; the specter of tasking the courts with providing redress on a theoretically unlimited scale, and permitting courts to interfere too much with the workings of other

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Fallon has pointed out, the Supreme Court has alluded to "concerns about the peculiar intrusiveness of injunctive remedies" in ruling that the plaintiff lacked standing to seek an injunction. Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 650 (2006) [hereinafter Fallon, *Justiciability and Remedies*]; *see* City of Los Angeles v. Lyons, 461 U.S. 95, 112 (1983). For additional analysis of the relationship between standing and courts' concerns about overly intrusive remedies, see Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of* Lyons, 59 N.Y.U. L. REV. 1, 23 (1984) [hereinafter Fallon, *Public Law Litigation*]; and Vicki C. Jackson, *Standing and the Role of Federal Courts: Triple Error Decisions in* Clapper v. Amnesty International USA *and* City of Los Angeles v. Lyons, 23 WM. & MARY BILL RTS. J. 127, 166-67 (2014).

38. *See, e.g.*, Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 191 (2000); Jackson v. Cal. Dep't of Mental Health, 399 F.3d 1069, 1073 (9th Cir. 2005).

39. *See Laidlaw*, 528 U.S. at 191 ("Standing doctrine functions to ensure ... that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake.").

40. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 n.1 (1992).

41. United States v. Richardson, 418 U.S. 166, 178 (1974) (quoting *Ex parte* Lévitt, 302 U.S. 633, 634 (1937) (per curiam)).

42. *See* Elliott, *supra* note 17, at 489; Scalia, *supra* note 35, at 894; *see also Richardson*, 418 U.S. at 179 (noting that the plaintiff could seek redress through the "traditional electoral process"). *But see* FEC v. Akins, 524 U.S. 11, 24 (1998) ("[T]he fact that a political forum may be more readily available where an injury is widely shared ... does not, by itself, automatically disqualify an interest for Article III purposes.").

branches of government, looms large over debates about the restrictiveness of standing requirements.[43]

In addition to invoking particularity as a feature of cognizable injury, courts have sometimes referred to "concreteness." Courts originally invoked "concreteness" as part of a justification for standing doctrine especially prevalent before the advent of injury in fact: "concrete adverseness" between parties to a lawsuit "sharpens the presentation of issues upon which the court so largely depends."[44] In order for such adverseness to exist, plaintiffs had to "allege[ ] ... a personal stake in the outcome of the controversy."[45] But once "injury in fact" became a standing requirement, injury itself—as distinct from the controversy between the parties—had to be "concrete."[46]

Prior to *Spokeo*, concreteness was not generally treated as a requirement for standing independent of particularity. The Supreme Court frequently used the phrase "concrete and particularized,"[47] but often without explicitly identifying the contribution of concreteness separate from that of particularity.[48] In fact, the Court has described the concreteness requirement in a manner closely related to particularity: "Concrete injury ... adds the essential dimension of specificity to the dispute by requiring that the complaining party have suffered a particular injury caused by the action challenged as unlawful."[49] The Court suggested in the 1998 case *FEC v. Akins*, in which the plaintiffs alleged that they had been deprived of informa-

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43. *See* Allen v. Wright, 468 U.S. 737, 761 (1984); *see also* Fallon, *Justiciability and Remedies*, *supra* note 37, at 649-51.

44. Baker v. Carr, 369 U.S. 186, 204 (1962); *see* Wu, *supra* note 17, at 454-55 ("In this context, concreteness refers to the nature of the case as a whole, rather than the nature of the alleged harm.").

45. *Baker*, 369 U.S. at 204.

46. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220-21 (1974) ("Concrete injury, whether actual or threatened, is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution."); Sierra Club v. Morton, 405 U.S. 727, 740 n.16 (1972) (noting Alexis de Tocqueville's "observation that judicial review is effective largely because it is ... exercised only to remedy a particular, concrete injury" (citing 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 102 (1945))).

47. *See, e.g.*, Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2341 (2014); Massachusetts v. EPA, 549 U.S. 497, 517 (2007); *Richardson*, 418 U.S. at 177.

48. *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1555 (2016) (Ginsburg, J., dissenting) ("[T]ime and again, our decisions have coupled the words 'concrete *and* particularized.'... True, but true too ... many ... opinions do not discuss the separate offices of the terms 'concrete' and 'particularized.'").

49. *Schlesinger*, 418 U.S. at 220-21.

tion relevant to voting, that an injury could be cognizable even if not "widely shared," provided that the injury was "sufficiently concrete."[50] The Court's examples of such injuries were mass torts and broad interference with voting rights.[51] If particularity means that the harm is not widely shared,[52] then these pronouncements imply that concreteness is distinct from particularity and is at least a sufficient condition for cognizability. But this does not mean that concreteness is an independently necessary condition for cognizability.[53]

Spokeo, however, explicitly took the position that concreteness was a requirement for injury in fact independent of particularity.[54] In this case, the Court confronted a putative class action suit by Thomas Robins, who alleged that Spokeo had violated the Fair Credit Reporting Act (FCRA) in disseminating false information about Robins.[55] For example, Robins claimed, Spokeo had failed to heed the FCRA's mandate that consumer reporting agencies "follow reasonable procedures to assure maximum possible accuracy of" reports on consumers.[56] Robins sued pursuant to a provision of the FCRA indicating that "[a]ny person who willfully fails to comply with any requirement [of the Act] with respect to any [individual] is liable to that [individual]" for damages.[57] The Ninth Circuit determined that Robins had standing to sue, noting that Robins's claim was adequately particularized; the alleged misuse of Robins's own information was at stake.[58] Spokeo argued, however, that the allegedly false information disseminated about Robins—for instance, that he was married, had a job, and was relatively affluent[59]—did

50. 524 U.S. 11, 24 (1998).

51. *Id.*

52. *But see infra* Part III.C for a discussion of possible meanings of particularity.

53. I thank Vicki Jackson for raising this point.

54. *See* Hudson, Keegan & DiStanislao, *supra* note 28, at 17 (stating that in *Spokeo*, the Court "[s]eparat[ed] [the concreteness and particularity] requirements into two different analyses for the first time"); Wu, *supra* note 17, at 455 (noting that before *Spokeo*, "[c]oncreteness ha[d] not been thought to require an assessment of the nature and value of effects directed at the plaintiff").

55. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1544 (2016).

56. *Id.* at 1545 (quoting 15 U.S.C. § 1681e(b) (2012)).

57. *Id.* (alterations in original) (footnote omitted) (quoting 15 U.S.C. § 1681n(a)).

58. Robins v. Spokeo, Inc., 742 F.3d 409, 413-14 (9th Cir. 2014), *vacated and remanded*, 136 S. Ct. 1540 (2016).

59. *Spokeo*, 136 S. Ct. at 1546.

not inflict on Robins any "concrete harm."[60] The Supreme Court granted certiorari to decide whether Robins had alleged a cognizable injury in fact as a consequence of the claimed statutory violation.[61]

Justice Samuel Alito's majority opinion did not ultimately answer this question, but the opinion identified core principles to apply to the question's resolution. Most significantly, the Court insisted that injury in fact, in addition to being "particularized" in the sense of "affect[ing] the plaintiff in a personal and individual way," must also be "concrete."[62] The Court defined "concrete" as "'*de facto*'; that is, it must actually exist," noting that "[w]hen we have used the adjective 'concrete,' we have meant to convey the usual meaning of the term—'real,' and not 'abstract.'"[63] The Court's definition of "concrete," though reasonably prompting the question of how much content it added to the term, was the most explicit one to appear in the Supreme Court's case law.[64] The Court remanded to the Ninth Circuit to inquire into whether Robins's harm, even if particularized, was also concrete.[65]

Though this Article later argues that concreteness should not be conceived as an independent requirement for standing,[66] it is worth elucidating the basis for, and effects of, the contrary position. In particular, an independent concreteness requirement might be thought to respond to concerns about the separation of powers and judicial resources underlying the injury-in-fact principle.

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60. Brief for Petitioner at 52, *Spokeo*, 136 S. Ct. 1540 (No. 13-1339).

61. *See Spokeo*, 136 S. Ct. at 1546; *see also* Spokeo, Inc. v. Robins, 135 S. Ct. 1892 (2015) (mem.).

62. *Spokeo*, 136 S. Ct. at 1548 (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 n.1 (1992)).

63. *Id.* (first quoting BLACK'S LAW DICTIONARY 479 (9th ed. 2009); and then quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 472 (1971); and RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 305 (1967)).

64. Prior to *Spokeo*, the Court had distinguished "concrete" from "abstract" injury, *see* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 223 n.13 (1974), and had placed "concrete" alongside other adjectival descriptions of harm, such as "specific," "demonstrable," "de facto," "actual," and "tangible," *see* Hollingsworth v. Perry, 133 S. Ct. 2652, 2661 (2013); Already, LLC v. Nike, Inc., 133 S. Ct. 721, 730 (2013); FEC v. Akins, 524 U.S. 11, 24-25 (1998); Lujan v. Defs. of Wildlife, 504 U.S. 555, 578 (1992); Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982); *see also* Richard M. Re, *Relative Standing*, 102 GEO. L.J. 1191, 1194-95 (2014) (listing several such adjectives).

65. *Spokeo*, 136 S. Ct. at 1550.

66. *See infra* Part III.B.

The Supreme Court has interpreted Article III to impose restrictions on Congress's ability to grant plaintiffs the right to sue to redress statutory violations.[67] But if particularity were satisfied whenever Congress authorized plaintiffs to sue to redress violations of their own rights, and concreteness provided no independent check, then constitutional limitations on standing might constrain Congress to a limited degree. Further, if Congress could authorize plaintiffs to sue simply because their own rights were violated, without any resulting "actual" harm, then those bringing suit might lack a "personal stake"[68] in the outcome of the suit. Moreover, lawsuits based on violations of apparently "technical" statutory requirements might flood the courts with trivial cases and reduce the resources available to those who have been more grievously harmed.[69] The concreteness condition can thus be understood as a response to concerns about the separation of powers, judicial administration, and the breadth of available remedies. But how are courts to decide whether the concreteness requirement is satisfied?

B. Who Decides? Judicial Legitimacy and Concreteness in Spokeo

Spokeo's response to the question of how harm could be deemed concrete proceeded as follows. The Supreme Court, after defining "concrete" injury as one that "must actually exist," clarified that "'[c]oncrete' is not, however, necessarily synonymous with 'tangible.' Although tangible injuries are perhaps easier to recognize, we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete."[70] To support this proposition, *Spokeo* cited two cases in which the Court had, without raising any standing difficulty, adjudicated plaintiffs' claims of free speech and free exercise violations, respectively.[71] The Court then focused on how "intangible" harms could be considered concrete, describing two factors bearing on the concreteness of intangible harm: "history and

67. *See Lujan*, 504 U.S. at 577; *see also* Sunstein, *supra* note 17, at 200-02.

68. Baker v. Carr, 369 U.S. 186, 204 (1962).

69. *See* Morley, *supra* note 28 (manuscript at 24).

70. *Spokeo*, 136 S. Ct. at 1548-49 (citing Pleasant Grove City v. Summum, 555 U.S. 406 (2009); Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993)).

71. *Id.* at 1549 (citing *Summum*, 555 U.S. 460; *Lukumi*, 508 U.S. 520).

the judgment of Congress."[72] The historical inquiry, according to the Court, was "whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[73] The "judgment" of Congress, the Court continued, "is also instructive and important" because "Congress is well positioned to identify intangible harms that meet minimum Article III requirements."[74]

Spokeo's reference to Congress's role in defining cognizable injury raises the question of whether congressional action suffices to create injury in fact.[75] The Court answered, in effect: not always. Specifically, "Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right."[76] A "concrete injury" is still required.[77] As a consequence, the Court indicated, "Robins cannot satisfy the demands of Article III by alleging a bare procedural violation," that is, a violation of the procedures for handling personal information mandated by the FCRA.[78] Nevertheless, the Court stated, "in some circumstances," a plaintiff alleging "the violation of a procedural right granted by statute ... need not allege any *additional* harm beyond the one Congress has identified."[79] The Court explained the possibility of cognizable injury in these circumstances by noting both that "the risk of real harm" could "satisfy the requirement of concreteness"[80] and that "the law has long permitted recovery by certain tort victims even if their harms may be difficult to prove or measure."[81] The Court's examples of such suits were libel and slander per se.[82]

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72. *Id.*

73. *Id.* (citing Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 775-77 (2000)).

74. *Id.*

75. For a discussion of the relationship between statutory causes of action and injury in fact in *Spokeo*, see Baude, *supra* note 28, at 213-16.

76. *Spokeo*, 136 S. Ct. at 1549.

77. *Id.*

78. *Id.* at 1550.

79. *Id.* at 1549.

80. *Id.* (citing Clapper v. Amnesty Int'l USA, 568 U.S. 398 (2013)).

81. *Id.* (citing RESTATEMENT (FIRST) OF TORTS §§ 569-570 (1938)).

82. *Id.*

The Court did not provide much guidance on how to distinguish procedural violations that caused concrete harm from procedural violations that did not. Instead, the Court gave an example of a procedural violation that would not count for standing because it did not "cause harm or present any material risk of harm": the dissemination of an incorrect zip code by a consumer reporting agency.[83] The Court then remanded to the Ninth Circuit to conduct the concreteness inquiry in Robins's case.[84]

Justice Clarence Thomas concurred in the *Spokeo* Court's opinion, providing a theory of standing according to which suits by "private plaintiffs who assert[ ] claims vindicating public rights" involve a more rigorous concreteness inquiry than "suits from private plaintiffs who allege[ ] a violation of their own rights."[85] Justice Ruth Bader Ginsburg, joined by Justice Sonia Sotomayor, dissented, arguing that Robins's allegation that he had suffered "actual harm" to his "employment prospects" rendered Robins's injury sufficiently concrete.[86]

Spokeo left to federal appellate and district courts the task of filling in the details of the concreteness inquiry, perhaps partially out of an interest among the Justices (down to eight after the death of Justice Antonin Scalia) in reaching a compromise about the relationship between Article III standing and statutory violations.[87] Nevertheless, the Court's identification of factors significant to the concreteness inquiry, and its references to intangible harm, highlight underlying concerns about the grounds for judicial injury-in-fact determinations. This point can be illuminated by considering possible responses to the institutional question "who decides whether harm is concrete?"[88]

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83. *Id.* at 1550.

84. *Id.*

85. *Id.* (Thomas, J., concurring); *see also id.* at 1552.

86. *Id.* at 1556 (Ginsburg, J., dissenting) (quoting Joint Appendix at 14, *Spokeo*, 136 S. Ct. 1540 (No. 13-1339)).

87. *See* Smith, *supra* note 28, at 894 ("In many respects, *Spokeo* is a narrow opinion with hallmarks of a compromise.").

88. *See* Hessick, *supra* note 36, at 675 ("[S]tanding protects the legitimacy of the federal courts by allowing them to act only when necessary to protect rights."); Daniel Townsend, *Who Should Define Injuries for Article III Standing?*, 68 STAN L. REV. ONLINE 76 (2015) (arguing that Congress should define injuries for Article III standing purposes).

The Supreme Court has not accepted the "subjective" response that harm is concrete if the sufferer thinks the harm is real, presumably because doing so would severely diminish the constraining force of the injury-in-fact requirement.[89] The Court has also not entirely delegated the decision about whether harm is real to the legal actor that created the cause of action. In particular, the fact that Congress has labeled certain conduct a legal violation does not mean that those subject to this conduct necessarily suffer injury in fact.

The *Spokeo* Court, to be sure, took a somewhat equivocal position on the relationship between legal violations and injury in fact.[90] *Spokeo* did not rule out the possibility that some plaintiff claiming that statutorily mandated procedures had been violated could, without more, allege cognizable harm.[91] This suggests that the legal injury involved in the violation of a legal right—classically known as "injuria"—could give rise to standing even without the "factual injury," or "damnum," resulting from the legal violation.[92]

Yet the overall thrust of *Spokeo* is to require plaintiffs to show factual harm over and above a legal violation. *Spokeo* emphasized that plaintiff Robins could not "satisfy the demands of Article III by alleging a bare procedural violation," divorced from any concrete harm.[93] The idea seems to be that some kinds of legal violations constitute, or imply the existence of, factual harm; other legal violations do not, but regardless, there must be a factual harm. Concreteness, then, is not defined purely with reference to the lawmaking powers of an institution outside the courts. Rather, the federal courts have assigned to themselves the last word on whether harm is concrete. The question is then on what basis courts can decide which harms are real, and which are not, for the purposes of exercising judicial authority. The *Spokeo* Court's invocation of "tangible"

89. As now-Judge William Fletcher noted, the notion of injury "in fact," if applied literally, would support such an understanding of cognizable injury. *See* Fletcher, *supra* note 17, at 231-32.

90. For discussion of the tension in *Spokeo*'s statements about injury in fact and statutory rights, see Baude, *supra* note 28, at 214-16.

91. *Spokeo*, 136 S. Ct. at 1549 (majority opinion).

92. For discussions of this distinction, see Hessick, *supra* note 17, at 280-81; *see also* Konnoth & Kreimer, *supra* note 18, at 57 (distinguishing between "threshold" injuries, such as a violation of certain procedures mandated by statute, and "consequent" harms that result from the violation of such procedures).

93. *Spokeo*, 136 S. Ct. at 1550; *see also* Baude, *supra* note 28, at 223-27.

and "intangible" harm is part of its response to this question. The next Section therefore examines the place of tangibility in constitutional standing doctrine.

C. The Role of Tangibility in Standing Doctrine

The Court invoked tangibility in the standing context infrequently for the first few decades after modern standing doctrine emerged. An early instance was in 1975, when the Court stated that a plaintiff "seek[ing] to challenge exclusionary zoning practices must allege ... that he personally would benefit in a tangible way from the court's intervention."[94] "In a tangible way" distinguished the kind of judicial action that could give plaintiffs access to affordable housing from a declaration of the plaintiffs' legal rights that could not result in an altered living situation.[95] "Tangible" in this sense seems to have meant something like "actually," although it could also have referred more specifically to an improvement in the plaintiff's material conditions.

More generally, "tangible" in the Supreme Court's usage has sometimes referred to a type of harm, but sometimes to the existence or reality of harm. As an example of "tangible" as a type of harm, the Court differentiated, in a suit brought under the Federal Water Pollution Control Act, between "plaintiffs seeking to enforce these statutes as private attorneys general, whose injuries are 'noneconomic' and probably noncompensable, and persons ... who assert that they have suffered tangible economic injuries because of statutory violations."[96] Here, "tangible" appears to refer to certain kinds of injuries, that is, economic ones. But in the influential 1992 standing case, *Lujan v. Defenders of Wildlife*, the Court used "tangibly" more along the lines of "actually" or "in reality," stating:

> [A] plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and

94. Warth v. Seldin, 422 U.S. 490, 508 (1975).

95. *See id.*

96. Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 17 (1981). The Court also referred, in a case about standing to sue under the Clayton Antitrust Act, to "tangible economic injury." Blue Shield of Va. v. McCready, 457 U.S. 465, 475 n.11 (1982).

> seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.[97]

"Tangibly" here seems to denote the reality of the benefit.[98] The Court appeared to use "tangible," in a related sense, to characterize the reality of harm in *Hollingsworth v. Perry*.[99] There, the Supreme Court held that proponents of a California ballot initiative that would amend the California Constitution to prohibit same-sex marriage lacked standing to appeal a court decision holding that the initiative violated the Federal Constitution.[100] The *Perry* Court indicated that "for a federal court to have authority under the Constitution to settle a dispute, the party before it must seek a remedy for a personal and tangible harm."[101]

The possibility of using "tangible" to refer to either the type of harm or the reality of harm has implications for the relationship between tangibility and concreteness, a relationship brought to the fore in *Spokeo*. The Court's insistence in *Perry* on "personal and tangible harm" suggests that cognizable injury—"concrete and particularized injury"[102]—must be tangible, and prior to *Spokeo*, many commentators took this view.[103] Yet the Court had previously been

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97. 504 U.S. 555, 573-74 (1992); *see also* Lance v. Coffman, 549 U.S. 437, 439 (2007) (per curiam) (same).

98. The Court has also referred to "tangible legal rights" in a way that suggests an association between "tangible" and "actual," though perhaps also between tangibility and economically valuable interests. *See* ASARCO Inc. v. Kadish, 490 U.S. 605, 619 (1989) (stating that a decision by the Arizona Supreme Court invalidating mineral leases "alter[ed] tangible legal rights"); *see also* Virginia v. Hicks, 539 U.S. 113, 120-21 (2003) (referring to a judgment preventing the prosecution of an individual for trespass as one that "alter[ed] tangible legal rights" (quoting *ASARCO*, 490 U.S. at 619)).

99. 133 S. Ct. 2652 (2013).

100. *Id.*

101. *Id.* at 2661.

102. *Id.* at 2659.

103. *See, e.g.*, Hessick, *supra* note 17, at 313 ("[I]n public rights cases[,] the plaintiff must demonstrate that the injury is material and tangible."); Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret*, 107 NW. U. L. REV. 169, 173 (2012) ("An injury-in-fact, according to the Court, is something more fundamental than a legal right. It is a 'real-world,' tangible harm."); William P. Marshall & Gene R. Nichol, *Not a* Winn-*Win: Misconstruing Standing and the Establishment Clause*, 2011 SUP. CT. REV. 215, 238, 240 (indicating, as part of highlighting inconsistencies in standing jurisprudence, that "[i]f there is no tangible effect, then presumably no individual would suffer concrete harm"); Nichol, *supra* note 20, at 75 ("Article III now requires 'distinct' and 'palpable' injury. No judicial defin-

willing to adjudicate cases involving harm that is often considered intangible, such as injury arising from the display of a religious monument or aesthetic harm resulting from environmental damage.[104]

The Court's approach toward cognizing intangible harm might simply be cast as an inconsistency.[105] In fact, the Third Circuit stated after *Spokeo* that the notion of concrete intangible injury created an "obvious linguistic contradiction."[106] But another possibility is that "tangible" can be used in different ways: to denote the reality of harm *or* a type of harm.[107] On this account, courts have not been engaged in direct contradiction. Yet the double-sided use of "tangible" risks both creating confusion[108] and fueling an assumption that certain types of harm (for example, economic harm) are

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ition of the new term has been offered, but I assume it requires that a litigant suffer tangible injury that distinguishes him from the populace at large." (footnote omitted)); William L. Pham, Comment, *Section 633 of IIRIRA: Immunizing Discrimination in Immigrant Visa Processing*, 45 UCLA L. REV. 1461, 1481 (1998) ("Standing, therefore, requires a showing of some tangible injury, whether economic or otherwise.").

104. *See, e.g.*, *ADAPSO*, 397 U.S. 150, 153-54 (1970) (holding that "aesthetic, conservational, and recreational" values, or "a spiritual stake in First Amendment values," count for standing purposes (first quoting Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608, 616 (1965); and then citing Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963))); *see also, e.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 562-63 (1992) ("[T]he desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing."); Bayefsky, *supra* note 28, at 1571-76; Kreimer, *supra* note 17, at 774-95.

105. For discussions of the tension between the Court's suggestion that "tangible" harm is required for standing and the Court's acceptance of "intangible" harm as injury in fact, see Nichol, *supra* note 20, at 74-75, 87; Kreimer, *supra* note 17, at 752-54; and Re, *supra* note 64, at 1202.

106. *In re* Horizon Healthcare Servs. Inc. Data Breach Litig., 846 F.3d 625, 637 (3d Cir. 2017).

107. *See* Wu, *supra* note 17, at 440 n.6 ("The Court's use of the term 'tangible' in *Spokeo* must have been different from its use in *Hollingsworth*, because in *Spokeo*, the Court distinguished between tangibility and concreteness.").

108. An example of the consequences of this dual usage of "tangible" appeared in the briefing on Spokeo's renewed certiorari petition following the Ninth Circuit's decision on remand. Robins's brief in opposition to certiorari argued that suffering "real-world harm" meant suffering "tangible" harm, and that Spokeo was therefore seeking to undermine the Court's previous determination that intangible harm could be concrete by seeking "to impose on a plaintiff alleging an *intangible* harm the duty to show that he has also suffered, or soon will suffer, a *tangible* harm." Brief in Opposition at 16 & n.1, Spokeo, Inc. v. Robins, 138 S. Ct. 931 (2018) (No. 17-806). The Court's usage of "tangible" in *Spokeo*, however, suggests that "tangible" is *not* the same as "real." *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016); *see also* Reply Brief for Petitioner at 3, *Spokeo*, 138 S. Ct. 831 (No. 17-806) ("Robins falsely equates 'real-world harm' with 'tangible harm.'").

"concrete" or "real" simply because they are sometimes called "tangible."

Spokeo held squarely that intangible harm can be concrete and can, as a result, constitute injury in fact.[109] In doing so, however, *Spokeo* endorsed a distinctive inquiry for courts to use in deciding whether intangible harm is concrete: one focused on "history and the judgment of Congress."[110] Craig Konnoth and Seth Kreimer have plausibly suggested that tangibility in *Spokeo* is "a sufficient but not a necessary condition" for concreteness.[111] That is, a court is to determine whether an alleged injury is particularized; if so, the court is to ask whether the injury is tangible; if so, the injury is concrete, and if not, the court is to ask whether the injury has been recognized by history or Congress.[112] Or, as one court recently stated, "An injury ... is concrete if it is 'tangible.' An 'intangible' harm may also be concrete where it is a *de facto* harm that the legislature has 'identif[ied] and elevat[ed]' such that an individual may seek relief when [he or she] suffer[s] a harm."[113]

Spokeo suggests, at a minimum, that tangible harms are recognized in a more straightforward way than intangible ones—or that, as one commentator put it, "[t]angible injuries ... more easily pass the concreteness test than intangible injuries."[114] The *Spokeo* Court, after all, noted that tangible harms "are perhaps easier to recognize" and excluded tangible harms from particular inquiries applied to gauge concreteness.[115] This is not to say that tangible harm is automatically considered cognizable injury; all harm must still be

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109. *Spokeo*, 136 S. Ct. at 1549. For an earlier example in which the Supreme Court indicated that intangible harm could be real, see *Carey v. Piphus*, 435 U.S. 247, 261 (1978) (referring to "real, if intangible, injury").

110. *Id.*

111. Konnoth & Kreimer, *supra* note 18, at 51-52; *see also id.* at 62.

112. *Id.* at 62. U.S. District Judge Henry E. Hudson, in an article written with his former law clerks Christopher Keegan and P. Thomas DiStanislao, III, has come to a similar conclusion: "At the first step, courts should assess whether the plaintiff has suffered a tangible harm as a result of the statutory violation.... [If not,] courts should then inquire whether he has suffered one of the specific types of intangible harms sufficient to confer Article III standing." Hudson, Keegan & DiStanislao, *supra* note 28, at 21.

113. Raden v. Martha Stewart Living Omnimedia, Inc., No. 16-12808, 2017 WL 3085371, at *2 (E.D. Mich. July 20, 2017) (second and third alterations in original) (quoting and citing *Spokeo*, 136 S. Ct. at 1548-49).

114. Manring, *supra* note 25, at 2535.

115. *Spokeo*, 136 S. Ct. at 1549.

"actual or imminent."[116] But tangible harm need not undergo, it seems, as much analysis as its intangible counterpart—if any—to be considered concrete.

Turning from the Court's doctrinal moves to the conceptual basis for these steps, the *Spokeo* Court's distinction between tangible and intangible harm can be understood partially as a response to issues of legitimacy and remedial authority raised by the Court's emphasis on concreteness as a prerequisite for injury in fact. Tangibility permits courts to sidestep the concreteness inquiry in cases involving more traditional types of harm—typically, as noted below, economic or physical harm[117]—without opening the doors too widely to other forms of harm, such as those stemming from privacy violations or unwanted contact by debt collectors. Courts can thereby avoid extensive and potentially contentious concreteness inquiries in a wide variety of cases while restricting the circumstances in which courts can be asked to reorder the status quo in order to redress more apparently nebulous harms. Further, the *Spokeo* Court's turn to historical common law courts and Congress to gauge the concreteness of intangible harm could represent an effort to bolster the legitimacy of standing determinations by identifying sources of authority beyond contemporary federal courts to guide these determinations.

Yet under *Spokeo*, the federal courts have the last word on the cognizability of intangible harm. The next Section points out, in examining the post-*Spokeo* landscape, that *Spokeo*'s concreteness analysis for intangible harm actually licenses an expansion of judicial discretion.

D. After Spokeo*: Deciding Whether Harm Is Real*

Spokeo's invocation of tangibility has made its way into the decision-making processes of federal appellate and district courts. These courts, while noting that intangible harm can be concrete, have frequently treated the "history" and "judgment of Congress" factors laid out in *Spokeo* as the pathways to cognizability for

116. *See* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013) (quoting Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 140 (2010)).

117. *See infra* Part II.A.

intangible harm.[118] Some courts have skirted debates about the cognizability of intangible harm by pointing to a tangible harm that a plaintiff had suffered. For example, a Minnesota federal court found cognizable injury because the defendant's transmission of an unwanted fax "disrupted [plaintiff's] business by tying up its fax line, wasted [plaintiff's] paper and ink, and wasted the time of [plaintiff's] employees."[119] The court referred to this injury as "tangible" and thus distinguished cases involving "the *intangible* injury experienced when personal data is lost or retained."[120] Courts' post-*Spokeo* jurisprudence is still developing and has taken varied paths. For instance, the Third Circuit found standing, in a case about an unsolicited phone call, based on the plaintiff's intangible harms rather than the plaintiff's tangible ones.[121] Nevertheless, the inquiry into the concreteness of intangible harm appears to be more complex than for its tangible counterpart; as the Ninth Circuit put it on remand in *Spokeo*, intangible harm is a "somewhat murky area" in which "Congress's judgment as to what amounts to a real, concrete injury is instructive."[122]

Courts' standing determinations in this "murky area"—that is, their evaluations of the concreteness of intangible harm—are by no means mechanical investigations. The guideposts that *Spokeo*

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118. *See, e.g.*, Demarais v. Gurstel Chargo, P.A., 869 F.3d 685, 691-92 (8th Cir. 2017); *In re* Horizon Healthcare Servs. Inc. Data Breach Litig., 846 F.3d 625, 637 (3d Cir. 2017) (quoting *Spokeo*, 136 S. Ct. at 1549); *see also* Robins v. Spokeo, Inc., 867 F.3d 1108, 1112-13 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 931 (2018); Perry v. Cable News Network, Inc., 854 F.3d 1336, 1340 (11th Cir. 2017).

119. Sandusky Wellness Ctr., LLC v. MedTox Sci., Inc., 250 F. Supp. 3d 354, 357 & n.1 (D. Minn. 2017).

120. *Id.* at 359 n.2; *see also* Horton v. Sw. Med. Consulting, LLC, No. 17-CV-0266-CVE-mjx, 2017 WL 2951922, at *1, *4 & n.5 (N.D. Okla. July 10, 2017) (determining that a plaintiff had alleged cognizable "tangible injuries" in the form of lost "paper, ink, and toner" resulting from the transmission of an unwanted fax and, accordingly, declining to address the plaintiff's alleged "intangible injuries," such as "invasion of privacy and occupation of his fax machine"); Stromberg v. Ocwen Loan Servicing, LLC, No. 15-cv-04719-JST, 2017 WL 2686540, at *1, *6 (N.D. Cal. June 22, 2017) (stating that "expenditures of time and money" in ensuring that a mortgage was recorded were not "intangible," but "[r]ather ... precisely the kinds of concrete injuries that support Article III standing," so that "the Supreme Court's concerns in *Spokeo* about bare statutory violations and intangible harms simply are not implicated here").

121. *See* Susinno v. Work Out World Inc., 862 F.3d 346, 351-52 (3d Cir. 2017) (ruling that the plaintiff's intangible harms of "nuisance and invasion of privacy" were concrete and thus not reaching the question of whether the plaintiff's alleged tangible injuries were cognizable).

122. *Robins*, 867 F.3d at 1112.

identified were "history and the judgment of Congress."[123] The historical inquiry focuses on the closeness of the relationship between the "alleged intangible harm" and "a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[124]

But the relationship between an alleged harm and a common law injury depends on the feature of the claimed harm on which a court focuses, as well as the court's interpretation of the scope of the historical cause of action. An example comes from lawsuits against banks for failing to present mortgage satisfaction notices for recording within a statutorily prescribed time, even if the banks presented the notices by the time suit was brought.[125] A court in the Southern District of New York held that a plaintiff bringing such a claim had suffered concrete injury in fact, noting that the "intangible harm" the plaintiff had alleged—"a cloud on title"—had "a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[126] The Eleventh Circuit Court of Appeals, however, held that such a plaintiff had alleged no concrete injury.[127] In doing so, the Eleventh Circuit distinguished the suit from historical actions to quiet title on the basis that the historical actions "provided a remedy to prevent the risk of harm that occurred while title to property was wrongfully clouded, not a remedy *after* the cloud was lifted."[128] Courts have also diverged on whether a lawsuit to challenge a company's procurement of a consumer report on a prospective employee without obtaining the employee's authorization is sufficiently similar to common law torts involving the violation of privacy.[129] Comparing

123. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016).

124. *Id.* (citing Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 775-77 (2000)).

125. *See, e.g.*, Bellino v. JPMorgan Chase Bank, N.A., 209 F. Supp. 3d 601, 603-04 (S.D.N.Y. 2016).

126. *Id.* at 609 (quoting *Spokeo*, 136 S. Ct. at 1549).

127. Nicklaw v. CitiMortgage, Inc., 839 F.3d 998, 1003 (11th Cir. 2016).

128. *Id.*; *see also* Zia v. CitiMortgage, Inc., 210 F. Supp. 3d 1334, 1341 & n.1 (S.D. Fla. 2016) (finding no common law cause of action analogous to suits based on a delay in recording a mortgage satisfaction notice, and distinguishing from historical common law causes of action involving a failure to record a notice, rather than a delay in recording).

129. *Compare* Thomas v. FTS USA, LLC, 193 F. Supp. 3d 623, 635 (E.D. Va. 2016) (holding that a company's procurement of a consumer report on a prospective employee without obtaining the employee's authorization is sufficiently related to violations of privacy recognized

statutory violations to common law causes of action requires threshold decisions about which kinds of similarities and distinctions are relevant and about the level of generality at which the harm ought to be defined.

In addition to the historical inquiry, *Spokeo* drew attention to "the judgment of Congress."[130] But this analysis, too, relies on contestable judgments about legislative intent and the likelihood that a given harm will occur. Courts are implicitly called upon to make these judgments, for instance, in applying a test adopted by the Second and Ninth Circuits to implement *Spokeo*'s statements on the relationship between statutory violations and intangible harm. This test is "(1) whether the statutory provisions at issue were established to protect [a plaintiff's] concrete interests (as opposed to purely procedural rights), and if so, (2) whether the specific procedural violations alleged in this case actually harm, or present a material risk of harm to, such interests."[131]

The first prong of this test involves an inquiry into congressional purpose—not always a straightforward examination. Several courts have examined legislative history to ascertain congressional purpose.[132] Though the turn to legislative history is not a necessary implication of *Spokeo*, this move may be encouraged by the test's suggestion that courts look past Congress's identification of a legal violation to the purposes that Congress, in identifying the violation, was seeking to advance.[133] Regardless of how courts ascertain

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at common law), *with* Dilday v. Directv, LLC, No. 3:16CV996-HEH, 2017 WL 1190916, at *4 (E.D. Va. Mar. 29, 2017) (finding an insufficient relationship because "the tort of publicity given to private life" did not "permit suit for merely sharing private information with a single third party" instead of disseminating the information more broadly); *see also* Bassett v. ABM Parking Servs., Inc., 883 F.3d 776, 780 (9th Cir. 2018) (holding that the "printing of [the plaintiff's] credit card expiration date on a receipt that he alone viewed" was insufficiently close to common law torts involving the violation of privacy because there was no "disclosure of private information to a third party").

130. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016).

131. Robins v. Spokeo, Inc., 867 F.3d 1108, 1113 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 931 (2018); *see also* Strubel v. Comenity Bank, 842 F.3d 181, 190 (2d Cir. 2016).

132. *See, e.g.*, *Robins*, 867 F.3d at 1114; Eichenberger v. ESPN, Inc., 876 F.3d 979, 983 (9th Cir. 2017); Groshek v. Time Warner Cable, Inc., 865 F.3d 884, 887 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 740 (2018); Hatch v. Demayo, 1:16CV925, 2017 WL 4357447, at *4 (M.D.N.C. Sept. 29, 2017).

133. Textualists can, however, seek to make "objective inference[s] of purpose" without turning to legislative history. John F. Manning, *What Divides Textualists from Purposivists?* 106 COLUM. L. REV. 70, 85 (2006).

congressional purpose, the basic question is what would justify a court in deciding that Congress enacted a provision in order to protect "purely procedural rights" rather than to advance any "concrete interests."[134] At least in the absence of a congressional statement that a given procedural requirement does not help to prevent a specified harm,[135] the judicial determination that Congress sought to prevent no "concrete harm" in enacting legislation raises questions about judicial respect for legislative processes.

More weight therefore falls on the second prong of the test laid out by the Second and Ninth Circuits, namely "whether the specific procedural violations alleged in [a particular] case actually harm, or present a material risk of harm to, [the plaintiff's concrete] interests."[136] The outcome of this analysis depends on how courts define the relevant harm. For example, courts could characterize the absence of particular statutorily required disclosures—say, a credit report's listing of a defunct credit card company rather than the company's servicer as a source of information—as harmless because the plaintiff did not allege that the absence of the required disclosure made the process of obtaining an accurate credit report less efficient.[137] However, courts could also treat the absence of a statutorily required disclosure in more general terms, as a failure to provide information that legally must be disclosed, akin to the failure to disclose information sought pursuant to the Freedom of Information Act, which the Supreme Court has treated as cognizable

134. *Robins*, 867 F.3d at 1113.

135. *See* Bassett v. ABM Parking Servs., Inc., 883 F.3d 776, 782 (9th Cir. 2018) (noting Congress's finding in a statute that printing an expiration date on a receipt, in violation of a prior statute, did not prevent identity theft, and determining that an alleged injury was not concrete); Crupar-Weinmann v. Paris Baguette Am., Inc., 861 F.3d 76, 81-82 (2d Cir. 2017) (same); Meyers v. Nicolet Rest. of De Pere, LLC, 843 F.3d 724, 727-29 (7th Cir. 2016) (same), *cert. denied*, 137 S. Ct. 2267 (2017).

136. *Robins*, 867 F.3d at 1113; *see Strubel*, 842 F.3d at 190. *But see In re* Horizon Healthcare Servs. Inc. Data Breach Litig., 846 F.3d 625, 638-39, 639 n.19 (3d Cir. 2017) (holding that an alleged violation of the Fair Credit Reporting Act stemming from the theft of a laptop containing personal information sufficed for injury in fact even without an allegation of a "material risk of harm" (quoting Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1550 (2016))).

137. Dreher v. Experian Info. Sols., Inc., 856 F.3d 337, 346 (4th Cir. 2017); *see also* Hagy v. Demers & Adams, 882 F.3d 616, 622 (6th Cir. 2018) (finding no standing for plaintiffs alleging that a letter failed to make the statutorily required disclosure that the letter was from a debt collector, because the plaintiffs did "not say that the non-disclosure created a risk of double payment, caused anxiety, or led to any other concrete harm").

injury.[138] The level of generality at which harm is defined thus affects its cognizability.

The issue of defining harm also affects the likelihood that plaintiffs will suffer harm to their "concrete interests." *Spokeo* thrust this question into the spotlight by noting that certain procedural violations do not "present any material risk of harm."[139] In doing so, *Spokeo* raised the issue of how the "material risk of harm" inquiry related to the Supreme Court's previously stated requirement that injury in fact be "actual or imminent," interpreted to mean that the harm must be "certainly impending" or, at least, that there be a "substantial risk" that the harm would occur.[140]

In particular, the definition of harm may vary between the two inquiries. For example, the Ninth Circuit on remand in *Spokeo* explained that Robins had alleged a "real risk of harm" to his "employment prospects" and had suffered anxiety as a result of this risk.[141] But then the question arose whether Robins had sufficiently alleged that his employment prospects would be "imminently" affected. The Ninth Circuit sidestepped this question by stating that Robins had alleged "actual or imminent" injury because he had already suffered the "intangible injury" of having inaccurate information disseminated about him.[142] But this move may have redefined the relevant harm from an adverse effect in the employment arena to the dissemination of inaccurate information in and of itself. The "material risk of harm" and "actual or imminent" standards, then, might be reconciled by shifting the definition of the harm at issue. The overall point is that courts' decisions about how to characterize harm affect the shape of the standing inquiry.

The material risk of harm standard raises two further issues about the exercise of judicial discretion. First, courts face a question

138. *See* Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 449 (1989) ("Our decisions interpreting the Freedom of Information Act have never suggested that those requesting information under it need show [for standing purposes] more than that they sought and were denied specific agency records."). For an example of a post-*Spokeo* case holding, partially on the basis of *Public Citizen*, that a violation of the FCRA's disclosure requirements constituted a concrete injury, see *Thomas v. FTS USA, LLC*, 193 F. Supp. 3d 623, 635 (E.D. Va. 2016).

139. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1550 (2016); *see also id.* (remanding to the Ninth Circuit to ascertain "whether the particular procedural violations alleged in this case entail a degree of risk sufficient to meet the concreteness requirement").

140. *See* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409, 414 n.5 (2013).

141. *Robins*, 867 F.3d at 1116-17.

142. *Id.* at 1118.

about how to decide whether the risk of harm is material. This determination could involve a relatively fact-intensive inquiry at the outset of a case,[143] potentially consuming additional judicial resources. Second, and most fundamentally, courts deciding that a statutory violation poses no material risk of harm override congressional determinations that the likelihood of real harm was sufficiently grave to justify imposing a procedural requirement.[144] It is unclear why courts are justified in taking this step.

Spokeo's inquiries into history and congressional judgment thus require courts to use considerable discretion in defining harm, characterizing common law causes of action, gauging congressional intent, and calibrating risk. While the exercise of judicial discretion is not necessarily a negative phenomenon, it suggests that *Spokeo*'s invocation of history and congressional judgment compounds, rather than alleviates, concerns about the legitimacy of judicial action in gauging the concreteness of harm. For the inquiry that *Spokeo* applied to intangible harm requires courts to make contested and potentially value-laden judgments that may override congressional determinations about how to protect against certain types of harm.

This Part has examined the principles underlying the emergence of concreteness and tangibility as aspects of constitutional standing doctrine. The next Part addresses the issue of when harm is considered tangible or intangible in the first place—that is, when a more searching concreteness analysis is triggered.

Before doing so, it is worth addressing the possible worry that closely parsing the meaning of terms in judicial opinions places too much weight on subtle linguistic differences.[145] The Supreme Court has, after all, cautioned that "the language of an opinion is not always to be parsed as though we were dealing with language of a

143. *See* Katz v. Donna Karan Co., L.L.C., 872 F.3d 114, 121 (2d Cir. 2017) (indicating that affidavits, "limited jurisdictional discovery," and "a fact-finding hearing with expert witness testimony may very well be appropriate" under some circumstances to evaluate the risk of harm for standing purposes); Kimble v. W. Ray Jamieson, P.C., No. 2:17-cv-02187-SHM-tmp, 2018 WL 814225, at *5 (W.D. Tenn. Feb. 9, 2018) ("Determining whether there is a concrete injury requires a factual inquiry.").

144. *See* Wu, *supra* note 17, at 459 ("The overall concreteness inquiry, though, invites courts to substitute their judgments of risk for that of legislatures, again usurping the legislative role.").

145. I am grateful to Andrew Hessick for raising these points.

statute."[146] Yet the Supreme Court has given legal effect to terms such as "concrete" and "tangible," and other courts in the aftermath of *Spokeo* have been wrestling with how to apply these concepts to specific factual situations. It is therefore valuable to gain a fuller understanding of the terms that the Court used. This is not to suggest that these terms have one fixed meaning whenever they are invoked. On the contrary: the next Part highlights the variable meanings of "tangible" in order to argue that the application of this label to certain types of harm reflects contestable normative judgments.

II. THE BOUNDARIES OF TANGIBILITY

This Part examines several ways to conceptualize tangibility. It both highlights the difficulties with assigning this concept a role in standing doctrine and demonstrates that the tangible/intangible distinction exacerbates rather than ameliorates the challenge of making consistent and principled standing determinations. First, the Part notes, *Spokeo* does not explain the nature of tangibility, but prior cases and commentary suggest that two particular types of harm are most likely to be considered tangible: physical and economic harm. Second, the identification of physical and economic harm as tangible in the standing context is not an automatic step; rather, it represents a normatively inflected effort to delineate human interests that federal courts are clearly justified in seeking to remedy. This endeavor, however, results in contestable judgments about citizens' essential interests and oversimplifies economic and physical harm. Third, the tangible/intangible distinction might be thought to track characteristics such as commensurability with money, quantifiability, and susceptibility to evidentiary proof, but these qualities are themselves ill-suited to playing a role in the standing analysis. This Part thus deconstructs the distinction between tangible and intangible harm and highlights adverse consequences of incorporating this distinction into standing doctrine.

146. Reiter v. Sonotone Corp., 442 U.S. 330, 341 (1979).

A. The Meaning of Tangibility in Spokeo

Spokeo included no explicit definition of "tangible" or "intangible." In fact, *Spokeo* provided more guidance about what "tangible" is *not* than about what tangible *is*. Most importantly, *Spokeo* indicated that "tangible" does not mean "actual" or "real," because intangible harms can be "concrete," understood as "*de facto*" or "actually exist[ing]."[147] The Court thereby took off the table one plausible dictionary definition of "tangible,"[148] a definition suggested in previous cases.[149]

As for a more positive characterization of tangibility, *Spokeo* can be read to describe at least three types of harm as intangible: certain constitutional violations, the results of procedural vioations, and the risk of harm. Each of these categories, however, raises further questions about the nature of tangibility.

First, *Spokeo*'s most prominent instances of concrete yet intangible harm were drawn from constitutional cases involving the infringement of free speech and free exercise rights.[150] Because the free speech and free exercise cases cited in *Spokeo* did not mention standing,[151] they did not create precedent on the standing issue[152] and, more significantly, contained no injury-in-fact analysis that could be extended to other cases. The Court may have cited these cases to avoid treating as cognizable more controversial forms of intangible harm, such as damage to "[a]esthetic" interests[153] or stigmatic harm.[154]

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147. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548-49 (2016).

148. *Tangible*, AM. HERITAGE DICTIONARY ENG. LANGUAGE, https://ahdictionary.com/word/search.html?q=tangible [https://perma.cc/UC7Y-P56Q] (defining "tangible" as, inter alia, "[p]ossible to be treated as fact; real or concrete"). For additional dictionary definitions, see *infra* Part II.B.2.

149. *See supra* Part I.C.

150. *See Spokeo*, 136 S. Ct. at 1549 (citing Pleasant Grove City v. Summum, 555 U.S. 460 (2009); Church of the Lukumi Babalu Aye v. Hialeah, 508 U.S. 520, 535, 547 (1993)).

151. *See* Pleasant Grove City v. Summum, 555 U.S. 460 (2009); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

152. Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 144 (2011) ("When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed."); *see also* Baude, *supra* note 28, at 220 & n.137.

153. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 562-63 (1992); Sierra Club v. Morton, 405 U.S. 727, 734 (1972).

154. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 755-56, 757 n.22 (1984) (denying standing on

The notion of intangible yet concrete constitutional violations raises the question of what it means to call legal violations "intangible."[155] To say that the failure to perform a legal duty is "tangible" or "intangible" seems incoherent. The terms "tangible" and "intangible" are best suited to describing not legal violations (*injuria*, or legal wrongs), but the harm that results from legal violations (*damnum*, or factual harm).[156] The *Spokeo* Court, however, did not indicate that the plaintiffs in the free speech and free exercise cases experienced specific harmful effects as a result of these legal violations.[157] One might surmise that these plaintiffs experienced "downstream" harms such as emotional distress or stigma, but *Spokeo* did not suggest that the finding of concrete harm depended on the existence of these effects. Indeed, the harmful effects of the free speech and free exercise violations were not clearly intangible; in the free exercise case, at least, the ordinance that plaintiffs challenged as a violation of the free exercise clause imposed penalties of fines and prison time for disobedience.[158]

The *Spokeo* Court, instead of indicating that "intangible" harm resulted from these constitutional violations, may have been suggesting that the violation of free speech or free exercise rights is *inherently* harmful. This approach would be akin to courts' practice, in deciding whether to grant an injunction, of presuming irreparable harm from certain constitutional violations.[159] Perhaps a legal

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the basis of stigmatic injury, but noting that this injury might be cognizable when plaintiffs are personally subject to discriminatory treatment); Thomas Healy, *Stigmatic Harm and Standing*, 92 IOWA L. REV. 417, 428-30 (2007) (describing the treatment of stigmatic harm in *Allen v. Wright*). For further discussion of the recognition of intangible injuries, see Bayefsky, *supra* note 28, at 1570-76; and Kreimer, *supra* note 17, at 774-90.

155. I am grateful to Richard Fallon for discussion of this point.

156. *See supra* Part I.B.

157. The *Spokeo* Court also did not specify which intangible harms resulted from libel and slander per se, which the Court described as injuries for which the common law has permitted recovery even if these tort victims' harms are "difficult to prove or measure." Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016). Libel and slander per se are actionable in the absence of "special harm," including proven damage to the plaintiff's reputation or pecuniary loss. *See* RESTATEMENT (FIRST) OF TORTS § 569 (AM. LAW INST. 1938) (libel); *id.* § 570 (slander per se).

158. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 528 (1993); *see also* Konnoth & Kreimer, *supra* note 18, at 52 ("*Lukumi* involved the threat of a $500 fine or sixty days in jail for engaging in ritual animal sacrifice, and in *Summum*, efforts by the plaintiffs to erect their 'stone monument' would have likely been met with force or legal sanctions." (footnote omitted)).

159. *See, e.g.*, Beatrice Catherine Franklin, Note, *Irreparability, I Presume? On Assuming*

violation can be "intangible," then, if the violation by its nature gives rise to harm, and that harm is not "tangible." In this case, however, *Spokeo*'s allusions to legal violations that *necessarily* cause intangible harm do not resolve the issue of which kinds of harm are tangible. Further, these examples do not shed light on how tangibility applies to legal violations that are not viewed as inherently harmful, such as the violations of the FCRA at issue in *Spokeo*.[160]

A second set of intangible harm cases discussed in *Spokeo* involved "procedural" violations, notably violations of statutorily mandated procedures.[161] *Spokeo*, like earlier cases, suggested that procedural violations, unlike certain constitutional violations, are not necessarily harmful in themselves.[162] Rather, a plaintiff seeking to redress a procedural violation must allege that the violation in question gave rise to a separate, if "intangible," harm. But this view does not provide much guidance about the nature of intangible harm. Moreover, the line between "procedural" and "substantive" statutory provisions is not a sharp one. A statutory requirement that landlords provide accurate information to all prospective tenants could be read to confer "a legal right to truthful information about available housing"[163]—seemingly a substantive right—or to mandate that landlords follow certain procedures in renting apartments, akin to "procedural" statutory provisions mandating that debt collectors make certain disclosures.[164] *Spokeo*'s references to

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Irreparable Harm for Constitutional Violations in Preliminary Injunctions, 45 COLUM. HUM. RTS. L. REV. 623, 640 (2014). *But see id.* at 649 (noting, however, that "[t]he irreparable harm presumption is by no means universally recognized").

160. *See Spokeo*, 136 S. Ct. at 1550 ("A violation of one of the FCRA's procedural requirements may result in no harm.").

161. *Id.* at 1549.

162. For previous expressions of a similar view, see, for example, *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation ... is insufficient to create Article III standing."); and *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573 n.8 (1992) ("An individual can[] enforce procedural rights ... so long as the procedures in question are designed to protect some threatened concrete interest.").

163. Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982).

164. *See* Strubel v. Comenity Bank, 842 F.3d 181, 192-93 (2d Cir. 2016) (referring to a bank's failure to make a statutorily required notification to a consumer as a "bare procedural violation"). Since *Spokeo*, some courts have stressed the procedural/substantive distinction in assessing standing. *See, e.g.*, Eichenberger v. ESPN, Inc., 876 F.3d 979, 983-84 (9th Cir. 2017) ("[A]lthough the FCRA outlines *procedural* obligations that *sometimes* protect individual interests, the [Video Privacy Protection Act] identifies a *substantive* right to privacy that

procedural violations, therefore, do not clearly illuminate the meaning of "intangible" harm.

A third type of harm that *Spokeo* can be read to characterize as intangible is the "risk of real harm."[165] The idea is that Congress may require defendants to follow certain procedures in order to avoid inflicting "real" harm on plaintiffs; as long as the feared harm is "real," and there is a sufficiently high risk that the harm will occur, the violation of statutorily mandated procedures can constitute injury in fact even if the feared harm has not yet occurred.[166] This use of "intangible" seems to be similar to the formulation "not yet real." But if "intangible" is to describe a particular type of harm rather than the reality of harm, then the use of "intangible" to refer to future harm does not help to explain which types of harms are intangible.

Spokeo thus describes as intangible the results of inherently harmful legal violations and some effects of procedural violations, as well as the risk of harm. This enumeration does not, however, explain why certain types of harm are tangible and others intangible. A more specific vision of the distinction, however, emerges from the work of courts and commentators who have suggested that "tangible" encompasses two specific types of harm: physical and economic.[167] The next Section argues that the association of tangibility with physical and economic harm reflects a misguided effort

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suffers *any time* a video service provider discloses otherwise private information."); Pisarz v. GC Servs. Ltd. P'ship, No. 16-4552 (FLW), 2017 WL 1102636, at *3 (D.N.J. Mar. 24, 2017) ("[S]tanding based on a violation of a statutorily created right turns on whether such a right is substantive or merely procedural.").

165. *Spokeo*, 136 S. Ct. at 1549 (suggesting that "risk of real harm" could "satisfy the requirement of concreteness"); *see also* Greenley v. Laborers' Int'l Union of N. Am., 271 F. Supp. 3d 1128, 1137 (D. Minn. 2017) (same). For discussion of the role of risk in the Supreme Court's standing jurisprudence, see F. Andrew Hessick, *Probabilistic Standing*, 106 NW. U. L. REV. 55, 61-65 (2012); and Jonathan Remy Nash, *Standing's Expected Value*, 111 MICH. L. REV. 1283, 1290-1304 (2013).

166. *See Strubel*, 842 F.3d at 190 ("[E]ven where Congress has accorded procedural rights to protect a concrete interest, a plaintiff may fail to demonstrate concrete injury where violation of the procedure at issue presents no material risk of harm to that underlying interest.").

167. *See, e.g.*, Konnoth & Kreimer, *supra* note 18, at 52; Solove & Citron, *supra* note 17, at 755; *see also* Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 642 (2007) (Souter, J., dissenting); Church v. Accretive Health, Inc., 654 F. App'x 990, 995 (11th Cir. 2016) (per curiam).

to identify uncontroversially legitimate human interests that would support judicial redress.

B. Tangibility and "Injury to Flesh or Purse"[168]

1. The Treatment of Physical and Economic Harm

In the standing context, courts and commentators have frequently—though not uniformly—cast two types of harm as tangible. One is economic harm. The Supreme Court has distinguished "'noneconomic' and probably noncompensable" injuries from "tangible economic injuries,"[169] and federal courts of appeals have associated economic harm with tangibility.[170] Economic harm is also frequently treated as clearly sufficient for Article III injury in fact; as then-Judge Alito of the Third Circuit put it, "While it is difficult to reduce injury-in-fact to a simple formula, economic injury is one of its paradigmatic forms."[171] Types of economic harm that are considered injury in fact include not only the loss of a specified amount of funds,[172] but also the impairment of more complex economically valuable interests, such as intellectual property,[173] securities,[174]

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168. *Hein*, 551 U.S. at 641.

169. Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 17 (1981); *see also* Blue Shield of Va. v. McCready, 457 U.S. 465, 475 n.11 (1982).

170. *See, e.g.*, Am. Humanist Ass'n v. Md.-Nat'l Cap. Park & Plan. Comm'n, 874 F.3d 195, 203 (4th Cir. 2017) ("An Establishment Clause claim is justiciable even when plaintiffs claim noneconomic or intangible injury."); *In re* Horizon Healthcare Servs. Inc. Data Breach Litig., 846 F.3d 625, 635 (3d Cir. 2017) (referring to "economic or other tangible harm"); L.A. Haven Hospice, Inc. v. Sebelius, 638 F.3d 644, 656 (9th Cir. 2011) (contrasting "economic or pecuniary injury" with "less tangible forms of injury").

171. Danvers Motor Co. v. Ford Motor Co., 432 F.3d 286, 291 (3d Cir. 2005); *see also* Cottrell v. Alcon Labs., 874 F.3d 154, 163 (3d Cir. 2017) ("[W]here a plaintiff alleges financial harm, standing 'is often assumed without discussion.'" (quoting *Danvers*, 432 F.3d at 293)); Carpenters Indus. Council v. Zinke, 854 F.3d 1, 5 (D.C. Cir. 2017) ("[Even a] dollar of economic harm is still an injury-in-fact for standing purposes.").

172. *See, e.g.*, Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 983 (2017) ("[A] loss of even a small amount of money is ordinarily an 'injury.'").

173. *See, e.g.*, Faiveley Transp. Malmo AB v. Wabtec Corp., 559 F.3d 110, 115-16 (2d Cir. 2009) (finding standing to bring claim for misappropriation of trade secrets); Morrow v. Microsoft Corp., 499 F.3d 1332, 1339 (Fed. Cir. 2007) ("A patent grant bestows the legal right to exclude others from making, using, selling, or offering to sell the patented invention.... Constitutional injury in fact occurs when a party performs at least one prohibited action with respect to the patented invention that violates these exclusionary rights."); Kreimer, *supra* note 17, at 793-94 ("Holders of patent and copyright entitlements may bring actions in federal

rights to payment under a contract,[175] and entitlements to legal claims in bankruptcy.[176] The second type of harm considered tangible is physical harm,[177] which is viewed as a "well-established injur[y]-in-fact under federal standing jurisprudence."[178] Commentators have joined these courts in conceiving of physical or economic harm as tangible.[179]

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court simply because others have acted in respect to information ways that the right holders believe to violate the law."); *see also* Konnoth & Kreimer, *supra* note 18, at 52 (referring, in characterizing "tangible injuries" in *Spokeo*, to "the value of economic interests, including intellectual property rights").

174. *See* Gollust v. Mendell, 501 U.S. 115, 123 (1991) (holding that a plaintiff can have a "financial stake" in the outcome of a case brought under certain provisions of the Securities Exchange Act by owning a "security," including "stock, notes, warrants, bonds, debentures, puts, calls, and a variety of other financial instruments").

175. *See, e.g.*, Guidiville Band of Pomo Indians v. NGV Gaming, Ltd., 531 F.3d 767, 774 (9th Cir. 2008); *see also* Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 316 (1990) (referring to the "right to contract" as "tangible"). The Supreme Court determined that it had jurisdiction to review a state court decision invalidating mineral leases, which the Court labeled "tangible legal rights." ASARCO Inc. v. Kadish, 490 U.S. 605, 618-19 (1989).

176. *See, e.g.*, Howe v. Richardson, 193 F.3d 60, 61 (1st Cir. 1999); *In re* James Wilson Assocs., 965 F.2d 160, 168 (7th Cir. 1992).

177. *See, e.g.*, Church v. Accretive Health, Inc., 654 F. App'x 990, 995 (11th Cir. 2016) (per curiam) (referring to the "tangible economic or physical harm that courts often expect"); Suhre v. Haywood County, 131 F.3d 1083, 1086 (4th Cir. 1997) (noting that "the Establishment Clause plaintiff is not likely to suffer physical injury or pecuniary loss" and then indicating that "rules of standing recognize that noneconomic or intangible injury may suffice to make an Establishment Clause claim justiciable"). For other cases associating tangibility with economic and physical harm, see, for example, *Schweer v. HOVG, LLC*, No. 3:16-CV-01528, 2017 WL 2906504, at *3 (M.D. Pa. July 7, 2017); *Pogorzelski v. Patenaude & Felix APC*, No. 16-C-1330, 2017 WL 2539782, at *3 (E.D. Wis. June 12, 2017); and *Kamal v. J. Crew Grp., Inc.*, No. 2:15-0190 (WJM), 2017 WL 2443062, at *2 (D.N.J. June 6, 2017).

178. Adinolfe v. United Techs. Corp., 768 F.3d 1161, 1172 (11th Cir. 2014); *see also* FEC v. Akins, 524 U.S. 11, 24 (1998) (casting "a widespread mass tort" as an instance in which harm is "concrete, though widely shared").

179. Konnoth & Kreimer, *supra* note 18, at 52 ("[T]angible injuries apparently embrace ... physical interference." (footnote omitted)); Manring, *supra* note 25, at 2535 ("Tangible injuries such as physical harm more easily pass the concreteness test than intangible injuries."); *see also* Hudson, Keegan & DiStanislao, *supra* note 28, at 22 (assenting to the view of Konnoth and Kreimer). For pre-*Spokeo* analyses, see Shi-Ling Hsu, *The Identifiability Bias in Environmental Law*, 35 FLA. ST. U. L. REV. 433, 468 (2008) (stating that the injury-in-fact requirement reflects a bias that "favor[s] tangible, economic harms over less tangible, less measurable harms"); Kreimer, *supra* note 17, at 752 (challenging "an account of Article III that insists on 'direct,' 'tangible,' and 'palpable' injuries to physical or economic interests as the ticket of admission to the federal courthouse"); and Townsend, *supra* note 88, at 80 ("[N]ot all harms that we care about are tangible. Many wrongs do not lead to bodily damage, economic damage, damage to property, or other physical correlates that can be pointed to as 'real' harm outside of the violation of a legal right.").

Spokeo did not state that "tangible" refers to economic and physical harm, but this understanding of tangible harm is compatible with the examples of intangible harm adduced in *Spokeo*. Violations of free speech and free exercise rights, as well as libel and slander per se,[180] do not necessarily involve physical or economic harm. If *Spokeo* is read to use "tangible" to refer to physical and economic harm, then *Spokeo* suggests that these types of harm can be concrete without an inquiry into history and congressional judgment. In accordance with this understanding, the Eighth Circuit, following *Spokeo*, bifurcated its inquiry into tangible and intangible harms alleged under the Fair Debt Collection Practices Act.[181] The court determined that the intangible harm of "being subjected to attempts to collect debts not owed" was cognizable after a detailed inquiry into history and congressional judgment,[182] and the court decided that the tangible harm was cognizable because "a loss of even a small amount of money is ordinarily an 'injury.'"[183]

If "tangible" harm under *Spokeo* is interpreted to refer to physical or economic harm, then *Spokeo* has the effect of distinguishing "murk[ier]"[184] harms, the recognition of which requires legitimization by other bodies—notably common law judges and Congress—from a core set of uncontroversial human interests the impairment of which self-evidently counts as injury in fact. This point can be illuminated by reading *Spokeo* against the background of a dissent by Justice David Souter in the 2007 case *Hein v. Freedom from Religion Foundation, Inc.*[185] In *Hein*, the Supreme Court declined to extend the concept of "taxpayer standing" in Establishment Clause cases, accepted in *Flast v. Cohen*,[186] to the context of executive branch expenditures.[187] Justice Souter argued, by contrast, that the use of taxpayer money to promote religion could count as cognizable injury and stated that "it would be a mistake to think [*Flast*] is

180. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016).

181. Demarais v. Gurstel Chargo, P.A., 869 F.3d 685, 691-93 (8th Cir. 2017).

182. *Id.* at 691-92.

183. *Id.* at 693 (quoting Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 983 (2017)).

184. Robins v. Spokeo, Inc., 867 F.3d 1108, 1112 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 931 (2018).

185. 551 U.S. 587, 637 (2007) (Souter, J., dissenting).

186. 392 U.S. 83, 105-06 (1968).

187. *Hein*, 551 U.S. at 608-09 (plurality opinion).

unique in recognizing standing in a plaintiff without injury to flesh or purse."[188] He continued:

> The question, ultimately, has to be whether the injury alleged is "too abstract, or otherwise not appropriate, to be considered judicially cognizable."
>
> In the case of economic or physical harms, of course, the "injury in fact" question is straightforward. But once one strays from these obvious cases, the enquiry can turn subtle. Are esthetic harms sufficient for Article III standing? What about being forced to compete on an uneven playing field based on race (without showing that an economic loss resulted), or living in a racially gerrymandered electoral district? These injuries are no more concrete than seeing one's tax dollars spent on religion, but we have recognized each one as enough for standing. This is not to say that any sort of alleged injury will satisfy Article III, but only that intangible harms must be evaluated case by case.[189]

Here, Justice Souter appeared to define "intangible" harms as those that are not "economic" or "physical." The cognizability of tangible "economic" or "physical" harm was, in Justice Souter's view, "straightforward" or "obvious"—a view echoed, though less definitively, in *Spokeo*'s statement that "tangible injuries are perhaps easier to recognize."[190] In Justice Souter's view, and in *Spokeo*, "intangible" harms could count as injury in fact, but only on a more complex, "case by case" basis.[191] *Spokeo*'s references to history and congressional judgment[192] could be viewed as standards by which courts can undertake such a case-by-case inquiry. This is not to say that allegations of economic or physical harm will automatically be accepted as injury in fact. Courts might inquire into the imminence of these harms or consider whether plaintiffs are engaging in a form of bootstrapping by seeking redress for the economic effects of avoiding noneconomic harms.[193] Still, plaintiffs can show that physical or

188. *Id.* at 641 (Souter, J., dissenting).

189. *Id.* at 642 (footnote omitted) (quoting Allen v. Wright, 468 U.S. 737, 752 (1984)).

190. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016).

191. *Hein*, 551 U.S. at 642.

192. *See Spokeo*, 136 S. Ct. at 1549.

193. *See, e.g.*, Clapper v. Amnesty Int'l USA, 568 U.S. 398, 410, 422 (2013) (stating that plaintiffs "cannot manufacture standing by incurring costs in anticipation of non-imminent harm"); Parker Madison Partners v. Airbnb, Inc., No. 16-CV-8939 (VSB), 2017 WL 4357952,

economic harms are concrete without being subject to the inquiries applied to intangible harm. As the Third Circuit has stated, plaintiffs "allege that ... violations [of state consumer protection statutes] caused each of them tangible, economic harm. This satisfies the concreteness requirement."[194]

The tangible/intangible distinction, thus understood, creates two tiers of harm: one category of "obvious" harm and one category of harm, the reality of which requires a more complex inquiry. Physical and economic harms are often conceived as the "obvious" harms that courts can declare to be concrete without turning to the legitimation provided by other sources, namely common law judges or congressional action. On this account, physical and economic harm are types of human interests, the infringement of which is clearly worthy of judicial redress.

The distinction between tangible and intangible is reminiscent of the category of "primary goods" found in John Rawls's original *A Theory of Justice*: "[T]hings that every rational [person] is presumed to want."[195] Rawls, interestingly, included in this category not only "natural goods" such as "health and vigor" and "social primary goods" such as "income and wealth," but also "self-respect."[196] Constitutional standing doctrine may not map directly onto Rawls's categorization, but both conceptual structures suggest a similar interest in attributing to individuals a set of concerns that, if thwarted, clearly give rise to harm.[197] The implication in the constitutional standing context is that remedial action taken by courts to redress physical and economic harm can be justified without resort to history or congressional judgment as sources of legitimizing authority.

The identification of a set of "obvious" harms might also be thought to serve other purposes of standing doctrine. One is the separation of powers; perhaps courts are less likely to exceed their

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at *4-5 (S.D.N.Y. Sept. 29, 2017) (ruling that allegations of economic harm were insufficiently specific and definite to ground standing).

194. Cottrell v. Alcon Labs., 874 F.3d 154, 167 (3d Cir. 2017).

195. JOHN RAWLS, A THEORY OF JUSTICE 62 (1971).

196. *Id.*

197. It may be objected that certain harms, though they genuinely infringe core human interests, are harder to prove, and that this evidentiary distinction justifies differential treatment. See *infra* Part II.C.3 for discussion of the relationship between evidentiary proof and the tangible/intangible distinction.

authority when they take action in response to harms that all would view as genuine, because there is a clearer need for judicial intervention to redress individual grievances.[198] By contrast, harms that require a judgment call in order to be labeled "real" could create a greater risk that courts will adjudicate suits concerning the abstract legality of defendants' conduct in which the plaintiff has no real stake—similar, in a sense, to advisory opinions.[199] A second interest that identifying "obvious" harms might further is judicial administration. Courts could find it more straightforward to redress physical and economic harm than to compensate plaintiffs when they have suffered, for example, reputational, emotional, or stigmatic damage.[200]

This Article argues, beginning in the next Subsection, that the invocation of tangibility to advance these aims oversimplifies physical and economic harm, and that the concept of tangibility is not necessary in order to strike an appropriate balance between concerns about the separation of powers and judicial administration, on the one hand, and values such as ensuring access to the federal courts to redress legal violations, on the other. Before doing so, it is worth noting the contestable nature of the view that economic and physical harm mark the boundaries of uncontroversially legitimate human interests.

In fact, individuals have many other interests fundamental to their ability to live, form relationships, and contribute to society in a constitutional democracy. Proponents of a "capabilities approach" to defining the prerequisites for adequate human functioning have identified as such capabilities, for instance, the ability to participate in social relationships,[201] "rights to political participation,"[202] the capacity to avoid stigma,[203] and "[n]ot having one's emotional development blighted by overwhelming fear and anxiety, or by

198. *See infra* Part III.A.

199. *See* Elliott, *supra* note 17, at 469.

200. *See* Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CALIF. L. REV. 772, 778 (1985).

201. *See* SABINA ALKIRE, VALUING FREEDOMS: SEN'S CAPABILITY APPROACH AND POVERTY REDUCTION 48 tbl.22 (2002); MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 79 (2000).

202. Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287, 317 (1999).

203. *See id.* at 318.

traumatic events of abuse or neglect."[204] A focus on economic and physical well-being to the exclusion of these other goods results in an overly narrow portrayal of core human interests.

It may be argued that money is the most valuable good because it facilitates access to every other good. But money cannot always purchase, say, social relationships or emotional well-being, and the significance of money in enabling people to access other goods does not detract from the inherent value of the other goods themselves. It may also be contended that physical well-being is necessary for people to enjoy any other good. Physical integrity in the sense of adequate nourishment and health is indeed essential to any human life, but this does not mean that other goods, such as "achieving self-respect or being socially integrated," are not also "widely valued."[205] Courts, in implicitly assuming that physical and economic harm are uniquely clear and uncontroversially legitimate human interests, are making a normative judgment that is subject to question. This judgment raises the institutional issue of why courts ought to be tasked with identifying the infringement of certain human interests as necessarily harmful. Further, the contested nature of this judgment provides reason to be skeptical of the application of a distinctive concreteness analysis to intangible harm.

One potential response is that *Spokeo* applies no distinctive concreteness inquiry to intangible harm, because physical and economic harm would necessarily count as injury in fact under the history and congressional judgment analyses of *Spokeo*. As an initial matter, however, economic and physical harms are not necessarily covered by these analyses. Examples of physical harm that have little basis in historically recognized causes of action include physical harm to a person whom others have no duty to rescue,[206] physical harm encountered by trespassers and other kinds of entrants on land under various circumstances,[207] and certain personal injuries caused by those not in privity with the injured under

204. NUSSBAUM, *supra* note 201, at 79.

205. Amartya Sen, *Capability and Well-Being*, *in* THE QUALITY OF LIFE 31 (Martha Nussbaum & Amartya Sen eds., 1993).

206. *See* Jonathan M. Purver, Annotation, *Duty of One Other Than Carrier or Employer to Render Assistance to One for Whose Initial Injury He Is Not Liable*, 33 A.L.R.3d 301, § 2[a] (1970).

207. *See* 4 STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS § 14:71 (2015).

traditional common law rules.[208] Some legislatures have changed the traditional common law rules on these subjects and thereby elevated certain harms to the status of legal cognizability (for example, by eliminating privity requirements[209]), but other legislatures have not altered common law rules (for example, in the context of harm to trespassers[210]). Physical harm, then, is not necessarily cognizable by virtue of a comparison with historical causes of action or through legislative enactments.

The same is true of economic harm. The concept of injury in fact was invoked in the Supreme Court's 1970 *ADAPSO* case to cover a type of "economic injury" untethered to a traditional right of action: competition in the data processing business.[211] Soon thereafter, the Court stated that "palpable economic injuries," such as adverse effects on tenant farmers' "economic position *vis-à-vis* their landlords," had "long been recognized as sufficient to lay the basis for standing, with or without a specific statutory provision for judicial review."[212] The injury-in-fact standard thus seems to have resulted in courts' cognizing economic injuries that were not viewed as sufficient for standing under previous common law or statutory regimes. To provide further examples: economic loss resulting from negligence has often not been treated as the basis for suit.[213] The Supreme Court has also suggested that a shareholder would have constitutional—but not statutory—standing "to sue a company for firing a valuable employee for racially discriminatory reasons, so long as he could show that the value of his stock decreased as a consequence."[214] While a shareholder suit understood broadly may have a common law analogue,[215] a shareholder suit for racial

208. *See, e.g.*, Steven Bonanno, Comment, *Privity, Products Liability, and UCC Warranties: A Retrospect of and Prospects for Illinois Commercial Code § 2-318*, 25 J. MARSHALL L. REV. 177, 178-79 (1991). The doctrine of contractual privity has since been restricted. *See, e.g.*, Elmore v. Am. Motors Corp., 451 P.2d 84, 88 (Cal. 1969).

209. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 106, § 2-318 (2017).

210. *See, e.g.*, Vitauts M. Gulbis, Annotation, *Modern Status of Rules Conditioning Landowner's Liability upon Status of Injured Party as Invitee, Licensee, or Trespasser*, 22 A.L.R.4th 294, § 2[a] (1973).

211. *ADAPSO*, 397 U.S. 150, 151-52, 154 (1970).

212. Sierra Club v. Morton, 405 U.S. 727, 733-34 (1972) (citing Barlow v. Collins, 397 U.S. 159 (1970)).

213. *See infra* note 232 and accompanying text.

214. *See* Thompson v. N. Am. Stainless, LP, 562 U.S. 170, 177 (2011).

215. *See, e.g.*, 19 AM. JUR. 2D *Corporations* § 1949 (2017).

discrimination against an employee arguably does not, and the fact that such a shareholder would not have statutory standing suggests that this harm has not been elevated by Congress to legal cognizability. Economic harm, then, is not necessarily closely related to historical causes of action or recognized by statute.

It may be contended that economic and physical harm are related to a historical cause of action provided that harm is defined at a sufficient level of generality. For instance, economic harm could be related to shareholder suits conceived broadly even if not to shareholder suits for racial discrimination against employees. The same point might be made about congressional or legislative judgment; perhaps statutes addressing certain forms of tort liability for causing physical harm could render harm to trespassers concrete.

But intangible harms, as suggested above, could also be related to "history" or "the judgment of Congress"[216] if they are defined at an adequately high level of generality.[217] Moreover, the point about levels of generality highlights a further reason why intangible harm in *Spokeo* is subject to a meaningfully different inquiry from that applied to tangible harm. As noted above, courts' inquiries into the concreteness of intangible harm require discretionary and contestable decisions about the nature of the harm, the scope of the historical cause of action, and congressional purpose.[218] The application of these analyses specifically to intangible harm affects the types of arguments plaintiffs must make, the litigation process (for example, the extent of jurisdictional discovery at the motion to dismiss stage), and the extent to which courts can determine that a given intangible harm has not cleared the threshold.

Given that the association between tangibility and physical and economic harm affects the standing inquiry, the question is whether this association is justified. The next Subsection highlights the contingency of this association and examines the principles underlying it.

216. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016).
217. *See supra* Part I.D.
218. *See supra* Part I.D.

2. Intangible Elements of Economic and Physical Harm

The link between tangibility and economic and physical harm is by no means inevitable, for there are legal settings in which aspects of these harms are considered intangible. To begin with economic harm, property is categorized in various settings as "tangible" and "intangible." As a leading torts casebook explains, "[m]uch personal property today is intangible, in the form of securities, contract rights, checks or bank accounts, and protected intangible property like trademark or copyright,"[219] as well as trade secrets.[220] The description of certain types of property as intangible—including types of intellectual property,[221] licenses granted by government agencies, covenants not to compete, and certain contractual rights[222]—is found in the Uniform Commercial Code,[223] the Fair Debt Collection Practices Act,[224] and Internal Revenue Service publications.[225] The Supreme Court has adjudicated cases involving a state's "'intangibles tax' on the fair market value of corporate stock"[226] and a federal tax on "customer-based intangibles" such as "customer lists" and "bank deposits."[227]

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219. DAN B. DOBBS ET AL., THE LAW OF TORTS § 66 n.1 (2d ed. 2017); *see also* Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2599 (2013) (describing the Florida Supreme Court's holding that a takings claim based on the alleged imposition of an unconstitutional condition failed "because the subject of the exaction at issue here was money rather than a more tangible interest in real property").

220. DOBBS ET AL., *supra* note 219, § 734.

221. *See also* Eureka Water Co. v. Nestle Waters N. Am., Inc., 690 F.3d 1139, 1147 (10th Cir. 2012) ("Intellectual property is ... a type of intangible property."); Blitz U.S.A., Inc. v. Okla. Tax Comm'n, 75 P.3d 883, 888-89 (Okla. 2003) ("An inventor sells intangible intellectual property in return for which the inventor receives a royalty. A manufacturer, on the other hand, sells tangible personal property." (footnote omitted)).

222. *See* DOBBS ET AL., *supra* note 219, § 63 n.1 (referring to contract rights as "intangible"); *see also* W. Union Tel. Co. v. Pennsylvania, 368 U.S. 71, 73, 79 (1961) (treating "obligations" to pay "sums of money" as "intangibles").

223. U.C.C. § 9-102 cmt. d (AM. LAW INST. & UNIF. LAW COMM'N 2017); *see also* Juliet M. Moringiello, *False Categories in Commercial Law: The (Ir)relevance of (In)tangibility*, 35 FLA. ST. L. REV. 119, 122-32 (2007) (criticizing the differential treatment of tangible and intangible assets in the Uniform Commercial Code).

224. 28 U.S.C. § 3002(12) (2012).

225. *See, e.g.*, IRS, PUBLICATION 544: SALES AND OTHER DISPOSITIONS OF ASSETS 12, 25 (2017).

226. Fulton Corp. v. Faulkner, 516 U.S. 325, 327 (1996).

227. Newark Morning Ledger Co. v. United States, 507 U.S. 546, 557 (1993).

Along with the possibility of intangible property comes the treatment of certain kinds of economic loss as intangible. In the property insurance context, for example, courts have characterized "tangible property" as "things that can be touched, seen, and smelled"[228] and, accordingly, treated as intangible various types of economic injury, including "loss of the use of money a claimant would have received but for the insured's negligence,"[229] "allegedly converted bank account funds,"[230] and "decline in stock value."[231] Economic loss is also described as intangible in the context of the economic loss doctrine in tort law, which "bars recovery in tort when a party suffers economic loss unaccompanied by personal injury or property damage."[232] As the Ohio Supreme Court put it, "[T]he general rule is 'there is no ... duty to exercise reasonable care to avoid intangible economic loss or losses to others that do not arise from tangible physical harm to persons and tangible things.'"[233] According to a leading treatise, these "[e]conomic losses encompass objectively verifiable monetary losses, including loss of property, costs of repair or replacement, loss of employment, and loss of business or employment opportunities," as well as "loss of goodwill; disappointed economic expectations; and diminution in value."[234]

The characterization of economic interests or losses as intangible is consonant with a prominent and intuitive definition of "tangible" as "[c]apable of being touched."[235] As a plurality of the Supreme

228. Kazi v. State Farm Fire & Cas. Co., 15 P.3d 223, 229 (Cal. 2001); *see also* Cmty. Antenna Servs., Inc. v. Westfield Ins., 173 F. Supp. 2d 505, 511 (S.D. W. Va. 2001) (defining "tangible" as "necessarily corporeal" in the sense that the item in question "may be perceived by any of the bodily senses").

229. Snug Harbor, Ltd. v. Zurich Ins., 968 F.2d 538, 542 (5th Cir. 1992).

230. Johnson v. Amica Mut. Ins., 733 A.2d 977, 978 (Me. 1999) (per curiam).

231. Harris v. Suniga, 149 P.3d 224, 225 (Or. Ct. App. 2006), *aff'd*, 180 P.3d 12 (Or. 2008).

232. 86 C.J.S. *Torts* § 23 (2017). The economic loss rule is subject to exceptions and variations; the point here is simply that in certain negligence contexts, unrecoverable economic losses may be considered intangible.

233. Floor Craft Floor Covering, Inc. v. Parma Cmty. Gen. Hosp. Ass'n, 560 N.E.2d 206, 208 (Ohio 1990) (omission in original) (quoting WILLIAM PROSSER & W. PAGE KEATON, LAW OF TORTS 657, § 92 (5th ed. 1984)); *see also* Gus' Catering, Inc. v. Menusoft Sys., 762 A.2d 804, 807 (Vt. 2000) ("'[N]egligence law does not generally recognize a duty to exercise reasonable care to avoid intangible economic loss to another unless one's conduct has inflicted some accompanying physical harm,' which does not include economic loss." (quoting O'Connell v. Killington, Ltd., 665 A.2d 39, 42 (Vt. 1995))).

234. 86 C.J.S. *Torts* § 23 (footnotes omitted).

235. *Tangible*, OXFORD ENG. DICTIONARY, http://www.oed.com/view/Entry/197491?redirect

Court recently stated in interpreting the Sarbanes-Oxley Act's phrase "tangible object," "The ordinary meaning of an 'object' that is 'tangible,' as stated in dictionary definitions, is 'a discrete ... thing,' that 'possess[es] physical form.'"[236] Many economic interests—from a debt owed to a creditor, to a stake in a company, to funds in a bank account—cannot be physically touched.[237] In a world of fiat money,[238] the economic value attaching even to the physical objects of bills and coins is rooted in a web of social understandings, expectations, and conventions that lack a physical location or physical form.[239]

Other understandings of "tangible," such as "real or concrete"[240] and "capable of being precisely identified or realized by the mind,"[241] do not involve the capacity to be touched. Indeed, different understandings of tangibility can lead to divergent results in the standing analysis. An example is the waste of a person's time in fielding unwanted phone calls or following up regarding a delay in the recording of a mortgage. Some courts call this type of harm "intangible,"[242]

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edfrom=tangible& [https://perma.cc/CL3L-GREX]. Other dictionaries include similar definitions among the meanings of "tangible." *See Tangible*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("1. Having or possessing physical form; CORPOREAL. 2. Capable of being touched and seen; perceptible to the touch."); AM. HERITAGE DICTIONARY ENG. LANGUAGE, *supra* note 148 ("Discernible by the touch."); *Tangible*, DICTIONARY.COM, http://www.dictionary.com/browse/tangible?s=t [https://perma.cc/FUD9-XDGG] ("[C]apable of being touched."); *Tangible*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webaster.com/dictionary/tangible [https://perma.cc/FJY-GZBX] ("[C]apable of being perceived especially by the sense of touch.").

236. Yates v. United States, 135 S. Ct. 1074, 1081 (2015) (alteration in original) (first quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1555 (2002); and then quoting BLACK'S LAW DICTIONARY, *supra* note 235, at 1683 (10th ed. 2014)). The *Yates* dissent adopted the same "ordinary meaning" of "tangible object." *See id.* at 1091 (Kagan, J., dissenting).

237. *See, e.g.*, Johnson v. Amica Mut. Ins., 733 A.2d 977, 979 (Me. 1999) (per curiam) ("[B]ank account funds are 'intangible property,' because they have no intrinsic value and merely represent, or are evidence of, value.").

238. *See* Hilary J. Allen, *$=€=Bitcoin?*, 76 MD. L. REV. 877, 884 (2017) (explaining that the U.S. dollar, a form of fiat money, "is backed only by the full faith and credit of the United States government and is not redeemable for any commodity").

239. *See* John J. Chung, *Money as Simulacrum: The Legal Nature and Reality of Money*, 5 HASTINGS BUS. L.J. 109, 120 (2009) (describing money as not "a thing of independent tangible value"); Moringiello, *supra* note 223, at 137 ("Money serves as an interesting illustration of the false distinction between the tangible and the intangible.... [M]oney has no value at all unless people believe in money.").

240. AM. HERITAGE DICTIONARY ENG. LANGUAGE, *supra* note 148.

241. MERRIAM-WEBSTER DICTIONARY, *supra* note 235.

242. *See, e.g.*, Abante Rooter & Plumbing, Inc. v. Pivotal Payments, Inc., No. 16-cv-05486-JCS, 2017 WL 733123, at *6-7 (N.D. Cal. Feb. 24, 2017); Reichman v. Poshmark, Inc., 267 F.

perhaps because time (and the loss thereof) have no physical form. Other courts call the expenditure of time "tangible,"[243] perhaps because the loss of time can be quantified.[244] The Third Circuit has, in fact, declined "to resolve the issue ... of whether wasted time is a tangible or intangible harm."[245] The existence of this kind of harm on the boundary between tangible and intangible harm[246] further highlights the malleability of the category of tangible harm.

The overall point is that the link between tangibility and economic harm does not flow inevitably from the nature of economic interests. Needless to say, there are also instances outside the standing setting in which economic harm is considered tangible. In antidiscrimination law, courts have distinguished "'economic' or 'tangible' discrimination" from "sexual harassment ... [that] 'create[s] an abusive working environment,'"[247] though the Supreme Court has also referred to "tangible psychological injury."[248] In privacy law, the Court has differentiated "damages for mental or emotional distress" from "tangible economic loss."[249] These examples, however, only underscore the variation in whether "tangible" is applied to economic harm. This variation suggests that the association between economic harm and tangibility in the standing context warrants critical evaluation.

Physical harm, too, has aspects viewed as intangible outside the standing context. While the component of physical harm consisting

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Supp. 3d 1278, 1284-85 (S.D. Cal. 2017); Mey v. Got Warranty, Inc., 193 F. Supp. 3d 641, 644-45 (N.D. W. Va. 2016).

243. *See* Smith v. Blue Shield of Cal. Life & Health Ins., 228 F. Supp. 3d 1056, 1062 (C.D. Cal. 2017); Cabiness v. Educ. Fin. Sols., LLC, No. 16-cv-01109-JST, 2016 WL 5791411, at *5 (N.D. Cal. Sept. 1, 2016); *see also* Stromberg v. Ocwen Loan Servicing, LLC, No. 15-cv-04719-JST, 2017 WL 2686540, at *6 (N.D. Cal. June 22, 2017).

244. See *infra* Part II.C.2 for a discussion of the role of quantifiability in standing doctrine.

245. Susinno v. Work Out World Inc., 862 F.3d 346, 352 n.4 (3d Cir. 2017).

246. Courts have also split on whether occupying a fax machine (for example, by sending a junk fax) is tangible harm. *Compare, e.g.*, Horton v. Sw. Med. Consulting, LLC, No. 17-CV-0266-CVE-mjx, 2017 WL 2951922, at *4 (N.D. Okla. July 10, 2017) (occupying a fax machine is intangible), *with* Zia v. CitiMortgage, Inc., 210 F. Supp. 3d 1334, 1343 (S.D. Fla. 2016) (occupying a fax machine is tangible and distinguishable from an "intangible injury" related to the delayed recording of mortgage documents, the latter of which did not support standing).

247. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 786 (1998) (first quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993); and then quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986)).

248. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).

249. FAA v. Cooper, 566 U.S. 284, 287, 303 (2012).

of bodily damage (say, a bruise on the skin) may be consistently tangible, the same is not true of a major effect of, or constituent part of, physical harm: pain and suffering arising from bodily damage. Pain and suffering are not tangible in the *Black's Law Dictionary* sense of "[h]aving or possessing physical form."[250] Pain and suffering are frequently treated as intangible in courts' descriptions of damages for tortious conduct; the Supreme Court, for example, has referred to "the intangible pain and suffering caused by an automobile accident."[251]

It may be argued that pain and suffering are the "consequent injury" arising from the "predicate injury" of physical harm and that the intangibility of the consequent injury does not undermine the tangibility of the predicate injury.[252] Yet pain and suffering themselves constitute a major portion of the harm effected by injurious contact with the body, and they provide an important reason why victims of such contact are treated as entitled to legal redress.[253] Take, for example, an individual with a wound, caused by another person's negligent driving, that heals within a few months, is not visible to the public, and does not prevent the person from going about his or her daily activities, albeit more painfully than before.

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250. *See Tangible*, BLACK'S LAW DICTIONARY, *supra* note 235.

251. Comm'r v. Schleier, 515 U.S. 323, 330 (1995); *see also* United States v. Burke, 504 U.S. 229, 235 (1992) (suggesting that "emotional distress and pain and suffering" are "intangible elements of injury"); Acevedo-Luis v. Pagán, 478 F.3d 35, 39 (1st Cir. 2007) ("As to pain and suffering, the court instructed the jury that no evidence of monetary value of such intangible things needed to be introduced into evidence."); State v. Gray, 280 P.3d 1110, 1113 n.3 (Wash. 2012) ("Restitution shall not include reimbursement for damages for mental anguish, pain and suffering, or other intangible losses, but may include the costs of counseling reasonably related to the offense." (quoting WASH. REV. CODE § 9.94A.753(3) (2012))).

252. These terms are adopted from the treatment of negligent infliction of emotional distress by John Goldberg and Benjamin Zipursky. *See* John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1665 (2002).

253. For example, Stanley Ingber points out that denying compensation for pain and suffering, as well as emotional damages, "creates the appearance of legal and societal indifference to the victim's plight" and "effectively bestows upon the injurer a form of legal 'entitlement' to cause the injury." Ingber, *supra* note 200, at 781. A Seventh Circuit opinion by Judge Richard Posner stated that:

> We disagree with those students of tort law who believe that pain and suffering are not real costs and should not be allowable items of damages in a tort suit.... If they were not recoverable in damages, the cost of negligence would be less to the tortfeasors and there would be more negligence, more accidents, more pain and suffering, and hence higher social costs.

Kwasny v. United States, 823 F.2d 194, 197 (7th Cir. 1987).

When considering exactly why negligent driving has harmed the person, and excluding the financial costs of treatment, the "intangible" pain and suffering endured by the person loom large—possibly larger than the "tangible" impact of the wound on the skin. More broadly, the harmfulness of physical wounds is deeply connected to phenomena often viewed as intangible, namely the pain and suffering that result from damage to the physical body.

As with economic harm, then, the application of the "tangible" label to physical harm in the constitutional standing context is not an automatic step; rather, the underlying basis of this association is subject to question. In undertaking this inquiry, it is worth asking when economic and physical harms are viewed as intangible.

First, economic and physical harms are viewed as intangible when compensation for these harms seems difficult or complex to provide. For example, damage to intangible property could be harder to quantify than damage to tangible property,[254] and pain and suffering could be viewed as both difficult to quantify and challenging to redress through a monetary award.[255] Second, harm may be labeled intangible as a signal that a particular pathway to legal recompense is not a suitable vehicle for the remediation of certain harms. For instance, the law may prevent recovery in tort for economic losses stemming from breaches of contract.[256]

Third, harm may be considered intangible when treating harm as legally cognizable would result in the imposition of a normatively undesirable form or level of liability. Justifications for the economic

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254. *See, e.g.*, Elizabeth Cosenza, *Co-Invest at Your Own Risk: An Exploration of Potential Remedial Theories for Breaches of Rights of First Refusal in the Venture Capital Context*, 55 AM. U. L. REV. 87, 111 n.118 (2005) (explaining that "damages for the loss of something as nebulous as an opportunity" consisting of "a musician's intangible property interest in a concert performance" would "be particularly difficult to quantify"); S. Christopher Provenzano, *Personal Property*, *in* COMMERCIAL CONTRACTS: STRATEGIES FOR DRAFTING AND NEGOTIATING § 11.06[B] (Vladimir R. Rossman & Morton Moskin eds., 2d ed. 2018) ("[E]quitable remedies are more readily available with respect to contracts concerning intangible property, which is more difficult to quantify, define, and value.").

255. *See* Ingber, *supra* note 200, at 774 ("Pain and suffering is essentially the prototype of a nontransferable, nonquantifiable injury."); *see also* RESTATEMENT (SECOND) OF TORTS § 903 cmt. a (AM. LAW INST. 1979) ("The sensations caused by harm to the body or by pain or humiliation are not in any way analogous to a pecuniary loss, and a sum of money is not the equivalent of peace of mind.").

256. 86 C.J.S. *Torts* § 23 (2017) ("The economic loss doctrine preserves the distinction between contract and tort law.").

loss doctrine in negligence law, for instance, include limiting tort liability so that manufacturers are not "liable for vast sums"[257] and avoiding the "impos[ition of] liability for damages that are speculative,"[258] as well as the imposition of "liability that is disproportionate to fault."[259] These justifications parallel common rationales for limiting liability for emotional distress,[260] which is often considered intangible.[261]

Fourth, the association of certain harms with intangibility may suggest that these harms are to be taken less seriously. As John Goldberg and Benjamin Zipursky have written in the negligence context, "[C]ourts have long given 'second class' citizenship to emotional distress and intangible economic loss as harms or protected interests."[262] When economic loss is relegated to "second-class citizenship," it may be more likely to be called "intangible."

The treatment of certain harms as tangible or intangible is thus not merely an empirical characterization, but a normative judgment that certain types of harms more appropriately trigger judicial intervention and are better suited to redress through the judicial process. This point pushes further the critique that "injury in fact" is a normative criterion, not a factual one.[263] The same is true of the categorization of harm as tangible or intangible for the purposes of undertaking the injury-in-fact inquiry. Therefore, the notion that intangible harm should be subject to a more complex or searching

257. E. River S.S. Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 874 (1986).

258. Vincent R. Johnson, *The Boundary-Line Function of the Economic Loss Rule*, 66 WASH. & LEE L. REV. 523, 542 (2009).

259. *Id.*; *see also* Seely v. White Motor Co., 403 P.2d 145, 151 (Cal. 1965) (stating that manufacturers "can appropriately be held liable for physical injuries caused by defects" but not for "the level of performance of [their] products in the consumer's business unless [they] agree[] that the product was designed to meet the consumer's demands").

260. *See, e.g.*, Metro-N. Commuter R.R. v. Buckley, 521 U.S. 424, 426-27, 435 (1997) (noting that, in a case on liability for negligently inflicted emotional distress under the Federal Employers' Liability Act, "[t]he large number of those exposed and the uncertainties that may surround recovery also suggest ... the problem of 'unlimited and unpredictable liability'" (quoting Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 557 (1994))); Bowen v. Lumbermens Mut. Cas. Co., 517 N.W.2d 432, 437 (Wis. 1994) (citing the concern "that suits would be brought for trivial emotional distress more dependent on the peculiar emotional sensitivities of the plaintiff than upon the nature of the tortfeasor's conduct").

261. *See infra* Part II.C.

262. Goldberg & Zipursky, *supra* note 252, at 1668.

263. *See* Fletcher, *supra* note 17, at 231; Nichol, *supra* note 17, at 304-05; Sunstein, *supra* note 17, at 188-89.

standing inquiry remains in need of justification. The next Section considers and refutes several possible rationales.

C. Tangibility's Neighbors: Counting, Proving, and Paying for Harm

The previous Section argued that tangibility is not an inherent characteristic of economic and physical harm. It may nevertheless be contended that certain features of economic and physical harm render these types of harms more amenable to consideration as injury in fact and that the "tangible" label reflects this greater amenability. This Section examines three such features: commensurability with money, quantifiability, and susceptibility to evidentiary proof. This Section argues that the connection between these factors and economic and physical harm is not as close as it may seem, and the view that these factors should play a role in constitutional standing doctrine merits skepticism. There is, therefore, further reason to doubt that the distinction between tangible and intangible harm properly influences the shape of the standing inquiry.

1. Commensurability with Money

Tangible harms may be viewed as especially straightforward candidates for injury in fact on the basis that the loss of tangible goods is commensurable with money.[264] Goods commensurable with each other are here understood as goods the value of which "can comprehensibly be measured on a single scale."[265] Examples of goods sometimes considered incommensurable with money include life, friendship, beautiful features of the environment, art, education,[266]

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264. *Cf.* Kaminski, *supra* note 17, at 415 ("Information harms are certainly not 'concrete' in the sense that they are tangible things one can hold in one's hand or easily measure in dollars.").

265. ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 46 (1993).

266. *See* Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 785-90, 803-08 (1994). For a critique of the view that these types of values are truly incommensurable, see Eric A. Posner, *The Strategic Basis of Principled Behavior: A Critique of the Incommensurability Thesis*, 146 U. PA. L. REV. 1185, 1187-88 (1998). For a discussion of commensurability with money in the context of administrative agencies' treatment of dignity, see Rachel Bayefsky, Note, *Dignity as a Value in Agency Cost-Benefit Analysis*, 123 YALE L.J. 1732, 1766-70 (2014).

reputation, and emotional distress.[267] As Douglas Laycock has written, "[D]amages cannot replace a reputation once lost, or erase emotional distress once suffered."[268] Similar intuitions underlie judgments of incommensurability and judgments of intangibility: that people value certain experiences and relationships in ways different to the ways in which people value goods bought and sold on the marketplace, such that discussing the purchase of these incommensurable or intangible goods is somehow not fitting, or even debases the value of these goods.[269] The notion that intangibility is similar to incommensurability is also reflected in a dictionary definition of "tangible" as "capable of being appraised at an actual or approximate value."[270] Because the loss of money is commonly viewed as a real harm, the loss of goods commensurable with money might provide a way to identify clear candidates for injury in fact.

But not all harms considered tangible in the standing context are commensurable with money. In particular, significant aspects of physical harm are often considered incommensurable. As the commentary to the *Restatement (Second) of Torts* has stated,

> When ... the tort causes bodily harm or emotional distress, the law cannot restore the injured person to his previous position. The sensations caused by harm to the body or by pain or humiliation are not in any way analogous to a pecuniary loss, and a sum of money is not the equivalent of peace of mind.[271]

Even actual physical damage, independently of pain and suffering, is plausibly considered incommensurable.[272] Part of many people's uneasiness about creating a market for body parts stems from the sense that body parts are too closely "bound up with one's personhood"[273] to be bought and sold. Offering a person the opportunity to

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267. Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 744 (1990).

268. *Id.* (footnote omitted).

269. *See* Sunstein, *supra* note 266, at 816.

270. MERRIAM-WEBSTER DICTIONARY, *supra* note 235.

271. RESTATEMENT (SECOND) OF TORTS § 903 cmt. a (AM. LAW INST. 1979); *see also* Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56, 70 (1993) ("[T]he traditional legal position on pain and suffering seems committed to incommensurability.").

272. *See* Laycock, *supra* note 267, at 709 ("Plaintiffs cannot replace defective body parts.").

273. MARGARET JANE RADIN, CONTESTED COMMODITIES 126 (1996); *see id.* at 125-26 (noting, however, that "we cannot honor our intuitions of what is required for society to respect

cut off one's arm in exchange for a certain sum of money similarly raises the concern that physical integrity is not being valued in the proper way. If tangibility is related to commensurability with money, then physical harm may not be tangible.

It may be argued that calling physical harm incommensurable fails to account for people's real-world behavior.[274] In the course of everyday life, people reveal their willingness to pay certain amounts of money to avoid physical harm—as, for example, when they pay for safety equipment or buy cars with more advanced safety features.[275] Many people would also likely accept some amount of money in exchange for enduring some degree of physical harm. Moreover, juries award monetary damages for pain and suffering, over and above medical bills.[276] But if these practices weaken the basis for incommensurability in the case of physical harm, then the same is true for more traditionally "intangible" goods. Emotional harm can form the basis of damages awards,[277] and people are willing to pay to avoid emotional harm;[278] they might pay therapists, or take lower-paying jobs in order to avoid a hostile work environment. The possibility that people would pay to avoid harm or that courts would award damages in response to such harm does not clearly separate physical harm from the realm of the intangible.

More generally, considering the concept of commensurability highlights the difficulty of neatly categorizing harm into more solid and more nebulous varieties. Many legal interests, even those the infringement of which is routinely remedied with damages, are not wholly commensurable with money. Discrimination, torts such as assault and false imprisonment, the denial of labor protections, and health and safety violations include an "incommensurable" compo-

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personhood[ ] either by permitting sales [of body parts] or banning them"); *see also* Jesse Wall, *The Legal Status of Body Parts: A Framework*, 31 OXFORD J. LEGAL STUD. 783, 800 (2011) ("[T]he concern remains that human dignity is derogated when we make body parts commensurable with market values.").

274. *See* Posner, *supra* note 266, at 1188 (describing ways in which people actually make trade-offs between goods that may appear incommensurable).

275. *See, e.g.*, Henrik Andersson, *Consistency in Preferences for Road Safety: An Analysis of Precautionary and Stated Behavior*, 43 RES. TRANSP. ECON. 41, 41-42 (2013); Eric A. Posner & Cass R. Sunstein, *Dollars and Death*, 72 U. CHI. L. REV. 537, 551 (2005).

276. *See* DOBBS ET AL., *supra* note 219, § 47.

277. *Id.*; *see also id.* § 383.

278. *See* Hi Po Bobo Lau et al., *Quantifying the Value of Emotions Using a Willingness to Pay Approach*, 14 J. HAPPINESS STUD. 1543 (2013).

nent. Even economic opportunities that do not involve immediate pecuniary detriment could have incommensurable aspects, such as the assurance provided by owning a contractual right, or the suspense involved in owning a financial product with uncertain returns. The multifaceted nature of legally recognized harm poses challenges to efforts to categorize these harms into commensurable and incommensurable varieties, and it underscores the risk of oversimplification involved in assuming that certain types of harm are clear while others are "murky."[279]

Economic harm that consists of actual financial loss, or that possesses a value reducible to such a loss, is commensurable with money. Perhaps, then, only plaintiffs who demonstrate such harm should merit the judgment, by that showing alone, that their harm is concrete. The Supreme Court has not explicitly carved out financial loss as a distinctive category that can be proven "concrete" in a different or more straightforward way, and the view that financial loss is always harmful should not be taken for granted, as discussed below.[280] Most pertinent to the analysis of tangibility, the meaningfulness of tangibility as a factor in constitutional standing analysis would be diminished if "tangible" did not include physical harm—that is, perceptible harm to parts of the body. Such a move would signal that the tangible/intangible distinction in constitutional standing doctrine had assumed a technical signification substantially distinct from the broader understanding of the term, and it is unclear what value this distinction would add.

Therefore, in searching for ways to comprehend and operationalize the Supreme Court's invocation of tangibility in *Spokeo*, there are limits to what a focus on commensurability with money can achieve. Further, the relationship between commensurability and tangibility highlights ways in which apparently solid and material forms of harm—specifically, physical harm—contain features associated with more ethereal harms related to the human psyche.

279. Robins v. Spokeo, Inc., 867 F.3d 1108, 1112 (9th Cir. 2017) (referring to the concreteness inquiry for intangible harm as a "somewhat murky area"), *cert. denied*, 138 S. Ct. 931 (2018).

280. *See infra* Part II.C.3.

2. Quantifiability

This Subsection challenges another possible reason to apply a more rigorous concreteness inquiry to intangible harm: the view that tangible harm is quantifiable. Quantifiability is here understood as the ability to assign a numerical value to the magnitude of harm; this is not equivalent to monetization, or the assignment of a monetary value, but rather involves the ability to capture a concept using a numerical benchmark.[281] For example, even if pain does not have a precise monetary value, a numerical ranking could be assigned to the intensity of pain.[282]

The concept of quantifiability underlies, in certain contexts, the distinction between tangible and intangible harm. A notable example comes from *Brown v. Board of Education*, in which the Supreme Court held that racial segregation in public schooling, despite equality in "tangible" factors, was unconstitutional.[283] The "tangible" factors mentioned in *Brown* and an earlier Supreme Court desegregation decision, *Sweatt v. Painter*,[284] included "buildings, curricula, qualifications and salaries of teachers,"[285] and "number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities."[286] These tangible factors appear to be quantifiable even if some of them, such as "availability of law review,"[287] "opportunity for specialization,"[288] and "qualifications ... of teachers"[289] are not commensurable with money. According to the Court, "intangible" factors encompassed "reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige."[290] The Court

281. On the distinction between quantification and monetization, see, for example, Cass R. Sunstein, *The Limits of Quantification*, 102 CALIF. L. REV. 1369, 1382 (2014); *see also* Bayefsky, *supra* note 266, at 1737 n.10.

282. But see *infra* note 298 and accompanying text regarding difficulties in ranking pain in this manner.

283. 347 U.S. 483, 492, 495 (1954).

284. 339 U.S. 629, 635 (1950).

285. *Brown*, 347 U.S. at 492.

286. *Sweatt*, 339 U.S. at 633-34.

287. *Id.*

288. *Id.* at 633.

289. *Brown*, 347 U.S. at 492.

290. *Sweatt*, 339 U.S. at 634.

indicated that intangible qualities are "incapable of objective measurement," further suggesting a connection between quantifiability and tangibility.[291]

Courts and commentators have connected quantifiability and tangibility in legal contexts other than equal protection,[292] and a dictionary definition of "intangible" as "of a value not precisely measurable"[293] is reminiscent of quantifiability, though also of commensurability with money. While the Supreme Court has not explicitly endorsed quantifiability as a factor in constitutional standing analysis, quantifiability might be thought to support the application of a more straightforward standing inquiry to physical and economic harm. For instance, quantifiable harm may be viewed as more suitable for judicial redress because there is a clear limit on the amount of harm that needs to be remedied.[294]

A difficulty with this suggestion is that physical and economic harms are not consistently quantifiable. The pain and suffering resulting from, or constituting part of, physical harm is hard to quantify. In fact, Stanley Ingber has written that "[p]ain and suffering is essentially the prototype of a nontransferable, nonquantifiable injury."[295] The difficulty in quantifying pain and suffering may

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291. *Id.*

292. *See* Mote v. City of Chelsea, No. 16-11546, 2018 WL 262855, at *19 (E.D. Mich. Jan. 2, 2018) ("The Supreme Court has held that even unquantifiable and intangible harms may qualify as injuries in fact."); Hossfeld v. Compass Bank, No. 2:16-CV-2017-VEH, 2017 WL 5068752, at *3 n.5 (N.D. Ala. Nov. 3, 2017) ("Tangible harms are injuries that are subject to a more objective measurement such as 'financial, property, or physical harms.'" (quoting Ferrill v. Parker Grp., Inc., 168 F.3d 468, 476 (11th Cir. 1999))); State v. Landrum, 832 P.2d 1359, 1363 (Wash. Ct. App. 1992) (stating that mental anguish and pain and suffering "are intangible in that they are not capable of being quantified with exactness"); Hsu, *supra* note 179, at 468 (arguing that the injury-in-fact requirement reflects a bias that "favor[s] tangible, economic harms over less tangible, less measurable harms"); Kaminski, *supra* note 17, at 414 ("Courts, desperate to find something tangible, sometimes resort to looking to more measurable proxies for injury.").

293. *Intangible*, ENG. OXFORD LIVING DICTIONARIES, https://en.oxforddictionaries.com/definition/intangible [https://perma.cc/JM2C-GA5H]. The full definition, however, is "not constituting or represented by a physical object and of a value not precisely measurable." *Id.*

294. *See, e.g.*, Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 557 (1994) (noting that "the specter of unpredictable and unlimited liability" underlies courts' reluctance to recognize emotional harm claims).

295. Ingber, *supra* note 200, at 774; *see also, e.g.*, Munn v. Hotchkiss Sch., 795 F.3d 324, 336 (2d Cir. 2015) (noting that "pain and suffering are difficult to quantify"); Champion v. Outlook Nashville, Inc., 380 F.3d 893, 907 (6th Cir. 2004) ("One simply cannot quantify the mental and physical pain and suffering such an experience would cause." (quoting Bickel v.

be viewed as a challenge in deriving a monetary equivalent, along the lines of incommensurability. But this challenge itself reflects the problems inherent in breaking down pain and suffering into fixed quanta of injury.

One might argue that it is possible to rate the intensity of pain on a numerical scale. For example, medical practitioners rate pain on a scale of 0 to 10,[296] and such ratings are used as part of medical evaluations of Social Security disability claimants.[297] First, however, assigning a standardized number to the pain that different individuals experience remains fraught with difficulty.[298] Second, harm that is apparently "intangible" can also be measured in a rough sense. For example, emotional distress is frequently viewed as a paradigmatic form of intangible harm.[299] Nevertheless, tools have been developed to measure the severity of various kinds of emotional distress—though, as with physical pain, there are difficulties in making standardized measurements across different individuals.[300] The overall point is that the possibility of quantifying aspects of pain and suffering does not differentiate physical and economic harm from other types of harm.

Economic loss may seem to present an easier case for quantifiability, but this association is not so strong as initially meets the eye. Economic loss in uncertain quantities may not be measurable at the

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Korean Air Lines Co., 96 F.3d 151, 156 (1995))).

296. *See* Smith v. Hunt, 707 F.3d 803, 814 (7th Cir. 2013) (Wood, J., concurring in the judgment); Erin E. Krebs et al., *Accuracy of the Pain Numeric Rating Scale as a Screening Test in Primary Care*, 22 J. GEN. INTERNAL MED. 1453, 1453 (2007).

297. *See, e.g.*, Goins v. Colvin, 764 F.3d 677, 678-79 (7th Cir. 2014) (reporting such pain ratings); 20 C.F.R. § 404.1529(c)(3)(ii) (2012) (factors considered in assessing disability include "[t]he location, duration, frequency, and intensity of [the claimant's] pain or other symptoms").

298. *See, e.g.*, Marcel Dijkers, *Comparing Quantification of Pain Severity by Verbal Rating and Numeric Rating Scales*, 33 J. SPINAL CORD MED. 232, 241 (2010) ("[Spinal cord injury] researchers and clinicians should be aware of the limitations of the various instruments used for operationalizing pain severity and make decisions accordingly.").

299. *See, e.g.*, FAA v. Cooper, 566 U.S. 284, 294 n.4 (2012) ("If 'actual damages' can mean 'tangible damages,' then it can be construed not to include intangible harm, like mental and emotional distress."); DOBBS ET AL., *supra* note 219, § 3 (referring to "emotional security and other intangible interests").

300. *See, e.g.*, Paul A. Pilkonis et al., *Item Banks for Measuring Emotional Distress from the Patient-Reported Outcomes Measurement Information System (PROMIS®): Depression, Anxiety, and Anger*, 18 ASSESSMENT 263, 263-64 (2011); Marsha L. Richins, *Measuring Emotions in the Consumption Experience*, 24 J. CONSUMER RES. 127, 127-30 (1997) (describing ways to measure emotion and their limitations).

outset of a lawsuit, when standing must be present.[301] For example, courts grant preliminary injunctions on the basis of findings that plaintiffs will be irreparably harmed because the plaintiffs' claimed harms will not be "fully compensable by monetary damages," and "an injury is not fully compensable by money damages if the nature of the plaintiff's loss would make the damages difficult to calculate."[302] Examples of commercial cases in which "damages are hard to measure" include those involving lost profits, breaches of covenants not to compete, and misappropriation of trade secrets.[303] As Robert Rabin has written—noting, for instance, that future economic loss resulting from an injury "in an early stage of apparently promising professional development involves highly imprecise estimation of future lost earnings"—it is an "illusion" that "there is a sharp distinction between noneconomic and economic loss on the dimension of precision in valuation."[304] The difficulty in quantifying certain types of economic harm highlights the variety and internal complexity of this type of damage.

Perhaps economic harm can *theoretically* be quantified, even if not at a specific point in time.[305] This point should not be taken too far, because aspects of, say, reputational and emotional harm can theoretically be quantified in certain respects. One might ask, for instance, how many people have been exposed to negative statements or how debilitating a mental illness has been.

But even if economic harm can theoretically be quantified with greater precision than other types of harm, the fundamental ques-

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301. *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180 (2000).

302. Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp., 511 F.3d 535, 550 (6th Cir. 2007) (first quoting Overstreet v. Lexington-Fayette Urban Cty. Gov't, 305 F.3d 566, 578 (6th Cir. 2002); and then quoting Basicomputer Corp. v. Scott, 973 F.2d 507, 511 (6th Cir. 1992)).

303. Laycock, *supra* note 267, at 711-14.

304. Robert L. Rabin, *Pain and Suffering and Beyond: Some Thoughts on Recovery for Intangible Loss*, 55 DEPAUL L. REV. 359, 362 (2006); *see also* Ingber, *supra* note 200, at 779 ("[D]amages for lost future wages, often viewed as tangible, economic losses, are also uncertain and a matter of conjecture.").

305. In fact, it is not clear that economic harm is always quantifiable in a sense that has practical value. The economic loss attending breach of a contract that would have entitled a party to a stream of revenue extending in perpetuity but pegged to a fluctuating future benchmark may not be quantifiable except from "the perspective of eternity," which may not be of much practical use. (The phrase "the perspective of eternity" is used in a different context in RAWLS, *supra* note 195, at 587.)

tion is whether the quality of "theoretical quantifiability" is of legal or normative significance. Why should the fact that harm is easier to measure in numerical terms play any role in that harm's treatment in standing doctrine?

A harm does not become more likely to "actually exist"[306] simply because it is more easily broken down into numbers. Harms whose magnitude can be measured only approximately, such as emotional distress, reputational harm, and stigma, are familiar to us as genuine and consequential from everyday life.[307] In fact, one of *Brown*'s fundamental lessons is that features of people's experiences that are "incapable of objective measurement"[308] can play just as significant a role in ensuring equal citizenship as the "tangible" factors. The *Spokeo* Court may have gestured toward this point in explicitly stating that intangible harm can be concrete.[309] But it is also unclear why a harm more difficult to break down into numbers requires more validation by history or congressional judgment to ascertain its reality.

It may be contended that quantifiability matters because quantifiable harms are easier to particularize. A harm that is difficult to quantify, such as stigmatic harm, may be more likely to be spread among many people in a way that raises suspicions about a suit by "ideological plaintiffs"[310] instead of by individuals who have been personally injured.[311] Yet quantifiable harms can be widely spread, as with a tax paid by every citizen. Moreover, given that *Spokeo* emphasized the distinction between particularity and concreteness,[312]

306. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016).

307. *See* Healy, *supra* note 154, at 459 ("Even the Court does not appear to deny that stigmatic harm is real."); *see also* Bayefsky, *supra* note 28, at 1592 (discussing the reality of psychological harm).

308. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (quoting Sweatt v. Painter, 339 U.S. 629, 634 (1950)).

309. *Spokeo*, 136 S. Ct. at 1549.

310. Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1030, 1040 (1968).

311. *See, e.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 575 (1992) (noting that "a suit rested upon an impermissible 'generalized grievance,' and was inconsistent with 'the framework of Article III' because 'the impact on [plaintiff] is plainly undifferentiated and "common to all members of the public."'" (alteration in original) (quoting United States v. Richardson, 418 U.S. 166, 176-77 (1974))).

312. *See Spokeo*, 136 S. Ct. at 1548.

the idea that quantifiable harm is easier to particularize may not be a suitable factor in courts' assessments of concreteness.

Quantifiability may also be valued as a way to identify types of claims that are easier for courts to administer, especially when courts award monetary damages. For instance, quantifiability might prevent "infinite liability"[313] because the amount of potential damages would be capped. As an initial response, much of the controversy surrounding *Spokeo* involves statutes that provide for capped statutory damage awards if a plaintiff cannot show actual damages.[314] So the amount of liability in these cases would not be limitless, although defendants would still face the prospect of significant liability to a class.[315] More generally, federal courts have substantial experience adjudicating cases involving harms with components that are difficult to quantify, such as those stemming from constitutional rights violations and discrimination. Challenges in the quantification of harm do not stymie a court's ability to administer a claim.

Another possible view is that quantifiability matters to the standing analysis because quantifiable harms are easier to prove. The idea is that if units of harm can be counted, then the existence or nonexistence of the harm will be more straightforward to gauge. First, however, the mere fact of being able to be counted does not render harm more easily recognizable; another person's disgust, for instance, can sometimes be readily ascertained even if it is difficult to put a number to the emotion. Second, even if harms that can be counted are easier to recognize, there is a question why the ease with which harm can be proven is relevant to courts' assessment of the harm's concreteness for standing purposes. The next Subsection takes up this issue.

3. Susceptibility to Evidentiary Proof

This Subsection challenges the view that the relative ease of proving the existence of tangible harm justifies a smoother path to cognizability for physical and economic harm. *Spokeo*'s statement

313. Thing v. La Chusa, 771 P.2d 814, 819 (Cal. 1989).

314. *See Spokeo*, 136 S. Ct. at 1545 (statutory damages of $100 to $1000 per violation of the Fair Credit Reporting Act); Morley, *supra* note 28 (manuscript at 8).

315. Morley, *supra* note 28 (manuscript at 11).

that "tangible injuries are perhaps easier to recognize"[316] suggests that evidentiary considerations play some role, even implicitly, in courts' distinctions between tangible and intangible harm. The link between tangibility and evidentiary factors derives support from such understandings of "tangible" as "[p]ossible to understand or realize"[317] and "[c]apable of being touched and seen."[318] If tangible harm is easier to prove, then the validation of history and congressional judgment may not be needed to ascertain tangible harm's reality.

Yet it is worth questioning the link between tangibility and evidentiary proof. Nonphysical and noneconomic harms can be proven, especially if the task is to prove the existence of harm rather than the precise quantity of harm. For instance, while emotional distress has often raised concerns about proof,[319] it is intuitive that people who face certain situations would undergo emotional distress. As a leading torts treatise has stated:

> [I]n most cases the reality or existence of the [emotional] distress is not in doubt. If you are seriously threatened with future harm by a hostile group of masked men who gather around you in a circle, the rest of us should not doubt that you suffered fear.[320]

In addition, medical practitioners diagnose and treat psychiatric illnesses involving emotional distress, and expert witnesses testify regarding the nature and extent of plaintiffs' emotional distress.[321]

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316. *Spokeo*, 136 S. Ct. at 1549.

317. AM. HERITAGE DICTIONARY ENG. LANGUAGE, *supra* note 148.

318. *Tangible*, BLACK'S LAW DICTIONARY, *supra* note 235.

319. *See, e.g.*, Metro-N. Commuter R.R. v. Buckley, 521 U.S. 424, 433 (1997) (suggesting that there is a "special 'difficult[y] for judges and juries' in separating valid, important [emotional harm] claims from those that are invalid or 'trivial.'" (quoting Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 557 (1994))); Betsy J. Grey, *The Future of Emotional Harm*, 83 FORDHAM L. REV. 2605, 2608 (2015) (noting that skepticism about emotional harm tort claims has been fueled in part by "the need to curtail fraudulent claims").

320. *See* DOBBS ET AL., *supra* note 219, § 383; *see also* Goldberg & Zipursky, *supra* note 252, at 1678-79 ("The fraud objection to general recovery for negligent infliction of emotional distress is unpersuasive for several reasons.").

321. *See* Travers v. Flight Servs. & Sys., Inc., 808 F.3d 525, 541 n.10 (1st Cir. 2015) ("[E]xpert testimony ... is useful but not essential to support an award of emotional distress damages." (omission in original) (quoting Boston Pub. Health Comm'n v. Mass. Comm'n Against Discrimination, 854 N.E.2d 111, 117 (Mass. Ct. App. 2006))).

Techniques are being developed to apprehend emotional trauma through neuroimaging, such as tests that reveal increases in brain activity associated with post-traumatic stress disorder.[322] While these methods of ascertaining emotional distress are not exact sciences, they demonstrate that emotional harm can be proven.[323]

Loss of reputation, too, is often considered an intangible harm.[324] Yet juries award actual damages for reputational harm in defamation cases even if such damage cannot be precisely quantified.[325] Some jurisdictions permit reputational damages to be "presumed"—that is, awarded without proof of injury—in certain types of cases, such as those in which people are reported to have committed a serious crime or to have a "loathsome disease."[326] But this practice does not undermine the point that reputational harm can, in other cases, be proven in court. In particular, the difficulty of quantifying reputational harm with specificity does not mean that the bare existence of such harm cannot be readily ascertained. This is a broader point: difficulties in quantifying the amount of harm to, for example, reputation or the psyche do not prevent plaintiffs from showing that some harm occurred.

It may be argued that tangible harm is *easier* to prove, even if intangible harm *can* be proven. But this point is doubtful when the relevant harm is *injuria*—the legal violation itself—rather than the downstream *damnum*, or factual harm.[327] "Proving" injury in fact in

322. Grey, *supra* note 319, at 2629-34; *see also* Erica Goldberg, *Emotional Duties*, 47 CONN. L. REV. 809, 826-31 (2015); Katherine C. Hughes & Lisa M. Shin, *Functional Neuroimaging Studies of Post-Traumatic Stress Disorder*, 11 EXPERT REV. OF NEUROTHERAPEUTICS 275 (2011).

323. *See* Goldberg & Zipursky, *supra* note 252, at 1679 ("[A]s to particular emotional harms for particular individuals, it is today possible to utilize specialists in psychiatry and psychology who are generally capable of ascertaining, at least to some degree, the extent of emotional damage.").

324. *See, e.g.*, WWP, Inc. v. Wounded Warriors Family Support, Inc., 628 F.3d 1032, 1044 (8th Cir. 2011); Goldberg & Zipursky, *supra* note 252, at 1689 (referring to "the intangible predicate harm of reputational damage").

325. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) (noting that the "actual harm[s] inflicted by defamatory falsehood include impairment of reputation and standing in the community," and that "all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury"); RESTATEMENT (SECOND) OF TORTS § 621 (AM. LAW INST. 1977).

326. Liberman v. Gelstein, 605 N.E.2d 344, 347 (N.Y. 1992). The Supreme Court has, however, imposed constitutional limits on presumed damages. *See Gertz*, 418 U.S. at 349.

327. *See supra* Part I.B.

Pleasant Grove City v. Summum,[328] the free speech case that *Spokeo* cited as an example of concrete intangible harm,[329] would not have involved an in-depth evidentiary determination. Rather, the Supreme Court in *Summum* appeared to assume that the plaintiffs had standing (without explicitly discussing standing) because the plaintiffs wanted to erect a monument in a city park and were told that they could not.[330] Similarly, a plaintiff can meet the threshold for constitutional standing in free exercise cases by "alleg[ing] that his or her own 'particular religious freedoms are infringed,'"[331] for instance by claiming that a church was "barred from assembling for religious worship on [a] [p]roperty" because the church was not granted a zoning variance.[332] These facts are not difficult to prove, even if there are thorny questions about whether the challenged conduct violated the Constitution. Nevertheless, the impairment of some economic and physical interests may well be easier to prove than the loss of certain noneconomic and nonphysical interests. This observation should not, however, necessarily translate into a smoother path for the cognizability of physical and economic harm.

To elaborate, proving that a phenomenon *occurred* is not the same as proving that the phenomenon was a *harm*. Controversy about intangible harm as injury in fact, for example, often centers on the recognition of small and apparently trivial "intangible" legal violations, as suggested by *Spokeo*'s example of an incorrect zip code[333] or cases on the receipt of unwanted faxes[334] or minor deviations from statutorily required disclosures.[335] In these cases, plaintiffs have little trouble showing that a given phenomenon—for instance, the dissemination of an incorrect zip code—occurred; the issue is whether the phenomenon was harmful. But the same point applies

328. 555 U.S. 460 (2009).

329. *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016).

330. *See Summum*, 555 U.S. at 465.

331. Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275, 292 n.25 (5th Cir. 2001) (quoting Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 224 n.9 (1963)).

332. Primera Iglesia Bautista Hispana of Boca Raton, Inc., v. Broward County, 450 F.3d 1295, 1304 (11th Cir. 2006).

333. *Spokeo*, 136 S. Ct. at 1550. The proposition that incorrect zip codes cause no cognizable harm is subject to question. Employers or social acquaintances could form judgments about people based on where they live, or mail might be sent to an incorrect address. I thank Vicki Jackson for raising this point.

334. *See supra* Part I.D.

335. *See, e.g.*, Dreher v. Experian Info. Sols., Inc., 856 F.3d 337, 346 (4th Cir. 2017).

to small amounts of economic or physical damage, such as the loss of a few cents[336] or a tiny scratch on the skin. Proof that these phenomena happened does not amount to proof that these phenomena were harmful. (Perhaps the plaintiff was better off not having small change weighing down her wallet.) Broadening the lens to more weighty harms, it is not necessarily easier to show that the loss of money or bodily damage caused genuine injury to plaintiffs than to make this showing for some apparently intangible occurrences, such as discriminatory comments likely to create stigma or a reduction in the aesthetic qualities of a wilderness area that a nature lover frequents.

The question of whether evidentiary factors justify a distinction between tangible and intangible harm depends on the phenomenon for which evidentiary proof is sought.[337] If the phenomenon is the occurrence of genuine harm, then the relative ease of proving economic loss or physical damage does not necessarily correlate with the presence of injury in fact. Moreover, the interest in ensuring that plaintiffs prove they have suffered harm does not mandate a distinctive analysis for intangible harm at the stage of the threshold standing determination. Plaintiffs, after all, bear the burden of showing injury in fact "with the manner and degree of evidence required at the successive stages of the litigation."[338] Plaintiffs could thus be required to prove during the course of litigation that they have suffered harm—by offering, say, evidence of reputational or emotional damage.[339] It may be argued that a more searching concreteness inquiry for intangible harm will help to weed out frivolous claims early in the litigation,[340] but this view requires an unjustified assumption that allegations of intangible harm are more likely to be frivolous.

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336. In fact, courts are willing to credit minute economic losses as cognizable injury in fact. *See, e.g.*, Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 983 (2017) ("For standing purposes, a loss of even a small amount of money is ordinarily an 'injury.'" (citing McGowan v. Maryland, 366 U.S. 420, 430-31 (1961))).

337. I am grateful to Richard Fallon for making this point.

338. Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992).

339. *See, e.g.*, DOBBS ET AL., *supra* note 219, § 574 (describing "factors [that] bear on the assessment of reputational loss"); 136 AM. JUR. 3D *Proof of Facts* § 18 (2013) (describing means of proving severe emotional distress).

340. *Cf.* Metro-N. Commuter R.R. Co. v. Buckley, 521 U.S. 424, 436 (1997) ("[T]he common law in this area does not examine the genuineness of emotional harm case by case.").

In fact, evidentiary considerations might not be as influential in standing determinations as they may appear. As now-Judge William Fletcher has argued, "If we put to one side people who lie about their states of mind, we should concede that anyone who claims to be injured is, in fact, injured if she can prove the allegations of her complaint."[341] Courts are understandably reluctant to call plaintiffs "liar[s]," in Eugene Kontorovich's terms,[342] and not only because doing so might be unseemly. The concern in some cases in which plaintiffs claim to have suffered intangible harm seems to be less that plaintiffs are fraudulently inventing injuries than that the recognition of plaintiffs' injuries would lack a limiting principle. For example, the Supreme Court, in deciding that plaintiffs lacked standing to bring an Establishment Clause challenge against the government's transfer of land to a religious institution, acknowledged that the plaintiffs were "firmly committed to the constitutional principle of separation of church and State, but standing is not measured by the intensity of the litigant's interest."[343] The Court noted that if it were to accept that these plaintiffs had suffered an injury,

> [A] principled consistency would dictate recognition of [plaintiffs'] standing to challenge execution of every capital sentence on the basis of a personal right to a government that does not impose cruel and unusual punishment, or standing to challenge every affirmative-action program on the basis of a personal right to a government that does not deny equal protection of the laws, to choose but two among as many possible examples as there are commands in the Constitution.[344]

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341. Fletcher, *supra* note 17, at 231.

342. Eugene Kontorovich, *What Standing Is Good for*, 93 VA. L. REV. 1663, 1673 (2007) ("As Judge Fletcher has written, to say that a plaintiff who feels injured does not have a cognizable injury in fact is to call him a liar.").

343. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 486 (1982).

344. *Id.* at 489 n.26; *see also* Allen v. Wright, 468 U.S. 737, 755-56 (1984) (expressing concern that if an "abstract stigmatic injury" based on the "grant of a tax exemption to a racially discriminatory school" were recognized, "[a] black person in Hawaii could challenge the grant of a tax exemption to a racially discriminatory school in Maine"); Healy, *supra* note 154, at 472-73 (discussing the concern about "[o]pening the [f]loodgates" in the context of the recognition of stigmatic harm).

The concern about the potential for unrestricted standing reflects both an interest in maintaining the separation of powers—in the sense that citizens' political opposition to government actions should not be channeled into the courts—and a reluctance to permit too high a volume of lawsuits.[345] The next Part addresses both issues, arguing that the distinction between tangible and intangible harm, and the concreteness requirement more broadly, are not needed to achieve an appropriate balance between preserving the separation of powers and conserving judicial resources, on the one hand, and ensuring adequate access to the federal courts, on the other. The current Section, for its part, has drawn attention to the limits of evidentiary considerations, along with judgments of incommensurability and quantifiability, in informing how harms should be categorized for the purposes of undertaking the standing inquiry.

III. BEYOND CONCRETENESS AND TANGIBILITY

Thus far, this Article has analyzed courts' turn to the categories of tangible and intangible harm as a way to operationalize the Supreme Court's renewed emphasis on the concreteness of harm in *Spokeo*. The tangible/intangible distinction, this Article has argued, is a normative rather than an empirical boundary that represents an attempt to delineate human interests the infringement of which clearly legitimizes the imposition of judicial remedies by the federal courts. This distinction, however, results in contestable judgments about citizens' essential interests; oversimplifies economic and physical harm; and places undue weight on characteristics such as commensurability with money, quantifiability, and susceptibility to evidentiary proof, which do not function well as proxies for cognizable harm. What follows, then, for the Supreme Court's constitutional standing jurisprudence? In particular, what would be a better path?

At the outset, a prominent critique of the Supreme Court's standing jurisprudence, expressed famously by now-Judge Fletcher, is that courts should not inquire into the presence of injury *in fact*, but should instead ascertain whether a plaintiff has presented a viable

345. Morley, *supra* note 28 (manuscript at 24) (portraying *Spokeo* as "an act of judicial self-defense" designed to ease the burden of "chronically overcrowded dockets and incessant delays").

cause of action.[346] This is a plausible response to the challenges and inconsistencies that courts have encountered in applying the concept of "concrete and particularized" injury—challenges and inconsistencies that are likely to grow with the incorporation of tangibility into standing analysis. Yet the injury-in-fact requirement has persisted despite long-standing academic critique,[347] and it is worth considering why this is, and how to proceed in light of this doctrinal entrenchment. The rest of this Part proceeds in that spirit.

A. The Standing Balance

Constitutional standing doctrine involves, this Section indicates, a balance between competing values, including the separation of powers and the conservation of judicial resources, on the one hand, and the role of the federal courts in addressing legal violations and articulating legal principles, on the other. This Section argues that the tangible/intangible distinction, and the requirement that injury in fact be concrete independent of being particularized, are not needed to promote a suitable balance among these values. Specifically, the Section casts doubt on the extent to which preserving the separation of powers supports either the tangible/intangible distinction or an independent concreteness requirement. The Section also argues that the goal of preserving judicial resources does not justify these features of standing doctrine.

To elaborate, the most prominent justification for standing doctrine in its current form is the separation of powers.[348] Heather Elliott and F. Andrew Hessick have separately catalogued various separation of powers rationales for standing doctrine: ensuring that courts maintain their historical role of deciding disputes between

346. *See* Fletcher, *supra* note 17, at 223; Sunstein, *supra* note 17, at 166-67; *see also* James E. Pfander, *Standing to Sue: Lessons from Scotland's* Actio Popularis, 66 DUKE L.J. 1493, 1503 (2017) ("Much has been said in the United States about whether to make the standing inquiry part of an evaluation of the merits of the plaintiff's claim or to preserve it as a threshold inquiry separate from the merits.").

347. *See* Heather Elliott, *Congress's Inability to Solve Standing Problems*, 91 B.U. L. REV. 159, 161-62 (2011).

348. *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1551 (2016) (Thomas, J., concurring); Lujan v. Defs. of Wildlife, 504 U.S. 555, 580-81 (1992) (Kennedy, J., concurring in part and concurring in the judgment).

adverse parties;[349] preventing courts from intruding on the lawmaking and law enforcement prerogatives of Congress and the executive branch;[350] and bolstering judicial legitimacy by "establishing for the public that courts act out of necessity to protect individual interests instead of out of the judges' desire to achieve particular policy goals."[351]

The extent to which standing doctrine furthers certain separation of powers interests has been challenged,[352] and below this critique is extended to the Supreme Court's recent invocation of tangibility.[353] The point for now is that the concreteness requirement can be cast as a way to ensure that federal courts stay within proper bounds by exercising remedial authority to redress only "real" harm.[354] The tangibility concept ostensibly permits courts to avoid contestable inquiries into concreteness for human interests viewed as uncontroversially legitimate, while maintaining judicial control over the recognition of more amorphous, and—in the eyes of some—less significant types of harm.[355]

Beyond the separation of powers, another cluster of concerns to which concreteness and tangibility respond are problems about the management of the federal courts and the scope of judicial remedies. Standing doctrine has been defended on the ground that it stems the flow of lawsuits and thereby helps to conserve judicial resources,[356] and the concreteness requirement strengthens the courts'

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349. *See* Elliott, *supra* note 17, at 461; Fallon, *supra* note 27, at 1066; Hessick, *supra* note 36, at 684-85.

350. *See* Elliott, *supra* note 17, at 462-63; Hessick, *supra* note 36, at 691-93.

351. Hessick, *supra* note 36, at 694. For illuminating discussions of different concepts of judicial legitimacy, see, for example, Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1789, 1813-39 (2005); and Jackson, *supra* note 37, at 176. The term "legitimacy" is here used largely to capture citizens' views that the exercise of judicial power is justified, akin to Fallon's conception of "sociological legitimacy." Fallon, *supra*, at 1795-96, 1828. As Fallon notes, sociological legitimacy, while by no means coextensive with moral legitimacy, "is also likely to depend partly on the public's moral views." *Id.* at 1849.

352. *See* Elliott, *supra* note 17, at 485-86.

353. *See infra* Part III.B.

354. *See, e.g.*, Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 221 (1974) ("[C]oncrete injury removes from the realm of speculation whether there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party.").

355. *See infra* Part III.B.

356. *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 191 (2000) ("Standing doctrine functions to ensure, among other things, that the scarce resources

gatekeeper role in performing this task. The treatment of certain harms as tangible could be thought to identify suits in which the need for judicial intervention to prevent harm is most evident, and the application of the "intangible" label to other harms could permit courts to decide that certain injuries are too insignificant to jump-start the machinery of federal adjudication. Michael Morley has written, for instance, that *Spokeo* is "an act of judicial self-defense" that is "designed solely to weed out the legal detritus from federal dockets" in order to ease the burden of "chronically overcrowded dockets and incessant delays" and to "focus [courts'] resources on litigants who need them most: those who have suffered concrete injuries."[357] In this way, tangibility and concreteness can be viewed as ways to further the separation of powers while advancing the administrability of judicial processes.

But the tangible/intangible distinction, when scrutinized more closely, creates certain problems for the separation of powers. This distinction, the Article has suggested, does not simply follow from the nature of tangibility; rather, the line shifts based on legal context and requires courts to make contestable judgments about which kinds of harm are susceptible to, and worthy of, remediation in the federal courts. In the aftermath of *Spokeo*, some courts have been charged with gauging the likelihood that the harms Congress sought to prevent will actually be prevented through the measures that Congress devised, or that the harms that Congress sought to prevent are genuine concerns.[358] Standing doctrine, in this iteration, does not function as a source of judicial constraint. Rather, it encourages an understanding of courts' standing determinations as forms of judicial overreach and poses problems for judicial legitimacy.[359]

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of the federal courts are devoted to those disputes in which the parties have a concrete stake."); Gubala v. Time Warner Cable, Inc., 846 F.3d 909, 912 (7th Cir. 2017) ("The standing rule reduces the workload of the federal judiciary"); Morley, *supra* note 28 (manuscript at 24) ("*Spokeo* is designed solely to weed out the legal detritus from federal dockets."); Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 452 (1994) ("To further reduce the workload of the federal judiciary, the Court began to maintain that justiciability was a constitutional barrier.").

357. Morley, *supra* note 28 (manuscript at 24).

358. *See supra* Part I.D.

359. For discussions of the relationship between standing determinations and judicial legitimacy, see Hessick, *supra* note 36, at 696-97; Jackson, *supra* note 37, at 176-78; and

Legitimacy concerns also counsel against accepting one variation of the argument for the concreteness requirement grounded in resource constraints, namely that this requirement curbs consumer class action lawsuits against companies for violating "procedural" statutory requirements.[360] The argument is that these suits do not serve to redress any actual harm that plaintiffs have suffered, but instead line the pockets of plaintiffs' attorneys and induce defendants to settle through the *in terrorem* effect of classwide statutory damages and attorneys' fees.[361] From the perspective of judicial restraint, this argument would be better addressed to Congress in the form of a request to change the law than as a view that courts should exclude such cases on standing grounds. As Vicki Jackson has noted, "[J]usticiability decisions [that] sweep broadly to close courthouse doors, and do not rest soundly on core principles," can "pose threats to judicial legitimacy."[362]

It remains true that the concreteness requirement, and the application of a distinctive standing analysis to intangible harm, could help to limit the number of lawsuits. This development could further the timely resolution of appeals and, perhaps, enhance the depth of reasoning in judicial opinions. The "overcrowded dockets" argument, however, should not function as a trump card.[363] As an initial matter, the possibility that dubious claims will drain judicial resources can be alleviated through a targeted discovery process in

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Nichol, *supra* note 17, at 331-32; *see also* Fletcher, *supra* note 17, at 233 ("[T]he 'injury in fact' test is a form of substantive due process."); Sunstein, *supra* note 17, at 187-88 (critiquing a "private law model of standing" as reflecting a discredited "*Lochner*-like conception of public law").

360. *See* Morley, *supra* note 28 (manuscript at 24).

361. *See id.*; *see also* Devin Chwastyk, NcNees Wallace & Nurick LLC, *Post-'Spokeo' Standing for Consumer Class Actions a Struggle*, JD SUPRA (Feb. 14, 2017), https://www.jd.supra.com/legalnews/post-spokeo-standing-for-consumer-class-86381 [https://perma.cc/V7E8-VSHY] ("[W]hether federal plaintiffs need only allege a bare violation of a consumer protection statute ... is particularly relevant in consumer protection class actions, where the award of even modest statutory damages to a putative class, together with attorney's fees, creates strong incentives for defendants to settle.").

362. Jackson, *supra* note 37, at 177.

363. *See* Healy, *supra* note 154, at 473 (arguing that the possibility of frivolous lawsuits should not deter courts from recognizing stigmatic harm as injury in fact). For a nuanced yet skeptical evaluation of certain arguments based on the "floodgates of litigation," see Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. 1007, 1056-73 (2013); *see also* Toby J. Stern, Comment, *Federal Judges and Fearing the "Floodgates of Litigation,"* 6 U. PA. J. CONST. L. 377, 396-405 (2003).

particular cases,[364] or more general discovery reforms,[365] instead of raising the cognizability threshold for a variety of disparate types of claims.

More fundamentally, courts do not have sole authority over the allocation of judicial resources. Congress is entitled to take action that increases the amount of litigation in federal courts; Congress may, for instance, create new causes of action that spawn litigation.[366] The judgment that increased delay in the adjudication of cases, or a reduced amount of time spent on each case, or simply a higher judicial workload, is the price to pay for increased access to the courts, is one that Congress can at least participate in making[367]—perhaps short of a caseload that makes it impossible for the judiciary to function and thus raises questions about the separation of powers.[368] In statutory cases, at least, courts are not the only bodies authorized to weigh considerations of judicial efficiency against increased access to the courts.

The broader point is that decisions about where to allocate resources may be administrative or managerial, but they are not merely technocratic. Rather, courts make choices to alleviate administrative problems by limiting access for those alleging certain types of harm. "Practical" concerns, in other words, are also normative ones, because decisions not to adjudicate certain types of suits have costs.

One such cost involves access to legal redress in the federal courts for those whose harms are judged to be insufficiently real. It may be

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364. *See, e.g.*, EM Ltd. v. Republic of Argentina, 695 F.3d 201, 207 (2d Cir. 2012) ("A district court has broad latitude to determine the scope of discovery and to manage the discovery process." (citing *In re* Agent Orange Prod. Liab. Litig., 517 F.3d 76, 103 (2d Cir. 2006))), *aff'd sub nom.* Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2250 (2014).

365. *See, e.g.*, Jonah B. Gelbach & Bruce H. Kobayashi, *The Law and Economics of Proportionality in Discovery*, 50 GA. L. REV. 1093, 1095 (2016); *see also* Levy, *supra* note 363, at 1070-71 (detailing procedural steps that courts could take to streamline litigation).

366. *See* JUDITH A. MCKENNA, FED. JUDICIARY CTR., STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS 30 (1993) ("Legislation that creates new causes of action or provides new remedies for existing causes of action generates appeals because it generates more district court litigation."); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 396 (1982) ("Congress has created and the courts have articulated a multitude of new rights and legally cognizable wrongs.").

367. *See* Joshua L. Sohn, *The Case for Prudential Standing*, 39 U. MEM. L. REV. 727, 741 (2009); Wu, *supra* note 17, at 458-59.

368. *See* Levy, *supra* note 363, at 1066; Stern, *supra* note 363, at 411.

argued that this cost is not genuine because claims by these plaintiffs are insubstantial,[369] but the issue is whether courts are well equipped to make this determination. Restrictive standing requirements might also decrease the deterrent power of consumer class action lawsuits challenging, say, companies' failure to follow reasonable procedures to protect personal information,[370] thereby imposing costs, including economic costs, on individuals harmed in the future by the absence of adequate protection.

A more institutionally oriented cost of stringent standing requirements is a reduction in the federal courts' role in articulating legal principles and advancing legal compliance, above and beyond the courts' role in resolving individual disputes.[371] Courts, after all, "describe the law as it applies to all" even as they issue rulings on the specific disputes before them.[372] Some might doubt that courts can legitimately exercise such a function outside the context of resolving individual disputes,[373] but—as the next Section argues—moving beyond tangibility and concreteness does not mean abandoning the concept of particularized harm.

The overall point is that constitutional standing doctrine properly mediates between multiple, sometimes competing principles. The separation of powers is one such principle, but the concreteness and tangibility inquiries license their own forms of judicial overreach. Moreover, resource constraints are one factor in the balance, and not necessarily an overriding one. With this conceptual framework in mind, this Article turns to implications for the future shape of standing doctrine.

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369. *See* Morley, *supra* note 28 (manuscript at 24).

370. *See* Brian T. Fitzpatrick, *Do Class Actions Deter Wrongdoing?* 2 (Vanderbilt Univ. Law Sch. Legal Studies Research Paper Series, Working Paper No. 17-40, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3020282 [https://perma.cc/R3ET-9KEM]. For critical discussion of the deterrence rationale for class actions, see Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399, 420-21 (2014).

371. For discussion of the conception of the federal courts as engaged in "law declaration" in addition to "dispute resolution," see Pushaw, *supra* note 356, at 458-59; *see also* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984).

372. Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 512 (2009).

373. For discussion of the view that the resolution of individual disputes is critical to the judicial function, see Gary Lawson, *Stipulating the Law*, 109 MICH. L. REV. 1191, 1223-36 (2011); *see also* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 382-87 (1978).

B. Injury Without Tangibility or Concreteness

This Article's most immediate suggestion is that courts should cease distinguishing between tangible and intangible harm in analyzing whether harm is concrete. This point is based on the complexities of defining tangibility and the potential for courts deploying the idea of tangibility to make problematic normative assumptions about citizens' legitimate interests. Avoiding the tangible/intangible distinction would not involve revision of long-standing doctrine, as the Court only recently in *Spokeo* conceptualized intangible harm as a form of potentially concrete harm that is proven in a distinctive way.[374] The suggestion not to consider tangibility is theoretically compatible with dividing types of harm in another manner for the purposes of analyzing whether harm is concrete; the point is that any lines drawn should not be based on tangibility.

Yet the critique of tangibility's invocation in standing doctrine also points the way to a broader challenge to the practice of categorizing harm in order to determine if harm is real. Courts, instead of subjecting certain types of harm to differential treatment in the concreteness analysis, could, as noted above, require plaintiffs to prove that they had suffered harm of whatever kind through the ordinary fact-finding processes of litigation.[375] If a plaintiff alleged, say, reputational harm or emotional harm, then the plaintiff would need to establish that the harm had occurred. Neither history nor the judgment of Congress, on this account, would be needed in order to establish that certain types of harm are suitable for redress in the federal courts.

This approach may raise the concern that restrictions on standing would be undermined because plaintiffs could always establish *some* amount of intangible harm.[376] But aspects of the standing inquiry

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374. *See supra* Part I.C.

375. *See supra* Part I.C. Courts could also abolish the distinction between tangible and intangible harm by subjecting all types of harm to the test of whether they had been sufficiently recognized by history or the judgment of Congress. Yet this approach would exacerbate the potential for the arbitrary and contestable exercise of judicial discretion in defining harm by extending these inquiries into the realm of tangible harm.

376. *See* Richard Murphy, *Abandoning Standing: Trading a Rule of Access for a Rule of Deference*, 60 ADMIN. L. REV. 943, 977 (2008) ("Virtually any plaintiff motivated enough to sue could plausibly claim that they were doing so to challenge some act or omission that upset them.").

other than concreteness could still serve a constraining role. Notably, the idea that injury in fact must be particularized provides a way for courts to limit the circle of potential plaintiffs without delving into contestable inquiries into the reality of plaintiffs' harms.[377] Courts could inquire into whether a plaintiff's alleged injury "affect[s] the plaintiff in a personal and individual way"[378] and is distinct from one "shared with 'all members of the public'"[379] without taking the additional step of determining whether the plaintiff's alleged injury rises to the level of "real" harm. This approach would involve rolling back the Supreme Court's emphasis on the conceptual independence of concreteness and particularity in *Spokeo*, but the Court has not consistently focused on the independence of these factors.[380]

The following example can illuminate the use of particularity to advance significant purposes of standing doctrine without necessitating an inquiry into the concreteness of harm. Take a lawsuit against a consumer reporting agency for failing to disclose statutorily required information on an individual's credit report; the plaintiff does not claim that he or she lost money or access to a specific job opportunity.[381] This dispute is particularized in the sense that the credit report in question concerns a specific plaintiff,[382] but courts might consider this type of harm to be intangible and question whether the debtor suffered a concrete harm.[383]

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377. It may be argued that every individual could claim to have suffered some kind of intangible harm, such as psychological harm; therefore, the concreteness requirement is necessary to preserve the possibility of enforcing the particularity requirement. I have argued elsewhere, however, that courts could distinguish between cognizable and noncognizable psychological harm by inquiring into the closeness of the connection between a plaintiff and the legal violation that gave rise to the alleged harm. *See* Bayefsky, *supra* note 28, at 1602-04.

378. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 n.1 (1992).

379. United States v. Richardson, 418 U.S. 166, 178 (1974) (quoting *Ex parte* Lévitt, 302 U.S. 633, 634 (1937) (per curiam)).

380. *See supra* Part I.C.

381. See Dreher v. Experian Info. Sols., Inc., 856 F.3d 337, 340, 347 (4th Cir. 2017), in which the consumer reporting agency allegedly "list[ed] a defunct credit card company, rather than the name of its servicer," on a credit report, and the Fourth Circuit held that a plaintiff lacked standing.

382. *See* Wu, *supra* note 17, at 458 ("Almost invariably, privacy plaintiffs are specific individuals who claim that their own personal information has been mishandled in some way."). Wu argues, more broadly, that separation-of-powers concerns are "largely absent in the privacy cases in which standing has become a particularly high hurdle." *Id.* at 457.

383. *See Dreher*, 856 F.3d at 345-46.

Turning to the separation of powers rationales for standing doctrine, this dispute is between adverse parties[384]: the recipient of the credit report and the reporting agency. The court's judgment will not be an advisory opinion;[385] it will have a legally binding effect, perhaps leading to a statutory damages award. It may be argued that this plaintiff lacks the "personal stake" required to enable him or her "to present to a court a complete perspective upon the adverse consequences flowing from the specific set of facts undergirding his grievance,"[386] because the plaintiff has suffered no real adverse consequences. But the absence of more severe consequences does not hamper the court's capacity to resolve the question of whether the consumer reporting agency violated the law, and to resolve this question in a manner that usefully illuminates the nature of mandated disclosures for future litigants.

Separation of powers rationales for standing doctrine also appeal to the executive branch's distinctive enforcement role and the interest in preventing judicial encroachment on this role.[387] When Congress permits the subjects of credit reports to sue for companies' failures to make mandated disclosures, Congress grants private plaintiffs a role in legal enforcement instead of leaving this task in the hands of the executive branch. Yet certain concerns about the effects of private enforcement on executive power have less purchase when harm is particularized, for it is not the case that anyone could challenge conduct taking place in an unrelated context or location.[388] For example, those who were not the subjects of a credit report with inaccurate information could not sue to force reporting agencies to obey the law.

It may be argued that suits against credit reporting companies pose less of a threat to the executive's enforcement role regardless of whether harm is particularized, because these suits target private parties instead of the government.[389] The plaintiffs in these suits

384. For discussions of the importance of adverse in standing doctrine, see *Baker v. Carr*, 369 U.S. 186, 204 (1962); and Elliott, *supra* note 17, at 469-70.

385. *See* Flast v. Cohen, 392 U.S. 83, 96 (1968); *see also id.* at 95 ("[When] no justiciable controversy is presented ... the parties are asking for an advisory opinion." (footnote omitted)).

386. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 221 (1974).

387. *See supra* Part I.A.

388. For an articulation of this concern by the Supreme Court, see *Allen v. Wright*, 468 U.S. 737, 756 (1984).

389. *See* Hessick, *supra* note 36, at 703 ("The concern that the judiciary might usurp the

therefore seek to enforce a private right owed by one private party to another, as distinct from a public right owed by the government to the citizenry at large.[390] Separation of powers concerns may indeed be heightened when a lawsuit seeks government enforcement of a public right.[391] But even if the identity of the defendant plays a role in alleviating separation of powers concerns, particularity does as well. If anyone could challenge inadequate disclosures on a credit report about any individual, then concerns about the displacement of executive enforcement discretion would be heightened. Moreover, particularity can play a role in suits to enforce public rights; it could limit suits against government agencies to, say, beneficiaries of a specific government program or recipients of inadequate disclosures on certain government communications. Consequently, particularity can play a role in reducing separation of powers concerns about moving away from an independent concreteness requirement.

Another justification for standing doctrine based in the proper role of different branches of government is that standing prevents, as Tara Grove has argued, the improper delegation of the executive's broad enforcement discretion to private parties.[392] This concern should be lessened when harm is particularized, because then the "pool of potential prosecutors" has "limits."[393] Moreover, because defendants would need to be connected to a particular harmful act, private parties would not have unbounded discretion to select defendants.[394]

Judicial power might still be more constrained under an approach that applies heightened scrutiny to intangible harm in the concreteness inquiry. But with the added constraint on judicial power would come, this Article has argued, an increased degree of questionable normative judgments about the reality of harm. To the extent that constitutional standing doctrine represents a balance among different interests, the interest in promoting the separation of powers

power of the political branches also does not support imposing standing in private suits seeking to enforce private rights.").

390. *See infra* Part III.C for a discussion of the distinction between public rights and private rights.

391. *See* Hessick, *supra* note 36, at 703-09.

392. *See* Grove, *supra* note 36, at 809-10.

393. *Id.* at 809.

394. *Id.* at 810-12.

can be substantially furthered by an approach that eschews a focus on concreteness independent of particularity.

A similar point applies to the interest in conserving judicial resources. The particularity requirement reduces the number of potential plaintiffs and thereby helps to conserve judicial resources, even if to a lesser extent than a more complex inquiry into whether intangible harm is concrete. The particularity requirement, in the absence of an independent concreteness requirement, thus helps to strike a balance between various competing aspects of standing doctrine.

The idea of particularity should not be treated as a black box; it is itself subject to different interpretations. The next Section disaggregates the concept of particularity, highlighting advantages and drawbacks of various understandings. It contends that particularity can plausibly be understood, in statutory cases, in terms of whether the statutory provision under which a plaintiff is suing defines the scope of potential plaintiffs with sufficient specificity.

C. Conceptions of Particularity

A common and intuitive understanding of particularity focuses on the number of potential plaintiffs who could bring claims if a certain type of injury were cognizable. According to this view, an injury is particularized if there is a "particular individual or class"[395] that has been affected by the challenged conduct differently from other "members of the public."[396] A vision of particularity centered on the size of the potential plaintiff class implicitly underlies a certain separation-of-powers rationale for the particularity requirement. This argument is that the legislative and executive branches have a comparative advantage over the judiciary in responding to the grievances of large numbers of citizens.[397]

Yet the Supreme Court has not defined particularity purely as a matter of numbers. The issue of whether "the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens"[398] depends not only on how many people

395. United States v. Richardson, 418 U.S. 166, 179 (1974).
396. *Id.* at 178 (quoting *Ex parte* Lévitt, 302 U.S. 633, 636 (1937) (per curiam)).
397. *See supra* Part I.A.
398. Warth v. Seldin, 422 U.S. 490, 499 (1975).

share the harm, but also on the ways in which citizens are influenced by the harm—whether each citizen is "affect[ed] ... in a personal and individual way."[399] As Justice Scalia stated in a dissent, a mass tort (which affects many people) could inflict "a particularized and differentiated harm. One tort victim suffers a burnt leg, another a burnt arm—or even if both suffer burnt arms they are *different* arms."[400]

Particularity understood in terms of whether a plaintiff is distinctively affected by an injury can advance the separation of powers and help to conserve judicial resources even in the absence of an independent concreteness requirement. Limiting standing to those distinctively affected by an inadequate disclosure on a credit report would, for the reasons discussed above, constrain federal jurisdiction.[401] Moreover, there is likely overlap between cases in which the number of potential plaintiffs is relatively contained and cases in which certain citizens are distinctively affected, so the intuition that a large number of plaintiffs correlates with noncognizable harm would maintain some force.

Nevertheless, conceiving of particularity in terms of whether a class of individuals has been distinctively affected creates difficulties of its own. First, this conception stands in tension with certain aspects of standing doctrine. Federal courts have, for instance, adjudicated cases in which plaintiffs claim that they have been improperly denied access to information even though numerous citizens are affected in the same way.[402] Second, if injury in fact involves "factual" harm,[403] then it is not clear why one person is less likely to have actually been injured simply because many others share that injury. A third challenge involves line-drawing; how many people need to be able to sue based on the same harm before that harm is no longer adequately particularized?

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399. Lujan v. Defs, of Wildlife, 504 U.S. 555, 560 n.1 (1992); *see also* Spokeo v. Robins, 136 S. Ct. 1540, 1548 n.7 ("The fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance.").

400. FEC v. Akins, 524 U.S. 11, 35 (1998) (Scalia, J., dissenting).

401. *See supra* Part III.B.

402. *See Akins*, 524 U.S. at 24-25 (lack of access to information relevant to voting); Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 449 (1989) (denial of a request under the Freedom of Information Act); *see also* Kreimer, *supra* note 17, at 753-54, 766. I am grateful to Richard Fallon for discussion of this point.

403. *See supra* Part I.C.

These objections are not necessarily fatal to the idea of particularity understood in terms of whether a certain class of plaintiffs has suffered a distinctive injury. First, courts could acknowledge that some types of injuries, such as denials of access to information relevant to voting, are especially difficult to particularize, without disturbing the particularity requirement for a wider class of claims. Such an approach would require a more context-specific view of the standing inquiry than courts have explicitly adopted.[404] But standing doctrine is already frequently criticized for inconsistency,[405] and this revision might provide a way to acknowledge the existence of different doctrinal strains more clearly. Alternatively, courts could limit standing to sue for lack of access to information to certain plaintiffs who are more likely to be especially harmed by the absence of a given type of information—for example, those whose professional activities are affected by the lack of access.[406]

Second, with respect to the point about factual harm, it is true that plaintiffs may be genuinely harmed even if many other individuals are harmed alongside them. But courts could still seek to identify plaintiffs who actually possess a heightened interest in the resolution of a legal question,[407] such as those who received unwanted telephone calls or faxes.[408] Moreover, the question of whether particularized harm is more likely to have actually occurred affects all accounts of standing that include a particularity component, including existing standing doctrine. The appropriate response may be to deny that the inquiry into cognizable injury is a factual one.[409]

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404. *See* Fallon, *supra* note 27, at 1107 (arguing that courts should acknowledge "that what counts as an injury depends on the provision under which a plaintiff brings suit").

405. *See* sources cited *supra* note 17.

406. *See, e.g.*, *Public Citizen*, 491 U.S. at 449 ("[The plaintiffs] seek access to the ABA Committee's meetings and records in order to monitor its workings and participate more effectively in the judicial selection process.").

407. This approach bears a similarity to the "relative standing" inquiry endorsed by Richard Re. *See* Re, *supra* note 64, at 1214 ("[R]elative standing authorizes suits by plaintiffs who have the most at stake in obtaining a particular remedy.").

408. *See, e.g.*, Susinno v. Work Out World Inc., 862 F.3d 346, 348 (3d Cir. 2017) (finding standing for an alleged violation of the Telephone Consumer Protection Act (TCPA) as a consequence of an unwanted call); Compressor Eng'g Corp. v. Thomas, 319 F.R.D. 511, 524 (E.D. Mich. 2016) (finding standing for an alleged violation of the TCPA as a result of the plaintiff's "occupied" fax machine or telephone line).

409. *See* Fletcher, *supra* note 17.

The third point involves the problem of where to draw the line in delineating "particularized" harm. The number of plaintiffs distinctively affected by an injury varies based on the nature of the injury, and courts likely cannot identify a specific number of plaintiffs that is too high for cognizability. But courts can still identify, as just noted, the characteristics of a class of distinctively affected plaintiffs.[410] Nevertheless, the task of identifying plaintiffs most affected by a legal violation may well be a challenging one with multiple plausible responses. It is therefore worth exploring other conceptions of particularity.

On one promising alternative, courts could conceive of particularity as a matter of the specificity with which the circle of potential plaintiffs is defined by the substantive legal provision under which a plaintiff is suing. In statutory cases like *Spokeo*, courts could inquire into whether the statute clearly identifies the circle of potential plaintiffs and whether a given plaintiff falls within this circle.

Indeed, Justice Thomas's concurrence in *Spokeo* may have moved partially in this direction.[411] Justice Thomas, drawing on historical common law practice, differentiated between private rights that belonged to particular individuals and public rights involving duties owed to the community at large.[412] He stated that "the concrete-harm requirement does not apply as rigorously when a private plaintiff seeks to vindicate his own private rights," and that the Court's "contemporary decisions have not required a plaintiff to assert an actual injury beyond the violation of his personal legal rights to satisfy the 'injury-in-fact' requirement."[413] By contrast, for public rights—say, a suit brought by a plaintiff to require a government agency to follow certain procedures—"the plaintiff must allege that he has suffered a 'concrete' injury particular to himself."[414]

One way to understand private rights cases is that the injury in these cases, which is simply the violation of a legal right belonging to an individual, is necessarily particularized and thus does not

410. *See supra* note 406 and accompanying text.

411. For illuminating discussion of this concurrence, see Baude, *supra* note 28, at 227-31.

412. *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1551 (2016) (Thomas, J., concurring).

413. *Id.* at 1552 (citing Carey v. Piphus, 435 U.S. 247, 226 (1978)).

414. *Id.* (citing Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 221-23 (1974)).

need to be concrete.[415] The question, then, is when a statutory provision should be considered sufficiently particularized. As Will Baude has noted,[416] Justice Thomas's concurrence indicated that Congress may be able to particularize harm by "creat[ing] a private duty owed personally to" a plaintiff "to protect *his* information."[417] Justice Thomas suggested that this condition might be satisfied by the statutory requirement that Spokeo "follow reasonable procedures to assure maximum possible accuracy of the information *concerning the individual about whom the report relates*."[418] Justice Thomas supported a remand to the Ninth Circuit to consider whether this legal provision had created a private right.[419]

Building on this suggestion, courts undertaking the injury-in-fact inquiry could consider whether the provision under which a plaintiff is suing specifically identifies the individuals who would suffer harm if the provision were violated, as well as whether the plaintiff is one of those individuals—in *Spokeo*, the person to "whom the report relates." In this way, courts would assign responsibility to the institution that made the law under which an individual is suing to define the scope of potential plaintiffs; courts would not inquire into whether those plaintiffs have suffered "real" harm. This suggestion is related to Justice Anthony Kennedy's statement, in his concurrence in *Lujan*, that Congress can "define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before," as long as Congress takes care to "identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit."[420] Particularity can be gauged with reference to whether the class of plaintiffs is specifically enumerated in the legal provision under which a plaintiff is suing.

The question remains, however, whether federal courts can enforce Article III limitations on Congress's ability to authorize suit

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415. *See* Baude, *supra* note 28, at 231 (noting that Justice Thomas's concurrence might be read to state that "any legal duty may be said to create a private right so long as it is adequately personalized"); Hessick, *supra* note 36, at 708 ("[A]ny threatened violation of a private right is particularized.").

416. *See* Baude, *supra* note 28, at 231.

417. *Spokeo*, 136 S. Ct. at 1554 (Thomas, J., concurring).

418. *Id.* at 1553-54 (quoting 15 U.S.C. § 1681e(b) (2012)).

419. *Id.*

420. Lujan v. Defs. of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring); *see Spokeo*, 136 S. Ct. at 1549 (majority opinion).

by private plaintiffs. If Congress specifically indicated that every citizen had a personal right to visit a certain wilderness area, could courts nevertheless determine that some plaintiffs had suffered no injury entitling them to challenge the area's destruction? The most plausible response is that courts could not restrict injury in fact in such a case, because Congress had clearly delineated the class of potential plaintiffs, which, in this case, included every citizen. On this account, Congress would be assigned the ultimate task of defining the contours of standing doctrine.[421]

The notion that Congress is not constrained in its ability to particularize harm would bring the standing inquiry close to Judge Fletcher's view that courts should examine whether a plaintiff has a cause of action rather than whether a plaintiff has alleged harm in a prelegal sense.[422] Yet Congress, in addition to creating a cause of action, would still be required to define the scope of suitable plaintiffs.

To the extent that this approach raises concerns about too significantly undermining limitations on standing, the inquiry might acquire greater constraining force if it were construed as a clear statement rule for Congress. On this account, a statute should not be interpreted to grant standing to any given plaintiff unless Congress has clearly stated as much.[423] Alternatively, and less restrictively, courts could use such a clear statement rule to control only the outer bounds of Congress's ability to grant standing: a statute should not be interpreted to grant standing to the citizenry at large without a clear statement of this goal.

The basic effect of such a clear statement rule would be to "impose[ ] a judicial tax on legislation"[424] that, in lifting constraints on injury in fact, might have an adverse impact on the separation of

421. *Cf.* John F. Manning, *The Supreme Court, 2013 Term—Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 66-67 (2014) (suggesting that "[t]he Necessary and Proper Clause delegates power to *Congress* to fill up the details" about various governmental functions and powers, including standing).

422. *See supra* note 346 and accompanying text; *see also* Sunstein, *supra* note 17, at 188-89.

423. For discussions of the nature of clear statement rules, see, for example, William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 597 (1992); John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 407 (2010); and David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 940-41 (1992).

424. Manning, *supra* note 423, at 425.

powers or on the conservation of judicial resources. Such a "tax" could help to advance these values without necessarily suggesting that Congress is constitutionally barred from creating standing when it clearly identifies the circle of plaintiffs entitled to sue. While such an approach might be criticized as a "backdoor" form of "constitutional lawmaking,"[425] it responds to the difficulty of accommodating concerns about the separation of powers and resource constraints without endorsing problematic judicial inquiries into whether harm is real.

This Part has provided several ways to respond to the challenges of categorizing harm in a way that is sensitive to the principles underlying the development of constitutional standing doctrine. Courts could eliminate the tangible/intangible distinction while continuing to inquire into concreteness; they could cease inquiring into concreteness defined independently of particularity and use the scope of potential plaintiffs as a factor in limiting standing; and they could conceptualize particularity in statutory cases in terms of the specificity with which the scope of plaintiffs is defined in the relevant legal provision. These options are different in substance and would require varying levels of revision to existing standing doctrine. But they all respond to the challenge of defining harm in a way that advances judicial legitimacy and avoids reliance on contestable conceptions of harm and citizens' interests—a challenge exacerbated by the distinction between tangible and intangible harm. At a minimum, the analysis here suggests, courts appealing to any distinction between tangible and intangible harm should explain the understanding of "tangible" that is being employed and justify the view that intangible harm ought to be subject to a distinctive standing inquiry.

CONCLUSION

This Article has provided an in-depth look at concepts that have recently assumed a more influential role in standing doctrine: the ideas of tangibility and concreteness. The distinction between "tangible" and "intangible" harm, the Article has argued, is not a clear-cut feature of objective reality, but a contextually dependent

425. Eskridge & Frickey, *supra* note 423, at 636.

boundary that implicates normative views about which kinds of harm count for standing purposes. More generally, the inquiry into whether harm is concrete invites courts to make contestable judgments that could override congressional determinations in a way that risks undermining the legitimacy of judicial standing decisions. The Article has proposed that courts cease invoking the tangible/intangible distinction in standing analysis and, more broadly, move away from the Supreme Court's recent emphasis on the concreteness of harm independent of whether harm is adequately particularized. Particularity, in turn, can be conceptualized in multiple ways, and a plausible approach in statutory cases is to focus on the specificity with which the circle of potential plaintiffs is defined by the legal provision under which a plaintiff is suing. These revisions would enable courts to strike a more suitable balance between concerns about the separation of powers and resource constraints that help to support standing doctrine, on the one hand, and the values of promoting judicial legitimacy and enabling access to legal redress in the federal courts, on the other.