

# STANDING, LEGAL INJURY WITHOUT HARM, AND THE PUBLIC/PRIVATE DIVIDE

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*Legal injury without harm is a common phenomenon in the law. Historically, legal injury without harm was actionable for at least nominal damages, and sometimes other remedies. The same is true today of many “traditional” private rights, for which standing is uncontroversial. Novel statutory claims, on the other hand, routinely face justiciability challenges: Defendants assert that plaintiffs’ purely legal injuries are not injuries “in fact,” as required to establish an Article III case or controversy. “Injury in fact” emerges from the historical requirement of “special damages” to enforce public rights, adapted to a modern procedural world. The distinction between public and private rights is unstable, however, with the result that many novel statutory harms are treated as “public,” and thus subject to exacting justiciability analysis, when they could easily be treated as “private” rights for which legal injury without harm is sufficient for standing. Public and private act as rough proxies for “novel” and “traditional,” with the former subject to more judicial skepticism. Applying “injury in fact” this way is hard to defend as a constitutional necessity, but might make sense prudentially, depending on the novelty and legal source of value for the harm. Taxonomizing these aspects of “harm” suggests that, even with unfamiliar harms, judicial discretion over value lessens the need for exacting injury analysis.*

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## INTRODUCTION

Thomas Robins awoke one morning from uneasy dreams to find that he was married. At least, that's what the internet said. According to a profile of him generated by Spokeo, Inc., a "people search engine," Robins also had kids, a job, a graduate degree, and was relatively affluent.<sup>1</sup> In reality, Robins was unmarried, unemployed, not affluent, and had no graduate degree.<sup>2</sup>

Robins brought a class action against Spokeo for willful violations of the Fair Credit Reporting Act of 1970 (FCRA),<sup>3</sup> which "regulates the creation and the use of 'consumer report[s]' by 'consumer reporting agenc[ies].'"<sup>4</sup> Among other things, the FCRA requires consumer reporting agencies to "follow reasonable procedures to assure maximum possible accuracy"<sup>5</sup> of consumer reports. Violators can be held civilly liable for either a consumer's "actual damages" or statutory damages of up to \$1000 per violation.<sup>6</sup> Beyond Spokeo's bare statutory violations, Robins alleged an additional harm: that the false information spread about him could have impeded his job search by, for example, making him appear overqualified for the jobs he was then seeking.<sup>7</sup>

<sup>1</sup> Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1546 (2016).

<sup>2</sup> See *id.* at 1546 ("According to Robins's complaint, all of this information is incorrect."). See also *id.* at 1554 (Ginsburg, J., dissenting) (outlining Robins's allegations that the information was incorrect).

<sup>3</sup> See *id.* at 1544, 1546 (describing the class action as brought "under the Fair Credit Reporting Act of 1970 (FCRA or Act), 84 Stat. 1127, *as amended*, 15 U.S.C. § 1681, *et seq.*").

<sup>4</sup> *Id.* at 1545 (citing 15 U.S.C. § 1681a(d)(1), a(f) (2012)).

<sup>5</sup> 15 U.S.C. § 1681e(b).

<sup>6</sup> 15 U.S.C. § 1681n(a).

<sup>7</sup> See Spokeo, 136 S. Ct. at 1556 (Ginsburg, J., dissenting).

Spokeo moved to dismiss for lack of subject-matter jurisdiction, asserting that Robins did not have standing under Article III,<sup>8</sup> which limits the judicial power of the United States to certain categories of “Cases” and “Controversies.”<sup>9</sup> Without a case or controversy, a federal court does not have the constitutional authority to decide a dispute. Standing measures the existence of a case or controversy by requiring a plaintiff to “have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.”<sup>10</sup> Spokeo argued that Robins had failed to plead an “injury in fact,”<sup>11</sup> i.e. that any violation of the FCRA did not cause Robins any “real” or “actual” harm.<sup>12</sup> The district court granted Spokeo’s motion, but the Ninth Circuit reversed, holding that the violation of a statutorily created right that protects against “individualized rather than collective” interests, as Robins alleged, is an injury in fact that satisfies Article III.<sup>13</sup>

This allowed the Supreme Court to assess “[w]hether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute.”<sup>14</sup> This issue goes to the heart of Article III and the separation of powers. On the one hand, Congress has long been recognized to “ha[ve] the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.”<sup>15</sup> On the other hand, this power cannot be used to “convert the undifferentiated public interest

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<sup>8</sup> *Robins v. Spokeo, Inc.*, 742 F.3d 409, 411 (9th Cir. 2014), *vacated and remanded*, 136 S. Ct. 1540 (2016).

<sup>9</sup> U.S. CONST. art. III, § 2.

<sup>10</sup> *Spokeo*, 136 S. Ct. at 1547.

<sup>11</sup> *See Robins*, 742 F.3d at 411 (noting that the district court initially rejected this argument, before accepting it on reconsideration).

<sup>12</sup> Pinning down a definition of “injury in fact” is notoriously difficult, but the general idea is that an injury must be *factually real*, i.e. “‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’” *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). If Spokeo’s violation did not cause Robins any *consequential* harms, then he did not suffer an injury in fact—unless, of course, the violation of the FCRA *itself* counted as an injury in fact, which is the question this Note is concerned with.

<sup>13</sup> *Robins*, 742 F.3d at 413–14. A statutorily created, judicially enforceable “right” that protected only collective interests would run afoul of the separation of powers: Article III standing and the case or controversy requirement generally “serve[ ] to prevent the judicial process from being used to usurp the powers of the political branches,” which are the primary guardians of the collective interest. *Spokeo*, 136 S. Ct. at 1547 (citation omitted).

<sup>14</sup> Petition for Writ of Certiorari at i, *Spokeo*, 136 S. Ct. 1540 (No. 13-1339).

<sup>15</sup> *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring).

. . . into an ‘individual right.’”<sup>16</sup> Where, exactly, is the limit on Congress’s power? Can the Court articulate limits without aggrandizing itself at the expense of the legislative branch and eviscerating some indeterminate swath of substantive rights Congress has created?<sup>17</sup>

How did the Court resolve this important and difficult question? The way any responsible, authoritative judicial body would: It punted. The Court equivocated on the proper standard,<sup>18</sup> and the case was remanded for consideration of whether Robins’s alleged “concrete and particular” injury was both concrete *and* particular; “the Ninth Circuit [had] failed to fully appreciate the distinction between concreteness and particularization . . . .”<sup>19</sup>

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<sup>16</sup> *Id.* at 577 (majority opinion) (noting this limit in the context of suits to enforce executive compliance with the law). Executive compliance with the law is the prototypical “undifferentiated public interest.” *Cf. id.* at 576–77. Standing doctrine prevents any old plaintiff from suing to enforce executive compliance without an injury *specific to that plaintiff*—an injury “in fact”—stemming from the alleged executive illegality. *See id.* at 576–78.

<sup>17</sup> *Cf. id.* at 602 (Blackmun, J., dissenting) (“[T]he principal effect of foreclosing judicial enforcement of such procedures is to transfer power into the hands of the Executive at the expense—not of the courts—but of Congress, from which that power originates and emanates.”); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 233 (1988) (“[S]uperimposing an ‘injury in fact’ test . . . is a way for the Court to enlarge its powers at the expense of Congress.”). *See generally* Richard J. Pierce, Jr., *Lujan v. Defenders of Wildlife: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1170–71 (1993) (arguing that “[*Lujan*] is an insupportable judicial contraction of the legislative power to make judicially enforceable policy decisions”).

<sup>18</sup> *Compare Spokeo*, 136 S. Ct. at 1549 (“Article III standing requires a concrete injury even in the context of a statutory violation.”), *and id.* at 1548 (“A ‘concrete’ injury must be ‘*de facto*’; that is, it must actually exist.”), *with id.* at 1549 (noting that sometimes “the violation of a procedural right granted by statute can be sufficient” for standing and “plaintiff . . . need not allege any *additional* harm beyond the one Congress has identified”). The best answer seems to be that Congress can open the federal courts to hear suits arising from novel injuries when those injuries are already “really” injuries. *See id.* (“Congress may ‘elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.’” (quoting *Lujan*, 504 U.S. at 578)); F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 303–04 (2008) (noting that after *Lujan*, Congress “has the power merely to identify *which* factual injuries are sufficient to sustain standing”). The Ninth Circuit adopted this view in the *Spokeo* remand. 867 F.3d 1108, 1112 (9th Cir. 2017) (“[E]ven when a statute has allegedly been violated, Article III requires such a violation to have caused some real—as opposed to purely legal—harm to the plaintiff.”). Several of the circuits have converged on this position. *Id.* at 1113 (collecting cases). Note, however, that this view is hard to reconcile with a number of past standing cases that have not been explicitly overruled. *See* Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1475 n.208, 1476 n.211 (1988) (collecting cases).

<sup>19</sup> *Spokeo*, 136 S. Ct. at 1550. The Court also could have punted by affirming. As the dissent noted, Robins *did* allege a concrete harm beyond the statutory violation: interference with his job search. *See id.* at 1554–55 (Ginsburg, J., dissenting) (arguing that remand was unnecessary). For a discussion of the Ninth Circuit’s approach on remand, *see infra* notes 97–98 and accompanying text.

In remanding, the Court ducked not only the question presented but also an underlying, more general problem: the constitutional status of legal injury without harm<sup>20</sup> (or *injuria absque damno*, in the language of the common law)<sup>21</sup> and its relation to standing and the “injury in fact” test, especially in actions for monetary remedies. Public law litigation<sup>22</sup> and suits seeking statutory damages based on novel regulatory violations<sup>23</sup> routinely face justiciability challenges, with defendants asserting that plaintiffs have suffered purely legal injuries and no injuries “in fact.”<sup>24</sup> Notoriously, the injury-in-fact standard has proven muddled, malleable, confusing, and probably incoherent, depending as it does on a court’s freestanding evaluation of what counts as a prelegal injury—a “real” injury out in the world, not defined by the legal obligation itself.<sup>25</sup> Wielding injury in fact in this way against would-be plaintiffs requires that legal injury alone—*injuria*—not be sufficient for Article III standing.

And yet in vast expanses of the law, legal injury without harm is not a bar to jurisdiction nor even, in many cases, to recovery. Many other substantive areas involve the alleged or acknowledged violation of legal rights, without any obviously compensable injury: Traditional common law rights, intellectual property infringement, and constitu-

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<sup>20</sup> By “legal injury without harm,” I mean, roughly, the violation of a legal obligation without any evident, measurable harm *resulting* from that injury—a “technical” violation. For example, putting one unauthorized foot on someone else’s property is unlikely to result in any measurable damages to the property owner, who has suffered legal injury without harm. Similarly, Spokeo argued, essentially, that its alleged violation caused Robins a legal injury without harm, *and thus did not amount to an “injury in fact.”* See Brief for Petitioner at 9–11, *Spokeo*, 136 S. Ct. 1540 (No. 13-1339) (arguing that FCRA requires such an injury for recovery, and that Robins had not met this requirement). Throughout, I use “harm” in contradistinction to “legal injury” to refer to quantifiable, compensable injuries that *may or may not* flow from a legal injury.

<sup>21</sup> See Fletcher, *supra* note 17, at 249 (defining the term).

<sup>22</sup> The essential features of “public law” litigation are contested, but it is probably not controversial to define as “litigation to articulate and enforce public, primarily constitutional, values.” *Id.* at 225. Classic examples are prison reform, school desegregation, and other “institutional reform litigation.” See Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 280 & n.61 (1989) (providing examples).

<sup>23</sup> By “novel” I mean here, roughly, a statutory obligation that does not have an analogue in the common law. For example, while antitrust has an analogue in common law conspiracy and the Lanham Act in unfair competition, statutes regulating housing discrimination, environmental harms, and some informational injuries arguably do not have common law analogues. See *infra* note 225 and accompanying text.

<sup>24</sup> See generally Sunstein, *supra* note 18 (explaining the development of the difficulties posed by standing and other justiciability doctrines to regulatory beneficiaries).

<sup>25</sup> See Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1062 & n.3 (2015) (collecting commentary on the “inconsistencies and anomalies” of modern standing doctrine); Fletcher, *supra* note 17, at 221, 231 (collecting commentary and noting the incoherence of injury in fact).

tional torts, among others, all routinely encounter instances of legal injury without harm.<sup>26</sup> Unlike in public law litigation or novel statutory damages actions, however, these more “traditional,” private-right cases are frequently resolved *on the merits*, not on justiciability grounds.<sup>27</sup> For example, in a trespass suit, we do not say that a plaintiff who can prove the trespass but no resulting compensable injury does not have standing; rather, the trespasser will be liable for nominal,<sup>28</sup> and maybe punitive,<sup>29</sup> damages. The law simply assumes the property owner’s injury is *de facto*.

One might wonder, given the ability of other areas of law to accommodate legal injury without harm, why similar public law suits and novel statutory damages actions are shut out at the threshold—without the opportunity to develop evidence of *de facto* injury or even to pursue nominal damages—and whether this is appropriate.<sup>30</sup> This Note confronts that question and finds that standing doctrine treats these cases differently because of an inherited distinction between public and private rights. Historically, public rights actions faced additional justiciability hurdles, while private rights claims did not.<sup>31</sup> It argues that conceptual instability in the distinction between public and private rights leads to inconsistency in the courts. It further finds that the blurry line between public and private allows courts to treat as “public” many legal obligations that could be equally or better conceived of as “private,” and that “public” and “private” often serve as rough proxies for “novel” and “traditional,” with more skepticism directed at the former than the latter. Lastly, this Note suggests that while this differential treatment may not be warranted as a matter of constitutional law, there might be prudential reasons for such treatment. It offers a taxonomy of the relationship between the novelty and value of statutory harms to help evaluate why. Among other

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<sup>26</sup> See *infra* Section I.A (discussing examples of these “traditional” private rights).

<sup>27</sup> Cf. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1551 (2016) (Thomas, J., concurring) (“Many traditional remedies for private-rights causes of action . . . are not contingent on a plaintiff’s allegation of damages beyond the violation of his private legal right.”).

<sup>28</sup> See 1 DAN B. DOBBS ET AL., *THE LAW OF TORTS* § 56, at 149 (2d ed. 2011) (“[A] trespasser is always liable to the possessor for at least nominal damages . . .”).

<sup>29</sup> See, e.g., *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 159–60, 166 (Wis. 1997) (allowing nominal damages to support a punitive damage award for an intentional trespass despite the lack of any measurable harm); *RESTATEMENT (SECOND) OF TORTS* § 163 cmt. e (AM. LAW INST. 1979) (noting that intentional trespasses can “justify the imposition of punitive in addition to nominal damages for even a harmless trespass”).

<sup>30</sup> Put another way, one might wonder, as many have, whether standing is the appropriate doctrinal vehicle for an inquiry into whether a remediable injury exists. See, e.g., Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 74 (1984).

<sup>31</sup> See *infra* Section II.B (tracing the reasons for this phenomenon).

things, the taxonomy highlights the importance of judicial discretion: Enforcing novel injuries without harm but with statutorily mandated recoveries can result in seemingly arbitrary damage awards. Where judges have discretion over setting these awards, there is less reason to be suspicious of enforcing novel injuries unaccompanied by consequential harms.

The Note proceeds as follows. Part I describes the phenomenon of legal injury without harm across various areas of law, first how it manifests in suits based on traditional private rights and then, with very different results, in the context of novel statutory damages actions. Part II explains this difference by tracing the development of modern standing doctrine. Section II.A considers the joint development of standing doctrine and public and administrative law litigation; Section II.B considers that development in light of the public/private distinction; and Section II.C offers additional examples to show how the doctrine plays out in modern statutory damages cases. Part III notes the weak constitutional basis for limiting judicial enforcement of arguably “public” rights and develops a taxonomy to help illustrate the possible prudential reasons for doing so.

## I

### LEGAL INJURY WITHOUT HARM TO PRIVATE RIGHTS NEW AND OLD

#### A. “Traditional” Private Rights, When Sued on as Legal Injuries Without Harm, Face No Justiciability Hurdles

This section briefly surveys the treatment of *injuria absque damno*, or legal injury without harm, across several different areas of law, all of them relatively “traditional” (even when rooted in statute).<sup>32</sup> Blessedly, Article III standing doctrine is almost nowhere to be found here,<sup>33</sup> which simplifies matters greatly: Courts are not prohibited from exercising jurisdiction by the lack of a pre-legal injury, and the availability of a remedy is a merits determination that can be made in light of the substantive law and the facts of a specific case. In general, the absence of an obvious remedy can result in dismissal on the merits, an award of nominal damages, or the imputation of a remedy. Unlike justiciability decisions, all these results have res

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<sup>32</sup> See *infra* note 225 and accompanying text (noting that many statutes codify common law causes of action).

<sup>33</sup> See Hessick, *supra* note 18, at 277 (“[Commentators] have generally assumed that the injury-in-fact requirement poses no obstacle to suits alleging violations of private rights.”).

judicata effects.<sup>34</sup> Additionally, nominal damages and imputed remedies can have significant collateral consequences,<sup>35</sup> and can further the underlying policy goals of a given private law regime.

### 1. Common Law Rights

Historically, legal injury alone was adequate for many common law actions, though not all.<sup>36</sup> If the plaintiff proved a legal violation but no additional harm, courts would award nominal damages.<sup>37</sup> Generally, then, *injuria absque damno* was sufficient to sustain these kinds of actions, either on the theory that the legal injury alone (*injuria*) justified a suit,<sup>38</sup> or that harm (*damnum*) could be inferred from the legal violation.<sup>39</sup>

This remains largely true today. Many torts are actionable for damages without proof of harm beyond the violation of a legal right.<sup>40</sup> Trespassers who do not cause any compensable harms can nonetheless be liable for nominal damages,<sup>41</sup> restitution,<sup>42</sup> or punitive damages.<sup>43</sup>

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<sup>34</sup> See James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601, 1620 n.89 (2011).

<sup>35</sup> Nominal damages for the invasion of a private right can result in costs being assigned or establishing title to land. See Hessick, *supra* note 18, at 323 & n.302 (“Indeed, it has long been the rule that a party held liable for nominal damages is not even permitted to appeal unless the judgment has some collateral consequence such as assigning costs or establishing title to land.”).

<sup>36</sup> See *id.* at 281–82 (comparing historical trespass cases, for which legal injury alone was sufficient, with actions on the case, which required both legal injury and damage).

<sup>37</sup> See *Webb v. Portland Mfg. Co.*, 29 F. Cas. 506, 507 (C.C.D. Me. 1838) (No. 17,322) (“[I]f no other damage is established, the party injured is entitled to a verdict for nominal damages.”); Hessick, *supra* note 18, at 281 & n.28, 285–86 (providing illustrative cases).

<sup>38</sup> See *Webb*, 29 F. Cas. at 507 (“But I am not able to understand, how it can correctly be said, in a legal sense, . . . that *injuria sine damno* is not actionable.”).

<sup>39</sup> See *Spokeo Inc. v. Robins*, 136 S. Ct. 1540, 1551 (2016) (Thomas, J., concurring) (“In a suit for the violation of a private right, courts historically presumed that the plaintiff suffered a *de facto* injury merely from having his personal, legal rights invaded.”); *Webb*, 29 F. Cas. at 507 (noting that legal injury “imports damage in the nature of it”). But see Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 719 n.146 (2004) (noting that there is “considerable historical support” for the idea that traditional private suits required both *injuria* and *damnum*). Subsequent scholarship has questioned their analysis, however. See Hessick, *supra* note 18, at 283 n.38 (arguing that the sources Woolhandler and Nelson rely on to conclude that *injuria absque damno* was a bar to recovery in early American law do not support this conclusion, because the same sources noted that *damnum* could be inferred from *injuria*).

<sup>40</sup> See, e.g., RESTATEMENT (SECOND) OF TORTS § 218 cmt. d (AM. LAW INST. 1965) (allowing liability for trespass to chattels even though no harm is caused); *id.* § 35(1)(c) (allowing liability for false imprisonment without harm if the imprisoned “is conscious of the confinement”); *id.* § 18(1)(a) (allowing liability for battery as long as the actor “intend[s] to cause a harmful or offensive contact”); *id.* § 21(1)(a) (allowing liability for assault as long as the actor “intend[s] to cause a harmful or offensive contact”).

<sup>41</sup> See *DOBBS*, *supra* note 28, § 56, at 149 (“[A] trespasser is always liable to the possessor for at least nominal damages . . .”).



Intentional torts to the person can result in “substantial as distinct from nominal”<sup>44</sup> recoveries without evidence of harm.<sup>45</sup> Breaches of contract that cause no loss are redressed by nominal damages.<sup>46</sup> In many unjust enrichment actions, plaintiffs can recover without proving more than the violation of their legal rights.<sup>47</sup> Defamation is actionable “although no special harm results from the publication.”<sup>48</sup> Even voter-interference cases can support a damages award “although the candidate for whom [the plaintiff] would have voted would have been defeated even though he had voted.”<sup>49</sup> Nominal damages generally remain an “appropriate means of ‘vindicated’ rights whose deprivation has not caused actual, provable injury.”<sup>50</sup>

The availability of nominal damages (and imputed remedies) in the absence of additional harm follows, to some extent, from the aspirational principle that every right has a remedy, which was accepted at the founding.<sup>51</sup> This principle has given way to the widespread understanding, dating at least to Justice Holmes if not to Justice Story, that private law “rights and remedies are . . . functionally inseparable.”<sup>52</sup> Famously, Calabresi and Melamed’s work on property

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<sup>42</sup> See, e.g., *Raven Red Ash Coal Co. v. Ball*, 39 S.E.2d 231, 238 (Va. 1946) (granting restitution for trespass, as “[n]atural justice plainly requires the law to imply a promise to pay a fair value of the benefits received”); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 40 cmt. c, illus. 2 (AM. LAW INST. 2011) (allowing restitution without injury for a violation of property rights).

<sup>43</sup> See, e.g., *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 159–60, 166 (Wis. 1997) (allowing nominal damages to support a punitive damage award for an intentional trespass despite the lack of any measurable harm); RESTATEMENT (SECOND) OF TORTS § 163 cmt. e (AM. LAW INST. 1979).

<sup>44</sup> DOBBS, *supra* note 28, § 47, at 120.

<sup>45</sup> See Brief of Restitution and Remedies Scholars as Amici Curiae in Support of Respondent at 20, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (No. 13-1339) [hereinafter Brief of Remedies Scholars] (pointing to cases where this has been found).

<sup>46</sup> RESTATEMENT (SECOND) OF CONTRACTS § 346(2) (AM. LAW INST. 1981).

<sup>47</sup> See Brief of Remedies Scholars, *supra* note 45, at 6–19 (collecting authority).

<sup>48</sup> RESTATEMENT (SECOND) OF TORTS § 569 (AM. LAW INST. 1977).

<sup>49</sup> *Id.* § 865 cmt. a (AM. LAW INST. 1979). See *Nixon v. Herndon*, 273 U.S. 536, 540 (1927) (“That private damage may be caused by such political action and may be recovered for in a suit at law hardly has been doubted for over two hundred years . . .”).

<sup>50</sup> *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 n.11 (1986).

<sup>51</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (“[W]here there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.” (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES \*23)); Hessick, *supra* note 18, at 285 (noting that “early American courts awarded nominal damages for violations of rights that did not result in harm”).

<sup>52</sup> Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999). Compare Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897) (“[A] legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court;—and so of a legal right.”), with *Webb v. Portland Mfg. Co.*, 29 F. Cas. 506, 508

rules and liability rules<sup>53</sup> expanded this insight into a “theoretical framework [that] ‘vaporized the inherited barriers between private law rights and remedies.’”<sup>54</sup>

Framed this way, it is easy to see a given right-remedy combination as a package deal, the judicial enforcement of which serves a regulatory function by promoting some yet more general normative interests, ends, or policy goals.<sup>55</sup> Just what the common law’s policy goals are, of course, is hotly debated.<sup>56</sup> Whatever they are, however, they are better served by causes of action and justiciability rules that require only a legal violation to be enforceable.

## 2. *Intellectual Property Rights*

As with traditional common law rights, intellectual property rights do not often face justiciability hurdles, and instead are decided on the merits. This is so even in cases where the violation is hard to quantify or seems purely “legal”—indeed, such violations are often sanctioned in order to further the purposes of the relevant legal regime. These dynamics are on display in the evolution of copyright law’s treatment of imputed licenses.

One who infringes a copyright or trademark is liable to its owner for the owner’s losses or the infringer’s profits.<sup>57</sup> Where the harm from copyright infringement is hard to quantify or cannot be quantified, the law provides for statutory damages.<sup>58</sup> This was true historically as well: In the first Copyright Act, the First Congress allowed copyright holders to recover, in an “action of debt,” fifty cents for every infringing page found in an infringer’s possession.<sup>59</sup>

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(C.C.D. Me. 1838) (No. 17,322) (“[I]t is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal.” (citation omitted)).

<sup>53</sup> Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

<sup>54</sup> Levinson, *supra* note 52, at 859 (quoting Saul Levmore, *Unifying Remedies: Property Rules, Liability Rules, and Startling Rules*, 106 YALE L.J. 2149, 2149 (1997)).

<sup>55</sup> See *infra* notes 179–81 and accompanying text.

<sup>56</sup> See Mark A. Geistfeld, *Hidden in Plain Sight: The Normative Source of Modern Tort Law*, 91 N.Y.U. L. REV. 1517, 1520 (2016) (noting the “ongoing controversy” regarding the public policies underlying tort law); Levinson, *supra* note 52, at 931 (noting the various “considerations” courts consider when deciding common law cases, including “economic efficiency, moral concerns . . . [and] distributional concerns”).

<sup>57</sup> See 15 U.S.C. § 1117(a) (2012); 17 U.S.C. § 504(b) (2012).

<sup>58</sup> See 17 U.S.C. § 504(c) (2012); 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 14.02[A][3] (Matthew Bender rev. ed. 2017) [hereinafter NIMMER] (noting that “statutory damages [are] particularly appropriate” where “actual damages may be particularly difficult to ascertain”).

<sup>59</sup> An Act for the Encouragement of Learning § 2, 1 Stat. 124, 124–25 (1790). This remedy applied only to pages not yet distributed, and thus unlikely to have caused any harm.

Under modern copyright law, however, statutory damages are generally only available after the effective date of registration of the copyright.<sup>60</sup> This is meant to incentivize registration,<sup>61</sup> but can end up foreclosing any recovery where the copyright owner has failed to register, suffers no quantifiable loss, and the infringer does not profit from the infringement.<sup>62</sup> One response to this dilemma is for courts to impute a license fee based on the fair market value of the infringed work.<sup>63</sup> The propriety of doing so, however, has not always been clear, with some authorities suggesting that such a remedy “relies on the most transparent of fictions.”<sup>64</sup>

The Seventh and Second Circuits went back and forth on this issue. The basic question was whether a license fee should be imputed, counterfactually, in the absence of any evidence that an infringer even considered negotiating for use of the infringed work. In *Deltak, Inc. v. Advanced Systems, Inc.*,<sup>65</sup> Judge Posner awarded the plaintiff copyright owner an imputed “value of use,” said to correspond to the infringer’s “saved acquisition costs.”<sup>66</sup> The Second Circuit initially rejected this approach in *Business Trends Analysts, Inc. v. Freedonia Group, Inc.*,<sup>67</sup> adopting a measure of defendant’s profits that turned on the defendant’s subjective<sup>68</sup> willingness to negotiate, largely as a matter of congressional intent.<sup>69</sup>

In *On Davis v. The Gap, Inc.*,<sup>70</sup> however, Judge Leval moved the Second Circuit much closer to the *Deltak* approach, awarding the plaintiff damages in the form of an imputed license fee based on

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<sup>60</sup> Or after publication but before registration, if registered within three months of publication. 17 U.S.C. § 412(2) (2012).

<sup>61</sup> See 2 NIMMER, *supra* note 58, § 7.16[C][1][a][iii] (“Because statutory damages may often constitute the only meaningful remedy available to a copyright owner for infringement of his work, Section 412 represents a powerful incentive to register.”); 4 NIMMER, *supra* note 58, § 14.02[B][1] (suggesting that Congress adopted the current statutory scheme “in order to foster registration”).

<sup>62</sup> See 4 NIMMER, *supra* note 58, § 14.02[B][1] (noting the “harsh result of no recovery under those triple circumstances”).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*; see also *Bus. Trends Analysts, Inc. v. Freedonia Grp., Inc.*, 887 F.2d 399, 405 (2d Cir. 1989) (quoting 4 NIMMER, *supra* note 58, § 14.02[B][1] for this point).

<sup>65</sup> 767 F.2d 357 (7th Cir. 1985).

<sup>66</sup> *Id.* at 362.

<sup>67</sup> 887 F.2d 399 (2d Cir. 1989).

<sup>68</sup> See *id.* at 405 (“TFG no more priced the BTA study and then decided to copy than a purse-snatcher decides to forgo friendly negotiations . . . . TFG did not save money that it would have paid to BTA for copies of the [infringed work].”).

<sup>69</sup> See *id.* at 406 (“Congress means ‘profits’ in the lay sense of gross revenue less out-of-pocket costs, not the fictive purchase price that TFG hypothetically chose not to pay to BTA.”).

<sup>70</sup> 246 F.3d 152 (2d Cir. 2001).

objective<sup>71</sup> evidence of a fair market value for licensing the infringed work.<sup>72</sup> The court distinguished *Business Trends* along several dimensions, reading it narrowly as rejecting the “value of use” remedy as a measure of *defendant’s profits*, but not plaintiff’s “actual” damages.<sup>73</sup> Judge Leval emphasized that without this remedy, “victims of infringement will go uncompensated” and “an infringer may steal with impunity.”<sup>74</sup>

The *Davis* court’s approach has become dominant.<sup>75</sup> Even under *Davis*, however, a plaintiff who cannot prove a market value for her work will have her claim dismissed.<sup>76</sup> For purposes of this Note, two points are important: 1) that such a dismissal is on the merits, after an opportunity for the presentation of evidence relevant to the remedy; and 2) that courts will broadly construe “actual damages” in order to find a remedy for a proven violation.

### 3. *Constitutional Torts*

The same dynamics described above are present in the law of constitutional torts. Money damages are available for the violation of constitutional rights by state officials through 42 U.S.C. § 1983.<sup>77</sup> The basic purpose of this remedy—a “species of tort liability”—is “to compensate persons for injuries that are caused by the deprivation of constitutional rights.”<sup>78</sup> While such damage awards are widely understood to deter constitutional violations,<sup>79</sup> the Court has suggested that the deterrence rationale is secondary to the goal of compensating injured plaintiffs.<sup>80</sup>

<sup>71</sup> See *id.* at 172 (“The usefulness of the [fair market value] test does not depend on whether the copyright infringer was in fact himself willing to negotiate for a license.”).

<sup>72</sup> *Id.* at 161, 172.

<sup>73</sup> *Id.* at 161–64. The court went on to note that imputing a license fee in the absence of any evidence of negotiations is no less counterfactual than many accepted copyright damage measurements, such as lost *opportunity* to license. *Id.* at 166–67.

<sup>74</sup> *Id.* at 166.

<sup>75</sup> See 4 NIMMER, *supra* note 58, § 14.02[B][4] (collecting cases).

<sup>76</sup> See *Davis*, 246 F.3d at 166 (“[T]he owner must show that the thing taken had a fair market value.”).

<sup>77</sup> 42 U.S.C. § 1983 (2012). A similar, implied cause of action against federal officials was found in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 395–96 (1971).

<sup>78</sup> *Carey v. Piphus*, 435 U.S. 247, 253–54 (1977).

<sup>79</sup> Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 346 n.1 (2000) (collecting authorities). *But see generally id.* (questioning whether government responds to cost-internalization incentives in the same way as private firms).

<sup>80</sup> See *Carey*, 435 U.S. at 256–57 (“[T]here is no evidence that [Congress] meant to establish a deterrent more formidable than that inherent in the award of compensatory damages.”). *But see* *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (“Deterrence is also an important purpose of this system, but it operates through the mechanism of damages that are *compensatory* . . . .”); *Carey*, 435 U.S. at 257 n.11

The § 1983 remedy is easy to apply where “the interests protected by a particular branch of the common law of torts . . . parallel closely the interests protected by a particular constitutional right.”<sup>81</sup> Where this is *not* the case, it can be difficult to “adapt[ ] common-law rules of damages to provide fair compensation for injuries caused by the deprivation of a constitutional right.”<sup>82</sup> What, for example, is an appropriate damage award for a denial of procedural due process? Is the ensuing emotional distress compensable, as it generally is in tort? What quantum of proof is required? If no compensable injury is proved, what happens to the claim?

The Court’s solution has not been to “adapt” common law damages rules to § 1983 actions so much as to apply them straightforwardly, even where a constitutional right has no tort analogue. For example, in *Carey v. Piphus*, students sued their schools under § 1983 after being suspended without due process.<sup>83</sup> The Court held that, while emotional distress is compensable, plaintiffs must be “put to their proof on the issue, as plaintiffs are in most tort actions.”<sup>84</sup> The Court rejected the students’ contention that, as in common law defamation, injury should be presumed.<sup>85</sup>

In *Memphis Community School District v. Stachura*, the Court considered the legality of a jury instruction in a § 1983 case authorizing compensatory damages based on the “value or importance” of the constitutional rights violated.<sup>86</sup> Plaintiff, a tenured life science teacher, was suspended after showing movies in class on human growth and sexuality; he sued under § 1983 for violations of his First and Fourteenth Amendment rights.<sup>87</sup> Unsurprisingly, the Court found that damages based on the abstract value or importance of constitutional rights are not “truly” compensatory and thus are not authorized by § 1983.<sup>88</sup> Despite *Carey*’s acknowledgement that the elements of recovery might vary with the constitutional right at issue, the *Stachura* Court doubled down on the requirement that damages compensate injuries and implicitly limited the categories of compensable injuries to those recognized in tort.<sup>89</sup> While *Stachura* left open the possibility

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(“[E]xemplary or punitive damages might . . . be awarded in a proper case under § 1983 with the specific purpose of deterring or punishing violations of constitutional rights.”).

<sup>81</sup> *Carey*, 435 U.S. at 258.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 249–50.

<sup>84</sup> *Id.* at 262.

<sup>85</sup> *Id.* at 261–64.

<sup>86</sup> *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 302 (1986).

<sup>87</sup> *Id.* at 300–02.

<sup>88</sup> *Id.* at 308, 309 n.13, 310.

<sup>89</sup> *Id.* at 309.

of “presumed” compensatory damages for some violations,<sup>90</sup> and the *Carey* Court foresaw “no particular difficulty” in proving emotional distress from such violations,<sup>91</sup> as a practical matter, many categories of constitutional torts are unlikely to generate significant damage awards, risking both underdeterrence and undercompensation.<sup>92</sup>

Consistent with other traditional rights, however, nominal damages are available as a floor in § 1983 actions where no compensable injury is proved, in order to “vindicate[ ]” the violated right and its importance to society.<sup>93</sup> Lack of an injury beyond the violation of a legal right is not grounds for dismissal on the merits, let alone for being nonjusticiable.

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This short survey has hopefully shown that, for traditional private rights, the violation of the right alone is enough to get into court, and the availability of a remedy is a merits issue, not a justiciability determination. In none of these cases was the power of the courts to hear the dispute ever in question, despite the lack of an obvious or proven injury. Hearing such suits on the merits, rather than dismissing them at the jurisdictional threshold, has consequences: Merits determinations on purely legal injuries have *res judicata* effects; they develop the substantive law; they can have collateral consequences, such as assigning costs or establishing title to land; and, however trivially, they help “vindicate” the social importance of established rights.

### *B. Novel Statutory Harms, When Sued on as Legal Injuries Without Harm, Frequently Face Justiciability Hurdles*

This section offers a brief illustration of how *injuria absque damno* plays out under less traditional statutory regimes. Unlike the cases discussed in Section I.A, the courts here refuse to reach the merits, despite being faced with the same scenario as in the cases detailed above—legal injury without harm. Examples are drawn from

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<sup>90</sup> *Id.* at 310–11, 311 n.14 (noting that presumed damages “may possibly be appropriate” for “an injury that is likely to have occurred but difficult to establish,” and characterizing voter-interference money damages suits in this way).

<sup>91</sup> *Carey v. Phipps*, 435 U.S. 247, 263 (1977).

<sup>92</sup> *See* Levinson, *supra* note 52, at 934 n.327 (noting “the potential for underdeterrence and undercompensation for categories of constitutional violations that do not generate significant damage awards”).

<sup>93</sup> *Carey*, 435 U.S. at 266 (“[B]ecause of the importance to organized society that procedural due process be observed . . . the denial of procedural due process should be actionable for nominal damages without proof of actual injury.”); *see also Stachura*, 477 U.S. at 308 n.11 (“[N]ominal damages . . . are the appropriate means of ‘vindicating’ rights whose deprivation has not caused actual, provable injury.”).

the Fair Credit Reporting Act (FCRA), the Cable Communications Policy Act (CCPA), and the wild world of ERISA litigation.

The FCRA case is *Spokeo* itself. As described above, Spokeo clearly disseminated misinformation about Robins.<sup>94</sup> Assuming injury in fact, it is still far from certain that Spokeo would end up liable. The FCRA is not a strict liability statute; actual damages require negligent noncompliance,<sup>95</sup> while statutory damages require *willful* noncompliance.<sup>96</sup> Under the framework described in Section I.A, one might expect these issues to be the focus of judicial analysis, with the allegation of a statutory violation sufficient to survive at least through the motion-to-dismiss stage. Instead, on remand, the Ninth Circuit dwelt on Congress's "instructive and important" judgment in "determining whether an intangible harm constitutes injury in fact,"<sup>97</sup> before announcing a new test for standing based on alleged statutory violations: "(1) whether the statutory provisions at issue were established to protect . . . concrete interests (as opposed to purely procedural rights), and if so, (2) whether the specific procedural violations alleged . . . actually harm, or present a material risk of harm to, such interests."<sup>98</sup> A sensible approach, probably, but still only a shadow of the merits.

Post-*Spokeo*, the Eight Circuit considered a suit under the CCPA in *Braitberg v. Charter Communications, Inc.*<sup>99</sup> The plaintiff sued Charter for violating its statutory duty to "destroy personally identifiable information" but did not allege any additional injury or "material risk of harm" stemming from this violation, such as disclosure to a third party or unauthorized use by Charter.<sup>100</sup> With "the benefit of *Spokeo*'s guidance," the court recognized this as a "bare procedural violation, divorced from any concrete harm," and thus insufficient for standing.<sup>101</sup> Legal injury without harm was inadequate to support standing.

A final example: ERISA allows retirement plan participants to sue plan fiduciaries for breaches of their statutorily specified duties of

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<sup>94</sup> See *supra* notes 1–2 and accompanying text.

<sup>95</sup> 15 U.S.C. § 1681o (2012).

<sup>96</sup> *Id.* § 1681n.

<sup>97</sup> *Robins v. Spokeo*, 867 F.3d 1108, 1112 (9th Cir. 2017).

<sup>98</sup> *Id.* at 1113. The Ninth Circuit answered both questions in the affirmative and thus found standing. *Id.* at 1113, 1117–18. Ironically, this new test bears more than a passing resemblance to the "zone of interests" test that the Court has recently decided is a merits question, not a matter of subject-matter jurisdiction. See *infra* note 145 and accompanying text.

<sup>99</sup> 836 F.3d 925, 929–30 (8th Cir. 2016).

<sup>100</sup> *Id.* at 930.

<sup>101</sup> *Id.*

loyalty and prudence, with any recovery inuring to the plan as a whole and not to individual litigants.<sup>102</sup> In *David v. Alphin*, plaintiffs were participants in a pension plan who brought a class action against the plan's sponsor (Bank of America) and fiduciaries, alleging, *inter alia*, that the fiduciaries engaged in prohibited, self-dealing transactions by investing in bank-affiliated mutual funds that performed poorly and charged excessive fees.<sup>103</sup> Though plaintiffs' statutory standing was "undisputed," the court found they lacked constitutional standing, rejecting four distinct, fairly robust theories of standing offered by plaintiffs.<sup>104</sup> The court saw no direct injury to the plaintiffs: They had a legal interest only in their defined benefits, not in the assets of the plan as a whole, and, due to regulatory safeguards, their personal interests were simply not at risk from the alleged misconduct.<sup>105</sup> Nor were the plaintiffs' statutory rights to have the plan operated in accordance with ERISA a sufficient basis for constitutional injury. The court simply dismissed this argument as a conflation of statutory and constitutional standing.<sup>106</sup> Perhaps most notably, the court failed to credit plaintiffs' argument that ERISA embodies traditional principles of trust law, which has long allowed beneficiaries to sue for breach of the duty of loyalty without an allegation of economic injury to the trust.<sup>107</sup> Despite the obvious similarities between these traditional principles and the fiduciary obligations imposed by ERISA,<sup>108</sup> the court refused to draw the connection.

These cases are, in several meaningful ways, the same as the cases described in Section I.A. They are all suits for monetary relief. They all allege clear legal violations. In all of them (save, arguably, the ERISA case), consequential, compensable harm is speculative or non-existent, and the law provides a workaround for this problem: nominal or imputed damages in the Section I.A cases and statutory damages in

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<sup>102</sup> See *David v. Alphin*, 704 F.3d 327, 332 (4th Cir. 2013) (citing 29 U.S.C. § 1132(a)(2) (2012)).

<sup>103</sup> *Id.* at 331.

<sup>104</sup> *Id.* at 333–34.

<sup>105</sup> *Id.* at 338. The Secretary of Labor, as amicus, argued that the risk of underfunding in a defined-benefit plan was an Article III injury, even where, as here, the plan was overfunded when the claims were filed. The Secretary argued that failure to recognize this injury would "immunize fiduciaries from lawsuits by plan participants in any case involving an overfunded defined benefit plan," leaving no remedy for clear ERISA violations in such cases." *Id.* at 337 (quoting Brief of the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellants Urging Reversal at 10, 704 F.3d 327 (No. 11-2181)). The court noted that the Secretary was always free to bring enforcement actions on her own. *Id.* at 339.

<sup>106</sup> *Id.* at 338.

<sup>107</sup> *Id.* at 336.

<sup>108</sup> See *Beck v. PACE Int'l Union*, 551 U.S. 96, 101 (2007) (noting that "the common law of trusts . . . serves as ERISA's backdrop").



the Section I.B cases. Except, as we have seen, the Section I.B cases do not reach the merits. We now turn to why that is. Part II looks at the historical development of standing doctrine and its reliance on a conceptually murky distinction between “public” and “private” rights to help explain why the Section I.B cases do not reach the merits.

## II

### STANDING AND LEGAL INJURY WITHOUT HARM

*“Generalizations about standing to sue are largely worthless as such.”*<sup>109</sup>

The doctrine of standing—or its inconsistent application—drives the difference between Sections I.A and I.B. Standing’s blackletter is easy: Article III of the Constitution limits the federal judicial power to actual “Cases” and “Controversies.”<sup>110</sup> Without a case or controversy, a federal court does not have the constitutional authority to decide a dispute. Standing measures the existence of a case or controversy, which is present when plaintiff has (1) an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.<sup>111</sup> The Court often says standing serves separation of powers purposes, preventing “the judicial process from being used to usurp the powers of the political branches” and confining the courts to “a properly judicial role.”<sup>112</sup> Injury in fact is the most prominent and frequently contested aspect of standing. Though standing is supposed to be transsubstantive,<sup>113</sup> many commentators have argued that it, and injury in fact in particular, bleed heavily into the merits or are even indistinguishable from them.<sup>114</sup>

Section II.A considers how the joint development of standing doctrine and public and administrative law litigation gave rise to the requirement of a concrete injury in fact. Section II.B argues that the “concreteness” of an injury turns, to some degree, on whether the underlying right is public or private, and that the distinction between

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<sup>109</sup> Ass’n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 152 (1970).

<sup>110</sup> U.S. CONST. art. III, § 2.

<sup>111</sup> See, e.g., Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016).

<sup>112</sup> *Id.* (citations omitted).

<sup>113</sup> See Fallon, *supra* note 25, at 1062 (noting the Court’s characterization of standing “as turning almost entirely on a single, transsubstantive, tripartite test”).

<sup>114</sup> See generally Robert Dugan, Comment, *Standing to Sue: A Commentary on Injury in Fact*, 22 CASE W. RES. L. REV. 256, 275 (1971) (“[T]here can be no meaningful limitations present in the term ‘injury in fact’ if the standing requirement is to avoid any consideration of the merits.”); Fletcher, *supra* note 17, at 231–33 (noting that the “injury in fact” test cannot be applied in a non-normative way, without reference to external standards of what makes an injury legally sufficient, and comparing it to substantive due process).

public and private is conceptually unstable, which results in inconsistencies in the courts. Section II.C offers examples of these inconsistencies.

*A. The Origins of the Concrete Injury Requirement:  
The Assertion of Judicial Control over Constitutionally  
Cognizable Injuries*

Standing did not develop as an independent doctrine until well into the early twentieth century.<sup>115</sup> Defenders of modern standing doctrine point to precedents that supposedly embody features of standing's current tripartite structure,<sup>116</sup> but attempts to ground the elements of modern standing in historical practice suffer from a significant indeterminacy: The procedural structure of the lawsuit at common law and under early code pleading did not readily distinguish between questions of standing and those on the merits.<sup>117</sup> Rarely were questions about the constitutional power of a federal court to hear a case anywhere near the surface of a suit. Rather, the inquiry was often simply: "On the facts pleaded, does this particular plaintiff have a right to the particular relief sought from the particular defendant?"<sup>118</sup> With standing and the merits so intertwined, "[t]he standing issue could hardly arise at common law or under early code pleading rules."<sup>119</sup>

This tight intertwinement followed, according to Professor Chayes, from the traditional, private-law model of the lawsuit, which

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<sup>115</sup> See Fletcher, *supra* note 17, at 224–25 (noting that, as late as 1923, the Court in *Frothingham v. Mellon*, 262 U.S. 447 (1923), did not use the word "standing" in denying a federal taxpayer the right to challenge the constitutionality of a federal statute); see also Hessick, *supra* note 18, at 290–91 ("Standing first flourished as an independent doctrine in the early 1900s.").

<sup>116</sup> See, e.g., *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 n.5 (1998) (disputing Justice Stevens's claim that standing's "redressability" prong "is a judicial creation of the past 25 years," and arguing instead that "the concept has been ingrained in our jurisprudence from the beginning." (citing *Marye v. Parsons*, 114 U.S. 325, 328–29 (1885))).

<sup>117</sup> Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1290 (1976).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*; see also JOSEPH VINING, LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW 43 (1978); Sunstein, *supra* note 18, at 1434. This is not to say that the constitutional dimensions of standing were *never* salient before the twentieth century, just that they arose relatively rarely and were cloaked in other doctrines. See Woolhandler & Nelson, *supra* note 39, at 716 (arguing that two early justiciability cases, often thought of as political question decisions, are in fact standing decisions because the legal defect was "simply that the plaintiffs were not proper parties . . . because they did not have the right sort of interests at stake," not that the legal issues themselves were nonjusticiable).

treated right and remedy as interdependent.<sup>120</sup> The right to participate in a lawsuit, whether as the initiating plaintiff or an intervenor, followed from the availability of a remedy from the defendant, which in turn followed from possession of a legal (or equitable) right in the form of an interest protectable by a cause of action.<sup>121</sup> Thus, standing was often just another element of the cause of action, with its scope determined by the source of law providing the cause of action and defining the right.<sup>122</sup>

The forces that gave rise to a “separately articulated and self-conscious law of standing”<sup>123</sup> are part of the familiar story of American legal change that began in the last quarter of the nineteenth century with the growth of social and economic legislation,<sup>124</sup> accelerated with the rise of the administrative state,<sup>125</sup> and is still being actively contested following the surge in public law litigation in the 1960s and 1970s.<sup>126</sup> The procedural reforms of the Field Code and the Federal Rules—in particular, liberalized joinder rules and the shift to a lawsuit structure focused on the factual “transaction or occurrence”—reflected “a growing sense that the effects of the litigation were not really confined to the persons at either end of the right-remedy axis.”<sup>127</sup>

This “growing sense” included an expanding notion of who could sue in the first place.<sup>128</sup> Departing from the right-remedy procedural model, however, created a line-drawing problem: how to determine who could get into court, if not by reference to a right to a specific remedy? Standing doctrine emerged to do this line-drawing work.<sup>129</sup>

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<sup>120</sup> Chayes, *supra* note 117, at 1282–83. Chayes characterized the traditional suit as having five defining features: (i) bipolar structure; (ii) retrospectivity; (iii) interdependence of right and remedy; (iv) self-containment to the parties; and (v) party-initiated and party-controlled process. *Id.*

<sup>121</sup> See Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 29–39 (1989) (locating the outer limit of code procedure’s ideal lawsuit structure in the “multiplicity-of-suits” doctrine, which allowed for equitable joinder of otherwise separate suits at law only when the rights at issue formed a “network” that could be resolved by a unitary remedy).

<sup>122</sup> Hessick, *supra* note 18, at 290–91.

<sup>123</sup> Fletcher, *supra* note 17, at 225.

<sup>124</sup> Chayes, *supra* note 117, at 1288–89.

<sup>125</sup> Fletcher, *supra* note 17, at 225.

<sup>126</sup> *Id.* at 227; Tobias, *supra* note 22, at 279–96.

<sup>127</sup> Chayes, *supra* note 117, at 1289–90.

<sup>128</sup> *Id.* at 1291 (“[T]he pressure to expand the circle of potential plaintiffs has been inexorable.”).

<sup>129</sup> *Id.* (“[T]he Supreme Court is struggling . . . with questionable success, to establish a formula for delimiting who may sue that stops short of ‘anybody who might be significantly affected by the situation he seeks to litigate.’”).

The growth of administrative agencies was a central driver of the growth of this evolving form of line drawing. Legal challenges to agency action frequently presented the question of who could sue to enforce the agency's legal duties.<sup>130</sup> Courts could not rely directly on the traditional forms of action following the abolition of the writ system by the Federal Rules in 1938.<sup>131</sup> So they did the next best thing: limiting standing to plaintiffs seeking to vindicate an interest that *could have been* sued on at common law—a traditional private right<sup>132</sup>—in what became known as the “legal interest” or “legal right” standard.<sup>133</sup> Statutory provisions authorizing those “aggrieved” by agency action to bring suit were construed to mean persons with a legal right, including statutorily granted rights.<sup>134</sup>

By midcentury, as the need for expanded judicial oversight of administrative agencies became clearer, the legal-interest test was perceived as an impediment to that oversight.<sup>135</sup> The test could also be complex to apply: As courts found more and more protectable legal interests in statutes,<sup>136</sup> difficult questions of statutory interpretation became more common.<sup>137</sup>

Judicial discomfort with the narrowness and complexity of the legal-interest standard culminated in *Association of Data Processing Service Organizations, Inc. v. Camp*.<sup>138</sup> The Court settled on a way to both simplify the standing inquiry and open up the range of interests

<sup>130</sup> Fletcher, *supra* note 17, at 225.

<sup>131</sup> Hessick, *supra* note 18, at 291.

<sup>132</sup> *Id.*

<sup>133</sup> See, e.g., *Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 137–38 (1939) (noting that a plaintiff threatened by agency action could not challenge that action “unless the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege”).

<sup>134</sup> See Sunstein, *supra* note 18, at 1440–41.

<sup>135</sup> Hessick, *supra* note 18, at 292–93, 293 n.106; see Sunstein, *supra* note 18, at 1441–44 (discussing judicial checks on administrative behavior during this period).

<sup>136</sup> See Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 886–87, 887 n.30 (1983) (noting “case law under various specific statutes” that “broadened the traditional rules in those particular fields” about who had standing to sue); cf. *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 154 (1970) (“Where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action.”).

<sup>137</sup> Cf. Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 695 (2006) (“If standing analysis proceeded on these more right-specific terms, questions about which provisions of law create which rights to sue . . . would remain difficult and divisive.”).

<sup>138</sup> 397 U.S. 150 (1970). Plaintiffs were data processing vendors who challenged, under the Administrative Procedure Act (APA), a determination by the Comptroller of Currency that banks could sell data processing services to their ordinary banking customers. *Id.* at 151.

sufficient to get a plaintiff into court. An Article III case or controversy could be found wherever a plaintiff “alleges that the challenged action has caused him injury in fact, economic or otherwise.”<sup>139</sup> The Court rejected the “legal interest” test specifically *because* it “goes to the merits,” while “[t]he question of standing is different.”<sup>140</sup>

The majority opinion in *Data Processing* divided standing into two inquiries: first, “the ‘case’ or ‘controversy’ test,” and second, the “zone of interests” test, i.e. “whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”<sup>141</sup> The “case” or “controversy” test, of course, was a matter of Article III jurisdiction, and was satisfied by an allegation of injury in fact.<sup>142</sup> The nature of the “zone of interests” test, on the other hand, was somewhat mysterious; it was not a constitutional limit,<sup>143</sup> nor did it go to the merits. The Court characterized it as a prudential standing doctrine,<sup>144</sup> now often known as “statutory standing.”<sup>145</sup>

Two interrelated aspects of the doctrinal developments in *Data Processing* are worth highlighting now. First, requiring a plaintiff to show “injury in fact” to get into court—*damnum absque injuria*, as

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<sup>139</sup> *Id.* at 152.

<sup>140</sup> *Id.* at 153.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 151–52. The Court later “clarified,” if there was any lingering doubt, that injury in fact is a “general requirement of Article III” in any suit, and not just in those brought under the APA. Hessick, *supra* note 18, at 294 n.111 (citing *Singleton v. Wulff*, 428 U.S. 106, 112 (1976)).

<sup>143</sup> *Data Processing*, 397 U.S. at 153–54 (noting that the “zone of interests” portion of the standing inquiry is “apart from the ‘case’ or ‘controversy’ test” and “[a]part from Article III jurisdictional questions”).

<sup>144</sup> *Id.* at 154 (“[P]roblems of standing, as resolved by this Court for its own governance, have involved a ‘rule of self-restraint.’”). Justice Brennan, who joined the Court’s holding as to the now-constitutional requirement of injury in fact, dissented on the “zone of interests” ruling, which he thought confusing and necessarily entangled with the merits. *Id.* at 176–77 (Brennan, J., concurring in part and dissenting in part).

<sup>145</sup> *See, e.g., Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 97 (1998) (“The latter question [of whether plaintiff came within the ‘zone of interests’ for which the cause of action was available] is an issue of *statutory* standing. It has nothing to do with whether there is [sic] case or controversy under Article III.”). Only recently has the Court apparently come around to Justice Brennan’s view, holding in *Lexmark International, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387–88 & nn.3–4 (2014), that the “zone of interests” and “statutory standing” inquiries really *are* about whether a plaintiff has a cause of action under a statute and do not implicate subject-matter jurisdiction. Needless to say, and as the Court hints, this result is in some tension with the Court’s past treatment of statutory standing as a jurisdictional requirement. *Id.* at 1387 n.4 (citing *Steel Co.*, 523 U.S. at 97 & n.2). Notably, the opinions in both *Steel Co.* and *Lexmark* were authored by Justice Scalia.

Justice Brennan saw it<sup>146</sup>—is almost precisely inverse to the common law requirement, which generally only allowed actions based on legal rights, even when unaccompanied by perceptible harm.<sup>147</sup> The standing inquiry morphed from one rooted almost entirely in the underlying source of law to one that, theoretically, should *ignore* the source of law.<sup>148</sup> Second, grounding the standing inquiry not in the source of law providing the cause of action—the legal right—but in the freestanding constitutional limit of injury in fact empowered the courts to impose more stringent justiciability requirements on an ad hoc basis, notwithstanding Congress’s legislative power to “define injuries and articulate chains of causation.”<sup>149</sup> While it had long been acknowledged that Congress could not expand the jurisdiction of the federal courts beyond the limits of Article III,<sup>150</sup> the Court had never allowed itself such a prominent role in deciding, as a routine jurisdictional inquiry,<sup>151</sup> which legal injuries established by Congress would and would not count as judicially cognizable.

In *Lujan v. Defenders of Wildlife*,<sup>152</sup> the Court explicitly embraced a greater share of the constitutional power implicit in the *Data Processing* framework. In striking down the citizen-suit provision of the Endangered Species Act for allowing suits to be brought by parties without injury in fact, the majority opinion seemed to place a hard cap on Congress’s power to define legal injuries, at least as against the state.<sup>153</sup>

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<sup>146</sup> *Data Processing*, 397 U.S. at 172 n.5 (Brennan, J., concurring in part and dissenting in part).

<sup>147</sup> See, e.g., *Webb v. Portland Mfg. Co.*, 29 F. Cas. 506, 506 (C.C.D. Me. 1838) (No. 17,322) (“But I am not able to understand, how it can correctly be said, in a legal sense, . . . that *injuria sine damno* is not actionable.”).

<sup>148</sup> See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 576 (1992) (“[T]here is absolutely no basis for making the Article III inquiry turn on the source of the asserted right.”). But see *Warth v. Seldin*, 422 U.S. 490, 500 (1974) (“Although standing in no way depends on the merits . . . it often turns on the nature and source of the claim asserted.”).

<sup>149</sup> *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring).

<sup>150</sup> See, e.g., *Data Processing*, 397 U.S. at 154 (“Congress can, of course, resolve [prudential standing rules] one way or another, save as the requirements of Article III dictate otherwise.” (citing *Muskrat v. United States*, 219 U.S. 346 (1911))); *Barlow v. Collins*, 397 U.S. 159, 173 n.6 (1970) (Brennan, J., concurring in part and dissenting in part) (“Congress cannot expand the Article III jurisdiction of federal courts.” (citing *Muskrat*, 219 U.S. 346)).

<sup>151</sup> And absent concerns about advisory opinions, adverseness, or friendly suits, that is. Cf. Fallon, *supra* note 137, at 658–59 (noting some of the “functional desiderata of sound adjudication”).

<sup>152</sup> 504 U.S. 555 (1992).

<sup>153</sup> *Lujan*, 504 U.S. at 577 (holding that Congress cannot “convert the undifferentiated public interest in executive officers’ compliance with the law into an ‘individual right’ vindicable in the courts”).

Despite this and other stark language from the majority,<sup>154</sup> *Lujan* did not decimate Congress's ability to grant individual litigants the power to sue. The majority opinion left a number of key precedents intact.<sup>155</sup> Additionally, Justice Kennedy's concurrence arguably converted the majority opinion's fixed cap on congressional power into a clear statement rule: The Endangered Species Act by its terms did not "identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit," but perhaps it could have, using Congress's power to "articulate chains of causation."<sup>156</sup> Kennedy, however, agreed with the majority that Congress does not have power to confer rights of action in "citizen suits to vindicate the public's *non-concrete* interest in the proper administration of the laws."<sup>157</sup>

Thus, *Lujan* left room for courts to accept Congress's determinations about the legal cognizability of novel injuries created by statute, as long as those injuries are "concrete." That is, a legal injury without harm might be sufficient for standing if the legal injury itself is "concrete." However, the cases playing out the issue of concreteness are notably obscure, abounding with seemingly metaphysical distinctions between acceptable "concrete" and "particularized" injuries and unacceptable "abstract" and "general" injuries.<sup>158</sup> Underneath the metaphysics, however, one gets the sense that, for some on the Court, whether the invasion of a legal right is a "concrete" injury turns, at least somewhat, on whether that right is "public" or "private." We now turn to those concepts and their relation to standing.

### *B. The Distinction Between Public and Private Rights as a Foundation of Standing Doctrine and the Source of the Justiciability Difficulties for Novel Legal Injuries*

This section first describes the historical distinction between public and private rights. It then argues that the Court's standing jurisprudence is built in part on this distinction, in particular on the requirement that an individual plaintiff prove "special damages" to

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<sup>154</sup> *Id.* at 578 ("'Individual rights,' . . . do not mean public rights that have been legislatively pronounced to belong to each individual who forms part of the public." (citing *Sierra Club v. Morton*, 405 U.S. 727, 740–41 n.16 (1971))).

<sup>155</sup> *See id.* ("Nothing in this contradicts the principle that 'the injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.'" (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1974) and *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973))).

<sup>156</sup> *Id.* at 580 (Kennedy, J., concurring).

<sup>157</sup> *Id.* at 580–81.

<sup>158</sup> *See, e.g.,* *FEC v. Akins*, 524 U.S. 11, 34–35 (1998) (Scalia, J., dissenting) (discussing the differences, if any, between concrete generalized grievances, concrete particularized grievances, abstract generalized grievances, and abstract particularized grievances).

enforce public rights. This requirement, refracted through separation of powers concerns, manifests as a requirement of showing “injury in fact” for public, but not private, rights. Finally, this section argues that the conceptual distinction between public and private rights is tenuous, as public rights often can be recharacterized as private, and vice versa. The result of this instability is inconsistency in the courts, of which Section II.C offers examples: Sometimes individuated statutory violations are sufficient for standing, and sometimes they are not.

In Blackstone’s words, “private rights” are those “belonging to individuals, considered as individuals,”<sup>159</sup> while “public rights” are “due to the whole community, considered as a community, in its social aggregate capacity.”<sup>160</sup> Traditionally, private rights have been enforceable by private parties without any showing of additional harm—*injuria absque damno*—while public rights were ordinarily vindicable only by the government and could be enforced by private parties only on a showing of “special, individualized damage.”<sup>161</sup> Put another way, public “rights” involve legal obligations—duties—that are not owed personally to any rightholders,<sup>162</sup> which is why historically only the state could enforce them.

Given the emphasis on separation of powers in standing doctrine,<sup>163</sup> one might expect some correspondence between the stringency of the standing inquiry and the risk of judicial overstepping, not only in challenges to official action but for all “disputes that are primarily political in nature,”<sup>164</sup> including those involving widely held grievances that thus ought to be resolved through majoritarian politics.<sup>165</sup> Justice Thomas, in his *Spokeo* concurrence, posits such a relationship: “The[ ] differences between legal claims brought by pri-

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<sup>159</sup> 3 WILLIAM BLACKSTONE, COMMENTARIES \*2.

<sup>160</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES \*5. Paradigmatic examples of public rights include free navigation of waterways, general compliance with regulatory law, and penal law; the classic private rights are those of tort, contract, and property. Woolhandler & Nelson, *supra* note 39, at 693.

<sup>161</sup> *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1551–52 (2016) (Thomas, J., concurring) (collecting authority); Woolhandler & Nelson, *supra* note 39, at 702.

<sup>162</sup> *Cf.* Tobias, *supra* note 22, at 282 n.76 (defining public law/interest litigation as suits in which plaintiffs do not assert that defendants breached a duty running personally to them).

<sup>163</sup> *See supra* notes 16, 112 and accompanying text; *infra* note 215 and accompanying text.

<sup>164</sup> *Spokeo*, 136 S. Ct. at 1551 (Thomas, J., concurring).

<sup>165</sup> *See* Scalia, *supra* note 136, at 894 (arguing that courts are best positioned to protect minority rights while the political branches are better positioned to enact majoritarian policies); *cf.* Woolhandler & Nelson, *supra* note 39, at 733 (“Our governmental institutions . . . have developed upon a different premise: the unique advantage of the courts lies in protecting private rights, not in representing the public more wisely than the political branches can.”).



vate plaintiffs for the violation of public and private rights underlie modern standing doctrine.”<sup>166</sup>

According to Justice Thomas, the necessary showing of special damages for a private individual to enforce public rights has evolved into the modern requirement of injury in fact, or, more specifically, the necessity of having some injury *beyond* a violation of asserted legal rights when pressing a claim of public right.<sup>167</sup> For Thomas, then, *injuria absque damno* is sufficient to confer standing in private right claims, but not in public right claims.<sup>168</sup> There are traces of this way of thinking in majority opinions as well.<sup>169</sup>

Putting aside the historical argument<sup>170</sup> over whether Article III should be understood to embody this limitation on federal courts’ ability to hear claims based on novel legal injuries, it can be hard to maintain a clean boundary between private and public rights. The ideal, polar cases seem easy to distinguish: On one hand, you have a duty not to assault me, and I have the right to seek redress if you breach that duty. On the other hand, ACME Inc. has a generalized regulatory obligation under Environmental Law *X* not to dump hazardous waste in playgrounds, an obligation only the government can

<sup>166</sup> *Spokeo*, 136 S. Ct. at 1552 (Thomas, J., concurring).

<sup>167</sup> *Id.* at 1552–53.

<sup>168</sup> See *id.* at 1553 (reconciling *Havens Realty Corp. v. Coleman*, *TVA*, and *Lujan* on this basis). For the significance of *Havens*, see *infra* note 201. Woolhandler & Nelson go further, arguing that there is “considerable historical support” that even private suits required both *injuria* and *damnum*. Woolhandler & Nelson, *supra* note 39, at 719 n.146. Subsequent scholarship has questioned their analysis, however. See Hessick, *supra* note 18, at 283 n.38 (arguing that the sources Woolhandler and Nelson rely on to conclude that *injuria absque damno* was a bar to recovery in early American law do not support this conclusion, because the same sources noted that *damnum* could be inferred from *injuria*).

<sup>169</sup> See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561–62 (1992) (noting that standing to challenge official action is much easier to show when one is a regulated entity—the “object of the action”—because private rights will be at stake, whereas “much more is needed” for regulatory beneficiaries asserting public rights); cf. Fallon, *supra* note 137, at 667 (“[S]ome of the Justices either see, or for instrumental reasons want to maintain, a constitutional distinction between public remedies and private remedies.”); Woolhandler & Nelson, *supra* note 39, at 720 (“[T]he public/private distinction upon which modern standing doctrine rests does have historical support, and the notion that the Constitution incorporates that distinction even as against Congress does not contradict any determinate original understanding.”).

<sup>170</sup> Compare *Spokeo*, 136 S. Ct. at 1553 (Thomas, J., concurring) (stating that Article III contains “principles [that] circumscribe federal courts’ power to adjudicate a suit alleging the violation of those new legal rights”), with *Nashville, Chattanooga & St. Louis Ry. v. Wallace*, 288 U.S. 249, 264 (1933) (“[T]he Constitution does not require that the case or controversy should be presented by traditional forms of procedure, invoking only traditional remedies. . . . [The judiciary clause] did not crystallize into changeless form the procedure of 1789.”), and *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240–44 (1937) (concluding that Congress, in conferring federal jurisdiction, “is not confined to traditional forms or traditional remedies”).

enforce because any “right” created by Environmental Law *X* is held by the public at large. The regulatory dynamics of public law regimes often seem to resist being expressed in terms of rights and duties.<sup>171</sup> Despite this mismatch, however, legislatures have “considerable power to create new rights and to redefine existing rights in ways that affect whether they are public or private.”<sup>172</sup> In our hypothetical Environmental Law, Congress chose to impose a general legal duty and to vest enforcement power solely in the government, but it likewise could have legislated a duty owed by potential polluters to, say, anyone affected by such pollution, creating a “private right” in the process. Whether a right is public or private would then seem to turn largely on legislative intent.

This is consistent with Justice Thomas’s analysis in *Spokeo*: He concurred in the remand because one of the provisions Robins was suing under “arguably” created a private legal duty owed to Robins, the violation of which would suffice for standing.<sup>173</sup> Whether Congress created such a private right, or instead only imposed on consumer reporting agencies a generalized duty to use reasonable procedures, was a question of statutory interpretation for the Ninth Circuit to consider on remand.<sup>174</sup>

Calling something a private right, however, does not necessarily make it so.<sup>175</sup> Relying on legislative intent just avoids the constitutional question entirely. If Congress does “not have total control over the line between public and private rights,”<sup>176</sup> then some other method of analysis is needed to identify the “core” rights in each category that cannot constitutionally be redefined. What this analysis is, however, is anybody’s guess. Some public rights can be disaggregated, while others cannot. The most significant of this latter category is “a citizen’s naked interest in a government official’s compliance with the law.”<sup>177</sup> Relatedly, if *everyone* possesses the same right and suffers the same injury to that right, the right is likely public.<sup>178</sup> Short of these landmarks, courts are once again left to do a freestanding analysis of

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<sup>171</sup> Sunstein, *supra* note 18, at 1446.

<sup>172</sup> Woolhandler & Nelson, *supra* note 39, at 694.

<sup>173</sup> *Spokeo*, 136 S. Ct. at 1553–54 (Thomas, J., concurring).

<sup>174</sup> *Id.* On remand, the Ninth Circuit reiterated its finding that the FCRA provides a private right, not just a generalized duty. 867 F.3d 1108, 1110–11 (9th Cir. 2017); *see also id.* at 1116 (citing Justice Thomas’s observation that 15 U.S.C. § 1681e(b) “potentially creates a private duty”).

<sup>175</sup> *See supra* note 16 and accompanying text.

<sup>176</sup> Woolhandler & Nelson, *supra* note 39, at 694.

<sup>177</sup> *Id.* at 724.

<sup>178</sup> *See* Hessick, *supra* note 18, at 309 (“The only limitation the Court has imposed consistently is that an injury is not cognizable if recognizing the injury would confer standing on any and all persons who might seek to bring suit.”).

which real-world interests can “support litigation”<sup>179</sup> by private parties. If this sounds strikingly similar to the “injury in fact” standing inquiry, that’s because it is: The question of whether a public right can be made private is the same as whether the violation of a “public” right can give rise to injury in fact sufficient for standing. Neither is analytically prior, and both are susceptible to the same incoherence.<sup>180</sup>

Further muddying the waters is the fact that traditional private rights, composed of seemingly discrete legal duties and obligations, are often profitably understood as regulatory systems that exist to serve ends beyond simply, for example, compensating individuals.<sup>181</sup> Private-law regimes also have “regulatory dynamics” that are perhaps only imperfectly expressed in terms of rights and duties. It verges on truistic to say that all rights, public or private, are ways of achieving some desired state or public end.<sup>182</sup> The point for our purposes is that it is hard to draw useful conceptual or functional distinctions between public and private rights, because the salient functional features of each are largely a question of emphasis. Any legal regime is likely to have both regulatory (public) and compensatory (private) aspects. Which one is salient in a litigation may end up being a matter of statutory drafting and interpretation.<sup>183</sup>

### C. Contemporary Examples of Standing Analysis of Novel Legal Injuries Without Harm

The result of this conceptual instability is inconsistency in the courts. Sometimes statutory violations, if sufficiently individuated, are

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<sup>179</sup> Woolhandler & Nelson, *supra* note 39, at 722.

<sup>180</sup> See *supra* note 25 and accompanying text.

<sup>181</sup> See generally, e.g., GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970) (analyzing the law of accidents as a system aimed at maximizing the reduction of accident and accident avoidance costs that can be achieved fairly).

<sup>182</sup> See VINING, *supra* note 119, at 31 (“[T]he difference between the focus of private law and that of a law concerned with end values can never have been more than one of degree.”); cf. Robert Dugan, Comment, *Standing to Sue: A Commentary on Injury in Fact*, 22 CASE W. RES. L. REV. 256, 275 (1971) (“[T]he concept of ‘public interest’ is nothing more or less than an euphemism used to conceal definite preconceptions about the desirability of specific social behavior and allocation of resources.”); Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 9 (1979) (“The function of a judge is to give concrete meaning and application to our constitutional values.”).

<sup>183</sup> See, e.g., 15 U.S.C. § 1681(b) (2012) (“It is the purpose of [the FCRA] to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit . . . in a manner which is fair and equitable to the consumer . . .”). It is not clear whether the purpose here is to benefit consumers in their individual capacities, or as a class. Nor is it clear that anything should turn on that distinction.

sufficient for standing. Sometimes they are not, despite being accompanied by statutory damage provisions. Before proceeding to the examples, the important point is that courts analyze standing in these cases *at all*. Sometimes it serves as little more than another procedural hurdle for plaintiffs, but in other cases the standing inquiry frustrates the regulatory ends of a statute because of a judicial judgment that the “injury” alleged, and often specified by Congress, doesn’t support standing.

In *Edwards v. First American Corp.*,<sup>184</sup> the plaintiff sued First American under the anti-kickback provisions of the Real Estate Settlement Procedures Act of 1974 (RESPA), which makes it unlawful for title agencies to enter into “exclusive” agency agreements with title insurance providers.<sup>185</sup> That is, RESPA prohibits a title agency from funneling all its clients’ title insurance needs to one insurer, in exchange for any “fee, kickback, or thing of value.”<sup>186</sup> Defendants who violate this prohibition are liable to the buyers of such title insurance for “three times the amount of *any charge paid*.”<sup>187</sup> However, the suit was brought in Ohio, which, like many states, requires that all title insurers charge the same price.<sup>188</sup> Thus, First American argued, the plaintiff was not *overcharged*, did not suffer any *actual* harm, and therefore did not suffer a concrete injury sufficient for standing.

The court affirmed a finding of Article III standing based solely on the statutory violation<sup>189</sup>—*injuria absque damno*. It relied on *Warth v. Seldin* (preserved by *Lujan*) for the proposition that Article III injury “can exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.”<sup>190</sup> After summarily dispensing with the constitutional issue, the court devoted considerably more ink to interpreting RESPA itself, looking to the text and legislative history to confirm that Congress did not intend to limit liability to overcharges.<sup>191</sup> Notably, the court relied solely on the conferral of a statutory cause of action as the basis for standing despite the fact that the House Committee Report referred to another potential harm: the loss of impartiality by the person making the referral, which in the aggregate would reduce “healthy competition” in the industry.<sup>192</sup> The

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<sup>184</sup> 610 F.3d 514 (9th Cir. 2010).

<sup>185</sup> *Id.* at 516.

<sup>186</sup> *Id.* at 516–17.

<sup>187</sup> *Id.* at 517 (quoting 12 U.S.C. § 2607(d)(2) (2012)).

<sup>188</sup> *Id.* at 516.

<sup>189</sup> *Id.* at 517.

<sup>190</sup> *Id.* (quoting *Fulfillment Servs., Inc. v. UPS*, 528 F.3d 614, 618–19 (9th Cir. 2008) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975))).

<sup>191</sup> *See id.* at 517–18.

<sup>192</sup> *Id.* (quoting H.R. REP. NO. 97-532, at 52 (1982)).

court could have relied on this harm explicitly as an “injury in fact” but instead deferred to Congress’s judgment that the prohibited conduct was injurious, and thus decided that the violation of the statute itself should count as an injury. In finding standing based solely on the statutory cause of action, the Ninth Circuit joined the Sixth and Third Circuits, the only other appellate courts to consider this issue.<sup>193</sup>

Before the Eighth Circuit denied standing in *Braitberg* in light of *Spokeo*,<sup>194</sup> the circuit rule was much like the Ninth Circuit’s in *Edwards*. In *Hammer v. Sam’s East, Inc.*,<sup>195</sup> the Eighth Circuit held that plaintiffs suing under the Fair and Accurate Credit Transactions Act (FACTA) had standing based solely on a violation of the statute’s requirement that vendors not print more than the last five digits of a credit card number on any receipt provided to the cardholder,<sup>196</sup> without any showing of further harm from the printing of the receipt. For the *Hammer* court, it was enough to satisfy Article III that the plaintiff was “among the injured” and that the suit was based on a personal and individualized injury.<sup>197</sup> At least one circuit, then, has read *Spokeo* to supersede the *Warth* principle that injury in fact can result solely from the invasion of a legal right created by Congress.<sup>198</sup>

At least one other appellate court has rejected this interpretation of *Spokeo* (or, really, has rejected *Spokeo* itself). In another FCRA case, *In re Horizon Healthcare Services Inc. Data Breach Litigation*,<sup>199</sup> the Third Circuit specifically disagreed with *Braitberg*’s reading of *Spokeo*.<sup>200</sup> The court first strained itself to read *Spokeo* as not displacing “traditional notions of standing,”<sup>201</sup> before essentially declaring that it would ignore *Spokeo*’s implications and wait for an

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<sup>193</sup> See *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753, 755 (3d Cir. 2009); *In re Carter*, 553 F.3d 979, 989 (6th Cir. 2009). A number of district courts came to the opposite conclusion, requiring the rates charged to exceed either the provider’s filed rate or the fair market value of the service. See, e.g., *Moore v. Radian Grp., Inc.*, 233 F. Supp. 2d 819, 825–26 (E.D. Tex. 2002) (finding that the treble damages provision of RESPA extends only to the portion of a settlement service charge involved in the RESPA violation); *Morales v. Attorneys’ Title Ins. Fund*, 983 F. Supp. 1418, 1427 (S.D. Fla. 1997) (same). The Supreme Court granted certiorari in *Edwards*, but later dismissed the writ as improvidently granted, 567 U.S. 756, 757 (2012), presumably to wait for a better vehicle—like *Spokeo*.

<sup>194</sup> See *supra* notes 99–101 and accompanying text.

<sup>195</sup> 754 F.3d 492 (8th Cir. 2014).

<sup>196</sup> *Id.* at 498–99 (citing 15 U.S.C. § 1681c(g)(1) (2012)).

<sup>197</sup> *Id.* at 499 (first citing *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972); and then citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 n.1 (1991)). The Court went on to dismiss the claim on the merits for lack of a willful violation. *Id.* at 501–02.

<sup>198</sup> *Braitberg v. Charter Commc’ns, Inc.*, 836 F.3d 925, 930 (8th Cir. 2016).

<sup>199</sup> 846 F.3d 625 (3d Cir. 2017).

<sup>200</sup> It characterized *Braitberg*’s reading as a requirement that statutory violations cause a “material risk of harm” in order to support standing. *Id.* at 637–38, 637 n.17.

<sup>201</sup> *Id.* at 638.

explicit overruling of *Havens Realty Corp. v. Coleman*,<sup>202</sup> *Warth v. Seldin*,<sup>203</sup> *FEC v. Akins*,<sup>204</sup> and the rest before refusing to find standing for the violation of procedural requirements.<sup>205</sup> The court rested standing solely on the alleged statutory violation,<sup>206</sup> finding that the FCRA's provision of statutory damages for willful violations "clearly illustrates that Congress believed that the violation of FCRA causes a concrete harm to consumers."<sup>207</sup> Noting the close relation between that violation and a harm—the invasion of privacy—"that has traditionally been regarded as providing a basis for a lawsuit," the court had "no trouble concluding that Congress properly defined an injury that 'gives rise to a case or controversy where none existed before.'"<sup>208</sup>

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While the weight of circuit authority seems to be in favor of finding standing based solely on statutory violations,<sup>209</sup> there is a strong countertendency that the Court could embrace any term now. Most of what separates the legal duties imposed by RESPA, FACTA, FCRA, and the like from the more traditional legal rights discussed in Section I.A are time, history, and the felt sense of some in the judiciary that statutory rights are more "public." At best, the standing inquiry in these cases acts as a procedural hurdle. At worst, it dismisses *injuria absque damno* as nonjusticiable, undermining regulatory regimes in the name of a distinction—public versus private—that is, to put it mildly, hard to operationalize.<sup>210</sup>

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<sup>202</sup> 455 U.S. 363, 373–74 (1982) (finding standing for plaintiff who had been "the object of a misrepresentation made unlawful" under the statute at issue and had "suffered injury in precisely the form the statute was intended to guard against").

<sup>203</sup> 422 U.S. 490, 500 (1975) (holding that the mere violation of a statute may create standing, provided that the "provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief").

<sup>204</sup> 524 U.S. 11, 19–20 (1998) (noting a congressional intent to "cast the standing net broadly" and finding that standing is satisfied when a plaintiff's injury and interests are of the nature Congress sought to address and protect in the statute).

<sup>205</sup> *Horizon Healthcare*, 846 F.3d at 638 ("It is nevertheless clear from *Spokeo* that there are some circumstances where the mere technical violation of a procedural requirement of a statute cannot . . . constitute an injury in fact. Those limiting circumstances are not defined in *Spokeo* and we have no occasion to consider them now." (citation omitted)).

<sup>206</sup> Two laptops containing sensitive personal information were stolen from defendant's office. Plaintiffs brought a class action alleging negligent and willful violations of the FCRA. *Id.* at 629, 631.

<sup>207</sup> *Id.* at 639.

<sup>208</sup> *Id.* (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016)).

<sup>209</sup> *See id.* at 640 n.24 (collecting cases).

<sup>210</sup> *See supra* Section II.B.

### III INJURY IN FACT AS A PRUDENTIAL, NOT CONSTITUTIONAL REQUIREMENT, AND A TAXONOMY OF HARM

Following the critiques of Cass Sunstein, William Fletcher, and others, this Part assumes that the stringent application of the injury in fact requirement to novel legal injuries cannot be justified as a *requirement* of Article III. It then suggests that this stringency, which has the effect of privileging traditional private rights, might nevertheless be justifiable for prudential reasons. It then taxonomizes statutory “harms” across two dimensions as a way of examining when a stringent, prudential injury analysis makes sense.

It is hard to dispute that courts privilege legal entitlements the more they resemble traditional common law rights.<sup>211</sup> This privileging is especially evident in the law of standing, where claims based on traditional rights (even when grounded in statute, such as copyright) rarely face standing challenges, while claims asserting newer, statutory rights do so routinely, even when those rights embody clear legal duties running directly to plaintiff rightholders.<sup>212</sup>

As we have seen, this privileging in standing is made possible largely through contingent doctrinal developments. The injury in fact requirement does not distinguish sharply between public and private rights. The analytic weakness of the requirement, along with the blurry line between public and private, allows courts to treat as “public,” and thus more susceptible to justiciability challenges, many legal obligations that could be equally or better conceived of as “private.”<sup>213</sup>

There might be any number of policy considerations behind judicial reluctance to enforce arguably public rights absent injury in fact.<sup>214</sup> Perhaps the most oft-stated rationale rests on the separation of powers: that judicial enforcement of a generalized interest in govern-

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<sup>211</sup> See, e.g., Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 897 (2000) (noting that the “only whiff of a theory” behind the Court’s choice of some legal provisions but not others as relevant to the “independent sources such as state law” that define property lies in “adjectival phrases” denoting tradition and historical pedigree); Sunstein, *supra* note 18, at 1460 (“[Certain] cases might be understood as an effort to narrow the judicial role in actions brought by statutory beneficiaries . . . . The distinctive judicial role is the protection of traditional or individual rights against governmental overreaching.”).

<sup>212</sup> See *supra* Parts I–II.

<sup>213</sup> See *supra* Section II.B.

<sup>214</sup> See generally Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the “Case or Controversy” Requirement*, 93 HARV. L. REV. 297 (1979) (offering three policy rationales to justify the injury in fact requirement).

ment compliance with the law would impermissibly interfere with the executive's constitutional duty to "take Care that the Laws be faithfully executed."<sup>215</sup> Whatever the merits of that rationale in suits against the government, it is an awkward fit with suits to enforce regulatory obligations embodied in individual rights and duties.<sup>216</sup> If anything, as Sunstein has noted, the separation of powers suggests that courts should be inclined to *enforce* these obligations precisely because they represent the political resolution of policy conflicts.<sup>217</sup>

It seems myopic to limit the institutional role of courts based on a muddled inquiry that likely depends, at bottom, on a tenuous distinction between public and private rights. As long as "injury in fact" is a constitutional requirement, however, standing doctrine will warp and distort congressionally conferred rights and undermine their deterrent effects.<sup>218</sup>

Oddly, the injury in fact requirement might be easier to justify as a prudential matter.<sup>219</sup> As *Lujan* notes, the source of law for a claim should not matter to the Article III standing inquiry.<sup>220</sup> And yet it is hard to escape the conclusion that what counts as a constitutional "injury in fact" varies with the substantive law invoked.<sup>221</sup> To resolve this inconsistency, the Court could lay off the Article III talk and just say, forthrightly, that the more an asserted injury deviates from common-law-like forms, the more restrictive a *prudential* determination of injury in fact will be in the first instance. This would leave the

<sup>215</sup> *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1991); cf. Scalia, *supra* note 136, at 894 ("[T]he law of standing roughly restricts courts to their traditional undemocratic role of protecting individuals . . . and excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest of *the majority itself*.").

<sup>216</sup> See Hessick, *supra* note 18, at 318 ("[T]his debate [regarding judicial supervision of generalized official illegality] has no place in the private rights context. In private rights cases, the plaintiff is not alleging a grievance suffered generally by the public, but rather the personal violation of an individual right.").

<sup>217</sup> Cf. Sunstein, *supra* note 18, at 1472 ("Arguments that invoke the primacy of the democratic process call for judicial involvement. The plaintiff is seeking to compel the executive to comply with the political resolution as it is expressed in law.").

<sup>218</sup> See Hessick, *supra* note 18, at 327 ("Requiring injury in fact undermines the deterrent effect of the threat of litigation.").

<sup>219</sup> Prudential standing doctrines are "not derived from Article III," *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014), but rather are self-imposed "rule[s] of self-restraint," *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 154 (1970).

<sup>220</sup> See *supra* note 148.

<sup>221</sup> See generally Fallon, *supra* note 25 (describing the "fragmentation" of standing into "subdoctrines" corresponding to different substantive areas).



courts to work out the scope of factual injury that is actionable under a statute, with Congress free to tweak as necessary.<sup>222</sup>

A prudential framework would have several benefits. Perhaps most significantly, it would address a lurking remedial worry about statutory damages suits that is likely on judges' minds<sup>223</sup>—the recovery of enormous damage awards through the class action device that are out of proportion with the severity of the underlying conduct<sup>224</sup>—without resorting to the Constitution to undermine a duly enacted regulatory statute. It would give courts flexibility to develop distinctive substantive law under each statute. And while it would attenuate some separation of powers values, it would enhance others, especially Congressional control over “injury.”

To see how such a prudential inquiry might work, we might consider what aspects of a statutory harm make it “common-law-like.” The remainder of this Note will do just that, examining two important but not always salient aspects of statutory harms—historical novelty and remedial value—and generating a rough taxonomy of their interactions.

We will consider two broad forms of statutory harms: those with common law analogues (or that directly codify common law injuries),<sup>225</sup> such as antitrust legislation and common law conspiracy, or the Lanham Act and unfair competition; and those that are novel, without an obvious common law analogue, such as housing discrimination, environmental violations, or some informational injuries. This is a rough distinction. It will of course be debatable in many cases just

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<sup>222</sup> Of course, much the same thing could be accomplished by dispensing with an injury-in-fact requirement altogether and making standing turn entirely on the existence of a legal interest, a merits question to be resolved under Rule 12(b)(6), as advocated for by Fletcher. See generally Fletcher, *supra* note 17. And the Court is very unlikely to embrace a new prudential standing doctrine at a time when it seems to be *eliminating* such doctrines, which raise their own difficult separation of powers questions. See *Lexmark Int'l*, 134 S. Ct. at 1387 & n.3 (noting the Court's reclassification of “zone-of-interests” and “generalized grievances” out of the prudential standing category).

<sup>223</sup> See generally Fallon, *supra* note 137 (arguing that judges routinely allow remedial considerations to influence justiciability doctrines and decisions).

<sup>224</sup> See, e.g., *Parker v. Time Warner Entm't Co.*, 198 F.R.D. 374, 383 (E.D.N.Y. 2001) (refusing to certify a class alleging violations of the Cable Communications Policy Act where the availability of statutory damages for “technical” violations might create liability for the defendant “grossly disproportionate to any actual harm sustained by an aggrieved individual”), *vacated*, 331 F.3d 13 (2d Cir. 2003).

<sup>225</sup> See, e.g., Lynn E. Blais, *Takings, Statutes, and the Common Law: Considering Inherent Limitations on Title*, 70 S. CAL. L. REV. 1, 21 n.103 (1996) (collecting statutes).

how analogous statutory and common law harms are—how much does ERISA really resemble the common law of trusts?<sup>226</sup>

On the value side, we will consider which legal actors determine the available remedial value for a harm. That is, who decides whether a given remedy is available, or what the measure of damages is? Considering the source and nature of value determinations will make it easier to observe when difficulties with quantifying a harm bleed over into difficulties with finding a harm at all.

There are, roughly, three different sources for the value of a harm: judges, juries or factfinders, and legislatures, with legislatures assigning values in two distinct ways. All these sources make, to varying extents, two kinds of determinations regarding the value of a harm: the categorical availability of certain remedies, and the retail application of those remedies in a given case.

Juries assign value almost entirely on a retail basis, as a matter of proof: for example, the accident victim's medical bills or the assault victim's emotional distress. Juries might be said to act categorically when viewed *collectively*: Repeated failures to award meaningful damages in a class of cases would have a practical effect similar to determining that no damages were available at all.

Legislatures make almost entirely categorical determinations about the value of a harm. It is worth considering separately two distinct kinds of determinations they make about value. Some statutes *enhance* or *limit* damages that are already available in a suit, for example through fee shifting,<sup>227</sup> damage multipliers,<sup>228</sup> or caps on noneconomic damages in certain kinds of tort suits.<sup>229</sup> Other statutes precisely determine the value of a harm, as with the examples involving statutory damages for regulatory violations.

Judges occupy a middle ground, making both wholesale and retail legal determinations. As a matter of law, a judge might award nominal damages in a particular case for *res judicata* purposes,<sup>230</sup> or find that presumed actual damages are available in a category of cases,<sup>231</sup> that the evidence is insufficient for punitive damages in a given suit, or that

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<sup>226</sup> Cf. *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1114–15 (9th Cir. 2017) (noting the differences and similarities between common law privacy protections and the interests protected by the FCRA).

<sup>227</sup> See, e.g., *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 260 n.33 (1975) (collecting federal statutes that provide for fee shifting).

<sup>228</sup> See, e.g., 15 U.S.C. § 15(a) (2012) (providing treble damages for antitrust violations); 18 U.S.C. § 1964(c) (2012) (providing treble damages for civil RICO violations); 35 U.S.C. § 284 (2012) (providing treble damages for willful patent infringement).

<sup>229</sup> See, e.g., Blais, *supra* note 225, at 21 n.103 (collecting statutes).

<sup>230</sup> See *supra* text accompanying note 34.

<sup>231</sup> See *supra* Section I.B.

certain kinds of conduct simply cannot be the basis for a punitive award.

None of these determinations about the value of harm are necessarily exclusive. On the contrary, they often interact: A jury in a copyright infringement suit can make a factual determination about how many instances of infringement there were, each of which might come with a statutorily determined penalty range; or a treble damages provision might be within the discretion of the court. Nor are the boundaries between wholesale and retail value determinations all that firm; it is probably best to think of them as a continuum.

With these preliminaries out of the way, we turn to the various configurations of harm and how they might fare under a prudential injury-in-fact analysis. Two kinds of statutory harm and four sources of value yield eight categories, each described briefly below:

1. *Harms with common law analogues, values assigned by juries.* These are the most common-law-like cases, with factfinders making factual determinations about the value of relatively uncontroversial injuries: damages under the Alien Tort Claims Act<sup>232</sup> or § 10(b) of the Securities Exchange Act,<sup>233</sup> or unjust enrichment flowing from copyright infringement such as defendant's profits.<sup>234</sup> If there is a harm for a jury to quantify, there is likely an injury in fact.

2. *Harms with common law analogues, values assigned by judges.* These cases, too, are familiar: a nominal damages award for res judicata purposes, an evidentiary sufficiency determination for a punitive damages award, or a ruling that presumed actual damages are available for copyright violations without proof of other "actual" injury. Damages enhancements under judicial control do not alter anyone's intuitive sense of whether an injury in fact exists.

3. *Harms with common law analogues, values enhanced by statute.* Legislative incentives to sue do not weigh much in the analysis if the underlying harm is familiar. Antitrust legislation and RICO both grew out of conspiracy and no one looks askance at their treble damages provisions,<sup>235</sup> nor at fee-shifting provisions in otherwise familiar causes of action, such as copyright.<sup>236</sup>

4. *Harms with common law analogues, values set by statute.* Statutory damages for familiar causes of action are usually *alternatives* to

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<sup>232</sup> 28 U.S.C. § 1350 (2012).

<sup>233</sup> 15 U.S.C. § 78j (2012); *see also* 17 C.F.R. § 240.10b-5 (2016).

<sup>234</sup> *See* 17 U.S.C. § 504(b) (2012).

<sup>235</sup> 15 U.S.C. § 15(a) (2012) (Clayton Antitrust Act); 18 U.S.C. § 1964(c) (2012) (RICO).

<sup>236</sup> *See* 17 U.S.C. § 505 (2012) (providing for discretionary fee shifting to prevailing parties in copyright suits).

actual damages when such damages are hard to prove, with the plaintiff free to elect either.<sup>237</sup> This can be an uncomfortable spot for factfinders, as damages determinations can become untethered from evidence of anything but willfulness,<sup>238</sup> but this discomfort does not generally reach the injury analysis.<sup>239</sup>

5. *Novel statutory harms, values assigned by juries.* All novel statutory harms, to some degree, risk running aground on an injury-in-fact analysis. To the extent that they cause consequential damages that can be quantified by a factfinder, however, such harms ought to be treated as injuries in fact. More often, the difficult question will not be injury but *causation*—the relation of the novel harm to the consequential damages.<sup>240</sup>

6. *Novel statutory harms, values assigned by judges.* If the court would have to assign a value (and the statute does not assign a value) because there are no evident consequential damages or they are difficult to calculate, that difficulty may lead courts to dismiss a damages claim as unduly speculative or to doubt the existence of an injury and dismiss as nonjusticiable. However, as with category two, if the judge is not bound by statutory damage provisions, there is little reason not to award at least nominal damages on a clear showing of a statutory violation in order to vindicate the importance of the policy.

7. *Novel statutory harms, values enhanced by statute.* Unlike category three, legislative enhancements, or at least fee-shifting provisions, ought to carry some weight in the injury analysis. As with category six, if there are no statutorily specified damages, there is little reason not to find an injury if the statutory violation is clear, despite any difficulties with quantifying the harm. Fee shifting, practically if not analytically, mitigates the quantification problem by tying the harm, and any equitable relief, to the fees and costs, an award of which will often be in the judge's discretion.

8. *Novel statutory harms, values set by statute.* Here, of course, is where courts are most suspicious, as damages determinations are often no longer calibrated to *evidence*. Like category four, statutory

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<sup>237</sup> See, e.g., *id.* § 504(b)–(c) (providing, in copyright suits, for actual damages, defendant's profits, or statutory damages, at the election of plaintiff).

<sup>238</sup> See *id.* § 504(c)(1) (setting the range of statutory damages at \$750 to \$30,000 per infringed work, "as the court considers just"); 4 NIMMER, *supra* note 58, § 14.04[B][1][a] (noting that levels of awards correspond to degree of willfulness).

<sup>239</sup> See *supra* Section I.A.2.

<sup>240</sup> See, e.g., *City of Miami v. Bank of Am. Corp.*, 800 F.3d 1262, 1272–83 (11th Cir. 2015) (dispensing easily, in city's FHA suit against mortgage lenders, with Article III injury, and devoting considerably more analysis to questions of statutory standing and proximate cause), *vacated*, 137 S. Ct. 1296 (2017).

damages in these cases are often an alternative to actual damages.<sup>241</sup> Unlike category four, actual damages will seem, as a practical matter, highly speculative or even nonexistent—it is hard to imagine what quantifiable harm could flow from a vendor’s decision to print ten digits of a customer’s credit card number, instead of the statutory maximum of five, on a receipt.<sup>242</sup> A restrictive injury analysis can compensate, not only for the raw analytical difficulty of quantifying an injury, but for the lack of any context for doing so. Hard-to-quantify category four cases often involve marketable goods and services: The copyrighted works are bought and sold. The subject matter of statutes like FCRA, FACTA, or CCPA, on the other hand, will often have no market or market value, in part because the statutes are so new.

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Breaking down “harm” in this way allows for a few brief observations about where courts ought to be most searching in our hypothetical “prudential” injury in fact analysis. For starters, they should be *least* searching wherever the harm in question has a common law analogue to give context to the analysis, even where the harm is hard to quantify. Scrutiny should be similarly light for novel injuries with quantifiable, consequential damages.

For novel harms that are harder to quantify, judicial control over value, either directly or through discretion to award statutory incentives, also lessens the need for a demanding injury analysis. With remedial flexibility on the backend, an exacting threshold inquiry into injury is less valuable<sup>243</sup> and hinders the development of substantive law. Where judges lack this flexibility—where mandatory statutory damages are in play—the need for scrutiny is more apparent.

Some of these brief observations reflect what courts are already doing, in one form or another, in constitutional injury analysis. By looking at these aspects of harm and casting the analysis as prudential, however, I hope to have highlighted some of the less salient considerations that nevertheless play a role when courts confront statutory harms. Further research might look more carefully at the role played by the presence or absence of markets for the underlying subject

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<sup>241</sup> See, e.g., 15 U.S.C. § 1681n(a)(1)(A) (2012) (providing actual or statutory damages for willful violations of the FCRA).

<sup>242</sup> Cf. *Hammer v. Sam’s E., Inc.*, 754 F.3d 492, 498 (8th Cir. 2014) (applying 15 U.S.C. § 1681c(g)(1), which gave consumers a legal right to obtain a receipt at the point of sale showing no more than the last five digits of a consumer’s credit or debit card).

<sup>243</sup> Cf. Fallon, *supra* note 30, at 43–47 (discussing, in the context of injunctive relief, the tradeoffs between a constitutionalized remedial standing and equitable principles, with the latter being a “calculus more sensitive”).

matter of legal claims in how courts quantify and analyze harms and injuries, and at the courts' own role in facilitating those markets.

### CONCLUSION

Legal injury without harm is a common phenomenon in the law. Historically, legal injury without harm was actionable for at least nominal damages, and sometimes more. The same is true today of many "traditional" private rights, for which standing is uncontroversial. Novel statutory claims, on the other hand, routinely face justiciability challenges: Defendants assert that plaintiffs' purely legal injuries are not injuries "in fact," as required to establish an Article III case or controversy. "Injury in fact" emerges from the historical requirement of "special damages" to enforce public rights, adapted to a modern procedural world. The distinction between public and private rights is unstable, however, with the result that many novel statutory harms are treated as "public," and thus subject to exacting justiciability analysis, when they could easily be treated as "private" rights for which legal injury without harm is sufficient for standing. Public and private act as rough proxies for "novel" and "traditional," with the former subject to more judicial skepticism. Applying "injury in fact" this way is hard to defend as a constitutional necessity but might make sense prudentially, depending on the familiarity and legal source of value for the harm. Taxonomizing those relationships suggests that, even with unfamiliar harms, judicial discretion over value lessens the need for exacting injury analysis.