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HOW PRIVACY DISTORTED STANDING LAW

*Felix T. Wu**

I. Introduction

Article III standing has emerged as a major barrier to federal court litigation for plaintiffs who assert a violation of their privacy rights. The Supreme Court has held that a plaintiff must show a "concrete and particularized" injury in order to have standing to sue.[1] Many courts, however, have held that a disclosure of personal information or other loss of privacy, on its own, does not pass this threshold.[2]

In dismissing privacy claims for lack of Article III standing, courts have treated the result as merely an application of existing principles to the new context of digital privacy.[3] In reality, such cases represent a doctrinal shift. Whereas older standing cases focused on whether the plaintiff before the court was the right plaintiff, the newer privacy-based cases are focused on, or making assumptions about, whether or not the harm caused by the defendant is the right kind of harm. There has been a shift from thinking about the nature of the plaintiff to thinking about the nature of the harm itself.

This doctrinal shift in standing law is deeper than simply a shift in the injuries the courts recognize as sufficient for standing. Plaintiffs have long been able to sue in federal court on the basis of intangible injuries,[4] and the Supreme Court recently affirmed this point explicitly.[5] Thus, the shift is not from recognizing intangible harms to requiring tangible ones. The shift is in turning to an inquiry in which the issue of tangibility even arises in the first place. Until recently, tangibility and other questions about the quality of the harm suffered by the plaintiff simply were not part of the Supreme Court's standing

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

2. *See, e.g.*, Reilly v. Ceridian Corp., 664 F.3d 38, 42 (3d Cir. 2011).

3. *See, e.g.*, *id.* at 42–43.

4. *See* Seth F. Kreimer, *"Spooky Action at a Distance": Intangible Injury in Fact in the Information Age*, 18 U. Pa. J. Const. L. 745, 752 (2016).

5. *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016) ("Although tangible injuries are perhaps easier to recognize, we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete.").

analysis.[6] Lower courts nevertheless incorporated such considerations into their analyses of standing in privacy cases. The Supreme Court has now done the same, thus shifting the law on standing, while professing that nothing has changed.[7]

Doctrinal shifts are not necessarily problematic, of course, but shifts that occur without awareness or discussion run the risk of being unprincipled. That has happened here. The data breach and other similar cases that precipitated a more robust standing inquiry are ones in which the separation of powers rationale for Article III standing is at its weakest.[8] At least as applied in these cases, standing law seems to be serving no purpose other than to constitutionalize a deregulatory agenda. Perhaps there are good reasons to expand standing law, but if so, those reasons, and that expansion, should be made explicit. Thus far, the unheralded expansion of standing law is entirely without justification.

To develop this argument, Part II below describes the Article III standing inquiry, and in particular, the requirement of an "injury-in-fact," as the Supreme Court had developed that analysis. Part III shows how the analysis of injury in standing cases has shifted in cases involving privacy and security, a shift that the Supreme Court itself made in the *Spokeo* case,[9] and which the lower courts have continued since *Spokeo*.[10] Finally, Part VI explains why the newly heightened scrutiny of injuries, far from supporting an appropriate separation of powers, actually harms an interest in containing the judicial branch to its proper role.

II. Article III Standing and Injury in Fact

The Supreme Court has held that under Article III, the judicial power of the federal courts extends only to cases and controversies in which the plaintiff can establish an "irreducible constitutional mini-

6. Where the Court had previously spoken about looking for a "tangible harm," it appears to have used the term "tangible" to mean the same thing as "concrete." *See* Hollingsworth v. Perry, 133 S. Ct. 2652, 2661 (2013) ("[Article III standing] requires the litigant to prove that he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision. In other words, for a federal court to have authority under the Constitution to settle a dispute, the party before it must seek a remedy for a personal and tangible harm." (citation omitted) (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992)). The Court's use of the term "tangible" in *Spokeo* must have been different from its use in *Hollingsworth*, because in *Spokeo*, the Court distinguished between tangibility and concreteness. *See Spokeo*, 136 S. Ct. at 1549.

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

8. *See infra* Part VI.

9. *See infra* Part IV.

10. *See infra* Part V.

mum of standing."[11] Article III standing requires the plaintiff to demonstrate the following:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."[12]

The Supreme Court has treated Article III standing as a trans-substantive requirement that must be met in every case.[13] Defenders of this view see the doctrine of standing as indispensable to an appropriate separation of powers.[14] Standing keeps the federal courts in check, ensuring that the courts are used only to protect individual rights and not to decide broad issues that are better left to the legislative and executive branches.[15]

Other commentators have argued that standing should be properly understood as a determination on the merits of whether a particular plaintiff has a valid cause of action under a particular law.[16] That is, there is no such thing as a trans-substantive restriction on standing, only restrictions that apply to particular laws. On this view, judicial overreach occurs not when courts permit lawsuits to proceed in accordance with the governing law, but when they restrict such lawsuits through trans-substantive limits of their own making, as if they were enforcing some kind of substantive due process restriction.[17]

Under the "substantive" view of standing, legislatures should have essentially free rein to define standing with respect to causes of action that they establish.[18] Similarly, common law courts can define standing as part of defining the contours of the common law. Standing is thus as much a part of the relevant cause of action as is, say, remedies, an area clearly within the province of lawmakers, though subject to

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11. *Lujan*, 504 U.S. at 560.

12. *Id.* at 560–61 (alteration in original) (citations omitted).

13. *See id.* at 561.

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

15. *See id.* at 894.

16. *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 236 (1988).

17. *See id.* at 233.

18. *See id.* at 223–24.

constitutional due process restrictions.[19] The power to define the cause of action entails the power to determine who may sue to enforce that cause of action.

The fully substantive view of standing has had little success in the Supreme Court.[20] And yet, in rejecting the fully substantive view, the Court had, until recently, nevertheless engaged in a form of standing analysis that was in some ways relatively limited. In particular, in evaluating whether a plaintiff has suffered an "injury-in-fact," the Court's analysis had rarely, if ever, focused on the cognizability of the injury. The Court permitted a broad range of injuries to satisfy the injury-in-fact requirement, focusing instead on the question of whether the particular plaintiff in the case actually suffered (or was about to suffer) one of those injuries. In so doing, the Court limited the class of plaintiffs to those directly affected by the challenged action without substantially limiting the types of actions that could serve as a basis for a lawsuit. The former inquiry was for the courts, but the latter could be left to legislatures.

A case like *City of Los Angeles v. Lyons*[21] exemplifies this model. In *Lyons*, the Supreme Court denied standing to an individual seeking to enjoin the Los Angeles Police Department from using chokeholds in non-life-threatening situations.[22] In that case, there was no doubt that being subjected to a chokehold is a cognizable injury. The only question was whether the plaintiff could show any real chance of it happening to him again in the future.[23]

Moreover, consider *Lujan v. Defenders of Wildlife*[24]—often regarded as a seminal Supreme Court case on standing—in which the Court denied standing to individuals who sought to challenge the Secretary of the Interior's determination that the Endangered Species

19. *See, e.g.*, State Farm Mutual Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003) ("While States possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards. The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." (citations omitted)).

20. *See, e.g.*, Summers v. Earth Island Inst., 555 U.S. 488, 497 (2009) ("[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute.").

21. 461 U.S. 95 (1983).

22. *Id*. at 98, 105.

23. *Id*. at 108. The Court held that the fact that the plaintiff had previously been subjected to the challenged practice gave him standing to seek damages to remedy that past violation, but was not a basis for standing to enjoin future violations because any future violations were not any more likely to affect him merely because he had been subjected to the chokehold in the past. *See id.* The four dissenting Justices thought otherwise, arguing that Lyons' unquestioned standing to seek damages should suffice to give him standing in the case generally without regard to the specific forms of relief sought. *See id.* at 122–23 (Marshall, J., dissenting).

24. 504 U.S. 555 (1992).

Act does not apply to federal actions taken outside of the United States.[25] Two individuals in particular alleged that they had previously traveled to specific parts of the world where federally funded projects could affect endangered species, that they intended to return to those parts of the world, and that they hoped to see the endangered species when they next visited those areas.[26]

In denying standing, the Court perhaps could have questioned whether an inability to view an endangered species is really an "injury" at all. Any such injury is purely psychic in nature.[27] It involves no loss of money or property, or even an intangible, but externally verifiable effect, such as damage to reputation. The injury exists largely because the person in question says that it exists. If anything, the opportunity to see endangered species is generally one that requires spending money in order to travel to an appropriate location. If one were to focus on monetary values, perhaps one would regard a diminished chance of seeing endangered species as a benefit, not a harm, because it might cause some individuals to cancel their travel plans and save money.

The Court said none of those things. Instead, the Court stated, "Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing."[28] The Court denied standing not because it thought the asserted injury was not cognizable, but because it thought the plaintiffs had produced insufficient evidence that the injury would ever come to pass.[29] The plaintiffs had stated only general intentions to revisit the appropriate areas of the world, and for the Court, "[s]uch 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be" were not enough to establish standing.[30]

The Court's rejection of the plaintiffs' other theories of standing similarly accepted various intangible injuries as cognizable, but found them inapplicable to these plaintiffs. For example, the Court found it to be "clear that the person who observes or works with a particular animal threatened by a federal decision is facing perceptible harm,

25. *Id*. at 562–63. Technically, it was a set of wildlife conservation organizations that filed the lawsuit, but the standing of those organizations depended upon having members with standing to bring the lawsuit, so the Court focused on the standing of those individual members. *See id.* at 559, 563.

26. *See id.* at 563.

27. *See* Kreimer, *supra* note 4, at 781.

28. *Lujan*, 504 U.S. at 562–63.

29. *Id.* at 564.

30. *Id.*

since the very subject of his interest will no longer exist."[31] The Court considered that a similar theory might apply even if the threatened animal was not one specific animal, but rather animals generally in the place where the person was observing or working.[32] The Court refused to extend this theory though to animals that were merely of the same species as those the person worked with or observed.[33] The distinction is that under the first two theories, the loss of species would directly affect the person's observations or work; not so under the third theory. Here again, the Court evaluated whether a person's observations or work would actually be affected by the loss of species, without questioning whether any such effects were cognizable harms.[34] Even if effects on one's work might translate into some kind of monetary loss, effects on one's observations seem very unlikely to result in monetary loss, and yet the Court assumed such effects to be cognizable.

Case after case repeated the same pattern. In each, the Supreme Court based its standing decision not on the cognizability of the plaintiff's harm or whether that harm was of the right type, but rather on whether the plaintiff had suffered or would suffer that harm.[35]

The one type of harm that the Court has generally rejected as insufficient to establish standing is generalized harm that flows merely from the plaintiff's status as a citizen.[36] One could characterize any unlawful action as harming an interest in living in a society free of unlawful actions. The Court has found this sort of "harm" not to be cognizable, since such harm always exists and is "generally available" to all.[37] Permitting lawsuits on the basis of such generalized harm would be tantamount to eliminating restrictions on standing alto-

31. *Id*. at 566.

32. *Id.* at 566–67.

33. *Id.* at 567.

34. *Lujan*, 504 U.S. at 566–67.

35. *See, e.g.*, Summers v. Earth Island Inst., 555 U.S. 488, 494 (2009) ("While generalized harm to the forest or the environment will not alone support standing, if that harm in fact affects the recreational or even the mere esthetic interests of the plaintiff, that will suffice."); Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc., 528 U.S. 167, 183 (2000) ("We have held that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity.").

36. *See Lujan*, 504 U.S. at 573–74 ("We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.").

37. *Id.*

gether.[38] As a result, the Court has refused to recognize "an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law."[39]

The Court's refusal to confer standing on the basis of generalized harms stemming from the very existence of unlawful conduct explains its analysis in a case like *Laird v. Tatum*.[40] In *Laird*, the plaintiffs sued to obtain declaratory and injunctive relief against the U.S. Army's "alleged surveillance of lawful and peaceful civilian political activity," which the plaintiffs claimed violated their First Amendment rights.[41] The Court held that the plaintiffs failed to "present[ ] a justiciable controversy," by failing to allege any "actual present or immediately threatened injury resulting from unlawful governmental action."[42] In so doing, the Court rejected the plaintiff's claim that they were injured because the government surveillance created a chilling effect on their expressive activities.[43] The Court did not, however, base its holding on the idea that a chilling effect was not a cognizable harm; to the contrary, the Court had previously recognized chilling effects as being an appropriate basis for a First Amendment suit.[44] The problem for the plaintiffs in *Laird* was that the alleged chilling effect was one that resulted from "the very existence of the Army's data-gathering system," rather than any particular use of the system against them.[45] This form of chilling effect was thus one shared by society at large, rather than being specific to these plaintiffs. Where, on the contrary, the alleged harm is sufficiently specific to the plaintiffs, the Court had rarely, if ever, questioned the nature of that harm.

Moreover, the need to avoid suits based on generalized harm also explains the Court's longstanding caveat that while Congress can create standing, its ability to do so has limits. The Court has long held

38. *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 483 (1982) ("[A]ssertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning.").

39. *Lujan*, 504 U.S. at 573; *see also* Allen v. Wright, 468 U.S. 737, 753–54 (1984) (rejecting as not judicially cognizable both "a claim simply to have the Government avoid the violation of law alleged in respondents' complaint" and "a claim of stigmatic injury, or denigration, suffered by all members of a racial group when the Government discriminates on the basis of race"). Conversely, though, in some cases involving relatively generalized harm, the Court has nevertheless permitted standing, as in recognizing taxpayer standing to challenge government expenditures as a violation of the Establishment Clause. *See* Flast v. Cohen, 392 U.S. 83, 88 (1968).

40. 408 U.S. 1 (1972).

41. *Id.* at 2–3.

42. *Id.* at 3, 15.

43. *See id.* at 13.

44. *See id.* at 11–12.

45. *Id.* at 13.

that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute."[46] At the same time, the Court has cautioned that "the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute."[47] The latter principle has now been used by the Court to support scrutiny of statutorily defined harms.[48] That was not the context, however, in which the principle was originally stated. In *Summers*, for example, the Court immediately elaborated on the need for the "hard floor" by explaining that it was necessary in order to avoid Congress authorizing "citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws."[49] It was only this injury to such a "nonconcrete interest in the proper administration of the laws," whether recognized in a statute or not, that the Court found to be insufficient for standing. Other statutorily defined injuries went unquestioned.

III. Standing in Privacy Cases

In analyzing standing in a privacy case, the Supreme Court had, until recently, continued this pattern of focusing on whether the plaintiff was affected, rather than on the nature of the effects. In *Clapper v. Amnesty International USA*,[50] the Court denied standing to a group of plaintiffs seeking to challenge the constitutionality of surveillance authorized under section 702 of the Foreign Intelligence Surveillance Act (FISA).[51] The crux of the problem for the plaintiffs was that they were unable to show that their particular communications would actually be acquired by the government through a section 702 order.[52] In the absence of any information about who the government targets under this program (information that the government obviously tries to keep secret), the Court deemed the plaintiffs' assertions that their communications would be targeted to be "highly speculative."[53]

Implicit in the Court's reasoning in *Clapper* is that if the plaintiffs had been able to show that their communications had been acquired,

46. Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973).

47. Summers v. Earth Island Inst., 555 U.S. 488, 497 (2009).

48. *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016) ("Article III standing requires a concrete injury even in the context of a statutory violation.").

49. *Summers*, 555 U.S. at 497 (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 580–81 (1992) (Kennedy, J., concurring in part and concurring in the judgment)); *see also Lujan*, 504 U.S. at 577 (refusing "[t]o permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts").

50. 133 S. Ct. 1138 (2013).

51. *Id*. at 1143.

52. *See id.* at 1148.

53. *Id.*

then that acquisition would have been a sufficient injury for standing purposes. The Court traced a chain of inferences that underlie the plaintiffs' argument for standing, starting with the government "decid[ing] to target the communications of non-U.S. persons with whom [the plaintiffs] communicate" and ending with the plaintiffs being "parties to the particular communications that the Government intercepts."[54] At no point did the Court suggest that perhaps even the interception would not be enough.[55]

It is true that the Court in *Clapper* did find one kind of harm not to be cognizable—namely, the plaintiffs' "fear of surveillance" and the steps the plaintiffs took in response to that fear.[56] In the absence of information about how the government chooses surveillance targets, however, that fear arises from the existence of the program itself, rather than anything the government has actually done under the program. In theory that fear could be equally applicable to anyone. Thus, as in *Laird*, the Court's refusal to recognize such fears can be understood as a version of its refusal to recognize generalized harms.[57] To be sure, perhaps the Court should have been more willing to acknowledge what everyone knows: Government surveillance programs are more likely to target some kinds of communications than others.[58] Moreover, perhaps the unique dangers of surveillance warrant a rule in which broadly shared chilling effects ought to suffice to establish standing.[59] The point here is that even if *Clapper* was wrongly decided, it did not represent a sharp departure from the Court's prior standing law.

In contrast, lower courts deciding privacy cases began to shift the standing inquiry in a more substantial way, toward an evaluation of whether certain harms are cognizable and away from primarily determining whether those harms have occurred or will occur to the plaintiff. For example, in *Reilly v. Ceridian Corp.*,[60] an unknown hacker infiltrated the defendant's computer systems and potentially gained access to the plaintiffs' personal information, including social security numbers, dates of birth, and bank account information.[61] The plain-

54. *Id.*

55. *See id.* at 1155 (Breyer, J., dissenting) ("No one here denies that the Government's interception of a private telephone or e-mail conversation amounts to an injury that is 'concrete and particularized.'").

56. *See Clapper*, 133 S. Ct. at 1151.

57. *See* Laird v. Tatum, 408 U.S. 1, 13 (1972).

58. *See Clapper*, 133 S. Ct. at 1157–58 (Breyer, J., dissenting).

59. *See* Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1963–64 (2013).

60. 664 F.3d 38 (3d Cir. 2011).

61. *See id*. at 40.

tiffs sued, asserting a number of state common law and statutory causes of action. The Third Circuit held that the plaintiffs lacked Article III standing because they had made only "allegations of hypothetical, future injury," which were "insufficient."[62]

In justifying its conclusion, the court in *Reilly* cited *Lyons* and *Lujan* and described a chain of inappropriately speculative inferences that plaintiffs needed to make in order to allege harm, much as in *Clapper*.[63] But whereas the *Clapper* chain ended with the government's acquisition of the plaintiffs' communications, the chain in *Reilly* started with the unauthorized acquisition and ended with the use of "such information to the detriment of Appellants by making unauthorized transactions in Appellants' names."[64] In other words, the court assumed that the mere acquisition of personal information was not a cognizable injury and that instead, unauthorized use was required to establish Article III standing.

That assumption represents a significant shift from the cases that the Third Circuit relied upon in its opinion. As described above, in *Lyons*, there was no question that being subjected to a chokehold was a cognizable injury, and in *Lujan*, the Court assumed that merely being unable to view an endangered species was a cognizable injury. The other two cases relied upon in *Reilly* were not any more helpful to its conclusion. In *Whitmore v. Arkansas*,[65] the Supreme Court denied the standing of one capital defendant to challenge the death sentence of another.[66] In that case, no one could question the significance of the harms that were at stake. Similarly, *Storino v. Borough of Point Pleasant Beach*[67] involved a zoning dispute in which all sides seemed to agree that the relevant interests were real property interests.[68] None of those cases provide any precedent for viewing the unauthorized acquisition of personal information as not a cognizable harm.

The Third Circuit in *Reilly* further asserted that "[i]n data breach cases where no misuse is alleged, . . . there has been no injury—indeed, no change in the status quo."[69] The court then used this assertion to distinguish cases involving medical malpractice or toxic torts.[70] If intended as a factual claim, the assertion is surely false. The status

62. *Id.* at 42.
63. *Id.* at 42–43.
64. *Id.* at 42.
65. 495 U.S. 149 (1990).
66. *See id*. at 151.
67. 322 F.3d 293 (3d Cir. 2003).
68. *See id*. at 295.
69. *Reilly*, 664 F.3d at 45.
70. *Id.*

quo has changed because some unauthorized individual now has access to information that he or she previously did not have access to. To make sense of the assertion, one must read it as a legal conclusion: There has been no change in any status quo *that the law recognizes*. The opinion in *Reilly*, however, did little to defend such a novel conclusion.

The opinion did no better at justifying its assumption that, unlike an environmental case, the interests at stake in this case were purely "monetary," and thus easily compensable after the fact.[71] A broad array of commentators have catalogued the ways in which privacy is about much more than money.[72] Whether or not those arguments are applicable in this context, what is striking here is that the court's analysis hinged on a characterization of the relevant interests—a characterization that the Supreme Court did not engage in when deciding cases like *Lujan*.

Nor does a case like *Reilly* fit into the paradigm of courts rejecting harms as too generalized. The plaintiffs in data breach cases are the ones whose data has been breached. They are suing because they are directly affected by whatever unlawful actions led to the breach and not merely because they are citizens asserting a right to live in a society free of unlawful actions. The harms they are asserting are individual harms, not societal ones. This remains true even in contexts in which large databases are amassed or breached, and thus many individuals are affected.[73]

The phenomenon of courts scrutinizing harms in privacy cases is not limited to ones involving data breaches, but extends to other types of privacy cases as well. For example, in *In re Google, Inc. Privacy Policy Litigation*,[74] plaintiffs challenged Google's decision to consolidate personal data across multiple products.[75] In partially dismissing the complaint for lack of Article III standing, the court explained that

> injury-in-fact in this context requires more than an allegation that a defendant profited from a plaintiff's personal identification information. Rather, a plaintiff must allege how the defendant's use of the information deprived the plaintiff of the information's economic value. Put another way, a plaintiff must do more than point to the

71. *Id.* at 45–46.

72. *See, e.g.*, Julie E. Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904, 1904–05 (2013).

73. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 572 (1992) (distinguishing "a case where concrete injury has been suffered by many persons, as in mass fraud or mass tort situations").

74. No. C-12-01382-PSG, 2013 WL 6248499 (N.D. Cal. Dec. 3. 2013).

75. *See id*. at *5–6.

> dollars in a defendant's pocket; he must sufficient[ly] allege that in the process he lost dollars of his own.[76]

Again, the court's holding is premised on the assumption that injury-in-fact means monetary loss, and that at a minimum, courts should scrutinize the nature of plaintiffs' alleged injuries. Such an assumption seems to have developed in privacy cases, despite being inconsistent with the Supreme Court's foundational standing cases. Indeed, the court in the *Google Privacy Policy* case explicitly noted,

> First, despite generating little or no discussion in most other cases, the issue of injury-in-fact has become standard fare in cases involving data privacy. In fact, the court is hard-pressed to find even one recent data privacy case, at least in this district, in which injury-in-fact has not been challenged. Second, in this district's recent case law on data privacy claims, injury-in-fact has proven to be a significant barrier to entry. And so even though injury-in-fact may not generally be Mount Everest, as then-Judge Alito observed, in data privacy cases in the Northern District of California, the doctrine might still reasonably be described as Kilimanjaro.[77]

This privacy exceptionalism is perhaps unsurprising. Privacy has long had a public relations problem.[78] While direct monetary and physical harms that flow from privacy violations are concrete and palpable,[79] other more subtle and structural harms are far less so.[80] In this context, Article III standing may appear to be a straightforward and expedient way to dispose of apparently unmeritorious lawsuits in which the plaintiffs have not "really" been harmed.[81] By using standing doctrine for this purpose though, courts are not only adopting a particular perspective on the nature and value of privacy, they are shifting the law on standing to one that allows courts to dismiss claims on the basis of their views on the nature and value of the asserted harms. That shift will have effects far beyond the privacy cases that precipitated it.

To be sure, reversing the trend and broadly recognizing injuries for standing purposes may not make much difference to the outcomes of

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76. *Id.* at *15.

77. *Id.* at *13–14.

78. *See* Cohen, *supra* note 72, at 1904.

79. *See, e.g.*, Remsburg v. Docusearch, Inc., 816 A.2d 1001, 1006 (N.H. 2003) (involving claims against an information broker that disclosed a woman's work address to a stalker who used that information to find and murder her).

80. *See* Paul Ohm, *Sensitive Information*, 88 S. CAL. L. REV. 1125, 1147 (2015).

81. *See* Eric Goldman, *Flash Cookies Lawsuit Tossed for Lack of Harm*–La Court v. Specific Media, TECH. & MKTG. L. BLOG (May 4, 2011), http://blog.ericgoldman.org/archives/2011/05/flash_cookies_l.htm ("I still think Article III standing is the best way to get rid of the junk privacy lawsuits, so I am happy when courts embrace the doctrine to end unmeritorious cases early.").

many privacy cases. This is because a showing of damages is required as an element of many of the substantive claims brought in privacy and security cases, and "injury-in-fact" sufficient for standing may not be sufficient to show "damages" in the underlying claim. Thus, for example, in the Ninth Circuit, which has often adopted relatively permissive standing rules, data breach plaintiffs have just as often failed on the merits, even after surpassing the standing hurdle.[82]

Nevertheless, it is important to distinguish properly between rejecting the plaintiff's claim on the merits and rejecting it for want of Article III standing. The former is a legislative matter, while the latter is a judicial one. When the underlying cause of action is based in state common law, the merits question is ultimately one for the state common law courts. Similarly, when the cause of action is a statutory one, the merits question is a matter of statutory interpretation. Article III standing is a constitutional question on which the federal courts have the last say and which is ultimately not a matter of statutory interpretation, at least as the Supreme Court has conceived of the doctrine.[83] Thus, plaintiffs whose state law claims fail on the merits can seek to change the law through state courts or through legislatures, while plaintiffs whose claims fail on Article III standing grounds cannot seek to change the law in the same way. Using Article III standing as a substitute for a merits determination shifts the locus of control over the development of the law.

IV. THE SHIFT COMPLETED: *SPOKEO, INC. V. ROBINS*

The doctrinal shift in standing law toward evaluating the cognizability of harms has now been completed by the Supreme Court's recent decision in *Spokeo, Inc. v. Robins*.[84] The question in *Spokeo* was whether the plaintiff Robins had standing to sue Spokeo for disseminating false information about him, allegedly in violation of the Fair Credit Reporting Act.[85] The Ninth Circuit, focusing on the fact that it was Robins' information that had been disseminated, found

82. *See, e.g.*, Krottner v. Starbucks Corp., 628 F.3d 1139, 1140 (9th Cir. 2010) (holding that plaintiffs had Article III standing); Krottner v. Starbucks Corp., 406 F. App'x 129, 130–31 (9th Cir. 2010) (holding in a separate, unpublished memorandum that the same plaintiffs failed on the merits of their state-law claims); Pisciotta v. Old Nat'l Bancorp, 499 F.3d 629, 634, 640 (7th Cir. 2007) (holding that the plaintiffs' alleged injuries were "sufficient to confer Article III standing," but were "not compensable as a matter of Indiana law").

83. *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016) ("Article III standing requires a concrete injury even in the context of a statutory violation.").

84. *Id*. at 1540.

85. *See id.* at 1546.

that he had standing.[86] The Supreme Court vacated the Ninth Circuit's decision, holding that the requirement of a "concrete and particularized" injury means that there are separate requirements of concreteness and particularization, and that the Ninth Circuit had erred by failing to consider the concreteness of the asserted harm.[87]

In establishing a free-standing concreteness requirement, the Supreme Court has now added a new hurdle to standing, much as the lower courts had done in cases like *Reilly*. The question is no longer simply whether an unlawful act has affected or may affect the plaintiff. The question is whether that effect counts as a "real harm."[88] Answering this question requires the courts to assess the nature and cognizability of harms in a way that the Supreme Court had not been doing before.

And yet, the Supreme Court claimed to be doing nothing new. It treated as a well-established proposition that concreteness and particularization are separate requirements, stating that "[w]e have made it clear time and time again that an injury in fact must be both concrete *and* particularized."[89] Despite the insistent, almost impatient-sounding language, this claim turns out to be utterly without support. The Court cited four cases for this "clear" rule.[90] In none of those four cases did the Court engage in a separate concreteness analysis or otherwise assess the cognizability of the asserted harm.[91]

For example, in *Susan B. Anthony List v. Driehaus*,[92] the question was whether a political advocacy organization had standing to challenge the constitutionality of an Ohio law that criminalized making certain false statements about a political candidate, even though the candidate in question had already lost the election and withdrawn his complaint.[93] The lower courts denied standing, finding that it was not sufficiently likely that the organization would be prosecuted under the law in a future election cycle.[94] The Supreme Court reversed, finding

86. *See* Robins v. Spokeo, Inc., 742 F.3d 409, 413–14 (9th Cir. 2014), *vacated*, 136 S. Ct. 1540.

87. *See Spokeo*, 136 S. Ct. at 1545.

88. *See id.* at 1549.

89. *Id.* at 1548.

90. *See id.* (citing Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2341 (2014); Summers v. Earth Island Inst., 555 U.S. 488, 493 (2009); Sprint Comm'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 274 (2008); Massachusetts v. EPA, 549 U.S. 497, 517 (2007)).

91. *See id.* at 1555 (Ginsburg, J., dissenting) ("[I]n the four cases cited by the Court, and many others, opinions do not discuss the separate offices of the terms 'concrete' and 'particularized.'").

92. 134 S. Ct. 2334.

93. *See id*. at 2340.

94. *See id.* at 2340–41.

that the organization was subject to a "'credible threat' of enforcement."[95]

The Court's analysis in *Susan B. Anthony List* was exactly the sort of analysis that it has consistently engaged in. Criminal prosecution is clearly a cognizable harm. The question in the case was not whether the harm was "real" enough. The question was simply whether or not the harm would be likely to occur to the plaintiff in the future.

Similarly, in *Sprint Communications Co. v. APCC Services, Inc.*,[96] the issue was whether assignees had standing to pursue legal claims that had been assigned to them, when the assignment provided that any money recovered in pursuing the claims would be paid back to the assignors.[97] Again, there was no question about the nature of the harm, which was monetary. The only question was whether the assignees, and not just the assignors, could be said to have suffered that harm. In the end, the Court found that the assignees did have standing.[98]

Finally, *Summers v. Earth Island Institute*[99] and *Massachusetts v. EPA*[100] were both environmental cases in which the Court accepted that environmental harms are real harms.[101] In *Summers*, the Court denied standing because "[t]here may be a chance, but is hardly a likelihood, that [the plaintiff organization's member's] wanderings will bring him to a parcel about to be affected by a project unlawfully subject to the regulations."[102] In other words, as in *Lujan*, the problem was not the nature of the harm, but whether the harm would in fact affect the plaintiff. In *Massachusetts*, the Court granted standing to the state of Massachusetts because a failure to address climate change would have negative effects on coastal land, including coastal land located within the state.[103]

In all four cases, the Court's analysis focused on whether the plaintiff would suffer the alleged harm, not whether the type of harm was the right kind of harm. In three of the four cases, the Court ultimately found that the plaintiffs did have standing. In none of the cases did

95. *Id.* at 2343 (quoting Holder v. Humanitarian Law Project, 561 U.S. 1, 15 (2010)).

96. 554 U.S. 269 (2008).

97. *See id*. at 274.

98. *See id.* at 275.

99. 555 U.S. 488 (2009).

100. 549 U.S. 497 (2007).

101. *See Summers*, 555 U.S. at 494 ("While generalized harm to the forest or the environment will not alone support standing, if that harm in fact affects the recreational or even the mere esthetic interests of the plaintiff, that will suffice."); *Massachusetts*, 549 U.S. at 521 ("The harms associated with climate change are serious and well recognized.").

102. *Summers*, 555 U.S. at 495.

103. *See Massachusetts*, 549 U.S. at 522.

the Court purport to explain the meaning of the requirement that the injury be "concrete and particularized," and certainly in none of the cases did the Court "make it clear" that these are two separate requirements.[104]

Beyond the attempt to invoke precedent, the *Spokeo* Court looked to the dictionary definition of "concrete,"[105] and the Court seemed also to invoke something like a canon against surplusage, suggesting that the words "concrete" and "particularized" in the test for Article III standing surely could not mean the same thing.[106] These, however, are tools of statutory construction,[107] and they are entirely misplaced here because the phrase "concrete and particularized" is not statutory language, but rather language invented by the Court itself. Indeed, the phrase was first used by the Supreme Court in *Lujan*,[108] and as we have seen, that case provides no support for scrutinizing the nature of the alleged harm.[109]

A more reasonable basis for interpreting the word "concrete" in the standing inquiry is to look to how the Supreme Court has previously used the word in this context. In fact, the Court has used the word to mean several different things, but none of them involve an inquiry into the reality of the harm, as the Court did in *Spokeo*. Sometimes the Court has spoken about how the standing doctrine is necessary "to

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104. Earlier in the *Spokeo* opinion, the Court also wrote: "As we have explained in our prior opinions, the injury-in-fact requirement requires a plaintiff to allege an injury that is both 'concrete *and* particularized.'" *Spokeo*, 136 S. Ct. at 1545 (citing Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc., 528 U.S. 167, 180–81 (2000)). The emphasis on "and," however, was added by the *Spokeo* Court. The quoted passage from the *Friends of the Earth* case simply quoted the test for standing as stated in *Lujan*, and did not purport to focus on the phrase "concrete and particularized," let alone the words "concrete" and "particularized" as separate requirements. *See Friends of the Earth*, 528 U.S. at 180–81. Indeed, far from imposing any separate concreteness requirement, the court in *Friends of the Earth* ultimately found standing on the basis that the organization's members lived near the allegedly polluted river and that their "recreational, aesthetic, and economic interests" would be affected. *Id.* at 181–84.

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

106. *See id.* ("Particularization is necessary to establish injury in fact, but it is not sufficient. An injury in fact must also be 'concrete.' Under the Ninth Circuit's analysis, however, that independent requirement was elided.").

107. On the canon against surplusage, see, for example, Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 698 (1995) ("A reluctance to treat *statutory terms* as surplusage supports the reasonableness of the Secretary's interpretation." (emphasis added)).

108. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992). The phrase "concrete and particularized" appears in one Supreme Court case predates *Lujan*, but only in passing. *See* Duke Power Co. v. Carolina Envt'l Study Grp., Inc., 438 U.S. 59, 80–81 (1978) ("Where a party champions his own rights, and where the injury alleged is a concrete and particularized one which will be prevented or redressed by the relief requested, the basic practical and prudential concerns underlying the standing doctrine are generally satisfied when the constitutional requisites are met.").

109. *See supra* notes 24–34 and accompanying text.

assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends."[110] In this context, concreteness refers to the nature of the case as a whole, rather than the nature of the alleged harm.

More commonly, the Court has used "concrete" as the opposite of "abstract," and it has contrasted a concrete harm with "an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law."[111] In other words, the concreteness requirement has been used only to reject injuries that flow solely from the very fact of unlawful action, untied to a particular effect on the plaintiff. In that sense, "concrete and particularized" refers to a single concept, not two separate ones. Scalia himself referred to a "concrete injury" as "an injury apart from the mere breach of the social contract, so to speak, effected by the very fact of unlawful government action."[112] Concreteness has not been thought to require an assessment of the nature and value of effects directed at the plaintiff.

V. CASES FOLLOWING *SPOKEO*

In implementing the *Spokeo* decision, lower courts have continued to scrutinize the harms claimed by plaintiffs and to reject at least some privacy harms as insufficiently "concrete" to support standing. For example, in a pair of cases, the Seventh and Eighth Circuits each rejected as insufficient for standing the unlawful retention of customer data by cable companies, in violation of the Cable Communications Policy Act.[113] In doing so, each court suggested that while unlawful disclosure or unlawful use of the data might be a concrete injury, unlawful retention was not.[114] According to the court in *Gubala v. Time*

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

111. *See, e.g.*, *Lujan*, 504 U.S. at 573.

112. Scalia, *supra* note 14, at 895.

113. *See* Gubala v. Time Warner Cable, Inc., 846 F.3d 909, 911 (7th Cir. 2017); Braitberg v. Charter Commc'ns, Inc., 836 F.3d 925, 930 (8th Cir. 2016).

114. *See Gubala*, 846 F.3d at 910 ("But the plaintiff has not alleged that Time Warner has ever given away or leaked or lost any of his personal information or intends to give it away or is at risk of having the information stolen from it. . . . The district judge was right, in these circumstances, to rule that the plaintiff does not have standing to sue."); *Braitberg*, 836 F.3d at 930 ("With the benefit of *Spokeo*'s guidance, we conclude that Braitberg has not alleged an injury in fact as required by Article III. . . . He does not allege that Charter has disclosed the information to a third party, that any outside party has accessed the data, or that Charter has used the information in any way during the disputed period."). In *Gubala*, some language suggests that perhaps even disclosure would not be sufficiently concrete absent some further economic or other harm. *See Gubala*, 846 F.3d at 910–11 (noting that the plaintiff had presented no evidence "that in the decade since he subscribed to Time Warner's residential services any of the personal information that he supplied to the company when he subscribed had leaked *and caused financial or other injury to him* or had even been at risk of being leaked" (emphasis added)).

Warner Cable, Inc.,[115] "there is no indication of any violation of the plaintiff's privacy because there is no indication that Time Warner has released, or allowed anyone to disseminate, any of the plaintiff's personal information in the company's possession."[116] Such a judgment about what "counts" as a privacy violation is precisely the sort of judgment that the Supreme Court's pre-*Spokeo* cases avoided but that the *Spokeo* decision invites.

Indeed, the new focus on the nature of the plaintiff's harm potentially comes at the expense of the prior focus on whether the plaintiff was personally affected. In *Gubala*, the court wrote that "Gubala can no more sue than someone who, though he has never subscribed and means never to subscribe to a cable company, nevertheless is outraged by the thought that Time Warner and perhaps other cable companies are violating a federal statute with apparent impunity."[117] In other words, the court cast the plaintiffs in the case as being in the same situation as plaintiffs who sue on the basis of an abstract, generalized harm that applies equally to everyone in society. The court effectively treated as insignificant the fact that the plaintiffs in the case were suing on the basis of *their* information having been retained and not someone else's information—precisely the sort of fact that was of crucial significance in cases like *Lujan*.

Similarly, in *Hancock v. Urban Outfitters, Inc.*,[118] the D.C. Circuit held that unlawfully collecting zip codes did not give rise to a sufficiently concrete injury for Article III standing.[119] As in the cable cases above, the court required some further "concrete consequence," such as "invasion of privacy, increased risk of fraud or identity theft, or pecuniary or emotional injury," in order to satisfy standing requirements.[120] Here again the court made a judgment about whether the plaintiffs' alleged privacy harm was sufficiently "real" or not.

Further, post-*Spokeo* scrutiny of harms is not limited to privacy cases. In *Soehnlen v. Fleet Owners Insurance Fund*,[121] for example, the Sixth Circuit denied standing to plaintiffs who sued their group health plan under Employee Retirement Income Security Act (ERISA) for failing to remove benefit caps as mandated by the Affordable Care Act.[122] The court found that the plaintiffs had failed to allege a

115. 846 F.3d 909.
116. *Id.* at 912.
117. *Id.* at 911–12.
118. 830 F.3d 511 (D.C. Cir. 2016).
119. *See id.* at 512.
120. *Id.* at 514.
121. 844 F.3d 576 (6th Cir. 2016).
122. *See id.* at 579–80.

sufficiently concrete injury, focusing on the "extreme generality" with which the plaintiffs had alleged "that certain members of their class suffer from conditions that have previously required medical expenses in excess of the benefit caps imposed by the Plan" or "that some of their employees will choose to delay important medical procedures in order to avoid exceeding the cap."[123] In focusing on employees actually bumping up against the cap, the court seems to have missed the idea that insurance is a hedge against risk, that insurance with a cap is not as good of a hedge as insurance without a cap, and that being subjected to a greater future risk is very much a present harm.

To be sure, the lower courts are sometimes finding even alleged privacy harms to be sufficiently concrete to confer standing, particularly given the Supreme Court's admonition that "concrete" does not necessarily mean tangible.[124] For example, the Third Circuit recently held that improper disclosure of personal information could be a concrete injury even without any evidence that the information had been, or was about to be, misused.[125] Even where the courts are finding injuries to be sufficiently concrete, however, they are engaging in a much more searching analysis to do so.[126] That sort of analysis is new.

VI. The Mismatch Between Theory and Doctrine

The doctrinal shift made by the Court in *Spokeo* might be less troublesome if it were theoretically justified, but it is not. Defenders of a particularly robust standing doctrine have generally invoked separation of powers concerns.[127] And yet those concerns are largely absent in the privacy cases in which standing has become a particularly high hurdle.

Courts have not been clear about precisely what they mean in saying that standing serves the goal of separation of powers,[128] but the basic idea seems to be to distinguish between resolving individual disputes—the province of courts—and resolving social policy questions—the province of the political branches. In *Lujan*, for example, the court wrote:

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123. *Id.* at 582.

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

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

126. *See, e.g.*, *id.* at 638–39 (relying at least in part on an analogy to common law privacy torts in finding an unauthorized disclosure of information to be a concrete injury).

127. *See* Allen v. Wright, 468 U.S. 737, 752 (1984) ("[T]he law of Art. III standing is built on a single basic idea – the idea of separation of powers."); Scalia, *supra* note 14, at 881.

128. *See* Heather Elliott, *The Functions of Standing*, 61 Stan. L. Rev. 459, 460–63 (2008).

> Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those "Cases" and "Controversies" that are the business of the courts rather than of the political branches. "The province of the court," as Chief Justice Marshall said in *Marbury v. Madison*, "is, solely, to decide on the rights of individuals." Vindicating the public interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive.[129]

The vast majority of privacy and security cases, though, are indeed ones involving individual rights, not merely broad questions of public interest. Almost invariably, privacy plaintiffs are specific individuals who claim that their own personal information has been mishandled in some way.[130] That mishandling then provides the factual basis for their legal claims under statutory or common law.

When courts deny standing in these cases on the basis of the injuries being insufficiently concrete, they are not deciding whether the cases are ones that concern individual rights, but rather deciding the substantive content of those rights. Far from supporting an appropriate separation of powers, this move amounts to a usurpation of legislative power by the federal judiciary.[131]

Consider again the Seventh Circuit's decision in *Gubala*, finding the unlawful retention of data to be an insufficiently concrete injury.[132] The court supported its holding by claiming that "otherwise the federal courts would be flooded with cases based not on proof of harm but on an implausible and at worst trivial risk of harm."[133] But where did the court get the authority to reject the case for fear of being "flooded"? Such a judgment is a quintessentially legislative one. Surely the federal courts could not, on their own accord, decide that they were being flooded with trivial class action cases and thereby impose some additional requirements on class actions, something that Congress of course can do (and has done).[134] Similarly, common law

129. Lujan v. Defs. of Wildlife, 504 U.S. 555, 576 (1992) (citation omitted) (quoting Marbury v. Madison, 5 U.S. 137, 170 (1803)).

130. *See, e.g.*, Gubala v. Time Warner Cable, Inc., 846 F.3d 909, 910 (7th Cir. 2017).

131. *See* Daniel Townsend, *Who Should Define Injuries for Article III Standing?*, 68 STAN. L. REV. ONLINE 76, 81 (2015) (arguing that judicial review of statutorily created injuries requires the Court "to come up with a way to acknowledge the socially defined nature of injuries while simultaneously overriding society's most significant deliberative body").

132. *See Gubala*, 846 F.3d at 911.

133. *Id.*

134. *See, e.g.*, Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

courts often take into account the potential for a flood of cases in deciding whether to recognize new causes of action[135] or how far to extend certain duties.[136] But the federal courts are not common law courts. Under the Constitution, Congress gets to decide whether or not to flood the federal courts.[137] For the federal courts to make this decision is to upend the constitutional order.

Similarly, the Supreme Court's suggestion in *Spokeo* to look to "history" and the common law in defining concrete injuries,[138] a suggestion taken up by the lower courts,[139] also undermines the role of legislatures. It is the legislature's prerogative to supersede the common law if it so chooses.[140] There is no reason why the legislature should be limited to recognizing only those injuries recognized at common law.

Moreover, scrutiny of harms undermines the legislature's ability to act to prevent harms proactively, rather than only addressing completed harms. For example, the D.C. Circuit's judgment that the collection of zip codes causes no "concrete consequence"[141] is at odds with the judgment of state legislatures, confirmed by state courts, that collecting zip codes can lead to consumer privacy harms, such as receiving unwanted marketing or the sale of personal information to third parties.[142] To be sure, the Court in *Spokeo* was careful to caution that a "risk of real harm" could be sufficiently concrete.[143] The overall concreteness inquiry, though, invites courts to substitute their judgments of risk for that of legislatures, again usurping the legislative role.

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135. *See, e.g.*, Roberson v. Rochester Folding Box Co., 64 N.E. 442, 443 (N.Y. 1902) (declining to recognize a common law right of privacy in New York at least in part because it would "necessarily result, not only in a vast amount of litigation, but in litigation bordering upon the absurd").

136. *See, e.g.*, 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc., 750 N.E.2d 1097, 1101 (N.Y. 2001) (declining to impose a duty owed to those who suffered purely economic losses in order to "avoid exposing defendants to unlimited liability to an indeterminate class of persons conceivably injured by any negligence in a defendant's act").

137. *See* Toby J. Stern, *Federal Judges and Fearing the "Floodgates of Litigation,"* 6 U. PA. J. CONST. L. 377, 399 (2003).

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

139. *See, e.g.*, Braitberg v. Charter Commc'ns, Inc., 836 F.3d 925, 930 (8th Cir. 2016) (finding the retention of data not to be a concrete harm at least in part because "[a]lthough there is a common law tradition of lawsuits for invasion of privacy, the retention of information lawfully obtained, without further disclosure, traditionally has not provided the basis for a lawsuit in American courts").

140. *See, e.g.*, N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2015) (superseding *Roberson* and establishing a statutory right of privacy in New York).

141. Hancock v. Urban Outfitters, Inc., 830 F.3d 511, 514 (D.C. Cir. 2016).

142. *See* Tyler v. Michaels Stores, Inc., 984 N.E.2d 737, 746 (Mass. 2013); Pineda v. Williams-Sonoma Stores, Inc., 246 P.3d 612, 619 (Cal. 2011).

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

An overly expansive standing inquiry is particularly problematic in the context of suits against private companies, as most data breach and other privacy cases are.[144] The paradigmatic standing case for someone like Scalia is a lawsuit challenging the validity of government action.[145] If in such a case, the challenged government action affects the citizenry generally, rather than specific individuals, then the preferred recourse for those who disagree with the action is to directly undo it through the legislative and executive branches.[146] In *Lujan*, for example, Scalia presumably would have told those dissatisfied with the Secretary of the Interior's rule to work to elect a new President, who would choose a new Secretary of the Interior, who would promulgate a new rule. Or Scalia might have advised them to advocate Congress to pass new legislation overruling the Secretary's rule. Either of those courses of action would have been preferable to suing the Secretary and seeking a judicial determination that would force the Secretary to change the rule.

In the case of a private actor, there is no corresponding ability to use the political process to directly halt the actor's challenged activity. Some form of government action will be necessary. Denying standing on the basis of the plaintiff being the wrong plaintiff would still leave the door open to other potential plaintiffs. Denying standing on the basis of the harm being the wrong kind of harm essentially takes private lawsuits in federal courts out of the picture entirely. While the possibility of purely executive or administrative action would remain, such a rule can severely hamper the government's ability to regulate the challenged activity by removing an important tool from the regulatory toolbox.

If government power against private parties is limited by standing doctrine, then the doctrine may be serving deregulatory goals, rather than separation of powers ones. Standing becomes a means by which politically desirable regulation is struck down by the courts. Whatever the merits of a deregulatory agenda, that agenda should be established, if at all, through the political process. Constitutionalizing der-

144. *See id.* at 1551 (Thomas, J., concurring) ("[Standing] limitations preserve separation of powers by preventing the judiciary's entanglement in disputes that are primarily political in nature. This concern is generally absent when a private plaintiff seeks to enforce only his personal rights against another private party."); *see also* F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 277 (2008).

145. *See* Scalia, *supra* note 14, at 895 ("[T]he doctrine of standing, *as applied to challenges to governmental action*, is an essential means of restricting the courts to their assigned role of protecting minority rather than majority interests." (emphasis added)).

146. *See id.* at 894–95.

egulation is unwarranted and unjustified.[147] And yet, that is what a standing doctrine that requires scrutiny of harms invites.

VII. Conclusion

There has been a subtle but important shift in standing doctrine. Where the Supreme Court once deferred to Congress and common law courts to define cognizable harms, it has now taken upon itself, particularly in privacy or information cases, to have some say in defining harms. While the Court has at least signaled that its review will not be as stringent as it could be, the exercise itself is unprecedented, unprincipled, and can only lead to mischief. Many of the privacy cases being eliminated on standing grounds are actually meritorious, but even if they were not, that judgment is not one for federal courts to make.

147. *Cf.* Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*.").