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# “Spooky Action at a Distance”: Intangible Injury in Fact in the Information Age

Seth F. Kreimer

*University of Pennsylvania Law School*, [skreimer@law.upenn.edu](mailto:skreimer@law.upenn.edu)

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**“SPOOKY ACTION AT A DISTANCE”: INTANGIBLE INJURY IN  
FACT IN THE INFORMATION AGE**

*Seth F. Kreimer*<sup>\*</sup>

ABSTRACT

*Two decades after Justice William O. Douglas coined “injury in fact” as the token of admission to federal court under Article III, Justice Antonin Scalia sealed it into the constitutional canon in Lujan v. Defenders of Wildlife. In the two decades since Lujan, Justice Scalia has thrown increasingly pointed barbs at the permissive standing doctrine of the Warren Court, maintaining it is founded on impermissible recognition of “Psychic Injury.” Justice Scalia and his acolytes take the position that Article III requires a tough-minded, common sense, and practical approach. Injuries in fact must be “tangible,” “direct,” “concrete,” “de facto” realities in time and space, free from spooky entities like “Psychic Injury.”*

*Albert Einstein famously maintained that quantum mechanics could not be a proper and complete theory on the ground that “physics should represent a reality in time and space, free from spooky actions at a distance.” The problem that ultimately overtook Einstein’s argument was that experimental results vindicating quantum mechanics stubbornly continued to appear in the journals. The burden of this Article is to demonstrate that spooky “injuries in fact” involving information have stubbornly continued to appear in United States Reports. It shows that the Court has regularly adjudicated the controversies of the information age: disputes regarding illicit acquisition of information, denial of access to information, and improper exposure to information and intellectual property. And it argues that the Court will continue to do so.*

*These adjudications fatally undermine an account of Article III that insists on “direct,” “tangible,” and “palpable” injuries to physical or economic interests as the price of admission to the federal courthouse, and profoundly alter notions of “particularized” and “imminent” injury. Information is by nature intangible, and information plays an increasingly dominant role in our social, economic, political, and cultural life. Information is largely non-rivalrous and non-excludable. Violations of duties regarding information thus regularly result in injuries that are “general” rather than “particularized.” And, with the advent of the Internet, informational harm is pandemically “imminent”: information can be spookily and instantaneously “present” at opposite ends of the country, or of the globe.*

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PROLOGUE: OF JUSTICIABILITY, EINSTEIN, AND “PSYCHIC INJURY”

Article III of the United States Constitution extends federal judicial power to “cases” and “controversies.” It has been common currency since the Framing that the language defines judicial authority in terms “of limited

signification . . . [denoting] a controversy between parties which had taken a shape for judicial decision.”<sup>1</sup>

To identify which controversies “had taken a shape for judicial decision” in the eighteenth century, courts referred to accepted elements of common law pleading and equity practice.<sup>2</sup> But as legislative and administrative rules supplanted common law, as law and equity merged, and as declaratory judgments became a part of the judicial landscape, the definition of justiciable “cases” became a matter of greater dispute.

It remained accepted doctrine that “[t]he controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests.”<sup>3</sup> And it remained the plaintiff’s obligation to establish standing to sue by demonstrating a “direct” and “substantial” injury.<sup>4</sup> But these parameters proved less than clean edged rules. By the mid-twentieth century, Chief Justice Earl Warren wrote with some wistfulness for a majority of the Court in *Flast v. Cohen* of “[t]he ‘many subtle pressures’ which cause policy considerations to blend into the constitutional limitations of Article III make the justiciability doctrine one of uncertain and shifting contours.”<sup>5</sup>

In *Flast*, the Warren Court recognized a justiciable “case” in a suit by federal taxpayers raising an Establishment Clause challenge against a fed-

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1 4 THE PAPERS OF JOHN MARSHALL 95 (Charles T. Cullen ed., 1984) (John Marshall in Congress); see also *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006) (“[W]e must find that the question is presented in a ‘case’ or ‘controversy’ that is, in James Madison’s words, ‘of a Judiciary Nature.’”); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (Max Farrand ed., 1966) (“[T]he jurisdiction given was constructively limited to cases of a Judiciary nature . . .”).

2 See *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 819 (1824) (“[Federal judicial] power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law.”).

3 *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240–41 (1937).

4 *E.g.*, *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 151 (1951) (Frankfurter, J., concurring) (“A petitioner does not have standing to sue unless he is ‘interested in and affected adversely by the decision’ of which he seeks review. His ‘interest must be of a personal and not of an official nature.’ The interest must not be wholly negligible, as that of a taxpayer of the Federal Government is considered to be. A litigant must show more than that ‘he suffers in some indefinite way in common with people generally.’” (citations omitted)).

5 *Flast v. Cohen*, 392 U.S. 83, 97 (1968) (citing *Poe v. Ullman*, 367 U.S. 497, 508 (1961)); see also *id.* at 95 (“[Justiciability’s] utilization is the resultant of many subtle pressures . . .”); *id.* at 98 (“[T]he problem of standing is surrounded by the same complexities and vagaries that inhere in justiciability.”); *id.* at 99 (noting “the many subtle pressures” that are “at work in the standing doctrine”).

Justice Felix Frankfurter’s “expert feel” test also betokened the pliable quality of justiciability doctrine: “[T]he jurisdiction of the federal courts can be invoked only under circumstances which to the expert feel of lawyers constitute a ‘case or controversy.’” *Joint Anti-Fascist Refugee Comm.*, 341 U.S. at 150 (Frankfurter, J., concurring); see also *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Black, J., concurring, joined by Frankfurter, J.) (“Judicial power could come into play only . . . if they arose in ways that to the expert feel of lawyers constituted ‘Cases’ or ‘Controversies.’”).

eral statute that channeled funds to parochial schools. Prior doctrine had held that a federal taxpayer challenging expenditures merely complained of wrongs suffered “in some indefinite way in common with people generally,” and hence that taxpayers had no standing to invoke judicial relief.<sup>6</sup> According to *Flast*, however, the “gist” of the standing question was whether the plaintiff had “alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues.”<sup>7</sup> The taxpayer plaintiff, according to *Flast*, could prove the “requisite personal stake” because she established two types of “nexus” with her status as a taxpayer: she “allege[d] the unconstitutionality only of exercises of congressional power under the taxing and spending clause,” and she alleged that “the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power.”<sup>8</sup>

From the outset, the *Flast* nexus test provoked dubious reactions. Justice John M. Harlan’s dissent challenged the conclusion that Florence Flast had a “personal stake” in the ultimate disbursement of her tax payments. Ms. Flast would pay identical taxes to the federal treasury regardless of the outcome of the suit, and Justice Harlan argued that a conclusion that she had a “personal stake” in the minimal share of federal disbursement that might be allocated pro rata to her payments betokened “a word game played by secret rules.”<sup>9</sup> Justice William O. Douglas’s concurrence spoke in uncharacteristically more measured language, maintaining that the *Flast* nexus test was not “a durable one for the reasons stated by my Brother Harlan.”<sup>10</sup>

Two years later, Justice Douglas wrote for a unanimous Court that in determining the presence or absence of standing under Article III, the “first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise.”<sup>11</sup> Unlike the *Flast* “nexus,” the “injury in fact” criterion proved both hardy and luxuriant.

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<sup>6</sup> *Frothingham v. Mellon* 262 U.S. 447, 488 (1923); *cf.* *Doremus v. Bd. of Educ.*, 342 U.S. 429, 434 (1952) (“[O]ur own jurisdiction is cast in terms of ‘case or controversy’ . . . . The taxpayer’s action can meet this test, but only when it is a good-faith pocketbook action.”).

<sup>7</sup> *Flast*, 392 U.S. at 99 (citing *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

<sup>8</sup> *Id.* at 102–03.

<sup>9</sup> *See id.* at 129 (Harlan, J., dissenting) (“To describe those rights and interests as personal, and to intimate that they are in some unspecified fashion to be differentiated from those of the general public, reduces constitutional standing to a word game played by secret rules.”).

<sup>10</sup> *Id.* at 107 (Douglas, J., concurring).

<sup>11</sup> *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152 (1970).

In *Barlow v. Collins*, Justice William Brennan, writing for himself and Justice Byron White, took the position that the first step inquiry into “injury in fact” should be the only one. *Barlow v. Collins*, 397 U.S. 159, 168 (1970) (Brennan, J., concurring); *see also id.* at 172 n.5 (“[F]or pur-

Over the next two generations, over 100 Supreme Court cases have invoked “injury in fact” as a defining quality of a justiciable case or controversy.<sup>12</sup> It has been stated that relevant “injury in fact” may not be simply an abstract “generalized grievance”; standing is often said to require “a personal and tangible harm.”<sup>13</sup> The “injury in fact” prerequisite is characterized as “bedrock” of the case or controversy limit, an “irreducible constitutional minimum” demanding proof of injury that is “concrete and particularized,” “distinct and palpable,” and “actual or imminent.”<sup>14</sup>

Two decades after Justice Douglas coined the phrase, Justice Antonin Scalia—a long time proponent both on and off the bench of more rigid standing limitations<sup>15</sup>—sealed “injury in fact” into the constitutional canon in *Lujan v. Defenders of Wildlife*.<sup>16</sup> Where earlier cases stated that Congress could “identify injuries in fact” where none had been recognized at common law,<sup>17</sup> *Lujan* for the first time invalidated a congressional grant of standing because of the absence of “injury in fact” sufficient to satisfy the

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poses of standing, it is sufficient that a plaintiff allege *damnum absque injuria*, that is, he has only to allege that he has suffered harm as a result of the defendant’s action.”).

<sup>12</sup> A list is on file with the *University of Pennsylvania Journal of Constitutional Law*.

The Court’s opinions have periodically acknowledged that the boundaries of standing doctrine remain less than cleanly drawn. *E.g.*, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004) (“The standing requirement is born partly of ‘an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.’” (citing *Allen v. Wright*, 468 U.S. 737, 750 (1984))).

<sup>13</sup> *E.g.*, *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013) (“[F]or 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.”); *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam) (noting that a plaintiff must seek relief that “directly and tangibly benefits him” to have Article III standing (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–74 (1992))).

<sup>14</sup> *McConnell v. FEC*, 540 U.S. 93, 225 (2003) (quoting *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (“‘bedrock’ case-or-controversy requirement”); *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000) (“irreducible constitutional minimum”); *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (“concrete,” “distinct and palpable,” and “actual or imminent”)); *see also* *Allen v. Wright*, 468 U.S. 737, 751 (1984) (“distinct and palpable” (quoting *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 100 (1979))).

<sup>15</sup> *E.g.*, *Ctr. for Auto Safety v. Nat’l Highway Traffic Safety Admin.*, 793 F.2d 1322, 1342–44 (D.C. Cir. 1986) (Scalia, J., dissenting); *United Presbyterian Church v. Reagan*, 738 F.2d 1375, 1378 (D.C. Cir. 1984); *Safir v. Dole*, 718 F.2d 475, 479 (D.C. Cir. 1983); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 *SUFFOLK U. L. REV.* 881, 890–91 (1983).

<sup>16</sup> 504 U.S. 555, 560 (1992).

<sup>17</sup> *See* *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (“[I]njury required by Art. III may exist solely by virtue of ‘statutes creating legal rights, the invasion of which creates standing.’” (quoting *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973))); *see also* *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) (citing *Warth v. Seldin* for the proposition that the injury required by Article III standing may exist “solely by virtue” of statutes that create legal rights); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 208–12 (1972) (recognizing a statutory legal right to an integrated community).

Court's Article III scruples. Reviewing a provision granting "any person" a right to sue to enjoin violation of the Endangered Species Act, Justice Scalia wrote for a majority of the Court that: "Over the years, our cases have established that the irreducible constitutional minimum of standing [requires] 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.'"<sup>18</sup>

The Endangered Species Act's grant of standing to "any person" seeking to challenge an action imperiling protected animals was constitutionally defective, according to Justice Scalia and a majority of the Court. While Congress can "elevat[e] to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law," the challenged provision lacked the constitutionally required predicate of "concrete de facto" injury.<sup>19</sup>

In the two decades since *Lujan*, Justice Scalia has thrown increasingly pointed barbs at *Flast*'s recognition of standing for taxpayers challenging expenditures as Establishment Clause violations.<sup>20</sup> His most fulsome critique came in a judgment concurrence in *Hein v. Freedom from Religion Foundation, Inc.*:

*Flast* is wholly irreconcilable with the Article III restrictions on federal-court jurisdiction that this Court has repeatedly confirmed are embodied in the doctrine of standing. . . . [In *Flast* and subsequent cases the Court has relied on] Psychic Injury [which] has nothing to do with the plaintiff's tax liability. Instead, the injury consists of the taxpayer's mental displeasure that money extracted from him is being spent in an unlawful manner. . . . [C]onceptualizing

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18 *Lujan*, 504 U.S. at 560. The *Lujan* formulation has provided the touchstone of justiciability for a generation cases, most recently, for example, *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2663 (2015); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014); *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014).

19 *Lujan*, 504 U.S. at 578. Justice Kennedy's crucial concurrence in the judgment articulated his understanding that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, and I do not read the Court's opinion to suggest a contrary view." *Id.* at 580 (Kennedy, J., concurring).

20 *E.g.*, *United States v. Windsor*, 133 S. Ct. 2675, 2701 (2013) (Scalia, J., dissenting) ("The Court's notorious opinion in *Flast v. Cohen* held that standing was merely an element . . . of the sole Article III requirement of adverseness. We have been living with the chaos created by that power-grabbing decision ever since."); *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1450 (2011) (Scalia, J. concurring) ("*Flast* is an anomaly in our jurisprudence, irreconcilable with the Article III restrictions on federal judicial power that our opinions have established. I would repudiate that misguided decision and enforce the Constitution."); *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 634–35 (2007) (Scalia, J., concurring) ("Moreover, *Flast* is damaged goods, not only because its fanciful two-pronged 'nexus' test has been demonstrated to be irrelevant to the test's supposed objective, but also because its cavalier treatment of the standing requirement rested upon a fundamental underestimation of that requirement's importance."); *Lewis v. Casey*, 518 U.S. 343, 353 n.3 (1996) ("[O]ur later opinions have made it explicitly clear that *Flast* erred . . .").

of injury in fact in purely mental terms conflicts squarely with the familiar proposition that a plaintiff lacks a concrete and particularized injury when his only complaint is the generalized grievance that the law is being violated. . . . We have never explained why Psychic Injury, however limited, is cognizable under Article III.<sup>21</sup>

Albert Einstein famously maintained that quantum mechanics could not be a proper and complete theory on the ground that “physics should represent a reality in time and space, free from spooky actions at a distance.”<sup>22</sup> In a similar vein, Justice Scalia and his acolytes take the position that Article III doctrine requires a tough minded, common sense and practical approach. Injuries in fact should be “tangible,” “direct,” “concrete,” “de facto” realities in time and space free from spooky entities like “Psychic Injury.”<sup>23</sup>

In physics, the theoretical case for “spooky action at a distance” had strong proponents and opponents. The problem that ultimately overtook the opposition was that experimental results vindicating quantum mechan-

<sup>21</sup> 551 U.S. at 618–20 (Scalia, J., concurring).

<sup>22</sup> Letter from Albert Einstein to Max Born (March 3, 1947), in *THE BORN-EINSTEIN LETTERS: FRIENDSHIP, POLITICS AND PHYSICS IN UNCERTAIN TIMES* 154–55 (Irene Born trans., 2005); see also A. Einstein et al., *Can Quantum-Mechanical Description of Physical Reality Be Considered Complete?*, 47 *PHYSICAL REV.* 777, 777 (1935) (“Any serious consideration of a physical theory must take into account the distinction between the objective reality, which is independent of any theory, and the physical concepts with which the theory operates.”).

<sup>23</sup> Justice Scalia’s hostility to “Psychic Injury” in *Hein* and his correlative insistence on “Wallet Injury” might be read as keyed to the context of taxpayer challenges—or taxpayer challenges under the establishment clause. See *Hein*, 551 U.S. at 619. But aversion to adjudicating the suits of plaintiffs claiming diffuse or intangible interests does not seem to be so limited. *E.g.*, *Sprint Commc’ns. Co. v. APCC Servs., Inc.*, 554 U.S. 269, 301 (2008) (Roberts, C.J., dissenting) (“The absence of any right to the substantive recovery means that respondents cannot benefit from the judgment they seek and thus lack Article III standing. ‘When you got nothing, you got nothing to lose.’” (quoting BOB DYLAN, *LIKE A ROLLING STONE*, on *HIGHWAY 61 REVISITED* (Columbia Records 1965))); *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc.*, 528 U.S. 167, 201 (2000) (Scalia J., dissenting) (“By accepting plaintiffs’ vague, contradictory, and unsubstantiated allegations of ‘concern’ about the environment as adequate to prove injury in fact, and accepting them even in the face of a finding that the environment was not demonstrably harmed, the Court makes the injury-in-fact requirement a sham.”); *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 105 (1998) (“We have not had occasion to decide whether being deprived of information that is supposed to be disclosed under EPCRA . . . is a concrete injury in fact that satisfies Article III.”); *Lewis v. Casey*, 518 U.S. 343, 353 n.3 (1996) (“Depriving someone of a frivolous claim . . . deprives him of nothing at all, except perhaps the punishment of Federal Rule of Civil Procedure 11 sanctions.”).

The colorful distaste for adjudication of intangible injury is also not without predecessors. Justice Frankfurter’s position in *Adler v. Board of Education* is illustrative:

Parents may dislike to have children educated in a school system where teachers feel restrained by unconstitutional limitations on their freedom. But it is like catching butterflies without a net to try to find a legal interest, indispensable for our jurisdiction, in a parent’s desire to have his child educated in schools free from such restrictions. The hurt to parents’ sensibilities is too tenuous . . . to serve as the earthy stuff required for a legal right judicially enforceable.

342 U.S. 485, 502–03 (1952) (Frankfurter, J., dissenting).



ics stubbornly continued to appear in the journals.<sup>24</sup> The burden of this paper is to demonstrate that spooky “injuries in fact” involving information have stubbornly continued to appear in United States Reports. If the Court is to adjudicate the controversies of the information age they will continue to do so. These adjudications fatally undermine an account of Article III that insists on “direct,” “tangible,” and “palpable” injuries to physical or economic interests as the ticket of admission to the federal courthouse, and profoundly alter notions of “particularized” and “imminent” injury.<sup>25</sup>

## I. INFORMATION, INJURY, THEORY, AND PRACTICE

### A. Theory

We live in the information age.<sup>26</sup> And the docket of the Supreme Court reflects it. The Court adjudicates challenges to illicit efforts to obtain in-

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<sup>24</sup> Professor Aram Harrow has helpfully pointed out to me that conclusive experimental evidence against Einstein’s local realism only emerged in the 1970s, and the framework showing that conclusive evidence was possible was only developed in 1964. Email from Aram Harrow to Seth Kreimer (June 19, 2015) (on file with author). See, e.g., Zeeya Merali, *Toughest Test Yet for Quantum ‘Spookiness’*, 525 NATURE 14, 14–15 (2015); Travis Norsen, *John S. Bell’s Concept of Local Causality*, 79 AM. J. PHYSICS 1261, 1262 (2011); Lawrence M. Krauss, *Tangled up in Entanglement*, THE NEW YORKER (Oct. 31, 2015), <http://www.newyorker.com/tech/elements/tangled-up-in-entanglement-quantum-mechanics> (“Entanglement now appears to be an empirically closed case.”).

<sup>25</sup> Rivers of ink and terrabytes of data have been expended in seeking to generate a complete account of the proper constitutional definition of “cases” and “controversies.” In this relatively constrained format, I do not seek to solve the problem, but primarily to demonstrate that one apparently appealing solution—an insistence on tangible physical or economic injury—is theoretically and practically flawed and has been repeatedly rejected by the Court in adjudicating cases involving information.

<sup>26</sup> See, e.g., *Bilski v. Kappos*, 130 S. Ct. 3218, 3228 (2010) (“[T]he Information Age . . . puts the possibility of innovation in the hands of more people and raises new difficulties.”); CARL SHAPIRO & HAL R. VARIAN, *INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORKED ECONOMY* 6 (1999) “[I]nformation is available so quickly, so ubiquitously, and so inexpensively . . . .”; DAVID WARSH, *KNOWLEDGE AND THE WEALTH OF NATIONS: A STORY OF ECONOMIC DISCOVERY*, at xx–xxii (2006) (discussing the impact of “technical change and the growth of knowledge” on economics). For a sense of scale, see J. Bradford DeLong & Lawrence H. Summers, *The ‘New Economy’: Background, Historical Perspective, Questions, and Speculations*, 86 FED. RES. BANK OF KAN. CITY ECON. REV. 29, 34–35 (2001) (“The essence of the ‘new economy’ is quickly stated. . . . [There has been] a four-billion-fold increase in the world’s raw automated computational power in 40 years, an average annual rate of growth of 56 percent per year.”).

Two and a half decades ago, I surveyed similar ground. See Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 3–7 (1991); see also *id.* at 4 (“The capacities to gather, store, correlate, and retrieve data have increased by orders of magnitude, as both public and private data manipulation and storage has mushroomed. The ability to uncover and manipulate the informational traces of citizens has exploded as government combines its own information with data subpoenaed or scavenged from private sources.”).

formation, illegal refusals to disclose information, improper dissemination of information, actions that expose plaintiffs to informational impacts along with—of course—alleged violations of rights to “intellectual property.”<sup>27</sup> Often these cases reach the Court brigaded with economic or tangible injuries to the parties asserting them. But the underlying interests are rights regarding information, and the Court regularly adjudicates cases involving bare informational rights.

This presents difficulties for an understanding of Article III jurisdiction which requires a) a “concrete injury in fact” that is b) “particularized” and c) “immediate” before a federal court may entertain legal claims. In each of these dimensions, information—to borrow from Einstein in translation—is “spooky.” Information is intangible. Information is often difficult to confine to particular recipients. And in the age of the Internet, information is immediately available without constraint of time or space.

The first point is the clearest: a conception of “injury in fact” that takes the requirement of “concrete” injury to mean injury that has some “tangible” physical or economic manifestation rests in obvious tension with a legal system and society that is built around legal rights regarding information. Information is by nature intangible,<sup>28</sup> and information plays an increasingly dominant role in our social, economic, political, and cultural life.

Information has a second set of spooky characteristics. As modern analysis highlights, information is largely non-rivalrous and non-excludable.<sup>29</sup> Unlike tangible resources, information can be used by an infinite number of persons and processes without depleting it; it is often dif-

27 For discussion of each, see *infra* Parts II (illicit acquisition of information); III (denial of access to information); IV (dissemination and exposure to information); and V (intellectual property).

28 For an early and influential recognition, see Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in *THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS* 609, 615 (1962) (“Any one purchaser can destroy the monopoly, since he can reproduce the information at little or no cost. . . . [N]o amount of legal protection can make a thoroughly appropriable commodity of something so intangible as information.”).

Language regarding “concrete” injuries often occurs in contradistinction to “hypothetical” or “abstract” injury. If the requirement is simply that some discernible state of the world be affected by the challenged action, the difficulty eases.

29 See WILLIAM M. LANDES & RICHARD POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 13–14 (2003) (“It is a ‘public good’ in the economist’s sense that consumption of it by one person does not reduce its consumption by another.”); WARSH, *supra* note 26, at 281–88 (distinguishing rival and non-rival goods); Oren Bracha & Talha Syed, *Beyond the Incentive-Access Paradigm? Product Differentiation & Copyright Revisited*, 92 *TEX. L. REV.* 1841, 1848–49 (2014) (“Information goods are nonexcludable to the extent that once they are distributed to some, it is difficult to prevent access to them by others. And such goods are non-rivalrous to the extent that consumption of the work by one does not degrade the ability of others to consume and enjoy it. These observations and the analysis based on them are, by now, painfully familiar to anyone versed in the literature.”).

difficult to claim that any “particular” individual suffers an injury different from those suffered by others. Conversely, it is difficult to cabin use of information to a particular individual or entity: once it has been made available to, or denied to one individual, it is simultaneously available to or denied to the general public. This means that often—though not always—violations of duties regarding information will result in injuries that are “general” by definition.

Finally, with the advent of the Internet, informational harm is pandemically “imminent”: information can be spookily and instantaneously “present” at opposite ends of the country, or of the globe.<sup>30</sup> The *Lujan* plaintiffs were denied standing because they could show no “imminent” plans to fly to Sri Lanka to observe endangered elephants. But today, a webcam posted in the elephant range would give them a solid claim that endangering the elephants harms their informational interests in real time. And in half a decade, they will be able to complain of an inability to observe the elephants in virtual reality.<sup>31</sup>

### B. Practice

From the time that “injury in fact” emerged on the stage of federal jurisdiction, the Court recognized that “the constitutional component of standing doctrine incorporates concepts concededly not susceptible of precise definition.”<sup>32</sup> Still, as not-yet Chief Justice John Roberts, who argued *Lujan* for the government, noted in his after-action account of the case:

Although it is easier to define injury in some cases than in others, the occasional difficulty of the enterprise is hardly reason to abandon it altogether . . . . As the Court has explained, “[t]he absence of precise definitions . . . hardly leaves courts at sea in applying the law of standing.” As is the case whenever the

30 See, e.g., SHAPIRO & VARIAN, *supra* note 26, at 4 (“[E]nforcement . . . [is] a problem that has become even more important with the rise of digital technology and the Internet. Digital information can be perfectly copied and instantaneously transmitted around the world.”); Mark A. Lemley, *IP in a World Without Scarcity*, 90 N.Y.U. L. REV. 460, 461 (2015) (“The Internet has reduced the cost of reproduction and distribution of informational content effectively to zero.”).

31 Cf. Ike Kamphof, *Linking Animal and Human Places: The Potential of Webcams for Species Companionship*, 2 ANIMAL STUD. J. 82, 86 (2013) (“What possibilities does the viewing that webcams invite offer for evoking an awareness of a living space and of life shared between human viewers and nonhuman animals?”); Sean Hollister, *Samsung Project Beyond: A 360° Camera For Streaming Virtual Reality*, GIZMODO (Nov. 12, 2014, 1:39 PM), <http://gizmodo.com/samsung-built-its-own-360-degree-camera-for-streaming-v-1657936437> (“[S]amsung says it can give you a full 3D, 360 degree of anywhere it films . . . [and] let you tap into a live virtual reality feed from another location.”).

32 *Allen v. Wright*, 468 U.S. 737, 751 (1984); see also *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (“[T]he concept of Art. III standing has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it . . . .” (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982)) (internal quotation marks omitted)).

Court defines a legal requirement, “the standing concepts have gained considerable definition from developing case law.”<sup>33</sup>

This Article therefore explores the case law on standing and information in order to illuminate the practical definition the Court has given over time to the status of informational harms as “injuries in fact.”<sup>34</sup>

## II. ILLICIT ACQUISITION OF INFORMATION: PRIVACY AND “INTANGIBLE” INJURY

### A. *Surveillance and Standing: The NSA*

The subject of this Symposium presents a prime example of intangible informational injury. For their first four years of existence, the national security surveillance programs initiated by the Bush Administration avoided

<sup>33</sup> John G. Roberts, Jr., Comment, *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1223 (1993) (footnotes omitted) (quoting *Allen*, 468 U.S. at 751); see also *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 274 (2008) (“We have often said that history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider.”); *id.* at 284 (“[T]he Court’s decisions . . . offer additional and powerful support for the proposition that suits by assignees for collection have long been seen as ‘amenable’ to resolution by the judicial process.” (citing *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102 (1998)); cf. *Zivotofsky v. Sec’y of State*, 444 F.3d 614, 619 (D.C. Cir. 2006) (“[T]he standing question can be answered chiefly by comparing the allegations of the particular complaint to those made in prior standing cases.” (quoting *Allen*, 468 U.S. at 751–52)), ultimately adjudicated in *Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012) and *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015).

<sup>34</sup> Fifteen years ago, Cass Sunstein used *FEC v. Akins* as the launching pad for a thoughtful discussion of one piece of the problem. Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 617 (1999). Bruce Teicher provided an earlier discussion but was not cited by Sunstein. See Bruce Teicher, Note, *Informational Injuries as a Basis for Standing*, 79 COLUM. L. REV. 366, 366–67 (1979). Sunstein highlighted the expanding scope of required disclosure, and concluded that in the aftermath of *FEC v. Akins*, where Congress created an obligation to disclose information, denial of that information will be held a per se injury in fact. See Sunstein, *supra*, at 617. This prediction has thus far proven correct.

Professor Sunstein went on to argue that the “public good” character of information is an important reason for requiring disclosures, *id.* at 624, and the right to receive information is particularly prone to generate “generalized grievances.” *Id.* at 644. Sunstein did not link these propositions with other types of informational injury.

Finally, Professor Sunstein saw *Akins* as a potential illustration of the proposition that “the injury in fact . . . test is not even coherent. . . . What is perceived, socially or legally, as an ‘actual’ injury is a product of social or legal categories giving names and recognition to some things that people, prominently people within the legal culture, consider to be (actual, cognizable) harms.” *Id.* at 639–41 (footnote omitted). He suggested that *Akins* could be the beginning of the demise of “injury in fact” as a prelegal conception.

Like many other academics, I have a good deal of sympathy for this normative point. Since Justice Brennan’s dissent in *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 492 (1982), and then-professor William Fletcher’s cogent analysis in William A. Fletcher, *The Structure of Standing*, 98 YALE L. J. 221, 267–70 (1988), it has appeared that the dichotomy between “injury in fact” and “injury at law” has rested on uneasy intellectual foundations. But in this regard, Sunstein’s positive prediction has not yet come to pass. The analysis here takes as given the necessity of demonstrating “injury in fact.”

legal review through a strategy of deep secrecy.<sup>35</sup> Surveillance that could not be known outside of the charmed circle of initiates could also not be subjected to legal challenge. With public intimations of the scope of National Security Agency (“NSA”) surveillance beginning in 2005, however, the field of battle changed.<sup>36</sup>

Stripped of the shield of deep secrecy, administration advocates sought to fabricate bulwarks against public judicial review of NSA surveillance by joining shallower secrecy to the requirements of modern justiciability doctrine. The bulwarks were built on an elegant syllogism. Plaintiffs who now knew they were at risk of surveillance could file suit. But to stay in federal court, they were obliged by the “irreducible constitutional minimum of standing” to show they had sustained an “injury in fact” that was “concrete,” “particularized,” and “actual or imminent.”<sup>37</sup> To present a justiciable case, therefore, it was incumbent on plaintiffs to prove they would in fact be subjected to secret surveillance. But because the surveillance was secret, they could present no proof.<sup>38</sup>

The scenario played out first in the dismissal of litigation surrounding the 2005 revelations of warrantless surveillance. Though the White House acknowledged the existence of a “Terrorist Surveillance Program,” cases seeking to enjoin the program were dismissed for want of a “concrete,” “imminent,” and “particularized” injury; plaintiffs could not affirmatively prove that their particular communications would be collected and misused.<sup>39</sup>

Congress explicitly authorized surveillance of communications with overseas targets without individualized suspicion in Section 702 of the Foreign Intelligence Surveillance Act (“FISA”) Amendments Act of 2008 (“FAA”),<sup>40</sup> in part as a way of providing a statutory authorization for ongo-

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35 For the canonical recent account, see David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 274 (2010) (“[A] government secret is deep if a small group of similarly situated officials conceals its existence from the public and from other officials, such that the outsiders’ ignorance precludes them from learning about, checking, or influencing the keepers’ use of the information.”).

36 For details of leaks to news reporters in 2004 and the struggles over publication, see ERIC LICHTBLAU, *BUSH’S LAW: THE REMAKING OF AMERICAN JUSTICE 194–99* (2008); JAMES RISEN, *STATE OF WAR: THE SECRET HISTORY OF THE CIA AND THE BUSH ADMINISTRATION 44–60* (2006); Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77, 145–47 (2010).

37 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

38 *Cf. JOSEPH HELLER, CATCH-22*, at 41 (1961) (“If he flew them he was crazy and didn’t have to; but if he didn’t want to he was sane and had to. Yossarian was moved very deeply by the absolute simplicity of this clause of Catch-22 and let out a respectful whistle.”).

39 *See ACLU v. NSA*, 493 F.3d 644, 657 (6th Cir. 2007) (Batchelder, J.) (“[T]he injury that would support a declaratory judgment action (i.e., the anticipated interception of communications resulting in harm to the contacts) is too speculative, and the injury that is imminent and concrete (i.e., the burden on professional performance) does not support a declaratory judgment action.”).

40 50 U.S.C. § 1881a.

ing surveillance, and in part as way of preempting damage actions by those who might be able to demonstrate that their conversations had been captured in the past.<sup>41</sup> In response, attorneys and human rights advocates at risk of surveillance under the FAA because of conversations with overseas clients and witnesses filed suit raising constitutional challenges. They claimed “injury in fact” because their ethical obligations as attorneys required them to spend valuable time and effort shielding privileged communications from prying government interlopers.<sup>42</sup> The trial court rejected the claimed injury as insufficiently “concrete.”<sup>43</sup> The Second Circuit reversed, concluding that “[i]f the plaintiffs can show that it was not unreasonable for them to incur costs out of fear that the government will intercept their communications under the FAA, then the measures they took to avoid interception can support standing.”<sup>44</sup>

On appeal, in *Clapper v. Amnesty International*, the Supreme Court divided 5-4. In an opinion joined by the Chief Justice and Justices Scalia, Anthony Kennedy, and Clarence Thomas, Justice Samuel Alito accepted the bulwark of secrecy and standing:

Respondents assert that they can establish injury in fact because there is an objectively reasonable likelihood that their communications will be acquired under § 1881a at some point in the future. But respondents’ theory of future injury is too speculative to satisfy the well-established requirement that threatened injury must be “certainly impending.”<sup>45</sup>

The plaintiffs’ “theory” might well be factually correct, but they had not provided proof. Justice Alito acknowledged “that the Government could help resolve the standing inquiry by disclosing to a court, perhaps through an in camera proceeding, whether it is intercepting respondents’ communications” but he dismissed the argument because “it is respondents’ burden to prove their standing by pointing to specific facts.”<sup>46</sup>

Justice Stephen Breyer dissented, joined by Justices Ruth Bader Ginsburg, Elena Kagan, and Sonia Sotomayor:

The plaintiffs’ standing depends upon the likelihood that the Government, acting under the authority of [§ 1881a], will harm them by intercepting at least some of their private, foreign, telephone, or e-mail conversations. In my view, this harm is not “speculative.” Indeed it is as likely to take place as are most

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41 See *NSA Telecomms. Records Litig. v. AT&T Corp.*, 671 F.3d 881, 890 (9th Cir. 2011) (“Partially in response to these suits, Congress held hearings and ultimately passed legislation that provided retroactive immunity to the companies, subject to various conditions, but expressly left intact potential claims against the government.”).

42 *Amnesty Int’l USA v. McConnell*, 646 F. Supp. 2d 633, 642 (S.D.N.Y. 2009).

43 *Id.* at 645 (“The plaintiffs can only demonstrate an abstract fear that their communications will be monitored under the FAA.”).

44 *Amnesty Int’l USA v. Clapper*, 638 F.3d 118, 133 (2d Cir. 2011).

45 *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1143 (2013) (citation omitted).

46 *Id.* at 1149 n.4 (emphasis omitted).

future events that commonsense inference and ordinary knowledge of human nature tell us will happen.<sup>47</sup>

## B. *Illicit Acquisition of Information as Injury in Fact*

### 1. *The Clapper Consensus*

Notwithstanding the division as to whether plaintiffs had adequately proven a threat of interception, both the majority and dissent in *Clapper* appeared to accept that when the government illicitly acquires private information, an actual interception constitutes a justiciable “injury in fact.” Justice Breyer’s dissent emphasized that the failure was one of proof not of concept: “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.’”<sup>48</sup> Justice Alito’s majority appeared to agree.<sup>49</sup>

### 2. *Illicit Acquisition of Information in the Supreme Court Canon*

This agreement should not be surprising. The proposition that illicit acquisition of information is a “concrete” and “particularized” injury under Article III is consistent with a broad swathe of Supreme Court case law.

At least since it expanded the constitutional definition of a “search” from physical trespass to infringements upon “legitimate expectations of privacy” in *Katz v. United States*,<sup>50</sup> the Court has treated intangible acquisition of private information as a potential violation of interests protected by the Fourth Amendment.

In the two decades since *Lujan*, in addition to wiretapping and electronic surveillance, the Court has held that information obtained by analysis of thermal imaging,<sup>51</sup> analysis of blood and urine samples,<sup>52</sup> and analysis of

<sup>47</sup> *Id.* at 1155 (Breyer, J., dissenting).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 1153 (majority opinion) (“*Laidlaw* would resemble this case . . . [if] it were undisputed that the Government was using § 1881a–authorized surveillance to acquire respondents’ communications . . .”).

<sup>50</sup> *Katz v. United States*, 389 U.S. 347, 353 (1967) (“[T]he reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure. . . . The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.”).

<sup>51</sup> *Kyllo v. United States*, 533 U.S. 27, 34–35 (2001) (“[T]he information obtained by the thermal imager in this case was the product of a search.”); *see also id.* at 35 (considering in dictum “powerful directional microphone[s],” “a satellite capable of scanning from many miles away,” and “through-the-wall surveillance”); *cf. Wilson v. Layne*, 526 U.S. 603, 605–06 (1999) (holding that presence of news media video cameras violates Fourth Amendment).

<sup>52</sup> *Ferguson v. City of Charleston*, 532 U.S. 67, 76 (2001) (“[T]he urine tests [of samples collected without coercion] . . . were indisputably searches within the meaning of the Fourth Amendment.”); *Chandler v. Miller*, 520 U.S. 305, 313 (1997) (“[T]esting of urine intrudes upon expect-

information contained in cell phones seized upon arrest<sup>53</sup> are illegal “searches” for purposes of the Fourth Amendment. And a majority of the Court has taken the position that aggregation of information from GPS monitoring can constitute an illegal search even in the absence of physical intrusion.<sup>54</sup>

Likewise in *Davis v. FEC*, the Court invalidated a requirement that candidates in federal elections who expended more than \$350,000 of their own funds in their own campaigns file disclosures of that fact.<sup>55</sup> The Court held that because “compelled disclosure, in itself, can seriously infringe on privacy of association,” “exacting scrutiny” was required, even in the absence of any demonstration of tangible harm to the candidate, and no adequate justification supported the requirement.<sup>56</sup> At the time the Court adjudicated the case, the election which sparked the challenge had passed. In response to a challenge to the plaintiff’s “personal stake” in the outcome, the Court relied on the fact that the plaintiff had “made a public statement expressing his intent” to run in a subsequent election subject to the requirement.<sup>57</sup>

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tations of privacy that society has long recognized as reasonable.” (quoting *Skinner v. Railway Labor Execs.’ Ass’n*, 489 U.S. 602, 617 (1989)) (internal quotation marks omitted).

53 *Riley v. California*, 134 S. Ct. 2473, 2489–90 n.1 (2014) (“[T]he United States and California agree that these cases involve *searches* incident to arrest, these cases do not implicate the question whether the collection or inspection of aggregated digital information amounts to a search under other circumstances.”); *id.* at 2491 (noting that access to data stored remotely was conceded to be an illegal search); *id.* at 2490 (“An Internet search and browsing history, for example, can be found on an Internet-enabled phone and could reveal an individual’s private interests or concerns . . .”).

54 *United States v. Jones*, 132 S. Ct. 945, 955 (2012) (Sotomayor, J., concurring); *id.* at 964 (Alito, J., joined by Ginsburg, J., Breyer, J. and Kagan, J., concurring in the judgment) (“[L]onger term GPS monitoring in investigations of most offenses impinges on expectations of privacy.”); *see also Riley*, 134 S. Ct. at 2490 (“Historic location information is a standard feature on many smart phones and can reconstruct someone’s specific movements down to the minute, not only around town but also within a particular building.” (citing *Jones*, 132 S. Ct. at 955 (Sotomayor, J., concurring))).

55 554 U.S. 724, 744 (2008).

56 *Id.*; *see also NASA v. Nelson*, 131 S. Ct. 746, 751 (2011) (assuming, without deciding, “a constitutional privacy ‘interest in avoiding disclosure of personal matters’”) (citing *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977); *Nixon v. Adm’r of Gen. Servs.* 433 U.S. 425, 457 (1977)); *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 401 (2003) (adjudicating a challenge to California’s Holocaust Victim Insurance Relief Act, which “requires any insurer doing business in that State to disclose information about all policies sold in Europe between 1920 and 1945 by the company itself or any one ‘related’ to it”); *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Stratton*, 536 U.S. 150, 168 (2002) (invalidating an ordinance requiring registration of door to door canvassers); *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 204 (1999) (invalidating requirement that referendum proponents list paid circulators and their income).

57 *Davis*, 554 U.S. at 736. The plaintiff did, in fact, run. *See Rachel Weinger, Who is Jack Davis?*, WASH. POST (May 12, 2011), [http://www.washingtonpost.com/blogs/the-fix/post/who-is-jack-davis/2011/05/11/AFPOfcyG\\_blog.html](http://www.washingtonpost.com/blogs/the-fix/post/who-is-jack-davis/2011/05/11/AFPOfcyG_blog.html).



In each of these cases, the intangible intrusion on privacy facilitated criminal prosecution or another threatened tangible consequence that could constitute a separate “concrete” injury in fact. Five months after *Lujan*, however, the Court explicitly sustained the justiciability of a challenge to illicit acquisition of data unaccompanied by tangible consequences to the target. In *Church of Scientology v. United States*, the Court addressed a challenge by the Church of Scientology to the allegedly illicit acquisition by the Internal Revenue Service (“IRS”) of tapes involving conversations between the Church and its attorneys.<sup>58</sup> The tapes were originally filed with the Los Angeles County Court Clerk, and in response to a summons, the Clerk released them to the IRS. After a flurry of legal skirmishing in which custody of the tapes bounced back and forth, the Clerk again delivered the tapes to the IRS. The United States moved to dismiss the Church’s appeal from the federal order requiring delivery, on the ground that the litigation presented no live “case or controversy.” With physical delivery of the tapes, according to the United States, the Church lost its claim to avoid a threatened injury in fact.

The Supreme Court held unanimously that despite the voluntary delivery of the tangible materials at issue by the Clerk of Court, and the absence of any imminent coercive use of the information in the tapes, the “affront to the taxpayer’s privacy” constituted an injury, and question of the disposition of intangible information continued to present a justiciable controversy:

[E]ven if the Government retains only copies of the disputed materials, a taxpayer still suffers injury by the Government’s continued possession of those materials, namely, the affront to the taxpayer’s privacy. . . . [E]ven though it is now too late to prevent, or to provide a fully satisfactory remedy for, the invasion of privacy that occurred when the IRS obtained the information on the tapes, a court does have power to effectuate a partial remedy by ordering the Government to destroy or return any and all copies it may have in its possession.<sup>59</sup>

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<sup>58</sup> *Church of Scientology v. United States*, 506 U.S. 9, 10 (1992).

<sup>59</sup> *Id.* at 13; *cf.* *City of Ontario v. Quon*, 560 U.S. 746 (2010) (addressing on the merits claims for damages by participants in text message conversations voluntarily surrendered to employer, in alleged violation of the Fourth Amendment and the Stored Communications Act); *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (adjudicating claim for statutory damages for violation of federal and state Wiretap Acts).

Note that for Fourth Amendment injuries, like other constitutional injuries, it makes no sense to say that the requirement of “injury in fact” is necessary to preserve the Article II authority of the Executive Branch to decline to enforce statutory rights. This undercuts the argument advanced by Justice Scalia in his dissent in *FEC v. Akins*, 524 U.S. 11, 37 (1998) (“[T]he statute unconstitutionally transfers from the Executive to the courts the responsibility to ‘take Care that the Laws be faithfully executed’ . . .”) and his opinion in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) (“To permit Congress to convert the undifferentiated public interest in executive officers’ compliance with the law into an ‘individual right’ vindicable in the courts is to

C. “Do You Have Standing Now?”

Unlike many subtleties of Supreme Court dialectic, the confluence of views on the injury of illicit acquisition in *Clapper v. Amnesty International* did not go unnoticed by outsiders. A little more than three months after the issuance of the *Amnesty International* opinion, *The Guardian* newspaper published material leaked by Edward Snowden demonstrating that the NSA had in fact established an ongoing program to acquire the information of millions of American Verizon customers in national security surveillance dragnets.<sup>60</sup> According to ACLU attorney Ben Wizner, in his first online conversation with Snowden, “one of his first questions for me was, ‘Do you have standing now?’”<sup>61</sup>

Six days after publication of the Verizon revelations, ACLU attorneys returned to the court in which they had filed their unsuccessful *Amnesty International* challenge, asserting standing on behalf of ACLU affiliates who were Verizon customers.<sup>62</sup> This time “the Government acknowledged that since May 2006, it has collected [metadata] for substantially every telephone call in the United States.”<sup>63</sup> Government attorneys argued, however, that “merely acquiring” data imposed no “injury in fact,” since no one was tangibly injured until the data was examined—a position that had some purchase in prior litigation.<sup>64</sup> Both the trial court and the court of appeals rejected the gambit, on the basis of the agreement between the opinions of

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permit Congress to transfer from the President to the courts the Chief Executive’s most important constitutional duty . . .”).

<sup>60</sup> *ACLU v. Clapper*, 785 F.3d 787, 795–96 (2d Cir. 2015). The Court noted that Americans first learned about the telephone metadata program that appellants now challenge on June 5, 2013, when the British newspaper *The Guardian* published a FISC order leaked by former government contractor Edward Snowden. The order directed Verizon Business Network Services, Inc. (“Verizon”), a telephone company, to produce to the NSA “on an ongoing daily basis . . . all call detail records or ‘telephony metadata’ created by Verizon for communications (i) between the United States and abroad; or (ii) wholly within the United States, including local telephone calls.”

*Id.*

<sup>61</sup> Kashmir Hill, *How ACLU Attorney Ben Wizner Became Snowden’s Lawyer*, FORBES (Mar. 10, 2014, 4:27 PM), <http://www.forbes.com/sites/kashmirhill/2014/03/10/how-aclu-attorney-ben-wizner-became-snowdens-lawyer/print/>; cf. *Here’s What the ‘Can You Hear Me Now?’ Guy is Doing Today*, BUSINESS INSIDER (Nov. 13, 2014, 8:19 AM), <http://www.businessinsider.com/verizon-can-you-hear-me-now-guy-today-2014-11>.

<sup>62</sup> *ACLU v. Clapper*, 959 F. Supp. 2d 724, 735 (S.D.N.Y. 2013).

<sup>63</sup> *Id.* at 734.

<sup>64</sup> *Clapper*, 785 F.3d at 801 (“[The government argues] that any alleged injuries here depend on the government’s reviewing the information collected . . .”); see also *ACLU v. NSA*, 493 F.3d 644, 656 n.14 (6th Cir. 2007) (“[E]ven if the NSA, unbeknownst to the plaintiffs, did intercept a communication, there would be no tangible injury until the NSA disclosed the information . . .”).

majority and dissent in *Amnesty International*; other courts entertaining post-Snowden challenges echoed this conclusion.<sup>65</sup>

The issue will likely not reach the Supreme Court on appeal from the Second Circuit, because the issue of metadata seizure has been significantly altered by the limitations imposed by legislation renewing authority for the program.<sup>66</sup> The same is also probably true of the other pending cases on NSA metadata seizure.

On the other hand, the challenge in the long-running *Jewel* litigation to the “upstream” dragnet collection of the substance of communications by the NSA through its collaboration with telecommunication providers under warrants allegedly authorized by Section 702 of the FAA continues to raise the question of whether illicit but intangible data acquisition constitutes an injury in fact.<sup>67</sup> An appeal in that case is pending, as is an appeal in a challenge to “upstream” surveillance lodged by Wikimedia.<sup>68</sup>

<sup>65</sup> *Clapper*, 785 F.3d at 801–02 (“If the telephone metadata program is unlawful, appellants have suffered a concrete and particularized injury fairly traceable to the challenged program . . . . *Amnesty International*’s ‘speculative chain of possibilities’ is, in this context, a reality. That case in no way suggested that such data would need to be reviewed or analyzed in order for respondents to suffer injury.”); see *Clapper*, 959 F. Supp. 2d at 738 (noting that the standing requirement was satisfied because there was “no dispute the Government collected telephony metadata related to the ACLU’s phone calls”); *Klayman v. Obama*, No. CV 13-851 (R JL), 2015 WL 6873127, at \*2 (D.D.C. Nov. 9, 2015) (holding that subscriber had standing to challenge the NSA telephony metadata collection program, and ejoining collection); *Klayman v. Obama*, 957 F. Supp. 2d 1, 29 (D.D.C. 2013) (same), *rev’d on other grounds* *Obama v. Klayman*, 800 F.3d 559, 561 (D.C. Cir. 2015) (showing of interception was too speculative to support injunction); see also *Smith v. Obama*, 24 F. Supp. 3d 1005, 1007 n.2 (D. Idaho 2014) (“The Court finds that Smith—a Verizon customer—has standing to bring this action.” (citing *Klayman*, 957 F. Supp. 2d at 26–28)).

<sup>66</sup> See *ACLU v. Clapper*, 804 F.3d 617, 622 (2d Cir. 2015) (declining to grant preliminary injunction regarding 180-day interim program in light of imminent cessation, but remanding for determination of whether NSA can be ordered to purge records). The latest FISA court opinion reads the statute’s 180-day grace period as validating the dragnet as a matter of statutory construction. *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things*, No. BR-15-75, at 2, 11–12 (FISA Ct. June 29, 2015), [http://www.fisc.uscourts.gov/sites/default/files/BR%2015-75%20Misc%2015-01%20Opinion%20and%20Order\\_0.pdf](http://www.fisc.uscourts.gov/sites/default/files/BR%2015-75%20Misc%2015-01%20Opinion%20and%20Order_0.pdf); see also *Smith v. Obama*, 2016 U.S. App. LEXIS 5231 (9th Cir. Mar. 22, 2016) (remanding metadata claim for consideration of purge remedy).

<sup>67</sup> The challenge to the Section 702 program by plaintiffs who claimed that AT&T routes their information to NSA servers was initially dismissed on the ground that “they neither allege facts nor proffer evidence sufficient to establish a prima facie case that would differentiate them from the mass of telephone and internet users in the United States and thus make their injury ‘concrete and particularized.’” *Jewel v. NSA*, No. C 06-1791 VRW, 2010 WL 235075, at \*9 (N.D. Cal. Jan. 21, 2010) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)); cf. *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 1001 (N.D. Cal. 2006) (“[T]his dragnet necessarily inflicts a concrete injury that affects each customer in a distinct way, depending on the content of that customer’s communications and the time that customer spends using AT&T services.”).

On appeal, the Ninth Circuit reversed. *Jewel v. NSA*, 673 F.3d 902, 908–10 (9th Cir. 2011) (“Each statute explicitly creates a private right of action for claims of illegal surveillance. . . . *Jewel* alleges a concrete claim of invasion of a personal constitutional right—the First Amend-

Of potentially even broader import, the understanding that illicit acquisition of information is an “injury in fact” has yet to be fully appreciated by some lower courts that are currently navigating rising tide of “data breach” litigation brought on by defective security and effective hacking. For at least half a decade, plaintiffs’ attorneys have brought class litigation against custodians of personally identifiable data who have allowed that data to fall into the hands of third parties in alleged breach of state and federal statutory duties. Since the breaches frequently affect large numbers of plaintiffs, and the relevant statutes often provide for statutory damages, potential liability is substantial.

Defendants have regularly responded to the litigation neither by denying that the data breach has occurred, nor by disputing that their actions culpably contributed to it, but by asserting that plaintiffs have suffered no “injury in fact,” until and unless they can demonstrate that the third parties have misused the data to impose “wallet injury.” Before *Clapper*, courts divided on the question of whether the threat of subsequent misuse and the expenditure of funds and effort to avoid misuse gave members of plaintiff classes standing.<sup>69</sup> After *Clapper*, debate continued with a number of lower courts accepting the argument that, like the threat of NSA interception in *Clapper*, the threat of subsequent misuse of illicitly obtained data was too “speculative” to constitute an “imminent” injury under *Clapper*.<sup>70</sup>

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ment right of association and the Fourth Amendment right to be free from unreasonable searches and seizures. . . . Jewel’s complaint also honed in on AT&T’s Folsom Street facility, through which all of Jewel’s communications allegedly passed and were captured. . . .”).

In the latest remand, the trial court determined that plaintiffs failed to establish that their particular communications had been captured, relying on classified “operational details” submitted *in camera*. *Jewel v. NSA*, No. C 08-04373 JSW, 2015 WL 545925, at \*4 (N.D. Cal. Feb. 10, 2015) (“[W]ithout disclosing any of the classified content of the Government Defendants’ submissions, the Court can confirm that the Plaintiffs’ version of the significant operational details of the Upstream collection process is substantially inaccurate.”).

68 *Wikimedia Found. v. NSA/Cent. Sec. Serv.*, No. 1:15-cv-662, 2015 WL 6460364 (D. Md. Oct. 23, 2015) (dismissing plaintiffs for lack of standing).

69 *E.g.*, *Katz v. Pershing, LLC*, 672 F.3d 64, 80 (1st Cir. 2012) (noting disarray among circuits over standing for enhanced risk of harm from data breach and denying standing); *Reilly v. Ceridian Corp.*, 664 F.3d 38, 46 (3d Cir. 2011) (denying standing); *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1140 (9th Cir. 2010) (finding standing); *Pisciotta v. Old Nat’l Bancorp.*, 499 F.3d 629, 634 (7th Cir. 2007) (finding standing).

70 *E.g.*, *Antman v. Uber Techs., Inc.*, No. 3:15-cv-01175-LB, 2015 U.S. Dist. LEXIS 141945, at \*28–29 (N.D. Cal. Oct. 19, 2015); *Carlsen v. GameStop, Inc.*, No. 14-3131 (DWF/SER), 2015 WL 3538906, at \*7 (D. Minn. June 4, 2015); *In re Zappos.com, Inc.*, No. 3:12-cv-00325-RCJ-VPC, 2015 WL 3466943, at \*4, 10 (D. Nev. June 1, 2015); *Green v. eBay Inc.*, No. 14-1688, 2015 WL 2066531, at \*3 (E.D. La. May 4, 2015); *Storm v. Paytime, Inc.*, 90 F. Supp. 3d 359, 365 (M.D. Pa. 2015); *Peters v. St. Joseph Servs. Corp.*, 74 F. Supp. 3d 847, 854 (S.D. Tex. 2015); *In re Sci. Applications Int’l Corp. (SAIC) Backup Tape Data Theft Litig.*, 45 F. Supp. 3d 14, 25 (D.D.C. 2014); *Strautins v. Trustwave Holdings, Inc.*, 27 F. Supp. 3d 871, 875 (N.D. Ill. 2014); *Galaria v. Nationwide Mut. Ins. Co.*, 998 F. Supp. 2d 646, 658 (S.D. Ohio 2014).

Courts adopting this position fail to acknowledge what both the *Clapper* majority and dissent agreed upon: illicit acquisition of personal information is a cognizable “injury in fact” in and of itself. The more perceptive judges in the lower federal courts have grasped this point.<sup>71</sup> The Scientologists had standing to challenge the acquisition of their attorney-client communications even absent a showing that the IRS would utilize the information to their detriment. Verizon customers who can show that there is data being acquired by the NSA have standing to challenge that acquisition even if the NSA never otherwise harms their persons or property. Likewise, the customer whose personally identifiable information has been intercepted or stolen by hackers has suffered an injury in fact whether or not the hackers have used it to inflict “wallet injury.”

No want of justiciability would bar a customer with advance knowledge of a hack facilitated by a default of statutory duty from requiring the holder of her data to comply with statutory data security duties to frustrate that exploit. The imminent threat of illicit acquisition of information constitutes “injury in fact.” No more does the customer lack “injury in fact” once the exploit has occurred and her data has been illicitly acquired. What measure of recovery the substantive law allows for this injury is, of course, an important question. But the federal courts simply misunderstand *Clapper* and Article III and allow themselves to be misled by language about “tangible” and “psychic” injury when they permit alleged Article III objections to truncate analysis.

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<sup>71</sup> See, e.g., *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 806 F.3d 125, 134 (3d Cir. 2015) (“For purposes of injury in fact, the defendants’ emphasis on economic loss is misplaced.”); *In re Adobe Sys., Inc. Privacy Litig.*, 66 F. Supp. 3d 1197, 1214–15 (N.D. Cal. 2014) (“[I]n contrast to *Clapper*, where there was no evidence that any of respondents’ communications either had been or would be monitored under Section 702, here there is no need to speculate as to whether Plaintiffs’ information has been stolen and what information was taken.” (citation omitted)); *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 996 F. Supp. 2d 942, 962 (S.D. Cal. 2014) (“[T]he Court finds Plaintiffs’ allegations that their Personal Information was collected by Sony and then wrongfully disclosed as a result of the intrusion sufficient to establish Article III standing. . . .”); see also *In re Zynga Privacy Litig.*, 750 F.3d 1098, 1105 n.5 (9th Cir. 2014) (finding standing in violation of wiretap act); *Corona v. Sony Pictures Entm’t, Inc.*, No. 14-CV-09600, 2015 WL 3916744, at \*4 (C.D. Cal. June 15, 2015) (finding that plaintiffs’ allegation that the PII was stolen and posted on file-sharing websites for identity thieves to download predicated standing); *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1222, 1236 (N.D. Cal. 2014) (noting that LinkedIn is alleged to have misappropriated plaintiffs’ names to grow its membership); *Moyer v. Michaels Stores, Inc.*, No. 14-C-561, 2014 WL 3511500, at \*6 (N.D. Ill. July 14, 2014) (finding sufficient threat of actual identity theft from the data breach at Michaels); *Cherri v. Mueller*, 951 F. Supp. 2d 918, 929 (E.D. Mich. 2013) (holding that threat of discriminatory questioning at border crossing sufficiently alleged an injury in fact).

### III. ACCESS TO INFORMATION: INTANGIBLE, NON-RIVALROUS, AND NON-EXCLUDABLE INJURY

#### A. *Intangible Denial of Information*

Like accessing information illicitly, denying access to information to which a claimant is entitled imposes no tangible harm in itself. Yet both before and after *Lujan*, the Court found that denial of access to information imposes a justiciable “injury in fact,” even in the absence of other tangible impact on plaintiffs.

##### 1. *Before Lujan*

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the plaintiff consumer organizations brought a First Amendment challenge to a state statute that allowed pharmacists to give quotes for drug prices by telephone, but prohibited advertisement of prices.<sup>72</sup> They claimed standing on the ground that the statute interfered with the access of the organizations and their constituents to price information.<sup>73</sup> Justice William Rehnquist in dissent would have denied standing noting that “the challenged statute does not prohibit anyone from receiving this information either in person or by phone. . . . [A]ppellees could both receive and publish the information in question.”<sup>74</sup> The rest of the Court held that interference with access to information short of total prohibition constituted a justiciable injury:

[W]here a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both. This is clear from the decided cases. . . . If there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these appellees.<sup>75</sup>

Six years later, the Court in *Havens Realty Corp. v. Coleman* reviewed the claims of a black “tester” who had been employed by a civil rights organization to pose as a potential renter to determine whether a real estate owner practiced racial steering.<sup>76</sup> Though the “tester”—who had no actual desire to rent an apartment—suffered no tangible harm when he was falsely informed that no apartment was available, the Court unanimously held that denial of true information was a justiciable “injury in fact”:

Congress . . . conferred on all “persons” a legal right to truthful information about available housing. . . . As we have previously recognized, “[t]he actual or

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<sup>72</sup> 425 U.S. 748, 749–52 (1976).

<sup>73</sup> *Id.* at 755–56.

<sup>74</sup> *Id.* at 782 (Rehnquist, J., dissenting).

<sup>75</sup> *Id.* at 756–57 (footnote omitted).

<sup>76</sup> 455 U.S. 363, 368 (1982).

threatened injury required by Art. III may exist solely by virtue of ‘statutes creating legal rights, the invasion of which creates standing . . . .’” [Section 804(d)] in terms, establishes an enforceable right to truthful information concerning the availability of housing, is such an enactment. . . . If the facts are as alleged, then respondent has suffered “specific injury” from the challenged acts of petitioners and the Art. III requirement of injury in fact is satisfied.<sup>77</sup>

Four years later, in *Japan Whaling Association v. American Cetacean Society*, the Court again unanimously acknowledged standing on the part of a group which claimed that the failure of the Commerce Secretary to trigger sanctions for whaling practices that “diminish the effectiveness” of the International Convention for the Regulation of Whaling harmed the plaintiff organization by reducing the opportunity to observe whales.<sup>78</sup> Despite the intangible nature of the Cetacean Society’s interest in whale watching, the Court held: “[T]hey undoubtedly have alleged a sufficient ‘injury in fact’ in that the whale watching and studying of their members will be adversely affected by continued whale harvesting . . . .”<sup>79</sup> Three years later, in *Public Citizen v. United States Department of Justice*, the Court was unanimous in holding the plaintiffs who sought information subject to disclosure under the Federal Advisory Committee Act (“FACA”) had stated a sufficiently “concrete” “injury in fact.”<sup>80</sup> While the plaintiffs alleged no tangible harm from the failure to disclose, Justice William Brennan wrote, without dissent:

Appellant WLF has specifically requested, and been refused, the names of candidates under consideration by the ABA Committee, reports and minutes of the Committee’s meetings, and advance notice of future meetings. As when an agency denies requests for information under the Freedom of Information Act, refusal to permit appellants to scrutinize the ABA Committee’s activities to the extent FACA allows constitutes a sufficiently distinct injury to provide standing to sue. Our decisions interpreting the Freedom of Information Act have never suggested that those requesting information under it need show more than that they sought and were denied specific agency records. . . . The fact that other citizens or groups of citizens might make the same complaint after unsuccessfully demanding disclosure under FACA does not lessen appellants’ asserted injury, any more than the fact that numerous citizens might request the same information under the Freedom of Information Act entails that those who have been denied access do not possess a sufficient basis to sue.<sup>81</sup>

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77 *Id.* at 373–74 (citations omitted).

78 478 U.S. 221, 232–33 (1986).

79 *Id.* at 231 n.4.

80 491 U.S. 440, 449 (1989).

81 *Id.* at 449–50 (citations omitted).

## 2. *After Lujan*

Notwithstanding the canonization of a constitutional requirement of “concrete and particularized” injury in fact in *Lujan*, over the course of the last two decades the Court has continued to recognize the denial of access to information as a sufficient basis for plaintiffs to bring cases and controversies within federal jurisdiction.

In *Lujan* itself, the Court rejected claims that plaintiffs had suffered “injury in fact” because the defendants’ actions would make it more difficult for them to observe the endangered crocodiles of the Nile and the elephants of Sri Lanka.<sup>82</sup> But the rejection was premised on a determination that plaintiffs had not concretely established that they would in fact seek to view the endangered animals *in situ*. Justice Scalia wrote—with gritted teeth:

It is even plausible—though it goes to the outermost limit of plausibility—to think that a person who observes or works with animals of a particular species in the very area of the world where that species is threatened by a federal decision is facing such harm, since some animals that might have been the subject of his interest will no longer exist.<sup>83</sup>

Since *Lujan*, the Court has only delivered one opinion directly addressing the question of whether a denial of access to information can constitute an injury in fact.<sup>84</sup> In *Federal Election Commission v. Akins*, the Court addressed an action brought by voters who had complained to the Federal Election Commission (“FEC”) that the American Israel Public Affairs Committee (“AIPAC”) was required by federal election laws to publicly disclose its donors and contributions.<sup>85</sup> The FEC determined AIPAC was

<sup>82</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563–64 (1992).

<sup>83</sup> *Id.* at 566–67 (citing *Japan Whaling Ass’n*, 478 U.S. at 230 n.4).

<sup>84</sup> In *Steel Co. v. Citizens for a Better Environment*, Justice Scalia wrote for the majority:

We have not had occasion to decide whether being deprived of information that is supposed to be disclosed under EPCRA [Emergency Planning and Community Right-To-Know Act]—or at least being deprived of it when one has a particular plan for its use—is a concrete injury in fact that satisfies Article III.

523 U.S. 83, 105 (1998).

Justice Scalia’s opinion for a five-member majority in *Lewis v. Casey*, which rejected an argument that prisoners denied access to an adequate law library to research frivolous claims have an action for unconstitutional denial of access to courts, commented that “[n]ot everyone who can point to some ‘concrete’ act and is ‘adverse’ can call in the courts to examine the propriety of executive action, but only someone who has been actually injured.” 518 U.S. 343, 353 n.3 (1996). But *Lewis* turned on the substantive definition of the right in question as “a reasonably adequate opportunity to file nonfrivolous legal claims.” *Id.* at 356. The opinion seems to acknowledge that if plaintiffs had a constitutional right of access to the information contained in a law library, the denial of that right would be an injury in fact. *Id.* at 360 n.7 (“Our holding . . . does not rest on the application standing rules but rather . . . [the rejection of the view] that lack of access to adequate law libraries qualifies as the relevant injury in fact.” (citations omitted)).

<sup>85</sup> *FEC v. Akins*, 524 U.S. 11, 16 (1998).



under no disclosure obligation, and the voters sought review on the basis of a provision of the Federal Election Campaign Act that permitted “any party aggrieved” to seek judicial review of an FEC decision to dismiss a complaint.<sup>86</sup> In response to a challenge to the voters’ standing to seek review, Justice Breyer wrote for six members of the Court that, notwithstanding the intangible quality of information, the “informational injury” suffered by the plaintiffs was a “concrete” “injury in fact”:

The “injury in fact” that respondents have suffered consists of their inability to obtain information—lists of AIPAC donors . . . and campaign-related contributions and expenditures—that, on respondents’ view of the law, the statute requires that AIPAC make public. There is no reason to doubt their claim that the information would help them (and others to whom they would communicate it) to evaluate candidates for public office, especially candidates who received assistance from AIPAC, and to evaluate the role that AIPAC’s financial assistance might play in a specific election. Respondents’ injury consequently seems concrete and particular. Indeed, this Court has previously held that plaintiff suffers an “injury in fact” when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute.<sup>87</sup>

Though he dissented on other grounds, Justice Scalia’s dissent did not maintain that the intangible injury of being denied information was not “concrete.” He acknowledged:

A person demanding provision of information that the law requires the agency to furnish—one demanding compliance with the Freedom of Information Act or the Federal Advisory Committee Act, for example—can reasonably be described as being “aggrieved” by the agency’s refusal to provide it.<sup>88</sup>

I will return shortly to Justice Scalia’s objection in *FEC v. Akins*,<sup>89</sup> which rests on another “spooky” characteristic of informational injury: its nonexclusive quality. But before doing so, it is important to note the frequency with which the Court since *Lujan* has adjudicated cases in which the plaintiff’s claimed injury is the denial of access to intangible information.

Modern doctrine holds that it is the burden of the plaintiff to demonstrate jurisdiction in federal courts, and that “injury in fact” is the “irreducible constitutional minimum” predicate for exercise of jurisdiction. Every federal court is required to raise the absence of jurisdiction *sua sponte*. Thus, as the Court recognized in *Public Citizen*, the continued exercise of

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<sup>86</sup> *Id.* at 19–20.

<sup>87</sup> *Id.* at 21 (citing *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 449 (1989); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–74 (1982)); *see also id.* at 24–25 (“[T]he informational injury at issue here . . . is sufficiently concrete . . .”).

<sup>88</sup> *Id.* at 30–31 (Scalia, J., dissenting).

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

jurisdiction by the Supreme Court to adjudicate claims supports the conclusion that these claims are predicated upon an “injury in fact.”<sup>90</sup>

Where jurisdiction is not controverted, the exercise of jurisdiction does not constitute binding precedent.<sup>91</sup> Still, as Chief Justice John Marshall observed, where the Court has repeatedly decided cases “without feeling a doubt respecting its jurisdiction,” the practice is entitled to consideration.<sup>92</sup> Decided cases demonstrate the actual metes and bounds of the injuries that bring litigants to court and the absence of catastrophic consequences accompanying the exercise of jurisdiction.

With respect to the intangible injury of denial of information, since *Lujan*, the Court has regularly upheld claims for plaintiffs seeking information under Freedom of Information Act (“FOIA”) claims without raising any doubt about whether plaintiffs had shown “tangible” injury.<sup>93</sup> And where it has denied relief, it has been on the merits, exercising jurisdiction that requires a dispute regarding a “concrete” “injury in fact.”<sup>94</sup>

<sup>90</sup> *Pub. Citizen*, 491 U.S. at 449 (“Our decisions interpreting the Freedom of Information Act have never suggested that those requesting information under it need show more than that they sought and were denied specific agency records.”); *see also* *Sprint Commc’ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 284 (2008) (“[T]he Court’s decisions . . . offer additional and powerful support for the proposition that suits by assignees for collection have long been seen as ‘amenable’ to resolution by the judicial process.”).

<sup>91</sup> *See* *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1448 (2011) (“When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed.”); *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 91 (1998) (“We have often said that drive-by jurisdictional rulings . . . have no precedential effect.”); *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996) (“[W]e have repeatedly held that the existence of unaddressed jurisdictional defects has no precedential effect.”); *Hagans v. Lavine*, 415 U.S. 528, 535 n.5 (1974) (“[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us.”).

<sup>92</sup> *Bank of the U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61, 88 (1809); *id.* (“Those decisions are not cited as authority; for they were made without considering this particular point; but they have much weight, as they show that this point neither occurred to the bar or the bench . . . .”); *see also* *Winn*, 131 S. Ct. at 1455 (Kagan, J., dissenting) (“[T]he Court should not ‘disregard the implications of an exercise of judicial authority assumed to be proper for over 40 years.’” (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 307 (1962)) (citing *Bowen v. Kendrick*, 487 U.S. 589, 619 (1988) (finding standing partly because the Court, in deciding similar cases, had “not questioned the standing of taxpayer plaintiffs to raise Establishment Clause challenges”)).

<sup>93</sup> *See, e.g.*, *Milner v. Dep’t of Navy*, 131 S. Ct. 1259 (2011); *Taylor v. Sturgell*, 553 U.S. 880 (2008); *Dep’t of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1 (2001); *U.S. Dep’t of Justice v. Landano*, 508 U.S. 165 (1993).

<sup>94</sup> *See, e.g.*, *McBurney v. Young*, 133 S. Ct. 1709, 1715 (2013) (holding that denial of information under Virginia’s Freedom of Information Act did not violate Privileges and Immunities Clause), *aff’g* *McBurney v. Cuccinelli*, 616 F.3d 393, 403–04 (4th Cir. 2010) (holding plaintiff has Article III standing to sue, citing *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 449 (1989), but rejecting claim on the merits); *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171 (2004) (FOIA); *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 375, 392 (2004) (FACA), *rev’g on the merits*, *Judicial Watch, Inc. v. Nat’l Energy Policy Dev. Grp.*, 219 F. Supp. 2d 20, 29–30 (D.D.C. 2002) (finding standing); *L.A. Police Dep’t v. United Reporting Publ’g Corp.*, 528 U.S.

The Court has upheld claims seeking statutory damages for violations of Truth in Lending Act disclosure obligations.<sup>95</sup> It has held for defendants in actions for statutory damages seeking statutorily mandated financial disclosures without casting doubt on the justiciability of plaintiffs' claims.<sup>96</sup> Finally, in *Sorrell v. IMS Health Inc.*, the Court granted relief to plaintiffs who sought to enjoin a statute preventing pharmacies from providing them with prescription drug information without raising any question about whether the plaintiffs had suffered "tangible" injury.<sup>97</sup>

*B. Non-Rivalrous and Non-Excludable: Information Access as a Public Good*

In addition to its intangible character, information often has a second set of spooky properties: it is non-rivalrous and non-excludable. Unlike tangible property, information can be used over and over without depletion. And unlike tangible property, public provision of information to one individual or citizen provides it effectively to all, while denial of information to one person denies it equally to the public at large.<sup>98</sup> This aspect of informational injuries might trigger the concern, dating back to *Flast v. Cohen*, that the exercise of federal jurisdiction is inappropriate where the plaintiff "seeks to employ a federal court as a forum in which to air his generalized grievances about the conduct of government."<sup>99</sup>

Before *Lujan*, this concern appeared sporadically regarding informational injuries. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, it was rejected. The plaintiffs sought to allow pharmacy advertising that would benefit them in common with the rest of the pub-

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32, 40 (1999) (rejecting claim of discrimination in limiting access to arrest records on the merits); *Bibles v. Or. Natural Desert Ass'n*, 519 U.S. 355 (1997) (per curiam) (FOIA) .

<sup>95</sup> See, e.g., *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50 (2004); *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232 (2004).

<sup>96</sup> See, e.g., *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871 (2011) (Truth in Lending Act); *Safeco Ins. Co. v. Burr*, 551 U.S. 47 (2007) (Fair Credit Reporting Act); *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000) (Truth in Lending Act).

<sup>97</sup> 131 S. Ct. 2653, 2666 (2011) ("[R]espondents here, unlike the newspaper in *Seattle Times*, do not themselves possess information whose disclosure has been curtailed. That information, however, is in the hands of pharmacies and other private entities."); cf. *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) (adjudicating a case brought both by television access programmers and by cable viewers).

<sup>98</sup> These qualities are not always present in the case of denials of information. In *Havens Realty, the obligation to provide truthful information ran only to the individual testers. Havens Realty Corp. v. Coleman*, 455 U.S. 363, 374 (1982). Truth in Lending disclosures are provided to borrowers, not the public at large, and in some FOIA cases the only question is whether particular information is provided to individual requesters. In today's FOIA environment, where FOIA disclosures are posted on websites, it is less clear that a strictly bilateral exchange of information is contemplated.

<sup>99</sup> 392 U.S. 83, 106 (1968).

lic, but the Court dismissed objections to standing without raising any questions of whether the injury was “generalized” or “particularized.”<sup>100</sup> But in *United States v. Richardson*, the Court dismissed plaintiffs seeking to adjudicate their claim that the Constitution’s Accounts Clause<sup>101</sup> obliged Congress to publish the details of secret allocations of funds to the CIA.<sup>102</sup> While plaintiffs invoked their interests as “members of the electorate” in their complaint, the Court read them to limit their claims on certiorari to the taxpayer standing recognized in *Flast*,<sup>103</sup> and determined that there was an insufficient “nexus” between the disclosure of information to the public at large and the characteristic interests of taxpayers.<sup>104</sup> At the same time, the Court reiterated the strictures against the exercise of jurisdiction to adjudicate “generalized grievances,” and propounded a concern that entertaining generalized grievances would extend judicial role inappropriately into areas best addressed by the political process.<sup>105</sup>

In *Lujan*, Justice Scalia foregrounded concern with separation of powers and “generalized grievances” in identifying “concrete and particularized” injuries in fact as the “irreducible constitutional minimum.”<sup>106</sup>

With this background we return to the voters seeking to require that the FEC mandate disclosure of AIPAC donors in *FEC v. Akins*. Justice Scalia, joined by Justices O’Connor and Thomas in dissent, took the position that because the plaintiffs’ complaint challenged “refusal to place information within the public domain,” the plaintiffs’ claim was a “generalized grievance” barred by *Richardson* rather than the “particularized” injury in fact required by *Lujan*:

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100 425 U.S. 748, 771–73 (1976).

101 U.S. CONST. art. I, § 9, cl. 7.

102 418 U.S. 166, 167–68, 170 (1974).

103 *Id.* at 167 n.1 (“Respondent’s complaint alleged that he was ‘a member of the electorate, and a loyal citizen of the United States.’ At the same time, he states that he ‘does not challenge the formulation of the issue contained in the petition for certiorari.’ The question presented there was: ‘Whether a federal taxpayer has standing to challenge the provisions of the Central Intelligence Act . . . .’” (citations omitted)).

104 *Id.* at 175 (“[T]here is no ‘logical nexus’ between the asserted status of taxpayer and the claimed failure of the Congress to require the Executive to supply a more detailed report of the expenditures of that agency.”).

105 *Id.* at 179 (“[T]he absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process. Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts.”); *see also id.* at 188 (Powell, J., concurring) (“It seems to me inescapable that allowing unrestricted taxpayer or citizen standing would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government.”).

106 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

“Particularized” means that “the injury must affect the plaintiff in a personal and individual way.” If the effect is “undifferentiated and common to all members of the public” . . . the plaintiff has a “generalized grievance” that must be pursued by political, rather than judicial, means. . . . [T]he injury or deprivation is not only widely shared but it is *undifferentiated*. The harm caused to Mr. Richardson by the alleged disregard of the Statement-of-Accounts Clause was precisely the same as the harm caused to everyone else: unavailability of a description of CIA expenditures. Just as the (more indirect) harm caused to Mr. Akins by the allegedly unlawful failure to enforce FECA is precisely the same as the harm caused to everyone else: unavailability of a description of AIPAC’s activities.<sup>107</sup>

On this view, the public good characteristics of many informational injuries make them by definition non-justiciable.<sup>108</sup> Justice Breyer, writing for a six-member majority rejected the argument that informational injuries were too spooky to constitute “injuries in fact.” While acknowledging the argument that “respondents’ asserted harm (their failure to obtain information) is one which is shared in substantially equal measure by all or a large class of citizens,”<sup>109</sup> the majority denied that this characteristic was a basis for denying that the injuries were properly characterized as “injuries in fact.” “Concrete and particularized” injuries are the opposite of “hypothetical” and “abstract” ones; they need not be tangible and exclusive to the plaintiff:

The kind of judicial language to which the FEC points, however, invariably appears in cases where the harm at issue is not only widely shared, but is also of an abstract and indefinite nature—for example, harm to the “common concern for obedience to law.” The abstract nature of the harm . . . deprives the case of the concrete specificity that characterized those controversies which were “the traditional concern of the courts at Westminster,” and which today prevents a plaintiff from obtaining what would, in effect, amount to an advisory opinion. Often the fact that an interest is abstract and the fact that it is widely shared go hand in hand. But their association is not invariable, and where a harm is concrete, though widely shared, the Court has found “injury in fact.”<sup>110</sup>

#### IV. DISSEMINATION AND EXPOSURE TO INFORMATION: INTANGIBILITY, NON-EXCLUDABILITY, IMMINENCE, AND THE INTERNET

Since *Lujan*, the Court has entertained another class of spooky suits based in informational injury: cases brought by plaintiffs whose claims of injury are rooted in the intangible impact of information on their perception. These cases fall into three classes. First, the Court has adjudicated

<sup>107</sup> *FEC v. Akins*, 524 U.S. 11, 35–36 (1998) (Scalia, J., dissenting) (citations omitted).

<sup>108</sup> In some cases, duties of disclosure will run only to particular individuals. The testers in *Havens Realty*, for example, claimed a right to personal delivery of accurate information. 455 U.S. at 374. But where the law requires publication of information, the information is a public good, and access will be common to all the public.

<sup>109</sup> *Akins*, 524 U.S. at 23 (internal quotation marks omitted).

<sup>110</sup> *Id.* at 23–24 (citations omitted).

claims that dissemination of information violates plaintiffs' intangible rights of privacy and reputation. Second, it has resolved claims arising out of plaintiffs' "esthetic" interest in viewing unspoiled nature. Although the precipitating cause of the "esthetic" injury has been the pollution or despoliation of the physical environment, the injury suffered by plaintiffs has been their intangible perceptions of the physical impact. Third, the Court has entertained Establishment Clause challenges to government actions conveying "messages" of religious endorsement brought by plaintiffs who have been exposed to those messages.

In each of these areas, the plaintiffs' injuries are intangible. In the second and third, they are non-exclusive. In all, the penetrating qualities of the internet blur the line of "imminence."

#### A. Reputation and Informational Autonomy

Justice Scalia's inclination to bar adjudicating claims of intangible harms to interests founded on "Psychic Injury" rests uneasily with the common law of defamation. While common law actions for slander—and libel *per quod* in some states—required a showing of "wallet injury," actions for libel *per se*, and all libel actions at English common law, awarded presumed damages for injury to reputation.<sup>111</sup> Likewise, the classic privacy tort proposed by Samuel Warren and Louis Brandeis built on common law copyright, which awarded causes of action to prevent or remedy nonconsensual dissemination of information without any demonstration that the information was either false or economically harmful. They wrote that "wherever substantial mental suffering would be the natural and probable result of the act, there compensation for injury to feelings has been allowed," and maintained that "the common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others."<sup>112</sup>

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<sup>111</sup> See RESTATEMENT (SECOND) OF TORTS ch. 24, § 569 at 57–58 (1977); see also *Doe v. Chao*, 540 U.S. 614, 621 (2004) ("Traditionally, the common law has provided such victims with a claim for 'general' damages, which for privacy and defamation torts are presumed damages: a monetary award calculated without reference to specific harm."); *FAA v. Cooper*, 132 S. Ct. 1441, 1450–51 (2012) (canvassing the common law); cf. *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011) (adjudicating cause of action for intentional infliction of emotional distress caused by signs near funeral).

<sup>112</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 197 n.1, 198 (1890); see also *id.* at 205 ("But if privacy is once recognized as a right entitled to legal protection, the interposition of the courts cannot depend on the particular nature of the injuries resulting."); *id.* at 213 ("If the invasion of privacy constitutes a legal *injuria*, the elements for demanding redress exist, since already the value of mental suffering, caused by an act wrongful in itself, is recognized as a basis for compensation."). The current formulation of the privacy tort awards damages for "publicity to a matter concerning the private life of another" that "would be

Since *Lujan*, the Supreme Court has manifested no Article III hesitation in exercising jurisdiction over cases predicated upon intangible harms from the dissemination of information regarding plaintiffs.<sup>113</sup> Indeed, the Court has twice explicitly sustained the justiciability of cases raising claims of this form of informational injury.

First, in *Doe v. Chao*, the Court reviewed on the merits a claim by a plaintiff who sought statutory damages for a violation of his rights under the Privacy Act.<sup>114</sup> In the course of adjudicating Doe's claim for black lung benefits, the Department of Labor had sent "multcaptioned" notices containing his Social Security number "to groups of claimants, their employers, and the lawyers involved in their cases."<sup>115</sup> Doe filed a class action on the basis of the Privacy Act's cause of action on behalf of those who suffered an "adverse effect" from failures to follow the terms of the Act's requirements.<sup>116</sup> He sought both injunctive relief and statutory damages. His complaint alleged "great[] concern[]" and "worr[y]" resulting from the challenged disclosure.<sup>117</sup>

The government defendants conceded that dissemination of Doe's number violated the Privacy Act, and stipulated to an order prohibiting future dissemination of social security numbers in "multcaptioned" notices, but opposed class certification and the award of the \$1,000 per occurrence per person minimum statutory damages "on proof of nothing more than a statutory violation."<sup>118</sup>

The six-member majority, in which Justice Scalia joined, stated that Mr. Doe's claim of adverse effect provided injury in fact, but held that the stat-

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highly offensive to a reasonable person" and the cause of action requires neither pleading nor proof of special damages. RESTATEMENT (SECOND) OF TORTS § 652D, § 652H (1977).

113 The Court has also adjudicated statutory claims involving intangible intrusions on seclusion. In *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, the Court reversed dismissal of an action for statutory damages under the Fair Debt Collection Practices Act brought by a plaintiff who had been subject to improper solicitations from a debt collector. 559 U.S. 573, 576–77 (2010). While Justice Kennedy observed in dissent on the merits that the plaintiff "had claimed no harm as a result of respondents' actions," neither the majority nor the dissent expressed any doubt that the allegedly illegal solicitation constituted an "injury in fact." *Id.* at 616 (Kennedy, J., dissenting). And in *Mims v. Arrow Fin. Servs., LLC*, the Court reversed dismissal of an action under the Telephone Consumer Protection Act seeking damages for use of an "automatic telephone dialing system or prerecorded or artificial voice to call Mims's cellular phone without his consent." 132 S. Ct. 740, 746 (2012).

114 540 U.S. 614, 616 (2004).

115 *Id.* at 617.

116 5 U.S.C. § 552a(g)(1)(D). The Privacy Act also provides a cause of action for any person denied the correction of any inaccurate or otherwise improper material in a record pertaining to him without proof of any adverse effect. 5 U.S.C. § 552a(g)(1)(A).

117 *Chao*, 540 U.S. at 617–18.

118 *Id.* at 620.

utory minimum damages were available only to plaintiffs who demonstrate proof of “actual damages”:<sup>119</sup>

[T]he reference in § 552a(g)(1)(D) to “adverse effect” acts as a term of art identifying a potential plaintiff who satisfies the injury-in-fact and causation requirements of Article III standing, and who may consequently bring a civil action without suffering dismissal for want of standing to sue. . . . That is, an individual subjected to an adverse effect has injury enough to open the courthouse door, but without more has no cause of action for damages under the Privacy Act.<sup>120</sup>

Justice Ginsburg, joined by Justices Breyer and John Paul Stevens, agreed with the presupposition of justiciability, but dissented from the statutory construction as to damages:

Doe has standing to sue, the Court agrees, based on “allegations that he was ‘torn . . . all to pieces’ and ‘greatly concerned and worried’ because of the disclosure of his Social Security number and its potentially ‘devastating’ consequences.” Standing to sue, but not to succeed, the Court holds, unless Doe also incurred an easily arranged out-of-pocket expense.<sup>121</sup>

Second, the recent saga of Menachem Binyamin Zivotofsky which twice reached the Supreme Court in the last five years was predicated on an alleged informational harm provoking mental distress. Menachem was born in Jerusalem in 2002 to American parents, and his mother requested that his place of birth be listed as “Jerusalem, Israel” on a consular report of birth abroad and on his American passport.<sup>122</sup> Consular officials refused, citing a policy that required them to record “Jerusalem,” without any further designation.<sup>123</sup>

In response, Menachem’s parents filed suit in federal district court in the District of Columbia, invoking a federal statute providing that Americans born in Jerusalem may elect to have “Israel” listed as their place of birth.<sup>124</sup> The district court dismissed Menachem’s claim, both because the case presented a “political question” separately and because their only “injury in fact” was “psychological”:

Plaintiffs have valid U.S. passports with no restrictions and are citizens of both the United States and Israel. If Plaintiffs’ requested relief were granted, they

119 The *Chao* court left open the question of whether “actual damages” could encompass mental anguish. *Id.* at 627 n.12. In *FAA v. Cooper*, the Court held by a vote of 5-4 that a plaintiff seeking Privacy Act damages for disclosure of his HIV positive status could not recover “actual damages” for non-pecuniary “humiliation, embarrassment, mental anguish, fear of social ostracism, and other severe emotional distress.” 132 S. Ct. 1441, 1447 (2012). Neither Justice Alito’s crabbed majority opinion nor Justice Sotomayor’s powerful dissent intimated any doubt that Mr. Cooper’s claim made out a justiciable “injury in fact.”

120 *Chao*, 540 U.S. at 624–25.

121 *Id.* at 641 (Ginsburg, J., dissenting).

122 *Zivotofsky v. Sec’y of State*, No. 03-1921, 2004 WL 5835212, at \*1–2 (D.D.C. Sept. 7, 2004).

123 *Zivotofsky v. Sec’y of State*, 444 F.3d 614, 616–17 (D.C. Cir. 2006).

124 *Zivotofsky*, 2004 WL 5835212, at \*2.



still would have valid passports and would be citizens of both the United States and Israel. They would gain no rights they did not have to begin with. If, as they allege, they have suffered the loss of some “psychological benefit,” that loss still does not rise to the level of a cognizable injury in fact.<sup>125</sup>

On appeal, the Court of Appeals for the District of Columbia reversed. It held that Menachem had suffered a concrete “injury in fact”; like “receipt of information,” the government’s inscription of a particular designation of Menachem’s birthplace was a “tangible benefit.”<sup>126</sup> Citing *Havens, Public Citizen, Akin, and Virginia Citizens Consumer Council*, the court observed: “Although it is natural to think of an injury in terms of some economic, physical, or psychological damage, a concrete and particular injury for standing purposes can also consist of the violation of an individual right conferred on a person by statute.”<sup>127</sup> After another remand, the D.C. Court of Appeals concluded that the case presented a non-justiciable political question.<sup>128</sup> The Supreme Court reversed, holding the case presented no political question precluding adjudication. Justice Breyer’s lone dissent took note of the spooky quality of Menachem’s claim:

The interest that Zivotofsky asserts, however, is akin to an ideological interest. And insofar as an individual suffers an injury that is purely ideological, courts have often refused to consider the matter, leaving the injured party to look to the political branches for protection. This is not to say that Zivotofsky’s claim is unimportant or that the injury is not serious or even that it is purely ideological. It is to point out that those suffering somewhat similar harms have sometimes had to look to the political branches for resolution of relevant legal issues.<sup>129</sup>

Chief Justice Roberts, writing for the remainder of the Court on this point, began his opinion with an account of the standing determinations that brought the case to the Court, and manifested no hesitation in remanding for determination on the merits.<sup>130</sup> When the case returned to the Supreme Court again, Justice Kennedy’s five-member majority noted the prior standing and justiciability determinations, held the statute unconstitutional

125 *Id.* at \*3 (footnotes omitted).

126 *Zivotofsky*, 444 F.3d at 619.

127 *Id.*

128 *Zivotofsky v. Sec’y of State*, 571 F.3d 1227, 1228 (D.C. Cir. 2009).

129 *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1440–41 (2012) (Breyer, J. dissenting) (citations omitted).

130 *See id.* at 1426 (majority opinion) (“The District Court granted the Secretary’s motion to dismiss the complaint on the grounds that Zivotofsky lacked standing . . . . The Court of Appeals for the D. C. Circuit reversed, concluding that Zivotofsky did have standing.”); *see also* *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594–95 (2015) (“Ohio law does not permit Obergefell to be listed as the surviving spouse on Arthur’s death certificate. By statute, they must remain strangers even in death, a state-imposed separation Obergefell deems ‘hurtful for the rest of time.’”); *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013) (“The parties do not contest that [plaintiffs] had Article III standing . . . . Each couple expressed a desire to marry and obtain ‘official sanction’ from the State, which was unavailable to them . . . .”).

and resolved the case against Menachem on the merits.<sup>131</sup> The three dissenters would also have exercised jurisdiction to sustain Menachem's right to the passport language of his choice.<sup>132</sup>

Since *Lujan*, the Court has regularly addressed the merits of claims involving improper dissemination of information about plaintiffs without discussing justiciability. Yet it has exhibited no concern regarding the plaintiffs' "injury in fact." In *Maracich v. Spears*, Justice Kennedy wrote for a majority reversing the dismissal of claims for statutory damages by a class of individuals whose home addresses had been disclosed to class action plaintiffs' attorneys in alleged violation of the Drivers Privacy Protection Act.<sup>133</sup> The class members injured, as recounted by Justice Kennedy, were those whose "personal and highly sensitive information"—cars purchased, names, addresses, and telephone numbers—was disclosed and who were solicited by mail to participate in a class action.<sup>134</sup> Without any demonstration of tangible harm, plaintiffs sought \$2,500 statutory damages for each solicitation letter mailed.<sup>135</sup> Neither majority nor dissent manifested any doubt that the plaintiffs claimed justiciable "injury in fact."

Nor has the Court manifested any doubts regarding the justiciability of informational injuries resulting from illegal dissemination of information in cases where it has held for defendants on the merits. Without raising any concerns about the absence of injury in fact, the Court has adjudicated claims for statutory damages under the Fair Credit Reporting Act for illegal disclosure of both four digits of a credit card and expiration date on a receipt,<sup>136</sup> and improper disclosure of information as part of a peer grading

131 See *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2096 (2015) ("To allow Congress to control the President's communication in the context of a formal recognition determination is to allow Congress to exercise the exclusive power itself. As a result, the statute is unconstitutional."). Justice Thomas also concurred in part in the judgment as to the passport, but dissented in part regarding relief as to consular reports.

132 Justice Scalia's dissent observed that the Zivotofskys "regard their son's birthplace as a part of Israel and insist as 'a matter of conscience' that his Israeli nativity 'not be erased' from his identity documents." *Id.* at 2117 (Scalia, J., dissenting). Justice Scalia has avowed himself a "faint-hearted originalist." Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989). He appears also to be something of a faint-hearted opponent of adjudicating claims of "Psychic Injury."

133 133 S. Ct. 2191, 2195–96 (2013).

134 *Id.* at 2209. The information at issue was "private purchases of new or used automobiles in Spartanburg County during the week of May 1–7, 2006, including the name, address, and telephone number of the buyer, dealership where purchased, type of vehicle purchased, and date of purchase." *Maracich v. Spears*, 675 F.3d 281, 284 (4th Cir. 2012).

135 *Maracich*, 675 F.3d at 288. It is also possible to conceptualize the injury as the illicit acquisition of the plaintiffs' information by the attorneys in a fashion comparable to the *Clapper* consensus, see *supra* Part II.B.1, but this was not the apparent basis of the claim.

136 See, e.g., *U.S. v. Bormes*, 133 S. Ct. 12, 14 (2012) (dismissing action on sovereign immunity grounds); cf. *TRW Inc. v. Andrews*, 534 U.S. 19, 22 (2001) (dismissing FCRA action for improperly furnishing credit report on statute of limitations grounds).

exercise, in violation of the Family Educational Rights and Privacy Act.<sup>137</sup> It has adjudicated a claim to corporate privacy in an action seeking to prevent disclosure to FOIA requesters.<sup>138</sup> It has adjudicated claims by sex offenders seeking to enjoin dissemination of their status and location on the internet<sup>139</sup> and by opponents of marriage equality seeking to enjoin disclosure of their signatures on a ballot initiative.<sup>140</sup>

Finally, in *Bartnicki v. Vopper*, the Court adjudicated an action seeking statutory damages and attorneys' fees under both state and federal statutes for dissemination of the contents of a cell phone conversation intercepted in violation of state and federal wiretap acts.<sup>141</sup> The majority expressed no doubt that the plaintiff had established "injury in fact," and noted that "disclosure of the contents of a private conversation can be an even greater intrusion on privacy than the interception itself."<sup>142</sup> Six members of the Court, however, held that the First Amendment precluded imposition of liability in the circumstances. Chief Justice William Rehnquist wrote a dissent for three members of the Court, taking the position that the plaintiffs should prevail:

Technology now permits millions of important and confidential conversations to occur through a vast system of electronic networks. These advances, however, raise significant privacy concerns. We are placed in the uncomfortable position of not knowing who might have access to our personal and business e-mails, our medical and financial records, or our cordless and cellular telephone conversations. In an attempt to prevent some of the most egregious violations of privacy, the United States, the District of Columbia, and 40 States have enacted laws prohibiting the intentional interception and knowing disclosure of electronic communications. . . . [T]he Court's decision diminishes, rather than enhances, the purposes of the First Amendment, thereby chilling the speech of the millions of Americans who rely upon electronic technology to communicate each day.<sup>143</sup>

Justice Scalia joined the dissent without a syllable of concern about the lack of a tangible "injury in fact."

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137 See *Owasso Indep. Sch. Dist. v. Falvo ex rel. Pletan*, 534 U.S. 426, 428 (2002) (finding no violation); see also *Gonzaga Univ. v. Doe*, 536 U.S. 273, 276 (2002) (finding no private cause of action for violation of FERPA).

138 See *FCC v. AT&T, Inc.*, 131 S. Ct. 1177, 1185 (2011) (finding no corporate privacy right).

139 *Conn. Dep't Pub. Safety v. Doe*, 538 U.S. 1, 3–4 (2003) (adjudicating challenge to state law requiring public disclosure of sex offender registry); *Smith v. Doe*, 538 U.S. 84, 91 (2003) (adjudicating challenge to state law allowing online publication of name and other biographical details of sex offenders); see also *Los Angeles v. Humphries*, 131 S. Ct. 447, 449 (2010) (adjudicating challenge to placement of plaintiffs names on registry of alleged child abusers).

140 See, e.g., *Doe v. Reed*, 561 U.S. 186 (2010); see also *Hollingsworth v. Perry*, 558 U.S. 183, 185 (2010) (per curiam) (enjoining live streaming of proceedings in marriage equality trial).

141 532 U.S. 514, 517 (2001).

142 *Id.* at 533.

143 *Id.* at 541–42 (Rehnquist, C.J., dissenting) (footnote omitted); cf. *Marek v. Lane*, 134 S. Ct. 8, 8 (2013) (declining to review the Facebook-Beacon settlement).

In the coming Term, the Court will return to these issues in *Spokeo Inc. v. Robins*, addressing the processing and dissemination of personal information by Spokeo, Inc., the operator of “a website that provides users with information about other individuals information” in alleged willful violation of the Fair Credit Reporting Act.<sup>144</sup> Robins, who was inaccurately described on Spokeo’s website as being married, wealthy, and having an advanced degree, brought suit alleging Spokeo had violated the Fair Credit Reporting Act by failing to “follow reasonable procedures to assure maximum possible accuracy of” consumer reports.<sup>145</sup> He provided only “sparse” allegations of “wallet injury” or injury to reputation, but nonetheless sought statutory damages.<sup>146</sup> The Court granted certiorari to address the proposed question of “[w]hether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm . . . , by authorizing a private right of action based on a bare violation of a federal statute.”<sup>147</sup>

As phrased, the question ignores an array of precedent: as the court below observed, Robins invoked his “personal interests in the handling of his credit information.”<sup>148</sup> The cases canvassed above give substantial weight to the plaintiff’s claims that he has suffered the “injury in fact” upon which the Court has regularly predicated adjudication.<sup>149</sup>

The information at issue in *Spokeo* concerns the plaintiff in particular and every release of information imposes an increment of—admittedly intangible and widely replicated—informational effect.<sup>150</sup> Like the actions challenged in *Chao*, *Maracich*, *Zivatovsky*, and *Bartnicki*—or the acquisition of information in *Clapper*—Spokeo’s alleged violations involve targeted, though intangible informational effects, which are rivalrous and exclusive; they are neither public goods nor bads. The information concerns

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<sup>144</sup> *Robins v. Spokeo, Inc.*, 742 F.3d 409, 410 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 1892 (Apr. 27, 2015) (No. 13-1339).

<sup>145</sup> 15 U.S.C. § 1681e(b).

<sup>146</sup> *Robins*, 742 F.3d at 410.

<sup>147</sup> Petition for Writ of Certiorari, *Spokeo*, at i, 135 S. Ct. 1892 (No. 13-1339).

<sup>148</sup> *Robins*, 742 F.3d at 413.

<sup>149</sup> Professor Joan Steinman has adopted and expanded on this analysis in Joan Steinman, *Spokeo, Where Shalt Thou Stand?*, 68 VAND. L. REV. EN BANC 243 (2015).

<sup>150</sup> The complaint also alleged violations of 1) limits on the circumstances in which consumer reporting agencies (“CRAs”) may provide “consumer reports for employment purposes”; 2) requirements that CRAs “issue notices to providers and users of information”; and 3) requirements that CRAs “post toll-free telephone numbers to allow consumers to request consumer reports.” See *Robins*, 742 F.3d at 411–12 (quoting 15 U.S.C. §§ 1681b(b)(1), 1681c(d), 1681j(a)).

With respect to 15 U.S.C. § 1681b(b)(1), the provision of consumer reports for employment purposes, like the issuance of false reports, or the improper provision of drivers license information, involves the improper dissemination of personal information of the sort recognized as a “concrete” injury by the cases in this section. The failures to provide notice in violation of 15 U.S.C. § 1681e(d) and 15 U.S.C. § 1681j(a) fall comfortably within the “informational injury” cases involving failure to provide information canvassed in Part III.

a single plaintiff, and each incremental dissemination generates an incremental effect on that plaintiff alone. It is possible to conceptualize the informational effects as either violations of the plaintiffs' sense of privacy, informational autonomy, and reputation, or as a violation of their statutorily recognized quasi property rights in the disposition and use of their personal information, analogous to the intellectual property claims canvassed in Part V.<sup>151</sup> The proper compensation for that violation may be a matter of debate—for it might be argued that Spokeo enhanced rather than impaired Mr. Robins reputation. But Congress appears to have resolved that question by providing statutory damages. To overrule this congressional determination as a matter of Article III standing on the basis of a claim that the injury is not “concrete” would require a conclusion that “intangible” informational effects cannot be “concrete.” And that conclusion would require the Court to withdraw from the information age.

Informational effects of this sort have no necessary spillover effect on others, and remedies provide no necessary benefit to others. They thus involve only the spooky intangibility of information. The same is not true, however, of the next category of informational injury which graces the modern pages of the United States Reports.

*B. Esthetic Injury: Intangible, Non-Exclusive, and Omnipresent*

In laying the foundation of the “injury in fact” requirement, Justice Douglas's opinion in *Association of Data Processing Service Organizations, Inc. v. Camp*,<sup>152</sup> found the requisite injury in the competitive harm to the petitioners' business, but observed that plaintiffs' injuries “at times, may reflect ‘aesthetic, conservational, and recreational’ as well as economic values. . . . We mention these noneconomic values to emphasize that standing may stem from them as well as from the economic injury on which petitioners rely here.”<sup>153</sup>

In the next decade, the Court repeatedly determined that “aesthetic” injury suffered by plaintiffs exposed to the direct perception of environmental degradation could constitute the “injury in fact” required for justiciabil-

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<sup>151</sup> As noted above, the original Warren and Brandeis argument for the privacy tort built on common law copyright claims regarding control of personal information.

<sup>152</sup> 397 U.S. 150 (1970).

<sup>153</sup> *Id.* at 154; see also *Barlow v. Collins*, 397 U.S. 159, 172 n.5 (1970) (Brennan, J., concurring) (“Injury in fact has generally been economic in nature, but it need not be.”). Both opinions cite with approval the recognition of aesthetic injury to environmental plaintiffs in *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608, 616 (2d Cir. 1965).

ity, but stipulated that plaintiffs must demonstrate that they had been “personally” exposed to the environmental harm.<sup>154</sup>

Yet “aesthetic” environmental injuries have spooky qualities. Esthetic environmental injuries are intangible: they may result from physical alterations to the habitat in question, but their impact on plaintiffs is not physical. When I regard an ugly open pit mine despoiling a beautiful mountain meadow, the “aesthetic” injury I suffer results not from any physical impact of the pit itself, but from my perception of it. It is “Psychic Injury” that arises not out of the impact of photons on my retina, but out of the interpretation by my brain of the ensuing electrical impulses that carry the esthetically disturbing image.

Esthetic injury is, moreover, spooky in another dimension; I share injury in common with all who share my view. Environmental law is notoriously shot through with externalities. The air I breathe is by definition also available to—or imposed upon—my neighbor. And my breathing in most circumstances does not reduce her enjoyment. A fortiori, my observation of the destruction of unspoiled nature is not mine alone. Yet no member of the Court has yet taken the position that these harms are non-justiciable “generalized grievances.” Esthetic injury suits have provided an ongoing stream of environmental litigation in the lower courts.

When Justice Scalia overturned the “citizen standing” provision of the Endangered Species Act in *Lujan*, his majority opinion acknowledged the status of “aesthetic”—or as he spelled it “esthetic”—environmental injuries

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154 In *Sierra Club v. Morton*, the Court found no standing where the plaintiffs made no allegations that they used the threatened wilderness of Mineral King Valley:

Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process. But the “injury in fact” test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.

405 U.S. 727, 734–35 (1972). By contrast, plaintiffs who alleged that they had been personally subjected to “aesthetic” injury were held to have the relevant injury in fact. *Duke Power Co. v. Carolina Env'tl. Study Grp., Inc.*, 438 U.S. 59, 73–74 (1978) (“Certainly the environmental and aesthetic consequences of the thermal pollution of the two lakes in the vicinity of the disputed power plants is the type of harmful effect which has been deemed adequate in prior cases to satisfy the ‘injury in fact’ standard.”); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686–87 (1973) (“[N]either the fact that the appellees here claimed only a harm to their use and enjoyment of the natural resources of the Washington area, nor the fact that all those who use those resources suffered the same harm, deprives them of standing.”); *cf. Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 885 (1990) (“We assume, since it has been uncontested, that the allegedly affected interests set forth in the affidavits—‘recreational use and aesthetic enjoyment’—are sufficiently related to the purposes of respondent association that respondent meets the requirements of § 702 if any of its members do.”).

as “injuries in fact.”<sup>155</sup> *Lujan* determined, however, that the plaintiff organizations’ claims failed for want of proof that their members would in fact be personally exposed to the prospect of esthetic injury. Although they had visited the threatened environments in the past, the affiants produced insufficient evidence of an “imminent” intent to return.<sup>156</sup>

In the two decades since *Lujan*, the Court has not receded from the recognition that “esthetic” injuries may ground standing for environmental plaintiffs. In *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, the Court held—over Justice Scalia’s dissent—that local residents who were reluctant to use streams polluted by excess discharges of mercury had standing to seek redress under the Clean Water Act even in the absence of demonstrated harm to flora or fauna or danger to health and safety.<sup>157</sup> The plaintiffs’ “reasonable concern” was sufficient “injury in fact”: 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.”<sup>158</sup>

In *Summers v. Earth Island Institute*, the plaintiff organization sought to challenge Forest Service regulations permitting logging in “fire rehabilitation” tracts without filing Environmental Impact Statements.<sup>159</sup> Justice Scalia’s five-member majority opinion acknowledged “[w]hile 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.”<sup>160</sup> But—as in *Lujan*—the plaintiff organ-

155 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562–63 (1992) (“[T]he desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing.”); see Roberts, *supra* note 33, at 1231 (noting that “[t]he Court has not revisited” the justiciability of esthetic injury).

156 *Lujan*, 504 U.S. at 564 (“[A]ffiants’ profession of an ‘inten[t]’ to return to the places they had visited before—where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species—is simply not enough.” (alteration in original)); see *id.* at 579 (Kennedy, J., concurring) (“While it may seem trivial to require that Mses. Kelly and Skilbred acquire airline tickets to the project sites or announce a date certain upon which they will return, this is not a case where it is reasonable to assume that the affiants will be using the sites on a regular basis . . . .” (internal citations omitted)).

157 *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc.*, 528 U.S. 167, 182–83 (2000).

158 *Id.* at 183 (internal quotation marks omitted). Justice Scalia dissented, joined by Justice Thomas, lamenting that “[b]y accepting plaintiffs’ vague, contradictory, and unsubstantiated allegations of ‘concern’ about the environment as adequate to prove injury in fact, and accepting them even in the face of a finding that the environment was not demonstrably harmed, the Court makes the injury-in-fact requirement a sham.” *Id.* at 201 (Scalia, J., dissenting).

159 *Summers v. Earth Island Inst.*, 555 U.S. 488, 490 (2009).

160 *Id.* at 494. The Court also noted that [a]ffidavits . . . alleged that organization member Ara Marderosian had repeatedly visited the Burnt Ridge site, that he had imminent plans to do so again, and that his interests in viewing the flora and fauna of the area would be harmed if the Burnt Ridge Project went forward . . . . The Government concedes this was sufficient to establish Article III standing with respect to Burnt Ridge.

izations did not affirmatively establish that at least one identified member would soon visit a site where forest fires would generate “fire rehabilitation” projects. The majority held that the organizations thus failed to demonstrate that “one or more of its members would be ‘directly’ affected,” and therefore failed to surmount the “injury in fact” requirement that constitutes the “hard floor of Article III jurisdiction.”<sup>161</sup> The four dissenters would have found adequate demonstration of threatened “esthetic” injury.<sup>162</sup>

And in *Decker v. Northwest Environmental Defense Center*,<sup>163</sup> the Court upheld the justiciability of a Clean Water Act challenge to logging companies and local regulators generating stormwater runoff brought by an environmental organization whose members alleged “esthetic” and “recreational harm” to their use of the river in question.<sup>164</sup>

From *Sierra Club v. Morton* to *Lujan* to *Earth Island Institute*, the Court has sought to constrain the scope of esthetic environmental injury to plaintiffs who “directly” confront environmental degradation, even if their intangible esthetic injury is uniformly shared by all who “directly” confront it. But in the Information Age, this constraint seems increasingly tenuous. If seeing environmental degradation provides adequately concrete injury to

*Id.*

<sup>161</sup> *Id.* at 497–98.

<sup>162</sup> Justice Breyer argued that the ongoing salvage program affecting “thousands of sites” every year was sufficiently likely to intersect with the “hundreds of thousands” of members who used national forests recreationally to generate a reasonable probability of “esthetic injury.” *See id.* at 507–08 (Breyer, J., dissenting) (“To know, virtually for certain, that snow will fall in New England this winter is not to know the name of each particular town where it is bound to arrive. The law of standing does not require the latter kind of specificity.”)

<sup>163</sup> 133 S. Ct. 1326 (2013); *see also* *Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012) (holding that neighboring landowner had prudential standing to bring a challenge under the Indian Reorganization Act to the erection of a casino because the owner’s alleged “economic, environmental, and aesthetic harms” fell within the “zone of interests” protected by the statute).

<sup>164</sup> The plaintiff organization alleged “[i]ts members derive aesthetic, recreational, and other benefits from Oregon’s waterways, including the rivers and tributaries near” the challenged projects, and the trial court held that “[t]he ‘injury in fact’ requirement in environmental cases is met if an individual ‘adequately shows that she has an aesthetic or recreational interest in a particular place, or animal, or plant species and that that interest is impaired by a defendant’s conduct.’” *Nw. Env’tl. Def. Ctr. v. Brown*, 476 F. Supp. 2d 1188, 1191–92 (D. Or. 2007).

Before the Supreme Court, defendants put justiciability at issue by alleging amendments to the governing regulation rendered the case moot. The Court responded: “the District Court might order some remedy for their past violations. . . . NEDC, in addition, requests injunctive relief for both past and ongoing violations, in part in the form of an order that petitioners incur certain environmental-remediation costs to alleviate harms attributable to their past discharges.” *Decker v. Nw. Env’tl. Def. Ctr.*, 133 S. Ct. 1326, 1335 (2013); *cf.* *Coeur d’Alene Tribe v. Se. Ala. Conservation Council*, 557 U.S. 261, 265–66 (2009) (adjudicating challenge by environmental organizations to issuance of permit to discharge slurry into lake protected by the Clean Water Act).



plaintiffs who observe it in person, why is similar esthetic injury not suffered by those who observe the environment in real time by webcam or—in the near future—in virtual reality?

*C. Spiritual Injury: Unwelcome Religious Exercise, Messages of Exclusion, and the Establishment Clause*

As it recognized “aesthetic” injury, the foundational “injury in fact” opinion in *Association of Data Processing* also acknowledged another form of intangible injury: “A person or a family may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause and the Free Exercise Clause.”<sup>165</sup> This “spiritual” injury is spooky in the same way that “esthetic” injury is spooky. Public religious displays and exercises send messages of exclusion, but messages are intangible, and take effect only when they are received. Messages are received in common by all who encounter them, and the harm suffered becomes more and more “direct” as the internet facilitates virtual presence.

In the landmark *Schempp* case, Ellory, Donna, and Roger Schempp had attended a public high school at which Pennsylvania statutes mandated opening exercises involving Bible reading and the recitation of the Lord’s Prayer. The Schempps were not required to participate themselves, and were statutorily entitled to be excused from the classroom exercises without tangible penalty.<sup>166</sup> Nonetheless,

Edward Schempp, the children’s father, testified that after careful consideration he had decided that he should not have Roger or Donna excused from attendance at these morning ceremonies [because] . . . he thought his children would be “labeled as ‘odd balls’” before their teachers and classmates every school day . . . .<sup>167</sup>

Joined by eight Justices, the *Schempp* opinion held that the plaintiffs met “the requirements for standing to challenge state action under the Establishment Clause”: “The parties here are school children and their parents, who are directly affected by the laws and practices against which their complaints are directed. These interests surely suffice to give the parties standing to complain.”<sup>168</sup>

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<sup>165</sup> *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970) (citing *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963)).

<sup>166</sup> *Schempp*, 374 U.S. at 205–06.

<sup>167</sup> *Id.* at 208 n.3.

<sup>168</sup> *Id.* at 224 n.9; *cf. Zorach v. Clauson*, 343 U.S. 306, 309 n.4 (1952) (adjudicating the constitutionality of a program which permits its public schools to release students during the school day to attend religious instruction off campus) (“No problem of this Court’s jurisdiction is posed in this case since, unlike the appellants in *Doremus v. Board of Education*, 342 U.S. 429, appellants here are parents of children currently attending schools subject to the released time program.”).

By the time *Lujan* was decided, a majority of the Court had limited the scope of the “spiritual stake” injury. In *Valley Forge v. Americans United*, in addition to denying taxpayer standing, the Court rejected the claimed “spiritual stake” of plaintiffs who resided in Maryland and Virginia and who learned of the transfer of federal property to a religious college in Pennsylvania through a news release: “They fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III . . . .”<sup>169</sup>

The opinion distinguished *Schempp*: “The plaintiffs in *Schempp* had standing . . . [only] because impressionable schoolchildren were subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them.”<sup>170</sup>

As noted earlier, in his *Hein* concurrence, Justice Scalia emphatically objected to the proposition that “Psychic Injury” could ground the standing of plaintiffs in Establishment Clause cases. Justice Scalia, however, did not write for a majority of the Court in *Hein*; *Hein* retained a narrow version of the *Flast* taxpayer standing to challenge explicit statutory expenditures in support of religion, and it did not address *Schempp* “spiritual stake.”<sup>171</sup> More importantly for the status of informational injury, the Court has regularly adjudicated cases in which the lineal descendants of the *Schempps* object to “direct” injury resulting from intangible exposure to the display of religious symbols or religious exercises under the auspices of official authority.

Before *Lujan*, in addition to a variety of school prayer cases, the Court adjudicated suits by community members that raised the questions of whether particular public religious displays to which they had been exposed “send[] a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to ad-

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Justice Stewart in *Schempp* would have remanded the case for a determination of the degree of “coercion” accompanying the exercises:

[I]f the record in the *Schempp* case contained proof (rather than mere prophecy) that the timing of morning announcements by the school was such as to handicap children who did not want to listen to the Bible reading, or that the excusal provision was so administered as to carry any overtones of social inferiority, then impermissible coercion would clearly exist.

*Schempp*, 374 U.S. at 320 n.8 (Stewart, J., dissenting).

<sup>169</sup> *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485–86 (1982) (emphasis removed).

<sup>170</sup> *Id.* at 487 n. 22.

<sup>171</sup> *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 595–96 (2007) (“Respondents further alleged that the content of these conferences sent a message to religious believers ‘that they are insiders and favored members of the political community’ . . . . [But,] the only asserted basis for standing was that the individual respondents are federal taxpayers . . . .”).

herents that they are insiders, favored members of the political community.”<sup>172</sup> And after *Lujan*, the stream of adjudicated cases continued.

In *Santa Fe Independent School District v. Doe*, the Court invalidated a school district policy establishing an opportunity for student-led prayer at the start of high school football games in an action brought by current and former high school students and their parents, on the ground that “an objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school’s seal of approval.”<sup>173</sup>

In *McCreary County v. American Civil Liberties Union* the Court upheld a preliminary injunction against a series of displays of the Ten Commandments in county courthouses on the ground that an objective “observer would find that the Commandments are sanctioned as divine imperative.”<sup>174</sup> The *McCreary County* plaintiffs were held below to have standing because they “must come into contact with the display of the Ten Commandments whenever they enter the courthouse to conduct business.”<sup>175</sup> In the companion case, *Van Orden v. Perry*, the Court adjudicated the merits and rejected a challenge to the maintenance of a Ten Commandments monument on the Capitol grounds brought by “a native Texan and a resident of Austin” who “encountered the Ten Commandments monument during his frequent visits to the Capitol grounds . . . for the purpose of using the law library in the Supreme Court building, which is located just northwest of the Capitol building.”<sup>176</sup> Neither majority nor dissent in

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172 *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984). *Cf.* *Lee v. Weisman*, 505 U.S. 577, 584 (1992) (“[A] live and justiciable controversy is before us. Deborah Weisman is enrolled as a student at Classical High School in Providence and from the record it appears likely, if not certain, that an invocation and benediction will be conducted at her high school graduation.”); *Marsh v. Chambers*, 463 U.S. 783, 786 n.4 (1983) (“[W]e agree that Chambers, as a member of the legislature and as a taxpayer whose taxes are used to fund the chaplaincy, has standing to assert this claim.”); *Stone v. Graham*, 449 U.S. 39, 40 (1980) (per curiam) (invalidating a statute requiring posting the Ten Commandments on schoolroom walls). *Compare* *Cnty. of Allegheny v. ACLU*, 492 U.S. 573 (1989) (upholding display of menorah, while striking down crèche display, challenged by local residents passing through courthouse) *with* *Lynch v. Donnelly*, 465 U.S. 668 (1984) (upholding crèche accompanied by Santa Claus and reindeer, challenged by a municipal taxpayer).

173 *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (“[M]embers of the listening audience must perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration.”); *id.* at 316 (“[T]he simple enactment of this policy, with the purpose and perception of school endorsement of student prayer, was a constitutional violation.”).

174 545 U.S. 844, 873 (2005).

175 *ACLU v. McCreary Cnty.*, 96 F. Supp. 2d 679, 682 (E.D. Ky. 2000); *accord* *ACLU v. Pulaski Cnty.*, 96 F. Supp. 2d 691, 694 (E.D. Ky. 2000).

176 545 U.S. 677, 682 (2005); *cf.* *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 19 (2004) (denying standing on prudential grounds to non-custodial father who challenged pledge of allegiance recited in his daughter’s classroom, because it would be “improper for the federal courts

either case tabled any objection to adjudicating the case on the merits though at least one amicus brief challenged plaintiffs' standing.<sup>177</sup>

In *Salazar v. Buono*, despite defendants' challenge to the plaintiff's standing in their Supreme Court briefing, the Court adjudicated the merits and reversed an injunction against the conveyance to private parties of land in a national park upon which a "memorial cross" was erected.<sup>178</sup> The plaintiff was "a retired Park Service employee who makes regular visits to the Preserve . . . [and] claims to be offended by the presence of a religious symbol on federal land."<sup>179</sup> The Court found that the government's challenge to Buono's "injury in fact" had been finally adjudicated adversely at previous stage of the litigation and the failure to seek review barred the objection.<sup>180</sup>

In each of these cases, the prevailing opinions invoked the principle that government endorsement of religion is substantively objectionable under Establishment Clause principles when it "sends a message to nonadherents" that they are not equal members of the political community.<sup>181</sup>

This conception of the Establishment Clause rests easily with the proposition that the targets of the message suffer a "direct harm" when the message is received—a harm that reaches beyond the "psychological consequence presumably produced by observation of conduct with which one disagrees."<sup>182</sup>

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to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute").

177 Brief for Ashbrook Center for Public Affairs and Ohio Senator Bill Harris as Amici Curiae Supporting Petitioners, *McCreary Cnty. v. ACLU*, 545 U.S. 844 (2004) (No. 03-1693), at 4–8.

178 559 U.S. 700, 711 (2010).

179 *Id.* at 707.

180 *See id.* at 712 ("Having obtained a final judgment granting relief on his claims, Buono had standing to seek its vindication.").

Justice Scalia, joined by Justice Thomas, would have held that the plaintiff sought to expand the scope of the relief originally obtained, and that he had no Article III standing to seek that expansion because "even assuming that being 'deeply offended' by a religious display (and taking steps to avoid seeing it) constitutes a cognizable injury, Buono has made clear that *he* will not be offended." *Id.* at 733 (Scalia, J., concurring). Justices Stevens, Ginsburg, and Sotomayor would have granted relief. *Id.* at 735–36 (Stevens, J., dissenting).

181 *See McCreary Cnty. v. ACLU*, 545 U.S. 844, 860 (2005) ("By showing a purpose to favor religion, the government 'sends the . . . message to . . . nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members . . .'" (alternations in original) (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309–10 (2000))).

182 *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 485 (1982); *cf. Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1440 (2011) ("Some plaintiffs may demonstrate standing based on the direct harm of what is claimed to be an establishment of religion, such as a mandatory prayer in a public school classroom." (citing *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 224 n.9 (1963))); *id.* at 1443 (observing that the *Schempp* plaintiffs were "directly affected" by the challenged laws).

The exact parameters of the exposure to religiously preferential displays necessary to establish “injury in fact” have regularly generated perplexity in lower courts.<sup>183</sup> But—like the Supreme Court—the lower courts have regularly adjudicated cases in which the intangible injury plaintiffs share with others exposed to official religious endorsement is the assault of information.<sup>184</sup>

Most recently, in *Town of Greece v. Galloway*, a five-member majority of the Court rejected on the merits a claim by two residents who “attended town board meetings to speak about issues of local concern” and objected on Establishment Clause grounds to the prayers that began the meeting.<sup>185</sup> The trial court had rebuffed the defendants’ claims that plaintiffs lacked “injury in fact,” and the defendants had not pressed the claim in the appeal below, or before the Court, although two amicus briefs challenged the plaintiffs’ of injury in fact.<sup>186</sup> In rejecting the plaintiffs’ claims, Justice

183 See *City of Edmond v. Robinson*, 517 U.S. 1201, 1203 (1996) (Rehnquist, C.J., dissenting from denial of certiorari; joined by Justices Scalia and Thomas) (“[T]here are serious arguments on both sides of this question [and] the Courts of Appeals have divided on the issue . . . .”); *Awad v. Ziriax*, 670 F.3d 1111, 1121 (10th Cir. 2012) (finding standing for resident Muslims to challenge anti-Sharia state constitutional amendment and noting that the Supreme Court “has not provided clear and explicit guidance on the difference between psychological consequence from disagreement with government conduct and noneconomic injury that is sufficient to confer standing”); *Freedom from Religion Found., Inc. v. Obama*, 641 F.3d 803, 811–12 (7th Cir. 2011) (Williams, J., concurring) (finding no injury in fact from Presidential Thanksgiving proclamation, and asserting that the Court “simply has not been clear as to what distinguishes the psychological injury produced by conduct with which one disagrees from an injury that suffices to give rise to an injury-in-fact in Establishment Clause cases”); *Catholic League for Religious and Civil Rights v. City & Cnty. of S.F.*, 624 F.3d 1043, 1049–52 (9th Cir. 2010) (en banc) (reviewing cases and finding standing for Catholics in San Francisco to challenge city council resolution condemning Catholic church hierarchy, observing that what “distinguishes the cases is that in *Valley Forge*, the psychological consequence was merely disagreement with the government, but in the others, for which the Court identified a sufficiently concrete injury, the psychological consequence was exclusion or denigration on a religious basis within the political community”); *id.* at 1062 (Graber, J., dissenting) (finding no injury in fact); *Cooper v. U.S. Postal Serv.*, 577 F.3d 479, 490 (2d Cir. 2009) (finding standing for Post Office patron) (“[Supreme Court precedent] explains what standing is *not*, without saying what standing *is* in these kinds of cases. Lower courts are left to find a threshold for injury . . . somewhat arbitrarily.”).

184 See, e.g., *Mount Soledad Mem’l Ass’n v. Trunk*, 132 S. Ct. 2535, 2535 (2012) (denying certiorari in challenge to official maintenance of memorial cross looming over San Diego). Justice Alito commented that Establishment Clause display jurisprudence is “undoubtedly in need of clarity.” *Id.*; see also *Utah Highway Patrol Ass’n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 15 (2011) (denying certiorari in challenge to memorial crosses placed along public highways). Justice Thomas, dissenting from the denial of certiorari, noted that “lower courts have understandably expressed confusion” regarding display of religious imagery. *Id.*

185 *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1817 (2014).

186 For the District Court’s opinion, see *Galloway v. Town of Greece*, 732 F. Supp. 2d 195, 211, 215 (W.D.N.Y. 2010) (“Defendants further maintain that Plaintiffs lack standing to challenge the Town’s legislative prayer practice, since they did not suffer any injury. . . . In this case, Plaintiffs felt uncomfortable and offended by the allegedly sectarian prayers . . . . [T]he Court finds that these facts suffice to establish standing.”). For the Second Circuit’s opinion, see *Galloway v.*

Kennedy's prevailing opinion made no mention of the justiciability issue, addressing the plaintiffs' claims on the merits:

[R]espondents stated that the prayers gave them offense and made them feel excluded and disrespected. Offense, however, does not equate to coercion . . . especially where, as here, any member of the public is welcome in turn to offer an invocation reflecting his or her own convictions. . . . If circumstances arise in which the pattern and practice of ceremonial, legislative prayer is alleged to be a means to coerce or intimidate others, the objection can be addressed in the regular course.<sup>187</sup>

The four dissenters, who would have found Establishment Clause violations in the practice of regular Christian prayer at town meetings to violate the Constitution, would have recognized the plaintiffs "injuries in fact" to be injuries in law as well.

#### V. INTELLECTUAL PROPERTY AND THE LEGAL CONSTRUCTION OF "INJURY"

I close by returning to the most economically consequential form of spooky informational injury that has been recognized by the Court. Intellectual property is the signature commercial asset of the information age.<sup>188</sup> Yet rights in information have famously spooky qualities. Unlike land or goods, information is intangible. Unlike land or goods, it can be simultaneously "possessed" by others without physically reducing the owner's

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Town of Greece, 681 F.3d 20, 30 n.4 (2d Cir. 2012) ("On appeal, the defendants do not dispute that the plaintiffs have standing to sue."). For the amicus briefs, see Brief for Liberty Counsel as Amicus Curiae Supporting Petitioner, *Town of Greece v. Gallway*, 134 S. Ct. 1811 (2013) (No. 12-696) (challenging standing); Brief for Am. Ctr. for Law and Justice as Amicus Curiae Supporting Petitioner, *Town of Greece v. Gallway*, 134 S. Ct. 1811 (2013) (No. 12-696) (same).

<sup>187</sup> *Town of Greece*, 134 S. Ct. at 1826. The prevailing opinion characterized the endorsement test as "dictum in *County of Allegheny*, that was disputed when written and has been repudiated by later cases." *Id.* at 1821 (internal citations omitted). It is unclear whether this characterization is limited to legislative invocations where a "reasonable observer is acquainted with this tradition and understands that its purposes are to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens, not to afford government an opportunity to proselytize or force truant constituents into the pews." *Id.* at 1825.

Justices Thomas and Scalia declined to join this part of the opinion, but adopted an even less constraining position that "there is no support for the proposition that the framers of the Fourteenth Amendment embraced wholly modern notions that the Establishment Clause is violated whenever the 'reasonable observer' feels 'subtle pressure,' or perceives governmental 'endorsement[ement].'" *Id.* at 1838 (Thomas, J., concurring, joined by Scalia, J.) (internal citations omitted). Justice Scalia has sought to characterize *Town of Greece* as a repudiation of endorsement analysis. See *Elmbrook Sch. Dist. v. Doe*, 134 S. Ct. 2283, 2286 (2014) (Scalia, J., dissenting from denial of certiorari) ("It is perhaps the job of school officials to prevent hurt feelings at school events. But that is decidedly not the job of the Constitution."). Neither Justice Thomas nor Justice Scalia articulated doubts regarding the justiciability of the case.

<sup>188</sup> See, e.g., DeLong & Summers, *supra* note 26, at 35 ("We are moving to an economy in which the canonical source of value is a gene sequence, a line of computer code, or a logo.").

holdings. And unlike land or goods, it is extremely difficult to physically preserve from other users. The regimes of intellectual property law seek to legally construct qualities of excludability and rivalrousness. The intangible “harm” suffered by the intellectual property owner whose rights are violated is a particularized injury only because the law makes it so.

The party asserting intellectual property rights sometimes claims pecuniary “wallet injury” of reduced sales or increased competition. But under the law as the Court has adjudicated it, “wallet injury” is not necessary to make out a claim that can be entertained in federal court. The Court has long taken the position that a patent holder who declines to use a patent may prevent others from doing so without showing that she wishes to use or sell the invention.<sup>189</sup> And “[l]ike a patent owner, a copyright holder possesses ‘the right to exclude others from using his property’” equally for reasons monetary, psychic, or whimsical.<sup>190</sup> Holders of patent and copy-

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189 See *Cont'l Paper Bag Co. v. E. Paper Bag Co.*, 210 U.S. 405, 422–30 (1908); see also 35 U.S.C. § 261 (“[P]atents shall have the attributes of personal property.”); *id.* § 154(a)(1) (defining the parameters of patent rights, including “the right to exclude others from making, using, offering for sale, or selling the invention”); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 393 (2006); cf. *Bowman v. Monsanto Co.*, 133 S. Ct. 1761, 1764 (2013) (growing new soybeans from patented beans was enjoined as patent infringement). See generally Adam Mossoff, *Exclusion and Exclusive Use in Patent Law*, 22 HARV. J.L. & TECH. 321 (2009). Professor Mossoff observes that the obviously legally constructed excludability of patent law served as a conceptual lever for legal realists to establish the legally constructed quality of other property relations.

In *eBay*, the Court divided as a matter of substantive equitable doctrine on the circumstances in which a patent holder could invoke equitable relief, but none of the Justices suggested that the assertion of the right to exclude did not present a “case or controversy” in the absence of wallet injury. Compare *eBay*, 547 U.S. at 395 (Roberts, C.J., concurring) (“[C]ourts have granted injunctive relief upon a finding of infringement in the vast majority of patent cases. This ‘long tradition of equity practice’ is not surprising, given the difficulty of protecting a right to exclude through monetary remedies that allow an infringer to use an invention against the patentee’s wishes . . .”), with *id.* at 396 (Kennedy, J., concurring, joined by Breyer, J., Souter, J., & Stevens, J.) (expressing substantive concern that “[a]n industry has developed in which firms use patents not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees”).

190 *eBay*, 547 U.S. at 392 (majority opinion) (quoting *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932)); see also U.S. CONST. art. I, § 8, cl. 8 (establishing authority to secure “for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”); *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 506 (2001) (recognizing author’s right to prevent previously published work from being included in online database); *Harper & Row, Publs. v. Nation Enters.*, 471 U.S. 539, 564 (1985) (“The right of first publication encompasses not only the choice whether to publish at all, but also the choices of when, where, and in what form first to publish a work.”); cf. *Golan v. Holder*, 132 S. Ct. 873, 878 (2012) (upholding withdrawal of works from public domain); *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 34 (2003) (citing with approval The Visual Artists Rights Act of 1990, 17 U.S.C. § 106A, providing rights to claim authorship, to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation); *F. W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233 (1952) (“Even for uninjurious and unprofitable invasions of copyright the court may, if it deems it just, impose a liability within statutory limits to sanction and vindicate the statutory policy.”); *Bleistein v. Donaldson Lithographing Co.*, 188

right entitlements may bring actions in federal court simply because others have acted in respect to information ways that the right holders believe to violate the law. Plaintiffs need show no other tangible injury; the violation of legally imposed duty suffices.<sup>191</sup>

In trademark law, the Court has recently held that Lanham Act misrepresentation claims require a showing that the plaintiff suffer “an injury to a commercial interest in sales or business reputation proximately caused by [a] defendant’s misrepresentations”<sup>192</sup> and “dilution” claims require a showing of “lessening of the capacity of the [senior] mark to identify and distinguish goods or services.”<sup>193</sup> But no Justice suggested that a claimant’s asserting a contrary rule would be barred from federal court by Article III.

These standard cases of legally enforceable rights against intangible injury are constructed by positive statute. They present no difficulties for a system of federal jurisdiction that acknowledges that “injury in fact” required by Article III may exist solely by virtue of “statutes creating legal rights, the invasion of which creates standing.”<sup>194</sup> The notion that the law can construct property interests in information that have no prior “de facto” existence is not problematic if the Court recognizes that “Congress has the power to define injuries . . . that will give rise to a case or controversy where none existed before.”<sup>195</sup>

Justice Scalia’s *Lujan* opinion interprets Article III to impose a requirement of some sort of “concrete, de facto injuries” as a prerequisite to the recognition of cases or controversies.<sup>196</sup> But the regular and central adjudication of intellectual property cases both before and after *Lujan* estab-

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U.S. 239, 252 (1903) (Harlan, J., dissenting, joined by McKenna J.) (upholding action for statutory damages against reproducers of lithographed poster advertising circus).

Where the Court has rejected efforts to enjoin copyright infringement, it has not been because of any doubt that the claimed infringement represented “injuries in fact.” *See, e.g., Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1367 (2013) (“[T]he fact that harm has proved limited so far may simply reflect the reluctance of copyright holders so far to assert geographically based resale rights. They may decide differently if the law is clarified in their favor.”).

<sup>191</sup> In law Latin, this appears to be “*injuria absque damno*.” *Cf.* Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 719 n.146 (2004) (discerning equivocal historical basis for the “injury in fact” requirement in the controverted “historical support for the proposition that private suits will not lie for *injuria absque damno* any more than they will lie for *damnum absque injuria*”).

<sup>192</sup> *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2234 (2014) (quoting *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1395 (2014)) (alteration in original).

<sup>193</sup> *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418, 434 (2003).

<sup>194</sup> *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

<sup>195</sup> *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007) (Kennedy, J., concurring in part and in judgment) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992)).

<sup>196</sup> *Lujan*, 504 U.S. at 578.



lishes that “de facto injury” cannot be a pre-legal category that requires physical or economic effect. At a minimum, “injuries in fact” can be grounded in intangible, but legally constructed, interests in the disposition of information.

#### CONCLUSION

One reason repeatedly articulated for limiting the scope of federal jurisdiction to “cases and controversies” is a policy of requiring concreteness of disputes. The goal is to ensure that the adjudicating court is not merely a forum for abstract debate. The facts of cases discipline and constrain courts; they provide the framework for the elaboration of law within a system of common law precedent. It thus seems appropriate with respect to determinations of justiciability as well those as substance to take seriously the facts of Supreme Court cases and their outcomes, not merely the “tests” the opinion articulates or the language it uses.

The literature on Article III standing is deep and vast (search “Flast” and “Lujan” in Lexis or Westlaw periodical databases if you doubt it). This Article does not propound a novel three-part test to resolve its roiling controversies. But canvassing the cases involving intangible informational injuries does establish several points.

The outcomes of adjudication by the Court in the information age and the spooky characteristics of information itself demonstrate that today the constitutional test for a “case” or “controversy” cannot require that plaintiffs demonstrate harm to person, goods, or pocketbook. Practice and theory clarify that “concrete” injury is the opposite of “abstract” injury rather than the opposite of injury that is “intangible.”

Nor can Article III mean that plaintiffs must show injury that they alone suffer. Informational injuries often carry spillover or public goods effects, but the inevitably broad and undifferentiated benefits and burdens associated with exposure to information do not make those effects inappropriate for adjudication. Practice and theory demonstrate as well that harm can be “imminent” without being physically present.

Practice and theory thus go a substantial distance toward answering Justice Scalia’s question of “why Psychic Injury, however limited, is cognizable under Article III.”