Michigan Law Review

Volume 122 | Issue 8

2024

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https://doi.org/10.36644/mlr.122.8.standing

STANDING AND PROBABILISTIC INJURY

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Standing to sue often turns on questions of probability. For example, public law plaintiffs must show that they are likely to be affected by allegedly unlawful government surveillance or environmental policies, and consumers may wish to sue private defendants over false credit reporting or data breaches that may or may not cause them financial or reputational harm in the future. This Article offers a framework for resolving a wide range of these "probabilistic standing" issues. Our core claim is that courts and commentators ask too much of standing doctrine in probabilistic cases. First, scholars sometimes seek a unified theory of probabilistic standing to cover categories of cases that ask distinct questions, such as cases involving who is subject to a challenged action, on the one hand, and those involving whether a person subject to such an action is sufficiently likely to be harmed, on the other. Second, courts should not ask how probable elements of a plaintiff's case must be in order to support standing, but rather who should decide whether a given probability is sufficient. Judges and parties struggle in litigation to assess the actual probability of occurrences, and Article III of the Constitution provides no standard for how probable an injury must be to support a lawsuit. Third, any doctrinal probability threshold for standing would encounter a related problem, which is that the probability of an injury depends significantly on how that injury is framed. Which harms "count" for standing is thus a vital question in assessing the probability of injury, but Article III is an unlikely place to look for answers. Within certain constraints, courts should look instead to the underlying substantive law to define the relevant injuries for standing purposes. Finally, we contend that many of the concerns associated with probabilistic claims are better addressed through the law of remedies and prudential elements of the timing doctrines (mootness and ripeness) than through the constitutional law of standing.

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For helpful comments and suggestions, we thank Jonathan Adler, Thomas Bennett, Joseph Blocher, Erin Blondel, Kathy Bradley, Zachary Clopton, Deborah DeMott, Richard Fallon, Tara Grove, Andrew Hessick, Doug Laycock, Henry Monaghan, Richard Re, Neil Siegel, and participants in faculty workshops at Duke Law School, George Washington University Law School, and the Northwestern Pritzker School of Law, as well as at the University of Chicago Law School's Standing Doctrine Conference. We are also grateful to Sydney Engle, John Macy, Mary Gen Sanner, and Rebekah Strotman for excellent research assistance.

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INTRODUCTION

The Supreme Court's docket continues to be preoccupied with issues of standing to sue. In the 2022–23 Term, for example, some of the Court's most significant decisions—concerning, for example, affirmative action, student-loan forgiveness, immigration enforcement, and Indian affairs—had to address questions of standing, with varying results.[1] The 2023–24 Term similarly had a number of important standing cases.[2] This is unlikely to change any time

1. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141 (2023) (finding that a nonprofit organization had standing to challenge affirmative action policies); Dep't of Educ. v. Brown, 143 S. Ct. 2343 (2023) (disallowing private-party challenge to student-loan forgiveness program due to lack of standing); Biden v. Nebraska, 143 S. Ct. 2355 (2023) (finding that the state of Missouri had standing to challenge student-loan forgiveness program); United States v. Texas, 143 S. Ct. 1964 (2023) (finding that the state of Texas lacked standing to challenge Biden administration policy regarding immigration enforcement); Haaland v. Brackeen, 143 S. Ct. 1609 (2023) (disallowing certain challenges to the Indian Child Welfare Act because of lack of standing to sue).

2. *See, e.g.*, Murthy v. Missouri, 144 S. Ct. 1972 (2024) (holding that states and social media users lacked standing to challenge government efforts to induce social media platforms to censor the plaintiffs' speech); FDA v. Alliance for Hippocratic Medicine, 144 S. Ct. 1540 (2024) (holding that doctors opposed to abortion lacked standing to challenge the FDA's approval of mifepristone, an abortion-inducing drug); Acheson Hotels, Inc. v. Laufer, 144 S. Ct. 18 (2023) (holding that case raising the constitutionality of "tester" standing had become moot).

soon. Just a few years ago, the Supreme Court decided what may be its most important standing decision in a generation—*TransUnion LLC v. Ramirez*.[3] Instead of settling the law of standing, however, *TransUnion* left in its wake a host of questions that are creating disagreements in the lower courts.

A central issue in the law of standing, directly implicated in *TransUnion*, is how the law should address situations in which a plaintiff's injury is uncertain. When someone challenges actions that may injure them in the future, they must establish a likelihood that those injuries will in fact occur.[4] Even when someone complains of present or past injuries, they must still demonstrate to the court's satisfaction both that the defendant's action is the likely cause of their injury and that the relief they request is likely to redress it.[5] Some of these questions have now acquired a distinctive label—"probabilistic standing."[6] As one commentator notes, "[D]etermining when a claim is too remote or speculative to support standing has occupied substantial attention of the Supreme Court, perhaps more attention than any other question of justiciability."[7] Not entirely surprisingly—given the critical tenor of much academic writing on standing—the doctrinal results have been weighed in the balance and found wanting.[8]

Issues of probability arise throughout public and private law litigation. Plaintiffs may challenge government policies relating to surveillance, environmental protection, or public health well before it is certain whether or how

3. TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021) (holding that some members of a class suing under the Fair Credit Reporting Act had standing but others did not, depending on the likelihood of actual injury as a result of a statutory violation). For commentary, see, for example, Cass R. Sunstein, *Injury in Fact*, *Transformed*, 2021 SUP. CT. REV. 349, 365 (2022) (stating that the Court's "radical ruling" in *TransUnion* "offered [the Court's] most elaborate and firm account of what kinds of injuries in fact are sufficient" under Article III of the Constitution).

4. *See, e.g.*, Clapper v. Amnesty Int'l USA, 568 U.S. 398 (2013) (concluding that plaintiffs could not establish a sufficient likelihood that they would be injured by government surveillance).

5. *See, e.g.*, Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167 (2000) (considering whether plaintiffs' injuries were caused by defendant's discharge of pollution into a waterway); Massachusetts v. EPA, 549 U.S. 497 (2007) (finding that, although future effects of climate change mitigation measures were uncertain, plaintiffs had alleged a sufficient probability that relief would redress their injury to some extent).

6. *See, e.g.*, F. Andrew Hessick, *Probabilistic Standing*, 106 NW. U. L. REV. 55 (2012); RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 119–23 (7th ed. 2015) [hereinafter HART & WECHSLER] (offering a section on "probabilistic harms").

7. Hessick, *supra* note 6, at 57–58 (footnote omitted).

8. *See, e.g.*, HART & WECHSLER, *supra* note 6, at 123 (noting that "[t]he Court's recent cases seem to vary in their willingness to treat probabilistic harms as a basis for granting standing," and suggesting that nothing is "at play other than the Court's own rough judgment about how realistic the threat of a contingent harm might be for the plaintiff in question"); Hessick, *supra* note 6, at 65, 101–02 (noting that "the limits on probabilistic standing have resulted in unpredictability in standing law" and that there is "an appearance that courts make standing decisions based on personal biases or considerations other than merely the size of risk").

they will be affected by those policies.[9] Efforts by beneficiaries of regulation to compel the government to better enforce the law—concerning environmental protection, consumer safety, non-discrimination, and many other topics—often turn on probabilistic assessments of whether such enforcement would make a difference.[10] In private litigation, standing to pursue products liability claims may depend on assessing the degree of risk that an alleged product defect presents.[11] Standing to sue for data breaches or false credit reporting may require establishing the likelihood that the breach or false reporting will cause harm.[12] Suits relating to unfair competitive behavior (including false advertising and trademark infringement) frequently turn on probabilistic claims about the likely effect of such behavior on the decisions of potential customers.[13]

This Article offers a framework for resolving a wide range of probabilistic standing issues—some emerging in *TransUnion*'s wake, others having frustrated scholars for a generation.[14] Our core claim is that courts and commentators tend to ask too much of standing doctrine in probabilistic cases.

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9. *See, e.g.*, *Clapper*, 568 U.S. at 401; Summers v. Earth Island Inst., 555 U.S. 488 (2009); Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139 (2010); E.T. v. Paxton, 41 F.4th 709 (5th Cir. 2022); Shrimpers & Fishermen of the RGV v. Tex. Comm'n on Env't Quality, 968 F.3d 419 (5th Cir. 2020). *See generally* Christopher H. Schroeder, *Rights Against Risks*, 86 COLUM. L. REV. 495, 498 (1986) (observing that "the typical feature[] of risky actions associated with modern technology" is that "[t]he probability of risk to any individual is relatively small while its severity is substantial, perhaps fatal").

10. *See, e.g.*, Allen v. Wright, 468 U.S. 737 (1984) (denying standing of parents of Black children in public schools to challenge Internal Revenue Service's allegedly insufficient enforcement of restrictions on charitable giving to discriminatory private schools); Baur v. Veneman, 352 F.3d 625 (2d Cir. 2003) (upholding standing of consumers to challenge the Department of Agriculture's failure to ban consumption of livestock possibly infected with mad cow disease); Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin., 489 F.3d 1279 (D.C. Cir. 2007) (denying standing to challenge agency rules on auto tire pressure monitoring).

11. *See, e.g.*, Kerin v. Titeflex Corp., 770 F.3d 978, 985 (1st Cir. 2014) (denying standing to sue based on uncertainty that future risk of harm would ever materialize); *In re* Aqua Dots Prods. Liab. Litig., 654 F.3d 748, 751 (7th Cir. 2011) (upholding standing to sue manufacturer of a toy based on future risk of injury to children).

12. *See, e.g.*, Hammond v. Equifax Info. Servs., LLC, 52 F.4th 669 (6th Cir. 2022); Beck v. McDonald, 848 F.3d 262 (4th Cir. 2017); Hutton v. Nat'l Bd. of Exam'rs, 892 F.3d 613 (4th Cir. 2018); *In re* Adobe Sys., Inc. Priv. Litig., 66 F. Supp. 3d 1197, 1211–16 (N.D. Cal. 2014); Daniel J. Solove & Danielle Keats Citron, *Risk and Anxiety: A Theory of Data-Breach Harms*, 96 TEX. L. REV. 737 (2018).

13. *See, e.g.*, Ford v. Nylcare Health Plans of the Gulf Coast, Inc., 301 F.3d 329 (5th Cir. 2002) (false advertising claim under the Lanham Act); Allbirds, Inc. v. Giesswein Walkwaren AG, No. 19-cv-05638, 2020 WL 6826487 (N.D. Cal. June 4, 2020) (same); Thermolife Int'l LLC v. Am. Fitness Wholesalers LLC, No. CV-18-04189-PHX-JAT, 2019 WL 3840988 (D. Ariz. Aug. 15, 2019) (same). Courts sometimes apply presumptions about likely harm. *See, e.g.*, TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820, 827 (9th Cir. 2011) ("There are good reasons to presume that a competitor bringing a false advertising claim has suffered a commercial injury.").

14. *See, e.g.*, City of Los Angeles v. Lyons, 461 U.S. 95 (1983) (holding that a victim of past police abuse lacked standing to seek an injunction because he could not show sufficient likelihood that he would be subject to such conduct in the future).

First, courts and commentators sometimes seek a unified theory of probabilistic standing to cover categories of cases that actually ask distinct questions.[15] These categories include cases asking who is subject to a challenged action, on the one hand, and cases asking whether a person subject to such an action is sufficiently likely to be harmed, on the other. Courts tend to reach different outcomes in these two sorts of cases, although they rarely acknowledge the difference or explain why it matters. A third category of probabilistic cases concerns uncertainties about whether the defendant's action has caused or will cause the plaintiff's injury (or whether the requested relief can redress it). These uncertain causation cases tend to turn on considerations involving separation of powers and the role of the jury, rather than assessments of probability alone.

Second, courts should not ask *how probable* elements of a plaintiff's case must be in order to support standing, but rather *who should decide* whether a given probability is sufficient. Judges and parties struggle to assess the actual probability of occurrences in litigation, and in any event, Article III provides no standard for how probable an injury must be to support a lawsuit. Determining which institution has primary responsibility to make a particular judgment is a more familiar and tractable problem for courts.[16]

Courts that attempt to set a probability threshold for standing encounter a third and related problem, which is that the probability of an injury depends significantly on how that injury is framed. A person whose private information has been wrongly disclosed through a data breach, for instance, may wish to sue before any concrete consequences arise based on a concern about future harm. That harm may seem remote, but if being wrongfully subjected to a *risk* of harm in the future counts as harm in itself, then the plaintiff's present injury is certain. Or she may experience other present harms, such as anxiety or the need to undertake costly precautions against identity theft. Which harms "count" for standing is thus a vital question in assessing the probability of injury, but Article III is an unlikely place to look for answers. Within relatively modest constraints, courts should look instead to the underlying substantive law to define the relevant injuries for standing purposes.

Finally, we contend that many of the concerns associated with probabilistic claims are better addressed through the law of remedies and prudential elements of the timing doctrines (mootness and ripeness) than through the constitutional law of standing. There is no reason, for example, to develop a mini-ripeness doctrine assessing an injury's "imminence" for *standing* purposes when existing ripeness jurisprudence is better suited to the task. Asking standing doctrine to do less work, we argue, will make it more coherent and

15. A similar problem afflicts thinking about the doctrine of third-party standing. *See* Curtis A. Bradley & Ernest A. Young, *Unpacking Third-Party Standing*, 131 YALE L.J. 1 (2021).

16. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 158 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (posing the comparative competence of different institutions to decide particular sorts of questions as the central issue for jurisprudence).

predictable. Our framework is consistent with *TransUnion*, which we contend some courts and commentators have read too expansively.

Many circumstances conspire to make consistency in standing doctrine elusive. The stakes in standing cases—access to court for the plaintiff, a dismissal at the threshold for defendants—create powerful incentives to raise the issue in a vast number of cases and explore every ambiguity or inconsistency in the doctrine. At the same time, standing always appears in cases that are fundamentally about something else—the merits—and we accept the widespread view that standing principles can never exist wholly apart from the substantive law governing that vast and diverse range of cases. Moreover, the Supreme Court's recent standing decisions reflect not one consistent voice but an assortment of Justices thinking about standing from a variety of perspectives. No one should expect the cases to neatly fall into line. But some coherence is still possible by focusing on the core principles and underlying goals of the doctrine.

Unlike much valuable writing about standing, we do not aim to rethink the law of standing from the ground up or suggest a radically different approach. Our aim instead is to develop a coherent account of standing doctrine that is derived from, and largely consistent with, the existing case law.[17] Such an account, we hope, will guide courts and help lawyers predict outcomes in future cases. Consistent with this approach, we accept the requirement of an "injury in fact," something that has sharply divided commentators but has repeatedly been endorsed by the Supreme Court as a bedrock of modern standing law.[18] We maintain that this requirement restricts standing considerably less than the commentary sometimes suggests.

Any effort to render a field of doctrine coherent, however, is bound to identify mistakes, inconsistencies, and points in need of reform. We contend that several leading Supreme Court decisions have been read to decide far more than they actually did. For example, many courts and commentators have treated *Clapper v. Amnesty International U.S.A.*[19] as the leading case on

17. *Cf.* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 890 (2000) ("The approach is thus normative, but the judgments are constrained by the path dependency of common-law constitutionalism."); Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 790 (2010) ("Any acceptable theory of constitutional adjudication should . . . have two qualities: (1) It must be normatively acceptable and (2) It must be able to account for most (though not necessarily every last bit) of the current constitutional order.").

18. *Compare, e.g.*, Cass R. Sunstein, *What's Standing After* Lujan*?: Of Citizen Suits, Injuries, and Article III*, 91 MICH. L. REV. 163, 166–67 (1992) (arguing that "the very notion of 'injury in fact' is not merely a misinterpretation of . . . Article III but also a large-scale conceptual mistake" (footnote omitted)), *with* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021) ("[A] plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent . . . ."), *and* Spokeo, Inc. v. Robins, 578 U.S. 330, 338 (2016) ("The plaintiff must have (1) suffered an injury in fact . . ."); *id.* at 350–51 (Ginsburg, J., dissenting) (agreeing with the majority's statement of the basic rules and dissenting only as to its construction of the plaintiff's complaint).

19. Clapper v. Amnesty Int'l USA, 586 U.S. 398 (2013).

probabilistic standing,[20] but we see it as relevant only in limited circumstances in which uncertainty over whether the plaintiffs have been subjected to the policy they challenge cannot readily be resolved. We also contend that the "remedial standing" rule, which requires plaintiffs to establish standing separately for each remedy sought, is a misinterpretation of the decision in *City of Los Angeles v. Lyons*;[21] that case should instead be understood as recognizing that the sorts of injuries that suffice for standing may vary depending on the remedy sought.[22] In other areas, the Supreme Court has expressed uncertainty that we endeavor to clear up. The Court and some commentators have doubted whether a meaningful difference divides standing and ripeness,[23] but we explain why that distinction is valuable. Accordingly, our most far-reaching proposal would largely abolish a freestanding "imminence" requirement for standing because the ripeness doctrine better serves the same function by asking questions that are more manageable for courts. Each of these positions is to some extent inconsistent with what the Court has *said* in certain cases, but we contend that they largely align with—and better explain—what the Court has actually *done*.

We begin, in Part I, with an overview of the probabilistic injury problem and an outline of our proposed framework. Part II addresses cases in which it is uncertain whether plaintiffs are exposed or subject to the allegedly unlawful practices they challenge. Part III considers plaintiffs who are subject to such practices but cannot establish with certainty that they will be harmed or when such harm will occur. This Part is the heart of our analysis, and it deals with the extent to which Article III permits Congress to render certain aspects of probabilistic harms actionable by statute. Part IV considers the role of both the law of remedies and the timing doctrines, especially ripeness, in relation to standing.

I. REFRAMING PROBABILISTIC STANDING

The term "probabilistic standing" is sometimes used to denote a relatively narrow set of cases that focus on how likely an injury must be to support litigation in federal court.[24] The scope of the issue is, in fact, much broader. Whenever standing to sue under Article III is contested, the dispute typically

20. *See* sources cited *infra* note 119.

21. City of Los Angeles v. Lyons, 461 U.S. 95 (1983).

22. *See id.* at 109 (holding that the past injury that might suffice to support a claim for damages would not create standing in a suit for an injunction); *see also TransUnion*, 141 S. Ct. at 2210 (stating that a risk of future injury would create standing for a claim to injunctive relief, but not for a suit seeking only damages).

23. *See, e.g.*, Trump v. New York, 141 S. Ct. 530, 535–36 (2020) (per curiam); Susan B. Anthony List v. Driehaus, 573 U.S. 149, 157 n.5 (2014).

24. *See, e.g.*, HART & WECHSLER, *supra* note 6, at 119–22 (discussing three cases raising the question of "probabilistic harms" as injury in fact); E.T. v. Paxton, 41 F.4th 709, 715 (5th Cir. 2022) (describing probabilistic standing as standing that is premised on "an increased risk that equally affects the general public"); Elec. Priv. Info. Ctr. v. EPA, 892 F.3d 1249, 1255 (D.C. Cir. 2018) (referring to probabilistic standing as "risk-based standing").

involves whether the plaintiff's injury is the sort that counts for Article III purposes, whether that injury is sufficiently likely to occur, or whether the causal link between that injury and the defendant's conduct suffices to establish traceability and redressability.[25] Issues of likelihood and causation are probabilistic on their face. And because the probability of an injury varies according to how that injury is defined, the question of what injuries count is inextricably linked to probability problems. One cannot talk about probabilistic standing without touching on the most basic issues in Article III standing doctrine.

A. *Injury in Fact and the* TransUnion *Case*

Standing's basic catechism is familiar: To satisfy the "irreducible constitutional" requirements for standing, "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision."[26] Injury in fact requires " 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.' "[27] The injury need not be large; as one court of appeals recently put it, "[a] concrete injury need be only an 'identifiable trifle.' "[28] Many scholars have noted that the case law's references to "a legally protected interest" or a "judicially cognizable injury"[29] establish that what counts as injury in fact is a *legal* question as well as a factual one.[30]

In *Spokeo, Inc. v. Robins*, the Supreme Court explained that "particularized" and "concrete" are separate concepts. The former means that the injury "must affect the plaintiff in a personal and individual way," and this can be true even when a large number of people suffer the same injury.[31] The latter element, concreteness, has proven trickier to define. The Court has explained that " '[c]oncrete' is not . . . necessarily synonymous with 'tangible,' " but a concrete injury "must be '*de facto*'; that is, it must actually exist" and be " 'real,'

25. Prudential standing arguments raise somewhat different problems. *See* Bradley & Young, *supra* note 15, at 20–21.

26. Spokeo, Inc. v. Robins, 578 U.S. 330, 338 (2016) (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992)); *accord* Dept. of Educ. v. Brown, 143 S. Ct. 2343, 2351 (2023).

27. *Spokeo*, 578 U.S. at 339 (quoting *Lujan*, 504 U.S. at 560).

28. Salcedo v. Hanna, 936 F.3d 1162, 1167 (11th Cir. 2019) (quoting United States v. Students Challenging Regul. Agency Procs. (SCRAP), 412 U.S. 669, 689 n.14 (1973)).

29. *See, e.g.*, *Lujan*, 504 U.S. at 563 (stating that "the 'injury in fact' test requires . . . an injury to a cognizable interest" (quoting Sierra Club v. Morton, 405 U.S. 727, 734 (1972)); Allen v. Wright, 468 U.S. 737, 754 (1984) (holding that a general claim of stigmatic injury whenever the government discriminates against a member of one's racial group was not "judicially cognizable").

30. *See, e.g.*, Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 640 (2006); Sunstein, *After* Lujan, *supra* note 18, at 189.

31. *Spokeo*, 578 U.S. at 339 & n.7 (quoting *Lujan*, 504 U.S. at 560 n.1); *see also* FEC v. Akins, 524 U.S. 11, 23–25 (1998) (elaborating on this distinction).

and not 'abstract.' "[32] The Justices have divided, however, over exactly how "real" an injury must be, and in particular whether a purely legal injury can suffice.[33]

The Justices grappled with these concepts at some length in *TransUnion LLC v. Ramirez*.[34] The case involved the Fair Credit Reporting Act (FCRA), which requires consumer reporting agencies to accurately report information about individuals.[35] A class of 8,185 consumers alleged that a credit reporting agency erroneously included an alert in their files that the consumer's name matched a watch list for terrorists and other serious criminals maintained by the Treasury Department's Office of Foreign Assets Control (OFAC). Mr. Ramirez, a named plaintiff, was denied a loan to purchase a car by an auto dealership based on a false OFAC alert. For 1,853 of the class members, the complaint alleged that TransUnion provided misleading credit reports to third-party businesses. For the remaining 6,332 class members, the erroneous information was included in their credit reports but not provided (during the class period) to any third parties.[36]

The FCRA conferred a right to sue for statutory damages on all of these persons.[37] The Court, however, distinguished between (a) Mr. Ramirez, who suffered consequential injury from the erroneous report; (b) 1,853 class members, who could claim an intangible injury to their reputation from distribution of the erroneous OFAC alert but not any identifiable consequences; and (c) 6,332 class members, who could show only a violation of their statutory right not to have the erroneous information included in their file. The Court held that Ramirez and the 1,853 class members had "actual" injuries under Article III, but the largest group did not.[38]

TransUnion considered both which injuries count and how probable those injuries have to be under Article III. Not all phenomena that people experience as harmful count for standing, and courts must make legal judgments about which injuries suffice.[39] All of the *TransUnion* plaintiffs had incorrect information in their credit files kept by the defendant, violating each plaintiff's legal rights under the FCRA, but only Ramirez had experienced any consequences on account of this legal violation. The Court said that purely legal

32. *Spokeo*, 578 U.S. at 340 (quoting *De Facto*, BLACK'S LAW DICTIONARY 506 (10th ed. 2009), WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 472 (1971), RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 305 (1967)).

33. *See, e.g.*, TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021).

34. *Id.*

35. 15 U.S.C. § 1681e(b); *see also* Richard L. Heppner, Jr., *Statutory Damages and Standing after* Spokeo v. Robins, 9 CONLAWNOW 125, 129 (2018) ("[O]n its face, the FCRA allows consumers to recover statutory damages for willful noncompliance with an FCRA requirement relating to them—even if the noncompliance did not materially harm them.").

36. *TransUnion*, 141 S. Ct. at 2201–02.

37. 15 U.S.C. § 1681n(a).

38. *TransUnion*, 141 S. Ct. at 2208–13.

39. *See* Sunstein, *After* Lujan, *supra* note 18, at 188–89; William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 231–34 (1988).

violations did not amount to "actual" injury, and it distinguished between plaintiffs whose tainted credit files had been accessed by third parties and plaintiffs whose files had not been accessed. The closest analogous injury recognized at common law was reputational harm under the tort of defamation, the majority reasoned, and this harm is actionable only when damaging information is disseminated to third parties.[40]

The probability question arose because the *TransUnion* plaintiffs argued that simply having wrong information in their files created a risk of reputational harm (and consequential damage) down the line. The Court rejected this argument, holding that, in a suit for damages, "the mere risk of future harm, standing alone, cannot qualify as a concrete harm—at least unless the exposure to the risk of future harm itself causes a *separate* concrete harm."[41] Only harm that has already materialized, the Court suggested, amounts to concrete injury in fact necessary to support standing to seek damages in federal court.[42]

The injury-in-fact requirement remains quite controversial in the academy.[43] Critics have emphasized that injury in fact emerged as a constitutional requirement for standing only in the last half-century, beginning with the Court's 1970 decision in *Data Processing*.[44] Prior to that decision, the Court had applied a *legal* injury test turning on whether the underlying law invoked by the plaintiff conferred a legal right to sue.[45] *Data Processing* evidently meant "to simplify and liberalize the standing inquiry" by making "[l]ayman's injury . . . rather than legal or 'lawyer's' injury . . . the linchpin."[46] But as Congress enacted environmental, consumer protection, and other federal regulatory statutes with citizen suit provisions expressly authorizing private lawsuits, the factual injury requirement came to be seen as unduly restricting Congress's

40. *TransUnion*, 141 S. Ct. at 2208–09, 2213–14.

41. *Id.* at 2210–11 (emphasis in original).

42. *Id.* at 2211.

43. *Compare, e.g.*, James E. Pfander, *Standing, Litigable Interests, and Article III's Case-or-Controversy Requirement*, 65 UCLA L. REV. 170, 204–12 (2018) (arguing that contemporary standing jurisprudence is inconsistent with the Founding Era history), *with* Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*,102 MICH. L. REV. 689, 732 (2004) ("[S]tanding doctrine has a far longer history than its modern critics concede."); *see also* Fallon, *Justiciability and Remedies*, *supra* note 30, at 638 (arguing that the injury in fact rule "has created needless confusion" and should be abandoned).

44. Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970).

45. Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1136–39 (2009).

46. Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1154 (1993); *see also* Magill, *supra* note 45, at 1162–63; Kenneth Culp Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450, 450, 452–53 (1970).

power.[47] Critics have typically argued that Article III should be satisfied whenever the plaintiff has a valid cause of action—a version of the old legal injury test.[48]

Academic frontal assaults on the injury-in-fact requirement have, however, gained little traction at the Supreme Court. In recent years, all the Justices signed on in various opinions to the standing doctrine as articulated in the modern case law, including the injury-in-fact requirement. Moreover, the differences between the Justices over application of the doctrine are often exaggerated. It is noteworthy, for example, that all the Justices agreed in *TransUnion* that there was standing for class members as to whom false reports had been submitted to third parties. In one of the student loan-forgiveness cases from 2023, the Court was unanimous in applying the modern standing framework, despite being divided in a companion case about the merits of the dispute.[49]

We thus accept in this Article the basic requirement of injury in fact, as well as the principle from *Lujan* and *TransUnion* that the Constitution constrains—to some meaningful degree—Congress's authority to create standing by conferring statutory rights to sue. Our exploration of the probabilistic injury problem proceeds within that framework. As will be evident, we read the cases to afford Congress considerably more discretion and flexibility than is sometimes appreciated. We contend that the significant challenges that undeniably exist within standing doctrine can best be handled through a more nuanced revision of existing principles rather than a wholesale reinvention of the jurisprudence.

B. *The Probability Problem*

Originally, the phrase "probabilistic standing" described a particular scenario aggregating large numbers of persons or incidents to establish a statistical likelihood of some injury to at least one plaintiff, even though it might be impossible to be sure which one. In *Summers v. Earth Island Institute*, for example, a group of environmental organizations challenged new Forest Service regulations exempting certain small fire-rehabilitation and timber-salvage projects from a notice, comment, and appeal process employed by the Service

47. *E.g.*, Sunstein, *After* Lujan, *supra* note 18, at 190–92; Nichol, *supra* note 46, at 1160–62.

48. *E.g.*, Fletcher, *supra* note 39; Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425 (1974); *see also* Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1122 (11th Cir. 2021) (Newsom, J., concurring) (adopting this view as "a far more natural and straightforward reading of the word 'Case' than one that turns on the existence of an 'injury in fact' "). Some scholars and judges who have argued for abandoning the injury in fact requirement would impose standing limitations based on Article II of the Constitution—that is, limitations that would prevent Congress from delegating to private parties the executive branch's enforcement authority. *Sierra*, 996 F.3d at 1132–37; Jonathan H. Adler, *Standing Without Injury*, WAKE FOREST L. REV. (forthcoming 2024). *See also, e.g.*, Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781 (2009).

49. *See* Dep't of Educ. v. Brown, 143 S. Ct. 2343 (2023). For the Court's division over the merits, see Biden v. Nebraska, 143 S. Ct. 2355, 2355–56 (2023).

for more significant land management decisions.[50] Plaintiffs had initially challenged a particular decision, the Burnt Ridge Project, and they established standing by showing that one of the plaintiff organizations' members had repeatedly visited the Burnt Ridge site and had imminent plans to do so again in the future.[51] Things got interesting, however, when the plaintiffs settled their dispute with regard to that particular project but wished to continue their challenge to the general regulation exempting such small decisions from the Service's prior procedural obligations. Writing for the majority, Justice Scalia denied that "when a plaintiff has sued to challenge the lawfulness of certain action . . . but has settled that suit, he retains standing to challenge . . . the regulation in the abstract . . . apart from any concrete application that threatens imminent harm to his interests." Allowing such an abstract suit, he explained, "would fly in the face of Article III's injury-in-fact requirement."[52]

In so holding, the Court in *Summers* rejected what it dubbed a "probabilistic standing" argument advanced by Justice Breyer's dissent. Breyer thought that the plaintiff organizations had shown that they were virtually certain to have *some* members affected by *some* wrongful timber sales at some point in the future. After all, he noted, "[t]he Complaint alleges, and no one denies, that the organizations, the Sierra Club for example, have hundreds of thousands of members who use forests regularly across the Nation for recreational, scientific, esthetic, and environmental purposes."[53] In other words, although the plaintiffs could not establish *which* members would be affected by the next allegedly unlawful timber sale, *some* member of at least one of the organizations would have the requisite contact with an allegedly unlawful act by the Service. Because the Forest Service's rules change applied so broadly, and the plaintiffs had so many members tromping about in virtually *all* the nation's national forests, Breyer concluded that standing was certain even without knowing where or when the next timber sale would take place.[54]

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

51. *See id.* at 494 ("The Government concedes this was sufficient to establish Article III standing with respect to Burnt Ridge.").

52. *Id.*

53. *Id.* at 506–07 (Breyer, J., dissenting).

54. The D.C. Circuit accepted a similar argument to Justice Breyer's in *Nat. Res. Def. Council v. EPA*, 464 F.3d 1 (D.C. Cir. 2006). In that case, a large membership organization challenged an EPA rule regulating ozone-depleting chemicals. The court of appeals found standing because, even accepting a conservative estimate that "[t]he lifetime risk that an individual will develop nonfatal skin cancer as a result of EPA's rule is about 1 in 200,000," one could "infer from the statistical analysis that two to four of NRDC's nearly half a million members will develop cancer as a result of the rule." *Id.* at 7. For a more recent lower court decision finding standing based on similar reasoning, but with a different ideological valence, see *Alliance for Hippocratic Med. v. FDA*, 78 F.4th 210 (5th Cir. 2023). In that case, groups of physicians opposed to abortion challenged the Food and Drug Administration's approval of the pregnancy-terminating drug mifepristone. The Fifth Circuit upheld the plaintiffs' standing in part on the statistical likelihood that they would encounter women needing emergency medical care as a result of complications from using the drug. *Id.* at 212–13. *See also* Jonathan H. Adler, *The Good and Bad of the Fifth Circuit's Abortion Pill Ruling*, VOLOKH CONSPIRACY (Apr. 13, 2023, 11:53 PM),

The *Summers* dissent presented a particularly explicit instance of standing based on probabilistic assessments, but similar difficulties occur in a wide range of more familiar contexts. Persons wishing to challenge government surveillance may be uncertain whether they have actually been spied upon.[55] Individuals who have bought a car with a defective component may not know when or whether that component will fail—or whether and how badly such failure might injure them.[56] Persons exposed to a hazardous chemical or unsafe food products may not know whether such exposure will actually result in injury.[57] Victims of police abuse may have a hard time showing that they are likely to be subjected to abusive policies again.[58] Commentators argue that probabilistic approaches to these sorts of problems are "necessary to address risks that pose concrete injuries to many people,"[59] and the lower courts have sometimes—but not always—accepted them.[60]

Probability problems are not limited to the injury prong of standing doctrine. Consider *Allen v. Wright*,[61] in which parents of black children enrolled in public schools challenged the Internal Revenue Service's failure to enforce rules making donations to private schools engaged in race discrimination non-tax deductible. The Court had little problem concluding that the plaintiffs were injured by the slow pace of desegregation in their public schools. However, the Court was unwilling to accept the plaintiffs' causation theory tracing that injury to inaction by the IRS.[62] Lax enforcement by the IRS, the plaintiffs said, undermined public desegregation efforts by effectively encouraging do-

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https://reason.com/volokh/2023/04/13/the-good-and-bad-of-the-fifth-circuits-abortion-pill-ruling [perma.cc/V49R-KFF5]. The Supreme Court reversed on the ground that "federal conscience laws definitively protect doctors from being required to perform abortions or to provide other treatment that violates their consciences." FDA v. Alliance for Hippocratic Medicine, 144 S. Ct. 1540, 1559 (2024). The Court thus had no occasion to consider the probabilistic aspect of the Fifth Circuit's standing argument.

55. *See, e.g.*, Clapper v. Amnesty Int'l USA, 568 U.S. 398 (2013).

56. *See, e.g.*, Cole v. Gen. Motors Corp., 484 F.3d 717 (5th Cir. 2007).

57. *See, e.g.*, Baur v. Veneman, 352 F.3d 625 (2d Cir. 2003).

58. *See, e.g.*, City of Los Angeles v. Lyons, 461 U.S. 95 (1983).

59. Bradford Mank, *Standing and Statistical Persons: A Risk-Based Approach to Standing*, 36 ECOLOGY L.Q. 665, 715 (2009). *But see* Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 504–06 & n.222 (2008) (criticizing this sort of reasoning and noting that, if enough large membership groups band together, they would effectively be able to challenge any failure to enforce the law).

60. *See* Fla. State Conf. of the NAACP v. Browning, 522 F.3d 1153, 1163–64, 1163 n.7 (11th Cir. 2008). In that case, the Eleventh Circuit upheld a state NAACP organization's standing to challenge a Florida voter registration statute by calculating that the organization likely had 200 members subject to the statute, the statute allegedly rejected 2% of minority registrants, and thus at least one member was 98% certain to be rejected under the law. "Human fallibility being what it is," the court said, "someone is certain to get injured in the end." *Id.*

61. Allen v. Wright, 468 U.S. 737 (1984).

62. *Id.* at 756–57.

nations to private schools, thereby allowing those schools to charge lower tuition and encourage white flight.[63] That theory depended on a large number of intervening decisions by third parties not before the court—donors, private school administrators, parents of white children—that were to at least some degree speculative.[64] Those independent variables precluded the conclusion that plaintiffs' injuries were definitively traceable to the IRS's conduct and created doubt as to whether ordering the IRS to change its enforcement practices would redress the plaintiffs' injury.[65]

Similar problems arise when it is uncertain whether a product defect or chemical exposure caused a tort plaintiff's injury, or when plaintiffs ask a court to order a regulatory agency to regulate practices that may cause long-term environmental harms. Or one may be confident that enforcement of a particular law or policy would cause injury, but it may be uncertain whether or when that law or policy will be enforced.[66] These problems of probabilistic causation and enforcement are important, and we hope to address them in future work. But because we view them as requiring somewhat different doctrinal solutions, our principal focus here remains on probabilistic harms and the extent to which they can satisfy the core requirement of injury in fact.

Probabilistic injury is not just—or even primarily—an issue in the law of standing. Whether injury will occur in the future, or whether the defendant's action caused the plaintiff's past or ongoing injury, is also a question both on the merits (is the defendant liable to the plaintiff?) and at the remedial stage (can the plaintiff show a sufficient likelihood of harm to justify a preventive injunction?). This overlap requires some coordination between standing doctrine and the substantive and remedial law, and sometimes between different institutions. For example, standing is a threshold issue decided by the judge, but a definitive standing ruling that the defendant's conduct actually did injure the plaintiff could preempt the jury's prerogative to decide the merits. Conversely, established doctrines limiting the availability of injunctions to prevent harms may adequately deal with many concerns about probabilistic future injuries, without having to reinvent the wheel in the context of standing doctrine.

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63. *Id.* at 745.

64. *See id.* at 759.

65. *Murthy v. Missouri*, 144 S. Ct. 1972 (2024), decided as this Article was going to press, raised a similar question. The plaintiffs sued government entities for allegedly inducing various social media platforms to exclude or downgrade the plaintiffs' speech. But the Court held that they lacked standing because they had not adequately shown that the government defendants' actions actually caused any censorship of their speech by the private platforms, or that such an effect was likely to occur in the future. *See id.* at 1987–96.

66. *See, e.g.*, Poe v. Ullman, 367 U.S. 497 (1961) (declining to hear a challenge to Connecticut's contraceptive ban because state law enforcement authorities had for years declined to enforce it).

C. *How to Assess Probabilistic Injury (and How Not to)*

Article III standing doctrine combines three sets of underlying imperatives and values. The first is historical continuity. The text of Article III gives courts relatively little to work with: it speaks to "cases," "controversies," and "judicial power."[67] The Justices have long said, however, that "[i]n endowing this Court with 'judicial Power' the Constitution presupposed an historic content for that phrase,"[68] confining federal jurisdiction to "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process."[69] The Court has combined originalist and traditionalist approaches to this history, and it has supplemented historical constraints grounded in common law practice with other concerns.[70] In general, the upshot has not been to lock in particular practices existing at the Founding—for example, no one thinks that Article III requires federal courts to retain the common law forms of action or to prevent significant innovations such as the class action. Rather, the Court's historical analysis has tended to require that modern litigation simply retain certain basic elements that have characterized the core of Anglo-American justice.

Historical considerations coexist in standing jurisprudence with separation of powers and prudential concerns. For many years, the Court has insisted that "[t]he 'case or controversy' requirement . . . defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded."[71] The Court in *TransUnion* reaffirmed this imperative, opining that "the concrete-harm requirement is essential to the Constitution's separation of powers" because "[a] regime where Congress could freely authorize *unharmed* plaintiffs to sue defendants who violate federal law not only would violate Article III but also would infringe on the Executive Branch's Article II authority."[72] More broadly, standing requirements protect both of the

67. *See, e.g.*, Honig v. Doe, 484 U.S. 305, 340 (1988) (Scalia, J., dissenting) (explaining that Article III's terms "have virtually no meaning except by reference" to the "traditional, fundamental limitations upon the powers of common-law courts").

68. Coleman v. Miller, 307 U.S. 433, 460 (1939) (Frankfurter, J., dissenting); *see also* Ernest A. Young, *Our Prescriptive Judicial Power: Constitutive and Entrenchment Effects of Historical Practice in Federal Courts Law*, 58 WM. & MARY L. REV. 535, 572 (2016).

69. Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 774 (2000) (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998)).

70. *See, e.g.*, Flast v. Cohen, 392 U.S. 83, 95–97 (1968) (noting the importance of the common law but also that American traditions are more restrictive of advisory opinions); Ernest A. Young, *Standing, Equity, and Injury in Fact*, 97 NOTRE DAME L. REV. 1885, 1893–96 (2022) (discussing the Court's approach to history in standing cases).

71. Allen v. Wright, 468 U.S. 727, 750 (1984) (citing Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 471–76 (1982)). For a recent emphasis by the Court on this point, citing *Allen*, see United States v. Texas, 143 S. Ct. 1964 (2023).

72. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2207 (2021) (emphasis in original).

political branches by limiting the courts' occasions to exercise the power of judicial review.[73]

Finally, separation of powers considerations shade into institutional prudence in standing doctrine, which expresses "the proper—and properly limited—role of the courts in a democratic society."[74] These concerns caution courts to act with restraint in order to preserve their legitimacy.[75] They also encourage courts to withhold decisions in circumstances where they may not be in a position to issue a sufficiently informed decision.[76] As Professor Fallon has explained, "A specific and concrete injury helps frame issues in a factual context suitable for judicial resolution," limits "the scope of a judicial decision," and promotes the "adverse interests and arguments [that] sharpen 'the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' "[77] As we will see, these concerns frequently constrain the timing of litigation as well as its permissibility.

This mix of historical continuity, separation of powers concerns, and institutional prudence complicates any effort to construct a straightforwardly originalist jurisprudence of standing. Orienting the doctrine around history only—or focusing solely on separation of powers or prudential matters—would require rejecting a great deal of precedent, something that the Court has understandably been unwilling to do. Nor would it be consistent with the Founding generation's decisions to rely on the common law and empower Congress, decisions that allowed for considerable flexibility.[78]

Thinking of these three elements in combination helps explain why the *Summers* majority rejected Justice Breyer's argument for probabilistic standing. The argument relied on the law of large numbers: Outcomes that may be

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73. *See, e.g.*, Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408 (2013); Lewis v. Casey, 518 U.S. 343, 353 n.3 (1996) (noting that standing doctrine's "separation-of-powers component . . . keeps courts within certain traditional bounds vis-à-vis the other branches").

74. *Allen*, 468 U.S. at 750 (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)). Prudential *rationales* are not limited to the so-called prudential *doctrines*, such as limits on third-party standing. They also underpin constitutional doctrines like injury in fact. *See* Bradley & Young, *supra* note 15, at 18–19.

75. *See* Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of* Lyons, 59 N.Y.U. L. REV. 1, 29 (1984); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 169–70 (1803) (acknowledging that "any legal investigation of the acts of [executive] officers [is] peculiarly irksome," and that "[t]he province of the court, is, solely, to decide on the rights of individuals").

76. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 204 (1962) (stating that standing assures that plaintiff has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions").

77. Fallon, *Lyons*, *supra* note 75, at 13–14 (quoting *Baker*, 369 U.S. at 204); *see also* Samuel L. Bray, *All is Not Well with the Preliminary Injunction* 35 (Jan. 23, 2024) (unpublished manuscript) (on file with authors) ("[T]he entire theory of our judicial system is built on the case—on the value of fact-specific adjudication and party-specific judgments.").

78. *See generally* Thomas H. Lee, *Article IX, Article III, and the First Congress: The Original Constitutional Plan for the Federal Courts, 1787–92*, 89 FORDHAM L. REV. 1895 (2021).

merely probable in isolation become nearly certain to occur if the experiment is tried a large number of times.[79] If injury is simply a formal requirement grounded only in history, it is hard to see why Breyer was wrong to find it met in *Summers*. The large number of members in the plaintiffs' organizations, the allegation that they visited *every* national forest, and the large number of timber sales that would be affected by the new Forest Service rules meant that *some* plaintiff, *some*where, was bound to visit an area affected by the rule *some*time in the relatively near future. Similar arguments could be made, however, in many circumstances where procedural aggregation mechanisms—including not only organizational standing but also class actions and (possibly) multi-district litigation—yield large numbers of plaintiffs. That would threaten the separation of powers value of standing doctrine in limiting the opportunities for judicial intervention in public disputes.[80] Standing based on aggregated probabilities of injury might likewise turn private litigation among small numbers of private parties into effectively public disputes with potentially broad regulatory consequences for society.

The prudential problems are even more compelling. From that perspective, the function of standing is to ensure a concrete frame for the litigation around a particular plaintiff affected by a particular government action. That frame permits a court to see how a challenged measure plays out in real circumstances and hear from real people about how they have been affected. Probabilistic standing cannot supply that frame. Justice Breyer's argument demonstrated that *some* plaintiff would be affected by *some* application of the challenged policy, but it could not tell the court who, where, when, or precisely how. The challenge in *Summers* remained fundamentally abstract, despite the mathematical near certainty of injury.[81] It is hardly surprising that the majority chose to await a less conceptual plaintiff.[82]

Against this backdrop, our approach parts company with the predominant thinking about probabilistic standing in three ways. First, we contend that courts should not attempt to set a probability or proximity threshold as a matter of standing doctrine; rather, they should simply rely on the usual pleading standards to ensure that a claim is properly presented. This issue cuts

79. *See, e.g.*, JEFFREY S. ROSENTHAL, STRUCK BY LIGHTNING: THE CURIOUS WORLD OF PROBABILITIES 23–25 (2006) (discussing the law of large numbers).

80. *See, e.g.*, Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin., 513 F.3d 234, 242 (D.C. Cir. 2008) (Sentelle, J., concurring) ("The wide-ranging, near-merits discussion at the standing threshold is the sort of thing that congressional committees and executive agencies exist to explore. . . . If we do not soon abandon this idea of probabilistic harm, we will find ourselves looking more and more like legislatures rather than courts.").

81. *See* Dept. of Educ. v. Brown, 143 S. Ct. 2343, 2351 (2023) (reaffirming *Summers*'s rejection of standing where the plaintiffs "did not have any 'concrete plans to observe nature in [a] specific area' affected by actions the Service took" (quoting Summers v. Earth Island Institute, 555 U.S. 488, 497 (2009))); Schroeder, *supra* note 9, at 502–03 (criticizing the abstract nature of probabilistic arguments).

82. *See also Pub. Citizen*, Inc., 489 F.3d at 1294 (Kavanaugh, J.) ("[I]t therefore does Public Citizen no good to string together 130,000 remote and speculative claims rather than one remote and speculative claim. Each claim is still remote and speculative . . . .").

across a wide variety of cases. In *Clapper*, the Justices sparred over whether a threat of future injury must be "certainly impending" or "reasonably probable."[83] Similarly, a leading circuit decision on data breaches evaluated standing by identifying three factors that would increase the likelihood that purloined information would someday be used to the detriment of plaintiffs.[84]

Commentary has generally agreed that the relevant question is to assess the likelihood of harm that Article III requires. Jonathan Remy Nash argues that federal courts should consider the "expected value" of an injury—that is, its probability multiplied by its impact—and recognize a plaintiff's standing as long as that value is positive.[85] Under this test, any risk of a genuine harm would suffice, however low the risk or trivial the harm. Andrew Hessick would drop any probability requirement altogether, thereby allowing standing to sue for "all claims involving a risk of future injury."[86] Although they allow standing for any assertion of a risk of future injury in principle, these authors would each impose a prudential limit to weed out small risks of injury—thereby reopening the question of where exactly that threshold should be set.[87] We doubt that this question can be answered in a nonarbitrary way.[88]

Any effort to set a uniform probability threshold in probabilistic cases overlooks important differences between classes of cases. And courts will struggle to evaluate objective likelihoods of future injury or, more importantly,

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83. *Compare* Clapper v. Amnesty Int'l USA, 586 U.S. 398, 401 (2013) (requiring threats of future injury to be "certainly impending"), *with id.* at 431–33 (Breyer, J., dissenting) (arguing for a "reasonable probability" standard). Other cases seem to concede the limited utility of such verbal formulae by treating these two standards as interchangeable. *See* Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158 (2014) (suggesting risks suffice for standing "if the threatened injury is certainly impending, *or* there is a substantial risk that the harm will occur") (emphasis added).

84. McMorris v. Carlos Lopez & Assocs., LLC, 995 F.3d 295, 301–02 (2d Cir. 2021); *see also* James Dempsey, *US Courts Mixed on Letting Data Breach Suits Go Forward*, IAPP (Mar. 9, 2022), https://iapp.org/news/a/u-s-courts-mixed-on-letting-data-breach-suits-go-forward [perma.cc/W8BU-REPW] (noting that many lower courts have continued to apply the *McMorris* factors after *TransUnion*).

85. Jonathan Remy Nash, *Standing's Expected Value*, 111 MICH. L. REV. 1283, 1285 (2013); *see also* Mank, *supra* note 59, at 671 ("[A]ny individual should have standing to challenge a government action that exposes her to an increased lifetime risk of one in one million or greater of death or serious injury.").

86. Hessick, *supra* note 6, at 67 ("[A]ll claims based on a risk of injury present an actual case or controversy, no matter how small the risk."); *see also* Amanda Leiter, *Substance or Illusion? The Dangers of Imposing a Standing Threshold*, 97 GEO. L.J. 391, 422 (2009) (rejecting any probability requirement for Article III injury).

87. *See* Hessick, *supra* note 6, at 91–101; Nash, *supra* note 85, at 1308–09.

88. Professor Mank, for example, offers a thoughtful critique of the D.C. Circuit's "substantial risk" standard in probabilistic cases, contending that it should be replaced by a "reasonable probability" test adopted in other circuits. Mank, *supra* note 59, at 713–15. But how probable, exactly, is "reasonable probability"—and how much *more* probable is "substantial risk"? We agree that the latter expresses a somewhat stricter mood toward plaintiffs' claims than the former. But different judges are likely to apply these standards quite differently, and the abstract standards on offer provide little guidance.

to draw a necessary probability threshold out of Article III. Courts should instead focus on defining injuries with more consistency and precision, which would dissolve some difficult imminence questions and, at least, simplify others. Once the injury is properly defined, courts should ask only that it be pled with the precision and support that any other factual allegation requires.[89] The pleading standards after *Twombly* and *Iqbal* are hardly toothless,[90] and the Supreme Court has made clear that allegations going to standing "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof."[91] If plaintiffs have pled with sufficient particularity that they were injured in a cognizable way, those allegations should be taken as true rather than subjected to some threshold probability standard drawn from the penumbra of Article III.[92]

The second departure involves carefully defining the plaintiff's injury but does *not* look to Article III for a catalog of cognizable harms. *What* injuries count is crucial: If purely legal injuries count, for example, then legislatures could obviate worries about the probability of factual harm by defining legal wrongs. Alternatively, some lower courts have held that subjecting someone to a *risk* of future injury can itself be a cognizable harm for standing purposes.[93] *TransUnion* sharply limited standing based on legal injury or exposure

89. *See, e.g.*, Schuchardt v. President of the U.S., 839 F.3d 336, 344 (3d Cir. 2016) (stating that "to survive a motion to dismiss for lack of standing, a plaintiff must allege facts that affirmatively and plausibly suggest that [he] has standing to sue" and that "those facts [must be] pleaded with enough detail to render them plausible, 'well-pleaded' allegations entitled to a presumption of truth" (citations omitted)) (quoting Finkelman v. NFL, 810 F.3d 187, 194 (3d Cir. 2016)).

90. *See generally* Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

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

92. Likewise, at summary judgment the plaintiff should prevail if facts concerning standing are disputed, and *Lujan* acknowledged that a trial might be necessary. *See id.* To be sure, a standing trial would undermine standing's role as a threshold limit on the Court's subject matter jurisdiction. This is virtually unheard of in practice, however, and where the factual question is one of injury it will typically (but not always) merge with the merits. The problem would be considerably worse if plaintiffs were required to establish injury at a particular level of probability. Either this requirement would be a pleading formality in practice, requiring only allegations that the specific probability standard is met, or it would tend to transform a threshold determination into a mini-trial on standing with expert evidence and the like. *See* Leiter, *supra* note 86, at 415 (criticizing the D.C. Circuit's "substantial risk" standard because "plaintiffs bear the burden of establishing the substantiality of the challenged risk in their first substantive filing to the court—a requirement that may necessitate conducting extensive interviews, preparing myriad affidavits, hiring statistical experts, and perhaps even developing new statistical models" (footnotes omitted)). A qualitative standard focused on the plaintiff's relationship to the challenged action, the type of injury alleged, and the ability of the court to decide the case at the present time—which we advocate in Parts II, III, and IV, respectively—is far more susceptible to evaluation on the pleadings.

93. *See, e.g.*, Baur v. Veneman, 352 F.3d 625, 634 (2d Cir. 2003); Courtney M. Cox, *Risky Standing: Deciding on Injury*, 8 NE. U. L.J. 75, 80–84 (2016) (collecting cases).

to risk,[94] but it did not otherwise look to Article III to prescribe which injuries count.

As we explain, Article III rules out some forms of harm as injuries in fact and accepts others—such as physical injury or financial loss—as sufficient without further inquiry. The most interesting category includes those harms that are not universally cognizable but may, depending on the state of the underlying law, suffice for injury in fact in particular circumstances. *TransUnion* acknowledged that present harms arising from exposure to risk, such as emotional distress, may count as injury in fact.[95] Standing doctrine should not rule out these sorts of injuries when the underlying law makes them immediately cognizable—for example, where creation of a risk violates a warranty or some other contractual provision.[96] Our argument thus emphasizes the underappreciated extent to which the substantive law governing a plaintiff's claim remains crucial in defining the interests that count for standing.

Third, once the plaintiff's injury has been appropriately defined and plausibly pleaded, courts should deal with uncertainty as to when or if future injuries are likely to occur through the timing and remedial doctrines. Standing asks whether the plaintiff is the right party to make a particular claim, *not* whether that claim is likely to be successful. It should not require some sort of mini-trial at the threshold. Allegations of uncertain or distant future injuries may, however, impede a court's ability to decide a case effectively. The court may not have all the necessary information to decide the legal issues presented, for example, if it does not know when or how the asserted injury will manifest.[97] Moreover, in constitutional cases, judicial legitimacy might best be preserved if courts avoid exercising their power of judicial review until such exercise is genuinely needed.[98]

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94. *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2205 (2021) ("[U]nder Article III, an injury in law is not an injury in fact."); *id.* at 2210–11 ("[I]n a suit for damages, the mere risk of future harm, standing alone, cannot qualify as a concrete harm . . . .").

95. *See id.* at 2210–11 & n.7 (stating that risk *could* qualify as concrete harm if "the exposure to the risk of the future harm itself causes a *separate* concrete harm" such as "emotional or psychological harm"). *See generally* Rachel Bayefsky, *Psychological Harm and Constitutional Standing*, 81 BROOK. L. REV. 1555 (2016) (discussing this question). The Court has also acknowledged that the cost of reasonable precautions undertaken to prevent or mitigate a risk may serve as injury in fact. *See* Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 154–55 (2010); *see also infra* Section III.C.

96. *See infra* text accompanying notes 227 and 259. *But cf.* Dinerstein v. Google, LLC, 73 F.4th 502, 522 (7th Cir. 2023) ("[A] breach of contract alone—without any actual harm—is purely an injury in law, not an injury in fact. And it therefore falls short of the Article III requirements for a suit in federal court."); F. Andrew Hessick, *Standing and Contracts*, 89 GEO. WASH. L. REV. 298, 313 (2021) ("By *Spokeo*'s reasoning, a plaintiff should not have standing to sue for breach of contract if the breach does not result in some additional factual harm.").

97. *See, e.g.*, United Pub. Workers v. Mitchell, 330 U.S. 75, 90 (1947) (refusing to decide a constitutional challenge to the Hatch Act restricting political activity by federal employees when "[w]e can only speculate as to the kinds of political activity the appellants desire to engage in or as to the contents of their proposed public statements or the circumstances of their publication").

98. *See, e.g.*, Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (invoking the "last resort" rule).

These sorts of concerns are largely prudential, and the doctrine of ripeness—and sometimes of mootness—has the requisite flexibility to deal with them.[99] There is little advantage, and considerable confusion, to having a *second* ripeness doctrine operating within the injury requirement itself.[100] And to the extent that timing doctrines are more prudential in nature than standing, they afford legislatures a potential say in determining when risks of future harm are adjudicated. Similarly, the law of remedies both informs the meaning of standing doctrine and provides an independent check on remote or unlikely harms. Remedial doctrines can and should be left to operate of their own force in many cases.

II. UNCERTAIN EXPOSURE

The Supreme Court has frequently suggested that plaintiffs regulated by or subject to allegedly unlawful action will nearly always have standing to challenge it; any difficulties will typically concern the timing of litigation or the appropriate remedy.[101] In public law litigation, the government's regulation of private actors generally involves coercive action presumptively subject to judicial review.[102] Similarly, standing is rarely a problem in private litigation when the plaintiff is clearly exposed or subject to the challenged behavior, even when the causal link to actual harm is contested on the merits. As we discuss in Parts III and IV, allegations that such actions will cause *future* harm may encounter arguments that the suit should await the manifestation of an injury. But what if it is unclear whether the plaintiff has *ever* been subject to the challenged action, or ever will be in the future? Plaintiffs have struggled to establish standing in this scenario.[103]

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99. *See infra* Section IV.A.

100. *See* Summers v. Earth Island Inst., 555 U.S. 488, 505 (2009) (Breyer, J., dissenting) (urging that temporal imminence is "a requirement more appropriately considered in the context of ripeness or the necessity of injunctive relief"). *See generally* F. Andrew Hessick, *Doctrinal Redundancies*, 67 ALA. L. REV. 635 (2016) (considering the redundancy of ripeness and standing).

101. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 561–62 (1992) ("When . . . the plaintiff is himself an object of the action (or forgone action) at issue . . . there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it."). In other words, these plaintiffs may have ripeness or mootness problems, but they are unlikely to lack standing.

102. *See* Heckler v. Chaney, 470 U.S. 821, 832 (1985); *see also* Sierra Club v. EPA, 292 F.3d 895, 899–900 (D.C. Cir. 2002) (stating that the standing of parties subject to a regulation to challenge it is "self-evident").

103. The primary exception is regulatory beneficiaries, who can sometimes establish standing to sue government actors to require them to regulate third parties more vigorously. *See, e.g.*, Friends of the Earth, Inc. v. Laidlaw Env. Svcs. (TOC), Inc., 528 U.S. 167, 183-84 (2000). Beneficiary plaintiffs face significant hurdles in establishing that their injuries are traceable to the defendant's failure to regulate and that an order requiring more regulation will redress those injuries. *See Lujan*, 504 U.S. at 562 ("When . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else* . . . causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well."). Other cases

Our discussion here distinguishes between two sorts of cases. *Clapper v. Amnesty International, USA* illustrates a category of *undisclosed exposure* in which plaintiffs do not and perhaps cannot know whether they have been subjected to the defendant's allegedly wrongful action.[104] Such cases are unusual; the far more common category involves the *uncertain repetition* of wrongful conduct to which plaintiffs have been subjected in the past, but which may not recur in the future. The plaintiff in *City of Los Angeles v. Lyons*, for example, challenged a police chokehold policy to which he had already been subjected, but which he could not be sure he would ever be subjected to again.[105] In both scenarios, courts have often denied standing on grounds that plaintiffs' claims were too speculative. But we contend that the best solutions in situations like these (to provide sufficient accountability, among other benefits) largely lie outside of conventional standing doctrine—in the law of remedies and timing doctrines of ripeness and mootness, for instance, or in particular institutional arrangements designed to accommodate unique government interests.

A. *Undisclosed Exposure*

Clapper is the leading example of uncertainty concerning whether a general policy has been applied to the plaintiffs challenging it.[106] The *Clapper* plaintiffs were attorneys as well as human rights, labor, and media organizations whose work sometimes required them to communicate with individuals located abroad with suspected ties to terrorism. Plaintiffs alleged that some of the individuals with whom they wished to communicate were likely targets of surveillance under the Foreign Intelligence Surveillance Act (FISA).[107] Plaintiffs challenged the FISA on various grounds—primarily on the ground that it

may involve action by government directed at third parties that may cause adverse downstream impacts on the plaintiffs. In *Murthy v. Missouri*, for example, the plaintiffs alleged that the government had induced third parties to censor them on social media. As that case illustrates, this posture may raise fatal traceability or redressability problems. 144 S. Ct. at 1987–96. The *Murthy* plaintiffs might have avoided this standing problem by suing the social media platforms, to whose actions they were plainly subject. The issue whether the government's actions had really induced the platform's censorship would then have arisen as a matter of state action doctrine, not standing. In any event, cases like *Allen* and *Murthy* involve probabilistic *causation*, not injury, and are thus outside the scope of this Article.

104. Clapper v. Amnesty Int'l USA, 568 U.S. 398 (2013).

105. City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983).

106. *See Clapper*, 568 U.S. at 406–07.

107. *Id.* at 401. *See generally* 50 U.S.C. § 1881(a); Stephen I. Vladeck, *Standing and Secret Surveillance*, 10 I/S: J.L. & POL'Y FOR INFO. SOC'Y 551, 562–63 (2014) (discussing the statutory and factual background of *Clapper*).

allowed authorities to intercept U.S. persons' communications without a warrant or probable cause.[108] The Supreme Court held that the plaintiffs lacked standing.[109]

The *Clapper* plaintiffs faced so many obstacles that any general lessons must be drawn with care. The plaintiffs challenged surveillance that legally could not target *them*,[110] although they might be incidentally surveilled if communicating with a person abroad who *was* targeted. But the plaintiffs did not know *which* non-U.S. persons were actually targeted.[111] Nor could they be sure whether, if they *were* party to a surveilled conversation, the government would rely upon § 1881(a) to justify it (as opposed to other legal bases they had not challenged).[112] And if the government *did* rely on § 1881(a), no one could be sure whether the FISA court would actually approve the government's application and permit the surveillance.[113] The government even argued that *it* could not be sure whether, if it did target plaintiffs' conversations and the FISA court approved that surveillance, the technology would actually *work* and yield intelligible results.[114] Of course, underlying all this, the national security interests involved surely influenced the Court's result.[115] At a minimum, those interests foreclosed the most obvious response to the case's pervasive uncertainties—that is, the Court could not simply require the government to divulge whether and under what circumstances it had surveilled persons with whom the plaintiffs had communicated.

It is hard to say exactly where *Clapper* left the bar for plaintiffs who might be uncertain whether they were subject to a challenged law or policy in other circumstances. In subsequent surveillance cases, plaintiffs' standing has turned on their ability to plead and support specific allegations indicating they are likely to have been surveilled; most, but not all, plaintiffs have failed to

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108. *See Clapper*, 568 U.S. at 406–07; *see also* Vladeck, *supra* note 107, at 563 (discussing the merits of the Fourth Amendment claim).

109. *See Clapper*, 568 U.S. at 422. The Court in *Clapper* relied in part on *Laird v. Tatum*, 408 U.S. 1 (1972), which held a challenge to alleged Army "surveillance of lawful and peaceful civilian political activity" nonjusticiable because the plaintiffs had not alleged that they, in particular, were subject to the Army's alleged activity in any way. *See Laird*, 408 U.S. at 12–14 & n.7.

110. *Clapper*, 568 U.S. at 411.

111. *Id.* at 411–12.

112. *Id.* at 412–13.

113. *Id.* at 413–14.

114. *Id.* at 414.

115. *See id.* at 408–09; Jacobson v. Fla. Sec'y of State, 974 F.3d 1276, 1277 (11th Cir. 2020) (Pryor, J., dissenting) ("*Clapper* presented unique circumstances that do not inform our inquiry here."); Const. Party v. Aichele, 757 F.3d 347, 364 n.21 (3d Cir. 2014) ("*Clapper* addresses the unique realm of national security in which peculiar balance-of-power concerns, which are not present here, abound."); Nash, *supra* note 85, at 1297 (emphasizing "the unique nature of [*Clapper*'s] circumstances"); *see also* Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1077 (2015) (contending that *Clapper* "suggests that the requirements of standing may vary, not just with the provision of the Constitution under which a plaintiff brings suit, but also with the nature of the governmental action or policy that a plaintiff seeks to challenge").

meet this burden.[116] Because national security barriers will often prevent disclosure of critical evidence concerning whether plaintiffs have been subjected to allegedly unlawful government actions,[117] the primary checks on secret government actions will likely come through the political process, expansion of checks internal to the FISA program, or criminal proceedings where the government actually seeks to use evidence acquired by surveillance.[118]

Clapper has been widely cited as "the leading case on claims of standing based on risk of future injury."[119] We contend, however, that the specific holding in *Clapper* should have little impact outside the rather special context of secret government surveillance. Ordinarily, plaintiffs challenging a general government policy know whether they have been subjected to that policy—or at least they ought to be able to find out through discovery requests early in the lawsuit. Secret surveillance is trickier, of course, because revealing that a party is subject to surveillance will generally cause the surveillance to fail or reveal the government's methods to other targets.[120] There may be other situations in which government interests in secrecy or confidentiality foreclose

116. *Compare* Wikimedia Found. v. Nat'l Sec. Agency/Cent. Sec. Serv., 14 F.4th 276 (4th Cir. 2021) (holding that plaintiffs established a dispute of material fact concerning whether they were subject to secret surveillance, thus surviving government's motion for summary judgment for lack of standing, but dismissing the case under the state secrets privilege), *with* Schuchardt v. President of the U.S., 802 F. App'x 69 (3d Cir. 2020) (affirming grant of summary judgment on standing grounds where plaintiff could not produce evidence to support specific allegations that had gotten him past a motion to dismiss). *See generally* Vladeck, *supra* note 107, at 567 (noting "the exceptionally high bar *Clapper* imposes before plaintiffs will be able to challenge secret government surveillance programs going forward").

117. *See Wikimedia*, 14 F.4th at 301–04 (holding that the state secrets privilege forbade any further disclosures that could support plaintiffs' assertion that they had been subject to government surveillance); Kareem v. Haspel, 986 F.3d 859, 861–64, 866 (D.C. Cir. 2021) (holding that journalist claiming to have narrowly escaped five U.S. bombings lacked standing because he could not establish that he had been targeted by the government).

118. *See* Vladeck, *supra* note 107, at 569–75 (discussing possible reforms to the process for challenging surveillance applications before the FISA court).

119. Attias v. Carefirst, Inc., 865 F.3d 620, 626 (D.C. Cir. 2017); s*ee also* James C. Chou, Note, *Cybersecurity, Identity Theft, and Standing Law: A Framework for Data Breaches Using Substantial Risk in a Post-*Clapper *World*, 7 AM. U. NAT'L SEC. L. BRIEF 120, 157 (2017) ("[M]any courts have applied the rigorous 'certainly impending' standard to almost all post-*Clapper* cases of heightened risk, defending this practice as applying the constitutionally minimum threshold.").

120. *See* Vladeck, *supra* note 107, at 570 ("[I]t would logically defeat the purpose of secret surveillance programs if those programs could be challenged in visible, public litigation in which plaintiffs presumably seek to discover information concerning the existence and scope—and sources and methods—of the government's surveillance.").

certainty about whether plaintiffs are subject to a challenged law or policy,[121] but we are not aware of many.[122]

Whether or not a plaintiff is *subject* to the law they challenge is foundational to standing. A plaintiff ordinarily "has standing to seek redress for injuries done to him but may not seek redress for injuries done to others."[123] This principle is "a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome."[124] The Court in *Clapper* enforced this basic requirement with considerable rigor. It is much harder, however, to justify applying *Clapper*'s rule to situations in which the plaintiff has already *been* subject to the challenged action in the past or is quite likely to be subject to it in the future and the question involves the probability of *harm*.

B. *Uncertain Repetition of Prior Exposure*

A more common scenario involves challenges to executive action based on past incidents that may or may not recur in the future. Plaintiffs in this scenario typically seek to enjoin officers' future behavior but struggle to show that recurrences are likely to affect them in particular. As Professor Fallon notes, these cases often involve broad allegations of racially tinged police misconduct, thus implicating "questions of enormous practical and political significance" that concern "[t]he scope of judicial oversight of institutional behavior."[125]

The leading case is *City of Los Angeles v. Lyons*.[126] Adolph Lyons alleged that police officers stopped him for a traffic infraction and, without provocation, placed him in a chokehold that rendered him unconscious and damaged

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121. The Securities Exchange Act, for example, requires the Securities and Exchange Commission to maintain the confidentiality of whistleblowers, subject to certain exceptions. 15 U.S.C. § 78u-6(h)(2)(A). It is thus possible that a party wishing to challenge the whistleblower provision could not find out whether it had, in fact, been subject to an SEC action based on information provided by a whistleblower.

122. In *FBI v. Fikre*, 144 S. Ct. 771 (2024), which concerned mootness, there was uncertainty about the considerations that the government might use in deciding whether to put the plaintiff back on the "no fly" list. This uncertainty, the Court reasoned, meant that it was not clear that the removal of the plaintiff from the list rendered the case moot. *See id.* at 778 ("[T]he government's sparse declaration falls short of demonstrating that it cannot reasonably be expected to do again in the future what it is alleged to have done in the past.").

123. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 166 (1972). In *Moose Lodge*, the plaintiff had been denied service at a private club that he had attended as a guest, but he had never applied for membership. The Court said that he had standing to challenge the club's guest policies but not its membership policies. *Id.* at 164–68. Exceptions to this principle are generally narrow. *See generally* Bradley & Young, *supra* note 15, at 63–67.

124. Sierra Club v. Morton, 405 U.S. 727, 740 (1972); *see also* Allen v. Wright, 468 U.S. 737, 756 (1984) (arguing that a contrary rule "would transform the federal courts into 'no more than a vehicle for the vindication of the value interests of concerned bystanders' " (quoting United States v. SCRAP, 412 U.S. 669, 687 (1973))).

125. Fallon, *Lyons*, *supra* note 75, at 7–8.

126. City of Los Angeles v. Lyons, 461 U.S. 95 (1983).

his larynx.[127] Lyons claimed damages based on that encounter, but he also sought injunctive and declaratory relief against an alleged city policy of "regularly and routinely apply[ing] these choke holds."[128] Alleging that "numerous persons" had been injured as a result of this policy, Lyons claimed that he "justifiably fear[ed] that any contact he has with Los Angeles Police officers may result in his being choked and strangled to death without provocation, justification or other legal excuse."[129] Lyons thus sought a declaration that the chokeholds were unconstitutional and an injunction against their use. The Supreme Court, however, held that he lacked standing to seek the injunction. "Absent a sufficient likelihood that he will again be wronged in a similar way," the Court said, "Lyons is no more entitled to an injunction than any other citizen of Los Angeles."[130]

Lyons resonates with current controversies about police tactics and misconduct, and its holding parallels other significant decisions rejecting standing to challenge allegedly racist administration of a local judicial system.[131] It is an uncertain exposure case, even though Mr. Lyons alleged that his mistreatment occurred pursuant to a general policy of the LAPD,[132] because it remained hard to know which persons would actually become subject to the policy in the future.[133] Courts have found standing particularly problematic when, as in *Lyons*, future exposure to the unlawful government policy may turn on conduct by the plaintiff that is itself unlawful.[134]

The most straightforward way to challenge policies like the LAPD's is to seek damages based on a past encounter with the police. Mr. Lyons had already been exposed to the chokehold policy; he had a live damages claim and unquestioned standing to bring it.[135] Success on such a claim would yield not

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127. *Id.* at 97–98.

128. *Id.* at 98.

129. *Id.*

130. *Id.* at 111.

131. *See, e.g.*, Rizzo v. Goode, 423 U.S. 362 (1976); O'Shea v. Littleton, 414 U.S. 488 (1974). Mr. Lyons did allege a race discrimination claim, noting that "in a city where Negro males constitute 9% of the population, they have accounted for 75% of the deaths resulting from the use of chokeholds." *Lyons*, 461 U.S. at 116 n.3; *see also* Brandon Garrett, Note, *Standing While Black: Distinguishing* Lyons *in Racial Profiling Cases*, 100 COLUM. L. REV. 1815 (2000).

132. *Lyons*, 461 U.S. at 106 & n.7; *see also id.* at 113–14 (Marshall, J., dissenting).

133. *See* HART & WECHSLER, *supra* note 6, at 232–33.

134. *See, e.g.*, United States v. Sanchez-Gomez, 138 S. Ct. 1532, 1541 (2018) (stating the Court's "assum[ption] that [litigants] will conduct their activities within the law" and thus "avoid . . . exposure" to allegedly unlawful practices that occur within the criminal justice process (second alteration in original) (quoting *O'Shea*, 414 U.S. at 497)). It is not immediately obvious why this should be so. After all, we allow litigants to allege their intent to violate a particular criminal law in order to challenge it. *See, e.g.*, United Pub. Workers v. Mitchell, 330 U.S. 75, 83–84, 90–91 (1947) (holding that ripeness barred a challenge to a law where the plaintiffs had not specifically alleged *how* they intended to violate it in the future without questioning the plaintiffs' standing to bring the challenge simply because it depended on future actions that would violate the law).

135. *Lyons*, 461 U.S. at 105.

only compensation but an adjudication that the chokehold was illegal.[136] That adjudication would be *res judicata* in any future litigation with the City; depending on the scope of the decision, it might encourage a change in policy. Commentary has likely discounted the value of a damages judgment on the assumption that qualified immunity would prevent success.[137] But if Lyons could prove a systemic policy of chokeholds, qualified immunity would not bar relief against the City.[138] To the extent that civil rights actions are often brought by victims of past abuse, damages claims may provide a valuable means of adjudicating the legality of police practices.[139]

The central question in *Lyons* and similar cases, however, is whether plaintiffs have standing to seek *prospective* relief establishing that the defendant's actions are illegal and enjoining similar acts in the future. The circuits have generally required plaintiffs to show that they are more likely than the general public to be subjected to the challenged government action in the future.[140] This pragmatic standard serves the intuition to seek out the best available plaintiff, but the Court has also made clear that that the lack of a *better* plaintiff will not always guarantee standing.[141] More fundamentally, the circuits' rule leaves difficult questions not only as to *how* likely a future encounter must be but also as to how a court can assess that likelihood accurately. Article III standing

136. *See id.* at 111 ("The legality of the violence to which Lyons claims he was once subjected is at issue in his suit for damages and can be determined there.").

137. For critiques of qualified immunity, see, for example, Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018), and William Baude, *Is Qualified Immunity Unlawful?* 106 CALIF. L. REV. 45 (2018). Qualified immunity is not insuperable. *See, e.g.*, Lombardo v. City of St. Louis, 141 S. Ct. 2239 (2021); Taylor v. Riojas, 141 S. Ct. 52 (2020) (per curiam). And courts retain discretion to resolve the legality of the defendant officer's conduct prior to considering the immunity question. Pearson v. Callahan, 555 U.S. 223, 242 (2009).

138. *See* Owen v. City of Independence, 445 U.S. 622, 638 (1980) (holding that local governments lack qualified immunity in suits under 42 U.S.C. § 1983); Monell v. Dept. of Soc. Servs., 436 U.S. 658, 694 (1978) (holding local governments liable under § 1983 for injuries inflicted by "execution of a government's policy or custom").

139. To the extent that damages actions are *not* likely to succeed, moreover, the general problem stems less from standing doctrine than from doctrines of qualified immunity and the difficulty of proving municipal policy or custom. Those rules, unlike Article III, are subject to statutory alteration. *See* Baude, *supra* note 137, at 82–88 (describing the Supreme Court's recent expansion of qualified immunity defenses to suits seeking damages for officials' misconduct); Schwartz, *supra* note 137, at 1798 (same); *Monell*, 436 U.S. at 691 (stating that a municipal liability claim requires showing the unconstitutional practice is "so permanent and well settled as to constitute a 'custom or usage' with the force of law").

140. *See, e.g.*, Brown v. Edwards, 721 F.2d 1442, 1446 (5th Cir. 1984) (finding no standing when "nothing in the record suggests, that Brown is . . . more likely than any other Mississippian, to be again subjected to arrest or charging"); Garrett, *supra* note 131 (discussing post-*Lyons* litigation).

141. *Compare* Richard M. Re, *Relative Standing*, 102 GEO. L.J. 1191 (2014) (arguing that courts should apply a "most interested plaintiff" rule), *with* Thole v. U.S. Bank N.A., 140 S. Ct. 1615, 1621 (2020) (stating that "this Court has long rejected" arguments that standing should be allowed on the ground that if the plaintiff lacked standing, no other party would likely be able to challenge the action in question).

doctrine, we contend, is too categorical an instrument to accommodate the nuances that pervade such cases.

We suggest that when plaintiffs have *already* been subject to the government action they wish to challenge—and have a live damages claim—that should satisfy Article III.[142] Even if a plaintiff's prior encounter does not give rise to compensable damages, they should at least receive nominal damages that suffice for constitutional purposes.[143] There is, in this situation, a "case or controversy" for purposes of Article III. The problems that arise in such cases are rather ones of timing and remedy: Does the cessation of the defendant's action render a claim for injunctive relief moot? Is a future repetition of the action insufficiently certain or imminent to make a claim for declaratory or injunctive relief ripe? Can the plaintiff show the irreparable harm necessary to support an injunction? The law of remedies and the prudential aspects of mootness and ripeness are more flexible instruments than Article III's jurisdictional standing requirements. They can thus better accommodate the disparate interests at stake in cases of sporadic unlawful actions by government officers.

Start with remedies: The likelihood and severity of future violations of a plaintiff's rights are the bread and butter of remedial inquiries as to the appropriateness of injunctive relief. Arguably, once a past encounter between the parties creates a live controversy over damages, whether the plaintiff is entitled to other relief is *purely* a remedial question. And the law of remedies furnishes a range of options that can be calibrated to the circumstances of particular cases. As *Lyons* suggests, only extraordinarily compelling circumstances might justify an intrusive structural injunction mandating federal judicial supervision of state and local institutions.[144] A prohibitory injunction—for example, "No chokeholds absent a clear threat to police officers"—would be less intrusive and perhaps require less imminence or less severe harm, although concerns about judicial second-guessing would remain.

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142. *Cf. Murthy*, 144 S. Ct. at 1987 ("[B]ecause the plaintiffs are seeking only forward-looking relief, the past injuries are relevant only for their predictive value.").

143. *See* Uzuegbunam v. Preczewski, 141 S. Ct. 792 (2021). *Uzuegbunam*'s rule that "a party whose [legal] rights are invaded can always recover nominal damages without furnishing any evidence of actual damage," and such nominal damages satisfy the redressability prong of Article III standing, *id.* at 800–02, is not easy to square with *TransUnion*'s rejection of the violation of a legal right as sufficient for injury in fact. *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2205 (2021) ("[U]nder Article III, an injury in law is not an injury in fact."). After all, Justice Thomas—who wrote for the majority in *Uzuegbunam*—dissented in *TransUnion* on this ground. *Id.* at 2218–19 (Thomas, J., dissenting). The key point, to our mind, is that *Uzuegbunam* was a *mootness* case in which the plaintiff's injury in fact at the outset of litigation was conceded and the question was whether, later on, any remedial claim remained viable. *See Uzuegbunam*, 141 S. Ct. at 797. In *TransUnion*, by contrast, the plaintiffs held to lack standing had *never* yet incurred a sufficient injury in fact. *See Transunion*, 141 S. Ct. at 2198. As the discussion in the text explains, the perspective of mootness is critical in assessing whether one remedy can sustain a lawsuit when another remedy drops out.

144. *See* City of Los Angeles v. Lyons, 461 U.S. 95, 112–13 (1983); *see also* O'Shea v. Littleton, 414 U.S. 488, 500–02 (1974).

Likewise, if a plaintiff can show injury from a past encounter, a declaratory judgment concerning the illegality of the defendant's past conduct should be broadly available. After all, the past encounter surely satisfies the only statutory requirement—"a case of actual controversy within [the court's] jurisdiction."[145] Such a binding declaration may be valuable to a plaintiff if unlawful conduct recurs, both for establishing a violation of clearly established law and as a basis for a future injunction. And of course, such a declaration could be written narrowly to address only a particular fact pattern, if a more general ruling about legality was inadvisable. The important point is simply that a remedial frame presents courts with a range of options rather than an all-or-nothing judgment on standing.

The barrier to treating sporadic government legal violations as primarily a remedial problem is the "remedial standing" rule attributed to *Lyons* itself. Subsequent decisions have cited *Lyons* for the proposition that "a plaintiff must demonstrate standing separately for each form of relief sought"[146]—language that might plausibly mean either of two different things. First, it might mean that a plaintiff who seeks multiple forms of relief—say, damages and an injunction—must establish standing separately for each of them and might well be found to have standing with respect to one and lack it for the other. Second, it might mean that the *requirements* for standing differ depending upon the remedy sought—for example, some sorts of injuries might support standing to seek an injunction, but not damages. But one might accept this latter principle and still say that once a plaintiff has established standing to seek one form of relief, that makes a case or controversy, and the availability of additional relief is simply a question of remedies. The Supreme Court has emphasized the second principle as recently as *TransUnion*, holding that a risk of future injury could establish standing to seek injunctive relief but did not suffice in a case seeking only damages.[147] It has never, to our knowledge, applied the first principle to hold that a plaintiff seeking multiple remedies has standing to seek some remedies but not others, although some lower courts seem to have done so.[148] We contend that the second principle is a valuable

145. 28 U.S.C. § 2201.

146. Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 185 (2000); *see also, e.g.*, *TransUnion*, 141 S. Ct. at 2210; Town of Chester v. Laroe Ests., Inc., 581 U.S. 433, 439 (2017); Davis v. Fed. Election Comm'n, 554 U.S. 724, 734 (2008). The Court has contended that "standing is not dispensed in gross," but that is consistent with an alternate reading of the remedial standing rule as simply affirming that standing requirements *differ* depending on whether the plaintiff seeks retrospective or prospective relief. Lewis v. Casey, 518 U.S. 343, 358, n.6. If plaintiffs have standing to seek damages, whether they can also get an injunction should be seen as a problem of remedy, not standing.

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

148. *See, e.g.*, Williams v. Reckitt Benckiser LLC, 65 F.4th 1243, 1253–57 (11th Cir. 2023); Waskul v. Washtenaw Cnty. Cmty. Mental Health, 900 F.3d 250, 255 (6th Cir. 2018). For a private law analog to *Lyons*, see *Freeman v. MAM USA Corp.*, 528 F. Supp. 3d 849 (N.D. Ill. 2021), in which a parent sued a producer of "orthodontic" pacifiers for falsely advertising that the product would benefit her son's dental health. The court held that the plaintiff obviously had standing to seek damages, but that she lacked standing to seek injunctive relief because she was now aware

insight, but the first misreads *Lyons* and creates inconsistencies with other relevant doctrines.

To begin, Justice White's majority opinion in *Lyons* articulated no remedial standing rule whatever. But it could not support the first reading of that rule, other than in dictum. Because Mr. Lyons's damages claim had been severed from his claim for injunctive relief—and only the latter appealed—the Court had only one form of relief before it and did not consider whether Lyons could have grounded standing in the claim of damages for past unlawful conduct.[149] It would be strange not to permit him to do so. Once a plaintiff has standing to bring one claim for relief, there is a case or controversy permitting the Court to resolve his legal claim. A request for an additional remedy is not a distinct substantive claim over which a court might lack jurisdiction, and it makes more sense to treat the availability of another form of relief as strictly a question of remedy.

At a minimum, the remedial standing doctrine should be considered prudential in nature, rather than constitutional, because it goes to which claims a party can make in litigation, not to the court's ability to hear the dispute at all.[150] Consider a case in which a party with a live damages claim against the local police moves permanently out of the jurisdiction, so that there is no likelihood of a future encounter supporting his claim for injunctive relief.[151] That case comes within Article III because the plaintiff has an injury in fact from his prior encounter with the police. But the argument for injunctive relief would rest on the rights of *other* persons who might be injured by police misconduct in the future, and it would properly run afoul of the general rule disfavoring third-party standing.[152] That rule is a prudential one, and courts may set it aside for countervailing prudential reasons.[153]

Justiciability's timing doctrines, ripeness and mootness, reflect this same prudential flexibility.[154] Scholars have debated whether dismissal in a case like

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of the falsity of the defendant's health claims and thus faced no risk of future harm. *See Freeman*, 528 F. Supp. 3d. at 853, 856–58. *But see* Davidson v. Kimberly-Clark Corp., 889 F.3d 956, 969–70 (9th Cir. 2018) (allowing suit for injunctive relief despite plaintiff's knowledge that the advertising was false because the plaintiff might either end up relying on the advertising in the future in the belief that it was no longer false or might avoid buying the product altogether because of uncertainty about what representations they can trust).

149. *See Lyons*, 461 U.S. at 105 n.6.

150. *Cf.* Bradley & Young, *supra* note 15, at 26 (noting that the prudential rule against third-party standing concerns "what arguments or legal principles a party can raise as a claim or defense" rather than "who has the right to invoke the power of a court").

151. *Cf.* Camreta v. Greene, 563 U.S. 692, 697–98 (2011) (holding that a dispute over a standard governing child welfare officers became entirely moot once the plaintiff's damages claim failed on qualified immunity grounds and plaintiff moved permanently out of the defendant's jurisdiction).

152. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 499 (1975).

153. *See, e.g.*, June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2117–19 (2020) (plurality opinion); Bradley & Young, *supra* note 15, at 17–25.

154. Whether ripeness and mootness are *entirely* prudential is an interesting question but outside the scope of our present effort. *See, e.g.*, HART & WECHSLER, *supra* note 6, at 201–02;

Lyons should rest on standing, ripeness, or mootness.[155] When a plaintiff clearly has been or is being subjected to the defendant's challenged action or policy, remaining temporal uncertainties generally are—and should be—resolved under the timing doctrines. As Professor Fallon pointed out in his article on *Lyons*, "the issue arising from the passage of time after an acknowledged injury, sufficient at some moment to confer standing, easily could have been analyzed as one of mootness instead of standing."[156]

Three settled aspects of mootness doctrine are relevant. First, once a plaintiff has established a basis for being in federal court, "a case 'becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party' "; "[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot."[157] These standards are plainly easier to meet than the standard for establishing standing in the first instance. In a case like *Lyons*, they would ask whether the plaintiff can make a case for any meaningful form of prospective relief. Second, where plaintiffs were subjected to unlawful action in the past, mootness doctrine does not require them to establish standing afresh to forestall a potential recurrence. Rather, the defendant must shoulder the " 'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to" recur.[158] Finally, although recurrences must affect the same plaintiff, the standard is simply whether "there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again."[159] These principles illustrate that, simply because claims arising out of a past encounter with the defendant may have become moot, the plaintiff need not start back at square one to establish standing to enjoin a recurrence of the defendant's conduct.

Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603 (1992). We rely on aspects of mootness and ripeness here that are generally viewed as not "forced upon us by the case or controversy requirement of Art. III itself." Honig v. Doe, 484 U.S. 305, 330 (1988) (Rehnquist, C.J., concurring).

155. *E.g.*, HART & WECHSLER, *supra* note 6, at 234 (suggesting that *Lyons* could be viewed as any of the three).

156. Fallon, *Lyons*, *supra* note 75, at 24.

157. Chafin v. Chafin, 568 U.S. 165, 172 (2013) (quoting Knox v. Serv. Emps. Int'l Union, Loc. 1000, 567 U.S. 298, 307–08 (2012)); *accord* N.Y. State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525, 1533 (2020) (Alito, J., dissenting). Citing *Chafin*, the Court emphasized this point recently in *Moore v. Harper*, 143 S. Ct. 2065, 2077 (2023).

158. Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), 528 U.S. 167, 189 (2000) (quoting United States v. Concentrated Phosphate Exp. Ass'n, 393 U.S. 199, 203 (1968)).

159. Turner v. Rogers, 564 U.S. 431, 440 (2011) (quoting Weinstein v. Bradford, 423 U.S. 147, 149 (1975) (per curiam)). The Court has held that "the mootness exception for disputes capable of repetition yet evading review . . . will not revive a dispute which became moot before the action commenced," Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 109 (1998) (quoting Renne v. Geary, 501 U.S. 312, 320 (1991), but it is far from clear that that rule should apply to particular remedies in a case with concededly live claims.

Cases like *Lyons* also implicate ripeness, because plaintiffs in these cases ask a court to consider future events. Ripeness doctrine helpfully shifts the inquiry away from pure (and intractable) questions of probability to more manageable questions about the court's ability to decide the case now and the impact on the parties if it chooses to wait. If Mr. Lyons had sought pre-enforcement review of LAPD's chokehold policy, ripeness doctrine would have required him to establish that the issues were fit for judicial review and that he would experience hardship if forced to litigate after the policy had been applied to him in the future.[160] The fact that he had *already* been subjected to the policy would both tee up the issues in a concrete factual setting and allow him to argue that he should not be exposed to the risk of further physical injury. Conversely, if future occurrences were likely to be quite different from the past incident, then a court might appropriately hold claims for prospective relief to be premature.

These prudential rules should govern where, unlike in *Lyons*, a live damages claim is still part of the case. But our fundamental point is that the *probability* problem in cases like *Lyons* cannot be solved by trying to establish a threshold likelihood of injury. Standing doctrine should not duplicate the work already done by remedial law and temporal doctrines like ripeness or mootness. We take up the latter point again below in Part IV, but first we consider the question whether careful definition of injury in the first place can reduce the scope of the problem.

III. Uncertain Harm and Cognizable Injury

What if the plaintiff is subject to the challenged action but not certain to be harmed? Canonical statements of the injury-in-fact requirement have long said that the injury must be "actual or imminent, not conjectural or hypothetical,"[161] or "certainly impending."[162] Courts have employed this language—which speaks to both certainty and temporal proximity[163]—as a limit when the plaintiff grounds injury in a future harm. But, as Professor Cox has noted, "what is meant by 'imminent' or 'certainly impending' remains ambiguous, poorly defined, and inconsistently applied."[164] No one seems to know *how* certain, or *how* imminent, an injury has to be. And what is the relationship between the imminence requirement, which seems like a mini-ripeness doctrine within the standing criteria, and the ripeness doctrine itself?

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160. Abbott Lab'ys v. Gardner, 387 U.S. 136, 148–49 (1967).

161. Spokeo, Inc. v. Robins, 578 U.S. 330, 339 (2016) (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992)).

162. Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158 (2014) (quoting Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013)).

163. Cox, *supra* note 93, at 79. As Professor Cox notes, these two concepts "are related in that, intuitively, the closer temporally the threatened harm is, the greater the certainty that the harm will occur because there is less time for other events to intervene." *Id.* at 79 n.20.

164. *Id.* at 79.

A. *Probability and the Definition of Injury*

To evaluate the imminence or probability of injury, one must know what kind of injury counts for purposes of Article III. Consider, for example, the range of injuries at issue in *TransUnion*. The named plaintiff, Sergio Ramirez, suffered a good old-fashioned tangible injury when he was denied the opportunity to buy a car based on the erroneous OFAC alert in his credit report.[165] In Ramirez's case, that injury is certain—it had already occurred when he filed suit. No such tangible injury had yet happened to the larger group of 1,852 class members. But because TransUnion had disseminated erroneous information about them to third-party businesses, that group stood at risk of similar harm in the future.[166] This depended, however, upon the reaction of those businesses to the misinformation—it depended, in other words, on the behavior of third parties not before the court. The 6,332 remaining class members bore a similar risk, because their credit files likewise contained a false OFAC alert. But that risk was less imminent (and also somewhat less likely) because no OFAC alert had yet been disseminated to third-party businesses during the class period.[167]

The *TransUnion* majority saw a tangible injury like Ramirez's as sufficient but not necessary for injury in fact. Rather, they accepted the plaintiffs' argument that "publication to a third party of a credit report bearing a misleading OFAC alert injures the subject of the report" in a way closely analogous to the reputational harm of defamation.[168] That injury sufficed for standing, and it was just as certain as Ramirez's injury, having already occurred. For the remaining class members, however, this reputational injury remained probabilistic. These plaintiffs argued that, because a similar misleading alert might well be disseminated to third parties in the future, "the existence of misleading OFAC alerts in their internal credit files exposed them to a material risk that the information would be disseminated in the future to third parties and thereby cause them harm."[169] The Court held that such a risk is not, by itself, a sufficient injury for purposes of Article III standing to seek damages.[170]

Injuries can be defined in different ways, even on the same basic facts, and the choice of definition can significantly affect the probability of the respective injuries. But some capacious forms of injury tend to obviate the probability problem altogether. The 6,332 residual plaintiffs *did* arguably have an injury that had already occurred: the violation of their *legal* right under the FCRA

165. *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2215–16 (2021) (Thomas, J., dissenting) (describing these events in more detail).

166. *Id.* at 2208.

167. *Id.*

168. *Id.*

169. *Id.* at 2210.

170. *Id.* at 2210–11; *see, e.g.*, Maddox v. Bank of N.Y. Mellon Tr. Co., 19 F.4th 58 (2d Cir. 2021) (holding that a state law claim for statutory damages failed to meet Article III standing requirements because the defendant's failure to record satisfaction of a mortgage on time exposed the plaintiffs to risk but caused them no concrete harm).

not to have false or misleading information included in their files. The dissenters argued that such a purely legal injury is sufficient, as long as the injury is to private, rather than public, rights.[171] The majority, by contrast, insisted that "under Article III, an injury in law is not an injury in fact."[172]

Another possibility is that *risk* of harm should be deemed a cognizable injury in fact. In *TransUnion*, all class members faced a risk that they would experience tangible harm like Ramirez's. Defining risk as injury avoids the need to describe the injury itself as probabilistic; we know for sure, in *TransUnion*, that the risk exists at the present moment.[173] Similarly, the class members might have argued—although apparently they did not—that TransUnion's FCRA violation caused them *present* distress or forced them to incur present expenses to guard against future reputational damage. Recognizing these sorts of present injuries would likewise dissolve any doubts about the probability of future injury.

Much discussion of these various classes of injury has asked whether risk, or costly precautions, or anxiety simply "is" or "is not" a cognizable injury for Article III purposes. We would resist that approach on the principle that Article III is not a font of tort law[174] (or contract or property law either)—that is, it does not purport to define the interests that give rise to cognizable injuries. Article III's text alone offers no guidance as to which interests are in or out. The Court has instead looked to tradition, considering whether an alleged harm has a "close relationship" to injuries historically "recognized as providing a basis for a lawsuit in American courts."[175] Consistent with this statement, much of the law structuring the federal judicial system looks to historical practice and the practice of the state courts, while leaving a considerable say to Congress.[176] The Court's standing jurisprudence establishes a kind of reflective equilibrium between the injuries generally recognized in federal and state positive law, including the English common law background, and the more specific values of Article III standing jurisprudence, which usually sound in separation of powers.

TransUnion thus embraced two principles for evaluating possible injuries as a basis for Article III standing that push in different directions. First, the

171. *TransUnion*, 141 S. Ct. at 2217–18 (Thomas, J., dissenting).

172. *Id.* at 2205.

173. *See* Sunstein, *After* Lujan, *supra* note 18, at 228 (noting that characterizing the injury "as a greater risk of cancer" makes "the injury less speculative; but it is unclear that it is sufficiently particularized").

174. *Cf.* Paul v. Davis, 424 U.S. 693, 701 (1976) (warning against making the Due Process Clause of the Fourteenth Amendment "a font of tort law to be superimposed upon whatever systems may already be administered by the States").

175. *TransUnion*, 141 S. Ct. at 2208.

176. *See generally* Young, *Judicial Power*, supra note 67, at 572 ("Federal courts law incorporates the English common law and equitable practice . . . as a pragmatic solution to the generality of the Article III judicial power and its instantiation in the various judiciary acts.").

injuries that count for standing will often be a function of the underlying substantive law.[177] "Congress's views may be 'instructive'" in "determining whether a harm is sufficiently concrete to qualify as an injury in fact," and "[c]ourts must afford due respect" to legislative choices in this area.[178] The Court looked to the common law to see if a plaintiff's injury "bears a 'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts."[179] Second, the Court insisted that Article III imposes a floor on interests that can count for standing. Congress "may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is."[180] Analysis of particular classes of injury must take its cues from the underlying substantive law yet appreciate that Article III imposes an independent constraint.[181]

The case law reveals three categories of interests. The first consists of interests that are clearly *in*, such as property and liberty interests and other interests traditionally protected by the common law. When plaintiffs can show physical injury or financial loss occasioned by a defendant's conduct, courts do not usually look to see if there is some further legal recognition of the plaintiffs' harm before concluding that they have injury in fact.[182] The second category encompasses interests that are clearly *out*—that is, that cannot establish injury in fact even if Congress enacted a statute purporting to protect them.

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177. *See generally* Fletcher, *supra* note 39, at 239 ("The essence of a standing inquiry is . . . the meaning of the specific statutory or constitutional provision upon which the plaintiff relies rather than a disembodied and abstract application of general principles of standing law."); David P. Currie, *Misunderstanding Standing*, 1981 SUP. CT. REV. 41, 47 ("[T]he proper inquiry in nonconstitutional standing cases is whether the law grants the plaintiffs 'a right to judicial relief.'" (quoting Warth v. Seldin, 422 U.S. 490, 500 (1975)).

178. *TransUnion*, 141 S. Ct. at 2204 (quoting Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016)); *see also Spokeo*, 578 U.S. at 341 ("Congress is well positioned to identify intangible harms that meet minimum Article III requirements . . . .").

179. *TransUnion*, 141 S. Ct. at 2208 (quoting *Spokeo*, 578 U.S. at 330).

180. *Id.* at 2205 (quoting Hagy v. Demers & Adams, 882 F.3d 616, 622 (6th Cir. 2018)).

181. The constraint applies to state law claims brought in federal court as well as federal law claims. *See, e.g.*, O'Leary v. TrustedID, Inc., 60 F.4th 240 (4th Cir. 2023) (holding that there was no standing to assert a claim for a breach of a South Carolina state statute because the claim involved "a bare statutory violation"); *cf.* Webb v. Injured Workers Pharmacy, LLC, 72 F.4th 365 (1st Cir. 2023) (upholding standing to assert state law claims relating to a data breach where "the complaint plausibly alleges an imminent and substantial risk of future misuse of the plaintiffs' [personal information]"). On the other hand, *state* standing rules may well permit both state and federal claims for "bare statutory violations" to be brought in state court. *See* Thomas B. Bennett, *The Paradox of Exclusive State-Court Jurisdiction over Federal Claims*, 105 MINN. L. REV. 1211 (2021); Rebekah G. Strotman, Note, *No Harm, No Problem (In State Court): Why States Should Reject Injury in Fact*, 72 DUKE L.J. 1605, 1609–10 (2023).

182. *See, e.g.*, Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 642 (2007) (Souter, J., dissenting) (suggesting that "[i]n the case of economic or physical harms, of course, the 'injury in fact' question is straightforward," while other forms of harms "must be evaluated case by case"); Rachel Bayefsky, *Constitutional Injury and Tangibility*, 59 WM. & MARY L. REV. 2285, 2292 (2018) (arguing that the Court's "distinction between tangible and intangible harm reflects an effort to identify a set of uncontroversially legitimate human interests that would justify courts in reordering the status quo").

Interests of this kind typically involve some sort of generalized grievance, such as "harm to . . . every citizen's interest in proper application of the Constitution and laws."[183] Likewise, the Court has "consistently held" that taxpayers' interest in the use of tax monies for lawful purposes "is too generalized and attenuated to support Article III standing."[184]

The most interesting category consists of interests that are not obviously cognizable but which positive law may recognize as actionable and thus cognizable under Article III.[185] One example is the FCRA's transformation of an interest in reputation. In *TransUnion*, the credit-reporting company argued that the erroneous information included in the plaintiffs' credit reports was merely misleading, while the common law of defamation required actual falsity.[186] The Court responded that although a plaintiff's injury must bear "a 'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts, we do not require an exact duplicate."[187] Within certain bounds, in other words, Congress may by statute expand the set of actionable harms beyond claims that the common law would have recognized as sufficient for liability.[188] The Court thus concluded that "the harm from a misleading statement of this kind bears a sufficiently close relationship to the harm from a false and defamatory statement."[189] In contrast, for those plaintiffs whose credit files had not yet been accessed by third parties, there was "no historical or common-law analog where the mere existence of inaccurate information, absent dissemination, amounts to concrete injury."[190]

This approach is similar to what Tom Merrill has called a "patterning definition" in the context of property interests protected under the Due Process Clause.[191] That clause generally does not itself *create* property interests, but it

183. Lujan v. Defs. of Wildlife, 504 U.S. 555, 573–74 (1992); *see also* Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 720–24 (2004).

184. *Hein*, 551 U.S. at 599. The *TransUnion* majority appeared to worry that allowing standing based on purely legal injuries would allow Congress effectively to authorize litigation of generalized grievances. *See TransUnion*, 141 S. Ct. at 2206.

185. *See Lujan*, 504 U.S. at 578 (noting Congress's authority to "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law"). This framework parallels the Supreme Court's treatment of liberty and property interests in procedural due process cases. *See* HART & WECHSLER, *supra* note 6, at 518–20.

186. *See TransUnion*, 141 S. Ct. at 2209 (citing Restatement (First) of Torts, § 559 (1938)).

187. *Id.* at 2209. The "close relationship" language appears to originate in *Spokeo*. See 578 U.S. at 341.

188. *See also Spokeo*, 578 U.S. at 341 ("[B]ecause Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important.").

189. *TransUnion*, 141 S. Ct. at 2209.

190. *Id.* at 2209 (quoting Owner-Operator Indep. Drivers Ass'n, Inc. v. U.S. Dep't of Transp., 879 F.3d 339, 344–45 (D.C. Cir. 2018)); *see also, e.g.*, Phillips v. U.S. Customs & Border Prot., 74 F.4th 986 (9th Cir. 2023) (holding that the government's mere retention of records obtained from surveillance was not a sufficiently concrete injury to support standing).

191. *See* Merrill, *supra* note 17, at 952–54.

does set outer bounds. Some interests *must* be treated as property for due process purposes, even if state law does not treat them as such, while other interests cannot be even if they are recognized as such by other positive law.[192] Likewise, Article III allows legislatures and common law courts considerable freedom to determine whether invasion of particular interests will qualify as injury in fact (category 3), but federal constitutional criteria both treat some familiar interests as conclusively sufficient (category 1), on the one hand, and limit the interests that may be recognized (category 2), on the other.[193]

Critics have argued that *TransUnion*'s approach "significantly changes the law and places in doubt the ability to sue to enforce countless federal laws,"[194] but this charge seems overstated. *TransUnion*'s references to the common law are not new,[195] and whether *application* of the historical test has changed remains to be seen. To be sure, statutory citizen-suit provisions conferring rights to sue without any showing of an individualized interest will be hard to square with *TransUnion*, but the validity of that sort of suit has been in doubt for at least 30 years.[196] Justice Kavanaugh's opinion in *TransUnion* made clear that, in looking for historical analogies to support a new statutory cause of action, "we do not require an exact duplicate."[197] The Court's willingness to recognize

192. *Compare, e.g.*, Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980) (stating that interest accruing on an interpleader account was "property" for purposes of the Fifth and Fourteenth Amendments even though state law did not recognize it as such), *with* Bd. of Regents v. Roth, 408 U.S. 564 (1972) (recognizing that state law protections for tenure of public university teacher had created a property interest protected under the Due Process Clause), *and* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 673–74 (1999) (holding that the interest in being free from a competitor's false advertising created by the federal Lanham Act was not a property interest for due process purposes). A similar pattern exists with respect to liberty interests. *See* HART & WECHSLER, *supra* note 6, at 518–20.

193. *Compare, e.g.*, Scanlan v. Eisenberg, 669 F.3d 838, 845 (7th Cir. 2012) ("[T]he actual or threatened injury required under Article III can be satisfied solely by virtue of an invasion of a recognized state-law right."), *with* Hollingsworth v. Perry, 570 U.S. 693, 713–14 (2013) (holding that California's delegation of right to defend the legality of a state constitutional amendment adopted by referendum to the referendum's proponents failed to confer Article III standing because the delegation did not satisfy federal criteria for a valid agency relationship).

194. Erwin Chemerinsky, *What's Standing After* TransUnion LLC v. Ramirez, 96 N.Y.U. L. REV. ONLINE 269, 270 (2021).

195. *See, e.g.*, Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 285 (2008) (finding common law history and U.S. historical practice "well nigh conclusive" on the standing question (quoting Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 777–78 (2000))); Raines v. Byrd, 521 U.S. 811, 833 (1997) (Souter, J., joined by Ginsburg, J., concurring) (discussing "the traditional common-law cause of action at the conceptual core of the case-or-controversy requirement"). Nor does the practice of looking to common law analogies appear to be controversial among the current justices. *See, e.g.*, Uzuegbunam v. Preczewski, 141 S. Ct. 792, 797–98 (2021) (in opinion for eight justices, beginning justiciability inquiry by "look[ing] to the forms of relief awarded at common law").

196. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part) (stating that "we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition," but "Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit").

197. *TransUnion*, 141 S. Ct. at 2209.

dissemination of erroneous information as injury *without* any showing of tangible harm does not strike us as all that restrictive.[198]

On the other hand, some courts have interpreted *TransUnion* as requiring a pretty close match between the harms addressed by statutory causes of action and harms recognized by common law torts (such as for defamation or invasion of privacy).[199] The closer the "harm-to-harm comparison" that courts demand,[200] the smaller the third category of legislative flexibility becomes.[201] Divergent approaches to this question among the circuit courts of appeal have arguably ripened into a circuit split,[202] and the proliferation of holdings that Article III forecloses particular claims under the Fair Debt Collection Practices Act (FDCPA) may well require Supreme Court review sooner rather than later.[203]

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198. *See, e.g.*, Green-Cooper v. Brinker Int'l Inc., 73 F.4th 883 (11th Cir. 2023) (concluding that the dissemination of the plaintiffs' credit card and personal information on the dark web created a sufficient present injury and risk of future injury to satisfy standing requirements).

199. *See, e.g.*, Hunstein v. Preferred Collection & Mgmt. Servs., Inc., 48 F.4th 1236, 1245–49 (11th Cir. 2022) (en banc) (rejecting standing under the Fair Debt Collection Practices Act (FDCPA) for debtor whose information had not been made public "[b]ecause the harm Hunstein now asserts . . . lacks a close relationship with a traditional common-law tort"); Ward v. Nat'l Patient Acct. Servs. Sols. Inc., 9 F.4th 357, 362 (6th Cir. 2021) (rejecting standing to assert a claim under the FDCPA, in a 2–1 decision, because "the procedural injuries [the plaintiff] asserts do not bear a close relationship to traditional harms").

200. *Hunstein*, 48 F.4th at 1244.

201. *See id.* at 1262 (Newsom, J., dissenting) ("[B]y insisting on a rigid . . . element-for-element test . . . the majority denies Congress *any* breathing space in which to recognize judicially enforceable rights that didn't exist at common law.").

202. *See, e.g.*, *id.* at 1267 (Newsom, J., dissenting) (identifying a circuit split); Pierre v. Midland Credit Mgmt., Inc., 29 F.4th 934, 953–55 (7th Cir. 2022) (Hamilton, J., dissenting) (same); Pucillo v. Nat'l Credit Sys., Inc., 66 F.4th 634, 636, 642–44 (7th Cir. 2023) (dividing 2–1 over whether sending improper debt collection letters to the plaintiff, in violation of the FDCPA, was sufficiently analogous to a common law invasion of privacy).

203. Other statutes raise similar issues. For example, the Fair and Accurate Credit Transactions Act (FACTA) prohibits merchants from printing more than the last five digits of a credit card number, or the card's expiration date, on receipts offered to customers, and courts have had to consider whether and under what circumstances there is standing to sue for a violation of that prohibition. *Compare, e.g.*, Muransky v. Godiva Chocolatier, Inc., 979 F.3d 917 (11th Cir. 2020) (en banc) (disallowing standing), *with* Jeffries v. Volume Servs. Am., Inc., 928 F.3d 1059 (D.C. Cir. 2019) (allowing standing). Although the circuits have divided over standing to assert statutory FACTA violations, most of the decisions predate *TransUnion*. *See, e.g.*, Barrientos v. Williams-Sonoma, Inc., No. 21-cv-05160, 2023 WL 5720855, at *3, *7–10 (N.D. Ill. Sept. 1, 2023) (collecting cases and analyzing FACTA injuries in light of *TransUnion*). The Driver's Privacy Protection Act (DPPA) prohibits the release of personal information relating to motor vehicle records. For a 2–1 decision holding that there was no standing to sue for disclosure of a driver's license number in violation of the Act because "the disclosure of a number in common use by both public and private actors does not correspond to any tort," see *Baysal v. Midvale Indemnity Co.*, 78 F.4th 976, 980 (7th Cir. 2023). The Supreme Court granted certiorari and heard argument in the 2023 term to consider the propriety under *TransUnion* of "tester" standing. Tester standing is the standing of individuals to challenge a defendant's failure to comply with the law in their offer of goods or services (for example, by engaging in improper discrimination or by failing to provide required information) in situations in which the challengers do not actually intend to

The broader question of how broadly Article III permits legislatures to recognize new categories of harm is beyond the scope of this Article. It does seem clear that, after *TransUnion*, considerable room remains for argument about whether particular forms of injury can suffice for Article III injury in fact. The next two sections play that analysis out for the most frequently invoked categories of injury in probabilistic standing cases.

B. *Legal Injuries, Risk, and Remedies*

Many probabilistic standing cases involve a present legal injury that may or may not result in actual harm sometime in the future. Notwithstanding the majority's insistence in *TransUnion* that purely legal injury is not sufficient under Article III, the Court's modern standing jurisprudence has waffled back and forth.[204] It is not easy to reconcile *TransUnion*, for example, with the Court's decision the same term in *Uzuegbunam v. Preczewski*. That case—an 8–1 decision written by Justice Thomas—adopted the common law rule "allowing nominal damages for a violation of any legal right" and held that nominal damages satisfy Article III.[205] Does that mean that *all* of the *TransUnion* plaintiffs could have had standing if the FCRA had authorized them to recover one dollar for violation of their legal rights?[206] *Uzuegbunam* suggests that, in some circumstances, Congress could authorize damages for a purely legal violation, at least those involving constitutional or traditional legal interests.

Moreover, neither *TransUnion* nor *Spokeo* purported to disturb a variety of well-established causes of action that do not require the plaintiff to establish any actual injury to prevail. One example is unjust enrichment. Although "the paradigm case of unjust enrichment is one in which the benefit on one side of the transaction corresponds to an observable loss on the other," unjust enrichment may also arise when the defendant has obtained a benefit " 'in violation of the other's legally protected rights,' without the need to show that the claimant has suffered a loss."[207] Plaintiffs may thus seek restitution of a defendant's gains obtained by commercial bribes or kickbacks, wrongful appropriation of

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avail themselves of the products or services. The Court did not address the propriety of such standing because it concluded that the case was moot. *See* Acheson Hotels, Inc. v. Laufer, 144 S. Ct. 18 (2023).

204. *See* William Baude, *Standing in the Shadow of Congress*, 2016 SUP. CT. REV. 197, 209–27.

205. *See* Uzuegbunam v. Preczewski, 141 S. Ct. 792, 799–80 (2021); *see also* Carey v. Piphus, 435 U.S. 247, 266 (1978) (holding that a plaintiff may obtain nominal damages for violation of her constitutional rights).

206. *See* Pierre v. Midland Credit Mgmt., Inc., 29 F.4th 934, 949 (Hamilton, J., dissenting) (observing that if "nominal damages are available and even presumed where a plaintiff proves a violation of her legal rights," then "I have trouble seeing why Congress cannot authorize a modest damages remedy where a plaintiff's statutory rights are violated"); *cf.* Gertz v. Robert Welch, Inc., 418 U.S. 323, 372 (1974) (White, J., dissenting) (noting that the common law "allowed the recovery of nominal damages for any defamatory publication").

207. 1 RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. a (AM. L. INST. 2011).

a business opportunity, misuse of confidential information, or other conflicts of interest without showing any consequential damage.[208] Likewise, owners of copyrights, trademarks, or trade secrets can recover a defendant's profits from an infringement even if the plaintiff cannot show losses of her own.[209] Some torts, moreover, are actionable without proof of damage to the plaintiff;[210] in fact, the tort of defamation at the heart of *TransUnion* is one of them.[211] Finally, as the Court acknowledged in *Spokeo*, invasions of constitutional rights can suffice for concrete injury without any consequential harm.[212]

The Court has not clearly articulated a theory of standing that squares these circumstances in which legal injury seems to suffice with its analysis and results in *Spokeo* and *TransUnion*. Two possibilities seem plausible. The first draws on *TransUnion*'s point that standing requirements differ depending upon the remedy that the plaintiff seeks. As we discuss further below, the Court said that plaintiffs may rely on a risk of sufficiently imminent harm to establish injury in fact if they seek a preventive injunction but not in an action for damages.[213] That would explain the constitutional rights cases cited in *Spokeo*, and one could accommodate the unjust enrichment cases by stressing that restitution is a fundamentally different remedy than compensatory damages.[214] But it is hard to explain why a claim for nominal damages based on the violation of Mr. Uzuegbunam's legal rights sufficed for standing, while a claim

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208. *See* Brief of Restitution and Remedies Scholars as Amici Curiae in Support of Respondent at 6–13, Spokeo, Inc. v. Robins, 578 U.S. 330 (2016) (No. 13-1339).

209. *See id.* at 13–15; Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390, 404–06 (1940); Three Boys Music Corp. v. Bolton, 212 F.3d 477, 487 (9th Cir. 2000).

210. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 7 cmt. a (AM. L. INST. 1965) ("[A]ny intrusion upon land in the possession of another is an injury, and, if not privileged, gives rise to a cause of action even though the intrusion is beneficial, or so transitory that it constitutes no interference with or detriment to the land or its beneficial enjoyment."); 1 DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 47, at 120 (2d ed. 2011) (noting that under the law of assault, "[t]he invasion of the plaintiff's rights is regarded as a harm in itself and subject to an award of damages"); Brief of Respondent at 16–22, *Spokeo*, 578 U.S. 330 (No. 13-1339) (collecting early English and American cases).

211. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 372 (1974) (White, J., dissenting) ("In 1938, the Restatement of Torts reflected the historic rule that publication . . . of defamatory material . . . subjected the publisher to liability although no special harm to reputation was actually proved.") (citing Restatement of Torts § 569 (1938)).

212. *See Spokeo*, 578 U.S. at 340 (citing Pleasant Grove City v. Summum, 555 U.S. 460 (2009) (free speech); Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993) (free exercise of religion)).

213. *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2210–11 (2021); *see also, e.g.*, Dinerstein v. Google, LLC, 73 F.4th 502, 515 (7th Cir. 2023) ("To the extent that [the plaintiff] rests his claim for damages on allegations of future risk, the argument is a nonstarter [under *TransUnion*].").

214. *See* Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 215 (2002) (discussing differences between restitution and damages relief); 1 DAN B. DOBBS, LAW OF REMEDIES § 1.1 at 5 (2d ed. 1993) ("[R]estitution is measured by the defendant's gains, not by the plaintiff's losses."); Brief of Restitution and Remedies Scholars, *supra* note 208, at 4–6.

for statutory damages for TransUnion's violation of FCRA rights was insufficient.[215]

The better explanation is that a violation of someone's legal rights may involve "an invasion of a legally protected interest that is concrete and particularized,"[216] even if there are no further consequential damages. *Spokeo* and *TransUnion* both acknowledged that intangible injuries may suffice as injury in fact. Just as the Court has accepted violation of a personal constitutional right as a sufficient injury, so too the violation of a property right in a trespass case, or a duty of loyalty owed to the plaintiff in an unjust enrichment case, may amount to "actual" injury even if no further physical or financial consequences flow from it. That was true in *TransUnion*, where the Court did not require plaintiffs to prove any consequential damages from the publication of incorrect information about them.[217] Each of these injuries "bears a 'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts."[218]

But the more important point may be that in each of these situations, the law provides a particular individual with a right to do something, have something, or enjoy a certain sort of security (e.g., from the fear that an agent may have a conflict of interest or from publication of false information), and the denial of these entitlements by a defendant's unlawful act works an "actual" injury. Although the line will not always be easy to draw, that sort of wrong can reasonably be seen as harmful in a way that the incorrect but undisseminated OFAC alert in the *TransUnion* plaintiffs' files was not.[219] If this is correct,

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215. *But see supra* note 143 (noting that *Uzuegbunam* concerned whether a plaintiff's claim that had initially established concrete injury for standing purposes had become moot).

216. *Spokeo*, 578 U.S. at 339 (quoting Lujan v. Defs. Of Wildlife, 504 U.S. 555, 560 (1992)).

217. *See TransUnion*, 141 S. Ct. at 2209; *see also* Santos v. Healthcare Revenue Recovery Group, LLC, 90 F.4th 1144, 1151, 1157 (11th Cir. 2024) (*per curiam*) (upholding standing under *TransUnion* for FCRA plaintiffs who alleged publication but not actual damages, based on consistency with the common law rule).

218. *TransUnion*, 141 S. Ct. at 2208 (quoting *Spokeo*, 578 U.S. at 341); s*ee* Brief of Restitution and Remedies Scholars, *supra* note 208, at 20–22 (demonstrating that unjust enrichment and trespass claims without injury pre-date the American Founding); Uzuegbunam v. Preczewski, 141 S. Ct. 792, 797–800 (2021) (tracing the pedigree of nominal damages for violations of common law and constitutional rights).

219. Justice Thomas would distinguish between private rights (which he contends that Congress may render actionable without further need to show "actual" injury) and public ones (which Congress can authorize private plaintiffs to enforce only if they can show private injury of some kind). *See Spokeo*, 578 U.S. at 344–46 (Thomas, J., concurring) (defining *public* rights as rights owed "to the whole community, considered as a community, in its social aggregate capacity" and *private* rights as rights "belonging to individuals, considered as individuals" (first quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *2; and then quoting 4 BLACKSTONE, *supra*, at *5)). Although the line between public and private rights will not always be clear, Justice Thomas's position might provide a cleaner line than the one we have offered in the text. Nonetheless, it is unclear how much support his approach has on the Court, and our object in this Article is to develop as coherent an account of current doctrine as we can within the bounds set by the Court's recent cases.

then the key in so-called "legal injury" cases will be to distinguish between invasions of legal interests analogous to individual constitutional rights, trespass, and unjust enrichment and "bare procedural violation[s]" of the sort found wanting in *TransUnion*.[220] At least with respect to the plaintiffs alleging only such violations, the Court in *TransUnion* likely saw the suit as one in which Congress had simply offered a bounty for private enforcement of the FCRA's procedural requirements rather than an effort to protect a real personal interest.[221]

One might still effectively sweep in all legal violations by treating the *risk* of future harm as a present concrete injury. The *TransUnion* plaintiffs tried to establish "actual" injury by asserting that "misleading OFAC alerts in their internal credit files exposed them to a material risk that the information would be disseminated in the future to third parties and thereby cause them harm."[222] This sort of argument enjoys considerable support in the commentary. Professor Nash points out, for example, that conventions of risk analysis typically calculate the "expected value" of a risk "by multiplying the magnitude of the harm by its probability."[223] Nash argues that "[i]f people have suffered a loss with a positive expected value, they have suffered an 'injury in fact.' It is unhelpful to say, as courts often have done, that an injury is 'speculative' or 'conjectural' when it has a positive expected value."[224]

Some lower courts have accepted this sort of reasoning while others have not.[225] The answer seems to turn not only on divergent readings of *Spokeo* and *TransUnion*, but also on the plaintiff's legal theory. A negligence or strict liability theory, for example, generally requires a realized harm;[226] a breach of

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220. *TransUnion*, 141 S. Ct. at 2213 (quoting *Spokeo*, 578 U.S. at 341).

221. *See* Vt. Agency of Nat. Res. v. U.S. *ex rel.* Stevens, 529 U.S. 765, 772 (2000) (stating that a plaintiff's interest in a bounty for enforcing federal law does not, by itself, suffice to establish standing).

222. *TransUnion*, 141 S. Ct. at 2210.

223. Nash, *supra* note 85, at 1306; *see also* Mank, *supra* note 59, at 671; Sunstein, *After* Lujan, *supra* note 18, at 207.

224. Nash, *supra* note 85, at 1285.

225. The Eleventh Circuit has identified a circuit split on the issue, Tsao v. Captiva MVP Rest. Partners, LLC, 986 F.3d 1332, 1340–43 (11th Cir. 2021), although the Second Circuit more recently questioned that conclusion, McMorris v. Carlos Lopez & Assocs., LLC, 995 F.3d 295, 300–01 (2d Cir. 2021); *see also* Hunstein v. Preferred Collection & Mgmt. Servs.., Inc., 48 F.4th 1236, 1267 (11th Cir. 2022) (en banc) (Newsom, J., dissenting) (identifying a circuit split). Whether or not the circuits' positions are legally irreconcilable, the cases in this area display sufficient differences in approach and result as to cry out for clarification. *See Tsao*, 986 F.3d at 1345 (Jordan, J., concurring) ("Hopefully the Supreme Court will soon grant certiorari in a case presenting the question of Article III standing in a data breach case."). *See generally* Sheila B. Scheuerman, *Against Liability for Private Risk-Exposure*, 35 HARV. J.L. & PUB. POL'Y 681, 691–716 (2012) (surveying cases).

226. *See* John C. P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1651 (2002) ("Criminal law sometimes prohibits and punishes genuinely inchoate wrongs—uncompleted wrongful acts. Tort law does not."); Heidi M. Hurd, *The Deontology of Negligence*, 76 B.U. L. REV. 249, 262–65 (1996) (observing that tort law "does not premise liability upon a defendant's creation of risks").

warranty theory, on the other hand, may be more likely to recognize failure to prevent a future risk as a present harm.[227] Another variable, in state law cases, is different jurisdictions' decisions on whether to permit liability for exposure to risk under the relevant substantive law.[228]

There are good reasons to hesitate before recognizing subjection to risk as an independent injury in fact. One is that this solution to the probability problem is largely semantic because the next question would be *how much* risk must exist to constitute a cognizable injury in fact. It is hard to see how that question is any less difficult than asking how probable some future harm must be to satisfy the same standard. Professor Nash initially avoids this trap by saying that *all* positive present value amounts to injury in fact,[229] but then he hops right back into it by introducing a prudential restriction eliminating "*de minimis*" injuries.[230] How minimal is *de minimis*? The Supreme Court, after all, has said that even small or nominal injuries are sufficient for Article III.[231]

The present-value argument also conflates two distinct questions. As Professor Cox observes, standing law always requires a normative judgment about whether a particular injury will be "cognizable,"[232] but considering whether *risk* of an injury should itself be cognizable requires *two* such judgments: "one about primary interests, and one about a secondary, derivative interest in not having increased risk of harm to the primary interest."[233] She notes that "identity theft can be an injury, while the increased risk of it might not be . . . ."[234] Professor Chris Schroeder similarly observes that even though everyone agrees that harm to human health counts as regulable harm, "modern governmental regulation . . . reflect[s] our wide disagreement over what constitutes a regulable risk."[235] Reducing risk to merely the "expected value" of any injury that would otherwise be actionable tends to overlook meaningful disagreements about when—and how much—risk ought to suffice.

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227. *See, e.g.*, *In re* Aqua Dots Prods. Liab. Litig., 654 F.3d 748, 751 (7th Cir. 2014) (reasoning that the plaintiffs' loss in this situation "is financial: they paid more for [the product] than they would have, had they known of the risks").

228. *See, e.g.*, Scheuerman, *supra* note 225, at 691–701, 713–16 (contrasting various state approaches).

229. Nash, *supra* note 85, at 1306.

230. *Id.* at 1308–09; *see also* Mank, *supra* note 59, at 737–41 (also proposing a de minimis threshold).

231. *See* United States v. SCRAP, 412 U.S. 669, 689 n.14 (1973). In a sense, almost all risk imposes *some* injury, in that the person exposed to it would be willing to pay something to avoid it—even if only a penny (unless the person obtained enjoyment from the risk, such as from skydiving or writing daring law review articles about standing).

232. *See* Cox, *supra* note 93, at 92 ("[I]njury in fact is not a factual inquiry, but an irreducibly normative endeavor . . . ."). Similarly, one may accept that risk is a "harm" and still question whether harms based on unrealized risks should be actionable in law. *See, e.g.*, Claire Oakes Finkelstein, *Is Risk a Harm?*, 151 U. PA. L. REV. 963, 964–66 & n.11 (2003); Goldberg & Zipursky, *supra* note 226, at 1651.

233. Cox, *supra* note 93, at 99.

234. *Id.*

235. Schroeder, *supra* note 9, at 496.

A second question concerns whether the injury of being subjected to a risk of future harm is sufficiently particularized. Writing for the D.C. Circuit, then-Judge Kavanaugh argued that "the mere increased risk of some event occurring is utterly abstract—not concrete, direct, real, and palpable. . . . [I]ncreased risk falls on a population in an undifferentiated and generalized manner; everyone in the relevant population is hit with the same dose of risk, so there is no particularization."[236] We are less sure that such injury is undifferentiated; each person's risk is that *they* will get cancer, not someone else.[237] The more fundamental problem is that, although we may be confident that the risk *will* materialize with respect to some members of the relevant population, those members remain "statistical persons rather than identifiable persons."[238]

TransUnion addressed the interest in avoiding *risk* of harm by distinguishing sharply between damages and injunctive relief. The Court acknowledged that " 'risk of real harm' . . . can sometimes 'satisfy the requirement of concreteness.' "[239] But it insisted that this possibility is limited to "suit[s] for *injunctive relief*," stating that "a person exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial."[240] The last phrase suggests that plaintiffs seeking injunctive relief cannot avoid the "imminence" requirement simply by recharacterizing an uncertain future harm as a harm experienced in the present. We argue in Section IV.A that imminence is better handled as a matter of ripeness. In any event, "a plaintiff's standing to seek injunctive relief does not necessarily mean that the plaintiff has standing to seek retrospective damages."[241]

TransUnion thus accepted the defendant's argument "that in a suit for damages, the mere risk of future harm, standing alone, cannot qualify as a concrete harm—at least unless the exposure to the risk of future harm itself

236. Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin., 489 F.3d 1279, 1297–98 (D.C. Cir. 2007); *see also* Sunstein, *After* Lujan, *supra* note 18, at 228 (acknowledging that "it is unclear that [risk] is sufficiently particularized").

237. *See* FEC v. Akins, 524 U.S. 11, 35 (1998) (Scalia, J., dissenting) (explaining that an injury may be particularized even though it is "widely shared," so long as "each individual suffers a particularized and differentiated harm").

238. Mank, *supra* note 59, at 668.

239. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2210 (2021) (quoting Spokeo, Inc. v. Robins, 578 U.S. 330, 341–42 (2016)).

240. *Id.* (citing Clapper v. Amnesty Int'l USA, 568 U.S. 398, 414 n.5 (2013) and City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983)).

241. *Id.* The Court made this point immediately after invoking the remedial standing rule that "a plaintiff must 'demonstrate standing separately for each form of relief sought.' " *Id.* (quoting Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 185 (2000). As in *Lyons*, however, the plaintiffs in *TransUnion* sought only one form of relief. *Id.* at 2202. This suggests (as we noted earlier) that the true import of the remedial standing rule is not that a plaintiff with a live, justiciable claim for one form of relief must surmount the Article III standing hurdle all over again for every additional form of relief claimed, but rather that the standing requirements may *vary* according to the nature of the relief that a plaintiff seeks.

causes a *separate* concrete harm."[242] By "separate" harm, the Court meant emotional distress or some other present injury arising from exposure to risk[243]—a possibility that we consider in the next section. But why distinguish between injunctions and damages in the first place? Although these remedies might well address different kinds of harm, one would expect that distinction to be a function of the law of remedies, not Article III standing.

The Court did not fully explain its reasoning on this point, but it offered a suggestive hypothetical example:

> Suppose that a woman drives home from work a quarter mile ahead of a reckless driver who is dangerously swerving across lanes. The reckless driver has exposed the woman to a risk of future harm, but the risk does not materialize and the woman makes it home safely. . . . [T]hat would ordinarily be cause for celebration, not a lawsuit. . . . But if the reckless driver crashes into the woman's car, the situation would be different, and . . . the woman could sue the driver for damages.[244]

As with the woman who got home safely, the Court stressed that "the 6,332 plaintiffs did not demonstrate that the risk of future harm materialized—that is, that the inaccurate OFAC alerts in their internal TransUnion credit files were ever provided to third parties or caused a denial of credit."[245] This discussion suggests that the distinction between damages and injunctions rests on a more fundamental difference between realized and unrealized harm. Injunctions are frequently available to prevent the realization of harm; if there were a way to predict the bad driver's reckless behavior in advance, one might well obtain a prohibitory injunction against it. But courts generally award damages only for realized harms.[246] This is sufficient reason to doubt that Professor Nash's expected-value analysis—familiar to investors and risk managers—can translate well to the law of remedies.

Whether the law should recognize risk of future harm as a present injury remains controversial.[247] We have considerable sympathy for Professor Cox's view that Article III does not itself take a position on whether risk should count for injury. The contrary view would certainly put much weight on words like "case," "controversy," or "judicial power." Cox argues, consistent with a general theme of this Article, that the question is not so much *whether* to recognize

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242. *Id.* at 2210–11.

243. *See id.* at 2211 n.7.

244. *Id.* at 2211.

245. *Id.*

246. *See, e.g.*, United States v. Hatahley, 257 F.2d 920, 923 (10th Cir. 1958) ("The fundamental principle of damages is to restore the injured party, as nearly as possible, to the position he would have been in had it not been for the wrong of the other party."); *see also* DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 15 (5th ed. 2019).

247. *See, e.g.*, Adriana Placani, *When the Risk of Harm Harms*, 36 L. & PHIL. 77, 77–78 (2017) (describing "[c]an a risk of harm be a wrong and harm?" as a "particularly divisive" question).

risk as an independent injury in fact but rather *who* should decide that issue.[248] In other words, courts should ordinarily defer to the underlying substantive law—whether it comes from a legislature, executive agency, or common law court—in determining whether to treat a present risk of a future injury as injury in fact. If Professor Mank is right that "most environmental and safety risks are probabilistic in nature,"[249] for example, then Congress could build that recognition into the relevant statutes (and leave it out of statutes involving more traditional harms).

Squaring this position with *TransUnion* depends on the size of our third category of harms, in which legislators exercise some discretion to authorize suits by parties suffering harms that are analogous to traditionally actionable wrongs.[250] *TransUnion* seems to have read the effort to seek FCRA damages for errors in undisseminated credit reports as a bounty for private enforcement of an essentially *public* procedural obligation, not a meaningful personal interest. But that decision need not be read to foreclose Congress from elevating exposure to risk of actual private harms to a legally cognizable injury. *TransUnion* did not attempt to explain why Article III *forecloses* recognition of risk as cognizable injury. State law sometimes permits damages for imposing a risk of future harm,[251] and it would be odd for a federal court sitting in diversity to dismiss such a case for lack of Article III standing. And the Court's willingness to hear claims for prospective relief when the only *present* injury is the risk of future harm strongly suggests that such risk can sustain an Article III lawsuit.

Although *TransUnion* has become a central focus of standing doctrine in the lower courts, we contend that it is being read more expansively than necessary. Dean Chemerinsky may be correct that it "has *the potential* to dramatically restrict standing to sue in federal courts to enforce federal statutes,"[252] but that reading is not inevitable. In suits for prospective relief—the heart of public law litigation[253]—*TransUnion* has little bite by its own terms.[254] And although federal statutes should generally not be read to permit recovery of damages based on exposure to risk of future harm, the Court has not categorically foreclosed that possibility. Even read for all it is worth, *TransUnion* did not bar a legislature from providing for statutory damages based on the likely present harms arising from risks.

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248. Cox, *supra* note 93, at 77.

249. Mank, *supra* note 59, at 723.

250. *See* Spokeo, Inc. v. Robins, 578 U.S. 330, 340 (2016) (emphasizing the importance of "the judgment of Congress" in identifying concrete injuries).

251. *See, e.g.*, Lloyd v. Gen. Motors Corp., 916 A.2d 257, 266 (Md. 2007) (recognizing damages liability for plaintiffs exposed to risk of injury by a defective product); Scheuerman, *supra* note 225, at 713–15.

252. *See* Chemerinsky, *supra* note 194, at 269 (emphasis added).

253. *See* Young, *Equity*, *supra* note 70, at 1907 (emphasizing the prevalence of equitable relief in public law litigation generally).

254. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2210 (2021).

C. *Reduced Value, Costly Precautions, and Anxiety*

Risks of future harm impinge on present behavior and well-being. Rational persons value property based in part on what is likely to happen to it in the future; they avoid actions they would normally take; they invest in other precautions against future harm; and they worry about future risks—sometimes to the point of severe emotional distress. Each of these phenomena is at least sometimes treated as cognizable harm in substantive causes of action, and each therefore offers a way for plaintiffs to plead around probabilistic standing problems. Much debate among the lower courts in probabilistic standing cases concerns these collateral consequences of risk, and the Supreme Court has sent mixed signals. As with the debate about risk itself, there is a temptation to ask whether diminished value, precautionary expenditure, and psychological harm simply are or are not cognizable under constitutional standing principles, but we contend that this is not a very fruitful inquiry.

This Section analyzes how these types of present harms fit into our three categories of cognizable and noncognizable interests. It will help to begin with cases in which the plaintiff sues under a common law cause of action or a generic statutory one—such as the Administrative Procedure Act or 42 U.S.C. § 1983—that does not specifically make the injury in question cognizable. Our Category 1 interests are those sorts of interests that familiarly form the basis of such lawsuits.

A reduction in the value of property, resulting from the defendant's conduct, seems to fit comfortably in this category of presumptively cognizable harm. In *Cole v. General Motors Corp.*,[255] for example, the plaintiffs represented a class of persons who had purchased cars from GM which, they alleged, had defective air bag systems. Although none of the class members had actually been in an accident in which the defect had manifested and caused them injury, they claimed that GM had promoted the air bag systems as a valuable safety feature, failed to deliver that feature, and thus reduced the value of the automobiles they had purchased. Their legal theory focused on breach of express and implied warranties.[256] The court of appeals rejected GM's argument that the plaintiffs lacked standing because they had not yet experienced any injury in fact; it was enough, the court said, that "[p]laintiffs seek recovery for their actual economic harm (e.g., overpayment, loss in value, or loss of usefulness) emanating from the loss of their benefit of the bargain."[257]

The court in *Cole* went out of its way to note that "[w]hether recovery for such a claim is permitted under governing law is a separate question; it is sufficient for standing purposes that the plaintiffs seek recovery for an economic

255. Cole v. Gen. Motors Corp., 484 F.3d 717 (5th Cir. 2007).

256. *See id.* at 719–20.

257. *Id.* at 723. The court emphasized that "[n]otably in this case, plaintiffs may bring claims under a contract theory based on the express and implied warranties they allege," *id.*, suggesting that the choice of a warranty over a tort theory made an important difference.

harm that they allege they have suffered."[258] That statement seems to contradict our notion that cognizability of an injury for standing purposes depends chiefly on whether the underlying law recognizes that injury. The critical point, however, is that diminished value is a sort of harm commonly and traditionally recognized in American law—even though jurisdictions differ on whether plaintiffs can recover on breach of warranty or tort claims when a product defect has not manifested in a failure causing injury to the plaintiff.[259] Our first category of injury thus presumptively suffices for injury in fact so long as it is generally recoverable in American law, whether or not the plaintiff will be able to recover in particular circumstances. That is probably why most of the cases refusing to recognize decreased-value injury in no-manifest-injury cases are not *standing* cases, but cases decided on the merits.[260]

On a first cut, precautionary expenses incurred to mitigate risks arising from unlawful action by the defendant fit readily within our first category of presumptively cognizable injury. A personal injury plaintiff's medical expenses, or expenses incurred to repair property damage, are a mainstay of private litigation. Plaintiffs may also incur such costs in response to a *risk* of injury. "In recent years," one court noted, "tort plaintiffs have increasingly sought, and have regularly been awarded, medical monitoring costs in both toxic tort and product liability cases."[261] In data breach cases, plaintiffs often seek to recover the cost of credit monitoring or changing service providers.[262] Courts sometimes allow standing to recover for such precautionary and mitigation costs, but the cases are mixed.

Here, too, courts have tended to over-rely on *Clapper*.[263] The *Clapper* plaintiffs tried to establish standing not only by citing the threat that their conversations would be spied upon but also by alleging that that threat had obliged them to take burdensome and sometimes costly measures to protect their conversations' confidentiality.[264] The Supreme Court, however, concluded that "[b]ecause [plaintiffs] do not face a threat of certainly impending interception . . . the costs that they have incurred to avoid surveillance are simply the product of their fear of surveillance, and . . . such a fear is insufficient to create standing."[265] The critical factor was that the plaintiffs could not establish that they were subject to the government action they challenged, and

258. *Id.*

259. *See, e.g.*, *In re* Gen. Motors LLC Ignition Switch Litig., 339 F. Supp. 3d 262, 276 (S.D.N.Y. 2018) (surveying cases).

260. *See, e.g.*, Briehl v. Gen. Motors Corp., 172 F.3d 623, 627–28 (8th Cir. 1999).

261. Sutton v. St. Jude Med. S.C., Inc., 419 F.3d 568, 571 (6th Cir. 2005); *see also id.* ("A medical monitoring award aids presently healthy plaintiffs who have been exposed to an increased risk of future harm to detect and treat any resultant harm at an early stage.").

262. *See, e.g.*, McMorris v. Carlos Lopez & Assocs., LLC, 995 F.3d 295, 298 (2d Cir. 2021); Solove & Citron, *supra* note 12, at 753.

263. *See, e.g.*, *McMorris*, 995 F.3d at 303; Tsao v. Captiva MVP Rest. Partners, LLC, 986 F.3d 1332, 1339 (11th Cir. 2021).

264. *See* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 415 (2013).

265. *Id.* at 417 (citing *Laird v. Tatum*, 408 U.S. 1, 10–15 (1972)).

the cost of precautions incurred *just in case* they were so subject could not supply the necessary injury. "If the law were otherwise," the Court explained, "an enterprising plaintiff would be able to secure a lower standard for Article III standing simply by making an expenditure based on a nonparanoid fear."[266] The situation of a mere "nonparanoid fear" is quite different from one involving a known violation of one's legal rights.

Importantly, the Court *did* rely on costly precautions to establish injury in *Monsanto v. Geertson Seed Farms*.[267] The plaintiffs there were non-GMO alfalfa farmers who challenged a federal agency's decision to deregulate Roundup Ready Alfalfa (RRA), a genetically modified form of alfalfa designed to tolerate a popular herbicide.[268] In holding that the non-GMO farmers had standing, the district court found that they had " 'established a reasonable probability' that their organic and conventional alfalfa crops will be infected with the engineered gene' if RRA is completely deregulated."[269] Because of that risk, the Court emphasized, plaintiffs had taken "certain measures to minimize the likelihood of potential contamination."[270] The Court stressed that those expenses injured the plaintiffs "even if their crops are not actually infected with the Roundup Ready gene" and were "sufficiently concrete to satisfy the injury-in-fact prong of the constitutional standing analysis."[271]

These decisions hardly provide a clear rule for when costly precautions will suffice to establish injury in fact. As already discussed, plaintiffs who cannot establish that the defendant has acted upon them at all—as in *Clapper*—cannot ordinarily establish standing. *Monsanto*'s facts, on the other hand, presented an unusually high degree of certainty that the plaintiffs would be affected by the challenged approval of RRA.[272] The central dilemma may be best expressed in cases like *Tsao v. Captiva MVP Restaurant Partners, LLC*,[273] decided by the Eleventh Circuit in 2021. That case held that costs of precautions could serve as injury only when there is a "substantial risk" of the underlying harm—the same degree of probable future harm needed to make the underlying future harm *itself* cognizable for standing purposes.[274] On this approach,

266. *Id.* at 416.

267. Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 146 (2010).

268. *Id.* at 146–49.

269. *Id.* at 153 (quoting Petition for a Writ of Certiorari at app. at 50a, *id.* (No. 09-475)).

270. *Id.* at 154.

271. *Id.* at 155.

272. The *Monsanto* plaintiffs did not immediately challenge the agency's deregulation of RRA, and when they did, they did not seek preliminary injunctive relief. As a result, "RRA enjoyed nonregulated status for approximately two years. During that period, more than 3,000 farmers in 48 states planted an estimated 220,000 acres of RRA." 561 U.S. at 146. That meant that many of the uncertainties present in much pre-enforcement review of agency action (the usual scenario for challenging actions alleged to create a risk of future harm) had been resolved by events by the time plaintiffs sued and, ultimately, asked for an injunction.

273. Tsao v. Captiva MVP Rest. Partners, LLC, 986 F.3d 1332 (11th Cir. 2021).

274. *See id.* at 1344; *see also In re* Adobe Sys., Inc. Priv. Litig., 66 F. Supp. 3d 1197, 1217 (N.D. Cal. 2014) ("[I]n order for costs incurred in an effort to mitigate the risk of future harm to

costly precautions could never serve as an independent basis for standing.[275] *Tsao* thus starkly poses the question of whether costly precautions should ever *lower* the bar for standing when the future harm itself remains insufficiently "imminent" to support standing on its own. Significantly, other lower courts more receptive to costly precautions as injury have found the underlying future harm itself to be sufficiently imminent to satisfy *Clapper*.[276] Such decisions are not necessarily inconsistent with *Tsao* and similar cases.

Courts hesitate to base standing on costly precautions alone because those precautions are within the plaintiff's control and "monetary expenditures are viewed as too easy to manufacture."[277] Precautionary costs thus need some sort of limiting principle to ensure that they are reasonably undertaken, rather than incurred simply to support litigation. If this limiting principle is to be a function of probability—that is, if precautions are reasonable according to the likelihood of the harm they guard against—then it is hard to see why the requisite quantum of probability (whatever it is) for taking reasonable precautions should not be the *same* as that needed to support judicial action based on the underlying risk. After all, an injunction *is* a precaution against a risk of future harm.

We would minimize the extent to which courts must assess the various probabilities in individual cases. And we would evaluate the risk of the underlying future harm differently from the costly precautions that plaintiffs sometimes take. Our framework would rest on three principles: First, *Clapper* stands for the proposition that if a plaintiff cannot establish (under the respective standards at the pleading or summary judgment stage) that they have even been subjected to the defendant's allegedly unlawful action, then costs incurred in efforts to mitigate that action's effects will not create injury in fact, even if they seem reasonable in light of the uncertainty. But as we suggested earlier, these circumstances should be quite rare.[278] Most cases will be governed by a second principle, which is that costly precautions will count as injury in fact where they are consistent with the underlying law. We would rely, for example, on tort rules specific to particular classes of cases to establish

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constitute injury-in-fact, the future harm being mitigated must itself be imminent." (footnote omitted)).

275. *See, e.g.*, McMorris v. Carlos Lopez & Assocs., 995 F.3d 295, 303 (2d Cir. 2021) ("[W]here plaintiffs 'have not alleged a substantial risk of future identity theft, the time they spent protecting themselves against this speculative threat cannot create an injury.' " (quoting *In re* SuperValu, Inc., 870 F.3d 763, 771 (8th Cir. 2017))).

276. *See, e.g.*, Remijas v. Neiman Marcus Grp., LLC, 794 F.3d 688, 693–94 (7th Cir. 2015); *In re Adobe*, 66 F. Supp. 3d at 1216–17. Similarly, although *Monsanto* did not hold that the likelihood of the impending risk was sufficient to establish injury in fact, it did note that the District Court's "conclusion that the deregulation of RRA poses a significant risk of contamination" to the plaintiffs' crops was supported by the evidence. 561 U.S. at 154 n.3.

277. Solove & Citron, *supra* note 12, at 752–53.

278. *See supra* Section II.A; *see also Remijas*, 794 F.3d at 694 ("[I]t is important not to overread *Clapper*. *Clapper* was addressing speculative harm based on something that may not even have happened to some or all of the plaintiffs.").

when harm from a toxic exposure or data breach is likely to warrant precautionary measures.[279] In those classes of cases, Article III should pose no additional barrier. Third, even if costly precautions suffice, prudential *ripeness* limitations might nonetheless bar review if the future harm that is the ultimate subject of the litigation were so amorphous or distant as to render the legal issues in question unfit for review.

Critically, our framework would judge whether precautionary costs count as injury in fact not by assessing the likelihood of the future risk in individual cases but by looking to whether the underlying law (or common practice) generally acknowledges precautions as an appropriate response to a category of risk. In toxic torts, medical monitoring is becoming a common remedy; likewise, credit monitoring is increasingly prevalent in data breach cases.[280] In some cases, the risk may be sufficiently remote that no recovery of precautionary costs is appropriate. But we would leave that for the merits or remedial phase, rather than asking judges to make these particularistic probability judgments up front as part of the standing analysis. It should be enough that the complaint states a plausible claim of injury of a type that is broadly recognized by the underlying body of substantive law. By definition, our approach would allow Congress to create causes of action to recover precautionary costs.[281]

We can imagine some hard cases under this rubric, particularly those that do not fall into a well-established "category" of substantive law. If standing in *Massachusetts v. EPA*[282] had depended on costly precautions taken by private landowners—building a seawall, for instance, to keep out rising seas caused by climate change—it might be difficult to assess the reasonableness of such precautions considering the unpredictable timing, magnitude, and precise location and character of the impending threat. Two points give us comfort, however: First, courts need not assess the probability of the actual risk but simply whether it is sufficiently probable, in light of both its likelihood of oc-

279. *See, e.g.*, Dougan v. Sikorsky Aircraft Corp., 251 A.3d 583, 589–93 (Conn. 2020) (surveying the law in various jurisdictions concerning recovery of costs for medical monitoring in the absence of a manifest physical injury). More general principles, such as the doctrine of contributory negligence's requirement that tort plaintiffs take reasonable precautions in some circumstances, may also be relevant. *See, e.g.*, W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 65, at 460–61 (5th ed. 1984).

280. *See, e.g.*, Victor E. Schwartz & Cary Silverman, *The Rise of "Empty Suit" Litigation[TM]: Where Should Tort Law Draw the Line?*, 80 BROOK. L. REV. 599, 620–26 (2015) (summarizing medical monitoring cases); Savidge v. Pharm-Save, Inc., No. 3:17-CV-00186-TBR, 2017 WL 5986972, at *5 (W.D. Ky. Dec. 1, 2017) (collecting credit monitoring cases); *see also* Webb v. Injured Workers Pharmacy, LLC, 72 F.4th 365, 377 (1st Cir. 2023) (holding that "time spent responding to a data breach can constitute a concrete injury sufficient to confer standing, at least when that time would otherwise have been put to profitable use").

281. For example, if Congress tied statutory damages under the FCRA to a judgment that incorrect evidence in a consumer's credit file always justifies certain precautionary measures by the consumer, that should suffice for standing to sue.

282. Massachusetts v. EPA, 549 U.S. 497 (2007).

curring and its magnitude, to render precautionary measures reasonable. Second, because the magnitude of injury is not important under Article III,[283] courts need not decide whether each particular precaution is reasonable under the circumstances but only whether *some* precautions are.

What about anxiety or emotional distress as a basis for injury in fact? *TransUnion* specifically reserved judgment on this issue, and standing literature has addressed it as a general question under Article III.[284] The Seventh Circuit's 2022 decision in *Pierre v. Midland Credit Management, Inc.*[285] provides a good example of the problem. There, a creditor attempted to persuade someone to pay a debt even though the statute of limitations would have barred legal recovery on the debt, thereby allegedly violating the Fair Debt Collection Practices Act (FDCPA). Although the debtor never actually paid the debt in response to the creditor's efforts, she brought a class action suit under the FDCPA[286] and obtained a jury award of $350,000. A divided panel rejected the plaintiff's argument that the worry and confusion she experienced because of the creditor's actions sufficed for standing.[287]

On the one hand, it seems obvious that emotional distress or anxiety ought to satisfy injury in fact in at least some circumstances. Some emotional distress claims have long been actionable at common law (most notably, claims for intentional infliction of emotional distress).[288] Other well-established claims at common law, such as claims relating to invasion of privacy and harm to reputation, are based in part on the emotional injury that such conduct tends to cause.[289] On the other hand, the common law has long been cautious about emotional distress claims. Claims for *negligent* infliction of

283. *See* United States v. SCRAP, 412 U.S. 669, 689 n.14 (1973).

284. *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2211 n.7 (2021) ("We take no position on whether or how such an emotional or psychological harm could suffice for Article III purposes—for example, by analogy to the tort of intentional infliction of emotional distress. The plaintiffs . . . have not claimed an emotional distress injury from the risk that a misleading credit report might be sent to a third-party business." (citation omitted)); *see also* Bayefsky, *Psychological Harm*, *supra* note 95; Bayefsky, *Constitutional Injury*, *supra* note 182.

285. Pierre v. Midland Credit Mgmt., Inc., 29 F.4th 934 (7th Cir. 2022).

286. 15 U.S.C. § 1692k.

287. *Pierre*, 29 F.4th at 40; *see also, e.g.*, Wadsworth v. Kross, Lieberman & Stone, Inc., 12 F.4th 665, 668 (7th Cir. 2021) (holding, in another FDCPA case, that "anxiety and embarrassment are not injuries in fact"). For a recent decision more receptive to these sorts of injuries, in a different statutory context, see *Laufer v. Arpan LLC*, 29 F.4th 1268, 1272–74 (11th Cir. 2022), *vacated as moot*, 77 F.4th 1366 (11th Cir. 2023). *Cf.* Mack v. Resurgent Cap. Servs., L.P., 70 F.4th 395, 406 (7th Cir. 2023) (allowing standing to assert FDCPA claim based on modest economic injury because the plaintiff "has pled harm to an underlying concrete interest that Congress sought to protect").

288. *See, e.g.*, Gerber v. Herskovitz, 14 F.4th 500, 506 (6th Cir. 2021) (allegations of "extreme emotional distress" resulting from picketing of the plaintiffs' synagogue were sufficient for standing).

289. *See, e.g.*, Carey v. Piphus, 435 U.S. 247, 262–63 (1978) (noting that "statements that are defamatory *per se* by their very nature are likely to cause mental and emotional distress, as well as injury to reputation").

emotional distress, for example, are typically only actionable in connection with a physical injury.[290] Moreover, recognizing anxiety or emotional distress injuries offers a ready end-run around any limits on recognizing legal or future risk-based injuries. And some forms of anxiety may be so widespread as to offend the principle barring generalized grievances.

We would again leave this largely to the underlying substantive law. When a plaintiff alleges a claim under a federal statute that the Supreme Court has held does not permit damages for emotional distress,[291] for example, emotional distress alone should not suffice for injury in fact. A tort plaintiff alleging intentional infliction of emotional distress, on the other hand, should generally not encounter any standing problem. The question would not be whether *this plaintiff*'s emotional injury was sufficiently serious or certain but whether the law governing the plaintiff's claim generally recognizes emotional injury as a harm or part of a larger category of circumstances that includes the plaintiff.[292] Legislatures, moreover, would ordinarily be able to satisfy Article III by rendering emotional injury or anxiety cognizable by statute.

Anxiety and emotional distress also provide a good illustration of our second category: cases in which Article III *excludes* a particular injury from recognition, even if a legislature attempts to make it actionable. In some circumstances, almost anyone may feel anxiety and emotional distress arising from a defendant's violation of the law.[293] For example, we are both professors of public law, with a considerable intellectual (and even emotional) investment in the rule of law and compliance with constitutional norms in which we are interested. If the President acts unconstitutionally, particularly in a sphere about which we write and teach, that may cause us far more distress and anxiety than if, say, our neighbor lets his dried leaves blow onto our property.[294]

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290. *See, e.g.*, Metro-North Commuter R.R. Co. v. Buckley, 521 U.S. 424, 429–31 (1997) (observing that the common law generally does not permit recovery in negligent infliction of distress claims unless the plaintiff sustains a physical injury or falls within the "zone of danger" of a physically-injurious act).

291. *See, e.g.*, Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562 (2022) (holding that damages for emotional distress are not available under the Rehabilitation Act or the Affordable Care Act); *Metro-North*, 521 U.S. at 428–38 (holding that the Federal Employer's Liability Act does not permit recovery for negligent infliction of emotional distress in the absence of a physical injury).

292. *Cf. Metro-North*, 521 U.S. at 436 (noting, with respect to emotional distress claim, that "the common law in this area does not examine the genuineness of emotional harm case by case. Rather, it has developed recovery-permitting categories the contours of which more distantly reflect this, and other, abstract general policy concerns"); *see also, e.g.*, Clemens v. Execupharm Inc., 48 F.4th 146, 158 (3d Cir. 2022) (concluding that the plaintiff's "emotional distress and related therapy costs and the time and money involved in mitigating the fallout" associated with a data breach were sufficient for standing).

293. The Court has largely eschewed taxpayer standing for similar reasons. *See* Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 619–20 (2007) (Scalia, J., concurring).

294. *See, e.g.*, Whitten v. Cox, 799 So.2d 1, 18 (Miss. 2000) ("It is a principle of universal application that every trespass gives the landowner a right to at least nominal damages." (quoting Chevron Oil Co. v. Snellgrove, 175 So.2d 471, 474 (Miss. 1965))).

But one bedrock principle of standing jurisprudence is that "an injury amounting only to the alleged violation of a right to have the Government act in accordance with law [is] not judicially cognizable."[295] So if Congress enacted the Law Professors' Peace of Mind Act, empowering any academic who plausibly alleged distress and anxiety to challenge illegal action by a government official, the Court would surely strike that down. The generalized grievance rule thus sets an outer bound on the ability of legislatures or courts to expand standing by recognizing rights to recover for emotional distress or anxiety.

* * *

Many probabilistic standing cases turn on framing.[296] A future threat of physical harm can be re-framed as a present risk, causing anxiety, distress, or economic impact in the here and now. Generally speaking, the limits of federal jurisdiction should not be a function of artful pleading. At the same time, we do not find in Article III any comprehensive rule about the particular types of injuries that suffice for standing. That tells us that the substantive law underlying a plaintiff's claim must predominantly shape what interests count for standing, with an outer bound composed by the Court's insistence on a constitutional floor of actual, *de facto* injury. The interaction of those two principles is necessarily messy. But our framework will hopefully help courts focus on the right questions.

IV. IMMINENCE, THE TIMING DOCTRINES, AND REMEDIES

Much of the difficulty in probabilistic standing cases arises because plaintiffs invoke injuries that have not happened yet. In those cases, the key requirement of contemporary standing doctrine is that the injury must be "actual or imminent, not conjectural or hypothetical."[297] As already noted, this imminence requirement for standing has both a probability dimension (how *likely* is the injury), and a temporal dimension (how *soon* is it likely to occur). These dimensions are related: If harm is unlikely, it might take a long time to come about, and if anticipated harm is far in the future, the likelihood that some circumstances may intervene to prevent it goes up. We have already argued

295. Lujan v. Defs. of Wildlife, 504 U.S. 555, 575 (1992); *see also* Allen v. Wright, 468 U.S. 737, 754 (1984) ("This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court."). The general prohibition on taxpayer standing rests on similar grounds. *See Hein*, 551 U.S. at 633 (Scalia, J., concurring) ("Is a taxpayer's purely psychological displeasure that his funds are being spent in an allegedly unlawful manner ever sufficiently concrete and particularized to support Article III standing? The answer is plainly no.").

296. *Cf.* Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311, 1314 (2002) ("The question of whether government has harmed some individual citizen (or vice versa) is meaningful only relative to some transactional frame that determines how much of that relationship, which of the multitudinous benefits and harms, should be included within the constitutionally relevant transaction.").

297. Spokeo, Inc. v. Robins, 578 U.S. 330, 339 (2016) (quoting *Lujan*, 504 U.S. at 560).

that courts should not seek to establish some minimum probability threshold for standing.[298] In this Part, we contend that the *temporal* dimension of "imminence" should be handled largely under the timing doctrines of ripeness and mootness, as well as the law of remedies.

We have two key goals in this Part. The first is to stave off a growing tendency among courts and litigants to conflate standing and ripeness by highlighting some important differences between the doctrines. Those differences make ripeness—and sometimes its close relation, mootness—a more supple instrument for pursuing the values that justiciability doctrine seeks to protect in future injury cases. Conversely, we contend that the "imminence" language in the Court's standing cases should be read as an allusion to the timing doctrines—not as an alternative temporal principle distinctive to standing.

Our second objective is to explore the role that the law of remedies plays in justiciability.[299] We have already criticized the most common formulation of the "remedial standing" rule, but one cannot deny that the remedy sought in a case has a great deal to do with what it takes to establish standing. A better understanding of timing and remedial doctrines would, in turn, help clarify the perennial puzzle of how much justiciability doctrine is constitutional in nature and how much is prudential.

A. *Standing, Ripeness, and Mootness*

The black letter law of justiciability has always distinguished between standing and the timing doctrines. Dean Chemerinsky, for instance, writes that "[w]hile standing is concerned with who is a proper party to litigate a particular matter, ripeness and mootness determine when that litigation may occur."[300] Particular litigants may be the right parties to bring a particular suit and yet be tossed out of court because they have sued too early or too late.[301] Despite this sharp distinction in the abstract, in practice contemporary courts—and some commentators—have tended to conflate standing, ripeness, and mootness. This tendency sows considerable confusion in the doctrine by eliding important differences in the relevant standards and the constitutional or prudential nature of their requirements. Further, the availability of two parallel tracks for deciding the same timing issues invites doctrinal manipulation.

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298. *See supra* notes 119–22 and accompanying text.

299. *See, e.g.*, Fallon, *Justiciability and Remedies*, *supra* note 30, at 637 ("[C]ourts . . . decide cases by seeking what they regard as an acceptable overall alignment of doctrines involving justiciability, substantive rights, and available remedies.").

300. ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.41, at 129 (8th ed. 2021); *see also* 13B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3532, at 365 (3d ed. 2008) ("Ripeness doctrine is invoked to determine whether a dispute has yet matured to a point that warrants decision."); *id.* at § 3533, at 715 ("Mootness doctrine encompasses the circumstances that destroy the justiciability of a suit previously suitable for determination.").

301. *E.g.*, Communist Party of the U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 79 (1961) ("That a proper party is before the court is no answer to the objection that he is there prematurely.").

Most important for present purposes, conflating standing with ripeness and mootness obviates the distinctive role that the timing doctrines can play in addressing probabilistic injury problems.

The most common tendency is to merge or conflate standing and ripeness when a lawsuit rests on concerns about what might happen in the future. In *Trump v. New York*, for example, the plaintiffs alleged that a plan to exclude aliens lacking lawful immigration status from being counted in the census would violate the law and significantly affect congressional representation and federal funding.[302] The Court dismissed the case based on "[t]wo related doctrines of justiciability"—standing and ripeness—because it was highly uncertain how many aliens without lawful status would actually be excluded from the count.[303] "At the end of the day," said the Court, "the standing and ripeness inquiries both lead to the conclusion that judicial resolution of this dispute is premature."[304] Other decisions on the timing of litigation have overlooked ripeness altogether. In *McConnell v. Federal Election Commission*, for instance, the Court held that a politician could not challenge restrictions on campaign advertising that would not affect him until he ran for re-election in five years.[305] The Court said that "[t]his alleged injury in fact is too remote temporally to satisfy Article III standing," without mentioning ripeness at all.[306] Both scholars and judges have wondered whether there is any difference between the doctrines.[307]

Standing can also be difficult to distinguish from mootness. Consider *City of Los Angeles v. Lyons*,[308] which we discussed in Part II.[309] Mr. Lyons had a claim for damages based on having been placed in a chokehold in police custody. But afterwards, any claim for an injunction *based on that particular encounter* was arguably moot (although Lyons might have argued that it fit into

302. Trump v. New York, 141 S. Ct. 530, 534–35 (2020) (per curiam).

303. *Id.* at 535.

304. *Id.* at 536; *see also, e.g.*, Susan B. Anthony List v. Driehaus, 573 U.S. 149, 155, 157 n.3 (2014) (concluding, in a case challenging a regulation of free speech that the plaintiff had been subjected to in the past and might be again in the future, that the standing and ripeness issues in the case "boil down to the same question" (quoting MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 128 n.8 (2007)); Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 297 (1979) (referring generally to whether there is a "case or controversy" without relying specifically on either the standing or ripeness labels).

305. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 226 (2003), *overruled on other grounds by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

306. *Id.* at 226.

307. *See, e.g.*, Hessick, *supra* note 6, at 64 (suggesting that "the constitutionally mandated imminence requirement is the same for ripeness and standing"); *MedImmune*, 549 U.S. at 128 n.8 (stating that "[t]he justiciability problem that arises . . . can be described in terms of standing . . . or in terms of ripeness" and suggesting that "standing and ripeness boil down to the same question in this case"). The Hart & Wechsler federal courts casebook asks students to "consider in what ways ripeness differs from the law of standing." HART & WECHSLER, *supra* note 6, at 213.

308. City of Los Angeles v. Lyons, 461 U.S. 95 (1983).

309. *See supra* note 105 and accompanying text.

one of several exceptions to that bar).[310] The Court instead held that Lyons lacked *standing* to seek an injunction because he had not established that any future encounter was sufficiently likely.[311] Professor Fallon concluded that "[a]s a result of *Lyons*, standing analysis apparently has displaced the more flexible doctrine of mootness as the applicable justiciability hurdle in much federal litigation predicated on past injuries."[312]

Distinguishing the timing doctrines from standing is difficult in large part because all three principles rest on the fundamental requirement that a plaintiff have a personal stake in the litigation. Uncertainty about whether or to what extent the plaintiff will be affected by the law or conduct they challenge can call into question both whether they have sufficient injury to support standing and whether adjudication is appropriate at this time. As Professor Monaghan has famously observed, "[T]here is no 'case or controversy' once the private rights of the litigants are no longer at stake. Mootness is, therefore, the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence."[313] The same can be said of ripeness, which assesses whether there is sufficient threat to the plaintiff's personal interest at the outset of litigation to support the court's exercise of jurisdiction.[314] Or as Professor Nichol put it, "The 'natural' overlap between standing and ripeness analysis occurs in the measurement of the cognizability of contingent or threatened harms."[315]

Despite the overlap of standing and the timing doctrines in principle, the doctrines have evolved differently. One likely reason is that ripeness and mootness questions generally come up in actions for injunctive relief, and thus

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310. *See* HART & WECHSLER, *supra* note 6, at 234. Indeed, the Court specifically *rejected* Mr. Lyons's argument that the case was moot because the LAPD had changed its policies during the pendency of the appeal. The Court said that nothing prevented LAPD from resuming its practices, and so the changes had not "irrevocably eradicated the effects of the alleged violation." *Lyons*, 461 U.S. at 101 (quoting Los Angeles Cnty. v. Davis, 440 U.S. 625, 631 (1979)); Fallon, *Lyons*, *supra* note 75, at 25.

311. *Lyons*, 461 U.S. at 101.

312. Fallon, *Lyons*, *supra* note 75, at 6.

313. Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973); *see also* Fred O. Smith, Jr., *Undemocratic Restraint*, 70 VAND. L. REV. 845, 860 (2017). The Court qualified Professor Monaghan's formulation in *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000). But the Court there simply said that the doctrines are not identical for all purposes; it did not deny that standing, mootness, and ripeness all concern the same necessary injury, with the latter two doctrines simply reflecting temporal reasons why the injury might no longer, or not yet, exist. *See, e.g.*, Uzuegbunam v. Preczewski, 141 S. Ct. 792, 796 (2021) ("At all stages of litigation, a plaintiff must maintain a personal interest in the dispute. The doctrine of standing generally assesses whether that interest exists at the outset, while the doctrine of mootness considers whether it exists throughout the proceedings.").

314. Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 579–80 (1985).

315. Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 173 (1987).

both timing doctrines reflect the highly flexible character of equity.[316] But whatever the explanation, standing and the timing doctrines apply quite different standards that focus on somewhat different concerns. As we previously noted,[317] the *Abbott Laboratories* test for ripeness turns on the fitness of the issues in the case for judicial review and the hardship to the parties of awaiting future litigation.[318] This test is designed not so much to limit the power of courts but "to enhance the quality of judicial decision making by ensuring that there is an adequate record to permit effective review."[319] Hence, the *Abbott Laboratories* test is not generally viewed as a stringent one,[320] and it adds another layer of flexibility by allowing one factor to trade off with the other in particular cases.[321] Mootness is likewise often less demanding than standing. As the Court wrote in *Friends of the Earth*, "[T]here are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness."[322]

Standing also differs from the timing doctrines in that, aside from certain specialized rules like the third-party standing doctrine,[323] standing is generally considered a constitutional issue while ripeness and mootness are often thought to be at least partly prudential.[324] To be sure, the Court has tied both

316. *See* DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 220 (1991).

317. *See supra* note 160 and accompanying text.

318. Abbott Lab'ys v. Gardner, 387 U.S. 136, 149 (1967); *see also, e.g.*, Nat'l Park Hosp. Ass'n v. Dep't of the Interior, 538 U.S. 803, 808 (2003). The test is framed somewhat differently for pre-enforcement challenges to criminal laws, where the plaintiff must have "alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979); *see also* Steffel v. Thompson, 415 U.S. 452, 459 (1974) ("[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights.").

319. CHEMERINSKY, *supra* note 300, § 2.4.1, at 131.

320. Cont'l Air Lines, Inc. v. Civ. Aeronautics Bd., 522 F.2d 123, 128 (D.C. Cir. 1975), *rev'ing en banc*, 552 F.2d 107 (1974) (stating that a "presumption of reviewability . . . 'permeates the *Abbott Laboratories* ruling'" (quoting Nat'l Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689, 694 (D.C. Cir. 1971))); Daniel Boger, Note, *Pre-Enforcement Review: An Evaluation from the Perspective of Ripeness*, 36 VA. ENVT'L L.J. 77, 85 (2018) (stating that *Abbott Labs* created a "strong presumption in [pre-enforcement review's] favor"); A. Raymond Randolph, *Administrative Law and the Legacy of Henry J. Friendly*, 74 N.Y.U. L. REV. 1, 9 (1999) (suggesting that, since *Abbott Labs*, "the pendulum has swung too far in favor of permitting [pre-enforcement] review").

321. *See, e.g.*, 13B WRIGHT, MILLER & COOPER, *supra* note 298, at 509 ("The determination that decision is possible without awaiting further events may be affected by the costs of delay.").

322. Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 190 (2000).

323. *See generally* Bradley & Young, *supra* note 15, at 17–25 (discussing the prudential status of the third-party rule).

324. *See* Fallon, *Justiciability and Remedies*, *supra* note 30, at 676–81 (stressing prudential elements of mootness and ripeness and their connections to remedial concerns). Despite some recent skepticism about prudential justiciability limits, *see* Susan B. Anthony List v. Driehaus,

timing doctrines to the case or controversy requirement of Article III.[325] But the ins and outs of both doctrines sound predominantly in prudence. Justice Harlan's opinion in *Abbott Laboratories*, for example, did not even mention Article III in formulating the modern test for ripeness.[326] In *Buckley v. Valeo*, the Court emphasized the importance of a legislative provision for expedited judicial review in upholding a pre-enforcement challenge to the Federal Election Campaign Act.[327] And the Court has recognized pragmatic exceptions to the mootness doctrine—such as for injuries "capable of repetition yet evading review"[328]—that would be exceptionally difficult to justify were mootness a hard and fast constitutional rule.[329] All three justiciability doctrines share the constitutional requirement that a case must arise from a concrete injury in fact, but *when* the court decides in relation to that injury's occurrence has been governed by more flexible prudential notions.

The choice to rely on standing, ripeness, or mootness in assessing the justiciability of a particular case may have important consequences. Without a clear division of labor between the doctrines, a court may choose a demanding standard or a relatively lenient one, a constitutional analysis or a prudential one. At best, the situation is confusing and arbitrary—it raises Justice Harlan's concern that standing may reduce to "a word game played by secret rules."[330] At worst, viewing standing and the timing doctrines as interchangeable raises the possibility of manipulating the applicable analysis to bias the outcome.

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573 U.S. 149, 167 (2014); Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 125–26 (2014), the Supreme Court and the lower courts routinely invoke prudential aspects of the ripeness doctrine. *E.g.*, DM Arbor Ct., Ltd. v. City of Houston, 988 F.3d 215, 219–20 (5th Cir. 2021).

325. *See, e.g.*, Honig v. Doe, 484 U.S. 305, 317 (1988) (mootness); Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 297–98 (1979) (ripeness).

326. *See* Abbott Lab'ys v. Gardner, 387 U.S. 136, 148–49 (1967) (grounding ripeness in prudential discretion afforded by equitable rules, the Declaratory Judgment Act, and the Administrative Procedure Act without mentioning Article III); *Honig*, 484 U.S. at 330–31 (1988) (Rehnquist, C.J., concurring) (concluding that many aspects of mootness are likewise prudential); *cf.* Simmonds v. INS, 326 F.3d 351, 356–58 (2d Cir. 2003) (Calabresi, J.) (distinguishing between constitutional and prudential ripeness); McInnis-Misenor v. Me. Med. Ctr., 319 F.3d 63, 70 (1st Cir. 2003) (same); Bradley & Young, *supra* note 15, at 23–24 (noting the pervasive importance of prudential doctrines, including ripeness and mootness, in the law of federal jurisdiction).

327. Buckley v. Valeo, 424 U.S. 1, 117 (1976); *see also* HART & WECHSLER, *supra* note 6, at 225–26 (discussing *Buckley*); Nichol, *supra* note 315, at 155 ("[E]xcept for those instances in which ripeness analysis is employed to eschew advisory opinions—a task performed more directly by the standing requirement—the doctrine serves goals that the Court has typically characterized as prudential rather than constitutional.").

328. FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 462 (2007); Roe v. Wade, 410 U.S. 113, 125 (1973) (quoting S. Pac. Terminal Co. v. Interstate Com. Comm'n, 219 U. S. 498, 515 (1911)).

329. *Honig*, 484 U.S. at 330 (Rehnquist, C.J., concurring); *see also* U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 400–01, 408 (1980) (allowing named plaintiff in a putative class action whose personal claim had become moot to continue to challenge the trial court's denial of class certification).

330. Flast v. Cohen, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting).

The most significant cost for our present purposes, however, is that conflating standing, ripeness, and mootness obscures the distinctive ways that the timing doctrines can assist in otherwise intractable probabilistic injury cases.

Courts and commentators have been too quick to give up on the basic distinction between a doctrine that seeks the right plaintiffs (standing)[331] and doctrines controlling the timing of when those plaintiffs may pursue their suit (ripeness and mootness).[332] In future injury cases, both standing and the timing doctrines focus on questions of probability. Standing asks (1) whether plaintiffs are *subject* to the challenged action, and (2) if they are, whether they are likely to be harmed in a cognizable way. Decisions like *Clapper* suggest that significant uncertainty about the first question will be fatal if it cannot be resolved at the outset of litigation.[333] Relatedly, if wrongful conduct is allegedly happening in the world but it is uncertain whether the plaintiff will be exposed to it, the focus will typically be on standing.

But if plaintiffs *are* subject to the alleged harmful act, then the second question—concerning whether and how the wrongful act will give rise to injury—can be better settled by the timing doctrines. If future harm is the only harm alleged, then ripeness is the relevant doctrine.[334] If the plaintiff has already experienced sufficient injury to get into court but is seeking relief predicated on that injury continuing or recurring, then mootness will often be the better choice.[335] But the crucial point is that both timing doctrines, being largely prudential, focus on pragmatic concerns about the court's ability to conduct the litigation and the practical needs of the parties. Ripeness emphasizes the extent to which the record before the court is sufficiently developed to proceed and the interests of the parties in avoiding delay.[336] Mootness adds consideration of the plaintiff's interest in securing a binding judgment to forestall recurrence of the defendant's wrongful action. These considerations are quite different—and more tractable for courts—than an effort to fix a standard

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331. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 498–99 (1975) ("[T]he standing question is whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf.") (internal quotation marks omitted).

332. 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3531.12, at 50 (2d ed. 1984) ("Ripeness and mootness easily could be seen as the time dimensions of standing.").

333. *See supra* Section II.A.

334. *See, e.g.*, Texas v. United States, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.' " (quoting Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 580–81 (1985))).

335. *See* LAYCOCK, IRREPARABLE INJURY, *supra* note 316, at 222 ("Mootness focuses on the past, ripeness on the future, but cases look both ways when plaintiff's fears for the future are based on an incident in the past.").

336. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 124 (1962) (explaining that "pure standing ensures a minimum of concreteness" but "the concept of ripeness seek[s] further concreteness, in varying conditions that cannot be described by a fixed constitutional generalization").

for "imminence" under the standing doctrine (not to mention an effort to determine how likely a particular future injury actually is).[337]

The Supreme Court's decision in *United Public Workers v. Mitchell*[338] illustrates these concerns about providing an adequately concrete factual context for judicial review. Federal employees subject to the Hatch Act, which barred them from taking part in political campaigns, challenged the Act on constitutional grounds. The Court held that their claims were not ripe because the plaintiffs had specified the prohibited activities in which they intended to engage in general, abstract terms.[339] This would have made it difficult for the Court to assess whether those activities implicated the government's interests in preventing corruption or the appearance of corruption.[340] As the *Hart & Wechsler* editors put it, "[T]here is a real issue in *UPW v. Mitchell* about whether the dispute was too 'ill-defined' to be appropriate for judicial resolution until further developments had more sharply framed the issues for decision. If ripeness doctrine has a distinctive role or focus, mustn't this be it?"[341]

This flexible, prudential inquiry is well-suited to the concerns associated with the "imminence" element of the Court's standing jurisprudence. If plaintiffs are, or will be, subject to the challenged action—and they plead a cognizable form of actual injury with the requisite specificity—then they should generally have Article III standing to challenge it. But prudential ripeness can still usefully assess whether the Court has the requisite information to decide the case, or whether, as in *Mitchell*, the issue will not be fit for judicial resolution until further developments have fleshed out the record. Delay may also help avoid unnecessary resolution of constitutional issues.[342] Against this concern, the Court must pragmatically weigh the hardship to the plaintiff if review is delayed, including the costs of any interim precautions the plaintiff must take to avoid future harm.[343] To the extent that these factors weigh against one another on a sliding scale,[344] they preclude establishing any set doctrinal

337. *See* Bray, *supra* note 77, at 12 ("If what we are looking for is the court's ability to give a meaningful decision [at a particular time]—well, that is something judges have a feel for.").

338. United Pub. Workers v. Mitchell, 330 U.S. 75 (1947).

339. *Mitchell* did not use the term "ripeness," but it is generally taken to be a leading ripeness holding. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 516 (1975); CHEMERINSKY, *supra* note 300, § 2.4.2, at 135–36.

340. *See Mitchell*, 330 U.S. at 90.

341. HART & WECHSLER, *supra* note 6, at 220 (emphasis added); *see also* Socialist Lab. Party v. Gilligan, 406 U.S. 583, 588 (1972) (rejecting constitutional challenge to state election law as unripe because—although the plaintiff might have standing to challenge the law, "their case has not given any particularity to the effect on them of Ohio's affidavit requirement").

342. *See, e.g.*, Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

343. *See* Abbott Lab'ys. v. Gardner, 387 U.S. 136, 152 (1967) (discussing the hardship prong); *cf.* Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 154–55 (2010) (considering costs of precautions as part of the standing inquiry).

344. *See, e.g.*, City of Kennett v. EPA, 887 F.3d 424, 432 (8th Cir. 2018) ("Both of these factors are weighed on a sliding scale, but each must be satisfied to at least a minimal degree.") (internal quotation marks omitted); Ernst & Young v. Depositors Econ. Prot. Corp., 45 F.3d 530,

threshold for ripeness. But attempting to concoct such a threshold for "imminence" as part of the standing inquiry would both obviate the Court's *Abbott Laboratories* inquiry for ripeness and sacrifice valuable flexibility on a question unsuited for categorical rules.

To be sure, prudential inquiries often elevate the discretion available to courts, and courts may sometimes abuse prudential discretion to mask decisions motivated by other concerns. But absent any textual mandate or guidance as to a probability threshold for standing, interpolating such a threshold into Article III is surely the more aggressive extension of judicial power. The ripeness criteria, moreover, focus discretionary judgment on issues falling more clearly within the judicial wheelhouse—that is, on the ability of the court to decide the case on the facts as they stand, and the hardship to the parties of delay.

B. *Standing and Remedies*

A final source of guidance in probabilistic injury cases is the law of remedies. Nearly two decades ago, Professor Fallon suggested that "the thesis that justiciability doctrines are deeply influenced by concerns about judicial remedies seems almost self-evidently true—even if it has seldom been stated expressly."[345] Fallon emphasized, however, the importance of "[i]mplicit judgments about appropriate judicial remedies"[346]—for instance, the judgment that an injunction providing for monitoring of police practices would be overly intrusive on state and local governmental prerogatives[347]—that might influence courts to construe standing or other justiciability doctrines more strictly. We build on Fallon's work here by adding two points. The first is that remedial principles can and should interact with standing and the timing doctrines not just implicitly, but also explicitly—as part of the legal framework for establishing what justiciability doctrine requires. Second, in certain circumstances, courts should be more willing to apply the remedial rules of their own force rather than developing an "imminence" doctrine as part of standing that purports to serve the same function. This is particularly true in cases seeking injunctive relief to forestall an uncertain future harm.

In *Lyons*, the Court acknowledged at the outset that "case-or-controversy considerations 'obviously shade into those determining whether the complaint states a sound basis for equitable relief.' "[348] Although Professor Fallon and other commentators often seem to treat justiciability and remedial law as

535 (1st Cir. 1995) (stating that "both prongs of the test ordinarily must be satisfied . . . [but] there may be some sort of sliding scale under which, say, a very powerful exhibition of immediate hardship might compensate for questionable fitness . . . or vice versa").

345. Fallon, *Justiciability and Remedies*, *supra* note 30, at 661.

346. *Id.* at 643.

347. *E.g.*, City of Los Angeles v. Lyons, 461 U.S. 95, 112–13 (1983) (stressing "principles of equity, comity, and federalism that should inform the judgment of federal courts when asked to oversee state law enforcement authorities").

348. *Id.* at 103 (quoting O'Shea v. Littleton, 414 U.S. 488, 499 (1974)).

doctrinally autonomous,[349] the Court's interpretation of Article III's "case or controversy" language has long focused on those disputes "traditionally amenable to, and resolved by, the judicial process."[350] Standing doctrine, in other words, is built on the traditional requirements for a lawsuit in the Anglo-American courts. It is hardly surprising, then, that the traditional rules for securing legal and equitable remedies should inform the content of standing and other rules of justiciability.

TransUnion is the best recent example. As we have already discussed, the Court distinguished sharply between remedies with regard to what sorts of harm may constitute concrete injury in fact.[351] The majority acknowledged that the threat of future harm could suffice in a suit for an injunction, but it rejected the notion that such harm could ground standing in a suit for damages.[352] This was true even though the Fair Credit Reporting Act specifically authorized persons who had not yet been injured by a violation of the Act's requirements to seek statutory damages. For the Court, the longstanding rule that damages may be made available only for *realized* harms informed the meaning of Article III.[353] At the same time, the fact that equitable relief *is* traditionally available to forestall unrealized future injuries would have permitted Congress to authorize injunctions for the same plaintiffs. Cognizable injury under Article III varies according to the remedy sought in a case.

The Court did muddy the waters in *TransUnion*, however, by stating that a plaintiff may pursue injunctive relief from future harm "at least so long as the risk of harm is sufficiently imminent and substantial."[354] That could mean either that standing itself requires a judgment of the harm's imminence or simply that plaintiffs cannot secure injunctive relief under the law of remedies without showing a likelihood of imminent and substantial harm.[355] The latter

349. *See* Fallon, *Justiciability and Remedies*, *supra* note 30, at 644.

350. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998); *see also* Muskrat v. United States, 219 U.S. 346, 356–59 (1911) (collecting citations to the effect that a case or controversy must involve the sort of "regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs" (quoting *In re* Pac. Ry. Comm'n 32 F. 241, 255 (Field, Circuit Justice, C.C.N.D. Cal. 1887)); Young, *Equity*, *supra* note 70, at 1893–96 (discussing the Court's historical test).

351. *See supra* Section III.B.

352. *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2210 (2021) ("As this Court has recognized, a person exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring . . . .").

353. *Id.* at 2210–11; *see also* LAYCOCK, REMEDIES, *supra* note 246, at 15 (stating that damages are generally only available for realized harms).

354. *TransUnion*, 141 S. Ct. at 2210.

355. *See, e.g.*, D.T. v. Sumner Cnty. Schs., 942 F.3d 324, 326 (6th Cir. 2019) (stating that "immediate, irreparable harm" is a prerequisite for a preliminary injunction); Cnty. of Allegheny v. Commonwealth, 544 A.2d 1305, 1307 (Pa. 1988) (noting that for a preliminary injunction, "the need for relief must be immediate, and the injury must be irreparable if the injunction is not granted" (emphasis omitted) (quoting Singzon v. Commonwealth, 436 A.2d 125, 127 (Pa. 1981)) (internal quotation marks omitted)); 11A WRIGHT & MILLER, *supra* note 300, § 2942 (noting

view makes considerably more sense. Just as Article III articulates no standard for how likely a risk of injury must be, so too it sets no standard for how proximate a future injury must be in time. If the federal courts were to erect such a standard, they would surely draw heavily on the existing law of remedies, which for centuries has had to determine whether a harm was sufficiently imminent to warrant equitable relief.[356] But why not let that law simply operate of its own force? Plaintiffs who can establish that they are subject to a risk of future harm should have *standing* to seek an injunction against it, but they should lose a motion to dismiss or for summary judgment if they cannot establish that the harm is sufficiently imminent under the relevant remedial law.

One might object that remedial considerations should be postponed to the end of the case and not be part of any threshold determination of standing.[357] But the norm that litigation proceeds in stages—from establishing jurisdiction to deciding the merits to formulating a remedy—has long coexisted with the possibility that a case may be dismissed at the threshold if the pleadings or summary judgment evidence are inadequate to support the plaintiff's obligations at a later stage. Motions to dismiss may implicate the merits as well as jurisdiction, and so a plaintiff who has pleaded a claim for damages based on an unrealized harm might have their case dismissed for failure to state a claim upon which *that* relief can be granted.

That is not to say that *everything* should always be decided up front. Professor Fallon argued years ago that "[b]ecause sound decisionmaking about appropriate remedies requires sensitivity to context, the minimal requirements of standing should be set relatively low, . . . and courts should consider whether to award injunctions . . . within the more flexible frameworks of ripeness doctrine and the law of equitable remedies."[358] We agree and would further suggest that some courts may be inclined to unduly restrict standing in probabilistic injury cases because the remedial law has shifted not only to favor pre-enforcement review[359] but to make preliminary injunctions routinely available.[360] Standing, in other words, is being used as a filter for cases that

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that "the injury [must be] impending or threatened" to warrant injunctive relief (quoting Bonaparte v. Camden & A. R. Co., 3 F. Cas. 821, 827 (Baldwin, Circuit Justice, C.C.D.N.J. 1830) (No. 1,617))).

356. *See* Kellis E. Parker & Robin Stone, *Standing and Public Law Remedies*, 78 COLUM. L. REV. 771, 782 (1978) ("The law of remedies has a long and familiar tradition of denying relief to persons whose relations to the case are deemed insufficient.").

357. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 791 (1984) (Stevens, J., dissenting) (arguing that "the possibility that the relief might be inappropriate does not lessen the plaintiff's stake in obtaining that relief"); Parker & Stone, *supra* note 356, at 778 (arguing that incorporating remedial questions in standing analysis "does violence to the public interest in public law remediation by cutting off inquiry in advance of an informed judgment concerning public law remedies").

358. Fallon, *Justiciability and Remedies*, *supra* note 30, at 638.

359. *See* HART & WECHSLER, *supra* note 6, at 221–22; Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability*, L. & CONTEMP. PROBS., Spring 1994, at 185, 235–36; sources cited *supra* note 320.

360. *See* Bray, *supra* note 77, at 6 (demonstrating that "if the court agrees with the plaintiffs on the merits, it is . . . routine for the preliminary injunction to be granted").

courts deem premature but that permissive interpretations of ripeness and remedies would permit. We contend that this approach distorts standing doctrine, and that, if overly preemptive litigation needs to be forestalled, the timing and remedial doctrines should be tightened accordingly.

Unlike Professor Fallon, however, we contend that existing standing doctrine need not be fundamentally reframed to achieve that end. Our discussion of the definition of injuries under *TransUnion* demonstrated that the underlying law—including the law of remedies—plays an important role in defining what injuries are cognizable for standing purposes. And nothing in the Court's standing jurisprudence demands that "imminence" become the basis for a separate set of temporal standards independent of established timing or remedial doctrines. Imminence is the bread and butter of ripeness, mootness, and remedies law. Standing will work better if its neighboring doctrines are allowed to shoulder part of the load.

CONCLUSION

Questions of probability pervade standing analysis. They affect all three core elements of Article III standing: injury, traceability, and redressability. And although the federal courts have decided a steady diet of probabilistic standing cases, no settled framework has emerged. We attribute this continuing confusion to courts and commentators asking standing doctrine to do too much, in several respects. Some scholars have sought to develop a unified theory of probabilistic standing that would apply to all sorts of cases. That approach, however, elides important distinctions between different categories of cases. We have labeled those categories uncertain exposure, uncertain injury, and uncertain causation. Each displays its own complexities, although certain themes overlap.

One of those overlapping themes is the notion that courts ordinarily should not seek to decide how probable an event must be to create standing—a task for which Article III provides little guidance and which courts are ill-positioned to assess. As Alexander Bickel said, "No answer is what the wrong question begets."[361] Rather, courts should ask *who* decides questions of probability—that is, which of several available institutions (juries, agencies, legislators) is best able to make the call. We have also argued that how injuries are framed makes a considerable difference in assessing their probability. Such framing should ordinarily come from the underlying substantive law—not standing doctrine—but the Court has complicated matters by holding that Article III sets certain constraints. That floor remains relatively modest in the cases so far, leaving plenty of room for deference to the underlying law.

Finally, it is worth remembering that standing doctrine is not the only source of law limiting access to courts and judicial remedies. The Court has developed important timing doctrines of ripeness and mootness, and it should resist the temptation to collapse them all into standing. Likewise, the law of

361. BICKEL, *supra* note 336, at 103.

remedies has for centuries dealt with the sorts of issues concerning probabilistic future harm that most bedevil standing doctrine. Both timing and remedial doctrines serve similar functions to standing doctrine, but they do so by asking different sorts of questions. Sometimes those questions will be both more appropriate and easier for courts to answer.

Perhaps if a committee of law professors could take standing doctrine down to the studs, they could rebuild it in a way that would be both more coherent and more workable. We often find such efforts valuable and enlightening, but we have not tried to do that here. Instead, we have offered an account that conforms reasonably well to most of the decided cases (suggesting an adjustment here and there) while trying to uncover the underlying rationales of these existing doctrines. As long as the doctrines are not asked to do more work than they are designed for, they hold up surprisingly well.