Injury-in-Fact and the Establishment Clause

CONNOR SUOZZO*

ABSTRACT

In his concurrence in American Legion v. American Humanist Ass'n, 139 S. Ct. 2067 (2019), Justice Gorsuch argued that the respondents' regular contact with a forty-foot cross at a traffic-heavy intersection did not sufficiently confer standing to sue for an Establishment Clause violation. Their status as "offended observers," he wrote, did not satisfy the usual requirement of a concrete and particularized injury-in-fact. I argue in this note that the respondents did suffer an injury-in-fact, as the feeling of exclusion, though intangible, is nonetheless a real harm. I further argue that Congress has the power to define injuries sufficient to confer Article III standing and can do so by creating substantive rights. In this vein, the Framers arguably recognized a new kind of injury by ratifying the Establishment Clause, conferring standing on a class of plaintiffs that would otherwise have suffered no cognizable injury.

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INTRODUCTION

In *American Legion v. American Humanist Association*, the Supreme Court held that a thirty-two-foot tall, government-owned Latin cross in Bladensburg, Maryland did not violate the Establishment Clause of the First Amendment,[1] which provides that "Congress shall make no law respecting an establishment of religion"[2] and was incorporated against the states by the Fourteenth Amendment.[3] The Court reasoned that the cross, a World War I memorial erected in 1925,[4] was "undoubtedly a Christian symbol," but has also "come to represent . . . a symbolic resting place," a community gathering place, and "a historical landmark."[5] Justice Gorsuch's concurrence in the judgment, joined by Justice Thomas, expressed the view that the plaintiffs lacked standing to bring the case.[6] Justice Gorsuch believed that the plaintiffs' status as offended observers could not satisfy the injury-in-fact requirement of standing.

This paper critiques Justice Gorsuch's approach to standing and explains why the plaintiffs' alleged injuries were sufficiently concrete and particularized. It further argues that by ratifying the First Amendment, the Framers transformed certain stigmatic harms into legally cognizable injuries. In making that argument, it articulates a theory of how substantive rights can inform courts' identification of injuries-in-fact without collapsing the standing inquiry into the merits inquiry.

I. BACKGROUND

A. Standing and the Injury-in-Fact Requirement

Article III "limits the jurisdiction of federal courts to 'Cases' and 'Controversies.'"[7] An essential consequence of this limitation is the requirement that plaintiffs possess standing to sue in federal court.[8] To establish Article III standing, a plaintiff must show that "it has suffered an 'injury in fact'" that is "fairly traceable to the challenged action of the defendant" and "it is likely . . . that the injury will be redressed by a favorable decision."[9] Absent any of these three elements, a federal court is powerless to hear the case.[10]

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1. Am. Legion v. Am. Humanist Ass'n (American Legion), *139* S. Ct. 2067, 2090 (2019).
2. U.S. CONST. amend. I.
3. *See* Everson v. Bd. of Educ., 330 U.S. 1, 8 (1947).
4. *American Legion*, 139 S. Ct. at 2077.
5. *Id*. at 2090.
6. *Id*. at 2098 (Gorsuch, J., concurring in the judgment).
7. Lujan v. Defenders of Wildlife, 504 U.S. 555, 559 (1992).
8. *Id*. at 560.
9. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180–81 (2000).
10. *See Lujan*, 504 U.S. at 561.

Standing has thus become an enormously important doctrine as it allows cases to be dismissed without ever reaching the merits.[11] In the past several decades, the Supreme Court has tightened standing analysis, making it more difficult for some plaintiffs to sue.[12] There are even cases where *no* plaintiff would have standing to bring a lawsuit despite the potential violation of constitutional rights.[13] Understandably, standing doctrine has become the target of criticism by legal scholars.[14]

One focus of the discussion considers which branch has the power to define injuries-in-fact—courts or Congress.[15] On the one hand, the injury-in-fact requirement is part of an interpretation of the constitutional phrase "case or controversy," and interpreting the Constitution is the judiciary's domain. Further, "injuries" would seem to exist independently of any efforts to define them; a broken leg is an injury regardless of what a legislature has to say about it. On the other hand, no one denies that Congress can create new causes of action, so it can use its legislative power to create new cases or controversies that did not exist before.[16] Thus, Congress is not usurping the judiciary's power to interpret the Constitution when it decides that certain injuries give rise to federal claims. And when Congress does this, it is not creating new injuries out of thin air, but is rather granting judges permission to recognize them.

This discussion came to a head in *Spokeo, Inc. v. Robins*, where the Court was asked to determine whether Congress permissibly conferred standing on "any individual" who suffered a procedural violation of a disclosure statute, even in the absence of concrete harm.[17] In that case, a website operator allegedly violated the Fair Credit Reporting Act when it listed false information about the plaintiff on the internet.[18] The plaintiff sued, even though the inaccurate information depicted him in a positive light.[19] The Court held that a "bare procedural violation" of the statute could not meet the injury-in-fact requirement, and it remanded the case for the lower court to determine whether the plaintiff suffered a concrete injury.[20]

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11. *See* Warth v. Seldin, 422 U.S. 490, 500 (1975) (noting that "standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal").

12. *See, e.g.*, Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016); *Lujan*, 504 U.S. 555; Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982).

13. *See* United States v. Richardson, 418 U.S. 166, 179 (1974) ("In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process.").

14. *See, e.g.*, Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689 (2004); Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret*, 107 NW. U. L. REV. 169 (2012).

15. *See* Daniel Townsend, *Who Should Define Injuries for Article III Standing?*, 68 STAN. L. REV. ONLINE 76 (2015).

16. *See, e.g.*, Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 209–11 (1972).

17. *Spokeo*, 136 S. Ct. at 1544–45.

18. *Id.* at 1546.

19. *Id.* For example, his online profile falsely stated that he had obtained a graduate degree. *Id.*

20. *Id.* at 1550.

Some commentators counted the *Spokeo* decision as a loss for plaintiffs;[21] it did, after all, place a limit on Congress's ability to create new Article III injuries. But that case did not end the debate; instead, it showed only that there could be no injury, and therefore no standing, if no one was harmed. In other words, although there can be some losses without legal injury—*damnum absque injuria*[22]—*Spokeo* made clear that there can never be the inverse. Injury without loss is a null set in the eyes of courts.

Although courts and legal scholars have often speculated about Congress's power to define injuries for standing purposes, little has been said about whether the Framers of the Constitution possessed or used this power. Specifically, it is an open question whether the Framers, by ratifying the Establishment Clause of the First Amendment, made certain injuries judicially cognizable. For example, the Establishment Clause has been interpreted to prohibit state-owned religious displays that "ha[ve] the effect of endorsing religious beliefs."[23] Harms caused by this kind of violation may seem less concrete than the harm caused by a requirement to participate in school prayer[24] or to close down one's shop on Sundays.[25] Yet the constitutional prohibition could arguably bring harms in the former category within the judiciary's purview.

B. American Legion v. American Humanist Association

The individual plaintiffs in *American Legion* were Maryland and Washington, DC residents that "encounter[ed] the cross" multiple times and objected to it.[26] The complaint states that one of them, Mr. Steven Lowe, was a non-Christian and "fe[lt] excluded by the governmental message" of support and approval for Christianity.[27]

Justice Gorsuch wrote in his concurrence that status as an "offended observer" is not an "injury-in-fact" that can confer standing.[28] According to Justice Gorsuch, for years, lower courts have been applying the wrong standing requirements in Establishment Clause cases.[29] After reiterating the injury-in-fact requirements to prove "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical," Justice Gorsuch rejected the notion that "offense alone" could

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21. *See, e.g.*, Blaine C. Kimrey, *Spokeo Was a Loss for Plaintiffs, Seventh Circuit Reaffirms*, VEDDER PRICE (Dec. 22, 2016), https://www.mediaandprivacyriskreport.com/2016/12/spokeo-was-a-loss-for-plaintiffs-seventh-circuit-reaffirms/.

22. *See, e.g.*, Parker v. Brown, 10 S.E.2d 625, 634 (1940).

23. Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 597 (1989), *abrogated by* Town of Greece v. Galloway, 572 U.S. 565, 134 S. Ct. 1811 (2014).

24. *See* School Dist. of Abington Township v. Schempp, 374 U.S. 203, 224 n.9 (1963).

25. *See* McGowan v. Maryland, 366 U.S. 420 (1961).

26. Am. Legion v. Am. Humanist Ass'n (American Legion), 139 S. Ct. 2067 (2019).

27. *Id.*

28. *American Legion*, 139 S. Ct. at 2098 (Gorsuch, J., concurring).

29. *Id.* at 2101.

qualify.[30] Apart from Justice Thomas joining that concurrence, no other justices mentioned standing.

II. DISCUSSION

Justice Gorsuch's view rests on the assumption that courts should rigidly apply the same requirements to every standing inquiry irrespective of non-judicial efforts to recognize new injuries. Even accepting his assumption as true, there is good reason to doubt his conclusion because the plaintiffs' deep feelings of exclusion are arguably concrete and particularized. Additionally, the label "offense" mischaracterizes and trivializes the plaintiffs' injuries. But courts should not accept Justice Gorsuch's assumption; instead, Congress, and in constitutional cases, the Framers, should continue to influence the definition of injuries-in-fact through the creation of substantive rights. Judges should defer to their judgment when determining whether intangible harms are sufficiently concrete. Under this analysis, the Framers, by ratifying the Establishment Clause, transformed certain harms, including those experienced by the plaintiffs in *American Legion*, into judicially cognizable injuries and thereby conferred Article III standing. This does not eliminate standing doctrine, but rather recognizes a small point of potential overlap between standing injuries and substantive claims.

A. American Legion Plaintiffs' Standing without Reference to the Constitutional Right

Justice Gorsuch's concurrence in the judgment in *American Legion* would have instructed the court below to dismiss the case for lack of standing.[31] He reasoned that the plaintiff association's members, who "'regularly' c[a]me into 'unwelcome direct contact'" with the cross "while driving in the area" were merely "offended observers."[32] He adds, "offense alone [does not] qualif[y] as a 'concrete and particularized' injury sufficient to confer standing."

This argument's heavy reliance on analogy to other cases and hypotheticals illustrates Justice Gorsuch's belief that Article III standing analysis is rigidly uniform across all contexts. He asks us to "imagine if a bystander disturbed by a police stop tried to sue under the Fourth Amendment," and points out the perceived absurdity in a standing doctrine that would prevent "[a]n African-American offended by a Confederate flag atop a state capitol" to sue under the Equal Protection Clause while allowing "an atheist who is offended by the cross on the same flag" to sue under the Establishment Clause.[33] Plaintiffs in these hypotheticals would lack standing, he argues, because their offense is not a concrete and particularized injury. But none of these analogies would hold water if there was reason to believe that the Establishment Clause was relevantly different

30. *Id.* at 2098.
31. *Id.*
32. *Id.*
33. *Id.* at 2098–99.

from the Fourth Amendment or the Equal Protection Clause. Thus, Justice Gorsuch's argument implicitly endorses the view that injuries-in-fact are determined exclusively by judges without reference to constitutional or statutory rights.

In his view, offense can never be an injury-in-fact because it is never concrete. He emphasizes the separation of powers concerns rooted in this element of standing: If courts entertained cases brought by plaintiffs seeking to "forbid what they dislike," then "[c]ourts would start to look more like legislatures, responding to social pressures rather than remedying concrete harms, in the process supplanting the right of the people and their elected representatives to govern themselves."[34]

Even assuming the substance of the constitutional right should not figure into the analysis, there is good reason to doubt Justice Gorsuch's conclusion that the plaintiffs' injuries were not sufficiently concrete. The Court gave a detailed explanation of the concreteness requirement in *Spokeo*. Justice Alito, writing for a six-Justice majority, stated that "[a] 'concrete' injury must be '*de facto*'; that is, it must actually exist."[35] And "[w]hen we have used the adjective 'concrete,' we have meant to convey the usual meaning of the term—'real,' and not 'abstract.'"[36] Most importantly for this discussion, Justice Alito then declared, "[a]lthough tangible injuries are perhaps easier to recognize, we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete."[37]

Justice Gorsuch's view may seem to contradict the idea that intangible injuries can be concrete. But there is another way to read his concurrence to be compatible with Justice Alito's pronouncements in *Spokeo*. Justice Gorsuch writes, "[a]bandoning offended observer standing will mean only a return to the usual demands of Article III, *requiring a real controversy with real impact on real persons* to make a federal case out of it."[38] His position is not a wholesale rejection of intangible injuries, but a declaration that "offense" is one kind of intangible injury that is not "real.""

Political philosophy provides a useful framework and terminology for analyzing this view. Justice Gorsuch's position rejects what philosopher Joel Feinberg called "the offense principle"[39] and limits the standing inquiry to "the harm principle."[40] The offense principle is the idea that "there are experiences that are harmless in themselves yet so unpleasant that we can rightly demand legal protection from them even at the cost of other persons' liberties,"[41] while the harm

34. *American Legion*, 139 S. Ct. at 2099 (Gorsuch, J., concurring in the judgment).
35. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016).
36. *Id*.
37. *Id*. at 1549.
38. *American Legion*, 139 S. Ct. at 2103 (Gorsuch, J., concurring) (emphasis added).
39. *See* Joel Feinberg, THE MORAL LIMITS OF THE CRIMINAL LAW, VOL. 2: OFFENSE TO OTHERS (1985).
40. *See* Joel Feinberg, THE MORAL LIMITS OF THE CRIMINAL LAW, VOL. 1: HARM TO OTHERS (1984).
41. Feinberg, *supra* note 39, at 10.

principle is John Stuart Mill's theory that "the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others."[42] It is important to add that Justice Gorsuch's conception of the harm principle defines harm narrowly so as not to include offense.

Spokeo did not definitively answer what it means for an injury to be "real." Instead, it simply held that the plaintiff "cannot satisfy the demands of Article III by alleging a bare procedural violation."[43] The plaintiff in *Spokeo* had sued a website operating a "people search engine" for inaccurately reporting that he [was] married, ha[d] children, [was] in his 50's, [had] a job, [was] relatively affluent, and [held] a graduate degree."[44] Although the company violated a statute requiring it to report accurate information, this procedural violation alone did not establish that these inaccuracies, which appeared to make the plaintiff a more attractive job candidate, harmed him in a "real" way.[45] Still, acknowledging that procedural violations may create "the risk of real harm," the court remanded the case to the Ninth Circuit to determine whether the plaintiff suffered a concrete injury.[46] *Spokeo* made clear that a violation that only confers a *benefit* on the plaintiff does not cause an injury-in-fact. This hardly suggests that a member of a minority religion who is deeply offended by regular exposure to a government-owned religious display in her community has not been harmed; such offense is certainly more than a procedural violation. Thus, Justice Gorsuch's notion that offense can never be a "real" injury is contestable.

Further, his characterization of the plaintiffs in *American Legion* as "offended observers" trivializes their experience. Mr. Lowe, a member of the plaintiff organization, was not only "personally offended" by the display, but he "fe[lt] excluded by th[e] governmental message."[47] This echoes Justice O'Connor's description of an Establishment Clause prohibition: A government may not endorse religion because it "sends a message to nonadherents that they are outsiders, not full members of the political community."[48] To describe this experience as mere offense significantly minimizes it and ignores the difference between someone outside the Maryland and DC area who objects to the Bladensburg Cross and someone who passes by it several times a month. Indeed, it is not unlike the difference between a "stigmatic injury . . . suffered by all members of a racial group when the Government discriminates on the basis of race," and that same injury suffered by "those persons who are personally denied equal

42. JOHN STUART MILL, ON LIBERTY 18 (Project Gutenberg 2011) (1859).
43. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016).
44. *Id.* at 1544, 1546.
45. *Id.* at 1550.
46. *Id.* at 1549–50.
47. Am. Legion v. Am. Humanist Ass'n (American Legion), 139 S. Ct. 2067, 2067 (2019).
48. Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

treatment."[49] For the latter group, the Court has said, "such [stigmatic] injury accords a basis for standing."[50]

By conflating mere offense—something that can be experienced by anyone who hears about the cross—with receiving a message of exclusion—something most acutely experienced by non-Christian members of the Bladensburg community—Justice Gorsuch wrongly emphasizes the concreteness prong of the injury-in-fact analysis when his critique more properly lies in the "particularization" prong. The latter is mentioned, though it does not play nearly as strong a role in the concurrence. Justice Gorsuch recites the rule that "generalized grievances about the conduct of Government are insufficient to confer standing to sue."[51] After all, "if offended observers could bring suit, this rule would be rendered meaningless."[52] But again, the experience of a non-Christian in California who reads about the Bladensburg cross and is offended is hardly comparable to the experience of religious minorities in Bladensburg. Nor is the experience of a Christian living in Bladensburg who is offended by the cross because of his belief in the separation between church and state.

By contrast, the complaint in *American Legion* alleged that plaintiff Steven Lowe "lives approximately four miles away from the Bladensburg Cross and passes it on average, about once a month."[53] He "believes that the Bladensburg Cross . . . gives the impression that the State supports and approves of Christianity, as opposed to other religions, and that the state may even prefer Christians and Christianity over other religions."[54] The complaint added that "[a]s a non-Christian, Mr. Lowe is personally offended and feels excluded by this governmental message."[55] His experience is particular to him and is arguably concrete even without reference to the right to be free from government endorsements of religion.

B. Non-exclusivity of Courts' Power to Define Concrete Injuries

Justice Gorsuch's conclusion that the plaintiffs lacked standing suffers from an even deeper flaw than the ones discussed above. His argument stands on the premise that courts, rather than congress or the Framers, have the sole power to define injuries-in-fact. This premise is wrong because it contradicts Supreme Court precedent. Although Congress can eliminate prudential bars to standing through private rights of action, it can also alter the constitutional minimum of standing by creating substantive rights which imply concrete injuries. The

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49. Allen v. Wright, 468 U.S. 737, 754–55 (1984).
50. *Id.* at 755.
51. *American Legion*, 139 S. Ct. at 2100 (Gorsuch, J., concurring in the judgment) (internal quotation marks omitted).
52. *Id.*
53. *Id.* at 2067.
54. *Id.*
55. *Id.*

Court's context-specific approach to standing confirms this. Finally, courts should respect congressional judgment in defining intangible rights.

1. Supreme Court Precedent Recognizes Congress's Role of Conferring Standing

First, the Court has acknowledged that Congress plays an important role in defining injuries. As it declared in *Lujan*, and reaffirmed in *Spokeo*, "Congress may 'elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate at law.'"[56]

There is, however, a "constitutional minimum" that an alleged injury must satisfy before Congress can make it cognizable.[57] This minimum includes the particularization requirement. The injury in *Lujan*, for example, failed to meet this minimum because, among other reasons, it was not "actual or imminent."[58] In that case, the plaintiffs were environmentalists who had expressed a "desire" and "hope" to visit the habitats of endangered species.[59] They alleged that new regulations "increase[d] the rate of extinction" of those species.[60] The Court held that they could not demonstrate an actual or imminent injury-in-fact where the complaint lacked a "description of concrete plans" or "any specification of *when* the some day [their visit to the habitats] will be."[61] In short, had the plaintiffs "acquire[d] airline tickets to the project sites,"[62] they would have had standing. Absent a showing of actual or imminent injury, Congress was powerless to confer standing on the plaintiffs by statute.

But when the minimum requirements are met, "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."[63] The classic example is competitor standing. In *FCC v. Sanders Bros. Radio Station*, the Court recognized that a radio station had standing to appeal an FCC order granting a newspaper's application to open a competing station.[64] The economic injury supported standing only because it was "within the power of Congress to confer such standing to prosecute an appeal."[65] Congress accomplished this by including a provision in the Communications Act authorizing suit by "any . . . person aggrieved or whose

56. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992)).
57. *Lujan*, 504 U.S. at 560.
58. *Id*. at 564.
59. *Id*. at 562–63.
60. *Id*. at 562.
61. *Id*. at 564.
62. *Id*. at 579 (Kennedy, J., concurring).
63. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring)).
64. FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 477 (1940).
65. *Id*. at 477.

interests are adversely affected by any decision of the Commission granting or refusing any such application."[66]

Similarly, in *Trafficante v. Metropolitan Life Ins. Co.*, the Court held that Congress conferred standing to persons suffering "the loss of important benefits from interracial associations" caused by the "exclusion of minority persons from [an] apartment complex."[67] The provision conferring standing read, "[a]ny person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur . . . may file a complaint with the Secretary."[68]

These examples show that Congress can confer standing where it otherwise would not have existed. But they do not fully answer the question whether Congress merely has the power to eliminate prudential bars to standing, or whether it can confer Article III standing by influencing the definition of Article III injuries. If the latter *is* within Congress's power, then how does it assert that power?

2. Creating Injuries-in-Fact by Creating Substantive Rights

Cases like *Sanders* and *Trafficante* establish that Congress can confer standing by creating private rights of action. At the very least, this eliminates prudential bars to standing when Article III requirements are otherwise met; it is an uncontroversial idea that "Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules."[69] But other cases suggest that Congress can go further and alter the constitutional baseline by creating new substantive rights. As the Court observed in *Linda R.S. v. Richard D.*, "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute."[70] This must refer to something more than a private right of action; the legal right of "any person" to *sue* under the Endangered Species Act,[71] for example, is not *invaded* by a violation of that act. Instead, the language from *Linda R.S.* is best understood to refer to new injuries that are formed when Congress creates substantive rights.

This is exactly what happened in *FEC v. Akins*.[72] There, voters sued under the Federal Election and Campaign Act of 1971, alleging that the FEC's refusal to require AIPAC to disclose information about its members and political contributions caused the plaintiffs to suffer injury defined as the "inability to obtain

66. *Id.*
67. Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 209–10 (1972).
68. *Id.* at 206 n.1.
69. Warth v. Seldin, 422 U.S. 490, 501 (1975); *see also* Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997) (grant of authority to bring suit "eliminates any prudential standing limitations and significantly lessens the risk of unwanted conflict with the Legislative Branch").
70. Linda R.S. v. Richard D. & Texas *et al.*, 410 U.S. 614, 617 n.3 (1973).
71. 16 U.S.C. § 1540(g)(1) (2002).
72. *See* FEC v. Akins, 524 U.S. 11 (1998).

information."[73] The Court held that the plaintiffs had articulated an Article III injury-in-fact.[74] Its discussion relied on the substantive rights enjoyed by the plaintiffs: "[T]here is a statute which . . . does seek to protect individuals such as respondents from the kind of harm they say they have suffered."[75] Notably, this went a step beyond the Court's reasoning earlier in the same opinion that supported prudential standing. That segment relied on the statute's *procedural* right to sue: "'[a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party . . . may file a petition' in district court seeking review of that dismissal."[76]

In contrast, the role of substantive rights in defining new injuries is most apparent in the way the *Akins* Court distinguishes another case, *US v. Richardson*.[77] In *Richardson*, the Court described the plaintiff's alleged injury as the inability to "intelligibly follow the actions of Congress and the Executive" and to "properly fulfill his obligations as a member of the electorate in voting" because he had been denied access to "detailed information on CIA expenditures."[78] The *Richardson* Court held that he had not suffered an injury-in-fact.[79] Justice Scalia, dissenting in *Akins*, said that the "inability to obtain information" was an indistinguishable injury from the one in *Richardson*. But Justice Breyer, writing for the majority in that case, explained that the relevant differences between the two cases rested in the substantive rights grounding the plaintiffs' claims. Whereas in *Richardson*, the Accounts Clause did not entitle a taxpayer to the information sought because "there was no logical nexus between the [plaintiff's] asserted status of taxpayer and the claimed failure of Congress to require the Executive to supply a more detailed report of the CIA's expenditures,"[80] in *Akins*, "no constitutional provision require[d] the demonstration of 'nexus.'"[81] The relevant substantive right in *Akins* was the statute that "seek[s] to protect individuals such as respondents from the kind of harm they say they have suffered."[82] Justice Breyer also notes that had the plaintiff in *Richardson* claimed an injury as a *voter*, then the standing inquiry "would have rested in significant part upon the Court's view of the Accounts Clause."[83] The *Akins* decision demonstrates how the contours of a substantive right can influence the definition of concrete injuries-in-fact.

This proposition finds support in *Spokeo*, which notes that "in determining whether an intangible harm constitutes injury in fact, both history *and the*

73. *Id*. at 21.
74. *Id*. at 20.
75. *Id*. at 22.
76. *Id*. at 19.
77. *See* United States v. Richardson, 418 U.S. 166 (1974).
78. *Richardson*, 418 U.S. at 176.
79. *Id*. at 176–77.
80. *Akins*, 524 U.S. at 22 (internal quotation marks omitted).
81. *Id*.
82. *Id*.
83. *Id*.

judgment of Congress play important roles."[84] This is because "Congress is well positioned to identify intangible harms that meet minimum Article III requirements."[85] The Court's discussion of intangible harms and the role of Congress in defining them is situated in Part II.B.2 of Justice Alito's opinion, which offers a detailed explanation of the concreteness requirement and begins by saying "[c]oncrete' is not, however, necessarily synonymous with 'tangible.'"[86] Congress's role in defining intangible harms by creating substantive rights is therefore best understood as influencing the definition of concreteness. Whether an injury is concrete, then, is not an exclusively judicial question.

B. Context-Specific Approach to Standing

Justice Gorsuch's view that there is one rigid and unified rule of standing ignores the stark differences in the Court's approach to standing in different contexts. Although the Court recites the same standard whenever confronted with standing challenges, the variation of injuries asserted and rights on which they depend precludes a unified approach. In addition to taxpayer standing[87] and voter standing[88] discussed above, the Court's approach differs significantly in legislative standing,[89] State standing,[90] and qui tam relator standing.[91] Further, United States standing in criminal cases is underdiscussed.[92] The unique aspects of Establishment Clause standing with which Justice Gorsuch takes issue are just variations on the theme.

Take State standing for example. In *Massachusetts v. EPA*, the Court held that a State had standing to sue the EPA for failing to issue regulations addressing greenhouse gas emissions.[93] Because of the State's "quasi-sovereign interests" coupled with a "procedural right to challenge the rejection of its rulemaking petition," the Court stated that "the Commonwealth is entitled to special solicitude in our standing analysis."[94] This enabled Massachusetts to obtain standing for long term environmental injuries caused by climate change, including its gradual loss

84. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016) (emphasis added).
85. *Id.*
86. *Id.*
87. *See* Flast v. Cohen, 392 U.S. 83, 105–06 (1968).
88. *See Akins*, 524 U.S. 11.
89. *See, e.g.*, Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997).
90. *See* Massachusetts v. EPA, 549 U.S. 497 (2007).
91. *See* Vt. Agency of Nat. Resources v. U.S. *ex rel.* Stevens, 529 U.S. 765 (1999).
92. *See* Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show That Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239, 2248 (1999) (arguing that "if current standing doctrine is correct, then the vast majority of federal criminal prosecutions are not 'cases' or 'controversies' and the United States lacks standing to initiate them."); *see also* Sierra Club v. Two Elk Generation Partners, Ltd. P'ship, 646 F.3d 1258, 1277 (10th Cir. 2011) ("When the federal government or one of its agencies brings suit, its standing is usually based on its power, defined by Congress, to redress violations of the laws of the United States. This may be in tension with courts' current understanding of Article III standing, but it is nonetheless axiomatic.").
93. *See Massachusetts*, 549 U.S. at 519.
94. *See id.* at 520.

of coastal property.[95] Chief Justice Roberts dissented, arguing that such injuries were neither concrete nor particularized. He lamented that the Court's decision "changes the rules" by recognizing that "States are not normal litigants."[96]

But Chief Justice Roberts did not win the day. The State standing conundrum is not an anomaly; standing doctrine is rife with inconsistencies across different contexts. *Akins* and *Richardson*, discussed above, are a prime example. And as the authors of one article describe it, "[a]fter examining several possibilities, we conclude that the best course is to recognize openly that the Case or Controversy Clause of Article III means different things in different types of litigation."[97] It is therefore no surprise that an Establishment Clause injury would be treated differently from a Fourth Amendment or Equal Protection Clause injury, and the best way to explain the differences is to peek at the merits and acknowledge the role played by the substantive right.

C. Congress Should Define Intangible Injuries

Justice Alito rightly observed in *Spokeo* that "Congress is well positioned to identify intangible harms that meet minimum Article III requirements."[98] Developments in culture, technology, and our understanding of psychology will reveal new kinds of harm and create new ways of articulating old harms. Intangible injuries are a "murky area," and Congress is better suited to tracking these developments and addressing them than courts.[99] Courts should show deference to congressional judgment and examine the harms that are implicitly recognized by new legislatively created rights.

II. CONCRETE INJURIES IMPLICIT IN THE ESTABLISHMENT CLAUSE

Just as Congress can define new concrete injuries by creating statutory rights, so too could the Framers by creating constitutional ones. Justice Breyer's observation in *Akins* that taxpayer standing in *Richardson* "would have rested in significant part upon the Court's view of the Accounts Clause," demonstrates that constitutional rights, like statutory ones, can authorize courts to recognize certain harms as sufficiently concrete.[100] And unlike in *Richardson*, the plaintiffs' harm in *American Legion* was directly derived from the constitutional provision supporting their merits claim.

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95. *Id*. at 522–23.

96. *Id*. at 536, 540–41 (Roberts, C.J., dissenting).

97. Lee & Ellis, *supra* note 14.

98. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016); *see also* Townsend, *supra* note 15 at 82 ("[T]he need to recognize new injuries may present empirical challenges more approachable via congressional capabilities than judicial ones.").

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

100. *Akins*, 524 U.S. at 22.

Although Establishment Clause doctrine has been less than clear in past decades,[101] the Court has, at various times, agreed with the principle that "the government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs."[102] Justice O'Connor originally formulated this "endorsement test" in *Lynch v. Donnelly*, explaining that "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community."[103]

The First Amendment contains a right to be free from receiving that message through regular contact with a religious display.[104] Implicit in the Amendment's protections is the recognition that the message sent by endorsement of a particular religion is an intangible but nonetheless concrete harm to members of minority religions. That message is handed down to members of "the political community" where the display is located, and so the harm is particular to religious minorities in that specific community. And the message is "actual or imminent" only to those who have regular contact with the display. This harm is "real" enough to be concrete.[105] In *American Legion*, the constitutional minimum requirements of standing are satisfied so long as the plaintiff is someone like Mr. Lowe: a "non-Christian" who regularly encounters the cross and "feels excluded by this governmental message."

Using a substantive right to determine whether certain harms are concrete will not eliminate standing analysis. The other elements of injury-in-fact—that it must be "particular" and "actual or imminent"—play a crucial role in ensuring that suits are brought by the right plaintiffs. Further, plaintiffs can also assert standing based on injuries not related to the substantive right—this approach does not change that "persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others."[106]

Nor does the use of a substantive right to inform the injury-in-fact analysis collapse standing with the merits. Accepting that the plaintiffs in *American Legion* had standing on this basis is entirely compatible with the Court's final decision that the cross was constitutional. This is because the injury-in-fact analysis asks only whether the plaintiffs alleged the harm of feeling excluded by a government message endorsing a religion and disfavoring their own beliefs. It does not apply the objective legal standard—the endorsement test asks whether "a *reasonable observer* would view [the religious display] as a disapproval of his or her

101. *See* Green v. Haskell Cty. Bd. of Comm'rs, 574 F.3d 1235 n.1 (C.A.10 2009) (Kelly, J., dissenting from denial of rehearing en banc) (discussing the "judicial morass resulting from the Supreme Court's opinions").

102. Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 597 (1989), *abrogated by* Town of Greece v. Galloway, 572 U.S. 565, 134 S. Ct. 1811 (2014); *See also* Wallace v. Jaffrey, 472 U.S. 38, 67–84 (1985) (O'Connor, J., concurring in the judgment).

103. Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

104. *See id.*

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

106. Warth v. Seldin, 422 U.S. 490, 501 (1975).

particular religious choices"[107]—nor does it require factual proof beyond the normal burdens that come with each successive stage of litigation.[108] This means that although the plaintiffs may have suffered a cognizable injury for standing purposes upon encountering the Bladensburg Cross, the display is nonetheless constitutional, either because the plaintiffs' experience did not match "the reasonable observer['s]" or because, as the Court specifically found, the monument "convey [s] many different messages, both secular and religious," and ordering the cross's destruction "would not be neutral."[109]

CONCLUSION

Justice Gorsuch's concurrence in the judgment in *American Legion* was flawed in two respects. First, it imposed too strict a limitation on the concreteness component of "injury-in-fact" and misunderstood the plaintiffs' injuries. Second, it ignored the role that the Establishment Clause's substantive right plays in the standing analysis. Although plaintiffs will not always be able to claim an injury directly derived from the substantive right asserted, courts should respect Congress's—or in this case, the Framers—identification of concrete intangible harms when plaintiffs do claim such an injury. Although the Court acknowledged in *Warth* that "standing in no way depends on the merits" it noted, in the same breath, that "it often turns on the nature and source of the claim asserted."[110]

107. *Cty. of Allegheny*, 492 U.S. at 631 (emphasis added).
108. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992).
109. Am. Legion v. Am. Humanist Ass'n (American Legion), 139 S. Ct. 2067, 2087, 2090 (2019).
110. *Warth*, 422 U.S. at 500.