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WHO SHOULD DEFINE INJURIES FOR ARTICLE III STANDING?

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INTRODUCTION

In November, the Supreme Court heard oral argument in *Spokeo, Inc. v. Robins*,[1] one of the Term's most talked-about cases.[2] The case presents a relatively unsympathetic plaintiff, Thomas Robins, and the prospect of sizeable class action damages.[3] That combination may explain why one particular narrative has become popular in both mainstream media and legal-industry press that *Spokeo* is a "no-injury" class action,[4] where "no one was harmed,"[5] but significant liability looms nonetheless.[6] Under this account of the case, the Supreme Court is set to rule on the question of whether it should "grant[] standing to

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1. Robins v. Spokeo, Inc., 742 F.3d 409 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 1892 (2015).

2. *See, e.g.*, Alison Frankel, *Class Actions Face Crucible in Next Supreme Court Term*, REUTERS: ON THE CASE (June 9, 2015), http://blogs.reuters.com/alison-frankel/2015/06/09/class-actions-face-crucible-in-next-supreme-court-term (describing the case as "enormously consequential"); Jacob Gershman, *Supreme Court Weighs Right to Sue in Spokeo Case*, WALL ST. J.: L. BLOG (Apr. 27, 2015, 3:22 PM), http://blogs.wsj.com/law/2015/04/27/supreme-court-weighs-right-to-sue-in-spokeo-case (noting the case's "huge implications"); Paul A. Scrudato et al., *No Injury? No Problem.—Spokeo v. Robins*, NAT'L L. REV. (May 31, 2015), http://www.natlawreview.com/article/no-injury-no-problem-spokeo-v-robins (describing *Spokeo* as "a case that has the potential to redefine standing in federal court").

3. *See, e.g.*, Editorial, *Surf, Cry, Sue*, WALL ST. J. (Apr. 16, 2015), http://on.wsj.com/1HcXfBp.

4. *See, e.g.*, Jaret J. Fuente et al., *SCOTUS Accepts Certiorari to Address Article III Standing in "No-Injury" FCRA Class Action*, LEXOLOGY: CLASSIFIED: THE CLASS ACTION BLOG (May 4, 2015), http://www.lexology.com/library/detail.aspx?g=db2546dd-4326-41be-997a-b685f66ab709.

5. *Surf, Cry, Sue*, *supra* note 3.

6. *See, e.g.*, Elliot Katz & Monica Scott, *Spokeo v. Robins: The Case That Has Silicon Valley Buzzing, Even Though Plaintiffs Likely Don't Have a Leg to "Stand" on*, TECH. LEGAL EDGE (May 22, 2015), http://www.technologyslegaledge.com/2015/05/22/spokeo-v-robins-the-case-that-has-silicon-valley-buzzing-even-though-plaintiffs-likely-dont-have-a-leg-to-stand-on; Scrudato et al., *supra* note 2; *Surf, Cry, Sue*, *supra* note 3.

plaintiffs who have not suffered an injury-in-fact."[7] Such a question is, of course, conclusory—Article III, as the Court has interpreted it, requires that a plaintiff be injured in order to have standing.[8] But the Supreme Court is not in the business of simple error correction,[9] and *Spokeo* would not have garnered so much attention—including over thirty amicus briefs[10]—if it presented only a question that was easily resolved by preexisting standing doctrine.

This Essay discusses what *Spokeo* is really about: who should decide what "counts" as an injury. The Court has been clear that Article III requires injury.[11] But what is less clear is whether the Court should accept an injury Congress defines via statute as sufficient for constitutional purposes.

Part I introduces this question and how it arises in the *Spokeo* case. Part II discusses the problems with leaving the injury-defining function to the courts, arguing that it is difficult to come up with a workable legal standard that will capture the many kinds of injuries that society rightfully cares about. Part III briefly suggests a few reasons why the articulation of injuries is more properly seen as a policy question left to Congress. Congress can better embody social consensus, and it has more tools to integrate new injuries into the existing policy landscape. I therefore conclude that where Congress has defined an injury, the Court should not apply a separate test to see if the injury is "real" enough for the Court's purposes.

I. *SPOKEO V. ROBINS* AND THE NON-LEGAL-INJURY ARGUMENT

Nominally, *Spokeo* raises the question of whether Thomas Robins was injured. The plaintiff in *Spokeo*, Robins, alleges that the online information-gathering database Spokeo violated the Fair Credit Reporting Act (FCRA) by publishing false information about Robins online; Spokeo counters that Robins was not injured because the false information he points to cast him in a more positive light.[12] But like many of the great standing cases that have preceded it, *Spokeo* is fundamentally about the separation of powers.[13]

Spokeo raises separation of powers concerns because the definition of injury implicates legal, rather than simply factual, questions. When we ask whether

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7. Scrudato et al., *supra* note 2.

8. *See, e.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

9. *See* SUP. CT. R. 10.

10. *See Spokeo, Inc. v. Robins*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/spokeo-inc-v-robins (last visited Dec. 13, 2015).

11. *See, e.g.*, *Lujan*, 504 U.S. at 560.

12. *See* Robins v. Spokeo, Inc., 742 F.3d 409, 410-11 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 1892 (2015).

13. *See, e.g.*, FEC v. Akins, 524 U.S. 11, 20-21 (1998) (holding that Congress had the constitutional authority to authorize a citizen suit similar to that in *Lujan*); Raines v. Byrd, 521 U.S. 811, 813-14, 820 (1997) (holding that members of Congress did not have standing to challenge the Line Item Veto Act); *Lujan*, 504 U.S. at 559-60 (discussing standing as a component of the Constitution's separation of powers).

someone was injured, we are not just asking, "what happened?" We are also asking what "counts" as an injury. Judge Fletcher gives the example of his daughter Leah, who was aggrieved when her older sister got a bike for Christmas.[14] The Judge told her that the fact that her sister had a new bike did not injure her. But Leah was clearly upset; the real question was whether her claim to injury was one that her family should treat as legitimate. It is this need to sort the legitimate claims from the illegitimate ones that makes the question "is this person injured?" one that requires a legal—not just a factual—answer.[15]

Because Robins's injury arises out of the violation of his statutory rights, the question, "was Mr. Robins injured?" cannot be decided without resolving another basic question: Who gets to decide? If Congress can define injuries, then the judicial task is simply to determine whether the requirements laid out via statute were met. But the *Spokeo* petitioners ask the Court to reject this approach and adopt what could be termed the "non-legal-injury argument": that "Congress lack[s] the power to deem a legal violation a *per se* injury."[16] According to this argument, in order for an injury to be judicially cognizable, the legal injury must correspond to some existing harm that the court can point to outside of the statute's terms. Legal violations cannot be per se injuries, because they are only legitimate when they reflect something more tangible, more "real," than a bare statutory violation.

The non-legal-injury argument has largely arisen in federal district and circuit courts in the last five years. The phrase "injury in law" owes its renaissance in the contemporary standing context largely to the 2012 case *First American Financial Corp. v. Edwards*,[17] and particularly to a colloquy during the oral argument in which Chief Justice Roberts stated that he would have thought that the violation of a statutory right "would be called injury-in-law,"[18] not injury-in-fact.[19] While the Court could have weighed in on the injury-in-

14. William A. Fletcher, *Standing: Who Can Sue to Enforce a Legal Duty?*, 65 ALA. L. REV. 277, 279-80 (2013).

15. *See id.* at 280; *see also* Cass R. Sunstein, *What's Standing After* Lujan*?: Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 188-89 (1992) (discussing why "injury" cannot be a purely factual designation).

16. Brief for Petitioners at 40, First Am. Fin. Corp. v. Edwards, 132 S. Ct. 2536 (2012) (per curiam) (No. 10-708), 2011 WL 3706110; *see also* Brief for Petitioners at 9, Spokeo v. Robins, No. 13-1339 (U.S. July 2, 2015), 2015 WL 4148655 ("[A] legal violation without concrete harm (i.e., an injury in law) does not satisfy the injury-in-fact requirement.").

17. 132 S. Ct. 2536 (2012) (per curiam).

18. Transcript of Oral Argument at 32, *First Am.*, 132 S. Ct. 2536 (No. 10-708), http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-708.pdf.

19. *See* Pamela S. Karlan, *The Supreme Court, 2011 Term—Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 60 (2012) (discussing the *First American* oral arguments). Karlan's contention that "[t]he distinction the Chief Justice drew—injury-in-fact versus injury-in-law—was novel," *id.*, is not quite accurate. The phrase "injury in law" has appeared occasionally in court opinions outside of the standing context to indicate the violation of a legal right as distinct from a more tangible harm. *See, e.g.*, Abrams v. Foshee, 3 Iowa 274, 277 (1856) (distinguishing between injury in law and injury in fact in the context

law argument in *First American*, it instead dismissed the case as improvidently granted.[20] But the non-legal-injury argument has not gone away. Litigators contend that a long list of major laws is implicated by the issue: the Truth in Lending Act, the Fair Debt Collection Practices Act, the Americans with Disabilities Act, the Fair Housing Act, Telephone Consumer Protection Act, the Employee Retirement Income Security Act, the Real Estate Settlement Procedures Act, the Lanham Act, the Video Privacy Protection Act, and more.[21] Wherever Congress has provided for statutory damages, there is space for litigants to argue that these damages do not correspond to some sort of nonlegal harm; the argument is thus one of significant scope.

II. THE PROBLEM WITH LEAVING "INJURY" TO THE COURTS

The non-legal-injury argument presents a bit of a doctrinal morass. On the one hand, there is a long line of common law holdings that "*injuria absque damno*"—a legal injury without accompanying damages—"will not sustain an action."[22] But at the same time, there are clear statements to the contrary coming from the highest levels. *Ashby v. White*, an appeal decided by the House of Lords in the early-eighteenth century, affirmed that an action was maintainable even where there was "no hurt or damage to the plaintiff," because "a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindred of his right."[23] Justice Story affirmed *Ashby*'s holding over a century later, writing that "[a]ctual, perceptible damage is not indispensable as the foundation of an action. The law tolerates no farther inquiry than whether there has been the violation of a right."[24]

Each side in *Spokeo* tries to cabin unfavorable doctrinal statements by arguing that these statements were limited to particular kinds of common law

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of proving damages in an action for slander); Croker v. N.Y. Tr. Co., 156 N.E. 81, 82 (N.Y. 1927) (positing that in the contract context there was a "purely technical" violation resulting in a promisee's "injury in law" when the promisor broke his obligation to perform to the benefit of a third party rather than the promisee). And in the standing context, the court in *McClure v. Carter* distinguished between injury "in law" and injury "in fact" while discussing the lack of clarity of modern standing doctrine. *See* 513 F. Supp. 265, 269 (D. Idaho), *aff'd mem. sub nom.* McClure v. Reagan, 454 U.S. 1025 (1981).

20. *See First Am.*, 132 S. Ct. at 2537.

21. *See, e.g.*, Petition for a Writ of Certiorari at 16-18, Spokeo, Inc. v. Robins, No. 13-1339 (U.S. May 1, 2014), *cert. granted*, 135 S. Ct. 1892 (2015), 2014 WL 1802228 (listing statutes).

22. *Injuria*, BLACK'S LAW DICTIONARY (2d ed. 1910); *see, e.g.*, Fields v. Napa Milling Co., 330 P.2d 459, 460, 462 (Cal. Dist. Ct. App. 1958) (citing *injuria absque damno* in suit regarding a car crash where one party was uninjured); Blot v. Boiceau, 3 N.Y. 78, 85 (1849) (citing *injuria absque damno* while holding that both a legal wrong and actual loss must occur for recovery in a suit about the price of goods).

23. Ashby v. White (1703) 92 Eng. Rep. 126, 137 (QB) (Holt, C.J., dissenting), *rev'd*, Ashby v. White, (1703) 1 Eng. Rep. 417 (HL) (appeal taken from Eng.).

24. Webb v. Portland Mfg. Co., 29 F. Cas. 506, 508 (C.C.D. Me. 1838) (No. 17,322).

actions.[25] Spokeo, for instance, argues that *Ashby* did involve a concrete harm because the right involved was a property right, and so the deprivation of it could be viewed as property damage.[26] But this effort obscures the fact that the doctrinal morass itself reflects a difficult conceptual terrain. The question of whether someone's claimed injury should count or not will be difficult to answer with some a priori standard not linked to a specific policy or statute. *Ashby* itself is a perfect example of how difficult it is to shoehorn important rights into traditional categories: the "property right" to which Spokeo refers was in fact the right to vote.[27] While the deprivation of the right to vote is a serious harm, it is not a particularly tangible one.

A judicially implemented non-legal-injury requirement would not be a good way to resolve these doctrinal problems. First, not all harms that we care about are tangible. Many wrongs do not lead to bodily damage, economic damage, damage to property, or other physical correlates that can be pointed to as "real" harm outside of the violation of a legal right. Damage to a person's reputation or privacy interests can often occur without physical consequences.[28] Racial discrimination does not always manifest itself with the kind of individualized economic damages courts are used to analyzing.[29]

In these situations, legal rights reflect social judgments about where harm has and has not occurred. Often, these kinds of injuries exist where we think the harm is in the act itself. The public disclosure of private information or defamatory falsehoods does not need downstream consequences to be hurtful; neither does differential treatment on the basis of race. Procedural wrongs are an oft-seen category where the distinction between the legal violation and the injury may be so thin as to be essentially nonexistent.[30] Proving the injury in many of these cases just entails proving the violation itself—that certain words were

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25. *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Respondent at 22-23, *Spokeo*, No. 13-1339 (U.S. Sept. 8, 2015), 2015 WL 5260469. A full analysis of the doctrinal argument is beyond the scope of this Essay. For more, see F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 280 (2008).

26. Brief for Petitioner at 24-26, *Spokeo*, No. 13-1339 (U.S. July 2, 2015), 2015 WL 4148655.

27. *See Ashby*, 92 Eng. Rep. at 134 (Holt, C.J., dissenting); *see also* Brief for Petitioner, *supra* note 26, at 24 (arguing that the right to vote in *Ashby* should be understood as a property right).

28. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS §§ 569-74 (AM. LAW INST. 1977) (describing a variety of causes of action for defamation per se).

29. *See, e.g.*, Havens Realty Corp. v. Coleman, 455 U.S. 363, 374 (1982) (holding that an African American woman given false information by a real estate development had standing to sue under the Fair Housing Act even though she was a "tester" who had not intended to actually purchase an apartment).

30. *See, e.g.*, Carey v. Piphus, 435 U.S. 247, 266 (1978) ("Even if respondents' suspensions were justified, and even if they did not suffer any other actual injury, the fact remains that they were deprived of their right to procedural due process . . . . [W]e believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury.").

spoken, certain information disclosed, or certain procedures flouted. As a result, requiring some sort of additional indicia of harm beyond the violation itself ignores the nature of the injury and the reason for the remedy.[31] If the Supreme Court adopts Spokeo's argument, it will be hard to avoid leaving some injuries out of whatever standard arises. This, in turn, will lead to the loss of meaningful rights, dishonest application of the new standard, or formalist contortions like labeling the loss of a voting right "property damage."

This reflects the second problem with a non-legal-injury requirement: it may just be impossible to develop a meaningful, useful standard. What kinds of injury are sufficiently "real"? To date, there hasn't been much progress—the Court's articulation of what constitutes a "concrete" enough injury for standing is essentially a list of serious-sounding adjectives whose elaboration consists of more of the same: "distinct,"[32] "palpable,"[33] "demonstrable,"[34] "direct,"[35] "not 'abstract,'"[36] or, simply, "real."[37]

To be useful for judicial review, any standard would have to exert some independent weight even where Congress had legislatively defined an injury. This raises a problem. As discussed above, an injury is essentially something like "a claim that society chooses to recognize," suggesting a legalistic formulation like "a harm that a reasonable person would find to be real." But the existence of a statute defining an injury seems like very good evidence that the injury in question is one that society chooses to recognize. So if the definition of injury incorporates some reference to social norms, it's hard to see how a statute's proscription of the relevant harm would not be outcome-determinative. In other words, if the judiciary wants a workable definition of injury that can serve as the basis for judicial review, it will have to come up with a way to acknowledge the socially defined nature of injuries while simultaneously overriding society's most significant deliberative body.

III. CONGRESS'S ADVANTAGES

The difficulty of determining a single manageable standard suggests that policymakers are better fitted to define injuries than judges. This is true for

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31. Under this view, it is possible to think of statutorily "presumed" damages not as estimations of the downstream consequential harm resulting from a violation, but instead as an evaluation of the damage done by a violation per se.

32. Warth v. Seldin, 422 U.S. 490, 501 (1975) (denying standing to individuals challenging allegedly exclusionary zoning ordinances).

33. *Id.*

34. *Id.* at 508.

35. *Id.* at 514.

36. Allen v. Wright, 468 U.S. 737, 751 (1984) (quoting City of Los Angeles v. Lyons, 461 U.S. 95, 101 (1983)), *abrogated by* Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014).

37. *Lyons*, 461 U.S. at 101-02 (denying standing to a man challenging the LAPD's use of chokeholds on behalf of himself and others similarly situated).

at least three reasons. First, the need to recognize new injuries may present empirical challenges more approachable via congressional capabilities than judicial ones. In *Allen v. Wright*, for instance, the Court denied standing to the parents of black children suing the IRS for not fulfilling its obligation to deny tax-exempt status to racially discriminatory private schools.[38] The Court distinguished its ruling from its previous failure to find a standing problem in *Coit v. Green*,[39] noting that "extensive evidence" regarding the public school system, private school system, and influence of tax exemptions had been established in *Coit*.[40] To the extent that fact gathering about social institutions and the effects of policymaking are more appropriately legislative rather than judicial functions, the need for an evidentiary basis to underlie complex theories of injury militates in favor of Congress as a decisionmaker. This is all the more true because standing analysis is jurisdictional, and could work to reject claims before extensive discovery is permitted.[41]

Second, Congress is more agile than Article III courts, which under Spokeo's theory would be forced to try and fit injuries into the traditional doctrinal categories of constitutional law. As discussed above, it will at times be difficult to analogize new injuries to past injuries. And while courts have shown a willingness to change their recognition of injuries over time, they are often slow to adapt to social and political change. In *Hoye v. Hoye*, for instance, the Kentucky Supreme Court admirably abolished the tort of "intentional interference with the marital relation," concluding that the tort was based in the "antiquated premise that a wife is her husband's chattel."[42] That decision came down in 1992.[43] Courts may not inevitably lag behind Congress in their articulation of injuries, but a non-legal-injury requirement would guarantee that Congress could not advance our collective notion of injury beyond what Article III courts would be willing to recognize.

Third, Congress is in a position where it needs to be able to articulate new injuries, as they often are key components of new policy regimes. Society changes, and those changes often require systemic policy responses. Because a great deal of policy enforcement in the United States depends on private rights of action,[44] Congress's ability to define new injuries is central to its ability to respond to change with broad and effective legislation. Statutory injuries underlie a huge number of blockbuster statutes; it is hard to imagine our modern legal regime without the private causes of action enabled by the Copyright Act,

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38. 468 U.S. at 739-40.

39. 404 U.S. 997 (mem.), *aff'g sub nom.* Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971).

40. *Allen*, 468 U.S. at 764-65.

41. *See, e.g.*, *id.*

42. 824 S.W.2d 422, 423 (Ky. 1992).

43. *Id.* at 422.

44. *See, e.g.*, Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1547 (2014).

Civil Rights Acts, Clean Water Act, Americans with Disabilities Act, Fair Credit Reporting Act, ERISA, and more.[45] While the non-legal-injury requirement would not undo these laws, it would create a new judicial check on their implementation—the scrutiny of the courts as to whether injuries enabled under a given law meet whatever nebulous standard of "realness" the courts interpret Article III to require.

Some have argued that Congress's use of statutory rights to aid in policy implementation is a violation of separation of powers, because it encroaches on the President's duty to "take care that the laws be faithfully executed."[46] Proponents of the non-legal-injury requirement have taken up this mantle, arguing that the requirement is a way to enforce the Constitution's separation between Article I and Article II powers.[47] But the argument assumes its own conclusion. It is clear that where there is an injury, the Take Care Clause does not prevent civil suits between private parties—if it did, civil lawsuits would not exist. So, if the violation of a person's statutory right counts as an injury, that person should be able to sue in court to vindicate his or her violated right. Arguments based on the Take Care Clause thus must first explain why the deprivation of a legal right per se is not an adequate basis for a private civil suit—which is the question posed by the non-legal-injury argument to begin with.[48] Ultimately, allowing Congress to define injuries is both more pragmatic and more in keeping with our traditional notions of the separation of powers—that "Congress shall make laws, the President execute laws, and courts interpret laws."[49]

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45. Spokeo itself notes that the rule it seeks would foreclose a variety of cases brought under many of these statutes. *See* Petition for a Writ of Certiorari, *supra* note 21, at 16-18.

46. U.S. CONST. art. II, § 3; Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 783 (2009); *see also* Lujan v. Defs. of Wildlife, 504 U.S. 555, 577 (1992) (aligning standing's injury requirement with the Take Care Clause).

47. *See, e.g.*, Brief for Petitioner, *supra* note 26, at 28-29.

48. The *Spokeo* case illustrates nicely the reason that the non-legal-injury argument does not fit well with the Take Care Clause approach to standing. The Take Care Clause approach argues that standing should prevent individuals from asserting generalized injuries. *See, e.g.*, *Lujan*, 504 U.S. at 577; Grove, *supra* note 43, at 786-88. In *Spokeo*, though, Robins alleges injury because of information that was published *about him*, demonstrating that the question of the "realness" of one's injury need not map onto the question of whether the injury is particular or generalized. *See* Robins v. Spokeo, Inc., 742 F.3d 409, 410-11 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 1892 (2015).

49. N.Y. Times Co. v. United States, 403 U.S. 713, 742 (1971) (Marshall, J., concurring).

CONCLUSION

Standing has often been justified by the need to maintain noninterventionist courts.[50] The non-legal-injury requirement, however, runs the risk of greatly increasing the number of cases where courts apply standing doctrine to overturn acts of Congress, rather than to enforce them—all without providing a clear, manageable legal standard for what counts as an injury. Deciding which injuries are worth vindicating more properly belongs in the policy realm than the judicial one.

50. *See* Vicki C. Jackson, *Standing and the Role of Federal Courts: Triple Error Decisions in* Clapper v. Amnesty International USA *and* City of Los Angeles v. Lyons, 23 WM. & MARY BILL RTS. J. 127, 181 (2014).