NOTE

Standing on Shaky Ground: How Circuit Courts Reconcile Legal Rights and Injuries in Fact After *Spokeo v. Robins*

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ABSTRACT

In Spokeo v. Robins*, the Supreme Court attempted to resolve a tension that has existed since the birth of modern Article III standing. On one hand, Congress has always been able to create legal rights, the invasion of which creates standing to sue. On the other hand, to satisfy the case-or-controversy requirement of Article III, a plaintiff always needs to allege an injury in fact, which exists independent of the law. Before* Spokeo*, the Court offered contradictory answers as to whether Congress can create legal rights which would suffice, in and of themselves, to create an injury in fact every time a plaintiff alleged the violation of his or her legal rights. In* Spokeo*, the Court muddied the waters even more. This Note conducts a content analysis of circuit court decisions in the wake of* Spokeo *to show that courts find Congress's judgment relevant to injury-in-fact analysis in a majority of cases. This Note surveys how courts use various tools of statutory interpretation to determine Congress's judgment, then suggests a uniform framework for injury-in-fact analysis that can achieve sensible and consistent results.*

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Introduction

On March 14, 1978, Sylvia Coleman inquired about vacancies at the Colonial Court Apartments in Richmond, Virginia.[1] An employee said no apartments were available.[2] On the same day, R. Kent Willis asked the same question and was told the opposite.[3] Coleman was black.[4] Willis was white.[5] Neither wanted an apartment but both

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1 Joint Appendix at 66, Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) (No. 80-988).

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.*

wanted to collect evidence of housing discrimination.[6] Over the ensuing weeks, Coleman, Willis, and other "testers" at Housing Opportunities Made Equal ("HOME") built a claim under the Fair Housing Act ("FHA")[7] against the apartment owner, question by question.[8]

Congress passed the FHA in 1968 at the peak of the "rights revolution."[9] Although most associate the rights revolution with an expansion of constitutional rights to privacy, equal protection, and due process through our courts,[10] Congress played a role in expanding individuals' rights to sue under environmental, consumer protection, and civil rights statutes.[11] At the core of this rights revolution was private enforcement.[12] Congress imagined centralized agencies as the primary means of enforcing laws like the National Labor Relations Act,[13] but in the FHA and dozens of other laws enacted during this period, Congress expected people like Coleman to be the primary means of enforcing the law.[14]

In *Havens Realty Corp. v. Coleman*,[15] the apartment owner challenged Coleman's ability to enforce the law.[16] To the apartment owner, the testers did not actually intend to rent apartments, so they suffered no injury as required to show a "case" or "controversy" for Article III standing.[17] A unanimous Court rejected this argument, relying on the idea that Congress can create "legal rights, the invasion of which creates standing" to find that the testers and HOME suffered injuries.[18] Because Congress created the "legal right to truthful information" in the FHA, the Court found that the testers and HOME suffered injuries by receiving false information even if they suffered no other harm.[19]

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6 *See Havens*, 455 U.S. at 373.

7 42 U.S.C. §§ 3601–3631 (2018).

8 *See Havens*, 455 U.S. at 366–68, 373 (citing 42 U.S.C. § 3604(d)); Joint Appendix, *supra* note 1, at 66.

9 *See* Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81; CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION 24, 28 (1990).

10 *See* CHARLES R. EPP, THE RIGHTS REVOLUTION 26–43 (1998).

11 *See* STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT 7–16 (2017).

12 *See id.*; *see also* EPP, *supra* note 10, at 44–70 (finding that the activity of litigants, including private plaintiffs, was the primary cause of various rights revolutions).

13 *See* 29 U.S.C. § 151–169 (2018).

14 *See* BURBANK & FARHANG, *supra* note 11, at 7–11.

15 455 U.S. 363 (1982).

16 *See* Petition for Writ of Certiorari at 11–14, *Havens*, 455 U.S. 363 (No. 80-988).

17 *See id.*

18 *Havens*, 455 U.S. at 373–74 (quoting Warth v. Seldin, 422 U.S. 490, 500 (1975)).

19 *Id.*

This principle was key to the enforcement of the new rights that Congress created during the rights revolution, many of which were intangible like Coleman's right to receive information untainted by discrimination.[20] If Congress could not expand the kinds of harms recognized within courts, then enforcement of these statutes could become illusory because courts would not recognize these new harms. Since *Havens*, decided at the tail end of the rights revolution in 1982, the Supreme Court has become more skeptical of private enforcement.[21]

The Court has been part of a counterrevolution, chipping away at private plaintiffs' ability to bring suit by raising pleading or class action certification standards.[22] The Court began to limit plaintiffs' ability to satisfy standing by articulating new tests rejecting an alleged injury as too speculative or generalized, though it never touched the core holding of *Havens*.[23] Taking their cue from the Court's anti-enforcement ethos, lower courts began to muddy the waters around which statutory violations could give rise to standing. Some courts relied on the principle in *Havens* to find injuries, particularly where the facts were closely analogous to *Havens*.[24] Other courts, in less analogous situations, required something more.[25] Could a person whose real estate broker received a prohibited kickback payment from a title

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20 *See, e.g.*, Fair Debt Collection Practices Act, Pub. L. No. 95-109, § 809, 91 Stat. 874, 879–80 (1977) (creating the right to information about a debt when debt collectors attempt to collect it); Fair Credit Reporting Act, Pub. L. No. 91-507, § 609, 84 Stat. 1114, 1131 (1970) (creating the right to truthful information about oneself in a credit report); Freedom of Information Act of 1966, Pub. L. No. 89-487, § 3, 80 Stat. 250, 250–51 (creating the right to public information from the government).

21 *See* BURBANK & FARHANG, *supra* note 11, at 152–61 (finding the probability of a pro-private enforcement vote in the Supreme Court to be 71% in 1970 and 31% in 2014, after coding and analyzing all private enforcement cases).

22 *See, e.g.*, Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309–12 (2013) (holding that plaintiffs may be compelled to bilateral arbitration even where it frustrates small-dollar class actions); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349–52 (2011) (increasing scrutiny of the commonality requirement in class actions); Ashcroft v. Iqbal, 556 U.S. 662, 677–80 (2009) (affirming heightened pleading standards for plaintiffs); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554–63 (2007) (increasing pleading standards for plaintiffs); *see also* A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 359 (2010) (noting that the expansion of rights through legislation in the 1960s led to a countervailing "restrictive ethos" in the courts).

23 *See infra* Section I.B.

24 *See* Smith v. Pac. Props. & Dev. Corp., 358 F.3d 1097, 1107 (9th Cir. 2004) (affirming standing for "tester" plaintiffs suing under the Fair Housing Amendments Act); Kyles v. J.K. Guardian Sec. Servs., Inc., 222 F.3d 289, 300 (7th Cir. 2000) (finding standing for "tester" plaintiffs suing under Title VII, who asked for employment information but did not actually want jobs).

25 *See, e.g.*, David v. Alphin, 704 F.3d 327, 338 (4th Cir. 2013) (holding that a violation of

company sue under the Real Estate Settlement Procedures Act[26] on that basis alone, or would they have to show another harm associated with the kickback?[27] Could a person whose debt collector violated the requirements of the Fair Debt Collection Practices Act[28] sue for that alone or would they need to allege additional harm?[29] Courts reached radically different answers.

In *Spokeo, Inc. v. Robins*,[30] the Supreme Court had the opportunity to squarely resolve the debate. Robins alleged that Spokeo, an online database, misstated facts about his education, marital status, and income in violation of the Fair Credit Reporting Act ("FCRA").[31] According to Spokeo, these misrepresentations did not cause Robins any "actual harm," and so were insufficient to establish Article III standing.[32] Spokeo implored the Court to stem the tide of "no-injury" class action plaintiffs who alleged a violation of a statute and nothing more.[33] To Robins, Spokeo's approach would force the Court to upend *Havens* and unsettle countless private enforcement regimes.[34] If the Court adopted Spokeo's view that "Congress cannot decide for itself whether certain private interests . . . warrant legal protection,"[35] then it would limit plaintiffs' ability to bring suit under statutes like the FHA where an injury is hard to prove beyond a bald statutory violation.[36]

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the Employee Retirement Income Security Act of 1974 does not automatically give rise to standing).

26 12 U.S.C. §§ 2601–2617 (2018).

27 *Compare* Edwards v. First Am. Corp., 610 F.3d 514, 517 (9th Cir. 2010) *cert. dismissed as improvidently granted sub nom.* First Am. Fin. Corp. v. Edwards, 567 U.S. 756 (2012), *and* Carter v. Welles-Bowen Realty, Inc. (*In re* Carter), 553 F.3d 979, 989 (6th Cir. 2009), *and* Alston v. Countrywide Fin. Corp., 585 F.3d 753, 759–60 (3d Cir. 2009) (finding standing without requiring an additional harm), *with* Moore v. Radian Grp., Inc., 233 F. Supp. 2d 819, 827 (E.D. Tex. 2002), *aff'd*, 69 F. App'x 659 (5th Cir. 2003), *and* Durr v. Intercounty Title Co. of Ill., 14 F.3d 1183, 1187 (7th Cir. 1994) (requiring an additional harm to find standing).

28 15 U.S.C. §§ 1692–1692p (2018).

29 *Compare* Ehrich v. Credit Prot. Ass'n, 891 F. Supp. 2d 414, 416 (E.D.N.Y. 2012) (requiring an additional harm to confer standing), *with* Tourgeman v. Collins Fin. Servs., Inc., 755 F.3d 1109, 1116 (9th Cir. 2014) (finding standing without requiring an additional harm), *and* Robey v. Shapiro, Marianos & Cejda, LLC, 434 F.3d 1208, 1212 (10th Cir. 2006).

30 136 S. Ct. 1540 (2016).

31 15 U.S.C. §§ 1681–1681x (2018); *Spokeo*, 136 S. Ct. at 1546.

32 Reply Brief for Petitioner at 5, Spokeo, Inc. v. Robins, 138 S. Ct. 931 (2018) (No. 17-806).

33 Petition for Writ of Certiorari at 12–15, *Spokeo*, 136 S. Ct. 1540 (No. 13-1339).

34 Brief of Respondent at 26–30, *Spokeo*, 136 S. Ct. 1540 (No. 13-1339).

35 *Id.* at 51.

36 *See id.* at 53–54.

Instead of a square resolution, the Court created more confusion. Depending on who was asked, Spokeo won, Robins won, they tied, or no one can tell who won, if anyone. According to Robins's lawyer, the Supreme Court's decision was "overall a major win for consumers and privacy advocates."[37] Rejecting that as "spin," Spokeo's Supreme Court advocate declared victory on behalf of the defense bar, proclaiming that *Spokeo* was a "game-changer for defendants who face 'no-injury' statutory damages class actions."[38] Still others described it as a "narrow victory for Spokeo,"[39] "at best as a tie for defendants,"[40] or a "punt" to avoid difficult issues.[41] Others were simply confused, comparing the opinion to "an M.C. Escher painting . . . sending the reader around and around in impossible loops."[42]

The question of whether Congress can create rights, the invasion of which creates standing, therefore remains unresolved. The scope of the rights revolution and the limits on Congress's power to define injuries is left to lower courts until the Supreme Court weighs in again.[43] This Note attempts to empirically chart the impact of *Spokeo* on standing jurisprudence. Part I traces how the Supreme Court historically has defined concrete injuries in fact and legal rights, then analyzes how *Spokeo* adds to standing doctrine. Part II outlines the methodology of a content analysis used to screen and code 38 U.S. circuit court opinions to determine how courts interpret injuries in

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37 Alison Frankel, *Brace for More Class Action Challenges Post-*Spokeo, REUTERS (May 16, 2016), http://blogs.reuters.com/alison-frankel/2016/05/16/brace-for-more-class-action-challenges-post-spokeo [https://perma.cc/AR4A-C7J3].

38 Andrew J. Pincus, *Plaintiffs' Lawyers Try to Spin* Spokeo, CLASS DEF. BLOG (May 18, 2016), https://www.classdefenseblog.com/2016/05/plaintiffs-lawyers-try-to-spin-spokeo [https://perma.cc/EJ2P-JXDJ].

39 Amy Howe, *Opinion Analysis: Case on Standing and Concrete Harm Returns to the Ninth Circuit, at Least for Now*, SCOTUSBLOG (May 16, 2016, 6:45 PM), http://www.scotusblog.com/2016/05/opinion-analysis-case-on-standing-and-concrete-harm-returns-to-the-ninth-circuit-at-least-for-now [https://perma.cc/EXY8-R3FM].

40 Stephen E. Embry and Christopher S. Burnside, Spokeo, Inc. v. Robins*: A Well Executed Punt?*, LEXOLOGY (May 16, 2016), https://www.lexology.com/library/detail.aspx?g=5566c718-b78b-4b4e-b87d-400fd3466c29 [https://perma.cc/T2KZ-M6L5].

41 Allison Grande, *High Court's* Spokeo *Punt Sets Bar for Class Action Injuries*, LAW360 (May 16, 2016, 11:24 PM), http://www.law360.com/articles/796883/high-court-s-spokeo-punt-sets-bar-for-class-action-injuries [https://perma.cc/YBR4-ADWS].

42 Daniel Solove, Response, Spokeo, Inc. v. Robins*: When Is a Person Harmed by a Privacy Violation?*, GEO. WASH. L. REV. ON THE DOCKET (May 18, 2016), https://www.gwlr.org/spokeo-inc-v-robins-when-is-a-person-harmed-by-a-privacy-violation [https://perma.cc/3W55-Y2LG].

43 The Supreme Court denied certiorari to weigh in a second time after the Ninth Circuit found standing on remand. *See* Robins v. Spokeo, Inc., 867 F.3d 1108 (9th Cir. 2017), *cert. denied*, Spokeo, Inc. v. Robins, 138 S. Ct. 931 (2018).

fact and legal rights post-*Spokeo*. Part III presents the results of this content analysis to determine the current frameworks courts use to assess whether a violation of a statute is a concrete injury in fact. Part IV extends the content analysis to examine how courts apply these frameworks using various tools of statutory interpretation. Part V synthesizes the best practices identified in Parts III and IV to construct a uniform framework that can yield sensible, consistent results.

I. BACKGROUND

Article III of the Constitution confines the federal judicial power to "cases" and "controversies."[44] It took until 1944 for the Supreme Court to first articulate how Article III affects standing, the "right to make a legal claim or seek judicial enforcement of a duty or right."[45] Between 1944 and the time the Supreme Court decided *Spokeo* in 2016, the Court defined a sprawling standing test, requiring an injury in fact, causation, and redressability, with each requirement containing its own subparts.[46] Complicating matters, the Supreme Court has recognized standing derived from other sources, including particular statutes[47] and self-imposed prudential concerns.[48] Mapping these boundaries and defining all standing requirements is beyond the scope of this Note.

Thankfully, understanding *Spokeo*'s impact on how or whether Congress can define injuries requires only a look at how two ideas within standing doctrine have been locked in struggle before *Spokeo*.

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44 U.S. CONST. art. III, § 2.

45 *Standing*, BLACK'S LAW DICTIONARY (9th ed. 2009); *see* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 169 (1992) (citing Stark v. Wickard, 321 U.S. 288 (1944)).

46 Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992). An injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized and (b) 'actual or imminent, not "conjectural" or "hypothetical."'" *Id.* at 560 (citations omitted) (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)). Causation requires "a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'" *Id.* (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41–42 (1976)). Redressability requires that it "be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 561 (quoting *Simon*, 426 U.S. at 38, 42).

47 *See* Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970) (defining statutory standing as asking whether a plaintiff is within a statute's "zone of interests").

48 *See* Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1387 n.3 (2014) (defining prudential standing as the Court not taking a case because of the "counsels of prudence"). Though the Court suggests that prudential standing actually derives from Article III, the Court does not expressly hold that this is the case. *Id.* The current status of prudential standing is unclear but beyond the scope of this Note.

First, the Court has held that a concrete injury must exist in fact.[49] Second, the Court has held that Congress can define new legal rights, which can be sufficient to satisfy standing in and of themselves if a plaintiff asserts them.[50] The Court in *Spokeo* presumably would have had to choose between these ideas or somehow resolve the tension between them.

*A. Concrete Injury in Fact Pre-*Spokeo

*1. Injury in Fact Pre-*Spokeo

As it came into this world, the injury-in-fact requirement was unadorned with any adjectives.[51] The Court in *Association of Data Processing Service Organizations v. Camp*[52] first explained that a plaintiff must have an "injury in fact, economic or otherwise" to satisfy Article III standing.[53] This was a sea change.[54] Before *Data Processing* required injuries in fact, the Court required a plaintiff to allege an invasion of a legal right instead.[55] The Court limited a litigant's ability to bring suit "unless the right invaded is a legal right—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege."[56] This "'legal interest' test" did not work well in the modern administrative state.[57] At the time the Court was writing in 1970, "the trend [was] toward enlargement of the class of people who may protest administrative action."[58] If the Constitution required a legal right granted by a statute or common law, this principle, taken to its extreme, would allow judicial review of agency action only for regulated

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49 *Data Processing*, 397 U.S. at 152.

50 *See* Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982).

51 *See* Barlow v. Collins, 397 U.S. 159, 163 (1970); *Data Processing*, 397 U.S. at 152. Both decisions mentioned an injury in fact, but *Data Processing* explained how it supplants earlier standing requirements. *See Data Processing*, 397 U.S. at 153. *Data Processing* can be read as defining injuries only under the Administrative Procedure Act, but it still adopted an injury-in-fact requirement that seeped into Article III standing cases. *See id.*; *Defs. of Wildlife*, 504 U.S. at 560–61.

52 397 U.S. 150 (1970).

53 *Id.* at 152.

54 *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 229–30 (1988).

55 *See, e.g.*, Tenn. Elec. Power Co. v. Tenn. Valley Auth., 306 U.S. 118, 138 n.6 (1939) (collecting cases).

56 *Id.* at 137–38.

57 *See Data Processing*, 397 U.S. at 153 (citing *Tenn. Elec. Power Co.*, 306 U.S. at 137); *see also* Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1449 (1988) (explaining that the new test, unlike the old one, allowed both "statutory beneficiaries and regulated class members" access to the courts).

58 *Data Processing*, 397 U.S. at 154.

parties whose property or liberty interests were protected by law but exclude regulatory beneficiaries like public interest organizations.[59] In this way, the new injury-in-fact requirement broadened the class of people who could bring suit in federal court.[60] When suing under a statute, one needed only some kind of injury.[61] If the law did not grant a litigant some explicit legal right by common law or statute, they were not stopped at the courthouse door.[62]

On the other hand, this new test had a simultaneous narrowing effect in excluding some intangible injuries because whether one had an intangible injury often depended on the eye of the beholder.[63] Consider a father who gives one of two daughters a bicycle.[64] The non-bicycle-receiving daughter says she has been injured, although her father says that she has not been.[65] The injury-in-fact requirement, strictly construed, would not look to a theoretical Sibling Bicycle Act to determine whether there is a legal right or injury, but instead look solely at the "fact" of injury.[66] Try as the Court might to characterize these questions as objective, many are ultimately normative questions whose answers often depend on a judge's perspective.[67] This may seem trivial when an eggshell sibling alleges a "[p]sychic" injury, but the stakes are more serious in other cases where, for example, a court has to determine whether a fear of future police chokeholds is an injury.[68]

Some scholars argue that, because the injury-in-fact requirement requires a normative judgment, political or personal bias may consciously or unconsciously affect decisionmaking.[69] Others dismiss this

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59 *See* Sierra Club v. Morton, 405 U.S. 727, 737–39 (1972).

60 *See id.*

61 *See Data Processing*, 397 U.S. at 152–53.

62 *See id.*

63 *See* Fletcher, *supra* note 54, at 231; Gene R. Nichol, Jr., *Rethinking Standing*, 72 CALIF. L. REV. 68, 76–77 (1984) (collecting cases where the Court finds intangible injuries lacking).

64 In fact, the example here happened to Judge Fletcher. *See* Fletcher, *supra* note 54, at 231–32.

65 *Id.*

66 *See* Sunstein, *supra* note 57, at 1447.

67 *See* Fletcher, *supra* note 54, at 231; *see also* Lujan v. Defs. of Wildlife, 504 U.S. 555, 566 (1992) (explaining that injury analysis is not "an ingenious academic exercise in the conceivable," but instead an inquiry into "a factual showing of perceptible harm.").

68 Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 619 (2007) (Scalia, J., concurring) (distinguishing between "Psychic" and "Wallet" injuries in taxpayer standing cases); *see* Nichol, *supra* note 63, at 100 (discussing the injury requirement in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983)).

69 *See* Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 323 (2002); *see also* Avner Ben-Ner et al., *Identity and In-Group/Out-Group Differ-*

concern because standing doctrine, although amorphous, still provides "reasonably precise guidelines of the sort common to the lawyer's craft,"[70] the one empirical study to attempt to measure bias found that it existed in some cases.[71] Regardless of whether the injury-in-fact requirement is too amorphous or prone to bias, it has become part of the "irreducible minimum" of standing along with other requirements.[72]

2. *Concreteness Pre*-Spokeo

An injury must not only exist in fact. It also must be "(a) concrete and particularized and (b) 'actual or imminent, not "conjectural" or "hypothetical."'"[73] On the rare occasions where the Supreme Court has insisted on concreteness pre-*Spokeo*, it has done so mostly to emphasize the "prelegal" nature of the injury-in-fact requirement.[74] It has used concreteness as a means of contrasting the "abstract" nature of some claims.[75] Since the Court first referenced a "concrete injury" in *Sierra Club v. Morton*,[76] the Court has subsequently used a lack of standing in declining to resolve the propriety of agency or other government action.[77] On these grounds, it has declined to rule on taxpayer suits to enjoin members of Congress from serving in the military,[78] to force the CIA to disclose its expenditures,[79] or to stop

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entiation in Work and Giving Behaviors: Experimental Evidence, 72 J. ECON. BEHAV. & ORG. 153 (2009) (explaining that "in-group" behavior can unconsciously lead people to benefit people like themselves).

70 John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1223 (1993).

71 *See* Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1759–60 (1999) (rejecting, at a 99% confidence level, the hypothesis that standing cases are not influenced by political affiliation, after compiling and analyzing environmental-standing cases across circuit courts from June 1992 to May 1998).

72 *Defs. of Wildlife*, 504 U.S. at 590 (Blackmun, J., dissenting).

73 *Id.* at 560 (citations omitted) (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).

74 *See* Sunstein, *supra* note 57, at 1447.

75 *See Defs. of Wildlife*, 504 U.S. at 573.

76 405 U.S. 727 (1972).

77 *See id.* at 740 n.16; *Defs. of Wildlife*, 504 U.S. at 572–73 (requiring a "concrete interest" or "concrete injury" to have the "'right' to have the Executive observe the procedures required by law"); *see also, e.g.*, Warth v. Seldin, 422 U.S. 490, 500–01 (1975). Though some consider these "generalized grievance[]" cases as part of prudential standing, the Court indicated in *Lexmark International, Inc. v. Static Control Components, Inc.* that this limitation is grounded in Article III. 134 S. Ct. 1377, 1387 n.3 (2014).

78 *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 222 (1974) (holding that being deprived of independent legislators is insufficient as an injury because "[t]o permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process").

the transfer of property to a religious institution on separation-of-church-and-state grounds.[80]

Concreteness also served as a means of bolstering other, independent requirements for an injury in fact like particularization and actuality.[81] The Court insisted on a "concrete and particularized" injury in fact in these "generalized grievance" cases involving the propriety of government action, but particularization did most of the work.[82] The Court declined to decide these cases because it did not want to "decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions."[83] If anyone could sue because they did not like what the government was doing, then the Supreme Court could become a "debating society" instead of a court that hears cases and controversies.[84] In cases requiring a "particular concrete injury," it was hard to know if the Court rested its holding on particularization, concreteness, or both, assuming that these were distinct requirements.[85] This may explain why the Ninth Circuit did not treat concreteness and particularization as distinct inquiries in *Spokeo* before it reached the Supreme Court.[86]

Similarly, the Court has denied injuries that are not "actual or imminent" without explaining how an actual injury is distinct from a concrete one.[87] In *Clapper v. Amnesty International USA*,[88] the Court limited the ability of purported government surveillance targets to bring suit unless it was imminent, which the Court defined as "certainly impending."[89] According to the Court, the plaintiffs had no direct evidence that the government intercepted their communications, so their allegations were "mere speculation" insufficient to establish

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79 *See* United States v. Richardson, 418 U.S. 166, 177 (1974) (holding that the lack of disclosure did not put the plaintiff "in danger of suffering any particular concrete injury").

80 *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 482 (1982) (holding that plaintiffs cannot allege "'a particular and concrete injury' to a 'personal constitutional right'" (quoting Ams. United for Separation of Church & State, Inc. v. U.S. Dep't of Health, Educ. & Welfare, 619 F.2d 252, 265 (3rd Cir. 1980))).

81 *See* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409–10 (2013); *Defs. of Wildlife*, 504 U.S. at 572.

82 *See* FEC v. Akins, 524 U.S. 11, 23 (1998); *Defs. of Wildlife*, 504 U.S. at 575 (collecting cases).

83 Warth v. Seldin, 422 U.S. 490, 500 (1975).

84 *Valley Forge*, 454 U.S. at 472.

85 *See* United States v. Richardson, 418 U.S. 166, 177 (1974).

86 Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1545 (2016).

87 *See* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409–10 (2013).

88 568 U.S. 398 (2013).

89 *Id.* at 409.

an actual or imminent injury.[90] Although that was helpful in defining what counts as "imminent," the Court did not distinguish how actuality and concreteness are distinct, if they are in any meaningful sense.[91] It stands to reason that some actual injuries may not be concrete and vice versa. An actually intercepted phone call may be ephemeral and therefore not concrete enough, for example. Still, if a distinction exists, the Court did not make one.[92]

Pre-*Spokeo*, then, concreteness served mostly to reinforce the factual nature of injuries in fact and other independent requirements for standing.[93] It helped to show that some grievances were generalized and therefore not particularized.[94] It also served, if actuality and concreteness are the same thing, to delineate which alleged injuries are too speculative.[95] Whether concreteness served a purpose outside these other requirements was unclear.

*B. Legal Rights Pre-*Spokeo

Post-*Data Processing*, the substantive law underlying a claim would seem totally irrelevant to standing because legal rights were no longer a necessary condition to establish standing.[96] The Court later emphasized the irrelevance of law by requiring that plaintiffs prove not just injuries but injuries in *fact*.[97] In case the "prelegal" nature of the inquiry was not clear enough, a plaintiff had to allege a "concrete" injury in fact.[98] It may then come as a shock that the Court has consistently held that legal rights can be *sufficient*, in and of themselves, to establish an injury in fact.[99] Indeed, in cases involving private disputes pre-*Spokeo*, the Court always found that a statutory violation was sufficient to establish an injury in fact.[100]

The Court delineated two separate kinds of standing cases: those where a plaintiff alleges a legal right from a "specific statute authorizing invocation of the judicial process"[101] and those where a party al-

90 *Id.* at 410.

91 *See id.*

92 *See id.*

93 *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 573 (1992).

94 *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 222 (1974).

95 *See Clapper*, 568 U.S. at 409–10.

96 *See supra* Section I.A.1.

97 *See* Fletcher, *supra* note 54, at 230.

98 *See Schlesinger*, 418 U.S. at 220–21; Sunstein, *supra* note 57, at 1447.

99 *See* Jonathan R. Siegel, *Injury in Fact and the Structure of Legal Revolutions*, 68 VAND. L. REV. EN BANC 207, 212 (2015).

100 *See id.* at 213–14.

101 Sierra Club v. Morton, 405 U.S. 727, 732 (1972).

leges "some threatened or actual injury."[102] For the former category, "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute."[103]

For example, the Court in *Linda R.S. v. Richard D.*[104] held that a mother lacked standing to force a District Attorney to prosecute her child's father for child support payments because she had neither an injury caused by the District Attorney's actions nor a legal right to force the District Attorney to do anything.[105] Because there was no "statute expressly conferring standing," she needed to allege "some threatened or actual injury resulting from the putatively illegal action."[106] She needed one or the other, either a legal right or an injury, but either would be sufficient.[107]

If a plaintiff alleged only the violation of a legal right, the legal right was sufficient.[108] The Court in *Havens* held that the FHA created a "legal right to truthful information about available housing" which was invaded when false information was provided, even though no plaintiff had any intention of using that information to rent an apartment.[109] Looking at the statute, the Court saw no requirement for a "bona fide offer" to rent.[110] The activists needed to allege only a violation of their statutorily conferred rights to establish an injury.[111] Though the Court did not reiterate the point for decades, the violation of a legal right had always been sufficient.[112]

C. Reconciling Concrete Injuries in Fact and Legal Rights

On its face, this absolute grant of standing to plaintiffs alleging statutorily created legal rights seems incompatible with the idea that injuries must exist in fact. Based on precedent, there are three ways to reconcile the concepts of injury in fact and legal rights, all of which find some support in the Court's earlier decisions: (1) a statutorily created legal right is always sufficient to satisfy standing in private rights

102 Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973).

103 *Linda R.S.*, 410 U.S. at 617 n.3.

104 410 U.S. 614 (1973).

105 *See id.* at 616–18.

106 *Id.* at 617.

107 *See id.*

108 *See* Havens Realty Corp. v. Coleman, 455 U.S. 363, 373–74 (1982).

109 *Id.* at 373.

110 *Id.* at 374.

111 *See id.* at 374–75.

112 *See* Siegel, *supra* note 99, at 207.

cases but not in public rights cases;[113] (2) an injury in fact is necessary in all cases, so that a statutorily created legal right is sufficient only where a factual injury exists;[114] (3) as a middle ground, a legal right can be elevated by Congress to the status of a concrete injury, but a legal right is not created in every part of every statute.[115]

The first possibility, as reflected in cases immediately post-*Data Processing*, is that either a legal right or injury in fact can be sufficient, depending on whether the case involves public or private rights. With public rights,[116] the Court worries about the judiciary becoming a "debating society" that decides "abstract questions of wide public significance" even though other governmental institutions may be more competent to address the questions.[117] Because these disputes are abstract and resolving them raises separation of powers concerns, an injury-in-fact requirement helps the Court avoid them.[118] In cases involving statutorily created private rights, the same concerns generally no longer exist.[119] For example, Sylvia Coleman in *Havens* asked the District Court to resolve a discrete dispute involving whether an apartment owner violated a law.[120] Resolving the dispute would not infringe on the powers of Congress or the President.[121] Although this distinction may square the circle, the Court has at least implied that the distinction between public and private rights makes no difference, finding that the "irreducible constitutional minimum" of injury in fact applies in all cases because Article III standing does not "turn on the source of the asserted right."[122]

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113 *See Havens*, 455 U.S. at 369.

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

115 *See id.* at 578.

116 Public rights involve obligations "to the whole community, considered as a community, in it's [sic] social aggregate capacity." 4 WILLIAM BLACKSTONE, COMMENTARIES *5. This includes suits between "the [g]overnment and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." Crowell v. Benson, 285 U.S. 22, 50 (1932).

117 Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472, 475 (1982).

118 *See Defs. of Wildlife*, 504 U.S. at 556 (finding that permitting generalized grievance cases would violate the Take Care clause).

119 Private rights include "rights of personal security (including security of reputation), property rights, and contract rights." Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1551 (2016).

120 Havens Realty Corp. v. Coleman, 455 U.S. 363, 369 (1982).

121 *See id.*

122 *Defs. of Wildlife*, 504 U.S. at 560, 576.

Taking *Lujan v. Defenders of Wildlife*[123] at its word, the second possibility is that an injury in fact may be necessary in all cases.[124] This view holds that, in spite of the absolute language in *Havens*, although Congress can create new legal rights, assertions of those rights satisfy standing only where injuries already exist.[125] A legal right would not be relevant to standing, only to the "merits."[126] By this view, discrimination was already a harm before Congress passed antidiscrimination laws, and Congress merely "elevat[ed]" those harms to be "legally cognizable" in *Havens*.[127] To give an example of this logic, consider being aggravated by opening plastic-encased electronics. Most would agree that opening this packaging is an injury, either in terms of time wasted or psychological harm. There is, however, no cause of action unless some legal right from federal, state, or common law confers one. A strict injury-in-fact requirement would enable Congress to recognize already-existing injuries like this one, but Congress could not expand what counts as an injury. Congress could not, for example, pass a Freedom from Annoying Packaging Act to create a consumer's right to be free from plastic packaging with a particular brittleness and automatically confer standing on everyone who bought this particular packaging. Even if consumers could show that they bought packaging of this kind, they would need to also allege some injury independent of the legal right like wasted time or pain and suffering. Still, this seems to contradict *Havens* and *Linda R.S.* which imagined an almost automatic satisfaction of the injury-in-fact requirement if a plaintiff alleges a statutory violation.[128] These cases remain good law.[129] Yet there is enough language in *Defenders of Wildlife* to suggest the possibility that an injury in fact is necessary in all cases, regardless of the legal right asserted.[130]

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123 504 U.S. 555 (1992).

124 *See id.* at 560.

125 *See* William S.C. Goldstein, *Standing, Legal Injury Without Harm, and the Public/Private Divide*, 92 N.Y.U. L. REV. 1571, 1574 n.18 (2017) (citing *Defs. of Wildlife*, 504 U.S. at 578); *see also* F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 303 (2008) (finding that under this view, "[t]he law no longer has the power to create individual rights which, if violated, will support standing").

126 Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970).

127 *See Defs. of Wildlife*, 504 U.S. at 578.

128 *See* Havens Realty Corp. v. Coleman, 455 U.S. 363, 369 (1982); Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973).

129 *See* Shalala v. Ill. Council on Long Term Care, Inc., 529 U.S. 1, 18 (2000) ("This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*.").

130 *See Data Processing*, 397 U.S. at 153; *Defs. of Wildlife*, 504 U.S. at 578.

Between these two opposite poles—a statutorily created legal right always confers standing in private rights cases or an injury in fact is always necessary—lies a third possibility exemplified by Justice Kennedy's concurrence in *Defenders of Wildlife*.[131] To Justice Kennedy, "Congress has the power to define injuries and articulate chains of causation . . . where none existed before."[132] Congress can do this, and a plaintiff can allege a statutory violation that can give rise to standing in certain circumstances.[133] Citing to *Warth v. Seldin*[134]—which found that "injury required by Art. III may exist solely by virtue of 'statutes creating legal rights'"—Justice Kennedy still did not say that a statutory violation confers standing in every instance.[135] To create a legal right, "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."[136] If a plaintiff fits within Congress's definition, then they suffer an injury that Congress has newly defined.[137] Justice Kennedy seems to adopt the view of *Havens* that legal rights and injuries do not exist in totally separate worlds, that Congress can create new legal rights which, when alleged, confer standing.[138] Justice Kennedy only differs from *Havens* in moderating its absolutism: Congress can only define new injuries if it follows his steps: "articulat[ing] chains of causation," "identify[ing] the injury," and "relat[ing] the injury to the class of persons entitled to bring suit."[139] With a theoretical Freedom from Annoying Packaging Act, Congress would have to articulate how packaging harms people, identify the particular injuries associated with it, and show which people suffer those injuries. The only problem is that the Court has never required these conditions.[140] As sensible as it may seem to thread the needle, this position, the only real middle ground between two incompatible poles, appears for the first time in Justice Kennedy's concurring opinion.[141]

In short, pre-*Spokeo*, the Court's precedents supported all three possibilities. A plaintiff needed to allege a concrete, particularized,

131 *See Defs. of Wildlife*, 504 U.S. at 580 (Kennedy, J., concurring).

132 *Id.*

133 *See id.*

134 422 U.S. 490 (1975).

135 *See Defs. of Wildlife*, 504 U.S. at 578, 580 (Kennedy, J., concurring) (quoting *Warth*, 422 U.S. at 500).

136 *Id.* at 580.

137 *See id.*

138 *See* Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982).

139 *Defs. of Wildlife*, 504 U.S. at 580 (Kennedy, J., concurring).

140 *See id.*

141 *See id.*

and actual or imminent injury in fact.[142] This was a factual inquiry, totally separate from the law.[143] Yet the invasion of a legal right could give rise to standing by itself without any independent injury in fact.[144] In retrospect, it may have been unrealistic for the *Spokeo* Court to clear up this "morass of imprecision."[145] Still, the Court could have reduced the "metaphysical" nature of standing generally, and the injury-in-fact requirement in particular, by reducing some subparts and adjectives in the inquiry.[146] In *Spokeo*, the Court would add even more of each.

D. Spokeo v. Robins

Pre-*Spokeo*, the Supreme Court had not squarely faced the question in *Havens* since *Havens*: Can a statute create a private legal right whose invasion would be sufficient to establish an injury, and if so, in what circumstances?[147] With Robins's argument that a statutory violation of the FCRA, with nothing more, sufficed as an injury, the Court had an opportunity to resolve the tension between legal rights and injuries in fact.[148]

To Robins, the FCRA created a legal right by imposing requirements on every "consumer reporting agenc[y] to" "follow reasonable procedures to assure maximum possible accuracy" and providing statutory damages to individuals when a consumer reporting agency willfully misstates a consumer's information.[149] Spokeo's online database said that Robins "is married, has children, is in his 50's, has a job, is relatively affluent, and holds a graduate degree."[150] To Robins, because none of this information was accurate, Spokeo violated the law, thus creating an injury in fact.[151]

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142 *See id.* at 560–61 (majority opinion).

143 *See* Sunstein, *supra* note 57, at 1447–48.

144 *See* Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973).

145 R.I. Ass'n of Realtors, Inc. v. Whitehouse, 199 F.3d 26, 30 (1st Cir. 1999) ("Despite its importance, [standing] doctrine remains 'a morass of imprecision.'" (quoting N.H. Right to Life Political Action Comm. v. Gardner, 99 F.3d 8, 12 (1st Cir. 1996))).

146 Initiative and Referendum Inst. v. Walker, 450 F.3d 1082, 1097 (10th Cir. 2006) ("We recognize that standing doctrine sometimes has a frustratingly metaphysical quality, and the Supreme Court's standing cases do not always seem satisfying or consistent.").

147 *See* Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982).

148 Brief of Respondent at 15, Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016) (No. 13-1339) ("Where, as here, one private party accuses another of invading a personal legal right conferred on him by federal statute, a case or controversy exists.").

149 *Spokeo*, 136 S. Ct. at 1545 (quoting 15 U.S.C. § 1681e(b) (2012)).

150 *Id.* at 1546.

151 *See id.* at 1546, 1556.

In finding an injury in fact, the Ninth Circuit essentially applied the principle that Congress can create Article III standing by statute, so long as the case does not involve a generalized grievance.[152] Similar to the fact that Congress created the "legal right to truthful information" in *Havens* without a bona fide offer, the Ninth Circuit found it significant that the FCRA did not require a showing of "actual harm."[153] Because Robins was "among the injured," he satisfied both concreteness and particularization.[154]

To the Court, this was an unreasonable conflation of concreteness and particularization.[155] Per the Court, concreteness and particularization are each necessary and require distinct analyses, even when a plaintiff alleges a statutory violation.[156] A particularized injury "must affect the plaintiff in a personal and individual way."[157] Affirming the "prelegal" conception of an injury in fact,[158] the Court held that a concrete injury must be "real."[159] "[I]t must actually exist."[160]

The Court created a taxonomy of concrete injuries that "actually exist."[161] Some concrete injuries are "tangible" and others are "intangible."[162] Though the Court did not offer a precise definition, tangible injuries are "easier to recognize," which presumably includes injuries like those to a "Wallet."[163] The Court then listed the scenarios in which an intangible harm could be concrete.[164] Infringements on constitutional rights to free speech or free exercise are intangible but can nonetheless be concrete.[165] An intangible harm with a "close relationship" to one recognized at common law, like slander per se, can be

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152 *See supra* Section I.C.

153 Havens Realty Corp. v. Coleman, 455 U.S. 363, 373–74 (1982); Robins v. Spokeo, Inc., 742 F.3d 409, 412 (9th Cir. 2014) (citing 15 U.S.C. § 1681n(a)), *vacated and remanded*, 136 S. Ct. 1540 (2016).

154 Robins v. Spokeo, Inc., 742 F.3d at 413–14 (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 578 (1992)).

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

156 *Id.*

157 *Id.* (quoting *Defs. of Wildlife*, 504 U.S. at 560 n.1).

158 Sunstein, *supra* note 57, at 1447.

159 *Spokeo*, 136 S. Ct. at 1548 (quoting *Concrete*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 472 (1971)).

160 *Id.*

161 *Id.* at 1548–49.

162 *Id.* at 1549.

163 *Id.*; Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 619 (2007) (Scalia, J., concurring) (distinguishing between "Psychic" and "Wallet" injuries).

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

165 *Id.* (citing Pleasant Grove City v. Summum, 555 U.S. 460 (2009) and Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993)).

concrete.[166] So too can an intangible "risk of real harm" that would meet the "certainly impending" test that the Court affirmed in *Clapper*.[167]

Lastly, Congress can "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law."[168] Congress can identify "intangible harms" and its "judgment" in doing so is "instructive" for courts.[169] However, a statutory violation may also be a "bare procedural violation" that does not give rise to standing.[170] For example, an allegation that a credit reporting agency misstated the plaintiff's zip code would be a "bare procedural violation" under the FCRA.[171] Because the Ninth Circuit held that a statutory violation gave rise to a concrete injury without articulating how, the Supreme Court remanded for the Ninth Circuit to reconsider the question.[172]

In *Spokeo*, one can find support for any of the three theories reconciling injuries in fact and legal rights.[173] In support of the idea that the invasion of a statutorily created right suffices to create an injury in fact in private rights cases, the Court held that "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact."[174] In those circumstances, a plaintiff "need not allege any additional harm."[175] The Court did not cite to the oft-cited adage from *Havens* or *Linda R.S.* about the invasion of legal rights being sufficient to establish standing, but it did not overrule those cases either.[176] Because the Court did not explicitly overrule those cases, they are still good law.[177] Further, Justice Thomas's concurrence and Justice Ginsburg's dissent make clear their understanding that, even post-*Spokeo*, a legal rights analysis is still vital, particularly where a plaintiff seeks to enforce a legal right

166 *Id.*

167 *Id.* (citing Clapper v. Amnesty Int'l USA, 568 U.S. 398, 402 (2013)).

168 *Id.* (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 578 (1992)).

169 *Id.*

170 *Id.*

171 *Id.* at 1549–50.

172 *Id.* at 1550.

173 *See supra* Section I.C.

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

175 *Id.* (emphasis omitted).

176 *See* Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982); Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973).

177 *See supra* note 129 and accompanying text.

against a private party.[178] Even to the greatest defender of *Havens*, though, this earlier interpretation of Article III standing seems to take a major hit. The Court comes close to repudiating *Havens* by saying "Article III standing requires a concrete injury even in the context of a statutory violation."[179] Though other parts of the opinion qualify this language in finding that Congress can "elevat[e]" injuries where none existed before, the Court at least tempers the absolute holding in *Havens*.[180]

The second possibility, that an injury in fact is always necessary and Congress's power is limited to identifying pre-existing injuries, finds support in the Court's definitions of "concrete."[181] Affirming the idea of "prelegal" injuries, the Court held that these injuries must "actually exist" as "de facto" and "real."[182] By this reading of *Spokeo*, Congress can play a role in "identifying and elevating intangible harms," but these harms must "actually exist" before Congress identifies and elevates them.[183]

Alternatively, by incorporating parts of Justice Kennedy's concurrence from *Defenders of Wildlife* in the *Spokeo* majority opinion, the Court may have adopted it as the definitive injury-in-fact analysis.[184] By this reading, some statutory violations, by themselves, do not create legal rights and instead create a "bare procedural violation."[185] The question of whether a legal or procedural right has been created is whether Congress has "articulate[d] chains of causation" by identifying the injury, and "relat[ing] the injury to the class of persons entitled to bring suit."[186]

Did the Court choose any of these possibilities? Or did they "punt"?[187] For now, answers to these questions lie in the hands of lower courts, which are now tasked with deciphering *Spokeo*. The remainder of this Note analyzes how circuit courts have resolved the

178 *See Spokeo*, 136 S. Ct. at 1552–54 (Thomas, J., concurring); *id.* at 1554–55 (Ginsburg, J., dissenting).

179 *Id.* at 1549 (majority opinion).

180 *Id.*

181 *Id.* at 1548 (citing *Concrete*, BLACK'S LAW DICTIONARY (9th ed. 2009), *Concrete*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1971), and *Concrete*, RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (1967)).

182 *Id.*; *see also* Sunstein, *supra* note 57, at 1447.

183 *Spokeo*, 136 S. Ct. at 1548–49.

184 *Id.* at 1549 (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring)).

185 *Id.*

186 *Id.* (quoting *Defs. of Wildlife*, 504 U.S. at 580 (Kennedy, J., concurring)).

187 *See* Grande, *supra* note 41.

tensions between injuries in fact and legal rights after *Spokeo*, then describes how circuit courts apply these frameworks to particular statutes.

II. METHODOLOGY

The goal of a content analysis is similar to that of a restatement: to describe what the law currently is and where it is going.[188] It is particularly valuable when there are a large number of decisions and "each decision should receive equal weight."[189] Instead of "engaging in a shouting match" about what *Spokeo* means, an empirical analysis "sharpens the issues."[190] Although this Note could focus on what *Spokeo* should mean based on the author's view of the caselaw, one more interpretative analysis would be a drop in an already-considerable bucket.[191] A content analysis can shed light on what *Spokeo* means in practice for the current treatment of injuries in fact and legal rights in lower courts. This may be particularly valuable in an area of the law as "chaotic or haphazard" as standing.[192]

This Note seeks to produce results that are "objective, falsifiable, and reproducible," the hallmarks of an objective content analysis.[193] Coding opinions for particular variables helps to make the analysis more objective because it "focuses attention more methodically on various elements of cases and is a check against looking, consciously or not, for confirmation of predetermined positions."[194] One could interpret and synthesize these decisions as one does in a case brief, but to code for various citations, holdings, and facts within them tends to minimize any risk of confirmation bias.[195] It also enables others to objectively verify the results.[196]

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188 Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CALIF. L. REV. 63, 66 n.8 (2008) (quoting AM. LAW INST., CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE 5 (2005)).

189 *Id.* at 83.

190 *Id.* at 84–85.

191 As of April 7, 2018, 1,458 cases and 910 secondary sources cite *Spokeo*. KeyCite Search for *Spokeo*, WESTLAW (last visited Apr. 7, 2018). As there are 691 days between May 16, 2016 and April 7, 2018, this means that a case or secondary source cites *Spokeo* 3.4 times a day.

192 Hall & Wright, *supra* note 188, at 92.

193 *Id.* at 64.

194 *Id.* at 81. Coding in this context means reading an opinion to see whether it contains various citations, tools of interpretation, and holdings. This Note reduces those findings to a simple "yes" or "no" for whether it is in an opinion.

195 *See id.* at 66, 81.

196 *See id.*

This Note aims to make an empirical claim. As such, it is valid only if it is capable of falsifiability and reproducibility.[197] The hypothesis here is that the Court in *Spokeo* did not resolve the pre-existing tension between injuries in fact and legal rights. Therefore, if this hypothesis were false, one would see a clear consensus among circuit courts on how to resolve the tension explained in Section I.C. Further, if false, circuit courts will have created and then applied one consistent framework along the lines of one of the three possibilities explained in Section I.C. With enough observations (both in terms of cases and data points within the cases), the extent to which courts find standing on the basis of the violation of a statutorily created legal right should be clear.[198] By offering the methodology of how this is done, this Note will also be reproducible.[199] The reader need not rely on this Note's "rhetorical power," but can, with the selection criteria and coding variables, independently "understand, evaluate, build on, and reproduce the research."[200]

The first part of the content analysis will code and analyze 38 circuit court decisions to determine how they have chosen between the three possible means of resolving the tension between injuries in fact and legal rights post-*Spokeo*.[201] The ultimate question is whether courts rely on one or more possible injury-in-fact frameworks: (1) a statutorily created legal right can be sufficient to satisfy standing in private rights cases; (2) an injury in fact is necessary in all cases; (3) as a middle ground, a legal right can be elevated by Congress to the status of a concrete injury by virtue of Congress articulating "chains of causation."[202]

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197 *See* KARL R. POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY 41 (1959) (explaining that, with an empirical study, a theory can never be proven, but it can be disproven).

198 *See* GARY KING ET AL., DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH 19–20 (1994).

199 *See* Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 38 (2002).

200 *Id.*; Hall & Wright, *supra* note 188, at 66.

201 These cases were selected following four screening criteria: (1) all reported circuit court decisions in Westlaw that cite *Spokeo* (2) featuring a statutory cause of action (3) between two private parties (4) where the Court attempts to resolve an injury-in-fact question related to the statutory violation. In so narrowing, this Note seeks the opinions with the greatest impact that squarely address the issue of statutorily conferred legal rights in disputes between private parties. As of April 7, 2018, this screen includes 38 cases on the Westlaw database. As 1,327 cases cite *Spokeo* on April 7, 2018, the conclusions of this Note are limited but at least capture the main opinions governing the analysis in lower courts.

202 Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016) (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring)).

The second part of the content analysis will determine how courts apply this framework to particular statutes.[203] If courts adopt any view in between the two absolutist positions on injuries in fact and legal rights, courts may have to divine whether Congress has elevated a statutory violation to the level of an injury, in which case courts may apply various tools of statutory interpretation to find answers.[204] This Note will determine which tools of statutory interpretation are most useful to courts on this question.

III. What Frameworks Do Circuit Courts Use Post-*Spokeo*?

Post-*Spokeo*, circuit courts have seemingly applied *Spokeo* to the same set of facts and reached opposite results.[205] This Note finds that this may be a result of circuit courts applying different injury-in-fact frameworks. A court may emphasize that Congress can create legal rights sufficient for standing, that Congress cannot do so, or that Congress can do so only in certain circumstances.[206]

Table 1. Cases by Category

	% of cases citing at least one principle within category[207]	**Of all cases, % finding a concrete injury**
Category one cases (legal rights)	42%	50%
Category two cases ("prelegal" injury)	84%	47%
Category three cases (Justice Kennedy in *Defenders of Wildlife*)	47%	50%
All cases		50%

Category one cases include at least one of the following: portions of *Linda R.S.*, *Havens*, or *Warth* using "legal rights" terminology; the phrase "legal right" or "legal rights"; or a citation to the one sentence in *Spokeo* arguably embodying such a legal rights approach, that a plaintiff alleging certain statutory violations "need not allege any

203 This part of the content analysis will examine the same cases as in the previous part.

204 *See supra* Section I.C.

205 *See* Henry E. Hudson et al., *Standing in a Post-*Spokeo *Environment*, 30 Regent U. L. Rev. 11, 19–20 (2017) (contrasting the Third and Fourth Circuit approaches in data breach cases).

206 *See id.*

207 Four cases fall into no category at all. Note that these percentages in the first column do not add up to 100% because many cases fall into multiple categories.

additional harm beyond the one Congress has identified."[208] Although no case relies exclusively on these concepts, 44% of cases rely on the principle in some form. Although the legal rights approach is far from dominant, it is also far from dead. Courts cite *Linda R.S.*, *Havens*, or *Warth* for the proposition that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute" in 26% of cases.[209] In 24% of cases, courts use the phrase "legal right" or "legal rights." A lower percentage, 18%, cite language from *Spokeo* that a plaintiff in some circumstances "need not allege any *additional* harm beyond the one Congress has identified."[210]

By contrast, category two cases—those that cite a portion of *Spokeo* supporting a "prelegal" conception of the injury-in-fact requirement—are dominant, with courts citing to some proposition emphasizing the factual nature of injuries in fact in 84% of cases.[211] Courts cite at least one of the following parts of *Spokeo* in category two cases: the Court's dictionary definitions of concrete as injuries that "actually exist" as "de facto" and "real," the Court's holding that "Article III standing requires a concrete injury even in the context of a statutory violation" so that "a plaintiff does not automatically satisfy the injury-in-fact requirement," or that the injury-in-fact requirement is part of the "irreducible constitutional minimum" of Article III standing.[212] Courts cite the dictionary definitions in 55% of cases and that "Article III standing requires a concrete injury even in the context of a statutory violation" or that "a plaintiff does not automatically satisfy the injury-in-fact requirement whenever a statute grants [a person a statutory] right" in 47% of cases.[213] A quotation of the "irreducible constitutional minimum" language appears in 37% of cases.[214]

Many courts also seek a middle ground in category three by relying on Justice Kennedy's concurrence in *Defenders of Wildlife* which was adopted in part by the *Spokeo* majority.[215] This category

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208 Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016); *see* Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982); Warth v. Seldin, 422 U.S. 490, 500 (1975); Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973).

209 *Linda R.S.*, 410 U.S. at 617 n.3; *accord Havens*, 455 U.S. at 373; *Warth*, 422 U.S. at 500.

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

211 *See* Sunstein, *supra* note 57, at 1447.

212 *Spokeo*, 136 S. Ct. at 1543, 1547–49 (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992)).

213 *Id.*

214 *Id.* at 1547 (citing *Defs. of Wildlife*, 504 U.S. at 560).

215 *See id.*

consists of any case citing one of the following: that Congress may play a "role in identifying and elevating intangible harms," that Congress "define[s] injuries and articulate[s] chains of causation," or that Congress's judgment is "instructive and important."[216] Courts cite to at least one of these propositions in 47% of cases. The *Spokeo* Court's statement that Congress's judgment is "instructive" or "important" is in 26% of cases.[217] Courts cite to the fact that Congress plays a "role in identifying and elevating intangible harms" in 39% of cases.[218] Only 8% cite the proposition that Congress can "articulate chains of causation" to identify a new injury in fact.[219]

Although courts emphasize the fact that an injury in fact is always necessary, a majority of circuit court opinions borrow liberally across all three categories.

TABLE 2. CASES CITING ONE CATEGORY VERSUS MORE THAN ONE CATEGORY

	% of all cases	Of all cases, % finding a concrete injury
More than one category	58%	45%
Cases citing exclusively category two	26%	50%
All cases		50%

The real split among circuit courts is whether to cite ideas supporting a strict, "prelegal" idea of an injury in fact always being necessary or to reckon with moderating language suggesting that Congress can play some role.[220] Although courts cite absolute language suggesting that Congress plays little to no role in injury-in-fact analyses in 84% of cases, only 26% of cases fall exclusively into this category. By contrast, courts cite variables across at least two categories in 58% of cases.

Across all these categories and even with a small sample size, the hypothesis of this Note—that *Spokeo* did not create a clear framework to resolve the tension between injuries in fact and legal rights—appears correct. If circuit courts found a clear framework, then one would expect more consistency in citations across categories. Instead, courts ascribe exclusively to absolute ideas about "prelegal"

216 *Id.* at 1549.

217 *Id.*

218 *Id.*

219 *Id.*

220 Sunstein, *supra* note 57, at 1447.

injuries in 26% of cases, although a majority attempts to find a middle ground by citing across at least two categories.[221]

What does this all mean? In terms of overall outcomes, the answer may be very little because courts find a concrete injury around half the time with little variation across categories. Beneath the surface though, it means that courts are applying different analyses. For courts applying an absolute category two analysis, their inquiry may be purely factual, looking to whether the plaintiff alleged anything in addition to a statutory violation. For courts seeking a middle ground though, the framework is far from clear. Congress can play a role, but Congress must create "legal rights"[222] or "elevat[e]" injuries.[223] The remaining question is how courts read statutes to determine whether Congress has created these rights or elevated these injuries.[224]

IV. How Do Circuit Courts Apply *Spokeo*?

The *Spokeo* Court gives some clues in how courts should read statutes. Lower courts should consider Congress's "judgment," and at least half of circuit court opinions have done so recently.[225] Presumably, this means reading a statute to determine whether Congress has elevated an intangible harm to the level of a concrete injury.[226] And assuming *Havens* is good law, courts could alternatively look to whether Congress has created a legal right. In determining the answer to whether Congress has done these things, a specific kind of statutory interpretation may be helpful to determine whether Congress created a legal right or "define[d] injuries and articulate[d] chains of causation."[227] In analyzing circuit court decisions, some intentionalist tools of interpretation and the Whole Act Rule appear to be more helpful than others.

A. Theories of Interpretation

How does one determine the "judgment" of Congress?[228] In interpreting statutes generally, judges emphasize textualist or intention-

221 *See id.*

222 Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982).

223 *Spokeo*, 136 S. Ct. at 1549 (citing Lujan v Defs. of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring)).

224 *Id.*

225 *Id.*

226 *See id.*

227 *Id.* (quoting *Defs. of Wildlife*, 504 U.S. at 580 (Kennedy, J., concurring)).

228 *Id.*

alist tools, depending on their judicial philosophy.[229] Regardless of a particular judge's philosophy though, determining Congress's judgment beyond a "statutory violation" may be an invitation to use intentionalist, not textualist, tools of interpretation.[230] As this content analysis shows, although some courts rely on text alone, intentionalist tools appear to be most useful to answering the questions raised by the *Spokeo* Court.

1. Intentionalism

Intentionalist tools of interpretation look beyond the text of a statute to consider whether an interpretation conforms with Congressional intent.[231] These tools may be particularly helpful for courts because looking solely to the violated section of the law to determine an injury in fact is not enough.[232] If the goal of an injury-in-fact analysis post-*Spokeo* is to divine which violations are sufficient for standing and which are not, a statute's legislative history will be relevant to determine the mischief and defect that Congress sought to address.[233] Depending on a court's perspective and the statute at issue, a court could conceivably deny standing because a statutory violation is not part of the "mischief and defect" that a statute seeks to address.[234] Alternatively, a court could attempt to "effectuate legislative goals" and expand standing by finding an intangible harm in the purpose of a statute, even if it is not explicitly mentioned in a statute's text.[235] Here, the content analysis codes intentionalism as any reference to legislative history or congressional statements of purpose because these sources are most likely to answer the questions of what Congress has done.[236] Legislative history includes committee reports, hearing testimony, and statements by legislators.[237]

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229 *See* James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 45 (2005).

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

231 *See* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 845 (1992).

232 *See Spokeo*, 136 S. Ct. at 1549.

233 RICHARD E. LEVY & ROBERT L. GLICKSMAN, STATUTORY ANALYSIS IN THE REGULATORY STATE 150 (2014).

234 *Id.*

235 *Id.* at 151.

236 *See* Breyer, *supra* note 231 (describing the scope of legislative history); *see also* Edward O. Correia, *A Legislative Conception of Legislative Supremacy*, 42 CASE W. RES. L. REV. 1129, 1162 (1992) (describing statements of purpose as "extra-textual").

237 Breyer, *supra* note 231, at 845 (defining "legislative history" as "congressional floor debates, committee reports, hearing testimony, and presidential messages").

Courts cite legislative history, congressional findings, or statements of purpose in 37% of cases. All but one of these cases fall into categories one and three, indicating that these courts cite language supporting legal rights or Justice Kennedy's middle ground. The one case using legislative history that fell exclusively within category two arguably cited the same ideas but relied more on Ninth Circuit precedent for the propositions.[238] Of these cases, courts find a concrete injury in 57% of them.

2. Textualism

To determine whether a right was created or whether Congress identified a new injury, a textualist may look to the text of statute alone, aided by whatever tools help in determining its plain meaning.[239] This approach does not preclude using tools beyond textual analysis, but it privileges text above legislative intention.[240] A court applying this approach may rely on the text of a statute, the principle of "plain meaning," or dictionary definitions to determine whether Congress created a legal right or elevated new injuries.[241]

No court uses the phrase "plain meaning" or dictionary definitions to aid in their standing inquiry. In 50% of cases, courts actually use the text of the statute in their standing inquiries, but of those 19 cases, 11 do so while also using intentionalist tools of interpretation. That leaves eight, or 21% of the cases, applying a purely textual approach to the *Spokeo* inquiry. One possible explanation is that, because courts in five of these six cases also rely exclusively on the strict "prelegal" injury framework of category two cases, these courts do not see a need for any statutory interpretation.[242] If determining whether an injury in fact exists does not depend upon Congress's judgment, it follows that these courts need only look at the statutory violation and facts alleged. Courts find an injury in only two, or 25%, of these purely textual cases.

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238 *See* Eichenberger v. ESPN, Inc., 876 F.3d 979, 982 (9th Cir. 2017).

239 *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. Rev. 621, 652–53 (1990). Though there are different varieties of textualism, this Note focuses on its most basic, unifying principles.

240 *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 452 (1987) (Scalia, J., concurring).

241 *See* Eskridge, *supra* note 239, at 660 (noting that the goal of traditional textualism is to derive the "plain meaning" of a statute from "ordinary principles of grammar and dictionary definitions of its words").

242 *See* Sunstein, *supra* note 57, at 1447.

B. Linguistic Canons

Linguistic canons seek to determine what Congress means by "its choice of certain words rather than others, or its grammatical configuration of those words in a given sentence, or the relationship between those words and text found in other parts of the same statute or in similar statutes."[243] Although these canons may be inherently textualist because they interpret text alone, Justices across the ideological spectrum have relied on them.[244]

1. The Whole Act Rule

Courts using the Whole Act Rule determine congressional intent on the assumption that "Congress uses terms consistently, intends that each provision add something to the statutory scheme, and does not want one provision to be applied in ways that undercut other provisions."[245] In the *Spokeo* context, this could mean that courts attempt to find coherence in a statute by looking to other statutory violations within the same statute to determine how a plaintiff's particular violation fits into a broader picture or looking to remedial provisions of an act to see whether it is part of the injury Congress elevated within an act.[246]

In 47% of cases, courts reference multiple parts of the statute to determine the meaning of the statute. Of these, courts find a concrete injury in 56% of cases.

2. Miscellaneous Inferential Linguistic Canons

Several canons of statutory interpretation which rely on inferences from a term's surrounding text appear to be potentially helpful to courts. First, the principle of *expressio unius est exclusio alterius* finds that the "express inclusion of some things in a statute implies the exclusion of others."[247] Second, the principle of *ejusdem generis* holds

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243 Brudney & Ditslear, *supra* note 229, at 12 (citing WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION 818 (3d ed. 2001)).

244 *See id.* at 45–46.

245 WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 263 (2000).

246 The Whole Act Rule and intentionalism necessarily overlap to some extent. Congressional findings and statements of purpose are part of a law that was passed, even if they do not create legal obligations, so a citation to that section of a law satisfies both variables.

247 LEVY & GLICKSMAN, *supra* note 233, at 118–19 (citing Ctr. for Cmty. Action & Envtl. Justice v. BNSF Ry. Co., 764 F.3d 1019, 1020 (9th Cir. 2014) (finding that emitting solid waste is not expressly included in a prohibition on "handling, storage, treatment, transportation, or disposal of any solid . . . waste," so it is not within the protection of the statute (quoting 42 U.S.C. § 6972(a)(1)(B) (2012))).

that "[a] general term at the end of a list refers to items 'of the same kind' as the other items on the list."[248] Lastly, the principle of *noscitur a sociis* holds that "[w]ords are 'known by their associates.'"[249] Courts use this "to interpret an item on a list as being of the same kind as other items on the list."[250] In the *Spokeo* context, determining whether a particular right has been created or a new injury has been defined may depend on what else is listed within a statute.[251] The courts can include or exclude injuries using these canons.

Courts rely on one of these canons in only 16% of cases. Courts in five of these cases, or 13% of all cases, rely on *expressio unius*, although one relies on *noscitur a sociis*. Courts in two of these six cases found a concrete injury.

C. *Findings Across Categories*

Courts tend to rely on intentionalist tools of interpretation and the Whole Act Rule to determine whether a statutory violation suffices as a concrete injury.

TABLE 3. TOOLS OF STATUTORY INTERPRETATION ACROSS CASES

	% of cases	% finding a concrete injury
Intentionalism	37%	57%
Legislative history	32%	58%
Findings and statements of purpose	18%	71%
Exclusive textualism	21%	25%
Plain meaning	0%	N/A
Dictionary definitions	0%	N/A
Linguistic canons	47%	56%
Whole Act Rule	47%	56%
Miscellaneous linguistic canons	16%	33%
All cases		50%

248 *Id.* at 121; *see also* ESKRIDGE ET AL., *supra* note 245, at 253–54 (citing State v. Ferris, 284 A.2d 288, 290 (Me. 1971) (holding that, in an antigambling law outlawing "any punch board, seal card, slot gambling machine or other implements, apparatus or materials of any form of gambling," pieces of paper recording bets were not included because the general term was limited by the specific items that have a "per se" relationship to gambling)).

249 LEVY & GLICKSMAN, *supra* note 233, at 121; *see also* ESKRIDGE ET AL., *supra* note 245, at 253 & n.11 (citing Jarecki v. G.D. Searle & Co., 367 U.S. 303, 311 (1961) (finding that profits from a patent were not applicable to a tax statute allowing special treatment for "exploration, discovery or prospecting" because "discovery" should be limited to the discovery of minerals)).

250 LEVY & GLICKSMAN, *supra* note 233, at 121.

251 *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016); Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982).

A court using intentionalist tools or linguistic canons is slightly more likely to find an injury. This makes sense. If a court looks only to its own judgment of what is "real," the analysis stops there.[252] The more a court looks for Congress's judgment, the more likely they will find something which recognizes a litigant's statutory violation as a harm. Still, many courts using these tools do not find standing, so the use of one or more of these tools does not guarantee that a court finds a concrete injury either way. Although no approach is outcome determinative, intentionalist tools and the Whole Act Rule appear to be useful to the inquiry the *Spokeo* Court outlined.

V. A Proposed Uniform Framework

Though circuit courts lack consensus, this Note identifies some best practices that courts appear to find useful post-*Spokeo*. First, this Note identifies a majority of circuit court decisions ascribing to a middle ground in the ongoing debate over injuries in fact and legal rights post-*Spokeo*. Second, because the Court in *Spokeo* implies a particular kind of statutory interpretation for courts applying the majority approach, this Note has identified tools of interpretation that can help this emerging majority identify which statutory violations are injuries in fact.

A. A Uniform Injury-in-Fact Rule

The Court in *Spokeo* did not explicitly choose one of the three categories identified in this Note, nor did the Court explicitly overrule any previous case.[253] Still, the Court, in its emphasis on "real" injuries, implied that courts can determine injuries in fact without any reference to the law.[254] Circuit courts in 26% of cases treat this emphasis as an instruction to look to the facts, not to Congress. A majority of cases treat this as an instruction to treat congressional action as relevant to whether an injury in fact exists.

Courts in this majority of cases infer a message from the *Spokeo* Court not referencing *Havens* or another "legal rights" case: Congress's ability to create new injuries is not absolute. The Court also implied that the opposite absolute is just as untenable because, for some statutory violations, a litigant need only allege the harm that Congress has identified.[255] Courts in most cases therefore look to a

252 *Spokeo*, 136 S. Ct. at 1548.

253 *See supra* Section I.D.

254 *Spokeo*, 136 S. Ct. at 1548.

255 *See id.* at 1549.

middle ground. Whether a court uses Justice Kennedy's concurrence in *Defenders of Wildlife* or a sprinkling of other cases that functionally stand for the same proposition, the end result is the same—courts tend to look to what Congress has done to determine whether a litigant has an injury in fact by virtue of alleging a statutory violation. Assuming that courts and litigants want a more uniform application of the injury-in-fact rule, courts should continue to look to Congress's judgment in some way. The remaining question is how.

B. A Uniform Injury-in-Fact Toolbox

Circuit courts have seized on several tools to determine Congress's judgment. First, intentionalist tools of interpretation like looking to legislative history are helpful because the *Spokeo* analysis inevitably leads courts to consider congressional judgment beyond the statutory violation alleged. Second, the Whole Act Rule provides a means of determining whether a statutory violation is central to the judgment of Congress or an afterthought.

1. Intentionalist Tools of Interpretation

In *Crupar-Weinmann v. Paris Baguette America, Inc.*,[256] the Second Circuit provides an example of how intentionalist tools can be helpful to determine which statutory violations are the kind which Congress has elevated.[257] There, a customer alleged that a restaurant printed the expiration date of her credit card in violation of the Fair and Accurate Credit Transactions Act of 2003 ("FACTA"),[258] which requires vendors to truncate credit card numbers on receipts.[259] The question for the court was, assuming that the inclusion of a nontruncated expiration date was a statutory violation, whether Congress recognized printing an expiration date as an injury.[260] In the findings and purposes section of an amendment to the Act, the court found it "dispositive" that Congress recognized that printing expiration dates did not create a risk of credit card fraud.[261] Congress failed to elevate plaintiff's injury, so there was no injury in fact.[262]

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256 861 F.3d 76 (2d Cir. 2017).

257 *See id.* at 81.

258 15 U.S.C. §§ 1681–1681x (2018).

259 *Crupar-Weinmann*, 861 F.3d at 78 (citing 15 U.S.C. § 1681c(g)(1)).

260 *Id.* at 81.

261 *Id.* (citing the Credit and Debit Card Receipt Clarification Act of 2007, Pub. L. No. 110-241, § 2(a)(6), 122 Stat. 1565, 1565).

262 *Id.*

Like the Second Circuit, courts may find that statements of findings and purpose are useful beyond the text of the statute itself. Others may find Senate and House Reports instructive.[263] Because every law and its history are unique, it is impossible to map the precise location of Congress's judgment, but courts should use every tool at their disposal to determine it. Because the Court in *Spokeo* instructs courts to look beyond the statutory violation, this may mean looking at legislative history, but it does not preclude other tools that permit inferences from the structure of the text.

2. The Whole Act Rule

Of any particular tool of statutory interpretation analyzed in this Note, courts most frequently relied on the Whole Act Rule.[264] The Third Circuit, in *In re Horizon Healthcare Services Inc. Data Breach Litigation*,[265] provides an example of how courts look to multiple sections of a statute to determine Congress's judgment. There, a third party stole two laptop computers containing private information of a health insurer's members.[266] Affected consumers alleged that the health insurer negligently violated the FCRA by not having adequate encryptions on those computers.[267] Though consumers did not allege any tangible injury, the court found that two provisions of the statute confirm that the "unauthorized dissemination of personal information" is a harm that Congress elevated; that Congress created a private right of action for enforcement; and that Congress allowed statutory damages for willful violations.[268] The private right of action implied that those affected should be given a remedy.[269] The statutory damages for willful violations affirmed the seriousness with which Congress treated this problem.[270]

Moving forward, courts should look to all relevant parts of a statute to determine whether Congress has elevated a statutory violation as an injury in fact. As in *Horizon Healthcare*, both the scope of a private litigant's right to sue and a law's remedial provisions may be relevant.[271] If all sections of a law are consistent with a litigant's theory

263 *See* Groshek v. Time Warner Cable, Inc., 865 F.3d 884, 887 (7th Cir. 2017).
264 *See supra* Section IV.B.1.
265 846 F.3d 625 (3d Cir. 2017).
266 *Id.* at 630.
267 *Id.* at 631.
268 *Id.* at 639.
269 *See id.*
270 *See id.*
271 *See id.*

that Congress has elevated their asserted harm, then a court should find that the statutory violation is sufficient to establish an injury in fact. If they are not consistent, the opposite may be true.

Conclusion

Circuit court decisions post-*Spokeo* appear to be a "muddle" to most observers.[272] Scratching beneath the surface though, patterns emerge. *Spokeo* is less of a new test for standing and more of a reflection of longstanding tensions between concrete injuries in fact, legal rights, and the role that Congress can play in establishing either. This Note demonstrates that an emerging majority of courts occupy a middle ground and use particular interpretive tools to determine whether Congress has created a new injury. Litigants and courts can adopt the framework of this Note to find consistent and sensible results as they assess injuries in fact.

272 Perry Cooper, *Class Actions: What to Watch for in 2018*, Bloomberg L. (Feb. 14, 2018), https://www.bna.com/class-actions-watch-n57982089080 [https://perma.cc/4FNS-657M].