

Standing and Contracts

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ABSTRACT

In *Spokeo v. Robbins*, the Supreme Court held that, to establish Article III standing to bring suit in federal court, a plaintiff cannot simply allege the violation of a legal right. Instead, the plaintiff must allege an injury in fact. Although it addressed standing to bring suit for statutory violations, *Spokeo* raises serious questions about limits on the ability to bring breach of contract actions in federal court. After all, contracts simply create legal rights. Under *Spokeo's* logic, the breach of contractual rights should not support standing; instead, standing exists only if the breach results in factual harm. But restricting standing in this way would significantly curtail freedom of contract and would render many traditionally enforceable contracts unenforceable in federal court. At the same time, creating an exception to the injury in fact rule for contract law would create anomalies that would threaten to destabilize standing law. The difficulties with each of those approaches casts serious doubt on *Spokeo's* holding that the violation of a legal right does not support standing.

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INTRODUCTION

Americans enter into thousands of contracts each year. Underlying every purchase and every payment for service is a contract. Enforcing these contracts is one of the principal functions of the courts.¹ Each year, courts resolve thousands of contract disputes.²

Increasingly, contracts today involve online transactions. Those online transactions raise new privacy concerns. People send their personal information and credit card numbers over the web and vendors often keep that information on their servers. Smart devices gather information about individuals. As a result, many contracts contain provisions relating to data protection and privacy, and we should expect those types of contracts only to grow.

These privacy provisions highlight an interesting jurisdictional problem for federal courts. One would think that, so long as there is diversity or federal question jurisdiction, the breach of one of those provisions constitutes a case appropriately brought in federal court. But that is not obviously so. The problem is one of standing.

Deriving from the “case” or “controversy” provision in Article III, standing defines who can bring suit in federal court. The precise test for standing has varied over time. Traditionally, individuals could bring suit if they suffered the invasion of a legal right. But in the 1970s, the Court began shifting the standing inquiry from whether a person suffered an invasion of a legal right to whether the plaintiff suffered a factual injury, such as the loss of money or physical harm. In 2016, the Court completed the shift, declaring in *Spokeo, Inc. v. Robins*³ that a plaintiff must show a “concrete” factual injury to estab-

¹ See *Balt. & Ohio Sw. Ry. Co. v. Voigt*, 176 U.S. 498, 505 (1900) (“[T]he usual and most important function of courts of justice is . . . to maintain and enforce contracts.”). Although enforcing contracts may no longer be the main business of the federal courts, it continues to be important today. See U.S. District Courts–Judicial Business 2018, UNITED STATES COURTS, <https://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2018> [https://perma.cc/K9TT-XFKG] (reporting 26,768 new contract actions in federal court in 2018).

² According to the Bureau of Justice Statistics, over 3,000 contract cases were decided by jury in 2005, and many others decided by a bench trial. Lynn Langton & Thomas H. Cohen, *Civil Bench and Jury Trials in State Courts, 2005*, BUREAU OF JUST. STAT. 2 (Oct. 2008), <https://www.bjs.gov/content/pub/pdf/cbjtsc05.pdf> [https://perma.cc/QEJ2-9KH9]. These statistics do not capture the number of contract disputes resolved by summary judgment or other pre-trial motion.

³ 136 S. Ct. 1540 (2016).

lish standing; the violation of a legal right, the Court held, does not provide a basis for standing.⁴

Following *Spokeo*, lower courts have denied standing to individuals claiming violations of various statutory rights, even when those statutes explicitly authorize private actions to enforce those rights. For example, although the Privacy Act confers a right to have federal agencies follow various procedures to protect information about individuals, the Fourth Circuit held in *Beck v. McDonald*⁵ that violating this right by failing to follow those procedures is not a basis for standing.⁶ Instead, a plaintiff must show that he suffered some additional factual harm from the violation, like the actual theft of his identity, because of the agency's misconduct.⁷

But the logic of *Spokeo* is not limited to statutory violations. It also extends to contracts. Contracts simply create legal rights. A person can demand the consideration specified in a contract because the contract creates a legal entitlement to that consideration. Just as the violation of statutory rights need not cause concrete factual harms, the violation of contractual rights need not cause concrete injury. *Spokeo*'s reasoning strongly suggests that victims of breaches that do not cause concrete factual harm do not have standing to vindicate their contractual rights. Instead, they must establish a concrete injury resulting from the breach of contract.

That conclusion would significantly affect the enforceability of contracts in federal courts. For example, following the Fourth Circuit's logic in *Beck*, if a person enters into a contract requiring an agency to follow procedures comparable to those prescribed by the Privacy Act, that person should not have standing to sue for breach of contract if the agency fails to follow those procedures. The effect would not be limited to contracts involving data privacy. Many breaches of contract do not result in a concrete injury in fact. For example, suppose Paul contracts with Dan to pay \$1,000 for a share of stock, Dan breaches, and Jeff immediately offers to sell Paul a share of the same stock for \$20. Or to take a more famous example: suppose a builder installs a pipe made by a manufacturer different from the one specified in a contract, yet the installed pipe is indistinguishable from the one called for by the contract and in any event will not be seen because it is

4 *Id.* at 1549 (“Article III standing requires a concrete injury even in the context of a statutory violation.”).

5 848 F.3d 262 (4th Cir. 2017).

6 *See id.* at 277.

7 *See id.*

inside the walls.⁸ The plaintiff in neither example suffers a concrete factual harm from the breach. By *Spokeo*'s logic, neither plaintiff should have standing.

Since it was decided, *Spokeo* has faced criticism. Critics have argued that *Spokeo* is unworkably incoherent,⁹ introduces undesirable normative judgments into jurisdictional determinations,¹⁰ does not advance the separation of powers principles underlying standing,¹¹ and conflicts with the original understanding of Article III.¹² None of these criticisms, however, has focused on the effect that *Spokeo* has on the enforceability of contracts. By the language and logic of *Spokeo*, the injury in fact requirement should apply equally to contracts, and the repercussions of doing so provides a compelling argument for discarding that requirement.

Requiring an injury in fact to support standing for breach of contract has several undesirable consequences. It would limit freedom of contract by restricting the enforceability of rights that parties create through contracts.¹³ Contract provisions designating federal courts as the appropriate forum for breach actions would be unenforceable if the consequence of the breach does not result in a cognizable factual injury. Requiring injury in fact could also generate disparity in the enforceability of contract rights in federal and state courts—thereby undermining one of the principal reasons for extending diversity juris-

⁸ *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889, 890 (N.Y. 1921).

⁹ See, e.g., William Baude, *Standing in the Shadow of Congress*, 2016 SUP. CT. REV. 197, 227 (“The way to make [*Spokeo*] coherent is to say that only injuries recognized in some form by the common law will suffice. But this is a position that the Court has (rightly) rejected.”); 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/JYQ5-T3MH>] (describing *Spokeo* as “an M.C. Escher painting . . . sending the reader around and around in impossible loops”).

¹⁰ See Rachel Bayefsky, *Constitutional Injury and Tangibility*, 59 WM. & MARY L. REV. 2285, 2370 (2018) (“[T]he inquiry into whether harm is concrete invites courts to make contestable judgments . . .”).

¹¹ See Leading Cases, *Justiciability—Class Action Standing—Spokeo, Inc. v. Robins*, 130 HARV. L. REV. 437, 442 (2016) (“[I]t is difficult to see how *Spokeo* serves standing doctrine’s broader principles . . .”).

¹² See F. Andrew Hessick, *The Separation-of-Powers Theory of Standing*, 95 N.C. L. REV. 673, 702 (2017) (arguing that the injury in fact requirement is ahistorical for suits alleging violations of private rights).

¹³ See *The Western Maid*, 257 U.S. 419, 433 (1922) (Holmes, J.) (“Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp.”); see also *Wood & Selick, Inc. v. Compagnie Generale Transatlantique*, 43 F.2d 941, 943 (2d Cir. 1930) (Hand, J.) (“[A] right without any remedy is a meaningless scholasticism . . .”).

diction to the federal courts.¹⁴ State courts that do not have an injury in fact requirement could hear breach claims that federal courts could not hear.¹⁵

At the same time, creating a “contracts exception” to *Spokeo* by dispensing with the injury in fact requirement for contract actions would create significant anomalies in standing law. It would give priority to contract rights over rights deriving from other legal sources, such as statutes and constitutions. Perhaps more important, recognizing standing for breach of contract actions would provide a means for avoiding the injury in fact requirement in other types of cases. Injury in fact would no longer be an absolute threshold prerequisite to suing in federal court; instead, injury in fact would become a default rule. Many parties could circumvent standing limitations on statutory rights by entering into contracts imposing obligations identical to those in statutes. Likewise, it would provide a means for Congress and state legislatures to circumvent the injury in fact requirement for statutory rights. The law has long recognized that statutes can create implied contracts.¹⁶ Legislatures could simply designate legal rights created by statute as obligations imposed by an implied contract.

The inability to square *Spokeo* with contracts provides a compelling argument that *Spokeo* was wrongly decided. Faithfully following its language and logic would prevent federal courts from fulfilling their function of enforcing legally valid contracts. Large swaths of contracts that contain provisions aimed at protecting privacy or provisions conferring rights idiosyncratically valued by the parties would not be vindicated in federal court. This cannot be right. When a person sues to vindicate a contract right, standing should not depend on whether the breach of contract caused an injury in fact. The violation of the contractual right alone should suffice to support standing. Generalizing this principle from contracts to other areas of the law provides strong support for the argument that the violation of a legal right should suffice to support standing.¹⁷

¹⁴ See F. Andrew Hessick, *Cases, Controversies, and Diversity*, 109 NW. U. L. REV. 57, 81–82, 86 (2014) (explaining that, because the primary purpose of diversity jurisdiction is to provide an alternative forum to resolve state law claims, “one of the assumptions underlying diversity jurisdiction is that the enforceability of state rights should not depend on whether a suit is brought in state or federal court”).

¹⁵ Many states have standing rules that differ from the Article III standing rules. See *id.* at 65–68 (documenting the range of standing tests in the states).

¹⁶ See, e.g., *Platt v. Wilmot*, 193 U.S. 602, 613 (1904) (describing “a liability created by the statute, because the statute is the foundation for the implied contract”).

¹⁷ Commentators have argued that the violation of a legal right alone should support standing. See F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L.

This Article proceeds in four parts. Part I provides a brief overview of the development of standing doctrine. As it explains, the original test for standing was whether litigants asserted their private rights. In the 1970s, the Court began shifting the standing inquiry away from whether the plaintiff asserted a legal right to whether the plaintiff suffered an injury in fact. This shift culminated in *Spokeo*, which held that the violation of a legal right unaccompanied by factual harm is not a basis for standing. Part II argues that the logic of *Spokeo* applies to contracts. It explains that contracts simply create legal rights. Under *Spokeo*, breaches of contract are not sufficient to support standing; only breaches that result in some additional factual harm will suffice. Part III addresses various arguments for why *Spokeo*'s rationale might not extend to contract actions, and ultimately concludes that none justifies exempting contracts from *Spokeo*'s holding. Part IV discusses the ramifications of the argument in Parts II and III that *Spokeo*'s logic applies to contracts. Applying the injury in fact requirement to contracts would have several significant, unwelcome effects on contract law. At the same time, excluding contracts from the injury in fact requirement would create anomalies that would destabilize all of standing law. Instead of navigating this Scylla and Charybdis, the best course is to overturn *Spokeo*.

I. ARTICLE III STANDING

Article III of the Constitution extends the federal judicial power to resolving “Cases” and “Controversies.”¹⁸ The Constitution leaves those terms undefined, and the records of the Constitutional Convention provide little clarification.¹⁹ Through a common-law-like process, the Court has developed various doctrines implementing those terms.²⁰ One of these doctrines is standing.

REV. 275, 278 (2008) (arguing that “injury in fact is superfluous in private rights cases” because the violation of the right alone should suffice); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1433 (1988) (“For purposes of standing, the principal question should be whether Congress has created a cause of action”); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 229 (1988) (“The essence of a true standing question is the following: Does the plaintiff have a legal right to judicial enforcement of an asserted legal duty?”). But they have not focused on private transactions to support that argument. Instead, they have relied on history and the separation of powers.

¹⁸ U.S. CONST. art. III, § 2.

¹⁹ See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (Max Farrand ed., 1911) (recounting James Madison’s statement that it was “generally supposed that the jurisdiction given” in Article III “was constructively limited to cases of a Judiciary nature”).

²⁰ See Hessick, *supra* note 14, at 62 (“[T]he Court has provided meanings to those terms

Originally, standing doctrine required private individuals to establish that their legal rights had been violated.²¹ In the 1970s, the Court began to shift the standing inquiry from whether the plaintiff's legal rights had been violated to whether the plaintiff had suffered a factual injury.²² The Court completed that shift in its 2016 decision in *Spokeo*. *Spokeo* held that the violation of a statutory right does not provide a basis for standing; instead, the violation of a statutory right supports standing only if the violation results in a factual injury.²³ Relying on *Spokeo*, lower courts have denied standing to individuals who have alleged violations of a variety of different statutory rights but have failed to show some additional factual harm that resulted from the violation.²⁴

A. *The Development of the Injury in Fact Test*

Under current standing law, a plaintiff seeking to bring suit in federal court must demonstrate that he has suffered “injury in fact,” that the injury is “fairly . . . trace[able]” to the actions of the defendant, and that the injury will “likely . . . be ‘redressed by a favorable decision.’”²⁵ According to the Court, this injury in fact test is critical to maintaining the separation of powers.²⁶ By the Court’s lights, the injury in fact requirement limits the federal judiciary to its traditional role of adjudicating the rights of individuals, and it avoids embroiling the federal courts in disputes more appropriately addressed by Congress or the Executive.²⁷

on a case-by-case basis through a common-law-like process that focuses on the appropriate role of the judiciary in the federal system.”).

²¹ See, e.g., *Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 137–38 (1939) (denying standing based on factual injury, stating that standing requires invasion of “legal right”).

²² See, e.g., *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152 (1970) (stating that standing turns on “whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise”).

²³ See *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1550 (2016).

²⁴ See, e.g., *Katz v. Donna Karan Co.*, 872 F.3d 114, 121 (2d Cir. 2017) (finding no standing under *Spokeo* for violation of the Fair and Accurate Credit Transactions Act).

²⁵ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal quotation marks omitted) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38–43 (1976)) (explaining that the constitutional minimum of standing contains three elements: (1) an injury in fact (2) that is both fairly traceable to the defendant’s actions and (3) that a favorable decision will redress); accord *Bennett v. Spear*, 520 U.S. 154, 162 (1997).

²⁶ See, e.g., *Allen v. Wright*, 468 U.S. 737, 752 (1984); *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 408 (2013) (“The law of Article III standing . . . is built on separation-of-powers principles . . .”).

²⁷ See, e.g., *Clapper*, 568 U.S. at 408 (“The law of Article III standing . . . serves to prevent the judicial process from being used to usurp the powers of the political branches.”); Warth v.

Despite the Court's claim that the requirement is essential to preserving the separation of powers, the injury in fact test has not always been the standard for establishing standing. Traditionally, standing turned on whether the plaintiff had alleged the invasion of a personal right, be it one conferred by common law, statute, or the Constitution.²⁸ The mere assertion of a factual injury was insufficient. In *Tennessee Electric Power Co. v. Tennessee Valley Authority*,²⁹ for example, several power companies sued to enjoin the Tennessee Valley Authority from generating or selling energy, alleging that they were harmed by the increased competition.³⁰ The Court denied standing.³¹ It explained that the harm of revenue loss from competition did not support standing; rather, standing required the invasion of a "legal right."³² By contrast, federal courts followed the ancient common law rule that individuals could maintain actions for legal violations that did not result in factual harm.³³ As the Court said in *Alabama Power Co. v. Ickes*, "[w]here . . . there has been a violation of a right, the person injured is entitled to an action."³⁴

The Court first adopted the injury in fact requirement in the 1970 decision of *Ass'n of Data Processing Service Organizations, Inc. v.*

Seldin, 422 U.S. 490, 498 (1975) ("[Standing] is founded in concern about the proper—and properly limited—role of the courts in a democratic society.").

²⁸ See, e.g., *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 159 (1951) (Frankfurter, J., concurring).

²⁹ 306 U.S. 118 (1939).

³⁰ *Id.* at 134–36.

³¹ *Id.* at 147.

³² See *id.* at 137–38; see also *L. Singer & Sons v. Union Pac. R.R.*, 311 U.S. 295, 304 (1940) (denying standing to food buyers and sellers who sought to challenge a railroad extension that would benefit competitors); *Ala. Power Co. v. Ickes*, 302 U.S. 464, 479 (1938) ("[I]njury, legally speaking, consists of a wrong done to a person, or, in other words, a violation of his right. It is an ancient maxim, that a damage to one, without an injury in this sense, (*damnum absque injuria*), does not lay the foundation of an action; because, if the act complained of does not violate any of his legal rights, it is obvious, that he has no cause to complain." (quoting *Parker v. Griswold*, 17 Conn. 288, 302–03 (1845))); *Alexander Sprunt & Son, Inc. v. United States*, 281 U.S. 249, 254–55 (1930) (denying standing to shippers who suffered competitive harm because no "independent right" of the plaintiffs had been violated). Although those cases were decided on standing grounds, the plaintiffs in those cases would have standing today under the injury in fact test adopted in *Ass'n of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). Their failure to allege a legal injury, however, would have resulted in a dismissal on the merits for failure to state a claim.

³³ See *Webb v. Portland Mfg. Co.*, 29 F. Cas. 506, 508 (C.C.D. Me. 1838) (No. 17,322) (Story, Circuit Justice); *Parker*, 17 Conn. at 304 ("The principle that every injury legally imports damage, was decisively settled, in the case of *Ashby v. White* . . ."); see also Hessick, *supra* note 17, at 284 ("Early American law adopted the English rule that the violation of every right carried a remedy.").

³⁴ 302 U.S. at 479 (quoting *Parker*, 17 Conn. at 302–03).

Camp.³⁵ There, the Court said that standing does not require the plaintiff to allege the violation of a legal right.³⁶ Instead, the Court said, standing turns on whether the plaintiff suffered an “injury in fact, economic or otherwise.”³⁷ The injury in fact test was adopted not simply to shift the set of people who had standing by extending standing to some individuals who previously lacked it while removing it from others who previously had standing. Instead, the Court explained two years later, the doctrinal change “broaden[ed] the categories of injury that may be alleged in support of standing.”³⁸ Thus, under the original injury in fact test, standing could rest on *either* the violation of a legal right *or* a factual injury.³⁹

But with the shift to the injury in fact test, the Court did not state that legal injuries and factual injuries were distinct bases for standing.⁴⁰ Instead, the Court stated that injuries in fact were the only basis for standing,⁴¹ and it described violations of legal rights *as* injuries in fact.⁴² An example is *Havens Realty Corp. v. Coleman*.⁴³ There, a

³⁵ See 397 U.S. 150, 152 (1970).

³⁶ See *id.* at 153.

³⁷ *Id.* at 152.

³⁸ *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972); see also *Linda R.S. v. Richard D.*, 410 U.S. 614, 616–17 (1973) (stating that the adoption of the injury in fact test “expanded the types of ‘personal stake[s]’ which are capable of conferring standing on a potential plaintiff” (alteration in original) (quoting *Barlow v. Collins*, 397 U.S. 159, 164 (1970))).

³⁹ See, e.g., *Morton*, 405 U.S. at 732 (declaring that standing could rest either on a “specific statute authorizing invocation of the judicial process” or on a “personal stake in the outcome” (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962))); *Linda R.S.*, 410 U.S. at 617 (“[W]e have steadfastly adhered to the requirement that, at least in the absence of a statute expressly conferring standing, federal plaintiffs must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction.” (footnote omitted)).

⁴⁰ See *Virginia v. Am. Booksellers Ass’n*, 484 U.S. 383, 392 (1988) (“To bring a cause of action in federal court requires that plaintiffs establish at an irreducible minimum an injury in fact”); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623 n.3 (1989) (stating that to establish standing, a plaintiff must show that he has “suffered some injury-in-fact, adequate to satisfy Article III’s case-or-controversy requirement”).

⁴¹ *Ass’n of Data Processing Serv. Orgs.*, 397 U.S. at 152 (“The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise.”); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982) (“The exercise of judicial power, which can so profoundly affect the lives, liberty, and property of those to whom it extends, is therefore restricted to litigants who can show ‘injury in fact’ resulting from the action which they seek to have the court adjudicate.”); *Caplin & Drysdale*, 491 U.S. at 623 n.3, 624 (“When a person or entity seeks standing to advance the constitutional rights of others, we ask two questions: first, has the litigant suffered some injury-in-fact, adequate to satisfy Article III’s case-or-controversy requirement.”); *Diamond v. Charles*, 476 U.S. 54, 65 (1986) (denying standing for plaintiff who was “not able to assert an injury in fact”).

⁴² See, e.g., *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–74 (1982) (basing standing on the violation of the “statutorily created right to truthful housing information”); *Warth v.*

black woman sued a real estate company after she allegedly received false information about the availability of housing.⁴⁴ She relied on the Fair Housing Act, which makes it unlawful to misrepresent to any person because of that person's race that an apartment is not available for sale or rental,⁴⁵ and which confers a private cause of action to enforce this prohibition.⁴⁶ Although the plaintiff did not intend to rent the apartment, the Court held that she had standing.⁴⁷ It explained that Article III requires "injury in fact,"⁴⁸ but the "injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'"⁴⁹ Accordingly, the Court held, the alleged violation of the "statutorily created right to truthful housing information" sufficed for the plaintiff's standing.⁵⁰

This conflation of factual and legal injuries made little sense. Factual injuries are distinct from legal injuries. The former describes harms to real world interests; the latter encompasses violations of intangible legal entitlements. A factual harm need not involve a violation of a legal right.⁵¹ A person who accidentally trips on someone else's steps has suffered a factual harm but not a legal injury. And a person who owns property onto which someone briefly steps in a way that causes no damage has suffered a legal harm but no factual injury.⁵² Over time the failure to list legal injuries as an independent basis for standing led to a doctrinal shift. Today, legal injuries alone are not a basis for standing; to establish standing, a plaintiff must allege a factual injury.

Seldin, 422 U.S. 490, 500 (1975) (stating that the injury for standing can arise from the violation of a right); O'Shea v. Littleton, 414 U.S. 488, 493 & n.2 (1974) (same); *Diamond*, 476 U.S. at 65 n.17 ("The Illinois Legislature . . . has the power to create new interests, the invasion of which may confer standing. In such a case, the requirements of Art. III may be met."); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41 n.22 (1976) (recognizing "Congress' power to create new interests the invasion of which will confer standing"); *Linda R.S.*, 410 U.S. at 617 n.3 ("Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute.").

⁴³ 455 U.S. 363 (1982).

⁴⁴ *Id.* at 368.

⁴⁵ 42 U.S.C. § 3604(d).

⁴⁶ *Id.* § 3612(a).

⁴⁷ *Havens*, 455 U.S. at 373–74.

⁴⁸ *Id.* at 372 (noting "the Art. III minima of injury in fact").

⁴⁹ *Id.* at 373 (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)).

⁵⁰ *Id.* at 373–74.

⁵¹ See *Hessick*, *supra* note 17, at 307 (drawing the distinction between factual harm and legal harm).

⁵² See *id.* at 282–84 (discussing nominal damages and standing).

The shift began in the 1992 decision *Lujan v. Defenders of Wildlife*.⁵³ Under the Endangered Species Act (“ESA”), federal agencies must consult with the Secretary of the Interior before taking actions that might threaten endangered species.⁵⁴ At issue in *Lujan* was a rule promulgated by the Department of the Interior that exempted agencies from this consultation requirement for actions affecting animals in foreign countries.⁵⁵ A group of concerned citizens challenged this rule, arguing that the ESA conferred on them the right to have the government follow consultation procedures for actions affecting animals in foreign countries.⁵⁶ The Court held that the plaintiffs lacked standing.⁵⁷ It explained that, even if the ESA did confer that right, the violation of that right alone did not support standing.⁵⁸ Instead, the Court said, standing required the plaintiff to establish a factual harm resulting from the statutory violation.⁵⁹ In so holding, the Court distinguished past cases such as *Havens* that based standing on the violations of statutory rights, claiming that standing in those cases was appropriate because the plaintiffs had alleged “de facto” injuries that were judicially cognizable only because of the statutes they invoked.⁶⁰

In so concluding, the *Lujan* Court did not say that standing requires proof of injury in fact instead of the violation of a right. Instead, it stated that the injury in fact requirement is necessary to protect the separation of powers by ensuring that the judiciary stays within its “province of . . . decid[ing] on the rights of individuals.”⁶¹ Thus, under *Lujan*, the injury in fact requirement operated as a proxy for determining whether plaintiffs allege their own rights.⁶²

⁵³ 504 U.S. 555 (1992).

⁵⁴ 16 U.S.C. § 1536(a)(2).

⁵⁵ See *Lujan*, 504 U.S. at 557–58; 50 C.F.R. § 402.01 (1991).

⁵⁶ *Lujan*, 504 U.S. at 559.

⁵⁷ *Id.* at 578.

⁵⁸ See *id.*

⁵⁹ See *id.*

⁶⁰ See *id.*

⁶¹ *Id.* at 576 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)).

⁶² Following *Lujan*, the Court remained inconsistent about whether the violation of a legal right could support standing. For example, in *FEC v. Akins*, the Court found standing for plaintiffs seeking relief under the Federal Election Campaign Act of 1971. 524 U.S. 11, 13–14 (1998). The Act requires certain groups to disclose information about campaign involvement and creates a private cause of action for “[a]ny person who believes a violation of th[e] Act . . . has occurred.” 52 U.S.C. § 30109(a)(1). In so finding, the Court did not focus on the violation of the statutory right; instead, it concluded that standing rested on the factual injury of the failure to provide the information required by the plaintiffs. *Akins*, 524 U.S. at 21 (concluding that the plaintiffs had suffered injury because they were deprived of information that would have been useful “to evaluate candidates for public office” and “to evaluate the role” that the financial assistance to candidates “might play in a specific election”). But it is clear that the violation of

Lujan involved a suit against the government, and the opinion limited the factual injury requirement to suits against the government.⁶³ And after *Lujan*, not all federal courts treated injury in fact as a prerequisite to standing in other types of suits. Instead, some courts continued to recognize violations of legal rights as a basis for standing in suits against non-government parties.⁶⁴

But in the 2016 decision *Spokeo, Inc. v. Robins*, the Court extended the injury in fact requirement to all suits.⁶⁵ It held that the violation of a right does not suffice for Article III standing to sue a private individual. Instead, the plaintiff must establish that he has suffered, or will suffer, a “concrete,” “real” injury.⁶⁶

Spokeo involved a suit under the Fair Credit Reporting Act (“FCRA”).⁶⁷ That Act requires consumer credit reporting agencies—agencies that gather and provide information about consumers—to take reasonable measures to ensure that the information they provide is accurate.⁶⁸ The Act also confers a private right of action against reporting agencies that fail to comply with this requirement,⁶⁹ entitling the victim to recover either actual damages or statutory damages of up to \$1,000.⁷⁰ Invoking this provision, Thomas Robins sued Spokeo, which operates a website that provides information about people, claiming that the information on its site about him was inaccurate.⁷¹ According to Robins, these inaccuracies were attributable to Spokeo’s failure to take reasonable measures to ensure the accuracy of informa-

the statutory right was critical to the standing conclusion. *United States v. Richardson*, in which the Court concluded that the failure to provide information requested by plaintiffs about CIA expenditures did not constitute injury in fact, had established that the failure to provide information demanded by individuals does not, by itself, establish an injury in fact that supports standing. 418 U.S. 166, 167–68, 179 (1974). The *Akins* plaintiffs could claim injury only because the statute gave them a right to that information. *See Hessick, supra* note 17, at 302 (“The plaintiffs could claim injury only because the statute gave them a right to that information.”).

⁶³ *Lujan*, 504 U.S. at 578 (“[I]t is clear that in suits against the Government, at least, the concrete injury requirement must remain.”).

⁶⁴ *See, e.g., Edwards v. First Am. Corp.*, 610 F.3d 514, 517 (9th Cir. 2010) (“The injury required by Article III can exist solely by virtue of ‘statutes creating legal rights, the invasion of which creates standing.’” (quoting *Fulfillment Servs. Inc. v. United Parcel Serv., Inc.*, 528 F.3d 614, 618–19 (9th Cir. 2008))); *Robins v. Spokeo, Inc.*, 742 F.3d 409, 412 (9th Cir. 2014) (“[T]he violation of a statutory right is usually a sufficient injury in fact to confer standing.”), *vacated*, 136 S. Ct. 1540 (2016).

⁶⁵ 136 S. Ct. 1540, 1548 (2016).

⁶⁶ *Id.*

⁶⁷ *Id.* at 1545.

⁶⁸ 15 U.S.C. § 1681e(b).

⁶⁹ *Id.* § 1681n(a).

⁷⁰ *Id.*

⁷¹ *Spokeo*, 136 S. Ct. at 1546.

tion.⁷² The Court held that this violation of FCRA did not provide a basis for standing.⁷³ According to the Court, “Article III standing requires a concrete injury even in the context of a statutory violation.”⁷⁴ Thus, Robins had to point to a “concrete” harm resulting from that violation, such as the loss of income or damage to his reputation.⁷⁵ In other words, even if a person’s statutory right has been violated, that person does not have standing to maintain an action to vindicate that right—unless the violation of the right caused him some other factual harm that resulted from the violation of the right, such as the loss of money.

Although it held that violations of statutory rights alone cannot support standing, the *Spokeo* Court acknowledged that a factual injury need not be tangible to support standing.⁷⁶ Thus, for example, it noted that deprivations of free speech and interference with the free exercise of religion can form the basis for standing.⁷⁷ According to the Court, whether an intangible injury can support standing turns on two considerations. First, explaining that standing doctrine seeks to limit federal courts to adjudicating disputes historically resolved by courts, the Court stated that an intangible injury can support standing if it is comparable to a harm that traditionally was the basis for a lawsuit.⁷⁸ Second, the Court stated that Congress can by statute authorize standing for an intangible, concrete harm that would otherwise not support standing.⁷⁹ In so stating, however, the Court reiterated that the deprivation of a right alone does not support standing because it is insufficiently concrete.⁸⁰ Thus, the Court said, even though FCRA requires companies to follow procedures to ensure the accuracy of information, the failure to follow those procedures does not support standing if the failure to do so caused no financial or other factual harm.⁸¹

⁷² *Id.*

⁷³ *Id.* at 1550.

⁷⁴ *Id.* at 1549.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* (citing *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (free speech); *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993) (free exercise)).

⁷⁸ *Id.* at 1549.

⁷⁹ *Id.* (“[B]ecause Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important. Thus, we said in *Lujan* that Congress may ‘elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law’” (alteration in original) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 578 (1992))).

⁸⁰ *Id.* (“Article III standing requires a concrete injury even in the context of a statutory violation.”).

⁸¹ *Id.* at 1550.

B. *Standing after Spokeo*

Following *Spokeo*, lower courts have rejected standing for individuals who have alleged the violation of statutory rights. Many of these decisions involve laws aimed at protecting privacy. The Second Circuit's decision in *Katz v. Donna Karan Co.*⁸² provides an example. At issue in that case was the Fair and Accurate Credit Transactions Act.⁸³ That Act aims to prevent identity theft by prohibiting businesses from printing more than the last five digits of credit card numbers on receipts, and it confers private actions to enforce this prohibition.⁸⁴ In *Katz*, a customer sued Donna Karan under this provision for printing the first six digits of his credit card number on his receipt.⁸⁵ The Second Circuit held that the customer lacked standing because he failed to allege stolen identity or other "concrete" harm from Donna Karan's illegal acts.⁸⁶

The Fourth Circuit followed a similar line of reasoning in *Beck v. McDonald*.⁸⁷ There, veterans sued a veterans clinic for violating the Privacy Act.⁸⁸ That Act requires federal agencies to follow various procedures in maintaining records on individuals, and it also authorizes private actions.⁸⁹ According to the veterans, the VA violated this provision when a VA laptop with personal information was stolen.⁹⁰ The Fourth Circuit held that the veterans lacked standing.⁹¹ It explained that the veterans had not established an injury in fact because they had shown neither an impending threat of identity theft nor a justification for bearing the costs of preventing identity theft.⁹²

A third example comes from the Seventh Circuit's decision in *Gubala v. Time Warner Cable, Inc.*,⁹³ which held that a cable subscriber lacked standing to sue for violations of his rights under the

⁸² 872 F.3d 114 (2d Cir. 2017).

⁸³ *Id.* at 116.

⁸⁴ *Id.* at 117.

⁸⁵ *Id.*

⁸⁶ *Id.* at 121.

⁸⁷ 848 F.3d 262 (4th Cir. 2017).

⁸⁸ *Id.* at 266.

⁸⁹ The Privacy Act authorizes relief only if a person suffers an "adverse effect" because of the agency's failure to follow those procedures. 5 U.S.C. § 552a(g)(1)(D). That provision appears to require an individual to establish injury in fact for relief. But the Fourth Circuit did not decide the case on the ground that the plaintiff failed to satisfy the Privacy Act. Instead, it held that the plaintiff lacked standing because they had not established injury in fact. *Beck*, 848 F.3d at 276–77.

⁹⁰ *Beck*, 848 F.3d at 267.

⁹¹ *Id.* at 277.

⁹² *See id.* at 276–77.

⁹³ 846 F.3d 909 (7th Cir. 2017).

Cable Communications Policy Act.⁹⁴ The Act requires a cable operator to “destroy personally identifiable information” provided by subscribers if the information is no longer necessary for the purpose for which it was collected and there are no pending requests for the information.⁹⁵ In *Gubala*, a former subscriber sued Time Warner after learning that Time Warner had failed to destroy his personal information eight years after he cancelled his subscription.⁹⁶ The Seventh Circuit denied standing.⁹⁷ It explained that, even if Time Warner violated the Act, the subscriber had failed to establish any factual harm, such as the dissemination of his personal information, resulting from the violation.⁹⁸

These cases are but a small sample of the decisions denying standing for violations of statutory provisions authorizing private actions when the violation does not result in a factual harm.⁹⁹ The phenomenon is not limited to violations of statutes providing data protections, nor is it limited to federal statutes. Federal courts have demanded injury in fact for suits alleging violations of state statutes regulating matters other than privacy. For example, in *Hagy v. Demers & Adams*,¹⁰⁰ James and Patricia Hagy sued a law firm for violating an Ohio law by failing to identify itself as a debt collector in a letter that it sent to them about a debt they owed.¹⁰¹ The Sixth Circuit held that

⁹⁴ *Id.* at 910, 913.

⁹⁵ 47 U.S.C. § 551(e).

⁹⁶ *Gubala*, 846 F.3d at 910.

⁹⁷ *Id.* at 911.

⁹⁸ *Id.* (“[Plaintiff’s] problem is that while he might well be able to prove a violation of [the Act], he has not alleged any plausible (even if attenuated) risk of harm to himself from such a violation—any risk substantial enough to be deemed ‘concrete.’” (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016))).

⁹⁹ For other cases, see also, e.g., *Kamal v. J. Crew Grp., Inc.*, 918 F.3d 102, 107, 117 (3d Cir. 2019) (denying standing in suit against J. Crew for publishing 10 digits of credit card numbers in violation of the Fair and Accurate Credit Transactions Act); *Long v. Se. Pa. Transp. Auth.*, 903 F.3d 312, 325 (3d Cir. 2018) (holding that individuals lacked standing to sue the Southeastern Pennsylvania Transportation Authority for violating a section of FCRA providing that, before a potential employer denies an applicant a job based on a criminal background check or a consumer report, the employer must provide the applicant with a description in writing of the applicant’s rights under FCRA); *Braitberg v. Charter Commc’ns, Inc.*, 836 F.3d 925, 930 (8th Cir. 2016) (denying standing for failure to destroy data as required by the Cable Communications Act); *Hancock v. Urban Outfitters, Inc.*, 830 F.3d 511, 514 (D.C. Cir. 2016) (finding no standing for an individual who alleged a retailer violated the Identification Act by collecting her zip code). See generally WILSON C. FREEMAN, CONG. RSCH. SERV., LSB10303, ENFORCING FEDERAL PRIVACY LAW—CONSTITUTIONAL LIMITATIONS ON PRIVATE RIGHTS OF ACTION (2019), <https://fas.org/sgp/crs/misc/LSB10303.pdf> [<https://perma.cc/TR7M-JL56>] (collecting cases denying standing for individuals alleging violations of federal law).

¹⁰⁰ 882 F.3d 616 (6th Cir. 2018).

¹⁰¹ See *id.* at 618–19.

the Hagys lacked standing.¹⁰² It explained that, although the firm might have violated the Ohio law, the Hagys suffered no harm from the firm's failure to identify itself as a debt collector.¹⁰³

II. *SPOKEO* AND CONTRACTS

The logic of *Spokeo*—that standing cannot rest on violations of legal rights that do not result in factual harms—extends to suits alleging breach of contract. After all, contracts simply establish legal rights. By *Spokeo*'s reasoning, a plaintiff should not have standing to sue for breach of contract if the breach does not result in some additional factual harm. Thus, given *Spokeo*'s holding that the violation of a statutory right does not constitute a valid basis for standing, the breach of contractual rights should likewise not be a basis for standing.

A. *A Brief Overview of Contract*

A contract is a promise that creates legal obligations.¹⁰⁴ In the usual contract, one party promises to perform, or abstain from performing, some action in exchange for the other party promising to perform, or refrain from performing, some action in return.¹⁰⁵ Aside from prohibitions on contracts that contravene public policy,¹⁰⁶ the law places no limits on the obligations created by a contract. Parties can include entirely idiosyncratic terms. For example, one party can agree to meow like a cat in exchange for the other party barking like a dog. Nor does the law impose requirements that consideration have a minimum market value.¹⁰⁷ A person may agree to pay \$1,000 for something that the rest of the world does not value at all.

Commentators have offered several theories to explain contract law, but none of these theories are descriptively or normatively complete.¹⁰⁸ Some have argued that contracts are binding because they embody promises that the parties have a moral obligation to per-

¹⁰² See *id.* at 624.

¹⁰³ See *id.* at 623–24.

¹⁰⁴ RESTATEMENT (SECOND) OF CONTRACTS § 1 (AM. L. INST. 1981) (“A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”).

¹⁰⁵ See *id.* § 71.1 (“To constitute consideration, a performance or a return promise must be bargained for.”).

¹⁰⁶ See *id.* § 178.1 (“A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.”).

¹⁰⁷ See, e.g., *Batsakis v. Demotsis*, 226 S.W.2d 673, 675 (Tex. Civ. App. 1949).

¹⁰⁸ Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113

form.¹⁰⁹ But the law has long rejected this theory.¹¹⁰ Instead of focusing on moral obligations, legal doctrine provides that a promise is enforceable because the mutual exchange of consideration between parties created a legal obligation,¹¹¹ because the party making the promise observed particular legal formalities,¹¹² or because the promise induced reasonable reliance.¹¹³

Others have relied on economic efficiency to justify contract law.¹¹⁴ When an exchange cannot happen simultaneously, one party must bear the risk of performing its side of the bargain before the other party performs.¹¹⁵ The enforceability of contracts mitigates this

YALE L.J. 541, 543 (2003) (“Contract law has neither a complete descriptive theory, explaining what the law is, nor a complete normative theory, explaining what the law should be.”).

¹⁰⁹ See CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 17 (2d ed. 2015) (“[S]ince a contract is first of all a promise, the contract must be kept because a promise must be kept.”); Matthew A. Seligman, *Moral Diversity and Efficient Breach*, 117 MICH. L. REV. 885, 891 (2019) (“A dominant philosophical theory of contract law grounds the normative justification of contract doctrine in the moral obligation to keep promises.”); see also Curtis Bridgeman, *Civil Recourse or Civil Powers?*, 39 FLA. ST. U. L. REV. 1, 5 (2011) (noting that “in many cases courts go out of their way to acknowledge a promisor’s moral obligation even as they refuse to enforce the contract”); Peter Benson, *Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory*, 10 CARDOZO L. REV. 1077, 1087 (1989) (analyzing approaches of contract morality); Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 283 (1986) (“In short, while the requirement of consent is in general supported by efficiency arguments, the normative justification for a consent theory of contract must be more broadly based.”).

¹¹⁰ Many have rejected this view that contracts rest on moral obligations. Opponents of this view see no moral obligation to perform contracts and therefore argue that parties can choose to breach if they are willing to pay the price. See, e.g., O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897) (“The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else.”); see also Barnett, *supra* note 109, at 321 (discussing counterarguments to the moral theory of contract).

¹¹¹ See RESTATEMENT (SECOND) OF CONTRACTS § 71 (AM. L. INST. 1981).

¹¹² E.g., U.C.C. § 2-205 (AM. L. INST. & UNIF. L. COMM’N 2017) (prohibiting the revocation of firm offers, even if the offeror receives no consideration).

¹¹³ RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (AM. L. INST. 1981). Some have argued that all contracts are binding because they induce reliance. See Barnett, *supra* note 109, at 274. That theory, however, is not descriptively or normatively accurate. Not all statements that induce reliance are binding. See *id.* at 274–75; RESTATEMENT (SECOND) OF CONTRACTS § 81(2) (AM. L. INST. 1981) (“The fact that a promise does not of itself induce a performance or return promise does not prevent the performance or return promise from being consideration for the promise.”). Nor should all such statements be binding, because a speaker can never be sure whether another will rely on her statements.

¹¹⁴ See, e.g., Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989).

¹¹⁵ Kevin E. Davis & Florencia Marotta-Wurgler, *Contracting for Personal Data*, 94 N.Y.U. L. REV. 662, 679 (2019) (“Contract law generally plays a critical role in facilitating mutually-beneficial exchanges that cannot be concluded instantaneously because performance either takes time or is difficult to verify.”).

risk. But that theory too is incomplete. Not all contract doctrines are efficient,¹¹⁶ and even commentators who support an efficiency theory argue that only some kinds of agreements and contract doctrines improve overall welfare.¹¹⁷

Still others have argued that contracts should be binding because they are the product of bargained-for exchanges.¹¹⁸ One person makes a promise in exchange for consideration from another person. But it is unclear why mutual exchange should be the trigger for the enforceability of contracts, and there are many exceptions to this requirement of mutual consideration.¹¹⁹ For example, various gratuitous promises will constitute a binding contract.¹²⁰

Despite the lack of a unified theory of contract law, the legal obligations created by a contract are no less binding than obligations from other legal sources, such as the common law, regulations, and statutes. Contracts are functionally private laws between the contracting parties. Likewise, a contract can create obligations that mirror statutory obligations. Just as a statute can require a person to follow procedures aimed at securing data, a contract can oblige a party to adopt practices to protect data.¹²¹

The breach of a contract entitles the victim of the breach to a judicial remedy¹²²—typically damages or specific performance.¹²³ The usual damages for a breach are expectancy damages: sufficient com-

116 ANTHONY T. KRONMAN & RICHARD A. POSNER, *THE ECONOMICS OF CONTRACT LAW* 234–35 (1979) (discussing contract rules that are not aimed at maximizing welfare).

117 See, e.g., Ayres & Gertner, *supra* note 114, at 90; see also Ignacio N. Cofone & Adriana Z. Robertson, *Consumer Privacy in a Behavioral World*, 69 *HASTINGS L.J.* 1471, 1498–99 (2018) (arguing the doctrine of unconscionability promotes efficiency only in some contexts); see generally Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 *YALE L.J.* 1261 (1980) (relying on efficiency to justify only some aspects of contract law).

118 Barnett, *supra* note 109, at 287 (stating that bargained-for exchange is the predominant theory of contract); Melvin A. Eisenberg, *The Principles of Consideration*, 67 *CORNELL L. REV.* 640, 640 (1982) (stating that “traditionally” contracts have been enforced because of “consideration”).

119 See Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 *J. LEGAL STUD.* 411, 411–12 (1977) (listing enforceable gratuitous promises).

120 See, e.g., *id.*; RESTATEMENT (SECOND) OF CONTRACTS § 86(1) (AM. L. INST. 1981) (“A promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice.”); see also *id.* §§ 82–89 (listing various types of binding gratuitous promises).

121 See, e.g., *In re Facebook, Inc. Section 220 Litig.*, No. 2018-0661-JRS, 2019 WL 2320842, at *1 (Del. Ch. May 30, 2019) (recounting Federal Trade Commission consent decree that required Facebook “to implement more robust and verifiable data security protocols”).

122 RESTATEMENT (SECOND) OF CONTRACTS § 1 (AM. L. INST. 1981) (“A contract is a promise or a set of promises for the breach of which the law gives a remedy . . .”).

pensation to put the victim of the breach in the position that she would have been in had the contract been performed by the breaching party.¹²⁴ For example, if Dan breaches a contract with Sam to paint Sam's house for \$100 and the next cheapest painter that Sam finds will paint the house for \$110, Sam is entitled to \$10 in damages from Dan. Awarding that \$10 will result in Sam paying only \$100 out of pocket for the painting, in accord with the original contract; the balance is covered by the \$10 awarded by the court.

But expectancy damages are not the only type of damages that a victim of a breach may seek. Among other things, contracts can prescribe liquidated damages for a breach.¹²⁵ For example, a contract can state that, if one party breaches the contract, that party must pay the other \$1,000, irrespective of the actual losses from the breach. These clauses are particularly common in contracts where actual damages would be hard to value. These clauses are also enforceable to the same extent as any other contractual provision. So long as the clause is not illegal, unconscionable, or inconsistent with some other general contracts doctrine, the courts will enforce them if the other party has breached.¹²⁶

B. *Standing to Enforce Contracts*

There is an intuitive sense that, if parties have a valid contract and one of the parties breaches, the other should have standing to bring an action for its breach. For many contract suits, that is plainly true because the breach of contract results in an injury in fact. Suppose Sam contracts to paint Jeff's house for \$500. If Sam paints the house and Jeff refuses to pay, Sam has been injured in fact to the tune of \$500.

But for some cases, the standing inquiry is much more difficult. Suppose Paul and Dave enter into a contract under which Paul gives personal information to Dave and Dave agrees to destroy it in two years. In return, Dave pays Paul consideration of \$100. Dave fails to destroy the data in two years. But he does nothing with the data. He

¹²³ See Richard R.W. Brooks & Alexander Stremitzer, *Remedies On and Off Contract*, 120 *YALE L.J.* 690, 692 (2011).

¹²⁴ RESTATEMENT (SECOND) OF CONTRACTS § 347 (AM. L. INST. 1981) (“[T]he injured party has a right to damages based on his expectation interest . . .”).

¹²⁵ *Id.* § 356(1) (“Damages for breach by either party may be liquidated in the agreement . . .”).

¹²⁶ See *id.* (prescribing the enforcement of liquidated damages “but only at an amount that is reasonable”).

just retains it. Dave has breached the contract. But does Paul have standing to sue Dave for breach of contract?

Spokeo and the cases implementing it suggest that the answer is no. The breach of the contractual right, standing alone, should not support standing. Contractual rights are simply legal rights,¹²⁷ and *Spokeo* makes clear that the violation of a legal right does not suffice.¹²⁸ Instead, the violation must cause an additional injury in fact.¹²⁹ Now, one might say that Dave's failure to destroy Paul's information does constitute a sufficient factual harm to support standing. But many courts after *Spokeo* have not agreed. For example, in *Gubala v. Time Warner Cable, Inc.*, the Seventh Circuit held that the failure to destroy personal information, as required by the Cable Communications Policy Act, does not constitute an injury in fact.¹³⁰

Nothing in the text of Article III suggests that the standing test should be different for contract rights than for statutory rights. Standing rests on Article III's provision extending the judicial power to "Cases" and "Controversies."¹³¹ Neither the term "case" nor the term "controversy" distinguishes between different types of civil disputes.¹³² As the debates surrounding ratification make clear, those terms were used simply to describe disputes amenable to judicial resolution.¹³³ Nothing suggests that disputes over contract rights were more amenable or less amenable to judicial resolution than disputes over other rights *because* the former involved contractual rights.

¹²⁷ Gregory Klass, *Intent to Contract*, 95 VA. L. REV. 1437, 1460 (2009) ("Contracts create legal rights and duties.").

¹²⁸ *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) ("Article III standing requires a concrete injury even in the context of a statutory violation.").

¹²⁹ *Id.*

¹³⁰ 846 F.3d 909, 913 (7th Cir. 2017).

¹³¹ See U.S. CONST. art. III, § 2.

¹³² There is some evidence that the term "controversies" did not extend to criminal cases. 1 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND THE COMMONWEALTH OF VIRGINIA, app. n.E at 420–21 (St. George Tucker, ed., Philadelphia, William Young Birch & Abraham Small 1803) (explaining that while the term "case" referred to all disputes, "whether civil or criminal," the term "controversy" referred only to disputes "of a *civil* nature" and therefore excluded criminal cases). Modern commentators generally agree with this position. See James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CALIF. L. REV. 555, 607 n.207 (1994) (collecting scholarly articles agreeing that "controversies," unlike "cases," excludes criminal cases). But nothing suggests that, by using the term "controversy," the Framers differentiated between different types of rights in *civil* actions.

¹³³ See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (Max Farrand ed., 1911) (James Madison) (explaining that it was "generally supposed that the jurisdiction given [in Article III] was constructively limited to cases of a Judiciary nature").

Nor does the theory underlying standing provide a basis for treating standing for contract actions differently from standing for statutory violations. According to the Court, the “single basic idea” underlying Article III standing is “separation of powers.”¹³⁴ Specifically, it has said, standing ensures that the federal judiciary stays within its sphere of authority and does not resolve matters more appropriately addressed by the elected branches of the federal government.¹³⁵ But this rationale does not support imposing higher standing requirements for violations of statutory rights than for violations of contract rights. The core duty of the judiciary is to remedy violations of individual legal rights.¹³⁶ As Chief Justice Marshall put it, “[t]he province of the court is, solely, to decide on the rights of individuals”¹³⁷ Contracts and statutes both create rights in individuals. The role of the judiciary does not change depending on which type of individual right is at stake. For all types of individual rights, the task of the judiciary is to vindicate the right through civil actions.¹³⁸

There also is no reason to think that the judiciary generally poses more of a threat to the other branches of government when it vindicates private rights conferred by statute in suits between private individuals than when it vindicates contract rights.¹³⁹ Contracts and

¹³⁴ *Raines v. Byrd*, 521 U.S. 811, 820 (1997) (quoting *Allen v. Wright*, 468 U.S. 737, 752 (1984)); see also, e.g., *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014) (“The law of Article III standing . . . is built on separation-of-powers principles” (quoting *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 408 (2013))).

¹³⁵ *Clapper*, 568 U.S. at 408 (“The law of Article III standing . . . serves to prevent the judicial process from being used to usurp the powers of the political branches.”); *Summers v. Earth Island Inst.*, 555 U.S. 488, 492–93 (2009) (“[Standing] is founded in concern about the proper—and properly limited—role of the courts in a democratic society.” (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975))).

¹³⁶ F. Andrew Hessick, *Consenting to Adjudication Outside the Article III Courts*, 71 VAND. L. REV. 715, 720 (2018) (“[T]he role of the courts is to provide remedies for legal wrongs.”); SAMUEL T. SPEAR, *THE LAW OF THE FEDERAL JUDICIARY* 3 (1883) (stating that the power of the court is “the authority to determine the rights of person or property, by arbitrating between adversaries, in specific controversies, at the instance of a party thereto” (citation omitted)); 3 WILLIAM BLACKSTONE, *COMMENTARIES* *25 (stating that the “judicial power” includes the power, “if any injury appears to have been done, to ascertain and . . . to apply the remedy”).

¹³⁷ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

¹³⁸ See John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 548 (2005) (“The immediate purpose of the typical common law suit was to permit the victim to obtain a pecuniary satisfaction from the wrongdoer as an ‘equivalent’ to a literal restoration of his rights.” (footnotes omitted) (quoting 3 WILLIAM BLACKSTONE, *COMMENTARIES* *146)).

¹³⁹ This is only a general proposition. Suits to vindicate some statutory rights can raise acute separation of powers concerns. One example is a suit seeking to vindicate statutory rights against the government, because the suit seeks to force the government to act. See Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1105 (2015) (arguing that suits

statutes both create private rights, and they can both create identical obligations. The same prohibitions on trespass, data retention, and countless other things can be imposed by statute or by contract.

A second separation of powers reason given by the Court is that standing prevents Congress from interfering with the Executive through the creation of private causes of actions. Article II of the Constitution vests the executive power in the President and imposes on the President the obligation to “take Care that the Laws be faithfully executed.”¹⁴⁰ In *Lujan*, the Court said that requiring a plaintiff to establish injury in fact when suing the government protects these presidential powers by preventing Congress from authorizing any individual to bring suit to force the Executive to act.¹⁴¹

This concern of preventing congressional interference with the Executive ordinarily does not apply to contract actions. Most contract suits are not against the government but are between private parties.¹⁴² Further, even in federal court, most contract actions turn on state law, not a congressional enactment.¹⁴³ But the Court has made clear that neither reason justifies dispensing with the injury in fact requirement. In *Spokeo*, the Court held that the plaintiff needed to establish a concrete injury in fact even though his suit was against a private person instead of against the Executive.¹⁴⁴ And the Court has consistently required plaintiffs to demonstrate injury in fact to establish standing to pursue state law actions in federal court.¹⁴⁵

If anything, limiting standing for violations of statutory rights raises greater separation of powers concerns than limiting standing for

against the government and its officials raise special separation of powers concerns). Another is a suit seeking to vindicate statutory rights that intrude on the constitutional powers of the other branches—such as a statute conferring on individuals power to grant pardons. *See* Hessick, *supra* note 12, at 689 (explaining that suits seeking to enforce rights that intrude on other branches raise special separation of powers concerns).

¹⁴⁰ U.S. CONST. art. II, § 3, cl. 4.

¹⁴¹ *See* *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992).

¹⁴² Thomas H. Cohen, *Contract Trials and Verdicts in Large Counties, 2001*, BUREAU OF JUST. STAT. 3 (Jan. 2005), <https://www.bjs.gov/content/pub/pdf/ctvlc01.pdf> [<https://perma.cc/259V-Z2M6>].

¹⁴³ *Table C-2—U.S. District Courts—Civil Federal Judicial Caseload Statistics (March 31, 2019)*, U.S. COURTS (Mar. 31, 2019), <https://www.uscourts.gov/statistics/table/c-2/federal-judicial-caseload-statistics/2019/03/31> [<https://perma.cc/PY4G-UWZS>] (showing 4,532 contract actions based on federal law and 20,889 contract actions based on diversity jurisdiction).

¹⁴⁴ *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548–49 (2016).

¹⁴⁵ *See* *Hollingsworth v. Perry*, 570 U.S. 693, 703, 715 (2013) (denying standing to sue to defend California law, despite explicit determination by California that the plaintiff had been authorized to pursue the suit); Hessick, *supra* note 14, at 101 n.300 (gathering cases in which federal courts required injury in fact to establish standing to pursue state-law claims).

violations of contract rights. Requiring an injury in fact to support standing for the violation of a right functionally redefines that right. Rights have practical value only to the extent that they can be vindicated.¹⁴⁶ Requiring injury in fact for violations of statutory rights thus limits the power of Congress. Congress cannot authorize suits to vindicate rights unless the violation of those rights results in factual harm. By contrast, requiring injury in fact for violations of contractual rights does not limit government power. Contracts are not the product of legislative power. They are the product of agreements between individuals.¹⁴⁷

This is not to say that breaches of contract should not suffice for standing as a normative matter. To the contrary, there are strong arguments that violations of any legal rights, including contractual rights, should support standing. But *Spokeo* rejected that position.¹⁴⁸ And if we accept *Spokeo*'s holding that the violation of a statutory right does not constitute a valid basis for standing,¹⁴⁹ then the breach of contractual rights should likewise not be a basis for standing.

C. Breach of Contract as Injury in Fact

Although the violation of a right does not itself support standing, one might argue that standing for all breaches of contract is consistent with *Spokeo* because a breach of contract itself is a cognizable injury in fact.¹⁵⁰ There are five different arguments supporting this position. First, a breach of contract constitutes a broken promise, and the breaking of a promise is a cognizable injury in fact. Second, a breach of contract injures a person because it deprives him of the benefit of his bargain. Third, a breach injures a person by depriving him of the benefits of the efficiencies of his contract. Fourth, the victim of a

¹⁴⁶ See cases cited *supra* note 13.

¹⁴⁷ One might try to distinguish breach of contract actions from actions alleging violations of statutes on the ground that the former involves the violation of private rights while the latter does not. The theory would be that contracts create rights, while statutes do not create rights but instead create only private causes of action. Cf. Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 784 (2004) (drawing historical distinction between causes of action and rights). But the argument rests on faulty logic. Causes of actions vindicate rights. See *id.* Even if the existence of a right does not imply a cause of action, the existence of a cause of action does imply a right. In any event, it is highly unlikely that modern legislatures draw fine distinctions between causes of actions and rights; the Court itself has not. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 576 (1992) (describing citizen suit provision as conferring statutory right).

¹⁴⁸ 136 S. Ct. at 1549.

¹⁴⁹ See *id.*

¹⁵⁰ For this argument to provide a basis for distinguishing violations of statutes, the relevant injury cannot be the *consequence* of breaching the contract because violating the statute has the same consequence. Rather, it is the breach itself, irrespective of the consequence.

breach of contract is injured because he relies on performance of the contract and the breach thwarts that reliance. Fifth, a breach of contract constitutes an intangible injury in fact that was historically recognized as a basis for a lawsuit.¹⁵¹ None of these arguments, however, establishes that a breach of contract constitutes a cognizable factual injury. If we accept *Spokeo*'s holding that the violation of a statutory right does not constitute a valid basis for standing, then the breach of contractual rights should likewise not be a basis for standing.

1. Breach as Broken Promise

Contracts embody promises.¹⁵² If a contract is a promise, a breach of contract constitutes a broken promise. One might argue that the breaking of a promise constitutes an injury in fact for the person given the promise, and this injury suffices for standing. Under this theory, the injury is not the failure to deliver whatever was promised; rather, it is the fact of breaking the promise itself that constitutes the injury. But given *Spokeo* and other decisions defining what constitutes a sufficient injury in fact,¹⁵³ the injury of a broken promise does not provide a basis for recognizing standing for breach of contract.

There are two types of factual injuries that the fact of breaking a promise—in contradiction to not delivering whatever was promised—may inflict. The first harm is moral. A promise creates a moral obligation to deliver on the promise, and the failure to honor that promise inflicts a moral injury on the promisee. But this type of moral injury is insufficient to support standing. According to the Court, the injury forming the basis for standing must be “concrete.”¹⁵⁴ Moral injuries are not concrete.¹⁵⁵ They do not inflict economic or physical harm,

¹⁵¹ See *Spokeo*, 136 S. Ct. at 1549.

¹⁵² See FRIED, *supra* note 109, at 17 (“[S]ince a contract is first of all a promise, the contract must be kept because a promise must be kept.”); OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 289 (1881) (“The common element of all contracts might be said to be a promise.”).

¹⁵³ See *supra* Section I.B.

¹⁵⁴ *E.g.*, *Spokeo*, 136 S. Ct. at 1549 (“Article III standing requires a concrete injury even in the context of a statutory violation.”); *Trump v. Hawaii*, 138 S. Ct. 2392, 2416 (2018) (“[Standing] requires allegations—and, eventually, proof—that the plaintiff ‘personal[ly]’ suffered a concrete and particularized injury in connection with the conduct about which he complains.” (second alteration in original) (quoting *Spokeo*, 136 S. Ct. at 1540)). Although the Court has long required concreteness, it has varied the phrasing of the requirement over time. In *Lujan v. Defenders of Wildlife*, for example, the Court did not say that the injury itself must be concrete; instead, it said that the injury must be to a “concrete interest.” 504 U.S. 555, 572–73 (1992). In some cases, the Court has phrased the test both ways. Compare *Allen v. Wright*, 468 U.S. 737, 756 (1984) (focusing on “concrete, personal interest”), with *id.* at 763 (focusing on “concrete injury” (quoting *Gilmore v. City of Montgomery*, 417 U.S. 556, 571 n.10 (1974))).

¹⁵⁵ One might also argue that, because it defines jurisdiction and does not purport to make

interfere with the plaintiff's freedom, or otherwise inflict a palpable harm. Instead, the harm from a moral wrong is the offense to an individual's sense of right and wrong.¹⁵⁶

The Court has consistently refused to recognize standing based on similar sorts of injuries.¹⁵⁷ For example, in *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*,¹⁵⁸ the Court held that individuals lacked standing to challenge the government's conveyance of property to a religious institution.¹⁵⁹ The Court explained that the government's violation of the plaintiff's asserted "right" to a government that obeys the law did not constitute an injury for standing purposes.¹⁶⁰ Nor, the Court stated, did the government's breach of the plaintiff's firmly held belief in separation of church and state provide a basis for standing.¹⁶¹ Likewise, in *Allen v. Wright*,¹⁶² the Court stated that offense to an individual's belief that racial discrimination is wrong is not a sufficient injury to support standing to challenge racial discrimination against another.¹⁶³ According to the Court, recognizing standing for those types of injuries would

substantive judgments, standing doctrine should not turn on value-laden moral judgments. Courtney M. Cox, *Risky Standing: Deciding on Injury*, 8 NE. U. L.J. 75, 94–95 (2016) ("But we should avoid, where possible, assuming that the courts have adopted controversial meta-ethical positions to understand a given doctrine, particularly given some members of the courts' self-professed general disdain for value theory—or, at least self-professed disdain for needing to rely on the fruits of practical philosophy.").

¹⁵⁶ See John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 926 (2010) (defining moral wrongs as wrongs against social norms). Of course, some moral injuries that cause psychological or dignitary harms could potentially be a basis for standing. See, e.g., Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA. L. REV. 1659, 1666 (1992) (defining "moral injury" as "an affront to the victim's value or dignity").

¹⁵⁷ See, e.g., *Diamond v. Charles*, 476 U.S. 54, 62 (1986) (stating that individuals do not have standing "for the vindication of the [sic] value interests" (quoting *United States v. Students Challenging Regul. Agency Procs.*, 412 U.S. 669, 687 (1973))); see also *Gonzales v. N. Twp. of Lake County*, 4 F.3d 1412, 1416 (7th Cir. 1993) ("Offense to moral and religious sensitivities does not constitute an injury in fact and is insufficient to confer standing.").

¹⁵⁸ 454 U.S. 464 (1982).

¹⁵⁹ *Id.* at 467–68, 485–86.

¹⁶⁰ *Id.* at 483; see also *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 223 n.13 (1974) (rejecting standing based on "the abstract injury in nonobservance of the Constitution asserted by . . . citizens").

¹⁶¹ *Valley Forge*, 454 U.S. at 486 ("It is evident that respondents are firmly committed to the constitutional principle of separation of church and State, but standing is not measured by the intensity of the litigant's interest . . .").

¹⁶² 468 U.S. 737 (1984).

¹⁶³ *Id.* at 755–56.

transform the courts into “a vehicle for the vindication of the value interests of concerned bystanders.”¹⁶⁴

The logic of these cases applies equally to moral injuries.¹⁶⁵ Recognizing standing for a person who is offended or feels wronged by another’s actions would open the courts to anyone wishing to vindicate their idiosyncratic value interests. A bystander would have standing if he was offended when a police officer arrested a friend, when one person failed to use an honorific title when addressing another, or when someone failed to hold the door open for other people.¹⁶⁶

The other potential harm resulting from a broken promise is psychological. The victim may suffer emotional distress from the promise not being fulfilled.¹⁶⁷ Courts disagree on whether a psychological harm suffices for standing.¹⁶⁸ One line of cases has refused to recognize standing based on emotional distress.¹⁶⁹ For example, in *Valley Forge Christian College*, the Court held that the “psychological” harm that people suffered from watching the government disobey the law did not constitute a sufficient injury for standing.¹⁷⁰ Likewise, the Court has held that individuals did not have standing based on the distress they felt from knowing that animals in foreign countries might be in-

¹⁶⁴ *Id.* (quoting *United States v. Students Challenging Regul. Agency Procs.*, 412 U.S. 669, 687 (1973)).

¹⁶⁵ *Schaffer v. Clinton*, 240 F.3d 878, 884 (10th Cir. 2001) (stating that “moral outrage, however profoundly and personally felt, does not endow [a plaintiff] with standing to sue”). As a general matter, moral wrongs are not legally actionable. See *Goldberg & Zipursky, supra* note 156, at 930–32; *HOLMES, supra* note 152, at 33 (distinguishing between moral and legal wrongs, and observing that the former is not actionable).

¹⁶⁶ One might argue that breach of contract does not raise the same generalized grievance problem as statutes because contractual rights extend only to the contracting party. But contractual rights are not more individualized than statutory rights. Although they apply to everybody, statutes confer individualized rights on each individual. That is the reason that, if a company poisons a large number of people by emitting toxins in violation of a statute, each victim has standing to sue. See *FEC v. Akins*, 524 U.S. 11, 24 (1998); *accord id.* at 36 (Scalia, J., dissenting).

¹⁶⁷ This psychological distress from a breach is related to the moral injury from the breach. See Johnathan Shay, *Moral Injury*, 31 *PSYCHOANALYTIC PSYCH.* 182, 182 (2014), <https://www.law.upenn.edu/live/files/4602-moralinjuryshayexcerptpdf> [<https://perma.cc/MG47-854F>] (discussing the psychological harm from moral injury).

¹⁶⁸ Rachel Bayefsky, *Psychological Harm and Constitutional Standing*, 81 *BROOK. L. REV.* 1555, 1581–83 (2016) (discussing the divergence in decisions).

¹⁶⁹ *E.g.*, *United States v. All Funds on Deposit with R.J. O’Brien & Assocs.*, 783 F.3d 607, 616 (7th Cir. 2015) (stating that “purely psychological harm” is insufficient for standing); *Humane Soc’y v. Hodel*, 840 F.2d 45, 52 (D.C. Cir. 1988) (holding that “mere emotional injuries” do not support standing). *ACLU of Ill. v. City of St. Charles*, 794 F.2d 265, 268 (7th Cir. 1986) (Posner, J.) (“The fact that the plaintiffs do not like a cross to be displayed on public property—even that they are deeply offended by such a display—does not confer standing . . .”).

¹⁷⁰ 454 U.S. 464, 485–86 (1982).

jured.¹⁷¹ The rationale of these cases is that, if emotional harm suffices for standing, standing would pose no barrier to suit. Anyone upset by anything would have standing to sue.¹⁷²

A different line of decisions has found standing based on psychological harms. For example, in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*,¹⁷³ the Court held that a person who liked to “fish, camp, swim, and picnic in and near” a river had standing to sue a facility for discharging pollutants into the river based on his “concern[] that the water was polluted by [the] discharges.”¹⁷⁴ Similarly, in *ASPCA v. Ringling Bros. & Barnum & Bailey Circus*,¹⁷⁵ the D.C. Circuit held that the emotional distress a person suffered from observing mistreated elephants at the circus sufficed for standing.¹⁷⁶

The distinguishing factor between the cases appears to be whether the emotional harm results from something directly experienced by the plaintiff.¹⁷⁷ If the emotional trauma results from mistreatment or discrimination targeting the plaintiff, that emotional injury will support standing. Likewise, if the plaintiff directly observes mistreatment of animals or pollution in a stream, the distress from those observations can support standing. Limiting standing in this way ensures that the courts do not become vehicles to vindicate anyone’s grievances about anything. Instead, only the set of individuals whose distress results from personal experience may proceed in court.¹⁷⁸

This analysis suggests that the emotional injury from a broken promise should suffice for standing. The emotional distress a person experiences from a broken promise is the result of personal experi-

¹⁷¹ See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 566–67, 578 (1992).

¹⁷² *Valley Forge*, 454 U.S. at 485, 486–87 (allowing standing on psychological harm from seeing government disobey the law would result in the courts becoming “ombudsmen of the general welfare”).

¹⁷³ 528 U.S. 167 (2000).

¹⁷⁴ *Id.* at 181–83.

¹⁷⁵ 317 F.3d 334 (D.C. Cir. 2003).

¹⁷⁶ *Id.* at 335 (basing standing on the “aesthetic and emotional injury” from seeing the mistreated animals).

¹⁷⁷ *Cf. Cath. League for Religious & Civ. Rts. v. City & Cnty. of San Francisco*, 624 F.3d 1043, 1052 (9th Cir. 2010) (“What distinguishes the cases is that in *Valley Forge*, the psychological consequence was merely disagreement with the government, but in the others, for which the Court identified a sufficiently concrete injury, the psychological consequence was exclusion or denigration on a religious basis within the political community.”).

¹⁷⁸ *Cf. ACLU of Ill. v. City of St. Charles*, 794 F.2d 265, 268 (7th Cir. 1986) (holding that emotional distress at viewing a cross is not a basis for standing because “it is not by itself a fact that distinguishes [the plaintiffs] from anyone else in the United States who disapproves of such displays”).

ence. The promise was owed to the plaintiff, not to somebody else. But the problem is that the same conclusion should apply to violations of statutes. Just as people can be distressed by breaches of contracts, people may be distressed by violations of statutory obligations owed to them. For example, the veterans in *Beck v. McDonald* would have standing to sue based on the distress in knowing that the VA violated their rights by failing to follow procedures owed to them.¹⁷⁹ Their distress would not be the product of observing illegal actions against others; rather, it would be the product of misconduct directly experienced by them. But it is highly doubtful that psychological distress would not be a basis for standing. *Valley Forge* makes clear that, if the violation of a right does not support standing, the psychological distress from the violation of that right also does not support standing.¹⁸⁰

Thus, the refusal to find standing for violations of statutory rights strongly suggests that the psychological distress resulting from the breach of a contract right also would not provide a basis for standing.¹⁸¹

2. *Contract as Bargained-For Exchange*

Another argument for injury in fact rests on the bargained-for-exchange theory of contracts. According to this argument, a breach results in the non-breaching party not receiving the benefit of his bar-

¹⁷⁹ See *supra* notes 87–92 and accompanying text.

¹⁸⁰ 454 U.S. 464, 485 (1982).

¹⁸¹ Viewing breaches of contract as moral wrongs also does not provide a clean basis for distinguishing standing for breaches of contract from standing for violations of statutes. Just as some argue that contracts establish a moral obligation, e.g., Seligman, *supra* note 109, at 891 (“A dominant philosophical theory of contract law grounds the normative justification of contract doctrine in the moral obligation to keep promises.”), others argue that there is a moral obligation to obey the law, see Hunt’s Heirs v. Robinson’s Heirs, 1 Tex. 748, 759 (1847) (“There is a moral obligation in the absence of a penalty to obey the law.”); *Mercantile Tr. & Deposit Co. v. Mellon*, 46 A. 308, 309 (Pa. 1900) (“Every citizen of a state is under a moral obligation to obey the laws”); Cynthia A. Williams, *Corporate Compliance with the Law in the Era of Efficiency*, 76 N.C. L. REV. 1265, 1385 (1998) (“Law, in a democracy, is more than a price tag. It is a command in which we participate, a limit on unacceptable behavior, and an architecture for social, political, and economic interaction.”). But see Stephen E. Sachs, *The Law and Morals of Interpretation*, 13 DUKE J. CONST. L. & PUB. POL’Y 103, 113 (2018) (“[W]hether [we have] a moral obligation to obey the law’ is a ‘traditional’ (indeed, ancient) question” (alterations in original) (footnotes omitted) (quoting Frederick Schauer, *Deconstructing Law’s Normativity* 13 (Nov. 30, 2017) (unpublished manuscript), <https://ssrn.com/abstract=3080437> [<https://perma.cc/JDP9-P2XT>]; Sophocles, *Antigone*, in *THE THREE THEBAN PLAYS* 126, 127–128 (E.F. Watling trans., Penguin Books 1974))). For example, under a corrective justice theory, one of the prominent theories underlying tort liability, “legal rights and duties . . . should be understood as embodiments of moral rights among private parties.” Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 697 (2003).

gain, and depriving the non-breaching party of that benefit is a factual injury. For example, suppose Paul and Dave enter into a contract under which Dave buys Paul's data. Under the terms of the contract, Dave pays \$100 for the data and must protect the data. Suppose further that, without the promise to protect the data, Paul would have insisted that Dave pay \$110. After entering into the contract, Dave breaches it by not protecting Paul's data.

The strongest argument in favor of standing is that Paul has been factually injured by not receiving the data protection that Dave promised. After all, Paul was entitled to that protection under the contract. But that theory conflicts with the cases following *Spokeo*. In *Beck v. McDonald*, the Fourth Circuit held that the failure to adopt procedures to protect data does not, by itself, constitute an injury in fact.¹⁸² So too, not adopting the procedures required by the contract does not constitute an injury.¹⁸³ This is not to say that *Beck* was rightly decided. It is only to say that, given *Beck's* holding that the failure to follow statutorily prescribed procedures to protect data is not a factual injury, the failure to provide the protection required by the contract should not be a cognizable injury in fact.

Another possible theory is that Paul has "lost" the \$10 he agreed to forego in exchange for Dave's promise to protect the data. By reducing the price if Dave agreed to protect his data, one might say, Paul functionally paid Dave \$10 in exchange for Dave's protection, but Dave did not deliver. This "loss" of \$10, however, does not provide a factual injury to support standing.

Paul did not actually lose \$10; he never had the \$10 in the first place. Instead, he lost the data protection for which he contracted. The \$10 is the value that Paul placed on the data protection. But that valuation does not make the data breach an injury. One cannot create standing by placing value on something that otherwise is not a basis for standing. Otherwise, a plaintiff who lacks standing could simply claim that he values the basis for his lawsuit.¹⁸⁴ Thus, a plaintiff could

182 848 F.3d 262, 277 (4th Cir. 2017).

183 It is inconsequential that those procedures were required by statute in *Beck* instead of by contract. *Beck's* conclusion was that the failure to comply with the legal obligation to follow procedures does not constitute a factual harm. *See id.* The source of the legal obligation is irrelevant.

184 Presumably, a person who brings a good-faith lawsuit to enforce a statutory right places at least some value on that right, because otherwise, bringing the suit would not be worth the cost of litigation. Fletcher, *supra* note 17 at 231 ("If we put to one side people who lie about their states of mind, we should concede that anyone who claims to be injured is, in fact, injured if she can prove the allegations of her complaint.").

avoid the Supreme Court's holding in *Spokeo*—that the violation of a procedural right is not a basis for standing—simply by claiming that he highly valued that procedure.¹⁸⁵

To be sure, if Paul can get into court, Paul may be entitled to \$10 because Dave breached the contract. But that entitlement to \$10 is not an injury. Instead, it is the compensation for the harm of Dave's failure to protect the data. But that harm—not protecting the data—is not an injury in fact under *Beck*.¹⁸⁶

Another problem with treating the loss of foregone consideration as an injury in fact is that it fails the traceability requirement. To support standing, the “injury in fact” claimed by the plaintiff must be “fairly traceable” to the actions of the defendant.¹⁸⁷ Foregone consideration does not meet this causation requirement. A party foregoes consideration *when they enter into the contract, not when the contract is breached*. Paul opted not to demand \$10 when he entered into the contract; the breach did not cause him to lose \$10.

3. *Economic Efficiency*

The efficiency theory of contracts also does not provide a sound basis to argue that breaches of contract are necessarily injuries in fact. This theory provides that enforcing contracts results in increased welfare; thus, leaving breaches unremedied reduces welfare.¹⁸⁸ But not all contracts increase welfare for the parties. An obvious example is when a person enters into a contract to purchase a good that is readily available from other vendors at a significantly lower price. A breach by the vendor puts the victim in a better position because he can obtain the same good at a lower price.¹⁸⁹

¹⁸⁵ Indeed, idiosyncratic valuation would undermine all of the Supreme Court's decisions denying standing for lack of injury in fact. For example, simply by claiming he idiosyncratically valued the information, a plaintiff could circumvent the Court's holding in *United States v. Richardson*—that individuals lack standing to sue the United States for failing to publish the receipts and expenditures of the CIA. See 418 U.S. 166, 175 (1974).

¹⁸⁶ Further undermining this argument is that a plaintiff might give up nothing when faced with a breach of contract. Many types of gratuitous promises constitute enforceable contracts. See Posner, *supra* note 119, at 411–12.

¹⁸⁷ See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

¹⁸⁸ See Ayres & Gertner, *supra* note 114, at 93.

¹⁸⁹ Nor can standing rest on the idea that enforcing contracts increases the overall welfare of society. The Court has stated that, to have standing, each plaintiff must establish a personalized injury in fact. Injuries to the public or the general welfare are precisely the kinds of generalized grievances that cannot support standing. See *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217 (1974); see also *Summers v. Earth Island Inst.*, 555 U.S. 488, 498–99 (2009) (refusing to recognize standing for a group whose members each faced a small probability

4. *Reliance*

A fourth possible theory to support standing for breach of contract is that a breach is an injury in fact because it interferes with the plaintiff's reliance on the defendant's promise in the contract. But reliance is not a requirement for a contract to be binding.¹⁹⁰ Some people might enter into a contract hoping that it will be performed but anticipating that it probably will not. Such people do not suffer the factual harm of disappointed expectations when the contract is breached. Because reliance is not a prerequisite to contracts, thwarted reliance should not be the basis for standing. At the least, thwarted reliance does not provide a basis for standing for individuals who did not rely on performance when they entered into the contract.

Moreover, basing standing on thwarting a plaintiff's reliance on a contract does not provide a sound way to distinguish breaches of contracts from violations of statutes. One might rely on statutory prohibitions in the same way as a provision in a contract.¹⁹¹ Paul might give data to Dave only because he thinks that Dave will obey a statute that requires the destruction of the data in two years. If Dave thwarts Paul's reliance by failing to obey that law, Paul has been injured in the same way that he would have been had he relied on a comparable contractual provision.

5. *Historically Recognized Intangible Injury*

According to the Court, one function of standing is to ensure that federal courts resolve those disputes that courts traditionally adjudicated.¹⁹² Thus, in *Spokeo* the Court stated that, even if a plaintiff has suffered only an "intangible harm" that ordinarily would not support standing, that intangible harm can support standing if it is comparable to a harm that historically was the basis for a lawsuit.¹⁹³ Although the

of harm, even though the aggregate probability of a member of the group suffering harm was significant).

¹⁹⁰ RESTATEMENT (SECOND) OF CONTRACTS § 79 cmt. b (AM. L. INST. 1981) ("[R]eliance is not essential to the formation of a bargain.").

¹⁹¹ See ABE FORTAS, CONCERNING DISSENT AND CIVIL DISOBEDIENCE 47–55 (1968) (arguing that society generally expects obedience to the law); Steven Shavell, *When Is Compliance with the Law Socially Desirable?*, 41 J. LEGAL STUD. 1, 19 (2012) (discussing how people can be expected to obey the law); cf. Grossman v. City of Portland, 33 F.3d 1200, 1209 (9th Cir. 1994) ("[A]n officer who acts in reliance on a duly-enacted statute . . . is ordinarily entitled to qualified immunity.").

¹⁹² *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013).

¹⁹³ See *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016). Because the doctrine of standing derives from the case-or-controversy requirement, and because that requirement in turn is grounded in historical practice, it is instructive to consider whether an alleged intangible harm

Court did not define “intangible harms,” it gave the examples of deprivations of the right to free speech and the right to free exercise of religion.¹⁹⁴ Based on these examples, one might argue that breach of contract is an intangible harm that supports standing because historically one could sue for breach of contract, even if that breach resulted in no additional factual harm.

It is true that a person could sue for breach of contract even if that breach resulted in no other harm than the breach. By the seventeenth century, *assumpsit* was the principal action to remedy breaches of contract.¹⁹⁵ Although *assumpsit* was an action on the case,¹⁹⁶ which ordinarily required proof of damages to maintain,¹⁹⁷ proof of damages from the breach was not a requirement for an *assumpsit* action to remedy a breach of contract.¹⁹⁸ Instead, to maintain an action for as-

has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts. See *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 775–77 (2000).

¹⁹⁴ See *Spokeo*, 136 S. Ct. at 1549.

¹⁹⁵ 3 WILLIAM S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 345 (3d ed. 1923) (“Thus the action [of] *assumpsit* . . . gradually supplanted debt or became alternative to it in all cases.”). *Assumpsit* was only one of four writs available for breach of contract. Eric Alden, *Reversing the Reliance Revolution in Contract*, 93 WASH. L. REV. 1609, 1615–18 (2018). The other writs applied only in limited circumstances. See *id.* Two of those writs—debt upon obligation and covenant—required the plaintiff to prove that the defendant had failed to perform an obligation that he had promised to perform in a “sealed” formal document. *Id.* at 1616. Although the failure to perform that obligation likely resulted in damages, proof of damages was not a requirement to bring the actions. *Id.* at 1616–17. The third writ, debt upon contract, entitled a plaintiff to recover if he had already performed his obligation under the contract. *Id.* at 1615–18. That requirement was comparable to the injury in fact requirement. A plaintiff could maintain his action only if he demonstrated that he had expended money or effort. *Id.* at 1618. But plaintiffs could avoid this requirement by pleading their cases in *assumpsit*. *Id.*

¹⁹⁶ See Eric Alden, *Promissory Estoppel and the Origins of Contract Law*, 9 NE. U. L. REV. 1, 29 (2017).

¹⁹⁷ See Hessick, *supra* note 17, at 281 (“[T]o maintain an action on the case, which was the appropriate action for the indirect invasion of a right, the plaintiff needed to demonstrate both legal injury and damage.” (footnote omitted)). But that damage requirement was not absolute, see A.W.B. SIMPSON, *A HISTORY OF THE COMMON LAW OF CONTRACT* 580–81 (1975) (explaining the superfluity of damages to actions on the case and citing cases in which actions on the case proceeded without factual harm), and in any event it largely collapsed in the eighteenth century as courts became resistant to denying relief to plaintiffs whose rights had been violated but who could not demonstrate harm. See Hessick, *supra* note 17, at 281–82 (“The distinction between actions for trespass and actions on the case began to collapse in the early eighteenth century as courts became resistant to denying relief to plaintiffs whose rights had been violated but who could not demonstrate harm.”); see also, e.g., *Weller v. Baker* (1769) 95 Eng. Rep. 892, 897 (KB) (permitting action on the case for a person illegally taking water from a well; concluding that even though damages were not shown, they could be assumed); *Wells v. Watling* (1778) 96 Eng. Rep. 726, 726 (KB) (permitting action on the case against defendant who overgrazed his sheep, even though the plaintiff presented no evidence that the overgrazing affected his sheep).

¹⁹⁸ According to some, the consideration requirement stemmed from the damage require-

sumpsit to recover on a breach of contract,¹⁹⁹ one had to establish only that the defendant made a promise, that the plaintiff offered consideration for the promise, and that the defendant breached the promise.²⁰⁰ If those requirements were met—if the plaintiff offered the defendant consideration in exchange for a promise, and the defendant subsequently breached that promise—the plaintiff could sue for breach of contract, even if the breach did not result in a factual harm.²⁰¹

But *Spokeo* rejected the same historical argument in holding that standing cannot rest solely on the violation of a statute.²⁰² The law historically recognized a number of actions that did not require proof of factual harm.²⁰³ For those actions, legal injury alone sufficed. Fac-

ment of an action on the case. See 3 HOLDSWORTH, *supra* note 195, at 337, 345–47. The theory is that consideration amounted to damages because it constituted detrimental reliance by the plaintiff. But others have responded that this theory rests on retrofitted reasoning because the consideration requirement predated the advent of the action on the case. SIMPSON, *supra* note 197, at 580–81; see also J. B. Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1, 1 (1888) (concluding that “it seems impossible to refer consideration to a single source” after identifying “three distinct theories of its origin”).

¹⁹⁹ Assumpsit was not limited to breach of contract. Ames, *supra* note 198, at 2 (listing assumpsit actions that “were not originally, and are not to-day, regarded as actions of contract”). Assumpsit was the appropriate action for any wrongs involving misperformance of an assumed obligation (including, for instance, when a person voluntarily helped an unconscious victim on the road). See 1 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 164–66 (3d ed. 1768). Breach of contract is one instance where someone failed to perform an assumed obligation.

²⁰⁰ SIMPSON, *supra* note 197, at 406. According to some, a plaintiff could recover for the breach of a promise only if the plaintiff relied on that promise, 3 HOLDSWORTH, *supra* note 195, at 337, and consideration established reliance because a plaintiff changed his position by offering consideration, *id.* at 345–47; SIMPSON, *supra* note 197, at 324. From this view, one might argue that plaintiffs did have to demonstrate factual harm other than the breach to maintain a contract action, and that harm was the consideration that the plaintiff provided. But this theory of the origin of consideration apparently is inaccurate. See SIMPSON, *supra* note 197, at 324–25. Courts instead viewed consideration as important because it demonstrated the motivation for a promise, as opposed to a harm to the plaintiff. *Id.* at 325.

²⁰¹ See 2 JOHN JOSEPH POWELL, ESSAY UPON THE LAW OF CONTRACTS AND AGREEMENTS 75 (1790) (“If he brought an action upon the agreement, he could shew no real damage; he could therefore recover only a nominal one.”); *Miles v. Miller*, 75 Ky. (12 Bush) 134, 137 (1876); *Beard v. Sloan*, 38 Ind. 128, 134 (1871); *Bush v. Canfield*, 2 Conn. 485, 487–88 (1818); *Clinton v. Mercer*, 7 N.C. (3 Mur.) 119, 120 (1819) (“[W]henever a non-performance is established, although no real loss be proved, nominal damages, at least, ought to be given.”); 5 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1001, at 29 (1964) (“If [plaintiff] makes no [proof of harm], the judgment in his favor will be for nominal damages only.”).

²⁰² See *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016).

²⁰³ See Hessick, *supra* note 17, at 281 (“While factual injury alone was never sufficient to warrant redress, legal injury alone was adequate for some actions.”); SIMPSON, *supra* note 197, at 580–81 (noting that in trespass in *vi et armis* and libel, damages need not be proved); DAN B. DOBBS, THE LAW OF TORTS 26 (2000) (noting that a plaintiff suing in trespass did not have to show a pecuniary loss, whereas a plaintiff could not recover under a writ of case unless he proved some legally cognizable harm).

tual harm was unnecessary. For example, a plaintiff could bring a writ for trespass, which was the action to remedy a direct, forceful invasion of rights, even if the invasion of rights did no harm.²⁰⁴

Among those actions for which factual harm was unnecessary were actions expressly conferred by statutes to enforce statutory rights. Statutes could confer legal rights on individuals,²⁰⁵ and they could authorize actions to vindicate those rights.²⁰⁶ The only requirement to bring those actions was that the plaintiff satisfy whatever elements the statute prescribed.²⁰⁷ As the House of Lords put it in *Donaldson v. Beckett*,²⁰⁸ the statutes prescribed the “terms and conditions” for maintaining statutory actions.²⁰⁹ Consequently, if a statute did not require the plaintiff to establish a factual harm, the plaintiff need not demonstrate a factual harm to maintain the action.²¹⁰

Highlighting this point—that a plaintiff need not establish a factual harm to bring a statutory cause of action if the statute did not specify factual harm as a requirement—is that a plaintiff *was* required to establish factual harm to maintain an action to vindicate a statutory right when the statute did *not* provide a cause of action. If a statute did not provide a cause of action, a plaintiff could still vindicate his

²⁰⁴ SIMPSON, *supra* note 197, at 580–81 (noting that in trespass in *vi et armis* and libel, damages need not be proved).

²⁰⁵ Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 694 (2004).

²⁰⁶ See *Donaldson v. Beckett* (1774) 1 Eng. Rep. 837, 846–47 (HL) (discussing copyright statute prescribing “terms and conditions” for recovery); 1 SIR JOHN COMYNS, DIGEST OF THE LAWS OF ENGLAND 309, 320 (Stewart Kyd ed., 4th ed. 1793) (noting that “the express words of the statute” may provide a remedy for statutory violations); accord SIR EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 55 (1642) (“[I]f any man feeleth himself grieved, contrary to any article in any Statute, he shall have present remedy in Chancery . . .”).

²⁰⁷ 5 SIR JOHN COMYNS, DIGEST OF THE LAWS OF ENGLAND 359–60 (Samuel Rose ed., 4th ed. 1800) (“As, in an action founded on a statute, the plaintiff ought to aver every fact necessary to inform the court that his case is within the statute . . .”).

²⁰⁸ 1 Eng. Rep. 837 (HL).

²⁰⁹ *Id.* at 847.

²¹⁰ Consistent with this history, through the 1980s, the Court held that a statute could provide the basis for standing, stating that the “injury required by Art. III may exist solely by virtue of ‘statutes creating legal rights, the invasion of which creates standing . . .’” *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973)); see also *Diamond v. Charles*, 476 U.S. 54, 65 n.17 (1986) (“The Illinois Legislature . . . has the power to create new interests, the invasion of which may confer standing. In such a case, the requirements of Art. III may be met.”); *Linda R.S.*, 410 U.S. at 617 n.3 (“Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute.”); *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972) (stating that to have standing the plaintiff may “rely on any specific statute authorizing invocation of the judicial process”).

statutory rights by bringing a common law action.²¹¹ That common law action was an action on the case,²¹² which, as noted earlier, did traditionally require proof of factual harm.²¹³

Despite receiving various briefs describing this history,²¹⁴ the *Spokeo* Court refused to recognize standing based solely on the violation of a statute. Instead, the Court said, “standing requires a concrete

²¹¹ See *Tex. & Pac. Ry. v. Rigsby*, 241 U.S. 33, 39 (1916) (“A disregard of the command of [a] statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law”); see also *COKE*, *supra* note 206, at 118 (“When any Act doth prohibit any wrong or vexation, though no action be particularly named in the Act, yet the party grieved shall have an action grounded upon this Statute”); *Ashby v. White* (1703) 91 Eng. Rep. 19, 20 (KB) (Holt, C.J., dissenting) (“If a statute gives a right, the common law will give a remedy to maintain that right”); *Anonymous*, 87 Eng. Rep. 791, 791 (KB) (“[F]or where-ever a statute enacts anything, or prohibits anything, for the advantage of any person, that person shall have remedy to recover the advantage given him, or to have satisfaction for the injury done him contrary to law by the same statute; for it would be a fine thing to make a law by which one has a right, but no remedy but in equity; and the action must be against the terre-tenant.”); *Bullard v. Bell*, 4 F. Cas. 624, 639 (C.C.D.N.H. 1817) (No. 2121) (Story, J.) (“[U]pon every statute made for the remedy of any injury, mischief, or grievance, an action lies by the party grieved, either by the express words of the statute or by implication; and that such action shall be recompense to the party.”); 3 WILLIAM BLACKSTONE, *COMMENTARIES* *23; *COKE*, *supra* note 206, at 55 (“[E]very Act of Parliament made against any injury, mischief, or grievance doth either expressly, or impliedly give a remedy to the party wronged, or grieved [by the violation]”); *Stout v. Keyes*, 2 Doug. 184, 187 (Mich. 1845) (“It is a general principle of the common law, that whenever the law gives a right, or prohibits an injury, it also gives a remedy by action; and, where no specific remedy is give[n] for an injury complained of, a remedy may be had by special action on the case.”); Henry H. Drummonds, *The Dance of Statutes and the Common Law: Employment, Alcohol, and Other Torts*, 36 WILLAMETTE L. REV. 939, 995 (2000) (listing examples of cases that recognized new common law causes of action).

²¹² See *Ashby v. White*, 92 Eng. Rep. 126, 137 (KB) (Holt, C.J.); *Bellia Jr.*, *supra* note 147, at 840 (“In several English and state cases decided at law, it was an action on the case that the plaintiff brought to remedy an injury that a statutory violation caused.”).

²¹³ See *supra* note 197 and accompanying text. Even when a statute expressly provided a cause of action, a plaintiff could forego that cause of action and instead pursue this separate common law action to vindicate his statutory right. See 1 COMYNS, *supra* note 206, at 322 (“[I]f a statute gives a remedy in the affirmative (without a negative expressed or implied) for a matter, which was actionable by the common law, the party may sue at the common law, as well as upon the statute; for this does not take away the common law.”); *Rowning v. Goodchild* (1773) 96 Eng. Rep. 536, 538 (KB) (rejecting the argument that an express action in a statute precludes a common law action, stating that “if the action lies at common law, as we think it does, the [statutory] penalty is only an accumulative sanction”). Unless, of course, the statute meant to preclude the common law action. See *Bellia Jr.*, *supra* note 147, at 843 & n.298; *Underhill v. Ellicombe* (1825) 148 Eng. Rep. 489, 491 (KB) (“This is a claim given by statute, and the same statute which creates it prescribes a particular remedy for its enforcement. Therefore, it appears to us that no other can be resorted to.”).

²¹⁴ See, e.g., Brief for the United States as Amicus Curiae Supporting Respondent, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (No. 13-1339), 2015 WL 5260469, at *19–23; Brief for Public Law Professors as Amici Curiae in Support of Respondent, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (No. 13-1339), 2015 WL 5261536, at *18–23.

injury even in the context of a statutory violation.”²¹⁵ The rejection of that argument from history for statutory actions suggests that it should be rejected for contract actions as well. If individuals must establish injury in fact for statutory violations even if the statute conferring the action does not require proof of injury in fact, so too they must be required to establish injury in fact for contract actions.²¹⁶

III. OTHER REASONS FOR DISTINGUISHING CONTRACTS

Although the logic of *Spokeo* extends to contract actions, there may be other reasons—reasons that *Spokeo* had no occasion to consider—to treat standing for breach of contract differently. One argument is that requiring injury in fact to establish standing for contracts impairs freedom of contract. Another is that defendants should be more easily sued for breach of contract than for violations of statutes because contractual obligations are voluntarily assumed while statutory obligations are involuntarily imposed. A third is that, because state law predominantly regulates contracts, standing for breach of contract raises federalism concerns that support broad standing. This Part addresses those arguments and concludes that none is persuasive.

A. Freedom of Contract

One of the central virtues of contract is that it allows individuals to choose which legal obligations to assume. This freedom of contract—the ability of individuals to choose what contracts to enter into—supports individual autonomy.²¹⁷ It also promotes economic efficiency by allowing individuals to allocate their money and resources as they see fit.²¹⁸ Requiring an injury in fact to support standing for breach of contract limits freedom of contract by restricting the enforceability of rights that parties create through contracts.²¹⁹ Even if a contract explicitly authorizes federal lawsuits in the event of a breach, parties cannot resort to federal court to enforce the contract if the

²¹⁵ *Spokeo*, 136 S. Ct. at 1549.

²¹⁶ Although the Court rejected this historical argument for actions based on violations of statutes, it could accept this historical argument for contract actions. But to do so would be unprincipled. Allowing that path would mean that courts decide outcomes first, and then choose whatever arguments are useful to support their position.

²¹⁷ FRIED, *supra* note 109, at 7 (arguing that contract law is required by the “liberal ideal” that we leave people “free to make their lives as we are left free to make ours”); see generally Mark Pettit, Jr., *Freedom, Freedom of Contract, and the “Rise and Fall”*, 79 B.U. L. REV. 263 (1999) (discussing the relationship of freedom to freedom of contract).

²¹⁸ RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 120–22 (8th ed. 2011) (arguing that contracts promote efficiency because they permit individuals to assign subjective values).

²¹⁹ See cases cited *supra* note 13 and accompanying text.

breach does not cause factual harm. Accordingly, one might argue, preserving freedom of contract demands dispensing with the injury in fact requirement for contract actions.

Despite its importance,²²⁰ freedom of contract does not support creating an exception to the injury in fact requirement for contract actions. Standing is a constitutional doctrine. It defines the federal judiciary's power under Article III to resolve disputes.²²¹ Since abandoning *Lochner*²²² and similar cases in the 1930s,²²³ courts have consistently held that freedom of contract does not deserve special constitutional treatment.²²⁴ Instead, contracts are like other economic and societal interests that legislatures can broadly regulate.²²⁵ Because it is not of constitutional dimensions, freedom of contract does not support creating a special constitutional exception to Article III standing to facilitate the enforcement of contracts.

Dispensing with injury in fact for contracts while requiring it for statutory violations would also elevate an individual's freedom to contract over Congress's power to legislate. Unlike freedom of contract, Congress's power to legislate is a constitutionally protected interest. The Constitution assigns to Congress the power to enact statutes creating rights and prescribing remedies for violations of those rights.²²⁶ That constitutional interest is at the core of standing doctrine, which aims to protect the political powers from judicial encroachment.²²⁷ Requiring injury in fact interferes with that power by limiting the enforceability of rights that Congress creates. Congress cannot create rights that can be enforced in federal court if the violation of the right does not cause factual harm.²²⁸ If injury in fact limits Congress's con-

220 *Progressive N. Ins. Co. v. Pippin*, 725 F. App'x 717, 725 (10th Cir. 2018) (“[T]he freedom of individuals to contract is an important part of our society . . .” (quoting *Siloam Springs Hotel, LLC v. Century Surety Co.*, 392 P.3d 262, 267 (Okla. 2017))).

221 *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

222 *See Lochner v. New York*, 198 U.S. 45 (1905).

223 *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392, 400 (1937) (overruling *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) and *Lochner*, 198 U.S. 45 (1905)).

224 *Parrish*, 300 U.S. at 391 (“The Constitution does not speak of freedom of contract.”).

225 *Id.* at 392 (stating that the legislature has authority to regulate “that wide department of activity which consists of the making of contracts” (quoting *Chicago, B. & Q. R.R. v. McGuire*, 219 U.S. 549, 567 (1911))).

226 *See, e.g.*, U.S. CONST. art. I, § 8.

227 *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) (“The law of Article III standing . . . serves to prevent the judicial process from being used to usurp the powers of the political branches.”).

228 *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547–48 (2016) (quoting *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997)).

stitutional power to create enforceable rights, it also should limit the sub-constitutional interest in freedom of contract.²²⁹

B. Consent

Although contracts and statutes both impose legal obligations, they derive from different sources. Contractual obligations are the product of an agreement between the contracting parties. People can choose the terms of their contractual obligations.²³⁰ By contrast, statutory obligations are not voluntary; the law independently imposes those obligations irrespective of the parties' consent.²³¹ One might argue that because defendants voluntarily enter into contracts, defendants should be more susceptible to suit for violating contracts than for violating statutes and a more relaxed standing requirement should therefore apply in contract actions.²³²

But the consensual nature of contracts does not provide a sound basis for dispensing with the injury in fact requirement for contracts. Whether an obligation is voluntary or involuntary focuses on the defendant; the defendant is the one who chooses to assume a contractual obligation. But standing focuses on the plaintiff.²³³ It asks whether the plaintiff has suffered an injury warranting judicial redress.²³⁴ Voluntarily and involuntarily assumed legal obligations both create legal rights in the plaintiff, and from the plaintiff's point of view, the violation of *any* right harms the plaintiff.

Indeed, to the extent the voluntariness of an obligation should matter to standing, most individuals may very well prefer a broader

²²⁹ The Supreme Court has claimed that there is no hierarchy of constitutional rights for standing. See *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982). But this argument—that standing should be at least as restrictive for contract rights as it is for statutory rights—does not rest on the ground that statutory rights are more important than contractual rights. Instead, it rests on the idea that separation of powers more strongly supports creating an exception to standing for statutory rights than for contractual rights.

²³⁰ 35 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING 194 (1925) (recounting Williston's statement that he "[didn't] see why a man should not be able to make himself liable if he wishes to do so").

²³¹ Daniel Markovits, *Theories of the Common Law of Contracts*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., Winter 2019 ed.), <https://plato.stanford.edu/archives/fall2015/entries/contracts-theories/> [<https://perma.cc/TXH8-EFTB>].

²³² See Barnett, *supra* note 109, at 288.

²³³ See *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1950–51 (2019). More accurately, standing focuses on the person seeking to invoke the jurisdiction of the court. Accordingly, an appellant must also establish standing before the court of appeals. *Id.* at 1951.

²³⁴ *Id.* at 1950–51.

ability to sue for breaches of involuntarily imposed statutory duties instead of for voluntary duties created by contract. Statutory rights protect core individual interests—such as life, personal safety, and property—that society has deemed so important that they should be protected for everyone, regardless of whether each person has entered into contracts to protect them.²³⁵ Presumably, most people would protect those interests by contract to the extent that they could if statutes did not provide that protection.

Dispensing with the injury in fact requirement because contracts are voluntary is also in tension with the doctrine that parties cannot avoid standing through an agreement.²³⁶ Standing is a jurisdictional requirement, and the law has long held that consent cannot confer jurisdiction that is otherwise lacking.²³⁷ Relaxing standing for voluntarily assumed obligations undermines this limitation. Courts would have broader jurisdiction simply because the parties agreed to assume legal obligations.²³⁸

To be sure, the consent a defendant gives in a contract is not aimed at conferring subject matter jurisdiction to enforce the contract.²³⁹ It is to establish substantive obligations and entitlements. Nevertheless, if standing is different for contract actions because contracts are consensual, a defendant's consent is the *basis* for permitting federal courts to hear contract claims without injury in fact.

C. Federalism

A third argument for dispensing with injury in fact for contract actions rests on federalism. The theory is that most contract actions involve state law, and more expansive standing would promote feder-

²³⁵ See POSNER, *supra* note 218, at 213–15, 260–62 (justifying tort doctrines on the ground that they promote efficiency and avoid the transaction costs of contract).

²³⁶ Capron v. Van Noorden, 6 U.S. (2 Cranch) 126, 127 (1804) (“[I]t was the duty of the Court to see that they had jurisdiction, for the consent of parties could not give it.”); *accord* Walker v. Taylor, 46 U.S. (5 How.) 64, 67 (1847).

²³⁷ See, e.g., Capron, 6 U.S. (2 Cranch) at 127.

²³⁸ Of course, consent is the reason that contracts are binding. The obligations in a contract are enforceable because parties voluntarily enter into them. See *Gibbons v. United States*, 75 U.S. (8 Wall.) 269, 273 (1868) (“If the plaintiff’s consent was voluntary, then the contract to which he assented was binding”); *cf.* RESTATEMENT (SECOND) OF CONTRACTS §§ 175–76 (AM. L. INST. 1981) (contracts voidable if not voluntary). But that consent does not provide a basis for expanding the *power* of the court to hear the claim.

²³⁹ Contracts regularly contain forum selection clauses that confer personal jurisdiction on courts that would otherwise lack it. But parties cannot establish subject matter jurisdiction through contract.

alism by expanding the federal judiciary's power to enforce state law. This argument has at least four flaws.

First, permitting federal courts to hear state law actions does not promote federalism. The core idea of federalism is that the federal government has limited, enumerated powers and cannot exercise the residual powers left to the states. Diversity jurisdiction is a departure from this rule.²⁴⁰ Far from protecting states from federal interference, diversity jurisdiction enables federal courts to exercise significant influence on state affairs by empowering the courts to hear issues of state law.²⁴¹ The Founders thought this federal jurisdiction was necessary *despite* the intrusion on states' rights to maintain the rule of law among the states.²⁴²

Second, even if the states desired federal enforcement of state law, more expansive federal standing for contract actions would protect state interests only if the states themselves had broader standing for contract actions. In that situation, the federal courts could enforce contracts to the same degree as the states. But in states that have more restrictive standing, expansive federal standing would be against state interests—unless the federal courts followed state standing law in those cases, a proposition that the Supreme Court has not addressed—because it would permit enforcement of state laws in situations that the states think they should not be enforced.²⁴³

Third, federal standing doctrine is not designed to protect federalism.²⁴⁴ The driving principle of standing is separation of powers.²⁴⁵ Standing seeks to determine which disputes the federal courts should resolve and which disputes should be left to the federal political

²⁴⁰ Hessick, *supra* note 14, at 100 (“Diversity thus is a departure from the ordinary balance of power between the state and federal governments.”).

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ See F. Andrew Hessick, *Standing in Diversity*, 65 ALA. L. REV. 417, 428 & n.70 (2013). To be sure, currently no state has adopted a more restrictive standing test than the Article III test. See Hessick, *supra* note 14, at 66–68 (discussing state standing requirements). But the point is that the states could adopt more restrictive tests. Certainly, some states have adopted more restrictive doctrines in other areas of justiciability. For example, although federal courts have created an exception to mootness for issues that are “capable of repetition, yet evading review,” *Norman v. Reed*, 502 U.S. 279, 287–88 (1992) (quoting *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969)), Oregon has not recognized a comparable exception for its courts, *Yancy v. Shatzer*, 97 P.3d 1161, 1171 (Or. 2004).

²⁴⁴ Hessick, *supra* note 14, at 100 (“Federal courts have not developed justiciability doctrines with an eye towards protecting state sovereignty.”).

²⁴⁵ *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014) (“The law of Article III standing . . . is built on separation-of-powers principles” (quoting *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 408 (2013))).

branches.²⁴⁶ To that end, the purpose of standing is to determine whether the dispute is appropriate for judicial resolution or whether it should instead be resolved politically.²⁴⁷ It does not sort cases based on whether they involve matters of particular importance to the states.²⁴⁸ Accordingly, the Court has applied the same standing requirements in a variety of suits that raise more significant state interests than contract disputes, such as challenges to state actions implementing state law.²⁴⁹

Fourth, although state law controls most contract disputes, some contracts involve important federal interests that are regulated by federal law.²⁵⁰ The same federalism concerns do not apply to those contracts. Those inapplicable concerns therefore do not support a blanket rule for dispensing with injury in fact for contract actions.

IV. IMPLICATIONS FOR CONTRACT AND STANDING LAW

Federal standing to sue to bring a contract action should be at least as stringent as standing to sue for statutory violations. Breaches of contract do not automatically result in a factual injury any more than a statutory violation does, and neither the history nor the separation-of-powers rationale underlying standing provides a basis for treating contracts and statutes differently. Nor are there other sound bases for relaxing the standing requirements for contracts. Accordingly, if *Spokeo* requires injury in fact to support standing to pursue violations of statutory rights, it should likewise require injury in fact to support standing for violations of contractual rights.

But requiring injury in fact to establish standing for breach of contract has several undesirable effects. One is that it would impair the freedom of contract. Although no longer a constitutionally pro-

²⁴⁶ Hessick, *supra* note 14, at 101 (arguing that standing “defin[es] which disputes the federal courts may resolve and which disputes should be left to the federal political branches”).

²⁴⁷ *See id.*

²⁴⁸ *See id.*; *see also* Heather Elliott, *Federalism Standing*, 65 ALA. L. REV. 435, 435–48 (2013) (describing in detail how standing doctrine does not account for federalism interests); *Hollingsworth v. Perry*, 570 U.S. 693, 703, 707 (2013) (denying standing to sue to defend California law, despite explicit determination by California that the plaintiff had been authorized to pursue the suit).

²⁴⁹ *See City of Chicago v. Int’l Coll. of Surgeons*, 522 U.S. 156, 168–71 (1997) (concluding that a challenge to conclusions of state administrative determination was justiciable); *Cleveland Hous. Renewal Project v. Deutsche Bank Tr. Co.*, 621 F.3d 554, 561 (6th Cir. 2010) (finding standing to challenge state nuisance laws).

²⁵⁰ *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 518 (1988) (Brennan, J., dissenting) (discussing when federal common law applies).

tected interest,²⁵¹ freedom of contract continues to play a critically important role in society.²⁵² Limiting standing to sue for breach of contracts would undermine that freedom by restricting the enforceability of contracts in federal court. Individuals could not select federal courts in their contracts for breaches of provisions that do not result in cognizable factual harms.

This limitation should apply to contracts containing provisions analogous to statutory provisions whose violations do not support standing. For example, if violations of statutory obligations to provide notice to consumers or to follow procedures aimed at protecting data privacy do not constitute injury in fact, breaches of contractual provisions prescribing comparable obligations likewise do not cause a factual injury. Victims of breaches accordingly should not be able to pursue those claims in federal court.

By the same token, victims should not be able to enforce liquidated damages clauses prescribing damages for breaches of those contractual provisions. In *Spokeo*, the Court held that a statutory damage provision—prescribing damages of up to \$1,000 for a violation of the procedures in FCRA²⁵³—did not supply an injury in fact necessary to establish standing. Similar logic applies to liquidated damages clauses in contracts. Those clauses prescribe a consequence for a breach; they do not establish that the breach itself constitutes an injury.

Restricting freedom of contract by requiring injury in fact would not just simply interfere with individual autonomy to designate the forum in which contractual rights are enforced. It would also undermine economic efficiency. Some contracts include federal forum selection clauses²⁵⁴ because the federal procedure is more regimented than the state ones,²⁵⁵ or because the attorneys are more familiar with fed-

²⁵¹ *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937) (“The Constitution does not speak of freedom of contract.”).

²⁵² See *supra* notes 217–20 and accompanying text.

²⁵³ 15 U.S.C. § 1681n(a).

²⁵⁴ Although important, the point should not be overstated. Many forum selection clauses designate a particular state in which suit must be brought but permit suit in state or federal court. See John F. Coyle & Christopher R. Drahozal, *An Empirical Study of Dispute Resolution Clauses in International Supply Contracts*, 52 *VAND. J. TRANSNAT’L L.* 323, 327 (2019).

²⁵⁵ See S. Scott Bluestein, *When Vacations Go Bad: The Stormy Seas of Vessel Passenger Litigation*, 30 *SC LAW.* 50, 52 (2018) (“[F]ederal court has stricter deadlines for the production of expert reports, completing discovery, providing the court and opposing counsel with information about the case and relevant case law, disclosure of documents related to the issues, discovery limitations and responding to motions. Litigation in federal court does have some advantages over state court, such as electronic filing of pleadings with the clerk of court, nationwide subpoena power, one judge deciding the issues in the case and date certain trial dates.”).

eral procedures.²⁵⁶ Requiring factual injury would increase costs by limiting the availability of those federal forums.²⁵⁷ Plaintiffs would have the choice of resorting to their less preferred option of state court, pursuing more costly extralegal relief, or possibly waiting until a more significant breach with more costly consequences occurs.²⁵⁸

These concerns are not limited to the plaintiff. Defendants in breach cases might prefer to be in federal court—be it because they prefer federal procedures or because they believe the federal court is more likely to resolve the dispute in their favor. But they would be unable to remove otherwise removable cases involving breach if the breach does not result in factual injury.

Another consequence of requiring injury in fact is that it would undermine the purposes of diversity jurisdiction. Most contract actions involve state law and accordingly can be in federal court only through diversity jurisdiction—that is, only if the parties are citizens of different states and the amount in controversy exceeds \$75,000.²⁵⁹ The primary reason for diversity jurisdiction is to provide federal courts as an alternative forum to resolve state law claims free from the bias that state courts might harbor against out-of-state litigants.²⁶⁰ Thus, when sitting in diversity, federal courts ordinarily do not apply different substantive law than the state court would.²⁶¹ Their function is to interpret and enforce state law as a court of that state would.²⁶² Their only function is to be “another court of the State”—just one that is free from the potential bias a state court might have against out of state litigants.²⁶³

Imposing an injury in fact requirement for standing in contract actions would create disparity in the enforceability of contracts in state court and federal court. State courts are not bound by federal

²⁵⁶ See *id.* (comparing federal and state procedures).

²⁵⁷ See *Beasley v. Tex. & Pac. Ry.*, 191 U.S. 492, 497 (1903) (“[A] man may make himself answerable in damages for the happening or not happening of what event he likes.”).

²⁵⁸ See POSNER, *supra* note 218, at 117 (“The basic aim of contract law . . . is . . . to encourage the optimal timing of economic activity and . . . obviate costly self-protective measures.”).

²⁵⁹ 28 U.S.C. § 1332.

²⁶⁰ See Hessick, *supra* note 14, at 82 (“Diversity jurisdiction empowered federal courts to serve as neutral fora for the resolution of claims involving those litigants. That neutrality would result in more just decisions; placate, to some degree, dissatisfied litigants who might otherwise resort to extra-legal measures were they to lose at the hands of a biased state court; and facilitate business . . .” (footnotes omitted)).

²⁶¹ *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996).

²⁶² See *id.*; Hessick, *supra* note 14, at 59.

²⁶³ See *Guar. Tr. Co. v. York*, 326 U.S. 99, 108–09 (1945); Hessick, *supra* note 14, at 59–60.

standing rules.²⁶⁴ Many states have adopted broader standing rules than the Article III rule that applies to federal courts.²⁶⁵ They accordingly could opt to hear breach of contract actions that do not result in an injury in fact. At the same time, federal courts could not hear those claims. Although they are bound by state substantive law in suits brought under diversity jurisdiction, federal courts apply federal standing rules in those suits.²⁶⁶

This disparity between federal and state jurisdiction is particularly salient for contract disputes. According to Henry Friendly, the main type of case posing the bias that diversity jurisdiction was meant to avoid consisted of contracts disputes.²⁶⁷ The fear was that state courts would unduly favor poor in-state debtors over out-of-state creditors.²⁶⁸ Requiring injury in fact would almost certainly not affect those types of disputes, because actions for debt involve financial harms. But it would affect other types of contractual disputes that raise the specter of bias. One can imagine a local state court unduly favoring in-state consumers claiming a breach of a privacy provision over an out-of-state service provider.

Of course, federal courts could avoid these unwelcome consequences simply by holding that breaches of contracts themselves constitute injuries in fact, even when the breach has no consequence other than the fact of the breach. The Court often manipulates standing doctrine by stretching the concept of injury to find standing in cases that it believes the federal judiciary should have the power to adjudicate.²⁶⁹ One set of cases in which the Court has done so involves claims under the Equal Protection Clause. For example, in *Adarand Constructors, Inc. v. Pena*,²⁷⁰ the Court held that a nonminority contractor had standing to challenge a government program that gave

²⁶⁴ *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989) (“[T]he constraints of Article III do not apply to state courts . . .”).

²⁶⁵ See Hessick, *supra* note 14, at 65–68 (showing that many states do not require injury in fact but permit standing for violations of rights or for generalized grievances).

²⁶⁶ *Id.* at 75.

²⁶⁷ See Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 486–87 (1928).

²⁶⁸ *Id.*

²⁶⁹ Hessick, *supra* note 17, at 304 (“The Court has been hesitant to deny standing in cases involving the violation of a right that the Court deems particularly important even when the plaintiff has not suffered a perceptible injury.”). By the same token, courts have applied a more stringent standing requirement in cases in which the plaintiff challenges government actions related to national security. In *Clapper v. Amnesty International USA*, for example, the Court explicitly said the imminence requirement is particularly rigorous in suits challenging actions implicating national security. See 568 U.S. 398, 408–09 (2013).

²⁷⁰ 515 U.S. 200 (1995).

preference to minority businesses, even though the plaintiff could not prove that it would have received any contracts if race were not considered.²⁷¹ According to the Court, the denial of the opportunity to compete on an equal footing constituted an injury in fact, even though the ability to compete on equal footing would not necessarily have resulted in the award of the contract.²⁷²

Another set of cases in which the Court has effectively dispensed with the injury in fact requirement involve criminal prosecutions. The Court has never hinted that the United States lacks standing to prosecute violations of federal criminal law, even though the violations do not cause any identifiable harm to the government.²⁷³ Following this approach, the Court could simply deem breaches of contract to be injuries in fact.

But this approach would create significant problems. The most obvious is that it would open the Court up to criticisms. Critics would likely point to the treatment of contracts as yet another example of standing law being unprincipled and esoteric. Others would likely claim that the Court is moving back in the direction of *Lochner* by more highly protecting contract rights than statutory rights.

More tangibly, dispensing with injury in fact for contract actions would have ripple effects throughout the law. Automatically recognizing standing for breach of contract actions would provide a means for avoiding the injury in fact requirement in other types of cases. Injury in fact would no longer be a threshold prerequisite to limit the power of the federal judiciary;²⁷⁴ instead, it would become a default rule. Parties could circumvent standing limitations on statutory rights by entering into contracts imposing identical obligations.

Consider a statute requiring a doctor's office to destroy data about former patients two years after they stopped seeing the doctor. Bob goes to Doctor Smith about a medical problem. Two years after the visit, Doctor Smith does not destroy Bob's personal data, in viola-

²⁷¹ *Id.* at 211–12.

²⁷² *Id.* at 211; Hessick, *supra* note 17, at 306 (“[T]he Court has found standing based on such abstract injuries as the loss of an opportunity to compete for a benefit that may have been denied anyway . . .”).

²⁷³ Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show that Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239, 2245 (1999).

²⁷⁴ *Town of Chester v. Laroe Ests., Inc.*, 137 S. Ct. 1645, 1650 (2017) (“Article III standing . . . serves to prevent the judicial process from being used to usurp the powers of the political branches[] . . . by requiring plaintiffs . . . seeking compensatory relief [to] have ‘(1) suffered an injury in fact . . .’” (citations omitted) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016))).

tion of the statute. That violation would not confer standing on Bob, if the failure to destroy the data did not cause any additional harm to him. But if the injury in fact requirement does not apply to contracts, Bob could have avoided the standing bar by insisting when he first saw Dr. Smith that his contract with the doctor include a provision requiring the destruction of his personal data.

Of course, contract provides an imperfect way to circumvent limitations on standing for statutory violations. For individuals to establish standing through contractual obligations that mirror statutory obligations, they must enter into the contract before the violation occurs. Many individuals will not be in a position to contract *ex ante*. But many others will be in a position to do so.

Potentially more important, dispensing with the injury in fact requirement for breach of contract could provide avenues for Congress and state legislatures to circumvent *Spokeo*. Courts have long recognized that statutes can impose implied contracts on parties.²⁷⁵ Legislatures could rely on this mechanism to avoid the injury in fact requirement by enacting legislation that framed legal obligations as contracts. For example, instead of simply requiring companies to adopt procedures to protect data, a statute could provide that, when a company gathers information about a person, it enters into an implied contract under which it is obliged to adopt procedures to protect the information. Because the obligation derives from contract instead of statute, a plaintiff claiming that a company did not maintain adequate procedures would not have to demonstrate an injury in fact to have standing.²⁷⁶ No doubt, to prevent Congress from circumventing *Spokeo* in this way, the Court could proclaim that federal statutes that create implied contracts are simply statutory rights, but it could not do so with respect to state law statutes that imply contracts. States could simply decree that, as a matter of state law, a state statutory obligation

²⁷⁵ See *Platt v. Wilmot*, 193 U.S. 602, 613 (1904) (“It is a liability created by the statute, because the statute is the foundation for the implied contract . . .”).

²⁷⁶ To be sure, historically, if an obligation arose from an implied promise imposed by law, as opposed to from an express contract, the usual form of action was an action on the case, which traditionally required proof of damages. See *supra* notes 197–200 and accompanying text. But the action on the case was not the exclusive form of action; it was only the usual form of action. See *id.* Parties could opt instead to bring a standard assumpsit action to enforce the promise, though it was not the usual avenue of relief. See *Burnett v. Lynch* (1832) 108 Eng. Rep. 220, 227 (KB) (Littledale, J.) (“[W]here from a given state of facts the law raises a legal obligation to do a particular act, and there is a breach of that obligation, and a consequential damage, there, although assumpsit may be maintainable upon a promise implied by law to do the act, still an action on the case founded in tort is the more proper form of action.”).

constituted a contractual obligation—and federal courts would be obliged to accept that construction.²⁷⁷

To be sure, one might say that requiring injury in fact for standing to pursue breach of contract would result in a better allocation of resources. Litigation is expensive both for the litigants and for the judiciary. Refusing to grant standing for breaches of contract that result in no factual injury would save resources for cases when something “real” is at stake. But even if judges perceive that a breach of contract does not result in harm, the victims of the breach may disagree. After all, they considered the right important enough to include in the contract.

Moreover, to the extent the federal judiciary faces the need to conserve resources, Article III standing is not the appropriate vehicle for achieving that goal. Article III does not limit the judicial power to disputes involving significant stakes. It extends the judicial power to all cases, irrespective of the amount at stake, that involve a federal question or fall into one of the other eight enumerated categories.²⁷⁸ It is for this reason that the Court has said that the judicial power extends to cases even when the matter at stake is a “trifle.”²⁷⁹ A more effective way for courts to protect judicial resources is through prudential doctrines. These doctrines would give the courts the flexibility to determine which disputes involve significant enough stakes to warrant the costs of judicial intervention.²⁸⁰ And even then, federal courts are the wrong institution to determine how to allocate judicial resources. Congress has the responsibility for determining how to prioritize the expenditure of federal resources.²⁸¹

In short, although it is tempting to craft ways around the holding in *Spokeo* for contract disputes, doing so would be unprincipled and could wreak havoc on the law. At the same time, applying the injury in fact requirement to contract disputes also results in unpalatable

²⁷⁷ *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass’n*, 426 U.S. 482, 488 (1976) (“We are, of course, bound to accept the interpretation of [the State’s] law by the highest court of the State.”).

²⁷⁸ U.S. CONST. art. III, § 2.

²⁷⁹ *United States v. Students Challenging Regul. Agency Procs.*, 412 U.S. 669, 689 n.14 (1973) (quoting *Kenneth Culp Davis, Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 613 (1968)).

²⁸⁰ Hessick, *supra* note 14, at 98–99 (discussing the pragmatic values of considering resources limitations through prudential doctrines).

²⁸¹ U.S. CONST. art. I, § 9, cl. 7 (assigning the appropriations power to Congress); see Hessick, *supra* note 17, at 323 (“[Federal] courts are not the appropriate body to determine how to allocate their resources—determining when resources should be spent on enforcement is a traditional function of Congress.”).

consequences. This dilemma provides a compelling reason to think that *Spokeo* was wrongly decided. Commentators have criticized *Spokeo* on the grounds that it is unprincipled, conflicts with the original understanding of Article III, introduces undesirable normative judgments into jurisdictional determinations, and unduly limits the ability of individuals to secure remedies for the violation of their rights.²⁸² The troublesome consequences of applying *Spokeo* to contracts provide further, powerful ammunition against *Spokeo*.

CONCLUSION

The requirements for Article III standing should not be more relaxed in suits for breaches of contract than in suits for violations of statutory rights. Both types of suits seek to do the same thing—enforce the rights and obligations created by legal instruments—and nothing in the Constitution suggests that courts have less power to enforce statutes than to enforce contracts.

The best way to achieve consistency in standing doctrine across contract and statutory actions is to dispense with the injury in fact requirement altogether. As many have argued, the requirement is ahistorical and unprincipled, and it has led to incoherence in standing law.²⁸³ No doubt, the Court may be reluctant to do away with the injury in fact requirement wholesale. Discarding that would not only overturn *Spokeo* but also draw into question decades of cases suggesting that injury in fact is a prerequisite to standing. But the implications of extending the injury in fact requirement to contract cases should nevertheless lead the Court to reconsider the requirement.

One might argue that reconciling standing for contract breaches and statutory violations is not worth the effort because most breaches of contract do result in factual injuries that would support standing.

²⁸² See, e.g., Raymond H. Brescia, *On Objects and Sovereigns: The Emerging Frontiers of State Standing*, 96 OR. L. REV. 363, 384 (2018) (“One of the most important criticisms of standing doctrine is that it simply has no direct support in the Constitution”); Erik R. Zimmerman, *Supplemental Standing for Severability*, 109 NW. U. L. REV. 285, 340 (2015) (criticizing the use of standing to limit remedies); Hessick, *supra* note 17, at 276 (arguing that standing does not follow history); Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 486–88 (2008) (criticizing standing doctrine’s effects on democracy and power dynamics); Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 304 (2002) (arguing that standing introduces normative judgments that favor the wealthy and privileged and unduly limits the ability of individuals to secure remedies for the violation of their rights).

²⁸³ See, e.g., Fletcher, *supra* note 17, at 221 (“The structure of standing law in the federal courts has long been criticized as incoherent.”); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1374 (1988) (criticizing standing as a twentieth century invention).

But even if breaches without injury are rare today, they may be more common tomorrow. That is especially so given that it is likely that people will increasingly enter into more contracts bearing on data privacy.

Moreover, a paucity of cases in which a breach of contract was not accompanied by a factual injury does not mean that courts should ignore the problem. For one thing, the discrepancy between standing for breaches of contract and violations of statutory rights creates unnecessary confusion and inconsistency in standing doctrine. As many have noted, standing is already confusing and incoherent,²⁸⁴ and adding further complications would throw fuel on the fire. More important, broader standing for contract breaches than for statutory violations undermines the core premise of standing. The central motivation for standing is separation of powers. Recognizing broader standing for contracts than for statutes runs exactly counter to protection of separation of powers. It results in the courts giving higher priority to the wishes of private parties than to the wishes of Congress. Accordingly, to resolve this dilemma and bring coherence to standing doctrine, the Court should overturn *Spokeo* and eliminate the injury in fact requirement.

²⁸⁴ For a criticism of standing, see Hessick, *supra* note 17, at 276; Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 227–29 (1990); Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 6–8 (1984); Fletcher, *supra* note 17, at 220–24; Myriam E. Gilles, *Representational Standing: U.S. ex rel. Stevens and the Future of Public Law Litigation*, 89 CALIF. L. REV. 315, 315–16 (2001).