NOTES

ARTICULATING A "RATIONAL CONNECTION" REQUIREMENT IN ARTICLE III STANDING

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On the last day of the 2011 Term, the Supreme Court dismissed, as improvidently granted, the writ of certiorari in First American Financial Corp. v. Edwards*. The dismissal, seven months after oral argument, was an unusual outcome for a case many expected to be the "sleeper" of the Term. At issue before the Court was whether Article III limits Congress's power to confer standing upon litigants whose only injury is a violation of a statutory right. At oral argument, members of the Court expressed discomfort with the existing formulation—that Article III injury may exist "solely by virtue of statutes creating legal rights, the invasion of which creates standing." This Note takes up where the Court left off. It suggests the existing formulation is incomplete insofar as it permits plaintiffs to bring suits against private parties without showing how their conduct injures the plaintiffs in a differentiated way. This Note argues that Article III requires a plaintiff's injury be "rationally connected" to the offending conduct at issue. It suggests the Court articulate such a "rational connection" requirement to close a doctrinal gap in the test for particularized injury.*

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INTRODUCTION

Amid the crush of media coverage on the day the Supreme Court announced its decision on the constitutionality of the Affordable Care Act,[1] few paid attention to the Court's order dismissing the writ of certiorari in *First American Financial Corp. v. Edwards* as improvidently granted.[2] The Court dismisses cases infrequently,[3] and, when it does, dismissal generally follows shortly after oral argument.[4] In *First American*, the dismissal—seven months after oral argument—was a notable departure from Court practice.[5] The outcome was all the more striking in light of the importance of the issue before the Court: the constitutional limits on Congress's power to confer standing upon

1. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

2. 132 S. Ct. 2536 (2012) (per curiam).

3. Since the 1950s, the Court has dismissed as improvidently granted an average of three cases each Term. *See* Michael E. Solimine & Rafael Gely, *The Supreme Court and the DIG: An Empirical and Institutional Analysis*, 2005 WIS. L. REV. 1421, 1421 (analyzing the 155 cases the Court dismissed as improvidently granted between 1954 and 2005); *see also* Scott A. Hendrickson, Opposite Side of the Same Agenda Setting Coin? DIGs in the U.S. Supreme Court 1 (June 1, 2012) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2241686 (describing dismissal as a "[r]arely used . . . aspect of the Court's deliberative process").

4. According to Pamela Karlan, "The modal DIG—the colloquial term for dismissing the writ as improvidently granted—happens relatively soon after oral argument, when the Court realizes that there might be a problem in reaching the issue on which certiorari was granted." Pamela S. Karlan, *The Supreme Court, 2011 Term—Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 58 (2012).

5. Karlan identifies two other recent outliers to this trend—*Philip Morris USA Inc. v. Williams*, 556 U.S. 178 (2009) (per curiam) (dismissing the case four months after argument), and *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (per curiam) (dismissing the case two months after argument)—but neither approached the timeline of *First American*. *See* Karlan, *supra* note 4, at 58 n.351.

plaintiffs bringing suit against other private parties. Given the high constitutional stakes involved, many Court observers had anticipated *First American* would be the "sleeper" of the Term.[6]

Denise Edwards sued her home title insurer, First American, for violating the Real Estate Settlement Procedures Act (RESPA).[7] The statutory provision at issue prohibits title insurers from paying kickbacks for client referrals.[8] Clients charged for services involving a kickback are entitled to recover three times the amount they paid.[9] In a typical suit, plaintiffs can argue they overpaid for their insurance as a result of a kickback. In a twist, Edwards purchased her home in Ohio, where insurance rates are set by law.[10] First American argued Edwards lacked standing to sue because she could not show she was actually injured by the kickback.

The Ninth Circuit rejected First American's argument and found Edwards had standing.[11] In reaching its decision, the Ninth Circuit applied the Supreme Court's formulation in *Warth v. Seldin*[12] that "injury required by Article III can exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'"[13] While over two-thirds of the Court's docket addresses

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6. *See, e.g.*, Kevin Russell, First American Financial v. Edwards*: Surprising End to a Potentially Important Case*, SCOTUSBLOG (June 28, 2012, 5:09 PM), http://www.scotusblog.com/2012/06/first-american-financial-v-edwards-surprising-end-to-a-potentially-important-case ("Lost in the hubbub of the health care decision is the Court's surprise punt in a case that many (including myself) thought would be the sleeper case of the Term."); *see also* Karlan, *supra* note 4, at 61 ("Like Kevin Russell, I viewed *First American* as 'the sleeper case of the Term.'" (quoting Russell, *supra*)); Daniel Fisher, *"Sleeper" Case Asks Whether Plaintiffs Can Sue Without an Injury*, FORBES (Sept. 26, 2011, 10:06 AM), http://www.forbes.com/sites/danielfisher/2011/09/26/sleeper-case-asks-whether-plaintiffs-can-sue-without-an-injury (quoting an attorney involved in the case as saying that "[t]his is the big sleeper of the term" (internal quotation marks omitted)); *SCOTUS's* First American Financial Corp v. Edwards *Ruling: What's the Holdup?*, LEGAL PULSE (June 19, 2012), http://wlflegalpulse.com/2012/06/19/scotuss-first-american-financial-corp-v-edwards-ruling-whats-the-holdup (speculating that the case could "end up being the sleeper of the 2011 term").

7. *See* Edwards v. First Am. Fin. Corp., 610 F.3d 514, 515 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 3022, *cert. dismissed as improvidently granted*, 132 S. Ct. 2536. Title insurance protects homebuyers against losses associated with defects in the title of their property. *See* Matthew C. Lucas, *Now or Then? The Time of Loss in Title Insurance*, FLA. B.J., Dec. 2011, at 10, 10. Homebuyers generally must purchase title insurance along with other settlement services, including appraisals and inspections. *See* Eric T. Freyfogle, *The Installment Land Contract as Lease: Habitability Protections and the Low-Income Purchaser*, 62 N.Y.U. L. REV. 293, 305 (1987); *see also* 12 U.S.C. § 2602(3) (2012).

8. 12 U.S.C. § 2607(a).

9. *Id.* § 2607(d)(2).

10. *See First Am.*, 610 F.3d at 516 (citing OHIO REV. CODE ANN. §§ 3935.04, .07).

11. *Id.* at 517.

12. 422 U.S. 490, 500 (1975).

13. *First Am.*, 610 F.3d at 517 (quoting Fulfillment Servs. v. United Parcel Serv., Inc., 528 F.3d 614, 618-19 (9th Cir. 2008) (quoting *Warth*, 422 U.S. at 500)) (internal quotation

splits among circuit courts,[14] all three circuits to confront the question agreed that plaintiffs had standing to bring a RESPA suit without proving they were overcharged.[15]

When the Court decided to review the Ninth Circuit decision, observers braced for reversal.[16] There was speculation that the Court would use the case "to establish new Article III limitations on Congress's power to create private rights of action."[17] Among the most likely outcomes, the Court could have decided that the violation of a statutorily created right could not satisfy Article III standing absent a showing of an underlying injury. This outcome would leave the Court with the unenviable task of defining what counts as an underlying injury.[18]

Even if the Court were to have affirmed standing, it could have done so on grounds "considerably narrower" than those offered by the Ninth Circuit.[19] As the Ninth Circuit applied *Warth v. Seldin*, Congress's power to confer standing seems virtually unlimited.[20] But an unbounded application of *Warth v. Seldin* is also in tension with the Court's view that Article III requires a plaintiff's injury be differentiated from that of the general public. Rather than decide these issues, the Court chose to pass on *First American.*

This Note takes up where the Court left off, examining potential reasons for the Court's discomfort with the formulation in *Warth v. Seldin*. It suggests that formulation is incomplete insofar as it permits plaintiffs to sue private par-

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marks omitted). In turn, *Warth v. Seldin* cited as its authority the Court's opinion in *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973) ("Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute.").

14. *See* David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 981 (2007) (book review) (finding that in the 2003-2005 Terms, approximately seventy percent of the Court's docket involved a circuit split); Nicholas J. Wagoner, *Occupy the Docket: How the Supreme Court Selects the 1%*, CIRCUIT SPLITS (May 24, 2012, 6:53 AM), http://www.circuitsplits.com/writ-of-habeas-corpus ("Cases involving circuit splits make up about 60-75% of the Supreme Court's docket each term.").

15. *See First Am.*, 610 F.3d at 517; Alston v. Countrywide Fin. Corp, 585 F.3d 753, 755 (3d Cir. 2009); Carter v. Welles-Bowen Realty, Inc. (*In re* Carter), 553 F.3d 979, 989 (6th Cir. 2009).

16. *See* Christopher Wright, *Argument Preview: Standing to Challenge Kickbacks That Do Not Directly Affect Price*, SCOTUSBLOG (Nov. 18, 2011, 2:28 PM), http://www.scotusblog.com/2011/11/argument-preview-standing-to-challenge-kickbacks-that-do-not-directly-affect-price ("In the absence of a clear conflict, a grant of certiorari in a case seeking review of a Ninth Circuit decision usually means that reversal is certain.").

17. Russell, *supra* note 6.

18. *Id.* ("[W]hat First American proposed was that courts would superintend that process by deciding which statutory violations cause constitutionally cognizable 'injuries' and which do not. Figuring out how to draw that distinction would not be easy.").

19. Wright, *supra* note 16.

20. *See infra* Part I.C.

ties without showing how the conduct injures them in a differentiated way. This Note argues that the formulation in *Warth v. Seldin* and the requirement of differentiated injury can be reconciled by requiring plaintiffs to show a "rational connection" between the violation of the statutory right and the conduct that Congress seeks to regulate.

The "rational connection" requirement proposed here addresses statutorily defined injury. Where a plaintiff suffers palpable harm from the conduct of a third party, injury in fact is never in doubt.[21] But where a plaintiff's only showing of injury is the violation of a statutory right, the "rational connection" requirement would limit standing to plaintiffs who can reasonably be said to have suffered at the hands of the conduct in question. This Note argues that the violation of a plaintiff's statutory right should constitute an injury in fact so long as the right is rationally connected to the conduct Congress seeks to regulate. It suggests that the Court articulate such a "rational connection" requirement to close the existing doctrinal gap in Article III standing.

The Note is divided into four Parts. Part I describes why the Ninth Circuit's application of *Warth v. Seldin* is in tension with the requirement that plaintiffs suffer a differentiated injury. Part II explains the origins of this doctrinal gap. Part III outlines a "rational connection" requirement by drawing on the Court's approach in several analogous areas of law. Part IV argues the standard of judicial review should be appropriately deferential to Congress.

I. STATING THE PROBLEM

A. Warth v. Seldin *and the Question of Underlying Injury*

Since deciding *Warth v. Seldin*, the Court has seldom invoked its formulation that injury required by Article III "may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'"[22] In contrast, circuit courts regularly recite this language to find Article III standing on the basis of a statutory violation.[23] During oral argument in *First American*, several Justices expressed their discomfort with how this formulation had been applied to Edwards's claim. Justice Kennedy, for one, objected to its circularity. When Edwards suggested that the requisite injury was the denial of an untainted referral to which a homebuyer was entitled by statute, Justice Kennedy objected: "[I]t's circular for you to say he's denied something he's entitled to. The ques-

21. A common law injury to person or property would fit this category.

22. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992) (quoting Warth v. Seldin, 422 U.S. 490, 500 (1975)); Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982) (quoting *Warth*, 422 U.S. at 500).

23. *See, e.g.*, Donoghue v. Bulldog Investors Gen. P'ship, 696 F.3d 170, 175 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 2388 (2013); Scanlan v. Eisenberg, 669 F.3d 838, 845 (7th Cir. 2012); L.A. Haven Hospice, Inc. v. Sebelius, 638 F.3d 644, 656 (9th Cir. 2011).

tion is whether there's an injury. . . . [T]o say he was entitled to it and, therefore, it's an injury . . . that's just circular. That gives no substance at all to the . . . meaning of the term 'injury.'"[24] Chief Justice Roberts similarly expressed doubt that the deprivation of a statutorily created right, without more, could qualify as an injury for standing: "[W]hen you tell me all that you've got or all that you want to plead is violation of the statute, that doesn't sound like injury-in-fact."[25]

With these concerns in mind, Justice Scalia posed the following hypothetical: aiming to ease the IRS's burden in collecting taxes, Congress passes a law giving the customer of any company that has not paid its taxes a cause of action to sue that company for $500.[26] In effect, the statute gives all such consumers the "right to a tax-observant seller."[27] Upon identifying a violation, would a consumer have standing to sue?

For the current Court, the answer would likely be no. In *Lujan v. Defenders of Wildlife*, the Court held that Congress cannot "convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts."[28] *Lujan* was a suit against a public agency, but for the reasons that follow,[29] the Court is likely to require that plaintiffs show a "differentiated" injury in suits against private parties as well.

In the hypothetical, Congress attempts to avoid this hurdle by limiting the universe of plaintiffs to consumers of the company's products. But the result is no less problematic. A consumer has no differentiated interest in seeing that the

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24. Transcript of Oral Argument at 46-47, First Am. Fin. Corp. v. Edwards, 132 S. Ct. 2536 (No. 10-708), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-708.pdf.

25. *Id.* at 32-33.

26. *Id.* at 49.

27. *Id.* Justice Scalia's hypothetical is potentially amenable to a *qui tam* action—with a private relator bringing suit on behalf of himself and the government to recover unpaid funds—but this need not be the case. Instead of a tax-observant seller, Justice Scalia could have described the right to a "pollutant-free seller" without changing the underlying issue.

28. 504 U.S. 555, 577 (1992). In *Lujan*, the Court acknowledged the appearance of a conflict with the formulation in *Warth v. Seldin*: "Nothing in this [opinion] contradicts the principle that '[t]he . . . injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.'" *Id.* at 578 (alterations in original) (quoting Warth v. Seldin, 422 U.S. 490, 500 (1975)) (some internal quotation marks omitted). But in the process, the Court disclaimed the notion that *Warth* gave Congress a free ticket through Article III:

> "[Statutory] broadening [of] the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party . . . suffered an injury." Whether or not the principle set forth in *Warth* can be extended beyond that distinction, it is clear that in suits against the Government, at least, the concrete injury requirement must remain.

Id. (first and second alterations in original) (citation omitted) (quoting Sierra Club v. Morton, 405 U.S. 727, 738 (1972)).

29. *See infra* notes 87-113 and accompanying text.

producer pays its taxes.[30] Congress could just as well have limited the universe of plaintiffs to "people with college degrees or people who were born on a Monday."[31] For the limitation in *Lujan* to have meaning, something more must be required.

This Note focuses on what that something more should be. It does not argue that *Warth v. Seldin* is incorrect, but rather that its formulation, without more, is incomplete.

B. *Why* Warth v. Seldin *Is Not a "Free Pass" Through Article III*

In the tax-observant seller hypothetical, Congress has created a statutory right (the right to a tax-observant seller), and it has conferred a cause of action (a consumer is entitled to $500). The literal terms of *Warth v. Seldin* are met. But, in creating this right, Congress has failed to explain why the consumer is a proper party to bring suit.

This same question animates the Court's struggle in *First American*, but there it is obscured by a second complication: RESPA imposes a legal duty on insurers and confers a cause of action on homebuyers *without* defining the homebuyer's underlying legal right. In effect, Congress has skipped a step. RESPA provides that in title insurance transactions "[n]o person shall give and no person shall accept any . . . kickback."[32] This is the insurer's legal duty. RESPA then provides that parties that breach that duty are liable to the "persons charged for the settlement service involved."[33] This is the homebuyer's cause of action. Nowhere does RESPA explicitly create a legal right for homebuyers.

It is tempting for a plaintiff to claim that "Congress has given me a right to sue, thus I have a legal right." But a "right to sue"—better phrased a "cause of action"—is different from an underlying "legal right." Undoubtedly, Congress can create new legal rights, and Congress can confer causes of action.[34] But not every right comes with a cause of action.[35] Likewise, to claim that a cause of

30. At the very least, she would have to argue that a company that swindles the IRS is more likely to swindle its consumers.

31. Transcript of Oral Argument, *supra* note 24, at 50.

32. 12 U.S.C. § 2607(a) (2012).

33. *Id.* § 2607(d)(2).

34. Indeed, some believe that, where Congress properly exercises its enumerated powers, its power to define new rights and provide attendant causes of action is plenary. *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 251 (1988) ("So long as the substantive rule is constitutionally permissible, Congress should have plenary power to create statutory duties and to provide enforcement mechanisms for them, including the creation of causes of action in plaintiffs who act as 'private attorneys general.'").

35. Addressing the question of implied private rights of action, the Court has made clear that Congress sometimes creates legal rights *without* conferring a cause of action. *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275, 286 (2001) ("The judicial task is to interpret the

action qualifies as the underlying "legal right" would be to bootstrap one's way into satisfying the requirements of injury in fact.

Of course, Congress could have drafted RESPA differently. Just as Congress might have created a "right to a tax-observant seller," Congress could have drafted RESPA to explicitly provide a "right to a kickback-free referral." Since Congress failed to do so, courts are left to infer the existence of that right. Courts often are willing to infer the creation of a legal right where a statute explicitly only imposes a duty.[36] More than likely the Court would have done so in *First American*. But where a court is left to infer a legal right from a corresponding duty, warning bells should go off. It is in this context that the connection between the plaintiff's injury and the alleged conduct is likely to be most tenuous.

Once a court infers from RESPA a "right to a kickback-free referral," the parallels between *First American* and Justice Scalia's hypothetical of the "tax-observant seller" become clear. In each instance, conduct by one party violates a legal right of another. But in each case, there is uncertainty about whether the prospective plaintiff has been otherwise harmed. If Article III requires plaintiffs to show a differentiated injury, the Court needs a principled way to distinguish between these two cases. This Note proposes a solution. By requiring plaintiffs to show a "rational connection" between the defendant's conduct and the plaintiff's statutory right, the Court can ensure that a violation of the plaintiff's right satisfies the Article III requirement that an injury be sufficiently concrete and particularized.

C. Warth v. Seldin *and the Risk of Circularity*

Given his frequent role as the Court's fifth vote, Justice Kennedy's approach to questions of standing is particularly salient. Historically, Justice Kennedy has taken a relatively expansive view of Congress's power to define injury for the purpose of Article III standing. In his oft-cited *Lujan* concurrence, Justice Kennedy wrote: "In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before . . . ."[37] But Justice Kennedy has also signaled his view that Congress's power to define injury is not unlimited. In the same *Lujan* concurrence, Justice Kennedy wrote that to confer standing, "Congress must at the very least . . . relate the injury to the class of persons entitled to bring

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statute Congress has passed to determine whether it displays an intent to create not just a private *right* but also a private *remedy*." (emphases added)).

36. However, courts are not always willing to do so. *See, e.g.*, Gonzaga Univ. v. Doe, 536 U.S. 273, 276 (2002) (holding that the Family Educational Rights and Privacy Act, which prohibits federal funding of educational institutions that release students' records without their authorization, "create[s] no personal rights to enforce" the statute).

37. Lujan v. Defenders of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part and concurring in the judgment).

suit."[38] That being the case, an unbridled application of *Warth v. Seldin* could be problematic. In *First American*, the Ninth Circuit's application of *Warth v. Seldin* effectively transforms the question of injury in fact into one of statutory interpretation. As the Ninth Circuit described in *First American*, its standing inquiry is "[e]ssentially" whether the statute "can be understood as granting persons in the plaintiff's position a right to judicial relief."[39] The court need only look to the text of RESPA to determine whether it prohibited a defendant's conduct: "[I]f it did, then [the plaintiff] has demonstrated an injury sufficient to satisfy Article III."[40]

Warth v. Seldin need not be given such a broad construction. In a RESPA case analogous to *First American*, the Sixth Circuit focused its standing inquiry on identifying a connection between the unlawful kickbacks and the homebuyers bringing suit. Like Edwards, the plaintiffs in *Carter v. Welles-Bowen Realty, Inc.* sought to recover statutory damages under RESPA without alleging injury beyond the violation of their legal rights.[41] Congress, the Sixth Circuit observed, "no doubt has the power to create new legal rights" and "generally has the authority to create a right of action whose only injury-in-fact involves the violation of that statutory right."[42] But, even in suits against private parties, "that congressional authority is not unlimited."[43] Acknowledging these limits, the Sixth Circuit held that the plaintiffs in *Carter* had standing only because their injuries were sufficiently differentiated from the "members of the public at large" given that RESPA authorizes suits "only by [those] individuals who receive a loan that is accompanied by an unlawful referral."[44] The Third Circuit similarly limited the scope of *Warth v. Seldin*. In an analogous RESPA challenge, *Alston v. Countrywide Financial Corp.*, the court found the plaintiff had standing to sue absent a showing of economic injury because "RESPA only au-

38. *Id.*

39. Edwards v. First Am. Fin. Corp., 610 F.3d 514, 517 (9th Cir. 2010) (quoting Warth v. Seldin, 422 U.S. 490, 500 (1975)) (internal quotation marks omitted), *cert. granted*, 131 S. Ct. 3022, *cert. dismissed as improvidently granted*, 132 S. Ct. 2536.

40. *Id.*

41. Carter v. Welles-Bowen Realty, Inc. (*In re* Carter), 553 F.3d 979, 982-83 (6th Cir. 2009).

42. *Id.* at 988.

43. *Id.*

44. *Id.* at 989. The Sixth Circuit advanced a similar analysis in *Beaudry v. TeleCheck Services, Inc.*, 579 F.3d 702, 707 (6th Cir. 2009). Relying on *Carter*, the court found a consumer had standing to sue a corporation under the Fair Credit Reporting Act without showing economic harm. *Id.* The court recognized as a "constitutional limitation[]" on Congress's power to confer standing that the challenged act "cause individual, rather than collective, harm." *Id.* (quoting *Carter*, 553 F.3d at 989) (internal quotation mark omitted). In this case, the court was satisfied that there was a sufficient "nexus between the individual plaintiff and the legal violation." *Id.*

thorizes suits by individuals who receive a loan accompanied by a kickback or unlawful referral."[45]

This Note uses Justice Kennedy's *Lujan* concurrence as a framework from which to propose a more restrained interpretation of *Warth v. Seldin*—one that recognizes that Congress has wide authority to define rights that give rise to injury in fact, but only to the extent that injury relates to the conduct at issue.

II. TRACING THE ORIGIN OF THE ARTICLE III DOCTRINAL GAP

A. *Article III Standing Requirements*

The constitutional standing requirements are, by now, "numbingly familiar."[46] Article III limits the federal judicial power to "Cases" and "Controversies."[47] The Court has developed Article III standing doctrine to serve as an "essential and unchanging part of the case-or-controversy requirement."[48] To have standing under Article III, a plaintiff must demonstrate (1) an "injury in fact,"[49] (2) a "causal relationship between the injury and the challenged conduct,"[50] and (3) a "likelihood that the injury will be redressed by a favorable decision."[51]

At issue in *First American* was the first of these three requirements—whether Edwards had an injury in fact. As the Court has defined injury in fact, a plaintiff must show "an invasion of a legally protected interest" that is both "concrete and particularized"[52] and "actual or imminent, not 'conjectural' or 'hypothetical.'"[53] The injury-in-fact requirement is a "hard floor of Article III jurisdiction that cannot be removed by statute."[54] However, Congress still plays

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45. 585 F.3d 753, 763 (3d Cir. 2009).

46. Fletcher, *supra* note 34, at 222. Eschewing wholesale revisions, the Court has preferred to tinker with its standing formulation, as it has most recently in *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013), and *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). In *Clapper*, a divided Court held that respondents lacked standing to challenge amendments to the law expanding permissible government wiretapping because their asserted injuries depended on a "chain of contingencies." 133 S. Ct. at 1148. In *Hollingsworth*, the Court held that supporters of California's Proposition 8 ban on same-sex marriage did not have standing to appeal a lower court's decision to invalidate the ban. 133 S. Ct. at 2659.

47. U.S. CONST. art. III, § 2.

48. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

49. Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 663 (1993) (quoting *Lujan*, 504 U.S. at 560) (internal quotation marks omitted).

50. *Id.*

51. *Id.*

52. *Lujan*, 504 U.S. at 560.

53. *Id.* (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)) (internal quotation marks omitted).

54. Summers v. Earth Island Inst., 555 U.S. 488, 497 (2009).

an important role in defining the legal interests required by Article III. As the Court has recognized, "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."[55] Justice Scalia himself has acknowledged that the "existence [of standing] in a given case is largely within the control of Congress."[56] After all, the required "legal injury is by definition no more than the violation of a legal right," and "legal rights can be created by the legislature."[57]

In addition to the constitutional requirements of Article III, the Court has developed a second set of "self-imposed limits" on federal court jurisdiction.[58] These "prudential" rules of standing have traditionally included a limitation on third-party standing, a prohibition against "generalized grievances," and a requirement that plaintiffs be within the "zone of interests" protected by the statute.[59] Unlike Article III standing requirements, the judiciary's prudential standing requirements may be overridden by Congress.[60] Of these three traditionally prudential rules, the bar against generalized grievances is relevant to the issue in *First American.* In particular, uncertainty about whether the Court considers it a prudential rather than constitutional requirement bears on the need for a "rational connection" requirement.[61]

B. *Cass Sunstein, William Fletcher, and the Contested Origin of Injury in Fact*

Article III standing continues to be one of the "most contested" doctrines in federal courts.[62] In particular, the injury-in-fact requirement has been the sub-

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55. Massachusetts v. EPA, 549 U.S. 497, 516 (2007) (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment)) (internal quotation marks omitted).

56. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 885 (1983).

57. *Id.* When Justice Scalia stated that standing is "largely within the control of Congress," the operative word is "largely." He subsequently cautioned that "[u]ltimately . . . there is a limit upon even the power of Congress to convert generalized benefits into legal rights." *Id.* at 886.

58. Allen v. Wright, 468 U.S. 737, 751 (1984).

59. *See id.* ("Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.").

60. *See* Bennett v. Spear, 520 U.S. 154, 162 (1997) ("[U]nlike their constitutional counterparts, [prudential standing rules] can be modified or abrogated by Congress.").

61. *See infra* notes 102-07 and accompanying text.

62. Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921-2006*, 62 STAN. L. REV. 591, 594 (2010).

ject of intense scholarly debate.[63] Critics have deemed the injury-in-fact requirement a "singularly unhelpful, even incoherent" part of the law of standing.[64] Most prominent among its critics, Cass Sunstein and William Fletcher have challenged whether injury in fact should be treated as a constitutional requirement at all.[65]

Sunstein's skepticism is rooted in the peculiar way the injury-in-fact requirement was introduced to federal courts jurisprudence. The Supreme Court first articulated injury in fact as a separate factual inquiry in the 1970 case *Ass'n of Data Processing Service Organizations v. Camp*.[66] In the case, an association of data processors sued the Comptroller of the Currency to challenge a regulation allowing national banks to sell competing data processing services. Under the then-existing standing inquiry, the Court would have asked whether the association had alleged an "injury to a legally protected interest."[67] Instead, the Court held the association had standing to sue because the agency's action had caused it "injury in fact, economic or otherwise."[68] Explaining the departure, Justice Douglas's majority opinion stated that the "'legal interest' test goes to the merits. The question of standing is different."[69] By shifting the standing inquiry from a consideration of the plaintiff's legal interest to a factual determination, Justice Douglas sought to expand the universe of plaintiffs who could have standing.[70] But in his effort to lower the bar, Justice Douglas created a new hurdle. The injury-in-fact inquiry would require plaintiffs to make a separate factual showing of injury before engaging in the merits of their claim. To critics of the Court's injury-in-fact doctrine, *Data Processing* has proven to be "an unredeemed disaster."[71]

The recentness of the adoption of an injury-in-fact requirement accounts for some of the scholarly skepticism: "The absence of any mention of an inju-

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63. *See, e.g.*, Heather Elliott, *Congress's Inability to Solve Standing Problems*, 91 B.U. L. REV. 159, 168 (2011); F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 299 (2008); Gene R. Nichol, Jr., *Injury and the Disintegration of Article III*, 74 CALIF. L. REV. 1915, 1924 (1986).

64. Fletcher, *supra* note 34, at 231.

65. *Id;* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 202 (1992).

66. 397 U.S. 150, 152 (1970). The Court also mentioned injury in fact in *Data Processing*'s companion case, *Barlow v. Collins*, 397 U.S. 159, 163 (1970).

67. *See* Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1160 (2009).

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

69. *Id.* at 153.

70. *See* Magill, *supra* note 67, at 1162 ("[T]he result in *Data Processing* proved that the injury-in-fact test expanded the class of persons who had standing to challenge administrative action.").

71. Richard B. Stewart, *Standing for Solidarity*, 88 YALE L.J. 1559, 1569 (1979) (book review); *see also* Fletcher, *supra* note 34, at 229 ("More damage to the intellectual structure of the law of standing can be traced to *Data Processing* than to any other single decision.").

ry-in-fact requirement for over one hundred years after the adoption of the Constitution suggests that the requirement is not essential to the exercise of the federal judicial power."[72] Aside from a historical critique of injury in fact, Sunstein and Fletcher have also questioned its utility. Fletcher, for one, has argued that the requirement cannot be applied in a "non-normative way."[73] He has advocated abandoning the requirement altogether: "[S]tanding should simply be a question on the merits of [the] plaintiff's claim."[74] Sunstein has reached a similar conclusion: "The Court should abandon the metaphysics of injury in fact" and "should return to the question whether a cause of action has been conferred on the plaintiff."[75]

Skepticism among some scholars and jurists has had little effect on the Court's view of the utility of the injury-in-fact requirement.[76] Before his appointment to the Court, Chief Justice Roberts noted that "the academic community is less convinced, but the Court is firmly committed."[77] He objected to scholarly criticism of *Lujan* as a misplaced effort to "challeng[e] the reasoning of the opinion in light of a different premise—the premise that injury is not an Article III requirement."[78] This Note accepts the premise that injury in fact is a constitutional requirement. It is from this starting point that the Note considers how to resolve the doctrinal tensions between an unbounded application of *Warth v. Seldin* and the requirement that plaintiffs have a differentiated injury.

C. *The Origin of Congressional Power to Confer Standing*

The Supreme Court has long recognized Congress's power to confer standing on private parties seeking to challenge private or governmental action. When drafting a statute, Congress has occasionally included a so-called citizen-suit provision explicitly giving concerned or aggrieved citizens the right to challenge a third party's action in court. Early citizen-suit litigation helps to illustrate the Court's eagerness to cabin the potential scope of these provisions. The Court addressed an early iteration of such a provision contained in the

72. Hessick, *supra* note 63, at 299.

73. Fletcher, *supra* note 34, at 231; *see also* Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1160 (1993) ("The injury determination is, necessarily, value-laden—drawing upon both legal norms and social acceptance of the sorts of claims asserted.").

74. Fletcher, *supra* note 34, at 223.

75. Sunstein, *supra* note 65, at 191.

76. Among the benefits of having an injury-in-fact requirement most frequently cited by the Court is the notion that, by requiring a "personal stake in the outcome of the controversy," the doctrine "assure[s] that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends." Baker v. Carr, 369 U.S. 186, 204 (1962).

77. John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1222 (1993) (footnote omitted).

78. *Id.* at 1219.

Communications Act of 1934 in two landmark cases—*FCC v. Sanders Bros. Radio Station*[79] and *Scripps-Howard Radio, Inc. v. FCC*.[80] The provision provided a right to appeal any action by the FCC to "any . . . person aggrieved or whose interests are adversely affected."[81]

In *Sanders Bros. Radio Station*, a radio station challenged the FCC's decision to grant a license to a competing station on the theory that there was insufficient advertising revenue to support both stations.[82] The Court held that the "any person" provision of the Communications Act properly gave the station standing to sue: "It is within the power of Congress to confer such standing to prosecute an appeal."[83] As the Court hypothesized, Congress might have included the provision in recognition that only a party at risk of injury by the granting of a license would have "sufficient interest to bring to the attention of the . . . court errors of law in the action of the Commission."[84]

Similarly, in *Scripps-Howard Radio*, the Court held that a station could challenge the FCC's decision to grant the request of a competing station for a new frequency on the basis that it would injure the original station and thereby risk depriving listeners of the only local, non-network broadcasts.[85] The Court's analysis was noteworthy: under the provision at issue, the "private litigants ha[d] standing only as representatives of the public interest."[86] At this early juncture, the Court accepted Congress's power to confer standing on private parties. But in doing so, the Court did not face the question of whether Congress's power to confer standing extended beyond those at risk of injury by the conduct at issue in a given suit.

D. Lujan *and the Requirement of a Differentiated Injury*

In *Lujan*, the Court held that Congress had impermissibly overstepped the boundaries of Article III standing.[87] At issue in the case was the provision in the Endangered Species Act providing that "any person may commence a civil suit" to enjoin a violation of the Act.[88] On the basis of this citizen-suit provision, conservation organizations challenged Department of the Interior regulations limiting the geographic scope of the Act.[89] In an opinion by Justice Scal-

79. 309 U.S. 470 (1940).
80. 316 U.S. 4 (1942).
81. Communications Act of 1934, 47 U.S.C. § 402(b)(6) (2011).
82. 309 U.S. at 471.
83. *Id.* at 476-77.
84. *Id.* at 477.
85. 316 U.S. at 5.
86. *Id.* at 14.
87. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (1992).
88. Endangered Species Act of 1973, 16 U.S.C. § 1540(g) (2012).
89. *Lujan*, 504 U.S. at 559.

ia, the Court found that Congress could not create standing in this way: "To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts" would be to infringe upon the powers of the executive branch.[90]

While *Lujan* clearly established limits on Congress's power to confer standing to sue the executive, how the Court's reasoning in *Lujan* applies to suits against private parties is less certain. The question is whether a plaintiff that sues another private party must suffer a differentiated injury to satisfy Article III's requirement that an injury be sufficiently concrete and particularized.[91] *Lujan* plausibly limits its reach to suits against the executive. Much of the Court's opinion addresses a concern that the citizen-suit provision undermines the power of the executive to "take Care that the Laws be faithfully executed."[92] In suits against private parties, the separation-of-powers concern should be greatly diminished.[93] Presumably, the parallel enforcement of the law by the executive and through private litigation raises few, if any, concerns about encroachment on the executive.[94]

But there is also language in *Lujan* to suggest that the Court will require differentiated injury in suits against private parties. The Court explained that "Congress established courts to adjudicate . . . claims of infringement of *individual rights* whether by unlawful action of *private persons* or by the exertion of unauthorized administrative power."[95] These "[i]ndividual rights," the Court cautioned, "do not mean public rights . . . legislatively pronounced to belong to each individual who forms part of the public."[96] The Court appeared to be focused on the nature of the right itself rather than on the status of the defendants. From this perspective, it would appear that courts may hear claims against private persons for violating individual rights only to the extent the injuries are distinct from those of the public at large.

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90. *Id.* at 577.

91. Some scholars use the terms "individuated" or "individualized" injury as a substitute for "differentiated" injury. *See* Craig A. Stern, *Another Sign from* Hein*: Does the Generalized Grievance Fail a Constitutional or a Prudential Test of Federal Standing to Sue?*, 12 LEWIS & CLARK L. REV. 1169, 1216 (2008) (describing "individuated injury" as requiring an injury to be "personal and individual, setting the plaintiff apart from the citizenry at large by its particularity").

92. *Lujan*, 504 U.S. at 577 (quoting U.S. CONST. art. II, § 3) (internal quotation marks omitted).

93. *See* Sunstein, *supra* note 65, at 231 ("This concern is entirely inapplicable when the executive is not even a party.").

94. *See id.* at 231 n.300 ("Parallel public and private remedies are most familiar to American law; they do not violate the Constitution.").

95. *Lujan*, 504 U.S. at 577 (emphases added) (quoting Stark v. Wickard, 321 U.S. 288, 310 (1944)) (internal quotation mark omitted).

96. *Id.* at 578 (internal quotation marks omitted).

E. Akins *and the Inconstant Bar Against Generalized Grievances*

Following *Lujan*, the Supreme Court appeared briefly to relax its insistence that plaintiffs suffer a differentiated injury. Most notably, in *FEC v. Akins*, the Court held that individuals had standing to challenge the FEC's failure to require a private political organization to disclose its campaign activities, as the plaintiffs claimed was required by law.[97] The Court reasoned that their injury "consists of their inability to obtain information" that "the statute requires that [the political organization] make public."[98] Despite the fact that this "informational injury" was widely shared, the Court determined that it was "sufficiently concrete and specific" to satisfy Article III.[99] Even so, the Court was careful to distinguish between palpable injuries, like the withholding of information, which happened to be widely shared, and other injuries that are more "abstract and indefinite."[100] For example, injuries arising from a mass tort would be widely shared, but because of the concrete nature of that injury, standing would never be in doubt. By contrast, the Court in *Akins* was clear that an injury "to the interest in seeing that the law is obeyed" would not qualify as an injury in fact.[101]

Akins signaled that the Court would accept for the purposes of standing an injury that was widely shared so long as it was not "abstract." But the Court's distinction between "specific" and "abstract" injuries proved unhelpful in distinguishing those who had standing from those who did not. In Justice Scalia's hypothetical, denial of an individual's right to a tax-observant seller would appear to be an abstract rather than a specific injury. The promise of a cash reward creates a concrete interest but not a concrete injury.

Adding to the uncertainty about the irreducible requirements for injury in fact is the Court's inconsistent treatment of the bar against generalized grievances. At times, the Court has described the generalized grievance doctrine as a self-imposed rule of judicial restraint, which could be overridden by Congress.[102] In other cases, the Court has treated the doctrine as if it were a constitutional requirement; in *DaimlerChrysler Corp. v. Cuno*, the Court contrasted a "concrete and particularized"[103] injury from "a grievance the [plaintiff] 'suffers in some indefinite way in common with people generally.'"[104] Some scholars treat *Lujan* itself as the key inflection point in the transmutation of the bar

97. 524 U.S. 11, 13-14, 26 (1998).

98. *Id.* at 21.

99. *Id.* at 24-25.

100. *Id.* at 23.

101. *Id.* at 24.

102. *See* Bennett v. Spear, 520 U.S. 154, 162 (1997).

103. 547 U.S. 332, 344 (2006) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)) (internal quotation marks omitted).

104. *Id.* (quoting Frothingham v. Mellon, 262 U.S. 447, 488 (1923)); *see also* Lance v. Coffman, 549 U.S. 437, 441 (2007) (per curiam).

against generalized grievances from a prudential to a constitutional requirement: Erwin Chemerinsky, for one, treats the Court's opinion in *Lujan* as a signal that "the bar against generalized grievances will be treated as constitutional and not prudential in the future."[105] A review of the Court's references to the bar against generalized grievances suggests that "the generalized grievance doctrine . . . has variously been categorized as constitutional, prudential, or perhaps both, for nearly its entire history."[106] Most recently, Justice Scalia has asserted that the Court now accepts the generalized grievance doctrine as a constitutional bar: "[W]e [have] held unanimously that suits raising only generalized grievances do not satisfy Article III's requirement that the injury in fact be concrete and particularized."[107]

In *First American*, both Edwards and First American took as a given that Article III requires differentiated injury in suits against private parties.[108] The United States, as amicus curiae in support of Edwards, agreed: "This Court's decisions emphasize that the requirement of 'concrete' and 'particularized' injury, distinguishing the plaintiff 'from the citizenry at large,' is 'the indispensable prerequisite of standing.'"[109] Accordingly, Edwards and the government went to considerable lengths to describe how Edwards's injury was differenti-

105. ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.3, at 100 (6th ed. 2012); *see also* Cass R. Sunstein, *Informational Regulation and Informational Standing:* Akins *and Beyond*, 147 U. PA. L. REV. 613, 643-44 (1999) (suggesting that *Lujan* may have elevated the prohibition of generalized grievances to a constitutional requirement).

106. Stern, *supra* note 91, at 1214; *see also* Ryan Guilds, Comment, *A Jurisprudence of Doubt: Generalized Grievances as a Limitation to Federal Court Access*, 74 N.C. L. REV. 1863, 1884 (1996) (citing judicial "uncertainty about whether generalized grievances are constitutional or prudential limitations").

107. Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 634 (2007) (Scalia, J., concurring in the judgment). Justice Scalia acknowledged that the "Court has occasionally in dicta described the prohibition on generalized grievances as merely a prudential bar." *Id.* at 634 n.5. But, he argued, the cases cited as evidence of a prudential bar "squarely rested on Article III considerations." *Id.*

108. *See* Brief for Petitioners at 38, First Am. Fin. Corp. v. Edwards, 132 S. Ct. 2536 (2012) (No. 10-708), 2011 WL 3706110 ("It is true that Edwards bought title insurance, but that fact does not materially distinguish her from any bystander to the transaction unless the violation had an adverse effect on the purchase—which is precisely what Edwards did not and could not allege."); Brief for Respondent at 40, *First Am.*, 132 S. Ct. 2536 (No. 10-708), 2011 WL 4872040 ("There is 'an outer limit to the power of Congress to confer rights of action.'" (quoting *Lujan*, 504 U.S. at 560 (Kennedy, J., concurring in part and concurring in the judgment))); *id.* at 40-41 ("Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." (quoting Massachusetts v. EPA, 549 U.S. 497, 516 (2007)) (internal quotation marks omitted)).

109. Brief for the United States as Amicus Curiae at 20, *First Am.*, 132 S. Ct. 2536 (No. 10-708), 2011 WL 4957380 (quoting Scalia, *supra* note 56, at 881-82, 895). By recognizing this to be the case, the government conceded that Article III limits Congress's power to confer standing in suits against private parties: "Congress cannot authorize suits by plaintiffs having no particularized connection to an alleged violation by conferring upon all persons a purported 'right' to have regulated parties obey the law." *Id.* at 15.

ated from others.[110] For example, the government argued that RESPA limits potential claims to individuals like Edwards with a "sufficient nexus to the violation to be reasonably regarded as its victims."[111] The government's use of the word "nexus" was notable for its frequency: it appeared in the government's brief five times.[112] At oral argument, Justice Scalia chided the government for submitting a brief "full of 'nexus,'" which he considered "legal jargon for 'connection.'"[113] Whether out of interpretive agreement or strategy, the approach of the parties in *First American* reflected their awareness that Justices on the Supreme Court would require a differentiated injury to satisfy Article III particularity.

III. LOCATING A "RATIONAL CONNECTION" REQUIREMENT

The Court has never directly addressed whether the violation of a person's statutory right constitutes injury in fact absent a showing of a connection between that right and the conduct Congress seeks to regulate.[114] But while the Court has never expressly articulated a "rational connection" requirement, the concept would not be altogether novel.[115] Justice Kennedy's approach to citi-

110. Edwards, for example, highlighted how her status as a contracting homebuyer differentiated her claim: Congress "declared its intent to protect *those consumers* from kickbacks that tend to increase the amount *they pay*." Brief for Respondent, *supra* note 108, at 41. Accordingly, "[w]hat differentiates *her* injury is that *she* purchased insurance as a result of a prohibited conflict that created incentives to disregard *her* best interests." *Id.* at 42.

111. Brief for the United States as Amicus Curiae, *supra* note 109, at 11. The government implied that the need for differentiated injury was rooted in the separation-of-powers concerns raised in *Lujan*. By limiting RESPA suits to homebuyers, the government argued that Congress was "respect[ing] the role of the Executive Branch as vindicator of the public interest." *Id.*

112. *Id.* at 11-12, 22-23, 27.

113. Transcript of Oral Argument, *supra* note 24, at 50.

114. Causation—the Article III requirement that plaintiffs show a causal relationship between the injury and the defendant's conduct—is analytically distinct from the "rational connection" requirement proposed here. To satisfy the causation prong of Article III standing, a plaintiff must prove her injury is "fairly traceable to the defendant's allegedly unlawful conduct." Allen v. Wright, 468 U.S. 737, 751 (1984). In other words, the defendant's conduct must have actually caused the plaintiff's injury. In *First American*, causation was never in doubt. By receiving a kickback, First American had violated Edwards's implied right to a kickback-free referral. The question is whether a violation of this right qualifies as an injury in the first place.

115. In contract law, for example, a "rational connection" requirement is already implicit in the rules governing standing for third-party beneficiaries. Standing in contract disputes is typically limited to those persons who are a party to a contract, but an exception is made when a person not party to the contract is the contract's intended beneficiary. However, courts impose strict limitations on the reach of third-party beneficiary standing. *See* Harry G. Prince, *Perfecting the Third Party Beneficiary Standing Rule Under Section 302 of the* Restatement (Second) of Contracts, 25 B.C. L. REV. 919, 926 (1984) (noting a "presumption against third party beneficiary standing"). For example, a litigant must show that the con-

zen-suit provisions provides an important foundation for such a requirement. Additionally, doctrines in two related areas of law provide additional support for such a requirement: the zone of interests test and *qui tam* jurisprudence.

A. *Citizen Suits and Justice Kennedy's Concurrence in* Lujan

The Court's approach to citizen-suit provisions—designed to confer standing in suits against the executive—offers an important parallel to the Court's approach to suits against private parties. In this context, Justice Kennedy's concurrence in *Lujan* comes closest to articulating a broadly applicable requirement for Article III injury that plaintiffs establish a rational connection between their legal interest and the violation at issue. Justice Kennedy's concurrence is often cited for the proposition that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."[116] But it is his analysis that followed which is of particular relevance here. Justice Kennedy suggested that Article III requires "at the very least" that Congress both "identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit."[117] This threshold showing is necessary, he reasoned, to ensure suits do not simply aim to "vindicate the public's nonconcrete interest in the proper administration of the laws."[118]

Given the focus of Justice Kennedy's analysis on the "complex and farreaching" nature of the modern regulatory state, it seems reasonable to assume that he was writing with agencies in mind.[119] Nevertheless, this two-part inquiry may be useful in setting the parameters within which plaintiffs should have standing to bring suit against private parties. In the first part of the inquiry, Justice Kennedy would require Congress to "identify the injury it seeks to vindicate."[120] In other words, Congress may confer privately enforceable rights only when it reasonably believes that those rights protect against some underlying harm. Congress, it seems, must be guarding persons against *something*—it cannot confer a legal interest and a right to sue by fiat. The second element of Justice Kennedy's formulation is that Congress may confer standing

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tracting parties *intended* the third party to benefit from the fulfillment of the contract. *Id.* at 923 ("[N]early all jurisdictions have agreed that the test for recognizable third party beneficiary rights is evidence that the contracting parties intended the third party to benefit substantially from the promised performance."). While various courts define the scope of this "intent to benefit" test differently—requiring contracts to indicate a "clear," "definite," or "express" intent—the test narrowly circumscribes the number of parties who may bring suit. *Id.* at 926.

116. Lujan v. Defenders of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part and concurring in the judgment).

117. *Id.*

118. *Id.* at 581.

119. *See id.* at 580.

120. *Id.*

to enforce those rights only to that "class of persons" who have some relation to the injury.[121] When describing the need for a relationship between the injury and the "class of persons" entitled to bring suit, Justice Kennedy was unlikely to have had the prudential "zone of interests" test in mind.[122] Instead, he appears to have suggested that Article III itself requires a connection between the injury sought to be redressed and the class of plaintiffs entitled to bring suit. Together, Justice Kennedy's two-part inquiry—that Congress identify the wrong it seeks to vindicate and that it limit the cause of action to the "class of persons" who bear some relation to the conduct—offers a useful formulation for how courts could apply a "rational connection" requirement in suits against private parties.

B. *Zone of Interests*

The prudential standing requirement that plaintiffs be within the "zone of interests" protected by a statute offers a useful analog to the "rational connection" requirement proposed here. A comparison of the two tests suggests a similarity in approach but counsels against treating them as interchangeable requirements.

The Court has traditionally employed the zone of interests test in cases where litigants challenge administrative agency regulations that do not directly regulate their actions. For example, in *Clarke v. Securities Industry Ass'n*, an association of securities brokers challenged the Comptroller of the Currency's decision to permit banks to set up discount brokerage offices in different states.[123] The association claimed the regulation violated a law prohibiting banks from creating branches in other states.[124] The Court found that the association had standing to sue because it had suffered economic injury and was within the zone of interests to be protected by the statute.[125] The Court described the test as follows: "In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies [standing] if the plaintiff's interests are so marginally related to . . . the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit."[126]

Given similarities between the prudential zone of interests test and the Article III "rational connection" requirement proposed here, it might be tempting to apply them interchangeably. In fact, during oral argument in *First American*, Justice Breyer appeared to do just that. Reacting to Justice Scalia's hypothetical

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121. *Id.*

122. Justice Kennedy's analysis was offered in the context of examining the "outer limit to the power of Congress to confer rights of action." *Id.*

123. 479 U.S. 388, 390-93 (1987).

124. *Id.* at 392-93.

125. *Id.* at 403.

126. *Id.* at 399.

about the tax-observant seller,[127] Justice Breyer suggested that Justice Scalia "was reiterating what used to be called a prudential rule of standing. It wasn't constitutional, but you looked to see if the statute is meant to protect this kind of person against that kind of harm."[128] To this, the government pushed back: "[I]t's more than prudential standing. It goes to what is an injury-in-fact . . . ."[129]

Why did the government feel obligated to draw this distinction? Three reasons seem likely. First, applying the zone of interests test in the context of an Article III inquiry would inadvertently elevate to constitutional status what has long been considered a prudential rule of standing. By mixing constitutional and prudential tests, the Court would confuse the proper standing analysis, particularly where it appears Congress has attempted to abrogate the prudential bar.

Second, scholars have long assumed that the zone of interests test applies only to suits against the executive.[130] In *Clarke*, the Court explained that the "principal cases in which the 'zone of interest' test has been applied" are those involving the Administrative Procedure Act and that "the test is most usefully understood as a gloss on the meaning of § 702 [authorizing judicial review]."[131] This has led some scholars to conclude that the zone of interests test is "an additional standing requirement only in cases seeking review of agency decisions" under the Administrative Procedure Act.[132]

Finally, "the Court has been inconsistent about whether [the zone of interests test] is a standing requirement" at all.[133] Often, the Court has failed to include the zone of interests test in the list of prudential standing requirements.[134] When the test resurfaced in *Clarke*, the Court emphasized that the test was "not meant to be especially demanding."[135] Given these reasons, the Court would be wise to keep an Article III "rational connection" requirement separate from an inquiry into the zone of interests. Nevertheless, use of a zone of interests test

127. *See supra* notes 26-27 and accompanying text.

128. Transcript of Oral Argument, *supra* note 24, at 53.

129. *Id.*

130. *See* CHEMERINSKY, *supra* note 105, § 2.3, at 107.

131. *Clarke*, 479 U.S. at 400 n.16.

132. *See* CHEMERINSKY, *supra* note 105, § 2.3, at 107. In its original formulation in *Data Processing*, the Court also described a constitutional dimension: "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or *constitutional* guarantee in question." Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970) (emphasis added). But, in practice, its application has effectively been limited to statutory cases. *See* CHEMERINSKY, *supra* note 105, § 2.3, at 103.

133. CHEMERINSKY, *supra* note 105, § 2.3, at 103.

134. *See, e.g.*, Duke Power Co. v. Carolina Envtl. Study Grp., 438 U.S. 59, 80 (1978); Warth v. Seldin, 422 U.S. 490, 499 (1975).

135. 479 U.S. at 399.

indicates willingness by the judiciary to evaluate when a prospective plaintiff's legal interest is rationally connected to the alleged conduct at issue in a given suit.

C. Qui Tam

A number of scholars and jurists have theorized that Congress could satisfy Article III particularity by offering potential plaintiffs the prospect of a cash bounty for bringing successful suits.[136] This arrangement has most frequently been used to explain standing in *qui tam* actions.[137] But scholars have also speculated that the provision of a cash bounty helps plaintiffs surmount Article III standing obstacles in the context of purely private suits.[138] In recent cases, the Court has cast doubt on the notion that statutory damages can be a substitute for injury in *qui tam* actions or in private suits.

Qui tam actions are suits brought by private individuals on behalf of themselves and the government.[139] Although *qui tam* actions predate the Constitution,[140] the Court did not until recently address whether plaintiffs had Article III standing to bring *qui tam* actions.[141] In 2000, the Court squarely decided that plaintiffs satisfied injury in fact by articulating a theory of "representational standing" in *Vermont Agency of Natural Resources v. United States ex rel.*

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136. Sunstein has advocated forcefully for this approach. *See* Sunstein, *supra* note 65, at 232 ("If Congress wants to reinstate the citizen suit after *Lujan*, a cash bounty would be the simplest strategy. Indeed, an exceedingly short amendment to existing law, giving a bounty to all successful citizen plaintiffs, should be sufficient.").

137. Indeed, Sunstein has suggested the Court practically invited this explanation in *Lujan*. *Id.* The Court wrote: "Nor, finally, is [this] the unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the Government's benefit, by providing a cash bounty for a victorious plaintiff." Lujan v. Defenders of Wildlife, 504 U.S. 555, 572-73 (1992).

138. *See* Sunstein, *supra* note 65, at 232 ("Congress might allow citizens to proceed against [defendants] without requiring a conventional injury in fact, but with provision for a financial bounty to victorious citizen litigants. . . . [T]he plaintiff has a concrete interest in the form of the bounty. Standing seems perfectly appropriate.").

139. The term *qui tam* comes from the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which translates to "who pursues this action on our Lord the King's behalf as well as his own." *See* Rockwell Int'l Corp. v. United States, 549 U.S. 457, 463 n.2 (2007).

140. Writing for the Court, Justice Scalia has traced the origin of *qui tam* actions to the end of the thirteenth century. *See* Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 774 (2000). *Qui tam* suits were prevalent prior to the Framing of the Constitution. *Id.* at 776. Following the Framing, the First Congress enacted a number of informer statutes with *qui tam* provisions. *Id.*

141. Instead, courts have presumed the constitutionality of *qui tam* provisions on account of their longevity. *See* Sean Hamer, *Lincoln's Law: Constitutional and Policy Issues Posed by the Qui Tam Provisions of the False Claims Act*, KAN. J.L. & PUB. POL'Y, Winter 1997, at 89, 95.

Stevens.[142] The Court's reasons for reaching this conclusion directly bear on the need for articulating a rational connection requirement in cases where the suit is brought not on behalf of the government, but on behalf of the party itself.

At issue in *Vermont Agency* was whether a plaintiff had standing to sue under the *qui tam* provisions of the False Claims Act (FCA).[143] The FCA imposes liability on parties that make false or fraudulent claims against the United States. Under the FCA, a private person—dubbed a relator—may file suit "for the person and for the United States Government."[144] Upon a successful outcome, the relator earns a percentage of the money recovered by the government.[145] The Court decided that relators have Article III standing because, as the "assignee" of the claim, they can "assert the injury in fact suffered by the assignor."[146] Describing this arrangement as "representational standing," the Court readily acknowledged that it was a novel approach: "Although we have never expressly recognized 'representational standing' on the part of assignees, we have routinely entertained their suits . . . ."[147]

Typically, the Court mints new constitutional doctrine as a matter of last resort.[148] That appears to be what happened here. The Court employed a theory of representational standing because a relator could *not* show injury in fact on his own. Simply put, the Court determined that a cause of action and a prospec-

142. 529 U.S. at 773 (internal quotation marks omitted).

143. 31 U.S.C. § 3730(b)-(d) (2012). While the FCA is the primary vehicle for *qui tam* actions today, the Court identified at least three other statutes with *qui tam* provisions still "on the books" in 2000. *Vt. Agency*, 529 U.S. at 768 n.1. They included: 25 U.S.C. § 81 (providing a cause of action against parties who unlawfully contract with Indians), 25 U.S.C. § 201 (providing a cause of action against parties who violate Indian protection laws), and 35 U.S.C. § 292(b) (providing a cause of action against parties who falsely sell patented goods). Section 81 has since been amended to eliminate the *qui tam* provision. Indian Tribal Economic Development and Encouragement Act of 2000, Pub. L. No. 106-179, 114 Stat. 46 (codified as amended at 25 U.S.C. § 81 (2012)).

144. 31 U.S.C. § 3730(b)(1).

145. *Id.* § 3730(d).

146. *Vt. Agency*, 529 U.S. at 773.

147. *Id.* at 773-74. Scholars, similarly, were quick to note the novelty of the Court's approach. *See* Myriam E. Gilles, *Representational Standing:* U.S. ex rel. Stevens *and the Future of Public Law Litigation*, 89 CALIF. L. REV. 315, 337 (2001) ("In an unexpected move, the *Stevens* Court upheld the standing of qui tam relators, announcing a new theory of 'representational standing' . . . .").

148. The issue arises most frequently in the context of statutory interpretation. *See* Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181, 186. The substantive canon of constitutional avoidance is often articulated as follows: "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988). Some reasons that animate the avoidance canon—including principles of judicial restraint and conservation of intellectual capital—also counsel against the unnecessary development of novel constitutional theories. *See* Hasen, *supra*, at 187.

tive bounty were—absent the violation of an underlying legal right—insufficient to confer standing. Applying language from *Lujan*, the Court indicated the plaintiff must show a "concrete private interest in the outcome of [the] suit."[149] While acknowledging that the prospect of a bounty "no doubt" amounted to a concrete private interest, the Court observed that "the same might be said of someone who has placed a wager upon the outcome."[150] Clearly, this would be inadequate. "An interest *unrelated* to injury in fact is insufficient to give a plaintiff standing."[151] Instead, the plaintiff's legal interest must arise from the offending conduct. In the words of the Court, "[t]he interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right," and a "*qui tam* relator has suffered no such invasion."[152]

As it relates to *First American*, the Court's reasoning in *Vermont Agency* is strong evidence that Congress cannot satisfy Article III standing simply by imposing a duty and conferring a cause of action with statutory damages. As one commentator has described, in the process of "harmonizing *qui tam* actions with the Article III standing requirement, the Court rejected the theory that granting the party an interest in the lawsuit itself by providing a bounty satisfied the test of injury."[153] To incur an injury in fact, the plaintiff must show the violation of an underlying legal interest. In *Vermont Agency*, the Court acknowledged the principle in *Warth v. Seldin* that Congress can "define new legal rights, which in turn will confer standing,"[154] but it explained that "an interest that is merely a 'byproduct' of the suit itself cannot give rise to a cognizable injury in fact."[155] In a suit under RESPA's anti-kickback provision, plaintiffs cannot simply rely on their cause of action and the prospect of statutory damages to satisfy injury in fact. In addition to the violation of a legal duty, there must be the invasion of a corresponding legal right.

Vermont Agency informs an analysis of Article III injury in fact in two important ways. First, by adopting a theory of "representational standing," the Court implied that the prospect of a cash bounty is an insufficient substitute for the invasion of an underlying legal right. Second, by deciding that a *qui tam* relator "has suffered no . . . invasion" of a "legally protected right,"[156] the Court suggested that the provision of a legal right unrelated to the offending conduct is inadequate for Article III injury.

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149. *Vt. Agency*, 529 U.S. at 772 (alteration in original) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 553, 573 (1992)) (internal quotation marks omitted).

150. *Id.*

151. *Id.* (emphasis added).

152. *Id.* at 772-73.

153. Stern, *supra* note 91, at 1188-89 (footnote omitted).

154. *Vt. Agency*, 529 U.S. at 773 (citing Warth v. Seldin, 422 U.S. 490, 500 (1975)).

155. *Id.*

156. *Id.* at 772-73.

IV. EVALUATING THE APPROPRIATE SCOPE OF JUDICIAL REVIEW

This Note has argued that the violation of a plaintiff's statutory right constitutes an injury in fact so long as that right is "rationally connected" to the conduct Congress seeks to regulate. Courts are well positioned to evaluate the requisite chains of reasoning to determine whether a plaintiff's statutory right is rationally connected to the defendant's conduct. But courts should also be deferential to Congress's judgment about when a plaintiff is reasonably at risk of injury from the conduct Congress seeks to regulate.

A. *Congress Should Have Broad Latitude to Decide When Persons Are at Risk of Injury*

If Article III requires plaintiffs to show a rational connection between their legal interest and the violation of a legal duty, the question is: "How *much* of a connection is . . . necessary?"[157] Stated differently, how broadly can Congress presume that persons are likely to suffer harm from the conduct of others?

The optimal standard of judicial review minimizes the extent to which courts must make normative judgments about what qualifies as injury for purposes of Article III.[158] When Congress creates a statutory right, it proceeds along two dimensions: it defines what injury it seeks to redress, and it determines who suffers from the proscribed conduct. In his *Lujan* concurrence, Justice Kennedy carefully distinguished these two questions: Congress must "identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit."[159] If, as some have suggested, Congress's power to define legal rights and duties is plenary, then it is with regard to the question of who suffers that courts should focus judicial review. The distinction also serves a practical purpose: whereas the question of what constitutes injury is necessarily a normative one, the question of who suffers has at least some grounding in a question of fact.

Congress is in a better position than the courts to evaluate who is reasonably at risk of injury from the conduct Congress seeks to regulate. This is particularly true when the underlying harm is difficult to prove, as is sometimes the case in RESPA suits. The Act gives homebuyers a cause of action because

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157. Justice Scalia asked this very question at argument. *See* Transcript of Oral Argument, *supra* note 24, at 51 (emphasis added).

158. Critics of the Court's injury-in-fact doctrine lament the role courts invariably play in passing normative judgment about what constitutes a cognizable injury under Article III. *See* Fletcher, *supra* note 34, at 231 ("[T]he 'injury in fact' requirement cannot be applied in a non-normative way."); Sunstein, *supra* note 65, at 188-89 ("In classifying some harms as injuries in fact and other harms as purely ideological, courts must inevitably rely on some standard that is normatively laden and independent of facts." (footnote omitted)).

159. Lujan v. Defenders of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part and concurring in the judgment).

Congress has determined that kickbacks paid for client referrals harm homebuyers.[160] In most instances, the homebuyer's economic injury is obvious—in exchange for a kickback, a broker refers the homebuyer to a title insurer charging above the market rate. But in other instances, harm may be harder to prove—a title insurer may charge market rates but provide deficient service.[161] In these instances, Congress can play a useful role in helping to articulate causal chains.[162] This is not to suggest, however, that Article III standing should hinge on finding sufficient evidence in the legislative record. Litigants are also well positioned to explain why their legal interest bears a rational connection to the conduct at issue.

Under even a deferential standard of review, there are limits to when a plaintiff can reasonably claim to be affected by the conduct of a third party. Consider a scenario in which Congress imposes a legal duty on companies to fully fund their employee pensions. Where an employer fails to do so, the employees suffer clear economic injury. By contrast, it would be problematic for *customers* to claim that the company's failure to fund employee pensions causes them differentiated injury. Were Congress to confer a cause of action upon the company's customer base, a court would be well positioned to bar the claim for lack of standing: a "right to a pension-paying producer" lacks a rational connection to the conduct Congress seeks to regulate. A court should dismiss such a suit for lack of Article III standing. The pension suit differs from a RESPA kickback because Congress cannot credibly claim that the cause of action is designed to protect the customer from injury. The hypothetical cause of action for underfunded pensions is just one of innumerable permutations Congress could create to protect those who cannot easily protect themselves. For example, Congress may wish to endow consumers with a cause of action to protect migrant laborers and like groups who lack either the resources or the legal standing to bring suit themselves. But just because Congress wishes to endow plaintiffs with a cause of action doesn't mean courts have to find Article III's standing requirements are satisfied.

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160. "[K]ickbacks or referral fees . . . tend to increase unnecessarily the costs of certain settlement services." 12 U.S.C. § 2601(b)(2) (2012).

161. Justice Ginsburg observed at oral argument that any deficiency in title insurance will not be discovered until long after the kickback has been made:

> [Edwards] can't prove it at the early stage. . . . [T]he problem that Congress was concerned about was that you can't tell until the house is going to be sold in the end how adequate the title insurance was. So, Congress is acting on the potential that these kind of kickbacks can cause harm.

Transcript of Oral Argument, *supra* note 24, at 6.

162. In the legislative history to the 1983 amendments to RESPA, a House Report detailed findings that kickback arrangements harm homebuyers, who are "likely to pay unreasonably high premiums, to accept poor service or to receive faulty title examinations." H.R. REP. NO. 97-532, at 51 (1982).

B. *Where the Statutory Right Bears a "Rational Connection" to the Proscribed Conduct, No Further Proof of Injury Is Required*

At oral argument in *First American*, the Justices debated whether a statutory violation constituted injury in fact absent proof of underlying harm. On this question, Justice Breyer and Justice Scalia probed analytically identical hypotheticals. Justice Breyer offered the following scenario: Congress passes a statute giving individuals a right not to receive telemarketing calls after 7:00 p.m. Anyone who receives a call after 7:00 p.m. has a cause of action for $500. Assume one such individual receives a call but was glad for the distraction. Can she still sue?[163] Justice Scalia followed up with a question about another hypothetical: Congress passes a statute requiring all cars to come with seatbelts. Any customer who purchases a car without a seatbelt has a cause of action for $500. Assume one such customer has plans to replace any seatbelt with his own. Can he still sue?[164]

In either case, the answer should be "yes." The violation of each individual's statutory right itself constitutes an injury in fact. As long as that statutory right bears a rational connection to the conduct Congress is attempting to regulate, the violation of that right satisfies the requirement of Article III particularity. By providing for statutory damages, Congress obviates the need for an individualized inquiry into the *scope* of the plaintiff's injury. When creating a statutory right, Congress has broad discretion to define its remedy. Under most statutes, plaintiffs must prove consequential damages—the damages awarded depend on the extent of their injury. But Congress may provide statutory damages instead.[165] Its decision to do so may reflect any number of policy judgments. For example, the nature or scope of a plaintiff's injury may be difficult to prove. Or the cost of proving the scope of injury may exceed the extent of the injury itself. In RESPA, both factors were likely motivations behind Congress's decision to set a statutory award.

The setup in Justice Breyer's and Justice Scalia's hypotheticals is the same: Congress creates a statutory right to protect persons from injury, but, by happenstance, one prospective plaintiff is not in need of Congress's protection. In either case, the prospective plaintiffs should have standing to sue, and the ra-

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163. Transcript of Oral Argument, *supra* note 24, at 3-4.

164. *Id.* at 51-52.

165. In addition to RESPA, a number of other federal laws authorize statutory damages without requiring proof of actual harm. *See* Brief for the United States as Amicus Curiae, *supra* note 109, at 25-27 (listing statutes). For example, federal copyright law authorizes awarding statutory damages to copyright holders who prove infringement without requiring a further showing of injury. *See* 17 U.S.C. § 504(a) (2012); *see also* 15 U.S.C. § 1117(c) (2012) (statutory damages for using counterfeit marks); *id.* § 1681c(a) (statutory damages for violating the Fair Credit Reporting Act); 18 U.S.C. § 2724(a) (2012) (statutory damages for improperly disclosing information from motor vehicle records); 47 U.S.C. § 227(b)(1)(A)(iii) (2011) (statutory damages for violating the Telephone Consumer Protection Act restricting telemarketing calls).

tional connection requirement helps to reach this conclusion. The alleged conduct violates the plaintiffs' statutory rights, and those rights bear a rational connection to the conduct Congress seeks to regulate. Proof of underlying harm is unnecessary because the violation of the statutory right itself constitutes an injury in fact. Article III requires no more.

CONCLUSION

In *First American*, the Court seemed poised to rule on whether the violation of a plaintiff's statutory right constitutes Article III injury absent evidence of underlying harm. Circuit courts have approached this question in different ways. The Ninth Circuit has adopted an expansive interpretation of the principle in *Warth v. Seldin* that Article III injury may exist solely by virtue of statutes creating rights, the violation of which creates standing. But insofar as the Ninth Circuit would permit plaintiffs to sue without showing a differentiated injury, its interpretation is in considerable tension with the Court's requirement that plaintiffs have a differentiated injury. This Note suggests that Article III requires plaintiffs to show how the violation of their statutory right bears a rational connection to the conduct Congress seeks to regulate. By adopting a rational connection requirement that limits the universe of plaintiffs to persons reasonably affected by the conduct at issue, the Court could resolve the current doctrinal tension between an unbounded application of *Warth v. Seldin* and the requirement of differentiated injury.