WHO SHOULD DEFINE INJURIES FOR ARTICLE III STANDING?

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INTRODUCTION

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

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6. See, e.g., Elliot Katz & Monica Scott, *Spokeo v. Robins: The Case That Has Silicon Valley Buzzing, Even Though Plaintiffs Likely Don’t Have a Leg to “Stand” on*, TECH. LEGAL EDGE (May 22, 2015), http://www.technologyslegaledge.com/2015/05/22/spokeo-v-robins-the-case-that-has-silicon-valley-buzzing-even-though-plaintiffs-likely-dont-have-a-leg-to-stand-on; Scruhado et al., * supra note 2; Surf, Cry, Sue, supra note 3.
plaintiffs who have not suffered an injury-in-fact.” Such a question is, of course, conclusory—Article III, as the Court has interpreted it, requires that a plaintiff be injured in order to have standing. But the Supreme Court is not in the business of simple error correction, and Spokeo would not have garnered so much attention—including over thirty amicus briefs—if it presented only a question that was easily resolved by preexisting standing doctrine.

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

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

I. Spokeo v. Robins and the Non-Legal-Injury Argument

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

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

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7. Scrudato et al., supra note 2.
11. See, e.g., Lujan, 504 U.S. at 560.
13. See, e.g., FEC v. Akins, 524 U.S. 11, 20-21 (1998) (holding that Congress had the constitutional authority to authorize a citizen suit similar to that in Lujan); Raines v. Byrd, 521 U.S. 811, 813-14, 820 (1997) (holding that members of Congress did not have standing to challenge the Line Item Veto Act); Lujan, 504 U.S. at 559-60 (discussing standing as a component of the Constitution’s separation of powers).
someone was injured, we are not just asking, “what happened?” We are also asking what “counts” as an injury. Judge Fletcher gives the example of his daughter Leah, who was aggrieved when her older sister got a bike for Christmas. The Judge told her that the fact that her sister had a new bike did not injure her. But Leah was clearly upset; the real question was whether her claim to injury was one that her family should treat as legitimate. It is this need to sort the legitimate claims from the illegitimate ones that makes the question “is this person injured?” one that requires a legal—not just a factual—answer.

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

The non-legal-injury argument has largely arisen in federal district and circuit courts in the last five years. The phrase “injury in law” owes its renaissance in the contemporary standing context largely to the 2012 case First American Financial Corp. v. Edwards, and particularly to a colloquy during the oral argument in which Chief Justice Roberts stated that he would have thought that the violation of a statutory right “would be called injury-in-law,” not injury-in-fact. While the Court could have weighed in on the injury-in-
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of proving damages in an action for slander); Croker v. N.Y. Tr. Co., 156 N.E. 81, 82 (N.Y. 1927) (positing that in the contract context there was a “purely technical” violation resulting in a promisee’s “injury in law” when the promisor broke his obligation to perform to the benefit of a third party rather than the promisee). And in the standing context, the court in McClure v. Carter distinguished between injury “in law” and injury “in fact” while discussing the lack of clarity of modern standing doctrine. See 513 F. Supp. 265, 269 (D. Idaho), aff’d mem. sub nom. McClure v. Reagan, 454 U.S. 1025 (1981).


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


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

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

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


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

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

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

30. See, e.g., Carey v. Piphus, 435 U.S. 247, 266 (1978) (“Even if respondents’ suspensions were justified, and even if they did not suffer any other actual injury, the fact remains that they were deprived of their right to procedural due process . . . . [W]e believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury.”).
spoken, certain information disclosed, or certain procedures flouted. As a result, requiring some sort of additional indicia of harm beyond the violation itself ignores the nature of the injury and the reason for the remedy.  

If the Supreme Court adopts Spokeo’s argument, it will be hard to avoid leaving some injuries out of whatever standard arises. This, in turn, will lead to the loss of meaningful rights, dishonest application of the new standard, or formalist contortions like labeling the loss of a voting right “property damage.”

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

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

III. CONGRESS’S ADVANTAGES

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

31. Under this view, it is possible to think of statutorily “presumed” damages not as estimations of the downstream consequential harm resulting from a violation, but instead as an evaluation of the damage done by a violation per se.
33. Id.
34. Id. at 508.
35. Id. at 514.
37. Lyons, 461 U.S. at 101-02 (denying standing to a man challenging the LAPD’s use of chokeholds on behalf of himself and others similarly situated).
at least three reasons. First, the need to recognize new injuries may present empirical challenges more approachable via congressional capabilities than judicial ones. In *Allen v. Wright*, for instance, the Court denied standing to the parents of black children suing the IRS for not fulfilling its obligation to deny tax-exempt status to racially discriminatory private schools. The Court distinguished its ruling from its previous failure to find a standing problem in *Coit v. Green*, noting that “extensive evidence” regarding the public school system, private school system, and influence of tax exemptions had been established in *Coit*. To the extent that fact gathering about social institutions and the effects of policymaking are more appropriately legislative rather than judicial functions, the need for an evidentiary basis to underlie complex theories of injury militates in favor of Congress as a decisionmaker. This is all the more true because standing analysis is jurisdictional, and could work to reject claims before extensive discovery is permitted.

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

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

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38. 468 U.S. at 739-40.
41. See, e.g., *id.*
42. 824 S.W.2d 422, 423 (Ky. 1992).
43. *Id.* at 422.
Civil Rights Acts, Clean Water Act, Americans with Disabilities Act, Fair Credit Reporting Act, ERISA, and more. While the non-legal-injury requirement would not undo these laws, it would create a new judicial check on their implementation—the scrutiny of the courts as to whether injuries enabled under a given law meet whatever nebulous standard of “realness” the courts interpret Article III to require.

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

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


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

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

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