PRIVACY INJURIES AND ARTICLE III CONCRETENESS

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ABSTRACT

The Supreme Court's 2016 decision in Spokeo, Inc. v. Robins *requires federal courts to investigate the "concreteness" of a plaintiff's injury, even after Congress has recognized the injury by statute.* Spokeo*'s concreteness discussion is a confusing mixture of several distinct considerations, and there is little rhyme or reason to how the lower courts have interpreted and applied* Spokeo *to other statutorily authorized injuries.*

This Article identifies four distinct informational injuries in the Court's past cases: injuries arising from the withholding, acquiring, using, and disseminating of information. To avoid Spokeo*'s mistakes, federal courts should give binding deference to Congress's decision to make an injury privately enforceable when three conditions are met: when the plaintiff alleges one of these informational injuries; when the defendant is a non-governmental actor; and when Congress has effectively personalized the injury and the plaintiff is among the injured.*

The Court's approach—an unmoored judicial investigation into an informational injury's amorphous "concreteness"—erodes Congress's ability to provide avenues of redress for new and novel harms, and this erosion is already undermining privacy protections. Since Spokeo*, lower courts have refused to enforce provisions of the Fair Credit Reporting Act, the Fair and Accurate Credit Transactions Act, and the Cable Communications Policy Act, among other statutes. The informational-injury lens shows that courts lack a principled way to stop* Spokeo *from also undermining provisions of the Wiretap Act, the Stored Communications Act, Illinois's Biometric Privacy Act, and nascent privacy reform proposals that have private rights of action—including European- and California-style data processing restrictions and an information fiduciary regime.*

The Court's Spokeo *decision is in tension with historical practice, is having deleterious effects on privacy interests in the lower courts, and threatens to gut putative privacy law reform. This Article provides a*

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mechanism for understanding how the Court's standing jurisprudence goes awry, and it posits a simpler and superior alternative approach.

INTRODUCTION

Imagine that Congress enacts a new privacy law with four privately enforceable provisions. First, the statute provides consumers with a right of data access. The data access right entitles any person to demand a copy of the information that a company has compiled on that person. Second, the statute prohibits companies from collecting certain sensitive categories of information—like political and religious beliefs, genetic data, and sexual orientation—absent explicit, opt-in consent. Third, the statute prohibits companies from using biometric data without first obtaining explicit, opt-in consent. Fourth, the statute prohibits companies from selling or otherwise disclosing users' sensitive data, including political and religious beliefs, genetic data, and sexual orientation. Now imagine a hypothetical social networking company. The company refuses to comply with the data access mandate, rebuffing users' requests to see the dossiers the company has created about them. The company has historically collected many different categories of sensitive data and continues to do so without obtaining opt-in consent. The company also continues to generate and use facial recognition scans—without consent—by using its massive cache of photographs. And the company continues to sell advertisers access to profiles of many different categories of users, including Roman Catholic Democratic voters. Users of the social network file suit against the company in federal court, alleging that it has violated the data access right, the prohibition on collecting sensitive data, the restriction on using biometric data, and the disclosure proscription. At the pleading stage, the defendant argues that the plaintiffs have not suffered a concrete injury, and the federal court agrees—holding that it lacks jurisdiction to even consider the merits of the plaintiffs' claims.

This is hardly an outlandish hypothetical. And the result in this case is—arguably, at least—compelled by the Supreme Court's 2016 decision in *Spokeo, Inc. v. Robins*.[1] *Spokeo* requires federal courts to investigate the "concreteness" of a plaintiff's injury, even after Congress has recognized the injury by statute. *Spokeo*'s concreteness discussion is a confusing mixture of several distinct considerations—tangibility, history and Congress's judgment, substantive versus procedural rights, and a so-called "risk of real harm." In the lower courts, *Spokeo* has been an injury Rorschach test: Jurists see what they want in the Court's jumbled discussion, and there is little rhyme or reason to how the circuits have interpreted and applied *Spokeo* to other statutorily authorized injuries. In other words, *Spokeo* clarifies very little, but it has sent one unmistakable message: Many privacy injuries are insufficiently concrete.

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

This Article supplies a framework for understanding the core problems underlying *Spokeo* and much of what has followed. Along the way, it dissects the Court's opinion, explains its subtext, offers an alternative approach, and articulates the decision's ominous implications for the future of actionable privacy injuries.

Article III provides that "'[t]he judicial Power of the United States' . . . extends only to 'Cases' and 'Controversies.'"[2] "Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy," and the doctrine of standing "limits the category of litigants empowered to maintain a lawsuit in federal court."[3] To have standing, "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision."[4]

The modern era of the Court's standing jurisprudence arrived in 1992's *Lujan v. Defenders of Wildlife*.[5] The Court's standing decisions have proliferated after *Lujan* and metastasized during the Roberts Court. In the past decade, scarcely a year has passed at the Court without one or more major decisions premised on Article III standing—from religious tax credits[6] to foreign policy;[7] from foreign surveillance[8] to same-sex marriage;[9] from abortion-related political speech[10] to racial gerrymandering;[11] from immigration[12] to bankruptcy;[13] from partisan gerrymandering[14] to class action settlements;[15] and from racial gerrymandering (again)[16] to overfunded retirement plans.[17]

The frequency of standing decisions does not correlate with their coherency. *Spokeo*, for example, arose under the Fair Credit Reporting Act (FCRA), and the FCRA creates this civil cause of action: "Any person who willfully fails to comply with any requirement [of the FCRA] with respect to any consumer is liable to that consumer."[18] The plaintiff in *Spokeo* alleged that the defendant's "people search engine"

2. *Id.* at 1547 (quoting U.S. CONST., art. III, §§ 1-2).
3. *Id.*
4. *Id.* (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 (1992)).
5. 504 U.S. 555 (1992).
6. *See* Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125 (2011).
7. *See* Zivotofsky v. Clinton, 566 U.S. 189 (2012).
8. *See* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138 (2013).
9. *See* Hollingsworth v. Perry, 570 U.S. 693 (2013).
10. *See* Susan B. Anthony List v. Dreihaus, 134 S. Ct. 2334 (2014).
11. *See* Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257 (2015).
12. *See* United States v. Texas, 136 S. Ct. 2271 (2016).
13. *See* Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973 (2017).
14. *See* Gill v. Whitford, 138 S. Ct. 1916 (2018).
15. *See* Frank v. Gaos, 139 S. Ct. 1041 (2019) (per curiam).
16. *See* Va. House of Delegates v. Bethune-Hill, 139 S. Ct. 1945 (2019).
17. *See* Thole v. U.S. Bank N.A., 140 S. Ct. 1615 (2020).
18. 15 U.S.C. § 1681n(a) (2018).

included search results about the plaintiff that were false.[19] The Ninth Circuit denied the defendant's motion to dismiss the case on standing grounds, but the Supreme Court vacated and remanded. The plaintiff "cannot satisfy the demands of Article III by alleging a bare procedural violation," the Court held, because a "violation of one of the FCRA's procedural requirements may result in no harm."[20]

The *Spokeo* opinion's discussion of an injury's "concreteness" suggests a one-size-fits-all approach to ascertaining whether a plaintiff has suffered an Article III injury. But Article III standing cases are not homogeneous, and *Spokeo* derails by attempting to provide an answer for every type of injury. Instead, *Spokeo* and many of the cases that have followed are best understood as concerning informational injuries.

After providing a brief history of Article III standing, Part I posits a taxonomy of informational injuries in fact. Past cases show that statutorily authorized informational injuries fall into four categories—injuries arising from withholding, acquiring, using, and disseminating information. Since *Lujan*, the Supreme Court has recognized—both implicitly and explicitly—that Congress may convert each of these four types of injuries into a justiciable injury. In several cases, the Court has squarely held that withholding information in violation of a statute is a concrete Article III injury. Second, the Court has repeatedly held or assumed that the acquisition of information in violation of a statute is an injury in fact. The third category concerns using information in violation of a statute. The Court has not squarely addressed the standing implications of injurious uses of information, but many laws limit how information may be used, and the Court's decisions have often assumed that violations of those rules create a justiciable dispute. Finally, the Court has held numerous times—both explicitly and implicitly—that disseminating information in violation of a statute creates a concrete injury in fact.

Part II examines *Spokeo* in three ways. It finely parses the Court's concreteness discussion and diagnoses the decision's latent defects. Among them, the Court ignores Justice Thomas's public-versus-private-rights framework, and the opinion is too eager to further constitutionalize class action defense. Part II concludes by reviewing scholars' and courts' interpretations of the decision.

Part III proposes a superior alternative approach to privacy standing cases. Federal courts should give binding deference to Congress's decision to make an injury privately enforceable when three conditions are met: when the plaintiff alleges an informational injury; when the defendant is a private-sector actor; and when Congress has effectively personalized the injury and the plaintiff is

19. Spokeo, Inc. v. Robins, 136 S. Ct. 1544 (2016).

20. *Id.* at 1550.

among the injured. First, informational injuries pose unique problems for judicial attempts to assess an injury's concreteness. When the political process produces consensus that an informational practice is harmful, courts should embrace that consensus—not displace it. As for the second and third conditions, the sole justification the Court has offered for Article III standing is the separation of powers, but separation-of-powers concerns are absent in cases against private defendants and in cases where Congress has effectively particularized an injury.

With informational injuries, the Court's immodest usurpation of the political process erodes Congress's ability to provide avenues of redress for new and novel harms. Part IV illustrates how this erosion is undermining privacy interests. Lower courts have already refused to enforce provisions of the Fair Credit Reporting Act, the Fair and Accurate Credit Transactions Act, and the Cable Communications Policy Act, among others. The informational-injury lens shows that there is no principled way to stop *Spokeo*'s reasoning from also undermining provisions of the Wiretap Act, the Stored Communications Act, the Video Privacy Protection Act, Illinois's Biometric Information Privacy Act, and nascent privacy reform proposals with private rights of action—including European- and California-style data processing restrictions and an information fiduciary regime.

The Supreme Court's standing jurisprudence is incongruent with historical practice, is having deleterious effects on privacy law in the lower courts, and threatens to gut putative privacy law reform. This Article provides a mechanism for understanding how the Court's standing jurisprudence goes awry, it posits a superior alternative approach, and it exposes how standing doctrine undermines privacy interests.

I. INFORMATIONAL INJURIES IN FACT

Privacy and information are intimately connected. Most privacy injuries are informational in nature.[21] To understand how *Spokeo* undermines privacy, this Part first recites a brief history of Article III standing and then posits a framework that organizes the Court's informational injury cases.

21. *See, e.g.*, Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PENN. L. REV. 477, 489 (2006) (taxonomizing activities that affect privacy as information collection, information processing, information dissemination, and invasions); *id.* at 491 ("Invasion, unlike the other groupings, need not involve personal information (although in numerous instances, it does)."); HELEN NISSENBAUM, PRIVACY IN CONTEXT 2-3 (2009) ("Many . . . argue that protecting privacy means strictly limiting access to personal information or assuring people's right to control information about themselves. I disagree. What people care most about is not simply *restricting* the flow of information but ensuring that it flows *appropriately* . . . .").

A. A Brief History of Article III Standing

Article III provides that "'[t]he judicial Power of the United States' . . . extends only to 'Cases' and 'Controversies.'"[22] The federal judiciary has been concerned with the scope of this power from the very beginning of this country.[23] In the nineteenth century, courts relied on common law pleading and equity practice to identify "cases" and "controversies" amendable to judicial resolution.[24] "But as legislative and administrative rules supplanted common law, as law and equity merged, and as declaratory judgments became a part of the judicial landscape, the definition of justiciable 'cases' became a matter of greater dispute."[25]

The Supreme Court's standing jurisprudence in the early twentieth century stayed opaque but was concerned first and foremost with particularization.[26] For example, the Court held that "[t]he controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests."[27]

The Warren Court changed this formulation. In 1968's *Flast v. Cohen*, the Court addressed taxpayer standing in the context of an alleged Establishment Clause violation.[28] Writing for the majority, Chief Justice Warren allowed the suit to proceed and created the "nexus" test. The nexus test requires "a logical nexus between the status asserted and the claim sought to be adjudicated."[29] Justice William O. Douglas's concurrence presciently noted that the nexus test was not "a durable one."[30]

Two years later, in *Association of Data Processing Service Organizations v. Camp*, Justice Douglas wrote for a unanimous court that "[t]he first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise."[31] "Unlike the *Flast* 'nexus,' the 'injury in fact' criterion proved both hard and luxuriant."[32]

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22. *Spokeo*, 136 S. Ct. at 1547 (quoting U.S. CONST., art. III, §§ 1-2).

23. *See, e.g.*, Letter to George Washington from Supreme Court Justices, FOUNDERS ONLINE (Aug. 8, 1793), https://founders.archives.gov/documents/Washington/05-13-02-0263 [https://perma.cc/62VH-JM3V].

24. *See, e.g.*, Osborn v. Bank of the United States, 22 U.S. 738, 819 (1824).

25. Seth F. Kreimer, *"Spooky Action at a Distance": Intangible Injury in Fact in the Information Age*, 18 U. PA. J. CONST. L. 745, 747 (2016).

26. *See, e.g.*, Frothingham v. Mellon, 262 U.S. 447 (1923).

27. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937).

28. Flast v. Cohen, 392 U.S. 83 (1968).

29. *Id.* at 102.

30. *Id.* at 107 (Douglas, J., concurring).

31. Ass'n of Data Processing Service Orgs., Inc. v. Camp, 397 U.S. 150, 152 (1970).

32. Kreimer, *supra* note 25, at 748.

Even after the arrival of the injury-in-fact requirement, its strictures remained vague, and standing doctrine more generally continued to be convoluted. For example, the Court bifurcated the standing analysis into prudential and constitutional questions. Prudential limitations on standing were subject to removal by the Court or Congress, whereas "the constitutional 'core' of standing . . . [was] a minimum requirement of injury in fact which not even Congress can eliminate."[33]

The Court's decision in 1992's *Lujan v. Defenders of Wildlife* was a decisive turning point. *Lujan* arose under the citizen-suit provision of the Endangered Species Act, which authorizes "any person" to "commence a civil suit on his own behalf to enjoin any person" allegedly violating the Act.[34] The Executive Branch's 1978 regulation interpreted a provision of the statute as applicable abroad;[35] a revised 1986 regulation limited the applicability to the United States and the high seas.[36] Wildlife conservation groups brought suit to enjoin the 1986 regulation, arguing that the new interpretation was inconsistent with the statute. The Court held that the plaintiffs lacked standing under Article III because they had not suffered an "injury in fact."[37]

Lujan represents two important doctrinal shifts. First, *Lujan*'s definition of the "injury-in-fact" requirement has endured ever since. The Court defined the "injury in fact" requirement as "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical."[38]

The second shift concerns the justification for a hawkish approach to Article III standing. *Flast v. Cohen* flatly rejected the notion that standing doctrine's justification was the separation of powers: "The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government."[39] Instead, Warren wrote, "[T]he question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution."[40]

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33. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 890-91 (1983).

34. 16 U.S.C. § 1540(g) (2018).

35. Lujan v. Defs. of Wildlife, 504 U.S. 555, 558 (1992) (citing 43 Fed. Reg. 874 (Jan. 4, 1978)).

36. *Id.* at 558-59 (citing 51 Fed. Reg. 19,926 (June 3, 1986)).

37. *Id.* at 578.

38. *Id.* at 560 (citations omitted).

39. Flast v. Cohen, 392 U.S. 83, 100 (1968).

40. *Id.* at 101.

Justice Scalia—the author of the *Lujan* majority opinion—had contested *Flast*'s treatment of the separation of powers nearly a decade before *Lujan* was decided.[41] In *Lujan*, he seized the opportunity to enshrine the separation of powers as the central justification for limits on Article III standing:

> To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed.[42]

B. A Taxonomy of Informational Injuries

Lujan did not, however, shut the door on intangible injuries. Even after *Lujan*, the Supreme Court has regularly adjudicated cases on the merits where the plaintiff alleged an informational injury in fact. Sometimes the Court expressly addresses the standing issue, but sometimes the Court proceeds to the merits of the case without addressing standing. Both types of cases provide relevant insights about the Court's conception of justiciable injuries because any adjudication on the merits—even dismissing with prejudice—presupposes the existence of standing.[43]

Taking a cue from other privacy law scholars[44] and building on fountains laid by Daniel Solove[45] and Seth Kreimer,[46] this section taxonomizes these informational injuries by sorting them into four categories.

1. Withholding Information

The first type of informational injury arises when a defendant is legally obligated to disclose information and refuses. The Supreme Court has repeatedly emphasized that withholding information in violation of a statute creates a justiciable injury in fact.

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41. *See* Scalia, *supra* note 33, at 891-93.

42. *Lujan*, 504 U.S. at 577, 559-60.

43. *See, e.g.*, Frederiksen v. City of Lockport, 384 F.3d 437, 438 (7th Cir. 2004) ("A suit dismissed for lack of jurisdiction cannot *also* be dismissed 'with prejudice'; that's a disposition on the merits, which only a court with jurisdiction may render.").

44. *See, e.g.*, Solove, *supra* note 21; DANIEL J. SOLOVE, UNDERSTANDING PRIVACY 101-70 (2008); Solon Barocas & Karen Levy, *Privacy Dependencies*, WASH. L. REV. 555 (2020).

45. *See* Solove, *supra* note 21.

46. *See* Kreimer, *supra* note 25.

A prominent illustration of this type of injury is *Federal Election Commission v. Akins*.[47] In that case, the Federal Election Commission (FEC) had determined that the American Israel Public Affairs Committee (AIPAC) was not a "political committee" as defined by the Federal Election Campaign Act.[48] The FEC's determination exempted AIPAC from the statute's mandatory disclosures about its membership, contributions, and expenditures.[49] A group of voters sought review of the FEC's determination that AIPAC was not covered. After the FEC dismissed the voters' petition, they filed suit in federal court pursuant to a provision of the statute that permitted "[a]ny party aggrieved" to seek judicial review of an FEC decision to dismiss a complaint.[50]

The Court held that the voters had standing: "The 'injury in fact' that respondents have suffered consists of their inability to obtain information . . . that, on respondents' view of the law, the statute requires that AIPAC make public."[51] The Court also recognized that past cases had "held that a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute."[52]

Most of the scuffling in *Akins* concerned the particularization requirement—not the concreteness requirement. "Often the fact that an interest is abstract and the fact that it is widely shared go hand in hand," the majority explained, "[b]ut their association is not invariable, and where a harm is concrete, though widely shared, the Court has found 'injury in fact.'"[53] Even Justice Scalia's dissent expressly conceded that withholding information was a concrete injury: "A person demanding provision of information that the law requires the agency to furnish . . . can reasonably be described as being 'aggrieved' by the agency's refusal to provide it."[54]

In short, the Court held that "the informational injury at issue here . . . is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts."[55]

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47. Fed. Election Comm'n v. Akins, 524 U.S. 11 (1998).

48. *Id.* at 13.

49. *Id.*

50. *Id.* at 18; *see also* 52 U.S.C. § 30109(a)(8)(A) (2018).

51. *Akins*, 524 U.S. at 21.

52. *Id.* (citing Public Citizen v. Dep't of Justice, 491 U.S. 440, 449 (1989)); *see* Havens Realty Corp. v. Coleman, 455 U.S. 363, 373-74 (1982).

53. Fed. Election Comm'n v. Akins, 524 U.S. 11, 24 (1998).

54. *Id.* at 30-31 (Scalia, J., dissenting).

55. *Id.* at 24-25.

2. Acquiring Information

A second type of informational injury occurs when information is obtained in violation of a statute. Many Supreme Court cases recognize this type of injury.

In *Bartnicki v. Vopper*, an unidentified person intercepted and recorded a cell phone conversation between a union president and the union's negotiator.[56] The recording was later played on the radio, and the conversation participants sought statutory damages and attorneys' fees under federal and state statutes.[57] The federal Wiretap Act, for example, prohibits "intentionally intercept[ing] . . . any wire, oral, or electronic communication,"[58] and it provides for either actual damages or "statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000."[59]

All nine justices agreed that both the interception and dissemination of the plaintiffs' phone conversation were concrete injuries. A six-justice majority held that enforcing the statute violated the First Amendment but nonetheless acknowledged "that some intrusions on privacy are more offensive than others, and that the disclosure of the contents of a private conversation can be an even greater intrusion on privacy than the interception itself."[60] In dissent, Chief Justice Rehnquist argued that "[t]hese statutes also protect the important interests of deterring clandestine invasions of privacy and preventing the involuntary broadcast of private communications."[61] (Part I.B.4 revisits *Bartinicki* in the context of illegal disseminations of information.)

More recently, in *Clapper v. Amnesty International USA*, the Court implicitly reaffirmed that illegal interceptions of communications are legally cognizable concrete injuries.[62] In 2008, Congress authorized the electronic surveillance of foreign targets, and a group of lawyers and activists sought to invalidate the law, arguing that the surveillance violated their Fourth Amendment rights.[63] The district court dismissed the suit and held the "plaintiffs can only demonstrate an abstract fear that their communications will be monitored."[64] The Second Circuit reversed the district court and said that "standing may

56. Bartnicki v. Vopper, 532 U.S. 514, 518 (2001).

57. *Id.* at 519-20.

58. 18 U.S.C. § 2511(1)(a) (2018).

59. *Id.* at § 2520I(2) (2018).

60. *Bartnicki*, 532 U.S. at 533.

61. *Id.* at 553 (Rehnquist, C.J., dissenting); *see also id.* (citing Gelbard v. United States, 408 U.S. 41, 52 (1972) (compelling testimony about matters obtained from an illegal interception at a grand jury proceeding "compounds the statutorily proscribed invasion of . . . privacy by adding to the injury of the interception the insult of . . . disclosure").

62. *See generally* Clapper v. Amnesty Int'l USA, 568 U.S. 398 (2013).

63. *See id.* at 401, 404-05.

64. Amnesty Int'l USA v. McConnell, 646 F. Supp. 2d 633, 642 (S.D.N.Y. 2009).

be based on a reasonable fear of future injury and costs incurred to avoid that injury, and the plaintiffs have established that they have a reasonable fear of injury."[65]

The Supreme Court reversed the Second Circuit, concluding that "reasonable fear of future injury" was the incorrect standard.[66] Importantly, however, all nine justices agreed that the plaintiffs would have had a concrete injury if they could prove that their communications had been intercepted.[67] One commentator explained, "Notwithstanding the division as to whether plaintiffs had adequately proven a threat of interception, both the majority and dissent in *Clapper* appeared to accept that when the government illicitly acquires private information, an actual interception constitutes a justiciable 'injury in fact.' "[68] Justice Breyer's dissent stressed that "[n]o one here denies that the Government's interception of a private telephone or e-mail conversation amounts to an injury that is 'concrete and particularized.'"[69]

This type of injury also has deep roots in the common law. William Prosser's taxonomy of privacy torts recognized that the intrusion upon seclusion tort "carried beyond . . . physical intrusions . . . [and] extended to eavesdropping upon private conversations by means of wire tapping and microphones."[70]

3. Using Information

The third type of information injury concerns the injurious use of information. This category encompasses several distinct types of injuries, including interests rooted in property, privacy, and discrimination.

Intellectual property law provides a stark example of an information use restriction. With intellectual property law, Congress has constructed a legal regime of property rights in intangible information, and among the rights conferred to the rights-holder is the right to exclude others from using the information.[71]

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65. Amnesty Int'l USA v. Clapper, 638 F.3d 118, 122 (2d Cir. 2011).

66. *See Clapper*, 568 U.S. at 415-16.

67. *Id.* at 419 ("Laidlaw would resemble this case only if . . . it were undisputed that the Government was using § 1811a-authorized surveillance to acquire respondents' communications . . . ."); *id.* at 423 (Breyer, J., dissenting) ("No one here denies that the Government's interception of a private telephone or e-mail conversation amounts to an injury that is 'concrete and particularized.'").

68. Kreimer, *supra* note 25, at 758.

69. *Clapper*, 568 U.S. at 423 (Breyer, J., dissenting).

70. William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 390 (citing, *inter alia*, Rhodes v. Graham, 238 Ky. 225 (1931)); *see also* McDaniel v. Atlanta Coca Cola Bottling Co., 2 S.E.2d 810 (1939); *see also* Roach v. Harper, 105 S.E.2d 564 (W.Va. 1958) (footnotes omitted).

71. *See* Adam Mossoff, *Exclusion and Exclusive Use in Patent Law*, 22 HARV. J. L. & TECH. 321 (2009).

In an intellectual property dispute, the rights-holder sometimes asserts a "wallet injury"—that infringement will reduce sales or increase competition.[72] However, the Supreme Court has never held that a wallet injury is a necessary prerequisite for Article III jurisdiction.[73] For example, in *eBay v. MercExchange*, the Court disagreed about when a patent holder could invoke equitable relief, but all nine Justices agreed that the patent holder had a right to exclude.[74] "The Court has long taken the position that a patent holder who declines to use a patent may prevent others from doing so without showing that she wishes to use or sell the invention."[75]

Intellectual property law may seem rather far afield, but property interests in intangible information have recently arisen in contexts closer to privacy. For example, at oral argument in *Carpenter v. United States*, Justice Gorsuch pressed the government's lawyer on the Fourth Amendment implications of recognizing a property right in intangible information held by a third party.[76] His dissenting opinion in that case picked up the thread, arguing that courts should treat user data held by third-party service providers as a bailment.[77]

Several federal laws include provisions that limit the permissible uses of certain types of information. For example, the Health Insurance Portability and Accountability Act gives individuals the right "to request that the covered entity restrict . . . [*u*]*ses* or disclosures of protected health information about the individual."[78] The Gramm-Leach-Bliley Act's Privacy Rule limits the "redisclosure and reuse" of some nonpublic personal information,[79] and the FCRA expressly limits permissible uses of consumer reports.[80]

Prohibitions on discrimination are also information use restrictions. For example, the Genetic Information Nondiscrimination Act "prohibits the use of genetic information in making employment decisions."[81] Further, "[t]here are no exceptions to the prohibition on using genetic information to make employment decisions."[82]

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72. Kreimer, *supra* note 25, at 793.

73. *See id.* at 789-91.

74. *See* eBay Inc. v. MercExchange, LLC, 547 U.S. 388, 392 (2006); *see also* Kreimer, *supra* note 25, at 790 n.190 (citing cases).

75. Kreimer, *supra* note 25, at 793.

76. *See* Transcript of Oral Argument at 52-55, Carpenter v. United States, 138 S. Ct. 2206 (2018) (No. 16-402).

77. Carpenter v. United States, 138 S. Ct. 2206, 2268-2271 (2018) (Gorsuch, J., dissenting).

78. 45 C.F.R. § 164.522(a)(1)(i)(A) (emphasis added).

79. *See* 12 C.F.R. § 1016.11.

80. *See* 15 U.S.C. § 1681b(3) (2018) (listing permissible "use[s of] the information").

81. U.S. EQUAL EMP. OPPORTUNITY COMM'N, FACTS ABOUT THE GENETIC INFORMATION NONDISCRIMINATION ACT (2014), https://www.eeoc.gov/eeoc/publications/fs-gina.cfm [https://perma.cc/X3PQ-U664]; *see also* 42 U.S.C. § 2000ff–1(a) (2006).

82. EEOC, *supra* note 81.

A decade before *Lujan*, a unanimous Court recognized that using information to discriminate—in violation of a statute—created a justiciable injury.[83] The Fair Housing Act of 1968 "establishes an enforceable right to truthful information concerning the availability of housing," and a plaintiff "who has been the object of a misrepresentation . . . has suffered injury in precisely the form the statute was intended to guard against."[84] It did not matter, the Court held, that the plaintiff "may have approached the real estate agent fully expecting that he would receive false information, and without any intention of buying or renting a home."[85]

Data protection law, privacy law, and privacy scholars have long recognized harm in the unrestricted use of information. Daniel Solove's *A Taxonomy of Privacy* outlines several distinct types of privacy harms that arise from how information is used, such as aggregation and secondary use.[86] Helen Nissenbaum's contextual integrity framework moves away from a rigid control paradigm and instead asks context-specific questions about how personal information is used.[87]

Prosser's appropriation tort recognized an injury when a defendant "makes use of the [plaintiff's] name to pirate the plaintiff's identity for some advantage of [the defendant's] own,"[88] and Prosser identifies "a great many decisions in which the plaintiff has recovered when his name or picture, or other likeness, has been used without his consent to advertise the defendant's product, or to accompany an article sold, to add luster to the name of a corporation, or for other business purposes."[89]

More recently, privacy laws have started recognizing the value of purpose limitations on information. Europe's General Data Protection Regulation (GDPR) identifies the "purpose limitation [as] one of the fundamental principles of European data protection law,"[90] and this

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

84. *Id.* at 373-74.

85. *Id.* at 374.

86. *See* Solove, *supra* note 21, at 510-15, 518-21.

87. NISSENBAUM, *supra* note 21, at 127 (2009) ("[A] right to privacy is neither a right to secrecy nor a right to control but a right to *appropriate* flow of personal information.").

88. Prosser, *supra* note 70, at 403.

89. *Id.* at 401-02 (footnotes omitted and emphasis added).

90. EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS AND COUNCIL OF EUROPE, HANDBOOK ON EUROPEAN DATA PROTECTION LAW 122 (Apr. 2018), https://iapp.org/media/pdf/knowledge_center/Handbook_european_data_protection_02ENG.pdf [https://perma.cc/V4ZR-8PSL] [hereinafter *Handbook*]; *see also* General Data Protection Regulation 2016/679, art. 4, 2016 O.J. (L 119) (on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing General Data Protection Regulation Directive 95/46/EC art. 5(1)(b), 2016 O.J. (L 119/1)) [hereinafter GDPR].

principle "requires that any processing of personal data must be done for a specific, well-defined purpose and only for additional purposes that are compatible with the original purpose."[91]

The California Consumer Privacy Act (CCPA) includes a version of this limitation, prohibiting businesses from "us[ing] personal information collected for additional purposes" without providing notice.[92] Proposed regulations implementing the CCPA have included a strong version of this proscription, providing that a "business shall not use a consumer's personal information for any purpose other than those disclosed in the notice at collection."[93]

Other proposals go further. Implementing a concept pioneered by academics like Solove,[94] Ari Waldman,[95] Jack Balkin,[96] and others,[97] there was recently proposed legislation in New York state that would create a fiduciary relationship between users and companies that collect their information, and this fiduciary relationship would naturally include significant information use restrictions.[98]

4. Disseminating Information

The final category of informational injuries is the dissemination of information. To be sure, dissemination is one way to use information, but information dissemination is a distinct category because the class is clear, well-defined, and recognizes a theory of harm that differs from other injurious uses of information.

There are many examples of Supreme Court cases that hold or assume a plaintiff whose information has been disclosed has suffered a concrete injury. "Since *Lujan*, the Supreme Court has manifested no

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91. *Handbook*, *supra* note 90, at 122.

92. CAL. CIV. CODE § 1798.100(b) (2020).

93. Cal. Attorney General Office, Proposed Text of Regulations, Cal. Consumer Privacy Act, § 999.305(a)(3), https://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/ccpa-proposed-regs.pdf [https://perma.cc/ZAE7-579U].

94. *See* DANIEL J. SOLOVE, THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE 103 (Jack M. Balkin et al. eds., 2004) ("I posit that the law should hold that companies collecting and using our personal information stand in a fiduciary relationship with us.").

95. *See* ARI EZRA WALDMAN, PRIVACY AS TRUST: INFORMATION PRIVACY FOR AN INFORMATION AGE 88-92 (2018) (explaining how an information fiduciary relationship would work in practice).

96. *See* Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1186-87 (2016) (examining the First Amendment ramifications of an information fiduciary relationship).

97. *See, e.g.*, Alicia Solow-Niederman, *Beyond the Privacy Torts: Reinvigorating a Common Law Approach for Data Breaches*, 127 YALE L.J. F. 614, 624-26 (2018) (arguing that data breaches should give rise to a common-law breach of confidentiality tort); Peter C. Ormerod, *A Private Enforcement Remedy for Information Misuse*, 60 B.C. L. REV. 1893, 1936-39 (2019) (arguing for a strict liability information fiduciary tort).

98. *See* S. 5642, 2019 Leg., (N.Y. 2019) ("A legal entity . . . may not use personal data . . . in any way that . . . will benefit the online service provider to the detriment of an end user . . . .").

Article III hesitation in exercising jurisdiction over cases predicated upon intangible harms from the dissemination of information regarding plaintiffs."[99]

Bartnicki is a prominent example of the Court holding that the dissemination of information is a concrete injury. The majority expressly concluded that "the disclosure of the contents of the intercepted conversation . . . violated the federal and state statutes. . . [and the] petitioners are thus entitled to recover damages from each of the respondents."[100] The only remaining question was "whether the application of these statutes in such circumstances violates the First Amendment."[101]

Doe v. Chao is another illustration of this principle.[102] In that case, the plaintiff sued the U.S. Department of Labor for disclosing his Social Security Number in violation of the Privacy Act.[103] Doe sought class certification and statutory damages under the Privacy Act's civil cause of action.[104] The government conceded that its practices violated the law but opposed class certification.[105] At the Supreme Court, Doe argued that the statute "entitles any plaintiff adversely affected by an intentional or willful violation to the $1,000 minimum on proof of nothing more than a statutory violation: anyone suffering an adverse consequence of intentional or willful disclosure is entitled to recovery."[106] The government countered that "the minimum guarantee goes only to victims who prove some actual damages."[107]

A six-member majority ultimately sided with the government, but the decision expressly holds that Doe suffered a concrete injury in fact: The statute's reference to "'adverse effect' acts as a term of art identifying a potential plaintiff who satisfies the injury-in-fact and causation requirements of Article III standing, and who may consequently bring a civil action without suffering dismissal for want of standing to sue."[108] In other words, "an individual subjected to an adverse effect has injury enough to open the courthouse door" but may still lose on the merits.[109] The dissent agreed on the standing issue but

99. Kreimer, *supra* note 25, at 76.

100. Bartnicki v. Vopper, 532 U.S. 514, 525 (2001).

101. *Id.* at 525.

102. Doe v. Chao, 540 U.S. 614, 614 (2004).

103. *Id.* at 616-17.

104. *Id.* at 617; 5 U.S.C. § 552a(g)(4) (2018).

105. *Chao*, 540 U.S. at 617.

106. *Id.* at 620.

107. *Id.*

108. *Id.* at 624 (2004) (citing Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122, 126 (1995) ("The phrase 'person adversely affected or aggrieved' is a term of art used in many statutes to designate those who have standing to challenge or appeal an agency decision, within the agency or before the courts.")).

109. *Id.* at 624-25.

opposed the majority's construction of the statute: "Doe has standing to sue, the Court agrees, based on 'allegations that he was "torn . . . all to pieces" and "greatly concerned and worried" because of the disclosure of his Social Security number . . . .' "[110]

There are many other examples of the Court adjudicating disputes on the merits where the Court simply assumes the injurious nature of information dissemination.[111] Whether explicit or implicit, the Court's clear holdings that disseminations create concrete injury should not be surprising because the common law has long recognized disseminations as injurious. Samuel Warren and Louis Brandeis's article, *The Right to Privacy*, was centrally concerned with the harm arising from dissemination and publication.[112] Prosser later outlined a tort that recognized the harm arising from the public disclosure of private facts.[113] With this four-injury framework in hand, the next Part turns to the Court's decision in *Spokeo v. Robins*.

II. CONCRETENESS IN *SPOKEO V. ROBINS*

In 2016, the Court decided *Spokeo, Inc. v. Robins*.[114] In this case, Robins, the plaintiff, filed suit under the FCRA against Spokeo, a company that operates a "people search engine."[115] The company's search results about Robins contained many falsehoods—it incorrectly "states that he is married, has children, is in his 50's, has a job, is relatively affluent, and holds a graduate degree."[116] Seeking to "ensure 'fair and accurate credit reporting,'" the FCRA "regulates the creation and the use of 'consumer reports' by 'consumer reporting agencies.'"[117] The statute creates a civil cause of action, which provides that

> any person who willfully fails to comply with any requirement of the Act with respect to any individual is liable to that individual" for, among other things, either "actual damages" or statutory damages of $100 to $1,000 per violation, costs of the action and attorney's fees, and possibly punitive damages.[118]

110. *Id.* at 641 (Ginsburg, J., dissenting).

111. *See generally* Kreimer, *supra* note 25, at 773-80.

112. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195-96 (1890); Prosser, *supra* note 70, at 392 ("[T]he article of Warren and Brandeis was primarily concerned with the second form of the tort, which consists of public disclosure of embarrassing private facts about the plaintiff.").

113. *See* Prosser, *supra* note 70, at 392-98.

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

115. *Id.* at 1544.

116. *Id.* at 1546.

117. *Id.* at 1545 (alterations omitted).

118. *Id.*

Robins commenced a putative class action in 2010, alleging that Spokeo willfully failed to comply with the FCRA's requirements.[119] The district court granted Spokeo's motion to dismiss, concluding that "Robins had not 'properly pled' an injury in fact, as required by Article III."[120] The Ninth Circuit reversed, noting that "the violation of a statutory right is usually a sufficient injury in fact to confer standing."[121] According to the Ninth Circuit, Robins had thus alleged a sufficient injury because he averred that "Spokeo violated *his* statutory rights, not just the statutory rights of other people," and because his "personal interests in the handling of his credit information are individualized rather than collective."[122]

The Court granted certiorari on the injury-in-fact issue in 2015.[123] By a 6-2 vote with an opinion by Justice Alito, the Court vacated and remanded the case to the Ninth Circuit.[124] The majority explained that remand was necessary because the Ninth Circuit's analysis focused [only] on the second characteristic (particularly), but it overlooked the first (concreteness)," and ordered the lower court "to consider *both* aspects of the injury-in-fact requirement."[125]

This Part first parses the substantive discussion of "concreteness" in Justice Alito's opinion for the Court. Second, it identifies several issues that are not expressly discussed in the *Spokeo* opinion but which lurk beneath the surface of the Court's recent standing jurisprudence. The third section reviews how scholars and lower courts have interpreted the *Spokeo* concreteness test.

A. Parsing Spokeo*'s Concreteness Discussion*

The substantive discussion of the concreteness requirement in Justice Alito's *Spokeo* majority is quite short—only five paragraphs. The first paragraph merely defines the word "concrete" and distinguishes it from particularization.[126]

The next four paragraphs each touch on distinct issues. First, the opinion draws a distinction between "tangible" injuries and "intangible" injuries.[127] Second, it discusses the roles of "both history and the judgment of Congress" in "determining whether an intangible

119. *Id.* at 1544-45.

120. *Id.* at 1546 (2016).

121. Robins v. Spokeo, Inc., 742 F.3d 409, 412 (9th Cir. 2014).

122. *Id.* at 413.

123. Spokeo, Inc. v. Robins, 575 U.S. 982, 982 (2015). *Spokeo* was the Court's second attempt to refine the statutory standing issue after dismissing as improvidently granted a case called *First American Financial Corp. v. Edwards* on the last day of the October Term 2011. *See* First Am. Fin. Corp. v. Edwards, 567 U.S. 756, 757 (2012).

124. *Spokeo*, 136 S. Ct. at 1550.

125. *Id.*

126. *Id.* at 1548.

127. *Id.* at 1549.

harm constitutes injury in fact."[128] Third, the decision explains that "a bare procedural violation, divorced from any concrete harm [cannot] satisfy the injury-in-fact requirement of Article III."[129] In the final paragraph—before turning to the facts of Robins's case—the opinion says that "the risk of real harm can[] satisfy the requirement of concreteness."[130]

It is unclear exactly how these four considerations—tangibility, history and Congress's judgment, procedural violations, and the risk of real harm—interact with one another.

1. Tangibility

The first issue concerns the role of an injury's "tangibility." The Court's discussion of the difference between tangible and intangible injuries is very short: two sentences and a pair of citations.

The opinion says: "'Concrete' is not, however, necessarily synonymous with 'tangible.' Although tangible injuries are perhaps easier to recognize, we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete."[131] At this point, the decision cites two First Amendment cases[132]—one Free Speech and one Free Exercise—suggesting that violations of enumerated fundamental rights are intangible injuries.

This discussion raises a pair of questions. First, are tangible injuries always concrete? The opinion says only that intangible injuries may sometimes be concrete. At least one commentator has suggested that the Court's discussion means that tangible injuries are always concrete.[133] But if so, it is only implicit. Because the opinion focuses on whether Robins's intangible injury is concrete, the Court does not say whether the analysis ends whenever a court finds a tangible injury.

A second question is more fundamental. How does one distinguish between tangible and intangible injuries? Black's Law Dictionary only distinguishes between tangible and intangible damages,[134] but injury

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 1549 (2016) (citing Pleasant Grove City v. Summum, 555 U.S. 460 (2009) and Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993)).

133. *See, e.g.,* Vanessa K. Ing, Spokeo, Inc. v. Robins*: Determining What Makes an Intangible Harm Concrete*, 32 BERKELEY TECH. L. J. 503, 516 (2017) (providing a decisional flowchart for the *Spokeo* opinion that includes a direct arrow from "tangible harm" to "concrete injury").

134. *Compare Damages,* BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "tangible damages" as synonymous with "actual damages") *with Injury,* BLACK'S LAW DICTIONARY (11th ed. 2019) (lacking any reference to tangibility).

and damages are not synonymous.[135] The Court cites two First Amendment cases as examples of intangible-but-concrete injuries, but these citations only raise more questions.[136] Why are violations of enumerated fundamental rights "intangible" injuries? Is the Constitution the only source of intangible-but-concrete injuries? For that matter, which constitutional violations are intangible injuries and which, if any, are tangible?

One possible reading of this portion of the opinion is that "tangibility" serves as a stand-in for "monetary harm." The virtue of this interpretation is that it helps make sense of the First Amendment citations: violations of Free Speech or Free Exercise rights do not cost money in the same way that a negligent driver's damage to a car costs money.

However, even this interpretation fails to withstand scrutiny. The constitutional violations in the Free Exercise case, *Church of the Lukumi Babalu Aye v. Hialeah*, had not yet caused monetary harm, but that was merely a byproduct of the case's procedural posture—the lawsuit was a pre-enforcement challenge to several city ordinances.[137] The challenged ordinances did, however, include criminal penalties, so the Free Exercise violations could have quickly become monetary penalties or incarceration[138]—both of which seem like tangible injuries.

In any event, the majority outright ignores Robins's argument about the harm that this misinformation caused. As Justice Ginsburg's dissent notes, Robins alleged that "Spokeo's misinformation causes actual harm to his employment prospects" by "creating the erroneous impression that he was overqualified for the work he was seeking, that he might be unwilling to relocate for a job due to family commitments, or that his salary demands would exceed what prospective employers were prepared to offer him."[139]

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135. *See* BRYAN A. GARNER, GARNER'S DICTIONARY OF LEGAL USAGE, 458 (3d ed. 2011) (defining *injuria absque damno*; *injuria sine damno); see also id.* at 243 (defining *damnum absque injuria*).

136. *See* Spokeo, 136 S. Ct. at 1549 (citing *Pleasant Grove City*, 555 U.S. at 460 (free speech) and *Church of Lukumi Babalu Aye*, 508 U.S. at 520 (free exercise)).

137. *See Church of the Lukumi Babalu Aye*, 508 U.S. at 528 ("Following enactment of these ordinances, the Church and Pichardo filed this action . . . in the United States District Court for the Southern District of Florida. Named as defendants were the city of Hialeah and its mayor and members of its city council in their individual capacities. Alleging violations of petitioners' rights under, *inter alia*, the Free Exercise Clause, the complaint sought a declaratory judgment and injunctive and monetary relief.").

138. *See id.* ("Violations of each of the four ordinances were punishable by fines not exceeding $500 or imprisonment not exceeding 60 days, or both.").

139. *Spokeo*, 136 S. Ct. at 1556 (Ginsburg, J., dissenting) (quoting Brief for Center for Democracy & Technology et al. as Amici Curiae, at 13) (internal quotation marks and brackets omitted).

2. History and Congress's Judgment

The next paragraph of the Court's decision begins: "In determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles."[140] This sentence lends support to the interpretation that all tangible injuries are concrete. In other words, only when an injury is intangible should a court proceed to consider the role of history and the judgment of Congress. (This, of course, leads right back into a quagmire of discerning the difference between tangible and intangible injuries.)

First is historical practice. The Court says: "[I]t is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[141] Here, the opinion cites an extended discussion of the historical basis for *qui tam* suits.[142] The problem is that courts have no guidance about what constitutes a sufficiently "close relationship." Further, this instruction may prove helpful in some cases—like those where historical practice proves dispositive—but, at least with regard to privacy harms, the directive to consider history creates more problems than solutions. *Spokeo* itself is an odd fit to admonish courts to consider history since the dissemination of false information has long been actionable at common law.[143]

Second is Congress's judgment. The Court says: "[B]ecause Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important."[144] For support, the decision directs our attention to passages from two opinions in *Lujan*. The majority in that case said, "Congress may 'elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.'"[145] Additionally, Justice Kennedy's concurring opinion in *Lujan* "explained 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.'"[146]

The problem is that *Lujan* held that Congress's citizen-suit provision in the Endangered Species Act (ESA) violated Article III. So, the two citations do not provide any examples of Congress's judgment

140. *Id.* at 1549.

141. *Id.* (citing Vermont Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 775-77 (2000)).

142. *Stevens*, 529 U.S. at 775-77.

143. *See infra* note 161 and accompanying text.

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

145. *Id.* (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 (1992)).

146. *Spokeo*, 136 S. Ct. at 1549 (quoting *Lujan*, 504 U.S. at 580) (Kennedy, J., concurring in part and concurring in the judgment).

successfully "elevating" an injury, "defining an injury," or "articulating" a new chain of causation. In other words, the Court says Congress has the power to legislate injuries but only provides an example where Congress tried and failed to legislate an injury.

Reliance on *Lujan* in this case has other problems—namely, that *Lujan*'s separation-of-powers justification evaporates when the defendant is a not a governmental entity.[147]

3. Substance and Procedure

The next paragraph clarifies that Congress's judgment, alone, is not dispositive. (Indeed, if it were, then Robins would have won.) The Court draws our attention to another consideration at this point—whether the injury is a "bare procedural violation."

The opinion says: "Article III standing requires a concrete injury even in the context of a statutory violation. For that reason, Robins could not . . . allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III."[148]

This passage raises the same pair of questions as the tangibility passage. The first is whether the inverse is true: If a procedural violation may not be concrete, does that mean Congress's creation of a substantive right always creates a concrete injury? Again, some commentary suggests that Congress's creation of a "substantive right" always creates standing.[149]

Second is the definitional problem—how to distinguish between substantive rights and procedural violations? The Court's citations provide little help. The Court cites *Lujan* and *Summers v. Earth Island Institute*—two cases where Congress created a complex statutory regime and purported to authorize any person to sue to ensure the Executive Branch's compliance with Congress's enactment. Congress's purpose with the FCRA is quite distinct from the ESA provision in *Lujan* and from the Forest Service Decision-making and Appeals Reform Act at issue in *Summers*.[150]

Few would argue that the ESA's citizen-suit provision created a substantive right. The FCRA presents a closer question. The FCRA does require consumer reporting agencies to "follow reasonable *procedures*,"[151] but that same provision also says that the purpose of those procedures is to "assure maximum possible accuracy of the information *concerning the individual about whom the report*

147. *See infra* Part II.

148. *Spokeo*, 136 S. Ct. at 1549 (citing Summers v. Earth Island Inst., 555 U.S. 488, 496 (2009) and *Lujan*, 504 U.S. at 572).

149. *See, e.g.*, Ing, *supra* note 133, at 516 (providing a decisional flowchart for the *Spokeo* opinion that includes a direct arrow from "substantive right" to "concrete injury").

150. *See Lujan*, 504 U.S. at 571-72; *Summers*, 555 U.S. at 490.

151. 15 U.S.C. § 1681e(b) (2018) (emphasis added).

relates."[152] The law also grounds its liability provision in individualized terms: The FCRA provides that "any person who willfully fails to comply with any requirement [of the FCRA] with respect to any [individual] is liable to that [individual]."[153] Through this provision, Congress sought to create a far more individualized regime of rights than the citizen-suit provision in *Lujan*.[154]

If the FCRA's rights are not sufficiently "substantive," then how much more explicit must Congress be? Perhaps Congress could avoid the problem outright merely by eschewing the word "procedures." Either way, the distinction between substantive rights and procedural rights is famously slippery,[155] and scholars have long posited that standing itself is a substantive merits doctrine masquerading as a procedural one.[156] Congress has relied on procedural frameworks in many contexts; through this paragraph, the Court diminishes one of Congress's tried-and-true regulatory approaches without justification.

4. Risk of Real Harm

The final paragraph discussing concreteness is scattershot, touching on several disparate topics with no common thread running through the discussion. The Court first says that "the risk of real harm can[] satisfy the requirement of concreteness."[157] This sentence is odd because it shifts the focus to a distinct issue: when the risk of a future injury suffices for Article III standing. The Court cites *Clapper* here,[158] which is two things that *Spokeo* is not: a case about information acquisition and a case about the standard of proof for future injuries.[159] Without elaboration, the opinion returns to discussion of common-law injuries and statutorily authorized procedural injuries.

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152. *Id.* (emphasis added).

153. *Spokeo*, 136 S. Ct. at 1545 (quoting 15 U.S.C. § 1681n(a)).

154. *See* 16 U.S.C. § 1540(g) (2018) (authorizing "any person" to "commence a civil suit on his own behalf to enjoin any person" allegedly violating the ESA).

155. *See, e.g.*, Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801, 812-18 (2009); *cf.* Jennifer S. Hendricks, *In Defense of the Substance-Procedure Dichotomy*, 89 WASH. U. L. REV. 103, 103-104 (2011).

156. *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L. J. 221, 223 (1988) ("As currently constructed, standing is a preliminary jurisdictional requirement . . . . I propose that . . . . standing should simply be a question on the merits of plaintiff's claim."); William A. Fletcher, *The Case of Controversy Requirement in State Court Adjudication of Federal Questions*, 78 CAL. L. REV. 263, 295 n.143 (1990) ("[U]nder my theory of standing as a matter of substantive law, state standing law should be binding on the federal courts, just as other substantive state law currently binds the federal courts under the *Erie* doctrine. Thus, a state court determination of standing to enforce *state* substantive law should be binding on the *federal* courts." (citations omitted)).

157. *Spokeo*, 136 S. Ct. at 1549 (citing Clapper v. Amnesty Int'l USA, 568 U.S. 398 (2013)).

158. *Id.*

159. *See supra* Section I.B.2.

The next sentence purports to illustrate the "risk of real harm" principle, but that suggestion is false. The Court says: "For example, the law has long permitted recovery by certain tort victims even if their harms may be difficult to prove or measure."[160] For support, the opinion cites the *First Restatement of Torts* provisions on libel and slander per se, but this is not an example of a "risk of real harm" because it does not concern the risk of a future injury. Instead, if anything, the sentence and citation are better understood as illustrating two other previously discussed topics: tangibility and historical practice. Slander per se is a good example of an intangible injury (and it illustrates historical common-law practice) because the "original *Restatement* adopted the position of English law and imposed no . . . requirement[]" that the plaintiff must "plead and prove special damages."[161]

Next, the *Spokeo* opinion says: "Just as the common law permitted suit in such instances, the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact."[162] The Court does not explain the connection between a common law tort damages pleading practice and statutorily created procedural right.

The Court concludes with this passage: "[T]he violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact. In other words, a plaintiff in such a case need not allege any additional harm beyond the one Congress has identified."[163] For support, the opinion cites *Akins* and *Public Citizen v. Department of Justice*.[164]

Akins and *Public Citizen*, properly understood, are distinct from *Spokeo* in several respects. First, *Akins* and *Public Citizen* are both information-withholding cases, whereas *Spokeo* is primarily an information-dissemination case. True, both concern informational injuries, but withholding information and disseminating false information have distinct theories of harm. The Court fails to explain what bearing it thinks a withholding case should have on a dissemination case. Relatedly, *Akins* was not a case about the "risk of real harm"—as an information-withholding case, *Akins* concerned an ongoing, present injury. *Spokeo* itself is not necessarily a case about risk either, but the Court suggests that it is, which renders reliance on *Akins* all the more peculiar.

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160. *Spokeo*, 136 S. Ct. at 1549 (citing RESTATEMENT (FIRST) OF TORTS §§ 569, 570 (AM. LAW. INST. 1938)).

161. George C. Christie, *Defamatory Opinions and the Restatement (Second) of Torts*, 75 MICH. L. REV. 1621, 1621 (1977).

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

163. *Id.* at 1549-50 (citing Fed. Election Comm'n v. Akins, 524 U.S. 11, 20-25 (1998) and Public Citizen v. Department of Justice, 491 U.S. 440, 449 (1989)).

164. *See supra* Section I.B.1.

Second, the role of history and Congress seem rather equivocal in *Akins*. History supports an action against false dissemination more strongly than an action for information access,[165] and Congress's role here seems clearer. *Akins* raised particularization concerns (all voters are entitled to the information withheld), whereas the Court is unanimous in agreeing with the Ninth Circuit's analysis that Robins alleged a sufficiently particular harm. If these two considerations matter—and the Court says they do—then the Court is wrong to rely on a case that has a weaker historical basis and a bigger particularization problem. The Court implies that the statute in *Akins* created a procedural right, but this blurs the distinction between particularization and procedural rights.[166]

B. Lurking Issues After Spokeo

Having parsed the Court's discussion of concreteness, this section highlights two issues that the Court did not expressly address. However, the Court's silence on these issues threatens to deafen the little guidance the Court did provide.

1. Justice Thomas's Public and Private Rights

Justice Thomas joined the majority opinion in *Spokeo* and issued a concurring opinion. In his concurrence, Justice Thomas posits a framework for analyzing statutory standing cases.[167] The framework draws on scholarship about the historical distinction between public rights and private rights.[168] Public rights are those "that involve duties owed 'to the whole community, considered as a community, in its social aggregate capacity.'"[169] Examples of public rights include "free navigation of waterways, passage on public highways, and general compliance with regulatory law."[170] In contrast, private rights belong "to individuals, considered as individuals,"[171] and they include "rights of personal security (including security of reputation), property rights, and contract rights."[172]

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165. *See, e.g.*, Christie, *supra* note 161.

166. For more on the blurred distinction between procedural rights and a lack of particularization, *see infra* Section II.B.2.

167. *See Spokeo*, 136 S. Ct. at 1550-54 (Thomas, J., concurring).

168. *See generally* Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?,* 102 MICH. L. REV. 689, 693 (2004); F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 317-321 (2008).

169. *Spokeo*, 136 S. Ct. at 1551 (Thomas, J., concurring) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *5) (internal quotation marks omitted).

170. *Id.* at 1551 (quoting Woolhandler & Nelson, *supra* note 168, at 693) (internal quotation marks omitted).

171. *Id.* (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *2) (internal quotation marks omitted).

172. *Id.* (quoting Woolhandler & Nelson, *supra* note 168, at 693).

Justice Thomas explains that the concrete injury "requirement applies with special force when a plaintiff files suit to require an executive agency to 'follow the law.'"[173] A right to sue to enforce the law, Justice Thomas says, is an example of a public right,[174] but Congress is not similarly restrained when legislating injuries that involve private rights: "[T]he concrete-harm requirement does not apply as rigorously when a private plaintiff seeks to vindicate his own private rights. Our contemporary decisions have not required a plaintiff to assert an actual injury beyond the violation of his personal legal rights."[175] Therefore, "Congress cannot authorize private plaintiffs to enforce *public* rights in their own names, absent some showing that the plaintiff has suffered a concrete harm particular to him."[176] On the other hand, "Congress can create new private rights and authorize private plaintiffs to sue based simply on the violation of those private rights, [and a] plaintiff seeking to vindicate a statutorily created private right need not allege actual harm beyond the invasion of that private right."[177]

After *Spokeo*, Justice Thomas has twice illustrated how to apply his theory.[178] First, in a case arising under the Stored Communications Act,[179] Justice Thomas briefly explained that the statute "creates a private right [because it] prohibits certain electronic service providers from 'knowingly divulg[ing]… the contents of a communication' sent by a 'user'. . . of the service."[180] This, Justice Thomas said, "established standing" because the plaintiffs "alleg[ed] the violation of 'private dut[ies] owed personally' to them 'as individuals.'"[181] Second, in a case arising under the Employee Retirement Income Security Act (ERISA), Justice Thomas argued that the plaintiff-petitioners lacked standing because "none of the rights identified by petitioners belong to them. The fiduciary duties created by ERISA are owed to the plan, not petitioners."[182]

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173. *Id.*

174. *Id.* at 1552 (citing Ex parte Levitt, 302 U.S. 633, 634 (1937) (per curiam) and Summers v. Earth Island Inst., 555 U.S. 488, 490, 496-97 (2009)).

175. *Id.* at 1552 (citing Carey v. Piphus, 435 U.S. 247, 266 (1978)).

176. *Id.* at 1553.

177. *Id.* (citing Warth v. Seldin, 422 U.S. 490, 500 (1975)); *see* Havens Realty Corp. v. Coleman, 455 U.S. 363, 373-74 (1982); Tenn. Electric Power Co. v. TVA, 306 U.S. 118, 137-38 (1939) (citations omitted).

178. *See* Frank v. Gaos, 139 S. Ct. 1041, 146-147 (2019) (Thomas, J., dissenting).

179. For more on this case, *see infra* Section IV.D.2.

180. *Frank*, 139 S. Ct. at 1047 (Thomas, J., dissenting) (quoting 18 U.S.C. §§ 2510(13), 2702(a)(1)-2, (b)).

181. *Id.* at 1047 (quoting *Spokeo*, 136 S. Ct. at 1551 (2016) (Thomas, J., concurring)) (internal quotation marks and brackets omitted).

182. Thole v. U.S. Bank N.A., 140 S. Ct. 1615, 1623 (2020) (Thomas, J., concurring).

Lower courts and commentators have found Justice Thomas's formulation helpful in making sense of the Court's standing doctrine.[183] If a majority of the Supreme Court disagrees with Justice Thomas's framework, then it should explain why and how its conception of standing departs from Justice Thomas's. Doing so would help elucidate what animates the Court's concreteness inquiry.

Justice Thomas's framework does raise questions of its own. First, "[u]nder what circumstances can Congress privatize a previously public right? When and how can Congress convert a legal duty that might traditionally have seemed public into a private one?"[184] There are, William Baude explains, two ways to answer this question—one restrictive and one more permissive.[185] The restrictive answer requires that a private right must take one of four specific forms enumerated in *Tennessee Electric Power Co. v. TVA*: The right invaded must be "a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege."[186] The more permissive answer, Baude says:

> [W]ould not wed itself to particular Hohfeldian categories or the language of *Tennessee Electric*. Under this version, any legal duty may be said to create a private right so long as it is adequately personalized—owed to a specific person or group of persons rather than to the public at large.[187]

A second and related issue concerns the difference between insufficiently concrete and insufficiently particular injuries. The *Spokeo* majority painstakingly erects a barrier between particularization and concreteness, and though he joined the majority opinion, Justice Thomas's theory begins to erase that exact distinction.[188] Justice Thomas directs his inquiry to whether the legislature "created a private duty owed personally to [the plaintiff] to

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183. *See*, *e.g.*, Carney v. Goldman, No. 15-260-BRM-DEA, 2016 WL 7408849, at *5 (D.N.J. 2016) (citing *Spokeo*, 136 S. Ct. at 1554 (Thomas, J., concurring)); Bautz v. ARS Nat'l Servs., Inc., 226 F. Supp. 3d 131, 141 (E.D.N.Y. 2016) (citing *Spokeo*, 136 S. Ct. at 1553 (Thomas, J., concurring)); William Baude, *Standing in the Shadow of Congress*, 2016 SUP. CT. REV. 197, 227-31 (explaining that Justice Thomas's concurrence "has several virtues" and "is plausible and generally consistent with history and doctrine"); *see generally* Michael N. Wolgin, *"Concrete" Disparities in Article III Case Law After* Spokeo, CARLTON FIELDS PUBLICATIONS, Jan. 31, 2017, https://casetext.com/analysis/concrete-disparities-in-article-iii-case-law-after-spokeo [https://perma.cc/8AZW-F7YN].

184. Baude, *supra* note 183, at 230.

185. *Id.* at 230-31.

186. *Spokeo*, 136 S. Ct. at 1553 (Thomas, J., concurring) (quoting Tenn. Elec. Power Co. v. TVA, 306 U.S. 118, 137-38 (1939)).

187. Baude, *supra* note 183, at 231 (discussing *Tenn. Elec. Power Co.*, 306 U.S. at 137-38).

188. *See Spokeo*, 136 S. Ct. at 1548 ("We have made it clear time and time again that an injury in fact must be both concrete *and* particularized."); *id.* at 1550 ("Because the Ninth Circuit failed to fully appreciate the distinction between concreteness and particularization, its standing analysis was incomplete."). For more on this distinction, *see infra* Part III.

protect *his* information."[189] This, as Baude notes, is a question about particularization—suggesting that "a statutory right is an enforceable private right if it is 'individualized rather than collective,' and if the person suing is 'among the injured.'"[190]

A final series of questions about Justice Thomas's approach concerns how it interacts with several issues discussed elsewhere in this Part. For one, how does the public/private rights distinction differ from the substance/procedure distinction the majority discusses? In other words, if "follow the law" injuries are procedural, then Justice Thomas's "private rights" may be synonymous with substantive rights.

And for another, what role does a governmental defendant play? Justice Thomas says "general compliance with regulatory law" is an unenforceable public right.[191] In this case, however, a private company was sued for failing to comply with a regulatory framework—alleviating concerns about infringing on the Executive Branch and rendering this case distinct from a case like *Lujan*. At one point, Justice Thomas suggests that separation-of-powers concerns drop out of the equation entirely when the defendant is a private party: "[W]here one private party has alleged that another private party violated his private rights, there is generally no danger that . . . the legislative branch has impermissibly delegated law enforcement authority from the executive to a private individual."[192] But elsewhere Justice Thomas implies that Article III continues to limit Congress's ability to employ the so-called "private attorneys general" doctrine: "[B]y limiting Congress' ability to delegate law enforcement authority to private plaintiffs and the courts, standing doctrine preserves executive discretion."[193] After all, Justice Thomas's decision to join the majority opinion in *Spokeo* suggests that he believes the separation of powers justification has a role even when the defendant is a private party.[194]

2. A Constitutional Dimension to Class-Action Defense

A second issue not discussed explicitly in *Spokeo* is the role of the case's class action posture. There is good reason to believe—despite the Court's silence—that hostility toward statutory damages class actions is animating the Court's standing jurisprudence in *Spokeo* and elsewhere.

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189. *Spokeo*, 136 S. Ct. at 1554.

190. Baude, *supra* note 183, at 231 (quoting Robins v. Spokeo, Inc., 742 F.3d 409, 413-14 (9th Cir. 2014)).

191. Spokeo, 136 S. Ct. at 1551-52 (Thomas, J., concurring) (quoting Woolhandler & Nelson, *supra* note 168, at 693).

192. *Id.* at 1553.

193. *Id.* at 1552-53.

194. *See*, *e.g.*, *id.* at 1553 (2016) ("Robins has no standing to sue Spokeo, in his own name, for violations of the duties that Spokeo owes to the public collectively.").

Both before and after *Spokeo*, the Court has considered related statutory standing issues. The issue first arose in *First American Financial v. Edwards*, which was dismissed as improvidently granted.[195] More recently, the Court granted *Frank v. Gaos* to address the legality of *cy pres* settlements, but it ended up vacating and remanding the case to the lower courts to apply the *Spokeo* concreteness test in the first instance.[196] *Spokeo* and *Gaos* were privacy cases, but *First American* was not.[197] All three cases, however, were statutory damage class actions. Admittedly a small sample, this nonetheless suggests that—while privacy injuries often raise standing arguments—the Court's concern with statutorily authorized standing correlates more strongly with class actions.

In cases that implicate statutory damages provisions, the Court's interpretation of Federal Rule of Civil Procedure 23 incentivizes plaintiffs to omit highly fact-specific allegations about their individualized injuries. Rule 23(b)(3) provides: "A class action may be maintained if . . . the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members."[198] The Court's interpretation of Rule 23(a)(2)'s commonality requirement demands that all "class members 'have suffered the same injury.'"[199] These provisions operate—along with *Spokeo*'s concreteness test—as a pincer against class action plaintiffs: Omitting fact-specific injury allegations creates a concreteness problem under *Spokeo*, whereas including fact-specific injury allegations makes class certification impossible.

There are other clues that suggest the Court's conservatives are more concerned with limiting the availability of class actions than with privacy injuries. Chief Justice Roberts has suggested that class actions can be inconsistent with Article III's "judicial Power." Two months before *Spokeo* was decided, Roberts wrote a concurring opinion in *Tyson Foods v. Bouaphakeo*, a class action case arising under the Fair Labor Standards Act.[200] In a portion joined by Justice Alito, the Chief Justice remarked: "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not. The

195. *See supra* note 123 and accompanying text.

196. *See* Frank v. Gaos, 139 S. Ct. 1041 (2019) (per curiam). The Court also recently decided an Article III standing case that arose under ERISA. *See* Thole v. U.S. Bank, 140 S. Ct. 1615 (2020). *Thole* was also a class action, but it was not a case involving privacy.

197. That said, companies that traffic in personal data recognized the importance of the standing issue for privacy law as early as *Edwards*. *See*, *e.g.*, Brief for Experian Information Solutions, Inc., as Amicus Curiae Supporting Petitioners, First American Financial Corp. v. Edwards, 564 U.S. 1018 (2011) (No. 10-708); Brief for Facebook, et al., as Amici Curiae Supporting Petitioners, *Edwards*, 564 U.S. 1018 (No. 10-708).

198. FED. R. CIV. P. 23(b)(3). *See also* Comcast Corp. v. Behrend, 569 U.S. 27, 34-38 (2013) (interpreting rule 23(b)(3)'s predominance requirement stringently).

199. *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349-50 (2011) (citation omitted).

200. Tyson Foods, Inc. v. Bouaphakeo 136 S. Ct. 1036 (2016).

Judiciary's role is limited 'to provid[ing] relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm.'"[201]

Thirteen months after *Spokeo*, Justice Thomas's concurring opinion in *Microsoft v. Baker* echoed the Chief Justice's *Tyson Foods* concerns.[202] As several commentators noted, Justice Thomas's concurring opinion suggests there are at least three justices who want to rigorously apply Article III standing requirements to cull class sizes.[203] In sum, Roberts and the other conservatives likely believe that statutory damages class actions raise the same problem—purportedly providing relief to claimants "who have [not] suffered . . . actual harm."[204]

This realpolitik explanation of the Court's standing jurisprudence has largely escaped scholarly comment,[205] but it is no secret.[206] The class action defense bar openly argues that the Supreme Court should constitutionalize a usurpation of Congress's ability to legislate injuries because it would be good for business. For example, after the Court

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201. *Id.* at 1053 (Roberts, C.J., concurring). The Court recently granted cert. in a case that squarely raises a question about the interaction between Article III and Federal Rule of Civil Procedure 23. *See* TransUnion LLC v. Ramirez, No. 20-297, 2020 WL 7366280 (Dec. 16, 2020).

202. *See* Microsoft Corp. v. Baker, 137 S. Ct. 1702 (2017). This case involved a narrow question about whether class-action plaintiffs could obtain mandatory appellate review of a class-certification denial by voluntarily dismissing their individual claims. All eight justices agreed that Court of Appeals lacked jurisdiction after the plaintiffs' voluntary dismissal, but the justices disagreed about why. *Id.* at 1712-17. Justice Thomas's concurring opinion argued that the Court lacked jurisdiction under Article III, remarking: "Class allegations, without an underlying individual claim, do not give rise to a 'case' or 'controversy.' Those allegations are simply the means of invoking a procedural mechanism that enables a plaintiff to litigate his individual claims on behalf of a class." *Id.* at 1717 (Thomas, J., concurring in the judgment).

203. *See, e.g.*, Alison Frankel, *Lurking in Latest SCOTUS Class Action Ruling: Long-running Question of Standing*, REUTERS (June 12, 2017), https://www.reuters.com/article/us-otc-standing/lurking-in-latest-scotus-class-action-ruling-long-running-question-of-standing-idUSKBN1932DV [https://perma.cc/JBL6-BAYV] ("Justice Thomas was getting at a long-running class action question the Supreme Court has danced around but never answered directly: Can a class be certified if it includes class members who don't meet constitutional standing requirements?"); Archis A. Parasharami, *Supreme Court Rejects End Runs Around Rule 23(f) by Use of "Voluntary Dismissal" Tactic*, MAYER BROWN CLASS DEFENSE BLOG (June 12, 2017), https://www.classdefenseblog.com/2017/06/supreme-court-rejects-end-runs-around-rule-23f-use-voluntary-dismissal-tactic/ [https://perma.cc/75DV-VD3Z].

204. *Tyson*, 136 S. Ct. at 1053 (Roberts, C.J., concurring).

205. *But cf.* Joan Steinman, *Spokeo, Where Shalt Thou Stand?*, 68 VAND. L. REV. EN BANC 243, 251-56 (2015) (asking whether Robins's class action allegations were relevant to the case before the Court's initial decision).

206. *See, e.g.*, John Seiver & Bryan Thompson, *Supreme Court's "Standing" Ruling and Its Impact on Pending and Future Litigation*, DAVIS WRIGHT TREMAIN LLP (June 9, 2016), https://www.dwt.com/insights/2016/06/supreme-courts-standing-ruling-in-spokeo-and-its-i [https://perma.cc/N87S-7D5M] ("*Spokeo*'s emphasis on plaintiffs demonstrating both a concrete *and* particularized harm in order to survive the standing inquiry may create problems for certifying a class under Rule 23(b)(3), which requires a class may only be certified if questions common to class members predominate over those affecting individual members and requires the class representative's claims to be typical of the class members.").

vacated and remanded, the Ninth Circuit evaluated the concreteness of Robins's alleged injury and again agreed with him.[207] Spokeo petitioned the Supreme Court a second time, seeking certiorari on the question of whether the Ninth Circuit's remand decision faithfully applied the Court's *Spokeo* opinion.[208] At every opportunity—including the initial certiorari-stage briefing,[209] the merits briefing,[210] and at the post-remand cert. stage[211]—the company and its amici relentlessly pressed policy arguments about the case's class action posture.

Remember that industry is making these constitutional arguments before the Supreme Court because Congress's policy choices occasionally create potentially large legal liabilities. Large companies and their allies are advancing a naked policy argument—that the interaction of the Federal Rules of Civil Procedure and Congress's statutory damages provisions may occasionally threaten their profitability—not to Congress, the body with plenary authority to grant the reprieve they seek. Rather, they advance that argument at the Supreme Court, urging the Court to interpret Article III in a way that has wide-ranging consequences for the separation of powers and Congress's ability to identify injuries and provide avenues for their redress.

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207. Robins v. Spokeo, Inc. (*Spokeo II*), 867 F.3d 1108 (9th Cir. 2017).

208. *See* Petition for Writ of Certiorari, *Spokeo II,* 867 F.3d 1108 (No. 17-806).

209. *See, e.g.*, Brief for Chamber of Commerce of the United States and the International Association of Defense Counsel as Amici Curiae Supporting Petitioner at 13-21, Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2014) (No. 13-1339) (arguing that "The Decision Below Will Encourage Abusive Class-Action Litigation"); Brief for Consumer Data Industry Association as Amici Curiae Supporting Petitioner at 15-22, Spokeo, Inc. v. Robbins, 136 S. Ct. 1540 (2014) (No. 13-1339) (arguing that "The Ninth Circuit's Decision Threatens [Our] Members With Crushing Liability Through Unchecked Class Action Litigation"); Brief DRI – Voice of the Defense Bar as Amicus Curiae Supporting Petitioner at 19, Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2014) (No. 13-1339) ("Litigation brought by entrepreneurial class action attorneys attempting to serve as private attorneys general in lieu of the federal government harms the civil justice system, both because it creates enormous litigation costs with no attendant benefit and because it destabilizes the carefully-calibrated equilibrium between the political branches of government and the judiciary.").

210. *See, e.g.*, Brief for the Chamber of Commerce of the U.S. America et al. as Amici Curiae Supporting Petitioner at 12-27, Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2015) (No. 17-806) (arguing that the decision below "Invite[s] Abusive Class-Action Litigation").

211. *See, e.g.*, Petition for a Writ of Certiorari at 23, Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2017) (No. 17-806) ("Encouraged by decisions like the one below, and lured by the combination of statutory damages and the class action device, plaintiffs will continue to argue that the real-world impact of the alleged legal violation on plaintiffs is irrelevant."); Brief for Chamber of Commerce at 12, Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2018) (No. 17-806) ("The Court should grant certiorari because the question presented is enormously important in modern class action litigation."); Brief for Consumer Data Industry Association at 14-18, Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2018) (No. 17-806) (arguing that "CDIA members continue to face ruinous damages through no-injury class actions as a result of the inconsistent application of *Spokeo I*"). This was also true in First Am. Fin. Corp. v. Edwards, 564 U.S. 1018 (2011). *See* Brief for Respondent at 52-54, *First Am. Fin. Corp.* v. *Edwards*, 564 U.S. 1018 (2011) (No. 10-708) (arguing that "The Court Should Not Rewrite Article III To Address Purported Class Action Abuses").

C. Rivaling Interpretations of Spokeo*'s Concreteness Test*

The Court's decision in *Spokeo* has wrought much confusion. Courts and commentators do not agree about how to conduct the Article III concreteness inquiry. This section considers five different interpretations.

Craig Konnoth and Seth Kreimer interpret *Spokeo* to create "a six-stage process."[212] These are the six stages:[213]

(A) Ask whether an injury is particularized. If not, there is no justiciable injury in fact.[214]

(B) If particularized, then ask if the injury is tangible. If so, there is a justiciable injury.[215]

(C) If not tangible, ask whether the injury is constitutional. If so, a justiciable injury in fact is "possible" but not certain.[216]

(D) If not constitutional, ask if the injury is historically recognized. If so, it is again possible there is a justiciable injury in fact.[217]

(E) If not historically recognized, ask whether the injury is recognized by statute. If not, then there is no justiciable injury.[218]

(F) If it is statutorily recognized, then ask if there is a material risk of real harm. If so, it is once again possible there is a justiciable injury. But if not, then there is no justiciable injury.[219]

212. Craig Konnoth & Seth Kreimer, *Spelling Out Spokeo*, 165 U. PA. L. REV. ONLINE 47, 62 (2016).

213. *Id.* at 62.

214. *Id.* at 50-51.

215. *Id.* at 51-52.

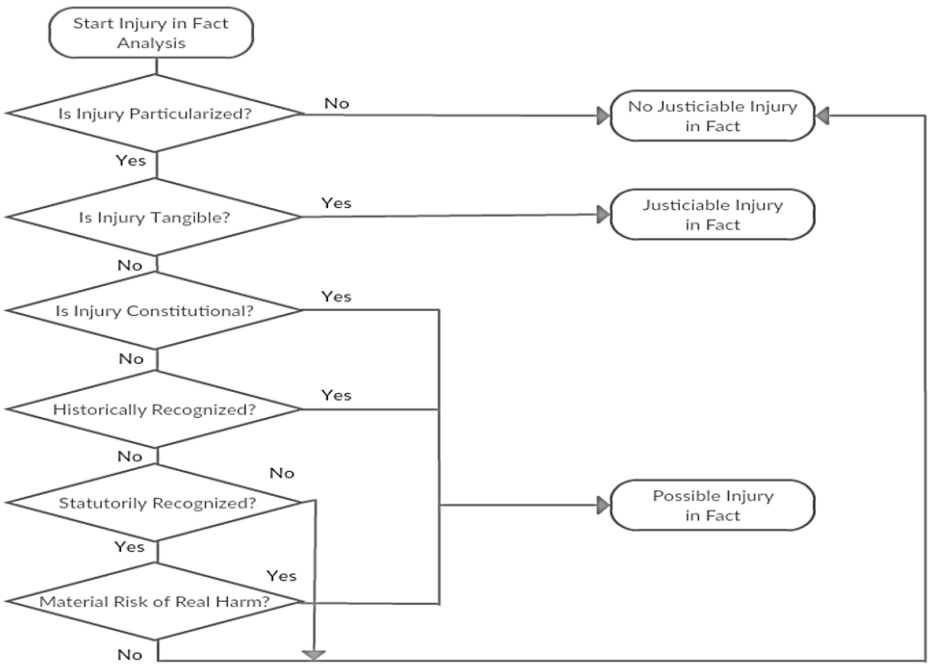
216. *Id.* at 52-53.

217. *Id.* at 54-55.

218. *Id.* at 55-58.

219. *Id.* at 59-60.

Konnoth and Kreimer provide this visualization:[220]



Despite the complexity of this interpretation, Konnoth and Kreimer explain that the inquiry nonetheless remains "indeterminate. It answers some questions, but *Spokeo*'s analysis ultimately resembles its outcome—an unstable equilibrium—leaving courts, litigants, and commentators in considerable doubt as to where the wheel will spin next."[221]

220. *Id.* at 62.

221. *Id.* at 61.

In a similar vein, Vanessa Ing reads *Spokeo* to create a four-step inquiry.[222] Ing explains the steps like this:[223]

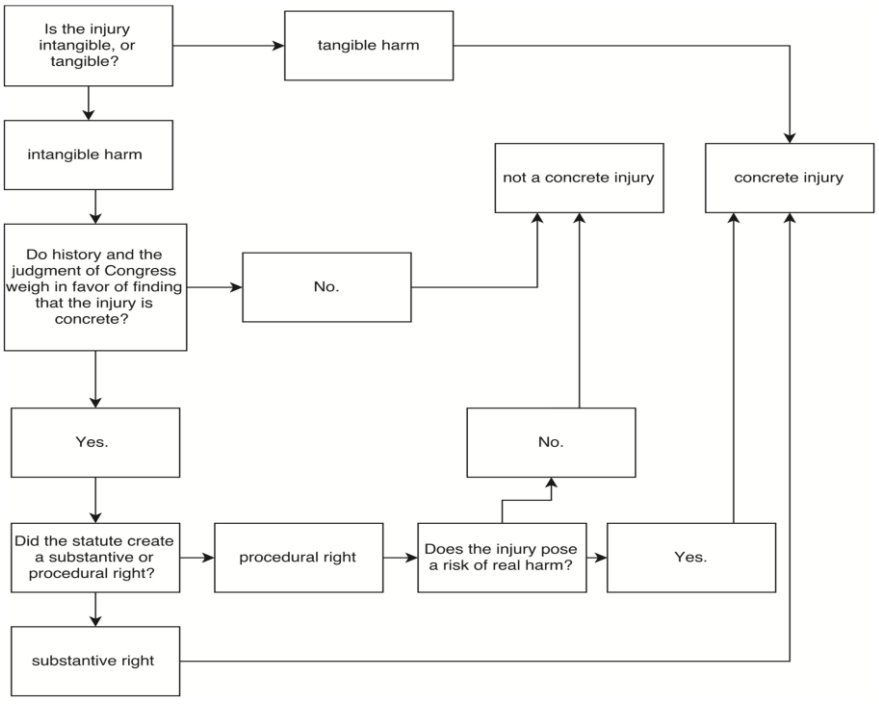
(A) Ask whether the injury is tangible or intangible. If tangible, then the injury is concrete and thus justiciable.[224]

(B) If intangible, ask whether history and the judgment of Congress weigh in favor of finding that the injury is concrete. If not, then there is no concrete injury.[225]

(C) If history and Congressional judgment favor concreteness, ask whether the statute created a substantive or procedural right. If substantive, then the injury is concrete and thus justiciable.[226]

(D) If procedural, then ask whether the injury poses a risk of real harm. If not, then the injury is not concrete. If so, then the injury is concrete.[227]

Here is how Ing visually represents this test:[228]



222. Ing, *supra* note 133 at 516. Ing characterizes the test as having three steps but does not include the threshold question of tangibility. Therefore, including the threshold question of tangibility yields a four-step inquiry.

223. *Id.* (providing flowchart).

224. *Id.* at 516.

225. *Id.* at 516, 518.

226. *Id.* at 518-21.

227. *Id.* at 516, 521-23.

228. *Id.* at 516.

Using this framework, Ing correctly predicted that the lower court would conclude that Robins had standing: "[T]he alleged injury very likely poses a risk of real harm, as evidenced by the actual economic and emotional harm incurred by Robins."[229]

Matthew DeLuca has used a different approach to examine lower courts' hunt for privacy injuries after *Spokeo*.[230] DeLuca finds that lower courts can be quite reliant on analogies to Prosser's four common-law privacy torts,[231] and he argues that these torts are ill-suited to the novel types of privacy harms that arise in a complex digital economy.[232]

For their part, the circuit courts have been less systematic than commentators in their application of *Spokeo* to new cases. Several circuits have adopted a two-step inquiry into concreteness.

For example, on remand in *Spokeo* itself, the Ninth Circuit said:

> In evaluating Robins's claim of harm, we thus ask: (1) whether the statutory provisions at issue were established to protect his concrete interests (as opposed to purely procedural rights), and if so, (2) whether the specific procedural violations alleged in this case actually harm, or present a material risk of harm to, such interests.[233]

In other words, the court asked one question that was statute-specific—an evaluation of Congressional intent—and a second question that was plaintiff-specific—an evaluation of whether the plaintiff suffered the harm Congress sought to protect against.

The Ninth Circuit found that one of Congress's purposes through the FCRA was to protect a concrete interest against having false information disseminated about individuals, and that Robins had alleged sufficient facts about the defendant's dissemination of false information about him.[234]

The Second Circuit also adopted a similar type of reasoning: A plaintiff "must satisfy a two-part test for such an allegation to constitute a concrete harm: first, that 'Congress conferred the procedural right to protect a plaintiff's concrete interests' as to the harm in question, and second, that 'the procedural violation presents a "risk of real harm" to that concrete interest.'"[235]

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229. *Id.* at 529.

230. *See generally* Matthew S. DeLuca, *The Hunt for Privacy Harms After* Spokeo, 86 FORDHAM L. REV. 2439 (2018).

231. *Id.* at 2460-63.

232. *Id.* at 2466-70.

233. Robins v. Spokeo, Inc., 867 F.3d 1108, 1113 (9th Cir. 2017).

234. *Id.* at 1113-17.

235. Katz v. Donna Karan Co., L.L.C., 872 F.3d 114, 199 (2d Cir. 2017) (citing Strubel v. Cmty. Bank, 842 F.3d 181 (2d Cir. 2016)).

Other courts have adopted a similar inquiry but added a third step. For example, the Third Circuit asks two statute-specific questions before proceeding to a plaintiff-specific question. The first statutory question—like the Ninth and Second Circuits—concerns what "injury . . . the statute is intended to prevent."[236] The second statutory question is historical—whether "the injury has a close relationship to a harm traditionally providing a basis for a lawsuit in English or American courts."[237]

That case arose under the Telephone Consumer Protection Act (TCPA); the plaintiff alleged that she received an unsolicited call from the defendant, a fitness company, which allegedly violated the TCPA's prohibition on prerecorded calls to cellular telephones.[238] The Third Circuit held that the plaintiff had alleged a concrete injury under *Spokeo*. "First, Congress squarely identified this injury. The TCPA addresses itself directly to single prerecorded calls from cell phones, and states that its prohibition acts 'in the interest of privacy rights.'"[239] As for the historical question, the court determined "that TCPA claims closely relate to traditional claims for . . . intrusion upon seclusion,"[240] and thus that "Congress was not inventing a new theory of injury when it enacted the TCPA. Rather, it elevated a harm that, while 'previously inadequate in law,' was of the same character of previously existing 'legally cognizable injuries.'"[241] Because the plaintiff made fact-specific allegations about receiving the illegal calls, she had standing.

Having covered what *Spokeo* says, what it fails to say, and how courts and commentators have struggled to interpret it, the next Part posits an alternative approach to informational injury standing questions.

III. A SUPERIOR ALTERNATIVE APPROACH

The Supreme Court's approach to an injury in fact's "concreteness"—as embodied by *Spokeo*—suffers from two related defects: the lack of a limiting principle and the lack of a justification. Part IV illustrates the deleterious effects of this unmoored judicial inquiry into the amorphous "concreteness" of a privacy plaintiff's injury. But this Part first posits a superior alternative to the Court's current approach.

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236. Susinno v. Work Out World, Inc., 862 F.3d 346, 351 (3d Cir. 2017) (quoting In re Horizon Healthcare Servs., Inc. Data Breach Litig., 846 F.3d 625, 639-40 (3d Cir. 2017) (internal quotation marks and brackets omitted)).

237. *Id.* at 351 (quoting *Horizon*, 846 F.3d at 639-40) (internal quotation marks and ellipses omitted)).

238. *Id.* at 348 (citing 47 U.S.C. § 227(b)(1)(A)(iii)).

239. *Id.* at 351 (quoting 47 U.S.C. § 227(b)(2)(C) (brackets omitted)).

240. *Id.* (quoting Van Patten v. Vertical Fitness Grp., L.L.C., 847 F.3d 1037, 1043 (9th Cir. 2017) (internal quotation marks omitted)).

241. *Id.* at 352 (quoting Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016)).

Courts should give binding deference to Congress's private enforcement policy choices when three conditions are met: when the injury is informational; when the defendant is a private-sector actor; and when Congress has effectively particularized the informational injury at issue. In short, it is not that there is no role for the federal courts in assessing the justiciability of a plaintiff's injury. However, a court should give effect to Congress's policy choices after concluding that the court is ill-suited for and has no justification for second-guessing the byproduct of the political process. The rest of this Part explains and justifies each of these conditions.

Courts should give Congress binding deference only when an injury is informational. At the first step of the analysis, federal courts should use the taxonomy of information injuries from Part I.B. A court weighing whether a plaintiff has suffered an injury in fact should first determine whether the plaintiff is alleging one or more informational injuries.

Why limit this approach to informational injuries? As others have explained, informational injuries raise a host of issues that are particularly ill-suited for judicial resolution. "[I]nformation is largely non-rivalrous and non-excludable. Unlike tangible resources, information can be used by an infinite number of persons and processes without depleting it . . . ."[242] In short, informational injuries are dissimilar from other more traditional legal injuries.

Over the course of several centuries, the common law has become quite adept at adjudicating cases involving tangible losses. Money and other tangible goods are both rivalrous and excludable, which eases the task of evaluating a plaintiff's injury. Information is different, and courts have significantly less experience adjudicating cases involving informational injuries.[243]

Given the novelty and unique aspects of informational injuries, courts should be willing to defer to the compromises forged in the legislature. If the democratic process reflects consensus that an informational practice is harmful, courts should embrace that

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242. Kreimer, *supra* note 25, at 754;

> Information goods are nonexcludable to the extent that once they are distributed to some, it is difficult to prevent access to them by others. And such goods are nonrivalrous to the extent that consumption of the work by one does not degrade the ability of others to consume and enjoy it. These observations and the analysis based on them are, by now, painfully familiar to anyone versed in the literature.

Oren Bracha & Talha Syed, *Beyond the Incentive-Access Paradigm? Product Differentiation & Copyright Revisited*, 92 TEX. L. REV. 1841, 1848-49 (2014).

243. Of course, there is an opposite reaction to the observations that information is unique and courts are ill-equipped to evaluate the concreteness of an informational injury—i.e., that courts should avoid informational injuries altogether. This, however, would be particularly extreme because it would foreclose federal courts from adjudicating any private plaintiff's suit premised on an informational harm, including illegal wiretaps. *See generally* Kreimer, *supra* note 25, at 752-53.

consensus, not contest it. Upon concluding that the plaintiff has alleged one or more of the four informational injuries, a court should proceed to the second step of the analysis. At the second step, courts should evaluate the identity of the defendant—is it a private-sector actor or a governmental actor? Binding deference is appropriate only in cases where the defendant is a private-sector actor.

It is worth remembering that the separation of powers is the only justification the Court has ever offered for an aggressive and constitutionally grounded injury-in-fact requirement. In a 1983 law review article, then-Judge Scalia argued at length that "the judicial doctrine of standing is a crucial and inseparable element of [the separation of powers], whose disregard will inevitably produce—as it has during the past few decades—an overjudicialization of the process of self-governance."[244]

In *Lujan* nine years later, Scalia's approach became law: "To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's . . . duty to 'take Care that the Laws be faithfully executed.'"[245] In other words, through the citizen-suit provision of the ESA, Congress employed the Judicial Branch to interfere with the Executive Branch's ability to faithfully execute the Executive's interpretation of the statute.

Despite the centrality of the separation of powers to the injury-in-fact requirement, the *Spokeo* majority never offers or mentions a justification for the role of Article III standing. And with good reason: The separation of powers is almost entirely irrelevant in cases where the defendant is not a governmental actor.

Felix Wu has highlighted this dissonance.[246] "In *Lujan*, for example, Scalia presumably would have told those dissatisfied with the Secretary of the Interior's rule to work to elect a new President."[247] But in "the case of a private actor, there is no corresponding ability to use the political process to directly halt the actor's challenged activity."[248] In sum, Wu argues, "If government power against private parties is limited by standing doctrine, then the doctrine may be serving deregulatory goals, rather than separation of powers ones . . . . Whatever the merits of a deregulatory agenda, that agenda should be established, if at all, through the political process."[249]

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244. Scalia, *supra* note 33, at 881.

245. Lujan v. Defs. of Wildlife, 504 U.S. 555, 577 (1992) (citing U.S. CONST. art II, § 3).

246. Felix T. Wu, *How Privacy Distorted Standing Law*, 66 DEPAUL L. REV. 439, 460 (2017) ("An overly expansive standing inquiry is particularly problematic in the context of suits against private companies, as most data breach and other privacy cases are.").

247. *Id.* at 460.

248. *Id.*

249. *Id.*

Other scholars have echoed this point. William Baude, for example, analogizes *Spokeo* to substantive due process.[250] Jurists have also begun noting the disconnect between the Supreme Court's Article III standing justification and the Supreme Court's recent Article III standing jurisprudence. A D.C. Circuit judge recently wrote, "It also bears mentioning that [suits involving private defendants] do not implicate traditional separation-of-powers concerns . . . . Far from preserving the separation of powers," the defendant's standing a rguments "invite[] the court to substitute its judgment for Congress's by holding that" the defendant's violation of a statute "is harmless."[251]

In sum, given the near-total absence of the separation-of-powers justification in cases against private-sector defendants, courts should proceed to the third and final step of the analysis after concluding that Congress has authorized an informational-injury case against a private-sector actor.

The third step asks courts to evaluate whether the plaintiff's injury is particularized. This consideration is necessary to extinguish one final separation-of-powers objection. Justice Thomas hinted in passing at this concern in his *Spokeo* concurrence: "[B]y limiting Congress' ability to delegate law enforcement authority to private plaintiffs and the courts, standing doctrine preserves executive discretion."[252] The court's role in assessing whether a plaintiff's injury is particularized remains important even in cases where the defendant is a private-sector actor. Most would agree that Congress could not authorize a federal court to issue an advisory opinion about the legality of a private company's informational practices. In the past, the Court "saw in some procedural legal rights the same things that had concerned [it] about advisory opinions—the possibility of courts being asked to adjudicate only '[t]he public's nonconcrete interest in the proper administration of the laws.'"[253] But concerns about an undifferentiated interest in procedural compliance with the law are absent when Congress adequately personalizes a legal right.

Several examples illustrate the importance of particularization to informational injuries. Justice Thomas's public-versus-private-rights framework does much of the same work—asking whether a right is owed to someone individually or whether a right is owed to the public at large.[254] Similarly, the Ninth Circuit opinion vacated by the Supreme Court in *Spokeo* focused intently on the question of whether

250. See Baude, *supra* note 183, at 223-27.

251. Jeffries v. Volume Servs. Am., Inc., 928 F.3d 1059, 1070 (D.C. Cir. 2019) (Rogers, J., concurring in part and concurring in the judgment) (internal quotation marks and brackets omitted).

252. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1552-53 (2016) (Thomas, J., concurring).

253. Baude, *supra* note 183, at 226-27 (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part & concurring in the judgment in part)).

254. *See supra* Section II.B.1.

Robins's injury was particularized. Employing an approach that focuses not on whether a plaintiff's injury is concrete, but rather on whether the injury is particularized "would look a great deal like what Judge O'Scannlain had written for the Ninth Circuit earlier in the *Spokeo* litigation: that a statutory right is an enforceable private right if it is 'individualized rather than collective,' and if the person suing is 'among the injured.'"[255]

In sum, questions about an informational injury's "concreteness" belong to Congress. Satisfied that Congress has not authorized a suit that creates separation-of-powers problems, courts should defer to the byproduct of the political process.

IV. ILLUSTRATING HOW *SPOKEO* UNDERMINES PRIVACY INJURIES

The Court's failure to supply a coherent limiting principle in *Spokeo* threatens Congress's ability to provide redress for each of the four types of informational injuries described in Part I.B. This Part illustrates the stark difference between the Court's approach and the three-condition deference approach outlined in Part III. Because the Court's *Spokeo* approach—its refusal to defer to Congress—promotes confusion, uncertainty, and inconsistency, it necessarily undermines legal protections for privacy injuries.

A. Information Withholding

After *Spokeo*, several Circuit Courts of Appeals have dismissed lawsuits under the FCRA, reasoning that the defendant's withholding of information in violation of the law was not a "concrete" injury.

In *Dreher v. Experian*, for example, the plaintiff filed a putative class action against a consumer reporting agency and alleged that it had violated the FCRA by failing to disclose the true source of information on credit reports.[256] The district court granted summary judgment to the plaintiff, and the parties stipulated to an award of $170 in statutory damages for each class member—totaling over $11.7 million.[257]

On appeal, the Fourth Circuit vacated the district court's judgment and remanded with instructions to dismiss the case because the plaintiff had "failed to demonstrate he has suffered a concrete injury sufficient to satisfy Article III standing."[258] The court held that "a constitutionally cognizable informational injury requires that a person lack access to information to which he is legally entitled and that the

255. Baude, *supra* note 183, at 231 (quoting Robins v. Spokeo, Inc., 742 F.3d 409, 413-14 (9th Cir. 2014)).

256. Dreher v. Experian Info. Sols., Inc., 856 F.3d 337, 341-42 (4th Cir. 2017).

257. *Id.* at 342.

258. *Id.* at 347.

denial of that information creates a 'real' harm with an adverse effect."[259] The court first concluded that "the harm [the plaintiff] alleges he suffered is not the type of harm Congress sought to prevent when it enacted the FCRA" because the plaintiff's complaints were "chiefly customer service complaints" and unrelated to Congress's purposes of promoting the fairness and accuracy of his consumer report.[260] The court also found the plaintiff's reliance on *Akins* and *Public Citizen* unpersuasive because those "cases involved the deprivation of information that adversely affected the plaintiffs' conduct."[261]

Adopting the three-factor deference test from Part III would likely—though not certainly—change the result in *Dreher*. The injury is information withholding and the defendant is a private-sector actor, but there is some uncertainty about how personalized the plaintiff's injury was. Irrespective of the result, however, the deference approach is superior because the analysis focuses on a discernable question (is the plaintiff among the injured?) rather than an inherently unprincipled one (is the plaintiff's injury "concrete"?).

Recently enacted privacy law regimes include a right to mandated disclosures. This is true for both the California Consumer Privacy Act (CCPA) and the European Union's General Data Protection Rule (GDPR). It is likely that new privacy laws at the state and federal level will also include this "right to access."[262]

The CCPA articulates an intent to give "consumers an effective way to control their personal information" by giving them "[t]he right . . . to know what personal information is being collected about them," and "[t]he right . . . to know whether their personal information is sold or disclosed and to whom."[263] The CCPA empowers consumers to request access to information from both businesses that collect personal information[264] and businesses that sell or disclose personal information for a business purpose.[265] Consumers have the right to obtain several distinct categories of information from both businesses that collect information and businesses that sell or disclose information.[266]

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259. *Id.* at 345 (citing Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016)).

260. *Id.* at 346.

261. *Id.* at 346-47.

262. *See* Cameron F. Kerry, *A Federal Privacy Law Could Do Better Than California's*, L.A TIMES (Apr. 25, 2019, 3:05 AM), https://www.latimes.com/opinion/op-ed/la-oe-kerry-ccpa-data-privacy-laws-20190425-story.html [https://perma.cc/NX4U-SRW3] ("[U]nder the state law, Californians have the right to access data about themselves, to correct this data, to have it deleted and to take it to another provider. These are important tools — but they are likely to be included in any federal law.").

263. Cal. Consumer Privacy Act, § 2(i)(1)-(2) (2018).

264. *See* CAL. CIV. CODE §§ 1798.100(a), 1798.110(a) (2020).

265. *See* § 1798.115(a) (2020).

266. *See* §§ 1798.110(a) (2020) (five types from information collectors), 1798.115(a) (2020) (three types from information sellers/disclosers).

The law imposes formatting requirements on the disclosure of this information, providing that, if delivered electronically, it "shall be in a portable and . . . readily usable format."[267] Individuals may request the information at any time, but businesses are not required to provide it more than twice in a 12-month period.[268] Companies are also prohibited from charging consumers for access to this information.[269]

The CCPA's access rights are largely modeled on the GDPR's right of access, though the two regimes do differ in some important respects.[270] A user whose information is withheld in violation of the CCPA has suffered an intangible informational injury.[271] The *Spokeo* opinion goes out of its way to cite *Akins* with approval, suggesting that when a legislature mandates disclosure, non-compliance with that mandate may be a sufficiently concrete injury for Article III purposes.[272] (In fact, a CCPA violation should raise fewer injury-in-fact objections than the claim in *Akins* itself because *Akins* also raised particularization concerns that should be absent in a CCPA case.[273]) In other words, if a user avails herself of the CCPA's right of access and a company refuses or fails to comply, the user should be able to rely on *Akins* and *Spokeo* to argue that she has suffered a concrete (and particularized) injury in fact.

That said, the logic behind *Spokeo* counsels the opposite result—as the plaintiff in *Dreher* discovered. It is unclear why withholding information in violation of the election law creates a concrete injury (under *Akins*), but withholding information and disseminating false information in violation of the FCRA do not create concrete injuries. Despite recognizing that Congress sought to "ensure . . . accurate

267. § 1798.100(d) (2020).

268. *See* § 1798.130(b) (2020).

269. *See* § 1798.130(a)(2) (2020).

270. *See* Anupam Chander, Margot E. Kaminski & William McGeveran, *Catalyzing Privacy Law*, GEO. L. FAC. PUBLICATIONS AND OTHER WORKS at 11-23 (Aug. 8, 2019), https://scholarship.law.georgetown.edu/facpub/2190 [https://perma.cc/E2NP-V8PU]; *see generally* GDPR, *supra* note 90 ("Right of access by the data subject").

271. The CCPA provides only a very limited private right of action. The law's private right of action extends only to breaches of unencrypted or unredacted data caused by a defendant business's failure to implement and maintain reasonable information security practices. *See* CAL. CIV. CODE § 1798.150 (2020). The initial ballot proposal did include a more expansive private right of action, and several states are currently considering similar bills that do include robust private rights. The ability to privately enforce an information-withholding injury is thus only hypothetical with regard to the CCPA specifically, but the point remains salient as other states and Congress consider similar legislation. I have also argued elsewhere in favor of private enforcement of data protection regulation. *See generally* Ormerod, *supra* note 97.

272. *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016) (characterizing *Akins*'s holding as "confirming that a group of voters' 'inability to obtain information' that Congress had decided to make public is a sufficient injury in fact to satisfy Article III").

273. *See* Fed. Election Comm'n v. Akins, 524 U.S. 11, 35 (1998) (Scalia, J., dissenting) ("What is noticeably lacking in the Court's discussion of our generalized-grievance jurisprudence is all reference to two words that have figured in it prominently: 'particularized' and 'undifferentiated.'").

credit reporting" with the FCRA, the Fourth Circuit nonetheless concluded that the plaintiff had failed to allege "he suffered . . . the type of harm Congress sought to prevent when it enacted the FCRA."[274]

In sum, an initial reading of *Spokeo* might suggest that the decision does not erode *Akins*'s holding, but the logic underpinning *Spokeo* cannot provide a meaningful way to distinguish between which information-withholding injuries suffice and which do not.

B. Information Acquisition

Spokeo also undermines legal prohibitions on acquiring information. A recent lower-court case relied on *Spokeo* to hold that the illegal acquisition of a consumer's personal information was not a concrete injury. The case's reasoning imperils other prohibitions on information acquisition.

Hancock v. Urban Outfitters arose under the District of Columbia's Use of Consumer Identification Information Act (Identification Act), which provides that "no personal shall, as a condition of accepting a credit card as payment for a sale of goods or services, request or record the address or telephone number of a credit card holder on the credit card transaction form."[275] Two consumers who made purchases at D.C. retailers brought suit, alleging that—in both instances—the cashier swiped the consumer's credit card in a credit card machine and then requested and recorded the consumer's zip code in the point-of-sale register.[276] The plaintiffs argued that, because their zip codes are part of their addresses, the retailers' zip code requests violated the Identification Act's prohibition on obtaining addresses as a condition of a credit card purchase.[277]

The D.C. Circuit held that the acquisition of the consumers' personal information—arguably in violation of a statute—was not a concrete injury under *Spokeo*: "If, as the Supreme Court advised [in *Spokeo*], disclosure of an incorrect zip code is not a concrete Article III injury, then even less so is [the plaintiffs'] naked assertion that a zip code was requested and recorded without any concrete consequence."[278]

To be clear, *Spokeo* demands this result. As the D.C. Circuit explained, *Spokeo* includes a passage that argues the dissemination of

274. Dreher v. Experian Info. Sols., Inc., 856 F.3d 337, 346 (4th Cir. 2017).

275. D.C. Code § 47-3153 (2020).

276. Hancock v. Urban Outfitters, Inc., 830 F.3d 511, 512 (D.C. Cir. 2016).

277. *Id.* at 512.

278. *Id.* at 514-15.

an inaccurate zip code cannot be a concrete injury absent additional allegations of further harm.[279]

The illegal acquisition of a zip code may not strike you as injurious, but *Spokeo*'s approach does not supply a limiting principle. What about the illegal collection of your name, your telephone number, or your email address—or, for that matter, the contents of your email correspondences?[280] *Spokeo* requires that a plaintiff plead additional allegations of harm over and beyond the statutory violation. While that may seem like a modest requirement for something like a zip code, the decision fails to account for more sensitive information.

Indeed, many statutes prohibit the acquisition of information. For example, the Wiretap Act prohibits, among other things, the "intentional[] intercept[ion] . . . [of] any wire, oral, or electronic communication"[281] and provides a civil cause of action with statutory damages as high as $10,000.[282] If *Spokeo* means that the acquisition of information may not itself be injurious, then is the acquisition of a telephone conversation or email contents only actionable if the plaintiff includes additional allegations of harm?

Of course, the contents of an email conversation are more sensitive than a zip code. So perhaps *Spokeo* only means that the unauthorized acquisition of non-sensitive information is not a concrete injury. But this interpretation resolves very little because the Court has not articulated any metric for evaluating what types of information are sensitive enough to create concrete injuries.

That is not to suggest there are no mechanisms for distinguishing between injurious and non-injurious information flows,[283] but *Spokeo* suggests that mere collection, alone, may never suffice. Instead, the Court seems to want something categorically different—like humiliation, mental anguish, or identity theft.[284] Even if the Court did hold that collecting a category of particularly sensitive information was—in and of itself—injurious, the Court cannot explain why its judgment should override a legislature's.[285]

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279. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1550 (2016) ("[N]ot all inaccuracies cause harm or present any material risk of harm. An example that comes readily to mind is an incorrect zip code. It is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm.").

280. *See* Baude, *supra* note 183, at 221.

281. 18 U.S.C. § 2511(1) (2018).

282. § 2520(c)(2) (2018).

283. *See, e.g.*, NISSENBAUM, *supra* note 21, at 153-56 (using GLBA to illustrate how contextual integrity supplies exactly such a mechanism).

284. *See* Baude, *supra* note 183, at 221 ("Why must the plaintiffs show something like a risk of identity theft or emotional injury to demonstrate a concrete injury? Why can't an illegal disclosure *itself* be a concrete injury?").

285. *Id.* at 222 ("If the legislature has made the judgment to protect both kinds of information, it is not at all clear why judges may decide that one is 'concrete,' that is, 'real,' and the other is not.").

The three-factor deference approach makes cases like *Hancock* easy: The injury is information collection, the defendant is a private-sector actor, and the defendant illegally collected information from these specific plaintiffs. Accordingly, deference to the legislature is warranted.

C. Information Use

Spokeo's treatment of intangible injuries also threatens legal prohibitions on information use. This section considers several different examples that are relevant to privacy injuries, including information destruction mandates, purpose restrictions, the CCPA's information use restrictions, facial recognition harms, and a proposed privacy fiduciary regime.

1. An Information Destruction Mandate

Several circuit courts have confronted a question that arises when a federal law requires that a regulated entity destroy customer information. For example, the Cable Communications Policy Act (Cable Act) provides in relevant part: "A cable operator shall destroy personally identifiable information if the information is no longer necessary for the purpose for which it was collected and there are no pending requests . . . for access to such information . . . pursuant to a court order."[286]

A consumer whose information is retained by a company that flouts a destruction provision has suffered an information use injury: The statute mandates destruction, but the company retains the information for uses unrelated to "the purpose for which it was collected."[287]

After *Spokeo*, this information use injury has not been sufficient for Article III. The Eight Circuit provided an apt example in *Braitberg v. Charter Communications*.[288] Three years after cancelling his cable subscription, Alex Braitberg confirmed that his former cable provider, Charter, retained all of the personally identifiable information he had provided when he initially subscribed.[289] Braitberg filed a class action,

286. 47 U.S.C. § 551(e) (2012). Other laws include similar provisions. The Video Privacy Protection Act provides:

> A person subject to this section shall destroy personally identifiable information as soon as practicable, but no later than one year from the date the information is no longer necessary for the purpose for which it was collected and there are no pending requests . . . for access to such information . . . pursuant to a court order.

18 U.S.C. § 2710(e) (2018).

287. 47 U.S.C. § 551(e) (2012).

288. Braitberg v. Charter Commc'ns, Inc., 836 F.3d 925 (8th Cir. 2016). The Seventh Circuit agreed shortly thereafter. *See* Gubala v. Time Warner Cable, Inc., 846 F.3d 909 (7th Cir. 2017).

289. 836 F.3d at 927.

alleging that "Charter's retention of personal information after it was no longer required to provide services, collect payments, or satisfy tax, accounting, or legal obligations violated the rights of putative class members under the Cable Act."[290] Charter argued that Braitberg failed to allege a sufficient injury in fact under *Spokeo*, and the Eighth Circuit agreed: Braitberg "does not allege that Charter has disclosed the information to a third party, that any outside party has accessed the data, or that Charter has used the information in any way during the disputed period. He identifies no material risk of harm from the retention."[291] The court further held that "[a]lthough there is a common law tradition of lawsuits for invasion of privacy, the retention of information lawfully obtained, without further disclosure, traditionally has not provided the basis for a lawsuit in American courts."[292]

The court is wrong to say that Charter "has [not] used the information in any way," because retention of the information is itself a prohibited use of the plaintiff's information. (Further—particularly at the motion-to-dismiss stage—there is no way for Braitberg to discover or know whether Charter has used or disclosed his information for any other purpose.) One commentator has identified one of the root problems with *Spokeo*, as revealed by *Braitberg*: "[T]he Eighth Circuit cast doubt on whether Congress can expand privacy rights beyond their common law scope at all. It is unclear why, in this area, Congress should not be allowed to protect interests beyond those protected by the common law."[293]

The three-condition deference approach gives Congress the ability to protect against new and novel harms. Here, the plaintiff would succeed because the injury is information use, the defendant is a private-sector actor, and the plaintiff is among those whose information has been used in violation of the statute.

2. Purpose Restrictions in the Driver's Privacy Protection Act

Some federal laws expressly restrict the use of information to certain purposes. For example, the Driver's Privacy Protection Act (DPPA) prohibits the disclosure or use of personal information contained in motor vehicle records except for purposes expressly enumerated in the statute.[294]

If a defendant uses information for a non-permissible purpose, has the plaintiff suffered a concrete injury under *Spokeo*? The Eighth

290. *Id.* at 927.

291. *Id.* at 930.

292. *Id.* at 930.

293. Baude, *supra* note 183, at 223.

294. 18 U.S.C. § 2721(b) (1986). The law explicitly refers to these purposes as "Permissible uses." *See id.*

Circuit squarely addressed that issue in *Heglund v. Aitkin County*.[295] In this case, a former law enforcement officer named Jennifer Heglund became concerned that her ex-husband had accessed her personal information in violation of the DPPA, and an audit of the state's driver's license database revealed that her information had been accessed 446 times in a ten-year period.[296]

A defendant sought to dismiss Heglund's DPPA suit on Article III concreteness grounds, but the Eighth Circuit refused to dismiss the case.[297] "An individual's control of information concerning her person—the privacy interest the Heglunds claim here—was a cognizable interest at common law. In enacting the DPPA, Congress recognized the potential harm to privacy from state officials accessing drivers' personal information for improper reasons."[298]

The court also sought to distinguish *Braitberg*:

> The Heglunds do not allege a bare procedural violation; they claim that [the defendant] violated the DPPA's substantive protections by invading Jennifer's privacy. This allegation distinguishes the Heglunds' claim from the one advanced in *Braitberg* based on a cable company's procedural violation of its statutory duty to destroy personally identifiable information the cable company lawfully obtained.[299]

Here again, *Spokeo*'s muddled reasoning creates several layers of reverberating confusion. The court says that both cases concern information use injuries—phrasing the injury in terms of "control of information concerning her person"—but entirely relies on a substance-versus-procedure distinction from *Spokeo* to reach an inconsistent result. The Eighth Circuit does not explain what makes the Cable Act's provision procedural and what makes the DPPA provision substantive. Adopting the approach that defers to Congress would avoid these word games and empower courts to reach clear and consistent conclusions.

3. California- and European-Style Data Processing Restrictions

The information use restrictions in the Cable Act and the DPPA are quite modest, but they serve as important guideposts. As some states implement, and as Congress considers, new information privacy regulations that contain more significant information use restrictions,

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295. Heglund v. Aitkin County, 871 F.3d 572 (8th Cir. 2017).

296. *Id.* at 575-76.

297. *Id.* at 577-78.

298. *Id.* at 577 (citing U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 763 (1989); Pichler v. UNITE, 542 F.3d 380, 388 (3d Cir. 2008); Maracich v. Spears, 570 U.S. 48 (2013) (citation omitted)).

299. *Id.* at 577-78.

policymakers must confront the Article III concreteness of the injuries they are legislating.

The California Consumer Privacy Act, like the GDPR, is built on a foundational premise that individuals are entitled to control how information about them is used.[300] Specifically, the CCPA gives consumers the right to tell a business not to sell their personal information.[301] The proposed CCPA regulations explicitly proscribe using information "for any purpose other than those disclosed in the notice at collection."[302]

This too is an information use restriction. If a consumer had the ability to privately enforce this right and if a company violated this use restriction, *Spokeo*'s reasoning suggests that the consumer may not have a concrete injury under Article III.

4. Illinois's Biometric Information Privacy Act

Another example of an information-use restriction called into question by *Spokeo* concerns facial recognition harms. In 2008, the Illinois legislature enacted the Biometric Information Privacy Act (BIPA).[303] BIPA defines a "biometric identifier" to include a "scan of hand or face geometry,"[304] and the law "imposes . . . various obligations regarding the collection, retention, disclosure, and destruction of biometric identifiers."[305] Some of these requirements include "establishing a retention schedule and guidelines for permanently destroying biometric identifiers" within three years of an individual's last interaction with the company,[306] and the statute also requires the company to notify the individual in writing and secure a written release before obtaining a biometric identifier.[307] The statute includes a private right of action. It provides that "[a]ny person aggrieved" by a violation of its provisions "shall have a right of action . . . against an offending party."[308]

Since 2010, Facebook has employed the use of facial recognition software as part of a photo-tagging suggestion feature.[309] Facebook

300. *See, e.g.*, GDPR, *supra* note 90, art. 18 (providing data subjects with the right to restrict how information is processed).

301. CAL. CIV. CODE § 1798.120 (2020).

302. Cal. Attorney General Office, *Proposed Text of Regulations*, California Consumer Privacy Act Regulations, § 999.305(a)(3), https://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/ccpa-proposed-regs.pdf [https://perma.cc/6HZU-KBYU].

303. 740 ILL. COMP. STAT. 14/1 et seq. (2008).

304. 740 ILL. COMP. STAT. 14/10 (2008).

305. Rosenbach v. Six Fags Entm't Corp., 129 N.E.3d 1197, 1203 (Ill. 2019).

306. 740 ILL. COMP. STAT. 14/15(a) (2008).

307. 740 ILL. COMP. STAT. 14/15(b) (2008).

308. 740 ILL. COMP. STAT. 14/20 (2008).

309. Patel v. Facebook, Inc., 932 F.3d 1264, 1268 (9th Cir. 2019).

users living in Illinois brought a class-action suit against Facebook, alleging that Facebook's facial-recognition technology violates BIPA because the company collects, uses, and stores biometric identifiers without obtaining a written release and without a compliant retention schedule.[310] Facebook sought to dismiss the suit, arguing that the Facebook users have not suffered a concrete injury in fact under *Spokeo*.[311]

The Ninth Circuit ruled against the company, holding that the users had suffered a concrete injury under the Ninth Circuit's interpretation of *Spokeo*.[312] The court laid out a two-step inquiry for concreteness questions: "We ask '(1) whether the statutory provisions at issue were established to protect [the plaintiff's] concrete interests (as opposed to purely procedural rights), and if so, (2) whether the specific procedural violations alleged in this case actually harm, or present a material risk of harm to, such interests.'"[313]

On the first step, the court held that "'the statutory provisions at issue' in BIPA were established to protect an individual's 'concrete interests' in privacy, not merely procedural rights."[314] To arrive at that conclusion, the court relied on the Supreme Court's recent Fourth Amendment cases:

> In light of this historical background and the Supreme Court's views regarding enhanced technological intrusions on the right to privacy, we conclude that an invasion of an individual's biometric privacy rights 'has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.[315]

On the second step, the court concluded that Facebook's practice of "creat[ing] and us[ing] a face template and . . . retain[ing] this template for all time" constituted a violation of the plaintiffs' substantive privacy interests "[b]ecause the privacy right protected by BIPA is the right not to be subject to the collection and use of such biometric data."[316] Accordingly, the court held, "[T]he plaintiffs have alleged a concrete injury-in-fact sufficient to confer Article III standing."[317]

BIPA represents a potent example of a statutory information use restriction. Facebook legally acquired the photos it uses for facial recognition purposes, but the statute seeks to restrain the company

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310. *Id.* at 1268.

311. *Id.* at 1269-70.

312. *Id.* at 1275.

313. *Id.* at 1270-71 (citing Robins v. Spokeo, Inc. *(Spokeo II)*, 867 F.3d 1108, 1113 (9th Cir. 2017)).

314. *Id.* at 1274 (quoting *Spokeo II*, 867 F.3d at 1113).

315. *Id.* at 1273 (citing Robins v. Spokeo, Inc., 136 S. Ct. 1540, 1549 (2016)). This is an excellent example of how elastic the Court's command to consider historical practice can be.

316. *Id.* at 1274.

317. *Id.*

from that specific purpose without first satisfying its requirements: "The judgment of the Illinois General Assembly . . . supports the conclusion that the capture and use of a person's biometric information invades concrete interests."[318] Despite the fact the legislature made the law privately enforceable, Facebook nonetheless argued that its violations of the statute did not implicate any concrete privacy rights.

While the Ninth Circuit's BIPA case represents a post-*Spokeo* victory for information-use standing, it will not be the last word on the matter.[319] "For district courts outside of the Ninth Circuit not bound by its precedent, the Supreme Court's ongoing resistance to finding standing in privacy claims, particularly on a class-wide basis, should fuel continued argument by defendants that BIPA violations do not constitute actual injury."[320]

A world where Facebook ultimately prevails on BIPA standing is an odd one indeed. In that world, the Supreme Court has stripped federal courts of jurisdiction to consider claims arising from legislatively authorized enforcement of digitally- and algorithmically-enabled privacy injuries. Governments have recently moved to restrict or ban the use of facial recognition, which suggests that people increasingly believe that using information in this way is harmful.[321] The three-condition deference approach would give effect to the emerging consensus about the perils of facial recognition. The Court's Article III jurisprudence, in stark contrast, suggests that this consensus is wrong—that facial recognition cannot create a concrete injury—and it thereby excludes individuals from the enforcement of facial-recognition restrictions.

5. Information Fiduciary Proposals

Scholars have proposed creating a fiduciary relationship between individuals and the companies that traffic in their personal

318. *Id.* at 1273 (emphasis added).

319. *Id.* at 1264; Daniel Stoller, *Facebook to Pay $550 Million in Biometric Privacy Accord*, BLOOMBERG (Jan. 29, 2020, 6:20 PM), https://www.bloomberg.com/news/articles/2020-01-29/facebook-to-pay-550-million-to-settle-biometric-privacy-suit [https://perma.cc/A2P4-7SHE].

320. Torsten Kracht & Bennett Sooy, *Insight: Ninth Circuit Facebook Ruling Adds Another Piece to BIPA Standing Chessboard*, BLOOMBERG L. (Aug. 14, 2019, 4:00 AM), https://news.bloomberglaw.com/privacy-and-data-security/insight-ninth-circuit-facebook-ruling-adds-another-piece-to-bipa-standing-chessboard [https://perma.cc/R4KR-MJHT].

321. *See, e.g.*, Kate Conger, Richard Fausset & Serge F. Kovaleski, *San Francisco Bans Facial Recognition Technology*, N.Y. TIMES (May 14, 2019), https://www.nytimes.com/2019/05/14/us/facial-recognition-ban-san-francisco.html [https://perma.cc/MAN5-63SX]; *see also* Kashmir Hill, *Meet Clearview AI, the Secretive Company That Might End Privacy as We Know It*, N.Y. TIMES (Jan. 18, 2020), https://www.nytimes.com/2020/01/18/technology/clearview-privacy-facial-recognition.html [https://perma.cc/8QAZ-JF4A].

information.[322] New York state proposed a bill that would create this information fiduciary relationship, and the bill also included a right of private enforcement.[323] An information fiduciary relationship, by definition, imposes significant use restrictions on a person's information. If the New York bill were to become law and a company violated the fiduciary relationship, it is quite likely that the Court's recent standing jurisprudence would nonetheless foreclose federal jurisdiction over the dispute.[324]

D. Information Dissemination

Many federal laws include prohibitions on the dissemination of information—far too many to exhaustively document here. This section first focuses on disclosure restrictions that *Spokeo* may have gutted—including those in the Fair and Accurate Credit Transactions Act, the Stored Communications Act, and the Video Privacy Protection Act. The end of this section then discusses recent litigation over the Cambridge Analytica scandal.

1. The Fair and Accurate Credit Transactions Act

The Fair and Accurate Credit Transactions Act (FACTA) has been the statute most commonly held unenforceable after *Spokeo*. As relevant here, FACTA provides that "no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction."[325] Any person who willfully violates this truncation requirement is liable for "any actual damages sustained by the consumer . . . or damages of not less than $100 and not more than $1,000" and for "such amount of punitive damages as the court may allow."[326]

FACTA's truncation requirement is an information dissemination restriction, but most courts do not consider dissemination of information inherently injurious; instead, they have demanded some additional showing of harm—most commonly in the FACTA context, risk of identity theft.[327] To date, U.S. Courts of Appeals for the Second

322. *See* SOLOVE, *supra* note 94, at 103; WALDMAN, *supra* note 95, at 88-92; Balkin, *supra* note 96, at 1183; Solow-Niederman, *supra* note 97, at 624-26.

323. *See* S.B. 5642, 2019 Leg. Sess. (N.Y. 2019).

324. *See, e.g.*, Thole v. U.S. Bank N.A., 140 S. Ct. 1615, 1619 (2020) ("The basic flaw in the plaintiffs' trust-based theory of standing is that the [plaintiffs] are not similarly situated to the beneficiaries of a private trust.").

325. 15 U.S.C. § 1681c(g)(1) (2018).

326. § 1681n(a)(1)(A), (a)(2) (2018).

327. *See, e.g.*, Kamal v. J. Crew Grp., Inc., 918 F.3d 102, 114 (3d Cir. 2019) (finding identity-theft allegations insufficient because the "threat consists of a highly speculative

Circuit,[328] the Third Circuit,[329] the Seventh Circuit,[330] the Ninth Circuit,[331] and the Eleventh Circuit[332] have relied on *Spokeo* to dismiss FACTA claims involving violations of the truncation requirement. Only the D.C. Circuit[333] has ruled in favor of plaintiffs in FACTA cases.

Employing the deference approach would allow consumers to enforce the truncation requirement because the injury is information dissemination, the defendants are private-sector actors, and obtaining a receipt that violates the statute puts the plaintiff in the class of injured persons.

2. The Stored Communications Acts

The Supreme Court recently called into question whether a plaintiff suffers a concrete injury when the defendant violates the SCA by disclosing communicative content.[334] The Court initially granted the case, *Frank v. Gaos*, to consider the propriety of *cy pres* settlements.[335] But in an amicus brief supporting neither party, the Solicitor General raised *Spokeo*-based standing arguments.[336] After oral argument extensively discussed standing,[337] the Court first ordered supplemental briefing on the issue,[338] and then remanded the case with instructions for the lower courts to consider *Spokeo* in the first instance.[339]

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chain of future events" wherein the plaintiff "loses or throws away the receipt, which is then discovered by a hypothetical third party, who then obtains the six remaining truncated digits along with any additional information required to use the card, such as the expiration date, security code or zip code") (internal citations omitted).

328. *See* Katz v. Donna Karan Co., L.L.C., 872 F.3d 114, 121 (2d Cir. 2017); Crupar-Weinmann v. Paris Baguette Am., Inc., 861 F.3d 76, 81 (2d Cir. 2017).

329. *See Kamal*, 918 F.3d at 116-17.

330. *See* Meyers v. Nicolet Rest. of De Pere, LLC, 843 F.3d 724, 727 (7th Cir. 2016).

331. *See* Noble v. Nev. Checker Cab Corp., 726 F.App'x 582, 583 (9th Cir. 2018); Bassett v. ABM Parking Servs., Inc., 883 F.3d 776, 783 (9th Cir. 2018).

332. *See* Muransky v. Godiva Chocolatier, Inc., 979 F.3d 917 (11th Cir. 2020).

333. *See* Jeffries v. Volume Servs. Am., Inc., 928 F.3d 1059, 1067 (D.C. Cir. 2019).

334. *See* Frank v. Gaos, 139 S. Ct. 1041 (2019) (per curiam).

335. *See* Petition for Writ of Certiorari at i, *Frank*, 139 S. Ct. 1041 (2018) (No. 17-961).

336. Brief for the United States as Amicus Curiae Supporting Neither Party at 11-15, *Frank*, 139 S. Ct. 1041 (2018) (No. 17-961) (arguing that "[t]here is a substantial question about whether plaintiffs had [Article III] standing").

337. Transcript of Oral Argument at 15-21, 28-33, 45-46, *Frank*, 139 S. Ct. 1041 (2018) (No. 17-961), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/17-961_j42k.pdf [https://perma.cc/W9MY-T85D] (discussing Article III standing).

338. *See* Frank v. Gaos, 139 S. Ct. 475 (2018) (directing the parties and the Solicitor General to file supplemental briefs concerning standing).

339. *See id.* at 1043-44. On remand, the district court concluded that plaintiffs had standing. *See also* In re Google Referrer Header Privacy Litig., 465 F. Supp. 3d 999 (N.D. Cal. 2020). Further appeals are likely. *See* Frank v. Gaos, HAMILTON LINCOLN LAW INSTITUTE, https://hlli.org/frank-v-gaos/ [https://perma.cc/C7UQ-GXBR] (last visited June 12, 2020) (listing the case among "Open Cases" and describing the case as being "actively litigated").

The complaint in *Frank* alleges that "when an Internet user conducted a Google search and clicked on a hyperlink to open one of the webpages listed on the search results page, Google transmitted information including the terms of the search to the server that hosted the selected webpage."[340] The transmitted data is called a referrer header, which tells "the server that the user arrived at the webpage by searching for particular terms on Google's website."[341] According to the plaintiffs, Google's transmission of referrer headers violates the SCA's prohibition on "a person or entity providing an electronic communication service to the public" from "knowingly divulg[ing] to any person or entity the contents of a communication while in electronic storage by that service."[342] Google ultimately agreed to settle the claims, which later provoked the *cy pres* challenge that the Court initially sought to address.[343]

In its supplemental briefing before the Supreme Court, the Solicitor General pressed a highly restrictive interpretation of *Spokeo*, foreclosing jurisdiction for all but the most egregious information disclosure cases. The government's argument proceeded in two steps. First, the government sought to distinguish the language of the SCA's civil cause of action from the FCRA and the Real Estate Settlement Procedures Act (RESPA). For comparison's sake, here are all three provisions:

- FCRA: "Any person who willfully fails to comply with any requirement [of the Act] with respect to any consumer is liable to that consumer."[344]
- RESPA: "Any person or persons who violate the prohibitions or limitations of this section shall be jointly and severally liable to the person or persons charged for the settlement service involved in the violation."[345]
- SCA: "[A]ny . . . person aggrieved by any violation of this chapter in which the conduct constituting the violation is engaged in with a knowing or intentional state of mind may, in a civil action, recover from the person or entity, other than the United States, which engaged in that violation."[346]

The government read the FCRA to "convey[] Congress's judgment that a statutory violation with respect to particular persons . . .

340. *Frank*, 139 S. Ct. at 1044.

341. *Id.*

342. 18 U.S.C. § 2702(a)(1) (2018). (The SCA also includes a private right of action, which entitles any "person aggrieved by any violation" to "recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate.").

343. *See Frank*, 139 S. Ct. at 1045-46.

344. 15 U.S.C. § 1681n(a) (2018).

345. 12 U.S.C. § 2607(d)(2) (2018).

346. 18 U.S.C. § 2707(a) (2018).

constituted an injury sufficient to justify a suit."[347] Similarly, RESPA "indicated Congress's express judgment that a particular class of plaintiffs . . . had suffered an injury sufficient to justify suit."[348]

In contrast, according to the government's interpretation, the SCA "contains no such express congressional judgment about particular injuries that give rise to suit."[349] The SCA's private right of action, the Solicitor General argued, merely "reflects Congress's intent to allow suit by plaintiffs with Article III standing that are within the statute's zone of interest."[350] This, the government said, "does not . . . express a judgment about which particular injuries are sufficiently concrete to satisfy Article III."[351]

On the second step, the government argued that these particular plaintiffs had not suffered a sufficiently concrete injury under Article III. Relying on Prosser's four privacy torts, the government argued that "the named plaintiffs' alleged harm does not have a 'close relationship' to the harms that provided 'a basis for a lawsuit' for the common-law tort of public disclosure of private facts."[352] The government pressed this point even more explicitly in its reply brief: The plaintiffs "were right to abandon [the] analogy" to common-law privacy torts because "the harms plaintiffs allege would not have provided a basis for a lawsuit for the common-law tort of public disclosure of private facts."[353] In other words, the government argued that the SCA protects nothing more than the common law—if the plaintiffs could not maintain a common law privacy tort, then the SCA does not apply. In that vein, the government also argued that the plaintiffs' property-right arguments would also be unavailing at common law.[354]

The government's arguments about the SCA are curious in a couple different respects. First is the strained reading of the SCA's civil cause of action. The government argued that Congress deliberately excluded

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347. Supplemental Brief for the United States as Amicus Curiae Supporting Neither Party at 11, Frank v. Gaos, 139 S. Ct. 1041 (2019) (No. 17-961) [*hereinafter U.S. Supp. Br.*].

348. *Id.* at 12.

349. *Id.*

350. *Id.* at 13.

351. *Id.*

352. *Id.* at 15.

353. Supplemental Reply Brief for the United States as Amicus Curiae Supporting Neither Party at 5, Frank v. Gaos, 139 S. Ct. 1041 (2019) (No. 17-961) [hereinafter "*U.S. Reply Br.*"].

354. *Id.* at 5-9. For his part, Orin Kerr—perhaps the foremost scholar on the Stored Communications Act—has argued that the plaintiffs in *Frank* have standing under a property-based approach to SCA violations. *See* Orin Kerr, *Article III Standing in* Frank v. Gaos, VOLOKH CONSPIRACY (Jan. 2, 2019, 5:34 AM), https://reason.com/2019/01/02/is-there-article-iii-standing-in-frank-v/ [https://perma.cc/M822-EXUL] ("I think the case is easier when you realize that Section 2702 is better understood as an intangible conversion statute, not a privacy tort statute. The SCA reflects Congress's judgment that your digital files are your stuff. Someone else can't come along and take that stuff from you. . . . [T]he basic idea behind Congress's cause of action in Section 2702 is digital conversion of personal property.").

language from the SCA (language amounting to a defendant being liable to "that plaintiff"), representing Congress's judgment that SCA plaintiffs—unlike FCRA and RESPA plaintiffs—must prove additional harm. To advance that reading, the government says the SCA "reflects Congress's intent to allow suit by plaintiffs with Article III standing that are within the statute's zone of interest."[355] But—if anything—the government's reading cuts the opposite way. In other words, the government's interpretation suggests that Congress cast a wider net with the SCA. This argument suggests that the SCA goes further than the FCRA and RESPA—providing an expansive cause of action that encompasses every claim permissible under the Constitution.

Second is the government's conception of *Spokeo*'s historical nexus consideration. The government suggests that *Spokeo* requires something approaching a one-to-one analogy to a historical cause of action—that Congress could not expand the universe of potential plaintiffs beyond what was actionable according to William Prosser in the middle of the twentieth century.

"In rejecting Congress's attempts to modestly expand the scope of personal informational rights," the government's argument—like the cable company's argument in *Braitberg*—"cast[s] doubt on whether Congress can expand privacy rights beyond their common law scope at all. It is unclear why, in this area, Congress should not be allowed to protect interests beyond those protected by the common law, as it has been allowed in other cases."[356] In contrast, the three-factor deference approach allows and empowers Congress to augment the common law. Deferring to Congress also avoids the government's esoteric interpretative contortions and makes the analysis simple, predictable, and straightforward.

3. The Video Privacy Protection Act

The Ninth Circuit and Eleventh Circuit have addressed the dissemination of information in violation of the Video Privacy Protection Act. Both held that the plaintiffs had suffered a concrete injury, but it is not clear that either case can truly be squared with *Spokeo*'s reasoning.

The VPPA provides: "A video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider shall be liable to the aggrieved person . . . ."[357]

The Eleventh Circuit emphasized *Spokeo*'s discussion of historical practice—stressing the similarities between the VPPA's prohibition

355. *U.S. Supp. Br.*, *supra* note 347, at 13.

356. Baude, *supra* note 183, at 223.

357. 18 U.S.C. § 2710(b)(1) (2018).

and the common law tort of intrusion upon seclusion: "[I]n the tort of intrusion upon seclusion, 'the intrusion itself makes the defendant subject to liability, even though there is no publication or other use,' meaning a showing of additional harm is not necessary to create liability."[358] But as others have explained, "[U]ndue adherence to Prosser's privacy torts leads to an incomplete picture of the range of privacy harms . . . historically recognized by the law. . . . Holding the courts to the four privacy torts in their search for analogues misrepresents the privacy concerns sown broadly across the landscape of American law."[359]

Considering the same statutory provision, the Ninth Circuit emphasized a different passage of *Spokeo*'s concreteness discussion—distinguishing the FCRA's procedural protections from the VPPA's substantive protections: The VPPA "provision does not describe a procedure that video service providers must follow. Rather, it protects generally a consumer's substantive privacy interest in his or her video-viewing history."[360] This difference, according to the court, means that "*every* disclosure of an individual's 'personally identifiable information' and video-viewing history offends the interests that the statute protects."[361]

It is not difficult to imagine a court arriving at the opposite conclusion under materially identical facts. After all, dissemination of most people's video-viewing history is unlikely to result in significant humiliation or financial injury. *Spokeo* says that "bare" statutory violations do not suffice.[362] A stringent application of *Spokeo*'s zip code discussion might conclude that dissemination of accurate information is not a concrete injury,[363] or that the dissemination of false information may not, without more, "work any concrete harm."[364]

4. The Cambridge Analytica Disclosures

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358. Perry v. Cable News Network, Inc., 854 F.3d 1336, 1341 (11th Cir. 2017) (quoting RESTATEMENT (SECOND) OF TORTS, § 652B cmt. b (AM. LAW INST. 1977) (internal brackets omitted) (emphasis added)).

359. DeLuca, *supra* note 230, at 2467-68.

360. Eichenberger v. ESPN, Inc., 876 F.3d 979, 983 (9th Cir. 2017).

361. *Id.* at 983-84 ("*Spokeo I* and *Spokeo II* are distinguishable from this VPPA claim, and Plaintiff need not allege any further harm to have standing."); *id.* at n.2 ("Were we to accept Defendant's argument regarding standing, the VPPA would not provide legal recourse to those in the precise situation that prompted the statute's enactment in the first place.").

362. *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1550 (2016) ("Robins cannot satisfy the demands of Article III by alleging a bare procedural violation.").

363. *Id.* at 1550 ("[E]ven if a consumer reporting agency fails to provide the required notice to a user of the agency's consumer information, that information regardless may be entirely accurate.").

364. *Id.* ("[N]ot all inaccuracies cause harm or present any material risk of harm. . . . It is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm.").

A district court in the Ninth Circuit recently considered disclosure harms after *Spokeo* in a consolidated class action against Facebook arising from the Cambridge Analytica scandal.[365] In that case, plaintiffs alleged that Facebook "made sensitive user information available to countless companies and individuals without the consent of the users; and . . . failed to prevent those same companies and individuals from selling or otherwise misusing the information."[366] Facebook moved to dismiss the case, arguing that the plaintiffs had not suffered a concrete injury in fact.

The court interpreted the plaintiffs' alleged injuries as falling into three categories. First, the plaintiffs "allege[d] a simple 'privacy injury'—that is, injury from Facebook's widespread disclosure of their sensitive information, including their photographs, videos they made, videos they watched, religious preferences, posts, and even private one-on-one messages sent through Facebook."[367] Second, they alleged that Facebook's disclosures increased the risk that they would become victims of identity theft.[368] Third, they allege an economic injury—that "they were deprived the economic value of their personal information as a result of its dissemination."[369]

The court held that the first category of injuries—simple privacy injuries—satisfied Article III's concreteness requirement, but the second and third categories did not.[370] "To say that a 'mere' privacy invasion is not capable of inflicting an 'actual injury' serious enough to warrant the attention of the federal courts is to disregard the importance of privacy in our society, not to mention the historic role of the federal judiciary in protecting it." Accordingly, "once it is understood that an intangible privacy injury *can* be enough, it becomes easy to conclude that the alleged privacy injury here *is* enough."[371] In sum, the court held, "[I]f you use a company's social media platform to share sensitive information with only your friends, then you suffer a concrete injury when the company disseminates that information widely."[372]

Most important here, the court noted the radical implications of Facebook's arguments for the Wiretap Act: "Would Facebook really argue that a violation of this statute inflicts no 'actual injury' on the participants in the conversation unless interception of the

365. *See* In re Facebook, Inc., Consumer Privacy User Profile Litig., 402 F. Supp 3d 767, 777-78 (N.D. Cal. 2019).

366. *Id.* at 766.

367. *Id.* at 784.

368. *Id.*

369. *Id.*

370. *Id.*

371. *Id.* at 786.

372. *Id.*

communication ends up visiting a more tangible, secondary harm on the participants?"[373]

This Part has illustrated how all four categories of informational injuries are vulnerable to *Spokeo* concreteness objections. Showing how *Spokeo* undermines informational injuries also reveals the most fundamental problem underlying the Court's "concreteness" project—the absence of any explanation for why courts, rather than legislatures, should be tasked with identifying which informational practices are injurious and which are not. The three-condition deference approach does not suffer from that same fatal flaw. Satisfied that Congress authorized an informational injury against a private-sector defendant and that Congress adequately personalized the injury, courts should defer to the byproduct of the political process.

CONCLUSION

The Court's standing jurisprudence is in disarray, and privacy bears the brunt of that chaos. The Court's opinion in *Spokeo, Inc. v. Robins* exacerbates the problem—its disorganized discussion of concreteness considerations, its silence on critical issues, and lower courts' inability to consistently apply it all signal the decision's fundamental incoherency.

Despite what *Spokeo* purports to hold, the Court's modern standing cases reveal four different informational injuries in fact—withholding, acquiring, using, and disseminating information in violation of a statute. Examined using this four-injury framework, the Court's newfound hostility to intangible injuries lacks justification, undermines privacy interests today, and threatens to gut future privacy reform. The informational-injury framework also helps reveal the Court's inability to explain why some informational injuries are concrete and why others are not.

The Court's failure to supply a workable limiting principle is not, however, its most fundamental mistake. At its core, the Court cannot explain why it should be the actor charged with identifying which informational practices are sufficiently injurious. So even if the Court could or did supply a coherent mechanism for distinguishing between concrete and non-concrete injuries, the Court still cannot justify substituting its judgment for the political process's.

Rather than requiring courts investigate an informational injury's "concreteness," standing doctrine should employ deference in appropriate cases. That approach would recognize that the justification for a counter-majoritarian injury-in-fact requirement—the separation of powers—is absent in cases against non-governmental defendants where the plaintiff is among the class of

373. *Id.*

persons suffering from an informational injury. Given the difficulties inherent in informational injuries—paired with the absence of a justification—courts should be eager to embrace political consensus about harmful informational practices.