2018

Statutory Damages and Standing after Spokeo v. Robins

Richard L. Heppner Jr.
Duquesne University, heppnerr@duq.edu

REMEDIES SYMPOSIUM:

STATUTORY DAMAGES AND STANDING AFTER *SPOKEO V. ROBINS*

Richard L. Heppner Jr. *

I. INTRODUCTION

Federal private attorney general statutes police conduct that would be costly or impractical to police directly (or supplement direct government enforcement) by authorizing and incentivizing private citizen suits. Congress authorizes private citizens (the "private attorneys general") to bring suit by creating private rights of action. And Congress incentivizes them to bring suit by including provisions guaranteeing minimum statutory damages.[1] Particularly when brought as class actions, private attorney general suits can be powerful enforcement mechanisms, and the mere threat of them can strongly discourage potential violators.

The efficacy of private attorney general statutes is threatened, however, by the Supreme Court's 2016 decision in *Spokeo v. Robins*.[2] *Spokeo* held (1) that the doctrine of constitutional standing requires a plaintiff to have suffered an "injury in fact" that is "concrete," and (2) that Congress cannot create an injury in fact merely by authorizing suit and creating a statutory damages remedy.[3] Those holdings threaten to undermine a line of cases where courts relied on the existence of a statutory damages remedy to infer injury in fact (and standing). Before

* Visiting assistant professor, Duquesne University School of Law. Associate, Reed Smith LLP. J.D., Harvard Law School 2008. Ph.D., Tufts University 2003. Thanks to my colleagues and to the participants in the Center for Constitutional Law's 2017 symposium on "The Constitution and Remedies" for their support, comments, and feedback on this article.

1. *See, e.g.*, In re Carter, 553 F.3d 979, 988 (6th Cir. 2009) ("RESPA allows individuals to police the marketplace in order *to ensure impartiality of referrals and competition* between settlement service providers, thereby creating a market-wide deterrent against unnecessarily high settlement costs. Ultimately, '[t]he purpose of the statute is to prevent certain practices that are harmful to all consumers by establishing that consumers have a right *not to be subject to those practices and providing both public and private remedies of that right*.'").

2. 136 S.Ct. 1540 (2016), *as revised*, (May 24, 2016).

3. *Id.* at 1548.

Spokeo, courts reasoned that Congress's inclusion of a statutory damages remedy indicated an intent to make any statutory violation a redressable injury in fact, regardless of whether the plaintiff alleges a material harm. According to those courts, the injury in fact could be presumed because the statutory damages provision relieved the plaintiff of the need to prove a material injury.

But, although *Spokeo* holds that Congress cannot create standing where there is no injury in fact, *Spokeo* also instructs courts to consider "the judgment of Congress," Congress's ability to "identify intangible harms that meet minimum Article III requirements," and its decision to "elevate" such harms by authorizing suit.[4] I argue that, even after *Spokeo*, courts can and should consider the existence of a statutory damages remedy to ascertain congressional intent about the existence of an injury in fact. The congressional choice to authorize statutory damages should remain a factor for the standing analysis.

When determining whether Congress has "identified" and "elevated" an intangible harm into an injury in fact, courts should continue to consider Congress's choice of remedy. By including a statutory damages remedy, Congress indicates, at minimum, that it has identified a wrong to be curtailed, and that it believes individual suits are a reasonable and effective means of doing so. Where a statute targets conduct that could potentially harm an individual plaintiff, the inclusion of a statutory damages remedy also indicates that Congress believes that the wrong is injurious to individuals, even if its effects are nonmonetary or difficult to quantify or identify.

Not all remedial schemes are created equal. Different statutes fall in different places along a spectrum between true statutory damages schemes and mere minimum damages schemes. The former—where Congress authorizes both actual damages and, alternatively, statutory or liquidated damages—support an inference that Congress intended to identify and elevate an intangible harm into an injury in fact. The latter—where Congress merely sets a floor for actual damages—do not support that inference. I propose that, in the absence of more direct evidence, courts should consider the particular structure and language of a statute's remedial provision to assess whether Congress intended to elevate an intangible injury to the status of injury in fact.

4. *Id.* at 1549 (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 578 (1997)).

II. INFERRING INJURY IN FACT FROM STATUTORY DAMAGES BEFORE AND AFTER *SPOKEO V. ROBINS*

Standing is a notoriously nebulous concept.[5] It is the name given to "a party's right to make a legal claim or seek judicial enforcement of a duty or right."[6] To demonstrate standing and make a claim in federal court, a plaintiff must fulfill both prudential and constitutional requirements. The prudential standing considerations are "judicially self-imposed limits,"[7] rooted in the courts' view of their appropriate role, and designed to avoid deciding "abstract questions of wide public significance even though other governmental institutions may [in the court's view] be more competent to address the questions, and even though judicial intervention may be unnecessary to protect individual rights."[8] Because they are self-imposed, the prudential considerations can be overridden by congressional enactments giving parties a right to sue.[9]

But the constitutional standing requirements are "derived directly" from the Constitution and impose jurisdictional limits and duties on the federal courts that Congress cannot override.[10] Constitutional standing requires: (1) that the plaintiff "have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not 'conjectural' or 'hypothetical'"; (2) that there be a "causal connection between the injury and the conduct complained of"; and (3) that the injury will "likely . . . be

5. "It is almost de rigueur for articles on standing to quote Professor Freund's testimony to Congress that the concept of standing is 'among the most amorphous in the entire domain of public law.'" Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1372 (1988) (quoting *Hearings on S. 2097 Before the Subcomm. on Constitutional Rights of the Comm. on the Judiciary*, 89th Cong., 2d Sess. 498 (1966)). Despite relatively recently standardizing the elements for constitutional standing, the Supreme Court has long acknowledged the frustration of trying to provide a clear definition. *See, e.g.*, Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 475 (1982) ("We need not mince words when we say that the concept of 'Art. III standing' has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it, nor when we say that this very fact is probably proof that the concept cannot be reduced to a one-sentence or one-paragraph definition."); Assn. of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150, 151 (1970) ("Generalizations about standing to sue are largely worthless as such.").

6. *Standing*, BLACK'S LAW DICTIONARY (10th ed. 2014).

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

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

9. Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S.Ct. 1377, 1388 (2014).

10. *Allen*, 468 U.S. at 751.

'redressed by a favorable decision.'"[11] Of those three requirements, injury in fact has become the "[f]irst and foremost."[12]

The injury-in-fact requirement is deceptively easy to state, but notoriously hard to pin down. Simply put, it means that you can only sue in federal court if you have really been harmed. The inquiry is, as then-Judge Scalia put it in an influential 1983 article, like the "question that is sometimes rudely asked when one person complains of another's actions: 'What's it to you?'"[13]

Until recently, most courts and scholars focused on the second part of that rude question; "What's it *to you*."[14] As Scalia advocated in his 1983 article and later held in *Lujan v. Defenders of Wildlife*, that part of the question is embodied in the rigorous application of the requirement that an injury in fact be "particularized," *i.e.*, that the injury "must affect the plaintiff in a personal and individual way."[15] With *Spokeo*, however, the focus shifted to the first part of the question: "*what is it* to you?" *i.e.* what makes an injury in fact "concrete." When is an injury real and personal—not abstract or attenuated—enough to grant standing?

A. Spokeo v. Robins

The metaphysical conundrum of what *really* constitutes an injury *in fact* has always been lurking beneath the surface of cases on standing.[16] In *Spokeo* it crystallized as a separation-of-powers question: can Congress, on its own, create a concrete injury in fact merely by granting a right to sue for damages for a statutory violation?[17]

---

11. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 (1992) (citations omitted).

12. Spokeo v. Robins, 136 S.Ct. 1540, 1547 (2016), *as revised*, (May 24, 2016) (quoting Steel Co. v. Citizens for Better Environment, 523 U.S. 83, 103 (1998)).

13. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881, 882 (1983).

14. *Id.* (emphasis added).

15. *Lujan*, 504 U.S. at 557 n.1; *see also*, Scalia, *supra* note 13, at 892.

16. *See* Michael T. Morley, *Spokeo: The Quasi-Hohfeldian Plaintiff and the Non-Federal Federal Question*, GEO. MASON L. REV. (forthcoming 2018) (available at SSRN: http://ssrn.com/abstract=2946482) (arguing that *Spokeo* creates a new category of "quasi-Hohfeldian" plaintiffs who have suffered a particularized injury because their statutory rights were violated, but no concrete harm because the violation caused no real damage); Cass R. Sunstein, *What's Standing after* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 188-90 (1992) ("In classifying some harms as injuries in fact and other harms as purely ideological, courts must inevitably rely on some standard that is normatively laden and independent of facts. . . . [W]hether there is a so-called nonjusticiable ideological interest, or instead a legally cognizable 'actual injury,' is a product of legal conventions and nothing else.").

17. *Spokeo*, 136 S.Ct. at 1548; *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES: § 2.3, at 71 (5th ed. 2015) (noting that the "interesting question concerning injuries to statutory rights is how far Congress can expand standing"); RICHARD H. FALLON, JR., ET

Spokeo was about the Fair Credit Reporting Act (FCRA).[18] The FCRA requires credit reporting agencies to, among other things, "follow reasonable procedures to assure maximum possible accuracy" of the information in credit reports.[19] It employs a private attorney general mechanism for enforcement. It contains a private right of action provision, authorizing individual consumers to sue for certain statutory violations.[20] And it awards consumers who prevail reasonable attorney's fees and costs, along with "any actual damages sustained."[21] In cases of willful noncompliance, it awards either "any actual damages sustained . . . or damages of not less than $100 and not more than $1,000."[22] Thus, on its face, the FCRA allows consumers to recover statutory damages for willful noncompliance with an FCRA requirement relating to them—even if the noncompliance did not materially harm them. The question the Supreme Court faced in *Spokeo* was whether that congressional grant was sufficient to create constitutional standing.

The facts of the plaintiff's claim in *Spokeo* are not complex. Spokeo.com is a "people search engine," a website that allows users to search for and obtain information about people, such as their ages, addresses, employment, etc.[23] Thomas Robins sued Spokeo, alleging that its online report about him was a credit report that contained factual inaccuracies about his age, education, and employment status—and that those inaccuracies were caused by Spokeo's willful noncompliance with the FCRA's "reasonable procedures" requirement.[24] Robins sued Spokeo on his own behalf, and on behalf of a class of similarly situated individuals—*i.e.*, anyone whose reports were inaccurate due to the willful failure to follow the FCRA's procedural requirements.

AL., HART & WESCHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 142 (6th ed. 2009) ("[U]ncertainty surrounds the question of how much authority Congress possesses to define judicially cognizable injuries that will provide Article III standing.").

18. 15 U.S.C. § 1681 *et seq.*

19. 15 U.S.C. § 1681e(b).

20. 15 U.S.C. § 1681p.

21. 15 U.S.C. §§ 1681n(a)(1)(A)–1681o(a)(1).

22. 15 U.S.C. § 1681n(a)(1)(A). The FCRA employs the commonplace legal shorthand of "damages" to refer to both the *injury* sustained by a plaintiff and the *remedy* awarded by a court for that injury. That shorthand has consequences and creates, if not ambiguity, a misleading impression of equivalence. In this paper, I avoid the shorthand and try to keep the concepts distinct: plaintiffs are "injured" or "harmed," not "damaged" (or they suffer "injury" or "harm," not "damages"); and courts remedy that injury or harm by awarding "damages."

23. Spokeo.com, https://www.spokeo.com/.

24. 15 U.S.C. § 1681e(b).

The district court dismissed Robins's complaint for lack of constitutional standing, finding that he did not allege an injury in fact.[25] But the Ninth Circuit reversed, holding that Robins had alleged an injury in fact, because he alleged that Spokeo's alleged failure to comply with the FCRA's procedural requirements violated "*his* statutory rights, not just the statutory rights of other people," and because the personal interest that Congress protected (namely the "personal interests in the handling of [one's] credit information") was individualized rather than collective.[26]

The Supreme Court found that reasoning unpersuasive and vacated and remanded for further consideration. The Court found that the Ninth Circuit had evaluated whether Robins's alleged injury was "particularized" but had not sufficiently considered whether it was "concrete."[27] The Court held that it was not sufficient to create standing for Congress to create a statutory right and a private right of action to enforce it. The violation of the statutory right must also be a "concrete" injury.[28] A "bare procedural violation" of a statute, the Court held, does not rise to the level of a concrete injury, even if Congress also grants a right to sue and collect statutory damages.[29]

But the Court did not decide whether Robins had pleaded a concrete injury, or whether the violation he alleged was "concrete" or merely "procedural." Instead, the Court laid out some guidelines for future courts to make those assessments. Looking first to dictionaries and precedent, the Court explained that "concrete" means "de facto," "actually exists," "real" and not "abstract."[30] To this unhelpful list of synonyms, the Court added the caveat that "concrete" does not necessarily mean "tangible"—a violation of an intangible right, such as free speech or free exercise of religion, can be a concrete injury.[31]

As for how to make the distinction between an intangible injury that is merely procedural and not concrete, and an "intangible harm [that] constitutes an injury in fact," the Court stated that "both history and the judgment of Congress play important roles."[32] The role of "history" (*i.e.*,

25. Robins v. Spokeo, No. CV10-05306, 2011 WL 597867 (C.D. Cal. Jan. 27, 2011), *reinstatement granted*, No. CV10-05306, 2011 WL 11562151 (C.D. Cal. Sept. 19, 2011), *rev'd and remanded*, 742 F.3d 409 (9th Cir. 2014), *vacated and remanded*, 136 S.Ct. 1540, (2016), *as revised*, (May 24, 2016), *rev'd and remanded*, 867 F.3d 1108 (9th Cir. 2017).

26. Robins v. Spokeo, 742 F.3d 409, 413 (9th Cir. 2014), *vacated and remanded by*, Spokeo v. Robins, 136 S.Ct. 1540 (2016), *as revised* (May 24, 2016).

27. Spokeo v. Robins, 136 S.Ct. 1540, 1548 (2016), *as revised*, (May 24, 2016).

28. *Id.*

29. *Id.* at 1549.

30. *Id.* at 1548.

31. *Id.* at 1549.

32. *Id.*

legal precedent) seems clear—if the injury in question resembles an injury that the Court has historically recognized as concrete, then it is concrete.

The role of "the judgment of Congress" is less clear. The Court said that Congress can "identify intangible harms" that meet the concreteness requirement and can (per *Lujan*) "*elevate* to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law."[33] The Court added that "similarly" Justice Kennedy's *Lujan* concurring opinion stated 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."[34] Beyond that, *Spokeo* did not explain exactly how Congress would "identify" and "elevate" such injuries, how Congress would indicate that it had done so, or exactly what weight courts should give that congressional judgment if they could ascertain it.

Thus, *Spokeo* provides some guideposts, but does not resolve the metaphysical "what is it?" conundrum at the heart of the injury in fact requirement. And it does not really resolve the separation-of-powers issue it purports to address, namely the role of Congress in identifying and elevating intangible harms that were previously not considered concrete, but now should be elevated to the status of injury in fact. While *Spokeo* holds that courts need not *defer* to congressional judgments, it also did direct courts to consider Congress's views—however expressed. One place courts might look for those views is in the remedial provisions, as some courts already did before *Spokeo* was decided.

B. Before Spokeo v. Robins

Before *Spokeo*, some courts had relied on Congress's use of a statutory damages remedy to infer that Congress intended for a statutory violation to count as a constitutional injury in fact. The Ninth Circuit's approach in *Spokeo* (before the case reached the Supreme Court) exemplifies this approach.

The Ninth Circuit held that the existence of an enforceable private right of action indicates congressional intent to create a statutory right,

---

33. *Id.* (quoting *Lujan*, 504 U.S. at 578) (emphasis added).

34. *Id.* (quoting *Lujan*, 504 U.S. at 580 (opinion concurring in part and concurring in judgment)). The Court did not explain why those two understandings of Congress's power are similar. And, indeed, they do not seem reconcilable. The first posits that there exist in the world "concrete, *de facto* injuries" that Congress can "identify" and "elevate" by creating a cause of action to enforce them. The second seems to understand Congress to have the power to create—by "defin[ing] injuries" and "articulat[ing] chains of causation"—a concrete injury, even where no "case or controversy . . . existed before." *Id.*

and that "violation of a statutory right is usually a sufficient injury in fact to confer standing."[35] The Ninth Circuit reasoned that, to have standing, Robins did not need to allege any "actual harm," beyond the violation of the statutory right, because the FCRA awards statutory damages for any willful violation.[36] Instead, "[w]hen, as here, the statutory cause of action does not require proof of actual damages, a plaintiff can suffer a violation of the statutory right without suffering actual damages."[37] Thus the Ninth Circuit relied on the remedy—statutory damages—to infer the injury needed to establish standing.

The Ninth Circuit, was not the only court to employ this inferential reasoning. In *Beaudry v. TeleCheck Services,* an FCRA decision on which the Ninth Circuit relied, the Sixth Circuit also held that, because the FCRA "permits a recovery when there are no identifiable or measurable actual damages," it "implies that a claimant need not suffer (or allege) consequential damages to file a claim."[38] *Beaudry* examined the FCRA's damages provision and concluded that "[b]ecause 'actual damages' represent an *alternative* form of relief and because the statute permits a recovery when there are no identifiable or measurable actual damages, [it] implies that a claimant need not suffer (or allege) consequential damages to file a claim."[39] Other circuits have likewise held that "actual damages are not required for standing under the FDCPA" (Fair Debt Collection Practices Act), because it "permits the recovery of statutory damages up to $1,000 in the absence of actual damages."[40] In each of these cases, the courts inferred what constituted an injury in fact for purposes of standing from Congress's inclusion of a statutory damages remedy.

C. After Spokeo v. Robins

At first blush, the Supreme Court's holding in *Spokeo* could be read to put a constitutional stop to the practice of inferring injury in fact from

35. Robins v. Spokeo, 742 F.3d 409, 412 (9th Cir. 2014), *vacated and remanded,* 136 S. Ct. 1540 (2016), *as revised* (May24, 2016) (citing Fulfillment Servs. Inc. v. United Parcel Serv., Inc., 528 F.3d 614, 619 (9th Cir. 2008); Edwards v. First Am. Corp., 610 F.3d 514, 517 (9th Cir. 2010)).

36. *Robins v. Spokeo,* 742 F.3d at 412.

37. *Id.* at 413.

38. 579 F.3d 702, 705-06 (6th Cir. 2009).

39. *Id.*

40. Miller v. Wolpoff & Abramson, L.L.P., 321 F.3d 292, 307 (2d Cir. 2003) (citing Keele v. Wexler, 149 F.3d 589, 594 (7th Cir.1998), Baker v. G.C. Servs. Corp., 677 F.2d 775, 777 (9th Cir. 1982), Gambardella v. G. Fox & Co., 716 F.2d 104, 108 n. 4 (2d Cir.1983) (holding same under the Truth in Lending Act)).

the congressional choice to authorize statutory damages.[41] *Spokeo* could be read to hold that, regardless of congressional intent, one has constitutional standing only if one suffered a "concrete," as opposed to "procedural," injury.[42] Congress's decision to create a statutory right and to provide a remedy would not be sufficient to "elevate" an injury to the status of "concrete."

But, as discussed, *Spokeo* did not answer the question of what exactly constitutes a concrete injury. And *Spokeo* did instruct courts making that determination to consider: "the judgment of Congress," Congress's ability to "identify intangible harms that meet minimum Article III requirements," and Congress's decision to "elevate" such harms by authorizing suit.[43] When courts implement those instructions and try to ascertain Congress's intent, they can still fruitfully consider Congress's choice of remedy. When Congress chooses to include a statutory damages remedy, it indicates, at minimum, that Congress identified a wrong to be curtailed, and that Congress believed that individual suits were a reasonable and effective means of doing so. Where the conduct targeted by the legislation potentially affects the individual plaintiff (*i.e.*, is particularized), congressional inclusion of a statutory damages remedy may also indicate that Congress believed that the wrong is injurious to individuals, even if its effects are nonmonetary or difficult to quantify or identify.

Still, just because Congress authorizes a minimum damages amount, that cannot be taken to mean that Congress intends to recognize a constitutional injury in fact. I propose that courts consider a number of factors when determining whether a statutory remedial scheme should give rise to an inference that Congress has identified an intangible injury to be elevated to a concrete injury in fact. Based on those factors, different remedial schemes can be placed on a spectrum between two types of schemes: (1) a true statutory damages scheme, which can give rise to an inference that Congress has identified an injury in fact and (2) a minimum damages scheme, which cannot.

---

41. When *Spokeo* returned to the Ninth Circuit on remand, that court abandoned its reliance on the statutory damages remedy to infer Congress's intent. It used a zone-of-interest-type analysis: if the statutory violation is of a procedural requirement, and that procedural requirement was designed to protect against a harm that Congress identified, and that harm is concrete, then violating the procedure is, itself, a harm, and thus an injury in fact. The Ninth Circuit found that the interest protected by the FCRA ("accurate credit reporting") was "concrete," and that therefore the procedural violations that Robins alleged were a "concrete" injury. Robins v. Spokeo, 867 F.3d 1108 (9th Cir. 2017), *cert. denied,* 2018 WL 491554 (Jan. 22, 2018).

42. Spokeo v. Robins, 136 S.Ct. 1540, 1549 (2016), *revised*, (May 24, 2016).

43. *Id.*

At one end of the spectrum lie true statutory damages schemes, where Congress (1) authorizes recovery of actual damages, (2) authorizes a separate, *alternative* recovery of fixed damages, and (3) labels the fixed damages as "statutory" or "liquidated" damages explicitly. For example, the Wiretap Act authorizes recovery of the sum of the "*actual damages* suffered by the plaintiff and any profits made by the violator as a result of the violation" or "*statutory damages*."[44]The key characteristic that these factors identify is that Congress has recognized that the wrong to be curtailed can give rise to actual injury (hence the actual damages) and that the difficulty of proving or quantifying the amount of damages necessitates an alternative award of statutory or liquidated damages to substitute for actual damages.

At the other end of the spectrum lie minimum damages schemes, where Congress authorizes recovery of actual damages and then sets a minimum amount—but the recovery of the minimum amount depends on eligibility for actual damages. These remedial schemes, while setting a minimum amount for recovery, lack the three factors present in true statutory damages schemes.

For example, the Privacy Act of 1974 provides that "the United States shall be liable to the individual in an amount equal to the sum of actual damages sustained by the individual as a result of the refusal or failure, but in no case shall *a person entitled to recovery* receive less than the sum of $1,000."[45] The Supreme Court examined this damages scheme in *Doe v. Chao*, and held that it requires plaintiffs to prove they have suffered some actual injury from a statutory violation before they can recover the statutorily defined minimum damages of $1,000.[46] Doe alleged that the Department of Labor had violated the Privacy Act because, while processing his black lung benefits application, it had used his Social Security number on official agency documents, including some sent to third parties. The government conceded the violation but argued that Doe had not suffered any actual harm. The Supreme Court held that the language and structure of the Privacy Act's damages provision quoted above mean that a plaintiff must prove some actual injury from a violation before being entitled to the statutory minimum damages. The Court focused its close textual analysis on the phrase "a person entitled to

44. 18 U.S.C. § 2520(c)(2)(A-B) (emphasis added).

45. 5 U.S.C. § 552a(g)(4)(A) (emphasis added); *see also, e.g.*, Stored Communications Act 18 U.S.C. § 2707; Vista Mktg., LLC v. Burkett, 812 F.3d 954, 975 (11th Cir. 2016); Van Alstyne v. Elec. Scriptorium, Ltd., 560 F.3d 199, 206 (4th Cir. 2009) (both holding that the Stored Communications Act, requires proof of actual injury).

46. 540 U.S. 614, 624–25 (2004).

recovery" which the statute uses to describe the class of plaintiffs eligible to receive the minimum damages. The Court reasoned that only a plaintiff who was actually injured (and thus entitled to actual damages) was "entitled to recovery," and, therefore, eligible for the minimum damages.[47] The statute did not create an alternative, statutory damages award—it merely set a minimum amount on the actual damages a plaintiff could recover. But, to recover the minimum damages award, the plaintiff had to prove she had suffered an actual injury.[48]

Even after *Spokeo*, Congress's choice of a particular remedial scheme can be informative as to Congress's intent regarding constitutional standing and injury in fact. Following the Court's reasoning in *Doe v. Chao*, where Congress has only set a minimum damages award, no inference should be drawn that Congress intended to eliminate the plaintiff's burden to prove an injury—and, likewise, no inference should be drawn that Congress intended to elevate an intangible injury to the status of a concrete injury in fact. But when Congress employs a true statutory damages scheme, and thus indicates the intent to eliminate the plaintiff's burden to prove actual injury, courts can infer that Congress intended to elevate an intangible injury to the status of a concrete injury in fact.

Other remedial schemes, including the FCRA provision at issue in *Spokeo*, fall somewhere between the two ends of the spectrum. As noted, for willful violations, the FCRA authorizes recovery of "any actual damages sustained . . . or damages of not less than $100 and not more than $1,000."[49] Thus, it does specifically provide for both actual and minimum damages, and it does specify that the minimum damages are an alternative to actual damages ("or"). But it does not label the minimum damages "statutory" or "liquidated" damages, or otherwise indicate either way who should be eligible for them.[50]

---

47. Doe v. Chao, 540 U.S. 614 (2004). In *Doe v. Chao*, the Court also compared the remedial scheme to similar remedies at common law—precisely the analysis based on "history" that it would later recommend in *Spokeo*. The Court explained that that the Act's remedial scheme "parallels" the remedial scheme for certain common law defamation torts where a plaintiff could recover general damages only after first proving "special harm" that was "of a material and generally of a pecuniary nature." 540 U.S. at 625 (citations omitted).

48. *Id.* at 617. Although *Doe v. Chao* was not explicitly about constitutional standing, the Court recognized that the inquiry into what constitutes "actual damages" overlaps with the constitutional injury in fact inquiry. *See Doe v. Chao*, 540 U.S. at 625–26 (noting that by making the "guaranteed minimum contingent upon some showing of actual damages [Congress avoided] giveaways to plaintiffs with nothing more than "abstract injuries'") (quoting Los Angeles v. Lyons, 461 U.S. 95, 101–02 (1983)).

49. 15 U.S.C. § 1681n(a)(1)(A).

50. *Id.*

Another statute that falls in the middle of the spectrum is the Drivers Privacy Protection Act (DPPA), which authorizes recovery of "actual damages, but not less than liquidated damages in the amount of $2,500."[51] On the one hand, the DPPA does not use language like "or" to specify that the fixed damages amount is an alternative to actual damages—it suggests that the fixed amount is a minimum ("not less than").[52] But on the other hand, it calls the fixed damages "liquidated damages," indicating that they are intended as a substitute for actual damages.[53] For such statutes, the particular structure and language of the remedial scheme can be informative (depending on the particular factors identified above and the scheme's similarity to or difference from other statutory schemes), but it will not conclusively establish Congress's intent.[54]

III. CONCLUSION

Before *Spokeo*, some courts inferred the existence of injury in fact—and thus constitutional standing—from Congress's use of statutory or liquidated damages provisions. *Spokeo* holds that that inference cannot conclusively decide the standing issue. But it does not invalidate the reasoning underlying it. And, because *Spokeo* also directs courts to inquire into and consider congressional intent, that same reasoning can be used for that inquiry.

Inferring Congress's intent to identify an intangible harm and elevate it to the level of injury in fact requires close attention to the structure and language of the remedial provisions. Where Congress has created a true statutory damages scheme—one that allows for both actual damages to remedy actual injuries, and also statutory damages to remedy intangible injuries—courts should continue to infer that Congress has identified an intangible injury that it intends to elevate to the status of a "concrete" injury in fact. But when Congress merely sets a minimum amount for actual damages, courts should not make any inference regarding injury

51. 18 U.S.C. § 2724(b)(1) (emphasis added).

52. 18 U.S.C. § 2724(b)(1).

53. 18 U.S.C. § 2724(b)(1); *see* Molzof v. United States, 502 U.S. 301, 310 (1992) (noting that "liquidated damages . . . compensate[] at fixed levels that may or may not correspond to a particular plaintiff's actual loss"); RESTATEMENT (SECOND) OF CONTRACTS § 356 (1981) (liquidated damages are permitted when they reasonably substitute for likely actual damages).

54. In such instances, other factors may be relevant, including legislative history and separation-of-powers concerns. Perhaps another fruitful distinction might be drawn between statutes that create private rights of action and award statutory damages in suits against the federal government, and those that do so in suits against private parties. For example, in *FAA v. Cooper*, the Court attributed its narrow reading of the damages provision in *Doe v. Chao* in part to the fact that "the Privacy Act waive[d] the federal government's sovereign immunity." 566 U.S. 284, 299 (2012).

and should continue to require plaintiffs to plead and prove a recognized actual injury to meet the injury in fact requirement.