Trust the Process: Understanding Procedural Standing Under Spokeo

Jon Romberg
Abstract

In Spokeo, Inc. v. Robins, the Supreme Court issued its first meaningful decision in nearly twenty-five years addressing procedural standing—the question of when violation of a statutory, procedural right presents the injury-in-fact required for standing under Article III. The opaque decision settled little, raising many important questions and leaving numerous circuit splits and enduring confusion on matters of compelling importance in its wake.

Procedural standing is a significant front in the Court’s nascent separation-of-powers revolution that was fueled by the appointments of Justices Gorsuch and Kavanaugh and the retirement of Justice Kennedy, who had been the fulcrum of the Court’s prior procedural standing jurisprudence. Procedural standing will shape Congress's power to enact statutes that protect consumers’ rights to informational privacy in cases involving data breaches and biometric hacks.

The Article proposes a comprehensive scheme for understanding procedural standing under Spokeo and the concrete injury-in-fact it requires. The key is recognizing that Congress enacts statutory, procedural rights for multiple, distinct reasons, and that each category corresponds to a different set of rules for assessing the existence of procedural standing.

There are two broad categories of procedural rights. First, there are intrinsically injurious rights, the violation of which itself constitutes injury-in-fact. Second, there are instrumental rights—newly brought into the procedural standing universe by Spokeo—the violation of which does not itself impose real-world harm. Congress enacts instrumental rights to prevent some other concrete, real-world injury. For one sub-type of instrumental rights, instrumental automatically injurious rights, Congress has concluded that violation of the statutory right is sufficient for standing
even without additional evidence of concrete injury; for another sub-type, instrumental presumptively injurious rights, additional evidence is required. The judiciary should defer to these congressional judgments in assessing procedural standing.

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*Introduction*

In *Spokeo, Inc. v. Robins*, the Supreme Court accurately—and unintelligibly—summarized the principles of procedural standing it had developed over the prior twenty-five years. Procedural standing presents the question of whether federal courts have jurisdiction to address claimed violations of a statutory, procedural right under Article III—in particular, whether the violation of such a right presents the concrete injury-in-fact required for standing. As *Spokeo* explained:

> [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

1. 136 S. Ct. 1540 (2016).
2. See U.S. CONST. art. III, §§ 1–2; Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (holding “the irreducible constitutional minimum of standing” imposed by the “case-or-controversy requirement of Article III” is “injury in fact” that is both “concrete and particularized” and “actual or imminent”; “a causal connection between the injury” and the defendant’s conduct; and proof that the injury is “redress[able] by a favorable decision”) (internal quotations and citations omitted).
additional harm beyond the one Congress has identified. . . . On the other hand, [a plaintiff] cannot satisfy the demands of Article III by alleging a bare procedural violation.³

Spokeo thus recognizes that in “some circumstances” involving a “risk of real harm,” violation of a statutory, procedural right automatically presents the concrete injury-in-fact necessary for standing; there is no need to “allege any additional harm” beyond the procedural violation itself.⁴ But how are those circumstances to be determined? In contrast, Spokeo also recognizes that a “bare” procedural violation is never sufficient to produce the injury-in-fact required by Article III.⁵ But which procedural violations are bare?

Moreover, those are apparently not the only possibilities: The cupboard is not always full or bare such that violation of a statutory, procedural right either always or never satisfies Article III. Instead, a third set of circumstances exists in which violation of the procedural right sometimes presents a case or controversy depending on the additional harm or risk of harm beyond the procedural violation itself.⁶ But what role does the risk of real harm play in such cases, and how is to be measured? Does that determination turn on the risk of harm to the particular plaintiff? Or does it turn on Congress’s judgment about the likelihood of risk to the class of people protected by a statutory, procedural right that generally arises from violation of that right?⁷ Spokeo provides no clear answer to any of these questions.

Moreover, without acknowledging the novelty of its approach, Spokeo applies procedural standing principles to a different context than the Court’s prior procedural standing decisions. In previous cases, two statutory, procedural concerns placed the decision within the procedural standing rubric.⁸ First, Congress had imposed a procedural decision-making
obligation on an administrative agency, constraining whether the agency was obligated to make a particular decision and how the agency was to make that decision, without constraining what substantive decision the agency would ultimately make. Second, Congress had granted a procedural enforcement right—a cause of action—that purportedly authorized anyone to bring suit challenging the agency’s failure to comply with its decision-making obligation.

In these prior procedural standing cases, the Court required that plaintiffs demonstrate a particularized interest in the subject matter of the agency’s decision. The Court held that plaintiffs lacked standing to enforce the procedural decision-making right as against the agency in the absence of such a particularized interest, notwithstanding Congress’s grant of a “bare” procedural enforcement right purporting to authorize anyone to bring suit, regardless of any particularized interest in the outcome of the agency’s decision. In environmental cases, for example, plaintiffs are required to demonstrate geographic proximity to the area the agency allegedly endangered by violation of its decision-making obligation.

However, so long as plaintiffs have a particularized interest in the subject matter of the agency’s decision, they need not demonstrate that violation of the decision-making obligation caused any further harm or risk of harm beyond the denial of that procedural decision-making right itself. In other words, the Court held that plaintiffs need not show that the agency’s failure to comply

and intangible, and the label is of course of little relevance. See Spokeo, 136 S. Ct. at 1549; Lujan, 504 U.S. at 560–61.


10. See, e.g., Summers, 555 U.S. at 497; Massachusetts v. EPA, 549 U.S. at 517–18; Lujan, 504 U.S. at 573 n.8; see also Baude, supra note 9, at 204–09; Burt, supra note 9, at 282–86.

11. Lujan, 504 U.S. at 576–78.

12. See id. at 562–67; see also Summers, 555 U.S. at 497.

13. Lujan, 504 U.S. at 572 n.7 (“The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency’s failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.”).
with the mandated procedure caused or risked causing them any additional, real-world harm.  

Spokeo, in contrast, involved neither a statutory decision-making process imposed on an administrative agency nor a general grant of a “bare” procedural enforcement right in any person. Instead, it involved a statute that granted specific rights to particular individuals, as against a private defendant, and afforded a right to sue to plaintiffs whose particularized rights have been violated.  

So what does Spokeo mean when it pours the new wine of particularized rights against private parties into old procedural standing bottles—what new type of statutory right does Spokeo characterize as procedural and thus subject to procedural standing principles, despite the sharply varying implications for separation of powers for statutes directed against private parties as opposed to those constraining agency decision-making?  

Procedural standing is a riddle wrapped in a mystery inside the enigma that is Article III standing.

14.  Id.  

16.  See Allen v. Wright, 468 U.S. 737, 752 (1984), abrogated by Lexmark Int’l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014) (“[T]he law of Art[icle] III standing is built on a single basic idea—the idea of separation of powers.”); see also Spokeo, 136 S. Ct. at 1550–51 (Thomas, J., concurring) (arguing that separation of powers has little applicability to suits against private parties); Pamela S. Karlan, Foreword: Democracy and Disdain, 126 HARV. L. REV. 1, 61 (2012) (explaining that, unlike in Lujan, in suits asserting individualized procedural rights as against private parties, “the separation of powers concern [i]s entirely absent, since the plaintiff [i]s not part of an ‘undifferentiated public,’ nor [i]s the executive branch the target of the lawsuit”).

17.  This Article accepts as a given the Supreme Court’s conclusions—questionable as they may be—about the requirement of concrete injury-in-fact for standing, and for procedural standing in particular. Instead, this Article aims to provide a coherent account of procedural standing that both makes sense, and that makes sense of the Court’s procedural standing jurisprudence, including that in Spokeo.

As to standing, many scholars have convincingly argued that the Court’s newfound insistence on concrete injury, beginning in the 1970s, is historically unfounded, not required or suggested by the text of Article III, and not even a good proxy for when a litigant has the incentive, capacity, and interest to be an effective advocate. The requirement of injury-in-fact under Article III is open to serious question and has been repeatedly and powerfully challenged by academics. See, e.g., Lee A. Albert, Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief, 83 YALE L.J. 425, 450–56 (1974); William A. Fletcher, The Structure of Standing, 98 YALE L.J. 221, 223 (1988) (“If such a
Part I of this Article explores Spokeo on its own terms. On the one hand, as Spokeo suggests, standing predicated on a procedural violation is in some ways more difficult to demonstrate than standing in other contexts because procedural standing faces the additional hurdle of demonstrating that denial of an intangible, procedural right has resulted in concrete injury.

On the other hand, procedural standing is in some ways less difficult to satisfy than other forms of standing. Lujan set forth the “irreducible constitutional minimum of standing” to require injury that is “redressable” and either “actual” or “imminent.”18 But in an enigmatic footnote, Lujan qualified that principle in the context of procedural standing, explaining that “[t]he person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal requirement of injury is a constitutional minimum that Congress cannot remove by statute, the Court is either insisting on something that can have no meaning beyond a requirement that plaintiff be truthful about the injury she is claiming to suffer, or the Court is sub silentio inserting into its ostensibly factual requirement of injury a normative structure of what constitutes judicially cognizable injury that Congress is forbidden to change.”); Richard J. Pierce, Jr., Lujan v. Defenders of Wildlife: Standing as a Judicially Imposed Limit on Legislative Power, 42 DUKE L.J. 1170, 1170–71 (1993) (arguing that Justice Scalia’s opinion “is an insupportable judicial contraction of the legislative power to make judicially enforceable policy decisions”); Cass R. Sunstein, What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III, 91 MICH. L. REV. 163, 217 (1992) (“Scalia reads Article III broadly, invests it with general, controversial values, and ultimately recommends judicial invalidation of the outcomes of democratic processes.”) [hereinafter Sunstein, What’s Standing]. See generally Edward A. Hartnett, The Standing of the United States: How Criminal Prosecutions Show that Standing Doctrine Is Looking for Answers in All the Wrong Places, 97 MICH. L. REV. 2239, 2245 (1999) (comparing the “injury-in-fact” requirements with Article III criminal standing requirements) (“Despite its apparent reasonableness under current Supreme Court doctrine, I submit that no federal judge, if pressed, would seriously contend that Article III requires that the United States must suffer an injury in fact that is ‘personal,’ ‘concrete and particularized,’ and ‘actual or imminent, not conjectural or hypothetical’ before litigation on its behalf can be brought in federal court.”).

Because the Court shows no inclination whatsoever to retreat from its approach to standing, this Article takes the Court’s basic principles, including concrete injury-in-fact, as a given.

As to procedural standing, other than Justice Thomas, every member of the Court in Spokeo, including the four liberal justices who might have been thought to take a more latitudinarian approach to procedural standing, rejected Justice Thomas’s sensible embrace of a sharp distinction between careful scrutiny of claims brought against public entities and minimal requirements for procedural standing as against private entities. See infra Section I.D. Whatever the merits of the Court’s rejecting such possibilities in Spokeo, the possibility of revisiting those decisions seems vanishingly small, and thus the propriety of doing so is largely beyond the scope of this Article.

standards for redressability and immediacy.”\textsuperscript{19} In other words, the irreducible constitutional minimum of standing is reduced in the procedural standing context. But how can these principles of procedural standing be harmonized, if at all? As Professor William Baude has observed, standing for statutory, procedural rights is “one of the hardest questions in modern federal courts doctrine.”\textsuperscript{20}

\textit{Spokeo} points to the important role of history and of congressional judgment in assessing procedural standing, as explained in Section I.B, but provides little in the way of clarity.\textsuperscript{21} It does not answer whether a historical analog to the procedural right at issue is necessary or simply sufficient for standing. \textit{Spokeo} is similarly opaque about the role congressional judgment plays in assessing procedural standing.\textsuperscript{22}

The Court has been unclear and contradictory regarding whether Congress can enact a statute that confers procedural standing that would otherwise not exist. It has stated, on the one hand, that “Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute.”\textsuperscript{23} In such cases, “[t]he actual or threatened injury required by Art[icle] III may exist solely by virtue of ‘statutes creating legal rights, the invasion of which creates standing . . . .’”\textsuperscript{24} On the other hand, “[i]t is settled that Congress cannot erase Article III’s standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.”\textsuperscript{25}

\textit{Spokeo} attempts to square these non-overlapping circles in the procedural standing context. Notably, it embraces Justice Kennedy’s concurrence in \textit{Lujan}, which, in addressing procedural standing, recognized

\begin{itemize}
\item 19. \textit{Id.} at 572 n.7; \textit{see also} Evan Tsen Lee & Josephine Mason Ellis, \textit{The Standing Doctrine’s Dirty Little Secret}, 107 \textit{Nw. U. L. Rev.} 169, 175, 185–87 (2012) (arguing that procedural standing is simply an incoherent anomaly that cannot be reconciled with the general law of standing) (“Congress has created procedural rights and made it clear that they can be enforced without meeting the normal injury, causation, and redressability requirements [of standing].”).
\item 20. Baude, \textit{supra} note 9, at 212.
\item 21. \textit{See infra} Section I.B.
\item 22. \textit{See infra} Section I.B.
\item 24. \textit{Id.} at 500 (quoting \textit{Linda R.S.}, 410 U.S. at 617 n.3).
\end{itemize}
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.” Spokeo cautions, however, that “Congress’ role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.” The Court adopts the following, purportedly harmonizing, criterion: “Article III standing requires a concrete injury even in the context of a statutory violation,” and concrete injury requires either actual harm or a “risk of real harm.” Thus, Spokeo concludes opaquely, Congress validly confers standing when denial of a procedure it mandates, though intangible, is concrete, and when the risk of harm resulting from that denial is real and not bare.

Section I.C then addresses the two confounding examples of procedural injuries that Spokeo apparently suggests would not be concrete: (1) an incorrect zip code in a credit report and (2) defective notice to users of a credit report when the report contains no inaccuracies. Both examples are mistaken in ways that are not actually relevant to the Court’s reasoning and that distract from the Court’s intended approach to procedural standing. Finally, Section I.D discusses Justice Thomas’s perceptive concurrence in which he alone endorses a fundamental distinction between the sort of procedural standing at issue in the agency decision-making cases and the more generous approach that should apply to the private procedural rights at issue in Spokeo.

In assessing procedural standing, one longs for the clarity and precision of Justice Stewart’s famous test for obscenity: “I know it when I see it . . . .” As the Sixth Circuit has acknowledged, “It’s difficult, we recognize, to identify the line between what Congress may, and may not, do in creating an ‘injury in fact.’ Put five smart lawyers in a room, and it won’t take long to appreciate the difficulty of the task at hand.”

Section II.A explains that procedural standing is both exceedingly complex and of great practical import. The scope of procedural standing, if

26. Id. at 1549 (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part and concurring in the judgment)).
27. Id. at 1549.
28. Id.
29. Id. at 1550.
read unduly narrowly, could sharply constrain Congress’s ability to enact judicially enforceable legislation that grants rights against private corporations. Procedural standing serves as a potentially oppressive gatekeeper in the Court’s nascent separation-of-powers revolution.

Standing, including procedural standing, is grounded on the separation of powers. “In order to remain faithful to the tripartite structure [of the federal government], the power of the Federal Judiciary may not be permitted to intrude upon the powers given to the other branches.” Under Spokeo, the judicial branch safeguards separation-of-powers, limiting its own power and thus preserving congressional power. But how? By exercising its own power to repudiate Congress’s power and refusing to enforce the procedural rights that Congress has enacted with the express purpose of judicial enforcement. This act of judicial jiu-jitsu—holding that Article III limits the judicial power so as to preserve congressional power, but somehow thereby empowers the Court to limit congressional power—is enough to make Chief Justice Marshall blush.

32. See, e.g., Fletcher, supra note 17, at 233 (“For the Court to limit the power of Congress to create statutory rights enforceable by certain groups of people—to limit, in other words, the power of Congress to create standing—is to limit the power of Congress to define and protect against certain kinds of injury that the Court thinks it improper to protect against.”); F. Andrew Hessick, Standing, Injury in Fact, and Private Rights, 93 CORNELL L. REV. 275, 320–21 (2008) (“The Constitution charges Congress with enacting laws. The injury-in-fact requirement, however, restricts Congress’s power to create rights . . . thus prevent[ing] Congress from exercising the full extent of its power to create rights that private individuals may seek to vindicate in the courts.”).


34. Spokeo, 136 S. Ct. at 1547.

35. See Daniel Solove, When Is a Person Harmed by a Privacy Violation? Thoughts on Spokeo v. Robbins, TEACHPRIVACY (May 17, 2016), https://www.teachprivacy.com/thoughts-on-spokeo-v-robbins/ (“When Congress deems something to be a concrete injury, courts should respect the will of Congress. The entire reason for the concrete injury requirement is a separation-of-powers . . . protection of Congress against encroachment by the courts. But the Spokeo[] decision usurps Congress’s power, curtailing its ability to define concrete injury.”). As a commentator suggested of Lujan, “[t]he majority opinion . . . transposes a doctrine of judicial restraint into a judicially enforced doctrine of congressional restraint.” Pierce, supra note 17, at 1199.

36. See generally Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (establishing the Court’s power to engage in judicial review of congressional action but declining to exercise that power).
The Court, apparently emboldened by newly confirmed Justices Gorsuch and Kavanaugh and a newfound skepticism of procedural standing in the Trump administration’s Department of Justice, has become increasingly vigilant about enforcing its stringent view of the separation of powers, including the tightly constrained role it sees for the judiciary under Article III. *Spokeo* is thus in harmony with the Court’s other recent decisions in *Gundy v. United States* and *Kisor v. Wilkie*, which strongly suggest that the Court will soon employ separation-of-powers principles to undercut the power of the administrative state, looking to Article III to constrain the legislative and executive branches’ abilities to protect individuals from corporate malfeasance.

Indeed, the Court signaled that it will continue paying close attention to procedural standing in 2019. In *Frank v. Gaos*, the Court avoided deciding a case on the grounds on which it had granted certiorari (the propriety of a cy pres class action settlement of a claim against Google). Instead, at the suggestion of the Solicitor General, the Court raised procedural standing—an issue that none of the parties had raised—and remanded the case to the Ninth Circuit for consideration of whether there was concrete injury sufficient to support procedural standing. Absent procedural standing, judicial approval of the class settlement will be impermissible, as will any realistic prospect of suit against Google for the claimed violation of millions of class members’ statutory rights of privacy.

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38. 139 S. Ct. 2116 (2019).


41. Id. at 1043–46.

42. Procedural standing and the question of how much risk of harm is necessary for standing are also central to the Court’s upcoming decision in *Thole v. U.S. Bank, N.A.*, No. 17-1712 (argued Jan. 13, 2020), See *Thole v. U.S. Bank, N.A.*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/thole-v-u-s-bank-n-a/ (last visited Jan. 1, 2020). *Thole* addresses a circuit split as to standing in the context of ERISA claims brought by beneficiaries of defined-benefit plans when defendants engaged in conduct that allegedly harmed the overall plan, but with little or no risk that the individual plaintiffs will be harmed.
As Section II.B explains, such rulings will control whether courts permit Congress and state legislatures to address informational and privacy concerns raised by the actions of technology giants such as Google and Facebook. On August 8, 2019, in a multi-billion dollar class claim against Facebook, the Ninth Circuit held that Facebook’s alleged violation of millions of class members’ rights under an Illinois biometric privacy statute constituted concrete injury that afforded procedural standing under Spokeo.43 Similarly, massive data breaches and exposure of biometric data have become commonplace, such as the recent hacking of Equifax44 and Capital One.45 Consumers will only be able to bring suit, and will only be able to receive the much-publicized $125 recovery or identity theft monitoring through settlements of such suits, if courts find procedural standing under Article III. The courts of appeals, however, are in disarray as to whether standing exists for plaintiffs whose private data or biometric information has been breached, but whose identity has not (yet) been stolen.46

Similarly, the rights of educationally disabled children may also be in jeopardy. Such rights are almost entirely grounded on procedural protections that mandate the process by which a school district must create an Individualized Education Plan (IEP) rather than on the substantive appropriateness of the resulting IEP.47 Will Spokeo be read to bar suit for a school district’s violation of its procedural duties in creating an IEP unless

by that conduct. See id; Basem Besada & Brandon A. Slotkin, Thole v. U.S. Bank, N.A., LEGAL INFO. INST., https://www.law.cornell.edu/supct/cert/17-1712 (last visited Jan. 31, 2020). The question of how much individualized risk of harm is sufficient for standing in this context implicates the historical openness to such claims brought by trust beneficiaries, even absent an individualized risk of harm, and a broad approach to standing that is in tension with the Court’s general skepticism about standing in the absence of evidence of such harm.

43. Patel v. Facebook, Inc., 932 F.3d 1264, 1268, 1274–75 (9th Cir. 2019).
46. See infra Section II.B.
47. See Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206 (1982) (recognizing “the legislative conviction that adequate compliance with the procedures prescribed [as to IEP formation] would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP”).
the child can somehow prove non-speculative, additional, concrete harm arising from the procedural violation?48

Indicative of the confusion and ferment in procedural standing jurisprudence, Section II.B further explains that the Delphic decision in Spokeo has given rise to multiple circuit splits, dissents, and dissents from denial of rehearing en banc in the courts of appeals in the brief period since the decision. For example, the courts of appeals are in significant tension, and often outright disagreement, about whether a data breach and ensuing risk of identity theft are sufficient for procedural standing.49 The circuits are split on multiple other issues as well.50 Perhaps even more fundamentally, the cases have not even coalesced into different camps; the courts have yet to develop a coherent theory—or theories—of procedural standing.

Part III attempts to resolve the opacity in the Supreme Court and confusion in the courts of appeals by setting forth such a theory. Two recent scholarly efforts attempting to make sense of procedural standing have arrived at real-world dead ends. First, Professor Baude concludes that Justice Thomas has the best of the argument in Spokeo by distinguishing between claimed statutory violations of public rights (the traditional realm of procedural standing) and of those against private defendants (for which standing should be much more readily satisfied).51 However, while this argument is historically compelling, no other member of the Court appears to agree with Thomas, so the approach is of little practical relevance. Second, authors Lee and Ellis analyze procedural standing in some depth, hoping to derive an intelligible theory; ultimately, however, they throw up their hands, announcing that they are unable to derive any single, coherent theory that places procedural standing within the realm of general principles of standing.52 They argue that the only way to understand procedural standing is simply to conclude “that the Case or Controversy Clause has two tiers” with completely inconsistent rules—a more forgiving tier for procedural standing and a stricter tier for everything else.53

49. See infra Section II.B.1.
50. See infra Sections II.B.2–5.
52. Lee & Ellis, supra note 19, at 235–36.
53. Id. at 175 (arguing one tier applies when “Congress has created procedural rights and made it clear that they can be enforced without meeting the normal injury, causation,
This Article agrees that there is no single, coherent theory of procedural standing that reconciles all the incompatible principles the Court recites and announces in Spokeo. However, it makes the principles of procedural standing intelligible by arguing that Congress enacts statutory procedural rights that fit into multiple, distinct categories, and that a coherent set of principles applies within each category.

Section III.A explains a fundamental, unrecognized development brought about by Spokeo: it expands procedural standing to apply to a novel, third strand of statutory rights that were referenced, but not actually presented, in Lujan. Spokeo implicitly holds that procedural standing principles apply to instrumental rights as against private parties, i.e., provisions that Congress enacts not because violation of the right is itself a real-world problem, but because the right is intended to protect against some distinct, concrete injury with which Congress is actually concerned.

Section III.B then explores the distinct reasons that Congress enacts the various categories of procedural rights: enforcement rights; decision-making rights; and, most notably, the novel category of instrumental statutory rights. It also assesses the legislative judgments that Congress is making when it enacts those various rights. Most notably, Congress enacts instrumental rights when it concludes that it may be difficult to prove or measure the existence of the concrete injury, or that the instrumental right is necessary and proper as a prophylactic means to help prevent occurrence of the concrete injury rather than merely provide compensation for its violation. Section III.C explains that the judiciary owes deference to such legislative judgments, so long as Congress is exercising its power to define injuries and articulate chains of causation between instrumental rights and the concrete injuries with which Congress is ultimately concerned.

Part IV catalogs the various types of procedural rights at issue in procedural standing cases: intrinsically injurious rights and instrumental rights. In addition to enforcement rights, i.e., those granting a cause of action, Congress enacts certain statutory rights—intrinsically injurious rights—because it believes violation of those rights automatically constitutes injury-in-fact. Intrinsically injurious rights include intrinsically injurious intangible rights, which define certain intangible rights as inherently legally enforceable, and intrinsically injurious decision-making

and redressability requirements . . . and another tier [applies] for all other cases, where the normal requirements [of standing] apply”).

54. See infra Section IV.B.
and dignitary rights, which involve procedural rights that govern decision-making such that the denial of the decision-making right itself constitutes injury, without requiring proof of additional harm by showing that the procedural violation affected the outcome of the decision.

Instrumental rights also fall into two sub-types. Congress’s intent in enacting such a right depends on its understanding of the chain of causation between the instrumental right and the ultimate concrete interest at stake. For the first category of instrumental rights—*instrumental automatically injurious rights*—Congress intends that a violation of the statutory right alone automatically affords standing, without the need for additional evidence of concrete harm; this is so because Congress has concluded that a material risk of harm categorically arises from violation of the statutory right.\(^{55}\) For the second category of instrumental statutory rights—*instrumental presumptively injurious rights*—Congress has concluded that concrete injury is likely to arise from the statutory violation, but intends for courts to assess whether the plaintiff has demonstrated that a material risk of harm to her concrete interests arose from the statutory violation.\(^{56}\)

Part V canvasses the issues that *Spokeo* resolved, and those it left open. It provides a concrete explanation of the best answers to the questions that *Spokeo* and the courts of appeals have left unanswered. Finally, Part VI applies the approach outlined above to various procedural standing disputes that have bedeviled the courts. While applying the proper approaches to procedural standing does not necessarily make resolution of these cases easy—at least until Congress starts explicitly expressing the category of instrumental right it intends to create—this approach vastly simplifies and clarifies the questions that must be answered to determine standing in cases in which plaintiffs assert procedural rights.

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I. Procedural Standing Under Spokeo

A. Spokeo’s Explication of Procedural Standing

1. The Claims in Spokeo

The mundane claim in *Spokeo* belies its vital implications for procedural standing. Thomas Robins sued Spokeo, Inc. for “publish[ing] an allegedly inaccurate report about him on its website,” claiming “willful violations” of

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\(^{55}\) See infra Section IV.C.1.

\(^{56}\) See infra Section IV.C.2.
“a number of procedural requirements on consumer reporting agencies” that the Fair Credit Reporting Act (FCRA) imposes.57

Most notably, the FCRA requires credit reporting agencies to “follow reasonable procedures to assure maximum possible accuracy of” consumer reports.58 The FCRA also requires that credit reporting agencies: (1) “notify providers and users of consumer information of their responsibilities under the Act;” (2) “limit the circumstances in which such agencies provide consumer reports ‘for employment purposes;’” and (3) “post toll-free numbers for consumers to request reports.”59

Robins alleged that Spokeo’s report “states that he is married, has children, is in his 50’s, has a job, is relatively affluent, and holds a graduate degree,” but that “all of this information is incorrect,” thereby interfering with his job prospects and causing him emotional distress.60 In its initial decision, the Ninth Circuit held that Robins had standing because “he allege[d] that Spokeo violated his statutory rights, not just the statutory rights of other people, . . . [and] the interests protected by the statutory rights at issue [were] sufficiently concrete and particularized.”61 As a result, Robins was “among the injured,” and Congress could elevate the violation of his rights “to the status of legally cognizable injuries.”62

2. Spokeo’s Superficial Holding: Procedural Standing Requires Injury-in-Fact That Is Not Only Particularized but Also Concrete

Spokeo’s holding is deceptively simple: Procedural standing requires injury-in-fact that is not only particularized but also concrete.63 The Supreme Court concluded that the Ninth Circuit’s holding, despite its reference to both particularity and concreteness, turned solely on the existence of particularized injury and entirely failed to analyze whether Robins’ injury was concrete, thus requiring remand as to concrete injury.64

60. Id. at 1546.
61. Robins v. Spokeo, Inc., 742 F.3d 409, 413 (9th Cir. 2014), overruled by Spokeo, 136 S. Ct. at 1540.
62. Id. (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 578 (1992)).
64. Id. at 1548 (“Under the Ninth Circuit’s analysis, . . . [the] independent requirement [of concreteness] was elided.”).
Spokeo for the first time clarified that the Court’s oft-articulated requirement that standing necessitates an actual injury to the plaintiff that is “particularized and concrete” establishes two distinct inquiries: “particularization is necessary to establish injury in fact,” but particularization is not sufficient because “[a]n injury in fact must also be ‘concrete.’”

Thus, standing requires two things. First, the plaintiff’s injury must be particularized—not merely an abstract, generalized interest in following the law, but instead a personal harm to the plaintiff. As explained in Section I.A.3, this principle undergirded the Court’s prior procedural standing decisions, which held that a generalized desire to correct unlawful agency conduct is insufficient to confer standing, notwithstanding Congress’s attempt to confer standing through just such a generalized enforcement right. Second, the “concrete” component of “particularized and concrete injury” has an independent meaning. To support standing, an injury must also meet the distinct requirement that it be “‘real’ and not ‘abstract.’” It must impose “de facto” harm on the plaintiff, which requires that “it must actually exist,” or there must be a “risk of real harm.”

The Court’s seemingly simple holding was that “[b]ecause the Ninth Circuit failed to fully appreciate the distinction between concreteness and particularization, its standing analysis was incomplete.” This result required remand for the Ninth Circuit to determine “whether the particular procedural violations alleged in this case entail a degree of risk sufficient to meet the concreteness requirement.”

65. Id.
66. See cases cited infra notes 83–85 and accompanying text.
67. Spokeo, 136 S. Ct. at 1548.
68. Id. In coming to this conclusion, the Court evaluated the definition of concrete. Id. (citing BLACK’S LAW DICTIONARY 479 (9th ed. 2009); WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 472 (1971); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 305 (1967)).
69. Id. at 1549. As the dissent explained, though the Court had quite often used the phrase “particularized and concrete,” it had not previously been clear that those elements were distinct; the Court had not previously held that statutory injury to a particular person, arising from a congressionally granted right particularized to that person, was not thereby concrete. Id. at 1554–55 (Ginsburg, J., dissenting).
70. Id. at 1550.
71. Id. On remand, the Ninth Circuit had no difficulty finding concrete injury along the lines suggested by the dissent. Robins v. Spokeo, Inc., 867 F.3d 1108, 1118 (9th Cir. 2017).
3. Procedural Standing Prior to Spokeo: Bare Procedural Enforcement Rights over Agency Decision-Making Don’t Confer Standing

In order to understand Spokeo and how its novel approach fits into the Court’s prior articulation of procedural standing, it is useful at this point to pan back from Spokeo itself, and from its superficial holding that the Ninth Circuit had simply elided analysis of the concrete injury necessary for procedural standing. Only by first understanding these prior decisions is it possible to revisit Spokeo, appreciate the novelty of the third strand of procedural standing it introduces—instrumental rights—and understand its implications for future procedural standing cases. Spokeo applied the rubric of procedural standing in a context that significantly expanded the scope of the doctrine as reflected in the Court’s foundational procedural standing decision, Lujan v. Defenders of Wildlife, and in subsequent cases echoing Lujan, such as Summers v. Earth Island Institute and Massachusetts v. EPA.

In those prior procedural standing cases, two statutory, procedural aspects had been present that placed the cases within the rubric of procedural standing. First, Congress had imposed a procedural decision-making obligation on an administrative agency to constrain how or whether the agency was to make a decision, but not what substantive decision it was to make. Second, Congress had granted a procedural enforcement right—a cause of action—that purported to authorize “anyone” to bring suit challenging the agency’s failure to comply with that decision-making obligation.

Lujan involved claims brought by Defenders of Wildlife and other environmental groups under the Endangered Species Act (ESA). The ESA imposed a decision-making obligation on the Secretary of the Interior to issue regulations listing “endangered or threatened” species and requiring that other agencies engage in “consultation” with the Secretary of the Interior to prevent agency actions that would be “likely to jeopardize the

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75. See, e.g., Lujan, 504 U.S. at 568–71.
76. See, e.g., id. at 571–72.
continued existence of any endangered species or threatened species." The plaintiffs filed suit against the Secretary of the Interior alleging, \textit{inter alia}, unlawful lack of consultation about certain actions outside the United States. The procedural enforcement mechanism came in the form of the ESA’s “citizen-suit” provision that allowed “any person” to bring a suit seeking to enjoin any person or agency he believes may have violated the ESA.

\textit{Lujan} directly addressed the Eighth Circuit’s alternative holding that so-called “procedural standing” afforded the plaintiff environmental groups standing, regardless of any injury to their actual interests. The Eighth Circuit, the Court explained, had held that the ESA’s “citizen-suit provision creates a ‘procedural righ[t]’ . . . so that \textit{anyone} can file suit in federal court to challenge the Secretary’s . . . failure to follow the assertedly correct consultative procedure,” regardless of that person’s “inability to allege any discrete injury flowing from that failure.”

The Supreme Court rejected this approach to procedural standing. \textit{Lujan}’s core holding is that a bare statutory enforcement right to challenge an agency’s \textit{decision-making} obligation does not confer standing unless the plaintiff has a concrete interest in the substantive subject matter of the agency’s procedurally constrained decision. The plaintiffs could not, therefore, enforce an environmental decision-making obligation that Congress had imposed on an agency, notwithstanding Congress’s grant of an enforcement right purporting to authorize anyone to enforce that right. Instead, to demonstrate standing, a plaintiff must show geographic proximity to the area allegedly endangered by the agency’s decision, which creates a concrete interest in the subject matter of that decision.

In other words, Congress cannot confer standing by purporting to grant a bare procedural enforcement right to sue on the basis of a general, non-particularized interest in the proper administration of an agency’s decision-making obligations. If the plaintiff has a concrete interest in the subject

\begin{itemize}
  \item \textit{Id.} (quoting 16 U.S.C. § 1536(a)(2)).
  \item \textit{Id.} at 559.
  \item \textit{Id.} at 571–72 (quoting 16 U.S.C. § 1540(g)) (emphasis added).
  \item \textit{Id.} at 571–78 (quoting Defs. of Wildlife v. Lujan, 911 F.2d 117, 121–22 (8th Cir. 1990)).
  \item \textit{Id.} at 562–67; Summers v. Earth Island Inst., 555 U.S. 488, 496–97 (2009) (“But deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right \textit{in vacuo}—is insufficient to create Article III standing.”).
  \item \textit{Lujan}, 504 U.S. at 566–67.
  \item \textit{See id.} at 562–67; \textit{Summers}, 555 U.S. at 496–97.
\end{itemize}
matter of the agency’s decision, however, then the enforcement right is not bare, and standing exists to enforce the decision-making right—regardless of any evidence that the outcome of a procedurally proper decision would have differed.\textsuperscript{86}

\textit{Lujan} rejected the Eighth Circuit’s conclusion that Congress could confer standing by granting a bare procedural enforcement mechanism for an agency’s failure to comply with a decision-making obligation, regardless of any connection between the plaintiff and the subject of that decision.\textsuperscript{87} Instead, plaintiffs have procedural standing to challenge an agency’s violation of a decision-making obligation only if plaintiffs have a concrete interest in the outcome of the agency’s decision. Moreover, Justice Scalia specifically recognized the viability of procedural standing in the form at issue in \textit{Spokeo} but not present in \textit{Lujan}, instrumental rights, explaining: “This is not a case where plaintiffs are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs . . .”\textsuperscript{88}

In \textit{Massachusetts v. EPA}, which represents a high-water mark for expansive procedural standing, the Supreme Court found that Massachusetts and other intervenor states had standing to challenge the agency’s failure to regulate greenhouse gases.\textsuperscript{89} The Court held that when Congress grants “a litigant . . . ‘a procedural right to protect his concrete interests,’ . . . [the litigant] ‘can assert that right without meeting all the normal standards for redressability and immediacy.’”\textsuperscript{90} The Court expressly embraced the D.C. Circuit’s recognition that such procedural rights, accorded by Congress for the purpose of protecting distinct, concrete interests, permit standing without the need to show concrete injury beyond the statutory violation itself.\textsuperscript{91}

\textsuperscript{86} See \textit{Lujan}, 504 U.S. at 562–67; \textit{Summers}, 555 U.S. at 496–97.

\textsuperscript{87} \textit{Lujan}, 504 U.S. at 573 & n.8 (“[T]he court [of appeals] held that the injury-in-fact requirement had been satisfied by congressional conferral upon all persons of an abstract, self-contained, noninstrumental ‘right’ to have the Executive observe the procedures required by law. We reject this view.”).

\textsuperscript{88} \textit{Id.} at 572.

\textsuperscript{89} 549 U.S 497, 526 (2007).

\textsuperscript{90} \textit{Id.} at 517–18 (internal citations omitted) (quoting \textit{Lujan}, 504 U.S. at 572 n.7) (citing 42 U.S.C. § 7607(b)(1) (2012)).

\textsuperscript{91} \textit{Id.} at 518 (“A [litigant] who alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been altered. All that is necessary is to show that the procedural step was
Thus, under *Lujan* and the other archetypal procedural standing cases, a plaintiff with a concrete interest in the outcome of an agency’s decision need not introduce any evidence showing that the decision, if made pursuant to the requisite decision-making obligation, would have actually benefited the plaintiff.92 Phrased differently, the denial of a procedural, decision-making right to a plaintiff with a concrete interest in the outcome of a decision need not be proved to cause the plaintiff any additional harm beyond the denial of that right itself.93 In contrast, congressional enactment of a *bare* procedural enforcement right, i.e., an “abstract, self-contained, noninstrumental ‘right’ to have the Executive observe the procedures required by law,” is insufficient to confer standing.94 Implicitly, in a principle not taken up again until *Spokeo*, congressional enactment of an *instrumental* procedural right intended to protect distinct concrete interests is sufficient to confer standing.

The Court first began to require concrete injury-in-fact and wrestle with procedural standing after Congress enacted numerous statutes that imposed procedural, rather than substantive, obligations on administrative agencies in the mid-twentieth century.95 By passing the Administrative Procedure Act (APA)96 in 1946, Congress expressly mandated an “entitle[ment] to judicial review” for any “person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute,”97 including the right to challenge agency actions that failed to observe “procedure required by law.”98 As the Supreme Court recognized in 1950, the APA established “a new, basic and connected to the substantive result.”) (quoting Sugar Cane Growers Coop. of Fla. v. Veneman, 289 F.3d 89, 94–95 (D.C. Cir. 2002)).

92. See *Lujan*, 504 U.S. at 572 n.7.

93. Id. (“The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency’s failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.”).

94. Id. at 573 (emphasis added).

95. See Sunstein, *What’s Standing*, supra note 17, at 179–82.


97. 5 U.S.C. § 702.

98. Id. § 706(2)(D).
comprehensive regulation of procedures in many agencies,” expanding administrative adjudication in “one of the dramatic legal developments of the past half-century.”

In the following decades, Congress passed numerous statutes, largely concerning the environment, that imposed procedural decision-making obligations on agencies and granted an express procedural enforcement right, either to anyone, or (opaquely) to anyone aggrieved by the agency action. Prominent among these statutes was the National Environmental Policy Act (NEPA), which requires “the preparation of an Environmental Impact Statement (EIS)” before the government undertakes any “major Federal action.” The Court read NEPA and similar statutes as imposing action-forcing, procedural obligations on agency decisions, even though those decisions are not subject to judicial assessment for substantive wisdom.

Congress similarly passed the Individuals with Disabilities Education Act (IDEA), which was also predicated on a proceduralist conception, in 1975. As Professor Herz explained the vision, “We search for pure

procedural justice—if only we can devise exactly the right procedures, outcomes will take care of themselves. In American public law, the preoccupation with and confidence in procedural remedies peaked in the 1970s."\textsuperscript{104} This background, which focused on administrative agencies’ compliance with novel forms of procedural obligation imposed by the administrative state, paved the way for the first round of procedural standing decisions, including \textit{Lujan}.

\textbf{4. Spokeo’s Opaque Recapitulation of the Established Principles of Procedural Standing}

\textit{Spokeo} provides an overview of procedural standing by recapitulating a grab bag of principles from previous standing cases—some that were obviously within the procedural standing universe prior to \textit{Spokeo} and others that were not. It begins by briefly pointing to the separation-of-powers underpinning for Article III standing generally, as well as the three core elements of standing: injury, causation, and redressability.\textsuperscript{105} \textit{Spokeo} quickly focuses on the “[f]irst and foremost” of those elements: “injury in fact.”\textsuperscript{106} \textit{Spokeo} holds that injury in fact must not only be particularized to the plaintiff, but also “concrete,” which means that the injury “must actually exist,” and that it be “‘real,’ and not ‘abstract.’”\textsuperscript{107}

The Court explains that “‘[c]oncrete’ is not . . . synonymous with ‘tangible,’” because even denials of “intangible injuries,” such as denial of free speech and free exercise rights, “can nevertheless be concrete.”\textsuperscript{108} The Court then notes the relevance of “historical practice,” i.e., whether the injury is of a sort that would historically have “been regarded as providing a

\begin{footnotes}
\item[105] Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016).
\item[106] Id. (quoting Steel Co. v. Citizens for Better Env’t, 523 U.S. 83, 103 (1998)).
\item[107] Id. at 1548 (citing \textit{BLACK’S LAW DICTIONARY} 479 (9th ed. 2009); \textit{WEBSTER’S THIRD NEW INT’L DICTIONARY} 472 (1971); \textit{RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE} 305 (1967)).
\item[108] Id. at 1549.
\end{footnotes}
basis for a lawsuit in English or American courts,” and thus so regarded by the drafters of Article III.109

Furthermore, “because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important,” both through creating “legally cognizable injuries” and through the broader principles found in Justice Kennedy’s Lujan concurrence.110 The Spokeo Court reiterated Justice Kennedy’s statement 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.”111

Spokeo, though noting “Congress’ role in identifying and elevating intangible harms,” specifically reaffirms the holding of Lujan and Summers that, despite Congress’s broad powers, its intent is not necessarily dispositive: Congress cannot simply enact a procedural enforcement mechanism (i.e., create a cause of action to sue for an abstract, non-concrete injury) and thereby establish standing.112 A plaintiff “could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III.”113

Concrete injury is thus necessary. But Spokeo is careful to point out that not only harm itself but “the risk of real harm can[] satisfy the requirement of concreteness.”114 By way of analogy, Spokeo points to the general risk of concrete injury arising from the violation of certain categories of legal rights that have historically been subject to suit under the common law.115

109. Id.
110. Id. (citing and discussing Lujan v. Defs. of Wildlife, 504 U.S. 555, 578 (1992)).
111. Id. (quoting Lujan, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment)).
112. Id.
113. Id. (citing Summers v. Earth Island Inst., 555 U.S. 488, 496 (2009); Lujan, 504 U.S. at 572).
114. Id. (citing Clapper v. Amnesty Int’l USA, 568 U.S. 398 (2013)).
115. Id. (“For example, the law has long permitted recovery by certain tort victims even if their harms may be difficult to prove or measure.”) (citing RESTATEMENT (FIRST) OF TORTS §§ 569, 570 (AM. LAW INST. 1938) (libel and slander per se, respectively)). Though the Court does not mention it, suit has similarly been permissible, absent proof of concrete harm, for claims such as breach of contract (in which nominal damages are recoverable, regardless of actual damages); unjust enrichment; property offenses such as trespass; and various infringements of intellectual property—all of which are actionable without proof of harm. See, e.g., Baude, supra note 9, at 216–17. But cf. Doe v. Chao, 540 U.S. 614, 625 (2004) (discussing certain defamation torts, unlike the claims discussed above, which are
In a crucial passage, *Spokeo* observes that “[j]ust 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. . . . [A] plaintiff in such a case need not allege any additional harm beyond the one Congress has identified.” In other words, the procedural, statutory violation itself is sometimes enough to demonstrate concrete injury (and thus afford standing) without the need to demonstrate any additional harm under the facts of the particular case.

*Spokeo* cites to *Federal Election Commission v. Akins* to illustrate this point. *Spokeo* characterizes *Akins* 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.” *Spokeo* thereby identifies *Akins*, decided six years after *Lujan*, as a procedural standing case—even though *Akins* does not appear to have anything to do with procedural standing. *Akins* held that a group of voters had standing to challenge the Federal Election Commission’s refusal to provide information that the voters argued had to be disclosed under the Federal Election Campaign Act. *Akins* referred to *Lujan* and procedural standing only in passing, and by distinguishing *Lujan* because the claims in that case were based on “generalized grievance[s]” and “harm . . . of an abstract and indefinite nature.” *Akins*, in contrast, found “concrete and specific” “informational injury” from denial of the statutory right itself, though the Court also observed that it found “no reason to doubt [plaintiffs’] claim that the information would help them (and others to whom they would communicate it) to evaluate candidates for public office.”

*Spokeo* similarly points to *Public Citizen v. Department of Justice* as a procedural standing case, establishing that “failure to obtain information subject to disclosure [by statute] ‘constitutes a sufficiently distinct injury to
provide standing to sue." Denial of these statutory rights was sufficient on its own for standing because the right to information was generally intended to further a distinct, concrete interest.

Finally, *Spokeo* attempts to sort these disparate “general principles” into two guideposts for resolving procedural standing under the FCRA:

On the one hand, Congress plainly sought to curb the dissemination of false information [in credit reports] by adopting procedures designed to decrease that risk. On the other hand, Robins cannot satisfy the demands of Article III by alleging a bare procedural violation. A violation of one of the FCRA’s procedural requirements may result in no harm.

*Spokeo* thereby establishes several new principles of procedural standing. The Court’s overt holding is that a statutory procedural right, even if particularized to an individual plaintiff, is insufficient for standing without some further connection to concrete injury. The Court also implicitly establishes three further principles. First, statutory procedural rights as against private parties (not just as against public agencies) are subject to procedural standing analysis. Second, instrumental statutory rights—i.e., those enacted to further a distinct, concrete interest beyond the denial of the right itself—exist within the procedural standing universe. And third, “bare” procedural rights are no longer limited to enforcement rights that do not require a connection to the possibility of concrete injury; they also refer to instrumental rights if violation of the instrumental right does not give rise to any risk of concrete injury to the distinct interest the instrumental right is intended to further.

But *Spokeo* left even more questions unresolved. In some circumstances, statutory, procedural violations do not require proof of further, concrete injury. Which circumstances are those? When proof of further, concrete injury is required, how is that determination to be made? When should courts defer to congressional judgment about the chain of causation between an instrumental right and the risk of concrete injury it was designed to protect? When should courts, in assessing the existence of a risk of real harm arising from violation of an instrumental right, find the statutory violation itself sufficient for standing? And when should courts

124. Id. at 1550.
require a plaintiff to show an additional risk of harm under the circumstances of the case?

B. Spokeo’s Embrace of the Role of History and the Role of Congress

In the course of its discussion, Spokeo briefly nods to the role of history and congressional judgment in informing the existence of procedural standing. But Spokeo does not explain much further about either or, notably, anything about the interaction between the two.

1. History

Spokeo provides a one-sentence explanation of how and why historical practice informs procedural standing:

Because the doctrine of standing derives from the case-or-controversy requirement, and because that requirement in turn is grounded in historical practice, it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.

The majority opinion provides no further analysis.

In contrast, Justice Thomas’s concurrence provides a relatively in-depth exploration of the judicial treatment of suits brought against private parties for violation of private rights. In doing so, he explains that “[h]istorically, common-law courts possessed broad power to adjudicate suits involving the alleged violation of private rights, even when plaintiffs alleged only the violation of those rights and nothing more.” Despite the merits of this historical approach, it was rejected by every other member of the Court rejected (or, perhaps more accurately, ignored). Both the majority opinion and Justice Ginsburg’s dissent require, for at least some types of claims against a private defendant (including the FCRA claim in Spokeo), that the plaintiff demonstrate a real risk of concrete injury beyond the statutory violation itself.

125. Id. at 1549 (“In determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles.”).

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

127. Id. at 1551 (Thomas, J., concurring); see infra Section I.D.

128. See Craig Konnoth & Seth Kreimer, Spelling Out Spokeo, 165 U. PA. L. REV. ONLINE 47, 55 (2016) (“[H]aving put history and tradition on the table, one might have
A critical question remains open on which the courts of appeals are split: Is a historical analog to the asserted procedural right necessary, or simply sufficient, for procedural standing? The Fourth Circuit held that a comparable historical analog offers one route to procedural standing, but its absence does not in any way cut against the existence of standing. In contrast, the Third and Ninth Circuits have used language that seems to suggest that a historical analog is necessary, not merely sufficient.

2. Congress

Spokeo also acknowledges the significant role of congressional intent. The Court explains that “because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important.” Spokeo then quotes Justice Kennedy’s Lujan concurrence, which recognizes that “Congress has the power to expected Justice Alito to address the rather robust Anglo-American history of statutes allowing private parties to collect bounties for enforcing public duties. . . . But Justice Alito’s majority opinion declined to engage with these or other historical statutory analogies to the FCRA.”

129. See infra Section V.A (explaining that the better view is that a historical analog is sufficient but not necessary).

130. Dreher v. Experian Info. Sols., Inc., 856 F.3d 337, 345 (4th Cir. 2017) (“[The plaintiff] does not propose a common law analogue for his alleged FCRA injury, and we find no traditional right of action that is comparable. The lack of a common law analogue is not fatal to his case, but it also does not help him establish a concrete injury.”) (internal citations omitted) (citing Pub. Citizen v. Dep’t of Justice, 491 U.S. 440, 449 (1989); Vt. Agency of Nat. Res. v. United States ex rel. Stevens, 529 U.S. 765, 774 (2000)); see also id. (concluding that Public Citizen “find[s] a ‘sufficiently discrete injury’ without finding that a similar right existed at common law”) (quoting Pub. Citizen, 491 U.S. at 449).

131. Long v. Se. Pa. Transp. Auth., 903 F.3d 312, 323–24 (3d Cir. 2018) (observing that the plaintiff satisfied “Spokeo’s congressional test,” and “the second Spokeo test, the historical test, is also met. Because the statute meets both tests, and because Plaintiffs have alleged sufficient concrete harm, they have standing to bring their claim”); Dutta v. State Farm Mut. Auto. Ins. Co., 895 F.3d 1166, 1173–74 (9th Cir. 2018) (“In making the first inquiry, we ask whether Congress enacted the statute at issue to protect a concrete interest that is akin to a historical, common law interest.”).

Ironically, though Long articulates a more stringent test for historical analogy, it applies the overall test for procedural standing flexibly, finding procedural standing to exist, whereas Dreher articulates the proper, less strict test for historical standing but then applies the overall test for procedural standing exceedingly stringently.

132. Spokeo, 136 S. Ct. at 1549.
define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.”

As detailed further in Part III, Spokeo thereby acknowledges (albeit briefly) the deference it owes to congressional judgment about standing and, in particular, to congressional judgment about the “chains of causation” between instrumental rights and the ultimate, concrete harm with which Congress is concerned. The Court, however, clouds the centrality of congressional judgment in two ways.

First, it concludes that “Article III standing requires a concrete injury even in the context of a statutory violation,” thus precluding suit based on an “allege[d] . . . bare procedural violation, divorced from any concrete harm.” This is the central disagreement between Justice Thomas and the other members of the Court: the majority recognizes that Congress may not enact automatically enforceable bare procedural enforcement rights, as in Lujan. But it also rejects Justice Thomas’s approach, seemingly consistent with Lujan, that instrumental rights against private parties, if particularized to the plaintiff (rather than serving an interest in general compliance with the law), are sufficient for standing. Spokeo requires a tighter connection between the instrumental right and risk of the concrete harm with which Congress is ultimately concerned.

Second, and more opaquely, Spokeo also complicates its boilerplate recitation of standing principles by repeating the bromide that “Congress cannot erase Article III’s standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.” Facially, this reads as if Spokeo endorses the idea that congressional judgment cannot alter how the Court would otherwise assess procedural standing in the context of the instrumental rights at issue in Spokeo; this language, however, simply means—or at least meant, prior to Spokeo—that a bare grant of a procedural enforcement right is ineffective as to a plaintiff who has no particularized interest in the outcome of a procedural decision-making obligation.

133. Id. (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part and concurring in judgment)).
134. Id. (citing Summers v. Earth Island Inst., 555 U.S. 488, 496 (2009)).
135. Id. at 1547–48 (quoting Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997)); see also id. at 1549 (“Congress’ role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation.”).
Spokeo imports this idea of a bare procedural right into the instrumental rights context without acknowledging the novelty or importance of this move; the Court apparently concludes that not only enforcement rights, but also instrumental rights, may be bare. Instrumental rights, however, are by definition intended to protect against some distinct harm. In all but bizarre circumstances, the distinct, target harm with which Congress is ultimately concerned is a real-world, concrete harm. So the question is not whether the instrumental right is “bare” because it has no connection to any concrete harm, but rather whether it is insufficiently connected to a real risk of such harm.\(^{136}\) Spokeo has metamorphosed bare enforcement right to mean insufficient instrumental right.

C. Spokeo’s Confounding Examples of No Material Risk of Concrete Harm

The majority in Spokeo closes its analysis by providing two examples of a violation of “the FCRA’s procedural requirements” that, it opines, “may result in no harm” and thus amount to “a bare procedural violation.”\(^{137}\) In particular, the Court expresses skepticism that either of the following would establish standing: (1) a credit report that contains an erroneous zip code, or (2) a credit reporting agency’s failure to provide the required notice to a credit report user if the underlying information in the credit report was entirely correct.\(^{138}\)

As explained below, these examples are mistaken on their own terms. Even more fundamentally, both can be misinterpreted to suggest a narrower approach to procedural standing than Spokeo intends; misconstruction of these two brief examples, tacked on to the end of the majority decision in dicta, could sharply curtail the possibility of judicial redress for claimants under process-heavy statutes, including consumers, environmentalists, and educationally disabled children.

\(^{136}\) As explained in Parts IV and V, (1) for an instrumental automatically injurious right, the question is whether the court finds Congress unjustified in its conclusion that violation of the statutory right categorically demonstrates material risk of harm to the concrete right, and (2) for an instrumental presumptively injurious right, whether the court finds the plaintiff has failed to demonstrate material risk of additional, concrete injury. See infra Parts IV–V.

\(^{137}\) Spokeo, 136 S. Ct. at 1550.

\(^{138}\) Id. (“For example, even 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. In addition, not 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.”).
1. Defective Notice to Users When a Credit Report Contains No Inaccuracies

Spokeo’s first example is when “a consumer reporting agency fails to provide the required notice to a user of the agency’s consumer information” but that consumer information is “entirely accurate.” 139 The Court, however, apparently misapprehends the nature of the notice the FCRA obligates reporting agencies to provide to users of consumer information; the purpose for that notice simply does not relate to the accuracy of the information in the consumer report. The FCRA provision mandating notice to users requires that a “consumer reporting agency shall provide to any person . . . to whom a consumer report is provided by the agency[]{] a notice of such person’s responsibilities under this subchapter.” 140

And the user’s responsibilities under the FCRA do not relate to the accuracy of the information in the credit report. Instead, those responsibilities include the fact that consumer reports may be furnished to users only for limited purposes specified by the FCRA, and that “prospective users of the information [in a credit report must] identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose.” 141 These obligations on users of a credit report do not relate to the accuracy of the credit report, instead focusing on users’ authorized purposes for accessing the credit report, accurate or otherwise. Because improper use of even an accurate credit report is unlawful and harmful, failure to notify users of the scope of authorized use (intended to lessen the likelihood of unauthorized use) is not made harmless by a report’s substantive accuracy. 142

A significant concern would arise if one read Spokeo as if it understood the nature of the notice requirement, but that it believed congressional intent in enacting the FCRA to be limited to the single, overriding purpose of increasing accuracy in credit reports. Under this construction, any other purpose reflected in any provision of the FCRA that does not directly further the single goal of accuracy could not possibly result in concrete

139. Id.
141. Id. § 1681e(a).
142. See Robertson v. Allied Sols., LLC, 902 F.3d 690, 697 (7th Cir. 2018) (finding Spokeo’s discussion of the examples to be “probably dicta, because the case before the Court concerned inaccurate information,” and the Court’s rumination about claims of inadequate notice from the agency to a user (such as a potential employer) entirely outside the scope of anything possibly relevant to the case).
injury. But this troubling reading (of Spokeo, and of the notice provision of the FCRA) is entirely unconvincing; notice to users of their FCRA obligations is plainly intended to increase the likelihood that users comply with those obligations. And other constructions of this example are more plausible.

First, the majority may have simply erred by failing to recognize that the required notice to users informs them of obligations that are wholly unconnected to a credit report’s accuracy. Second, the Court, in referring to notice to users, may have intended to refer obliquely to the FCRA’s obligation on credit reporting agencies to post toll-free numbers so that users can request credit reports—a duty mentioned earlier in the opinion, and one arguably rendered irrelevant absent some inaccuracy in the report.143

Perhaps most charitably, one could read Spokeo as implicitly assuming that the only claim that Robins raised was a violation of § 1681e(b), which requires “reasonable procedures to assure maximum possible accuracy.”144 On that plausible assumption—which Robins expressly endorsed on remand145—violation of some other FCRA right (such as the duty to provide notice to users) could not contribute to the claimed violation of § 1681e(b) unless the failure to provide notice undermined the report’s accuracy, the only purpose underlying the claim Robins actually raised.

Thus, the Court’s discussion of the notice obligation should not be understood to suggest, problematically, that an instrumental right does not afford standing unless it furthers the single, central purpose of a statute.

143. Consumers have reason to access their credit reports, other than contesting inaccurate information, so the example would be misplaced. However, Robins may well not have had standing for any violation of the duty to post toll-free numbers, either because Robins’s complaint acknowledged he had access to his credit report online, so he was not injured by the failure to post the toll-free number, or because, as Justice Thomas suggests, that right is owed to the public as a whole, so Robins would need to show additional, particularized and concrete injury not apparently present. See Spokeo, 136 S. Ct. at 1553 (Thomas, J., concurring).


145. Robins v. Spokeo, Inc., 867 F.3d 1108, 1116 n.2 (9th Cir. 2017) (“[F]ollowing remand from the Supreme Court, Robins now insists that [his] ‘inartfully styled . . . “claims”’ are not alleged as independent grounds for relief but instead serve as ‘merely examples of Spokeo’s willful failure to use reasonable procedures and to assure maximum possible accuracy in its published reports.’ Robins now states that he has alleged only ‘a single claim for relief under Section 1681e(b)’.”).
Instead, the Court is either confused about the nature of the notice obligation, or elliptical in its elucidation of that obligation.

2. An Incorrect Zip Code

Spokeo’s second example of a potentially bare instrumental violation is even more confounding. The Court explains that “not 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.”

In actuality, it is difficult to imagine information in a credit report (apart from, perhaps, a social security number) that is more likely than a zip code to cause harm if incorrect. As the Court’s opinion observes, “Spokeo markets its services to a variety of users, including not only ‘employers who want to evaluate prospective employees,’ but also ‘those who want to investigate prospective romantic partners or seek other personal information.” First, potential employers quite plausibly screen potential employees based on geographical proximity to the place of employment, for legitimate or illegitimate reasons.

And those deciding whether to extend credit paradigmatically do so by reviewing credit reports. As a historical matter, it is difficult to imagine a piece of information more problematically related to the extension of credit than zip code. Under this country’s troubled history of redlining, lenders refuse to extend credit based on zip code (often with a discriminatory intent or impact) rather than on individual credit-worthiness.

146. Spokeo, 136 S. Ct. at 1550; see also Konnoth & Kreimer, supra note 128, at 60 & n.102 (explaining that harm from an erroneous zip code is not hard to imagine, pointing to the possibility that mail with an incorrect zip code might not be delivered).
147. Spokeo, 136 S. Ct. at 1546 (quoting Brief for Respondent 7).
148. See Charles A. Sullivan, Employing AI, 63 VILL. L. REV. 395, 417 (2018) (explaining that artificially intelligent hiring algorithms “might . . . hire applicants residing in nearby zip codes and reject those living further away”); see also Matthew T. Bodie et al., The Law and Policy of People Analytics, 88 U. COLO. L. REV. 961, 1014–15 (2017) (“A bad actor who does not want to hire African Americans or who wants to hire more white employees can hide this unlawful motive by basing the decision on zip code, distance to work, or something similar that targets location.”).
149. Michael Harriot, Redlining: The Origin Story of Institutional Racism, ROOT (Apr. 25, 2019, 3:53 PM), https://www.theroot.com/redlining-the-origin-story-of-institutional-racism-1834308839 (“Residents who live in redlined areas pay higher interest rates and are denied mortgages more often than whites with the same credit and income, according to reporting for the Center for Investigative Journalism. People in redlined areas pay higher
The link between zip code and perceived credit-worthiness is far from a historical relic. As President Obama stated in a 2015 weekly address,

Just a few weeks ago, the Supreme Court . . . recognized what many people know to be true from their own lives: that too often, where people live determines what opportunities they have in life. . . . In this country, of all countries, a person’s zip code shouldn’t decide their destiny.150

Indeed, as the Washington Post reported in 2008 and again in 2015, banks and mortgage lenders still use zip codes in deciding whether to extend credit:

Critics call it the new redlining: Many of the country’s largest mortgage lenders are imposing loan restrictions in entire counties or Zip codes that they rank as risky or “declining.”

. . .

. . . If a major lender has tagged your Zip code, county or entire metropolitan area with a scarlet letter—and they exist in nearly every state, including many in places generally assumed to have relatively healthy market conditions—you're going to need more cash upfront.151

auto insurance rates, ProPublica reports. Homes in black neighborhoods are valued, on average, $48,000 less than homes in white neighborhoods with similar crime rates and amenities.”). See generally David I. Badain, Insurance Redlining and the Future of the Urban Core, 16 COLUM. J.L. & SOC. PROBS. 1 (1980) (examining the redlining problem related to insurance and effectiveness of government actions attempting to address this issue).


Similarly, “[e]xperts . . . say they believe banks may now be using data collected by customers to compare them to other shoppers at individual retail locations or by zip code, weeding out customers in neighborhoods hardest hit by the economic downturn.”152 And potential romantic partners, another target audience for Spokeo, are also highly focused on zip code, both for concrete and intangible reasons.153

Concern arising from the Court’s zip code example does not relate (at least primarily) to the Court’s surprisingly limited imagination. Rather, it would be highly concerning if the Court were understood to require that a plaintiff establish procedural standing for an instrumental right by demonstrating a stronger causal link than that between an incorrect zip code and the risk of real-world harm.

This zip code example, however, should be understood as judicial myopia, rather than as an implicit imposition of an almost impossibly stringent test for risk of real harm. A careful reading of Spokeo provides the textual basis for a properly narrow interpretation. The opinion states that “[i]t is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm.”154 If one excludes the relevance of anything more than the zip code error itself, then the Court is best understood as simply intending to suggest that the mere existence of an error in a credit report, without any evidence of some meaningful, real-

152. Chris Cuomo et al., ‘GMA’ Gets Answers: Some Credit Card Companies Financially Profiling Customers, ABC NEWS (Jan. 28, 2009, 5:47 AM), https://abcnews.go.com/GMA/TheLaw/gma-answers-credit-card-companies-financially-profiling-customers/story?id=6747461; see also Adam Tanner, Never Give Stores Your ZIP Code. Here’s Why, FORBES (June 19, 2013, 08:19 AM), https://www.forbes.com/sites/adamtanner/2013/06/19/theres-a-billion-reasons-not-to-give-stores-your-zip-code-ever (“Why make such a big deal over five digits that only records that someone lives in the same area as many thousands of others? Because along with other information, the ZIP code may provide the final clue to figuring out your address, phone number and past purchasing details, if a sales clerk sees your name while swiping your credit card.”).

153. Lea Rose Emery, Tinder’s Most Right-Swiped Neighborhoods in Your City, BUSTLE (June 15, 2018), https://www.bustle.com/p/tinders-most-right-swiped-neighborhoods-in-your-city-9413721 (noting that Tinder was able to identify locations in certain cities where residents were more likely to be “swiped right” most often); see also Anna Davies, Here Are the Dating Lies It’s Okay to Tell, N.Y. POST (Nov. 7, 2014, 9:20 PM), https://nypost.com/2014/11/07/the-dating-lies-its-okay-to-tell/ (“Stephanie loved her Long Island City neighborhood. But the 32-year-old lawyer was dismayed at the dearth of eligible matches she found on various online dating sites—until she changed her ZIP code to the Union Square area.”).

world effect, does not work a concrete injury, and the Court’s choice of zip code as exemplar of triviality was oddly, but irrelevantly, misguided.\textsuperscript{155}

\textbf{D. Justice Thomas’s Concurrence}

Justice Thomas concurred in \textit{Spokeo}, expressing a historically grounded openness to standing for particularized claims brought against private parties.\textsuperscript{156} As he explained, separation of powers “concern[s] are generally absent when a private plaintiff seeks to enforce only his personal rights against another private party.”\textsuperscript{157} Justice Thomas’s concurrence points to the historical distinction between the strict requirements of standing applied when a plaintiff asserts public rights as against the government, as in \textit{Lujan}, as opposed to the much more flexible bases considered sufficient for standing purposes when a private party asserts statutory rights as against a private defendant.\textsuperscript{158} Thus, Justice Thomas argues that “a plaintiff seeking to vindicate a statutorily created private right need not allege actual harm beyond the invasion of that private right.”\textsuperscript{159}

This position is entirely consistent with Justice Scalia’s observation in \textit{Lujan} that “it is clear that \textit{in suits against the Government}, at least, the concrete injury requirement must remain.”\textsuperscript{160} In an article that insightfully highlights the numerous, puzzling questions that \textit{Spokeo} left open, Professor Baude recognizes the significant historical support for Justice

\begin{itemize}
\item \textsuperscript{156} \textit{Spokeo}, 136 S. Ct. at 1550 (Thomas, J., concurring). Justice Thomas’s heavy reliance on historical understanding, and relatively lack of concern with stare decisis, may explain his openness to procedural standing, notwithstanding his general approach to separation of powers.
\item \textsuperscript{157} \textit{Id.} at 1551 (Thomas, J., concurring).
\item \textsuperscript{158} \textit{Id.} at 1553 (Thomas, J., concurring) (“[W]here one private party has alleged that another private party violated his private rights, there is generally no danger that the private party’s suit is an impermissible attempt to police the activity of the political branches or, more broadly, that the legislative branch has impermissibly delegated law enforcement authority from the executive to a private individual.”) (citing Hessick, \textit{supra} note 32, at 317–21).
\item \textsuperscript{159} \textit{Id.} (Thomas, J., concurring) (citing Havens Realty Corp. v. Coleman, 455 U.S. 363, 373–74 (1982); Tenn. Elec. Power Co. v. Tenn. Valley Auth., 306 U.S. 118, 137–38 (1939)).
\item \textsuperscript{160} \textit{Lujan v. Defs. of Wildlife}, 504 U.S. 555, 578 (1992) (emphasis added).
\end{itemize}
Thomas’s distinction between suits against public and private defendants, as documented by Professor Andrew Hessick and others.\textsuperscript{161}

Whatever its merits, however, no other member of the Court joined Justice Thomas’s concurrence. Indeed, his concurrence is in significantly more tension with the majority’s analysis than is Justice Ginsburg’s dissent, which was joined only by Justice Sotomayor. The dissent did not disagree with the majority’s statement that an incorrect zip code (without more) would not be enough for standing. Moreover, it did not suggest that a minor error in a credit report would afford standing, either as a particularized violation as against a private party (as Justice Thomas suggested) or even because an incorrect zip code would present a risk of real harm using even the most stunted of judicial imaginations.\textsuperscript{162}

Instead, the dissent diverged from the majority’s decision to remand on the issue of concrete injury unaddressed below because it felt the existence of concrete injury to be manifest. Justice Ginsburg explained, in a convincing but exceedingly narrow manner, that remand as to concrete injury was unnecessary because Robins had plainly alleged a risk of real harm: “Far from an incorrect zip code, Robins complains of misinformation about his education, family situation, and economic status, inaccurate representations that could affect his fortune in the job market.”\textsuperscript{163} Thus, because Justice Thomas’s concurrence is ignored by the rest of the Court, and Justice Ginsburg’s dissent diverges from the majority’s analysis on narrow grounds, eight members of the Court in \textit{Spokeo} embraced applying procedural standing principles to statutory instrumental rights as against private parties.

\textit{II. Judicial Turbulence in Spokeo’s Wake}

\textit{A. The Supreme Court’s Recent Intimations About Procedural Standing}

In the wake of Justice Kennedy’s retirement from the Supreme Court and the appointment of Justices Gorsuch and Kavanaugh, \textit{Spokeo} has claimed a seat at the war-room table for the conservative majority’s revolution-in-the-making. The Court has signaled that it will apply separation-of-powers principles to limit the legislative and executive branches’ power to

\textsuperscript{161} Baude, \textit{supra} note 9, at 227–30 (“Justice Thomas, who joined the majority opinion in full, wrote a concurring opinion that put forward a proposed rule that is both theoretically and historically consistent and that may provide a way to reconcile the tension . . . .”).

\textsuperscript{162} See \textit{supra} Section I.C.2.

\textsuperscript{163} \textit{Spokeo}, 136 S. Ct. at 1556 (Ginsburg, J., dissenting).
implement judicially enforceable legislation and regulations. One case from 2012 and two from 2019 provide insight into the future of procedural standing that the Court seems to envision.

The Court’s awareness of procedural standing as an important arena in which the separation-of-powers debate will unfold has been manifest since 2012, four years prior to Spokeo. The battle began in First American Financial Corp. v. Edwards, a case that Stanford Law’s Professor Pamela Karlan and SCOTUSblog’s Kevin Russell called “the sleeper case of the Term.”

As Karlan explained, First American “float[ed] the possibility of a new conception of injury-in-fact” necessary for standing, a requirement that the plaintiff prove actual or threatened harm beyond the statutory, procedural violations itself. In so doing,

First American had the potential to undermine an enforcement technique Congress has been using in a variety of fields: having proscribed certain conduct, Congress then confers a statutory right to sue on individuals subjected to the conduct without requiring proof of injury beyond violation of the statutory duty.

Karlan, in her 2012 article, pointed to the Court’s imposition of procedural hurdles to undercut the other branches’ efforts to protect citizens. As she observed, “In a variety of arenas, the Roberts Court has been cutting back not on the content of rights or duties but on their enforceability . . . .” That inclination has become even more pronounced with the appointment of Justices Gorsuch and Kavanaugh.

First American involved a claim under the Real Estate Settlement Procedures Act of 1974 (RESPA) that prohibited “any fee, kickback, or thing of value” in exchange for business referrals in covered mortgage transactions. These cases were: Kisor v. Wilkie, 139 S. Ct. 2400, 2422 (2019); Gundy v. United States, 139 S. Ct. 2116, 2135 (2019).


Id. at 61.

Id.

Id.
transactions. Edwards alleged that First American had entered into such “kickback” agreements, intended to result in exclusive referrals of title insurance business, in direct violation of RESPA.

First American argued, however, that Edwards lacked standing to sue for the unlawful kickback due to an unusual quirk of Ohio law, which set the price for title insurance. First American argued that, given the set price, Edwards was not injured by the kickback scheme and the business First American therefore received because Edwards was charged the same price she would otherwise have been charged, even absent the kickback, regardless of who provided her with title insurance. The Ninth Circuit held that Edwards established an injury under Article III because “[t]he injury required by Article III can exist solely by virtue of ‘statutes creating legal rights, the invasion of which creates standing,’” The Supreme Court granted certiorari, despite the absence of a circuit split, to consider this issue of procedural standing.

At oral argument, Chief Justice Roberts—no stranger to procedural standing—made a particularly insightful comment to Edwards’ counsel. Roberts explored three possibilities for the role of concrete injury-in-fact, beyond the statutory violation, in establishing standing:

I’m having trouble getting my arms around . . . what your position is . . . [. T]here are three possible arguments. One is that there is injury-in-fact in this case. . . . Two, that Congress presumes injury-in-fact. Injury-in-fact is still required, but that is presumed. . . . Or, three, that injury in fact is not required at all [and the statutory violation on its own is sufficient].

171. Id. at 515.
172. Id. at 516 (citing OHIO REV. CODE ANN. §§ 3935.04, 3935.07 (West 2019)).
173. Id. at 516–17.
174. Id. at 517 (quoting Fulfillment Servs. Inc. v. United Parcel Serv., Inc., 528 F.3d 614, 618–19 (9th Cir. 2008)).
Roberts thus identified a set of extraordinarily difficult procedural standing questions that *Spokeo* leaves unresolved. If a plaintiff asserts a procedural, statutory violation, what else (if anything) is necessary for standing under Article III? Roberts identifies three options:

1) The plaintiff’s demonstration of further actual or threatened risk of injury-in-fact beyond the statutory violation itself;

2) The plaintiff’s demonstration of actual injury, a showing that is automatically satisfied by proving the statutory violation itself, because Congress is entitled to conclude categorically that a risk of injury-in-fact arises from the statutory violation; or

3) The plaintiff’s demonstration of only the statutory violation itself, because injury-in-fact is not required beyond violation of the procedural right that Congress has granted.

As this Article explains, all three of the options Roberts identifies are valid arguments for procedural standing, depending on what category of right Congress intends to grant when enacting the right at issue. Sometimes Congress intends that denial of the statutory intangible right or procedural decision-making right is itself intrinsically injurious, regardless of any additional injury-in-fact. Other times, Congress categorically concludes that injury-in-fact is difficult to prove and materially likely to arise from denial of the statutory procedural right, and thus concrete injury automatically arises from denial of that right. And still other times, Congress intends that injury-in-fact should be presumed likely to arise from denial of the statutory, procedural right, but expects the court to assess the particular facts of the case to determine whether that risk actually arose from the violation.

Since *Spokeo*, though the Court has not issued a major procedural standing decision, it has not been silent on the issue. Procedural standing played a prominent role in March 2019, when the Court went out of its way to signal the importance it attaches to procedural standing in *Frank v.*

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178. See infra Part IV.
179. See infra Section IV.B.
180. See infra Section IV.C.1.
181. See infra Section IV.C.2.
Frank sidestepped addressing the substance of a prominent dispute under Federal Rule of Civil Procedure 23(e)(2) about the propriety of cy pres settlements that provide no direct relief to class members. The Court instead raised procedural standing as a potential antecedent bar to suit, and by extension to judicial approval of settlement, cy pres or otherwise.

Frank involved a class action suit alleging that Google violated the Stored Communications Act (SCA) by passing along to webpages, without notice or permission, a “referrer header” that included the particular search terms users had employed in arriving at the website. The question of procedural standing had not been raised to the Court by either party or by the objectors to the cy pres settlement, nor addressed by the District Court or the Ninth Circuit. The Court, however, once it recognized the vehicle problem of the antecedent question of jurisdiction, did not dismiss the petition as improvidently granted like it did in First American. This was so, even though the question on which certiorari had been granted turned solely on the propriety of the cy pres settlement. Instead, following the suggestion of the Solicitor General, the Court remanded to the Ninth Circuit “because there remain substantial questions about whether any of the named plaintiffs has standing to sue in light of our decision in Spokeo.” The Court’s decision to remand on the question of procedural standing, unprompted by the parties and unaddressed in the lower court decisions, suggests that its next procedural standing decision may be in the offing.

183. Id. “The SCA prohibits ‘a person or entity providing an electronic communication service to the public’ from ‘knowingly divul[g]ing] to any person or entity the contents of a communication while in electronic storage by that service.’” Id. at 1044 (quoting 18 U.S.C. § 2702(a)(1)) (alterations in original).
184. Id. at 1044–45. The parties disputed whether the information divulged by Google was potentially individually identifiable; Google had argued, earlier in the case, that if the information was not individually identifiable, class members suffered no harm. Id.
185. Id. at 1044–46.
187. See Frank, 139 S. Ct. at 1045–46.
188. Id. at 1043–44.
189. Ironically, perhaps, the next such case might also involve First American, which in May 2019, acknowledged that its website had exposed private information from nearly a billion mortgage records for more than a decade. Nicole Perlroth & Stacy Cowley, Security Gap Leaves 885 Million Mortgage Documents Exposed, N.Y. TIMES (May 24, 2019), https://www.nytimes.com/2019/05/24/technology/data-leak-first-american.html (“First American
Spokeo is not merely an intellectually intriguing constitutional chestnut. It is emblematic of the Court’s tentative but significant steps toward amplifying the role of separation-of-powers principles in the October 2018 term. If read unduly narrowly, Spokeo may serve as an imposing gatekeeper, employing novel separation-of-powers principles to hamper Congress’s ability to enact legislation that protects the rights of individuals from corporate defendants.

In June 2019, in Kisor v. Wilkie, the Court narrowed Auer deference, hobbling executive branch agencies’ power to interpret statutes within their realm of expertise. Chief Justice Roberts concurred on the grounds of stare decisis and refused to join Section III.A of the opinion, in which the four-member plurality rejected the argument that “Auer deference violates ‘separation-of-powers principles.’” Kisor also suggests that a majority of the members of the Court are open to overturning or greatly constraining Chevron deference.

Also in June 2019, the dissenters in a fractured Court in Gundy v. United States signaled their willingness to sharply constrain congressional lawmaking power through a stringent reading of separation of powers principles. This approach would jettison more than eight decades of precedent under which Congress has enjoyed broad power to delegate rule-making authority to executive branch agencies. Though a plurality of

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Financial Corporation, a provider of title insurance, said Friday that it had fixed a vulnerability in its website that exposed 885 million records related to mortgage deals going back 16 years. The vulnerability would have allowed anyone to gain access to Social Security numbers, bank account details, drivers license and mortgage and tax records.

191. Id. at 2418, 2423.
192. Id. at 2424 (Roberts, C.J., concurring in part).
193. Id. at 2421–22.
195. Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting) (“Working from an understanding of the Constitution at war with its text and history, the plurality reimagines the terms of the statute before us and insists there is nothing wrong with Congress handing off so much power to the Attorney General.”).
196. See, e.g., Mistretta v. United States, 488 U.S. 361, 372 (1989) (“Congress simply cannot do its job absent an ability to delegate power under broad general directives.”);
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four justices retained the long-standing rule, Justice Kavanaugh did not take part in the decision, and Justice Alito stated in his concurrence that “[i]f a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort.”

In dissent, Justice Gorsuch, joined by Chief Justice Roberts and Justice Thomas, expressed an overt desire to construe the Constitution as imposing strict limits on Congress’s ability to enact enforceable laws. In doing so, he opined that the framers believed the new federal government’s most dangerous power was the power to enact laws restricting the people’s liberty. An “excess of law-making” was, in their words, one of “the diseases to which our governments are most liable.” To address that tendency, the framers went to great lengths to make lawmaking difficult.

If Spokeo is read unduly narrowly as supporting this perspective, Congress may face difficulty in enacting legislation to protect intangible or uncertain injuries through instrumental rights. Professor Michael Herz explains that, “In Gundy, as [in Kisor, Justices] Kagan and Gorsuch wrote competing opinions in which the first calmly stood by long-standing principles and the other fulminated about a fundamental violation of separation of powers.” In cases that follow Spokeo, procedural standing provides another arena in which the Court may similarly invoke Article III to limit the power of the other branches and take action to protect individuals against corporate intrusion into their intangible interests in information, privacy, special education, and consumer rights.

Yakus v. United States, 321 U.S. 414, 425–26 (1944) (“Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers.”).

197. Gundy, 139 S. Ct. at 2130.
198. Id. at 2131 (Alito, J., concurring in the judgment).
199. Id. at 2134 (Gorsuch, J., dissenting) (footnotes omitted) (citing THE FEDERALIST NO. 48, at 309–312 (James Madison)) (quoting THE FEDERALIST NO. 62, at 378 (James Madison)). As the plurality observed, “Indeed, if . . . delegation [in this case] is unconstitutional, then most of Government is unconstitutional—dependent as Congress is on the need to give discretion to executive officials to implement its programs.” Id. at 2130.
Finally, in *Food Marketing Institute v. Argus Leader Media*, the Court issued an almost entirely unnoticed procedural standing ruling at the end of its October 2018 term. The Court was highly flexible in finding sufficient evidence of risk of concrete injury—and, in turn, procedural standing—for a trade association of grocery retailer intervenors *objecting* to the disclosure of information under FOIA. The federal appellate court had specifically concluded that, although “releasing the contested data is likely to make [competitors’] statistical models marginally more accurate,” the “contested data . . . lacked the specificity needed [for competitors] to gain *material* insight into an individual store[,]” but the Supreme Court ignored this factual finding in the course of finding sufficient concrete injury for standing. If one read *Spokeo* narrowly to require that harm be material to constitute injury-in-fact, one would be tempted to conclude that release of the contested data in *Argus Leader* was akin to an erroneous zip code—a technical harm, to be sure, but one specifically found to lack evidence of material effect, thus arguably lacking risk of real harm. Nonetheless, the Court found procedural standing.

The basis for the Court’s openness to finding risk of real harm, despite the court of appeals’ conclusion of no material harm, is unclear. The holding of *Argus Leader*, however, is best understood to reinforce the reading of *Spokeo* advanced in Section I.C.2, cabining any implications from *Spokeo*’s zip code example that might suggest that courts should scrutinize the extent of harm, rather than the realistic risk of harm, when assessing the possible real-world consequences of statutory violations.

**B. Confusion in the Courts of Appeals**

In addition to signs of continued ferment in the Supreme Court, the courts of appeals have been in disarray following *Spokeo*, with numerous

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201. 139 S. Ct. 2356, 2362 (2019).
202. *Id.* at 2361–62. Plaintiffs seeking information under FOIA have procedural standing under such cases as *Akins* as an instrumental intrinsically injurious right, because Congress has granted a statutory right to the information, which it believes generally useful, without the need for proof of concrete injury if the information were denied. But *objectors* to disclosure need to show risk of real harm from disclosure to show concrete injury-in-fact.
204. *Food Mktg.*, 139 S. Ct. at 2362.
205. *Id.*
206. It might be indicative of the majority’s sympathy to the interests of a corporate trade group, as opposed to the consumers bringing suit in *Spokeo* and similar cases.
split decisions and circuit splits and no consensus about the rules that apply when analyzing procedural standing. Cases typically quote the set of general principles articulated in Spokeo—including that violation of some statutory procedural rights is sufficient on its own for standing, and that an erroneous zip code without more is an example of a bare procedural right insufficient for standing—then announce a result consistent with some subset of Spokeo’s principles without explaining the basis for choosing among them.207

The cases regularly point to Spokeo’s recognition of a risk of real harm as the general benchmark for procedural standing, contrasting such a risk with bare procedural rights insufficient for standing. But the cases fail to elucidate several fundamental questions underlying any such criterion: Does the material risk test differentiate between cases in which plaintiffs must demonstrate additional harm beyond the statutory violation and those in which they do not, or is that test the means by which to measure whether plaintiffs have demonstrated such additional harm (or both)? To what extent should the court defer to congressional judgment in assessing material risk? Is material risk of harm assessed generally, on the basis of the statutory right that has allegedly been violated, or more narrowly, as a matter of the consequences of the violation for the particular plaintiff? Or do the answers to these questions change, depending on some unidentified distinction? The courts do not identify, let alone answer, these questions.208

1. Collecting, Retaining, and Failing to Secure Information

Perhaps the most notable division in the courts of appeals involves cases challenging statutorily prohibited collection and retention of information, (often followed by data breach of that information) and the resultant risk of identity theft. Given a defendant’s violation of a statutory obligation concerning privacy of information or biometric data, what more (if anything) must plaintiffs show to demonstrate sufficient harm, or risk of real harm, beyond the violation itself? Does unauthorized collection or retention of information cause concrete harm or risk of harm, or must some real risk of use or transmission of the information, or other real-world consequence, be shown? Does violation of a duty to secure information that results in data breach suffice to show concrete injury, or must some further evidence of identity theft, or risk of identity theft, be shown? Procedural

207. See, e.g., cases cited infra notes 210–13 and accompanying text.
208. See supra Section I.B (noting an apparent (unrecognized) circuit split over whether a historical analog is necessary or sufficient for procedural standing).
standing in significant part drives the viability of lawsuits—and of class action settlement of such suits—in prominent cases like the Equifax data breach.209

As the Fourth Circuit recognizes:

Our sister circuits are divided on whether a plaintiff may establish an Article III injury-in-fact based on an increased risk of future identity theft. The Sixth, Seventh, and Ninth Circuits have all recognized, at the pleading stage, that plaintiffs can establish an injury-in-fact based on this threatened injury.[210] By contrast, the First and Third Circuits have rejected such allegations.211

The Fourth Circuit, citing to the Third Circuit’s acceptance of such an argument and the Seventh Circuit’s rejection, also observes that “[i]n Spokeo’s aftermath, some plaintiffs have attempted to establish Article III standing by alleging that the violation of a privacy statute, in and of itself, is sufficiently ‘concrete’ to establish an ‘injury-in-fact,’ to varying result.”212

The Seventh Circuit, in Remijas v. Neiman Marcus Group, LLC, found that a class of 350,000 customers had standing when they sued Neiman Marcus for a data breach that compromised their credit card information.213 Plaintiffs alleged that every class member’s “personal data ha[d] already been stolen,” thousands of plaintiffs had already “incurred fraudulent charges,” and “a concrete risk of harm [exists] for the rest.”214 The court agreed, explaining that “it is plausible to infer that the plaintiffs have shown a substantial risk of harm from the Neiman Marcus data breach. Why else

209. See, e.g., Cowley, supra note 44 (describing the settlement, involving 147,000,000 class members, that requires Equifax to pay at least $650,000,000).
211. Id. at 273–74 (citing Katz v. Pershing, LLC, 672 F.3d 64, 80 (1st Cir. 2012); Reilly v. Ceridian Corp., 664 F.3d 38, 40, 44 (3d Cir. 2011)).
212. Id. at 271 n.4 (citing In re Horizon Healthcare Servs. Inc., 846 F.3d 625, 640–41 (3d Cir. 2017); Gubala v. Time Warner Cable, Inc., 846 F.3d 909, 913 (7th Cir. 2017)).
213. Remijas, 794 F.3d at 690, 697.
214. Id. at 692.
would hackers break into a store’s database and steal consumers’ private information?”

In contrast, a similar complaint was filed in the Fourth Circuit, though there was no proof that identity theft had already occurred.\(^{216}\) Though this factual difference has some relevance, the Fourth Circuit’s reasoning contrasted sharply with that of the Seventh, going so far as to reject “standing based on a ‘substantial risk’ that the harm [of identity theft] will occur.”\(^{217}\) The Fourth Circuit reasoned, “[e]ven if we credit the Plaintiffs’ allegation that 33% of those affected by [the] data breaches will become victims of identity theft,”\(^{218}\) and even if “data breach victims are 9.5 times more likely [than the average person] to suffer identity theft,”\(^{219}\) these “statistic[s] fall[] far short of establishing a ‘substantial’ risk of harm.”\(^{220}\) It is difficult, however, to reconcile the Fourth Circuit’s holding that a one-third chance of the severe consequences arising from identity theft falls “far short” of the risk of real harm sufficient for standing when the Supreme Court has held that “an identifiable trifle is enough for standing.”\(^{221}\)

In a trio of 2017 cases, the Third, Eighth, and D.C. Circuits similarly arrived at sharply conflicting outcomes. In direct contrast to the Fourth Circuit, the Third Circuit held that “violation of [plaintiffs’] statutory right to have their personal information secured against unauthorized disclosure constitutes, in and of itself, an injury in fact.”\(^{222}\) The majority found that Congress expressed concern about unauthorized disclosure of private

\(^{215}\) Id. at 693.

\(^{216}\) Beck, 848 F.3d at 274.

\(^{217}\) Id. at 275.

\(^{218}\) Id. at 275–76.

\(^{219}\) Id. at 276 (quoting Khan v. Children’s Nat’l Health Sys., 188 F. Supp. 3d 524, 533 (D. Md. 2016)).

\(^{220}\) Id. at 276 & n.7. Beck also expressly disagreed with the Sixth and Seventh Circuit’s recognition of the relevance of the defendant’s offer of free credit monitoring. Id. at 276 & n.8. Instead, the court held that “a threatened event can be ‘reasonab[ly] likel[y]’ to occur but still be insufficient ‘imminent’ to constitute an injury-in-fact.” Id. at 276 (citing Clapper v. Amnesty Int’l USA, 133 S. Ct. 1138, 1147–48 (2013)) (alterations in original). Ultimately, Beck ignored Lujan’s conclusion that procedural standing does not require a showing of immediacy. See Lujan v. Defs. of Wildlife, 504 U.S. 555, 572 n.7, 573 n.8 (1992).


\(^{222}\) In re Horizon Healthcare Servs. Inc., 846 F.3d 625, 634 (3d Cir. 2017).
information when enacting the statutory provision at issue.\textsuperscript{223} Because Congress elevated this privacy concern to a legal right, the procedural violation was not bare and thereby constituted concrete harm, even without regard to any consequent risk of identity theft.\textsuperscript{224}

The Third Circuit further reasoned that the risk of future harm in the form of identity theft was sufficient for standing, thereby crediting as a material risk the allegation that “those whose personal information has been stolen are ‘approximately 9.5 times more likely than the general public to suffer identity fraud or identity theft’”—precisely the same fact that the Fourth Circuit rejected as immaterial.\textsuperscript{225} The Third Circuit recognized that, although “it is possible to read . . . Spokeo as creating a requirement that a plaintiff show a statutory violation has caused a ‘material risk of harm’ before he can bring suit, we do not believe that the Court so intended to change the traditional standard”—thereby expressly rejecting the Eighth Circuit’s contrary interpretation.\textsuperscript{226} In doing so, the Third Circuit implicitly recognized that a risk of real harm must exist, but that a plaintiff need not show it, so long as Congress concluded that such risk automatically arises from the statutory violation.

The Eighth Circuit found standing for one class representative (and therefore for the class as a whole) who alleged identity theft after a data breach; the court, however, rejected standing for fifteen other class representatives whose data had been stolen but who had not alleged they had already experienced identity theft.\textsuperscript{227} Unlike the Eighth Circuit, the D.C. Circuit mirrored the Third Circuit, finding standing for all individuals whose data had been stolen, based on the risk of future identity theft, and specifically disclaimed reliance on the two class members who alleged they “had already suffered identity theft as a result of the breach.”\textsuperscript{228} The court reasoned that “an unauthorized party has already accessed personally identifying data” by breaching the servers, and “it is plausible[] to infer that this party has both the intent and the ability to use that data for ill.”\textsuperscript{229} In

\begin{itemize}
\item \textsuperscript{223} Id. at 639.
\item \textsuperscript{224} Id. at 639 & n.19.
\item \textsuperscript{225} Id. at 634, 639 n.19 (quoting the briefs).
\item \textsuperscript{226} Id. at 637–38, 637 n.17 (footnote and citation omitted) (citing Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1550 (2016)).
\item \textsuperscript{227} In re SuperValu, Inc., 870 F.3d 763, 771–74 (8th Cir. 2017).
\item \textsuperscript{228} Attias v. Carefirst, Inc., 865 F.3d 620, 626 & n.2 (D.C. Cir. 2017).
\item \textsuperscript{229} Id. at 628.
\end{itemize}
such cases, “a substantial risk of harm exists already, simply by virtue of the hack and the nature of the data that the plaintiffs allege was taken.”

The cases are fundamentally and hopelessly inconsistent on an issue underlying cases of immense practical importance: Does a plaintiff have standing to sue when her private data has been breached, in violation of a statutory privacy right, (1) even absent evidence that the breach has yet resulted in identity theft for anyone subject to that breach, given the heightened risk that such identity theft will occur? (2) with evidence that the breach has resulted in identity theft for some of those subject to the breach? or (3) only with evidence that the breach has resulted in identity theft for the plaintiff, personally?

2. The Obligation to Notify Consumers that Disputes Must Be in Writing

A direct circuit split also exists under a Fair Debt Collection Practices Act (FDCPA) provision that requires debt collectors to provide consumers notice that their dispute of a debt must be in writing. The Sixth and Eleventh Circuits held that procedural standing exists for such violations because, as the Sixth Circuit explained, “[w]ithout the information about the in-writing requirement, Plaintiffs were placed at a materially greater risk of falling victim to ‘abusive debt collection practices.’” The Seventh Circuit, in contrast, expressly rejected the Sixth Circuit’s conclusion, holding that the failure to provide the mandated notice was insufficient for standing: the particular plaintiff never disputed her debt (in writing or otherwise), thus she was not harmed or at risk of harm from the lack of notice that such disputes must be in writing.

The Second Circuit largely sided with the Sixth and Eleventh Circuits in Strubel v. Comenity Bank, a particularly thoughtful decision that addressed claims under the Truth in Lending Act. In Strubel, the court found

230. Id. at 629.
233. Casillas v. Madison Ave. Assocs., Inc., 926 F.3d 329, 335–36 (7th Cir. 2019) (“It is not enough that the omission risked harming someone—it must have risked harm to the plaintiffs.”). Three Seventh Circuit judges dissented from denial of rehearing en banc. Id. at 336 n.4.
234. 842 F.3d 181, 185–86 (2d Cir. 2016). The statutory protection here required “creditors to provide credit card holders . . . with ‘[a] statement, in a form prescribed by
concrete injury arising from a violation of the requirement that a lender provide “notice that . . . a consumer dissatisfied with a credit card purchase must contact the creditor in writing or electronically.” The court reasoned:

A consumer who is not given notice of his obligations is likely not to satisfy them and, thereby, unwittingly to lose the very credit rights that the law affords him. For that reason, a creditor’s alleged violation of [this] notice requirement, by itself, gives rise to a “risk of real harm” to the consumer’s concrete interest in the informed use of credit.

Thus, the Second Circuit reasoned, “Having alleged such procedural violations, [the plaintiff] was not required to allege ‘any additional harm’ to demonstrate the concrete injury necessary for standing”—placing it in significant tension with the Seventh Circuit. The cases thus conflict on whether failure to comply with a consumer notice obligation that Congress intended to protect a class of consumers suffices for standing absent individualized proof that the absence of notice harmed the particular plaintiff.

3. Disclosing Excessive Information on a Credit Card Receipt

The courts of appeals are also in sharp disagreement about procedural standing for violations of the Fair and Accurate Credit Transactions Act (FACTA), an amendment to FCRA that prohibits merchants from printing “more than the last 5 digits of the card number or [printing] the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction.” Most notably, the Third Circuit has recognized its direct conflict with the Eleventh Circuit. The Eleventh Circuit held that “the structure and purpose of FACTA show that it provides customers the right to enforce the nondisclosure of their untruncated credit card numbers, similar to the rights and harms” in common law breach of privacy and

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regulations of the Bureau[,] of the protection provided by sections 1666 and 1666i.” Id. at 186 (quoting 15 U.S.C. § 1637(a)(7)) (alterations in original).

235. Id. at 190.

236. Id. (citing Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016)).

237. Id. at 191 (citing Spokeo, 136 S. Ct. at 1549). Casillas attempts to reconcile Strubel by observing that Strubel involved an open-ended credit relationship, whereas in Casillas the plaintiff knew she would not dispute the debt when she received the non-compliant notice of her rights. Casillas, 926 F.3d at 336–37.

breach of confidence torts. The court thus concluded that “[t]he resulting harm from [FACTA’s] violation is ‘concrete in the sense that it involves a clear *de facto* injury, *i.e.*, the unlawful disclosure of legally protected information.”

The Third Circuit expressly disagreed. Although FACTA specifically prohibits disclosure of credit card information on a “receipt provided to the cardholder at the point of the sale”—exactly what the plaintiff had alleged—the court found no material risk of harm in such disclosure because the plaintiff had not alleged the information on the receipt had been disclosed to any third party who might engage in identity theft. The courts thus disagreed about whether violation of a statutory right to information privacy granted by Congress to protect a class of consumers is sufficient for standing, absent evidence of a heightened risk of harm to the individual plaintiff.

4. Notice About the Identity of a Creditor

The Second and Fourth Circuits have split about the need for a plaintiff to prove that material harm arose from the mistaken identification of a creditor under similar provisions in the FCRA and the FDCPA. The Fourth Circuit denied standing under the FCRA for misidentification of a creditor because it found that the misidentification caused the plaintiff no material, real-world harm.

In contrast, the Second Circuit found standing under the FDCPA for “allegedly incorrect identification of . . . the creditor in the foreclosure complaint” because that misidentification “might have . . . pos[ed] a ‘risk of real harm’” to the plaintiff. Highlighting its divergence from the Fourth Circuit’s approach, the Second Circuit expressly refused to consider, as a matter of standing, the defendant’s argument that the plaintiff did not suffer any risk of concrete injury because he “failed to demonstrate any injury that could have possibly resulted” from the “misidentification” because it was


240. *Id.* at 1210 (quoting *In re Nickelodeon*, 827 F.3d 262, 274 (3d Cir. 2016)).

241. *Kamal v. J. Crew Grp., Inc.*, 918 F.3d 102, 106, 112–18 (3d Cir. 2019) (quoting 15 U.S.C. § 1681c(g)(1)). The court stated that it would not address an alternative basis for concrete injury held sufficient in *Muransky*, which had found that the burden of keeping or destroying the receipt to avoid having the information fall into the hands of a third party was a concrete injury affording standing. *Id.* at 118 n.10.


The court held that the materiality of harm arising from the misidentification was a merits issue that was irrelevant to standing. Again, the courts split on whether Congress’s grant of a procedural, statutory right to protect a class of consumers was sufficient to infer a sufficient risk of injury, or whether the plaintiff needed to demonstrate individualized risk of harm.

5. Recording the Satisfaction of a Mortgage

In an intra-circuit dispute, the Eleventh Circuit split on whether standing arose from a statutory, procedural requirement that mortgage satisfaction be timely recorded when the violation was cured before suit was filed. The majority held that because suit was brought after the mortgage satisfaction was recorded—albeit long after the law required that recording—the plaintiff no longer faced any risk of harm and thus lacked standing. Judge Martin dissented from denial of rehearing en banc, once again highlighting the question of whether denial of a statutory, procedural right is itself harm, and the extent to which courts should defer to congressional judgment about the likelihood of harm.

6. The Obligation to Provide Job Applicants a Credit Report Before Taking Adverse Action

Yet another circuit split—again unnoticed by the cases themselves—has arisen concerning standing under an FCRA requirement that potential employers provide job applicants a copy of a consumer report before taking adverse action based on such a report. The Third and Seventh Circuits have found that standing exists when employers fail to provide reports before taking adverse action, reasoning that the statutory right grants the employee an opportunity to use the information in an attempt to influence the employer’s decision, regardless of whether the information is

244. Id. at 82 & n.6 (quoting the brief).
245. Id.
247. Id.
248. Nicklaw v. CitiMortgage, Inc., 855 F.3d 1265, 1272–74 (11th Cir. 2017) (Martin, J., dissenting from the denial of rehearing en banc) (“Like the FCRA, the [statute at issue here] required CitiMortgage to provide truthful information about him to the public. These statutes were crafted in response to a real risk of harm. And [the plaintiff] alleged that he suffered that real risk of harm as a result of CitiMortgage’s inaction that violated these statutes. In that way he properly alleged injury-in-fact to meet Article III standing requirements.”).
In contrast, the Ninth Circuit has rejected standing for such a claim if the credit report is accurate. In that case, the job applicant was rejected because his credit report showed that he had a charged-off debt within the prior twenty-four months, making him ineligible for the defendant’s job program. The court held that the applicant showed no material risk of harm from the violation, including loss of the opportunity to explain to the employer that he had actually incurred the debt four years earlier than it was ultimately charged off and thus to argue that he fell outside the eligibility bar, or to argue for an exception to the bar. The court also necessarily concluded, unlike the Third and Seventh Circuits, that the job applicant had no right to receive his credit report and use that information in an attempt to influence the employer’s decision (or a subsequent employer’s decision) by explaining or providing context.

III. Understanding Procedural Standing Under Spokeo

In light of the many circuit splits that have percolated since the Supreme Court decided Spokeo in 2016, the question of how one should make sense of procedural standing remains. The central insight is that Congress does not enact statutory, procedural rights that fall somewhere on a spectrum from no risk of harm to extremely likely harm. Further, the judicial assessment of procedural standing is not simply a matter of line-drawing between risks that are “real” and those that are “bare.”

Instead, Congress enacts distinct categories of procedural rights, with each category corresponding to a distinct set of underlying legislative judgments and intentions, and thus implicating a distinct set of standing principles. Sometimes Congress enacts a statutory enforcement right, i.e.,

250. Robertson v. Allied Sols., LLC, 902 F.3d 690, 697 (7th Cir. 2018) (“That Robertson has not pleaded what she may have said if given the chance to respond [to the adverse information in the credit report], or that she may not have convinced Allied to honor its [job] offer, is immaterial to the substance of her interest in responding.”); Long v. Se. Pa. Transp. Auth., 903 F.3d 312, 319, 323–24 (3d Cir. 2018) (“§ 1681b(b)(3) confers on the individual a right to receive, before adverse action is taken, a copy of his or her consumer report (regardless of its accuracy) and a notice of his or her rights. This right permits individuals to know beforehand when their consumer reports might be used against them, and creates the possibility for the consumer to respond to inaccurate or negative information—either in the current job application process, or going forward in other job applications.”).


252. Id. at 1170, 1176.

253. Id. at 1173–76.

254. Id. at 1175–76.
an overt grant of a bare right to file suit for some other injury.255 Other times, Congress creates a right the violation of which is *intrinsically injurious*, meaning that Congress intends that denial of the right in-and-of itself imposes a concrete injury.256 And still other times, Congress enacts an *instrumental* statutory right that, through a chain of causation, is intended to protect against the material risk of some other concrete harm with which Congress is ultimately concerned.257

*Spokeo* specifically recognizes that “Congress has the power to define injuries and articulate chains of causation that . . . give rise to a case or controversy where none existed before.”258 Courts properly defer to the legislature’s judgment in exercising those powers; doing so requires courts to understand the different sorts of legislative judgments Congress has made for each category of procedural right.

A. Spokeo Introduces a Third Strand of Procedural Standing: Instrumental Rights Against Private Defendants

To understand *Spokeo*, it is important to look behind the Court’s language and identify the novel strand of rights that *Spokeo* introduces as subject to procedural standing. *Spokeo* does not concern itself with bare procedural *enforcement* rights that Congress has granted to authorize suit for an administrative agency’s alleged dereliction of its procedural, *decision-making* obligation. Instead, *Spokeo* introduces a third set of procedural rights into the procedural standing universe: *instrumental* rights against private parties.259

255. *E.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 571–78 (1992) (holding that the citizen-suit provision of the Endangered Species Act, 16 U.S.C. § 1540(g), which states that “any person may commence a civil suit” for any violation of the Act, is a bare procedural right and that concrete injury must otherwise be shown).


257. *E.g.*, Massachusetts v. EPA, 549 U.S. 497, 517–18 (2007) (holding that a “litigant to whom Congress has ‘accorded a procedural right to protect his concrete interests,’” i.e., an instrumental right, “can assert that right without meeting all the normal standards for redressability and immediacy”) (quoting *Lujan*, 504 U.S. at 572 n.7).


259. *See id.* at 1549–50.
In other words, what makes a statutory right “procedural” in the sense advanced by Spokeo is that it is instrumental, which means it is intended to protect some distinct interest other than the denial of the right itself. Congress grants instrumental rights (mandating or forbidding certain conduct by statute) not because of the harm caused by violation of that instrumental right—violation of the instrumental right itself, with nothing more, ordinarily causes no real-world harm—but because Congress has concluded that granting the instrumental right serves to protect against risk to a distinct, real-world, target harm. That is, the instrumental right is enacted for the instrumental purpose of protecting against the concrete, target injury.

Lujan set the stage for instrumental rights as a distinct category, expressly distinguishing the bare procedural enforcement right Congress had enacted in that case from circumstances in which standing would exist when “plaintiffs are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs.”\(^{260}\) Lujan expressly rejected the Eighth Circuit’s reasoning, which had “held that the injury-in-fact requirement had been satisfied by congressional conferral upon all persons of an abstract, self-contained, noninstrumental ‘right’ to have the Executive observe the procedures required by law.”\(^{261}\)

Lujan thereby laid the groundwork for recognizing instrumental rights (expressly denominated as such) as part of the realm of procedural rights that afford standing when it explained “that an individual can[] enforce procedural rights . . . so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing.”\(^{262}\) Thus, Lujan appears to hold that an instrumental right—unlike a bare enforcement right—suffices for standing because Congress intends for that right to protect some distinct concrete interest. It does not suggest any need for judicial assessment of whether the instrumental right in question actually provided such protection in a particular case.

Spokeo, however, implicitly imports the concept of a “bare” procedural right in the form of a procedural enforcement mechanism that is untethered from any concrete interest, as in Lujan, and concludes that the concept applies—at least in some circumstances—to instrumental rights.\(^{263}\) Spokeo

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\(^{260}\) Lujan, 504 U.S. at 572; see also Massachusetts v. EPA, 549 U.S. at 517–18 (construing an instrumental right against a public agency).

\(^{261}\) Lujan, 504 U.S. at 573 (emphasis added).

\(^{262}\) Id. at 573 n.8.

\(^{263}\) See Spokeo, 136 S. Ct. at 1549–50.
explains that the requirement of a concrete injury “is not automatically satisfied whenever a statute grants a statutory right and authorizes a person to sue to vindicate that right; a plaintiff may not merely allege a ‘bare procedural violation’ of a statute. Rather, to confer standing, the statutory violation must be accompanied by a concrete injury.”

That wording is entirely consistent with prior procedural standing cases, but because *Spokeo* involved instrumental rather than enforcement rights, the implication of the language is significant: instrumental rights (like enforcement rights) may be bare, i.e., insufficiently connected to a “risk of real harm” to afford standing, regardless of Congress’s intent to protect concrete interests.

*Spokeo* also observes, however, that “the 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.”

The central question left unresolved by *Spokeo* is how to harmonize the various principles the Court has stated regarding how a court should determine when the violation of a procedural right bestowed by Congress presents a concrete injury without evidence of additional harm: Bare enforcement rights never create a concrete interest that would not otherwise exist because Congress does not have the power to abrogate the bedrock concrete injury requirement of Article III. Denial of some procedural rights automatically establishes a concrete injury because Congress has the power to define intrinsically injurious rights. Denial of some instrumental rights automatically establishes a material risk of real harm because Congress has the power to articulate chains of causation connecting instrumental rights to a real risk of concrete injury. Denial of other instrumental rights establishes concrete injury, as in *Spokeo*, only when a violation of the right presents a “risk of real harm.” How are courts to reconcile these principles in a particular case, and in doing so, what level of deference should be accorded to Congress?

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B. Congress Enacts Procedural Rights for Multiple, Distinct Reasons Corresponding to Multiple, Distinct Categories of Procedural Standing

Why does Congress enact procedural rights? It does so for four distinct reasons: (1) to authorize suit; (2) to define and thereby protect an intangible right; (3) to mandate a decision-making process; or (4) for the category of procedural rights at issue in Spokeo, to grant an instrumental right for the purpose of protecting a distinct, concrete interest.

And why does Congress grant an instrumental right rather than directly protect the target, concrete interest? It does so for one of two reasons: (1) because it concludes that it may be unduly difficult to prove the existence or extent of injury to that target interest, or to prove the likelihood of risk of future injury; or (2) because it believes the instrumental right is a necessary and proper means of prophylactically preventing members of a group from suffering the target injury, rather than simply affording compensation for the subset of group members who file suit and are able to prove the target injury has occurred.267

The first of Congress’s four reasons for enacting procedural rights is that it sometimes wishes to create an enforcement right, i.e., to grant a private cause of action to enforce some other right. When that other right is also procedural, as under Lujan, standing turns on whether that other right affords standing by implicating a particularized and concrete injury.268

Second, Congress sometimes enacts a right that, though intangible, is granted for its own sake—i.e., though it may not be obvious, the intangible right is what would traditionally be understood as a substantive right. It is not, at least primarily, intended to be instrumentally useful in protecting some other right. Instead, it is granted for its own sake, given congressional judgment that violation of the right itself intrinsically constitutes real-world, concrete injury.

Third, Congress sometimes enacts a right that requires a defendant—an executive agency or, post-Spokeo, a private party—to engage in a specified decision-making process before it acts.269 In some sense, Congress is motivated by the belief that a better process is likely to result in a substantively wiser eventual decision. But Congress also grants such

procedural, decision-making rights because those rights are valuable, in and of themselves. Congress grants those with a concrete interest in the subject matter of the decision a right to attempt to influence the decision-making process, or to have the decision-maker consider specified factors before making the decision.270 Denial of the mandated process thus creates an injury that is not contingent on the likelihood that a valid process would result in a more favorable decision.271

And finally, as with the rights at issue in Spokeo, Congress sometimes enacts an instrumental right. That is, Congress enacts instrumental rights mandating or forbidding particular conduct not because that conduct is intrinsically harmful, but because Congress believes protecting the instrumental right is necessary and proper to further protect a distinct, real-world interest.

With such instrumental rights, Congress enacts the instrumental right rather than direct protection of the target right because it has made a categorical judgment that the target harm or risk of harm to members of the protected group is some combination of likely, difficult to prove, or prophylactically useful in avoiding the target harm. Based on this congressional judgment, the violation of such an instrumental right should result in an automatic judicial finding of real-world harm to the target interest.272

With other instrumental rights, Congress believes such real-world harm may well occur as a result of a violation of the instrumental right, but it has not made that categorical judgment, and it does not intend for that conclusion to be automatic for a reviewing court. Such a conclusion is only presumptive, and a reviewing court must determine whether the particular plaintiff was harmed or subjected to a risk of real harm by violation of such instrumental rights.273

C. Judicial Deference to Congressional Judgment

When Congress makes legislative judgments in the course of enacting procedural rights, courts should defer to those judgments in determining standing. Courts should not defer blindly but should recognize congressional power to define injuries for intrinsically injurious rights, and to articulate chains of causation between instrumental rights and the

270. See id. at 350 n.13.
271. Lujan, 504 U.S. at 572 & n.7.
272. See infra Section IV.C.1.
273. See infra Section IV.C.2.
concrete, target harms they are intended to prevent.274 “[E]valuating the gravity of injury and its connection to statutory violation involves both findings of legislative fact, at which Congress is more adept than courts, and determining the desirability of value-laden trade-offs, which must rely on the democratic accountability of Congress.”275

Historically, the judiciary has so deferred. “When a plaintiff relies on a statute as the basis for its standing claim, the Court has consistently resolved the standing issue in accordance with its interpretation of congressional intent.”276 As the Court has recognized:

The nature of the judicial process makes it an inappropriate forum for the determination of complex factual questions of the kind so often involved in constitutional adjudication. Courts, therefore, will overturn a legislative determination of a factual question only if the legislature’s finding is so clearly wrong that it may be characterized as “arbitrary,” “irrational,” or “unreasonable.” Limitations stemming from the nature of the judicial process, however, have no application to Congress.277

274. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016) (“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.”) (quoting Lujan, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment)).


Judicial respect for the separation of powers, and for the legislature’s power to make law and to determine complex factual questions, includes respecting Congress’s judgment underlying the procedural rights it enacts. Thus, when Congress makes a judgment that a right is intrinsically injurious, such that its violation constitutes injury in fact, that judgment should be respected. Moreover, when Congress articulates a chain of causation between an instrumental right and the target right it is intended to protect, courts should defer to that congressional judgment, whether it is categorical or presumptive.

IV. The Categories of Statutory, Procedural Rights

Recall that Chief Justice Roberts, at oral argument for First American, asked plaintiff’s counsel to clarify his argument concerning injury-in-fact. He highlighted three possible arguments: (1) that there was an injury in fact in the case, (2) Congress’s creation of the statute should be construed as a presumption of injury in fact, or (3) an injury in fact is not required and the procedural violation alone is sufficient.278

The answer to which of the three arguments is correct is: It depends, because determination of injury-in-fact depends on the category of procedural right Congress intended to enact. Congress sometimes intends to enact intangible statutory rights for which injury-in-fact beyond the statutory violation is not required; sometimes, it intends to enact instrumental rights for which injury-in-fact is to be automatically presumed; and sometimes, it intends to enact instrumental rights for which material risk of injury-in-fact is presumptively present, but must be demonstrated in each particular case.

When Congress enacts a procedural statutory right, it does not have a monolithic intent to enact a single type of statutory right. Not all procedural rights are subject to a single, over-arching test for procedural standing which courts use to divide statutory rights into two piles, bare rights and rights involving at least a risk of real harm.279 Instead, Congress enacts


278. Transcript of Oral Argument, supra note 177, at 32.

279. See Macy v. GC Servs. Ltd. P’ship, 897 F.3d 747, 756 (6th Cir. 2018) (“Spokeo categorized statutory violations as falling into two broad categories: (1) where the violation of a procedural right granted by statute is sufficient in and of itself to constitute concrete injury in fact because Congress conferred the procedural right to protect a plaintiff’s
procedural rights that fit into distinct categories, each with a different nexus between the procedural right and the concrete interest with which Congress is ultimately concerned. Congress enacts procedural rights for distinct reasons—and with different intended connections between the statutory provision and the concrete harm that Congress ultimately wishes to protect. In order to protect the separation of powers between the branches, the judicial branch must actually consider the particular nature of the power that Congress intended to exercise and defer to “Congress[’s] . . . power to define injuries and articulate chains of causation that . . . give rise to a case or controversy where none existed before.”

This recognition leads to a fundamental principle of procedural standing: When a court assesses the existence of procedural standing, its task is not to engage in some over-arching, trans-procedural assessment of concrete injury, risk of real harm, bareness of procedure, or any additional facts concerning concrete harm alleged beyond the statutory violation itself. The first step in analyzing procedural standing requires the court to determine the category of procedural right that Congress intended to enact. The second step requires the court to determine, deferentially, whether Congress’s judgment reflected in that decision is so arbitrary, irrational, or unreasonable that it must be rejected. Procedural standing is warranted unless Congress intended to direct the court to issue an advisory opinion, enforce a generalized right to proper administration of the law, or enforce an instrumental procedural right that (at the time of violation) had no material connection to any risk of actual, concrete harm.

On, then, to a typology of procedural rights. Statutory procedural rights fall into three categories: enforcement, intrinsically injurious, and instrumental. The first category—enforcement rights—is straightforward: it includes provisions in which Congress expressly provides a cause of action, stating that a claim may be brought. These rights are procedural in the sense that they relate to the conduct of litigation rather than regulating real-world conduct.

The second category—intrinsically injurious rights—includes those intangible rights the denial of which Congress in and of itself intends to

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constitute injury-in-fact; the right is not aimed at protection of some other, ultimate harm. In contrast, the third category—instrumental rights—are those rights Congress enacts to protect some other distinct target interest that would likely be materially affected by a violation, rather than Congress being concerned with violation of the instrumental right in and of itself. Spokeo brings these instrumental rights into the procedural standing pantheon, as against private parties.

A crucial, practical dividing line exists between those procedural rights that do not require a plaintiff to demonstrate some additional harm or risk of real harm beyond denial of the statutory right itself and those that do. All intrinsically injurious rights fit into the former category, as one may imagine—whether that right is intangible or is a decision-making or dignitary right like that at issue in Lujan.

Not so obviously, but of vital importance, one sub-type of instrumental rights also fits into this category. Such rights, which this Article terms instrumental automatically injurious rights, are those rights that Congress enacts for the purpose of preventing some distinct target harm, intending that a statutory violation automatically result in standing. Congress intends this outcome because it concluded that a violation of the instrumental right in question categorically results in a chain of causation that gives rise to a risk of real harm to the protected class that would be difficult to prove.

Another sub-type of instrumental rights is instrumental presumptively injurious rights. For these rights, Congress presumes that standing is appropriate but intends for courts to exercise judicial scrutiny to determine whether the statutory violation resulted in a risk of the real harm with which Congress was ultimately concerned for the particular plaintiff.

A. Enforcement Rights

The first category of procedural rights is enforcement rights. These are the traditional “bare” procedural rights, or procedural rights “in vacuo,” recognized in Lujan and Spokeo. Because this category of procedural

281. See infra Section IV.C.1.
282. See infra Section IV.C.2.
283. Such harm or risk of harm is often an element of the violation itself, but even if it is not, it remains a matter of procedural standing.
284. See, e.g., Spokeo, 136 S. Ct. at 1545 (quoting the enforcement right for willful violation of the FCRA); Lujan, 504 U.S. at 571–72 (quoting “[t]he so-called ‘citizen-suit’ provision of the Endangered Species Act as the enforcement right).
right only represents congressional intent to afford a cause of action for enforcing some other right (in the context of procedural standing, some other procedural right) it cannot itself confer standing, absent a risk of concrete injury from denial of that other right.

But the existence of such an enforcement right is still relevant, notwithstanding its inability to confer standing. Congress’s decision to grant such an enforcement right demonstrates its belief that standing is proper. That belief, while not dispositive, tilts the scale toward a finding that standing is proper when courts afford deference to this congressional intent while conducting the standing analysis. 285

B. Intrinsically Injurious Rights

The second category of procedural rights is intrinsically injurious rights, i.e., those rights that, when denied, automatically result in concrete injury (and thus standing). The two sub-types are intrinsically injurious intangible rights, i.e., rights that in and of themselves provide a benefit that is concrete, though intangible, and intrinsically injurious decision-making or dignitary rights, i.e., rights that provide a remedy for harm resulting from denial of an entitlement to participation in and opportunity to attempt to influence a decision-making process.

1. Intrinsically Injurious Intangible Rights

The first sub-type of intrinsically injurious right is intrinsically injurious intangible rights, which are intangible rights granted for their own sake because the denial of such rights constitutes concrete injury. Because Congress has, in these instances, created a legal right the denial of which in and of itself constitutes injury, evidence of additional harm is not only unnecessary but also irrelevant. 286

It is useful to recognize that these rights, while intangible, are not really procedural in any meaningful sense. They are raised here because Spokeo’s discussion of standing blurs the distinction between procedural and

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285. The existence of an enforcement right to sue must be distinguished from the ultimate legal viability of the claim. The existence of a sufficient “legal interest” as a threshold matter of standing is limited to determining if the federal “claim is wholly insubstantial and frivolous.” Bell v. Hood, 327 U.S. 678, 682–83 (1946); see also Oneida Indian Nation of N.Y. State v. Cty. of Oneida, 414 U.S. 661, 666 (1974) (holding that standing is precluded only if a claim is “so insubstantial, implausible, foreclosed by prior decisions of [the Supreme] Court, or otherwise completely devoid of merit as not to involve a federal controversy”).

286. See Spokeo, 136 S. Ct. at 1549.
intangible rights when it begins its discussion of procedural standing by pointing to free speech and free exercise rights as “intangible injuries [that] can nevertheless be concrete.”\textsuperscript{287} Moreover, courts of appeals consistently analyze the existence of standing for such rights by applying \textit{Spokeo}, without appreciating the distinction between intrinsically and instrumentally injurious rights.\textsuperscript{288}

There is also a practical reason for discussing this category of rights in the course of delineating procedural standing: It is not always obvious whether Congress intended a right to be intrinsically or instrumentally injurious.\textsuperscript{289} Thus, drawing lines between intangible intrinsically injurious rights and instrumental rights is necessary, and accurate line-drawing requires an understanding of what lies on either side.

\textit{Spokeo} recognizes this category when it quotes Lujan’s observation that “Congress may ‘elevat[e] to the status of legally cognizable injuries concrete, \textit{de facto} injuries that were previously inadequate in law.’”\textsuperscript{290} In other words, this category covers interests that are already (intrinsically) concrete, prior to and independent of Congress’s decision to statutorily grant a right protecting that interest; Congress has simply created a legal right, defining what would already be a \textit{de facto} injury as a legal injury. But sometimes, if there would otherwise be doubt as to whether an injury is concrete, Congress’s power to exercise its judgment in defining the injury as a legal right warrants judicial deference.

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{287} Id.
  \item \textsuperscript{288} \textit{Cf.} Meyers v. Nicolet Rest. of De Pere, LLC, 843 F.3d 724, 727 n.2 (7th Cir. 2016) (concluding that the characterization of a right as substantive or procedural is irrelevant under \textit{Spokeo} because both require injury-in-fact—though not recognizing that a statutory violation can be intrinsically injurious and thereby constitute injury-in-fact).
  \item \textsuperscript{289} \textit{See}, e.g., Fed. Election Comm’n v. Akins, 524 U.S. 11, 19–20 (1998) (exemplifying the difficulty in distinguishing whether a right is intrinsically or instrumentally injurious due to the lack of clarity about Congress’s intent in granting the statutory right to receive the information at issue). Congress might plausibly have granted the right at issue: (1) because the information was itself intrinsically valuable, (2) because Congress concluded the information would as a general matter be instrumentally useful to the class of recipients statutorily entitled to that information, who could reasonably be expected to use it to further the distinct, concrete interests in lobbying and in influencing elections, or (3) because Congress thought the information likely instrumentally useful to each recipient (thus requiring each recipient to prove that its denial as to them would cause a risk of harm). \textit{Id}. \textit{Spokeo} rejected the third possibility and suggested the second to be correct. \textit{Spokeo}, 136 S. Ct. at 1549.
  \item \textsuperscript{290} \textit{Spokeo}, 136 S. Ct. at 1549 (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 578 (1992)).
\end{itemize}
\end{footnotesize}
Intrinsically injurious intangible rights parallel common law rights, such as trespass and breach of contract, for which violation of the right is itself injurious. A plaintiff can bring suit for trespass or breach of contract and recover nominal damages, even absent any proof, evidence, or possibility of concrete harm arising from the violation. Courts have been in widespread agreement—applying the rubric of Spokeo—that unsolicited telemarketing, in violation of the Telephone Consumer Protection Act of 1991 (TPCA), affords procedural standing, even absent any proof of harm beyond the fact that an unauthorized call, fax or text was placed.

The TCPA makes it unlawful “for any person within the United States . . . to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement.” The Ninth Circuit held that the TCPA conferred standing to sue when a plaintiff received an unsolicited text message advertisement. The court pointed to the history of “[a]ctions to remedy . . . invasions of privacy, intrusion upon seclusion, and nuisance” and congressional findings that unwelcome telemarketing can invade privacy. As the court explained, “Unsolicited telemarketing phone calls or text messages, by their nature, invade the privacy and disturb the solitude of their recipients. A plaintiff alleging a violation under the TCPA ‘need not allege any additional harm beyond the one Congress has identified.’”

291. See Hessick, supra note 32, at 281–86; 1 Dan B. Dobbs et al., The Law of Torts § 56, at 149 (2d ed. 2011) (tresspass actionable for nominal damages, even absent injury); Restatement (Second) of Contracts § 346(2) (Am. Law Inst. 1981) (nominal damages for breach of contract); Restatement (Third) of Restitution and Unjust Enrichment §1 cmt. a, § 3 cmt. a (Am. Law Inst. 2011) (restitution is permissible in the absence of, or beyond the scope of, provable loss).


293. See, e.g., Van Patten v. Vertical Fitness Grp., LLC, 847 F.3d 1037, 1042–43 (9th Cir. 2017).


295. Van Patten, 847 F.3d at 1042–43.

296. Id. at 1043.

In other words, the receipt of an unsolicited advertisement via telephone, fax machine, computer, or cellphone is intrinsically injurious; no further harm or risk of harm need be shown.

Some courts have also found violation of rights that prohibit the collection or dissemination of private information to be intrinsically injurious, looking to both history and congressional intent to determine that the legislatively forbidden intrusion was itself injurious, regardless of any additional risk or loss.298 History is particularly relevant in determining the existence of an intrinsically injurious intangible right because the existence of a historical analog, either common-law or statutory, that was regularly brought without evidence of harm beyond the violation itself provides compelling evidence that Congress intended for a similar right to be considered intrinsically injurious.

2. Intrinsically Injurious Decision-Making and Dignitary Rights

The second sub-type of intrinsically injurious rights is intrinsically injurious decision-making and dignitary rights, which are the sort of rights at issue imposed on agencies in traditional procedural standing cases.299 One form of such rights is when Congress mandates that an agency or a private defendant employ a particular decision-making process, e.g., that it must decide particular issues when a triggering event occurs, or that it must consider certain data or issue a report on particular issues before making a decision. Another form is when Congress mandates that those with a

298. See, e.g., Eichenberger v. ESPN, Inc., 876 F.3d 979, 983–84 (9th Cir. 2017) (holding that disclosure of personal identity and viewing history under Video Privacy Protection Act was concrete injury, even absent “additional consequences”); Heglund v. Aitkin Cty., 871 F.3d 572, 577–78 (8th Cir. 2017) (holding that unlawful accessing of private driver’s license information under Driver’s Privacy Protection Act, affording standing, regardless of further harm, because it was not a bare procedural violation under Spokeo); In re Nickelodeon, 827 F.3d 262, 271–74 (3d Cir. 2016) (holding that Viacom’s and Google’s collection and disclosure of internet users’ personal information, such as websites visited and videos viewed, afforded standing, given “Congress’s judgment [that the information] ought to remain private,” and that “Spokeo . . . does not alter our prior analysis in Google”); In re Google, Inc., 806 F.3d 125, 133–35 (3d Cir. 2015) (holding that placement of cookies on users’ computers violated various state and federal statutes, including the Stored Communications Act, giving rise to standing even if the users had not suffered any resulting economic loss).

299. See Massachusetts v. EPA, 549 U.S. 497, 517–18 (2007) (“[A] litigant to whom Congress has ‘accorded a procedural right to protect his concrete interests’ . . . ‘can assert that right without meeting all the normal standards for redressability and immediacy.’”) (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 573 n.7 (1992)).
concrete interest in the outcome of a decision be afforded an opportunity to participate in the decision-making process. Such participatory rights are granted because of the dignitary value thereby provided, guaranteeing access and an opportunity to attempt to influence the ultimate decision, regardless of any evidence providing a basis to believe that the interested party’s participation is likely to alter that decision.

When Congress grants such decision-making rights, part of its motivation is a general desire to advance the substantive wisdom of the ultimate decision to be made. But part of the motivation is also to create a fair process, independent of the outcome. Congress thus employs the mechanism of granting those with a personal interest in the outcome of the decision an enforceable right to insist that the defendant employ the required decision-making process, without requiring proof that compliance with that process would have resulted in a different, more favorable outcome. Similarly, when Congress grants a participatory right to someone with a concrete stake—a guaranteed opportunity to influence a decision by participating in the process—denial of the mandated process necessarily causes injury to the party in question, without proof or evidence that the exclusion caused additional harm by altering the decision that would have been made.300

These decision-making rights include the procedural rights discussed in cases like Lujan: obligations on agencies to issue a decision in defined circumstances, or to consider particular evidence in reaching a decision.301 They include agency obligations, under statutes like NEPA, to issue an Environmental Impact Statement (EIS) before making a decision constituting a “major Federal action.”302 The agency is substantively free to take any action, regardless of any environmental impact it recognizes in the EIS, but the failure to issue an EIS bars the agency from taking action.303 As Justice Scalia explained in Lujan, plaintiffs who are geographically proximate to areas affected by an environmental decision who have been denied such a decision-making right need not prove that, if they had been afforded the right, the ultimate decision would have been different or the potential consequence imminent; rather, denial of the decision-making right

300. See Lee & Ellis, supra note 19, at 174 n.21 (explaining that with decision-making rights, “the plaintiff is entitled to the process whether or not it will make any difference in the real world”), accord Burt, supra note 9, at 295–97.
301. Lujan, 504 U.S. at 568–70.
303. Id.
is itself enough to afford standing, regardless of any additional risk of harm.\textsuperscript{304} As the Court recognized as early as 1997, “It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking.”\textsuperscript{305}

This sub-type of rights parallels the Supreme Court’s recognition of the intrinsic value of procedural due process. The Court held in \textit{Carey v. Piphus} that suit may be brought and nominal damages recovered for violation of the procedural due process right to pre-deprivation notice and a hearing, even if it is proven that provision of such a process would not have changed the resulting decision.\textsuperscript{306} The \textit{Carey} Court declined to authorize actual damages for a public school’s denial of plaintiff’s participatory decision-making right absent proof that the mandated process would have changed the outcome of the decision or that emotional damages arose from the denial.\textsuperscript{307} But the Court permitted recovery of nominal damages, even without proof of such additional harm—thus necessarily, if implicitly, finding standing to bring suit—because denial of the mandated process was itself an injury-in-fact.\textsuperscript{308}

This type of dignitary, decision-making right also helps explain the Supreme Court’s recognition of standing in cases challenging affirmative action in contracting and university admissions. The Court has held that being subject to an unfair decision-making process affords standing, even if it is proven that the proper process would not have altered the decision: “The injury in cases of this kind is that a ‘discriminatory classification prevent[s] the plaintiff from competing on an equal footing.’ The aggrieved party ‘need not allege that he would have obtained the benefit but for the barrier in order to establish standing.”\textsuperscript{309}

Whatever one thinks of the Court’s solicitude for the dignitary injuries of white plaintiffs challenging affirmative action policies in programs for which they had no chance of admission even absent affirmative action, the principle is the same as that at issue in procedural standing: Certain

\textsuperscript{304} \textit{Lujan}, 504 U.S. at 572 n.7, 573 n.8.
\textsuperscript{305} \textit{Bennett v. Spear}, 520 U.S. 154, 172 (1997).
\textsuperscript{307} \textit{Id.} at 259–64.
\textsuperscript{308} \textit{Id.} at 266–67.
decision-making rights are so fundamental that their denial works a dignitary injury, regardless of additional harm.

Intrinsically injurious decision-making and participatory rights exist when a procedure itself constitutes the guaranteed right that Congress intends to protect. Just as procedural due process guarantees notice and an opportunity to be heard, regardless of whether the plaintiff can prove any possibility of a different result if such procedural rights were provided, these rights reflect the value and importance of a fair process, independent of the substantive outcome. Such rights include the guarantee of an opportunity to attempt to convince a decision-maker—a core procedural value—through a combination of a dignitary right in the person and the institutional integrity of the decision-making entity.

The determination of whether a procedural right is an intrinsically injurious decision-making or dignitary right, as opposed to an instrumental right focused on the potential effect on the outcome of the decision, is analogous to the determination of structural error at trial. For intrinsically injurious rights, the nature of the flaw is sufficiently serious that any asserted harmless error is either unduly difficult to determine or irrelevant given the gravity of the denial. Overwhelming evidence of a criminal defendant’s guilt can never justify the denial of a jury, or the use of a jury that was selected through a racially biased process. But a right’s relationship to a decision-making process does not necessarily make it intrinsically injurious; the question is whether Congress intended to confer the sort of decision-making, participatory, or dignitary right such that the denial itself causes injury.

Spokeo’s extension of procedural standing to claims against private parties strongly suggests that when Congress has enacted a statutory obligation that fundamentally constrains a private party’s decision-making process, the same principles applicable to an agency’s decision-making obligations also apply. When a plaintiff alleges that a private party has failed to comply with a mandated decision-making process, or to afford interested plaintiffs a right of participation that respects their dignity and provides them an opportunity to attempt to influence the decision, that violation is itself sufficient for standing: The plaintiff need not prove that compliance with the decision-making obligation would have been likely to change the decision.

310. In contrast, the denial of an instrumental presumptively injurious right is precisely of the sort subject to harmless error analysis. See infra Section IV.C.2.
Courts and scholars have frequently noted the existence of such dignitary, procedural rights concerning decision-making processes. As Professor Robert Bone has noted, “[S]ome scholars argue that a right to participate is required to respect the dignity of those who are bound or otherwise seriously affected by a decision.”\textsuperscript{311} Respect for the dignity of those deeply affected by a substantive decision justifies, for example, the rights of absent class members. Federal Rule of Civil Procedure 23(b)(3) grants an absolute right of notice and participation to absent class members in a class proceeding that will bind them as to individualized damages, regardless of whether there is any reason to believe that such a right is pragmatically useful, or even when such a right is harmful to the interests of those absent class members.\textsuperscript{312} Such rights are justified because “participation in regulatory problem solving by interested and affected parties has an independent, democratic value.”\textsuperscript{313}

Professor William Buzbee argues that at least some of these constraints on agency decision-making should be understood as substantive rather than procedural violations, thus justifying standing.\textsuperscript{314} In arguing that the denial is substantive, what he apparently means is that the violation is intrinsically injurious, regardless of proof of additional harm; the distinction is largely semantic, but the argument he makes, echoed in this Article, is that some intrinsically injurious rights arise from mandated decision-making procedures. The essential point is that certain decision-making rights, often labeled procedural because they concern the decision-making process, are

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  \item \textsuperscript{312} FED. R. CIV. P. 23(b)(3); see Scott Dodson, An Opt-In Option for Class Actions, 115 MICH. L. REV. 171, 183–84 (2016).
  \item \textsuperscript{313} Jody Freeman, Collaborative Governance in the Administrative State, 45 UCLA L. REV. 1, 27 (1997). Similarly, Professor Solum points to a model of procedural justice that “connects the independent value of process with the dignity of those who are affected by legal proceedings…. This right to participation is justified by a background right of political morality, that is, the right of persons … to be treated with dignity and respect.” Lawrence B. Solum, Procedural Justice, 78 S. CAL. L. REV. 181, 262–63 & n.208 (2004) (footnote omitted); see also id. at 259 & n.201 (“The participation model holds that procedural fairness requires that those affected by a decision have the option to participate in the process by which the decision is made.”).
  \item \textsuperscript{314} William W. Buzbee, Expanding the Zone, Tilting the Field: Zone of Interests and Article III Standing Analysis After Bennett v. Spear, 49 ADMIN. L. REV. 763, 793 n.148 (1997).
\end{itemize}
so fundamental that their denial itself creates an injury-in-fact, regardless of any effect on the resulting decision.\textsuperscript{315}

Perhaps best exemplifying this category of rights is the circuit split as to standing under the FCRA for an employer’s failure to provide job applicants with a copy of a consumer report before taking adverse action based on that report.\textsuperscript{316} The Third and Seventh Circuits, which found standing based on the applicant’s guaranteed procedural right to use the report to have an opportunity to influence the employer’s decision\textsuperscript{317} have the better of the arguments here. The right at issue is an intrinsically injurious decision-making right guaranteeing participation in the decision-making process and access to information to craft an argument in an attempt to influence the employer’s decision, without any need for proof of likely success. As the Seventh Circuit explained, “Article III’s strictures are met not only when a plaintiff complains of being deprived of some benefit, but also when a plaintiff complains that she was deprived of a chance to obtain a benefit.”\textsuperscript{318}

\textsuperscript{315} See Sunstein, What’s Standing, supra note 17, at 203. “Procedural fairness . . . is not subsumed completely by substantive justice. Procedural fairness means that a legitimate decisionmaking process promotes independent values of participation, deliberation, and consensus.” Lani Guinier, No Two Seats: The Elusive Quest for Political Equality, 77 VA. L. REV. 1413, 1489 (1991) (“The decisionmaking enterprise can be empowering where it gives participants a stake in the outcome because it promotes both a sense of collective responsibility for the outcome and an individual opportunity to succeed a fair proportion of the time.”). Thus, “[i]f process is constitutionally valued . . . it must be valued not only as a means to some independent end, but for its intrinsic characteristics: being heard is part of what it means to be a person. Process itself, therefore, becomes substantive.” Laurence H. Tribe, The Puzzling Persistence of Process-Based Constitutional Theories, 89 YALE L.J. 1063, 1070–71 (1980) (footnote omitted).

\textsuperscript{316} See supra Section II.B.6.


\textsuperscript{318} Robertson, 902 F.3d at 697 (citing Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 983 (2017); Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. Jacksonville, 508 U.S. 656, 666 (1993)). The Ninth Circuit decision rejecting standing on this claim seems particularly misguided; the information in that particular credit report was technically accurate, but the plaintiff had an entirely reasonable explanation for why it was not as troubling as it seemed, in that the potentially concerning conduct of not paying a debt had occurred four years earlier than the report implied; thus the legislative purpose would have been particularly well-served by affording the employee an opportunity to explain why the debt should not have been disqualifying. See Dutta v. State Farm Mut. Auto. Ins. Co., 895 F.3d 1166, 1173–75 (9th Cir. 2018).
C. Instrumental Procedural Rights

The third category of procedural rights—*instrumental* rights, including those against private parties—were referenced in *Lujan* and overtly incorporated into the procedural standing universe in *Spokeo*. An instrumental right is one that Congress enacts for the purpose of protecting against some other distinct harm, rather than for its own sake; the instrumental right is granted only because of the risk of harm its denial presents to the distinct (concrete) target harm that Congress is actually intending to prevent.

For example, the obligation to provide notice of some other right or duty is always instrumental; Congress is not directly concerned with the act of notice itself, but notice serves to protect the other right or duty about which Congress is ultimately concerned. Also instrumental is the right at issue in *Spokeo*, credit reporting agencies’ obligation to employ reasonable procedures to assure maximum possible accuracy of the information in credit reports. Consumers do not have a concrete interest in credit reporting agency’s procedures in and of themselves; nor do they have a concrete interest in agencies’ following the law, and Congress had no reason to confer such a right for its own sake. Instead, Congress believed the obligation to have reasonable procedures to assure maximum possible accuracy to be instrumentally useful to protect consumers against the distinct, concrete injury of errors in credit reports that posed a risk of real-world harm.\(^{319}\)

1. Instrumental Automatically Injurious Rights

The first sub-type of instrumental right is the *instrumental automatically injurious right*. These rights, though instrumental, are intended by Congress to automatically confer standing whenever they are denied. The rights themselves are not intrinsically injurious; no concrete harm arises directly from their denial. Rather, Congress has concluded that a violation of the instrumental right creates a categorical, material risk of harm to the concrete, target right with which Congress is ultimately concerned. That categorical risk of harm to the class of people protected by the right, at the time of violation, justifies automatically conferring standing for a violation of the instrumental right.

These rights (along with intrinsically injurious rights) are within the category *Spokeo* refers to when it states that “the violation of a procedural

\(^{319}\) See infra Section IV.C.2.
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.\textsuperscript{320} If Congress intends for the violation of an instrumental right to automatically establish standing, based on the categorical risk of a difficult-to-prove real harm that it determined was materially likely to arise from the statutory violation, then the court’s task is simply to assess the propriety of that conclusion, with due deference to Congress.

This category parallels the common law torts of libel and slander per se. As \textit{Spokeo} observes, “[T]he law has long permitted recovery by certain tort victims even if their harms may be difficult to prove or measure.”\textsuperscript{321} Unlike trespass or breach of contract, the violation itself does not cause intrinsic injury; rather, the general difficulty of proving and measuring the harm that is likely to arise from the violation justifies recovery (and thus, plainly, authorizes suit), even absent evidence of such harm or risk of harm in a particular case.

As \textit{Spokeo} explains, “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. . . . [A] plaintiff in such a case need not allege any additional harm beyond the one Congress has identified.”\textsuperscript{322} For example, \textit{Spokeo} explains, Congress decided that it was useful to enact rights to receive information in various statutes that \textit{Spokeo} specifically denominates as “procedural”; these rights require that, in defined circumstances, certain information be provided because Congress has concluded that such information is useful to the class of people who are statutorily entitled to receive it.\textsuperscript{323} \textit{Spokeo} continues, the


\textsuperscript{321} Id. at 1549 (citing \textsc{Restatement (First) of Torts} §§ 569, 570 (\textsc{Am. Law Inst.} 1938) (libel and slander per se, respectively)).

\textsuperscript{322} Id. at 1549–50 (citing \textit{Akins}, 524 U.S. at 20–25; \textit{Pub. Citizen}, 491 U.S. at 449).

\textsuperscript{323} \textit{Akins} involved mandated provision of information under the Federal Election Campaign Act of 1971, and \textit{Public Citizen} under the Federal Advisory Committee Act. \textit{Id.} at 1549–50. Though the Court did not mention it, the Freedom of Information Act (FOIA) is similar: someone entitled to information under FOIA need not prove concrete injury arising from denial of the information sought; Congress has concluded that the information is sufficiently likely to be useful that its denial automatically presents a material risk of harm. \textit{Pub. Citizen}, 491 U.S. at 449 (“As when an agency denies requests for information under the Freedom of Information Act, refusal to permit appellants to scrutinize the ABA Committee’s
“inability to obtain information’ that Congress had decided to make public is a sufficient injury in fact to satisfy Article III,” without any need for the plaintiff to prove that denial of the information caused any further injury.  

Again, Congress has not concluded that the information is of intrinsic value to everyone; instead, it enacts the instrumental right to access the information in order to further the distinct interest in recipients’ use of the information to “participate more effectively in the judicial selection process,” or “to evaluate candidates for public office.” Impairment of the target interest is the concrete injury. But Congress has enacted the instrumental right and made the judgment that denial of that instrumental rights suffices for standing. 

As the Court explained in Public Citizen, when an agency refuses to provide information that must be disclosed under FOIA, that denial “constitutes a sufficiently distinct injury to provide standing to sue,” and plaintiffs need not “show more than that they sought and were denied specific agency records.” History and congressional judgment thus show that it is permissible for Congress to enact an instrumental right that automatically confers standing when violated, if Congress determines that a material risk of harm arises from that violation; Article III does not mandate that each plaintiff be able to prove that the harm or risk of harm to the target interest actually manifested itself.

activities to the extent FACA allows constitutes a sufficiently distinct injury to provide standing to sue.”).

328.  Even as to instrumental automatically injurious rights, courts properly deny standing if, at the time of violation, the circumstances are such that it was impossible for the procedural right to be of benefit to the plaintiff, i.e., that the plaintiff was not in the class of people Congress intended to protect by enacting the statutory right. For example, as the Second Circuit held in Strubel v. Comenity Bank, 842 F.3d 181, 191–92 (2d Cir. 2016), standing does not exist for failure to provide notice of a right concerning a service the defendant did not offer and which there was no plausible basis to believe it might later offer. The question is whether, affording deference to congressional judgment, there was a material risk of harm that arose from the violation. If the defendant did not offer a service, or the plaintiff was definitively ineligible for the service, then there is no risk of real harm. Congress’s judgment covers the likely consequences of the statutory violation for those who
2. Instrumental Presumptively Injurious Rights

The next sub-type of instrumental right is the instrumental presumptively injurious right. For such rights, Congress has concluded that a violation of the instrumental right has a material possibly of resulting in harm to a distinct, concrete interest, but it does not intend for that judgment to be categorical such that violation of the instrumental right is itself automatically sufficient to confer standing. Instead, Congress has concluded that a violation of the instrumental right will often—and in the ordinary case does—cause harm or a material risk of harm to the target interest, but the difficulties of proof and risk of harm are not so great as to warrant automatic standing from denial of the statutory right alone.329

For these rights, a court properly considers not only violation of the instrumental statutory right, but also whether the facts at issue suggest a past, present, or future harm or risk of harm to the target concrete interest with which Congress is ultimately concerned. Of vital importance is that assessment of the risk of real harm is satisfied if that risk existed at any point—most notably, if risk of harm existed at the time of the violation, thereby ensuring that the procedural right is not bare or in vacuo, i.e., with no meaningful risk that it will materialize into a real-world harm.330

Congress has the power to enact procedural, instrumental rights it considers necessary and proper to protect against material risk of concrete injury. As the historical examples of libel, slander, unjust enrichment, and intellectual property demonstrate, Article III standing requires no more than that the plaintiff face a material risk of concrete injury arising from violation of the procedural right that Congress has granted. Judicial judgment about the existence of material risk—either automatic or

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329. Often, with presumptively injurious rights, Congress will confer the enforcement right to sue only on those who are harmed or “aggrieved” by violation of the instrumental right. In such cases, “statutory standing” is coextensive with Article III standing.

330. See, e.g., Strubel, 842 F.3d at 189 (“[T]o determine whether a procedural violation manifests injury in fact, a court properly considers whether Congress conferred the procedural right in order to protect an individual’s concrete interests. ‘[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right in vacuo—is insufficient to create Article III standing.’”) (quoting Summers v. Earth Island Inst., 555 U.S. 488, 496 (2009)); Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548–50 (2016) (“This does not mean, however, that the risk of real harm cannot satisfy the requirement of concreteness.”).
presumptive—is guided by deference to congressional judgment about the “chains of causation”\(^{331}\) between violations of the instrumental right and the target harm.

For instrumental automatically injurious rights, Congress intends for courts to hear cases based on the statutory violation alone. The judicial role in assessing standing is to review, deferentially, Congress’s judgment that a risk of injury to the ultimate concrete interest generally arises, at the time that the instrumental right is violated, to those granted a right to sue, and that difficulties of proof justify automatic standing. For instrumental presumptively injurious rights, in contrast, Congress intends for courts to consider the facts of the actual case to see if the particular circumstances show that the violation resulted in harm or risk of real harm, at the time of violation (or thereafter).

Most obviously within this presumptively injurious category is the violation in *Spokeo* itself: the duty for credit reporting agencies to “follow reasonable procedures to assure maximum possible accuracy” of consumer reports.\(^{332}\) This mandate is instrumental because Congress is not concerned—with—and did not intend to grant consumers a right to challenge—credit reporting agencies’ abstract, sub-standard procedures.\(^{333}\) It intended to enact an instrumental presumptively injurious right that would reserve to a reviewing court the question whether the procedural shortcoming that would ordinarily result in a meaningful error in a credit report actually gave rise to a risk of real harm in the particular case or, instead, if the violation was so trivial that, without evidence of any further risk of harm beyond the violation itself, no harm or risk of real harm arose.\(^{334}\)

**D. Substance Versus Procedure Is Not a Meaningful Categorical Distinction**

It is worth noting that it is fruitless to analyze the existence of procedural standing—or statutory standing, intangible standing, or whatever else one might label the questions of standing implicated by *Lujan* and *Spokeo*—by

\(^{331}\) *Spokeo*, 136 S. Ct. at 1549–50.


\(^{333}\) *Spokeo*, 136 S. Ct. at 1545, 1550 (“On the one hand, Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk. On the other hand, Robins cannot satisfy the demands of Article III by alleging a bare procedural violation.”).

\(^{334}\) See *id.* at 1550 (“A violation of one of the FCRA’s procedural requirements may result in no harm.”).
distinguishing statutory rights that are substantive as opposed to those that are procedural. As the Court has explained, “[T]he words ‘substantive’ and ‘procedural’ themselves . . . do not have a precise content, even (indeed especially) as their usage has evolved.” 335 “Except at the extremes, the terms ‘substance’ and ‘procedure’ precisely describe very little except a dichotomy, and what they mean in a particular context is largely determined by the purposes for which the dichotomy is drawn.” 336

Some observations can be made from the Court’s general unwillingness to place weight on the traditional understanding of “substance” and “procedure.” First, enforcement rights are plainly procedural in the paradigmatic sense that they govern adjudication rather than real-world conduct (though, of course, the existence of a right to sue influences the behavior of those subject to suit). Second, intrinsically injurious intangible rights are plausibly substantive, in a traditional sense, because they grant a real-world right, the denial of which causes real-world injury (though, of course, the granting of such a right is in some sense procedural in that it enables one to file suit to adjudicate denial of that right). 337

Intrinsically injurious decision-making and dignitary rights are a mixed bag. Previous commentators often, understandably, characterized them as procedural in that the obligation is to employ a particular procedure. 338

337. Solum, supra note 313, at 205 (“A rule is procedural if its function is to regulate adjudication-related conduct. A rule is substantive if its function is to regulate conduct that occurs outside the context of adjudication.”).
338. See Burt, supra note 9, at 276 (“A procedural injury occurs when an agency fails to follow a legally required procedure, such as the preparation of an EIS, and this failure increases the risk of future harm to some party.”); Brian J. Gatchel, Informational and Procedural Standing After Lujan v. Defenders of Wildlife, 11 J. LAND USE & ENVTL. L. 75, 77 n.6 (1995) (“Procedural standing is standing to ensure that a governmental agency follows proper procedure as set out in a particular statute.”) (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 572 (1992)); Lee & Ellis, supra note 19, at 174 n.21 (“By ‘procedural rights,’ we refer (as Justice Scalia did in his Lujan footnote seven) to those rights affirmatively conferred by statute or regulation. Procedural rights are entitlements to process that may be divorced from any underlying ‘real-world’ desiderata . . . .”).
More comprehensively, the medium is sometimes the message; here, the procedural right is sometimes the substance in the sense that the denial of the procedural right is itself a concrete injury.

Finally, instrumental rights are neither fish nor fowl. Nothing is gained by trying to characterize them as one or the other, or as some particular chimera. Perhaps instrumental presumptively injurious rights might in some ways lean more toward the procedural side of the ledger, whereas instrumental automatically injurious rights are another thoroughly mixed bag. The label applied, however, is not what matters. Instead, courts should focus on questions such as whether the statutory violation itself suffices for standing, without evidence of risk of additional harm, or if such risk must be shown in the particular case.

V. Spokeo’s Answers, and Answers to Spokeo’s Questions

Spokeo thus establishes several new principles:

- Statutory rights as against private parties require not only particularized injury but also concrete injury to afford standing;
- Instrumental statutory rights—procedural rights conferred to further a distinct, concrete interest—are subject to procedural standing analysis;
- “Bare” procedural rights insufficient for standing no longer refer solely to enforcement rights with no connection to concrete injury—instrumental rights are also bare if not connected to concrete injury or risk of real harm;
- Concrete injury is established by real-world harm or risk of real harm;

340. See, e.g., Curtis v. Propel Prop. Tax Funding, LLC, 915 F.3d 234, 240–43 (4th Cir. 2019) (characterizing as “substantive” a statutory right prohibiting credit transactions that require consumers to pre-authorize repayment by electronic fund transfer). The right is best thought of as an instrumental right, one the court properly recognized as automatically injurious, given the congressional conclusion that pre-authorization presented a categorical risk of real harm to consumers from the creditor’s exercise of that right.
In some circumstances, statutory, procedural violations presenting a risk of real harm do not require proof of additional concrete injury beyond the statutory violation itself;

History is instructive about standing, thus courts should consider whether an intangible right has a close relationship to a harm traditionally regarded as providing a basis for suit; and

Congressional judgment is important and instructive about procedural standing, because Congress is well-positioned to identify intangible harms that satisfy Article III, and given Congress’s power to define injuries and articulate chains of causation to create standing that would not otherwise exist.

Spokeo and its progeny, however, leave several further questions unclear:

- How should risk of real harm be assessed: by evaluating the risk generally posed by violation of the statutory right in question, or by considering the risk of real harm to a particular plaintiff?
- When the risk of real harm is assessed by considering the risk to a particular plaintiff, does standing exist if risk of real harm was present at the time of violation but dissipated prior to suit?
- When courts consider whether the procedural right at issue has a close relationship to a historical analog affording standing, is the existence of the analog necessary for standing, or is it simply sufficient?
- When should courts defer to congressional judgment in defining injuries sufficient for standing?
- When should courts defer to congressional judgment about the chain of causation between an instrumental right and the risk of real harm the instrumental right is intended to prevent?
- How broadly should courts determine the concrete interest Congress intends to further through an instrumental right—does it turn on a statute’s overall purpose, or on the interest furthered by the particular instrumental right at issue?
- What are the steps of judicial review over questions of procedural standing?

Observations about each of these loose ends follow. Most importantly, much of the confusion and uncertainty surrounding procedural standing can
be eliminated by recognizing the different categories of procedural rights that Congress intends to enact, as enumerated in Part IV.

When Congress intends to enact an intrinsically injurious right, courts should defer to congressional power to define injuries and thereby create standing where none existed before. That is true for both intrinsically injurious intangible rights and for intrinsically injurious decision-making and dignitary rights. For all such intrinsically injurious rights, a plaintiff need not show additional harm or risk of harm beyond violation of the statutory right.

When Congress intends to enact an instrumental right, courts should defer to congressional power to find chains of causation between the instrumental right and the ultimate, real-world target interest with which Congress is ultimately concerned.

When that instrumental right is an instrumental automatically injurious right, Congress has determined that a real risk of concrete harm categorically arises to the group protected by the statute as a general matter from the statutory violation, but has determined that the harm or risk of harm may be difficult to prove. Thus no additional harm or risk of harm beyond the statutory violation need be shown. For such rights, the court’s role is to review—deferentially—Congress’s judgment about the general chain of causation between the instrumental right and the target, real-world interest Congress intended to further. And when determining that real-world interest, courts should consider the real-world interest furthered by the particular statutory right or rights at issue in the case—informed by, but not limited to, the overarching purpose of the statute as a whole.341

When that instrumental right is an instrumental presumptively injurious right, Congress has determined that a risk of real harm is likely to exist as a consequence of the statutory violation, but it has not determined that the risk arises categorically for every member of the group protected by the statute. Instead, Congress intends for the court to assess not only the existence of the statutory violation, but also the existence of additional harm or risk of real harm to the particular plaintiff under the facts of the case. This determination should be made with due deference to Congress’s determination of policy judgments and likely factual chains of causation in

341. See, e.g., Gundy v. United States, 139 S. Ct. 2116, 2126 (2019) (“[R]easonable statutory interpretation must account for both the specific context in which . . . language is used and the broader context of the statute as a whole.”) (quoting Utility Air Regulatory Grp. v. EPA, 573 U.S. 302, 321 (2014)).
the face of uncertainty, but the facts of the particular case may override such determinations or otherwise conflict with that congressional judgment.

When a court assesses whether a statutory violation resulted in harm or risk of real harm to a particular plaintiff, that assessment should encompass risk of real harm that existed at the time of the violation. In other words, for standing to exist, if actual harm has not been shown, the statutory violation must have placed the plaintiff at risk of real harm—but that risk need not continue indefinitely or even be in existence at the time of suit. As under the common law, risk of real harm is sufficient for standing, even when, at the time of suit, it turns out that there is no evidence of actual harm beyond the statutory violation. For instrumental automatically injurious rights, violation of the instrumental right must generally give rise to a sufficient risk of harm. For instrumental presumptively injurious rights, the particular plaintiff must generally have been exposed to a risk of real harm; exposure to that actual, real-world risk of harm is sufficient for standing, regardless of whether that risk later dissipates.

As to the role of history, neither the language nor the reasoning of *Spokeo* suggests that a historical analog is necessary for standing; they simply suggest that it is sufficient. *Spokeo* refers to “historical practice” as “instructive,” language it would not have used if it meant to convey that an analog is necessary. Moreover, Justice Kennedy’s concurrence in *Lujan*, which was both necessary for the fifth vote in *Lujan* and was embraced in *Spokeo*, explains that “[a]s Government programs and policies become more complex and farreaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition.” That admonition is well taken. Courts should be sensitive to congressional judgment about new rights of action that are necessary and proper to protect against risk of real-world harm, even if that protection is indirect and instrumental.

**VI. Problem Cases Revisited**

Finally, it is useful to briefly revisit some cases raised earlier that seemed to present intractably perplexing issues of procedural standing. Applying

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the approach described above greatly simplifies the analysis of standing in these cases.

First, consider special education claims on behalf of educationally disabled children under the IDEA. Plaintiffs bringing these claims face what appears to be a formidable standing hurdle in that the vast majority of the IDEA’s protections are procedural, dictating the process by which an Individualized Education Plan (IEP) should be created, rather than the substantive propriety of the IEP that results. If a school district fails to follow one of the IDEA’s procedural mandates, does procedural standing require that the child prove the existence of additional, concrete harm beyond the procedural statutory violation itself? And how would the child prove, for example, that a failure to include a special education teacher on the team drafting the IEP, or to include the child’s parents as members of the IEP team, caused the child concrete, real-world injury?

The answer is that these IDEA procedural obligations are intrinsically injurious decision-making and dignitary rights; for purposes of standing, there is no need to demonstrate the practical consequences of a government actor’s failure to comply with its decision-making obligations. For such decision-making rights, as the Supreme Court has explained with regard to a failure to draft an Environmental Impact Statement, a plaintiff “who alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been altered. All that is necessary is to show that the procedural step was connected to the substantive result.”

Next, consider Frank v. Gaos, the case involving a cy pres settlement in which the Supreme Court remanded for an assessment of procedural standing. With the benefit of the framework developed above, this case is also relatively straightforward: On the plaintiff’s version of the facts (which should be taken as true for purposes of finding standing sufficient to permit

345. See, e.g., Massachusetts v. EPA, 549 U.S. 497, 517–18 (2007). Some of the IDEA’s less-fundamental procedural obligations, not relating directly to the IEP formation process, such as the requirement that certain waivers be in a signed writing, are likely instrumental rights, intended to further the concrete right to knowing and voluntary waiver of that right (and ultimately to the provision of a free and appropriate public education). But for such rights, liability under the IDEA for the procedural violation requires that the right to a free and appropriate education be impeded, so procedural standing imposes no additional barrier to suit. See generally Romberg, supra note 48.

346. Massachusetts v. EPA, 549 U.S. at 518 (quoting Sugar Cane Growers Coop. of Fla. v. Veneman, 289 F.3d 89, 94–95 (D.C. Cir. 2002)).

347. 139 S. Ct. 1041, 1046 (2019).
approval of the class action settlement), Google had relayed individualized, stored electronic information about the search terms consumers used to reach a website. Setting aside the merits question of whether the statute prohibited such conduct—an issue not relevant to standing—the violation asserted is of an intrinsically injurious intangible right to informational privacy. Thus, plaintiffs need not demonstrate additional harm or risk of harm arising from unauthorized transmission of their private information in order to have standing to assert their claim.

And what of Spokeo itself, and the claim that Spokeo had failed to employ reasonable procedures designed to assure maximum possible accuracy in credit reports, resulting in substantial errors in Robins’ credit report? First, Spokeo quite reasonably (if implicitly) determined that Congress intended to enact an instrumental right rather than an intrinsically injurious intangible or decision-making right. Congress did not intend for a credit reporting agency’s use of a sub-optimal procedure, in connection with the creation of an individual’s credit report, to itself constitute concrete injury to the individual. Most notably, if a credit reporting agency used lax procedures to gather information but the resulting credit report was nonetheless entirely accurate, Congress did not intend for the statute to have been violated. Instead, Congress intended for the procedural obligation to be instrumental, i.e., it imposed the obligation on credit reporting agencies to follow procedures designed to assure maximum possible accuracy so as to protect consumers from the distinct, real-world harm of erroneous credit reports resulting from inadequate procedures.

Further, Spokeo implicitly concludes (reasonably enough) that Congress did not intend to enact an instrumental automatically injurious right; Congress did not believe that credit reporting agencies’ failure to follow reasonable procedures justifies an automatic assumption of resulting real-world injury. A credit report created with sub-optimal procedures does not necessarily result in error, let alone any real-world risk of harm. This conclusion is entirely plausible, both because sub-optimal procedures do not so regularly lead to error such that a court should automatically find injury from the procedural shortcoming, and, even more importantly, because resulting error in the credit report is not hard to determine or prove. It is simple for an individual to demonstrate the existence and nature of any errors in a resulting credit report; thus, there is no reasonable basis to

348. Id. at 1044–45.
believe Congress intended for concrete injury to automatically arise from inadequate procedures. Instead, Spokeo understood that Congress presumed concrete injury would likely arise from the failure to follow reasonable procedures assuring maximum possible accuracy, but intended to require the particular consumer to show some additional real-world risk of injury.

Finally, and less obviously, Spokeo’s zip code example, discussed in dicta, is best understood to suggest that the Court did not consider a perfectly accurate credit report to be the real-world, target harm with which Congress was ultimately concerned. Instead, Congress was concerned with the real-world harm that might well arise from inaccurate credit reports. I determined that sub-optimal procedures would likely result in erroneous credit reports, and that credit reports containing such errors would, in turn, likely have the potential to result in real-world harm. But Congress did not believe these chains of causation to be automatic; Congress anticipated that consumers would need to demonstrate further risk of harm beyond the statutory, procedural violation itself.

This understanding explains the Court’s statement that “[i]t is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm.” Setting aside the infelicity of the chosen example, what the Court meant was that the FCRA did not impose a statutory obligation on credit reporting agencies to employ reasonable procedures for the purpose of protecting a consumer’s target interest in a perfectly accurate credit report, free of meaningless, technical errors. Congress meant instead to protect consumers against some risk of real-world harm arising from errors in credit reports caused by sub-optimal procedures.

Conclusion

Spokeo portrays itself as a modest case that establishes no new law, simply remanding for the Ninth Circuit to apply the second half of an injury-in-fact test that it had improperly ignored: the existence of not only particularized but also concrete injury-in-fact. In actuality, Spokeo’s opaque summary of procedural standing, and the confounding examples it provides, have given rise to widespread uncertainty and confusion in the courts of appeals and have left unanswered multiple, fundamental questions about when statutory, procedural injuries afford standing absent evidence of additional risk of harm.

350.  Id. at 1550 (emphasis added).
This Article has attempted to explain Spokeo’s sub silentio introduction of instrumental rights as against private parties into the procedural standing universe; how such instrumental rights fit into the various categories of statutory, procedural rights that Congress enacts; and how the congressional intent underlying each of those categories maps onto the requirements of procedural standing applicable to each category. Properly understood, procedural standing is neither toothless nor a fearsome gatekeeper.

There are two further reasons why Spokeo may not unduly constrain congressional power. First, at least given the current membership of the Supreme Court, Justice Thomas and the four liberal justices will likely provide five votes to read procedural standing in a broader way than other separation-of-powers issues that come before the Court.

And, more importantly in the long run, if Congress is more careful and overt about its intent when enacting instrumental rights, courts both should—and as a practical matter, are more likely to—defer to such legislative determinations. Specifically, when enacting a procedural right, Congress should overtly state the following: (1) the group and the target right it intends to protect; (2) any causal chain it has concluded connects an instrumental right to a target injury; and, perhaps most importantly, (3) the category of procedural right it intends to enact, thereby making plain what further harm or risk of harm, if any, it expects the plaintiff to demonstrate in order to have standing. Such clarity will result in a better balance between the legislative and judicial powers, while best promoting separation of those powers without infringement by either branch.

Congress cannot direct the courts to violate Article III’s case or controversy requirement by purporting to grant a plaintiff standing to enforce a bare procedural right not actually designed to protect that plaintiff’s concrete interests. Congress, however, has the power to define rights that afford standing without the need for evidence of further harm. And Congress has the power to articulate chains of causation, concluding that risk of real harm arises from violation of an instrumental right. And those are judgments to which the judiciary properly defers.