Injury in Fact and the Structure of Legal Revolutions

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I. INTRODUCTION

At first blush, the hardest question in *Spokeo, Inc. v. Robins*[1] is how cert could have been granted. The case turns on an issue that has long been settled: Does a plaintiff have standing to sue if the plaintiff has suffered an invasion of his legal rights? Not only is the answer yes, but an invasion of the plaintiff's legal rights was traditionally the *only* basis that could give rise to standing.[2] Today, a plaintiff has standing if the plaintiff has suffered an "injury in fact," without regard to whether the defendant has invaded the plaintiff's legal rights,[3] but the cases make clear that the new test supplements, and does not supplant, the traditional test.[4] A plaintiff may have standing on either basis, and, in particular, a plaintiff may have standing because the defendant has violated a statutory right that Congress has conferred

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1. No. 13-1339 (U.S. *petition for cert. filed* May 1, 2014). Readers of this Roundtable are presumably familiar with the case, so this essay does not recite the facts.

2. Tenn. Elec. Power Co. v. TVA, 306 U.S. 118 (1938).

3. Ass'n of Data Processing Serv. Org. v. Camp, 397 U.S. 150 (1970).

4. Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982).

on the plaintiff, without regard to whether, in the absence of the statute, a court would determine that the plaintiff had suffered an "injury in fact."[5]

Why, then, would the Supreme Court have granted cert? The Supreme Court's decision to take the case gives rise to the disquieting possibility that the case will complete a legal revolution. As Part I of this essay discusses, it sometimes happens that a new legal test, initially created as an expansion of an existing legal test, later displaces the previous test entirely and becomes the sole test itself. However, as Part II shows, the injury-in-fact test should not effect such a legal revolution, because (1) the Supreme Court has already decided that it does not do so, (2) it would be inappropriate for a newly minted test to displace the traditional test in an area where the constitutional goal is understood to be maintaining tradition, and (3) the result would be so undesirable as a policy matter. Part III suggests a less dramatic change to standing law that the Supreme Court may make in *Spokeo*.

II. THE STRUCTURE OF LEGAL REVOLUTIONS[6]

As the law changes over time, it sometimes evolves in a recognizable pattern through a series of defined steps. In some areas, as the law shifts from one legal rule to another, the new rule does not immediately oust the old rule in a single, cataclysmic case. Rather, the new rule first emerges as a supplement to the old rule. Only later does it become clear that the new rule has supplanted the old rule.

Abstractly, the pattern looks like this: At the start, there is a legal rule under which fact pattern *A* leads to legal result *X*:

$$A \rightarrow X$$

A case then arises in which fact pattern *A* is not present, but the court feels that legal result *X* ought to follow anyway. In explaining why it is reaching legal result *X* in the absence of fact pattern *A*, the court observes that the case presents, not fact pattern *A*, but a related fact pattern, *B*. The court determines that fact pattern *B* should also give rise to result *X*:

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5. *Id*.

6. This heading is of course an homage to THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1970).

$$A \rightarrow X$$
$$B \rightarrow X$$

Sometimes, there is an intermediate step in which the court determines that in cases presenting fact pattern *B*, courts may fictionally assume that fact pattern *A* is present, even though in reality it is not.[7] Result *X* then follows from the previous, accepted rule:

$$B \rightarrow A \rightarrow X$$

In any event, *B* becomes established as an alternative basis for legal result *X*. For some period, therefore, either fact pattern *A* or fact pattern *B* leads to legal result *X*:

$$A \_ B \rightarrow X$$

But then a curious case arises—a case in which the traditional fact pattern *A* is present but fact pattern *B* is not. In this case, the court completes the shift from one rule to another. The court determines that fact pattern *B* is the true basis of the legal rule leading to result *X*. Fact pattern *A*, the court might even determine, was traditionally important because of its frequent association with *B*. But cases in which fact pattern *A* occurs by itself and is *not* associated with *B* should no longer lead to legal result *X*. The new rule is simply:

$$B \rightarrow X$$

The legal revolution is complete. The rule that fact pattern *B* leads to legal result *X*, which initially emerged to *supplement* the traditional rule that *A* led to *X*, has now *supplanted* the traditional rule. Only fact pattern *B*, and not fact pattern *A*, leads to legal result *X*.

The twentieth-century shift in personal jurisdiction law provides an example of this pattern in practice. A legal revolution changed the focus of personal jurisdiction from whether the defendant or the defendant's property was present in the territory of the forum state to whether the defendant had minimum contacts with the forum state.

7. In such a case the court temporarily pretends to preserve the old rule while actually changing it. *See*, *e.g.*, *infra* note 9 and accompanying text.

In this example, fact pattern *A* was that the defendant, the defendant's agent, or the defendant's property was present within the territory of the forum state, or the defendant consented to jurisdiction. Legal result *X* was that the defendant was subject to personal jurisdiction in the forum state. Fact pattern *A* had to exist for legal result *X* to follow. If the defendant was not present in the forum state and had no property there, then there was "nothing upon which the tribunals c[ould] adjudicate"[8]

This restrictive rule changed in the twentieth century. Fact pattern *B* was that the defendant had "minimum contacts" with the forum state. In an early case, before the minimum contacts concept was fully developed, the Supreme Court approved the fiction that where the defendant had such contacts, the defendant could be deemed to have consented to jurisdiction in the forum state, thereby bringing the case within the established rule that fact pattern *A* led to result *X*.[9] Later, the Supreme Court more forthrightly said that the defendant's having minimum contacts with the forum state was itself the basis for personal jurisdiction.[10] After that case, a defendant could be subject to personal jurisdiction in a state if the defendant met the traditional presence test (*A*) or if the defendant had minimum contacts with the forum state (*B*).

Later, however, a case arose in which the defendant met the traditional presence test but did *not* have minimum contacts with the forum state. That is, fact pattern *A* was present but *B* was not. In *Shaffer v. Heitner*,[11] the defendants had property in the forum state—which was attached as the basis for an action in rem—but the cause of action was not related to the property. The Supreme Court, recognizing that traditional jurisdiction in rem had (thus far) continued notwithstanding the advent of the minimum contacts test,[12] nevertheless held that the minimum contacts test did not merely supplement the traditional test, but supplanted it. The Court held that "*all* assertions of state-court jurisdiction must be evaluated according to the" minimum contacts test.[13] Jurisdiction might therefore fail even in a case in which jurisdiction would have had a

8. Pennoyer v. Neff, 95 U.S. 714, 723–24 (1877).

9. Hess v. Pawloski, 274 U.S 352 (1927). The case also suggested that the defendant could be fictionally regarded as having appointed an agent to receive service of process in the forum state.

10. Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

11. 433 U.S. 186 (1977).

12. *Id*. at 205 ("No equally dramatic change has occurred in the law governing jurisdiction in rem.").

13. *Id*. at 212 (emphasis added).

valid basis under the traditional test.[14] The test of *B* had fully displaced the test of *A*.

To be sure, something of a counterrevolution occurred in *Burnham v. Superior Court*,[15] in which four Justices joined an opinion stating that the other part of the traditional *A* fact pattern—the presence of the defendant in the forum state when served with process—remained a valid basis for jurisdiction precisely because it was traditional, without regard to whether it met the new *B* test of minimum contacts.[16] Four other Justices, however, insisted that *Shaffer* had made clear that only the *B* test of minimum contacts could justify personal jurisdiction.[17] Thus, the Court itself has not backed away from the statement in *Shaffer* that the *B* minimum contacts test has fully displaced the *A* test for personal jurisdiction. The area therefore illustrates the structure of a legal revolution in which a new legal test first supplements, and then supplants, a prior test.

III. THE REVOLUTION IN STANDING

Viewed against this background, the question in *Spokeo* is whether the injury-in-fact doctrine has effected, or should effect, a similarly complete revolution in the law of standing. Once again, a new test emerged as a supplement to a traditional rule, and the question before the Court is whether the new doctrine has wholly supplanted the traditional rule.

In this case, the traditional rule provided that a plaintiff who had suffered an invasion of his legal rights (fact pattern *A*) had standing to bring a lawsuit (legal result *X*). The traditional rule required fact pattern *A* to be present for legal result *X* to follow. Traditionally, a party that suffered injury, but not by an invasion of its legal rights, lacked standing to sue.[18] In the 1970s, the Supreme Court expanded the rule of standing by holding that a plaintiff that had suffered "injury in fact" (fact pattern *B*) had standing to sue, without regard to whether the defendant had invaded the plaintiff's legal rights.[19]

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14. *Id.* at 211–12 ("[H]istory . . . is not decisive.").

15. 495 U.S. 604 (1990).

16. *Id.* at 621 (plurality opinion).

17. *Id.* at 629 (Brennan, J., concurring in the judgment) (noting that *Shaffer* held that the rule of *International Shoe* applied to *all* cases). These Justices agreed, however, that personal jurisdiction based on presence when served met the minimum contacts test. *Id.* at 633–40.

18. Tenn. Elec. Power Co. v. TVA, 306 U.S. 118 (1938).

19. Ass'n of Data Processing Serv. Org v. Camp, 397 U.S. 150 (1970). The Court also required that the plaintiff be within the "zone of interests" of a relevant statute. *Id.*

Although fact pattern *B* emerged initially as an expansion of the traditional test of *A*, the question now is whether it wholly displaces that test. In a case in which a plaintiff has suffered what tradition would regard as an invasion of his legal rights, but not what modern law would regard as an injury in fact, what should happen?

Spokeo is mysterious because the answer seems so clear. On the basis of precedent, tradition, and policy, the injury-in-fact test supplements, and does not supplant, the invasion of legal rights test. Either one is a sufficient basis for standing.

A. Precedent

The Supreme Court has already decided this question. As might be expected, following the advent of the injury-in-fact test, courts had to decide whether the new test expanded or replaced the traditional test. Not once, but on several occasions, the Supreme Court held or indicated that even after the advent of the injury-in-fact test, invasion of legal rights survived as a basis for standing.

The clearest case on this point is *Havens Realty v. Coleman*.[20] In that case, black and white "tester" plaintiffs sought housing information from the defendant, which operated apartment complexes. Coleman, the black tester, was falsely told that no apartments were available. The tester plaintiffs sued the defendant for violating their rights under the Fair Housing Act, which makes it unlawful to provide a person with false housing information because of the person's race.

If the case turned on whether the plaintiffs had suffered an "injury in fact," the defendants would have had a strong argument that the tester plaintiffs lacked standing. Coleman was not harmed by receiving false housing information, because she had no plan to do anything with truthful information. She suffered no adverse real-world consequence—no "injury in fact"—from the defendant's action.

The Supreme Court, however, unanimously held that she had standing to sue. The key, the Court explained, was that Congress had conferred on all persons a *legal right* to truthful housing information. Invasion of this right gave rise to standing. The Court held that "[t]he actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates

20. 455 U.S. 363 (1982).

standing."[21] Thus, the Court made clear that the injury-in-fact test supplements, and does not supplant, the invasion of legal rights test.[22]

Havens Realty is just one of several cases to make this point.[23] In other standing cases the Court noted that invasion of a statutory right suffices for standing "even though no injury would exist without the statute," thereby driving home the point that invasion of statutory rights and injury in fact are alternative bases for standing.[24] Indeed, even in its restrictive standing decision in *Lujan v. Defenders of Wildlife*,[25] the Court said that "[n]othing in this contradicts the principle that [t]he . . . injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing."[26] Justice Kennedy, concurring, noted 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."[27]

To be sure, *Defenders of Wildlife* indicated that Congress's ability to confer standing by statute is not limitless. In particular, the Court held that Congress cannot "convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts."[28] But the statute at issue in *Spokeo* is quite different from the statute at issue in *Defenders of Wildlife*. The individual right allegedly created by the statute at issue in *Defenders of Wildlife* was the right to have government agencies consult with the Secretary of Interior regarding actions that might jeopardize the continued existence of endangered species. This alleged right lacked connection with any particular person upon whom it was supposedly conferred, and the Court therefore analogized the case to "generalized grievance" cases.[29] The "right" allegedly conferred by the statute applied to everyone in the country and an action that violated

21. *Id*. at 373 (internal quotations omitted).

22. Technically, the Supreme Court reached this result by holding that an invasion of legal rights necessarily *constitutes* an injury in fact. *Id.* at 374. That is, the Court used a fiction that is the reverse of the fictional step referred to abstractly in Part I: Rather than hold that a case raising fact pattern *B* may be deemed to involve fact pattern *A*, the Court said that a case raising fact pattern *A* (here, invasion of legal rights) should be treated as involving fact pattern *B* (here, injury in fact). But the effect is the same as if the Court had said more forthrightly that the new rule that $B \rightarrow X$ stands side by side with the traditional rule that $A \rightarrow X$.

23. The Court used the same language in *Warth v. Seldin*, 422 U.S. 490, 500 (1975); *O'Shea v. Littleton*, 414 U.S. 488, 493 n.2 (1974); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973).

24. *O'Shea*, 414 U.S. at 493 n.2; *Linda R.S.*, 410 U.S. at 617 n.3.

25. 504 U.S. 555 (1992).

26. *Id*. at 578 (internal quotations omitted).

27. *Id*. at 580 (Kennedy, J., concurring).

28. *Id*. at 577 (majority opinion).

29. *Id*. at 575–76.

the right would have violated everyone's supposed "rights" simultaneously.

By contrast, the right conferred by the statute at issue in *Spokeo* is particularized and differentiated. The Fair Credit Reporting Act gives any consumer the right to sue about a violation of the act *with respect to that consumer*.[30] A violation of the statute does not give rise to a right of action that could be brought by any member of the public. Only a consumer who is particularly involved may sue. So there is no cause for concern of the kind that motivated the decision in *Defenders of Wildlife*.

In short, the Court has already faced the question of whether the injury-in-fact test supplements or wholly supplants the traditional invasion of legal rights test. The two tests exist side by side. Invasion of legal rights still creates standing.

B. Tradition

The standing inquiry is also particularly inappropriate for a fully revolutionary change in which the new rule wholly displaces the traditional rule because tradition is an essential part of the standing inquiry. The Supreme Court has adopted Justice Frankfurter's principle that the point of standing law is to confine federal courts to considering cases of the kind that were "'the *traditional* concern of the courts at Westminster.'"[31] Thus, "history is *particularly relevant* to the constitutional standing inquiry since . . . Article III's restriction of the judicial power to 'Cases' and 'Controversies' is properly understood to mean 'cases and controversies of the sort *traditionally* amenable to, and resolved by, the judicial process.'"[32] It would be peculiar for a new test, developed only in the 1960s, to displace the traditional test on a point as to which the constitutional goal is understood to be to maintain tradition.

The traditional rule stated in *Tennessee Electric Power Co.* that standing turns on whether a plaintiff has suffered an invasion of its legal rights rests on a long history that goes back to the common law. The common law permitted those who suffered an invasion of their legal rights to maintain an action without a showing of actual damages. Justice Story stated the traditional rule very strongly in the

30. 15 U.S.C. § 1681n(a).

31. FEC v. Akins, 524 U.S. 11, 24 (1998) (emphasis added) (quoting Coleman v. Miller, 307 U.S. 433, 460 (1939) (Frankfurter, J., dissenting)); *see also* Vt. Agency of Nat'l Res. v. U.S. *ex rel.* Stevens, 529 U.S. 765, 774 (2000) (same).

32. *Stevens*, 529 U.S. at 774 (emphasis added).

early case of *Webb v. Portland Manufacturing Co.*[33] There, the plaintiff mill owner claimed that the defendant had wrongfully diverted water from its millstream. The defendant claimed that its diversion of the water had caused no damage to the plaintiff's mill. Justice Story said that the plaintiff was not required to prove actual damages in order to be able to sue:

> I can very well understand that no action lies in a case where there is *damnum absque injuria*, that is, where there is a damage done without any wrong or violation of any right of the plaintiff. But I am not able to understand, how it can correctly be said, in a legal sense, that an action will not lie, even in case of a wrong or violation of a right, unless it is followed by some perceptible damage, which can be established, as a matter of fact; in other words, that *injuria sine damno* is not actionable. . . . On the contrary, from my earliest reading, I have considered it laid up among the very elements of the common law, that, wherever there is a wrong, there is a remedy to redress it; and that every injury imports damage in the nature of it; and, if no other damage is established, the party injured is entitled to a verdict for nominal damages. . . . Actual, perceptible damage is not indispensable as the foundation of an action. The law tolerates no farther inquiry than whether there has been the violation of a right.[34]

Thus, while the common law did not permit actions for damage that violated no right, it permitted actions for violations of right that caused no damage.[35]

Invasion of statutory rights, including federal statutory rights created by Congress, traditionally received similar treatment. For example, in an early patent infringement case, the defendant objected that merely *making* a patented invention could not be actionable because it could not cause the patentee any actual damages—damages would occur only when the machine was used or sold. The court, speaking again through Justice Story, said, "where the law gives an action for a particular act, the doing of that act imports of itself a damage to the party. Every violation of a right imports some damage, and if none other be proved, the law allows a nominal damage."[36] Similarly, the first Copyright Act contained the concept, still maintained today, of "statutory damages," which allows a copyright owner to recover a statutorily specified sum upon proof of infringement, without requiring any showing that the infringement

33. 29 F. Cas. 506 (C.C.D. Me. 1838).

34. *Id.* at 507–08. Most of this quotation appears in the plaintiff's Supreme Court brief in *Spokeo*. Brief for Respondent at 20, Spokeo, Inc. v. Robins, No. 13-1339 (U.S. *petition for cert. filed* May 1, 2014).

35. *See also* Entick v. Carrington (1765) 95 Eng. Rep. 807; 19 St. Tr. 1029) ("[N]o man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all.").

36. Whittemore v. Cutter, 29 F. Cas. 1120, 1121 (C.C.D. Mass. 1813).

actually damaged the plaintiff.[37] Thus, invasion of statutory rights, like invasion of common law rights, has long been actionable whether or not the plaintiff can show actual damages.

Because standing doctrine is understood as an attempt to limit courts to the kinds of cases they traditionally heard, the long history of judicial consideration of cases where the plaintiff suffered an invasion of rights (including statutory rights) that caused no actual damage should be "well nigh conclusive" as to Congress's ability to create causes of action of the same kind today.[38] Where Congress confers a statutory right on an individual for something that particularly affects him, the traditional rule has always been that invasion of that right confers standing.[39]

C. Policy

Finally, displacing Congress's traditional power to grant causes of action for invasions of statutory rights would be inappropriate as a matter of policy. As society evolves, new circumstances emerge in which a legislature may find it necessary to confer rights and causes of action that would not previously have existed. If the Supreme Court were to hold that a plaintiff seeking to enforce such a new right in federal court had to prove actual damages, innumerable well-accepted rights might in many cases be unenforceable in federal court.

Consider, for example, the right of publicity. The common law of states such as New York did not recognize a right of publicity; therefore, a New York business was traditionally free to use a person's photograph to sell its products without the person's permission.[40] The New York legislature subsequently created a right of publicity by statute.[41] The statutory right permits a plaintiff (among other things) to obtain an injunction restraining the wrongful use of her photograph for advertising purposes without requiring any showing that the

37. Copyright Act of 1790, § 2, 1 Stat. 124, 125. For today's provision, see 17 U.S.C. § 504(c). Like patent infringement, copyright infringement might occur without damaging the owner of the copyright, if infringing copies are made but are not sold or distributed.

38. Vt. Agency of Nat'l Res. v. U.S. *ex rel.* Stevens, 529 U.S. 765, 777 (2000).

39. It is noteworthy that some of the Justices who are the most inclined to restrict standing are also the strongest defenders of regarding the Constitution as requiring the courts to follow tradition. Justice Scalia, for example, wrote the Court's restrictive decision regarding Congress's power to confer standing in *Defenders of Wildlife*, and he also wrote the plurality decision in *Burnham* arguing that traditional process is necessarily due process. Justices who agree that the Constitution instructs courts to follow tradition should be particularly inclined to maintain invasion of legal rights as a basis for standing.

40. Roberson v. Rochester Folding Box Co., 171 N.Y. 538 (1902).

41. N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2015).

plaintiff suffered damages.[42] This right is well accepted today. Are we really to believe that the right of publicity may not be enforced by a federal court (in a diversity case) unless the plaintiff can show damages?[43]

Moreover, the right of publicity is one part of a more general right that is of great importance today: the right of privacy.[44] Innumerable statutory provisions now protect against unauthorized release of private information. For example, the Video Privacy Protection Act prevents video service providers from improperly releasing information about consumers' video rental history, and it authorizes a private right of action for statutory damages that does not require a plaintiff to prove actual damages.[45] If consumers must prove actual damages in order to have standing to challenge a violation of the statute, an important part of the statute's protections would be lost. The same analysis would apply to even more personal information, such as medical information protected against unauthorized release by HIPAA.[46] HIPAA does not currently provide a private right of action for violation of its requirements,[47] but if Congress wanted to create one it seems inconceivable that Congress would be obliged to require a plaintiff to show that the release of the information caused actual damages. Similar observations would apply to federal protection against identity theft.[48]

In sum, modern life presents innumerable situations in which a state or federal legislature may choose to confer a right and create a cause of action that would not previously have been recognized. Part of the role of a legislature is to create such rights in order to keep the law current with the needs of society in light of social and technological change. Indeed, in cases about implied private rights of action, the Supreme Court has recently stressed that the conferring of rights of action is a legislative function.[49] The rule that "[t]he actual or threatened injury required by Art. III may exist solely by virtue of

42. *Id*. § 51.

43. Even a plaintiff who is seeking only injunctive relief and not damages must have standing to sue in federal court. *E.g.*, Sierra Club v. Morton, 405 U.S. 727 (1972).

44. *See* William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960) (identifying the right of publicity as one of four "privacy" torts).

45. 18 U.S.C. § 2710 (2011); *see In re* Hulu Privacy Litigation, 2013 WL 6773794 (N.D. Cal. 2013).

46. *See* Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. § 1320d (2010), particularly § 1320d-6.

47. Byrne v. Avery Ctr. for Obstetrics & Gynecology, 314 Conn. 433, 435 (2014).

48. *See*, *e.g.*, 18 U.S.C. § 1028 (2010).

49. *E.g.*, Alexander v. Sandoval, 532 U.S. 275, 286 (2001) ("Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress.").

statutes creating legal rights, the invasion of which creates standing"[50] is essential to permit legislatures to carry out this important function.

IV. SO WHAT'S GOING ON?

As the foregoing parts demonstrate, the rule that Congress may create new legal rights, the invasion of which confers standing, is a longstanding, well-accepted rule. The appellate judgment in *Spokeo* represents a routine application of the rule. The petitioner pointed to no circuit split on the issue of whether a plaintiff must show damages to have standing to sue under the Fair Credit Reporting Act.[51]

So why would the Supreme Court grant cert? It is of course no secret that the Court has for a long time now been curbing standing, including congressionally created standing.[52] The Supreme Court's decision to take this unremarkable case gives rise to the disquieting possibility that the Court is planning a revolution in standing law, which would prevent Congress from conferring a right on individuals (even in a particularized and differentiated way) that when violated necessarily gives rise to standing. Under this scenario, fact pattern *B* (injury in fact) would officially supplant fact pattern *A* (invasion of a legal right), with the standing rule's evolution tracking the pattern outlined above.

While that could be the Court's plan, there is also a less dramatic possibility: The Court might be thinking of imposing a "clear statement rule" or some similar interpretive principle. The Court might say that Congress may confer a statutory right that, if invaded, creates standing, but it must do so expressly. Merely authorizing *suit* under specified circumstances would not be enough without expressly creating the right upon which suit would be brought.

This possibility would mesh with Justice Kennedy's concurrence in *Defenders of Wildlife*. In that case, as noted earlier, Justice Kennedy said 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."[53] But, Justice Kennedy added, "In exercising this power . . . Congress must at the very least identify

50. Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982) (internal quotations omitted).

51. Petition for a Writ of Certiorari at 9-12, Spokeo, Inc. v. Robins, No. 13-1339 (U.S. *petition for cert. filed* May 1, 2014). The petitioner did claim that the Ninth Circuit's decision in *Spokeo* conflicted with other appellate decisions about different statutes. *Id.*

52. *E.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 577–78 (1992).

53. *Id.* at 580.

the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit."[54]

This line of thinking could perhaps be the prelude to a new rule: If Congress wants to confer a right on people, the invasion of which would create standing in the absence of actual damages, it must create such a right expressly. It would not be enough for Congress merely to imply the existence of such a right by granting a cause of action for its violation. The Court might regard this new rule as being similar to its interpretive rule for cases about implied private rights of action, under which a statute that lacks "rights-creating language" and that focuses on the person regulated or on the government agency that will do the regulating and not on the party to be benefitted will usually not be taken as creating a private right of action.[55] Under such an interpretive principle, the FCRA would not have successfully conferred a right on parties such as the plaintiff in *Spokeo*, and therefore such a party would have standing only if actually injured.

Such a rule would, though, be incorrect. As the Ninth Circuit pointed out in its decision in *Spokeo*, "Congress's creation of a private cause of action to enforce a statutory provision implies that Congress intended the enforceable provision to create a statutory right."[56] If Congress expressly authorizes a party to sue for a statutory violation, it must necessarily intend that statute to confer a right on the party, the violation of which creates standing. This principle is nothing new; it is no more than an application of Justice Story's statement more than two hundred years ago that "where the law gives an action for a particular act, the doing of that act imports of itself a damage to the party."[57] It would make little sense to apply an interpretive principle drawn from cases about *implied* rights of action, where the goal is to figure out whether Congress wanted private parties to be able to sue, to cases where Congress created an *express* cause of action, thereby putting that question to rest. Still, imposing such a clear statement rule on Congress would be a less dramatic error than holding that Congress cannot create new rights at all.

V. CONCLUSION

Spokeo involves no new principles of law. The principle that Congress may create new rights, the invasion of which gives rise to

54. *Id.*
55. Alexander v. Sandoval, 532 U.S. 275, 289 (2001).
56. Robins v. Spokeo, Inc.,742 F.3d 409, 412 (2014).
57. Whittemore v. Cutter, 29 F. Cas. 1120, 1121 (C.C.D. Mass. 1813).

standing, is well settled. Standing based on invasion of legal rights is indeed the *traditional* rule of standing, of which the injury-in-fact test is a modern expansion. The modern injury-in-fact test supplements, and does not supplant, the traditional rule.