SPOKEO: THE QUASI-HOHFELDIAN PLAINTIFF AND THE NONFEDERAL FEDERAL QUESTION

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INTRODUCTION

In *Spokeo, Inc. v. Robins*,[1] the Supreme Court held that violations of a plaintiff's rights under a federal statute do not necessarily constitute injuries-in-fact for Article III purposes that allow the plaintiff to sue in federal court.[2] This "interesting question" has loomed over the federal judiciary for the past quarter-century,[3] ever since the Supreme Court laid the foundation for modern standing doctrine in *Lujan v. Defenders of Wildlife*.[4] Under *Spokeo*, to bring a federal statutory claim in federal court, a plaintiff must demonstrate not only that the statute was violated, but also that the violation caused it to suffer a concrete injury-in-fact according to the federal judiciary's standards.[5]

Commentators already have explored *Spokeo*'s standing analysis.[6] This Article focuses on the previously unexamined consequences of the ruling for

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[1] 136 S. Ct. 1540 (2016).

[2] *Id.* at 1550.

[3] ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.3, at 69 (6th ed. 2012) ("The interesting question concerning injuries to statutory rights is how far Congress can expand standing . . . ."); *see also* RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 142 (6th ed. 2009) ("[U]ncertainty surrounds the question of how much authority Congress possesses to define judicially cognizable injuries that will provide Article III standing.").

[4] 504 U.S. 555, 560–61 (1992).

[5] *Spokeo*, 136 S. Ct. at 1548.

[6] *See, e.g.*, *Class Action Standing:* Spokeo, Inc. v. Robins, 130 HARV. L. REV. 437, 446 (2016) ("[T]he Court would have been better served . . . by deferring to the will of Congress and the protection of individual rights."); Craig Konnoth & Seth Kreimer, *Spelling Out* Spokeo, 165 U. PA. L. REV. ONLINE 47, 48 (2016) ("[W]hile *Spokeo* added structure to the injury in fact doctrine, each stage of the analysis adds play in the joints, leaving future courts and litigants substantial room for maneuver."); *see also* Howard M. Wasserman, *Fletcherian Standing, Merits, and* Spokeo, Inc. v. Robins, 68 VAND. L. REV. EN BANC 257, 270 (2015) (arguing, before the *Spokeo* Court's ruling, that the Court should eliminate standing as an independent jurisdictional inquiry and exercise jurisdiction over any case in which a federal statute creates a private right of action for the plaintiff); Mark Seidenfeld & Allie Akre, *Standing in the Wake of Statutes*, 57 ARIZ. L. REV. 745, 748 (2015) (identifying, prior to *Spokeo*, various ways in which Congress may recognize justiciable harms).

victims of statutory violations who have not personally suffered any concrete harm. It offers three main contributions to the literature. Part I demonstrates that *Spokeo* requires a re-examination of the traditional dichotomy between Hohfeldian and non-Hohfeldian plaintiffs.[7] The term *Hohfeldian plaintiff* conventionally refers to a plaintiff that sues to seek redress for a concrete, particularized injury to itself, while a non-Hohfeldian plaintiff sues to vindicate ideological principles and promote the broad public interest, despite the absence of any particularized harm to itself.[8] *Spokeo* calls for recognition of the "quasi-Hohfeldian" plaintiff, which sues based on a particularized violation of its statutory rights that does not amount to a concrete injury for Article III purposes.

Part II asserts that *Spokeo*'s restriction on the ability of quasi-Hohfeldian plaintiffs to seek statutory damages may be more formal than substantive. At first blush, *Spokeo* seems to preclude a quasi-Hohfeldian plaintiff from suing in federal court for statutory damages that are unrelated to the extent of its injury, even when attorneys' fees are available to successful claimants.[9] *Spokeo*, however, did not purport to disturb "[t]he well-established exception for *qui tam* actions [that] allows private plaintiffs to sue in the government's name for the violation of a public right."[10] Notwithstanding *Spokeo*, Congress still effectively may make statutory damages available to private plaintiffs, regardless of whether they have suffered actual injury. To do so, Congress simply must redesignate the damages as civil fines and allow private plaintiffs to recover and retain them as *qui tam* relators.[11]

Part III explains that, even when *Spokeo* prevents quasi-Hohfeldian plaintiffs from suing under federal statutes in federal court, such plaintiffs often will be able to pursue their claims in state courts, which are not subject to Article III's justiciability requirements.[12] Rather than limiting Congress's ability to allow private enforcement of federal laws, *Spokeo*'s primary effect instead may be to shift the venue of such claims to state courts—which, ironically, are perceived as more plaintiff-friendly—subject to certiorari review

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7 The terms *Hohfeldian* and *non-Hohfeldian* derive from the works of Wesley Hohfeld, as examined in Professor Louis L. Jaffe's classic article. *See* Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968) (citing Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913)).

8 *See infra* notes 33–34 and accompanying text.

9 Attorneys' fees are often tens or even hundreds of times greater than the underlying statutory damages at issue in nonclass cases. *See, e.g.*, *infra* notes 62–65 and accompanying text.

10 *Spokeo*, 136 S. Ct. at 1551 n.* (citing Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 773–74 (2000)).

11 *E.g.*, False Claims Act, 31 U.S.C. §§ 3730(b)(1), (d) (2012).

12 *See infra* notes 78–83 and accompanying text.

in certain cases by the U.S. Supreme Court.[13] Under *Spokeo*, federal statutes allowing quasi-Hohfeldian plaintiffs to recover statutory damages may raise "nonfederal federal questions": federal causes of action that may not be filed in federal court.

This Part presents this Article's central thesis, arguing that courts should not interpret federal laws authorizing statutory damages as creating causes of action for quasi-Hohfeldian plaintiffs in any court, absent a clear statement in the statutory text or legislative history to the contrary. Courts should be reluctant to recognize nonfederal federal questions for three reasons: the constitutional avoidance canon, congressional intent as embodied in Congress's sweeping grant of federal-question jurisdiction to federal courts, and Article II concerns.[14]

First, a federal law that allows a person who has not suffered concrete harm to sue in federal court would have a substantial number of unconstitutional applications under *Spokeo*. Under the constitutional avoidance canon of statutory construction, laws creating private rights of action should therefore be interpreted as implicitly referring only to persons with Article III standing. Because the same statutory text applies in both federal and state courts, this limitation would carry over to state courts as a matter of statutory interpretation when plaintiffs file suit there.

Second, Congress has implemented Article III through a sweeping grant of federal-question jurisdiction to the federal courts.[15] This jurisdictional grant embodies Congress's fundamental, structural intent to allow federal district courts to adjudicate any federal causes of action a plaintiff chooses to file there.[16] We therefore should not interpret other federal laws as authorizing causes of action outside the district courts' jurisdiction, unless their statutory text or legislative history expressly requires that conclusion. To the contrary, we should presume that Congress does not intend to sanction a category of federal causes of action—claims by quasi-Hohfeldian plaintiffs—that must be tried exclusively in the courts of another sovereign (i.e., the states).

Finally, allowing quasi-Hohfeldian plaintiffs to enforce federal laws in state courts, while permissible under Article III, intrudes on the President's power and duty to "take Care that the Laws be faithfully executed."[17] Entities that have not suffered constitutionally cognizable injuries presumptively

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13 *See* ASARCO, Inc. v. Kadish, 490 U.S. 605, 625 (1989) (holding that, when a nonjusticiable federal claim is filed in state court, the Supreme Court may grant review if the last state court to rule in the matter upheld the claim, but not if that court rejected it).

14 Because this Article deals with claims for statutory damages under federal laws, none of its arguments apply to or affect judge-made causes of action at law or in equity. I am grateful to Professor Douglas Laycock for suggesting this important qualification.

15 *See* 28 U.S.C. § 1331 (2012).

16 *See infra* notes 110–117 and accompanying text.

17 U.S. CONST. art. II, § 3.

should not be deemed empowered to act as private attorneys general to enforce public norms, absent express and specific congressional authorization.

I. *SPOKEO* AND QUASI-HOHFELDIAN PLAINTIFFS

Spokeo is a website that allows users to search for a person by name, phone number, or e-mail address.[18] It combs through "a wide spectrum of databases and gathers and provides information such as the individual's address, phone number, marital status, approximate age, occupation, hobbies, finances, shopping habits, and musical preferences."[19] The plaintiff in *Spokeo* alleged that "someone"—whom the complaint did not identify—searched for him on the Spokeo website and received a report incorrectly asserting he was "married, has children, is in his 50's, has a job, is relatively affluent, and holds a graduate degree."[20] The plaintiff brought a class action suit under the Fair Credit Reporting Act ("FCRA"), which requires consumer reporting agencies to "follow reasonable procedures to assure maximum possible accuracy of" consumer reports they disseminate.[21] FCRA provides for either actual damages or statutory damages of between $100 and $1,000 per violation, attorneys' fees, and punitive damages.[22]

The six-Justice majority in *Spokeo* reaffirmed that, to establish an "injury in fact" sufficient to invoke federal jurisdiction, a plaintiff must allege and ultimately prove that it suffered a harm that is both "particularized" and "concrete."[23] The Court emphasized, "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."[24] Although the Ninth Circuit had correctly determined that the complaint alleged a particularized harm to the plaintiff due to Spokeo's alleged violation of his rights under FCRA, it had failed to consider whether this harm was sufficiently "concrete."[25] The Court remanded for further consideration of that issue.[26]

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18 *See About Us,* SPOKEO, http://www.spokeo.com/about (last visited Aug. 28, 2018).

19 Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1546 (2016).

20 *Id.*

21 15 U.S.C. § 1681e(b) (2012).

22 *Id.* § 1681n(a).

23 *Spokeo*, 136 S. Ct. at 1545 (quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180–81 (2000)). Justice Thomas also issued a concurrence in which he "join[ed] the Court's opinion," but emphasized "the injury-in-fact requirement applies differently to different types of rights." *Id*. at 1550 (Thomas, J., concurring).

24 *Id.* at 1547–48 (quoting Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997)).

25 *Id.* at 1550 ("Because the Ninth Circuit failed to fully appreciate the distinction between concreteness and particularization, its standing analysis was incomplete.").

26 *Id.*

Under *Spokeo*'s "[c]oncreteness" requirement, an alleged injury must be "real," though it need not be "tangible."[27] The Court explained that, to "determin[e] whether an intangible harm constitutes injury in fact," a court should consider "both history and the judgment of Congress."[28] From a historical perspective, the court must determine whether the alleged intangible harm has a "close relationship" with the types of harms for which plaintiffs have "traditionally" been permitted to sue in "English or American courts."[29] In conducting this analysis, the court must give some undefined measure of deference to Congress's decision to create a cause of action for that harm.[30]

In the opinion's key passage, however, the Court cautioned:

> 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.[31]

The majority went on to declare that not all violations of statutorily required procedures or inaccurate statements about a plaintiff will result in concrete or real harm.[32]

Spokeo requires a reassessment of our understanding of Hohfeldian plaintiffs. Conventionally, a Hohfeldian plaintiff is one that seeks to enforce "a right, a privilege, an immunity or a power" of its own because it has been "damage[d]" by the defendant's actions "in some appreciable fashion" distinct from "persons in general."[33] A non-Hohfeldian plaintiff, in contrast, is merely a "fungible citizen" or taxpayer that seeks to enforce a legal provision for ideological or other similar reasons.[34] The dichotomy between Hohfeldian and non-Hohfeldian plaintiffs underlies much of the conventional debate concerning standing in federal courts.[35] Commentators have vigorously

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27 *Id.* at 1548–49.

28 *Id*. at 1549.

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

30 *See id.* (holding that Congress's judgment in recognizing an intangible harm as real is "instructive and important").

31 *Id.*

32 *Id.* at 1550.

33 Jaffe, *supra* note 7, at 1033. Professor Jaffe argued that "[i]t is almost impossible any longer to contend that a Hohfeldian plaintiff is a necessary element of a case or controversy." *Id.* at 1043. Whatever the accuracy of that claim at the time of his writing in 1968, *Lujan* rendered that sentiment inaccurately overbroad, and *Spokeo* further undermined it.

34 *See id.* at 1036; Mark V. Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698, 1708 (1980) (defining a non-Hohfeldian plaintiff as "purely ideological"). Non-Hohfeldian plaintiffs also are sometimes referred to as "private attorneys general." Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 590 & n.3 (2005).

35 "The terms 'Hohfeldian' and 'non-Hohfeldian' plaintiff have become terms of art in modern literature on standing." Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of* Lyons, 59 N.Y.U. L. REV. 1, 3 n.12 (1984). Professor Sergio Campos contends

disputed whether Article III standing should be limited to Hohfeldian plaintiffs.[36]

Spokeo's holding gives rise to a new classification: the quasi-Hohfeldian plaintiff. Like the classic Hohfeldian plaintiff (and unlike the plaintiffs in *Lujan*), a quasi-Hohfeldian plaintiff has allegedly suffered a particularized injury from a defendant's statutory violation.[37] That is, the defendant has allegedly violated that entity's rights under a statute or otherwise affected that entity in a manner not generally shared by the public at large. Moreover, a quasi-Hohfeldian plaintiff sues, at least in part, for personal benefit: recovery of statutory damages.[38]

Like a non-Hohfeldian plaintiff, however, a quasi-Hohfeldian plaintiff has not suffered any concrete, judicially cognizable harm and does not seek actual compensation for the injury it has suffered.[39] Rather, incentivized by the availability of statutory damages (and potentially attorneys' fees), a quasi-Hohfeldian plaintiff effectively acts as a private attorney general to enforce the underlying statute.[40]

The following chart summarizes the analysis:

Type of Plaintiff	Harm Suffered	Claim Justiciable?
Hohfeldian	Particularized and concrete	Yes
Quasi-Hohfeldian	Particularized, but not concrete	No
Non-Hohfeldian	Not particularized, not concrete	No

that, even prior to *Spokeo*, this dichotomy was not entirely descriptively accurate. Sergio J. Campos, *Class Actions and Justiciability*, 66 FLA. L. REV. 553, 597–98 (2014). He argues more broadly that courts should replace *Lujan* with a more functional approach to standing, treating a case as justiciable if the plaintiff adequately represents the interests it is advancing. *See id.* at 599.

36 *Compare* Martin H. Redish & Sopan Joshi, *Litigating Article III Standing: A Proposed Solution to the Serious (but Unrecognized) Separation of Powers Problem*, 162 U. PA. L. REV. 1373, 1385 (2014) ("The Hohfeldian plaintiff requirement . . . prevents courts from adjudicating issues affecting the majority of the populace, issues that are more properly resolved by democratic political processes."), *with* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1936 (2001) (arguing that Hohfeldian plaintiffs are not necessarily better situated than non-Hohfeldian plaintiffs to litigate cases effectively), *and* Tushnet, *supra* note 34, at 1709 (arguing that "the Hohfeldian/non-Hohfeldian distinction is not useful for determining which litigants should be denied standing," and any entity "with a continuing concern for the relevant substantive law" that is "capable of generating an adequate record" should be afforded standing to sue).

37 *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016).

38 *See infra* note 49.

39 *See* Campos, *supra* note 35, at 598; *Spokeo*, 136 S. Ct. at 1547–49.

40 *See* Flast v. Cohen, 392 U.S. 83, 119–20 (1968) (Harlan, J., dissenting) (discussing the nature of "private attorneys general").

Spokeo treats quasi-Hohfeldian plaintiffs like non-Hohfeldian plaintiffs, barring both from federal court due to the absence of an injury-in-fact. As discussed in Part II, however, these restrictions may be more formal than substantive, amenable to congressional evasion.

II. FEDERAL JURISDICTION OVER QUASI-HOHFELDIAN PLAINTIFFS

Like *Marbury v. Madison*,[41] *Spokeo* is simultaneously a judicial check on congressional power and a self-enforced limitation on the scope of the judicial power. In *Marbury*, the Supreme Court asserted the power to prevent Congress from expanding the Court's original jurisdiction.[42] In doing so, the Court disclaimed constitutional authority to order the government to grant William Marbury his commission,[43] despite concluding he was entitled to it.[44] Likewise, in *Spokeo*, the Court asserted power to prevent Congress from authorizing a cause of action in federal court for plaintiffs that have not suffered concrete harm. This ruling concomitantly prohibited federal courts from exercising Article III jurisdiction over such claims.[45]

Spokeo likely will impact federal courts' willingness to hear quasi-Hohfeldian plaintiffs' claims under a wide range of federal consumer protection, environmental, and other comparable statutes,[46] and even analogous state-law claims in diversity or supplemental jurisdiction cases.[47] The ruling thus initially appears to be a welcome limitation on Congress's ability to use the federal judiciary to facilitate pretextual wealth transfers and enrich the

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41 5 U.S. (1 Cranch) 137 (1803).

42 *Id.* at 174 (holding that Congress is not "at liberty" to grant the Supreme Court "original jurisdiction where the constitution has declared it shall be appellate").

43 *Id.* at 176 ("The authority . . . given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution.").

44 *Id.* at 162 ("To withhold [Marbury's] commission, therefore, is an act deemed by the court . . . violative of a vested legal right.").

45 Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548–49 (2016).

46 *See, e.g.*, Truth in Lending Act, 15 U.S.C. § 1640(a)(2)(A), (a)(3) (2012) (authorizing statutory damages of $200–5,000, depending on the nature of the violation, as well as attorneys' fees); Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692k(a)(2)(A), (a)(3) (2012) (authorizing statutory damages up to $1,000, even when a plaintiff has suffered no actual harm, as well as attorneys' fees); Driver's License Protection Act, 18 U.S.C. § 2724(b)(1), (b)(3) (2012) (authorizing "liquidated damages in the amount of $2,500" and attorneys' fees if information from a person's driving record is impermissibly disclosed); Copyright Act, 17 U.S.C. § 504(c)(1), 505 (2012) (authorizing a minimum of $750 in statutory damages as an alternative to actual damages, as well as attorneys' fees, for copyright violations); Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(3)(B) (2012) (authorizing $500 in statutory damages for each illegal prerecorded telephone call or other telemarketing violation, but not attorneys' fees).

47 Article III's justiciability limits apply equally in federal court whether the plaintiff's claims arise under federal or state law. *Cf.* F. Andrew Hessick, *Cases, Controversies, and Diversity*, 109 NW. U. L. REV. 57, 75–77 (2015) (arguing federal courts should apply state justiciability standards to claims arising under state law).

plaintiffs' bar. The primary purpose of a remedy is to restore an aggrieved party, as closely as possible, to its "rightful position": the position it would have occupied had its rights not been violated.[48] Statutory damages, particularly for plaintiffs that have not suffered any concrete harm, are not primarily intended or tailored to redress such injuries.[49] At best, statutory damages seek to incentivize the plaintiffs' bar to enforce federal laws[50]—arguably reducing the need for federal enforcement—and to ensure that plaintiffs receive adequate compensation when the amount of damages they have suffered is difficult to prove or quantify.[51] At worst, statutory damages allow plaintiffs' lawyers to enrich themselves at the expense of legitimate businesses based on minor, technical statutory violations that cause no real harm.[52]

Laws that provide for statutory damages frequently also allow plaintiffs to recover attorneys' fees.[53] And plaintiffs' attorneys typically can aggregate claims for statutory damages through class actions.[54] As a result, a defendant can face ruinous liability—many times its net worth—based on *de minimis* statutory violations that caused no concrete harm to anyone. Class-action litigation under the Fair and Accurate Credit Transactions Act ("FACTA")[55] is paradigmatic of the problem.[56] FACTA prohibits retailers from giving a

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48 DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 14–15 (4th ed. 2010).

49 Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins., 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) (recognizing that statutory damages may be "unmoored to actual injury"); *see also* Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A., 559 U.S. 573, 616 (2010) (Kennedy, J., dissenting) (recognizing that statutory damages may "create incentives to file lawsuits even where no actual harm has occurred").

50 *See* Stephen B. Burbank et al., *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 677–78 (2013) ("Legislators can also provide 'statutory damages,' which are a specific sum awarded either in lieu of or in addition to actual damages, an approach typically taken to incentivize private enforcement where actual damages are small or difficult to establish . . . ."); Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 MO. L. REV. 103, 110 (2009) ("[S]tatutory damages provide an incentive to pursue a lawsuit where actual damages are 'small or difficult to ascertain.'" (quoting Perrone v. Gen. Motors Acceptance Corp., 232 F.3d 433, 436 (5th Cir. 2000))).

51 Douglas v. Cunningham, 294 U.S. 207, 209 (1935) (explaining that statutory damages ensure adequate remedies in cases "where the rules of law render difficult or impossible proof of damages or discovery of profits"); *see also* F.W. Woolworth Co. v. Contemporary Arts, Inc., 344 U.S. 228, 233 (1952) (explaining that statutory damages enable a court to "vindicate the statutory policy" in cases where statutory violations cause little harm).

52 *See infra* notes 62–69 and accompanying text.

53 *See supra* note 46.

54 *See* FED. R. CIV. P. 23(b)(3).

55 Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108–159, 117 Stat. 1952 (2003).

56 *See* J. Patrick Redmon, *Plausibly Willful—Tightening Pleading Standards in FACTA Credit Card Receipt Litigation Where Only an Expiration Date Is Present*, 94 N.C. L. REV. 1314, 1325–26 (2016) ("[FACTA] lawsuits resemble a kind of strike suit—i.e., 'suits brought to force settlement, regardless of merit, merely because the risk of loss is too great.'" (quoting Michael E. Chaplin, *What's So Fair About the Fair and Accurate Credit Transactions Act?*, 92 MARQ. L. REV. 307, 324–25 (2008))); Scheuerman, *supra* note 50, at 104–06 ("When pursued as a nationwide or statewide class action, the statutory damages

consumer a credit card receipt containing more than the last five digits of her credit card number or her credit card's expiration date.[57] A defendant must pay statutory damages of between $100 and $1,000 for each willful violation.[58]

Customers who received credit card receipts containing their cards' expiration dates have brought class action suits for FACTA violations for hundreds of millions, even billions, of dollars against national chains.[59] For example, a plaintiff brought a class action for $1.9 billion against Chuck E. Cheese's, even though the company's net income the previous year was only $68 million.[60] Another FACTA plaintiff class sued U-Haul Company of California, a company worth $118 million, for up to $1.5 billion, again based on credit card receipts.[61]

Even where an individual plaintiff recovers only a few thousand dollars in damages, courts frequently uphold attorneys' fees that are many times larger, extending into the high five-figure range.[62] Many of these cases arise from trivial violations that government regulators would either overlook as a matter of prosecutorial discretion or settle for small amounts commensurate with the insubstantial nature of the violations. In one recent example, a plaintiff sued under the Fair Debt Collection Practices Act[63] because debt collectors sent him a letter that violated the statute regarding an alleged $220 debt, with a tone that "was neither threatening nor abusive."[64] Because the plaintiff had not suffered any actual damages, he sought and received only $250 in

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[under FACTA] create devastating liability that would put the defendant out of business simply for failing to redact information from a retail receipt.").

57 15 U.S.C. § 1681c(g)(1) (2012).

58 *Id.* § 1681n(a)(1)(A).

59 *See* Schuerman, *supra* note 50, at 106.

60 *Id.* at 106 & n.14 (citing Blanco v. CEC Entm't Concepts L.P., No. CV 07-0559 GPS (JWJx), 2008 WL 239658, at *2 (C.D. Cal. Jan. 10, 2008)).

61 *Id.* at 106 n.15 (citing Evans v. U-Haul Co. of Cal., No. CV 07-2097-JFW (JCx), 2007 U.S. Dist. LEXIS 82026, at *15 (C.D. Cal. Aug. 14, 2007)). Courts have sometimes relied on the potential for such crippling statutory damages as a basis for refusing to certify classes. *See* Christine P. Bartholomew, *The Failed Superiority Experiment*, 69 VAND. L. REV. 1295, 1306 (2016).

62 *See, e.g.*, Wolff v. Royal Am. Mgmt., 545 F. App'x 791, 792, 796 (11th Cir. 2013) (affirming award of $61,810.44 in attorneys' fees following a settlement for $3,600 under the Fair Labor Standards Act, 29 U.S.C. § 216(b)); Bea-Mone v. Silverstein, No. 8:17-cv-00550-JLS-DFM, slip op. at 4, 11 (C.D. Cal. Feb. 20, 2019) (awarding $91,242.50 in attorneys' fees based on a $1,000 award of statutory damages under the FDCPA); Garcia v. Stanley, No. 14-cv-01806-BLF, 2017 U.S. Dist. LEXIS 32550, at *5, 21 (N.D. Cal. Mar. 7, 2017) (awarding a total of $49,330 in attorneys' fees based on a $1,500 award of statutory damages under the FDCPA and state-law analogue); Sheffer v. Experian Info. Sols., Inc., 290 F. Supp. 2d 538, 542, 553 (E.D. Pa. 2003) (awarding $25,000 in attorneys' fees based on a $1,000 award of actual damages under FCRA).

63 15 U.S.C. § 1692 (2012).

64 Welther v. Schlottman & Wagner, P.C., No. 2:14-cv-11001, 2017 U.S. Dist. LEXIS 3105, at *4 (E.D. Mich. Jan. 10, 2017), *modified*, Welther v. Schlottman & Wagner, P.C., No. 2:14-cv-11001, 2017 U.S. Dist. LEXIS 112118, at *5–6 (E.D. Mich. July 19, 2017) (leaving the total fee award unchanged).

statutory damages yet was awarded $36,628 in attorneys' fees.[65] The attorneys' fees were nearly 150 times greater than the statutory damage award.

In another recent case, prospective employers had sent forms to job applicants, seeking their consent to credit checks as permitted by federal law.[66] The plaintiffs brought a class action on behalf of 220,000 applicants who had received the form, claiming that it violated FCRA's requirement that notices concerning credit checks "consist[] solely" of a statutorily required disclosure.[67] They alleged that the form contained two extra truthful, non-misleading sentences that were not alleged to have actually harmed them in any way.[68] The district court has preliminarily approved a settlement that would provide statutory damages of between $14 and $41 to each member of the plaintiff class, along with $2,250,000 in attorneys' fees.[69] Such attorneys' fees are a social deadweight loss that few reasonable plaintiffs would voluntarily choose to incur for themselves.

Spokeo appears to create a check—however limited—on the worst excesses of the legislative process. Taken at face value, the ruling precludes Congress from empowering quasi-Hohfeldian plaintiffs to force defendants into burdensome and expensive litigation in which they might be held liable for statutory damages as well as five-, six-, or even seven-figure attorneys' fees, despite the complete absence of any real harm. This check may not be very effective, however, as Congress may authorize such suits simply by drafting future statutes slightly differently. Precedent appears to allow Congress to redesignate statutory damages as civil fines, relabel plaintiffs as relators, and recharacterize private rights of action as *qui tam* claims brought on behalf of the government (and the government could be permitted to retain a portion of the proceeds, to boot).[70]

In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*,[71] the Supreme Court affirmed the justiciability of a private relator's suit under the False Claims Act[72] alleging that the defendant had defrauded the government.[73] The Court held that the complaint adequately alleged that the government had suffered two different types of injuries-in-fact: "both the injury to its sovereignty arising from violation of its laws (which suffices to support a criminal lawsuit by the Government) and the proprietary injury

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65 *Id.* at *7.

66 Hillson v. Kelly Servs., No. 2:15-cv-10803, 2017 U.S. Dist. LEXIS 8699, at *1–2 (E.D. Mich. Jan. 23, 2017).

67 *Id.* at *4 (quoting 15 U.S.C. § 1681b(b)(2)(A)(i) (2012)).

68 *Id.* at *3–5.

69 *Id.* at *6, *54.

70 *See, e.g.*, Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 783–85, 787 (2000).

71 529 U.S. 765 (2000).

72 31 U.S.C. § 3730 (2012).

73 *Stevens*, 529 U.S. at 771.

resulting from the alleged fraud."[74] Particularly in light of the long tradition of *qui tam* litigation in both England and the United States, the Court concluded, a private relator could "reasonably be regarded" as a partial assignee of the government's claim.[75]

Such reasoning could be used to allow quasi-Hohfeldian plaintiffs to bring any cause of action.[76] If Congress wishes to permit and rely on private enforcement of a federal statute, *Stevens* appears to allow it to impose a statutory fine for violations.[77] A person affected by a statutory violation—albeit not enough to constitute a concrete injury under Article III—could be empowered to sue in the government's name to recover the statutory fine. The statute could allow a successful plaintiff to retain the fine (or perhaps surrender a share to the government) and recover attorneys' fees from the defendant. In short, while *Spokeo* bars quasi-Hohfeldian plaintiffs from manufacturing bet-the-company cases out of wholly innocuous statutory violations, Congress may have power to achieve the same substantive result through a slightly different route.

III. INCORPORATING JUSTICIABILITY RESTRICTIONS INTO FEDERAL STATUTES

Spokeo limits only the federal judiciary's Article III jurisdiction over federal statutory claims. State courts, however, may hear federal causes of action unless Congress expressly grants federal courts exclusive jurisdiction over them[78] or a "disabling incompatibility" exists between a federal statute and the state court's jurisdiction.[79] In fact, absent one of those exceptions, the Supremacy Clause[80] *requires* state courts to adjudicate federal claims.[81]

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74 *Id.*

75 *Id.* at 773–74.

76 Indeed, Congress could expand such causes of action even further, allowing non-Hohfeldian plaintiffs to sue as private relators as well.

77 *See also* Mo. Pac. Ry. Co. v. Humes, 115 U.S. 512, 523 (1885) (holding that a state has discretion to impose civil fines or penalties for statutory violations, determine whether those provisions shall be enforced publicly or privately, and provide for the disposition of any funds collected).

78 Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820, 823 (1990) (holding that state courts may exercise concurrent jurisdiction over federal statutory claims unless a federal statute's text "expressly confines jurisdiction to federal courts or ousts state courts of their presumptive jurisdiction"); *see also* THE FEDERALIST NO. 82, at 536 (Alexander Hamilton) (E. Earle ed., 1941) (explaining that state courts will "take cognizance" of causes of action under federal statutes, exercising "concurrent jurisdiction in all cases arising under the laws of the Union," unless Congress "expressly excluded" them from doing so).

79 Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477–78 (1981) (citing Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 507–08 (1962), and Clafin v. Houseman, 93 U.S. 130, 136 (1876)).

80 U.S. CONST. art. VI, § 2.

81 *See* Testa v. Katt, 330 U.S. 386, 394 (1947) (holding that a state court may not refuse to exercise jurisdiction over a federal claim where "this same type of claim arising under [state] law would be enforced by that State's courts"). The power and responsibility of state courts to hear federal claims flows

Many states grant their courts far broader jurisdiction than Article III affords federal courts.[82] Such state courts may entertain claims by quasi-Hohfeldian plaintiffs under federal laws such as the FCRA or FACTA that are nonjusticiable in federal court due to the absence of concrete harm.[83]

Commentators disagree about whether state courts should be permitted to adjudicate federal claims that Article III precludes federal courts from entertaining, focusing on two main issues. First, they dispute the proper respective structural roles of the Supreme Court and state courts. Judge William Fletcher and others argue that state courts should apply Article III's justiciability requirements when adjudicating federal claims,[84] in part to preserve the

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naturally from the Madisonian Compromise, in which the Framers granted Congress discretion over whether to create lower federal courts at all. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 124–25 (Max Farrand ed., 1911); *see also* Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 42 (1995). Congress's constitutional power to refrain from establishing lower federal courts presupposes that state courts will adjudicate federal causes of action. *See* Lockerty v. Phillips, 319 U.S. 182, 187 (1943) ("Article III left Congress free to establish inferior federal courts or not as it thought appropriate. It could have declined to create any such courts, leaving suitors to the remedies afforded by state courts, with such appellate review by this Court as Congress might prescribe."); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1363–64 (1953). Throughout America's first century, state courts exercised exclusive jurisdiction over most federal claims, as the Judiciary Act did not grant federal courts general federal-question jurisdiction. *See* An Act to Establish the Judicial Courts of the United States, ch. 20, § 9, 1 Stat. 73, 76–77 (1789) (establishing federal jurisdiction over only certain types of federal cases, such as admiralty suits).

82 Christopher S. Elmendorf, Note, *State Courts, Citizen Suits, and the Enforcement of Federal Environmental Law by Non-Article III Plaintiffs*, 110 YALE L.J. 1003, 1006 & n.15 (2001) (noting that the "default rules of justiciability" in state courts "tend to be more liberal" than in federal court).

83 *See* ASARCO, Inc. v. Kadish, 490 U.S. 605, 617 (1989) ("[S]tate courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret . . . a federal statute."); Doremus v. Bd. of Educ., 342 U.S. 429, 434 (1952) (holding that "a state court may . . . render an opinion on a federal constitutional question even under such circumstances that it can be regarded only as advisory"). Under *ASARCO*, the U.S. Supreme Court may hear a federal claim filed in state court that was initially nonjusticiable under Article III if the final state court to adjudicate the case grants relief to the plaintiff, but not if it rules in favor of the defendant. Matthew I. Hall, *Asymmetrical Jurisdiction*, 58 UCLA L. REV. 1257, 1259 (2011) (complaining that *ASARCO* creates a "jurisdictional gap . . . in which state courts may exercise jurisdiction over questions of federal law, but the Supreme Court may not review their decisions on appeal"). When a state court of last resort grants relief under a federal statute, it generally causes "direct, specific, and concrete injury" to the defendant, giving that defendant Article III standing to further litigate the matter in the U.S. Supreme Court. *ASARCO*, 490 U.S. at 623–24; *cf.* City of Erie v. Pap's A.M., 529 U.S. 277, 288–89 (2000) (holding that, where a state supreme court invalidates a municipal ordinance under the U.S. Constitution and the plaintiff no longer wishes to engage in the prohibited conduct, the city may maintain its appeal to the U.S. Supreme Court, despite mootness concerns, because the state court ruling causes it continuing harm). When the state judiciary rejects a plaintiff's federal claim, in contrast, it leaves the parties' rights unaffected, meaning that the plaintiff continues to lack a justiciable claim that would enable it to seek review in the U.S. Supreme Court.

84 William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 CALIF. L. REV. 263, 265 (1990) ("State courts should be required to adhere to

Supreme Court's primacy in interpreting federal law.[85] Allowing state courts to entertain federal claims only when they would be justiciable under Article III ensures that all state court rulings concerning federal law are subject to the possibility of Supreme Court review, regardless of which party prevails in the state courts.[86]

In contrast, Professor Robert A. Schapiro,[87] Professor Chris Elmendorf,[88] and others[89] support the assertion of state court jurisdiction over quasi-Hohfeldian and even non-Hohfeldian plaintiffs' federal claims. Schapiro hails it as an example of "interactive federalism,"[90] a "polyphonic" conception of federalism in which the national government and the states act as alternative enforcers of legal rights.[91] Under interactive federalism, both levels of government are presumptively able to enforce the law to promote

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article III 'case or controversy' requirements whenever they adjudicate questions of federal law."); William P. Murphy, *Supreme Court Review of Abstract State Court Decisions on Federal Law: A Justiciability Analysis*, 25 ST. LOUIS U. L.J. 473, 498 (1981) ("[J]usticiability of all federal issues in state or federal courts should be controlled by article III principles."); *see also* Paul A. Freund, *The Supreme Court, 1951 Term – Foreword: The Year of the Steel Case*, 66 HARV. L. REV. 89, 95 (1952) (suggesting that it would be "sounder practice . . . to treat the standing of complainants [pursuing federal claims in state court] as itself a federal question"); Nicole A. Gordon & Douglas Gross, *Justiciability of Federal Claims in State Court*, 59 NOTRE DAME L. REV. 1145, 1151 (1984) (asserting that "federal standards of justiciability must control" the adjudication of federal statutory causes of action in state courts); Paul J. Katz, Comment, *Standing in Good Stead: State Courts, Federal Standing Doctrine, and Reverse*-Erie *Analysis*, 99 NW. U. L. REV. 1315, 1317–18 (2005) (arguing that, as a matter of reverse-*Erie*, "state courts should abide by federal standing requirements to enforce federal causes of action consistently with federal courts").

85 Fletcher, *supra* note 84, at 283 (arguing that Article III should govern state court jurisdiction over federal claims to preserve the Supreme Court's position as "the final appellate tribunal on questions of federal law"); Hall, *supra* note 83, at 1274 (emphasizing the Supreme Court's "role as supreme arbiter of federal law"); Murphy, *supra* note 84, at 496–97 (citing Osborn v. President of Bank of the U.S., 22 U.S. (9 Wheat.) 738, 818–19 (1824)).

86 Fletcher, *supra* note 84, at 283.

87 Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 303 (2005) ("[S]tate courts can enforce the federal laws without the obstacle of federal standing requirements.").

88 Elmendorf, *supra* note 82, at 1003 ("[S]tate courts can, will, and should adjudicate the federal environmental claims of parties who lack Article III standing . . . .").

89 *See, e.g.*, Brian A. Stern, Note, *An Argument Against Imposing the Federal Case or Controversy Requirement on State Courts*, 69 N.Y.U. L. REV. 77, 78 (1994) ("[S]tate courts should not be bound by article III . . . . [I]mposing federal standing requirements on state courts would unnecessarily intrude on the states as 'distinct sovereignties' . . . ."); *see also* James W. Doggett, Note, *"Trickle Down" Constitutional Interpretation: Should Federal Limits on Legislative Conferral of Standing Be Imported into State Constitutional Law?*, 108 COLUM. L. REV. 839, 880–81 (2008) (arguing that state courts should reject federal justiciability restrictions); Hershkoff, *supra* note 36, at 1906 (arguing that state courts "ought not feel bound by Article III or its radiating prudential concerns").

90 Schapiro, *supra* note 87, at 305–06 ("The existence of parallel state and federal court systems provides a crucial alternative means for the enforcement of federal or state rights.").

91 *Id.* at 248–49, 285–86, 288.

"plurality, dialogue, and redundancy."[92] From this perspective, allowing state courts to hear cases that would be nonjusticiable in federal court enhances their power to act as effective, independent tribunals. Brian Stern also points out that numerous other restrictions, such as the independent and adequate state grounds doctrine and abstention, already preclude the U.S. Supreme Court from reviewing state court rulings on federal issues without jeopardizing the Court's status as the ultimate expositor of federal law.[93]

Second, commentators disagree over the appropriate level of enforcement of federal law. Supporters of the Fletcherian approach, under which state courts would be bound by Article III's justiciability requirements, point out that justiciability limitations may prevent potentially unwise applications of broad federal statutes.[94] They contend that "[f]ew would equate sound policy with the maximum enforcement authorized by law."[95] Conversely, advocates of broader state jurisdiction emphasize the vital role that state courts can play in implementing federal policy.[96] Schapiro, urging his conception of interactive federalism, explains, "If the federal courts underenforce federal rights through restrictive application of justiciability requirements . . . [s]tate courts can participate in the implementation of federal rights that might otherwise not be enforced."[97]

In contrast to past commentators, this Article recommends that both state courts and the U.S. Supreme Court apply Article III's justiciability restrictions to federal statutory claims in state court as a matter of statutory interpretation. Absent a clear statement in a statute's text or legislative history, a court should presume that causes of action created by federal statutes are limited to litigants with Article III standing, for three reasons.[98]

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92 *Id.* at 288.

93 Stern, *supra* note 89, at 79, 100, 110–11.

94 *See* Fletcher, *supra* note 84, at 288–89.

95 Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793, 1803 (1993); *see also* David Krinsky, *How to Sue Without Standing: The Constitutionality of Citizen Suits in Non-Article III Tribunals*, 57 CASE W. RES. L. REV. 301, 308 (2007) ("Defending against lawsuits is burdensome; it is probably inappropriate, if not unconstitutional, to require private parties to shoulder this burden in the absence of a plaintiff who has suffered an alleged injury-in-fact at the hands of the defendant.").

96 Schapiro, *supra* note 87, at 305.

97 *Id.*; *see also* Elmendorf, *supra* note 82, at 1030 (arguing that allowing a "diffusion of authority" to state courts promotes the enforcement of federal rights); *id.* at 1032, 1038 ("Allowing non-Article III plaintiffs to be heard in state courts would enable the private attorney general to work, functionally, more like Congress intended," particularly for violations that might be low priorities for government enforcers.); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 212–13 (1992); *cf.* Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 n.4 (1981) ("If Congress does not confer jurisdiction on federal courts to hear a particular federal claim, the state courts stand ready to vindicate the federal right, subject always to review, of course, in this Court.").

98 *Cf.* United States v. Kwai Fun Wong, 135 S. Ct. 1625, 1632–33 (2015) (consulting both a statute's text and its legislative history to determine whether a clear statement rule was satisfied). Courts and

First, the Supreme Court has cautioned that federal laws should be construed to avoid creating or authorizing constitutional violations.[99] A statute that establishes a cause of action that may be brought in either state or federal court, but is not limited to plaintiffs that have suffered concrete injury, would have a substantial number of unconstitutional applications under *Spokeo*.[100] Courts should presume that Congress did not intend to attempt to authorize lawsuits that would violate Article III. They therefore should interpret federal laws creating causes of action as being implicitly limited to Hohfeldian plaintiffs. If federal statutes are construed in this manner, federal justiciability requirements would apply as a matter of statutory interpretation when plaintiffs sue under those laws in state court. A quasi-Hohfeldian plaintiff therefore would be statutorily barred from suing in either federal or state court (and also constitutionally barred, under *Spokeo*, from suing in federal court).

One might object that Article III's justiciability restrictions do not apply to plaintiffs in state court. A federal statute, however, is treated as having a single, correct interpretation that both federal and state courts must attempt to ascertain, even though rulings from those separate judicial systems are not binding on each other (apart from holdings of the U.S. Supreme Court).[101] If federal laws are interpreted to implicitly include justiciability restrictions that prevent quasi- and non-Hohfeldian plaintiffs from suing in federal court, those restrictions are part of the statute and apply equally in state court as well. The language creating the cause of action would have the same meaning, regardless of the court in which the plaintiff sues.

Second, Congress has enacted a sweeping grant of federal-question jurisdiction to federal district courts.[102] Section 1331 provides that federal district courts "shall have original jurisdiction of all civil actions arising under

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commentators that reject the use of legislative history may implement this recommendation by considering only the statute's text.

99 *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 191 (1991) (noting that the Court "assume[s] [Congress] legislates in the light of constitutional limitations"); NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 500 (1979) ("[A]n Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available."); *see also* Clark v. Martinez, 543 U.S. 371, 381 (2005) (noting that, when "competing plausible interpretations of a statutory text" exist, courts apply the "reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts").

100 Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547–48 (2016) (emphasizing that "concrete" injury is an "'irreducible constitutional minimum' of standing" (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (2016)).

101 *See* Lockhart v. Fretwell, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) ("[N]either federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation."); Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898, 1960 n.214 (2011) ("[T]he prevailing view in the state courts is the one expressed by Justice Thomas's concurrence in *Lockhart* . . . ."); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 283 n.219 (1994) (collecting cases).

102 28 U.S.C. § 1331 (2012).

the Constitution, laws, or treaties of the United States."[103] This provision may fairly be considered a "super-statute" that acts as "the baseline[] against which other sources of law . . . are read,"[104] although one need not accept Professors William Eskridge and John Ferejohn's theory of super-statutes to agree with this argument. While Section 1331 does not grant district courts the full measure of federal-question jurisdiction authorized by Article III,[105] it embodies Congress's intent that federal courts be open to any civil action in which the face of a "well-pleaded complaint" contains a federal cause of action.[106] Most of the federal judiciary's jurisdiction rests on this critical statute, which represents the endpoint of over two centuries' worth of debate and evolution[107] tracing back to the Judiciary Act of 1789.[108]

Senate Judiciary Chairman Howard Metzenbaum sponsored the bill abolishing the amount-in-controversy requirement for federal-question cases and amending Section 1331 to its current form.[109] He explained that the legislation would establish a "comprehensive and uniform Federal question jurisdiction,"[110] giving "every citizen the right to litigate his or her Federal claim before a Federal court if he or she so chooses."[111] Chairman Peter W. Rodino of the House Judiciary Committee made the same point.[112] The House Judiciary Committee report accompanying the bill declared that "[i]t represents sound principles of federalism by mandating that the Federal courts should bear the responsibility of deciding all questions of Federal law. At the same time, it demonstrates an increased respect for the States by providing

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103 *Id.*

104 William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216 (2001).

105 Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 495 (1983) ("Art[icle] III 'arising under' jurisdiction is broader than federal-question jurisdiction under § 1331 . . . .").

106 Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987); *see also* Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152 (1908) ("[A] suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution.").

107 *See* FALLON, *supra* note 3, at 745–47 (tracing the development of federal-question jurisdiction). Congress first granted the federal courts general federal-question jurisdiction in 1875, subject to a $500 amount-in-controversy requirement. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470. Congress repeatedly increased the amount-in-controversy requirement over the course of the next century and eventually abolished it in 1980. Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, § 2, 94 Stat. 2369, 2369 (Dec. 1, 1980) (codified as amended at 28 U.S.C. § 1331 (2012)); *see also* FALLON, *supra* note 3, at 746–47 & n.34. For the past thirty-nine years, federal district courts have exercised federal-question jurisdiction without regard to the amount in controversy. FALLON, *supra* note 3, at 746–47.

108 An Act to Establish the Judicial Courts of the United States, ch. 20, 1 Stat. 73, 76 (1789). The Judiciary Act of 1789 did not grant the lower federal courts general federal-question jurisdiction. *See id.* §§ 9, 11.

109 125 CONG. REC. 5233 (Mar. 15, 1979) (statement of Sen. Metzenbaum).

110 *Id.*

111 *Id*. at 5231.

112 124 CONG. REC. 4992 (Feb. 8, 1978) (statement of Rep. Rodino) ("When Federal law questions are in dispute, the Federal forum will be used.").

that Federal claims should not be forced on the overburdened State court systems."[113]

One member elaborated, "If the Federal Government believes it necessary to create rights, then the Federal Government should bear the burden of providing a forum to parties who wish to be heard on those rights."[114] A committee print discussing a previous version of the bill expressed the Senate Judiciary Committee's determination that "state law questions should be adjudicated in state courts, federal questions should be litigated in federal courts."[115] Several supporters of the legislation, including Assistant Attorney General Daniel Meador,[116] echoed this sentiment.[117] This legislative history consistently demonstrates that Congress enacted the present version of Section 1331 to open the federal courts to any causes of action it creates.

In light of Section 1331's sweeping grant of subject-matter jurisdiction to federal district courts over federal claims, we should not lightly presume—absent a clear statement—that Congress intends to authorize federal claims that federal courts are constitutionally precluded from adjudicating.[118] This jurisdictional provision counsels strongly in favor of construing federal statutory causes of action as being presumptively limited to Hohfeldian plaintiffs, which may properly invoke the federal judiciary's federal-question jurisdiction.

Finally, allowing quasi-Hohfeldian plaintiffs to enforce federal statutes in state court may violate the U.S. Constitution's Take Care Clause, which requires the President to "take Care that the Laws be faithfully executed."[119] In *Lujan v. Defenders of Wildlife*, the Court held that Article III's "concrete injury" requirement implements separation-of-powers principles by ensuring that "Congress and the Chief Executive," rather than the courts, "[v]indicat[e] the public interest."[120] Allowing individuals who have not suffered

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113 H.R. REP. NO. 96-1461, at 1 (1980); *accord* 126 CONG. REC. 29,787 (Nov. 17, 1980) (statement of Rep. Kastenmeier).

114 124 CONG. REC. 4995 (Feb. 28, 1978) (statement of Rep. Railsback); *see also* S. REP. NO. 96-827, at 1–2 (1980) ("When the right relied on is Federal, the national Government should bear the burden of providing a forum to parties who wish to be heard in Federal court."); 126 CONG. REC. 4203 (Feb. 28, 1980) (statement of Sen. Metzenbaum) ("Under our American system of federalism, it ought to be axiomatic that all litigants with legitimate claims under Federal law should have the option of bringing their cases before a Federal court.").

115 124 CONG. REC. 32 (Jan. 19, 1978); *see also* H.R. REP. NO. 95-893, at 1 (1978) (noting that the proposed legislation "provides that Federal law questions are to be adjudicated in the Federal courts, regardless of the amount in controversy").

116 124 CONG. REC. 21,085 (July 14, 1978) (letter from Asst. Att'y Gen. Daniel Meador) ("In our judgment a litigant asserting a federal right should be entitled to do so in a federal forum regardless of the amount of his claim.").

117 *See, e.g.*, 124 CONG. REC. 13,940 (May 16, 1978) (statement of Rep. Kastenmeier).

118 Depending on how a state's judiciary rules in a case, even the U.S. Supreme Court may be constitutionally precluded from hearing an appeal of the federal issues. *See supra* note 83.

119 U.S. CONST., art. II, § 3.

120 Lujan v. Defenders of Wildlife, 504 U.S. 555, 576 (1992) (emphasis removed).

"concrete injury" to sue to enforce "compliance with [federal] law" would "transfer from the President to the courts the Chief Executive's . . . duty" under the Take Care Clause.[121] *Lujan* was discussing the separation-of-powers implications of allowing non-Hohfeldian plaintiffs to sue in federal court to compel executive officials and agencies to comply with federal law.[122] Similar concerns arise from allowing quasi-Hohfeldian plaintiffs to sue in state court to enforce federal law against private parties.[123]

Article III allows a private plaintiff to sue in federal court for redress only for concrete injuries it has sustained.[124] A plaintiff that has not suffered a concrete injury may not sue simply to promote compliance with a federal statute.[125] Such a generalized concern for federal law enforcement is properly the province of the Executive Branch. This principle applies equally whether the defendant is a private party or a government agency.[126] Quasi-Hohfeldian plaintiffs should not be permitted to usurp the Executive Branch's law enforcement prerogatives by simply suing in state court.

Some commentators contend that Article III's justiciability restrictions are "not necessary to preserve separation of powers when state courts adjudicate federal questions."[127] Professor Elmendorf in particular argues that

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121 *Id.* at 577; *cf.* Printz v. United States, 521 U.S. 898, 922–23 (1997) (holding that the "unity" of the Executive Branch "would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws").

122 *Lujan*, 504 U.S. at 576–77.

123 *See* Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 790 (2009) (explaining that, under the Take Care Clause, Congress may not grant prosecutorial discretion to politically unaccountable private plaintiffs that have not suffered concrete injuries-in-fact by allowing them to "assert[] an abstract grievance" or "sue any person for any legal violation").

124 *Lujan*, 504 U.S. at 577.

125 *Id*. at 575–77.

126 *See id.* at 577 ("Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power." (quoting Stark v. Wickard, 321 U.S. 288, 309–10 (1944))).

127 Stern, *supra* note 89, at 96–97. Stern asserts that applying Article III's justiciability requirements to state courts is unnecessary to protect Congress's prerogatives. *Id.* at 96. He explains that "Congress enjoys structural protections from encroachment by state courts," which are subject to Congress's "supremacy" in ways federal courts are not. *Id.* In many respects, Mr. Stern's argument seems exactly backwards. Congress has many more levers of influence and control over federal courts than state courts. Congress has power to decide whether to establish and retain lower federal courts at all, Lockerty v. Phillips, 319 U.S. 182, 187 (1943); *see also* U.S. CONST. art. I, § 8, cl. 9; 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 124–25 (Max Farrand ed., 1911); determine the jurisdiction of the federal judiciary, Kline v. Burke Constr. Co., 260 U.S. 226, 233–34 (1922), including that of the U.S. Supreme Court, U.S. CONST. art. III, § 2, cl. 2 (allowing Congress to make "Exceptions" to the Supreme Court's appellate jurisdiction); set funding levels for the federal judiciary, *id.* art. I, § 9, cl. 7, so long as it does not reduce judges' salaries, *id*. art. III, § 1; and decide whether to create or modify judicial districts and circuits, *see, e.g.*, Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 (1980) (splitting the former U.S. Court of Appeals for the Fifth Circuit into the current Fifth and Eleventh Circuits). Congress must approve—and may modify—the rules of procedure and evidence for federal courts,

allowing quasi- or non-Hohfeldian plaintiffs to litigate claims in state court cannot threaten the President's Article II powers because Hohfeldian plaintiffs unquestionably could pursue identical claims.[128] If litigation by private plaintiffs that have suffered injuries-in-fact does not infringe the President's constitutional prerogatives, Professor Elmendorf reasons, then similar litigation by quasi- or non-Hohfeldian plaintiffs should not raise Article II concerns, either.[129]

As Professor Elmendorf points out, the Supreme Court has not interpreted the Take Care Clause to require that the federal Executive Branch have a complete monopoly on enforcing federal laws, at least through civil litigation.[130] In addition to authorizing private suits by Hohfeldian plaintiffs, Congress has broad discretion to permit—though not require[131]—states to bring civil suits to enforce federal laws.[132] *Lujan* nevertheless identifies Article III's injury-in-fact requirement as a constraint on Congress's power to circumvent the Executive Branch.[133] And the invasion of the President's Article II power by private parties who lack standing to enforce a federal statute is the same, regardless of whether they sue in federal or state court. In light of the President's Take Care power, we should not presume that Congress intends to allow individuals who lack Article III standing to self-deputize themselves as roving commissions or private attorneys general to enforce federal statutes in state courts. Consequently, courts should interpret statutory causes of action as implicitly limited to Hohfeldian plaintiffs.

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see 28 U.S.C. § 2074(a) (2012), and it may remove federal judges who commit impeachable offenses, U.S. CONST. art. I, § 2, cl. 5; *id.* art. I, § 3, cl. 6; *id.* art. II, § 4. And the Senate has power to confirm federal judges, *id.* art. II, § 2, cl. 2. Congress lacks such authority over state courts. Thus, because Congress is less equipped to prevent state courts from encroaching on its prerogatives, greater constraints on their adjudicative authority might be required.

128 *See* Elmendorf, *supra* note 82, at 1029–30.

129 *Id.* at 1030.

130 *See id.* at 1035; *supra* Part II (discussing Congress's power to authorize private relators to enforce the federal government's claims); Michael T. Morley, *Reverse Nullification and Executive Discretion*, 17 U. PA. J. CONST. L. 1283, 1317 (2015) (arguing that preemption doctrines should be modified to permit states to enact statutes that parallel federal law to provide an alternate means of implementing underenforced federal restrictions).

131 Printz v. United States, 521 U.S. 898, 935 (1997) ("The Federal Government may . . . no[t] command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.").

132 *Id.* at 923 n.12 (observing that, although "control by the unitary Federal Executive is also sacrificed when States voluntarily administer federal programs, . . . the condition of voluntary state participation significantly reduces the ability of Congress to use this device as a means of reducing the power of the Presidency"); *see also* Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 748 (2011) (arguing that allowing state officials to enforce federal laws "creates a state-level check against underenforcement by federal agencies"); Amanda M. Rose, *State Enforcement of National Policy: A Contextual Approach (with Evidence from the Securities Realm)*, 97 MINN. L. REV. 1343, 1345 (2013) ("The benefit of concurrent enforcement most emphasized in this recent literature is the ability of state regulators to remedy under-enforcement by potentially captured federal agencies.").

133 *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 576–77 (1992).

This proposal differs from past recommendations to require state courts to follow Article III's justiciability requirements in federal-question cases, although its practical effect would be comparable.[134] Judge Fletcher maintained that state courts should be bound by Article III as a matter of constitutional structure[135] and to improve the quality of both state-court adjudication[136] and standing doctrine itself.[137] Professor William P. Murphy's argument is similarly rooted in concerns about constitutional structure.[138] Such constitutional arguments are difficult to mount, however, because the Constitution's text does not restrict state courts, and there is no evidence the Framers contemplated that the Constitution would somehow implicitly limit state courts' jurisdiction over federal issues. Moreover, *ASARCO v. Kadish*[139] establishes a coherent, workable framework for facilitating Supreme Court review of state court rulings in appropriate federal-question cases that were initially nonjusticiable.[140]

A student note relies instead on a reverse–*Erie Railroad v. Tompkins*[141] analysis to justify imposing Article III's restrictions on state courts.[142] It argues that state courts should apply federal standing requirements to ensure "system-wide uniform enforcement" of federal statutes.[143] Professor Matthew Hall rejects this reasoning, persuasively arguing that justiciability restrictions are distinct from substantive rules of law and therefore not subject to reverse-*Erie*.[144] He also points out that the reverse-*Erie* doctrine ensures that state courts remain open to adjudicate federal causes of action.[145] Consequently, reverse-*Erie* is generally inapplicable where state rules, such as lower jurisdictional barriers, would make it easier to entertain federal claims.[146]

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134 *See generally supra* note 84.

135 Fletcher, *supra* note 84, at 283 (arguing that the "structural reality" of the Constitution supports applying Article III to state courts when they adjudicate federal issues).

136 *Id.* ("To the degree that the 'case or controversy' requirement serves the values of sensitive and wise adjudication, it should apply to both state and federal courts.").

137 *Id.* at 284 (noting that applying justiciability requirements to state courts "may help clarify or improve the doctrine").

138 Murphy, *supra* note 84, at 498 ("[J]usticiability of all federal issues in state or federal courts should be controlled by article III principles" to "promote[] the traditional object of complete federal judicial oversight in reviewing federal law . . . .").

139 490 U.S. 605 (1989).

140 *See supra* notes 13, 83.

141 304 U.S. 64 (1938).

142 *See* Katz, *supra* note 84, at 1328.

143 *Id*.

144 Hall, *supra* note 83, at 1289.

145 *See id.*

146 *See id.* The student note, however, provides several examples concerning the Federal Employers' Liability Act, ch. 149, 35 Stat. 65 (1908) (codified as amended at 45 U.S.C. §§ 51–60 (2012)), of reverse-*Erie* rulings where the U.S. Supreme Court required state courts to be "evenhanded[]," prohibiting them from applying state rules that were more favorable to plaintiffs than federal law. Katz, *supra* note 84, at

Applying Article III's justiciability restrictions in state courts as a matter of statutory interpretation is more defensible than these other rationales. This approach also leaves Congress the flexibility to include express language in a statute authorizing quasi-Hohfeldian, and even non-Hohfeldian, plaintiffs to sue, thereby enabling them to bring their claims in state court.

CONCLUSION

Spokeo presents an opportunity for the federal courts, which suffer from chronically overcrowded dockets and incessant delays,[147] to focus their resources on litigants who need them most: those who have suffered concrete injuries. Some critics will undoubtedly object that *Spokeo* is simply the latest obstacle the Supreme Court has placed in the path of plaintiffs entitled to relief.[148] Unlike other doctrines that frustrate legitimate suits from truly aggrieved plaintiffs, however, *Spokeo* is designed solely to weed out the legal detritus from federal dockets. Through jurisdictional abnegation, federal courts can stop devoting resources to abusive litigation in which plaintiffs seek grossly disproportionate statutory damages and exorbitant attorneys' fees based on minor, technical, and ultimately innocuous violations of complex statutory schemes. *Spokeo* is, put simply, an act of judicial self-defense. At the same time, it also supplements due process protections for defendants against such excessive statutory damages.[149]

Spokeo's effects may be limited in a variety of ways, however. Lower courts may effectively nullify the ruling by concluding that virtually any statutory violation gives rise to a constitutionally cognizable harm.[150] Moreover,

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1334–36; *see also* Garrett v. Moore-McCormack Co., 317 U.S. 239, 245 (1942) (holding that, when adjudicating federal claims, a state court may not "substantially . . . alter the rights of either litigant").

147 As of December 31, 2016, there were 443,855 cases pending in U.S. District Courts across the nation, or an average of 656 per judge. ADMIN. OFFICE OF U.S. COURTS, UNITED STATES DISTRICT COURTS — NATIONAL JUDICIAL CASELOAD PROFILE (2016), http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile1231.2016.pdf. Of the civil cases, 15.7%, or 56,548, had been pending for more than three years. *Id.*

148 *See generally* ERWIN CHEMERINSKY, CLOSING THE COURTHOUSE DOOR: HOW YOUR CONSTITUTIONAL RIGHTS BECAME UNENFORCEABLE (2017) (discussing the wide range of doctrines that make it difficult for plaintiffs to sue).

149 *See* St. Louis, Iron Mountain & S. Ry. Co. v. Williams, 251 U.S. 63, 66–67 (1919) (holding that statutory damages are unconstitutional only when they are "so severe and oppressive as to be wholly disproportion[ate] to the offense and obviously unreasonable"). *See generally* Scheuerman, *supra* note 50 (explaining how procedural and doctrinal restrictions prevent defendants from adequately challenging ruinous statutory damage awards in class-action cases).

150 *See, e.g.*, Gambles v. Sterling Infosystems, Inc., 234 F. Supp. 3d 510, 525 (S.D.N.Y. 2017) (holding that a plaintiff suing under the FCRA because the defendant had provided a credit report about him containing incorrect previous addresses had adequately alleged concrete harm under *Spokeo*); Daubert v. NRA Grp., LLC, No. 3:15-CV-00718, 2016 U.S. Dist. LEXIS 105909, at *1–3, 13–14 (M.D. Pa. Aug. 11, 2016) (holding that a plaintiff suing under the Federal Debt Collection Practices Act had adequately

to the extent lower courts faithfully apply *Spokeo* to preclude quasi-Hohfeldian plaintiffs from suing in federal court, Congress may convert private causes of action into *qui tam* actions for civil fines. Quasi-Hohfeldian plaintiffs also may attempt to pursue their claims in state courts that do not follow Article III justiciability standards.

At the very least, courts should reject this last method of limiting or avoiding *Spokeo*'s impact. Both the U.S. Supreme Court and state courts should avoid construing federal statutes to create causes of action for quasi-Hohfeldian (or non-Hohfeldian) plaintiffs. Since Article III precludes federal courts from adjudicating claims of plaintiffs that lack standing, the constitutional avoidance canon suggests that federal laws creating causes of action should be interpreted as authorizing lawsuits only by Hohfeldian plaintiffs. Additionally, Congress's sweeping grant of federal-question jurisdiction to federal district courts suggests that it wished to allow those courts to adjudicate any federal statutory causes of action a plaintiff chooses to file there. It would frustrate that intent to interpret federal statutes as creating causes of action for quasi-Hohfeldian plaintiffs that federal district courts are constitutionally precluded from hearing. Finally, allowing quasi- or non-Hohfeldian plaintiffs to enforce federal laws in state court raises serious questions under the Take Care Clause as construed in *Lujan*.

Thus, quasi-Hohfeldian plaintiffs excluded from federal court by Article III's "concrete" injury requirement should not be permitted to pursue their federal statutory claims in state courts. Courts should interpret federal statutes to avoid unnecessarily creating nonfederal federal questions.

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alleged concrete harm under *Spokeo* because a bar code that, if scanned, would have revealed the plaintiff's account number with a debt collector was visible through a small clear address window on an envelope the debt collector had mailed to the plaintiff), *aff'd in part and rev'd in part on other grounds*, 861 F.3d 382 (3d Cir. 2017).