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Brief of Restitution and Remedies Scholars as Amici Curiae in Support of Respondent: *Spokeo v. Robins*

Doug Rendleman
Washington and Lee University School of Law, rendlemand@wlu.edu

Douglas Laycock
University of Virginia School of Law

Mark P. Gergen
University of California School of Law

No. 13-1339

IN THE
Supreme Court of the United States

SPOKEO, INC., *Petitioner*,
v.
THOMAS ROBINS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESTITUTION AND REMEDIES SCHOLARS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

Doug Rendleman
Washington & Lee
School of Law
1 Denny Circle
Lexington, VA 24450
540-458-8934
rendlemand@wlu.edu

Douglas Laycock
University of Virginia
School of Law
580 Massie Road
Charlottesville, VA 22903
434-243-8546
dlaycock@virginia.edu
Counsel of Record

Mark P. Gergen
University of California
School of Law
215 Boalt Hall
Berkeley, CA 94720
510-643-9577
mgergen@law.berkeley.edu

QUESTION PRESENTED

This brief principally addresses the question of how petitioner's proposed standing rule would affect longstanding and well established causes of action for restitution and unjust enrichment.

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INTEREST OF AMICI

Amici are law professors and practicing lawyers who study restitution, remedies, or both. One amicus was the Reporter for the *Restatement (Third) of Restitution and Unjust Enrichment*, and eight served as Advisers or on the Members Consultative Group for that *Restatement*. Individual amici are further identified in the Appendix.[1]

If this Court were to adopt petitioner's proposed rule — that a plaintiff who suffers no harm beyond the loss of his legal rights has no standing to sue — it could wreak havoc with the law of restitution and unjust enrichment, barring many long-established causes of action from federal courts. This important body of law long predates the American founding and serves essential functions, especially in private law but in parts of public law as well.

These amici take no position on the underlying statutory claim.

SUMMARY OF ARGUMENT

Petitioner's sweeping and ill-defined argument that no plaintiff can have standing without proof of

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[1] This brief was prepared entirely by amici and their counsel. No other person made any financial contribution to its preparation or submission. Consent letters are submitted with the brief.

The American Law Institute speaks only through its *Restatements* and similar projects. Each such project is repeatedly revised in light of detailed reviews by multiple groups of judges, practitioners, and academics. Each position taken is supported by cases cited in the reporter's notes. Finally, each project must be approved by the Institute's governing Council and separately by its membership. This brief did not go through these processes; it is not a statement of the American Law Institute.

"concrete harm" is aimed at claims for statutory minimum damages. The Court should reject this frontal assault on statutory remedies. But whatever the Court does with respect to statutory damages, it should take care not to inadvertently sweep away much of the law of restitution.

1. The law of restitution and unjust enrichment creates remedies and causes of action based on gain to defendant rather than loss to plaintiff. It follows that in appropriate cases, courts may impose liability for unjust enrichment even though the wrong that is the basis for plaintiff's claim caused no harm. It is enough that defendant's gain derived from a violation of plaintiff's rights. Moreover, plaintiffs to whom a fiduciary or confidential duty is owed can sue to set aside conflicted transactions without alleging or proving either damages to themselves or gain to defendant. Such remedies and causes of action have been part of Anglo-American law since before the American founding.

Only one person has standing to sue under the slayer rule, but that plaintiff need not even allege a violation of his own rights. There are also tort claims that are actionable without harm — trespass, trespass to chattels, assault, battery, and false imprisonment.

Even more at odds with petitioner's theory, private litigants at the founding could recover statutory damages or penalties in an action of debt, without proof of actual damages.

2. Standing necessarily depends on the relief sought. Plaintiffs may have standing to sue for damages but not standing to sue for an injunction, or vice

versa. *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). And plaintiffs may have standing to sue for restitution of unjust enrichment without having standing to sue for damages or an injunction.

Standing to sue in unjust enrichment requires plaintiff to show that he is the source of defendant's enrichment, either in the sense that he suffered a loss that corresponds to defendant's gain, *or* in the sense that defendant's gain was acquired by violating plaintiff's rights. These rules are deeply embedded in the substantive law of restitution, and only occasionally are they labeled as standing rules. But they serve the function of standing rules: they confine the right to sue to identifiable individuals with a concrete stake in the litigation.

Congress cannot authorize individual plaintiffs to enforce generalized rights that belong to the whole public. But Congress can create new individualized rights, and it can enact effective remedies for those rights. Standing to sue for statutory minimum damages requires violation of an individualized statutory right personal to plaintiff. The "injury in fact" that is "the irreducible constitutional minimum of standing" is "invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Additional or consequential harms are not required.

3. Petitioner never specifies what it means by injury or harm. It acknowledges standing in many cases based only on violation of an individualized legal right, without proof of any further harm. It appears to say that standing on this basis is acceptable for common-law rights but not for statutory rights. Its

position reduces to little more than hostility to legislatures and to the statute it has allegedly violated.

ARGUMENT

I. Standing Often Does Not Require Plaintiffs to Establish Any Harm Beyond the Violation of Their Legal Rights.

As further explained in Part III, petitioner's understandings of "injury" and "harm" are undefined, shifting, and inconsistent. But the heart of petitioner's argument is that loss of respondent's statutory rights is not an injury that will support standing. Some *additional* or consequential harm is required. Pet. Br. 14-17.

Petitioner's approach cannot even explain the law of damages. It is utterly inconsistent with the law of restitution and unjust enrichment.

A. Restitution and Unjust Enrichment Is Based on Defendant's Gain, Not Plaintiff's Loss.

Compensatory damages, based on plaintiff"s loss, and restitution of unjust enrichment, based on defendant's gain, are fundamentally distinct. *See, e.g.*, *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204, 215 (2002) (contrasting restitution with damages). The remedies and the causes of action have different conceptual bases, different histories, and different measures of recovery.

These differences are long established and uncontroversial. As summarized in the standard treatises, "[R]estitution is measured by the defendant's gains, not by the plaintiff's losses." 1 Dan B. Dobbs, *Law of Remedies* §1.1 at 5 (2d ed. 1993). "[I]n the damage

action the plaintiff seeks to recover for the harm done to him, whereas in the restitution action he seeks to recover the gain acquired by the defendant through the wrongful act." 1 George E. Palmer, *The Law of Restitution* §2.1 at 51 (1978).

Often, an unjust gain to defendant will be matched by a corresponding loss to plaintiff. If $100 is misappropriated, or paid by mistake, defendant has gained $100 and plaintiff has lost $100. But sometimes, plaintiff's loss is smaller than defendant's gain. And sometimes, plaintiff has no economic loss at all. Such a plaintiff may still have a claim in restitution, because the basis of the claim is defendant's gain, not plaintiff's loss.

The new *Restatement* summarizes the basic principle as its predecessors summarized it: "A person who is unjustly enriched at the expense of another is subject to liability in restitution." *Restatement (Third) of Restitution and Unjust Enrichment* §1 (2011) (hereinafter *Restatement (Third)*).[2] It further explains in the first paragraph of the first Comment:

> While the paradigm case of unjust enrichment is one in which the benefit on one side of the transaction corresponds to an observable loss on the other, the consecrated formula "at the expense of another" can also mean "in violation of the other's legally protected rights," *without the need to show that the claimant has suffered a loss*. See §3.

Restatement (Third) §1 cmt. *a* (emphasis added).

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[2] *Accord*, *Restatement (Second) of Restitution* §1 (Tentative Draft No. 1, 1983); *Restatement of Restitution* §1 (1937).

Section 3, also closely tracking its predecessors, says simply that "A person is not permitted to profit by his own wrong." The first Comment makes two important points about this principle. First:

> The present section marks one of the cornerstones of the law of restitution and unjust enrichment. The general principle it identifies is the one underlying the "disgorgement" remedies in restitution, whereby a claimant potentially recovers more than a provable loss so that the defendant may be stripped of a wrongful gain.

Id. §3 cmt. *a*.

Second, the broad principle that no man may profit by his own wrong "identifies an outlook and an objective, not a cause of action." *Ibid.* "Working rules" that define specific causes of action come in later sections.

B. Many Familiar Causes of Action for Unjust Enrichment Do Not Require Plaintiffs to Establish Harm Beyond the Violation of Their Legal Rights.

Many familiar causes of action can support a restitutionary remedy in which plaintiff recovers defendant's unjust enrichment based on violation of a legally protected right, without the plaintiff having to establish any further harm. In some of these cases, it is clear that plaintiff suffered no harm beyond the loss of his rights. In others, plaintiff may or may not have suffered further harm, but he need not allege or prove any such harm.

A word about terminology: Some opinions rather clearly say that defendant's violation of plaintiff's

legal rights is an injury to plaintiff, even though plaintiff cannot establish any further harm. *See, e.g.*, *Olwell v. Nye & Nissen Co.*, 173 P.2d 652, 654 (Wash. 1946). These opinions define injury as violation of a right. In every case in which a person's legal right is violated, he has lost at least the entitlement created by that right.

Other opinions equate injury with further or consequential harm. These opinions rather clearly say that plaintiff can recover defendant's unjust enrichment without proof of any injury. *See*, *e.g.*, *Jackson v. Smith*, 254 U.S. 586, 589 (1921). The result is the same under either explanation: plaintiff can sue for defendant's unjust enrichment without establishing any harm beyond the violation of his legal rights.

1. Commercial Bribes and Kickbacks.

An employer can recover any bribe or kickback paid to his employee, without establishing that the quality of the employee's services or the terms of any transaction were actually affected. The rule is the same for a client who is entitled to honest and loyal services from a professional or a service provider. *Restatement (Third)* §43 illus. 17-19 & reporter's note *d*; *id.* §44 illus. 9 & reporter's note *b*; *Restatement (Third) of Agency* §8.02 and cmt. *b* (2006) ("it is not necessary that the principal show that the agent's acquisition of a material benefit harmed the principal.").

As the Minnesota court explained:

> It matters not that the principal has suffered no damage or even that the transaction has been profitable to him. …
>
> "Actual injury is not the principle the law

> proceeds on, in holding such transactions void. Fidelity in the agent is what is aimed at, and, as a means of securing it, the law will not permit him to place himself in a position in which he may be tempted by his own private interests to disregard those of his principal."

Tarnowski v. Resop, 51 N.W.2d 801, 803 (Minn. 1952) (quoting *Lum v. McEwen* (*Lum v. Clark)*, 57 N.W. 662, 662-63 (Minn. 1894)).

Governments are frequent plaintiffs in such cases. *See, e.g.*, *United States v. Carter*, 217 U.S. 286, 305-09 (1910); *United States v. Podell*, 572 F.2d 31, 34-35 (2d Cir. 1978).

2. Business Opportunities.

Another example, with ancient roots, is trustees or agents who take for themselves business opportunities that might have been of interest to their beneficiaries or principals.

This body of law appears to have been well established by the time of *Keech v. Sandford*, 25 Eng. Rep. 223 (Ch. 1726). A landlord refused to renew a lease to a trust for a minor; he then leased the property to the trustee individually. "[T]here was clear proof of the refusal to renew for the benefit of the infant," *id.* at 223, and the Chancellor did not doubt the fact. So the minor had not lost the lease due to any action by the trustee.

The minor had suffered no harm unless violation of his right to the trustee's undivided loyalty counts as harm. But the absence of harm could not change the result: "it is very proper that rule should be strictly pursued, and not in the least relaxed." *Ibid.*

From these beginnings, there has grown the whole modern law of corporate opportunities. Directors, officers, agents, partners, and the like cannot take for themselves a business opportunity that might have been of interest to their principal. Those who do are liable to the principal for all their profits from the opportunity. Plaintiff need not show that it would have invested in the opportunity itself, and therefore, it need not show that it was harmed. *Restatement (Third)* §43 illus. 14-15 and reporter's note *d*; *Restatement (Third) of Agency* §8.02 and cmt. *d* and reporter's note *d*; American Law Institute, *Principles of Corporate Governance* §5.05, §5.12, and reporter's notes (1992). For modern variations on *Keech*, see *Restatement (Third)* §43 illus. 1 and reporter's note *b*.

A famous illustration is Judge Cardozo's opinion in *Meinhard v. Salmon*, 164 N.E. 545 (N.Y. 1928). The opportunity there was to take a lease on a much larger tract, for a much longer term, requiring much more capital, than the original lease in the joint venture between the parties. *Id.* at 545-46. But it was not for defendant to decide whether his joint venturer would have been willing and able to participate. "No answer is it to say that the chance would have been of little value even if seasonably offered." *Id.* at 547. One who improperly takes a business opportunity for himself is liable for his profits, whether or not the victim was harmed.

3. Other Conflicts of Interest.

The rule that applies to bribes and kickbacks and to corporate opportunities applies with equal rigor to other transactions conducted under the potential influence of a conflict of interest. The principal or beneficiary in such a case can recover the unjust

enrichment of his agent or trustee without proof of harm. Or, because proof of defendant's gain is often difficult, he can sue to rescind or set aside the transaction without proving *either* harm to plaintiff or gain to defendant. *Restatement (Third) of Agency* §8.01 cmt. *d(1)* and reporter's note *d(1)* (summarizing both remedies).

Thus, it is a settled rule, again with ancient roots, that a receiver or trustee of the assets of an insolvent debtor cannot buy at his own sale, even if the sale is conducted at public auction and the trustee is the high bidder. *Restatement (Third)* §43 illus. 20 & reporter's note *d*; *Whelpdale v. Cookson*, 27 Eng. Rep. 856 (Ch. 1747).

A revealing example in this Court is *Jackson v. Smith*, 254 U.S. 586 (1921). The Court said that "it affirmatively appears that the sale was fairly conducted, that there was competitive bidding, and that the property was finally knocked down to the highest bidder." *Id.* at 587. But this high bidder was a group that included the trustee responsible for the sale, and the group went on to make profits with the property it had purchased. The Court unanimously held that the trustee and his confederates were liable "for all the profits obtained by him and those who were associated with him in the matter, *although the estate may not have been injured thereby*." *Id.* at 589 (emphasis added).

Another striking example is *Mosser v. Darrow*, 341 U.S. 267 (1951). There, the employees of a reorganization trustee traded in the securities of the enterprise undergoing reorganization. The trustee who employed them and allowed them to trade was held personally liable for their profits, although he had not

traded for his own account and had no improper profits of his own. The trustee argued that his employees had caused no loss, and even that their purchases of securities had supported the price and been beneficial to the reorganizing enterprise. *Id.* at 272. The Court was not so sure of that, but its holding was that it did not matter. *Id.* at 273. The estate could recover the profits of a conflicted transaction, whether or not it had suffered any harm.

Another variation arises when an agent or trustee borrows assets of the principal or of the trust, and uses those assets to profit personally. The borrower is liable for his profits even if he repays the loan with interest and no harm is done. A clear example is *Slay v. Burnett Trust*, 187 S.W.2d 377 (Tex. 1945). The trustees borrowed money from the trust to invest personally in a speculative venture. They gave an interest-bearing note secured by oil and gas interests, *id.* at 385, and they had repaid most of the loan by the time of trial, *id.* at 387. Almost certainly the speculative investment would have been inappropriate for the trust. But the trustees were liable to the trust for their profits, because they had improperly used trust assets to make these profits. *Id.* at 387-89.

Similarly if a corporate officer uses any of the corporation's property for his own benefit, he is liable to the corporation for any resulting profit, whether or not the corporation is harmed. *Principles of Corporate Governance* §5.04(a), (c) and reporter's note *2*.

4. Misuse of Confidential Information.

A person who misuses confidential information is liable for any profits he makes as a result — whether or not the person entitled to control the information

can show harm. An example in this Court is *Snepp v. United States*, 444 U.S. 507 (1980), where a CIA agent published a book about his work without submitting the manuscript for review by the agency. The government made no effort to prove damages. The Court believed the government had been harmed but that any damages were "unquantifiable." *Id.* at 514. The Court granted a constructive trust over the profits from the book.

The rule is the same in more prosaic contexts such as trade secrets. One who misappropriates a trade secret is liable for his profits, whether or not plaintiff suffers any damages. Uniform Trade Secrets Act §3(a), 14 Unif. Laws Ann. 633 (2005).

Civil liability for insider trading depends on this principle. When the insider uses corporate information to profit by trading in the corporation's securities, the corporation can recover those profits without pleading or proving any harm. *Diamond v. Oreamuno*, 248 N.E.2d 910, 912 (N.Y. 1969); *Restatement (Third)* §43 illus. 9 and reporter's note *c*; *Principles of Corporate Governance* §5.04(a), (c). The cause of action is to recover defendant's profits, *see, e.g.*, *SEC v. Warde*, 151 F.3d 42, 49-50 (2d Cir. 1998), and it is probably rare for the corporation to have any compensable loss.

5. Forfeiture of Fees.

An agent, attorney, or other person in a confidential relationship who breaches a duty of loyalty may forfeit fees to which he would otherwise be entitled. *Restatement (Third) of Agency* §8.01 cmt. *d(2)* and reporter's note *d(2)*; *Restatement (Third) of the Law Governing Lawyers* §37 and reporter's notes *a*, *e*

(2000). If the client has already paid those fees, he may sue to recover them. *Id.* cmt. *a*. The fiduciary would be unjustly enriched if he retained fees that he had forfeited by his disloyalty.

When the client sues to recover the fees, he need not show that the disloyal act caused harm. *See, e.g.*, *Burrow v. Arce*, 997 S.W.2d 229, 237-40 (Tex. 1999); *see id.* at 239 nn.36-37 (collecting authorities).

6. Infringement of Intellectual Property.

One who infringes a copyright, trademark, or trade secret is liable for either his own profits or the victim's losses. 17 U.S.C. §504(b) (copyright); 15 U.S.C. §1117(a) (trademark); Uniform Trade Secrets Act §3(a) (trade secret). Liability for profits has been repealed in patent infringement, 35 U.S.C. §284, except for design patents, §289, for policy reasons unrelated to standing.

If the infringer takes sales away from the victim of infringement, plaintiff will have losses and defendant will have gains that may be either more or less than plaintiff's damages. Plaintiff can generally sue for whichever is larger.

If the infringer expands the market, or creates a derivative work that is infringing but not duplicative, he may earn substantial profits without causing plaintiff to lose any sales. In such a case, plaintiff can recover defendant's profits without showing any harm. *Restatement (Third)* §42 illus. 7-9 and reporter's note *g*.

A copyright example is *Three Boys Music Corp. v. Bolton*, 212 F.3d 477 (9th Cir. 2000), where defendant produced a hit song in 1991 that infringed another hit from 1964. The infringer was liable for the portion of

his profits attributable to the infringement. But it is hard to imagine that plaintiff lost any sales of its 1964 song to a "similar" song in 1991.

A leading trademark example is *Maier Brewing Co. v. Fleischmann Distilling Corp.*, 390 F.2d 117 (9th Cir. 1968), where the sellers of an inexpensive beer copied the trademark of a well known scotch whisky. The infringers profited from their infringement, but plaintiff did not claim that it had lost any sales of whisky. Defendants plausibly argued that plaintiffs had shown "no injury to themselves, no diversion of sales from them to the appellants, no direct competition from which injury may be inferable." *Id.* at 120. Even so, defendants had to disgorge their profits.

The leading case in this Court is *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (1940), where MGM plagiarized the script of a play and made a major movie. Damages to the copyright holder might have been zero, and were at most quite modest compared to the profits from the movie. The Court affirmed plaintiff's judgment for 20% of the profits from the movie, based on the lower court's estimate of the highest proportion of the profits that might possibly have been attributable to the script. *Id.* at 408-09.

Recovery of the infringer's profits is sufficiently settled that although this Court decides many intellectual property cases, it has not returned to issues of how to measure the profits. *Sheldon* cites numerous earlier cases. *See also Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1967 & n.1, 1973 (2014) (discussing the profits remedy in copyright); *Mishawaka Rubber & Woolen Manufac-*

turing Co. v. S.S. Kresge Co., 316 U.S. 203 (1942) (trademark).

7. Trespass.

A trespasser is liable for compensatory damages, for nominal damages in the absence of any actual damage, *infra* at 19, or for the profits of the trespass, *Restatement (Third)* §40 and reporter's note *c*.

There are well known examples where the trespass was harmless, because plaintiff was not using his property or could not use his property. But he could still recover the trespasser's profits. In *Raven Red Ash Coal Co. v. Ball*, 39 S.E.2d 231 (Va. 1946), defendant had an easement to build a railroad across plaintiff's land and to transport coal mined from specified tracts of land. Without authorization, defendant also transported coal from additional tracts. Defendant argued that the only remedy should be nominal damages for the tort. The court disagreed, awarding instead the value of the benefit wrongfully acquired:

> To limit plaintiff to the recovery of nominal damages for the repeated trespasses will enable defendant, as a trespasser, to obtain a more favorable position than a party contracting for the same right. Natural justice plainly requires the law to imply a promise to pay a fair value of the benefits received. Defendant's estate has been enhanced by just this much.

Id. at 238; *Restatement (Third)* §40 illus. 2.

Another well known example is *Edwards v. Lee's Administrator*, 96 S.W.2d 1028 (Ky. 1936); *Restatement (Third)* §40 illus. 4, §51 illus. 13. Edwards, who owned the mouth of the Great Onyx Cave, developed the cave as a tourist attraction. About one-third of the

cave was under Lee's land — 360 feet below the surface and inaccessible to Lee. 96 S.W.2d at 1030. The court did not find any damages; instead, it awarded one-third of the profits from the cave. "[W]e are led inevitably to the conclusion that the measure of recovery in this case must be the benefits, or net profits, received by the appellants from the use of the property of the appellees." *Id.* at 1032. Reviewing similar cases from various contexts, the court said: "The philosophy of all these decisions is that a wrong-doer shall not be permitted to make a profit from his own wrong." *Ibid.*

8. Conversion.

Similar facts can arise in conversion. *Restatement (Third)* §40 and reporter's note *d*. A well known example is *Olwell v. Nye & Nissen Co.*, 173 P.2d 652 (Wash. 1946). Defendant "borrowed" plaintiff's egg-washing machine, without authorization, and used it in his business for more than three years until discovered. Plaintiff had stored the machine in space adjacent to defendant's business, had no current use for it, and did not know it was missing. Defendant plausibly argued that plaintiff had suffered no loss.

The court said that the violation of plaintiff's rights was in itself an injury. *Id.* at 654. But the remedy it affirmed was restitution, not damages: the court awarded defendant's profits from using the machine. "To hold otherwise would be subversive of all property rights since his use was admittedly wrongful and without claim of right. The theory of unjust enrichment is applicable in such a case." *Ibid*; *Restatement (Third)* §40 illus. 17.

9. Rescission.

Rescission is another familiar restitutionary remedy that need not be accompanied by harm. If one party repudiates a contract, or substantially fails to perform, the other party is entitled to its money back, even if performance would have been worthless and contract damages would have been zero. *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604 (2000); *Restatement (Third)* §37 illus. 1. After reviewing the underlying principles, 530 U.S. at 607-08, the Court in *Mobil* turned to the facts. The government convincingly argued that Mobil had suffered no harm, but the Court said that did not matter.

> This argument, however, misses the basic legal point. The oil companies do not seek damages for breach of contract. They seek restitution of their initial payments. Because the Government repudiated the lease contracts, the law entitles the companies to that restitution whether the contracts would, or would not, ultimately have produced a financial gain or led them to obtain a definite right to explore. If a lottery operator fails to deliver a purchased ticket, the purchaser can get his money back — whether or not he eventually would have won the lottery.

Id. at 623-24.

10. The Slayer Rule.

If a person who would inherit property on the death of another feloniously kills that other person, the slayer does not get to keep the property he inherits. *Restatement (Third)* §45. The rule is the

same if the slayer would acquire the property through life insurance, joint tenancy, or any other means by which property passes at death. *Ibid.*

The property passes instead to the person next in line, usually the person who would have inherited the property if the slayer had predeceased the victim. §45(3). That person had no legally protected interest at common law, and very often, he has no compensable injury and no legally protected interest under the wrongful death act. He may be an adult child of the victim, a sibling, a nephew, or a third cousin once removed. If he was not financially dependent on the victim, and not on the short list of other potential plaintiffs listed in the wrongful death acts of some states, he cannot sue for damages. But he can recover the slayer's unjust enrichment.

It is unimaginable that this body of law, partly judge-made and partly statutory, would be held unconstitutional. Yet the cause of action is vested in a substitute heir or beneficiary who often has suffered no legally cognizable harm. The purpose of the cause of action is to deprive the slayer of his unjust gains, the claim is vested in the most appropriate plaintiff, and that plaintiff has a concrete personal stake in the litigation. The slayer's enrichment is at plaintiff's expense only in the sense that this plaintiff will inherit if the slayer cannot.

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The point of all these examples is that plaintiffs who suffered no harm beyond the violation of their legal rights can often sue to recover or prevent defendant's unjust enrichment. Large, diverse, and important areas of law would be thrown into confusion

by an opinion suggesting that an unjust enrichment plaintiff must establish harm to have standing to sue in federal court.

C. Some Torts Are Actionable for Damages Without Evidence of Harm Beyond the Violation of Plaintiff's Rights.

As respondent explains, many common-law claims are actionable for damages without harm in petitioner's apparent sense of the word. Resp. Br. 16-22. We offer additional examples and authorities. "[A]ny intrusion upon land in the possession of another is an injury, and, if not privileged, gives rise to a cause of action even though the intrusion is beneficial, or so transitory that it constitutes no interference with or detriment to the land or its beneficial enjoyment." *Restatement (Second) of Torts* §7 cmt. *a* (1965); *see also id.* reporter's note *d*; *id.* §158, §163; 1 Dan B. Dobbs *et al.*, *The Law of Torts* §56 at 149 (2d ed. 2011).

Similarly, the action for trespass to chattels will lie for temporary dispossession "although there has been no impairment of the condition, quality, or value of the chattel, and no other harm to any interest of the possessor," and "he is not deprived of the use of the chattel for any substantial length of time." *Restatement (Second) of Torts* §218 cmt. *d*.

False imprisonment is actionable if the plaintiff *either* "is conscious of the confinement or is harmed by it." *Id.* §35(1)(c).

Assault is to intentionally cause apprehension of either "a harmful or offensive contact." *Id.* §21(a). Battery can be either "a harmful or offensive contact with the person." *Id.* §18(1)(a). And as Professor Dobbs reads the cases, "offensive" means no more

than without actual or apparent consent. Dobbs, *Torts* §33 at 81-82. The touching is offensive because defendant overrode plaintiff's objection.

In each of these intentional torts to the person, plaintiff may "recover substantial as distinct from nominal damages" without proof of either physical harm or emotional distress. "The invasion of the plaintiff's rights is regarded as a harm in itself and subject to an award of damages." *Id.* §47 at 120.

D. These Causes of Action Long Predate the American Founding.

Some of these claims, without harm in petitioner's sense, long predate the American founding. *Keech v. Sandford*, *supra* at 8, holding a trustee liable for taking an opportunity that the trust could not have taken in any event, was decided in 1726. And the Chancellor treated the rule as already settled.

Whelpdale v. Cookson, 27 Eng. Rep. 856 (Ch. 1747), where a trustee was the high bidder at his own public sale, set aside the sale without proof of either harm to plaintiff or profit to the trustee. The facts are more fully stated in *Whelpdale v. Cookson,* 28 Eng. Rep. 440 (Ch. 1747), where the reporter says that "This doctrine is not confined to Trustees, but extends to Assignees under Commissions of Bankrupt, Solicitors, Agents, and in short all persons having a confidential character," citing numerous cases. *Id.* at 441.

The reporter also notes that the authority of *Whelpdale* had "been doubted" by Lord Eldon in *Ex parte Lacey*, 31 Eng. Rep. 1228, 1229 (Ch. 1802). Lord Eldon's "doubt" was that *Whelpdale* had not gone far enough. *Whelpdale* said that a majority of the creditors could ratify a sale to a trustee who bought at his

own sale. But Lord Eldon insisted that only unanimous consent of all the creditors could ratify such a sale.

The Chancellors discussed these cases as a recurring problem. Those who had been deprived of their right to undivided loyalty could sue without more, because proof of actual injury or profit was too difficult. As Lord Eldon explained:

> [The rule] is founded upon this; that though you may see in a particular case, that he has not made advantage, it is utterly impossible to examine upon satisfactory evidence in the power of the Court, by which I mean, in the power of the parties, in ninety-nine cases out of an hundred, whether he has made advantage, or not.

Lacey, 31 Eng. Rep. at 1229.

So the courts dispensed with proof of loss to plaintiff; they dispensed even with proof of gain to defendant. It was enough to support a cause of action that defendant violated a duty of loyalty.

E. Founding-Era Plaintiffs Could Recover Statutory Damages or Penalties Without Evidence of Harm.

Even more fundamentally at odds with petitioner's theory, statutes often enacted civil penalties for various wrongs. Private plaintiffs could recover these penalties in an action of debt. *Tull v. United States*, 481 U.S. 412, 418 (1987); F.W. Maitland, *The Forms of Action at Common Law* 52 (1968 reprint) (debt "serves for the recovery of statutory penalties").[3] The

[3] *Tull* cites *Calcraft v. Gibbs*, 101 Eng. Rep. 11 (K.B. 1792),

one "untranscendible limit" of an action of debt was that "the claim must be for a fixed sum." *Id.* at 51. Plaintiffs in such cases could recover only the fixed statutory sum; any actual damages were irrelevant.

The First Congress provided that copyright holders could recover, in an "action of debt," fifty cents for every infringing page found *in an infringer's possession*. An Act for the Encouragement of Learning §2, 1 Stat. 124, 124-25 (1790). So the remedy applied only to pages that had not been sold or distributed. Plaintiff could also recover and destroy these pages, *ibid*, so they never would be sold or distributed. So it is not just that no harm was required. Resp. Br. 22-23. These pages would never do harm, but plaintiff could recover the statutory sum in an action of debt.

Congress may have assumed that often there were other pages that had been sold, and that but for the lawsuit, some of the destroyed pages would have been sold. But Congress no doubt made similar assumptions about the harm of publishing false information about individuals. Both statutes may have presumed harm, but neither required evidence of harm.

F. Petitioner's Proposed Rule — Especially If Broadly Stated — Would Disrupt Large Bodies of Long-Established Law.

All these causes of action — for restitution without harm, for damages without harm, for statutory penalties without harm — were part of "the traditional concern of the courts at Westminster." Pet.

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and *Atcheson v. Everitt*, 98 Eng. Rep. 1142 (K.B. 1775); *see also* Theodore F.T. Plucknett, *A Concise History of the Common Law* 363 (5th ed. 1956) (debt lay "to enforce various statutory penalties"); *id.* at 633 (same).

Br. 18. They present traditional cases and controversies.

Petitioner rejects standing for any plaintiff who suffers no harm beyond the violation of his legal rights. This argument directly jeopardizes all statutes that provide minimum statutory recoveries. The danger to the law of restitution and unjust enrichment lies in the potential breadth of an opinion adopting petitioner's formulation of standing rules.

Broadly stating petitioner's rule would overturn centuries of Anglo-American law. All the cases discussed above would appear to be barred from federal court if this Court adopts petitioners' argument. Where a restitution plaintiff could establish harm, the claim could proceed — but requiring such proof in a claim for restitution of unjust enrichment would fundamentally change the lawsuit, adding a previously irrelevant issue to every plaintiff's burden of proof.

Many federal claims would be barred or fundamentally changed — claims to recover bribes paid to federal employees; claims for infringement of copyright, trademark, and design patents; claims to recover the profits of insider trading; claims to recover insiders' short-term profits; and more. Many state-law claims would be barred from the diversity jurisdiction.

Many states have similar standing rules for litigation in state court, often following or visibly influenced by this Court's decisions.[4] Defendants would argue the persuasive value of this Court's

[4] A Westlaw search on September 4, 2015 revealed 749 state supreme court opinions discussing "standing" and "injury in fact" in the same paragraph.

decision in state court; every state would have to decide whether to preserve the traditional rules of restitution and unjust enrichment or to follow this Court's lead and bar many such claims. Of course this Court is not responsible for state law. But the Court should think carefully before it bars many state-law claims from federal court and throws large swathes of state law into potential chaos.

II. The Requirements of Standing Necessarily Depend on the Relief Plaintiff Seeks.

A plaintiff must show "that he has standing for each type of relief sought." *Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983)). This is because the relevant personal stake necessarily varies with the type of relief sought. There is no uniform rule of standing that applies without change to every type of relief.

A. Standing in Suits for Damages and Injunctions.

In *Lyons*, plaintiff suffered damages when a policeman choked him, so he had standing to sue for damages. But he was not sufficiently threatened with a repetition to have standing to sue for an injunction.

Many cases are the reverse. A plaintiff who is threatened with unlawful conduct has standing to sue for an injunction, but no standing to sue for damages, because his rights have yet not been violated. Threatened violation of a legal right is not injury in fact until or unless the right is actually violated. Plaintiffs in such cases have standing to sue for an injunction or declaratory judgment because they are threatened with injury that the court can prevent. *See, e.g., Med-*

Immune, Inc. v. Genentech, Inc., 549 U.S. 118 (2007).

B. Standing in Suits for Restitution and Unjust Enrichment.

Just as standing to sue for damages is different from standing to sue for an injunction, so standing to sue for restitution of unjust enrichment is different from either. Because claims for unjust enrichment are based on defendant's gains rather than plaintiff's losses, a focus on harm asks the wrong question. The basis for standing in claims for restitution of unjust enrichment is that defendant was enriched "at the expense of" plaintiff, either in the sense of a corresponding loss to plaintiff and gain to defendant, or in the sense that defendant's profits were derived from a violation of plaintiff's legally protected rights. *Supra* at 5.

This Court considered the standing question in *Gollust v. Mendell*, 501 U.S. 115 (1991). *Gollust* was a suit to recover a corporate insider's short-term trading profits under §16(b) of the Securities and Exchange Act, 15 U.S.C. §78p(b). The statute authorizes the issuer whose securities are illegally traded to recover these profits, and it authorizes holders of that issuer's securities to recover the profits on behalf of the issuer if the issuer fails to act.

It is unlikely that the issuer is harmed when one of its officers or major shareholders buys and sells in a six-month period, and even less likely that any individual security holder is harmed. Certainly no plaintiff is required to allege harm. The issuer has standing to sue because the statute creates the right; the statute creates the right because of the substantial risk that defendant misused the issuer's confi-

dential information to produce his profits. Shareholders have standing on the general principles of derivative suits.

Gollust held that a derivative plaintiff in a §16(b) suit must continue to hold his securities in the issuer throughout the litigation. Otherwise, he would not have the necessary "personal stake" in the lawsuit that is essential to Article III standing. 501 U.S. at 125-26. But this "personal stake" was not a matter of the derivative plaintiff establishing a likelihood, or even a possibility, that he was harmed. Plaintiff's "personal stake" was that "respondent still stands to profit, albeit indirectly, if this action is successful." *Id.* at 128. "[H]e retains a continuing financial interest in the outcome of the litigation derived from his stock in International's sole stockholder, Viacom, whose only asset is International." *Id.* at 127-28. The decision was unanimous.

To have standing to sue on a restitutionary claim for defendant's wrongful profits, plaintiff had to have a personal stake in recovering *defendant's profits* — not a personal stake in his own non-existent losses. Claims in restitution and unjust enrichment are based on defendant's gains, and standing depends on plaintiff's personal stake in those gains.

It does not follow that just anybody can create a personal stake by suing to recover a stranger's unjust enrichment. The requirement that defendant's gains be at plaintiff's expense is deeply embedded in the law of restitution. It appears in the black letter of §1 of the *Restatement (Third)*, and in the formulation of nearly every substantive rule of restitution and unjust enrichment. Even in the exceptional case of the slayer rule, courts carefully identify the appropriate plaintiff

entitled to inherit in lieu of the slayer — a choice that is easy in most cases but difficult in a few. *Restatement (Third)* §45(3) & cmt. *d*. Only that plaintiff can sue. Self-appointed plaintiffs without a personal stake cannot sue.

These rules requiring identification of the source of defendant's enrichment, or the appropriate heir in the slayer-rule cases, control who can be a plaintiff. Usually lawyers and judges think of these rules as simply part of the substantive law of restitution and unjust enrichment — just as in compensatory damages cases, they are more likely to think of the requirement that plaintiff suffer damages as part of his substantive claim than as a standing rule.

But when the wrong plaintiff tries to sue, or when an unusual plaintiff asserts that special circumstances give him the right to sue, then the court may talk about the identity of the restitution plaintiff in terms of standing. An example is *Fuchs v. Bidwill*, 359 N.E.2d 158 (Ill. 1976), where the court held that citizens and taxpayers lacked standing to sue on behalf of the state for restitution of corrupt profits allegedly earned by state legislators. *Id.* at 162. The state could have sued, but individual citizens and taxpayers could not.

Standing to sue depends on the "type of relief" sought. *Summers*, 555 U.S. at 493. The proper rule of standing in claims for restitution of unjust enrichment is that plaintiff have a personal stake in defendant's gains, and in all but the exceptional case of the slayer rule, that defendant's gains were acquired by violating plaintiff's legal rights.

C. Standing in Claims Specific to an Individual Plaintiff or General to the Whole Public.

Restitution claims without harm, and tort claims without harm, are examples of standing based on violation of an individual legal right that is specific, or "particularized," to the plaintiff. *Lujan*, 504 U.S. at 560. In such a case, there is individualized injury in the loss of plaintiff's individualized right.

The search for some injury or harm *beyond* the alleged violation developed in public-law cases where plaintiffs challenged government policies that did not actually apply to them. Thus in *Summers*, plaintiff sued to enjoin implementation of certain rules by which the Forest Service managed the national forests. In *Lujan*, plaintiffs challenged the government's failure to protect endangered species outside the United States. In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), the Court held that a private plaintiff's standing to recover damages suffered *by the government* depended on an implicit assignment from the government. But here too, plaintiff alleged only that a state agency had misreported labor costs to the federal government. *Id.* at 770. In these and many similar public-law cases, the challenged rule or practice did not regulate plaintiffs or interfere with any individualized right of plaintiffs. No right in any way personal or specific to plaintiffs had been violated. *See* Resp. Br. 35, 37.

Where the alleged violation is in no way personal to plaintiff, the Court's cases require plaintiff to show that the violation caused a further individualized injury that *is* personal to plaintiff. Otherwise, plaintiff

would have no more standing to sue than any other American, and the concern with courts exercising a general power to supervise the political branches would be at its maximum. Congress cannot by statute confer on individuals the right to assert generalized grievances or enforce public rights that belong to the people as a whole. *Lujan*, 504 U.S. at 573-74, 578. That is the principle on which petitioner relies. But this case does not fit within the principle.

What Congress *can* do is create new and individualized "legal rights, the invasion of which creates standing." *Warth v. Seldin*, 422 U.S. 490, 500 (1975). The "injury in fact" that is "the irreducible constitutional minimum of standing" is "*invasion of a legally protected interest* which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (emphasis added; quotation marks omitted); *see* Resp. Br. 25.

We know petitioner understands the significance of this definition — because they changed it in their opening quotation. Petitioner substituted "harm" for "invasion of a legally protected interest," placing "harm" just outside the quotation marks. Pet. Br. 2. But *Lujan* requires only "an invasion of a legally protected interest which is (a) concrete and particularized." 504 U.S. at 560. It does not require additional or consequential harm.

Respondent claims a particularized statutory right not to have false consumer-credit information published *about him*. The statute imposes liability for "willfully" failing to use "reasonable procedures to assure maximum possible accuracy of the information *concerning the individual* about whom the report relates." 15 U.S.C. §1681n(a), §1681e(b) (emphasis

added). This right is "concrete and particularized," and allegedly, it has been willfully violated. False consumer-credit information about respondent, published in violation of that right, is injury in fact. This Court's cases require no more. Petitioner cites no case in which the Court held that loss of such an individualized and personal right is insufficient to confer standing.

There is an unambiguous holding in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), where a tester inquired about the availability of apartments in defendant's complex. As respondent explains, Resp. Br. 27-28, the decision rested squarely on the statutory violation. "A tester who has been the object of a misrepresentation made unlawful under § 804(d) has suffered injury in precisely the form the statute was intended to guard against, and therefore has standing …." 455 U.S. at 373-74. The Court did not require some *additional* "concrete harm" to follow from loss of that statutory right. Plaintiff did not want an apartment and had no use for truthful information. Petitioner's claim that the case depends on some special rule about "discrimination" as inherently injurious, whether or not it has any further consequences, Pet. Br. 41, has no basis in the opinion. What the Court unanimously held is that loss of an individualized statutory right, without more, is injury in fact.

There is a less pointed illustration in *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013). Plaintiffs alleged that government surveillance of foreigners created a substantial risk that plaintiffs' international communications would be unconstitutionally intercepted. The Court held that this risk was too speculative to support standing. But the issue was

simply the certainty or substantiality of the threat that a communication would be intercepted. The Court did not suggest that an individual whose communications were sufficiently threatened with interception would also have to show that he would suffer some further harm *resulting from* that interception. The Fourth Amendment right to security in one's own communications is an individualized right, and violation of that right would be injury in fact.

Just as Congress can enact new individualized rights, so it can make those rights enforceable. Where compensatory damages are often small or hard to quantify, legislatures may authorize statutory minimum damages so that individuals will have a workable remedy when their rights are violated. Standing in such cases depends on a claim that plaintiff's individualized right was violated — that he lost that to which he was personally entitled under the statute — and that he satisfies any other prerequisites to the statutory remedy. The prerequisites to standing to seek this statutory remedy depend on the elements of the statutory claim, just as the prerequisites to standing to seek compensatory damages, injunctions, or restitution depend on the elements of those claims. What standing for all these remedies has in common is an actual or threatened "invasion of a legally protected interest which is … concrete and particularized." *Lujan*, 504 U.S. at 560.

III. Petitioner Obfuscates What It Means by Injury and Harm.

Petitioner argues that plaintiffs who suffer no "concrete harm" have no standing to sue in federal court, even if their individual rights were violated. But petitioner never defines "harm." Petitioner obfus-

cates the meanings of "injury" and "harm" in unsuccessful efforts to hide the radical implications of its proposed rule and to distinguish the many cases that do not fit that rule.

Petitioner tries to explain away a few of the causes of action reviewed in part I of this brief. It ignores all the others. The heart of its argument is that loss of plaintiff's statutory right, without more, is not "concrete harm." Pet. Br. 14-17.

But then petitioner says that violation of rights under a contract, without more, *is* concrete harm. *Id.* at 26. Violation of rights under a trust, without more, *is* concrete harm. *Ibid.* Petitioner's apparent reason is that these rights were created by judges, not legislatures.

And then petitioner concedes that some *statutory* rights are also actionable without any harm beyond the violation of the right. Petitioner says that infringement of copyrights and patents, without more, is concrete harm, because those statutory rights built on older common-law rights. *Id.* at 46 n.9, 49. Petitioner appears to concede that plaintiffs under the Freedom of Information Act need show only that they "sought and were denied specific agency records" — not that failure to get the records would cause some further harm. *Id.* at 43 (quoting *Public Citizen v. United States Department of Justice*, 491 U.S. 440, 449 (1989)). That statutory right is said to build on mandamus. Pet. Br. 44.

But when Congress creates a new right not sufficiently "rooted in the common law," that is a mere "fiat." *Id.* at 16, 46 n.9, 49. Loss of that statutory right is not an injury; plaintiffs must show some further

harm, apparently some consequential damage from the loss of their statutory right.

Nothing underlies this distinction between common-law and statutory rights but hostility to Congress. Judges create real rights, loss of which is an injury, but the elected representatives of the people cannot create such rights. This distinction has no possible justification. "[T]here is absolutely no basis for making the Article III inquiry turn on the source of the asserted right." *Lujan*, 504 U.S. at 576.

Petitioner is forced to offer other ad hoc distinctions as well. It says that trespass to land is actionable without concrete harm because repeated trespasses might eventually create an easement. Pet. Br. 25-26. But plaintiff can recover for a single trespass; proof that defendant threatens to repeat the trespass is required only if plaintiff seeks an injunction. *See* Dobbs, *Torts*, §56 at 148-49. The prospect of continued controversy is sometimes what motivates plaintiff to sue, but continuing controversy has never been a prerequisite to the claim.

To explain damages for loss of the right to vote, petitioner implausibly claims that voting is a property right. Pet. Br. 25; *but see* Resp. Br. 18-19.

Petitioner misdescribes *Havens Realty*, emphasizing a harm the Court never mentioned to avoid recognizing the loss of the statutory right to truthful information that the Court relied on. *See supra* at 30.

Petitioner also misstates *Carey v. Piphus*, 435 U.S. 247 (1978), implying that standing to sue for nominal damages depended on plaintiffs' allegations that they lost "educational benefits" when they were suspended from school without due process. Pet. Br. 46 n.9. Not

so. If a hearing would have prevented plaintiffs' suspensions, they could have recovered actual "damages to compensate them for the injuries caused by the suspensions." 435 U.S. at 260. Nominal damages were authorized on the explicit assumption that there was no such loss. *Id.* at 266. "[T]he denial of procedural due process should be actionable for nominal damages without proof of actual injury." *Ibid.* Violation of plaintiffs' individualized right to due process — and nothing more — supported the claim.

To mask the radical implications of its proposed rule, petitioner finds harm in bare violations of law in various cases that it cannot distinguish — contract, trust, trespass, patent, copyright, discrimination, FOIA. Petitioner concedes that violation of these legal rights, without more, is concrete harm and injury in fact.

But petitioner cannot explain why violation of respondent's individualized right is not injury in just the same way. Respondent alleges that petitioner willfully failed to follow reasonable procedures to assure the accuracy of its information and that consequently, it published "information" that specifically, individually, and falsely described respondent. Congress created a statutory right that protects individuals from such false publications about them; violation of that right is an injury in fact. All that petitioner ultimately appears to say is that legislatively created rights are an inferior set of rights that do not count.

There is no difference in the magnitude of the interests at stake. An individual may well care more about Spokeo publishing false but arguably positive credit and employment information about him to the

whole world than he cares about a trespasser's harmless entry upon his land. An applicant can lose the job for being over-qualified; a suitor can lose a woman if she reads that he is married. When all the obfuscation and fallacious distinctions are stripped away, petitioner's argument boils down to hostility to Congress and to its view that the individual right Congress created is not worth protecting. This is an objection to the statutory remedy. It is not an argument about standing.

CONCLUSION

The judgment below should be affirmed. And the Court's opinion should take care to preserve the long-established law of restitution and unjust enrichment.

Respectfully submitted,

Doug Rendleman
Washington & Lee
School of Law
1 Denny Circle
Lexington, VA 24450
540-458-8934
rendlemand@wlu.edu

Douglas Laycock
University of Virginia
School of Law
580 Massie Road
Charlottesville, VA 22903
434-243-8546
dlaycock@virginia.edu
Counsel of Record

Mark P. Gergen
University of California
School of Law
215 Boalt Hall
Berkeley, CA 94720
510-643-9577
mgergen@law.berkeley.edu

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APPENDIX

Identifying the Amici

The following individuals have joined as amici in this brief:

Mark P. Gergen is the Robert and Joann Burch D.P. Professor of Tax Law and Policy at the University of California-Berkeley and the American Editor of the *Restitution Law Review*. He was an Adviser to the *Restatement (Third) of Restitution and Unjust Enrichment*.

Andrew Kull is Distinguished Senior Lecturer at the University of Texas at Austin and has published many scholarly articles on restitution. He was the Reporter for the *Restatement (Third) of Restitution and Unjust Enrichment*.

Douglas Laycock is the Robert E. Scott Distinguished Professor of Law at the University of Virginia, Alice McKean Young Regents Chair in Law Emeritus at the University of Texas, First Vice President of the American Law Institute, and editor of *Modern American Remedies* (4th ed. 2010). He was an Adviser to the *Restatement (Third) of Restitution and Unjust Enrichment*.

Colleen P. Murphy is Professor of Law at Roger Williams University. She has published scholarly articles on remedies and restitution and served on the Members Consultative Group for the *Restatement (Third) of Restitution and Unjust Enrichment*.

Phil C. Neal is former Dean of the University of Chicago Law School and a partner in Neal, Gerber, & Eisenberg, LLP. He was an Adviser to the *Restatement (Third) of Restitution and Unjust Enrichment*.

Doug Rendleman is the Huntley Professor of Law at Washington & Lee University and senior editor of Doug Rendleman & Caprice Roberts, *Remedies* (8th ed. 2011). He was an Adviser to the *Restatement (Third) of Restitution and Unjust Enrichment*.

Caprice Roberts is Professor of Law at Savannah Law School and co-editor of Doug Rendleman & Caprice Roberts, *Remedies* (8th ed. 2011). She served on the Members Consultative Group for the *Restatement (Third) of Restitution and Unjust Enrichment*.

Chaim Saiman is Professor of Law at Villanova University. He has published scholarly articles on restitution and unjust enrichment.

Emily L. Sherwin is the Frank B. Ingersoll Professor of Law at Cornell University and co-editor of *Ames, Chafee, and Re on Remedies*. She was an Adviser to the *Restatement (Third) of Restitution and Unjust Enrichment*.

Michael Traynor is President Emeritus and Chair of the Council Emeritus of the American Law Institute and Senior Counsel at Cobalt LLP. He was an Adviser to the *Restatement (Third) of Restitution and Unjust Enrichment*.