Justiciability — Class Action Standing — Spokeo, Inc. v. Robins

In 1992, the Supreme Court laid out the contours of modern constitutional standing doctrine in *Lujan v. Defenders of Wildlife*.[1] To have a justiciable case or controversy under Article III, a plaintiff must have, among other things, suffered an injury in fact.[2] The *Lujan* Court stated that such injury "may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'"[3] Yet in the decades since *Lujan*, federal circuit courts have divided over whether a statutory violation, in and of itself, may suffice for injury in fact.[4] Last Term, in *Spokeo, Inc. v. Robins*,[5] the Court held that a plaintiff cannot satisfy Article III standing through allegation of a bare procedural violation of a statute and remanded the case for the lower court to identify an accompanying concrete harm.[6] *Spokeo*'s pronouncement follows logically from the Court's oft-repeated refrain that Congress cannot erase Article III requirements by statute alone. But the Court's failure to take into consideration the specificity of the private right of action provided ultimately belied standing doctrine's underlying purposes, illuminating a category of cases in which the judiciary should respect the judgment of Congress in defining injury in fact. More immediately, *Spokeo* destabilizes the enforcement schemes of a number of analogous statutes featuring particularized private rights of action and hampers class certification efforts under such statutes.

Spokeo is an online "people search engine" that collects information from a variety of databases and provides in-depth consumer reports.[7] This information is marketed to human resource departments and romantic suitors, among others, for screening purposes.[8] Thomas Robins, an unemployed resident of Virginia, discovered inaccurate information about himself on Spokeo's website.[9] Robins's Spokeo profile featured an incorrect photograph and stated that he was a married parent in his fifties who worked in a professional field and had a

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[1] 504 U.S. 555 (1992).

[2] To satisfy standing, the plaintiff must have (1) suffered an injury in fact, (2) fairly traceable to the challenged conduct of the defendant and (3) likely to be redressed by a favorable judicial decision. *See id.* at 560–61.

[3] *Id.* at 578 (quoting Warth v. Seldin, 422 U.S. 490, 500 (1975)).

[4] *Compare, e.g.*, Edwards v. First Am. Corp., 610 F.3d 514, 517 (9th Cir. 2010) (statutory violation itself sufficient), *with* David v. Alphin, 704 F.3d 327, 338–39 (4th Cir. 2013) (statutory violation alone insufficient).

[5] 136 S. Ct. 1540 (2016).

[6] *Id.* at 1549–50.

[7] *Id.* at 1544.

[8] *Id.* at 1546.

[9] First Amended Complaint at 2, 7, Robins v. Spokeo, Inc., No. CV10–05306, 2011 WL 1793334 (C.D. Cal. May 11, 2011).

graduate degree, robust "economic health," and a "wealth level in . . . the 'Top 10%'" — all of which was inaccurate.[10] Robins alleged that this information caused harm to his employment prospects, which in turn caused him increased anxiety and stress.[11] He filed a class action[12] alleging violations of the Fair Credit Reporting Act[13] (FCRA) including that Spokeo had failed to "follow reasonable procedures to assure maximum possible accuracy of" consumer reports,[14] notify providers and users of their responsibilities under the FCRA,[15] and post a toll-free number for consumers to request reports.[16] Robins invoked the FCRA's private right of action to file suit.[17]

The District Court dismissed the case, concluding that Robins lacked standing under Article III because the alleged harm to his employment prospects was "speculative, attenuated and implausible."[18] The Ninth Circuit reversed and remanded.[19] Writing for the panel, Judge O'Scannlain[20] relied on circuit precedent to argue that violation of a private statutory right is "usually a sufficient injury in fact to confer standing."[21] The panel explicitly recognized that Congress's ability to confer standing was limited by the Constitution.[22] However, as *Lujan* stated, Congress was permitted to "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law."[23] According to the court, that is exactly what happened in this instance, for two reasons: "First, [Robins] allege[d] that Spokeo violated *his* statutory rights, not just the statutory rights of other people."[24] Second, the statutory right at issue protects against

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[10] *Id.* at 7.

[11] *Id.* at 8.

[12] *Id.*

[13] 15 U.S.C. §§ 1681–1681x (2012).

[14] *Id.* § 1681e(b).

[15] *Id.* § 1681e(d).

[16] *Id.* § 1681j(a)(1)(C)(i).

[17] First Amended Complaint, *supra* note 9, at 13, 14 (citing 15 U.S.C. § 1681n).

[18] Robins v. Spokeo, Inc., No. CV10–05306, 2011 WL 11562151, at *1 (C.D. Cal. Sept. 19, 2011). The court dismissed Robins's initial complaint because he had not alleged "any actual or imminent harm." Robins v. Spokeo, Inc., No. CV10–05306, 2011 WL 597867, at *1–2 (C.D. Cal. Jan. 27, 2011). Robins then amended his complaint to include allegations of employment, stress, and anxiety injuries. First Amended Complaint, *supra* note 9, at 7. The court initially found Spokeo's "marketing of inaccurate consumer reporting information" to be a valid injury in fact. Robins v. Spokeo, Inc., No. CV10–05306, 2011 WL 1793334, at *2 (C.D. Cal. May 11, 2011). However, after Spokeo sought an interlocutory appeal, the district court reversed its ruling and dismissed the case. *Robins*, 2011 WL 11562151, at *1.

[19] Robins v. Spokeo, Inc., 742 F.3d 409, 414 (9th Cir. 2014).

[20] Judge O'Scannlain was joined by Judges Graber and Bea.

[21] *Robins*, 742 F.3d at 412 (citing Edwards v. First Am. Corp., 610 F.3d 514, 517 (9th Cir. 2010); Fulfillment Servs. Inc. v. United Parcel Serv., Inc., 528 F.3d 614, 619 (9th Cir. 2008)).

[22] *See id.* at 413.

[23] *Id.* (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 578 (1992)).

[24] *Id.*

individual, rather than collective, harm.[25] In a critically important footnote, Judge O'Scannlain added that the panel need not decide "whether harm to [Robins's] employment prospects or related anxiety" could qualify as injury in fact because the alleged violation of Robins's statutory rights sufficed for standing.[26]

The Supreme Court vacated and remanded.[27] Writing for the Court, Justice Alito[28] stressed that, in order to satisfy constitutional standing, a plaintiff must show that they suffered injury in fact: an invasion of a legally protected interest that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical."[29] The Court clarified that particularization and concreteness were two separate necessary conditions: an injury must "affect the plaintiff in a personal and individual way"[30] and must *also* be "real, and not abstract."[31] Justice Alito cautioned that both tangible and intangible injuries could satisfy the concreteness requirement.[32] In the case of the latter, he noted that it is important to consider whether an alleged intangible harm bears resemblance to a harm that has historically been considered a legitimate basis for suit.[33] Congress's judgment is also particularly instructive because, as *Lujan* noted, Congress may elevate concrete, de facto injuries into legally cognizable injuries by defining the injury and articulating a chain of causation.[34] However, Justice Alito underscored that injury in fact is not automatically satisfied whenever a statute grants a statutory right and authorizes a person to sue to vindicate that right; a plaintiff may not merely allege a "bare procedural violation" of a statute.[35] Rather, to confer standing, the statutory violation must be accompanied by a concrete injury.[36] Still, Justice Alito qualified, a risk of real harm may suffice as concrete and, in these instances, the violation of a procedural right can qualify as injury in fact absent additional harm.[37]

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[25] *Id.* The court followed the same two-step analysis employed by the Sixth Circuit addressing the same issue in *Beaudry v. TeleCheck Services, Inc.*, 579 F.3d 702, 707 (6th Cir. 2009).

[26] *Robins*, 742 F.3d at 414 n.3.

[27] *Spokeo*, 136 S. Ct. at 1550.

[28] Justice Alito was joined by Chief Justice Roberts and Justices Kennedy, Thomas, Breyer, and Kagan.

[29] *Spokeo*, 136 S. Ct. at 1548 (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992)).

[30] *Id.* (quoting *Lujan*, 504 U.S. at 560 n.1).

[31] *Id.* (internal quotations omitted).

[32] *Id.* at 1549.

[33] *Id.*

[34] *Id.* (citing *Lujan*, 504 U.S. at 578; *id.* at 580 (Kennedy, J., concurring in part and concurring in the judgment)).

[35] *Id.*

[36] *Id.*

[37] *See id.*

Applying these principles to the case at hand, Justice Alito concluded that Robins could not satisfy Article III by alleging a bare procedural violation of the FCRA that may result in no harm — for example, an incorrect zip code.[38] The Court held, therefore, that the Ninth Circuit's inquiry was incomplete and "failed to fully appreciate the distinction between concreteness and particularization."[39] Although the panel considered the particularity of the procedural violation, it failed to consider whether such violations entailed "a degree of risk sufficient to meet the concreteness requirement."[40] The Court vacated the judgment and remanded the case, taking no position on whether the Ninth Circuit's ultimate conclusion was correct.[41]

Justice Thomas concurred.[42] Although he joined the Court's opinion in full, he wrote separately to explain how the injury-in-fact requirement has applied differently depending on the nature of the right at stake.[43] Historically, common law courts exercised broad authority to adjudicate suits involving the violation of private rights. In these instances, Justice Thomas explained, the risk of the judiciary encroaching upon the province of the political branches is "generally absent."[44] Accordingly, courts historically "presumed that the plaintiff suffered a *de facto* injury merely from having his personal, legal rights invaded," and the plaintiff was not required to allege any additional harm.[45] On the other hand, suits seeking to vindicate public rights were generally reserved for the government unless the plaintiff was able to allege special, individualized damage.[46] Justice Thomas then connected these principles to modern standing doctrine: when a plaintiff sues to vindicate a public right, the plaintiff must allege concrete and particularized harm distinct from the general population — an injury in fact.[47] However, Justice Thomas argued that a plaintiff invoking a private right, including one created by statute, need not allege an injury beyond the invasion of that private right.[48] As a consequence, Justice Thomas concluded that Robins had no standing to sue Spokeo for "violations of the duties that Spokeo owes to the public collectively," such as the requirement to post a toll-free number.[49] However, the

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[38] *Id.* at 1550.
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.* (Thomas, J., concurring).
[43] *Id.*
[44] *Id.* at 1551.
[45] *Id.*
[46] *Id.* at 1551–52.
[47] *Id.* at 1552.
[48] *Id.* at 1553.
[49] *Id.*

statutory requirement "to assure maximum possible accuracy of the information concerning the individual about whom the report relates" could be read to create a private right.[50] Therefore, Justice Thomas encouraged the Ninth Circuit to consider the nature of this claim and whether it created a private duty owed personally to Robins.[51]

Justice Ginsburg dissented.[52] Justice Ginsburg agreed with much of the Court's rationale but argued that Robins's allegations were sufficiently concrete to confer standing.[53] Robins was not seeking redress for a generalized grievance common to the citizenry, but rather misinformation specifically about him.[54] Far from a bare procedural violation, Justice Ginsburg argued, Robins alleged misinformation about his education, family, wealth, and other topics that could affect his employment search by making him appear overqualified and expectant of a higher salary.[55] Therefore, the dissent saw no use in remanding the case for analysis of what was already clear in Robins's complaint — actual harm to Robins's employment prospects.[56]

On its surface, *Spokeo* follows necessarily from the principles of *Lujan* and related precedent. The Court has on multiple occasions recognized that the injury-in-fact requirement — the presence of a preexisting, concrete injury — circumscribes Congress's ability to confer Article III standing. For the Ninth Circuit to grant Robins standing by virtue of the violation of his statutory rights alone would then seem to impermissibly lift any remaining Article III constraint on Congress. But the Court failed to take into account an important difference between *Lujan* and *Spokeo*: while the private right of action in the former case allowed "any person" to bring suit, the FCRA enabled only the individual aggrieved by the consumer reporting agency to sue. This particularization, specific to an aggrieved party, significantly mitigates the separation of powers concerns that standing doctrine addresses and highlights an instance in which Article III's standing requirement should be understood to track the will of Congress.

At first glance, *Spokeo* is nothing more than an application of the Court's modern standing doctrine. The Court had already made clear that injury in fact is a floor of Article III jurisdiction — a constitutional constraint that cannot be satisfied by statute alone.[57] Although deprivation of a procedural right may constitute injury in fact, the proce-

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[50] *Id.* at 1553–54 (emphasis omitted) (quoting Fair Credit Reporting Act, 15 U.S.C. § 1681e(b) (2012)).

[51] *Id.* at 1554.

[52] Justice Ginsburg was joined by Justice Sotomayor.

[53] *Spokeo*, 136 S. Ct. at 1554–55 (Ginsburg, J., dissenting).

[54] *Id.* at 1555.

[55] *Id.* at 1556.

[56] *Id.*

[57] *See, e.g.*, Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997).

dural right must protect a concrete interest impacted by the alleged conduct.[58] Otherwise, the plaintiff is left with "a procedural right *in vacuo* . . . insufficient to create Article III standing."[59] Ultimately, then, while Congress can create standing where it did not exist, it must build off a "concrete, *de facto*" injury predating the statute.[60] The Ninth Circuit correctly understood that its task was to identify "concrete, *de facto* injuries" that Congress was empowered to elevate in this instance.[61] Yet, the Ninth Circuit resolved this question through analysis of the statute alone, emphasizing that the statutory rights violated were unique and particularized to Robins.[62] There is circularity to this logic: if the outer bound of Congress's authority is the existence of a "concrete, *de facto*" injury, then Congress should not be able to manufacture such injury itself. If this were the case, there would be no independent Article III limit on Congress whatsoever. The Court was therefore consistent with its recent precedent in instructing the Ninth Circuit to examine the concrete interests that underlay the statutory violations. And the Court's decision not to undertake this task itself likely indicates that the broad majority coalition's agreement went only so far as these well-established principles.[63]

Yet it is difficult to see how *Spokeo* serves standing doctrine's broader principles, despite its disciplined application of precedent. Standing limitations primarily serve separation of powers ends by ensuring that the judiciary serves its traditional role of deciding cases and controversies, while avoiding political disputes more appropriately left for the legislative and executive branches.[64] Although law has evolved in complexity over the years, Chief Justice Marshall's proclamation that "[t]he province of the court is, solely, to decide on the rights of individuals" continues to carry weight.[65] Accordingly, Article III standing requires a particularized injury in fact that extends beyond the generalized interest of all members of the public in proper application of the law.[66] As the *Lujan* Court famously explained, "[t]o permit Congress to convert the undifferentiated public interest in ex-

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58 *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 573 n.8 (1992).

59 *See* Summers v. Earth Island Inst., 555 U.S. 488, 496 (2009).

60 *See Lujan*, 504 U.S. at 578.

61 *See* Robins v. Spokeo, Inc., 742 F.3d 409, 413 (9th Cir. 2014) (quoting *Lujan*, 504 U.S. at 578).

62 *See id.* at 413–14.

63 *See* Adam Klein, *Thoughts on the Opinion in* Spokeo v. Robins, LAWFARE (May 16, 2016, 3:08 PM), https://www.lawfareblog.com/thoughts-opinion-spokeo-v-robins [https://perma.cc/UAL2-NQPA].

64 *See, e.g.*, *Summers*, 555 U.S. at 492; Warth v. Seldin, 422 U.S. 490, 498 (1975).

65 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803); *see also, e.g.*, Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357, 376 (1997) (recognizing that "a plaintiff customarily alleges violations of private rights, while . . . public right[s] [are] enforced by the government").

66 *See, e.g.*, United States v. Richardson, 418 U.S. 166, 175 (1974).

ecutive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'"[67]

It is easy to see how this principle applied in *Lujan* to the citizen-suit provision of the Endangered Species Act (ESA), which provided that "*any person* may commence a civil suit on his own behalf . . . to enjoin any person . . . who is alleged to be in violation of any provision of this chapter."[68] This is the critical difference between *Lujan* and *Spokeo*. While many of Robins's auxiliary claims can be readily dismissed as concerning purely regulatory violations under *Lujan*'s reasoning, the gravamen of his suit was an alleged violation of § 1681e(b), which provides, "[w]henever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information *concerning the individual about whom the report relates*."[69] As Justice Thomas highlighted, this provision can be understood to establish a duty towards particular aggrieved individuals, rather than a general regulatory duty.[70] And Justice Thomas's suggestion is further bolstered by the statutory text establishing the private right of action, not discussed in his opinion — § 1681n of the FCRA declares, "[a]ny person who willfully fails to comply with any requirement imposed under this subchapter *with respect to any consumer* is liable *to that consumer*."[71] From these provisions, it is clear that only a consumer about whom the credit reporting agency has published false information may sue for damages under the statute. In this way, the FCRA's private right of action fundamentally differs from the citizen-suit provision of the ESA — it does not allow for the sorts of generalized grievances disfavored by the Court's injury-in-fact jurisprudence. Instead, this focused scheme of privatized enforcement, intended to create and protect an individual right, poses little threat to the Executive's Take Care prerogative.[72]

It remains true, of course, that the individual right at issue was a creation of Congress, existing solely by virtue of statute. But the Court has failed to explain why that should be dispositive when the

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[67] Lujan v. Defs. of Wildlife, 504 U.S. 555, 577 (1992) (quoting U.S. CONST. art. II, § 3).

[68] Endangered Species Act, 16 U.S.C. § 1540(g)(1) (2012) (emphasis added).

[69] Fair Credit Reporting Act, 15 U.S.C. § 1681e(b) (2012) (emphasis added). The Court has established that standing is to be determined with regards to both a particular plaintiff and a particular claim. *See* Allen v. Wright, 468 U.S. 737, 752 (1984).

[70] *Spokeo*, 136 S. Ct. at 1553–54 (Thomas, J., concurring).

[71] 15 U.S.C. § 1681n(a) (emphasis added).

[72] *See* F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 318 (2008) ("In private rights cases, the plaintiff is not alleging a grievance suffered generally by the public, but rather the personal violation of an individual right. Such plaintiffs represent their own interests, not those of the public." (footnotes omitted)).

underlying separation of powers concerns are diminished. In the absence of such reasoned justification, separation of powers principles should instead require the judiciary to respect the policy judgment of Congress[73] and protect individual rights from unlawful intrusion.[74] And, as Justice Thomas explained, courts historically have done exactly that;[75] as Robins pointed out to the Court, Justice Story once even wrote that "[e]very violation of a right imports some damage, and if none other be proved, the law allows a nominal damage."[76]

The individualized nature of the congressionally created right casts *Spokeo*'s novelty in particularly harsh relief — it is the first Supreme Court case to pull apart the concreteness and particularization prongs of injury in fact in order to deny standing.[77] Article III undoubtedly restricts Congress's ability to open the courtroom to those without a "real" case, but it remains unclear where the Court gets the authority to displace Congress's policy judgment that an individual who has had false information published about him has suffered a sufficient injury, no matter how minor the topic. Defining and updating injuries in an increasingly complex and dynamic world presents difficult challenges,[78] and as the Court has recognized in a different context, "Congress is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon" empirical issues.[79] For example, even incorrect zip codes assuredly cause harm of *some* degree, since in-

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[73] The Necessary and Proper Clause, which grants Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof," provides a textual constitutional basis for this claim. U.S. CONST. art. I, § 8, cl. 18. Professor John Manning has argued that the capacious language of the Clause delegates broad discretion to Congress to compose the government and determine the means of implementing federal power absent "some particular constitutional provision, settled course of constitutional practice, or specific line of judicial precedent." *See* John F. Manning, *The Supreme Court, 2013 Term — Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 4 (2014); *see also id.* at 5–8.

[74] *See* THE FEDERALIST NO. 78 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (recognizing that courts exist "to guard the Constitution and the rights of individuals," *id.* at 468, and that "the reservations of particular rights or privileges would amount to nothing" without judicial action, *id.* at 465).

[75] *Spokeo*, 136 S. Ct. at 1551 (Thomas, J., concurring).

[76] Respondent's Brief in Opposition to Petition for Writ of Certiorari at 13, *Spokeo*, 136 S. Ct. 1540 (No. 13-1339) (quoting Whittemore v. Cutter, 29 F. Cas. 1120, 1121 (C.C.D. Mass. 1813) (No. 17,900)).

[77] *See Spokeo*, 136 S. Ct. at 1555 (Ginsburg, J., dissenting) ("The Court's opinion observes that time and again, our decisions have coupled the words 'concrete *and* particularized.' True, but true too, in the four cases cited by the Court, and many others, opinions do not discuss the separate offices of the terms 'concrete' and 'particularized.'" (citations omitted)).

[78] Daniel Townsend, *Who Should Define Injuries for Article III Standing?*, 68 STAN. L. REV. ONLINE 76, 81–83 (2015).

[79] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 665–66 (1994) (plurality opinion) (quoting Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 331 n.12 (1985)).

surance and marketing companies often segment by zip code, and individuals are prone to make generalizations about race, religion, or ethnicity based on where somebody lives.[80] The pertinent question is not exactly how much harm is caused, but why is it not harm enough?

Other justifications for the injury-in-fact requirement, not based in the separation of powers, have become increasingly scarce. At times, the Court argues that the requirement safeguards the vitality of the adversarial process.[81] Similarly, the Court on occasion declares that "legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action."[82] But this rationale similarly does little to justify *Spokeo*. As a threshold practical matter, there is little doubt the parties to a class action involving damages *to each individual* between $100 and $1000 *for each individual statutory violation* would have the incentive to vigorously litigate the case, even though this remedy was also Congress's creation.[83] More importantly, *Spokeo*'s reasoning is particularly unpersuasive in light of the many intangible harms that the Court has already found "capable of resolution through the judicial process,"[84] including injury to an individual's ability to: gather information about a political action committee's members, contributions, and expenditures;[85] obtain the ABA's list of potential judicial nominees;[86] live in a racially integrated community;[87] market a product free from competition;[88] receive benefits without regard to one's sex;[89] compete for contracts and university admission on equal footing with minorities;[90] and obtain truthful housing information despite a professed lack of intent to rent or purchase the home or apartment.[91] In prior informational-injury cases, the information at issue was not even about the plaintiff, as it was in *Spokeo*; it sufficed that the plaintiff wanted information

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[80] *See* Daniel Solove, *When Is a Person Harmed by a Privacy Violation? Thoughts on* Spokeo v. Robins, TEACHPRIVACY (May 17, 2016), https://www.teachprivacy.com/thoughts-on-spokeo-v-robins [https://perma.cc/5HU5-PXZE].

[81] *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675, 2687 (2013).

[82] *E.g.*, Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982).

[83] *See* 15 U.S.C. § 1681n(a)(1)(A) (2012).

[84] U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 396 (1980) (quoting Flast v. Cohen, 392 U.S. 83, 95 (1968)).

[85] FEC v. Akins, 524 U.S. 11 (1998).

[86] Pub. Citizen v. Dep't of Justice, 491 U.S. 440 (1989).

[87] Trafficante v. Metro. Life Ins. Co., 409 U.S. 205 (1972).

[88] Hardin v. Ky. Utils. Co., 390 U.S. 1 (1968).

[89] Heckler v. Mathews, 465 U.S. 728 (1984).

[90] Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

[91] Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982).

about somebody or something else, even if they were not intending to use it. It is difficult to see what makes those injuries sufficiently concrete, yet not the alleged violation of Robins's statutory right.

The foregoing analysis suggests that *Spokeo* should fall into a broad category of cases in which Article III's standing requirement should be satisfied by Congress's legal recognition of harm, no matter how slight. This approach differs from the dissent's view that the alleged harm to Robins's employment prospects caused by Spokeo's misinformation was sufficiently concrete, rendering remand futile.[92] Instead, Congress's judgment that the publication of misinformation *about you* entitles *you* to a day in court should be the end of the judicial inquiry. While this approach is contrary to the trend of recent jurisprudence, it is also true that standing law, at least as a constitutional limit on legislative power, is itself a recent judicial invention.[93] In fact, Professor Cass Sunstein has argued that "from the founding era to roughly 1920[,] . . . [n]o one believed that the Constitution limited Congress' power to confer a cause of action,"[94] calling into question just how essential such rules are to a well-functioning democracy.

While *Spokeo* seemed only to reiterate well-established tenets of standing, its consequences may be far-reaching. *Spokeo* jeopardizes the breadth of many laws whose enforcement is likewise premised on suits by classes of persons whom the proscribed conduct has a tendency to injure, regardless of proof of consequential harms. These include, among others, the Copyright Act of 1976,[95] the Credit Repair Organizations Act,[96] the Electronic Fund Transfer Act,[97] and the Telephone Consumer Protection Act of 1991.[98] In addition, the Court's remand to consider the concreteness of Robins's injury — beyond the statutory violation — makes certifying a class much more difficult as it seems to elevate questions of individual concern over those common to all class members.[99] Because the Court had no particular basis for displacing Congress's judgment that the publication of misinformation inflicted an injury worthy of a federal case, the Court would have been better served to avoid such consequences by deferring to the will of Congress and the protection of individual rights.

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92 *Spokeo*, 136 S. Ct. at 1556 (Ginsburg, J., dissenting).

93 John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1009 (2002) (claiming that the Supreme Court "fabricat[ed] the doctrine[] of standing" in the twentieth century).

94 Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 170 (1992).

95 17 U.S.C. § 504(a), (c) (2012).

96 15 U.S.C. § 1679g(a) (2012).

97 15 U.S.C. § 1693m(a) (2012).

98 47 U.S.C. § 227(b)(3) (2012).

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