

STANDING IN THE SHADOW
OF CONGRESS

In *Spokeo v Robins*,¹ the Supreme Court confronted one of the harder questions of its intricate law of standing to sue. The question is whether Article III of the Constitution limits Congress's ability to create legal rights that can be vindicated in federal court—and, if so, what those limits are. The Court's cases had provided two contradictory approaches to answering it.

Boxed in by these conflicting precedents, *Spokeo* failed to resolve the problem. The violation of a legal right can support standing, said the Court, only if it represents an injury that is “concrete”—a term that simultaneously includes some “intangible” injuries, but requires that they be “real.”² These terms, and the Court's explanation of them, do little work to answer the core question. And to the extent that they do point to a general approach, that approach is a wrong turn.

But *Spokeo* also produced a glimmer of hope for approaching standing in the future: a concurring opinion by Justice Thomas,

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¹ 136 S Ct 1540 (2016).

² Id at 1548–49.

building off of an important line of scholarship on the long-standing difference between public rights and private rights. While Justice Thomas's proposal is not yet fully developed, it may provide a theoretically satisfying way to make sense of the Court's approach to statutory standing. Even if his answers are not perfect, they are answers to the right questions, which will reframe the problem of standing in a helpful way. Justice Thomas's concurrence may be one of the most fruitful things to happen to standing at the Supreme Court in many years.

The rest of this article explains the problem of standing in the face of Congress's creation of statutory rights. Part I describes the basic problem and the prior cases that address it. Part II describes the Court's attempted answer in *Spokeo*. Part III argues that *Spokeo*'s answer is unhelpful and even problematic, and could have ominous implications for the law of privacy and other areas of substantive law. Part IV shows why Justice Thomas may have provided a better way forward.

I. THE PROBLEM OF STANDING TO ENFORCE STATUTORY RIGHTS

The Constitution gives federal courts the “judicial” power to decide “cases” or “controversies.”³ It is black letter law that these terms require the case to be between the proper sorts of parties, ones who have some legal dispute that the court can resolve. A key part of this requirement is that the plaintiff have “standing” to sue, which means—says the Court—that the plaintiff must have suffered (or be likely to suffer) a “concrete, particularized” “injury” (or sometimes “injury in fact”); that the injury must be “fairly traceable to the challenged action”; and that the injury must be “redressable by a favorable ruling.”⁴

To be sure, even these propositions have had their critics, Raul Berger⁵ and Laurence Tribe⁶ among them. And there are further complexities as well, such as the questions of whether standing should

³ US Const, Art III, §§ 1, 2.

⁴ *Clapper v Amnesty International*, 133 S Ct 1138, 1147 (2013). There are many similar but subtly different formulations in the case law.

⁵ See, for example, Raul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 Yale L J 816 (1969).

⁶ Laurence H. Tribe, *American Constitutional Law* § 3-27, at 110–12 (1st ed, 1978); 1 Laurence H. Tribe, *American Constitutional Law* § 3-14, at 391–92 (3d ed, 2000).

be seen as jurisdictional or part of the merits of the claim,⁷ and of whether “standing” and “injury in fact” are novel concepts or old ones in new language.⁸ But these requirements of standing doctrine have grown relatively settled despite the debates.

Beyond this settlement, however, the Court’s standing cases have equivocated about an important question lying behind those requirements. What relationship do *statutes* have to the injury needed for standing? Is the violation of a statutory right an injury? To ask these questions is not to doubt that injury is a requirement—it is now taken as a given that injury is required.⁹ Rather the question is what law *defines* that injury. To what extent is it shaped by ordinary law, and therefore by Congress, and to what extent is it instead hard-coded in Article III?

In two mostly separate lines of reasoning, the Court has said on the one hand that the content of an injury is shaped by law, and therefore by Congress; and said on the other hand that some congressional attempts to do so are unconstitutional. The two lines of reasoning—which I will, unoriginally, call Proposition A and Proposition B¹⁰—have coexisted for some time, but they are in tension.

A. “CONGRESS MAY ENACT STATUTES CREATING LEGAL RIGHTS,
THE INVASION OF WHICH CREATES STANDING”

This first branch of the Court’s cases reflects a seemingly simple intuition: Legislatures create rights. Invasions of those rights are injuries. To consider an obvious example, it might be that no private person has standing to sue over misuse of a piece of public property,

⁷ For example, Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 Yale L J 425, 450–56 (1974); William A. Fletcher, *The Structure of Standing*, 98 Yale L J 221, 223 (1988).

⁸ Compare Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 Mich L Rev 163, 166 (1992), and Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 Stan L Rev 1371 (1988), with Ann Woolhandler and Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 Mich L Rev 689 (2004).

⁹ Cf. John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L J 1219, 1219 (1993) (criticizing critics of *Lujan* for failing to “grant the artist . . . his donee”—*viz* “that injury in fact is required for standing under Article III”).

¹⁰ Cf. Paul M. Bator, Daniel J. Meltzer, Paul J. Mishkin, and David L. Shapiro, *Hart and Wechsler’s The Federal Courts and the Federal System* 995 (3d ed 1988) (dividing federal question cases into “Proposition A” and “Proposition B”); Thomas W. Merrill, *Anticipatory Remedies for Takings*, 128 Harv L Rev 1630, 1634 (2015) (ascertaining “two separate lines of authority about takings remedies, which I will call the A line and the B line”).

owned in common by the public. But if the legislature parcels up that property into private plots, each new owner has standing to litigate their own private property rights against intruders.¹¹

Various early cases in England and America featured this basic intuition that invasion of legal rights was necessarily an injury. As early as the fourteenth and fifteenth centuries, English courts had allowed suits for trespass (to persons and to property) even when there had been no damage and no injury in fact apart from the *legal* injury of the trespass itself.¹² And in America, Joseph Story affirmed an expanded version of this principle when allowing downstream mill owners to sue an upstream mill owner for illegal diversion of water.¹³ Surveying the precedents, he concluded: “whenever there is a clear violation of a right, it is not necessary in an action of this sort to show actual damage; that every violation imports damage; and if no other be proved, the plaintiff is entitled to a verdict for nominal damages.”¹⁴

It took longer for this principle to appear explicitly in Supreme Court cases about standing, perhaps in part because the language of modern standing doctrine did not appear until the twentieth century. In any event, in the twentieth century, the Court reaffirmed that legal rights are sufficient to ground standing. Moreover, they were sufficient to do so even in the case of rights unknown to the common law.

For instance, in *Trafficante v Metropolitan Life Insurance*, the Court found standing for two tenants of an apartment building to challenge their landlord’s illegally discriminatory rental practices.¹⁵ The tenants had obviously not themselves been denied the ability to rent there (that is why they were tenants), but they wanted to live in a more racially mixed apartment building and thought the law gave them a right to do so. Even though such a right would not have existed at the common law, it was enough for standing.

To be sure, it is not clear that the statutory right was the only source of standing, since the plaintiffs had also named other injuries, such as the loss of “social benefits,” “missed business and professional advantages,” and the “embarrassment and economic damage . . . from

¹¹ See Woolhandler and Nelson, 102 Mich L Rev at 693–94 (cited in note 8).

¹² F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 Cornell L Rev 275, 281 (2008) (discussing *I de S et ux v W de S* (1348), and *Hulle v Orynge* (1466)).

¹³ *Webb v Portland Manufacturing Co.*, 29 F Cas 506 (CCD Me 1838) (opinion of Story, Circuit Justice) (cited in Hessick, 93 Cornell L Rev at 285 (cited in note 12)).

¹⁴ *Id.*

¹⁵ 409 US 205, 207 (1972).

being ‘stigmatized’ as residents of a ‘white ghetto.’”¹⁶ But the majority did not spend time substantiating these consequences. And four Justices wrote separately to emphasize their reliance on the statutory right: “Absent the Civil Rights Act of 1968, I would have great difficulty in concluding that petitioners’ complaint in this case presented a case or controversy within the jurisdiction of the District Court under Art. III of the Constitution. But with that statute purporting to give all those who are authorized to complain to the agency the right also to sue in court, I would sustain the statute.”¹⁷

The Court relied on this proposition most explicitly in *Havens Realty v Coleman*, where it considered (among other things) the rights of Sylvia Coleman, a black Fair Housing Act “tester.”¹⁸ Coleman had been told, apparently falsely and because of her race, that there were no apartments available to rent, and she sued for the violation of the Fair Housing Act’s “steering” provisions. Even though she had no intent to actually rent from the defendants, the Court found that she had standing to sue. The key was the injury to her statutory rights to truthful and nondiscriminatory information.

As the Court put it:

Congress has thus conferred on all “persons” a legal right to truthful information about available housing. This congressional intention cannot be overlooked in determining whether testers have standing to sue. As we have previously recognized, the actual or threatened injury required by Art. III may exist solely by virtue of “statutes creating legal rights, the invasion of which creates standing.” . . . In the instant case, respondent Coleman—the black tester—alleged injury to her statutorily created right to truthful housing information. . . . If the facts are as alleged, then respondent has suffered “specific injury” from the challenged acts of petitioners, and the Art. III requirement of injury in fact is satisfied.¹⁹

The holding in *Havens* relied on similar statements the Court had repeatedly made in dicta: For instance, it had said that “Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute”²⁰ or

¹⁶ Id at 208.

¹⁷ Id at 212 (White, J, concurring).

¹⁸ 455 US 363 (1982).

¹⁹ Id at 373–74 (citations omitted).

²⁰ *Linda RS v Richard D*, 410 US 614, 617 n 3 (1972), subsequently quoted in *O’Shea v Littleton*, 414 US 488, 493 n 2 (1973).

that “[t]he actual or threatened injury required by Art. III may exist solely by virtue of ‘statutes creating legal rights, the invasion of which creates standing.’”²¹ Similarly, in denying standing to challenge potential conflicts of interest under the Constitution’s Incompatibility Clause²² the Court expressed “no doubt that if the Congress enacted a statute creating such a legal right, the requisite injury for standing would be found in an invasion of that right.”²³

Not all applications of the principle are dicta, either. For instance, in *Hardin v Kentucky Utilities*, the Court noted that it had “repeatedly held that the economic injury which results from lawful competition cannot, in and of itself, confer standing on the injured business.”²⁴ But the Court also pointed to a different line of cases that recognized standing for injured competitors “when the particular statutory provision invoked does reflect a legislative purpose to protect a competitive interest.”²⁵ *Hardin* found standing on that basis, which works only because Congress can create rights against competitive injuries that support standing.

Similarly, in *FEC v Akins*, the Court held that a group of voters had standing to challenge the Federal Election Commission’s refusal to subject the American Israel Public Affairs Committee to various disclosure requirements.²⁶ The Court concluded that the voters’ “inability to obtain information . . . that, on respondents’ view of the law, the statute requires that AIPAC make public” was enough to satisfy Article III’s standing requirements. It admitted that a similar injury had *not* been enough for standing in *United States v Richardson*, where the Court had rejected a taxpayer’s demand for information about CIA expenditures.²⁷ But in *Akins*, by contrast, “there [was] a statute which . . . does seek to protect individuals such as respondents

²¹ *Warth v Seldin*, 422 US 490, 500 (1975) (quoting *Linda RS v Richard D*).

²² US Const, Art I, § 6, cl 2 (“no person holding any office under the United States, shall be a member of either House during his continuance in office”).

²³ *Schlesinger v Reservists to Stop the War*, 418 US 208, 224 n 14 (1973).

²⁴ *Hardin v Kentucky Utilities*, 390 US 1, 5–6 (1967) (citing *Railroad Co. v Ellerman*, 105 US 166 (1882); *Alabama Power v Ickes*, 302 US 464 (1938); *Tennessee Power v TVA*, 306 US 118 (1939); *Perkins v Lukens Steel*, 310 US 113 (1940)).

²⁵ *Hardin*, 390 US at 6 (citing *Chicago Junction Case*, 264 US 258 (1924); *Alton Railroad v United States*, 315 US 15, 19 (1942); *Chicago v Atchison, Topeka & Santa Fe Railroad*, 357 US 77, 83 (1958)).

²⁶ 524 US 11 (1998).

²⁷ *United States v Richardson*, 418 US 166 (1974) (discussed by *Akins*, 524 US at 21–22).

from the kind of harm they say they have suffered, *i.e.*, failing to receive particular information about campaign-related activities.”²⁸ While the Court noted other differences between the cases, the statute seemed to be the crux of it:²⁹ “failing to receive particular information” was itself a constitutionally sufficient injury in *Akins*, but not in *Richardson*, because of the right created by Congress.

Similar logic presumably supports standing in cases under the Freedom of Information Act (FOIA), where individuals may request information from the government and sue if it is denied.³⁰ The only injury in such cases is the denial of information, as in *Akins* and *Richardson*, but the Court has said in dictum that FOIA plaintiffs need show only “that they sought and were denied specific agency records,”³¹ and it continues to decide FOIA cases without demanding any more.³²

As we will see, these and other cases led many lower courts to think of Proposition A as presenting the general rule of standing: that a statutory cause of action created by Congress necessarily creates a right, the invasion of which satisfied Article III’s requirement of injury.³³

B. “A HARD FLOOR OF ARTICLE III JURISDICTION THAT CANNOT BE REMOVED BY STATUTE”

Despite the Court’s widespread use of statutory rights as a basis for Article III standing, the Court has also sometimes adverted to Article III limits on those rights. That is, it has found that federal courts

²⁸ *Akins*, 524 US at 22.

²⁹ Id (observing “[t]he fact that the Court in *Richardson* focused upon taxpayer standing, not voter standing, places that case at still a greater distance from the case before us.” But adding “[w]e are not suggesting . . . that *Richardson* would have come out differently if only the plaintiff had asserted his standing to sue as a voter, rather than as a taxpayer.”).

³⁰ See generally 5 USC § 552. See also David Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U Pa L Rev (forthcoming 2017), at <https://ssrn.com/abstract=2907719> (describing individual-centered FOIA regime).

³¹ *Public Citizen v U.S. Department of Justice*, 491 US 440, 449 (1989). See also Roberts, 42 Duke L J at 1228 n 60 (cited in note 9) (“When an agency wrongfully denies an individual’s FOIA request, that particular individual has suffered injury in fact under Article III and has standing to sue in federal court to redress that injury.”).

³² See Seth F. Kreimer, “Spooky Action at a Distance”: *Intangible Injury in Fact in the Information Age*, 18 U Pa J Const L 745, 771 (2016) (citing cases).

³³ See, for example, *Beaudry v TeleCheck Services, Inc.*, 579 F3d 702, 707 (6th Cir 2009); *Hammer v Sam’s East, Inc.*, 754 F3d 492 (8th Cir 2014); *Edwards v First American*, 610 F3d 514 (9th Cir 2010); *Robey v Shapiro, Marianos & Cejda, LLC*, 434 F3d 1208, 1211 (10th Cir 2006); *Zivotofsky ex rel Ari Z v Secretary of State*, 444 F3d 614, 617–19 (DC Cir 2006).

lack constitutional power to hear certain lawsuits, even when Congress has tried to create an enforceable legal right and that legal right has been violated.

The most famous case in this second line is *Lujan v Defenders of Wildlife*, an opinion written by the late Justice Scalia that denied standing to an environmental group whose members wished to challenge a regulation under the Endangered Species Act.³⁴ (The regulation had interpreted Section 7(a)(2) of the Act,³⁵ which required interagency consultation to avoid harm to endangered and threatened species, to apply only to actions taken in the United States or on the high seas.³⁶)

Some of the group's theories of standing turned on claims that the regulation would injure their ability to see or study various animals. The Court rejected these as "pure speculation and fantasy."³⁷ This required the Court to turn to the more lasting issue: whether Congress had created a right to those procedures, the invasion of which could support standing.

The argument had persuaded the D.C. Circuit, and the Court summarized it as follows:

that, because § 7(a)(2) requires interagency consultation, the citizen-suit provision [16 USC § 1540(g)] creates a procedural right to consultation in all persons—so that anyone can file suit in federal court to challenge the Secretary's (or presumably any other official's) failure to follow the assertedly correct consultative procedure, notwithstanding his or her inability to allege any discrete injury flowing from that failure.³⁸

The Court seemed to assume for purposes of the case that the statute had indeed created such a right (though the opinion cast some aspersions by describing it as "an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law").³⁹ But the Court denied that the invasion of such a congressionally created right was sufficient to support standing, holding that "there is absolutely no basis for making the Article III

³⁴ *Lujan v Defenders of Wildlife*, 504 US 555 (1992)

³⁵ 16 USC § 1536(a)(2).

³⁶ 51 Fed Reg 19926 (1986).

³⁷ *Lujan*, 504 US at 567.

³⁸ *Id.* at 572.

³⁹ *Id.*

inquiry turn on the source of the asserted right.”⁴⁰ It would violate the separation of powers, the Court concluded, “[t]o permit Congress to convert the undifferentiated public interest in executive officers’ compliance with the law into an ‘individual right’ vindicable in the courts.”⁴¹

Lujan has been subject to extensive academic criticism,⁴² but it was neither the last case in this line nor the first. Sixteen years later, the Court said the same thing in another case quite like *Lujan*, *Summers v Earth Island Institute*.⁴³

Summers was another environmental group’s challenge to another procedural defect in another environmental regulation—this one concerning fire rehabilitation and timber salvage sales. Once again, in an opinion by Justice Scalia, the Court rejected various theories of standing including one premised on Proposition A. The Court acknowledged that the challengers claimed to “have suffered procedural injury, namely that they have been denied the ability to file comments on some Forest Service actions,” but concluded that “deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right in vacuo—is insufficient to create Article III standing.”⁴⁴

Then the Court explicitly denied Proposition A:

*It makes no difference that the procedural right has been accorded by Congress. That can loosen the strictures of the redressability prong of our standing inquiry. . . . Unlike redressability, however, the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute.*⁴⁵

The Court has also found standing limits on Congress’s ability to create enforceable rights in other cases, including in opinions not written by Justice Scalia. In *Raines v Byrd* the Court expanded Proposition B to create limits on congressional standing. In *Raines*

⁴⁰ Id at 576.

⁴¹ Id at 577. Justice Kennedy wrote a concurring opinion, which I discuss below.

⁴² For example, Sunstein, 91 Mich L Rev at 163 (cited in note 8); Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 Duke L J 1141 (1993); Richard J. Pierce, Jr., *Lujan v Defenders of Wildlife: Standing as a Judicially Imposed Limit on Legislative Power*, 42 Duke L J 1170 (1993).

⁴³ 555 US 488 (2009).

⁴⁴ Id at 496

⁴⁵ Id at 497 (emphasis added).

several legislators wished to challenge the so-called Line Item Veto Act, which authorized the President to decline to spend money they had voted to appropriate.⁴⁶ As a prestatutory matter, it was somewhat debatable whether legislators had been personally injured when the consequence of their votes was illegally ignored.⁴⁷ But in *Byrd* there was once again an express statutory right to sue, specifically vested in “any Member of Congress” to enjoin the act as unconstitutional.⁴⁸ The Court was unimpressed, declaring it “settled that Congress cannot erase Article III’s standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.”⁴⁹ Not even Justices Breyer and Stevens, who wrote dissents, relied heavily on Proposition A.⁵⁰

And indeed this skeptical line of cases has early roots. The Supreme Court had rejected, on Article III grounds, a congressionally created right to sue as early as 1911, in a confusing opinion in *Muskrat v United States*.⁵¹ That case arose after Congress had passed a series of statutes altering various allotments of property from the Cherokee tribe.⁵² Four people—David Muskrat, J. Henry Dick, William Brown, and Levi B. Gritts—wanted to bring various suits challenging some of the statutes, and Congress wanted to help them do so. In 1907 Congress had passed a statute providing:

That William Brown and Levi B. Gritts . . . and David Muskrat and J. Henry Dick . . . be, and they are hereby, authorized and empowered to institute their suits in the court of claims to determine the validity of any

⁴⁶ *Raines v Byrd*, 521 US 811 (1997).

⁴⁷ *Id.* at 820–29 & n 4 (discussing precedents).

⁴⁸ Line Item Veto Act, § 3(a)(1), Pub Law No 104-130, 110 Stat 1200, 1211 (1996).

⁴⁹ *Raines*, 521 US at 820.

⁵⁰ *Id.* at 835 (Stevens, J, dissenting); *id.* at 838–39 (Breyer, J, dissenting) (“As the majority points out, Congress has enacted a specific statute (signed by the President) granting the plaintiffs authority to bring this case. That statutory authorization eliminates any prudential standing limitations and significantly lessens the risk of unwanted conflict with the Legislative Branch. Congress, however, cannot grant the federal courts more power than the Constitution itself authorizes us to exercise.”).

⁵¹ 219 US 346 (1911).

⁵² For the original allotment, see An Act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes, ch 1375, 32 Stat 716 (1902); for the amendments, see An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes, ch 1867, 34 Stat 137 (1906), amended by 1907 Indian Appropriations Bill, ch 3504, 34 Stat 325 (1906); and also An Act Authorizing the Secretary of the Interior to grant right of way for pipe lines through Indian lands, ch 505, 33 Stat 65 (1904).

acts of Congress passed since the said act of July first, nineteen hundred and two, in so far as said acts, or any of them, attempt to increase or extend the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September first, nineteen hundred and two, and provided for in the said act of July first, nineteen hundred and two.⁵³

When Muskrat's case got to the Supreme Court, the Court acknowledged that "[t]his act is the authority for the maintenance of these two suits."⁵⁴ But it found that act, and its authority, unconstitutional under Article III.

The Court's reasoning was famously obscure.⁵⁵ It mentioned several earlier cases that had invalidated claims legislation where the adjudications would not be enforced without exercise of political discretion.⁵⁶ But the Muskrat statute made the Supreme Court's decision final⁵⁷ and so it did not raise this problem. Instead, the Court seemed to have two related complaints, both of which echo modern standing requirements. One was that the plaintiffs had been wrong to sue the United States, when their goal was "not to assert a property right as against the government, or to demand compensation for alleged wrongs because of action upon its part."⁵⁸ The other was that their suit was effectively a request for an advisory opinion about the constitutionality of the allotment statutes.⁵⁹

⁵³ 1908 Indian Appropriations Bill, ch 2285, 34 Stat 1015, 1028.

⁵⁴ *Muskrat*, 219 US at 351.

⁵⁵ David P. Currie, *The Constitution in the Supreme Court: The Second Century, 1888–1986*, at 92 (1990); Henry M. Hart, Jr. and Herbert Wechsler, *The Federal Courts and the Federal System* 130 (1st ed 1953) ("Complete the following sentence: 'The Supreme Court held that no justiciable controversy was presented in the Muskrat case because . . .'"); see also 3 Kenneth Culp Davis, *Administrative Law Treatise* § 21.01, at 120–24 (1958) ("The Court gave seven reasons for the decision, not one of which will withstand close examination.").

⁵⁶ *Muskrat*, 219 US at 353–54 (citing *Gordon v United States*, 117 US 697, 702 (1885); *United States v Ferreira*, 54 US (13 How) 40, 47 (1852)).

⁵⁷ *Muskrat*, 219 US at 351, 361.

⁵⁸ *Id.*

⁵⁹ *Id.* ("It is therefore evident that there is neither more nor less in this procedure than an attempt to provide for a judicial determination, final in this court, of the constitutional validity of an act of Congress"); *id.* at 361–62 ("The whole purpose of the law is to determine the constitutional validity of this class of legislation, in a suit not arising between parties concerning a property right necessarily involved in the decision in question, but in a proceeding against the government in its sovereign capacity, and concerning which the only judgment required is to settle the doubtful character of the legislation in question").

In the end, even though Congress had attempted to give the plaintiffs a right to that adjudication, the Court found it violated Article III: “This attempt to obtain a judicial declaration of the validity of the act of Congress is not presented in a ‘case’ or ‘controversy,’ to which, under the Constitution of the United States, the judicial power alone extends,” and hence “exceeded the limitations of legislative authority.”⁶⁰ *Muskrat* thus shows that the Court’s skepticism about the full force of Proposition A has deep roots. It may be tempting to distinguish both *Raines* and *Muskrat* as reflecting special separation-of-powers concerns, and therefore as not strictly relevant to the question of statutory rights and Article III standing. But this distinction is artificial. The Court has described its Article III standing doctrine generally as a doctrine of separation of powers.⁶¹ To quote *Raines* itself: “The law of Article III standing is built on a single basic idea—the idea of separation of powers.”⁶²

The Court has not expounded the two propositions about statutory rights in complete isolation from one another. Some of the Proposition B cases attempt to reconcile themselves with Proposition A. For instance, in *Lujan*, the Court stressed that “Nothing in this contradicts the principle that “[t]he . . . injury required by Art. III may exist solely by virtue of ‘statutes creating legal rights, the invasion of which creates standing.’”⁶³ That principle, *Lujan* suggested, “involved Congress’ elevating to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law.”⁶⁴

Similarly, Justice Kennedy, who provided one of the five votes for the majority opinion in *Lujan*, added in a separate concurrence that: “As Government programs and policies become more complex and far reaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition. . . . In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, and I do not read the Court’s opinion to suggest

⁶⁰ Id at 361–62.

⁶¹ See, for example, *Susan B. Anthony List v Driehaus*, 134 S Ct 2334, 2341 (2014); *Arizona Christian School Tuition Org. v Winn*, 563 US 125, 132, 135 (2011); *Lujan*, 504 US at 560. See also Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U L Rev 881 (1983).

⁶² *Raines*, 521 US at 820 (quoting *Allen v Wright*, 468 US 737, 752 (1984)).

⁶³ *Lujan*, 504 US at 578 (quoting *Warth* and *Linda RS*).

⁶⁴ *Lujan*, 504 US at 578.

a contrary view.”⁶⁵ He added that “[i]n exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit,” and he did not think that Congress had done so in *Lujan*.⁶⁶ Still, as we will see, such acknowledgments have not prevented a conflict from arising between the two propositions.

C. THE GROWING TENSION

While these two propositions have coexisted in standing case law for decades, the tension between them makes a simple question very hard to answer: *When* does a right created by Congress nonetheless fall below the “hard floor” of Article III jurisdiction? In the years leading up to *Spokeo*, the difficulty of that question became apparent.

That difficulty became salient in *First American Financial Corp. v Edwards*,⁶⁷ a case brought under the Real Estate Settlement Procedures Act, which forbids kickbacks and revenue splits for those who settle regulated mortgage transactions.⁶⁸ These restrictions are designed to eliminate conflicts of interest among, for example, one’s lender, one’s real estate lawyer, and one’s title insurer. The restrictions are backed by criminal penalties,⁶⁹ and also a civil cause of action that awards statutory damages “equal to three times the amount of any charge paid for such settlement service.”⁷⁰

Denise Edwards bought a house in Cleveland with title insurance provided by First American, and then complained that First American had been the beneficiary of a referral agreement banned by the act. As a matter of law, her damages seemed to be \$2,186.55, three times the amount that she and her settlement agent paid for the insurance.⁷¹ But as a matter of reality, her damages seemed to be zero: Ohio law regulates the price and terms of title insurance,⁷² so Edwards got exactly what she would have gotten in any event. First American might

⁶⁵ Id at 580 (Kennedy, J, concurring in part and concurring in the judgment).

⁶⁶ Id.

⁶⁷ 567 US 756 (2012).

⁶⁸ 12 USC § 1607 (a), (b).

⁶⁹ 12 USC § 1607 (d)(1).

⁷⁰ 12 USC § 1607 (d)(2).

⁷¹ See *Edwards v First American Corp.*, 610 F3d 514, 516 (9th Cir 2010) for these numbers, though I did the math myself.

⁷² Ohio Rev Code Ann §§ 3935.04, 3935.07.

have profited from an illegal referral agreement, but Edwards did not suffer from it; the victims, if any, were First American's competitors.

Under established standing doctrine, the case presented a puzzle. On one hand, black letter law requires Edwards to have suffered an actual or imminent injury, and she was not in fact overcharged. So the case seems to fall below the "hard floor" of Article III. On the other hand, perhaps we can see her injury as being not her out-of-pocket costs, but the conflict of interest itself: Congress gave Edwards "a right to a conflict-free transaction,"⁷³ and that right can be vindicated even if it is not an economic one, just as the right to live in legally integrated housing can be vindicated even if it is not an economic one either. And yet if Congress can define such an injury, what remains of Article III's "hard floor"?

The Ninth Circuit did not fully confront the problem, instead writing its opinion as if only the Proposition A cases existed:

"The injury required by Article III can exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" "Essentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." Thus, we must look to the text of RESPA to determine whether it prohibited Defendants' conduct; if it did, then Plaintiff has demonstrated an injury sufficient to satisfy Article III.⁷⁴

The first two quotations are true enough, but the last sentence does not quite follow. For as we have seen, while the Court has said that Congress can create legal rights that support standing, it has also sometimes said that it cannot—otherwise *Summers* and *Lujan* and *Raines* and even *Muskraat* would all be wrongly decided. The Ninth Circuit gave no explanation for invoking Proposition A while ignoring Proposition B.

Perhaps it is not surprising, then, that the Supreme Court took an interest in the case. And at oral argument, it looked as if the Court was poised to continue expanding Proposition B beyond *Lujan* and *Summers*. For instance, the Chief Justice seemed to deny the existence of Proposition A altogether:

⁷³ This was one of her counsel's formulations in the Supreme Court oral argument. *First American Financial Corp. v Edwards*, No 10-708, Supreme Court Oral Argument Transcript at 28, 39.

⁷⁴ *Edwards v First American Corp.*, 610 F3d 514, 517 (9th Cir 2010) (quoting *Fulfillment Services v UPS*, 528 F3d 614, 618 (9th Cir 2008), and *Warth v Seldin*, 422 US 490, 500 (1975)).

You said violation of a statute is injury in fact. I would have thought that would be called injury in law. And when we say, as all our standing cases have, is that what is required is injury in fact, I understand that to be in contradistinction to injury in law. And when you tell me all that you've got or all that you want to plead is violation of the statute, that doesn't sound like injury in fact.⁷⁵

So too did Justice Alito: “[W]e are looking for whether there is an injury in fact. Put aside the question of whether there is a breach of the duty in law. There is allegedly here. I just don't see where there is an injury in fact.”⁷⁶ And Justice Scalia described the plaintiff's injury as “the vague notion of—of buying it from—from—I don't know, a white knight? Is—is that the kind of injury-in-fact that our cases talk about? . . . It seems to me purely—I don't know—philosophical.”⁷⁷

Meanwhile, Justice Kennedy described Proposition A as “circular”: “For you to say he was entitled to it and, therefore, it's an injury, that's just—that's just circular. That gives no substance at all to the—to the meaning of the term ‘injury.’”⁷⁸ And he later expressed skepticism specifically “that Congress can say that you have a right to buy a conflict-free title insurance policy.”⁷⁹ It looked to observers as if the Court would reject a thorough endorsement of Proposition A, “under which no showing of injury is required simply because Congress has provided for statutory damages.”⁸⁰

Then came an unexpected reprieve: on the last day of the Term, seven months after oral argument, the Court dismissed the case as improvidently granted. As is typical, the Court issued no explanation for the late abandonment of the case. The timing makes it unlikely that the Court had suddenly discovered a “vehicle problem”⁸¹—a procedural wrinkle or faulty premise that made it hard to reach the question presented. Rather, it seems that the Court had some difficulty *answering* the question. Perhaps a Justice changed his or her

⁷⁵ *First American Financial Corp. v Edwards*, No 10-708, Supreme Court Oral Argument Transcript at 32–33.

⁷⁶ *Id.* at 29.

⁷⁷ *Id.* at 44.

⁷⁸ *Id.* at 47.

⁷⁹ *Id.* at 57.

⁸⁰ Christopher Wright, *Argument Recap: First American Financial Corp. v. Edwards*, SCOTUSBlog, Nov 29 (2011), at <http://www.scotusblog.com/2011/11/argument-recap-first-american-financial-corp-v-edwards/>.

⁸¹ Pamela S. Karlan, *Foreword: Democracy and Disdain*, 126 Harv L Rev 1, 62 (2012).

mind at the last minute; perhaps the Court's resources were stretched thin by the massive drafting exercise in *NFIB v Sebelius* (decided that day);⁸² or perhaps the Justices simply regretted confronting one of the hardest questions in modern federal courts doctrine. Later that year, Pam Karlan suggested that “[a]s with . . . the significance of the French Revolution for western civilization—it may be too soon to tell.”⁸³ As it happens, we did not have to wait long for the next sortie.

II. SPOKEO'S ATTEMPTED ANSWER

Last Term, the Court tried once again to make progress on the doctrinal problem it had created for itself. The vehicle was *Spokeo v Robins*, another consumer protection case arising out of the Ninth Circuit.⁸⁴ This time the consumer protection statute was the Fair Credit Reporting Act, which contains a range of substantive and procedural requirements for consumer reporting agencies, including the requirement that they “follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.”⁸⁵ It also gives a cause of action to consumers “with respect to [whom]” these requirements are violated, for \$100–\$1,000 in statutory damages.⁸⁶

The plaintiff was Thomas Robins, an unemployed, unmarried man living in Virginia. Like many of us, Mr. Robins was the subject of a consumer report on www.spokeo.com. And as with many of us, not all of that information was accurate.⁸⁷ But as in *First American*, even if these inaccuracies reflected a violation of the Fair Credit Reporting Act, it was a little hard to say how they had actually injured Mr. Robins. Spokeo described him as richer and more educated than

⁸² 132 S Ct 2566 (2012).

⁸³ Karlan, 126 Harv L Rev at 62 (cited in note 81).

⁸⁴ 136 S Ct 1540 (2016).

⁸⁵ 15 USC § 1681(e).

⁸⁶ 15 USC § 1681(n).

⁸⁷ For instance, while writing this article I signed up at www.spokeo.com to look up my own information, and discovered that pieces of it seemed to be associated with at least nine different identities, which variously contained the wrong age, <http://www.spokeo.com/William-Baude/Illinois/Chicago/p40004472993>, wrong address, <http://www.spokeo.com/William-Baude/Indiana/Bloomington/p30715587001>, wrong marital status, <http://www.spokeo.com/William-Baude/Illinois/Chicago/p40024907275>, and even the wrong surname, <http://www.spokeo.com/William-Bavde/Connecticut/New-Haven/p40001834445> and <http://www.spokeo.com/William-Daude/California/San-Diego/p11151218031>. I did not sue.

he really was, with a spouse and children that he did not have. To the extent these facts have a valence, they might seem like good things. At a minimum, they do not obviously seem like bad things.

That is how the district court saw the case, and it held that despite the statutory violation, Robins lacked standing to sue. It thought, per Proposition B, that Robins had to show a concrete and imminent injury beyond the statutory violation.⁸⁸ In principle, this could be something like showing that the inaccuracies had caused him to lose or miss out on a job, which Robins tried to allege,⁸⁹ but the court thought the allegation was “speculative, attenuated and implausible” and that Robins had “fail[ed] to allege facts sufficient to trace his alleged harm to Spokeo’s alleged violations.”⁹⁰

The Ninth Circuit, however, found standing because of the statutory violation, as it had in *First American*.⁹¹ This time its reasoning was slightly more careful. It concluded (citing *First American*)⁹² that “the violation of a statutory right is *usually* a sufficient injury in fact to confer standing,”⁹³ in accordance with Proposition A. But it also recognized, in accordance with Proposition B, that “[o]f course, the Constitution limits the power of Congress to confer standing.”⁹⁴ The Ninth Circuit concluded that those limits did not apply to Robins, because his injury was personal (i.e., his rather than somebody else’s) and individual (i.e., not collective).⁹⁵ Hence, it thought, Robins’s statutory injuries were “concrete, de facto injuries” that Congress could “elevat[e] to the status of legally cognizable injuries.”⁹⁶

⁸⁸ See Order Correcting Prior Ruling and Finding Moot Motion for Certification, No CV10-05306 ODW (AGRx) (CD Cal, Sept 19, 2011) (“Mere violation of the Fair Credit Reporting Act does not confer Article III standing, moreover, where no injury in fact is properly pled. Otherwise, federal courts will be inundated by web surfers’ endless complaints.”).

⁸⁹ First Amended Complaint, *Robins v Spokeo, Inc.*, No CV10-05306 7–8.

⁹⁰ Spokeo Order (cited in note 88).

⁹¹ *Robins v Spokeo, Inc.*, 742 F3d 409, 412 (9th Cir 2014), vacated and remanded, 136 S Ct 1540 (2016).

⁹² *First American* remained good law in the Ninth Circuit because of the dismissal of certiorari two years earlier. Unlike the Ninth Circuit’s en banc rules, see Ninth Circuit Advisory Committee Note to Rules 35-1 to 35-3 (3), nothing automatically vacates or suspends an opinion that is up for review by the Supreme Court.

⁹³ *Robins*, 742 F3d at 412.

⁹⁴ Id at 413.

⁹⁵ Id at 413–14.

⁹⁶ Id (quoting *Lujan* at 578).

Once again, however, the Supreme Court was not satisfied. Justice Alito wrote an opinion for the Court reversing the Ninth Circuit and ordering a remand. It was joined by five other Justices, one of whom—Justice Thomas—also wrote a separate opinion to which we will return. Justices Ginsburg and Sotomayor dissented. (The new lineup shed little light on what had gone wrong in *First American*; and it is also possible that the case was reoriented when Justice Scalia died a few months after argument and (presumably) the drafting assignment.)⁹⁷

The fundamental tension between Proposition A and Proposition B was evident in the Court's opinion in *Spokeo*. From Proposition B cases, the Court repeated that "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing,"⁹⁸ and that "[i]n no event may Congress abrogate the Art. III minima."⁹⁹ And it denied 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."¹⁰⁰

But in a nod to the Proposition A cases, the Court also acknowledged that "both history and the judgment of Congress play important roles. . . . because Congress is well positioned to identify intangible harms that meet minimum Article III requirements,"¹⁰¹ that "Congress may 'elevate to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law,'"¹⁰² and that "'Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.'"¹⁰³

⁹⁷ Cf. Richard M. Re, *Explaining SCOTUS Repeaters*, 69 Vand L Rev En Banc 297, 317 (2016) (suggesting this).

⁹⁸ *Spokeo*, 136 S Ct at 1547–48 (quoting *Raines*, 521 US at 820 n 3).

⁹⁹ Id at 1548 (quoting *Gladstone, Realtors v Village of Bellwood*, 441 US 91, 100 (1979)).

¹⁰⁰ Id at 1549.

¹⁰¹ Id.

¹⁰² Id (quoting *Lujan*, 504 US at 578).

¹⁰³ Id (quoting *Lujan*, 504 US at 580 (Kennedy, J, concurring in part and concurring in the judgment)). See also Judith Resnik, *Revising Our "Common Intellectual Heritage": Federal and State Courts in Our Federal System*, 91 Notre Dame L Rev 1831, 1899 (2016) ("Two competing common heritages can now be drawn upon, one counseling hospitality and the other committed to limiting both judicial and congressional authority to provide remedies in courts.").

To attempt to ease that tension, the Court's opinion made a narrow doctrinal innovation, though in the service of a broader, implicit theme of narrowing Proposition A. The narrow doctrinal innovation was to focus on asking whether the statutory injury was "concrete." The word "concrete" had appeared in the Court's standing cases before. For instance, *Lujan* had described an "injury in fact" as being "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical."¹⁰⁴ But the word had not before been given any independent definition or meaning in the Court's standing doctrine.

Prior to *Spokeo*, in the context of statutory rights, the requirement that the injury be "concrete" might have seemed to be effectively the same as the requirement of particularization. This had been Judge O'Scannlain's reasoning in the Ninth Circuit opinion below. He concluded that an injury is "concrete" so long as it is (1) an invasion of a legal right created by Congress, (2) personal, and (3) individualized.¹⁰⁵

The Supreme Court's opinion in *Spokeo* disagreed, concluding that "[c]oncreteness . . . is quite different from particularization."¹⁰⁶ The Court also concluded that not all legal injuries, and not all injuries to defined statutory rights, were concrete.¹⁰⁷ A statutory right required something more.

But as to what more, exactly, was required, the Court was somewhat mysterious. Citing dictionaries, it said that to be concrete an injury "must actually exist," and be "'real,' and not 'abstract.'"¹⁰⁸ And yet the harm could also nonetheless be "intangible" or based only on the "risk of real harm."¹⁰⁹ The Court did not explain, however, why some statutory rights are not "real," especially when some intangible harms apparently can be. After providing a few sentences of guidance for how to apply this new requirement to the Fair Credit Reporting

¹⁰⁴ *Lujan*, 504 US 555, 560 (1992) (emphasis added; citations and quotation marks omitted).

¹⁰⁵ *Robins*, 742 F3d at 413–14.

¹⁰⁶ *Spokeo*, 136 S Ct at 1548.

¹⁰⁷ Id at 1549 ("Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right").

¹⁰⁸ Id at 1548 (quoting dictionaries).

¹⁰⁹ Id at 1549.

Act itself, the Court remanded the case to the lower courts for further consideration.¹¹⁰

As noted above, the broader message of the Court's opinion seemed to be a certain measure of skepticism about Proposition A, and a search for some additional rule for limiting Congress's ability to create private rights, the invasion of which supports standing. As I will discuss in a moment, that skepticism, and the Court's attempt to implement it, are understandable, but problematic.

There were two other opinions in *Spokeo*: Justice Ginsburg, joined by Justice Sotomayor, dissented, while largely following the majority's framework. Her dissent emphasized the Court's Proposition A cases¹¹¹ but also acknowledged the Proposition B cases.¹¹² She also read the concreteness requirement more narrowly and thought that Robins's complaint had already satisfied that requirement.¹¹³ Justice Thomas, meanwhile, wrote a concurring opinion attempting to ground the Court's standing doctrine in historical principles differentiating public rights and private rights.¹¹⁴ I will return to his view in Part IV.

III. THE PROBLEMS WITH SPOKEO'S ANSWER

Taken seriously, both the larger and smaller implications of *Spokeo* are problematic. They cast doubt on standing in several different cases where standing seemed to be widely presumed. That is not to say that the majority's approach is obviously wrong. It may reflect just how difficult it is to find a principled way of reconciling the two long-standing propositions of the Court's case law.

A. NOMINAL DAMAGES

The first problem with the Court's ruling in *Spokeo* is that it creates a tension with the basic notion of nominal damages. Nominal damages are damages in a trivial amount—a nominal sum—that allow a plaintiff to litigate important legal rights without seeking or litigating damages issues. As we have seen, nominal damages were available at common

¹¹⁰ The Ninth Circuit called for supplemental briefing and argument, and heard argument again on December 13, 2016. Docket No 108, *Robins v Spokeo*, No 11-56843 (9th Cir). As of now, the case remains outstanding.

¹¹¹ 136 S Ct at 1554–55 (Ginsburg, J, dissenting).

¹¹² See, for example, *id* at 1555 (quoting *Lujan*).

¹¹³ *Id* at 1555–56 (Ginsburg, J, dissenting).

¹¹⁴ *Id* at 1551–53 (Thomas, J, concurring).

law for trespass claims, where the plaintiff mostly cared about establishing a property right,¹¹⁵ or in libel cases where the plaintiff cared most about “brand[ing] the defamatory publication as false.”¹¹⁶ Nominal damages have been called “in many respects an early precursor to the declaratory judgment proceeding.”¹¹⁷

“[I]t has long been settled that a claimant may waive or forgo claims for compensatory and punitive damages and pursue nominal damages alone.”¹¹⁸ In more modern cases, the Court has specifically affirmed that nominal damages are available to compensate for the violation of legal rights. In *Carey v Phipus*, the Court concluded that “the denial of procedural due process should be actionable for nominal damages without proof of actual injury.”¹¹⁹ And in a later case the Court even went on to hold that an award of nominal damages is a sufficient victory to make a plaintiff eligible for attorneys fees (though they might not actually be awarded in all cases).¹²⁰

But it is hard to see how nominal damages are fully consistent with the logic of *Spokeo*. The very premise of nominal damages is that one cannot show any “actual injury” apart from the violation of the legal right itself.¹²¹ *Spokeo* seems to require something more than just the violation of a legal right. The *Spokeo* opinion is ambiguous on this score, given its reference to concrete but “intangible” injuries,¹²² but it is nonetheless at odds with the basic idea of nominal damages, whose very point is that nothing more concrete need be shown.

B. ZIVOTOFSKY

Spokeo is also inconsistent with other causes of action that the Court has taken for granted as constitutional up until now. Consider, for instance, the statutory cause of action that the Court confronted the

¹¹⁵ *Webb v Portland Manufacturing Co.*, 29 F Cas 506 (CCD Me 1838).

¹¹⁶ *Gertz v Robert Welch, Inc.*, 418 US 323, 372 (1974).

¹¹⁷ James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 Colum L Rev 1601, 1620 (2011). There are some who argue that nominal damages should not be available in circumstances where a declaratory judgment would not be. See generally *Utah Animal Rights Coalition v Salt Lake City*, 371 F3d 1248, 1262–67 (10th Cir 2004) (McConnell, J, concurring).

¹¹⁸ Pfander, 111 Colum L Rev at 1620 (cited in note 117).

¹¹⁹ *Carey v Phipus*, 435 US 247, 266 (1978).

¹²⁰ *Farrar v Hobby*, 506 US 103, 113 (1992).

¹²¹ *Carey*, 435 US at 266.

¹²² 136 S Ct at 1549.

previous year in *Zivotofsky v Kerry*.¹²³ *Zivotofsky* presented a separation-of-powers issue that arose under Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003. Section 214(d) stated that “[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen’s legal guardian, record the place of birth as Israel.”¹²⁴ The suit was brought in the name of a child, Menachem Binyamin Zivotofsky, to vindicate his statutory right to a passport that said “Israel.”

The Court ultimately concluded that the statute was unconstitutional, at least as applied to passports, because it infringed on the executive’s power over foreign affairs.¹²⁵ But under the logic of *Spokeo*, it is not clear whether the Court should have gotten that far. Before the case reached the Supreme Court, the D.C. Circuit had been forced to confront the question of Zivotofsky’s standing, and it had relied expressly on the broad form of Proposition A. It wrote:

The Supreme Court has recognized that “Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute.” Or stated differently, “Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute.”¹²⁶

As for the Proposition B cases, the D.C. Circuit understood them to be limited to having “qualified statutory standing in one respect,” namely, the exclusion of “a generalized interest shared by all citizens in the proper administration of the law.”¹²⁷ In other words, the D.C. Circuit’s theory of standing in *Zivotofsky* tracked almost exactly the Ninth Circuit’s theory of standing in *Spokeo*. If *Spokeo* is right, then it seems that *Zivotofsky* was wrong to reach the merits.

To be sure, the Supreme Court may not have focused on the standing question in *Zivotofsky*. By 2015 the parties had stopped

¹²³ 135 S Ct 2076 (2015).

¹²⁴ Foreign Relations Authorization Act, Fiscal Year 2003, Pub L No 107-228, 116 Stat 1350, 1366 (2002).

¹²⁵ 135 S Ct at 2081, 2096. For evaluation of the merits, see Jack Goldsmith, *Zivotofsky II as Precedent in the Executive Branch*, 129 Harv L Rev 112, 115–32 (2015); Saikrishna Bangalore Prakash, *Zivotofsky and the Separation of Powers*, 2015 Supreme Court Review 1 (2015).

¹²⁶ *Zivotofsky ex rel Ari Z v Secretary of State*, 444 F3d 614, 617 (DC Cir 2006) (quoting *Linda RS v Richard D*, 410 US 614, 617 n 3 (1973) and *Warth v Seldin*, 422 US 490, 514 (1975)).

¹²⁷ *Zivotofsky ex rel Ari Z*, 444 F3d at 618.

contesting the issue of standing, though the government had contested it before losing on the issue in the D.C. Circuit. But courts have an obligation to consider standing questions on their own, and both an amicus brief¹²⁸ and some public commentary¹²⁹ pointed out the standing problems in *Zivotofsky* while it was pending in the Supreme Court. And the Supreme Court granted certiorari in *Spokeo* just six weeks before deciding *Zivotofsky*.¹³⁰ Nonetheless, none of the Justices in *Zivotofsky* acknowledged the standing problem, even though three of them joined the majority opinion in both that case and *Spokeo*.

Perhaps some members of the Court thought that standing in *Zivotofsky* was permissible because there was a concrete injury apart from the statutory right. But it is hard to see what that would be. One could perhaps imagine that some Section 214(d) claimants would suffer psychological harm from the treatment of their passports, and one can read *Spokeo* to treat psychological harms as sufficiently “concrete.”¹³¹ But, as the D.C. Circuit pointed out, at the time of its standing decision Menachem Zivotofsky was “only three years old” and any psychological harm seemed “conjectural.”¹³² What is more, standing is supposed to exist *when the complaint is filed*.¹³³ When the complaint in *Zivotofsky* was filed, Menachem was eleven months old.¹³⁴ It seems implausible that he had any psychological harm from the contents of his passport at that time.

¹²⁸ Brief of True Torah Jews as amicus curiae in support of respondent, *Zivotofsky v Kerry*, No 13-628 (US Supreme Court, filed Sept 29, 2014).

¹²⁹ William Baude, *The Standing Problem in Zivotofsky, Revisited*, Washington Post, Volokh Conspiracy (Dec 4, 2014), at <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/12/04/the-standing-problem-in-zivotofsky-revisited/>; William Baude, *The Legal Power of “Standing,”* NY Times (May 14, 2015), at <http://www.nytimes.com/2015/05/14/opinion/the-legal-power-of-standing.html>. But see Andy Hessick, *Zivotofsky and Spokeo*, Notice & Comment: A Blog from the Yale J on Reg (May 18, 2015), at <http://www.yalejreg.com/blog/zivotofsky-and-spokeo-by-andy-hessick>.

¹³⁰ 135 S Ct 1892 (2015) (granting certiorari).

¹³¹ Rachel Bayefsky, *Psychological Harm and Constitutional Standing*, 81 Brooklyn L Rev 1555, 1568–69, 1597–98 (2016).

¹³² *Zivotofsky ex rel Ari Z*, 444 F3d at 617.

¹³³ See *Newman-Green v Alfonzo-Larrain*, 490 US 826, 830 (1989) (“The existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed.”); *Lujan*, 504 US at 569 n 4 (plurality); see also *Campbell-Ewald v Gomez*, 136 S Ct 663, 669 (2016) (Article III “demand[s] that an actual controversy be extant at *all* stages of review, not *merely* at the time the complaint is filed.”) (emphasis added, internal quotation marks and alterations omitted).

¹³⁴ Complaint, *Zivotofsky v Secretary of State*, No 03-1921 (DDC, filed Sept 16, 2003) (noting Menachem Zivotofsky’s birthdate as October 17, 2002).

Or perhaps one could characterize *Zivotofsky*'s injury as expressive. *Spokeo* gave as examples of permissible "intangible injuries" violations of free speech and free exercise rights,¹³⁵ and one could see the right to put one's country of origin on one's passport as an expressive right. But that seems like a strained interpretation of the passport (and one that the majority in *Zivotofsky* indeed rejected).¹³⁶ Moreover, it simply raises the question why the abstract rights to engage in free speech and free exercise are "concrete" but the right to reasonable accuracy in *Spokeo* might not be.

One might dismiss the question of standing in *Zivotofsky* as a moot point. The Justices did not discuss the standing question, and therefore the case establishes no precedent on standing.¹³⁷ But the contrary treatment of standing in *Zivotofsky* and *Spokeo* suggests that there is something confused about the Court's intuitions in this area. Moreover, the question of standing in cases like *Zivotofsky* may well arise again, even under the very same statute. That is because Section 214(d) applies not only to passports but to consular reports of birth abroad. Justice Thomas expressly distinguished the two and argued that Congress has greater power to regulate the latter in light of its naturalization power.¹³⁸ And the majority expressly reserved the question because it had been waived.¹³⁹ Hence, if Jerusalem-born U.S. citizens wish to litigate the issue of consular birth reports, the courts will have to confront the standing question in light of *Spokeo*.

C. PRIVACY

Finally, *Spokeo* has also raised questions about the enforcement of privacy statutes throughout the lower courts. In these cases, plaintiffs sue somebody who has illegally disclosed information about them;

¹³⁵ *Spokeo*, 136 S Ct at 1549.

¹³⁶ For example, *Zivotofsky*, 135 S Ct at 2095 (describing "a passport's place-of-birth section as an official executive statement").

¹³⁷ *Arizona Christian School Tuition Org. v Winn*, 563 US 125, 144 (2011) ("When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed.").

¹³⁸ 135 S Ct at 2109–11 (Thomas, J, concurring in the judgment in part and dissenting in part).

¹³⁹ *Id* at 2083 ("The arguments in *Zivotofsky*'s brief center on his passport claim, as opposed to the consular report of birth abroad. . . . He has . . . waived the issue here by failing to differentiate between the two documents. As a result, the Court addresses *Zivotofsky*'s passport arguments and need not engage in a separate analysis of the validity of § 214(d) as applied to consular reports of birth abroad.").

they are then confronted with the question of whether illegal disclosure of information, without more, is a concrete injury under *Spokeo*. Remarkably, most courts have said “no.” Taken seriously, this would imply constitutional limits on federal enforcement of privacy rights. This further demonstrates the implausibility of *Spokeo*.

For instance, last summer the D.C. Circuit confronted a lawsuit by two D.C. shoppers who complained that local clothing stores had demanded their zip codes in violation of local law. Without disputing that the information was illegally demanded, D.C. Circuit dismissed the case for lack of standing.¹⁴⁰ The forced disclosure of one’s zip code, it held, was not a concrete injury after *Spokeo*. In *Spokeo* the Court had offered a coincidentally similar example, writing: “not all inaccuracies cause harm or present any material risk of harm. An example that comes readily to mind is an incorrect zip code. It is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm.”¹⁴¹

The D.C. Circuit found the dictum apt, writing, “If, as the Supreme Court advised, disclosure of an incorrect zip code is not a concrete Article III injury, then even less so is [the plaintiffs’] naked assertion that a zip code was requested and recorded without any concrete consequence. [The plaintiffs] do not allege, for example, any invasion of privacy, increased risk of fraud or identity theft, or pecuniary or emotional injury.”¹⁴²

This is probably the correct conclusion to draw from *Spokeo*’s somewhat gratuitous discussion of zip codes, but at a more fundamental level it again suggests that something is wrong with *Spokeo*. Why must the plaintiffs show something like a risk of identity theft or emotional injury to demonstrate a concrete injury? Why can’t an illegal disclosure *itself* be a concrete injury? As to a zip code, this may seem strange. But imagine that the illegal disclosure was something else—an unflattering photograph or email, perhaps. Surely this ought to be actionable without showing a subsequent consequence, like the loss of one’s job or social standing. Or, more modestly, imagine somebody who is embarrassed by their middle name and does not wish to see it disclosed. If that person has a legal right against disclosure, why should they need anything more?

¹⁴⁰ *Hancock v Urban Outfitters*, 830 F3d 511 (DC Cir 2016) (Millett, J).

¹⁴¹ *Spokeo*, 135 S Ct at 1550.

¹⁴² *Hancock*, 830 F3d at 514.

There are two possible ways to resolve the scope of privacy laws in light of the courts' position on zip codes. One possibility, the more aggressive one, is to conclude that illegal disclosure of facts about oneself is never itself a concrete injury. To sue over the disclosure of one's address, photos, name, or anything else, one would have to demonstrate some sort of downstream consequences from these disclosures. In other words, privacy itself would not be a protectable interest under Article III. This position has a certain logical purity, but one hopes that it is too implausible even for today's courts to adopt. It would mean that even injuries recognized under longstanding common law principles would not be enough to satisfy the "injury in fact" requirement.¹⁴³

The alternative possibility, a more modest one, is that some illegal disclosures are injurious in themselves, and others are not. For instance, perhaps the disclosure of photographs is different in kind from the disclosure of zip codes, even if both are protected by legal right. (The D.C. Circuit's attempt to distinguish "invasion of privacy" as an actionable "concrete consequence" might point to this possibility.)¹⁴⁴ There is some common sense intuition behind this approach, but it is not entirely principled. If the legislature has made the judgment to protect both kinds of information, it is not at all clear why judges may decide that one is "concrete," that is, "real," and the other is not.¹⁴⁵ This saves some of privacy law from *Spokeo* only by creating a constitutional common law of privacy interests.

Other post-*Spokeo* decisions in the lower courts reveal more ambiguity and troubling possibilities. For instance, in *Braitberg v Charter Communications*, the Eighth Circuit dismissed a lawsuit brought by a former customer complaining that his cable company had illegally retained some of his personal information in violation of federal law.¹⁴⁶

¹⁴³ See Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 Harv L Rev 193, 206–13 (1890) (suggesting that under "the existing law" the "invasion of privacy" is "a legal injury"); see also Restatement (Second) of Torts § 652D (1977) (collecting cases).

¹⁴⁴ *Hancock*, 830 F3d at 514 ("Hancock and White do not allege, for example, any invasion of privacy, increased risk of fraud or identity theft, or pecuniary or emotional injury.")

¹⁴⁵ See *Leading Case, Spokeo, Inc. v Robins*, 130 Harv L Rev 437, 444–45 (2016) ("For example, even incorrect zip codes assuredly cause harm of some degree, since insurance 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. The pertinent question is not exactly how much harm is caused, but why is it not harm enough?")

¹⁴⁶ 836 F3d 925 (8th Cir 2016).

The court concluded that illegally retaining personal information was not itself a harm for which Congress could authorize suit, suggesting once again that Article III might impose limits on federal privacy law.

Like the D.C. Circuit, the Eighth Circuit tried to salvage some privacy law, by noting that in this case the defendant had not “disclosed the information to a third party” nor “used the information in any way during the disputed period.”¹⁴⁷ This was relevant, said the court, because at common law, “the retention of information lawfully obtained, without further disclosure, traditionally has not provided the basis for a lawsuit in American courts.”¹⁴⁸ This is somewhat reassuring for privacy law, but not entirely. In rejecting Congress’s attempts to modestly expand the scope of personal informational rights in the Cable Communications Policy Act, the Eighth Circuit cast doubt on whether Congress can expand privacy rights beyond their common law scope at all. It is unclear why, in this area, Congress should not be allowed to protect interests beyond those protected by the common law, as it has been allowed in other cases.

On the other hand, the Third Circuit has taken the opposite lesson from *Spokeo*. In *In re Nickelodeon Consumer Privacy Litigation*,¹⁴⁹ the court concluded that statutory privacy claims automatically supply standing. Dealing with a class of consumers who alleged that Viacom had illegally disclosed children’s web-browsing data to Google, the court wrote that while their harms were “perhaps ‘intangible,’” they nonetheless presented “a clear *de facto* injury, *i.e.*, the unlawful disclosure of legally protected information.”¹⁵⁰ While the D.C. Circuit in *Hancock* thought the unlawful disclosure of legally protected information was not an injury without more—without some consequences flowing from that unlawful disclosure—the Third Circuit thought that the disclosure was itself the harm.

D. SUBSTANTIVE DUE PROCESS ALL OVER AGAIN?

The purpose of reciting these problematic implications of *Spokeo* is not to show that Article III limits on statutory standing are obvi-

¹⁴⁷ *Id.* at 930.

¹⁴⁸ *Id.*

¹⁴⁹ 827 F3d 262 (2016).

¹⁵⁰ *Id.* at 274. See also *In re Horizon Healthcare Services Inc. Data Breach Litigation*, 846 F3d 625 (3d Cir 2017) (reaffirming this holding).

ously wrong. While there may once have been widespread academic skepticism of restrictions on Congress's plenary power to confer standing through statutory rights,¹⁵¹ that power has been limited in several cases that seem well entrenched. But even accepting those limits, the conflict between the Court's two lines of standing doctrine raises tricky problems, and *Spokeo* does not do much to solve them.

Indeed, the Court's so far unsuccessful quest to define the limits of statutory standing is reminiscent of the path of another doctrine—that of substantive due process. This analogy has been made before by some critics of Proposition B's limits on statutory standing¹⁵² who have said that it “uses highly contestable ideas about political theory to invalidate congressional enactments, even though the relevant constitutional text and history do not call for invalidation at all”¹⁵³—an analogy intended as “particular anathema to those members of the Court most anxious to tell us that there are Article III limitations on statutory grants of standing.”¹⁵⁴ The analogy between standing limitations and substantive due process is an apt one, but in a more nuanced and sympathetic way than those critics may intend. The vagueness of Proposition B, illustrated by *Spokeo*, invites courts either to fashion constitutional limits out of nothing, or to say that only interests protected by the common law satisfy Article III requirements—both paths that have proven unworkable in the substantive due process context.

In a nutshell, one story of substantive due process's early rise is this: The Due Process Clause forbids deprivations of “life, liberty, or property without due process of law.”¹⁵⁵ This was paradigmatically understood as a rule regulating the executive and judicial branches, requiring them to obey the positive law when their actions might injure a private person.¹⁵⁶ It might have been satisfying to conclude

¹⁵¹ Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv L Rev 1669, 1734–42 (1975); David P. Currie, *Misunderstanding Standing*, 1981 Supreme Court Review 41, 42–43, 47; Fletcher, 98 Yale L J at 253–54 (cited in note 7); Sunstein, 91 Mich L Rev at 191–92, 236 (cited in note 8).

¹⁵² Fletcher, 98 Yale L J at 233 (cited in note 7); Sunstein, 91 Mich L Rev at 205–06, 234–35 (cited in note 8).

¹⁵³ Sunstein, 91 Mich L Rev at 167 (cited in note 8).

¹⁵⁴ Fletcher, 98 Yale L J at 233 (cited in note 7).

¹⁵⁵ US Const, Art V. See also *id* Art XIV.

¹⁵⁶ John Harrison, *Substantive Due Process and the Constitutional Text*, 83 Va L Rev 493, 504–05 (1997).

that the clause does not apply to the legislature at all—and seemingly consistent with due process’s forebearer, the requirement that the government conform to “the law of the land.”¹⁵⁷ But the clause could not easily ignore the legislature, for what if the legislature passed a statute saying that the executive branch could do whatever it wished and dispense with the courts? Or what if the legislature itself directly effected the deprivation? In order to prevent what seem like obvious evasions of the clause, it was logical to characterize those legislative actions, too, as deprivations of due process.¹⁵⁸

Perhaps one could still hold the line by insisting that the requirement as applied to the legislature be strictly procedural: The legislature could create whatever substantive rules or liabilities it wished so long as they were adjudicated by a court and through “due” procedures. But regulations of substance can circumvent the requirements of process. What if, for example, the legislature passes a statute making it a crime to be on an officially maintained list of enemy combatants? One can have all of the process one likes, limited to the single element of the offense: whether one is on the list. The hypothetical is troubling because its substance makes procedure irrelevant.

And while courts did not confront exactly that hypothetical, they confronted other substantive regulations that seemed similar to them, such as a law providing for the one-time election of county clerks,¹⁵⁹ or a law prohibiting the sale of liquor,¹⁶⁰ and found them to violate due process principles.¹⁶¹ These substantive rules came so close to evading the constitutionally required process that it seemed natural to invalidate them too. Thus due process expanded to include certain substantive constraints that supplement procedural due process, such as

¹⁵⁷ Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 Yale L J 408, 428–35 (2010).

¹⁵⁸ Harrison, 83 Va L Rev at 506–20 (cited in note 156) (describing, though not endorsing, this move); Nathan S. Chapman and Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L J 1672, 1713–17 (2012) (describing Alexander Hamilton’s view); id at 1724 (“Most American courts and jurists in the early Republic agreed, at a minimum, that legislative enactments that authorized other branches to deprive persons of life, liberty, or property without traditional procedural protections or their equivalent violated due process.”).

¹⁵⁹ *Hoke v Henderson*, 15 NC (4 Dev) 1 (1833).

¹⁶⁰ *Wynehamer v People*, 13 NY 378 (1856).

¹⁶¹ See Chapman and McConnell, 121 Yale L J at 1751–54, 1768–70 (cited in note 158) and Williams, 120 Yale L J at 461, 465, 468–70 (cited in note 157) for discussion.

the requirements that legislation authorizing deprivations be “general” or “prospective.”¹⁶²

But once one has started invalidating substantive regulations, it is easy to see how one slips into even more “substantive” applications of due process—whether a right to freedom of contract or a right to intimate decision making or what have you. Having abandoned the most formally stark principles, like the rule that due process does not apply to the legislature, or applies only to process and never to substance, the doctrinal category has tended to drift out into more open territory. And in this open sea, courts looking for landmarks instead drift to things like common-law tradition or their own ethical intuitions.

This is not to say that this evolution from formally procedural to broadly substantive due process is inevitable—on the contrary! Many jurists and scholars have put forward plausible theories about how and where the stopping line should have been drawn. But it is to say that it is easier than one might think to slip from formal procedural rules to quite substantive judge-made ones. And it is hard to draw a coherent, stable line in such an area by proceeding only in intuitive, case-by-case fashion.

Congressionally created standing has much the same character. It might have been satisfying to conclude that standing limitations do not apply to the legislature at all—but that would suggest that Congress could even go so far as to authorize federal courts to issue advisory opinions, whose illegality is supposedly one of the paradigm rules of Article III. It seemed natural enough, perhaps even necessary, to describe the legal right to an advisory opinion as violating the requirement of a “judicial” “case” or “controversy.” This gives us *Musk-rat*, the first of the standing cases supporting today’s Proposition B.¹⁶³

Even once standing doctrine has extended to limit legislatively created rights, one might attempt to limit that doctrine to a ban on advisory opinions. But courts saw in some procedural legal rights the

¹⁶² Chapman and McConnell, 121 Yale L J at 1717, 1738 (cited in note 158); Williams, 120 Yale L J at 423–25 (cited in note 157).

¹⁶³ 219 US 346 (1911) (discussed at notes 56–60). See also Richard M. Re, *Relative Standing*, 102 Georgetown L J 1191, 1232 (2014) (“[T]he Court has . . . insisted that there are limits on Congress’s power to confer standing, and it is easy to see why. Unfettered authority to confer standing would empower the political branches to compel adjudication of controversies that are, as presented, poorly suited to judicial resolution. And courts have said for decades, even centuries, that effective judicial resolution of disputes is facilitated through adjudication focused by concrete adversity.” (citing *Musk-rat*)).

same things that had concerned them about advisory opinions—the possibility of courts being asked to adjudicate only “[t]he public’s nonconcrete interest in the proper administration of the laws.”¹⁶⁴

And once courts have started invalidating such statutory rights, it is easy to see how they might keep going. The rule that all federal legal rights can be vindicated in federal court has been replaced with a judicial limitation on which legal rights are sufficiently real to be judicially enforced. Such judicial limitation is not inherently flawed, but the Court has not fully understood the problem it is trying to solve, and so it has not deployed a solution that is likely to solve it.

The concept of “concreteness” does not do much to resolve these problems. Nor does it help to rephrase that term, as *Spokeo* does, into a judicial inquiry into which injuries, including “intangible” ones, are nonetheless “real.”¹⁶⁵ What makes some rights “real” enough to justify nominal damages, and others insufficiently real to justify the statutory damages available under the Fair Credit Reporting Act? What makes the word “Israel” on Menachem Zivotofsky’s passport more concrete than the word “married” on Robins’s *Spokeo* profile? What makes the zip code disclosed in *Hancock* less concrete than the internet cookie disclosed in *Nickelodeon*?

The way to make the concept of “intangible” yet “real” injury coherent is to say that only injuries recognized in some form by the common law will suffice. But this is a position that the Court has (rightly) rejected, and it is one that is not really reconciled to a post-*Lochner* world. The inquiry in *Spokeo* looks, at best, like an effort to identify the subset of statutory rights that vaguely resemble the common law. That inquiry is both indefinite, but more importantly, misguided. So while the doctrinal problem faced in *Spokeo* is a genuinely tricky one, the Court’s attempted answer should be classified as a misstep.

IV. JUSTICE THOMAS’S ALTERNATIVE

One Justice on the *Spokeo* Court seemed to see the problem. Justice Thomas, who joined the majority opinion in full, wrote a

¹⁶⁴ *Lujan*, 504 US at 580 (Kennedy, J, concurring in part and concurring in the judgment in part).

¹⁶⁵ *Spokeo*, 136 S Ct at 1548–49. See also Re, 102 Georgetown L J at 1203 (cited in note 163) (arguing that because of the failure of the concept of adequate factual injury, “the Court has adopted a ‘standard’ for factual injury defined only by a list of synonymous adjectives”).

concurring opinion that put forward a proposed rule that is both theoretically and historically consistent and that may provide a way to reconcile the tension between Proposition A and Proposition B. Justice Thomas's opinion built off of insightful articles by Andrew Hessick¹⁶⁶ and by Ann Woolhandler and Caleb Nelson.¹⁶⁷ While Justice Thomas's argument may need to be articulated more fully in the future, here are the essential parts:

The fundamental inquiry that standing derives from is who is a "proper party" to a given lawsuit. Having the so-called proper party is an independent requirement for judicial cognizance of a case.¹⁶⁸ Most importantly, the "proper party" for bringing a lawsuit depends very much on whether the suit is one to vindicate public rights or private rights. Public rights are owed "to the whole community, considered as a community, in its social aggregate capacity,"¹⁶⁹ such as "free navigation of waterways, passage on public highways, and general compliance with regulatory law."¹⁷⁰ Public rights can most paradigmatically be vindicated by the government itself.¹⁷¹ But they can also be vindicated by private people if those people suffered "special damage" that distinguishes them from other members of the public.¹⁷²

By contrast, private rights are those "belonging to individuals, considered as individuals,"¹⁷³ such as "rights of personal security (including security of reputation), property rights, and contract rights."¹⁷⁴ They can be vindicated by the holders of those private rights regardless of what kind of damage they had suffered. These include the

¹⁶⁶ Hessick, 93 Cornell L Rev at 275 (cited in note 12).

¹⁶⁷ Woolhandler and Nelson, 102 Mich L Rev at 689 (cited in note 8).

¹⁶⁸ Id at 695 ("The concept of proper parties is central to standing doctrine, and it may also infuse notions of a 'Case'"). The relationship of proper parties to Article III may also explain the constitutionalization of sovereign immunity. See Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 Harv L Rev 1559, 1568–75 (2002). See also William Baude, *Sovereign Immunity and the Constitutional Text*, 103 Va L Rev 1 (2017).

¹⁶⁹ *Spokeo*, 136 S Ct at 1551 (Thomas, J, concurring) (quoting 4 William Blackstone, Commentaries at *5).

¹⁷⁰ *Spokeo*, 136 S Ct at 1551 (Thomas, J, concurring) (quoting Woolhandler and Nelson, 102 Mich L Rev at 693 (cited in note 8)).

¹⁷¹ Hessick, 93 Cornell L Rev at 278–279 (cited in note 12).

¹⁷² Woolhandler and Nelson, 102 Mich L Rev at 701 (cited in note 8).

¹⁷³ *Spokeo*, 136 S Ct at 1551 (Thomas, J, concurring) (quoting 3 William Blackstone, Commentaries at *2).

¹⁷⁴ *Spokeo*, 136 S Ct at 1551 (Thomas, J, concurring) (citing 1 Blackstone at *130–*39 and Woolhandler and Nelson, 102 Mich L Rev at 693 (cited in note 8)).

instances of nominal damages and trespass without injury discussed earlier.¹⁷⁵

Put together, these two principles led Justice Thomas to the conclusion that Proposition A controlled in private rights cases, while Proposition B controlled in public rights cases:

Congress can create new private rights and authorize private plaintiffs to sue based simply on the violation of those private rights. A plaintiff seeking to vindicate a statutorily created private right need not allege actual harm beyond the invasion of that private right. A plaintiff seeking to vindicate a public right embodied in a federal statute, however, must demonstrate that the violation of that public right has caused him a concrete, individual harm distinct from the general population. Thus, Congress cannot authorize private plaintiffs to enforce public rights in their own names, absent some showing that the plaintiff has suffered a concrete harm particular to him.¹⁷⁶

This position has several virtues. It is consistent with the historical antecedents of standing doctrine, and also basically consistent with the Court's invocations of Propositions A and B. Under this theory, the Proposition A cases are generally correct because Congress had in those cases created a private right, which can be enforced by the holder of that right without anything more.¹⁷⁷ Meanwhile, *Lujan* and *Summers* and *Muskrat* and *Raines*—the Proposition B cases—are correct because they all involve the enforcement of a public right, namely, that of “general compliance with regulatory law.”¹⁷⁸

I am not certain that this position is sound, but it is plausible and generally consistent with history and doctrine, and it provides an actual attempt at a way forward. The historical categories of public and private rights, though not of crystalline purity, seem more workable and more apt than the Court's struggle to define some injuries as “real” and “concrete.” By focusing the inquiry on the distinction between public and private rights, Justice Thomas helps us see that the question is not about whether the injury matches some platonic class of real injuries, but rather about whether Congress has

¹⁷⁵ See notes 12–15.

¹⁷⁶ *Spokeo*, 136 S Ct at 1553 (Thomas, J, concurring) (citations omitted).

¹⁷⁷ Justice Thomas joined Justice Scalia's dissent in *FEC v Akins*, 524 US 11, 30 (1998), which argued that the cause of action in that case should be narrowly construed to avoid rendering it unconstitutional. It is possible, but not certain, that the cause of action at issue in *Akins* could be seen as conferring a private right to information, rather than a public right.

¹⁷⁸ *Spokeo*, 136 S Ct at 1551 (Thomas, J, concurring) (quoting Woolhandler & Nelson, 102 Mich L Rev at 693 (cited in note 8)).

given the right a particular *form*—a form that matches the judicial function in resolving it.

To be sure, Justice Thomas’s position, and the scholarship on which he relied, does not fully resolve an important and hard question: Under what circumstances can Congress privatize a previously public right? When and how can Congress convert a legal duty that might traditionally have seemed public into a private one?¹⁷⁹ Answering this question will be important to know whether a new statutory right should be classed with the cases under Proposition A or Proposition B.

It seems to me that Justice Thomas’s approach could yield at least two plausible answers to this question, one more restrictive of Congress’s power and one more generous. Under the more restrictive approach, one might say that private rights must take a particular form. For instance, at one point Justice Thomas deployed a quotation from *Tennessee Electric Power v TVA*,¹⁸⁰ implying that a private right must have one of four specific forms.¹⁸¹ It must be “‘a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege.’”¹⁸²

These categories exclude the Proposition B cases. None of them were rights of property or contract. The “procedural right” at issue in *Lujan* and *Summers* was not a “privilege,” at least if that term is used in the Hohfeldian sense of being “the opposite of a duty, and the correlative of a ‘no-right.’”¹⁸³ It did not give its holders the privilege to do anything, other than sue to enforce the duty it imposed on the government.¹⁸⁴ Nor was it “protected from tortious invasion,”¹⁸⁵

¹⁷⁹ Cf. William Baude and James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 Harv L Rev 1821, 1880 (2016) (noting that “one of the great debates among legal theorists is over how to determine whether and upon whom a legal duty confers a legal right” and that it is “not yet resolved”).

¹⁸⁰ 306 US 118 (1939).

¹⁸¹ *Spokeo*, 136 S Ct at 1553 (Thomas, J, concurring).

¹⁸² *Id* (quoting *Tennessee Electric*, 306 US at 137–38).

¹⁸³ Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L J 16, 32 (1913).

¹⁸⁴ This made it a “right in the strictest sense.” *Id* at 30. See also *id* at 32 (“In other words, if X has a right against Y that he shall stay off the former’s land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place”).

¹⁸⁵ 306 US at 138.

because the government's violation of the right was not treated as a tort or subject to damages. The same seems even more clearly true of *Raines* and *Muskrat*.

Under this restrictive approach, however, rights like those at issue in *Spokeo* may well be validly created private rights, because they do seem to be "protected against tortious invasion."¹⁸⁶ Hence, Justice Thomas concluded that if the Fair Credit Reporting Act created "a private duty owed personally to Robins to protect *his* information," that was enough for standing, but not if it "vests any and all consumers with the power to police the 'reasonable procedures' of *Spokeo*, without more."¹⁸⁷

There is also a more permissive version of Justice Thomas's approach, one that would not wed itself to particular Hohfeldian categories or the language of *Tennessee Electric*. Under this version, any legal duty may be said to create a private right so long as it is adequately personalized—owed to a specific person or group of persons rather than to the public at large.

There are parts of Justice Thomas's opinion that point to this more permissive formulation¹⁸⁸ and it would have the advantage of simplicity. It would not get bogged down in categories like "privilege" or "tortious invasion."¹⁸⁹ Indeed, this more permissive approach would look a great deal like what Judge O'Scannlain had written for the Ninth Circuit earlier in the *Spokeo* litigation: that a statutory right is an enforceable private right if it is "individualized rather than collective," and if the person suing is "among the injured."¹⁹⁰ In other words, Justice Thomas's concurrence not only suggests that the majority opinion in *Spokeo* was a misstep, but also suggests that a more principled and workable approach may have been lying in front of the Court all along.

¹⁸⁶ *Id.*

¹⁸⁷ *Spokeo*, 136 S Ct at 1554 (there was some statutory ambiguity on that point).

¹⁸⁸ *Id.* (Thomas, J, concurring) (emphasizing the question of whether there was "a private duty owed personally to Robins").

¹⁸⁹ *Id.* (quoting *Tennessee Electric*, 306 US at 137–38).

¹⁹⁰ *Robins v Spokeo, Inc.*, 742 F3d 409, 413–14 (9th Cir 2014).