Fletcherian Standing, Merits, and *Spokeo, Inc. v. Robins*

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I. INTRODUCTION

The year 2013 marked the twenty-fifth anniversary of (now-Judge) William Fletcher's *The Structure of Standing*, which recast standing as a question of substantive merits and of the underlying substantive cause of action, leaving Congress with "essentially unlimited" power to create new statutory rights and empower individuals to enforce those rights in federal court.[1]

Two years later, the Supreme Court's pending review of the Ninth Circuit in *Spokeo, Inc. v. Robins* offers a new opportunity to consider the benefits of Fletcherian standing, in the context of a particular statutory dispute.[2] I hold no illusions that the Court will do this, of course. The Court has only moved further away from Fletcher's model in the twenty-five years since his landmark article. This Essay ultimately may be an exercise in wishful procedural and jurisdictional thinking.

On the other hand, a major project for the Roberts Court, which I have discussed in previous work, has been the elimination of

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1. William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223–24 (1988).

2. Robins v. Spokeo, Inc., 742 F.3d 409 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 1892 (2015).

"drive-by jurisdictional rulings," decisions marked by "profligate" and "less than meticulous" use of the word jurisdictional and the concept of jurisdiction.[3] The Court has corrected course by repeatedly declaring to be merits issues a host of other doctrines previously, albeit wrongly, associated with federal adjudicative jurisdiction. The time is right for the Court to do the same with issues wrongly associated with standing.

The remainder of this Essay shows how *Spokeo* illustrates the wisdom of Fletcher's merits-based model of standing. His approach is consistent with other pieces of the Court's recent jurisdictionality jurisprudence and offers a normatively preferable way to determine who is entitled to sue in federal court to vindicate legal rights created by Congress.

II. FLETCHERIAN STANDING REVISITED

In highly abbreviated form, Fletcher proposes that courts "abandon the idea that standing is a preliminary jurisdictional issue," understanding it instead as simply "a question on the merits of plaintiff's claim."[4] The lynchpin of Fletcher's argument is his insistence that there is no such thing as an objective, neutral injury in fact divorced from some external, normative source of law establishing rights and duties and defining when someone has been injured.[5] The relevant question is not whether an actual injury occurred, but whether it is an injury that the courts should recognize; that, in turn, depends on the substantive right sought to be vindicated and enforced in a particular case.[6] To illustrate, the meaningful difference between a person losing sleep because the government is not taking sufficient steps to eliminate homelessness and a person losing sleep because his neighbor's dog is barking is that applicable substantive law recognizes the latter, but not the former, as a remediable injury.[7]

This view has its most significant implications in cases involving statutory (as opposed to constitutional) rights. Congress has power to create legal rights and duties by statute (within the bounds

3. Howard M. Wasserman, *Prescriptive Jurisdiction, Adjudicative Jurisdiction, and the Ministerial Exemption*, 160 U. PA. L. REV. PENNUMBRA 289, 308 (2012) [hereinafter Wasserman, *Ministerial*]; Howard M. Wasserman, *The Demise of "Drive-By Jurisdictional Rulings"*, 105 NW. U. L. REV. 947, 947–48 (2011) [hereinafter Wasserman, *Drive-By*]; *see* Arbaugh v. Y&H Corp., 546 U.S. 500, 510–11 (2006).

4. Fletcher, *supra* note 1, at 223.

5. *Id.* at 231.

6. *Id.* at 231–32, 234.

7. *See id.* at 232.

of Article I, Section 8; Section 5 of the Fourteenth Amendment; or some other source of legislative power). An essential incident of that power to create rights and duties is unfettered authority to define the class of persons entitled to enforce those rights and duties.[8] It is incoherent for a court to say that a plaintiff who is entitled to sue under a statute has nevertheless not suffered an injury in fact; the statute itself provides the normative structure that defines the injury.[9] Thus, the sole focus should be on identifying the specific statutory duty Congress created and determining whom Congress intended to authorize as enforcers of that duty.

Fletcher recognizes an essential identity between statutory standing and implied rights of action, both being about the right of a plaintiff to initiate private litigation to enforce and vindicate a congressionally created right.[10] As to either, Fletcher argues, "the important point to notice is that the question of whether plaintiff 'stands' in a position to enforce defendant's duty is part of the merits of the plaintiff's claim."[11]

Indeed, for courts to deny standing in such statutory actions undermines the notion that separation of powers forms the "single basic idea" underlying standing doctrine.[12] It allows courts to act in derogation of otherwise-proper congressional power to confer a legal right on some plaintiffs. For the Court to hold that a grant of standing to enforce a statutory duty violates Article III is for the Court to fail to "defer[ ] to the exercise of power by our democratically elected legislative body," thereby "restraining Congress's power and increasing its own."[13]

Jonathan Siegel elaborates on this point. Imposing an Article III overlay onto statutory causes of action disables Congress from imposing truly mandatory requirements;[14] Congress can purport to create legal duties, but is limited in its power to create a regime in which the public can enforce those duties where the statutory injury is generally dispersed.[15] The beneficiary of such a system is the President, who now wields near-exclusive power to determine the

8. *Id.* at 223–24, 254.

9. *See id.* at 254.

10. *Id.*

11. *Id.* at 239.

12. *See* Allen v. Wright, 468 U.S. 737, 752 (1984).

13. William A. Fletcher, *Standing: Who Can Sue to Enforce a Legal Duty?*, 65 ALA. L. REV. 277, 282 (2013); *see* Fletcher, *supra* note 1, at 254.

14. Jonathan R. Siegel, *What if the Universal Injury-in-Fact Test Already is Normative?*, 65 ALA. L. REV. 403, 413–15 (2013).

15. *Id.*

appropriate level of statutory enforcement.[16] Congress has been stripped of any power to create a regime in which the public can demand an appropriate degree of enforcement by allowing private individuals to supplement government enforcement through the courts.

Two other commentators have recognized the appeal of Fletcher's pure-merits approach to standing, while arguing for some limits on the approach, particularly as it affects Congress' power to establish statutory standing.

First, Robert Pushaw argues that courts should not give total deference to statutory standing grants, but only accord them a "strong presumption of validity."[17] That presumption is overcome "most starkly" where a statute permits "any person" to sue for violations, "regardless of whether that person has suffered a fortuitous invasion of legal rights."[18] Pushaw also singles out situations in which "ideologically driven plaintiffs" insist they have been adversely affected by broad agency action.[19] He is particularly concerned that Fletcher's theory leaves no limits on ideological suits, such as by environmental advocacy groups against federal officials over their unlawful or insufficient enforcement of federal environmental laws.[20]

Second, Ernest Young agrees with Fletcher that standing cannot be divorced from the underlying law at issue. But Young argues that courts must deal with the many statutes in which Congress has not made its intent known with respect to who is entitled to sue. In such cases, default rules are necessary to resolve the question when "Congress will simply not have considered—or simply failed to reach closure on—the question who can sue to enforce a particular statutory scheme."[21] And, Young insists, those default rules look very much like the general, freestanding, non-merits-based standing principles that Fletcher decries.[22]

16. *Id.* at 415.

17. Robert J. Pushaw, Jr., *Fortuity and the Article III "Case": A Critique of Fletcher's* The Structure of Standing, 65 ALA. L. REV. 289, 332 (2013).

18. *Id.*

19. *Id.*

20. *Id.*

21. Ernest A. Young, *In Praise of Judge Fletcher--And General Standing Principles*, 65 ALA. L. REV. 473, 481 (2013).

22. *See id.* at 475.

III. JURISDICTION, STANDING, AND MERITS

A. Distinguishing Merits from Jurisdiction

One of the Roberts Court's jurisprudential projects has been elimination of "drive-by jurisdictional rulings"—that is, rulings employing the jurisdictional label in a "profligate" or "less than meticulous" way without considering the meaning or effect of that label.[23] The Court has drawn properly sharp lines between federal district courts' "arising under" federal-question jurisdiction and the substantive merits of federal claims by broadening what issues establish the merits of a claim and narrowing what issues function as limitations on a court's adjudicative jurisdiction.

Merits fundamentally ask who is entitled to sue whom, for what conduct, and for what remedy.[24] A plaintiff prevails on her claim when applicable substantive law permits that person to sue this defendant for this real-world conduct and entitles her to this remedy.[25] Recent decisions establish that the scope and reach of a federal statute—what conduct it reaches or prohibits, by whom, and for whose benefit—is a merits question.[26] Merits remain distinct from a court's adjudicative jurisdiction, its root power or authority to provide an adjudicative forum for resolving claims of right and to hear and resolve the legal and factual issues raised under applicable substantive law.[27]

The Court has attempted to be unequivocal about this divide. Whether a company qualifies as an employer subject to Title VII liability is a question of substantive merits, not adjudicative jurisdiction.[28] So is whether a non-U.S. defendant can be liable under federal securities law for non-U.S. conduct.[29] The merits characterization also applies to whether a particular individual is entitled to sue under a statute—for example, whether a plaintiff qualifies as a ministerial employee so as to fall within the "ministerial

23. Wasserman, *Drive-By*, *supra* note 3; *see* Arbaugh v. Y&H Corp., 546 U.S. 500, 510–11 (2006).

24. John Harrison, *Jurisdiction, Congressional Power, and Constitutional Remedies*, 86 GEO. L.J. 2513, 2515 (1998); Wasserman, *Ministerial*, *supra* note 3, at 296 (quoting Harrison, *supra*); Howard M. Wasserman, *Jurisdiction, Merits, and Non-Extant Rights*, 56 U. KAN. L. REV. 227, 236 (2008) (citing Harrison, *supra*).

25. Wasserman, *Ministerial*, *supra* note 3, at 296; Wasserman, *supra* note 24, at 236.

26. *See* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 254 (2010).

27. Wasserman, *Ministerial*, *supra* note 3, at 302; Wasserman, *Drive-By*, *supra* note 3, at 948; Wasserman, *supra* note 24, at 261; *see Morrison*, 561 U.S. at 254.

28. *Arbaugh*, 546 U.S. at 515–16.

29. *Morrison*, 561 U.S. at 253–54.

exemption" from federal employment discrimination laws[30] or whether a plaintiff is an independent contractor not subject to those laws.[31]

The effect of this trend is that it is more likely that a court will be deemed to have authority to adjudicate a case so long as it appears that the plaintiff asserts a legal right created by or existing because of federal law. Other limitations that might defeat the claim become matters of when the plaintiff can or should prevail under the legal rules that Congress (or the Constitution) has established.[32]

That question is analyzed in three different ways at three different points in the litigation process. First is on a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6); the court limits its inquiry to the four corners of the plaintiff's complaint, accepts non-conclusory factual allegations as true, and asks whether the plaintiff has pled a plausible claim for recovery under substantive law.[33] The second point involves a motion for summary judgment; the court considers evidence produced in discovery and, drawing inferences in favor of the non-moving party, determines whether there are genuine disputes as to the material facts that plaintiff must show to prevail on her claim.[34] The final point is at trial on the merits before a factfinder empowered to resolve factual disputes and to decide whether the defendant breached its duties or violated plaintiff's rights and, if so, the appropriate remedy.[35]

The Court's new effort to cleanly divide merits from subject-matter jurisdiction calls into question the longstanding-but-dubious rule of *Bell v. Hood*. Under *Bell*, it is "well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction."[36] But *Bell* acknowledged, and retained, "previously carved out exceptions" characterizing certain dismissals as jurisdictional where "the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous."[37] *Bell* creates an erroneous blending of jurisdiction and merits, in which jurisdiction

30. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n, 132 S. Ct. 694, 709–10 n.4 (2012).

31. Anyan v. Nelson, 68 F. App'x 260, 262 (2d Cir. 2003) (summary order).

32. Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643, 698 (2005).

33. Fed. R. Civ. P. 12(b)(6); Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554-56 (2007).

34. Fed. R. Civ. P. 56; Scott v. Harris, 127 S. Ct. 1769, 1776 (2007).

35. Wasserman, *supra* note 32, at 653–55.

36. Bell v. Hood, 327 U.S. 678, 682 (1946).

37. *Id.* at 682–83.

turns on the strength of the claim.[38] Even if *Bell* strips jurisdiction only in cases of extraordinarily weak claims and even if it rarely forms the basis for a jurisdictional dismissal, it still imposes an unnecessary and confusing overlap between the concepts. [39] The Court itself has questioned *Bell*, calling it "a maxim more ancient than analytically sound."[40] It certainly has never explained how a claim that seeks recovery for a violation of rights created by federal law can become so weak as to not arise under federal law.

The incoherence of *Bell* figures into Fletcher's critique of standing. Just as *Bell* improperly recasts merits as jurisdiction, so does standing recast merits as a threshold jurisdictional issue. We could discard *Bell* and require that all objections to the sufficiency of a plaintiff's legal argument be raised on a 12(b)(6) motion[41] or, later in the process, on a motion for summary judgment. And we similarly could discard standing as a constitutional threshold and require that all objections to the plaintiff's right to sue be raised and resolved on a 12(b)(6) or summary judgment motion.

Unfortunately, while properly holding that the failure of an element of a Title VII claim did not affect the district court's jurisdiction, the Court in *Arbaugh v. Y&H Corp.*[42] missed an opportunity to jettison *Bell*, even while recognizing it as flawed. In citing *Bell* while drawing otherwise sharp divisions between subject matter jurisdiction and substantive merits,[43] the Court at least retained the possibility of a jurisdictional dismissal of an especially weak claim, leaving a roadblock to the necessary clean divide between the concepts.[44] On the other hand, the Court did not cite *Arbaugh* or *Bell* for the insubstantiality point in two subsequent cases rejecting jurisdictional characterizations of statutory elements.[45] Although the Court addressed the issue only in passing in both cases, the silence perhaps reflects further distancing from this troubling jurisdiction-merits overlap.

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38. Howard M. Wasserman, *Jurisdiction, Merits, and Substantiality*, 42 TULSA L. REV. 579, 590–91 (2007).

39. *See id.* at 586; Kevin M. Clermont, *Jurisdictional Fact*, 91 CORNELL L. REV. 973, 1011–12 (2006).

40. Rosado v. Wyman, 397 U.S. 397, 404 (1970); *see* Hagans v. Lavine, 415 U.S. 528, 538 (1974); Fletcher, *supra* note 1, at 235.

41. Fletcher, *supra* note 1, at 235.

42. 546 U.S. 500 (2006).

43. *Id.* at 501 & n.10.

44. Wasserman, *supra* note 38, at 584.

45. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n, 132 S. Ct. 694, 709–10 n.4 (2012); Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 254 (2010).

The important point is that the Court has become increasingly inclined to characterize statutory factual issues as merits and to abandon any understanding of those issues as connected to a court's adjudicative authority. Put differently, the Court has become increasingly inclined to treat appropriate factual issues as part of the underlying claim rather than as part of the Article III threshold.

B. Distinguishing Merits from Standing

If more legal issues are treated as merits rather than the Article III subject-matter jurisdiction threshold, it makes sense to do the same with the merits as compared with the Article III standing threshold. Like statutory facts such as whether the defendant qualifies as an employer or whether the plaintiff is a person protected by the statute, the elements of standing—injury in fact, causation, and redressability[46]—go to who can sue whom for what conduct and what remedy. If that question goes to the underlying merits in the context of subject-matter jurisdiction, it also should go to the merits in the context of standing.

Unfortunately, the Court has been less ready to acknowledge standing as erroneously constitutionalized merits to the same extent it has with adjudicative jurisdiction. Several significant standing decisions from the Rehnquist and Roberts Courts involved challenges to the constitutionality of grants of statutory standing, with the Court usually concluding that the grant violated Article III.[47] These cases acknowledge that Congress may create new statutory rights, define new injuries, establish new chains of causation, and even "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law."[48] But Article III limits that power in that, regardless of what the statute requires or allows, the plaintiff must also show an injury in fact that is concrete and particularized and actual and imminent.[49] While the Court leaves some room for congressional creativity (and Justice Kennedy appears to leave even greater room[50]), it is far from the plenary power that Fletcher urges.

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46. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).

47. Summers v. Island Trees Inst., 555 U.S. 488, 500–01 (2009); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 109–10 (1998); *Lujan*, 504 U.S. at 578. *But see* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 180–81 (2000).

48. *Lujan*, 504 U.S. at 578.

49. *Id.*.

50. *Summers*, 129 S. Ct. at 1153 (Kennedy, J., concurring); *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment).

The one case running in the opposite direction is 2014's *Lexmark International, Inc. v. Static Control Components, Inc.*, which at least feinted toward removing the standing label from some concepts better understood as going to the substantive merits of a claim.[51] Static manufactured components that businesses used to refurbish Lexmark's toner cartridges, a practice Lexmark sought to discourage by sending letters containing allegedly false statements to some of the companies that did business with Static, although not to Static itself.[52] Static nevertheless brought counterclaims under a provision of the Lanham Act establishing liability for false or deceptive statements and providing a cause of action for "any person who believes that he or she is or is likely to be damaged by" the defendant's statements.[53] The question was presented to the Court as whether Static had "prudential standing" to bring the case, specifically whether it fell within the "zone of interest" of, or had "statutory standing" under, the Lanham Act.

For our purposes, the Court rejected the standing label and characterized these issues as going to the substantive merits of Static's counterclaim. The zone of interest test requires the Court "to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim"—that is, whether this plaintiff falls within the class "whom Congress has authorized to sue."[54] Stated still differently, the Court "asks whether Static Control has a cause of action under the statute," a question of substantive merits, not a question of standing or jurisdiction.[55] *Lexmark* further recognized that the alternative label "statutory standing" was no less misleading, as it still used "standing" to capture whether a party has a valid cause of action.[56]

The Court recognized, in other words, that the fundamental question of statutory standing—who can sue, for what conduct, and for what remedy under the statute—is properly a question of merits. This new conception matches Fletcher's argument that standing is merits—the Court all along has actually been using these concepts to "determine[ ] whether a plaintiff has a federal cause of action."[57] It also matches more recent arguments from Radha Pathak that the alternative term statutory standing is merely "shorthand for the

51. 134 S. Ct. 1377 (2014).
52. *Id.* at 1383–84.
53. 15 U.S.C. § 1125(a) (2012).
54. *Lexmark*, 134 S. Ct. at 1387–88 & n.3.
55. *Id.* at 1387.
56. *Id.* at 1388 n.4.
57. Fletcher, *supra* note 1, at 252.

familiar rule that a plaintiff cannot recover unless the plaintiff is within the class of persons to whom Congress has conferred a private right of action."[58]

Having thus recharacterized prudential standing, *Lexmark* was left to determine the merits of Static's claim—whether Static's allegations showed that it was entitled to sue under the Act, considering the scope of the statute and its incorporation of proximate cause.[59] Critically, the Court analyzed this as on a Rule 12(b)(6) motion, accepting the allegations as true and asking whether the complaint contained sufficient facts to plausibly show causation.[60]

Lexmark's effect is perhaps limited because it involved purported prudential or statutory limitations on a claim, not the Article III limits on the rights and enforcement mechanisms Congress can create. There was also no suggestion that Static had not suffered an injury in fact, given its allegations of lost sales and loss of business reputation.[61] Justice Scalia—who wrote for the Court in both *Lexmark* and 1998's *Steel Co. v. Citizens for a Better Environment*—willingly concedes that, while whether the plaintiffs falls within the scope of the statute is a merits question, whether that plaintiff has suffered an Article III injury in fact remains a distinct, non-merits threshold question.[62] In this respect, Scalia remains Fletcher's sharpest interlocutor and the justice least likely to accept the fundamentally merits-based, and congressionally dictated, nature of whether a plaintiff is entitled to sue under a statute.[63]

IV. A FLETCHERIAN MERITS APPROACH TO *SPOKEO*

Spokeo shows Fletcher's arguments in action and where they should lead doctrinally, producing not only a better result, but also a more sensible explanation and justification for that result.[64] The case involves claims under a provision of the Fair Credit Reporting Act ("FCRA") establishing a private right of action for "any consumer" to recover for "willful" violations of the Act by a credit-reporting agency,[65]

58. Radha Pathak, *Statutory Standing and the Tyranny of Labels*, 62 OKLA. L. REV. 89, 106 (2009).

59. *Lexmark*, 134 S. Ct at 1388.

60. *Id.* at 1393–94 & n.6.

61. *Id.* at 1384, 1386.

62. Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 102 (1998).

63. *See* Siegel, *supra* note 14, at 406–07.

64. Fletcher, *supra* note 13, at 282–83 ("I no longer insist so vigorously that the Court explain what it is doing and why, and I no longer object so strenuously to the Court's substituting its view for Congress's.").

65. 15 U.S.C. § 1681n(a) (2012).

such as failing to maintain "reasonable procedures" designed to avoid violations of the Act.[66] A consumer-plaintiff can recover actual or statutory damages, punitive damages, and attorney's fees.[67] An amicus brief from several privacy scholars describes the statute as reflecting a "careful bargain."[68] Congress insulated data collectors from liability if they establish appropriate procedures, while providing a private right of action with statutory damages as a meaningful deterrent for non-compliance.[69] That remedy recognized the difficulty associated with "proving the extent of injury flowing from conduct in a marketplace whose detailed workings still remain largely invisible to consumers."[70]

Spokeo operates a web site providing in-depth reports about individuals; the reports present a vast range of information, including address, phone number, educational and work history, marital status, family relations, property values, and other facts.[71] Thomas Robins sued Spokeo, alleging that his profile contained a picture that was not of him and inaccurately stated that he: had a graduate degree, was employed in a professional or technical field, enjoyed wealth in the "Top 10 %", was in his 50s, was married, and had children.[72]

The Ninth Circuit reversed the district court dismissal of the claim for lack of standing. The court rejected Spokeo's argument that Robins's claim must fail because he had not pled actual harm. Section 1681n(a) does not require a showing of actual harm to recover on a willful violation; when a "statutory cause of action does not require proof of actual damages, a plaintiff can suffer a violation of the statutory right without suffering actual damages."[73] Turning to Article III, the court held that the statutory rights at issue were of the kind that, although previously inadequate, could be elevated by Congress to a legally cognizable injury.[74] Agreeing with the Sixth Circuit, the court emphasized that Robins was enforcing his own statutory rights in the handling and presentation of his own personal information.[75]

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66. 15 U.S.C. § 1681e

67. 15 U.S.C. § 1681n(a).

68. Brief of *Amici Curiae* Information Privacy Law Scholars in Support of Respondent at 4, Spokeo, Inc. v. Robins, No. 13-1339 (U.S. *petition for cert. filed* May 1, 2014).

69. *Id.*

70. *Id.*

71. Robins v. Spokeo, Inc., 742 F.3d 409, 410 (9th Cir. 2014), *cert. granted* 135 S. Ct. 1892.

72. Brief of Respondent, *Spokeo, Inc.*, No. 13-339, at 8–9; *see also Robins*, 742 F.3d at 411 (discussing Robins's allegations below).

73. *Robins*, 742 F.3d at 413.

74. *Id.* at 413–14.

75. *Id.*

Fletcher's approach to standing makes this an easy case. Congress wields virtually limitless legislative power to decide which private individuals can sue to enforce their statutory rights and what remedies should be available for violations of those rights, power with which the Court should not interfere.[76] Having created a specific statutory duty and provided remedies for its violation, Congress had unlimited power to authorize Robins to enforce that duty through private litigation in federal court.

What remain to be resolved are the merits of Robins's claim—whether he has shown that Spokeo's conduct violated his statutory rights. This, too, is relatively straightforward, at least at the pleading stage. As alleged, Robins is a consumer, Spokeo published consumer credit information about Robins, and that information was factually inaccurate. Robins further alleges that Spokeo failed to maintain appropriate procedures for ensuring accuracy and that its failure to do so (and the resulting inaccurate report) were willful.[77]

Of course, it may be that Spokeo did maintain appropriate procedures or that the information was not materially inaccurate. In other words, Robins may not prevail on his claim. But the plaintiff's ultimate success, based on a court's actual resolution of those issues, goes to the substantive merits of whether Spokeo breached the duties that Congress imposed on it in the FCRA and its amendments. The court must answer that question at one or more of the three litigation points described above.[78] But none of this should implicate a court's threshold adjudicative power, whether we speak of that threshold as jurisdiction or standing.

Fletcher's model also offers the strongest rejoinder to Spokeo's framing of the case before the Supreme Court. Spokeo argues repeatedly that Robins has only suffered an "injury-in-law," in that his injury is a "mere" violation of the statute unaccompanied by any constitutionally required "real" injury in fact.[79] But Fletcher's fundamental insight is that all injuries are injuries in law, violations of legal interests derived from some external source; an injury is only judicially cognizable if some substantive law makes it an injury by creating a right and a remedy and granting someone the power to enforce that right and obtain that remedy in court.[80] Robins's injury is whatever Congress defined as an injury under the statute, which is

76. Fletcher, *supra* note 1, at 253; *supra* notes 8-11 and accompanying text.
77. Brief for Respondent at 8–9, *Spokeo, Inc.*, No. 13-1339.
77. *Supra* notes 33 – 35 and accompanying text.
79. Brief for Petitioner at 33, 35, 40, *Spokeo, Inc.*, No. 13-1339.
80. Fletcher, *supra* note 1, at 231–32.

sufficient to allow Robins to pursue his claim. Under Fletcher's model, the additional real-world injury that Spokeo demands, one divorced from the statute and the rights it creates, is both logically impossible and unnecessary.

Even accepting that Congress's power may be subject to some limitations in statutory cases, *Spokeo* presents none of the features justifying such limitations. Robins is attempting to enforce his own, singular, and personal statutory rights, not the rights of another person and not rights held in common or collectively with the undifferentiated public as a whole; Spokeo published false information about Robins and Robins is asserting his statutory rights not to have his information falsified. Even if the injury—that is, Spokeo's alleged violation of Robins's right not to have such false information published—would not exist as federal law but for the statute, it remains his particular injury.

Robins is also acting to secure his own rights against another private party and to recover statutory damages available only to him. He is not seeking a remedy (such as a structural injunction) that would benefit the public at large, nor is he enforcing the law for broader public goals or to serve broader public purposes. In other words, he is not attempting to act as a "sort of private attorney general."[81] As William Rubenstein explains the difference, "when anyone pursues a deterrent remedy, particularly one with wide application, it feels as if they are doing something public, while when anyone pursues compensation, it feels as if they are doing something private."[82] To be sure, if a damages plaintiff (such as Robins) wins, a defendant (such as Spokeo) may feel compelled to change its practices to avoid liability to others in future suits. But this deterrent effect remains incidental to the lawsuit's central goals of obtaining compensation for the plaintiff himself.[83] Robins's lawsuit differs from the type of statutory action that most often triggers standing concerns within the Court—environmental advocacy groups suing to enforce environmental-protection laws through potentially far-reaching injunctions against government officials.[84]

Nor does *Spokeo* implicate the limitations on Fletcherian standing discussed previously.[85] The case does not involve the type of

81. *Id.* at 254.

82. William B. Rubenstein, *On What a "Private Attorney General" Is—And Why it Matters*, 57 VAND. L. REV. 2129, 2142 (2004).

83. *See id.* at 2147.

84. *See supra* note 47; *see also* Pushaw, *supra* note 17, at 304.

85. *Supra* notes 17–22 and accompanying text.

plaintiff or the type of injury that Pushaw criticizes.[86] Section 1681n(a) grants standing not to "any person," but only to the "consumer" with respect to whose personal information the defendant engaged in a willful violation of the act.[87] The consumer here, Robins, suffered a fortuitous invasion of his own rights—that is, Spokeo's unexpected publication of inaccurate information about his personal and credit situations. Further, there is no indication that Robins is ideologically driven or that he sought out the statutory violation.

Similarly, there are no gaps in the present statute that demand the standing-like default rules that Young describes.[88] Section 1681n(a) is unambiguous as to who can sue, who can be sued, for what conduct (violations of all the other provisions of the FCRA), and for what remedies. There should be nothing more for a court to do but apply that unambiguous provision to conclude that Robins and his claim, as alleged in the complaint, fall within the plain language of that section. All that remains is to determine the truth of those facts and thus the validity of that claim on the merits. But that occurs later in the litigation process, not at the adjudicative threshold.

V. CONCLUSION

If the Supreme Court were going to adopt *The Structure of Standing* and recognize standing as being not a jurisdictional threshold but a piece of the substantive merits of the underlying statutory or constitutional claim, it would have done so a long time ago. Unfortunately, it has not.

But recent doctrinal moves, in which the Court has recast both statutory standing and certain features of "arising under" subject-matter jurisdiction as merits issues, reflect small steps in the right direction. As a relatively straightforward case involving an individual statutory right, *Spokeo, Inc. v. Robins* offers the Court another opportunity to nudge the law another small step in that direction. We can only hope the Court seizes the opportunity.[89]

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86. Pushaw, *supra* note 17, at 332.

87. 15 U.S.C. § 1681n(a) (2012).

88. Young, *supra* note 21, at 475, 481.

89. *Spokeo* may not be the Court's only opportunity of the Term to parse substantive merits from justiciability. The Court is also considering *Campbell-Ewald Co. v. Gomez* and whether an offer of judgment providing a plaintiff complete relief moots a case. During argument, counsel for Gomez and for the United States in support of Gomez spent considerable time arguing that what several Justices framed as issues rendering the case moot were more properly raised as affirmative defenses to liability on the merits. *See, e.g.*, Oral Argument at 29:05, *Campbell-Ewald Co. v. Gomez*, No. 14-857 (U.S. argued Oct. 14, 2015), https://www.oyez.org/cases/2015/14-857; Howard Wasserman, *Merits and Mootness*, PRAWFSBLAWG (Oct. 19, 2015, 8:31 AM)

http://prawfsblawg.blogs.com/prawfsblawg/2015/10/merits-and-mootness.html (discussing argument in *Campbell-Ewald* and arguing that mootness issues can be recharacterized in merits terms).