Spokeo, Inc. v. Robins and the Constitutional Foundations of Statutory Standing

*Maxwell L. Stearns**

I. INTRODUCTION 221
A. *Summary of Argument (and a Comment on Terminology)* 225
II. STANDING DOCTRINE'S THREE-LEGGED STOOL 226
III. *LUJAN* AND THE PROBLEM OF STATUTORY STANDING 231
IV. *SPOKEO* AND THE PROBLEM OF STATUTORY STANDING REVISITED 239
V. CONCLUSION 241

I. INTRODUCTION

In *Spokeo, Inc. v. Robins*, the Supreme Court granted certiorari to address the following question: Does Congress have the power to confer standing upon an individual claiming that a privately owned website violated its federal statutory obligation to take specified steps designed to promote accuracy in aggregating and reporting his personal and financial data even if the resulting false disclosures did not produce concrete harm?[1] This somewhat arcane standing issue involves congressional power to broaden the scope of the first of three

* Professor of Law and Marbury Research Professor, Associate Dean of Research and Faculty Development, University of Maryland Francis King Carey School of Law. I would like to thank Richard Boldt, Bob Pushaw, and Aaron Zelinsky for their extremely helpful comments, and Sue McCarty for her tremendously thorough work on proofing, editing, and citation. I also received insightful comments from those who participated in the Maryland Carey Law Legal Theory Workshop, and Linda Morris and Matthew Sarna provided excellent research assistance.

1. The formal statement for which certiorari was granted is: "Whether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute." Petition for a Writ of Certiorari at *i, Spokeo v. Robins, No. 13-1339 (May 1, 2014), 2014 WL 1802228 (U.S. *petition for cert. filed* May 1, 2014).

constitutional standing requirements: injury in fact, causation, and redressability. Although the case does not directly address the prudential standing elements—no right to enforce the rights of others or to litigate diffuse harms—this Essay will demonstrate that along with the remaining constitutional elements of standing, the analysis also implicates these prudential barriers.[2]

Spokeo presents a valuable opportunity to solidify standing doctrine's proper constitutional foundations. This Essay demonstrates that properly understood, standing doctrine is designed to preserve and protect congressional primacy in lawmaking. This includes deferring to Congress's policy decision concerning who has standing to enforce its statutes.

The financial stakes for the claimant (as opposed to his class-action attorneys and the defendant),[3] are fairly small, set at a statutory minimum of $100 and maximum of $1000 per alleged willful violation;[4] as this Essay argues, the stakes for separation of powers are significant. The lower court opinions and the Supreme Court briefs present detailed technical standing arguments, and although not without their flaws, they aptly survey several core doctrinal issues. There is a sense in reading them, however, that the forest has gotten lost in the trees.[5] The question presented—Congress's power to define a technical statutory violation, affecting but not concretely harming an individual for purposes of the Article III injury-in-fact requirement—goes to fundamental principles of separation of powers. This important

2. In *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014), Justice Scalia, writing for a unanimous Court, denied standing to Static Control, for a counterclaim under the Lanham Act against Lexmark. *Id.* at 1395. The case involved a deceptive practices claim arising from communications that Lexmark had sent to its customers, who also did business with Static, but not directly to Static, warning those customers against employing Static products to refurbish Lexmark cartridges. *Id.* at 1383–84. The *Lexmark* majority recast the "zone of interest" test, developed in *Association of Data Processing Service Org. v. Camp*, 397 U.S. 150 (1970), which had long been understood to be a prudential standing barrier, to instead operate as part of a broader question of statutory interpretation involving who has the right to raise the statutory claim. *Id.* at 1388. More notably, Justice Scalia also suggested in dicta that the diffuse harm standing barrier, which had also long been viewed as prudential, is better understood as a constitutional standing element. *Id.* at 1387 n.3. Because *Spokeo* does not turn on the prudential standing elements or on the claim of diffuse harm even if that is treated as a constitutional standing element, this Essay does not explore that question.

3. This class action suit has the potential to produce a rather enormous judgment if allowed to proceed, or more likely, to force a significant settlement as a means of avoiding such a judgment.

4. 15 U.S.C. § 1681n(a). Had the violation merely been negligent, he would have been limited to seemingly non-existent actual damages. *Id.*

5. This has long been a problem among those assessing standing doctrine. *See* Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309 (1995).

aspect of the case has likely been suppressed due to a natural tendency among lower courts and lawyers to emphasize how cases can be reconciled,[6] and more to the point, to show that such reconciliation inexorably leads to the result they claim should obtain.[7] Rare (and perhaps unwise) is the litigant who emphasizes a fundamental tension pervading the relevant doctrines, or that coming out for petitioner forces a strained reading in one direction, whereas coming out for respondent forces a strained reading in the other. Fortunately, as a law professor, I have the luxury to say just that, and I have written this Essay in that spirit. To be sure, I too will claim that my position is reconcilable with the precedents—it actually is—but my true objective is to show, plain as day, what the doctrinal tension is, how it arose, why resolving it matters.

The case facts are as follows: Robins discovered that Spokeo, a website that profits from aggregating and disclosing personal and financial data, failed to abide by a set of statutory requirements,

---

6. As one example, Respondent's brief maintains: "Statutory rights are as worthy of judicial protection as common-law and constitutional rights because 'there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right.'" Brief of Respondent at *24, Spokeo v. Robins, No. 13-1339 (Aug. 31, 2015), 2015 WL 5169094 (U.S. *petition for cert. filed* May 1, 2014) (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 576 (1992)). Perhaps not surprisingly, counsel does not point out the ironic nature of the posit in the context of the *Lujan* case. *See infra* note 45, and accompanying text. Robins's counsel further maintains: "Congress may not 'abandon[ ] the requirement that the party seeking [redress in federal court] must himself have suffered an injury'" and that "'[t]he province of the court,' after all, 'is, solely, to decide on the rights of individuals.'" *Id.* (quoting Marbury v. Madison, 5 U.S. 137, 170 (1803)). Although Robins's counsel uses this as a basis to distinguish *Lujan,* the *Lujan* framing of these issues tends to favor Respondent and derives from that opinion's premise-shifting account of standing.

For its part, counsel for Spokeo cite *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180–81 (2000), for the following proposition:

> To demonstrate standing, a plaintiff bears the burden of showing that he
>
> (1) has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and
>
> (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Brief for Petitioner at *11–12, Spokeo v. Robins, No. 13-1339 (July 2, 2015), 2015 WL 4148655 (U.S. *petition for cert. filed* May 1, 2014). But the *Laidlaw* majority recognized a Clean Water Act permit violation as satisfying the requirement of a justiciable injury notwithstanding its determination that the violation produced no concrete harm to the environment, thus placing that case in tension with Spokeo's argument on the very point for which the case is cited. *See infra* at 231.

7. This is also a natural consequence of the Supreme Court's proper admonition that it reviews judgments not opinions. Chevron USA v. Nat. Res. Def. Council, 467 U.S. 837, 842 (1984) ("Nevertheless, since this Court reviews judgments, not opinions, we must determine whether the Court of Appeals' legal error resulted in an erroneous judgment on the validity of the regulations.") (footnote omitted).

codified in the Fair Credit Reporting Act ("FCRA"),[8] that are designed to improve reporting accuracy. The consequence for Robins was the disclosure of false factual assertions about him that some might consider a compliment: He was reported as married (he's single), as having a job (he's unemployed), and as having a specific set of professional credentials (he lacks them). It is not beyond comprehension that seemingly benign false disclosures might be harmful, and the brief for Robins presents the arguments.[9] Were the Court to find a concrete injury in fact, Robins would prevail, but the case would be rendered trivial. There are other jumping off points as well.[10] For an example going in the other direction, the Court could construe the statutory cause of action as insufficiently specific to confer Article III standing.[11] The case is only interesting, however, on the assumption that it presents the issue for which certiorari was granted, and for the rest of this Essay, I therefore assume away such tangential inquiries.

We now assume, therefore, that Robins suffered no concrete harm, or at least no harm sufficient to satisfy the injury-in-fact requirement but for the statute, and that his standing claim rests solely on the violated statutory obligation to take more careful steps in gathering and reporting his personal information. We must further assume that Spokeo's failure to abide by the statutory care requirements was willful. Under the statute, Robins is entitled only to actual damages if the violation is negligent, and to statutory damages if it is willful.[12] Assuming no concrete harm, therefore, damages can only arise in the event of willful conduct. For Spokeo, the statutory damages create the possibility of a large adverse verdict—or perhaps more likely, a significant settlement—as Robins is the named plaintiff in a class action suit, another issue beyond this Essay's scope.[13] To

---

8. Fair Credit Reporting Act, Pub. L. No. 91-508, 84 Stat. 1128 (1970) (codified at 15 U.S.C. § 1681 et seq.).

9. As examples: The site advertises itself as available for prospective romantic partners who might be deterred and prospective employers might think Robins dishonestly represented his skills or who might think that his income or other work requirements render him ineligible for positions for which he is appropriately suited. Brief of Respondent, *supra* note 6, at *44–45 & n.6.

10. An argument in Robins's favor would advocate less stringent standing requirements when the claimant relying on a federal statute sues a private entity, as in the *Spokeo* case, but more stringent requirements when the claimant sues a government official, including a suit for injunctive relief. For an analysis critical of this distinction, see *infra* at 235.

11. Brief for Petitioner, *supra* note 6, at *10–11.

12. FCRA, 15 U.S.C. § 1681n(a).

13. This Essay will not address the interplay between the statutory cause of action and the issue of class certification. Rather, it will focus exclusively on whether the statutory violation provides the basis for standing for Robins as the named plaintiff.

sharpen the inquiry, let's further assume that *even if* Spokeo had undertaken the statutorily required additional steps to reduce the likelihood of false disclosures, it might not have identified, and thus might not have avoided, the mistakes affecting Robins that gave rise to the suit. This makes plain the purely procedural nature of Robins's claim: The question is whether, on these stringent facts, Congress had the power define Robins as injured for Article III standing purposes. This Essay will explain why an affirmative answer is essential to preserving the separation-of-powers foundations of standing doctrine.

A. Summary of Argument (and a Comment on Terminology)

This Essay's thesis is easily expressed: Properly understood, the primary purpose of standing doctrine is to ensure congressional primacy in policy making. This includes its presumptive role in monitoring the executive branch without undue judicial interference. Although there are circumstances in which the judiciary must interfere with legislative policymaking prerogatives, constitutional standing doctrines cabin such judicial power to a specific and narrow class of circumstances. An essential aspect of congressional policymaking autonomy involves its choice of means in monitoring the executive branch. As a corollary, Congress has the power to determine the conditions under which private individuals can supplement, or even displace, executive enforcement through such devices as citizen and taxpayer suits. Modern standing case law developments have lost sight of the doctrine's critical function in preserving congressional regulatory and monitoring powers, and have instead shifted the doctrine's focus toward protecting executive enforcement discretion from judicial encroachment. These two competing premises—standing as protecting congressional monitoring of the executive branch *versus* standing as preserving executive enforcement discretion from judicial encroachment—are ultimately irreconcilable.[14] The *Spokeo* case helps to demonstrate the importance of restoring standing doctrine to the first, proper separation-of-powers foundation.

Before proceeding, it is important to offer a brief comment on nomenclature. As the analysis below reveals, the Court has identified two aspects of standing doctrine, one deemed constitutional and the other prudential, with both sets of implications derived from the Article III case or controversy requirement. The term "constitutional

14. And this holds even if, as Respondent appears to suggest, a narrow holding might allow those premises to be reconciled as applied to this case, for example, by claiming that the connection to Robins of the claimed statutory violation suffices to satisfy the *Lujan* injury-in-fact test. Brief of Respondent, *supra* note 6, at *24–25.

standing elements" refers to a set of requirements that Congress and the judiciary are duty bound to observe. These are contrasted with "prudential standing elements," which Congress generally has the power to waive by expressly or impliedly conferring standing by statute, and which the federal judiciary, in its discretion, can relax in particular cases based on a variety of policy considerations. In addition, litigants can claim standing based either on a constitutional provision, typically but not exclusively equal protection, or on a federal statute. The term "constitutional standing" means reliance on the Constitution, as opposed to a federal statute, as the basis for standing. This is contrasted with "statutory standing," meaning an express or implied statutory conferral.[15] Unless the context dictates otherwise, in the analysis that follows, I will use the terms "constitutional standing elements," "constitutional standing," and "statutory standing" as described here.

II. STANDING DOCTRINE'S THREE-LEGGED STOOL

The analysis returns us to first principles. Compare *Marbury v. Madison*,[16] the case in which the Supreme Court formally established the power of constitutional judicial review, with *Allen v. Wright*,[17] a case that articulated what I will call the conventional separation-of-powers theory of the modern standing doctrine.[18] These are familiar cases to most readers, and the comparison does not require a detailed factual analysis of either; instead, the goal is to generate a set of parallel framings. After this initial comparison, we expand the scope, invoking as well the corpus of criminal procedure case law, thus allowing three-way comparison. The resulting "three-legged stool" provides the theoretical foundation of standing, and it serves as the starting point for the second stage inquiry, comparing claims of standing that rest on the Constitution with those that rest instead on a federal statute.

In *Marbury*, the Supreme Court, with Chief Justice Marshall writing, declined to issue a writ of mandamus ordering Secretary of State James Madison to deliver Marbury a promised commission for which the President's signature had been affixed, the document had

15. The terminology is further complicated by the doctrinal tension relevant to this very case concerning the scope of congressional power to relax or expand the reach of the constitutional standing elements, including injury in fact.

16. 5 U.S. 137 (1803).

17. 468 U.S. 737 (1984).

18. By this, I simply mean that *Allen* rested on a set of already developed Supreme Court doctrines concerning the constitutional and prudential standing elements.

been sealed, but alas, the final step, delivery to Marbury himself, had not occurred.[19] The fatal defect, one that the Chief Justice himself helped to create, did not give rise to a discretionary choice on the part of President Thomas Jefferson, who refused to order his subordinate, James Madison, to deliver it up.[20] Chief Justice John Marshall made plain that President Jefferson, the successor to President John Adams, who had signed the commission and affixed the seal, had a ministerial obligation to compel the delivery.[21] Even so, the *Marbury* Court rejected the plea for mandamus, an otherwise appropriate writ, to compel the delivery of the commission due to a fatal jurisdictional defect in § 13 of the Judiciary Act of 1789, which in Marshall's reading empowered the Supreme Court to issue it as a matter of original jurisdiction.[22] Marshall combined his reading of § 13 with a construction of Article III, § 2, clause 2, as authorizing the Supreme Court to grant the writ only as a matter of appellate jurisdiction. The effect was to render the jurisdiction-conferring statute *ultra vires*, or unconstitutional, thus forcing the Court to resolve whether it had the power to decline to exercise original jurisdiction in the case despite Congress's contrary statutory command.

Marshall resolved that question with dispatch: "It is emphatically the province and duty of the judicial department to say what the law is,"[23] making plain that the Court had the power *and duty* not only to construe the statute, but also to construe *and apply* the Constitution as a source of higher law when, as in *Marbury*, the two sources of law conflict. We can now express the *Marbury* holding as follows: *When Congress acts (by passing the statute) and when its action violates the Constitution (creating a conflict with the Constitution), in a proper case or controversy, the Supreme Court will invalidate congressional action (striking the law down).*

Now compare *Allen v. Wright*.[24] In *Allen,* the Supreme Court was called upon to apply the Fourteenth Amendment Equal Protection Clause to invalidate an Internal Revenue Service ("IRS") policy through which institutions, including private schools, operating under the umbrella of another organization that had already been granted tax-exempt status, received that status as a result of abbreviated review. A nationwide class of African-American parents alleged that a

---

19. *Marbury*, 5 U.S. at 155.
20. *Id.* at 162.
21. *Id.*
22. *Id.* at 175–76.
23. *Id.* at 177.
24. 468 U.S. 737 (1984).

consequence had been to confer tax-exempt status on private schools throughout the United States despite their having engaged in racially discriminatory practices that would have disqualified them under an independent merits-based assessment. These parents further alleged that as a consequence of the *de facto* subsidization of private school discrimination, the public schools that their children attended were victims of white flight. The effect, they claimed, was to inhibit desegregation of those public schools their children attended.

Justice O'Connor, writing for the *Allen* majority, denied the parents standing, claiming that it was first and foremost the job of Congress, not the courts, to monitor executive conduct, including through its power of the purse.[25] Congress could have accomplished such monitoring through various means. For example, Congress could remove tax-exempt status for private schools across the board, or it could, more narrowly, demand that such schools be assessed for tax exempt status on their individual merits without regard to the previously conferred status of a parent organization. In effect, the *Allen* holding implies that the Court is presumptively disinclined to step in to select among Congress's choice of means.

---

25. The *Allen* Court stated:

> The idea of separation of powers that underlies standing doctrine explains why our cases preclude the conclusion that respondents' alleged injury "fairly can be traced to the challenged action" of the IRS. That conclusion would pave the way generally for suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations. Such suits, even when premised on allegations of several instances of violations of law, are rarely, if ever appropriate for federal-court adjudication.
>
> "Carried to its logical end, [respondents'] approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action; such a role is appropriate for the Congress acting through its committees and the 'power of the purse'; it is not the role of the judiciary, absent actual present or immediately threatened injury resulting from unlawful governmental action."

Id. at 759–60 (alteration in original) (citations omitted). The *Allen* Court further recognized the obligation under Article III "against recognizing standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties." *Id.* at 761. This principle hearkens back to the admonition in *Marbury v. Madison* that the power of judicial review cannot be construed to allow judiciary to interfere with discretionary, or non-ministerial, executive prerogatives.

The complication in *Allen* that distinguished it from more conventional cases alleging ongoing constitutional violations is that striking the IRS policy would have forced a judicial restructuring of executive agency operations without, at the same time, ensuring meaningful relief, at least if such relief is defined in terms of furthering the racial integration of public schools that the claimants' children attended. This explains Justice O'Connor's reliance on identified links in the chain of causation as implicating a problem of redressability. *Id.* at 768 (identifying four causal links involving parties not before the Court). As discussed *infra* at 232, whereas in conventional litigation injury, causation, and redressability typically coalesce, *Allen* illustrates an instance of institutional litigation in which they split apart, thus helping to explain their emergence as separate standing elements.

We can now express the *Allen* holding in parallel with the stylized presentation of *Marbury* presented above*: When Congress fails to act (by failing to specify what happens when the IRS employs a problematic method of determining tax exempt status) and when that failure to act is alleged to violate the Constitution (thus violating the Equal Protection Clause by conferring tax exempt status on discriminatory private schools), the Supreme Court will not invalidate congressional inaction by acting on Congress's behalf (thus declining to strike down the IRS policy).*[26]

Despite the seeming parallelism of these two cases, implying that the Court will act on affirmative unconstitutional congressional action but will hold back on congressional inaction that generates unconstitutional results, a third case category stands in marked contrast with the second. In this case category, Congress (or a state general assembly) fails to act, its failure to act produces an alleged constitutional violation, and the federal judiciary, including the Supreme Court in a proper case or controversy, routinely steps in and acts on the legislature's behalf. This is, of course, the premise of the body of Criminal Procedure case law, which thus provides the third and final leg to the constitutional standing stool. In such cases as *Weeks v. United States*,[27] *Mapp v. Ohio*,[28] and *Miranda v. Arizona*,[29] the problem was not the failure to apply the exclusionary rule (*Mapp* and *Weeks*) or to issue *Miranda* warnings (*Miranda*). After all, those rules were crafted (or extended) in these very cases. Rather, the problem was the violation, through state or federal executive conduct, of a constitutional requirement, here arising under the Fifth and Sixth Amendments (as applied in *Mapp* and *Miranda* to the States via the Fourteenth Amendment), but with no legislative command (or with legislative inaction) as to the remedy that follows that violation.

The Court in *Allen* established that in the ordinary course of constitutional litigation, it will defer to Congress as the primary source of lawmaking authority even at the price of condoning some alleged ongoing constitutional violations that allow Congress to fulfill its primary function as monitor of the executive branch. In Criminal Procedure cases, the Court conversely implies that when individuals are subject to the most significant sanctions that a state can impose—criminal penalties, including death—it cannot await possible

26. For a preliminary presentation of this framing, see Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219, 1261–62 n.158 (1994).

27. 232 U.S. 383 (1914).

28. 367 U.S. 643 (1961).

29. 384 U.S. 436 (1966).

legislative intervention; rather, it is duty bound (consistent with *Marbury*'s "province *and duty*") to pronounce federal constitutional common law as needed to provide an appropriate remedy for the identified constitutional violation.[30]

Certainly one can disagree with the *Allen v. Wright* outcome, and we can also find cases that appear in tension with it, for example, the body of standing case law that involves challenges to race-based affirmative action.[31] And yet, these cases help to form the basis for a robust account of constitutional standing case law. This account casts these combined standing cases, along with the body of criminal procedure case law,[32] along a normative spectrum. That spectrum involves whether, based on objective factors, each case presents primarily as a vehicle to create precedent, without necessarily providing meaningful relief to the claimant, or instead, presents as a means of securing relief, with the creation of precedent as a consequence or byproduct. The analysis develops from the intuition that the order in which cases are presented can have a profound effect on the substantive case law that develops, and standing doctrine works to limit the power of litigants to manipulate case law orderings for maximum doctrinal effect by presumptively requiring a set of fortuitous factors that give rise to a justiciable harm as a precondition

30. *Marbury*, 5 U.S. at 177. Although *Dickerson v. United States*, 530 U.S. 428 (2000), might suggest that criminal procedure cases are mandatory rather than constitutional common law, and are therefore not subject to displacement by Congress, a better reading suggests that if Congress chooses to displace a rule of constitutional criminal procedure, it must devise an alternative that is constitutionally adequate. *See id.* at 437. Replacing *Miranda* warnings with a balancing test, the very approach that the Supreme Court rejected in *Miranda v. Arizona*, failed that test.

31. For a discussion that compares *Board of Regents v. Bakke*, see MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING 30–36, 271–81 (2002). The analysis does not turn on whether the nominal litigants in these cases subjectively intended to create law; rather, it turns on whether objective factors make the case appear as a vehicle for precedent creation or instead for securing relief. *Id.*

32. This includes criminal procedure cases in which the strong presumption as to standing to raise the claim appears misplaced. *See, e.g.*, Powers v. Ohio, 499 U.S. 400, 416 (1991) (allowing white criminal defendant to raise equal protection challenge to race-based exclusion of African American juror under *Batson v. Kentucky*, 476 U.S. 79 (1986)); Campbell v. Louisiana, 523 U.S. 392, 398–401 (1998) (extending *Powers* in context of exclusion of foreperson based on race in grand jury indictment). Under traditional third party standing principles, there would be no personal injury for a white criminal defendant to raise a *Batson* claim as the juror exclusion was not based on his race, leading to the circular proposition that a white defendant can raise the racial exclusion of an African American juror because doing so provides the white defendant a basis for relief if relief is granted. For a more detailed discussion, see STEARNS, *supra* note 31, at 259–63. See also Powers, 499 U.S. at 1426 (Thomas, J., concurring in part and dissenting in part) (stating that he cannot "understand how the rights of blacks excluded from jury service can be vindicated by letting a white murderer to go free.").

to standing to sue.[33] My purpose here is not to provide a comprehensive doctrinal review of constitutional standing or to present such a doctrinal reconciliation.[34] Instead it is to construct the basic architecture of constitutional standing as a prelude to comparing the more specific question of statutory standing at issue in *Spokeo*.

III. *LUJAN* AND THE PROBLEM OF STATUTORY STANDING

Before delving into modern statutory standing doctrine, a bit of historical background will be helpful. Legal historians have documented that the modern justiciability doctrines, including standing, find their origins in the Progressive Era. The linkage is not fortuitous. A central purpose of standing doctrine at its Progressive-Era inception was to provide a judicial mechanism of insulating ambitious, and previously unseen, developments in the regulatory state from constitutional challenge. As William Fletcher,[35] and others,[36] have aptly demonstrated, one method by which Louis Brandeis and Felix Frankfurter accomplished this goal was through a regime of presumptions: If Congress conferred or denied standing in particular statutes, those rules would apply; faced instead with congressional silence, the judiciary would analogize to doctrines of contract, tort, or property to see if the alleged injury was of the sort that was cognizable at common law. A feature of this regime was to favor standing for those who suffered traditional harms as regulatory

---

33. For an analysis that assesses the corpus of standing case law against this theory, see STEARNS, *supra* note 31; *see also* Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309 (1995) [hereinafter *Justiciability and Social Choice*]; *Maxwell L. Stearns, Standing and Social Choice: Historical Evidence*, 144 U. PA. L. REV. 309 (1995) [hereinafter *Standing and Social Choice*].

34. For interested readers, I have provided such a review in several published sources. *See* STEARNS, *supra* note 31; Stearns, *Justiciability and Social Choice*, *supra* note 33; Stearns, *Standing and Social Choice*, *supra* note 33.

35. *See* William Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1998). For a symposium celebrating the twenty-fifth anniversary of this publication, see Symposium, The Structure of Standing *at 25*, 65 ALA. L. REV. 269 (2013) (with contributions by Heather Elliott, William Fletcher, Tara Grove, Andy Hessick, Bob Pushaw, Tom Rowe, Jonathan Siegel, Maxwell Stearns, Ernest Young). The contributors to this on-line symposium overlap with the Alabama symposium. (Heather Elliott, Andy Hessick, Jonathan Siegel, Joan Steinman, Maxwell Stearns, Howard Wasserman). One Essay bridges the two symposia by extending Fletcher's analysis to the *Spokeo* case. *See* Howard M. Wasserman, *Fletcherian Standing, Merits, and* Spokeo, Inc. v. Robins, 68 VAND. L. REV. EN BANC 257, 268–70 (2015).

36. For a review of the literature, see Stearns, *Justiciability and Social Choice*, *supra* note 33, at 366–67 and cites therein (discussing works by William Fletcher, Steven Winter, and Gene Nichol). *See also* Robert J. Pushaw Jr., *Fortuity and the Article III "Case": A Critique of Fletcher's The Structure of Standing*, 65 ALA. L. REV. 289, 295–303 (2013) (reviewing history and developing argument for a fortuitous injury requirement derived from the Article III Case or Controversy clause.)

objects as compared with those whose claimed injury resulted from insufficiently aggressive regulatory enforcement. This once-Progressive understanding of standing doctrine allowed Congress to play a central role not only in the development of regulatory policy, but also in the legislative selection of means by which such policies would be enforced.

Today, commentators tend to view strict standing doctrine as conservative, and case outcomes like *Allen* provide fodder for this position, although there are also counter examples.[37] The ideological valence of standing, however, becomes more complicated in the context of statutory conferrals. Consider the landmark, and controversial, 1992 decision, *Lujan v. Defenders of Wildlife*.[38] In *Lujan*, the Court denied two women who had previously traveled to Egypt and Sri Lanka standing to force statutorily required interagency consultation between the Department of Commerce and the Department of the Interior, prior to federal funding of projects threatening the habitats of endangered species abroad, which had not occurred with respect to the affected projects in those countries.[39] Despite the broad statutory conferral of standing to persons who claimed injury nexuses—vocational, animal, ecosystem—Justice Scalia, writing for a majority, denied standing.[40] Scalia reasoned that the mere desire to have the government abide by the law without a more concrete personal harm, for example, one analogous to an injury cognizable at common law, was inadequate for standing notwithstanding the congressional grant.[41] Scalia grounded his holding in the observation that the President, not the courts, holds the power to execute legislative policy, and that the statutory conferral, if relied upon to grant standing, would result in judicial encroachment of executive enforcement prerogatives.

Scalia stated:

> To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed." It would enable the courts, with the permission of Congress, "to assume a position of authority over the governmental acts of another and co-equal department," and to

37. *See, e.g.*, *infra* note 47, and accompanying text, and notes 69-71, and accompanying text.

38. 504 U.S. 555 (1992).

39. *Id.* at 563, 578.

40. *Id.* at 566.

41. *Id.* at 573–75.

> become "'virtually continuing monitors of the wisdom and soundness of Executive action.'"[42]

Scalia claimed this reading was consistent with *Marbury*: "'The province of the court,' as Chief Justice Marshall said in *Marbury v. Madison*, 'is, solely, to decide on the rights of individuals.'"[43] Notably Justice Scalia omitted the immediately following *Marbury* passage:

> But, if this be not such a question; if so far from being an intrusion into the secrets of the cabinet, it respects a paper, which, according to law, is upon record, and to a copy of which the law gives a right, on the payment of ten cents; if it be no intermeddling with a subject, over which the executive can be considered as having exercised any control; what is there in the exalted station of the officer, which shall bar a citizen from asserting, in a court of justice, his legal rights, or shall forbid a court to listen to the claim; or to issue a mandamus, directing the performance of a duty, not depending on executive discretion, but on particular acts of congress and the general principles of law?
>
> If one of the heads of departments commits any illegal act, under color of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law.[44]

More simply put, *Marbury* does not establish that the judiciary is barred from compelling executive officials to perform their ministerial obligations. Instead, it establishes the less controversial proposition that the judiciary may not cabin executive discretion. Of course, *Marbury v. Madison* did not involve executive discretion, and that was Marshall's point. The Court lacked jurisdiction because the statute was unconstitutional *even though* mandamus was otherwise proper to compel a purely ministerial executive obligations.

Left open in *Marbury* is the scope of Congress's power to define as personal an injury that extends well beyond the boundaries of common law harms, a point to which we now turn. Most of Scalia's *Lujan* analysis centered on rejecting the nominal claimants' injury in fact. Scalia implicitly acknowledged this line of analysis ran up against a tradition of judicial latitude toward congressional conferral of standing, including broadening of traditional notions of injury. Thus Justice Scalia stated: "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.'"[45] Of course disclaiming a contradiction does not prove none exists. Consider Justice Blackmun's dissenting rejoinder, which Justice O'Connor, the *Allen* majority opinion author, joined:

---

42. *Id.* at 577 (citations omitted).

43. *Lujan*, 504 U.S at 576 (quoting Marbury v. Madison, 5 U.S. 137, 170 (1803)).

44. *Marbury*, 5 U.S. at 170.

45. *Lujan*, 504 U.S. at 578 (quoting Warth v. Seldin, 422 U.S. 490, 500 (quoting Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973))).

> The Court expresses concern that allowing judicial enforcement of "agencies' observance of a particular, statutorily prescribed procedure" would "transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.' In fact, the principal effect of foreclosing judicial enforcement of such procedures is to transfer power into the hands of the Executive at the expense—not of the courts—but of Congress, from which that power originates and emanates.[46]

Although both *Allen* and *Lujan* denied standing, it is not surprising that Justice O'Connor joined the Blackmun *Lujan* dissent. That is because the dissent was consistent with the traditional *Allen* separation-of-powers theory of standing, one that *Lujan* appeared to displace. Consistent with *Allen*, Blackmun determined that Congress has the power to choose its preferred enforcement methods, including through broadening standing to create a basis for supplemental private enforcement. That is because the very policies sought to be enforced emanate not from the executive branch—the branch with enforcement power—but from Congress "from which that power originates and emanates."

Indeed, it is not surprising that Justice Scalia's *Lujan* premise has not been universally embraced. In the 2000 case, *Friends of the Earth v. Laidlaw Environmental Services, Inc.*,[47] the Supreme Court, with Justice Ruth Bader Ginsburg writing, permitted a suit against Laidlaw for a technical permit violation under the Clean Water Act that did not result in any identifiable harm to the claimants.[48] Sound familiar? The *Laidlaw* case originally presented on mootness grounds, and Justice Ginsburg, writing for the majority, rejected the mootness claim. She and Justice Scalia, writing in dissent, also used the case to revisit the *Allen/Lujan* debate. This time, the *Laidlaw* majority found standing and restored, at least temporarily, the doctrine's congressional primacy foundation.

In *Laidlaw*, a Clean Water Act permit violation resulted in the emission of effluents into a river near where claimants resided, but at levels that produced no identifiable environmental damage, and thus no discernible harm to the claimants. Indeed, there is some evidence that the violation followed from an erroneous calculation in the permit itself, thereby rendering the emissions entirely safe.[49] Despite this,

46. *Id.* at 602 (Blackmun, J., dissenting) (citation omitted).

47. 528 U.S. 167 (2000).

48. *Id.* at 183–84.

49. Richard J. Pierce, Jr., *Issues Raised by* Friends of the Earth v. Laidlaw Environmental Services*: Access to the Courts for Environmental Plaintiffs*, 11 DUKE ENVTL L. & POL'Y F. 207, 233–35 (2001) (explaining that emissions did not render water unsafe based on review of Supreme Court Brief Amicus Curiae of the State of South Carolina, and the District Court opinion, demonstrating calculation errors in permitting); *see also* Maxwell L. Stearns, *From*

claimants averred that the violation inhibited their enjoyment of the river, and on this basis the Court allowed the suit against Laidlaw to proceed.[50]

Consider the following exchange between Justice Ginsburg for the *Laidlaw* majority, and Justice Scalia, writing in dissent. Justice Scalia rejected standing based on the absence of an injury in fact, stating: "While it is perhaps possible that a plaintiff could be harmed even though the environment was not, such a plaintiff would have the burden of articulating the nature of the injury."[51] One might imagine a basis for satisfying even this restrictive scope of permissible injury if the publicity attendant the permit violation diminished property values. Even setting aside that possibility, which did not affect the majority analysis, Justice Ginsburg directly challenged Scalia's premise:

> The relevant showing for Article III standing . . . is not injury to the environment but injury to the plaintiff. To insist upon the former rather than the latter . . . is to raise the standing hurdle higher than the necessary showing for success on the merits in an action alleging noncompliance with [the required] permit.[52]

The permit was issued pursuant to a statutory scheme, thereby establishing that there is no need for a concrete injury—or that Congress could define the permit violation itself as an injury for Article III purposes—where the basis for standing rests on a federal statute as opposed to the Constitution itself. We can compare the Ginsburg and Scalia approaches based on a conventional set of linear relationships from (1) permit violation to (2) individual harm to (3) justiciable injury. This, after all, is the way common law adjudication customarily proceeds. An event, for example a negligent act, a breach of contract, or a violated property right produces an injury to a plaintiff,[53] and the courts treat that injury as the basis for a cognizable common law suit.

Lujan *to* Laidlaw*: A Preliminary Assessment of Environmental Standing*, 11 DUKE ENVTL. L. & POL'Y F. 321, 379 (2001).

50. For an assessment of the various claims of injury in *Laidlaw*, see Stearns, *supra* note 49, at 381–83.

51. 528 U.S. at 714 (Scalia, J., dissenting).

52. *Id.* at 703–04.

53. One might characterize an unobserved trespass that causes no property damage as a legal violation without injury to the property owner, even though the common law defines the trespass as the basis for a legal claim. Of course most persons do not press such trespass violations in court (consider the frequency of turning a car around in a property owner's driveway). The claimed injury for those who do resembles Professor Fletcher's observation that a non-lying person claiming to be injured by a legal violation, is, in fact, injured, leaving open the policy question as to which of these injuries we allow to have pressed in court. Fletcher, *supra* note 35, at 231.

In that framing, all of the features that have become requisites to standing are rolled into one: The injury is caused by the defendant, and finding for plaintiff will remedy that injury.[54] These also tie in the prudential barriers: the claimant raises his or her own claim, and therefore the claim is not diffuse. This coalescence explains something critical about standing doctrine. The Court devised its doctrine with reference to the common law not because each standing criterion carries independent normative significance, but rather because these features conventionally coexisted in suits that for hundreds—nay thousands—of years were resolved in legal forums. This includes such ancient texts as the *Code* of *Hammurabi* and the *Five Books of Moses*, both of which created the basis for many legal claims that today would fall within the scope of the common law.

But this feature of the common law, or more ancient codes, does not answer whether in our constitutional scheme of separation of powers, Congress holds the power to broaden the ambit of harms that it chooses to define as the basis for a cognizable injury. This also answers Spokeo's argument that allowing Congress to define injury collapses the three constitutional standing prongs into one.[55] This observation merely restates what we have long known: just as these features coalesce within traditional common law suits, so too they do so when Congress defines a justiciable injury by statute.

In *Laidlaw,* Justice Ginsburg did not disclaim that the conventional litigation model in which these standing factors are combined remains dominant. That, after all, has been the basis for legal disputes from time immemorial. Rather, she claimed that in our system of representative governance, when there is no express or implied source of constitutional limitation to its policy, Congress has the wherewithal both to create policy and to determine its preferred method of enforcement. The enforcement schemes can be varied, and they can include executive enforcement exclusivity;[56] concurrent private and public enforcement authority, sometimes with the

---

54. To be sure, injury in fact, which was developed in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), differs from the legal injury test that it displaced. Once more, however, these two variations on injury were also combined in the conventional understanding of a justiciable suit at common law or earlier. Although there are exceptions, the general supposition that rights and remedies were coextensive implies a coalescence of the personal and legal aspects of an injury in the traditional understanding of a legal claim.

55. Brief for Petitioner, *supra* note 6, at *39.

56. *See, e.g.*, Occupational Safety & Health Act, 29 U.S.C. § 659 (enforcement procedures limited to the Secretary).

executive power to close off private suits;[57] or exclusive private enforcement.[58] This complex set of arrangements also allows for specific instances of private enforcement under FCRA, as in *Spokeo*, while providing a separate role for federal or state enforcement under the same statute based, in part, on consumer complaints.[59] It might seem counterintuitive that Congress can empower private persons to enforce public rights, but on reflection, it should not be.[60] Although the historical record has been disputed, there is evidence that before the framing and in the early republic, private individuals enforced legal actions that today we associate with executive enforcement power, even sometimes including private enforcement of criminal laws.[61]

---

57. *See, e.g.*, False Claims Act, 31 U.S.C. § 3730 (subsection (a) allows Attorney General to bring a civil action against a violator, and subsection (b) allows a "private person" to bring suit against a violator on behalf of the person and the government, "in the name of the government"); Fair Labor Standards Act, 29 U.S.C. § 216(b) (private right of action) § 216(c) (actions by the Secretary of Labor); Clean Air Act, 42 U.S.C. § 7604 (private right of action unless the Administrator or the State is "diligently prosecuting a civil action").

58. *See, e.g.*, 42 U.S.C. § 1983. Of course this statute contemplates private enforcement of rights that the federal government generally has the power to otherwise enforce separately.

59. 15 U.S.C. 1681n (civil liability for willful noncompliance); 15 U.S.C. 1681s (administrative enforcement procedures).

60. *See* William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1 (1975).

61. The following provides an apt summary of the once-prevalent consensus among academics concerning the relationship of modern standing doctrine to early federal judicial practice:

> In separate, major, and compelling efforts, Louis Jaffe in 1965, Raoul Berger in 1969, and Steven Winter in 1988 have demonstrated that injury was not a requisite for judicial authority in either the colonial, framing, or early constitutional periods. The Judiciary Act of 1789, like several contemporaneous state statutes, allowed "informer" actions. English practice included prerogative writs, mandamus, *certiorari*, and prohibitions, all designed to "restrain unlawful or abusive action by lower courts or public agencies," and requiring only "neglect of justice," not individual injury. Stranger suits and relator practice countenanced the assertion of judicial power without the existence of personal stakes in the controversy.

Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1151–52 (1993) (citations omitted); *see also* Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence,* 144 U. PA. L. REV. 309, 366–67 and cites therein; Cass R. Sunstein, *What's Standing After Lujan? Of Citizens Suits, "Injuries," and Article III,* 91 MICH. L. REV. 163 (1992). More recently, the following article has contested some of these broad claims, see Caleb Nelson & Ann Woolhandler, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689 (2004).

Although the historical record concerning statutory standing contains some unambiguity, the dispute concerning the antecedents to modern standing doctrine is most acute in the context of legal claims arising directly from Constitution. This Essay's thesis does not turn on resolving these interesting historical debates, whether founded on contemporaneous English practice, practices during the founding period, or practices shortly after the Constitution was ratified. Because the thesis advanced here and in my earlier work, see *supra* note 32, and cites therein, emphasizes the important functions that the modern standing doctrine serves, it is not in tension with claims that the doctrine has earlier historical antecedents than some constitutional historians have previously recognized. The goal of this Essay is instead to situate statutory standing within a broader theoretical and doctrinal framework. That includes identifying the

Of course the development of professional bureaucracies, including criminal prosecutors' offices, significantly curtailed reliance on private enforcement for many rights so enforced in the framing period,[62] but that history does not undermine the central argument here: We have two competing models of separation of powers that create a tension in the context of congressional standing conferrals. There are times when it is possible to find a middle ground between two opposing theories. Reliance on balancing tests in certain criminal procedure cases was often the product of such efforts,[63] as was Justice Powell's attempt, and then Justice O'Connor's, to find a middle position between the opposing extremes on race-based affirmative action.[64] In the context of statutory standing, Justice Kennedy has also sought a middle ground. Justice Kennedy concedes that Congress may broaden the scope of injury, but he contends that in doing so, it must tie its conferral to a specific class of individuals, presumably a class that is narrower in scope than one susceptible to diffuse harm status were they to rely on the Constitution alone as the basis for standing to sue. Consider Kennedy's famous passage from his *Lujan* partial concurrence and partial concurrence in the judgment:

> 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 a contrary view. In 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.[65]

Notably, Justice Kennedy did not concur in the judgment on this very point; rather he chose to recast the majority opinion, which he joined, rendering ironic his assertion about not reading the majority opinion "to suggest a contrary view."[66] As Kennedy has

---

separation of powers underpinnings of the modern standing doctrine as it has been applied and understood since the Progressive Era.

62. Stephen L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1414 (1988).

63. Michael R. Dreeben, *Prefatory Article: The Confrontation Clause, the Law of Unintended Consequences, and the Structure of Sixth Amendment Analysis*, 34 GEO. L.J. ANN. REV. CRIM. PROC. iii (2005); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (decrying the use of balancing tests).

64. *See* Regents of the Univ. of Cal. at Davis v. Bakke, 438 U.S. 265 (1978) (permitting reliance on race in medical school admissions provided it is not used as a quota, that it is a plus factor in a holistic review of combined files); Gratz v. Bollinger, 539 U.S. 244 (2003) (striking algorithmic use of race in race-based affirmative action program at undergraduate level); Grutter v. Bollinger, 539 U.S. 206 (2003) (allowing reliance on race as part of holistic process despite effectively replicating algorithmic function with careful daily review of law school admissions reports).

65. Lujan v. Defs. of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part and concurring in the judgment) (citation omitted).

66. *Id.*

shown, as a possible middle ground one can posit that Congress has the power to broaden standing by statute, just not too much.

IV. *SPOKEO* AND THE PROBLEM OF STATUTORY STANDING REVISITED

One could similarly devise various middle ground opinions in *Spokeo.* For example, the Court could rule for Robins by claiming that in combination, *Lujan* and *Laidlaw* impose less stringent standing requirements when the litigation is between private parties, as opposed to when a private party sues a government official. There is no foundation for this distinction within standing doctrine, which likely explains why it did not form the basis for the doctrinal debate between Justice Ginsburg and Justice Scalia in *Laidlaw*. This distinction is also not persuasive as a matter of policy. As previously shown, the decision to allow enforcement of congressional policy with purely private litigation, public litigation, or various regimes in between, represent points along a broader congressional policy enforcement spectrum.[67] The constitutional standing rules do not change based upon where along that spectrum Congress chooses to locate its enforcement scheme.[68]

Alternatively, the Court could rule for Robins on the ground that whereas *Lujan* failed to link the injury in any specific way to the individual claimants, it was Robins's personal data that was erroneously (if benignly) disclosed. Whereas the immediately preceding account offers an unsatisfying distinction between *Laidlaw* and *Lujan*, this theory fails altogether to account for *Laidlaw*, which presented similarly attenuated claims to injury. It also creates a further doctrinal tension with such cases as *Trafficante v. Metropolitan Life Ins. Co.,*[69] *Gladstone, Realtors v. Village of Bellwood*,[70] and *Havens Realty v. Coleman*.[71] In each of these cases, the Supreme Court granted standing based upon a federal statute that expanded the scope of justiciable injury. In addition to allowing

67. *See supra* note 56–58, and cites therein.

68. Alternatively, one might analogize this distinction to the discredited non-delegation doctrine. *See, e.g.*, J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928). To the extent that the doctrine remains relevant, however, it would seem to cut the other way, imposing more, rather than less, restrictive limits on purely private actions.

69. 409 U.S. 205, 208–12 (1972) (construing Fair Housing Act to confer standing on testers seeking to document standing even though they were not personally victims).

70. 441 U.S. 91, 111–15 (1979) (extending *Trafficante* to permit whites to raise challenge to racial steering practices on ground that they were denied opportunity to reside within an integrated community).

71. 455 U.S. 363, 382 (1982) (conferring standing on housing tester, under Fair Housing Act, who was not in the market for rental property).

standing to challenge a technical permit violation that produced no harm, the Court has afforded standing to persons who were not themselves victims of housing discrimination to challenge racial steering practices in a variety of ways.[72] This includes allowing testers standing even though they themselves are not in the market for housing, and expanding the scope of "injury" to include the loss of an opportunity to reside in an integrated community even though the claimants, once more, were not victims of the discriminatory practices and appeared to be raising the claims of others who were.

These cases further support the *Allen* intuition that standing doctrine affords Congress broad latitude in deciding who is permitted to bring suit. Or, as stated in *Linda RS v. Richard D.*,[73] "[t]he . . . injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing."[74] Resolving *Spokeo* by narrowly distinguishing the *Lujan* facts ultimately postpones an important question for another day, and it does so at the expense of lower federal courts who must decide these cases and of persons who rely on federal statues as the basis for their legal claims and for standing to raise those claims.

This Essay has shown that the difficulty, and uncertainty, arises as an inevitable feature of two competing premises concerning the purpose of standing doctrine. This conflict ultimately involves the nature of our representative democracy and its implications for the scope of congressional power to choose preferred policy, including how to have that policy enforced. Either Congress has the power to define the scope of standing as a means of supplementing, or even supplanting, executive enforcement for regulatory policy or it does not. Failing to clarify this important constitutional inquiry leaves Congress, the executive branch, and those who engage in statutory enforcement in a state of ongoing uncertainty. For many observers, the resulting unpredictability creates the not altogether unjustified supposition that when standing restrictions are imposed, the unstated motivation is dislike for the particular legislative policy. This occurred in *Lujan* itself. Justice Blackmun accused Justice Scalia of having undertaken "a slash-and-burn expedition through the law of environmental standing,"[75] and added that he had "difficulty imagining this Court applying its rigid principles of geographic formalism anywhere outside the context of environmental claims. As I

72. *Trafficante*, 409 U.S. at 208–12.

73. 410 U.S. 614 (1973).

74. *Id.* at 617 n.3.

75. Lujan v. Defs. of Wildlife, 504 U.S. 555, 606 (1992) (Blackmun, J., dissenting).

understand it, environmental plaintiffs are under no special constitutional standing disabilities."[76]

At its Progressive-era inception, or reinvigoration,[77] modern standing doctrine served a set of liberal/Progressive causes. In more recent decades in the Burger and Rehnquist Court periods, it served as the basis for retrenching a once liberal set of rights. But until *Lujan*, this was accomplished in the context of cases in which litigants rested on the Constitution directly for standing. The *Spokeo* case does not bring those issues before the Court. Despite these ideological shifts, and despite claims in the literature to the contrary, the composition of constitutional standing largely coheres.[78] That is not to suggest that no anomalies remain, but rather that the anomalies do not challenge the foundations of standing and the underlying premises of our constitutional adjudicatory system. The same cannot be said of statutory standing, a doctrine that presently operates on two conflicting premises that get to the heart of separation of powers. *Spokeo* offers the Court a critical opportunity to set the record straight and to clarify this important doctrine.

V. CONCLUSION

Spokeo is not a case about an obscure doctrine, an instance of lawyer's law. Rather it is a case that goes to the heart of our system of governance. Conservatives frequently define themselves by disclaiming a judicial pretense to upset legislative choice of policy, and with good reason. Conservatism often equates with judicial humility. In the context of statutory standing, humility has given way to hubris, the sort that claims to protect congressional choice of policy by preventing Congress from the very policy choices it has made. *Lujan* manifested that mistake, thereby creating a tension that was destined to arise, and that in fact did so in *Laidlaw*.

Spokeo provides the Court with a much-needed opportunity to restore statutory standing to its proper constitutional foundations, rested on the three-legged stool. The job of the Court is to preserve and protect congressional primacy in lawmaking. A logical first step is deferring when Congress chooses who has standing to enforce its statutes.

---

76. *Id.* at 595.

77. *See supra* note 61, and cites therein (discussing debates over historical antecedents to modern standing doctrine).

78. *See supra* note 34 (discussing reconciliation of standing case law).