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## Balancing as Well as Separating Power: Congress's Authority to Recognize New Legal Rights

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# Balancing as Well as Separating Power: Congress’s Authority to Recognize New Legal Rights

*Heather Elliott\**

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## I. INTRODUCTION

As the Supreme Court has told us repeatedly, Article III standing “is built on a single basic idea—the idea of separation of powers.”<sup>1</sup> The Court invokes this structural constitutional principle to justify controversial decisions, in which plaintiffs are ruled out of court because they have not suffered the kind of injury in fact required (at least on the Court’s view) by Article III’s “case or controversy” provisions.<sup>2</sup>

The issue in *Spokeo, Inc. v. Robins*<sup>3</sup> puts the Court at an important crossroads in this separation-of-powers-and-standing jurisprudence. The key question presented is “[w]hether Congress may confer Article III standing upon a plaintiff who suffers no concrete

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1. *Allen v. Wright*, 468 U.S. 737, 752 (1984). *But see* *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 396 (1980) (“The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government.” (quoting *Flast v. Cohen*, 392 U.S. 83, 100–01 (1968))).

2. *See generally* Heather Elliott, *The Functions of Standing*, 61 STAN. L.R. 459 (2008).

3. *Spokeo, Inc. v. Robins*, No. 13-1339 (U.S. petition for cert. filed May 1, 2014).

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"<sup>4</sup> (in this case, a right under the Fair Credit Reporting Act (the "FCRA") to have one's personal information reported correctly).

To put the question presented more simply, can Congress recognize legal injuries that are not predicated on injuries in fact? As I demonstrate below, the Court would abuse the language of Article III, would transgress on congressional authority, and would exceed its own role in the constitutional structure by holding that Congress lacks the authority to create such legal injuries.<sup>5</sup>

In addition to the historical analyses given elsewhere in this Symposium,<sup>6</sup> there are strong separation-of-powers reasons to respect congressional enactments conferring legal injury. Separation of powers is always also balance of powers. When the Court rules whole categories of plaintiffs out of the federal courts, it interferes with Congress's authority to recognize new societal problems and to choose judicial mechanisms for addressing those problems.<sup>7</sup> To be sure, there are outside limits to Congress's authority in this area,<sup>8</sup> but the "case or controversy" provision must be read in the larger constitutional context and should not be used to deprive Congress of its full measure of constitutional authority.<sup>9</sup>

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4. Petition for a Writ of Certiorari at i, *Spokeo, Inc. v. Robins*, No. 13-1339 (U.S. *petition for cert. filed* May 1, 2014).

5. Indeed, as one of this Roundtable's participant's notes, the answer to the question granted is so obvious—yes, of course! Congress may create purely legal injuries—that might suggest the grant of certiorari is improvident. See Jonathan R. Siegel, *Injury in Fact and the Structure of Legal Revolutions*, 68 VAND. L. REV. EN BANC 207, 207–08 (2015). Professor Steinman also suggests that certiorari was improvidently granted because it is too likely that Mr. Robins actually meets the injury-in-fact requirement. See Joan Steinman, *Spokeo, Where Shall Thou Stand*, 68 VAND. L. REV. EN BANC 243, 244 (2015).

6. E.g., F. Andrew Hessick, *Understanding Standing*, 68 VAND. L. REV. EN BANC 195, 199–202 (2015); Siegel, *supra* note 5, at 214–16. The historical antecedents of the current standing doctrine have been examined extensively; no scholar has found that the current tripartite test is *mandated* by history. See Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 818 (1969); F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 281 (2008); James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, the Injury-in-Fact Rule, and the Framers' Plan for Federal Courts of Limited Jurisdiction*, 54 RUTGERS L. REV. 1 (2001); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 169–77 (1992); Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689 (2004).

7. See Part I *infra*.

8. 13 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3525 (3d ed. 2002) ("Congress cannot limit the Court's original jurisdiction.")

9. See also Maxwell L. Stearns, *Spokeo, Inc. v. Robins and the Constitutional Foundations of Statutory Standing*, 68 VAND. L. REV. EN BANC 221, 225–26 (2015) ("Properly understood, the

We should also be suspicious when one branch of our government asserts that it is the sole judge of its own power (or lack thereof).<sup>10</sup> If the Court gets to impose on the other branches its view of what facts in the world are sufficiently harmful to amount to a case or controversy, it makes itself the sole arbiter—short of constitutional amendment—of one of the most important aspects of our democracy: the ability to obtain recourse in the courts when one's rights are violated.<sup>11</sup> The Court has implicitly recognized the danger of going it alone in other contexts.<sup>12</sup>

If the Constitution authorizes Congress to create legal injuries such as the one created by the FCRA, are there any limits at all on what Congress can do to throw open the doors of the federal courts? As I demonstrate in the final Part of this Essay, Congress is subject to extensive political constraints, as well as constitutional constraints outside Article III itself, that go a long way in preventing truly abusive statutes.

## II. SEPARATION OF POWERS IS ALSO BALANCE OF POWERS

Congress cannot create this cause of action for Mr. Robins and his like if the Constitution simply forbids it.<sup>13</sup> The question, then, is whether the constitutional phrase “case or controversy” limits Congress's power in this area.

The Court has said since 1984, in *Allen v. Wright*, that standing is required by the Constitution's separation of powers

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primary purpose of standing doctrine is to ensure congressional primacy in policy making.”); Howard M. Wasserman, *Fletcherian Standing, Merits, and Spokeo, Inc. v. Robins*, 68 VAND. L. REV. EN BANC 257, 259 (2015) (“[T]o deny standing in such statutory actions . . . allows courts to act in derogation of otherwise-proper congressional power to confer a legal right on some plaintiffs.”).

10. *E.g.*, THE FEDERALIST NO. 10, at 44 (James Madison) (G. Wills ed., 1982) (“No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.”); THE FEDERALIST NO. 80, at 405 (Alexander Hamilton) (G. Wills ed., 1982) (“No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias.”).

11. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); *see also* *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 741 (1983) (explaining that access to courts is protected under the First Amendment's petition clause).

12. Heather Elliott, *Jurisdictional Resequencing and Restraint*, 43 NEW. ENG. L. REV. 725 (2009) (arguing that the Court's cases holding that subject-matter jurisdiction need not be determined before questions of personal jurisdiction, forum non conveniens, and the like, reflect the Court's recognition of Congress's power over jurisdiction and the need to refrain from trenching on that power unnecessarily).

13. *Cf. NLRB v. Canning*, 134 S. Ct. 2550, 2600 (2014) (Scalia, J., dissenting) (“The historical practice of the political branches is, of course, irrelevant when the Constitution is clear.”).

between the Legislative, Executive, and Judicial branches.<sup>14</sup> This view of standing as an essential element of separation of powers is not venerable: the Court had said just four years before *Allen* that “[t]he question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government.”<sup>15</sup> Moreover, as the Court has also often recognized, the Constitution does not simply separate powers—it also balances them, so that no branch may act unfettered.<sup>16</sup>

Thus the Court is not the only decision maker when it comes to the Judicial Branch: the Legislative and Executive Branches have significant authority over the work of the courts. Congress is given the authority to create inferior courts, which comes with it the power to implement jurisdiction,<sup>17</sup> determine judicial salaries<sup>18</sup> (though not diminish them once set<sup>19</sup>), and anything else that is necessary and

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14. *Allen v. Wright*, 468 U.S. 737, 752 (1984). As I have argued elsewhere, there are at least three separation-of-powers purposes the Court uses standing to promote (though, as I also argue, standing is not very good at serving any of these functions). See generally Elliott, *supra* note 2. First, the doctrine helps keep a court’s involvement as a court proper: courts should do only judicial things. *E.g.*, *Liverpool, N.Y. & Phila. SS. Co. v. Comm’rs of Emigration*, 113 U.S. 33, 39 (1885). Second, the doctrine helps courts refuse cases they believe are better suited to the political process, including “abstract questions of wide public significance which amount to generalized grievances, pervasively shared and most appropriately addressed in the representative branches.” *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982) (internal quotation marks and citations omitted); see also *United States v. Richardson*, 418 U.S. 166, 179 (1974). Third, standing is sometimes used against Congress, when the Court suspects Congress of using citizen suits to usurp executive power. See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992).

15. *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 396 (1980) (quoting *Flast v. Cohen*, 392 U.S. 83, 100–01 (1968)).

16. *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring) (“Separation of powers helps to ensure the ability of each branch to be vigorous in asserting its proper authority. In this respect the device operates on a horizontal axis to secure a proper balance of legislative, executive, and judicial authority.”); see also M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1130 (2000) (consensus at the Founding was that “separation of powers is a way to prevent a single institution of government from accumulating excessive political power; the way to achieve that objective is to disperse the three governmental powers – legislative, executive, and judicial – among different institutions and to equip each department with select powers to protect itself and to police the other departments”).

17. 13 WRIGHT & MILLER, *supra* note 8 § 3503 (“Though some legislators took the position that Congress had a duty to confer the entire judicial power on the courts, Congress rejected this view. Indeed, at no time has Congress vested in the federal courts the entire constitutional judicial power.”).

18. *E.g.*, *U.S. v. Will*, 449 U.S. 200 (1980).

19. U.S. CONST., art. III, § 1.

proper in running a judicial branch.<sup>20</sup> The Executive Branch appoints federal judges, and the Senate confirms them.<sup>21</sup> The laws that the Executive is to “Take Care are faithfully executed”<sup>22</sup> (in part by suing in the federal courts<sup>23</sup>) are enacted by both Houses of Congress and signed into law by the President.<sup>24</sup> And, as the federal prosecutor, the Executive Branch has discretion over which cases the federal government pursues.<sup>25</sup>

So too should standing doctrine recognize not only the separation of powers, but also their balance. Congress is vested with constitutional authority to legislate, which means the Legislative Branch is charged with recognizing social problems and societal goals and adopting statutes to prevent or pursue them.<sup>26</sup> Thus Congress has, since the Founding, repeatedly recognized emerging problems and legislated to deal with them: the railroads,<sup>27</sup> the food system,<sup>28</sup> the financial system,<sup>29</sup> the relationship between employers and workers,<sup>30</sup> the environment,<sup>31</sup> and the Internet<sup>32</sup> have all been the subjects of Congressional action. While the Supreme Court is empowered to evaluate these statutes for constitutionality, the Justices have recognized that courts are in an inferior position to legislatures to recognize problems in the world.<sup>33</sup>

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20. U.S. CONST., art. I, § 8, cl. 18. *See, e.g.*, 13 WRIGHT & MILLER, *supra* note 8 § 3511 (describing the support system of magistrate judges, law clerks, and the like that Congress has created to aid Article III judges in their work).

21. U.S. CONST., art. II, § 2, cl. 2.

22. U.S. CONST., art. II, § 3.

23. *Tigner v. Texas*, 310 U.S. 141, 148 (1940).

24. U.S. CONST., art. I, § 7.

25. *E.g.*, *Heckler v. Cheney*, 470 U.S. 821 (1985).

26. *United States v. Morrison*, 529 U.S. 598, 628 (2000) (Souter, J., dissenting). Compare *Londoner v. City of Denver*, 210 U.S. 373 (1908), with *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915), which together help delineate the difference between legislative and judicial action (albeit in the administrative law context).

27. An Act to Regulate Commerce, ch. 104, 24 Stat. 379 (1887).

28. Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040 (codified as amended at 21 U.S.C. §§ 301–395 (2012)).

29. Securities Exchange Act of 1934, 48 Stat. 881 (codified as amended at 15 U.S.C.A. § 78a (2012)); Dodd–Frank Wall Street Reform and Consumer Protection Act, 124 Stat. 1376 (2010).

30. National Labor Relations Act, 49 Stat. 449, 29 U.S.C.A. §§ 151–169 (2012).

31. *E.g.*, Clean Water Act, Pub. L. 92-500, 86 Stat. 816, (codified as amended at 33 U.S.C.A. §§ 1251–1387 (2012)).

32. Child Online Protection Act, 47 U.S.C. § 231 (2012).

33. *United States v. Morrison*, 529 U.S. 598, 628 (2000) (Souter, J., dissenting). Indeed, the Court does not even require Congress to make extensive factual findings to support its actions in most contexts. *Gonzales v. Raich*, 545 U.S. 1, 21 (2005) (“[W]e have never required Congress to make particularized findings in order to legislate, absent a special concern such as the protection of free speech.” (citations omitted)).

Moreover, when Congress recognizes a societal problem, it also has a large degree of freedom to determine what enforcement mechanisms will best accomplish statutory goals. Sometimes Congress decides to leave enforcement entirely to federal agencies,<sup>34</sup> but sometimes it decides to enlist the federal courts at the instance of private litigants. The Court has long recognized the deference it owes Congress in making these choices.<sup>35</sup>

Congress's power over the doorway to the Judicial Branch is not unlimited, of course. For example, Congress cannot tell courts what merits decisions to reach in certain cases.<sup>36</sup> Congress cannot suspend the writ of habeas corpus except in times of war.<sup>37</sup> Congress cannot fire judges for no reason.<sup>38</sup> And Congress cannot take away jurisdiction promised to the Supreme Court in the Constitution.<sup>39</sup>

Does Article III standing doctrine impose a similar bar to Congress's creation of private legal rights? Given the clear constitutional commitment of problem solving to Congress, and the Court's repeated insistence that it owes deference to congressional decisions about enforcement, it is hard to see how the "case or controversy" provision *must* be interpreted to pose a significant obstacle to the FCRA and similar statutes.

The Court itself has repeatedly recognized that Congress does have the power to create legal injuries. In *Sierra Club v. Morton*, it said "the question whether the litigant is a 'proper party to request an adjudication of a particular issue' is one within the power of Congress to determine."<sup>40</sup> In *Warth*, the Court said "[t]he actual or threatened injury required by Art. III may exist *solely* by virtue of 'statutes creating legal rights, the invasion of which creates standing.'"<sup>41</sup> And

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34. *E.g.*, *Merrell Dow Pharm. v. Dow*, 478 U.S. 804, 810 (1986) (recognizing lack of cause of action under the Federal Food, Drug, and Cosmetic Act).

35. *Tigner v. Texas*, 310 U.S. 141, 148 (1940) ("How to effectuate policy—the adaptation of means to legitimately sought ends—is one of the most intractable of legislative problems. Whether proscribed conduct is to be deterred by qui tam action or triple damages or injunction, or by criminal prosecution, or merely by defense to actions in contract, or by some, or all, of these remedies in combination, is a matter within the legislature's range of choice.")

36. *E.g.*, *United States v. Klein*, 80 U.S. 128 (1871); *see also* *Petition for a Writ of Certiorari, Bank Markazi v. Peterson*, No. 14-770 (U.S. *petition for cert. filed* Dec. 29, 2014) (asking whether "a statute that effectively directs a particular result in a single pending case" violates the doctrine of separation of powers).

37. U.S. CONST., art. I, § 9, cl. 2.

38. U.S. CONST., art. III, § 1.

39. 13 WRIGHT & MILLER, *supra* note 8 § 3525.

40. *Sierra Club v. Morton*, 405 U.S. 727, 732 n.3 (1972) (emphasis added) (quoting *Flast v. Cohen*, 392 U.S. 83, 100 (1968)).

41. *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (emphasis added) (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973)).

Justice Kennedy, concurring in *Lujan*, wrote “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,”<sup>42</sup> language the entire Court adopted in *Massachusetts v. EPA*.<sup>43</sup>

To be sure, the Court has also said that Article III limits this authority. *Gladstone Realtors v. Village of Bellwood* held that “[i]n no event . . . may Congress abrogate the Article III minima.”<sup>44</sup> And in *Lujan*, the Court said that Congress may “elevat[e] to the status of legally cognizable injuries *concrete, de facto injuries that were previously inadequate in law.*”<sup>45</sup> “Whether the courts were to act on their own, *or at the invitation of Congress*, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those ‘Cases’ and ‘Controversies’ that are the business of the courts rather than of the political branches.”<sup>46</sup> Other cases making similar points include *Raines v. Byrd*<sup>47</sup> and *Summers v. Earth Island Institute*.<sup>48</sup> And, indeed, as I have argued elsewhere, the Court’s current constitutional jurisprudence suggests that perhaps even a majority of the Justices will be hostile to Mr. Robins’s claim of solely legal injury.<sup>49</sup>

But, based on the arguments I have made so far, the Court should hesitate before it rejects out of hand Congress’s ability to recognize solely legal injuries. A proper respect for the separation and *balance* of constitutional powers compels the conclusion that Congress can create legal rights, even if they are not predicated on injuries in fact in the Court’s Article-III-doctrinal sense. In other words, the

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42. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 580 (Kennedy, J., concurring); *see also* *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 126 n.22 (1998) (Stevens, J., dissenting) (quoting Justice Kennedy’s *Lujan* concurrence). Professor Sunstein reads that language to mean that “Congress does possess power to define [lost opportunities, increases in risks, and attempts to alter incentives] as injuries for purposes of standing.” Sunstein, *supra* note 6, at 231.

43. *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007).

44. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979).

45. 504 U.S. at 578 (emphasis added). As noted above, a number of scholars view *Lujan* as a decided break with prior standing law. *See supra* notes 82–92 and accompanying text (explaining why some scholars argue that *Lujan* improperly reduced the role of Congress).

46. *Lujan*, 504 U.S. at 576.

47. *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997).

48. *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009).

49. Heather Elliott, *Congress’s Inability to Solve Standing Problems*, 91 B.U. L. REV. 159 (2011) (noting that cases outside the standing context, including *City of Boerne v. Flores*, 521 U.S. 507 (1997), reinforce the conclusion that the Court believes itself to be the sole arbiter of what counts as a case or controversy).



Court should temper its Article III standing jurisprudence with proper concern for the powers of its coordinate branch.

### III. THE COURT SHOULD NOT BE THE SOLE JUDGE OF ITS OWN JURISDICTION

The other side of the separation-and-balance coin is the Court's own role. The standing doctrine has been criticized endlessly for overstepping the Court's Article III bounds.<sup>50</sup> For example, some critics have suggested that the doctrine is so incoherent that courts can and do use it to implement their policy preferences.<sup>51</sup> Others have equated the doctrine with *Lochnerism*: "[T]he injury-in-fact requirement should be counted as a prominent contemporary version of early twentieth-century substantive due process."<sup>52</sup>

One reason for this criticism is our general suspicion of those who are judges of their own cause. The Founders had a deep concern on this point: as James Madison wrote in *The Federalist*, "[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity."<sup>53</sup> Alexander Hamilton likewise wrote "[n]o man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias."<sup>54</sup> When the Court determines the scope of Article III jurisdiction, it is judging its own cause: what cases it and the inferior courts can hear and what cases they cannot. And with that fact comes suspicion that the standing decisions may be the product of ulterior motives.<sup>55</sup>

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50. See generally Elliott, *supra* note 2 (detailing criticisms of the standing doctrine). The criticisms date to every decade since the modern doctrine evolved in the early 1970s. See Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 U. TEX. L. REV. 1061 (2015); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 222 (1988); Myriam E. Gilles, *Representational Standing: U.S. ex rel. Stevens and the Future of Public Law Litigation*, 89 CAL. L. REV. 315, 315–16 (2001); Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741 (1999); Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 663 (1977).

51. See generally Pierce, *supra* note 50 (criticizing the standing doctrine as a tool for judges to further political agendas); see also Amy J. Wildermuth & Lincoln L. Davies, *Standing, On Appeal*, 2010 ILL. L. REV. 957, 960 (2010) (discussing the same criticism with respect to standing in agency decisions and appeals of those decisions).

52. Sunstein, *supra* note 6, at 167. See also Fletcher, *supra* note 50, at 233 ("[O]ne may even say that the 'injury in fact' test is a form of substantive due process.").

53. THE FEDERALIST NO. 10, *supra* note 10, at 44 (James Madison).

54. THE FEDERALIST NO. 80, *supra* note 10, at 405 (Alexander Hamilton).

55. E.g., Laura E. Little, *Hiding with Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions*, 46 UCLA L. REV. 75 (1998).

When the Court rejects a congressionally-defined legal injury on the ground that it does not meet the injury-in-fact requirement of Article III, the Court makes itself the sole judge of who gets into the courts, precisely in the area where we have the most reason to suspect self dealing. Of course, the Court has emphasized its authority over all constitutional interpretation in cases such as *City of Boerne v. Flores*,<sup>56</sup> *United States v. Lopez*,<sup>57</sup> and *Seminole Tribe v. Florida*.<sup>58</sup> In doing so, it has retreated from any idea that Congress has a role in constitutional interpretation: “[n]o longer does the Court emphasize the respect due to the constitutional judgments of a coequal and democratically elected branch of government. Now it claims that only the judiciary can define the meaning of the Constitution.”<sup>59</sup>

But perhaps the Court should *not* isolate itself as the sole interpreter, especially in interpretations of Article III. To do so not only strains against the notion of balancing described above,<sup>60</sup> but also makes the Court a virtual tyrant over issues of its own power. The Court appears to have recognized this concern in other areas. As I have argued, the Court has refrained from confronting difficult subject-matter jurisdiction questions in order to respect Congress’s power over jurisdictional definitions.<sup>61</sup> Some standing decisions also recognize the dangers of what may be judicial overreaching. In *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*,<sup>62</sup> for example, the Court (Justice Ginsburg writing) deferred to Congress’s choice of a citizen suit as the proper remedy for Clean Water Act violations, and emphasized its duty to refrain from interfering unduly with the work of a coordinate branch.<sup>63</sup>

The other reason it is dangerous for the Court to inflexibly interpret the Constitution is the relative permanence of its decisions. The Court itself is constrained by precedent and *stare decisis*.<sup>64</sup> And

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56. *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

57. *United States v. Lopez*, 514 U.S. 549 (1995).

58. *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

59. Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003); see also Neil Devins & Keith E. Whittington, *Introduction to CONGRESS & THE CONSTITUTION* 1, 3 (Neil Devins & Keith E. Whittington eds., 2005) (discussing “the Rehnquist Court[s] . . . sustained assault on congressional power”).

60. See *supra* Part I (arguing that the standing doctrine must include the balancing of powers, as well as the separation of powers).

61. Elliott, *supra* note 12.

62. *Friends of the Earth v. Laidlaw Envntl. Servs. (TOC), Inc.*, 528 U.S. 167, 171 (2000).

63. *Id.* at 186–87.

64. *Stare decisis* “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

Congress can overrule a constitutional interpretation only by amending the Constitution—something that is, intentionally, extremely difficult to do.<sup>65</sup>

#### IV. WHAT LIMITS ON CONGRESSIONAL AUTHORITY EXIST?

What is the protection against congressional overreaching then? What is to prevent Congress from creating legal rights willy-nilly? After all, there is some reason to suspect that Congress would rather punt hard questions to the courts; an easy way to do that is to create some vague legal right and then leave it to the courts (or to federal agencies *and* the courts) to figure it out.<sup>66</sup>

As the Court has often said in other contexts, the political process provides notable protections. It is *extremely difficult* to enact a statute.<sup>67</sup> When a bill is proposed that would create a legal right where none existed before, the members of Congress will argue about whether that path is the correct one to take, whether creating a cause of action to enforce that right will invite abuses, and the like. The Court could be expected to trust—as it has expected other political entities to trust<sup>68</sup>—that the constitutional obstacles to lawmaking protect against abuse.

Moreover, even if Congress were to unify with the President to pass a statute that created an unacceptably expansive set of legal rights, the voters, if they wish, could elect different legislators to undo

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65. U.S. CONST., art. V.; *see, e.g.*, Erwin Chemerinsky, *Amending the Constitution*, 96 MICH. L. REV. 1561 (1998) (book review) (“[A] constitution differs from all other laws in that it is much more difficult to revise. For example, the next session of Congress can amend or repeal a statute, but altering the U.S. Constitution requires a complex process involving supermajorities of both houses of Congress and the states. A constitution thus reflects a desire to place a society’s core values of governance—such as the structure of government and the rights of individuals—in a document that is hard to revise.”).

66. *E.g., generally*, Abner S. Greene, *Checks and Balances in an Age of Presidential Lawmaking*, 61 U. CHI. L. REV. 123 (1994) (discussing the now-common delegation of substantial law-making power to the executive and judicial branches in the form of rulemaking and adjudication).

67. *Cf.* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (“[T]o retreat to the notion that the legislature itself—Congress!—is in some mystical way adequately representative of all the interests at stake . . . is to impose democratic theory by brute force on observed institutional behavior.”). *See generally* THE FEDERALIST NO. 63, *supra* note 10 (James Madison) (detailing the necessity of the Senate in maintaining a stable political process).

68. *Cf.* *Garcia v. Metropolitan Transit Authority*, 469 U.S. 528 (1985) (“[T]he principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself.”).

that statute.<sup>69</sup> The Court is not the only bulwark against overreaching. (It is one of the ironies of Justice Scalia's view of standing that he so often in other contexts invokes the electoral process as a constitutional safeguard.<sup>70</sup>)

But what if, with ongoing voter approval, Congress gets its act together and (with the President) enacts a statute that appears truly problematic under the Constitution? What if, for example, a statute is enacted to make every American a private attorney general, empowered to enforce federal law?<sup>71</sup> Certainly the Court has held that to confer such an unconstrained enforcement right on private individuals—regardless of any invasion of their own rights—is to violate the Constitution.<sup>72</sup> But, if one thinks that private attorneys general are a constitutional problem, one can adopt the argument I present here and nevertheless reject as unconstitutional a statute that creates an unlimited private-attorney-general right to sue.

First, the slippery-slope possibility that Congress might enact a private attorney general statute is irrelevant to deciding, in *Spokeo*, whether Congress is empowered to create specific legal rights, the injury of which gives rise to a cause of action. The FCRA makes it a legal injury to have false information posted about oneself on the Internet.<sup>73</sup> In the absence of a showing that she has a colorable false-information claim under the FCRA, a plaintiff would not be within the group of individuals empowered to sue for relief under the Act.<sup>74</sup> The

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69. *E.g.*, James A. Gardner, *Liberty, Community and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote*, 145 U. PA. L. REV. 893, 903 (1997) (“Choosing officeholders by election is thus a means of assuring that the government exercises its powers consistent with the popular will.”).

70. *E.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2627 (2015) (“This practice of constitutional revision by an unelected committee of nine, always accompanied . . . by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.”).

71. For a thorough discussion of private attorneys general, see generally William A. Rubenstein, *On What a Private Attorney General Is—And Why It Matters*, 57 VAND. L. REV. 2129 (2004).

72. *E.g.*, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573–74 (1992) (“We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.”).

73. 15 U.S.C. § 1681n(a)(1)(A) (2012) (creating cause of action against “Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer” and making that person “liable to that consumer in an amount equal to the sum of . . . any actual damages sustained by the consumer as a result of the failure or damages of not less than \$100 and not more than \$1,000”).

74. *See, e.g.*, 13A WRIGHT & MILLER, *supra* note 8 § 3531 (detailing requirements to bring suit under the Act).

Act does not create the right to sue on behalf of others who are injured and thus satisfies the Court's mandate that "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."<sup>75</sup>

A pure private-attorney-general statute, on the other hand, does not have such limitations; private attorneys general are empowered to sue on behalf of other individuals or on behalf of the public. A private-attorney-general statute would fail to identify any legal right or injury at all and would, accordingly, fail a legal-injury test, while a statute that conferred specific legal rights would pass that test. A legal-injury test is not an abandonment of all limits on access to the federal courts. Moreover, for courts to investigate whether Congress had actually enacted a statute conferring a specific legal right would be a far superior approach to courts attempting to apply the Court's malleable and controversial standing test.<sup>76</sup>

What if, however, Congress purported to create a "legal right" to be a private attorney general (e.g., "Every American has a legal right to sue to enforce the law"<sup>77</sup>)? That statute would pass a naked test of congressional action: after all, Congress has stated that it is creating a legal right. Would such a statute succeed? There are reasons to think not. First, if the Court's legal-injury test requires that "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,"<sup>78</sup> a private-attorney-general statute fails such a test. Second, such a statute might also raise other constitutional questions. For example, a private attorney general may interfere with the Executive's Article II power to "take care that the laws be faithfully executed."<sup>79</sup> The Court has suggested in several cases that Article II may place limits on who may sue, even in the absence of Article III constraints.<sup>80</sup>

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75. *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 580 (Kennedy, J., concurring)).

76. *See supra* notes 50–51.

77. *Cf. Conley v. Gibson*, 29 F.R.D. 519 (S.D. Tex. 1961) ("I can consider that whatever happened to my fellow man, it happens to me as well.")

78. *Massachusetts v. EPA*, 549 U.S. at 516 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 580 (Kennedy, J., concurring)).

79. U.S. CONST. art. II § 3.

80. *E.g., Vt. Agency of Nat'l Res. v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 202 (2000) (Kennedy, J., concurring) ("Difficult and fundamental questions are raised when we ask whether exactions of public fines by private litigants, and the delegation of Executive power which might be inferable from the authorization, are permissible in view of the responsibilities committed to the Executive by Article II . . . . In my view these matters are best reserved for a later case.").

In sum, the abandonment of the injury-in-fact test—and according turn to Congress to identify legal rights and causes of action—does not threaten a collapse of Article III boundaries. Indeed, it gives the Court better and more reliable tools for deciding who is entitled to proceed in federal court.

#### V. CONCLUDING THOUGHTS

It is worth noting that the Court faces a question of similar dimension in *Campbell-Ewald Company v. Gomez*,<sup>81</sup> which asks two questions relevant to my purposes here: “[w]hether a case becomes moot, and thus beyond the judicial power of Article III, when the plaintiff receives an offer of complete relief on his claim” and “whether the answer to the first question is any different when the plaintiff has asserted a class claim under Federal Rule of Civil Procedure 23, but receives an offer of complete relief before any class is certified.”<sup>82</sup> These seemingly technical questions are of exceeding practical importance. If the Court says “yes, the claim is moot,” *and* it says “yes, the class action is also moot,” defendants can foreclose class-action lawsuits by picking off the named plaintiff: the named plaintiff would be offered a settlement that purports to redress all her injuries, and, even if she chose to reject it, the court would be required to find both the individual claim and the class action moot. This would work even if there were multiple named plaintiffs, as long as the defendant offered “complete” settlement to each of them.<sup>83</sup>

Just like standing, mootness is one of the justiciability doctrines of Article III.<sup>84</sup> The Court has long recognized that a thoughtless application of the mootness doctrine leads to paradoxical results. For example, the Court recognizes an exception to mootness for events that are “capable of repetition yet evading review” for events (such as human pregnancies) that occur faster than a court system could hope to reach a final judgment with appeals.<sup>85</sup>

Similarly, on an unthinking view of mootness doctrine, a defendant could moot a lawsuit seeking injunctive relief simply by

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81. *Campbell-Ewald Co. v. Gomez*, No. 14-857 (U.S. *petition for cert. filed* Jan. 16, 2015).

82. *Petition for a Writ of Certiorari at i, Campbell-Ewald Co. v. Gomez*, No. 14-857 (U.S. *petition for cert. filed* Jan. 16, 2015).

83. Ronald Mann, *Argument preview: Court returns to dispute over forced settlement of class actions*, SCOTUSBLOG (Oct. 1, 2015, 5:54 PM), <http://www.scotusblog.com/2015/10/argument-preview-court-returns-to-dispute-over-forced-settlement-of-class-actions/> [<http://perma.cc/4FG3-EVL5>].

84. 13 WRIGHT & MILLER, *supra* note 8 § 3529.

85. *E.g.*, *Roe v. Wade*, 410 U.S. 113, 125 (1973).

ceasing the offending activity, getting the lawsuit dismissed on mootness grounds, and then resuming the activity. So, in a suit for a factory's pollution of a river, the factory would shut off the pipes conveying pollution into the river, get the lawsuit dismissed, and open the pipes again. The Court has taken the more thoughtful approach that recognizes this strategic reality: thus "voluntary cessation" of the offending activity cannot moot a case; only if the defendant takes steps that reflect a permanent cessation of the activity (e.g., shuttering the factory altogether) will the lawsuit be moot.<sup>86</sup>

The *Campbell-Ewald* case has similar resonance to *Spokeo*. It simply cannot be right that a defendant's unilateral offer of settlement can moot not only the plaintiff's case but also the class action; this seems just like voluntary cessation. To hold that the defendants in such actions can impose a settlement that moots such cases would place an unthinkingly slavish dedication to doctrine above common sense, just as would dismissing a case involving abortion after the baby was born or dismissing a pollution case because the defendant had temporarily turned off the taps.

Congress has authorized class action mechanisms to allow the vindication of claims that are too difficult to litigate individually but too big societally to leave unaddressed.<sup>87</sup> To allow a defendant to force a settlement on named plaintiffs and thus defeat the class altogether would trespass on Congress's authority to create judicial mechanisms for the enforcement of private rights.<sup>88</sup> Congress has authorized any number of judicial mechanisms that sit uncomfortably within a thoughtlessly strict interpretation of justiciability: class actions, collective actions, mass tort actions, and declaratory judgment actions are all problematic if one takes a rigid view of Article III.<sup>89</sup> And yet the Court has historically been deferential to such congressional innovations.<sup>90</sup>

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86. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000).

87. 7A WRIGHT & MILLER, *supra* note 8 § 3525 ("It now is apparent that the increasing complexity and urbanization of modern American society has magnified tremendously the importance of the class action as a procedural device for resolving disputes affecting numerous people.")

88. *Tigner v. Texas*, 310 U.S. 141, 148 (1940).

89. *E.g.*, Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 118, 138 (2007). See generally Chayes, *supra* note 67 (discussing the broad role of the courts as delegated to by Congress).

90. *But see* Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223 (2003) (exposing efforts of the Rehnquist Court to limit judicial power under a narrow view of Article III, both using doctrinal development through cases and using the Judicial Conference to directly lobby Congress).

Both *Spokeo* and *Campbell-Ewald* point in the same direction, if one takes seriously the Court's role in a constitutional system that not only separates but also balances constitutional powers. In both cases, the Court has a choice: to continue to insist upon untrammelled judicial authority over these threshold constitutional questions or to respect Congress's coordinate role in the constitutional system.