AMERICAN CONSTITUTIONALISM

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

The Contemporary Era—Judicial Power and Constitutional Authority/Constitutional Litigation

**Spokeo, Inc. v. Robins, \_\_ U.S. \_\_** (2016)

*Thomas Robins was unemployed and unmarried. At some point around 2010, he learned that Spokeo Inc., which operated a “people’s search engine” was providing people with a profile of him that included false information that he was employed, had a graduate degree and was married with children. Concerned that this profile might make him appear overqualified for numerous jobs he was interested in obtaining, Robins sued Spokeo for violations of the Fair Credit Reporting Act. A lower federal district court dismissed the suit because Robins lacked standing, but that decision was reversed by the Court of Appeals for the Ninth Circuit. Spokeo appealed to the Supreme Court of the United States.*

*The Supreme Court by a 6-2 vote remanded the case to the Ninth Circuit. Justice Samuel Alito’s majority opinion maintained that plaintiffs had to demonstrate both particularity and concreteness in order to satisfy the injury-in-fact requirement of standing law. How does Justice Alito define concreteness? How does Alito define particularity? Why does he think that Robins satisfied particularity but may not have satisfied concreteness? Why does Justice Ruth Bader Ginsburg think Robins satisfied both? Who has the better of that argument? Justice Thomas distinguishes between private and public actions. What is that distinction and how does that distinction affect standing law? When* Spokeo *first came before the court, many people thought the main issue was whether Congress could dispense with the injury-in-fact requirement? To what degree does* Spokeo *strengthen or weaken that requirement.*

Justice [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I041b593a1b6011e6a807ad48145ed9f1&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Keycite)) delivered the opinion of the Court.

. . . .

Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy. The doctrine developed in our case law to ensure that federal courts do not exceed their authority as it has been traditionally understood. . . . Our cases have established that the “irreducible constitutional minimum” of standing consists of three elements. The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.  The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements. Where, as here, a case is at the pleading stage, the plaintiff must “clearly ... allege facts demonstrating” each element.

This case primarily concerns injury in fact, the “[f]irst and foremost” of standing's three elements.  Injury in fact is a constitutional requirement, and “[i]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.” To establish injury in fact, a plaintiff must show that he or she suffered “an invasion of a legally protected interest” that is “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.”

For an injury to be “particularized,” it “must affect the plaintiff in a personal and individual way. Particularization is necessary to establish injury in fact, but it is not sufficient. An injury in fact must also be “concrete.” . . . A “concrete” injury must be “de facto ”; that is, it must actually exist. When we have used the adjective “concrete,” we have meant to convey the usual meaning of the term—“real,” and not “abstract.” Concreteness, therefore, is quite different from particularization. “Concrete” is not, however, necessarily synonymous with “tangible.” Although tangible injuries are perhaps easier to recognize, we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete.

In determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles. Because the doctrine of standing derives from the case-or-controversy requirement, and because that requirement in turn is grounded in historical practice, it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts. In addition, because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important. Thus, we said in Lujan that Congress may “elevat[e] to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law.” .. .

Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation. For that reason, Robins could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III. This does not mean, however, that the risk of real harm cannot satisfy the requirement of concreteness. For example, the law has long permitted recovery by certain tort victims even if their harms may be difficult to prove or measure.  Just as the common law permitted suit in such instances, the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact. In other words, a plaintiff in such a case need not allege any additional harm beyond the one Congress has identified.

In the context of this particular case, these general principles tell us two things: On the one hand, Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk. On the other hand, Robins cannot satisfy the demands of Article III by alleging a bare procedural violation. A violation of one of the FCRA's procedural requirements may result in no harm. For example, even if a consumer reporting agency fails to provide the required notice to a user of the agency's consumer information, that information regardless may be entirely accurate. In addition, not all inaccuracies cause harm or present any material risk of harm. An example that comes readily to mind is an incorrect zip code. It is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm.

Because the Ninth Circuit failed to fully appreciate the distinction between concreteness and particularization, its standing analysis was incomplete. It did not address the question framed by our discussion, namely, whether the particular procedural violations alleged in this case entail a degree of risk sufficient to meet the concreteness requirement. We take no position as to whether the Ninth Circuit's ultimate conclusion—that Robins adequately alleged an injury in fact—was correct.

Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I041b593a1b6011e6a807ad48145ed9f1&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Keycite)), concurring.

. . . .

Standing doctrine limits the “judicial power” to “‘cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.’”  To understand the limits that standing imposes on “the judicial Power,” therefore, we must “refer directly to the traditional, fundamental limitations upon the powers of common-law courts.”  These limitations preserve separation of powers by preventing the judiciary's entanglement in disputes that are primarily political in nature. This concern is generally absent when a private plaintiff seeks to enforce only his personal rights against another private party.

Common-law courts imposed different limitations on a plaintiff's right to bring suit depending on the type of right the plaintiff sought to vindicate. Historically, common-law courts possessed broad power to adjudicate suits involving the alleged violation of private rights, even when plaintiffs alleged only the violation of those rights and nothing more. “Private rights” are rights “belonging to individuals, considered as individuals.” “Private rights” have traditionally included rights of personal security (including security of reputation), property rights, and contract rights. In a suit for the violation of a private right, courts historically presumed that the plaintiff suffered a de facto injury merely from having his personal, legal rights invaded. Thus, when one man placed his foot on another's property, the property owner needed to show nothing more to establish a traditional case or controversy. . . .

Common-law courts, however, have required a further showing of injury for violations of “public rights”—rights that involve duties owed “to the whole community, considered as a community, in its social aggregate capacity.” Such rights include “free navigation of waterways, passage on public highways, and general compliance with regulatory law.”  Generally, only the government had the authority to vindicate a harm borne by the public at large, such as the violation of the criminal laws. Even in limited cases where private plaintiffs could bring a claim for the violation of public rights, they had to allege that the violation caused them “some extraordinary damage, beyond the rest of the [community].” An action to redress a public nuisance, for example, was historically considered an action to vindicate the violation of a public right at common law, lest “every subject in the kingdom” be able to “harass the offender with separate actions.” But if the plaintiff could allege “special damage” as the result of a nuisance, the suit could proceed. . . . Similarly, a plaintiff had to allege individual damage in disputes over the use of public lands.

These differences between legal claims brought by private plaintiffs for the violation of public and private rights underlie modern standing doctrine and explain the Court's description of the injury-in-fact requirement. “Injury in fact” is the first of three “irreducible” requirements for Article III standing. The injury-in-fact requirement often stymies a private plaintiff's attempt to vindicate the infringement of public rights. The Court has said time and again that, when a plaintiff seeks to vindicate a public right, the plaintiff must allege that he has suffered a “concrete” injury particular to himself. This requirement applies with special force when a plaintiff files suit to require an executive agency to “follow the law”; at that point, the citizen must prove that he “has sustained or is immediately in danger of sustaining a direct injury as a result of that [challenged] action and it is not sufficient that he has merely a general interest common to all members of the public.”

But the concrete-harm requirement does not apply as rigorously when a private plaintiff seeks to vindicate his own private rights. Our contemporary decisions have not required a plaintiff to assert an actual injury beyond the violation of his personal legal rights to satisfy the “injury-in-fact” requirement.

The separation-of-powers concerns underlying our public-rights decisions are not implicated when private individuals sue to redress violations of their own private rights. But, when they are implicated, standing doctrine keeps courts out of political disputes by denying private litigants the right to test the abstract legality of government action. And by limiting Congress' ability to delegate law enforcement authority to private plaintiffs and the courts, standing doctrine preserves executive discretion. But where one private party has alleged that another private party violated his private rights, there is generally no danger that the private party's suit is an impermissible attempt to police the activity of the political branches or, more broadly, that the legislative branch has impermissibly delegated law enforcement authority from the executive to a private individual.

When Congress creates new private causes of action to vindicate private or public rights, these Article III principles circumscribe federal courts' power to adjudicate a suit alleging the violation of those new legal rights. Congress can create new private rights and authorize private plaintiffs to sue based simply on the violation of those private rights. A plaintiff seeking to vindicate a statutorily created private right need not allege actual harm beyond the invasion of that private right. A plaintiff seeking to vindicate a public right embodied in a federal statute, however, must demonstrate that the violation of that public right has caused him a concrete, individual harm distinct from the general population. Thus, Congress cannot authorize private plaintiffs to enforce public rights in their own names, absent some showing that the plaintiff has suffered a concrete harm particular to him.

Given these principles, I agree with the Court's decision to vacate and remand. The Fair Credit Reporting Act creates a series of regulatory duties. Robins has no standing to sue Spokeo, in his own name, for violations of the duties that Spokeo owes to the public collectively, absent some showing that he has suffered concrete and particular harm. . . .

But a remand is required because one claim in Robins' complaint rests on a statutory provision that could arguably establish a private cause of action to vindicate the violation of a privately held right. [Section 1681e(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=15USCAS1681E&originatingDoc=I041b593a1b6011e6a807ad48145ed9f1&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Keycite)#co_pp_a83b000018c76) requires Spokeo to “follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.”  If Congress has created a private duty owed personally to Robins to protect his information, then the violation of the legal duty suffices for Article III injury in fact. If that provision, however, vests any and all consumers with the power to police the “reasonable procedures” of Spokeo, without more, then Robins has no standing to sue for its violation absent an allegation that he has suffered individualized harm. On remand, the Court of Appeals can consider the nature of this claim.

Justice [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I041b593a1b6011e6a807ad48145ed9f1&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Keycite)), with whom Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I041b593a1b6011e6a807ad48145ed9f1&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Keycite)) joins, dissenting.

I part ways with the Court . . . on the necessity of a remand to determine whether Robins' particularized injury was “concrete.” Judged by what we have said about “concreteness,” Robins' allegations carry him across the threshold. The Court's opinion observes that time and again, our decisions have coupled the words “concrete and particularized.” True, but true too, in the four cases cited by the Court, and many others, opinions do not discuss the separate offices of the terms “concrete” and “particularized.”

Inspection of the Court's decisions suggests that the particularity requirement bars complaints raising generalized grievances, seeking relief that no more benefits the plaintiff than it does the public at large. Robins' claim does not present a question of that character. He seeks redress, not for harm to the citizenry, but for Spokeo's spread of misinformation specifically about him.

Concreteness as a discrete requirement for standing, the Court's decisions indicate, refers to the reality of an injury, harm that is real, not abstract, but not necessarily tangible. Robins would not qualify, the Court observes, if he alleged a “bare” procedural violation, one that results in no harm, for example, “an incorrect zip code.” Far from an incorrect zip code, Robins complains of misinformation about his education, family situation, and economic status, inaccurate representations that could affect his fortune in the job market. I therefore see no utility in returning this case to the Ninth Circuit to underscore what Robins' complaint already conveys concretely: Spokeo's misinformation “cause[s] actual harm to [his] employment prospects.”