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Substance or Illusion? The Dangers of Imposing a Standing Threshold

AMANDA LEITER*

Individuals and interest groups challenging agency action or inaction often must allege not that they or their members have been or certainly will be harmed by the agency's approach, but instead that they face an increased risk of future harm. Courts struggle to analyze standing in these so-called "increased-risk" cases: Does the elevated risk constitute the necessary injury-in-fact, or must the likelihood of realized harm exceed a certain threshold before the case becomes cognizable? Several circuits take the former view, but the D.C. Circuit requires plaintiffs to establish that the alleged risk clears some indeterminate "sufficiency" or "substantiality" bar. The resulting circuit split positions the issue for Supreme Court review, yet the theoretical underpinnings and practical effects of the differing approaches remain largely unexamined.

Examining these issues reveals little to support imposition of a substantiality-of-the-risk standing threshold. Neither moral nor jurisprudential theory supports the notion that small risks are inherently non-injurious, and careful analysis demonstrates that in practice, such a threshold consistently fails to identify increased-risk cases "worthy of review" (whatever one's definition of that term). Worse, a threshold comes at significant cost, insulating demonstrably injurious administrative policies from review, distracting courts from issues more relevant to reviewability, imposing a significant financial burden on citizen plaintiffs, and cloaking a substantive encroachment on Congress's power to recognize injuries to regulatory beneficiaries in the guise of a superficially objective statistical analysis.

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* Visiting Associate Professor at Georgetown Law. © 2008, Amanda Leiter. Many thanks to Tabatha Abu El-Haj, Hope Babcock, Peter Byrne, Julie Cohen, Heather Elliott, Chai Feldblum, Richard Frankel, Amanda Frost, Craig Goldblatt, Lisa Heinzerling, Charisma X. Howell, Greg Klass, Richard Lazarus, Carrie Menkel-Meadow, Tzili Mor, Eliza Platts-Mills, Jonathan Molot, Sam Sankar, Justin Smith, David Vladeck, Sasha Volokh, Dave Zaring, Allison Zieve, and the Georgetown Junior Law Profs for thoughts, comments, and moral support, and to Corey Talcott for outstanding research assistance.

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INTRODUCTION

In *Natural Resources Defense Council v. Environmental Protection Agency (NRDC I)*, petitioner Natural Resources Defense Council (NRDC) challenged an administrative rule that regulated production and use of the pesticide methyl bromide.¹ To evaluate NRDC's standing, the D.C. Circuit calculated the "excess fatalities" that might be expected among the petitioner's members as a result of the rule.² The panel's elaborate calculations were precise to the seventh decimal place, involved more than six mathematical operations, and extended over more than a page in the published opinion. Based on these calculations, the panel asserted that "[e]ven if all present NRDC members were *immortal*" (or, more accurately, long-lived) "we could expect to wait approximately 12,000 years . . . before seeing the first . . . methyl bromide [rule]-related death."³ Accordingly, the panel concluded, NRDC lacked standing to proceed.⁴

On reconsideration (*NRDC II*), the court withdrew its math-laden opinion, conceding that some of its unstated assumptions were erroneous and that NRDC had demonstrated a risk "sufficient to support standing."⁵ Significantly, however, the panel declined to revisit the threshold requirement, unique to the D.C. Circuit,⁶ that an increased risk of harm can constitute the injury-in-fact neces-

1. *Natural Res. Def. Council v. EPA (NRDC I)*, 440 F.3d 476, 477 (D.C. Cir. 2006) (challenging Protection of Stratospheric Ozone: Process for Exempting Critical Uses From the Phaseout of Methyl Bromide, 69 Fed. Reg. 76,982 (Dec. 23, 2004) (codified at 40 C.F.R. pt. 82)), *withdrawn*, *Natural Res. Def. Council v. EPA (NRDC II)*, 464 F.3d 1 (D.C. Cir. 2006).

2. *See NRDC I*, 440 F.3d at 481–82 nn.8, 9.

3. *Id.* at 482 (quoting an affidavit submitted by Intervenor Methyl Bromide Industry Panel (MBIP)).

4. *Id.* at 484.

5. *NRDC II*, 464 F.3d at 7.

6. Cassandra Sturkie & Nathan Seltzer, *Developments in the D.C. Circuit's Article III Standing Analysis: When Is an Increased Risk of Future Harm Sufficient to Constitute Injury-in-Fact in Environmental Cases?*, 37 ENV. L. REP. 10287, 10293 (2007) (noting that in *NRDC I*, "the D.C. Circuit distinguished itself from other courts of appeals . . . which have suggested that an increase in probability *itself* constitutes an 'actual or imminent' injury" (internal quotation marks omitted) (citing *Covington v. Jefferson*, 358 F.3d 626, 652 (9th Cir. 2004) (Gould, J., concurring))); *see also* *Baur v. Veneman*,

sary to support standing “only if the increase is sufficient to ‘take a suit out of the category of the hypothetical’”⁷—that is, only if the contemplated harm is “substantially probable.”⁸ Indeed, a more recent D.C. Circuit decision confirms that a plaintiff seeking to establish standing to raise an “increased-risk” claim must demonstrate both (1) that the challenged agency action “creates a *substantial* increase in . . . risk” and (2) that the “ultimate risk of harm to which [the plaintiff is] exposed . . . is [also] ‘*substantial*.’”⁹ Moreover, even plaintiffs who rely on an agency’s quantitative risk assessment must convince the D.C. Circuit that the risk identified by the agency is “substantial.”¹⁰ That is, the substantiality requirement does not serve only to weed out assertions of risk that rest on faulty or inadequate science; it applies equally to assertions backed by putatively expert agencies.¹¹

The implausibility of *NRDC I*’s tortured mathematics is immediately apparent when one turns to the relevant pages in the *Federal Reporter*.¹² By contrast, the substantiality-of-the-risk standing threshold seems superficially plausible as a safeguard to prevent “virtually *any* citizen” from challenging “virtually *any* [agency] action.”¹³ On closer evaluation, however, the threshold reveals itself as the most far-reaching and ill-conceived maneuver in a longstanding drive to place constitutional “constraint[s] . . . on Congress’s power to specify harms that give rise to standing.”¹⁴

Numerous authors have questioned the constitutional and historical underpinnings of that drive, explored its ramifications for separation of powers and a well-functioning regulatory state, and observed that one effect of the drive is to make judicial review less available to beneficiaries of regulation (usually individuals or communities) than to objects of regulation (usually

352 F.3d 625, 634 (2d Cir. 2003); *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 947–48 (9th Cir. 2002); *Friends of the Earth v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir. 2000) (en banc).

7. *NRDC I*, 440 F.3d at 484 (quoting *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1234–35 (D.C. Cir. 1996)).

8. *Id.* at 483 (quoting *Fla. Audubon Soc’y v. Bentsen*, 94 F.3d 658, 666 (D.C. Cir. 1996) (en banc)).

9. *Pub. Citizen, Inc. v. Nat’l Highway Traffic Safety Admin. (Public Citizen I)*, 489 F.3d 1279, 1297 (D.C. Cir. 2007) (emphasis added), *supplemented by Public Citizen, Inc. v. Nat’l Highway Traffic Safety Admin. (Public Citizen II)*, 513 F.3d 234 (D.C. Cir. 2008) (per curiam). As these quotes make clear, there are actually two quantities involved here: the background risk (which could be large or small), and the increase in risk due to the challenged agency action (which could be small even if the underlying risk is large). For simplicity, this Article treats these two quantities as identical, as the argument applies equally well whether the background risk itself is small, or the background risk is large but the increase due to the challenged rule is small.

10. *See, e.g., NRDC II*, 464 F.3d at 7 (noting that “[t]he lifetime risk that an individual will develop nonfatal skin cancer as a result of EPA’s rule is about . . . 1 in 129,000” according to the EPA).

11. *See, e.g., Kennecott Greens Creek Mining Co. v. Mine Safety and Health Admin.*, 476 F.3d 946, 954–55 (D.C. Cir. 2007) (noting that the court “will give an extreme degree of deference to the agency when it is evaluating scientific data within its technical expertise”).

12. *See NRDC I*, 440 F.3d at 481–82 nn.8, 9.

13. *See Public Citizen I*, 489 F.3d at 1295.

14. *See Mark Tushnet, Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203, 1216 (2002).

business interests).¹⁵ But even if one accepts the premise that the Take Care Clause¹⁶ and case-or-controversy requirement of Articles II and III, respectively, limit courts' jurisdiction to hear increased-risk suits alleging agency misinterpretation or under-enforcement of the law, the D.C. Circuit standing threshold offers no assistance in identifying the appropriate limits. On the contrary, the threshold obscures the real issues raised by increased-risk claims—and does so without theoretical justification. Moreover, the threshold trivializes true (if sometimes tiny) injuries; imposes a formidable, judicially created tax on citizen suits; subverts legislative priorities; and creates a superficially objective shield behind which courts can hide inherently “malleable” and “value-laden”¹⁷ evaluations of injury.

To explore these flaws, this Article considers the D.C. Circuit standing threshold's historical context, theoretical foundation, practical effect, and implications for separation of powers. Part I provides a brief history of the development of standing jurisprudence, focusing on the recent Supreme Court cases that have begun to explicate constitutional limits on the types of injury-in-fact sufficient to support standing. Part II turns from doctrinal history to analysis, considering and rejecting the most obvious theoretical justification for a standing threshold in increased-risk cases: that tiny risks are somehow not (or not sufficiently) injurious.

Part III examines the practical effects of the D.C. Circuit threshold on increased-risk cases, on plaintiffs, and on agency policy implementation. As these effects make clear, the threshold is far too blunt an instrument to distin-

15. See, e.g., RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 82, 133–34 (2004) (discussing standing history); William W. Buzbee, *Expanding the Zone, Tilting the Field: Zone of Interests and Article III Standing Analysis After Bennett v. Spear*, 49 ADMIN. L. REV. 763, 766 (1997) (observing that, after *Bennett*, the “standing inquiry playing field . . . is tilted to the advantage of regulatory targets”); Evan Caminker, *Printz, State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 226 (characterizing *Lujan v. Defenders of Wildlife*'s standing holding as perhaps “an attempted end-run around the Court's rejection of [Justice Scalia's] extreme unitarian position in *Morrison v. Olson*”); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223 (1988) (arguing that the only constitutional standing requirement is and should be a legal cause of action); Lisa Heinzerling, *The Commercial Constitution*, 1995 SUP. CT. REV. 217, 268–69 (contrasting standing in Commerce Clause and other regulatory challenges and concluding that “the Court's concepts of discrimination and regulation suggest a return to *Lochner*-style assumptions about the natural and proper role of government”); Gene R. Nichol, *Forward: The Impossibility of Lujan's Project*, 11 DUKE ENVTL. L. & POL'Y F. 193, 196 (2001) (“*Lujan*, in full flower, would strike at congressionally authorized standing and the claimed ‘overjudicialization’ of the operation of American government.”); Richard J. Pierce, Jr., *Lujan v. Defenders of Wildlife: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170 (1993) (characterizing *Lujan* as “an insupportable judicial contraction of the legislative power to make judicially enforceable policy decisions”); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 169–70 (1992) (questioning the constitutional necessity for a fact-based standing inquiry); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1374 (1988) (“[T]he modern doctrine of standing is a distinctly twentieth century product that was fashioned out of other doctrinal materials largely through the conscious efforts of Justices Brandeis and Frankfurter.”).

16. U.S. CONST. art. II, § 3 (“[H]e shall take Care that the Laws be faithfully executed.”).

17. Nichol, *supra* note 15, at 199.

guish increased-risk claims worthy of review from those better left to agency discretion—particularly given the numerous, more finely-honed analytic tools that courts have at their disposal. Finally, Part IV argues that fixing the threshold's logical failings would not address the fundamental issue—namely, that legislators are better suited than judges to decide whether imposition of a tiny risk should be a legally cognizable injury and that agencies are better equipped than courts to perform quantitative risk assessments.

I. THE APPARITION OF STANDING LAW

The “irreducible constitutional minimum” requirement for standing is familiar to most lawyers: The plaintiff must allege an “injury in fact’ . . . ‘fairly traceable’ to the actions of the defendant, and . . . likely [to] be redressed by a favorable decision.”¹⁸ Less familiar, perhaps, is the history of that requirement. Until about 100 years ago, courts concerned themselves less with detailed factual questions about the nature and scale of the harm to the plaintiff than with “whether Congress or any other source of law had granted the plaintiff a right to sue. To have standing, a litigant needed a legal right to bring suit”—in short, a cause of action.¹⁹

A. STANDING PAST

How, then, did standing law develop into its current “confusing,” and at times “seemingly incoherent”²⁰ form? According to many scholars, the doctrine developed in tandem with—and largely as a reaction to—the growth of the federal administrative state.²¹ “As private entities increasingly came to be controlled by statutory and regulatory duties, as government increasingly came to be controlled by statutory and constitutional commands, and as individuals sought to control the greatly augmented power of the government through the judicial process,” citizen plaintiffs increasingly called on courts “to articulate and enforce public . . . values.”²² Courts, in turn, struggled to identify appropriate limits for the growing array of lawsuits in which plaintiffs sought, in general terms, to enforce agencies’ statutory duties. Eventually, the requirement that a plaintiff establish an individualized “injury in fact” emerged as one such limit.²³

On first consideration, the requirement of individuated injury-in-fact may

18. *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

19. Sunstein, *supra* note 15, at 170; *see also* Fletcher, *supra* note 15, at 225 (describing the same history); Winter, *supra* note 15, at 1372–73).

20. Winter, *supra* note 15, at 1372.

21. *See, e.g.*, Fletcher, *supra* note 15, at 225; Gene R. Nichol, *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141 (1993); Sunstein, *supra* note 15, at 179–81; Winter, *supra* note 15, at 1453.

22. Fletcher, *supra* note 15, at 225.

23. *See Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970). For the argument that the present, fact-based standing inquiry has constitutional rather than pragmatic roots, *see, for example*, Bradley S. Clanton, *Standing and the English Prerogative Writs: The Original Understanding*, 63 BROOK. L. REV. 1001 (1997); John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42

seem a straightforward answer to the “difficult question” of “who [may] sue to enforce the legal duties of an agency”²⁴: Only plaintiffs who have suffered at the hands of the agency may sue; third parties with philosophical bones to pick may not. The problem, of course, is how to define individuated injury—and therein lies much of the complexity and contentiousness of the current standing debate.

The Supreme Court first attempted to delimit justiciable injury in the 1930s and 1940s—at the end of the era of substantive due process, when libertarian Justices sought other ways to curtail the power of progressive New Deal agencies.²⁵ In response to this line of attack, “Justices like Brandeis and Frankfurter . . . develop[ed] doctrines of jurisdictional limitation,” deliberately adopting a private rights framework to “preclude any dissatisfied private citizen from invoking the Constitution in the courts to challenge the progressive programs enacted by the polity.”²⁶

In the private rights framework, true harms that do not violate a legal right—a right “of property, . . . arising out of contract, . . . protected against tortious invasion, or . . . founded on a statute which confers a privilege”—are “damnum absque injuria, and will not support a cause of action or a right to sue.”²⁷ The resulting cases “protect[ed] the legislative sphere from judicial interference”²⁸ by curtailing taxpayers’ and business interests’ standing to challenge agencies’ spending programs and participation in private markets.²⁹ In so doing, these early-twentieth-century cases confirmed that some harms are not justiciable because they do not amount to “legal injury.”

These cases said nothing, however, about the extent of Congress’s authority

DUKE L.J. 1219, 1220 (1993); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894–95 (1983).

24. Fletcher, *supra* note 15, at 225.

25. See Winter, *supra* note 15, at 1454–55.

26. *Id.* at 1456–57.

27. *Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 137, 140 (1939).

28. Winter, *supra* note 15, at 1457.

29. In *Fairchild v. Hughes*, for example, a citizen taxpayer plaintiff challenged the ratification process for the Nineteenth Amendment and asked the Court to “restrain the Secretary of State from issuing any proclamation declaring that it has been ratified; and . . . [to restrain] the Attorney General . . . from enforcing it.” *Fairchild v. Hughes*, 258 U.S. 126, 127 (1922). The Court dismissed the suit because the plaintiff lacked an enforceable private right:

Plaintiff has only the right, possessed by every citizen, to require that the government be administered according to law and that the public moneys be not wasted. Obviously this general right does not entitle a private citizen to institute in the federal courts a suit to secure . . . a determination whether a statute, if passed, or a constitutional amendment, about to be adopted, will be valid.

Id. at 129–30.

Along related lines, in *Tennessee Electric*, the appellant electricity companies objected to competition from the Tennessee Valley Authority (TVA) on the ground that Congress could not constitutionally grant TVA the power to generate and sell electricity because such power lies outside Congress’s authority “to improve navigation and control floods in the navigable waters of the nation.” *Tenn. Elec.*, 306 U.S. at 135–36. The Court held the harm to appellants nonjusticiable because “the damage consequent on competition, otherwise lawful, . . . will not support a cause of action or a right to sue.” *Id.* at 140.

to expand the legal injury category, in particular by crafting citizen-suit provisions that expressly recognize the harm done to beneficiaries of a regulatory regime when the implementing agency misapprehends, under-enforces, or otherwise violates the law. This issue of congressional authority to (re)define justiciable injury came to a head toward the end of the twentieth century. In the previous decades, Congress had passed the Administrative Procedure Act (APA) and numerous public health and environmental statutes that, together, purported to grant citizens the right to sue agency "administrators [for] failing to enforce the law as Congress required."³⁰ Through the early 1970s, though, courts' justiciability inquiries still placed emphasis on the existence of a "legal injury," albeit now an injury *either* to a protected common law interest *or* to an interest newly recognized by statute. The resulting legal regime responded well to then-current research suggesting that "agencies were sometimes subject to sustained political pressure from regulated industries."³¹ Permissive standing decisions allowed citizens to enlist the courts in their efforts to force "captured" agencies to toe the statutory line.³²

Even as the Court was issuing these decisions, however, the standing landscape was beginning to shift in ways that would have significant repercussions for citizen standing. Of particular note is a 1970 Supreme Court decision that many read as expanding citizen standing,³³ *Association of Data Processing Organizations v. Camp*.³⁴ In *Camp*, the Court found standing for the petitioners, who sought equitable relief against the Comptroller of the Currency for allowing national banks to horn in on the petitioners' data processing business.³⁵ In

30. See Sunstein, *supra* note 15, at 184, 193.

31. See *id.* at 183–84.

32. See, e.g., *Duke Power Co. v. Carolina Env'tl. Study Group*, 438 U.S. 59 (1978); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973); *Sierra Club v. Morton*, 405 U.S. 727 (1972). In *Sierra Club*, the Court denied *Sierra Club's* standing because the group had failed to allege that the challenged development of a national forest would harm the club in any way. 405 U.S. at 735. Importantly, though, the Court made clear that the Club would have standing to sue on behalf of members who used the area, and "for whom the aesthetic and recreational values of the area [would] be lessened by" the challenged development. *Id.* In *SCRAP*, the Court found standing for plaintiffs who made the rather attenuated argument that a rail-fare increase would increase pollution by making recycling more costly. 412 U.S. at 686, 687–88. In *Duke Power*, the Court permitted organizations and individuals to challenge the constitutionality of the Price Anderson Act, which, they alleged, made possible *Duke Power's* construction of nuclear power plants in North and South Carolina. 438 U.S. at 67, 81–82. These and other 1970s cases established that "citizen allegations of [ecological injury] could satisfy" at least the first, injury-in-fact prong of the standing inquiry, despite "the exceedingly attenuated and speculative allegations of causation" present in some cases. Lazarus, *supra* note 15, at 82, 134.

33. See, e.g., *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38–39 (1976) ("In *Data Processing Service v. Camp*, this Court held the constitutional standing requirement under [the APA] to be allegations which, if true, would establish that the plaintiff had been injured in fact by the action he sought to have reviewed. Reduction of the threshold requirement to actual injury redressable by the court represented a substantial broadening of access to the federal courts over that previously thought to be the constitutional minimum under this statute." (internal citation omitted)).

34. *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970).

35. *Id.* at 151, 158.

so doing, however, the Court recharacterized the standing inquiry, describing the “‘legal interest’ test” as “go[ing] to the merits”³⁶ and identifying a novel alternative—a fact-based, two-step standing inquiry.³⁷ According to *Camp*, that inquiry asks *first* “whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise,” and only *second* (and prudentially, rather than as a matter of constitutional necessity) “whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”³⁸ That is, the *Camp* Court redirected the constitutional inquiry from the text of the applicable statute to the facts of the particular case and shifted consideration of the relevant statutory review provisions to a secondary, prudential “zone of interests” test.³⁹

The *Camp* Court may not have anticipated the jurisdiction-limiting potential of its shift from a standing requirement based on legal injury to one based on individualized injury-in-fact. After all, the Court found standing for the petitioners and did so after quoting *Flast v. Cohen*⁴⁰ for the proposition that “the question of standing is related *only* to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.”⁴¹ That is, *Camp* implies that if a *factual* injury exists, there is constitutional standing, whatever the merits of the plaintiff’s legal claim. Finally, the times were such that Justice Douglas could assert that “[w]here statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action.”⁴² In short, the context and language of the opinion suggest that the Court viewed itself as expanding the range of cases and controversies that courts could entertain.

As things played out, however, *Camp* had the opposite effect,⁴³ for two contrary reasons. First, the *Camp* Court’s expansive description of the “zone of interests” test worried those (including then-Judge Antonin Scalia) who question the role of citizen attorneys general in promoting agency enforcement of the laws.⁴⁴ At the same time, *Camp*’s refocusing of the constitutional inquiry gave those opponents a hook on which to hang a novel and highly restrictive standing theory. In a widely quoted 1983 essay, Scalia developed the idea:

36. *Id.* at 53.

37. *See id.* at 152–53; Sunstein, *supra* note 15, at 184–86.

38. *Camp*, 397 U.S. at 152–53.

39. *See id.* at 153.

40. *Flast v. Cohen*, 392 U.S. 83 (1968).

41. *Camp*, 397 U.S. at 151–52 (quoting *Flast*, 392 U.S. at 101) (emphasis added). *Flast* expanded taxpayer standing, recognizing what the Court has since characterized as “a narrow exception to the general rule against federal taxpayer standing” for plaintiffs challenging “a law authorizing the use of federal funds in a way that allegedly violates the Establishment Clause.” *Hein v. Freedom from Religion Found.*, 127 S. Ct. 2553, 2559 (2007).

42. *Camp*, 397 U.S. at 155.

43. *See* Sunstein, *supra* note 15, at 164–65 (describing the narrow law of standing advocated by Justice Scalia and adopted by the Court when dealing with a congressional grant of standing to citizens).

44. Scalia, *supra* note 23, at 888–89 (critiquing *Camp*).

[T]he law of standing roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and excludes them from the even more undemocratic role of prescribing how the other two branches should function

. . . [Consider] the increasingly frequent administrative law cases in which the plaintiff is complaining of an agency's unlawful *failure* to impose a requirement or prohibition upon *someone else*. Such a failure harms the plaintiff, by depriving him, as a citizen, of governmental acts which the Constitution and laws require. But that harm alone is . . . a *majoritarian* one. The plaintiff may *care* more about it But that does not establish that he has been harmed distinctively Unless the plaintiff can show some respect in which he is harmed *more* than the rest of us . . . he has not established any basis for concern that the majority is suppressing or ignoring the rights of a minority that wants protection, and thus has not established the prerequisite for judicial intervention.

*That explains . . . why "concrete injury"—an injury apart from the . . . very fact of unlawful government action—is the indispensable prerequisite of standing.*⁴⁵

Moreover, Scalia continued, "not *all* 'concrete injury' . . . [is] capable of supporting a congressional conferral of standing"; some injuries are too "widely shared" to "mark out a subgroup of the body politic requiring judicial protection."⁴⁶ In other words, if a plaintiff complains only that an agency failed to follow a legislative mandate that was enacted to protect her *and many others*, she lacks the individuated injury that is a constitutional prerequisite to suit, even if she can point to a statutory provision that clearly grants her a cause of action.

Less than a decade after then-Judge Scalia articulated this standing theory, Justice Scalia "talked his colleagues into following his lead" in *Lujan v. Defenders of Wildlife*.⁴⁷ With *Lujan*, the Court completed the transformation of standing doctrine from a comparatively straightforward examination of causes of action into an abstruse inquiry into injuries-in-fact. Plaintiffs in the case challenged a Department of Interior rule that adopted a restrictive reading of the Endangered Species Act.⁴⁸ To establish standing, the plaintiffs cited the Act's expansive citizen-suit provision,⁴⁹ but they failed to introduce evidence that satisfactorily distinguished them from "anyone who observes or works with an endangered species, anywhere in the world."⁵⁰ That is, the *Lujan* plaintiffs

45. *Id.* at 894–95 (final emphasis added).

46. *Id.* at 895–96.

47. Nichol, *supra* note 15, at 194. See generally *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

48. See *Lujan*, 504 U.S. at 558–59.

49. See *id.* at 571–72. This provision purports to allow "any person" to "commence a civil suit on his own behalf . . . to enjoin any person, including the United States and any other governmental instrumentality or agency . . . alleged to be in violation of any provision" of the Act. Endangered Species Act of 1973 § 11, 16 U.S.C. § 1540(g) (2000).

50. *Lujan*, 504 U.S. at 567.

claimed just the sort of “widely shared” injury that Scalia had argued nine years earlier cannot “support[] a congressional conferral of standing.”⁵¹ The results were dire: The Court not only disputed the plaintiffs’ claimed injury but also held, for the first time, that statutory grants of comprehensive jurisdiction over citizen suits brought to ensure “executive officers’ compliance with the law” may violate the case-or-controversy requirement and encroach on the President’s responsibility “to ‘take Care that the Laws be faithfully executed.’”⁵² Importantly, though, Justices Kennedy and Souter emphasized (in a partial concurrence authored by Justice Kennedy) that in their view Congress does have the authority “to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before,” provided that the relevant statute both identifies “the injury [Congress] seeks to vindicate” and ties that injury “to the class of persons entitled to bring suit.”⁵³

Commentators immediately recognized *Lujan* as an important case and speculated about its implications.⁵⁴ Clearly, the holding “foreclose[d] ‘pure’ citizen suits,” in which someone “with an ideological or law-enforcement interest initiates a proceeding against the government, seeking to require an agency to undertake action of the sort required by law.”⁵⁵ Together, Article III and the Take Care Clause bar such a suit, no matter how sweeping the language of the applicable statutory cause of action. But how much farther would the Court extend its condemnation of widely shared injuries? What of cases in which an individual with a health-related interest in, say, abatement of air pollution seeks to hold the Environmental Protection Agency’s feet to the fire? Must she establish that her concern about pollution exceeds the general public’s concern? Is it enough if she is an asthmatic, or must she also claim to live or work near a regulated smokestack? And finally, of particular importance here, may she assert that she faces a small increased risk of asthma attacks, or must she either establish that her increased risk is substantial or wait to sue until she has experienced shortness of breath due to the challenged agency action? As one commentator put it, the “sentiment” that “[c]laims based on the public interest . . . are political disputes, not lawsuits . . . began to look like law in *Lujan*”;⁵⁶ the question that remained was how many claims the Court would ultimately place in the “political disputes” category.

B. STANDING PRESENT

Between 1992 and the present, the Court largely allayed concerns that it would expand on the ideas in the *Lujan* majority opinion by defining the injury-in-fact concept so narrowly as to bar Congress from relying on citizen

51. Scalia, *supra* note 23, at 895.

52. *Lujan*, 504 U.S. at 577 (quoting U.S. CONST. art. II, § 3).

53. *Id.* at 580 (Kennedy, J., concurring in part and concurring in judgment).

54. See, e.g., Pierce, *supra* note 15, at 1188–95 (speculating about the “potential effects of [*Lujan*]”).

55. Sunstein, *supra* note 15, at 226.

56. Nichol, *supra* note 15, at 195.

attorneys general to ensure enforcement of the nation's environmental and public health and welfare laws. In *Federal Election Commission v. Akins*, for example, six members of the Court found standing for plaintiffs who challenged the Commission's failure to enforce certain disclosure provisions of the election laws against the American Israel Public Affairs Committee.⁵⁷ The Court explained that the resulting informational injury, though "widely shared," was neither "abstract" nor "indefinite"; the injury was "directly related to voting, the most basic of political rights," and was "sufficiently concrete and specific such that the fact that it [was] widely shared [did] not deprive Congress of constitutional power to authorize its vindication in the federal courts."⁵⁸ Under *Akins*, then, Congress may continue to authorize citizen suits to vindicate "concrete" and "specific" public interests; *Lujan's* strictures extend only to "abstract . . . harm[s]—for example, injury [solely] to the interest in seeing that the law is obeyed."⁵⁹

Two years later, in *Friends of the Earth v. Laidlaw Environmental Services*, a slightly larger majority of the Court further confirmed the vitality of this sort of public litigation.⁶⁰ The *Laidlaw* plaintiffs filed a citizen suit against the owner of a wastewater treatment facility that had violated its obligations under a Clean Water Act discharge permit. The Court held that to establish standing, the plaintiff organizations did not have to demonstrate that discharges from the facility had harmed the river or its environs. Rather, the organizations could represent members who lived, worked, or recreated near the facility, and who asserted that the discharges, and "reasonable concerns about the effects of those discharges, directly affected [the members'] recreational, aesthetic, and economic interests."⁶¹

Laidlaw did not concern injuries as universal as those at issue in *Lujan* and *Akins*. In the former case, the injured members of the plaintiff organizations had all spent significant time within a few miles of the affected river—they were, in Scalia's words, "harmed distinctively."⁶² That said, one can frame many environmental harms as a threat to some individual's use and enjoyment of some environmental resource. In theory, then, *Laidlaw* further limited the potential ramifications of *Lujan*; as long as a plaintiff wishing to challenge agency inaction can identify harm to her distinct "recreational, aesthetic, and economic interests,"⁶³ her claim no longer bears the hallmarks of a constitutionally suspect "'pure' citizen suit[]." ⁶⁴

57. *FEC v. Akins*, 524 U.S. 11, 15–16, 28 (1998). Chief Justice Rehnquist and Justices Stevens, Kennedy, Souter, and Ginsburg joined Justice Breyer's opinion; Justices O'Connor and Thomas joined Justice Scalia's dissent. *Id.* at 13.

58. *Id.* at 24–25.

59. *Id.* at 24.

60. *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180–88 (2000).

61. *Id.* at 183–84.

62. Scalia, *supra* note 23, at 895.

63. *Laidlaw*, 528 U.S. at 184.

64. Sunstein, *supra* note 15, at 226.

Finally, no history of standing is complete without mention of the Court's recent opinion in *Massachusetts v. Environmental Protection Agency*.⁶⁵ This victory for environmental plaintiffs established EPA's authority under the Clean Air Act to regulate greenhouse gas emissions from automobiles.⁶⁶ To reach the merits issue, however, the Court had to satisfy itself that the plaintiffs' climate change concerns—"widely held" almost by definition—constituted sufficiently concrete and specific injury to support the Clean Air Act's grant of standing.⁶⁷

Although the majority found standing in *Massachusetts*, several aspects of the opinion suggest an uncertain future for citizen attorneys general pressing claims based on injuries that are widely shared. First, only five Justices signed the *Massachusetts* opinion. In some contrast to the Rehnquist Court, which mustered a six-member majority for *Akins*, the newly constituted Roberts Court includes four members who readily agree that redress of widely held grievances, such as concern about the present and future effects of climate change, "is the function of Congress and the Chief Executive," not the federal courts."⁶⁸ Moreover, Justice Stevens' carefully worded opinion for the remaining five Justices leaves some doubt as to their collective willingness to affirm a role for courts in addressing such claims. Specifically, Stevens' discussion of the "concrete" nature of the plaintiffs' injury⁶⁹ focuses entirely on property loss to a state rather than an individual, as a result of historic rather than future sea level rise.

According to petitioners' unchallenged affidavits, global sea levels rose somewhere between 10 and 20 centimeters over the 20th century as a result of global warming. These rising seas have *already* begun to swallow Massachusetts' coastal land. Because the Commonwealth owns a substantial portion of the state's coastal property, it has alleged a particularized injury in its capacity as a landowner. The severity of that injury will only increase over the course of the next century. . . .⁷⁰

That is, nothing in the *Massachusetts* opinion suggests that standing premised on a widely shared risk of *future* (rather than past or present) harm to *individuals* (rather than sovereign States) would satisfy all five Justices who signed that opinion. But for its actual holding, therefore, the opinion portends a dubious future for individuals' standing to assert injury due to agency dereliction on a pending problem of broad public significance.⁷¹

65. *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007).

66. *Id.* at 1462.

67. *See id.* at 1453.

68. *Id.* at 1464 (Roberts, J., dissenting) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992)).

69. *See id.* at 1455–56 (majority opinion).

70. *Id.* at 1456 (emphasis added) (internal quotation marks and citations omitted).

71. The *Massachusetts* Court does quote favorably from *SCRAP*, the Supreme Court's most permissive (and most widely discredited) standing opinion: "To deny standing to persons who are in fact

C. STANDING YET TO COME

Enter the D.C. Circuit. The circuit's requirement that plaintiffs facing a widely shared risk of future injury must demonstrate the substantiality of that risk before they may challenge the causative agency action derives from the same separation of powers concerns expressed in *Lujan* (and in the dissents in *Akins*, *Laidlaw*, and *Massachusetts*). Specifically, as the court explained in a preliminary decision in *Public Citizen, Inc. v. National Highway Traffic Safety Administration*, the standing threshold aims to ensure that courts do not overstep their constitutional role:

The consequences of allowing standing in . . . increased-risk cases are perhaps obvious, but worth explicating. Much government regulation slightly increases a citizen's risk of injury—or insufficiently decreases the risk compared to what some citizens might prefer. . . . [If courts were to hear all probabilistic injury claims, then] after an agency takes virtually *any* action, virtually *any* citizen—because of a fractional chance of benefit from alternative action—would have standing to obtain judicial review of the agency's choice. Opening the courthouse [in this way] . . . would expand the “proper—and properly limited”—constitutional role of the Judicial Branch beyond deciding actual cases or controversies; and would entail the Judiciary exercising some part of the Executive's responsibility to take care that the law be faithfully executed.⁷²

In other words, in the D.C. Circuit's view, the sheer number of potential increased-risk claims creates a constitutional dilemma. Hearing all such claims would turn courts into a sort of democratically unaccountable über-agency, so judges must find some way to separate the wheat from the chaff.

What is remarkable about the D.C. Circuit's approach is that it goes considerably further than the *Lujan* majority did in limiting Congress's power “to define injuries . . . that will give rise to a case or controversy.”⁷³ As noted above, two of the six Justices who signed the majority opinion in *Lujan* recognized only two qualifications on congressional authority to identify new, legally cognizable

injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion.” *Id.* at 1458 n.24 (quoting *SCRAP*, 412 U.S. 669, 687–88 (1973) (emphasis added) (citations omitted)). To establish *Massachusetts*' standing, however, the Court relies on the state's *historic* loss of coastline rather than any risk of future injury, suggesting that the majority's refusal to “accept that conclusion” extends only to widespread government actions that have *already* taken a toll, not to widespread government actions that merely impose risks.

72. *Public Citizen I*, 489 F.3d 1279, 1295 (D.C. Cir. 2007) (internal citations omitted) (ordering supplemental briefing on plaintiff's standing). Ultimately, after *Public Citizen* submitted a supplemental brief and more than 200 pages of additional declarations supporting standing, the court determined that the group had “not met its burden to demonstrate injury in fact.” *Public Citizen II*, 513 F.3d 234, 241 (D.C. Cir. 2008) (per curiam).

73. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part and concurring in judgment).

injuries: To grant citizen standing, legislators must specify the injuries they aim to address and the relationship between those injuries and the class of citizens who may sue.⁷⁴ The D.C. Circuit approach is far more limiting—no matter how specific and carefully drafted the statute, legislators may not grant standing to individuals who face only a tiny increase in risk of harm.

This outcome is sufficiently novel and important that it is worth restating. Read together, the *Lujan* majority and concurring opinions place a constitutional burden on legislators. By contrast, the D.C. Circuit's substantiality-of-the-risk standing threshold places a constitutional *limit* on legislative authority.

To date, this standing threshold is peculiar to the D.C. Circuit. Other circuits "have suggested that an increase in probability [of harm] itself constitutes an 'actual or imminent' injury" sufficient to support constitutional standing.⁷⁵ That other circuits take a different approach does not, however, render the D.C. Circuit standing threshold unimportant. For one thing, as just noted, the threshold represents the most far-reaching step in the longstanding effort to place constitutional limits on congressional authority to grant citizen standing. Moreover, the threshold creates a real and perhaps insurmountable obstacle for the many citizen plaintiffs who have little choice but to file in the D.C. Circuit.⁷⁶ Finally, the present difference of opinion among the courts of appeals makes eventual Supreme Court review likely, at which point the rationale behind the threshold may well appeal to that Court's recently expanded cadre of standing skeptics.⁷⁷ For the reasons explained below, though, the

74. *Supra* note 53 and accompanying text.

75. Sturkie & Seltzer, *supra* note 6 (citing cases in the Second, Fourth, and Ninth Circuits).

76. The D.C. Circuit has exclusive jurisdiction over many administrative disputes and concurrent jurisdiction over most others. For example, the court has exclusive jurisdiction to review regulations promulgated under the Toxic Substances Control Act of 1976 § 19, 15 U.S.C. § 2618(a)(1) (2000), the Oil Pollution Act of 1990 § 1017, 33 U.S.C. § 2717(a) (2000), Resource Conservation and Recovery Act of 1976 § 7006, 42 U.S.C. § 6976(a)(1) (2000), and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 § 113, 42 U.S.C. § 9613(a) (2000); national pollution standards issued under the Clean Air Act of 1963 § 307, 42 U.S.C. § 7607(b)(1) (2000); "actions pertaining to the establishment of national primary drinking water regulations" under the Safe Drinking Water Act of 1974 § 1448, 42 U.S.C. § 300j-7(a)(1) (2000); decisions of the "God Squad" under the Endangered Species Act of 1973 § 7, 16 U.S.C. § 1536(n) (2000); and national rules promulgated under the Surface Mining Control and Reclamation Act of 1977 § 526, 30 U.S.C. § 1276(a) (2000). Under the National Labor Relations Act of 1935 § 10, on the other hand, "[a]ny person aggrieved by a final order of the [National Labor Relations] Board may obtain review . . . in any United States court of appeals in the circuit wherein the unfair labor practice was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia." 29 U.S.C. § 160(f) (2000) (emphasis added). Similarly, venue for review of any proceeding under the Nuclear Waste Policy Act of 1982 § 119 "shall be in the judicial circuit in which the petitioner involved resides or has its principal office, or in the United States Court of Appeals for the District of Columbia." 42 U.S.C. § 10139 (2000). See also John G. Roberts, *What Makes the D.C. Circuit Different*, 92 VA. L. REV. 375, 389 (2006) ("Whatever combination of letters you can put together, it is likely that jurisdiction to review that agency's decision is vested in the D.C. Circuit.").

77. Cf. Susan Low Bloch & Ruth Bader Ginsburg, *Celebrating the 200th Anniversary of the Federal Courts of the District of Columbia*, 90 GEO. L.J. 549, 567-68, 576-77 & n.165 (2002) (noting numerous cases in which the Supreme Court has adopted the D.C. Circuit's view on issues of substance

threshold is neither a necessary nor a prudent solution to any separation of powers problem.

II. THE INJURIOUSNESS OF SMALL RISKS IN THEORY

The first important criticism of the standing threshold is that there is no coherent *theoretical* justification for limiting standing in increased-risk cases to plaintiffs who face a “substantial” risk of future harm. That is, as explained below, there is no valid theoretical reason to suppose that small risks are non-injurious. Thus, if there is any justification for the threshold at all, it is not to weed out cases that are in some sense inherently improper, but instead to reduce the number of increased-risk cases, either to keep courts within their “proper—and properly limited—role . . . in a democratic society,”⁷⁸ or simply to conserve judicial resources for cases involving more serious risks.

To prove this point, this section considers and rejects the two most plausible theoretical justifications for the D.C. Circuit standing threshold: that dismissal of cases involving ‘insubstantial’ risks is necessary either (A) to advance some jurisprudential goal or (B) to adhere to some moral framework.

A. JURISPRUDENTIAL THEORY

To determine whether the D.C. Circuit standing threshold advances any of the jurisprudential goals of the standing inquiry, one must first articulate those goals. At the most general level, the inquiry prevents courts from overstepping their constitutional bounds. As the Supreme Court put it in a recent decision: “The standing requirement is born partly of ‘an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.’”⁷⁹

In practice, those “constitutional and prudential” limits amount to a prohibition on advisory opinions and the need for a statutory or other legal “hook.”⁸⁰ In turn, the prohibition on advisory opinions necessitates “proper adversarial presentation”—that is, both parties must “have an actual . . . stake in the outcome, and . . . the legal questions presented . . . [must] be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context

or procedure). Of course, the D.C. Circuit’s innovations do not always impress the Supreme Court. *See, e.g.,* *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 476 (2001) (rejecting the D.C. Circuit’s conclusion that the Clean Air Act’s delegation of authority to EPA to set air pollution standards at a level “requisite to protect public health” violated the nondelegation doctrine). *But see* Bloch & Ginsburg, *supra*, at 577 (pointing out that even in those administrative law cases in which the Supreme Court rejects the D.C. Circuit’s view, the lower court’s consideration of the issues often “elevate[s] the [Supreme] Court’s comprehension of the diverse considerations at stake”).

78. *Allen v. Wright*, 468 U.S. 737, 750 (1984) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

79. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004) (quoting *Allen*, 468 U.S. at 750 (internal quotation marks omitted)).

80. *See infra* Part III.

conducive to a realistic appreciation of the consequences of judicial action.”⁸¹ To mount a jurisprudential defense of the substantiality-of-the-risk standing threshold, therefore, one must identify some difference between large and small risks that aligns with this purpose—in other words, some characteristic of small risks that reduces plaintiffs’ “stake in the outcome” of their lawsuits.

The difficulty with such an argument is that in all other contexts, a violation of legally protected interests is a cognizable injury *however small the violation*. The Supreme Court made this very point in a passage of *SCRAP* that has thus far escaped criticism:

The Government urges us to limit standing to those who have been “significantly” affected by agency action. But . . . we think [such a test] fundamentally misconceived. “Injury in fact” . . . serves to distinguish a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem. We have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, a \$5 fine and costs, and a \$1.50 poll tax. As Professor Davis has put it: “The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle”⁸²

Indeed, in the class action context, both the Federal Rules and the courts view the small size of some real injuries as a hurdle for federal litigation to overcome rather than a theoretical bar to jurisdiction.⁸³ As the Supreme Court has stated, “[t]he policy at the . . . core of [Rule 23’s] class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.”⁸⁴ The Seventh Circuit made the same point in the context of a 17-million-member class action: “The *realistic* alternative to a class action is not 17,000,000 individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.”⁸⁵ Concededly, the named plaintiffs in class actions must individually demonstrate standing.⁸⁶

81. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1453 (2007) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring in part and concurring in the judgment)) (internal quotation marks omitted).

82. *SCRAP*, 412 U.S. 669, 689 n.14 (1973) (quoting Kenneth Culp Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 613 (1968)) (internal citations omitted).

83. For a general discussion of “parallels between class action litigation and administrative regulation,” see Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 94–118 (2003).

84. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (1997)).

85. *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

86. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976) (“That a suit may be a class action . . . adds nothing to the question of standing, for even named plaintiffs who represent a class ‘must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.’” (quoting *Warth v. Seldin*, 422 U.S. 490, 502 (1975))).

That is, they cannot rely on injuries to other members of the class to establish their own standing. But that requirement ensures only that *uninjured* plaintiffs do not seek to represent a class of injured people; it does not block class-action suits by named plaintiffs who, individually, sustained only tiny injuries.⁸⁷ The lesson from these cases is that even tiny violations of individual rights deserve vindication—when matters of principle are at stake, “an identifiable trifle is enough.”⁸⁸

Lessons from tort law are only slightly more ambiguous. First, although few courts permit a tort plaintiff to recover for increased risk absent a present manifestation of illness,⁸⁹ courts impose this limitation primarily to achieve efficient compensation and optimal deterrence⁹⁰—concerns absent in administrative increased-risk cases. Allowing some toxic tort victims to recover for risk and the same or other victims to recover for manifest physical injury could expose tortfeasors to liability in excess of the actual societal costs of their conduct, creating an inefficient level of deterrence and exhausting the limited resources available for compensation.⁹¹ In administrative law, there is no such problem: One suit is sufficient to determine the lawfulness of an agency action, one remand sufficient to remedy any alleged defects.

In addition, in the few situations in which the availability of a tort remedy turns on the size rather than the existence of an alleged risk, the issue is generally recognized as one of causation and not—as in the D.C. Circuit standing threshold—one of injury-in-fact. Consider, for example, medical malpractice cases. Historically, courts required plaintiffs in such cases to demonstrate that they had a greater than fifty percent chance of recovery but for the malpractice.⁹² That is, courts refused to recognize a medical malpractice claim premised on increased risk of death unless the plaintiff could demonstrate that her *ex ante* risk of death was less than fifty percent. So, for example, relatives of a woman who died of cancer could not sue her doctor alleging that his failure to provide timely diagnosis and treatment reduced her chance of survival unless

87. See, e.g., *Carnegie*, 376 F.3d at 661–62.

88. See *SCRAP*, 412 U.S. 669, 689 n.14 (1973) (quoting Kenneth Culp Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 613 (1968)).

89. See, e.g., *In re Rezulin Prods. Liab. Litig.*, 361 F. Supp. 2d 268, 275 (S.D.N.Y. 2005) (“[W]here bodily injury is at most latent and any eventual consequences uncertain, the case for allowing recovery is weak.” (internal quotations omitted) (citing *Temple-Inland Forest Prods. Corp. v. Carter*, 993 S.W.2d 88 (Tex. 1999))). But see, e.g., *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 850–51 (3d Cir. 1990) (recognizing a cause of action for medical monitoring in Pennsylvania law; also discussing other jurisdictions’ handling of claims for emotional distress and medical monitoring and collecting cases).

90. See, e.g., *Rezulin*, 361 F. Supp. 2d at 275 (“[P]olicy concerns weigh[] against compensating [latent] injury because plaintiffs might compete against those with manifest diseases for the legal system’s limited resources.”).

91. See *id.*

92. See Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L. J. 1353, 1363 (1981) (“Under the traditional approach, . . . loss of a not-better-than-even chance of recovering from . . . cancer would not be compensable because it did not appear more likely tha[n] not that the patient would have survived with proper care.”).

they could show that she would have had a greater-than-even chance of survival with timely intervention. At bottom, though, medical malpractice courts focused on the size of the ex ante chance of survival in these cases to assure themselves that the doctor's negligence probably (that is, more likely than not) caused the plaintiff's injury,⁹³ rather than out of some concern that the plaintiff had suffered no injury in fact.

Moreover, the trend in these cases is away from risk thresholds. Courts today thus commonly recognize claims for "loss of chance," awarding partial or full recoveries to medical malpractice plaintiffs who do not meet the historic ex-ante-chance-of-recovery threshold of fifty-one percent.⁹⁴ Courts use various methods to compute damages for loss of chance.⁹⁵ For example, under one version of the doctrine, if the woman in the above example had a forty percent chance of recovery before the missed diagnosis, and no chance of recovery once treatment was delayed, the court would hold the doctor "liable for 40 percent of the damages caused by the patient's death."⁹⁶ In essence, though, all versions of the lost-chance doctrine turn on a recognition that "loss of chance is better understood as a description of the injury than as . . . a surrogate for the causation element of a negligence claim."⁹⁷ That is, courts reviewing these claims increasingly see the imposition of risk itself as a compensable injury, even if the patient's prognosis was dire before the malpractice and the malpractice only slightly increased the patient's risk.

Finally, even if there were some jurisprudential reason to treat tiny risks differently in standing law than in class actions and tort suits, it would be nonsensical to evaluate only the quantitative likelihood of the feared harm and not the magnitude of that harm. The familiar economics term "expected value" embodies this intuition. A one-in-a-million chance of winning money has no clear value, but a one-in-a-million chance of winning \$1 million or \$1 billion does—\$1 or \$1000, respectively. Similarly, it makes little sense to hold, as in *NRDC I*, that a plaintiff is insufficiently injured if she faces only a tiny numerical probability of harm.⁹⁸ To be internally coherent, a substantiality-of-the-risk standing threshold would have to turn on the expected value of the threatened harm; no other value gives any indication of the plaintiff's "actual . . . stake in the outcome"⁹⁹ of the case.

The D.C. Circuit standing threshold therefore does little to advance the jurisprudential goal of true adversity. But what if one believes, as Justice Scalia avowedly does, that standing serves to maintain courts' "traditional undemo-

93. See *id.* at 1363–64.

94. See, e.g., *Smith v. State*, 676 So. 2d 543, 547 n.8 (La. 1996) (noting that "the loss of a chance of survival doctrine . . . has been recognized by a majority of the states").

95. See *id.* at 547–48 (discussing the various methods).

96. David A. Fischer, *Tort Recovery for Loss of a Chance*, 36 WAKE FOREST L. REV. 605, 611 (2001).

97. *Alexander v. Scheid*, 726 N.E.2d 272, 279 (Ind. 2000).

98. See *NRDC I*, 440 F.3d 476, 484 (D.C. Cir. 2006).

99. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1453 (2007).

cratic role of protecting individuals and minorities against impositions of the majority”?¹⁰⁰ A threshold based on the size of the risk to the named plaintiff does nothing to filter out cases involving injuries to a majority of the population. A risk imposed by the majority on a minority may be large or small, just as a risk imposed by the majority on itself, or by a minority on the majority.¹⁰¹ In short, the size of the risk says nothing about the relative democratic strength of the group suffering the risk. If the role of the standing inquiry is to reserve questions of broad public import for resolution by the democratically elected branches, then the filter should turn on the number of affected individuals rather than the size of the effect on any one individual.

One jurisprudential possibility remains. Perhaps, as the quotation from *Public Citizen I* suggests,¹⁰² the D.C. Circuit’s principal concern is that the sheer number of increased-risk cases is itself constitutionally problematic because it risks wholesale judicial intervention in the faithful execution of the laws. Even if that concern is justified, though, it calls for a justiciability filter that somehow culls “worthwhile” cases and leaves the remainder to agency discretion—that is, a filter that operates accurately in practice. As discussed in Part III below, the D.C. Circuit standing threshold fails this test.

B. MORAL THEORY

Moral-theory justifications for the standing threshold are equally unavailing. The reason is intuitive. To establish such a justification, one would need to identify a moral framework that called for courts to ignore cases in which plaintiffs faced only a *de minimis* risk of harm. Yet intuition suggests that at least in an ideal world—that is, absent resource and human limitations—there would be no moral reason for society or courts to turn a blind eye to any risk, no matter how tiny.

Professor Matthew Adler gives this intuition firm footing in a somewhat different context—the statutory and regulatory “*de minimis* criteria [that] are a widespread feature of U.S. risk regulation,” including “cut-offs for incremental individual cancer risk,” “extreme event cutoffs in natural hazards policymaking,” and “*de minimis* failure probabilities for built structures.”¹⁰³ Applying both consequentialist and nonconsequentialist moral views, Adler concludes that these *de minimis* criteria are “difficult to justify” as a matter of ideal moral

100. Scalia, *supra* note 23, at 894.

101. For example, the significant risks associated with inhaling air pollutants are imposed by a minority (owners and operators of industrial facilities) on the majority (everyone who lives in reasonable proximity to such a facility). See, e.g., Luis Cifuentes et al., *Climate Change: Hidden Health Benefits of Greenhouse Gas Mitigation*, 293 *SCIENCE* 1257, 1257 (2001) (“It has been estimated that reducing emissions from older coal-fired power plants in the United States could provide substantial benefits to public health, including the avoidance of 18,700 deaths, 3 million lost work days, and 16 million restricted-activity days each year.”).

102. See *supra* note 72 and accompanying text.

103. Matthew D. Adler, *Why De Minimis?* 1 (Univ. of Pa. Law Sch., Paper No. 164, 2007); available at <http://lsr.nellco.org/cgi/viewcontent.cgi?article=1168&context=upenn/wps>.

theory.¹⁰⁴

Adler's point is a simple one. If one assumes perfectly rational policymakers with the ability to analyze an infinite array of potential outcomes from any given policy choice, there is no *moral* justification for legislation that mandates the design of risk-reduction programs that stop just shy of complete protection. A perfectly rational policymaker, with infinite time and cognitive capacity and without biases, should be able (1) to evaluate all possible consequences of a given policy choice and (2) to decide which choice yields the best results (including all tradeoffs) in the governing moral frame. In this ideal world, then, there would be no reason to place artificial legislative or regulatory limits on the policymaker's choices by telling her to neglect outcomes whose risks fall below some specified threshold. The policymaker might choose to neglect certain risks in her policy *choice* (that is, she might decide, using cost-benefit analysis or some other decision guide, that the advantages of a particular policy choice outweigh its risks), but there is no reason to direct her to neglect those risks in her policy *analysis*.

Though Adler develops his thesis in the context of legislative and regulatory *de minimis* thresholds, the conclusion has direct application in the standing context. Specifically, in ideal theory, all risks are morally relevant. There is no rationale grounded in moral theory for concluding that small risks are non-injurious.

What happens, though, when one relaxes the assumption of perfect decision-makers unconstrained by resource limitations? Adler observes that there may indeed be a practical role for *de minimis* criteria in a world of real policymakers with biases and cognitive limitations because such criteria permit policymakers to "economize on decision costs" by neglecting minimally risky (or minimally probable) outcomes.¹⁰⁵ By analogy, there may be a corresponding role for *de minimis* criteria in justiciability inquiries—but that role, if it exists at all, is solely to allow judges to economize on decision costs by conserving judicial resources for cases of greater import in the relevant moral frame.

Thus, both jurisprudential and moral theory lead to a single conclusion: There is no pure-theory justification for a substantiality-of-the-risk standing threshold. Such a threshold *might* serve jurisprudential- or moral-theory goals by permitting judges to dispose of frivolous cases, but only if the threshold successfully identifies cases that are, in some sense, more "worthy of review."

104. *Id.* at 3.

105. *See id.* at 26. According to Adler, however, it is by no means clear "[w]hich [de minimis] tests . . . a boundedly rational decisionmaker [is] morally justified in employing . . . given the presence and level of decision costs, and . . . the tests' relative[] accuracy in mimicking what a fuller social welfare analysis would conclude." *Id.* at 28. In other words, even in a real world of imperfect regulators, moral theory offers no clear justification for legislative imposition of any particular *de minimis* risk threshold.

III. THE INJURIOUSNESS OF SMALL RISKS IN PRACTICE

The next question, then, is whether the D.C. Circuit standing threshold serves this practical purpose of culling worthwhile increased-risk cases, and thereby conserving judicial resources and protecting the “proper—and properly limited”—constitutional role of the Judicial Branch.”¹⁰⁶ This question has a two-part answer.

A. A DULL KNIFE

The first part of the answer to the “practical effects” question is no. Quite the contrary, the D.C. Circuit’s standing threshold routinely fails to identify cases that merit judicial review, for at least five reasons.

First, as noted above, the threshold focuses solely on the size of the risk to the plaintiff and ignores the nature and magnitude of the feared harm.¹⁰⁷ Again, this approach ignores the central lesson of expected value: the value of an opportunity (or risk) is the product of both its likelihood and its value (or cost) if realized. Ignoring this lesson makes little sense for a lottery, but it is even less sensible in the context of public health and environmental risks because the anticipated harm is often irreversible injury to the health of an individual or ecosystem. Such harms are notoriously difficult—some would say impossible—to monetize,¹⁰⁸ but the solution is not to pretend they are valueless, as the D.C. Circuit standing threshold effectively does. A plaintiff who faces a 1:1000 probability of getting sunburned may or may not have a sufficient stake in the outcome of a lawsuit challenging the underlying agency action, but a plaintiff who faces a much smaller probability of developing melanoma surely does.¹⁰⁹

Second, the threshold focuses narrowly on the risk to the plaintiffs rather than to the exposed population—that is, the “individual risk” rather than the “population risk.”¹¹⁰ One can make this critique of risk assessment more generally,¹¹¹ but it is just as valid a critique in the jurisprudential context as in policymaking. Behaviors or policies that impose significant societal costs frequently have only a tiny effect on each individual victim. For example, an employer who allegedly

106. *Public Citizen I*, 489 F.3d 1279, 1295 (D.C. Cir. 2007) (quoting *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1860 (2006)).

107. See *supra* text accompanying note 99.

108. See generally Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553, 1557–60 (2003) (detailing the problems with monetizing environmental and public health benefits, and with figuring out how to express future benefits in today’s dollars).

109. Of course, some also argue that *being at risk* is itself an injury: See, e.g., Claire Finkelstein, *Is Risk a Harm?*, 151 U. PA. L. REV. 963, 965 (2003) (arguing for “the existence of risk harm”). If one accepts this view, then the “expected value” of the risk is not just the likelihood of illness multiplied by the cost of illness but that quantity augmented by some measure of the cost of risk.

110. See Matthew D. Adler, *Against “Individual Risk”: A Sympathetic Critique of Risk Assessment*, 153 U. PA. L. REV. 1121, 1126 (2005).

111. See, e.g., *id.*

violates the Fair Labor Standards Act by refusing to compensate employees for the few minutes spent changing into protective gear at the start of each workday may significantly pad its own pockets while depriving each employee of only a few cents per day.¹¹² In such situations, the extent of the harm to the named individual plaintiff-employee (a few dollars a year) is a wholly inadequate proxy for the importance of the underlying legal question (the legality of the employer's company-wide compensation policy). As the Supreme Court has noted, "modern class action practice emerged," in part, to address cases like this, "where the question is of general interest, and a few may sue for the benefit of the whole."¹¹³

In cases involving statistical injury, the proxy problem is even more acute because those who file suit represent not only the whole, but also the as-yet-unidentified few who will ultimately bear the full cost of the alleged misconduct.¹¹⁴ Thus, a court that looks only at the present risk to the plaintiffs is ignoring *two* additional variables: the size of the affected population and the size of the anticipated harm.

Suppose, for example, that the nation's largest electric company, Florida Power and Light (FPL), were simultaneously:

- (1) Defrauding each of its approximately 4.5 million residential customers¹¹⁵ of a penny a year (total loss \$38,000 per year);
- (2) Emitting water pollutants that exposed those same customers to an annual 1:1,000,000 risk of contracting a disease that costs \$10,000 to cure (total expected loss \$38,000 per year); and
- (3) Emitting air pollutants that exposed those customers to an annual 1:10,000,000 risk of contracting an incurable disease that statisticians estimate

112. See *IBP, Inc. v. Alvarez*, 546 U.S. 21, 24 (2005).

113. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 832-33 (1999) (quoting *West v. Randall*, 29 F. Cas. 718, 722 (C.C.D.R.I. 1820)).

114. One should not be misled by the fact that, at the time an increased-risk case is filed, the risk has not yet been realized. The magnitude of a risk does not have to be large relative to the size of the group-at-risk in order for there to be a greater than fifty-percent likelihood that at least one member of that group *will* eventually suffer the anticipated harm. The following table illustrates this fact for a cancer risk of 1:10,000.

Size of Group	Probability of No Cancers in Group	Probability of at Least One Cancer	Expected Number of Cancers
100	0.99	0.00995	0.01
1000	0.905	0.095	0.1
10,000	0.37	0.63	1
100,000	4.54E-05	0.999955	10
1,000,000	Essentially 0	Essentially 1	100
10,000,000	Essentially 0	Essentially 1	1000

115. See FPL About Us, <http://www.fplgroup.com/about/contents/fpl.shtml> (last visited Aug. 18, 2008).

reduces quality of life by \$100,000 (total expected loss \$38,000 per year).¹¹⁶

Further suppose that three plaintiff groups sue the company, one seeking reimbursement for the fraud, one seeking to force the company to halt the fluid discharges, and one seeking an injunction to require installation of smokestack scrubbers. The individual plaintiffs' present interest in each case is the same—\$0.01 per year of fraud losses or risk exposure. And the overall value of each case is also the same—\$38,000 per year of misconduct.¹¹⁷ But in the risk cases, one can expect a few plaintiffs to get sick.¹¹⁸ If those plaintiffs could find out who they were *before* they succumbed to illness, their interest in seeing the lawsuits through to completion would grow to at least \$10,000 (but quite possibly more) in case (2) and at least \$100,000 (but likely more) in case (3).¹¹⁹ Focusing narrowly on the 1:1,000,000 and 1:10,000,000 risks in cases (2) and (3), respectively, utterly ignores this additional complexity. Thus, a court that rejects the first case on justiciability grounds imposes a general welfare cost of \$38,000, but individual welfare costs of just \$0.01 per plaintiff, whereas a court that rejects the second or third case acquiesces in the imposition of losses of \$10,000 or \$100,000 (or more), respectively, on those few who eventually get sick.

The main point here is that the injuriousness of a risky policy or action depends not only on the average risk to exposed individuals but also on the size of the affected population and the nature of the anticipated harm.¹²⁰ The importance of population size has led other authors to argue that U.S. agencies, including the Environmental Protection Agency, the Food and Drug Administration, the Occupational Safety and Health Administration, and even the Nuclear Regulatory Commission, should focus on population risk in their regulatory efforts.¹²¹ But one need not agree with this prescriptive argument to see that, as a practical matter, assessing individual risk to named plaintiffs as part of the

116. Note, though, that pre-illness estimates of the level at which people value living a healthy life are notoriously inaccurate. *See, e.g.,* Jonathan S. Masur, *Probability Thresholds*, 92 IOWA L. REV. 1293, 1333 (2007) (noting that using willingness-to-pay techniques to estimate the value of life generates numbers that range over two orders of magnitude); Cass R. Sunstein, *Lives, Life-Years, and Willingness to Pay*, 104 COLUM. L. REV. 205, 205–13 (2004) (discussing and critiquing willingness-to-pay techniques).

117. The tradeoffs for the company could be different, of course, as in case (1) FPL could make the plaintiffs whole by paying out \$38,000, whereas the costs to the company of addressing the pollution problems in cases (2) and (3) may not correlate with the societal costs that the pollution is imposing.

118. Given the numbers above, the expected number of illnesses in the second case is 3.8 per year of misconduct (3.8 million times 1/1,000,000); in the third case it is 0.38 per year of misconduct (3.8 million times 1/10,000,000).

119. *See, e.g.,* Masur, *supra* note 116, at 1333 (discussing the imprecision of willingness-to-pay measures for estimating the value of life or health). For case (3), the estimation problem is even more serious, because (by hypothesis) the illness is incurable. *See id.*

120. For further discussion of the illogic of ignoring the magnitude of the anticipated harm, see *supra* text accompanying notes 98–99.

121. *See, e.g.,* Adler, *supra* note 110, at 1124, 1130, 1241 (“Both welfare consequentialism and alternative moral views generally demand that regulatory criteria for addressing hazards attend to the number of persons incurring various levels of (Bayesian) risk from the hazards.”).

standing inquiry is a fundamentally misguided way to identify either the cases of greatest general interest or the cases of greatest significance to those particular individuals who will eventually suffer realized harms due to the challenged agency action.¹²²

A third significant problem with a standing threshold that turns on the “substantiality” of the increase in risk concerns the necessarily incremental nature of policymaking. Agencies implement policies in incremental steps—year by year, pollutant by pollutant, or industry by industry.¹²³ As a result, the riskiness of an individual agency action may drastically understate the riskiness of the guiding agency policy. The full risk will not be realized until the agency implements the full policy, yet plaintiffs often must challenge the first appearance of the policy or chance losing the opportunity to challenge the policy at all.¹²⁴ Put differently, public litigants only have an opportunity to challenge agencies’ broad policies in specific cases in which the policies’ overall harmfulness to the plaintiffs may not be evident. By rejecting suits premised on tiny risks, the D.C. Circuit therefore insulates broad and often highly risky agency policies from judicial oversight for the sole, unsatisfying reason that the first instantiation of the policy, considered by itself, poses only a tiny risk. As I have argued elsewhere in the context of ripeness,¹²⁵ the net result is, effectively, judicially sanctioned path dependence: The agency takes its first step and then, hearing silence from the courts, continues down what may well be, considered *in toto*, an unlawful and highly risky path.

Relatedly, it is not clear what baseline the D.C. Circuit does or should use to evaluate the “substantiality” of a risk. That is, what difference is relevant, theoretically or practically? Is it that between the risk imposed by the agency’s action and the identical preexisting risk? Or that between the *ex post* risk and some measure of the risk sanctioned by applicable substantive law? At the standing argument in *Public Citizen*, Judge Randolph suggested that the proper baseline is the riskiness of whatever alternative approach the plaintiff suggested to the agency during the rulemaking comment period.¹²⁶ In most cases, though, the plaintiffs’ litigation obligation is to place all relevant legal and factual issues

122. The fact that the individuals who will get sick do not yet know who they are does not negate their significant present interest in averting that outcome—it just makes them less likely and less able to press their case with a court.

123. For two prime examples of this fact, see *NRDC I*, 440 F.3d 476, 479–80 (D.C. Cir. 2006) and *NRDC II*, 464 F.3d 1, 3–5 (D.C. Cir. 2006) (reviewing an EPA rule that allowed use of a particular amount of the pesticide methyl bromide for a single year, 2005).

124. See, e.g., *Eagle-Picher Indus. v. EPA*, 759 F.2d 905, 909, 911–12 (D.C. Cir. 1985). In the context of a retrospective determination of the ripeness of an untimely claim, the court noted that “[i]t is the duty of the court to make the prudential judgment whether a challenge to agency action is ripe; it is the responsibility of petitioners to file for review within the period set by Congress.” *Id.* at 912.

125. Amanda C. Cohen, *Recent Development, Ripeness Revisited: The Implications of Ohio Forestry Association v. Sierra Club for Environmental Litigation*, 23 HARV. ENVTL. L. REV. 547, 548, 556–61 (1999).

126. Oral Argument, *Pub. Citizen, Inc. v. Highway Traffic Safety Admin.*, 513 F.3d 234 (D.C. Cir. 2008) (notes on file with author).

before the agency, not to propose particular approaches to addressing those issues.¹²⁷ More fundamentally, it makes little sense to suggest that with passage of the APA's notice-and-comment requirements—which, among other things, work to democratize agencies by increasing public involvement in the rulemaking process—Congress created a procedural hurdle of constitutional dimensions: submit an alternative approach under which the plaintiff would suffer significantly less risk or face dismissal of any subsequent legal challenge for lack of standing. Concerned regulatory beneficiaries must play the procedural game in order to give the agency a reasonable opportunity to consider potential legal and factual objections to any proposed policy approach,¹²⁸ but the burden to devise an alternative approach that comports with governing law surely lies with the agency, not with the commenting public.

The fifth important flaw in the practical application of the D.C. Circuit standing threshold is the significant hurdle that it places in the way of even the most important lawsuits. Under the D.C. Circuit precedents, plaintiffs bear the burden of establishing the substantiality of the challenged risk in their first substantive filing to the court¹²⁹—a requirement that may necessitate conducting extensive interviews, preparing myriad affidavits, hiring statistical experts, and perhaps even developing new statistical models.¹³⁰ Yet the height of this litigation hurdle has less to do with the importance of the legal question in the case than with the nature of the risk and the difficulty of establishing the statistical link between the risk and the underlying agency action—the trickier the science, the more work the plaintiffs must do to substantiate the alleged risks.¹³¹ Imposing this litigation burden therefore threatens to weed out cases in which the plaintiff is cash-strapped or the connection between the agency policy and the resulting risk is scientifically complicated, rather than cases in which the link is tenuous, the resulting risk is truly small, or the legal question is unimportant.

Overall, then, the D.C. Circuit standing threshold ignores the real differences among increased-risk cases. As such, the threshold has little to offer judges who are concerned, constitutionally or practically, about an explosion of such cases.

B. SHARPER TOOLS

There is a different answer to the practicality question though: It is not at all

127. See, e.g., *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1297–98 (D.C. Cir. 2004) (“It is a hard and fast rule of administrative law, rooted in simple fairness, that issues not raised before an agency are waived and will not be considered by a court on review.” (citing *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952))).

128. See *id.*

129. See, e.g., *Public Citizen I*, 489 F.3d 1279, 1289 (D.C. Cir. 2007).

130. *Public Citizen II*, 513 F.3d 234 (D.C. Cir. 2008) (per curiam), provides one data point: the plaintiffs' supplementary standing filings exceeded 200 pages and cost more than \$50,000 to produce. Conversation with Allison Zieve, Public Citizen Attorney (July 28, 2008).

131. For example, substantiating some health risks may require extensive laboratory testing or modeling.

clear that the D.C. Circuit's perceived problem—too many increased-risk cases—is real. Several well-established safeguards already prevent plaintiffs from mounting successful challenges to every exercise of agency discretion. Most obviously, the rewards of a successful challenge—remand to the agency and sometimes attorneys' fees—provide little financial incentive to file ill-considered or frivolous lawsuits premised on insignificant risks. Therefore, when an individual or organization chooses to target an agency action that appears to impose only a tiny risk, the suit may well be a piece of a broader litigation agenda. (For example, the plaintiff may have identified the action as the first in a likely series of similar actions, or as the initial phase in the implementation of a new and highly risky agency policy.) Further, plaintiffs who choose to proceed must identify a cause of action under a governing statute; they must establish both that the agency has a “legal duty” and that they have the “right to enforce . . . [that] duty.”¹³² Cases that challenge completely unconstrained exercises of agency discretion are thus doomed from the start.

On the merits, *Chevron* deference,¹³³ both statutorily and judicially created rules of prosecutorial discretion,¹³⁴ and the APA's arbitrary-and-capricious review standard¹³⁵ give judges ample room to defer to, or simply to decline to review, all but the most blatantly unlawful agency policy choices. As the Second Circuit recognized in *Baur v. Veneman*, even if one is concerned about the effect on separation of powers principles of “lawsuits that assert no more than ‘generalized grievances,’” courts “need not enshrine, as a matter of constitutional principle, barriers to suit that may be addressed through other, potentially more flexible”—but less easily manipulated—constraints on jurisdiction and judicial interventionism.¹³⁶

The D.C. Circuit appears to have turned this insight on its head, applying the substantiality-of-the-risk standing threshold to allay, at least in part, concern about the largely independent problems of agency causation and speculative and diffuse injuries. Consider the first sentence of the quote from *Public Citizen*, above: “Much government regulation slightly increases a citizen's risk of injury—or insufficiently decreases the risk compared to what some citizens might prefer.”¹³⁷ The palpable concern underlying this characterization is that in some cases, plaintiffs sue about preexisting risks—that is, risks that are not truly

132. Fletcher, *supra* note 15, at 291.

133. See generally *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

134. See, e.g., 5 U.S.C. § 701(a)(2) (2000) (noting that judicial review is unavailable for actions “committed to agency discretion by law”); see also *Heckler v. Chaney*, 470 U.S. 821, 832, 837–38 (1985) (holding that in most circumstances, the Administrative Procedure Act does not provide for judicial review of agency decisions not to bring enforcement actions); cf. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1459 (2007) (noting that unlike nonenforcement decisions, denials of rulemaking petitions are “susceptible to judicial review, though such review is ‘extremely limited’ and ‘highly deferential’” (internal citations omitted)).

135. See 5 U.S.C. § 706(2)(A) (2000).

136. *Baur v. Veneman*, 352 F.3d 625, 636 (2d Cir. 2003).

137. *Public Citizen I*, 489 F.3d 1279, 1295 (D.C. Cir. 2007) (emphasis added).

caused by the agency's action. And, the Court continued, recognizing standing in such cases would throw wide the courthouse doors and "expand the 'proper—and properly limited'—constitutional role of the Judicial Branch beyond deciding actual cases or controversies."¹³⁸ A passage in *NRDC II* makes the same point about speculative injuries:

Environmental and health injuries often are purely probabilistic. We have cautioned that this category of injury may be too expansive. "[W]ere all purely speculative 'increased risks' deemed injurious, the entire requirement of 'actual or imminent injury' would be rendered moot, because all hypothesized, nonimminent 'injuries' could be dressed up as 'increased risk of future injury.'"¹³⁹

That is, entertaining claims premised on speculative risks would allow courts to overstep their constitutional role.

Two simple examples suffice to establish that a standing bar is inadequate to weed out cases involving either inadequate causation or overly speculative injury. First, consider the risk of death in car accidents, and various potential lawsuits over (hypothetical) Department of Transportation (DOT) regulations requiring automobile manufacturers to install airbags. At least three such lawsuits seem eminently plausible:

(1) Assume DOT has a clear statutory duty to reduce the risk of injury in car accidents by a particular date. Based on this mandate, plaintiffs could sue the agency, at some point after the statutory date, for failing to issue a rule requiring installation of airbags.

(2) Now suppose DOT issues a rule requiring installation of driver- and passenger-side airbags. Plaintiffs could challenge this rule for failing also to require installation of side-impact airbags.

(3) Alternatively, a group of small adults and children who could be injured or killed during airbag deployment could challenge the same rule for *creating* a risk to them.

In Suit (1), the risk of death or injury in a car accident is what it has always been—the allegation is that the agency did nothing to reduce that risk. In Suit (2), the risk was *higher* before the agency published its rule; the rule *reduced* that risk, just (allegedly) not as much as the law required. Finally, in Suit (3), the plaintiff complains of a risk that would not have existed but for the agency's rule.

These cases differ in ways that courts should and do find relevant. For example, depending on the terms of the governing statute, the plaintiffs in Suit (1) would probably have to establish that they petitioned the agency to issue an

138. *Id.* (internal citation omitted).

139. *NRDC II*, 464 F.3d 1, 6 (D.C. Cir. 2006) (quoting *Ctr. For Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1161 (D.C. Cir. 2005)).

airbag rule, that the agency refused, and that the agency's refusal violated the terms of either the governing law or the APA. Suits (2) and (3) could proceed without a rulemaking petition, but their likelihood of success would also depend on the scope of the agency's mandate—albeit in different ways than for Suit (1).¹⁴⁰

Importantly though, a substantiality-of-the-risk standing threshold does nothing to elucidate these differences. Indeed, in the above example, the plaintiffs in the least plausible suit—Suit (1), which challenges agency inaction—are in the best position to allege substantial injury because they can blame the agency for the entirety of their accident risk: “If only the agency had *done something*,” they can say, their risk of dying in an automobile accident would be significantly reduced. Thus, these plaintiffs would satisfy the substantiality requirement even though the agency did not create the identified risk.¹⁴¹ Suit (3), by contrast, has the most traditional form: The plaintiffs allege that they now face a risk that they would not have faced *but for* the agency rule. Yet the size of the alleged risk is small relative to the risk in Suit (1).¹⁴² Thus, these plaintiffs might fail to satisfy the substantiality requirement even though they challenge an agency action that *created* a risk to them. As these examples illustrate, a substantiality-of-the-risk threshold provides an inadequate and at times inaccurate filter for insufficient causation.

The second example establishes that likewise, the size of a risk says little about whether it is speculative. Consider the circumstances of *NRDC I* and *II*. NRDC challenged an EPA rule that allowed the use of a certain amount of an ozone-depleting pesticide.¹⁴³ The organization complained about the health-related risks to its members associated with increased UV-exposure due to ozone depletion.¹⁴⁴ The *size* of those risks hinged on two quantitative factors: (1) the amount of pesticide use allowed by the challenged rule, and (2) various statistical estimates of the degree to which the risk might grow or shrink at each

140. “[W]here . . . the [plaintiff’s] claim is not that [an existing] regulation is substantively unlawful, or even that it violates a clear procedural prerequisite, but rather that it was ‘arbitrary’ and ‘capricious’ [for the agency] not to conduct [a new or] amendatory rulemaking . . . [t]he proper procedure for pursuit of [the] grievance is set forth explicitly in the APA: a petition to the agency for rulemaking, denial of which must be justified by a statement of reasons, and can be appealed to the courts.” *Auer v. Robbins*, 519 U.S. 452, 459 (1997) (internal citations omitted).

141. This is not to suggest that the plaintiffs in Suit (1) would not or should not have a cause of action if the agency failed to meet its statutory obligation to address the risk of injury from car accidents. Rather, it merely suggests that a court hoping to weed out cases involving dubious causation cannot address that concern by evaluating the substantiality of the plaintiff’s risk.

142. A recent study, for example, indicates that on average, about 1 in 100 children in crashes were seated in the front passenger seat and thus “exposed to an air bag deployment.” See Kristy B. Arbogast et al., *Injury Risk to Restrained Children Exposed to Deployed First- and Second-Generation Air Bags in Frontal Crashes*, 159 ARCHIVES PEDIATRICS & ADOLESCENT MED. 342, 342–43 (2005). Of the children so exposed, the risk of serious injury from exposure to deployed second-generation passenger air bags was 9.9%. *Id.* at 342. The risk to children who are in serious crashes is thus just .099% (1% times 9.9%), and the risk to *all* children who ride in cars is considerably lower.

143. See *supra* note 1 and accompanying text.

144. See *NRDC I*, 440 F.3d 476, 481 (D.C. Cir. 2006).

intervening step in the chain of causation from rule-passage to health-harm.

The former factor relies on a simple correlation: The greater the quantity of pesticide allowed by the rule, the greater the potential for future ozone depletion. The latter factor is far more complicated, involving numerous steps, some predictable and some less so, including actual methyl bromide usage (because farmers could choose to use less methyl bromide than allowed by the agency's rule); usage levels of other ozone-depleting chemicals in the U.S. and elsewhere (because methyl bromide is not the only or even the most potent ozone-depleting chemical); weather patterns (because ozone breakdown depends on both sunlight and the presence of ozone-depleting compounds); and NRDC-members' medical histories, occupational and recreational practices, and use of sunscreen (because UV-risk depends on susceptibility as well as exposure). It should be clear, then, that any number that purports to estimate the "size" or "substantiality" of a risk actually conflates two uncorrelated factors—the scale of the agency's action (that is, how big a regulatory step the agency took in its rule) and the number and nature of the links in the chain of causation (that is, how many and what sort of intervening steps must occur before the agency's action results in on-the-ground harm to the plaintiffs). One cannot gain insight into both of these unrelated issues by asking a binary question about the "substantiality" of the risk.

Returning to the practicality question posed at the start of Part IV, the second part of the answer is that traditional justiciability and deference doctrines may adequately filter increased-risk cases. Further, using the size of a risk as a proxy for concerns about causation and speculativeness is neither accurate nor informative. Thus, there may be no need for a substantiality-of-the-risk standing threshold, and using such a threshold threatens to confuse.

IV. THE ARGUMENT FROM INSTITUTIONAL ROLES

Even if one could fix some of the standing threshold's practical flaws, the very idea of a justiciability limit that hinges on the substantiality of the risk to the plaintiff exhibits profound confusion about the institutional roles of Congress, the agencies, and the courts.

Consider first the role of the Judiciary vis-à-vis Congress. In many situations, Congress has clearly recognized a risk (for example that associated with air pollution or with injuries in car accidents), directed an agency to address that risk, and enlisted citizen attorneys general to ensure that the agency complies with its statutory duty.¹⁴⁵ Implicit in the resulting legislation is the creation of a legally enforceable right to benefit from the agency's action in the manner and to the degree envisioned by Congress. Also implicit is a reduction in the degree of power delegated to the Executive. The agency to which Congress has granted

145. See, e.g., Edward Lloyd, *Citizen Suits and Defenses Against Them*, (A.L.I.-A.B.A. Course Study, June 25–28, 2008), WL SNO85 A.L.I.-A.B.A. 847 app. A (listing federal citizen suit provisions).

regulatory authority has the power to act only in compliance with Congress's policy choices,¹⁴⁶ as detailed in the relevant statutes and interpreted first by the agency and later (with deference) by the courts. Moreover, it is up to Congress to decide whether and to what degree the agencies are free to neglect their statutory responsibilities:

If Congress *wants* to create a statutory scheme that may lapse in desuetude if the Executive Branch decides not to implement it, Congress is free to specify (as it occasionally does) that there shall be no private right to compel any enforcement of the scheme. If, on the other hand, Congress does not wish a particular program to be lost in vast bureaucratic hallways, . . . Congress [may] enable any citizen to demand implementation of the statutory scheme.¹⁴⁷

In the former situation, there is no cause of action and thus no room for the court to apply a standing threshold. In the latter situation, though, a court that uses a substantiality-of-the-risk threshold to determine which citizen attorneys general have standing redefines the legal injury as limited to beneficiaries facing substantial risk, and thus revisits legislative choices Congress has already made. This outcome is doubly problematic. Not only does the court second-guess the legislators' determination that citizen attorneys general are needed "to demand implementation of the statutory scheme,"¹⁴⁸ but it also usurps the patently legislative responsibility of determining what sorts and levels of risk society should tolerate.

In short, by means of a superficially objective discussion of risk statistics, the court attains precisely the outcome that critics of *Lujan* denounced: "A clear statutory expression of authority [to sue falls] before the notoriously amorphous demand for a constitutional 'case.'"¹⁴⁹ The problem is more serious in the D.C. Circuit than in the Supreme Court, however, because the *Lujan* Court identified a constitutional flaw that Congress could easily remedy by specifying the injury more clearly and relating that injury to the plaintiff class.¹⁵⁰ In contrast, the D.C. Circuit posits a constitutional flaw that Congress lacks authority to remedy. In the D.C. Circuit, no statute, no matter how specific and well-drafted,

146. See, e.g., *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it").

147. Jonathan R. Siegel, *A Theory of Justiciability*, 86 *Tex. L. Rev.* 73, 103–04 (2007) (emphasis added).

148. *Id.* at 104.

149. Nichol, *supra* note 21, at 1147. As Judge William A. Fletcher put it almost twenty years ago:

In the case of a statutory right, Congress is the source both of the legal obligation and of the definition of the class of those entitled to enforce it. . . . So long as the substantive rule is constitutionally permissible, Congress should have plenary power to create statutory duties and to provide enforcement mechanisms for them, including the creation of causes of action in plaintiffs who act as "private attorneys general."

Fletcher, *supra* note 15, at 251; see also Siegel, *supra* note 147, at 103–05 (discussing Congress's role and powers in relation to standing).

150. See *supra* text accompanying note 53.

may recognize tiny risks as legally cognizable. Thus, the standing threshold permanently and irremediably limits congressional authority to, in the words of Justice Kennedy, “define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.”¹⁵¹

In addition, the standing threshold muddies the role of courts vis-à-vis agencies. Specifically, the doctrine elevates to a constitutional concern the factual question of whether the agency’s action creates a “substantial” risk for the plaintiff, and simultaneously places responsibility for establishing the size and substantiality of the risk squarely on the plaintiff.¹⁵² As a result, the threshold creates a predicate factual question for the court, with regards to which no deference is due (because the issue is now one of constitutional interpretation), even though the agency has greater risk-assessment expertise and may already have performed a detailed scientific risk assessment and provided a quantitative estimate of the likely impacts of its rule.¹⁵³

Finally, it is important to note that in some cases, imposition of a standing threshold enables the court to shirk even its “proper—and properly limited—”¹⁵⁴ constitutional role. Specifically, agencies sometimes *create* risks to subsets of the population as a side effect of unrelated policy choices—for example, the risk to children and small adults from the hypothetical seatbelt rule.¹⁵⁵ In such cases, even if the risk is tiny, the plaintiffs are in the classic and generally approved litigating position: a minority facing a harm imposed by (the agent of) the majority.¹⁵⁶ Imposing a quantitative standing threshold in these cases thus bars precisely the sorts of actions we expect and depend on courts to entertain.

CONCLUSION

Needless to say, courts need not provide a judicial remedy to all plaintiffs who can demonstrate that agency action or inaction has placed them (or left

151. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part and concurring in the judgment).

152. In *Public Citizen I*, for example, the court’s interim opinion instructed the parties to file additional briefs “addressing (i) whether [the challenged agency action] creates a substantial increase in the risk of death, physical injury, or property loss . . . , and (ii) whether the ultimate risk of harm to which Public Citizen’s members are exposed, including the increase allegedly due to [the challenged] action, is ‘substantial.’” *Public Citizen I*, 489 F.3d 1279, 1297 (D.C. Cir. 2007).

153. See Petitioner’s Petition for Rehearing or Rehearing en Banc at 6, *NRDC I*, 440 F.3d 476 (D.C. Cir. 2006) (No. 04-1438) (“According to EPA’s own risk assessments, releases of methyl bromide under the [challenged] rule *will cause* thousands of U.S. cases of cancer and cataracts.”).

154. *Public Citizen I*, 489 F.3d at 1295.

155. See *supra* note 142 and accompanying text.

156. See, e.g., *Raines v. Byrd*, 521 U.S. 811, 829 (1997) (“The irreplaceable value of the power articulated by Mr. Chief Justice Marshall [in *Marbury v. Madison*] lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action. It is this role, not some amorphous general supervision of the operations of government, that has maintained public esteem for the federal courts and has permitted the peaceful coexistence of the counter-majoritarian implications of judicial review and the democratic principles upon which our Federal Government in the final analysis rests.” (quoting *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring) (internal citation omitted))).

them) at risk. Even if such expansive judicial oversight of agency action were constitutional and desirable, it would be impossible to implement. Human life is—and agency actions are—fraught with risk; granting a remedy to anyone who complains that an agency failed adequately to reduce her risk of snake bite, shark attack, or lightning strike would give judges significant and unconstitutional power to review and reorder regulatory priorities. Of necessity, then, Congress and the courts must draw some lines between cognizable risk-based injuries and unreviewable exercises of agency discretion.

There is no need, however, for a new, judicially created, and under-theorized standing threshold to police this territory. Congress has already drawn some lines in the form of statutory citizen-suit provisions. If those lines are improvidently drawn—a question of numbers on which this Article takes no view—Congress could fix the problem by narrowing citizen suit provisions, perhaps requiring, for instance, that plaintiffs challenging pollution regulations live within some radius of the regulated smokestacks, or that those challenging automobile safety regulations drive a certain number of miles each year. Courts, too, have identified lines by refining the requirements of causation and redressability and developing doctrines of prosecutorial discretion and deference. Adding assumption-laden and eminently manipulable risk estimates to this mix serves only to hide hard questions under a veneer of superficially simple but contested and largely misdirected mathematics.