

SUBSTANCE OR ILLUSION? THE DANGERS OF IMPOSING A STANDING THRESHOLD

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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 unexplored.

Examining those issues reveals that there is little to recommend 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.

I. Introduction

In a 2006 decision, *Natural Resources Defense Council v. Environmental Protection Agency* ("NRDC P"),¹ a D.C. Circuit panel performed elaborate calculations to determine the "excess fatalities" that might be expected among the petitioner's members as a result of

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¹ 440 F.3d 476 (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)).

an administrative rule regulating production and use of the pesticide methyl bromide.² The 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

On reconsideration (“*NRDC II*”⁴), the panel 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 Court declined to revisit the requirement, unique to the D.C. Circuit,⁶ that “an increase in the likelihood of harm may constitute [the injury-in-fact necessary 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 in the Circuit 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

² *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 *NRDC v. EPA*, 464 F.3d 1 (D.C. Cir. 2006) (“*NRDC II*”).

⁵ *Id.* at 7.

⁶ Cassandra Sturkie and Nathan Seltzer, *Developments in the D.C. Circuit’s Article III Standing Analysis: When Is 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 omitted)) (citing *Baur v. Veneman*, 352 F.3d 625, 634 (2d Cir. 2003); *Central 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); *Covington v. Jefferson*, 358 F.3d 626, 652, 34 *ELR* 20015 (9th Cir. 2004) (Gould, J., concurring)).

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 *Public Citizen, Inc. v. National Highway Traffic Safety Admin.*, 489 F.3d 1279, 1296 (2007) (emphasis added). 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 essay treats these two quantities as identical, as the argument applies equally

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." 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 the assumedly expert agency.¹⁰

The absurdity of *NRDC I*'s tortured mathematics is immediately apparent on turning to the relevant pages in F.3d.¹¹ 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."¹² On closer evaluation, however, the threshold reveals itself as the most ill-conceived maneuver in a longstanding drive to place constitutional "constraint[s] ... on Congress's power to specify harms that give rise to standing."¹³

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 its objects (usually business interests).¹⁴ Even

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 by EPA's ... lights").

¹¹ *NRDC I*, 440 F.3d at 481-82 nn. 8, 9.

¹² *Public Citizen*, 489 F.3d at 1295.

¹³ 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).

¹⁴ See, e.g., William A. Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 225 (1988) (arguing that the only constitutional standing requirement is and should be a legal cause of action); 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."); Cass R. Sunstein, *What's Standing after Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163, 170 (1992) (questioning the constitutional necessity for a fact-based standing inquiry); 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"); Lisa Heinzerling, *The Commercial Constitution*, 1995 Sup. Ct. Rev. 217, 268 (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); William W. Buzbee, *Expanding the Zone, Tilting the Field: Zone of Interests and Article III Standing Analysis After Bennett v. Spear*, 49 Admin. L.

if one accepts the premise that the case-or-controversy requirement and the “take Care”¹⁵ clause do limit courts’ jurisdiction to hear increased-risk suits alleging agency misinterpretation or under-enforcement of the law, however, 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”¹⁶ evaluations of injury.

To explore these flaws, this essay considers the D.C. Circuit standing threshold’s historical context, theoretical foundation, practical effect, and implications for separation of powers. Part two 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 three turns from doctrinal history to analysis, considering and rejecting the only possible theoretical justification for a standing threshold in increased-risk cases: that tiny risks are somehow not (or not sufficiently) injurious.

Part four examines the practical effects of the D.C. Circuit threshold on increased-risk cases, on plaintiffs, and on agency policy implementation. As those effects make clear, the threshold is far too blunt an instrument to distinguish 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 five argues that patching the threshold’s logical flaws would not solve the most fundamental problem – namely, that Congress is the body best suited to decide whether to recognize imposition of a tiny risk as a legally cognizable injury, and

Rev. 763, 766 (1997) (observing that the “standing inquiry playing field ... is tilted to the advantage of regulatory targets); Evan Caminker, *Prinz, 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*”); Gene R. Nichol, *Forward: The Impossibility of Lujan’s Project*, 11 Duke Envtl. L. & Pol’y F. 193, 199 (2001) (“*Lujan*, in full flower, would strike at congressionally authorized standing and the claimed “overjudicialization” of the operation of American government”); Richard J. Lazarus, *THE MAKING OF ENVIRONMENTAL LAW*, 82, 134-34 (2004) (discussing standing history).

¹⁵ Art. II § 3 (“[H]e shall take Care that the Laws be faithfully executed.”).

¹⁶ Nichol, *supra* note ___, at 199.

agencies are the entities best equipped to perform quantitative risk assessments.

II. 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.”¹⁷ Less familiar, perhaps, is the history of that requirement. Until about 100 years ago, courts concerned themselves less with detailed factual questions about 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.¹⁸

A. *Standing past*

How, then, did standing law develop into its current “confusing,” and at times “incoherent” form?¹⁹ According to many scholars, the doctrine developed in tandem with – and largely as a reaction to – the growth of the federal administrative state.²⁰ “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.”²¹ 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.²²

¹⁷ *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

¹⁸ Sunstein, *supra* note __, at 170. See also Winter, *supra* note __, at 1374, and Fletcher, *supra* note __, at 225 (describing the same history).

¹⁹ Winter, *supra* note __ at 1372.

²⁰ See, e.g., Fletcher, *supra* note __, at __; Winter, *supra* note __, at __; Sunstein, *supra* note __, at __; Gene R. Nichol, *Justice Scalia, Standing, and Public Law Litigation*, 42 Duke L.J. 1141 (1993).

²¹ Fletcher, *supra* note __, at 225.

²² See *Association of Data Processing Service Organizations, Inc. 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, e.g., Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 894-95 (1983); John G.

On first consideration, the requirement of individuated injury-in-fact may seem a straightforward answer to the “difficult question” of “who [may] sue to enforce the legal duties of an agency”²³: 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 to curtail the power of progressive New Deal agencies. In response to this line of attack, “Justices like Brandeis and Frankfurter ... develop[ed] doctrines of procedural 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.”²⁴

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.”²⁵ The resulting cases “protect[ed] the legislative sphere from judicial interference”²⁶ by curtailing taxpayers’ and business interests’ standing to challenge, respectively, agencies’ spending programs and participation in the private market.²⁷ In the process, these early twentieth century cases

Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1141, 1142 (1993); Bradley S. Clanton, *Standing and the English Prerogative Writs: The Original Understanding*, 63 Brook. L. Rev. 1001 (1997).

²³ Fletcher, *supra* note __, at 225.

²⁴ Winter, *supra* note __, at 1456-57.

²⁵ *Tennessee Elec. Power Co. v. Tennessee Val. Authority*, 306 U.S. 118, 140 (1939).

²⁶ Winter, *supra* note __, at 1457

²⁷ 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.” 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

confirmed that some harms are not justiciable because they do not amount to “legal injury.” The cases said nothing, however, about the extent of Congress’s authority 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 redefine 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.”²⁸ 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.”²⁹ Permissive standing decisions allowed citizens to enlist the courts in their efforts to force “captured” agencies to tow the statutory line.³⁰

Along related lines, in *Tennessee Electric Power Company v. Tennessee Valley Authority*, the appellant electricity companies objected to competition from the 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.” 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.

²⁸ Sunstein, *supra* note ___, at 184, 193.

²⁹ *Id.* at 183-84.

³⁰ See, e.g., *Sierra Club v. Morton*, 405 U.S. 727 (1972); *United States v. Students Challenging Regulatory Agency Procedures (“SCRAP”)*, 412 U.S. 669 (1973); *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59 (1978). 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. 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. 405 U.S. at 735. 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. 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. These and other 1970s cases established that “citizen allegations of [ecological injuries] could satisfy” at least the first, injury-in-fact prong of the standing inquiry, despite “the uncertain and speculative nature of such injuries.” Lazarus, *supra* note ___, at 82, 134-34.

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,³¹ *Association of Data Processing Organizations v. Camp*.³² 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. In the process, however, the Court significantly altered the standing inquiry, characterizing the "'legal interest' test" as "go[ing] to the merits"³³ and identifying a novel alternative – a fact-based, two-step standing inquiry.³⁴ 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 "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."³⁵ 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.³⁶

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*³⁷ for the proposition that "the question of standing is

³¹ E.g., *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (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." (emphasis added)).

³² *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970).

³³ *Id.* at 153.

³⁴ See Sunstein, *supra* note ___, at 184-86.

³⁵ *Camp*, 397 U.S. at 152-53.

³⁶ See

³⁷ 392 U.S. 83 (1968). 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 Foundation, Inc.*, 127 S.Ct. 2553, 2559 (2007).

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.”³⁸ 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 state, “Where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action.”³⁹ 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,⁴⁰ 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.⁴¹ 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:

[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

³⁸ *Camp*, 397 U.S. at 151-52 (quoting *Flast*, 392 U.S. at 101) (emphasis added).

³⁹ *Id.* at 155.

⁴⁰ See generally Sunstein, *supra* note __, at 164-65.

⁴¹ Scalia, *supra* note __, at 888-889 (critiquing *Camp*).

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.*”⁴²

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.”⁴³ In other words, in this view, 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”⁴⁴ in *Lujan v. Defenders of Wildlife*.⁴⁵ 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. To establish standing, the plaintiffs cited the Act’s expansive citizen-suit provision,⁴⁶ but they failed to introduce evidence that satisfactorily distinguished them from “anyone who observes or works with an endangered species, anywhere in the world.”⁴⁷ That is, the *Lujan* plaintiffs claimed just the sort of “widely shared” injury that Scalia had argued nine years earlier cannot “support[] a congressional conferral of standing.”⁴⁸ 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-

⁴² Scalia, *supra* note __, at 894-95 (final emphasis added).

⁴³ *Id.* at 895-96.

⁴⁴ Nichol, *supra* note __, at 194.

⁴⁵ 504 U.S. 555 (1992).

⁴⁶ 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. 16 U.S.C. § 1540(g).

⁴⁷ *Lujan*, 504 U.S. at 567.

⁴⁸ Scalia, *supra* note __, at 895.

or-controversy requirement and encroach on the President's power to "to 'take Care that the Laws be faithfully executed.'"⁴⁹

Commentators immediately recognized *Lujan* as an important case and speculated about its longterm impact.⁵⁰ 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."⁵¹ 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, can she assert that she faces an increased risk of *future* asthma attacks, or must she 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*";⁵² 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 concern that it would take *Lujan* to its logical extreme and define the injury-in-fact concept so narrowly as to bar Congress from relying on citizen attorneys general to ensure enforcement of the nation's environmental and public health and welfare laws. In *Federal Election Commission v. Akins*,⁵³ for example, six members of the Court found standing for plaintiffs who challenged the Commission's failure to enforce certain disclosure provisions of the

⁴⁹ *Lujan*, 504 U.S. at 577 (quoting Article II § 2).

⁵⁰ See, e.g., Pierce, *supra* note __, at 1189 (speculating about the "potential effects of *Defenders*").

⁵¹ Sunstein, *supra* note __, at 226.

⁵² Nichol, *supra* note __, at 195.

⁵³ 524 U.S. 11 (1998).

election laws against American Israel Public Affairs Committee.⁵⁴ The Court explained that the resulting informational injury, though “widely shared,” was neither “abstract” nor “indefinite”: The injury is “directly related to voting, the most basic of political rights,” and “is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts.”⁵⁵ 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.”⁵⁶

Two years later, in *Friends of the Earth v. Laidlaw Environmental Services*,⁵⁷ a slightly larger majority of the Court further confirmed the vitality of this sort of public litigation. 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.”⁵⁸

Laidlaw did not concern injuries as universal as those at issue in *Lujan* and *Akins*. 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.”⁵⁹ 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 on an environmental- or health-related issue can identify harm to her

⁵⁴ 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.

⁵⁵ *Id.* at 23-24.

⁵⁶ *Id.* at 24.

⁵⁷ 528 U.S. 167 (2000).

⁵⁸ *Id.* at 698.

⁵⁹ Scalia, *supra* note ___, at 895.

distinct “recreational, aesthetic, and economic interests,” her claim no longer bears the hallmarks of a constitutionally-suspect “‘pure’ citizen suit[.]”⁶⁰

Finally, no history of standing is complete without mention of the Court’s recent opinion in *Massachusetts v. Environmental Protection Agency*.⁶¹ This victory for environmental plaintiffs established EPA’s authority under the Clean Air Act to regulate greenhouse gas emissions from automobiles. 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.

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.”⁶² 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’ injury 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

⁶⁰ Sunstein, *supra* note ___, at 226.

⁶¹ 127 S.Ct. 1438 (2007).

⁶² *Id.* at 1464 (quoting *Lujan*, 504 U.S. at 576).

injury will only increase over the course of the next century....⁶³

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 a majority of the Court. On the contrary, but for its actual holding, the opinion hints at a dubious future for individuals' standing to assert injury due to agency dereliction on a problem of broad public significance.

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.⁶⁴

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

⁶³ *Id.* at 1456 (emphasis added; internal quotations and citations omitted).

⁶⁴ *Public Citizen*, 489 F.3d at 1295 (internal citations omitted).

democratically unaccountable uber-agency, so judges must find some way to separate the wheat from the chaff.

To date, the substantiality-of-the-risk standing threshold is peculiar to the D.C. Circuit. Other circuits, by contrast, “have suggested that an increase in probability [of harm] itself constitutes an ‘actual or imminent’ injury” sufficient to support constitutional standing.⁶⁵ That other circuits take a different approach does not, however, render the D.C. Circuit standing threshold unimportant. For one thing, 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.⁶⁶ Moreover, the present difference of opinion among the courts of appeals makes eventual Supreme Court review likely, at which point the rationale behind the threshold – so closely aligned with *Lujan*’s rationale for questioning the Endangered Species Act’s expansive grant of citizen standing – may well appeal to that Court’s recently expanded cadre of standing skeptics.⁶⁷ For the reasons explained below, however, the threshold

⁶⁵ Sturkie and Seltzer, *supra* note __, at 10293 (citing cases in the Second, Fourth, and Ninth Circuits).

⁶⁶ 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 Resource Conservation and Recovery Act, 42 U.S.C. § 6976(a)(1), the Comprehensive Environmental Resource, Compensation, and Liability Act, 42 U.S.C. § 9613(a), the Oil Pollution Act, 33 U.S.C. § 2717(a), and the Toxic Substances Control Act, 15 U.S.C. § 2618(a)(1); national pollution standards issued under the Clean Air Act, 42 U.S.C. § 7607(b)(1); “actions pertaining to the establishment of national primary drinking water regulations” under the Safe Drinking Water Act, 42 U.S.C. § 300j-7(a)(1); decisions of the “God Squad” under the Endangered Species Act, 16 U.S.C. § 1536(n); and national rules promulgated under the Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1276(a). Under the National Labor Relations Act, on the other hand, “any person aggrieved by a final order of the [National Labor Relations Board] may obtain review in the court of appeals for any circuit wherein the unfair labor practice was alleged to have been engaged, wherein such person resides or transacts business, or in the D.C. Circuit.” 29 U.S.C. §160(f) (emphasis added). Similarly, venue for review of any proceeding under the Nuclear Waste Policy Act “shall be in the circuit in which the petitioner involved resides or has its principal office, or in the D.C. Circuit.” 42 U.S.C. § 10139. *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.”).

⁶⁷ *See generally* Susan Low Bloch & Ruth Bader Ginsburg, *Celebrating the 200th Anniversary of the Federal Courts of the District of Columbia*, 90 Geo. L.J. 549, __ (2002) (noting numerous cases in which the Supreme Court has adopted the D.C. Circuit’s view on issues of substance or procedure). Of course, the Circuit’s innovations do not always impress the Supreme Court. *See, e.g., Whitman v. American Trucking Assns*, 531 U.S. 457 (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 and Ginsburg, *supra*, at __ (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 “elevat[e] the [Supreme] Court’s comprehension of the diverse considerations at stake”).

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

III. The Injuriousness of Small Risks in Theory

The first important criticism of the standing threshold is that there is absolutely no *theoretical* justification for limiting standing in increased-risk cases to plaintiffs who face a “substantial” risk of future harm. That is, there is no theoretical reason to suppose that small risks are non-injurious. Thus, if there is any justification for the standing 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,”⁶⁸ or simply to conserve judicial resources for cases involving more serious risks.

To see this, consider two possible justifications for the contrary view: Either (1) advancing some jurisprudential goal or (2) adhering to some moral framework might necessitate the dismissal of cases involving “insubstantial” risks. For the reasons outlined below, neither justification withstands close analysis.

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.”⁶⁹

In practice, those “constitutional and prudential” limits amount to a prohibition on advisory opinions and the need for a statutory or other legal “hook” (about which, more later). 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

⁶⁸ *Allen v. Wright*, 468 U.S. 737, 750 (1984) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

⁶⁹ *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 11 (2004) (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984) (internal quotations omitted)).

rarified atmosphere of a debating society but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.”⁷⁰ 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 – that is, 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 *U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP)*⁷¹ 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....”⁷²

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.⁷³ 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.”⁷⁴ The Seventh

⁷⁰ *Massachusetts v. EPA*, 127 S.Ct. 1438, 1453 (2007) (quoting *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring)).

⁷¹ 412 U.S. 669 (1973).

⁷² *Id.* at 689, n.14 (quoting *Baker v. Carr*, 369 U.S. 186 (1962); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); and K. Davis, *Standing: Taxpayers and Others*, 35 U.Chi.L.Rev. 601, 613 (19??)).

⁷³ 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).

⁷⁴ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997).

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 \$30.00.”⁷⁵ Concededly, the named plaintiffs in class actions must individually demonstrate standing.⁷⁶ 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.⁷⁷

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,⁷⁸ they impose this limitation primarily to achieve efficient compensation and optimal deterrence⁷⁹ – concerns absent in administrative increased-risk cases. Specifically, 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. 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 not (as in the D.C. Circuit standing threshold) injury-in-fact. Consider, for

⁷⁵ *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

⁷⁶ *Simon v. Eastern Ky. Welfare Rights Organization*, 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))).

⁷⁷ *See, e.g., Carnegie v. Household Int'l, Inc., supra.*

⁷⁸ *See, e.g., In re Rezulin Products Liability Litigation*, 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)). *But see, e.g., In re Paoli R.R. Yard PCB Litigation*, 916 F.2d 829, 850 (3rd 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).

⁷⁹ *See, e.g., In re 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.”).

example, medical malpractice cases. Historically, courts required plaintiffs in such cases to demonstrate that they had a greater than 50% chance of recovery but for the malpractice.⁸⁰ That is, courts refused to recognize medical malpractice claims premised on increased risk of death unless the plaintiff could demonstrate that her ex ante risk of death was less than 50%. 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 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,⁸¹ 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. Thus, courts today commonly recognize claims for "loss of chance," awarding partial or full recoveries to medical malpractice plaintiffs who do not meet the historic 51%-ex-ante-chance-of-recovery threshold.⁸² Courts use various methods to compute damages for loss of chance.⁸³ For example, under one version of the doctrine, if the woman in the above example had a 40% 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."⁸⁴ At bottom, 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."⁸⁵ That is, courts reviewing these claims increasingly see the imposition of risk itself as a compensable injury, even if the patient's

⁸⁰ See generally, 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 that not that the patient would have survived with proper care."); add cases.

⁸¹ See *id.*

⁸² 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")

⁸³ See *id.* (discussing the various methods).

⁸⁴ David A. Fischer, *Tort Recovery for Loss of a Chance*, 36 Wake Forest L. Rev. 605, 611 (2001).

⁸⁵ *Alexander v. Scheid*, 726 N.E.2d 272 (Ind. 2000).

prognosis was dire *before* the malpractice, and the malpractice itself 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. 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"⁸⁶ of the case.

Thus, the D.C. Circuit standing threshold 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 undemocratic role of protecting individuals and minorities against impositions of the majority"?⁸⁷ Clearly, 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. 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 quote from *Public Citizen* suggests,⁸⁸ 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

⁸⁶ *Massachusetts v. EPA*, 127 S.Ct. at 1453.

⁸⁷ Scalia, *supra* note __, at 894.

⁸⁸ *Supra* note __ and accompanying text.

somehow culls “worthwhile” cases and leaves the remainder to agency discretion – that is, the filter must operate accurately in practice. As discussed in Part IV below, the D.C. Circuit standing threshold utterly 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 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 D. 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.”⁸⁹ Applying both consequentialist and nonconsequentialist moral views, Adler concludes that these *de minimis* criteria are “difficult to justify ... as a matter of ideal moral theory.”⁹⁰

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 no 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

⁸⁹ Matthew D. Adler, *Why De Minimis*, at 1, 19, 22 (2007), available at <http://ssrn.com/abstract=992878>.

⁹⁰ *Id.*

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 decisionmakers 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.⁹¹ 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, but only if it successfully identifies cases that are, in some sense, “worthy of review.”

IV. 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.”⁹² This question has a two-part answer.

⁹¹ *Id.* at 24. 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 26. 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.

⁹² *Public Citizen*, 489 F.3d at 1295 (quoting *DaimlerChrysler Corp. v. Cuno*, 126 S.Ct. 1854, 1860 (2006)).

A. *A dull knife*

The first answer to the “practical effects” question is no. Quite the contrary, the D.C. Circuit standing threshold predictably 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.⁹³ This approach would make little sense for a lottery, but it is even less sensible in the context of public health and environmental risks, as 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,⁹⁴ but the solution is not to pretend they are valueless, as the D.C. Circuit standing threshold effectively does. A plaintiff who faces some probability of getting sunburned may or may not have a sufficient stake in the outcome of a lawsuit challenging the causative agency action, but a plaintiff who faces even a tiny probability of developing melanoma surely does.⁹⁵

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.”⁹⁶ One can make this critique of risk assessment more generally,⁹⁷ 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 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

⁹³ See *supra* note __ and accompanying text.

⁹⁴ See generally, Frank Ackerman and Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. Pa. L. Rev. 1553, 1557-1560 (2003) (detailing the problems with monetizing environmental and public health benefits, and with figuring out how to express future benefits in today’s dollars)

⁹⁵ 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 (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 times the cost-of-illness but that quantity augmented by some measure of the cost-of-risk.

⁹⁶ Matthew D. Adler, *Against “Individual Risk”: A Sympathetic Critique of Risk Assessment*, 153 U. Penn. L. Rev. 1121, 1126 (2005).

⁹⁷ See, e.g., *id.*

only a few cents per day.⁹⁸ 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.’”⁹⁹

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.¹⁰⁰ Thus, a court that looks only at the present risk to the plaintiffs is ignoring *two* additional variables: not only the size of the affected population but also 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 3.8 million residential customers¹⁰¹ 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

⁹⁸ See *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005).

⁹⁹ *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 832-33 (1999) (quoting *West v. Randall*, 29 F. Cas. 718, 721 (No. 17,424) (C.C.D.R.I.1820) (Story, J.); also citing Benjamin Kaplan, *A Prefatory Note*, 10 B.C. Ind. & Com. L.Rev. 497 (1969)).

¹⁰⁰ 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 50% 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 cancers in group	no	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

¹⁰¹ See FPL Facts, at http://www.fpl.com/about/profile/fpl_facts.shtml.

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 reduces quality of life by \$100,000 (total expected loss \$38,000 per year).¹⁰²

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.¹⁰³ But in the risk cases, one can expect a few plaintiffs to get sick.¹⁰⁴ 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 more¹⁰⁵) in case two, and at least \$100,000 (but likely more¹⁰⁶) in case three. Focusing narrowly on the 1:1,000,000 and 1:10,000,000 risks 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

¹⁰² 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). Add more.

¹⁰³ 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 in cases (2) and (3), the costs to the company of addressing the pollution problems may not correlate with the societal costs that the pollution is imposing.

¹⁰⁴ 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). *See supra* note ____.

¹⁰⁵ *See, e.g.*, Masur, *supra* note ____, at 1333.

¹⁰⁶ For case (3), the estimation problem is even more serious, because (by hypothesis) the illness is incurable. *See Masur, supra* note ____, at 1333.

anticipated harm.¹⁰⁷ 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.¹⁰⁸ 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 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.¹⁰⁹

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.¹¹⁰ Agencies implement policies in incremental steps – year by year, pollutant by pollutant, or industry by industry.¹¹¹ 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.¹¹² 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, therefore, the D.C. Circuit 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

¹⁰⁷ For further discussion of the illogic of ignoring the magnitude of the anticipated harm, see *supra* note __ and accompanying text.

¹⁰⁸ See Adler, *supra* note __ at 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.”).

¹⁰⁹ 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.

¹¹⁰ See *infra*, at __.

¹¹¹ *NRDC I* and *II* offer prime examples of this fact. [Add detail.]

¹¹² See, e.g., *Eagle-Picher Indus., Inc. v. EPA*, 759 F.2d 905 (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.

tiny risk. As I have argued elsewhere in the context of ripeness,¹¹³ the net result is, effectively, judicially-sanctioned path dependence: The agency takes its first step and then, hearing silence from the court, 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 – that between the risk imposed by the agency’s action and the identical preexisting risk? Or between the *ex post* risk and some measure of the risk sanctioned by applicable substantive law? At the standing argument in *Public Citizen*,¹¹⁴ 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. In most cases, though, the plaintiffs’ litigation obligation is to place all relevant legal and factual issues before the agency – not to propose particular approaches to addressing those issues.¹¹⁵ More fundamentally, it makes little sense to suggest that with passage of APA 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 for those same members of the public. 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,¹¹⁶ but the burden to devise an alternative approach that comports with governing law surely lies with the agency not 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

¹¹³ 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 (1999).

¹¹⁴ Cite transcript.

¹¹⁵ See, e.g., *Nuclear Energy Inst. Inc. v. EPA*, 373 F.3d 1251, 1298 (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)).

¹¹⁶ *Id.*

the court¹¹⁷ – a requirement that may necessitate conducting extensive interviews, preparing myriad affidavits, hiring statistical experts, and perhaps even developing new statistical models.¹¹⁸ Yet the height of this litigation hurdle correlates only with the nature of the risk in question and the difficulty of establishing the link between that risk and the causative agency action¹¹⁹ – there is no obvious relationship to the importance of the legal question in the case. 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 *complicated*, rather than cases in which the link is tenuous, the resulting risk truly small, or the legal question 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 – at either a constitutional or a practical level – about a potential explosion of such cases.

B. Sharper tools

There is a second, very different answer to the practicality question, though: It is not at all 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. Instead, as discussed above,¹²⁰ when an individual or organization chooses to target an agency action that appears to impose only a tiny risk, it is likely that the plaintiff identified the action as the first in a likely series of similar actions, or as the initial phase in 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; that is, they must establish both that the agency has a "legal duty" and that they have the "right to enforce [that] duty."¹²¹ Cases that challenge completely

¹¹⁷ See, e.g., *Public Citizen*, 489 F.3d at 1289.

¹¹⁸ In *Public Citizen v. NHTSA*, for example, the plaintiffs' supplementary standing filings exceeded __ pages and cost __ to produce.

¹¹⁹ For example, substantiating some health risks may require extensive laboratory testing or modeling.

¹²⁰ *Supra* note __ and accompanying text.

¹²¹ William A. Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 291 (1988).

unconstrained exercises of agency discretion are thus doomed from the start.

Moreover, there are the causation and redressability prongs of the standing inquiry. If there are several independent links in the chain between the challenged agency action and the resulting risk – if, in short, the threatened harm is too speculative – the plaintiff is unlikely to convince the court that the agency caused the risk, nor that a remand would improve the situation.¹²² Then, on the merits, *Chevron*¹²³ deference, both statutory and judicially-created rules of prosecutorial discretion,¹²⁴ and the Administrative Procedure Act’s arbitrary-and-capricious review standard¹²⁵ give judges ample room to defer to, or simply to decline to review, all but the most blatantly unlawful agency policy choices. In short, 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.¹²⁶

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 logically unrelated 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.”¹²⁷ The palpable concern underlying this characterization is that in some cases, plaintiffs sue about preexisting risks – that is, risks that are not in any sense *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

¹²² [Add cites.]

¹²³ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

¹²⁴ [Add cites.]

¹²⁵ 5 U.S.C. § 706(2)(A).

¹²⁶ 352 F.3d 625, 634 (2d Cir. 2003).

¹²⁷ 2007 WL 17133334, at *12.

deciding actual cases or controversies.”¹²⁸ A passage in *NRDC I* 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.’”¹²⁹

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

Two simple examples suffice to establish that a standing bar does nothing 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, other plaintiffs could challenge the same rule for *creating* a risk to small passengers (small adults and children), who could be injured or killed during airbag deployment.

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.

¹²⁸ *Id.*

¹²⁹ *NRDC II*, 464 F.3d at 7 (quoting *NRDC I*, 440 F.3d at 483).

Clearly, 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 airbag rule; the agency refused; and 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 likelihoods of success would also depend on the scope of the agency's mandate – albeit in different ways than for Suit (1).

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. 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 undoubtedly quite small. Thus, 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 its speculativeness. Consider the specific facts in *NRDC I* and *II*: NRDC challenged an EPA rule that allowed the use of a certain amount of an ozone-depleting pesticide. The organization complained of the health-related risks to its members associated with increased UV-exposure due to ozone depletion. The *size* of those risks hinged on two things: (1) the amount of pesticide use allowed by the challenged rule, and (2) various statistical estimates of “pass through” at each intervening step in the chain of causation from rule-passage to health-harm.

The former turns on a simple correlation: The more pesticide allowed by the rule, the more ozone depletion could ultimately occur. The latter is far more complicated, involving numerous factors, some predictable and some less so, including: actual methyl bromide usage (farmers could, for example, 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 both exposure and susceptibility). It should be clear, then that any number that purports to estimate the "size" or "substantiality" of a risk actually conflates two uncorrelated issues – the magnitude of the agency's action (that is, how much the agency accomplished in its rule) and the number and nature of the links in the chain of causation. It is simply impossible to gain insight into both issues by asking a binary question about the "substantiality" of the risk.

In conclusion, returning to the practicality question posed at the start of section IV, the second 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 in many instances, using such a threshold serves only to confuse.

V. The Argument from Institutional Roles

Importantly, addressing the above-identified practical problems would not fix all that ails the substantiality-of-the-risk threshold. Whatever its contours, such a threshold fundamentally confuses the institutional roles of Congress, the agencies, and the courts.

Consider first the role of the courts vis-à-vis Congress. In many situations, Congress has clearly recognized a risk (say, the risks 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. 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 whom Congress has delegated regulatory authority has the power *only* to act in compliance with Congress's policy choices, as interpreted first by the agency, and later by the courts (with proper deference to the agency).

In such situations, a court that carves up the category of citizen attorneys general into those with standing (because substantially at risk) and those without (because only insubstantially at risk) effectively redefines the legal injury as limited to beneficiaries facing *substantial* risk – and thus revisits legislative choices Congress has

already made. That is, by means of a superficially objective discussion of risk statistics, the court achieves, deliberately or otherwise, precisely the result decried in *Lujan*: “A clear statutory expression of authority [to sue falls] before the notoriously amorphous demand for a constitutional ‘case.’”¹³⁰

What of cases in which there is no clear congressional mandate? In such cases, the risk issue comes up in one of two ways. First, agencies sometimes have leeway to choose which of a broad category of risks to address, and in what manner to address those risks. As noted above,¹³¹ in cases challenging the resulting agency policy, there is considerable room for judicial deference, either under the doctrine of prosecutorial discretion, or under the deferential *Chevron* and “arbitrary and capricious” review standards. It is far from clear, therefore, that in these circumstances courts have further need to winnow the pool of potential plaintiffs by imposing an artificial standing threshold. Second, agencies sometimes *create* a risk as a side effect of some unrelated policy choice. In such cases, even if the corollary risk is tiny, the plaintiff is in the classic and generally-approved litigating position: a minority facing an individual harm imposed by (the agent of) the majority.¹³² Thus, even in cases in which Congress has not spoken, imposition of a standing threshold is either unnecessary (because courts have numerous alternative grounds for refusing to interfere with the executive’s faithful execution of the laws) or misguided (because such a threshold may bar precisely the sorts of actions we expect and depend on courts to entertain).

Finally, independent of the choices Congress and the agencies have made in a particular regime, there is the problem of judicial

¹³⁰ Nichol, *supra* note __, at 1147. As Judge William A. Fletcher put it almost twenty years ago, “[i]n 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 __, at 251.

¹³¹ See *supra* pp. ____.

¹³² 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*, 1 Cranch 137, 2 L.Ed. 60 (1803),] 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 countermajoritarian 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))).

competence to draw a line between “substantial” and “insubstantial” risk. Deciding what sorts and levels of risk society should tolerate requires legislative line-drawing. Deciding which experts to trust in a risk assessment requires informed and scientific line-drawing. [The remainder of this part will return to *NRDC I* and *Public Citizen* and note that various assumptions and mistakes in the mathematics of that opinion well illustrate that neither enterprise is properly the province of the courts – particularly when the parties’ dueling risk-experts arrive in the Court of Appeals in the first instance, and there is no obvious standard of review to apply.]

VI. Conclusion

Needless to say, courts need not provide a judicial remedy to any plaintiff who can demonstrate that agency action or inaction has placed her (or left her) 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 essay takes no view – Congress could fix the problem by narrowing such provisions, perhaps requiring, for instance, that citizen attorneys general challenging pollution regulations live within some radius of the regulated smokestacks, or that those challenging automobile safety regulations commute 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 – all inquiries that raise their own concerns,¹³³ but that have some theoretical grounding. Adding assumption-laden and eminently manipulable risk estimates to this mix serves only to hide hard

¹³³ See, e.g. [cites].

questions under a veneer of simple but contested and largely misdirected mathematics.