

PROBABILISTIC STANDING

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ABSTRACT—Federal courts have long recognized their power under Article III to award prospective relief, such as an injunction, to prevent a threatened injury. But the Supreme Court has refused to recognize Article III standing for some claims of threatened injury. Based on the concern that extending standing so broadly would threaten separation of powers, the Court has held that a plaintiff has standing to challenge a threatened injury only if the risk of harm is real and the threatened harm is imminent. This Article challenges that doctrine. It argues that Article III does not create a threshold of risk for potential harms. Contrary to the Court’s view, imposing such a threshold actually undermines the powers of both the courts and Congress. It also results in incoherent and unpredictable decisions because difficulties in applying the doctrine lead courts to base their decisions not on the actual likelihood of injury, but instead on other considerations, such as separation of powers and the fitness of the case for review. Nevertheless, recognizing that there may be reasons not to adjudicate particular claims alleging small risks of harm, this Article recommends that courts develop a prudential doctrine under which they may abstain from hearing such claims. Replacing the blanket prohibition on all low-risk claims with this prudential approach would produce a more coherent body of law and would promote both transparency and better decisionmaking by requiring courts to articulate the actual reasons for their decisions.

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INTRODUCTION

Courts cannot decide legal questions in the abstract based on hypothetical disputes.¹ As the Supreme Court has told us, the case-or-controversy requirement of Article III limits the federal judiciary to resolving legal questions only in the context of redressing or preventing an “actual” or threatened injury resulting from violations of the law.² To hear

¹ See *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (“If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so.”); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240–41 (1937) (“The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests.”). The Supreme Court has also said that Article III imposes other limitations, such as a requirement that the dispute must be of the sort traditionally heard by the courts. See *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102 (1998); *GTE Sylvania, Inc. v. Consumers Union, Inc.*, 445 U.S. 375, 382 (1980) (stating that federal courts may resolve legal questions only when “presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process” (quoting *Flast v. Cohen*, 392 U.S. 83, 95 (1968)) (internal quotation mark omitted)).

² *Alvarez v. Smith*, 130 S. Ct. 576, 580 (2009) (“The Constitution permits this Court to decide legal questions only in the context of actual ‘Cases’ or ‘Controversies.’” (quoting U.S. CONST. art. III, § 2)); *Cuno*, 547 U.S. at 341 (“[N]o principle is more fundamental to the judiciary’s proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.” (quoting *Raines v. Byrd*, 521 U.S. 811, 818 (1997)) (internal quotation marks omitted)); see also *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009) (stating that “courts have no charter to

claims based merely on a hypothetical, the Court has explained, would unduly expand the judiciary's role by empowering it to address questions more properly reserved for the legislature or executive.³

The concern about overexpansive federal judicial power has led to restrictions on jurisdiction over claims seeking prospective relief from threatened harms that have not yet taken place. Threatened future injuries are probabilistic; they might not occur. Based on the fear that recognizing jurisdiction for all injuries that have some probability of occurring—however small—would effectively empower courts to hear hypothetical disputes, the Supreme Court has held that Article III authorizes federal courts to hear claims alleging future injury only when the threatened injury has a real chance of occurring.⁴ When the threat of injury is too speculative, that threat does not present a justiciable case under Article III.

The Court has enforced this limitation through the doctrine of standing.⁵ To establish Article III standing in a suit brought to prevent a future injury, plaintiffs must demonstrate that they face a “real and immediate” threat of suffering an injury in fact because of the defendant's conduct.⁶

Although seemingly simple on its face, this doctrine has proven difficult to apply and has provoked substantial scholarly commentary.⁷ Over the years, determining when a claim is too remote or speculative to support standing has occupied substantial attention of the Supreme Court, perhaps

review and revise legislative and executive action” except “when necessary in the execution of” deciding justiciable disputes).

³ See *Cuno*, 547 U.S. at 341 (stating that if courts could address all legal questions under the Constitution, “[t]he division of power [among the branches of government] could exist no longer, and the other departments would be swallowed up by the judiciary” (alterations in original) (quoting John Marshall, Speech Delivered in the House of Representatives of the United States on the Resolutions of the Hon. Edward Livingston (Mar. 7, 1800), in 4 THE PAPERS OF JOHN MARSHALL 82, 95 (Charles T. Cullen ed., 1984)) (internal quotation mark omitted)).

⁴ See *City of Los Angeles v. Lyons*, 461 U.S. 95, 102–06 (1983).

⁵ See *Salazar v. Buono*, 130 S. Ct. 1803, 1814 (2010) (“To demonstrate standing, a plaintiff must have ‘alleged such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction.’” (quoting *Horne v. Flores*, 129 S. Ct. 2579, 2592 (2009))). In some older decisions, the Court relied on the restriction on advisory opinions. See *United Pub. Workers v. Mitchell*, 330 U.S. 75, 89–91 (1947).

⁶ *O’Shea v. Littleton*, 414 U.S. 488, 494 (1974) (internal quotation marks omitted).

⁷ See, e.g., Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 698 (2006) (supporting a qualitative approach to assessing the substantiality of risk for standing); Jonathan Remy Nash, *Standing and the Precautionary Principle*, 108 COLUM. L. REV. 494, 511–15 (2008) (advocating for the incorporation of the precautionary principle into standing doctrine, under which states would have standing to sue for uncertain risks of potentially catastrophic and irreversible injury); Cass R. Sunstein, *Standing Injuries*, 1993 SUP. CT. REV. 37, 46–50 (criticizing the Court’s approach to standing in cases alleging a risk of future harm); see also Amanda Leiter, *Substance or Illusion? The Dangers of Imposing a Standing Threshold*, 97 GEO. L.J. 391 (2009) (criticizing the D.C. Circuit’s particularly high threshold on risk for standing as immoral and not compelled by doctrine).

more attention than any other question of justiciability.⁸ Despite these decisions, there continues to be uncertainty about when a threatened injury is justiciable. Courts disagree about the necessary threshold of risk for justiciability.⁹ They also often lack the information necessary to determine the probability of injury, forcing them to render decisions based on guesses—guesses that are assuredly influenced by personal biases and other concerns such as separation of powers and federalism. Scholars have responded by offering proposals ranging from limiting the probability threshold only to cases involving private plaintiffs¹⁰ to adopting a more flexible approach that considers not only the probability of harm but also the severity of the harm.¹¹

This Article offers a different solution. It argues that the difficulties associated with the threshold of risk necessary for standing need not encumber the doctrine of standing because Article III does not impose a minimum-risk requirement. For hundreds of years, courts have had the power to award prospective relief, such as an injunction, to prevent future injuries. Yet all future injuries addressed by prospective orders have some chance of not occurring. Claims to prevent these injuries are nevertheless justiciable because awarding judicial relief will have the real-world effect of reducing the risk of injury. A plaintiff who faces a small threat of injury likewise has a real interest in reducing that risk of injury. The plaintiff's interest is no less real than the interest held by an individual in avoiding a threatened injury that is extremely likely to occur. The only difference is that the plaintiff's stake is smaller. The plaintiff's claim therefore presents a case under Article III.

Of course, even though a risk of small harm presents a justiciable case, there may still be reasons for a court not to intervene in a particular case involving a small risk. For example, a plaintiff may face a small risk of injury because there is a significant chance that the political branches will intervene to prevent the harm from occurring. In that situation, respect for the other branches might counsel courts to abstain from exercising that

⁸ See, e.g., *Summers v. Earth Island Inst.*, 555 U.S. 488, 492–97 (2009); *Davis v. FEC*, 554 U.S. 724, 734–35 (2008); *Massachusetts v. EPA*, 549 U.S. 497, 521–23 (2007); *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 181–84 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563–64 (1992); *Whitmore v. Arkansas*, 495 U.S. 149, 157 (1990); *Diamond v. Charles*, 476 U.S. 54, 66 (1986); *Lyons*, 461 U.S. at 105; *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298–99 (1979); *Ashcroft v. Mattis*, 431 U.S. 171, 172 & n.2 (1977); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40–44 (1976); *Rizzo v. Goode*, 423 U.S. 362, 371–73 (1976); *O'Shea*, 414 U.S. at 494.

⁹ Compare, e.g., *Vill. of Elk Grove Vill. v. Evans*, 997 F.2d 328, 329 (7th Cir. 1993) (“[E]ven a small probability of injury is sufficient to create a case or controversy . . .”), with *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002) (requiring a “substantial probability” of injury (quoting *Am. Petroleum Inst. v. EPA*, 216 F.3d 50, 63 (D.C. Cir. 2000) (internal quotation marks omitted))).

¹⁰ See Nash, *supra* note 7, at 498–99.

¹¹ See Fallon, *supra* note 7, at 698.

jurisdiction. But that decision not to exercise jurisdiction should not rest on the lack of a case under Article III; instead, it should depend on prudential principles of abstention.

The Article proceeds in four Parts. Part I begins by providing an overview of standing and the case-or-controversy clause of Article III. It then describes the current doctrines restricting standing for plaintiffs seeking prospective relief. Part II explains why threats of injury, no matter how small or remote, present a case or controversy. It also points out the problems, doctrinal and otherwise, that arise from limiting standing based on future injury to only those plaintiffs alleging a substantial risk of harm. Part III responds to historical objections and other concerns, such as the threat of overwhelming the federal dockets, arising from reading Article III to encompass any threat of harm.

The logical upshot of Parts II and III is that standing should extend to all claims involving a risk of future injury. But recognizing that there may nevertheless be reasons for courts to refuse to hear some claims involving small risks of injury, Part IV offers a framework for cabinining the federal judiciary's ability to hear claims involving future injury. It explains that, although Article III extends the judicial power over claims alleging a small risk of injury, federal courts should develop a prudential doctrine under which they may refuse to exercise jurisdiction over such claims. In exercising this permissive authority, courts should consider multiple factors, such as the need for judicial review, the quality of decisionmaking, separation of powers, and federalism. This prudential test would be superior to current doctrine not only because it does not rely on a flawed Article III doctrine that implicitly obscures so many different theoretical and practical considerations, but also because it would increase the legitimacy of judicial decisions by promoting transparency. It would also clarify the law and result in decisions that more accurately implement the considerations leading courts to deny jurisdiction in cases alleging a low risk of injury.

I. THE CURRENT DOCTRINE OF STANDING

A. *Article III Standing*

Article III of the Constitution extends the federal judicial power to resolving “Cases” or “Controversies.”¹² The Supreme Court has explained that this clause does not empower federal courts to resolve all disputes. Instead, the dispute must be “of a Judiciary [N]ature”¹³—that is, it must be capable of resolution by a judicial order imposing a specific form of relief through an “an immediate and definitive determination of the legal rights of

¹² U.S. CONST. art. III, § 2, cl. 1.

¹³ *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006) (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (Max Farrand ed., rev. ed. 1966)).

the parties.”¹⁴ According to the Supreme Court, this restriction on the power of the federal judiciary is fundamental to maintaining the appropriate separation of powers.¹⁵ By permitting the courts to pass on legal questions only in the context of resolving disputes, this doctrine ensures that courts do not usurp the role of the political branches to set policy and define legal obligations and rights.¹⁶

The principal doctrine employed by the courts to enforce the limits of Article III is standing. For plaintiffs to have standing to bring suit in federal court, they must demonstrate that they have suffered, or are about to suffer, an “injury in fact,” which has been broadly defined to include injuries not only to economic and physical interests but also to spiritual and aesthetic interests.¹⁷ A plaintiff must also show that this factual injury is “fairly traceable” to the actions of the defendant, and that it “will likely be redressed by a favorable decision.”¹⁸ In the Court’s view, these requirements are necessary conditions for the existence of an actual

¹⁴ *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937); accord David P. Currie, *Misunderstanding Standing*, 1981 SUP. CT. REV. 41, 41–47; see also *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (noting that to be justiciable, the dispute must “admi[t] of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.” (alteration in original) (quoting *Haworth*, 300 U.S. at 241) (internal quotation marks omitted)); *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (“[T]he standing question . . . is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff’s position a right to judicial relief.”).

¹⁵ See *Cuno*, 547 U.S. at 341 (“[N]o principle is more fundamental to the judiciary’s proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.” (quoting *Raines v. Byrd*, 521 U.S. 811, 818 (1997)) (internal quotation marks omitted)).

¹⁶ See *id.* at 340–41; see also Marshall, *supra* note 3, at 95 (“If the judicial power extended to every question under the constitution it would involve almost every subject proper for legislative discussion and decision; if to every question under the laws and treaties of the United States it would involve almost every subject on which the executive could act. The division of power [among the branches of government], could exist no longer, and the other departments would be swallowed up by the judiciary.”).

¹⁷ *Ass’n of Data Processing Serv. Orgs. Inc. v. Camp*, 397 U.S. 150, 152, 154 (1970). Courts and commentators have disagreed over the kinds of injuries that should suffice for standing. Some have argued that a violation of rights should suffice for standing, see, e.g., *Zivotofsky ex rel. Ari Z. v. Sec’y of State*, 444 F.3d 614, 619 (D.C. Cir. 2006) (“[A] concrete and particular injury for standing purposes can . . . consist of the violation of an individual right conferred on a person by statute.”); F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 324 (2008), while others have contended that standing should turn on whether the plaintiff suffered any consequences from the violation of the right, see, e.g., *Doe v. Nat’l Bd. of Med. Exam’rs*, 199 F.3d 146, 153 (3d Cir. 1999) (“The proper analysis of standing focuses on whether the plaintiff suffered an actual injury, not on whether a statute was violated.”); John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1220 (1993). It is unnecessary to resolve that dispute in this paper, which addresses the requirement that the injury for standing—whatever it may be—be nonspeculative and imminent.

¹⁸ *Bennett v. Spear*, 520 U.S. 154, 162 (1997); accord *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

controversy by limiting jurisdiction to disputes in which the plaintiff has a direct stake in the litigation.¹⁹ Individuals may resort to the federal courts only to remedy their personal injuries; they cannot go to the courts simply to pursue a policy agenda.²⁰

B. Standing in Cases Alleging Future Injuries

Standing in federal courts is not limited to claims for retrospective relief like damages. Article III empowers the federal judiciary to hear cases in “[e]quity,”²¹ which encompasses requests for prospective injunctions.²² There is an unbroken historical practice of federal courts exercising jurisdiction over claims for prospective relief to prevent threatened injuries that have not yet occurred.²³

But the Court has not extended Article III jurisdiction over *all* claims of threatened future injuries. Out of concern that recognizing the justiciability of all such injuries would unduly expand the power of the federal courts to resolve legal issues, it has limited the type of future injuries that suffice for standing.²⁴ The Court has held that for a plaintiff to have standing, the threat of injury must be “real.”²⁵ This Article calls this the “minimum-risk requirement.” Relying on this requirement, the Court has not hesitated to exercise its power to grant injunctions to prevent threatened injuries that are likely to occur.²⁶ But when the threat of injury is

¹⁹ See *Summers*, 555 U.S. at 493 (noting that standing ensures that the plaintiff has “‘alleged such a personal stake in the outcome of the controversy’ as to warrant *his* invocation of federal-court jurisdiction” (quoting *Warth*, 422 U.S. at 498–99 (internal quotation mark omitted))).

²⁰ See *Lujan*, 504 U.S. at 576.

²¹ U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity . . .”).

²² See, e.g., Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 154–58 (1998) (documenting the early American history of copyright injunctions); Daniel J. Walker, Note, *Administrative Injunctions: Assessing the Propriety of Non-Class Collective Relief*, 90 CORNELL L. REV. 1119, 1129–32 (2005) (documenting the early history of injunctions in America).

²³ See, e.g., *Vicksburg Waterworks Co. v. Vicksburg*, 185 U.S. 65, 82 (1902) (holding that a “threatened” injury from illegal activity presented an actual case); see also *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (recognizing standing for a party who “personally has suffered some actual or threatened injury” (quoting *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99 (1979))).

²⁴ See, e.g., *Lujan*, 504 U.S. at 560–61.

²⁵ E.g., *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990); *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983); *Golden v. Zwickler*, 394 U.S. 103, 109–10 (1969); *United Pub. Workers v. Mitchell*, 330 U.S. 75, 89–91 (1947); see also *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941) (requiring a “substantial controversy”).

²⁶ See *Bryant v. Yellen*, 447 U.S. 352, 366–68 (1980) (finding standing for workers to challenge refusal to apply law where application of law would have increased the likelihood that land would be available for sale at a low price).

too low, the Court has said, the dispute is merely “hypothetical” and is consequently insufficient to support standing.²⁷

*Whitmore v. Arkansas*²⁸ provides an example of this minimum-risk requirement. Whitmore, an Arkansas inmate who had been sentenced to death, sought to intervene in an Arkansas state action to challenge the imposition of the death penalty on another inmate, Ronald Simmons.²⁹ According to Whitmore, although Simmons opted not to appeal his death sentence, the Eighth Amendment required the state to conduct appellate review before imposing the death penalty.³⁰ Whitmore explained that he had an interest in intervening because, if Simmons’s death sentence were overturned, that decision might provide a state law basis for Whitmore to challenge his own death sentence before the Arkansas Supreme Court³¹—not on direct appeal, because Whitmore’s appeals had been exhausted, but instead in a subsequent case if Whitmore were granted habeas relief and *then* retried, convicted, and resentenced to death.³² The Supreme Court dismissed the case for lack of standing.³³ It explained that the injury that Whitmore claimed—an increased possibility that he would be executed if Arkansas did not review Simmons’s sentence—was “too speculative to invoke the jurisdiction of an Art. III court.”³⁴ The Court reasoned that, even if the state had reviewed Simmons’s case, Whitmore would still face the hurdles of obtaining habeas relief, being subsequently resentenced to death, and then convincing the Arkansas Supreme Court that Simmons’s case should affect the outcome in Whitmore’s case.³⁵

²⁷ *Lujan*, 504 U.S. at 560; see *Diamond v. Charles*, 476 U.S. 54, 66 (1986) (rejecting standing based on “unadorned speculation”); *Lyons*, 461 U.S. at 105 (denying standing to an individual seeking to challenge police chokehold because it was only speculative that the plaintiff would be subjected to chokehold); *Ashcroft v. Mattis*, 431 U.S. 171, 171–72 & n.2 (1977) (denying standing in a claim challenging police use of deadly force against a person attempting to escape arrest); *O’Shea v. Littleton*, 414 U.S. 488, 497 (1974) (denying standing to residents who sought injunctive relief against judges allegedly engaged in a pattern and practice of discriminatory practices on the ground that the threat to plaintiffs from this discrimination was only “speculation and conjecture”); *Golden*, 394 U.S. at 109 (denying standing for a claim based on the potential future candidacy of a former Congressman); *Mitchell*, 330 U.S. at 89–91 (stating that a “hypothetical threat [of enforcement] is not enough” for jurisdiction); see also *Pub. Citizen, Inc. v. Nat’l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1294 (D.C. Cir. 2007) (denying standing for claim of speculative future injury), *modified on reh’g* by 513 F.3d 234 (D.C. Cir. 2008) (per curiam).

²⁸ 495 U.S. 149.

²⁹ *Id.* at 153.

³⁰ *Id.* at 153–54.

³¹ Under Arkansas law, the Arkansas Supreme Court assessed the propriety of death sentences by comparing them to other death sentences. See *id.* at 156–57.

³² *Id.* at 156.

³³ *Id.* at 166.

³⁴ *Id.* at 157.

³⁵ *Id.*

This requirement of a sufficiently likely threat of injury frequently arises in challenges to administrative actions. Individuals often challenge government regulation that they perceive as too lax, basing standing on the claim that a more stringent regulation would further decrease the risk that they would suffer harm from the regulated activity. Frequently, however, the marginal increase in risk from the less stringent regulation is small. For example, in *Sierra Club v. EPA*, environmental groups challenged a regulation on the storage and disposal of hazardous sludge.³⁶ To establish standing, the group argued that some of its members lived and worked near facilities that, under the regulation, could be used for the production and storage of the sludge, and that the proximity to those facilities could result in injury.³⁷ The D.C. Circuit denied standing, explaining that the challengers had not established a sufficient likelihood of injury from the permitted production and disposal.³⁸

In addition to requiring that a threat be “real,” courts have held that standing is appropriate only when the threatened risk is “imminent.”³⁹ This imminence requirement also appears in the doctrine of ripeness. Unlike standing, which limits *who* can bring suit, ripeness defines *when* a person may bring suit.⁴⁰ The ripeness requirement prohibits federal courts from

³⁶ 292 F.3d 895, 896–97 (D.C. Cir. 2002).

³⁷ *Id.* at 901.

³⁸ *Id.* at 902; *see also* NRDC v. EPA, 440 F.3d 476, 481–84 (D.C. Cir. 2006) (holding that a risk of 1 in 4.2 billion is insufficiently substantial to support standing), *overruled on other grounds by* 464 F.3d 1, 7 (D.C. Cir. 2006); *Ctr. for Law & Educ. v. Dep’t of Educ.*, 396 F.3d 1152, 1161 (D.C. Cir. 2005) (denying standing to a plaintiff who failed to establish a “*demonstrably* increased risk” from a challenged regulation (quoting *Fla. Audubon Soc’y v. Bentsen*, 94 F.3d 658, 667) (internal quotation marks omitted)). Professor Leiter has argued that this risk threshold for standing is unique to the D.C. Circuit. *See* Leiter, *supra* note 7, at 404. But the Supreme Court has held that not all risks suffice for standing, instead requiring that the risk be “real.” *See City of Los Angeles v. Lyons*, 461 U.S. 95, 101–02 (1983) (internal quotation mark omitted). And several circuits other than the D.C. Circuit have likewise imposed a heightened risk threshold. *See Stewart v. Blackwell*, 444 F.3d 843, 855 (6th Cir. 2006) (stating that an increased risk of harm suffices for standing, so long as the risk is “neither speculative nor remote”), *superseded by* 473 F.3d 692, 694 (6th Cir. 2007) (en banc); *Paul Revere Variable Annuity Ins. Co. v. Kirschhofer*, 226 F.3d 15, 24 (1st Cir. 2000) (requiring a “realistic risk of significant harm” for standing); *see also Cent. Delta Water Agency v. United States*, 306 F.3d 938, 950 (9th Cir. 2002) (requiring a “credible threat of harm” to support standing); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 159 (4th Cir. 2000) (en banc) (noting that low risks because of a lack of imminence do not suffice for standing). That said, some circuits have rejected a minimum threshold of risk for standing despite the Supreme Court’s holding. *See Baur v. Veneman*, 352 F.3d 625, 634 (2d Cir. 2003) (finding standing based on the “enhanced risk” from exposure to “potentially harmful products”); *Vill. of Elk Grove Vill. v. Evans*, 997 F.2d 328, 329 (7th Cir. 1993) (“[E]ven a small probability of injury is sufficient to create a case or controversy . . .”).

³⁹ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (quoting *Whitmore*, 495 U.S. at 155); *see also O’Shea v. Littleton*, 414 U.S. 488, 494 (1974) (requiring the risk to be “immediate” (quoting *Golden v. Zwickler*, 394 U.S. 103, 109 (1969)) (internal quotation mark omitted)); *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) (requiring the plaintiff to show “that he has sustained or is immediately in danger of sustaining some direct injury”).

⁴⁰ *See* Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 160–62 (1987).

hearing cases prematurely.⁴¹ Like standing, ripeness implements Article III's limitations on the judicial power.⁴² The chief requirement of ripeness is that plaintiffs may invoke federal jurisdiction only if they are so in danger of suffering an injury as to require immediate judicial relief.⁴³ The Court has explained that this hardship inquiry is identical to the imminence requirement of standing: parties that do not face an imminent threat sufficient to support standing likewise do not face a hardship rendering their claim ripe.⁴⁴ Given that the constitutionally mandated imminence requirement is the same for ripeness and standing, this Article will, for convenience, discuss the imminence requirement solely in terms of standing.⁴⁵

Although there are several reasons for the imminence requirement,⁴⁶ in *Lujan v. Defenders of Wildlife*, the Supreme Court stated that imminence is relevant to justiciability *only* insofar as it relates to the probability that an injury will occur.⁴⁷ Of course, lack of risk does not eliminate risk itself; rather, it provides more opportunity for other factors to influence the risk. Thus, as the Court has explained, the more remote an injury is in time, the less likely it is to occur.⁴⁸ For example, suppose Paul seeks an injunction against Duncan based on Duncan's threats to attack Paul in twenty years. There is a good chance that at some point during those twenty years some

⁴¹ See *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967), *abrogated by Califano v. Sanders*, 430 U.S. 99, 105 (1977).

⁴² See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1767 n.2 (2010) ("Ripeness reflects constitutional considerations that implicate 'Article III limitations on judicial power[]'" (quoting *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993))).

⁴³ See *Abbott Labs.*, 387 U.S. at 149 (stating that ripeness turns, in part, on the "hardship to the parties of withholding court consideration").

⁴⁴ See *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128 n.8 (2007); *Hotel & Rest. Emps. Union, Local 25 v. Attorney Gen.*, 804 F.2d 1256, 1277 n.10 (D.C. Cir. 1986) (Silberman, J., concurring in part and dissenting in part) (equating constitutional ripeness with imminence), *vacated*, *Hotel & Rest. Emps. Union, Local 25 v. Smith*, 846 F.2d 1499 (D.C. Cir. 1988) (en banc); see also Nichol, *supra* note 40, at 172 (noting the link between ripeness and standing).

⁴⁵ Ripeness also has prudential aspects. See *Stolt-Nielsen*, 130 S. Ct. at 1767 n.2 (noting the "prudential reasons" underlying ripeness (quoting *Reno*, 509 U.S. at 57 n.18) (internal quotation mark omitted)). The prudential component of ripeness asks whether the case is fit for judicial review at the time of suit. Whether a case is fit for review does not implicate the *power* of the courts to act; instead, it focuses on whether the court has adequate information to make an informed decision. See ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 2.4.1, at 119 (5th ed. 2007) ("[T]he focus on the quality of the record seems prudential."). On this understanding, courts have discretion to consider a claim that may not be fit for review, but they are constitutionally forbidden from considering claims when delaying review would not present a hardship to the plaintiff.

⁴⁶ One reason to require imminence is to promote efficient use of resources. For more on this and other reasons, see *infra* Part IV.C.

⁴⁷ 504 U.S. 555, 565 n.2 (1992) (stating that the "purpose" of "imminence" is "to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is '*certainly* impending'" (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)) (internal quotation marks omitted)).

⁴⁸ See *Lujan*, 504 U.S. at 565 n.2.

intervening event will occur (such as Paul's or Duncan's death, or their falling out of touch) that will prevent the attack from occurring.⁴⁹ Because the probability of the attack actually occurring is so low, *Lujan* suggests that Paul lacks standing.

Because under the Court's theory the imminence requirement is simply one component of the requirement that a threatened injury not be too speculative, the mere fact that an injury is not imminent should not necessarily render that injury nonjusticiable. If an injury is inevitable, it is justiciable even if it may not occur until the distant future.⁵⁰ Thus, if Paul could somehow demonstrate with certainty that Duncan would attack him in twenty years, Paul would have standing to pursue his claim.

II. EXTENDING STANDING TO ALL THREATENED INJURIES

The minimum-risk requirement is an unwarranted limit on federal power under Article III. A dispute constitutes a justiciable case if a plaintiff has a personal interest at stake.⁵¹ A threat of injury, even if the threat is small, establishes a personal interest. By insisting that Article III does not empower courts to hear claims based on low risks of injury, current standing doctrine prevents individuals who may indeed be injured in the future (although at the time of suit the chance of injury is small) from obtaining relief that would prevent that injury. It also limits the legislature's ability to provide redress for potential risks by barring federal courts from enforcing laws to prevent those risks when the risks are small. Moreover, the limits on probabilistic standing have resulted in unpredictability in standing law both because courts have not precisely defined what constitutes an adequate risk and because courts have often lacked the information necessary to determine whether the risk of injury in a particular case meets that threshold.

A. All Probabilistic Injuries Present an Actual Case or Controversy

Article III does not distinguish between low risks of harm and high risks of harm. It states simply that federal courts may hear "Cases" or "Controversies."⁵² Article III does not define those terms. The

⁴⁹ See *Summers v. Earth Island Inst.*, 555 U.S. 488, 495–97 (2009).

⁵⁰ The Court has made this observation in the ripeness context. See *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974) (finding a claim ripe even though the injury was not imminent because the "injurious event [was] certain to occur").

⁵¹ Courts have defined the interests to support standing broadly to include not only economic and physical interests, but also aesthetic, spiritual, and recreational interests. See *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 154 (1970). Still, not all personal interests will suffice. Courts have refused standing based on racial stigmatization, see *Allen v. Wright*, 468 U.S. 737, 759 (1984), and the interest in governmental compliance with the law, see *United States v. Richardson*, 418 U.S. 166, 179 (1974).

⁵² See *supra* Part I.A.

Constitutional Convention also provides little insight on the meaning of the terms; the only statement about them is that they limit the judicial power “to cases of a Judiciary Nature.”⁵³

Although there has been disagreement on the precise contours of what constitutes a case, there is general agreement that a dispute constitutes a case when two parties have adverse legal interests and that a court can resolve the dispute through “decid[ing] on the rights” of the parties.⁵⁴ Thus, not all disputes form a case. Abstract disagreements about the law, for example, do not form a justiciable case because they do not involve adverse interests.⁵⁵ The judicial power is properly invoked when a plaintiff has at stake a personal interest that is adverse to the defendant’s interest and a court can vindicate that interest immediately through a judicial order based on a legal determination of the rights of the parties.⁵⁶

A plaintiff facing a threat of injury from a defendant’s illegal conduct meets this threshold. That plaintiff has an interest in preventing that injury from occurring, or at least an interest in reducing the risk of its occurrence. Thus, for example, if a factory’s emissions create a 10% chance that Paul, who lives next door to the factory, will develop lung cancer, Paul has a real interest in stopping the factory’s emissions even if there is a 90% chance that the emissions will not cause him to develop cancer. If the law forbids such emissions, a court may vindicate Paul’s interest by ordering the factory to cease from producing those emissions. That is the reason why courts have held that they have jurisdiction to hear claims for prospective relief.⁵⁷

The same reasoning applies when the risk of injury is extremely low. In such cases, the plaintiff still has a personal interest that the courts may vindicate through an appropriate order. If Paul faces only a 0.0001% chance, or even a 0.00001% chance, of developing cancer because of the factory’s emissions, he still has a real interest in stopping the factory’s emissions even though there is little chance that the emissions will harm him. To be sure, when the risk of injury is small, the plaintiff’s stake in the

⁵³ THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 13, at 430; Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1763–64 (1999) (stating that the statement was “[t]he only remotely relevant” one regarding the case-or-controversy requirement).

⁵⁴ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)); *accord* *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 598 (2007) (plurality opinion); *id.* at 636 (Scalia, J., concurring in the judgment).

⁵⁵ *See* *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 297 (1979).

⁵⁶ *See* *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (noting that to be justiciable, the dispute must “admi[t] of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts” (alteration in original) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937)) (internal quotation marks omitted)).

⁵⁷ *See* *NRDC v. EPA*, 464 F.3d 1, 7 (D.C. Cir. 2006) (finding risk of 1 in 200,000 sufficiently substantial to support standing).

case is correspondingly smaller. But the plaintiff still has a real-world interest that the court may vindicate.

One might argue that a tiny risk of injury does not actually present a dispute because there is an extremely low likelihood that the injury will occur. But the fact that the injury might not occur does not render the claim nonjusticiable; otherwise, federal courts would lack jurisdiction to hear *any* claims for prospective relief because all potential future injuries have some chance of not transpiring. Rather, it is the possibility that the injury *might* occur that creates the plaintiff's interest in the case and that ought to render the case justiciable. Even when the risk of harm is very low, there is still some chance that the threatened injury will occur. The plaintiff accordingly has an interest at stake: he may be harmed.

What this means is that all claims based on a risk of injury present an actual case or controversy, no matter how small the risk. So long as (1) the challenged activity increases the plaintiff's risk of suffering harm and (2) a judicial order could stop the challenged activity, thereby removing the increased risk of harm, courts should have Article III jurisdiction to hear the claim.⁵⁸ Whether there is an actual dispute between two parties is a binary question: there either is a dispute, or there is not. If a substantial risk of injury constitutes an actual dispute, a small risk of injury does as well. The degree of risk goes to the intensity of the dispute, not whether it exists at all.⁵⁹

The Supreme Court has recognized a similar argument in concluding that there is no threshold requirement for the *size* of an injury. It has explained that any "identifiable trifle" relating to a cognizable interest will support standing.⁶⁰ Thus, standing treats identically a plaintiff who alleges

⁵⁸ Recall that, aside from injury, a plaintiff must demonstrate that the injury is traceable to the defendant and that a judicial order would redress the injury. *See Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2752 (2010) (setting forth requirements of "traceab[ility]" and "redressab[ility]" as prerequisites to standing); *supra* note 18 and accompanying text.

⁵⁹ One might argue that if the defendant's action produces only a small threat of injury and the plaintiff would still face some threat of incurring that same injury even if the defendant's conduct were stopped, then the injury the plaintiff may face is not traceable to the defendant and would not be redressed by a court order in the plaintiff's favor. But in *Massachusetts v. EPA*, the Court explained that even when a plaintiff faces a risk of injury from multiple sources, if the action represents even a "small incremental step" towards eliminating that risk, then it satisfies the traceability and redressability requirements of Article III. 549 U.S. 497, 524 (2007).

⁶⁰ *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973) (quoting Kenneth Culp Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 613 (1968)). There are reasons to question this doctrine. If any identifiable trifle can support standing, standing should pose no barrier to any plaintiff's suit because anyone who is motivated enough to file suit has suffered some emotional distress—which is at least a trifling injury—from the challenged conduct. Indeed, for this reason, the Court itself has limited the types of injuries that may support standing. *See, e.g., Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 486 (1982) (refusing to recognize standing based solely on psychic harm). This limitation has led to confusion in standing law because the Court has refused to abandon its rhetorical stance that any trifle suffices for standing and has continued to allow standing based on certain types of psychic

only 1¢ in harm and a plaintiff who alleges a \$100,000 injury; both have a personal stake warranting invocation of the courts.⁶¹ A plaintiff's interest in a case depends on both the size and likelihood of suffering an injury.⁶² Therefore, because standing does not impose a minimum requirement for the size of the injury, it also should not impose a threshold for the likelihood of injury.

Indeed, more than being merely conceptually inconsistent with the “identifiable trifle” standard, the minimum-risk requirement directly conflicts with holdings that the size of the harm is irrelevant to whether a plaintiff has standing. That is because risk of harm itself—as opposed to the particular harm that is threatened—may constitute an injury in fact. To use the same example as before, the injury supporting Paul's standing is not the cancer that he may develop, but the risk that he might develop cancer.

Although many cases focus only on the harms that will result when determining whether a plaintiff has standing to challenge future injuries, a number of decisions establish that a risk of harm itself constitutes an injury in fact.⁶³ One example comes from the equal protection context. Courts have held that the relevant injury a person suffers from unlawful discrimination is the loss of *opportunity* that results from discrimination, regardless of the other consequences of that discrimination. Thus, where a state discriminates against a job applicant on the basis of race, the denial of opportunity to compete on equal footing for the job is the relevant injury, not the denial of the job.⁶⁴ Indeed, even if the minority applicant is hired, he

injury such as the displeasure arising from harm to aesthetic interests. See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000). That said, there are also reasons for retaining the identifiable trifle standard. Among other things, the standard prevents judges from imposing their preferences in deciding which cases are “worth” adjudicating. Different people value different things differently. A dollar might matter more to *X* than to *Y*, because *Y* might be much richer than *X*. Setting a minimum threshold on the value of the injury for standing risks excluding harms that some might think are important. See generally Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 324–28 (2002) (noting that judges recognize injury based on their own preferences).

⁶¹ See Leiter, *supra* note 7, at 406.

⁶² This concept is reflected in the notion of expected value. See 5 DAVID BESANKO, DAVID DRANOVE, MARK SHANLEY & SCOTT SCHAEFER, *ECONOMICS OF STRATEGY* 470 & 503 n.2 (5th ed. 2010).

⁶³ See Sunstein, *supra* note 7, at 46–50. One example of risk causing injury outside the legal context comes from the stock market. The market routinely discounts the present values of a firm's securities based on the risks associated with that firm's future performance. Conduct today that increases the risk for the firm tomorrow injures the firm by reducing the firm's present value. See Daniel A. Farber, *Uncertainty as a Basis for Standing*, 33 HOFSTRA L. REV. 1123, 1123 (2005).

⁶⁴ See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 211 (1995) (stating that injury occurs when a “discriminatory classification prevent[s] the plaintiff from competing on an equal footing” (alteration in original) (quoting *Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 667 (1993)) (internal quotation marks omitted)).

may still have suffered the harm of discrimination.⁶⁵ Loss of opportunity to compete on a level playing field is essentially a risk injury: the discrimination increases the probability that the discriminated-against individual will not get the job.⁶⁶

Together with the principle that the size of the harm is irrelevant to whether a plaintiff has standing, the fact that a risk of harm may constitute an injury itself means that any risk of harm, even a tiny one, should suffice for Article III standing. Indeed, the Supreme Court has implicitly recognized this point in cases alleging procedural injury.⁶⁷

Procedural injuries occur when agencies undertake actions without affording the statutory procedures due to the plaintiff—for example, when an agency promulgates a rule without addressing substantive comments submitted by the plaintiff on that rule.⁶⁸ In those cases, courts have insisted that the injury supporting standing is not the failure of the agency to observe the procedures; rather, the injury stems from the interest that is affected by the agency's failure to observe the procedures.⁶⁹ But it is clear that the injury is *not* the effect of the agency action on the plaintiff. Courts have explained that standing is appropriate only if the court can redress the injury in fact to the plaintiff,⁷⁰ and prevailing on a procedural claim does not necessarily prevent the agency from undertaking the same action.⁷¹ Even if a plaintiff prevails on a claim that an agency failed to address the plaintiff's comments, the agency may still promulgate the same regulation on remand, just with a better justification. But the successful claim *does* reduce the probability that the agency will promulgate the same rule; the comments may lead the agency to promulgate a different rule.⁷² Thus, the relevant injury that is redressed in a procedural claim is the increased probability of harm.⁷³

⁶⁵ Likewise, even if the nonminority applicant would have received the job under a race-neutral process, the minority applicant is still harmed if the actual reason for the decision was race-based.

⁶⁶ One might argue that the recognition of standing for loss-of-opportunity claims might be based on a normative conclusion that such injuries are particularly important and therefore do not establish that standing extends to other risk injuries. But the Court has not made that distinction. Moreover, the normative desirability of recognizing standing for a particular claim is encompassed by the separate judicially cognizable test. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

⁶⁷ *Summers v. Earth Island Inst.*, 555 U.S. 488, 495–97 (2009); *Lujan*, 504 U.S. at 573.

⁶⁸ *See Summers*, 555 U.S. at 496–97.

⁶⁹ *See id.*

⁷⁰ *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000).

⁷¹ *See* Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 228 (1992).

⁷² *See* STEPHEN G. BREYER, RICHARD B. STEWART, CASS R. SUNSTEIN & ADRIAN VERMEULE, *ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES* 351 (6th ed. 2006) (describing the range of consequences from judicial remands of agency actions).

⁷³ To be sure, some injuries—such as stigma and dissatisfaction with government action—cannot support standing. *See* CHEMERINSKY, *supra* note 45, § 2.3.2, at 74. But those exceptions depend on the type of injury, not the size of that injury. Economic injury will always support standing even if the

Although courts have deemed them justiciable, procedural injuries present a conundrum under the minimum-risk requirement. The reason is that many claims asserting procedural injury do not allege imminent harm because plaintiffs often must challenge administrative actions long before any harm occurs. Instead of declaring these claims nonjusticiable, however, the Supreme Court has stated that the imminence requirement does not apply to claims based solely on procedural injury.⁷⁴ Thus, in *Lujan*, the Court explained that a person “living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency’s failure to prepare an environmental impact statement, even though . . . the dam will not be completed for many years.”⁷⁵

But as noted earlier, under the Court’s view, the imminence requirement is simply one component of the minimum-risk requirement.⁷⁶ Imminence ensures that the harm is not overly speculative.⁷⁷ There is no reason to treat a low probability of injury resulting from a lack of imminence differently from a low probability resulting from other causes.⁷⁸ The reason that an injury is unlikely to occur is irrelevant to whether a dispute constitutes a case; all that matters is whether the parties have interests that are adverse and the court can issue a ruling that resolves that conflict.⁷⁹ Accordingly, if Article III does not forbid actions based on procedural claims where the injury is unlikely to occur because it is not imminent, neither should it prohibit claims based on injuries that are unlikely to occur for other reasons.

B. Other Advantages of the “Any-Risk-of-Harm” Standard

Recognizing that any threat of injury constitutes a justiciable case or controversy would result in a number of other improvements over the minimum-risk requirement. To start, broad probabilistic standing would allow the courts to carry out better their role of preventing avoidable harms. One reason that courts have the power to award injunctions and other forms of prospective relief is that people should not be forced to sustain injuries

economic loss is extremely small. Likewise, if an injury is of the sort that cannot support standing, standing will still be unavailable even if that injury is extremely large. *See, e.g.,* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 485–86 (1982) (refusing to find standing based on intense dissatisfaction with government policies because dissatisfaction with government policies cannot alone support standing).

⁷⁴ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992).

⁷⁵ *Id.*

⁷⁶ *See supra* note 47 and accompanying text.

⁷⁷ *See supra* note 47 and accompanying text.

⁷⁸ If anything, a lack of imminence provides *greater* reasons for not recognizing standing because other branches might have sufficient time to cure the alleged harm. *See infra* Part IV.C.

⁷⁹ *See supra* text accompanying note 56.

that can be prevented.⁸⁰ The minimum-risk requirement impairs that power. Although a low-threat injury only rarely occurs, it still may transpire. For example, even if the risk of injury is one in a million, there is a greater than 50% chance that at least one resident in a town of one million residents subject to that risk will sustain that injury.⁸¹ Under the minimum-risk requirement, those individuals who will eventually end up suffering that unlikely injury are prevented from obtaining judicial intervention to prevent that injury.

Extending the judicial power to any threat of injury would also better achieve legislative goals. Congress ordinarily does not legislate to prevent injuries to particular individuals. Instead, legislation usually is targeted at reducing the number of injuries to the population at large.⁸² It is, in other words, probabilistic in nature.⁸³ Imposing a threshold risk requirement for standing undermines Congress's ability to legislate in this way. Congress may seek to prevent all risks of a particular type of harm, but courts will not enforce that legislation with respect to an individual who faces only a small risk of suffering that harm. Indeed, in some cases no individual may face the risk necessary to support standing, and consequently Congress's policies could go unenforced. In short, under the minimum-risk requirement, Congress and the courts talk past each other.⁸⁴

Extending standing to any risk of harm would also result in a more rational doctrine. A rational plaintiff's interest in a case depends not on the size of the harm he faces but on the expected value of the harm—that is, the probability of the harm multiplied by the size of the harm. For example, a plaintiff should treat a 10% chance of a \$500 injury the same as a 50% chance of a \$100 injury, because both have an expected value of \$50. But

⁸⁰ See, e.g., DAN B. DOBBS, LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION § 2.5(3), at 92–93 (2d ed. 1993) (articulating arguments underlying coercive remedies).

⁸¹ Indeed, there is a greater than 50% chance of injury occurring to a resident in a town of 693,147 residents. This results from solving for x in the following inequality: $1 - (999,999/1,000,000)^x > 0.5$.

⁸² See *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445–46 (1915) (distinguishing between legislation, which is general, and adjudication, which is particularized); *Leiter*, *supra* note 7, at 413–14.

⁸³ See Felix Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1005 (1924) (“[L]egislation to a considerable extent must necessarily be based on probabilities . . .”).

⁸⁴ Courts could solve this problem by considering standing based on the aggregate risk to a population. Under that approach, standing would be easier to establish because, even though one person might not face a sufficient threat of injury, the community as a whole would face a substantial threat of injury. But in *Summers v. Earth Island Institute*, the Court rejected this approach. 555 U.S. 488, 497–99 (2009). There, an environmental association brought suit to challenge regulations that would affect various parcels of land regulated by the U.S. Forest Service. *Id.* at 491. Although no member had firm plans to visit a site covered by this regulation, the organization had more than 700,000 members who enjoy the forest in which the sites were located, making it statistically likely that at least one of the members of the organization would visit one of those sites. *Id.* at 497–98. The Court held that the association lacked standing, explaining that standing cannot be aggregated among the members of an organization; instead, each member must be evaluated independently for standing. *Id.* at 498–99.

because of the minimum-risk requirement, standing doctrine does not treat these two equivalent expected values the same way.⁸⁵

As noted earlier, although it imposes a minimum requirement for risk of injury, standing does not impose a minimum threshold for the size of an injury; any identifiable trifle will suffice.⁸⁶ Consequently, a plaintiff may have standing to challenge a small injury that is likely to occur, but lack standing to challenge a large injury that is unlikely to occur, even though the expected harm from those two injuries is the same. Indeed, under current doctrine, standing exists for a potential trivial injury that barely clears the probability threshold, but does not exist for a severe injury that is just below that probability threshold. This is true even if the expected harm of the more serious injury *exceeds* that of the expected harm of the more likely but trivial injury. This discrepancy is reflected in decisions finding standing for an individual likely to suffer the tiny harm of the denial of a fraction of a vote,⁸⁷ but denying standing for an individual who faced a smaller risk of the greater harm of being subject to a chokehold that had the potential to inflict serious physical injury.⁸⁸ Although the two injuries are not easily compared, it is hardly unreasonable to think that the expected harm of the less likely chokehold exceeded that of the less potentially harmful but more likely denial of a fraction of a vote.

A similar irrationality occurs in cases where a large number of people face a risk of harm. Imagine two situations, each involving a population of 1000 people. In the first scenario, one member of that population has a 100% chance of being harmed. In the second scenario, there is a 100% chance that one random person in the population of 1000 will be harmed; thus, each person faces a 0.1% chance of harm. In both cases, a person will be hurt. But under the minimum-risk requirement, standing is proper only in the first case. (One might argue that a 0.1% chance of harm is substantial enough to justify standing, but that objection is easily answered by increasing the population at risk so as to reduce the risk of harm to any one person.) The difference is that in the first situation we know *ex ante* who will be hurt while in the second we know only *ex post*. But that difference should not matter, at least so far as justiciability is concerned. In both cases a court may enter an order preventing the harm (in the former case by granting an injunction for the particular victim, in the latter for anyone among the potential victims). Of course, there is a question about who is the appropriate plaintiff. In the case of the known victim, the plaintiff is

⁸⁵ See Leiter, *supra* note 7, at 408–09 (making a similar observation).

⁸⁶ See *supra* note 60 and accompanying text.

⁸⁷ See *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973) (“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.” (citations omitted)).

⁸⁸ See *City of Los Angeles v. Lyons*, 461 U.S. 95, 102–03 (1983).

obvious, while in the case of the random victim, any individual who faces the threat of harm has a stake in the suit. The consequence is that many individuals have standing to bring suit. But the number of potential plaintiffs does not affect whether a dispute presents a justiciable controversy. Courts routinely hear claims, like those alleging securities fraud, involving many plaintiffs.⁸⁹

Aside from the irrationality of the doctrine, the minimum-risk requirement is troublingly imprecise. As currently framed, the requirement involves a qualitative, not a quantitative, assessment. To establish standing, plaintiffs need not clear a precise numerical threshold of risk for standing; instead, they must show that the risk of injury is “real.”⁹⁰ But courts have disagreed about when a risk of harm is sufficiently high to be real.⁹¹ Moreover, even when there is agreement about the appropriate qualitative standard, reasonable people routinely differ about whether that qualitative standard is satisfied. What constitutes a “real” threat of injury for one person may not for another.⁹² Ambiguity is the inevitable consequence of a qualitative standard.

Exacerbating this problem is the fact that courts generally have proven themselves incapable of applying the minimum-risk requirement in a rigorous way. As a general matter, courts have failed to engage in a careful analysis in evaluating whether a threatened injury alleged by a plaintiff has a sufficient likelihood of occurring. One example of this shortcoming is in the courts’ failure to recognize that most claims of future injury actually involve multiple probabilities.

Consider the simple case in which Jim seeks an order barring Todd from hitting him with a bat. This claim involves at least two separate probabilistic events. There is first the probability of Todd actually undertaking the activity that could cause harm—swinging the bat. The

⁸⁹ See *FEC v. Akins*, 524 U.S. 11, 24 (1998); *accord id.* at 36 (Scalia, J., dissenting). To be sure, courts have refused to recognize standing for individuals claiming a generalized grievance. But so long as each plaintiff has an individualized interest at stake—as is the case when each individual faces a threat of harm—each plaintiff has standing to bring suit even if the result is that many different plaintiffs have standing. *See id.* at 35. An example may illustrate this point. Suppose several people each face a 20% chance of developing cancer from exposure to a toxic substance. Although each individual faces an identical risk of developing cancer, the risk is personal to each individual. Each person faces an individual risk of harm.

⁹⁰ See *supra* note 25 and accompanying text.

⁹¹ Compare *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002) (requiring a substantial risk for standing), with *Vill. of Elk Grove Vill. v. Evans*, 997 F.2d 328, 329 (7th Cir. 1993) (allowing any risk to support standing).

⁹² Compare, e.g., *La. Env'tl. Action Network v. EPA*, 172 F.3d 65, 68 (D.C. Cir. 1999) (concluding that the probability of harm from a potential deposit of hazardous waste was sufficiently substantial to support standing), with *id.* at 71–72 (Sentelle, J., concurring in part and dissenting in part) (disagreeing with the majority opinion).

second is the probability that the swing will hit Jim, causing him harm.⁹³ When the occurrence of an event depends on multiple probabilities, the probability of that event occurring is the product of each of the probabilities. Thus, if there is a 40% chance that Todd will swing the bat, and a 10% chance that Todd will hit Jim if he swings the bat, there is only a 4% (40% × 10%) chance that Jim will suffer harm (assuming the probabilities are independent).

Courts addressing probabilistic standing have generally not analyzed separate probabilities in assessing whether the plaintiff had standing. In *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, for example, environmentalists located in Washington D.C. challenged a freight rate increase for railroads.⁹⁴ The plaintiffs claimed that the rate increase would lead to less recycling because the greater rates would allow railroads to afford transporting raw material, which consequently would encourage more mining and lumbering.⁹⁵ According to the environmentalists, these events could cause them aesthetic harm because some of these resources might be taken from the Washington area, resulting in more refuse in local parks.⁹⁶ The probability of each of these events occurring was rather low. There was uncertainty whether the rate increases would indeed result in more consumption of raw materials, whether the consumption would result in mining and logging in the Washington area, whether those activities would produce refuse in local parks, and whether the plaintiffs would visit any of the precise locations affected by greater refuse. Although it is difficult to measure the probability of each of these events, the probability of each event occurring independently was no doubt low, and consequently the product of those probabilities was extremely low.⁹⁷ Nevertheless, the Court found standing.⁹⁸

Contrast *SCRAP* with *Lujan*.⁹⁹ There, petitioners sought to challenge a government regulation exposing endangered species in foreign countries to

⁹³ There is also the question whether the harm the plaintiff suffers is cognizable under the law—a probabilistic inquiry because courts have introduced uncertainty by refusing to recognize some injuries as sufficient for standing. Cf. Yuval Feldman & Doron Teichman, *Are All Legal Probabilities Created Equal?*, 84 N.Y.U. L. REV. 980, 985–86 (2009) (discussing the probabilistic nature of uncertain law).

⁹⁴ 412 U.S. 669, 678 (1973).

⁹⁵ *Id.* at 675–76.

⁹⁶ *Id.* at 688.

⁹⁷ See *Massachusetts v. EPA*, 549 U.S. 497, 548 n.2 (2007) (Roberts, C.J., dissenting) (criticizing the “attenuated nature of the injury” in *SCRAP*). The Court subsequently recognized in *Whitmore v. Arkansas* that the string of probabilities in *SCRAP* rendered the alleged injury “attenuated.” 495 U.S. 149, 158 (1990). But in doing so, the *Whitmore* Court did not conclude that the probabilities were not so remote as to make the claim in *SCRAP* plausible. Instead, the Court switched gears, justifying *SCRAP* on the ground that “the string of occurrences alleged [c]ould happen immediately.” *Id.* at 159. That the injury could happen immediately, however, does not establish that the injury is likely to happen.

⁹⁸ *SCRAP*, 412 U.S. at 690.

⁹⁹ 504 U.S. 555 (1992).

harm.¹⁰⁰ The petitioners based their standing on the claim that they intended to go to the foreign countries to see the endangered animals and that the regulation would impair their ability to do so.¹⁰¹ The Court denied standing on the ground that the petitioners did not specify when they intended to go to those countries.¹⁰² The fact that the petitioners did not specify a particular date does tend to reduce the probability that they would indeed go to those foreign countries, but their averment that they had every intention of going still seems to create a realistic probability that they would eventually go. Of course, even if the petitioners went to those countries, there was uncertainty whether they would be unable to see the animals because of the regulation. But it is difficult to say that the probability of harm was clearly lower than the probability of harm in *SCRAP*.

One likely explanation for courts' failure to assess probabilistic injuries rigorously is that courts often must make their assessment without adequate information about the probabilities of harm. Probabilities are predictions about future events, and those predictions themselves are often imprecise.¹⁰³ Doctors may agree, for example, that secondhand exposure to cigarette smoke increases the risk of developing cancer, but they do not agree on the precise amount of risk increase. Similar unknowns plague many other areas of risk assessment. Consider global warming, the threat of nuclear meltdown, the chances of entering into an economic recession, and the likelihood that a house will be devoured by termites—all risks that undeniably exist, but whose size is a matter of dispute.

Uncertainty about probability forces courts to forego precise calculations of probabilities and instead to evaluate probability on a gestalt feeling of the likelihood of a harm occurring. Assessments of this sort, however, are vulnerable to biases. One such bias is the availability heuristic, which leads people to have a heightened fear of a risk of harm if an example of that harm occurring readily comes to mind.¹⁰⁴ This heuristic suggests that decisions about whether a threat of injury is adequate may depend more on an individual judge's personal experiences and biases than

¹⁰⁰ *Id.* at 558–59.

¹⁰¹ *Id.* at 563–64.

¹⁰² *Id.* at 564.

¹⁰³ See generally Hillel J. Einhorn & Robin M. Hogarth, *Ambiguity and Uncertainty in Probabilistic Inference*, 92 *PSYCHOL. REV.* 433 (1985) (describing uncertainty about uncertainty).

¹⁰⁴ See Norbert Schwarz & Leigh Ann Vaughn, *The Availability Heuristic Revisited: Ease of Recall and Content of Recall as Distinct Sources of Information*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 103, 103 (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds., 2002); see also Cass R. Sunstein, *On the Divergent American Reactions to Terrorism and Climate Change*, 107 *COLUM. L. REV.* 503, 534 (2007) (discussing the practical impact of the heuristic). Other considerations influence perceptions of risks. For example, one study concludes that the expressive function of law may lead people to have heightened perceptions of the risk of avoiding conviction arising from a lack of clarity in the law, as compared to the risk of avoiding conviction from uncertain enforcement. See Feldman & Teichman, *supra* note 93.

actual probabilities.¹⁰⁵ This may explain in part the Court's willingness to find standing in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*,¹⁰⁶ but its refusal to do so in *City of Los Angeles v. Lyons*.¹⁰⁷ In *Laidlaw*, the plaintiffs brought suit against a company because of the alleged risk of harm from the discharge of pollutants into a river waterway, even though the plaintiffs conceded that continual past emissions had not caused them harm.¹⁰⁸ In *Lyons*, the plaintiff had previously been choked by police and alleged that he might again be subject to a police chokehold.¹⁰⁹ No doubt, the Justices, who were law-abiding property owners, could more easily relate to property damage from emissions than to experiencing a chokehold while being arrested.

These cognitive biases are likely not the only extraneous factors that influence probability determinations. Given the entirely inadequate information courts must use to evaluate risk, it seems likely that a variety of considerations other than the size of the threat of injury creep into courts' standing determinations for claims of unlikely future injuries. Although framing their decisions in terms of whether a threat is speculative or not, courts may actually base their standing decisions on matters such as separation of powers, federalism, efficiency, docket size, or some other concern. This, too, may provide some explanation of the decisions in *Lyons* and *Laidlaw*. In *Lyons*, the plaintiff sought an injunction against the Los Angeles police,¹¹⁰ but the suit in *Laidlaw* was against a private company.¹¹¹ The denial of standing in *Lyons* and the grant of standing in *Laidlaw* may reflect the Court's unwillingness to interfere in the workings of state government.¹¹² This is not to say that the Justices consciously based their decisions on these considerations. But the point remains that the current doctrine is sufficiently vague that courts may easily justify deciding many cases either way, and those decisions may be influenced by a number of factors other than the size of the risk of injury.

¹⁰⁵ Cf. Nichol, *supra* note 60, at 332 (arguing that Justices reach conclusions about adequacy of injury based on personal experience and intuition).

¹⁰⁶ 528 U.S. 167 (2000).

¹⁰⁷ 461 U.S. 95 (1983).

¹⁰⁸ 528 U.S. at 181–84, 199.

¹⁰⁹ 461 U.S. at 97–98.

¹¹⁰ *Id.* at 99–100.

¹¹¹ 528 U.S. at 173.

¹¹² See Fallon, *supra* note 7, at 648 (arguing that justiciability rulings may depend on concerns about interfering with the government). The *Laidlaw* majority distinguished *Lyons* on the ground that in *Lyons* it was speculative whether the harm would ever “take place,” while in *Laidlaw* it was clear that the illegal activity—the discharge of pollutants—would continue. *Laidlaw*, 528 U.S. at 184. But the continuance or not of the illegal activity is not the relevant question. Rather, the question is whether there is any injury from that activity, and in *Laidlaw*, there had not been injury from the ongoing activity.

Extending Article III jurisdiction to all threats of injury would largely solve these problems. Judges would no longer face the prospect of guessing based on insufficient information whether a particular risk is adequately substantial, and litigants would no longer face the prospect of decisions being rendered based on biases and considerations other than the threshold of the injury.¹¹³

III. ADDRESSING OTHER REASONS FOR EXCLUDING SMALL RISKS OF INJURY UNDER ARTICLE III

Although a low probability of injury presents a dispute capable of judicial resolution, there may be other reasons to interpret Article III in a way that does not extend to those claims. For example, one might argue that the historical backdrop against which Article III was written establishes that the Framers did not intend federal courts to be empowered to hear disputes based on small risks of harm. Or one might think that ruling on low-probability injuries runs afoul of the restriction on advisory opinions or violates separation of powers in other ways. Another possible objection is that extending standing to all potential injuries would overwhelm the federal courts with litigation. This Part considers those arguments.

A. Historical Equity

The Supreme Court has explained that the case-or-controversy requirement limits the judicial power to deciding those disputes “traditionally amenable to, and resolved by, the judicial process.”¹¹⁴ Historically, courts did not have the power to award relief for all threatened injuries. Instead, according to Mitford’s 1782 treatise on equity, courts would enter an injunction only when the plaintiff faced a “probable ground of possible injury.”¹¹⁵ Justice Johnson articulated the same standard in 1792, stating that a plaintiff must confront a “probable danger” of injury,¹¹⁶ as did Justice Story in his *Commentaries on Equity Pleadings*, in which he states that an injunction is appropriate to prevent “a probable ground of possible

¹¹³ This is not to say that courts *must* exercise jurisdiction for all claims of any potential risk. As discussed *infra* Part IV, one might create a system under which, even though they possess Article III jurisdiction, courts may decline to exercise that jurisdiction based on the cost of the remedy, the effect of exercising jurisdiction on the government, or a host of other costs.

¹¹⁴ *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774 (2000) (quoting *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102 (1998) (internal quotation mark omitted)).

¹¹⁵ JOHN MITFORD & SAMUEL TYLER, *MITFORD’S AND TYLER’S PLEADINGS AND PRACTICE IN EQUITY: A TREATISE ON THE PLEADINGS IN SUITS IN THE COURT OF CHANCERY BY ENGLISH BILL* 106 (5th ed. 1890); accord JOHN MITFORD, *A TREATISE ON THE PLEADINGS IN SUITS IN THE COURT OF CHANCERY BY ENGLISH BILL* 8 (2d ed. 1787).

¹¹⁶ *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 402, 405 (1792) (Johnson, J.).

injury.¹¹⁷ Other historical sources espoused a similar view.¹¹⁸ Thus, it was not necessary for the plaintiff to prove that the injury necessarily would occur. But when an injury was unlikely to occur, relief would be denied.¹¹⁹

It may be that these historical limitations on equity are the original source of standing law's minimum-risk requirement.¹²⁰ But even so, the Supreme Court has separated Article III from equity in more recent times. Since the 1930s, the Court has held that Article III does not confine the judiciary to the traditional forms of equity. Thus, in *Aetna Life Insurance Co. v. Haworth*,¹²¹ the Court rejected the argument that Article III did not permit the issuance of a declaratory judgment, explaining that Article III "did not crystallize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy."¹²²

Moreover, recent cases suggest that standing imposes a lower threshold than that historically required for an injunction. One example is *Massachusetts v. EPA*.¹²³ There, Massachusetts challenged the EPA's refusal to issue a rule regulating emissions that allegedly contribute to global warming.¹²⁴ Massachusetts claimed standing on the ground that global warming could threaten the loss of land from rising sea levels by the

¹¹⁷ 1 JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS, AND THE INCIDENTS THEREOF, ACCORDING TO THE PRACTICE OF THE COURTS OF EQUITY OF ENGLAND AND AMERICA, ch. 2, § 9, at 9 (10th ed. 1892).

¹¹⁸ See, e.g., *City of Rochester v. Curtiss*, Cl. Ch. 336, 339 (N.Y. Ch. 1840) ("In cases of doubtful right or remote and contingent injury, this court will wait for the right to be settled at law or the injury to become imminent, before it will interfere with its extraordinary process of injunction."); *Coalter v. Hunter*, 25 Va. (4 Rand.) 58, 66 (1826) ("If [plaintiff] had been in the actual enjoyment of the use of the water, and had reasonable ground to apprehend that [defendant] intended to deprive him of that enjoyment, an application to the Chancellor to *prevent* this threatened injury, might have been proper."); *Bush v. Western*, (1720) 24 Eng. Rep. 237 (K.B.) 237–38 (refusing to grant relief to a mortgage holder, as opposed to a land possessor, for potential damage to property since the holder did not face a sufficient probability of injury); 1 JOHN NORTON POMEROY, JR., A TREATISE ON EQUITABLE REMEDIES; SUPPLEMENTARY TO POMEROY'S EQUITY JURISPRUDENCE § 523, at 888 (1905) (stating that "a mere possibility of a future nuisance will not support an injunction," but nor is it necessary to prove "that the nuisance *will* occur"; rather, "it is sufficient . . . that the *risk* of its happening is greater than a reasonable man would incur" (first emphasis added)).

¹¹⁹ See *Clinton Liberal Inst. v. Fletcher*, 55 How. Pr. 431, 432 (N.Y. Sup. Ct. 1878); 3 WILLIAM BLACKSTONE, COMMENTARIES *225 ("[H]e, who hath the remainder *for life* only, is not entitled to sue for waste; since his interest may never perhaps come into possession, and then he hath suffered no injury.").

¹²⁰ The Court has also justified the hearing of future injuries under Article III on the ground that historically courts *could* hear such claims. See *Vicksburg Waterworks Co. v. Vicksburg*, 185 U.S. 65, 82 (1902) (holding that a threatened injury presented a case because "one of the most valuable features of equity jurisdiction[] [is] to anticipate and prevent a threatened injury, where the damages would be insufficient or irreparable").

¹²¹ 300 U.S. 227 (1937).

¹²² *Id.* at 240 (quoting *Nashville, Chattanooga & St. Louis Ry. v. Wallace*, 288 U.S. 249, 264 (1933)) (internal quotation mark omitted).

¹²³ 549 U.S. 497 (2007).

¹²⁴ *Id.* at 514.

end of the twenty-first century.¹²⁵ But traditionally, injunctions were not available to prevent harms on such a time horizon. In the nineteenth-century case *Fletcher v. Bealey*, a paper mill, which operated on a river and depended on pure water for its operation, sought an injunction against a plant that was discharging substantial quantities of sulfuric “vat waste” upstream.¹²⁶ The court denied injunctive relief.¹²⁷ Although acknowledging that within ten years the water “would be polluted sufficiently to do a great amount of injury to the Plaintiff,” the court explained that by that time advances in technology might prevent the damage.¹²⁸ If the limitations of equity defined the scope of Article III, *Fletcher* would suggest that Massachusetts lacked standing in *Massachusetts v. EPA*. But the *Massachusetts v. EPA* Court found standing based on the threatened loss of coastal land, even though advances in technology might have prevented the damage.

Most important, the reasons underlying the constitutional doctrine of standing are not the same as those underlying the limitations on injunctive relief. Under current understanding, the main reason for standing is to preserve separation of powers.¹²⁹ More functional concerns motivate the restrictions on injunctive relief. The ancient Court of Chancery did not have the same degree of concern about separation of powers because the court was acting on behalf of the Crown.¹³⁰ The reason for the probable harm requirement was to preserve judicial resources by refusing to issue injunctions except when necessary and to avoid placing unnecessary burdens on parties.¹³¹

The doctrine of ripeness most clearly illustrates the distinction between the probability requirements of equity and Article III. Ripeness has both

¹²⁵ *Id.* at 541–542 (Roberts, C.J., dissenting) (noting that one harm supporting standing was the possible loss of land in the next few decades).

¹²⁶ (1885) 28 Ch. 688 at 693–95 (Eng.).

¹²⁷ *Id.* at 700.

¹²⁸ *Id.* at 699–700; *see also* Attorney Gen. v. Kingston-on-Thames, (1865) 34 H.L. 481 at 487 (Eng.) (refusing to enjoin the town of Kingston from dumping sewage into the Thames on the ground that that any harm from dumping might not arise for “a hundred years hence”).

¹²⁹ *See* Hessick, *supra* note 17, at 296.

¹³⁰ DAVID LINDSAY KEIR, THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN SINCE 1485, at 29 (9th ed. 1969) (“[C]ontact between the Crown and its judges was close and . . . the judges reckoned themselves very fully its servants.”); *see also id.* at 142. That said, beginning in the seventeenth century, England did recognize some authority of the courts to check the Crown. *See* Roscoe Pound, *The End of Law as Developed in Juristic Thought*, 27 HARV. L. REV. 605, 622 (1914) (noting “the victory of the courts in the contests between courts and crown in seventeenth-century England”).

¹³¹ *See* Gene R. Shreve, *Federal Injunctions and the Public Interest*, 51 GEO. WASH. L. REV. 382, 419 (1983) (“For a court to issue an injunction without finding the probability of imminent harm is wasteful of scarce judicial resources.”); *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 1005–08 (1965) (explaining that the imminence requirement derives from a desire to avoid overly regulating conduct).

constitutional and prudential components.¹³² As noted earlier, the constitutional component mirrors the imminence requirement of standing; a party must face a sufficiently immediate threat of injury that presents an actual controversy.¹³³ The prudential component extends beyond this constitutional core. It aims to improve the decisionmaking process and to avoid the unnecessary expenditure of judicial resources.¹³⁴ These are precisely the functional concerns underlying the hesitancy of federal courts to grant injunctions based on remote harms.¹³⁵

Courts have also treated requirements for an injunction more flexibly than those for standing. In determining whether to grant an injunction, courts consider the severity of an alleged harm together with the likelihood that the harm will occur.¹³⁶ The greater the threatened harm, the less the required showing of the harm's likelihood of occurring.¹³⁷ By contrast, in determining whether a risk of injury is sufficient, courts have generally not inquired into the severity of the threatened harm alleged.¹³⁸ Instead, they have considered the likelihood of the injury occurring independent from the nature of the harm. Whatever the threatened injury—be it a chokehold that can result in permanent physical damage,¹³⁹ the impairment of the ability to view and enjoy animals,¹⁴⁰ the destruction of coastline,¹⁴¹ the deprivation of hospital services,¹⁴² or the death penalty¹⁴³—courts have employed the same probability requirements, asking only whether the risks of injury are realistic and imminent, without factoring in the gravity of the harm.

B. *Advisory Opinions*

Another possible objection to the any-risk-of-harm standard is that allowing standing based on any threat of injury potentially runs afoul of the restriction on advisory opinions. Courts and commentators have disagreed

¹³² See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1767 n.2 (2010) (quoting *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993)).

¹³³ See *supra* note 44 and accompanying text.

¹³⁴ See *Nichol*, *supra* note 40, at 176 (detailing the prudential uses of ripeness).

¹³⁵ See *Hotel & Rest. Emps. Union, Local 25 v. Attorney Gen.*, 804 F.2d 1256, 1277 n.10 (D.C. Cir. 1986) (Silberman, J., concurring in part and dissenting in part) (noting that the prudential aspects of ripeness derive from equity), *vacated*, 846 F.2d 1499 (D.C. Cir. 1988) (en banc).

¹³⁶ See, e.g., *Oakland Tribune, Inc. v. Chronicle Publ'g Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985) (describing a “sliding scale” of likelihood and severity of harm).

¹³⁷ RESTATEMENT (SECOND) OF TORTS § 933(1) cmt. b (1977) (“The more serious the impending harm, the less justification there is for taking the chances that are involved in pronouncing the harm too remote.”).

¹³⁸ See *supra* note 85 and accompanying text.

¹³⁹ *City of Los Angeles v. Lyons*, 461 U.S. 95, 97–99 (1983).

¹⁴⁰ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–63 (1992).

¹⁴¹ *Massachusetts v. EPA*, 549 U.S. 497, 521 (2007).

¹⁴² *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 43 (1976).

¹⁴³ *Whitmore v. Arkansas*, 495 U.S. 149, 156–57 (1990).

on the precise definition of an advisory opinion.¹⁴⁴ An expansive definition is that an advisory opinion encompasses a judicial decision that has no effect in the real world.¹⁴⁵ Under this definition, a decision on a claim based on an extremely-low-probability injury would arguably be an advisory opinion because resolving the claim would require the court to provide relief from an injury that is almost certain not to occur and thus likely to have no real-world effect.

This is the view that the Supreme Court espoused in *United Public Workers of America (C.I.O.) v. Mitchell*.¹⁴⁶ There, several federal employees who sought to participate in political campaigns brought suit challenging the potential enforcement of the Hatch Act, which prohibits federal employees from participating in political campaigns.¹⁴⁷ The Court dismissed the claim of all appellants (with the exception of George P. Poole, the only appellant who had actually violated the Hatch Act) for lack of jurisdiction.¹⁴⁸ It explained that, to exercise jurisdiction, plaintiffs had to allege not simply the “general threat” that officials might enforce the Act against them, but a “direct threat of punishment” for violating that law.¹⁴⁹ According to the Court, any opinion to redress a “hypothetical threat,” as opposed to an actual controversy, would be merely an “advisory opinion.”¹⁵⁰

But *Mitchell*’s characterization of a decision where the probability of injury was low as an advisory opinion is unwarranted. Resolving a claim based on a low probability of injury *does* have a real-world effect. Even when the threat of injury is extremely low, a judicial decision targeted at that threat might reduce, or even remove, the threat. Consider the situation where a person faces a 0.005% chance of cancer because of a factory’s emissions. Although the chance of developing cancer from the emissions is low, an injunction ordering the factory to reduce its emissions will still reduce the plaintiff’s chance of developing cancer from those emissions.

Moreover, the expansive definition of an advisory opinion relied on by *Mitchell* is too broad.¹⁵¹ *Mitchell* does not explain *why* a decision addressing a remote threat of injury constitutes an advisory opinion. Instead, it simply equates advisory opinions with lack of standing because of a low

¹⁴⁴ See Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 643–45 (1992) (noting different uses of the term “advisory opinion”).

¹⁴⁵ See, e.g., Jennifer Mason McAward, *Congress’s Power to Block Enforcement of Federal Court Orders*, 93 IOWA L. REV. 1319, 1344 (2008) (arguing that “judicial intervention” that has “no real-world effect” is “tantamount to an advisory opinion”).

¹⁴⁶ 330 U.S. 75, 89 (1947).

¹⁴⁷ *Id.* at 81–82.

¹⁴⁸ *Id.* at 83, 91.

¹⁴⁹ *Id.* at 88.

¹⁵⁰ *Id.* at 89–90.

¹⁵¹ See Lee, *supra* note 144, at 643–44.

probability of injury.¹⁵² Indeed, in subsequent opinions, the Supreme Court itself has interpreted *Mitchell* as a standing decision.¹⁵³ Presumably, if the Court deemed that the threat of injury was sufficiently substantial to support standing, it would not have determined that a decision would constitute an advisory opinion. Thus, *Mitchell* does not establish a separate jurisdictional restriction for advisory opinions; rather, it limits jurisdiction only to the extent there is not standing.

Indeed, as Professor Evan Tsen Lee has persuasively demonstrated, the restriction on advisory opinions properly encompasses only two situations.¹⁵⁴ The first is when a court issues a judgment that is subject to review by another branch.¹⁵⁵ This form of the advisory opinion derives from the 1792 decision in *Hayburn's Case*.¹⁵⁶ That case involved a statutory pension scheme for disabled Revolutionary War veterans.¹⁵⁷ Under the statute, a disabled veteran submitted an application for benefits to the federal court.¹⁵⁸ The court was to determine whether the veteran was entitled to benefits, but instead of ordering benefits itself, it was to transmit its conclusions to the Secretary of War, who made the final decision whether to award benefits.¹⁵⁹ Sitting on circuit, Chief Justice Jay and Justices Iredell, Cushing, Wilson, and Blair explained that the scheme violated separation of powers by undermining the independence of the judiciary.¹⁶⁰ Since *Hayburn's Case*, the Supreme Court has consistently held that the Constitution forbids courts from issuing judgments subject to revision by another body.¹⁶¹ This first form of advisory opinion does not pose an

¹⁵² *Cf. id.* at 645 (criticizing the Supreme Court's use of the term "advisory opinion" merely on the basis of lack of standing).

¹⁵³ *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (relying on *Mitchell* for the proposition that a plaintiff has standing only if he faces an immediate threat of injury); *see also Golden v. Zwickler*, 394 U.S. 103, 109–10 (1969) (general interest in constitutionality of law is not an actual controversy). Even cases predating *Mitchell* that address insufficient injury speak in terms of standing instead of advisory opinions. In *Massachusetts v. Mellon*, for example, the Court concluded that it lacked jurisdiction to hear a challenge to a statute by an individual unaffected by the statute on the ground that the plaintiff must show "that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement." 262 U.S. 447, 488 (1923); *see also Ex parte Lévit*, 302 U.S. 633, 633–34 (1937) (per curiam) (using similar language to reject a challenge to the appointment of Justice Black).

¹⁵⁴ Lee, *supra* note 144, at 644–51 (explaining why advisory opinions do not encompass all justiciability doctrines); *see also Frankfurter, supra* note 82, at 1004 (limiting advisory opinions to situations in which the courts rule prematurely on the constitutionality of a statute).

¹⁵⁵ Lee, *supra* note 144, at 645–46.

¹⁵⁶ 2 U.S. (2 Dall.) 409 (1792).

¹⁵⁷ *Id.* at 409–10.

¹⁵⁸ Act of Mar. 23, 1792, ch. 11, 1 Stat. 243, 243–44 (repealed in part and amended by Act of Feb. 28, 1793, ch. 17, 1 Stat. 324, 324–325).

¹⁵⁹ 2 U.S. (2 Dall.) at 410 n.†; *see also* 1 Stat. at 244.

¹⁶⁰ The opinion is reproduced in a footnote in *Hayburn's Case*, 2 U.S. (2 Dall.) at 410 n.†.

¹⁶¹ *See, e.g., Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948) ("Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not

obstacle to cases alleging a low probability of injury; the likelihood of an injury is irrelevant to whether the President or Congress can review a judicial decision.

The second type of advisory opinion is one in which a court provides advice to Congress on potential legislation before it is enacted or to the President regarding how a law should be interpreted before it is enforced.¹⁶² The Supreme Court first recognized that such opinions were forbidden in 1793 when it refused to answer President Washington's questions about France's rights under various treaties.¹⁶³

This second form of advisory opinion potentially poses an obstacle to the exercise of federal court jurisdiction based on a small risk of harm. There is always a chance, though it may be miniscule, that a legislature will enact a statute that could injure an individual. Allowing absolutely any risk of injury to support standing would mean that an individual could challenge any potential future law before its enactment. Issuing an injunction against the enforcement of such a potential statute would amount to pre-enactment review and, consequently, would violate the restriction on advisory opinions. But this does not mean that federal courts generally cannot hear claims alleging small risks of harm; rather, it means only that federal courts lack jurisdiction over pre-enactment challenges to legislation.

Unlike challenges to legislation before enactment, the restriction on providing advice to the President does not bar jurisdiction over a claim because it alleges a small threat of injury.¹⁶⁴ This restriction does not generally prohibit courts from providing pre-enforcement interpretations of laws; it merely prevents the President from seeking such interpretations.¹⁶⁵ Private parties do not face a similar limitation. Federal courts routinely interpret statutes before they have been enforced at the instigation of private parties.¹⁶⁶ Thus, this form of advisory opinion does not depend on the

lawfully be revised, overturned or refused faith and credit by another Department of Government."); *United States v. O'Grady*, 89 U.S. (22 Wall.) 641, 647–48 (1874) ("Judicial jurisdiction implies the power to hear and determine a cause, and . . . Congress cannot subject the judgments of the Supreme Court to the re-examination and revision of any other tribunal . . ."); *see also* *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 225–27 (1995) (forbidding Congress from directing reopening of decided cases).

¹⁶² *Lee*, *supra* note 144, at 644–45, 647; *see also* Frankfurter, *supra* note 83, at 1004.

¹⁶³ Letter from Chief Justice Jay and Associate Justices to President Washington (Aug. 8, 1793), in 3 CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 1782–1793, at 488 (Henry P. Johnston ed., 1891).

¹⁶⁴ Moreover, this restriction on advisory opinions has no bearing on many claims of low-probability injuries. That is because this form of advisory opinion implicates only those laws that the Executive branch enforces. For laws that the President has no role in enforcing—such as state laws and federal laws creating private causes of action—the prohibition on advisory opinions poses no barrier.

¹⁶⁵ *Raines v. Byrd*, 521 U.S. 811, 827–28 (1997) (indicating that the President and legislators cannot resort to the courts for clarification of law).

¹⁶⁶ *See, e.g.,* *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733, 2742 (2011) (striking down California law regulating the sale or rental of violent video games based on a pre-enforcement challenge).

quality of the injury. Rather, it turns on who is bringing suit—the President or a private individual—regardless of the type of injury alleged.¹⁶⁷

To be sure, allowing suits based on low-probability injuries may require a court to interpret a law before it is enforced, as in the situation where an individual brings a declaratory judgment action seeking an interpretation of a law that is unlikely to be enforced against him. But unlike ruling on legislation before enactment, which poses the threat that the courts will interfere in the legislative process, providing interpretations based on hypothetical disputes does not present serious separation-of-powers concerns. Interpreting the law, unlike legislating, is the province of the judiciary.¹⁶⁸ For this reason, courts have repeatedly concluded that Article III does not pose an absolute bar to interpretations of laws pre-enforcement in the course of issuing injunctions and declaratory judgments.¹⁶⁹ A suit alleging a low probability of injury is not different in kind from these actions: both involve the courts providing an interpretation before the executive acts.

One might try to argue that low-probability injuries are somehow different because they call for interpretations based on more hypothetical facts. But courts often render interpretations of both statutes and the Constitution based on hypothetical facts.¹⁷⁰ The most striking example is in an overbreadth challenge to a law on the ground that it violates the First Amendment. For such challenges, the court determines the constitutionality of the statute by considering whether the statute might impair the First

¹⁶⁷ Although the Constitution does not prohibit courts from rendering opinions on hypothetical facts, there are several more practical reasons for courts to avoid rendering interpretations in hypothetical cases, including ensuring that there is a concrete factual background against which the court resolves the legal question and to preserve judicial resources. *See infra* Part IV; *see also* CHEMERINSKY, *supra* note 45, § 2.2, at 49. Both of these considerations are prudential, and may be outweighed by other considerations in particular cases or may simply be overridden by Congress. Thus, courts could more sensibly account for these considerations in a discretionary test, as detailed below in Part IV.

¹⁶⁸ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

¹⁶⁹ *See Vicksburg Waterworks Co. v. Vicksburg*, 185 U.S. 65, 82 (1902) (holding that a threatened injury presented a case because “one of the most valuable features of equity jurisdiction[] [is] to anticipate and prevent a threatened injury, where the damages would be insufficient or irreparable”); *see also, e.g., Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1329–31 (2010) (considering an as-applied pre-enforcement challenge brought under the First Amendment).

¹⁷⁰ *See, e.g., United States v. Comprehensive Drug Testing, Inc.*, 579 F.3d 989, 1006–07 (9th Cir. 2009) (providing a “guidepost” for future cases), *revised and superseded*, 621 F.3d 1162 (9th Cir. 2010) (en banc); *Culombe v. Connecticut*, 367 U.S. 568, 622–23 (1961) (explaining theories of coerced confession unrelated to the case). Likewise, courts routinely render interpretations of statutes and the Constitution when it is unnecessary to do so. *See, e.g., Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (suggesting that courts resolve whether officials violated the Constitution in suits brought under 42 U.S.C. § 1983 even when doing so may be unnecessary because of qualified immunity); *Marbury*, 5 U.S. (1 Cranch) at 154–73 (resolving merits of mandamus petition despite finding no jurisdiction).

Amendment rights of other hypothetical people not before the court.¹⁷¹ The fact that courts do so demonstrates that Article III does not prohibit the practice.

In short, the restriction on advisory opinions does not bar the adjudication of low-threat injuries generally. To the extent it does so at all, it is only in the context of challenges to hypothetical legislation.

C. Separation of Powers

The objection about advisory opinions is just one example of a broader concern that extending standing to low-probability injuries potentially violates separation of powers. Under the Court's current theory of separation of powers, the Legislative and Executive branches have the task of establishing social policy through the enactment and enforcement of laws.¹⁷² The courts, by contrast, do not have a similar policy role; their function is to resolve the rights of individuals.¹⁷³ Given this understanding of the appropriate allocation of powers, one might argue that extending jurisdiction to cases in which a plaintiff has alleged only a miniscule risk of injury will lead to courts resolving policy matters more properly answered by the other branches.¹⁷⁴

This separation-of-powers concern has significantly influenced standing doctrine.¹⁷⁵ For example, the Supreme Court has refused to recognize standing for generalized grievances common to all members of the public—such as harm arising from the government's failure to obey the law¹⁷⁶—based on the conclusion that the Legislature or Executive is the

¹⁷¹ See, e.g., *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (justifying overbreadth on the ground that the costs of unconstitutional limitations on speech of those not before the court warrant suspending all enforcement of the law); *New York v. Ferber*, 458 U.S. 747, 769–70 (1982) (stating that a statute is constitutionally overbroad if it affects a “substantial” amount of protected conduct).

¹⁷² Indeed, as then-Professor Frankfurter noted, the consideration of probabilities is central to the legislative process. Frankfurter, *supra* note 83, at 1005 (“[L]egislation to a considerable extent must necessarily be based on probabilities, on hopes and fears, and not on demonstration.”). In enacting a law, legislators must predict the need for and consequences of that legislation.

¹⁷³ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992). Although courts may create policy through their decisions, they may do so only in the course of resolving a dispute about rights.

¹⁷⁴ Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 476–77 (2008). Whether *all* individuals will have access to courts depends on the generality of the definition of an injury. If an injury is defined generally, more people will be likely to face that injury. For example, if the injury is discrimination on the basis of race, all people may face that injury since anyone may be discriminated against on the basis of his race. But if the injury is narrowly defined to be discrimination against Asians, only Asians face that injury—though even in that case, standing is arguably appropriate since there is some chance, however small, that a white person could suffer discrimination based on the wrong conclusion that he is Asian.

¹⁷⁵ *Id.*

¹⁷⁶ See, e.g., *Lujan*, 504 U.S. at 577–78 (concluding that a private individual does not have standing to challenge executive's failure to obey law); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220–21 (1974) (denying standing to individuals challenging congressmen holding office while

appropriate body to redress an injury shared by the entire public.¹⁷⁷ Similarly, the Court has held that taxpayer status alone cannot confer standing, explaining that to extend standing to all taxpayers would convert the courts into fora for anyone seeking to challenge any government policy, thereby resulting in the courts becoming the overseers of the political branches.¹⁷⁸

Under the Court's vision of separation of powers, the role of the courts is to vindicate the interests of individuals who suffer distinct, personalized injuries.¹⁷⁹ As Justice Scalia has explained, when a majority of people share an injury, that group may resort to the political process.¹⁸⁰ Judicial relief is appropriate only to protect minorities who cannot rely on the political process.¹⁸¹

One might think that this vision of separation of powers demands that standing should not extend to small risks of injury. After all, everyone has at least some probability of facing an injury; thus, if the probability threshold for standing is set sufficiently low, everyone has standing to challenge any action.¹⁸² But this concern does not justify the minimum-risk requirement.

being commissioned in the military in violation of Art. I, § 6, cl. 2); *United States v. Richardson*, 418 U.S. 166, 177 (1974) (holding that a private individual lacks standing to challenge Congress's failure to publish the CIA's expenditures as required under Art. I, § 9, cl. 7); *see also* Elliott, *supra* note 174 (discussing this line of cases).

¹⁷⁷ *See Lujan*, 504 U.S. at 577 (arguing that granting standing would undermine the President's power to take care that the laws are enforced); *Richardson*, 418 U.S. at 179 (noting that interest in government obedience to the law "is committed to the surveillance of Congress, and ultimately to the political process"); *Newman v. United States ex rel. Frizzell*, 238 U.S. 537, 547–48 (1915) (stating that although "every citizen and every taxpayer is interested in the enforcement of law . . . that general interest is not a private but a public interest . . . to be represented by the Attorney General or the District Attorney").

¹⁷⁸ *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 593, 599–600 (2007); *Massachusetts v. Mellon*, 262 U.S. 447, 486–87 (1923) (holding that taxpayers lacked standing under the Tenth Amendment to challenge federal funding of health programs for mothers and children).

¹⁷⁹ Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 895–97 (1983).

¹⁸⁰ *Id.*

¹⁸¹ *Id.* Justice Scalia's defense of standing law fails to account for all of the Court's decisions, for the Court has invoked separation of powers in denying standing for concrete and particularized injuries. In *Allen v. Wright*, 468 U.S. 737 (1984), for example, the Court held that black plaintiffs did not have standing based on the stigma resulting from discrimination against other blacks. *Id.* at 761. Although stigmatization is a real injury, the Court explained that recognition of stigma as sufficient injury would extend standing to "all members of a racial group," *id.* at 754, converting the courts into "virtually continuing monitors of the wisdom and soundness" of policy choices, *id.* at 759–60 (quoting *Laird v. Tatum*, 408 U.S. 1, 15 (1972)). Likewise, in *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, (1982), the Court rejected standing based on psychological distress caused by the government's illegal conduct, although that distress was a very real injury. *Id.* at 484.

¹⁸² *See* Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin., 513 F.3d 234, 242 (D.C. Cir. 2008) (Sentelle, J., concurring in the judgment) (arguing that allowing standing based on probabilistic

Even under the modern Court's vision of separation of powers, the restriction on low-risk injuries is unwarranted. First, even for an injury that is unlikely to occur, different groups face different risks of suffering that injury. One group may face an extremely low probability of injury, but that probability may still be substantially higher than the probability of injury faced by other individuals. For example, people who live in a town near high-tension power lines face a higher probability—though the probability is still low—of developing cancer from those power lines than those who live further away. Although the town residents face small risks of injury, their risk might still be significant when compared to the threat facing the general population. Because of this difference in relative risk, the town residents constitute a minority. The minimum-risk requirement therefore closes the court doors to those who are in a minority in the sense used by Justice Scalia.¹⁸³

Further, the fact that the minimum-risk requirement may extend standing to virtually everyone for all injuries does not conflict with the Court's separation of powers theory. As the Court has recognized, some widespread injuries may support standing. For example, an individual who suffers a burned arm in a fire has standing even if that fire also burned thousands of others.¹⁸⁴ Although the injury is widespread, standing is appropriate because each burn victim suffers a particularized, personal injury.¹⁸⁵ This analysis should extend to risk of injury. If the threatened injury is particularized, the risk of that injury is also particularized. Each plaintiff faces a personal interest in preventing the threatened injury. Just as a plaintiff who develops cancer as a result of tortious conduct that also affects thousands of others has suffered a personal injury, so too a plaintiff who faces a *risk* of cancer from that same tort has a personalized injury—the risk of developing cancer.

Even to the extent that prohibiting standing for low-risk injuries does protect some aspect of separation of powers insofar as it restricts the judiciary's ability to act, this prohibition undermines other aspects of separation of powers by impairing legislative powers. The Constitution charges Congress with creating rights through legislative enactments. The minimum-risk requirement, however, restricts this congressional power to

harm results in courts "looking more and more like legislatures rather than courts"), *supplemented by* 513 F.3d 234 (D.C. Cir. 2008) (per curiam).

¹⁸³ This is not to say that only those who are in this minority should have standing; to the contrary, all those who face a risk of harm should have standing. Rather, the point is that the minimum-risk requirement does not achieve the separation-of-power goals articulated by the Court because it bars suit by those in the minority. It is particularly important to recognize this point given that people routinely face different risks of suffering the same harm because of their daily activities, geography, genetic predisposition, and other factors. There accordingly will almost always be some group of people facing a greater risk than the general populace.

¹⁸⁴ *FEC v. Akins*, 524 U.S. 11, 24 (1998); *accord id.* at 36 (Scalia, J., dissenting).

¹⁸⁵ *Id.*

create judicially enforceable rights; courts will recognize a right only when there is a sufficiently high probability of the violation of that right.¹⁸⁶ Because a right has practical effect only to the extent that it is vindicated,¹⁸⁷ the minimum-risk requirement functionally redefines the scope of rights. For practical purposes, the minimum-risk requirement limits the scope of the rights that Congress may create. Under the requirement, Congress cannot pursue a policy of preventing extremely low-risk injuries through private causes of action; courts will not entertain such actions unless they cross the judicially created Article III threshold of risk.

Likewise, the minimum-risk requirement interferes with administrative programs. Congress often tasks agencies with minimizing the risks of particular types of harm and leaves it to the courts to ensure that the agencies fulfill this goal.¹⁸⁸ The Administrative Procedure Act and other statutes afford individuals the right to challenge agency actions that fall short.¹⁸⁹ This scheme reduces agency power by empowering the public to seek judicial enforcement and provides an independent body—the judiciary—to ensure that the agency acts in accordance with its delegated power.¹⁹⁰ Prohibiting standing for low risks of injury undermines this scheme. An agency may promulgate a regulation that reduces the risk of harm, but not to the degree intended by Congress. By refusing to extend standing to these low-level risks prohibited by Congress, the courts displace

¹⁸⁶ It is not uncommon for Congress to regulate conduct to prevent low-risk injuries; indeed, because of cognitive biases, Congress may regulate to prevent low-risk events—such as airplane crashes—more readily than to prevent high-risk events—such as heart disease. *See generally* CASS R. SUNSTEIN, *RISK AND REASON: SAFETY, LAW, AND THE ENVIRONMENT* (2002) (discussing the rationality of risk regulation).

¹⁸⁷ *See In re The Western Maid*, 257 U.S. 419, 433 (1922) (“Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp.”); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999) (“Rights are dependent on remedies not just for their application to the real world, but for their scope, shape, and very existence.”).

¹⁸⁸ The Safe Drinking Water Act is an example. It requires the EPA to set “maximum contaminant level goals” for water contaminants at a level at which no known adverse health consequences will occur, 42 U.S.C. § 300g-1(b)(4)(A) (2006), and then to establish regulations for each contaminant designed to achieve these goals to the extent feasible, *id.* § 300g-1(b)(4)(B). Of course, Congress may direct an agency to disregard trivial risks. *See* Cass R. Sunstein, *Is OSHA Unconstitutional?*, 94 VA. L. REV. 1407, 1408–09 (2008).

¹⁸⁹ *See* Administrative Procedure Act, ch. 324, 60 Stat. 237, 243 (1946) (codified at 5 U.S.C. § 702 (2006)) (generally authorizing review of administrative actions); *see also, e.g.*, 12 U.S.C. § 1848 (2006) (authorizing review of actions of the Federal Reserve Board); 29 U.S.C. § 160 (2006) (authorizing review of actions of the NLRB).

¹⁹⁰ CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 143 (1990) (“Broad delegations of power to regulatory agencies, questionable in light of the grant of legislative power to Congress in Article I of the Constitution, have been allowed largely on the assumption that courts would be available to ensure agency fidelity to whatever statutory directives have been issued.”).

Congress's legislative choices by permitting risks that Congress has deemed intolerable.

Finally, the limits on probabilistic standing exacerbate inequalities in our democratic system that separation of powers was designed to prevent. One function of the courts is to serve as a forum for those who lack political power.¹⁹¹ But the limitations on standing set up the opposite scheme. Regulated entities often have substantially more influence in Congress than does the general public,¹⁹² and they have standing to challenge regulations to which they are subject because those regulations affect their bottom line.¹⁹³ It is the general public that faces standing problems because of the restrictions on low probabilities of injuries.

D. Caseload

A fourth objection to expanding standing to all risks of injury is that it would open the floodgates of litigation and overburden the federal dockets. Many activities marginally increase virtually everybody's risk of suffering a particular type of harm, and consequently anyone could bring suit to challenge those activities.

Although expanding standing may indeed increase the federal docket, that increase is unlikely to be substantial. To start, the expansion of standing doctrine would not necessarily result in significantly more suits. Common sense and experience suggest that many people who already have standing to bring suit do not do so. Individuals often privately resolve their disputes,¹⁹⁴ or they simply live with the wrong done to them on the theory that the costs of bringing suit are not worthwhile.¹⁹⁵ In a substantial number

¹⁹¹ See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 73–104 (1980) (arguing that judicial review should be used in cases where the democratic process has failed).

¹⁹² See Noah D. Hall, *Toward a New Horizontal Federalism: Interstate Water Management in the Great Lakes Region*, 77 U. COLO. L. REV. 405, 455 (2006) (noting that representatives of industry have a sphere of influence in Congress). The explanation is that regulated industries have greater resources to lobby and otherwise influence government, and they suffer less from collective action problems than the general public.

¹⁹³ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561–62 (1992) (“[If] the plaintiff is himself an object of the action (or forgone action) at issue . . . there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.”).

¹⁹⁴ Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143, 147 (2002) (noting a prelitigation settlement rate of 95%); see also ALAN SCOTT RAU, EDWARD F. SHERMAN & SCOTT PEPPET, *PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS* 13–21 (4th ed. 2006) (noting an empirical study that lists trial rates for certain areas of law, such as civil cases and prisoners suits, which range from 0.9% to 3.7%).

¹⁹⁵ This is the theory underlying class actions: individuals will not bring suit because the costs of the litigation outweigh the expected rewards. John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 685 (1986).

of public-law challenges brought by an individual, the individual plaintiff himself did not seek to bring suit; instead, an interest group wishing to pursue the litigation found an individual with standing and encouraged that individual to bring suit.¹⁹⁶ Indeed, given the size of our population, current standing doctrine poses no real impediment to litigation to those who wish to bring suit.¹⁹⁷ Thus, expanding standing may not have any real effect on the size of the federal docket.

In addition, although more people would have standing under the any-risk-of-harm standard, many will nevertheless be discouraged from bringing suit because courts are likely to dismiss their cases on the merits. One reason why courts currently do not face a large number of cases alleging small risks of harm: plaintiffs undoubtedly do not bring such suits because they expect that their suits will be dismissed for lack of standing.¹⁹⁸ Similar reasoning extends to the merits. The standards for awarding prospective relief often pose obstacles for those facing only small risks of harm. To obtain an injunction, for example, a plaintiff must demonstrate not only that the law prohibits the defendant's conduct, but also that the plaintiff faces a likelihood of suffering irreparable harm if relief is not immediately granted.¹⁹⁹ Similarly, courts have discretion whether to grant declaratory relief, and one of the considerations relevant to the exercise of that discretion is the likelihood that the plaintiff will suffer harm if relief is withheld.²⁰⁰ A substantive standard itself might also preclude claims based on low-probability risks. A challenge to legislation evaluated under the rational basis test, for example, is likely to fail if the basis for the plaintiff's challenge is that the legislation poses a potential, but small, risk, because

¹⁹⁶ In *District of Columbia v. Heller*, 554 U.S. 570 (2008), for example, the Cato Institute sought out the plaintiffs to bring suit challenging the handgun restrictions in the District of Columbia. See *Supreme Court Overturns D.C. Gun Ban; What Next?*, NPR NEWS & NOTES (Jul. 3, 2008), http://pd.npr.org/anon.npr-mp3/npr/newsnotes/2008/07/20080703_newsnotes_01.mp3.

¹⁹⁷ See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1305 (1976) (“[I]t is never hard to find [a] . . . plaintiff to raise the issues.”); Mark Tushnet, “Meet the New Boss”: *The New Judicial Center*, 83 N.C. L. REV. 1205, 1213 (2005) (stating that current standing doctrine “will rarely impede a well-advised litigant seeking to challenge almost any statute enacted by Congress or action taken by an executive official”).

¹⁹⁸ Cf. *Taylor v. Sturgell*, 553 U.S. 880, 904 (2008) (rejecting arguments that the potential for many suits requires a more stringent doctrine of res judicata, because, even if res judicata does not apply, there is a “human tendency not to waste money” that “deter[s] the bringing of suits” that are bound to lose (quoting DAVID L. SHAPIRO, CIVIL PROCEDURE: PRECLUSION IN CIVIL ACTIONS 97 (2001))).

¹⁹⁹ See *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2760 (2010) (noting that a court may award an injunction only “to guard against any present or imminent risk of likely irreparable harm”); *Bokulich v. Jury Comm’n of Greene Cnty.*, 394 U.S. 97, 99 (1969) (holding that injunctions are appropriate only “to prevent irreparable injury which is clear and imminent” (quoting *Douglas v. City of Jeannette*, 319 U.S. 157, 163 (1943) (internal quotation mark omitted))).

²⁰⁰ See, e.g., *Fieger v. Mich. Sup. Ct.*, 553 F.3d 955, 974 (6th Cir. 2009) (vacating declaratory judgment because of lack of imminent harm); *El Dia, Inc. v. Hernandez Colon*, 963 F.2d 488, 498 (1st Cir. 1992) (reversing grant of declaratory judgment when the plaintiff failed to demonstrate high likelihood of harm).

the legislature could rationally conclude that the benefits of the legislation offset the small risks it creates.²⁰¹ Because courts are unlikely to award prospective relief for small risks of harm, plaintiffs are bound to be less likely to bring suit.

In any event, to the extent that the federal judiciary faces the need to reduce its caseload, it can more effectively and transparently accomplish that goal through the prudential doctrines discussed in the next section.

IV. A PRUDENTIAL APPROACH

What should be apparent by now is that Article III should extend to all claims in which a plaintiff challenges conduct that increases the threat of a future injury so long as a court order would remove that increase in risk. Doing so would make better sense of the text of Article III, simplify the law of standing, and improve the legitimacy of standing determinations.

Still, there is reason to resist expanding Article III standing in this way. After all, the minimum-risk requirement is not worthless. Although not compelled by Article III, it arguably helps to avoid unnecessary judicial interference with the political branches, preserves judicial resources by limiting the number of potential plaintiffs, and promotes better decisionmaking by ensuring that interested parties—the ones who are in the best position to make strong arguments—are the ones who make it into court.

For this reason, courts should develop prudential rules limiting standing in cases alleging small risks of injury. Although Article III authorizes federal courts to hear those claims, these prudential doctrines would allow courts to decline to hear some of those suits. Allowing courts to decline jurisdiction in these cases would hardly be unprecedented. Courts have long recognized prudential limitations on standing²⁰²—for example, courts have created prudential doctrines limiting standing for plaintiffs asserting the rights of third parties²⁰³—that allow them to decline jurisdiction because of concerns about the potential negative consequences of exercising jurisdiction.²⁰⁴

Under this proposed prudential test, a court would determine whether to hear a claim alleging a low risk of injury based on a number of factors, such as the plaintiff's interest in having the case heard, the risk to

²⁰¹ See, e.g., *Britell v. United States*, 372 F.3d 1370, 1383 (Fed. Cir. 2004) (rejecting challenge to abortion funding ban despite increase in health risk for some mothers).

²⁰² See *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 298–90 (2008) (Roberts, C. J., dissenting) (identifying various prudential forms of standing); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004); see generally RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART AND WECHSLER'S: THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 170 (6th ed. 2009) (summarizing this area of law).

²⁰³ *Kowalski v. Tesmer*, 543 U.S. 125, 129–30 (2004).

²⁰⁴ See David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 580–85 (1985).

separation of powers or federalism, and the amount of information available to the court to render decision. Needless to say, courts should be more willing to intervene when the plaintiff has a significant interest at stake and less so when judicial intervention threatens separation of powers or federalism, or when there is insufficient information for a court to render an intelligent decision.²⁰⁵

As suggested earlier, there is reason to think that courts already often base standing decisions on these considerations.²⁰⁶ But this prudential test would require courts to consider these factors explicitly, instead of implicitly in a minimum-risk test. Explicit discussion of these considerations would promote judicial legitimacy by increasing transparency in decisionmaking.²⁰⁷ It would also lead to a more coherent law of standing because it would facilitate better understanding among the lower courts for the superior courts' decisions. Likewise, explicit discussion would foster better decisionmaking not only by enabling parties to offer arguments actually tailored to the court's concerns, but also by forcing judges to engage in the process of articulating the factors underlying their decision whether to exercise jurisdiction.²⁰⁸

What follows is a discussion of several factors that courts should consider in determining whether to exercise jurisdiction over a claim asserting a small risk of injury. Some of these considerations point in favor of the exercise of jurisdiction and others counsel against that exercise. Although the list is not exhaustive, it illustrates the kinds of matters courts should consider in determining whether to exercise jurisdiction.

A. *Nature of the Violation*

Courts should be more willing to intervene when the plaintiff's interest at stake is significant. The plaintiff's interest depends on both the severity of the threatened harm and the likelihood that the injury will occur. When the threatened harm is substantial, courts should be more willing to

²⁰⁵ Others have proposed prudential doctrines of abstention to replace standing. See Elliott, *supra* note 174, at 508; Louis L. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 304–05 (1961); Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1296 (1961); Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 129–38 (2007); Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 700 (1977). This Article expands on those prudential tests by adding consideration of the plaintiff's interest.

²⁰⁶ See *supra* notes 110–13 and accompanying text.

²⁰⁷ See F. Andrew Hessick & Samuel P. Jordan, *Setting the Size of the Supreme Court*, 41 ARIZ. ST. L.J. 645, 661 (2009) (“Transparency further promotes legitimacy by providing the public with greater access to the decision-making process to satisfy itself of the Court’s candor.”).

²⁰⁸ See Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1375 (1995) (noting how the drafting process forces judges to confront the case and often leads judges to “modulate, transfer, or even switch an originally intended rationale or result”).

intervene despite a low probability of that harm occurring. For example, when death is the threatened harm, the required risk should be relatively low. By contrast, when the threatened harm is less significant—such as the possibility that a person’s yard will be exposed to a benign fungus—the required probability should be higher.

There are two reasons why courts should be more willing to exercise jurisdiction for serious harms. The first is moral. There is a sense that society should prevent harm when doing so would not entail substantial burdens.²⁰⁹ By this logic, the greater the threatened harm, the stronger the obligation to prevent that harm. Thus, when a particularly important interest is at stake, courts should more readily exercise jurisdiction. Second, consideration of the nature of the harm allows courts to allocate judicial resources more efficiently. Courts do not have the resources to address all potential injuries.²¹⁰ They accordingly should devote judicial resources to those harms that pose the highest cost to society.

In addition to the gravity of the factual harm that plaintiffs might suffer, the consideration of whether to exercise jurisdiction should include the nature of the rights that might be violated.²¹¹ Courts should be more willing to exercise jurisdiction when important rights are at stake.²¹² The role of the court is to protect rights.²¹³ That role becomes more essential as

²⁰⁹ Joel Feinberg, *The Moral and Legal Responsibility of the Bad Samaritan*, 3 CRIM. JUST. ETHICS 56, 67 (1984) (“[W]here minimal effort is required to prevent harm, the moral duty to prevent it seems every bit as stringent as the negative duty not to inflict that same harm directly.”); William W. Fisher & Talha Syed, *Global Justice in Healthcare: Developing Drugs for the Developing World*, 40 U.C. DAVIS L. REV. 581, 649 (2007) (noting the “positive moral duty to prevent severe harm or to alleviate severe suffering that is within one’s sphere of influence”).

²¹⁰ See, e.g., Robert L. Pushaw, Jr., *Limiting Article III Standing to “Accidental” Plaintiffs: Lessons from Environmental and Animal Law Cases*, 45 GA. L. REV. 1, 3 (2010) (“[S]tanding improves efficiency by allocating scarce judicial resources to the most pressing cases.”).

²¹¹ It is unclear whether the violation of a legal right is essential for standing. Some decisions suggest that standing requires both that the plaintiff has suffered a factual harm and that the harm be the consequence of a violation of a right. See *Raines v. Byrd*, 521 U.S. 811, 819 (1997) (noting that, for standing, the injury must involve “an invasion of a legally protected interest” (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)) (internal quotation marks omitted)). Other decisions suggest that factual harm alone will support standing. See *Bennett v. Spear*, 520 U.S. 154, 160, 166 (1997) (granting standing based solely on the fact that the plaintiffs would suffer the adverse consequence of less water without mention of riparian rights); *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152–54 (1970) (basing standing on an economic injury without regard to any legal interest).

²¹² The Supreme Court has claimed that there is no hierarchy of constitutional rights. See *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982). But the Court itself has created a hierarchy in its decisions about incorporation by distinguishing between fundamental and nonfundamental constitutional rights and the levels of scrutiny to apply. Similarly, the exceptions to general doctrines that the Court has recognized for some rights—such as the overbreadth doctrine for First Amendment challenges—suggest that the Court deems certain rights more important. In any event, one may easily draw a line between constitutional and nonconstitutional when determining the importance of rights.

²¹³ Hessick, *supra* note 17, at 325.

the importance of the right increases. Thus, courts should be more willing to find standing for claims alleging potential violations of rights that we deem fundamental, such as the right to a petit jury in a criminal case,²¹⁴ than for rights that are not fundamental, such as the right to make peremptory challenges to potential jurors.²¹⁵ Similarly, insofar as one of the principal functions of the judiciary is to protect the rights of the minority who cannot rely on the political process, courts should be particularly solicitous of claims against the government seeking to enforce rights necessary to participate in the political process.²¹⁶

Several cases endorse this approach.²¹⁷ For example, to have standing to challenge a criminal law outlawing conduct in which the plaintiff wishes to engage, the plaintiff usually must show that he faces a threat of prosecution if he engages in the activity.²¹⁸ But in the First Amendment context, courts have dispensed with that showing. All the plaintiff must show is that the law targets the conduct that the plaintiff wishes to undertake.²¹⁹ Similarly, courts appear to have relaxed the standing requirement in cases involving the right to abortion. In *Doe v. Bolton*, the Court held that doctors had standing to challenge criminal abortion statutes, “despite the fact that the record does not disclose that any one of [the doctors] has been prosecuted, or threatened with prosecution.”²²⁰

²¹⁴ See *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (“[T]rial by jury in criminal cases is fundamental to the American scheme of justice . . .”).

²¹⁵ See *Georgia v. McCollum*, 505 U.S. 42, 57 (1992) (“[P]eremptory challenges are not constitutionally protected fundamental rights; rather, they are but one state-created means to the constitutional end of an impartial jury and a fair trial.”).

²¹⁶ ELY, *supra* note 191, at 73–104 (arguing that judicial review should be used in cases where the democratic process has failed).

²¹⁷ 13B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3532.5, at 551–72 (3d ed. 2008) (“As often happens with questions of justiciability, results are shaped by an often unarticulated sense of the importance of the rights claimed and by an uncertain pragmatic assessment of the reality of the plaintiff’s claimed need for guidance.”).

²¹⁸ E.g., *Mink v. Suthers*, 482 F.3d 1244, 1257 (10th Cir. 2007) (dismissing challenge to criminal statute for lack of standing because plaintiff faced “no credible threat of prosecution”); *Reed v. Giarrusso*, 462 F.2d 706, 710–11 (5th Cir. 1972).

²¹⁹ *Virginia v. Am. Booksellers Ass’n*, 484 U.S. 383, 392–93 (1988) (“That requirement is met here, as the law is aimed directly at plaintiffs, who, if their interpretation of the statute is correct, will have to take significant and costly compliance measures or risk criminal prosecution . . . Further, the alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution.”); see also, e.g., *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003); *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003) (“But if it arguably covers it, and so may deter constitutionally protected expression because most people are frightened of violating criminal statutes especially when the gains are slight, as they would be for people seeking only to make a political point and not themselves political operatives, there is standing.”), *certifying questions to 792 N.E.2d 22* (Ind. 2003); cf. *Laird v. Tatum*, 408 U.S. 1, 15 (1972) (no standing where the law does not target the chilled activity).

²²⁰ 410 U.S. 179, 188 (1973).

To be sure, these decisions have approached the standing issue in terms of Article III, not prudential, standing: they have concluded that the more important the right, the more likely a dispute presents a case or controversy under Article III. But it is far more sensible to frame the issue as one of prudential standing. Whether a dispute constitutes a case or controversy should not vary with the right. A case is a dispute subject to judicial resolution, and whether a court *can* resolve a dispute does not depend on which right is at stake; rather, it depends on whether the right, whatever it may be, has been or will be violated.²²¹ By contrast, treating the importance of the right as a prudential consideration allows courts to exercise discretion in exercising jurisdiction.

B. Comity

Although concerns about separation of powers do not warrant interpreting Article III to exclude *all* low-probability threats of harm, comity—that is, the desire to avoid conflict with state governments and the other branches of the federal government²²²—might justify a court’s refusal to hear some of those claims.²²³ Comity routinely informs courts’ decisions about whether to exercise jurisdiction.²²⁴ These same concerns should inform courts’ decisions whether to intervene in cases alleging low-risk injuries.

Comity concerns are most significant when resolving a claim would require a court to interfere with the function of another branch. Take, for example, a claim asking a court to pass on the constitutionality of legislative enactments. Declaring a statute unconstitutional directly conflicts with the legislature’s task of implementing policy through legislation. It also signifies disrespect of the legislature’s constitutional judgment because legislative enactment implicitly carries the legislature’s determination that the law is constitutional.²²⁵ When a claim alleging a low risk of injury raises these concerns, a court should be more hesitant to intervene.

²²¹ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (“[W]here there is a legal right, there is also a legal remedy[,] by suit or action at law, whenever that right is invaded.” (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *23) (internal quotation mark omitted)).

²²² See *Turner Entm’t Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1519 n.10 (11th Cir. 1994) (noting commentators have defined comity using terms such as “courtesy, politeness, convenience or goodwill” (quoting Joel R. Paul, *Comity in International Law*, 32 HARV. INT’L L.J. 1, 3 (1991))).

²²³ *Levin v. Commerce Energy, Inc.*, 130 S. Ct. 2323, 2336 (2010) (“Comity . . . is a prudential doctrine.”).

²²⁴ See, e.g., *Younger v. Harris*, 401 U.S. 37, 44 (1971) (invoking comity in abstaining from ruling on legality of state criminal proceedings); *Wright v. Associated Ins. Cos.*, 29 F.3d 1244, 1252 (7th Cir. 1994) (noting comity as consideration in determining whether to exercise supplemental jurisdiction).

²²⁵ See *United States v. Morrison*, 529 U.S. 598, 607 (2000); F. Andrew Hessick, *Rethinking the Presumption of Constitutionality*, 85 NOTRE DAME L. REV. 1447, 1462–63 (2010).

Comity also counsels that courts should hesitate to exercise jurisdiction in suits that seek the imposition of expensive or intrusive remedies on the government. As Professor Fallon has explained, courts should avoid such suits because of the costs to the government in conforming to court rulings and because they involve the courts in the business of dictating policy to the political branches.²²⁶ A corollary of that theory is that the judiciary should be especially reluctant to award expensive or intrusive relief when the need for that award is low.²²⁷ In such situations, the benefits of that award are uncertain, but the costs are certain.

Indeed, as noted earlier, these concerns likely already play a role, albeit an unmentioned one, in many of the Court's standing decisions.²²⁸ They explain better than current doctrine why the Court is willing to recognize standing for some risks of harm but not others. But the way that the Court has considered comity in these decisions is through Article III; when the requested remedy may intrude too much on the other branches, the Court has said that the claim does not present an Article III case or controversy.²²⁹ But the cost to the government is irrelevant to whether a dispute constitutes a case over which a court has the power to exercise jurisdiction. Whether a dispute constitutes a case depends on whether that dispute involves the violation of rights for which the court can provide a remedy.²³⁰ The concern about interfering with the other branches bears on whether a court *should* exercise jurisdiction over an actual dispute, not whether it *may*. Thus, comity should be a factor bearing not on whether a court has Article III jurisdiction, but on whether the court should exercise that jurisdiction.²³¹

C. Imminence

The imminence of an injury should also factor into a court's decision whether to hear a case. As noted earlier, the Court has said that the imminence requirement is relevant to justiciability only to the extent that it

²²⁶ Fallon, *supra* note 7, at 648 (developing thesis that jurisdiction doctrines reflect concerns about remedies).

²²⁷ *Cf.* Hessick, *supra* note 17, at 312 (arguing that the judiciary may be reluctant to award relief when the "plaintiff would not materially benefit from a favorable decision").

²²⁸ *See supra* notes 111–13 and accompanying text; *see also* Fallon, *supra* note 7, at 649–52 (gathering cases tending to show that jurisdiction doctrines reflect concerns about remedies).

²²⁹ *See supra* notes 111–13 and accompanying text.

²³⁰ *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

²³¹ Alexander Bickel usefully described this concept in terms of political capital. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 116 (2d ed. 1986). Judicial decisions against other branches have effect only if those branches acquiesce in those decisions. *Id.* Refusing to exercise jurisdiction allows the courts to avoid spending political capital on particularly sensitive issues. *Id.* At the same time, however, courts may also expend capital by refusing to hear cases that the other branches believe should be heard. *Id.*

bears on whether a threat of injury is realistic.²³² But imminence may serve other roles. An imminence requirement may promote private resolution of claims. Consider the situation where one individual presents a nonimminent threat of injury to another individual. Because the harm is not imminent, the individuals have time to try to resolve their dispute without judicial intervention. Private resolution of claims would preserve judicial resources and arguably could lead to more efficient outcomes.²³³

Requiring imminence of an injury also may promote comity. Even when a remote harm is inevitable, another government body may still have an opportunity to remedy that harm if the harm is not imminent. In that situation, courts should be reluctant to intervene. This approach is consistent with a variety of other prudential doctrines, such as exhaustion²³⁴ and abstention,²³⁵ which rest in part on this notion that courts should not intervene when other bodies of government may redress the challenged wrong.

Under this approach, courts should decline jurisdiction for nonimminent harms, irrespective of whether the harm will inevitably occur under the status quo, if another government body may provide relief. For example, suppose a state university has an affirmative action program that imposes an unconstitutional quota for admission, and that a five-year-old white child seeks to challenge that program. Because he has a stake in that claim, the child has Article III standing. But there is good reason for the courts to refuse to exercise jurisdiction. That is because the child is not yet in a position to apply to college, and in the next thirteen years, the political branches may abolish the affirmative action program.²³⁶ If they do not, the child can turn to the courts at that time.

²³² *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 565, n.2 (“Although ‘imminence’ is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is ‘*certainly* impending[.]’” (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990))).

²³³ Michael P. Vandenbergh, *The Private Life of Public Law*, 105 COLUM. L. REV. 2029, 2079–81 (2005).

²³⁴ Courts require plaintiffs to exhaust their remedies before administrative agencies before proceeding to court because it “giv[es] agencies the opportunity to correct their own errors, afford[s] parties and courts the benefits of agencies’ expertise, [and] compil[es] a record adequate for judicial review[.]” *Avocados Plus Inc. v. Veneman*, 370 F.3d 1243, 1247 (D.C. Cir. 2004) (third and fifth alterations in original) (quoting *Marine Mammal Conservancy, Inc. v. Dep’t of Agric.*, 134 F.3d 409, 414 (D.C. Cir. 1998)) (internal quotation marks omitted). Courts may excuse exhaustion when requiring the parties to exhaust their administrative remedies would not fulfill these goals. *Id.*

²³⁵ Federal courts will abstain from ruling on the constitutionality of a state criminal statute at the instigation of a plaintiff who is being prosecuted under that law because state officers have the principal duty of implementing the state’s laws. *See Fenner v. Boykin*, 271 U.S. 240, 243–44 (1926).

²³⁶ This concern underlies the Supreme Court’s decision in *Lujan*. There, as noted earlier, the Court denied standing for a person who asserted intent to travel to Sri Lanka to view endangered animals because the person did not specify that his trip to Sri Lanka was imminent. *Lujan*, 497 U.S. at 564. One reason the Court gave for dismissing the case was that recognizing standing would interfere with the

Applying this prudential approach would have led to a much more nuanced decision in *Massachusetts v. EPA*.²³⁷ There, the Court found standing for Massachusetts, which had challenged the EPA's refusal to issue a rule regulating emissions, based on the threat of loss of land from rising sea levels due to global warming.²³⁸ Although acknowledging that the harm would not occur for several decades, the Court explained that the probability of harm without regulation of emissions was certain.²³⁹ But that reasoning is too simplistic. The eventual certainty of harm is not automatically a sufficient reason for the courts to intervene. Even if the threat of harm under the current legal regime was certain, it was not certain that regulations had to be enacted immediately to prevent those harms. The political branches thus may have had adequate time to change the law to redress the problem, in which case comity counseled against immediate judicial intervention.

On the other hand, although it was not clear that immediate intervention was necessary to prevent the future harm, one might argue that the interest at stake—the possible destruction of the coastline—was too large for the federal courts to abstain. These considerations should have informed the Court's decision whether the exercise of federal jurisdiction was appropriate.²⁴⁰ A balance of these considerations may suggest that the Court did come to the correct conclusion in finding standing, but got there by taking the wrong path. Instead of focusing on whether there was a sufficient likelihood of harm to create a “case” under Article III, the Court should have asked whether the exercise of jurisdiction was appropriate.

D. *Functional Concerns*

In cases alleging a small risk of harm, courts should also consider whether exercising jurisdiction is particularly likely to result in lower

President's power under Article II to enforce the laws. *Id.* at 577. But this argument does not raise a problem of low probability. Arguably, even if the probability that the plaintiff would visit Sri Lanka was very high—for example, if the plaintiff had stated that returning to Sri Lanka was his principal goal in life—the Court would have hesitated to grant standing because it would result in premature judicial intervention into matters reserved to the President.

Courts should not intervene without evidence that the political branches did not have adequate time to determine whether to take action and what course to take. Indeed, Professor Nash himself notes that there should be severe limits on the doctrine because of separation-of-powers concerns of these sorts. See Nash, *supra* note 7, at 522.

²³⁷ 549 U.S. 497 (2007).

²³⁸ *Id.* at 514.

²³⁹ *Id.* at 523.

²⁴⁰ Of course, Congress or the EPA could refuse to take additional action to deal with global warming. In that situation, a court could exercise jurisdiction over a future claim challenging the EPA's failure to develop regulations combating global warming. But the fact that Congress and the EPA refused to take any additional action in the meantime may reflect Congress's intent not to create regulations targeting global warming and thus lead the court not to grant relief.

quality decisions. Under our adversarial system, courts depend in large part on the parties in resolving cases. The burden is on the parties to make arguments and gather factual information relevant to deciding the case. Ordinarily, the size of a plaintiff's stake in a case is directly related to his incentives to litigate effectively: the greater the stake, the more forceful the litigation, and consequently the more aid that the plaintiff is likely to provide the court in reaching its decision.²⁴¹ Courts accordingly should be more hesitant to exercise jurisdiction in a case in which the plaintiff has only a small stake because he faces only a minute risk of injury. But courts should not automatically deny standing in those cases. That is because the size of the stake does not necessarily determine the forcefulness of a plaintiff's argument. An interest group seeking to enforce a principle through litigation may pursue claims more vigorously than an individual who actually suffers the type of harm that the interest group seeks to prevent.²⁴² That is because, although the group may not suffer injury, it nevertheless has a strong interest in the way in which the case is resolved. That said, it stands to reason that a person with a small stake in a case is less likely to litigate a claim as forcefully as someone with a substantial stake.

Small risks of injury may also undermine the quality of decisionmaking by requiring courts to decide issues with an inadequate set of facts. One reason for the injury-in-fact requirement is that it provides factual context for a court's decision, thereby increasing the chance of a sound decision by making the court aware of the impact of its decision.²⁴³ A claim based on a small threat of a future injury might provide inadequate context for a decision if the reason for the low probability of harm is that there is a possibility of intervening events that will change *how* the injury will occur or the precise nature of the injury. These types of uncertainty about an injury make it difficult for a court to tailor its decision to remedy the harm in the least intrusive way.

²⁴¹ Hessick, *supra* note 17, at 321; *see also* Baker v. Carr, 369 U.S. 186, 204 (1962) (stating that the parties seeking to invoke the court's jurisdiction must have "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions").

²⁴² *See* Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 266 n.251 (1990); David M. Driesen, *Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication*, 89 CORNELL L. REV. 808, 819 & n.77 (2004).

²⁴³ Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 14 (1984); Hessick, *supra* note 17, at 321; Gene R. Nichol, Jr., *Injury and the Disintegration of Article III*, 74 CALIF. L. REV. 1915, 1927 (1986) ("Examination of these effects serves to fine tune the judicial decisionmaking process since abstract rulings based on hypothetical impacts are more apt to be unwise ones."); *see also* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982) (noting that the judicial standard for establishing standing "tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.").

Of course, not all low-probability injuries are attributable to changing circumstances that may affect how a court writes its decision. An injury may have a low probability of occurring, not because of potential intervening events that affect the nature of the injury, but simply because it is unlikely that the event will occur. An example is rolling a one on a hundred-sided die. In that circumstance, the low probability of rolling a one is not attributable to some potential intervening circumstances; it is simply that there are many other possible outcomes. When the low probability of injury is not due to an intervening event, the low probability does not affect the court's ability to predict the factual context of the injury. Consequently, courts should be more willing to exercise jurisdiction. But when the reason for the low probability of injury might affect the nature of the injury, courts should be more hesitant.

A related problem arises when there is uncertainty about probability itself. Unknown probability might have a significant impact on the quality of decisionmaking. When the risk of injury is unknown, the judiciary may not be able to assess intelligently the effects of awarding relief or the need to adopt a doctrine preventing similar future threats.²⁴⁴ For example, if it is uncertain whether a tire manufacturer's conduct raises the risk of blowouts and accidents, a court cannot rationally assess whether to adopt a rule prohibiting that conduct. The uncertainty of the harm prevents the court from knowing whether the prohibition is worth the costs it would impose on the manufacturer.²⁴⁵

Of course, courts should not dismiss out of hand claims alleging uncertain risks of harm. If a court knows that the probability of harm is high but simply does not know how high, the court should exercise jurisdiction

²⁴⁴ To be sure, this uncertainty does not pose a direct problem in all cases in which it occurs. The merits of most administrative law cases do not depend on the injury forming the basis for standing. *See* Driesen, *supra* note 242, at 820 (illustrating this point through examples). But even in those cases, the facts may present equitable concerns that influence the development of doctrine. *See generally* Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883 (2006) (arguing that the facts of a case influence legal development).

²⁴⁵ The Court's decisions occasionally reflect this concern. *See, e.g.*, *Renne v. Geary*, 501 U.S. 312, 321–22 (1991) (finding unripe a challenge to a state law prohibiting political party endorsements for nonpartisan office on the ground that the political parties had not alleged an intent to endorse a particular candidate, and had not described “the nature of the endorsement, how it would be publicized, or the precise language” that would be forbidden). Uncertainty of this sort often occurs in facial challenges to statutes. Generally, a law is facially invalid only if there are no possible constitutional applications of the law. *See* *United States v. Salerno*, 481 U.S. 739, 745 (1987). It is often not obvious whether a law has a potential constitutional application before a case arises presenting that constitutional application. For this reason, courts have dismissed facial challenges on the ground that they are not ripe. *See* *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 810–11 (2003) (rejecting facial challenge to regulation as unripe because regulation might have legal application in some cases). *But cf.* Nathaniel Persily, *Fig Leaves and Tea Leaves in the Supreme Court's Recent Election Law Decisions*, 2008 SUP. CT. REV. 89, 96 (arguing that in some cases the Court has “conflat[ed] the as-applied/facial doctrine with doctrines of ripeness” by upholding laws against facial challenges on the ground that “the true extent of the constitutional burden remained unknown at the time of the litigation”).

to award relief (if warranted on the merits) and fashion a doctrine to prevent that injury.²⁴⁶

A separate pragmatic concern arising from extending standing to small risks of injury is that the potential increase in caseload threatens to reduce the quality of decisions and distract courts from considering the claims of those individuals who most need relief. As noted earlier, there is reason to think that the federal docket would not substantially grow under the any-risk-of-harm standard.²⁴⁷ But if the dockets did grow, courts could ameliorate the burden by confining jurisdiction to claims with a more pressing need for resolution based on the prudential considerations identified earlier. Doing so would allocate judicial resources to resolving claims of individuals presenting the greatest need for relief. But this does not mean that courts should never exercise jurisdiction for remote threats of injury. Jurisdiction might be warranted if the threatened harm is extremely severe, even if its risk of occurring is small or if the risk of harm is widely shared and recurrent. In those situations, a decision would produce substantial benefits warranting the use of judicial resources.²⁴⁸

CONCLUSION

The constitutionalization of the minimum-risk requirement for jurisdiction confuses what courts ought not to do with what they cannot do. Despite the Supreme Court's protestations to the contrary, the size of the likelihood of a threat occurring does not determine whether that threat presents a case or controversy. Any potential threat of injury that the courts can remedy creates a justiciable controversy and thus is sufficient to support Article III standing.

To be sure, expanding Article III standing to plaintiffs who allege small risks might not ultimately change many outcomes because those plaintiffs are likely to lose on the merits of the claims.²⁴⁹ But that does not mean that the current doctrine should be preserved. For one thing, the minimum-risk requirement unjustifiably limits the power of the legislature by shifting to the courts the constitutional authority to determine whether a particular claim warrants judicial intervention. For another, the minimum-risk requirement threatens to muddle standing because of the imprecise standards and insufficient information that courts employ in making risk assessments. The result is an appearance that courts make standing

²⁴⁶ At least one court has dealt with uncertainty of injury simply by saying the uncertain increase in risk *did* suffice for standing. See *N.Y. Pub. Interest Research Grp. v. Whitman*, 321 F.3d 316, 326 (2d Cir. 2003) (finding standing based on uncertain increase in risk from pollution emissions).

²⁴⁷ See *supra* notes 194–98 and accompanying text.

²⁴⁸ Of course, Congress should have the power to override these concerns, given that it has traditionally been the role of Congress and not the courts to determine the appropriate allocation of judicial resources.

²⁴⁹ See *supra* note 198 and accompanying text.

decisions based on personal biases or considerations other than merely the size of risk.²⁵⁰

This is not to say that courts must exercise jurisdiction over all individuals seeking redress for small risks of injury. One can justify creating a framework under which courts have discretion to decline jurisdiction in cases alleging a small risk of injury. But courts should articulate their reasons for doing so by using more refined tools that explicitly allow them to balance these concerns on a case-by-case basis instead of relying on a blanket rule that the Constitution forbids the adjudication of such claims. Doing so would promote transparency by making explicit the fact that courts do often make standing determinations based on these considerations. And it would facilitate a more coherent and predictable law of standing, which would benefit litigants and all three branches of government alike.

²⁵⁰ Cf. Tushnet, *supra* note 205, at 663 (arguing that standing determinations often reflect views about the merits).