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When Cows Fly: Expanding Cognizable Injury-in-Fact and Interest Group Litigation

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J.D. Candidate, 2010, Fordham University School of Law; M.A. Candidate, 2010, International Political Economy and Development, Fordham University Graduate School of Arts and Sciences. I am very grateful to Professor Abner Greene for help in selecting the topic of this Note, Professor Julian Mortenson for his constant efforts and wonderful skills as an advisor on this project, and Professor Michael Baur for his availability and advice. Additionally, I would like to thank Noushin Ketabi for her patience and help editing throughout the writing of this piece.

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WHEN COWS FLY:
EXPANDING COGNIZABLE INJURY-IN-FACT
AND INTEREST GROUP LITIGATION

Robert Terenzi, Jr.*

This Note takes an in-depth look at standing and, specifically, the extent to which increased risk of exposure to toxins caused by a government agency's regulations constitutes a judicially cognizable injury-in-fact. Despite over a century of case law on the topic, standing doctrine remains in flux and ill defined, largely due to the constantly changing ideological makeup of the U.S. Supreme Court. The lower courts are divided on the question of whether increased risk of future harm constitutes an injury-in-fact. Using Baur v. Veneman as a case study, this Note argues for the expansion of the definition of injury-in-fact to include potential future injuries that result from a specific government policy.

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INTRODUCTION

It is not the function of our Government to keep the citizen from falling into error; it is the function of the citizen to keep the Government from falling into error.

—Justice Robert Houghwout Jackson, American Communications Ass'n v. Douds

The story behind Baur v. Veneman is a study in irony. A vegan sues the U.S. Department of Agriculture (USDA) to bolster its preventative measures against a disease that can only be contracted by consuming meat. Yet, eerily prescient, less than three weeks after the U.S. Court of Appeals for the Second Circuit allows the suit to proceed, the USDA announces that they have discovered the first instance of the disease in the country.

2. 352 F.3d 625 (2d Cir. 2003).
3. Id. at 628.
4. Id.
One would think that a vegan would be the last person to bring suit against the U.S. government alleging fear of contracting mad cow disease, because mad cow can only be transmitted to humans by consuming tainted meat. Yet, in 2002 that is exactly what Gene Baur did, with the help of his brother, Michael Baur, a “frequent consumer of meat.” Gene Baur, an animal rights activist, vegan, and founder of Farm Sanctuary, an animal rights advocacy group, wanted to do something about the way slaughterhouses treat their cattle. Gene believes that animals have souls and that the government has a duty to protect animal rights, and he has fought for over thirty years to advance this agenda. One aspect of the slaughtering process, in particular, seemed unusually cruel. When a cow collapses on its way to the slaughterhouse, it is dragged the remaining distance and then killed, butchered, and distributed for human consumption.

The inability to walk and maintain basic motor functions happens to be one of the only visible symptoms of mad cow disease, a neurological disorder that destroys the brain matter of cows. The disease can be transmitted to humans in the form of variant Creutzfeldt-Jakob disease (vCJD), a rare and fatal human neurodegenerative condition that, as one writer described, “murders by driving its young victims insane, then melting their brains.” Gene decided that the best way to stop cows from suffering the fate of being dragged to their destruction was to advocate that the USDA ban the distribution of “downed,” or “downer,” cattle—cows that have collapsed on their way to the slaughterhouse—and thereby end the slaughter and suffering associated with being dragged to their death.

Gene enlisted his brother to help establish standing. Because a substantial number of the Farm Sanctuary members were vegetarians or vegans, they needed a meat eater to allege particularized fear of contracting mad cow disease. Relying on Michael’s fear of eating contaminated meat, their suit sought injunctive relief in the form of a ban on the distribution of downer cattle.

7. Interview with Michael Baur, Assoc. Professor, Fordham Univ., in N.Y., N.Y. (Nov. 22, 2008) [hereinafter Interview with Baur].
9. Id. See Interview with Baur, supra note 7.
13. Interview with Baur, supra note 7.
14. Id.
15. Id.
The biggest hitch in their argument, however, was that mad cow disease had never been detected in the United States. Further, the USDA argued, even if mad cow disease entered the U.S. food supply, the chances that Michael Baur would come in contact with an infected piece of meat were beyond miniscule. Yet, in an unprecedented expansion of judicially recognized injuries, the Second Circuit, on appeal, concluded Michael Baur had standing and allowed the case to proceed.

This Note examines the extent to which an increased risk of exposure to harm constitutes a judicially cognizable injury-in-fact for the purposes of establishing standing. Part I of this Note provides an overview of the history of the standing doctrine, with specific attention paid to standing for plaintiffs looking to challenge forward-looking government regulations. Part II proceeds with the current controversy amongst the lower federal courts in their attempts to grapple with the extent to which enhanced risk of future harm constitutes injury-in-fact. Finally, Part III proposes that federal courts should follow the Baur decision and allow a wider array of impending injuries to validate standing if the potential injury is grave enough and is the result of a specific government policy.

I. TRACING THE HISTORY OF STANDING

The standing inquiry seeks to determine "whether a specific person is the proper party to bring a matter before a federal court for adjudication." Standing is a threshold requirement for a plaintiff seeking to access a federal court and have that court determine the merits of his or her claim. Federal courts have limited jurisdiction, meaning that cases before them must possess certain qualities to allow full adjudication. Federal courts can only hear cases that both the Constitution and a federal statute authorize them to hear. A case is constitutional if it falls within one of the nine enumerated classes of "cases" or "controversies" identified in the Constitution. Courts have developed the standing doctrine to define the terms "cases" and "controversies."

17. Farm Sanctuary, Inc., 212 F. Supp. 2d at 284.
18. Id. at 282–83.
20. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 57 (5th ed. 2007).
21. Warth v. Seldin, 422 U.S. 490, 498 (1975) ("In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.").
22. See generally CHEMERINSKY, supra note 20, at 16.
24. Id. at 63; see, e.g., Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
25. See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) ("Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.") (citing Allen v. Wright, 468 U.S. 737, 751 (1984)).
The development of the standing doctrine is a relatively new concept in modern U.S. law. Due to conflicting ideologies on the U.S. Supreme Court, standing is an unsettled area of the law. Yet, it is one of such profound fundamental importance that existence of confusion amongst lower federal courts results in inconsistent judgments across circuits and allows for potential forum shopping. Indeed, inquiries into standing are an inexact science, to say the least. This is partly due to the incongruous emphasis the Supreme Court has placed on standing compared to its traditional place in the British and U.S. common-law systems. The

26. See Joseph Vinling, Legal Identity: The Coming of Age of Public Law 55 (1978) (“The word standing . . . does not appear to have been commonly used until the middle of [the twentieth] century.”); Cass R. Sunstein, What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III, 91 Mich. L. Rev. 163, 169 (1992) (finding only eight U.S. Supreme Court references to “standing” before 1965); cf. Fallon, Jr. et al., supra note 23, at 127 (“During the twentieth century, courts became self-conscious about the concept of standing only after developments in the legal culture subjected the private law model to unfamiliar strains.”).

27. See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 475 (1982) (“We need not mince words when we say that the concept of ‘Art. III standing’ has not been defined with complete consistency in all of the various cases decided by this Court . . . .”); see also Vinling, supra note 26, at 1 (arguing that it is impossible to read the standing decisions “without coming away with a sense of intellectual crisis” and classifying judicial behavior regarding standing as “erratic, even bizarre”).

28. See Daniel A. Farber, A Place-Based Theory of Standing, 55 UCLA L. Rev. 1505, 1505 (2008) (“Standing doctrine is well-known to be a quagmire, plagued by inconsistent results and judicial dissension.”); Richard J. Pierce, Jr., Is Standing Law or Politics?, 77 N.C. L. Rev. 1741, 1742–43 (1999) (“[Lawyers] can predict judicial decisions in this area with much greater accuracy if they ignore doctrine and rely entirely on a simple description of the law of standing that is rooted in political science: judges provide access to the courts to individuals who seek to further the political and ideological agendas of judges.”); Peter M. Shane, Returning Separation-of-Powers Analysis to Its Normative Roots: The Constitutionality of Qui Tam Actions and Other Private Suits To Enforce Civil Fines, 30 EnvTL. L. REP. 11081, 11082 (2000) (describing challenges for plaintiffs “in an area of the law as mercurial as standing”); Steven L. Winter, The Metaphor of Standing and the Problem of Self-Governance, 40 Stan. L. Rev. 1371, 1372 (1988) (“One of the traditional criticisms of standing law is that it is confusing and seemingly incoherent. Even the staunchest judicial advocates of the doctrine readily admit as much . . . .”). Compare United States v. Richardson, 418 U.S. 166, 179 (1974) (holding that plaintiff must rely on political process, as “[s]low, cumbersome, and unresponsive” as it may be, to get access to information regarding Central Intelligence Agency expenditures), with FEC v. Akins, 524 U.S. 11 (1998) (holding that a plaintiff had a right to information regarding expenditures of American Israel Public Affairs Committee, despite a contrary ruling of government agency).

29. See Sunstein, supra note 26, at 168 (“[O]ne of [modern standing doctrine’s] principal features is an insistence that Article III requires injury in fact, causation, and redressability—requirements unknown to our law until the 1970s.”); id. at 169 (“In the history of the Supreme Court, standing has been discussed in terms of Article III on 117 occasions. Of those 117 occasions, 55, or nearly half, of the discussions occurred after 1985 . . . . Of those 117, 71, or over two thirds, of the discussions occurred after 1980—that is, in just over a decade. Of those 117, 109, or nearly all, of the discussions occurred since 1965.” (citing Winter, supra note 28, at 1418–25; Search of LEXIS, Genfed library, US file (July 11, 1992)); see also Winter, supra note 28, at 1374 (“[A] painstaking search of the historical material demonstrates that—for the first 150 years of the Republic—the Framers, the first Congresses, and the Court were oblivious to the modern conception either that standing is a component of the constitutional phrase ‘cases or controversies’ or that it is a
Part I provides an overview of the history of standing doctrine jurisprudence. Part I.A explores the roots of standing doctrine and the limits it placed on who could bring lawsuits in both early U.S. and English law. This Part then discusses exceptions to the need for standing in early U.S. case law, such as *qui tam* actions, writs of mandamus, and various forms of citizen suits. Part I.B examines how standing quickly rose to prominence through a series of decisions by the Supreme Court in the middle of the twentieth century. Finally, Part I.C demonstrates the obstacles facing citizens seeking to obtain standing to challenge a federal agency’s fulfillment of its regulatory duty in federal court.

A. The Early History and Parallels to Standing Requirements

This section examines the early roots of standing doctrine in U.S. law. Part I.A.1 looks broadly at the legal principles underlying the formation of the U.S. legal system during the founding period. Part I.A.2 draws parallels and distinctions between various mechanisms in existence at the founding for suing the government, such as informers’ actions, writs of mandamus, *qui tam* actions, and modern standing doctrine.

1. The Framing to the 1920s

From the founding of the United States to 1920, standing had almost no place in U.S. law.\textsuperscript{31} History from the framing of the United States shows that, up until the 1920s, courts relied exclusively on Congress to define causes of action and did not place further limitations upon who could bring suit.\textsuperscript{32} Courts believed that Congress had an unrestrained power to articulate causes of action.\textsuperscript{33} Plaintiffs could come to court and present their claims if either the common law or a statute gave them the power to do so.\textsuperscript{34} There was no explicit constitutional limit on Congress’s power to confer standing.\textsuperscript{35} Thus, courts viewed their responsibility in standing

\textsuperscript{26} Fallon, et al., supra note 23, at 127 (arguing that “the advent of the administrative state” and questions regarding “who, if anyone, should be able to sue” governmental agencies to ensure compliance with the Constitution and statutes “intended to protect broadly shared interests of large numbers of citizens” led to the Court becoming “self-conscious” about standing doctrine).

\textsuperscript{27} See, e.g., Shane, supra note 28, at 11085; Sunstein, supra note 26, at 170.

\textsuperscript{28} Sunstein, supra note 26, at 170.

\textsuperscript{29} Id. (“No one believed that the Constitution limited Congress’ power to confer a cause of action.”).

\textsuperscript{30} Cf. id. (“People with a concrete interest could not bring suit unless the common law, or some other source of law, said so. But if a source of law conferred a right to sue, ‘standing’ existed . . . .”).

\textsuperscript{31} Id.
cases as limited to determining whether Congress authorized the cause of action, and not whether the plaintiff had a sufficiently "particularized" dispute with the defendant to create an injury-in-fact for constitutional purposes. The lack of an injury-in-fact requirement before 1920 has important implications for understanding modern standing doctrine. Since the framing, federal courts have understood that their power to adjudicate cases depends on congressional and constitutional authorization. The U.S. Constitution urges that "the judicial power shall extend to all Cases . . . [and] Controversies" between or affecting a specified set of parties and concerning a set of issues. The "case or controversy" requirement is an important check on the judiciary, allowing the third branch of the federal government to exercise its powers in only a specific set of circumstances.

In early U.S. standing doctrine jurisprudence, the courts looked only to congressional action and the constitutional limits of their authority to determine standing. If Congress had statutorily authorized a cause of action, and it was within the limits of the Constitution, standing was valid. Courts determined a plaintiff's standing based on whether the plaintiff had suffered "harm" or a "legal injury." Only the latter was justiciable, while the former was damnum absque injuria. The Article III requirement of a case or controversy limited the types of disputes before federal courts, but it did so based on whether Congress or some other source of law created a cause of action, not on whether the plaintiff suffered an injury-in-fact.

There is historical evidence that the injury-in-fact requirement never existed in common-law jurisprudence. Looking at both English and U.S.

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36. Id. at 170 n.30 (quoting Antonin Scalia, The Doctrine of Standing As an Essential Element of the Separation of Powers, 17 SUFFOLK U. L. REV. 881, 885 (1983)).
37. See Winter, supra note 28, at 1394–95 ("[T]he English, colonial, and post-constitutional practices suggest that the contemporaneous understanding of the 'case or controversy' clause considered as justiciable actions concerning general governmental unlawfulness, even in the absence of injury to any specific person, and even when prosecuted by any common citizen with information about the alleged illegality. In other words, there was a public rights model structured in terms of alternative schemata.").
40. Winter, supra note 28, at 1381–82 ("At the time of the Framers and in succeeding generations, American law provided several constitutionally acceptable models for the adjudication of group rights at the behest of any member of the public, without regard to the necessity of personal interest, injury, or standing.").
41. Cf. Sunstein, supra note 26, at 170 ("If neither Congress nor the common law had conferred a right to sue, no case or controversy existed.").
42. Id. at 171.
43. Damnum absque injuria is Latin for "harm without injury." It refers to an injury incurred for which there is no legal remedy. For example, losses from fair competition are damnum absque injuria. BLACK'S LAW DICTIONARY 449 (9th ed. 2009).
44. Cf. Sunstein, supra note 26, at 169 ("What of 'injury in fact'? No court referred to this phrase before . . . 1970.").
45. Id. at 171 ("In both England and America, actions by strangers, or by citizens in general, were fully permissible and indeed familiar."); see also supra note 28 and accompanying text.
history, there is ample evidence that citizens could bring lawsuits on behalf of their interests, without needing to prove specific or particularized harm.\textsuperscript{46} In England, standing, as understood in its present form, was determined and validated by a writ covering the plaintiff's complaint.\textsuperscript{47} The relationship of the plaintiff to the defendant did not require the particularity that current injury-in-fact requirements impose on plaintiffs. Suits "by a stranger" are specifically authorized in several sources of eighteenth century English law.\textsuperscript{48} The existence of several forms of "stranger suits" has important implications for contemporary standing requirements.

2. Writs of Mandamus and Other Legal Means of Suing the Government

\textit{a. Writs of Mandamus}

Some scholars today contest the idea that injury-in-fact is a fundamental part of the U.S. or English legal system based on the existence and use of writs of mandamus.\textsuperscript{49} A writ of mandamus is a directive issued by a higher court to compel a lower court or a government officer to perform a mandatory duty correctly.\textsuperscript{50} Several states at the founding authorized suits by citizens explicitly.\textsuperscript{51} The existence of the writ of mandamus, coupled with historical evidence from both the early U.S. states and England, led Professor Louis Jaffe to conclude that "the public action—an action brought by a private person primarily to vindicate the public interest in the enforcement of public obligations—has long been a feature of our English and American law."\textsuperscript{52}

\begin{footnotes}
\item46. See Sunstein, supra note 26, at 170.
\item48. See, e.g., 2 \textsc{Edward Coke}, \textit{Institutes of the Laws of England} 602 (Thomas Gale ed., 2004) (1797) ("And the kings courts that may award prohibitions, being informed either by the parties themselves, or by any stranger, that any court temporall or ecclesiasticall doth hold plea of that . . . may lawfully prohibit the same . . ."); Sunstein, \textit{supra} note 26, at 171–72 (listing several other instances where a citizen, or stranger, could bring suit against the government). Sunstein explains that the writ of mandamus is a close corollary to the notion that both English and early American law were familiar with citizen suits. \textit{Id.} at 172 ("The mandamus action is closely related to the modern citizen suit. The purpose of the mandamus action is to require the executive branch to do what the law requires it to do. This is the same idea that underlies the citizen suit, most conspicuously in the environmental area.").
\item49. See Louis L. Jaffe, \textit{Standing To Secure Judicial Review: Private Actions}, 75 \textit{HARV. L. REV.} 255, 302 (1961); Shane, \textit{supra} note 28, at 11085 ("Early state and federal practice confirm the justiciability of 'stranger' suits."); Sunstein, \textit{supra} note 26, at 171 ("Before and at the time of the framing, the English practice was to allow strangers to have standing in many cases involving the ancient prerogative writs.").
\item50. \textsc{Black's Law Dictionary}, \textit{supra} note 43, at 1046–47.
\item51. See, e.g., Jaffe, \textit{supra} note 47, at 1275–82.
\item52. Jaffe, \textit{supra} note 49, at 302.
\end{footnotes}
When Cows Fly

At a federal level, the history is a bit murkier, though still indicative of an accepted tradition of citizen suits. Despite the lack of an explicit mandate, the Supreme Court did allow, on several occasions, citizen suits, where an individual citizen brought suit to compel government action without alleging particular or specific harm. In Union Pacific Railroad Co. v. Hall, merchants brought suit to force the railroad company, a federally chartered entity, to create a new railroad line. The merchants sued "to compel the Union Pacific Railroad Company to operate its road as required by law," under a general mandamus statute. Despite admonishment from the Court, the suit proceeded.

b. Qui Tam and Informers' Actions

While the Court has sent mixed messages regarding citizen suits, Congress clearly contemplated and authorized citizen suits in the form of two judicial mechanisms enacted to empower citizens to bring suit, no matter the nature of their grievance: Qui tam actions and informers' actions. Qui tam actions allow a citizen to bring suits against offenders of the law even if they have no direct personal interest in the case. Informers' actions authorize private citizens to sue other private actors for breaking a criminal or civil law, and recover a portion of the penalty or reward. The history of both qui tam and informers' actions suggests that Congress, in the eighteenth century, wanted citizens to have the power to compel government action.

Early congressional statutes authorized qui tam actions for the enforcement of a plethora of both civil and criminal actions. As recently

53. Sunstein, supra note 26, at 174 (“At the national level, there is no clear American tradition of reliance on the prerogative writs. . . . Congress did not choose explicitly to create general mandamus, prohibition, or certiorari jurisdiction . . . .”).
54. See, e.g., Marvin v. Trout, 199 U.S. 212, 225 (1905) (“Statutes providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our Government.”); see also 4 W. S. Holdsworth, A History of English Law 356–57 (1924); Berger, supra note 47, at 825–26.
55. 91 U.S. 343 (1875).
56. Id. at 343–44. For further discussion of this case as it relates to standing, see Sunstein, supra note 26, at 174, and Winter, supra note 28, at 1404–05.
58. Id. at 354 (stating that the merchants were attempting to enforce "a duty to the public generally" and that they "had no interest other than such as belonged to others").
59. Sunstein, supra note 26, at 174–75.
60. The term qui tam comes from the Latin phrase qui tam pro domino rege quam pro se ipso in hac parte sequitur, meaning "who as well for the king as for himself sues in this matter." Black's Law Dictionary, supra note 43, at 1368. The person who brings the suit is a relator. Id.
62. Id.
63. See, e.g., id. ("The False Claims Act, a federal statute with antecedents nearly as old as the republic itself, authorizes private citizens—called 'relators'—to bring 'qui tam' actions on behalf of the United States seeking civil penalties and damages payable to the
as in 2000, the Court has affirmed *qui tam* actions.\(^{64}\) The *qui tam* action’s traditional place in U.S. law provides support for the claim that injury-in-fact may not be a constitutional necessity under Article III to validate a case or controversy.\(^{65}\)

Based on early history of U.S. jurisprudence, it seems safe to say that plaintiffs had standing if the law granted them a cause of action.\(^{66}\) Writing in 1905, Professor Frank Goodnow observed,

> The purpose of the writs is twofold. In the first place, they are issued mainly with the intention of protecting private rights; . . . some of them may be made use of also for the purpose of the maintenance of the law regardless of the fact whether in the particular case a private right is attacked or not.\(^{67}\)

Thus, the Court was open to plaintiffs who wanted to force government action regardless of their personal stake in the outcome of the case.\(^{68}\) Both the historical prevalence of *qui tam* actions, as well as the Court’s consistent willingness to find *qui tam* actions and informers’ actions constitutional, suggest that the Court’s recent imposition of an injury-in-fact

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\(^{64}\) In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), the Court held that a relator’s interest in recovering a bounty for successful prosecution could support standing. *Id.* at 765–66. The Court, however, did say that “an interest that is merely a ‘byproduct’ of the suit itself” did not satisfy the injury requirement. *Id.* at 773. Yet, the relator, as the assignee of the Government’s claim, “has standing to assert the injury in fact suffered by the assignor.” *Id.* The Court based its holding in *Vermont* on “the long tradition of *qui tam* actions in England and the American Colonies.” *Id.* at 774; see also FALLON, JR. ET AL., supra note 23, at 155–56.

\(^{65}\) Sunstein, *supra* note 26, at 175–76 (“For present purposes, what is especially revealing is that there is no evidence that anyone at the time of the framing believed that a *qui tam* action or informers’ action produced a constitutional doubt. No one thought to suggest that the ‘case or controversy’ requirement placed serious constraints on what was, in essence, a citizen suit. This fact provides extremely powerful evidence that Article III did not impose constraints on Congress’s power to grant standing to strangers.”). But see *id.* at 176 (suggesting that *qui tam* and informers’ actions were constitutional “only if dollars were to change hands”).

\(^{66}\) Cf. *Winter*, supra note 28, at 1409 (“Suits by those without personal injury who were acting as representatives of others were not viewed as raising constitutional problems under article III.”).


\(^{68}\) Sunstein, *supra* note 26, at 177–78 (“There is no affirmative evidence of a requirement of a ‘personal stake’ or an ‘injury in fact’—beyond the genuine requirement that some source of law confer a cause of action.”).
requirement lacks the hearty historical backing on which advocates of a more relaxed standing inquiry rely.  

B. The New Deal and Beyond: The Development of Standing

During the New Deal and Progressive Period of the 1930s to 1950s, standing began to emerge as a "discrete body of doctrine." As the country and courts struggled over the legitimacy of the emerging regulatory state, the Supreme Court repeatedly invoked the Constitution to bar challenges to the expansion of the federal government's power. In the 1930s, Justice Louis Brandeis invoked justiciability doctrines, such as standing, to insulate progressive legislation from frequent attack and constant, defensive litigation. Justice Felix Frankfurter, two decades later, expanded and refined these doctrines, cementing their place and importance in U.S. law.

Professor Cass Sunstein offers an explanation of this era of standing doctrine jurisprudence that is consistent with the early period discussed above. He argues that even though the idea of standing was a novel one—so much so that the decisions of Justices Brandeis and Frankfurter do not mention the word—no common-law or statutorily authorized private right was at stake. In other words, though Justice Brandeis was particularly eager to protect New Deal legislation, the fact that Congress had not authorized plaintiffs to bring suit against the government by enacting a law, even in the days of the framing, would have been sufficient for a court to throw the suit out and declare *damnum absque injuria*. Therefore, though the Court seemingly became more restrictive, "[t]he
relevant denials of standing were . . . properly based on the plaintiffs' inability to find a law that entitled them to sue.\textsuperscript{78}

1. Standing: What Is It Good For?

The requirement that plaintiffs meet a certain threshold requirement of personal affliction serves four fundamental values.\textsuperscript{79} First, standing promotes separation of powers ideals by restricting the availability of judicial review to a narrow category of disputes.\textsuperscript{80} Separation of powers is the idea that each branch of the government, the executive, legislative, and judiciary, should exercise only those powers expressly designated to it in the Constitution. James Madison argued forcefully for the strict enforcement of a rigid separation of powers doctrine, claiming that “[n]o political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty” than separation of powers.\textsuperscript{81} The desire to maintain a separation of powers has shaped the Court’s reasoning in standing cases immensely.\textsuperscript{82} In fact, in nearly all of the Supreme Court’s hallmark decisions on standing, the Court emphasized the importance of enforcing separation of powers through the doctrine.\textsuperscript{83} The Court has repeatedly held that the standing inquiry ensures that the other branches of government will not be interfered with in executing their constitutionally enumerated powers.

\textsuperscript{78} Id. at 181.
\textsuperscript{79} CHEMERINSKY, supra note 20, at 58–60.
\textsuperscript{81} THE FEDERALIST No. 47, at 293 (James Madison) (Gary Wills ed., 2003).
\textsuperscript{82} See Shane, supra note 28, passim.
\textsuperscript{83} See Raines v. Byrd, 521 U.S. 811, 819–20 (1997) (stating that the standing inquiry is "especially rigorous when reaching the merits" of a suit would force the Court "to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional" (citing Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 542 (1986); Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 473–74 (1982)); Lewis v. Casey, 518 U.S. 343, 353 n.3 (1996) ("[Standing] has a separation-of-powers component, which keeps courts within certain traditional bounds vis-à-vis the other branches, concrete adverseness or not. That is where the 'actual injury' requirement comes from."); Allen v. Wright, 468 U.S. 737, 752 (1984) (declaring that standing is "built on a single basic idea—the idea of separation of powers"); Warth v. Seldin, 422 U.S. 490, 498 (1975) (explaining that standing "is founded in concern about the proper—and properly limited—role of the courts in a democratic society" (citing Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 221–27 (1974); United States v. Richardson, 418 U.S. 166, 188–97 (1974) (Powell, J., concurring))). But see Susan Bandes, The Idea of a Case, 42 STAN. L. REV. 227, 230 (1990) (arguing that concern for enforcing separation of powers must also include preserving the federal judiciary's role, which can be undermined by a restrictive interpretation of its place among the three branches of government).
Second, standing preserves the judiciary’s limited material resources and political capital. Justice Lewis Powell, in a concurring opinion in *United States v. Richardson,* argued that the Court “risk[ed] a progressive impairment of the effectiveness of the federal courts if their limited resources are diverted increasingly from their historic role to the resolution of public-interest suits brought by litigants who cannot distinguish themselves from all taxpayers or all citizens.” Noting that the “irreplaceable value” of the federal courts lies in protecting “minority groups against oppressive or discriminatory government action,” Justice Powell saw the development of standing as a means of guarding against erosion of the Court’s power. Additionally, in *United Public Workers v. Mitchell,* the Court held, “Should the courts seek to expand their power so as to bring under their jurisdiction ill-defined controversies over constitutional issues, they would become the organ of political theories. Such abuse of judicial power would properly meet rebuke and restriction from other branches.”

Third, standing improves the judiciary’s ability to decide a case correctly by ensuring that there is a clearly defined and specific controversy in front of the tribunal. Standing ensures that the parties litigating the dispute have a sufficiently concrete personal stake in the outcome to ensure good decision making by the court, which sharpens the issue before the court. One criticism of this justification is that a lawyer who both cares deeply about an issue and would be an effective advocate of a given issue would not be able to litigate a complaint without a plaintiff, while a pro se litigant could litigate a highly contentious issue without the benefit of specialized counsel.

Fourth, the Supreme Court often invokes standing as an enforcement of an underlying concern with fairness. The specificity required by a court assures that only the rights and interests of the litigants in front of the court will be decided. However, the opposite side of this argument is that

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84. See *United States v. Richardson,* 418 U.S. 166, 192 (1974) (Powell, J., concurring); see also CHEMERINSKY, supra note 20, at 59.
85. 418 U.S. 166.
86. Id. at 192 (Powell, J., concurring).
87. Id.
89. Id. at 90–91.
90. See *Baker v. Carr,* 369 U.S. 186, 204 (1962) (noting that a plaintiff must allege “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”). A related justification for standing is that it preserves the doctrine of stare decisis by limiting the ability of the Supreme Court to deliver inconsistent opinions over time. See Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice,* 83 CAL. L. REV. 1309, 1309–10 (1995).
91. See CHEMERINSKY, supra note 20, at 59.
92. Id.
93. See *Singleton v. Wulff,* 428 U.S. 106, 113–14 (1976) (“[T]he courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights
standing "might be quite unfair" for potential plaintiffs if they feel that they have been seriously harmed but the court refuses to recognize their injury or disqualifies them for some other reason.94

2. Private Rights Versus Public Rights Models of Adjudication

From the 1920s through the 1990s, standing doctrine became a more important restriction on the types of lawsuits citizens could bring against the government. This section traces the development of standing doctrine from the early New Deal decisions through the most restrictive Supreme Court decisions of the 1970s and 1980s.

Since 1923, the Court has battled over whether the private rights model of adjudication or the public rights model of adjudication should hold sway.95 The Court's decision in *Frothingham v. Mellon*96 exemplifies the private rights model.97 In *Frothingham*, a federal taxpayer challenged the Maternity Act of 1921 as beyond Congress's Article I powers and an invasion of the state's Tenth Amendment rights.98 In a unanimous decision, the Court held that the action was nonjusticiable.99 It found that the plaintiff's "interest in the moneys of the [federal] Treasury" was "comparatively minute and indeterminable" and that "the effect upon future taxation, of any payment out of [federal] funds . . . [was] remote, fluctuating and uncertain."100 Further, the Court held that the administration of a statute was the concern of the public and not any one individual.101

Thus, the Court required that common-law-style injuries be sustained by an individual with enough specificity in order to deter a common taxpayer from slowing the processes of government by constantly litigating the validity of statutes.102 Common-law-style injuries are injuries in the classic tort sense—a personal injury sustained as a result of the breach of duty to another individual.103 In *Frothingham*, the Court held that they would not

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94. See CHEMERINSKY, supra note 20, at 60.
95. For a discussion of the origins of Public Rights Models, see Winter, supra note 28, at 1394-99.
96. 262 U.S. 447 (1923).
97. Id. In a companion case, *Massachusetts v. Mellon*, the Supreme Court also denied the State of Massachusetts standing to attack the constitutionality of the Maternity Act. Id. at 485-86.
98. Id. at 479.
99. Id. at 488-89.
100. Id. at 487; see also FALLON, JR. ET AL., supra note 23, at 127.
101. *Frothingham*, 262 U.S. at 487-88 ("The party who invokes the [court's] power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.").
102. Id. at 487.
103. Id. at 484.
entertain cases where the plaintiff’s complaint consisted of an allegation that the government was acting illegally, without demonstrating some personal, specific injury sustained as a result of the government’s illegal action.\(^\text{104}\)

The Court revisited and qualified its *Frothingham* decision in *Flast v. Cohen*.\(^\text{105}\) In *Flast*, a federal taxpayer successfully challenged a federal spending program that provided financial support for educational programs in religious schools on the ground that it violated the Establishment Clause.\(^\text{106}\) The Court distinguished *Frothingham* as resting on policy rather than constitutional grounds, limiting the standing inquiry as relating “only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.”\(^\text{107}\) The Court’s holding in *Flast* is limited to cases concerning the Establishment Clause.\(^\text{108}\)

The two decisions essentially frame the public rights versus private rights models of adjudication debate. Private rights models require plaintiffs to frame their complaints in a common-law manner, consistent with the tort doctrine of early U.S. jurisprudence.\(^\text{109}\) The public rights model expands the class of plaintiffs allowed in court by leaving the standing inquiry at the two pronged nexus requirement articulated in *Flast*.\(^\text{110}\) Yet, in light of the last thirty years of Supreme Court precedent, the only time a citizen has proved standing to challenge government action, without a federal statute giving him or her the right to sue, is by challenging government spending as a violation of the Establishment Clause.\(^\text{111}\)

3. A More Defined Role of Standing—The Administrative Procedure Act

The enactment of the Administrative Procedure Act (APA)\(^\text{112}\) in 1946 sought to statutorily institutionalize the growing body of judge-made

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104. *Id.* at 486.
107. *Flast*, 392 U.S. at 101. Further refining their holding, the Court continued, “The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged.” *Id.* at 102.
108. *See* Bowen v. Kendrick, 487 U.S. 589, 620 (1988) (granting standing to a plaintiff challenging a federal statute as a violation of the Establishment Clause); *cf.* CHEMERINSKY, *supra* note 20, at 96 (“After Richardson, Schlesinger, and Valley Forge the only situation in which taxpayer standing appears permissible is if the plaintiff challenges a government expenditure as violating the establishment clause.”).
110. *See* id. at 128–29.
111. *See supra* note 108 and accompanying text.
standing law and provide a statutory basis for plaintiffs to rely on to validate their standing when challenging a federal agency's actions or expenditures. The law recognized standing in three categories of cases, which were all well-established under previous law. The APA recognized standing for plaintiffs (1) whose common-law interests had been invaded by agency action, (2) if a statute granted plaintiffs an interest, and (3) where a statute granted plaintiffs standing, regardless of injury.

First, the law recognized standing for plaintiffs who could show that they had suffered a "legal wrong," which would consist of an agency regulation invading a common-law interest. Second, plaintiffs could prove "legal wrong" if their statutory interests were at stake. Even if Congress did not expressly grant standing with regard to a particular type of interest or agency, under the APA, the existence of an interest protected by statute was sufficient. Lastly, the APA recognized standing for plaintiffs if a statute granted them standing, regardless of injury. The APA provided congressional authorization of actions by people lacking traditionally defined legal injuries. First codified as 47 U.S.C. § 402(b)(6), part of the Federal Communications Act, these statutes became known as "private attorneys general" statutes and allowed people to bring causes of action.

The 1960s saw a broadening of the APA to include beneficiaries of agency regulations. Courts allowed displaced urban residents, listeners of radio stations, and nature lovers seeking to redress insufficient regulatory protection to proceed against the government. Increasing

113. See Sunstein, supra note 26, at 181.
114. See U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 96 (1947) ("The Attorney General advised the Senate Committee on the Judiciary of his understanding that section 10(a) was a restatement of existing law.... This construction of section 10(a) was not questioned or contradicted in the legislative history.") (citing Am. Stevedores, Inc. v. Porello, 330 U.S. 446 (1947)); see also Richard B. Stewart, The Reformation of American Administrative Law, 88 HARV. L. REV. 1667, 1723-27 (1975).
115. Sunstein, supra note 26, at 181-82.
116. Id. at 181.
117. Id. at 181-82.
118. Id. Professor Sunstein uses the following example: "[I]f the interest of a litigant in competition on equal terms was a relevant factor under the governing statute—if the agency was required to take that factor into account—the litigant would have standing to bring suit to vindicate its interest." Id. at 182.
119. Id.
121. Sunstein, supra note 26, at 182.
125. Then-Judge Warren Burger wrote, in an influential passage, The theory that the [FCC] can always effectively represent the listener interests in a renewal proceeding without the aid and participation of legitimate listener representatives fulfilling the role of private attorneys general is one of those assumptions we collectively try to work with so long as they are reasonably
numbers of private attorneys general statutes sought to achieve equilibrium among a rapidly changing horizon of administrative regulatory agencies, those entities regulated by the agencies, and the supposed beneficiaries of those regulations.\textsuperscript{126}

4. The Maturation of Standing Doctrine

This section discusses the landmark case of \textit{Association of Data Processing Service Organizations, Inc. v. Camp},\textsuperscript{127} which increased the plaintiff's burden to establish standing. It looks at the immediate aftermath of \textit{Data Processing} and concludes by looking at a series of cases that increased the restrictiveness of standing. In doing so, this section seeks to provide a working definition of contemporary standing doctrine.

a. Data Processing: \textit{Changing the Standing Landscape}

The landmark decision by the Supreme Court in \textit{Data Processing} changed the landscape of standing markedly. In \textit{Data Processing}, sellers of data processing services sought review under the APA of a ruling by the Comptroller of the Currency permitting national banks to provide data processing services to other banks and bank customers.\textsuperscript{128} The U.S. District Court for the District of Minnesota dismissed for lack of standing and the U.S. Court of Appeals for the Eighth Circuit affirmed, finding the plaintiff had failed to demonstrate that a statute authorized the suit.\textsuperscript{129} The Supreme Court reversed, with Justice William O. Douglas writing for the Court.\textsuperscript{130}

\textsuperscript{126} See Sunstein, supra note 26, at 187 (“The resulting set of legislative and administrative initiatives generally reflected a democratic judgment that the new interests now protected by statute—interests of consumers, listeners, poor people, and so forth—should receive no less protection than the interests traditionally protected by the common law.”).

\textsuperscript{127} 397 U.S. 150 (1970).

\textsuperscript{128} Id. at 151.


\textsuperscript{130} Data Processing, 397 U.S. at 151.
The holding "essentially jettisoned the entire framework of the APA."131 This case was the first instance of the use of the term "injury in fact," and it introduced "an entirely new focus for determining the class of persons entitled to bring suit" against a government agency by imposing an additional prerequisite to standing.132 As a result of Data Processing, plaintiffs had to show not only that a statute authorized their suit, but also, when challenging the illegality of government action, that Congress intended for plaintiffs to be protected by the law under which they brought their challenge.133

Justice Douglas found that the plaintiffs had suffered an "injury in fact" and rejected any requirement of a legally protected interest, essentially saying that not only must Congress authorize the suit, but an additional set of constitutional requirements must be met as well.134 No longer would courts refer to statutory authorization to determine if Congress intended for a party to have standing; a plaintiff must show both "injury in fact, economic or otherwise," and injury "arguably within the zone of interests."135

The shift from an inquiry about whether the plaintiff alleged a breach of "a legally protected interest" to whether the plaintiff had suffered an "injury in fact" has important implications. First, the decision adopted a private rights model of adjudication, arguably repudiating the realities of modern U.S. politics and congressional efforts to adapt the judiciary to the regulatory state.136 Data Processing stands for "the idea that standing should be reserved principally to people with common law interests" at stake and "denied to [those] without such [traditionally defined] interests.137 The decision raised important separation of powers concerns because of its dismissal of statutorily protected interests.138

Second, and perhaps even more importantly, the Data Processing decision intended to simplify the standing inquiry by looking away from "complex inquiry[ies] of law . . . to an exceedingly simple, law-free inquiry into fact (is there a factual harm?)."139 Critics have suggested that this effort to simplify is flawed because, by distinguishing harm-in-fact from harm that is purely ideological, "courts must inevitably rely on some standard that is normatively laden and independent of facts."140

131. Sunstein, supra note 26, at 185; see also Fallon, Jr. et al., supra note 23, at 157 (referring to the Data Processing case as a "major doctrinal shift").
132. See Sunstein, supra note 26, at 185–86.
133. Id. at 185.
134. See Data Processing, 397 U.S. at 152–54; Fallon, Jr. et al., supra note 23, at 157.
136. See Sunstein, supra note 26, at 188.
137. Id.
138. Id.
139. Id.
140. Id. at 189.
b. The Aftermath of Data Processing: Citizen Suits Revisited

In several decisions following Data Processing, the Supreme Court severely restricted both Congress's power to authorize "citizen suits" and citizens themselves from bringing suit against a regulatory agency, regardless of whether they were the regulated object or the beneficiary of such regulation. An "object," in terms of agency regulation, is the regulated entity; radio stations, for example are the object of Federal Communications Commission (FCC) regulations. Beneficiaries are the individuals whom the agency's regulation is intended to protect. In this example, radio station listeners are the intended beneficiaries of FCC regulations. The FCC regulates radio stations for the benefit of those who listen to the stations. The Court has moved away from adopting the same standard for evaluating standing for both "objects" and "beneficiaries," instead putting each category of potential litigants on different footing, allowing "objects" of regulation more access to courts than "beneficiaries."

In the late 1980s, Congress attempted to create a series of statutes authorizing citizen suits that would be available to citizens against a private defendant operating in violation of a statute or agency regulation. The focus of the citizen suit provisions of these statutes was to empower beneficiaries with the ability to enforce compliance with statutes, disproportionate to their political power within the agency system.

c. Becoming Restrictive

Throughout the 1970s, the Supreme Court enhanced the restrictive role of standing. In Sierra Club v. Morton, the Court refined the requirements for a plaintiff to bring suit against a government agency. Relying on the APA, the Sierra Club, as plaintiff, challenged government approval of a

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141. *Id.* at 193.
143. Sunstein, *supra* note 26, at 188 ("After the New Deal, the very distinction between regulatory beneficiaries and regulatory objects seemed based on a conceptual mistake... [T]his understanding was no longer consistent with the practices and values of modern government. The so-called regulatory objects were in fact beneficiaries of law... ").
146. 405 U.S. 727 (1972).
147. *Id.*
development plan as against its statutory decree.\textsuperscript{148} The Sierra Club claimed that it had "a special interest in the conservation and the sound maintenance of the national parks" where the development was planned.\textsuperscript{149} The Court ruled that the plaintiff lacked standing because it had not alleged an injury-in-fact.\textsuperscript{150}

Though the kind of noneconomic harm the plaintiff alleged was a cognizable injury, the plaintiff did not allege that he would be among those specifically injured by the plan.\textsuperscript{151} In other words, the plaintiffs had not alleged with sufficient specificity that the area planned for development would impair their ability to use or enjoy the national park.\textsuperscript{152} The Supreme Court held that despite "acknowledged potential public injury from allegedly illegal environmental degradation[, . . .] demonstrable private injury was required" to give the Court jurisdiction to hear the case.\textsuperscript{153} Justice Harold Blackmun dissented and relied on the Court's decision in \textit{Flast v. Cohen} to show that the Sierra Club, with ample resources and expertise in the area of park preservation would be the ideal candidate for an adversarial setting against the government on this topic.\textsuperscript{154}

The Court continued to limit access to federal courts by reinforcing the importance of common-law-style injuries. The holding in \textit{Linda R. S. v. Richard D.}\textsuperscript{155} stands for the proposition that complaints that did not allege a tort-like injury would not fit into the constitutional definition of a "case" or "controversy."\textsuperscript{156} The Court denied relief in a class action suit brought by the mothers of children born out of wedlock.\textsuperscript{157} The plaintiffs challenged a state policy of bringing nonsupport prosecutions against fathers of legitimate children only, alleging that the policy violated the Equal Protection Clause of the U.S. Constitution.\textsuperscript{158} Justice Thurgood Marshall denied the injunctive relief sought by finding a lack of standing.\textsuperscript{159} He based the opinion on the theory that the plaintiffs were not seeking relief for themselves but instead were suing to force the prosecution of someone

\begin{itemize}
\item \textsuperscript{148} Id. at 730.
\item \textsuperscript{149} Id.
\item \textsuperscript{150} Id. at 740–41.
\item \textsuperscript{151} See id. at 739–40. This part of the opinion was hailed as a victory for environmentalists, although the group lost the case on standing. Robin Kundis Craig, \textit{Removing "The Cloak of a Standing Inquiry": Pollution Regulation, Public Health, and Private Risk in the Injury-in-Fact Analysis}, 29 CARDOZO L. REV. 149, 177 (2007).
\item \textsuperscript{152} Sierra Club, 405 U.S. at 734–35.
\item \textsuperscript{153} ROBIN KUNDIS CRAIG, MERCER UNIVERSITY SCHOOL OF LAW VIRTUAL LECTURE IN ENVIRONMENTAL LAW, IMPLEMENTING A PUBLIC HEALTH APPROACH IN POLLUTION ENFORCEMENT: A PATH TO IMPROVING AGENCY DECISIONMAKING AND THE PUBLIC'S ACCEPTANCE OF ENVIRONMENTAL LAW 8 (2005), available at http://www.law.mercer.edu/elaw/public_health.pdf.
\item \textsuperscript{154} Sierra Club, 405 U.S. at 755–58 (Blackmun, J., dissenting).
\item \textsuperscript{155} 410 U.S. 614 (1973).
\item \textsuperscript{156} Id. at 616.
\item \textsuperscript{157} Id. at 614–15.
\item \textsuperscript{158} Id. at 615–16.
\item \textsuperscript{159} Id. at 619.
\end{itemize}
WHEN COWS FLY

else—the deadbeat fathers. The Court took issue with this both because "[t]he prospect that prosecution [of the father] will . . . result in the payment of support can, at best, be termed only speculative," and because "in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." Even when presented with a common-law-style complaint, the Court demanded a high-level of immediacy to allow standing for a plaintiff asking for injunctive relief from a repeated injury. The Court's holding in Los Angeles v. Lyons suggested that even when harm has already been inflicted, the Court would be extremely cautious before providing injunctive relief to prevent a future, similar injury. The plaintiff was a man who was placed in a choke hold by police on a routine traffic stop. He sued the city, asking the Court to impose a moratorium on the use of choke holds by the police force. The Court held that the plaintiff lacked standing because the plaintiff's complaint was conjectural and hypothetical, in that there was no reason to believe he would be stopped and restrained in the same manner again.

The Court expressed an analogously narrow view of injury-in-fact the following year in United States v. Richardson, when it rejected a plaintiff's attempt to litigate whether the CIA was violating his constitutional rights by not accounting for all of its expenditures. The Court synthesized the holdings of Frothingham and Flast by ruling that the injury was "plainly undifferentiated and ‘common to all members of the public.’" The Court also tackled the apparent difficulty in litigating the constitutionality of a government act. The Court decided that it was an issue best resolved through the political process. In doing so, it sought to preserve the power of judicial review to claims that violated Fourteenth Amendment principles, namely the trampling of a minority group by a politically powerful majority. Thus, the 1970s saw a limiting of access to federal adjudication as the Court fomented the role of standing through constitutional interpretation and respect for the separation of powers.

160. Id. at 618 ("[T]he requested relief . . . would result only in the jailing of the child’s father.").
161. Id. at 618–19.
163. Id. at 111.
164. Id. at 97–98.
165. Id. at 98.
166. Id. at 102–03.
168. Id. at 177 (quoting Ex parte Levitt, 302 U.S. 633, 634 (1937) (per curiam)).
169. Id. at 179.
170. Id. at 188–92 ("The irreplaceable value of the power [of judicial review] . . . lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action. It is this role, not some amorphous general supervision of the operations of government, that has maintained public esteem for the federal courts and has permitted the peaceful coexistence of the countermajoritarian implications of judicial review and the democratic principles upon which our Federal Government in the final analysis rests.").
5. A Definition of Standing Requirements

In the landmark decision of Allen v. Wright,171 the Supreme Court synthesized the strands of Linda R.S., Richardson, and other cases to enunciate the canonical modern definition of standing.172 In another challenge to an IRS policy, parents of black schoolchildren sued the IRS for failing to deny tax-exempt status to racially discriminatory schools.173 The plaintiffs claimed that "the IRS . . . harm[ed] them directly and interfere[d] with the ability of their children to receive an education in desegregated public schools" by not adopting more comprehensive procedures to review whether racially discriminatory schools should receive tax benefits.174

The Supreme Court held that the complaint did not meet the constitutional requirement of a "case" or "controversy" and the plaintiffs therefore lacked standing to pursue their claim.175 The Court described standing as "embrac[ing] several judicially self-imposed limits on the exercise of federal jurisdiction."176 In their clearest definition to date of the standing doctrine, the Court provided three specific requirements that plaintiffs must demonstrate to withstand a standing inquiry: injury, traceability, and redressability.177 The Court held that plaintiffs did not have standing for several reasons; chief among them was that the plaintiffs could not show that a decree in their favor would actually affect their children.178 The plaintiffs could not define the causal relationship between the tax exemption and desegregation as anything more than "speculative."179

The Allen decision is important for several reasons. First, it recognizes standing as a fundamental ingredient of judicial power, suggesting that standing enforces the ideal of separation of powers and that Article III courts should use their power of judicial review only as a "'last resort, and as a necessity."180 The Court held that granting standing to the plaintiffs would be tantamount to making judges "'virtually continuing monitors of the wisdom and soundness of Executive action'"181 and that they would risk judicial usurpation of the President's power to "'take Care that the Laws be

172. Id. at 791–92.
173. Id. at 739–40.
174. Id.
175. Id. at 754–55.
176. Id. at 751.
177. Id. ("A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." (citing Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982))).
178. Id. at 758.
179. Id.
180. Id. at 752 (quoting Chi. & Grand Trunk Ry. Co. v. Wellman, 143 U.S. 339, 345 (1892)).
181. Id. at 760 (quoting Laird v. Tatum, 408 U.S. 1, 15 (1972)).
faithfully executed." 182  Secondly, by cementing standing—as defined by the Court—into federal court precedent, the Court adopted a private rights model of adjudication that both rejected congressional attempts to modify the types of cases federal courts could hear and protected agencies from litigation by restricting potential plaintiffs’ access to federal court. 183

In *Lujan v. National Wildlife Federation* 184 the Supreme Court held that interest groups who were concerned with protecting the environment faced the same scrutiny as any other group trying to bring a lawsuit against the government. 185 In *Lujan*, the Court found the plaintiff lacked standing to challenge the administration of the Interior Department’s land withdrawal renewal program, which, they alleged, unlawfully increased mining on public lands. 186 The plaintiff sought to overcome the requirements of standing by submitting two affidavits of its members stating that the increased mining would diminish their ability to enjoy the land. 187 The Court concluded that the affidavits were not specific enough to uphold standing. 188

Subsequently, the Court placed further restrictions on the class of plaintiffs allowed to bring suit against the government by holding in *Lujan v. Defenders of Wildlife* 189 that the plaintiffs had to include specific future plans in order to be sufficiently injured to qualify for federal adjudication. 190 In this case, Defenders of Wildlife brought suit against Lujan, Secretary of the Interior, for plans to develop land internationally. 191 Again the Court rejected the claim based on standing for lack of specificity. 192 Although the plaintiffs alleged that they had been to the exact areas the agency planned to develop for the purpose of studying the wildlife that would be directly affected by the government’s allegedly illegal act, the Court said that the future plans the plaintiffs had to return to those sites were not specific enough. 193

182. *Id.* at 761 (quoting U.S. CONST. art. II, § 3).
183. *Id.* at 759–62.
185. *Id.* at 894.
186. *Id.* at 879.
187. *Id.* at 885–88.
188. *Id.* at 889 (holding that “averments which state only that one of respondent’s members uses unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of the governmental action” were insufficient to support standing).
190. *Id.* at 564.
191. *Id.* at 562–64.
192. *Id.* at 560–62 (holding that plaintiff’s injury-in-fact must be “concrete and particularized” and “actual or imminent, not ‘conjectural’ or ‘hypothetical’” (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984))). Further, the Court clarified its use of the word “particularized.” *Id.* at 560 n.1 (“By particularized, we mean that the injury must affect the plaintiff in a personal and individual way.”).
193. *Id.* at 564 (“Such ‘some day’ intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the ‘actual or imminent’ injury that our cases require.”).
Defenders of Wildlife is an important decision because of its implications for future causes of action. While Justice Kennedy would have allowed Congress to authorize causes of action and define new types of injury to support standing, the majority did not adopt his opinion. As a result, the practical effect of the holding "was to clarify that Congress could not statutorily create a right of action in persons who have not met the constitutional requirement of injury in fact."\footnote{Id. at 580 (Kennedy, J., concurring) ("As Government programs and policies become more complex and far reaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition . . . . In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, and I do not read the Court's opinion to suggest a contrary view. In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." (citing Warth v. Seldin, 422 U.S. 490, 500 (1975))).}

C. Exceptions to Rigidity

In three important recent cases, the Court has relaxed the bar for interest groups to sue. In *FEC v. Akins*,\footnote{Id. at 13.} the Court recognized standing for a beneficiary to challenge an agency's regulation of an object, departing from previous restrictions because the right at stake—informed voting—was of such vital importance.\footnote{Id. at 13.} In *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*,\footnote{Id. at 168 (2000).} the Court went further by allowing a private party to sue another private party for noncompliance with the Clean Water Act.\footnote{Id. at 167 (2000).} Finally, in *Massachusetts v. EPA*,\footnote{Id. at 1438 (2007).} the Court recognized the right of a state to sue the EPA for failing to protect its citizens from the future harm of global warming.\footnote{Id. at 1454–55.} Taken together, these cases represent a significant admission, on the part of the Court, that standing doctrine is one that is both adaptable and less rigid than previously defined.

In *Akins*, in a situation similar to *Richardson*, the Court allowed standing to a plaintiff challenging the Federal Elections Commission's decision that American Israel Public Affairs Committee (AIPAC) was not a political action committee (PAC).\footnote{Id. at 22–23.} The Court distinguished its refusal in *Richardson* under apparently similar circumstances to hear challenges to the CIA's spending by emphasizing that the *Akins* plaintiff was a taxpayer, not a voter.\footnote{Id. at 22–23.} The Court held that by allowing AIPAC to withhold information

194. Id. at 580 (Kennedy, J., concurring) ("As Government programs and policies become more complex and far reaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition . . . . In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, and I do not read the Court's opinion to suggest a contrary view. In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." (citing Warth v. Seldin, 422 U.S. 490, 500 (1975))).
197. Id. at 13.
199. Id.
201. Id. at 1454–55.
203. Id. at 22–23.
regarding its donors and supporters, the voter was injured in fact by not being able to make an informed decision in the course of voting. This case represented a shift in the Court’s reasoning in that, by allowing a citizen to challenge a government action, the Court became more sympathetic to a public rights model of adjudication.

The Court continued to follow this line of reasoning with its decision in Laidlaw, where the Court upheld standing for a plaintiff to challenge the defendant’s noncompliance with the Clean Water Act. It is important to note, however, that in Laidlaw, the plaintiff was suing a private party, not challenging the government’s actions or the regulation of actions by an agency. Furthermore, Friends of the Earth alleged damage not to the environment but to its members. Commentators characterized the decision as a liberalization of the Court’s injury-in-fact analysis, especially compared to the Court’s holding in Linda R.S., yet the Court was careful to limit the applicability of its holding.

The Lujan cases and the Laidlaw decision are the most important discussions by the Court, to date, on the issue of standing. Yet, Massachusetts v. EPA seems to indicate a retreat from the harsh Lujan approach because it not only recognizes standing for a beneficiary to sue an agency over its regulation of an object, but also because the harm alleged had not yet come to fruition. The Supreme Court granted standing to the State of Massachusetts to sue the EPA for failing to protect their shores from erosion caused by the effect of greenhouse gases on the

204. Id. at 21.
206. Id. at 177.
207. Id. at 181. Justice Ginsburg, writing for the majority, clarified the holding of the Court: “[t]he relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff.” Id.
This case is important because the Court recognized standing despite the triangular relationship between the plaintiff and defendant, which had doomed so many other lawsuits in the past. On the other hand, the decision indicates that the Court only allowed the suit to proceed because the plaintiff was a class composed of several states. The Court heavily couched its decision in language indicating that the plaintiffs received special consideration because a sovereign, as an intervenor, joined on behalf of its citizens.

The case represents an important victory for environmental groups because it lowers the bar for establishing standing in the environmental context. The Court held that Congress had articulated a procedural right for plaintiffs to challenge EPA activities, thus establishing that a "litigant to whom Congress has 'accorded a procedural right to protect his concrete interests,' . . . 'can assert that right without meeting all the normal standards for redressability and immediacy.'" Environmental litigants face a lower bar in establishing standing in these cases because of Congressional authorization. The recognition of standing as an elastic concept, adaptable to the will of Congress, suggests a potential move towards recognizing standing for an expanded definition of injury, inching the Court back towards an interpretation of standing that is consistent with colonial era decisions. This is important because the Court has fluctuated in its definition of standing, from seeing standing as a low threshold to using standing to stop a wide range of suits from being heard. Part II provides an in-depth examination of the Second Circuit's holding in Baur v. Veneman, which expanded the breadth of judicially cognizable injuries to include increased risk of exposure to harm. The decision has been met with both criticism and praise as courts and commentators have debated whether such an expansion is constitutional and proper.

II. TREATING ENHANCED RISK OF HARM AS INJURY-IN-FACT

Part II of this Note discusses the circuit court split and academic opinions on whether increased risk of exposure to harm constitutes injury-in-fact. Part II.A examines the Second Circuit's holding in Baur v. Veneman in detail and then discusses other court holdings and academic literature supporting the expansion of cognizable injury-in-fact. Part II.B discusses court opinions, principally from the U.S. Court of Appeals for the D.C.
Circuit, and academic articles that explain the rationale for maintaining the restrictive status quo regarding injury-in-fact.

A. Arguments and Cases Advocating the Expansion of Injury-in-Fact

This section looks closely at the *Baur v. Veneman* decision and then uses a combination of Supreme Court dissents and academic articles to explain the arguments for expanding judicially recognized injuries to include increased risk of exposure to potential harm. Commentators and courts argue that the historically minimal use of standing as a bar to hearing suits undermines the separation-of-powers concerns proponents of a strict standing doctrine advance. Further, though the *Baur* court expanded the definition of injury-in-fact to include increased risk of exposure to harm with its holding, the court noted that it should be done only when the potential injury was grave and the result of a specific government policy.

1. *Baur v. Veneman*

This section first provides a brief history of mad cow disease. The section then turns to the decision of the U.S. District Court for the Southern District of New York and, finally, provides an in-depth analysis of the Supreme Court’s decision on appeal, which expanded judicially cognizable injury-in-fact for standing purposes.

a. "Mad Cow Disease"

Downer cattle have long been a sore subject for the USDA and FDA.\(^{217}\) Downer cattle is a term used to describe cows that unexpectedly collapse before being slaughtered.\(^{218}\) Collapsing is a primary symptom, and the only observable symptom, of Bovine Spongiform Encephalopathy (BSE), which is more commonly known as mad cow disease.\(^{219}\) Prior to 2003, mad cow disease had never been detected in the United States.\(^{220}\) However, its prevalence in other industrialized countries was an indication of its eventual arrival.\(^{221}\)

BSE is a strain of a class of chronic neurological diseases known as Transmissible Spongiform Encephalopathies (TSEs), strains of which can be found in sheep, goats, cows, deer, and mink.\(^{222}\) Another form, known as


\(^{218}\) *Baur v. Veneman*, 352 F.3d 625, 628 (2d Cir. 2003) ("‘Downed’ is an industry term used to describe animals that collapse for unknown reasons and are too ill to walk or stand prior to slaughter.").

\(^{219}\) See Gantenbein, *supra* note 11.

\(^{220}\) *Id.*

\(^{221}\) See Plotz, *supra* note 12.

Fatal Familial Insomnia (FFI), is a condition that causes rapid brain deterioration by completely depriving an individual of the ability to sleep.\textsuperscript{223} BSE is one of the most recently discovered strains and, unlike other food-borne diseases, cannot be killed off by sterilizing the meat.\textsuperscript{224} Further, TSEs can incubate for very long periods of time.\textsuperscript{225} In cows, for example, symptoms may not appear for two to eight years after infection and in humans, vCJD can lay dormant and show no signs of activity for up to thirty years.\textsuperscript{226} TSEs cause microscopic holes in the brain, rendering it porous and sponge-like.\textsuperscript{227} There is no known treatment, and humans fall into a coma and die within a year, and usually within four months, of their first symptoms.\textsuperscript{228}

The BSE crisis began in England in 1986, with cows inexplicably showing signs of aggression and problems maintaining balance.\textsuperscript{229} The origin of the disease was the food supply, which was enriched with meat and bone meal (MBM)—essentially recycled remains of other ruminants (animals with four chambered stomachs).\textsuperscript{230} The British government thus banned feeding cattle MBM-enriched food.\textsuperscript{231} By 1991, the government ordered destruction of any cow showing signs of BSE.\textsuperscript{232}

Nonetheless, animals born after the food ban still showed signs of BSE.\textsuperscript{233} It soon became clear that slaughterhouses and feed mills were not respecting the ban.\textsuperscript{234} Even in cases of accidental exposure, scientists learned that as little as a single gram of contaminated feed could infect a cow with BSE.\textsuperscript{235} After the effects on humans and the link between BSE and vCJD became clear, the British government took drastic measures, destroying over 3.3 million cattle between 1996 and 1999 at a cost of 3.5 billion pounds.\textsuperscript{236}

France was similarly affected by BSE, reporting nearly 1000 cases of confirmed BSE.\textsuperscript{237} In total, BSE has appeared in twenty-six countries.\textsuperscript{238} 183,000 cases have been diagnosed in Britain.\textsuperscript{239} Because of its long incubation period, it is impossible to say how many people have contracted
vCJD, though in the roughly fifteen years since the first diagnosed case, 750,000 BSE-infected cattle were slaughtered for human consumption.\textsuperscript{240} Meat from each cow could have exposed as many as 500,000 people to infection.\textsuperscript{241}

As mentioned earlier, before 2003 mad cow disease had never appeared in the United States.\textsuperscript{242} Yet, Michael Baur was not the only American concerned with increasing preventative measures. In 1989, the USDA restricted imports on beef from countries that had detected BSE-infected meat and, in 1991, it went further by restricting all products derived from cows.\textsuperscript{243} These restrictions were expanded in 1997 and remain in place today.\textsuperscript{244}

Concurrent with the Farm Sanctuary litigation, several steps were taken within the legislative branch to ban downed cattle from the food supply, though all were unsuccessful.\textsuperscript{245} In both 2002 and 2003, a ban on downed cattle was removed from farm bills due to stiff opposition from the Bush administration, as well as the cattle and dairy lobbies.\textsuperscript{246} In addition, the U.S. Senate passed a measure that would have banned downer cattle from the food supply chain, only to be defeated in the House by a vote of 202 to 199.\textsuperscript{247}

\textbf{b. The District Court Decision}

In 2001, Farm Sanctuary, a nonprofit animal rights organization, and Michael Baur, a philosophy and law professor at Fordham University, sued the USDA for injunctive relief in the Southern District of New York, asking the court to ban the use of downed cattle for human consumption.\textsuperscript{248} Ann M. Veneman, as secretary of the USDA, had previously denied the plaintiff’s petition for a change to USDA procedure.\textsuperscript{249}

Michael Baur alleged that his injury-in-fact was due to mental anguish and apprehension of contracting vCJD from eating meat infected with

\textsuperscript{240} Id.
\textsuperscript{241} Id.
\textsuperscript{242} See Odeshoo, supra note 217, at 289–90.
\textsuperscript{243} Id. at 290.
\textsuperscript{244} Id.
\textsuperscript{245} See, Sarah Lueck, \textit{Cattlemen Saddle Up for Duels over Rules}, \textit{Wall St. J.}, Jan. 8, 2004, at A4 (“Before the mad-cow scare hit the U.S., [Cattlemen’s Beef Association] had helped defeat legislative attempts to ban from the human food supply injured and immobilized animals—so-called downer cattle that are at higher risk for mad-cow disease.”).
\textsuperscript{249} Farm Sanctuary, 212 F. Supp. 2d at 281–82.
Baur claimed that he faced particularized harm in fearing for his safety, as he ate meat on a regular basis. While Judge Naomi Reice Buchwald recognized that the plaintiff "need not suffer a physical injury in order to have standing," she required the plaintiff to show that his injury was imminent.

In his brief, Baur cited several cases from several circuits where the courts had found standing on the basis of fear of contracting a disease from a contaminated product. The judge distinguished this case by holding that, in those cases, "the contaminated or untested product was actually on the market." Thus, because the plaintiffs provided no evidence that BSE existed within the United States, the court held "Baur's harm is more appropriately classified as hypothetical rather than imminent." The court relied on Lyons, suggesting that Baur's fear of harm was similar to the plaintiff's concern of being put into a choke hold again.

Lastly, the court held that Baur's injury was not only hypothetical, but "too remote to warrant standing." The court suggested that Baur's wish that a federal government agency followed a different policy did not satisfy the requirement of standing and suggested that the proper recourse for Baur's complaint was through the political branches, rather than the judiciary.

The court additionally expressed policy concerns about permitting Baur's claim to move forward. Citing Allen v. Wright, the court predicted that if Baur had standing to sue, "any citizen would have standing to sue to direct the federal government to take an action to improve health, occupational, or environmental safety. The standing requirement would no longer be a genuine test."

c. The Appeal

Baur appealed the district court's decision and amended his complaint to include studies done on the risk that downed cattle posed to humans. Baur's appeal sought a change in USDA policy, asking them to label all downed cattle as "adulterated" and thus not fit for human consumption.

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250. Id. at 282–83.
251. Id.
252. Id. at 283 (citing Animal Legal Def. Fund, Inc. v. Glickman, 154 F.3d 426, 437 (D.C. Cir. 1998) (en banc)).
253. Id.
254. Id.
255. Id.
256. Id.; see supra notes 166–69 and accompanying text.
257. Farm Sanctuary, 212 F. Supp. 2d at 284.
258. Id. ("The USDA has not inflicted a cognizable injury on Baur; his proper recourse is to the legislative branch, not the judicial branch.").
259. Id.
260. Id. (citing Allen v. Wright, 468 U.S. 737, 751 (1984)).
262. Id. at 628 (quoting 21 U.S.C. § 331).
The Second Circuit reversed the district court’s decision, holding that “exposure to an enhanced risk of disease transmission may qualify as injury-in-fact in consumer food and drug safety suits.” The court addressed the narrow question of whether Baur’s allegation that he faced an increased risk of contracting a food-borne illness from consumption of downed livestock constituted a cognizable injury-in-fact for Article III purposes.

Drawing on various circuit court decisions, the court found that “the courts of appeals have generally recognized that threatened harm in the form of an increased risk of future injury may serve as injury-in-fact for Article III standing purposes.” However, not one of the string of cases the court cited from the U.S. Courts of Appeals for the Fourth, Ninth, Seventh, and D.C. Circuits dealt with health, food, or drug-related disputes. This is important because the Second Circuit broadened injury-in-fact without the support of precedent that is directly on point. Importantly, the Supreme Court has only relaxed standing requirements in the environmental context because the mandate from Congress was so strong and specific. The Second Circuit used a combination of environmental and discrimination-based lawsuits as its foundation for finding a general consensus amongst the circuit courts in increased risk of harm as an injury-in-fact.

The court acknowledged that “the Supreme Court has yet to speak directly on this issue.” Yet, as in its discussion of circuit court precedent, the court pieced together Supreme Court precedent to find indications that it...
too would rule that increased risk of exposure to harm in a food and drug case substantiates a plaintiff's injury-in-fact. Both Supreme Court cases cited were health related. However, significantly, the two cases dealt with plaintiffs who were actively exposed to known toxins. The Baur court held that "the Supreme Court's analysis in both Helling and Metro-North displays a willingness, at least under some circumstances, to conceptualize exposure to enhanced risk as a type of cognizable injury."270

The court demurred from answering whether enhanced risk "generally qualifies as sufficient injury to confer standing," but held that "[i]n the specific context of food and drug safety suits ... such injuries are cognizable for standing purposes, where the plaintiff alleges exposure to potentially harmful products."271 The court cited three cases as support for this position; two are district court decisions, one of which the reviewing court disapproved on other grounds.272

Responding to the district court's holding that those cases were only valid because the contaminated product was actually on the market, the court held, "we can discern no reason to distinguish between uncontested exposure to a potentially harmful substance and potential exposure to an undisputedly dangerous contaminant for standing purposes."273 The court held that standing should rest on all of the facts behind the plaintiff's complaint, "not on the happenstance of which particular facts happen to be in dispute."274

In extending the ambit of cognizable injury-in-fact to increased risk of exposure to harmful substances, the court analogized its decision to the "commonly recognized" equivalent in environmental litigation.275 Beating back the criticism faced by the U.S. Court of Appeals for the Fourth Circuit

269. Baur, 352 F.3d at 633 n.7. The court cites Helling v. McKinney, 509 U.S. 25 (1993), where the Supreme Court concluded that a prisoner could bring an Eighth Amendment claim for injunctive relief based on allegations that prison officials had "exposed him to levels of [second-hand smoke] that pose an unreasonable risk of serious damage to his future health." Id. at 35. It also cites Metro-North Commuter Railroad Co. v. Buckley, 521 U.S. 424 (1997). Although deciding for the defendant, the Court noted "that exposure to known carcinogens may reasonably cause distress." Id. at 434–36.

270. Baur, 352 F.3d at 633 n.7.
271. Id. at 634.
272. Id. (citing Pub. Citizen v. Foreman, 631 F.2d 969, 974 n.12 (D.C. Cir. 1980) (holding that standing existed for plaintiffs seeking a declaratory judgment that nitrates are an unsafe food additive); Stauber v. Shalala, 895 F. Supp. 1178, 1187–88 (W.D. Wis. 1995) (reasoning that where the specific purpose of the statute the plaintiffs brought their challenge under is to eliminate uncertainty as to health risks, the "increased risk of potential harm that the consumer must bear is an injury in fact for standing purposes" and holding that standing existed where plaintiffs alleged "exposure to a potentially dangerous drug whose safety has not been demonstrated in accordance with the [Federal Food, Drug, and Cosmetic Act]")); Cutler v. Kennedy, 475 F. Supp. 838, 848–50 (D.D.C. 1979) (stating that allegations of inadequate testing of drugs by the FDA and subsequent exposure to those drugs that had been approved was sufficient to support standing given the resulting risk of harm), rev'd, Chaney v. Heckler, 718 F.2d 1174 (D.C. Cir. 1983).
273. Baur, 352 F.3d at 634 n.8.
274. Id.
275. Id. at 634.
in *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*—that the injury requirement was “by nature probabilistic”—the court hedged its argument in common tort language, suggesting that “unreasonable exposure to risk may itself cause cognizable injury.” Recognizing injury-in-fact in this context, where there has been no actual harm and where the plaintiff’s risk of injury is the same as every other meat-eater in America, stretches the limits of the private rights model of adjudication. Yet, by framing the injury in tort language, the Second Circuit sought to insulate its holding from Supreme Court reproach.

Finding in both case law and legal scholarship another criterion for substantiating injury-in-fact, the court held that, where there is a “tight connection between the type of injury [plaintiff] alleges and the fundamental goals of the statutes which he sues under,” that nexus reinforces the plaintiff’s claim of a cognizable injury. The court looked to “the very purpose” of the Federal Meat Inspection Act (FMIA) and the Federal Food, Drug, and Cosmetic Act (FFDCA) and found that the purpose is to “protect public health by keeping impure and adulterated food from the channels of commerce.” The court’s focus on the purpose of the statute was in step with the *Data Processing* “zone of interests” test. The court used this nexus to substantiate its analytical leap in extending the range of cognizable injuries to include enhanced risk of exposure in food and drug cases.

Additionally, the court used *Akins* to anchor its decision in Supreme Court precedent. Specifically, it held that, just because Baur’s injury

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276. 204 F.3d 149 (4th Cir. 2000) (en banc).
277. *Baur*, 352 F.3d at 634.
278. See supra Part I.B.
279. *Baur*, 352 F.3d at 635; (citing *Gaston Copper*, 204 F.3d at 156 (holding plaintiffs had standing where the plaintiff “alleged precisely those types of injuries that Congress intended to prevent by enacting the Clean Water Act”); *Cutler v. Kennedy*, 475 F. Supp. 838, 848–49 (D.D.C. 1979) (stating that “[p]laintiffs’ claim of injury must be considered in the context of the comprehensive regulatory scheme created by the [statute at issue]”); Jerry L. Mashaw, “Rights” in the Federal Administrative State, 92 YALE L.J. 1129, 1168 (1983) (arguing that some Supreme Court precedent “suggests that increased risk will satisfy the requirement of injury in fact, at least where the statutory scheme that gives rise to the complaint is itself essentially concerned with restructuring risks”); Cass R. Sunstein, Standing Injuries, 1993 SUP. CT. REV. 37, 58 (reasoning that where the very purpose of the regulatory statute is risk minimization, plaintiffs “should be allowed to bring suit to prevent the sorts of injuries that the regulatory scheme was designed to prevent”).
280. *Baur*, 352 F.3d at 634–35 (citing 62 Cases of Jam v. United States, 340 U.S. 593, 596 (1951)).
281. See supra notes 134–40 and accompanying text.
282. See *Baur*, 352 F.3d at 635 n.9 (“The dissent concludes that Baur has asserted no more than a generalized grievance, because Baur cannot distinguish himself from the millions of other Americans who regularly consume beef. But if a concrete harm is ‘widely shared’ there is no additional requirement that a plaintiff demonstrate enhanced susceptibility to establish constitutional standing. The fact that many other citizens could assert the same injury, by itself, is not sufficient to defeat standing.” (citing FEC v. Akins, 524 U.S. 11, 23–24 (1998))).
may be widely shared, it is nonetheless a judicially cognizable injury.\textsuperscript{283} Rebuffing the district court, the Second Circuit explained,

As the Supreme Court recently explained in [\textit{Akins}], injury-in-fact may be found although the asserted harm is ‘widely shared’ if the harm is sufficiently concrete and particularized. Here, there is no question that Baur alleges a discrete, individual risk of personal harm from exposure to contaminated beef and bases his claim of standing on more than a generalized concern that the government obey the law.\textsuperscript{284}

This holding ignored the probabilistic nature of the threat, namely, that the chances of Baur actually being harmed were miniscule.

Lastly, the court responded to both the district court and the dissent’s concerns regarding the overexpansion of cognizable injuries. The court suggested that the judicial system should rely on other limiting doctrines to avoid the influx of new claims that its holding might foretell.\textsuperscript{285} It also cited the “zone of interests” test as “further limiting the scope of potential citizen suits that may be brought under the APA.”\textsuperscript{286}

The court found the lack of direction from the Supreme Court in determining standing both confusing and unhelpful.\textsuperscript{287} In attempting to fill this void, the Second Circuit applied a balancing test used in environmental litigation.\textsuperscript{288} The court determined that, in evaluating the degree of risk sufficient to support standing, the inquiry would have to be highly fact specific and “qualitative, not quantitative, in nature.”\textsuperscript{289}

Accordingly, the court determined that its inquiry would look like the famous Hand test, where the greater the potential harm, the “lesser the increment in probability necessary to establish standing.”\textsuperscript{290} Because Baur alleged such a serious potential injury, “even a moderate increase in risk of disease may be sufficient to confer standing.”\textsuperscript{291}

The court relied on two case-specific factors that weighed in favor of finding standing in this instance.\textsuperscript{292} First, the court weighed “the fact that
government studies and statements confirm several of Baur’s allegations” regarding the increased risk of exposure to BSE.293 Second, the court held that Baur faced an increased risk of exposure due to an established government policy.294 Relying on precedent from other circuits, the court noted that when the threatened injury is part of a government policy, it is more likely the injury will occur.295

Both parties submitted papers detailing the risk of infection of BSE they foresaw from downed cattle.296 Several of the papers indicated that eliminating downed cattle from the food supply would decrease the risk of BSE in the United States.297 Thus, the court found it very persuasive that “the USDA itself . . . ha[s] recognized that downed cattle are especially susceptible to BSE infection.”298

Baur relied on two studies, one by the Harvard Center for Risk Analysis and another by the U.S. General Accounting Office, to allege that methods then applied by the USDA were defective for detecting BSE.299 Further, Baur alleged that a form of BSE might already be present in the United

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293. Id.
294. Id.
295. Id. (citing 31 Foster Children v. Bush, 329 F.3d 1255, 1266 (11th Cir. 2003); Deshawn E. v. Safir, 156 F.3d 340, 344–45 (2d Cir. 1998)).
296. Baur, 352 F.3d at 639.
297. See id. at 638; see, e.g., Risk Reduction Strategies for Potential BSE Pathways Involving Downer Cattle and Dead Stock of Cattle and Other Species, 68 Fed. Reg. 2703, 2704 (proposed Jan. 21, 2003) [hereinafter USDA Proposed Rulemaking] (noting that surveillance data from Europe indicates that BSE is present in a higher percentage of nonambulatory livestock and that “[b]y their nature, downer animals and dead stock include many animals dead or dying from communicable diseases [and therefore represent a significant pathway for spread of disease if they are not handled or disposed of with appropriate safeguards”); FOOD SAFETY AND INSPECTION SERV., CURRENT THINKING ON MEASURES THAT COULD BE IMPLEMENTED TO MINIMIZE HUMAN EXPOSURE TO MATERIALS THAT COULD POTENTIALLY CONTAIN THE BOVINE SPONGIFORM ENCEPHALOPATHY AGENT (2002) [hereinafter FSIS THINKING], available at http://www.fsis.usda.gov/OA/topics/BSE_Thinking.pdf (acknowledging that downed cattle are among the cattle most likely to be infected with BSE).
298. Baur, 352 F.3d at 637–38.
299. See id. at 638–39 (“For example, FSIS has previously acknowledged that ‘the typical clinical signs associated with BSE cannot always be observed in downer cattle infected with BSE. Thus, if BSE were present in the U.S., downer cattle infected with BSE could potentially be offered for slaughter and, if the clinical signs of the disease were not detected, pass ante-mortem inspection. These cattle could then be slaughtered for human food.’” (quoting FSIS THINKING, supra note 297, at 9)); see also USDA Proposed Rulemaking, supra note 297, at 2706 (noting that “because the signs of BSE often cannot be differentiated from the signs of the many other diseases and conditions affecting downer cattle,” BSE-infected animals may pass inspection and be offered for human consumption). Moreover, a January 2002 report by the U.S. General Accounting Office may call the Harvard Study into doubt by raising concerns about the effectiveness of current federal BSE prevention and detection efforts. See U.S. GEN. ACCOUNTING OFFICE, REP. NO. GAO-02-183, MAD COW DISEASE: IMPROVEMENTS IN THE ANIMAL FEED BAN AND OTHER REGULATORY AREAS WOULD STRENGTHEN U.S. PREVENTION EFFORTS 3 (2002) (noting that “[w]hile BSE has not been found in the United States, federal actions do not sufficiently ensure that all BSE-infected animals or products are kept out or that if BSE were found, it would be detected promptly and not spread to other cattle through animal feed or enter the human food supply”).
States, "an allegation which receives some support from government reports." The court looked at the long incubation period of BSE and the current methods used for detecting BSE. It weighed against the defendants the fact that the USDA had already taken preemptive measures to improve their detection methods.

Second, the court rejected the district court's reliance on Lyons as controlling precedent. The court reasoned that while, in Lyons, the risk of future harm rested on the independent actions of a third party, "Baur face[d] a present, immediate risk of exposure to BSE as a consumer of beef." By reframing the inquiry as a question of present risk, rather than a question of future injury, the Second Circuit found that "[t]his present exposure to a credible threat of harm constitutes the relevant injury in fact for Article III purposes."

Further, the court held that despite the chain of contingencies necessary for Baur to actually contract vCJD as a result of eating contaminated food, the injury was "exposure to a sufficiently serious risk of medical harm." The court expressed concern over adopting a contrary rule, which it contended would effectively bar any medical suit where the effects of the disease were delayed. Responding to the dissent, the court held that barring standing in this case would allow the USDA to effectively stop enforcing its current regulations because no citizen would be able to challenge its policy, as the chances of coming in contact with an adulterated product would be exceedingly remote.

Ultimately, the court's standing analysis suggests that the injury-in-fact requirement is not the bar that will stop frivolous claims from entering court—a position the Second Circuit is expressly comfortable with. Rather, relying on the seriousness of the alleged harm, the court declined to use the injury-in-fact requirement as a bar for Baur's claim. The court framed the standing inquiry as to whether "the plaintiff is entitled to "walk through the courthouse door" and raise his grievance before a federal court."
The Second Circuit followed the Fourth and Ninth Circuits’ reasoning in two environmental cases with its Baur decision. It remains to be seen whether the Fourth and Ninth Circuit will, in turn, follow the Second Circuit and apply the expanded definition of injury-in-fact within their own circuits in nonenvironmental cases.

2. Arguments for Expanding Cognizable Injury-in-Fact

Commentators advocating for the expansion of standing point to the historical parallels, including the qui tam and informers’ actions that allowed citizens to sue the government. As discussed earlier, these actions present persuasive parallels to the type of actions restricted by the Lujan decision and others. These arguments typically suggest that the standing requirements articulated by twentieth-century courts do not have the constitutional roots that decisions like Allen and Lujan claim. A lack of history belies the fundamental importance courts claim that injury-in-fact has in ensuring a proper role for the courts in the federal government. In other words, the absence of the injury-in-fact requirement in American legal history suggests that it is not fundamental to the structure of the federal government. Additionally, inconsistent Supreme Court precedent on standing has led commentators to critique the Court’s jurisprudence as disingenuous.
Further, scholars point to the lack of accountability and insufficiency of the political process to check government agencies.\textsuperscript{318} Agencies, like the National Security Agency (NSA), Environmental Protection Agency (EPA), and USDA are often several degrees of separation from direct voter accountability. Accordingly, when an agency increases the likelihood that a U.S. citizen will be injured, contract cancer, or otherwise suffer, the political process can be insufficient to protect him from the harm.\textsuperscript{319} As standing gained importance in judicial opinions in the 1970s, several commentators argued for a more expanded definition of injury-in-fact as a necessary tool to check on increasingly powerful administrative agencies.\textsuperscript{320}

Additionally, some commentators point to the value-laden judgments that courts must apply to differentiate between kinds of harm.\textsuperscript{321} Harm means different things to different people.\textsuperscript{322} In order to avoid courts using normative analysis in determining whether increased risk of exposure to harm sufficiently qualifies as injury-in-fact, these scholars suggest allowing a wide range of complaints to qualify, especially when the statute at issue specifies public-health-related goals.\textsuperscript{323}

B. Not Buying It

The Second Circuit clearly realized it was broadening the permissiveness of the standing inquiry.\textsuperscript{324} The dissent in the Baur decision along with several other circuit courts, however, have raised forceful arguments against this expansion. Scholars have recognized that the Baur decision is
indicative of current confusion amongst lower federal courts on the topic. While there has been positive recognition in the courts, there has also been vehement opposition voiced by some members of the D.C. Circuit and tepid treatment of the holding in several other circuits. Perhaps even more surprisingly, within the Second Circuit, the holding has been met with uncertainty at the district court level.

1. The Baur Dissent

In Baur, Judge Rosemary Pooler wrote a dissenting opinion that articulated her concerns with expanding standing. Judge Pooler’s most forceful criticism argued that the plaintiff had not adequately alleged that he faced injury from a future outbreak of BSE. In other words, just because Baur “asserted the plausible existence of an imminent threat to the health . . . of society at large” did not mean that he, personally, had met the threshold requirement of standing. The dissent emphasized language from Supreme Court precedent, arguing that the plaintiff must allege some personal form of injury, “not merely that he suffers in some indefinite way in common with people generally.”

Further, the dissent stressed the importance of separation of powers, suggesting that Baur’s complaint was one better left resolved by the political channels, rather than the judicial branch. Additionally, the dissent relied extensively on Lyons, where the plaintiff was denied standing when seeking injunctive relief from the prospective injury of being put in a choke hold by the Los Angeles Police Department.

Finally, the dissent in Baur used a floodgates argument to argue against finding that the plaintiff had standing. The dissent tied the potential

325. Cf. Mark Gabel, Generalized Grievances and Judicial Discretion, 58 Hastings L.J. 1331, 1363–64 (2007) (“[T]he Court has given the lower courts little guidance as to how they should exercise [standing decision] discretion.”).
327. See, e.g., Nat’l Council of La Raza v. Gonzales, 468 F. Supp. 2d 429, 438, 440 (E.D.N.Y. 2007) (noting the “potential expansiveness” of Baur and that “Baur . . . has been criticized by other courts” and holding that “the Court will not enable the expansion of the heightened risk doctrine”).
328. Baur, 352 F.3d at 643 (Pooler, J., dissenting).
329. Id. at 644.
330. Id.
332. Id. at 644–45.
333. See id. at 646–49.
334. See, e.g., id. at 648 (“Specifically, I fear that the majority’s finding that Baur has established injury in fact allows the requirement of an imminent threat of injury to be
flood of litigation to concerns about separation of powers. Nonetheless, the dissent’s most significant argument was that Baur had not alleged an injury particular to him. Baur did not differentiate his complaint from the general public in any significant way, a requirement the dissent viewed as part of the ""irreducible constitutional minimum’ of standing.""

2. The D.C. Circuit Opinions in NRDC v. EPA and Center for Law & Education v. Department of Education

The D.C. Circuit heard the Natural Resources Defense Council v. Environmental Protection Agency case twice on the very issue of standing, at first denying standing and then dismissing the case as a nonjusticiable question. Natural Resources Defense Council (NRDC) challenged the EPA’s failure to control the use of methyl bromide, relying on the Baur holding that an increased risk of exposure to toxins, regardless of its current prevalence, constituted sufficient grounds for standing. Rebutting the Baur logic, the court first held that "the law of [the] circuit is that an increase in the likelihood of harm may constitute injury in fact only if the increase is sufficient to ‘take a suit out of the category of the hypothetical.’" This suggests that the increase in risk attributable to government policy would have to be serious in order to qualify as an injury-in-fact.

In rebuffing the Baur decision, the court argued, "The Baur court acknowledged the ‘potential expansiveness of recognizing exposure to enhanced risk as injury-in-fact.’ ‘Expansiveness’ is an understatement."
The court held that the probability that the EPA's regulation would impact an NRDC member was so minuscule that the group did not have standing to challenge the agency's decision. The D.C. Circuit reheard the case after both parties submitted amended briefs and overturned the panel's decision, granting the NRDC standing. The court acknowledged that the suitability of the use of increased risk of injury as injury-in-fact currently splits the courts, yet demurred from providing its own holding specifically on point. Instead, the court relied on the relaxed standing requirements that apply where plaintiffs have an explicit procedural right to sue in the context of environmental suits.

Both the D.C. Circuit and the Eighth Circuit have refused to allow increased risk of injury to qualify as injury-in-fact in instances outside of environmental lawsuits. In Center for Law & Education v. Department of Education, the D.C. Circuit found no standing where plaintiffs "allege[d] direct injury styled as 'increased risk,' in the form of giving the States the opportunity to injure Appellants' interests." Further, the court found that the risk of not receiving a high-quality education was too hypothetical to validate standing.

Similarly, in Shain v. Veneman, the Eighth Circuit held that increased risk of flood damage caused by an agency regulation was not sufficient to support standing. The plaintiffs alleged that the USDA's construction of two sewage lagoon ponds would reduce protection against floods. The court held that the plaintiffs did not have standing because whether a flood would occur while the plaintiffs owned or occupied that land was "a matter of sheer speculation." Accordingly, because the plaintiffs did not particularize when the flooding might happen, they lacked standing to prevent the USDA from increasing the risk of flood damage by enacting their plan. In other words, establishing standing in this case and forcing the government to change its procedure for preventing flood damage to vulnerable property would have required the plaintiffs to tell the court exactly when the flooding was going to happen. Shain is in conflict with Baur principally because the plaintiffs in Shain were suing for injunctive relief and the court concluded that the "injury" was directly tied to the agency action, yet refused to find standing because the injury had not yet

344. NRDC II, 464 F.3d at 3, 11 (failing to reach the merits of the case and holding instead that the issue presented was a nonjusticiable political question).
345. Id. at 6–7.
347. 396 F.3d 1152 (D.C. Cir. 2005).
348. Id. at 1161.
349. Id.
350. 376 F.3d 815 (8th Cir. 2004).
351. Id. at 816.
352. Id. at 816–17.
353. Id. at 818.
354. Id.
Accordingly, the case is important because of its apparent rebuff of the Baur logic.

3. Arguments Against Expanding Standing

Judges and scholars who argue for a limited and restrictive approach to standing doctrine emphasize the “case or controversy” language of the Constitution and note the already overloaded dockets of federal courts. Scholars on this side of the debate point to the three fundamental goals of standing. First, standing requirements preserve the separation of powers. Second, standing “improves judicial decision-making because it ‘assures [a] factual setting in which the litigant asserts a claim of injury in fact.’” Finally, standing ensures that the federal courts do not become a “vehicle for the vindication of the value interests of concerned bystanders.”

Focusing on separation of powers ideals, scholars argue that adjudicating a marginal increase in risk of future harm detracts from the executive branch’s ability to function efficiently and allocates too much power to the judicial branch, essentially allowing the judiciary to monitor the executive branch. Justice Scalia, in particular, has been forceful in his condemnation of citizen suits and any lowering of the standing bar as an encroachment on the executive branch’s “Take Care” duty. As the dissent argues in the Baur decision, the nebulous nature of increase in risk as an injury could allow citizens to take just about any government agency to court based on allegations of just about any kind of injury.

355. Id.
360. See generally Harold J. Krent & Ethan G. Shenkman, Of Citizen Suits and Citizen Sunstein, 91 MICH. L. REV. 1793 (1993) (arguing that Article II forbids congressional licensing of private attorneys general in cases in which no plaintiff or group of plaintiffs suffers “individuated injury”); Scalia, supra note 36.
361. See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (1992) (“To permit Congress to convert the undifferentiated public interest in executive officers’ compliance with the law into an ‘individual right’ vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive’s most important constitutional duty, to ‘take Care that the Laws be faithfully executed.’ It would enable the courts, with the permission of Congress, to assume a position of authority over the governmental acts of another and co-equal department,’ and to become ‘virtually continuing monitors of the wisdom and soundness of Executive action.’ We have always rejected that vision of our role.” (quoting U.S. CONST. art. II, § 3; Allen v. Wright, 468 U.S. 737, 760 (1984); Massachusetts v. Mellon, 262 U.S. 447, 489 (1923))); see also Shane, supra note 28, at 11093 (“Justice Scalia’s understanding of the primary function of standing doctrine is the insulation of the elected branches from judicial overreaching.”).
362. See supra notes 314–20 and accompanying text.
Further, as Justice Scalia suggests repeatedly in standing-related decisions, Congress grants the executive branch certain latitude in executing laws requiring agency involvement.\textsuperscript{363} Allowing the judiciary to consistently check on the executive branch would essentially strip the executive of the power that Congress has granted it.\textsuperscript{364} Of course, the executive does not have the power to act illegally, so it does not have the discretion to act in a way that circumvents the law or fails to fulfill its duty to protect American citizens.

\section*{III. EXPAND STANDING DOCTRINE NOW}

Lawsuits challenging illegal wiretapping, insufficient flood damage protection, and tax breaks for racist schools have all failed the standing inquiry because the suits failed to properly allege an injury-in-fact.\textsuperscript{365} Some commentators, such as Professor Sunstein, have argued that standing is a legal fiction created by a conservative court.\textsuperscript{366} Yet, both judges and scholars have also argued the opposite, that standing ensures the court's rightful position amongst the other branches of the federal government by avoiding advisory opinions and by limiting the court's ability to adjudicate disputes best left to the political process.\textsuperscript{367} A critical reading of the history of standing, Supreme Court precedent, and policy concerns all indicate that the Court should expand its definition of judicially cognizable injury-in-fact. The test articulated by the Second Circuit in \textit{Baur} strikes the correct balance between ensuring the fitness of the dispute before a federal court and limiting the potential for abuse by overzealous litigants.\textsuperscript{368}

When an agency regulation increases the risk of injury that a citizen faces, federal courts are the appropriate fora to seek redress for that risk. By applying the \textit{Baur} test to agency regulations that increase the risk that citizens will be harmed, courts can expand the definition of standing without overloading their dockets and without cost to the power of the executive branch. As the \textit{Baur} court explained, when a citizen's risk of being injured is increased by an agency decision, he faces a "\textit{present, immediate} risk of exposure . . . not a future risk that awaits intervening events."\textsuperscript{369} The \textit{Baur} court created a two-prong test to determine whether a

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363. See Winter, \textit{supra} note 28, at 1381 ("The most appealing justification of standing law is that, in preserving the separation of powers, it protects the majoritarian political process from undue intrusion by the unelected judiciary.").

364. FEC v. Akins, 524 U.S. 11, 36 (1998) (Scalia, J., dissenting) ("If today's decision is correct, it is within the power of Congress to authorize any interested person to manage (through the courts) the Executive's enforcement of any law . . . .").

365. See \textit{supra} notes 175--83 and accompanying text.


367. See \textit{supra} notes 318--26, 326--29 and accompanying text.

368. See \textit{supra} notes 274--88 and accompanying text.

369. Baur v. Veneman, 352 F.3d 625, 640 (2d Cir. 2003); see also \textit{supra} notes 305--10 and accompanying text.
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plaintiff's allegations are sufficient to justify standing. First, the potential injury must be grave in nature. In *Baur*, if the increased risk of exposure to harm resulted in actual exposure to mad cow disease, then the plaintiff risked contracting a deadly disease for which there was no known cure.

Second, the *Baur* court suggested that there must be a "tight connection between the type of injury which [plaintiff] alleges and the fundamental goals of the statutes which he sues under . . . ." The plaintiff in *Baur* sued because the USDA's policy increased the risk of his contracting vCJD. The USDA's founding statute states, "It is essential in the public interest that the health and welfare of consumers be protected by assuring that meat and meat food products . . . are wholesome . . . ." These two qualifications—that the potential injury be grave and that Congress must have vested the defendant with a duty to protect the public from the injury—will help to limit the types and number of suits brought against government agencies.

Since the framing, citizen suits have been contemplated, authorized, and routine for federal courts. The limits on a citizen's ability to bring suit against a government agency are a recent invention, designed to accelerate judicial docket management and, alternatively, to expand the federal government's power. Seeking to protect New Deal legislation in the first half of the century and expand executive power in the second half of the century, the Supreme Court crafted standing in a way that rejected history and insulated the government from legitimate judicial intervention.

These restrictions occurred at precisely the moment in history when American citizens most needed the ability to sue the government. With the rise of administrative agencies, Americans are being affected on a daily basis and exposed to risks never before imagined, sometimes due to the negligent or nonexistent regulation of manufacturers by democratically unaccountable administrative agencies. The Supreme Court repeatedly stresses that its decisions about standing propel an invigorated understanding and enforcement of separation of powers, yet it cannot speak out of both sides of its mouth. Advocating a limited role for the judiciary while striking down congressionally authorized citizen-suits tramples on the democratic will and strengthens the politically unaccountable judiciary at the expense of the legislature.

Recent Supreme Court precedent indicates that the Court is willing to expand the definition of injury-in-fact to include even marginal increases in

370. See supra notes 278–88 and accompanying text.
371. *Baur*, 352 F.3d at 635.
373. See supra notes 49–56 and accompanying text.
374. See supra notes 82–91 and accompanying text.
375. See supra notes 73–77 and accompanying text.
376. See supra note 141 and accompanying text.
risk of harm. The Court’s holdings in Akins, Laidlaw, and especially in Massachusetts, indicate a growing awareness of the Court’s potential in adjudicating these claims. The Court’s holding in Massachusetts, which allowed a suit to proceed based on the injury of potential, future erosion to shorelines, particularly hints at the relaxed standard that should be adopted by federal courts nationwide. The threat to one’s health is as grave as any threat to America’s shores and whenever an irreversible, serious threat is alleged and the lack of oversight by an agency causes it, a citizen should have access to federal courts to adjudicate his claim.

Additionally, the Baur decision addresses the concerns of the conservative judicial mentality. First, because it limits the type of claims brought by plaintiffs with its two-prong test, there will still be a number of lawsuits capable of immediate dismissal for lack of standing, just as there are presently. Second, regarding the Court’s concern with adjudicating real cases or controversies, the threat of injury is an immediate, present injury. While it is important to heed the warning of the Lujan Court that injuries should not be conjectural, hypothetical, or speculative, it is both a moral and legal imperative to allow concerned citizens access to federal court as a forum for addressing specific government policies that put them in peril.

A trademark of an actual case or controversy is zealous advocacy over a dispute about something that has already occurred. By applying Baur to other types of increased-risk-related injuries, well-financed, well-informed, and passionate interest groups will be able to establish standing and present an enthusiastic argument for their members about the illegality of an agency decision. Thus, both temporally and procedurally, courts will be in a constitutionally sound place to adjudicate the dispute.

A potential complication in establishing increased risk of injury as a judicially cognizable injury lies in the first part of the Baur test, assessing the seriousness of the potential fruition of the injury. Certainly, contracting an incurable disease is grave. The D.C. Circuit in NRDC v. EPA admitted that contracting skin cancer is also grave enough to constitute injury-in-fact, though that was in the context of an environmental suit, which has a lower bar for establishing standing. If the Baur decision was applied to all injuries including death, serious illness, and invasion of constitutionally protected rights, then citizens would have a viable means of protecting themselves from disinterested, unaccountable administrative agencies.

Recently, the U.S. Court of Appeals for the Sixth Circuit held that the threat of invasion of one’s privacy via illegal wiretapping did not give the plaintiffs standing because they could not show that the NSA had spied on them. A citizen challenging the NSA’s wiretapping could point to the potential invasion of his Fourth Amendment right to be free from unwarranted search and seizure. The NSA’s charter states that it is

377. See supra notes 202–11 and accompanying text.
378. See supra note 204 and accompanying text.
379. See supra notes 330–35 and accompanying text.
380. ACLU v. NSA, 493 F.3d 644, 648 (6th Cir. 2007).
fundamental to American freedom to protect the Constitution and the citizens of the United States. Using Baur, the citizen should be able to challenge the government’s illegal wiretapping. While other prudential doctrines, such as ripeness, separation of powers, and deference to the executive branch on matters of national security might later nullify the case, on standing grounds, the citizen has established injury-in-fact.

Concerns on the topic of docket management ignore the fact that once the court has ruled on an issue of such fundamental importance as an agency decision that puts constitutional rights at stake or increases the chances of a U.S. citizen contracting an incurable illness that passes the first of the two Baur prongs, that issue is binding precedent within a district, circuit, and, ultimately, a nation. The NSA wiretapping cases, for example, would not produce a wave of litigation. The first prong of the Baur test demands that the increased risk of injury threatens a grave injury. In order to pass that element of the test, the issue must be important enough to warrant federal court intervention. As agencies became more powerful and less democratically accountable, the federal courts are a citizen’s last hope at protecting his health, rights, and life. Accordingly, increased risk of injury should be a judicially cognizable injury-in-fact.

If the Supreme Court expands the definition of injury-in-fact to include even marginal increases in risk of injury, more groups will be able to challenge government interference with their interests. While there are important considerations—such as separation of powers, countermajoritarian impulses of the Court, docket management, and the efficient administration of government—the Baur decision represents a responsible and considered application of an expanded definition of injury-in-fact.

CONCLUSION

Over the course of the last century, standing doctrine has taken on a life of its own. Inconsistencies abound and are due, in large part, to the shifting ideological makeup of the Court. Rather than defining injury-in-fact narrowly, federal courts should simply loosen the definition of injury-in-fact to include increased risk of future harm as a judicially cognizable form of injury-in-fact. As demonstrated by the Baur v. Veneman decision, doing so would allow courts to operate within the confines of precedent, preserving injury-in-fact as a component of the standing inquiry. Further, if courts used the Baur test, allowing increased risk of future harm as an injury-in-fact if the threatened injury is grave enough and the result of a specific government policy, courts would strengthen, rather than erode, ideals such as separation of powers by strengthening a check on democratically unaccountable government agencies and stare decisis by resolving important disputes once and for all.

Environmental groups, citizen watchdog groups, and even a “frequent consumer of meat” would all be able to litigate some of the most important issues of our day without exhausting judicial resources or reimagining the
Constitution. Expanding the definition of judicially cognizable injuries will allow the Court to perform its most important function, which is to protect the rights of minority groups against the unchecked power of the majority.