

Case Comment

Risk Magnified:

Standing Under the Statist Lens

Central Delta Water Agency v. United States, 306 F.3d 938 (9th Cir. 2002).

Why some harms count before the courts and others do not is a matter of acute expressive and practical impact. Judicial refusal to see claimed injuries is an effective denial of legal personhood¹ and a bar from powerful judicial machinery. The issue of “erratic, even bizarre” judicial recognition of applicants vexed Professor Joseph Vining as early as 1978.² Recent scholarship argues that injuries are seen through a subjective lens, reflecting the relative privilege of the judiciary and their concomitant difficulties in perceiving injuries to minorities and the poor.³ This is a troubling contention. So long as another, objective explanation remains, it should be superimposed, not to conceal and legitimate potentially problematic practices, but to substitute as an alternative rationality and a neutral and transparent principal for future decisions. This Comment advances such an alternative explanation: The erratic pattern of judicial sight is partly a refraction of how judges view the risk of probabilistic future injury.

Present harm is immediately visible, but the contours of risked injury are less distinct, requiring congressional or constitutional magnification. Aspects of positive law aimed at reducing the risk of prescribed

1. See JOSEPH VINING, *LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW* 58-60 (1978) (describing when and how courts “see” legal persons).

2. *Id.* at 1.

3. *E.g.*, Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 304 (2002); *cf.* Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 188-89 (1992) (“In classifying some harms as injuries in fact and other harms as purely ideological, courts must inevitably rely on some standard that is normatively laden and independent of facts.” (footnote omitted)).

probabilistic future harms are telescopes.⁴ Such collectively constructed magnifiers, however, often do not track social risk or vulnerability, since some clout is typically necessary to enshrine interests in positive law. As a result, those whose interests are socially slighted may find themselves similarly slighted before the courthouse doors.

This Comment proceeds in two Parts. Part I describes how the differential perceptions of risk as injury in *City of Los Angeles v. Lyons*⁵ and *Friends of the Earth v. Laidlaw Environmental Services*⁶ illustrate the rules of risk recognition employed by the judiciary. Part II discusses *Central Delta Water Agency v. United States* as an example of when risks alleged as harms do not match the risks magnified in law.⁷ The Part concludes that, in such cases, the rules of recognition established by Supreme Court cases may be obeyed, and the crushing impact of a no-injury finding avoided by dismissal on timing grounds.

I

The standing axiom is oft-incanted. The Supreme Court interprets the case-or-controversy requirement of Article III, Section 2 of the Constitution to mandate three requirements for bringing suit. A plaintiff must claim (1) an “injury in fact,” (2) that the injury is fairly traceable to the challenged action of the defendant, and (3) that redress of the injury by a favorable judgment is likely.⁸ The Court defines an “injury in fact” as “an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.”⁹ Future harms are thus cognizable as injuries only if they are “imminent,” the meaning of which is “certainly impending.”¹⁰ The metric of cognizability, therefore, is the probability of occurrence—“certainly.”

The probability of a claimed future injury occurring ranges from nil to certainty. The imminence standard shows that the Supreme Court calls for future injuries near certainty to find standing. As discussed below, however, the Court has viewed future injuries in the realm of probability, adopting a statist lens. As formulated by Jerry L. Mashaw, the statist perception of legal rights and personality depends “on legislative definitions of public welfare and on the organizational imperatives” of the administrative state.¹¹

4. I thank Professor Jerry L. Mashaw for the metaphor.

5. 461 U.S. 95 (1983).

6. 528 U.S. 167 (2000).

7. 306 F.3d 938 (9th Cir. 2002).

8. *E.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

9. *Id.* at 560 (internal quotation marks and citations omitted).

10. *Id.* at 564 n.2 (citation omitted).

11. Jerry L. Mashaw, “Rights” in the Federal Administrative State, 92 YALE L.J. 1129, 1129 (1983).

The judiciary may enforce goals and duties arising from these collective definitions.¹² In contrast, rights to adjudication under the individualist model stem from losses. Rights are informed by the moral principle of corrective justice.¹³ Standing law traditionally operates under the individualist model.

This Comment posits that probabilistic future injuries, which are not determinate events and therefore are invisible through the individualist lens, can be seen through a statist lens—but only if a risk-reducing statute or constitutional provision underlies the suit, providing the collective judgment that the risks alleged count.¹⁴ When such legislative judgments exist, the separation-of-powers concerns over judicial interference with collectively defined policies, which underlie a rigid injury requirement,¹⁵ are not implicated. Of course, the plaintiff still must allege personally experienced risk, for the statist lens is hybridized with the individualist search for personalized harm, the heart of the injury inquiry. When no underlying risk-reducing provision provides the basis for perceiving risks, courts do not see probabilistic injuries and try to prod allegations of risk into allegations of an impending loss, visible under an individualist lens.

The dual nature of the injury standard becomes clearer when the injury analysis in *City of Los Angeles v. Lyons*¹⁶ is contrasted with the recent Supreme Court decision in *Friends of the Earth v. Laidlaw Environmental Services*.¹⁷ *Lyons* is among the most troubling examples of how probabilistic future injuries are viewed through the individualist lens. After a traffic stop for a burned-out taillight, Los Angeles police subjected Lyons to a pat-down search. When Lyons dropped his hands after the search, the officers slammed them back against his head, and when he complained of the pain of the keys in his hand pressed against his head, the officers placed him in a chokehold. When Lyons regained consciousness, he “was lying face down on the ground, choking, gasping for air, and spitting up blood and dirt. He had urinated and defecated. He was issued a traffic citation and released.”¹⁸ The Supreme Court ruled that Lyons did not allege a sufficient probability of future injury to seek an injunction against the use of chokeholds in situations involving no threat of immediate deadly force.¹⁹

12. *Id.* at 1154-57.

13. *Id.*

14. *Cf.* JERRY L. MASHAW ET AL., ADMINISTRATIVE LAW 1000 (1998) (observing that in cases involving regulatory programs aimed at mitigating risk, courts “arguably should be focusing on whether the beneficiaries’ risks have in fact been increased by failures of implementation because, again arguably, the statute confers a right to whatever level of risk reduction effective implementation would assure”).

15. *See* *Allen v. Wright*, 468 U.S. 737, 750 (1984).

16. 461 U.S. 95 (1983).

17. 528 U.S. 167 (2000).

18. The facts are taken from *Lyons*. 461 U.S. at 113, 114-15 (Marshall, J., dissenting).

19. *Id.* at 105-10.

The Court ruled that Lyons's standing depended on whether he was "likely" to suffer future injury—an amorphous adjective given bite by the Court's requirement that the danger be "real and immediate."²⁰ The Court read an LAPD manual to suggest that chokeholds were permitted only "to gain control of a suspect who is violently resisting the officer or trying to escape."²¹ The Court concluded that the probability of any future threat was no greater than the probability that Lyons would have an encounter with the police and illegally resist, or that officers would disobey instructions and choke him without provocation.²²

Most revealing was the Court's statement that Lyons needed to establish a virtual certitude of experiencing a chokehold for judicial perception of future injury. Lyons would have to "make the incredible assertion either (1) that *all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter . . . or (2) that the City ordered or authorized police officers to act in such manner."²³ The requirement represents the Court's prodding of probabilistic future injury to resemble a crystallized future event visible in the individualist universe.²⁴

The Court's requirement of near-certain future injury and its refusal to recognize Lyons's concern contrasts sharply with the injury analysis in *Laidlaw*. *Laidlaw* arose when the environmental group Friends of the Earth brought suit under a Clean Water Act provision allowing adversely affected citizens to enforce the limits on pollutant discharge set by a company's permit.²⁵ The Court held that Friends of the Earth suffered sufficient injury to sue for enforcement of permit limits against a hazardous waste incinerator that had violated its mercury discharge limits 489 times between 1987 and 1995—although the district court found that the violations "did not result in any health risk or environmental harm."²⁶ The Court accepted

20. *Id.* at 101.

21. *Id.* at 110 (citation omitted).

22. *Id.* at 106. The Court's presumption that Lyons would not resist arrest, thereby lowering the probability of occurrence, contrasts with the Court's presumption of full enforcement of statutes against regulatory objects, which amplifies the probability of injury against regulatory objects to certainty. *See, e.g.*, *Pennell v. City of San Jose*, 485 U.S. 1, 7-8 (1988). The probability that Lyons might be subjected to a police chokehold again was even lower than the Court's analysis might suggest: Prompted by several deaths stemming from police chokeholds, the Board of Police Commissioners imposed and extended a six-month moratorium on chokeholds, while the police department investigated alternative measures. *Lyons*, 461 U.S. at 100 & n.4. In light of this, Lyons withdrew his injunction request and urged that his preliminary injunction be vacated, but the Court refused to find the suit moot, since the moratorium could be lifted. *Id.* at 101. Oddly, the Court did not consider these facts in its future injury analysis.

23. *Lyons*, 461 U.S. at 106.

24. Some of the Court's bombast in building the high wall to pleading injury may be attributed to its view of the underlying factual issues and "a further extension and reification of the Court's almost instinctive respect and deference for men in uniform," as Laurence Tribe argues. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-16, at 412-13 (3d ed. 2000).

25. 528 U.S. 167, 173 (2000).

26. *Id.* at 176, 181 (citing findings by the district court, 956 F. Supp. 588, 602, 613-21 (D.S.C. 1997)).

as sufficient to establish standing affidavits by the group's members that they had curtailed use of the river into which the plant discharged.²⁷

Was the Court liberating standing analysis from *Lyons*? If Lyons had described how his fears of future chokeholds affected his conduct, would he have passed the injury-in-fact hurdle? Probably not, judging from the majority's reasoning. The *Laidlaw* Court wrote that the reasonableness of Lyons's fear depended on his lived nightmare recurring and his "subjective apprehensions" were not sufficient to support standing.²⁸ In contrast, the concerns of Friends of the Earth members were "reasonable" because of continuous and illegal discharges in the river.²⁹ Yet Lyons experienced his fear against a backdrop of continuous deaths from chokeholds, disproportionately suffered by people of his race and gender: Between 1975 and 1983, the date of the *Lyons* decision, at least sixteen people died following the use of a chokehold by a Los Angeles police officer—twelve of them African-American males like Lyons.³⁰ As Justice Marshall noted, "[I]n a city where Negro males constitute 9% of the population, they have accounted for 75% of the deaths resulting from the use of chokeholds."³¹

This restores the question: Why were the fears of future risk experienced by Friends of the Earth members perceptible to the Court while Lyons's fears remained invisible? A trio of the Court's prior precedents accepting risk of future injury as sufficient for standing may shed light. Professor Mashaw has described the first two, *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*³² and *Duke Power Co. v. Carolina Environmental Study Group, Inc.*,³³ as "suggest[ing] 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."³⁴ A third case extends the principle to

27. *Id.* at 181-83.

28. *Id.* at 184 (quoting *Lyons*, 461 U.S. at 107 n.8).

29. *Id.* at 183-84.

30. *Lyons*, 461 U.S. at 115-16 (Marshall, J., dissenting).

31. *Id.* at 116 n.3. The moratorium on chokeholds might have accounted for some contrast except that neither the *Lyons* nor the *Laidlaw* Courts considered the fact in their injury analyses.

32. 412 U.S. 669 (1973).

33. 438 U.S. 59 (1978).

34. Mashaw, *supra* note 11, at 1168. *SCRAP*, for example, involved a procedural claim under the National Environmental Policy Act of 1969, which requires environmental impact statements—essentially risk assessments—for certain federal actions. 412 U.S. at 679. The Court accepted an attenuated argument of injury: A general rate increase among railroads, approved by a government agency without an impact statement, would (1) encourage the use of nonrecyclable commodities, (2) thereby requiring more natural resources, which (3) might deplete those near the plaintiffs and (4) might result in more refuse discarded where the plaintiffs enjoyed recreation. *Id.* at 688. Compare *SCRAP*, 412 U.S. 669, with *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26 (1976). The *Simon* Court refused to recognize as a legally cognizable injury the risk that an IRS ruling extending tax exemptions for "charitable" groups to hospitals that did not serve indigents to the extent of their financial ability would encourage provision of fewer medical services to indigents. 426 U.S. at 40-43. The Court reasoned the harm was indirect since the hospitals, who were not defendants in the suit, decided the level of service to indigents. *Id.* at 44-45. Yet *SCRAP*

constitutional provisions concerned with mitigating risks. In *Babbitt v. United Farm Workers*,³⁵ the Court ruled that the United Farm Workers (UFW) had standing to bring First Amendment challenges to parts of an Arizona statute governing union practices, enforced by civil and criminal penalties.³⁶ The Court allowed the challenge though the UFW did not express future intent to use the procedures. The Court noted past UFW involvement with Arizona farmworkers, current activity in California, and claimed “continuing burden on . . . associational rights” because of the hindrance posed by the contested statute.³⁷ The Court also found sufficient injury for the UFW to challenge the statute’s criminal sanctions, noting the chill of the provisions on the union’s engaging in regulated activities like organizing and boycotting.³⁸

The trio of risk-as-injury cases highlights the significant distinction in the *Laidlaw-Lyons* conundrum. The Clean Water Act underlay the claims of Friends of the Earth, and is one of a host of statutes aimed at reducing the risk of environmental and health harms stemming from pollution.³⁹ The risks articulated by the plaintiffs—disrupted use of a nearby river stemming from health concerns—resonated with the risks at which the statute was aimed. *Lyons*, in contrast, arose after the district court granted a preliminary injunction premised on the affront to Lyons’s substantive due process rights under the Fourteenth Amendment.⁴⁰ While the Due Process Clause of the Fourteenth Amendment arguably mitigates the risk of a violation of other substantive rights through procedural protections, *substantive* due process defines harms. The violation of a risk-mitigating provision is heightening the probability of harm; the violation of a harm-defining provision is an event perpetrating the harm.

involved indirect and speculative decisions by multiple hypothetical entities to use nonrecyclable goods prompted by a railroad rate increase rather than other factors; another layer of decisions by local actors to sell natural resources in the plaintiffs’ vicinity; and yet another layer of decisions by users of such goods to litter. Moreover, the *Simon* plaintiffs alleged denials of access that had *already occurred*, while *SCRAP* involved future hypothetical events. Both *SCRAP* and *Simon* involved motions to dismiss, so they cannot be differentiated technically by the standards applied. The *Simon* Court distinguished *SCRAP* as involving “specific and perceptible harm,” *id.* at 45 n.25 (quoting *SCRAP*, 412 U.S. at 689), a claim not further supported by argument, nor borne out by the facts of the case. The only intelligible difference is that an environmental statute in *SCRAP* provided a collective co-institutional judgment that risks of environmental harm count. The *Simon* plaintiffs pointed to no statutes saying that the interests of indigents in medical care matter.

35. 442 U.S. 289 (1979).

36. *Id.* at 292-93, 298-305.

37. *Id.* at 299-300.

38. *Id.* at 303. The First Amendment commands reducing the risk of chilled speech. *See, e.g.*, *New York Times v. Sullivan*, 376 U.S. 254 (1964).

39. The permit system is linked to each state’s obligation to set the maximum daily load of pollutants in covered waters “at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety.” 33 U.S.C. § 1313(d)(1)(C) (2000).

40. *City of Los Angeles v. Lyons*, 461 U.S. 95, 98-100 (1983). Lyons initially alleged threats to his First, Fourth, Eighth, and Fourteenth Amendment rights.

II

Risk can be perceived as injury if illuminated by an underlying risk-reducing statute or constitutional provision. The future probabilistic harms alleged as injury and the risks delineated in the risk-reducing statute must match, however. These recognition rules derive from the deference to collective judgments underpinning statist sight of risks. What happens when the risks do not match? *Central Delta Water Agency v. United States* is an example of a court confronted with the problem.⁴¹

Farmers and two state agencies representing farmers who relied on water from the New Melones Reservoir brought suit in *Central Delta* against the federal operators of the largest water-management project in the United States, the Central Valley Project (CVP) in California.⁴² Congress, after heavy lobbying by environmental groups, enacted the Central Valley Project Improvement Act,⁴³ which required the Bureau of Land Reclamation, a CVP operator, to “make all reasonable efforts” to ensure by 2002 long-term sustainable natural production of anadromous fish. The Act required the Bureau to divert water to manage 800,000 acre-feet of Project waters to implement the goal—but required that the Bureau do so while remaining in compliance with applicable state water-use permits.⁴⁴ The Bureau’s state water-use permit to operate the New Melones Reservoir required it to limit salinity concentration downstream to a set standard.⁴⁵

To implement the Act, the Bureau adopted an interim operations plan, which provided for the periodic release of water from the reservoir to supplement other water sources.⁴⁶ The plaintiffs claimed the plan violated the Bureau’s obligations, citing statistical modeling by the Bureau showing that the plan might increase water salinity enough to violate the permit’s salinity standard at least one month per year in forty-one percent of the next seventy-one years.⁴⁷ The Bureau contended that a series of contingencies had to occur in a dry year for the violations to occur and stated that it would do whatever was required to stay within its permit terms, including acquiring water elsewhere and adopting another plan in a dry year.⁴⁸

The Ninth Circuit reversed the district court’s ruling denying standing. The appellate court found injury in fact based on the farmers’ allegations

41. 306 F.3d 938.

42. *Id.* at 943-44.

43. Reclamation Projects Authorization and Adjustment Act of 1992, Pub. L. No. 102-575, §§ 3401-3412, 106 Stat. 4600, 4706-31 (1992) (Title XXXIV of this Act is the Central Valley Project Improvement Act.).

44. *Central Delta Water Agency*, 306 F.3d at 944-45.

45. *Id.* at 943.

46. *Id.* at 945.

47. *Id.* at 948.

48. *Id.* at 950.

that should the salinity standard be exceeded, their crops would be damaged by the excessively saline water.⁴⁹ The court, applying *Laidlaw* and two lower court cases, also based on the Clean Water Act, stated that the necessary showing for injury was that “plaintiffs face significant risk that the crops that they have planted will not survive as a result of the Bureau’s decision.”⁵⁰ The *Central Delta* court tried to lay *Lyons* to rest in a footnote as the “doctrine of recurring harm.”⁵¹ Regrettably, *Lyons* is not so easily cabined, because the *Lyons* Court’s injury analysis had two sides: a refusal to extrapolate future injury from past harms and a requirement of a showing of near certainty, rather than mere risk, of future injury.⁵² The contingent probability the *Central Delta* plaintiffs cited was not near certainty.

Perhaps this is why the *Central Delta* court tried to bolster its injury holding by waxing lyrical about the need to permit challenges to actions increasing the risk of environmental harms, arguing, “The extinction of a species, the destruction of a wilderness habitat, or the fouling of air and water are harms that are frequently difficult or impossible to remedy.”⁵³ Yet the farmers were not premising standing on fear over species extinction, wilderness destruction, or fouled air and water. Rather, the *Bureau* diverted water to carry out the collective goal of mitigating the risk of harm to anadromous fish. The plaintiffs’ risks were not aligned with the environmental statutory goals underlying the suit.

The statist lens is animated by collective judgments that certain risks count, but limited by the pronouncement of *which* risks count. Thus, under the individualist lens of *Lyons* and the hybrid statist-individualist lens of *Laidlaw*, the risks the farmers feared cannot be perceived. Time and changing conditions, however, might make the injury appear more certain, thus enabling its perception under the individualist lens. A dismissal on one of the doctrines of timing—ripeness, finality, and exhaustion of administrative remedies—would avoid the expressively and practically crushing statement that the farmers experienced no injury, and would preserve the statist-individualist distinction. The membrane between the individualist and statist distinction is thin. Preserving it is important, for the rarity of statutes solicitous of harms suffered by the vulnerable may be more readily cured than a doctrine of selective standing, described by Nichol, excluding those most in need of objective judicial sight because of inequities and problematic subjectivities outside the courthouse.⁵⁴

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49. *Id.* at 947. The court also found the state agencies had organizational standing to represent farmers similarly affected. *Id.* at 951.

50. *Id.* at 948 (emphasis added).

51. *Id.* at 949 n.7.

52. See *Lewis v. Casey*, 518 U.S. 343 (1996); *supra* text accompanying note 23.

53. *Central Delta Water Agency*, 306 F.3d at 950.

54. See Nichol, *supra* note 3.