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A "STANDING" AMENDMENT TO THE FEDERAL RULES OF CIVIL PROCEDURE*

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The doctrine of standing is one of "the most amorphous [concepts]" in American law.[1] Generally, plaintiffs must have standing to sue in the federal courts,[2] and whenever a court determines that the plaintiff lacks standing, it will dismiss the action.[3] This rule derives from the view that article three of the Constitution[4] requires that plaintiffs have standing to invoke the subject matter jurisdiction of the federal courts.[5] Because a court must dismiss any action over which it lacks subject matter jurisdiction,[6] the plaintiff must have standing to give rise to a justiciable claim.

The law of standing has gone through significant change and development in the last decade.[7] To date, however, legal literature on the

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1. Flast v. Cohen, 392 U.S. 83, 99 (1967) (citing *Hearings on S. 2097 Before the Subcomm. on Constitutional Rights of the Senate Judiciary Comm.*, 89th Cong., 2d Sess. 498 (statement of Professor Paul A. Freund)).

2. *See* Linda R.S. v. Richard D., 410 U.S. 614 (1973); Association of Data Processing Orgs. v. Camp, 397 U.S. 150 (1970); Flast v. Cohen, 392 U.S. 83 (1967); Baker v. Carr, 369 U.S. 186 (1962).

3. *See* Warth v. Seldin, 422 U.S. 490 (1975); United States v. Richardson, 418 U.S. 166 (1974); Sierra Club v. Morton, 405 U.S. 727 (1972); Frothingham v. Mellon, 262 U.S. 447 (1923).

4. U.S. CONST. art. III, § 2 provides:

> The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, between citizens of different States, between citizens of the same state claiming lands under grant of different States, and between a state, or the citizens thereof, and foreign States, citizens or subjects.

5. *See* notes 9-38 *infra* and accompanying text.

6. FED. R. CIV. P. 12(h)(3) states: "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." *See also* City of Kenosha v. Bruno, 412 U.S. 507 (1973); American Fire & Cas. Co. v. Finn, 341 U.S. 6 (1951); Mansfield, C. & L.M. Ry. v. Swan, 111 U.S. 379 (1884).

7. *See generally* Warth v. Seldin, 422 U.S. 490 (1975); Schlesinger v. Reservists Comm. to

doctrine has focused primarily on the substantive parameters of the principle and the standards for determining the standing of certain categories of individual and group plaintiffs.[8] The procedural implications of the doctrine's evolution have been largely ignored. In particular, a crucial procedural question remains unanswered: Does article three necessarily require that a federal court dismiss a suit whenever it finds that the plaintiff lacks standing, even after it has rendered an otherwise valid judgment on the merits of the claim?

This article examines the constitutional and prudential policies underlying the standing requirement, and concludes that a federal court may render a valid judgment when the defendant fails to raise the standing issue prior to judgment. Accordingly, this article proposes that the Federal Rules of Civil Procedure be amended to preclude a defendant from asserting any defense based on plaintiff's lack of standing once the court has determined the merits of the claim.

I. THE STANDING DOCTRINE: ITS CONSTITUTIONAL AND PRUDENTIAL DIMENSIONS

Flast v. Cohen[9] set the modern standard for determining whether a plaintiff has standing. Plaintiff-taxpayers brought suit to enjoin the expenditure of federal funds under the Elementary and Secondary Edu-

Stop the War, 418 U.S. 208 (1974); United States v. Richardson, 418 U.S. 166 (1974); United States v. SCRAP, 412 U.S. 669 (1973); Linda R.S. v. Richard D., 410 U.S. 614 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972); Association of Data Processing Orgs. v. Camp, 397 U.S. 150 (1970); Flast v. Cohen, 392 U.S. 83 (1968).

8. *See* Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425 (1974); Bittker, *The Case of the Fictitious Taxpayer*, 36 U. CHI. L. REV. 364 (1969); Bledsoe, *Mootness and Standing—In Class Actions*, 1 FLA. ST. U.L. REV. 430 (1973); Davis, *The Case of the Real Taxpayer: A Reply to Professor Bittker*, 36 U. CHI. L. REV. 375 (1969); Jaffe, *Standing Again*, 84 HARV. L. REV. 633 (1971); Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968); Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645 (1973); Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L.J. 599 (1962); Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663 (1977); Zacharias, *Standing of Public Interest Litigating Groups to Sue on Behalf of Their Members*, 39 U. PITT. L. REV. 453 (1978); Note, *Taxpayer Standing to Litigate*, 61 GEO. L.J. 747 (1973); Comment, *The Burger Court's Approach to Jus Tertii Standing*, 13 GONZ. L. REV. 961 (1978); Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423 (1972); Comment, *Associational Third-Party Standing and Federal Jurisdiction Under Hunt*, 64 IOWA L. REV. 104 (1978); Comment, *Standing to Sue in Federal Courts: The Elimination of Preliminary Threshold Standing Inquiries*, 51 TUL. L. REV. 119 (1976).

9. 392 U.S. 83 (1967).

cation Act of 1965,[10] claiming that the use of federal funds by religious schools to finance education and purchase textbooks violates the establishment clause of the Constitution.[11] A three-judge district court dismissed the complaint on the ground that plaintiffs, in their role as federal taxpayers, did not have standing to sue,[12] but the Supreme Court reversed.[13] Confronted with the issue of whether the district court "was simply imposing a rule of self-restraint which was not constitutionally compelled,"[14] the Court held that standing is an aspect of the justiciability requirement imposed by article three of the Constitution.[15] The party seeking relief 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 the illumination of difficult constitutional questions."[16] To establish standing, a taxpayer must demonstrate a nexus between his status as a taxpayer and the legislative act under attack as well as a nexus between his taxpayer status and a specific constitutional limitation on the congressional spending power.[17]

The standing cases since *Flast* resemble a labyrinth of analytically questionable decisions,[18] but the basic constitutional consideration underlying the standing doctrine has remained consistent: whether the plaintiff has a sufficient interest in the outcome of the litigation to present the case in the adversary context required by article three.[19]

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10. Pub. L. 89-10, 79 Stat. 36 (1965) (amended 1966, 1967, 1970) (codified in scattered sections of 20 U.S.C.).

11. 392 U.S. at 85-86. The establishment clause provides: "Congress shall make no law respecting an establishment of religion, ..." U.S. CONST. amend. I.

12. Flast v. Gardner, 271 F. Supp. 1 (S.D.N.Y. 1967).

13. 392 U.S. 83 (1967).

14. *Id.* at 92.

15. *Id.* at 102.

16. *Id.* at 99 (citing Baker v. Carr, 369 U.S. 186, 204 (1962)).

17. *Id.* at 102.

18. *See, e.g.,* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976); Warth v. Seldin, 422 U.S. 490 (1975); United States v. SCRAP, 412 U.S. 669 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972).

Critics charge that the Court's standing decisions represent an attempt to close the doors of the federal courts, *see* Styne & Van Aken, Warth v. Seldin: *The Substantial Probability Test*, 3 HASTINGS CONST. L.Q. 485, 516 (1976), to avoid decisions on the merits of controversial cases, *see* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 66 (1976) (Brennan, J., dissenting); Warth v. Seldin, 422 U.S. 490, 518 (1975) (Douglas, J., dissenting), and to render concealed decisions on the merits by denying standing when the the Court deems a claim to be not meritorious, *see* Tushnet, *supra* note 8.

19. *See, e.g.,* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S 26 (1976); Warth v. Seldin,

Prudential considerations also underpin the standing doctrine. In *Warth v. Seldin*[20] petitioners sought declaratory and injunctive relief from a town ordinance that effectively excluded low and moderate income persons from in-town living. The district court dismissed the complaint, finding that petitioners did not have standing to prosecute the action, and the court of appeals affirmed.[21] Justice Powell, writing for the Court, noted that a litigant is entitled to a decision on the merits of his claim when he makes out a "case or controversy" between himself and the defendant within the meaning of article three.[22] Even when a plaintiff satisfies the case-or-controversy requirement, however, he must rest his claim for relief on his own legal rights and interests, not on those of third parties.[23] Because petitioners in *Warth* alleged injury only to unidentified members of a class they purported to represent, they lacked standing to assert the unconstitutionality of the ordinance.[24]

Prudential concerns also entered into the Court's decision in *Simon v. Eastern Kentucky Welfare Rights Organization*.[25] Plaintiffs, named indigents and organizations composed of indigents, brought a class action against the Secretary of the Treasury and the Commissioner of the Internal Revenue Service, claiming that defendants violated the Internal Revenue Code and the Administrative Procedure Act in their issuance of a revenue ruling that granted advantageous tax treatment to nonprofit hospitals that offered only emergency room service to indigents. The Court held that neither plaintiff-organizations nor plaintiff-individuals had standing to sue.[26] Despite the organizations' interest in the health problems of their indigent members, the organizations had not demonstrated "injury in fact" as required by article three.[27] Plaintiff individuals, even assuming that they had been denied hospital services,

422 U.S. 490 (1975); Laird v. Tatum, 408 U.S. 1 (1972). *But see* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 64 (1976) (Brennan, J., concurring) (majority needlessly based its decision on article three); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 212 (1972) (White, J., concurring) (article three case or controversy created by statute).

20. 422 U.S. 490 (1975).

21. 495 F.2d 1187 (2d Cir. 1974).

22. 422 U.S. at 498.

23. *Id.* at 499.

24. *Id.* at 504-08. *See also* Note, *Associational Third Party Standing and Federal Jurisdiction Under Hunt*, 64 IOWA L. REV. 104 (1978).

25. 426 U.S. 26 (1976).

26. *Id.* at 28.

27. *Id.* at 40.

also lacked standing because no hospital was made a party defendant in the proceeding.[28]

In *Duke Power Co. v. Carolina Environmental Study Group, Inc.*,[29] however, the Court, in one of its most recent pronouncements on standing, permitted citizens groups and individuals who lived near the site of a proposed nuclear power plant to sue the Nuclear Regulatory Commission for a declaratory judgment that the Price-Anderson Act,[30] which limited the liability of public utilities for nuclear accidents resulting from the operation of federally licensed nuclear power plants, was unconstitutional. In discussing the prudential considerations underlying the standing doctrine, Chief Justice Burger wrote:

> There are good and sufficient reasons for this prudential limitation on standing when rights of third parties are implicated—the avoidance of the adjudication of rights which those not before the Court may not wish to assert, and the assurance that the most effective advocate of the rights at issue is present to champion them. We do not, however, find these reasons a satisfactory predicate for applying this limitation or a similar nexus requirement to all cases as a matter of course. Where a party champions his own rights, and where the injury alleged is a concrete and particularized one which will be prevented or redressed by the relief requested, the basic practical and prudential concerns underlying the standing doctrine are generally satisfied when the constitutional requisites are met.[31]

In sum, whatever the standard—personal stake in the outcome,[32] injury-in-fact,[33] economic harm,[34] or otherwise—the Supreme Court regards standing as an element of the article three justiciability requirement. Though the Court has imposed different standing requirements for different types of plaintiffs—taxpayer,[35] environmentalist,[36] or busi-

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28. "[T]he 'case or controversy' limitation of Art. III still requires that a federal court act only to redress injury that fairly can be *traced to the challenged action of the defendant*, and not injury that results from the independent action of some third party not before the court." *Id.* at 41-42. (emphasis added).

29. 438 U.S. 59 (1978).

30. 42 U.S.C. § 2210 (1970) (amended 1975).

31. 438 U.S. at 80-81 (citations omitted).

32. *See* Flast v. Cohen, 392 U.S. 83 (1967); Baker v. Carr, 369 U.S. 186 (1962).

33. *See* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); Association of Data Processing Orgs. v. Camp, 397 U.S. 150 (1970).

34. *See* Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978); United States v. Richardson, 418 U.S. 166 (1974); United States v. SCRAP, 412 U.S. 669 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972).

35. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); United States

ness competitor[37]—standing is regarded as essential to invoke the subject matter jurisdiction of the federal courts. Furthermore, the concept of standing is inextricably intertwined with concerns over the proper role of the federal judiciary. In cases in which courts doubt the "concrete adverseness" of the action—such as when plaintiffs alleged a generalized injury,[38] or fail to name a defendant necessary to the granting of proper relief[39]—the courts, for prudential reasons, probably will find that plaintiffs lack standing.[40]

II. THE PROCEDURAL QUESTION: VALIDITY OF JUDGMENTS ENTERED PRIOR TO DEFENDANTS' CHALLENGE TO PLAINTIFFS' STANDING[41]

The federal courts derive their sole adjudicatory authority from the Constitution and acts of Congress.[42] The parties to an action cannot confer jurisdiction on the court by either consent[43] or collusion.[44] A federal court, therefore, must dismiss any suit over which it lacks subject matter jurisdiction at whatever point in the litigation that the jurisdictional defect becomes evident.[45] A defendant may wait until after the trial court has rendered an unfavorable judgment on the merits of

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v. Richardson, 418 U.S. 166 (1974); Flast v. Cohen, 392 U.S. 83 (1967); Frothingham v. Mellon, 262 U.S. 447 (1923).

36. *See* Duke Power Co. v. Carolina Environmental Study, 438 U.S. 59 (1978); United States v. SCRAP, 412 U.S. 669 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972).

37. *See* Association of Data Processing Orgs. v. Camp, 397 U.S. 150 (1970).

38. *See, e.g.,* Warth v. Seldin, 422 U.S. 490 (1975).

39. *See, e.g.,* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976).

40. When Congress, however, confers standing on a particular category of persons to litigate constitutional or statutory claims, the courts will honor the congressional determination even when prudential considerations otherwise would not allow a decision on the merits. *See* United States v. SCRAP, 412 U.S. 669 (1973); Association of Data Processing Orgs. v. Camp, 397 U.S. 150 (1970). Nevertheless, plaintiffs must still satisfy the case-or-controversy requirement of the standing doctrine. *See* Warth v. Seldin, 422 U.S. 490, 501 (1975).

41. For an excellent discussion of the problems and theories relating to the validity of judgments, see Dobbs, *Beyond Bootstrap: Foreclosing the Issue of Subject-Matter Jurisdiction Before Final Judgment*, 51 MINN. L. REV. 491 (1967); Dobbs, *Trial Court Error as an Excess of Jurisdiction*, 43 TEX. L. REV. 854 (1965).

42. *See* notes 4-8 *supra* and accompanying text. *See also* Kline v. Burke Constr. Co., 260 U.S. 226 (1922); 13 C. WRIGHT & F. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3522 (1973).

43. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857); Jackson v. Ashton, 33 U.S. (8 Pet.) 148 (1834); FED. R. CIV. P. 12(h)(3).

44. *See* Kramer v. Caribbean Mills, Inc., 394 U.S. 823 (1969); 28 U.S.C. § 1359 (1976).

45. *See* note 6 *supra*.

the claim to challenge for the first time on appeal the court's jurisdiction over the subject matter of the dispute.[46] In addition, a court either at trial or on appeal may raise the issue *sua sponte* and dismiss the action if the jurisdictional defect is present.[47]

This rule, which allows a subject matter jurisdiction defect to be raised at any point during the litigation, is troubling when it operates to upset an otherwise valid judgment on the merits.[48] When a defendant appears at trial and challenges the plaintiff's standing, but the trial court rules against him on the issue and proceeds to the merits of the claim, the rule is appropriate. Like any other issue, the defendant should have recourse to attack the judgment either by motion in the court that rendered the judgment[49] or by appeal of the judgment to the

46. *See* note 6 and accompanying text; *cf.* American Fire & Cas. Co. v. Finn, 341 U.S. 6 (1951) (diversity jurisdiction). In *Finn*, defendant waited until after the district court decided the merits of the case to claim for the first time on appeal that the case had been improperly removed to federal court because no diversity jurisdiction existed. The Supreme Court sustained the challenge:

> To permit a federal trial court to enter a judgment in a case removed without right from a state court where the federal court could not have original jurisdiction of the suit even in the posture it had at the time of judgment, would by the act of the parties work a wrongful extension of federal jurisdiction and give district courts power the Congress had denied them.

Id. at 18.

47. *See* State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967); McGrath v. Kristensen, 340 U.S. 162 (1950); King Bridge v. Otoe County, 120 U.S. 225 (1887); Mansfield, C. & L.M. Ry. v. Swan, 111 U.S. 379 (1884); FED. R. CIV. P. 12(h)(3).

48. Professor Moore criticizes the rule on its premise:

> With deference, we question whether such an inflexible rule [that federal jurisdiction can never, except under express statutory provisions, arise from consent or estoppel] is needed or sound. The federal courts, it is true, are courts of limited jurisdiction. Jurisdiction represents the distribution of judicial power in our federal system as blueprinted by the Constitution and declared by Congress; and the federal courts ought therefore to be mindful that they stay within defined limits. These are broad working principles and ought not to be applied destructively. Where all the parties have colluded to manufacture jurisdiction, the action should be dismissed at any stage when this fact is discovered. The colluding parties deserve no sympathy and may properly be dealt with in a stern manner. If a jurisdictional objection is made before trial it should normally be respected; and the district court should have the power to raise lack of jurisdiction on its own motion so long as the case pends before it, although wisdom would not demand an inflexible use after a hearing or trial on the merits. In our opinion, it is very questionable whether a party who has invoked the federal court's jurisdiction should be allowed to raise lack of federal jurisdiction after he has lost on the merits. And only in rare cases should an appellate court on its own motion raise lack of the district court's jurisdiction.

1 MOORE'S FEDERAL PRACTICE ¶ 0.60[4] (2d ed. 1979) (footnotes omitted).

See Morse, *Judicial Self-Denial and Judicial Restraint: The Personality of the Original Jurisdiction of the District Courts*, 3 CLEV.-MAR. L. REV. 101 (1955), 4 CLEV.-MAR. L. REV. 7 (1955).

49. *See* FED. R. CIV. P. 59, 60(b)(4). *See generally* Klapprott v. United States, 335 U.S. 601 (1949). Under certain circumstances a defendant may also bring an independent action in equity

court with appellate jurisdiction over the case.[50] If the appellate court also upholds the plaintiff's standing, then the defendant is precluded from further direct attack on the judgment absent review by the Supreme Court.[51] When the defendant raises the standing issue after a judgment on the merits, however, the rule commands less support.[52] When a plaintiff satisfies "the basic practical and prudential concerns underlying the standing doctrine,"[53] there is little reason to upset the judgment.

At least one court has upheld a judgment even though the plaintiff lacked standing. In *Forsythe v. Overmeyer*[54] plaintiff sued to recover on defendant's personal guarantee under a sale-lease back agreement. Only after the trial court reached a decision on the merits did defendant challenge plaintiff's standing to sue.[55] The Court of Appeals for the Ninth Circuit summarily dismissed the challenge without discussion of the merits of defendant's motion.[56] Although the implication of *Forsythe* is clear that a defendant who loses on the merits at trial will not be allowed to later assert plaintiff's lack of standing to attack an otherwise valid judgment, the decision may be read in either of two ways. First, the case may be read to hold that standing is not a prerequisite to the subject matter jurisdiction of the federal courts. If, as according to *Flast*, standing is a requirement of subject matter jurisdiction, then the judgment in *Forsythe* should have been indefinitely subject to attack and the *Forsythe* court would have had to decide the issue, even at the appellate stage, and dismiss the complaint if plaintiff lacked standing to sue. If, however, standing is not essential to the proper exercise of subject matter jurisdiction, then the *Forsythe* court could have appropriately proceeded to the merits of the case before it determined its subject matter jurisdiction.

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to enjoin the enforcement of a void judgment. *See* Simon v. Southern Ry., 236 U.S. 115 (1915). *See also* 7 MOORE'S FEDERAL PRACTICE ¶ 60.37[1] (2d ed. 1979).

50. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 92, 97 (1971). *See also* Jackson v. Irving Trust Co., 311 U.S. 494, 503 (1940).

51. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 92, 97 (1971). *See also* Durfee v. Duke, 375 U.S. 106 (1963); Stoll v. Gottlieb, 305 U.S. 165 (1938).

52. *See* RESTATEMENT OF JUDGMENTS, Explanatory Notes § 15, at 128 (Tent. Draft No. 5, 1978). *See also* Hartog v. Memory, 116 U.S. 588 (1966); 53 HARV. L. REV. 652 (1940).

53. Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 81 (1978); *see* notes 20-31 *supra* and accompanying text.

54. 576 F.2d 779 (9th Cir. 1978).

55. *Id.* at 784.

56. *Id.*

Alternatively, *Forsythe's* summary rejection of defendant's motion to dismiss for lack of standing may be read to support the proposition that at some point during the litigation—certainly, after trial on the merits—a defendant may be deemed to have waived his defense of lack of standing, even though standing is a requirement for the subject matter jurisdiction of the federal courts. This view avoids direct conflict with *Flast*, yet recognizes the acceptability of defendant's waiver of the right to challenge plaintiffs' standing when the prudential concerns underlying the standing doctrine have been satisfied.

In *Thurston v. Dekle*,[57] for example, a district court awarded back pay as well as declaratory and injunctive relief to a discharged city employee who challenged the defendant-city's suspension and dismissal rules.[58] The Fifth Circuit Court of Appeals held that while plaintiff had standing to assert a claim for back pay, the district court was not the appropriate forum to adjudicate the claim.[59] The court of appeals also held that plaintiff did not have standing to challenge the city's suspension and dismissal rules, but ruled that the district court properly reached the merits of plaintiff's challenge to these rules.[60] The court reasoned that the probability of another attack on the city rules by a plaintiff with standing and the concrete adversary context apparent throughout the present proceeding outweighed the procedural technicality that plaintiff lacked standing.[61]

Forsythe and *Thurston* thus stand for the proposition that a federal

57. 383 F. Supp. 1167 (M.D. Fla.), *rev'd in part*, 531 F.2d 1264 (5th Cir. 1976), *vacated on other grounds*, 98 S. Ct. 3118 (1978).

58. 383 F. Supp. at 1181-82.

59. 531 F.2d at 1269.

60. *Id.* at 1270.

61. *Id.* at 1270-01. *See also* First Nat'l City Bank v. Saks Constr. Corp., 70 F.R.D. 417 (D.V.I. 1976); Grossberg v. Deusebio, 380 F. Supp. 285 (E.D. Va. 1974).

This rationale resembles that used by courts to avoid problems of mootness resulting from changes in the facts or the law that deprive the litigant of a sufficient stake in the outcome. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973), in which the Court did not declare moot a class action suit brought by a single woman against the Texas criminal abortion laws even though the pregnancy had terminated before the Court heard the case. The Court explained that if "termination ma[de] a case moot, pregnancy litigation seldom will survive much beyond the trial stage. . . . Our laws shall not be that rigid. . . . Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be 'capable of repetion, yet evading review.'" 410 U.S. at 125 (quoting Southern Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911)). *See generally* Moore v. Ogilvie, 394 U.S. 814, 816 (1969); Carol v. Princess Anne, 393 U.S. 175, 178-79 (1968); United States v. W.T. Grant Co., 345 U.S. 629, 632-33 (1953); Note, *The Mootness Doctrine in the Supreme Court*, 88 HARV. L. REV. 373, 378 (1974).

court may render a valid judgment even in the absence of plaintiff's standing. The cases correctly separate the defenses of lack of standing and lack of subject matter jurisdiction when the legal question concerns the effect of defendant's failure to raise timely the respective defenses. When, as in *Forsythe* and *Thurston*, a plaintiff satisfies the policy considerations underlying the standing doctrine, a court should be permitted to proceed to the merits and render a valid judgment despite plaintiff's lack of standing, if defendant fails to raise the issue prior to judgment.[62]

This conclusion finds support by analogy to other subject matter jurisdiction requirements that defendant may waive if he fails to raise them in a timely fashion. In *Hartog v. Memory*[63] defendant challenged a judgment against him on the ground that the trial court lacked diversity jurisdiction over plaintiff's claim. Defendant first raised the issue after the verdict, even though he testified at trial that he was a British citizen. The trial court dismissed the complaint and the court of appeals affirmed.[64] The Supreme Court reversed, however, holding that plaintiff should have been given an opportunity to rebut defendant's testimony prior to dismissal.[65] In addition, the Court held that when the jurisdictional defect does not appear on the record, a court may—but is not required to—dismiss the complaint; the rule that subject matter jurisdiction can be raised for the first time on appeal applies only to cases in which the defect appears on the record.[66] On the facts of this case, defendant's knowing and false identification of his citizenship in the pleadings and his allowing the jurisdictional defect to pass unnoticed at trial estopped him from denying the jurisdiction of the court on appeal.[67]

62. This view is consistent with the Supreme Court's conclusion in Frank v. Bowman Transp. Co., 424 U.S. 747 (1976), that the meaning and scope of all concepts of justiciability "must be derived from the fundamental policies in forming the 'cases and controversies' limitations imposed by Article III." *Id.* at 754.

When a defendant does not appear at trial, however, he should be able to raise by direct appeal all jurisdictional defects, including the plaintiff's lack of standing. *See* Continental Bank & Trust Co. v. Lewis, Roca, Scoville & Beaucamp, 278 F.2d 497 (10th Cir. 1960); Wyman v. Newhouse, 93 F.2d 313 (2d Cir. 1937).

63. 116 U.S. 588 (1886).

64. 23 F. 835 (7th Cir. 1885).

65. 116 U.S. at 591-92. *Accord,* Huntington v. Ladley, 176 U.S. 668 (1900).

66. 116 U.S. at 591. *Accord,* American Fire & Cas. Co. v. Finn, 341 U.S. 6 (1951).

67. 116 U.S. at 592.

The *Hartog* exception has been followed in a few recent cases.[68] In *Di Frischia v. New York Central Railroad Company*[69] the parties stipulated, immediately prior to a preliminary hearing on the jurisdictional question, that the district court had jurisdiction. As a result, the court did not hold the hearing, and instead entered an order that it had jurisdiction over the subject matter.[70] Twenty-three months later—after the completion of discovery and the running of the statute of limitations—defendant moved to amend its answer in a way that would destroy the court's diversity jurisdiction.[71] The trial court granted the motion and subsequently dismissed the complaint, but the court of appeals reversed, holding that "[a]llowance of such an amendment under the circumstances would be an abuse of discretion."[72] In reaching a similar result, the court in *Kreger v. Ryan Brothers, Inc.*[73] found it "inappropriate for a defendant to admit to the jurisdictional allegations of a Complaint, to remain silent upon the defects in those allegations for more than two years, and then to raise a jurisdictional defense upon the eve of trial . . . particularly where defendant itself remains in exclusive possession of the [relevant] facts."[74] Similarly, in *Greenbaum v. United States*[75] the court did not allow the government to assert lack of subject matter jurisdiction under the Federal Tort Claims Act[76] after it had allowed the statute of limitations to run.[77]

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68. *But see* Miller v. Weller, 286 F.2d 172 (3d Cir. 1961); Shroeder v. Freeland, 188 F.2d 517 (8th Cir. 1951); Central States Co-ops v. Watson Bros. Transp. Co., 165 F.2d 392 (7th Cir. 1948), *vacated on other grounds*, 337 U.S. 951 (1949); Associated Press v. Emmett, 45 F. Supp. 907 (S.D. Cal. 1942).

69. 279 F.2d 141 (3d Cir. 1960). *See* Klee v. Pittsburgh & W. Va. Ry., 22 F.R.D. 252 (W.D. Pa. 1958). *See also* Young v. Handwork, 179 F.2d 70 (7th Cir.), *cert. denied*, 339 U.S. 949 (1950); Price v. Greenway, 167 F.2d 196 (3d Cir. 1948); Murphy v. Sun Oil Co., 86 F.2d 895 (5th Cir.), *cert. denied*, 390 U.S. 683 (1936).

70. 279 F.2d at 142-43.

71. *Id.* at 143.

72. *Id.* at 144. *Accord,* Joyce v. United States, 329 F. Supp. 1242 (W.D. Pa. 1971).

73. 308 F. Supp. 727 (W.D. Pa. 1970).

74. *Id.* at 728.

75. 360 F. Supp. 784 (E.D. Pa. 1975).

76. 28 U.S.C. §§ 2671-2680 (1976).

77. Plaintiff was an employee of the United States Post Office. On his day off he went to the post office where he worked to pick up his paycheck. While in the parking lot he suffered an accident for which he brought suit. Five years after the employee filed a claim under the Federal Torts Claim Act, the Government for the first time argued that the plaintiff sustained the injury in the course of his employment and should therefore file under the Federal Employees Compensation Act; 5 U.S.C. §§ 8101-8151 (1976). The Government further argued that because the FECA, precluded judicial review, the court lacked jurisdiction. The court noted, however, that plaintiff

One could attempt to distinguish waiver of subject matter jurisdiction in the above cases from waiver of standing on the ground that the Constitution does not require Congress to vest the lower federal courts with the full potential of subject matter jurisdiction,[78] but the Constitution does mandate standing under the case-or-controversy requirement of article three.[79] On the other hand, article three criteria must still be met for the proper exercise of subject matter jurisdiction even in cases in which Congress provides for federal jurisdiction when no complete diversity exists,[80] or when Congress imposes monetary limits on the exercise of article three jurisdiction.[81] Furthermore, Congress may not grant jurisdiction to federal courts outside the limits of article three,[82] nor may the federal courts exercise jurisdiction over cases that fall outside article three parameters.[83]

Hartog and the other cases discussed above, however, illustrate that courts have ignored what seem to be the minimum requirements of article three. Thus, precedent exists for the waiver of subject matter jurisdictional requirements when the defendant exhibits bad faith or

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would be barred by FECA's statute of limitations from asserting a claim. 360 F. Supp. at 788 (citing 5 U.S.C. § 8128 (1970)). Thus, the Government "did not raise this defense . . . when an administrative remedy was still possible, but waited until the fifth anniversary date had safely passed." 360 F. Supp. at 789.

The district court also found that "[T]he present case is not exactly on point with *Di Frischia*. The Government has never stipulated to jurisdiction or to jurisdictional facts. The problem in this action is the Government's long and unexcusable delay in discovering materials in its own possession which gave rise to the issue of FECA coverage." *Id.* at 787.

78. *Compare* U.S. CONST. art. III, § 2 (nine categories of federal jurisdiction) *with* 28 U.S.C. §§ 1331, 1332 (federal question and diversity jurisdiction). *See* National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949).

> It has never heretofore been doubted that the constitutional grant of power is broader than the general federal question jurisdiction which Congress has from time to time thought to confer on district courts by statute.

Id. at 614 (Rutledge, J., concurring).

79. *See* notes 2-6 *supra* and accompanying text.

80. *See* State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967). *See generally* Mississippi Pub. Corp. v. Murphee, 326 U.S. 438 (1946); Chicago Great W. Ry. v. Kendall, 266 U.S. 94 (1924); Munter v. Neil Corset Co., 261 U.S. 276 (1923); Bekins v. Bekins Van & Storage Co., 210 F.2d 338 (5th Cir.), *cert. denied*, 347 U.S. 1015 (1954).

81. *See* 28 U.S.C. §§ 1331, 1332. *See, e.g.,* Pinel v. Pinel, 240 U.S. 594 (1916); Vraney v. Pirellas County, 250 F.2d 617 (5th Cir. 1958); Sturgeon v. Great Lakes Steele Corp., 143 F.2d 819 (9th Cir.), *cert. denied*, 323 U.S. 779 (1944); Krisel v. Duncan, 258 F. Supp. 845 (S.D.N.Y.), *aff'd*, 386 F.2d 179 (2d Cir. 1967), *cert. denied*, 390 U.S. 1042 (1968); Jenn-Air Prods. Co. v. Penn Ventilator, Inc., 283 F. Supp. 591 (E.D. Pa. 1968).

82. *See* note 47 *supra* and accompanying text.

83. *See, e.g.,* Hodgson v. Bowerbank, 9 U.S. (5 Cranch.) 303 (1809); United States v. Binn, 74 F. Supp. 603 (D. Or. 1947).

permits the statute of limitations to elapse, leaving the plaintiff without a remedy.[84] By analogy, therefore, a defendant who fails to challenge plaintiff's standing before the court reaches the merits of the controversy should not be allowed to assert later the court's lack of subject matter jurisdiction to attack an otherwise valid judgment on the merits. To permit a defendant to assert plaintiff's lack of standing postjudgment places the defendant in a "no-lose" position. If plaintiff succeeds on the merits at trial, defendant can avoid the judgment on appeal by asserting plaintiff's lack of standing. If plaintiff loses on the merits at trial, defendant then holds a res judicata determination against plaintiff on the merits of the claim. In either case the defendant gains the benefits of legal process without any corresponding risks of liability.

A corollary procedural question is whether the absence of standing should be a basis for a collateral attack on the judgment. Generally, a judgment rendered by a court that lacks subject matter jurisdiction may be collaterally attacked.[85] Collateral attacks on the integrity of a judgment typically arise in two situations: first, where the defendant has previously litigated the jurisdictional issue at trial or on direct appeal; and second, where the defendant has not previously raised the issue.

The defendant who voluntarily appears and has the opportunity to litigate the standing issue should be precluded from collaterally attacking the judgment on the ground that the court lacked subject matter jurisdiction; recourse for the defendant is available through direct appeal.[86] Because federal courts have jurisdiction to determine their own jurisdiction,[87] the judgment should be given full force and effect subject

84. *Compare* these cases *with* Dekrell v. Johnson, 404 F. Supp. 664 (E.D. Pa. 1975), in which the court granted defendant-corporation's motion to dismiss for want of diversity jurisdiction even though the statute of limitations had run. Although *Dekrell* represents the majority view on the question of waiver of subject matter jurisdiction requirements, it may be distinguished from the cases discussed in text. Defendant in *Dekrell* displayed no bad faith: it raised the jurisdictional issue in its answer, *id.* at 666; and even though defendant filed its answer after the statute of limitations had run, plaintiffs had prior notice of the jurisdictional defect, *id.* In addition, *Dekrell* may be distinguished on the ground that dismissal in favor of the corporate defendant did not leave plaintiffs without a remedy against an individual defendant named in the action. *Id.*

85. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 96 (1971).

86. *See* Chicot County Dist. v. Bank, 308 U.S. 371 (1948); Davis v. Davis, 305 U.S. 32 (1938). *See also* Somporter, Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435 (3rd Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972); 7 MOORE'S FEDERAL PRACTICE ¶ 60.41[2] (2d ed. 1979).

87. *See* United States v. UMW, 330 U.S. 258 (1947); Bell v. Hood, 327 U.S. 678 (1946); note 67 *supra* and accompanying text.

only to direct appellate review.[88] When the defendant, however, does not appear to defend on the merits of the action, a judgment may be collaterally attacked for lack of subject matter jurisdiction,[89] because "the policy underlying the doctrine of res judicata is outweighed by the policy against permitting the court to act beyond its jurisdiction."[90]

In short, when a defendant has had the opportunity to litigate the issue of standing in the trial court, he should not be permitted to raise the issue for the first time on appeal either by direct or collateral attack on the judgment. Although standing may be a requirement of subject-matter jurisdiction, a federal court can render a valid judgment even though the plaintiff lacks standing if the defendant fails to raise the issue in a timely manner.

III. THE PROPOSED AMENDMENT

Two sections of the present Federal Rules of Civil Procedure potentially permit a defendant to raise the issue of lack of standing. Rule 12(b)(6) requires a plaintiff to state the essential elements of his claim against the defendant.[91] The motion to dismiss under 12(b)(6) performs the same function as the previously used general demurrer: the movant admits the well-pleaded allegations of the complaint, but denies their legal sufficiency.[92] The motion will be granted only if it appears to a legal certainty that plaintiff is not entitled to relief.[93]

Rule 12(b)(6), however, does not provide an appropriate vehicle to raise the lack of standing issue. *Flast* and its progeny make clear that standing relates to the subject matter jurisdiction of a federal court, not to the legal sufficiency of a plaintiff's claim.[94] A plaintiff who lacks standing does not *ipso jure* fail to state a claim upon which relief may be granted.[95] Thus, rule 12(b)(6), because it is designed to test legal

88. *See* United States v. UMW, 330 U.S. 258 (1947); Bell v. Hood, 327 U.S. 678 (1946); note 67 *supra* and accompanying text.

89. RESTATEMENT OF JUDGMENTS § 10 (1942).

90. *Id.*

91. FED. R. CIV. P. 12(b)(6).

92. *See* 2A MOORE'S FEDERAL PRACTICE ¶ 12.08 (2d ed. 1979).

93. Haines v. Kerner, 404 U.S. 519 (1972); Marshal v. Spangler, 397 F. Supp. 200 (D. Va. 1975); Schmitt v. Crist, 333 F. Supp. 820 (E.D. Wis. 1971).

94. *See* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976); Warth v. Seldin, 422 U.S. 490 (1975); United States v. SCRAP, 412 U.S. 699 (1973); Sierra Club v. Morton, 405 U.S. 26 (1972); Flast v. Cohen, 392 U.S. 83 (1967); notes 9-25 *supra* and accompanying text.

95. *See* Flast v. Cohen, 392 U.S. 83, 106 (1967); American Med. Ass'n v. Mathews, 429 F. Supp. 1179, 1189 (N.D. Ill. 1977). In DaCosta v. Laird, 471 F.2d 1146 (2d Cir. 1973), although the

sufficiency of a claim rather than the plaintiff's standing to assert the claim, does not permit a defendant to challenge the plaintiff's standing.

Presently, the practitioner who wishes to raise the lack of standing defense should do so pursuant to rule 12(b)(1), which provides that a court shall dismiss any suit over which it lacks subject matter jurisdiction.[96] Under the *Hartog* exception, however, a court is not required to dismiss a complaint when the defendant fails to raise the issue prior to verdict and the absence of standing does not appear on the record.[97] A court might also ignore the defense even prior to verdict if the defendant's delay in raising the issue severely prejudices the plaintiff.[98]

At the same time, the federal courts have not uniformly allowed defendants to raise the standing issue at any point in the litigation, unlike other defenses associated with subject matter jurisdiction. *Forsythe*, in fact, supports the proposition that standing is not an element of subject matter jurisdiction, or if so, that a defendant must raise the standing issue in a timely fashion.[99] *Thurston* also holds that a plaintiff who litigates a case with "concrete adverseness," and thus satisfies the primary policy considerations underlying the standing requirement, will not be subject to a defendant's standing challenge once a judgment has been entered.[100]

Like rule 12(b)(6), therefore, rule 12(b)(1) lacks the clarity and scope to provide an adequate means for defendants to challenge plaintiffs' lack of standing. This situation calls for the amendment of rule 12(b) to designate lack of standing as a separate defense and to indicate at what point during the litigation process the failure by a defendant to raise the defense should constitute a waiver of the defense.

Under the present Federal Rules of Civil Procedure, rule 12(h) sets out the time frame for defenses to be raised by motion or responsive pleading.[101] Under 12(h)(1) a defendant waives the defenses of lack of jurisdiction over the person, improper venue, insufficiency of process,

court dismissed the complaint for lack of standing, it implied that had a different plaintiff asserted the claim the court would have heard the dispute. *Id.* at 1150-51.

96. FED. R. CIV. P. 12(b)(1).

97. *See* notes 63-67 *supra* and accompanying text.

98. *See* notes 69-79 *supra* and accompanying text.

99. *See* notes 52-56 *supra* and accompanying text.

100. *See* notes 57-61 *supra* and accompanying text.

101. FED. R. CIV. P. 12(h) provides:

> (1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion

and insufficiency of service of process if he does not raise them in his answer or first motion to the court. Defendants, under 12(h)(2), may raise defenses based upon failure to state a claim upon which relief may be granted and failure to join an indispensable party as late as trial on the merits. The defense of lack of subject matter jurisdiction, however, may be raised at any time under 12(h)(3).

In the present scheme of rule 12(h), those defenses that must be raised at the earliest stage are those most apparent or discoverable from the inception of the litigation. Defenses that relate to lack of personal jurisdiction, improper venue, insufficient process, and insufficient service of process are, in the main, statutorily defined. Because a diligent defendant may easily discover and rely upon statutes that specifically govern personal jurisdiction, venue, and process, it is not unreasonable to require these defenses to be raised in defendant's first responsive pleading. Furthermore, none of these defenses go to the substantive merits of a plaintiff's claim. Nor does the waiver of these defenses encourage collusion between the parties to confer jurisdiction on the federal courts because the parties may choose to litigate a claim in any federal court that is competent to hear it. A defendant who acquiesces in the plaintiff's choice of forum or to service of process, therefore, should not be heard to object once he has begun to litigate the merits of the claim.

Lack of standing differs from these defenses in a number of respects. First, standards for standing are not well defined by statute. Nor have the courts clearly enunciated the requirements for standing in every situation—the Supreme Court's standing cases vary in outcome according to the type of plaintiff.[102] A defendant could, in good faith, believe at the time of answer that plaintiff has standing, only to discover the defect later in the litigation. Thus, a defendant should not be expected to either raise or waive this defense at this early stage.[103] More impor-

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under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleading, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

102. *See* notes 32-37 *supra* and accompanying text.

103. If, however, courts consistently required plaintiffs to affirmatively allege standing rather than relied upon defendants to point out lack of standing, defendants might then be called upon to

tantly, standing, unlike the defenses that a defendant waives at the threshold of the suit for failure to assert them, affects the competency of the court to hear the controversy. It would be constitutionally unfair, therefore, to require a defendant to raise a standing challenge at the outset of the litigation.[104]

On the other end of the waiver spectrum in current rule 12(h), the policies underlying the standing doctrine do not justify identical treatment of the standing and subject matter jurisdiction defenses. The standing requirement is designed to insure that the plaintiff will present the issues with concrete adverseness.[105] If a plaintiff has presented the case in such a manner as to raise issues of fact that require the court to render a verdict, the fundamental purpose of the standing requirement has been fulfilled. Certainly, it would be an anomaly to maintain that a plaintiff who has won a verdict did not present the case with sufficient vigor. As a result, even though standing may be an element of a court's subject matter jurisdiction, it makes little sense to treat standing as a defense that can be raised at any time.

The logical approach dictates an amendment to rule 12(b) to make lack of standing a defense separate from the general defense of lack of subject matter jurisdiction. Rule 12(h) should also be amended to require a defendant to raise any defense based on the plaintiff's lack of standing prior to judgment. Plaintiff's interest, or lack thereof, should surface during discovery, and certainly, a defendant should be aware of

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raise the defense in the pleadings stage. The Nuclear Regulatory Commission, for example, requires persons who wish to intervene in licensing proceedings to demonstrate standing at the earliest stage in the proceeding. *See* 10 C.F.R. 2.714(a) (1978). *See also* Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claims for Relief*, 83 YALE L.J. 425, 444-50 (1974). If the intervenor cannot demonstrate an interest that may be affected, then he is precluded from participation in the hearing even though he may be prepared to present the issues with all the vigor that the standing doctrine seeks to ensure. *See* Admin. Proc. Act § 6 (a), 4 U.S.C. § 1005 (a) (1964); Shapiro, *Some Thoughts on Intervention Before Courts, Agencies and Arbitrators*, 81 HARV. L. REV. 721 (1968); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1728-30 (1975). Inasmuch as the Federal Rules of Civil Procedure require plaintiffs to plead subject matter jurisdiction, of which standing is technically an element, an alternative similar to that used by the NRC might appear reasonable. The NRC procedures, however, set out the specific information that the intervenor must plead, 10 C.F.R. 2.471(a), while the courts have not clearly enunciated these requirements, *see* notes 32-37 *supra* and accompanying text. Consequently, the NRC procedures probably are not adaptable to the federal courts because plaintiffs may not be on notice of what they would be required to show.

104. This factor also argues against the alternative proposed in the previous footnote. Unlike administrative proceedings, the Constitution requires that plaintiffs have standing to sue in the federal courts.

105. *See* notes 9-40 *supra* and accompanying text.

the plaintiff's ability to present the case in an adversary and concrete manner by the end of trial. Failure to raise the defense prior to judgment also should constitute a waiver of the issue even if the defect appears on the record.

The proposed amendment to rule 12(h) also should allow a court on its own motion to dismiss a complaint for lack of standing. The Constitution requires standing to invoke the subject matter jurisdiction of the federal courts, and standing—regardless of the point at which waiver occurs—remains important to the effective presentation of the merits of a dispute. In addition, a court must be able to guard against collusion by the parties to invoke its jurisdiction. Thus, a court should be allowed to dismiss a suit for lack of standing prior to judgment, even though the parties fail to raise the issue.

Arguably, the proposed amendment might entail a few drawbacks, but none justify its rejection. First, one might argue that by highlighting lack of standing as a separate defense, defendants may raise the issue routinely, forcing the courts to become immersed in the standing quagmire in nearly every case. Defendants might also use the defense as a dilatory tactic to the detriment of already clogged court calendars. The potential burden on the courts, however, is insignificant in light of the constitutional significance of the standing doctrine and the policies supporting the proposed amendment. Because standing is a constitutional prerequisite to the proper exercise of subject matter jurisdiction, courts should, as a matter of course, determine early in the litigation whether the plaintiff has standing. In addition, plaintiffs should have notice early in the litigation of their standing prior to the expenditure of large sums of time and money in the litigation effort. More importantly, once a plaintiff has successfully litigated a controversy, no policy reasons support vacating the judgment for lack of standing; if the standing requirement is designed to ensure that a plaintiff will present the issues in a concrete manner, then the underlying policy is not advanced by dismissing a judgment that plaintiff has successfully pursued.

A second potential problem stems from the judiciary's reluctance to render advisory opinions or to permit plaintiffs to litigate the rights of nonparties.[106] If, as in *Thurston*,[107] a court permits a plaintiff who lacks

106. *See* Pugh, *The Federal Declaratory Remedy: Justiciability, Jurisdiction and Related Problems*, 6 VAND. L. REV. 79, 93 (1952). *See also* Tushnet, *supra* note 8, at 677.

107. In *Thurston*, for example, the plaintiff who successfully challenged the city's suspension

standing to litigate a claim, the judgment rendered will be advisory in the sense that it will have no direct effect on the named plaintiff. Also, the defendant will have a judicial determination of his rights and liabilities with respect to the issues litigated without incurring any actual liability to the plaintiff who brought the suit. If, in fact, no person would have standing, the court's decision will be only a response to a hypothetical controversy. *Thurston*, however, illustrates the inappropriateness of a blanket rule against advisory opinions and the litigation of third-party rights when the issues of the case have been argued adequately by the plaintiff and the court has determined the merits in plaintiff's favor. When the plaintiff satisfies the policy considerations underlying the standing doctrine and the defendant fails to raise the lack of standing defense until judgment has been rendered, judicial economy does not support the relitigation of the same issues merely because of a procedural technicality that no longer serves a substantive purpose.

A final concern relates to the res judicata effect of a judgment entered in a case in which the plaintiff lacked standing.[108] Questions arise in two situations. First, if suit *A* results in a judgment for defendant against a plaintiff who did not have standing, is a nonparty with interests similar to the plaintiff—but with standing—bound by that judgment in suit *B*? According to the general rule, the plaintiff in suit *B* would not be bound by any res judicata effect of the judgment in suit *A*.[109] Second, if suit *A* ends in a judgment for a plaintiff who did not have standing, is the defendant bound by the judgment in suit *B* brought against him by plaintiffs who do meet the standing requirement? According to the mutuality of estoppel rule, the defendant would not be bound by the judgment because the plaintiffs in suit *B* were not parties to suit *A*.[110]

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and dismissal rules received no benefits from the court's judgment. *See* notes 57-61 *supra* and accompanying text.

108. For a general discussion of the res judicata effect of judgments, see 1B MOORE'S FEDERAL PRACTICE ¶ 10.411[1] (2d ed. 1979).

109. *See* Blonder-Tongue Lab., Inc. v. University of Ill., 402 U.S. 313 (1971); Hansberry v. Lee, 311 U.S. 32 (1940); Neenan v. Woodside Astoria Transp. Co., 261 N.Y. 159, 184 N.E. 744 (1933). *See also* Bernhard v. Bank of Am. Nat'l Trust & Sav. Assoc., 19 Cal. 2d 87, 122 P.2d 892 (1942).

110. *See* RESTATMENT OF JUDGMENTS §§ 83-92 (1942).

The doctrine of mutuality, however, has been limited. *Id.* *See* Bernhard v. Bank of Am. Nat'l Trust & Sav. Assoc., 19 Cal. 2d 87, 122 P.2d 892 (1942), in which Justice Traynor triggered the demise of the mutuality doctrine and suggested an alternative test that has set the trend for deter-

Although the judgment may not be binding on res judicata grounds in either situation, the stare decisis effect of the judgment in suit *A* will, in all likelihood, determine the merits of suit *B* to the extent that suit *A* litigated the same issues. In *Thurston*, for example, the court noted that the primary reason for allowing the case to proceed to judgment even in the absence of a plaintiff with standing was the possibility that other persons with standing would initiate identical challenges if the court dismissed the present suit. In cases in which the interests of nonparties are not identical with those of the named plaintiff, however, the judgment should not terminate the rights of nonparties; the need for, and fairness of, holding the judgment conclusive against the nonparties does not outweigh the need to grant nonparties their "day in court."

The permutations that might arise from the application of the res judicata and stare decisis doctrines in a single fact situation are too numerous to explore in this article.[111] In general, judgments should not be binding on nonparties, but courts should use their discretion to examine each case to determine whether this rule would produce an unfair result.

IV. CONCLUSION

A judgment rendered in a case in which the plaintiff lacked standing to sue is valid and should not be subject to direct or collateral attack. Because standing, however, falls within rule 12(b)(1)'s treatment of subject matter jurisdiction, the Federal Rules of Civil Procedure presently allow a defendant to move to dismiss a suit after an adverse verdict merely because plaintiff did not meet the technical standing requirements. Rule 12(b) should be amended to make lack of standing a separate defense, and rule 12(h) should be similarly amended to result in waiver of this defense after a trial on the merits. This amend-

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mining when a judgment should be conclusive. *See, e.g.,* Blonder-Tongue Lab., Inc. v. University of Ill., 402 U.S. 313 (1971); Pennington v. Snow, 471 P.2d 370 (Alaska 1970); Eisen v. Columbia Packing Co., 181 F. Supp. 298 (D. Mass. 1960); DeWitt v. Hall, 19 N.Y.2d 141, 225 N.W.2d 195 (1967).

111. For a more detailed discussion, see Currie, *Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25 (1965); Currie, *Mutuality of Collateral Estoppel—Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957); Note, *The Impact of Defensive and Offensive Assertions of Collateral Estoppel by a Nonparty*, 35 GEO. WASH. L. REV. 1010 (1967); Comment, *The Collateral Estoppel Effect of Prior State Court Findings in Cases Within Exclusive Federal Jurisdiction*, 91 HARV. L. REV. 1281 (1978).

ment accommodates the reasonable interests of all parties and reflects the complexities and policies underlying the standing requirement.

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