Florida Law Review

Volume 29 | Issue 2 Article 4

January 1977

Casual Nexus: What Must be Shown for Standing to Sue in Federal Courts

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NOTES

THE CAUSAL NEXUS: WHAT MUST BE SHOWN FOR STANDING TO SUE IN FEDERAL COURTS*

INTRODUCTION

One of the most difficult standing questions facing the federal courts today is determining when it is proper to grant standing to plaintiffs whose injuries, although personal, are only indirectly or remotely related to the challenged government action. City councilmen claiming that a proposed highway interchange will eventually pollute their town's water supply;[1] consumers claiming that a failure to appoint certain members to a government commission will eventually raise the price of gas and oil;[2] indigents claiming that the Internal Revenue Service has issued a ruling which illegally deprives them of needed medical care[3] — such plaintiffs regularly seek federal forums for their complaints. In deciding whether these plaintiffs have standing to be heard, the courts must determine what showing of causal relationship between the challenged act and the alleged injury must be offered to satisfy the minimum constitutional requirement for invoking the court's jurisdiction.

The problem of attenuated causal relationships between act and injury has become particularly acute in recent years because of the increasingly complex nature of our society. On the one hand, a growing public awareness of extended causal relationships has led many citizens to seek judicial protection from remote causes of injury, although those injuries might be light-years away.[4] On the other hand, the very complexity that creates these attenuated relationships presents the courts with new problems both in identifying the extent to which specific acts indeed cause injuries[5] and in making policy decisions as to how far the judiciary will provide a forum to remedy injuries created by remote causes.[6] Although these questions are sometimes resolved at later stages of litigation,[7] they are often decided at the threshold standing level.

*EDITOR'S NOTE: This note received the *Gertrude Brick Law Review Apprentice Prize* for the best student note submitted in the Summer 1976 quarter.

1. *See* City of Davis v. Coleman, 521 F.2d 661, 671 (9th Cir. 1975).

2. *See* Metcalf v. National Petroleum Council, 407 F. Supp. 257 (D.D.C. 1976).

3. *See* Simon v. Eastern Ky. Welfare Rights Org., 96 S. Ct. 1917 (1976).

4. *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727 (1972), (plaintiff environmental group alleged that the challenged development of Mineral King Valley in California would "impair the enjoyment of the park for future generations"). *Id.* at 734.

5. *See, e.g.*, United States v. SCRAP, 412 U.S. 669 (1973); Laird v. Tatum, 408 U.S. 1 (1972).

6. *See* Evans v. Lynn, 537 F.2d 571 (2d Cir. 1976); *see also* Tucker, *The Metamorphosis of the Standing to Sue Doctrine*, 17 N.Y.L.F. 911, 929 (1972); Cappelletti, *Governmental and Private Advocates for the Public Interest in Civil Litigation: A Comparative Study*, 73 MICH. L. REV. 793, 854-56 (1975).

7. See notes 50, 60 *infra*.

Two additional problems contribute to the confusion when there is an attenuated chain of causality: (1) the sharply conflicting attitudes of the Warren and Burger Courts toward the proper function of the standing doctrine,[8] and (2) the inherent theoretical weakness of the "injury in fact" test in weighing the proper elements for a standing decision.[9] The result has been an increased incidence of standing decisions couched in causal language without a corresponding theoretical development.[10] This lack of constructive analysis on the Supreme Court level has forced the lower federal courts to develop their own ad hoc causality approaches, most of which are better understood in terms of underlying policy decisions than in terms of strict causal considerations.

Two cases recently decided by the Supreme Court have taken a new approach toward standing when there are questions of attenuated causal relationships. In *Warth v. Seldin*[11] and *Simon v. Eastern Kentucky Welfare Rights Organization*[12] the Court applied a strict new test for determining when groups alleging remote or indirect injury should be denied standing.[13] The Court's use of this test raises disturbing questions both about the ability of such groups to gain standing in the future and about an expansion of the "causal nexus" test into areas where plaintiffs have traditionally been granted standing.

The purpose of this note is to examine standing doctrine to determine what role causal considerations can and should play in determining whether the court hears a particular plaintiff's case. The note will first briefly examine the functions that a causal showing serves in a standing determination, particularly as it relates to the question of injury in fact. It will then analyze the Supreme Court's treatment of the causal requirement in recent standing

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8. For a discussion of the recent expansion and contraction of the standing doctrine *see generally*, C. WRIGHT, A. MILLER, & E. COOVER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3531 (1975) [hereinafter cited as WRIGHT & MILLER]. Much has been written about the expansion of standing under the Warren Court; *see, e.g.*, Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970) [hereinafter cited as *Liberalized Law*]; Davis, *Standing: Taxpayers & Others*, 35 U. CHI. L. REV. 601 (1968); Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968); Jaffe, *Standing Again*, 84 HARV. L. REV. 633 (1971); Sedler, *Standing, Justiciability, and All That: A Behavioral Analysis*, 25 VAND. L. REV. 479, 487-88 (1972); Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645 (1973); Tucker, *supra* note 6. Less has been written on the recent Supreme Court trend to contract standing. *See* Broderick, *The* Warth *Optional Standing Doctrine: Return to Judicial Supremacy?* 25 CATH. U.L. REV. 467 (1976); Note, *Recent Standing Cases and a Possible Alternative Approach*, 27 HASTINGS L.J. 213 (1975) [hereinafter cited as *Possible Alternative*]; Note, *Standing, Separation of Powers, and the Demise of the Public Citizen*, 24 AM. U.L. REV. 835 (1975) [hereinafter cited as *Demise*]; Note, *Federal Standing: 1976*, 4 HOFSTRA L. REV. 383 (1976).

9. See text accompanying notes 40-59 *infra*.

10. *See, e.g.*, Simon v. Eastern Ky. Welfare Rights Org., 96 S. Ct. 1917 (1976); Linda R.S. v. Richard D., 410 U.S. 614 (1973).

11. 422 U.S. 490 (1975).

12. 96 S. Ct. 1917 (1976).

13. See text accompanying notes 109-112 and notes 145-150 *infra*.

cases, contrasting its most liberal position, taken in *United States v. SCRAP*,[14] with the stricter test developed in *Warth* and *Eastern Kentucky*. Finally the note will look at the treatment of causality in standing cases in the lower courts to determine when the courts may be expected to follow *SCRAP*'s liberal lead and under what circumstances a court may turn in the future to the *Warth/Eastern Kentucky* causality rule.

CAUSALITY IN STANDING DOCTRINE

Causal considerations play a vital if only recently articulated role in the analysis of standing. Courts have always implicitly recognized the need for a causal relationship between act and injury for standing to exist.[15] Yet the early development of standing doctrine placed little emphasis on the requisite causal relationship, since in most cases it was the legal status of the plaintiff and not the fact of his injury that was at issue.[16]

It was the Warren Court's eradication of the strict "legal interest" approach to standing,[17] along with its recognition of new interests deserving of protection,[18] that eventually made questions of actual causality an important part of standing analysis. In both constitutional and statutory cases as old barriers to standing were dissolved, judicial attention shifted to the actual injury of which the plaintiff complained. Both *Baker v. Carr*[19] and *Flast v. Cohen*[20] focused on the "personal stake" of the plaintiff alleging infringement of a constitutionally protected right; *Flast* further addressed the "logical nexus" between the status of the plaintiff and his claim.[21] In *Associa-*

14. 412 U.S. 669 (1973).

15. *See, e.g.*, Frothingham v. Mellon, 262 U.S. 447, 488 (1923).

16. For discussion of earlier standing law and the "legal interest" test, see authorities cited in note 8 *supra*. For the purposes of this note it is sufficient to recognize that since emphasis was on legal status and not on injury, the causal element rarely arose as an issue in pre-Warren standing cases, except in a few instances of speculative injury. *See* Arizona v. California, 283 U.S. 423 (1931); New York v. Illinois, 274 U.S. 488 (1927). The notable exception is Frothingham v. Mellon, 262 U.S. 447 (1923), where the Court held that to have standing the plaintiff must show "not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Id.* at 488. This "directness" test was echoed in Justice Frankfurter's concurring opinion in *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 153 (1951) (whether a person consequentially harmed by government action can challenge the action depends on the directness of the impact of the action on him), but has since been repudiated in such cases as *Warth v. Seldin*, 422 U.S. 490, 504-05 (1975).

Some lower federal court cases used causality considerations as a means of defining duty and thereby limiting plaintiff's right of action, much as "policy cause" is used in tort law. Sometimes these decisions were based on a finding of "no standing." *See, e.g.*, Philco Corp. v. FCC, 257 F.2d 656 (D.C. Cir. 1958), *cert. denied*, 358 U.S. 946 (1959); Note, *Standing to Protest and Appeal the Issuance of Broadcasting Licenses: A Constricted Concept Redefined*, 68 YALE L.J. 783 (1959).

17. See authorities cited in note 8 *supra* for discussion of this change.

18. Davis, *Liberalized Law*, *supra* note 8, at 450.

19. 369 U.S. 186, 204 (1962).

20. 392 U.S. 83, 91-101 (1968).

21. *Id.* at 102 (1968). Scott, *supra* note 8, at 661-62, criticizes the logical nexus text as

tion of Data Processing Service Organizations, Inc. v. Camp[22] the Court adopted a similarly flexible test for statutory standing cases, which distinguished between the constitutional and prudential aspects of standing.[23] First, to meet Article III case or controversy requirements a plaintiff must allege "that the challenged action has caused him injury in fact, economic or otherwise."[24] Thus a causal requirement was explicitly made part of the constitutional standing requirement. Second, as an exercise of its prudential powers, the Court limited standing to those plaintiffs whose interests were "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[25]

A key part of the *Data Processing* decision is the Court's distinction between the constitutional and prudential dimensions of the standing doctrine. Although it is difficult to separate the two, the constitutional standing requirement is recognized as an expression of the Article III case or controversy limitation on the Court's exercise of its power.[26] This limitation meets not only the judiciary's internal need for cases susceptible of judicial resolution, but also the external need of federalism to put some constraints on the power of the court *vis à vis* coequal branches of the federal government.[27] Beyond these threshold constitutional constraints the Court has also recognized its power to refuse to hear cases it might constitutionally entertain, as an act of judicial self-governance.[28] The policy factors that might under-

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"untenable," since it does nothing to assure a personal stake and lends itself to generalized citizens' suits. However weak the tests, "[e]ach of these cases contributed to a tone of openness, summoning the judiciary to turn away from past principles which served to insulate government officials from challenges by litigants in a variety of circumstances." Tucker, *supra* note 6, at 920.

22. 397 U.S. 150 (1970).

23. See notes 26-31 *infra* and accompanying text.

24. 397 U.S. at 152.

25. *Id.* at 153.

26. "In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case. . . . The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally." Warth v. Seldin, 422 U.S. at 500.

27. See *Demise, supra* note 8, at 841-43. "While the innate limitation of adversity is concerned with the ability of the courts to decide an issue within the structure of the judicial system, the separation of powers limitation involves the relationship of the judiciary to the other branches, that is, the judiciary may not decide issues committed to resolution through those other branches." *Id.* at 842-43.

28. See Ashwander v. TVA, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring); Broderick, *supra* note 8, at 517-34; *Demise, supra* note 8, at 843-45. How far standing limitations are "prudential" has been subject to much controversy. In his dissent to *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 229 (1974), Justice Douglas argued that "[t]he requirement of 'standing' to sue is a judicially created instrument serving several ends: (1) It protects the status quo by reducing the challenges that may be made to it and to its institutions . . . . (2) It sometimes is used to bar from the courts questions which by the Constitution are left to the other two coordinate branches to resolve, *vis.*, the so-called political question. (3) It is at times a way of ridding court

lie higher judicially imposed standing requirements include a reluctance to adjudicate difficult constitutional questions,[29] a desire to allocate limited judicial resources more effectively,[30] and a determination to leave certain decisions to other branches of the federal or state governments.[31]

The two-pronged *Data Processing* test, which distinguishes between the plaintiff's injury and his protected interests, is peculiarly susceptible to classification on the basis of constitutional/prudential standing dimensions. Courts have uniformly recognized "injury in fact" as the sole constitutional criterion for standing;[32] the distinction between the statutory injury in fact test and the constitutional nexus test has been so blurred in recent years that courts have generally accepted the injury in fact test as the constitutional minimum in both types of cases.[33] The more discredited "zone of interests" test, despite widespread academic criticism and some judicial disfavor,[34] has retained its vitality in statutory standing cases,[35] and is often an

dockets whether of abstract questions or questions involving no concrete controversial issue." *Id.* at 229 (Douglas, J., dissenting).

Concurring in *Schlesinger's* companion case, *United States v. Richardson*, 418 U.S. 166, 185 (1974), Justice Stewart also implied that there is a large measure of discretion in a court's decision not to grant standing, and discussed the policy reasons for restricting standing: "Relaxation of standing requirements is directly related to the expansion of judicial power. It seems to me inescapable that allowing unrestricted taxpayer or citizen standing would significantly alter the allocation of power at the national level . . . . I also believe that repeated and essentially head-on confrontations between the life-tenured branches and the representative branches of government will not, in the long run, be beneficial to either. The public confidence essential to the former and the vitality critical to the latter may well erode *if we do not exercise self-restraint.*" *Id.* at 188 (Stewart, J., concurring) (emphasis added, footnote omitted). The Burger majority, on the other hand, sees the question of citizen and taxpayer standing as a limitation by constitutional constraint rather than by judicial self-restraint. *See* the majority opinions in *Schlesinger, supra*, at 209-28, and in *Richardson, supra*, at 171-80. In *Warth v. Seldin*, 422 U.S. 490, 499 (1975), Justice Powell recognized the prudential aspect of standing only insofar as it usually poses a bar to a "generalized grievance" or to a plaintiff asserting the rights of another.

29. Warth v. Seldin, 422 U.S. 490, 520 (1975) (Brennan, J., dissenting); Ashwander v. TVA, 297 U.S. 288, 346 (1936).

30. *See generally* Scott, *supra* note 8.

31. This prudential limitation is in addition to the constitutional separation of powers restraint, and involves judicial deference to other branches of both state and federal government. *See* United States v. Richardson, 418 U.S. 166, 185 (1974) (Powell, J., concurring); Linda R. S. v. Richard D., 410 U.S. 614, 619 (1973).

32. *See, e.g.*, Simon v. Eastern Ky. Welfare Rights Org., 96 S. Ct. 1917, 1924 (1976); Evans v. Lynn, 537 F.2d 571, 592 (2d Cir. 1976).

33. *See, e.g.*, Warth v. Seldin, 422 U.S. 490 (1975); CBS, Inc. v. Young, 522 F.2d 234 (6th Cir. 1975); Construction Ind. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

34. Sedler, *supra* note 8, at 486, calls the zone of interests test "functionally irrelevant," and many courts and commentators seem to agree. *Warth v. Seldin*, 422 U.S. 490 (1975), made no mention of the test, and the District of Columbia courts have indicated that the test may be unnecessary for standing. *See* Constructores Civiles de Centroamerica, S.A. v. Hannah, 459 F.2d 1183 (D.C. Cir. 1972); Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970); Tax Analysts & Advocates v. Shultz, 376 F. Supp. 889 (D.D.C. 1974). *See also Liberalized Law, supra* note 8; *but see* text accompanying notes 55-57 *infra*.

35. *See, e.g.*, Gifford-Hill & Co. v. FTC, 523 F.2d 730 (D.C. Cir. 1975); Prince George's County v. Holloway, 404 F. Supp. 1181 (D.D.C. 1975); Rhode Island Comm'n

important element in determining injury in fact.[36]

Since the injury in fact test focuses on the plaintiff's actual injury, causal considerations have become increasingly important in standing decisions. Two issues must be decided in determining whether the requisite causal relationship between act and injury exists for standing purposes: whether a cause in fact relationship exists, and whether the court should impose any limits on the class of plaintiffs who claim that a remote action is causing or will cause them injury. These two questions are analogous to the distinction made between cause in fact and policy cause in tort cases. In tort law, the cause in fact question must be decided by the trier of fact,[37] applying either a "but for" or a "substantial factor" test to eliminate those actions not causally related to the plaintiff's injury.[38] The policy cause question, on the other hand, is for the judge: whether as a matter of law the defendant should be held responsible for the consequences of his actions in this particular case.[39]

CAUSE IN FACT

Similar distinctions between cause in fact and policy cause may be made in analyzing causality for standing purposes. On the surface the only causal question relevant to the injury in fact determination should be the sufficiency of the plaintiff's allegations of a causal relationship. However, just as in tort law, distinctions between cause in fact and policy cause determinations are almost impossible to make.[40] Inherent in the injury in

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on Energy v. General Serv. Admin., 397 F. Supp. 41 (D.R.I. 1975). The test has even been applied in constitutional cases. *See* CBS, Inc. v. Young, 522 F.2d 234 (6th Cir. 1975); Construction Ind. Ass'n. v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

36. See City of Hartford v. Hills, 408 F. Supp. 889, 893-95 (D. Conn. 1976); and note 205 *infra*.

37. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 236-37 (4th ed. 1971).

38. The "but for" test really only serves to eliminate one act as a cause of another if the event would have occurred without it. PROSSER, *supra* note 37, at 238-39. Prosser, however, prefers the "substantial factor" test, which finds that "[t]he defendant's conduct is a cause of the event if it was a material element and a substantial factor in bringing it about." *Id.* at 240.

39. "Once it is established that the defendant's conduct has in fact been one of the causes of the plaintiff's injury, there remains the question whether the defendant should be legally responsible for what he has caused. Unlike the fact of causation, with which it is often hopelessly confused, this is essentially a problem of law." *Id.* at 244. Although articulated in causal language, the question merges with one of duty. As Prosser points out, the issue is "whether the policy of law will extend the responsibility for the conduct to the consequences which have in fact occurred. Quite often this has been stated, and properly so, as an issue of whether the defendant is under any duty to the plaintiff. . . . This is not a question of causation, or even a question of fact . . . and the attempt to deal with it in such terms has led and can lead only to utter confusion." *Id.*

40. Prosser's description of the confusion surrounding causality issues in tort law accurately describes the problem in standing law as well: "Much of this confusion is due to the fact that no one problem is involved, but a number of different problems, which are not distinguished clearly, and that language appropriate to a discussion of one is carried over to cast a shadow upon the others." Prosser, *supra* note 37, at 236. The

fact analysis are policy decisions not only about the sufficiency of the injury,[41] but also about the type of showing that the plaintiff must make that his injury has or will actually result from the challenged action.[42] The court must first decide whether it will permit reasonable inferences to fill in certain gaps in the causal chain;[43] and second, whether the plaintiff will be required to allege and demonstrate that "but for" the challenged action his injury would not occur,[44] the standard applied in tort cases on the merits,[45] or whether the plaintiff need only demonstrate that the challenged action has substantially contributed to his alleged injury.[46]

Policy arguments may be made for both the stricter and the more liberal approach. The stricter test would eliminate any possibility that the court may exceed its jurisdiction, and would guarantee cases in which issues are sharply focused.[47] Furthermore the court and the defendant would avoid time-

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circularity of the proximate cause/duty concepts of private law is equally applicable to the circularity of standing considerations of injury, interest and cause. "The question [was the defendant under a duty to protect the plaintiff against this particular risk?] becomes particularly helpful in cases where the only issue is in reality one of whether the defendant is under any duty to the plaintiff at all — which is to say, whether he stands in any such relation to the plaintiff as to create any legally recognized obligation of conduct for his benefit. Or, reverting again to the starting point, whether the interests of the plaintiff are entitled to legal protection at the defendant's hands against the invasion which has in fact occurred. Or, again reverting, whether the conduct is the 'proximate cause' of the result. The circumlocution is unavoidable, since all of these questions are, in reality, one and the same." *Id.* at 244-45. *Cf.* C. WRIGHT, FEDERAL COURTS 43 (2d ed. 1970): "Such an approach [the legal interest test] is demonstrably circular: if the plaintiff is given standing to assert his claims, his interest is legally protected; if he is denied standing, his interest is not legally protected."

41. In its analysis of the sufficiency of the injury some of the factors the court may weigh include its concreteness, specificity, directness, magnitude, imminence, and whether it is personal to the plaintiff. Obviously the more direct, concrete, specific and imminent, the more likely it is that the court will find a cognizable injury in fact. *See, e.g.*, Evans v. Lynn, 537 F.2d 571 (2d Cir. 1976); Rodos v. Michaelson, 527 F.2d 582 (1st Cir. 1975); Jackson v. Dukakis, 526 F.2d 64 (1st Cir. 1975); Kiser v. Johnson, 404 F. Supp. 879 (M.D. Pa. 1975); Lowenstein v. Rooney, 401 F. Supp. 952 (E.D.N.Y. 1975). Of these qualities, however, only the personal nature of the injury is presently an absolute requirement for standing. See Sierra Club v. Morton, 405 U.S. 727, 735 (1972).

42. Thus the "directness" and "imminence" of the injury can play double roles in a standing decision, first in their effect on the court's characterization of the sufficiency of the injury, see note 41 *supra*, and second in their effect on a court's decision as to how clearly plaintiff will be required to demonstrate the causal relationship between act and injury. See also note 92 *infra*.

43. *See* Simon v. Eastern Ky. Welfare Rights Org., 96 S. Ct. 1917, 1927 (1976).

44. *See* Warth v. Seldin, 422 U.S. 490, 504 (1975).

45. See note 38 *supra*.

46. On the surface the question seems merely a technical pleadings question: what degree of causal connection must be alleged and demonstrated prior to a hearing on the merits in order to survive motions to dismiss, F. R. Civ. P. 12(b)(1), or a motion for summary judgment, F. R. Civ. P. 56? *See* Broderick, *supra* note 8, at 480-82, 508-09. A related question is whether there is, or should be, any difference between the quantum of causal showing necessary to grant standing and that required to state a claim for which relief can be granted. *See generally* Lewis, *Constitutional Rights and the Misuse of Standing*, 14 STAN. L. REV. 433 (1962); and note 50 *infra*.

47. *See* Baker v. Carr, 369 U.S. 186, 204 (1962).

consuming, expensive litigation, and the court could shield itself from controversies that it feels are more appropriate for resolution by other branches of the federal or state governments – both strong prudential reasons for imposing the higher threshold test.[48]

On the other hand, unlike tort cases, standing questions do not involve the liability of a private defendant for the consequences of his actions, but instead are concerned with the individual's right to obtain a judicial forum to protect himself from injurious government action.[49] Since it is a threshold determination,[50] the standing causality test should not be as strict as that which must be met on the merits. Instead the court should be satisfied with

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48. These are the resource-allocation and decision-making aspects of standing discussed in Scott, note 8, *supra*.

49. A tort cause of action is generally a private right of action for a wrong done to private individuals; it is not primarily concerned, as is standing law, with the impact on individuals of public actions or of private actions with a strong public interest element, such as antitrust cases. See note 182 *infra*. Thus policy considerations are not parallel in the two situations: if the public interest as a whole is high, or if acts of the government are involved, society may very well benefit from permitting a far more attenuated causal connection, in order to provide a forum for its citizens who wish to avoid governmental injury. *See* WRIGHT & MILLER, *supra* note 8, §3531 at 180, who point out that it is hard to understand why the courts would limit standing to injuries to legal rights "in light of the greatly increased capacity of official action to cause injury and of the relatively helpless predicament of an individual affected by an injurious government action." Private actions, on the other hand, rest on policy considerations of establishing a standard of care among private individuals. Thus, there is a strong interest in limiting liability to harm that is reasonably foreseeable and an attenuated causal chain is less desirable. *See* PROSSER, *supra* note 37, at 251.

50. Actually there is much confusion as to the "preliminary" nature of the standing inquiry. The Court has tried to distinguish issues of standing and the merits, in theory at least. *See* Flast v. Cohen, 392 U.S. 83, 99 (1968): "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated"; and Barlow v. Collins, 397 U.S. 159, 176 (1970) (Brennan, J., concurring and dissenting): "[A]lleged injury in fact, reviewability, and the merits pose questions that are largely distinct from one another, each governed by its own considerations. To fail to isolate and treat each inquiry independently of the other two, so far as possible, is to risk uninformed, poorly reasoned decisions that may result in injustice." However, these principles are more often honored in the breach than in the observance. *See, e.g.*, National R.R. Pass. Corp. v. National Ass'n of R.R. Pass., 414 U.S. 453, 456 (1974). Professor Albert, *Standing to Challenge Administrative Actions: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425 (1974), points to the similarities between the test for standing and the test for stating a claim for relief: both involve questions of injury, duty, and violation. *Id.* at 428-29. It is Albert's thesis that it is dangerous to ignore the interrelationships between the two inquiries, since principles of policy are so clearly interrelated. *Id.* Perhaps the best way to look at the standing question is as part of a procedural continuum consisting of the following questions: 1) whether a justiciable case or controversy exists; 2) whether plaintiff has standing; 3) whether the controversy is sufficiently ripe, or moot; 4) whether plaintiff has stated a claim for relief; and 5) whether the court can grant any remedy. If courts frequently fail to make adequate distinctions between these issues, it may be because they are not discrete areas of concern. *See* WRIGHT & MILLER, *supra* note 8, § 3529. Such confusion makes the case which does succeed in sorting out these issues particularly valuable. *See, e.g.*, Bergman v. Stein, 404 F. Supp. 286 (S.D.N.Y. 1975).

a demonstration of a reasonable possibility of a causal relationship.[51] This would be particularly helpful in areas of complex fact situations since it would permit the court to reserve judgment on its jurisdiction[52] until after the plaintiff has had an opportunity to avail himself of pretrial discovery.[53] Furthermore if the higher test is one of constitutional dimension, it must be applied across the board, which would eliminate many plaintiffs otherwise qualified to bring their suits.[54]

A second factor further complicates the court's attempt to apply neutral principles in measuring the sufficiency of the injury and of the causal showing: the relationship of the injury to the underlying statute or constitutional provision upon which plaintiff bases his claim. Following the *Data Processing* test, federal courts have attempted to distinguish the injury in fact analysis from the second, non-constitutional, prong of the test: that plaintiff's interests are arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee invoked.[55] As a result many courts, including the Burger Court, have attempted to apply the *Data Processing* test, which was developed in a situation where a concrete economic injury was alleged,[56] to situations where the injury cannot properly be identified apart from the claim upon which it is based.[57]

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51. *See* Environmental Defense Fund v. EPA, 465 F.2d 528, 530-31 n.1 (D.C. Cir. 1972): "*Sierra* makes clear that the Court is retaining all of its decisions establishing a 'modernized law of standing' so as (a) to embrace injury in fact, suffered or anticipated, to environmental . . . as well as economic interests; (b) to prohibit dismissal of a litigation where there is an 'arguable' claim of injury . . . ." *Id.*

52. The ability of a court to reserve a standing decision until it hears the merits of a case would seem to counter the concern of courts that they not violate their Article III jurisdiction. *See* American Civil Liberties Union v. FCC, 523 F.2d 1344 (9th Cir. 1975).

53. *But see* Laird v. Tatum, 408 U.S. 1, 14 (1972), where the Court demonstrated its reluctance to grant that discovery power without first determining standing.

54. If, on the other hand, the higher standard is to be applied only in selected cases, it raises serious questions about the present Court's return to "judicial supremacy." R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY, cited in Broderick, *The* Warth *Optimal Standing Doctrine: Return to Judicial Supremacy?* 25 CATH. U.L. REV. 467, 467 n.4 (1976).

55. 397 U.S. 150, 153 (1970).

56. *Id.* at 154.

57. The Supreme Court has recognized that "the actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing. . . .'" Warth v. Seldin, 422 U.S. 490, 500 (1975), *citing* Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973). *See also* Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 212 (1972) (White, J., concurring); Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127 (1947). However, it has become increasingly clear that many noneconomic injuries cannot be properly identified, much less analyzed for their sufficiency, without some reference to the sources upon which plaintiff bases his claim. See notes 154-156 and 195-208 *infra* and accompanying text.

Thus the *Data Processing* test, which seemed to open up standing where economic injury was concerned, may have resulted in a stricter standard when courts attempt to analyze a noneconomic injury. Since the plaintiffs in *Data Processing* asserted an economic injury, the only issue in the case was whether this competitive injury gave them sufficient status to assert a claim against the administrative action, a problem that the second prong of the test addressed. 397 U.S. 150, 153 (1970). Although it might have been difficult for the plaintiffs to prove the fact of their injury, this question was left

Despite the contention that the causal showing requirement is part of the constitutional case or controversy standing determination, the type of showing required in actuality depends to a large extent on how clearly the plaintiff's injury is related to an interest protected by an underlying statute or constitutional guarantee. Thus the federal courts invariably mix constitutional and prudential considerations when they use an implicit "zone of interests" test to determine what cause in fact and injury in fact tests they will impose.[58]

POLICY CAUSE

Since analysis of injury, claim, and causation are part of the injury in fact determination, most policy decisions to limit standing are made within the constitutional standing framework. Even when a plaintiff alleges a sufficient cause in fact relationship to meet whatever standard the court imposes, a court may nevertheless determine that for policy reasons it will not give the plaintiff a cause of action against the defendant.[59] Although this policy determination may be articulated through other doctrines,[60] it is often stated as a finding that the plaintiff lacks standing.[61] As in tort cases, courts will sometimes use causal language to explain this decision.[62]

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for the trial. Given the facts of the case, the Court required the least onerous showing possible. Yet in later cases, when the injury was less palpable, courts have been forced to analyze the components of the injury and its relationship to the challenged action in much more detail. In this situation the injury in fact requirement, taken without the zone of interests test, proves to be much harder to meet than *Data Processing* would suggest. For an interesting suggestion on how the zone of interests test can be effectively used to vary the type of injury required, *see* Note, *Recent Standing Cases and a Possible Alternative Approach*, 27 HASTINGS L.J. 213 (1975).

58. See notes 203-207 *infra* and accompanying text.

59. This is the case in the private antitrust area. See notes 181-182 *infra* and accompanying text.

60. These include the doctrines of justiciability, ripeness, mootness, political question and finality. *See* WRIGHT & MILLER, *supra* note 8, § 3529 at 153; Broderick, note 54 *supra*. While courts frequently use concepts of justiciability and standing interchangeably, some courts, making particular efforts to distinguish between the purposes of the various justiciability doctrines, may find that plaintiffs have standing yet dismiss the case on other justiciability grounds. *See, e.g.*, Kiser v. Johnson, 404 F. Supp. 879 (M.D. Pa. 1975); Bergman v. Stein, 404 F. Supp. 287 (S.D.N.Y. 1975); Uzzell v. Friday, 401 F. Supp (M.D.N.C. 1975).

61. *See, e.g.*, Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974). Although the court specifically stated that it would not reach the political question issue, but rather settle the case on standing doctrine, *id.* at 215, many of its arguments reflect the policy issues relevant to the political question doctrine. *Id.* at 227.

62. *See, e.g.*, Jeffrey v. Southwestern Bell, 518 F.2d 1129 (5th Cir. 1975); Pollack, *The "Injury" and "Causation" Elements of a Treble Damage Antitrust Action*, 57 NW. U.L. REV. 691, 699 (1963). Similarly, tort cases sometimes speak in terms of causality when analyzing a statutory violation, holding that the violation of the statute was not the proximate cause of the injury: "In such a statement there is an obvious fallacy. In all such cases the act of the defendant has clearly caused the damage. . . . What the statute does, or does not do, is condition the legality of the act, and to qualify or characterize it as negligent." PROSSER, *supra* note 37, at 193. Courts sometimes use the same misleading causal language to deny standing. What they are actually doing is deciding whether

An examination of the Supreme Court's position on attenuated causal relationships under the Warren and Burger Courts well illustrates the complex issues that arise when plaintiffs seek standing to complain of injuries caused by remote governmental action.

RECENT CASES: *SCRAP, Laird,* AND *Linda R.S.*

The question of how great an attenuation between cause and effect will be permitted for standing purposes was partially answered by the Supreme Court in 1973 in *United States v. SCRAP.*[63] In *SCRAP* an environmental group sought to enjoin enforcement of an ICC order allowing railroads to collect a surcharge on freight rates pending the adoption of rate increases until an environmental impact study was made under the National Environmental Policy Act (NEPA).[64] The plaintiffs alleged that the failure to suspend the surcharge would cause their members economic, recreational, and aesthetic harm, and that the new rate structure would discourage the use of recyclable materials and promote the use of raw materials, causing an adverse effect on the environment.[65] They specifically claimed that the raised rates would result in air and solid waste pollution in the parks they used in Washington and in a possible diminution of the natural resources within those parks.[66] Although defendants claimed that it would be impossible for plaintiffs to prove that such an injury would result,[67] the Court granted standing by applying the liberal test of *Conley v. Gibson*[68] that a complaint should not be dismissed "unless it appears beyond doubt that the plaintiff could prove no set of facts in support of his claim which would entitle him to relief."[69] Recognizing the extremely attenuated line of causation,[70]

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plaintiff falls within the class of persons to be protected by the statute – the familiar "zone of interests" test. However, by speaking in causal terms, they appear to be talking about the constitutional dimension of standing. Furthermore, "[t]reating 'injury' and 'causation' as if they presented merely factual questions, dealing solely with time and space without reference to values, can only serve to confuse analysis . . . ." Pollack, *supra,* at 699.

63. 412 U.S. 669 (1973).

64. 42 U.S.C. §4342(2)(c) (1970). Plaintiffs claimed standing under §10 of the Administrative Procedure Act (APA), 5 U.S.C. §702 (1970).

65. 412 U.S. at 675-76.

66. *Id.* at 678.

67. Brief for Appellant at 87, United States v. SCRAP, 412 U.S. 669 (1973). Indeed the appellees themselves acknowledged the difficulty of proof: "It should be obvious to all parties that S.C.R.A.P. has neither the finances nor the expertise to 'prove' that a specific quantity of scrap in the Washington, D.C. area would have been recycled 'but for' the latest I.C.C. railroad rate increase. Similarly, S.C.R.A.P. cannot 'prove' the amount of additional pollution in the Washington, D.C. area created by the latest I.C.C. railroad rate increase." Brief for Appellee on Motion to Dismiss or Affirm, at 25, United States v. SCRAP, 412 U.S. 699 (1973).

68. 355 U.S. 41 (1957).

69. *Id.* at 45-46. The degree of proof required for summary judgment could be higher. *See* United States v. SCRAP, 412 U.S. at 689; *but see* Coalition for the Environment v. Volpe, 504 F.2d 156, 168 (8th Cir. 1974): "Indeed, despite the dicta concerning the possibility of summary judgment on a standing question contained in [*SCRAP*], this Court believes that such a disposition will be proper in only a very few and unique cases."

the Court nevertheless could not be certain that the allegations were incapable of proof.[71] The minority Justices vehemently disagreed. Calling the injuries "remote" and "speculative"[72] they argued that such tenuous future injury was insufficient to create a justiciable case or controversy.[73]

As in all standing cases turning on complex causal questions, the distinction between majority and minority opinions is easier to grasp when underlying policy questions are examined. As the minority Justices implied,[74] plaintiffs were a group of law students who were probably less interested in preventing specific tin-can litter in their local park than in overcoming the detrimental impact that higher freight rates might have on recycling efforts nationwide.[75] To the minority Justices the concrete injury alleged seemed at most a spurious cover for litigating what was essentially a generalized grievance.[76] An injury so characterized raises standing questions of both constitutional and prudential dimensions: since no injury may ever occur there is some question as to whether the court has the power to entertain the suit, and, even assuming such power, whether it would be wise to exercise it in this situation.[77]

The majority, except for Justice Douglas,[78] refused to confront the policy and constitutional questions that the case raised concerning the speculative nature of the alleged injury or the attenuated causal relationship. Moreover the Court refused to base its holding on the specific qualities of the

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See also Simon v. Eastern Ky. Welfare Rights Org., 96 S. Ct. 1917, 1932 n.6 (1976) (Brennan, J., concurring and dissenting).

70. 412 U.S. at 688.

71. *Id.* at 689-90.

72. *Id.* at 723. (White, J., Burger, J. and Rehnquist, J., dissenting in part).

73. *Id.* at 722-23. The dissenting justices criticized the majority for its willingness "to suspend its judgment in the dim hope that proof at trial will in some unexplained way flesh them out and establish the necessary nexus . . . ." *Id.* at 723 (White, J., dissenting).

74. *Id.* at 722-23.

75. See Comment, *Standing to Challenge Governmental Actions Which Have an Insubstantial or Attenuated Effect on the Environment*, 1974 DUKE L.J. 491.

76. The allegations are "in reality little different from the general-interest allegations found insufficient and too remote in Sierra Club." 412 U.S. at 723 (White, J., dissenting).

77. *See, e.g.*, United States v. Richardson, 418 U.S. 166 (1974), and Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974), where the Court's discussion of generalized citizens' grievances seems to combine both constitutional and prudential aspects of standing. *Id.* at 209-28. The Court refused to hear the cases partly because it claimed that no specific injury in fact personal to the plaintiffs existed. *Id.* at 220. Justice Brennan pointed out that Richardson had alleged such an injury, which the Court refused to consider. *See* 418 U.S. at 236 (Brennan, J., dissenting). Thus the Court seems to be ignoring the injury in fact rule, or at least looking behind alleged injuries to determine whether they serve merely as pleading formalities masking cases it otherwise would not hear.

78. Dissenting in part, Justice Douglas made a complicated analysis of the rate structure in an effort to show that there was indeed a clearly detrimental environmental impact to be anticipated. 412 U.S. at 699-714. While he generally stands in favor of eliminating standing requirements entirely, (*see* Warth v. Seldin, 422 U.S. 490, 518 (Douglas, J., dissenting)) he seems prepared to go to the merits to prove a causal connection for standing purposes when he feels it is necessary to offset a claim of tenuousness.

underlying environmental statute (NEPA) that plaintiffs claimed defendants had violated.[79] Instead the case turned on a procedural point: although plaintiffs might have appropriately been required to make a stronger showing of causality on a motion for summary judgment, they should not be forced to show more on a motion to dismiss.[80] It may be said, as defendants argued,[81] that *SCRAP* stands for a negative cause in fact rule, namely that the defendant must prove there is no causal connection. At least on a motion to dismiss, any showing of a potential tie between the challenged act and the alleged future injury is sufficient for injury in fact purposes, even if it depends on inference and even if it is equally possible that plaintiff's success on the merits will not prevent the alleged detrimental impact.[82] While *SCRAP* took a very liberal approach toward the necessary causal showing, the lack of a more principled basis for its decision left the question open for future courts to consider.

Other Supreme Court decisions of the same period indicated that some situations would warrant a closer scrutiny of the causal nexus than was made in *SCRAP*. In *Laird v. Tatum*,[83] handed down a year before *SCRAP*, the Court refused to grant standing to plaintiffs who complained that the existence of an extensive Army surveillance system caused them present injury by chilling their first amendment rights.[84] Holding that the allegations of a subjective chill were not "an adequate substitute for a claim of specific present objective harm or threat of specific future harm,"[85] the Court ex-

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79. See text accompanying notes 186-195 *infra*. It is possible that given its liberal position toward standing the majority preferred to make the holding on attenuation broader than it would have been had the decision rested on the basis of the statute involved. The result is that federal courts have been able to apply the *SCRAP* holding to a variety of non-NEPA cases. *See, e.g.*, Tax Analysts & Advocates v. Shultz, 376 F. Supp. 889 (D.D.C. 1974); Florida v. Weinberger, 492 F. Supp. 488 (5th Cir. 1974).

80. 412 U.S. at 689. In a footnote the Court suggests that any lack of "precision" in the allegations could have been corrected through a motion for a more precise statement under FED. R. CIV. P. 12(c). *Id.* at 689 n.15. Furthermore, defendants should have moved in the district court for more evidence on the standing issue. *Id.*

81. *See* Brief for Appellant, United States v. SCRAP, 412 U.S. 669 (1973), saying that even if the burden of proof were on the railroads to disprove SCRAP's standing, "there would be no way to meet allegations of this kind since there are virtually no specifics provided." *Id.* at 85.

82. See 412 U.S. at 724 (White, J., dissenting): "I add only that failure to maintain this country's railroads even in their present anemic condition will guarantee that recyclable materials will stay where they are—far beyond the reach of recycling plants that as a consequence may not be built at all."

83. 408 U.S. 1 (1972).

84. *Id.* at 10. Both the Supreme Court and the appellate court emphasized that plaintiffs were not complaining about any "specific action" of the Army against them, but the mere existence of the system itself. *Id.* at 3, citing Tatum v. Laird, 444 F.2d 947, 953 (D.C. Cir. 1971).

85. 408 U.S. at 13-14. The indirectness of the injury was not a problem. *Id.* at 12-13. However, the Court found that the case differed from other chilling effect cases in that here the challenged action was not "regulatory, proscriptive, or compulsory in nature." *Id.* at 11. Instead plaintiffs' chilling effect arose merely from the knowledge that the activity was occurring. *Id.* The dissent, however, agreed with the lower court that the

pressed skepticism about the causal nexus by noting that the plaintiffs had "left somewhat unclear the precise connection between the mere existence of the challenged system and their own alleged chill. . . ."[86] The majority implied that plaintiffs' allegations of a chill were a pretext for seeking disclosure of the Army's activities through a judicial forum,[87] and indicated that the court should not act as "monitors" of executive action.[88]

A similar result was reached in *O'Shea v. Littleton*,[89] in which the Court refused to permit a group of plaintiffs to challenge the allegedly discriminatory administration of their county criminal justice system. Here none of the plaintiffs had alleged specific past injuries, and the Court found that any future injuries were too remote since they were contingent on the double possibility that plaintiffs would act illegally and that the state would arrest and prosecute them.[90] This decision put access to a forum beyond plaintiffs' reach since they could not allege an intent to act illegally.[91]

Both *Laird* and *O'Shea* demonstrate that causal problems may be different where the injury is only threatened and there is no underlying protective statute expressing congressional intent to protect against such future injury. In such a situation a court's insistence that plaintiffs demonstrate a fairly strong likelihood that the injury will occur may be constitutionally mandated, since without such an injury there would be no case or controversy.[92] *Laird*

Army surveillance "exercises a *present inhibiting effect* on their . . . First Amendment rights." *Id.* at 25, (Douglas, J., dissenting), citing Tatum v. Laird, 444 F.2d at 954.

86. 408 U.S. at 13 n.7. The Court also found that plaintiffs had "cast considerable doubt on whether they themselves are in fact suffering from any chill . . . Even assuming a justiciable controversy, if respondents themselves are not chilled, but seek only to represent those 'millions' whom they believe are so chilled, respondents clearly lack that 'personal stake in the outcome of the controversy' essential to standing." *Id.*

87. What respondents "appear to be seeking is a broad-scale investigation, conducted by themselves as private parties armed with the subpoena power of a federal district court and the power of cross-examination, to probe into the Army's intelligence-gathering activities, with the district court determining at the conclusion of that investigation the extent to which those activities may or may not be appropriate to the Army's mission." *Id.* at 14.

88. 408 U.S. at 15. "Carried to its logical end, this approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action . . . ." *Id.*

89. 414 U.S. 488 (1974).

90. *Id.* at 497-98.

91. *Id.* at 498.

92. The dissenting justices in *Laird*, however, recognized that "one need not wait to sue until his reputation is defamed." 408 U.S. 1, 26 (1972) (Douglas, J., and Marshall, J., dissenting). When the causal issue is one of "imminence," that is, of whether the injury may occur at all—as it is in *SCRAP* and *O'Shea*—policy considerations may be different from those that arise when an injury is alleged to be present but the causal claim is attenuated. *See* Warth v. Seldin, 422 U.S. 490 (1975). The question of "imminence," which focuses on a future rather than an existing injury, comprises the most difficult aspect of injury in fact analysis, since the plaintiff must prove to some undefined degree the probability of the injury as well as its causal connection to the challenged action. Most courts, however, do not distinguish between the two issues and tend to treat both questions, admittedly closely related, in the same standing terms. This is true in *SCRAP*, *Laird* and *O'Shea*.

and *O'Shea* may be further distinguished from *SCRAP* in that plaintiffs could not show tangible, concrete injury to individuals; thus to grant relief the court would need to monitor the overall systems that the plaintiffs were challenging – in one case the Army,[93] in the other a state court.[94] Clearly the Court's reluctance to assume this role contributed to its finding of no injury in fact.

Linda R.S. v. Richard D.[95] was the most important Warren Court case to deny standing squarely on the grounds of an insufficient causal nexus. In *Linda R.S.* an unwed mother sought to enjoin the discriminatory application of a Texas criminal child support statute to parents of legitimate children only, claiming that the district attorney unconstitutionally discriminated against her illegitimate children by refusing to prosecute their father for failure to provide child support.[96] The Court held that since the child support statute provided solely for criminal sanctions, the "only result" of success on the merits would be to send the father to jail.[97] The Court recognized the inference that a judicial declaration could result in future payments of child support but called it "speculative."[98] Since the " 'direct' relationship between the alleged injury and the claim sought to be adjudicated which previous decisions of this Court suggest is a prerequisite of standing is absent,"[99] there was an insufficient nexus between the plaintiff's injury and the government action she attacked.

The Court's requirement that an injury be directly caused by the challenged act seems to go against the flow of post-*Data Processing* case law.[100] The Court's basis for a denial of standing on the ground that ultimate relief is speculative also seems questionable. Had the plaintiff produced an affidavit demonstrating the father's intent to pay support if the plaintiff were to prevail on the merits, it is still doubtful that the Court would have en-

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The difference between directness and imminence is primarily one of emphasis: an imminence investigation looks first at the challenged act to see what, if any, chain of causation it can follow to the plaintiff. The directness inquiry looks first at the plaintiff and his injury, and then tries to follow a chain backwards to the challenged action. A potential breakdown in the chain when the question is the imminence of the injury is a more severe barrier to standing that when it is directness, since such a breakdown would suggest that no injury at all may occur, and thus that the case is not suitable for judicial consideration. With the directness question, a potential breakdown should be less important at the threshold level since an injury has already occurred and a causal question can be settled on the merits.

93. See notes 87-88 *supra.*

94. *See* O'Shea v. Littleton, 414 U.S. 488, 498 (1974).

95. 410 U.S. 614 (1973).

96. *Id.* at 614-15. The Texas courts had construed the statute to apply to parents of legitimate children only. *Id.* at 615.

97. The court noted that unlike civil contempt statutes, under which a defendant would be freed "on compliance with his legal obligations," the statute in question imposed a fixed penalty on offenders. *Id.* at 618.

98. *Id.*

99. *Id.*

100. *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727 (1972). In *Linda*, the Court returned to Massachusetts v. Mellon, 262 U.S. 447, 488 (1923) to find support for its "directness" requirement. 410 U.S. at 614.

tertained the suit. The real reason for denying standing seems not to have been the failure of a cause in fact relationship but a policy cause decision that interested or even injured citizens should not be permitted to interfere in prosecutorial decisions.[101] Unfortunately, by basing its rationale on the plaintiff's actual prospects of relief,[102] the Court introduced a new concept into the law of standing which was to be developed by the Burger Court into a tool for denying standing where there were weaker policy reasons for avoiding a decision on the merits.

Warth, Simon AND THE NEW CAUSALITY

Warth v. Seldin

Both *Laird* and *Linda R.S.* represent limitations on the *SCRAP* attenuated-cause standard. However, it was *Warth v. Seldin*[103] that directly repudiated the possibility of applying the lenient *SCRAP* test in constitutional standing cases. In *Warth* a group of low-income plaintiffs, among others,[104] alleged that they were unable to locate low-cost housing in the town of Penfield[105] and that the town's restrictive zoning ordinances had made it impossible for such housing to be built. They further alleged that such an exclusion

101. The Court specifically based its holding on the underlying policy issue, emphasizing that "in the unique context of a challenge to a criminal statute" there was an insufficient nexus "to justify judicial intervention," 410 U.S. at 617-18, and further pointed out that "a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution." *Id.* at 619. However, later courts have treated the holding on directness as a general rule to be applied apart from the special circumstances of the case. *See* Simon v. Eastern Ky. Welfare Rights Org., 96 S. Ct. 1917, 1927 (1976). Wright has criticized this foundation for the holding, saying that although there is "strong justification for denying standing in the area of a private citizen's relationship to the enforcement of criminal sanctions," here standing was denied with the "surprising assertion that there was no adequate claim that the lack of support merely was a direct injury resulting from the failure to prosecute." WRIGHT & MILLER, *supra* note 8, §3531 at 229.

102. Whether this rationale is based on the constitutional ground that no case or controversy exists if relief cannot be guaranteed, or on prudential ground of limiting judicial resources is unclear. In any case this writer would contend that treating these considerations in standing language is misleading since the issue really goes to failure to state a claim for relief or to the overall case or controversy rule that the court will not give advisory opinions (*see* Muskrat v. United States, 219 U.S. 346 (1911)), and not to the issue of whether an injury in fact exists. The only way that the measure of relief relates to standing is that it might be used as an indicium, as the court may be doing in *Warth*, of whether the challenged action caused the plaintiff's injury. However, the better approach would be to grant the plaintiff standing if the action in any way contributes to the plaintiff's injury.

103. 422 U.S. 490 (1975).

104. The court also denied standing to other plaintiffs, including a not-for-profit corporation interested in alleviating housing shortages of low- and moderate-income persons in the Rochester area, several individual Rochester taxpayers, a home builders association, and an umbrella corporation consisting of several organizations interested in housing problems. *Id.* at 491.

105. Each low-income plaintiff specifically alleged that he had sought housing in Penfield. *Id.* at 503 n.13-14, and 506 n.16.

violated their constitutional right to travel and contravened the civil rights statutes.[106]

The court attacked the sufficiency of the low-income plaintiffs' causal allegations:

> We may assume, as petitioners allege, that respondents' actions have contributed, perhaps substantially, to the cost of housing in Penfield. But there remains the question whether petitioners' inability to locate suitable housing in Penfield reasonably can be said to have resulted, *in any concretely demonstrable way*, from respondents' alleged constitutional and statutory infractions.[107]

Although the court was willing to concede *arguendo* that there was a cause in fact relationship between the challenged action and housing costs in Penfield[108] this nexus was insufficient. Instead petitioners had to satisfy a rather stringent "but for"[109] test, showing not just a loss of opportunity, but a loss of specific housing.[110] Similarly, they had to demonstrate that an equally concrete future benefit would flow from the adjudication.

> Petitioners must allege facts from which it reasonably could be inferred that, absent the respondents' restrictive zoning practices, there is a substantial probability that they would have been able to purchase or lease in Penfield and that, if the court affords the relief requested, the asserted inability of petitioners will be removed.[111]

Although the Court agreed that the injury need not be direct, the fact of indirectness made it more difficult to meet the minimal constitutional causal showing that "in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm."[112]

On the other hand, as the dissent pointed out, plaintiffs had clearly alleged that because of the exclusionary zoning ordinance, they had been unable to find a home in Penfield.[113] Rather than accept this allegation on its face, the Court scrutinized the supporting affidavits[114] and then — without

106. Plaintiffs claimed that the exclusion contravened their 1st, 9th and 14th amendment rights, and violated 42 U.S.C. §§1981, 1982 and 1983 (1970).

107. *Id.* at 504 (emphasis added).

108. *Id.*

109. See notes 38 and 67 *supra* and accompanying text. Surely it is possible from the face of the pleadings and the supporting affidavits to find a material issue of fact as to whether the zoning practices in question could have been a substantial factor in plaintiff's inability to find housing, particularly since the court is willing to assume a causal relationship between zoning and housing costs. See note 51 *supra.*

110. *See Comment, Constitutional Law — Standing to Sue in Exclusionary Zoning Litigation: Catch-22 Revisited,* 54 N. CAR. L. REV. 449 (1976); see also note 130 *infra.*

111. 422 U.S. at 504.

112. *Id. See also* Roe v. Wade, 410 U.S. 113, 124 (1973).

113. 422 U.S. at 526 (Brennan, J., dissenting). The dissent also points out that if plaintiffs manage to prove that their injuries are causally connected to the zoning practices, they will have the requisite personal stake — the outcome required to meet constitutional criteria for standing. *Id.* at 524-25.

114. *Id.* at 501-02.

benefit of an adversary hearing — gave its own causal explanation: plaintiff's "inability to reside in Penfield is the consequence of the economics of the area housing market, rather than of respondents' assertedly illegal acts."[115]

Warth's strict causality test seems to go much farther than previous Court decisions in the type of showing necessary to meet constitutional standing requirements.[116] Judged by the liberal standards of *Flast v. Cohen*[117] and *Conley v. Gibson*,[118] plaintiffs had made a sufficient allegation of a causal nexus to survive a motion to dismiss. Their failure to produce a concrete project in which they had an interest could be taken as further proof of the success of the exclusionary zoning practices they challenged.[119] Furthermore, the only significant intervening factor — the desire and ability of builders to erect suitable low-cost housing — was apparently accounted for in the case since area builders were also joined as plaintiffs.[120] Indeed, as the minority opinion pointed out, the true weakness of *Warth* is that it treated each plaintiff group as a separate unit, denying standing to each without considering the causal interrelationships of their various claims.[121]

Equally questionable is the Court's application of the rule that plaintiffs must prove that they "personally would benefit in a tangible way from the courts' intervention."[122] While this principle reflects the constitutional standing requirement that the plaintiff have a "direct personal stake in the outcome,"[123] rarely has the Court required the type of specific showing that *Warth* demands — that plaintiffs have a future stake in a particular project. For instance, in *James v. Valtierra*,[124] another exclusionary case, plaintiffs challenging a California law that required a public referendum prior to the establishment of any low-cost housing were not required to show exactly how the removal of the rule would affect their personal housing needs.[125]

Although clothed as a constitutional decision that an insufficient injury in fact existed, *Warth* seems to be based on a prudential determination by the Court to impose higher injury in fact standards where constitutional

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115. *Id.* at 506.

116. See cases cited at note 125 *infra* and accompanying text.

117. 393 U.S. 83 (1968).

118. 355 U.S. 41 (1957).

119. See note 131 *infra*.

120. 422 U.S. at 514. The association, which represented member firms engaged in the development and construction of housing in the Penfield area, alleged that the challenged zoning practices had deprived some of its members of "substantial business opportunities and profits" and asked for damages and equitable relief. The court dismissed the petition for damages on the grounds that the association alleged no monetary injury to itself, and lacked standing to claim such injury on the behalf of its individual members. *Id.* at 515. Its prayer for prospective relief was also dismissed for failure to refer to any specific projects currently precluded by the challenged action. *Id.* at 516.

121. *Id.* at 521 (Brennan, J., dissenting).

122. *Id.* at 508.

123. Baker v. Carr, 369 U.S. 186, 204 (1962).

124. 402 U.S. 137 (1971).

125. Nor was more required of plaintiffs in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) or Village of Belle Terre v. Borass, 416 U.S. 1 (1974). See *Supreme Court, 1974 Term*, 89 HARV. L. REV. 49, 189 (1975).

rights are being adjudicated.[126] There may be stronger policy reasons for requiring a greater causal showing in such cases since the Court is not dealing with statutory interpretation but with constitutional principle.[127] If this is indeed the reason for the higher standard, the Court should so state, making it clear that the *Warth* test is appropriate only in special constitutional cases.[128] Furthermore, it should weigh the factors militating against adjudication[129] against those which would favor standing in such cases, in particular, the plaintiff's difficulty in proving causation without an adequate opportunity to present his case, and the significant problem of obtaining standing in "lost opportunity" cases,[130] in which the success of the allegedly violative acts

126. *Cf.* WRIGHT & MILLER, *supra* note 8, §3531 at 18 (Supp. 1975): "It remains to be seen whether [*Warth*] will be generalized into a broader authorization to rely on standing doctrine to avoid resolution of sensitive constitutional issues." *Id.* Professor Davis dislikes the "notion that the law of standing can keep judges from assuming too much governmental power, that it can limit courts to appropriate subject matter, that it can help assure competent presentation of cases, and above all, that it can protect against a flood of litigation . . . ." and argues that the "law of standing is the wrong tool to accomplish [these] judicial objectives . . . ." Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450, 469 (1970).

127. *See* Scott, *Standing to Sue in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 656-57 (1973).

128. This is the dissenting Justices' opinion of the policy factors behind the case: "[T]he opinion, which tosses out of court almost every conceivable kind of plaintiff who could be injured by the activity claimed to be unconstitutional, can be explained only by an indefensible hostility to the claim on the merits. I can appreciate the court's reluctance to adjudicate the complex and difficult legal questions involved in determining the constitutionality of practices which assertedly limit residence in a particular municipality to those who are white and relatively well-off, and I also understand that the merits of this case could involve grave sociological and political ramifications. But courts cannot refuse to hear a case on the merits merely because they would prefer not to, and it is quite clear, when the record is viewed with dispassion, that at least three of the groups of plaintiffs have made allegations, and supported them with affidavits and documentary evidence, sufficient to survive a motion to dismiss for lack of standing." 422 U.S. at 520-21 (Brennan, J., dissenting).

129. Such factors might include (1) a reluctance to become entangled with complex social, political and economic issues, see note 128 *supra*; (2) a desire not to interfere in areas traditionally left to state control, see 422 U.S. at 508 n.18; and (3) a fear of opening the "floodgates" of litigation. Although the "floodgate" argument is frequently cited as a reason for denying standing, Professor Scott has suggested that the court has exaggerated the dimensions of the problem. "When the 'floodgates' of litigation are opened to some new class of controversy by a decision, it is notable how rarely one can discern the flood that the dissenters feared. The plaintiff (or the organization actually funding and conducting the litigation, if legal rules force the use of nominal plaintiffs) must feel strongly enough about the issue in question to pay the bills, and that both cuts down the flood and gives us at least a partial measure of his 'stake' in the outcome." Scott, *supra* note 127, at 673-74.

130. *Cf.* WRIGHT & MILLER, *supra* note 8, §3531 at 18 (Supp. 1975): "It is difficult to know how far this decision will influence the future development of standing doctrine. There may be an increased emphasis on detailed pleading of the facts claimed to constitute injury in fact, but pleading latitude probably will depend on the nature of the injury asserted. The injury of exclusion is susceptible to much more elaborate factual inquiry, and thus pleading requirements, than—for instance—such injuries as are commonly alleged by users of a potentially injured environment. More fundamentally, the opinion

denies plaintiffs the opportunity to obtain the concrete interest necessary for standing.[131] By basing its rationale on the issue of causality alone, the Court distorts the truly complex standing problem that *Warth* represents.

Simon v. Eastern Kentucky Welfare Rights Organization

Simon v. Eastern Kentucky Welfare Rights Organization[132] extended the application of the causal nexus test from constitutional to general statutory standing cases. Like *United States v. SCRAP*,[133] *Eastern Kentucky* was an Administrative Procedure Act (APA)[134] case in which plaintiffs based their claim on an interest allegedly created and protected by an underlying congressional statute, here the Internal Revenue Service Code.[135] Several low income individuals and organizations representing such individuals[136] brought a class action against the Secretary of the Treasury and the Commissioner of Internal Revenue, claiming that the IRS had violated the Internal Revenue Code and the APA "by issuing a Revenue Ruling[137] allowing favorable tax treatment to a nonprofit hospital that offered only emergency room services to indigents."[138] An earlier ruling had required a nonprofit hospital to be operated "to the extent of its financial ability for those not able to pay for the services rendered" to claim these favorable tax benefits as a charitable organization.[139]

The substance of plaintiffs' claim was that the IRS change in policy encouraged hospitals to deny services to indigents, thereby injuring their "opportunity and ability" to receive services in nonprofit hospitals receiving benefits under the Code.[140] They further alleged that individual plaintiffs had been denied services because of their indigency by hospitals claiming

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reflects a determination that the constitution does not protect against simple impairment of the opportunity to look for housing, but protects only against interference with quite specific projects of identified builders and intending occupants. In such terms, it may be wondered whether the Court demanded too much." *Id.*

131. Similar problems of exclusionary tactics which by their very success denied access to the judicial system arose in the "white primary" cases of the forties and fifties, when Democratic Party groups in the South excluded Negroes from pre-general election selection process, claiming that such an exclusion did not constitute state action. Looking at substance over form, the Court held that the exclusion was unconstitutional state discrimination. Terry v. Adams, 345 U.S. 461 (1953); Nixon v. Herndon, 273 U.S. 536 (1927).

132. 96 S. Ct. 1917 (1976).

133. 412 U.S. 669 (1973).

134. 5 U.S.C. §6702 (1970).

135. 96 S. Ct. at 1922, 1924.

136. *Id.* at 1921.

137. Rev. Rul. 69-545, 1969-2 CUM. BULL. 117.

138. 96 S. Ct. at 1920. The new Ruling did not explicitly extend this treatment to all non-profit hospitals; instead it described two unidentified hospitals, and held that one would qualify for charitable status despite its failure to meet more restrictive IRS requirements which had previously been in force. A second hospital, "which differed significantly in both corporate structure and operating policies," was still refused this status. 96 S. Ct. at 1920-21.

139. Rev. Rul. 56-185, 1956-1 CUM. BULL. 202.

140. 96 S. Ct. at 1922.

the charitable exemption.[141] To bring themselves within the second prong of the *Data Processing* test they also alleged that they were among the intended beneficiaries of the Code section granting favorable tax treatment to charitable organizations.[142]

Writing for the majority, Justice Powell found that plaintiffs failed to allege facts sufficient to support a finding that they had suffered an injury in fact. As in *Linda R.S. v. Richard D.*[143] and *Warth v. Seldin,*[144] the Court focused on the plaintiffs' prospects for relief, restating the test as whether "the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision."[145] The Court then applied the two-pronged test it had used in *Warth,* analyzing first the causal relationship between the injury and the challenged action,[146] and next the relationship between the provision of a forum and alleviation of the injury.[147] The complaint failed to meet either prong because it relied on speculation to flesh out its causal claims.

> [I]t does not follow from the allegation [that the adoption of the Ruling encouraged hospitals to deny services] . . . that the denial of access to hospital services in fact results from petitioners' new Ruling, or that a court-ordered return by petitioners to their previous policies would result in these respondents' receiving the hospital services they desire. It is purely speculative whether the denials of service specified in the complaint fairly can be traced to petitioners' "encouragement" or instead result from decisions made by the hospitals without regard to the tax implications.[148]

Although the Court recognized that the allegations that the hospitals receive heavy donations supported an inference that hospitals would admit plaintiffs if the new ruling were invalidated,[149] it held such an inference impermissible

141. *Id.* at 1921-22.

142. *Id.* at 1922. Plaintiffs claimed that the word "charitable" in the Code had been established by legislative history, IRS regulations and judicial precedent to mean "relief of the poor." *Id.*

143. 410 U.S. 614 (1973).

144. 422 U.S. 490 (1975).

145. 96 S. Ct. at 1924. The Court even read its "redressability" test into the *Data Processing* holding, saying that "[r]eduction of the threshold requirement to actual injury redressable by the court represented a substantial broadening of access to the federal courts over that previously thought to be the constitutional minimum under [the APA]." *Id.*

146. Although the court recognized that plaintiffs had been injured in their interest in obtaining hospital services. *id.* at 1925, since no hospital was a defendant, this was insufficient injury unless it "fairly can be traced to the challenged action" rather than to "the independent action of some third party not before the court." *Id.* at 1925-26.

147. Obviously the second half of the test is a key determinant in the finding of no standing. Thus while the Court held that the possibility of relief was an "implicit corollary" of an allegation of injury caused by the challenged action, *id.* at 1926, the test actually appears to add a dimension to the type of causal showing required for standing.

148. *Id.*

149. This contention, made by plaintiffs, countered the Court's argument that if plaintiffs won on the merits hospitals might nevertheless decide not to take the favorable tax treatment. *Id.*

when the injury is indirect.[150] Thus, unless plaintiffs are able to allege sufficient facts to show a completed causal chain from the Ruling to the denial of services, and from the invalidation of the Ruling to the provision of those services, they may not ask the court to consider the merits of their claim.

The Court's definition of the constitutional standing test as "actual injury redressable by the court"[151] is not in itself objectionable, since it properly focuses on the central question of standing, *i.e.*, whether plaintiff possesses a personal stake in the outcome.[152] Here as in *Warth* the difficulty lies in the type of showing that the Court requires to meet this test. It is not enough that plaintiffs allege that the challenged action contributes to their injury. They must demonstrate that "but for" the challenged action they would not be so injured. While this is an appropriate test for identifying cause in fact on the merits, such a high standard seems unnecessary for standing purposes.[153] It is questionable whether many federal plaintiffs would be able to account for the hundreds of contingencies that might occur between a decision on the merits and the eventual mitigation of their injury.[154] The imposition of such a high standard may foreclose many plaintiffs from obtaining a forum to protect against injurious government action despite the possibility that an adequate case or controversy actually exists.

The fundamental question in *Eastern Kentucky*, as in *Warth*, is this: when should plaintiffs be permitted to challenge governmental acts that allegedly infringe an interest in obtaining benefits that may be constitutionally or statutorily protected? In *Eastern Kentucky* plaintiffs claimed to be beneficiaries under the IRS exemption for charitable organizations. By focusing on the injury in fact test without explicit regard for the congressional scheme under which plaintiffs claimed their interest, the Court failed to identify the injury as plaintiffs and the dissenting Justices do: namely, injury to their opportunity and ability to obtain hospital services,

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150. *Id.* at 1927. In support of this proposition, the Court cited *Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973), and *Warth v. Seldin*, 422 U.S. 490, 504-05 (1975). However, the Court did not succeed in distinguishing *United States v. SCRAP*, 412 U.S. 669 (1973), under the rule, for surely the *SCRAP* facts required at least as much speculation to complete the causal chain as the present facts do. The Court merely stated that while the injury was indirect in *SCRAP*, "the complaint nevertheless 'alleged a specific and perceptible harm' flowing from the agency action." 96 S. Ct. at 1927 n.25, citing United States v. SCRAP, 412 U.S. at 689. The Court also pointed out that the complaint might not have survived a motion to dismiss. 96 S. Ct. at 1927 n.25.

151. 96 S. Ct. at 1924.

152. See text accompanying notes 19-20 *supra*.

153. See notes 49-54 *supra* and accompanying text.

154. *See, e.g.*, Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970) and its companion case, Barlow v. Collins, 397 U.S. 159 (1970). The Court suggested that the holdings in both cases were consistent with the test since in both cases the injurious act would have been illegal were it not for the challenged regulations. However, in neither of these cases were plaintiffs required to show that absent the challenged action their ultimate economic situations would in fact be altered.

which is at least arguably protected by the statute.[155] Had the Court weighed the components of the plaintiffs' claim of right in determining the nature of the injury it might have reached a different result, even applying the stricter "but for" test, since plaintiffs could probably demonstrate that this interest was injured by the new ruling.[156] Had it not found an intent to protect plaintiffs, at least it would have grounded its holding on the proper prudential zone of interests test.

Perhaps the most disturbing aspect of *Eastern Kentucky* is that it demonstrates that the Court will not limit the higher causal showing test to constitutional standing cases, where there may be particularly strong policy reasons for restricting standing to situations where the issues are sharply focused.[157] The application of the same test to plaintiffs claiming an interest, albeit indirect, under a statute suggests, as the dissent points out,[158] that the federal courts may in the future use this higher standard to deny standing in other types of statutory cases, and that Congress will be unable to "supply

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155. This was essentially the position taken by Justice Brennan in an opinion concurring in the result only. Justice Brennan would have denied standing on ripeness grounds because respondents failed to demonstrate "that the hospitals whose conduct affected them were hospitals whose operations could fairly be characterized as implicated by the terms of the ruling," 96 S. Ct. at 1931 (Brennan, J., dissenting), or that "the tax-exempt status of the hospitals was in any way related to the ruling." *Id.* at 1932. However, Justice Brennan was alarmed both by the Court's "selectively imposed pleading requirement," *id.* at 1932 n.6, and by the Court's refusal to properly identify the injury in fact. The proper injury (which is not an illegal denial of hospital services) can only be identified in terms of plaintiff's claim of right: "[I]f respondents have a claim cognizable under the law, it is that the Internal Revenue Code requires the government to offer economic inducements to the relevant hospitals only under conditions which are likely to benefit respondents. The relevant injury in light of this claim is, then, injury to this beneficial interest—as respondents alleged, injury to their 'opportunity and ability' to receive medical services . . . . Nothing in the logic or policy of constitutionally required standing is added by the further injury in fact dimension required by the Court today . . . ." *Id.* at 1932-33. *See also* Evans v. Lynn, 537 F.2d 571 (2d Cir. 1976).

156. The district court also failed to measure the plaintiff's claim when deciding that sufficient injury existed, but seemed satisfied that a deprivation of medical care was the correct injury in fact. Recognizing the problems inherent in proving a direct causal nexus, the court noted that "iron clad documentation of a nexus between their tragic situation and hospital behavior towards indigents, as affected by the new Ruling, has not been, and, in all probability, cannot be provided to the satisfaction of the criteria urged by the government." Eastern Ky. Welfare Rights Org. v. Shultz, 370 F. Supp. 325, 330 (D.D.C. 1973), *rev'd on other grounds*, Eastern Ky. Welfare Rights Org. v. Simon, 506 F.2d 1278 (D.C. Cir. 1974). However, the court felt that: "[I]n light of the crucial significance with which hospitals regard their status as charities, the court does not consider itself engaged in wild speculation by assuming or recognizing that the relaxation of the requirement for charitable classification would necessarily effect [*sic*] hospital policy, in this case care for indigents, upon which such a status had been earlier dependent." *Id.* The court found the "correlation" between act and injury "at least as demonstrable" as that in *SCRAP*. *Id.*

157. See note 127 *supra* and accompanying text.

158. 96 S. Ct. at 1936-37. "We may properly wonder where the Court, armed with its 'fatally speculative pleadings' tool, will strike next." *Id.* at 1936.

injured individuals with the means to make the factual showing in a specific context that the Court today requires."[159]

CAUSALITY IN THE LOWER FEDERAL COURTS

Although it is not yet clear what effect the *Warth* and *Eastern Kentucky* decisions will have on standing in the lower federal courts, some direction is beginning to emerge. Lower court cases reveal the same tension between the approaches of *SCRAP* and *Warth* that were apparent at the Supreme Court level. Some cases follow *SCRAP* in permitting almost any causal allegation to suffice without clear theoretical support for the decision.[160] Other cases are beginning to use the *Warth* pleadings test to support findings of insufficient injury in fact.[161] Fortunately the very number of cases in which the lower federal courts must make standing decisions gives them an advantage over the Supreme Court in that rules of standing evolve in a more orderly and meaningful way.[162] The piecemeal approach that the Supreme Court is forced to take in developing standing theory through such disparate vehicles as *SCRAP* (a statutory standing case with a liberal underlying statute) and *Warth* (a constitutional case involving state action) often prohibits this kind of coherent overview.

In general, the lower courts seem to be applying a causal test falling somewhere between *SCRAP* and *Warth*. Under this test some causal relationship must appear on the face of the complaint.[163] However, if the nexus is questionable or attenuated, courts will still sometimes strain to permit standing when any of the following factors is present: (1) a specific injury;[164] (2) the allegation of a fundamental interest;[165] (3) the existence of a protective statute;[166] (4) a request for relief which would involve minimal court

159. *Id.* at 1937. "Of course the most disturbing aspect of today's opinion is the Court's insistence on resting its decision regarding standing squarely on the irreducible Art. III minimum of injury in fact, thereby effectively placing its holding beyond congressional power to rectify. Thus, any time Congress chooses to legislate in favor of certain interests by setting up a scheme of incentives for third parties, judicial review of administrative action that allegedly frustrates the congressionally intended objective will be denied, because any complainant will be required to make an almost impossible showing." *Id.* at 1936-37.

160. *See, e.g.*, Florida v. Weinberger, 492 F.2d 488 (5th Cir. 1974), in which the court granted standing to nursing home administrators challenging an HEW regulation on the ground that it had caused them a loss of public respect: "If these be thought gossamer distinctions, we can only rejoin that *SCRAP*'s ingenious law students have caused us to be translated to ethereal realms, where we must function as best we are able." *Id.* at 495.

161. *See* Evans v. Lynn, 537 F.2d 571 (2d Cir. 1976); Metcalf v. National Petroleum Council, 407 F. Supp. 257 (D.D.C. 1976).

162. *See* Eisenberg, *Congressional Restrictions on Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 510-11 (1975).

163. *See, e.g.*, Rodos v. Michaelson, 527 F.2d 582 (1st Cir. 1975); Independent Bankers Ass'n of America v. Smith, 402 F. Supp. 207 (D.D.C. 1975).

164. *See, e.g.*, Lowenstein v. Rooney, 401 F. Supp. 952 (E.D.N.Y. 1975).

165. *See, e.g.*, Tax Analysts & Advocates v. Shultz, 376 F. Supp. 889 (D.D.C. 1974); see also notes 226-228 *infra* and accompanying text.

166. See the discussion of NEPA cases accompanying notes 186-195 *infra*.

interference;[167] (5) an alleged causal connection that would be difficult to prove prior to trial;[168] and (6) a strong public policy favoring the grant of a forum.[169] The presence of several of these factors may tip the scales in favor of standing despite an attenuated causal chain. Certainly the most important is the presence or absence of a statute or constitutional provision that specifically protects against the type of injury the plaintiff is asserting. Therefore the analysis of lower federal court opinions which follows will emphasize the different causal treatments made in cases relying on express statutory grants of standing, those founded upon general statutory review provisions, and those based on a constitutional claim of right.

Express Statutory Review

Courts generally follow *SCRAP*'s relaxed causal showing rule where there has been an express Congressional grant of a right of action or a right to review of administrative actions. Such Congressional authorization of the exercise of judicial power resolves the separation of powers issue that partially underlies the standing doctrine.[170] A court must still have adversary parties before it to have a case or controversy; however, recent holdings emphasize that mere violation of a statute creating interests in the plaintiff creates sufficient injury in fact, thus satisfying the minimal constitutional requirement.[171] As some lower federal courts have recognized, the standing question cannot be resolved until the merits are decided since an injury in fact will not exist unless there is a violation of the statute.[172]

In *White v. Arlen Realty and Development Corp.*[173] a consumer was granted standing to bring an action against a department store for improperly identifying goods bought on credit, in violation of the Truth in Lending Act,[174] despite undisputed allegations by defendant that the plaintiff had not in fact been misled by the violation.[175] Although the district court found no injury in fact,[176] the Fourth Circuit, citing *Linda R.S.*,[177] held that the Act's disclosure requirements created a statutory right in the creditor to have specific information, and the violation of that right made

167. See note 195 *infra*.

168. *See* Malamud v. Sinclair Oil Corp., 521 F.2d 1142, 1148 (6th Cir. 1975).

169. *See* Eastern Ky. Welfare Rights Org. v. Shultz, 370 F. Supp. 325, 330 (D.D.C. 1973), *rev'd. on other grounds*, Eastern Ky. Welfare Rights Org. v. Simon, 506 F.2d 1278 (D.C. Cir. 1974), *vacated and remanded*, 96 S. Ct. 1917 (1976). See also note 156 *supra*.

170. See Scott, *supra* note 127, at 656-57; Note, *Standing, Separation of Powers and the Demise of the Public Citizen*, 24 AM. U.L. REV. 835, 876 (1975).

171. Warth v. Seldin, 422 U.S. 490, 501 (1975); Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973); *but see* Evans v. Lynn, 537 F.2d 571 (2d Cir. 1976).

172. *See* American Civil Liberties Union v. FCC, 523 F.2d 1344 (9th Cir. 1975).

173. 540 F.2d 645 (4th Cir. 1975, *modified*, 1976).

174. 15 U.S.C. §1637(b)(2) (1970).

175. See 540 F.2d at 648, 650.

176. 374 F. Supp. 151 (D. Md. 1974). The court found that plaintiff "faced no actual or threatened injury as a result of defendant's billing practice" since plaintiff did not allege or prove that he needed the information that defendant failed to provide. *Id.* at 158.

177. 540 F.2d at 649.

him sufficiently aggrieved.[178] Similar results have been reached under the Freedom of Information Act, as courts have also generally dispensed with the need to show detriment flowing from the refusal to supply requested information.[179] If a plaintiff can bring himself within the protected class of such a statute the court may dispense with the question of injury in fact and causal proof entirely. In some areas, however, higher causal showing requirements have been specifically imposed for policy reasons on otherwise broad statutory standing grants. In private antitrust actions brought under the Clayton Act,[180] the lower federal courts have strictly limited standing, despite broad statutory language,[181] to those plaintiffs who can meet both strict cause in fact and strict policy cause requirements.[182]

General Statutory Review

The *SCRAP/Warth* tension is strongest in the area of general statutory review. Plaintiffs who claim standing under general statutory standing grants such as section 702 of the Administrative Procedure Act[183] have met with varying success when there is an attenuated causal nexus. They are most successful when they are able to invoke a statute which clearly protects against the kind of injury they complain of, even if it does not give them an explicit right to review. Such a statute indicates a congressional judg-

178. "[C]ongress gave the debtor a right to specific information and therefore defined 'injury in fact' as the failure to disclose such information." *Id. See also* Mourning v. Family Publications Serv., Inc., 411 U.S. 356 (1973); Ratner v. Chemical Bank New York Trust Co., 329 F. Supp. 270 (S.D.N.Y. 1971).

179. *See* Nixon v. Sampson, 389 F. Supp. 107 (D.C. Cir. 1975) (when access is denied a controversy exists and injury must be presumed); Skolnick v. Parsons, 397 F.2d 523, 525 (7th Cir. 1968).

180. 15 U.S.C. §§1, 14 (1970).

181. Under the Clayton Act, any person can file suit provided that he is "injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. §15 (1970).

182. *See* In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 125-30 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973); Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952); Beane, *Anti-trust: Standing and Passing On*, 26 BAYLOR L. REV. 331, 331-40 (1974); Note, *Standing to Sue for Treble Damages Under Section 4 of the Clayton Act*, 64 COLUM. L. REV. 570, 571 (1964). Because of the perceived policy needs of avoiding strike suits and limiting the extent of consequential damages from antitrust violations, courts have construed the standing requirement under the Clayton Act strictly. See note 181 *supra*. The vehicle for this stricter construction has been the statute's causal language. A plaintiff is required to show that he stands in a certain relationship to the alleged conspirator before he can claim that he has been injured "by reason of" anything forbidden by the antitrust laws. Clearly the question is not one of cause in fact, but of policy cause. Nevertheless it should be noted that in a post-*Warth* case the Sixth Circuit recently refused to apply the strict antitrust causality test. In Malamud v. Sinclair Oil Corp., 521 F.2d 1142 (6th Cir. 1975), despite defendant's contention that its act was not the proximate cause of plaintiff's injury, the court held that in the highly complex antitrust area such questions should hardly be resolved in an affidavit for summary judgment or a motion to dismiss. *Id.* at 1150. Instead it reserved the question of both cause in fact and policy cause for the merits.

183. 5 U.S.C. §702 (1970).

ment that certain interests are worthy of protection; thus it is not difficult for courts to find, as they do with express grants of review, that a violation of such interests may in itself provide the necessary injury in fact.[184] Here the zone of interests is incorporated into the injury in fact determination.[185]

Such is the case with threatened environmental injuries. Without the National Environmental Policy Act (NEPA),[186] it would be difficult to obtain standing to complain about threatened harm to the environment since proof that a specific personal injury will result from a challenged action is often impossible.[187] However in NEPA Congress expressed a clear intent to protect against potential environmental harm,[188] and required that an environmental impact study (EIS) be made whenever major federal action was contemplated.[189] Thus Congress has made the underlying policy decision balancing the conflicting interests of protection against future environmental harm and the preservation of efficient governmental operations.

The question of the necessary causal nexus might still have caused great conflict among the courts were it not for *United States v. SCRAP*.[190] Courts could have strictly interpreted the necessary causal showing, requiring plaintiffs to demonstrate that a harm personal to them would occur were it not for failure to prepare an EIS.[191] However, the better view seems to be that taken by the Ninth Circuit in *City of Davis v. Colemen*.[192] In *Davis* a municipality and individual plaintiffs challenged the government's failure to conduct an EIS before deciding where to place an interstate interchange. The court held that the district court erred in requiring the plaintiffs to plead and prove actual damage ensuing from the statutory violation.[193] Since

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184. *See* McDowell v. Schlesinger, 404 F. Supp. 221 (W.D. Mo. 1975).

185. See City of Hartford v. Hills, 408 F. Supp. 889 (D. Conn. 1976), and notes 203-208 *infra* and accompanying text.

186. 42 U.S.C. §§4321, 4331-4335 (1970).

187. See the opinions of the dissenting justices in Sierra Club v. Morton, 405 U.S. 727, 741, 755 (1972) (Douglas, Brennan, Blackmun, JJ., dissenting). Justice Douglas observed that standing would be simplified in environmental cases if suits could be brought "in the name of the inanimate object about to be dispoiled. . . ." *Id.* at 741.

188. 42 U.S.C. §§4341-4347 (1970). The statute has also been held to protect a secondary class of interests whose invasion also affords standing: interests of governmental organizations, groups or individuals whose economic and social "environments" may potentially be disrupted by a federal project. McDowell v. Schlesinger, 404 F. Supp. 221, 225 (W.D. Mo. 1975).

189. 42 U.S.C. §4332(2)(c) (1970).

190. 412 U.S. 669 (1973).

191. This approach would involve a heavy burden of proof that the harm would actually occur and that it would specifically touch plaintiffs. This was essentially the position of defendants and the minority in *SCRAP*: if the harm is indirect or attenuated, plaintiffs must make a clear threshold showing of a causal nexus between the proposed federal action and the environmental harm alleged. See note 81 *supra*.

192. 521 F.2d 661 (9th Cir. 1975).

193. *Id.* at 671 n.13. The court held that the lower court's description of the proper test was "erroneous." *Id.* The court cited from the district court's unpublished opinion, which had held that "the normal requisites of standing in environmental lawsuits [require] plaintiff to plead and prove actual damage ensuing from a statutory violation . . . ." *Id.*

the challenged action was not the federal project itself, but the failure to make the requisite EIS,[194] the only allegation of injury necessary was that this failure to study the environmental impact of the move might potentially have a detrimental effect on the environment.[195]

Somewhat similar to NEPA cases are those in which indigent plaintiffs seek standing to challenge the misallocation of funds under federal anti-poverty or community development programs. There are several policy factors that may make courts more reluctant to entertain such suits. These factors include the precedents of *Warth* and *Eastern Kentucky*, both of which refused to recognize "lost opportunities" as a valid injury in fact;[196] the difficulty in shaping relief when funds have already been expended;[197] and, most important, the general judicial disinclination to become involved in administrative allocation of the "new property"[198] without explicit congressional authorization.[199]

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194. *Id.* at 671. The injury, which is "procedural," is specifically the "creation of a risk that serious environmental impacts will be overlooked." *Id.* Persons having a geographic nexus with the site of the challenged project are those injured "since they may be expected to suffer whatever environmental consequences the project may have." *Id.* at 672. Thus the court has substituted the simpler "geographic nexus" requirement for a more detailed look at the individual plaintiff's actual prospects of suffering. The court also explicitly held that attenuation of the causal link between NEPA compliance and possible substantial injury did not defeat standing. *Id.* at 671.

195. Under such an interpretation the causal showing is minimal; however, since the merits themselves deal only with whether such an impact study is required, this seems a reasonable requirement. Obviously the existence of NEPA tips the scales in favor of requiring a minimal causal showing, not only because NEPA represents a congressional determination that the courts should grant standing for a broad variety of fairly nebulous and necessarily hypothetical interests, but also because of the limited role the court sets for itself in these adjudications. Its purpose is not to determine whether in fact a causal connection exists between the challenged action and environmental injury, but only whether there is a sufficient threat of harm to warrant an agency study. Viewed in this light *SCRAP* and the *NEPA* cases may be seen as standing for the limited proposition that when a causal connection between a challenged action and harm-in-fact need not be shown in order to prevail on the merits, it is not necessary for standing to reach those issues. It is possible that this may be the approach taken in the future by the Burger Court to reconcile *SCRAP* with its own more limited view of standing.

196. See notes 108-131 and 155-159 *supra* and accompanying text.

197. *See* Economic Opportunity Comm'n v. Weinberger, 524 F.2d 393 (2d Cir. 1975).

198. *See* Reich, *The New Property*, 73 YALE L.J. 733 (1964).

199. *See* Economic Opportunity Comm'n v. Weinberger, 524 F.2d 393 (2d Cir. 1975), particularly the concurring opinion of Judge Friendly, *Id.* at 404-08, for a discussion of the difficult policy factors involved in such situations. *See also* Urban Contractors Alliance v. Bi-State Develop. Agy., 531 F.2d 877 (8th Cir. 1976), where plaintiffs claiming status as employees, beneficiaries, participants and potential construction contractors challenged alleged racial inequality in the administration of bus service in greater St. Louis. The court was unable to find sufficient demonstration of specific injuries to individual plaintiffs despite an "exhaustive search of the record." *Id.* at 880 n.3. However it also emphasized the policy issues behind its reluctance to entertain the case: "The plaintiffs ask the courts to withhold several thousand dollars in federal assistance which is earmarked for the improvement of public transportation in the St. Louis area, alleging serious infringements of basic civil rights by an agency of two sovereign states. Obviously the ramifications of federal court interference here could be far-reaching and grave." *Id.* at 882.

As in *Warth* and *Eastern Kentucky*, the definition of plaintiffs' injury becomes crucial in these cases: should the courts hold plaintiffs to the *Warth* causality test, requiring them to demonstrate that they have suffered concrete losses because the funds were allocated elsewhere and, further, that there is a strong likelihood that they will receive the funds if they win on the merits?[200] Some courts have taken this approach, arguing that there is no injury in fact when plaintiffs cannot demonstrate such a loss.[201] Others have granted standing under a looser test.[202] In *City of Hartford v. Hills*[203] low-income residents of Hartford were granted standing to challenge a HUD approval of a grant application by seven nearby communities.[204] The court reasoned that the low-income plaintiffs were clearly within the zone of interests of the relevant statute,[205] the Community Development Act. Since the city council would be in a strong position to receive reallocated funds[206] if funds had been improperly allocated, "plaintiffs may well have lost the benefits of redirected priorities by the applicant towns, or perhaps, the benefits of projects implemented by the City of Hartford with any reallocated funds."[207] Two aspects of this holding are significant: the court analyzed

200. See text accompanying notes 108-159 *supra*.

201. *See, e.g.*, Evans v. Lynn, 376 F. Supp. 327 (S.D.N.Y. 1974), *aff'd on rehearing*, 537 F.2d 571 (2d Cir. 1976).

202. *See* Knoxville Progressive Christian Coalition v. Testerman, 404 F. Supp. 783 (E.D. Tenn. 1975), where *Warth*'s "tangible benefits" test was also rejected, although in dictum only. Defendants argued that plaintiffs could not challenge their alleged misallocation of funds under the Community Development Act, 42 U.S.C. §5311 (1970) unless they could show that the challenged funds would be used in their neighborhood if they prevailed on the merits. 404 F. Supp. at 788. Although the court decided the case on ripeness grounds, it expressed concern that by following *Warth*'s principle it would be "difficult to imagine *any* low- or middle-income plaintiff with standing to challenge alleged improper allocation of funds . . . ." *Id.*

203. 408 F. Supp. 889 (D. Conn. 1976).

204. Plaintiffs claimed violations under Title I of the Housing and Community Development Act of 1974, 42 U.S.C. §5301 *et seq.* (1975 Supp.), Title VIII (Fair Housing) of the Civil Rights Act of 1968, 42 U.S.C. §3601 *et seq.* (1970); and Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d *et seq.* (1970); as well as claims under the civil rights statutes, 42 U.S.C. §§1981, 1982, 1985 (1970) and the fifth amendment. 408 F. Supp. at 892.

205. *Id.* at 895. It is relevant that in its standing analysis the court recognized that it must determine the relationship of the claim to the statute, *i.e.*, the "zone of interests," before it could determine the injury in fact. *Id.* at 893-95. In fact the court called the injury in fact requirement the "second prong" of the standing test. *Id.* at 894.

206. *Id.* at 894-95. Although plaintiff city officials also fell within the proper zone of interests they lacked standing to challenge the HUD grant on the grounds that it interfered with their ability to perform their official duties. *Id.* at 895.

207. *Id.* at 897. The court held that Warth v. Seldin, 422 U.S. 490 (1975), was not controlling because statutory claims were at issue. The controlling case at that time was *Evans v. Lynn*, No. 74-1793 (2d June 2, 1975). In *Evans* the appellate court had found standing in a similar situation despite the district court's holding that plaintiffs' " 'injury' [ghetto living conditions] is in no way linked to the particular grants complained of herein. Nor would restraining deliverance of the federal funds in any way alleviate their situation." 376 F. Supp. 327, 332 (S.D.N.Y. 1974). However, after *City of Hartford* was decided, the Second Circuit sitting en banc reversed the panel's opinion in *Evans v. Lynn*, and affirmed the lower court's finding of no standing. 537 F.2d 571 (2d Cir. 1976). The

the injury in terms of the claim upon which it was based, permitting a potential "lost opportunity" of a beneficial interest to suffice;[208] and, furthermore, it permitted a showing of a reasonable possibility of such a loss to suffice, rather than applying the more stringent "but for" test.

The Ninth Circuit, however, has indicated a willingness to use the *Warth* test in a "lost opportunity" zoning case when plaintiffs' interests were less directly related to the protection of the statute in question. In *Topic v. Circle Realty*[209] a community volunteer organization brought a civil rights action under the Fair Housing Act[210] against local realtors for steering minority customers to designated minority residential areas. Plaintiffs claimed that such practices encouraged continued patterns of segregation in the communities from which the organization drew its membership.[211] Although the court did not need to reach the issue, it indicated that it would have denied standing by applying the *Warth* causality test:

> [T]he role played by defendants' alleged racial steering in denying the plaintiffs the benefits of living in an integrated community may be so attenuated as to negate the existence of any injury in fact. It is

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majority held that plaintiff's claim of damage (ghettoization) flowed only indirectly from the challenged actions by which community development grants were given to exclusive all-white suburbs allegedly in violation of the fair housing provisions of the 1964 and 1968 Civil Rights Acts, 42 U.S.C. §§2000d *et seq.*, 3601 *et seq.* (1970), 537 F.2d at 593 n.34. Noting that the injury in fact analysis must be clearly distinguished from the zone of interests tests, *id.* at 592, the court refused to accept the panel's finding that an invasion of their statutory right to have programs and housing administered in furtherance of fair housing policy was sufficient injury in fact. *Id.* at 577. Citing *Warth* at length, the majority indicated that plaintiffs must demonstrate specific injuries in terms of lost housing to meet the case or controversy requirement. *Id.* at 595. In strong dissents, the minority justices argued that the majority had misperceived what plaintiffs' injury comprised, *Id.* at 599-609 (Oakes, Kaufman, Feinberg, and Gurfein, JJ., dissenting). They emphasized that plaintiffs had the requisite "personal stake" and that Congress had intended to provide for review of federal grants such as these by persons such as plaintiffs who were "adversely affected." *Id.* at 608. Furthermore, the exercise of judicial resolution would not interfere with the separation of powers doctrine, *id.* at 609, but would, if anything, avoid such problems. "There is need for judicial action where Congress has mandated benefits for a class and where an agency of the Executive Branch fails to carry out that legislative mandate. The contrary would give the Executive Branch a silent veto not provided in the Constitution." *Id.* at 611 (Gurfein, J., dissenting).

208. In an earlier decision in the same case, 408 F. Supp. 879 (D. Conn. 1975), the court dealt with defendants' claim that plaintiffs' "lost opportunity" claim was "bootstrapping": "The defendants' argument that this is 'bootstrapping' fails to understand the nature of a lawsuit, and thereby seeks to convert possession from nine to ten tenths of the law. It often happens that one party to a lawsuit will not have any present interest in funds unless s/he is successful." *Id.* at 886 n.8.

209. 532 F.2d 1273 (9th Cir.), *cert. denied*, 97 S. Ct. 160 (1976).

210. 42 U.S.C. §3601 et seq. (1970).

211. Plaintiffs claimed a precedent in *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), in which the Supreme Court granted standing under the fair housing act to tenants in an apartment complex who claimed that their landlord's alleged racial discrimination denied them the benefits of living in an integrated community. However, the court did not need to apply *Trafficante* since it held that the present action was based on a more restrictive standing grant within the statute. 532 F.2d at 1275-76.

> quite possible that, even absent the defendents' discriminatory practices, [the towns] would still be segregated communities.[212]

This dictum is surprising, for it suggests that otherwise valid civil rights cases might be defeated, since few plaintiffs would be able to account for the numerous contingencies that might also contribute to racial discrimination in society, much less demonstrate that judicial intervention would clearly have the hoped-for effect of alleviating discrimination. One need only look at the aftermath of *Brown v. Board of Education*[213] to comprehend the difficulty of showing a substantial likelihood that the ultimate injury will be remedied.

As *Topic* demonstrates, the less direct the nexus between plaintiffs and the benefits to flow from a particular government program or regulation, the more likely that a court will find an insufficient causal relationship. Once again the zone of interests can be determinative of injury in fact. In *Metcalf v. National Petroleum Council*,[214] plaintiffs[215] challenging the National Petroleum Council for failing to function in accord with the requirements of federal energy legislation were denied standing despite their allegations that they would be injured through higher costs for petroleum products, potential environmental damage, and loss of benefits from the development of alternate sources of energy.[216] The court found these injuries to be speculative and generalized.[217] It also found a "further defect"[218] in plaintiffs' failure to meet the *Warth* causality test. Plaintiffs "failed to allege facts from which it could be reasonably inferred that, absent defendants' actions, the injuries alleged would not have occurred and that, if plaintiffs are granted the relief they seek, the injuries would vanish."[219] This language reveals the distorted focus of the *Warth* test, for never before have courts held that a plaintiff, in order to obtain standing,[220] must demonstrate that his injuries will "vanish" as a result of his lawsuit.

Even though there was an attenuated nexus and a challenged statute that did not directly protect the plaintiffs, the District of Columbia district court

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212. *Id.* at 1275.

213. 347 U.S. 483 (1954).

214. 407 F. Supp. 257 (D.D.C. 1976).

215. Plaintiffs included a United States Senator and a private citizen claiming status as a consumer. *Id.* at 258.

216. They claimed that the Council and its subgroups were unlawfully functioning "because they are not fairly balanced in membership and are improperly influenced by certain petroleum industry special interests, contrary to the express requirements of these statutes." *Id.*

217. *Id.* at 259.

218. *Id.* at 260.

219. *Id.* The court found no "record support" for plaintiffs' assumptions that things would be different if the committee's membership changed. *Id.* at 261.

220. The court shares the concern of Laird v. Tatum, 408 U.S. 1 (1972) that it will be put into a position to monitor "the wisdom and soundness of [e]xecutive action," 407 F. Supp. at 261, *citing* 408 U.S. at 15, a position it clearly does not desire.

still granted standing in *Tax Analysts and Advocates v. Shultz.*[221] Plaintiff[222] challenged a Revenue Ruling that allowed individual donors to escape substantial gift taxes on their contributions,[223] alleging that the ruling injured an individual member of the plaintiff organization in that it "substantially diminish[ed] his ability to affect the electoral process and to persuade elected officials to adopt policies and programs he favored."[224] Although recognizing that the causal link was "somewhat strained,"[225] the court nevertheless granted standing, no doubt swayed by the fundamental nature of the constitutional interest asserted,[226] and by the fact that since *Baker v. Carr*[227] plaintiffs complaining of an adverse impact on their voting power have never been required to show how the provision of a forum will improve the effectiveness of their vote.[228]

Constitutional Cases

It is not clear how the courts will apply the *Warth* causal nexus test in areas of constitutional adjudication. Arguably the prudential dimension of the standing doctrine, relating to a desire to avoid difficult questions of constitutional adjudication, plays a major role in the kind of causal showing required.[229] However these considerations may be offset by indications of strong congressional policy protecting certain interests. Thus when the injury in zoning cases is racial discrimination rather than the inhibition of the right to travel, courts may be more reluctant to ask plaintiffs to meet the *Warth* causal showing test. In *Ybarra v. City of San Jose,*[230] a pre-*Warth* case, the Ninth Circuit struggled with issues similar to those in *Warth* but reached an opposite result.

In *Ybarra* the plaintiffs[231] alleged that defendants had discriminated in

221. 376 F. Supp. 889 (D.D.C. 1974). Although the case was brought under the Administrative Procedure Act, 5 U.S.C. §702 (1970), the court was clearly influenced by the fundamental nature of the constitutional right involved. 376 F. Supp. at 898-99.

222. Plaintiffs included a nonprofit corporation organized to promote tax reform; an unincorporated committee organized to influence the election of candidates; and an individual member and officer of the corporation, who claimed status as a taxpayer, citizen, and a small contributor to election campaigns. *Id.* at 893, 898.

223. Rev. Rul. 72-355, 1972-2 CUM. BULL. 532.

224. 376 F. Supp. at 898. Plaintiffs also alleged that the ruling reduced the influence of small contributors while increasing the influence of large contributors. *Id.*

225. *Id.* at 899. However the Court found it "more persuasive than that which was upheld in *SCRAP* . . . ." *Id.*

226. *See* Note, *Nontaxpayer Challenges to Internal Revenue Service Rulemaking: Constitutional and Statutory Barriers to Judicial Review,* 63 GEO. L.J. 1263, 1272-77 (1975).

227. 369 U.S. 186, 204 (1962).

228. It is interesting to consider how the case might be decided in light of *Eastern Kentucky.* If plaintiffs are required to meet the same "prospects of relief" test imposed on the plaintiffs in *Eastern Kentucky,* who were also challenging a revenue ruling, it could have an important impact on all future voter suits since the test has been treated as a constitutional requirement. See note 159 *supra.*

229. See note 128 *supra* and accompanying text.

230. 503 F.2d 1041 (9th Cir. 1974).

231. Plaintiffs included an unincorporated association, parents of school children and others. *Id.* at 1041.

granting variances, zoning, and building permits in such a way as to create an ethnically imbalanced education system.[232] Although the court clearly could have analyzed the situation as the Supreme Court was later to do in *Warth*, ruling that the intervening economic situation was the "real cause" of the resultant segregation, it did not. Pointing out that "[s]tate action related to land use control, tainted by racial discrimination, had been held violative of the Equal Protection Clause in a variety of other contexts,"[233] the court concluded that it was "not prepared to hold at this stage of the proceedings that relief is necessarily precluded because the injury complained of in this case, segregated schools, is one step removed from the cause."[234]

As *Ybarra* demonstrates, the assertion of constitutional rights to be free of race and sex discrimination is frequently sufficient to relax the type of causal showing necessary for standing, both because of a strong congressional policy in this area and because of the difficulty of proving exact causal relationships, even at trial.[235] The cases may also be distinguished by the fact that racial discrimination was alleged as the injury in fact in *Ybarra*, and was not merely, as in *Warth*, an indirect result of the alleged low-income exclusionary zoning. Furthermore, in *Ybarra* plaintiffs challenged the town's discriminatory granting of variances rather than general zoning which indirectly excluded low-income persons.

In the area of first amendment rights the *Warth* causality test has also had little immediate impact. In two post-*Warth* cases courts have granted standing to plaintiffs claiming invasions of their first amendment rights because of illegal surveillance, despite the precedents of *Laird* and *Warth*. In *Paton v. LaPrade*[236] the Third Circuit was willing to grant standing to a high school student who alleged that the FBI's illegal possession of a dossier with her name on it threatened injury to her since she eventually planned to enter the foreign service.[237] Although the court clearly could have found, as in *O'Shea*,[238] that too many contingencies stood between the challenged action and the threatened injury, and that therefore the injury was merely speculative, instead it granted standing, holding that the plaintiff need not

232. *Id.* at 1044.

233. *Id.* at 1043.

234. *Id.* The plaintiffs' failure to own land in the affected areas was not a bar to standing since "[t]he causal relationship between that injury [segregated schools] and the alleged discriminatory administration of zoning ordinances is not so attenuated as to deny standing at least to the minor plaintiffs." *Id.* at 1044.

235. For an exploration of the type of causal showing necessary in employment discrimination cases, see Note, *Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal*, 89 HARV. L. REV. 387, 391-93 (1975).

236. 524 F.2d 862 (3d Cir. 1975).

237. *Id.* at 868. The issue arose on a motion for summary judgment. The court cited *Warth* for the proposition that the existence of the injury should be determined from the pleadings and any "undisputed facts in the affidavits." *Id.* at 867. But it added that "summary judgment denying standing should be entered only if the allegations of injury are shams and the affidavits raise no genuine issues of fact." *Id.*, citing United States v. SCRAP, 412 U.S. at 689. Here it found sufficient allegations of an injury for standing.

238. O'Shea v. Littleton, 414 U.S. 488 (1974).

"point with mathematical certainty to the exact consequences" that would flow from the government's possession of the files.[239] The court was clearly affected by the nature of the material in the file,[240] the allegations of illegality, and the fact that a specific injury to an individual was alleged.[241]

A similar result was reached in *Lowenstein v. Rooney*,[242] in which a legislator and former congressional candidate sued various government officials, asking for the destruction of files acquired by illegal government surveillance.[243] The court found that the controversy was sufficiently delineated to survive a motion to dismiss since the files were still in existence and the government's actions were alleged to be illegal and in bad faith.[244] Significantly, the court did not require any showing of a future impact from the existence of the files.

CONCLUSION

Recent standing cases have introduced new questions into the already complex standing field concerning the nature of the causal connection between the challenged action and the injury. Although courts have always recognized the need for a causal connection to have a "live" controversy, early standing cases rarely turned on causal issues. It is only in recent years, with the reduction of standing requirements to the single test of injury in fact, that the causality issue has gained such prominence.

Much of the present confusion concerning causality seems attributable to the amorphous nature of the injury in fact test. Although the test is extremely useful in liberalizing standing if a clear tangible injury and a clear causal nexus exist, it is practically meaningless as a guide if the injury is less palpable and there is a more attenuated causal relationship between the injury and the challenged action. Here a closer look at the possibilities and limits of causal analysis is vital if the standing doctrine is to serve any useful purpose in identifying the parties who will be heard in the federal court.

Courts use causal determinations on standing in three situations: (1) to eliminate cases when it is clear from the pleadings that the challenged action is not or will not be a cause of the plaintiff's injury;[245] (2) to make policy

239. 524 F.2d at 868, *citing* Menard v. Saxbe, 498 F.2d 1017, 1023 (D.C. Cir. 1974).

240. Plaintiff had mistakenly written for information from the Socialist Workers Party as part of a class assignment. 524 F.2d at 865. As a result of a mail cover, FBI records now included an index card bearing her name and a symbol for "subversive matter." *Id.* at 866. The court noted that "history of a not too distant era has demonstrated that future misuse of a file labeled 'subversive material' can prove extremely damaging." *Id.* at 868.

241. The allegations of illegality and the concreteness of the injury distinguish the facts from Laird v. Tatum, 408 U.S. 1 (1972). *See* 524 F.2d at 868-69.

242. 401 F. Supp. 952 (E.D.N.Y. 1975).

243. The question before the court in this case, as with *Paton* and *O'Shea*, was whether the "injuries claimed are not so subjective and non-specific as to justify invok[ing] the judicial power . . . ." *Id.* at 956, *citing Ex parte* Lévitt, 302 U.S. 633, 634 (1937).

244. *Id.* at 958-59.

245. *See, e.g.*, Rodos v. Michaelson, 527 F.2d 582 (1st Cir. 1975); Independent Bankers Ass'n. of America v. Smith, 402 F. Supp. 207 (D.D.C. 1975).

decisions, in line with tort proximate cause concepts, that the defendant owes no duty to the plaintiff, and that therefore his illegal act has not directly caused the injury;[246] and (3) to evaluate cases where complex factors impinge on a more or less attenuated relationship between challenged action and alleged injury in order to determine whether as a matter of constitutional law or judicial policy the controversy is sufficiently sharp to warrant judicial intervention.[247]

There is a place for causal analysis in standing decisions, particularly in the first situation. Causal analysis, however, is misleading in the second instance, where "duty" concepts would be more appropriate. The third situation obviously requires the most attention, since here valid questions of whether the injury/violation relationship is sufficiently close to present a case or controversy may often be mixed with prudential considerations of limiting judicial resources and avoiding constitutional determinations until absolutely necessary. The nebulous nature of the injury in fact requirement, particularly where no palpable economic injury is alleged, contributes to this problem of mixing prudential and constitutional considerations without sufficiently distinguishing between the two.

The Burger Court, confronting the third situation, has developed a new rule for the requisite causal showing when the relationship between the challenged action and the injury is attenuated or indirect. While this test purports to be part of the constitutional standing requirement, it seems instead to be an exercise of the court's prudential powers, since it requires a type of showing which most federal plaintiffs have not been required to — and probably could not — meet. Since the federal courts no longer recognize policy reasons for denying standing, at least in determining whether the injury in fact standard is met, the additional test serves to separate sharply defined cases from those whose issues are less distinct. However this should be recognized as a prudential use of the standing doctrine rather than as an element of the constitutional injury in fact test.

Courts must recognize what they are doing when they make causal decisions regarding standing. First they should distinguish, to the degree possible, between cause in fact and policy cause questions. Second, they should analyze the causal showing in terms of what is constitutionally required, following the *Conley v. Gibson*[248] rule that any allegation of a probable nexus is sufficient for constitutional case or controversy purposes. A refusal to hear such a case might properly be based on the court's prudential powers to refuse standing, or on the nonexistence of a claim for relief, but not on the lack of a justiciable case or controversy. Finally, courts should attempt to analyze the injury in fact in terms of the claim upon which it is based to avoid imposing impossibly high cause in fact requirements on plaintiffs who are alleging injury to a beneficial opportunity.

246. *See* Loeb v. Eastman Kodak Co., 183 F. 704, 709 (3d Cir. 1910); *but see* Relf v. Weinberger, 372 F. Supp. 1196, 1201 (D.D.C. 1974).

247. *See* Topic v. Circle Realty Co., 532 F.2d 1273 (9th Cir.), *cert. denied*, 96 S. Ct. 160 (1976).

248. 355 U.S. 41 (1957).

While it is unlikely that many standing decisions will clearly articulate the various factors that underlie a particular causal finding, an awareness of the elements that play a role may help future courts base their decisions on reasonably neutral principles. Perhaps some direction can be found in examining the approach the lower federal courts have developed in handling causal questions. These courts are clearly engaging in a balancing test in determining what causal showing is necessary for standing by weighing the traditional constitutional and prudential reasons for refusing standing where an insufficient or attenuated causal nexus exists against factors which favor a looser causal nexus. Although the result is a fluctuating causal test that varies with the conditions of each case, rather than a steady application of a single principle, given the variety of cases in which the issue arises, and the amorphous nature of the injury in fact standard, perhaps this is the only functional solution.

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