Cornell Law Review

Volume 65
Issue 3 *March 1980*

Article 3

Fact Pleading Notice Pleading and Standing

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FACT PLEADING, NOTICE PLEADING, AND STANDING

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> All too often judges and law professors alike condemn the technicalities of the procedural methods and then turn about and for lack of understanding achieve results more technical than any experienced student of the history of procedure would think of even suggesting. . . . [A] brilliant court may show a general impatience with procedural delays and faults only to make some of the strangest of procedural rulings, either without appreciating their significance and how far they are departing from modern viewpoints or in an endeavor to rid themselves of unattractive cases through an assumed procedural fault. But such omissions come back to plague us mightily.
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> —*Charles Clark*[1]

The law of standing has undergone a complex transformation during the past two decades. In its 1962 decision in *Baker v. Carr*[2] the Supreme Court substantially relaxed the doctrine's frequently illogical and inflexible barriers against judicial review of government activities. With that case the Court began to reexamine the standing doctrine, apparently searching for a firm conceptual foundation upon which to set this most "complicated specialty of federal jurisdiction."[3] This effort, however, has largely miscarried. Although standing's earlier rigidity has substantially softened, its notorious illogical flaws remain. And in practice it is applied more capriciously than ever before.

This malaise cannot be traced to any single cause, but an important factor has been the Court's consistent failure to appreciate elementary procedural considerations,[4] particularly in the area of

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[1] Clark, *The Handmaid of Justice*, 23 WASH. U.L.Q. 297, 304 (1938), *reprinted in* C. CLARK, PROCEDURE—THE HANDMAID OF JUSTICE 73 (1965) [hereinafter cited without cross-reference as CLARK].

[2] 369 U.S. 186 (1962).

[3] United States *ex rel.* Chapman v. FPC, 345 U.S. 153, 156 (1953) (Frankfurter, J.).

[4] The late Judge Clark observed that the inability to grasp the implications of procedure is an historic failing of the legal profession:

> [W]hile a greater degree of legal sophistication is usually needed than in the

pleading. In its more than forty years[5] of existence federal "notice pleading"[6] has achieved widespread acceptance. This consensus evaporates where standing is concerned. At various times during the past ten years the Supreme Court, while manipulating access to courts through the standing doctrine, has managed to apply pleading standards ranging from conventional notice pleading to the most stringent and anachronistic fact pleading.

This confusion over standing's relationship to notice pleading has generated consequences far more serious than mere offense to the procedural purist. It has thwarted the policies behind notice pleading. In addition, it has hampered the Court's efforts to fashion a rational, equitable, and consistent law of standing. Despite the extensive and valuable literature[7] on standing, surprisingly scant attention has been paid to this phenomenon or to any facet of the procedural context in which substantive standing doctrine must function.[8] A study of the relationship between the substantive and procedural sides of standing can therefore provide a fresh—and badly needed—perspective.

This Article will begin with a broad survey of the elements of this relationship—notice pleading and substantive standing

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> substantive field to appreciate subtle nuances of procedural causes and effects and their interrelation, yet the subject is often approached with a blitheness, indeed a naiveté, on the whole appalling. There are, however, natural reasons for this, which stem from the apparent simplicity of the subject and the small regard for it currently held by the profession.

Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 VAND. L. REV. 493, 496-97 (1950), *reprinted in* CLARK 128.

[5] The federal rules were adopted by the Supreme Court on December 20, 1937 (302 U.S. 783 (1937)), and became effective September 16, 1938 (McCrone v. United States, 307 U.S. 61, 65 (1939)). 12 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3181, at 250 (1973) [hereinafter cited without cross-reference as WRIGHT & MILLER or, for volumes co-authored by E. Cooper, as WRIGHT, MILLER & COOPER].

[6] The term "notice pleading" has achieved wide currency as a convenient shorthand description of the federal approach to pleading. *See, e.g.*, Conley v. Gibson, 355 U.S. 41, 47 (1957). Nowhere, however, do the federal rules use that term, and Judge Clark, one of the most influential of the rules' authors, objected vigorously to it as a vague and inappropriate "abstraction." Clark, *To an Understanding Use of Pre-Trial*, 29 F.R.D. 454, 457 (1962), *reprinted in* CLARK 156. Similar reservations are voiced in 5 WRIGHT & MILLER § 1202, at 63-64 (1969). The ambiguity of the federal pleading standard contained in rule 8(a)(2) is partially responsible for this debate over characterization of the standard. *See* text accompanying notes 184-86 *infra*.

[7] For references, see 13 WRIGHT, MILLER & COOPER § 3531, at 175 n.1 (1975).

[8] There are two notable exceptions. *See* Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425, 425-26 (1974) (standing should be viewed as a substantive question not separate from merits); Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 667 (1973) (standing cases can turn on technical rules of pleading).

doctrine—and of the inconsistent ways they have been manipulated by the Court. It will then examine in more detail the history of the current confusion regarding the role of pleading in standing. The causes and costs of this confusion will be explored in the third part of the Article.

This exploration will show that although some confusion derives from each element of the pleading-standing relationship, the principle difficulty is with substantive standing doctrine, not notice pleading. Based on this analysis, the remainder of the Article will then suggest modifications of standing doctrine to cure these difficulties.

I

CURRENT STANDING AND PLEADING DOCTRINES

A. *Standing Generally*

The roots of the standing requirement lie in article III's cryptic restriction of the federal judicial power to "cases" and "controversies."[9] Since it is not self-evident what qualifies as a "case" or "controversy"[10] several related concepts, collectively called "justiciability," have been developed. A complex blend of constitutional requirements and policy considerations,[11] the various justiciability doctrines traditionally have been viewed as hurdles that must be cleared at the threshold of litigation before a court may proceed to the merits. Thus, if the court finds that plaintiff is asking only for an advisory opinion,[12] or finds that the parties have the same rather than opposing interests,[13] it will proceed no further and will dismiss the action immediately. Similarly,

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[9] U.S. CONST. art. III, § 2.

[10] As Chief Justice Warren once observed, "[T]hose two words have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government." Flast v. Cohen, 392 U.S. 83, 94 (1968). Although "case" occasionally is distinguished from "controversy," such usage is comparatively rare. 13 WRIGHT, MILLER & COOPER § 3529, at 147. The two terms will be used synonymously throughout this Article.

[11] Flast v. Cohen, 392 U.S. 83, 92-97 (1968). *Compare* Frothingham v. Mellon, 262 U.S. 447, 480, 488-89 (1923) (taxpayer standing denied) *and* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 150 (1951) (concurring opinion, Frankfurter, J.) (plaintiff can have standing only in cases that would have been heard in eighteenth century England and America) *with* Baker v. Carr, 369 U.S. 186, 204-08 (1962) (voter standing granted to allow suit to challenge debasement of voting power).

[12] Flast v. Cohen, 392 U.S. 83, 96 (1968). *See also* 13 WRIGHT, MILLER & COOPER § 3529, at 154-62.

[13] Moore v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 47, 48 (1971). *See also* 13 WRIGHT, MILLER & COOPER § 3530.

it will dismiss if it finds that the issues are not yet ripe for judicial resolution[14] or, conversely, that they have been rendered moot by developments subsequent to the filing of the action.[15]

Standing is easily among " 'the most amorphous' "[16] of the justiciability doctrines. It focuses on the identity of the party seeking to get his claim or defense before a federal court rather than on the particular issue he wishes to have adjudicated. The question of standing is whether a litigant is a proper person to seek adjudication of the issue, and not whether the issue itself is justiciable.[17] For example, in the so-called jus tertii, or third party standing cases, courts must decide whether a litigant may assert in his own behalf rights vested in a third person. Classic cases of this type concerned doctors' attempts to assert their patients' constitutional privacy rights to use birth control devices.[18]

Questions of standing arise in a wide variety of factual and legal contexts. This Article will focus on the area generating the greatest current concern and confusion: the standing of a private plaintiff to obtain judicial review of the legality of government actions.[19] Despite this limitation, standing questions still arise in extraordinarily diverse situations. As a *taxpayer*, a plaintiff may seek to establish his standing to challenge government expenditures at the federal,[20] state,[21] or local[22] level. In addition, by

[14] Roe v. Wade, 410 U.S. 113, 127-29 (1973). *See also* 13 WRIGHT, MILLER & COOPER § 3532.

[15] DeFunis v. Odegaard, 416 U.S. 312, 315, 317 (1974). *See also* 13 WRIGHT, MILLER & COOPER § 3533.

[16] Flast v. Cohen, 392 U.S. 83, 99 (1968) (quoting *Judicial Review: Hearings on S. 2097 Before the Subcomm. on Constitutional Rights of the Senate Judiciary Comm.*, 89th Cong., 2d Sess. 498 (1966) (statement of Paul A. Freund)).

[17] Flast v. Cohen, 392 U.S. 83, 99-100 (1968).

[18] *Compare* Tileston v. Ullman, 318 U.S. 44 (1943) (per curiam) (no standing where constitutional rights of another are raised in declaratory judgment action) *with* Griswold v. Connecticut, 381 U.S. 479 (1965) (acknowledging standing to raise constitutional rights of others as defense to criminal prosecution).

[19] Many interesting topics could not be dealt with in this Article. A prime question concerns a defendant's standing to raise certain defenses. *See, e.g.*, Brown v. United States, 411 U.S. 223 (1973) (criminal); NAACP v. Alabama, 357 U.S. 449 (1958) (civil). In addition, there is the question of standing in actions between purely private parties. *See generally* Tyler, *Private Antitrust Litigation: The Problem of Standing*, 49 COLO. L. REV. 269 (1978). A final topic not fully discussed here is third party or jus tertii standing. *See generally* Sedler, *Standing to Assert Jus Tertii in the Supreme Court*, 71 YALE L.J. 599 (1962).

[20] *See, e.g.*, Flast v. Cohen, 392 U.S. 83 (1968) (taxpayer standing granted); Frothingham v. Mellon, 262 U.S. 447 (1923) (taxpayer standing denied).

[21] *See, e.g.*, Doremus v. Board of Educ., 342 U.S. 429 (1952) (no taxpayer standing to challenge state law requiring Bible reading in public schools because no financial injury was alleged).

[22] *See, e.g.*, Crampton v. Zabriskie, 101 U.S. 601 (1880) (resident standing granted to challenge county creation of debt).

virtue of his status as a *citizen,* a plaintiff may seek standing to challenge government action.[23] Or he may seek standing as a *competitor* of someone benefited by government action.[24]

As presently articulated by the Supreme Court, the principal touchstone of standing is "injury in fact," requiring proof that plaintiff was injured by the particular government action he seeks to challenge. Thus the Supreme Court denied the Sierra Club standing to challenge the legality of United States Forest Service plans for commercial development of a wilderness area.[25] The Court never reached the merits of the challenge because, it said, there was no indication that the organization or any of its members had ever used the wilderness area or would in any way be adversely affected by its development.[26]

Injury in fact would seem to be a simple test for standing, but several Supreme Court opinions have introduced considerable complexity by radically restricting the range and types of qualifying "injuries." A purely abstract injury will not suffice;[27] it must be a "concrete,"[28] "particularized" injury not shared by the public generally.[29] The Sierra Club, for example, could not base standing upon its or its members' interest in seeing that the Forest Service abide by its own rules and regulations, for such interest was merely abstract and undifferentiated from the general public interest in lawful governance. Standing has been further complicated by the Court's sporadic emphasis upon elements of causation and remediability,[30] involving intricate proof that plaintiff's injury was caused by the government activity and that it can effectively be remedied by judicial action. The inherent difficulties of these requirements have been magnified by the Court's procedural treatment of them—particularly in the area of pleading.

[23] *See, e.g.,* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) (citizen standing denied for challenge to Congressmen's holding of additional government positions in violation of incompatibility clause).

[24] *See, e.g.,* FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940) (standing granted to challenge FCC's granting of license to competitor); Tennessee Elec. Power Co. v. TVA, 306 U.S. 118 (1939) (no standing to sue federal government as competitor).

[25] Sierra Club v. Morton, 405 U.S. 727 (1972).

[26] *Id.* at 735.

[27] *See, e.g.,* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 216-25 (1974).

[28] *See, e.g., id.* at 224; United States v. Richardson, 418 U.S. 166, 177 (1974).

[29] *See, e.g.,* Warth v. Seldin, 422 U.S. 490, 499 (1975); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220 (1974); United States v. Richardson, 418 U.S. 166, 177 (1974).

[30] *See, e.g.,* Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 42-43 (1976); Warth v. Seldin, 422 U.S. 490, 504 (1975); Linda R.S. v. Richard D., 410 U.S. 614, 618 (1973).

B. *Pleading Generally*

The development of federal notice pleading is well known and need be sketched here only briefly.[31] Until New York adopted the Field Code[32] in 1848,[33] a general theory of pleading was unnecessary and nonexistent since in common law procedure each form of action had its own discrete pleading formula. In common law pleading, plaintiff's most difficult preliminary task was not drafting the initial pleading but choosing the correct writ from among the variety available.[34] Once he had selected a writ, the language of his declaration followed largely as a matter of course.[35]

The Field Code, which was quickly adopted in most other American jurisdictions,[36] required that the initial pleading contain a "plain and concise statement of the facts constituting a cause of action without unnecessary repetition."[37] Widespread misunderstanding of and resistance[38] to this "fact pleading" standard soon resulted in an unwieldy hierarchy of "facts," only a fraction of which could properly be pleaded. The courts developed three categories of pleaded facts: "evidentiary facts," "conclusions," and "ultimate facts."[39] Only ultimate facts satisfied the pleading standard; evidentiary facts and conclusions within a pleading could not state a claim.[40] This scheme placed considerable emphasis on

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[31] *See generally* Clark & Moore, *A New Federal Civil Procedure—I. The Background*, 44 YALE L.J. 387 (1935), *reprinted in* CLARK 8; Clark & Moore, *A New Federal Civil Procedure—II. Pleadings and Parties*, 44 YALE L.J. 1291 (1935), *reprinted in* CLARK 43.

[32] The New York Code of Civil Procedure was popularly known after its principal author, David Dudley Field. *See generally* C. CLARK, CODE PLEADING § 7, at 22 (2d ed. 1947); R. FIELD, B. KAPLAN & K. CLERMONT, CIVIL PROCEDURE 355-59 (4th ed. 1978).

[33] Act to Simplify and Abridge the Practice, Pleadings, and Proceedings of the Courts of the State, ch. 379, 1848 N.Y. Laws 497.

[34] *See* 5 R. POUND, JURISPRUDENCE § 145, at 445 (1959).

[35] Although the initial pleadings could vary within a given form of action the writ chosen by the plaintiff dictated the essence of a declaration. Within a particular form there was much less flexibility—and hence more certainty—in common law pleading than in either code or federal practice.

[36] C. CLARK, *supra* note 32, § 8, at 24-25.

[37] Act to Amend the Code of Procedure, ch. 479, § 142, 1851 N.Y. Laws 887. This was a modification of the similar but somewhat more prolix standard established three years earlier in the original code. *See generally* Act to Simplify and Abridge the Practice, Pleadings, and Proceedings of the Courts of the State, ch. 379, § 120(2), 1848 N.Y. Laws 521.

[38] *See* 5 R. POUND, *supra* note 34, § 146, at 486.

[39] The most significant distinction was between ultimate facts and conclusions. According to one influential scholar, a conclusory allegation had "a legal coloring," while an allegation of ultimate fact presented the facts "in their actual naked simplicity." J. POMEROY, CODE REMEDIES § 423, at 640 (5th ed. 1929).

[40] Thus condemned to the special hell reserved for conclusions were, for example, allegations that defendant was "indebted" to plaintiff (Aetna Ins. Co. v. Heneley, 215 Ky.

hypertechnical artifices of pleading and produced inconsistent judicial interpretations of the adequacy of a complaint's allegations.[41] Contemporary scholars stressed the high social cost of the system,[42] arguing that any gains in precise issue-identification came at the expense of many otherwise valid claims that were dismissed for inadequate pleadings.[43]

Further efforts at pleading reform finally culminated in the Federal Rules of Civil Procedure, which became effective in 1938.[44] The key provision, rule 8(a), abolished fact pleading and required only "a short and plain statement of the claim showing that the pleader is entitled to relief."[45] This provision was designed to avoid the distinctions drawn under the codes among evidentiary facts, ultimate facts and conclusions.[46]

Surprisingly, not until *Conley v. Gibson*,[47] nineteen years later, did the Supreme Court end all doubt and emphatically lay the fact-conclusion dichotomy to rest. In a passage which, together with rule 8(a), has remained the general keystone of federal pleading,[48] the *Conley* Court held:

45, 284 S.W. 425 (1926) (allegation conclusory); *but see* Gillespie Bros. v. Page, 87 S.C. 82, 68 S.E. 1044 (1910) (allegation allowed)), and that one person was the "heir" of another (Cohen v. Doran, 58 Fla. 418, 51 So. 282 (1910) (allegation insufficient); *but see* Dibble v. Winter, 247 Ill. 243, 93 N.E. 145 (1910) (allegation sufficient)).

[41] For example, a general allegation of "ownership" appears usually to have been accepted as one of ultimate fact. *See* Aronson & Co. v. Pearson, 199 Cal. 295, 249 P. 191 (1926). *But see* Lapique v. Walsh, 50 Cal. App. 82, 195 P. 296 (1921) (per curiam) (in bank).

With respect to certain matters, such as the bare allegation of "consideration," there never was widespread agreement. *Compare* Magee v. Magee, 174 Cal. 276, 162 P. 1023 (1917) (allegation sufficient) *with* California Packing Corp. v. Kelly Storage & Distrib. Co., 228 N.Y. 49, 126 N.E. 269 (1920) (allegation conclusory and insufficient). Negligence was an especially troublesome area. Although a naked allegation that someone was "negligent" was usually treated as a mere conclusion (*see* C. CLARK, *supra* note 32, § 47, at 298), there was little agreement as to the degree of additional detail required (*compare* Hanson v. Anderson, 90 Wis. 195, 62 N.W. 1055 (1895) (sufficient to allege defendant drove carriage at high speed and negligently collided with plaintiff's carriage) *with* Kramer v. Kansas City Power & Light Co., 311 Mo. 369, 279 S.W. 43 (1925) (insufficient to allege that defendant's actions caused unreasonably unsafe condition because that is conclusion—must allege what, in fact, defendant did do or should have done)).

[42] *See, e.g.*, 5 R. POUND, *supra* note 34, § 146, at 492-501; Cook, *Statements of Fact in Pleading under the Codes*, 21 COLUM. L. REV. 416 (1921).

[43] It was estimated in 1918 that in American jurisdictions using code pleading one judgment in twenty was reversed on a question of pleading. Whittier, *Notice Pleading*, 31 HARV. L. REV. 501, 507-09 (1918). Even this study, however, failed to deal with the more pressing problem: inefficiency of code pleading at the *trial* level.

[44] *See* note 5 *supra*.

[45] FED. R. CIV. P. 8(a)(2).

[46] *See* 5 WRIGHT & MILLER §§ 1216, 1218, at 115, 133-34.

[47] 355 U.S. 41 (1957).

[48] In an earlier case, United States v. Employing Plasterers' Ass'n, 347 U.S. 186, 187-88

> In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. . . .
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> . . . .
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> The respondents also argue that the complaint failed to set forth specific facts to support its general allegations of discrimination and that its dismissal is therefore proper. The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.[49]

The *Conley* Court further stated that notice pleading rejected the notion that pleading should be "a game of skill in which one misstep by counsel may be decisive to the outcome."[50] The task of further issue-identification was assigned to discovery and other pretrial procedures where it would be accomplished more accurately and economically.[51]

C. *Application of Notice Pleading to Standing*

Although standing may be an extraordinarily difficult question in certain cases, it does not require special rules of pleading. In particular, its uniqueness does not compel resurrection of the artificial and trap-laden distinction between "facts" and "conclusions." *Conley* indicates that allegations of standing—as any other element of the plaintiff's claim—should be construed liberally; a dismissal motion should be denied if facts consistent with plaintiff's allegations can reasonably be hypothesized which, if proved, would support standing. Just as precise and ultra-specific identification of every tiny technical element of a cause of action is not demanded at the pleading stage, it should not be expected in the area of standing. Similarly, discovery and other pretrial procedural mechanisms should be employed to identify and develop

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(1954), the Supreme Court had also rejected the conclusion-ultimate fact dichotomy under the federal rules. *Employing Plasterers'*, however, never achieved *Conley*'s notoriety and is cited with relative infrequency.

[49] 355 U.S. at 45-46, 47 (citing Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944); Continental Collieries, Inc. v. Shober, 130 F.2d 631 (3d Cir. 1942); Leimer v. State Mut. Life Assur. Co., 108 F.2d 302 (8th Cir. 1940)) (second footnote omitted).

[50] 355 U.S. at 48. *See also* note 6 *supra*.

[51] 355 U.S. at 47-48; 5 WRIGHT & MILLER § 1202, at 59-60.

relevant facts and issues surrounding questions of standing. Finally, logic suggests that any deviations from accepted pleading norms should not occur without substantial justification.

United States v. Students Challenging Regulatory Agency Procedures (SCRAP),[52] decided by the Supreme Court in 1973, fulfilled most of these expectations by reconciling standing to notice pleading standards. Disturbed by orders of the Interstate Commerce Commission (ICC) granting temporary rate surcharges to substantially all of the railroads in the United States, five law students formed an unincorporated association which then sought judicial review of those orders. SCRAP's complaint alleged that its members had suffered injury in fact because the increased freight rates would discourage recycling of waste materials, thereby increasing air pollution and other environmental damage.[53] Justice Stewart, writing for the Court, recognized that the line of causation alleged in the complaint was "attenuated"[54] but held the complaint was sufficient to withstand a dismissal motion. The legal sufficiency of the allegations, he held, should be tested through the summary judgment process.[55] To defendant's objection that the complaint was too imprecise to allow formulation of responsive pleadings, he suggested that sufficient clarity could be achieved by rule 12(e)[56] motions for a more definite statement, together with normal civil discovery.[57]

Although this was an unexceptional application of federal notice pleading, it did not go unchallenged. Justice White, in dissent, observed:

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[52] 412 U.S. 669 (1973).

[53] Justice Stewart summarized the allegations:

> Specifically, SCRAP alleged that each of its members was caused to pay more for finished products, that each of its members "[u]ses the forests, rivers, streams, mountains, and other natural resources surrounding the Washington Metropolitan area and at his legal residence, for camping, hiking, fishing, sightseeing, and other recreational [and] aesthetic purposes," and that these uses have been adversely affected by the increased freight rates, that each of its members breathes the air within the Washington metropolitan area and the area of his legal residence and that this air has suffered increased pollution caused by the modified rate structure, and that each member has been forced to pay increased taxes because of the sums which must be expended to dispose of otherwise reusable waste materials.

Id. at 678.

[54] *Id.* at 688.

[55] *Id.* at 689.

[56] FED. R. CIV. P. 12(e).

[57] 412 U.S. at 689 n.15.

> To me, the alleged injuries are so remote, speculative, and insubstantial in fact that they fail to confer standing. . . . [If these allegations] are sufficient here, we are well on our way to permitting citizens at large to litigate any decisions of the Government which fall in an area of interest to them and with which they disagree.[58]

What is most noteworthy about both *SCRAP* opinions is not that they differed regarding the sufficiency of plaintiff's standing allegations. It is, rather, the appalling casualness with which each approached the whole problem of pleading. Justice Stewart's majority opinion, for example, squarely rested on *Conley* principles, yet he failed even to hint at the existence of that case or of rule 8(a). Nor was Justice White's dissent any better crafted. Whatever their disagreements, both opinions shared an unstated premise that problems of pleading are self-answering, too trivial to warrant careful analysis.[59]

However unsatisfactory its analytical process may have been, the Court in *SCRAP* appeared committed to the application of normal notice pleading principles in the area of standing. Its resolve lasted precisely two years. In *Warth v. Seldin*[60] plaintiffs challenged certain zoning ordinances and practices of the town of Penfield, New York, that were allegedly designed to exclude persons of low and moderate income from residing in the town. Their complaint alleged several concrete injuries that the challenged practices had inflicted on them personally.[61] Although these allegations clearly met *Conley* and *SCRAP* standards,[62] Justice Powell, for the majority, ruled them insufficient. He characterized the allegations as fatally "conjectural"[63] and "conclusory."[64] Making clear that this was not just a slip of the pen,

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[58] *Id.* at 723.

[59] Later sections will demonstrate that the Court's opinions have continued to share this premise, even as the quagmire has deepened. *See* notes 94-157 and accompanying text *infra*.

[60] 422 U.S. 490 (1975).

[61] For example, one group of plaintiffs, property owners in the nearby city of Rochester, alleged that Penfield's exclusionary zoning practices had increased their city's tax rates by forcing low-income residents into Rochester where they were subsidized. *Id.* at 496. Other plaintiffs alleged that the practices had prevented them from acquiring residential property in the town, thus forcing them and their families to live in less attractive environments. *Id.* Still another plaintiff, an association of building contractors, alleged that the challenged practices had deprived its member firms of profits by preventing construction of low- and moderate-cost housing in Penfield. *Id.* at 497.

[62] Compare especially the allegations in *SCRAP, summarized in* note 53 *supra*.

[63] 422 U.S. at 509.

[64] *Id.* at 503.

Justice Powell then held that "[p]etitioners must allege *facts*"[65] from which the necessary causation and remediability could be inferred.

> [I]t is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further *particularized allegations of fact* deemed supportive of plaintiff's standing. If, after this opportunity, the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed.
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> . . . .
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> We hold only that a plaintiff who seeks to challenge exclusionary zoning practices must allege *specific, concrete facts* demonstrating that the challenged practices harm *him*, and that he personally would benefit in a tangible way from the court's intervention.[66]

No comfortable gloss can be put on *Warth*'s resolution of the standing issue. It is grounded in expediency, not in logic and certainly not in earlier cases or the federal rules. Justice Powell's opinion failed to acknowledge the existence of rule 8(a) or *Conley*;[67] nor did it make more than the most superficial of references to *SCRAP*.[68] As Justice Brennan observed in dissent: "To require [plaintiffs] to allege such facts is to require them to prove their case on paper in order to get into court at all, reverting to the form of fact pleading long abjured in the federal courts."[69]

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[65] *Id.* at 504 (emphasis added).

[66] *Id.* at 501-02, 508 (first and second emphases added) (footnote omitted).

Further underscoring the distance Justice Powell put between himself and *Conley* are repeated instances where he construed specific allegations most strongly *against* the pleader—drawing all possible inferences negating the conclusion of standing. *Id.* at 505 n.15, 507 n.16. Justice Powell concluded that certain plaintiffs had not adequately pleaded actual injury. He based this conclusion on observations prefaced by such qualifications as "apparently," "it is doubtful," "the matter is left entirely obscure," "presumably," "strongly suggests," and "must be assumed." Rule 8(f), of course, commands that "[a]ll pleadings shall be construed so as to do substantial justice." FED. R. CIV. P. 8(f). This reflects a preference for resolving lawsuits on their merits and not at the pleading stage; rule 8(f), thus, has been interpreted as abolishing the code practice of construing pleadings most strongly against their drafters. *See* 5 WRIGHT & MILLER § 1286, at 381.

[67] But the opinion does cite Jenkins v. McKeithen, 395 U.S. 411, 421-22 (1969), for the proposition that the complaint is to be liberally construed in ruling on a dismissal motion. 422 U.S. at 501. If *Warth* reflects a "liberal construction," one can only wonder what a strict construction would have produced.

[68] Its most pertinent reference to *SCRAP*, ironically, is for the proposition that " 'pleadings must be something more than an ingenious academic exercise in the conceivable.' " 422 U.S. at 509 (quoting United States v. SCRAP, 412 U.S. 669, 688 (1973)).

[69] *Id.* at 528. Justice Brennan also noted, probably correctly, that the specificity demanded by the Court was "unachievable." *Id.*

Just as *SCRAP* had appeared to commit the Court to the use of normal notice pleading principles in the area of standing, *Warth* appeared to signal resurrection of a particularly harsh variation of fact pleading. But such a conclusion would be hasty. Although in both cases the Court examined in detail the pleadings and their construction, it never approached the task in a systematic fashion. In neither case did it undertake even a cursory examination of pleading standards or of their relation to standing. Both cases share a bland unconcern about the subject. Thus, despite their significant impact on pleading standards, neither case can be considered a purposive enunciation of a uniform standard of pleading in the area of standing.

The recent decision in *Duke Power Co. v. Carolina Environmental Study Group*[70] buttresses the conclusion that the Court has failed to adopt a consistent standard of pleading, whether "notice," "fact" or otherwise. The plaintiffs in this class action were landowners and residents of property located near two nuclear plants being constructed in North and South Carolina by the defendant.[71] They challenged the constitutionality of the Price-Anderson Act's[72] imposition of a $560 million liability ceiling for nuclear accidents involving federally licensed nuclear power plants. Chief Justice Burger, writing for the Court, held that plaintiffs had standing. Although the complaint contained allegations that could have been labeled unacceptably "conclusory" and "conjectural"[73] under *Warth*, the Court swept past them and avoided the difficult choice between the very different pleading philosophies of *SCRAP* and *Warth* by simply ignoring them.

Absolute consistency is rarely found in any area of law, but the extreme discord among *SCRAP*, *Warth*, and *Duke Power* is unusual. The resolution of this problem of the relationship between pleading and standing should begin by tracing in some detail how it evolved.

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[70] 438 U.S. 59 (1978).

[71] *Id.* at 67.

[72] 42 U.S.C. § 2210 (1976).

[73] The complaint was amended twice. In its final form it contained allegations that: "there is *not insubstantial risk* of a nuclear disaster" (Second Amended Complaint at 31 (emphasis added)); "[i]f such a disaster occurs, the aggregate amount of damage . . . will *in all probability* exceed [the statutory limit]" (*id.* (emphasis added)); "[b]ut for [the statutory limits on liability] Duke . . . *at the very least* would obtain insurance" (*id.* at 32 (emphasis added)); and, lastly, that the granting of declaratory relief would *"cause Congress to amend* the Price-Anderson Act so that adequate provisions are made to fully insure plaintiffs and others in the event of a nuclear accident" (*id.* at 33 (emphasis added)).

II

EVOLUTION OF THE PROBLEM

A. *The Traditional View of Standing: Legal Rights and Direct Injury Tests*

For many years, standing was usually formulated in terms of whether the right or interest plaintiff was attempting to vindicate was "legal."[74] Only holders of legal interests were granted standing to challenge government action impairing those interests.[75] Justice Frankfurter provided the classic statement of this approach:

> [A] court will not decide a question unless the nature of the action challenged, the kind of injury inflicted, and the relationship between the parties are such that judicial determination is consonant with what was, generally speaking, the business of the Colonial courts and the courts of Westminster when the Constitution was framed. . . .
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> . . . .
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> . . . A litigant ordinarily has standing to challenge governmental action of a sort that, if taken by a private person, would create a right of action cognizable by the courts. Or standing may be based on an interest created by the Constitution or a statute. But if no comparable common-law right exists and no such constitutional or statutory interest has been created, relief is not available judicially.[76]

Justice Frankfurter also touched upon a corollary of the legal rights test: plaintiff's injury must have been the "direct" and not merely the consequential result of the challenged activity.[77] Probably the most notable application of this principle occurred twenty-eight years earlier in the archetypical taxpayer standing case, *Frothingham v. Mellon*.[78] The *Frothingham* Court denied plaintiff standing as a taxpayer to challenge the constitutionality of federal expenditures under a program to reduce maternal and infant mortality. The impact upon any taxpayer of such expenditures, it held, "is shared with millions of others; is comparatively

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[74] This Article will use the terms "legal rights" and "legal interests" interchangeably to denote the traditional approach to standing. For an excellent brief discussion of its formulation, see 13 WRIGHT, MILLER & COOPER § 3531, at 177-84.

[75] The injury had to be "a wrong which directly results in the violation of a legal right." Alabama Power Co. v. Ickes, 302 U.S. 464, 479 (1938).

[76] Joint Anti-Facist Refugee Comm. v. McGrath, 341 U.S. 123, 150, 152 (1951) (concurring opinion) (citations and footnote omitted).

[77] *Id.* at 153-54.

[78] 262 U.S. 447 (1923).

minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating, and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity."[79]

During this period the Supreme Court virtually ignored the semantics of plaintiffs' allegations of standing. Specifically, on standing issues it disregarded the fact-conclusion distinction, even during the code pleading era,[80] apparently because the legal rights view of standing required only minimal consideration of facts unique to a particular plaintiff.[81] This conception of standing focused on broader considerations: the *class* of persons of which plaintiff was a member and the *class* of claims to which his claim belonged. This approach resulted in a number of distinct and rigid standing doctrines aimed at general types of plaintiff-claim combinations. Thus, for example, a businessman had no standing to challenge the legality of government action that benefited a competitor.[82] The plaintiff's identity and the severity of his injury had only minimal significance. Similar doctrinal absolutism attended taxpayer standing: *Frothingham*'s prohibition applied to *all* taxpayers and *all* expenditures alike.[83]

Whether such doctrines were well-founded in justice, logic, or policy, their application demanded relatively little from the pleadings. Even the most general of complaints usually revealed its appropriate pigeonhole for standing purposes and, consequently, its ability to survive a demurrer. Artifices of pleading thus played a correspondingly minor role in standing doctrine.

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[79] *Id.* at 487.

[80] Ironically, the only significant attention paid to technical pleading rules with respect to standing occurred *after* adoption of the federal rules. Two dissenting opinions contained the argument that the allegations of standing were conclusory rather than factual, hence not well-pleaded, and should not survive a dismissal motion. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 197-98 (1951) (dissenting opinion, Reed, J.); FCC v. NBC, Inc., 319 U.S. 239, 260-61 (1943) (dissenting opinion, Frankfurter, J.).

[81] In addition, evidentiary hearings had been held in several cases at the district court level. With the records in those cases thus expanded, there was less need to resolve standing by reference to the pleadings alone. *See, e.g.*, Tennessee Elec. Power Co. v. TVA, 306 U.S. 118 (1939); Alabama Power Co. v. Ickes, 302 U.S. 464 (1938); Alexander Sprunt & Sons, Inc. v. United States, 281 U.S. 249 (1930); Edward Hines Yellow Pine Trustees v. United States, 263 U.S. 143 (1923).

[82] Perkins v. Lukens Steel Co., 310 U.S. 113 (1940); cases cited in note 81 *supra*. *But cf.* FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940) (plaintiff granted standing as representative of the public interest). The barriers to competitor standing have been gradually lowered. *See* Hardin v. Kentucky Utils. Co., 390 U.S. 1 (1968). And at least where administrative proceedings are governed by § 10(a) of the Administrative Procedure Act, 5 U.S.C. § 702 (Supp. I 1977), competitor standing may be granted. *See* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.11, at 255 (1958).

[83] Alabama Power Co. v. Ickes, 302 U.S. 464, 478-79 (1938); Duke Power Co. v.

B. *Baker to SCRAP: Substantive Change Begets Procedural Confusion*

Whatever the procedural merits of the legal rights approach, its frequent artificiality and inflexibility of application insulated too many government activities from judicial review. Thus, the legal rights model attracted significant criticism, and its shortcomings spurred lawyers to develop alternative approaches. "Injury in fact" as the sole test for standing emerged as the most influential recommendation: standing to challenge government action should be accorded anyone who was actually injured by it.[84]

Such arguments began to bear fruit in the 1960's. In the 1962 case of *Baker v. Carr*,[85] the Supreme Court granted Tennessee voters standing to challenge alleged malapportionment of their state legislature. *Baker* did not abandon the legal rights view of standing,[86] but it did signal the Court's movement toward a more liberal and flexible approach. "[T]he gist of the question of standing," the Court stated, is whether plaintiffs allege "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[87] This emphasis on plaintiff's "personal stake" increased six years later in *Flast v. Cohen*.[88] Eschewing *Frothingham*'s blanket prohibition of taxpayer standing, the *Flast* Court substituted[89] a cumbersome nexus test which per-

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Greenwood County, 91 F.2d 665, 676 (4th Cir. 1937), *aff'd*, 302 U.S. 485 (1938); Scott, *supra* note 8, at 673.

[84] Professor Kenneth Culp Davis is the principal advocate of this model of standing. He has noted that the "worst trouble spot in the law of standing is the confusion about the question whether an adverse effect in fact is enough to confer standing, or whether a deprivation of a legal right is [also] required." 3 K. DAVIS, *supra* note 82, § 22.04, at 216-17. He has further observed:

> [T]he state courts that have constructed their own doctrine independently of the federal doctrine have usually tended toward the simpler, less artificial, and more satisfactory idea that anyone who is in fact substantially injured by administrative action has standing to challenge it. The federal law of standing is a "specialty of federal jurisdiction" only to the extent that it involves artificialities that the state courts have refused to adopt.

Id. § 22.01, at 210.

[85] 369 U.S. 186 (1962).

[86] Standing, the *Baker* Court observed, exists only if a court "is called upon to adjudge the *legal rights* of litigants." *Id.* at 204 (emphasis added).

[87] *Id.*

[88] 392 U.S. 83 (1968).

[89] *Frothingham* was carefully distinguished, not overruled. *Id.* at 104-06. The modifications were sufficiently radical, however, that henceforth *Flast*, not *Frothingham*, became the lodestar in the field of taxpayer standing.

mitted taxpayer standing to challenge some, but not all, government expenditures.[90] The avowed purpose of the test was to determine the sufficiency of plaintiff's "personal stake."[91]

The Court's movement toward a less doctrinaire model of standing inevitably brought the role of pleadings into sharper focus.[92] *Baker* and *Flast* did not rest solely upon facts peculiar to each plaintiff; thus they do not represent an abandonment of the Court's traditional attention to broad class- and claim-based considerations. Indeed, such factors relating to class and claim were crucial in both opinions, and those considerations remain vital elements of standing even to the present day.[93] But when *Baker* and *Flast* liberalized standing and introduced considerations peculiar to each individual plaintiff—his "personal stake in the controversy"—the complexity of the problem increased vastly. Standing questions became much more difficult to determine solely by reference to the pleadings. The need for an articulated pleading standard increased correspondingly.

The Court turned to the pleading problem only a year after *Flast*. *Jenkins v. McKeithen*[94] involved a union member's constitutional challenges to the procedures of a Louisiana labor-management commission that had been established to investigate illegal labor practices. Although a majority of the Court agreed that plaintiff had standing, there was no agreement on the pleading standard to be applied.[95] Justice Marshall's plurality opinion took an unswerving notice pleading approach: the complaint

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[90] Professors Wright, Miller and Cooper summarize the *Flast* nexus test in these terms:

> [F]irst, the taxpayer must establish that the statute challenged involves an exercise of congressional power under the taxing and spending clause of the Constitution, Article I, Section 8; there is no logical nexus between taxpayer status and the "incidental expenditure of tax funds in the administration of an essentially regulatory statute." Second, the taxpayer must "show" that the challenged enactment violates specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power; there is no logical nexus between taxpayer status and congressional action that merely exceeds the general delegation of powers to Congress.

13 WRIGHT, MILLER & COOPER § 3531, at 186-87 (footnote omitted).

[91] 392 U.S. at 103.

[92] Consistent with sporadic dissenting opinions by other justices in two earlier cases (*see* note 80 *supra*), and foreshadowing the trend in later cases such as *Warth*, Justice Harlan argued in his dissent in *Baker* that plaintiffs' allegations were mere legal conclusions and could not save the complaint from dismissal. 369 U.S. at 338.

[93] *See* notes 235-40 and accompanying text *infra*.

[94] 395 U.S. 411 (1969).

[95] Justice Marshall delivered the judgment of the Court in an opinion in which Chief Justice Warren and Justice Brennan joined. *Id.* at 413. Separate concurring opinions were

should be liberally construed[96] and dismissed only if plaintiff could " 'prove no set of facts in support of his claim which would entitle him to relief.' "[97] Not surprisingly, he successfully hypothesized such facts.[98]

Justice Harlan's dissent took a markedly narrower perspective. Foreshadowing the Court's later emphasis on the pleading of causation, he argued that "it is not enough for the plaintiff to allege that he has been or will be injured by the defendant; the plaintiff must further claim that the injury to *him* (or those whom he has status to represent) *results from the particular course of conduct he challenges.*"[99] He then briefly turned to the objectives of federal pleading:

> The prevailing opinion's strained construction of the complaint goes well beyond the principle, with which I have no quarrel, that federal pleadings should be most liberally construed. It entirely undermines an important function of the federal system of procedure—that of disposing of unmeritorious and unjusticiable claims at the outset, before the parties and courts must undergo the expense and time consumed by evidentiary hearings.[100]

Few short-term consequences resulted from *Jenkin*'s failure to resolve clearly the pleading problem. Opinions handed down during the following three years in *Association of Data Processing Service Organizations v. Camp*,[101] *Barlow v. Collins*,[102] and *Sierra Club v. Morton*[103] placed greater emphasis on injury in fact as the principal constitutional standing requirement. They extended the range of protected interests from traditional liberty or property interests to include aesthetic, conservational, environmental, and recreational concerns.[104]

Although these cases did not directly address the role of pleadings in standing, their approach to injury in fact laid the

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filed by Justices Black and Douglas; neither discussed the pleading problem. *Id.* at 432-33. Justices Stewart and White joined in the dissenting opinion written by Justice Harlan. *Id.* at 433-43.

There is no indication that either Justice Black or Justice Douglas disagreed with the adoption of a notice pleading standard for standard allegations.

[96] *Id.* at 421.

[97] *Id.* at 422 (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

[98] 395 U.S. at 423-25.

[99] *Id.* at 434 (emphasis added) (footnotes omitted).

[100] *Id.* at 437.

[101] 397 U.S. 150 (1970).

[102] 397 U.S. 159 (1970).

[103] 405 U.S. 727 (1972).

[104] *Id.* at 734; *Data Processing*, 397 U.S. at 154.

foundation for further pleading problems. *Sierra Club* is in this respect the most significant of the three.[105] Plaintiff brought suit to challenge plans of the United States Forest Service for commercial development of the Mineral King Valley, a wilderness area in the Sierra Nevada. Relying on its extensive concern with and expertise in environmental matters, plaintiff asserted standing as a "representative of the public" to prevent the development.[106] It carefully avoided making any allegations that it or its members used the Valley or that such use would be injured by the proposed development.[107] The Court, however, denied standing based on injury to such an abstract interest. Emphasizing that plaintiff's injury had to be of a personal, "individualized" nature,[108] the Court stated that the complaint must identify such injury.[109]

The pleading consequences of *Sierra Club* were indirect but significant. Even viewed through sympathetic *Conley* eyes, the complaint did not allege the individualized injury the Court believed essential. But the Court did accept the proposition that virtually any injury occasioned by governmental action would confer standing, provided only that the injury was sufficiently personal. Plaintiff apparently would have encountered no difficulty had it simply alleged that the proposed development of Mineral King would have disturbed at least some of its members' enjoyment of the valley's scenery and solitude.[110]

The significance of *Data Processing, Barlow* and *Sierra Club* lies principally in their adoption of injury in fact as the core deter-

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[105] *Data Processing* and *Barlow*, however, generated the most controversy. They established a general two-pronged test for determining standing to challenge administrative action. First, plaintiff must demonstrate injury in fact. *Data Processing*, 397 U.S. at 152. Second, "the interest sought to be protected by the complainant [must be] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 153.

Professor Wright and his colleagues have observed with nice restraint that "[s]ome obscurity surrounds this [zone of interests] requirement." 13 WRIGHT, MILLER & COOPER § 3531, at 196. It is beyond the scope of this Article to analyze the genesis, evolution, and meaning of this requirement, which in any event does not appear to have operated as a very serious impediment to the liberalization of standing. *See id.*; Scott, *supra* note 8, at 666; Sedler, *Standing, Justiciability, and All That: A Behavioral Analysis*, 25 VAND. L. REV. 479, 486-87 (1972). *But see* Hasl, *Standing Revisited—The Aftermath of Data Processing*, 18 ST. L. U.L.J. 12, 34-38 (1973).

[106] 405 U.S. at 736.

[107] *Id.* at 735 n.8, 740 n.15.

[108] *Id.* at 736, 738-40.

[109] *Id.* at 731-740.

[110] On remand, the complaint was so amended, and the dismissal motions were unsuccessful. 348 F. Supp. 219 (N.D. Cal. 1972).

minant of standing. This revolution of substantive standing doctrine overshadowed *SCRAP*'s subsequent use of the traditional notice pleading standard in the standing context.[111] And yet *SCRAP* revealed the considerable judicial problems inherent in the *Sierra Club* trilogy of cases. By its marriage of *Sierra Club*'s emphasis on injury in fact with *Conley* notice pleading, *SCRAP* threatened to deprive the federal judiciary of its only device for summary resolution of standing questions—the rule 12(b)(6)[112] dismissal motion. The determination of injury in fact often is a highly individualized process, and courts engaged in that process may often need to examine in some detail the particular facts and circumstances peculiar to each plaintiff. The dismissal motion, which sympathetically considers only plaintiff's *pleaded* allegations, is not well-suited to this task. After *SCRAP* and *Sierra Club*, an accurate pretrial determination of standing frequently must proceed through other procedures, especially summary judgment. The effectiveness of such devices may be limited.[113]

C. *The Erratic Revival of Fact Pleading*

The revolutionary implications of *SCRAP*'s notice pleading approach to standing were not realized. The Court quickly moved to tighten the standing screws again on both substantive and procedural grounds. Although retaining injury in fact as the focus of standing, it restricted the concept with a host of limitations, and no case since *SCRAP* evidences a generous notice pleading standard for standing issues.

Giving further substantive definition to injury in fact, the Court developed the notion that it had to be "specific," "particularized," and "concrete," not merely an "abstract injury" common to the public generally.[114] Moreover, the Court did not hesitate to use the bare allegations of the complaint as the sole means of characterizing plaintiff's injury. This is illustrated by Chief Justice Burger's opinions in two 1974 cases. In *Schlesinger v. Reservists Committee to Stop the War*,[115] plaintiffs asserted taxpayer and citizen standing to challenge members of Congress who also held membership in the armed forces reserves and thus allegedly violated the incompatibility clause of the Constitution.[116] Plain-

[111] For an examination of *SCRAP*, see text accompanying notes 52-59 *supra*.

[112] FED. R. CIV. P. 12(b)(6).

[113] *See* text accompanying notes 192-213 *infra*.

[114] *See* notes 27-29 *supra*.

[115] 418 U.S. 208 (1974).

[116] That clause provides:

tiffs' theory of injury apparently was that membership in both groups created a conflict of interests which impaired the officials' faithful discharge of their legislative duties.[117] Confidently resolving the standing issue solely on the basis of the pleadings, Chief Justice Burger held that it was mere "speculation" that such a result flowed from the challenged conduct.[118] *Baker v. Carr*, he noted, established plaintiff's " 'personal stake in the outcome of the controversy' " as the gist of standing,[119] while the alleged violation of the incompatibility clause by defendants "would adversely affect only the generalized interest of all citizens in constitutional governance, and that is an abstract injury" insufficient to support standing.[120]

Although at first blush the Court's analysis in *Reservists* resembles that in *Sierra Club*,[121] *Reservists* imposed a more restrictive standing requirement. In both cases plaintiffs had failed to allege personalized injury in fact, distinct from injuries sustained by the general public. But the complaint in *Sierra Club* contained no allegation that plaintiff or its members had actually been injured in any way.[122] The *Reservists* plaintiffs, however, had alleged injury in fact. To be sure, they did not allege injury peculiar to themselves, but they did allege that all of the public (themselves included) were injured by the conflicts of interests of their elected representatives. Although the injury undeniably was not unique to them, it was personal. Application of a liberal *Conley* pleading standard would dictate that they be given the opportunity to undertake the proof regardless of its difficulty. Such difficulty seems not measurably greater than that borne by the plaintiffs in *SCRAP*, and the allegation no more "speculative," Chief Justice Burger's characterization to the contrary notwithstanding.

United States v. Richardson,[123] a companion case to *Reservists*, even more clearly demonstrated the Court's disregard for the im-

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No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

U.S. CONST. art. I, § 6, cl. 2.

[117] 418 U.S. at 212.

[118] *Id.* at 217.

[119] *Id.* at 217-18 (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

[120] 418 U.S. at 217 (footnote omitted).

[121] *See* text accompanying notes 105-10 *supra*.

[122] *See* notes 106-07 and accompanying text *supra*.

[123] 418 U.S. 166 (1974).

pact of standing doctrine on notice pleading. Alleging that he had been unable to obtain a document setting forth the Central Intelligence Agency's (CIA) expenditures and receipts, plaintiff sought taxpayer standing to challenge the secrecy of the agency's budgetary practices.[124] Chief Justice Burger again wrote the Court's opinion denying standing, and again he rested his determination on a narrow construction of the complaint. Plaintiff, he held, failed to allege that as a taxpayer "he is in danger of suffering any particular concrete injury."[125] His grievance was thus "plainly undifferentiated and 'common to all members of the public.' "[126] The complaint would have survived an application of the *Conley* standard because, consistent with his allegations, plaintiff could have established "particularized" concrete injuries. For example, he might have shown that he needed the information to challenge a particular CIA expenditure or to publish a salable magazine article about the agency's operations. For plaintiff's failure to disclose sufficient *factual* details—his purpose in seeking disclosure—Chief Justice Burger nevertheless ruled the complaint insufficient.[127]

The Court, adding to the increasingly restrictive standing requirements enunciated in *Reservists* and *Richardson*, subsequently insisted that pleadings also show causation and "remediability." The Court's disregard for *Conley* is illustrated most strikingly in its treatment of these two concepts. In *Linda R. S. v. Richard D.*,[128] the mother of an illegitimate child sought to enjoin the allegedly discriminatory application of a Texas statute that rendered nonsupport of children a criminal offense.[129] Texas courts had construed the statute to apply only to the parents of legitimate children and to impose no duty of support on parents of illegitimate children. Consequently, plaintiff alleged, the father of her child had been able to escape paying child support.[130] After harking back to the *Frothingham* "direct injury" requirement,[131] Justice

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[124] *Id.* at 168-69. His claim was based on article I of the Constitution, which provides: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." U.S. CONST. art. I, § 9, cl. 7.

[125] 418 U.S. at 177.

[126] *Id.*

[127] *Id.* at 175, 176-77.

[128] 410 U.S. 614 (1973).

[129] *Id.* at 614-15.

[130] *Id.* at 615-16.

[131] *Id.* at 618. For a discussion of *Frothingham*, see text accompanying notes 78-79 *supra*.

Marshall emphasized a restrictive focus on the pleading of causation: plaintiff failed to allege a sufficient nexus between her injury (nonsupport of her child) and the challenged governmental activity (the state's refusal to prosecute the father).[132]

This opinion raises two points. First, Justice Marshall's narrow construction of the complaint does not square with *Conley*. It was not "beyond doubt" that plaintiff would fail to prove causation[133]—she possibly could establish that prosecution of the father would result in the payment of child support. That might not be an inevitable consequence of prosecution but it assuredly is not inconceivable.[134] Second, Justice Marshall's reliance upon perceived pleading defects almost certainly masks deeper federalism reservations: whether plaintiff, given the lack of nexus, was the proper party to ask a federal court to undertake the very sensitive process of interfering with state prosecutorial procedures.[135]

Standing doctrine's influence over pleading in *Reservists*, *Richardson*, and *Linda R. S.* was quite minor and their deviations from *Conley* went nearly unnoticed at the time. *O'Shea v. Littleton*,[136] however, decided the same year as *Reservists* and *Richardson*, made considerably more explicit the Court's departure from *Conley* principles. *O'Shea* was a class action brought by several blacks challenging the racially discriminatory enforcement of state laws by certain state and local officials in Cairo, Illinois.[137] The district court dismissed the complaint. The Seventh Circuit, however, reinstated it, noting "the underlying motivation of federal pleading to be to avoid the semantical donnybrooks inherent in differentiating what is evidence, ultimate facts and conclusions of law and fact."[138] This faithful application of *Conley* pleading

[132] 410 U.S. at 618. Justice Marshall reasoned that "if appellant were granted the requested relief, it would result only in the jailing of the child's father. The prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative." *Id.*

[133] The phrase "beyond doubt" is drawn from *Conley v. Gibson*: "[A] complaint should not be dismissed ... unless it appears *beyond doubt* that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U.S. at 45-46 (emphasis added).

[134] Justice White, dissenting, wryly characterized the Court's rationale as "a very odd statement. I had always thought our civilization has assumed that the threat of penal sanctions had something more than a 'speculative' effect on a person's conduct." 410 U.S. at 621.

[135] *See id.* at 619 (citing Younger v. Harris, 401 U.S. 37, 42 (1971)).

[136] 414 U.S. 488 (1974).

[137] *Id.* at 490-91.

[138] Littleton v. Berbling, 468 F.2d 389, 394 (7th Cir. 1972), *rev'd sub nom.* O'Shea v. Littleton, 414 U.S. 488 (1974).

principles was then reversed on standing grounds by the Supreme Court, which enthusiastically threw itself into the "semantical donneybrook" that the lower appellate court so carefully had avoided. "[T]he claim against petitioners," wrote Justice White, "alleges injury in only the most general terms. . . . We thus do not strain to read inappropriate meaning into the *conclusory allegations* of this complaint. . . . [W]e are . . . unable to conclude that the case-or-controversy requirement is satisfied by *general assertions or inferences* . . . ."[139] Thus, the Court required that plaintiffs be prosecuted before they could have standing, even though they continually lived under the possibility that they would be subjected, either fairly or unfairly, to the prosecutorial process.

O'Shea clearly revealed that a majority of the Supreme Court favored an exceedingly strict pleading standard for standing questions that it has not acknowledged in any other area of federal law.[140] *Warth*[141] then should have been no surprise when it was decided the following year. That later decision only made more explicit the Court's apparent condemnation of "conclusory" standing allegations and its concomitant demand for "particularized allegations of fact deemed supportive of plaintiff's standing."[142]

This demand for particularity surfaced in another decision handed down shortly after *Warth*. In *Simon v. Eastern Kentucky Welfare Rights Organization*,[143] the plaintiffs were several indigents and organizations composed of indigents. They challenged the legality of an IRS revenue ruling relaxing the conditions under which nonprofit hospitals could obtain favorable tax treatment as charitable organizations.[144] Plaintiffs objected that the ruling encouraged hospitals to deny services to indigents, including themselves.[145] Relying principally on the now familiar themes of *Linda R. S.* and *Warth*, Justice Powell applied a constricted view of the pleadings[146] and found plaintiffs' allegations of causation and

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[139] 414 U.S. at 495-97 (emphasis added).

[140] As it was in *Linda R. S.* (*see* text accompanying note 135 *supra*), the Court was also preoccupied with federalism concerns. *See* 414 U.S. at 499-501.

[141] *See* text accompanying notes 60-69 *supra*.

[142] 422 U.S. at 501.

[143] 426 U.S. 26 (1976).

[144] *Id.* at 28.

[145] Individual plaintiffs recounted incidents where they were denied services because of an inability to pay fees. *Id.* at 33.

[146] The standing issue actually was joined on defendants' motions for summary judgment. Justice Powell observed, however, that plaintiffs' counteraffidavits in support of standing merely supported the allegations of the complaint rather than going beyond them. "Thus, the standing analysis is no different, as a result of the case having proceeded to summary judgment, than it would have been at the pleading stage." *Id.* at 37 n.15.

remediability overly "speculative":[147] "In the instant case respondents' injuries might have occurred even in the absence of the IRS ruling that they challenge; whether the injuries fairly can be traced to that ruling depends upon unalleged and unknown facts about the relevant hospitals."[148]

The progression from *Linda R. S.* to *Eastern Kentucky* seems to reflect a conscious adoption of a strict fact pleading standard. But such a conclusion would be hasty. A more sound conclusion is that the Court has failed to adopt any consistent standard for the pleading of standing. Despite its several restrictive decisions, the Court has consistently refused to overrule or even disparage *SCRAP* or *Conley*. Furthermore, in at least two cases since *Eastern Kentucky* the Court found standing despite standing allegations every bit as "conclusory" and "speculative" as those Justice Powell quickly condemned in *Warth* and *Eastern Kentucky*. Those cases are *Duke Power*,[149] discussed earlier, and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[150] decided in 1977.

Factually, *Arlington Heights* was remarkably similar to *Warth*. A real estate developer and several individuals sought to challenge the constitutionality of village officials' refusal to rezone a tract of land to permit construction of an integrated, low and moderate income housing project.[151] Deviating from his approach in *Warth* and *Eastern Kentucky*, Justice Powell devoted little attention to plaintiffs' standing allegations. As the Court later did in *Duke Power*, he chose to ignore the arguably conclusory nature of several allegations[152] and found that causation and remediability had been adequately averred.[153]

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[147] *Id.* at 43.

[148] *Id.* at 45 n.25.

[149] 438 U.S. 59 (1978), *discussed in* text accompanying notes 70-73 *supra.*

[150] 429 U.S. 252 (1977).

[151] *Id.* at 254.

[152] For example, with respect to the individual plaintiffs who worked in Arlington Heights but lived elsewhere, the complaint alleged that eacb "drives the long distance daily, a time-consuming trip involving excessive expense," and that each had "been unable to find, decent housing at a price [he] could afford in the vicinity of [his] job." Complaint at 6-8. To mention but a few other examples, tbe complaint alleged that minority group members were "effectively discouraged" from seeking employment in Arlington Heights (*id.* at 14); that there was a "desperate need" for "decent housing" in the village (*id.* at 14); and that "only society's wealthier members, overwhelmingly wbite," were permitted to live in Arlington Heights (*id.* at 15).

At the same time the complaint, whicb runs to some sixteen printed pages, is replete with a vast amount of evidentiary trivia. Perhaps the complaint was so drafted to avoid the fate that had befallen the plaintiffs in *Warth*. To a considerable degree its mixture of evidentiary allegations, "facts" and "conclusions" was probably inevitable—and is a monument to *Warth*'s demand for fact pleading.

[153] 429 U.S. at 264.

The Supreme Court's relative lack of attention to the pleadings in *Arlington Heights* and *Duke Power* might be attributed to the lengthy evidentiary hearings held at the district court level in both cases.[154] With expanded records, the Court's need to rely on pleaded allegations of standing diminished accordingly. This rationale, however, creates additional problems. Ruling on the sufficiency of a pleading is not usually thought to be a discretionary matter.[155] A complaint either avers standing adequately or it does not.[156] If the complaint is fatally "conclusory," it remains so when received by the Supreme Court, even though an evidentiary hearing may produce additional information. If the Court ignores defective standing allegations, it then grants the district court discretion to waive accepted pleading standards, and exercise of that discretion, moreover, may be essentially unreviewable. If the district court finds the allegations of causation, for example, to be overly "conclusory," it may dismiss the complaint and deny plaintiff any opportunity to prove them. On the other hand, if the district court overlooks the defective averments and allows plaintiff an evidentiary hearing at which all he must prove is "but-for" causation,[157] the complaint apparently can avoid re-examination on appeal because once done the evidentiary hearing cannot be undone.

Equally important, the pretense of a uniform pleading standard must be abandoned if the district court is given discretion to waive pleading defects. Pleading then becomes predominantly a game of forecasting the idiosyncratic predilections of the district judge in whose court a complaint has been filed. In such a system, the role of the Supreme Court is reduced to merely articulating a minimal standard which each of the approximately four hundred district judges may apply or not, as he desires.

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[154] A four-day hearing was held in *Duke Power* (*see* Carolina Environmental Study Group, Inc. v. United States Atomic Energy Comm'n, 431 F. Supp. 203, 205 (W.D.N.C. 1977)), while in *Arlington Heights* the standing issue was resolved after trial on the merits (*see* Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 373 F. Supp. 208, 209 (N.D. Ill. 1974)).

[155] 5 WRIGHT & MILLER § 1357, at 593-94 .

[156] The rule 12(b)(6) motion to dismiss for failure to state a claim "allows of no discretion in the usual sense. The complaint is either good or not good." Mitchell v. E-Z Way Towers, Inc., 269 F.2d 126, 130 (5th Cir. 1959).

[157] The "but-for" causation test appears to have been adopted by the Supreme Court in *Duke Power*. 438 U.S. at 77-78.

III

EXPLANATION AND EVALUATION OF THE CURRENT APPROACH

Recent Supreme Court opinions thus appear to require that standing allegations must be "factual," "specific," and "concrete," not "conclusory," "vague," or "speculative," but they also allow a district court to disregard such defects if it chooses to order an evidentiary hearing. This flatly contradicts *Conley* and rule 8(a) and completely ignores Justice Brennan's several dissenting opinions vigorously pointing out the inconsistency.[158] If the Court has somewhere discovered a rich vein of policy considerations warranting an exception to notice pleading in the area of standing, it has not bothered to communicate this discovery. *Warth v. Seldin* is a perfect example: plaintiff's standing allegations were condemned out-of-hand as "conclusory" and "speculative," but there was no genuine effort to explain this characterization or its significance.

The Court's ad hoc and erratic reversion to fact pleading in standing stands as a paradigm of what Judge Clark perceptively referred to as the "endeavor to rid [itself] of unattractive cases through an assumed procedural fault."[159] And the "fault" has been found by a method with a long history in Anglo-American procedure—the employment of strict pleading rules in judicially disfavored actions.[160] Yet this situation is most surprising because it is occurring in standing, which the Court had earlier seemed bent on liberalizing, and within the context of the federal rules, which long had been thought to abolish such pleading doctrines.[161] The practical result of the current approach resembles

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[158] *See Eastern Kentucky*, 426 U.S. at 62; *Warth*, 422 U.S. at 520, 525-28; *Reservists*, 418 U.S. at 236-37.

[159] Clark, *supra* note 1, at 304, *reprinted in* CLARK 73.

[160] 5 WRIGHT & MILLER § 1226, at 162.

[161] Standing is not unique in this respect, however. Professors Wright and Miller have observed that in defamation and malicious prosecution actions the traditionally strict attitudes toward pleading have at least partially survived adoption of the federal rules. 5 *id.* §§ 1245, 1246, at 217, 224. To these can be added another class of actions newly fallen into disfavor: private civil rights actions. *See* text accompanying notes 172-80 *infra*. Wright and Miller ascribe this survival to two causes: (1) in such actions the courts are less inclined to construe the complaint liberally; and (2) if facts essential to avoiding a defense are not alleged, the courts may assume their nonexistence and dismiss the complaint. Consequently, in such disfavored actions the plaintiff must plead with greater specificity than usual. 5 WRIGHT & MILLER § 1226, at 162-63.

Professors Wright and Miller are undoubtedly correct in describing what has occurred, but it is difficult to square that practice with the federal rules. First, those authors do not give any reasons for the survival of fact pleading other than that courts are "inclined" to demand it in certain cases. Second, rule 9 identifies several matters which are required

that of the archetypical standing case, *Frothingham v. Mellon*,[162] which established a conclusive presumption that no taxpayer had a sufficiently direct interest in federal expenditures to have standing to challenge them. The principal twist today is that the presumption is unstated, applied in the guise of construing pleadings, and—apparently—rebuttable.[163] In addition, it appears to apply to all areas of standing, not just taxpayer standing.

There are several powerful reasons why the pleading of standing has been thus handicapped. Since the Court has never adequately articulated these reasons, a complete study of the pleading of standing requires their exposition.

A. *Historical and Conceptual Difficulties with Notice Pleading*

The revival of fact pleading in standing springs from the deep historical roots of fact pleading itself. When the federal rules were promulgated in 1938, their embrace of notice pleading was met with considerable resistance, which slowly subsided but never entirely disappeared.[164] Practitioners and judges who had grown accustomed to code pleading were shocked by abandonment of the traditional distinction between "facts" and "conclusions" and by disappearance of the notion that only "facts constituting a cause of action" could be pleaded. They believed that an effective and efficient procedural system demands precise issue-identification, accomplished at the very outset of the action, and that this requires a more detailed complaint than one merely providing defendant with some vague notice about the general kind of asserted claim.[165] Such dissatisfaction was aggravated by a

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to be pleaded with greater than normal particularity—fraud, for example. One therefore would assume that the drafters did not intend to require extraordinary specificity in other actions.

[162] *See* text accompanying notes 78-79 *supra*.

[163] But one legitimately may doubt whether even the most detailed fact pleading would have succeeded in gaining grants of standing in such cases as *Richardson, Reservists,* and *Linda R. S.* Despite their attention to perceived defects in the pleading of causation, these cases seem to embody a presumption against standing that is every bit as substantive, and as absolute, as *Frothingham*'s.

[164] *See* Fee, *The Lost Horizon in Pleading Under the Federal Rules of Civil Procedure*, 48 COLUM. L. REV. 491 (1948); McCaskill, *The Modern Philosophy of Pleading: A Dialogue Outside the Shades*, 38 A.B.A. J. 123 (1952); Rothschild, *The Federal Wonderland (Some "Simplified" Federal Concepts)*, 18 BROOKLYN L. REV. 16 (1951); Simpson, *A Possible Solution of the Pleading Problem*, 53 HARV. L. REV. 169 (1939).

[165] In evaluating pleading under the federal rules, Judge Fee observed:

> [T]here is no rationale to the pleadings. . . . [The complaint] cannot be shaped by motions because there is no basic substratum of legal theory to which it must conform.

controversial opinion[166] of Judge Clark and finally culminated in a recommendation of the Ninth Circuit Judicial Conference that rule 8(a)(2) be amended to require "a short and plain statement of the claim showing that the pleader is entitled to relief, which statement shall contain the facts constituting a cause of action."[167] Though rejected by the Advisory Committee on the Civil Rules,[168] this proposal embodied a philosophy that continued to find proponents. This was especially true in antitrust litigation where, during the two decades following adoption of the federal rules, courts not infrequently voiced a preference for special strict pleading rules.[169] An influential 1957 opinion[170] by Judge Clark took much of the momentum out of this movement. And, of course, *Conley v. Gibson*,[171] also decided in 1957, reaffirmed and extended the Supreme Court's commitment to notice pleading. After *Conley*, federal notice pleading appeared to have emerged from its challenges intact, its opponents silenced if not converted.

After only a few years' respite, however, several developments again brought federal notice pleading into question. Coincidentally, these developments arose around the time the Supreme Court was undertaking its reexamination of standing. The first, which began in the early 1960's, was a dramatic increase in the number of filings of private civil rights actions.[172] Many fil-

> . . . As Columbus, he who embarks on a law suit will not know where he is going. When he comes to the end of the proceeding, he will not know where he is. The result at times will be astonishing.

Fee, *supra* note 164, at 494.

[166] Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944). *Dioguardi* was severely criticized in McCaskill, *supra* note 164, at 125-26.

[167] Claim or Cause of Action, 13 F.R.D. 253, 253 (1951).

[168] FED. R. CIV. P. 8(a) note (1955 Adv. Comm. Note), *reprinted in* 12 WRIGHT & MILLER app. F, at 591-92 (1973).

[169] *See* Alexander v. Texas Co., 149 F. Supp. 37 (W.D. La. 1957); Baim & Blank, Inc. v. Admiral Corp., 132 F. Supp. 412 (S.D.N.Y. 1955). *See also* 5 WRIGHT & MILLER § 1228, at 166 nn.28 & 29.

[170] Nagler v. Admiral Corp., 248 F.2d 319 (2d Cir. 1957).

[171] 355 U.S. 41 (1957).

[172] When the federal rules were adopted and for several years thereafter, civil rights actions were rare. In 1946, for example, out of a total of approximately 68,000 civil cases filed in the federal district courts, only 40 were civil rights actions. [1946] DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS ANN. REP. (Table C 2), *reprinted in* [1946] JUDICIAL CONFERENCE OF SENIOR CIRCUIT JUDGES REP. 88-89. Annual filings of such actions slowly increased until the early 1960's, when they rose dramatically. In 1965 they exceeded one thousand for the first time. [1965] DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS ANN. REP. (Table C 2), *reprinted in* [1965] JUDICIAL CONFERENCE OF THE UNITED STATES REP. 178-79. In the 12 month period ending June 30, 1979, the last period for which figures are available, there were approximately 155,000 civil cases filed; of these, some 25,000 were civil rights actions. This latter figure includes 1,222

ings were pro se state prisoner complaints, crudely drawn and involving matters of state prison administration in which the federal courts traditionally have been reluctant to intervene.[173] Many districts and circuits responded to this pressure by resurrecting the fact-conclusion pleading distinction.[174] If the allegations of such a complaint could be characterized as "vague," "conclusory," or "speculative," it became increasingly subject to dismissal. This trend now has attained great momentum,[175] possibly because of such a strict standard's perceived "virtue"—judicial ability to dispose summarily of unattractive cases.[176] It is most prevalent in the Second[177] and Third[178] Circuits as an express exception to normal federal pleading standards and is recognized in varying degrees in most other circuits,[179] save possibly the Fifth Cir-

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non-prisoner civil rights actions in which the United States was named as defendant, as well as 11,783 prisoner civil rights actions. It does not, however, include 11,218 other prisoner-initiated actions—principally habeas corpus petitions. [1979] DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS ANN. REP. app. 14 (Table C 2).

[173] *See* Procunier v. Martinez, 416 U.S. 396, 404-05 (1974).

[174] *See, e.g.*, United States *ex rel.* Hoge v. Bolsinger, 311 F.2d 215 (3d Cir. 1962).

[175] The Supreme Court has never approved such an exception to federal notice pleading. To the contrary, Haines v. Kerner, 404 U.S. 519 (1972) (per curiam), militates strongly against it by holding that pro se inmate civil rights complaints are to be measured against "less stringent standards than formal pleadings drafted by lawyers." *Id.* at 520. The impact of *Haines*, however, has been minimal. For an especially labored attempt to harmonize *Haines* with the condemnation of "conclusory" allegations in civil rights complaints, see Gray v. Creamer, 465 F.2d 179, 182 n.2 (3d Cir. 1972).

[176] This "virtue" has not gone unnoticed in the habeas corpus context either, where fact pleading also has supplanted the more relaxed notice pleading standard. *See* Blackledge v. Allison, 431 U.S. 63, 75 n.7 (1977); Sanders v. United States, 373 U.S. 1, 22-23 (1963); Machibroda v. United States, 368 U.S. 487, 495-96 (1962); 28 U.S.C. § 2242 (1976) (application for writ of habeas corpus); RULE GOVERNING § 2254 CASES IN THE UNITED STATES DISTRICT COURTS 4 note (Advisory Comm. Note).

[177] *See* Albany Welfare Rights Organization Day Care Center, Inc. v. Schreck, 463 F.2d 620 (2d Cir. 1972), *cert. denied*, 410 U.S. 944 (1973); Powell v. Jarvis, 460 F.2d 551 (2d Cir. 1972); Birnbaum v. Trussell, 347 F.2d 86 (2d Cir. 1965). *But see* Williams v. Vincent, 508 F.2d 541 (2d Cir. 1974).

[178] *See* Rotolo v. Borough of Charleroi, 532 F.2d 920 (3d Cir. 1976); Kauffman v. Moss, 420 F.2d 1270 (3d Cir. 1970); Negrich v. Hohn, 379 F.2d 213 (3d Cir. 1967); United States *ex rel.* Hoge v. Bolsinger, 311 F.2d 215 (3d Cir. 1962).

[179] First Circuit: *compare* Kadar Corp. v. Milbury, 549 F.2d 230 (1st Cir. 1977) *with* O'Brien DiGrazia, 544 F.2d 543 (1st Cir. 1976), *cert. denied*, 431 U.S. 914 (1977). Sixth Circuit: *compare* Place v. Shepherd, 446 F.2d 1239 (6th Cir. 1971) *and* Blackburn v. Fisk Univ., 443 F.2d 121 (6th Cir. 1971) *and* Sexton v. Barry, 233 F.2d 220 (6th Cir. 1956) *with* Puckett v. Cox, 456 F.2d 233 (6th Cir. 1972). Eighth Circuit: *compare* Harley v. Oliver, 539 F.2d 1143 (8th Cir. 1976) *and* Gilbert v. Corcoran, 530 F.2d 820 (8th Cir. 1976) *and* Anderson v. Sixth Judicial Dist. Court, 521 F.2d 420 (8th Cir. 1975) *and* Ellingburg v. King, 490 F.2d 1270 (8th Cir. 1974) *with* Nickens v. White, 536 F.2d 802 (8th Cir. 1976) *and* Windsor v. Bethesda Gen. Hosp., 523 F.2d 891 (8th Cir. 1975). Ninth Circuit: *compare* Sherman v. Yakahi, 549 F.2d 1287 (9th Cir. 1977) *and* Kennedy v. H. & M. Landing, Inc., 529 F.2d 987 (9th Cir. 1976) *and* Finley v. Rittenhouse, 416 F.2d 1186 (9th Cir. 1969) *with* Fajeriak

cuit.[180] Thus, a large segment of the federal judiciary now systematically applies very strict pleading standards at odds with *Conley* and rule 8(a), albeit in an exceptional class of cases.

The impact of a related development has been more subtle. During the past several years federal pretrial practice has come under increasing criticism by prominent segments of the legal profession. The focus thus far has been on perceived abuses and delays caused by the existing rules of discovery. Committees of the American Bar Association[181] and the United States Judicial Conference[182] have proposed substantial modifications in this area to expedite the discovery process by providing for early and precise issue-identification.[183] Because the rules on discovery and pleadings are inextricably intertwined, these recommendations might be followed by suggestions for changes in the pleading rules. The most straightforward and obvious way to promote early delineation of issues is by substituting detailed fact pleading for the relatively vague notice pleading permitted by rule 8(a)(2) and *Conley*.

Resistance to federal notice pleading is further facilitated by the semantic slipperiness of both the rule and *Conley*. In requiring

v. McGinnis, 493 F.2d 468 (9th Cir. 1974). Tenth Circuit: Coopersmith v. Supreme Court, 465 F.2d 993 (10th Cir. 1972).

Results from other circuits are not as clear. Few pertinent cases come out of the Fourth and District of Columbia Circuits. The Seventh Circuit has wrestled with the problem in a most interesting fashion. It was one of the earliest of the circuits to dismiss civil rights complaints that merely contained "conclusory" allegations. *See, e.g.*, Hess v. Petrillo, 259 F.2d 735 (7th Cir. 1958); Ortega v. Ragen, 216 F.2d 561 (7th Cir. 1954). More recently, however, it has taken a more sympathetic view. *See, e.g.*, Roberts v. Acres, 495 F.2d 57 (7th Cir. 1974). Its most pronounced liberalization was in Littleton v. Berbling, 468 F.2d 389, 394 (7th Cir. 1972), *rev'd sub nom.* O'Shea v. Littleton, 414 U.S. 488 (1974), where it noted that federal pleading was intended "to avoid the semantical donnybrooks inherent in differentiating what is evidence, ultimate facts and conclusions of law and fact." This noble effort was promptly undercut by the Supreme Court. *See* text accompanying notes 136-39 *supra*.

[180] Although the Fifth Circuit has occasionally condemned conclusory allegations (*see, e.g.*, Cook v. Whiteside, 505 F.2d 32 (5th Cir. 1974)), it has been generally critical of rule 12(b)(6) dismissals of "barebones" pleadings (*see, e.g.*, Covington v. Cole, 528 F.2d 1365, 1373 (5th Cir. 1976)). It has been actively seeking alternative methods of winnowing out non-meritorious claims. *See, e.g.*, Watson v. Ault, 525 F.2d 886 (5th Cir. 1976).

[181] ABA LITIGATION SECTION, REPORT OF THE SPECIAL COMMITTEE FOR THE STUDY OF DISCOVERY ABUSE (1977) [hereinafter cited as ABA REPORT].

[182] UNITED STATES JUDICIAL CONFERENCE, COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE 6-11 (1978) [hereinafter cited as PRELIMINARY PROPOSED AMENDMENTS]; UNITED STATES JUDICIAL CONFERENCE, COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, REVISED PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE 3-5 (1979) [hereinafter cited as REVISED PROPOSED AMENDMENTS].

[183] Detailed examination of these proposals is beyond the scope of this Article, but a brief survey is helpful. One significant change recommended by the ABA committee in-

a "short and plain statement of the claim showing that the pleader is entitled to relief," rule 8(a)(2) is almost as fuzzy as the older code standard. What, for example, must one plead in order to *show* that he is *entitled* to relief? Abstract logic could produce a construction as strict as that existing under the codes.[184] Nor is the ambiguity resolved by *Conley*. Its holding—that a complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"[185]—overstates the nature of notice pleading and cannot be taken literally. It would permit a complaint alleging no more than that defendant wronged plaintiff,[186] a position that cannot safely be ascribed to any member of the Court at any point in its history.

The erratic revival of fact pleading in standing, then, is by no means an isolated phenomenon. It is part of a larger environment in which early, summary disposition of non-meritorious claims is increasingly demanded and the existing pleading standards are too ambiguous to prevent a creeping revival of fact pleading as the favored procedural device. What is most noteworthy about this slow erosion of federal notice pleading is not the fact of its occurrence, nor even the reasons propelling it. It is the utter silence in which the process is taking place. There is no frontal challenge, for example, to the wisdom of rule 8(a)'s proscription of attempts to distinguish "facts" from "conclusions."[187] And it is almost as difficult to find any justification for the piecemeal dismantling of notice pleading.[188] This is truly distressing. What-

volves revision of rule 26(b) to restrict the scope of discovery to "issues raised by the claims or defenses of any party," instead of the present formulation which allows discovery of material relevant to "subject matter involved in the pending action." Another ABA recommendation would modify rule 26(c) to provide for an early discovery conference where the "issues to be tried" shall be fixed. ABA REPORT, *supra* note 181, at 2-7.

The response of the federal Judicial Conference committee has been interesting. With respect to rule 26(b), it originally recommended dropping the "subject matter" test for scope of discovery, but without substituting the "issue" standard suggested by the ABA. PRELIMINARY PROPOSED AMENDMENTS, *supra* note 182, at 6, 9-11. But the committee has apparently abandoned this proposal and has offered no other revision of rule 26(b). REVISED PROPOSED AMENDMENTS, *supra* note 182, at 3. The committee, however, has accepted much of the substance of the ABA recommendations for an early discovery conference. *Id.* at 3-5.

[184] *See* R. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 192 (1952).

[185] 355 U.S. at 45-46 (footnote omitted).

[186] F. JAMES, CIVIL PROCEDURE § 2.11, at 86 (1965).

[187] *See* text accompanying notes 44-51 *supra*.

[188] The Supreme Court's extraordinarily casual treatment of the pleading of standing is the most egregious example. In the similar resurrection of fact pleading at the circuit and district court levels in private civil rights actions there have been occasional attempts to

ever problems are associated with notice pleading—and they are many—can hardly be resolved unless they are first addressed.

B. *Threshold Resolution of Injury in Fact*

The resurrection of fact pleading in standing undoubtedly has been a practice of convenience, enabling the Court to avoid difficult substantive issues.[189] But it also has been the product of some very real difficulties with current notions of standing. These difficulties are both procedural and conceptual.

The period from *Baker* to *Sierra Club* saw a substantial liberalization of standing: de minimis injury in fact emerged as the core standing requirement.[190] When this concept of standing is combined with normal *Conley* doctrine, however, it may produce singular inefficiencies. Detailed analysis of injury in fact may involve intricate factual issues regarding the extent and nature of plaintiff's injury, as well as its causation and remediability. Resolution of such issues may well demand extensive factual data which *Conley's* permissive acceptance of relatively generalized allegations is not well-designed to produce at the pleadings stage. Yet standing traditionally has been viewed as a threshold issue to be resolved before the court may turn to the merits of the case.[191] This characterization suggests that the information essential to determine standing *should* be available in the pleadings, for if the matter cannot be determined at that point its later "threshold" resolution may become exceedingly tortured or even impossible.

SCRAP[192] is a concrete illustration of the problem. An organization composed of five law students sought to challenge the legality of the ICC's grant of temporary rate surcharges to most American railroads. To have standing plaintiffs had to show injury caused by the challenged order. This they accomplished by

justify the creation of an exception to rule 8(a). *See, e.g.*, Martin v. Merola, 532 F.2d 191, 198-99 (2d Cir. 1976) (concurring opinion, Gurfein, J.); Powell v. Workmen's Compensation Bd., 327 F.2d 131, 137 (2d Cir. 1964); Weller v. Dickson, 314 F.2d 598, 601-04 (9th Cir. 1963) (concurring opinion, Duniway, J.). But even these few efforts have been wholly unsatisfactory.

[189] This may be only a short range benefit at best. The underlying problem in *Warth*, for example, refused to disappear and eventually resurfaced in *Arlington Heights*. *See* notes 141-53 and accompanying text *supra*.

[190] And it was so perceived at the time. *See, e.g.*, K. DAVIS, ADMINISTRATIVE LAW TEXT § 22.01, at 419 (3d ed. 1972). Beyond injury in fact, *Data Processing*, 397 U.S. at 153, added the prudential "zone of interests" requirement, which generated no small amount of confusion. *See* note 105 *supra*.

[191] *See, e.g.*, Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 150 (1951) (concurring opinion, Frankfurter, J.). For discussion of the costs of this view, see Albert, *supra* note 8, at 442-49; notes 201-02 and accompanying text *infra*.

[192] 412 U.S. 669 (1973).

alleging that the increased shipping rates would discourage the recycling of reusable waste products, thus increasing environmental pollution which would in turn impair their recreational use of "forests, rivers, streams, mountains, and other natural resources."[193] The likelihood of plaintiffs ever *proving* this "attenuated"[194] chain of causation was remote, at best. But theoretically they could, and *Conley*'s liberal pleading standard enabled them to leapfrog defendants' dismissal motions.[195]

Alternatively, the Court suggested that defendants still could resort to rule 12(e) motions for more definite statements and to normal civil discovery.[196] The utility of the first is doubtful. However lacking in details the complaint may have been, it was not so vague or ambiguous that defendants could not have framed a responsive pleading:[197] plaintiffs' allegations were incredible, not ambiguous, and defendants could deny them in all good conscience. Nor would discovery provide the solution. Although discovery can produce the facts necessary to determine standing, it cannot by itself resolve the often sensitive standing questions. Discovery could serve as a foundation for summary judgment motions on the standing issue,[198] but the efficacy of that procedure for such issues is suspect. Plaintiffs could easily produce at least some evidence tending to show injury and but-for causation. And unless the substantive standing doctrine itself becomes more restrictive, once the plaintiff presents a genuine issue of material fact, summary judgment could not be granted.[199]

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[193] *Id.* at 678.

[194] *Id.* at 688.

[195] Under *Conley*, the complaint could not be dismissed unless it appeared *"beyond doubt* that the plaintiff [could] prove *no set of facts* in support of his claim which would entitle him to relief." 355 U.S. at 45-46 (emphasis added) (footnote omitted). In *SCRAP* the Court did not have to hypothesize acceptable circumstances since plaintiffs had already alleged them.

[196] 412 U.S. at 689 n.15.

[197] These are the only circumstances under which the motion has been permitted since rule 12(e) was amended in 1948. Federal civil procedure provides no means for obtaining a bill of particulars. 5 WRIGHT & MILLER § 1375, at 729-30.

[198] *SCRAP*, 412 U.S. at 689.

[199] FED. R. CIV. P. 56(c). Indeed, although *SCRAP* had a long and convoluted future after remand from the Supreme Court, there is no indication in any of the published reports that plaintiffs' standing was ever again challenged, even by summary judgment motion. *See, e.g.*, Aberdeen & Rockfish R.R. v. SCRAP, 422 U.S. 289 (1975).

The Eighth Circuit has suggested that despite the statements in *SCRAP* regarding summary judgment, "such a disposition will be proper in only a very few and unique cases. ... The court is not to consider the weight or significance of the alleged injury, only whether it exists." Coalition for the Environment v. Volpe, 504 F.2d 156, 168 (8th Cir. 1974). Although this view may accurately reflect what happens in many cases, it is not consistent with the Supreme Court's teachings in either *SCRAP* or *Eastern Kentucky*, 426 U.S. at 45 n.25.

Ultimately, the only means for accurate resolution of such injury and causation issues may be through a full scale evidentiary hearing.[200] The cost of such a procedure is a major diversion of the court's and litigants' energies, for the sole purpose of determining standing. If standing issues are to be resolved relatively early in the litigation, with reasonable dispatch and expense, the dismissal motion is the only effective procedural means presently provided by the federal rules. And fact pleading, not notice pleading, promotes the use of that motion.

These difficulties are not traceable solely to the demands of injury in fact analysis for more factual information than is likely to be produced by *Conley* notice pleading. If standing were considered simply an additional element of plaintiff's claim for relief, any factual issues could be resolved as all other factual issues are—at trial. The problem arises from the traditional perception of standing as a preliminary question that somehow must be resolved apart from and before consideration of the merits.[201] When that preliminary question involves intricate factual problems, as would a hearing on standing, the result may be massive disruption of orderly and efficient litigation processes.

Aside from the practical effects on the litigation process, the logical flaws of a rigid threshold view of standing can be demonstrated easily. Although injury and causation are ingredients of standing, they also remain elements of the substantive claim. Why, then, should injury and causation be torn from their contextual moorings in the substantive claim and submitted in a preliminary inquisition? Consider an analogous requirement in the law of private claims. Any ordinary personal injury case, for example, may present issues of negligence, causation, and damages. All are jury questions. In a rare case it might be expeditious to require a finding of damages (or causation) before permitting plaintiff to prove negligence, but it is difficult to perceive any persuasive reason for demanding such an awkward procedure in every case. Yet that is precisely what happens in standing.[202]

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[200] Such a hearing is permitted by FED. R. CIV. P. 12(d).

[201] *Id.* This view is so strongly held that in *Data Processing*, Justice Douglas gave it as a reason for rejecting the legal interest approach to standing: "The 'legal interest' test goes to the merits. The question of standing is different." 397 U.S. at 153.

[202] An even more striking analogy exists in the realm of personal jurisdiction. Long-arm statutes in many states provide for extraterritorial service of process on absent defendants who have engaged in certain specified activities within the forum state—the commission of a tortious act, for example. The argument has been made that when jurisdiction is challenged in such a case the court must find preliminarily that defendant did commit the

Such difficulties are not the only hurdles presented by emphasizing injury in fact. No fundamental unfairness flows from requiring a plaintiff, who seeks to challenge government action, to show that he has been injured by it. Indeed, the article III case or controversy requirement could not be met in the absence of such injury, unless the Framers intended to sanction the use of judicial power in vindicating purely abstract principles or satisfying mere curiosity.[203] Conversely, there is nothing inherently wrong with accepting a "trifling" injury as sufficient, provided it is identifiable.[204]

But demanding *some* injury in fact can be a much stricter standard than requiring *only* injury in fact. A comparison with the law of private claims is again instructive. Doctrines such as privity, proximate cause, and duty have long been employed to circumscribe the range of persons entitled to judicial relief from the wrongful and injurious acts of others.[205] Like standing, such limitations may be abused and cause individual hardship. They nevertheless serve legitimate objectives, including the rationing of relatively scarce judicial resources. If traced with sufficient precision, the ripples from virtually any human act may reach—and injure—a far greater number of persons than the judicial system can accommodate.[206] And the potential impact of most private activities is incomparably narrower than those of the government.

Even if the rationing problem is disregarded, a related difficulty remains. A government activity may injure many different classes of persons, some more gravely than others. In *SCRAP*, for

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alleged tort. This ingenious argument has been rejected, for it produces the anomalous result of requiring a preliminary trial on the merits simply to determine the court's power to reach the merits. Nelson v. Miller, 11 Ill. 2d 378, 392, 143 N.E.2d 673, 681 (1957).

[203] The Court has not been so accommodating. *See, e.g.*, Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 217, 223 (1974). On the bases of historical and policy analyses, Professors Berger, Jaffee and Scott apparently find no constitutional impediments to adjudication of such "generalized" grievances. *See* Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 846 (1969); Jaffee, *The Citizen as Litigant in Public Actions: The Non-Hochfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968); Jaffee, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961); Scott, *supra* note 8, at 674, 691-92.

[204] *SCRAP*, 412 U.S. at 689 n.14.

[205] *See generally* 4 A. CORBIN, CONTRACTS § 778, at 28-31 (1951); W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 41, 53, at 236-37, 325 (4th ed. 1971); Albert, *supra* note 8, at 438-42; Comment, *Implied Warranties—The Privity Rule and Strict Liability—The Non-Food Cases*, 27 MO. L. REV. 194 (1962).

[206] "In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the discovery of America and beyond. 'The fatal trespass done by Eve was cause of all our woe.'" W. PROSSER, *supra* note 205, at 236.

example, the ICC order could adversely affect manufacturers of goods customarily shipped by rail, other shippers, competing forms of transportation, consumers, and as *SCRAP* ingeniously illustrates, even those persons who do nothing more than breathe the air. Should all be given equal standing to challenge the ICC order, irrespective of the nature and extent of their injury? An affirmative response follows from an unadorned injury in fact test as the only requirement for standing; Justice White probably was correct in observing that *SCRAP* put the Court "well on [its] way to permitting citizens at large to litigate any decisions of the Government which fall in an area of interest to them and with which they disagree."[207]

One can of course argue as a matter of fundamental policy that any injury, however indirect and minimal, should be enough for standing.[208] But post-*SCRAP* cases demonstrate that the Court has not been consistently willing to accept the consequences of a simple injury in fact test. While purporting to retain that standard the Court has ringed it closely with prudential and other limitations so abtruse and impossible to apply rationally that only a shell of the real injury in fact test remains. To this same end, the Court also has reverted to the erratic demand for strict fact pleading. It would seem preferable to acknowledge candidly the difficulties with injury in fact and to search instead for an alternative framework for the resolution of standing questions.

C. *Evaluation of the Current Approach*

The Court's erratic treatment of the pleading of standing has some limited, although probably unintended benefits. As long as the Court retains standing as a significant barrier to judicial review of government action, its focus on pleadings will provide flexibility. *Frothingham*'s doctrinaire approach to taxpayer standing, for example, allowed minimal leeway for considering the equities even in a compelling case. By contrast, recent standing decisions present far fewer barriers to judicial review of government actions. Although *Warth* erected pleading obstacles in the path of challenges to exclusionary zoning practices,[209] *Arlington*

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[207] 412 U.S. at 723 (dissenting opinion).

[208] Although this somewhat simplifies his position, Professor Davis has consistently supported this proposition. *See* 3 K. DAVIS, *supra* note 82, § 22.18, at 291-94; K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 22.20, at 196 (Supp. 1978).

[209] *See* text accompanying notes 60-69 *supra*.

Heights demonstrates that some plaintiffs injured by such practices may achieve standing.[210] The costs of such flexibility, however, are unacceptably high. It can mask the exercise of unexplained and unbridled discretion not to entertain certain actions.[211] The Court's failure to address the inconsistencies and unworkability of substantive standing law through reliance on ad hoc pleading doctrines is even more costly.[212]

Another arguable advantage of fact pleading is that it facilitates early appellate review of standing questions. Despite its erratic application of strict fact pleading, the Court may have encouraged district courts to dismiss in close or novel cases, thus effecting early appeals before the possibly useless investment of energies on the merits. Considerable economies may result, given the blurred and uncertain contours of standing doctrine.[213]

Nevertheless, the anomalies that the Court has introduced into the pleading of standing are disconcerting. The Court has never explained its reasons for deviating from normal pleading principles. It has not candidly acknowledged even the existence of the deviation. The problem is not simply that prospective plaintiffs cannot determine the degree of specificity for alleging standing; that could be circumvented by cautious overpleading.[214] The

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[210] *See* text accompanying notes 150-53 *supra*. This is not to say that such plaintiffs are better off than if they were simply denied standing, since the Court ruled against them on the merits in *Arlington Heights*. On the authority of Washington v. Davis, 426 U.S. 229 (1976), it held that plaintiffs must prove that the purpose of the defendants' refusal to rezone was to discriminate; proof merely of a racially disproportionate impact was not sufficient. 429 U.S. at 264-65.

This raises another question not discussed in *Arlington Heights*: with what factual specificity must plaintiffs allege discriminatory purpose? Before the current emphasis on pleading facts in standing and private civil rights actions, one could have predicted with some confidence that discriminatory purpose need he alleged only generally, without supporting factual particularity. *See* FED. R. CIV. P. 9(b). That still may be true, but the cautious pleader today probably should plead as many relevant facts as possible.

[211] Justice Brennan has made this point. *See* Warth v. Seldin, 422 U.S. at 520 (dissenting opinion). *See also* 13 WRIGHT, MILLER & COOPER § 3531, at 82 n.63.22 (Supp. 1978).

[212] Professor Lewis made a similar point with marvelous prescience in 1962, when the revolution in standing doctrine was just beginning.

> So long as standing serves, on occasion, as a shorthand expression for all the various elements of justiciability, and serves interchangeably with other terms, such as ripeness, to sum up a judicious exercise of discretion in the use of the reviewing power, its convenience alone likely will preclude the Court's adoption of greater precision in the use of the concept. By the same token, discovering what the Court intends to convey when it relies on the concept will become increasingly difficult.

Lewis, *Constitutional Rights and the Misuse of "Standing,"* 14 STAN. L. REV. 433, 453 (1962).

[213] This justification is weakened considerahly by the availability of other means for early appellate review, especially 28 U.S.C. § 1292(b) (1976).

[214] When a court is hostile to plaintiff's claim, however, even overpleading carries the

Court's careless commingling of pleading and substantive doctrine may render it impossible to predict rationally whether *any* allegation will suffice, no matter how carefully crafted. Since plaintiffs can never be certain of the extent to which the attention paid pleadings in such cases as *Warth* and *Linda R. S.* masks other unstated concerns, their value as precedent is diminished. These uncertainties encourage suits that should not be filed, defense motions that should not be made, district court decisions that cannot be sustained, and circuit court opinions whose fate in the Supreme Court is utterly unpredictable. In short, general pleading standards are unascertainable. Form is not only elevated over substance, but the form is unknown and unknowable. This unpredictability is particularly unfortunate in an area such as standing, where the impact of the judicial process may have extraordinary constitutional and social dimensions. A more complete antithesis to the rational scheme envisioned by the drafters of the federal rules is unimaginable.

There are other equally grave consequences of the Supreme Court's erratic and unpredictable attitude toward pleadings. First, it may be counterproductive to the efficient and economical development of issues in a given case. In the standing area, as elsewhere, the issues presented may be purely legal (formulation of an abstract standard), purely factual (whether a given event or act occurred), or a mixture of law and fact (whether the occurrence of a given event or act satisfies an abstract standard). Confusion of pleading doctrine with substantive principles may obscure this identification of issues and prevent their assignment to procedurally appropriate modes of resolution.[215]

Second, creating an exception to *Conley* and rule 8(a) principles ignores hard lessons of procedural history and reform. The universality of the federal rules, which promotes an informed and consistent body of adjective law, will be severely undermined by

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risk of providing ammunition that can be used against the pleader. *See, e.g.*, Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 217 (1974); O'Brien v. DiGrazia, 544 F.2d 543, 546 n.3 (1st Cir. 1976), *cert. denied*, 431 U.S. 914 (1977).

[215] *Linda R. S.* illustrates this problem. The trial court could have viewed standing as a purely legal question, appropriately resolved by ruling on a dismissal motion with no need to consider any actual evidence of causation. Such a ruling would have rested only minimally on the factual particularity with which plaintiff had alleged causation, for the decisive issue was whether as a matter of law the nexus between nonprosecution and nonsupport was sufficiently direct. On the other hand, the court could have considered the nexus issue as purely factual, resolvable only after an evidentiary hearing at which plaintiff was given the opportunity to prove that prosecution of the child's father would have resulted in the payment of support.

elusive and inconsistent alterations of its pleading requirements. Such piecemeal modifications may also have unfortunate and unforeseen effects in other areas of the highly interdependent federal procedural system; for example, related concepts, such as summary judgment, may suffer similar fates.[216] Even more obviously, the Court by relying on subtle pleading principles has forgotten that the failure of fact pleading under the codes contributed significantly to adoption of the federal rules.[217] Construction of the complaint can be useful in determining whether a judicially cognizable claim for relief has been asserted in litigation between private individuals. It can also play a significant role in evaluating standing to challenge government action. But it is no more realistic in standing than elsewhere to demand that all, or even most, issues be resolved solely by reference to the pleadings. When pleadings-based standing decisions are appropriate, they should result from a fair and sympathetic reading of the complaint, not from semantic hairsplitting. In particular, courts need not revert to a rigid fact-conclusion pleading dichotomy. That approach proved illogical and counterproductive in the pleading of private claims; it can function no better in the pleading of standing.

Finally, such incursions on rule 8(a) and *Conley* may have ramifications far beyond standing. We already have noted the tendency of many circuit and district courts to erect special pleading requirements in private civil rights actions.[218] The Supreme Court's similar treatment of standing can only encourage this development.[219] Once opened, the gates of special pleading may be difficult to close.

The choice of procedure can be crucial in such a case, for plaintiff may be able to prove causation *if* the trial judge treats standing as essentially an evidentiary problem—the *Duke Power* approach. *See* 438 U.S. at 72. But if the judge considers standing as predominantly a legal problem, plaintiff may never have that opportunity. This appears to be what the Supreme Court actually had in mind in *Linda R. S.*, despite its dicta about the allegations of causation being "speculative." 410 U.S. at 618. In any event, considerable consequences may flow from the characterization of the problem as "legal" or "factual," but the Supreme Court has given precious little guidance about the making of that characterization.

[216] *See* note 199 *supra*.

[217] *See* notes 39-46 *supra*.

[218] *See* text accompanying notes 172-80 *supra*.

[219] As demonstrated by his dissent in Cruz v. Beto, 405 U.S. 319 (1972), Justice Rehnquist needs no encouragement. In *Cruz*, a state prison inmate brought a § 1983 action against various corrections officials based on allegations that they had unconstitutionally discriminated against his practice of Buddhism. In an unexceptional application of *Conley*, the Supreme Court reversed the rule 12(b)(6) dismissal granted and affirmed below. Dissenting, Justice Rehnquist noted that the Court had "never dealt with the special pro-

IV

INTEGRATION OF THE SUBSTANTIVE AND PROCEDURAL FACETS OF STANDING

The difficulties with the pleading of standing are too fundamental to be resolved by minor tinkering with either the pleading standard or the substantive law of standing. *SCRAP* and *Warth* illustrate the problems resulting from the thoughtless overlay of both notice and fact pleading on current standing principles. Neither case offers an entirely satisfactory approach: while *SCRAP*'s adoption of notice pleading proved, in the Court's subsequent view, too radical an expansion of standing, *Warth*'s retreat to strict fact pleading eviscerated federal pleading policy and unduly confused the law of standing itself. The difficulties, for the most part, are traceable to the Court's failure to appreciate the inherent conflict between notice pleading and current substantive standing doctrine. The situation requires a systematic accommodation of both concepts; any successful solution will entail a radical rethinking of at least one.

The awkward and often artificial refinements that the Court has added to standing's core concept, injury in fact—nexus, causation, and remediability—suggest that the root of this conflict lies with the standing doctrine and that difficulties with notice pleading are only symptomatic of standing's fundamental doctrinal deficiencies. A reappraisal of standing is therefore preferable to the abandonment of notice pleading. At least two alternatives are available.

The Court should abandon or substantially modify its traditional perception of standing as a threshold issue. This view has been persuasively criticized[220] and is logically and pragmatically unsupportable.[221] It not infrequently has been ignored in practice.[222]

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cedural problems presented by prisoners' civil suits." *Id.* at 323. He then suggested one of the most extraordinary pleading standards ever conceived: such claims would be entertained only if the complaint alleged "facts showing the difference in treatment between petitioner and his fellow Buddhists and practitioners of denominations with more numerous adherents could not reasonably be justified under any rational hypothesis." 405 U.S. at 326. In other words, he proposed to stand *Conley* on its head. How one can *fact plead a negative* is something of a mystery.

[220] *See* Albert, *supra* note 8, at 427-29, 442-50, 490-97.

[221] *See* text accompanying notes 191-202 *supra*.

[222] *See, e.g.*, Alabama Power Co. v. Ickes, 302 U.S. 464, 475 (1938) (district court's finding of standing after "full hearing" including merits issues reversed by Court); Edward Hines Yellow Pine Trustees v. United States, 263 U.S. 143, 144-45 (1923) (district court's

Substantive standing doctrine has enjoyed considerable liberalization over the past twenty years. The substitution of injury in fact for the legal rights standing model, together with recognition of "public action" litigation, opened the standing door to a wide variety of plaintiffs and spawned a proliferation of challenges to government action.[223] In the Court's eyes, the interaction of this liberalized approach with notice pleading proved intolerable. The reversion to strict fact pleading reflects an attempt to retain standing as a significant access barrier.[224]

This process has seriously impaired the integrity of federal procedure. And the damage has been gratuitous. *No* pleading standard, fact or notice, can effectively screen cases on standing grounds. Substantive standing doctrine is just too convoluted, emphasizing ambiguous concepts[225] whose resolution often requires a fully developed evidentiary record. Summary, threshold determination of standing frequently is impossible.

Standing's voracious appetite for facts can easily be reconciled with notice pleading, but only if courts are willing to delay standing issues until trial. Although this reform deviates from present theory, it eliminates the conflict between the pleading and standing doctrines while providing beneficial side effects. Specific facts material to standing can be presented and resolved most effectively in litigating the merits.[226] The cost and delay of a preliminary hearing on standing would be avoided.

This proposal would undermine the effectiveness of standing as a door-closing device. But such an effect would be less substantial than prior incursions. The expansion of standing beyond the legal rights model already largely vitiated its door-closing utility, regardless of any partial regression in cases like *Warth*. Deciding standing issues at trial would work little additional ill.

Thus, notice pleading and substantive standing law can coexist in their current forms if standing decisions can be delayed until trial. Even if jurisdictional considerations require that a court

denial of standing after "final hearing" affirmed by Court); Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 373 F. Supp. 208, 209 (N.D. Ill. 1974) (standing decided after trial on merits), *rev'd on other grounds*, 517 F.2d 409 (7th Cir. 1975), *rev'd*, 429 U.S. 252 (1977).

[223] *See* Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1379-83, 1389-92 (1973).

[224] *See* notes 114-57 and accompanying text *supra*.

[225] Causation and remediability are examples, as are the ephemeral "concrete" and "particularized" qualities of injury in fact. *See* notes 27-30 and accompanying text *supra*.

[226] "I would let the case go to trial and have all the facts brought out. Indeed, it would be better practice to decide the question of standing only when the merits have been developed." Warth v. Seldin, 422 U.S. 490, 519 (1975) (dissenting opinion, Douglas, J.).

find standing before deciding the merits, standing and merits issues may be *developed* and *tried* simultaneously, following normal federal practice. If plaintiff's standing allegations satisfy normal *Conley* standards, then a court should exercise its discretion under rule 12(d) and defer the standing determination until trial.[227]

While this alternative reconciles standing and notice pleading by eliminating the point of conflict, it fails to address critical inadequacies of substantive standing doctrine. The amorphous qualities of the injury in fact test and its prudential overlays have led to the erratic, unpredictable application of standing doctrine. Only a principled reformulation of substantive doctrine can cure this defect. While the precise contours of a principled standing law are difficult to plot, it may be possible to discern the doctrine's general shape.

A satisfactory reformation of standing can proceed only after a recognition of the failings of past efforts. The abstract nature of the concept defies attempts to isolate the "essence" of standing. "Standing" is merely a conclusion and not a tool of analysis; it is devoid of content and useful only as a label for a number of complex, and frequently different, problems.

Given, then, that standing has no single "essence," endeavors to articulate an all-encompassing formula must be imprecise or overly broad to the point of futility and counterproductivity. The injury in fact standard provides a typical example. This liberal test is simple and predictable in application; most plaintiffs have standing because most offending governmental actions could generate at least some trifling injury.[228] An unadulterated injury in fact standard, however, is so broad that it fails to sort cases on justiciability grounds. It does not guarantee that plaintiffs granted standing are the best representatives to bring the case and sharpen the issues. But the Court's imposition of additional screening criteria beyond injury in fact has complicated the pristine standard, sacrificed predictability, and rendered the "injury in fact" label imprecise.[229]

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[227] Rule 12(d) gives federal courts the discretion to defer the hearing and determination of all rule 12(b) defenses until trial.

[228] *See* Monaghan, *supra* note 223, at 1380-83, 1389-92.

[229] Moreover, the Court has so overburdened standing that the doctrine is now hopelessly confused with other justiciability and avoidance concepts with which it has strong ties, such as abstention, political question, and mootness. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-8, at 53-56 (1978); 13 WRIGHT, MILLER & COOPER § 3529, at 152-54; Scott, *supra* note 8, at 683. A separate standing rubric has only a limited

A principled standing rule must meet all these objections. The answer, surprisingly, has always been close at hand and, paradoxically, repudiates all overarching standing models. Standing's similarity to the cause of action concept provides a useful analogy for designing an analytical framework for the resolution of standing questions.[230] The *Flast* nexus requirement and the *Data Processing* zone of interest test closely resemble the familiar cause of action[231] components of duty and proximate cause. The legal rights model of standing, with its classifications of injured interests and plaintiffs, made this connection quite clear. For example, *Frothingham* denied taxpayers standing to challenge the validity of government expenditures because of the insubstantial nature of their injury.[232] If the case had been a private litigation, the attenuation between delict and injury, a notion essentially identical to the *Frothingham* rationale, would prevent plaintiff from establishing his cause of action. The two cases differ only in that the plaintiff in the private litigation is denied relief as a matter of substantive law.

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value as an abbreviated and imprecise description of certain vague variables in an interrelated set of problems collectively comprising the justiciability of claims against the government. *See* Sedler, *supra* note 105, at 481-82. As Justice Frankfurter observed: "Justiciability is . . . not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures . . . ." Poe v. Ullman, 367 U.S. 497, 508 (1961) (concurring opinion). Whatever the justiciability classification into which a case most neatly falls, the ultimate question remains constant: whether the plaintiff may adjudicate the legality of a given government action on specific grounds. *See, e.g.*, Flast v. Cohen, 392 U.S. 83, 99-100 (1968). Standing may emphasize plaintiff's identity; ripeness and mootness, temporal factors; and the abstention doctrine, prudential considerations. None, however, can be resolved in a vacuum. By themselves, particular facts regarding plaintiff's identity are utterly meaningless and acquire relevance only when there is something to which they can be related—a particular claim for relief. And claims always are made within a temporal, social and judicial context.

Running through the standing decisions, for example, are repeated references to nonconstitutional, prudential considerations justifying the denial of standing. *See, e.g.*, Singleton v. Wulff, 428 U.S. 106, 112-16 (1976) (jus tertii standing); Warth v. Seldin, 422 U.S. 490, 498-500, 509-10, 517-18 (1975); United States v. Richardson, 418 U.S. 166, 196-97 (1974) (concurring opinion, Powell, J.); Flast v. Cohen, 392 U.S. 83, 92-94, 98-99 (1968). And in such decisions as *Linda R. S.* and *Reservists*, standing and pleading doctrines have been severely stretched in order to avoid reaching the merits. These practices are nothing more than disguised forms of abstention, but the Court has made no effort whatever to integrate them into a coherent whole.

[230] Professor Albert has previously noted this similarity. Albert, *supra* note 8, *passim*. *See also* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 151-57 (2d ed. 1973).

[231] "Cause of action," the operative code terminology, is used here as synonymous with "claim for relief," the more modern phrase.

[232] Frothingham v. Mellon, 262 U.S. 447, 487 (1923).

The cause of action concept once suffered from the definitional dispute now plaguing the standing doctrine.[233] The breakthrough for cause of action analysis came with the realization that the concept lacked a unitary definition. Once the quest for an all-encompassing formula was abandoned, attention could focus on factors governing whether a cause of action should be recognized, or should be implied from a statutory duty.[234]

Courts could profitably recast standing methodology along similar lines. Standing analysis should not replicate private cause of action analysis; cause of action criteria are not necessarily appropriate to standing[235] and in any event are continually evolving. Rather, courts should adopt a similar *process* and directly analyze whether plaintiff should be permitted to bring the case. A detailed explication of the appropriate methodology is beyond the scope of this Article, but its general direction is clear; it, like implied cause of action analysis, must focus on broad class- and claim-based factors. Rather than concentrating exclusively on the facts of each plaintiff's idiosyncratic injury,[236] courts should scrutinize the general nature of the injury, its relationship to the challenged activity, and the availability of a remedy created by decisional or statutory norms.[237]

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[233] For a collection of references regarding this debate, see Clark, *supra* note 1, at 313 n.37, *reprinted in* CLARK 69, 79 n.37.

[234] The drafters of the federal rules appreciated this, with the result that nowhere in those rules does reference appear to the "cause of action." *See* Clark *supra* note 1, at 314, *reprinted in* CLARK 69, 80.

[235] Professor Albert has argued persuasively that private rules of law reflect a "considered adjustment of . . . [the] conflicting and competing . . . purposes, aspirations, motives, and interests that are associated with individual and institutional private conduct. . . . Ordinarily the interests and purposes behind government activities and the harms they produce do not correspond with those of private persons." Albert, *supra* note 8, at 443-44.

[236] This is not to say that the magnitude of injury cannot and should not be considered in public standing or private cause of action litigation. But such factors should neither be exclusive, nor even predominant.

[237] There is nothing startling or novel about this approach to standing. Indeed, the Supreme Court has continued to rely upon class- and claim-based considerations even during its flirtation with injury in fact. The most obvious example is the distinction it has consistently drawn between taxpayer standing and citizen standing. *See, e.g.,* Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 78-79 (1978); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 225 n.15 (1974). The kinds of injuries involved in taxpayer suits are frequently different from those involved in citizen suits. Resulting from an increased tax liability, the injury in taxpayer suits is limited to the plaintiff's pocketbook. *See, e.g.,* Flast v. Cohen, 392 U.S. 83, 91-92 (1968). The range of injuries asserted in citizen suits is broader. *See, e.g.,* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 210-11 (1974) (conflict of interest of elected officials). Plaintiffs often claim different kinds of injuries in the same case. *See id.* at 211. But the greater importance of these standing classifications is that they reflect wide differences in the representative status asserted by the claimants; the boundaries of taxpayer and citizen groups frequently

The advantages of this approach are noteworthy. Courts would address the ultimate issue directly; they would not be diverted or led astray by the intricacies of applying a less elemental formula. They could openly consider the whole range of historical, political, jurisprudential, and other policy concerns always relevant to standing. Because a cause of action-type analysis would categorize plaintiffs more in terms of classes and claims than idiosyncratic facts, predictability would be improved. This test would also reconcile standing with notice pleading. Prior to *Baker v. Carr*, with the similar analytical emphasis and reduced need for particularity in pleading of the now-defunct[238] legal rights model,[239] courts resolved standing issues with a minimum of fuss and bother about pleading technicalities, even though fact pleading was dominant during much of that era.[240] This alternative approach would borrow the legal rights model's compatibility with

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are not coterminal. The same might be said of the types of delicts and of the dispositive legal norms. *See, e.g.*, Flast v. Cohen, 392 U.S. 83 (1968) (taxpayer suit alleging violations of first amendment, establishment, and free exercise clauses); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) (citizen suit alleging violations of incompatibility clause).

[238] Professor Monaghan has observed that the erosion of the legal rights approach to standing resulted primarily from the rise of the administrative agencies, which generated irresistible pressure to accord judicial review to anyone adversely affected by administrative action. Monaghan, *supra* note 223, at 1380.

Another explanation is that, although the courts recognized that the sources of "legally protected interests" could be statutory and constitutional (*see* note 76 and accompanying text *supra*), they tended to emphasize another source, the law governing private claims. As Professor Albert has pointed out, this focus was misplaced. *See* note 235 *supra*. It inevitably distorted the law of standing and produced results poorly grounded in policy and justice, thus discrediting the model itself.

Finally, the legal rights approach is not analytically satisfying. The objective of any inquiry into standing is to determine whether the constitutional or statutory rule at issue supports the grant of standing. It is not whether that rule "creates" a "legal interest." The natural tendency, therefore, is to focus directly on standing, eschewing legal interest determinations as unnecessary abstractions.

[239] Professor Scott identified four factors that appear to have been influential in determining standing under the legal rights model: (1) the size of the group protected or benefited by the legal rule relied on; (2) the "directness" of the adverse effect on plaintiff; (3) whether plaintiff's injury merely resulted from increased competition; and (4) whether a public agency existed which was charged with protecting the interests of persons in plaintiff's position. He noted that the list could be extended and that it reflects considerations which are conventionally treated as questions going to the merits, Scott, *supra* note 8, at 652-54.

[240] *See* notes 80-83 and accompanying text *supra*. The principal contributing factor was an almost subliminal perception of the similarities between justiciability (including standing) and cause of action concepts. That is, the analytical focus was upon establishing appropriate *classifications* of injured interests and plaintiffs; only tangentially did the inquiry involve facts unique to the injury sustained by a particular plaintiff.

Tennessee Elec. Power Co. v. TVA, 306 U.S. 118 (1939), *aff'g* 21 F. Supp. 947 (E.D. Tenn. 1938), exemplifies how unique facts can tangentially come into play under the legal

notice pleading, although the new test need not be as substantively restrictive; its liberality would depend on the factors employed to assess standing and their relative weights. In addition, the proposal's class- and claim-based considerations would not commonly present narrow fact questions and would correspondingly reduce the need for particularity of pleading or for tedious discovery. Resort to summary judgment procedure likewise would become less frequent.[241]

CONCLUSION

The Supreme Court's recent decisions reflect a determined desire to retain standing as a significant preliminary barrier to at least some challenges to government action. This vision is quite difficult to reconcile with *SCRAP*'s joinder of notice pleading and simple injury in fact. But the resulting retreat from *SCRAP* has turned into a rout, and all sense of direction has been lost in the process. The Court has overlaid injury in fact with a number of substantive restrictions which may be charitably characterized as opaque. Simultaneously, it has apparently abandoned *SCRAP*'s procedural prop, notice pleading. Given the traditional view of standing as a threshold issue, the Court's revival of fact pleading reflects an understandable desire to resolve standing as early in the litigation as possible, through dismissal motions directed to the complaint. If injury in fact remains the cornerstone of standing,

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rights approach to standing. Claiming violation of their rights under the fifth, ninth, and tenth amendments, sixteen power companies sought to enjoin TVA from competing with them in the generation and sale of electric power. The Supreme Court held that the plaintiffs had no standing since "damage consequent on competition, otherwise lawful, is in such circumstances *damnum absque injuria*, and will not support a cause of action or right to sue." 306 U.S. at 140. Plaintiffs had also alleged fraudulent and coercive conduct by TVA which, if true, would have rendered the competition unlawful. *Id.* at 144-45. The allegations of fraud and coercion had raised fact questions that could be resolved only by trial. 21 F. Supp. at 950.

The crux of the analysis was whether certain classes of claims and plaintiffs merited judicial protection from injurious government activities, not whether plaintiff had sustained such an injury as to acquire a sufficient "personal stake in the outcome of the controversy." The passage from *Tennessee Electric* clearly illustrates this old overlap between cause of action and standing concepts. *See also* Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 21 (1942) (dissenting opinion, Douglas, J.).

[241] Most complaints can be expected to reveal with sufficient clarity the general nature of the claim asserted and the class of persons to which plaintiff belongs. If a complaint is so vague or conclusory that it fails to give even this minimal information, it is unlikely that defendant reasonably could be expected to respond to it; thus defendant will likely make a rule 12(e) motion to compel the necessary specificity.

the burdens of its resolution may be greatly magnified by shifting the procedural emphasis to other pretrial mechanisms such as discovery and summary judgment.

Nevertheless, the Court's assault on notice pleading has been unwise for several reasons. First, strict fact pleading casts too broad a net, ensnaring cases where standing should be granted as well as those where it should not. To whatever degree this consequence has been avoided, it is only because the Court has employed the doctrine selectively. Such unexplained selectivity itself injects needless confusion into an already difficult area. Second, fact pleading measures only the relative specificity with which allegations are made, not their content vis-à-vis standing. It cannot effectively serve the substantive function of distinguishing between justiciable and nonjusticiable controversies. Third, fact pleading has considerable liabilities even as a purely procedural means of issue-identification. It encourages prolix, boilerplate pleadings by plaintiffs who naturally seek to cover every possible contingency, and it promotes dilatory defense motions which are based on nothing more than technical semantic grounds. Both responses tend to confuse the issues, not to clarify them. Fourth, in the cases where the Court has condemned standing allegations as "conclusory," its logic has been pure ipse dixit, untainted by any hints of reasoned analysis. Fifth, and most important, its facile manipulation of pleading principles has diverted the Court from formulating a comprehensive and workable approach to standing. It should stop treating symptoms and instead direct its energies to the causes of standing's current malaise: the post-*Baker* emphasis on each plaintiff's idiosyncratic "personal stake in the controversy" and the corollary of injury in fact. The Court should directly face the difficult policy issues involved in standing by either resolving standing issues after the merits have been developed or returning the focus to substantive class- and claim-based considerations, paralleling cause of action analysis.