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A LITIGATION PRIMER FOR STANDING DISMISSALS

JOHN H. GARVEY*

Professor Garvey examines a very theoretical issue—whether standing objections are jurisdictional, claim-related, or both—to resolve a very practical problem—how to characterize motions to dismiss for lack of standing. As he notes, the choice of characterization under the Federal Rules of Civil Procedure has important practical consequences for the litigator, involving evidentiary limitations, consolidation requirements, and the res judicata effect of dismissal. Professor Garvey suggests, as a solution to the litigator’s dilemma, that both rule 12(b)(1) and rule 12(b)(6) are appropriate means by which to raise standing objections in the constitutional sense since a determination that the plaintiff lacks standing means both that the court lacks jurisdiction and that the plaintiff has failed to state a claim. On the other hand, since prudential standing objections rest on the very considerations that determine whether a court will infer a right of action, they should be treated as entirely claim-related and therefore should be made under rule 12(b)(6) only.

INTRODUCTION

It is symptomatic of the confusion which plagues the law of standing that even after the past decade of intense litigation of the question, the Supreme Court is heard to say that the issue of standing is one which “may be jurisdictional.” That means, I suppose, that it may not be; and if not, it is rather clear that the only other taxonomic possibility makes it an integral part of the plaintiff’s claim or cause of action. Exactly which label is to be applied—or rather, when one label rather than the other is appropriate—has real

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2 I omit as not germane discussion of those cases in which a defending party seeks standing to raise a particular issue, not access to court. See, e.g., United States v. Payner, 100 S. Ct. 2439, 2444 (1980) (respondent lacked standing to exclude evidence from his own criminal trial that had been seized in violation of a third party’s fourth amendment rights); McGowan v. Maryland, 366 U.S. 420, 429-30 (1961) (litigant may assert only his own constitutional rights, Sunday closing laws caused litigant economic harm but did not abridge his freedom of religion); United States v. Raines, 362 U.S. 17, 22 (1960); Barrows v. Jackson, 346 U.S. 249, 255 (1953).


significance at the appellate level; but the problem is even more pressing in the trial courts since the Federal Rules of Civil Procedure attach important consequences to the choice of description. A glance at the reported cases recently decided in the lower federal courts reveals no consistent pattern. One finds courts both sustaining and denying the contention that lack of standing is a jurisdictional defect that may be asserted by motion under federal rule 12(b)(1). Just as frequently, though, defendants will object that lack of standing amounts to failure to state a claim, and will seek and at times obtain dismissal under rule 12(b)(6). Scholarly commentary on the litigator's dilemma is virtually nonexistent, though at least one suggestion has been made that the issue, while at all times jurisdictional, cannot conveniently be accommodated by the Federal Rules of Civil Procedure unless some amendments are made.

There is no need to confuse the issue further by adding another category to rule 12(b), an action which might suggest that standing is not claim-related and not really jurisdictional either. Rather, it

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4 Proper characterization will determine whether the standing issue may be raised at the appellate level. If standing is characterized as a jurisdictional issue the defendant may raise it at any time, even after the trial court has rendered a final judgment. See French Renovating Co. v. Ray Renovating Co., 170 F.2d 945, 947 (6th Cir. 1948); Marin v. University of P.R., 377 F. Supp. 613, 631 (D.P.R. 1974) (motion for relief from judgment under Fed. R. Civ. P. 60(b)(4)). Since the question of jurisdiction remains open after judgment, an appellate court may even raise the issue sua sponte. See McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 188-90 (1936); Louisville & N.R.R. v. Mottley, 211 U.S. 149, 152 (1908); Amfac Mortgage Corp. v. Arizona Mall of Tempe, Inc., 583 F.2d 425, 430 n.5. (9th Cir. 1978). On the other hand, the defense of failure to state a claim is waived if not asserted at some point during the trial; appellate courts generally will not consider the sufficiency of the complaint after judgment. Fed. R. Civ. P. 12(h)(2); see Black, Sivalls & Bryson, Inc. v. Shondell, 174 F.2d 587, 591 (8th Cir. 1949); Snead v. Department of Social Servs., 409 F. Supp. 995, 1000 (S.D.N.Y. 1975).

5 See text accompanying notes 15-46 infra.


11 The proposed amendment would require that a motion to dismiss for lack of standing be brought prior to a judgment on the merits. Once a final judgment is rendered, the verdict
should be acknowledged that standing in its constitutional sense is both jurisdictional and claim-related, and a motion to dismiss for lack of constitutional standing may properly question both the court’s subject matter jurisdiction and the sufficiency of plaintiff’s claim. Standing in its prudential aspect is a separate question. Prudential limitations are morphologically analogous to the rules governing implied rights of action and should be treated, as the latter already are, as entirely claim-related for purposes of consideration under the Federal Rules.

I

CONSEQUENCES OF THE CHOICE
UNDER THE FEDERAL RULES

The distinction between jurisdictional and claim-related issues is made in rule 12(b), which states: “Every defense, in law or fact, . . . shall be asserted in the responsive pleading . . . , except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, . . . (6) failure to state a claim upon which relief can be granted . . . .” Naturally, one seeking to make a standing objection by such a motion will be concerned about what to call it, especially since it has to be done in writing and since the court will want to know that it is the kind of defense which can be made by motion rather than in an answer. The suggested form for making a 12(b) motion, form 19, seems to make a point of identifying the appropriate subsection of rule 12(b) for each of several defenses, and a conscientious moving party will want to do likewise. Of course, that kind of uncertainty is not going to provoke

would not be vulnerable to direct or collateral attack on standing grounds, even when the plaintiff at all times lacked standing. See Bernstine, supra note 10, at 520-21. As Professor Bernstine admits, however, standing has a clear article III component, and therefore would come within the general rule that subject matter jurisdiction is a fundamental predicate of the court’s power to hear a case, and may not be created even by agreement of the parties. Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 167 (1939); see 5 C. Wright & A. Miller, Federal Practice & Procedure: Civil § 1350, at 546 (1969) [hereinafter Wright & Miller]. An amendment proscribing postjudgment attacks on plaintiff’s standing, when the deficiency was jurisdictional, would result in binding judgments being issued by courts admittedly incompetent to hear the case. This is precisely the result which the Federal Rules of Civil Procedure sought to avoid, as inconsistent with article III’s grant of judicial power to the federal courts. Fed. R. Civ. P. 12(b)(1).
14 Motions for dismissal because of prudential standing limitations therefore should be brought under rule 12(b)(6).
the Advisory Committee to convene an extraordinary session, and there are solutions to the litigator's quandary. One which has been tried is simply to label the motion as one under "rule 12(b)" and leave the classification problem to the courts, which after all have created the standing muddle themselves. And if all else fails, the moving party can rest assured that even when the judge disagrees with his choice of label, the mistake won't be fatal given rule 1's mandate that the Rules be construed to "secure the just, speedy, and inexpensive determination of every action."  

A slightly more annoying problem is presented by the last sentence of rule 12(b):

If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 . . . .

There is no similar provision for conversion of a rule 12(b)(1) motion into a summary judgment proceeding, a fact which did not escape the eye of Justice Brennan in *Warth v. Seldin.* He dissented from the Court's dismissal on the pleadings for want of standing but, believing that standing questions did not go the merits, said that the motion to dismiss was not converted into summary judgment by the introduction of affidavits and documents. Although Justice Brennan is surely correct in saying that the last sentence of rule 12(b) operates only to convert 12(b)(6) motions into motions for summary judgment, his suggestion that matters outside the pleadings should not be introduced on motions other than those under 12(b)(6) is somewhat harsh. There never was any doubt about the propriety of introducing matters outside the pleadings to assist a court in resolving the

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17 Fed. R. Civ. P. 1. Not infrequently, judges simply relabel a motion which is improperly denominated. See note 22 infra.

18 422 U.S. 490, 527 n.6 (1975) (Brennan, J., dissenting).


20 See 5 Wright & Miller, supra note 11, § 1366, at 676.

21 422 U.S. at 526-27.

22 Most trial courts convert any challenge to the sufficiency of plaintiff's claim into a summary judgment motion if the original motion is supported by material outside the pleadings. In short, the denomination may be irrelevant. See *Kaufman v. Scanlon*, 245 F. Supp. 352, 353 (E.D.N.Y. 1965) (12(b)(1) motion converted to rule 56 summary judgment motion; defendant
other issues listed in rule 12(b). It was only the common-law bar against "speaking demurrers" which led to anomalous treatment of motions alleging failure to state a claim. But even if the characterization of a standing objection does not determine whether extrinsic evidence is admissible at all, it does determine whether the court should apply the evidentiary limitations imposed on summary judgment proceedings—but not on otherwise dispositive motions not going to the merits—by rule 56(e). Still more serious questions arise from the waiver provisions in rule 12(h)(2) and (3):

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

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

challenged the sufficiency of the plaintiff's claim when he thought he was challenging the court's subject matter jurisdiction. See also Papastein v. B & L Constr. Co., 356 So. 2d 163, 160 (Ala. 1978) (applying state law analogue of Fed. R. Civ. P. 12(b)(6)); Brosie v. Stockton, 105 Ariz. 574, 576, 468 P.2d 933, 935 (1970). Thus, district courts have exhibited more flexibility in reading rule 12(b) dismissal motions than Justice Brennan would admit.

23 See cases cited in 5 Wright & Miller, supra note 11, § 1364, at 662 n.8. But see Winkleman v. New York Stock Exch., 445 F.2d 786, 788 (3d Cir. 1971) ("This rule 12(b)(6) makes no provision for matters outside the pleading.").


25 A controversy arose soon after the enactment of the Federal Rules over whether rule 12(b)(6) motions had to be made only on the basis of the pleadings, or could be supplemented by extrinsic materials. Some courts took the position that rule 12(b)(6) merely codified the old common law demurrer with its ban on the use of affidavits and other material not included on the face of the pleadings. See, e.g., Kohler v. Jacobs, 139 F.2d 440, 441 (5th Cir. 1943); Cohen v. United States, 129 F.2d 733, 736 (8th Cir. 1942). Other courts held that it enacted an entirely new pleading procedure which allowed "speaking demurrers" in which extrinsic evidence was admissible. See, e.g., Carroll v. Morrison Hotel Corp., 149 F.2d 404, 407 (2d Cir. 1945); Lucking v. Delano, 129 F.2d 283, 285 (6th Cir. 1942). In 1948, the rule was amended to eliminate this confusion by expressly permitting rule 12(b)(6) motions to be supplemented by materials extrinsic to the pleadings. See Advisory Committee Note to the 1946 Amendment to Rule 12(b); 5 Wright & Miller, supra note 11, § 1364, at 668-69, § 1366.

26 5 Wright & Miller, supra note 11, § 1364. See also Garvey, The Attorney's Affidavit in Litigation Proceedings, 31 Stan. L. Rev. 191, 192 n.7, 195 (1979) (courts on a preliminary motion generally will accept evidence by affidavit that would not be admissible at trial, a practice in which they do not engage when hearing rule 56 motions).

And although a court may accept evidence by affidavit relating to a summary judgment motion, it will not make findings of fact determinative of such a motion if a genuine and material factual controversy exists. Rather, the court must set the issue for trial. See Manetas v. International Petroleum Carriers, Inc., 541 F.2d 408, 413-14 (3d Cir. 1976), Radohenko v. Automated Equip. Corp., 520 F.2d 540, 543 (9th Cir. 1975). This limitation does not apply.
The aim of the provisions is to define the point in the proceedings after which the specified defense is lost. And the obvious distinction between 12(b)(6) and 12(b)(1) defenses is that only the latter survive completion of the trial on the merits in the district court. Although it is not entirely clear what is encompassed by "the trial on the merits," it is at least certain that motions to dismiss for failure to state a claim may not be made for the first time after judgment. By contrast, it is well accepted that objections to subject matter jurisdiction may first be raised by motion for relief from the judgment under rule 60(b)(4), a provision which is unrestricted even by the one-year limitation generally imposed by rule 60(b).

A subsidiary point which emerges from the rule 12(h) waiver provisions is that objections to jurisdiction may be made either by the parties "or otherwise," meaning, of course, that the court may make the suggestion on its initiative. This should hardly be surprising since the underlying policy rests not on any interest of the parties but on an institutional concern about the judiciary acting beyond its competence. But it is an unusual exception to the general rule that control over the litigation rests with the parties, even when their laxity or stupidity results in judgment on a claim for which the law would not otherwise afford relief. In contrast, the practice of dismiss ing a suit sua sponte for failure to state a claim, although not

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28 See note 4 supra.

29 See, e.g., French Renovating Co. v. Bay Renovating Co., 170 F.2d 945, 946 (6th Cir. 1948); Metropolitan Opera Ass’n, Inc. v. Metropolitan Opera Ass’n of Chicago, Inc., 86 F. Supp. 526, 527 (N.D. Ill. 1949); cf. Restatement of Judgments § 7 (1942) (judgment void if rendered by a court which lacks jurisdiction).


31 This policy is graphically illustrated by the rule that the parties may not confer jurisdiction by consent, Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 167 (1939).
unknown in the federal courts, is a step to be taken guardedly and with proper precautions for the submission of the parties' views.32

A further distinction relevant to the proper characterization of standing objections is tied to the use of the word "suggestion" in rule 12(h)(3) to describe the procedure for putting forward a jurisdictional defense. Since it would have been just as easy to say "whenever it appears by motion of the parties or otherwise," what the drafters must have meant is that it does not matter how the deficiency is brought to the court's attention; it could be in a letter,33 a pretrial memorandum,34 a formal "suggestion,"35 or otherwise.36 Indeed, any further requirement would be superfluous since the court may act on its own without a motion. But this lax treatment of jurisdictional defenses further complicates the problem of the moving party37 who worries about what his papers should look like.

The use of the word "suggestion" also presents problems of timing when it is read together with rule 12(g), requiring consolidation of defenses in any motion made under rule 12. That section means that if, for example, the defendant moves in advance of answer for a more definite statement, or to dismiss for improper venue, he may not make a second preanswer motion based on rule 12(b)(6).38 But rule 12(g) does not prevent the defendant from making a "suggestion" that the court lacks jurisdiction over the subject matter.39 The distinction will never be crucial since rule 12(h)(2) affords at least three later opportunities to make an objection to the claim.40 But a mistake can

32 See, e.g., Haggy v. Solem, 547 F.2d 1363, 1364 (8th Cir. 1977); Dougherty v. Harper's Magazine Co., 537 F.2d 758, 761 (3d Cir. 1976); Literature, Inc. v. Quinn, 452 F.2d 372, 374 (1st Cir. 1971); Fischer v. Cahill, 474 F.2d 951, 992-93 (3d Cir. 1973); Dodd v. Spokane County, 393 F.2d 930, 934 (9th Cir. 1969); Barnes v. Dorsey, 354 F. Supp. 179, 184 (E.D. Mo. 1973); 5 Wright & Miller, supra note 11, § 1357, at 593.

33 See Puente v. Spanish Nat'l State, 116 F.2d 43, 44-45 (2d Cir. 1940), cert. denied, 314 U.S. 627 (1941).


37 See text accompanying notes 15-17 supra.


39 See Graske v. Johnson, 97 F. Supp. 678, 678 (S.D.N.Y. 1951); 5 Wright & Miller, supra note 11, § 1385.

40 The purpose of rule 12(h)(2) is to preserve the defense of failure to state a claim, among others, until a judgment on the merits has been reached. See McLaughlin v. Curtis Publishing Co., 5 F.R.D. 87, 87 (S.D.N.Y. 1943). Rule 12(h)(2) therefore provides that such a defense may be raised not only in a motion under rule 12(b)(6), but also in a responsive pleading such as an
result in an order that the befuddled moving party pay his opponent’s costs incurred while opposing an unconsolidated motion.\textsuperscript{41}

One final reason for concern about the proper characterization of standing arises from the res judicata effect of involuntary dismissals. A dismissal for lack of standing may or may not bar plaintiff from reasserting the claim since the last sentence of rule 41(b), concerning involuntary dismissals, provides:

Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

It is accurate but not very helpful to say that this rule does not mean what it says. The term “jurisdiction,” for example, has been stretched far beyond its ordinary sense of the competence of the court, to cover things like whether the plaintiff is the real party in interest.\textsuperscript{42} And a dismissal under rule 12(b)(6), although falling within the scope of the phrase “any dismissal not provided for in this rule,” is one which some courts have found to have a preclusive effect,\textsuperscript{43} and others not.\textsuperscript{44} It is nonetheless safe to say that dismissals on jurisdictional grounds will almost certainly not be considered to have been made “upon the merits,”\textsuperscript{45} while those made for the reason specified in answer, in a rule 12(c) motion for judgment on the pleadings, and in a motion to dismiss at trial. See 5 Wright & Miller, supra note 11, § 1392, at 860-61. In addition, some courts have allowed the defense to be raised by a motion for summary judgment. See Horwitz v. Food Town, Inc., 241 F. Supp. 1, 2 (D. La. 1965), aff’d per curiam, 367 F.2d 584 (5th Cir. 1966); cf. 2A Moore’s Federal Practice ¶ 12.22, at 2445 (1974) (motion to dismiss for failure to state a claim may technically be brought as summary judgment motion, but would be contrary to the spirit of rule 12(g)).

\textsuperscript{41} Cf. Munson Line, Inc. v. Green, 10 Fed. R. Serv. 56g, I, Case 1 (S.D.N.Y. 1947) (costs allowed for summary judgment motion not made in good faith).


\textsuperscript{43} See, e.g., Hall v. Tower Land & Inv. Co., 512 F.2d 481, 483 (5th Cir. 1975); Asher v. Harrington, 461 F.2d 890, 895 (7th Cir. 1972); Durham v. Mason & Dixon Lines, Inc., 404 F.2d 864, 865 (6th Cir. 1968), cert. denied, 394 U.S. 998 (1969).

\textsuperscript{44} See, e.g., Brazier v. Great Atl. & Pac. Tea Co., 256 F.2d 96, 99 (5th Cir. 1958); Estevez v. Nabers, 219 F.2d 321, 323 (5th Cir. 1955); Russo v. Sofia Bros., Inc., 2 F.R.D. 80, 81-82 (S.D.N.Y. 1941). See also Nasser v. Isthmian Lines, 331 F.2d 124, 127 (2d Cir. 1964) (dictum); Rambur v. Diehl Lumber Co., 144 Mont. 84, 93, 394 P.2d 745, 750 (1964) (interpreting Montana Rules of Civil Procedure); 9 Wright & Miller, supra note 11, § 2373, at 239.

\textsuperscript{45} See Mann v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 488 F.2d 75, 76 (5th Cir. 1973); Wade v. Rogala, 270 F.2d 280, 282 (3d Cir. 1959); Topping v. Fry, 147 F.2d 715, 718 (7th Cir. 1945); Danisch v. Guardian Life Ins. Co., 151 F. Supp. 17, 19 (S.D.N.Y. 1957). Such a dismissal for lack of jurisdiction therefore would not bar plaintiff from reasserting the claim in
rule 12(b)(6) will likely be preclusive\(^4\) even if made at the pleading stage.

All that has been said indicates that it would be good to know how to characterize the standing objection in rule 12 terms. But the discussion has rested on the unspoken assumption that standing must be crammed into one or another of the categories offered by rule 12(b)(1)-(7), however uncomfortable the fit. To some degree, that assumption is justified by the first sentence of rule 12(b), which says that "the following defenses" may be made by preanswer motion, apparently indicating that items not on the list may not. But, of course, the Rules themselves authorize other kinds of preanswer motions, some of which may be characterized as "defenses" or "objections,"\(^5\) even if most cannot.\(^6\) And it is not uncommon for local court rules to authorize motions not provided for by the Rules, though such matters generally are far removed from any issues in the case,\(^7\) and, in any event, reliance on local rules would be a fairly haphazard way of coping with the standing problem. More to the point, courts frequently grant motions for stays, or for abstention, or occasionally to dismiss because of the pendency of another action, although none of

\(^4\) See Hitt v. City of Pasadena, 561 F.2d 606, 603 (5th Cir. 1977), Ripperger v. A.C. Allyn & Co., 37 F. Supp. 373, 374 (S.D.N.Y.), aff'd, 113 F.2d 332 (2d Cir.), cert. denied, 311 U.S. 695 (1940). For a contrary result, in which the trial court dismissed with an explicit statement that the dismissal was with prejudice, see Weissinger v. United States, 493 F.2d 795, 799-800 (5th Cir. 1970) (en banc).

\(^5\) Some which are defensive motions include: rules 12(c) (more definite statement); 12(f) (motion to strike); and 56(b) (summary judgment for defending party). Others not explicitly provided for, but rather plainly contemplated by the Rules, may be made to enforce provisions like those in rules 10 (form of pleadings) and 11 (signing of pleadings); cf. Fed. R. Civ. P. 65 (injunctions).

\(^6\) Fed. R. Civ. P. 6(b) (enlargement of time); 15(d) (supplemental pleadings); 21 (add or drop a party); 25 (substitution of party); 30(a) (permission for plaintiff to take deposition prior to 30 days after service of summons and complaint); 31(a) (motion to shorten time for taking deposition on written questions); 33 (motion to require answers to interrogatories in less than allowed time); 34(b) (motion requesting production of documents or entry on land in less than allowed time); 35(a) (physical or mental examination); 36(a) (request for admission in less than prescribed period).

\(^7\) See, e.g., Local Court Rule 14(b), Eastern District of California (security for costs); Local Court Rule 2(e), Southern District of Illinois (approval of security); Local Court Rule 6, Western District of Kentucky (security for costs); Local Court Rule 37, District of Massachusetts (special orders for the protection of litigants in widely publicized cases); Local Court Rule 2, Southern District of New York (security for costs); Local Court Rule 25, Western District of New York (security for costs).
those grounds fits very adequately within any of the categories enumerated in rule 12.\textsuperscript{50} Unlike standing objections, however, motions of those kinds are clearly outside the specified objections: they are surely not jurisdictional since such issues present problems only in cases in which the federal court plainly has jurisdiction, and the choice not to decide rests not on a finding that the claim is without merit but on a decision that it should be adjudicated elsewhere, if possible.\textsuperscript{51} Furthermore, motions of the type just mentioned do not present most of the problems which could result from the failure to categorize. Because they are based on considerations of judicial administration and federalism which do not go to the merits, the issue of conversion to summary judgment and use of the evidentiary standard set out in rule 56(e) does not arise. For the same reason, dismissal in a case of Burford-type abstention\textsuperscript{52} or in situations in which another action is pending will never have the preclusive effect that might otherwise be required by rule 41(b). Again, because the reasons for grant or denial of such a motion are largely extrinsic to the rights of the parties, it is easy to see that the point is one which may be raised by the judge without prompting from the parties.\textsuperscript{53}


\textsuperscript{51} It goes without saying that the defendant's objection is not described by the other subsections of rule 12(b), which deal with personal jurisdiction, venue, process, and service, and failure to join an indispensable party.

\textsuperscript{52} See Burford v. Sun Oil Co., 319 U.S. 315 (1943). In "Burford" abstention, the court dismisses the suit to avoid needless conflict with the state's administration of its own affairs.


The matter of waiver is a complex one, on which some specific directions might well be helpful. But it is not at all clear that it could be solved in any homogeneous fashion applicable to every kind of motion being discussed. For example, motions for stay or dismissal because another action is pending become irrelevant once a certain quantum of judicial effort has been expended, but when that point is reached could depend on contingencies such as the rate at which a parallel action was proceeding. The federalism concerns implicated in some abstention cases could survive any decision in the district court if a stay were ordered pending appeal. The same would be true of the policy against unnecessary decision of constitutional questions. For that reason such issues should perhaps be ones which could be raised for the first time on appeal.
and could be brought to the court’s attention not just by formal motion appropriately entitled, but in virtually any manner.

The better analogy for deciding how to treat motions attacking standing is the approach the courts have taken to motions seeking dismissal for lack of capacity. Like standing, the capacity issue does not fit very well within the enumerated categories of rule 12(b). Despite the fact that rule 9(a) contemplates that objections to lack of capacity will be raised in the answer, it seems settled that the same defense may be put forward by motion when the relevant facts appear on the face of the complaint. In such cases, it seems to be the established practice to identify the motion with one of the classes found in rule 12(b)—most commonly 12(b)(6)—for purposes of deciding such questions as whether to convert to summary judgment, what the appropriate evidentiary standard is, when waiver occurs, when consolidation is required, and so on.

In short, finding the right 12(b) label for standing motions is not necessarily required by the Rules. But the typical extra-rule motions which have been permitted share two qualities which are not characteristic of standing motions: they are substantially unlike any of the enumerated defenses and objections; and the failure to categorize them does not result in serious problems of description, conversion, evidentiary standards, waiver, initiative in presentation, consolidation, and preclusive effect. In cases like capacity in which the objection is more closely related to the enumerated defenses and objections, the practice has been to fit the motion into the most appropriate class and resolve such problems accordingly. The confusion about whether standing issues are jurisdictional or claim-related calls for a resolution of that sort.

54 Fed. R. Civ. P. 9(a) states: “When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader’s knowledge.”


60 See 5 Wright & Miller, supra note 11, § 1360, at 641.
II

ARTICLE III JURISDICTION AND THE OUTER LIMITS OF STANDING

If we are to take what the Supreme Court says at face value, it should be undisputed that part of the complex of standing issues is jurisdictional in a constitutional sense. The most extended discussion of that question in recent years was Justice Powell's effort in Warth v. Seldin to summarize the law:

In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a "case or controversy" between himself and the defendant within the meaning of Art. III. . . . The Art. III judicial power exists only . . . when the plaintiff himself has suffered "some threatened or actual injury resulting from the putatively illegal action. . . ."

Put another way, the jurisdiction which article III permits Congress to vest in the federal courts does not extend to situations in which the plaintiff cannot allege: (1) injury, and (2) causation by the defendant. In addition to the explicit language of its opinion, the Court

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61 422 U.S. 490 (1975).
62 Id. at 498-99 (quoting Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973)).
63 It was a while before the Court came to this formulation of the matter, but from the beginning it has maintained that there is a jurisdictional component to standing. See, e.g., Frothingham v. Mellon, 262 U.S. 447, 480 (1923) ("the cases must be disposed of for want of jurisdiction"); Flast v. Cohen, 392 U.S. 83, 101 (1968) ("in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution"); Jenkins v. McKeithen, 395 U.S. 411, 421 (1969) ("since the question of standing goes to this Court's jurisdiction . . . we must decide the issue"); Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 151 (1970) ("standing in the federal courts is to be considered in the framework of Article III"); Barlow v. Collins, 397 U.S. 159, 164 (1970) ("petitioners . . . have the personal stake and interest that impart the concrete adverseness required by Article III"); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211 (1972) ("injury is alleged with particularity, so there is not present the abstract question raising problems under Art. III of the Constitution"); United States v. Richardson, 418 U.S. 166, 173 (1974) ("Art. III requirements are the threshold inquiry"); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 215 (1974) ("justiciability, which expresses the jurisdictional limitations imposed upon the federal courts by the 'case or controversy' requirement of Art. III, embodies both the standing and political question doctrines"); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976) ("Absent . . . a showing [of injury redressable by the court], exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation."); Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 260-61 (1977) ("The essence of the standing question, in its constitutional dimension, is . . . that the plaintiff must show that he himself is injured by the challenged action of the defendant . . . [and] that the injury is indeed fairly traceable to the defendant's acts or omissions."); Duke Power Co. v. Carolina Envt'l Study Group, Inc., 438 U.S. 59, 72 (1978) (article III requisites for standing include "not only a 'distinct and palpable injury' . . . but also a 'fairly traceable' causal connection between the claimed injury and the challenged conduct.").
has demonstrated that it considers at least those two elements to be jurisdictional by raising the standing issue on its own motion,\(^6\) a practice in which it does not engage when the omitted defense or objection goes to the merits.\(^6\)

An even clearer indication that the Supreme Court thinks that the issue is one of jurisdiction and not the merits is found in \(\text{Doremus v. Board of Education.}^6\) In \(\text{Doremus, the New Jersey Supreme Court had decided, at the behest of two citizen-taxpayers,}^6\) that a state law providing for reading the Old Testament at the beginning of the school day did not violate the establishment clause. The unsuccessful plaintiffs' appeal to the United States Supreme Court was dismissed for lack of standing. But the Court noted that its action left the state court's decision unaltered,\(^6\) a plain indication that it thought lack of standing had no relation to the merits of the plaintiffs' constitutional claim.

In short, then, the jurisdiction which article III gives to the federal courts is limited to "cases" and "controversies," and the Supreme Court has indicated that those concepts in turn presuppose the existence of injury and causation. For example, economic harm to a protected interest can be an injury sufficient to satisfy the constitutional requirements of standing,\(^6\) so too is the loss of satisfaction suffered by a user from injury to the environment.\(^7\) On the other hand, the constitutional injury threshold bars claims that one is merely deprived of the psychological satisfaction of knowing that government officials are acting according to law.\(^7\) Caution questions fall along a similar spectrum. A mere allegation that the defendant engaged in unlawful conduct does not present a constitutional "case" unless there is the requisite degree of proximity between the defendant's conduct and the plaintiff's injury. A claim by a taxpayer in town X that his taxes

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\(^6\) See Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274, 278-79 (1977); 5 Wright & Miller, supra note 11, § 1394.

\(^6\) 342 U.S. 429 (1932).

\(^6\) One of the plaintiffs also had a daughter in school at the time of the state court litigation. Although the Supreme Court seemed to feel that alone would not help the plaintiffs much, any additional issues which it created were moot by the time the case was argued in the Supreme Court since she had graduated. Id. at 433.

\(^6\) Id. at 434.


\(^7\) Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 217 (1974); Ex Parte Levitt, 302 U.S. 633, 634 (1937) (per curiam).
are higher because town Y discriminates in its zoning policies fails that test.  

What is salient about all this for our purposes is that the very concepts which the Court has made the shibboleth for recognizing standing—causation and injury-in-fact—are, at least with respect to private law, essential to the notion of "claim" or "cause of action." Suppose, for example, that the hospital negligently gives me the wrong baby to take home, and that I am emotionally upset when I discover the error several days later. My suit against the hospital might well be dismissed even though the hospital violated a duty which it legally owed me, not because a court would not have jurisdiction over the case, but because the kind of injury I suffered was too tenuous and indefinite to be compensable—i.e., because I failed to state a claim.  

The same might happen if I found a dead mouse in my milk.  

The same result—dismissal for failure to state a claim—might occur if I could not establish causation by the defendant. As Prosser puts it: "An essential element of the plaintiff's cause of action for negligence, or for that matter for any other tort, is that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered." Suppose not only that I find a dead mouse in my milk, but also that three weeks later I die of cancer. If, as I suspect is likely, there is no connection between mousy milk and cancer, an action by my estate would be dismissed, again not for lack of jurisdiction, but for failure to state a claim.  

This means that the very elements that the Court has identified as prerequisites to article III standing also are requirements for stating many claims at common law. Since there does not seem to be any reason why those same elements should not be central to the existence of the kind of public-law claims which most often give rise to

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76 Though I wouldn't be surprised to find that mice fed 400 times the normal human dose of milk would contract it.

standing problems, the solution to this aspect of our problem—how to categorize motions to dismiss for lack of standing—is to say that the objection is both jurisdictional and claim-related. As long as a successful motion may be characterized in either way, litigants should be able to choose whichever rule has the harsher consequences for the plaintiff. If, for example, a standing objection is not raised until after judgment, the judge should consider that lack of standing deprives the court of jurisdiction, and entertain the motion. If a subsequent action is brought in state court after a federal suit is dismissed for lack of standing, the rules of bar and issue-preclusion should be applied as though the first action decided—as in fact it did—that the plaintiff's claim was insufficient as a matter of law. The same approach would resolve the problems of description, initiative in presentation, and consolidation. Whether a preanswer motion could be converted into a motion for summary judgment, and what evidentiary standards should be applied to matters outside the pleadings, might present slightly more difficult problems since it would not be clear a priori which procedure would be more likely to result in dismissal. But, since an adverse result would preclude further litigation by the plaintiff, it probably would be best to follow the procedure employed for rule 12(b)(6) motions.

I can see no reason not to follow this approach and say that the plaintiff's claim lacks merit because it fails to allege an injury (or causation), and that for the same reason the federal courts do not have jurisdiction. The Supreme Court feels differently, however, and has said so on several occasions. In Schlesinger v. Reservists Committee to Stop the War, for example, it found that the plaintiffs—the Committee and some of its members who were citizens, reservists, and taxpayers—had no standing as citizens or taxpayers to sue to

78 That seems to be precisely the way things are done in the law of public nuisance, in which the failure to allege or prove particular damage may be treated indifferently as a lack of standing or the absence of an essential component of the plaintiff's cause of action. See National Audubon Soc'y, Inc. v. Johnson, 317 F. Supp. 1330, 1334-35 (S.D. Tex. 1970); Kemper v. Cooke, 576 S.W.2d 263, 266 (Ky. Ct. App. 1979). Compare W. Prosser, Handbook of the Law of Torts § 88, at 586-91 (4th ed. 1971) ("a private individual has no action for the invasion of the purely public right, unless his damage is in some way to be distinguished from that sustained by other members of the general public") with Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 216-17 (1974).

79 Just as the defensive team in football may choose a 15- rather than a 5-yard penalty when the offense is charged with both clipping and offsides.

80 This avoids the problem created by Bernstine's proposed standing amendment, see note 11 supra.

enjoin violations of the incompatibility clause because they suffered no article III injury from the Reserve membership of members of Congress. The Court characterized its dismissal as jurisdictional, and chastised the district court for making "an appraisal of the merits before the issue of standing was resolved." What the district court had done was to conclude "that respondents' interests as citizens were meant to be protected by the Incompatibility Clause because the primary purpose of the Clause was to insure independence of each of the branches of the Federal Government." I, for one, have a difficult time seeing that conclusion as any more an "appraisal of the merits" of their claims than was the Supreme Court's own conclusion that respondents' interests as citizens in the enforcement of the incompatibility clause were not meant to be judicially protectible, whatever other interests the clause might protect.

The suggestion that a dismissal might be both on the merits and jurisdictional is not at all strange. It's not too different from being unable to enter a bicycle in the Kentucky Derby because it's too slow, and anyway, it's not a horse. Moreover, it is fairly consistent with our accustomed way of thinking about some other kinds of jurisdictional dismissals, such as those in which a plaintiff unsuccessfully tries to ground his complaint on a federal question. Suppose, for example, that I sue the state Department of Motor Vehicles arguing that compulsory automobile insurance deprives me of property without due process of law. One fatal flaw in such a claim is that my rights against the state are defined by the state's rather unimposing duty to pass only those laws which have a reasonable relation to some legitimate state interest. Such a complaint fails to state a claim because it indicates no duty which the defendant has failed to fulfill. At the same time, if the fourteenth amendment offers virtually no protection against compulsory automobile insurance, there is some sense in saying that my claim does not "arise under" the Constitution, laws, or treaties of the United States, as required by article III and 28 U.S.C. § 1331, and that I am deprived of no "right" mentioned in 28 U.S.C. § 1343(3). So my complaint is faulty for both jurisdictional and claim-related reasons.

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82 418 U.S. at 215.
83 Id. at 226.
84 Id.
85 This would be analogous to saying, for private law purposes, that I can't collect from my neighbor if I'm bitten by a snake while crossing his lot, because he had no duty to warn me of unknown dangers. See generally W. Prosser, Handbook of the Law of Torts § 58 (4th ed. 1971).
86 Ex parte Poresky, 290 U.S. 30, 31-32 (1933).
One gets the impression from reading the cases, however, that inquiries about "arising under" questions are divided into two stages: one first determines the existence of jurisdiction by asking simply whether the federal claim is not frivolous. That established, all remaining issues go to the merits.87 What I have said up to now by no means implies that all dismissals on the merits—for failure to state a claim—are also jurisdictional. Whether the court has power to decide the case should not turn on what its decision would be.88 But I do mean to say that all standing dismissals for want of a "case" or "controversy," and all dismissals for want of a nonfrivolous question "arising under" the Constitution, laws, or treaties, determine both the court's power to decide and the plaintiff's right to relief, and consequently are both jurisdictional and claim-related. It is easy to get the opposite impression from the cases dealing with dismissal for want of a substantial federal question since the sole emphasis is always on the jurisdictional aspects of the dismissal. But such cases generally have concerned the need to empanel a three-judge court,89 or the existence of pendent jurisdiction,90 questions which make the existence of jurisdiction critical. Though the Supreme Court does not seem to have had occasion to say so, it has at least intimated that such dismissals determine the merits of the plaintiff's claims as well.91

87 Bell v. Hood, 327 U.S. 678, 682-83 (1946). In Bell, the Court held that, once an "arising under" claim was alleged, the district court was required to hear the case:

For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law . . . [that] must be decided after and not before the court has assumed jurisdiction over the controversy.

Id. The claim therefore must be patently without merit to warrant dismissal before trial.


91 See, e.g., Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 249 (1951) ("Even a patently frivolous complaint might be sufficient to confer power to make a final decision that it is of that nature, binding as res judicata on the parties."); Binderup v. Pathe Exch., Inc., 263 U.S. 291, 305-06 (1923) ("Jurisdiction, as distinguished from merits, is wanting only where the claim set forth in the complaint is so unsubstantial as to be frivolous, or in other words, is plainly without color of merit. . . . In that event the claim of Federal right under the statute, is a mere pretence and, in effect, is no claim at all.").

The idea that such dismissals go to the merits is reinforced by the Supreme Court's practice of dismissing appeals for want of a substantial federal question. It is a bit treacherous to equate the Supreme Court's dismissal of cases for lack of appellate jurisdiction with dismissals at the trial level, given the unquestioned element of discretion in the former decision, see, e.g.,
In short, it is perfectly reasonable to say that if the plaintiff cannot allege injury and causation—the criteria by which constitutional standing is tested—then the action should be dismissed both because the plaintiff fails to state a claim (rule 12(b)(6)) and because the court lacks jurisdiction (rule 12(b)(1)).

III

THE PRUDENTIAL ASPECT OF STANDING

The last section began by stating that the Supreme Court had indicated that at least part of the complex of standing issues is jurisdictional in a constitutional sense. More recently, the Court has distinguished a second set of standing cases which rest on prudential, rather than constitutional, considerations. Prudential concerns exist when the plaintiff asserts a generalized grievance held in common by all or at least a large group of citizens, or when the plaintiff bases his claim to relief on the "legal rights or interests of third parties."

Without such limitations—closely related to Art. III concerns but essentially matters of judicial self-governance—the courts would be called upon to decide abstract questions of wide public significance.
even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.96

That the barrier to standing in such cases does not rest on article III is clear from the Court's recognition that the barrier may be breached in appropriate situations, and the controversy heard and determined. The assertion of jus tertii, for example, will be permitted when a litigant can show that compliance with a legal duty would result in the dilution of the rights of a third party.97 It may also be allowed when "the law that imposes the duty on the third parties both infringes their constitutional rights and alters their behavior in a way that injures the claimant."98 In the same way, a court may entertain a generalized grievance which is no different from that held by the public at large without violating the principle of separation of powers if Congress has authorized standing.99 Moreover, although the issue of judicial competence presented by lack of article III jurisdiction is so crucial that it can be raised for the first time on appeal,100 the Court has held that the failure of the parties and the lower courts to raise prudential considerations will permit it to disregard such constraints on appeal.101

Although it may be clear that standing objections based on prudential considerations are not rooted in article III and therefore are not jurisdictional in the constitutional sense, we still must determine how they should be characterized for purposes of dismissal motions under the Federal Rules. Let us begin with an observation made by Justice Powell in his majority opinion in Warth v. Seldin:

96 Warth v. Seldin, 422 U.S. at 500.
100 Capron v. Van Noorden, 6 U.S. (2 Cranch) 125, 126 (1804).
Although standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal, . . . it often turns on the nature and source of the claim asserted. . . . [T]he source of the plaintiff's claim to relief assumes critical importance with respect to the prudential rules of standing that, apart from Art. III's minimum requirements, serve to limit the role of the courts in resolving public disputes. Essentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief.102

If Justice Powell's language sounds vaguely familiar, there is a reason. "[W]hether the constitutional or statutory provision . . . grant[s] persons in the plaintiff's position a right to judicial relief" is a question the Court is accustomed to considering when it is asked to infer (or, as lawyers say, imply) a cause of action.103 The inquiry becomes necessary when the particular constitutional104 or statutory105 provision on which the plaintiff relies does not clearly suggest that it is to be enforced by a private right of action by one in the plaintiff's position.

The notion, to which I adhere, that a decision about the existence of prudential standing is precisely the same undertaking as a decision about an implied right of action, is one which the Supreme Court has resisted—albeit only halfheartedly.106 Just recently it announced, in Davis v. Passman,107 that

standing is a question of whether a plaintiff is sufficiently adversary to a defendant to create an Art. III case or controversy, or at least to overcome prudential limitations on federal-court jurisdiction . . . ; cause of action is a question of whether a particular plaintiff is

102 422 U.S. at 500 (citations omitted).
107 442 U.S. 228 (1979).
a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court ...  

On the other hand, the Court has freely interchanged the terms "standing" and "right of action" in several "implied right of action" cases; more to the point, it did so in Warth v. Seldin. If the latest pronouncement, in Passman, makes all of that just ancient history, we are entitled to ask what the Court now believes distinguishes the two concepts. Justice Brennan's statement quoted above suggests that prudential limitations present in essence a question of "sufficient adversity" and not a "matter of law." I am not sure that, stated so compactly, the definition makes any sense, but I assume that what he meant was this: in deciding prudential standing cases the courts look only to see whether the parties are likely to fight conscientiously enough—and perhaps in a sufficiently concrete setting—to develop the case to a point at which it is suitable for judicial resolution; on the other hand, in deciding whether there should be an implied cause of action, the courts ask whether, quite apart from the vividness of the dispute, the plaintiff has a constitutional or statutory right to judicial relief arising from the defendant's violation of some specific duty. If that is a fair paraphrase, I think the idea is mistaken. Not only does the standing issue in its prudential aspects turn largely on the existence of a "cause of action" in the conventional sense, but the decision to imply a private right of action is strongly influenced by the adequacy with which the parties will present the issues.

Before elaborating, let me point out why this is germane to our issue. As I suggested at the start, courts should classify standing objections under the most analogous subsection of rule 12(b).


110 422 U.S. at 500 & n.12, 501.

111 See text accompanying notes 54-60 supra.

112 442 U.S. at 232.
explicitly agreed.\textsuperscript{113} The Court found it equally clear that the question was in no sense jurisdictional.\textsuperscript{114}

Both those conclusions make good sense. In \textit{Cort v. Ash},\textsuperscript{115} for example, the Court said that stockholders had no right of action under federal law against directors who had made corporate contributions in a presidential election, in part because the statute making such conduct illegal was intended primarily to protect the general public by reducing corporate influence over elections.\textsuperscript{116} That seems a lot like saying that a restaurant in a business district has no right of action against a zoning board which improperly grants McDonald's a variance in an adjacent residential district because the zoning ordinance was not meant to protect the plaintiff from competition.\textsuperscript{117} In each case, an essential element of the plaintiff's claim is lacking: an allegation that the defendant violated a duty owed to the plaintiff. If dismissals on prudential standing grounds rest on the same foundation, they too should be considered claim-related—and sought by 12(b)(6) motions—and not jurisdictional. There are several reasons why I think they do.

Although there are marked differences in the implication process between constitutional and statutory claims (the chief one being the element of congressional intent\textsuperscript{118}), the courts in both situations have some element of discretion in defining the statutory or constitutional rights of the parties. In making this decision, courts take three policies into account. First, and perhaps most crucial, is the importance of securing the intended protection to any class specifically described by the relevant constitutional or statutory provision.\textsuperscript{119} For example, the courts are far more likely to imply a cause of action under a statute saying "employees shall have the right to organize and bargain collectively through representatives"\textsuperscript{120} than they are

\textsuperscript{113} Id. at 239 ("this cause of action is a necessary element of his 'claim' "). See also \textit{Cannon v. University of Chicago}, 441 U.S. 677, 680 n.2 (1979); \textit{Blue Chip Stamps v. Manor Drug Stores}, 421 U.S. 723, 727 (1975); 13 Wright & Miller, supra note 11, § 3562 (Supp. 1980).

\textsuperscript{114} 442 U.S. at 236-37.

\textsuperscript{115} 422 U.S. 66 (1975).

\textsuperscript{116} Id. at 81-82.


\textsuperscript{120} Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210, 213 (1944) (Railway Labor Act).
under one which merely lays down the "duty of every common carrier... to establish... just and reasonable rates." Second, there is a corresponding interest in leaving to executive or administrative action the protection of the public at large in cases in which violations of duty work a general harm. The reason is not so much that individuals have no enforceable rights if they proceed separately, as that permitting private enforcement is unlikely to bring to the attention of the court all considerations relevant to the public interest, and so may provoke redress of a specific claim by a decision which, publicly speaking, is inefficient. When the government does not have the resources to make public enforcement satisfactory, though, the inadequacies of private actions are likely to be discounted, and an individual right of action permitted. Third, the courts are concerned that their implication of rights of action, though not inconsistent with the intentions and objectives of the federal government, may unnecessarily displace state control over matters which basically concern the states.

Those considerations, whose calculus constitutes the implication process, largely define the contours of the prudential standing rules as well. Though their current vitality is the subject of some confusion, the "nexus" and "zone of interests" requirements which the

125 This is the last facet of the Cort inquiry for statutory implication cases. See 422 U.S. at 78. See also Cannon v. University of Chicago, 441 U.S. at 708, Piper v. Chris-Craft Indus., Inc., 430 U.S. at 40-41; J.I. Case Co. v. Borak, 377 U.S. at 434. But it is also a matter of interest in cases of constitutional implication. See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 385, 394-95 (1971).
126 The Court held in Duke Power Co. v. Carolina Envt'l Study Group, Inc., 435 U.S. 59, 80-81 (1978), that it would not require a nexus between the claimed injury and the right asserted when the litigant was himself the rightholder. The redundance of the "zone of interests" has been widely noted, and more than one writer has pronounced it dead even in the Court's own mind. See K. Davis, Administrative Law Treatise § 22.19-1 (1st ed. Supp. 1950), Albert, Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief, 83 Yale L.J. 425, 493-97 (1974); Davis, Standing, 1976, 72 Nw. U.L. Rev. 69, 81 (1977), Sedler, Standing, Justiciable, and All That: A Behavioral Analysis, 25 Vand. L. Rev. 479, 456-91 (1972). See also

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Court has used to implement the concept of prudential standing bear a striking resemblance to the factors just discussed in connection with implied causes of action. Consider first the “zone of interests” test. Basically an attempt to free the law of standing from the restrictions imposed by the old “legal right” requirement, the zone test asks only “whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.” The Court has said that this test asks a question which is different from the merits, and so it does: arguably having a protected interest is a very different thing from actually having one, so winning against a standing objection is no guarantee against losing on the merits. But to dismiss a claim as not within the zone is to say that the claimant is not even arguably protected or regulated, to say, in other words, that he clearly has no right to relief.

When that happens, though, it seems to me that the court has made precisely the same determination as it would make in undertaking the first implication inquiry, that is, whether protection for a specific class is provided by the statute or constitutional provision. Examples are scarce, for reasons I will mention presently, but consider first *Clinton Community Hospital Corp. v. Southern Maryland Medical Center*. Plaintiff-hospital sued the Medical Center and the Secretaries of HUD and HEW to avoid competitive injury from construction of the Medical Center nearby; the basis for its claim was that the construction violated the National Environmental Policy Act and other statutes. The court of appeals held that even if that were true (though it was not), the hospital had no standing to sue since its concern was not within the zone of interests protected by the Act, and it consequently had failed to state a claim. That, like the first implication inquiry in *Cort v. Ash*, seems precisely like saying that a restaurant in a business district has no right of action against a zoning board which improperly grants a variance to another restaurant in an adjacent residential district, because the zoning there was not meant to benefit the plaintiff.

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129 Id.

130 510 F.2d 1037 (4th Cir.) (per curiam), cert. denied, 422 U.S. 1048 (1975).

131 Id. at 1038.
The only significant difference between the prudential standing and the implication inquiries is one of degree: the "zone of interests" requirement is far more expansive and easily met. Few cases have flunked it, and the Supreme Court, by suggesting that references to legislative history are inconsequential in determining the scope of the zone, has made sure that few others will. But this means only that the "zone of interests" question is rather pointless in the vast majority of cases. By asking about "arguable" protection and avoiding legislative history, it merely postpones the more rigorous inquiry which must follow: whether the plaintiff actually has a cause of action against the defendant.

If the "zone" test matches up with the implication inquiry concerning the protected class, the "nexus" test—the second criterion for prudential standing—is designed to avoid the kind of representational problems that the second implication policy addresses. In its best recognized form the nexus requirement acts to bar suits by taxpayers who seek to protect the public at large from a general harm. It does so by making two demands: (1) that the plaintiff attack only an exercise of the taxing and spending power, not an incidental expenditure of tax funds to administer a regulatory statute; and (2) that the statutory or constitutional limitation allegedly exceeded be a specific limit on the taxing and spending power, not just the outer bound set by the delegation of powers to Congress in article I, section 8. The first aspect automatically acts to narrow the range of cases in which the public interest may be asserted by taxpayer-plaintiffs. The reason seems to be an extension of the article III concern for adversity and concreteness: generally, spending cases are more likely to have a direct impact on the pocketbook; and when that is assured the litigation is more likely to revolve around the interests of the parties involved.

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in a specific controversy. In a somewhat different way, the second nexus requirement expresses the concern of the implication cases that isolated litigants may upset political balances with which the most affected segments of society may be happy.\textsuperscript{136} A comparison of \textit{Flast v. Cohen}\textsuperscript{137} and \textit{Frothingham v. Mellon}\textsuperscript{138} provides a useful illustration. In \textit{Flast}, the Court found that the plaintiff-taxpayers had satisfied the second aspect of the nexus requirement because they alleged that the federal expenditures under the Elementary and Secondary Education Act of 1965 contravened the establishment and free exercise clauses of the first amendment.\textsuperscript{139} In \textit{Frothingham}, the Court disallowed standing to challenge the Maternity Act of 1921 because the claim was that the expenditure exceeded the powers delegated to the federal government by the Constitution. “In essence, Mrs. Frothingham was [a third party] attempting to assert the States’ interest in their legislative prerogatives and not a federal taxpayer’s interest in being free of taxing and spending in contravention of specific constitutional limitations.”\textsuperscript{140} Put another way, when a party objects to an expenditure by asserting a right it makes sense to permit standing because the various unrepresented interests affected by a decision one way or another become, in a sense, irrelevant;\textsuperscript{141} but when the objection is based on a matter of policy the very nature of the decision to be made demands that the litigation not go forward without adequate representation of all affected interests.

In addition to using the nexus requirement in taxpayer suits, courts have employed it to prevent a party claiming “injury in fact” from seeking redress by asserting a violation of the rights of others.\textsuperscript{142} There must, in short, be a nexus between the injury asserted and the right which is the litigant’s ticket to judicial redress.

\textsuperscript{136} By precluding challenges to the spending power based on the federalist limits inherent in art. I, § 8, \textit{Flast} seems to make those questions “political” in the sense in which \textit{Gibbons v. Ogden} suggested that all implied limits on the enumerated powers are political: “The wisdom and the discretion of congress, their identity with the people, and the influence which their constituents possess at election, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse.” 22 U.S. (2 Wheat.) 1, 86-87 (1824).
\textsuperscript{137} 392 U.S. 83 (1968).
\textsuperscript{138} 262 U.S. 447 (1923).
\textsuperscript{139} 392 U.S. at 105.
\textsuperscript{140} Id.; see L. Tribe, American Constitutional Law § 3-22, at 98-99 (1978).
\textsuperscript{142} I should caution that the Court has not used the term “nexus” to describe the rule to which I now refer. In \textit{Duke Power Co. v. Carolina Envt’l Study Group, Inc.}, 439 U.S. 59 (1978), the Court spoke as though the rule against third-party standing is something different from the nexus requirement. See id. at 80. In using the term in the text, I am following the
Here, even more clearly than was true of taxpayer suits, the purpose of the requirement is to ensure that the claims of the surrogate do not obscure the interests of absentees. But, in traditional terms, the basis of a dismissal under these circumstances would be that the plaintiff has failed to state a claim. Suppose, for example, that I was crossing the street in the middle of the block and was hit by a car driving on the left-hand side of the road. The injury which I sustain would be very real, and unquestionably caused by the defendant. But unless I could prove some independent act of negligence, I might well be told by the court that the only people who have a right to demand that the defendant keep on the other side of the street are drivers who were travelling in the opposite direction, and that I am not entitled to relief simply because their rights were violated. Put another way, the defendant would be entitled to object that I failed to allege or prove an essential element of my action for negligence—that he had breached a duty owed to me—and could secure a dismissal on the merits for failure to state a claim.

I already have noted a final point of congruence between the nexus test and the second policy which operates in implication cases: despite the general rule against permitting the plaintiff to assert claims on behalf of another, or the public at large, the courts have been quite willing to do so when it is demonstrably necessary to provide adequate protection for unrepresented interests.

The last policy which is considered in implication cases is the concern about displacing state control over matters which basically interest the states. It is true that one sees little evidence of that policy in cases which the Supreme Court has treated under the rubric of

lead of Professor Tribe, who has argued persuasively that the two are really congruent. See L. Tribe, American Constitutional Law § 3-23, at 100-01 (1978). His understanding of “nexus” seems to have been confirmed by the Duke Power decision, notwithstanding what the Court says. The really significant conclusion of Duke Power is that it is unnecessary to ask for a nexus between the injury and the right asserted when the litigant is himself the rightholder. That suggests that the Court is concerned with the connection only in third-party situations (and tax cases).

144 See Westlund v. Iverson, 154 Minn. 52, 191 N.W. 253 (1922).
146 See Carey v. Population Servs. Int'l, 431 U.S. 678, 682-84 (1977); Craig v. Boren, 429 U.S. 190, 192-97 (1976); L. Tribe, American Constitutional Law § 3-26 (1978); text accompanying notes 122-24 supra. It will be allowed also when Congress has expressly permitted a right of action, although in the latter case implication is unnecessary because the plaintiff’s cause of action is made explicit by the relevant statute. See text accompanying notes 97-99 supra.
prudential standing, but that is perhaps only a matter of coincidence. To begin with, federalism concerns have played no part in the implication cases brought to challenge action by federal agencies or officials,\textsuperscript{147} for the obvious reason that the states have no inherent interest in taking jurisdiction over the federal government itself. Thus, it should come as no surprise that discussion of state interests is absent from the large number of prudential standing cases against federal defendants.\textsuperscript{148} In the second place, the Court has indicated that the existence of a state interest in exclusive regulation is essentially irrelevant when the plaintiff asserts a cause of action under a provision of the United States Constitution.\textsuperscript{149} Consequently, it is hardly surprising to see no reference to state interests in independent lawmaking and enforcement in prudential standing cases grounded on constitutional claims. That leaves only statutory prudential standing cases against private individuals or state officials, and all of those cases have happened to fall under the Fair Housing Act,\textsuperscript{150} which the Court has read "to define standing as broadly as is permitted by Article III of the Constitution."\textsuperscript{151} In short, the Court has had limited opportunity to consider whether federalism concerns should be considered in prudential standing cases.


I might add that even if there were such a state interest, it would not turn up in most of these cases because the Court has terminated the standing inquiry once it was satisfied that the plaintiff is "arguably" within the zone of interests to be protected or regulated.


The Supreme Court intimated, in Davis v. Passman, that the difference is as follows: the statutory implication process is essentially an exercise in discerning congressional intent (in which, I need add, it is presumed that Congress did not intend to displace state law); congressional intent, however, plays no role in determining fundamental constitutional rights, and the presumption of accommodation to state law disappears. 442 U.S. at 241-44.


\textsuperscript{151} Id. at 209 (quoting Hackett v. McGuire Bros., 445 F.2d 442 (3d Cir. 1971) (Civil Rights Act of 1964)).
I have been attempting to demonstrate that the notion of prudential standing which the Court has recently begun to define is basically no different from the idea of an implied constitutional or statutory cause of action. If both rest on the same grounds and serve the same purposes, it should make sense to suppose that the former is, as the latter is admitted to be, claim-related and not in any sense jurisdictional. Thus, the defense of lack of standing for prudential reasons should be governed by the complex of rules which attend rule 12(b)(6) motions under the Federal Rules of Civil Procedure.

**CONCLUSION**

By adopting the methodology now used to classify motions challenging a litigant's capacity—looking for an analogous category within rule 12(b)—litigators can determine the proper characterization of standing dismissals under the Federal Rules. The initial inquiry is whether the standing objection rests on constitutional grounds or on prudential limitations governing a court's willingness to hear a case. If the plaintiff lacks standing in the constitutional sense his complaint is faulty both because it fails to state a claim and because the court lacks jurisdiction. Consequently, both rule 12(b)(6) and rule 12(b)(1) motions are appropriate.

A different conclusion follows from my analysis of prudential standing limitations. Since, as the Court has made clear, such limitations are in no sense jurisdictional and since the definition of prudential standing replicates the process by which implied rights of action are determined, it makes sense that the former ought to be considered, as the latter presently are, claim-related. Rule 12(b)(6), therefore, is the appropriate vehicle for making prudential standing objections.