

# COMMENTS

## STANDING TO CHALLENGE EXCLUSIONARY ZONING IN THE FEDERAL COURTS

### INTRODUCTION

Municipalities traditionally have had broad powers to control the uses to which property owners may put their land through the enactment of local zoning ordinances. In recent years, substantial attention has been focused on one specific effect of local zoning ordinances: the exclusion of the poor and minorities from suburban communities,<sup>1</sup> and its resulting negative impact on metropolitan growth and development.<sup>2</sup> Parties who have perceived their interests as being adversely affected by the exclusionary aspects of local zoning ordinances have turned to state and federal courts to challenge such ordinances. However, these challenges have often been blocked by (1) the presumption of the constitutional validity of local zoning ordinances; and (2) the inability of plaintiffs to establish standing to maintain their suit.

#### *1. Zoning and the Presumption of Validity: Some Social Ramifications*

Fifty years ago, in *Village of Euclid v. Ambler Realty Co.*,<sup>3</sup> the Supreme Court first considered whether a comprehensive zoning scheme which restricted the uses to which a landowner could put his land constituted a "taking" of property in violation of the due process clause of the Fourteenth Amendment.<sup>4</sup> The Court held that zoning plans were presumptively a valid exercise of the state police power unless demonstrated to be clearly arbitrary, unreasonable and having no substantial relation to the public health, morals or general welfare.<sup>5</sup>

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<sup>1</sup> See, e.g., R. BARCOCK & F. BOSSELMAN, *EXCLUSIONARY ZONING* (1973); C. HAAR & D. IATRIDIS, *HOUSING THE POOR IN SUBURBIA: PUBLIC POLICY AT THE GRASS ROOTS* (1974); UNITED STATES COMMISSION ON CIVIL RIGHTS, *TWENTY YEARS AFTER BROWN: EQUAL OPPORTUNITY IN HOUSING* (1975) [hereinafter cited as *TWENTY YEARS AFTER BROWN*]; UNITED STATES COMMISSION ON CIVIL RIGHTS, *EQUAL OPPORTUNITY IN SUBURBIA* (1974) [hereinafter cited as *EQUAL OPPORTUNITY*]; Brantman, Cohen & Trubek, *Measuring the Invisible Wall: Land Use Controls and the Residential Patterns of the Poor*, 82 YALE L.J. 483 (1973).

<sup>2</sup> See, *EQUAL OPPORTUNITY*, *supra* note 1, at 29.

<sup>3</sup> 272 U.S. 365 (1926).

<sup>4</sup> 272 U.S. at 384. Prior to 1926, the Court had invalidated a zoning ordinance based on race, *Buchanan v. Warley*, 245 U.S. 60, 62 (1917), and had upheld ordinances excluding certain noxious trades and businesses which could be considered nuisances or which threatened the public health, see, e.g., *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Reinman v. City of Little Rock*, 237 U.S. 171 (1915), but the Court had never considered a comprehensive plan.

<sup>5</sup> *Id.* at 395. In upholding the legitimacy of residential zoning the Court referred to apartments as "mere parasite[s], constructed in order to take advantage of the open

Although the Court thus set forth a strong presumption in favor of the constitutionality of zoning, it did leave open the possibility that in certain instances "the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way."<sup>6</sup>

After presenting this caveat to zoning boards, the Court adopted a hands-off attitude with regard to municipal zoning. For over forty years, it deferred to judgment of local authorities by dismissing appeals or denying petitions for certiorari.<sup>7</sup> In cases tangentially related to land use and zoning, the Court, in dictum, reaffirmed its *Euclid* position that local ordinances would be presumed constitutional.<sup>8</sup> As a result of this strong and long-standing presumption, courts have generally upheld, as relating to the public welfare, many variations of zoning legislation which tend to exclude the poor from more affluent communities.<sup>9</sup>

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spaces and attractive surroundings created by the residential character of the district . . . [and which] come very near to being nuisances." *Id.* at 394-95.

<sup>6</sup> *Id.* at 390.

<sup>7</sup> *E.g.*, *Lionshead Lake, Inc. v. Township of Wayne*, 344 U.S. 919 (1953) (per curiam) (appeal dismissed for want of a substantial federal question); see Johnson, *Constitutional Law and Community Planning*, 20 LAW & CONTEMP. PROB. 199, 208 (1955) and cases cited therein; Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767, 783 (1969). The sole exception was *Nectow v. Cambridge*, 277 U.S. 183 (1928). In *Nectow*, a then-recent zoning ordinance caused a portion of the plaintiff's land to be classified as residential whereas the greater portion of the plaintiff's land was in the non-restricted business district and the land itself was near an auto assembly plant and a soap factory. *Id.* at 186. The classification of part of the plaintiff's land as residential precluded the plaintiff from fulfilling a contract to sell his land. The Supreme Court found that the classification could not be justified as promoting the health, safety or general welfare of the town. *Id.* at 188. Therefore, since there was no basis for the "invasion of the property" of the plaintiff, the zoning ordinance deprived plaintiff of his property without due process of law. *Id.* at 185, 188-89.

<sup>8</sup> See, *e.g.*, *Berman v. Parker*, 348 U.S. 26 (1954) where the Court noted:

[I]t is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

*Id.* at 33; *Zahn v. Board of Public Works*, 274 U.S. 325, 328 (1927). In 1974, the Court departed from its practice of denying review in zoning cases. In deciding *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), the Court reaffirmed the rationale espoused in *Euclid*. The zoning ordinance in question restricted the number of unrelated adults who could live in a single dwelling unit. The Court refused to view the zoning ordinance as one which impinged upon any constitutionally protected rights. Rather, it analyzed the ordinance as the type of "economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause, if the law be 'reasonable, not arbitrary.'" *Id.* at 8, quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

<sup>9</sup> State courts have traditionally upheld such exclusionary devices as minimum lot area regulations, *e.g.*, *Wilson v. Town of Sherborn*, 1975 Mass. App. Ct. Adv. Sh. 643,

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The willingness of the Court to presume a local zoning ordinance valid unless shown to be clearly arbitrary and unreasonable has left the control of land development to the discretion of local authorities.<sup>10</sup> Thus, policy decisions concerning land use have been guided largely by municipal self-interest.<sup>11</sup> The Report of the National Commission on Urban Problems, released in 1968, pointed to two such local interests which have characterized zoning decisions since *Euclid*. First is the municipality's desire to maintain control over the nature of the local environment: "The buyers and sellers of lots needed some device to prevent a drop in property values, keep out unwanted intrusions, encourage investment in land and construction—in sum, to assure character."<sup>12</sup> Second, insofar as local governments rely heavily on property taxes to meet the municipality's financial needs, there is an interest in using the zoning power to raise the local tax base.<sup>13</sup> This practice, known as fiscal zoning, attempts to eliminate the possibility of developments that might result in a net financial burden, and to encourage developments which will probably yield a net financial gain.<sup>14</sup> Where the goal of the municipality is to achieve fiscal balance, there is an incentive to exclude low- and moderate-income housing because it produces lower tax revenue than luxury housing.<sup>15</sup> In addition, it is generally feared that low-income families, which tend to be larger, require greater expenditures by the

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655, 326 N.E.2d 922, 927 (two acre minimum lot size upheld); floor area restrictions, e.g. *Flower Hill Bldg. Corp. v. Village of Flower Hill*, 199 Misc. 344, 348, 100 N.Y.S. 2d 903, 908 (Sup. Ct. 1950) (minimum 1800 square feet of livable floor area upheld); and restrictions on the number of multiple unit dwellings (see generally Babcock & Bosselman, *Suburban Zoning and the Apartment Boom*, 111 U. PA. L. REV. 1040, 1060-61 (1963) for a discussion of some techniques used to restrict the use of multiple-family dwellings which have been upheld by the courts) on the grounds that these devices are valid exercises of police power. But see *N.A.A.C.P. v. Township of Mount Laurel*, 67 N.J. 151, 163-64, 185-87, 336 A.2d 713, 719, 730-32 (1975) (one-half acre minimum lot size and minimum 1,100 square feet for one-story houses and 1,300 square feet for one and one-half stories or higher held invalid); *Concord Township Appeal*, 439 Pa. 466, 478, 268 A.2d 765, 770 (1970) (two and three acre lot size invalid). The latter two cases are indicative of a recent trend in the opposite direction. A detailed review of state court responses to exclusionary zoning is beyond the scope of this comment. See generally *TWENTY YEARS AFTER BROWN*, *supra* note 1, at 109-14 (discussion of recent trend of courts to invalidate exclusionary devices). Comment, *A Survey of the Judicial Responses to Exclusionary Zoning*, 22 SYR. L. REV. 537 (1971) (discussion of the traditional response of state courts to uphold exclusionary devices). See text at notes 41-48 for a brief overview of challenges to exclusionary zoning brought in the lower federal courts.

<sup>10</sup> Comment, 42 TEMP. L. Q. 347, 347-48 (1970); see R. BABCOCK & F. BOSSELMAN, *supra* note 1, at 4.

<sup>11</sup> EQUAL OPPORTUNITY, *supra* note 1, at 29, 30. See BUILDING THE AMERICAN CITY: REPORT OF THE NATIONAL COMMISSION ON URBAN PROBLEMS TO THE CONGRESS AND TO THE PRESIDENT OF THE UNITED STATES, H.R. DOC. NO. 91-34, 91st Cong., 1st Sess. 211 (1968) [hereinafter cited as REPORT ON URBAN PROBLEMS].

<sup>12</sup> REPORT ON URBAN PROBLEMS, *supra* note 11, at 18-19.

<sup>13</sup> *Id.* at 19.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

municipality for education, public health, welfare, police and fire protection than are necessary for higher income families.<sup>16</sup>

To avoid these perceived drains on its economy, a municipality might draw upon a wide variety of exclusionary practices. For example, a municipality might: (1) impose unduly large minimum lot size requirements, which have the effect of significantly inflating the cost of entry into the market; (2) mandate minimum floor space requirements, often considerably larger than necessary, which effectively raise the cost of homes in the municipality beyond the financial means of all but a few persons; (3) prohibit the construction of multiple-family dwellings; and (4) exclude mobile homes.<sup>17</sup> When zoning caught hold in the 1920's such practices may have been relatively benign. Because they were not being effectuated during a period of region-wide metropolitan growth, the zoning decisions of the community did not affect bordering communities.<sup>18</sup> Municipalities in the 1970's, however, make their land use decisions in a much different context—that of continued, large scale metropolitan expansion.<sup>19</sup> It is important to highlight several characteristics of this widespread metropolitan growth in order to appreciate the present effect of local zoning decisions.

Most of the recent urban growth has occurred in the suburbs surrounding the major cities.<sup>20</sup> The flight to the suburbs resulted in the creation of thousands of new units of local government, each having the power to make zoning decisions according to its own self-interest.<sup>21</sup> The National Commission on Urban Problems points out that this often results in "a type of Balkanization which is intolerable in large urban areas where local government boundaries rarely reflect the true economic and social watersheds."<sup>22</sup> This dispersion of

<sup>16</sup> *Id.*

<sup>17</sup> For a general discussion of exclusionary devices, see, e.g., R. BABCOCK & F. BOSSELMAN, *supra* note 1, at 5-14; REPORT ON URBAN PROBLEMS, *supra* note 11, at 213-16; Williams, Jr. & Norman, *Exclusionary Land Use Controls: The Case of North-Eastern New Jersey*, 22 SYR. L. REV. 475, 481-98 (1971); Cutler, *Legal and Illegal Methods for Controlling Community Growth on the Urban Fringe*, 1961 WIS. L. REV. 370.

<sup>18</sup> See R. BABCOCK & F. BOSSELMAN, *supra* note 1, at 28.

<sup>19</sup> From 1951 to 1976, almost as much land was converted to urban use in the United States as in the preceding 175 years of the country's existence. M. BROOKS, EXCLUSIONARY ZONING I (ASPO Planning Advisory Serv. Rep. No. 254, 1970). By 1960, 70% of the population lived in urban areas; 63% lived in metropolitan areas. REPORT ON URBAN PROBLEMS, *supra* note 11, at 42. The United States Commission on Urban Problems has noted that large scale metropolitan growth "has come to characterize the pattern of American settlement. Roughly defined, it encompasses a city of more than 50,000 and the counties which contain it and maintain a certain economic and social dependence on it." *Id.* An estimated 71% of the total U.S. population will live in metropolitan areas by 1985. 80.6% of the projected population growth will occur inside these metropolitan areas. *Id.*

<sup>20</sup> M. BROOKS, *supra* note 19, at 1.

<sup>21</sup> See R. BABCOCK & F. BOSSELMAN, *supra* note 1, at 4.

<sup>22</sup> REPORT ON URBAN PROBLEMS, *supra* note 11, at 19; see Note, *Suburban Zoning Ordinances and Building Codes: Their Effect on Low and Moderate Income Housing*, 45 NOTRE DAME L.Q. 123, 130 (1969).

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zoning authority has led to incompatible uses along jurisdictional borders, the near exclusion of regional facilities, and a duplication of public facilities.<sup>23</sup> In short, the widespread distribution of zoning authorities has often frustrated attempts to achieve sound metropolitan planning.<sup>24</sup>

Metropolitan growth has also involved a massive movement of employment activities away from the central city into the suburbs and outlying areas.<sup>25</sup> Low- and moderate-income persons find themselves foreclosed from these new jobs because zoning practices effectively prevent them from moving to the suburbs, and they are unable to afford the cost of commuting the physical distance between their residence in the city and the new job locations in the suburbs. Their inability to obtain this employment, compounded by the steady disappearance of employment opportunities within the central cities, prevents them from acquiring the very financial means needed to move into suburban communities.<sup>26</sup> Thus a bottleneck is placed on regional mobility and development by zoning practices which exclude low-income housing from suburban communities, thereby separating potential employees from growing job markets.<sup>27</sup>

An additional characteristic of the present pattern of metropolitan growth is its corresponding racial imbalance.<sup>28</sup> The exclusionary practices of suburban communities which prevent the construction of homes within the financial means of a low-income family have a disproportionate effect on blacks who, as a group, suffer a significantly higher incidence of poverty than the population at large.<sup>29</sup> Thus the movement of whites from the inner cities to the suburbs and the maintenance of financial barriers through exclusionary zoning techniques which effectively exclude low-income individuals, also impedes the possibility of integrated housing patterns within a metropolitan

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<sup>23</sup> REPORT ON URBAN PROBLEMS, *supra* note 11, at 19.

<sup>24</sup> *Id.*

<sup>25</sup> M. BROOKS, *supra* note 19, at 2. More than one-half of all new employment created in the 1960's was created outside central cities. From 1960-1967, 62% of the industrial and 52% of the commercial buildings constructed were built outside of central cities. *Id.*

<sup>26</sup> See Note, *The Equal Protection Clause and Exclusionary Zoning after Valtierra and Dandridge*, 81 YALE L.J. 61, 62 (1971).

<sup>27</sup> Davidoff & Davidoff, *Opening the Suburbs: Toward Inclusionary Land Use Controls*, 22 SYR. L. REV. 509, 513 (1971).

<sup>28</sup> EQUAL OPPORTUNITY, *supra* note 1, at 7. In 1968, 95% of the metropolitan suburbs of one million or more persons were white. M. BROOKS, *supra* note 19, at 2. Moreover, the movement of whites away from the central city to the suburbs has been shown to be increasing. *Id.* Between 1960 and 1970 nearly two million whites moved out of the cities while the concentration of blacks increased by nearly three million. During the same time period the white suburban population has increased by 12.5 million, whereas only one million blacks have moved to the suburbs. EQUAL OPPORTUNITY, *supra* note 1, at 4. In nearly one-third of the metropolitan areas having a population of at least one million, the percentage of black residents in suburban communities has either remained stable or declined in the 1960's. *Id.*

<sup>29</sup> EQUAL OPPORTUNITY, *supra* note 1, at 7.

region.<sup>30</sup> The net effect is to place resources such as open land and employment at the disposal of the predominantly white middle class suburbs<sup>31</sup> while the central cities, drained of their tax base, struggle with the problems of providing decent housing, job opportunities, and adequate services.<sup>32</sup>

## 2. *The Problem of Establishing Standing to Challenge Exclusionary Zoning*

In recent years there has been a growing realization that exclusionary zoning policies often result in serious economic and social dislocation.<sup>33</sup> Even so, federal litigation involving exclusionary zoning has been relatively sparse.<sup>34</sup> One factor responsible for the minimal judicial intervention is that those who are excluded by the ordinances are not the individuals who have traditionally been recognized as having standing to challenge zoning practices.

Challenges to municipal zoning ordinances have traditionally been heard in state courts rather than federal courts. State courts generally have jurisdiction to hear such challenges pursuant to the individual state's zoning enabling act,<sup>35</sup> which typically provides that "appeals may be taken to a Court by a 'person aggrieved' . . . by any decision of the administrative officer."<sup>36</sup> To qualify as a "person aggrieved" one must allege some direct legal or equitable property interest in a parcel of land, the proper zoning of which is the subject of the dispute before the court.<sup>37</sup> Persons who are not owners of the land actually zoned qualify as "persons aggrieved" only when some "special damages which are not generally shared with other property owners similarly situated" can be proved.<sup>38</sup> The general rule in regard to non-residents is that they do not have the right to appeal decisions of another district's zoning board.<sup>39</sup> Also, civic and improvement associations seeking review typically have not been granted the right of

<sup>30</sup> See *id.* at 4; Comment, 47 TUL. L. REV. 1056 (1973).

<sup>31</sup> Note, *The Massachusetts Zoning Appeals Law: First Breach in the Exclusionary Wall*, 54 B.U.L. REV. 37, 45 (1974).

<sup>32</sup> Note, *supra* note 22, at 130.

<sup>33</sup> REPORT ON URBAN PROBLEMS, *supra* note 11, at 19.

<sup>34</sup> See TWENTY YEARS AFTER BROWN, *supra* note 1, at 91.

<sup>35</sup> Note, *The "Aggrieved Person" Requirement in Zoning*, 8 WM. & MARY L. REV. 294 (1967).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 301; see, e.g., *Flynn v. Zoning Bd. of Review of the City of Pawtucket*, 77 R.I. 118, 122, 73 A.2d 808, 810 (1950); *Scholl v. Borough of Yeadon*, 148 Pa. Super. 601, 606, 26 A.2d 135, 137 (1942).

<sup>38</sup> Note, *supra* note 35, at 302-03; see, e.g., *Downey v. Village of Ardsley*, 152 N.Y.S.2d 195, 199 (Sup. Ct. 1956), *aff'd mem.*, 3 App. Div. 2d 663, 664, 158 N.Y.S.2d 306, 308 (1957).

<sup>39</sup> Note, *supra* note 35, at 304; see, e.g., *Wood v. Freeman* 43 Misc.2d 616, 619, 251 N.Y.S.2d 996, 998 (1964); *Village of Russell Gardens v. Board of Zoning Appeals*, 30 Misc.2d 392, 394, 219 N.Y.S.2d 501, 502 (Sup. Ct. 1961).

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appeal, as ordinarily they do not own realty and therefore are neither taxpayers nor aggrieved parties.<sup>40</sup>

In the federal courts, challenges to exclusionary zoning have focused on the racially discriminatory purpose and effect of zoning ordinances, rather than on the particular zoning devices used. Since 1890, ordinances expressly providing for residential racial segregation have been struck down by the federal courts.<sup>41</sup> However, it was not until 1970 that plaintiffs attempted to challenge exclusionary zoning ordinances that were not explicitly enacted for the purpose of racial segregation.<sup>42</sup> These challenges were typically brought either by associations which had purchased or taken an option on property with the intent to develop low- or moderate-income housing,<sup>43</sup> or by persons eligible and willing to move into such projects.<sup>44</sup> All the suits were brought when building plans already underway were blocked by such town actions as rezoning or attempting to rezone the area reserved for the project;<sup>45</sup> instituting a referendum nullifying the ordinance permitting the proposed project;<sup>46</sup> or denying a request for a building permit and zoning change which would allow construction of low-income multi-family dwellings.<sup>47</sup> Each challenge was viewed and decided by the courts as a race discrimination case.<sup>48</sup>

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<sup>40</sup> "Where the association does not own any real estate in the zoning district, the courts have denied the right of review, since one without ownership cannot be adversely affected." Note, *supra* note 35, at 306; see, e.g., *Stocksdale v. Barnard*, 239 Md. 541, 543-44, 212 A.2d 282, 283-84 (1965); *Lindenwood Improv. Ass'n v. Lawrence*, 278 S.W.2d 30, 31 (Mo. Ct. App. 1955). Even where challenges have been brought by parties traditionally considered "persons aggrieved," state courts have frequently upheld exclusionary devices. See note 9 *supra*.

<sup>41</sup> E.g., *Buchanan v. Warley*, 245 U.S. 60 (1917); *In re Lee Sing*, 43 F. 359, 361 (C.C.N.D. 1890).

<sup>42</sup> See *Kennedy Park Homes Ass'n v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); *Dailey v. City of Lawton*, 425 F.2d 1037 (10th Cir. 1970); *Southern Alameda Span. Speaking Org. v. City of Union City*, 424 F.2d 291 (9th Cir. 1970).

<sup>43</sup> E.g., *Park View Heights Corp. v. City of Black Jack*, 467 F.2d 1208, 1210 (8th Cir. 1972); *Kennedy Park Homes Ass'n v. City of Lackawanna*, 436 F.2d 108, 109 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); *Dailey v. City of Lawton*, 425 F.2d 1037, 1038 (10th Cir. 1970).

<sup>44</sup> E.g., *Park View Heights Corp. v. City of Black Jack*, 467 F.2d 1208, 1210 & n.2 (8th Cir. 1972); *Dailey v. City of Lawton*, 425 F.2d 1037, 1038 (10th Cir. 1970); *Sisters of Providence of St. Mary of the Woods v. City of Evanston*, 335 F. Supp. 396, 398 (N.D. Ill. 1971).

<sup>45</sup> *Park View Heights Corp. v. City of Black Jack*, 467 F.2d 1208, 1211 (8th Cir. 1972); *Kennedy Park Homes Ass'n v. City of Lackawanna*, 436 F.2d 108, 109 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971).

<sup>46</sup> *Southern Alameda Span. Speaking Org. v. City of Union City*, 424 F.2d 291, 292 (9th Cir. 1970).

<sup>47</sup> *Dailey v. City of Lawton*, 425 F.2d 1037, 1038 (10th Cir. 1970); *Sisters of Providence of St. Mary of the Woods v. City of Evanston*, 335 F. Supp. 396, 398 (N.D. Ill. 1971).

<sup>48</sup> See *Park View Heights Corp. v. City of Black Jack*, 467 F.2d 1208, 1212 (8th Cir. 1972); cf. *Ybarra v. City of the Town of Los Altos Hills*, 503 F.2d 250, 252-53 (9th Cir. 1974).

The federal courts have had little trouble granting standing to such plaintiffs challenging exclusionary zoning where there was an actual property interest involved; where low-income non-residents were ready, willing, and able to move into a specific project planned for that property; and where the zoning ordinance preventing low-income housing construction has been challenged on the basis of a racially discriminatory purpose and effect.<sup>49</sup> However, until mid-1975, the Supreme Court had yet to decide whether developers who desire to build and non-residents who desire to live in low- or moderate-cost housing in a particular municipality have standing to challenge that municipality's zoning practices where (1) the practices have effectively discouraged building activity, such that developers have neither purchased land in the municipality nor begun plans for the particular project, or (2) discrimination on the basis of wealth is alleged, with racial discrimination being asserted as a secondary effect of the economically exclusionary practices. It is the purpose of this comment to examine the question of standing to challenge exclusionary zoning ordinances in the context of these two fact situations.

The comment will first present a short overview of the doctrine of standing. Special emphasis will be given to the question of whether the courts impose different requirements for standing depending upon the source of the plaintiff's claim; that is, whether plaintiffs asserting claims based on statutes providing for judicial review are in a better position to establish standing than plaintiffs asserting claims based on common law or constitutional rights. The next section will explore the difficulties created when the standing doctrine is applied to individuals petitioning the federal courts to order suburban communities to change their zoning laws and to allow construction of low-income housing. It will present a detailed analysis of three recent zoning cases, *Warth v. Seldin*,<sup>50</sup> decided in 1975 by the Supreme Court, *Evans v. Lynn*,<sup>51</sup> decided later in the same year by the Second Circuit, and *City of Hartford v. Hills*,<sup>52</sup> decided in 1976 by a district court in the Second Circuit. In the final section of this comment, the implications of these doctrines for future challenges to exclusionary zoning will be discussed. It will be submitted that as a result of the Supreme Court's pronouncements in *Warth*, plaintiffs finding themselves in the fact situations under study are likely to establish standing to challenge zoning in only a very narrow set of circumstances.

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<sup>49</sup> *Kennedy Park Homes Ass'n v. City of Lackawanna*, 436 F.2d 108, 114 (2d Cir. 1970), cert. denied, 401 U.S. 1010 (1971); *Dailey v. City of Lawton*, 425 F.2d 1037, 1040 (10th Cir. 1970); *Southern Alameda Span. Speaking org. v. City of Union City*, 424 F.2d 291, 296 (9th Cir. 1970).

<sup>50</sup> 422 U.S. 490 (1975).

<sup>51</sup> — F.2d —; No. 74-1793 (2d Cir. June 2, 1975), rehearing en banc granted, August 11, 1975. The text of this opinion can be found at P-H 1971 EQUAL OPPORT. IN HOUSING ¶13,712.

<sup>52</sup> — F. Supp. —; Civil No. H-75-258 (D. Conn. Jan. 28, 1976). The text of this opinion can be found at P-H 1971 EQUAL OPPORT. IN HOUSING ¶13,742.

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Moreover, even where such plaintiffs are able to establish standing, the relief afforded is likely to be of a very limited and generally inadequate nature.

### I. THE STANDING DOCTRINE: AN HISTORICAL PERSPECTIVE

There are two principal sources of the requirements for standing in the federal courts. First is Article III of the Constitution which defines and limits the jurisdiction of the federal courts to "cases" and "controversies."<sup>53</sup> To assure a concrete case or controversy, courts have consistently required plaintiffs to allege, at a minimum, that they have been or will be sufficiently injured in fact, economically or otherwise, as to have a personal stake in the outcome.<sup>54</sup> Second is a jurisprudential concern that the court not exceed the bounds of proper judicial inquiry mandated by the separation of powers doctrine.<sup>55</sup> As a result of this concern, the Supreme Court has often required plaintiffs to allege that the injury asserted violates a "legal right" personal to the plaintiffs.<sup>56</sup> The extent to which the federal courts insist that the jurisprudential requirements be satisfied often depends on the nature of the claim upon which plaintiffs sue; that is, whether plaintiffs' claim arises (1) without the aid of a statute specifically providing for judicial review of congressional or executive action (nonstatutory review);<sup>57</sup> (2) under a specific statutory grant of review (statutory review); or (3) under the review provisions of the Administrative Procedure Act.<sup>58</sup>

In a nonstatutory review case, Congress has not specifically provided for judicial review of the governmental action being challenged. Thus the Court's concern that it not exceed the bounds of proper judicial inquiry is particularly acute. To allay this concern, the Supreme Court has required that the injury mandated by Article III be to a

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<sup>53</sup> *Flast v. Cohen*, 392 U.S. 83, 94-5 (1968).

<sup>54</sup> See, e.g., *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220-21 (1974); *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972); *Association of Data Processing Serv. Orgs., v. Camp*, 397 U.S. 150, 152 (1970); *Jenkins v. McKeithen*, 395 U.S. 411, 423 (1969); *Flast v. Cohen*, 392 U.S. 83, 99-100 (1968); *Baker v. Carr*, 369 U.S. 186, 204 (1962). But see *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973) where the Court suggested that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute."

<sup>55</sup> *Flast v. Cohen*, 392 U.S. 83, 94-95 (1967); see *United States v. Richardson*, 418 U.S. 166, 179 (1974); *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125 (1940).

<sup>56</sup> *Jenkins v. McKeithen*, 395 U.S. 411, 423 (1969); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 152 (1951) (Frankfurter, J., concurring); *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125 (1940); *Alabama Power Co. v. Ickes*, 302 U.S. 464, 479 (1938); *Associated Indus. v. Ickes*, 134 F.2d 694, 700 (2d Cir. 1943); Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 649-50 (1973).

<sup>57</sup> In these cases, judicial review is obtained by invoking a general jurisdictional grant or remedy, e.g., 28 U.S.C. §§ 1331-32 (1970). See *Brewer v. Hoxie School Dist.* No. 46, 238 F.2d 91, 94-98 (8th Cir. 1956); Scott, *supra* note 56, at 647-48.

<sup>58</sup> 5 U.S.C. §§ 551-59, 701-06 (1970).

specific "legal right."<sup>59</sup> Plaintiffs cannot use the Court to vindicate a general grievance shared in common by large segments of the public<sup>60</sup> but must assert the violation of a particular interest of their own which is based on a common law right,<sup>61</sup> a constitutional right<sup>62</sup> or a statutory right.<sup>63</sup> One aspect of this requirement is the ban on taxpayer suits.<sup>64</sup> The Court has traditionally held that a taxpayer challenging a statute or governmental action must demonstrate that he will suffer a direct injury as a result of its enforcement and "not merely that he suffers in some indefinite way with people generally."<sup>65</sup>

A second implication of the requirement of injury to a specific legal right is that the Court generally will not allow plaintiffs to rest their claims on the rights of third parties.<sup>66</sup> The Court has noted, however, that this requirement is merely a "rule of practice"<sup>67</sup> and other countervailing factors have often precluded its application.<sup>68</sup> One such factor is the existence of a close or significant relationship between the plaintiffs and the third parties whose rights are being asserted.<sup>69</sup>

<sup>59</sup> See cases and Note cited at 56 *supra*.

<sup>60</sup> *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220 (1974); *United States v. Richardson*, 418 U.S. 166, 177-78 (1974); *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125 (1940); *Ex parte Levitt*, 302 U.S. 633, 634 (1937); *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923).

<sup>61</sup> *Jenkins v. McKeithen*, 395 U.S. 411, 424 (1969).

<sup>62</sup> *N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958); *Coleman v. Miller*, 307 U.S. 433, 438 (1939).

<sup>63</sup> *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 212 (1972) (White, Blackman & Powell, J.J., concurring); *Hardin v. Kentucky Util. Co.*, 390 U.S. 1, 5-6 (1968).

<sup>64</sup> *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923). *But see* *Flast v. Cohen*, 392 U.S. 83, 102-03 (1968) where the Court granted taxpayers standing based on the satisfaction of a two-pronged test: (1) a nexus between their status as taxpayers and the challenged legislative enactment; and (2) a nexus between their taxpayer status and specific constitutional restrictions imposed on the taxing and spending power of Congress. *Id.* The Court has since made clear, however, that it will limit the *Flast* holding to suits based on "specific constitutional limitation[s] upon the . . . taxing and spending power [of Congress]." *United States v. Richardson*, 418 U.S. 166, 175 (1975), quoting *Flast v. Cohen*, *supra*, at 104.

<sup>65</sup> *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923); see *United States v. Richardson*, 418 U.S. 116, 178 (1974).

<sup>66</sup> *Barrows v. Jackson*, 346 U.S. 249, 255-57 (1953); *Tileston v. Ullman*, 318 U.S. 44, 46 (1943) (per curiam). A detailed discussion of this intricate area of law is beyond the scope of this comment. The reader is referred to Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L.J. 599, 626-60 (1962); Note, 88 HARV. L. REV. 423. (1975).

<sup>67</sup> *Barrows v. Jackson*, 346 U.S. 249, 257 (1953).

<sup>68</sup> *Id.* Indeed, the principle has been termed "a rule most often honored in the breach." Note, *supra* note 66, at 443.

<sup>69</sup> See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965); *N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U.S. 449, 458-59 (1958); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 154 (1951) (Frankfurter, J., dissenting).

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Doctor-patient<sup>70</sup> and teacher-pupil<sup>71</sup> relationships are two such examples. Other factors considered by the Court include the ability of the third parties to assert their own rights,<sup>72</sup> and the possibility that the rights of the third parties will be diluted if the plaintiffs are unable to assert those rights.<sup>73</sup> These numerous exceptions to the "rule" against asserting the rights of third parties evidence the Court's shifting concept of its proper role. Where the concern for otherwise unassertable rights of third parties has outweighed the concern for proper judicial restraint, the Court has not hesitated to subordinate its concern for restraint and has allowed the plaintiffs to assert the third party rights.

In statutory review cases, Congress, by explicitly authorizing the courts to review the challenged governmental action,<sup>74</sup> has rendered all but unnecessary the Court's concern for proper judicial restraint.<sup>75</sup> Thus the Court has been very liberal in recognizing the standing of persons to sue under such acts once the plaintiffs establish that they are within the class of persons authorized by the statute to bring suit.<sup>76</sup> In such cases, the Court generally has not denied standing to

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<sup>70</sup> *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965). In *Tileston v. Ullman*, 318 U.S. 44 (1943) a doctor was denied the right to assert the rights of his patients. The reason for the denial of standing, however, appears to be that the doctor had failed to satisfy the minimum Article III requirement of alleging injury to himself. *Id.* at 45. See Note, *supra* note 66 at 430.

<sup>71</sup> *Brewer v. Hoxie School Dist. No. 46*, 238 F.2d 91, 104-05 (8th Cir. 1956); cf. *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925).

<sup>72</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 446 (1972); *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 459 (1958); *Barrows v. Jackson*, 346 U.S. 249, 257 (1953); *United States v. Raines*, 362 U.S. 17, 22 (1960) (dictum).

<sup>73</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 446 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 481 (1964); *United States v. Raines*, 362 U.S. 17, 22 (1960) (dictum).

Thus in *Barrows v. Jackson*, 346 U.S. 249 (1952), the Court allowed the white plaintiff to challenge the enforcement of a restrictive covenant preventing her from selling her land to a black buyer: "The relation between the coercion exerted on respondent and her possible pecuniary loss thereby is so close to the purpose of the restrictive covenant, to violate the constitutional rights of those discriminated against, that respondent is the only effective adversary of the unworthy covenant in its last stand." *Id.* at 259.

<sup>74</sup> See generally Scott, *supra* note 56, at 654-58. A typical provision allows any person aggrieved or adversely affected by agency action to bring suit in the federal courts. For example, Congress has decreed that "any . . . person who is aggrieved or whose interest is adversely affected" by an action by the Federal Communications Commission may seek review in a federal court. 47 U.S.C. § 402(b)(6) (1970). Some provisions, however, more narrowly define the class of persons who may bring suit. The Federal Trade Commission Act provides review for: "Any person . . . required by an order of the Commission to cease and desist . . ." 15 U.S.C. § 45(c) (1970). The Federal Aviation Act provides for "any person disclosing a substantial interest in [an] order." 49 U.S.C. § 1486(a) (1970). For other examples see Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425, 429 n.12 (1974).

<sup>75</sup> Compare *Tennessee Elec. Power Co. v. T.V.A.*, 306 U.S. 118, 137-38 (1939) (nonstatutory), with *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 477 (1940) (statutory). See Scott, *supra* note 56 at 656.

<sup>76</sup> See *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209-10 (1972); *id.* at 212 (White, Brennan & Powell, J. J., concurring); Scott, *supra* note 56, at 656-57

plaintiffs asserting grievances shared by large segments of the public.<sup>77</sup>

The third group of cases are those which invoke the review provisions of the Administrative Procedure Act to challenge the actions of federal agencies. Section 702 of the APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."<sup>78</sup> According to many commentators, this provision did no more than restate the current law regarding statutory and nonstatutory review; that is, unless the plaintiffs were granted standing by a "relevant statute" they had to assert an injury to a legal right as in nonstatutory review cases.<sup>79</sup> Recent Supreme Court opinions, however, have indicted otherwise.

In *Association of Data Processing Service Organizations v. Camp*,<sup>80</sup> the Supreme Court devised a two part test for standing to challenge administrative action under section 702 of the APA:<sup>81</sup> Plaintiffs must al-

n.43. A distinction must be drawn between a congressional grant of standing to "aggrieved persons" to challenge agency action and an attempt by Congress to authorize someone to bring suit to determine the constitutionality of actions of the legislative or executive branches of government. In the former situation the minimum constitutional mandate of a "case" or "controversy" has been satisfied since the plaintiff is aggrieved, i.e., injured in fact. In the latter situation there is no "case" or "controversy" but merely an attempt to elicit an advisory opinion and hence the Court may not hear the case. See *Sierra Club v. Morton*, 405 U.S. 727, 732 n.3 (1972); *Muskrat v. United States*, 219 U.S. 346, 363 (1910). See note 171 *infra* for a more detailed discussion.

<sup>77</sup> *Associated Indus. v. Ickes*, 134 F.2d 694, 705 (2d Cir. 1943). Justice Frankfurter referred to persons vindicating generalized grievances felt by the public at large as "private Attorney Generals [sic]," *id.* at 704, a phrase and concept which has been widely utilized. See *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972) and cases cited therein.

<sup>78</sup> 5 U.S.C. § 702 (1970).

<sup>79</sup> See *Kansas City Power & Light Co. v. McKay*, 225 F.2d 924, 932 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 844 (1955); L. JAFFEE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 528-31 (1965); S. DOC. NO. 248, 79th Cong., 2d Sess. 310 (1946) (remarks of then Attorney General Clark); Jaffee, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 287-88 (1961); Scott, *supra* note 56, at 658-59.

<sup>80</sup> 397 U.S. 150 (1970).

<sup>81</sup> Since the *Data Processing* opinion did not specifically refer to the APA during its discussion of standing, some commentators have questioned whether the statute played a significant role in the decision regarding standing. Scott, *supra* note 56, at 662 n.76. However, in a subsequent opinion, *Sierra Club v. Morton*, 405 U.S. 727 (1972), the Court made clear that in *Data Processing* plaintiffs' standing was based on the APA:

Early decisions under this statute interpreted the language as adopting the various formulations of 'legal interest' and 'legal wrong' then prevailing as constitutional requirements of standing. But, in *Data Processing* . . . we held more broadly that persons had standing to obtain judicial review of federal agency actions under § 10 of the APA where they had alleged that the challenged action had caused them 'injury in fact,' and where alleged injury was to an interest 'arguably within the zone of interests to be protected or regulated' by the statutes that the agencies were claimed to have violated.

*Id.* at 733 (citations omitted).

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lege, first, that the challenged action caused them injury in fact, be it economic or otherwise;<sup>82</sup> and second, that the interest sought to be protected is "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."<sup>83</sup> This second part of the test greatly liberalized the traditional requirement of a violation of a specific legal interest formerly imposed by the Court. Prior to *Data Processing*, plaintiffs had to assert that they were members of the class of persons which the statute in question was designed to protect.<sup>84</sup> After *Data Processing*, plaintiffs could successfully argue that in enacting the relevant statute, Congress was arguably aware of their interests,<sup>85</sup> or that, regardless of Congress' intent, one of the effects of the statute was the protection of their interests.<sup>86</sup>

In two recent cases, the Supreme Court has noted that it will restrict the more liberal "zone of interests" test to plaintiffs whose standing is based on the APA or on a specific statutory grant of review.<sup>87</sup> As a result, standing in APA cases has become very closely aligned with standing in cases based on specific statutory review.<sup>88</sup> However, plaintiffs challenging governmental action without relying on the APA or a specific statutory grant of review still must meet the more traditional legal interest test.<sup>89</sup>

In light of the foregoing discussion of standing it appears that challengers of exclusionary zoning would be in a stronger position to establish standing in the federal courts if they were to invoke either a statute expressly providing for judicial review or the review provisions of the APA than if they were to bring suit in a nonstatutory review context. However, challengers cannot invoke specific statutory review in the federal courts since zoning boards are local agencies and state enabling acts cannot provide for review in federal courts. Thus, those who wish to challenge exclusionary zoning in the federal courts are limited to two avenues of attack. If they wish to directly challenge the constitutionality of exclusionary zoning, they must proceed on non-statutory review grounds and face formidable barriers to standing arising out of jurisprudential concerns regarding generalized

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<sup>82</sup> *Data Processing*, 397 U.S. at 152.

<sup>83</sup> *Id.* at 153.

<sup>84</sup> *Hardin v. Kentucky Util. Co.*, 390 U.S. 1, 7 (1968); see Scott, *supra* note 56, at 663; Note, 13 B.C. IND. & COM. L. REV. 289, 297 (1971).

<sup>85</sup> *Arnold Tours, Inc. v. Camp*, 400 U.S. 45, 46 (1970) (per curiam).

<sup>86</sup> See *Investment Co. Institute v. Camp*, 401 U.S. 617, 620-21, 634-38 (1971); Note, *supra* note 84, at 302-04.

<sup>87</sup> *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 n.16 (1974); *United States v. Richardson*, 418 U.S. 166, 176 n.9 (1974).

<sup>88</sup> See *United States v. Richardson*, 418 U.S. 166, 176 n.9 (1974) in which the Court indicated that in *Data Processing* (a case in which standing was based on the APA) standing arose "under a specific statute . . . . In short, Congress had provided . . . standing."

<sup>89</sup> See *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 & n.16 (1974); *United States v. Richardson*, 418 U.S. 166, 176 & n.9 (1974).

grievances.<sup>90</sup> If they wish to indirectly challenge exclusionary zoning—by attempting to block the receipt of federal funds by the municipality because of the exclusionary zoning—then they may invoke the more liberal standing requirements of the APA, but must be content with the limited relief such a challenge may afford.<sup>91</sup>

## II. CHALLENGES TO EXCLUSIONARY ZONING PRACTICES

### A. *A Direct Challenge: Warth v. Seldin*

#### 1. The Case

##### (a) *Standing Formula*

In *Warth v. Seldin*,<sup>92</sup> plaintiffs attempted to challenge an exclusionary zoning ordinance without the aid of an express statutory grant of standing. Several organizations and individuals concerned with the housing problems of the Rochester, New York metropolitan area brought an action for declaratory and injunctive relief and damages against both the Town of Penfield, a suburb adjacent to Rochester, and against members of the town's Zoning, Planning, and Town Boards.<sup>93</sup> Plaintiffs claimed that the town's zoning ordinance, by its terms and as enforced, excluded people of low and moderate incomes from living in Penfield, in violation of the First, Ninth, and Fourteenth Amendments, as well as 42 U.S.C. sections 1981, 1982, and 1983.<sup>94</sup> Because the Court was presented with such a large variety of plaintiffs, representing the interests of many of the diverse groups affected by exclusionary zoning practices, *Warth* is a landmark case not only as an indication of the Court's future role in addressing the housing problems of low- and moderate-income citizens, but also for its reassessment of the meaning of standing.

The original plaintiffs in *Warth* included three low- or moderate-income residents of Rochester;<sup>95</sup> one resident of a nearby town who owned property in and paid taxes to Rochester, but who was employed in Penfield;<sup>96</sup> four residents of Rochester all of whom owned property in and paid taxes to the city; and Metro-Act, Inc., a not-for-profit corporation whose purpose was to "inquire into the reasons for the critical housing shortages for low and middle income persons in the Rochester area and to urge action . . . to alleviate the

<sup>90</sup> See text and note at 60 *supra*.

<sup>91</sup> For a discussion of the limited nature of this relief, see text at notes 346-51 and 447-48 *infra*. It is possible, for example, that in such a challenge, a plaintiff's relief may be restricted to a court order requiring the federal agency in question to institute review procedures prior to making grants of federal funds.

<sup>92</sup> 422 U.S. 490 (1975).

<sup>93</sup> *Id.* at 493.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 494.

<sup>96</sup> *Id.* at 495.

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general housing shortage for low and moderate income persons.<sup>97</sup> Both the low or moderate income residents of Rochester and the resident of the nearby town were members of ethnic or racial minority groups.<sup>98</sup> Two additional associations attempted to intervene or be joined in the suit: Rochester Home Builders, an association of firms involved in residential construction in the Rochester Metropolitan area, and Monroe Area Housing Council, a not-for-profit corporation comprised of several organizations interested in housing problems.<sup>99</sup>

Plaintiffs challenged both specific terms of the zoning ordinance as well as certain practices of the officials responsible for its enforcement.<sup>100</sup> The challenged terms of the zoning ordinance included: (1) the allocation of 98 percent of the town's vacant land to single-family detached housing; (2) the imposition of allegedly unreasonable requirements relating to lot size, set back, floor area, and habitable space; and (3) the imposition of low-density and other restrictive requirements on the limited space allocated to multi-family structures.<sup>101</sup> It was alleged that these factors made the construction of low-cost housing economically unfeasible, and thus increased the cost of housing built in Penfield beyond the financial means of persons with low or moderate incomes.<sup>102</sup>

The challenged practices of the town officials included: (1) delays of action on proposals for low- and moderate-income housing; (2) arbitrary denials of approval of such projects; (3) refusal to grant necessary variances, permits, or tax abatements; (4) failure to provide necessary support services for low- and moderate-cost housing developments; and (5) amendment of the zoning ordinance in a manner making approval of low- and moderate-cost housing projects nearly impossible.<sup>103</sup> On the basis of these allegations, plaintiffs claimed that members of Penfield's Zoning, Planning, and Town Boards had acted in an arbitrary and discriminatory manner in enforcing the community's zoning ordinance.<sup>104</sup> Plaintiffs also asserted that the exclusion of such low-cost housing from Penfield had the effect of excluding members of racial and ethnic minorities from the town.<sup>105</sup>

The district court dismissed the entire suit, including Home Builder's motion to intervene and the motion to join Monroe Area Housing Council on the ground that none of the individual and as-

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<sup>97</sup> *Id.* at 494.

<sup>98</sup> *Id.* at 494-95.

<sup>99</sup> *Id.* at 497.

<sup>100</sup> *Id.* at 493.

<sup>101</sup> *Id.* at 495.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 495-96.

<sup>104</sup> *Id.* at 495.

<sup>105</sup> *Id.* at 496. Each group of plaintiffs, in addition, alleged certain specific harm to themselves. Although these specific allegations are illustrative of the sweeping breadth of the attack on Penfield's zoning practices, they will be discussed in the presentation of the Court's analysis of each plaintiff's standing.

sociational plaintiffs had standing.<sup>106</sup> The court of appeals affirmed.<sup>107</sup> The Supreme Court, in turn, affirmed the judgment of the court of appeals and held that the plaintiffs had not met the standing requirements imposed either by Article III or by the jurisprudential rules of judicial self-restraint.<sup>108</sup>

The Court first set forth general principles governing the determination of standing. Its starting point was a characterization of the standing issue as a question of "whether the litigant is entitled to have the court decide the merits of the dispute or of the particular issues."<sup>109</sup> The majority then indicated that it viewed the standing inquiry as a dual question, involving both constitutional and jurisprudential limitations on federal court jurisdiction.<sup>110</sup> The Court noted, however, that this traditional "dual" view of the standing doctrine was grounded in a concern for "the proper—and properly limited—role of the courts in a democratic society,"<sup>111</sup> suggesting at the outset that standing, by definition, imported broad questions of justiciability.<sup>112</sup>

The Court then stated that the threshold question in the standing inquiry is "whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Article III."<sup>113</sup> As judicial power may be extended only to litigants who have themselves suffered some injury resulting from an allegedly illegal action, the Court noted that it was constitutionally required to

<sup>106</sup> 422 U.S. at 493. An additional ground for dismissal was the district court's finding that the plaintiffs had failed to state a claim upon which relief could be granted. *Id.*

<sup>107</sup> 495 F.2d 1187 (2d Cir. 1974).

<sup>108</sup> *Warth*, 422 U.S. at 517-18.

<sup>109</sup> *Id.* at 498; *see, e.g.*, *Jenkins v. McKeithen*, 395 U.S. 411, 423 (1969); *Flast v. Cohen*, 392 U.S. 83, 99 (1968); *Baker v. Carr*, 369 U.S. 186, 204 (1962); P. BATOR, D. SHAPIRO, P. MISHKIN & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 156 (2d ed. 1973).

<sup>110</sup> The analysis of standing as a dual question involving both constitutional and jurisprudential policy limitations is set forth in *Flast v. Cohen*, 392 U.S. 83, 99 (1968); *Barrows v. Jackson*, 346 U.S. 249, 255 (1953).

<sup>111</sup> *Warth*, 422 U.S. at 498.

<sup>112</sup> *Id.* In *Baker v. Carr*, 369 U.S. 186 (1962), Justice Brennan characterized justiciability as an inquiry which decides "whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." *Id.* at 198. This inquiry has, according to previous authorities, been one which remains separate from the narrower issue of standing. *See, e.g.*, *Flast v. Cohen*, 392 U.S. 83 (1968), where the majority stated:

[W]hen standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable . . . . The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government. Such problems arise, if at all, only from the substantive issues the individual seeks to have adjudicated.

<sup>113</sup> *Id.* at 99-101. 422 U.S. at 498.

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determine whether the plaintiff had alleged "a personal stake in the outcome of the controversy to warrant *his* invocation of federal court jurisdiction and to justify the exercise of the court's remedial powers on his behalf."<sup>114</sup>

However, throughout the opinion, the Court indicated that a simple allegation that the plaintiff had been harmed, or that a legally protected interest had been invaded, would not in itself be sufficient to meet Article III standing requirements. Rather, a plaintiff would be required to demonstrate in the pleadings that the injury was uniquely suited and appropriate for judicial resolution—that a remedy fashioned by the Court would alleviate the injury alleged.<sup>115</sup> The Court suggested that a plaintiff would be required to demonstrate in the pleadings an injury which was shown to be personal, palpable, and the necessary, direct result of the defendant's allegedly illegal actions. The injury must also have been one that was immediate and ripe for judicial resolution.<sup>116</sup>

In addition to Article III concerns, the Court noted a second set of questions which must be addressed in determining the type of litigant who may invoke judicial power. This second category of questions involves matters of judicial self-governance.<sup>117</sup> More specifically, prudential limitations developed by the Court restrict the exercise of judicial power where the plaintiff raises abstract questions of broad public significance (or generalized grievances) which may be more appropriately addressed by other branches of government,<sup>118</sup> or where judicial intervention may be appropriate as to some unjoined third party, but unnecessary to protect the plaintiff's individual rights.<sup>119</sup> Thus, the court stated that it would require the plaintiff to assert a personal, legally recognized interest in order to avoid application of the prudential rules of judicial restraint.<sup>120</sup>

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<sup>114</sup> *Id.* at 498-99; *Baker v. Carr*, 369 U.S. 186, 204 (1962).

<sup>115</sup> *Contra*, *Barlow v. Collins*, 397 U.S. 159, 171-73 (Brennan & White, J. J., concurring); Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450, 468, 472-73 (1970), where the view is expressed that the concept of standing simply requires an allegation of personal injury in fact. See also *Jenkins v. McKeithen*, 395 U.S. 411, 423 (1969); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 152-53 (1951) (Frankfurter, J., concurring), where the standing determination is seen to turn on a showing that a judicially cognizable interest has been invaded.

<sup>116</sup> *Warth*, 422 U.S. at 501, 502, 504, 516.

<sup>117</sup> *Id.* at 499.

<sup>118</sup> *Id.* at 500. See, e.g., *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974); *Ex parte Levitt*, 302 U.S. 633 (1937); *Tyler v. Judges of the Court of Registration*, 179 U.S. 405, 406 (1900).

<sup>119</sup> *Warth*, 422 U.S. at 499-500. See, e.g., *Barrows v. Jackson*, 346 U.S. 249, 255 (1953).

<sup>120</sup> *Warth*, 422 U.S. at 499. The requirement of asserting a personal legal interest is set forth in the opinion as a prudential limit which stands *apart* from the minimum constitutional mandate of Article III. This distinction is recognized in the Court's analysis of the standing of low income plaintiffs (see text at notes 131-38 *infra*) and the Rochester Taxpayers (see text at notes 141-49 *infra*). However, this distinction becomes blurred in the Court's treatment of Metro-Act's assertion of standing, where the legal interest requirement is treated as an integral part of the meaning of Article III. See

The Court pointed out that the nature and source of the plaintiff's claim are crucial factors in determining whether a claim will be barred by prudential rules of standing.<sup>121</sup> Thus, in addition to determining that Article III requirements have been met, the Court must also focus upon the statutory or constitutional provision upon which the plaintiff relies to determine whether such provision "can be understood as granting persons in the plaintiff's position a right to judicial relief."<sup>122</sup> If such provision can be so understood, then the plaintiff is an appropriate litigant to invoke judicial power on his behalf; he has alleged both an injury sufficient to meet Article III requirements, and has shown that the injury alleged can be considered an invasion of his legally protected interest. If the statutory or constitutional provision on which the plaintiff relies cannot be so understood, then it necessarily follows that the plaintiff is either asserting a "generalized grievance,"<sup>123</sup> or is asserting rights other than his own.<sup>124</sup> As such, the party is barred by the prudential limitations on the jurisdiction of the Court.

The Court noted two exceptions to the jurisprudential rule of self-restraint: (1) An express congressional grant of standing, even to persons who would otherwise be barred by jurisprudential standing

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text at notes 162-76 *infra*. Both views seem to have historical precedent: Compare *Flast v. Cohen*, 392 U.S. 83, 101 (1968) (where the majority viewed Article III as encompassing the question "whether the party . . . has 'a personal stake in the outcome . . . ' and whether the dispute touches upon 'the legal relations of the parties having adverse legal interests.'") (emphasis added), with *United States v. Richardson*, 418 U.S. 166, 181 (1974) (Powell, J., concurring) (where the Court views "the controlling definition of the irreducible Article III case-or-controversy requirements for standing" as the allegation of a personal stake in the outcome of the controversy which will assure concrete adverseness.) and *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972). See also *United States v. Richardson*, *supra*, at 196 n.18, where Justice Powell noted that "it might be said that the correct reading of the *Flast* nexus test is a prudential limit, given the *Baker v. Carr* definition of the constitutional bare minima." *Accord*, *Construction Indus. Assoc. of Sonoma County v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 44 USLW 3467 (U.S. Feb. 24, 1976). The latter view seems to be the soundest. If the federal courts were limited by the constitution to cases "traditionally viewed as capable of judicial resolution," then it would be constitutionally impermissible for them to recognize new legal interests created either by statute or by "broadening categories of judicially cognizable injury." However, the Court has had no trouble recognizing legal interests created by Congress, see *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 473 (1940); *Data Processing*, 397 U.S. at 153-55 and has broadened categories of judicially cognizable injury, see *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973). Therefore, it must be inferred that the legal interest test is more appropriately a question of application of prudential rules of self-restraint than one of constitutional restrictions on federal court jurisdiction.

<sup>121</sup> 422 U.S. at 500.

<sup>122</sup> *Id.*

<sup>123</sup> A generalized grievance is found where the asserted injury is one that is felt by all, and is not of the type to which the law provides a personal, individual remedy. See, e.g., *Sierra Club v. Morton*, 405 U.S. 727 (1972).

<sup>124</sup> Third party standing problems arise where the injury alleged is one which the law recognizes, but is one to which a remedy is afforded to persons other than those in the position of the plaintiff. See, e.g., *Barrows v. Jackson*, 346 U.S. 249, 255-57 (1953) and test at notes 66-73 *supra*.

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rules, would be viewed as a clear mandate to the Court indicating the propriety of judicial intervention;<sup>125</sup> and (2) "countervailing considerations"<sup>126</sup> may outweigh the concerns underlying judicial restraint where the litigant's claim rests on the rights of third parties. In such instances, the Court would find "that the constitutional or statutory provision in question implies a right of action in the plaintiff."<sup>127</sup>

The Court then applied these general principles of the standing doctrine to each individual and association involved in the suit. In order to more fully understand the Court's analysis of the plaintiffs' claims, it is important to note the use to which the majority put these general principles. In its consideration of each of the plaintiff's allegations, the Court adhered to these principles not merely as broad guidelines, but as a concrete formula devised for the purpose of determining standing. In order to establish himself as properly before the court, a plaintiff must:

(1) Allege a direct, palpable, immediate, and personal injury which is sufficient to meet the requirements of Article III;<sup>128</sup> and

(2) either:

(a) show that the statute or constitutional provision upon which he relies can be understood to grant him a right to judicial relief,

(b) show that Congress has expressly granted standing to persons in his position, or

(c) show that countervailing considerations are present which outweigh the general rule that a plaintiff may not rest a claim to relief on the rights or interests of third parties.

Each claim presented in *Warth* was subjected to the criteria set forth in this formula. Further, with each application of the formula, the Court added layers of meaning to the individual elements within. It is from this formula, as well as from the way it was applied to each type of plaintiff, that one may derive the Burger Court's view of the structure and function of the standing doctrine.

### (b) *Individual Plaintiffs*

In addition to the general allegations set forth above<sup>129</sup> the low- and moderate-income plaintiffs also claimed that the town's zoning practices, by preventing low- and moderate-income people from living in Penfield, had forced them to live in less attractive environments.<sup>130</sup> The Court accepted this allegation as true for the purposes of decid-

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<sup>125</sup> 422 U.S. at 501. See text at notes 74-77 *supra* for a discussion of the effect of a statutory grant of standing.

<sup>126</sup> 422 U.S. at 501-02. See text at notes 70-73 *supra* where such countervailing considerations are set forth.

<sup>127</sup> 422 U.S. at 501.

<sup>128</sup> See text at notes 113-16 *supra* where the Court's definition of Article III injury is set forth.

<sup>129</sup> See text at notes 103-09 *supra*.

<sup>130</sup> 422 U.S. at 496.

ing the standing issue. Nevertheless, the Court held that the allegation was insufficient to meet Article III standing requirements,<sup>131</sup> the first criterion in the standing formula.

Two deficiencies in the allegations were noted by the Court. First, the thrust of the plaintiffs' claim was that they were *among* the class of persons excluded by Penfield's zoning practices.<sup>132</sup> The fact that the plaintiffs were part of this group did not convince the Court that they were *personally* injured by the challenged zoning practices. In order to establish the first requirement of standing "[p]etitioners must allege and show that they personally have been injured, not that injury has been suffered by other unidentified members of the class to which they belong and which they purport to represent."<sup>133</sup>

Second, the plaintiffs failed to show that their inability to locate suitable housing in Penfield necessarily or directly resulted from the actions of the respondents. The Court was not certain from the allegations that "absent the respondent's restrictive zoning practices, there is a substantial probability that [these plaintiffs] would have been able to purchase or lease in Penfield and that if the court affords the relief requested, the asserted inability of petitioners will be removed."<sup>134</sup> The majority pointed out that other factors, such as economics of the housing market in the area, may have been equally responsible for plaintiffs' alleged injury.<sup>135</sup> Since the Court remained uncertain that the plaintiffs could "benefit in a tangible way from the courts' intervention,"<sup>136</sup> it did not allow the plaintiffs a hearing on the merits. In order for these plaintiffs to have met the minimum requirements of standing under Article III they would not only have had to allege

<sup>131</sup> *Id.* at 502-05.

<sup>132</sup> *Id.* at 502.

<sup>133</sup> *Id.*; *cf.* *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972) where Justice Stewart noted that the requirement of individualized injury serves "as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome." *Compare Warth*, 422 U.S. at 502, with *Baker v. Carr*, 369 U.S. 186 (1962), where the majority found that the plaintiffs had alleged an injury sufficient to meet the requirements of Article III. "If [the alleged impairment of plaintiffs' votes] does produce a legally cognizable injury, they are *among* those who have sustained it." (emphasis added). *Id.* at 204.

<sup>134</sup> 422 U.S. at 504. *Compare id.*, with *Baker v. Carr*, 369 U.S. 186 (1962), where the Court approached the question of the efficacy of judicial relief in this manner: "It would not be necessary to decide whether appellants' allegations of impairment of their votes by the 1901 apportionment will, ultimately, entitle them to any relief in order to hold that they have standing to seek it." *Id.* at 204.

<sup>135</sup> 422 U.S. at 506; *cf.* M. BROOKS, EXCLUSIONARY ZONING 7 (ASPO Planning Advisory Serv. Rep. No. 254, 1970). It is reasonable to decide that such factors are beyond the scope of judicial management. However, the Court failed to recognize that many exclusionary zoning practices directly affect the economics of the area housing market by affecting the cost of construction. *See* 422 U.S. at 506; M. BROOKS, *supra*, at 7-9; BUILDING THE AMERICAN CITY: REPORT OF THE NATIONAL COMMISSION ON URBAN PROBLEMS TO THE CONGRESS AND TO THE PRESIDENT OF THE UNITED STATES 422-24 (1968); UNITED STATES COMMISSION ON CIVIL RIGHTS, EQUAL OPPORTUNITY IN SUBURBIA 31-33 (1974).

<sup>136</sup> 422 U.S. at 508.

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that they suffered some personal injury but they also would have had to demonstrate in their pleadings a direct causal relationship between their injury and the respondents' actions.<sup>137</sup> Because their allegations failed on both scores, the claims of the low- and moderate-income plaintiffs were dismissed.

The Court thus indicated that even in determining the minimum constitutional requirements of standing, it was fundamentally concerned not simply with the existence of truly adverse *parties*, but with the amenability of the *issue* to judicial resolution as well. In prior decisions, these concerns were thought to be questions not of standing, but of justiciability, and were to be addressed when considering the merits of the claim.<sup>138</sup>

The Court next considered the standing of those plaintiffs who sued on the basis of their status as taxpayers of Rochester. Their claim asserted that as a result of Penfield's exclusionary zoning practices, "the city of Rochester had been forced to impose a higher tax rate on its citizens than would otherwise have been necessary."<sup>139</sup> In essence, since Penfield refused to allow construction of low- and moderate-cost housing, Rochester was forced to do so. To provide such housing, however, it was necessary for Rochester to allow certain tax abatements; and "as the amount of tax-abated property increase[d], Rochester taxpayers [were] forced to assume an increased tax burden in order to finance essential public services."<sup>140</sup>

According to the majority, this claim of economic injury resulting from Penfield's zoning practices also fell short of meeting the minimum requirements of Article III. First, the existence of an injury

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<sup>137</sup> *Id.* at 507. The concern that there be a direct causal relationship between the defendants' actions and the injury asserted has appeared in previous cases considering the standing doctrine. In *Jenkins v. McKeithen*, 395 U.S. 411 (1969), for example, the Court granted standing to a labor union member challenging the constitutionality of a state statute which created a commission to investigate possible criminal conduct in labor-management relations. *Id.* at 414, 425. The Court stated that "[t]he decisions of this Court have also made it clear that something more than an 'adversary interest' is necessary to confer standing. There must in addition be some connection between the official action challenged and some legally protected interest of the party challenging that action." *Id.* at 423. The Court found that the plaintiff possessed a sufficient adversary interest, stating: "We are not presented with a case in which any injury to appellant is merely a collateral consequence . . . ." *Id.* at 424.

In *Jenkins*, the allegations were read broadly in light of FED. R. CIV. P. 8 (f), providing that a complaint is to be construed liberally in favor of the plaintiff. In *Jenkins* the Court concluded that the mere allegation of a direct causal relationship was sufficient. *Id.* at 425. In *Warth*, however, plaintiffs were required to state in their pleadings facts from which the Court could infer a direct causal relationship. 422 U.S. at 504. As Justice Brennan argued in his dissenting opinion, this view seems to require the party to prove his case on paper before he can get into court. Citing *Jenkins*, Justice Brennan pointed out that "this Court has not required such unachievable specificity in standing cases in the past." *Id.* at 528 (Brennan, J., dissenting).

<sup>138</sup> See note 112 *supra*. See also *Barlow v. Collins*, 397 U.S. 159, 171-73 (Brennan, J., & White, J., concurring).

<sup>139</sup> 422 U.S. at 496.

<sup>140</sup> *Id.* at 508-09.

to this group was considered "conjectural."<sup>141</sup> Even assuming that an injury did exist, the Court concluded that "the line of causation between Penfield's actions and such injury [to Rochester taxpayers] is not apparent from the complaint."<sup>142</sup> Rather, the alleged injury—higher taxes—resulted only from decisions made by Rochester authorities who were not parties to this case.<sup>143</sup>

The Court further noted that even if the taxpayers had met the Article III requirements for standing, their claim would still have been barred by the prudential rules. In its analysis, the Court measured the taxpayer's claim against each criterion in its standing formula and concluded that none of the possible elements barring the application of jurisprudential rules was present.<sup>144</sup>

Looking to the nature and source of the taxpayers' claim, the Court found that these plaintiffs had not asserted any personal right, either statutory or constitutional, to be free from actions of an adjacent suburb, even where those actions have possible adverse effects on the city in which they reside.<sup>145</sup> Finding no legally protected interest, the Court concluded that the taxpayers' complaint either expressed a general rather than a personal grievance, or asserted the legal interests of third parties.<sup>146</sup> The Court determined that the latter applied: the plaintiffs had based their claim not on their own rights as taxpayers, but on the rights of those who had been excluded from Penfield by its exclusionary zoning practices.<sup>147</sup> The Court found none of the countervailing considerations which would otherwise outweigh the usual reluctance to adjudicate claims based on the rights of third parties. The only relationship that the Court could find between the taxpayers and those excluded from Penfield was a coincidental "congruity of interest."<sup>148</sup> Such a "tenuous" relationship was insuffi-

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<sup>141</sup> *Id.* at 509. The fact that the Court treats the claim of injury to the taxpayers as "conjectural" could mean one of two things: either (1) the Court was not satisfied that the plaintiffs alleged that their taxes had increased at all, or that their tax rates were disproportionately high—basically a question of improper or insufficient pleading; or (2) the Court is turning away from *Flast v. Cohen*, 392 U.S. 83 (1968) (individual taxpayer was granted standing) and returning to *Frothingham v. Mellon*, 262 U.S. 447 (1923) (individual taxpayer claim was barred because, *inter alia*, the injury was "comparatively minute . . . remote, fluctuating and uncertain.") 422 U.S. at 487. The Court in *Warth* cited to *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973), where the Court's concern was not with the amount, but with the personal nature of the injury. *Id.* at 684-85. Thus, the inference may be drawn that the Court's analysis of the Rochester taxpayer's claim is based on the first rationale. However, the question is not squarely resolved in the opinion.

<sup>142</sup> *Warth*, 422 U.S. at 509.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 509-10.

<sup>145</sup> *Id.* at 509.

<sup>146</sup> See text at note 128 *supra*, where the Court's overall framework in assessing standing of each party is set forth.

<sup>147</sup> 422 U.S. at 509.

<sup>148</sup> *Id.* at 510.

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cient to bring the taxpayers within the exception to the rule barring third party claims.<sup>149</sup>

### (c) Associational Plaintiffs

In considering the claims of the three associational plaintiffs, Metro-Act, Home Builders, and Monroe Area Housing Council, the Court significantly expanded its definition of Article III standing requirements by suggesting that these requirements include factors of immediacy, ripeness,<sup>150</sup> and presence of a legal interest (a factor which was previously considered by the Court to be a *jurisprudential* requirement).<sup>151</sup> The Court also made major departures from the reasoning of previous exclusionary zoning cases where plaintiffs were granted standing due in part to the willingness of the lower federal courts both to allow builders and developers to raise the rights of third parties,<sup>152</sup> and to recognize a connection between a claim of wealth discrimination and a claim of race discrimination.<sup>153</sup>

Before treating the specific claims raised by the three associational plaintiffs, the Court reviewed the circumstances under which associations generally have standing. The majority pointed out that an association itself may have standing where there is an injury to or an interference with the association's own rights.<sup>154</sup> In such cases the association may also assert the rights of its members, as long as the challenged violations adversely affect the members' "associational ties."<sup>155</sup>

In the absence of an injury to itself, an association may have standing solely as the representative of its members.<sup>156</sup> Under these

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<sup>149</sup> See discussion of the assertion of third-party rights by Metro-Act in text at notes 201-209 *infra*.

<sup>150</sup> See 422 U.S. at 516 and discussion of Home Builders' and Housing Council's claim at notes 210-220 *infra*.

<sup>151</sup> See 422 U.S. at 513, and discussion of Metro-Act's claim at notes 163-176 *infra*.

<sup>152</sup> See *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 517 F.2d 409 (7th Cir. 1975), *cert. granted*, 43 U.S.L.W. 3265 (U.S. Nov. 4, 1975); *Park View Heights Corp. v. City of Black Jack*, 467 F.2d 1208, 1212-13 (8th Cir. 1972); *Sisters of Providence of Saint Mary of the Woods v. City of Evanston*, 335 F. Supp. 396 (N.D. Ill. 1971).

<sup>153</sup> See cases cited at note 152 *supra*. See also *Kennedy Park Homes Ass'n v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971).

<sup>154</sup> 422 U.S. at 511. Several exclusionary zoning cases illustrate this point. See, e.g., *Construction Indus. Ass'n of Sonoma County v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975); *cert. denied*, 44 U.S.L.W. 3467 (U.S. Feb. 24, 1976); *Park View Heights Corp. v. City of Black Jack*, 467 F.2d 1208, 1212-13 (8th Cir. 1972); *Kennedy Park Homes Ass'n v. City of Lackawanna*, 436 F.2d 108, 112 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971).

<sup>155</sup> *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 458-60 (1958); see *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973), where standing was granted to an environmental group alleging that a particular measure promulgated by the Interstate Commerce Commission caused their members "economic, recreational, and aesthetic harm." *Id.* at 678.

<sup>156</sup> *National Motor Freight Traffic Ass'n v. United States*, 372 U.S. 246, 247 (1963).

circumstances, however, additional factors must be established before the Court will apply its standing formula as set forth above. Here, the Article III requirement of an injury in fact will be met only where the association can allege that its members are suffering such immediate or imminent injury as would be sufficient to establish standing had they themselves brought suit.<sup>157</sup> The Court further indicated that representational standing is appropriate only where the relief sought "does not make the individual participation of each injured party indispensable to the proper resolution of the cause . . . ." <sup>158</sup> Thus, where the association asserts standing as a representative of its members, it must take care to seek a remedy that will inure to the benefit of those members actually injured.<sup>159</sup>

The Court then applied these principles to Metro-Act which claimed: (1) injury to itself as a Rochester taxpayer; (2) injury to its members who were Rochester taxpayers and persons of moderate or low income; and (3) injury to its members who were Penfield residents, on whose behalf Metro-Act alleged deprivation of the benefits of living in an integrated community.<sup>160</sup> The assertions of injury to Metro-Act itself and to its members as Rochester taxpayers were held to be insufficient to establish Article III injury.<sup>161</sup> These claims were dismissed because the allegations failed to show a personal, palpable injury directly caused by the actions of the defendants, the same reasons which had been applied to the allegations of the individual plaintiffs.<sup>162</sup> The Court then turned to Metro-Act's claim that the exclusionary zoning practices deprived Penfield residents of the benefits of living in an integrated community. In its treatment of this claim, the Court made its most significant departures from previous zoning cases, and applied its own criteria of standing in a most questionable manner.

Metro-Act specifically relied on *Trafficante v. Metropolitan Life Insurance Co.*<sup>163</sup> as authority to establish an immediate or foreseeable injury to Penfield residents. In *Trafficante*, the Court granted standing to tenants who had filed a complaint with the Secretary of Housing and Urban Development (HUD) pursuant to section 810(a) of the Civil Rights Act of 1968.<sup>164</sup> The tenants alleged racial discrimination in apartment rentals, in violation of the Act. After HUD failed to secure from the landlord voluntary compliance with the Act, the plaintiffs brought an action in the district court alleging lost social, business

<sup>157</sup> *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972).

<sup>158</sup> *Warth*, 422 U.S. at 511.

<sup>159</sup> *Id.* at 515; see *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973); *National Motor Freight Traffic Ass'n v. United States*, 372 U.S. 246, 247 (1963).

<sup>160</sup> 422 U.S. at 512.

<sup>161</sup> *Id.* at 513.

<sup>162</sup> See discussion of Rochester taxpayer standing in text at notes 139-49 *supra*.

<sup>163</sup> 409 U.S. 205 (1972).

<sup>164</sup> 42 U.S.C. § 3601 (1970).

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and professional benefits of living in an integrated community and embarrassment and economic damage from being stigmatized as residents of a "white ghetto."<sup>165</sup>

The district court dismissed the suit for lack of standing<sup>166</sup> and the Court of Appeals affirmed.<sup>167</sup> However, the Supreme Court reversed, holding that the plaintiffs had alleged a particular individual injury sufficient to meet Article III requirements, and to demonstrate that the suit was brought in an adversarial context.<sup>168</sup> Further, the Court found that the Act upon which the plaintiffs relied was broad and inclusive, depending upon private suits as its primary method of enforcement.<sup>169</sup> Therefore, the Court concluded that the plaintiffs had demonstrated the existence of a personal legal right sufficient to allay the Court's jurisprudential concerns.

The concurring opinion, however, took the position that absent the Civil Rights Act, which authorized suits by persons in the position of these plaintiffs, the tenants would have had great difficulty in establishing a case or controversy under Article III.<sup>170</sup> The important difference in the two opinions was the differing views on the significance of the statute involved. The majority found the existence of an injury sufficient to meet Article III requirements independent of the statute. According to the majority, the statute satisfied not the constitutional, but the jurisprudential requirement that there be a personal legal interest at the core of the complaint. The concurring opinion, on the other hand, indicated that a finding of injury which would meet constitutional requirements was wholly dependent upon the existence of the statute. Thus, the concurring Justices in *Trafficante* recognized a power in Congress to "create" an injury in fact by creating legal interests, the denial of which would confer standing.<sup>171</sup>

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<sup>165</sup> 409 U.S. at 208.

<sup>166</sup> 322 F. Supp. 352 (N.D. Cal. 1971).

<sup>167</sup> 446 F.2d 1158 (9th Cir. 1971).

<sup>168</sup> 409 U.S. at 208.

<sup>169</sup> *Id.* at 209, 211.

<sup>170</sup> *Id.* at 212 (White, J., joined by Blackmun & Powell, J.J., concurring).

<sup>171</sup> This recognition raises serious constitutional questions as to the appropriate role of Congressional power within the realm of Article III. The Court makes an important distinction in this regard: In *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), the Court noted that "[i]t is of course true that 'Congress may not confer jurisdiction on Art. III federal courts to render advisory opinions' . . . But Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Id.* at 617 n.3. Such a distinction is crucial, for an attempt on the part of Congress to create cases or controversies where none would otherwise exist has been seen to be inimical to the proper exercise of the judicial function. See, e.g., *Gordon v. United States*, 117 U.S. 697, 702 (1864), where Chief Justice Taney stated,

Congress cannot extend the appellate power of this Court beyond the limits prescribed by the Constitution, and can neither confer nor impose on it the authority or duty of hearing and determining an appeal . . . nor can Congress authorize or require this Court to express an opinion on a case where its judicial power could not be exercised . . .

The Court in *Warth* did not follow the *Trafficante* majority's indication that the type of injury alleged by the plaintiffs was in itself sufficient to meet Article III requirements independent of the existence of the statute. Rather, it followed the concurring opinion in *Trafficante*, and found that Metro-Act's alleged injury alone, without the aid of the statutory grant of standing, was insufficient to meet Article III requirements.<sup>172</sup> Because Metro-Act had not relied on the Civil Rights Act of 1968 as had the *Trafficante* plaintiffs, the Court was unwilling to conclude that it had suffered a "judicially cognizable injury."<sup>173</sup>

It is submitted that the Court's reasoning in reaching this conclusion is both questionable in terms of its adherence to its standing formula previously set forth,<sup>174</sup> and troubling in its suggestion as to the way in which Article III injury is defined.<sup>175</sup> In determining the existence of an injury in fact, the Court went beyond considering whether there was a personal, palpable injury directly caused by defendants' actions. It looked, in addition, to the nature and source of the plaintiff's claim. As such, the Court found that the lack of a statutory grant of standing was determinative not of whether the party had asserted a personal legal interest, but rather, of whether the party had been injured *at all*.<sup>176</sup>

See also *Muskraut v. United States*, 219 U.S. 346 (1911), where the Court refused to hear a case brought pursuant to a statute authorizing a suit to test the validity of previous legislation concerning the property rights of the Cherokee Nation. The Court held: "[W]e think the Congress . . . exceeded the limitations of legislative authority, so far as it required of this court action not judicial in its nature within the meaning of the Constitution." *Id.* at 362. In *Muskraut*, the ultimate determination of the sort of issue which was "judicial in nature" remained not with Congress, but with the Court. The Court indicated that the alternative would be that

this court, instead of keeping within the limits of judicial power, and deciding cases and controversies arising between opposing parties, as the Constitution intended it should, will be required to give opinions in the nature of advice concerning legislative action—a function never conferred upon it by the Constitution, and against the exercise of which the court has steadily set its face from the beginning.

*Id. Accord*, *Sierra Club v. Morton*, 405 U.S. 727 (1972):

Congress may not confer jurisdiction on Art. III federal courts to render advisory opinions . . . or to entertain "friendly suits" . . . or to resolve "political questions" . . . because suits of this character are inconsistent with the judicial function under Art. III. But where a dispute is otherwise justiciable, the question whether the litigant is a "proper party to request an adjudication of a particular issue" . . . is one within the power of Congress to determine . . . .

*Id.* 723 n.3. The distinction asserted in *Linda R.S.* is not without problems, however. These problems are discussed in the text *infra* at notes 179-183.

<sup>172</sup> 422 U.S. at 513-14.

<sup>173</sup> *Id.* at 514.

<sup>174</sup> See text at note 128 *supra*.

<sup>175</sup> See note 171 *supra*.

<sup>176</sup> 422 U.S. at 513-14.

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In considering the nature and source of the plaintiff's claim as a crucial factor in establishing an injury sufficient to meet the minimum requirements of Article III, the Court incorporated into its definition of Article III standing requirements certain aspects of the prudential considerations which it had been so careful to separate in its previous general analysis.<sup>177</sup> Had the Court faithfully applied this analysis, which defined Article III requirements of personal injury as distinct from the jurisprudential inquiry into the source of the plaintiff's claim, and had the Court followed the majority opinion in *Trafficante* indicating that such an injury was sufficient in itself to meet Article III standing requirements, it could have found that Metro-Act had alleged an injury in fact within the meaning of Article III.

The necessity of relying on a statute to establish the existence of an injury within the meaning of Article III is troubling. It is possible that the Court was merely analyzing the Metro-Act nonstatutory claim, as compared to the *Trafficante* statutory claim, as follows: (1) Congress may create rights which only exist by statute; (2) a denial of these rights may result in an injury sufficient to meet the requirements of Article III;<sup>178</sup> (3) therefore, where no legal right exists, and where none has been created by statute, there can be no invasion of a legal right, and hence, no injury. This analysis is consistent with a statement made in the opinion that "the actual or threatened injury required by Article III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing . . .'"<sup>179</sup> This analysis is also consistent with Justice Frankfurter's view set forth earlier,<sup>180</sup> in which Article III standing was determined by the existence both of an injury in fact and of a legal interest.

Yet the Court in *Warth* carefully separated considerations of injury in fact from those of legal interest. "Injury in fact," the minimum constitutional requirement of Article III, was characterized by the Court as involving the question of adverseness, "'whether the plaintiff has alleged such a personal stake in the outcome of the controversy' to warrant his invocation of federal court jurisdiction and to justify the exercise of the court's remedial power on his behalf."<sup>181</sup> As assurance of this constitutionally mandated adverseness, the Court has required plaintiffs to allege an injury which is palpable, personal, and direct. The existence of a legal interest, on the other hand, was characterized as part of the jurisprudential component of standing, a separate and distinct element of the doctrine. Even where plaintiffs could point to a statute that expressly granted them a right of action, the Court insisted that the Article III requirement of adverseness remained.<sup>182</sup>

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<sup>177</sup> See text at notes 113-128 *supra* where the Court's two-part standing analysis is set forth.

<sup>178</sup> *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973).

<sup>179</sup> *Warth*, 422 U.S. at 500, citing *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973). See note 171 *supra*.

<sup>180</sup> See note 115 *supra* and text at note 240 *infra*.

<sup>181</sup> 422 U.S. at 498-99.

<sup>182</sup> *Warth*, 422 U.S. at 501.

In this context, a reliance on a statute to "create" injury in fact within the meaning of Article III suggests a willingness on the part of the Court to cede to Congress the power to create "adverseness" where it would not otherwise exist. As was pointed out earlier, this result has been consistently viewed as inimical to the proper exercise of the judicial function.<sup>183</sup>

The Court further stated that even if Metro-Act had met the Article III requirement of a personal injury, its claim would still have been barred by the prudential rules.<sup>184</sup> It rejected<sup>185</sup> the argument set forth in an *amicus* brief that Metro-Act's complaint stated colorable claims under section 3610 and section 3604 of the Civil Rights Act of 1968.<sup>186</sup> The Court refused to apply these statutes, which focus on racial discrimination, to a complaint which stated that the zoning practices in question have only the effect of excluding persons of low and moderate income, thereby excluding members of racial or ethnic minorities.<sup>187</sup> The Court distinguished this type of allegation from a complaint directly alleging *purposeful* racial or ethnic discrimination.<sup>188</sup>

Finding no other statute which created personal rights in the plaintiff, and finding no constitutional provision affording it a personal right of action under 42 U.S.C. section 1983, the Court concluded that Metro-Act's claim on behalf of Penfield residents was an attempt to assert the rights of third parties.<sup>189</sup> As "none of the exceptions that allow such claims is present here,"<sup>190</sup> Metro-Act's assertions of standing were, in the Court's view, barred by rules of judicial self-restraint.<sup>191</sup>

The Court's analysis is significant in two respects. First, the Court was unwilling to treat an allegation of purposeful exclusion of low-income residents, with the effect of excluding racial and ethnic minorities, as stating a claim of race discrimination within the purview of various civil rights statutes. In so ruling, it severely restricted the types of challenges to exclusionary zoning which had previously been recognized as appropriate by the lower courts.

Several circuits have applied a race discrimination analysis to complaints alleging that zoning practices exclude low-income persons, and thereby maintain a pattern and practice of racial segregation. For example, the Eighth Circuit in *Park View Heights Corp. v. City of Black*

<sup>183</sup> See note 171 *supra*.

<sup>184</sup> 422 U.S. at 514.

<sup>185</sup> *Id.* at 513 n.21

<sup>186</sup> Brief for Lawyers' Committee for Civil Rights under Law as Amicus Curiae at —, cited in *Warth*, 422 U.S. at 513 n.21. The statutes cited were 42 U.S.C. §§ 3610 (a), 3608 (a), (b) (1970).

<sup>187</sup> 422 U.S. at 513, n.21.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 514.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

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Jack<sup>192</sup> treated a claim<sup>193</sup> that the city's zoning practices had the purpose and effect of excluding moderate and lower income persons, including blacks, as properly stating a claim under various statutes and constitutional provisions traditionally applied only to discrimination on the basis of race, color, or national origin.<sup>194</sup> This approach was adopted in the Second Circuit in *Kennedy Park Homes v. City of Lackawanna*,<sup>195</sup> by the Fifth Circuit in *Metropolitan Development Corporation v. City of Arlington Heights*<sup>196</sup> and by the district court in *Sisters of Providence of St. Mary of the Woods v. City of Evanston*.<sup>197</sup> The willingness of the lower courts to treat allegations of economic discrimination as essentially stating claims of race discrimination is appropriate for two reasons: (1) factually, economic discrimination has a disproportionate effect on blacks;<sup>198</sup> and (2) the plaintiffs in these actions face unique problems of proof. Where a pattern and practice of racial dis-

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<sup>192</sup> 467 F.2d 1208 (8th Cir. 1972).

<sup>193</sup> *Id.* at 1211.

<sup>194</sup> *Id.* at 1212.

<sup>195</sup> 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971). In *Kennedy Park Homes*, plaintiffs alleged that the defendant city and city officials had deliberately rezoned property which the plaintiffs had selected for a housing project, in order to deny decent housing to low income and minority families. The Second Circuit Court of Appeals considered the alleged conduct not only in its immediate effect, but also in its historical context and ultimate effect. *Id.* at 113. The court considered evidence of housing patterns in the city as well as the atmosphere in which the parties acted, concluding that "racial motivation resulting in invidious discrimination" guided the actions of the defendants, *id.* at 109, and that the effect of the city's action was "inescapably adverse" to the enjoyment of the constitutional right to be free from discrimination in the exercise of property rights. *Id.* at 114.

As an indication of the extent to which the *Kennedy* court considered the analysis of race discrimination appropriate, it should be noted that it viewed the case as one similar to *Buchanan v. Warley*, 245 U.S. 60 (1917), where the Supreme Court struck down a zoning ordinance which explicitly required racial segregation within the city, *id.* at 82. *Kennedy*, 436 F.2d at 115.

<sup>196</sup> 517 F.2d 409 (7th Cir. 1975), *cert. granted*, 43 U.S.L.W. 3265 (U.S. Nov. 4, 1975). In *Arlington*, plaintiffs alleged, *inter alia*, that the town's zoning practices had the effect of perpetuating segregation through its housing patterns. This was found sufficient to state a claim of race discrimination invoking strict judicial scrutiny under the Fourteenth Amendment. *See id.* at 412-13.

<sup>197</sup> 335 F. Supp. 396 (N.D. Ill. 1971). In *Sisters of Providence*, plaintiffs alleged that current zoning practices made it economically unfeasible to build low-cost housing. Claiming that there was an urgent need for such housing in the city, and that black persons represented a substantial percentage of residents suffering from inadequate housing, the plaintiffs alleged that the challenged zoning practice had the effect of perpetuating racial segregation. Following *Kennedy Park Homes*, the district court indicated that a showing of the segregative effect of a zoning practice could be probative of a purposeful intent to discriminate. *Id.* at 404. The court held that "plaintiffs' allegations that 'Black persons . . . represent a substantial percentage of residents of Evanston who have low and moderate incomes' . . . is sufficient to bring this case into the realm of racial rather than economic discrimination." *Id.* at 403. Thus, for the purposes of standing, the court concluded that it was appropriate to "treat the allegations as those of racial discrimination, with 'economic feasibility' as a secondary factor in the factual basis of the Complaint." *Id.*

<sup>198</sup> UNITED STATES COMMISSION ON CIVIL RIGHTS, EQUAL OPPORTUNITY IN SUBURBIA 7 (1974).

crimination is involved,<sup>199</sup> a requirement that plaintiffs prove that the challenged actions were the result of an illegal motive has been considered unrealistic.<sup>200</sup>

On the basis of these previous zoning challenges, the Supreme Court in *Warth* could have viewed the exclusion of moderate- and low-income persons as having a racially discriminatory effect which maintained a pattern of racial segregation. Thus, Metro-Act's claim could have been brought within the purview of the Civil Rights Act of 1968 for the purposes of standing. Had the Court recognized that the claim did fall within the Act, it would not have been concerned with the questions of prudential self-restraint, as the statute would have conferred the requisite personal legal interest in the plaintiffs.

The second significant aspect of the Court's analysis with regard to prudential limitations involves the Court's refusal to allow Metro-Act to assert the rights of third parties. Had the Court adopted the reasoning used in either of two previous lower court exclusionary zoning cases, it could have permitted the assertion of third party rights. The approach taken by the district court in *Sisters of Providence* was to grant all the plaintiffs standing, subject to the condition that if it were established at a later stage that the rights in issue were sufficiently represented by some of the plaintiffs, other unnecessary plaintiffs would be dismissed.<sup>201</sup> Following this approach, a community organization was granted standing to represent the interests of minority groups excluded by a challenged zoning ordinance. Their grant of standing, however, was conditioned upon a showing at the trial that "there is a compelling need to grant them standing in order that constitutional rights of persons not immediately before the court might be vindicated."<sup>202</sup> The Court in *Warth* did not even consider this approach of a conditional grant of standing, but instead applied its own formula—unconditional in this regard—and, not finding any of the exceptions which would allow the assertion of third party rights, it denied Metro-Act standing.

A third approach was applied in *Black Jack*, where two non-profit corporations were granted standing to question whether the purpose and effect of a particular zoning ordinance was to exclude low- and moderate-income people from the city.<sup>203</sup> The court held that the associations had a right to raise constitutional claims of the excluded individuals because the interests of the corporate and individual plaintiffs—a desire to be free from discriminatory zoning practices—were "sufficiently close."<sup>204</sup>

<sup>199</sup> The situation in which a plaintiff challenges a pattern and practice rather than a specific action is described by Justice Brennan in his dissenting opinion in *Warth*, 422 U.S. at 522-23.

<sup>200</sup> See *Warth*, 422 U.S. at 527-28, 530 (Brennan, J., dissenting).

<sup>201</sup> 335 F. Supp. at 400.

<sup>202</sup> *Id.* at 401, quoting *Norwalk CORE v. Norwalk Redev. Agency*, 395 F.2d 920, 937 (2d Cir. 1968).

<sup>203</sup> *Id.* at 1212-13.

<sup>204</sup> *Id.* at 1213.

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The Court in *Warth*, however, did not allow Metro-Act to assert the rights of excluded potential residents of Penfield. It found that there was "no relationship other than an incidental congruity of interests" between the members of Metro-Act who were Rochester taxpayers and the excluded potential residents of Penfield.<sup>205</sup> Similarly, those Metro-Act members who were Penfield residents and were claiming a denial of the benefits of living in an integrated community could not assert the rights of excluded minorities where "no contractual or other relationship" was involved.<sup>206</sup>

The Supreme Court's apparent failure to sanction the "sufficiently close" interest test used in *Black Jack* seemingly restricts the circumstances under which one may assert third party rights. *Black Jack*, however, is distinguishable from *Warth* in several important respects. The plaintiffs in *Black Jack* were sponsors of a building project, ready and willing to construct low-cost housing. Specific viable projects were thus involved.<sup>207</sup> Therefore the court knew that once it granted the plaintiffs the remedy they sought—invalidation of the zoning ordinances—plaintiffs would then proceed to construct the housing. The third party low-income non-residents whose rights were being asserted would thus be afforded relief.<sup>208</sup> In contrast, if the Court in *Warth* declared the Penfield zoning actions unconstitutional, it had no assurance that the third party's injury would be alleviated, since there was no specific project being thwarted by the present zoning. The Metro-Act plaintiffs, not being builders or contractors, were not parties who would be instrumental in alleviating the injury of those excluded. Thus, the Court in *Warth* may not have rejected the "sufficiently close" interest test of *Black Jack*. It simply may have had a reasonable factual basis for its refusal to allow an "incidental" congruity of interests to suffice for the assertion of third party non-resident rights by Metro-Act and Penfield residents.

Further, although the court in *Black Jack* indicated that a congruity of interests alone would be a sufficient condition to allow the assertion of third party rights, the authority upon which it relied was merely dictum in cases in which a significant relationship was involved.<sup>209</sup> At most, then, the Court was merely departing from dictum in cases distinguishable on their facts from *Warth*. It indicated only that exclusionary zoning cases will be considered according to the

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<sup>205</sup> 422 U.S. at 510.

<sup>206</sup> *Id.* at 514 n.22. Arguably, the congruity of interests in the latter situation was far greater than "incidental."

<sup>207</sup> 467 F.2d at 1210.

<sup>208</sup> The court in *Black Jack* relied on *Brewer v. Hoxie School Dist.* No. 46, 238 F.2d 91, 104 (8th Cir. 1956) as precedent for allowing a congruity of interest to suffice for the ability to assert third party rights. *Black Jack*, 467 F.2d at 1213. In *Brewer*, the plaintiffs (school board), if granted the remedy requested, would have been instrumental in affording relief to the third parties (students) whose rights were asserted. See *Brewer v. Hoxie School Dist.* No. 46, *supra*, at 105.

<sup>209</sup> *Brewer v. Hoxie School Dist.* No. 46, 238 F.2d 91 (8th Cir. 1956) (school board—pupils); *Barrows v. Jackson*, 346 U.S. 249 (1953) (vendor of property—vendee).

same standard as other standing cases in which the parties attempt to raise the rights of third parties, despite the apparent loosening of such standards in some lower court decisions.

The Court next examined the standing of Home Builders, the second associational plaintiff. In doing so the Court introduced two new factors into its standing analysis: (1) a requirement of a precise relationship between the amount of the damages claimed and the injury alleged; and (2) a requirement that the representative association claim an injury to its members which is *immediate and ripe* for judicial consideration.

Home Builders claimed that Penfield's zoning practices "arbitrarily and capriciously had prevented member firms from building low- and moderate-cost housing in Penfield, and thereby had deprived them of potential profits."<sup>210</sup> As a representative of member firms involved in the development of residential housing in the Rochester area, Home Builders sought both damages and injunctive and declaratory relief.<sup>211</sup> Before applying its standing formula the Court first examined the plaintiff's claim for damages, noting that "whether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought."<sup>212</sup> Any injury that may have been suffered by the association could only be that which was representative of economic harm felt by particular individual members. Therefore, the Court found that the damages claimed by Home Builders was not representative of an injury which was shared equally among the entire membership.<sup>213</sup> As such, the claim for damages required "individualized proof."<sup>214</sup> Under these circumstances, the Court found that in order to obtain damages, each individual member of the association claiming injury as a result of Penfield's exclusionary zoning practices had to be a party to the suit. As a representative association, Home Builders was found not to have standing to claim these damages on behalf of its members.<sup>215</sup>

Thus it is apparent from the Court's analysis that a determination of representational standing turns, in part, on the type of relief sought. The association asserting standing on behalf of its members is not considered an appropriate litigant where the remedy sought could not at the outset reasonably be expected to benefit those parties actually injured.<sup>216</sup> This ruling is consistent with the Court's concern that the remedy must be no broader than that which is necessary to alleviate the harm alleged.<sup>217</sup> However, as a practical matter, the ruling

<sup>210</sup> 422 U.S. at 497.

<sup>211</sup> *Id.* at 515.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 515-16.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 515.

<sup>217</sup> *Id.* at 508.

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suggests a very strict approach to the plaintiffs' complaint: where the court scrutinizes the amount of the damage claim at the pleading stage, it requires of the plaintiff an extreme degree of precision and specificity in drafting the complaint.

Unlike the damages claim, however, Home Builders' claim for declaratory and injunctive relief could, according to the Court, inure to the benefit of all individual members of Home Builders Association. Therefore, the Court proceeded to an examination of whether Article III requirements had been satisfied. The Court held that these requirements had not been met.<sup>218</sup> In examining the allegations, it found no showing that any of the individual members had been precluded from commencing any current housing project due to the exclusionary zoning practices of the town. As such, the members suffered no injury of "sufficient immediacy and ripeness to warrant judicial intervention."<sup>219</sup> Applying the rule that an association can have standing to represent its members only where it alleges facts sufficient to establish a case or controversy had the individuals themselves brought suit, the Court denied Home Builders standing.<sup>220</sup>

This holding is susceptible to two possible interpretations. Read narrowly, the denial of standing to this plaintiff is consistent with the Court's general analysis of representational standing. As representational standing is derived from the ability of the represented individuals to bring suit, a representative association may not assert standing on behalf of its members unless the members themselves could demonstrate the existence of a case or controversy. Thus, to the extent that mootness, ripeness, or standing considerations enter into the determination of "a case or controversy," they will also be determinative of representational standing. This view of the Court's ruling simply states a guideline for determining representational standing. It does not affect the definition or essential nature of the minimum injury which is required by Article III.

Read more broadly, however, the ruling imports questions of ripeness into Article III standing requirements, thereby adding a new element to the constitutional definition of "injury." The injury of which the litigant complains must not only be palpable and personal. It must not only be the direct and necessary result of the actions of the respondents. It must also be immediate and ripe for judicial consideration. If this requirement had arisen purely as a ripeness consideration, as distinct from a standing consideration, the Court could have dismissed the complaint solely on ripeness grounds. However, the Court held that the plaintiff had not met standing requirements,<sup>221</sup> suggesting that the timing of the claim is an important factor in the standing determination. In so ruling, the Court seems to be utilizing the concept of standing as one which represents

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<sup>218</sup> 422 U.S. at 516.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

Article III concerns in general; rather than being treated as a doctrine conceptually distinct from other Article III questions of ripeness, mootness, and justiciability, standing is viewed as a set of rules which subsume all of these concerns as "threshold determinants of the propriety of judicial intervention."<sup>222</sup>

The Court found the same timing problem in examining the standing of Housing Council, the third associational plaintiff. As to Housing Council, however, the denial of standing on grounds that there was no live controversy was even more extreme. Housing Council had stated in an affidavit that at least seventeen member groups "have been, are, or will be involved in the development of low- and moderate-cost housing."<sup>223</sup> Moreover, one member organization, Penfield Better Homes, had actually applied for a zoning variance in 1969 pursuant to plans for the construction of a moderate-cost housing project. The application was rejected by the respondents. On these grounds, Housing Council alleged on behalf of Penfield Better Homes that the member organization "is and has been actively attempting to develop moderate income housing in Penfield, but has been stymied by its inability to secure the necessary approvals."<sup>224</sup>

The Court noted that in 1969, "or within a reasonable time thereafter,"<sup>225</sup> Penfield Better Homes, and possibly Housing Council, could have had standing. However, in the absence of any showing that this 1969 project was viable and ongoing at the time the complaint was filed in 1972, the Court was unwilling to infer from the allegations the existence of any live, concrete dispute between the parties.<sup>226</sup> Thus, Housing Council, like the other associational plaintiffs, was denied standing.<sup>227</sup>

## 2. Some Effects of the *Warth* Decision

The *Warth* opinion raises implications both for the procedural requirements to be met in demonstrating standing and for the substantive definition of the standing doctrine. The procedural implications flow from the Court's close scrutiny of the plaintiffs' complaint to determine the standing question. For example, the low- and moderate-income plaintiffs were denied standing because they had

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<sup>222</sup> *Id.* at 518. See also *Flast v. Cohen*, 392 U.S. 83 (1968), where the Court noted that standing "serves, on occasion, as a shorthand expression for all the various elements of justiciability." *Id.* at 99, quoting *Hearings on S. 2097 before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee*, 89th Cong., 2d Sess. 465, 498 (1966).

<sup>223</sup> 422 U.S. at 516.

<sup>224</sup> *Id.* at 497.

<sup>225</sup> *Id.* at 517.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* The same conceptual problems are present in this ruling as those which have been discussed in the analysis of the Court's treatment of Home Builders' claim. See text at notes 218-22 *supra*. Here, however, the problem was not the prematurity of the claim, but rather its staleness.

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failed to allege in their complaint facts sufficient to show that "but for" the exclusionary zoning practices, they would have been able to reside in Penfield. This exacting requirement prompted Justice Brennan to remark, in his dissent, that the Court was forcing the plaintiffs "to prove their cases on paper in order to get in court at all, [thus] reverting to the form of fact pleading long abjured in the federal Courts."<sup>228</sup>

This criticism is equally applicable to the Court's treatment of the Metro-Act, Home Builders, and Housing Council claims. Metro-Act had failed to allege the application of the Fair Housing Act to its claim. Although colorable claims were arguably present under this Act,<sup>229</sup> the Court would not infer them where they were not pleaded. Home Builders' damages claim was scrutinized before the substantive allegations in the complaint were analyzed. Because it was not "reasonably" apparent to the Court that such damages would inure to the benefit of individual members which the association represented, the entire claim was dismissed. As to the claim for injunctive and declaratory relief raised by Home Builders and Housing Council, the Court was unwilling to read the complaint as one attempting to show a pattern and practice of exclusionary zoning. Instead, it read the complaint literally, concerning itself only with whether the respondents had in the recent past denied approval of a specific project.

As Justice Brennan accurately noted: "This Court has not required such . . . specificity in standing cases in the past."<sup>230</sup> The policy has been to view the allegations of the complaint broadly,<sup>231</sup> leaving for the consideration of the merits questions of appropriateness of relief and the extent and effect of the challenged practices.<sup>232</sup> With regard to Home Builders' and Housing Council's claims for injunctive and declaratory relief, Justice Brennan noted that "the merits of the exclusion of this or that project is not at the heart of the complaint; the claim is that the respondents will not approve *any* project which will provide residences for low and moderate income people."<sup>233</sup> Under these circumstances, "allegations of past injury, which members of both of these organizations have clearly made, and of a future intent, if the barriers are cleared, again to develop suitable housing for Penfield, should be more than sufficient."<sup>234</sup> Thus, despite the general rule that pleadings are to be construed liberally in favor of

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<sup>228</sup> *Id.* at 528 (Brennan, J., dissenting). The dissenting opinion by Justice Brennan argued that in its treatment of the plaintiffs' claims, the Court imported into the concept of standing "outmoded notions of pleading and justiciability" which have the effect of tossing out of Court almost every conceivable kind of plaintiff who could be injured by the activity claimed to be unconstitutional. *Id.* at 520.

<sup>229</sup> See text at notes 185-200 *supra*.

<sup>230</sup> 422 U.S. at 528 (Brennan, J., dissenting).

<sup>231</sup> See *Jenkins v. McKeithen*, 395 U.S. 411, 421-22 (1969).

<sup>232</sup> See note 134 *supra*.

<sup>233</sup> 422 U.S. at 530 (Brennan, J., dissenting).

<sup>234</sup> *Id.*

the pleader,<sup>235</sup> the *Warth* opinion has placed on notice plaintiffs bringing broad public interest suits in the federal courts that their pleadings will be subjected to exacting scrutiny. The Court has indicated that it will be willing to entertain suits involving broad questions of public policy only when a judicially manageable controversy *clearly appears in the complaint*.

After *Warth*, the plaintiff challenging exclusionary zoning must expect an extremely literal reading of the complaint by a Court unwilling to infer from the pleadings the existence of a judicially manageable controversy. In order to insure that the Court reaches the merits of a challenge to exclusionary zoning, the allegations must be framed with a high degree of factual specificity, indicating the harm suffered, the precise source of the claim, a direct and necessary causal relation between the specific action of the defendant and the injury suffered, and a direct relationship between the harm alleged and the remedy sought.

The substantive effects of *Warth* on the standing doctrine may only be fully understood in light of the manner in which the Court has approached the concept of standing in the past. There has been consistent agreement that standing is one aspect of justiciability, a concept which gives expression to the concern for the proper role and function of the federal courts in a tripartite system of government.<sup>236</sup> There is also general agreement that the standing inquiry focuses primarily upon the particular litigant presently before the court, asking whether this litigant is the appropriate party to bring a suit.<sup>237</sup> However, there has been strong disagreement over the extent to which the concept of standing has a unique focus of its own which is distinct from the other general concerns of justiciability.

For example, Justice Brennan has argued that the standing doctrine is clearly distinct from the other jurisprudential questions inherent in the concept of justiciability.<sup>238</sup> Therefore, according to Justice Brennan's approach, the appropriate standing inquiry simply focuses on the question of whether or not the party has been injured. The concern over the appropriateness of judicial resolution of the issues raised by the injured party is not a concern of standing, but rather, is a question of "reviewability."<sup>239</sup>

<sup>235</sup> See, e.g., *Great Atlantic & Pacific Tea Co. v. Amalgamated Meat Cutters Local 88*, 410 F.2d 650, 652 (8th Cir. 1969). See also *Conley v. Gibson*, 355 U.S. 41, 48 (1957), where the Court stated: "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."

<sup>236</sup> *Flast v. Cohen*, 392 U.S. 83, 94-95 (1968).

<sup>237</sup> See *id.* at 99; *Baker v. Carr*, 369 U.S. 186, 204 (1962); P. BATOR, D. SHAPIRO, P. MISHKIN & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 156 (2d ed. 1973).

<sup>238</sup> *Barlow v. Collins*, 397 U.S. 159, 171-73 (1970) (Brennan, J., dissenting).

<sup>239</sup> *Id.* See also Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970).

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Others on the Court such as Justices Warren, Douglas and Frankfurter have urged that standing is a concept which limits the exercise of judicial power to disputes in which the parties are adverse, and in which they present claims in a form historically viewed as capable of judicial resolution.<sup>240</sup> Here, the focus is not only on whether the party has been injured, as in Justice Brennan's approach, but also on whether the injury alleged invades a legally protected interest. Thus, it is not only the litigant, but also the legal questions raised which must be examined "to determine whether there is a nexus between the status asserted and the claim sought to be adjudicated."<sup>241</sup> However, the proponents of this view caution that the question of standing does not *in itself* raise issues of the separation of powers or the fitness for adjudication of the legal question posed. These concerns, according to this analysis, remain distinctly questions of justiciability.<sup>242</sup>

The most recent view, enunciated in *United States v. [oop's!]* now *Warth*, approaches standing as a doctrine which necessarily raises questions of justiciability. According to this approach, the appropriate party to invoke judicial power is one who not only asserts a personal injury and a legal interest, but who also presents issues which may best be decided by the judicial branch.<sup>243</sup> The result is a standing doctrine that is by definition strongly concerned with the proper role of the judiciary. Imported into the standing doctrine itself is an awareness that the judicial branch is the non-representative branch of government, and that a "[r]elaxation of standing requirements is directly related to the expansion of judicial power."<sup>244</sup> Thus, a grant of standing, according to this view, is also a statement of the degree to which the Court is willing to assert its power. This expanded view of the matters encompassed in the standing determination necessarily heightens the difficulty of meeting standing requirements, and thus can be expected to result in the dismissal of a larger number of lawsuits on the basis of standing.

Pursuant to this view of standing, the Burger Court, unlike the Warren Court, has been hesitant to assert judicial power where the issue is a public matter which, in the Court's view, could be better handled by other branches of government.<sup>247</sup> This hesitancy was

<sup>240</sup> *Data Processing*, 397 U.S. at 151-52 (Douglas, J., writing for the majority); *Flast v. Cohen*, 392 U.S. 83, 101 (1968) (Warren, J., writing for the majority); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 151-52 (1951) (Frankfurter, J., concurring).

<sup>241</sup> *Flast v. Cohen*, 392 U.S. 83, 102 (1968).

<sup>242</sup> *Id.* at 100.

<sup>243</sup> 418 U.S. 166 (1974).

<sup>244</sup> 418 U.S. 188 (1974).

<sup>245</sup> See *Warth*, 422 U.S. at 500; *Schlesinger*, 418 U.S. at 222.

<sup>246</sup> *Richardson*, 418 U.S. at 188 (Powell, J., concurring).

<sup>247</sup> Compare *Baker v. Carr*, 369 U.S. 186 (1962) (voting reapportionment); *Brown v. Board of Educ. of Topeka*, 347 U.S. 483 (1954) (school desegregation); *Flast v. Cohen*, 392 U.S. 83 (1968) (taxpayer suits), with *Warth*, 422 U.S. at 498; *Richardson*, 418 U.S. at 188 (Powell, J., concurring).

perhaps best expressed by Justice Powell, who stated in his concurring opinion in *Richardson*:

Repeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence essential to the former and the vitality critical to the latter may well erode if we do not exercise self-restraint in the utilization of our power to negative the actions of the other branches. We should be ever mindful of the contradictions that would arise if a democracy were to permit general oversight of the elected branches of government by the nonrepresentative, and in large measure insulated judicial branch.<sup>248</sup>

This view has affected the definition of standing both in terms of the nature of the minimum injury required under Article III, and in terms of the frequency which prudential rules of self-restraint are applied. The effect has been to severely tighten standing requirements, thereby narrowing the circumstances under which a party will be considered appropriate to litigate a claim in a federal forum.

Guided by this view of standing, the Court restated the meaning of Article III standing requirements. Its examination in *Warth* of the minimum Article III requirement of a case or controversy went beyond a consideration of the degree of adverseness between the parties. The Court also examined the personal interest of the plaintiffs to determine whether the injury alleged was palpable, and personal; whether it was the direct and necessary result of the challenged actions; and whether it was immediate and ripe for judicial consideration.<sup>249</sup> In its focus on these factors, the Court was additionally concerned with whether judicial relief would be appropriate or necessary in the present case, and whether such relief could be framed so as to apply only to the precise facts presented in *Warth*.<sup>250</sup> The theoretical problem of Congress' role in the definition of "injury

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<sup>248</sup> *Richardson*, 418 U.S. at 188 (concurring opinion). See also *Brown, Quis Custodiet Ipsos Custodes?—The School Prayer Cases*, 1963 SUP. CT. REV. 1:

One does know that judicial power expands as the requirements of standing are relaxed. One knows also that if the so-called public action . . . were allowed with respect to constitutional challenges to legislation, then the halls of Congress and of the state legislatures would become with regularity only Act I of any contest to enact legislation involving public officials in its enforcement or application. Act II would, with the usual brief interlude, follow in the courts . . . Relaxation of standards of standing would be even more substantial movement toward constituting the Supreme Court the Council of Revision that the Constitutional Convention decided it should not be.

<sup>249</sup> *Id.* at 15-16, 422 U.S. at 516.

<sup>250</sup> To illustrate, see text at notes 136-39 and 193-97 *supra* for a discussion of the Court's treatment of the claims of Home Builders.

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in fact" for the purposes of Article III is left unresolved in the opinion.<sup>251</sup> For example, in its preliminary analysis,<sup>252</sup> the Court indicated that a congressional grant of standing only affected the application of prudential rules, leaving Article III requirements as separate standards which the plaintiff must meet in any case. However, in its treatment of Metro-Act's claim, the Court indicated that the absence of a statute precluded the plaintiffs from establishing an Article III injury.<sup>253</sup>

On a practical level, it also remains unclear whether different standards of "injury" will be applied to plaintiffs who assert standing pursuant to an express statutory grant and plaintiffs who do not. At least as to the latter class of plaintiffs, the strict Article III requirements set forth in *Warth* apply.

A second way in which *Warth* substantively affected the standing doctrine was in its indication of the manner in which the jurisprudential rules of self-restraint are to be applied. To allay its concerns about the maintenance of limits on its own power, the Court has traditionally required that the plaintiff assert a personal injury which is based upon the violation of a "legal right."<sup>254</sup> Clearly, if a statute or a constitutional provision directly applies to the particular plaintiff, this is sufficient to establish the required legal interest.<sup>255</sup> However, it is also important to examine the willingness of the Court to broaden statutory or constitutional provisions by giving judicial recognition to interests outside of their specific terms.

The *Warth* opinion indicated that the Court, at least in the area of exclusionary zoning, takes an extremely narrow view of "judicially cognizable injuries." This is illustrated by the Court's unwillingness to accept several of the assumptions which have in the past allowed plaintiffs to litigate challenges to exclusionary zoning in the various lower federal courts. For example, although there exists substantial data indicating a direct socioeconomic relationship between zoning activities of satellite suburbs and the problems of the central cities,<sup>256</sup> the Court in *Warth* viewed the taxpayers' assertion of "any personal right . . . to be free of action by a neighboring municipality that may have some incidental adverse effect on Rochester"<sup>257</sup> very narrowly. Since the plaintiffs were unable to point to a statute or constitutional provision to support their claim, the Court "discern[ed] no justification for recognizing in the Rochester taxpayers a right of action on the asserted claim."<sup>258</sup>

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<sup>251</sup> See note 171 *supra*.

<sup>252</sup> See text at note 128 *supra*.

<sup>253</sup> 422 U.S. at 513-14.

<sup>254</sup> See text at notes 55-56 *supra*.

<sup>255</sup> See text at notes 74-77 *supra*.

<sup>256</sup> See text and notes at 20-32 *supra*.

<sup>257</sup> 422 U.S. at 509.

<sup>258</sup> *Id.* at 510.

Even more significant for the purposes of the "legal right" determination is the Court's unwillingness to imply colorable race discrimination allegations in the plaintiff's complaint. Despite substantial data which points to the disproportionate effect of exclusionary zoning on racial and ethnic minorities,<sup>259</sup> the Court confined its consideration of the complaint to the question of wealth discrimination alone. As earlier noted,<sup>260</sup> such a narrow approach is in direct contrast to the approach taken by the circuit courts in *Black Jack*, *Kennedy Park Homes*, and *Metropolitan Housing Development Co. v. Village of Arlington Heights*, and by the district court in *Sisters of Providence*.<sup>261</sup> The Court's refusal to recognize that a claim of wealth discrimination may imply judicially cognizable racial or ethnic discrimination points to an unwillingness to broaden the category of injuries deemed appropriate for judicial intervention.<sup>262</sup> This refusal necessarily increases the circumstances under which the prudential rules of self-restraint will apply to bar a litigant's claim.

#### B. Indirect Challenges: *Evans v. Lynn* and *City of Hartford v. Hills*

In contrast to a direct challenge of allegedly exclusionary zoning ordinances, such as the suit in *Warth*, some plaintiffs have brought indirect challenges which focus not on specific zoning ordinances but rather on the allocation of federal funds to exclusively zoned communities. In this section two such indirect challenges will be examined: *Evans v. Lynn*,<sup>263</sup> a pre-*Warth* case decided by the Second Circuit and currently being reconsidered *en banc*, and *City of Hartford v. Hills*,<sup>264</sup> decided after *Warth* by a district court in the Second Circuit. In both cases the plaintiffs, by alleging an improper allocation of federal funds—a federal agency action—were able to invoke the general review provisions of the Administrative Procedure Act.<sup>265</sup> Thus, they avoided many of the barriers to standing which result from jurisprudential concerns present in a nonstatutory review situation.<sup>266</sup>

<sup>259</sup> See text and notes at 28-30 *supra*.

<sup>260</sup> See text at notes 192-200 *supra*.

<sup>261</sup> *Id.*

<sup>262</sup> Implications for the ability of future plaintiffs effectively to challenge exclusionary zoning in light of the Court's unwillingness to find a claim of wealth discrimination as also alleging a claim of racial discrimination are discussed at notes 408-17 *infra*.

<sup>263</sup> —F.2d—No. 74-1793 (2d Cir. June 2, 1975) [hereinafter cited as "*Evans* slip opinion"]. The text of this opinion can be found at P-H 1971 EQUAL OPPORT. IN HOUSING ¶ 13,712.

<sup>264</sup> —F. Supp.—; Civil No. H-75-258 (D. Conn. Jan. 28, 1976) [hereinafter cited as "*Hartford* slip opinion"]. The text of this opinion can be found at P-H 1971 EQUAL OPPORT. IN HOUSING ¶ 13,742.

<sup>265</sup> 5 U.S.C. § 702 (1970).

<sup>266</sup> See text at notes 78-88 *supra* for a discussion of the APA and its effect on standing.

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Nonetheless, consideration will be directed to the extent to which the standing requirements set forth in *Warth*, a case of nonstatutory review, are applicable to indirect challenges of exclusionary zoning which invoke the Administrative Procedure Act.

Since the federal funding programs relied on by the plaintiffs in *Evans*<sup>267</sup> were later altered and incorporated into the funding program at issue in *Hartford*,<sup>268</sup> the two cases present a unique opportunity to compare and contrast the standing problems raised in two differing statutory schemes in light of the standing requirements set forth in *Warth*. One of the main distinctions between the two programs was that the *Hartford* funding program contained a specific statutory provision that would require funds which were enjoined from being used in one community, to be reallocated for use in a neighboring metropolitan community.<sup>269</sup> In contrast, the *Evans* program contained no such provision. This distinction will be shown to have significance for the finding of injury in fact as well as for the propriety of judicial intervention—two issues which were of great concern to the Court in *Warth*.

In *Evans*, low-income minority residents of communities in the same county as New Castle, New York, brought suit to enjoin the Department of Housing and Urban Development (HUD) and the Bureau of Outdoor Recreation (BOR) from issuing grants of federal funds to New Castle for construction of sewer facilities and clearance of a swamp for recreational use.<sup>270</sup> The complaint alleged that New Castle had practiced racial and economic discrimination through the use of zoning and community development regulations.<sup>271</sup> Plaintiffs further asserted that HUD and BOR each had an affirmative duty under Title VI of the Civil Rights Act of 1964<sup>272</sup> (Title VI) and Title VIII of the Civil Rights Act of 1968<sup>273</sup> (Title VIII) to encourage non-discrimination and fair housing by reviewing the housing situation in areas requesting federal funds, and by denying funds to those areas which maintained discriminatory housing practices.<sup>274</sup> Therefore, plaintiffs concluded that a grant of funds to New Castle would be in violation of this affirmative statutory duty. The failure of the federal agencies to perform their affirmative duties<sup>275</sup> allegedly denied plaintiffs, as members of racial minorities and as low-income persons, an equal opportunity to benefit from the grants.<sup>276</sup> The result

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<sup>267</sup> 42 U.S.C. § 3102 (1970); 16 U.S.C. § 460(l) (1970) cited in *Evans* slip opinion at 3888 n.3.

<sup>268</sup> See *Hartford* slip opinion at 12, n.21 and 16 n.27.

<sup>269</sup> 42 U.S.C. § 5306(e) (Supp. 1975).

<sup>270</sup> *Evans* slip opinion at 3888-89.

<sup>271</sup> *Id.* at 3888.

<sup>272</sup> 42 U.S.C. § 2000d-1 (1970).

<sup>273</sup> 42 U.S.C. § 3601-19 (1970).

<sup>274</sup> *Evans v. Lynn*, 376 F. Supp. 327, 331 (S.D.N.Y. 1974).

<sup>275</sup> A duty is imposed upon HUD and BOR affirmatively to administer their programs relating to housing and urban development by 42 U.S.C. § 3608(c) (1970).

<sup>276</sup> 376 F. Supp. at 329.

of this failure would be to greatly increase the likelihood that plaintiffs would continue to live in the very type of ghetto conditions from which it was the duty of HUD to rescue them. Standing was asserted on the basis of section 702 of the APA.<sup>277</sup>

The district court dismissed the complaint, holding that the plaintiffs lacked standing since the injury they suffered, that of living in ghetto conditions, had no relationship to the particular grants in question.<sup>278</sup> The court based its denial of standing not only on the nature of the relief sought, noting that the enjoining of the issuance of grants to New Castle would not necessarily alleviate the living conditions which the plaintiffs were presently forced to endure,<sup>279</sup> but also on the speculative nature of the injury asserted.<sup>280</sup>

The Court of Appeals for the Second Circuit reversed the district court decision and held that plaintiffs living in urban ghetto communities have standing under section 702 of the APA to challenge an administrative agency's failure to perform its affirmative duty under Title VIII of the Civil Rights Act of 1968 to encourage fair housing through the awarding of federal grants.<sup>281</sup> The court emphasized that it granted the plaintiffs standing to challenge the grants not

on the basis that they have a sufficient connection with the community to or for the benefit of which the grants are made . . . [but] purely and simply because one important method of enforcement of the congressional policy set forth in Title VIII is by the agencies' administration of grants relating either to housing or urban development. The grants . . . involved, made to an urban community, or one that is a satellite to a metropolitan area of which appellants are residents, are so related.<sup>282</sup>

<sup>277</sup> *Id.* at 333 n.8; *Evans* slip opinion at 3898.

<sup>278</sup> 376 F. Supp. at 332.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at 333. Since there was no allegation that New Castle would discriminatorily administer the funds for the sewer and swamp project, *id.* at 332-33 & n.6, the court reasoned that to enjoin the federal grants, "it would have to be established that New Castle's zoning laws result in unconstitutional racial and economic segregation." *Id.* at 332. The court noted, however, that none of the plaintiffs alleged that anyone had refused to sell or lease a house to him; the plaintiffs had neither an interest in New Castle property nor a connection with any planned housing project. *Id.* Following closely the reasoning in the *Warth* circuit court decision, 495 F.2d 1187, 1192-93 (2d Cir. 1974), the district court in *Evans* concluded that the speculative nature of the plaintiffs' injury prevented them from establishing standing. 376 F. Supp. at 333.

<sup>281</sup> *Evans* slip opinion at 3888. In a concurring opinion, Judge Gurfein noted that he would grant standing for the limited purpose of challenging the agencies' failure to make inquiries concerning the housing situation prior to making grants of federal funds, but would deny standing to seek injunctive relief. *Id.* at 3917-19 (concurring opinion). The majority opinion did not explicitly limit standing. While expressing no opinion as to whether plaintiffs were entitled to relief, *Evans* slip opinion at 3889, Judge Oakes did say for the majority that they had standing "to challenge the particular grants in question." *Id.* at 3899.

<sup>282</sup> *Evans* slip opinion at 3899.

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The court in *Evans* reached its conclusion that the plaintiffs had standing by utilizing the two-part test set forth in *Association of Data Processing Service Organizations, Inc. v. Camp*,<sup>283</sup> which requires that (1) the plaintiffs' interests be arguably within the zone of interests protected by the relevant statute, and (2) the plaintiffs be injured in fact.<sup>284</sup> For purposes of this inquiry, the court assumed, first, that plaintiffs were low-income minority residents of ghetto communities;<sup>285</sup> second, that New Castle is a predominantly wealthy white enclave which perpetuates discriminatory housing practices;<sup>286</sup> and third, that HUD and BOR did not effectively evaluate New Castle's discriminatory zoning program prior to approving the challenged federal grants.<sup>287</sup>

The court then considered whether the plaintiffs were within the zone of interests of the statutes alleged to be relevant—Title VI and Title VIII. However, before the court could conclude whether plaintiffs were arguably within the protected zone, the court first had to determine the zone of interests actually covered by the Acts. More specifically, the court had to determine whether Title VI and Title VIII placed an affirmative duty on HUD and BOR "which would require them to take some action, not taken here, on behalf of county residents such as withholding otherwise proper grants."<sup>288</sup> The court concluded that both agencies had affirmative duties under Title VI, which provides that "no person shall be excluded from participation, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."<sup>289</sup> However, since the statute further provides that agencies may withhold funds from "the particular program, or part thereof," in which non-compliance exists<sup>290</sup> and since there were no allegations that the sewer or swamp projects, themselves, would be discriminatorily administered,<sup>291</sup> the court acknowledged that Title VI was "not so much involved."<sup>292</sup>

Title VIII, being broader in scope, received more of the court's attention. The court indicated<sup>293</sup> that HUD and BOR had an affirmative duty under Title VIII to consider withholding grants of funds to urban communities with discriminatory housing practices since Title VIII requires agencies to "administer their programs and activities re-

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<sup>283</sup> 397 U.S. 150 (1970). The court of appeals did not specifically cite *Data Processing* when it applied the test, but the district court did. 376 F. Supp. 327, 331 (S.D.N.Y. 1974).

<sup>284</sup> See text at notes 80-86 *supra* for a discussion of the two-part test.

<sup>285</sup> *Evans* slip opinion at 3889. "Ghetto" was defined as "racially-concentrated low-income neighborhoods." *Id.* at 3889-90.

<sup>286</sup> *Id.* at 3890.

<sup>287</sup> *Id.* at 3891.

<sup>288</sup> *Id.* at 3892.

<sup>289</sup> 42 U.S.C. § 2000d (1970); *Evans* slip opinion at 3892-93.

<sup>290</sup> 42 U.S.C. § 2000d-1 (1970).

<sup>291</sup> *Evans* slip opinion at 3890 n.6.

<sup>292</sup> *Id.* at 3894.

<sup>293</sup> *Id.* at 3892-93.

lating to housing and urban development in a manner affirmatively to further the purposes of [the Act],"<sup>294</sup> the primary purpose being "to provide . . . for fair housing throughout the United States"<sup>295</sup> and to promote integrated and balanced living conditions.<sup>296</sup> The court found ample support in the legislative history of Title VIII<sup>297</sup> and in the applicable case law<sup>298</sup> to buttress the assertion that the agencies in question had an affirmative duty to use the funds that they would expend for housing and urban development to end the concentration of minority groups in limited areas.<sup>299</sup> The court then considered whether the specific plaintiffs fell within the protected zone and concluded that, as residents of racially concentrated urban ghettos, they were arguably within the zone of interests of Titles VI and VIII.<sup>300</sup>

Implicit in the court's determination that HUD and BOR had an affirmative duty to promote the purposes of Title VIII which extended to the plaintiffs in this case was the determination that the agencies' duty encompassed the specific grants in question—funds for sewer and swamp projects to a community abutting a metropolitan area.<sup>301</sup> The court noted that only grants "relating to housing and urban development" were subject to the agencies' affirmative duties.<sup>302</sup> Thus, absent this correlation the agencies had no affirmative duties under Title VIII to consider the discriminatory zoning practices of New Castle.

The court found the necessary correlation with respect to the sewer program by relying on a HUD statement indicating that sewers, roads, schools, "and other public facilities relating to urban development"<sup>303</sup> are subject to the affirmative duty provisions of Title

<sup>294</sup> 42 U.S.C. § 3608(c) (1970).

<sup>295</sup> 42 U.S.C. § 3601 (1970).

<sup>296</sup> *Evans* slip opinion at 3896, quoting 114 CONG. REC. 3422 (1968) (remarks of Senator Mondale).

<sup>297</sup> *Evans* slip opinion at 3894-95; 114 CONG. REC. 2278, 9563 (1968) (remarks of Senator Mondale and Representative Celler).

<sup>298</sup> *Evans* slip opinion at 3895, citing *Shannon v. HUD*, 436 F.2d 809, 821 (3d Cir. 1970); *Brookhaven Housing Coalition v. Kunzig*, 341 F. Supp. 1026 (E.D.N.Y. 1972); *Garrett v. City of Hamtramck*, 335 F. Supp. 16, 27 (E.D. Mich. 1971). The court cited these cases as lending support for the applicability of affirmative duties under Title VI as well. *Evans* slip opinion at 3895.

<sup>299</sup> *Evans* slip opinion at 3895.

<sup>300</sup> *Id.* at 3896-97. The court reserved the question of the applicability of Title VI for argument on the merits. *Id.* at 3894. Since Title VIII was broad enough in scope to secure the proper basis for plaintiffs' standing, see discussion in text at notes 293-99 *infra*, the court apparently allowed plaintiffs to proceed to the merits of the Title VI argument as well. It is not clear whether the plaintiffs could have established standing by relying on Title VI alone.

<sup>301</sup> "Here the 'statutory right' is to have programs and activities 'relating to housing and urban development' administered in furtherance of the fair housing policy. That right is invaded by grants for sewer facilities or acquisition of recreation areas in urban communities which are not so administered." *Evans* slip opinion at 3896.

<sup>302</sup> *Evans* slip opinion at 3893 n.10.

<sup>303</sup> "A substantial number of programs are subject to [the] affirmative provisions [of Title VIII], including those relating to urban renewal, model cities, grants for sewer

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VIII.<sup>304</sup> In addition, the HUD regional administrator stated in his deposition that the water and sewer program was subject to Title VIII requirements.<sup>305</sup> The HUD statement could be interpreted two ways. It could mean that *all* sewer projects are considered to be related to urban development and hence are subject to the affirmative provisions of Title VIII, the apparent interpretation of the court in *Evans*, or it could mean that *in an urban community*, road, school and sewer projects are all subject to Title VIII affirmative provisions. This interpretation would avoid the anomaly of a school or road project in a completely rural setting being considered as "relating to housing and urban development." The *Evans* court, however, did not seem to consider this interpretation.

The court in *Evans* determined that the BOR funds for swamp clearance related to urban development because New Castle fell within BOR's definition of an urban area.<sup>306</sup> In addition, the court relied heavily on a rather ambiguous statement made by BOR's regional director in his deposition indicating that BOR "ought" to include existing and desirable housing patterns as a factor in determining whether to grant funds for recreational purposes.<sup>307</sup>

Although interpretations of an act by the agency delegated to administer it have been accorded great weight by the Supreme Court,<sup>308</sup> and the Supreme Court has recently attached great weight to the interpretation of Title VIII by an assistant regional administrator of HUD,<sup>309</sup> such deference generally has occurred only when the administrator's interpretation was "the consistent administrative construction of the Act"<sup>310</sup> and his construction was confirmed by the purpose and design of the Act.<sup>311</sup> It is not clear that the adminis-

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and water installations, roads, schools and other public facilities relating to urban development." DEPT OF HOUSING & URBAN DEV., HISTORICAL OVERVIEW—EQUAL OPPORTUNITY IN HOUSING, P-H EQUAL OPPORT. IN HOUSING 2302, 2316 (1973).

<sup>304</sup> *Evans* slip opinion at 3893.

<sup>305</sup> *Id.* at 3893 n.10.

<sup>306</sup> *Id.* BOR's definition includes satellite communities having a population over 2,500. *Id.*

<sup>307</sup> The director stated in a deposition: "[E]xisting housing patterns and desirable housing patterns ought to be a factor in the planning process in assessing [recreation] needs and we attempt to encourage consideration of all community needs and not just to leave ourselves merely concerned with recreation, because it's important to the fabric of this system." *Id.*

<sup>308</sup> E.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971); *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

<sup>309</sup> *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 210 (1972).

<sup>310</sup> *Id.*

<sup>311</sup> *Id.* The two cases the Supreme Court cited in *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, (1972) in support of its deference to the interpretation by the regional administrator involved: (1) an interpretation of an administrative regulation by the Secretary of the Interior, *Udall v. Tallman*, 380 U.S. 1, 2, 16 (1965); and (2) an interpretation of an Act by the Commission charged with its enforcement, *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971). In *Griggs*, as in *Trafficante*, the construction adopted by the Court was supported by the purpose of the Act and its legislative history. *Griggs v. Duke Power Co.*, *supra*, at 434; *Trafficante*, 409 U.S. at 210.

trators' interpretations in *Evans* meet these criteria since one possible and logical interpretation of the official HUD statement would exclude sewer projects in non-urban areas such as New Castle from the affirmative provisions of Title VIII. Similarly, it is not clear that the same judicial deference should be given to *policy considerations* of a BOR regional administrator as would be given to an agency's interpretations of an Act which it administers. There is even less cause for deference when the policy consideration is phrased in a manner which does not indicate a "consistent administrative construction of the Act,"<sup>312</sup> but merely a belief that housing "ought" to be taken into consideration.

It is submitted that in order to have a basis for finding plaintiffs within the zone of interests of Title VIII, the court found it necessary to take a quite liberal attitude in interpreting the scope of the language in the statute—"relating to housing and urban development"—giving perhaps undue weight to the opinions of the regional directors of HUD and BOR. If the court had construed the statute more narrowly it might have found that the plaintiffs' protected interests did not extend to the grants in question<sup>313</sup> and the plaintiffs would be denied standing to challenge the grants under the APA.<sup>314</sup> Plaintiffs, therefore, would have been seeking standing in a nonstatutory review situation and the traditional jurisprudential concerns might well have prevented them from achieving standing.

Indeed, in a dissenting opinion in *Evans*, Judge Moore indicated without extensive elaboration, that Title VIII was not applicable to the issue of plaintiffs' standing.<sup>315</sup> He noted that the purpose of that Act was to provide for fair housing<sup>316</sup> and that fair housing was not involved in the case.<sup>317</sup> In absence of a statutory grant of standing, he found the plaintiffs could not assert an abstract injury<sup>318</sup> or a generalized grievance.<sup>319</sup> Reiterating<sup>320</sup> the jurisprudential concerns regarding the expansion of judicial power outlined by Justice Powell

<sup>312</sup> *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 210 (1972).

<sup>313</sup> Under a narrow reading of the statute, grants for swamp clearance and sewer projects would not be considered part of housing and urban development. See *Evans* slip opinion at 3893 n.10.

<sup>314</sup> If the agencies had no affirmative duties under Title VI or Title VIII, then plaintiffs could not be "aggrieved" within the meaning of 5 U.S.C. § 702 (1970), the statutory grant of review. See text at notes 297-300 *supra*.

<sup>315</sup> *Evans* slip opinion at 3914.

<sup>316</sup> *Id.*

<sup>317</sup> *Id.* at 3916. "To say that plaintiffs' right to adequate housing 'is invaded by grants for sewer facilities or acquisition of recreation areas . . . ' is a most illogical non sequitur." *Id.*

<sup>318</sup> *Evans* slip opinion at 3910-11, citing *O'Shea v. Littleton*, 414 U.S. 488, 493-94 (1974).

<sup>319</sup> *Evans* slip opinion at 3911-12, citing *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220 (1974); *United States v. Richardson*, 418 U.S. 166, 179-80 (1974).

<sup>320</sup> *Evans* slip opinion at 3912-13.

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in his concurring opinion in *United States v. Richardson*,<sup>321</sup> he concluded that there was no basis for standing.

The court next turned to the second part of the *Data Processing* standing test, injury in fact, noting initially that federal funds which are used to improve New Castle and other wealthy white enclaves arguably could have been used to alleviate urban ghetto conditions.<sup>322</sup> The court also noted the possibility that funds diverted from urban ghettos to wealthy suburbs may increase the disparity between the two life styles.<sup>323</sup> The plaintiffs' injury, then, was the perpetuation of their ghetto living conditions which might have been alleviated had HUD and BOR performed their affirmative duties.<sup>324</sup> Thus, the court allowed plaintiffs to assert a generalized injury, quoting with approval from *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*.<sup>325</sup> "To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept this conclusion."<sup>326</sup> The court in *Evans* distinguished recent cases that strictly limited standing<sup>327</sup>—on which the dissent relied—as cases of nonstatutory review and therefore inapposite,<sup>328</sup> noting that standing is conceptually broader in a case involving statutory review.<sup>329</sup>

The injury recognized in *Evans*—perpetuation of ghetto living conditions as a result of agency inaction—appears analogous to that found sufficient to confer standing in *SCRAP*, another case in which review was based on the APA.<sup>330</sup> In that case, the Supreme Court allowed standing to plaintiffs who asserted a very attenuated line of causation between agency inaction and alleged harm to the environment which they used and enjoyed.<sup>331</sup> Specifically, the plaintiffs al-

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<sup>321</sup> 418 U.S. 166, 188 (1974) (Powell, J., concurring).

<sup>322</sup> *Evans* slip opinion at 3898. In his dissenting opinion, Judge Moore argues that if plaintiffs were awarded the injunction against the grant of federal funds to New Castle, their living conditions probably would not be alleviated since the amount of money involved, \$400,000, "would scarcely suffice for a low-cost housing project." *Id.* at 3916 (dissenting opinion). Instead, he asserts, the primary result of the litigation would be that the residents of New Castle would be prevented from receiving a much needed sewer project and park. *Id.* at 3909, 3915. However, the New Castle residents would not necessarily be prevented from receiving new sewers; they just would be prevented from having the sewer project subsidized by federal funds.

<sup>323</sup> *Evans* slip opinion at 3898.

<sup>324</sup> *Id.*

<sup>325</sup> 412 U.S. 669 (1973).

<sup>326</sup> *Id.* at 688.

<sup>327</sup> See *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220 (1974); *United States v. Richardson*, 418 U.S. at 175 (plaintiffs could not assert generalized grievances); *O'Shea v. Littleton*, 414 U.S. 408, 494 (1974) (plaintiffs could not assert the rights of third parties).

<sup>328</sup> *Evans* slip opinion at 3898-99.

<sup>329</sup> *Evans* slip opinion at 3899.

<sup>330</sup> Indeed, the court in *Evans* buttressed its finding of standing by citing *SCRAP*. *Evans* slip opinion at 3898.

<sup>331</sup> 412 U.S. at 685.

leged that the failure of the Interstate Commerce Commission to suspend a surcharge on all railroad freight rates would "discourage the use of 'recyclable' materials, and promote the use of new raw materials that compete with scrap, thereby adversely affecting the environment by encouraging unwarranted mining, lumbering, and other extractive activities."<sup>332</sup>

The injury alleged in *Evans* is nonetheless one step removed from that in *SCRAP*. In *SCRAP*, plaintiffs alleged that agency inaction would result in a *deterioration* of their living conditions. In *Evans*, on the other hand, plaintiffs alleged that agency inaction would result in the *continuation* of their present living conditions.<sup>333</sup> Although the Court in *SCRAP* acknowledged that the destruction of the environment was a sufficient injury to allow standing,<sup>334</sup> it is not clear that perpetuation of one's present living conditions as a result of agency inaction is entirely comparable. Moreover, since in *SCRAP*, the plaintiffs alleged injury to the environment, it was clear that they, as inhabitants and users of the environment arguably would be adversely affected by any deterioration of the environment. In contrast, the *Evans* court could only *hypothesize* that the funds that were allocated to the town of New Castle might otherwise have been used to alleviate their ghetto conditions.<sup>335</sup> The *Evans* plaintiffs could not assure the court that the perpetuation of their living conditions resulted directly from the "misallocation" of the challenged funds. As the Supreme Court cautioned in *Sierra Club v. Morton*:<sup>336</sup> "[B]roadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury."<sup>337</sup>

The importance of a specific, personal injury was also underscored in *Warth*. Noting that Congress may grant persons a right of action by providing statutory review, the Court in *Warth* emphasized: "Of course, Article III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself,"<sup>338</sup> even if it is shared by others. The Supreme Court thus characterized the distinct and palpable injury requirement as a minimum constitutional mandate,<sup>339</sup> distinguishable from a jurisprudential requirement in that it cannot be waived by Congress or the Court. It is submitted that the *Evans* plaintiffs' alleged injury—the perpetuation of their living conditions as a result of the challenged funding—is analogous to the injury alleged by the low-income, minority non-residents of Penfield in *Warth*: the perpetuation of their living conditions as a result of Penfield's ex-

<sup>332</sup> *Id.* at 676.

<sup>333</sup> *Evans* slip opinion at 3897-98.

<sup>334</sup> 412 U.S. at 685.

<sup>335</sup> *Evans* slip opinion at 3898.

<sup>336</sup> 405 U.S. 727 (1972).

<sup>337</sup> *Id.* at 738.

<sup>338</sup> 422 U.S. at 501.

<sup>339</sup> 422 U.S. at 499, 501.

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clusionary zoning practices. The Supreme Court rejected the *Warth* plaintiffs' injury:

[T]he fact that these petitioners share attributes common to persons who may have been excluded from residence in the town is an insufficient predicate for the conclusion that petitioners *themselves* have been excluded, or that the respondents' assertedly illegal actions have violated their rights. Petitioners must allege and show that they *personally* have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.<sup>340</sup>

The Court noted that the Penfield non-residents had failed to allege that their injury resulted "in any concretely demonstrable way" from the towns' alleged exclusionary practices.<sup>341</sup> It is submitted that the *Evans* plaintiffs similarly cannot meet the standards set forth in *Warth* since they cannot demonstrate concretely that the perpetuation of their living conditions results directly from the allocation of funds to New Castle. Thus they fail to meet the requirement of a "direct and palpable" injury mandated by Article III.

These problems, arising from the analysis of the injury in fact requirement set forth in *Warth*, illustrate how *Warth* might be applied to deny standing in a case invoking statutory review. Even if allegations such as those in *Evans* are found to be sufficient to establish standing under *Warth* and the plaintiffs are able to proceed to the merits, they may encounter further difficulties inherent in the process of indirect challenges to exclusionary zoning practices under the statutory scheme present in *Evans*. The first difficulty is the substantial burden of proving that an unconstitutional motive lies behind a zoning ordinance which is neutral on its face.<sup>342</sup> In light of the refusal of the Supreme Court in *Warth* to recognize the racially discriminatory effect of wealth discrimination,<sup>343</sup> plaintiffs probably will not be able to sustain that burden.

A further problem, which also troubled the *Warth* Court, is whether the relief requested of the court will actually alleviate the alleged injury. As the dissenting opinion in *Evans* noted, the relief requested in that case—an injunction against the issuance of federal funds amounting to \$400,000—probably would not affect the plaintiffs' living conditions.<sup>344</sup> The court thus has no assurance that the

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<sup>340</sup> *Id.* at 502.

<sup>341</sup> *Id.* at 504.

<sup>342</sup> Branfman, Cohen & Trubek, *Measuring the Invisible Wall: Land Use Controls and the Residential Patterns of the Poor*, 82 YALE L. J. 483, 487 & n.13 (1973).

<sup>343</sup> See *id.*; cf. *Palmer v. Thompson*, 403 U.S. 217, 224 (1971). For an analysis of the issues involved in a court's review of legislative motive see Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95.

<sup>344</sup> *Evans* slip opinion at 3916.

particular plaintiffs bringing suit would receive any benefit from the injunction.<sup>345</sup>

A third problem facing plaintiffs who achieve standing is the question whether the court has the authority to issue an injunction at all.<sup>346</sup> The majority opinion in *Evans* expressed no opinion on the subject.<sup>347</sup> Judge Gurfein, in his concurring opinion, however, indicated that although the plaintiffs had standing to challenge HUD's and BOR's failure to consider factors relevant to their affirmative duties under Title VIII,<sup>348</sup> he would deny plaintiffs standing to actually enjoin the federal grants.<sup>349</sup> Since the plaintiffs were basically challenging the agencies' failure to consider the housing practices of communities receiving grants,<sup>350</sup> it is possible that the "relief" ultimately granted in *Evans* will be limited to an order that HUD and BOR institutionalize a method of considering the relevant racial and socioeconomic factors prior to granting federal funds. If HUD and BOR elect to make the grants after instituting proper consideration procedures<sup>351</sup> plaintiffs could still institute a later suit challenging the decision.<sup>352</sup> The Supreme Court has noted, however, that the scope of

<sup>345</sup> In another case in which plaintiffs invoked the APA, the Supreme Court denied plaintiffs standing when they had neglected to assert that they specifically would be harmed in any way by the agency action being challenged. *Sierra Club*, 405 U.S. at 740. The concern of the judiciary over the efficacy of judicial relief will be shown to be eliminated under the statutory scheme relied on in *City of Hartford v. Hills*, Civil No. H-75-258 (D. Conn. 1975) discussed *infra* at notes 374-77.

<sup>346</sup> Cf. *SCRAP*, 412 U.S. at 690. Once the *SCRAP* plaintiffs established standing, the Court went on to conclude that it had no jurisdiction to issue an injunction. *Id.*

<sup>347</sup> See *Evans* slip opinion at 3889.

<sup>348</sup> *Id.* at 3918 (concurring opinion).

<sup>349</sup> *Id.* at 3917, 3919-20.

<sup>350</sup> *Evans v. Lynn*, 376 F. Supp. 327, 331 (1974).

<sup>351</sup> If, after undergoing proper review procedures (see generally *Shannon v. HUD*, 436 F.2d 809, 821-22 (1970) for a discussion of such procedures) HUD and BOR determined that New Castle's zoning discriminated along economic but not racial lines, then the proposed federal grants could not be detrimental to the fair housing policy set forth in Title VIII (which is concerned with racial, not economic discrimination) and federal funds could be granted for the swamp and sewer projects. Courts either would refuse to review this decision (see note 351 *infra*; *Evans*, slip opinion at 3917-18 (concurring opinion) or, if the decision were reviewed, would uphold it as rational, and not "arbitrary and capricious." See *Shannon v. HUD*, 436 F.2d 809, 822 (3d Cir. 1970).

<sup>352</sup> Courts may refuse to review agency decisions only in the event that statutes prohibit review or agency action is committed to agency discretion by law. 5 U.S.C. § 701 (a) (1970). The Supreme Court has interpreted the review provision of the APA broadly so as to presume judicial review in the absence of "clear and convincing evidence of a contrary legislative intent." *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967), citing *Rusk v. Cort*, 369 U.S. 367, 379-80 (1962). There is no "clear and convincing evidence" of congressional intent to preclude decisions of HUD and BOR from judicial review. *Shannon v. HUD*, 436 F.2d 809, 818, 821 (1970). But see *Hahn v. Gottlieb*, 430 F.2d 1243 (1970), where the court refused to review a HUD decision. The reasoning in *Hahn*, however, has been implicitly rejected in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971). See McCabe, *Recent Developments in Judicial Review of Administrative Actions: A Developmental Note*, 24 ADMIN. L. REV. 67, 94 (1972). The set of circumstances in which a Secretary's decision escapes judicial review, if he has been granted discretion by law, has been the subject of intensive debate. See, e.g., L. Jaffee,

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review of agency action is very narrow: "The court is not empowered to substitute its judgment for that of the agency."<sup>353</sup> To be successful, a plaintiff would need to demonstrate that the agency's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>354</sup> Under this standard the courts generally have upheld substantive agency decisions when supported by an adequate factual basis.<sup>355</sup>

It is submitted that as a result of (1) the attenuated connection which sewer construction and swamp clearance have with "housing and urban development," a connection which a court less liberal than the court in *Evans* might not be able to appreciate; (2) the inherently amorphous nature of the *Evans* plaintiffs' injury; (3) the substantial burden of proving that a zoning ordinance, neutral on its face, was enacted for unconstitutional purposes; (4) the lack of assurance that the injunctive relief requested in an indirect challenge would actually alleviate plaintiffs' poor living conditions; and (5) the very limited remedy likely to be afforded plaintiffs who adopt the indirect approach, the indirect approach adopted under the statutory scheme present in *Evans* would not have developed into an effective means of seriously attacking the problems of exclusionary zoning.

A recent change in the statutory scheme under which federal grants to cities are made has significantly improved the possibility of establishing standing in an indirect challenge aimed at decreasing the use of exclusionary zoning practices. In *City of Hartford v. Hills*,<sup>356</sup> the city of Hartford, eight city officials,<sup>357</sup> and two members of a class that consisted of minority as well as low- and moderate-income persons living in inadequate housing in Hartford alleged that the Secre-

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JUDICIAL CONTROL OF ADMINISTRATIVE ACTION, 181-82 (1965); Berger, *Administrative Arbitrariness: A synthesis*, 78 YALE L.J. 965 (1969); Davis, *Administrative Arbitrariness is Not always Reviewable*, 51 MINN. L. REV. 643 (1967); Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367 (1968).

<sup>353</sup> *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). See generally McCabe, *supra* note 352, at 402-04 for a discussion of recent cases illustrating the extent to which the courts have been willing to defer to agency discretion.

<sup>354</sup> 5 U.S.C. § 706(2)(A) (1970); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413-16 (1970). See McCabe, *supra* note 352. But see Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1781-89 (1975) for a discussion of stricter standards of judicial review.

<sup>355</sup> See *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 470 F.2d 289, 300-01, (8th Cir. 1972), *cert. denied*, 412 U.S. 921 (1973); *Scenic Hudson Preservation Conf. v. FPC*, 453 F.2d 463, 481-82 (2d Cir. 1971); *Calvert Cliffs' Coordinating Comm., Inc. v. Atomic Energy Comm.*, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

<sup>356</sup> Civil No. H-75-258 (D. Conn. Jan. 28, 1976) [hereinafter cited as *Hartford slip opinion*]. The text of this opinion can be found at P.H. 1971 EQUAL OPPORT. IN HOUSING ¶ 13,742.

<sup>357</sup> The court dismissed the suit as to these plaintiffs since their only "injury" was their alleged inability to perform their official duties and responsibilities because of HUD's improper approval of grant applications. *Hartford slip opinion* at 9. The court held that these plaintiffs had no legal interest in the outcome of the suit, and therefore did not have standing. *Id.* at 10.

tary of Housing and Urban Development and other officials<sup>358</sup> improperly approved the grants of federal funds to seven of Hartford's suburbs. The plaintiffs alleged that the grants in question were improper since HUD disregarded "the emphasis in the [suburb's] applications for non-housing expenditures, and upon local rather than regional needs,"<sup>359</sup> and sought an injunction against the use of the funds, claiming that the defendants had failed to fulfill their obligations under various federal statutes.<sup>360</sup>

In essence, the plaintiffs alleged that (1) under Title I of the Housing and Community Development Act of 1974<sup>361</sup> (the "Housing Act of 1974") it was an abuse of discretion for HUD to approve applications for community development funds when the Act mandated that the applications be disapproved;<sup>362</sup> (2) under Title VIII of the Civil Rights Act of 1968<sup>363</sup> HUD failed to "affirmatively administer" the community development program in order to facilitate low- and moderate-cost housing in Hartford's suburbs;<sup>364</sup> and (3) under Title VI of the Civil Rights Act of 1964<sup>365</sup> HUD improperly approved the grant applications "in the face of a history by [the] applicant communities of discriminatory housing, zoning, and land use practices . . . ."<sup>366</sup>

The Housing Act of 1974 played a significant role in the court's analysis of the standing issue. This Act is designed to alleviate the problems of the urban areas.<sup>367</sup> Particular emphasis is placed on inadequate housing opportunities for low- and moderate-income individuals: under the Act, funds are to be given to a community only after it has submitted a three-year community development program designed to give "maximum feasible priority to activities which will benefit low- or moderate-income families or aid in the prevention or

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<sup>358</sup> The Regional Administrator and Area Director of HUD were also named as defendants. The officials were sued only in their official capacities. *Id.* at 2 and n.5.

<sup>359</sup> *Hartford* slip opinion at 1.

<sup>360</sup> *Id.*, at 2, citing Title I of the Housing and Community Development Act of 1974, 42 U.S.C. §§ 5301-17 (Supp. 1975); Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 *et seq.* (1970); Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* (1970). Plaintiffs also invoked constitutional claims under the civil rights statutes, 42 U.S.C. §§ 1981, 1982 and 1985, and the Fifth Amendment. *Hartford*, slip opinion at 2.

<sup>361</sup> 42 U.S.C. § 5301 (Supp. 1975).

<sup>362</sup> *Hartford* slip opinion at 3. See text at notes 370-72 *infra*.

<sup>363</sup> 42 U.S.C. § 3601-19 (1970).

<sup>364</sup> *Hartford* slip opinion at 3.

<sup>365</sup> 42 U.S.C. § 2000d-1 (1970).

<sup>366</sup> *Hartford* slip opinion at 3 quoting paragraph 31 of the Complaint.

<sup>367</sup> *Id.* at 5. The statute states that "[t]he primary objective of this chapter is the development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income." 42 U.S.C. § 5301(c) (Supp. 1975). The Act is a consolidation of ten development programs administered by HUD. See *Hartford* slip opinion at 16 n.27 for a list of the programs.

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elimination of slums or blight."<sup>368</sup> The application for funds must include, among other information, a housing assistance plan which (1) accurately assesses the current housing stock in the community; (2) determines the housing needs of lower-income individuals expected to reside in the community; (3) specifies a realistic annual goal for the provision of low-income housing; and (4) indicates the locations for planned housing for low-income individuals.<sup>369</sup>

The *Hartford* suit was brought because HUD approved applications for grants under the Housing Act of 1974 to suburbs that allegedly had not fulfilled the statutory obligations of developing a housing assistance plan.<sup>370</sup> Most of the suburbs involved estimated that "zero" lower-income persons were expected to reside in the community, therefore distorting the "needs" section of their applications.<sup>371</sup> Plaintiffs alleged that had the low-income housing needs of the community been more accurately described, the projects proposed by the towns for the use of the federal funds would have been found to be inappropriate to meet those needs, necessitating the disapproval of the applications by the Secretary of HUD.<sup>372</sup>

The district court found that the city of Hartford clearly had standing. First, the city was within the zone of interests of the Housing Act of 1974: the Act was designed to ease urban blight and Hartford was an urban area faced with serious economic and housing problems.<sup>373</sup> Second, the city demonstrated an injury in fact since, under the Housing Act of 1974, funds which are disapproved are reallocated, with metropolitan areas of the same state receiving first priority.<sup>374</sup> The court noted that Hartford, therefore, was clearly injured if the challenged grant had been approved in a manner contrary to law.<sup>375</sup> This stands in sharp contrast to the statutory scheme under which the challenged federal funds were granted in *Evans*, which did not provide for reallocation of disapproved funds.<sup>376</sup> Because of the specific allocation procedures contained in the statute, the *Hartford* court, unlike the *Evans* court, was assured that injunctive relief would most probably cause the enjoined funds to be reallocated to the plaintiffs. Because of the different statutory provision, the *Hartford* plaintiffs could state a much more direct causal relationship between the injury alleged and the claim sought to be adjudicated.

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<sup>368</sup> 42 U.S.C. §§ 5304(a)(1), (b)(2) (Supp. 1975).

<sup>369</sup> 42 U.S.C. § 5304(a)(4) (Supp. 1975).

<sup>370</sup> *Hartford* slip opinion at 19-21.

<sup>371</sup> *Id.* at 20. The communities submitted a "zero" expected to reside figure on their applications as a result of a memorandum issued by an official of HUD. The memorandum stated that communities would be granted funds even if they did not submit figures in the "expected to reside" category. *Id.* at 21-23.

<sup>372</sup> *Id.* at 21.

<sup>373</sup> *Id.* at 5-8.

<sup>374</sup> *Id.* at 8-9, citing 42 U.S.C. § 5306(e) (Supp. 1975); 24 C.F.R. § 570.409(f)(1)(i) (1975); 40 Fed. Reg. 42347, 42348 (Sept. 12, 1975).

<sup>375</sup> *Hartford* slip opinion at 9.

<sup>376</sup> 42 U.S.C. § 5102 (1970) and 16 U.S.C. § 460i (1970).

Thus, the *Hartford* court noted that the city of Hartford "certainly stands to benefit in a tangible way from this court's intervention, thereby meeting the Supreme Court's most recent formulation of the 'injury-in-fact' requirement."<sup>377</sup>

Although the court found the standing question of the individual low-income and minority plaintiffs more difficult,<sup>378</sup> it concluded that they also had standing.<sup>379</sup> The court considered the individual plaintiffs' basis for standing under both the Housing Act of 1974 and Title VIII of the Civil Rights Act of 1968, commencing its analysis with the former.

The court noted at the outset that as poor persons living in sub-standard housing in Hartford, the plaintiffs were "certainly" within the zone of interests of the Housing Act of 1974, since language in the Act clearly demonstrated that it was intended to benefit persons of low and moderate income.<sup>380</sup> Although the defendants, relying on *Warth*, argued that the individual plaintiffs' suit should have been dismissed for failure to state a claim,<sup>381</sup> the court distinguished *Warth* as a case not based on a statute and therefore inapposite.<sup>382</sup> Instead, the court found that *Evans* was the controlling decision in its circuit.<sup>383</sup> The court noted that the *Evans* plaintiffs' standing was grounded on an allegation that federal agencies did not perform their affirmative duties to administer their programs in order to promote fair housing opportunities.<sup>384</sup> The individual *Hartford* plaintiffs' allegations similarly accused HUD of improperly approving grants. Under the redirected priorities scheme, plaintiffs were arguably prevented from receiving otherwise reallocable funds as a result of HUD's allegedly improper approval of the suburbs' applications. Therefore, the plaintiffs had standing under the Administrative Procedure Act as persons aggrieved by agency action.<sup>385</sup>

Turning next to the basis for standing under the Civil Rights Act of 1968, the court indicated that for the same reasons stated in *Evans* plaintiffs had standing under Title VIII of that Act: "Here, as there, we have plaintiffs who claim injury from purposeful adminis-

<sup>377</sup> *Hartford* slip opinion at 9, citing *Warth v. Seldin*, 422 U.S. 490 (1975).

<sup>378</sup> *Hartford* slip opinion at 10.

<sup>379</sup> *Id.* at 14-15.

<sup>380</sup> *Id.* at 11.

<sup>381</sup> *Id.*

<sup>382</sup> *Id.* at 11-12. It is interesting to note that although the *Hartford* court claimed that *Warth* was not controlling, it later indicated that the plaintiffs met the standing requirements set forth in *Warth*. *Id.* at 14.

<sup>383</sup> *Id.* at 12. The court noted but did not comment upon the fact that *Evans* is being reheard *en banc*. The fact that *Warth*, a Supreme Court decision, came down after *Evans*, and that *Evans* is being reheard, dilutes somewhat that decision's immediate precedential value. The statute relied on in *Hartford*, however, seems to have changed the basis of standing sufficiently so that many of the weaknesses in the *Evans* court's finding of injury are no longer problems. See text following note 355 *infra*, for a summary of the problems found in *Evans*.

<sup>384</sup> *Hartford* slip opinion at 12-13.

<sup>385</sup> *Id.* at 14-15.

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trative inaction. Here, as there, the improper approval of grants may perpetuate existing patterns of racial (and economic) segregation. This claim under the Civil Rights Act of 1968 distinguishes *Warth v. Seldin* . . . .<sup>386</sup>

The basis for the court's finding of injury under the Housing Act of 1974 bears closer examination. In recognizing this injury, the court cited language in both the Act<sup>387</sup> and the federal regulations<sup>388</sup> that requires disapproved funds to be reallocated first to a community within the same metropolitan area as the one whose funds were cut off. The court reasoned that the city of Hartford would have benefited from the reallocation of the funds.<sup>389</sup> In so reasoning, the court apparently ignored a provision in the federal regulations which requires that reallocated funds be used first to fulfill the "urgent needs" of a community.<sup>390</sup> A community qualifies as having "urgent needs" if the funds originally allocated to it under various HUD programs are found to be insufficient to complete an ongoing project which had been approved by HUD.<sup>391</sup> If there are no urgent needs in the same metropolitan area then the funds are to be reallocated to a different metropolitan area within the same state.<sup>392</sup> Thus, unless Hartford qualified as having urgent needs, it had no legitimate expectation that the challenged funding would be reallocated to benefit Hartford. It would seem, then, that the court's finding of a judicially cognizable injury rests on the assumption that Hartford could establish urgent needs which would qualify for the reallocated funds. Since demonstrating an urgent need might not have been difficult for Hartford, the court's assumption does not represent a serious problem.<sup>393</sup>

Another aspect of the finding of injury under the statute requires closer scrutiny. The court seems to have concluded that the plaintiffs were injured as a result of the existence of and non-compliance with a statute. As indicated earlier in this comment,<sup>394</sup> it is questionable whether a plaintiff may be granted standing solely on the basis of an injury created by the existence of a statute. In *Evans*, it should be noted, the court held that the plaintiffs' injury was their ghetto living conditions which were allegedly perpetuated as a result

<sup>386</sup> *Id.*, at 15, citing *Accion Hispana v. Town of New Canaan*, Civ. No. B-312 (D. Conn. Aug. 18, 1975). It is important to note that in relying on Title VIII the plaintiffs claimed the perpetuation of racial patterns of segregation. It was the lack of allegations concerning racial segregation which presented the Court in *Warth* from finding Title VIII to be applicable in that suit. *Warth*, 422 U.S. at 513, n.21. See text at notes 185-88 *supra*.

<sup>387</sup> *Id.* at 8, citing 42 U.S.C. § 5306(e) (Supp. 1975).

<sup>388</sup> *Id.* at 9, citing 24 C.F.R. § 570.409(f)(1)(i) (1975); 40 Fed. Reg. 42347, 42348 (Sept. 12, 1975).

<sup>389</sup> *Hartford* slip opinion at 9.

<sup>390</sup> 24 C.F.R. § 570.409(d) (1975); 40 Fed. Reg. 42348 (Sept. 12, 1975).

<sup>391</sup> 24 C.F.R. §§ 570.401(b)(1), (3) (1975).

<sup>392</sup> *Id.* § 570.409(f)(1); 40 Fed. Reg. 42348 (Sept. 12, 1975).

<sup>393</sup> See *Hartford* slip opinion at 6-8 n.14, for a discussion of the serious housing problems facing the city of Hartford.

<sup>394</sup> See discussion in text and note 171 *supra*.

of federal agency action.<sup>395</sup> In *Hartford*, since much the same socioeconomic situation existed, the court could easily have found that the individual plaintiffs' injury was that of being forced to reside in "deteriorating, inadequate or overly-costly housing."<sup>396</sup> Similarly, the city's injury could have been found to be its urban blight.<sup>397</sup> Recognition of these underlying injuries was, perhaps, implicit in the *Hartford* court's finding of injury. It is submitted, however, that the court would have had a sounder basis for its grant of standing had it clearly set forth reasons such as those above for its finding of standing, rather than relying solely on the statutory provisions of the Housing Act of 1974. As noted by the Court in *Warth*, "Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself . . . ." <sup>398</sup> Future plaintiffs should therefore be more explicit in their allegations of injury.

Despite these minor problems with the court's analysis, there are three reasons why the resolution of the standing question in *Hartford* seems to rest on a much sounder basis than that in *Evans*. First, due to the clear-cut provisions of the Housing Act of 1974, it was not necessary for the court to enter into any strained interpretations of the statute involved to bring the plaintiffs within the act's zone of interest.<sup>399</sup> Second, the injury alleged in *Hartford* was much more palpable than that alleged in *Evans*. The *Evans* plaintiffs complained of the perpetuation of their living conditions as a result of the actions of federal agencies, and could only hypothesize that if the challenged funds were enjoined their situation might be improved. In contrast, under the statutory scheme relied on in *Hartford*, it was clear that if HUD had disapproved the suburbs' applications, there was a high probability that the funds would have been reallocated to Hartford. Thus Hartford and its low-income residents were injured by HUD's improper approval of the funds. Even though the court did not clearly articulate the "injury" of urban blight, it seems implicit in the court's holding and thus the requirements of Article III were satisfied. Third, and again as a result of the statutory scheme, the *Hartford* court was assured that if it provided the judicial remedy requested—an injunction against the grants—the relief would most probably inure to the benefit of the specific plaintiffs before it. Thus the court was able to avoid one of the major stumbling blocks placed before the plaintiffs in *Warth*: that of showing the appropriateness or efficacy of judicial intervention.

<sup>395</sup> *Evans* slip opinion at 3898.

<sup>396</sup> *Hartford* slip opinion at 1-2.

<sup>397</sup> See *id.* at 6 n.14.

<sup>398</sup> 422 U.S. at 501 (1975).

<sup>399</sup> See text at note 313 *supra* for a discussion of the arguably strained interpretations used by the *Evans* court.

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### III. WHO CAN CHALLENGE LOCAL ZONING ORDINANCES IN THE FEDERAL COURTS

In *Warth*, the Court clearly indicated that in nonstatutory review cases it will not tackle the problem of exclusionary zoning practices in the context of regional metropolitan growth in a broad, remedial manner. It has consequently been argued that *Warth* "tosses out of court almost every conceivable kind of plaintiff who could be injured by the activity claimed to be unconstitutional,"<sup>400</sup> and that it rules on standing so as "to close the doors of the federal courts to claims of this kind."<sup>401</sup>

It is certainly true that the decision both limits the type of plaintiff who may challenge exclusionary zoning, and the nature of the circumstances under which the plaintiff will be permitted to assert his claim. There remain, however, a narrow set of circumstances under which particular parties may be allowed to directly challenge exclusionary zoning in the federal courts. It is clear after *Warth* that (1) non-resident individuals eligible for low- or moderate-cost housing, (2) builders and developers attempting to construct low- or moderate-cost housing, and possibly (3) residents of a community in which exclusionary zoning laws have been in effect may, in some circumstances, bring a direct challenge to exclusionary zoning.<sup>402</sup> The following analysis discusses each of these types of plaintiffs separately, suggesting the circumstances under which each type may successfully assert standing and examining the grounds upon which the court will treat a claim for relief.

#### A. Direct Challenges (Nonstatutory Review)

##### 1. Non-resident, minority individuals with low or moderate incomes

According to *Warth*, the non-resident plaintiffs must allege a distinct and palpable injury to themselves as a direct result of the challenged zoning.<sup>403</sup> This standard requires a showing that the plaintiffs are prevented from moving into a zoned area *solely* as a result of the community's zoning practices, and not because there is no builder interested in constructing a project priced within the plaintiffs' means. A crucial factor, then, becomes the existence of a current housing project which will meet the needs of low-income plaintiffs. Thus, in

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<sup>400</sup> 422 U.S. at 520 (Brennan, J., dissenting).

<sup>401</sup> *Id.* at 528. "Today's decision will be read as revealing hostility to breaking down even unconstitutional zoning barriers that frustrate the deep human yearning of low income and minority groups for decent housing they can afford in decent surroundings." *Id.* at 528-29.

<sup>402</sup> In light of the Court's ruling on the ability of plaintiffs to assert third party rights, it seems unlikely that either taxpayers or interest groups alleging no other interest than a desire for the challenged community to change its zoning policies will effectively be able to assert standing to challenge exclusionary zoning.

<sup>403</sup> See 422 U.S. at 508.

order for such plaintiffs to establish standing, there must be some showing that: (1) an attempt has been made to construct such a project; (2) the particular plaintiffs are eligible for such housing and are willing to move if given the opportunity; and (3) the attempt to begin the project was blocked by the enforcement of an exclusionary zoning ordinance.<sup>404</sup> The *Warth* opinion notes that it is only in this limited set of circumstances that the court will be able to fashion a remedy precisely tailored to the claims of the plaintiffs. Otherwise, the court faces the danger of setting out standards broadly regulating regional development, an activity which *Warth* suggests may be better left to the democratic processes.<sup>405</sup>

As Justice Brennan indicates in his dissent, the Court has made the rights of low-income, minority plaintiffs, excluded from a community because of zoning practices, dependent upon the willingness of a third party first to attempt to build the project, and then to litigate the matter when the project is precluded by exclusionary zoning devices.<sup>406</sup> This is true, Justice Brennan points out,

despite the fact that the third party may have no economic incentive to incur the costs of litigation with regard to one project, and despite the fact that the low-income minority plaintiffs' interest is not to live in a particular project but to live somewhere in the town in a dwelling they can afford.<sup>407</sup>

Even where circumstances are present that enable the individual non-resident to establish standing, he must be extremely careful in framing the allegations in the complaint to make an *effective* challenge. If the plaintiff simply asserts deprivation of liberty or property in violation of due process, the challenged zoning ordinance will be subjected to the rational relationship test.<sup>408</sup> As noted earlier,<sup>409</sup> broad deference is given to municipalities in their land use decisions, making it extremely rare for a zoning ordinance to be struck down on due process grounds.

It is only on the ground of equal protection that the zoning ordinance will be subjected to strict scrutiny requiring the state to justify

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<sup>404</sup> See *id.* at 504-06.

<sup>405</sup> See *id.* at 508 & n.18.

<sup>406</sup> *Id.* at 522 (Brennan, J., dissenting).

<sup>407</sup> *Id.* Brennan's observation is vividly illustrated by the district court's treatment of the standing issues in *Cornelius v. City of Parma*, 374 F. Supp. 730 (N.D. Ohio 1974), *remanded without published opinion*, 521 F.2d 1401 (6th Cir. 1975), where standing was denied to black non-residents who challenged exclusionary zoning devices. The court noted that the project which had been denied a building permit had lost its financial backing and had ceased to be viable; thus there was no longer a "live" controversy. *Id.* at 736.

<sup>408</sup> *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 392 (1926); *Construction Indus. Ass'n of Sonoma County v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975).

<sup>409</sup> See text at notes 6-11 *supra*.

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the ordinance by a compelling state interest.<sup>410</sup> Strict judicial scrutiny is applied in only two circumstances: (1) where the statute or ordinance in question effects an allegedly suspect classification; or (2) the statute or ordinance in question allegedly invades a fundamental interest.<sup>411</sup>

There is little likelihood that a low-income plaintiff would be able to argue successfully that an exclusionary zoning ordinance invades a fundamental interest. The Supreme Court in *Lindsey v. Normet*<sup>412</sup> refused to recognize a constitutionally protected right to decent housing.<sup>413</sup> The Court has likewise held that the recognized fundamental right to travel does not encompass the right to live or settle where one wishes.<sup>414</sup>

Further, it is clear that the low-income plaintiff cannot invoke strict scrutiny simply by claiming that the zoning practices exclude moderate- and low-income people. The Court has consistently refused to regard wealth as a suspect classification.<sup>415</sup> Moreover, *Warth* made it clear that the Court will recognize a claim of race discrimination only where certain precise allegations appear in the complaint. The Court was unwilling to assume a nexus between poverty and race:<sup>416</sup> alleging that the zoning ordinance discriminates on the basis of wealth, thereby having the well-documented, secondary effect of discriminating on the basis of race, is in itself insufficient to establish a claim of racial or ethnic discrimination.<sup>417</sup> Consequently, plaintiffs challenging exclusionary zoning may be assured of strict scrutiny of the ordinance in question only where they have specifically alleged racial discrimination in the complaint. In order to be certain of raising an equal protection claim which invokes the strict scrutiny test, the plaintiff must allege that the zoning ordinance in question is racially discriminatory in both *purpose* and *effect*.

### 2. Builders and Developers

Circuit court opinions consistent with *Warth* suggest that a developer acting alone may bring suit to challenge exclusionary zoning

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<sup>410</sup> Compare *Construction Indus. Ass'n of Sonoma County v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3467 (U.S. Feb. 24, 1976) (due process analysis), with *Black Jack*, 467 F.2d 1208, 1213 (8th Cir. 1972) (equal protection analysis) and *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 517 F.2d 409, 412-13 (7th Cir. 1975), *cert. granted*, 43 U.S.L.W. 3265 (U.S. Nov. 4, 1975) (equal protection analysis). For a general discussion of the Warren Court's broadening of the Equal Protection Clause, see Note, *Developments in the Law of Equal Protection*, 82 HARV. L. REV. 1065 (1969).

<sup>411</sup> *San Antonio Indep. School District v. Rodriguez*, 411 U.S. 1, 17 (1972).

<sup>412</sup> 405 U.S. 56 (1972).

<sup>413</sup> *Id.* at 73-74. See also R. BABCOCK & F. BOSSELMAN, EXCLUSIONARY ZONING 35 (1973).

<sup>414</sup> *James v. Valtierra*, 402 U.S. 137, 140 (1971). See also R. BABCOCK & F. BOSSELMAN, *supra* note 413, at 35.

<sup>415</sup> E.g., *San Antonio Indep. School District v. Rodriguez*, 411 U.S. 1 (1972).

<sup>416</sup> See *James v. Valtierra*, 402 U.S. 137, 141 (1971). See also R. BABCOCK & F. BOSSELMAN, *supra* note 413 at 35.

<sup>417</sup> 422 U.S. at 513 n.21.

practices.<sup>418</sup> However, the developer must first meet the requirement of a "direct and palpable" injury to himself to establish standing. *Warth* indicates that to satisfy this test, a builder must point to a specific viable project which, within a reasonable time of the suit, has been blocked by the challenged zoning ordinance.<sup>419</sup> If a builder satisfies this requirement, he is then in a position to argue the merits of the case. The grounds upon which builders and developers may challenge exclusionary zoning practices seem limited to due process, as these plaintiffs assert economic injury rather than violation of a fundamental right. Thus, the ultimate effectiveness of their challenge is doubtful. To withstand a challenge on due process grounds, a zoning ordinance need only bear a rational relationship to a valid state interest. In light of *Village of Euclid v. Ambler Realty Co.*,<sup>420</sup> *Village of Belle Terre v. Boraas*,<sup>421</sup> and *Construction Industry Association of Sonoma County v. City of Petaluma*,<sup>422</sup> it would seem that most zoning ordinances would be found to be "rationally related," and the builder would lose on the merits.

Only if a builder could assert the violation of a fundamental right would he invoke the stricter requirements of the compelling interest test. Since the builder bringing suit alone could only assert economic injury, his ability to assert the violation of a fundamental right would depend upon the court's willingness to allow the plaintiff to assert the rights of third parties. *Warth* suggests that a mere "congruity of interests" between a potential plaintiff and third parties who wish to reside in low-cost housing is an insufficient reason to allow the plaintiff to raise third party rights.<sup>423</sup> Therefore, in order to raise these rights, a builder would have to show: (1) that the ordinance precluded or otherwise adversely affected a special ongoing relationship between the builder and those third persons whose rights have been violated;<sup>424</sup> or (2) that the litigation was necessary to ensure the protection of the third party rights asserted.<sup>425</sup>

It is difficult to imagine a situation in which either of these circumstances would exist. The type of relationship which a builder might establish with a non-resident individual adversely affected by

<sup>418</sup> See, e.g., *Construction Indus. Ass'n v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975).

<sup>419</sup> 422 U.S. at 517.

<sup>420</sup> 272 U.S. 365 (1926). See text at notes 3-5 *supra*.

<sup>421</sup> 416 U.S. 1 (1974).

<sup>422</sup> 522 F.2d 897 (9th Cir. 1975). Here, builders were granted standing to challenge alleged exclusionary zoning practices. They alleged economic injury as a result of the town's zoning. Because their interest was economic and not "fundamental," they were permitted to challenge the ordinance only on the basis of its rationality. Following *Belle Terre* and *Euclid*, the court upheld the ordinance. The plan of controlled growth adopted by the town was considered rational.

<sup>423</sup> 422 U.S. at 515.

<sup>424</sup> See, e.g., *N.A.A.C.P. v. Alabama, ex rel. Patterson*, 357 U.S. 449 (1958); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

<sup>425</sup> See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Barrows v. Jackson*, 346 U.S. 249 (1953).

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exclusionary zoning ordinances is the very relationship which would allow the individual to bring suit on his own behalf. If a builder established a legal relationship with a non-resident by means of a contract for low-cost housing, then the non-resident could assert his own legal interest in the contract. Therefore, the builder bringing suit alone could not claim that prosecution of the suit was the only means by which the interests of the non-resident would be protected. Where an individual may bring suit on his own behalf, the court will not allow a different plaintiff to raise that individual's rights.<sup>426</sup>

In light of these considerations, it seems clear that the builder or developer, bringing a challenge to exclusionary zoning on his own, will be limited to a due process argument. In order *effectively* to challenge a zoning ordinance, a builder must, therefore, bring suit in conjunction with specific non-resident plaintiffs who could have afforded to move into the thwarted project. Only by joining his claim with that of individual plaintiffs will the builder be able to assert violations of equal protection and thus invoke the strict scrutiny test.

### 3. Residents of the zoned community

The *Warth* decision made it clear that in the absence of a specific statutory provision, no resident of a town has a "legal right" to live in an integrated community.<sup>427</sup> Thus, in order to establish standing to challenge exclusionary zoning in such cases, residents must allege that they are "aggrieved" within the meaning of Title VIII of the Civil Rights Act of 1968, much as the apartment residents did in *Trafficante v. Metropolitan Life Insurance Co.*<sup>428</sup> In *Trafficante*, plaintiffs were granted standing to assert the right to live in an integrated apartment complex.<sup>429</sup> However, the Court could easily distinguish *Trafficante* by refusing to recognize an analogous injury in the context of a community, since a resident could not be sure that any of the excluded persons would live near him if the Court invalidated the zoning ordinance.<sup>430</sup> The residents' problems are further complicated by the *Warth* caveat that to base a complaint on Title VIII, one must do more than allege that the zoning ordinance has the *effect* of excluding minorities; the zoning ordinances must allegedly have been enacted with the *purpose* and *intent* of excluding minorities.<sup>431</sup>

If a resident nevertheless was able to achieve standing, the refusal of the Court in recent years to recognize a nexus between poverty and race<sup>432</sup> indicates that the plaintiff would bear a heavy burden of proof on the merits of his claim. To be successful, a plaintiff would

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<sup>426</sup> *Warth*, 422 U.S. at 510.

<sup>427</sup> 422 U.S. at 512-14.

<sup>428</sup> 409 U.S. 205, 206-08. See *Warth*, 422 U.S. at 514.

<sup>429</sup> 409 U.S. at 212.

<sup>430</sup> But see *Cornelius v. City of Parma*, 374 F. Supp. 730, 741 (1974) (dictum), remanded without published opinion, 521 F.2d 1401 (6th Cir. 1975).

<sup>431</sup> 422 U.S. at 513 n.21.

<sup>432</sup> See *James v. Valierrra*, 402 U.S. 137, 141 (1971).

need to prove that the zoning ordinance in question was enacted purely to promote racial discrimination and that it has had such an effect.<sup>433</sup> Proof of discrimination on the basis of wealth would not be sufficient.

*B. Indirect Challenges (Review under the Administrative Procedure Act)*

Plaintiffs may choose to challenge exclusionary zoning practices indirectly by filing a suit to contest grants of funds by federal agencies to those communities which have maintained such practices. Under this type of challenge, plaintiffs may be granted standing on the basis of the Administrative Procedure Act as persons aggrieved by a federal agency action.<sup>434</sup> As a result of the change in the statutory scheme since *Evans*,<sup>435</sup> most such suits will be brought under the Housing Act of 1974, as was done in *Hartford*.

Under this approach, low-income individuals residing in sub-standard housing in a metropolitan city would have standing to challenge the improper approval of an application for HUD funds by a community within the same metropolitan area. Since the Housing Act of 1974 has the purpose of alleviating the sub-standard living conditions in urban areas,<sup>436</sup> such plaintiffs could easily satisfy the requirement that they be within the zone of interests of the Act. In addition, the plaintiffs could satisfy the injury in fact requirement of *Warth* if they allege (1) that they suffer an injury based on their sub-standard living conditions, and (2) that as a result of the "urgent needs"<sup>437</sup> of their community, they have a legitimate expectation that the challenged funds will be reallocated to their community. This would satisfy the minimum constitutional requirement of an injury in fact outlined in *Warth*, since the plaintiffs will have demonstrated the distinct and palpable injury of perpetuation of their sub-standard living conditions which, but for the actions of HUD, would have been alleviated. Thus, there would be a true case or controversy between the plaintiffs and HUD.

A city could similarly establish standing under the approach and under the conditions outlined above. Its "injury" would be the existence of urban blight which would have been partially alleviated if the challenged HUD funds had been reallocated to meet the city's urgent needs. Builders and developers, however, could not achieve standing since they are not even arguably within the zone of interests of the Housing Act of 1974.

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<sup>433</sup> See Branfman, Cohen & Trubek, *Measuring the Invisible Wall: Land Use Controls and the Residential Patterns of the Poor*, 82 YALE L.J. 483, 487 & n.13 (1973).

<sup>434</sup> 5 U.S.C. § 702 (1970).

<sup>435</sup> See text at notes 373-77 and note 367 *supra*.

<sup>436</sup> 42 U.S.C. § 5301(c) (Supp. 1975).

<sup>437</sup> See text at notes 390-92 *supra* for a discussion of the "urgent needs" requirement.

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There is one factor which limits, somewhat, the efficacy of the indirect approach. Once the plaintiffs establish standing, they need to demonstrate that HUD's approval of the challenged grant was improper to obtain the injunctive relief requested. This was easy to prove in the *Hartford* situation where most of the suburban communities claimed that they had absolutely no need for low-income housing. These suburbs thus clearly violated the statutory requirement that they accurately assess the housing needs of low-income persons in their community.<sup>438</sup> Therefore, HUD's approval of funds to these suburbs was clearly improper.

An inaccurate but nonetheless positive declaration of community need might pose greater problems to challengers, however. The *Hartford* court also granted an injunction against funds allocated to East Hartford, a suburb which *had* submitted an estimate of its need for low-income housing.<sup>439</sup> The court determined that the estimate was too low, based on the facts and data available to HUD and East Hartford at the time of the application, and concluded that HUD's approval of the funding application was improper.<sup>440</sup> The court held that "HUD was doubly at fault—it did not obtain the generally available information required for a proper review, and it acted upon the basis of inadequate information."<sup>441</sup> This, the court indicated, amounted to "arbitrary and capricious decision-making"<sup>442</sup> and an abdication of its responsibilities under the Housing Act of 1974.<sup>443</sup> The *Hartford* court thus seems to have undertaken quite an active review of HUD's approval of East Hartford's funds, a role which other courts may decline to emulate. Under the Housing Act of 1974, HUD may disapprove applications only if (1) a community's assessment of its needs is "plainly inconsistent" with the significant facts or data generally available concerning the community's housing needs; (2) HUD determines that the proposed project is "plainly inappropriate" to meet the community's needs; or (3) the application does not fulfill the statutory requirements.<sup>444</sup> Congress thus seems to have limited HUD's ability to disapprove funding to instances of flagrant violations. The courts may enjoin allocations of funds only insofar as HUD was able to disapprove the original application. To the extent that other courts may be more restrained than the court in *Hartford* in their assessment of what is "plainly inconsistent" or "plainly inappropriate" in a community's assessment of its needs, plaintiffs will find a HUD allocation less open to challenge.

Plaintiffs who bring suit under Title VIII of the Civil Rights Act of 1968 would encounter similar problems. Although low-income

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<sup>438</sup> 42 U.S.C. § 5304(a)(4) (Supp. 1975).

<sup>439</sup> *Hartford* slip opinion at 35, 41.

<sup>440</sup> *Id.* at 35.

<sup>441</sup> *Id.* at 32.

<sup>442</sup> *Id.*

<sup>443</sup> *Id.* at 37.

<sup>444</sup> 42 U.S.C. § 5304(c) (Supp. 1975).

plaintiffs of a neighboring metropolitan community might achieve standing based on HUD's alleged failure to "affirmatively administer" the community development program of the Housing Act of 1974, a court's review of agency action is quite narrow. Thus it is unlikely that a plaintiff could convince a court to "substitute its judgment for that of the agency"<sup>445</sup> unless the agency's decision was arbitrary or capricious.<sup>446</sup>

Two further problems limit the efficacy of the indirect challenge to exclusionary zoning. First, some of the wealthier and more exclusively zoned communities may decide against applying for federal funds in order to avoid the necessity of providing for low-income housing within their communities. This approach has already been taken by the towns of both Berwyn and Cicero, Illinois.<sup>447</sup> Second, some exclusively zoned communities which have no employment opportunities for low-income individuals may be able to claim—legitimately—that they have no need for low-income housing. Thus they might qualify for federal funding under the Housing Act even though they have no plan for providing low-income housing.<sup>448</sup> The end result in either case is that the most exclusively zoned communities may remain immune to an indirect challenge aimed at federal funding.

### CONCLUSION

In the area of exclusionary zoning practices, the Supreme Court's treatment of Article III requirements and its concern with jurisprudential limitations forecloses the possibility of the sort of sweeping reform brought about by the landmark decisions of *Baker v. Carr*<sup>449</sup> and *Brown v. Board of Education of Topeka*.<sup>450</sup> The Court is clearly confining its role to a case by case analysis; it appears willing to correct specific wrongs but is unlikely to reach a comprehensive conclusion that exclusionary zoning *per se* is unconstitutional.

Even within the confines of an individual case, the litigant attempting to challenge exclusionary zoning is faced with the heavy burden of alleging in the pleading facts from which the court may clearly see a personal palpable injury which is directly caused by the challenged actions and which may be appropriately remedied by the exercise of judicial power. As *Warth* indicates, this showing is constitutionally mandated by Article III and thus necessary in both statutory

<sup>445</sup> *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

<sup>446</sup> See generally McCabe, *Judicial Review of Administrative Actions: A Survey of Recent Developments*, 25 ADMIN. L. REV. 375, 402-04 (1973) for a discussion of recent cases illustrating the extent to which the courts have been willing to defer to agency discretion.

<sup>447</sup> UNITED STATES COMMISSION ON CIVIL RIGHTS, TWENTY YEARS AFTER BROWN: EQUAL OPPORTUNITY IN HOUSING 61 n.191 (1975).

<sup>448</sup> *Id.* at 61.

<sup>449</sup> 369 U.S. 186 (1962) (voting reapportionment).

<sup>450</sup> 347 U.S. 483 (1954) (racial desegregation in public schools).

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and nonstatutory review situations.<sup>451</sup> As a result of this expansion of Article III requirements, the practical differences between a statutory and nonstatutory assertion of standing have been narrowed. Whether or not there is a statutory grant of standing facilitating a challenge to exclusionary zoning, the litigant will be allowed to present the merits of the claim only in the precise factual circumstances reviewed above, and only on the basis of a complaint which carefully sets forth these necessary facts.

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<sup>451</sup> The statutory/nonstatutory review distinction still is used by the Court for applying its jurisprudential considerations.