WARTH v. SELDIN: THE SUBSTANTIAL PROBABILITY TEST

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Introduction

Zoning ordinances were originally an outgrowth of nuisance law and, as such, regarded as peculiarly local in nature.[1] Traditionally, challenges to these ordinances or their administration were brought in state forums where rigid standing requirements for land use cases assured the strictly intra-community character of such suits. Under generally accepted state standing requirements prospective residents, as well as nonresidents owning land contiguous with that affected by the ordinance, have been denied recourse to the judiciary. Even residents of the community have been precluded unless they have made a personal request for relief that was denied by the zoning board.[2]

In recent years, however, commentators have discovered a constitutional dimension to the land use ordinance.[3] They point out that cer-

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1. Ayer, *The Primitive Law of Standing in Land Use Disputes: Some Notes From a Dark Continent*, 55 IOWA L. REV. 344 (1969).

2. Most states have adopted the Standard State Zoning Enabling Act, which provides standing for judicial review to any "person aggrieved" by a decision of an administrative officer relating to a zoning ordinance. The majority of courts construing "person aggrieved" have applied a strict property interest requirement. Thus a landowner, tenant, contract vendor, contract vendee, mortgagee and mortgagor all would have standing if a zoning board denied their requested relief. On the other hand, prospective homeowners and tenants, optionees and homeowner's associations would be denied access to the courts. Under state standing law, nonresidents are barred from challenging land use decisions in another municipality. This barrier exists in the majority of cases even when a nonresident owns property outside the municipality that is contiguous with the land subject to the zoning decision. *See* 3 R. ANDERSON, AMERICAN LAW OF ZONING, §§ 21.05 -.12 (1968); 2 A. RATHKOPF, THE LAW OF ZONING AND PLANNING, ch. 40 (3d ed. 1972); Note, *The "Aggrieved Person" Requirement in Zoning*, 8 WM. & MARY L. REV. 294 (1967); Comment, *Standing to Appeal Zoning Determinations: The "Aggrieved Person" Requirement*, 64 MICH. L. REV. 1070 (1966).

3. Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969); Note, *Low-Income Housing and the Equal Protection Clause*, 56 CORNELL L. REV. 343 (1971); Note, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645 (1971); Note, *Segregation and the Suburbs: Low-Income Housing, Zoning, and the Fourteenth Amendment*, 56 IOWA L. REV. 1298

tain land use ordinances may have an exclusionary impact upon minorities[4] in violation of the equal protection clause of the Fourteenth Amendment. Aggrieved minority individuals excluded from the community by an allegedly unconstitutional ordinance could not satisfy state standing requirements. Consequently, they sought relief from a federal forum. This choice of a federal forum would have been illusive but for the simultaneous changes taking place in the federal law of standing.[5] The "legal injury" test[6] which had governed standing in the

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(1971); Comment, *The Equal Protection Clause: A Single-edged Sword for the Gordian Knot of Exclusionary Zoning*, 40 U. MO. KAN. CITY L. REV. 24 (1971).

4. Many different types of exclusionary land use ordinances have been reviewed by the courts. Minimum residential lot sizes were invalidated in Appeal of Kit-Mar Builders, Inc., 439 Pa. 466, 268 A.2d 765 (1970) (zoning ordinance for two or three acres); but upheld in Ybarra v. Town of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974) (large minimum lot size zoning ordinance); County Comm'rs of Queen Anne's County v. Miles, 246 Md. 355, 228 A.2d 450 (1967) (five acre minimum lot size). Minimum building size requirements were upheld in Lionshead Lake v. Wayne Township, 13 N.J. Super. 490, 80 A.2d 650 (L. Div. 1951), *rev'd*, 10 N.J. 165, 89 A.2d 693 (1952), *appeal dismissed*, 344 U.S. 919 (1953) (per curiam) (minimum floor area requirements); but invalidated in Appeal of Medinger, 377 Pa. 217, 104 A.2d 118 (1954) (minimum floor area requirement of 1800 square feet). Exclusion of mobile homes has been allowed in Vickers v. Gloucester Township, 37 N.J. 232, 181 A.2d 129 (1962), *appeal dismissed*, 371 U.S. 233 (1963) (zoning ordinance barring trailer camps from industrial district); Wilkerson v. Murray, 471 S.W.2d 460 (Sup. Ct. Mo. 1971), *cert. denied*, 404 U.S. 851 (1971) (exclusion of mobile homes from residential areas). Exclusion of multiple unit dwellings was disallowed in Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970). Restrictions on the number of bedrooms per dwelling unit were invalidated in Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super. 11, 283 A.2d 353 (L. Div. 1971); but upheld in Malmar Associates v. Board of County Comm'rs for Prince George's County, 260 Md. 292, 272 A.2d 6 (1971) (percentage of bedrooms in apartment developments in medium density district).

Much has been written about exclusionary land use devices. Among the most informative discussions is 3 N. WILLIAMS, AMERICAN LAND PLANNING LAW pt. 8, § D (1975) [hereinafter cited as WILLIAMS]. Professor Williams points out that exclusionary land use devices are usually not motivated solely by a desire to discriminate. Bona fide purposes such as preservation of aesthetics, a rural atmosphere, or topographical characteristics may encourage their adoption. Justice Douglas in Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), impliedly sanctioned certain motives as legitimate when he stated that "[a] quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs." *Id.* at 9.

5. Most authors who undertake an analysis of any facet of the law of standing preface their work with epithetical warnings. Resisting the temptation, we will simply note the constitutional origin of the doctrine in U.S. CONST. art. III, § 2, cl. 1. "The judicial Power shall extend to all *Cases*, in Law and Equity, arising under this Constitution, the Laws of the United States, . . . to all *Cases* affecting Ambassadors, . . . to all *Cases* of admiralty . . . to *Controversies* between two or more States . . ." (emphasis added).

This clause has always been cited as the foundation for the standing doctrine. The meaning attached to the terms "cases" and "controversies" determines the extent of judi-

federal courts for fifty years would have required a property interest in any case involving land use. With the abandonment of the "legal injury" test in 1970 in *Association of Data Processing Service Organizations, Inc. v. Camp*,[7] and the substitution of the "injury in fact" test,

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cial power. Adverse litigants with truly conflicting interests represent the standard stressed in numerous cases. In Baker v. Carr, 369 U.S. 186 (1962), the Court posed the fundamental question which must be answered in determining whether a litigant has standing to sue: "Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions?" *Id.* at 204. During the last decade, however, the very nature of the standing doctrine has been questioned. *See, e.g.*, Bledsoe, *Mootness and Standing in Class Actions*, 1 FLA. ST. U.L. REV. 430 (1973); Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645 (1973). Professor Raoul Berger goes so far as to doubt the very legitimacy of the doctrine in Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816 (1969). Professor Berger points out that if one is to analyze the true origin of the limiting phrase "cases or controversies" and discover its meaning, one must look to the English common law as the lineal ancestor of our own body of law. In doing so he finds that " 'standing' was neither a term of art nor a familiar doctrine at the time the Constitution was adopted." *Id.* at 818. At that time, the English practice allowed "one without a 'personal stake' . . . to initiate and maintain an 'adversary' proceeding in the public interest to challenge a jurisdictional usurpation." *Id.* at 827. Thus, "[w]hen the Court stated in Flast v. Cohen, 392 U.S. 83 at 101 (1968), that in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution[,] . . . [the Court] misinterpreted English history." *Id.* at 827. Perhaps entertaining doubts concerning Justice Frankfurter's references to the "practices of the courts of Westminster," the Court sought to bolster the doctrine of standing by arguments derived from the separation of powers and advisory opinion doctrines. "The phrase 'cases and controversies' was explained primarily as defining 'the role assigned to the judiciary in a tripartite allocation of power to assure that the courts will not intrude into areas committed to the other branches of the government.' " *Id.* at 828. This overemphasis on the separation of powers, Berger warns, "is apt to obscure the no less important system of 'checks and balances.' " *Id.* " 'Case or controversy,' to be sure, seeks to confine the courts to what Madison termed cases of a 'judiciary nature' as distinguished from a roving revision of legislation. Legislation is emphatically not for the courts; but after the legislative process is completed the courts may decide in the frame of litigation that a statute is invalid as a legislative usurpation. A legislative usurpation does not change character when it is challenged by a stranger; and judicial restraint thereon remains a 'judicial' function, not an 'intrusion,' though undertaken at the call of one without a personal stake." *Id.* at 829.

6. The "legal injury" test was enunciated in Tennessee Electric Power Co. v. T.V.A., 306 U.S. 118 (1939), and provided that a person threatened with injury by governmental action does not have standing to contest such action in the courts "unless the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." *Id.* at 137-38. Since there is no legal right to be free from competition by the government, standing was denied in that case.

7. 397 U.S. 150 (1970).

the federal courts became the obvious forum for constitutional challenges to local zoning ordinances by nonpropertied low-income minorities.

Though the *Data Processing* test significantly reduced the threshold requirement for access to the federal courts in general, exactly how this test would be applied in land use cases was unclear. In the first generation cases after *Data Processing*, nonpropertied minorities raising Fourteenth Amendment challenges to zoning ordinances overcame the standing barrier.[8] However, in each case, the minorities joined as co-plaintiff a corporation which had actually perfected an application for a specific housing project and it was not evident from the decisions to what extent the individuals' standing was dependent, if at all, upon this joinder. Nevertheless, this initial success led minority plaintiffs to attempt more direct attacks on zoning ordinances. Both individually, and through class actions, prospective purchasers or renters of low or moderate cost housing and prospective builders of such housing challenged ordinances on their faces or as enforced without perfecting an application for a specific housing project.[9] This trend was noted by commentators,[10] several of whom viewed the Supreme Court's grant of certiorari in *Warth v. Seldin*[11] as an opportunity for the Court to give its *imprimatur* to the abandonment of traditional standing rules in land use cases. The majority of the Court in *Warth*, however, declined this opportunity in spite of the liberalization of standing under *Data Processing* and the important constitutional issues involved in the case. Instead, the Court adopted a causation test for standing which limits any future deliberations to the constitutionality of denying a specific variance, thereby precluding any full-scale attack on the system of exclusionary devices.[12]

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8. *See, e.g.*, Park View Heights Corp. v. City of Black Jack, 467 F.2d 1208 (8th Cir. 1972); Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972); Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); Sisters of Providence of St. Mary of Woods v. City of Evanston, 335 F. Supp. 396 (N.D. Ill. 1971); English v. Town of Huntington, 335 F. Supp. 1369 (E.D.N.Y. 1970); *cf.* United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974).

9. *See* Aloi, *Recent Developments in Exclusionary Zoning: The Second Generation Cases and the Environment*, 6 SW. U.L. REV. 88 (1974) [hereinafter cited as Aloi].

10. *Id.*; Note, *Towards Liberalized Requirements for Standing in Zoning Litigation—Approximation of the Public Welfare*, 5 MEMPHIS ST. U.L. REV. 251 (1975).

11. 495 F.2d 1187 (2d Cir.), *cert. granted*, 419 U.S. 823 (1974).

12. "In holding that neither potential developers nor potential residents of such housing have standing to make such a claim unless local authorities have rejected a particular proposal for development, the Court has not merely postponed adjudication of the exclusionary zoning issue. It has eliminated the issue from future litigation. The effect of requiring a concrete proposal prior to development will be to shift the focus of subsequent litigation from the issue the plaintiff in *Warth* wanted to raise—the per-

The Court's departure from "pure" *Data Processing* analysis by its emphasis on the causal element raises questions about the future of the standing doctrine. The authors contend that such a departure was not necessary if the Court merely sought to avoid the merits on the particular facts of the *Warth* case. A review of the relevant case law discloses ample precedent available to the Court for dismissing the case on the merits. The fact that the Court did not do so may indicate that the Court viewed *Warth* as an opportunity to restrict standing in the land use area without disrupting the substantial body of law under *Data Processing*. Yet the Court's detailed discussion of the causation requirement lends credence to the hypothesis that the Court may intend to apply *Warth* even beyond the land use area as part of a wholesale retreat from the *Data Processing* decision.

Although the *Warth* complaint names several classes of plaintiffs,[13] we will discuss only the denial of standing to the low-income

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missibility of excluding all low- and moderate-cost housing from a suburb—to the quite different issue of whether rejection of a particular proposal is constitutionally permissible. The focus, in other words, will be upon the issue so familiar in zoning litigation, whether the refusal to permit a particular development at a particular location is 'reasonable.'

"The legal significance of the Court's supposedly procedural decisions is, thus, to foreclose the substantive issue plaintiff attempted to raise. The practical consequence is to preclude effective use of the federal constitution to open suburbia to additional low- and moderate-cost housing." Sandalow, *Comment on Warth v. Seldin*, 27 LAND USE LAW & ZONING DIGEST, No. 9, at 7-8 (1975).

13. The class of plaintiffs in *Warth* included several individual Rochester taxpayers and three associations: Metro-Act of Rochester, Housing Council of Monroe County, and Rochester Home Builders Association.

The taxpayers owning property in Rochester contended that Penfield's refusal to provide its "fair share" of low and moderate cost housing had caused an increase in their tax burden, because the city of Rochester was forced to supply such housing, much of which was tax-abated. The Court found that apart from the conjectural nature of the asserted injury, the line of causation between Penfield's action and such injury was not apparent from the complaint. "Whatever may occur in Penfield, the injury complained of—increases in taxation—results only from decisions made by the appropriate Rochester authorities, who are not parties to this case." Warth v. Seldin, 422 U.S. 490, 509 (1975). Even assuming an adequate causal connection, however, the Court found another flaw which alone would have warranted dismissal: plaintiffs did not assert any personal right under the Constitution or any statute. "In short the claim of these petitioners falls squarely within the prudential standing rule that normally bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves." *Id.* The Court noted exceptions to this general rule:

(1) when Congress, by statute, explicitly allows such third party suits;

(2) when enforcement of the challenged restriction against the litigant would result indirectly in an infringement of the third party's rights;

(3) when the challenged activity adversely affects a relationship between the petitioner and the persons whose rights allegedly are violated; and

(4) where the petitioner's prosecution of the suit is necessary to insure protection of the rights asserted because those actually injured are unable to assert their own rights.

minority individuals. Our discussion is so limited because they are the persons who, after *Warth*, are left largely without a remedy.

This note gives a general background of present standing law, discusses the *Warth* decision with special emphasis on the newly announced causation test, and considers possible explanations for the Court's denial of standing in *Warth*.

But the Court found none of these exceptions applicable to the petitioner-taxpayers. *Id.* at 509-10.

Metro-Act is a nonprofit corporation having as one of its primary purposes the securing of open housing in Rochester suburbs. This organization claimed standing on its own behalf as a Rochester taxpayer and on behalf of its members who were also Rochester taxpayers. The Court found that the denial of standing to the Rochester taxpayers was equally applicable to all taxpayer-plaintiffs. Metro-Act also claimed standing on behalf of persons of low and moderate income. For the Court's answer to this claim, see text accompanying notes 50-57 *infra*. Relying on Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972), Metro-Act alleged that 9% of its members were current residents of Penfield who were deprived, by defendants' exclusionary practices, of the constitutionally protected benefits of living in a racially and ethnically integrated community. The Court determined that *Trafficante* was not controlling in the *Warth* case. In *Trafficante*, the plaintiffs had a congressionally conferred right of action under the 1968 Civil Rights Act, 42 U.S.C. § 3604. Metro-Act asserted no such statutorily conferred right of action. The Court indicated that even assuming, *arguendo*, that the asserted harm to Metro-Act's Penfield members was sufficiently direct and personal to satisfy the case or controversy requirement of Article III, prudential considerations would strongly militate against a grant of standing. Warth v. Seldin, 422 U.S. at 512-14.

Housing Council is a nonprofit organization consisting of private and governmental agencies as well as minorities. Housing Council includes in its membership at least seventeen groups that have been, are, or will be involved in the development of low and moderate cost housing. But, with the exception of Penfield Better Homes Corporation, there was no allegation that any of these groups or their members took any steps toward building in Penfield or had any dealings with the respondents. Consequently, Housing Council failed to demonstrate any injury to its members of sufficient immediacy and ripeness to warrant judicial intervention. *Id.* at 516-17. The Court treated Penfield Better Homes separately in view of the allegations that it had applied to respondents in late 1969 for a zoning variance to allow the construction of a moderate-cost housing project and had been rejected. The Court found nothing in the complaint to indicate that the Better Homes project was still viable in 1972, when this complaint was filed, or that respondents continued to prevent a then current project. "In short, neither the complaint nor the record supplies any basis from which to infer that the controversy between respondents and Better Homes, however vigorous it may once have been, remained a live, concrete dispute when this complaint was filed." *Id.* at 517.

Home Builders is a nonprofit trade association, consisting of persons in the business of constructing, developing, and maintaining residential housing in metropolitan Rochester. Home Builders asserted standing to represent its member firms on the grounds that Penfield's zoning restrictions and the township's refusals to grant permits and variances for low and moderate cost housing had deprived some of its members of "substantial business opportunities and profits." *Id.* at 515. While Home Builders claimed $750,000 in damages, it alleged no monetary injury to itself, nor any assignment of the damage claims to its members. Since whatever injury that may have been suffered was peculiar to the individual member concerned, each member would have to be a party to the suit, and Home Builders would have no standing to claim damages on the member's behalf.

I. Requirements for Standing

A. The Data Processing Test

In 1970, the Supreme Court, with a heightened awareness of its role in social reform, determined that the "legal injury"[14] requirement on which standing traditionally had been predicated was unduly restrictive and inappropriate because it necessarily went to the merits. The thrust of the Court's decision in *Data Processing* was to create a standing doctrine which would not compel the anticipatory, sub silentio consideration of substantive issues.[15] A new, two-prong test was advanced which required that the plaintiff *allege* (1) that the challenged action had caused him "injury in fact," economic or otherwise, and (2) that the interest which he was seeking to protect was *arguably* within the zone of interests protected or regulated by statute or constitutional guarantee.[16] Justice Douglas, writing for the majority, acknowledged the rule of judicial self-restraint. However, he also emphasized the trend toward enlarging the class of persons who may protest administrative action to include even those who are not specifically included in the statutory or constitutional provision, as long as they are not specifically excluded.[17] Justices Brennan and White would have gone further in liberalizing the standing doctrine by eliminating the second prong of the test and requiring simply an allegation of "injury in fact."[18]

Home Builders' prayer for prospective relief failed also. The complaint referred to no specific project of any of its members that was currently precluded either by the ordinance or by respondents' enforcement thereof. Home Builders and its members suffered no personal and immediate injury. *Id.* at 514-16.

14. See note 6 *supra.*

15. "The 'legal interest' test goes to the merits. The question of standing is different." Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970).

16. *Id.* at 152-53.

17. "Where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action. The whole drive for enlarging the category of aggrieved 'persons' is symptomatic of that trend." *Id.* at 154.

18. "By requiring a second, nonconstitutional step, the Court comes very close to perpetuating the discredited requirement that conditioned standing on a showing by the plaintiff that the challenged governmental action invaded one of his legally protected interests." Barlow v. Collins, 397 U.S. 159, 168 (1970). *See* Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970) [hereinafter cited as Davis]. Professor Davis agrees with the Brennan-White approach and strongly criticizes the majority view as being: "(1) analytically faulty, (2) contrary to much case law the Court should not have intended to overrule, (3) cumbersome, inconvenient, and artificial, and (4) at variance with the dominant intent behind the Administrative Procedure Act." *Id.* at 457-58. *But see* Sedler, *Standing, Justiciability, and All That: A Behavioral Analysis*, 25 VAND. L. REV. 479 (1972) [hereinafter cited as Sedler]. Professor Sedler finds the appropriateness of the second prong of the *Data Processing* test not to be so "live" an issue as Professor Davis suggests. "In the area of judicial review of administrative action, the differ-

The *Data Processing* decision was greeted in most quarters with great relief and applause.[19] Most writers viewed it as an opening of the Court's doors to new litigation.[20] Others predicted the demise of the standing doctrine: "The Supreme Court's recent decisions have made the standing obstacle to judicial review a shadow of its former self, and have for all practical purposes deprived it of meaningful vitality."[21]

B. The Test Refined

Although it was clear that the Court intended to lower the threshold of standing to accommodate all but the most spurious suits, the precise height of that preliminary step was to be measured by subsequent cases applying the *Data Processing* yardstick. As the Court began to employ the new test, it became clear that one vestige of the pre-*Data Processing* standing doctrine remained: namely, the party seeking review must claim some personal injury. However, the fact that the grievance was shared by the multitude did not make it any less appropriate as a basis for standing provided it was not a "generalized grievance."[22] A comparison between *Sierra Club v. Morton*[23] and *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*[24] illustrates this distinction. In *Sierra Club* a declaratory

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ence in approach conceivably could bring about a different result, but only if the courts would employ the zone of interests test to deny standing to one who has been injured in fact. In practice they have not done so, and there appears to have been no reported case in which a court finding injury in fact has not also found that the plaintiff's claim was arguably within the zone of interests to be protected or regulated." *Id.* at 486.

19. *See* Tucker, *The Metamorphosis of the Standing to Sue Doctrine*, 17 N.Y.L.F. 911 (1972); Davis, *supra* note 18. *But see* Dugan, *Standing to Sue: A Commentary on Injury in Fact*, 22 CASE W. RES. L. REV. 256 (1971); Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425 (1974). In Professor Albert's opinion, "[b]y de-emphasizing inquiry into the personal interests of the complainant and granting unexplained relief without inquiry into legal interest, the Court has indirectly endorsed public interest standing. And in affirming that standing is or should be a threshold inquiry unconcerned with the merits, and by rejecting legal interest on that basis, the Court has perpetuated the inappropriate notion of access standing." *Id.* at 475-76.

20. *See, e.g.*, Sedler, *supra* note 18, at 481-82. "The practical effect of these decisions . . . is that in most cases standing is no longer an obstacle to judicial action in federal courts. In policy terms, the new decisions represent a value judgment—and in this sense a command to lower federal courts—that standing should be liberalized and federal judicial review of governmental action broadened."

21. National Automatic Laundry and Cleaning Council v. Shultz, 443 F.2d 689, 693 (D.C. Cir. 1971).

22. United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 687 (1973) [hereinafter cited as SCRAP].

23. 405 U.S. 727 (1972).

24. 412 U.S. 669 (1973). It should be noted that Justice Stewart, author of *SCRAP*, was the pivotal vote in the five to four decision in *Warth*.

judgment and an injunction were sought against the building of a ski resort in the Mineral King Valley of Sequoia National Forest. The Court denied standing because the plaintiffs failed to allege personal injury by neglecting to plead that they were among those who used the park, and that the projected ski resort would diminish the aesthetic and recreational value of the area for them. On the other hand, in *SCRAP*, the Court was willing to follow a far more attenuated line of causation to the eventual injury of the plaintiffs. There, the plaintiffs challenged a proposed rate increase of 2.5 percent on transportation of freight which allegedly would have caused an increase in the use of nonrecyclable as compared to recyclable commodities. The increased use of nonrecyclable goods allegedly would have resulted in a need for more natural resources, some of which might have been taken from the Washington area, and in the discarding of more refuse in the national parks in the Washington area. As residents of Washington, the plaintiffs alleged harm to their recreational and aesthetic interests. As taxpayers, they alleged economic harm due to the increased taxes that would be needed to provide for the disposal of otherwise reusable waste materials. The Court, finding that these allegations constituted a claim of personal injury, granted standing. A comparison of these two cases leads to the conclusion that the test for "injury in fact" was based not on the directness or significance of the injury, but rather on a simple formality, the proper phrasing of the pleadings.

In *Schlesinger v. Reservists Committee to Stop the War*,[25] the Court again emphasized the need for personal injury, but this time the requirement was couched in terms of "abstract" and "concrete" injury. The plaintiffs, suing as citizens, sought a declaration that members of Congress were ineligible to hold a commission in the armed forces reserve because of the incompatability clause of Article I, section 6. The plaintiffs alleged that a violation of the incompatability clause would deprive citizens of the faithful discharge of legislative duties by reservist members of Congress.[26] The Court found the allegation abstract and speculative, and the plaintiffs' interest one that was shared by all citizens.[27] The Court spoke at length of the necessity for concrete injury:

> [C]oncrete injury, whether actual or threatened, is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution. It adds the essential dimension of specificity to the dispute . . . . This personal stake is what the Court has consistently held enables a complainant authoritatively to present to a court a complete perspective upon the

25. 418 U.S. 208 (1974).
26. *Id.* at 212.
27. *Id.* at 220.

> adverse consequences flowing from the specific set of facts undergirding his grievance.[28]

The Court indicated that the demand for concrete injury was not only a constitutional requirement, but also a rule of judicial restraint:

> To permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing "government by injunction."[29]

In *O'Shea v. Littleton*,[30] the Court placed another gloss on the general requirement of personal injury by requiring that the injury be "present." Plaintiffs brought a class action to enjoin "discriminatory enforcement and administration of criminal justice in Alexander County."[31] The Court held that past injury, caused by illegal conduct, in itself did not present a case or controversy "if unaccompanied by any continuing, present adverse effects."[32] None of the named plaintiffs alleged a present injury as a result of a statute being unconstitutional on its face or as applied. Since any future injury rested on a violation of a criminal law, the Court considered such injury too remote to present an actual case or controversy. The Court assumed that plaintiffs would conduct their activities within the law and thereby avoid prosecution, conviction, and exposure to the defendants' allegedly illegal conduct.[33]

This case by case expansion and definition of the term coined in *Data Processing* makes it clear that while "injury in fact" may take almost any form, it must nevertheless be a personal, concrete, and present harm. Against this background, *Warth* occupies a unique position as the first post-*Data Processing* standing decision in the land use area.

II. Warth v. Seldin

A. Background of the Litigation

In 1970, of the 23,782 persons residing in Penfield, New York, a suburb of Rochester, only sixty were black.[34] The community's land

28. *Id.* at 220-21.

29. *Id.* at 222.

30. 414 U.S. 488 (1974). The circuit court judge in *Warth* relied on *O'Shea* in denying standing to the plaintiffs.

31. *Id.* at 491.

32. *Id.* at 495-96.

33. *Id.* at 497.

34. This statistic is based on the 1970 census. Petitioners' Brief for the United States Supreme Court at 8 n.7, Warth v. Seldin, 422 U.S. 490 (1975).

use ordinance, fairly typical of suburban communities,[35] allocated ninety-eight percent of the town's vacant land to single-family detached housing.[36] Only three-tenths of one percent of the land available for residential construction was zoned for multifamily dwellings,[37] with a maximum density of twelve units per acre,[38] and a minimum number of garage and enclosed parking facilities for each unit.[39] In 1972, it was impossible to construct a single-family dwelling in Penfield conforming to the zoning ordinance at a cost less than $29,115.[40] In that year the plaintiffs brought a class action in the District Court for the Western District of New York. They challenged Penfield's ordinance and its administration during a fifteen year period[41] by the zoning and planning boards and the city council as "racially discriminatory and exclusionary."[42] In support of this allegation, they claimed that they searched for housing in Penfield but were excluded due to defendants' policies and practices and were therefore injured, having been forced to live in a community with inferior housing[43] and schools, reduced job opportunities, and increased expense and inconvenience in commuting long distances to work.[44]

35. This observation was made by Federal Circuit Judge Hays. Warth v. Seldin, 495 F.2d at 1189.

36. Warth v. Seldin, 422 U.S. at 495 (referring to petitioners' complaint).

37. *Id.*

38. PENFIELD, N.Y. ORDINANCES §§ 2.9-11.21 D(1)(e).

39. Petitioners' Brief for the United States Supreme Court at 6, Warth v. Seldin, 422 U.S. 490 (1975).

40. *Id.* at 5.

41. Respondents' Brief for the United States Supreme Court at 1, Warth v. Seldin, 422 U.S. 490 (1975).

42. Petitioners' Brief for the United States Supreme Court at 3-9, Warth v. Seldin, 422 U.S. 490 (1975). Petitioners alleged the deprivation of rights secured by the First, Ninth and Fourteenth Amendments to the Constitution and violation of their rights under 42 U.S.C. § 1982, 42 U.S.C. § 1981 and 42 U.S.C. § 1983. *Id.* at 4, nn.3 & 4.

43. " 'The defects in our apartment include many leaks in the roof, bad wiring, roach infestation, rat and mice infestation, crumbling housing foundation, broken front door, broken hot water heater, etc. . . . . [S]ince the foundation has started crumbling, there have been mice and rats coming into the house. The mice and rat infestation is now so bad that they come through the heating vents into the rooms of the apartment itself. I have already caught two mice in the children's bed. To have rats and mice infesting the house causes great anxiety among the children. One way I try to reduce the danger of my children getting bitten is to leave the light on in the bedroom all night. The children are now afraid to go to sleep unless there is a light on in the room.' " *Id.* at 10-11.

44. " 'The maximum distance from my job if I had been able to live in the Town of Penfield would have involved driving time of no more than twenty minutes. . . . [T]he costs of gasoline alone, commuting to and from the job in Penfield has cost me $666.00 per year.' " *Id.* at 10. "Since I was unable to locate housing near my work in the Town of Penfield (employment dating from my arriving in Rochester in 1966 to May 1972) I have been forced by reason of the exclusionary practices of the Town

The district court dismissed the complaint,[45] stating that plaintiffs lacked the requisite standing and had failed to state a claim upon which relief could be granted. The Court of Appeals for the Second Circuit affirmed the lower court on the sole ground that the plaintiffs lacked standing.[46] On October 15, 1974, the Supreme Court granted certiorari.[47]

B. Standing of the Minority Plaintiffs

The minority plaintiffs in *Warth* alleged that they were excluded from living in Penfield as a result of the town's racially discriminatory exclusionary zoning ordinance and its administration by defendants.[48] Each petitioner asserted that he had made fruitless attempts to locate housing in Penfield that would be within his means and adequate for his family's needs. Why, despite these allegations of personal, present, and concrete injury, were plaintiffs denied standing?

The Supreme Court stated at the outset the well-established rule that for the purpose of testing a motion to dismiss for lack of standing all allegations are assumed true.[49] Accepting plaintiffs' allegations, the Court did not focus upon a lack of injury in fact or a failure to fall within the zone of interest of the constitutional and statutory framework that allegedly protected plaintiffs. Rather, the Court articulated a new question concerning causation.[50] Did petitioners allege facts from which it could reasonably be inferred that, absent respondents' restrictive zoning practices, "there [was] a *substantial probability* that they would have been able to purchase or lease in Penfield[?]"[51] This question, never asked in *Data Processing*, limits what was formerly thought to be the *Data Processing* rule. The *Warth* decision makes it

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of Penfield to reside . . . forty-two miles from my work. . . . Travel one way to the job in Penfield took at least one hour and ten minutes one way—in bad weather, the time involved one way to work was about two hours.' " *Id.* at 9-10.

45. The district court opinion was unpublished.

46. 495 F.2d at 1189.

47. 419 U.S. 823 (1974).

48. Petitioners' Brief for the United States Supreme Court at 3-9, Warth v. Seldin, 422 U.S. 490 (1975).

49. 422 U.S. at 501-02.

50. From the numerous citations in the *Warth* opinion to prior standing cases one might deduce that the decision was merely an application of a well-established standing doctrine. Justice Brennan's dissent shows that he felt that a new test, out of step with *Data Processing*, had been established. "The Court today, in an opinion that purports to be a 'standing' opinion but that actually, I believe, has overtones of outmoded notions of pleading and of justiciability, refuses to find that any of the variously situated plaintiffs can clear numerous hurdles, *some constructed here for the first time*, necessary to establish 'standing'." 422 U.S. at 520 (Brennan, J., dissenting) (emphasis added).

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

clear that not every allegation of injury in fact that falls within the purview of a statute or a constitutional provision invoked by plaintiffs will trigger judicial review. In contrast to the *Data Processing* decision where new terms and concepts were generated without definition, the *Warth* opinion stated explicitly what a showing of *substantial probability* entailed. Petitioners must allege that (1) they held "a present interest in any Penfield property," (2) they were "subject to the ordinance's strictures," and (3) they had been "denied a variance or permit by respondent officials."[52] Since no low-income minority plaintiff successfully excluded from Penfield could satisfy any of these requirements the possibility of any direct attack on exclusionary zoning ordinances is foreclosed. The only persons who can satisfy these three criteria, other than the residents of Penfield[53] are developers; any future challenge must therefore be brought as a third party suit by minority plaintiffs on behalf of a developer. Even this avenue of attack, which has been used successfully in the lower federal courts, was narrowed by the *Warth* decision.

C. The Third Party Standing of Minority Plaintiffs

After concluding that the individual petitioners did not have standing in their own right, the Court presumed that they were in fact bringing a third party action on behalf of the developers who were denied a variance by the Penfield Zoning Board.[54] Originally intended to supply a causal link between respondents' actions and plaintiffs' injury, the allegations relating to two unsuccessful applications for rezoning filed by developers were examined in the context of a third party suit.

In late 1969, Penfield Better Homes Corporation attempted to obtain a variance to rezone certain land to allow construction of subsidized cooperative housing units that could be purchased by persons of moderate income. The Penfield Planning Board denied the variance on the grounds that it would (1) constitute an inappropriate use of the land and would not be consonant with the existing character of the neighborhood, (2) cause traffic congestion, and (3) present the danger

52. *Id.*

53. Those white residents of Penfield who did not wish to perpetuate the exclusionary zoning policy and who sought to challenge the ordinance because it deprived them of the benefits of living in an integrated community were denied standing by the *Warth* Court. See note 13 *supra.*

54. The Court warned that in such third party suits, it may be substantially more difficult to satisfy the case or controversy mandate of Article III because the harm caused by the governmental prohibition or restriction is only indirect. 422 U.S. at 505. See note 13 *supra* for a general discussion of the circumstances in which third party suits are proper.

of soil erosion during and after construction.[55] In late 1971, O'Brien Homes, Inc. made a similar effort to build housing for persons of "low income and accumulated funds" and persons "of moderate income with limited funds for down payment." Once again the request for a variance was denied.[56]

The *Warth* Court held plaintiffs' third party standing inadequate. In the case of third party suits, the *substantial probability* test again comes into play, this time requiring that plaintiffs represent the hypothetical family for whom the proposed housing project was designed. After an elaborate analysis in extensive footnotes, the Court concluded that none of the plaintiffs represented precisely that family. Petitioners Ortiz, Broadnax, and Sinkler alleged that they could afford a maximum of $120 per month for housing. The majority of the Court concluded that the proposed units were too small to accommodate the large families of Ortiz and Broadnax and that neither Sinkler nor Broadnax could afford to live in the proposed units. Petitioner Reyes presented a "special case" in that her income level would preclude her from living in the proposed units because they were to be government-subsidized.[57] Thus, only those cases in which plaintiff has alleged that he has the housing needs and financial capabilities to reside in one of the proposed units will be reviewed on the merits.

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55. Petitioners' Brief for the United States Supreme Court at 7, Warth v. Seldin, 422 U.S. 490 (1975). A survey by the County of Monroe, Director of Public Works revealed that increased traffic would not create any problems with respect to existing traffic facilities in the area. *Id.*

56. 422 U.S. at 505 n.15.

57. 422 U.S. at 506-07 n.16. The majority's conclusion is subject to question in several respects. For example, the calculations of the Court took inflation into account in computing rental costs of the units, but ignored probable salary increases of the petitioners in computing the amounts that each could afford to spend for housing.

In his dissenting opinion, Justice Brennan argues that petitioners would have qualified under the proposed project income levels: "[T]here appears in the record as it stands a report of the Penfield Housing Task Force on Moderate Income Housing . . . prepared for the Penfield Town Board itself, which defines '*moderate income families* as families having incomes between $5,500 and $11,000 per year, depending on the size of the family,' . . . and moderate-income housing as housing 'priced below $20,000 or [carrying] a rental price of less than $150 a month' . . . . Thus, while the Court might not know what was meant by 'low' and 'moderate' income housing, . . . respondents clearly did. The petitioners here under discussion fell within the Board's own definition of moderate-income families, except for petitioner Reyes, who alleges that she could afford a house for $20,000 but not more . . . . The causation theory which the Court finds improbable, then, was adopted by the task force of the Town Board itself. Of course, we do not know at this stage whether a particular named plaintiff would *certainly* have benefited from the changes recommended by the task force, but at least there is a good chance that, after discovery and trial, they could show they would." 422 U.S. at 527-28 n.7.

D. The Requirement of Proof on the Pleadings

The dissent argued that the *Warth* plaintiffs did have standing under *Data Processing*:

> [I]t is abundantly clear that the harm *alleged* satisfies the "injury in fact, economic or otherwise," [citing *Data Processing*] requirement which is prerequisite to standing in federal court. The harms claimed—consisting of out-of-pocket losses as well as denial of specifically enumerated services available in Penfield but not in these petitioners' present communities . . . are obviously *more* palpable and concrete than those held sufficient to sustain standing in other cases. [Citing *SCRAP* and *Sierra Club*.][58]

Until *Warth* a mere allegation of a causal link was sufficient. The first prong of the *Data Processing* standing test required that a plaintiff *allege* a causal connection between the alleged injury in fact and defendants' action. *SCRAP* exemplified the Court's willingness to accept a complaint alleging a most attenuated chain of causation, at least for the issue of standing.[59] As stressed by Justice Brennan, the new test set out in *Warth* exhibits, in contrast, the Court's unwillingness to find that the requirement of causation can be satisfied by anything less than proof on the pleadings.[60]

The newly created "substantial probability" test undermines the policy decision made in *Data Processing* by reducing access to the federal courts and compelling threshold examination of the merits. The Court may have wished to qualify the causal element in standing cases to preclude the use of a standard as lax as that employed in *SCRAP*, which might be characterized as requiring only a remote possibility of injury. Still, the Court could have accomplished this result without subverting the policy underlying the *Data Processing* decision. A demand of "reasonable probability" would have assured that the pleadings "be something more than an ingenious academic exercise in the conceivable,"[61] yet would not have forced the plaintiff to prove his case at the standing stage.

E. The Problem of an Adequate Remedy

Underlying the causation standard announced in *Warth* is the Court's concern that an adequate remedy be provided in all cases. Thus, the ultimate question is not whether the defendants harmed plaintiffs in a specific way, but whether the Court feels that it can pro-

58. *Id.* at 525 (Brennan, J., dissenting).
59. 412 U.S. 669 (1973).
60. This is noted by Justice Brennan in his dissent. 422 U.S. at 528.
61. U.S. v. SCRAP, 412 U.S. at 688.

vide effective relief. The Court's reliance on *Linda R. v. Richard D.*[62] illustrates this concern:

> Petitioners must allege facts from which it reasonably could be inferred that . . . if the court affords the relief requested, the asserted inability of petitioners will be removed.[63]

In this opinion, a mother of an illegitimate child challenged the allegedly discriminatory application of a Texas criminal statute[64] providing that any "parent" who failed to support his or her children was subject to prosecution. This statute had been consistently construed by the Texas courts to apply solely to parents of legitimate children. Although the Court acknowledged that the mother had suffered an injury, the majority, in a five to four decision, nevertheless denied her standing because she was unable to show that the father's failure to support his illegitimate child was a result of the nonenforcement of the criminal statute. The Court reasoned that enforcement of the statute would send the father to jail but would in no way insure that the plaintiff's child would receive any support.[65] According to the Court, the proper party to challenge the underinclusiveness of the statute[66] would be the parent of a legitimate child who had been prosecuted for failure to support his child.

Similarly, the minority plaintiffs in *Warth* were denied access to the Court because they had not established a substantial probability that they would be able to purchase or lease homes in the township if the Penfield ordinance were struck down. The court in *Warth* cited *Linda R.S.* as support for its new causation test. But in *Linda R.S.* the standard of causation was appreciably lower than "substantial probability": "[A] plaintiff must show a 'logical nexus between the status asserted and

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62. 410 U.S. 614 (1973).

63. 422 U.S. at 504.

64. Tex. Acts 1913, at 188; 1929, ch. 195, § 1, at 427; 1931, ch. 276, § 1, at 479 (repealed 1973) (now Tex. Penal Code § 25.05).

65. The majority's rationale in *Linda R.S.* is subject to question. As pointed out by Justice White in his dissent: "The Court states that the actual coercive effect of those sanctions on Richard D. or others 'can, at best, be termed only speculative.' This is a very odd statement. I had always thought our civilization had assumed that the threat of penal sanctions had something more than a 'speculative' effect on a person's conduct. . . . Certainly Texas does not share the Court's surprisingly novel view. It assumes that criminal sanctions are useful in coercing fathers to fulfill their support obligations to their legitimate children." 410 U.S. at 621 (White, J., dissenting).

66. For a discussion of underinclusiveness, see Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 348-51 (1949). There, the authors define an underinclusive classification as follows: "All who are included in the class are tainted with the mischief, but there are others also tainted whom the classification does not include. Since the classification does not include all who are similarly situated with respect to the purpose of the law, there is a prima facie violation of the equal protection requirement of reasonable classification." *Id.* at 348.

the claim sought to be adjudicated . . . .' "[67] In view of the *Warth* decision, low income minorities who wish to challenge zoning ordinances as exclusionary will be presented with two alternatives. The first is to incur the expense involved in perfecting an actual housing start and filing an application with the zoning board. If this is not a viable alternative, as it generally will not be, they will be forced to rely on developers who may have different and even conflicting motives and goals in challenging a local zoning ordinance. Land developers are unlikely spokesmen for persons excluded from the suburbs, in view of the fact that they share the same fears as suburbanites who adopt exclusionary ordinances—that land values will drop if low and moderate cost housing is built in the area where their land investment is made.[68]

F. Alternative Precedents

The outcome in *Warth* was not preordained. In the past few years several federal district and circuit courts have granted standing to low-income minority plaintiffs who joined with developers to challenge the exclusionary policies of a particular community.[69] Typical of these cases is *Kennedy Park Homes Association v. City of Lackawanna.*[70] Lackawanna, New York, had a total population of approximately 30,000. The city was divided into three wards, with a series of railroad tracks separating the first ward from the second and third. Most of the heavy industry in the city was located in the first ward where the Bethlehem Steel Corporation alone occupied more than half of the land. "Health-wise it is classified as a 'high risk area,' having double the incidence of tuberculosis and the highest infant mortality rate of the entire city."[71] In this highly industrialized first ward, which contained the most dilapidated housing in Lackawanna, lived 98.9 percent of the city's nonwhite population.[72]

In 1968, the Colored People's Civic and Political Organization, a group of citizens concerned about the housing situation in the first ward, obtained a commitment from the Catholic Diocese of Buffalo to sell them approximately thirty acres of land in the third ward. The organization planned to build low-income housing on this land. The pro-

67. 410 U.S. 614, 618. Had this standard been applied in *Warth*, the plaintiffs' allegations would have sufficed. Certainly, a showing of "logical nexus" would not have demanded the extensive inquiry into each petitioner's precise financial status that was required by the "substantial probability" test.

68. Note, *The Responsibility of Local Zoning Authorities to Nonresident Indigents*, 23 STAN. L. REV. 774, 782 (1971).

69. See note 8 *supra*.

70. 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971).

71. 436 F.2d at 110.

72. *Id.*

posed sale was greeted with an "enthusiastic" response by the prospective third ward members. Immediately petitions were circulated opposing the sale. The many signatories included such illustrious members of the community as the incumbent mayor and the president of the city council. In October, 1968, the city council passed an ordinance designating the land, previously proposed as a subdivision, as a park and recreation area and announced an indefinite moratorium on new subdivisions due to sewer problems. Shortly thereafter, a group of low-income residents and several developers brought suit in federal court to rescind both the rezoning and the moratorium. The court, in granting plaintiffs relief, summarily concluded that "all Plaintiffs [including minority individuals] have a personal stake in the outcome of the controversy."[73] In reaching this conclusion, the court did not condition the standing of the minority plaintiffs upon that of the developer.

Insofar as the court in *Kennedy Park* reached an innovative result by granting standing to persons who had no property interest in the traditional sense, it should have carefully explained its holding. The fact that the court did not do so enabled the Supreme Court in *Warth* to make short shrift of this holding. The Court distinguished cases like *Kennedy Park* from *Warth* on three grounds: (1) the plaintiffs challenged rezoning restrictions preventing development of particular projects; (2) the projects would have supplied housing within plaintiffs' means; and (3) the plaintiffs intended to reside in the projects.[74] But even though lower court cases such as *Kennedy Park* were more specifically oriented to particular projects, the policy and scope of *Data Processing* certainly did not preclude an extension of these cases to encompass the *Warth* litigants.[75] The Court in *Warth* indicated that at least when the discriminatory motive is blatant the Court will not tolerate municipalities' exclusionary practices. The Court also acknowledged the possibility that its test for standing may be relaxed in certain circumstances:

> This is not to say that the plaintiff who challenges a zoning ordinance or zoning practices must have a present contractual interest in a particular project. A particularized personal interest may be shown in various ways, which we need not undertake to identify in the abstract. But usually the initial focus should be on a particular project.[76]

The unidentified circumstances would presumably involve a situation in which the discriminatory motive is so apparent as to obviate the problem of causation.

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73. *Id.* at 112.
74. 422 U.S. at 507.
75. *Id.* at 525 (Brennan, J., dissenting).
76. *Id.* at 508 n.18.

III. Possible Explanations for the Result in Warth

A. A Decision on the Merits

The suggestion is often made that standing decisions are inevitably tainted to some degree by the court's attitude toward the merits of the case.[77] Clearly, the outraged dissenters in *Warth* felt that the majority opinion rested, in reality, upon the merits. Justice Douglas, in a separate dissent, suggested that the majority lacked sympathy for the petitioners' case:

> With all respect, I think that the Court reads the complaint and the record with antagonistic eyes. There are in the background of this case continuing strong tides of opinion touching on very sensitive matters, some of which involve race, some class distinctions based on wealth.[78]

Justice Brennan, joined by Justices White and Marshall, perceived an aversion on the part of the Court to confront the numerous and extremely complicated questions posed by this case:

> I can appreciate the Court's reluctance to adjudicate the complex and difficult legal questions involved in determining the constitutionality of practices which assertedly limit residence in a particular municipality to those who are white and relatively well off, and I also understand that the merits of this case could involve grave sociological and political ramifications. But courts cannot refuse to hear a case on the merits merely because they would prefer not to. . . .[79]

In light of these remarks, it seems appropriate to discuss the merits and to attempt to determine what it was that the majority may have felt was better left undecided.

Traditionally, in the area of equal protection, the Court applies a test of minimum rationality[80] to state action that raises socio-economic

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77. *See, e.g.*, Sedler, *supra* note 18, at 480-81. "[I]t is difficult to believe that a judge deciding whether to hear a constitutional or administrative challenge always draws fine distinctions between these components [of justiciability, including, among others, standing, ripeness, mootness]. It is perhaps more reasonable to conclude that frequently the judge takes more of a 'Gestalt approach,' and that his real concern is simply whether he should hear the case on the merits. This may explain why courts strain to find standing and to navigate the other hurdles to judicial review in some cases but not in others. Furthermore, it is difficult to ignore the merits of the case, particularly when the denial of standing may be an effective denial of the underlying claim itself." *Id. See also* Lewis, *Constitutional Rights and the Misuse of "Standing,"* 14 STAN. L. REV. 433 (1962).

78. 422 U.S. at 518 (Douglas, J., dissenting).

79. *Id.* at 520 (Brennan, J., dissenting).

80. *See, e.g.*, Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911). *See* Gunther, *The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a*

issues. The application of this standard generally determines the outcome of the action, because some rational basis, real or hypothetical, can always be found to justify the allegedly discriminatory action.[81] Where a suspect classification or a fundamental right is involved, however, the Court employs a more demanding standard. The state must show that the classification or the infringement of such a right is necessary to further a compelling state interest and that no less onerous alternative is available. Again, the application of this strict scrutiny standard generally determines the outcome of the case because the burden is virtually impossible for the defendant to sustain.[82] As a result, a plaintiff challenging exclusionary ordinances seeks to trigger this higher standard of review. Ordinances involving wealth and racial classifications and infringements on the right to travel would appear to present a strong case for applying the compelling state interest test.

1. *Wealth*

San Antonio Independent School District v. Rodriguez[83] dispelled any prospect that classifications based on wealth were *per se* suspect classifications. Prior to *Rodriguez*, several cases seemed to indicate that the Court was contemplating a campaign for economic equalization.[84] In *Rodriguez*, however, without overruling a single prece-

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Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1 (1972); *Forum: Equal Protection and the Burger Court*, 2 HASTINGS CONST. L.Q. 645 (1975). A most intriguing development in the Burger Court is the sporadic indication that traditional "mere rationality" review may mean, for the first time in many years, more than a perfunctory sanction of challenged state action. In several decisions during the 1971-72 Term the Court, while ostensibly employing the rational basis standard, struck down the challenged legislation. *See, e.g.*, James v. Strange, 407 U.S. 128 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971).

81. Only one Supreme Court decision in recent decades has held socio-economic legislation violative of equal protection. *See* Morey v. Doud, 354 U.S. 457 (1957), *rev'd per curiam*, City of New Orleans v. Duke, 44 U.S.L.W. 5075 (U.S. June 25, 1976).

82. In only one case has the state ever sustained the burden of demonstrating a compelling state interest. *See* Korematsu v. United States, 323 U.S. 214 (1944).

83. 411 U.S. 1 (1973).

84. Michelman, *The Supreme Court, 1968 Term, Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969). Professor Michelman went so far as to attempt to develop a theoretical framework within which elaboration of a governmental "*duty to protect against certain hazards which are endemic in an unequal society*" can take place. *Id.* at 9. Michelman recognizes the undesirability of complete economic equality and would require only minimum protection for the poor. In his view, poverty is a "complex of absolute, not relative, deprivations—a syndrome of particularly poignant hardships and particularly crushing denials of opportunity." *Id.* at 8. Under this theory, "[t]he claimant does not, except in a quite limited sense, try to show that an overall distributional configuration is improper. He claims a right to have *a specific, existing want* provided for, rather than to have a gen-

dent,[85] Justice Powell reduced the significance of wealth classifications to a single application. Two factors must coexist: (1) the plaintiff's income must fall below some identifiable level of poverty, or he must be indigent; and (2) he must have been *absolutely* deprived of a desired benefit.[86]

The high water mark in what many saw as the pre-*Rodriguez* current toward defining wealth classification as suspect was *Shapiro v.*

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erally larger or more equal income." *Id.* at 13-14 (emphasis in original). A "just want" is identifiable by two distinctive characteristics: (1) it is one that "justice requires that everyone be enabled to satisfy," and (2) it is one "everyone presumably would choose to satisfy" if he had the means. *Id.* at 30. To allow such want to go unsatisfied involuntarily is an injustice resultant from lack of wealth, because had the person had access to the means, he would have satisfied the want. "[J]ustice requires *more* than a fair opportunity to realize an income which can cover these needs or insure against them—requires, to be sure, absolute assurance that they will be met when and as felt, free of any remote contingencies pertaining to effort, thrift, or foresight." *Id.* at 14.

85. A line of criminal cases, beginning with Griffin v. Illinois, 351 U.S. 12 (1956), appeared to be indicia of a possible willingness on the part of the Court to undo other inequalities resulting from disparate economic conditions. *See* Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970); Douglas v. California, 372 U.S. 353 (1963). These were approved by Justice Powell because each had involved a constitutional right in which an *indigent* was *completely* deprived by reason of his poverty. Justice Powell notes in *Rodriguez* that the Court in *Douglas* provided no relief for those on whom the burden of paying for a criminal defense is relatively great but not insurmountable. Nor did the Court there deal with the relative differences in quality of counsel employed. 411 U.S. at 21. The Court in *Rodriguez* discussed only one in the series of voting rights cases, Bullock v. Carter, 405 U.S. 134 (1972). In *Bullock*, the Court invalidated a Texas filing fee requirement for primary elections. Like the criminal cases, *Bullock* was approved because in that case inability to pay caused absolute denial of a place on the primary ballot, and no other reasonable means of access was provided by the state.

Justice Powell's failure to discuss Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), is understandable because, despite the fact that the case has been cited as a wealth classification case, it really is not. True, the case contained some enigmatic language to the effect that the poll tax drew a line based on wealth, that such lines are "traditionally disfavored," and that wealth is "not germane to one's ability to participate intelligently in the electoral process." *Id.* at 668. But the decision strikes down the poll tax completely as applied to *all* persons, not just the poor.

86. 411 U.S. at 22-25. The Court indicates that "benefits" will be limited to important constitutional rights. Evidently, these rights when coupled with wealth in the appropriate circumstance need not be of that special breed of right, the "fundamental" right, since Justice Powell indicates in a footnote that the right to a basic education coupled with wealth discrimination might well suffice to require that strict scrutiny be applied. *Id.* at 25 n.60. "An educational financing system might be hypothesized, however, in which the analogy to the wealth discrimination cases would be considerably closer. If elementary and secondary education were made available by the State only to those able to pay a tuition assessed against each pupil, there would be a clearly defined class of "poor" people . . . who would be absolutely precluded from receiving an

Thompson,[87] in which the Court applied the strict scrutiny test to strike down welfare residency requirements. Surprisingly, the *Rodriguez* majority had no difficulty reconciling *Shapiro* with its conclusion that wealth is not a suspect classification. The Court simply concluded that the *Shapiro* decision was based, not upon wealth discrimination, but upon an interference with a fundamental right—the right to travel.[88] It was the penalty attendant upon the exercise of this fundamental right that compelled the application of the strict scrutiny test. Thus, the perception of *Shapiro* and other cases as the heralds of a constitutional assault upon economic inequity was nothing more than a case of mistaken identity.[89]

Although the *Warth* plaintiffs were excluded because of their inability to afford the type of home allowed under the Penfield ordinance, this wealth classification was not the kind constitutionally impermissible under *Rodriguez*. While it might be argued that the plaintiffs' incomes fell below a particular poverty level, they were not absolutely deprived of a "desired benefit" as they could afford housing in a community other than Penfield.

2. *Right to Travel*

In view of the Court's position in *Rodriguez* that "[i]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws,"[90] commentators have suggested the enlistment of an existing constitutional doctrine, the fundamental right to travel, to combat exclusionary land use practices.[91] Although an attractive proposition, this approach is fraught with many problems.

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education. That case would present a far more compelling set of circumstances for judicial assistance than the case before us today." *Id.*

87. 394 U.S. 618 (1969).

88. 411 U.S. at 31-32. *Shapiro* is not discussed at all in the portion of the opinion dealing with wealth.

89. Interestingly, in *Rodriguez*, Justice Powell's discussion of wealth classification never mentions the fact that the *Rodriguez* decision is another milestone in the Court's retreat from at-large intervention in the name of economic equality, a direction in which the Court had already taken steps in such cases as Lindsey v. Normet, 405 U.S. 56 (1972), James v. Valtierra, 402 U.S. 137 (1971), and Dandridge v. Williams, 397 U.S. 471 (1970). Justice Powell apparently refuses to acknowledge any trend from which retreat could be made, and he treats these cases as concerned with nonfundamental rights, not with wealth classifications.

90. 411 U.S. at 33.

91. *See, e.g.*, Note, *Constitutional Law—Right to Travel—Phased Development Plan Unconstitutionally Burdens the Right to Travel of Persons Excluded*, 28 VAND. L. REV. 430 (1975); Comment, *The Right to Travel: Another Constitutional Standard for Local Land Use Regulations?*, 39 U. CHI. L. REV. 612 (1972).

The uncertainty surrounding the *Shapiro* brand of right to travel raises doubts about whether it can appropriately be applied to exclusionary zoning that prevents people from moving from inner-city to suburb. The Supreme Court has not extended the right to travel to *intra*state travel, and it is unclear whether the Court will ever do so. Possibly the lack of precedent is more the result of the interstate nature of the factual situations brought before the Court than a conscious limiting of the scope of the doctrine.[92] Several lower court opinions since *Shapiro* have shown no conceptual difficulty in extending the right to include intrastate travel:[93]

> [T]here appears to be no valid distinction between interstate and intrastate travel. . . . The right to travel does not depend on the interstate nature of the travel. Although only interstate travel was involved in *Shapiro*, the Court ascribed the right to travel to the Constitution generally, not specifically to the Commerce Clause. . . . To the extent that the right to travel derives from "our constitutional concepts of personal liberty," . . . it is not dependent on the crossing of state lines, but encompasses movement within a state as well.[94]

Another stumbling block in applying the right to travel doctrine to exclusionary zoning cases is that the *Shapiro* penalty analysis demands that the interference with the right must amount to a penalty before intensive review is applied. In *Shapiro* a statutory prohibition of welfare benefits to residents of less than one year was found to constitute a penalty to those exercising their constitutional right to travel. The Court found that the purpose of the statute, the deterrence of in-migration, was not constitutionally permissible, and therefore would not justify the statutory prohibition under either standard of review. The professed purpose of preserving fiscal integrity was not a compelling state interest. *Shapiro* suggested two criteria in determin-

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92. In Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974), the Supreme Court refused to extend the right to travel to *intra*state travel because this was not necessary for the resolution of the case. *Id.* at 255-56. The Court denied certiorari in King v. New Rochelle Municipal Housing Authority, 314 F. Supp. 427 (S.D.N.Y. 1970), *cert. denied*, 404 U.S. 863 (1971), a case extending the right to travel to intrastate travel. The Court has indicated, however, that it considers the right to travel to be a personal right and that such rights transcend state boundaries. "This Court long ago recognized that the nature of our Federal Union *and our constitutional concepts of personal liberty* unite to require that all citizens be *free to travel* throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." Shapiro v. Thompson, 394 U.S. at 629 (emphasis added).

93. *See, e.g.*, Construction Indus. Ass'n v. City of Petaluma, 375 F. Supp. 574 (N.D. Cal. 1974), *rev'd on other grounds*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976); Valenciano v. Bateman, 323 F. Supp. 600 (D. Ariz. 1971); Cole v. Housing Authority of Newport, 312 F. Supp. 692 (D.R.I. 1970).

94. King v. New Rochelle Municipal Housing Authority, 314 F. Supp. 427, 430 (S.D.N.Y. 1970).

ing what standard of review should be used in a given case: (1) whether the alleged interference deters migration and (2) whether the state action penalizes the exercise of the right to travel.[95]

In *Memorial Hospital v. Maricopa County*,[96] decided five years after *Shapiro*, Justice Marshall reduced the criteria to a single element. Actual deterrence of travel need not be shown; instead, the penalty characterization is the critical consideration.[97] Justice Marshall added to the learning of *Shapiro*, stating that whether a residency requirement is a penalty depends upon the nature of the benefits affected.[98] In *Shapiro*, the Court found the denial of the basic necessities of life to be a "penalty". On the facts in *Maricopa*, Justice Marshall observed:

> Whatever the ultimate parameters of the *Shapiro* penalty analysis, it is at least clear that medical care is as much "a basic necessity of life" to an indigent as welfare assistance.[99]

Only one district court case, *Construction Industry Association of Sonoma County v. City of Petaluma*,[100] has dealt with the *Shapiro* brand of right to travel in the context of local land use restrictions. That decision struck down an ordinance designed to restrict Petaluma's growth on the ground that it violated the constitutional right to travel:

> Inasmuch as there is no meaningful distinction between a law which "penalizes" the exercise of a right and one which denies it altogether, it is clear that the growth limitation under attack may be defended only insofar as it furthers a compelling state interest.[101]

However, this holding is of dubious value as precedent because the case was reversed on other grounds,[102] and the district court's analysis was so scant as to be of little value to subsequent litigants. The final disposition of the *Petaluma* case leaves one question unanswered:

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95. 394 U.S. at 629-31.

96. 415 U.S. 250 (1974).

97. *Id.* at 257-58.

98. "And, governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements." *Id.* at 259.

99. *Id.*

100. 375 F. Supp. 574 (N.D. Cal. 1974).

101. *Id.* at 582.

102. 522 F.2d 897 (9th Cir. 1975). On appeal, the circuit court, relying on *Warth v. Seldin*, denied standing to the Construction Industry Association on the grounds that it was not threatened by personal injury within the zone of interest protected by the constitutional right to travel. The association was, in effect, bringing this cause of action on behalf of "a group of unknown third parties allegedly excluded from Petaluma," *id.* at 904, and this suit did not qualify for any of the exceptions to the general rule barring third party suits. See note 13 *supra*. The circuit court's treatment of the right to travel challenge suggests that had the "unknown third parties" alleged, on their own behalf, a violation of their right to travel, they would have been granted standing.

Is denial of an opportunity to reside in a particular locality an infringement upon the right to travel within the meaning of *Shapiro*? Such a denial seems to be a greater infringement upon the right than a denial of welfare benefits to recent immigrants since it constitutes a total restriction. The Supreme Court, however, may find that unlike food, shelter and medical care for an indigent, a residence in Penfield, New York for a low-income family cannot be characterized as a "necessity of life," especially in view of the Court's express holding in *Lindsey v. Normet*[103] that the right to decent housing is not a fundamental right.

Village of Belle Terre v. Boraas[104] also presents a formidable obstacle to any attempt to compel strict scrutiny in land use cases. The ordinance there in question restricted land use in the town to single family dwellings. The definition of family was limited to no more than two unrelated persons. Petitioners argued that this statute interfered with their right to travel, right to freedom of association, and right to privacy. Justice Douglas' response, accompanied by a string of citations, was a conclusory statement to the effect that no fundamental rights were involved.[105] Having found no suspect classification or fundamental right, the Court required merely that the ordinance be rationally related to a legitimate purpose and that the rational basis test be met:

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs.[106]

Belle Terre indicates that in any attack on exclusionary land use ordinances via the right to travel, the Court may defer to the right of self-determination of communities.[107]

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103. 405 U.S. 56 (1972). In this case the Supreme Court definitively denied that there is a fundamental right to decent housing: "We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality. . . . Absent constitutional mandate, the assurance of adequate housing . . . [is a] legislative, not judicial, function." *Id.* at 74.

104. 416 U.S. 1 (1974).

105. *Id.* at 7-8.

106. *Id.* at 9. Justice Douglas uses similar language in his *Warth* dissent in support of his argument that Metro-Act and Housing Council have standing to attack the Penfield ordinance insofar as they represent the communal feeling of the actual residents of the township. "A clean, safe, and well-heated home is not enough for some people. Some want to live where the neighbors are congenial and have social and political outlooks similar to their own. This problem of sharing areas of the community is akin to that when one wants to control the kind of person who shares his own abode." 422 U.S. at 518.

107. The Supreme Court has been out of the land use field for several decades. This is evident from the dates of the five land use decisions cited by the Court, all of

3. *Race*

Any invidious racial classification automatically invokes strict scrutiny.[108] Where the statute is discriminatory on its face[109] or has been unequally applied to the disadvantage of minorities,[110] invidious discrimination is easily identified. A more difficult case arises when neither of these factors is present and plaintiff's claim of discrimination is based solely upon allegations of defendant's intent.

Although the *Warth* plaintiffs challenged the ordinance as "racially discriminatory," neither the face of the ordinance nor its overall administration evidenced any unequal or arbitrary application against minorities. On the facts alleged, the plaintiffs could only have invoked strict scrutiny of the ordinance by claiming that a nonexplicit race classification was inherent in the explicit wealth classification created by the ordinance. This challenge would have to be founded upon a basic syllogism that persons of low income are excluded by the Penfield ordinance, that a disproportionate number of such persons are minorities and that thus a disproportionate number of minorities are excluded from the community. Were the Court to accept this reasoning, in the absence of a showing of discriminatory intent on the part of defendants, it would have to go one step further and employ an "impact test." Under such a test, a statute fair on its face and fairly administered, which is unaccompanied by any evidence of discriminatory intent, would be struck down simply because it had a disproportionately adverse effect on minorities.

The impact test has been employed by the legislature in the very limited area of employment testing under Title VII.[111] The language of Title VII is specific and has not been given an extended reading by the federal courts.[112] In areas outside of employment testing the Su-

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which predate 1929, except Berman v. Parker, 348 U.S. 26, decided in 1954. The Supreme Court is sorely aware of its lack of expertise in this area. As the dissenting Justice Marshall suggested in *Belle Terre*, the Court's deference is very close to "abdication." 416 U.S. at 14 (Marshall, J., dissenting).

108. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967); Bolling v. Sharpe, 347 U.S. 497 (1954).

109. *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184 (1964); Strauder v. West Virginia, 100 U.S. 303 (1880).

110. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886).

111. The standards developed by the Equal Employment Opportunity Commission for employment testing covered by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. § 2000e (1974) (EEOC guidelines), preclude the use of testing procedures which disproportionately exclude protected minorities, regardless of intent unless they are a demonstrably reasonable measure of job performance and persons acting upon the results can demonstrate that alternative suitable hiring, transfer, or promotion procedures are unavailable.

112. The only judicial expansion of Title VII has been in the narrow context of employment tests administered by governmental entities such as police and fire depart-

preme Court has never acknowledged the impact analysis as a viable tool, and in fact has, on two occasions, refused to recognize its efficacy. Both *Jefferson v. Hackney*[113] and *James v. Valtierra*[114] stand for the proposition that an otherwise legitimate classification is not constitutionally "suspect" simply because a greater number of a racial minority fall into the group disadvantaged by the classification.

In *Jefferson*, the Court brushed aside the "naked statistical argument" that it was unconstitutional to fund an Aid to Families with Dependent Children (AFDC) program at a lower percentage of recognized need than other categories of assistance because of the higher percentage of minority recipients in the AFDC category.

> The basic outlines of eligibility for the various categorical grants are established by Congress, not by the States; given the heterogeneity of the Nation's population, it would be only an infrequent coincidence that the racial composition of each grant class was identical to that of the others. The acceptance of appellants' constitutional theory would render suspect each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational the treatment might be.[115]

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ments. *See, e.g.*, Douglas v. Hampton, 512 F.2d 976 (D.C. Cir. 1975); Walston v. County School Bd., 492 F.2d 919 (4th Cir. 1974); United States v. Chesterfield County School Dist., 484 F.2d 70 (4th Cir. 1973); Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972); Chance v. Bd. of Examiners, 458 F.2d 1167 (2d Cir. 1972); Carter v. Gallagher, 452 F.2d 315 (8th Cir.), *modifying* 452 F.2d 327 (en banc), *cert. denied*, 406 U.S. 950 (1972). Though this is significant because Title VII, as originally enacted, provided a specific exemption from the act's requirements for governmental units, it is not an example of judicial intervention as the exemption was deleted prior to any of these decisions, disclosing to the courts a congressional intent to extend the act.

In Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975), appellants argued that the court should not view the Georgia bar exam, which is failed by a disproportionate number of black applicants, as within the framework of traditional equal protection analysis, but should instead apply by analogy the standards developed by the Equal Opportunity Commission (EEOC) covered by Title VII. Appellants contended that Title VII and the Fourteenth Amendment should be equated. The circuit court in rejecting this argument relied, *inter alia*, upon Geduldig v. Aiello, 417 U.S. 484 (1974). At issue in *Geduldig* was the constitutionality of the California Unemployment Compensation Disability Fund, which excluded from coverage disabilities associated with normal pregnancy. The Court found no violation of the equal protection clause of the Fourteenth Amendment. What the court in *Tyler* found significant in the *Geduldig* opinion, however, was the Court's failure to mention that there existed an EEOC regulation promulgated pursuant to Title VII which demanded that any temporary disability plan cover disability due to normal pregnancy. This the circuit court interpreted as a refusal on the part of the Supreme Court to equate the Fourteenth Amendment with Title VII.

113. 406 U.S. 535 (1972).

114. 402 U.S. 137 (1971). Justice Douglas took no part in the decision. Justice Marshall's dissent, in which Justices Brennan and Blackmun joined, was based upon the argument that a classification based on poverty is suspect and demands exacting judicial scrutiny.

115. 406 U.S. at 548.

The *James* case concerned the constitutionality of a California constitutional provision, Article XXXIV, which requires approval by referendum for low-rent housing projects. The appellants attempted to bring their attack on the referendum requirement within the ambit of *Hunter v. Erickson*,[116] in which the Court struck down a city charter amendment on the ground that the amendment created an impermissible classification based on race. In *Hunter*, the citizens of Akron, Ohio had amended the city charter to require that any ordinance regulating real estate on the basis of race, color, religion, or national origin could not take effect without approval of a majority of those voting in a city election. The Court held that the amendment created a classification based on race because it allowed laws dealing with racial housing matters to take effect only if they survived a mandatory referendum while other housing ordinances took effect immediately. The Court in *James* distinguished *Hunter*.

> Unlike the Akron referendum provision, it cannot be said that California's Article XXXIV rests on "distinctions based on race" . . . . The Article requires referendum approval for any low-rent public housing project, not only for projects which will be occupied by a racial minority.[117]

The Court was obviously fearful of where the impact test might ultimately lead:

> The present case could be affirmed only by extending *Hunter*, and this we decline to do . . . . [P]resumably a state would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group. And this Court would be required to analyze governmental structures to determine whether a gubernatorial veto provision or a filibuster rule is likely to "disadvantage" any of the diverse and shifting groups that make up the American people.[118]

The juxtaposition of *Hunter* and *James* demonstrates the contrast between the traditional equal protection analysis and the impact test, as well as the bounds beyond which the Court has refused to go.[119]

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116. 393 U.S. 385 (1969).

117. 402 U.S. at 141.

118. *Id.* at 141-42.

119. The Supreme Court's recent decision in Washington v. Davis, 44 U.S.L.W. 4789 (U.S. June 7, 1976), makes it clear that the Court does not intend to extend the standard applicable under Title VII to the constitutional standard for adjudicating claims of invidious racial discrimination. In *Davis*, the validity of a qualifying test administered to applicants for positions as police officers in the District of Columbia Metropolitan Police Department was challenged. Plaintiffs, two unsuccessful applicants, alleged that the test bore no relationship to job performance and had a highly discriminatory impact in screening out black candidates. In rejecting their contention,

The *Warth* plaintiffs' allegation that defendants' administration of the ordinance was racially discriminatory could be construed as an attack on the defendants' intent. An inquiry into intent would avoid the problems inherent in the impact test. However, plaintiffs did not support this bald allegation with sufficient facts to show a continuing discriminatory pattern of administration by defendants and thus foreclosed a finding by the Court of invidious intent on the part of the defendants.

B. The Concept of Prudential Limitations

The above analysis supports a conclusion that, on the basis of existing case law, the Court could have dismissed *Warth* on the merits. The Court declined this option and instead articulated a new causation test that will significantly curtail access to the Court. This latter choice dovetails with the concept of prudential limitations. This concept emphasizes division of powers as opposed to intra-governmental checks and balances. Justice Powell, a major proponent of the concept, prefaced the *Warth* opinion with a statement defining the limited role of the Court in a tripartite system. Citing his concurrence in *United States v. Richardson*,[120] where he responded to the dissent's call for unrestricted taxpayer and citizen standing, he stated:

> Relaxation of standing requirements is directly related to the expansion of judicial power . . . . [T]he argument that the Court should allow unrestricted taxpayer or citizen standing underestimates the ability of the representative branches of the Federal Government to respond to the citizen pressure that has been responsible in large measure for the current drift toward expanded standing.[121]

According to Justice Powell, citizen advocacy should be employed against the branches of government intended to be responsive to the public. The federal system strikes a delicate balance which can be upset by an overextension of the Supreme Court's power. Any expansion of the standing doctrine should therefore be accomplished through congressional mandate. Prudential restraint is crucial if the Court is to remain the branch of government "least dangerous to the political rights of the Constitution. . . ."[122]

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the court stated: "[D]isproportionate impact is not irrelevant," but "[s]tanding alone, it does not trigger the rule, that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations." *Id.* at 4793.

120. 418 U.S. 166, 180-97 (1974).

121. *Id.* at 188-89.

122. *Id.* at 193 (citing THE FEDERALIST No. 78, at 483 (H. Lodge ed. 1908) (A. Hamilton)). It is interesting to note that it was also in the 78th Federalist that Hamilton said: "[T]he judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active

Justice Powell's concept of the role of the Court overlooks those victims of exclusionary zoning practices who are unable to secure relief through the normal democratic process, and whose rights can therefore be vindicated only by judicial intervention. The facts of *Kennedy Park* illustrate that persons excluded cannot successfully interject themselves into a community's political system in order to generate changes responsive to their needs.

Conclusion

There are other possible explanations why the Court did not dismiss *Warth* on the merits rather than dispensing with the case on standing grounds. One possibility is that the Court still intends, in a stronger case, to announce an affirmative obligation on the part of suburbs to zone inclusionarily[123] to integrate. Another possibility is that the Court

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resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." THE FEDERALIST No. 78 at 483-84 (H. Lodge ed. 1888) (A. Hamilton).

123. Inclusionary zoning has been defined as a theory that "all parts of a municipality's residential land must be available to all sectors of the population." The theory is "premised on the belief that public laws cannot be used to create race or income class zones either by direction of indirection, except upon the finding of a special need by a particular class." Davidoff & Davidoff, *Opening the Suburbs: Toward Inclusionary Land Use Controls*, 22 SYRACUSE L. REV. 509, 523 (1971).

Legislation to counter the effects of exclusionary zoning has already been passed in two states, Massachusetts and New York. MASS. ANN. LAWS ch. 40B, § 20 (Supp. 1976) provides that at least 0.3% of the vacant residential land of a community must be made available for development each year for a period of five years upon application by eligible nonprofit or limited-profit housing sponsors for zoning changes. The law creates a special state zoning board of appeals which rules on the propriety of refusals by local jurisdictions to permit nonprofit or limited-profit sponsors to proceed with development plans. If the commission finds that a local jurisdiction has failed to make land available under the law, it is empowered to issue a state permit, overriding local authorities, for the construction to proceed.

New York's Urban Development Corporation was granted the power to override local zoning and subdivision laws when they conflict with the corporation's findings that a certain site was appropriate for low or moderate cost housing, N.Y. UNCONSOL. LAWS §§ 6251-85 (McKinney Supp. 1976).

For a thorough discusison of inclusionary land use programs see H. FRANKLIN, D. FALK, A. LEVIN, IN-ZONING: A GUIDE FOR POLICY-MAKERS ON INCLUSIONARY LAND USE PROGRAMS (1974); Kleven, *Inclusionary Ordinances—Policy and Legal Issues in Requiring Private Developers to Build Low Cost Housing*, 21 U.C.L.A. L. REV. 1432 (1974).

Only the Supreme Court of New Jersey has ruled that every municipality in the state has to provide its fair share of low and moderate cost housing for the surrounding region. Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713, *appeal dismissed, cert. denied*, 423 U.S. 808 (1975).

did not reach the merits because it felt that broad-scale regulation of land use at the local level is within neither its province nor its capabilities.[124] Apart from any considerations of substantive issues, the authors feel that the *Warth* case, as an example of public interest suits

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The Supreme Court of the United States has granted certiorari in Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409 (7th Cir.), *cert. granted*, 423 U.S. 1030 (1975). This case exemplifies yet again the failure of attorneys in the area of discrimination in housing to compile a convincing and exhaustive factual record. It stands as one more confrontation in a series of hopelessly uncoordinated attacks on exclusionary zoning ordinances. See note 124 *infra*. In this case the petitioners sought the rezoning of property to permit the construction of a 190-unit townhouse development for low and moderate income persons. The village denied the rezoning on the grounds that the property was within an exclusively single family dwelling area and that a grant of the rezoning would violate the integrity of the village's general plan. Petitioners alleged that the denial of the rezoning violated their constitutional rights under the Fourteenth Amendment, the Civil Rights Act of 1968, § 801 *et seq.*, 42 U.S.C. § 3601 *et seq.*, and 42 U.S.C. §§ 1981-83. This contention was sustained by the circuit court, relying on Clark v. Universal Builders, Inc., 501 F.2d 324 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974). The court reasoned that as the rejection of the project had a racially discriminatory effect, it could only be upheld if it were shown that a compelling public interest necessitated the decision. The contentions of the village that the integrity of the plan would be violated and that neighboring property values would be diminished were not sufficiently compelling interests to justify the racially discriminatory effect.

It is questionable whether the standing hurdle will be overcome in *Arlington Heights* in view of the fact that the development of the project by plaintiff corporation was to be financed pursuant to section 236 of the National Housing Act and all funds under this statute have been sequestered.

124. In Milliken v. Bradley, 418 U.S. 717 (1974), the Supreme Court held that approval of so-called metropolitan school desegregation orders involving suburban school districts adjacent to or near inner-city school districts are beyond the remedial powers of federal district courts unless the suburban school officials have actually violated the Constitution. In *Milliken*, there was no finding of unconstitutional action on the part of the suburban schools and no demonstration that the violations committed in the operation of the Detroit school system had any significant segregative effects in the suburbs.

The Supreme Court indicated in Hills v. Gautreaux, 96 S. Ct. 1538 (1976), that the rule of *Milliken* would apply in land use cases but that on the facts of the case, *Milliken* could be distinguished. In *Gautreaux*, Negro tenants in, or applicants for, public housing in Chicago brought separate class actions against the Chicago Housing Authority (CHA) and the Department of Housing and Urban Development (HUD), alleging the CHA had purposely selected public housing sites in Chicago to avoid placement of Negro families in white neighborhoods, in violation of the Fourteenth Amendment and federal statutes passed pursuant thereto. Petitioners also alleged that HUD had assisted in this unconstitutional policy by providing financial assistance and other support to CHA.

The Court held that a metropolitan area remedy in the *Gautreaux* case would not be impermissible as a matter of law and allowed the case to be remanded for additional findings and further consideration of the issue of metropolitan area relief. *Id.* at 1550.

"Here, unlike the desegregation remedy found erroneous in *Milliken*, a judicial order directing relief beyond the boundary lines of Chicago will not necessarily entail coercion of uninvolved governmental units, because both CHA and HUD have the authority to operate outside the Chicago city limits." *Id.* at 1546. "To foreclose such relief solely

at their worst,[125] afforded the Court, already adversely predisposed to such actions, an opportunity to place a gloss on the *Data Processing* test which would dramatically curtail this type of litigation.

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because HUD's constitutional violation took place within the city limits of Chicago would transform *Milliken*'s principled limitation on the exercise of federal judicial authority into an arbitrary and mechanical shield for those found to have engaged in unconstitutional conduct." *Id.* at 1547.

125. *See* N. Williams, 3 AMERICAN LAND PLANNING LAW, § 66.52, at 152b n.202 (1975). Professor Williams has expressed his dismay over the lack of coordinated strategy by attorneys challenging exclusionary zoning ordinances, in contrast to the brilliant strategy employed by the NAACP in litigation involving the desegregation of public education. In the public school cases, the most outrageous examples of segregation were brought first, followed logically by slightly more innovative situations which were only a short step from settled precedent. In the area of discrimination in housing, the situation has been completely different. *Warth* supports this observation of Professor Williams. In light of the strong precedent requiring a property interest in challenges of local zoning ordinances by nonresident plaintiffs, attorneys in this area should have proceeded with caution. A logical progression would have been to secure the Supreme Court's approval of cases such as *Kennedy Park* where the discriminatory intent was clear and the corporate plaintiffs in the action did meet the traditional property interest requirement. Next the attorneys should have brought a case in which the discriminatory intent was evident although no participant in the suit had a property interest, or a case in which the discriminatory intent was latent but one of the corporate plaintiffs did have a property interest. The worst possible case strategically is *Warth* in which the discriminatory intent was unclear, there was no specific housing project denied, and none of the plaintiffs was a future resident of the proposed housing. In addition to these strategic shortcomings, the *Warth* litigation also falls short of capturing the sympathy of the Court by failing to create an overwhelming statistical record to confirm that Penfield's motive was racial discrimination and not one of the many permissible objectives furthered by exclusionary ordinances. Lastly, the *Warth* litigation challenges the entire ordinance on its face and fifteen years of administration. Such an allegation lacks the specificity which is usually viewed with favor by the Court.