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Constitutional Law - Local Government Action - Standing to Challenge Restrictive Zoning Ordinances

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Court in *Aiken* relied on precedents which legislation would effectively overrule⁷¹ to reach a decision contrary to the traditional policy of expansive copyright protection of the performance right.

Donna L. Seidel

CONSTITUTIONAL LAW—LOCAL GOVERNMENT ACTION—STANDING TO CHALLENGE RESTRICTIVE ZONING ORDINANCES—The Supreme Court of the United States has held that minority nonresidents lack standing to attack a town zoning ordinance where they cannot show that but for the ordinance they could have obtained affordable housing, or that if granted relief they would benefit.

Warth v. Seldin, 422 U.S. 490 (1975).

The zoning ordinance of the town of Penfield, a suburb of Rochester, New York, allocated ninety-eight percent of its vacant land to single-family detached dwellings and contained minimum lot size, set back, floor area and habitable space requirements which were allegedly unreasonable. Petitioners sought declaratory and injunctive relief and damages, maintaining that this ordinance, coupled with the refusals of Penfield's Zoning, Planning and Town Boards to grant variances, resulted in an almost total absence of affordable housing for low and moderate income minority persons.

The original plaintiffs were nonresident minority persons with low or moderate incomes, individual taxpayers of Rochester, and Metro-Act, a nonprofit association promoting improved low and moderate income housing in the Rochester area whose membership included Penfield residents. Rochester Home Builders (Home Builders), representing area construction firms, and the Housing Council in the Monroe County Area, Inc. (Housing Council) unsuccessfully at-

lived novelty, Congress amended the Copyright Act in 1947 so that the reproduction or rendition of a copyrighted musical composition on a coin-operated machine would not constitute a public performance for profit unless a fee were charged for admission to the place where the performance occurred. Under the revised copyright law, the proprietor of an establishment who operates such a phonorecord player is liable for infringement unless he obtains a license to perform the work publicly.

71. Passage of the copyright revision legislation, which expressly treats CATV as public performance, effectively overrules *Fortnightly* and *Teleprompter* and certainly undermines *Aiken*.

tempted to be joined as party plaintiffs. The complaint was dismissed by the district court on the ground, *inter alia*, that the plaintiffs lacked standing to sue;¹ the Court of Appeals for the Second Circuit affirmed.² Petition for certiorari was granted.³ The Supreme Court held that none of the petitioners alleged facts sufficient to satisfy either the article III standing requirement or the judicially imposed prudential limitations.⁴

Before examining the issues, Justice Powell, writing for the majority, summarized the applicable standing principles. In determining whether a plaintiff is entitled to receive judicial consideration of his case on its merits, the court must take into account both constitutional and prudential limitations.⁵ The plaintiff must allege a case or controversy within the accepted meaning of article III of the Constitution. He must allege that he is threatened with or has suffered an actual personal injury as a result of the defendant's putatively illegal action.⁶ The prudential limitations are self-imposed to avoid litigation involving "abstract questions of wide public significance" which might better be dealt with by another governmental branch.⁷ Thus when the plaintiff's injury is shared by a large class of persons or was indirectly caused by the defendant's actions toward a third party, standing may be denied.⁸ An examination of the claim's source could determine that the plaintiff has a right to relief in spite of a prudential limitation. Congress may specifically grant a right of action to those who would otherwise be foreclosed. Additionally, when the claim is based on third party rights, the court might imply a right of action when there are strong countervailing circumstances which outweigh prudential concerns.⁹ In every case, the constitutional requirement of a distinct, palpable injury to the plaintiff must be satisfied.

1. *Warth v. Seldin*, Civil No. 73-2024 (W.D.N.Y. Dec. 27, 1972). The court also held that petitioners failed to state a claim upon which relief could be granted and that the suit could not proceed as a class action.

2. *Warth v. Seldin*, 495 F.2d 1187 (2d Cir. 1974).

3. *Warth v. Seldin*, 419 U.S. 823 (1974).

4. *Warth v. Seldin*, 422 U.S. 490 (1975).

5. *Id.* at 498. The Court cited *Barrows v. Jackson*, 346 U.S. 249, 255 (1953) (Court has developed a complementary rule of self-restraint in addition to the jurisdictional requirement).

6. 422 U.S. at 499, *citing* *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973). *See* note 49 and accompanying text *infra*.

7. 422 U.S. at 500.

8. *Id.* at 499.

9. *Id.* at 500-01.

Four individual petitioners alleged that they were residents of Rochester with low or moderate incomes who desired to reside in Penfield.¹⁰ They claimed Penfield's zoning ordinance, on its face and as enforced, violated their civil rights by effectively prohibiting construction of affordable housing for persons of their financial class, which included the majority of racial and ethnic minorities.¹¹ Accordingly, these petitioners asserted standing to challenge the respondents' allegedly discriminatory practice. The majority stated that the constitutional standing requirement necessitated an allegation of facts from which it might reasonably be inferred that absent the restrictive zoning practice there would have been a substantial probability either that these low income petitioners could have obtained affordable housing, or that if granted relief they would benefit.¹² The proposed housing projects which were barred and similar projects which might be built should relief be granted were too expensive to satisfy petitioners' needs.¹³ Hence the facts alleged were insufficient to demonstrate an actionable causal relationship between respondents' actions and petitioners' asserted injuries.¹⁴ The taxpayers' alleged injury was strictly economic. They argued that Penfield's ordinance forced low and moderate income persons to reside in Rochester, where tax abatements on housing necessary to accommodate these persons resulted in an increase in property taxes required to support municipal services. The majority held the line of causation was too attenuated, and noted that even had it been sufficient, the claim would still fail since it was based on the rights of the low income petitioners.¹⁵

Metro-Act claimed standing on the basis of injury to its members, who included low and moderate income persons, Rochester taxpayers and residents of Penfield. The Court felt this group's reliance on *Trafficante v. Metropolitan Life Insurance Co.*¹⁶ was inapposite.

10. Petitioners desired better housing conditions, recreational and educational opportunities, police protection and easier access to jobs. *Id.* at 524 n.3 (Brennan, J., dissenting). The majority observed that, if proved, the exclusion alone would constitute a sufficient injury for standing purposes. *Id.* at 503 & n.13.

11. All of the petitioners generally invoked the first, ninth and fourteenth amendments, and 42 U.S.C. §§ 1981-83 (1970). 422 U.S. at 493.

12. 422 U.S. at 504.

13. *Id.* at 506. For the majority's analysis of the specific facts see *id.* at 505-07 nn.15 & 16.

14. *Id.* at 507.

15. *Id.* at 509.

16. 409 U.S. 205 (1972).

The *Trafficante* plaintiffs, residents of a housing complex whose landlord discriminated against non-whites, claimed they were denied the benefits of living in a racially integrated environment. The majority in *Warth* emphasized that those plaintiffs were successful because their claim was based on § 804 of the Civil Rights Act of 1968,¹⁷ which created a right of action for an injury which would otherwise not be judicially cognizable.¹⁸ *Warth* was distinguishable, since Metro-Act did not invoke this statute.¹⁹

Home Builders sought prospective relief and damages for its member construction firms allegedly deprived of substantial business opportunities and profits. Standing was denied as to the claim for damages. Since the damages alleged were peculiar to each firm and could not be generalized, Home Builders was not a proper representative of the members' claims. The claim for prospective relief failed due to the nonexistence of a controversy of sufficient immediacy or ripeness, since no member firm had recently been denied the opportunity to build in Penfield. Housing Council's claim was precluded for the same reason.²⁰

None of the Justices upheld the taxpayers' position.²¹ Justice

17. This section provides that it shall be unlawful:

- (a) To refuse to . . . negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion or national origin.
- (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling . . . because of race, color, religion, sex, or national origin.

42 U.S.C. § 3604 (Supp. V, 1975).

18. 422 U.S. at 513-14. See 409 U.S. at 212 (White, J., concurring). The majority's statement of *Trafficante* is somewhat misleading. In *Trafficante*, the issue was whether the residents of a housing complex who claimed to be injured by the exclusion of non-whites could properly assert a § 3604 injury. A broad interpretation of 42 U.S.C. § 3610(a) (1970), a "person aggrieved" enforcement provision, enabled the Court to grant standing. This was a "zone of interests" case. See note 47 and accompanying text *infra*. The Court did not indicate the result had the *Warth* action been brought under § 804. 422 U.S. at 513 & n.21.

19. Metro-Act argued that *Trafficante*'s real significance was its holding that allegations of denial of important benefits from interracial associations satisfied the article III "injury in fact" requirement. Petitioner's Brief at 40-41, *Warth v. Seldin*, 422 U.S. 490 (1975). Metro-Act maintained that such an injury fell within the zone of interests protected by the first amendment. *Id.* at 42.

The Penfield residents had claimed their first amendment right of association had been violated, but the majority did not address this argument. The Court observed that even if the injury to the Penfield residents satisfied constitutional requirements, the injury was "indirect" since it resulted from the exclusion of a third party. Hence the claim would be foreclosed by the appropriate prudential limitation. 422 U.S. at 514.

20. See 422 U.S. at 514-17.

21. The majority flatly denied the taxpayers standing. Justice Douglas did not discuss the taxpayers' claim. Justice Brennan did not consider the claims of either the taxpayers or

Douglas would have granted standing to Housing Council and Metro-Act, since in his opinion both represented the "communal feeling."²² Justice Brennan would have found favorably for Housing Council, the low income petitioners and Home Builders. He felt the majority's rationale deprived the low income petitioners of their day in court by requiring them to actually prove their case beforehand.²³ Further, where a pattern-and-practice claim such as that made out by Housing Council and Home Builders was asserted, it was unrealistic to focus on a particular project. The existence of past injury and the intent to build if the barrier was removed were a sufficient basis for standing.²⁴

In 1970, the Court, in *Association of Data Processing Service Organizations v. Camp*,²⁵ created a two-part standing test. The plaintiff must allege an "injury in fact"²⁶ to an interest which arguably lies within the zone of interests to be protected by the constitutional or statutory provision in question.²⁷ The significance of the *Data Processing* test is readily apparent when compared with previous standing doctrine. Prior to 1968, one who claimed standing to sue in a federal court had to demonstrate that his "legal interests" had been violated. These interests might stem from common law rights, statutes or constitutional provisions.²⁸ An inherent difficulty with

Metro-Act, since in his opinion the other petitioners had standing. *Id.* at 521 n.2 (Brennan, J., dissenting).

22. *Id.* at 518 (Douglas, J., dissenting). The dissenters characterized the majority as "antagonistic" and indefensibly hostile. *Id.* at 519, 520. Justice Douglas observed that a desire to limit federal court caseloads was an invalid justification for denying access to the courts, particularly in cases involving racial discrimination. *Id.* at 519.

23. *Id.* at 528 (Brennan, J., dissenting). Justice Brennan also chastised the majority for purposely avoiding a decision on the merits from fear of the sociological and political consequences. *Id.* at 520.

24. *Id.* at 530.

25. 397 U.S. 150 (1970).

26. *Id.* at 152. This was a reiteration of the article III "case or controversy" requirement, aimed at insuring that the plaintiff possessed a sufficient personal interest in the litigation. *Barlow v. Collins*, 397 U.S. 159, 164 (1970). As explained in *Data Processing*, the injury could be noneconomic as well as economic in nature. 397 U.S. at 154.

27. 397 U.S. at 155.

28. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 152 (1951) (Frankfurter, J., concurring). See *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125 (1940); *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118, 137 (1939). But see *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4 (1942) (plaintiffs as representatives of the public interest); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940) (although Communications Act did not protect a radio station from competitive injury, Congress intended standing for those in plaintiff's position that they might serve as a check on the Commission's power).

The above cases are discussed in Scott, *Standing—A Functional Analysis*, 86 HARV. L. REV.

this approach was evident where a plaintiff's claim rested on a statute which, like a constitutional provision, had no enforcement mechanism. To determine whether the statute granted the plaintiff a right of action, the courts looked for guidance to the circumstances surrounding the case. Prime focal points were the directness of the injury and the size of the group suffering the injury.²⁹ Such inquiries could lead to a consideration of the merits of the case, which theoretically should have no impact on the standing issue.³⁰

In 1962 the Court had enunciated in *Baker v. Carr*³¹ an extremely flexible test, which has survived with varying interpretations: The person claiming standing must have a "personal stake in the outcome of the controversy."³² This touchstone of the standing doctrine was rendered somewhat more concrete through application in *Flast v. Cohen*.³³ The plaintiff, a federal taxpayer, challenged the expenditure of federal funds for what he alleged was an unconstitutional purpose. The Court held that for the plaintiff to have a personal stake in the outcome of the controversy there must be a "logical nexus between the status asserted and the claim sought to be adjudicated."³⁴ As applied in *Flast*, this test provided federal taxpayers

645 (1973) [hereinafter cited as Scott]. Professor Scott analyzes the evolution of the standing doctrine by classifying cases as involving either statutory or non-statutory review. Claims founded upon a statute which expressly provides for judicial review fall in the former category; those based on statutes without such provisions or on constitutional provisions fall within the latter. *Sanders*, according to Scott, is an example of the more liberal standing which the Court has been willing to give in statutory review cases. *Id.* at 656. See K. DAVIS, ADMINISTRATIVE LAW § 22.01 (3d ed. 1972) [hereinafter cited as DAVIS].

29. Scott, *supra* note 28, at 651-54. By his analysis of the standing decisions in the "legal interest" era, Scott concludes that the Court considered such factors when exercising its discretion to grant standing in non-statutory review cases. Using the Court's terminology, these factors are prudential limitations on the exercise of its jurisdiction. See *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166 (1974); *Ex parte Levitt*, 302 U.S. 633 (1943) (dealing with generalized grievances). See also *United States v. Raines*, 362 U.S. 17 (1960); *Barrows v. Jackson*, 346 U.S. 249 (1953); *Tileston v. Ullman*, 318 U.S. 44 (1943) (concerning third party rights). These cases were cited by the *Warth* majority. 422 U.S. at 499-500. See generally Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L.J. 599 (1962) [hereinafter cited as Sedler].

30. Scott, *supra* note 28, at 654. See 422 U.S. at 500.

31. 369 U.S. 186 (1962).

32. *Id.* at 204. For a repudiation of this approach to the standing question see DAVIS, *supra* note 28, at § 22.04; Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450, 470 (1970).

33. 392 U.S. 83 (1968).

34. *Id.* at 102.

with standing in limited situations.³⁵ Both *Baker* and *Flast* set the stage for the *Data Processing* decision.

The "injury in fact" portion of the *Data Processing* test was a new appellation for a similar requirement under the "legal interest" approach; the "zone of interests" test, however, was a departure from traditional standing doctrine. After *Data Processing*, a plaintiff need only show that his injured interest arguably fell within the protective ambit of a statute which lacked provision for judicial review. Consequently, the court might largely circumvent the need to examine the substantive merits of the case.³⁶ The Court had embarked upon a course calculated to expand the opportunity for a plaintiff to have his day in court. A brief examination of the subsequent implementation of the *Flast* and *Data Processing* tests will aid in assessing the impact of the *Warth* decision.

In an environmental action, *Sierra Club v. Morton*,³⁷ the Court revealed that it would not interpret the *Data Processing* injury in fact requirement restrictively. An injury of an aesthetic nature would be sufficient, although it still must be personal to the plaintiff.³⁸ The Court also showed a willingness to liberally construe statutory enforcement provisions, a policy reinforced in *Trafficante v.*

35. *Flast* only partially overruled the doctrine set forth in *Frothingham v. Mellon*, 262 U.S. 447 (1923), which absolutely denied standing to federal taxpayers *qua* taxpayers. The *Flast* doctrine granted standing when the taxpayer could point to a violation of a constitutional limitation on Congress's taxing and spending power. The first amendment establishment and free exercise clauses were held to constitute such a limitation.

36. 397 U.S. at 153, 158. In *Data Processing*, the plaintiff alleged a competitive injury resulting from the Comptroller of Currency's decision to permit banks to provide data processing services. The action was based on the Bank Service Corporation Act of 1962 § 4, 12 U.S.C. § 1864 (1970), which provides: "No bank service corporation may engage in any activity other than the performance of bank services for banks." The Court considered this language in light of § 10 of the Administrative Procedure Act (APA), which states: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702 (1970). Standing was granted, the Court observing, "Where statutes are concerned, the trend is towards enlargement of the class of people who may protest administrative action." 397 U.S. at 154. Justice Brennan, concurring, would have used the "injury in fact" test alone, since even under the "zone of interests" approach some consideration of the merits would still be necessary. An allegation of injury in fact should be sufficient to show a personal stake in the outcome. *Id.* at 172-73.

Data Processing was reaffirmed in *Investment Co. Institute v. Camp*, 401 U.S. 617 (1971) and *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970). See *DAVIS*, *supra* note 28, at § 22.02; *Scott*, *supra* note 28, at 663.

37. 405 U.S. 727 (1972).

38. *Id.* at 740.

*Metropolitan Life Insurance Co.*³⁹ Following *Trafficante* were three cases particularly relevant to *Warth*. *Linda R.S. v. Richard D.*⁴⁰ concerned a charge that the discriminatory enforcement of a state criminal statute was violative of an unwed mother's right to equal protection.⁴¹ The Court responded that the injury alleged must be more than "abstract"; there must be a logical nexus between the injury and the putatively illegal action.⁴² Standing was denied, since in the Court's opinion a nondiscriminatory enforcement of the statute would not result in the relief the plaintiff sought.⁴³

Later that year the Court was again presented with an opportunity to define its position on matters of causation. In something of a sequel to *Sierra Club*, the plaintiffs in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*⁴⁴ alleged personal aesthetic injuries caused by the adverse impact on the environment which would result from the Interstate Commerce Commission's increase in railroad freight rates.⁴⁵ A right of action was implied in these plaintiffs, although the statute invoked was silent as to judicial review.⁴⁶ More importantly, the Court found the causal

39. 409 U.S. 205 (1972). See notes 17-20 and accompanying text *supra*. The claim in *Sierra Club* was grounded on § 10 of the APA, 5 U.S.C. § 702 (1970). See note 36 *supra*. Apparently the Court would have been prepared to grant standing, even in the absence of a "relevant statute," had a personal injury been alleged. For two interpretations of the intended operation of § 10 see *DAVIS*, *supra* note 28, § 22.07 and *Scott*, *supra* note 28, at 658-59.

The pertinent statute in *Trafficante* was the Civil Rights Act of 1968 § 810(a), 42 U.S.C. § 3610(a) (1970), which provides: "Any person who claims to have been injured by a discriminatory housing practice . . . may file a complaint with the Secretary [of Housing and Urban Development]." The Court broadly construed this provision to enable "private attorneys general" to aid in the statute's enforcement. 409 U.S. at 211.

40. 410 U.S. 614 (1973).

41. The plaintiff was the mother of an illegitimate child, and was seeking support payments from the father by prosecuting under a Texas criminal statute which imposed sanctions for nonpayment. The statute was construed by the Texas courts as having application only when the child involved was legitimate. *Id.* at 615.

42. *Id.* at 617-18. "[A]t least in the absence of a statute expressly conferring standing," the plaintiff must allege a "threatened or actual injury." *Id.* at 617.

43. The Court reasoned that it was speculative to assume the father would pay support as a result of serving a jail sentence. *Id.* at 618. The proper party to bring the suit would be a parent of a legitimate child who has been prosecuted under the statute. *Id.* at 619 n.5.

44. 412 U.S. 669 (1973).

45. It was alleged that the freight rate increase would have a discouraging effect on the use of recyclable materials, thereby causing an increased use of natural resources in the Washington metropolitan area. The plaintiffs claimed that as a result they would suffer aesthetic injuries since they camped, hiked and fished in this vicinity. *Id.* at 675-76, 678.

46. The claims were founded on a provision of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (2)(C) (1970). The ICC failed to file an environmental impact statement as required by the statute. The Court deemed the plaintiffs to be persons "adversely

relationship between the increased rates and the alleged injuries to be sufficient, even though the line of causation was "attenuated" and "less direct and perceptible" than that alleged in *Sierra Club*.⁴⁷

The third case crucial to this issue was *O'Shea v. Littleton*,⁴⁸ decided in 1974. There, both blacks and whites claimed that racially discriminatory practices by the local judiciary violated their civil rights as secured by statutory and constitutional provisions.⁴⁹ Because the plaintiffs had not recently suffered a personal injury and were not presently threatened by the alleged practices, standing was denied. The principle stated in *Linda* was held to apply in both statutory and constitutional contexts.⁵⁰ An unrelated injury was an inadequate basis for standing, and an allegation of a threat of injury which was at best speculative or conjectural failed as well.⁵¹

Finally, two recent decisions closely followed the *Flast* "logical nexus" test, adding the injury in fact requirement.⁵² *Schlesinger v. Reservists Committee to Stop the War*⁵³ held that neither federal taxpayers *qua* taxpayers nor citizens *qua* citizens had standing to challenge the constitutionality of dual membership in Congress and the Armed Forces Reserve.⁵⁴ In *United States v. Richardson*,⁵⁵ federal taxpayers were held not to have standing to challenge the federal government's refusal to permit public scrutiny of the Central Intelligence Agency's expenditures.⁵⁶

affected" by agency action within the meaning of § 10 of the APA, 5 U.S.C. § 702 (1970). See note 36 *supra*. 412 U.S. at 685-86.

47. 412 U.S. at 688. The plaintiffs' pleadings were attacked as "vague, unsubstantiated, and insufficient." *Id.* at 684. The Court responded that the defendants could have moved for a more definite statement under FED. R. Civ. P. 12(e), or used normal civil discovery devices. 412 U.S. at 689-90 n.15.

48. 414 U.S. 488 (1974).

49. The first, sixth, eighth, thirteenth and fourteenth amendments, and 42 U.S.C. §§ 1981-83, 1985 (1970) were invoked.

50. 414 U.S. at 493.

51. *Id.* at 496-97. The mere possibility that these plaintiffs might suffer an injury due to the unconstitutional application of an otherwise constitutional statute was too remote. *Id.* Cf. *Laird v. Tatum*, 408 U.S. 1, 13 (1972) (plaintiffs' claim that military surveillance of civilian political activity "chilled" their first amendment rights was held to be nonjusticiable, since no direct injury or threat of injury was alleged).

52. *United States v. Richardson*, 418 U.S. 166, 180 (1974); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 224 (1974).

53. 418 U.S. 208 (1974).

54. The claim was based on the incompatibility clause, U.S. CONST. art. I, § 6, which provides in part: "[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." 418 U.S. at 211.

55. 418 U.S. 166 (1974).

56. The plaintiffs invoked U.S. CONST. art. I, § 9, which states that "a regular Statement

While bearing in mind Justice Douglas's caveat in *Data Processing* that generalizations about standing are "largely worthless as such,"⁵⁷ it is useful to categorize these decisions to facilitate an understanding of *Warth*. Although the *Flast* and *Data Processing* tests have been cited interchangeably, there is a dichotomy between constitutional and statutory claims.⁵⁸ *Linda, Reservists* and *Richardson* presented constitutional claims, and the *Flast* test was primarily applied. The latter two cases were unsuccessful attempts to expand the constitutional limitations upon federal spending power beyond the free exercise and establishment clauses. In this type of action the requirements of *Flast* have been rather mechanically followed. Thus the influence of *Warth* in this area may be minimal, given the completeness of the *Flast* scheme of inquiry⁵⁹ and the apparent reluctance of the Court to extend the rule of *Flast* beyond the facts of that case. The potential for a more plaintiff-oriented stance by the Court in constitutional actions not strictly governed by *Flast* may not be realized.

In the realm of statutory claims the Court has used the *Data Processing* test, indicating a willingness to broaden the concept of "injury in fact" and to apply the "zone of interests" test liberally.⁶⁰ This trend invaded even the causal aspect of standing in *SCRAP*, where the line of causation between the alleged injury and the ICC's action was attenuated. There was no showing that the environment in which the plaintiffs engaged in their activities was in fact adversely affected, or that it was adversely affected as a result of the ICC's action. Assuming that it was, no *showing* of personal injury in fact was made by the plaintiffs. In contrast, the Court was not so easily satisfied in *O'Shea*. A personal injury resulting from the discriminatory action was shown, but in the Court's opinion it was not sufficiently recent. Thus the claim failed for want of ripeness.⁶¹

and Account of the Receipts and Expenditures of all public Money shall be published from time to time." 418 U.S. at 168. Public scrutiny of CIA expenditures was precluded by the Central Intelligence Agency Act, 50 U.S.C. § 403j(b) (1970).

57. 397 U.S. at 151.

58. Compare *Scott*, *supra* note 28.

59. In the federal taxpayer context the *Flast* Court demands a "nexus between that status and the precise nature of the constitutional infringement alleged." 392 U.S. at 102. This inquiry will be satisfied only when there exists a limiting constitutional provision. *Id.* at 102-03.

60. Several authorities maintain the Court has ignored the "zone of interests" test. *DAVIS*, *supra* note 28, at § 22.07; *Scott*, *supra* note 28, at 669; *Sedler*, *supra* note 29, at 511.

61. 414 U.S. at 495-97.

O'Shea and *Linda* provided the immediate foundation for *Warth*, for the "actionable causal relationship" test is but a more precise statement of the principle set forth in these two cases.⁶² Whether this increased emphasis on causation is to be used, as the dissenters felt, to limit consideration of questions which a court would prefer to avoid will be revealed by the future application of the test. Additionally, it remains to be seen whether this shift in focus will serve to neutralize the gains made by *Data Processing* and its progeny.⁶³ Had the *Warth* test been applied in *SCRAP*, there is a strong likelihood that the outcome would have been otherwise.

It is evident from *Warth* that the Court will not forego an intense examination of the standing question in order to reach the merits of a case, regardless of their seriousness. The dissenters in *O'Shea* and *Warth* felt the courts should be made available for attacks upon racial discrimination whenever feasible.⁶⁴ The majority of the Court has been unwilling to go so far. In fact, the pains taken by the Court to reaffirm established standing principles might be interpreted as an attempt to dispel any notions of an intention to expand the scope of the standing doctrine.

More narrowly, what does this mean for the individual who wishes to challenge restrictive zoning ordinances? The basic flaw in the allegations of the low income petitioners was the absence of any kind of property interest in Penfield. None of them were subject to the ordinance or were denied a request for a variance.⁶⁵ Nor were they able to point to any personal stake in the outcome of the litigation. It was this fact which enabled the Court to distinguish a group of circuit court decisions in which the complaining parties had a personal interest in a particular housing project; if relief were afforded, those parties would personally benefit.⁶⁶ While a present

62. Justice Brennan, however, remarked that the majority had placed "numerous hurdles, some constructed here for the first time," in front of the petitioners. 422 U.S. at 520 (Brennan, J., dissenting). He felt these new requirements indicated only that the Court had chosen to close the federal courts to claims like those raised by the plaintiffs. *Id.* at 528.

63. Dictum in *Warth* may have ramifications in areas other than causation. In its discussion of statutorily created rights, the Court observed that the right of action must be "expressly" stated or "clearly implied." *Id.* at 501. This is essentially a zone of interests inquiry, an area which has been given liberal treatment in the past; this was particularly true when agency action was challenged, thus bringing the plaintiff within the purview of the APA.

64. See *Warth v. Seldin*, 422 U.S. 490, 519 (1975) (Douglas, J., dissenting); *id.* at 520 (Brennan, J., dissenting); *O'Shea v. Littleton*, 414 U.S. 488, 509 (1974) (Douglas, J., dissenting); Sedler, *supra* note 29, at 500.

65. 422 U.S. at 504.

66. *Id.* at 507. The cases referred to were *Park View Heights Corp. v. Black Jack*, 467 F.2d

contractual interest is not absolutely required, the "focus should be on a particular project."⁶⁷ In the event the individual challenging the ordinance has neither a property interest which is adversely affected nor a sufficient personal interest in a recently proposed housing project, he has no other presently available avenue of attack.

Viewed against the background of the standing doctrine as it has developed since *Data Processing, Warth* may be seen as foreshadowing a reversal of the recent plaintiff-oriented philosophy; it may also be interpreted as a refusal to open the courts' doors any further. With increasing attention being given to zoning patterns in suburban communities and their effect upon minority residents in urban areas who desire better living conditions, *Warth* shows the Court's reluctance to break down long held notions of the right of residents to control the development of their communities with a minimum of outside intervention. In light of the departure of Justice Douglas, who has long been a vigorous proponent of a liberalized standing doctrine, the chances of a reversal in the current philosophy of the Court appear dim.

Walter John Rackley

CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT—DUE PROCESS—STATE ACTION—TERMINATION OF SERVICE BY A STATE-REGULATED PUBLIC UTILITY—The Supreme Court of the United States has held that the Commonwealth of Pennsylvania's connection with the termination of service by a public utility corporation was insufficient to make the utility's conduct attributable to the state for purposes of the fourteenth amendment.

1208 (8th Cir. 1972) (standing was granted to plaintiffs who wished to move into a specific project in which corporate plaintiffs had made a substantial investment); *Crow v. Brown*, 457 F.2d 788 (5th Cir. 1972), *aff'g* 332 F. Supp. 382 (N.D. Ga. 1971) (individual plaintiffs were on a waiting list to move into planned low income apartments upon completion); *Kennedy Park Homes Ass'n v. Lackawanna*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971) (corporate plaintiffs had committed themselves contractually and federal assistance had been approved); *Dailey v. Lawton*, 425 F.2d 1037 (10th Cir. 1970), *aff'g* 296 F. Supp. 266 (W.D. Okla. 1969) (corporate plaintiff needed only a zoning amendment to commence construction and individual plaintiff was a potential renter in that project). *Cf.* *United Farmworkers Housing Project, Inc. v. Delray Beach*, 493 F.2d 799 (5th Cir. 1974) (once municipal services are extended to outsiders, such extensions must be granted in a nondiscriminatory manner).

67. 422 U.S. at 508 n.18.