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The Impact of Policy on Federal Standing

Henry Pitman

COMMENTS

THE IMPACT OF POLICY ON FEDERAL STANDING

Few areas of federal law have produced as much confusion for attorneys and judges as the doctrine of standing.[1] Between 1968 and 1973, the Supreme Court decided a number of cases[2] which significantly liberalized the requirements of the doctrine.[3] Although the more recent cases[4] appear to have retreated[5] from this position, whether the Court has in fact modified its liberal stance on this issue is not yet certain.

The issue of standing involves both constitutional and court-imposed limitations[6] on the power of the judiciary. Since the discretionary aspects of the doctrine concern serious questions of federal judicial policy, a finding of standing in one case may have little value as precedent in a subsequent case in which the policy considerations are significantly different. Unfortunately, the frequent failure of the Court to acknowledge the impact of these differences in policy has generated confusion regarding the appropriate standards in this area.[7] As a result, in recent rulings the Supreme Court and the Second Circuit

1. See, e.g., Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 151 (1970), United States ex rel. Chapman v. Federal Power Comm'n, 345 U.S. 153, 156 (1953); Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859, 861 (D.C. Cir. 1970); Jaffe, Standing to Secure Judicial Review: Private Actions, 75 Harv. L. Rev. 255, 256 (1961) [hereinafter cited as Private Actions].

2. United States v. SCRAP, 412 U.S. 669 (1973); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972); Sierra Club v. Morton, 405 U.S. 727 (1972); Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970); Flast v. Cohen, 392 U.S. 83 (1968). In spite of the fact that the Court in Sierra Club v. Morton found that the petitioners lacked standing, the decision can still be regarded as part of the line of cases reducing standing requirements since it recognized the existence of non-economic, aesthetic injury as a basis for standing. 405 U.S. at 734.

3. See Sierra Club v. Morton, 405 U.S. 727, 738 (1972).

4. Simon v. Eastern Ky. Welfare Rights Org., 96 S. Ct. 1917 (1976); Warth v. Seldin, 422 U.S. 490 (1975); United States v. Richardson, 418 U.S. 166 (1974); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); Linda R.S. v. Richard D., 410 U.S. 614 (1973). See Evans v. Lynn, 376 F. Supp. 327 (S.D.N.Y. 1974), rev'd, 537 F.2d 573 (2d Cir. 1975), rev'd, 537 F.2d 589 (2d Cir. 1976) (rehearing en banc) (The slip opinion of the Second Circuit's en banc rehearing captions the case Evans v. Hills due to Carla A. Hills' succeeding James T Lynn as Secretary of the Department of Housing and Urban Development.) Evans v. Hills, No 74-1793 (2d Cir., June 4, 1976), 537 F.2d 589 n.1. But see City of Hartford v. Hills, 408 F. Supp. 879 (D. Conn. 1975), modified 408 F. Supp. 889 (D. Conn. 1976).

5. Comment, Federal Standing: 1976, 4 Hofstra L. Rev. 383 (1976).

6. Warth v. Seldin, 422 U.S. 490, 499 (1975); Flast v. Cohen, 392 U.S. 83, 92-95 (1968).

7. Justice Brennan has been particularly sensitive to this problem and has stated that "[w]hen agency action is challenged, standing, reviewability, and the merits pose discrete, and often complicated, issues which can best be resolved by recognizing and treating them as such." Barlow v. Collins, 397 U.S. 159, 170 (1970) (Brennan, J., concurring in the result and dissenting).

Professor Scott has suggested that decisions in cases involving standing should clearly distinguish between determinations made on constitutional grounds and those made on grounds of judicial discretion. Scott, Standing in the Supreme Court—A Functional Analysis, 86 Harv L. Rev. 645 (1973) [hereinafter cited as Scott].

have denied standing in situations analogous both in terms of constitutional and policy considerations to prior cases which held that the plaintiffs did have standing.[8] This inconsistency is particularly striking because the later cases have involved alleged civil rights violations, traditionally an area of federal judicial concern and one in which the Court had long construed standing requirements in an exceedingly liberal manner.[9]

Because the issue of standing turns upon prudential, as well as constitutional considerations, the more recent decisions cannot be fully understood without an examination of the role of the doctrine within the federal judiciary and the manner in which it has been applied in recent years. Therefore this Comment will first review the functions which standing performs. Secondly, it will examine in depth how the doctrine has been applied in the post-1970 cases to carry out its most important function, that of defining the proper role of the federal judiciary in our governmental system. Thirdly, it will discuss the confusion, as exemplified by three recent cases, that has been caused by the Court's failure to articulate clearly the relevant policy considerations involved in the use of standing to define the scope of federal judicial power.

I. THE FUNCTIONS OF STANDING

Justice Douglas, speaking for the Court, has commented that "[g]eneralizations about standing to sue are largely worthless as such."[10] The doctrine of standing has been applied to different cases by the Supreme Court with glaring inconsistencies[11] in spite of the fact that it is considered a jurisdictional requirement.[12] Although this suggests that any generalized discussion of standing is of limited value, some indication of the scope of the problems presented by the doctrine is essential to an understanding of the concept.[13]

8. Compare United States v. SCRAP, 412 U.S. 669 (1973), with Warth v. Seldin, 422 U.S. 490 (1975), and Evans v. Lynn, 537 F.2d 589 (2d Cir. 1976) (en banc). See part III-A(2) infra.

9. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 212 (1972). Although Warth v. Seldin, 422 U.S. 490 (1975), did not involve a challenge under Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 et seq. (1970), as did Trafficante, it would not have been difficult for the Court to extend the reasoning used in Trafficante to the factual situation presented in Warth, especially in view of 42 U.S.C. § 3601 (1970) which states: "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."

10. Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 151 (1970). Justice Frankfurter has referred to the concept of standing as a "complicated specialty of federal jurisdiction, the solution of whose problems is in any event more or less determined by the specific circumstances of individual situations . . . ." United States ex rel. Chapman v. Federal Power Comm'n, 345 U.S. 153, 156 (1953).

11. Compare United States v. Storer Broadcasting Co., 351 U.S. 192, 197 (1956) (sua sponte examination of respondent's standing) with Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128, 129 n.1 (1953) (question of respondent's standing not raised by the parties, not ruled on by the Court). See 3 K. Davis, Administrative Law Treatise § 22.18, at 291-92 (1958).

12. Warth v. Seldin, 422 U.S. 490, 498 (1975); Flast v. Cohen, 392 U.S. 83, 101 (1968); Barrows v. Jackson, 346 U.S. 249, 255 (1953). Insofar as standing is a jurisdictional requirement, it is incumbent upon federal courts to examine standing sua sponte. E.g., Cameron v. Hodges, 127 U.S. 322, 325 (1888); Mansfield, C. & L.M. Ry. v. Swan, 111 U.S. 379, 383 (1884).

13. In spite of Justice Douglas' counsel, the Supreme Court has not been at all reticent to

The gist of the question of standing is: "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 . . . questions?"[14] In theory, the requirement of standing is an attempt to resolve the question of whether the particular plaintiff before the court is the appropriate party, by virtue of personal involvement, to seek a resolution on the merits of the case.[15] In its present form, the doctrine is regarded as a requirement of article III of the Constitution, which restricts the jurisdiction of federal courts to "cases and controversies."[16] Because standing is a jurisdictional requirement it is considered to be distinct from the merits of the case,[17] and more properly regarded as a "threshold requirement,"[18] the negative determination of which precludes consideration of the merits.[19]

Apart from its nature as an element of a "case or controversy," the Court has also utilized the doctrine of standing as a tool to broaden its discretion in

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speak generally on the subject. E.g., Warth v. Seldin, 422 U.S. 490, 498-502 (1975), Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 151-55 (1970).

14. Baker v. Carr, 369 U.S. 186, 204 (1962).

15. P. Bator, P. Mishkin, D. Shapiro, H. Wechsler, The Federal Courts and the Federal System 156 (2d ed. 1973).

16. Flast v. Cohen, 392 U.S. 83, 94-101 (1968). See note 7 supra. Commenting on the role standing plays in the formulation of a justiciable controversy, Justice Frankfurter noted that "a court will not decide a question unless the nature of the action challenged, the kind of injury inflicted, and the relationship between the parties are such that judicial determination is consonant with what was, generally speaking, the business of the Colonial courts and the courts of Westminster when the Constitution was framed." Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 150 (1951) (concurring opinion).

Various commentators have disagreed with this analysis and through a process of historical interpretation have concluded that standing was not a requirement "of the courts of Westminster when the Constitution was framed." Professor Jaffe has pointed out that until the administrative reforms of 1832, the courts were the primary organ of centralized control in England and as such were not at all loath to exercise their power even at the behest of a person who, by today's standards, would be considered without standing. "I have encountered no case before 1807 in which the standing of the plaintiff is mooted, though the lists of cases in the digests strongly suggest the possibility that the plaintiff in some of them was without a personal interest." Jaffe, Standing to Secure Judicial Review: Public Actions, 74 Harv. L. Rev. 1265, 1270 (1961) (footnote omitted).

It has also been stated that "[a]lthough [standing] has been explained as a description of 'the constitutional limitation on the jurisdiction of the Court to "cases" and "controversies," ' it apparently entered our law via Frothingham [v. Mellon, 262 U.S. 447 (1923)] . . . " Berger, Standing to Sue in Public Actions: Is it a Constitutional Requirement?, 78 Yale L.J. 816, 818-19 (1969) (footnote omitted). This last statement, however, would appear to be somewhat questionable in light of Liverpool, N.Y. & Phil. S.S. Co. v. Commissioners of Emigration, 113 U.S. 33 (1885), which stated that the Court "has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies." Id. at 39.

17. Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970).

18. O'Shea v. Littleton, 414 U.S. 488, 493 (1974).

19. Id. at 504-05 (Blackmun, J., concurring in part); International Longshoremen's Local 37 v. Boyd, 347 U.S. 222, 223-24 (1954).

deciding whether or not to pass judgment on the merits of a particular case.[20] Justice Powell has stated: "The doctrine of standing has always reflected prudential as well as constitutional limitations."[21] However, in enunciating a test for standing the Court rarely states what role both elements play in the formulation of the test.

Due to its hybrid nature the concept of standing performs a number of functions with varying degrees of propriety and efficiency. Because the doctrine requires the existence of an active controversy between the parties, it guarantees that "the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor to assure that the . . . challenge will be made in a form traditionally thought to be capable of judicial resolution."[22] It further ensures that the relief sought, if granted, will be "no broader than required by the precise facts to which the court's ruling would be applied."[23] The theory is that by requiring plaintiff to be aggrieved, he will have a strong interest in having the case decided in his favor. Consequently, he will present a better argument to the court than one who has not been injured by the defendant's action and, therefore, would not receive any benefit from the exercise of the court's remedial power.[24] Moreover, since the judiciary must rely almost exclusively on the information put before it by the litigants, the higher quality of argument presented by such a plaintiff should result in better reasoned decisions.[25]

Standing also limits a federal court's remedial powers even when they are exercised on behalf of the plaintiff. The requirement of a "personal stake" on the part of the plaintiff ensures that the court's powers will be employed only to the extent necessary to protect that stake. Thus, the doctrine guards against " 'government by injunction' "[26] by reserving the formidable powers of the judiciary for the occasions when their exercise is essential to remedy a particular plaintiff's injury.

Although these justifications of the standing doctrine would seem correct in the majority of cases, they are not without deficiencies. First, because litigation is an expensive process, it would seem that any individual who is willing to bear the cost has at least as much motivation to present a good argument on the merits as one who is aggrieved by the challenged action. "If

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20. A. Bickel, The Least Dangerous Branch, 117-18 (1962) [hereinafter cited as Bickel]; Bickel, The Supreme Court—1960 Term, Foreword: The Passive Virtues, 75 Harv. L. Rev. 40, 42-47 (1961).

21. United States v. Richardson, 418 U.S. 166, 196 n.18 (1974) (Powell, J., concurring). That standing is a hybrid requirement, i.e., that there is a minimal constitutional requirement and a higher court-imposed requirement, is made clear by the fact that "Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III's requirement remains . . . ." Warth v. Seldin, 422 U.S. 490, 501 (1975).

22. Flast v. Cohen, 392 U.S. 83, 106 (1968).

23. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 222 (1974).

24. Id. at 221.

25. Id.

26. Id. at 222.

plaintiff did not have the minimal personal involvement and adverseness which Article III requires, he would not be engaging in the costly pursuit of litigation."[27] Secondly, by making the syllogism turn on the expected quality of the argument, it is at least conceivable that the same logic could be used to support the denial of a hearing in any case where it was expected the argument would be poor, a manifestly unjust result.[28] Thirdly, even when the plaintiff does have the requisite "personal stake," decisions of the Court often have ramifications far beyond the protection of that interest.[29] Although the propriety of the Court's ruling in such a case may be questioned, the ability of a judicial body to make such decisions remains unaffected by the character of the plaintiff's interest.

A third function served by standing is to limit the demands made on the courts.[30] Professor Scott points out that the user of judicial services does not bear the full cost of the service. Thus, greater demands are placed on the judiciary than if those services were unsubsidized.[31] Professor Scott concludes, however, that standing, as opposed to legislative limitations on court access, is an unwieldy tool to limit the demand for judicial resources. A judge is without criteria for determining which plaintiffs should be granted subsidized access. "Nor is he instructed as to the very raison d'être of that subsidy—whether it is concerned with income distribution and the lot of the poor, or with the external benefits and transaction costs associated with bringing representative actions, or with some combination of both."[32]

The fourth, and probably most controversial, function served by the doctrine is to limit the role of the judiciary in a representative form of government.[33] Standing acts as a limitation on the exercise of jurisdiction by the federal courts and, as such, tends to minimize friction with other branches of the federal government and with the states.[34] The Supreme Court is well aware that it is entrusted with broad powers which, if improperly used, could ultimately lead to an anti-majoritarian form of government.[35] As a result, the Court generally exercises a great deal of prudence in "deciding to decide."[36]

To guard against the dangers of an overly active judiciary, the Court has

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27. Scott, supra note 7, at 674.

28. See Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 298 (1921) (Brandeis, J., dissenting) (criticism of Law of March 3, 1911, ch. 231, § 237, (now 28 U.S.C. § 1257 (1970)) as enabling the "skill of counsel" to determine whether a particular state court decision will be reviewed on appeal as a matter of right or on certiorari as a matter of discretion).

29. E.g., Brown v. Board of Educ., 347 U.S. 483 (1954); Scott v. Sandford, 60 U.S. (19 How.) 393 (1857); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

30. Scott, supra note 7, at 670-83.

31. Id. at 670-71. See generally Griswold, Rationing Justice—The Supreme Court's Caseload and What the Court Does Not Do, 60 Cornell L. Rev. 335 (1975).

32. Scott, supra note 7, at 682.

33. Id. at 683.

34. Bickel, supra note 20, at 116.

35. United States v. Richardson, 418 U.S. 166, 179-80 (1974); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 222 (1974).

36. See, e.g., Ashwander v. TVA, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

enunciated a number of other doctrines which aid in determining whether a case is justiciable.[37] These "avoidance" techniques include the concepts of ripeness,[38] reviewability,[39] political question,[40] and mootness,[41] as well as the prohibitions against collusive suits[42] and advisory opinions.[43] Like standing, all these doctrines theoretically are based on the case or controversy requirement of article III. Yet in decisions involving these concepts there are often unspoken considerations concerning both the power of the federal judiciary vis-à-vis the legislative and executive branches, and the proper role of the federal judiciary in the division of power between the federal and state governments.[44] Moreover, the foundation of an avoidance doctrine in article III does little to clarify the limits of the concept when, as with standing, the doctrine is accorded a prudential, as well as a constitutional dimension. Thus, the use of the doctrine of standing to maintain the separation of powers and to limit federal judicial intrusion into traditional state concerns is particularly troublesome. As Chief Justice Warren noted:

> Standing has been called one of "the most amorphous [concepts] in the entire domain of public law." Some of the complexities peculiar to standing problems result because standing "serves, on occasion, as a shorthand expression for all the various elements of justiciability." In addition, there are at work in the standing doctrine the many subtle pressures which tend to cause policy considerations to blend into constitutional limitations.[45]

In its recent major standing cases, the Court has often failed to acknowledge the differing policy considerations involved when an individual seeks to challenge (1) the decision of a federal administrative agency; (2) a spending or regulatory statute of Congress which does not directly affect the plaintiff

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37. "Justiciability is the term of art employed to give expression to this dual limitation [that federal courts only decide questions presented in an adversary context and that they do not rule in cases which are more properly determined by another branch of government] placed upon federal courts by the case-and-controversy doctrine." Flast v. Cohen, 392 U.S. 83, 95 (1968).

38. E.g., Poe v. Ullman, 367 U.S. 497 (1961); International Longshoremen's Local 37 v. Boyd, 347 U.S. 222 (1954); Arizona v. California, 283 U.S. 423 (1931); New Jersey v. Sargent, 269 U.S. 328 (1926).

39. E.g., Schilling v. Rogers, 363 U.S. 666 (1960); Work v. United States ex rel. Rives, 267 U.S. 175 (1925); United States ex rel. Louisville Cement Co. v. ICC, 246 U.S. 638 (1918); ICC v. United States ex rel. Humboldt S.S. Co., 224 U.S. 474 (1912).

40. E.g., Baker v. Carr, 369 U.S. 186 (1962); Coleman v. Miller, 307 U.S. 433 (1939); Oetjen v. Central Leather Co., 246 U.S. 297 (1918); United States v. Old Settlers, 148 U.S. 427 (1893); Fellows v. Blacksmith, 60 U.S. (19 How.) 366 (1856).

41. E.g., DeFunis v. Odegaard, 416 U.S. 312 (1974); Atherton Mills v. Johnston, 259 U.S. 13 (1922); Berry v. Davis, 242 U.S. 468 (1917); Richardson v. McChesney, 218 U.S. 487 (1910).

42. E.g., Moore v. Board of Educ., 402 U.S. 47 (1971) (per curiam); United States v. Johnson, 319 U.S. 302 (1943) (per curiam); Muskrat v. United States, 219 U.S. 346 (1911); Lord v. Veazie, 49 U.S. (8 How.) 250 (1850).

43. E.g., Alabama State Fed'n of Labor v. McAdory, 325 U.S. 450 (1945); Alabama v. Arizona, 291 U.S. 286 (1934); Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792).

44. Scott, supra note 7, at 683.

45. Flast v. Cohen, 392 U.S. 83, 99 (1968) (footnotes omitted). See note 7 supra.

except insofar as the plaintiff is a taxpayer; (3) a state or local ordinance; or (4) the failure to enforce a clearly announced federal policy.[46] In all these cases, the question of standing has been dealt with in radically different manners. Although the doctrine always demands some injury to the plaintiff, the requisite degree, directness, and singularity of the plaintiff's injury vary greatly depending on the Court's frequently unstated assessment of the competing policy considerations involved in each case.[47]

II. IMPLEMENTATION OF POLICY: 1970-74

Prior to 1970, a number of different tests were used to determine standing. To challenge the decision of an administrative agency, a plaintiff would, at times, have to allege the violation of a legally protected interest,[48] while in other instances, an allegation of injury-in-fact would suffice.[49] In order for a federal taxpayer, suing as a taxpayer, to have standing to challenge the constitutionality of a federal statute, a complicated, two-part "nexus" had to be met.[50] For a state citizen to have standing to enjoin the enforcement or non-enforcement of a state statute, he had to show that he would be directly affected by the relief sought.[51]

During the years from 1970 to 1974, the Court ruled in a number of standing cases,[52] in which some of these tests were modified, other reaffirmed. Several of the decisions applied seemingly inconsistent tests to determine standing. However, the cases can be reconciled if the standing tests are viewed primarily as tools used to implement the policies which the Court found determinative in each case. This section will examine a number of cases from this period and suggest how policy considerations affected the Court's holding on the issue of standing.

A. *Standing Under the Administrative Procedure Act:* Data Processing *and* Barlow

A significant change in the law of federal standing occurred in 1970 in the cases of *Association of Data Processing Service Organizations, Inc. v. Camp*[53] and *Barlow v. Collins*.[54] In *Data Processing* plaintiffs sought to challenge a

46. This is an illustrative rather than an exhaustive list of the situations in which policy affects the determination of standing.

47. See Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 157 (1970); Evans v. Lynn, 537 F.2d 589, 609 (2d Cir. 1976) (en banc) (Oakes, J., dissenting).

48. See note 61 infra and accompanying text.

49. See note 60 infra and accompanying text.

50. See note 105 infra and accompanying text.

51. Cramp v. Board of Pub. Instruc., 368 U.S. 278, 283 (1961). See notes 85-86 infra and accompanying text.

52. United States v. Richardson, 418 U.S. 166 (1974); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); United States v. SCRAP, 412 U.S. 669 (1973); Linda R.S. v. Richard D., 410 U.S. 614 (1973); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972); Sierra Club v. Morton, 405 U.S. 727 (1972); Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970).

53. 397 U.S. 150 (1970).

54. 397 U.S. 159 (1970).

ruling of the Comptroller of the Currency which would have allowed national banks to provide data processing services to other banks and their customers. In *Barlow,* tenant farmers attacked a ruling of the Secretary of Agriculture which would have permitted landlords to require that their tenant farmers assign their benefits under the federal uplands cottom program as a condition to working on the landlord's land, thereby forcing the tenants to buy all their farm needs from the landlord at inflated prices. In both cases, standing was predicated on the Administrative Procedure Act (APA) which provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[55]

Speaking for the Court in both cases, Justice Douglas promulgated a two-part test by which to judge the standing of a litigant who seeks to challenge the decision of an administrative agency: (1) the plaintiff must allege "that the challenged [agency] action has caused him injury in fact, economic or otherwise;"[56] and (2) "the interest sought to be protected by the complainant [must be] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[57]

In so holding, the Court changed the prior law of standing to challenge agency action by blurring the distinction between what had been referred to as statutory and non-statutory review. Formerly, there had existed

> [a] central distinction in the field of standing . . . between judicial review of an act or decision of a government official or agency which Congress has expressly provided shall be subject to review in the courts by some prescribed proceeding [statutory review], and judicial review obtained by invoking some general jurisdictional grant or remedy not related to the specific governmental action or decision being challenged [non-statutory review].[58]

Before *Data Processing* and *Barlow,* two different tests were used to determine the plaintiff's standing to challenge the decision of an administrative agency. Where a statute specifically provided for the review of the action by the particular agency[59] in question, the requirement was that of injury-in-fact.[60] Where there was no such statute, the plaintiff had to allege the

55. 5 U.S.C. § 702 (1970).

56. 397 U.S. at 152.

57. Id. at 153.

58. Scott, supra note 7, at 647-48 (footnotes omitted).

59. E.g., 15 U.S.C. § 80a-42(a) (1970) (review of orders of the SEC under the Investment Company Act of 1940); 29 U.S.C. § 160(f) (1970) (review of final orders of NLRB); 47 U.S.C. § 402(b)(6) (1970) (review of FCC orders and decisions); 49 U.S.C. § 1486(a) (1970) (review of CAB orders).

60. "In the field of standing for statutory review, the controversial question became not how high to set the requirements but how low." Scott, supra note 7, at 657. See Private Actions, supra note 1, at 272-87; Comment, Standing to Challenge Exclusionary Zoning in the Federal Courts, 17 B.C. Ind. & Com. L. Rev. 347, 357-58 (1976) [hereinafter cited as Exclusionary Zoning]. At least two cases held that plaintiffs seeking judicial review of agency action had standing solely as representatives of the public. Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 14 (1942); Associated Indus., Inc. v. Ickes, 134 F.2d 694, 704 (2d Cir.), vacated as moot, 320 U.S. 707 (1943) (per curiam).

violation of a legal interest—"one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege."[61] Until the decision in *Data Processing*, the APA had been considered merely a codification of these tests,[62] providing for the application of the appropriate standard in both statutory and nonstatutory review situations. However, in *Data Processing* the Court held the legal interest test inappropriate to determine the threshold question of standing because that test went to the merits of the case.[63] Thus, the new standard enunciated in *Data Processing* appeared to abolish the distinction between statutory and non-statutory review,[64] substituting a single test for standing to be applied in any case brought under the APA.[65]

At first blush, it would appear that *Data Processing* and *Barlow* stand for the proposition of increased judicial review of the actions of executive agencies. Certainly, the cases liberalized the conditions under which judicial review will be granted. But it should be noted that this liberalization of standing requirements occurred in cases where federal policy strongly favored increased judicial review.

Both cases concerned an agency's interpretation of a statute,[66] a matter which " 'does not significantly engage the agency's expertise. . . . [and] on which courts, and not [administrators], are relatively more expert.' "[67] Since neither case addressed particularly delicate matters within the agency's special expertise, judicial review would not result in a significant arrogation of powers more properly within the province of the agency. Moreover, even though the action of the agency was presumptively subject to judicial review,[68] in the trial of the substantive issues the determination of an agency is

61. Tennessee Elec. Power Co. v. TVA, 306 U.S. 118, 137-38 (1939). Accord, Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 152 (1951) (Frankfurter, J., concurring); Perkins v. Lukens Steel Co., 310 U.S. 113, 125 (1940); Alabama Power Co. v. Ickes, 302 U.S. 464, 479 (1938).

62. Sierra Club v. Morton, 405 U.S. 727, 733 (1972); Kansas City Power & Light Co. v. McKay, 225 F.2d 924, 931-32 (D.C. Cir.), cert. denied, 350 U.S. 884 (1955); Atchison, T. & S.F Ry. v. United States, 130 F. Supp. 76, 78 (E.D. Mo.), aff'd mem., 350 U.S. 892 (1955); Private Actions, supra note 1, at 287; Scott, supra note 7, at 658.

63. 397 U.S. at 153. Accord, 3 K. Davis, Administrative Law Treatise § 22.04, at 217 (1958) ("Circular reasoning is very common, for one of the questions asked in order to determine whether a plaintiff has standing is whether the plaintiff has a legal right, but the question whether the plaintiff has a legal right is the final conclusion, for if the plaintiff has standing his interest is a legally-protected interest, and that is what is meant by a legal right."); C. Wright, Federal Courts § 13, at 43 (2d ed. 1970).

64. See note 58 supra and accompanying text.

65. See Scott, supra note 7, at 668; Exclusionary Zoning, supra note 60, at 359

66. Data Processing involved the Comptroller's interpretation of 12 U.S.C. § 1864 (1964) which provides that "[n]o bank service corporation may engage in any activity other than the performance of bank services for banks." Barlow involved the Secretary of Agriculture's interpretation of 16 U.S.C. § 590h(g) (1964), which permits participants in the upland cotton program to assign payments thereunder only "as security for cash or advances to finance making a crop."

67. 397 U.S. at 166, quoting Hardin v. Kentucky Utilities Co., 390 U.S. 1, 14 (1968) (Harlan, J., dissenting).

68. Abbott Laboratories v. Gardner, 387 U.S. 136, 140-41 (1967).

accorded great deference.[69] Thus, although the Court asserted the right to oversee an agency's construction of a statute, such oversight in no way constitutes interference with a co-equal branch of government. To the contrary, the opinions in both cases can be read as indicating deference to Congress. In both cases, the statutes involved tended to serve as a check on the powers of the executive agencies in question. By asserting its power to review the acts of the agency, the Court was basically seeking to apply those restrictions Congress had seen fit to impose. In an analogous situation, it has been stated that "[t]here is need for judicial action . . . [when] an agency of the Executive Branch fails to carry out [a] legislative mandate. The contrary would give the Executive a silent veto not provided in the Constitution."[70]

Under this analysis, the decisions in *Data Processing* and *Barlow* seem not an expansion of power but rather a fulfillment of the traditional federal judicial function of mediation between the coordinate branches of the federal government.[71]

B. *Non-APA Standing:* Trafficante *and* Linda R.S.

In 1972 and 1973 the Court decided two standing cases[72] in which strong policy considerations played a determinative role in the Court's decisions. Neither of these cases was brought under the APA and both involved substantive issues unlike those in *Data Processing* and *Barlow*. As a result, the Court approached the standing question in a different manner than it had in those rulings.

In *Trafficante v. Metropolitan Life Insurance Company*,[73] two tenants (one black and one white) of an apartment complex had filed a complaint with HUD, alleging that the owner of their apartment complex had discriminated against non-whites in violation of Title VIII of the 1968 Civil Rights Act,[74] thereby depriving the tenants of "the social benefits of living in an integrated community; . . . [and causing them] embarrassment and economic damage in social, business, and professional activities from being 'stigmatized' as residents of a 'white ghetto.' "[75] In addition, a statute provided for judicial review at the request of "[a]ny person who claims to have been injured by a discriminatory housing practice . . . ."[76]

On the face of the complaint, plaintiffs' standing was, at the very least,

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69. Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971); Udall v. Tallman, 380 U.S. 1, 18 (1965).

70. Evans v. Lynn, 537 F.2d 589, 611 (2d Cir. 1976) (en banc) (Gurfein, J., dissenting).

71. See Bickel, supra note 20, at 26-33; A. Mason & W. Beaney, The Supreme Court in a Free Society 28-68 (1959).

72. Linda R.S. v. Richard D., 410 U.S. 614 (1973); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972).

73. 409 U.S. 205 (1972).

74. 42 U.S.C. § 3601 et seq. (1970).

75. 409 U.S. at 208. Professor Davis has characterized these allegations of injury as "[s]omething like an abstract interest . . . ." K. Davis, Administrative Law of the Seventies § 22.02-5 (1976).

76. 42 U.S.C. § 3610(a) (1970).

questionable. First, there was no indication in the opinion that the landlord had discriminated against specific blacks who would have been able to move into the complex but for the discriminatory practices (*i.e.*, no allegation was made that there was an absence of blacks in the complex for non-economic reasons). Unless this was the case, plaintiffs would not derive any benefit from the relief sought, and logically it could therefore be said that their injury was not caused by the defendant's actions. Thus, it could be argued that any benefit the plaintiffs would receive from a favorable adjudication on the merits would be dependent on the acts of third parties (*i.e.*, non-whites). It could be argued further that the primary goal of Title VIII was to benefit those who had been discriminated against. Therefore, it could be said that the plaintiffs were also attempting to raise the rights of third parties, a practice traditionally barred by prudential rules of standing.[77]

However, a unanimous Court did find that the plaintiffs in *Trafficante* had standing. The Court stated that plaintiffs had alleged injury-in-fact and that the broad definition of "person aggrieved" in the statute was indicative of " 'a congressional intention to define standing as broadly as is permitted by Article III of the Constitution.' "[78] The Court went on to point out that since the Attorney General lacked the resources to prosecute adequately all claims arising under Title VIII, "the main generating force must be private suits in which . . . the complainants act not only on their own behalf but also 'as private attorneys general in vindicating a policy that Congress considered to be of the highest priority.' "[79] That such was the intent of Congress was supported by the legislative history of the statute which indicated a belief on the part of Congress that " 'the whole community' "[80] is victimized by a landlord's discriminatory practices.

The following year, however, in *Linda R.S. v. Richard D.*[81] the Court was unwilling to apply the same liberal standards to determine whether plaintiff had standing. In that case the mother of an illegitimate child sought to enjoin

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77. Warth v. Seldin, 422 U.S. 490, 499 (1975); McGowan v. Maryland, 366 U.S. 420 (1961); Tileston v. Ullman, 318 U.S. 44 (1943). However, at times the Court has waived the application of this rule. In its most recent statement on the issue, the Court pointed out that the relevant factors to be considered are the relationship between the litigant and the third party, and the probability of the third party's ever being able to raise the rights effectively. Singleton v. Wulff, 96 S. Ct. 2868 (1976) (doctor seeking to challenge exclusion of elective abortions under state medicaid program allowed to raise the rights of his patients); Planned Parenthood v. Danforth, 96 S. Ct. 2831 (1976) (same); Griswold v. Connecticut, 381 U.S. 479 (1965) (doctor convicted of aiding in the use of contraceptives allowed to raise the rights of his married patients); Barrows v. Jackson, 346 U.S. 248 (1953) (white defendant sued for breach of racially restrictive covenant allowed to raise the rights of blacks); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (private and parochial schools suing to enjoin enforcement of statute requiring all parents to send their children to public schools allowed to raise the rights of parents). See generally Sedler, Standing to Assert Constitutional Jus Tertii in the Supreme Court, 71 Yale L.J. 599 (1962).

78. 409 U.S. at 209, quoting Hackett v. McGuire Bros., 445 F.2d 442, 46 (3d Cir. 1971).

79. 409 U.S. at 211.

80. Id., quoting 114 Cong. Rec. 2706 (1968) (remarks of Senator Javits).

81. 410 U.S. 614 (1973).

what she contended was the discriminatory application and enforcement of a provision of the Texas Penal Code[82] which provided for criminal penalties for a husband who failed to support his minor child. Plaintiff alleged that the father of her illegitimate child had failed in his duty of support and argued that the refusal of the state to enforce the provision against him was violative of the equal protection clause of the fourteenth amendment.

Under the decision in *Trafficante*, in which the question of causation was not very clearly examined, it would seem that the plaintiff should have had standing. The injury was much more concrete than that alleged in *Trafficante*. Moreover, the claim of causation in *Linda R.S.* was relatively convincing[83] since the very statute in question was based on the assumption that "criminal sanctions are useful in coercing fathers to fulfill their support obligations to their legitimate children."[84] Under this rationale, the plaintiff in *Linda R.S.* would arguably have been benefited had the relief sought been granted.

However, Justice Marshall, speaking for a majority of five, found plaintiff lacked the requisite standing because there was insufficient causal connection "between her injury and the government action which she attack[ed]. . . ."[85] The majority viewed the statute as creating a completed offense as soon as the father failed to provide support, with his subsequent actions having no effect on the penalty imposed. The ultimate benefit of enforcement to the plaintiff was therefore dependent upon the actions of a third party not before the Court. Thus, the relief sought was described as "speculative,"[86] since it could not be said that but for the non-enforcement of the statute, the plaintiff would be benefited.

In both *Trafficante* and *Linda R.S.*, the benefit of the relief sought was ultimately dependent upon the acts of third parties. In *Trafficante* the Court ignored this point. Yet in *Linda R.S.* this factor was held to be determinative in the Court's finding that the plaintiff lacked standing. Despite the seeming inconsistency in the Court's analysis, an examination of the vastly different policy considerations in these two cases suggests an underlying rationale for the results reached by the Court in both rulings. In *Trafficante* the plaintiffs were seeking to enforce a federal statute, and since the remedy was sought

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82. Law of May 25, 1959, ch. 222, [1959] Tex. Laws 504 (repealed 1973).

83. "I had always thought our civilization has assumed that the threat of penal sanctions had something more than a 'speculative' effect on a person's conduct." 410 U.S. at 621 (White, J., dissenting).

It has been argued that were it not for this deterrent effect, state criminal laws might be without a rational basis sufficient to pass constitutional muster. See Gregg v. Georgia, 96 S. Ct. 2909, 2931 (1976).

84. 410 U.S. at 621 (White, J., dissenting). That the statute's effect was intended to be coercive is made clear from Adams v. State, 172 Tex. Crim. 615, 361 S.W.2d 877 (1962) (conviction could not be sustained absent proof that defendant was financially able to support minor children) and Rainwater v. State, 140 Tex. Crim. 88, 141 S.W.2d 364 (1940) (proof that father provided support to the best of his ability allowed as an affirmative defense).

85. 410 U.S. at 617-18.

86. Id. at 618.

against a private individual, judicial action would not result in a confrontation with a coordinate branch of the federal government or interference with a state's application of its own laws. Secondly, a statute specifically provided for the bringing of civil actions to eliminate discrimination in housing, indicating that Congress intended a concerted federal attack on the problem.[87] Thirdly, the case involved a question of discrimination on the basis of race, which, apart from any particular statutory program, has long been a ground for special scrutiny by the Court.[88] Finally, since the ability of HUD and the Attorney General to enforce the statute was minimal, and there was no immediate prospect that this situation would change, a failure to find that the plaintiffs had standing would result in a frustration of congressional intent where the federal statute had arguably been violated.

On the other hand, in *Linda R.S.* the relief sought would have required the Court to interfere directly with a state's application and enforcement of its own laws, a particularly sensitive area. The Supreme Court and Congress have traditionally recognized that the states possess broad powers in terms of the substance and application of their laws.[89] The federal policy is, therefore, one of deference to state regulation of local matters. Thus, it is consistent for

87. See 42 U.S.C. § 3610 (1970).

88. The federal policy against racial discrimination has been the subject of both judicial and legislative action since the post-Civil War period. Shortly after its adoption, the fourteenth amendment was interpreted as protecting only blacks. Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872). Even in situations where the prohibitions of the fourteenth amendment do not apply, it has been held that it would be inconsistent with the policy of the United States for the judiciary to rule in a manner contrary to the result in situations where the prohibitions did apply. Hurd v. Hodge, 334 U.S. 24, 34-35 (1948). Moreover, in cases arising under the equal protection clause of the fourteenth amendment, classifications based on race have been held to be "suspect" and subject "to the most rigid scrutiny," Korematsu v. United States, 323 U.S. 214, 216 (1944), thus demanding a "very heavy burden of justification," Loving v. Virginia, 388 U.S. 1, 9 (1967).

The Supreme Court has consistently vindicated the general policy of eliminating racial segregation. E.g., Hamm v. City of Rock Hill, 379 U.S. 306 (1964) (retroactive application of the 1964 Civil Rights Act to state criminal trespass proceedings); Brown v. Board of Educ., 347 U.S. 483 (1954) (racially separate but "equal" treatment in public schools prohibited); Barrows v. Jackson, 346 U.S. 249 (1953) (racially restrictive covenants unenforceable at law); Shelley v. Kraemer, 334 U.S. 1 (1948) (racially restrictive covenants unenforceable in equity).

Congress has also attacked racial discrimination through the enactment of a number of statutes. E.g., 28 U.S.C. § 1443 (1970) (civil rights cases removable to federal courts); the Civil Rights Act of 1964. 78 Stat. 241 (codified in scattered sections of 42 U.S.C.); the Civil Rights Act of 1968, 82 Stat. 73 (codified in scattered sections of 18, 25, 42 U.S.C.); the Housing and Community Development Act of 1974, 42 U.S.C. § 5301 et seq. (Supp. V, 1975).

89. See, e.g., Steffel v. Thompson, 415 U.S. 452 (1974); Younger v. Harris, 401 U.S. 37 (1971); Cameron v. Johnson, 390 U.S. 611 (1968); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Leffingwell v. Warren, 67 U.S. (2 Black) 599, 603 (1862); Elmendorf v. Taylor, 23 U.S. (10 Wheat.) 152, 159-60 (1825); 28 U.S.C. § 1652 (1970) (state laws as rules of decision); 28 U.S.C. § 2281 (1970) (three-judge court needed to enjoin enforcement of state statute as unconstitutional); 28 U.S.C. § 2283 (1970) (general prohibition against federal courts enjoining proceedings in state courts). Of course, this deference to the states lies at the heart of the federalist system. See U. S. Const. amends. X, XI. See generally P. Bator, P. Mishkin, D. Shapiro, H. Wechsler, The Federal Courts and the Federal System 691-718 (2d ed. 1973).

the Court to impose more stringent requirements to determine the standing of a plaintiff seeking to challenge state or local laws.

The Court even admitted that the plaintiff in *Linda R.S.* did "have an interest in the support of her child. But given the *special* status . . ." which the Court accords to state criminal prosecutions, plaintiff had failed to show "a direct nexus between the vindication of her interest and the enforcement of the State's criminal laws."[90] Moreover, *Linda R.S.* was decided at a time when the Court was re-evaluating the role of federal equity jurisdiction with regard to state criminal proceedings and had recently established a trend toward less federal interference in this area.[91] Admittedly, *Linda R.S.* involved a classification based on illegitimacy—a legislative practice which has been carefully scrutinized by the Court in recent years.[92] Yet such classifications have not been reviewed as rigorously as those based on race.[93] Furthermore, the refusal of standing to this particular plaintiff would not necessarily mean that the statute in question would be immune from constitutional challenge, since such a challenge could be brought by one convicted under the statute. Finally, the challenged statute was repealed three months after the Court's ruling in a total revamping of the Texas Criminal Code.[94] Although there is no indication in the opinion that this factor was taken into account, it would not be unreasonable to suggest that the members of the Court knew that the Texas legislature was considering the repeal of the statute and, therefore, did not want to interfere in a delicate matter that could shortly be rendered moot by legislative action.[95]

Hence, in *Trafficante,* many policy considerations militated in favor of a finding of standing, while in *Linda R.S.* similar considerations weighed against such a finding. Thus, the Court overlooked the question of causation in *Trafficante* although it was the focal point of the decision in *Linda R.S.* It would seem, therefore, that by varying the requisite degree of causation, the Court had utilized a convenient tool to implement policies while ostensibly deciding questions of jurisdiction.

The difficulty, however, with the use of causation in this context is the

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90. 410 U.S. at 619 (emphasis added).

91. See Steffel v. Thompson, 415 U.S. 452 (1974); O'Shea v. Littleton, 414 U.S. 488 (1974); Younger v. Harris, 401 U.S. 37 (1971); Cameron v. Johnson, 390 U.S. 611 (1968); Dombrowski v. Pfister, 380 U.S. 479 (1965).

92. See Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Labine v. Vincent, 401 U.S. 532 (1971); Levy v. Louisiana, 391 U.S. 68 (1968).

93. Compare Loving v. Virginia, 388 U.S. 1, 9 (1967) with Labine v. Vincent, 401 U.S. 532, 538-39 (1971).

94. Law of June 14, 1973, ch. 399, §§ 1 (enacting a new Penal Code), 3(a) (repealing Art. 602), [1973] Tex. Laws 883-990, 992. Under the revised Texas Penal Code, nonsupport of both legitimate and illegitimate children is specifically prohibited. Tex. Rev. Penal Code Ann. § 25.05(d) (1974).

95. The possibility of the Court's having knowledge of the impending repeal of the challenged statute is evidenced by the fact that the repeal of the statute in question was part of the total revamping of the Texas Penal Code., In all probability, such a major revision was under consideration by the Texas Legislature well before the Court's decision.

failure of the Court to distinguish the underlying considerations which justified the apparently conflicting results in *Linda R.S.* and *Trafficante*. While it appears that the above-stated policy factors motivated the Court to require different degrees of causation in these cases, the Court's failure to place the holdings explicitly on such policy grounds has led to the application of the *Linda R.S.* "but for"[96] standard in what are essentially *Trafficante* situations. As a result, subsequent rulings have seemed logically inconsistent and the policies suggested as the rationale for *Trafficante* have been thwarted.

C. *Taxpayer and Citizen Standing:* Richardson *and* Schlesinger

In 1974 the Court decided two major standing cases[97] involving the question of whether a federal taxpayer, without showing more than his status as taxpayer, could challenge the failure of Congress to comply with certain provisions of the Constitution. The second case also addressed the issue of whether standing could be predicated on a citizen's interest in having Congress comply with the Constitution. In both cases, the Court failed to find standing, primarily due to considerations of the proper role of the judiciary within the federal government. As is evident in both opinions, the application of liberalized standing requirements to plaintiffs who predicate standing on their status as taxpayers or as citizens could have far reaching effects in altering the balance of power within the federal government. Therefore, the Court is more sensitive to policy considerations in the areas of taxpayer and citizen standing than in any other type of standing case. Hence, these decisions are properly considered as being sui generis and great caution should be exercised before attempting to transpose the principles in these rulings to cases which deal with standing in other contexts.

In *United States v. Richardson*[98] a federal taxpayer brought suit seeking to enjoin the publication of the Treasury Department's "Combined Statement of Receipts, Expenditures, and Balances of the United States Government" on the ground that it did not fulfill the requirements of article I, section 9 of the Constitution,[99] and to compel the Secretary of the Treasury to publish a full accounting of the receipts and expenditures of the CIA.[100] In *Schlesinger v. Reservists Committee to Stop the War*[101] plaintiffs attempted to challenge the membership in the Armed Forces Reserves of certain members of Congress as

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96. See part III-A(2) infra.

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

98. 418 U.S. 166 (1974).

99. U.S. Const. art. I, § 9, cl. 7 provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

100. In effect, the suit was a challenge to the constitutionality of the Central Intelligence Agency Act, 50 U.S.C. § 403 et seq. (1970), which requires an accounting from the CIA "solely on the certificate of the Director . . . ." 50 U.S.C. § 403j(b) (1970).

101. 418 U.S. 208 (1974).

violative of the incompatibility clause of the Constitution.[102] Standing was predicated on plaintiffs' status both as taxpayers and as citizens. The alleged injury was that "Reserve membership by Members of Congress . . . 'deprives or may deprive the individual named plaintiffs and all other citizens and taxpayers of the United States of the faithful discharge by members of Congress who are members of the Reserves of their duties as members of Congress, to which all citizens and taxpayers are entitled.' "[103]

In both cases, the plaintiffs were trying to expand the holding of *Flast v. Cohen*,[104] which held that a federal taxpayer *qua* taxpayer could sue to enjoin allegedly unconstitutional federal spending programs provided she showed: (1) that there was a logical link between the plaintiff's status as taxpayer and the program sought to be challenged, *i.e.*, the challenged expenditures had to be part of a spending program rather than expenditures incidental to an essentially regulatory program, and (2) that there was a logical link between the plaintiff's status as a taxpayer and the constitutional provision alleged to have been violated, *i.e.*, it must be alleged that the Government is spending money in violation of specific constitutional limitations on its spending powers.[105]

Since Mrs. Flast was challenging a spending program[106] and since she alleged that money was being spent in violation of a specific constitutional limitation,[107] she was found to have standing as a federal taxpayer to challenge a spending program of the federal government.

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102. U.S. Const. art. I, § 6, cl. 2 provides that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."

103. 418 U.S. at 212, quoting respondent's petition for certiorari at 46.

104. 392 U.S. 83 (1968).

105. Id. at 102-03. A brief examination of the problems of the Flast "nexus" test indicates that the Court in Flast was considering a good deal more than the plaintiff's "personal stake in the outcome." First, the decision stated that standing involves both constitutional and prudential considerations, id. at 97, yet the Court did not state whether the two-part "nexus" test states a constitutional or prudential rule. Secondly, the Court also made clear that standing involves a question distinct from the merits, id. at 99, yet the application of the test announced requires at least a cursory investigation of the merits of the case. Thirdly, and most troublesome, is the fact that the second part of the test requires that the plaintiff allege a violation of "specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8." Id. at 103. The Court also characterized the role standing plays as essentially that of plaintiff selection. Id. It would seem that if standing can be properly characterized as a plaintiff selection device, the specificity of the constitutional limitations should be totally irrelevant to the "threshold" question of standing because the specificity of the limitation does not relate to whether or not the plaintiff has a "personal stake" in the outcome. If anything, the requirement that the plaintiff invoke a specific constitutional limitation seems much more related to the problems encountered with political questions (those of "judicially discoverable and manageable standards," Baker v. Carr, 369 U.S. 186, 217 (1962)) than those which should be the proper subject of consideration when the standing of one of the litigants is brought into question. 392 U.S. at 123-24 (Harlan, J., dissenting).

106. Mrs. Flast sought to enjoin expenditures under the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 241a et seq. (Supp. II, 1964). 392 U.S. at 85.

107. The spending program was alleged to be violative of the establishment and free exercise clauses of the first amendment. 392 U.S. at 85-86.

Substantively, there were important distinctions between *Flast* on the one hand and *Richardson* and *Schlesinger* on the other. The statute under attack in *Flast* provided for federal aid to schools, both public and private.[108] The Court has traditionally perceived the establishment clause as erecting " 'a wall of separation between church and State.' "[109] In the Court's view, the failure to maintain this wall would lead to divisiveness between sects, the very thing sought to be avoided by the first amendment.[110] *Richardson*, however, involved a challenge to the statutes regulating the CIA, an agency whose activities are related to the war-making powers of Congress. Judicial intervention in this instance would result in a direct confrontation between the coordinate branches of the federal government in sensitive areas where great latitude must be accorded the powers of Congress and the Executive in order for those powers to be effective.[111] Similarly, *Schlesinger* involved a direct challenge to a coordinate branch. The Court there did not reach the question of whether the qualifications of members of Congress present a "political question."[112] Nevertheless, the issue is a highly sensitive one in which it appears that the best course for the Court is to decide not to decide absent a clear showing of the need for adjudication.

In denying standing to the plaintiffs in both *Richardson* and *Schlesinger*, the Court applied the two-part *Flast* test. It found that since neither case involved a Congressional spending program, there was no logical link between the status of taxpayer and the claim sought to be adjudicated. In *Schlesinger* the Court also dealt with the question of standing predicated on citizenship. On this point the court ruled that one who suffered an abstract, speculative injury in a manner undifferentiated from that suffered by all citizens was not entitled to judicial review of the sensitive constitutional questions presented in the case:

> In some fashion, every provision of the Constitution was meant to serve the interests of all [citizens]. Such a generalized interest, however, is too abstract to constitute a 'case or controversy' appropriate for judicial resolution. The proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions has no boundaries.[113]

It is noteworthy that in both cases the Court to some degree indicated its sensitivity to the delicate policy questions involved. The Court addressed the argument that if the plaintiffs in *Richardson* and *Schlesinger* lacked standing no one would be able to challenge the alleged violation of the Constitution.

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108. The constitutionality of a very similar state statute was affirmed the same day Flast was decided. Board of Educ. v. Allen, 392 U.S. 236 (1968). The constitutionality of the statute involved in Flast was affirmed in Wheeler v. Barrera, 417 U.S. 402 (1974), modified, 422 U.S. 1004 (1975).

109. Everson v. Board of Educ., 330 U.S. 1, 16 (1947), quoting Reynolds v. United States, 98 U.S. 145, 164 (1879).

110. 330 U.S. at 51-53 (Rutledge, J., dissenting).

111. See Woods v. Cloyd W. Miller Co., 333 U.S. 138 (1948); Bowles v. Willingham, 321 U.S. 503 (1944); see also cases cited at note 40 supra.

112. 418 U.S. at 215-16.

113. Id. at 226-27 (footnote omitted).

The Court found that such a circumstance does not necessarily militate in favor of a finding of standing, but rather "gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process."[114] The Court further asserted that although extremely liberal taxpayer and citizen standing might be appropriate in a direct democracy, it would be inconsistent with our representative form of government.[115] Moreover, the Court commented, firm standing limitations are a practical necessity in order to check the ever increasing workload of the federal courts.[116]

However, while the Court did indicate those policies which it considered in determining the standing issue, the opinions failed to distinguish prior cases. The injury-in-fact in *Richardson* and *Schlesinger* seems at least as nonspeculative as the injury in *Trafficante,* and the zone of interest test enunciated in *Data Processing* could also have been met in both cases.[117] It would have been preferable, therefore, if the Court had acknowledged this apparent discrepancy and emphasized that the standards used in *Schlesinger* and *Richardson* were tailored to cases raising delicate questions of constitutional adjudication. Under such an approach, the requirements in those cases of particular, concrete, direct, non-generalized injury[118] would be properly understood as prudential limitations which apply to certain constitutional challenges and which should be of lesser importance in, for example, situations involving review of agency action.[119] As one commentator has suggested:

> The Court's insistence that standing requires a concrete, differentiated injury should not be understood as an attempt to redefine the minimum requirement of injury under article III. Rather, it should be seen as a reflection of prudential considerations peculiarly applicable to citizen suits brought to enforce general mandates of the Constitution.[120]

D. *APA Standing Revisited:* Sierra Club *and* SCRAP

As was stated above,[121] the decisions in *Data Processing* and *Barlow* seemed to lessen the requirements of standing to sue under the APA. In *Sierra Club v. Morton*[122] and *United States v. SCRAP*[123] the Court had an opportu-

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114. United States v. Richardson, 418 U.S. 166, 179 (1974).

115. Id. at 179-80.

116. Id. at 179.

117. The Supreme Court, 1973 Term, 88 Harv. L. Rev. 41, 239 (1974); see notes 73-77 supra and accompanying text.

118. United States v. Richardson, 418 U.S. 166, 180 (1974).

119. The Supreme Court, 1973 Term, 88 Harv. L. Rev. 41, 242-43 (1974). But see part III-B infra.

120. The Supreme Court, 1973 Term, 88 Harv. L. Rev. 41, 243 (1974) (footnotes omitted).

121. See part II-A supra.

122. 405 U.S. 727 (1972).

123. 412 U.S. 669 (1973).

nity to apply the test enunciated in *Data Processing*. In these two cases, the requirements of standing to challenge agency action under the *Data Processing* test were held to be quite minimal. Moreover, an examination of these two cases suggests that, in the absence of countervailing policy considerations, the Court should not apply the more rigid standards established in *Linda R.S.*, *Richardson* and *Schlesinger*.[124]

In *Sierra Club*, an environmental interest group attempted to challenge a decision by the Forest Service which permitted the commercial development of Mineral King Valley. In spite of the fact that the members of the Sierra Club appeared to use the area in question,[125] the plaintiff did not allege this. Rather, the Sierra Club sued as an organization with a special interest in conservation, predicating its standing on the APA,[126] apparently in the hope of being recognized as a private attorney general.

Finding that plaintiff lacked standing, the Court acknowledged that aesthetic injury would be sufficient injury-in-fact to find standing under the APA, but emphasized that "a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA."[127] Hence, under *Sierra Club* interest alone does not equal injury sufficient for a finding of APA standing, in spite of the liberalization which took place in *Data Processing* and *Barlow*.[128]

In *SCRAP*, the plaintiffs, environmental interest groups, sought to challenge an ICC ruling which allowed railroads to charge a 2.5% surcharge on freight rates. They alleged that the increase:

> would discourage the use of "recyclable" materials, and promote the use of new raw materials that compete with scrap, thereby adversely affecting the environment by encouraging unwarranted mining, lumbering, and other extractive activities. The members of these environmental groups were allegedly forced to pay more for finished products, and their use of forests and streams was allegedly impaired because of

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124. Although the continued vitality of SCRAP has apparently been called into question by Simon v. Eastern Ky. Welfare Rights Org., 96 S. Ct. 1917 (1976), it is noteworthy that the Court in Eastern Kentucky distinguished rather than questioned the decision in SCRAP. Id. at 1927 n.25. Moreover, the ruling in Eastern Kentucky is subject to criticism because the Court there apparently failed to acknowledge the policy considerations involved when agency action is challenged under the APA. Id. at 1934 (Brennan, J., concurring in the judgment and dissenting). See text accompanying notes 252-63 infra.

125. From an amici curiae brief filed in the case it would appear that the members of the Sierra Club actually did use the area. 405 U.S. at 735 n.8.

126. 405 U.S. at 730.

127. Id. at 739.

128. The opinion in Sierra Club is equally interesting for what it does not say. The Court cites five cases in which interest, without a showing of injury, was sufficient for standing to be found. The Court does recognize that standing is a jurisdictional requirement, yet surprisingly it cites these cases without condemnation and, indeed, without comment. 405 U.S. at 738 n.13.

For a discussion of the problems involved in allowing special interest groups to have standing absent a showing of injury, see Scott, supra note 7, at 680-81.

unnecessary destruction of timber and extraction of raw materials, and the accumulation of otherwise recyclable solid and liquid waste materials.[129]

Plaintiffs sought standing under the APA, alleging that the ICC had failed to file an environmental impact statement as required by the National Environmental Policy Act of 1969.[130] Despite the attenuated chain of causation, it was held that the plaintiffs in *SCRAP* did have standing. The Court noted that the crucial difference between *SCRAP* and *Sierra Club* was that the plaintiffs in *SCRAP* alleged that they did in fact use the area that was allegedly affected by the ruling.[131] A comparison of these two cases indicates that although the Court was willing to apply liberalized standing requirements in situations involving challenges to agency action,[132] it remained unwilling to remove the requirement of injury-in-fact altogether.

Apart from its relationship to *Sierra Club,* the decision in *SCRAP* provides an illuminating contrast to the manner in which standing was handled in several other cases. The major difficulty with the alleged injury in *SCRAP* is the extremely attenuated causal connection between the injury alleged and the specific action challenged. First, the rate increase was general and, as such, it should not have affected recyclable goods differently from virgin goods.[133] Secondly, the injury alleged would really stem from the practices of manufacturers and not from the rate increase in question. In view of these two factors it would seem that plaintiffs' injury was speculative. Moreover, in *Linda R.S.,* decided just three months earlier, a plaintiff was found to lack standing absent a showing that but for the defendant's actions, she would not be injured. Without distinguishing or even citing *Linda R.S.,* the Court indicated that the question of causation should be left for the trial on the merits, or at the very earliest, considered in a motion for summary judgment. While conceding that plaintiffs' pleading must be "more than an ingenious academic exercise in the conceivable," the Court was satisfied that in the case at bar plaintiffs had asserted "a specific and perceptible harm that distinguished them from other citizens who had not used the natural resources that were claimed to be affected."[134] It would seem that the only convincing explanation for these divergent approaches is to be found in policy considerations underlying the issues in each case. Since *SCRAP* involved a challenge to agency action, which is presumptively subject to review,[135] the Court required only that the allegation of causation be more than an "academic exercise in the conceivable." When, however, the substantive issue involved federal judicial intervention in the state's application of its own criminal laws, there had to be a convincing showing of direct causation.[136]

129. 412 U.S. at 676.
130. 42 U.S.C. § 4321 et seq. (1970).
131. 412 U.S. at 687.
132. But see part III-B infra.
133. 412 U.S. at 676.
134. Id. at 688-89 (footnote omitted).
135. See note 68 supra and accompanying text.
136. But see part III-B infra.

The Court in *SCRAP* also dealt differently with the degree and singularity of the injury needed to establish standing to challenge agency action. It was stated in *SCRAP* that " '[t]he basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle . . . .' "[137] This contrasts sharply with the statement in an earlier taxpayer case in which it was held that de minimis injury to a federal taxpayer is insufficient as a basis for standing.[138] Again, it seems that the Court was requiring more injury when there was the possibility of direct confrontation with Congress than when the question was whether or not a regulatory agency had complied with federal statutes.[139]

Finally, the decision in *SCRAP* seemingly contravened the Court's position in *Richardson* that an injury suffered by the public as a whole is insufficient as a basis for standing. In *SCRAP* it was held that "[t]o deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion."[140] In *Richardson*, on the other hand, the fact that the grievance was generalized was held to indicate that the proper forum for redress was the political arena.[141] The statements are not necessarily inconsistent. A generalized grievance may be held a sufficient basis for standing to challenge the action of a regulatory agency since judicial review of agency action is anticipated and usually authorized by Congress.[142] Yet, the same grievance might be insufficient to challenge the constitutionality of a federal statute because such a challenge necessitates a direct confrontation between the judiciary and the legislature.

E. *Summary*

As of 1974, the law of standing was far from clear, but there were a number of recurring themes. The Court had lessened the requirements of standing to challenge the actions of a federal agency[143] or to seek enforcement of a federal statute.[144] However, such liberalization did not take place in challenges to state criminal laws[145] or in federal taxpayers suits.[146] The decisions from 1970 to 1974 often turned on delicate policy considerations unique to a particular type of cases. Therefore, any attempt to formulate a general rule of standing on the basis of these rulings would be counter-

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137. 412 U.S. at 689 n.14, quoting Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601, 613 (1968).

138. Frothingham v. Mellon, 262 U.S. 447, 487 (1923); accord, Flast v. Cohen, 392 U.S. 83 (1968).

139. But see part III-B infra.

140. 412 U.S. at 688.

141. See note 114 supra and accompanying text.

142. But see part III-B infra.

143. See part II-A supra.

144. See part II-B supra.

145. See part II-B supra.

146. See part II-C supra.

productive to an understanding of the doctrine, because no single rule would be responsive to the varying policy considerations which were weighed by the Court in different decisions. In all the rulings the Court retained the prerequisite of injury-in-fact; yet at times even this requirement was held to be satisfied by a trifle.[147]

III. The Misapplication of Principles: *Warth* and *Evans; Eastern Kentucky*

It was against this background that the Supreme Court decided *Warth v. Seldin*[148] and *Simon v. Eastern Kentucky Welfare Rights Organization*,[149] and the Second Circuit decided *Evans v. Lynn*.[150] These decisions reveal the difficulties that have been caused by the failure of the Court to articulate clearly the policy considerations underlying the determination of standing in earlier cases. Moreover, the Second Circuit's decision in *Evans*, insofar as it failed to recognize the distinctions between that case and *Warth*, illustrates the confusion which has been generated throughout the federal judiciary. In each decision examined in this section, the plaintiffs were found to be without standing through the extension of principles not entirely appropriate to the situation in the case at bar.

A. Warth *and* Evans

1. The Decisions

In *Warth* five groups of plaintiffs attempted to challenge the zoning ordinances of Penfield, New York, a suburb of Rochester. It was alleged that the zoning ordinances, in purpose and effect, excluded low and moderate income persons from town by limiting construction of multi-family dwellings to 0.3% of the land available for residential construction. In furtherance of this policy, plaintiffs alleged that "Penfield's Town, Zoning, and Planning Boards had acted in an arbitrary and discriminatory manner . . . ."[151] to exclude members of racial minorities in violation of the plaintiffs' first, ninth and fourteenth amendment rights and in violation of sections 1981 to 1983 of Title 42.[152]

Justice Powell, speaking for a majority of five, held that Penfield's zoning ordinances could not be challenged by any of the plaintiffs at bar.[153]

The first group of plaintiffs, persons of low and moderate income, alleged that each had a desire to live in Penfield and had made efforts to do so, but

147. See note 137 supra and accompanying text.

148. 422 U.S. 490 (1975).

149. 96 S. Ct. 1917 (1976).

150. 537 F.2d 589 (2d Cir. 1976) (en banc).

151. 422 U.S. at 495.

152. 42 U.S.C. §§ 1981-83 (1970).

153. Before dealing with the question of the standing of each of the plaintiffs, the Court discussed the general nature and purpose of the doctrine. 422 U.S. at 498-502. It also noted that in ruling on a motion to dismiss for lack of standing, the reviewing and trial courts must accept all of the material allegations of the complaint as true and draw those inferences which are most favorable to the complaining party. Id. at 501.

that they had been unable to find adequate housing there at any price which they could afford as a result of the town's zoning ordinance.[154] The Court noted that the exclusion alone would be sufficient injury upon which to base standing.[155] Nonetheless, petitioners in *Warth* did not have standing since "their inability to reside in Penfield is the consequence of the economics of the area housing market, rather than of respondents' assertedly illegal acts."[156] Relying heavily on *Linda R.S.*,[157] Justice Powell noted that the lack of sufficient causal connection rendered the plaintiff's injury inadequate to meet article III requirements. The majority found that there was nothing more than a possibility that any relief afforded by the Court would inure to the benefit of the plaintiffs, since their ability to live in Penfield would always be dependent on the acts of third parties, *i.e.*, someone to build and sell housing at a price plaintiffs could afford.[158]

The second group of plaintiffs, taxpayers of the city of Rochester, alleged economic injury, pleading that Penfield's failure to provide low and moderate income housing caused Rochester to assume a disproportionate share of this burden. Consequently, Rochester was forced to allow more tax-abated property for low and moderate income housing, resulting in the Rochester taxpayers' having to shoulder the burden caused by the tax-abated properties. The Court denied standing to these plaintiffs on two grounds: (1) the line of causation was so attenuated that the complaint was little more than " 'an ingenious academic exercise in the conceivable,' "[159] and (2) since there is no constitutional or statutory right to be free from the adverse effects of a neighboring community,[160] the petitioners were basing their claims on the rights of third parties.[161]

In dealing with Metro-Act, an organization of taxpayers devoted to racial problems, Justice Powell noted that insofar as Metro-Act predicated its standing on its status as a Rochester taxpayer and as a representative of Rochester taxpayers, a finding of standing was precluded by the Court's prior holding regarding individual Rochester taxpayers. However, Metro-Act also alleged that 9% of its members were residents of Penfield and therefore

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154. Id. at 502.

155. Id. at 503 n.13.

156. Id. at 506 (footnote omitted).

157. 410 U.S. 614 (1973). See notes 81-86 supra and accompanying text.

158. 422 U.S. at 504-05.

159. Id. at 509, quoting United States v. SCRAP, 412 U.S. 669, 688 (1973). Hence, it would seem that the report of the National Advisory Committee on Civil Disorders could also be deemed a mere "academic exercise in the conceivable" since it found that "[d]iscrimination prevents access to many nonslum areas, particularly the suburbs, and has a detrimental effect on ghetto housing itself. By restricting the area open to a growing population, housing discrimination makes it profitable for landlords to break up ghetto apartments for denser occupancy, hastening housing deterioration." Report of the National Advisory Commission on Civil Disorders 259 (1968). See Exclusionary Zoning, supra note 60, at 351.

160. 422 U.S. at 509.

161. Id. As noted above, such a practice is generally forbidden in the federal courts. See note 77 supra and accompanying text.

claimed standing as a representative of those members who, "as a result of the persistent pattern of exclusionary zoning practiced by respondents and the consequent exclusion of persons of low and moderate income," had been "deprived of the benefits of living in a racially and ethnically integrated community."[162] Since this was essentially the same claim of injury presented in *Trafficante v. Metropolitan Life Insurance Co.*,[163] the Court distinguished that case on the grounds that *Trafficante* involved an alleged violation of Title VIII of the Civil Rights Act of 1968[164] while the instant case did not.[165] The Court held that absent the violation of the particular statute involved in *Trafficante* there was no judicially cognizable injury. In addition, the alleged violation of sections 1981 and 1982 was found not to provide a basis for standing since the plaintiffs did not allege the existence of a contractual or other relationship protected by those statutes.[166] Hence, the claims of the Penfield residents were also based on the rights of third parties.

Finally, the majority denied the standing of the Rochester Home Builders Association and the Monroe County Housing Council, both of which claimed standing as representatives of firms engaged in developing low and moderate cost housing in the Rochester metropolitan region. Home Builders and Housing Council sought both damages and prospective relief, alleging that the zoning ordinances had caused its members injury through lost business and profits. The Court held that since neither organization alleged an assignment of damages from their member firms or offered proof as to how much each firm had lost, neither had standing to seek damages on behalf of its members.[167]

The Court also found that neither organization had standing to seek prospective relief.[168] Since, with one exception, the members of both organizations had no pending plan to build a specific project that could be completed but for the zoning ordinances, there was no showing "of any injury . . . of sufficient immediacy and ripeness to warrant judicial intervention."[169] As to the one member of Housing Council who had attempted to obtain a variance to build a specific project, the absence of any indication as to whether the member was still attempting to pursue the project precluded a finding that there was still a viable "case or controversy."[170]

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162. 422 U.S. at 512.

163. 409 U.S. 205 (1972). See text accompanying note 75 supra.

164. 42 U.S.C. § 3610(a) (1970).

165. 422 U.S. at 512-13. Although Metro-Act did not allege any violation of the Civil Rights Act of 1968, the point was argued in an amicus brief filed by the Lawyer's Committee for Civil Rights under Law. Id. at 513 n.21.

166. Id. at 512-14. The court explicitly rejected standing under § 1983 only for Metro-Act as representative of Penfield residents, who the court found were merely "harmed indirectly by the exclusion of others." Id. at 514. Presumably, however, the Court's causation analysis in Warth precluded a finding of standing under § 1983 for all plaintiffs.

167. Id. at 515-16.

168. Id. at 514-17.

169. Id. at 516.

170. Id. at 517-18. The Supreme Court is currently considering a case in which just such a

Although *Warth* involved a direct attack on local zoning ordinances, its effects were soon felt in a Second Circuit case involving an indirect challenge to local zoning laws. In *Evans v. Lynn,*[171] four plaintiffs residing in low and moderate income housing sought to enjoin two federal grants to the town of New Castle, New York. New Castle had applied for and been granted funds from HUD for the construction of sewer facilities.[172] New Castle had also received funds from the Bureau of Outdoor Recreation to develop a local swamp into a wildlife preserve.[173] Plaintiffs asserted that the grants were allocated to " 'a predominantly white' " and " 'well-to-do enclave' located in northern Westchester County with a minority population of only 1.3 percent."[174] Plaintiffs claimed "that 90 per cent of New Castle's land is zoned for single-family, residential development on parcels of more than one acre . . . ."[175] Thus, plaintiffs alleged both that the grants were made in violation of the

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viable "case or controversy" appears to exist. In Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 373 F. Supp. 208 (N.D. Ill. 1974), rev'd, 517 F.2d 409 (7th Cir.), cert. granted, 423 U.S. 1030 (1975), oral argument heard, Oct. 13, 1976, 45 U.S.L.W. 3302 (U.S. Oct. 19, 1976), a nonprofit housing development corporation and a number of individual plaintiffs are seeking to challenge the refusal of the town to rezone in order to permit the construction of low and moderate income housing, alleging that the town's refusal is violative of the fourteenth amendment, 42 U.S.C. §§ 1981-83 (1970), and Title VIII of the Civil Rights Acts of 1968, 42 U.S.C. § 3601 et seq. (1970). 373 F. Supp. at 209. The corporate plaintiff in this case had obtained an option to buy the land in question, had already arranged for the financing of the proposed project, and, in contesting the zoning ordinance, had fully exhausted available administrative remedies. 517 F.2d at 410-11. Neither the district court nor the court of appeals dealt with the question of the plaintiffs' standing, and it appears that the plaintiffs here would meet the criteria for standing discussed in Warth. 422 U.S. at 517-18. Nevertheless, the Court could conceivably find that the corporate plaintiffs lack standing because their allegations do not fall within the zone of interests to be protected by the equal protection clause or the statutes in issue. See note 57 supra and accompanying text. The court of appeals opinion does not provide sufficient facts to clarify the standing question as to the individual plaintiffs in Metropolitan Housing. However, under a Warth analysis, these plaintiffs could be found to lack standing if the Court determined that they would be unable to afford housing in the project even if it was constructed. 422 U.S. at 505-06.

171. 376 F. Supp. 327 (S.D.N.Y. 1974), rev'd, 537 F.2d 573 (2d Cir. 1975), rev'd, 537 F.2d 589 (2d Cir. 1976) (rehearing en banc). The Second Circuit specifically granted rehearing to reconsider the panel's decision in light of Warth which came down three weeks after the panel's decision. 537 F.2d at 589.

172. 537 F.2d at 589. These grants were made pursuant to 42 U.S.C. § 3102 (1970), as amended, 42 U.S.C. § 3102(c) (Supp. III, 1973). 537 F.2d at 573 n.3.

173. 537 F.2d at 589. These grants were made pursuant to 16 U.S.C. § 460l-8 (1970). 537 F.2d at 573 n.3.

174. Appellant's Brief on Rehearing En Banc at 6, quoting 376 F. Supp at 330. The town's character and policy of resistance to low and moderate income housing is described in Brown, Last Holdout Besieged, N.Y. Times, June 27, 1976, § 8 (Real Estate) at 1, col. 1.

175. 537 F.2d at 600 (Oakes, J., dissenting). In addition to its exclusionary zoning policy, the town had also successfully defeated an attempt by the New York State Urban Development Corporation to build low cost housing in the town. Id. at n.4. See also Berenson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975) (zoning prohibition against "age-oriented" condominium not unconstitutional).

agencies' duty to affirmatively disburse their funds in a manner consistent with the federal policy of furthering desegregation,[176] and that the plaintiffs were persons aggrieved within the meaning of the APA and Title VIII of the 1968 Civil Rights Act.[177] Plaintiffs also asserted that they were injured-in-fact because the failure of the agencies to administer their funds in accord with the relevant statute exacerbated segregation within the region.[178]

Judge Moore, speaking for the majority, found that plaintiffs did not have standing under the standards prescribed in *Warth*.[179] He ruled that plaintiffs' allegation of injury was abstract and, therefore, constitutionally inadequate as a basis for standing.[180] The majority compared the plaintiffs in *Evans* to the individual plaintiffs in *Warth*, denying them standing because, as in *Warth*, plaintiff's exclusion was held attributable to economic conditions rather than the zoning ordinance.[181] The court supported its denial of standing by noting that in *Evans* the plaintiffs had not alleged that they had sought housing unsuccessfully in the restricted town as had their counterparts in *Warth*.[182] In Judge Moore's words, "[the appellants] claim only that, had the grants not been approved, the monies *could conceivably* have gone to some other, as yet *totally imaginary* project in the County which *might* have had the result of making more housing available to them."[183] Hence, in *Evans* the possible benefits to the plaintiffs of judicial intervention were deemed to be "pure speculation and conjecture."[184]

2. An Analysis

Warth and *Evans* are troubling decisions because they imposed more rigid standing requirements than had been foreshadowed by prior rulings; yet neither opinion fully explains the rationale for the imposition of such severe standards. The fuzzy reasoning in these cases is especially unfortunate in view of the policy considerations involved. The plaintiffs in *Warth* and *Evans*, raised allegations of racial discrimination, charges to which the federal courts have long been particularly receptive.[185] Moreover, the complaints alleged

176. 537 F.2d at 590. See 42 U.S.C. §§ 2000d-1, 3608(c), (d)(5) (1970); Shannon v. HUD, 436 F.2d 809, 816 (3d Cir. 1970) ("Whatever were the most significant features of a workable program for community improvement in 1949, by 1964 such a program had to be nondiscriminatory in its effects, and by 1968 the Secretary had to affirmatively promote fair housing.")

177. 537 F.2d at 590. See 42 U.S.C. § 3610(a), (d) (1970).

178. Appellant's Brief on Rehearing En Banc at 31-32.

179. The degree to which Judge Moore found Warth controlling is indicated by the fact that in finding that the plaintiffs lacked standing he quoted rather extensively from Warth. 537 F.2d at 593-95.

180. Id. at 593.

181. 537 F.2d 593. "[Appellants'] claims of damage flow — if at all — from the Town's exclusionary practices, not from the specific grant of federal aid. This is an indirect route to the same charge made more directly in Warth, to wit, an alleged exclusion from housing of their choice in a more integrated neighborhood." Id. at n.34.

182. See text at notes 155-56 supra.

183. 537 F.2d at 595 (emphasis in original).

184. Id.

185. See note 88 supra.

discrimination in housing, an area in which federal policy has been clearly and specifically announced by Congress.[186] These factors should have weighed strongly in favor of a finding of standing in both cases.

The basic flaw in *Warth* is the application of the strict causation requirement that the alleged injury flow directly from the challenged action. This stringent causation standard was imported by the Court from its earlier decision in *Linda R.S.*, which involved a challenge to the application of a state penal law. However, the Court specifically stated that its decision in that case resulted from the "unique context of a challenge to a criminal statute"[187] and "the special status of criminal prosecutions."[188] The extension of this rationale to the situation in *Warth* seems unwarranted. The relief sought in *Warth* in no way affected a state criminal statute. Hence, the "unique context" of *Linda R.S.* was lacking. Furthermore, the allegation of racial discrimination in housing, in view of the strong stance taken by the federal legislature and judiciary in this area, arguably should have provided sufficient reason for the application of more liberal requirements.

Additionally, the mere fact that the relief sought by the individual petitioners in *Warth* was dependent upon the actions of third parties need not have resulted in a finding that petitioners lacked standing. In both *Trafficante* and *SCRAP* a similar situation existed and in neither case was the plaintiff found to lack standing. In Justice Brennan's view:

> [The plaintiffs could not] be expected, prior to discovery and trial, to know the future plans of building companies, the precise details of the housing market in Penfield, or everything which has transpired in 15 years of application of the Penfield zoning ordinance, including every housing plan suggested and refused. To require them to allege such facts is to require them to prove their case on paper in order to get into court at all, reverting to the form of fact pleading long abjured in the federal courts. This Court has not required such unachievable specificity in standing cases in the past . . . .[189]

The rigid emphasis on causation is made all the more objectionable by the multiplicity of plaintiffs in *Warth*. "[O]ne glaring defect of the Court's opinion is that it views each set of plaintiffs as if it were prosecuting a separate lawsuit, refusing to recognize that the interests are intertwined, and that the standing of any one group must take into account its position vis-à-vis the others."[190] If the Court felt that the individual plaintiffs were denied access to Penfield due to the lack of projects that would meet their needs, the fact that builders were joined as plaintiffs should have been sufficient for a finding of standing for the individual plaintiffs. *Warth* was a somewhat unusual case

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186. 42 U.S.C. § 3601 (1970).

187. 410 U.S. 614, 617 (1973).

188. Id. at 619. See Simon v. Eastern Ky. Welfare Rights Org., 96 S. Ct. 1917, 1934 n.7 (1976) (Brennan, J., concurring in the result and dissenting).

189. 422 U.S. at 527-28 (Brennan, J., dissenting); accord, Jenkins v. McKeithen, 395 U.S. 411, 421-25 (1969); Conley v. Gibson, 355 U.S. 41, 47 (1957), Exclusionary Zoning, supra note 60, at 380-82; Comment, Federal Standing: 1976, 4 Hofstra L. Rev. 383, 410-13 (1976), 54 N.C.L. Rev. 449, 458-59 (1976).

190. 422 U.S. at 521 (Brennan, J., dissenting).

precisely because of the multiplicity of plaintiffs involved. The dissent pointed out that the majority's opinion, which denied standing to almost every conceivable type of plaintiff, "can be explained only by an indefensible hostility to the claim on the merits."[191]

The dismissal of the builders' claims on what were essentially grounds of ripeness seems equally unjustified. This position virtually requires persons already directly affected by the zoning law to plan a violation of the ordinance in order to have standing to challenge it.[192] Such a requirement greatly limits the number of situations in which minorities who claim de facto exclusion due to a town's zoning ordinance can establish standing to attack these statutes. It is also inconsistent with many Supreme Court decisions which held that plaintiffs had standing to challenge allegedly unconstitutional laws without showing specific plans to violate them.[193] Finally, by discussing the matter in terms of standing, rather than ripeness,[194] the Court needlessly obfuscated the meaning of standing, implying that the concept embodies at least ripeness, and possibly all the other avoidance techniques developed under article III.[195]

Another deficiency of *Warth* is its apparent revival of the legal interest test. Distinguishing *Trafficante* on the grounds that the instant case did not involve any alleged violation of the 1968 Civil Rights Act, the Court ignored the finding in *Trafficante* that the exclusion of racial minorities is injury-in-fact both to those excluded and those living in the area in which the minorities are denied housing opportunities.[196] Instead, the Court found that the Rochester taxpayers in *Warth* lacked standing because they could not "assert any personal right under the Constitution or any statute to be free of action by a neighboring municipality that may have some incidental adverse effect on Rochester."[197] It would seem, however, that the existence of this right was the very thing sought to be adjudicated in *Warth*. Five years earlier, in *Data Processing*, the Court had rejected such a legal interest test to determine standing because it involved a premature examination of the merits of the case.[198] It is difficult to understand why a test which goes to the merits of a challenge to an administrative agency action does not also go to the merits of a challenge to a local zoning ordinance. Yet the Court relied on this discredited formula despite the long established policy of maintaining accessibility to a federal judicial forum for charges of racial discrimination.[199]

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191. Id. at 520 (Brennan, J., dissenting).

192. K. Davis, Administrative Law of the Seventies, § 22.02-4 (1976).

193. Id. See, e.g., Doe v. Bolton, 410 U.S. 179 (1973); Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970); Dombrowski v. Pfister, 380 U.S. 479 (1965); Adler v. Board of Educ., 342 U.S. 485 (1952); Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249 (1933). Contra, Poe v. Ullman, 367 U.S. 497 (1961).

194. 422 U.S. at 516-17.

195. See Exclusionary Zoning, supra note 60, at 378-80. See notes 38-43 supra and accompanying text.

196. 409 U.S. at 209-10; Exclusionary Zoning, supra note 60, at 370-73.

197. 422 U.S. at 509.

198. See note 63 supra and accompanying text.

199. See note 88 supra.

The reasoning in *Evans*[200] is plagued by even greater inconsistencies than that in *Warth*. Despite the logical weaknesses discussed above, the result in *Warth* is perhaps understandable because a Supreme Court ruling on the merits in *Warth* would have resulted either in direct interference by the federal judiciary with the formulation of local zoning laws, or in a holding that to some degree might seem to sanction the enactment of zoning ordinances which result in de facto segregation. The former course would involve direct federal intrusion into an area long recognized to be the appropriate province of state and local governments.[201] The latter would result in a holding which might well be construed as a retreat from the traditional federal policy of encouraging racial integration.[202] The Second Circuit in *Evans*, however, was not confronted with this dilemma, since a finding of standing in *Evans* would not necessarily have resulted in the adoption of either of these disagreeable alternatives. The essential difference between *Warth* and *Evans* was that the latter involved a challenge to the practices of an administrative agency. Therefore, the relief sought would in no way directly affect the validity of New Castle's zoning ordinances. Thus, the case did not have the same potential as *Warth* for head-on confrontation with state and local governments. As Judge Oakes, in his dissent on rehearing, pointed out:

[I]t must be remembered that the controversy sought to be determined is *not*, as in *Warth v. Seldin* . . . whether a town in which the plaintiffs are not resident[s] may

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200. The original decision of the Second Circuit in Evans v. Lynn, 537 F.2d 573 (2d Cir. 1975), in which it was found that the plaintiffs did have standing has so far met with mixed reactions. Compare 50 St. John's L. Rev. 303, 315 (1976) ("By assuming whatever increased burden results from the Evans decision, courts can provide an additional but much needed forum for promoting the policy of the Civil Rights Acts.") and 53 J. Urban L. 355, 363 (1975) ("The Evans court properly took a position contrary to the one dictated by blind obedience to the Warth result.") with Exclusionary Zoning, supra note 60, at 394-95 ("[T]he Evans plaintiffs' alleged injury — the perpetuation of their living conditions as a result of the challenged funding — is analogous to the injury alleged by the low-income, minority non-residents of Penfield in Warth: the perpetuation of their living conditions as a result of Penfield's exclusionary zoning practices." This was an injury the Supreme Court rejected in Warth.).

In the last cited article, the authors compare the 1975 Evans decision to the one in City of Hartford v. Hills, 408 F. Supp. 889 (D. Conn. 1976), a case which closely paralleled the factual situation in Evans. The authors note that City of Hartford involved statutes other than those involved in Evans which provide for the reallocation of disapproved funds with first priority given to other areas within the same state. Exclusionary Zoning, supra note 60, at 399-400. See 42 U.S.C. § 5306(e) (Supp. V, 1975); 24 C.F.R. § 570.409(f)(1)(i) (1975). The authors conclude, therefore, that City of Hartford is correctly decided in that there was a much higher probability that the plaintiffs would benefit from the relief sought. Exclusionary Zoning, supra note 60, at 402. However, due to the fact that the court in City of Hartford regarded the 1975 Evans decision as dispositive of the standing issue, the future of City of Hartford is questionable.

201. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). See generally Note, Challenging Exclusionary Zoning: Contrasting Recent Federal and State Court Approaches, 4 Fordham Urban L.J. 147 (1975).

202. See note 88 supra.

exclude persons of low and moderate income by its zoning laws. Rather . . . the question brought in this case is whether federal agencies administering grants-in-aid may approve grants to "activities" . . . whose practices . . . have the purpose and effect of subjecting blacks and other racial minorities to discrimination by excluding them from residence within the Town's borders . . . .[203]

In view of this difference, it would seem that the majority's wooden[204] application of *Warth* was inappropriate. Although both cases involved challenges to zoning, the indirect nature of the challenge in *Evans* and the fact that jurisdiction in that case was predicated on the APA, should have served to distinguish *Warth*. The Supreme Court held in *SCRAP* that where federal agency action is challenged under the APA, an "identifiable trifle" is sufficient for standing.[205] When, as in *Evans*, a complaint is brought under the APA alleging racial discrimination, the standing requirement should be as minimal as possible within the confines of article III.

Therefore, a more suitable standard for assessing the plaintiff's standing in *Evans* is that employed by the Supreme Court in *SCRAP*. Both *SCRAP* and *Evans* were challenges to agency action in which standing was predicated on the APA. Moreover, both cases involved statutes[206] which clearly announced federal policy concerning the subject matter of the litigation. Yet the majority in *Evans* applied the strict *Warth* causation requirements (*i.e.*, "but for" causation apparent on the face of the complaint) and found that, as in *Warth*, the benefit of the relief sought would be dependent on the acts of third parties (*i.e.*, the diversion of the funds from New Castle to build an "as yet *totally imaginary* project in the County which *might* have had the result of making more housing available to [the plaintiffs]").[207] In *SCRAP* too, plaintiff's relief was contingent upon the acts of third parties, but the Court did not therefore find itself compelled to deny the plaintiffs' standing. To the contrary, in *SCRAP* the Court left the proof of the allegation of causation to the trial on the merits.

Under the criteria applied in *SCRAP*, the proper inquiry in *Evans* would have been whether the plaintiffs' allegation of causation and injury constituted anything more than "an ingenious academic exercise in the conceivable."[208] Indeed, the allegations in *Evans* are far more convincing than those which the Supreme Court approved in *SCRAP*, since the perpetuation of segregated housing conditions has been recognized as injury-in-fact.[209] Under

203. 537 F.2d at 602-03.

204. See note 179 supra.

205. See text accompanying note 137 supra.

206. SCRAP involved the National Environmental Policy Act of 1969, 42 U.S.C. § 4331 et seq. (1970). Evans involved Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 et seq. (1970).

207. 537 F.2d at 595.

208. 412 U.S. at 688.

209. Shannon v. HUD, 436 F.2d 809, 820-21 (3d Cir. 1970); Jones v. Tully, 378 F. Supp. 286, 287 & n.1 (E.D.N.Y. 1974), aff'd sub nom. Jones v. Meade, 510 F.2d 961 (2d Cir. 1975) (per curiam); Banks v. Perk, 341 F. Supp. 1175, 1185 (N.D. Ohio 1972), aff'd in part, rev'd in part on other grounds, 473 F.2d 910 (6th Cir. 1973).

the *SCRAP* criteria, the *Evans* plaintiffs also alleged sufficient causal connection to withstand a motion to dismiss, since the sewer project to be funded by HUD would only have the capacity to handle the area's needs if the town's exclusionary zoning ordinance was retained.[210] Finally, under this view, the benefit of the relief sought would not be dependent upon the acts of third parties, since the direct remedial effect would be to eliminate conditions which perpetuate segregation within the region.[211]

Thus, it would seem that the Second Circuit in *Evans* failed to perceive the distinctions between that case and *Warth*, and as a result held that the plaintiffs lacked standing through the application of inappropriate criteria. By imposing a statutory duty on HUD to disburse its funds in a manner consistent with the federal policy of desegregation, Congress has seen fit to use a "carrot and stick"[212] approach. Under this method, Congress attacks segregation by requiring potential receipients of federal grants to comply with certain conditions in order to receive the funds. The failure of the courts, in cases like *Evans*, to reach the merits through the imposition of overly rigid standing requirements can effectively frustrate that approach by not providing a forum in which to determine whether the requisite conditions have been satisfied.

B. Eastern Kentucky

The most perplexing of recent standing decisions is the Supreme Court's ruling in *Simon v. Eastern Kentucky Welfare Rights Organization*.[213] In that case, several indigents and organizations composed of indigents brought suit against the Secretary of the Treasury. Plaintiffs sought to challenge a Revenue Ruling[214] of the IRS which extended certain tax benefits to hospitals which provide free emergency treatment only to indigent patients.[215] The complaint alleged that this ruling was violative of the statute[216] which set the guidelines for determining the qualifications of charitable corporations, and that the ruling had been promulgated in violation of congressionally imposed[217] procedures.[218] Plaintiffs predicated their standing on the judicial review provision of the APA.[219] They alleged " 'injury in their opportunity and ability to

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210. 537 F.2d at 605, relying on the Affidavit of Paul Davidoff, Director of Suburban Action Institute. That sewer systems have an effect on a town's development pattern is also supported by the fact that New Castle's own master plan prohibited the consideration of sanitary sewers as a basis for rezoning. Id. at 600 n.4.

211. 537 F.2d at 605 n.15 (Oakes, J., dissenting).

212. See generally R. Babcock & F. Bosselman, Exclusionary Zoning, Land Use Regulation and Housing in the 1970s 144 (1973); Fisher, The Carrot and the Stick: Conditions for Federal Assistance, 6 Harv. J. Legis. 401 (1969).

213. 96 S. Ct. 1917 (1976).

214. Rev. Rul. 69-545, 1969-2 Cum. Bull. 117.

215. 96 S. Ct. at 1919-20.

216. Int. Rev. Code of 1954, § 501(c)(3).

217. 5 U.S.C. § 553 (1970).

218. 96 S. Ct. at 1922.

219. Id. at 1924.

receive hospital services in nonprofit hospitals which receive . . . benefits . . . as "charitable" organizations' under the Code."[220] Plaintiffs further asserted that they had been denied free non-emergency services at hospitals which received tax benefits from the challenged ruling.[221]

The Court, in an opinion by Justice Powell, found that neither the individuals nor the organizations had standing to challenge the ruling.[222] Since the organizations had not alleged any injury to themselves, their standing was held to be dependent upon that of their members.[223] The individual members were found to lack standing because the causal link between the ruling in question and the plaintiffs' alleged injury was found to be "speculative."[224]

The Court accepted as true the allegation that the ruling encouraged hospitals to provide fewer medical services to indigents.[225] However, it reasoned that the encouragement of the denial of services was not a sufficient allegation to establish that the actual denials of services suffered by the plaintiffs were caused by the challenged ruling rather than by "decisions made by the hospitals without regard to the tax implications."[226] Thus, the majority held that the injury alleged was not "fairly . . . trace[able]"[227] to the challenged action. The Court further noted that plaintiffs did not allege that the hospitals which had denied them services were dependent upon the benefits received under the ruling in question.[228] Therefore, the majority found that plaintiffs' allegations failed to indicate that the exercise of the Court's remedial power would benefit them.[229] The Court suggested that "it is just as plausible that the hospitals to which [plaintiffs] appl[ied] for service would elect to forego favorable tax treatment to avoid the undetermined financial drain of an increase in the level of uncompensated services."[230] Finally, the Court stated that plaintiffs' receipt of free, non-emergency services was ultimately dependent upon the actions of hospitals — parties not before the Court.[231] The majority, therefore, found that the attenuated relationship between the action challenged and the injury alleged was identical to that in *Linda R.S.* and *Warth.*[232] Thus, these decisions were held to control the outcome of the case at bar.[233]

Although, as noted above,[234] the result in *Warth* was perhaps justifiable on

220. Id. at 1922.
221. Id. at 1925.
222. Id. at 1920.
223. Id. at 1925.
224. Id. at 1926-27.
225. Id. at 1926 n.23.
226. Id. at 1926.
227. Id.
228. Id.
229. Id.
230. Id.
231. Id.
232. Id. at 1927.
233. Id.
234. See text accompanying note 201 supra.

the ground that it prevented federal judicial interference with what were essentially local matters, the decision in *Eastern Kentucky* seems inconsistent with appropriate Supreme Court precedent and unwarranted by relevant policy considerations. Since the case was brought under the APA, the majority's reliance on *Linda R.S.* and *Warth* was improper. As Justice Brennan, dissenting, stated:

> [a]ny prudential, nonconstitutional considerations that underlay the Court's disposition of the injury in fact standing requirement in cases such as *Linda R. S.* . . . and *Warth* . . . are simply inapposite when review is sought under a congressionally enacted statute conferring standing and providing for judicial review.[235]

In both those cases, the Court's reluctance to reach the merits was understandable because the substantive issues touched upon matters long entrusted to state and local governments. However, in *Eastern Kentucky*, as in *Evans*, plaintiffs sought to challenge the presumptively reviewable[236] action of an administrative agency "to ensure that the attainment of congressionally mandated goals [was] not frustrated by illegal action . . . ."[237] Thus, the application of the causation requirements of *Linda R.S.* and *Warth* to a challenge brought under the APA is, to say the least, disconcerting.[238]

As the dissent indicated, the appropriate precedent in *Eastern Kentucky* would have been *SCRAP* and other cases brought under under the APA, in which the plaintiffs' standing was not vitiated because the ultimate benefit of the relief sought was dependent upon the actions of third parties or because the line of causation was attenuated.[239] Although the majority did mention *SCRAP*, their treatment of the case was relegated to a rather cryptic footnote reference.[240] Under the view of the majority, the plaintiffs in *SCRAP* alleged an injury "flowing"[241] from the challenged action while the plaintiffs in the instant case failed "to allege an injury that fairly can be traced to [the] challenged action."[242] The Court appears to have relied upon a distinction without a difference since it failed to clarify the vague terms "flowing" and "fairly traceable." Moreover, contrary to the majority's analysis, a comparison of the facts in *SCRAP* and *Eastern Kentucky* reveals a far more plausible causal connection in the latter case.[243] Thus, the Court merely concluded that *SCRAP* was distinguishable without supporting that conclusion by analysis or explanation.[244]

A second problem with *Eastern Kentucky* is that it apparently goes beyond *Warth* by demanding that plaintiffs draw their complaint with even greater

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235. 96 S. Ct. at 1934 (Brennan, J., concurring in the judgment and dissenting)
236. See note 68 supra and accompanying text.
237. 96 S. Ct. at 1937 (Brennan, J., concurring in the judgment and dissenting).
238. Id. at 1934 n.7 (Brennan, J., concurring in the judgment and dissenting).
239. Id. at 1934-35 (Brennan, J., concurring in the judgment and dissenting).
240. Id. at 1927 n.25.
241. Id.
242. Id.
243. Id. at 1935 (Brennan, J., concurring in the judgment and dissenting).
244. Id. at 1936 (Brennan, J., concurring in the judgment and dissenting).

specificity than was required in that case. The majority in *Eastern Kentucky* accepted as true the allegation that the ruling in question "encouraged" the denial of services; yet it further required that the plaintiffs allege facts to indicate that the hospitals in question were dependent upon the tax benefits received under the challenged ruling.[245] The majority appears to be demanding not only that the challenged action be *a* cause of the plaintiffs' injury, but that it be *the* cause. Such a requirement is not only offensive to the modern concept of notice pleading[246] but sets a standard which, if strictly imposed, would be virtually impossible to meet. Logically, it would seem to prevent the challenging of any action which is the result of concurrent causes unless the challenge is brought against the actors responsible for each concurrent cause.[247]

A third difficulty with the majority opinion in *Eastern Kentucky* is the failure of the Court once again to distinguish between artcle III requirements and discretionary limitations on standing. In *Warth,* the Court found that the individual plaintiffs lacked standing for an essentially prudential reason: they were trying to assert the rights of third parties.[248] Therefore, the holding in *Warth* would not prevent the Court from later reversing itself should it find that other factors outweighed these prudential considerations in a subsequent case. In *Eastern Kentucky,* on the other hand, the decision was placed squarely on constitutional grounds.[249] Thus the ruling precludes later modification of the result either by Congress[250] or the Court. Such a holding could act as a considerable impediment to the effectuation of congressional policies. Under the approach of the majority:

> [A]ny time Congress chooses to legislate in favor of certain interests by setting up a scheme of incentives for third parties, judicial review of administrative action that

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245. Id. at 1932 & n.6 (Brennan, J., concurring in the judgment and dissenting).

246. Id. at 1932 n.6 (Brennan, J., concurring in the judgment and dissenting). See Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

247. The problem discussed in the text finds analogy in tort law dealing with concurrent causes where any one cause alone would be sufficient to produce the plaintiff's injury. Rather than requiring that defendant's acts be the sole cause of plaintiff's injury, the requirement is that "[i]f the defendant's conduct was a substantial factor in causing the plaintiff's injury, it follows that he will not be absolved from liability merely because other causes have contributed to the result, since such causes, innumberable, are always present." W. Prosser, Law of Torts § 41 at 240 (4th ed. 1971); accord, Gantt v. Sissell, 222 Ark. 902, 263 S.W.2d 916 (1954); Barringer v. Arnold, 358 Mich. 594, 101 N.W.2d 365 (1960); Henthorne v. Hopwood, 218 Ore. 336, 345 P.2d 249 (1959).

In Eastern Kentucky, whether the challenged ruling alone would have produced the plaintiffs' injury or whether it was a "substantial factor in causing the plaintiffs' injury" may have been difficult to prove. However, this factor made it all the more improper that the issue was considered as part of the "threshold" question of standing and, thus, considered before the trial on the merits.

248. See text accompanying notes 158, 161 supra.

249. 96 S. Ct. at 1928.

250. Id. at 1936-37 (Brennan, J., concurring in the judgment and dissenting).

allegedly frustrates the congressionally intended objective will be denied, because any complainant will be required to make an almost impossible showing.[251]

The holding in *Eastern Kentucky* also calls into question the continued vitality of *SCRAP*. As was indicated above,[252] the allegation of causal connection was more plausible in *Eastern Kentucky* than that in *SCRAP;* yet the Court was willing to follow the more attenuated causal chain in the latter case, but would not follow that alleged in the former. Had the plaintiffs in *Eastern Kentucky* been found to lack standing for prudential reasons, the result would at least have been conceptually consistent with *SCRAP*. However, to place the result on constitutional grounds as the Court did, could logically suggest that the allegations in *SCRAP* were also constitutionally insufficient. Nevertheless, the Court did not expressly question *SCRAP* but rather simply "distinguished" it.[253] In any event, after the decision in *Eastern Kentucky,* plaintiffs raising issues under the APA will be confronted with two inconsistent guidelines to the constitutional minimum for standing: the "trifle"[254] found sufficient in *SCRAP,* and the "fairly traceable"[255] requirements of *Eastern Kentucky*. As Justice Brennan pointed out:

> The Court's treatment of injury in fact without any "particularization" in light of either the policies properly implicated or our relevant precedents threatens that [standing] shall "become a catchall for an unarticulated discretion on the part of this Court" to insist that the federal courts "decline to adjudicate" claims that it prefers they not hear.[256]

Finally, the majority's use of standing to decline to reach the merits in *Eastern Kentucky* is most disturbing. Even if it is assumed that the IRS is an agency which warrants special deference from the judiciary due to its crucial role in the collection of the public fisc, the majority's reliance on standing to guarantee this deference was unnecessary. In *Eastern Kentucky* the defendant challenged both the jurisdiction and the propriety of judicial intervention in a number of ways:[257] non-justiciability of the subject matter, prohibition of plaintiffs' suit under the Anti-Injunction Act,[258] the statutory prohibition against declaratory judgments with respect to federal taxes,[259] and sovereign immunity. Moreover, defendant's argument before the Supreme Court was essentially couched in terms of ripeness.[260] In the view of two members of the Court, the case should have been decided on this ground.[261] Faced with this

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251. Id. at 1937 (Brennan, J., concurring in the judgment and dissenting).

252. See text accompanying note 243 supra.

253. See text accompanying notes 240-44 supra.

254. See text accompanying note 137 supra.

255. 96 S. Ct. at 1926.

256. Id. at 1937-38 (Brennan, J., concurring in the judgment and dissenting), quoting Poe v. Ullman, 367 U.S. 497, 530 (1961) (Harlan, J., dissenting).

257. 96 S. Ct. at 1922.

258. Int. Rev. Code of 1954, § 7421(a).

259. 28 U.S.C. § 2201 (1970).

260. 96 S. Ct. at 1930 (Brennan, J., concurring in the judgment and dissenting).

261. Id. at 1928-30 (Brennan, J., concurring in the judgment and dissenting).

multiplicity of avoidance techniques, the majority's use of standing is especially unfortunate. There was no need to resort to a doctrine of such broad application in a manner which totally failed to recognize those policy considerations which should have distinguished the instant case from the precedents relied upon by the majority.[262] Furthermore, the Court's placing the case on constitutional rather than statutory grounds seems inconsistent with its established policy of avoiding constitutional adjudications whenever possible.[263]

In sum, the Court's standing decision in *Eastern Kentucky* was unnecessary, logically confused, and inconsistent with relevant Supreme Court precedent.

IV. CONCLUSION

An attempt to formulate a generalized statement of the test for standing in federal courts would indeed be "largely worthless,"[264] primarily because no such single standard exists. The Court has applied several inconsistent tests to a number of different situations. Nevertheless, these cases can, for the most part, be understood if it is recognized that the primary goal of the Court in this area has not been to achieve a consistent definition of standing but to maintain a consistent policy regarding the role of the judiciary within the federal system.

Standing is a powerful vehicle through which federal courts can exercise their discretion. However, the propriety of using this particular technique in some instances is questionable. The federal taxpayer suits serve as a good example of this problem. Throughout the opinions in *Richardson* and *Schlesinger,* the Court made clear its desire to limit the role of the judiciary within a representative form of government. In view of this concern, perhaps an innovative re-evaluation of the political question doctrine might have been more appropriate than the application of a concept which ostensibly focuses on the plaintiff's "personal stake" in having the case decided.

Secondly, the use of standing to implement policy is often troubling because, when articulating the decision only on terms of standing, a court does not have the opportunity to explain fully the policy considerations which are so often determinative in a particular case. Dealing with the problem in a manner that would facilitate such a discussion would certainly be more intellectually honest than relying on a doctrine which, in theory, is not relevant to the substantive issues at bar. The present approach of the Court can only further complicate the law of standing. In fact, recent cases have already resulted in inconsistent applications of judicial policies and frustration of those promulgated by Congress. The Court's decision in *Eastern Kentucky* is the most flagrant example of this problem, since in that case neither logic nor policy justified the use of the standing doctrine or the manner in which it was applied. The *Trafficante* and *Evans* cases further illustrate this point. In the former the Court was quite liberal in finding standing, a result which is

262. See text accompanying note 235 supra.

263. Ashwander v. TVA, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).

264. Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 151 (1970).

explicable in terms of the underlying issue and the clear delineation by Congress of the federal policy in this area. However, due to the Court's failure to discuss the impact of this consideration on the decision in *Trafficante*, the Second Circuit in *Evans* did not apply the same liberal requirements, and, consequently, obstructed federal policy. As Judge Gurfein noted in his dissenting opinion in *Evans:*

> [A] narrow holding on standing can be the equivalent of a substantive repeal of the legislation. The issue is really not whether the courts should abstain by denying standing, but whether by rejecting standing the courts are impeding national policy as expressed in the legislative will.[265]

In contrast, the opinion in *Warth* clearly differentiated between the article III requirements of standing and the prudential aspects of the doctrine. The Court in *Warth* pointed out that the general prohibitions against predicating one's standing upon the rights of third parties or upon generalized grievances are discretionary limitations imposed by the Court rather than constitutional requirements of article III.[266] Such an approach is clearly to be preferred over that in *Eastern Kentucky*, where the majority ignored the fact that the doctrine of standing encompasses both a constitutional and a discretionary dimension. The reasoning in *Warth* distinguishes those situations in which a federal court *cannot* rule from those in which it *chooses* not to rule. Thus, it preserves the option of a federal court to entertain a similar case when countervailing factors outweigh the prudential concerns which make the court reluctant to decide the case currently before it. On the other hand, the analysis in *Eastern Kentucky* further obscures the meaning of standing due to the Court's failure to acknowledge the dual nature of the doctrine. Consequently, that approach only hinders recognition of those relevant policy considerations which underlie the Court's prior decisions on standing and which ultimately justify the use of the doctrine.

In the future, therefore, the Court should clearly distinguish article III requirements from prudential limitations on standing. The separation of prudential from constitutional concerns would result in better reasoned, more informative opinions since the policy issues involved in a particular case would be fully and openly examined. Such a practice could also provide the Court with an opportunity to clarify the presently confused state of the doctrine regarding the relationship between causation and standing. The difficulties in this area are exemplified by *Linda R.S.*, *Warth* and *Eastern Kentucky*. Each of these cases applied more stringent causation requirements than those in *Trafficante* and *SCRAP*, yet no explanation was given as to why these different standards were used. Certainly, it is necessary to distinguish allegations of causation which are clearly frivolous from those which are at least arguable. However, the use of standing to make this distinction has not yet produced any meaningful guidelines on this issue. Finally, it should be noted that the Court's open acknowledgment that it is choosing not to rule in

265. 537 F.2d at 612 (Gurfein, J., dissenting).

266. 422 U.S. at 499.

a particular case would breach no constitutional provision since it seems clear under the abstention doctrine that a federal court may, in some instances,[267] decline to decide a case over which it does have jurisdiction.

A properly passive judiciary is not undesirable. To the contrary in Justice Powell's view, it is the general reticence of federal courts "that has maintained public esteem for the federal courts and has permitted the peaceful coexistence of the countermajoritarian implications of judicial review and the democratic principles upon which our Federal Government in the final analysis rests."[268] In addition to maintaining respect for the courts, judicial reticence should also have the effect of limiting a court's workload and enabling it to deal more effectively with the cases before it. However, it is necessary to distinguish between responsible judicial reserve and judicial "abdication."[269] The distinction between the two is subtle and may well be one of degree rather than kind. Nevertheless, the distinction must be made if the judiciary is to perform its proper role within the federal system. The doctrine of standing, in its present form, does little to assist the judiciary in making this crucial distinction; indeed, it has only served to make the task more burdensome.

Henry Pitman

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267. When the Court does invoke the abstention doctrine, it technically retains jurisdiction pending a determination by a state court of the relevant state law. Zwickler v. Koota, 389 U.S. 241, 244 n.4 (1967); Doud v. Hodge, 350 U.S. 485, 487 (1956); Railroad Comm'n v. Pullman Co., 312 U.S. 496, 501 (1941). However, under Professor Wright's analysis, there are four distinct abstention doctrines, one of which is a doctrine of dismissal which allows "a federal court [to] refrain from exercising its jurisidction in order to avoid needless conflict with the administration by a state of its own affairs." C. Wright, Federal Courts § 52 at 199 (1970).

268. United States v. Richardson, 418 U.S. 166, 192 (1974) (Powell, J., concurring).

269. Flast v. Cohen, 392 U.S. 83, 111 (1968) (Douglas, J., concurring).