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Constitutional Law -- Standing to Sue in Exclusionary Zoning Litigation: Catch-22 Revisited

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successful production of theatrical programs.[69] The Court simply refused to go farther than to confirm the fact that a public forum may not be run as if it were a privately owned facility, leaving it up to the municipalities to develop the " 'narrow, objective, and definite standards to guide the licensing authority' "[70] required by the Constitution.

CONCLUSION

The fundamental implications of the Supreme Court's decision in *Southeastern Promotions* are to be derived from the public forum underpinnings of its holding. That the Court never reached the substantive obscenity questions raised in the lower courts should put those accountable for the management of municipal facilities on notice that they must apprise themselves of the potential public forum ramifications that might well attend their actions. And since the Court refused to lay down specific guidelines, the burden of devising sufficiently narrow standards to govern the managing authority in its function was defaulted to the states. Furthermore, lower courts are charged with the responsibility of exploring the public forum consequences of governmental action that would frustrate the exercise of first amendment rights. Thus, the Court recognized that "[t]o permit the continued building of our politics and culture, and to assure self-fulfillment for each individual,"[71] those forums appropriately public must be kept open to constitutionally protected expression.

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Constitutional Law—Standing to Sue in Exclusionary Zoning Litigation: Catch-22 Revisited

Catch-22, Yosarian observed, involved a simple test with conditions defined so that it was impossible to meet them.[1] In an opinion

69. See note 61 and accompanying text *supra*. *See also* Southeastern Promotions, Ltd. v. City of Atlanta, 334 F. Supp. 634, 641 (N.D. Ga. 1971); Southeastern Promotions, Ltd. v. City of Charlotte, 333 F. Supp. 345, 351 (W.D.N.C. 1971).

70. 420 U.S. at 553, *quoting* Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1969).

71. Police Dep't v. Mosley, 408 U.S. 92, 95-96 (1972).

1. J. HELLER, CATCH-22 47 (1955).

superficially praiseworthy for its simplification of the test for standing in federal courts, the United States Supreme Court in *Warth v. Seldin*[2] followed Heller's cue. The Court in *Warth* so defined the terms of this procedural test that most persons challenging a zoning ordinance on grounds of unlawful economic exclusion will never get into federal court. The practical result forces low and moderate income persons first to obtain suburban housing before they can challenge a zoning ordinance that effectively precludes their acquiring it.

Warth involved the zoning ordinance of Penfield, New York, an incorporated suburb of Rochester. The ordinance allocated ninety-eight percent[3] of the town's vacant land to single-family detached housing, with less than one percent[4] reserved for multi-family structures (apartments and townhouses).[5] Further ordinance requirements relating to lot size, floor area, and density of persons per acre combined effectively to price low and moderate income persons out of the Penfield housing market.[6]

Several groups of plaintiffs alleged that Penfield's zoning ordinance, on its face and as applied, excluded low and moderate income persons from living in Penfield, in violation of their constitutional rights. A number of persons who had unsuccessfully sought to find housing in Penfield alleged that the ordinance forced them to reside in less attractive and rewarding environments, which additionally resulted in higher commuting expenses. They argued that the ordinance was unconstitutional because it violated their right to economic equal protection.[7] A

2. 95 S. Ct. 2197 (1975).

3. The opinion of the court of appeals, 495 F.2d 1187, 1189 (2d Cir. 1974), gives this figure as ninety percent. There is no indication whether the difference is real or typographical, and if the latter, which figure is correct.

4. The Court indicated that only .3% of the land allocated for residential use (ninety-eight percent of available land) was zoned for multi-family housing. 95 S. Ct. at 2203.

5. The ordinance had been in effect for ten years at the time of suit. *See id.* at 2203.

6. The Court found that only two projects for low or moderate cost housing had been proposed in the ten years the Penfield ordinance was in effect prior to suit. One had failed to secure the requisite approvals from the town government three years prior to suit. The other was pending at the time of suit. Both of these projects anticipated use of rent subsidization. Low or moderate cost housing allegedly was unavailable in Penfield without subsidization. *See id.* at 2208 n.15.

7. The essence of these plaintiffs' claim was a violation of equal protection based upon economic exclusion. The record indicates that at least some of these plaintiffs were members of racial or ethnic minorities, and hence could have brought suit on grounds of racial exclusion. See U.S. CONST. amend. XIV, Fair Housing Act of 1968, 42 U.S.C. § 3601 et seq. (1970); 42 U.S.C. §§ 1981-83 (1970). However, plaintiffs' attorneys, in briefs to the court of appeals, specifically sought standing only on economic

group of Rochester taxpayers alleged that Penfield's failure to provide for its fair share of the region's total housing needs resulted in Rochester taxpayers having to subsidize a disproportionate share of these needs.[8] A civic group concerned with housing sued on behalf of its members who lived in Penfield, arguing that they had been deprived of the benefits of living in an economically mixed community.[9] In addition, two associations, one of developers and one of builders, claimed monetary damages for deprivation of profits they would have made in constructing low and moderate cost housing had it not been for the exclusionary effect of the zoning ordinance. In sum, these plaintiffs sought (1) to have the ordinance declared unconstitutional, (2) to enjoin the town from enforcing the existing ordinance and to require it to develop a new one correcting past inequities, and (3) monetary damages.

The district court dismissed the complaint on the grounds that plaintiffs lacked standing to sue and had failed to state a claim upon which relief could be granted.[10] The court of appeals affirmed the decision, reaching only the standing question.[11] The United States Supreme Court affirmed in a five to four decision.

The Court held that none of the plaintiffs had demonstrated a personal injury, stating that,

> the fact that these petitioners share attributes common to persons who may have been excluded from residence in the town is an insufficient predicate for the conclusion that petitioners themselves have been excluded, or that respondents' assertedly illegal actions have violated their rights.[12]

Although the Court declined to say exactly what would satisfy the requirement of personal injury, it did indicate that some demonstrable interest in a particular project, in which plaintiffs intended to reside, would suffice to provide standing.[13] Plaintiffs here lacked such an

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grounds. Accordingly, the Court distinguished *Warth* from racial exclusion cases which could have been used to establish standing. *See* note 14 *infra.*

8. Note that this is the same ground accepted by the New Jersey Supreme Court in the recent, perhaps landmark, case of NAACP v. Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975), *petition for cert. filed*, 44 U.S.L.W. 3053 (U.S. July 8, 1975) (No. 38). See note 39 *infra* for a discussion of this case.

9. 95 S. Ct. at 2212 & n.21. Here, too, petitioners' claims were based on economic, not racial grounds, despite precedent on point that could have established standing on racial grounds. *See* note 14 *infra.*

10. The Court also noted that the case should not proceed as a class action. Given that the plaintiffs claiming to represent a class lacked a basis for suit, the class action issue is moot. 95 S. Ct. at 2207.

11. 495 F.2d 1187 (2d Cir. 1974).

12. 95 S. Ct. at 2207.

13. *Id.* at 2210 n.18.

interest, and accordingly failed to meet the "injury in fact" requirements for standing. The associations and the Rochester taxpayers were held to be suing for rights of third parties, and hence were not proper parties to bring suit.[14]

Mr. Justice Brennan's dissent bitterly denounced the opinion as fabricating procedural snares to insure that the substantive questions raised would not be reached.[15] He argued that according to prior decisions the injuries alleged were sufficient to allow standing,[16] and he regarded the Court's failure to so hold as "an indefensible hostility to the claim on the merits."[17]

STANDING TO SUE IN THE FEDERAL COURTS

The law of standing is predicated upon the Article III requirement that disputes in federal courts present a "case" or "controversy" between the parties.[18] The Supreme Court historically has construed this to mean that the plaintiff must be a *proper* party to bring the action in question.[19] In *Baker v. Carr*,[20] the Court defined this requirement by stating that plaintiffs must allege "a personal stake in the outcome of the

14. Although the Court dealt at length with the grounds for refusing standing to each group of plaintiffs, its decision in each instance involved lack of an injury in fact. (1) The Court rejected the Rochester taxpayers' claim involving regional housing needs (note that this argument was made on equal protection grounds, not under state statute as in *Mt. Laurel*). The Court accordingly found assertions of personal injury too attenuated, and noted that any remaining claim asserted only third parties' rights. *Id.* at 2209-11. (2) The civic organization, nine percent of whose members were Penfield residents, was said to be asserting the rights of third parties. Regarding the Penfield residents, the Court implied that standing would have been granted had petitioners alleged racial exclusion under Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972) (asserting lost benefits of living in a racially mixed community). However, the Court noted plaintiffs' refusal to plead on this ground and distinguished *Trafficante*. *Id.* at 2212-13. (3) The association of builders asserted no instance where a project had been precluded by any action of the town relating to the ordinance, and hence had shown no injury. *Id.* at 2214. (4) The association of developers asserted only one instance of such preclusion, which had occurred three years prior to suit. *Id.* at 2214-15. The record indicated no evidence to show a live and concrete dispute, and the Court refused to hear this claim essentially on grounds of mootness. The Court noted that were there a live dispute, the question of exhausting remedies would then arise. *Id.* at 2214 n.23.

15. *Id.* at 2216.

16. *Id.* at 2218.

17. *Id.* at 2216.

18. U.S. CONST. art. III, § 2.

19. The Court historically has sought to avoid spurious or unnecessary suits. *See, e.g.*, Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937). *See generally* Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970); Scott, *Standing in the Supreme Court: A Functional Analysis*, 86 HARV. L. REV. 645 (1973).

20. 369 U.S. 186 (1962).

controversy"[21] in order to insure that a favorable decision by the Court would personally benefit plaintiffs.

Prior to 1968, the Court's standing test required proof by the plaintiff of many of the substantive elements of his case.[22] This test involved substantive evaluation of the legal provisions under which the plaintiff sought relief, demonstration of the extent and nature of injury, and a showing that the plaintiff fell within the scope of the contested statute or constitutional guarantee.[23] Additionally, the Court developed closely related, though non-constitutional, discretionary rules relating to standing. The most important discretionary rule required that plaintiffs' claims be based upon their own injuries, thus barring the use of courts as a political forum to try suits on the behalf of third parties.[24]

Beginning in 1968 with *Flast v. Cohen*[25] and continuing through *Warth*, the Court revamped the requirements for standing in federal courts.[26] In cases prior to *Flast*, the Court treated the concepts of standing and justiciability almost interchangeably and did not distinguish between the plaintiff and the merits of the case he was bringing. In subsequent cases the Court established specific standing requirements relating solely to the person bringing suit. Exemplary of this shift was the 1970 case of *Association of Data Processing Service Organizations, Inc. v. Camp*,[27] which established a two-pronged test for standing under

21. *Id.* at 204. This language was a statement of existing philosophy, and still reflects the philosophical underpinnings of standing. The changes in the law of standing have concerned the test for implementing this philosophy.

22. *See, e.g.*, Frothingham v. Mellon, 262 U.S. 447, 488 (1923).

23. *See* Davis, *supra* note 19; Scott, *supra* note 19. Such statutory evaluation often had the effect of insuring standing in cases where the general test used under Article III left the standing question in doubt. *E.g.*, FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940).

24. *E.g.*, Tileston v. Ullman, 318 U.S. 44, 46 (1943). *See also* United States v. Raines, 362 U.S. 17, 21-22 (1960); Barrows v. Jackson, 346 U.S. 249, 256-57 (1953). For a detailed discussion on standing and the rights of third parties, see Note, 88 HARV. L. REV. 423 (1974) (constitutional *jus tertii*). Note that this is the converse of the requirement that a plaintiff must assert a personal injury. See the Court's discussion, 95 S. Ct. at 2205-06.

25. 392 U.S. 83 (1968). Although *Flast* has since been pigeonholed as limited to taxpayers' suits brought under the first amendment, it broke with prior tests for standing and initiated the revision of federal standing law.

26. The major cases in this process have been (in order of decision) Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150 (1970); its companion case, Barlow v. Collins, 397 U.S. 159 (1970); Sierra Club v. Morton, 405 U.S. 727 (1972); Linda R.S. v. Richard D., 410 U.S. 614 (1973); United States v. SCRAP, 412 U.S. 669 (1973); O'Shea v. Littleton, 414 U.S. 488 (1974); United States v. Richardson, 418 U.S. 166 (1974); Schlesinger v. Reservists Comm. To Stop The War, 418 U.S. 208 (1974); Warth v. Seldin, 95 S. Ct. 2197 (1975).

27. 397 U.S. 150 (1970). Although *Data Processing* was brought under section 10 of the Administrative Procedures Act, 5 U.S.C. § 702 (1970), the language of the

Article III: (1) that plaintiff suffer an "injury in fact," and (2) that plaintiff's interests fall within the "zone of interests to be regulated by the statute or constitutional guarantee in question."[28] In creating the "zone of interests" test, the Court sought to maintain a screening mechanism for invoking its discretionary authority not to hear a case for policy reasons.[29] The dissent in *Data Processing* argued that the zone of interest test concerned reviewability of the subject matter of the case, not the particular plaintiff bringing suit, and hence was not an appropriate test for determining standing. The dissent further argued that the Court could exercise its discretionary powers under the rubric of justiciability instead of standing. Notably, cases subsequent to *Data Processing* turned on the question of injury in fact, not zone of interest, and by 1974 a plurality of five of the Justices in *United States v. Richardson*[30] favored abandoning the zone of interest test altogether.[31] The Court, however, has been careful to note that while it has markedly reduced the requirements for standing, it has not abandoned "the requirement that the party seeking review must himself have suffered an injury."[32] The rationale for maintaining this requirement reflects the Court's antipathy toward deciding "political questions"[33] and its concern that the remedy provided be "no broader than required by the precise facts to which the court's ruling would be applied."[34]

Two problems in the revision of standing law are noteworthy. First, although the cases indicate an attempt to standardize the test for standing in varied factual contexts, the Court has persistently repeated the warning that generalizations about standing are hazardous.[35] Second, the Court's opinions have been noteworthy in their failure to define "injury in fact."[36] Given the Court's opinions through *Richardson*, a definitional process appeared imminent.

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opinion refers to both statutory and constitutional claims. Subsequent decisions have indicated that the case does apply to nonstatutory suits. *See* cases cited note 26 *supra*.

28. 397 U.S. at 152-53.

29. *See* Frothingham v. Mellon, 262 U.S. 447, 488 (1923).

30. 418 U.S. 166 (1974).

31. The four dissenting Justices and Justice Powell, concurring, were of this opinion. *Id.* at 180, 197, 202, 235.

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

33. *See, e.g.*, Frothingham v. Mellon, 262 U.S. 447, 488-89 (1923).

34. Schlesinger v. Reservists Comm. To Stop The War, 418 U.S. 208, 222 (1974).

35. This has historically been true of the Court's standing decisions, prompting the comment by Professor Freund that the concept of standing is one of "the most amorphous in the entire domain of public law." In *Hearings on S. 2097 Before the Subcomm. on Constitutional Rights of the Senate Judiciary Comm.*, 89th Cong., 2d Sess. 467-68 (1966).

36. This fact was noted in the court of appeal's decision in *Warth*, 495 F.2d at

EXCLUSIONARY ZONING

The Supreme Court has heard less than a handful of zoning cases in the past fifty years.[37] Virtually all zoning problems have been litigated at the state court level. Suits in state court typically challenge a specific ordinance as failing to comply with the state's zoning enabling act. Standing requirements, usually requiring that the plaintiff exhibit some proprietary interest, are generally found within these statutes. In many states, these requirements have recently been liberalized to include persons who lack proprietary interests but are nevertheless affected by the zoning ordinance.[38]

State remedies have been sufficient for virtually all zoning controversies except those involving racial discrimination. These controversies have been brought in federal court, under civil rights legislation,[39] the Fair Housing Act of 1968,[40] and the equal protection clause of the fourteenth amendment. Federal courts generally have invalidated zon-

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1190. The Court has specified only very broad parameters for the "injury in fact" test. For example, in O'Shea v. Littleton, 414 U.S. 488 (1974), the Court indicated that "[a]bstract injury is not enough." *Id.* at 494. Similarly, the Court in Linda R.S. v. Richard D., 410 U.S. 614 (1973), required "some threatened or actual injury resulting from the putatively illegal action." *Id.* at 617. No actual definition of "injury in fact" had been given prior to *Warth*.

37. The landmark case establishing zoning as a proper exercise of police power was Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). There have been two pure zoning cases since *Euclid*. Beery v. Houghton, 273 U.S. 671 (1927) (which merely followed *Euclid*); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (upholding single-family zoning). *See generally* N. WILLIAMS, 3 AMERICAN PLANNING LAW: LAND USE AND THE POLICE POWER (1975) [hereinafter cited as WILLIAMS].

38. Most statutes require persons suing under them to show a proprietary or equitable interest in land within the zoned area subject to dispute. However, recent decisions at the state court level have expanded the basis for suit. Of particular note in the context of economic exclusion is *Mt. Laurel*. See note 8 *supra*. The New Jersey Supreme Court there held that zoning ordinances which failed to provide for the municipality's fair share of the regional housing needs are challengeable under the state zoning enabling act. This conclusion is seen as following from a regionalized conception of *Euclid*'s public welfare language. *See* Burns, *Class Struggle in the Suburbs: Exclusionary Zoning Against the Poor*, 2 HASTINGS CON. L.Q. 179 (1975). A number of commentators see *Mt. Laurel* as setting the trend in state courts in economic exclusionary zoning litigation. Burns, *supra*; Kushner, *Land Use Litigation and Low Income Housing: Mandating Regional Fair Share Plans*, 9 CLEARINGHOUSE REV. 10 (1975); Williams, *supra* note 37. The implications of this development in terms of who can sue is to stretch the requisite interest for suit to a regional scope, thereby including taxpayers of other municipalities in the region and other municipalities themselves. For discussions of other trends in exclusionary zoning decisions in the state courts, *see generally* Aloi, *Recent Developments in Exclusionary Zoning: The Second Generation of Cases and the Environment*, 6 SW. U.L. REV. 88 (1974); Note, 5 MEMPHIS STATE U.L. REV. 251 (1975).

39. Generally under 42 U.S.C. §§ 1981-83 (1970).

40. *Id.* § 3601 et seq.

ing provisions which embody racial discrimination.[41]

Cases involving economic, as opposed to racial, exclusion have appeared only recently. Some of these suits have been brought in state courts under state enabling acts.[42] Others, based solely on a constitutional right of economic equal protection under the fourteenth amendment, have been brought in federal court. Inasmuch as these latter suits are not brought under state statute or under a federal statute,[43] both of which have standing requirements, plaintiffs must comply with the general requirements for standing under Article III as construed by the Supreme Court. Determination of these requirements accordingly fixes the scope of litigation in an economic exclusionary zoning context.[44]

CATCH-22 REVISITED

The Court in *Warth* used the context of exclusionary zoning to further revise the law of standing, much as it had in cases of varied fact situations since 1968. Recognizing the plurality decision in *Richardson*, the Court used a single test, injury in fact, as the determinant of standing under Article III. "Zone of interests" was not mentioned in the opinion. One may accordingly draw the conclusion that *Warth's* significance in the context of standing litigation is to remove the zone of interest test established in *Data Processing*.

Despite this step toward simplification, however, the Court complicated the entire standing issue, and severely restricted the substantive bases for suit, at least in economic exclusionary zoning litigation, through the manner in which it defined "injury in fact." The cases prior to *Warth* seemed to indicate that almost any showing of monetary or opportunity losses resulting from the alleged statutory or constitutional violation constituted a sufficient "injury" to meet the standing requirement and allow the suit to be heard on the merits.[45] *Warth*, in contrast, construed the statutory/constitutional violation itself to be the requisite "injury" that must be shown to establish standing. The Court stated that alleged monetary and opportunity losses might measure the extent of harm, but such losses without the showing of the violation of a

41. See 95 S. Ct. at 2209 n.17 for a listing of a number of major cases in this area. All of these cases involved particular projects and instances of discrimination.

42. See the discussion of the *Mt. Laurel* case note 39 *supra*.

43. *E.g.*, the Administrative Procedure Act, 5 U.S.C. § 501 et seq. (1970).

44. *See* WILLIAMS, *supra* note 37, for a discussion of the courts' treatment of cases asserting the doctrine of economic equal protection.

45. See 95 S. Ct. at 2218.

right are not sufficient to warrant suit.[46] This is clearly inconsistent with the Court's prior use of the term injury. For example, in *Sierra Club v. Morton* the Court recognized an aesthetic and environmental interest in land about to be despoiled as sufficient to warrant standing in a suit alleging a violation of the Administrative Procedures Act.[47] Clearly an allegation that one's aesthetic interests have been or are about to be harmed is a far cry from a claim that one's statutory/constitutional rights have been violated. Had the Court used the *Warth* test, it would have refuted an aesthetical/environmental basis for attaining standing in *Morton*. It would also have denied standing in *Data Processing*, in which an alleged violation of plaintiff's economic interests was found sufficient to clear the standing hurdle.

In *Warth* the Court thus retained the catch-words of its test for standing under Article III—injury in fact—but changed what those words mean. In an exclusionary zoning context, the result is that the plaintiff must demonstrate a specific instance of exclusion involving a specific project or parcel of land in order to attain standing.[48] Accordingly, by its construction of "injury in fact," the Court requires a proprietary interest for zoning litigation.[49] One may postulate that the Court decided upon a final result (proprietary interest) and then redefined "injury in fact" as the easiest way of arriving at it. It might be noted, however, that by raising a proprietary interest to a federal constitutional requirement in zoning litigation, the Court is reverting to the pre-1968 confusion in standing cases by failing to differentiate between the person bringing suit and the justiciability of his claim. This seems to obviate the entire line of standing decisions since 1968—unless future decisions manage to limit the construction used in *Warth* to an exclusionary zoning context.[50]

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46. *Id.* at 2207 n.13.

47. 405 U.S. at 738.

48. One has to be excluded from something. Saying one has been excluded from the whole town fails to demonstrate when and how this exclusion occurred. Such specificity requires an instance of exclusion from a particular project. Mr. Justice Brennan asserts that the effect of the decision is to require proof on the merits in order to gain standing. *See* 95 S. Ct. at 2220.

49. Note that this result is strangely similar to the traditional requirements for standing under the state enabling acts. *See* WILLIAMS, *supra* note 37.

50. It is interesting to note that the Court's construction of injury left the dissent in the anomalous position of arguing that the interests of at least three of the sets of plaintiffs (i.e., the individual petitioners, the civic association, and the group of developers), taken as a whole, justified standing, and that the Court erred in treating "each set of plaintiffs as if it were prosecuting a separate lawsuit, refusing to recognize that the interests of any one group must take into account its position vis-a-vis the others." 95 S. Ct. at 2216. The dissent argued that the manner in which the standing issue was framed

In trying to ascertain who *can* sue and under what circumstances in the wake of *Warth*, it becomes apparent that the Court, in the name of procedure, has severely restricted the substantive claims that will be heard on the merits to the point of virtually removing economic exclusionary zoning litigation from the federal courts.[51] One need merely look at the possible injuries in fact that would satisfy *Warth's* standing test to see the validity of this assertion. (1) Persons living outside the muncipality may sue on grounds of unlawful exclusion,[52] so long as they demonstrate an interest in a particular project. However, this means that they must find a project, which in turn requires a developer willing to tie up his money in a project that contravenes the zoning for the amount of time needed to exhaust administrative remedies before an intransigent municipal government and then proceed with litigation. Time costs money in development, and the amount of time involved in such a situation is likely to make development prohibitive. (2) Those living within the municipality can challenge the administration of the ordinance in a particular instance, alleging as their injury the deprivation of the benefits of an economically mixed community.[53] But again, this will require a project and a developer. (3) The developer or his association can challenge a particular application of the ordinance as being arbitrary, once administrative remedies are exhausted.[54] But again, there must be a development—presumably planned, financed, subsidized, and ready for construction except for the zoning problem—in order for there to be a real injury.

These are the only direct, personal "injuries in fact" that can exist under *Warth*. Any plaintiff failing to allege such an instance of exclusion will lack standing to sue. Justice Brennan notes the absurdity of this position:

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ignored the realities of the case, "that the low-income-minority plaintiff's interest is *not* to live in a particular project but to live somewhere in the town in a dwelling they (sic) can afford." *Id.* at 2217. However true this may be, the context in which the dissent moved to get from this argument to the conclusion that standing existed is nothing less than the "zone of interest" test that these same dissenters favored abolishing in *Richardson*. This reasoning ignores the philosophy underlying the recent trend of standing decisions, and mirrors the majority opinion in attempting to reach a final result without paying enough attention to how it gets there.

51. See *id.* at 2216, 2221.

52. The bases of suit would be equal protection and possibly the right to travel. *See generally* WILLIAMS, *supra* note 37.

53. This is the *Trafficante* argument discussed in note 14 *supra*. It is based on arbitrariness under due process (fourteenth amendment).

54. Depending upon the project, claims would be based on either equal protection or due process grounds.

> In effect, the Court tells the low-income-minority and building company plaintiffs they will not be permitted to prove what they have alleged—that they could and would build and live in the town if changes were made in the zoning ordinance and its application—because they have not succeeded in breaching, before the suit was filed, the very barriers which are the subject of the suit.[55]

In Heller's words, "there was only one catch, and that was Catch-22."[56]

The Court's restriction of future suits to these three types of fact situations—all of which require a wealthy developer willing to tie up his money for a considerable length of time—will have the practical result of keeping further economic exclusionary zoning litigation out of federal court. Arguably, this is what the Court intended to do. A decision in a zoning context based solely on a right of economic equal protection under the fourteenth amendment would open to challenge on constitutional grounds zoning ordinances and restrictive covenants nation-wide. This is not to say that the Court has determined that there is no such right, but merely that the Court has substantially reduced the chances of hearing such a case. In a zoning context, the result of the restrictive definition in *Warth* will be to channel all cases involving zoning back into state courts. Here plaintiffs can challenge local ordinances under the state enabling acts and avoid the federal standing test. That this is the signficance of *Warth* is indicated in the first (and so far only) case to apply it, *Construction Industry Association of Sonoma County v. City of Petaluma*,[57] in which the Ninth Circuit, relying heavily on *Warth*, denied standing in an exclusionary zoning context on the ground that plaintiffs had not themselves been unlawfully excluded from the city, and hence were arguing the rights of third parties.[58]

CONCLUSION

The Court in *Warth* recognized the plurality position in *Richardson* by adopting a single test for standing in federal courts, but then proceeded to define that simple test so as to preclude most plaintiffs and their substantive claims, at least within an exclusionary zoning context.

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55. 95 S. Ct. at 2217.

56. J. HELLER, *supra* note 1, at 47.

57. 522 F.2d 897 (9th Cir. 1975), *noted in* 54 N.C.L. REV. 266 (1976).

58. The court of appeals' terminology is confusing, in that the opinion is predicated on *Warth* but uses the language "zone of interest." Arguably, this confusion arises from the court's failure to understand that *Warth* changes the definition of injury. In any event, the rationale used by the court is firmly grounded in *Warth*, even if the language is not.

The dissent's view that the Court treated the substantive area with hostility seems justified.[59] Whether future opinions will attempt to limit the "injury in fact" construction of *Warth* to exclusionary zoning cases is conjectural, though it is likely in light of the trend of cases prior to *Warth* and the peculiarly volatile consequences of applying this trend in a zoning context. The impact of *Warth* on zoning litigation is not likely to be severe. State courts are becoming increasingly receptive to problems of economic exclusion, and arguably every plaintiff that has litigated this issue in the federal courts to date would have found a more favorable forum in state court. *Warth* may have a larger impact in the area of equal protection, given the constraints it places on bringing cases in federal court that raise this issue in an economic context.

It might be noted that *Warth* was the wrong case to appeal if the goal were to establish an economic equal protection doctrine. There should have been a history of repeated project denials and plaintiffs who would have been able to live in the projects had they been built.[60] The consequences of bringing *Warth* before the Court are a number of restrictive precedents in both standing law and the use of the equal protection doctrine that if followed will have an adverse impact on creative developments in both these areas. Unfortunately, given the context of *Warth* in the series of standing decisions and the restrictions it imposes on future zoning cases, it is not at all certain that the Court will reassess its holding in the near future.

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Constitutional Law—The Conclusive Presumption Doctrine

From 1972 to 1974, the conclusive presumption doctrine[1] surfaced as a viable vehicle for Supreme Court invalidation of legislation. The doctrine requires nearly perfect conformity between the results of the

59. 95 S. Ct. at 2216.
60. *See* the Court's discussion. *Id.* at 2209 n.16.

1. "Conclusive presumption" will be used interchangeably with "irrebuttable presumption." *See* Simson, *The Conclusive Presumption Cases: The Search for a Newer Equal Protection Continues*, 24 CATHOLIC U.L. REV. 217, 220 (1975), where the internal inconsistency of the terminology is described.