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Standing to Challenge Federal Grants to Nearby Town (Evans v. Lynn)

Timothy Donovan

CIVIL RIGHTS

STANDING TO CHALLENGE FEDERAL GRANTS TO NEARBY TOWN

Evans v. Lynn

Federal courts have recently exhibited an increased willingness to broaden the categories of persons qualified to bring suit in housing and urban development cases.[1] Consequently, standing in such actions is no longer restricted to direct victims of discriminatory action.[2] The relaxation of standing barriers with respect to those seeking judicial review of agency action, and in particular the review of an agency's failure to perform its statutory duties, can be identified as a parallel trend.[3] Serving to give these developments added impetus, the Second Circuit, in *Evans v. Lynn*,[4] held that ghetto residents questioning grants made to a nearby town have standing to challenge the alleged "inaction" of federal agencies in failing to perform their statutory duties under the Civil Rights Acts of 1964[5] and 1968.[6]

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[1] *See, e.g.*, Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972) (residents of housing unit, although not direct victims of discrimination, have standing under Civil Rights Act of 1968 to challenge landlord's discriminatory practices); Shannon v. HUD, 436 F.2d 809 (3d Cir. 1970) (residents of urban renewal area have standing under Housing Act of 1949 and Civil Rights Acts of 1964 and 1968 to challenged HUD action maintaining the low income character of the area); Norwalk CORE v. Norwalk Redev. Agency, 395 F.2d 920, 937 (2d Cir. 1968) (association may be given standing if necessary to protect constitutional rights of persons "not immediately before the court").

[2] In Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972), for example, the Court extended standing to white persons who allegedly suffered the loss of the benefits of interracial association when blacks were excluded from their apartment complex. Similarly, in Topic v. Circle Realty Co. 377 F. Supp. 111, 113-14 (C.D. Cal. 1974) (mem.), residents of a community of over 100,000 persons were held to have standing to challenge the "racial steering" practices of local realtors who were directing nonwhite purchasers into minority residential areas. Although none of the plaintiffs had been so "steered," the court found that, as residents of a segregated community, they were sufficiently affected. For a discussion of residence in a community as a basis for standing, see note 19 *infra*.

[3] *See, e.g.*, Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970); Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973) (en banc) (per curiam). *See generally* Tucker, *The Metamorphosis of the Standing to Sue Doctrine*, 17 N.Y.L.F. 911 (1972) [hereinafter cited as Tucker].

[4] Civil No. 74-1793 (2d Cir., June 2, 1975), *rev'g and remanding in part and aff'g in part* 376 F. Supp. 327 (S.D.N.Y. 1974).

[5] 42 U.S.C. §§ 2000a *et seq.* (1970), *as amended*, (Supp. IV, 1974). In Title VI, 42 U.S.C. §§ 2000d *et seq.* (1970), it is established that

> [n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Id. § 2000d. In particular, federal agencies empowered to grant federal aid are directed to effectuate this basic policy and may do so

> (1) by the termination of or refusal to grant or to continue assistance under such program . . . to any recipient as to whom there has been an express finding . . . of a

Defendants, the Department of Housing and Urban Development (HUD) and the Board of Outdoor Recreation (BOR), awarded the Town of New Castle monetary grants to be used for the construction of sewers and the creation of a park and wildlife preserve in nearby Turner Swamp.[7] The Town is a predominantly white, high income suburban community, 90 percent zoned for single-family homes. Plaintiffs, low income minority residents of the county, sought to challenge the grants on the ground that defendants had failed to perform their Civil Rights Acts duties to affirmatively effectuate national antidiscrimination and fair housing policies.[8]

Plaintiffs alleged that HUD and BOR had approved the grants in question without properly evaluating the character of the recipient Town in terms of its fair housing policies.[9] Such inaction, it was claimed, was evidence of the specific and nationwide neglect by HUD and BOR of their obligations under the affirmative duty provisions of the Civil Rights Acts.[10] Plaintiffs further contended that, as nearby ghetto residents, they were within the zone of statutorily protected interests and that by reason of defendants' inaction,

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failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity . . . as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law. . . .

Id. § 2000d-1.

[6] Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601 *et seq.* (1970), *as amended*, (Supp. IV, 1974), declares it to be "the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601 (1970). Title VIII further provides:

All executive departments and agencies shall administer their programs and activities relating to housing and urban development in a manner affirmatively to further the purposes of this subchapter. . . .

Id. § 3608(c).

[7] Civil No. 74-1793 at 3888. The court acknowledged that the grants for a sewer system and recreational area were arguably outside the statutes' purview since they might not be considered related to housing and urban development. It was also noted, however, that both HUD and BOR had characterized the grants as so related and that such administrative interpretations were entitled to great weight. *Id.* at 3893 n.10, *citing* Udall v. Tallman, 380 U.S. 1, 16 (1965). For the dissent's opinion on this point, see note 35 *infra*.

[8] *See* notes 5-6 *supra*.

[9] In January of 1973, when interested parties filed an informal letter of complaint with HUD concerning the grants, they were informed that no rating sheet for the project was on file. A "reconstructed" rating sheet assessing the character of the community and the need for funding was thereafter assembled. There was, however, some evidence that the reconstructed rating sheet did not accurately portray either the policies or the financial situation of New Castle. Brief for Plaintiff-Appellants at 12-14.

[10] *Id.* at 25. Since it would entail inquiry beyond the question of standing, no determination was made by the *Evans* court as to the extent of the statutory duty to promote fair housing. Interestingly, however, in Acevedo v. Nassau County, 500 F.2d 1078 (2d Cir. 1974), it was pointed out that there is no duty incumbent upon federal agencies to construct low income housing.

which permitted the maintenance of segregated housing patterns within the county, they suffered injury in fact.[11]

HUD moved to dismiss the complaint for lack of jurisdiction and failure to state a claim upon which relief can be granted. Plaintiffs cross-moved for a preliminary injunction to prohibit disbursement of the grants in question, and the Town of New Castle was granted leave to intervene.[12] The district court denied the request for a preliminary injunction and granted the motion to dismiss on the ground that plaintiffs lacked standing to sue.[13] More specifically, District Judge Pollack found that, having failed to demonstrate that they would suffer injury in fact as a result of the grants, plaintiffs had no personal stake in the outcome.[14]

A divided Second Circuit panel, holding that plaintiffs had satisfied the two-pronged test for standing established by the Supreme Court in *Association of Data Processing Service Organizations, Inc. v. Camp*,[15] reversed and remanded the decision of the district court for further proceedings.[16] The *Data Processing* test requires that plaintiffs allege "injury in fact" as a result of the challenged action and that the interest they seek to defend be "arguably within the zone of interests" intended to be protected by the statute in question.[17]

Judge Oakes, who authored the court's opinion, initially noted three factual assumptions made by the district court.[18] First, the appellants were minority ghetto residents of Westchester County.[19]

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[11] Civil No. 74-1793 at 3888.

[12] *See id.* at 3905 (Moore, J., dissenting).

[13] 376 F. Supp. at 334.

[14] *Id.* at 332. Although Judge Pollack acknowledged that ghetto living conditions are a "very real and very serious 'injury,'" he found that there was no "link" between the injury and the challenged action. In his opinion, these plaintiffs would not be affected by continuation or termination of the New Castle grants. He further noted that the plaintiffs' status as "potential residents" did not aid their position since it would not give them the necessary "'personal stake in the outcome of the controversy.'" *Id.*, *citing* Warth v. Seldin, 495 F.2d 1187 (2d Cir. 1974), *aff'd*, 422 U.S. 490 (1975).

[15] 397 U.S. 150 (1970).

[16] Civil No. 74-1793 at 3901. The court affirmed the decision below as to a third defendant, Tri-State Regional Planning Commission (Tri-State). Tri-State is an interstate agency established by New York, New Jersey, and Connecticut and designated by the Office of Management and Budget to serve as "areawide clearinghouse for review of applications for federal aid to assure conformance with regional comprehensive plans." *Id.* at 3900. Tri-State had refused to evaluate the impact of the grants on the ground that they lacked regional significance. It is submitted that a contrary approach would have been unduly burdensome since it would be unreasonable to expect a large multistate review board to expend its limited resources to comment on the civil rights aspect of local problems of limited scope.

[17] 397 U.S. at 152-53.

[18] Civil No. 74-1793 at 3889-92.

[19] That plaintiffs were residents of the county in which New Castle is located is significant in light of prior decisions pursuant to which members of a community affected by

Second, the Town for which the grants were authorized was not only 98.7 percent white and zoned for single-family residences of more than 1 acre, but was also characterized by a history of opposition toward attempts to alter the exclusive nature of the community.[20] Third, the defendants' evaluation of New Castle's development policies reflected little if any attempt on their part to perform the affirmative duties allegedly required under the Acts.[21] It is within this factual context that the *Data Processing* test was applied.

Whether or not the plaintiffs' asserted interests are within the zone of statutory protection, Judge Oakes reasoned, depends upon whether a "viable" claim is presented that the federal agencies are charged with affirmative duties requiring them to take some action, not taken in this instance, on the plaintiffs' behalf.[22] In his opinion, the scope and purpose of the relevant legislation,[23] the express language of the Acts,[24] and the case law construing these provisions,[25] supported such a claim. Generally, courts have found legislative history of little help in determining questions of standing under the Civil Rights Acts.[26] The *Evans* court, however, gained considerable insight from remarks by Senator Mondale and other sponsors of those portions of the Civil Rights Acts which contain the affirmative duty provisions.[27] Indicating that the purpose of

discriminatory or allegedly illegal agency action have been given standing to challenge such action. *See, e.g.*, Shannon v. HUD, 436 F.2d 809 (3d Cir. 1970); Brookhaven Housing Coalition v. Kunzig, 341 F. Supp. 1026 (E.D.N.Y. 1972). Indeed, in Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211 (1972), the Supreme Court recognized that individual acts of discrimination may affect an entire community. And, somewhat similarly, in South East Chicago Comm'n v. HUD, 343 F. Supp. 62, 67 (N.D. Ill. 1972), *aff'd*, 488 F.2d 1119 (7th Cir. 1973), the court strongly implied that residents of one neighborhood could challenge agency action affecting another part of the city in which they reside. What may be involved in these decisions, including *Evans*, which recognized the plaintiffs' right to bring suit as "nearby" ghetto residents, is an expansion of the concept of community for purposes of standing.

[20] New Castle was among several other Westchester communities which had successfully thwarted attempts by the New York State Urban Development Corporation to construct low income housing within their towns. Civil No. 74-1793 at 3890 n.7.

[21] *Id.* at 3891; *see* note 9 and accompanying text *supra.*

[22] Civil No. 74-1793 at 3892.

[23] *See* notes 27-29 and accompanying text *infra.*

[24] Some of the Acts' more relevant provisions are quoted in notes 5-6 *supra.* Judge Oakes viewed the establishment of an affirmative duty, pursuant to which the federal agencies would be required to act, as creating a statutory right which would be violated by grants such as those in *Evans.* Civil No. 74-1793 at 3896.

[25] *See* notes 30-31 and accompanying text *infra.*

[26] *See* Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 210 (1972). The chief reason that legislative history has not been particularly helpful in resolving questions of standing under the Civil Rights Acts is that Congress, in drafting the Acts, never directly dealt with the issue of standing of private persons. *See* Comment, *Standing to Challenge Housing Discrimination: The Limits of* Trafficante v. Metropolitan Life Ins. Co., 7 URBAN L. ANNUAL 311, 315 (1974).

[27] *See* Civil No. 74-1793 at 3894-95, *quoting* 114 CONG. REC. 2278 (1968) (remarks of Senator Mondale) *and id.* at 9563 (remarks of Representative Celler). *See also* Comment, *The*

the legislation was to reshape the policies of federal agencies which had in the past either ignored or affirmatively encouraged discrimination in housing, these remarks revealed that it was the legislature's intent that the fair housing statutes, particularly the Civil Rights Act of 1968,[28] alleviate the plight of ghetto residents.[29] The judiciary, Judge Oakes observed, has traditionally recognized that the 1968 Act was intended to provide a wide range of protection, and, to this end, its statutory provisions have been given a liberal construction.[30] Moreover, other circuit courts have held that a viable claim of noncompliance with statutory duties may exist where federal agency action results in the maintenance of existing patterns of segregation which Congress has affirmatively ordered agencies to eliminate.[31] Hence, Judge Oakes concluded that the plaintiffs' asserted interest was within the broad umbrella of statutory protection.

Fair Housing Act: Standing for the Private Attorney General, 12 SANTA CLARA LAW. 562, 563-64 (1972).

[28] As Judge Oakes noted, the Civil Rights Act of 1964 may be more limited in scope than the 1968 Act, since the former contains a "pinpoint provision" limiting an agency's power to terminate or refuse federal funding to those portions of the program in which discrimination has been found. *See* Civil No. 74-1793 at 3894; note 5 *supra.* Since no claim was made that the park and sewer projects involved in *Evans* would be operated solely for the benefit of whites, the affirmative duty provisions of the 1964 Act may be inapplicable. *See* Gautreaux v. Romney, 457 F.2d 124, 128 (7th Cir. 1972).

[29] *See* Civil No. 74-1793 at 3895, *quoting* 114 CONG. REC. 9563 (1968), wherein Representative Celler stated that "[t]he purpose or 'end' of the Federal Fair Housing Act is to remove the walls of discrimination which enclose minority groups in ghettos . . . ." This concern with the housing of ghetto residents was shared by members of the Senate. *See* 114 CONG. REC. 2274 (1968) (remarks of Senator Mondale) ("[O]ur failure to abolish the ghetto will reinforce the growing alienation of white and black America."); *id.* at 2281 (remarks of Senator Brooke) ("The purpose of this bill . . . is to give black Americans an opportunity to live in decent housing in this country.").

[30] The Supreme Court has described Title VIII of the Civil Rights Act of 1968 as "a detailed housing law, applicable to a broad range of discriminatory practices and enforceable by a complete arsenal of federal authority." Jones v. Alfred H. Mayer Co., 392 U.S. 409, 417 (1968) (dictum). *Accord,* Williams v. Matthews Co., 499 F.2d 819, 826 (8th Cir. 1974) (Fair Housing Act of 1968 prohibits "all forms of discrimination, sophisticated as well as simpleminded"); United States v. Grooms, 348 F. Supp. 1130, 1133-34 (M.D. Fla. 1972) (Fair Housing Act of 1968 "prohibits conduct with discriminatory consequences as well as discriminatorily motivated practices"); United States v. Real Estate Dev. Corp., 347 F. Supp. 776, 781 (N.D. Miss. 1972) (Fair Housing Act of 1968 to be given broad construction to implement congressional policy of providing fair housing).

[31] *See, e.g.,* Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973) (en banc) (per curiam), wherein the court held that plaintiffs, including citizens and taxpayers as well as black students, were entitled to injunctive relief ordering the Secretary of Health, Education, and Welfare to take immediate action to end segregation in over 200 school districts which had been receiving federal funds. According to the court, continuation of such subsidization would be "contrary to the expressed purposes of Congress" under Title VI of the Civil Rights Act of 1964. *Id.* at 1162. So too, in Shannon v. HUD, 436 F.2d 809 (3d Cir. 1970), the court held that residents and businessmen in the vicinity of an urban renewal project had standing to challenge HUD action which maintained the low income character of the neighborhood.

The court divided not on the concept of zone of interests,[32] but on the question of injury in fact. Because disbursement of the grants in question would have no visible effect on the plaintiffs,[33] narrowly viewing the issue as an attempt to enjoin specific agency grants would seem to mandate the conclusion that the plaintiffs were without injury on which such a complaint could be based. This was essentially the approach adopted by Judge Moore in his dissent. Limiting his consideration to the question of standing for the purpose of enjoining the specific grants to the Town of New Castle,[34] the Judge concluded that the plaintiffs had not demonstrated the requisite injury in fact upon which standing could be based.[35] As support for his conclusion, Judge Moore relied principally on recent Supreme Court decisions which denied citizens and taxpayers standing to raise constitutional questions.[36] Pre-

[32] Unlike Judge Oakes, the dissent never addressed the issue of whether the plaintiffs were within the statutes' zone of interests. Professor Davis has pointed out that many lower federal courts have ignored the *Data Processing* zone of interests test. K. DAVIS, ADMINISTRATIVE LAW TEXT § 22.07 (3d ed. 1972). This appears to be the approach taken in Hodgson v. Carpenters Local 2212, 457 F.2d 1364, 1369 (3d Cir. 1972), and Lee v. Resor, 348 F. Supp. 389, 392 (M.D. Fla. 1972). While a majority of the Supreme Court continues to adhere to the zone of interests test, Justices White and Brennan would require no more than a showing of injury in fact. *See* Barlow v. Collins, 397 U.S. 159, 167-68, 178 (1970) (Brennan, J., concurring in the result and dissenting). Other courts have given the test a very liberal construction, apparently emphasizing the word "arguably." *See, e.g.*, Constructores Civiles de Centroamerica, S.A. v. Hannah, 459 F.2d 1183, 1189 (D.C. Cir. 1972); Harry H. Price & Sons v. Hardin, 425 F.2d 1137, 1140-41 (5th Cir. 1970), *cert. denied*, 400 U.S. 1009 (1971); Crow v. Brown, 332 F. Supp. 382, 394 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972). For a general discussion of the varying approaches courts have taken to the *Data Processing* test, see Hasl, *Standing Revisited — The Aftermath of* Data Processing, 18 ST. LOUIS U.L.J. 12, 33 (1973).

[33] The dissent assessed the monetary amount involved at $358,000 for the sewers and $57,500 for the park. Such amounts, he noted, would "scarcely suffice for a low-cost housing project." Civil No. 74-1793 at 3916 (Moore, J., dissenting).

[34] Judge Moore stated: "What the plaintiffs seek to achieve here would indeed '. . . open the Judiciary to an arguable charge of providing "government by injunction." ' " *Id.* at 3912, *quoting* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 222 (1974).

[35] Civil No. 74-1793 at 3910-17 (Moore, J., dissenting). Judge Moore emphasized the absence of any connection between the plaintiffs and either the grants or the Town benefited by the grants. Specifically, plaintiffs made no claim that they were denied housing on the basis of race, that the use of the relatively small amount of money involved would result in diminished grants for any low income housing project, nor that the exclusionary zoning was constitutionally infirm. *Id.* at 3908. Additionally, Judge Moore argued that the grants for sewer and park facilities were not related to housing. *Id.* at 3916. Apparently this emphasis on the absence of a connection with the community stems from Judge Moore's view of the controversy as an indirect attack on the exclusionary zoning and land use policies of New Castle. *See id.* at 3903.

[36] Judge Moore relied upon Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) (citizen standing), United States v. Richardson, 418 U.S. 166 (1974) (taxpayer standing), O'Shea v. Littleton, 414 U.S. 488 (1974) (citizen standing), and Sierra Club v. Morton, 405 U.S. 727 (1972) (special interest group). In *Richardson*, a taxpayer, challenging statutes regulating the funding of the CIA, claimed that the secrecy provisions were unconstitutional. The Court dismissed the complaint, refusing to allow a federal court to be used as a forum for " 'generalized grievances.' " 418 U.S. at 175, *quoting* Flast v. Cohen, 392 U.S. 83,106 (1968). In *O'Shea*, plaintiffs had brought a class action to enjoin allegedly unconstitutional bond-setting and sentencing procedures. Holding that none of the named plaintiffs

sumably such reliance on the part of Judge Moore indicates that he considered the injury alleged in *Evans* neither concrete, nor actual, nor personal to the plaintiffs.[37] Judge Oakes, however, adopted a broader view of the allegations. In his opinion, plaintiffs had challenged the alleged failure of the defendant agencies to perform statutory duties established for their benefit. The "gist" of the complaint, therefore, was agency inaction rather than action.[38] Persistent noncompliance with statutory obligations, he noted, may result in perpetuation of existing patterns of discriminatory housing. In many instances, grants made without proper evaluation may serve to support white enclaves as well as divert funds which could be used to alleviate ghettoization.[39] Judge Oakes therefore concluded that, as ghetto residents, the plaintiffs were sufficiently aggrieved by the defendants' inaction to challenge the grants in question.[40]

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had suffered the injury specified, the Court denied them standing. In *Schlesinger*, the claimants, relying on the incompatibility clause, challenged the constitutionality of allowing Congressmen to be members of the armed forces reserves. The Supreme Court again denied standing, finding that the plaintiffs had no personal stake in the lawsuit.

At least in *Richardson*, the Court's refusal to grant standing might be based in part on the nonjusticiability of the subject matter. In fact, the majority there observed that there might be some support for the argument that the claims presented were "committed to the surveillance of Congress." 418 U.S. at 179. All of the cases relied upon by Judge Moore, moreover, may be distinguished from *Evans* in that they involved constitutional questions. Standing to litigate statutory claims, on the other hand, has a broader scope. *See* note 46 and accompanying text *infra*.

Furthermore, courts are hesitant to recognize standing based on taxpayer or citizen status believing that such claims are often mere generalized grievances which are better channelled through the political process than through the judiciary. United States v. Richardson, 418 U.S. 166, 188, 192 (1974). The Court applied the concept of generalized grievances to deny standing in *Sierra Club*. There, an environmental association challenged the modernization and development of an area of great natural beauty. The Court said that mere assertion of a "special interest," without any allegation of injury, was insufficient to confer standing. 405 U.S. at 739. In United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973), *discussed in* note 45 *infra*, however, the Court granted standing to an association where only a minimal allegation of personal injury was made. Perhaps the strong public policy in favor of conservation prompted the *SCRAP* Court, having found an article III "case" or "controversy," to recognize such minimal allegations of injury as sufficient. The strong public policy of fair housing coupled with the minimal allegation of injury presented in *Evans* would similarly appear sufficient to confer standing.

[37] *See* Civil No. 74-1793 at 3911-17.

[38] *Id.* at 3897.

[39] *Id.* at 3898.

[40] *Id.* The views expressed by Judge Oakes in his dissenting opinion in Citizens Comm. for Faraday Wood v. Lindsay, 507 F.2d 1065, 1072 (2d Cir. 1974), *cert. denied*, 421 U.S. 948 (1975), might profitably be compared with his policy arguments in *Evans*. The *Faraday Wood* court refused to recognize any obligation on the part of government agencies to provide low income housing. In his dissent, Judge Oakes stressed the importance of housing as a "basic necessity." *Id.* at 1072 (Oakes, J., dissenting). He suggested that given the scarcity of decent housing in today's cities, citizens may have a "fundamental" right to adequate housing. *Id.* at 1073. In his view, "at least partial solutions to many of urban America's problems may be found by breaking down metropolitan income-group clustering." *Id.*

One probable reason for the division of the *Evans* panel is the absence of any definitive statement from the Supreme Court on what constitutes injury in fact.[41] It is clear that the injury to the claimants must be both actual and personal,[42] although it need not be economic. Aesthetic and environmental harm[43] and injury resulting from the loss of the benefits derived from interracial associations[44] have been held sufficient to confer standing. Indeed, general principles have developed, and legalisms and key phrases abound, but there seem to be no definitive rules. It appears that in some instances, because of the importance of the subject matter or the nature of the claim asserted, courts have granted standing to plaintiffs who have what some consider to be merely "remote, speculative, and insubstantial" injuries.[45] Moreover, where statu-

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Although limited to the issue of standing, his decision in *Evans*, taken together with his dissent in *Faraday Wood*, indicates that Judge Oakes favors broad judicial review of administrative action in the area of fair housing.

[41] *See* Warth v. Seldin, 495 F.2d 1187, 1190 (2d Cir. 1974), *aff'd*, 422 U.S. 490 (1975); K. DAVIS, ADMINISTRATIVE LAW TEXT § 22.06 (3d ed. 1972); Dugan, *Standing to Sue: A Commentary on Injury in Fact*, 22 CASE W. RES. L. REV. 256, 258 (1971).

[42] United States v. Richardson, 418 U.S. 166, 179-80 (1974); Conservation Council v. Costanzo, 505 F.2d 498, 501 (4th Cir. 1974); Coalition for the Environment v. Volpe, 504 F.2d 156, 164, 167 (8th Cir. 1974).

[43] *E.g.*, United States v. SCRAP, 412 U.S. 669 (1973); Scenic Hudson Preservation Conf. v. Federal Power Comm'n, 354 F.2d 608, 615 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

[44] Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972) (white tenants injured by landlord's refusal to rent to blacks); Marable v. Alabama Mental Health, Bd. 297 F. Supp. 291, 297 (M.D. Ala. 1969) ("secondary effects" on hospital patients caused by segregating hospital staff).

[45] United States v. SCRAP, 412 U.S. 669, 723 (1973) (White, J., dissenting in part). In *SCRAP*, five law students sought to enjoin ICC action allowing a rate hike for railroad freight carriers across the nation. The students alleged that the rate boost would result in making shipment of recycled materials too costly. "[E]conomic, recreational and aesthetic harm," *id.* at 678, would then be suffered, they claimed, since their use of the forests, lakes, and streams would be adversely affected by environmental pollution.

Justices Rehnquist and White and Chief Justice Burger labeled the allegations of injury "remote, speculative, and insubstantial." *Id.* at 723. Recognizing that they were being asked to follow a "far more attenuated line of causation to the eventual injury," *id.* at 688, a majority of the Court nevertheless held that the allegations satisfied the jurisdictional requirement of injury in fact and expressly refused to limit standing to those persons "significantly" affected by agency action. *Id.* at 689 n.14. In explaining that small injury might be sufficient where important rights are at stake, the Court noted that it had previously "allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, . . . a $5 fine and costs, . . . and a $1.50 poll tax." *Id.* (citations omitted).

In consumer suits, voting rights cases, and first amendment actions, intangible harm and minimal allegations of injury have been deemed sufficient for standing purposes. In Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970), the court held that membership associations with an "organizational interest in the problem" have standing as representatives of consumers of regulated products to challenge the application of regulations intended to protect the public safety. *Id.* at 1097. In Baker v. Carr, 369 U.S. 186 (1962), the Court recognized that plaintiffs whose individual interests amounted to no more than a fraction of a vote had a sufficient personal stake in the outcome. While Judge Moore is correct in stating that the monetary amount involved in *Evans* would not finance a small

tory construction, rather than an abstract constitutional question, is concerned, courts have been less reluctant to enlarge the categories of those persons who have standing to sue.[46]

Although the standing doctrine originates in the Constitution, which limits judicial review to "cases and controversies,"[47] it is, practically speaking, largely a self-imposed rule of judicial restraint utilized to conserve court resources in the face of voluminous litigation.[48] Viewed as a prudential device, the doctrine of standing appears to restrict in no way a court's opinion to expand, within constitutional limits, the range of persons permitted to prosecute actions in areas of important public interest.[49] The Supreme Court has noted that in order to effectuate the purposes of the fair housing provisions "the main generating force must be private suits."[50] As the Third Circuit has recognized, where the claimant presents a genuine case or controversy, "overly technical judicial doctrines of standing" should not be permitted to frustrate the national policy embodied in civil rights legislation.[51] The furtherance of this national policy requires that standing under these statutes be broadly construed.[52]

The cases relied upon by Judge Moore in reaching his conclusion that plaintiffs will suffer no injury in fact concerned, for the

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housing project, it is also obvious that a fraction of a vote will not determine the outcome of an election. Indeed, a mere "chilling effect" on the exercise of first amendment rights has been recognized as a basis for standing. *See, e.g.*, Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154 (1971); Apter v. Richardson, 510 F.2d 351 (7th Cir. 1975).

[46] *See* Association of Data Processing Serv. Orgs. Inc. v. Camp, 397 U.S. 150, 154 (1970), where the Court noted: "Where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action."

[47] U.S. CONST. art. III, § 2.

[48] Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 154 (1970).

[49] Warth v. Seldin, 422 U.S. 490, 500-01 (1975). In *Warth* the Court stated that standing "essentially [involves] matters of judicial self-governance." *Id.* at 500. There the Court chose not to exercise its discretion to expand the scope of standing to include certain residents of Rochester who, as "potential residents" of the suburb of Pennfield, directly attacked the Town's exclusionary zoning laws. Although Judge Moore deemed the action in *Evans* to be an indirect attack on New Castle's zoning laws, *see* text accompanying note 66 *infra*, *Warth* should not be controlling. *Evans* is not a zoning case and a favorable decision for the plaintiffs will not affect the Town's zoning laws.

[50] Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211 (1972).

[51] Hackett v. McGuire Bros., 445 F.2d 442, 446-47 (3d Cir. 1971). Hackett brought suit against his employer claiming violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (1970), *as amended*, (Supp IV, 1974), which prohibits discriminatory employment practices. The plaintiff's status as an "employee" within the meaning of the Act was challenged on the ground that he had already left the job and was receiving a pension. The court rejected this argument, stating that the statute's remedies provision, permitting suit by " 'a person claiming to be aggrieved' shows a congressional intention to define standing as broadly as is permitted by Article III of the Constitution." 445 F.2d at 446.

[52] Solomon v. Miami Woman's Club, 359 F. Supp. 41, 44 (S.D. Fla. 1973). *See also* Shannon v. HUD, 436 F.2d 809 (3d Cir. 1970); Gautreaux v. Chicago Housing Authority, 265 F. Supp. 582 (N.D. Ill. 1967).

most part, delicate constitutional questions raised at the behest of taxpayers or citizens.[53] Where the issues involve fair housing, an area high on the list of priorities of a number of members of Congress,[54] courts should be more reticent to close their doors to plaintiffs who have a personal interest and are ready to present a vigorous adjudication of the issues.

Judge Moore also expressed serious concern over the court's expanding power of review over administrative action. In his opinion, the *Evans* litigation largely involved the extent to which the judiciary may override discretionary decisions by the executive branch of government.[55] He cautioned that a favorable decision for the plaintiffs could result in "the establishment of a principle that the judgment and discretion exercised by the executive and legislative branches of government can be examined and questioned . . . by any citizen . . . ."[56]

Considering the limited holding of the Second Circuit in *Evans*, Judge Moore's fears appear to be somewhat premature. It is suggested that Judge Oakes' holding is limited to the issue of plaintiffs' standing to question whether the agencies had made the inquiries allegedly required by statute.[57] No opinion as to the ultimate reviewability of the agency's final determination was expressed. In fact, Judge Gurfein, in a concurring opinion, presented such a view of the court's holding: that the plaintiffs were sufficiently aggrieved by agency action "to raise the question of whether the Secretary has failed to make the inquiries implied from his affirmative duty . . . ."[58] He would not, however, go so far as to say that the plaintiffs were injured enough to seek to enjoin the agency grants. In this way, Judge Gurfein sidestepped, for now, a determination as to whether the grants in question could be enjoined by the plaintiffs, thus avoiding confrontation with Judge

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[53] *See* note 36 *supra*.

[54] *See* 114 CONG. REC. 2274 (1968), where Senator Mondale noted that "fair housing legislation is a basic keystone to any solution of our present urban crisis." The remarks by Senator Mondale reflect recognition of a direct relationship between housing, on the one hand, and employment and educational opportunities, on the other. *See id.* So too, Senator Brooke called fair housing "one of the most urgent matters of our day," *id.* at 2279, and considered this issue the "first priority" in dealing with the urban crisis. *Id.*

[55] Civil No. 74-1793 at 3901 (Moore, J., dissenting).

[56] *Id.* at 3909. Judge Moore's argument is partly based on the reluctance exhibited by the Supreme Court in United States v. Richardson, 418 U.S. 166 (1974), *discussed in* note 36 *supra*, to allow confrontations between the representative or elected and the nonrepresentative or nonelected branches of government. Whether in fact HUD and BOR may have the benefit of such a policy might be disputed. *See* Tucker, *supra* note 3, at 939-40.

[57] *See* Civil No. 74-1793 at 3898.

[58] *Id.* at 3918 (Gurfein, J., concurring and dissenting).

Moore's spectre of judicial "Big Brother" running roughshod over the executive branch. He further noted, however, that when Congress has provided that "federal funds shall not be used if certain conditions exist, the courts are often not without jurisdiction to review."[59]

Judge Moore's worry that the decision of the *Evans* court portends the unwarranted expansion of judicial power is rather surprising in view of the Supreme Court's presumption that agency action is reviewable by the courts.[60] Furthermore, although some decisions by the Secretary of HUD may be committed to agency discretion and therefore subject to limited judicial review, a decision to disregard a clear congressional mandate to effectuate a national policy through the administration of agency programs would neither be within the agency's discretion nor immune from judicial reversal.[61] It is submitted that there are strong policy reasons for this approach. There is increasing concern over the tendency of agencies to shield the very organizations they are designed to regulate, rather than safeguard the interests they are designed to protect.[62] The inertia which often characterizes bureaucratic administrative agencies and their failure to respond to external pressures may make broader judicial review a desirable goal, particularly where the legislature has specifically prescribed the policy to be followed. In a system where the maintenance of checks and balances among the three branches is fundamental to the proper functioning of government, some would welcome rather than shun an active judiciary "peering over the shoulders" of the executive branch.[63] Perhaps in recognition of these factors, courts have been willing to broaden standing when agency action is questioned.[64] Administrative agencies should not be immunized

[59] *Id.* at 3921. *Accord,* Powelton Civic Home Owners Ass'n v. HUD, 284 F. Supp. 809, 819-20 (E.D. Pa. 1968) (Fair Housing Act of 1949).

[60] *See* Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 154 (1970); Barlow v. Collins, 397 U.S. 159, 166 (1970); Abbott Laboratories v. Gardner, 387 U.S. 136, 140-41 (1967).

[61] *See* Civil No. 74-1793 at 3920. In response to a question concerning the recourse of "persons who disagree with [HUD's] interpretation of the Act," Senator Mondale, one of the chief sponsors of the Fair Housing Act, noted: "All orders of the Department will be subject to review by the Federal courts. In addition the Department will be subject to the provisions of the Administrative Procedure Act in all its operations under the Fair Housing Act." 114 CONG. REC. 2273 (1968).

[62] *See* Tucker, *supra* note 3, at 921.

[63] *Id.* at 939-40.

[64] Hardin v. Kentucky Util. Co., 390 U.S. 1, 7 (1968) ("no explicit statutory provision is necessary to confer standing"); Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970) (abandonment of invasion of a "legal right" as prerequisite for stand-

from the challenges of other governmental branches merely to avoid the potential threat of "Big Brother."[65]

Judge Moore saw this action as an attempt to provide government by injunction and as an indirect attack on the zoning policies of one town by the residents of another.[66] Judge Oakes, on the other hand, restricted his consideration to the question of standing based upon the allegations of the complaint and the district court's limited findings of fact.[67] In deciding the narrow issue of standing, it is suggested that the latter is the better approach. Whereas Judge Moore's considerations extend beyond the question of standing to inquiries involving the merits,[68] the focus in standing questions is on *who* the plaintiffs are, not *what* they seek to challenge.[69] The *Evans* court passed no judgment on the merits of the plaintiffs' claim. The court did not decide whether the defendants met their duties under the Civil Rights Acts or even what those duties entail. For purposes of standing, a court need only be satisfied that plaintiffs present a "viable" claim that their asserted interests are within the purview of the statute and threatened by the challenged action.

The holding of the *Evans* court, while perhaps at the outer limit of the standing perimeter, is supported by the strong national policy underlying the Civil Rights Acts and the traditionally broad interpretation[70] given the term "person aggrieved,"[71] which appears in the remedial provisions of these Acts. Since judicial review of agency action is the rule rather than the exception, granting standing to the plaintiffs in *Evans* will not threaten the unique roles of the judiciary and executive branches of government. Furthermore, since standing requirements are often self-imposed measures utilized to further judicial economy, they are thought to be flexible enough to give way in areas where courts find it necessary to protect important public interests. It is suggested that fair housing

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ing); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1970) (standing question "easily answered" since no statutory prohibition against review).

[65] Tucker, *supra* note 3, at 940.

[66] *See* Civil No. 74-1793 at 3912, 3903.

[67] *See id.* at 3889, 3897.

[68] In voicing his dissent, Judge Moore, approaching the issue "in terms of the plaintiffs' objectives," Civil No. 74-1793 at 3908 (Moore, J., dissenting), characterized the suit as an "oblique coercive proceeding" to secure more low income housing throughout the nation. *Id.* at 3909. More specifically, he viewed the plaintiffs' complaint as an indirect attack on New Castle's housing and zoning policies. *Id.* at 3903. Concerned with what he envisioned as "the result of success for plaintiffs in this litigation," *i.e.* termination of the New Castle grants, the Judge concluded that the court should not entertain their suit. *Id.* at 3909.

[69] Flast v. Cohen, 392 U.S. 83, 99 (1968).

[70] *See* Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 208-09 (1972); note 51 *supra*.

[71] *E.g.*, 42 U.S.C. § 3610(a) (1970).

is one such area where judicial economy should give way to the public interest. 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.

Timothy Donovan