Warth Redux:  
The Making of Warth v. Seldin

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Etymology

Article III

Section I

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.¹

Section 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the

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1. U.S. CONST. art. III § 1.
United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.2

Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant’s raising another person’s legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff’s complaint fall within the zone of interests protected by the law invoked.3

“When a court determines a person’s standing to sue, it is deciding whether a specific person is the proper party to bring a matter to the court for adjudication.”4

The ‘irreducible constitutional minimum’ of standing, the court instructed, has been defined as containing three elements: (1) that the plaintiff has suffered an “injury-in-fact,” that is, an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) that there is a causal connection between the injury and the conduct complained of; and (3) that it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.5

Prelude

Robert Katz, Associate Professor of Law at the District of Columbia School of Law,6 is frustrated. It is the Spring semester,

5. George L. Blum, Annotation, Standing of Employee or Former Employee to Bring Civil Action Under ERISA, 21 A.L.R. FED. 2d 199 § 17 (2007).
6. Formerly Antioch School of Law, the D.C. School of Law was established in 1989. It is now the David A. Clarke School of Law and is one of the nation’s few public interest clinical law schools.
1992, Katz’s Federal Jurisdiction class is discussing standing under Article III to the U.S. Constitution. One case in particular is causing Professor Katz considerable anguish: Warth v. Seldin. It is a moment difficult to forget. Professor Katz’s lecture contains a few expletives and an abiding tone of personal angst.

Years before Professor Katz’s lecture, residents of the area around Rochester, New York, non-profit housing developers, eligible taxpayers, low-income African Americans and Puerto Ricans, and other eligible persons, sought to integrate a suburban Rochester, New York, town called Penfield. Penfield, the city, was 98 percent white at the time of the lawsuit. Zoning laws and ordinances passed by the city in 1962 kept the city segregated and nearly all white since its inception with little, if any chance for change.

A lawsuit was filed in federal court against the city of Penfield alleging racial discrimination as a result of the exclusionary zoning ordinances that effectively kept African Americans, Puerto Ricans, and the poor out of the city of Penfield. Housing developers were part of the lawsuit because the ordinance prevented the developers from constructing housing in Penfield that would provide housing to individuals with low to moderate income.

The United States District Court for the Western District of New York dismissed the lawsuit for lack of standing. The United States Court of Appeals for the Second Circuit affirmed the dismissal of the case. The U.S. Supreme Court accepted jurisdiction of the case and upheld both decisions.

Warth is one of Justice Powell’s forgotten moments on the court. Yet, the opinion is troubling now even thirty-four years after it was

9. Id.
10. Warth, 422 U.S. at 495.
11. Id. at 493-94.
12. Id. at 497.
13. Id. at 493.
14. Id.
15. Id.
16. Linda Greenhouse, Lewis F. Powell Jr., Who Became the Quiet Centrist of the Supreme Court, Is Dead at 90; N.Y. TIMES, August 26, 1998, at 1.
rendered. The Court, through Powell’s opinion, uses the law to avoid addressing a difficult issue put forth by Warth: residential segregation based upon race and class and perpetuated by zoning ordinances and policy. This essay revisits Warth with a fresh perspective and the passage of time from 1975 when the Supreme Court originally rendered the decision.

With the assistance of Justice Powell’s Supreme Court papers from the Warth deliberations, this essay explores the following: Did Lewis Powell, despite his reputation as the “quiet centrist,” but a child of racially segregated and more privileged Virginia, issue a decision that potentially impacted housing patterns in America based upon his own lingering personal prejudices relating to race and class nurtured during the post-Plessy18 days of Richmond, Virginia?

Part I of this essay explores the life of Lewis Powell from his days in Richmond up through his appointment to the U.S. Supreme Court. Part II discusses Article III standing in the leading U.S. Supreme Court cases that form the foundation of the legal arguments set forth in the Warth case. Part III examines the Warth decision from the standpoint of Powell’s papers on the opinion and the behind the scenes deliberations of the case’s issues. Part IV discusses the Powell opinion and the counter-arguments to Powell’s opinions as presented by the plaintiffs in the case. Part V presents the dissenting voices in the decision including the dissents of other justices and legal scholars and journalists who noted the decision after it was rendered. Finally, Part VI offers closing remarks on the case and the historical relevance of the decision.

As is necessary, this article begins with the examination of the life and work of the Honorable Lewis F. Powell, Jr.

I. Lewis F. Powell, Jr.

A. Powell’s Upbringing

Lewis F. Powell, Jr. was born on September 19, 1907, in Suffolk, Virginia.19 His father, Louis F. Powell, Sr.,20 moved the family to the city of Richmond, Virginia the following year.21 It was here that Lewis would grow up. Powell, Sr., after a series of employment and business misadventures, consistently earned a good

20. Id. Justice Powell’s father spelled his name “Louis” according to his biography.
21. Id.
living for his family as a manager and owner of David M. Lea and Company, a “small and rather antiquated manufacturer of tobacco boxes, cigar boxes, and shopping cases” in Richmond. Years later, the business would be sold by Powell, Sr. providing the entire family with a significant financial windfall.

Richmond, the city where Lewis Powell, Jr. grew up, was an important city for Powell. It was in Richmond that Powell’s views about the world likely were framed. In 1902, just five years before Lewis Powell was born, the state of Virginia in keeping in line with its history and the philosophical and legal direction of the country’s southern states, passed a new constitution. The constitution was specifically designed to disenfranchise the African-American population of Virginia. In fact, a Constitutional Convention was called in February 1901 and the following year, the convention was held. On July 10, 1902, the new constitution was passed by an overwhelming margin effectively putting in place a racial apartheid system in Virginia and in Richmond.

Needless to say, well before the passage of the 1902 constitution, “official segregation in Richmond” was already the city’s unspoken law and custom. By the 1880s, in fact, African American and white children were not only attending separate schools but were also “walking to and from school on separate sides of the streets.” Following the end of the Civil War, slavery, and the passage of laws enfranchising African Americans, the whites of Richmond resisted change and fought long and hard to deny African Americans the right to vote. African Americans did vote in Richmond for a short period of time until white leaders began gerrymandering the districts in an effort to deny the right by dividing them. But the constitution of 1902 addressed the voting and all other racial issues.

22. Id.
23. Id.
25. Id.
26. Id.
27. Id.
29. Id.
31. Id.
32. Id. Through the use of poll taxes, literacy tests, and Confederate credentials, African
There is no evidence that Powell was a devout segregationist; however, Powell, like many whites born into and of privilege in Richmond in the midst of the Jim Crow era, accepted the life and the societal arrangements regarding race they inherited without overt and open argument or dissent. There is no indication in the Jeffries biography that he did not reject the life he had inherited either in any form of passive or aggressive protest.

This period in Powell’s life cannot be ignored. The gravity of life in Richmond for African Americans during this time shares a historical relationship with the issues at stake in *Warth*:

During the late nineteenth century, Richmond’s African-Americans were increasingly precluded from participating in white-dominated society. Opportunities for African-Americans to participate in Richmond’s economy had always been highly circumscribed, but the rise of Jim Crow and legal disenfranchisement restricted the opportunities of African-Americans even more.34

African Americans, in Richmond, at the time of Powell’s birth and early life in the city were “shunted aside by law and custom” and were “forced to live a separate existence.”35 The city, in all respects had two sides: “one white, the other black.”36 Thus, the question is not what kind of life Powell led but rather whether his segregated upbringing had any effect on his judicial philosophy.

Nevertheless, Powell overall enjoyed a very successful academic life and career and his accomplishments certainly reveal his talents. After graduating first in his Harvard Law School class in 1931, Powell studied there for an additional year.37 Powell initially worked for the firm of Christian, Barton, and Parker during the Great Depression.38 He later joined the Richmond law firm of Hunton, Williams, Anderson, Gay & Moore on January 1, 1935, as an associate.39 Three years later on January 1, 1938, he made partner at

33. Id.
35. Id.
36. Id.
37. JEFFERIES, supra note 19, at 34.
38. Id. at 46.
39. Id. at 46.
Powell also served admirably in World War II volunteering almost immediately after the U.S. became involved in the war after Pearl Harbor. Powell excelled in the military and rose in the ranks “from first lieutenant to colonel, earning the Legion of Merit, Bronze Star and Croix de Guerre” during his service. Powell also served in the “Special Branch,” an army division that assisted in decoding “German messages” that were used by the allies to pick bombing targets. After the war, he returned to the States to work at the Hunton firm where he was still a partner and where he eventually took on a larger leadership role and helped expand the firm’s reach and client base.

Powell’s other career highlights before he arrived at the Supreme Court included a term as President of the American Bar Association in 1964-1965 and a long tenure on the Virginia State Board of Education. Powell’s term as ABA President included strong advocacy for more legal assistance to the poor by the federal government. This last point is difficult to juxtapose with the decision in Warth considering some of the plaintiffs this essay will discuss later. Powell also served as Chairman of the Richmond School Board from 1952-1961.

Powell’s tenure on the Richmond School Board is significant because Powell’s tenure occurred during the time of the Brown v. Board of Education decision and when many Jim Crow laws around the country were successfully outlawed. Powell was not in charge of the specific schools that resisted change but he was in charge of the school board.

Examined more closely, the fact that Powell chaired the school board of Richmond, Virginia, at such a contentious time suggests that Powell was in position to bring about significant change in the

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40. Id. at 53.
41. Pearl Harbor, the location of the United States’ naval fleet in the Pacific, was attacked by Japan on December 7, 1941, at 7:55 a.m. The bombing of the naval base is the event which led the U.S. to enter World War II. Robert Sullivan, Pearl Harbor: What Really Happened? Time, May 25, 2001, available at http://www.time.com/time/sampler/article/0,8599,128065,00.html.
43. JEFFERIES, supra note 19, at 88-91.
44. Id. at 129-30.
45. Id. at 123.
46. Id.
47. Id. at 124.
Richmond school system. Yet, during Powell’s tenure, there was little, if any change in the racial composition of the segregated Richmond school system. There were also many more disturbing facts regarding Powell’s tenure on the board.

First, it wasn’t until 1960 that African-American children were admitted to white schools in Richmond. In fact, of the 23,000 African-American students in Richmond, only two attended school with whites when Powell resigned in 1961. Powell has been defended over the years on this point because the school board did not control the assignment of students. But Powell biographer, John C. Jeffries even found it difficult to accept the argument.

Jeffries stressed that while it was “true” that the only the state could “assign black students to white schools,” the local school boards such as the Richmond board Powell chaired had a role in “maintaining segregation.” Jeffries added the following:

Obviously, the state board did not consider individually the appropriate school for every child in Virginia. Special requests came to the Pupil Placement Board, but the patterns of pupil assignment were set by local practice. In Richmond, the directory of public schools explicitly grouped ‘White Schools’ in one division and ‘Negro Schools’ in another. There was one set of geographic attendance zones for the white schools and another set of attendance zones for the black schools.

Jeffries stresses that in 1954, the year of the Brown decision; this is the system that existed. When Powell departed from the school board in 1961, the system was still in place. For a man of Powell’s reputation, this was clear evidence that he supported and never attempted in any way to dismantle the Jim Crow school system that existed in Virginia when he was born. Further evidence discussed by Jeffries reveals also that even when it was appropriate for the local school board to transfer African-American students to white schools as a result of overcrowding in the African-American schools, the

49. JEFFERIES, supra note 19, at 139-42.
50. Id. at 140.
51. Id. at 140-41.
52. Id. at 141-142.
53. Id. at 141.
54. Id.
55. Id.
56. Id.
board, under Powell’s leadership took no such action.\footnote{Id.}

In conclusion, Powell’s service as chairman of the Richmond School Board is troubling in light of the Warth decision. It suggests that even when the law of the country advances forward, Powell allowed the social practices he was exposed to daily in his formative years to influence his public service decisions. If Powell would refuse to allow integration of schools for nearly a decade as chairman of a school board, is it inconceivable to suggest that as a Supreme Court justice, Powell refused to allow judicial intervention to address an obvious problem with racial segregation?

B. Powell’s Supreme Court Appointment

Powell was one of four Justices to the U.S. Supreme Court appointed during the Nixon administration.\footnote{President Nixon appointed Warren Burger, Harry Blackmun, William Rehnquist and Lewis F. Powell Jr. to the high court during his time in office. See The Supreme Court and Public Policy: The Supreme Court of the 1970s, American Decades, http://www.encyclopedia.com/doc/1G2-3468302734.html (last visited Feb. 17, 2009).} The Nixon’s appointments transformed the Court instantaneously. Powell’s term on the Supreme Court is one of the most important and famous of the modern era.

Due to these appointments, the legendary “Warren Court,”\footnote{The Warren Court, notably, was responsible for not only the Brown v. Board of Education decisions that ended school desegregation based on race, but the Court also handed down several decisions that expanded and clarified the Bill of Rights. See The Warren Court, http://www.supremecourthistory.org/02_history/subs_history/02_c14. html (last visited Feb. 17, 2009). It is referred to as “The Warren Court” as its Chief Justice was Earl Warren, former Governor of California, and Chief Justice of the Supreme Court from 1953-1969. See The History of the Court, http://www.supremecourthistory.org/o2_history/subs_timeline/images_chiefs/ 014.html (last visited Feb. 17, 2009).} led by Chief Justice Earl Warren, became the “Burger Court,” led by the Minnesota conservative Warren Burger.\footnote{Warren Earl Burger served as Chief Justice of the U.S. Supreme Court from 1969 to 1986. See The History of the Court, http://www.supremecourthistory.org/o2_history /subs_timeline/images_chiefs/015.html (last visited Feb. 17, 2009).} Yet this change also set the stage for Powell’s historical role on the Court as a swing vote in many opinions where the liberal wing of the Court led by Justice William Brennan\footnote{William J. Brennan served on the U.S. Supreme Court from 1956 to 1990. See The History of the Court, http://www.supremecourthistory.org/o2_history/subs_timeline/images_ associates/076.html (last visited Feb. 17, 2009).} and the conservative wing led by Chief Justice Warren Burger were evenly split.

When Powell was nominated to the Court, opposition was strong
from a few individuals of great influence at the time. This is noteworthy in regards to the final outcome in *Warth* decision because the fiercest opposition to the nomination of Powell emanated from two African Americans, U.S. Representative John Conyers of Michigan, and Attorney, Henry Marsh III of Virginia, who was also the first African-American mayor of the city of Richmond.

Conyers presented the most strident opposition and provided the Senate Judiciary Committee with extensive testimony as to why Powell should not be confirmed to the Court. The Conyers-Marsh opposition is significant precisely because of the social issue at stake in *Warth*: segregation.

Conyers' comments concerned Powell's tenure as chairman of the Richmond School Board and how the city of Richmond, on Powell's watch, had been able to maintain a dual system of public education: one for African Americans, another for whites. Conyers referenced the 1963 Fourth Circuit Court of Appeals case, *Bradley v. School Board of City of Richmond, Virginia* that, in the view of that court, and Conyers, served as proof that following the *Brown* decision, Richmond continued to operate as if *Brown* had never been decided.

What the very words of the U.S. Court of Appeals, Fourth Circuit, indicate beyond any doubt is that Mr. Powell's 8-year reign as chairman of the Richmond School Board created and maintained a patently segregated system, characterized by grossly overcrowded black public schools, white schools not filled to normal capacity, and the school

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62. United States Representative John Conyers, Jr., a Detroit Democrat, was re-elected in November 2006 to his twenty-second term in the U.S. House of Representatives, winning 87 percent of the vote in Michigan's Fourteenth Congressional District. Congressman Conyers represents all of Highland Park and Hamtramck, as well as large portions of Detroit and Dearborn. In addition, due to recent Congressional redistricting, the Down River communities of Melvindale, Allen Park, Southgate, Riverview, Trenton, Gibraltar, and Grosse Ile Township are also part of the 14th District. Congressman Conyers, a senior statesman in American political life, is respected and admired by colleagues on both sides of the aisle. Reserved and studious, he has quietly built a solid record of legislative achievement in his 43 years on Capitol Hill. See Meet John Conyers, http://www.johnconyers.com/biography (last visited Feb. 17, 2009).


65. *Id.* at 363-86.

board’s effective perpetuation of a discriminatory feeder or assignment system whereby black children were hopelessly trapped in inadequate, segregated schools.  

Conyers added that at the end of Powell’s tenure as Chairman on the Richmond School Board, “only 37 black children out of a total of more than 23,000 were attending previously white schools.” Conyers stressed that Powell did not respect the decrees of the U.S. Supreme Court in the area of school desegregation, and Powell sanctioned the dual system of racially segregated schools.

The Conyers-Marsh opposition to Powell was not enough alone to stop the nomination. Powell had the support of Oliver Hill, a Richmond attorney, and member of the Brown v. Bd. of Educ. legal team, to counter the attack by Conyers. Powell also enjoyed tremendous support from an array of respected individuals. The Senate Judiciary Committee voted unanimously to confirm Powell. The full Senate vote was nearly the same with just Senator Fred Harris of Oklahoma voting against Powell. Interestingly, in voting against Powell, Harris referred to Powell as an “elitist” who had never shown “deep feelings for little people.”

C. Powell on the Supreme Court

After becoming a member of the Court, Lewis Powell, irrespective of his views, became a strong Justice on the Court. Powell made his presence known immediately and again demonstrated, as he had in law school, in professional practice, and in the military that he was a quick learner and an able and adept intellectual. Powell did not shy away from race cases or cases involving inequality as well.

As a man born and bred in the capitol of the Confederacy,

67. Nominations of Rehnquist and Powell, supra note 65, at 363.
68. Id. at 371.
69. Id.
70. Oliver Hill was born May 1, 1907. A long-time civil rights attorney and Virginia native, Hill was one of the key attorneys who successfully litigated the Brown decisions of 1954. The Associated Press, Oliver Hill, Civil Rights Attorney, is Dead, N.Y. TIMES, Aug. 6, 2007, available at http://www.nytimes.com/2007/08/06/washington/06hill.html.
71. 347 U.S. 483 (1954). Brown, arguably the most important Supreme Court decision of the 20th century, declared “separate but equal” schools unconstitutional and ultimately began the process that dismantled the system of legalized segregation in the U.S.
72. JEFFERIES, supra note 19, at 240.
73. Id.
74. Id.
Powell was fully aware that race, as an issue, was divisive. However, Powell also possessed core values that were shaped slowly over the years which he would not forfeit just because he had entered perhaps the most challenging arena in the American legal system. Powell asserted his beliefs in his votes on the Court and demonstrated early on that he was, at least ideologically, opposed to racial segregation. However, Powell did not always agree with his colleagues, neither with respect to the remedies necessary to address racial segregation nor what alleged perpetrators of that segregation were required to adhere to under the law.

In his first half-term on the court, Powell authored a concurring/dissenting opinion in the Denver, Colorado, school desegregation case, Keyes v. Sch. Dist. No. 1.\textsuperscript{75} The majority opinion, written by the great liberal William Brennan, and only joined in part by Powell (for altogether different reasons), sought to treat a non-southern public school system (Denver) different from the southern public school districts that had been ordered over the years by the Court to desegregate due to the Brown\textsuperscript{76} decisions.\textsuperscript{77} In effect, Powell believed that it was a mistake to treat \textit{de facto}\textsuperscript{78} segregation different from \textit{de jure}\textsuperscript{79} segregation.

\textit{Keyes} is an important post-Brown case and very important for the analysis of \textit{Warth}. It provides an early indication that Justice Powell possessed a different legal and social perspective in race cases. Although \textit{Keyes} is a school case and \textit{Warth} is a residential case, both are segregation cases based upon race.

\textit{Keyes}, as policy, is an example of the federal government aggressively addressing racial segregation in a citywide school system (Denver) even though the evidence that there was widespread racial discrimination in the school system was not clearly evident throughout the system.\textsuperscript{80} The syllabus of the case's opinion was clear on this issue and this is the part of the opinion that troubled Powell:

Where, as in this case, a policy of intentional segregation has been proved with respect to a significant portion of the

\begin{itemize}
\item \textsuperscript{75} Keyes v. Sch. Dist. No. 1, 413 U.S. 189 (1973).
\item \textsuperscript{76} 347 U.S. at 483.
\item \textsuperscript{77} \textit{See generally Keyes}, 413 U.S. 189.
\item \textsuperscript{78} Latin for "concerning the fact." It does not involve a particular law meaning, in this context, it is segregation by custom or practice.
\item \textsuperscript{79} Latin for "by law." It does involve a particular law that upholds the practice.
\item \textsuperscript{80} Keyes, 413 U.S. at 189. The evidence in \textit{Keyes}, as presented, demonstrated that unlike many school desegregation cases, the Denver school system was not operating a dual system of segregation in schools. The school system, however, was engaged in discrimination. \textit{Id.} at 190.
\end{itemize}
school system, the burden is on the school authorities (regardless of claims that their ‘neighborhood school policy’ was racially neutral) to prove that their actions as to other segregated schools in the system were not likewise motivated by a segregative intent.  

*Keyes* took the position that the fact that one part of the city was segregated by race in the public school system was enough to sustain the core allegations of the lawsuit. There was no evidence that the Denver school system was operating dual systems of public education based upon race. However, it was apparent that the overall effect of the conduct of one district had impact upon the entire school system.  

Powell did not accept the argument.  

“In my view,” Powell wrote in *Keyes*, “we should abandon a distinction which long since has outlived its time, and formulate constitutional principles of national rather than merely regional application.” Powell further noted that “the great contribution of *Brown I* was its holding in unmistakable terms that the Fourteenth Amendment forbids state-compelled or state-authorized segregation of public schools.”  

Powell believed that the *Brown* decision and the line of cases that followed *Brown* placed a duty on the school districts to eliminate segregation no matter what section of the country that the district was located. *Keyes* was seemingly harmless at the time. Powell’s dissent was just that — a dissent. However, Powell’s disagreement in *Keyes* was a clear hint as to his future votes in school integration cases. Powell was opposed to segregation but was also opposed to the specific intervention efforts by the judiciary to facilitate the end of segregation.  

This became more evident when Powell voted with the conservative wing of the Court in *Wright v. City Council of Emporia*. Powell did not author a dissent in *Wright* but he did join Chief Justice Burger’s dissent.  

In *Wright*, the city of Emporia, Virginia, sought to separate from Greenville County, Virginia, with respect to its public school
system. Due to the fact that the separation, in the view of the majority, would "impede the process of dismantling" a county school system that was historically segregated, Emporia could not separate from the county system. Emporia, in the view of the majority, had once been part of the very system that was in need of being dismantled.

Powell's vote, in this instance, demonstrated the same philosophy that had been revealed to a degree in *Keyes*. Where in *Keyes*, Powell's motivation was to stand firm against aggressive intervention by the federal government on grounds that lacked evidentiary support for such intervention; *Wright* was a much more defined stance.

The dissent in *Wright* stood for the conservative ideal of local autonomy. The dissenters were prepared to extend a considerable degree of discretion to local officials as they sought to correct their school systems following the Court's numerous desegregation decisions. Emporia, the city, was seeking to create a new city controlled public school system that did not necessarily suggest any malevolent purpose. However, the effect of such a new system would be to impede desegregation within the region (the county) and to increase the number of black students attending school in the county system. The Court did not believe such an approach was tolerable under the school cases that preceded *Wright*.

The Burger dissent, which Powell joined, rejected the notion that desegregation should achieve specific "racial balancing." Yet the evidence suggests that the more important concept to the conservatives dissenting in *Wright* was local control. It was a theme that the *Keyes* decision also suggested but *Wright* clearly enunciated this view. Burger's opinion is emphatic:

Local control is not only vital to continued public support of the schools, but it is of overriding importance from an educational standpoint as well. The success of any school system depends on a vast range of factors that lie beyond the competence and power of the courts. Curricular decisions, the structuring of grade levels, the planning of extracurricular activities, to mention a few, are matters lying solely within the province of school officials, who maintain a day-to-day

87. Id. at 454.
88. Id. at 466.
89. Id. at 477-78 (Burger, J., dissenting).
90. Id. at 472-74.
supervision that a judge cannot. A plan devised by school officials is apt to be attuned to these highly relevant educational goals; a plan deemed preferable in the abstract by a judge might well overlook and thus undermine these primary concerns.\textsuperscript{91}

Powell’s votes in both \textit{Keyes} and \textit{Wright} cases were consistent with a more conservative view of remedial desegregation efforts. Both cases involved efforts by the courts to aggressively impose a remedy upon a school district. Powell rejected this approach. This is extremely important because the imposition of a remedy to address entrenched segregation patterns was the solution in the \textit{Warth} case.

Needless to say, the \textit{Keyes} and \textit{Wright} cases are, indeed, a legal preface to Justice Powell’s role in the \textit{Warth} decision.

\section*{D. Certiorari}

In the initial certiorari conference\textsuperscript{92} held on October 7, 1974, in \textit{Warth}, the sitting justices voted 6-3 in favor of denying review of the case by the court.\textsuperscript{93} Justices Rehnquist,\textsuperscript{94} Blackmun,\textsuperscript{95} Stewart,\textsuperscript{96} Powell, Douglas and Chief Justice Warren Burger all voted to deny review in that initial vote.\textsuperscript{97} Justices Marshall, Brennan, and White voted to grant certiorari.\textsuperscript{98} However, at some point, Justice William O Douglas,\textsuperscript{99} the great New Deal liberal, switched his vote.\textsuperscript{100}

\begin{itemize}
\item \textsuperscript{91} \textit{Id.} at 478.
\item \textsuperscript{92} Certiorari is Latin for “to be informed of.” Litigants file a petition for writ for certiorari with the Court, and if granted, the Court will hear the case. The certiorari conference is where the justices voted as to whether to hear a case. Certiorari is granted if four justices vote to hear the case. \textit{Supreme Court Procedures: Writs of Certiorari}, http://www.uscourts.gov/outreach/topics/hamdanc/cedures.html#writes (last visited Feb. 17, 2009).
\item \textsuperscript{93} Lewis F. Powell Jr., \textit{Warth v. Seldin} Certiorari Conference Documents (Oct. 1, 1974) (collected papers on file with author).
\item \textsuperscript{97} \textit{Warth v. Seldin} Certiorari Conference Documents, \textit{supra} note 95.
\item \textsuperscript{98} \textit{Id.}
\end{itemize}
On Powell’s conference chart, Douglas’ deny vote is scratched out with the words “Join 3” beside the box. Douglas provided the crucial fourth vote required to grant review of the case. Justice Lewis Powell also scribbles the following intriguing notes on his Warth voting sheet: “Only the standing issue was reached by CA2 — but it didn’t discuss SCRAP. Stewart commented that SCRAP was environmental case involving ‘air everyone breathes.’ He seemed to think this is unique standing situation. Brennan argues there is standing.”

Powell also writes in large letters the words “Granted” on the sheet followed again by the short phrase: “only issue is ‘standing.’” Finally, Powell writes in the box beside his vote: “We have had enough standing cases recently,” a phrase that seems almost unnecessary.

But did those final comments by Powell suggest frustration on his part that the case had, indeed, been granted review by the Court even though he saw no need to accept a case with difficult legal issues but more importantly, social issues many members of the Court would gladly have avoided at the time? Perhaps Powell, a man with an impeccable reputation in legal circles, felt the burden of the sensitive issues in the case. Was the man who would become known as the “quiet centrist” feeling the pressure of the moment that involved a case with glaring controversial issues hidden beneath its procedural debate?

Warth was, of course, a very important case in 1974-75. The U.S. was in the early stages of racial integration following the passage of several civil rights laws and cases such as Warth were bellwethers on the progression of racial equality. Warth was a challenge to a zoning ordinance of the Town of Penfield, New York, that, among other things, zoned “90% of all vacant land for single family detached housing.” In addition, the zoning ordinance fixed “minimum lot sizes, floor areas, lot widths, and setbacks for...

100. Warth v. Seldin Certiorari Conference Documents, supra note 95.
101. Id.
102. Id.
103. Id.
104. Id.
105. Id.
107. In 1964, the Civil Rights Act became law. In 1965, the Voting Rights Act was passed and signed into law. Finally, in 1968, the Fair Housing Act was passed and signed into law. Federal Civil Rights Primer, Congressional Research Service, Oct. 24, 2008, available at https://secure.sunshinepress.org/wiki/CRS.
108. Warth v. Seldin, 495 F.2d 1187, 1189 (2d Cir. 1974).
dwellings” and limited “density to twelve units per acre, limits the portion of the lot which may be occupied by the dwelling, and require[d] a minimum number of garage and unenclosed parking facilities for each unit.”

The ordinance, in effect, did not allow low- to moderate-income housing to be constructed in the city and thus, either purposely or incidentally, excluded members of minority groups who lacked the financial ability to obtain financing to purchase a home in the community. The city practiced what was described as housing policy “fairly typical for a suburban community” at the time.

The Plaintiffs in Warth were “various organizations and individuals ... in the Rochester, New York, metropolitan area.” This included Metro-Act, a “not-for-profit New York corporation, formed for the purposes of which are ‘to alert ordinary citizens to problems of social concern’”, “Housing Council in the Monroe County Area (Housing Council), a not-for-profit corporation consisting of a number of organization interested in housing problems”, “Rochester Home Builders Association (Home Builders), embracing a number of residential construction firms in the Rochester area”, several taxpayers living in the Rochester area such as Robert Warth and Victor Vinkley; and “several Rochester area residents with low or moderate incomes who are also members of minority racial or ethnic groups.” The case was filed in the United States District Court for the Western District of New York.

The District Court granted defendants’ motion to dismiss for “lack of standing and for failure to state a claim upon which relief can be granted.” The appeal of that ruling was taken thereafter to the United States Court of Appeals for the Second Circuit. The Court of Appeals held that none of the plaintiffs had standing and affirmed the ruling of the District Court to dismiss the case. The petition for certiorari soon followed.

109. Id.
110. Id.
111. 422 U.S.
112. Id. at 493. Metro Act is referred to in the decision as “Metro Act of Rochester Inc.”
113. Id.
114. Id. at 497.
115. Id. Procedurally, “Home Builders” sought to intervene as a party-plaintiff but the motion to intervene was denied. Id. at 498.
116. Id.
117. Id.
118. Id. at 493.
119. Id.
120. Id.
Even though it is a case about standing in federal court, *Warth* is also a case about race and class. It was a successful action by a suburban municipality to use exclusionary zoning laws to deny low-to moderate-income minorities from residing permanently in the city. Exclusionary zoning is a legal tactic used with great success in the past by municipalities to deny housing to racial minorities. It harkens back to a disgraceful period in the United States.

In 1917, the U.S. Supreme ruled that exclusionary zoning based upon race is unconstitutional in *Buchanan v. Warley*. The issue in *Buchanan* was the constitutionality of a municipal ordinance in Louisville, Kentucky, that made it unlawful for persons of color to "occupy as a residence . . . or to establish and maintain as a place of public assembly any house upon any block upon which a greater number of houses are occupied as residences . . . by white people than are occupied as residences, places of abode . . . by colored people." In *Buchanan*, the Court held that the Louisville ordinance, as it applied to the property rights of persons of color, is not a "legitimate exercise of police power." In addition, the Court held that the ordinance violated the Fourteenth Amendment and could not stand.

*Buchanan* was an important holding despite the fact that municipalities in the South, ignored the decision and fought the decision for decades. By the time of the *Warth* decision, and the rise of suburban segregation patterns throughout the country, exclusionary zoning ordinances had re-emerged though in a less overt manner than in *Buchanan*.

The *Warth* opinion reflects the seemingly benign features of such ordinances. By dismissing the case completely, the real issue in the case involving race, class and residential integration was dismissed as well. The decision also effectively dismissed that issue with respect to equal housing, which was the reason the lawsuit was filed.

But in order to understand the *Warth* opinion and why the Powell decision is still difficult even after all these years, a discussion

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122. 245 U.S. 60 (1917).
123. *Id.* at 72.
124. *Id.* at 82.
125. *Id.*
127. *Id.* at 20.
of standing under Article III is necessary as a preface to a discussion of the case.

II. Standing

A. *Frothingham v. Mellon*

*Frothingham v. Mellon*[^128^] is the starting point for an analysis of standing in federal court under Article III of the U.S. Constitution. It is the leading case in the 20th century on the issue and provides clarification for some aspects of the *Warth* decision. In fact, *Frothingham* provides some credibility to some parts of Powell’s decision.

In *Frothingham*, taxpayers attacked the constitutionality of the Maternity Act of 1921[^129^], alleging, *inter alia*, that Congress had exceeded its delegated powers and invaded the state sovereignty granted by the Tenth Amendment[^130^]. The taxpayers alleged that “to increase the burden of future taxation and thereby take . . . property without due process of law” was unconstitutional[^131^]. The Court rejected the taxpayer’s arguments and denied standing in federal court regarding the constitutional challenge to the Maternity Act:

> If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review, but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned.[^132^]

The Court, in *Frothingham*, decided that the barrier that prevented taxpayers from obtaining standing in court was a policy consideration and not really an issue of constitutionality[^133^]. The Court explained the policy consideration when the Court commented upon the relationship between taxpayer and the federal government. This relationship between a taxpayer and the federal government is described as “very different.”[^134^]

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[^129^]: Id.
[^130^]: Id.
[^131^]: Id. at 486.
[^132^]: Id. at 488.
[^133^]: Id.
[^134^]: Id.
It is a relationship, the Court stressed that "is shared with millions of others," and "is comparatively minute and indeterminable." In other words, if one taxpayer is able to obtain standing in federal court challenging the constitutionality of an appropriation, the number of lawsuits that would have to be heard in federal courts around the country would increase significantly.

The Court, in *Frothingham*, also made it clear that the taxpayers did not have real claims that consisted of real measurable injuries.

The party who invokes the power must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.

This language in *Frothingham* forms the basic foundation for the development of Article III standing before the Court in future cases.

**B. Flast v. Cohen**

The second case that provides the foundation for Article III standing is *Flast v. Cohen*. *Flast* is another taxpayer lawsuit. *Flast* sought to define and interpret the same legal principles enunciated in *Frothingham*.

In *Flast*, taxpayers complained about Title I and Title II of the Elementary and Secondary School Act. The taxpayers alleged that the statute violated "the Establishment and Free Exercise Clauses of the First Amendment." The Court described the issues at stake as follows:

The gravamen of the appellants’ complaint was that federal funds appropriated under the Act were being used to finance instruction in reading, arithmetic, and other subjects in religious schools, and to purchase textbooks... and other instructional materials for use in such schools. Such expenditures were alleged to be in contravention of the Establishment and Free Exercise Clauses of the First Amendment. Appellants’ constitutional attack focused on the

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135. *Id.* at 487.
136. *Id.*
137. 392 U.S. 83 (1968).
138. *Id.* at 85-86.
139. *Id.*
The statutory criteria which state and local authorities must meet to be eligible for federal grants under the Act.\(^{140}\)

The lasting significance of *Flast* is that the case decided if taxpayers could have standing in federal court. The precedent established by the Court in *Frothingham* stood as an “impenetrable barrier to suits” prior to *Flast*.\(^{141}\) *Flast* provided an opening for taxpayers to sue in federal court.

In addition, *Flast* is important because it provided a much more modern discussion of standing under Article III. As Justice Warren wrote in his opinion, “the judicial power of federal courts is constitutionally restricted to ‘cases’ and ‘controversies’ . . . words,” he describes as possessing an “iceberg quality.”\(^{142}\) Warren also stressed that these concepts contain “submerged complexities which go to the very heart of our constitutional form of government.”\(^{143}\)

Warren wrote that the cases and controversies doctrine manifests itself as a “term of art” known as “justiciability.”\(^{144}\) His discussion in *Flast* of this concept also provides further clarification of the concepts the Court and Justice Powell would confront in *Warth*:

Justiciability is itself a concept of uncertain meaning and scope. Its reach is illustrated by the various grounds upon which questions sought to be adjudicated in federal courts have been held not to be justiciable. Thus, no justiciable controversy is presented when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion, when the question sought to be adjudicated has been mooted by subsequent developments, and when there is no standing to maintain the action.\(^{145}\)

Ultimately, the Court in *Flast* held that taxpayers could possibly have standing in federal court if the taxpayers satisfied a two-part test.\(^{146}\) The holding added that the taxpayers bringing the lawsuit in

\(^{140}\) Id.
\(^{141}\) Id. at 85 Justice Earl Warren wrote the majority opinion in *Flast*.
\(^{142}\) Id. at 85-86.
\(^{143}\) Id.
\(^{144}\) Id.
\(^{145}\) Id.
\(^{146}\) Id. at 102. In the test established in *Flast*, the Court stated the following:

First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional
federal court needed to establish a "nexus" to establish a "nexus" between their status as taxpayers, the legislation and the alleged constitutional infringement. This clarified the ability of taxpayers and more than likely many others seeking to maintain a lawsuit federal court. *Flast* brings the discussion to the last and a very important standing case for purposes of this *Warth* analysis: *Sierra Club v. Morton*.

### C. Sierra Club v. Morton

In *Sierra Club*, the Sierra Club filed suit against the U.S. Department of Interior alleging that various aspects of the proposed development of Mineral King Valley in the Sierra Nevada Mountains in Tulare County, California, contravened federal laws and regulations governing the preservation of national parks, forests, and game refuges. *Sierra Club*’s lawsuit, *inter alia*, sought compliance with these laws. The issue again was whether Sierra Club had standing to bring the action in federal court, or as the Court makes clear in the case: "whether the Sierra Club ha[d] alleged facts that entitle[d] it to judicial review of the challenged action." The Court also referred to the issue as "whether a party ha[d] a sufficient stake in an otherwise justiciable controversy." This language was consistent with Justice Warren’s analysis in *Flast*.

The Sierra Club, in its legal actions against Morton requested "a declaratory judgment and an injunction to restrain federal officials" from taking action that would lead to damage to the aesthetic value of the proposed area and the ecology of the specific area to be developed. The action did have problems.

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147. *Id.*
149. *Id.* at 731.
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.* at 730.
First, no members of the Sierra Club were allegedly affected by the development nor would be affected by the development. More importantly, Sierra Club did not actually allege any "individualized harm to itself or its members." With regard to the fundamental principles of standing, the need for a "nexus" between the actions and the harm incurred, Sierra Club seemed to fail the test easily because of the absence of harm to any specific member of the organization.

Nevertheless, the District Court granted a preliminary injunction in the case though the U.S. Court of Appeals reversed the decision. The U.S. Supreme Court upheld the reversal and ruled that the organization, in its corporate capacity, lacked standing to bring the action, but that the organization could sue on behalf of any of its members who had individual standing because the government action affected their aesthetic or recreational interests.

Sierra Club analysis provides interesting parallels to the Warth holding. Sierra Club is similar to Warth because Warth also contained an association as a plaintiff in the case amongst many plaintiffs. However, unlike Sierra Club, the strongest plaintiffs in Warth were individuals who could cite harm that could be linked specifically to the actions of the city to prevent the building of a certain kind of residence that would have made housing available to them. Even though the individuals were not subject to the ordinance directly in Warth because they did not build or develop real property, their interests were directly affected by decisions perpetuated by the zoning ordinance. Sierra Club lacked such a relationship. This was the principle difference between the two lawsuits.

III. Warth

A. Carr's Preliminary Memorandum

The Warth decision, for Powell, within the machinations of the Court, began on the day that the Court decided to accept the case for review. Powell wrote notes relating to the issues in the case directly
on the conference documents for the case.\textsuperscript{162} One of Powell’s law clerks at the time, Ron Carr, also took extensive notes on the case and drafted detailed memoranda on the case.\textsuperscript{163} Powell and Carr’s writings on the case both shed light on the constitutional issues presented to the Court. Carr’s role in the case is also critical to understanding how Powell handled the case internally.

Carr, like any law clerk to Supreme Court Justice, was an important figure in the Court’s judicial process. The rise in importance of law clerks was also one of the single important evolutionary developments within the Supreme Court and one of the more controversial.\textsuperscript{164} At the time of \textit{Warth} it was “more common than not for justices to solicit the views of their clerks on the merits of cases.”\textsuperscript{165} In addition, while many factors influence a decision of a justice, “clerks pay a crucial role behind the scenes”\textsuperscript{166} on the Court. The late Justice William Rehnquist, a clerk on the Court in 1957, believed clerks had too much influence as far back as 1957.\textsuperscript{167} Rehnquist believed this so much that he wrote an article on the topic that is published in \textit{U.S. News and World Report} at the time.

Ron Carr’s work with Powell is important to the \textit{Warth} decision. Powell acknowledged that Ron Carr was his “principal adviser”\textsuperscript{168} in cases involving “[f]ederal jurisdiction.”\textsuperscript{169} \textit{Warth} is a federal jurisdiction case. Despite this pronouncement regarding Carr’s role as a law clerk on the Court, Powell’s opinion was opposite of Carr’s review of the case on several critical points.

Carr initially prepared a “Preliminary Memorandum”\textsuperscript{170} (hereinafter “the Carr Memorandum”) for Powell in \textit{Warth} that was used to review the petition for certiorari. The Carr Memorandum was a cogent argument presented in great detail that included important notes that Powell recorded on the document.

The Carr Memorandum explained in detail the actions of the town of Penfield that led to the \textit{Warth} lawsuit. According to the Carr Memorandum, the plaintiffs alleged that the zoning laws of the town

\textsuperscript{162} See e.g., \textit{Warth v. Seldin} Certiorari Conference Documents, \textit{supra} note 95; Lewis F. Powell, Jr., \textit{Warth v. Seldin} Conference Notes (Mar. 19, 1975) (on file with author).

\textsuperscript{163} See \textit{Warth v. Seldin} Preliminary Memorandum from Ron Carr to Justice Powell (Sept. 11, 1974) (collected papers on file with author) (hereinafter “the Carr Memorandum”).

\textsuperscript{164} ARTEMUS WARD AND DAVID WEIDEN, SORCERER’S APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT 21, New York University Press 2006.

\textsuperscript{165} Id. at 150.

\textsuperscript{166} Id. at 151.

\textsuperscript{167} Id. at 6.

\textsuperscript{168} Id. at 167.

\textsuperscript{169} Id.

\textsuperscript{170} The Carr Memorandum, \textit{supra} note 165.
"violated the First, Ninth, and Fourteenth amendments" of the U.S. Constitution and also sections 42 U.S.C. Sections 1981, 1982, and 1983. It was not just the ordinance on its face that violated the law, the Carr Memorandum added; the actions of the town in enforcing their laws were also a violation. Carr summarized the ordinance's effect as follows: "The ordinance earmarks 98 percent of the town's vacant land for single family housing. Because of the ordinance's house setback, lot size, floor area and habitable space requirements, it is impossible to build such housing except at a price far in excess of what low-income persons can afford."

In addition, the plaintiffs, according to Carr, alleged that only "three tenths of one percent of vacant land is available for multi-family structures, but even on this limited space, low and middle income housing is precluded by low density and other requirements." The complaint also alleged that the town applied the ordinance "in an arbitrary and discriminatory manner," and delayed action "on proposals for multi-racial, low and moderate housing for inordinate periods of time" through various means. The various plaintiffs asked for the Court to declare the ordinance illegal, an injunction to prevent enforcement of the zoning ordinance, the enactment of an acceptable ordinance, and monetary damages.

The Carr Memorandum expressed Carr's trouble with the decision by the U.S. Court of Appeals decision that upheld the denial of standing by the District Court. Carr discussed the problems with that holding within the context of the petition presented by the plaintiffs who sought relief in Warth. In the memorandum section entitled "Discussion," Carr described the petition presented to the Court as presenting "a variety of distinct problems." Carr added that the Court of Appeals' "analysis [was] not entirely satisfactory."

The most critical of these problems with the lower court ruling was exposed when Carr discussed the plaintiffs in Warth who were

171. Id. at 1.
172. Id. at 2.
173. Id.
174. Id. According to the Carr Memorandum," some actions included "denying approval of proposals for arbitrary reasons," "refusing to grant necessary variances, permits and tax abatements," "failing to provide necessary support services for low and moderate housing," and "amending the zoning ordinance to make approval of such housing projects 'virtually impossible.'"
175. Id. at 3.
176. Id. at 8.
177. Id. at 8. Carr referred to the U.S. Court of Appeals for the Second Circuit as "CA2."
Those were the individuals who sought housing in Penfield but did not locate suitable housing as a result of the policies of the city. Carr described the analysis of the Court of Appeals as "questionable." Carr contended that the harm suffered by those individuals was "immediate and personal" and are "within the zone of interests protected by the constitutional and statutory provisions." Although the plaintiffs, for the most part, were not specifically linked to any housing project under construction in Penfield, that, in no way, at least in Carr's view, should affect standing in federal court.

Carr also had problems with the Court of Appeals' analysis that denied standing to the taxpayers. Carr contended that there was a clear link between the actions of the city and the harm to the taxpayers despite the policy issues presented by such a decision. The Carr Memorandum stated the problem as follows: "Assuming that S.C.R.A.P. is applicable to other than environmental cases, it is difficult to see how the causal chain alleged there is any more attenuated than that alleged here." Carr resolved the issue by not relying upon S.C.R.A.P. in the legal evaluation with respect to the taxpayers. Carr did not utilize the S.C.R.A.P. analysis but opted for the legal holding used in a case referred to in his memorandum as "Data Processing." Data Processing is an important standing case for understanding the discussions between Justice Powell and Carr regarding the resolution of the issue in Warth.

Data Processing involved organizations, a corporation, and an association that represented data processors, that sought a "review" of a "ruling" of the Comptroller of the Currency "that national banks...could make data processing services available to other banks and to banks' customers." The district court dismissed the action for review for lack of standing. The United States Court of Appeals

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178. Id. at 9. Carr described these individuals as "low income, black and Puerto Rican residents of Rochester, who claim that they have sought housing in Penfield, but because of the town's zoning laws, all available housing is beyond their means." Id. at 3.
179. Id. at 9.
180. Id.
181. Id. Carr believed the challenge was more a challenge of "ripeness" and not standing.
182. Id. at 8.
183. Id.
186. Id. at 150-51.
187. Id. at 154.
for the Eighth Circuit affirmed and the Supreme Court granted review.\textsuperscript{188}

The Court reversed the ruling of the lower courts and granted the plaintiffs in \textit{Data Processing} standing to review the ruling.\textsuperscript{189} Justice William O. Douglas, in his majority opinion, wrote that the question in standing determinations was "whether the interest sought to be protected . . . is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."\textsuperscript{190} The Court held that the statute in \textit{Data Processing}, The Administrative Procedures Act, did grant standing to "a person aggrieved by agency action within the meaning of the relevant statute."\textsuperscript{191}

It is difficult to conclude that Carr was being creative, clever, or correct in his suggestion to Powell that he use the "zone of interest" test.\textsuperscript{192} It is also not that persuasive that \textit{Data Processing} actually solves the problems Carr identifies. While the use of this standard from \textit{Data Processing} resolved the issue with regard to the taxpayers in \textit{Warth}, it did not dismiss the potential residents from the lawsuit because those plaintiffs were within the constitutional zone of protection as well as within the zone of interests that the statutes identified in the complaint seek to cover.\textsuperscript{193}

At the end of the Carr Memorandum, Carr’s handwritten notes provide more insight into the development of the \textit{Warth} decision.\textsuperscript{194} Carr repeated his call to Powell to use the "zone of interests" standard as enunciated in \textit{Data Processing} but more importantly, asserted that refusing standing to the potential residents of Penfield, cannot be justified.\textsuperscript{195} Carr wrote: "as to standing, there is a conflict here."\textsuperscript{196} Although admitting that the plaintiffs do not have "much of a case on the merit" and that he would "hate to formulate the decree" being sought, Carr added that those considerations are "quite apart from standing."\textsuperscript{197} The inference here by Carr is the plaintiffs have alleged enough in their complaint to be granted standing.

Carr’s final statement in his handwritten notes is most revealing

\begin{itemize}
  \item \textsuperscript{188} \textit{Id.}
  \item \textsuperscript{189} \textit{Id.} at 150.
  \item \textsuperscript{190} \textit{Id.}
  \item \textsuperscript{191} \textit{Id.}
  \item \textsuperscript{192} The Carr Memorandum, \textit{supra} note 165, at 8.
  \item \textsuperscript{193} \textit{Id.} According to the Carr Memorandum, the plaintiffs sued for violations of the U.S. Constitution as well as violations of several federal civil rights laws. \textit{Id.} at 1.
  \item \textsuperscript{194} \textit{See id.} at 10.
  \item \textsuperscript{195} \textit{Id.}
  \item \textsuperscript{196} \textit{Id.} at 11.
  \item \textsuperscript{197} \textit{Id.} at 10-11.
\end{itemize}
with respect to the lower court decisions and Powell's decision as well. Carr wrote, "I suspect that the real basis for CA2's decision was a thoroughly understandable timidity about reaching the merits."\textsuperscript{198} This statement contains the real problem in \textit{Warth}; a set of worthwhile plaintiffs, namely the low-income black and Puerto Ricans who wanted to integrate Penfield, were denied an opportunity to pursue actionable claims within the zone of interests that can be linked to the actions of the city officials.

\textbf{B. The Bobtail Memorandum}

Ron Carr's role in the \textit{Warth} opinion did not end with the Preliminary Memorandum. In fact, his second memorandum, entitled, "The Bobtail Memorandum,"\textsuperscript{199} is even more detailed and opinionated than the first memorandum. This document is dated March 17, 1975, the same date of oral argument.\textsuperscript{200} It was Carr's best effort to suggest or recommend how Justice Powell should vote in the case. The Bobtail Memorandum also contained many of the same arguments and discussions as were contained in the first memorandum. Most importantly, however, Carr, who Powell claims was his law clerk of choice on the issue of federal jurisdiction,\textsuperscript{201} set forth a discussion of standing at the very beginning of the memorandum that was even more specific and exacting. Carr, using cases as support, explained the standing doctrine in explicit detail.\textsuperscript{202} Carr also was careful to allude to conclusions regarding the doctrine that Powell supported in order to explain the principles underlying standing.\textsuperscript{203}

Carr began by reminding Powell that as he "observed in \textit{Richardson},\textsuperscript{204} the question of standing includes two discrete inquiries."\textsuperscript{205} The first, according to Carr, is "whether the plaintiff has made out a 'case or controversy.'"\textsuperscript{206} Carr asserted that the "purpose of this requirement is to ensure that Article III courts will exercise judicial review power and afford a remedy only when there

\textsuperscript{198} Id. at 11.
\textsuperscript{199} Warth v. Seldin Bobtail Memorandum from Ron Carr to Justice Powell (Mar. 17, 1975) (on file with author) (hereinafter "the Bobtail Memorandum").
\textsuperscript{200} Id. at 1.
\textsuperscript{201} WARD AND WEIDEN, supra note 166, at 167.
\textsuperscript{202} The Bobtail Memorandum, supra note 201, at 1-7.
\textsuperscript{203} Id. at 7.
\textsuperscript{204} U.S. v. Richardson, 418 U.S. 166 (1974).
\textsuperscript{205} The Bobtail Memorandum, supra note 201, at 2.
\textsuperscript{206} Id.
is a conflict between the parties in fact.”207 Carr added that the “requirement” is “satisfied when the plaintiff alleges and subsequently demonstrates that he is suffering present harm.”208 Carr insisted that this was the critical point — the present harm, as he referred to it as “harm,” that was “almost” a “proximate cause.”209 In other words, if the defendant’s actions are removed, there would be no harm at all.

Carr also asserted in his second memorandum that plaintiffs have to overcome certain “prudential” limitations presented by the standing issues.210 This discussion was also important to the final decision in Warth. For Carr, there were two specific prudential limitations: The first was whether or not the harm is the kind of harm that the Constitution, statute, or the legal obligation was designed to protect; and the second Carr calls the “Hohfeldian” limitation or a limitation that basically states that even though the harm was real, if it was “shared by the public generally,”212 in “equal measure,”213 the Court usually does not have to grant standing to such plaintiffs. With those principles in mind, Carr evaluated each plaintiff that was before the Court.

With respect to the taxpayers, Carr immediately dismissed them as lacking standing by asserting that the plaintiffs “failed to allege that any part of their tax burden is the direct result of defendants’ actions.”214 The taxpayers also had great difficulty overcoming the “Hohfeldian” limitation because they were the kind of plaintiffs who the limitation seemed to describe. Carr did not mention the limitation in his review but that was perhaps because the taxpayers did not even meet the lower threshold for establishing standing in federal court under many of the leading cases.215

Carr handled Metro Act, one of the builder plaintiffs in Warth, in a similar fashion. Carr was very skeptical of Metro Act’s assertion of standing but ultimately believed that their claims were in no way unique because all residents of the city of Penfield shared the same burden.216 This was, again, an attempt by Carr to dismiss a plaintiff using the “Hohfeldian” limitation language.

207. id.
208. id.
209. id. at 3.
210. id. at 4.
211. id. at 6.
212. id.
213. id.
214. id. at 7.
215. id. at 8.
216. id. at 13-14.
The plaintiffs that Carr discussed in great detail in his second memorandum were Rochester Home Builders Association, Housing Council and the low-income, black and Puerto Rican plaintiffs who sought housing in Penfield. With respect to Rochester Home Builders, it was clear to Carr that there was some merit to their claim of standing.

Carr sought to fashion a scenario where they might have been granted standing on their claims.\textsuperscript{217} Carr easily dismissed Housing Council's claim of standing but found that Rochester Home Builders have "alleged . . . sufficient harm to survive "a motion to dismiss for want of standing."\textsuperscript{218} Carr, however, expressed problems with how the claims were worded.

Carr wrote that their claim was for damages even though Rochester Home Builders was an association and Carr knew of "no case in which a membership organization had been allowed to bring an action for damages."\textsuperscript{219} It would have been much more compelling if the association sought "prospective relief" in Carr's view. In order to receive damages, the association would have had to name members worthy of relief in the form of actual damages. This discussion by Carr provided support for the position that those organizations, while worthy to a degree with respect to standing, perhaps could not meet the legal threshold because of the inherent flaws in the complaint.

The low-income black and Puerto Rican residents of Rochester presented the most difficulty for Carr. Those plaintiffs' claims challenged the constitutionality of the city ordinance under the First and Fourteenth Amendments.\textsuperscript{220} Specifically, the plaintiffs alleged that the Constitution forbade the specific conduct that the town of Penfield was engaged in with the enactment and enforcement of the ordinance that was denying them an opportunity to reside in the city.\textsuperscript{221}

Carr conceded early on that if the low-income black and Puerto Rican residents of Rochester plaintiffs could satisfy the standing requirements under Article III, they could also withstand a prudential standing claim.\textsuperscript{222} Those plaintiffs were not a set that could be deemed "Hofeldian" as they could easily link the actions by the city

\textsuperscript{217} Id. at 8-9.
\textsuperscript{218} Id. at 12.
\textsuperscript{219} Id.
\textsuperscript{220} Id.
\textsuperscript{221} Warth, 422 U.S. at 493.
\textsuperscript{222} Id.
\textsuperscript{223} The Bobtail Memorandum, supra note 201, at 8.
to the harm they were suffering. Although Carr acknowledged that the claims asserted by the plaintiffs were “highly conclusory,” he also contended that if the zoning ordinance were removed, “low income housing would be built in Penfield.”

Further, Carr, while admitting that there was some speculation to the claim of the plaintiffs that they would be able to move into Penfield, but for the ordinance, also contended that those plaintiffs did not have to demonstrate that level of proof with respect to standing. They have demonstrated, according to Carr, “a logical connection . . . between the assertedly illegal practices and the harm to them.”

C. Powell’s Conference Memorandum

Following oral argument, Ron Carr’s analysis and comments on the standing issue in Warth were already circulating to the other Justices. This was primarily because Powell’s memorandum to the conference (hereinafter “Powell’s Conference Memorandum”) contained the same legal conclusions Carr put forth in his memorandum. In fact, the documents were nearly identical in content.

Powell expressed to the other Justices his view of the case overall and his opinions with respect to all of the individual sets of plaintiffs. While nearly all of the plaintiffs were denied standing for various reasons, Powell revealed to the conference that Carr believed, and provided support for, the position that the low-income, black and Puerto Rican residents of Rochester, met the standing requirements required by the Court. Powell’s note on those plaintiffs in his memo stated the following:

Await discussion. Ron, recognizing that the issue is close and largely one of judgment, thinks he would hold the plaintiffs have standing. He notes that, for standing purposes, we must assume that the ordinance and its application are unconstitutional; that these plaintiffs allege they are suffering present harm; and that they make allegations of repeated

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224. Id. at 8-9.
225. Id. at 9.
226. Id. at 10.
227. Id.
228. Memorandum from Justice Powell to the Conference (Mar. 19, 1975) (on file with author) (hereinafter “Powell’s Conference Memorandum”).
229. Id. at 2-3.
efforts (various builders) to construct housing.\textsuperscript{230}

This is important. It suggests that Powell was not convinced that this set of plaintiffs was treated fairly.

Powell added language that Carr provided regarding the speculative nature of the lawsuit. Powell’s Conference Memorandum by suggesting that the low-income, black and Puerto Rican residents of Rochester probably did not have standing because they did not demonstrate that they would become tenants in Penfield if the ordinance were lifted.\textsuperscript{231}

This argument is troubling. Powell relies upon this argument to deny that the low income, black and Puerto Rican residents of Rochester an opportunity to pursue their claim. As Carr stated in the Carr Memorandum, the strength of the residents’ claims on the merits is “a matter quite apart from standing.”\textsuperscript{232} However, Powell, wavering with respect to those plaintiffs at conference, injects comments into the debate that were potentially damaging to the prospects of a favorable vote for that set of plaintiffs on review. The fact that Carr believed that the claims were weak was prejudicial to the issue before the Court. Carr, in fact, believed that the claims were weak but that standing was separate from the claims put forth by the parties.

IV. The Powell Opinion

A. Potter Stewart

The real judicial leader in the \textit{Warth} decision was Justice Potter Stewart. Powell wrote the opinion but Stewart, judging by Powell’s notes from conference, was the justice who took command of final resolution of the case.\textsuperscript{233} The conference notes were grouped by each justice that voted at the conference with their overall vote and included additional notes that Powell must have believed were relevant. Stewart’s opinion with respect to the plaintiffs was so forceful, at least according to Powell’s notes, that even if one felt strongly about any of the plaintiffs, Potter will produce doubt in one’s mind.

With respect to the Rochester taxpayers, Powell records “no

\textsuperscript{230} \textit{Id.} at 2.
\textsuperscript{231} \textit{Id.} at 3.
\textsuperscript{232} The Carr Memorandum, \textit{supra} note 165, at 11.
\textsuperscript{233} \textit{Warth} v. \textit{Seldin} Conference Notes, \textit{supra} note 164.
standing” in Stewart’s box.\textsuperscript{234} The organizations, according to Stewart, as Powell’s notes, have no standing as well though Stewart believed that a member of the organization could have had standing if they had been “denied a permit & gone through administrative appeals.”\textsuperscript{235}

Surprisingly, the low-income plaintiffs, the plaintiffs in the best position to achieve standing according to Ron Carr, were also dismissed away easily by Stewart, according to Powell. “Not even our most ‘far out case,’ justifies standing,”\textsuperscript{236} Powell recorded as Stewart’s position in Stewart’s box.\textsuperscript{237} Stewart supported this position by declaring that the case was an Article III case and was not a case involving a statute. How Stewart reached the conclusion that the case did not involve a statute is difficult to understand under the facts.

This is most unfortunate considering that Stewart was able to influence Powell and Justice Harry Blackmun that his theory of the legal issues in the case was correct. The Carr Memorandum detailed the various civil rights statutes that the plaintiffs invoked as the basis for the unconstitutional nature of the ordinance that kept low income housing from being constructed in Penfield.\textsuperscript{238} Stewart also ignored portion of the United States Constitution relating to individual rights. Yet, more troubling was the fact that Powell accepted this legal argument.

Stewart convinced Blackmun of this view. In conference, Blackmun voted to go along with Stewart.\textsuperscript{239} Powell, likewise, also voted to affirm, and wrote simply: “I agree with Potter.”\textsuperscript{240} Did Powell also believe that the case does not involve a statute with respect to the low-income minority plaintiffs? There is no indication of Powell’s opinion of this issue.

Stewart’s vote and opinion was also troublesome because he suggested that one of the organizational members should have gone through the process of applying for a building permit to construct

\textsuperscript{234} Id.
\textsuperscript{235} Id.
\textsuperscript{236} Id.
\textsuperscript{237} Id.
\textsuperscript{238} See The Carr Memorandum, supra note 165, at 1. The complaint, according to Carr, alleged that the Penfield ordinance violated 42 U.S.C §§ 1981, 1982, and 1983, all well-known civil rights statutes. 42 U.S.C. § 1982 is a civil rights statute that concerns property rights. It states: “All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.” 42 U.S.C. § 1982(a) (2000).
\textsuperscript{239} Warth v. Seldin Conference Notes, supra note 164.
\textsuperscript{240} Id.
housing in Penfield and been denied in order to obtain standing. The problem with such an approach was that the potential tenants of the project were not able to obtain standing under such an approach. Their potential residency in the proposed project would have still been speculative and would not have advanced any standing claim.

B. Justice Powell and the Nixon Legacy

The other affirming votes in Warth are, of course, expected, and are more independent in nature. Chief Justice Warren Burger believed the matter was a political question. Justice Rehnquist, a solid ideological conservative, believed the complaint was “too vague” and that the petitioner had no “case or controversy.” The Court’s vote was 5-3 in favor of affirming the decision. Justice William O. Douglas did not vote in the conference because he had recently suffered a severe and debilitating stroke in December 1974. The vote tally again: Rehnquist, Burger, Blackmun, Stewart, and Powell voted to affirm; Brennan, White, and Marshall voted for reversal.

Powell wrote the majority opinion for the Court and much of his opinion was influenced by the writings and discussion provided by his law clerk, Ron Carr. Powell handled the most difficult plaintiffs first — the low-income minorities. It was that group of plaintiffs who Carr indicated, at least in his memoranda, had standing to pursue their claims even if the allegations were weak. Carr’s view, as stated plainly the Carr Memorandum, was that whether the claim was strong was not the issue; the issue was whether absent the actions of the city of Penfield these plaintiffs might have had the opportunity to

241. Id.
242. Id. See also, Baker v. Carr, 369 U.S. 186 (1962) (leading opinion on the political question doctrine).
243. Warth v. Seldin Conference Notes, supra note 164.
244. Id.
Powell, however, placed a burden on the plaintiffs so enormous that he endorsed exclusionary zoning practices.

Powell wrote that the low-income residents had to demonstrate that they had been "personally injured." Plaintiffs must, according to Powell, demonstrate the requisite case and controversy requirement under Article III. This is true, but Powell took the standing requirement a step further. His opinion re-defined the standing requirement. Powell’s opinion, in relevant part, states:

None of them has ever resided in Penfield; each claims at least implicitly that he desires, or has desired, to do so. Each asserts, moreover, that he made some effort, at some time, to locate housing in Penfield that was at once within his means and adequate for his family’s needs. Each claims that his efforts proved fruitless.

Powell essentially required that the plaintiffs demonstrate that they would likely prove their case against the city of Penfield when Article III makes no such requirement.

Powell also imposed a burden on the plaintiffs that is illogical in nature. The zoning ordinance in Penfield prevented the construction of low-income housing. The plaintiffs collectively alleged that if the ordinance were not in effect, the low-income housing would be constructed and they would seek to obtain housing in the city at one of the developments. Powell contended that the speculative nature of that process precluded the plaintiffs from pursuing their claim in court. However, the plaintiffs are not required to dismiss all manner of doubt regarding their claims just to have the claims heard in court. Or in other words, was Powell claiming that these plaintiffs need to demonstrate that if low-income housing were built, they would most likely obtain housing?

This appears to be the case.

Powell wrote early in the opinion that Article III “exists only to redress or otherwise to protect against injury to the complaining party, even though the court’s judgment may benefit others collaterally.” Powell further elaborated that a party “may have standing to seek relief on the basis of the legal rights and interests of

248. Id.
249. Warth, 422 U.S. at 503.
250. Id. at 501.
251. Id. at 503.
252. Id. at 499.
others, and, indeed, may invoke the general public interest in support of their claim." 253 In addition, Powell added the following to provide further clarification of the law:

Petitioners must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent. Unless these petitioners can thus demonstrate the requisite case or controversy between themselves personally and respondents, "none may seek relief on behalf of himself or any other member of the class." 254

Despite the pronouncement of these legal standards, Powell’s demands on the blacks and Puerto Rican plaintiffs were much more stringent. Powell maintains that the claims asserted by these plaintiffs were really the claims of others and not the claims of the black and Puerto Rican low-income potential residents. 255

Powell asserted that the claims of these plaintiffs were really the claims of "third parties — developers, builder[s]..." 256 He further added that the plaintiffs might have wanted to reside in Penfield but they had never actually been denied any housing by the city. 257 The developers were denied an opportunity to build housing and that was how these plaintiffs were allegedly denied the opportunity to reside in the city. 258

There were only two efforts to build housing in Penfield that could have been linked to the desires of these particular plaintiffs to reside in the city. However, the submitted affidavits suggested that the plaintiffs would not have been able to afford to reside in these developments. 259 Powell used these facts to conclude that the plaintiffs were not denied housing in Penfield on the account of race but because they could not afford to reside in Penfield based upon the information provided to the court. 260 Powell wrote: "Indeed, petitioners’ descriptions of their individual financial situations and housing needs suggest precisely the contrary—that their inability to reside in Penfield is the consequence of the economics of the area..."

253. Id. at 501.
254. Id. at 502 (quoting Bailey v. Patterson, 369 U.S. 31, 32 (1962)).
255. Id. at 504.
256. Id.
257. Id.
258. Id.
259. Id. at 506-07, n.16.
260. Id. at 507.
housing market, rather than of respondents' assertedly illegal acts.\textsuperscript{261}

This is the most controversial portion of the case.

Powell’s argument is strong evidence that Powell was not basing his position on constitutional jurisprudence but was advancing the federal housing policy of President Richard Nixon, the individual who appointed him to the Supreme Court. The Nixon housing policy is worthy of a brief discussion as well in order to understand the implications of the policy and how that policy is implicated in \textit{Warth}.

Richard Nixon’s housing policy has its origins in Nixon’s political aspirations to become President of the United States in 1968. Nixon, who lost narrowly to John F. Kennedy in the 1960 election, invoked the famous “Southern strategy”\textsuperscript{262} in an effort to win the election. The strategy eventually evolved into housing policy under Nixon in an effort to win the 1968 election by appealing to white Southerners and suburban whites around the country by using race.

It began initially in 1967 when the passage of a Fair Housing Act\textsuperscript{263} became a strong possibility. Nixon publically asserted that opposition to the proposed fair housing law was shared by the majority of Americans in the U.S.\textsuperscript{264} Nixon elaborated on this opinion the following year when he stated further that the Fair Housing Act would not assist many African Americans and that the effort to pass a fair housing law was a gesture by “liberals.”\textsuperscript{265}

The Nixon doctrine soon encompassed race and class once he was elected President.\textsuperscript{266} His appointee to the U.S. Department of Housing and Urban Development (“HUD”), George Romney\textsuperscript{267} expressed a strong commitment to integration in his housing policy. One of his statements on the issue addressed the specific issue presented in the \textit{Warth} case: “The most explosive threat to our nation

\textsuperscript{261} Id.
\textsuperscript{262} Mike Allen, \textit{RNC Chief Says It Was Wrong to Exploit Racial Conflict for Votes}, \textit{WASH. POST}, July 14, 2005 at A04. (The strategy “described Republican efforts to use race as a wedge issue — on matters such as desegregation and busing — to appeal to white southern voters”).
\textsuperscript{263} 42 U.S.C. § 3601 (1968).
\textsuperscript{264} LAMB, \textit{supra} note 128, at 108-17.
\textsuperscript{265} Id. at 111-17.
\textsuperscript{266} Id.
\textsuperscript{267} George Wilcken Romney was born in a Mormon colony in Mexico in 1907. His parents, American citizens, had moved there after the U.S. Congress outlawed polygamy in the 1880s. Romney’s parents eventually relocated back to the U.S. and Romney was raised in Idaho and Utah. Romney, who never graduated from college, became a political speechwriter in Congress, a lobbyist for the aluminum industry, and a representative for the automobile industry as well. Romney was elected governor of Michigan in 1962 and was re-elected in 1964 and 1966. Romney unsuccessfully ran for President in 1968 but was named to the Nixon cabinet to serve as Secretary of the U.S. Department of Housing and Urban Development. David Rosenbaum, \textit{George Romney dies at 81}, \textit{N.Y. TIMES}, July 25, 1995.
is the confrontation between the poor and the minority groups who are concentrated in the central cities, and the middle income and affluent who live in the surrounding and separate communities. This confrontation is divisive. It is explosive. It must be resolved.\textsuperscript{268} Romney actually attempted to implement policies when the federal government would try to achieve the goals of the Fair Housing Act.\textsuperscript{269}

Nixon claimed to oppose segregation but his position on the issue was much more complex and is ultimately divisive. His exploitation of his own HUD Secretary, Romney, is demonstrative of this point. Nixon appointed Romney as his HUD Secretary but undermined him throughout his tenure.\textsuperscript{270} Nixon also made it clear that he did not support suburban segregation.

Nixon presented two significant memoranda that clarified his views on housing policy.\textsuperscript{271} These statements provide evidence of Nixon’s opposition to suburban segregation and by default, his strong support for the actions of cities like Penfield that designed policies to prevent racial integrated housing in their municipalities.

In the two memos, both prepared for his Chief of Staff, John Ehrlichman, Nixon made it abundantly clear that he was not in favor of “forced integration” and believed that forced integration through housing is as wrong as “legally sanctioned segregation.”\textsuperscript{272}

In addition, Nixon was adamantly opposed to integration through the construction of public housing units in residential neighborhoods with homeowners.\textsuperscript{273} Nixon advised Ehrlichman that he did not agree that the law should propose housing integration when individuals residing in the proposed areas were not “willing to support” such proposals.\textsuperscript{274} He further advised Ehrlichman that he was in favor of a constitutional amendment “forbidding forced busing and housing integration.”\textsuperscript{275}

At the root of the Nixon doctrine on housing and integration was Nixon’s racist beliefs.\textsuperscript{276} Those beliefs formed Nixon’s policy on

\textsuperscript{269} \textit{Lamb}, \textit{supra} note 128, at 56-62.
\textsuperscript{270} \textit{Id.} at 108-17.
\textsuperscript{271} \textit{Id.} at 115-17.
\textsuperscript{272} \textit{Id.}
\textsuperscript{273} \textit{Id.}
\textsuperscript{274} \textit{Id.}
\textsuperscript{275} \textit{Id.}
suburban integration and prevented any serious efforts by Romney from being successful in any of his own efforts to follow through on the mandate of the Fair Housing Act for racial integrated housing.

But regardless of the validity of the Nixon doctrine, when the issue is housing, the interests of individuals cannot be separated from the housing developers and builders. This is the major problem with the Warth decision. The zoning ordinance does ultimately affect individuals though it applies to developers and organizations that would have to comply with the zoning laws in order to build the housing. The builders are also affected by the ordinance.

For example, a city passes a zoning law making it illegal to build any additional buildings in certain parts of a city that contain wheelchair ramps. The city does not actually name wheelchair ramps but passes a zoning ordinance that has the effect of denying such projects.

The law directly impacts the disabled. Yet it is the developers who develop real property that provides housing to the disabled. Thus the interests of the developers or housing associations are intertwined with the interests of the disabled persons who require the ramps. The two interests cannot be severed. Under Powell's reasoning, individuals could not obtain standing in federal court because the ordinance is not directed at them; it is directed at builders. While this is a more extreme example of a policy choice that impacts both the housing provider and those seeking housing, this is precisely the kind of analysis that was missing from Powell's decision.

Powell invoked a legal standard that the plaintiffs simply could not demonstrate even under the most favorable circumstances. The plaintiffs provided the Court with other cases where potential residents were allowed to proceed to trial on the basis of a housing development by another party; however, Powell decided that because the ability of these plaintiffs to reside in a development in Penfield was economically speculative or not likely, the plaintiffs had no standing to sue in federal court.

C. The Housing Organizations

The arguments used to deny the standing to the the low-income black and Puerto Rican plaintiffs, provided the foundation for Powell's legal justification to deny standing to the organization

277. Warth, 422 U.S. at 507-08.
plaintiffs. Powell acknowledged that an association can maintain standing on behalf of its members in the opinion; but then refused to extend such standing to the three housing organizations in *Warth*.

Powell handled the first organization, Metro Act, an original plaintiff, by again asserting that the claims that the named plaintiff seeks to maintain are the claims of another party. Powell reached this conclusion even though his analysis in the case did not exclude Metro Act:

> We do not understand Metro-Act to argue that Penfield residents themselves have been denied any constitutional rights, affording them a cause of action under 42 U.S.C. § 1983. Instead, their complaint is that they have been harmed indirectly by the exclusion of others. This is an attempt to raise putative rights of third parties, and none of the exceptions that allow such claims is present here.

However, preceding that portion of Powell’s discussion, Powell admitted that Metro Act might be able to satisfy the case and controversy requirement under Article III. Powell eluded that this results by invoking “prudential considerations” as the reason that Metro Act could not maintain this action. Powell even admitted that Metro Act had alleged harm; Powell’s legal justification was that the harm was indirect and that the harm alleged was harm that excluded others. Powell’s critique of Metro-Act is also troubling because it completely ignores the purpose of Metro-Act’s formation. The unwillingness of Powell to admit the underlying issue in the lawsuit — race and class — was self evident by his failure to acknowledge this central theme.

Metro-Act, Powell was aware, was formed specifically to alter the “racially exclusionary zoning” practices in Penfield. The organization was formed following riots in Rochester, New York in 1964. Metro-Act, at the time of the *Warth* litigation, consisted of

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278. *Warth*, 422 U.S. at 508.
279. *Id.* at 514.
280. *Id.*
281. *Id.* at 511.
282. *Id.* at 514. Prudential considerations also receive strong discussions in the memorandum relating to the case in Powell’s papers. The Bobtail Memorandum, *supra* note 201, at 8-14.
283. *Warth*, 422 U.S. at 514.
284. *Id.*
285. *Id.*
286. The Rochester riots occurred from July 24-26, 1964. ‘The ‘riot’ was precipitated by
“350 individual members” many of whom resided in the city of Penfield.  

The organizations attempted to meet with city officials to discuss racially integrated housing in Penfield but met stiff resistance. Metro-Act also presented proposals to town officials “to end the racially exclusionary zoning practices and policies existing in Penfield.” There was no success. Thus, Metro-Act filed the lawsuit seeking a redress of grievances for its members. The organization’s brief was very clear with respect to the reason for the lawsuit and the legal claims: “As a result of the exclusionary zoning ordinance and defendants’ administration of the law, Metro-Act members are suffering direct injury in that they are losing the benefits of living in an integrated community.”

Petitioner Metro Act added that the injury suffered by its members was “not economic,” but was “a real and concrete harm, resulting directly from defendants’ illegal practices and policies.”

The two other housing organizations, Home Builders and Housing Council did not succeed either. Home Builders’ status, as an intervener in the case was potential problematic because the complaint was already pending and under the theory eventually advanced by Powell, the harm would have had to been incurred directly by Home Builders. However, that status should not have

the arrest of an allegedly drunk and disorderly African-American man at a Joseph Avenue street dance. But even in its immediate aftermath, many looked to underlying social and environmental conditions to explain the events that followed. These conditions were analogous to those that existed in many Northern cities. They included a large and rapid influx of African-Americans from the South, the de-facto segregation of black arrivals in specific areas of the residential urban core, a failure to extend economic opportunities from white to black residents, the physical decay of black neighborhoods due to poverty and inadequate services, the routine exploitation of African-American tenants by white landlords, the neglect and persecution of blacks at the hands of an overwhelmingly white police force, inequities in educational instruction and facilities, and the inability of African-Americans to redress grievances through legitimate political channels. Rochester’s was one of a trio of ‘riots’ in the summer of 1964. Together, they inaugurated the ‘long hot summers’ of racial strife that marked the mid and late sixties.” The riot ultimately resulted in $1 million in property damage, 4 deaths, 350 injuries, and 800 arrests. The National Guard had to be called into service in the city to restore order. Residents and leaders in the city of Rochester, home to the Eastman Kodak camera company, typically described the moment as “a blow” to the city’s “positive self image.” William J. Bulb, Jr. & Allen Grimshaw, Rochester Race Riot Papers (U. of Rochester ed., 1984) available at http://www.library.rochester.edu/index.cfm?page=1097.

288. Id.  
289. Id.  
290. Id.  
291. Id. at 13-14.  
292. Id. at 14.
precluded Home Builders from presenting a case on the merits.

This portion of the opinion contains evidence that strongly supports the fact that there was standing in the case. Powell, however, did not accept many of the very cogent arguments put forth by the housing developers and their claims were dismissed as well per Powell’s decision and vote to affirm.

D. Petitioners’ Arguments

Even with the assertions and seemingly strong influence Justice Potter Stewart might have had on the Powell’s decisions in Warth, and even with the Nixon administration’s housing policy possibly impacting the resolution of the case, the arguments of the petitioners, as presented in their briefs, addressed many of the arguments put forth in Powell’s opinion.

The petitioners noted early in their brief of the evidence presented to the lower court in support of their contentions that Penfield was engaged in discriminatory conduct. The petitioners advised the Court that “the conclusion of the experts who have examined the ordinance [was] un-contradicted and binding upon this Court.” The un-contradicted expert opinion presented to the lower court described the Penfield zoning ordinance as an “inflexible control mechanism which has the effect of producing economically and racially stratified housing arrangements.” Penfield’s zoning ordinance, according to the petitioners, acted as a “complete rejection by suburban communities of all low and moderate income housing” and did not take into account the “housing needs either of its own citizenry or for the citizenry within the larger metropolitan community.”

Petitioners also documented the actual efforts of Penfield to deny applications under the zoning ordinance. The application of Penfield Better Homes Corporation was specifically identified in the brief because the organization was, in fact, a member of “petitioner, Housing Council.” Better Homes’ proposal to construct “low and moderate income housing” was rejected by the city of Penfield for reasons that were directly contradicted by data provided by the Better Homes’ application. Those included allegations of traffic problems

293. Id. at 6.
294. Id.
295. Id.
296. Id
297. Id
298. Id. at 7.
and community non-conformity.\textsuperscript{299}

The petitioners also cited other proposals rejected by the city of Penfield when the case was litigating through the lower court. Finally, petitioners noted city officials also threatened one of the organizational plaintiffs (Rochester Home Builders) once legal action against the city seemed certain.\textsuperscript{300} According to the petitioners, city officials threatened Home Builders with exclusion from other business if they insisted upon being included in the legal action against the city attempting racial integration.\textsuperscript{301}

The petitioners also presented compelling arguments on behalf of the low-income black and Puerto Rican plaintiffs that documented the harm suffered by the individual plaintiffs and the relationship of that harm to the actions of the city. Contrary to Powell's assertions in his opinion, the plaintiffs did allege harm specifically related to the city's refusal to allow low- to moderate-income housing to be built in Penfield. Specifically, the petitioners identified “[p]laintiffs, Ortiz, Broadnax, Reyes, and Sinkler” as “black or Spanish-surnamed persons of low or moderate income who have been excluded from the town of Penfield because of their race and low income level.”\textsuperscript{302}

With respect to Ortiz, it is noted that Ortiz resided in Rochester and was raising his children in a “ghetto environment.”\textsuperscript{303} Ortiz’s living environment was one reason, among many, that Ortiz cited as his motivation for seeking housing in Penfield. Ortiz, while working in the city of Penfield in the early 1970s, began “searching for home.”\textsuperscript{304} Due to the lack of housing in Penfield, Ortiz was forced to reside in Wayland, New York, a city located 42 miles north of Penfield where Ortiz was employed.\textsuperscript{305} Ortiz was due at work in Penfield at 7:30 in the morning; his transportation to work often involved a commute of more than an hour.\textsuperscript{306} The commute presented increased costs for Ortiz but much more aggravating for Ortiz was the harm he and his family suffered overall that he expressed in an affidavit: “Because our living environments are dictated by laws, practice, and policies which prevent us from living where we might wish, we are forced for example, to accept as a way of life, poor schools for our children, reduced job opportunities,

\textsuperscript{299} Id.
\textsuperscript{300} Id. at 8.
\textsuperscript{301} Id.
\textsuperscript{302} Id. at 9.
\textsuperscript{303} Id.
\textsuperscript{304} Id.
\textsuperscript{305} Id.
\textsuperscript{306} Id. at 9-10.
inferior community services and added expenses of reaching employment." 307

The other individual plaintiffs, Broadnax, Reyes, and Sinkler alleged similar experiences as Ortiz in seeking housing in Penfield in their affidavits. Additionally, these plaintiffs alleged exclusion from residing in Penfield due to their "race and income levels." 308 The plaintiffs all resided in deplorable housing conditions in nearby Rochester with "uncontrolled violence and insufficient or nonexistent community services." 309 All sought housing in Penfield in an effort to provide their families with better quality of life, access to better education for their children, and "decent housing in a decent environment." 310 The policy of the city of Penfield to deny permits on all construction of low- to moderate-income housing effectively prevented all of these plaintiffs from obtaining housing in a better community.

In order to reach the decision with respect to these plaintiffs, Justice Powell ignored or discounted the statements by the individuals in their affidavits. Powell also had to ignore the statements of expert witnesses presented on behalf of the organizational plaintiffs with respect to the various issues raised by the city. 311 While this evidence may or may not have been enough to prove the allegations against Penfield, the evidence was enough to sustain the complaint and have the action proceed to trial.

Powell's law clerk, Ron Carr, stated as much in his analysis of the case with respect to the low-income black and Puerto Rican plaintiffs. 312 But for the zoning ordinance and how the city administered the ordinance, low- to moderate-income housing would have been constructed in Penfield. The plaintiffs likewise would have had an opportunity to obtain such housing and reside in Penfield.

Carr, as stated previously, stressed that the law did, in fact, support standing in favor of the low-income black and Puerto Rican plaintiffs. 313 The legal support is contained in the Data Processing 314 holding that was discussed in Carr's memoranda.

307. Id. at 10.
308. Id.
309. Id.
310. Id. at 11
311. See Warth v. Seldin, 422 U.S. at 519-29. The plaintiffs presented evidence from experts in support of their case. The information presented by the experts is discussed below in the Brennan discussion below.
312. The Carr Memorandum, supra note 165, at 9.
313. Id. at 8.
At the time of the *Warth* litigation, *Data Processing* was one of the key cases involving and interpreting standing. *Data Processing* provided a simple definition for standing under Article III that the plaintiffs in *Warth* met easily based upon the facts.\(^{315}\) Justice William O. Douglas, writing for the majority in *Data Processing*, stressed that the question with respect to standing is “whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise.”\(^{316}\) Douglas added that the issue of standing is determined by “the ‘case’ or ‘controversy’ test,” or “whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”\(^{317}\) The harm the individual experiences also does not necessarily have to be “economic” according to Douglas because the real issue is whether the harm suffered by the individuals is immediate and personal, as law clerk Ron Carr noted in his memoranda to Justice Powell.\(^{318}\)

The *Warth* petitioners, *inter alia*, alleged statutory violations under the Reconstruction statutes.\(^{319}\) The harm they alleged was directly linked to alleged violations of these laws. In addition, the petitioners presented constitutional claims to the lower court. It was the violation of the federal statutes and the allegations of violations of several amendments to the U.S. Constitution that placed the plaintiffs within the zone of interests protected by these various provisions. If Powell had used the *Data Processing* standard, the matter would have resolved in much simpler manner.

The organizational plaintiffs also met the standard under *Data Processing*. Their interests to construct low- to moderate-income housing in Penfield was within the zone of interests contemplated by the statutes and the Constitution. The organizational plaintiffs suffered personal harm as a result of the refusal of the actions of the zoning board in Penfield.

In addition to petitioner’s legal arguments contained in their briefs, numerous other well-respected organizations filed amicus briefs in support of the plaintiffs including the National Committee

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315. Id. at 152.
316. Id.
317. Id. at 154.
318. Id. See also, The Carr Memorandum, supra note 165, at 9.
Against Discrimination in Housing ("NCDH"), and the NAACP Legal Defense Fund ("LDF"). Both offered noteworthy points.

NCDH noted in its amicus brief two intriguing facts. First, NCDH pointed out that the county where Penfield is located in Monroe County, New York. Within Monroe County, 95 percent of the African Americans that reside in the county reside in the city of Rochester. Only 1 percent of the African Americans reside in Penfield, according to NCDH. This supported the factual arguments presented by plaintiffs that document their status as segregated residents of Monroe County in Rochester.

Secondly, and most importantly, NCDH noted a particularly interesting point regarding the Penfield ordinance. NCDH pointed out that under the provisions of the ordinance concerning "planned unit development," the ordinance required the builder to consider the needs of "existing and potential town residents at all economic levels." This point underscored the actions of the city in promoting residential racial segregation because their actions were contrary to the purpose of their own ordinance.

The LDF also submitted an amicus brief. The arguments of the organization were historical in nature and also were driven by an overall examination of the problem of racially motivated exclusionary zoning. Of particular note is the following excerpt put forth by LDF: "Notwithstanding applicable Reconstruction amendments and laws, and long-standing judicial precedent, exclusionary zoning practices such as lot size, restrictions on multi-family structures, density limitations, and discriminatory grant of variances persist as barriers to racial integration of metropolitan areas.

320. NCDH was founded in 1950 with the objectives of establishing and implementing programs to eliminate racial segregation and discrimination in housing and to broaden housing opportunities for minority group members, especially those of lower income. NINA MJAGKI, ORGANIZING BLACK AMERICA: AN ENCYCLOPEDIA OF AFRICAN-AMERICAN ASSOCIATES 433 (Taylor & Francis, eds. (2001)).

321. The NAACP Legal Defense Fund is a non-profit corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist African Americans in securing their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid gratuitously to black persons suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own behalf. NAACP - Our Mission, http://www.naacp.org/about/mission/index.htm (last visited Feb. 17, 2009).


323. Id.

324. Id.

325. Id. at 5, n.3 (emphasis in original).

across the nation.”

LDF’s point in this instance was that Powell and the other members of the Court who voted to deny the challenges to the ordinance were demonstrating a lack of historical knowledge of the problem of exclusionary zoning based upon race. LDF cited numerous cases where the Court recognized the discriminatory impact of racially motivated exclusionary zoning.

In addition, LDF argued that “[r]acial zoning is a particularly pernicious form of housing discrimination” because it is “wholesale exclusion” and that to deny standing to the individuals with the “greatest interest in the eradication of exclusionary policies” because of “artificially” contrived “strict” standing requirements is “anomalous.” Again, the LDF view was that the decision by the Court simply made little sense and was unsupported by legal precedent and the need for the judicial system to continue to confront racism. The denial of standing by the Court in Warth missed the point of the case completely.

V. Dissenting Voices

A. Douglas and Brennan

As expected, Justice William Brennan, Jr. was the leader of the dissent in Warth. On May 30, 1975, Justice Brennan forwarded a short inter-office note to Justice Powell that referred to “No 73-2024 Warth v. Seldin.”

“Dear Lewis,” Justice Brennan’s note began, “I shall circulate a dissent in the above. Sincerely, Bill.” Brennan’s note was followed several days later with similar notes from Justice Thurgood Marshall and Justice Byron White expressing the fact that they intended to join the Brennan dissent.

The emergence of the dissenting block in Warth was clear by

327. Id. at 4.
328. Id.
329. Id. at 5.
330. Id.
333. See Interoffice Memorandum from Justice Marshall to Justice Powell (June 3, 1975) (on file with author); Interoffice Memorandum from Justice White to Justice Powell (June 3, 1975) (on file with author).
March 19. March 19 was the day of the conference on *Warth* where Brennan voted for "reversal." Powell's notes under Brennan's name reflect his position on the issue. Powell wrote that Brennan agreed that there was only one issue — standing. Powell also noted that Brennan believed "Housing Council has standing because one of its members (Penfield Homes)... alleged to have been denied building permit." Powell's sentiments, as expressed in Powell's notes, from the March 19 conference were reflected in his dissent to *Warth*. However, Brennan's dissent commenced with a scathing critique upon the opinion drafted by Powell. The implication in the dissent was that Powell and those voting in the majority crafted a new broader interpretation of standing in order to prevent the plaintiffs from pursuing viable claims against the city of Penfield.

Brennan described Powell's opinion as an "opinion" that "purports to be a 'standing' opinion." Brennan added that the opinion contained "outmoded notions of pleading and of justifiability" which were used to prevent any of the plaintiffs from clearing procedural "hurdles, some constructed here for the first time." Brennan alleged that Powell and the other Justices had "tossed out of court every conceivable kind of plaintiff who could be injured by the activity claimed to be unconstitutional."

Brennan also discussed in detail the legal issues at stake but prefaced those arguments with his overall feelings regarding the decision of the majority to prevent a valid lawsuit to be heard on the merits:

I can appreciate the Court's reluctance to adjudicate the complex and difficult legal questions involved in determining the constitutionality of practices which assertedly limit residence in a particular municipality to those who are white and relatively well off, and I also understand that the merits

335. *Id.*
336. *Id.*
337. *Id.*
338. See *Warth*, 422 U.S. at 519-30 (Brennan, J., dissenting).
339. *Id.* at 519-21.
340. *Id.*
341. *Id.* at 520.
342. *Id.*
343. *Id.*
of this case could involve grave sociological and political ramifications. But courts cannot refuse to hear a case on the merits merely because they would prefer not to, and it is quite clear, when the record is viewed with dispassion, that at least three of the groups of plaintiffs have made allegations, and supported them with affidavits and documentary evidence, sufficient to survive a motion to dismiss for lack of standing.\textsuperscript{344}

This passage from Brennan’s dissent sums up the complex issues in the case that Powell and the majority refused to acknowledge. In fact, Powell’s opinion is medicinal in nature when compared to Brennan’s much more probing review of the facts. The Powell opinion removes the sociological and political issues from the case entirely and decides the case as if the individuals seeking relief do not exist.

Brennan’s dissent was also more than just his own personal assessment of the facts and the Powell opinion. Brennan supports his dissent with facts from the case and legal precedent that existed at the time of the \textit{Warth} decision. This was very important; otherwise, Brennan’s dissent would have been dismissed as a personal view with no support for it in Supreme Court jurisprudence.

As an example, Justice William O. Douglas drafted a short dissent to the \textit{Warth} decision that suffers from such problems.\textsuperscript{345} While it was a noble argument that raised important issues; it was not based upon solid legal precedent regarding Article III standing. The Douglas dissent began as follows: “With all respect, I think that the Court reads the complaint and the record with antagonistic eyes. There are in the background of this case continuing strong tides of opinion touching on very sensitive matters, some of which involve race, some class distinctions based on wealth.”\textsuperscript{346}

Granted, the dissent by Justice Douglas was accurate in raising the issue of race and class but Douglas, who was ill at the time from a massive stroke when the dissent was published,\textsuperscript{347} does not provide strong legal arguments for the problems with the case in the manner that Justice Brennan accomplishes in his dissent. Douglas referred to standing as a “barrier to access to federal courts” and referred to the issues at stake in \textit{Warth} as “festering sores.”\textsuperscript{348} Douglas, \textit{inter alia},

\textsuperscript{344} Id.
\textsuperscript{345} See id. at 518 (Douglas, J., dissenting).
\textsuperscript{346} Id.
\textsuperscript{347} JEFFERIES, supra note 19, at 416-18.
\textsuperscript{348} Warth, 422 U.S. at 519.
proposed that the Court lower the “technical barriers” to curb the “ancient need” to correct the problem of residential segregation based upon race and class. Most importantly, however, Douglas referenced Justice Brennan’s dissent and directs the reader to it.

Brennan’s dissent was much better because it not only contained Douglas’ references to the race and class issues but also because Brennan weaved this argument into his overall presentation. Brennan elaborated on his initial thematic points regarding the case by explaining that the interests of the low-income black and Puerto Rican plaintiffs are “intertwined” with the various organizations seeking to construct housing in the city. Brennan wrote that it is a “glaring defect” for the Court to view each plaintiff as if they were “prosecuting” separate lawsuits. Brennan explained the problem in this approach with an example from the facts of the case:

For example, the Court says that the low-income minority plaintiffs have not alleged facts sufficient to show that but for the exclusionary practices claimed, they would be able to reside in Penfield. The Court then intimates that such a causal relationship could be shown only if ‘the initial focus (is) on a particular project’. Later, the Court objects to the ability of the Housing Council to prosecute the suit on behalf of its member, Penfield Better Homes Corp., despite the fact that Better Homes had displayed an interest in a particular project, because that project was no longer live. Thus, we must suppose that even if the low-income plaintiffs had alleged a desire to live in the Better Homes project, that allegation would be insufficient because it appears that that particular project might never be built.

In other words, Brennan contended that Powell and the Justices who joined him the majority missed the point or perhaps, they understood the issue all too well and were engaging in their version of judicial activism to advance a specific policy. The by-product of the more stringent legal standard produced in the Warth decision was to place the plaintiffs in the very difficult position of having to prove that they could afford to reside in Penfield, in a particular housing development proposed to be developed but denied a permit for

349. Id.
350. Id.
351. Id. at 521 (Brennan, J., dissenting).
352. Id.
353. Id. at 521-22.
construction by the city. It was an impossible standard to meet under the circumstances.

For Brennan, the fact that the plaintiffs were not connected to a particular project was less important than the fact that the ordinance was a “total, purposeful, intransigent exclusion of certain classes of people from the town.” Brennan contended that the “scheme” perpetuated by city officials was “unconstitutional” and to add insult to injury, the Court, with its ruling, advised the plaintiffs that “they will not be allowed to prove what they have alleged.” Brennan made the point to examine the claims of various plaintiffs separately in his dissent to further his point.

With respect to the low-income black and Puerto Rican plaintiffs, Brennan contended that they more than met the existing legal standards for standing in federal court. Brennan maintained that these plaintiffs had alleged harm that they personally had suffered from as a result of the “exclusionary” practices in housing of the city of Penfield. The harm suffered, according to Brennan, is “more palpable and concrete than those held sufficient to sustain standing in other cases” such as Sierra Club, S.C.R.A.P., and Data Processing.

Brennan raised the same kinds of personal harm that the plaintiffs stated emphatically in their affidavits: issues relating to the quality of life that their children must endure living in a poor, violent, and unstable section of Rochester where the schools are substandard and the apartments are in disrepair. Brennan furthered the argument by comparing the facts in Warth to the facts in S.C.R.A.P., one of the cases mentioned in the Carr Memoranda.

S.C.R.A.P., according to Brennan, supported the position that the Court, in Warth, was holding the low-income plaintiffs to an extremely high standard of proof just on the merits of the allegations. The Court in S.C.R.A.P. held that the parties had a right to prove their allegations even though it was alleged that the allegations were, in fact, “untrue” and a “sham.” Brennan noted that the Warth plaintiffs were being asked to prove the allegations on paper “prior to discovery and trial.” Brennan elaborated on this point, in relevant

354. Id. at 523.
355. Id.
356. Id.
357. Id. at 525.
358. Id. at 524.
359. Id. at 526-27.
360. Id. at 506-28 (citing S.C.R.A.P., 412 U.S. at 689.)
361. Id. at 527.
362. Id. at 528.
part, as follows:

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 . . . and the fact that it does so now can only be explained by an indefensible determination by the Court to close the doors of the federal courts to claims of this kind.363

In the end, with respect to the low-income minorities seeking residence in Penfield, Brennan stressed that the real issue was beyond the procedural issues supported by the majority in the case. The Court did not want the matter heard by a court so the plaintiffs were precluded from being afforded a day in court to prove their very coherent and serious allegations. Brennan believed it was the very nature of the allegations that produce legal apprehension by the Court.

Finally, Brennan briefly discussed the organizational plaintiffs whom he also contended should have received an opportunity to demonstrate their allegations.364 Brennan’s discussion of these allegations was shorter but also similar in tone and substance. The organizations noted by Brennan are Housing Council and Rochester Home Builders.

Brennan again repeated the dubious reasons for denying standing to these organizations: The organizations did not have a current project they were seeking to build in Penfield; therefore, their allegations were insufficient to demonstrate injury.365 Brennan took the majority to task for invoking this strident standard:

Again, the Court ignores the thrust of the complaints and asks petitioners to allege the impossible. According to the allegations, the building concerns’ experience in the past with Penfield officials has shown any plans for low- and moderate-income housing to be futile for, again according to the allegations, the respondents are engaged in a purposeful, conscious scheme to exclude such housing.366

363. Id.
364. Id. at 523-29.
365. Id. at 524-25.
366. Id. at 530.
Brennan added that the problem was not the refusal of Penfield to approve or disapprove any particular project. Penfield, according to the allegations as noted by Brennan, "will not approve any project which will provide residences for low- and moderate-income people." Ultimately, Brennan maintained that because the plaintiffs had made allegations of "past injury" and are further asserting their "future intent" to build in Penfield if the "barriers [were] cleared" this was more than "sufficient" to sustain standing in court. The organizations, according to Brennan, possessed the "requisite personal stake" in the litigation's outcome.

In sum, prior to the Warth decision, the organizational plaintiffs referenced above satisfied the Court's precedent for standing in federal court. Likewise, the low- to moderate-income minority plaintiffs also met the prevailing standards at the time of Warth. Warth was a departure from the established standard and was a decision fashioned to conform to certain prevailing attitudes at the time resistant to residential integration.

B. Post-Warth Dissents

On June 26, 1975, The New York Times reported the Warth decision. While the Times reported the opinion as a news story, the opening to the article suggested a little more for the reader: "Slum dwellers cannot attack suburban zoning restrictions on the ground that they deliberately make homes too expensive for the poor and racial minorities to afford."

The suggestion here was that the city was engaged in a deliberate act of exclusionary zoning but the Court simply refused to allow the issues in the lawsuit to be resolved in a judicial forum. The article did not offer any additional passages to elaborate upon this suggestion; however, the implication was obvious. The Times article noted that the majority held that the plaintiffs "lacked legal standing." Justice Brennan's dissent was mentioned numerous times as well. His dissent was described as "sharply worded."

The Washington Post published a three-page commentary to the

367. Id.
368. Id.
369. Id.
371. Id.
372. Id.
373. Id.
decision a few weeks after the decision.\footnote{Randall W. Scott, \textit{Supreme Court Seen Missing Thrust of Case}, \textit{WASH. POST}, July 12, 1975, at E-1.} Randall W. Scott, a local land use attorney,\footnote{The \textit{Post} article describes Scott as a "research attorney in the field of housing and urban growth." \textit{Id.}} authored the commentary. While Scott’s opinion was concerned to a certain extent with the land use issues, Scott mentions the substantive issues avoided by the Court.

Scott described the decision as a “missed opportunity if not a misdirection.”\footnote{\textit{Id.}} In addition, Scott stated that if the decision had reversed the denial of standing by the lower courts, “this unheralded case might have become one of the most important decisions affecting local governments since the inception of formal zoning.” Scott does not allow this point to be taken lightly as like Justice Brennan’s dissent, Scott’s view was again that the Court’s decision to erected a barrier, a higher standard than usual in a case involving race and class. While Scott’s focus was not specifically race or class, the implication was fairly obvious.

Scott described the Court’s holding as erecting “artificially high barriers” that denied the plaintiffs the opportunity to “seek redress of alleged grievances.”\footnote{\textit{Id.}} At the end, Scott also mentioned the issue that is the crux of the \textit{Warth} holding: affordable housing.

“The court backed away from dealing with an enormously important and problematic area,” Scott wrote, “involving the rights of the nation’s citizens in seeking affordable housing.”\footnote{\textit{Id.}}

In the years immediately following the \textit{Warth} decision, legal scholars also addressed the problems brought forth by the opinion. The focus was again on the new and very difficult standard on standing in federal court. The writings on the case reveal problems with the Court’s analysis.

New York University Law School Professor Laurence Gene Sager heavily criticized \textit{Warth} in a 1978 article analyzing the principles enunciated by the decision.\footnote{Lawrence Gene Sager, \textit{Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enterprises, Inc.}, 91 \textit{HARVARD L. REV.} 1373 (1978).} Sager found the Powell opinion to be inconsistent with Powell’s previous writing in the area of standing.\footnote{Id.} Sager described the opinion as “tortured” and noted that the “application of this principle to defeat standing . . . raises
very serious objections."\textsuperscript{382}

Sager wrote that the Court in dismissing the case was demanding “more specific allegations” from the plaintiffs.\textsuperscript{383} Sager proposed that such allegations be included in the complaint and offered two examples. However, both pleading examples provided according to Sager, were inconsistent with “modern federal practice.”\textsuperscript{384} Sager elaborated:

These propositions could easily have been inferred from the actual complaint in the case, and even under stringent pleading standards, the case should have been remanded with instructions to permit amendment of the complaint to include propositions of this order. To demand what the Warth majority seemed to require as a condition for standing is not symptomatic of a sensitive judiciary.\textsuperscript{385}

Sager’s point was federal courts do not require such specificity.\textsuperscript{386} In addition, Sager pointed out the fact that Powell’s decision would not have granted standing under this scenario as well. “Justice Powell leaves little, if any, room for an exclusionary zoning challenge under any other circumstances”\textsuperscript{387} according to Sager.

Sager did not accuse Powell of inherent bias or race and class prejudices but he did allege that Powell and his colleagues in the majority believed that the judiciary should resist rendering zoning decisions on municipalities. This view suggests that there was a personal belief by Powell and the other Justices that the federal government should not become involved with solving the problems of local municipalities especially when race and class are so prevalent. Powell radically interpreted federal standing laws in an effort to prevent racial integration in a suburban city.

Professor Robert C. Ellickson also expressed criticism of the holding in \textit{Warth} shortly after the decision.\textsuperscript{388} While Ellickson only mentioned \textit{Warth} in passing in discussing suburban control over land use by the landowners, Ellickson stressed that efforts by

\textsuperscript{382} \textit{Id}. at 1382.
\textsuperscript{383} \textit{Id}. at 1383.
\textsuperscript{384} \textit{Id}. at 1383-84.
\textsuperscript{385} \textit{Id}. at 1384.
\textsuperscript{386} See Simplified Pleading, 2 F.R.D. 456 (1942).
\textsuperscript{387} Sager, \textit{supra} note 382, at 1384.
\textsuperscript{388} Robert C. Ellickson, \textit{Suburban Growth Controls: An Economic and Legal Analysis}, 86 YALE L. J. 385 (January 1977). At the time of the published article below, Ellickson was a Visiting Professor at Yale Law School. He was a Professor of Law at Stanford Law School.
municipalities to restrict consumers from residing in their cities is the policy that creates the problems. Ellickson wrote that such efforts "may damage a particular subgroup of housing consumers by enacting a residency restriction that forbids those consumers from living in a particular part of town."[^389]

Finally, the *Harvard Law Review*’s annual review of the previous Supreme Court term devoted extensive discussion and critique of the *Warth* decision worth noting.[^390] The *Harvard* article noted that the *Warth* decision and its legal analysis was "inconsistent with the approach taken in other cases."[^391] It was also stressed that in several non-standing cases the Court did not require the stringent requirements as the Court insisted were necessary in *Warth*. The three cases noted by the court are *Village of Euclid v. Ambler Realty Co.*,[^392] *Village of Belle Terre v. Boraas*,[^393] and *James v. Valtierra*.[^394] All three cases involving housing.

The analysis of the meaning of the cases to the decision was very important as well:

These decisions suggest that, when a zoning ordinance deprives an individual of the opportunity to persuade property owners and builders to accommodate his housing needs, a constitutionally cognizable case or controversy has been established. The effect of the Warth holding is to alter the nature of the injury necessary to create justiciability, from loss of opportunity to actual denial of access to existing or planned housing.[^395]

Of these three decisions, *Valtierra* is most interesting. *Valtierra* was a challenge to a constitutional referendum passed by the voters in California that declared "no low-rent housing project should be developed, constructed, or acquired in any manner by a state public body until the project was approved by a majority of those voting at a community election."[^396] Several citizens, eligible for low-income housing, as a result of the referendum, filed suit attacking the referendum on constitutional grounds. The citizens

[^389]: Id. at 413.
[^391]: Id. at 190-91.
[^392]: 272 U.S. 365 (1926).
[^395]: *Standing to Challenge Exclusionary Zoning*, supra note 392, at 191.
[^396]: 402 U.S. at 139.
were successful initially in enjoining enactment of the referendum but the Court reversed their injunction preventing the enforcement of the referendum.

*Valtierra* is not a good decision with respect to fair housing policy. Actions by municipalities to engage in practices that promote residential segregation are upheld. However, the citizens were, at least, afforded an opportunity to pursue legal action against government entities in a legal forum. In *Warth*, the opportunity to present evidence of discrimination on the basis of race, an actual protected class under the law, was denied.

VI. Final Observations and Conclusions

A. The Nixon Legacy

Due to Justice Powell’s decision in *Warth*, President Richard Nixon forged his deep-seated goals in housing in the United States that included the promotion of suburban segregation based upon race and class.\(^{397}\) Powell’s decision in *Warth* allowed the Nixon agenda to move advance in a significant manner. In summary, the goal of integration inherent in the Fair Housing Act of 1968 was marginalized.\(^{398}\) African Americans, in general, remain segregated residentially in the U.S. following the decision and the *Warth* decision is part of that legal legacy.\(^{399}\) While there have been successful efforts at integration, the *Warth* decision is a procedural bar to certain kinds of lawsuits in that might address suburban segregation patterns. Suburban segregation like that perpetuated by the city of Penfield is one of the main culprits in the forging of this legacy.

\(^{397}\) Lamb, *supra* note 128, at 3-4. See also Hutchinson, *supra* note 403.

\(^{398}\) The legislative history of the Fair Housing Act indicates that the law should fight discrimination in housing in the U.S.; however, the law also was passed to promote racial integration in housing in the U.S. Lamb, *supra* note 128, at 10-11.

\(^{399}\) A recent report issued by the National Commission on Fair Housing and Equal Opportunity reports that racial segregation is still a very serious problem in the U.S. The report, in relevant part, stated the following: “When the Fair Housing Act became law in 1968, high levels of residential segregation had already become entrenched. However, the Act’s promise as a tool for deterring discrimination and dismantling segregation remains unfulfilled. During the 40 years since the Act was passed, these segregated housing patterns have been maintained by a continuation of discriminatory governmental decisions and private actions that the Fair Housing Act has not stopped.” NEW: National Commission on Fair Housing and Equal Opportunity, The Future of Fair Housing 23 (Dec. 2008), available at http://www.nationalfairhousing.org/Portals/33/reports/Future_of_Fair_Housing.pdf.
B. The Powell Manifesto: The Hidden Clue?

Of the many Supreme Court Justices nominated to serve on the Court and then confirmed, Justice Lewis Powell fits into the category of Justices who have done very well in that process. The U.S. Senate, despite opposition presented by Congressmen John Conyers of Michigan, overwhelmingly confirmed Powell.400

However, investigative journalist, Jack Anderson, revealed one year following Powell’s confirmation a secret memorandum written by Powell known as “The Powell Manifesto” that probably would have inspired great scrutiny of Powell if it had been discovered prior to his appointment.401 Powell wrote the memorandum to Eugene Sydnor, Jr., Chairman of the Education Committee of the U.S. Chamber of Commerce on August 23, 1971, two months prior to his nomination to the U.S. Supreme Court.402 It was widely circulated within the U.S. Chamber of Commerce and argued that corporations were under attack. Powell’s solution was to endorse a counter-attack by corporations led by the U.S. Chamber of Commerce. This was specifically why Powell sent the memorandum to Syndor.

“No thoughtful person can question that the American economic system is under broad attack.” Powell’s letter began. “This varies in scope, intensity, in the techniques employed, and in the level of visibility.”403 Powell stressed that the attacks on corporations were not “sporadic or isolated . . . from a relatively few extremists or even from the minority socialist cadre.” Powell described the attack as an “assault on the enterprise system . . . broadly based and consistently pursued.”404

The Powell Manifesto is bold; it contains the views of a wealthy, high-achieving lawyer who believes in the free enterprise system and every aspect of that system. It is a class statement; Powell was defending the system that had allowed him to become affluent, and by design, was defending the by-products of that system including poverty and disparities in wealth and income.405

400. JEFFERIES, supra note 19, at 240. Only one senator voted against Powell. Senator Fred Harris of Oklahoma also noted his belief that Powell demonstrated a bias based on economic class.


402. Id.

403. Id.

404. Id.

405. Id.
Powell names “Communists,” “New Leftists,” and “other revolutionaries” as the leaders of the movement against corporate power and insists that the attack can be found coming from “perfectly respectable elements of society: from the college campus, the pulpit, the media, the intellectual and literary journals, the arts and sciences, and from politicians.”

The nature of the attack was serious as well, according to Powell, as financial institutions were subject to violence, students were being taught radical ideologies condemning capitalism, and corporations, overall, were subject to a barrage of criticism from a variety of prominent individuals, the most successful of which is Ralph Nader, a consumer lawyer and highly successful advocate.

Powell’s letter to his friend, Eugene Syndor, stated exactly what needed to be done in order to address the problem with respect to each of the problem areas named in the memorandum. This memorandum, according to at least one commentator, was allegedly the basis for the economic wing of the conservative movement that emerged during the Nixon era and continued for the most part for nearly 40 years. Indeed, in 1975, the conservative think tank, the Heritage Foundation was founded, and the modern conservative movement was unleashed with all of its power and domination of American fiscal policy.

Powell recommended aggressive action to confront the direct threat to the corporate free market system. Corporations should create a position within their companies that will be engaged in seeking to counteract the threat to capitalism. The issue was not just

406. Id.

407. Ralph Nader is a consumer advocate, lawyer, author, and has been named by Time Magazine as one of the 100 Most Influential Americans in the Twentieth Century. For over four decades Ralph Nader has exposed problems and organized millions of citizens into more than 100 public interest groups to advocate for solutions. His efforts have helped to create a framework of laws, regulatory agencies, and federal standards that have improved the quality of life for two generations of Americans. His groups were instrumental in enacting the Occupational Safety and Health Administration (OSHA), the Environmental Protection Agency (EPA), the Consumer Product Safety Commission, and the Safe Drinking Water Act. In 2000, 2004, and 2008, Ralph Nader was a candidate for President of the United States. About Ralph Nader, http://www.votenader.org/about/ (last visited Feb. 17, 2009).

408. The Powell Manifesto, supra note 403.

409. Id.

410. The Heritage Foundation is the nation’s most broadly supported public policy research institute, with more than 390,000 individual, foundation, and corporate donors. The mission of the organization is “to formulate and promote conservative public policies based on the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense.” Heritage Foundation Mission Statement, http://www.heritage.org/press/palm/ mission.cfm (last visited Feb. 17, 2009).

411. The Powell Manifesto, supra note 403.
profit, in Powell’s opinion; it was the survival of free enterprise.\textsuperscript{412}

In addition, Powell recommended the creation of scholars and speakers “of national reputation,” individuals “who do believed in the system” to provide a counterattack on college campuses to the perceived threat to the intellectual attacks Powell noted in the memorandum.\textsuperscript{413} The counterattack upon college campuses also would entail a review of textbooks used to teach students in order to understand to what kind of information was being disseminated to the students. Powell described this aspect of his program as keeping textbooks “under surveillance.”\textsuperscript{414}

Other elements of Powell’s program included the use of television to promote the pro-capitalism message, radio and other media, equal time on college campuses, scholarly journals, books, paperbacks, pamphlets, development of graduate schools of business, advertising, use of the legal system to advance the pro-capitalist vision, and an overall more aggressive attitude in preserving the corporate system.\textsuperscript{415}

With respect to the entire program, Powell was clear as well as to how it had to present itself:

Essential ingredients of the entire program must be responsibility and “quality control.” The publications, the articles, the speeches, the media programs, the advertising, the briefs filed in courts, and the appearances before legislative committees — all must meet the most exacting standards of accuracy and professional excellence. They must merit respect for their level of public responsibility and scholarship, whether one agrees with the viewpoints expressed or not.\textsuperscript{416}

Why is Powell’s role in this policy significant?
Powell’s stance is important because it was during the time period following this manifesto that conservative economic ideals and governmental policies were heavily promoted while, at the same time, economic inequality began to expand significantly in the U.S. It was only after the basic tenets of Powell’s manifesto appeared along with implementation of his ideas that inequality expanded significantly. The statistics during this time period are, indeed,
staggering. The U.S. Census Bureau reported the following in 2004: "The wealthiest 20% of households in 1973 accounted for 44% of total U.S. income... Their share jumped to 50% in 2002, while everyone else's fell. For the bottom fifth, the share dropped from 4.2% to 3.5%.417

Even more striking is a 2006 article from The Philadelphia Inquirer that reported on a survey conducted by Business Week magazine. The data reported is again definitive evidence that the period following the issuance of the Powell memorandum and the implementation of many aspects of Powell's recommendations, economic inequality increased substantially. The Inquirer article reported that in 1980 corporate CEOs were earning 42 times in salary as the "average American worker." By 2000, the CEOs were earning "531 times" the salary of the workers.

This period, where corporations rose to dominate the path of the economy and government policy, can be easily linked in time and in policy to Justice Lewis Powell's dramatic call for conservatives to defend their economic interests in an aggressive and comprehensive manner. The Powell Manifesto, inter alia, has proven to be a good measurement for Justice Powell's core beliefs regarding economic class.

C. If Powell Had Voted to Reverse

Justice William O. Douglas suffered a massive stroke on December 31, 1974, while on vacation in the Bahamas. He was severely incapacitated and was never fully recovered. Douglas did continue to participate in the Court's affairs following the stroke but seven of his colleagues on the Court voted to re-hear any case where he would cast the deciding vote. In an indirect way, this development could have had ramifications for the Warth decision if Powell's vote had been different.

Consider the following: If Justice Powell voted to reverse in Warth, Warth was potentially a 5-4 decision to reverse with Douglas voting with the majority. By March 1975 when oral argument was

419. Id.
420. Id.
421. JEFFERIES, supra note 19, at 416-18.
422. Id.
held, Douglas was effectively muted on the Court with respect to his vote. His vote, if Powell had voted to reverse, was a deciding vote; therefore, the case would have to be re-argued under the agreement forged by the sitting Justices at the time.

President Gerald Ford nominated John Paul Stevens to the Court when Ford took office following the resignation of Richard Nixon in August 1974. Stevens was confirmed. Thus, the vote in *Warth* would have become to Stevens' vote to decide the case.

Stevens recently has been a solid voting member of the liberal wing of the Court, though historically not an ideologue. While he opposes affirmative action programs as a Justice, his views on segregation are different. When he served as a clerk on the U.S. Supreme Court in 1948, Stevens wrote a memorandum stating that segregation is unconstitutional. This is a good indication that Stevens might have, at least, allowed the plaintiffs to present their case to a court of law whether he believed in the merits of the allegations or not.

In conclusion, the decision in *Warth v. Seldin* is a lost moment in the U.S. legal history. The U.S. Supreme Court was afforded an opportunity to open up housing opportunities for minorities and low-income families, or at least, provide a forum where the plaintiffs could try to prove their case, however the Court, with Justice Lewis Powell taking the lead, decided to close the judicial system as the appropriate forum to resolve the issue.

Segregation, in effect, found protection through the U.S. Supreme Court. Perhaps, the plaintiffs in *Warth* did not have a strong case, as Ron Carr, Powell's law clerk, suggested in his writings. However, even Carr, skeptical of the merits of their case, would have provided them with an opportunity to be heard. Did Justice Powell, a man born and bred in the segregated South, and a man of a privileged economic background, miss an opportunity to address housing discrimination in the U.S. by allowing his own beliefs to influence his decision? The evidence suggests that this is precisely what happened.

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423. *Id.* at 420-21.
425. *Id.*