

*HAVENS REALTY CORP. V. COLEMAN:*  
EXTENDING STANDING IN RACIAL  
STEERING CASES TO HOUSING  
ASSOCIATIONS AND TESTERS

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I. INTRODUCTION

In 1968, Congress passed the Fair Housing Act (FHA) under Title VIII<sup>1</sup> in response to concern over discriminatory practices in the housing market.<sup>2</sup> Aiming to produce “truly integrated and balanced living patterns”,<sup>3</sup> the Act prohibited a refusal to sell, rent, negotiate, or “otherwise make unavailable” housing on the grounds of “race, color, religion, sex or national origin.”<sup>4</sup> Since enactment, many ven-

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1. 42 U.S.C. §§ 3602-3619 (1976).

2. Congress has definitively stated its policy objective in passing the Fair Housing Act: “(I)t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.” 42 U.S.C. § 3601 (1976).

Senator Mondale alluded to the purpose of Title VIII when he introduced the fair housing legislation, amendment 524 to H.R. 2516, 90th Cong., 2d Sess. (1968), subsequently part of Title VIII: “(F)air housing legislation is a basic keystone to any solution of our present urban crisis. . . . Declining tax base, poor sanitation, loss of jobs, inadequate educational opportunities, and urban squalor will persist as long as discrimination forces millions to live in the rotting core of central cities.” 114 CONG. REC. 2274 (1968).

In response to Senator Brooke’s expression of hope for integration, Senator Mansfield stated that Title VIII would provide everyone in this country, “the opportunity to freely choose the house which he desires.” 114 CONG. REC. at 2283, 2525.

3. 114 CONG. REC. 3422 (1968) (statement by Senator Mondale).

4. 42 U.S.C. § 3604(a) (1976).

dors of housing have attempted to avoid the FHA prohibitions by engaging in subtle methods of perpetuating housing discrimination.<sup>5</sup>

5. In addition to racial steering, defined at note 6 and accompanying text, *infra*, there exist several other methods of housing discrimination such as: exclusionary zoning, blockbusting, and restrictive covenants.

Exclusionary zoning labels the effects of a municipality's zoning ordinance falling disproportionately upon a certain class (or classes) of persons, usually the lower-income groups or members of minorities. This is not generally a result of direct quotas. Population stagnation is a consequence of limiting property development or timing such development so as to prevent growth. D. MOSKOWITZ, EXCLUSIONARY ZONING LITIGATION 18 (1977). See *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975) (held a developing municipality may not by a system of land use regulation make it physically and economically impossible to provide low- and moderate-income housing in the municipality for different categories of people who need and desire it); *Surrick v. Zoning Bd.*, 476 Pa. 182, 382 A.2d 105 (1977) (ordinance invalidated that excluded multifamily dwellings by having a one-acre minimum in a residential district); *Township of Williston v. Chesterdale Farms, Inc.*, 462 Pa. 445, 341 A.2d 466 (1975) (zoning ordinance that provided for apartment construction in only 80 of 11,589 acres in the township was unconstitutionally exclusionary).

Blockbusting is one means of inducing complete racial turnover in a neighborhood by high-pitched broker activity centered around excessive solicitation of sales at greatly lowered prices. Note, *Legal Control of Blockbusting*, 1972 URBAN L. ANN. 145 (1972). See *United States v. Bob Laurence Realty, Inc.* 474 F.2d 115 (5th Cir.), *cert. denied*, 414 U.S. 826 (1973), *reh'g denied* 414 U.S. 1087 (upheld anti-blockbusting provision of FHA and reached illegal group activities even if individual members did not engage in the practice or pattern); *Brown v. State Realty Co.*, 304 F. Supp. 1236 (N.D. Ga. 1969) (statements of a real estate company to white property owners that a neighborhood was "going colored" violated § 804(a)); *but see United States v. Saroff*, 377 F. Supp. 352 (E.D. Tenn.), *aff'd*, 516 F.2d 902 (6th Cir. 1975) (an agent's telling home buyers on three occasions "the coloreds are moving in" and he "wasn't showing anything in that area except to colored people" did not constitute a violation of § 804(e)).

Restrictive covenants are agreements or promises by two or more individuals, in writing in a deed, to restrict the use of property in some manner. These limitations permit landowners to set up conditions for development of the land. See generally MacEllven, *Land Use Control Through Covenants*, 13 HASTINGS L.J. 310 (1962). See *Crowley v. Knapp*, 94 Wis. 2d 421, 288 N.W.2d 815 (1980) (the court held a "residential purposes only" covenant did not exclude a run-for-profit group home for mentally retarded adults); *Starmount Co. v. Greensboro Memorial Park, Inc.*, 233 N.C. 613, 65 S.E.2d 134 (1951) (restrictions limiting use of property to residential purposes and single-family dwellings, and prohibiting commercial uses other than truck gardening and poultry raising for 22 years were reasonable); *Clifton v. Puente*, 218 S.W.2d 272 (Tex. Civ. App. 1949) (state court's refusal to hold for purchasers of Mexican descent in his action for land where covenant prohibited sale of property to persons of Mexican descent would amount to a violation of equal protection).

Redlining is a form of discrimination concerning financial policies of a lending institution in granting mortgages or loans. When this practice excludes certain communities due to racial factors, it constitutes a violation of 42 U.S.C. § 3605 (1976). See *Dunn v. Midwestern Indem., Etc.*, 472 F. Supp. 1106 (S.D. Ohio 1979) (a failure

Racial steering<sup>6</sup>—a tactic by which a realtor “steers” a prospective buyer or renter to accommodations in areas primarily inhabited by members of the buyer or renter’s racial or ethnic group—is a major method of preserving segregated housing.<sup>7</sup>

Typical victims of racial steering seldom have the ability, expertise, or resources to prove a racial steering violation.<sup>8</sup> Consequently, enforcement of the FHA prohibition against racial steering often occurs through actions instigated by testers and housing associations.<sup>9</sup> Testers pose as homeseekers in order to determine whether a particular realtor will engage in unlawful steering practices.<sup>10</sup> A group of testers is uniquely able to penetrate the realtor’s subterfuge and make the difficult factual showing of discriminatory intent.<sup>11</sup> Housing associa-

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or refusal to provide property insurance on dwellings based on racial composition of the neighborhood violated FHA); *Laughman v. Oakley Building & Loan Co.*, 408 F. Supp. 489 (S.D. Ohio 1976) (violation of FHA where race was a consideration in the denial of a loan). See also Baptiste, *Attacking the Urban Redlining Problem*, 56 B.U. L. REV. 989 (1976).

6. The practice of racial steering generally evolves from a real estate agent’s judgment that the customer is “either incompatible or unacceptable to the residents of a housing area due to his race, religion or national origin, or that the residents of an area will be unacceptable to that buyer due to racial, religious or ethnic differences.” See Note, *Real Estate Steering and the Fair Housing Act of 1968*, 12 TULSA L.J. 760 (1977) (hereinafter cited as *Real Estate Steering*).

One explanation for the agent or broker’s decision to steer is the real estate industry’s belief that property values drop when minorities begin to settle in white communities. Note, *Racial Steering: The Real Estate Brokers and Title VIII*, 85 YALE L.J. 808, 809 (1976) (hereinafter cited as *Racial Steering*).

7. See *Zuch v. Hussey*, 394 F. Supp. 1028 (E.D. Mich. 1975) (conduct which may not result in a refusal to deal may still constitute illegal steering, and it is irrelevant whether the realtor or witness initiated a discussion of race); but see *Tomlinson Agency v. Pennsylvania*, 11 Pa. Commw. 277, 312 A.2d 118 (1973) (omission of a home’s availability without more evidence did not result in a violation where it could be caused by distraction or absentmindedness). See also *Racial Steering, supra*, note 6, at 809-12.

8. *Village of Bellwood v. Gladstone Realtors*, 569 F.2d 1013, 1016 (7th Cir. 1978) (racial steering is difficult to prove other than by comparing the neighborhoods homeseekers are directed to.).

9. *Gladstone v. Village of Bellwood*, 441 U.S. 91 (1979); see *Coles v. Havens Realty Corp.*, 633 F.2d 384 (4th Cir. 1980), *aff’d in part, sub. nom.* *Havens Realty Corp. v. Coleman*, 50 U.S.L.W. 4232 (U.S. Feb. 24, 1982) (No. 80-988). *Sherman Park Community Assoc. v. Wauwatosa Realty Co.*, 486 F. Supp. 838 (E.D. Wis. 1980).

10. For a general discussion of the roles testers play and the important functions they serve as witnesses, see *United States v. Youritan Constr. Co.*, 370 F. Supp. 643, 647 n.3, 650, (N.D. Cal. 1973), *modified on other grounds*, 509 F.2d 623 (9th Cir. 1974).

11. 569 F.2d at 1016.

tions formed to promote fair housing often finance and coordinate racial steering investigations and litigation.<sup>12</sup> Despite their usefulness in FHA litigation, testers and housing associations have found the threshold issue of standing to sue to be a major barrier to their direct participation in a racial steering case.<sup>13</sup>

Courts have characterized testers as falling within the broader category of "private attorneys general"—persons seeking to further an interest or redress an injury common to a broad class of persons.<sup>14</sup> Private attorneys general and testers have difficulty meeting the constitutional and prudential prerequisites to standing to sue because their injuries are not purely private or personal.<sup>15</sup> Housing associations have also had difficulty showing a sufficient injury to meet standing requirements.<sup>16</sup> After briefly discussing racial steering<sup>17</sup> and general standing concepts,<sup>18</sup> this Note discusses the evolution of standing under the FHA.<sup>19</sup> Specifically, this Note examines the Supreme Court's recent expansion of standing to include testers and housing associations.

## II. RACIAL STEERING UNDER TITLE VIII

Plaintiffs allegedly victimized by racial steering encounter both substantive and procedural barriers in seeking judicial relief. Section 804<sup>20</sup> of the Fair Housing Act defines the substantive prerequisites for proving that realtor conduct is unlawfully discriminatory. Section 804(a) establishes a broad proscription against those who would

12. See *Coles v. Havens Realty Corp.*, 633 F.2d 384 (4th Cir. 1980) (Housing association investigated allegations of discrimination, referred complaints to authorities, and took steps to eliminate discriminatory housing practices).

13. See *TOPIC v. Circle Realty*, 532 F.2d 1273, (a community volunteer organization was denied standing to challenge alleged steering practices) (9th Cir. 1976), *cert. denied* 429 U.S. 859 (1976).

14. See *Trafficante v. Metropolitan Life Ins.*, 409 U.S. 205, 211 (1972). (As HUD has no enforcement powers and assuring fair housing is a large task, plaintiff's act as private attorneys general to further an important congressional policy).

15. *TOPIC v. Circle Realty*, 532 F.2d 1273 (9th Cir. 1976) *cert. denied*, 429 U.S. 859 (1976). Plaintiffs who did not make bonafide efforts to seek housing were not direct victims of an alleged steering.

16. 569 F.2d at 1017.

17. See notes 20-43 and accompanying text *infra*.

18. See notes 44-93 and accompanying text *infra*.

19. See notes 94-222 and accompanying text *infra*.

20. 42 U.S.C. § 3604 (1976).

"otherwise make unavailable" housing on a discriminatory basis.<sup>21</sup> Subsequent sections specifically prohibit discriminatory advertising,<sup>22</sup> false statements regarding availability of housing,<sup>23</sup> and discrimination in providing general services connected with the sale or lease of a dwelling.<sup>24</sup>

The practice of racial steering does not fall neatly within any of the FHA proscriptions. The difficulty in utilizing the Act to combat racial steering results from the fine, conceptual line between the real estate agent who merely provides information to the prospective buyers, and the agent who intentionally directs them into "homogeneous" communities.<sup>25</sup> In determining on which side of the line the activities of a particular agent fall, courts make a factual, case by case inquiry into whether the realtor's actions are racially motivated.<sup>26</sup> For example, an agent may describe neighborhoods as "uncomfortable" or "changing", "good" or "nice" to steer prospective buyers away from or into that area.<sup>27</sup> A court must determine whether use

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21. 42 U.S.C. § 3604(a) (1976).

22. 42 U.S.C. § 3604(c) (1976). § 804(c) makes it illegal "to make, print or publish, or cause to be made, printed, or published any notice, statement or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, or national origin, or an intention to make any such preference, limitation or discrimination." *Id.*

23. 42 U.S.C. § 3604(d) (1976). This section makes it unlawful "to represent to any person because of race, color, religion, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available." *Id.*

24. 42 U.S.C. § 3604(b) (1976). This provision makes it a violation "to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, or national origin." *Id.*

25. In the blockbusting context, *see, e.g.*, *United States v. Saroff*, 377 F. Supp. 352 (E.D. Tenn. 1974) *aff'd* 516 F.2d 902 (1975). However, some statements by real estate agents regarding a decline of certain neighborhoods may be protected as free speech. *See Dekalb Real Estate Bd., Inc. v. Chairman and Bd. of Comm'rs*, 372 F. Supp. 748, 755 (N.D. Ga. 1973).

26. The defendant has the burden of showing race was not a main consideration in the steering. *See Seaton v. Sky Realty Co., Inc.*, 491 F.2d 634 (7th Cir. 1974) (humiliation inferred from racial motivation in awarding damages); *Haythe v. Decker Realty Co.*, 468 F.2d 336 (7th Cir. 1972) (racial motivation not disregarded just because it was not the only or total factor of discrimination).

27. *Zuch v. Hussey*, 394 F. Supp. 1028, 1039 (E.D. Mich. 1975) (it is not necessary to show steering a prospective buyer was on a racial basis in that the "steered" areas were all white). Relating code words to discriminatory intent arguably impinges upon First Amendment rights of the agent. However, the First Amendment has some limitations, such as commercial speech or making remarks to further housing discrimination. Perhaps the less benign the motive the less the First Amendment protection.

of such code words manifests an unlawful discriminatory intent, or whether such comments are lawful comments concerning racial composition that are accurate and not intended to foster racial bias.<sup>28</sup>

In order for victims of racial steering to surmount these substantive hurdles, they must meet certain procedural requirements. The Fair Housing Act provides three alternative enforcement mechanisms.<sup>29</sup> Section 813 authorizes the Attorney General to redress wrongs resulting from any discriminatory practice that "raise[s] an issue of public importance."<sup>30</sup> Section 810<sup>31</sup> allows enforcement suits by a private party claiming past or potential "irrevocably injur[y] by a discriminatory housing practice that is about to occur."<sup>32</sup> Such a party is a "person aggrieved" for purposes of standing under the section.<sup>33</sup> The private plaintiff may file a complaint with the Secretary of Housing and Urban Development (HUD) within 180 days of the alleged discrimination.<sup>34</sup> The Secretary has the authority to use informal measures to settle meritorious disputes.<sup>35</sup> If remedies under state or local law appear substantially equivalent to the Title VIII remedy,<sup>36</sup> a

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*See* United States v. Bob Laurence Realty, Inc., 474 F.2d 115, 121 (5th Cir. 1973) (Fair Housing Act reaches commercial speech made to reap profits from racial representation).

28. In the analogous blockbusting situation, see *Quinlan and Tyson, Inc. v. City of Evanston*, 25 Ill. App. 3d 879, 324 N.E.2d 65 (1975); *Abel v. Lomenzo*, 18 N.Y. 2d 619, 219 N.E.2d 289, 272 N.Y.S.2d 771 (App. Ct. N.Y. 1966) (advising prospective buyers as to racial make-up of different areas not prohibited since the information was accurate and not meant to encourage racial prejudice).

29. 42 U.S.C. §§ 3610, 3612, 3613 (1976).

30. 42 U.S.C. 3613 (1976). The Attorney General, in filing a complaint may also include a request for a permanent or temporary injunction, restraining order, or other preventive relief against those engaged in the discriminatory practice. *Id.*

31. 42 U.S.C. § 3610 (1976).

32. *See, e.g.,* *Trafficante v. Metropolitan Life Ins.*, 409 U.S. 205, 208 (1972) (Section 810's "person aggrieved" has a broad meaning, as it is defined as "(a)ny person who claims to have been injured by a discriminatory housing practice"). For a more in depth discussion of *Trafficante*, see notes 96-104 and accompanying text *infra*.

33. 42 U.S.C. § 3604 (1976).

34. 42 U.S.C. § 3610(b) (1976).

35. 42 U.S.C. 3610(a) (1976). The Secretary has the power to resolve a complaint by informal means of conference, conciliation and persuasion. *Id. See, e.g.,* *Trafficante v. Metropolitan Life Ins.*, 409 U.S. 205, 207 (1972) (as HUD failed to obtain voluntary compliance within the statutory period, plaintiffs brought suit in District Court under § 810(d) of the Act).

36. 42 U.S.C. § 3610(d) (1976). At present there are 22 states HUD considers having substantially the same remedies it does: Alabama, Colorado, Connecticut, Indiana, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Nebraska,

plaintiff suing under Section 810 must instead pursue those avenues of relief.<sup>37</sup> In the absence of a comparable state or local remedy, Section 810 expressly creates a private cause of action under the Act.<sup>38</sup>

Section 812<sup>39</sup> provides a third enforcement scheme that allows a victim of housing discrimination to bring an action in federal district court without delay.<sup>40</sup> Section 812 does not include the "person aggrieved" requirement set out in Section 810.<sup>41</sup> This omission raises the question of whether or not indirectly injured persons may sue under Section 812.<sup>42</sup> Since Section 812 lacks the "person aggrieved" standing limitation, the provision arguably extends standing to a class of persons beyond those protected by Section 810.<sup>43</sup> Thus, a potential private plaintiff must be a "person aggrieved" before he has standing under § 810 and, perhaps, § 812 to request redress for any injury suffered or threatened.

### III. GENERAL CONCEPTS ABOUT STANDING

Federal standing law is rooted in the "case or controversy" requirement of Article III of the United States Constitution,<sup>44</sup> and certain prudential limitations developed by the federal judiciary to restrict its authority to hear and decide cases.<sup>45</sup> For a claim to meet

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Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Virginia, West Virginia, and Wisconsin. Also included is the District of Columbia, 24 C.F.R. § 115.11 (1979).

37. 42 U.S.C. 3610(c) (1976). If a state or local fair housing law has remedial provisions comparable substantially to those in the Fair Housing Act, the Secretary must refrain from further action after notifying that state or local agency of the complaint as long as that agency acts with reasonable promptness. *Id.*

38. 42 U.S.C. 3610(d) (1976). If the Secretary is unable to resolve the dispute within the 30-day period in subsection (c), the person aggrieved has the right to bring suit within another 30 days in the United States District Court. *Id.*

39. 42 U.S.C. 3612(a) (1976). This section requires that the action be filed within 180 days after the alleged discriminatory housing practice occurred. *Id.*

40. *Id.*

41. 42 U.S.C. § 3612 (1976).

42. *See Gladstone v. Village of Bellwood*, 441 U.S. 91 (1979). The controversy received early attention in *Trafficante v. Metropolitan Life Ins.*, 409 U.S. at 208, and continued in *Gladstone v. Village of Bellwood*, 441 U.S. at 103 (the absence of "person aggrieved" in § 812 does not indicate standing is more restricted under that section than under § 810).

43. 441 U.S. at 103 n.9.

44. U.S. CONST. Art. III, § 2.

45. According to these prudential limitations: 1) claimants may not assert rights

the Article III requirement, the plaintiff must show that a "case or controversy" exists between himself and the defendant.<sup>46</sup> The threshold standing question is whether or not the plaintiff has asserted such a "personal stake in the outcome of the controversy" as will justify the Court's intervention.<sup>47</sup>

Recent courts have used the two-part test established by the Supreme Court in *Data Processing Service Organizations, Inc. v. Camp*.<sup>48</sup> First, to determine both the constitutional and prudential standing requirements, a plaintiff must allege that he incurred an "injury in fact" as a result of the challenged practice.<sup>49</sup> This showing satisfies the constitutional "case or controversy" requirement.<sup>50</sup> Secondly, the plaintiff must assert an interest that arguably falls within

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of third parties (except in special situations); 2) plaintiff's interest must fall within the zone of interests protectable by the statute involved; and 3) a party generally must allege an injury to himself, not one society shares with him. *See, e.g.,* Warth v. Seldin, 422 U.S. 490, 499 (1975). *See also* notes 105-110 and accompanying text *infra*.

46. U.S. CONST. Art. III, § 2. *See* Powell v. McCormack, 395 U.S. 486 (1976) (petitioner's suit for back salary as a member of the House of Representatives for barring his seating in the 90th Congress was a "case" within Article III after he became seated in the 91st Congress); Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937) (where insurer denied total and permanent disability existed under a policy which lapsed because premiums were not paid and the holder of the policy claimed the disability entitled him to cash benefits anyway, an "actual controversy" existed to allow the suit to be brought); Dewey & Almy Chemical Co. v. American Anode, 137 F.2d 68 (3rd Cir. 1943) (where defendant used patents as an "economic weapon" against other alleged infringers to include similar methods practiced commercially by plaintiff, an "actual controversy" existed to determine patent validity even though defendant did not know until the suit was filed that plaintiff practiced the process commercially). *But see* Preiser v. Newkirk, 422 U.S. 395 (1975) (respondent's transfer without a hearing from a medium to a maximum security prison because of inmate conflicts over a prisoners' "union" was not a "case or controversy" as there was no reasonable expectation now that the wrong would be repeated); United States v. Alaska S.S. Co., 253 U.S. 113 (1920) (there was no "controversy" in a suit in which the Interstate Commerce Commission was temporarily prevented from requiring water carriers to use certain bills of lading as the Commission lacked the power to prescribe them due to legislation passed pending an interlocutory appeal requiring changes in the bills).

47. Baker v. Carr, 369 U.S. 186, 204 (1962) (plaintiffs allegedly qualified to vote, as residents of Tennessee counties, for members of the General Assembly for his county sued on their own behalf and those of all qualified voters similarly situated in Tennessee to challenge a 1901 statute's apportionment plan of seats in the Assembly as arbitrary and capricious).

48. 397 U.S. 150 (1970). *See* notes 77-83 and accompanying text *infra*.

49. *Id.* at 152-53.

50. *Id.* at 152.

the “zone of interests” protected by the Constitution or statute.<sup>51</sup> This additional requirement represents judicial self-restraint.<sup>52</sup>

### A. *Injury in Fact*

The injury in fact component of the two-part test characterizes the type of injury plaintiff must incur in order to satisfy the case or controversy requirement. First, absent a congressional declaration that injury in fact is met,<sup>53</sup> a plaintiff must allege an actual or threatened, rather than speculative, harm.<sup>54</sup> The plaintiff must assert a “personal stake” in the outcome or a “distinct and palpable injury to himself.”<sup>55</sup> Thus, traditional standing law requires an allegation of a personal constitutional or statutory harm rather than that of a third party.<sup>56</sup>

Courts have extended the traditional personal stake requirement by allowing an interest group or association<sup>57</sup> to meet the injury in fact element where the group makes allegations sufficient to establish that its members individually possess personal stakes in the result of the litigation.<sup>58</sup> Utilizing this representational standing test, the

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51. *Id.* at 153.

52. *Barrows v. Jackson*, 346 U.S. 249, 255 (1953).

53. *See Associated Indus. of N.Y. State Inc. v. Ickes*, 134 F.2d 694, 704 (2d Cir.) (Frank, J.) *vacated as moot* 320 U.S. 707 (1943) (although Congress cannot authorize a suit absent an actual justiciable controversy, Congress may authorize the Attorney General or another official to bring suit to enforce a statutory obligation, and in like fashion. Congress can authorize private persons to bring such suits). The reach of *Associated Industries* may be limited by recent Supreme Court decisions. *See Valley Forge Christian College v. Americans United for Separation of Church and State*, 50 U.S.L.W. 4103 (U.S. Jan. 12, 1982) (denying taxpayer standing predicated on the establishment clause to challenge the transfer of surplus government property to a religious institution). In *Valley Forge*, the Court appears to distinguish constitutional injury-in-fact, which Congress cannot alter, from prudential injury-in-fact and other prudential requirements which Congress can abolish or alter. *Id.* at 4105-06. *Cf. id.* at 4110-11 (Brennan, J., dissenting).

54. *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973). The Court acknowledged the alterations in the doctrine of standing over the last decade, and that the “threatened or actual” harm requirements remained unchanged. *Id.* *City of Rohnert Park v. Harris*, 601 F.2d 1040 (9th Cir. 1979) (city seeking to enjoin its urban renewal agency and a developer from building a regional shopping center because it allegedly violated antitrust and housing laws had only a speculative interest and no proximate threat from any violations).

55. *Warth v. Seldin*, 422 U.S. 490, 501 (1975) (emphasis added).

56. *Id.* at 499.

57. *Id.* at 510-511.

58. *Id.* at 511.

Supreme Court granted standing to an association in *Hunt v. Washington Apple Advertising Commission*<sup>59</sup> even though the association itself suffered no injury.<sup>60</sup> The Court found the association's members suffered injury in fact, and the interests sought to be protected by the litigation related to the organization's purposes.<sup>61</sup> Based on these findings the Court concluded neither the claim nor the requested relief necessitated participation by individual members in the suit.<sup>62</sup>

The Supreme Court, however, has refused to grant an association standing where the association predicates its standing claim solely on its asserted representation of broader public interests. In *Sierra Club v. Morton*,<sup>63</sup> the Court denied the plaintiff-organization standing to bring suit challenging an administrative order allowing commercial development of a national forest and game refuge.<sup>64</sup> The Sierra Club alleged no direct harm to itself or its members but claimed standing as a representative of environmentally concerned persons.<sup>65</sup> The Court required the organization to allege injury to its members, rather than the public at large.<sup>66</sup>

Crucial to carrying the injury in fact burden, an individual plaintiff or an association must demonstrate a causal connection between the challenged unlawful activity and the alleged personal harm.<sup>67</sup> The present statement of the causation standard, established in *Warth v.*

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59. 432 U.S. 333 (1977). Plaintiffs in *Hunt* challenged a North Carolina statute that required all apples sold or shipped into North Carolina in closed containers only be marked with the appropriate federal grade or identified they are not graded. Claimants consisted of a statutory agency for promoting the apple industry in Washington state, including 13 state growers/dealers chosen by their peers, all of whom were required to finance the agency's operations. *Id.* at 337.

60. *See* NAACP v. Alabama, ex rel Patterson, 357 U.S. 449 (1958) (The probability that the Association itself may suffer an injury in fact if financial support and membership so that an association has standing on its own).

61. 432 U.S. at 342.

62. *Id.*

63. 405 U.S. 727 (1972).

64. *Id.* at 741.

65. *Id.* at 730. The plaintiff sued with "a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country." *Id.*

66. *Id.* at 735. The court stated that only those who use the park and will have the recreational and aesthetic values decline as a result of the development would be directly injured.

67. 422 U.S. at 508.

*Seldin*,<sup>68</sup> and since modified,<sup>69</sup> requires the plaintiff to show that “but for” the alleged unlawful act of the defendant, there exists a “substantial probability” that the plaintiff would not suffer the claimed injury.<sup>70</sup>

The causation requirement presents a difficult barrier to litigants suing as private attorneys general.<sup>71</sup> The Supreme Court, however, has proven willing to grant standing on rather attenuated chains of causation. In *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*,<sup>72</sup> the Court found an injury in fact to SCRAP’s members and allowed them to challenge an agency order imposing a surcharge on railroad freight rates. The organization claimed the higher rates would increase the use of nonrecyclable commodities, and the production of these commodities would result in consumption of more natural resources.<sup>73</sup> Some of these resources might be extracted from the geographic area in which SCRAP’s members live, and therefore impair their enjoyment of the outdoors.<sup>74</sup> In addition, SCRAP alleged that the increased use of nonrecyclable goods would result in persons discarding more refuse in the national parks enjoyed by SCRAP members.<sup>75</sup> Despite the rather strained causal connection in *SCRAP*, a plaintiff faces greater difficulty establishing a causal link whenever the alleged injury is more public than personal.<sup>76</sup>

In summary, individuals seeking to bring suit must allege a distinct and personal injury. Associations generally have standing only as representatives of their members, who would have standing had they sued individually. The association cannot establish standing by desiring to vindicate an injury to members of the public in general. Regardless of whether the suit is brought by individuals or associations in their representative capacity, the litigants must present a causal link between the asserted unlawful action and the claimed injury.

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68. 422 U.S. 490 (1975).

69. See *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978).

70. 422 U.S. at 504.

71. *Id.* at 505.

72. 412 U.S. 669 (1973).

73. *Id.* at 675-676.

74. *Id.* at 687.

75. *Id.* at 676.

76. *Id.* at 685.

### B. *Zone of Interests*

Under the zone of interests component of the *Data Processing* test, the plaintiff must show that the interest that he seeks to vindicate is at least arguably protected by the Constitution or statute.<sup>77</sup> *Data Processing* and *Barlow v. Collins*,<sup>78</sup> illustrate the "arguably protected" standard. In *Data Processing*, plaintiff-vendors of data processing services to businesses challenged a ruling by the Comptroller of the Currency allowing national banks to make data processing services available to their corporate customers and other banks.<sup>79</sup> Plaintiffs alleged that the ruling arguably violated the Banking Act<sup>80</sup> which limits the services that national banks may provide.<sup>81</sup> Plaintiffs further alleged that Congress intended the Act, in part, to protect those businesses that would suffer competitive harm if banks performed services beyond narrow banking functions.<sup>82</sup> The Supreme Court held that vendors of data processing services arguably fell within the zone of interests protected by the Act.<sup>83</sup>

In *Barlow*, the companion case to *Data Processing*, the Supreme Court granted standing to plaintiffs arguably protected by federal statute.<sup>84</sup> Tenant farmers eligible to receive cash subsidy payments under the Upland Cotton Program<sup>85</sup> sought to challenge agency regulations allowing tenant farmers to assign future profits to their landlords for a payment of rent.<sup>86</sup> Plaintiffs alleged that Congress, in establishing the subsidy program, intended to benefit tenant farmers, and that the regulations would frustrate this purpose by allowing landlords to force the tenants to assign Program benefits to the landlords as a prerequisite to obtaining leases to work the land.<sup>87</sup> The

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77. 397 U.S. at 153.

78. 397 U.S. 159 (1969).

79. 397 U.S. 151 (1969).

80. Bank Service Corporation Act of 1962, 76 Stat. 1132, 12 U.S.C. § 1864.

81. 397 U.S. at 155.

82. 397 U.S. at 152.

83. *Id.* at 156.

84. 397 U.S. at 167.

85. The Secretary of Agriculture was authorized to pay a farmer in advance of the growing season up to 50% of the estimated benefits due him. The Secretary held the authority to make such payments in 7 U.S.C. § 1444(d)(5) (1964 ed., Supp. IV). 397 U.S. at 160 n.1.

86. 397 U.S. at 162.

87. *Id.* at 163.

Court concluded that the legislative history of the relevant statutory provisions clearly placed the tenant farmers within the zone of interests protected by the Act.<sup>88</sup> As *Barlow* and *Data Processing* demonstrate, courts willingly recognize a broad class of people who may challenge administrative action.<sup>89</sup> Apart from economic injuries, the zone of interest may include "aesthetic, conservational, and recreational values."<sup>90</sup> For example, in *Scenic Hudson Preservation Conference v. FPC*,<sup>91</sup> the Second Circuit held that a conservationist association had exhibited such a special interest in the aesthetic, conservational, and recreational aspects of power development to be an "aggrieved party" under the Federal Power Act.<sup>92</sup> Judicial inclination to construe broadly the "zone of interest" reflects judicial sentiment in favor of relaxing standing requirements if "private attorneys general" can further vital public policies.<sup>93</sup> This relaxed standing doctrine extends to plaintiffs under the Fair Housing Act.

#### IV. THE DEVELOPMENT OF STANDING UNDER FAIR HOUSING CASES

The class of fair housing plaintiffs with standing to sue has expanded in recent years, both in terms of the plaintiff's identity and the nature of the injury alleged.<sup>94</sup> The pre-*Bellwood* decisions involving general fair housing claims reflect the liberalization of standing requirements and provide the foundations for the post-*Bellwood* racial steering cases granting standing under the FHA to fair housing

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88. *Id.* at 164.

89. *Id.* at 165.

90. Courts have also recognized the validity of aesthetic considerations in zoning restrictions, where it serves a public interest and is formulated rationally. For a discussion of these decisions, see Note, *Aesthetic Zoning*, 11 URBAN L. ANN. 295, 303 (1976).

91. 354 F.2d 608 (2nd Cir. 1965), *cert. denied* 384 U.S. 941 (1966).

92. *Id.* at 616.

93. See *Allen v. State Bd. of Elections*, 393, 215 U.S. 544, 556 (1969) (The Voting Rights Act of 1965 has a broad enough purpose to grant the individual citizen standing to insure his city or county government complies with the Act's approval requirements); *Newman v. Piggie Park Enterprises, Inc.* 390 U.S. 400, 402 (1968) (A plaintiff seeking an injunction under Title II of the Civil Rights Act does so for himself and as a "private attorney general" indicating a policy of the highest congressional priority).

94. Plaintiff's identity refers to the scope of the class of potential litigants. The nature of the harm characterizes a distinction in degree rather than kind. See notes 135-222 and accompanying text *infra*. For a thorough discussion of this development, see SCHWEMON, *Standing to Sue in Fair Housing Cases*, 41 OHIO S.L.J. 3 (1980).

associations and testers.<sup>95</sup>

The first standing case to reach the Supreme Court under the Fair Housing Act was *Trafficante v. Metropolitan Life Ins.*<sup>96</sup> Two tenants of an apartment complex, one black and the other white, filed separate complaints alleging that the apartment complex owner had discriminated against non-white rental applicants.<sup>97</sup> Plaintiffs alleged an injury in fact consisting of lost social benefits of living in an integrated environment, missed professional advantages from residing with minority groups, and embarrassment and economic harm, socially and professionally, in being labelled "white ghetto" residents.<sup>98</sup> The Court held plaintiffs had standing to bring suit under Section 804<sup>99</sup> of the FHA, even though lost benefits of living in an integrated community constituted an indirect injury.<sup>100</sup>

The Court found the plaintiffs easily fell within the "broad and inclusive" language of the Act.<sup>101</sup> In granting standing the Court emphasized that refusal to allow private attorneys general to seek enforcement would frustrate congressional intent to halt discriminatory housing practices.<sup>102</sup> The Court noted that suits by the Attorney General to vindicate the FHA are limited by shortage of staffing and the authority to sue only if there is "a pattern or practice" of housing discrimination.<sup>103</sup> This led the Court to conclude Congress intended to grant standing as broadly as the Constitution allows, thus minimizing zone of interest inquiry.<sup>104</sup>

In *Warth v. Seldin*,<sup>105</sup> the Supreme Court addressed the issue of standing as it applied to persons seeking to challenge alleged racially motivated exclusionary zoning in an area in which they did not re-

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95. See notes 156-222 and accompanying text *infra*.

96. 409 U.S. 205 (1972).

97. *Id.* at 206-07.

98. *Id.* at 208.

99. 42 U.S.C. § 3604 (1976).

100. *Id.* at 209-210.

101. *Id.* at 209.

102. 409 U.S. at 211.

103. *Id.* at 108. *Trafficante* emphasized the limited staff of the Housing Section of the Civil Rights Division who acts for the Attorney General. The court further stated HUD's lack of enforcement powers and the momentous job of overseeing fair housing minimizes the Attorney General's role, the primary enforcement mechanism must be private suits.

104. *Id.* at 209.

105. 422 U.S. 490 (1975).

side.<sup>106</sup> The individual plaintiffs—low income and minority residents of the Rochester, New York area—alleged that the zoning ordinance in suburban Penfield in violation of the Constitution and the Civil Rights Act of 1968,<sup>107</sup> precluded the construction of low- and moderate-income housing in Penfield.<sup>108</sup> In finding the individual plaintiffs did not have standing, the Court held that petitioners present a successful standing claim when they allege facts from which a court could reasonably infer that absent the restrictive zoning plan, the individual plaintiffs would be able to lease or purchase in Penfield.<sup>109</sup> The Court found the present complaint defective because the plaintiffs failed to demonstrate the existence of a specific planned housing project in which the plaintiffs could reside if the court struck down the ordinance.<sup>110</sup>

Having rejected the standing claim of the individual plaintiffs in *Warth*,<sup>111</sup> the Court denied standing<sup>112</sup> to Metro-Act<sup>113</sup>—an organi-

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106. *Id.* at 494-95 (setting out the demographic characteristics of the individual plaintiffs).

107. *Id.* at 493. The plaintiffs alleged the Penfield ordinance violated their First, Ninth, and Fourteenth Amendment rights and those civil rights protected under 42 U.S.C. §§ 1981-83 (1976 & Supp. III 1979). *Id.*

108. Plaintiffs alleged the Penfield ordinance allocated 98% of the town's available land to single-family use and reserved only 0.3% of the available land to multi-family use. As to the single-family zoning, regulations on lot size, setback, floor area, and habitable space, increased the cost of single-family housing beyond the reach of low- and moderate-income persons. As to the available multi-family uses, low density and other requirements rendered multi-family developments too costly for low- and moderate-income residents. Plaintiffs also alleged Penfield's zoning authorities acted improperly when developers presented them with proposals for low- and moderate-income housing. 422 U.S. at 495.

109. *Id.* at 504 (citing *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973)).

110. *Id.* at 504-508. The Court stated that despite claims by the individual plaintiffs that they had attempted and failed to find adequate low- and moderate-income housing in Penfield, plaintiffs failed to show that their inability to locate housing directly resulted from the alleged violations of the defendants. *Id.* at 504. The Court emphasized that plaintiffs' injuries can be remedied only if developers come forward with suitable projects. The Court found no indication that planned developments submitted to and rejected by Penfield's zoning authorities in the past, would be affordable to persons at the plaintiffs' income levels. *Id.* at 505-07.

111. Two years later, in *Village of Arlington Heights v. Metropolitan Housing Development Corporation (MHDC)*, 429 U.S. 252 (1977), the Supreme Court granted standing to individual, non-resident plaintiffs to challenge a zoning ordinance which excluded low-income housing from the village. Unlike *Warth*, the plaintiffs presented the Court with a specific plan for construction of a housing project. The Court held that there existed a substantial probability that the project would be realized if the Court struck down the exclusionary ordinance. *Id.* at 264.

zation of low- and moderate-income persons residing in the Rochester area, some of whom resided within Penfield. Metro-Act claimed standing as a Rochester taxpayer and as a representative of its members, also Rochester taxpayers.<sup>114</sup> The organization alleged that although the ordinance did not result in the exclusion of its members from Penfield,<sup>115</sup> the ordinance operated to exclude other low- and moderate-income persons and thereby deprive Metro-Act members of association with the excluded persons.<sup>116</sup> In rejecting this claim, the Court distinguished *Trafficante*, holding that the Civil Rights Act, unlike the FHA, does not define the alleged deprivation of association as a sufficient injury to merit standing.<sup>117</sup>

Applying the law developed by the Supreme Court in *Trafficante*<sup>118</sup> and *Warth*,<sup>119</sup> the Ninth Circuit in *Topic v. Circle Realty*<sup>120</sup> denied standing to testers seeking to enforce the FHA. In *Topic*, plaintiffs, members of an organization devoted to eliminating racial discrimination in the housing market,<sup>121</sup> posed as homeseekers in order to investigate suspected perpetrators of racial steering.<sup>122</sup> In their

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112. In addition to the individual plaintiffs, the Court denied standing to Rochester Home Builders Association, Inc., an association of residential developers in the Rochester metropolitan area. Home Builders sought to intervene, claiming that the alleged unlawful activities of defendants injured its member-developers. The Court held that for damage relief for past injury the individual injured members and not the association are the appropriate parties. *Id.* at 515-16. As to prospective relief, the association lacks standing because it failed to allege that any member had applied for a building permit or variance for a current project. Absent such a showing the association lacked representational standing to seek prospective relief for its members. *Id.* at 516.

113. Metro-Act was a nonprofit corporation organized for the following purpose: To alert ordinary citizens to problems of social concern; . . . to inquire into the reasons for the critical housing shortage for low- and moderate-income persons in the Rochester area and to urge action on the part of citizens to alleviate the general housing shortage for low- and moderate-income persons. 422 U.S. at 494.

114. *Id.* at 512.

115. *Id.*

116. *Id.* Metro-Act in so alleging relied on the standing justification accepted in *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972). See discussion of *Trafficante*, notes 96-104 and accompanying text *supra*.

117. *Id.* at 513.

118. See notes 96-104 and accompanying text *supra*.

119. See notes 105-117 and accompanying text *supra*.

120. 532 F.2d 1273 (9th Cir. 1976).

121. *Id.* at 1274.

122. *Id.*

complaint, plaintiffs alleged the same injuries successfully asserted in *Trafficante*,<sup>123</sup> namely, the deprivation of social, professional, and economic benefits of living in an integrated community.<sup>124</sup>

In denying standing to housing associations and three individual members, the court compared the provisions of Sections 812 and 810. The court emphasized that Section 810 allows access to persons indirectly injured only after complying with administrative prerequisites,<sup>125</sup> while Section 812 permits immediate access to the courts.<sup>126</sup> Implying that plaintiffs prefer immediate access, the court reasoned that allowing equivalent standing under both sections would negate the utility of Section 812.<sup>127</sup> Therefore, the court held that Congress intended Section 812 to grant immediate access only to persons who are the "primary victims" of illegal discrimination.<sup>128</sup>

The court, however, indicated that even under Section 810, the plaintiffs still might not be the proper parties to maintain such a suit.<sup>129</sup> Although recognizing that litigants may assert the interests of third parties if the litigants meet the constitutional injury in fact requirement,<sup>130</sup> the court stated that the plaintiffs in *Topic* failed to allege facts sufficient to establish injury in fact.<sup>131</sup> The plaintiffs, unlike the litigants in *Trafficante*, did not reside within the area of the alleged discrimination. Rather, they resided in different parts of the metropolitan area.<sup>132</sup> As a result the court found an attenuated causal connection between the plaintiffs' asserted injury—loss of the benefits of living in an integrated community—and the defendant's alleged acts of discrimination.<sup>133</sup> Relying on *Warth*, the court reasoned that it could not conclude that "but for" the defendant's acts,

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123. See notes 96-104 and accompanying text *supra*.

124. 532 F.2d at 1274.

125. *Id.* at 1275-76.

126. *Id.* The court emphasized that the narrow language of § 812, those who are deemed to have access to the courts by virtue of the Act are only those who are the "direct objects" of the practices. *Id.*

127. *Id.* at 1276.

128. *Id.* at 1275.

129. *Id.*

130. *Id.*

131. *Id.* The court noted that even if defendant had not conducted these discriminatory practices, there still existed the possibility the communities involved would still be segregated. *Id.*

132. *Id.*

133. *Id.*

the plaintiffs would reside in integrated communities.<sup>134</sup> In other words, plaintiffs failed to show that a remedy against the defendant would cure plaintiffs' alleged injury.

In its 1979 decision in *Gladstone v. Village of Bellwood*,<sup>135</sup> the Supreme Court partially resolved the uncertainty regarding who has standing to sue under Section 812. In *Bellwood*, one black and four white residents of the Village of Bellwood, a black resident from a neighboring town, the Leadership Council for Metropolitan Open Communities,<sup>136</sup> and the Village of Bellwood all filed separate suits under Section 812 against two real estate agencies.<sup>137</sup> The plaintiffs alleged that the defendant real estate agencies steered prospective black home buyers away from predominantly white areas and toward integrated neighborhoods in the Village of Bellwood.<sup>138</sup> The realtors also allegedly directed white buyers away from Bellwood.<sup>139</sup> The realtors responded, contending that the plaintiffs lacked standing to assert unlawful steering under Section 812.<sup>140</sup>

Finding that Congress intended to confer Section 812 standing on the same class of persons covered by Section 810, the Supreme Court held that at least some of the plaintiffs here possessed standing.<sup>141</sup> In so holding, the Court rejected the distinction in *Topic*<sup>142</sup> between Sections 810 and 812. Instead the Court drew upon *Trafficante* and upon evidence of Congressional intent<sup>143</sup> that Section 810 and 812

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134. *Id.*

135. 441 U.S. 91 (1979).

136. The Leadership Council for Metropolitan Open Communities was a non-profit corporation devoted to elimination of housing discrimination in the Chicago metropolitan area. 569 F.2d at 1015.

137. *Id.* at 1015.

138. *Id.*

139. *Id.*

140. *Id.*

141. 441 U.S. at 102. The court analyzed the language of the two sections, pointing out that on its face, § 812 does not have particular statutory limitations. The use of passive voice in § 812 eliminated the need for a direct reference to a possible claimant. *Id.*

142. See notes 125-128 and accompanying text *supra*.

143. The court looked to a House Judiciary Committee Report's use of the words "aggrieved person" to indicate potential § 812 claimants, in addition to the § 812 remedy as alternate relief to § 810. 114 CONG. REC. 9612 (1968). The court inferred from this report these two sections were to encompass one class of plaintiffs. 441 U.S. at 107 n.18. For a general legislative history of the Act, see Dubofsky, *Fair Housing: A Legislative History and Perspective*, 8 WASHBURN L.J. 149 (1969).

provide alternative remedial mechanisms for the same class of plaintiffs.<sup>144</sup> Thus, some “indirect” victims of housing discrimination are within the “zone of interests” for standing under Section 812.<sup>145</sup>

Having dispensed with the need for further inquiry into “zone of interests,” the Court turned to whether the specific plaintiffs met the Article III “injury in fact” requirement. First, the Court held that the Village of Bellwood alleged a sufficient injury by claiming that racial steering resulted in a reduced number of prospective homebuyers and an exodus of white residents.<sup>146</sup> The exodus would depress property values, thereby threatening the municipality’s ability to bear the costs of local government and to provide services.<sup>147</sup>

Second, the Court viewed the individual resident-testers as seeking standing in two independent capacities—as residents and as “testers.”<sup>148</sup> Following *Trafficante*, the Court in *Bellwood* held that residents of a neighborhood whose racial composition is affected by racial steering meet the injury in fact requirement by alleging a deprivation of the social advantages of living in an integrated area and an economic diminution of property values.<sup>149</sup> The Supreme Court declined to constrain the application of *Trafficante* to a residential area not larger than an apartment complex by granting individual residents standing in *Bellwood* although the area of the alleged harm spanned 156 square blocks.<sup>150</sup> The Court concluded that the causal connection needed between the harm and the act did not follow from a temporal or spatial relationship with a defendant.<sup>151</sup> Causality depends only upon whether a personal injury resulted from the defendant’s actions.<sup>152</sup>

As the testers did not reargue their claim on appeal, the Supreme

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144. 441 U.S. 91, 107-09.

145. The court placed importance on Representative John Conyers’ statement in 1966 when this bill was discussed in the House: “Conciliation is easier in an informal administrative procedure than in the formal judicial process. Also individual court suits would place a greater burden of expense, time, and effort not only on the plaintiff but on all other parties involved, including the seller, broker, and mortgage financier, and on the judicial system itself.” 112 CONG. REC. 18402 (1966).

146. 441 U.S. at 110.

147. *Id.* at 110-111.

148. *Id.* at 111.

149. *Id.* at 115.

150. 441 U.S. at 113.

151. *Id.* at 113-114.

152. *Id.* at 114.

Court did not consider whether the individuals had standing by virtue of their status as testers.<sup>153</sup> The Seventh Circuit opinion in *Bellwood* did not distinguish between individual plaintiffs within the affected area and those outside, and found the individual plaintiffs in general suffered an injury in fact.<sup>154</sup> The Seventh Circuit also denied standing to housing associations.<sup>155</sup>

Two post-*Bellwood* racial steering cases, however, have held that fair housing organizations and testers have standing to bring their own suits under the FHA.<sup>156</sup> In *Sherman Park Community Association v. Wauwatosa Realty Co.*,<sup>157</sup> a nonprofit corporation devoted to promoting integrated housing in Milwaukee and thirty-nine individual member-testers brought suit against a realtor for alleged steering practices.<sup>158</sup> The association and twenty-three member-testers residing in the association's "primary service area" alleged that the realtor was causing the area to change from an integrated to a predominantly segregated neighborhood, thereby depriving the resident

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153. *Id.* at 111.

154. 569 F.2d at 1016 (1978). The court acknowledged that racial steering is almost impossible to prove without comparing the areas to which homeseekers of different races are directed. As the court pointed out to defendants that plaintiff testers were not alleging a cause of action *as* testers, as defendants seemed to believe, the court offered that the "tester evidence itself creates a fact issue." *Id.* at 1016. Therefore, plaintiffs were granted standing expressly only in their capacity as residents of a "white ghetto" deprived of the social and professional benefits from being in an integrated community. *Id.*

155. *Id.* at 1017. The court rejected the association's claim that frustration of its mission to promote equal opportunity in housing and costs incurred to attack the steering practices as a sufficient concrete interest for standing. The court commended the association's housing goals, but found the dollars spent to challenge defendants as "simply concomitant to its concern about open housing issues, and does not present independently cognizable injury." *Id.* at 1017.

For examples of other insufficient concrete injuries, see *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. at 39-40 (1975). (insofar as organizations committed to promoting access of the poor to health services sought standing on their own, they alleged insufficient injuries to themselves as organizations). *Sierra Club v. Morton*, 405 U.S. at 739-40 (1972) (despite the Club's dedication to protecting "Our Nation's natural heritage from man's depredations," the organization lacked the required injury in fact for standing as it was merely involved with this issue, without more).

156. *Coles v. Havens Realty Corp.*, 633 F.2d 384 (4th Cir. 1980) *aff'd in part; rev'd in part, sub. nom.* *Havens Realty Corp. v. Coleman*, 50 U.S.L.W. 4232 (U.S. Feb. 24, 1982) (No. 80-988); *Sherman Park Community Association v. Wauwatosa Realty Co.*, 486 F. Supp. 838 (E.D. Wis. 1980).

157. 486 F. Supp. 838 (E.D. Wis. 1980).

158. *Id.* at 840.

member-testers of the benefits of living in an integrated neighborhood.<sup>159</sup> The association and sixteen member-testers residing in exclusively white areas outside the association's service area alleged that the steering resulted in "white ghettos" that also deprived the plaintiffs of the advantages of integration.<sup>160</sup> The defendant-realtor argued that the plaintiffs lacked standing to challenge its activity in such a broad geographic area as metropolitan Milwaukee.<sup>161</sup>

In its 1980 opinion, the federal district court rejected the defendant's argument.<sup>162</sup> Without distinguishing the association from its member-testers, the *Sherman Park* court broadly construed *Bellwood* to grant standing to any plaintiff deprived of the benefits of integration by a realtor's racial steering activity.<sup>163</sup> *Sherman Park* emphatically rejected the defendant's contention that *Bellwood* required an injury to a small, compact geographic area.<sup>164</sup> Instead, the court held that a realtor's actions throughout an entire metropolitan area could sufficiently injure residents of smaller, more distinct neighborhoods within the metropolitan area.<sup>165</sup>

The court also examined an analogous issue regarding the right of plaintiffs to bring a class action suit on behalf of all current and potential, black and white, residents and homeseekers in metropolitan Milwaukee.<sup>166</sup> *Sherman Park* found that the plaintiff had standing to represent all current and potential residents of the metropolitan area desiring to live in integrated neighborhoods.<sup>167</sup> The court, however, refused to grant standing to represent current and potential

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159. *Id.*

160. *Id.*

161. *Id.* at 841. Defendant relied greatly upon the *Bellwood* passage commenting on the possibility of a "neighborhood" being so extensive in area or so densely or sparsely settled that no actual harm to any one resident resulted. 441 U.S. at 114.

162. 486 F. Supp. at 842.

163. *Id.*

164. *Id.* The court then responded to defendant's argument that the target area was too wide to result in a particularized injury by saying to so reason would disregard the "practical realities of the Milwaukee housing market." As defendant operated throughout the entire metropolitan area, the alleged practices could be felt throughout that area. *Id.*

165. *Id.* The court cautioned that, although these particular plaintiffs perhaps were without standing to challenge the whole city's housing patterns, they received standing regarding the patterns in their own neighborhoods. *Id.*

166. *Id.* at 843-44.

167. *Id.* at 844.

homebuyers.<sup>168</sup> Citing the Seventh Circuit *Bellwood* opinion, the court reasoned that homebuyers suffer “. . . an entirely different injury from. . . [testers]. . . in that their claim for relief depends upon their status as homebuyers. This difference affects proof of damages, causation, and liability. Such factors go to the very nature of a claim. . . .”<sup>169</sup>

Six months after *Sherman Park*, the Fourth Circuit used much broader reasoning to also find that testers and associations have standing under the FHA to challenge racial steering. In *Coles v. Havens Realty Corporation*,<sup>170</sup> a housing association (HOME) and its employee testers individually filed suit against the defendant broker for alleged racial steering in the rental of apartment units.<sup>171</sup> The purpose of HOME, a non-profit organization with approximately 600 members, was to eliminate unlawful discriminatory practices, and promote equal opportunity in housing in the Richmond Metropolitan Area.<sup>172</sup> Pursuant to this purpose, HOME operated a housing counseling service, investigated complaints of discrimination, conducted independent investigations for housing discrimination, and referred victims of discrimination to appropriate state and federal agencies.<sup>173</sup> In the scope of their employment at HOME, the testers posed as prospective renters interested in vacancies within the county.<sup>174</sup> HOME and the testers alleged that the defendant realtors unlawfully “steered” the testers to certain apartment complexes because of their race.<sup>175</sup> In a series of alternative holdings, the Fourth Circuit rejected the defendant’s contention that the testers and HOME lacked standing.<sup>176</sup>

The court stated that the testers in their capacity as testers had standing to assert the rights of third parties independent of any personal harm.<sup>177</sup> *Coles* analogized the present case with two older civil rights cases that granted standing to plaintiffs who deliberately al-

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168. *Id.*

169. *Id.*

170. 633 F.2d 384 (4th Cir. 1980).

171. *Id.* at 385.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 386.

176. *Id.* at 387-91.

177. *Id.* at 387.

lowed themselves to be injured for the sole purpose of initiating litigation.<sup>178</sup> According to *Coles*, the “binding similarity” of the cases is that they all deal with the rights of plaintiffs “to challenge actions frustrating vital public policy where in most instances no other effective challenge could be mounted.”<sup>179</sup> After noting this similarity, however, the court acknowledged that the civil rights plaintiffs actually incurred a *personal* injury while the *Coles* testers asserted the rights of *third persons*.<sup>180</sup> *Coles* reasoned an alleged personal injury was unnecessary since the fraudulent nature of racial steering made victims actually injured less able than testers acting as private attorneys general to bring suit to enforce the “deeply-grounded human right” of fair housing.<sup>181</sup> Therefore, the court concluded that allowing testers standing to assert third party rights independent of personal injury recognizes the “elasticity necessary to accommodate constitutional congressional intent.”<sup>182</sup>

Alternatively, the Fourth Circuit used reasoning similar to *Sherman Park* to find that the testers alleged sufficient injury to meet the standing requirements as individuals personally harmed.<sup>183</sup> Noting that Henrico County was the location of the alleged racial steering and also the residence of the testers, the court found that the testers suffered the same injuries as did apartment complex residents in *Trafficante* or the neighborhood residents in *Bellwood*.<sup>184</sup> The size of the geographic area was not important provided plaintiffs could show some injury.<sup>185</sup> The court also suggested that the false information itself (as opposed to the resulting discriminatory housing) constituted an injury to the tester since the Act expressly prohibits such false representations.<sup>186</sup>

*Coles* summarily held that HOME had representational standing

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178. *Id.* at 387, citing *Pierson v. Ray*, 386 U.S. 547 (1967); (plaintiffs denied admission to the “whites only” section of the bus station), *Evers v. Dwyer*, 358 U.S. 202 (1958) (plaintiffs denied seating in prohibited section of bus).

179. *Id.*

180. *Id.* at 388.

181. *Id.*

182. *Id.*

183. *Id.* at 388-89.

184. *Id.* at 388-89.

185. *Id.* at 391. The Richmond city limits had a population of 219,883 and surrounding county of 172,922, as compared to 8,200 tenants in the *Trafficante* apartment complex and 20,969 in the city of Bellwood, Illinois. *Id.* at 391 & n.5.

186. *Id.* at 388.

under the *Washington Apple* doctrine to litigate on behalf of its members allegedly injured by defendant's conduct.<sup>187</sup> Alternatively, the court held that HOME had standing to sue in its capacity as an association independent of any injury to its members.<sup>188</sup> HOME met the "injury in fact" requirement by alleging that the realtor's conduct injured the association itself by frustrating HOME's purpose of furthering equal access to housing through referrals.<sup>189</sup> In addition, HOME emphasized the substantial resources it devoted toward detecting and working against defendant's racial steering practices.<sup>190</sup> In finding independent association standing, the court stated that HOME's goals were ". . . functional, requiring identifiable action and the expenditure of effort and funds which may result in success or failure in achieving its objectives."<sup>191</sup>

The Supreme Court partially affirmed *Coles v. Havens Realty Corp.* in its recent opinion, *Havens Realty Corp. v. Coleman*.<sup>192</sup> In a unanimous opinion, the Court held that both testers and associations may have standing under the FHA.<sup>193</sup> In reaching this result, the Court adopted reasoning that may significantly alter both FHA and general standing law.

The reasoning used by *Coles* and *Sherman Park* to grant standing to testers illustrates some of the alternative rationales available to the Court in *Havens Realty*. First, *Sherman Park* and *Coles* both broadly construed *Bellwood* and *Trafficante* to eliminate or minimize any geographic area limitation on asserting the deprivation of the benefits of integration as an injury in fact.<sup>194</sup> Secondly, *Coles* briefly suggested that the FHA made the receipt of false information sufficient

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187. *Id.* at 390.

188. *Id.*

189. *Id.* The court viewed the harm as more precise than that asserted in *Sierra Club v. Morton*, 405 U.S. 727 (1972) (an association interested in park conservation alleged a skiing development in Sequoia National Forest would adversely affect the area's aesthetics and ecology), and having the "essential dimension of specificity" by the non-profit plaintiff in *Arlington Heights*. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977).

190. 633 F.2d at 390.

191. *Id.* at 391. The court stated that although the organization's goals were not as well defined as "bricks and mortar", they were functional in calling for measurable action and spending time and money to ensure achievement of its objectives. *Id.*

192. 50 U.S.L.W. 4232 (U.S. Feb. 24, 1982) (No. 80-988).

193. *Id.* at 4235, 4236.

194. 633 F.2d at 389; 486 F. Supp. at 842.

to meet the injury in fact requirement.<sup>195</sup> Finally, *Coles* reasoned that "vital public policies" justified granting testers standing as "private attorneys general" to assert the injuries of third parties.<sup>196</sup>

Most racial steering cases prior to *Havens Realty* found that the plaintiffs met the injury in fact requirement by alleging that they resided in a geographic area deprived of the advantages of integration.<sup>197</sup> All of these cases easily dismissed the defendant's contention that the alleged geographic area was too large.<sup>198</sup> *Havens Realty* refused to extend this gradual enlargement of the geographic area by denying standing to racial steering plaintiffs alleging the lost benefits of integration for residents of Richmond, Virginia.<sup>199</sup> In so doing, the Court stated that *Bellwood* limited the "neighborhood standing" theory to residents of a "relatively compact area."<sup>200</sup> While the Court did not explicitly define what would constitute a "relatively compact neighborhood," it did hold that an entire metropolitan area was too large.<sup>201</sup>

Even though the Court refused to extend standing to the plaintiffs under a liberalized neighborhood standing theory, it did grant standing to the testers under a novel theory suggested by the Fourth Circuit.<sup>202</sup> *Havens Realty* held that Section 804(d) establishes an enforceable right of "any person" to truthful information regarding the availability of housing.<sup>203</sup> Consequently, any person who receives illegal false information suffers an injury in fact that Congress intended the FHA to prevent.<sup>204</sup> In applying this new standing theory to *Havens Realty*, the Court found that the black testers directed away from vacant housing in white areas suffered an injury in fact based on false information.<sup>205</sup> The Court refused to grant standing

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195. 633 F.2d at 388.

196. 633 F.2d at 389.

197. See notes 135-186 and accompanying text *supra*.

198. *Id.*

199. 50 U.S.L.W. at 4236 (U.S. Feb. 24, 1982) (No. 80-988).

200. *Id.*

201. *Id.*

202. *Id.* at 4235. See *Coles v. Havens Realty Corp.*, 633 F.2d 388 (4th Cir. 1980) ("This prohibition against providing false information creates a concomitant right to receive correct housing information without regard to race or color").

203. *Id.* at 4234 at — (U.S. Feb. 24, 1982) (No. 80-988).

204. *Id.* at 4235.

205. *Id.*

to the white testers since the realtor only used truthful information to steer the white testers away from integrated neighborhoods.<sup>206</sup> The Court did, however, eventually find that the statute of limitations prevented the black testers from proceeding with their cause of action based on false information given prior to the one hundred and eighty day period.<sup>207</sup> *Havens Realty* characterized the alleged false information as a one time injury that started the statute of limitations period. Those seeking standing as an injured neighborhood or association, however, could avoid any statute of limitations problem under a "continuing violation" theory.<sup>208</sup>

*Havens Realty* ignored the Fourth Circuit's contention that the "vital public policy" of preventing racial discrimination justified tester standing to assert third party rights independent of any alleged personal injury.<sup>209</sup> Had the Supreme Court adopted this rationale, *Havens Realty* would have allowed plaintiffs to avoid the Constitutional "personal stake" requirement under the guise of defending "vital public policies."<sup>210</sup>

*Havens Realty's* reliance on the false information theory coupled with its refusal to extend the neighborhood standing theory suggests a dramatic shift in the judicial focus in fair housing standing cases. Instead of looking just at the continuing effects of racial steering on residents of a certain geographic area, the Court will now look at the mere receipt of illegal false information by any "person" regardless of their residence or the effects of such information.<sup>211</sup> This shift in focus has both positive and negative aspects for potential racial steering tester plaintiffs. While *Havens Realty* relieves them of the burden of proving a detrimental effect in a particular area, it also places a time constraint upon testers.<sup>212</sup> By refusing to hold that mere illegal false information constitutes a "continuing violation", the Court, for the first time, forces tester plaintiffs to initiate their case within one hundred and eighty days of the first false information incident offered as evidence.<sup>213</sup>

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206. *Id.*

207. *Id.* at 4237. See note 34 and accompanying text *supra*.

208. *Id.*

209. See notes 177-82 and accompanying text *supra*.

210. 633 F.2d at 387.

211. 50 U.S.L.W. at 4235 (U.S. Feb. 24, 1982) (No. 80-988).

212. *Id.* at 4237.

213. *Id.*

*Coles* found that HOME had standing both as a representative of its members and independently as an association.<sup>214</sup> The plaintiffs later withdrew the representational standing claim from consideration, thus leaving the Court to only consider the issue of association standing for injury to the association itself.<sup>215</sup> *Havens Realty* granted the association standing independent of any alleged injury to its individual members.<sup>216</sup> The Court found that HOME met the injury in fact requirement by alleging that the defendant's action frustrated its ability to provide counseling and referral services for low- and moderate-income homeseekers and that the association had incurred significant expense in furthering this purpose.<sup>217</sup> *Havens Realty* distinguished *Sierra Club* by reasoning that whereas *Sierra Club* merely alleged a "setback to the organization's abstract social interests", HOME alleged a "concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources."<sup>218</sup> Based upon this distinction, the Court granted standing to HOME.<sup>219</sup>

*Havens Realty's* association standing holding obviously makes it easier for opponents of racial steering to bring suits against realtors allegedly engaging in racial steering practices. This holding, however, has potentially enormous ramifications for general standing law. Apparently, any association that alleges that a defendant illegally frustrated the association's activities with a consequent financial expense to the association will have standing independent of its members.<sup>220</sup> *Havens Realty's* potential for undercutting *Sierra Club* is best illustrated with a hypothetical involving facts similar to *Sierra Club*.<sup>221</sup> Under *Havens Realty* would *Sierra Club* have standing if it alleged that it counselled its members about the availability of scenic wilderness and spent significant sums of money to ensure such availability? If the Court would grant standing, then *Havens Realty* appears to seriously undermine *Sierra Club*. Perhaps, however, future courts will limit this holding to racial steering cases based upon the

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214. 633 F.2d at 390.

215. 50 U.S.L.W. at 4236 (U.S. Feb. 24, 1982) (No. 80-988).

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. See notes 218-219 and accompanying text *supra*.

221. See note 63 and accompanying text *supra*.

“vital public policy” referred to in *Coles*.<sup>222</sup>

#### CONCLUSION

In summary, *Havens Realty Corp. v. Coleman* is a very important racial steering standing case with potentially enormous significance for general standing law. At the very least, racial steering tester plaintiffs will have greater access to the courts. Plaintiffs apparently still have the option of alleging an injury in fact caused by the deprivation of the benefits of integration. *Havens Realty*, however, limits this alternative to residents of a “relatively compact neighborhood.”<sup>223</sup> While future cases must sharpen this test, presumably a “relatively compact neighborhood” is at least 156 square blocks but less than an entire metropolitan area. Racial steering plaintiffs now have an additional option of merely alleging an illegal misrepresentation.<sup>224</sup> While this eliminates the need to prove the individual’s residence in an affected geographic area, racial steering plaintiffs under this theory must meet a reinvigorated statute of limitations.

Plaintiff housing associations attacking racial steering have achieved a far more clear cut victory in *Havens Realty*. They only have to allege that a defendant illegally frustrated the association’s purpose with a consequential financial expense to the association to have standing.<sup>225</sup> Unlike tester plaintiffs, they need not meet the 180 day statute of limitations.<sup>226</sup> This decision may also potentially open the courts to suits brought by associations outside the area affected by racial steering practices. Thus, the holding in *Havens Realty* helps fulfill the purpose of the Fair Housing Act to prevent discriminatory practices in the housing market.

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222. See note 196 and accompanying text *supra*.

223. See note 200 and accompanying text *supra*.

224. See note 203 and accompanying text *supra*.

225. See note 217 and accompanying text *supra*.

226. See note 213 and accompanying text *supra*.