Urban Law Annual ; Journal of Urban and Contemporary Law

Volume 19

January 1980

Standing to Challenge Federal Grant Termination

Robert S. Catz

STANDING TO CHALLENGE FEDERAL GRANT TERMINATION

*ROBERT S. CATZ**

I. INTRODUCTION

Federal grant-in-aid programs have grown to giant proportions. In 1950, the federal government spent only 2.2 billion dollars[1] on grant programs[2] in areas such as education, health, social welfare, housing, environmental protection, and transportation.[3] By 1971, the total expenditures for federal grant programs increased to 27.6 billion dollars.[4] By 1976, the federal government was spending 1.5 billion

* Professor of Law, Cleveland-Marshall College of Law, Cleveland State University. This work was assisted by a faculty research grant from the Cleveland-Marshall Fund. The author wishes to acknowledge the able research assistance of Karen Koskoff and Nancy Firak and the valuable comments of Professor Ralph S. Tyler offered on an earlier draft of this article. [The author was counsel for plaintiff in Southern Mutual Help Ass'n v. Califano, 574 F.2d 518 (D.C. Cir. 1977). *See* notes 31 and 134-161 and accompanying text *infra*.]

1. Boasberg & Feldsman, *The Washington Beat: Federal Grant Law and Administration*, 7 URB. LAW. 556 (1975) [hereinafter cited as Boasberg & Feldsman].

2. The term federal grant applies to any disbursement of monies or property by the federal government in support of programs which benefit the public and which are carried out by the several states, their political sub-divisions, public and private institutions and private individuals. *See* D. WRIGHT, FEDERAL GRANTS-IN-AID: PERSPECTIVES AND ALTERNATIVES 18 (1968).

3. Boasberg & Hewes, *The Washington Beat: Federal Grants and Due Process*, 6 URB. LAW. 399, 402 (1974) [hereinafter cited as Boasberg & Hewes].

4. BUREAU OF THE BUDGET, SIMPLIFYING FEDERAL AID TO STATES AND COMMUNITIES 5 (1970); Tomilson & Mashaw, *The Enforcement of Federal Standards in Grant-in-Aid Programs: Suggestions for Beneficiary Involvement*, 58 VA. L. REV. 600, 602 (1972).

'dollars in a single week for grant programs.[5] Yet, despite this enormous growth in federal grant appropriations, there has been little corresponding development of federal grant law either through judicial decisions[6] or legal scholarship.[7] Notwithstanding the substantial monetary expenditures and the expanding role of federal grantees in the execution of congressional programs during the past thirty years, federal grant law exists as a "slumbering giant"[8] which only now is awakening.

For some time commentators have viewed federal grants-in-aid as conditional gifts.[9] As a result, grantees have possessed none of the rights or safeguards of those carrying out congressional programs under contract. While rules on general contract law applied to government contracts,[10] federal grantees were "looked upon as objects of federal charity, without any legal 'right' to agency largess."[11] There

5. Mason, *Current Trends in Federal Grant Law—Fiscal Year 1976*, 35 FED. B.J. 164 (1976) [hereinafter cited as Mason].

6. Very little litigation has occurred in the area of federal grants. *See* Southern Mutual Help Association v. Califano, 574 F.2d 518 (D.C. Cir. 1977); National Ass'n of Regional Councils v. Costle, 564 F.2d 583 (D.C. Cir. 1977); National Ass'n of Neighborhood Health Centers v. Mathews, 551 F.2d 321 (D.C. Cir. 1976); National Consumer Information Center v. Gallegos, 549 F.2d 822 (D.C. Cir. 1976); Mil-ka-ko v. O.E.O., 352 F. Supp. 169 (D.D.C. 1972), *aff'd mem.*, 497 F.2d 684 (D.C. Cir. 1974).

7. Only recently has a small body of scholarly material been published. *See* Boasberg & Feldsman, *supra* note 1; Boasberg & Hewes, *supra* note 5; Brown, *Federal Funds and National Supremacy: The Role of State Legislatures in Federal Grant Programs*, 28 AM U. L. REV. 279 (1979); Cappalli, *Federal Grant Disputes: The Lawyer's Next Domain*, 11 URB. LAW. 377 (1979); Conway, *The Federal Grant: An Administrative View*, 30 FED. B.J. 119 (1971); Madden, *The Right to Receive Federal Grants and Assistance*, 37 FED. B.J. 17 (1978); MASON, *supra* note 4; Tomilson & Mashaw, *The Enforcement of Federal Standards in Grant-in-Aid Programs: Suggestions for Beneficiary Involvement*, 58 VA. L. REV. 600 (1972) [hereinafter cited as Tomilson & Mashaw]; Wallick & Montalto, *Symbiosis or Domination: Rights and Remedies Under Grant-Type Assistance Programs*, 46 GEO. WASH. L. REV. 159 (1977) [hereinafter cited as Wallick & Montalto]; Wilcox, *The Function and Nature of Grants*, 22 AD. L. REV. 125 (1969).

8. Judge Tamm adopted this term in Southern Mutual Help Ass'n v. Califano, 574 F.2d 518, 522 (D.C. Cir. 1977).

9. Wallick & Montalto, *supra* note 7.

10. *See* Note, *Due Process in Public Contracts: Pre-Award Hearings to Determine Responsibility of Bidders*, 5 PAC. L.J. 142 (1974).

11. Boasberg & Hewes, *supra* note 5, at 400. *See* Cahn & Cahn, *The New Sovereign Immunity*, 81 HARV. L. REV. 929, 934 (1968). Tomlinson and Mashaw, *supra* note 7, observed that:

> Formula grants are distributed to all states according to a pre-determined formula spelled out in the enabling statutes. A state must normally submit a plan

has been a growing recognition, however, that federal grant-making is no less important than federal contracting; that grantees can sustain significant harm as a result of an agency's refusal to renew a grant;[12] and that since grantees now play a vital role in implementing congressional programs they not only have significant rights, but also they should be provided meaningful remedies to protect those rights.[13]

> Grantees . . . more and more feel they have rights to the benefits to be obtained under grants and the courts more and more tend to agree with them.
>
> This concept of the right to a grant derives from several sources. The first is the constitutional necessity of treating all people similarly situated equally . . . [Grantees] have a right to some objective assurance that the discretion in awarding the grant has been exercised fairly and even-handedly.
>
> A second element that goes into the drive towards entitlement is the strong value we place on established patterns. If a grantee has received a grant, he expects when renewal time comes to get a renewal and his expectation of renewal is not without jurisprudential value. . . .
>
> The third is the simple political fact that the grantee's bargaining position may be very great.[14]

While there has been no judicial recognition of a grantee's right to

---

for approval by the federal agency administering the program in order to qualify for its share of the funds . . . Because a state which has an approved plan on file with the federal agency is entitled as a matter of right to the continued payment of its share of any funds authorized and appropriated by Congress for the program, formula grants are sometimes referred to as mandatory grants.

Project grants are disbursed to eligible recipients for specific projects on the basis of project applications. . . . Recipients are usually local units of government or private entities rather than states, as in the case of formula grants. Project grants rely on local initiative and local sensing of needs in requesting funds and in following up applications. Often referred to as discretionary grants, project grants are far more flexible than formula grants and allow federal administrators considerable discretion in deciding which project applications deserve funding.

Id. at 600-601.

12. "In actual practice, the failure of the government to renew a grant made annually in the past can have disasterous consequences. Experienced professional staff must be abruptly laid off; office leases terminated; equipment and furnishing returned; and often the grantee itself must go out of business." Boasberg & Hewes, *supra* note 5, at 402.

13. Wallick & Montalto, *supra* note 7, at 161.

14. Mason, *supra* note 5, at 181.

a due process hearing,[15] some federal agency regulations provide for grant termination hearings.[16] Commentators have argued, however, that such administrative hearings still do not "accord the grantee many traditional due process hearing rights."[17] As Tomlinson and Marshaw[18] opined:

> There are growing indications . . . that the grantees and beneficiaries of many grant programs are without recourse in the face of autocratic decisions or indifference by federal administrators, who are unaccountable to a popular constituency and may be insensitive or unsympathetic to local problems and conditions.[19]

When unable to effectively enforce due process rights at the administrative level, grantees have logically turned to the courts. Recourse to the courts, however, has also often been unsatisfactory. The principal obstacle encountered by non-profit federal grantees seeking to challenge federal grant termination is the fundamental rule that a litigant in federal court must have standing in order to seek judicial relief.[20] This is no small problem; while federal grant law is still undeveloped, the federal law of standing "lacks a rational conceptual framework. It is little more than a set of disjointed rules dealing with

15. Boasberg & Hewes, *supra* note 5, at 405-06.

16. *See, e.g.*, HUD Debarment, Suspension and Ineligibility of Contractors and Grantees; Administrative Sanctions, 24 C.F.R. § 24 (1979). *See also* 45 C.F.R. § 16.2-16.5 (1979) (HEW regulations); 45 C.F.R. § 1606.10 (1979) (Legal Services Corp. regulations).

17. *See* Boasberg & Hewes, *supra* note 5, at 405-06 ("For example, there is no right to an independent hearing examiner . . . no grantee right to make depositions of agency officials . . . or to inspect internal agency documents . . . nor . . . a requirement that the agency make its program officers available at the hearing.").

18. Tomlinson & Marshaw, *supra* note 7.

19. *Id.* at 618-19. *See generally* Cahn & Cahn, *supra* note 11.

20. Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26 (1976); Warth v. Selden, 422 U.S. 490 (1975); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); U.S. v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973); Linda R.S. v. Richard D., 410 U.S. 614 (1973); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972); Sierra Club v. Morton, 405 U.S. 727 (1972); Investment Co. Inst. v. Camp, 401 U.S. 617 (1971); Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970); Barlow v. Collins, 397 U.S. 159 (1970); Flast v. Cohen, 392 U.S. 83 (1968); Baker v. Carr, 369 U.S. 186 (1962); *Ex parte* Levitt, 302 U.S. 633 (1937); Frothingham v. Mellon, 262 U.S. 447 (1923).

See generally Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Relief*, 83 YALE L.J. 425 (1974); Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645 (1973); Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961).

a common subject."[21] The federal grantee also must survive the usual reluctance of courts to interfere with discretionary decisions of the executive branch. Further,

> The matter is made more difficult by the requirement that one show sufficient injury to give him standing to challenge an administrative decision. . . . Regardless of which organization received the funds, the same amount would be spent and approximately the same number of [individuals] would benefit.[22]

The standing doctrine is among the threshold barriers that can obstruct access to the federal judiciary. Traditional analysis of the standing requirement, based on the case or controversy clause of Article III of the Constitution,[23] focuses on the personal interest of the litigant.[24] To ensure the necessary adverseness,[25] the courts have asserted that a party must have suffered an injury in fact.[26] Furthermore, the jurisdiction of the federal courts has been limited further

---

21. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV 663 (1977). Cf. Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297 (1979) (author supports current standing jurisprudence).

22. Cahn & Cahn, *supra* note 11, at 935.

23. U.S. CONST. art. III, § 2, cl. 1 provides that:
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, on which shall be made . . . [and] to controversies to which the United States shall be a Party;—to controversies between Citizens of different States . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

24 Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26, 38 (1976). "[T]he standing question in its Art. III aspect 'is whether the plaintiff has "alleged such a personal stake in the outcome of the controversy" as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf.' " (quoting Warth v. Seldin, 422 U.S. 490, 498-99 (1975)). *Id.* The inquiry focuses on the status of the party initiating the action, not on the issues he seeks to have adjudicated. *See* Flast v. Cohen, 392 U.S. 83, 99 (1968).

25. Baker v. Carr, 369 U.S. 186, 204 (1962) (the personal stake in the outcome works "to assure . . . the concrete adverseness . . . upon which the court so largely depends for illumination of difficult . . . questions").

26. For example, in an effort to restrict its own jurisdiction, the Supreme Court has held that although a plaintiff suffered sufficient injury to meet the case or controversy requirement, he must assert his own legal rights and not rest his claim on the rights of other parties. Warth v. Seldin, 422 U.S. 490, 499. *See* United States v. Raines, 362 U.S. 17 (1966); Barrows v. Jackson, 346 U.S. 249 (1953).
The Court also has denied standing to persons having only a generalized grievance shared by a large class of citizens. Warth v. Seldin, 422 U.S. at 99. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); United States v. Richardson, 418 U.S. 166 (1974).

by what the Supreme Court has termed prudential limitations,[27] designed to inhibit judicial usurpation of powers reserved to the other branches of the government.[28] In addition, the Court has required that the complainant arguably be within the zone of interests to be protected or regulated by the statute in question.[29] In a recent decision involving termination of a federal migrant health clinic grant[30] awarded to a non-profit corporation funded by HEW, the District of Columbia Circuit Court in *Southern Mutual Help Ass'n v. Califano*,[31] held that non-profit grantees have standing to challenge an agency's decision to terminate a grant when the agency fails to provide a hearing to grantees prior to its decision, even though direct beneficiaries of the grant (migrant farmworkers) continue to be served by a successor grantee. This Article analyzes how the various standing requirements impact on the ability of public non-profit, federally-funded grantees, to assert an effective legal challenge to a federal agency's decision to terminate a grant previously awarded.

II. STANDING AND INJURY IN FACT

In recent years, the Supreme Court has limited potential litigants' access to the federal courts by strictly interpreting standing requirements. In particular, the Court has strengthened the requirements that federal litigants suffer an "injury in fact," that the alleged injury be directly related to the actions the litigant desires to challenge, and that the judicial relief sought can obviate the injury suffered.[32] Designed to ensure that only the appropriate litigants advocate a particular claim, the standing rule's ultimate purpose is to prevent the

27. "Without such limitations— . . . essentially matters of judicial self-governance—the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions. . . ." Warth v. Seldin, 422 U.S. 490, 500.

28. The separation of powers problem does not arise from the issue of standing generally, but only when implicated by a substantive issue raised by the initiating party. Flast v. Cohen, 392 U.S. 83, 100-01 (1968); Baker v. Carr, 369 U.S. 186, 210 (1962).

29. Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, 153 (1970).

30. The grant was awarded under the Migrant Health Act, 42 U.S.C. § 247(d) (1976), which authorizes the Secretary of HEW to make grants to public and private organizations to operate health clinics for migrant farmworkers.

31. 574 F.2d 518 (D.C. Cir. 1977).

32. *See, e.g.*, Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976); Warth v. Seldin, 422 U.S. 490 (1975).

judiciary from encroaching on the prerogatives of its two-co-equal branches and to limit decisions to only those cases deemed appropriate for judicial resolution in a common law system.[33]

The requirements of the standing doctrine derive from both the "case or controversy" clause of Article III and from policies of judicial prudence. The requirements of Article III are jurisdictional in nature and must be satisfied before invoking the power of the judiciary.[34] Even if plaintiffs satisfy the demands of Article III, prudential considerations may still limit access to the courts.[35] While Congress cannot alter the standing requirements mandated by Article III,[36] it can influence the courts' application of prudential requirements.[37] The requirement that litigants must have suffered an "injury in fact" to secure standing also rests on Article III limitations.[38] By ensuring that the plaintiff has a personal stake in the outcome of the controversy, this prerequisite guarantees the necessary "concrete adverseness which sharpens the presentation of issues."[39] The "injury in fact" requirement is important because it prevents the federal courts from deciding issues in abstract or hypothetical factual settings.[40] "The very essence of civil liberty certainly consists in the right of every individual to claim protection of the laws, whenever he receives an injury."[41]

The individual right to claim protection of the laws was reaffirmed

33. *See* Flast v. Cohen, 392 U.S. 83 (1968) (principle of separation of powers and prohibitions against advisory opinions derived from Article III are embodied in the doctrine of justiciability). Genuine, particularized controversies between litigants with conflicting and pressing interests ensure that issues are narrowly framed and vigorously presented. *Id.* at 106. Decisions rendered outside an adversary context are advisory opinions beyond the competence of the federal judiciary. *Id.* at 95-97.

34. Barrows v. Jackson, 346 U.S. 249 (1953) (standing requirement describes the constitutional case or controversy limitation on the courts' jurisdiction).

35. Warth v. Seldin, 422 U.S. 490, 500-01 (1975) (standing is a hybrid requirement consisting of a minimum constitutional requirement and a stricter court-imposed requirement).

36. Flast v. Cohen, 392 U.S. 83, 109 n.5 (1968) (attempts by Congress to confer standing when it is constitutionally lacking are unavailing).

37. Warth v. Seldin, 422 U.S. 490, 501 (1975) (Congress may grant an express right of action to persons otherwise barred by prudential standing rules).

38. *Id.*

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

40. Flast v. Cohen, 392 U.S. 83, 100 (1968).

41. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

in *Baker v. Carr*,[42] where the Court also defined the standard which must be met to satisfy Article III standing requirements:

> Have the appellants alleged such a personal stake in the outcome of the controversy as to assume that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional issues? This is the gist of the question of standing. It is, of course, a question of Federal law.[43]

Since *Baker*, courts have modified, limited and refined the question of injury or personal stake in the outcome of the case. Despite important standing limitations, a lesser burden of establishing injury in fact has been required to challenge actions by federal administrative agencies. In a series of cases, the Supreme Court expanded significantly the class of injuries sufficient to convey standing for challenges to agency action.

Association of Data Processing Service Organizations v. Camp[44] represents the watershed for cases addressing challenges to administrative actions. Data processing retailers sued the Comptroller of the Currency and a national bank, claiming injury from an administrative ruling[45] permitting national banks to provide data processing services to other banks and their customers.[46] Bringing the action under the Administrative Procedure Act,[47] the plaintiffs asserted standing as "persons . . . aggrieved by agency action within the meaning of a relevant statute. . . ."[48] The substantive claim rested on the Bank Service Corporation Act,[49] which precludes banks covered by the Act from engaging in any activity other than banking services. Because of the alleged unlawful invasion by banks into the data processing market, the plaintiffs claimed economic injury from the loss of potential customers. Additionally, plaintiffs alleged that, as a result of the Comptroller's ruling, several of their customers had

42. 396 U.S. 186 (1962).

43. *Id.* at 204.

44. 397 U.S. 150 (1970).

45. Comptroller's Manual for National Banks, ¶ 3500 (1966).

46. 397 U.S. at 151.

47. 5 U.S.C. §§ 701-706 (1964 ed., Supp. IV).

48. *Id.* at § 702.

49. 397 U.S. at 155-156. The Act in question directed that "no bank service corporation may engage in any activity other than the performance of bank services for banks." 12 U.S.C. § 1864 (1976).

taken their business to competitor banks.[50]

The Court applied a two-part test for standing, requiring plaintiff to demonstrate not only that he had suffered injury in fact, but also that the claim was arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.[51] The burden of establishing injury in fact in competitor suits was distinguished from that required in taxpayers' suits, in which the plaintiff, to secure standing, must demonstrate a sufficient logical nexus between his status as a taxpayer and the challenged legislative actions.[52] Considering the potential loss of profits as well as the actual loss of customers, the Court concluded that the plaintiffs had alleged sufficient injury in fact.[53] Moreover, the legislative history of the Bank Services Croporation Act,[54] prohibiting non-banking activities by national banks, indicated that the plaintiffs interests were arguably protected by the statute.[55]

Application of the zone of interests test seems to provide a basis for standing to non-profit agencies, institutions and organizations which are conduits for federal funds if agency action arbitrarily and unilaterally cut off such funds. This interpretation is especially valid since the Court's term "arguably" has been described as a quite generous standard.[56] Although the zone of interests test developed in non-constitutional litigation, it now seems to be a test necessary to satisfy Article III requirements regarding constitutional issues.[57]

In *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*,[58] the Supreme Court articulated its broadest interpretation of the injury in fact requirement. In *SCRAP*, the Court held that an environmental group had standing to challenge the ICC's failure to suspend a surcharge on railroad freight rates as indi-

50. 397 U.S. at 152.

51. *Id.* at 152-153.

52. *Id.* at 152.

53. *Id.*

54. 12 U.S.C. § 1864 (1976).

55. 397 U.S. at 155.

56. *See* Davis, *Standing*, 72 NW. U.L. REV. 69 (1977); Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970); Jaffe, *Standing Again*, 84 HARV. L. REV. 633 (1971); Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645 (1973); Stewart, *The Reformation of American Administration Law*, 88 HARV. L. REV. 1669, 1723-47 (1975).

57. *See* notes 105-115 and accompanying text *infra*.

58. 412 U.S. 669 (1972).

viduals injured under the Administrative Procedure Act.[59] After the ICC approved certain surcharges pending permanent rate increases, the student organization filed suit contending the ruling would damage the environment and cause its members economic, recreational and aesthetic harm.[60] Maintaining that its members used local recreational areas that would be polluted as a result of the surcharges' adverse effect on recycling efforts, SCRAP further alleged noncompliance by the ICC with the National Environmental Policy Act[61] in the ICC's failure to issue an environmental impact statement.[62] The Court acknowledged that the harm alleged by SCRAP existed only through an "attentuated line of causation;"[63] nonetheless, it held that the pleadings satisfied the requirement that the plaintiff allege "that he has been or will in fact be perceptibly harmed by the challenged agency action."[64] The scope of the Court's holding is evidenced by its recognition that aesthetic as well as economic injury can confer standing. Additionally, because the rate increases had not yet been implemented, the claimed injury which the Court recognized was prospective only, and therefore speculative.

Although the Court acknowledged that the allegations must be proven at trial,[65] it emphasized that the question of standing must not be determined by the prospects of proof at trial but rather only on the basis of the pleadings.[66] The SCRAP decision represents the most attentuated and liberal injury standard recognized by the Supreme Court in support of a plaintiff's standing to challenge an agency's

59. *Id.* at 685; *see* 5 U.S.C. § 702 (1976).

60. *Id.* at 678.

61. 42 U.S.C. § 4332(2)(c) (1976).

62. 412 U.S. at 679. Specifically, SCRAP alleged that each of its members would be required to pay more for finished products; that each of its members "[u]ses the forests, rivers, streams, mountains, and other natural resources surrounding the Washington Metropolitan area and at his legal residence, for camping, hiking, fishing, sightseeing, and other recreational [and] aesthetic purposes," and that these activities were affected adversely by the increased freight rates; that each of its members breathes the air and that this air had suffered increased pollution caused by the modified rate structure; and, finally, that each member had been forced to pay increased taxes as a result of the sums necessarily expended to dispose of otherwise reusable waste materials. *Id.* at 678.

63. *Id.* at 688.

64. *Id.* at 688-89.

65. *Id.* at 689.

66. *Id.*

action. Thus, a plaintiff may have standing even when the injury alleged is indirect.

Since *Data Processing* and *SCRAP*, the Court appears to have limited the opportunities for litigants to successfully assert standing.[67] A recent case, *Warth v. Seldin*,[68] is the first of a series of Supreme Court cases which have greatly impacted Article III standing requirements.[69] In *Warth*, plaintiffs were various organizations and individuals of Rochester, New York. They sued under 42 U.S.C. sections 1981, 1982, and 1983 against the town of Penfield's zoning, planning, and town boards. Claiming these boards excluded persons of low and moderate income from living in the town, plaintiffs alleged violation of the First, Ninth, and Fourteenth Amendments of the United States Constitution. The District and Circuit Courts held for defendants. The Supreme Court affirmed the lower court decisions, finding that the plaintiffs did not satisfy Article III requirements.

The plaintiffs' complaint identified and described eight individuals. Four individual plaintiffs were residents of Rochester who owned real property and paid property taxes to that city. One of the four, who was black, asserted a denial of rights on that basis. The fifth individual plaintiff, of latino descent, owned real property and paid taxes to Rochester and resided in a town forty-two miles from Penfield, where he was employed. The sixth, who was latino, and the seventh and eighth, both of whom were black, were described as residents of Rochester who were of low and moderate income. The complaint further identified Metro-Act of Rochester as a non-profit corporation whose purpose was

> 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 . . . and to urge action on the part of citizens to alleviate the general housing shortage for low and moderate income persons.[70]

The statement of facts asserted in the complaint alleged that:

1. Penfield's zoning ordinance allocated ninety-eight percent of the town's vacant property to single-family detached housing by im-

67. *See* Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663 (1977).

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

69. *Warth* is frequently cited along with Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976). The holdings of both *Warth* and *Simon* are discussed in detail because of the impact they have on subsequent cases.

70. 422 U.S. at 494-95.

plementing requirements relating to lot size, setback, plan area and habitable space. Thus, the purpose and effect was to exclude persons of low and moderate income since they are unable to afford the single-family detached housing, and since only .03 percent of the land was allocated to multi-family structures.

2. Penfield's zoning and planning boards delayed action on proposals for low- and moderate-cost housing for inordinate periods of time; denied such proposals for arbitrary and unsubstantial reasons; refused to grant necessary variances and permits, or to allow tax abatements; failed to provide necessary support services for low- and moderate-cost housing projects; and amended the ordinance to make approval of such projects virtually impossible.[71]

The injury plaintiffs asserted included:

1. Higher tax rates in Rochester resulting from the exclusionary practices; and

2. An inability to lease or purchase residential property which as a result forced residency in a less attractive environment.[72]

Before trial, a Rochester Home Builders Association, engaged in residential construction, moved to intervene. The Association asserted that the facts alleged by plaintiffs deprived them of the opportunity to build low- and moderate-cost housing, and consequently denied them potential profits.

The Court, introducing the issue of standing by a general summary of previous case law, stated: "A federal court's jurisdiction . . . can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action . . .,'" quoting from Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973).[73]

The Court further asserted that when "harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction."[74] The Court mentioned other Article III considerations such as whether another branch of government could more appropriately redress the grievance; whether the injury and legal rights alleged were actually those of a third party; and whether Congress

71. *Id.* at 495-96.

72. *Id.* at 496.

73. *Id.* at 499.

74. *Id.*

granted an express right of action, the absence of which would bar standing by other Article III considerations. Further, the Court asserted, all material allegations in the complaint must be accepted as truth, and must be construed in the light most favorable to the plaintiff.

The Court, therefore, assumed as truth that the zoning ordinance and its application purposefully and effectively excluded the individual plaintiffs. If these assumptions were proved, the ordinance would be in violation of the Constitution and relevant statutes. The Court held, however, that plaintiffs nevertheless lacked standing as a result of several deficiencies in their complaint.

The Court found that the complaint lacked specificity as to the causal relationship between defendants and plaintiffs. The Court stated that the desire of the plaintiffs to live in Penfield depended upon third parties' willingness to build such housing, and found it significant that "[t]he record specifically referred to only two such efforts; that of Penfield Better Homes Corp., in late 1969, and a similar effort by O'Brien Homes, Inc., in late 1971."[75] The Court also noted that plaintiffs should have focused their case on a particular project.[76] The Court concluded that the plaintiffs had failed to establish a relationship between themselves and the earlier projects or others like them: "The record is devoid of any indication that these projects, or other like projects, would have satisfied [plaintiff's] needs at prices they could afford, or that, were the court to remove the constrictions attributable to [defendants] such relief would benefit [plaintiffs]."[77] The Court found that the plaintiffs' inability to obtain housing in Penfield was "the consequence of the economics of the area housing market, . . . [not] of [defendants'] assertedly illegal acts."[78]

The Court held that in the absence of a causal relationship between the parties, the plaintiffs could not satisfy Article III standing requirements.

> [A] plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm *him* and that he personally would benefit in a tangible way from the court's intervention. Absent the necessary allegations of demonstrable, particularized injury,

75. *Id.* at 505.

76. *Id.* at 508 n.18.

77. *Id.* at 506.

78. *Id.*

> there can be no confidence of a "real need to exercise the power of judicial review" or that relief can be framed "no [broader] than required by the precise facts to which the court's ruling would be applied."[79]

The Court's dicta with respect to the individual plaintiffs affects in significant ways subsequent holdings. It also is confused and is put forth without satisfactory analysis. The Court stated that the fact the individual plaintiffs

> share common attributes to persons who may have been excluded from residence in the town is an insufficient predicate for the conclusion that petitioners themselves have been excluded, or that the [defendants'] illegal actions have violated their rights. . . . In their complaint [plaintiffs] alleged in conclusory terms that they are among the persons excluded by [defendants'] actions. 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.[80]

The Court also found that plaintiff Metro Act lacked standing. Metro Act had alleged that it sued on behalf of its membership which resides in Penfield and alleged that the membership was "deprived of the benefits of living in a racially and ethnically integrated community" under the theory of standing described in *Trafficante v. Metropolitan Life Insurance Co.*[81] In *Trafficante*, the Court held that where plaintiffs, residents of an apartment complex, alleged that the owner discriminated against rental applicants on the basis of race, plaintiffs

> had been injured in that (1) they had lost the social benefits of living in an integrated community; (2) they had missed business and professional advantages which would have accrued if they had lived with members of minority groups; (3) they had suffered embarrassment and economic damage in social, business and professional activities from being "stigmatized" as residents of a "white ghetto."[82]

The Court initiated its discussion of Metro Act with a general summary of relevant case law:

> There is no question that an association may have standing in its

79. *Id.* at 508.

80. *Id.* at 502-03.

81. 409 U.S. 205 (1972).

82. *Id.* at 208.

> own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association may enjoy. Moreover, in attempting to secure relief from injury to itself the association may assert the rights of its members, at least so long as the challenged infractions adversely affect its members' associational ties.[83]

The Court also stated that an association may have standing to assert the rights of its members even in the absence of injury to itself. The Court opined, however, that to meet the requirement of standing, an association must allege that its members sued in their individual capacity. Only then can a court determine that individual participation of the injured members is not required for proper resolution of the case. The Court distinguished Metro Act from the *Trafficante* plaintiffs by noting that Metro Act did not assert a cause of action under the 1968 Civil Rights Act as did plaintiffs in *Trafficante*. The Court stated the reasoning for the distinction as follows: "Congress may create a statutory right to entitlement which can suffer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of a statute. . . . No such statute is applicable here."[84]

The Court further held that Home Builders, who intervened, lacked standing. The Court implied that the relief requested must be some form of equitable relief, such as a declaratory judgment or injunction. "Whether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought."[85] The Court pointed out that Home Builders did not allege any compensable damage to itself and did not assign damages to its members. The Court was troubled because the Association wanted to sue on behalf of its members as if they had sued individually, but the complaint lacked specificity as to the individual injury. Further, the request for individual compensatory damages would indicate that the individual members are indispensable to the suit:

> [T]he damage claims are not common to the entire membership nor shared by all in equal degree. To the contrary, whatever injury may have been suffered in particular to the individual member concerned, and both the fact and extent of injury would require individualized proof. Thus, to obtain relief in damages,

83. 422 U.S. at 511.

84. *Id.* at 514.

85. *Id.* at 515.

> each member . . . who claims injury as a result . . . must be party to the suit.[86]

The Court also stated that the complaint failed to specifically allege necessary averments; for example, that Home Builders was denied permits, that defendants delayed construction or that Home Builders exhausted the appropriate administrative remedies.

The *Warth* decision, as it relates to the individual plaintiffs, unfortunately ignores factual assertions made by the plaintiffs which could have produced a contrary result. First, the individual plaintiffs alleged injury by demonstrating the amounts they could afford to spend for housing. Second, not only were two specific projects mentioned and plans for housing produced, but also an association of home builders intervened in the suit, alleging that as a result of defendants' zoning practices, it could not plan or attempt to implement a project of the kind the individual plaintiffs were required to show. Third, the Court's statement that "we may assume . . . that [defendants'] actions have contributed, perhaps substantially, to the cost of housing in Penfield,"[87] seems to indicate an assumption of the existence of a causal relationship between plaintiffs and defendants that the Court later ignores.

The Court's rationale for including the comment referring to the individual plaintiffs' injury and the attributes they share with others is unclear, since the Court did find that plaintiffs were excluded, though not by defendants, and several references relate to an allegation of specific injury to the named plaintiffs. Further, it is difficult for a party to allege in other than conclusory terms that he or she has never resided in Penfield, for the plaintiff must prove a negative.[88] The Court might, of course, require plaintiffs to submit affidavits of residence since birth. The plaintiffs filed the suit specifically so that they might, someday, be able to reside in Penfield. There is nothing implicit about such action or the Court's treatment of the request. The Court itself states that plaintiffs attempted to find suitable housing in Penfield but were unsuccessful. Thus, if the Court had considered the averment to be true, it would have found that the plaintiffs had suffered injury distinguishable from that of other members of their class.

The manner in which the Court distinguished *Trafficante* claimants

86. *Id.* at 515-16.

87. *Id.* at 504.

88. *Id.* at 500.

from plaintiff Metro Act obfiscates the real issue of whether the plaintiff has in fact been injured. The Court's holding implied that Metro Act was not the proper plaintiff to sue under the First, Ninth and Fourteenth Amendments given the facts alleged in the complaint. The Court stated that "[e]ssentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief."[89] This principle seems to have been forgotten in the Court's holding that Metro Act lacked standing.

Finally, with respect to intervenor Home Builders, the reason for the Court's statements about equitable relief is unclear. The Court insinuated that if the Association had requested equitable relief it would not have been denied standing. Yet the Court denied Home Builders standing because that Association sought only compensatory damages.

Thus, *Warth* emphasized the Court's reluctance to grant standing to plaintiffs who failed to allege specific averments in their complaints. The Court emphasized two standing rules: First, that plaintiffs must allege injury in fact; and second, that plaintiffs must sufficiently allege that the relevant law is intended to protect their interests.

The Supreme Court's predilection in *Warth* for more stringent pleadings requirements was continued in *Simon v. Eastern Kentucky Welfare Rights Organization* (*EWKRO*),[90] where the Court held that plaintiffs did not establish a case or controversy as required by Article III of the U.S. Constitution. In *EWKRO*, plaintiffs were individual indigent persons and indigent members of organizations who claimed they were denied hospital services because of their indigent status. They sued treasury officials who promulgated a regulation that provided favorable tax treatment even to hospitals that did not serve indigents to the full extent of their financial capability. The plaintiffs alleged that the regulation encouraged hospitals to deny assistance to poor people and violated the Administrative Procedure Act and the Internal Revenue Code. Plaintiffs did not sue the hospitals that denied them medical services.

Plaintiffs requested a declaratory judgment that the defendants violated the relevant statutes. They further requested an injunction to

89. *Id.*

90. 426 U.S. 26 (1976).

compel the defendants to suspend the charitable treatment of hospitals that did not submit adequate proof that they served indigents, and they wanted an injunction to compel defendants to collect all taxes due as a result of the failure of the hospitals to serve indigents as required by law.

The Supreme Court held that the district court should have dismissed the suit since the plaintiffs had failed to allege an injury in fact, and consequently had failed to establish their standing to sue:

> [T]he five respondent organizations, which described themselves as dedicated to promoting access of the poor to health services could not establish their standing simply on the basis of that goal. Our decisions make clear that an organization's abstract concern with a subject does not substitute for the concrete injury required by Article III. Sierra Club v. Morton, supra; see Warth v. Seldin, supra. Insofar as these organizations seek standing based on their special interest in the health problems of the poor their complaint must fail. Since they allege no injury to themselves as organizations, and indeed could not in the context of this suit, they can establish standing only as representatives of those of their members who have been injured in fact, and thus could have brought suit in their own rights. Warth v. Selden, supra, at 511. The standing question in this suit therefore turns on whether any individual respondent has established an actual injury or whether the respondent organizations have established actual injury to any of their indigent members.[91]

The Court also held that whether the relief requested by plaintiffs would actually result in more or better hospital services to indigents was only speculative. The actual reason for the hospital's denial of services was unknown. Further, it was not clear whether "the desired exercise of the court's remedial powers in this suit would result in the availability to respondents of such services."[92] The Court affirmed that "[p]rior decisions of this Court establish that unadorned speculation will not suffice to invoke the federal judicial power."[93]

EWKRO denied respondents standing because they failed to sufficiently show their injury was caused by the petitioners and that their injury would be redressed by a favorable decision. It is reasonable to presume that the majority found that the hospitals, and not the defendants, may have been responsible for the injury alleged. This no-

91. *Id.* at 39-40.

92. *Id.* at 43.

93. *Id.* at 44.

tion becomes clear in the concurring opinion of Justice Powell, who formulated *EKWRO*'s "causation" test. Powell stated that "Article III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court."[94] Powell further stated that the injury *EKWRO* plaintiffs alleged had not been caused by the defendants but rather by the hospitals and that the hospitals' reasons for the exclusion of indigents were speculative. Powell concluded by opining that "it is just as plausible that the hospitals to which respondents may apply for service would elect to forego favorable tax treatment to avoid the undetermined financial drain of an increase in the level of uncompensated services."[95]

Thus, the *EKWRO* Court reaffirmed the *Warth* holding that an allegation of specific injury is required to establish a "personal stake" in the litigation. "As we reiterated last term," the Court observed, "the standing question in its Article III aspect is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf."[96] The *EKWRO* Court also added a new dimension to the *Warth* test, however, with the conclusion that:

> In sum, when a plaintiff's standing is brought into issue the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court could be gratuitious and thus inconsistent with the Article III limitation.[97]

This new test clearly originates from *Warth*. Although the *Warth* Court held that necessary facts were not alleged, the *Warth* Court indicated in dicta that the alleged facts implied the actions of third parties. The *EKWRO* Court addressed this dicta by incorporating it into the Court's holding itself.

Warth and *EKWRO* require that a plaintiff allege injury in fact (*Warth*) and that he allege a causal connection based upon the facts (*EKWRO*). Taken together, the two cases set down the following

94. *Id.* at 41-42.

95. *Id.* at 43.

96. *Id.* at 38 (emphasis in text).

97. *Id.*

four-pronged test which must be met to satisfy Article III requirements:

1. Is there an injury in fact? (*Warth*)
2. Are the interests of the plaintiff arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question? (*Warth*)
3. Has the plaintiff made a sufficient allegation that the injury he suffered has resulted from the acts of the defendant? (*EKWRO*)
4. Will the remedy requested correct the injury of which the plaintiff complains? (*EKWRO*)

Justice Brennan, with whom Justice Marshall joined, concurred in these decisions on other grounds. The two jurists vehemently responded, however, to both the majority's and Powell's opinions:

> We may properly wonder where the court, armed with its "fatally speculative pleadings" tool will strike next. To pick the most obvious examples, will minority children now have to plead and show that in the absence of illegal governmental "encouragement" of private segregated schools, such schools would not "elect to forego" their favorable tax treatment, and that this will "result in the availability" to complainants of an integrated educational system? . . . or will black Americans be required to plead and show that in the absence of illegal government encouragement, private institutions would not "elect to forego" favorable tax treatment and that this will "result in the availability" to complainants of services previously denied? . . . As perusal of these reported decisions reveals, the lower courts have not assumed that such allegations and proofs were somehow required by Article III.[98]

This attack upon the majority's and Justice Powell's holdings clearly has merit. Although the holdings of the two cases are similar, and although *EKWRO* can be analyzed as an extension of *Warth*, the holdings collectively make access to the federal court system more difficult.

Supreme Court cases decided after *Warth* and *EKWRO* have applied the four-pronged test rather conservatively. In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[99] for example, in a factual situation similar to *Warth*'s, the Court held that the plaintiffs had standing to sue. The Court was able to see distinc-

98. *Id.* at 63-64.

99. 429 U.S. 252 (1977).

tions in *Arlington Heights* which allowed the Court to reach the merits.

In *Arlington Heights*, the plaintiff, Metropolitan Housing Development Corporation (MHDC), a non-profit corporation whose purpose was to build low- and moderate-income housing, applied to Arlington Heights to change its zoning law from single-family to multi-family classifications so that MHDC could build townhouse units under federal assistance. MHDC had a contract for the lease and sale of a specific site which was contingent upon MHDC's securing zoning clearances and federal funds. MHDC made specific architectural plans for the project and conducted studies which revealed the need for housing for low- and moderate-income families. The project was also designed to ensure racial integration. MHDC provided this information to the zoning board of Arlington Heights. The local zoning board, however, refused to reclassify the property.

Consequently, MHDC and three black individuals sued for declaratory and injunctive relief, asserting that defendant's denial was racially discriminatory and violative of the Fourteenth Amendment and the Fair Housing Act of 1968. A second non-profit corporation and a Mexican-American individual intervened as plaintiffs. The district court found for the defendants on the merits. The court of appeals reversed.

The Supreme Court ruled in favor of the defendants on the merits, but the Court first held that the plaintiffs had standing to sue. The Court set out the requirements of standing by citing *Baker v. Carr* in the context of *Warth*, stating that the essence of standing was whether the plaintiff alleged a personal stake in the outcome of the case. The Court also mentioned *EKWRO*, stating that the alleged injury must be traceable to the defendant's acts or omissions. The Court found actual injury in MHDC's expenditures for plans and studies. The Court also found that the indirect injury to the plaintiff corporation's interest in building low- and moderate-income housing where it was scarce was sufficient for standing on the basis of *United States v. SCRAP*.

Applying the zone of interests test, the *Arlington Heights* Court found that the corporation had a right to be free of "arbitrary or irrational zoning actions"[100] but also found that because corporations have no racial identity, MHDC could not sue on the basis that the zoning practices discriminate against minority persons. The Court

100. *Id.* at 263.

did not decide whether the corporation had standing to sue on behalf of its members. Instead, the Court found that an individual plaintiff had sufficiently met the zone of interest test.

> [Plaintiff], a [black] works at the Honeywell factory in Arlington Heights and lives approximately 20 miles away in Evanston in a five room house with his mother and his son. The complaint alleged that he seeks and would qualify for the housing MHDC wants to build . . . [plaintiff] testified at trial that if [the project] were built he would *probably* move there, since it is closer to his job.[101]

The Court concluded there was a causal relationship between plaintiffs and defendants, since plaintiffs' injury focused on a particular project and was "not dependent upon speculation about possible actions of third parties who were not before the court."[102]

The Court held that MHDC would gain appropriate relief from a favorable decision if granted the injunctive relief it requested. The Court stated:

> If MHDC secured the injunctive relief it seeks, that barrier will be removed. An injunction would not, of course, guarantee that [the housing project] will be built. MHDC would still have to secure financing, qualify for federal subsidiaries and carry through with construction. But all housing developments are subject to some extent to similar uncertainties. When a project is as detailed and specific as [this], a court is not required to engage in undue speculation as a predicate for finding that the plaintiff has the requisite personal stake in the controversy.[103]

The Court, mentioning the *Warth* decision twice, stated in its initial discussion of standing that "[i]n *Warth* . . . , a case similar in some respects to this one, we reviewed the constitutional limitations and prudential considerations that guide a Court in determining a party's standing, and we need not repeat that discussion here."[104] It is unfortunate that the Court did not repeat and clarify these "prudential considerations," to mitigate some of the speculation required to distinguish *Warth* from *Arlington Heights*. In both *Warth* and *Arlington Heights*, corporations sued. In *Warth*, the intervenor alleged injury as a result of the effect of the ordinance. The corporation concerned with low-income housing sued on behalf of its members for

101. *Id.* at 264.
102. *Id.*
103. *Id.* at 261.
104. *Id.* at 260.

injury not specifically economic, yet the Court found that neither the intervenor nor the corporate plaintiff met Article III requirements. In *Arlington Heights*, however, the corporate plaintiff's thwarted plans for development were viewed as an injury. Further, the Court, on authority of *United States v. SCRAP*, held that the requisite injury may be indirect, though the Court did not accept this argument in *Warth*. The question which can only be partially answered is, how did the Court make its findings in light of the severe limitations provided by the *Warth-Simon* four-prong tests? The correct political answer is that in the instant case the Court wanted to decide the merits. The legal distinctions are few, but the Court apparently found them persuasive.

With reference to the individual plaintiffs, the *Warth* Court did not accept the premise that the exclusion of individuals from numerous places (though not specifically alleged) constituted injury. But in *Arlington Heights* the Court found that one individual plaintiff had sustained injury as a result of being excluded. Although it is encouraging that the Court found one plaintiff had standing, the *Arlington Heights* Court seemed to abandon its four-pronged *Warth-EKWRO* test for the purpose of analysis of this individual plaintiff. The individual did not sue as a member of the corporation, but the Court applied its tests as if the individual were a corporate member. The Court first found that the corporation was injured in fact by defendants, and the corporation could obtain relief, if it was granted a favorable decision. The Court then found that the individual plaintiff was injured, that the defendants caused his injury and that the individual was protected by the relevant case law. The Court never addressed, however, the issue of whether the relief that the individual requested would result from a favorable decision. Indeed, it is left to speculation whether the Court will now hold satisfaction of the first three tests will automatically result in satisfaction of the fourth test.

Regarding the zone of interest question, the *Arlington Heights* Court held that the corporation had no racial identity. The Court specifically refused to decide whether the corporation nevertheless could claim the protection of the Fourteenth Amendment, since the Court found that the Amendment was meant to protect the individual black plaintiff. In *Warth*, the corporate and black plaintiffs were not granted such protection.

In *Warth*, the Court did not find the requisite causal relationship between plaintiffs and defendants since it found that unrepresented third parties, namely housing developers, were responsible for the

lack of low- and moderate-income housing. This holding was reached in disregard of the fact that an association of developers had intervened in the suit.[105] In *Arlington Heights*, however, the causal relationship between the individual plaintiff and the defendant was established when the Court found that if the specific project was constructed, the individual plaintiff's desires would be met.

Finally, in *Arlington Heights*, the Court held that a favorable decision would grant the relief requested to MHDC. This test was obviously not required in *Warth*, since it was formulated only in the later *EKWRO* case. One can speculate, however, that since the *Warth* Court stated that unrepresented third parties were responsible for the alleged injury, it is doubtful that the Court would have believed a favorable decision would provide the relief requested.

The *Arlington Heights* decision turned on the specificity of the averments in the complaint. The Court noted that the concreteness of the facts alleged compelled its decision. Throughout the *Warth* decision, the Court stated that the averments were not specifically stated. In *Warth* there were no current, but only two previous, efforts by corporations to build low- and moderate-income housing, and the plaintiffs failed to focus on any particular project.

The importance of *Arlington Heights* is that it finally gives some indication of what must be alleged to satisfy Article III. Further, it revives the *SCRAP* rationale which indicates that the Court might possibly entertain a standing issue based on indirect or non-economic injury.

Hunt v. Washington State Apple Commission,[106] can be considered both as an extension of the *Arlington Heights* holding and as reviving the *SCRAP* holding and extending its applicability to state agencies. The State of Washington, this nation's largest producer of apples, sued North Carolina through its agency, the Washington State Apple Advertising Commission (the Commission). Washington challenged the constitutionality of a North Carolina statute which required "[a]ll closed containers of apples sold, offered for sale or shipped into the State to bear no grade other than the applicable U.S. grade or standard."[107]

The Commission sought a declaratory judgment that the North Carolina statute was unconstitutional under the commerce clause of

105. 422 U.S. at 508 n.18.

106. 432 U.S. 333 (1976).

107. *Id.* at 335.

the United States Constitution. The Commission further requested that the defendant be enjoined from requiring that only the applicable U.S. standard be stamped on the containers. The request for such remedies arose because Washington apple growers stamped all closed containers of apples which were then placed in cold storage warehouses. The stamps identified the various grades of apples. "Since the ultimate destination of these apples is unknown at the time they are placed in storage, compliance with North Carolina's unique regulation would have required Washington growers to obliterate the printed labels on containers shipped to North Carolina, thus giving their product a damaged appearance."[108] Thus, the impact of abiding by the regulation would be costly. The apples would have to be repacked, sent in damaged containers, or not sent at all.

A three-judge district court held that the Commission had standing and granted the declaratory and injunctive relief after finding the North Carolina statute unconstitutional. The Supreme Court affirmed.[109] The defendants had argued that the Commission was a state agency; that the Commission did not produce, sell or ship apples; that the function of the Commission was to advertise Washington apples in North Carolina and elsewhere; and that the challenged statute did not prohibit the advertisement of apples, beyond the actual labeling seal. Defendants, citing *Warth* and *Arlington Heights*, asserted that the statute did not infringe upon the function or the activities of the Commission and that as a result, the Commission could not establish the requisite causal connection between itself and the defendants.

Defendants also alleged that the Commission was not the appropriate body to represent the apple growers and dealers and that the apple growers and dealers should have asserted their interests on their own behalf. Defendants argued that the Commission was not a traditional association and that it therefore had no members. Defendants concluded by stating that even though an association may have standing to assert

> the claims of its members even where it has suffered no injury from the challenged activity, Warth v. Selden, 422 U.S. at 511 . . . , the commission has no members whose claims it might raise, and since it has suffered no distinct and palpable injury to itself, it can assert no more than an abstract concern for the well-

108. *Id.* at 338.

109. *Id.* at 354.

> being of the Washington apple industry as the basis for its standing. That type of interest . . . cannot substitute for the concrete injury required by art. III. Simon v. Eastern Ky. Welfare Rights Organ., 426 U.S. 27, 40 (1976).[110]

Given the *Warth* and *EKWRO* holdings, the defendant's argument seems plausible. The Court held, however, that the Commission did have standing on the basis of *Warth*. The Court stated that if the Commission had a voluntary membership, it would be clear that the Commission could have brought suit on behalf of its members. The Court quoted *Warth*:

> Even in the absence of injury to itself, an association may have standing solely as the representative of its members . . . the association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable cause had the members themselves brought suit. So long as this can be established, and so long as the nature of the claim and the relief sought does not make the individual participation of each injured party indispensible to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.[111]

Still quoting *Warth*, the Court elaborated on the remedies that an association could properly request, namely, relief such as declaratory judgments or injunctions. The Court observed that the remedy requested must be reasonably calculated to redress the grievances or injuries of the members. The Court recognized that an organization could sue on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit."[112]

The Court found that the apple growers and dealers were injured by having to remove the Washington stamps from containers and by having to either abandon the use of preprinted containers or discontinue accounts in North Carolina. The Court further found that the injuries were germane to the Commission's purpose since "the commission's attempt to remedy these injuries and to secure the industry's right to publicize its grading system is central to the

110. *Id.* at 342.

111. *Id.* at 342-43.

112. *Id.* at 343.

commission's purpose of protecting and enhancing the market for Washington apples."[113] Finally, the Court found that the requested relief did not require individualized proof.

The Court then addressed the novel issue of the suit, whether the Commission's status as a state agency precluded it from asserting the claims of the apple growers and dealers. The Court held that although the Commission was a state agency, "for all practical purposes, [it] perform[ed] the functions of a traditional trade association representing the apple industry."[114] The Court found that the Commission's purpose was to protect the apple industry through advertising, market research, public education and scientific research. The Court stated that although the growers and dealers were not members of the Commission in the sense of a traditional trade organization, "they possess[ed] all of the indicia of membership in an organization."[115] They elected members, they alone served on the Commission, they alone financed activities (including the suit) through assessments levied upon them. Finally, the Court found that the Commission would ensure the "concrete adverseness" necessary in constitutional litigation, since the finances and operation of the Commission were dependent upon the financial success of the apple growers and dealers.

The *Hunt* decision represents the Court's continued abandonment or inconsistent application of the four-pronged *Warth-EKWRO* test. The defendant's arguments addressed these tests, but the Court apparently found their arguments without merit. The tests were not specifically analyzed. Instead, the Court reviewed the ability of associations to sue on behalf of their membership, and provided a method by which this could be successfully accomplished. Certainly the surprising aspect of *Hunt* is that state agencies may now sue if they perform the functions of associations.

Most recently, the Supreme Court, in *Duke Power Co. v. Carolina Environmental Study Group*,[116] has defined the "injury in fact" requirement strictly to include only "distinct and palpable" injuries.[117] This restriction has barred some types of injuries from serving as a basis for standing. For example, the Court has rejected, as constitu-

113. *Id.* at 344.
114. *Id.*
115. *Id.*
116. 438 U.S. 59 (1977).
117. *Id.* at 72.

tionally insufficient, injuries to a litigant's value preferences[118] and injuries suffered in common with the general public. The Court also stated that Article III requires potential plaintiffs demonstrate a " 'fairly traceable' causal connection between the claimed injury and the challenged conduct."[119] Additionally, the Court noted there must be a "substantial likelihood that the sought-after relief will prevent or cure the alleged injury."[120]

In *Duke Power*, two organizations and forty individuals who lived within close proximity of planned nuclear power facilities brought suit. Defendants were an investor-owned public utility company, engaged in the construction of nuclear power plants in North and South Carolina, and the Nuclear Regulatory Commission. Plaintiffs sought a declaratory judgment that the Price-Anderson Act violated Fifth Amendment due process and equal protection guarantees in that it encouraged injuries without providing adequate compensatory damages to victims who would bear the burden of injury while the country benefited from nuclear power plants.

The Court began its standing inquiry by citing the *Baker v. Carr* requirement of "a personal stake in the outcome . . . to assure that concrete adverseness which sharpens the presentation of the issues."[121] The Court indicated that "personal stake" required a "distinct and palpable injury"[122] to the plaintiff and a "fairly traceable" causal connection between the alleged conduct of the defendant and injury of the plaintiff.[123]

The Court then evaluated the following effects which resulted from the operation of the nuclear power plants:

> (a) the production of small quantities of non-natural radiation which would invade the air and water; (b) a sharp increase in the temperature of two lakes presently used for recreational purposes resulting from the use of the lake waters to cook the reaction; (c) interference with the normal use of the waters of the Catawba River; (d) threatened reduction in property values of land neighboring the power plants; (e) objectively reasonable present fear . . . regarding the effect of the increased radioactiv-

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

119. 438 U.S. at 72.

120. *Id.* at 79.

121. 369 U.S. 186, 204 (1962).

122. Warth v. Seldin, 422 U.S. at 501.

123. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. at 261; Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. at 41-42.

> ity . . . upon [plaintiffs] and their property, and the genetic effects upon their descendents; (f) the continual threat of an accident . . . without adequate compensation for the damage.[124]

The Court found these effects constituted injury in fact and found the environmental and aesthetic consequences similar to those in *SCRAP*.

The Court then addressed the question whether the injuries could be traced to the activity of the defendants. Since the Court had no independent information, it felt bound to accept the findings of the district court that "there [was] a substantial likelihood that Duke would [not have been able] to complete the construction and maintain the operation . . . [of the] plants but for the protection provided by the . . . Act."[125] Thus the Court found that the causation test was satisfied.

Although defendants also contended that plaintiffs must demonstrate a connection between the injuries they asserted and the constitutional rights they sought to enforce, the Court held that this requirement was limited to taxpayer suits. The Court distinguished this requirement from "other limits on the class of persons who may invoke the courts' decisional and remedial powers."[126] The Court stated that it would not grant standing where the injury asserted was considered a generalized grievance shared by a large number of persons. Further, the Court stated that a plaintiff must assert his own legal rights, not those of third parties. Clarifying the defendant's assertion, the Court said that, "This limitation on third party standing arguably suggests a connection between the claimed injury and the right asserted, bearing some resemblance to the nexus requirement now urged upon us."[127] This statement is interesting in light of *Arlington Heights*, where the corporation could not sue under the 1964 Civil Rights Act because corporations have no color, but a black individual could sue as that Act was meant to protect blacks from discriminatory practices. It seems that the Court will continue to require the first three of the *Warth-EKWRO* tests, but in most instances will limit use of the fourth test. "Where a party champions his own rights, and where the injury alleged is a concrete and particularized one which will be prevented or redressed by the relief re-

124. 438 U.S. at 73.

125. 431 F. Supp. 220.

126. Warth v. Seldin, 422 U.S. at 499 (1975).

127. 438 U.S. at 80.

quested, the basic practical and prudential concerns underlying the standing doctrine are generally satisfied when the constitutional requisites are met."[128]

Finally, in *Duke Power*, the Court also catalogued certain prudential limitations intended to supplement the constitutional requirements for standing.[129] Of particular concern to the Court were the requirements that the injury asserted not be "a generalized grievance shared in a substantially equal measure" by the public and that the rights and interests the plaintiff wishes to assert be his own and not those of a third party.[130] Since they are prudential, rather than constitutional, these judicially created restrictions may be circumvented by congressional grants of standing.[131] The line separating prudential and constitutional standing restrictions, however, is ambiguous. The Court's recent conservative decisions regarding standing have severely undermined the ability of public interest groups to assert injuries to environmental and other social interests as a basis to assert standing.

III. Federal Grantee Standing to Challenge the Termination of a Grant

Recent circuit court decisions have similarly applied the *Warth-EKWRO* test conservatively. The applicability of the four-pronged test was reaffirmed in recent cases in which congresspersons sued.[132] Other cases have reached similar result.[133] Plaintiffs addressing Article III considerations, in other words, typically must satisfy both the

128. 438 U.S. at 80-81.

129. *Id.* at 80.

130. *Id.*

131. Because one purpose of standing is to maintain the properly limited role of the courts in a democratic society, Warth v. Seldin, 422 U.S. 490, 498 (1975), the Court has reasoned that the prudential standing requirements are unnecessary where Congress, the democratic arm of government, has authorized standing for litigants. *Id.* at 501. *See also* Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979).

132. *See* Harrington v. Bush, 553 F.2d 190 (D.C. Cir. 1977); Edwards v. Carter, 445 F. Supp. 1279 (D.D.C. 1978); Chamber of Commerce of United States v. Dept. of Interior, 439 F. Supp. 762 (D.D.C. 1977). *See also* Parkview Heights Corp. v. City of Black Jack, 467 F.2d 1208 (8th Cir. 1972). *But see* Florida v. Weinberger, 492 F.2d 488 (5th Cir. 1974) (court ignores zone of interests test and is receptive to plaintiffs who allege non-economic injury sufficient for standing under *SCRAP*).

133. In Gray v. Greyhound Lines, East, 545 F.2d 169 (D.C. Cir. 1976), for example, the District of Columbia Circuit, applying the four-pronged test, held that a black bus driver who slipped through a discriminatory screening process and who alleged

injury in fact, zone of interests, causation and usefulness of remedy tests of *Warth-EKWRO* and the non-economic injury allowances of *SCRAP*.

In light of the preceding analysis, would it be possible for a federally funded non-profit organization, irrespective of the constituency it serves, to satisfy these standing requirements in order to assert a Fifth Amendment challenge? In *Southern Mutual Help Ass'n v. Califano*,[134] the District of Columbia Circuit Court of Appeals addressed the issue of standing and Article III requirements as applied to a nonprofit corporation that received its grant funds from a federal agency.

Southern Mutual Help Association (SMHA) is a non-profit corporation organized under the laws of Louisiana to provide social services to sugarcane cutters and migrant farm workers. In 1971, SMHA received a five-year project grant under authority of the Migrant Health Act[135] to establish and operate a family health service clinic for migrant farm workers and sugarcane cutters in southwestern Louisiana. The award authorized substantial funds for capital expenditures. The project period of the grant was from July 1, 1971 through June 30, 1976.

In 1972 and 1973, SMHA filed its annual progress report with the requisite "continuation" application, and its funds were increased each year. In November 1973, the Department of Health, Education and Welfare (HEW) had its first fiscal audit of SMHA and released its results on May 22, 1974, advising SMHA that it had thirty days to present any comments or additional information that might affect HEW's final determination.[136] On June 6, before SMHA could respond, it was notified that its 1974 continuation application would

danger of arbitrary treatment by defendants' failure to provide a working environment free of racial intimidation adequately alleged injury in fact.

134. 574 F.2d 518 (D.C. Cir. 1977).

135. 42 U.S.C. § 247(d) (1976). The Act authorizes the Secretary of HEW:

> (1) to make grants to public and other nonprofit agencies, institutions and organizations for paying part of the cost of (i) establishing and operating family health service clinics for domestic agricultural migratory workers and their families . . ., and (ii) special projects to improve . . . the health conditions of domestic agricultural migratory workers and their families . . . and (2) to encourage and co-operate in programs for the purpose of improving health services for or otherwise improving the health conditions of domestic agricultural migratory workers and their families.

Id.

136. 574 F.2d 518, 520 (D.C. Cir. 1977).

not be approved. HEW informed SMHA in a letter that it would not be re-funded on the basis of the following concerns:

1. It is apparent from the considerable amount of correspondence this office has received from individuals and groups located in the Saint Mary Parish area, telephone communications and personal discussion between my staff and interested citizens from the target area that the community has lost confidence in SMHA.
2. SMHA has failed to reconstitute its Board of Directors or to make appropriate provision for the community at large, particularly the target population, to participate in the planning, development and implementation of the project.
3. The sponsor has failed to give consideration to the advice and counsel of the medical and dental committees on Saint Mary Parish, the primary focus of the project's activities.
4. There appears to have been usurpation of the Project Director's administrative and management authority by the Executive Staff of the Southern Mutual Help Association in respect to the negotiation of contracts, i.e., purchase of film, obtaining consultants for staff and board training. Also it is apparent that employment procedures and practices have not been consistent with program guidelines and requirements.
5. The Farm Workers Advisory Board, Professional Advisory Committee and project staff have indicated that they have had virtually no communication with the SMHA Executive Staff or the governing board of SMHA.
6. Of particular concern is the practice of SMHA which allows members of the Board and/or relatives of Board members to work as salaried staff for SMHA-sponsored programs and projects. This creates a basic conflict of interest.[137]

On June 25, 1974, in response to this termination of its grant, SMHA requested review by the HEW Grant Appeals Board so that SMHA could argue that termination of the grant violated HEW's own regulations.[138] The language of HEW's regulations clearly indi-

137. *Id.* at 520-521.

138. 45 C.F.R. § 16.5 (1979) provides: "(a)(1) Termination, in whole or in part, of a grant for failure of the grantee to carry out its approved project proposal in accordance with the applicable law and the terms of such assistance or for failure of the grantee otherwise to comply with any law, regulation, assurance, term or condition applicable to the grant."

42 C.F.R. § 50.404 (1979) provides: "(a)(1) Termination, in whole or in part, of a grant for failure of the grantee to carry out its approved project in accordance with the applicable law and the terms and conditions of such assistance or for failure of the

cates that opportunity for a hearing is to be provided to grantees who, like SMHA, were denied funding because of alleged misfeasance. Once an agency has promulgated a regulation, it is bound to adhere to its provisions. On June 25, 1974, the Grant Appeals Board held that it did not have jurisdiction over SMHA's complaint since the failure of HEW to issue an additional grant was not considered a "termination" under HEW's regulations. "It is viewed rather as a pre-award decision related to an application for the additional grant . . ."[139] On the same day, HEW informed SMHA that a competing applicant had been awarded the funds.

SMHA then filed a complaint in the federal district court alleging due process violations as a result of the arbitrary and unilateral termination of its grant. SMHA sought declaratory and injunctive relief and monetary damages. The district court granted HEW's motion for summary judgment. The court of appeals vacated the district court's decision with instructions to remand the case to the Secretary of HEW in order that a formal hearing could be held before the Grant Appeals Board. The parties then settled the case by agreement,[140] awarding SMHA $21,180 and providing for the absolute nullification and withdrawal of all the allegations set forth in the

---

grantee otherwise to comply with any law, regulation, assurance, term or condition applicable to the grant."

139. 574 F.2d at 521.

140. The Settlement Agreement between SMHA and HUD, dated March 15, 1979, provided as follows:

WHEREAS, SMHA has asserted various claims against HEW in a suit brought in the United States District Court for the District of Columbia in connection with the discontinuance by HEW of a migrant health grant to SMHA;

WHEREAS, HEW has at all times denied such claims; and

WHEREAS, HEW and SMHA, without admission of liability, wish to resolve the disputes and controversies between them;

NOW, THEREFORE, IT IS AGREED that within thirty (30) days from the date of this Agreement:

1. HEW will pay to SMHA the sum of $21,180.00.

2. Dr. George Lythcott and Dr. Gerald Barton on behalf of HEW will send a letter to SMHA in the form attached hereto as Exhibit A.

3. HEW will henceforth not rely on or give any consideration (i) to the allegations in the letter dated June 6, 1974 from Dr. Floyd A. Norman to SMHA, or (ii) to the discontinuance of SMHA's migrant health grant funds in the process-

June 6, 1974 letter.[141] The court of appeals based the remand upon SMHA's claim that HEW violated its own regulations, rather than upon plaintiff's constitutional claim. Yet, before the court could reach the merits, it found that SMHA had standing to sue.[142]

The court initially stated that the question of standing must be decided in light of the fact that the services provided to migrant workers by SMHA were continued without interruption by another federal grantee. The court invoked the *Warth-EKWRO* test, stating that "[w]hen a plaintiff's standing is brought into issue the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision."[143]

The court first found that the plaintiff had satisfied the zone of interests test. The court's consideration of the relevant statutes re-

---

ing or disposition of grant applications submitted by SMHA or for any other purpose.

4. SMHA will sign the General Release and Covenant attached to this Agreement as Exhibit B.

5. HEW will sign the General Release and Covenant attached to this Agreement as Exhibit C.

6. SMHA will withdraw its request for a hearing before the Departmental Grant Appeals Board of HEW, in connection with the above-mentioned suit.

7. SMHA and HEW will sign the Stipulation of Dismissal, a copy of which is attached to this Agreement as Exhibit D, which will dismiss with prejudice the suit brought by SMHA against HEW in the United States District Court for the District of Columbia (Civ. No. 74-1293).

8. HEW will not impose on SMHA a record retention requirement greater than the three-year period pursuant to 45 C.F.R. § 74.20 (1977), which will commence on August 31, 1974, the last day of the grant period.

9. This Agreement and the attached exhibits will constitute a grant closeout pursuant to 42 C.F.R. § 56.113(c) (1977), and HEW will not require SMHA to provide any further final accounting of its migrant health grant pursuant to said section.

10. No provision of this Agreement is intended to restrict the right of SMHA or HEW to bring an action for breach of this Agreement.

141. *Id.*

142. SMHA had assumed standing under the Administrative Procedure Act, 5 U.S.C. § 702 (1976), which gives standing to "A person suffering legal wrong because of agency action or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof," and under the HEW regulations at 45 C.F.R. § 16 (1979), which establish the Departmental Grant Appeals Process: "This part establishes a Departmental Grant Appeals Board, for the purpose of reviewing and providing hearings upon post-award disputes which may arise in the administration of or carrying out of grants under grant programs and which are submitted to the Board as provided in Section 16.6."

143. 574 F.2d at 522.

vealed that while grants for migrant health services were to be made to non-profit agencies and organizations for the benefit of migrant workers, Congress "also recognized that conduit organizations such as SMHA were necessary to deliver the services contemplated."[144] The court noted HEW had designed a grant appeals procedure. Therefore, "[b]ecause organizations such as SMHA are such an integral part of the migrant health program . . . [the court had] no trouble concluding that SMHA's interest is arguably within that zone of interests protected or regulated by the statutory framework under scrutiny . . ."[145]

The court, addressing the injury in fact requirement of the *Warth-EKWRO* test, reviewed "injury in fact" as defined in the Supreme Court:

> [W]hile the injury cannot be abstract, *O'Shea v. Littleton*, 414 U.S. 488, 494 . . . (1974), it need not be significant; an identifiable trifle will suffice. *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689, n.14 . . . (1973). However, the injury must be specifically alleged by the plaintiff, *see Sierra Club v. Morton*, 405 U.S. 727, 735 . . . (1972), it must be particularized, *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 220-222 . . . (1974) and it must be capable of direct redress by the court through the requested remedy, *see Linda R.S. v. Richard D.*, 410 U.S. 614, 617-619 . . . (1973). Finally, the injury must be fairly traceable to the challenged action of the defendant, *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. at 41.[146]

The court then concluded that SMHA's allegation of damage to its reputation was sufficient to meet this test. The court pointed out that at least since 1951 injury to the reputation of an organization has been recognized as sufficient for standing[147] and that without its good reputation SMHA would encounter difficulty in receiving funding from other sources.

Interestingly, the court found that the same allegation of injury to reputation that satisfied the injury in fact test also satisfied two other *Warth-EKWRO* tests: the showing of a causal connection of defendant, and the showing that the remedy requested is capable of redressing the injury of which plaintiff complains. "While SMHA has

144. *Id.* at 523.

145. *Id.*

146. *Id.* at 523-524.

147. *See* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951).

alleged a number of particularized injuries, the one that is capable of direct redress by this court through the requested remedy, and clearly traceable to the action by HEW, is the assertion by SMHA that its good name and reputation have been damaged."[148]

In short, the court found that SMHA had standing to sue since it satisfied the four-pronged test put forth by *Warth* and *EKWRO* and reaffirmed in *Duke*. The court did not specifically address the *SCRAP* rationale, nor did it find it necessary to analyze standing of the corporation through analysis of its members. However, the court carefully limited its holding:

> Specifically, this opinion should not be read as supporting the contention that disappointed grant *applicants* have standing to challenge agency grant decisions. There is a distinct difference between a grantee engaged in an existing relationship with the government and an applicant initially seeking a government grant.[149]

Having thus held that SMHA had standing to assert its complaint against the actions of HEW, the court considered the merits of SMHA's contention that it was entitled to a hearing on the basis of HEW's own regulations, the Administrative Procedure Act, and the due process clause of the Fifth amendment. Expressly avoiding the constitutional issue, the court carefully examined the relevant HEW

148. 574 F.2d at 524. The Court never addressed the question of whether the "injury in fact" requirements could have been met by SMHA's allegations of HEW's termination of the grant and of HEW's corresponding failure to provide SMHA a pre-termination hearing as provided by its own regulations. The Court instead grounded its standing decision solely on the claims of injury to reputation traced from HEW's allegations of SMHA improprieties. Such allegations triggered the agency's decision to withhold further funding. Recently, the District of Columbia Circuit in Committee for Full Employment v. Blumenthal. 606 F.2d 1062 (D.C. Cir. 1979), held that plaintiffs can assert standing upon an agency's mere denial of a procedural right, and the denial constitutes "injury in fact." Under this holding the *SMHA* court could have grounded its finding of "injury in fact" on HEW's denial of the grant and its failure to provide SMHA a pre-termination hearing as contained in HEW's own regulations. Presumably, the reason the *SMHA* court grounded its standing decision on the grantee's injury to reputation was to avoid potential mootness problems. By the time the case reached the court the grant monies appropriated by Congress under the Migrant Health Act had already been awarded and spent by the successor grantee. Any subsequent hearing remanded by the court to HEW's Board of Grant Appeals could not have resulted in the reinstatement of the grant monies wrongfully withheld. The court ordered the Board to provide SMHA a hearing to rebut the allegations of impropriety and clear the organization's injury to reputation and expungement of records. 574 F.2d 528 n.22. *See also*, Judge Wilkey's dissent, *id.* at 530-31.

149. 574 F.2d at 525.

regulations which define the Grant Appeals process and which were intended to create due process rights for grantees. The court also considered HEW's argument that the action it took in ending SMHA's participation under the Migrant Health Act was a "pre-award decision related to an application for the additional grant"[150] rather than a termination, and that the former type of action is not subject to the jurisdiction of the Grant Appeals Board. The court rejected this argument, stating that while great deference should be given to an agency's interpretation of its regulations, the Secretary was, in view of the underlying purpose of the grant appeals process of affording grantees maximum due process, obliged to interpret the term "grant termination" in the light most favorable to the grantee. The court found that by regulation HEW had "chosen the 'grant expiration date *in the grant award document*' as its benchmark in defining grant termination . . ."[151] and that the Grants Administration Manual revealed that the SMHA action was not simply a pre-award termination:

> [T]he Grants Administration Manual indicates that there are two basic methods for ending support of a project: "(1) withholding support [failing to fund *non-competing* continuation applications] and (2) withdrawing support [termination]." Since HEW has conceded that SMHA and TAB were viewed as *competing* applicants . . . then the action taken by HEW must logically be considered as withdrawing support from, and therefore termination of, SMHA.[152]

The court held that since HEW's action constituted a termination, SMHA was entitled to a hearing by virtue of HEW's own regulations. The court warned, however, that

> [w]e intimate no position on whether HEW, by more carefully drafted regulations, could have denied SMHA a hearing, because that inquiry necessarily would lead to a constitutional determination. We hold only that, under the regulatory framework in existence at the appropriate stages of this case, SMHA was entitled to a hearing prior to termination.[153]

The case was remanded to the Secretary for a formal hearing before the Grant Appeals Board at which SMHA would have an opportunity to rebut the allegations made by HEW. Thus, the court

150. *Id.* at 526.
151. *Id.* at 527.
152. *Id.* at 528.
153. *Id.*

observed that, "SMHA will have been provided the 'maximum due process' sought by the HEW regulations."[154]

Judge Wilkey dissented both to the finding of standing and to the decision on the merits. He believed that SMHA lacked standing since it failed to show requisite interests in the funds and since the loss of the funds was not a redressable injury. He reasoned that SMHA, a non-profit organization, "motivated solely by altruism,"[155] without expectation of economic benefit, was merely a conduit for the federal funds. He felt that SMHA was not before the court to represent the personal rights of SMHA's employees, who in any case also did not have the requisite interest for standing purposes: "[The] real interest is a public interest, the welfare of the ultimate beneficiaries, *not* the *private* interest . . . SMHA attempted to [assert] here."[156] Since neither SMHA nor its workers had an interest in the funds, loss of the funds failed to meet the requisite standard of "injury in fact."

Judge Wilkey also rejected the majority's recognition of SMHA's allegation of damage to reputation as sufficient to establish injury in fact under the doctrine of standing. Again focusing on the altruistic aspect of SMHA's operation, he reduced the suit to a complaint that SMHA "may have lost opportunities to help other people and have the government pay for it,"[157] and asserted: "This interest in being altruistic at the government's expense strikes me as somewhat ephemeral, and I question whether the invasion of an interest of the kind suggested here constitutes . . . 'injury in fact' . . . ."[158]

The dissent added that SMHA lacked standing since, having not lost anything, SMHA did not have legitimate rights or interests to enforce. Judge Wilkey said there was no remedy which SMHA, as a mere conduit agency, could reasonably expect would redress the injury alleged:

> The programs have been carried out; the funds have been spent; the true beneficiaries have already received the benefits which Congress intended they receive. This court cannot require Congress to appropriate further funds so that appellant can have the pleasure of administering a redundant program. Nor can we re-

154. *Id.*

155. *Id.* at 529.

156. *Id. See also*, Hood River County v. United States, 532 F.2d 1236, 1238 (9th Cir. 1976) (no standing for rejected applicant for CETA funds since the "program is aimed at aiding migrant workers, not the organizations which receive the funds").

157. *Id.* at 532.

158. *Id.*

> quire the Secretary of HEW to award to SMHA grant money appropriated by Congress in future fiscal years for future programs. Thus, SMHA's claimed loss of $700,000 in grant money is not only illusory but unredressable and, hence, cannot provide a basis for the Association's standing.[159]

The dissent's view on this issue is too narrow and inappropriate; in view of the interests to be protected did not include consideration of the Administrative Procedure Act and its implications for SMHA. Therefore, this narrow perspective must be discarded for the broader analysis given by the majority opinion.

On the merits, Judge Wilkey similarly rejected damage to reputation as a compensable injury. Since he believed that SMHA had no property interest in its role as a conduit for the funds, he reasoned there was no financial or economic injury. He agreed with the district court that *Board of Regents v. Roth*[160] and *Perry v. Sinderman*[161] would support dismissal against SMHA on this issue.

In *Board of Regents v. Roth*, a non-tenured professor's contract was not renewed and he brought suit hoping that the Court would find that due process requires a hearing before the non-renewal could go into effect. The Supreme Court held that a mere showing that he was not rehired in one particular job, without more, did not amount to a showing of a loss of liberty. Nor did it amount to a showing of a loss of property. A similar situation occurred in *Perry v. Sinderman*, where a non-tenured faculty professor was not rehired. There, the college itself had no system of tenure, but it did create expectations of rehiring by its policy and practice. The Court held that this policy and practice was sufficient to create a property interest and that therefore the professor was entitled to a due process hearing before nonrenewal of his contract.

The dissent also relied on *Bishop v. Wood*[162] to reject the contention that the injury to SMHA's good name and reputation amounted to a legally protected interest. In *Bishop v. Wood*, the petitioner was a North Carolina police officer, discharged for reasons he claimed to be false and which were "so serious as to constitute a stigma that may severely damage his reputation in the community . . ."[163] The

159. *Id.* at 530-31.
160. 408 U.S. 564 (1972).
161. 408 U.S. 593 (1972).
162. 426 U.S. 341 (1976).
163. *Id.* at 347.

Supreme Court did not accept this claim of damage to reputation for two reasons. First, on the basis of *Roth* the Court observed such a claim "would stretch the concept too far 'to suggest that a person is deprived of liberty when he simply is not rehired in one job but remains as free as before to seek another.' "[164] Second, the Court cited *Paul v. Davis*[165] where the court held that reputation alone, apart from some more tangible interest, such as employment, is insufficient to invoke the procedural protection of the due process clause of the Fifth Amendment.

Judge Wilkey's reliance on these cases is misplaced, for they are distinguishable from SMHA. The distinction between *Roth* and *Sinderman* is the existence of a created expectation for continued employment which plaintiff Sinderman reasonably assumed in light of the college's policy and practice. Similarly, in SMHA, the grant award document created the expectation in SMHA of five years of continued funding. This is a property interest which the dissent chose to ignore. "A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit . . ."[166] *Roth* and *SMHA* are clearly distinguishable. In *Roth*, the employee's contract was not renewed after the contract period was complete. But SMHA's funds were terminated prior to the completion of the five-year grant period. SMHA also had the requisite "more tangible interest"[167] than its reputation alone at stake in the termination since SMHA's interests lie squarely within the grant award document which is subject to the Administrative Procedure Act and HEW's own regulations. And while the petitioner in *Bishop v. Wood* may have been free to seek another position, the alleged basis for SMHA's termination effectively prohibited it from receiving any similar funds from any other source.

Judge Wilkey also disagreed with the majority's finding that HEW's own regulations required SMHA to be given a hearing before the Grant Appeals Board. He concluded that SMHA had no right to hearing because SMHA had no financial or economic interest in the outcome. He did not even discuss the grant award document, but rather deferred construction of the document to HEW. "[T]he De-

164. *Id.* at 348.
165. 424 U.S. 693 (1976).
166. 408 U.S. at 601.
167. 424 U.S. at 701.

partment's construction of its regulations is most consistent with Congress' intent in enacting the Migrant Health Act. The Department's construction would give a grantee a hearing whenever the grantee had a tangible financial stake in the grant funds, that is, whenever a grant was terminated in mid-term."[168]

The dissent's perspective once again is far too narrow. Termination of a grantee's funds can cause a whole series of detrimental effects for a grantee. To say that the only interest that the grant appeals process intends to protect is a financial interest, is to afford an aggrieved party only a minimum of due process. To maintain that financial loss is the only injury entitled to due process protection is to show an insufficient understanding of due process protection. A fundamental due process principle is the right to notice and the opportunity to be heard, granted in a meaningful time and manner.[169] Fortunately, the majority showed a greater understanding of the interests SMHA had at stake and of the necessity for a due process hearing.

The significance of SMHA lies in the resolution of SMHA's rights as a grantee against the arbitrary and unilateral termination action HEW took on problems it perceived on its first fiscal audit. HEW as a grantor agency had the responsibility to give SMHA a reasonable opportunity to comply with HEW standards and to answer the allegations of wrongdoing. An administrative review of all the areas in which SMHA allegedly lacked compliance could have been made and SMHA could have been given an adequate amount of time to remedy the situation. HEW chose, however, to deny any due process to SMHA and chose to use the most extreme sanction it had, the cutoff of funds.[170]

168. 574 F.2d at 533.

169. Armstrong v. Manzo, 380 U.S. 545, 552 (1965); *see also* Boddie v. Connecticut, 401 U.S. 371, 375 (1971); Fuentes v. Shevin, 407 U.S. 67, 81 (1972). *See generally* Catz & Robinson, *Due Process and Creditor Remedies: From* Sniadach *and* Fuentes *to* Mitchell, North Georgia *and Beyond*, 28 RUTGERS L. REV. 541 (1975).

170. Other possible sanctions short of termination that HEW could have utilized include: (1) The public disclosure by the agency that a grantee has failed to comply with federal standards; (2) An injunction brought by the agency to require the grantee to fulfill any assurances of compliance with federal standards made by the grantee, or to enforce the federal standards attached to the grant; (3) The disallowance as a program or project cost of an expenditure by the grantee that does not conform to federal standards or other partial denial or cut-off of funds that affects only that portion of a program or project that is not in compliance with federal standards; (4) The imposition of special administration conditions on grantee operations, including retroactive

HEW's extreme action left SMHA no choice but to pursue the matter in court in an effort to redress its legitimate grievances. But it is clear that court review is an inadequate solution to problems like those encountered by SMHA and not only because of standing limitations:

> [T]he judicial function is narrowly limited to ascertaining whether the Secretary has made the determination required of him by law, and, if so, whether he has acted in apparent good faith, reasonably rather than arbitrarily and with some factual basis for his decision. If so, judicial review can go no further.[171]

Fortunately for SMHA, the court of appeals found that the Secretary had not made the minimum requisite determination but had simply transferred the funds to SMHA's competing agency without any factual determination of SMHA's non-compliance.

It is difficult to determine at this time what due process SMHA would have received from a hearing held two years after the grant project expiration date and four years after the hearing was first denied. Although SMHA won in court on the issue of its own right to a due process hearing, the question still remains as to what due process rights grantees enjoy when the final funding decision remains in the power of the Secretary of HEW, whose determinations are made without adequately written or easily understood guidelines and whose own judgment lies distant from those of the beneficiaries whom the grants are designed to assist.

IV. CONCLUSION

The recent standing decisions raise several obstacles to a non-profit federally-funded corporation seeking to raise constitutional challenges. A careful pleading designed to pass the four-pronged *Warth-EKWRO* test should provide sufficient standing to argue the constitutional issues.

In *Warth*, the Court held that an association may sue on behalf of its members, and may have standing to assert its members' rights even in the absence of injury to itself. The corporation, however,

---

awarding of benefits, in order to ensure the reparation of any individual damage or prejudice or to correct any shortcomings in the effectuation of federal policy which have resulted from failures to comply with federal standards. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATION 31, ENFORCEMENT OF STANDARDS IN FEDERAL GRANT-IN-AID PROGRAMS (adopted December 7, 1941).

171. Comments of Arthur Gang, former Ass't General Counsel for Litigation and Financing at HUD (published in 22 AD. L. REV. 113, 268 (1970)).

must assert that its members have been injured in fact. To pass the injury in fact test, a grantee should specifically allege the termination of all finances, salaries, bonuses, medical and other benefits provided to the workers of the corporation. It should also document any action taken by its workers in reliance upon their portion of the grant. The grantee should also allege injury to itself and document any action (such as investments or contracts with third parties) that it took upon the belief that the grant would be forthcoming.

Since *Warth* also held that courts must determine whether participation of the individual corporation members is necessary for a proper resolution of the case, the grantee's workers should sue on an individual basis as well to avoid possible pitfalls. Employees threatened with loss of salaries and other employment benefits as a result of a grant termination would be able to allege an economic injury in fact traceable directly to the agency's action.

Non-economic injury, under the *SCRAP* rationale, may also be alleged, although it is extremely doubtful that it would succeed on the merits of the claim. Injury such as deprivation of the freedom of association and freedom of speech may be alleged. Assertions sufficient to indicate a violation of First Amendment rights (such as that the federal agency terminated funds in retaliation for political activity) are cognizable.[172] Injury to reputation may be alleged although in recent case law the Supreme Court has found that injury to reputation standing alone does not warrant judicial intervention on constitutional grounds.

Beyond the test of whether the grantee association can effectively allege injury in fact, the grantee must also demonstrate that the injuries fall within the zone of interest to be protected. One of the difficult requirements raised in *Warth* is that the interests a corporation seeks to protect must be germane to its purpose. A non-profit corporation's general purpose is to address the problems of the constituency it serves, not the problems of the members or its staff. Thus, when it is impossible to raise the rights of the constituency, the corporations's purpose must be described as generally as possible. While in *Hunt* the Court found that the Commerce Clause was meant to protect a state agency, it is unlikely that state agencies would be enti-

172. Southern Mutual Help Ass'n v. Califano, 574 F.2d at 521 n.15. *See also* Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 283-84 (1977); Board of Regents v. Roth, 408 U.S. 564, 574-75 (1971); Apter v. Richardson, 510 F.2d 351, 354 (7th Cir. 1975).

tled the protection of the Fifth Amendment, nor is there clear indication that federal grantees would be entitled to Fifth Amendment protection. In addition, the test of causation can be easily satisfied if it is specifically alleged that the funding was terminated by the federal agency involved.

Finally, to satisfy the fourth *Warth-EKWRO* test, the grantee must sufficiently allege that, if it is granted a favorable decision, the relief requested will be effective to correct the alleged injury. Therefore, it is important to state that the injury and deprivation of rights would not have occurred had there been a due process hearing. Since the *Warth* court stated that a corporation's standing depends in substantial measure upon the relief requested, simple allegations of compensatory damages alone may not satisfy Article III requirements. The relief requested should be a declaratory judgment that the agency has violated the Fifth Amendment of the Constitution and an injunction compelling the agency to continue grant funding until the hearing procedures have been completed.

NOTES