STANDING AFTER *HAVENS REALTY*: A CRITIQUE AND AN ALTERNATIVE FRAMEWORK FOR ANALYSIS

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For more than a decade, the United States Supreme Court has required that a plaintiff demonstrate an "injury in fact" in order to satisfy the Constitution's case-or-controversy prerequisite to the exercise of Article III judicial power.[1] Intended to supplant the "legal injury" test employed in earlier decisions,[2] the injury in fact standard has been shown to be a mutable and poorly defined standard against which to measure standing.[3] The inability to define "injury in fact" with any precision indicates the tremendous burdens constitutional standing requirements are expected to bear in the Court's attempts to delineate generally the boundaries of justiciability. Perhaps it is no surprise, then, that a recent decision displays not only signs of strain in the injury in fact standard, but is also evidence of cracks in the conceptual framework of the standing doctrine.

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1. *See* Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 152 (1970).

2. The concept of legal injury generally eucompassed only violations of a legal right protected by common law or statute. *See, e.g.*, Perkins v. Lukens Steel Co., 310 U.S. 113, 125 (1940). *See also infra* note 38. In Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970), the Court recognized that an interference with an economic interest in freedom from competition was an injury in fact for Article III standing purposes even though the interference did not constitute a legal injury. For a discussion of the difference, see Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450, 457 (1970). *See also* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 501 (1965).

3. *Compare* United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1975) *with* Warth v. Seldin, 422 U.S. 490 (1975). *See generally* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976).

This past term, in *Havens Realty Corp. v. Coleman*,[4] the Court decided that a particular kind of plaintiff—a "white tester"[5]—did not have standing under the Fair Housing Act in his capacity as a tester.[6] The white tester attempted to sue landlords in Richmond, Virginia, who made misrepresentations to others about the availability of apartment units. In reaching the conclusion that the white tester did not have standing, the Court seems to have fallen back on a legal injury requirement for standing.[7] It has disposed of the white tester's claim in a way that fails to distinguish the question whether a plaintiff has standing to sue from the question whether a plaintiff has stated a claim upon which relief can be granted.[8]

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4. 102 S. Ct. 1114 (1982), *aff'g in part & rev'g in part*, Coles v. Havens Realty Corp., 633 F.2d 384 (4th Cir. 1980).

5. A "white tester" in the context of *Havens Realty* means a nonminority individual who would pose as a potential renter or purchaser in order to obtain information about housing availability from a realty company or landlord. This information could then be compared to that information given minority individuals—"black testers"— by the same realty company or landlord. Disparities in the information given the two kinds of testers might constitute evidence of unlawful practices under the Fair Housing Act. *See* 102 S. Ct. at 1121; *see also infra* text accompanying note 17; Schwemm, *Standing to Sue in Fair Housing Cases*, 41 OHIO ST. L.J. 1, 75 (1980); Note, *Gladstone v. Village of Bellwood: The Development and Application of Standing to the Fair Housing Act of 1968*, 9 CAP. U.L. REV. 175, 175 n.2 (1979); Comment, *Fair Housing—The Use of Testers to Enforce Fair Housing Laws—When Testers Are Sued*, 21 ST. LOUIS U.L.J. 172, 190-92 (1977); Note, *Real Estate Steering and the Fair Housing Act of 1968*, 12 TULSA L.J. 758, 770-71 (1977).

6. *See* 42 U.S.C. § 3604 (1976). The Act generally prohibits racially discriminatory practices in housing.

7. The Court left ambiguous the precise nature of its decision with regard to the white tester's standing, noting that he had made no argument in the Supreme Court defending the court of appeals' holding that he had standing to sue in his capacity as a tester, and that he "appears to concede its error." 102 S. Ct. at 1122 n.15. The Court did say that it could "discern no support for the Court of Appeals' holding that [the white tester] has standing to sue in his capacity as a tester." *Id.* at 1122. Muddying the waters even further, the Court also held that the white tester might have standing on a "neighborhood standing" basis previously recognized in Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 97-98, 111 (1979), and indicated that the district court on remand should allow the white tester to make the allegations contained in the complaint more definite in order to demonstrate that this basis of standing was in fact present. 102 S. Ct. at 1124. For discussion of neighborhood standing, see *infra* text accompanying notes 25-27.

8. *See* FED. R. CIV. P. 12(b)(6). The Court refers to the white tester's complaint as demonstrating a failure to plead "a cause of action," and characterizes this failure as "[m]ore to the point" than the lack of standing to sue in the plaintiff's capacity as a tester to whom truthful information was given. Thus one might argue that the Court decided that the white tester's claim could not go to trial on the merits because he failed to state a claim for relief rather than because he lacked standing as a tester.

This does not seem to describe accurately what the Court did in *Havens Realty*, however. The Court has held that standing is a jurisdictional matter, *see* Jenkins v. McKeithen, 395 U.S. 411, 421 (1969) and Flast v. Cohen, 392 U.S. 83, 99 (1968), and thus the standing question must be answered in the affirmative in order for a court to reach the substantive claims for relief. Because the Court stated that it found no support for the court of appeals' holding that Willis had tester standing, *see* 102 S. Ct. at 1122, the claim for relief issue was not properly before the Court.

The Court's disposition of the white-tester standing issue in *Havens Realty* was not central to the disposition of the case,[9] nor does it represent a clear repudiation of standing doctrines to which the Court currently adheres.[10] Nevertheless, the Court's approach does raise questions about the direction in which standing may be developing. Of particular concern is the degree to which the Court's action concerning the white tester's standing will affect the "private attorney general" theory of standing to challenge administrative action.[11] This article does not attempt to unravel the Supreme Court's snarled line of standing decisions following the adoption of the injury in fact standard in 1970.[12] It uses *Havens Realty* as an opportunity to demonstrate the

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The most extensive work to date on the relationship between the concepts of standing and claim for relief is Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425 (1974). Professor Albert argues that, in the context of judicial review of allegedly unlawful government action, courts ought to recognize that the standing inquiry involves "an adjudication of familiar components of a cause of action, resolved by asking whether a plaintiff has stated a claim for relief." *Id.* at 426 (footnote omitted). This is apparently also Professor Currie's view. *See* D. Currie, *Misunderstanding Standing*, 1981 SUP. CT. REV. 41, 47; *see also* Schwemm, *supra* note 5, at 7-8. Part I of this article demonstrates the undesirability of this view of standing in a context other than the review of administrative action. Part II examines the operation of Professor Albert's view, as adopted by the Supreme Court of Colorado, and finds it wanting even in the context of judicial review of administrative action.

9. The Court did hold open the possibility that the white plaintiff who lacked standing in a tester capacity might have standing on a "neighborhood standing" basis. *See supra* note 7. If a white tester can obtain "neighborhood standing," then the tester standing theory may not have much significance to him. For the suggestion that neighborhood standing may not have been available in *Havens Realty*, however, see *infra* text accompanying notes 62-64.

Furthermore, even if the white plaintiff had tester standing as a constitutional matter, a sound analysis of practical considerations along the lines suggested in this article, *see infra* notes 118-56 and accompanying text, may lead to the conclusion that, on nonconstitutional grounds, a court might choose not to recognize the white plaintiff's standing as a tester. Should the white plaintiff lack standing on any basis whatsoever, the availability of individual black plaintiffs, as well as an organizational plaintiff, may suffice to bring before a court the merits of Fair Housing Act violations similar to those alleged in *Havens Realty*.

10. *See generally supra* notes 7-8.

11. The private attorney general theory is most often associated with Judge Frank's opinion in Associated Indus. of N.Y. State, Inc. v. Ickes, 134 F.2d 694, 704 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943); *cf.* FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940) (employing the concept but not using the term). Part II of this article addresses the impact *Havens Realty* could have on this theory of judicial review of administrative action.

12. One critic of the line of Supreme Court standing decisions has referred to a "sense of intellectual crisis" created by "erratic, even bizarre" judicial behavior. J. VINING, LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW 1 (1978). Another commentator has characterized the Supreme Court's standing decisions after 1970 as "largely irrational," but explainable by the "motivation of the Justices to sacrifice rationality of the law of standing in order to produce wanted substantive results." K. DAVIS, ADMINISTRATIVE LAW TREATISE 326 (2d ed. Supp. 1982). A state supreme court has said that the line of cases beginning in 1970 does "not articulate a coherent body of standing law." Cloverleaf Kennel Club, Inc. v. Colorado Racing Comm'n, 620 P.2d 1051, 1055 n.5 (Colo. 1980). Nevertheless, for helpful general discussions of standing since the Supreme Court's decision in Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970), *see, e.g.*, Albert, *Justiciability and Theories of Judicial Review: A Remote Relationship*, 50 S.

flaws in the Court's analysis of white-tester standing[13] and to explore the effects that this flawed analysis could have on the issue of standing to obtain review of administrative action.[14] Finally, drawing on this analysis, the article develops a multiple factor framework for the analysis of standing,[15] designed to reduce the constitutional dimensions of the standing inquiry and to resolve the problem of controlling access to federal courts by utilizing a more flexible analysis of practical standing considerations.

I. *HAVENS REALTY*: THE LEGAL INJURY TEST REVIVED?

In 1978, Housing Opportunities Made Equal (HOME), a "nonprofit corporation created for the purpose of eliminating unlawful, discriminatory housing practices" in the Richmond, Virginia, area,[16] employed a number of testers to inquire into the availability of housing in the Richmond metropolitan area.[17] Among these testers was R. Kent Willis, who is white. On three occasions in March of that year, he contacted Havens Realty to inquire about the availability of apartments owned and operated by Havens. On each occasion a Havens Realty employee told him that an apartment was available. On each of the three days that Willis made an inquiry, a black HOME employee acting as a tester was told by Havens Realty that no apartments were available. In January of 1979, HOME, Willis, and two black plaintiffs sued Havens Realty and a Havens employee in federal district court, alleging that the defendants had made racially discriminatory misrepresentations concerning the availability of rental units, and that the misrepresentations constituted a practice of "racial steering."[18] The

CAL. L. REV. 1139 (1977); Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425 (1974); Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297 (1979); Brilmayer, *A Reply*, 93 HARV. L. REV. 1727 (1980); Jaffe, *Standing Again*, 84 HARV. L. REV. 633 (1971); Roberts, *Fact Pleading, Notice Pleading, and Standing*, 65 CORNELL L. REV. 390 (1980); Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645 (1973); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975); Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663 (1977); Tushnet, *The "Case or Controversy" Controversy*, 93 HARV. L. REV. 1698 (1980).

13. *See infra* notes 16-60 and accompanying text.

14. *See infra* notes 61-95 and accompanying text.

15. *See infra* notes 96-156 and accompanying text.

16. HOME is so described in Coles v. Havens Realty Corp., 633 F.2d 384, 385 (4th Cir. 1980), *aff'd in part & rev'd in part*, 102 S. Ct. 1114 (1982).

17. *See supra* note 5 for a brief definition of the term "tester."

18. "Racial steering" has been defined as "directing prospective home buyers interested in equivalent properties to different areas according to their race." Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 94 (1979); *see also* Note, *Gladstone Realtors v. Village of Bellwood: Expanding Standing Under the Fair Housing Act*, 8 B.C. ENVTL. AFF. L. REV. 783, 786-89 (1980);

court dismissed the claims of all but one of the individual plaintiffs, holding that the other plaintiffs lacked standing under both the Fair Housing Act[19] and the Civil Rights Act of 1866.[20] The Court of Appeals for the Fourth Circuit reversed, holding that all the plaintiffs had standing under the Fair Housing Act.[21] The Supreme Court granted *certiorari.*[22]

A. *The Court's Rejection of Standing for the White Tester.*

Cases decided prior to *Havens Realty* had raised the issue of tester standing,[23] but the Supreme Court had not reviewed the issue.[24] In its most recent Fair Housing Act standing decision prior to *Havens Realty*, *Gladstone, Realtors v. Village of Bellwood*,[25] the Court was able to bypass the tester issue because the plaintiffs did not press their claim for standing in their capacity as testers before the Court. The plaintiffs claimed that the defendants' racial steering practices deprived them of the benefits of living in an integrated community. Accordingly, the Court limited its discussion to the issue of whether homeowners in such target neighborhoods[26] had standing as home owners or residents.[27] By granting *certiorari* in *Havens Realty*, the Court seemed prepared to face squarely the question of tester standing. Unfortunately, the Court only added to the confusion in its current approach to the law of standing.[28]

In *Havens Realty* the Court unanimously held[29] that Willis, the

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Note, *Racial Steering: The Real Estate Broker and Title VIII*, 85 YALE L.J. 808, 809-12 (1976). The practice violates the Fair Housing Act, which provides that "it shall be unlawful . . . [t]o represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available," 42 U.S.C. § 3604(d) (1976).

19. 42 U.S.C. §§ 3601-3631 (1976 & Supp. IV 1980).

20. 42 U.S.C. § 1982 (1976).

21. Coles v. Havens Realty Corp., 633 F.2d 384 (4th Cir. 1980).

22. Havens Realty Corp. v. Coleman, 451 U.S. 905 (1981).

23. *See, e.g.*, Village of Bellwood v. Dwayne Realty, 482 F. Supp. 1321 (N.D. Ill. 1979); Wheatley Heights Neighborhood Coalition v. Jenna Resales, 429 F. Supp. 486 (E.D.N.Y. 1977). *But see* Schwemm, *supra* note 5, at 75; Comment, *supra* note 5, at 190-92.

24. For a review of the Supreme Court decisions on fair housing claims, see Note, *Havens Realty Corp. v. Coleman: Extending Standing in Racial Steering Cases to Housing Associations and Testers*, 22 URB. L. ANN. 107, 119-34 (1981).

25. 441 U.S. 91 (1979).

26. These target neighborhoods are neighborhoods that were becoming, or were being maintained as, racially segregated as a result of the realtors' practice of steering white prospective buyers only to white neighborhoods and black prospective buyers only to black or integrated neighborhoods.

27. 441 U.S. at 111.

28. *See supra* note 12 (current irrationality in the Court's approach to standing).

29. Justice Powell, the author of the majority opinion in *Gladstone, Realtors*, filed the only separate opinion. He questioned the individual plaintiffs' ability in *Havens Realty* to establish

white tester, did not have standing as a tester.[30] The Court concluded, however, that Coleman, the black tester, had satisfied the Article III requirement of injury in fact.[31] This would have given Coleman standing under the Fair Housing Act as a tester.[32] The Court's reason for distinguishing between the black and white individual plaintiffs on the issue of tester standing involved a literal reading of section 804(d) of the Fair Housing Act, which makes it, *inter alia*, "unlawful . . . to represent to any person because of race . . . that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available."[33] Havens Realty told HOME's black tester that units were not available when such units allegedly were available.[34] That allegation, if true, would establish a violation of section 804. Havens Realty told HOME's white tester that apartments were available, and in fact there were units available.[35] Consequently, the white tester had not alleged that Havens Realty provided him with false information about the availability of housing. The Court seemed to reason that, as a result, Havens Realty had not violated any section 804 right of the white tester to receive truthful information. The Court concluded that there was thus no basis for recognizing the tester standing of Willis, the individual white plaintiff.[36]

The Court's focus on whether Havens Realty's conduct invaded Willis' congressionally-created right to truthful, nondiscriminatory

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"neighborhood standing" based on what he characterized as "a particularly disturbing example of lax pleading." 102 S. Ct. at 1127.

30. 102 S. Ct. at 1122.

31. *Id.*

32. In *Gladstone, Realtors* the Court had held that standing under section 812 of the Fair Housing Act was as broad as Article III of the Constitution permitted. 441 U.S. at 109. The Court had earlier held that standing under section 810 of the Act, 42 U.S.C. § 3610 (1976), showed the same congressional intent to confer standing to the limits of Article III. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 209 (1972). Thus, the *Havens Realty* black tester plaintiff, having shown an injury in fact satisfying the Article III requirement, would have encountered no other hurdles in establishing that she had standing as a tester. The Supreme Court decided, however, that Coleman's tester claim was time-barred by not having been brought within 180 days after the defendants allegedly made misrepresentations to her. 102 S. Ct. at 1125-26.

33. 42 U.S.C. § 3604(d) (1976).

34. Ms. Coleman, the black tester plaintiff in the suit against *Havens Realty,* inquired four times about the availability of apartments at Havens Realty complexes. Each time she was told that no apartments were available. 102 S. Ct. at 1118-19.

35. *Id.*

36. Respondent Willis' situation is different. He made no allegation that petitioners misrepresented to him that apartments were unavailable in the two apartment complexes. To the contrary, Willis alleged that on each occasion that he inquired he was informed that apartments *were* available. As such, Willis has alleged no injury to his statutory right to accurate information concerning the availability of housing. We thus discern no support for the Court of Appeals' holding that Willis has standing to sue in his capacity as a tester.

102 S. Ct. at 1122 (emphasis in original).

housing information is not properly a standing inquiry. It raises instead the question whether Willis had stated a claim on which relief could be granted.[37] By confusing the two questions in this fashion, the Court in *Havens Realty* raises the possibility that the legal injury test, which required plaintiffs to show an invasion of a "private substantive legally protected interest,"[38] is again being read into the Article III requirement of standing.[39]

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37. The Court noted that "because Willis does not allege that he was a victim of a discriminatory misrepresentation, he has not pleaded a cause of action under § 804(d)." 102 S. Ct. at 1122. In *Gladstone, Realtors*, the Court had noted that whether the "respondents themselves are . . . granted substantive rights by § 804 . . . hardly determines whether they may sue to enforce the § 804 rights of others. . . . The central issue at this stage . . . is not who possesses the legal rights protected by § 804, but whether respondents were genuinely injured by conduct that violates *someone's* § 804 rights, and thus are entitled to seek redress of that harm under § 812." Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 103 n.9 (1979) (emphasis in original). Of course, not all the relief generally available under the Fair Housing Act necessarily should be granted to all plaintiffs who have standing to assert violations of the Act. Section 812 of the Act, 42 U.S.C. § 3612(c) (1976), provides for compensatory and punitive damages as well as injunctive relief. *See generally* Chandler, *Fair Housing Laws: A Critique*, 24 HASTINGS L.J. 159, 180 (1973). A white tester plaintiff might appropriately seek an injunction against misrepresentations of housing availability on the basis of race, but an award of compensatory or punitive damages would seem to be inappropriate relief for such a plaintiff. *See generally* Schwemm, *supra* note 5, at 8-9.

38. In Tennessee Power Co. v. TVA, 306 U.S. 118 (1939), the Court described the legal injury test as follows:

> The appellants invoke the doctrine that one threatened with direct and special injury by the act of an agent of the government which, but for statutory authority for its performance, would be a violation of his legal rights, may challenge the validity of the statute in a suit against the agent. The principle is without application unless the right invaded is a legal right—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege.

Id. at 137-38.

The language quoted in the text draws on Judge Frank's summary of the legal injury approach:

> In a suit in a federal court by a citizen against a government officer, complaining of alleged past or threatened future unlawful conduct by the defendant, there is no justiciable "controversy," without which, under Article III, § 2 of the Constitution, the court has no jurisdiction, unless the citizen shows that such conduct or threatened conduct invades or will invade a *private substantive legally protected interest* of the plaintiff citizen; such invaded interest must be either of a "recognized" character, at "common law" or a substantive private legally protected interest created by statute.

Associated Indus. of N.Y. State, Inc. v. Ickes, 134 F.2d 694, 700 (2d Cir.), *vacated as moot*, 320 U.S. 708 (1943) (issue mooted by expiration of Bituminous Coal Act) (emphasis added).

The Supreme Court rejected this legal injury or legal interest test in Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970), as being "a matter quite distinct from the problem of standing." *Id.* at 153 n.1. For an interesting parallel between the legal injury test and the restrictive standing opinions of the 1970s, see Comment, *Form and Function: Federal Standing Since* Warth v. Seldin, 18 SANTA CLARA L. REV. 183, 200 n.103 (1978).

39. If the Court is to be consistent with its prior rulings that the only limitations on standing in Fair Housing Act cases are those imposed by Article III, *see supra* note 32, the decision that Willis does not have standing must have constitutional undertones. This article critiques the legal injury test's blend of standing and claim for relief issues. *See infra* notes 61-95 and accompanying text.

B. *The White Tester Should Have Standing Under the Current Injury in Fact Standard.*

Under the Supreme Court's current standing analysis,[40] the plaintiff must have suffered an injury in fact redressable by the relief sought from the court in order to satisfy the constitutional standing requirement.[41] Nothing in this version of the constitutional test of standing requires the plaintiff to show that the injury also constitutes the invasion of a right created by the statute allegedly violated by the defendant.[42] In *Havens Realty*, the Court's analysis—tracking statutory rights

40. It is possible to define a "mainstream" standing test as that test first enunciated in Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970) and Barlow v. Collins, 397 U.S. 159 (1970). The *Data Processing* test consists of two questions: first, "whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise," and second, "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." 397 U.S. at 152-153.

41. One of the Court's most recent reiterations of the constitutional standards for standing states that the

> essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions. . . . This requirement of a personal stake must consist of a distinct and palpable injury to the plaintiff . . . and a fairly traceable causal connection between the claimed injury and the challenged conduct.

Larson v. Valente, 102 S. Ct. 1673, 1680 (1982).

42. Such a connection between the injury that the plaintiff alleges and a right created by statute would seem to be a form of the nexus requirement introduced and applied in Flast v. Cohen, 392 U.S. 83 (1968). In setting out the standing requirements for federal taxpayers who challenge federal spending programs, the *Flast* Court described two nexuses that had to be established: first, a link between the plaintiff's status as a taxpayer and the type of legislative enactment attacked, and second, a link between the taxpayer status and the precise nature of the constitutional infringement alleged. *See id.* at 102. For a discussion of whether the white tester plaintiff would satisfy a similar nexus requirement, *see infra* text accompanying notes 54-60. In any event, the Supreme Court has strictly limited the applicability of the *Flast* nexus requirements to cases of taxpayer standing. *See* Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 78-79 (1978), in which the Court observed that although the argument had been made "that the nexus requirement . . . has general applicability," a litigant would have to show a "nexus between the right asserted and the injury alleged only in the context of taxpayer suits."

The Court's collapsing of the standing inquiry and the claim for relief question is prefigured by developments in the first amendment, *see* Rendleman, *Free Press-Fair Trial: Restrictive Orders After Nebraska Press*, 67 KY. L.J. 867, 877-79 (1978-79), and the fourth amendment, *see* Kuhns, *The Concept of Personal Aggrievement in Fourth Amendment Standing Cases*, 65 IOWA L. REV. 493 (1980); Williamson, *Fourth Amendment Standing and Expectations of Privacy: Rakas v. Illinois and New Directions for Some Old Concepts*, 31 U. FLA. L. REV. 831 (1979), to the United States Constitution. Regarding the fourth amendment standing issue, Professor Williamson characterizes Rakas v. Illinois, 439 U.S. 128 (1978), as "the first case in which the United States Supreme Court has expressly acknowledged the close relationship between the concept of standing and the merits of the substantive claims presented by litigants." 31 U. FLA. L. REV. at 835. In *Rakas*, the Court concluded "that the type of standing requirement [that a person making a motion to suppress must have been a victim of the search and seizure] is more properly subsumed under substantive Fourth

created by the Fair Housing Act—focused on whether the white tester personally received a discriminatory misrepresentation of housing availability.[43] The relevant question under injury in fact analysis, however, remains whether the defendants' practice of giving racially discriminatory housing information injured the white tester. In a Fair Housing Act misrepresentation case, the defendant's conduct should be viewed as inflicting an informational injury[44] on the class of people to whom the defendants made representations. An isolated piece of information is relatively meaningless in the housing context. Only after the defendants have made a number of statements can anyone validly conclude whether any statements were false and whether the defendants' practices can be characterized as racial steering. The persons injured are those to whom the defendants direct this total package of information. Whether the recipients of any particular statement were white or black is irrelevant to the determination of whether the entire class of recipients has suffered injury.[45]

Amendment doctrine." 439 U.S. at 139. This leaves the Court with the question "whether the challenged search and seizure violated the Fourth Amendment *rights of a criminal defendant* who seeks to exclude the evidence obtained during it. That inquiry in turn requires a determination of whether the disputed search and seizure has infringed *an interest of the defendant* which the Fourth Amendment was designed to protect." *Id.* at 140 (emphasis added).

Rakas demonstrates the Court's blending of what had previously been identified as standing considerations into the question of the scope of fourth amendment protection. *Havens Realty* suggests that the Court is incorporating a claim for relief inquiry into what had previously been considered a matter of Article III standing. The distinction between the two cases is more than a matter of semantics, more than a quibbling about what-gets-merged-into-what. Although it may be true that "no decided cases of this Court . . . would have come out differently" under a substantive fourth amendment rather than a standing inquiry, *id.* at 139, that clearly cannot be said of the *Havens Realty* transformation of standing. *See infra* notes 78-95 and accompanying text.

43. The white tester "made no allegation that petitioners misrepresented *to him* that apartments were unavailable." 102 S. Ct. at 1122 (emphasis added).

44. *Cf.* Note, *Informational Injuries as a Basis for Standing*, 79 COLUM. L. REV. 366 (1979) (drawing a distinction between injury to economic, environmental, recreational, and aesthetic interests, on the one hand, and injury to a litigant's interest in information, on the other). The author focuses on information held by a governmental entity, but his definition of informational interests as existing "whenever litigants seek information possessed by another party," *id.* at 366, would encompass the interest in seeking information from a landlord about the availability of housing. The informational character of the injury is revealed when the business of the defendants is seen "as a service that disseminates information covering a broad spectrum of factors usually considered by prospective purchasers . . . , such as the quality and location of the schools, transportation, property values, proximity to employment and the crime rate." Note, *Real Estate Steering and the Fair Housing Act of 1968*, 12 TULSA L.J. 758, 762-64 (1977).

45. White testers acquire information about the practice of realtors on the same basis as black testers. One commentator, however, labels white testers as "corroborative" testers to distinguish them from black, or "litigious," testers. *See* Comment, *Fair Housing—The Use of Testers to Enforce Fair Housing Laws—When Testers are Sued*, 21 ST. LOUIS U.L.J. 170, 184-85 (1977). That distinction lends itself to viewing the white testers as "no more than an investigative tool," *id.* at 184, rather than as potential plaintiffs. This article makes the opposite point that a white tester is also properly a "litigious" tester. To deny standing for the white tester would be to ignore the

The preceding analysis is not a disguised version of citizen standing[46] in which an individual plaintiff asserts no more than a general interest in lawful behavior.[47] Three factors distinguish a white tester and his claim of injury from any other citizen who is offended by Havens Realty's alleged racial steering.[48]

First, in both his actions and his motive, the white tester plaintiff in *Havens Realty* differs from the mass of citizens who object to racial discrimination in general and discriminatory housing practices in particular. As a HOME employee, Willis participated in a concerted effort to determine whether Havens Realty engaged in racial steering. Willis also resided in one of the political subdivisions in which HOME sought to bring about equal housing opportunities.[49] These facts indicate a specific, localized concern with the particular instances of unlawful conduct challenged in the lawsuit. A localized concern of this sort, which will usually be apparent on the face of the pleadings, provides a line separating particularly injured persons from the general citizenry. Courts can set standing limits to correspond with that line rather than to reflect the demarcation between those who hold a statutorily created right invaded by the defendant's conduct and those who hold no such right.[50]

Second, as noted earlier,[51] the Court has held that Congress intended to grant standing to assert violations of the Fair Housing Act to the full extent permitted by Article III. Having reached this conclusion without reservation, the Court should not now read into the constitutional injury-in-fact requirement considerations that are essentially

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informational injury defendants have inflicted on those who were being steered. Furthermore, recognizing that both black and white testers suffer the same informational injury from the defendants' pattern of statements avoids hair-splitting exercises in semantics in evaluating the truth or falsity of defendants' responses to the testers' questions.

46. *See generally*, Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968).

47. *Cf.* Valley Forge Christian College v. Americans United for Separation of Chureh & State, Inc., 454 U.S. 464, 474-75 (1982) (denying citizen standing to taxpayers challenging the conveyance of federal surplus property to a college operated by a religious order).

48. For a suggested restructuring of the constitutional and nonconstitutional components of the standing inquiry, see *infra* notes 96-156 and accompanying text. Identifying a white tester with the general population would properly be couched as a practical reason for denying standing, but would not be deemed a constitutional matter.

49. "The . . . individual plaintiffs . . . at the time the complaint was filed were all residents of the City of Richmond or the adjacent Henrico County." 102 S. Ct. at 1119. *See supra* text accompanying note 16.

50. The latter distinction is one that cannot normally be made on the basis of the pleadings. It involves instead a consideration of legislative purpose, and quickly involves the court in the merits of the claim. *See* Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 175-76 (1970) (Brennan, J., concurring in part & dissenting in part).

51. *See supra* note 32.

prudential in nature. By deciding that the white tester lacks standing because Havens Realty had not violated his right to truthful information, the Court refuses to let Willis assert the statutory rights of those to whom the defendants allegedly provided false information regarding rental vacancies. To remain consistent with its past decisions, the Court should acknowledge that a denial of standing for this reason does not proceed from a constitutional basis, but rather from "prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim."[52] Two facts therefore distinguish the white tester plaintiff from the general citizen who alleges a violation of some legal duty imposed on the defendant: (1) Congress swept away all but the constitutional barriers to standing, and (2) asserting the legal rights of others has been treated as a nonconstitutional restriction on standing.[53]

Finally, even if the Supreme Court were to extend its restrictive approach to citizen or taxpayer[54] standing to this case, Willis would have satisfied the requirements the Court would most likely have set out. If the *Flast v. Cohen*[55] taxpayer standing nexus requirements[56] were to be reworked into a citizen standing test, the test probably would be stated in the form suggested by the Supreme Court in *Duke Power Co. v. Carolina Environmental Study Group:*[57] a "subject matter nexus between the right asserted and the injury alleged."[58] Willis could

52. Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99-100 (1979).

53. *Id.; see also* Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 474-75 (1982); *id.* at 769 n.4 (Brennan, J., dissenting).

54. Citizen and taxpayer suits are similar in that they contemplate a very broad class of litigants who are able to challenge governmental action on the basis of a remote or tenuous link to that action. The taxpayer plaintiff alleges some unauthorized use of federal revenues, at least a portion of which in theory have come from the plaintiff. Professor Jaffe suggests that "[t]he point of the distinction . . . is that the plaintiff in the taxpayer's suit is thought to be 'affected' in a sense that distinguishes him from the citizen who . . . is the mere instrument of the public's concern." L. JAFFE, *supra* note 2, at 473.

55. 392 U.S. 83 (1968).

56. *See supra* note 42.

57. 438 U.S. 59 (1978).

58. *Id.* at 79. Had the Court in *Duke Power* acknowledged the true nature of the plaintiffs' injury in that case, the plaintiffs would have satisfied this nexus. The Court phrased the right and the injury in the following language: "The only injury that would possess the required subject-matter nexus to the due process challenge is the injury that would result from a nuclear accident causing damages in excess of the liability limitation provisions of the Price-Anderson Act." *Id.* at 78 n.23. To find a nexus, however, the Court needed only to recognize that the injury that the plaintiffs suffered lay in the destruction of their latent or inchoate claim for damages above the Price-Andersou Act ceiling. The environmental and health effects identified by the Court as constituting injury in fact from the operation of Duke Power Company's nuclear power plants, *id.* at

assert a right to insist on the defendants' compliance with the Fair Housing Act's prohibition of discriminatory misrepresentation and could allege as an injury the receipt of part of the total package of information disseminated by the defendants as they engaged in racial steering.[59] Thus, even under the restrictive test, which the Supreme Court has until now refused to extend beyond the context of taxpayers' suits,[60] the white tester would have standing as a tester.

Because, as these three factors illustrate, recognizing white tester standing in *Havens Realty* would not open the door to mere citizen standing, the Supreme Court's flawed analysis cannot be excused by claiming that its result is "a necessary evil." Nor, as the next section of this article demonstrates, is the error of the Court's analysis benign, in the sense of doing little damage.

II. *HAVENS REALTY*'S IMPLICATIONS FOR STANDING TO OBTAIN JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

Defenders of the result in *Havens Realty* might argue that even if the Supreme Court has collapsed a claim for relief inquiry into the standing requirement, the development will not prove decisive in many cases.[61] In *Havens Realty* itself, for example, because the Court left open the possibility that the white tester could have standing on a neighborhood standing basis,[62] the denial of tester standing might appear insignificant. The *Havens Realty* facts suggest, however, that a white tester may not be able to demonstrate, at a standing hearing, that he resides in a neighborhood subjected to steering practices that deprive him of the benefits of interracial associations.[63] For example, if a

73-74, represented valid indicia of the likelihood that, in the event of a serious nuclear power plant accident (or "incident"), the plaintiffs adversely affected by low level radiation, for example, would be in such close proximity to the plant that they would suffer the harms serving as the basis of a claim for damages. The deprivation of an opportunity to hold another party liable for the harm caused by that party's conduct does implicate due process rights. *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

59. *Cf. supra* note 45 (A white tester such as Willis might engage in an attempt to impute false connotations to the replies he received from artfully phrased questions posed to realtors. This focus on interpretations is avoided by treating the combined true and false statements issued by a realtor as an informational package presented to the segment of the public consisting of white and black testers.).

60. *See supra* note 42.

61. For the suggestion that the distinction between a dismissal for lack of standing and a dismissal for failure to state a claim can be a significant procedural matter, *see* Schwemm, *supra* note 5, at 13 n.53.

62. *See supra* notes 7 & 9, and text accompanying notes 25-27.

63. In *Gladstone, Realtors v. Village of Bellwood,* the Court recognized the standing of four individual respondents who "actually reside within the target area of Bellwood" and who "claim that the transformation of their neighborhood from an integrated to a predominately Negro com-

plaintiff tester lived in an integrated neighborhood that, by chance, was not becoming segregated despite the racial steering practices of local realtors, the plaintiff would find himself unable to use neighborhood standing to assert the realtors' discriminatory practices as violations of the Fair Housing Act. Thus tester standing might provide the only avenue to a remedy for the informational injury as a result of realtors' practices that are, for whatever reason, unsuccesful in producing segregated housing patterns.[64]

Even apart from whatever practical effect the Supreme Court's analysis of tester standing has in the factual setting of *Havens Realty*-type cases, that analysis has potentially significant consequences for the scope of standing to obtain judicial review of administrative agency decisions. The paradigm case for illustrating those consequences is *FCC v. Sanders Brothers Radio Station*.[65]

A. *Standing Under* Sanders Brothers.

Sanders Brothers operated radio station WKBB in East Dubuque, Illinois. In January of 1936, the Telegraph Herald filed an application with the FCC to open a radio station in Dubuque, Iowa. Five months later, Sanders Brothers applied for a permit to move its station across

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munity is depriving them of 'the social and professional benefits of living in an integrated society.'" 441 U.S. 91, 111 (1979). The Court discussed the distinction between claiming a harm to the racial character of a "community" and alleging such harm to "society," and concluded that "the allegations of injury to the individual respondents' 'society' refer to the harm done to the residents of the *carefully described neighborhood* in Bellwood in which four of the individual respondents reside." *Id.* at 112 (emphasis added). The Court noted that it did not "intimate [a] view as to whether persons residing outside of the target neighborhood have standing to sue under § 812." *Id.* at 113 n.25.

The apparent racism of the comments quoted above might be tempered somewhat by the realization that earlier cases extending standing under the Fair Housing Act involved the exclusion of minority residents from a neighborhood or community. *See, e.g.*, Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972).

64. Another situation in which recognizing tester standing would be an important part of enforcement of the legislative intent embodied in the Fair Housing Act is the one encountered when the residents of a community or neighborhood wish to maintain existing segregated housing. Commenting on *Gladstone, Realtors*, one writer has observed that if the circumstances in that case were such that

> the residents of Bellwood had preferred to live in a segregated area, it is unlikely that the suit would ever have been brought. If the residents were unwilling to integrate their community, it is likely that the village would have thought it politically wise to accommodate the residents. Thus, the two parties who were granted standing would not have brought suit and the discrimination would have continued.

Note, *Federal Jurisdiction—Standing to Sue in Federal Court: The Direct Injury Standard*, 2 W. NEW ENG. L. REV. 793, 811 (1980).

65. 309 U.S. 470 (1940). Professor Jaffe characterizes this case as "the watershed case in the law of standing," noting that "it has generated a strong current toward the broader concept of standing, particularly where there is present a statutory phrase such as 'person aggrieved' or 'adversely affected,' but even where there is none." L. JAFFE, *supra* note 2, at 503.

the Mississippi River to Dubuque, Iowa. Subsequent to their own application, Sanders Brothers sought and received permission to intervene in the Telegraph Herald license proceedings. The agency granted both of the applications, thus licensing two radio stations in Dubuque. Before the agency, and in its appeal to the Court of Appeals for the District of Columbia Circuit, Sanders Brothers alleged that the advertising market in the broadcast area could not support two stations and that WKBB had been operating at a loss. Sanders Brothers claimed that the FCC should make findings about, and include in its decision a consideration of, the economic injury that a competitor of a license applicant would suffer if the applicant is granted a license. Because the FCC failed to make such findings of fact on the issue of economic injury, the court of appeals reversed the FCC's licensing decision.[66] The Supreme Court, in turn, reversed the decision of the court of appeals.[67]

Before the Supreme Court, the FCC argued that Sanders Brothers did not have standing to obtain judicial review of the agency decision to issue a license to the Telegraph Herald. Relying on the proposition that economic injury to a competitor did not constitute an independent factor that the agency must consider, the FCC contended that "absence of right implies absence of remedy."[68] The Court rejected the FCC's attempt to limit the class of those who had standing to challenge the agency decision to those whose legally protected rights or interests were invaded by that decision. The Court instead held that the economic injury alleged by Sanders Brothers gave the company standing to obtain judicial review of the agency action.[69] The Court tied this grant of standing to the congressional extension of appeals from FCC license or permit decisions to "any other person aggrieved or whose interests are adversely affected by" a decision of the agency granting or denying an application.[70] The Court decided that the "other person" language could be read as an expression of a congressional "opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license."[71] The Court gave effect to that congressional intent by recognizing the standing of Sanders Brothers "to raise . . . *any* relevant question of law in respect to the orders of the Commission."[72]

66. Sanders Bros. Radio Station v. FCC, 106 F.2d 321 (D.C. Cir. 1939).
67. FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940).
68. *Id.* at 477.
69. *Id.*
70. *See* 47 U.S.C. § 402(b) (1976).
71. 309 U.S. at 477.
72. *Id.* (emphasis added).

The Court in *Sanders Brothers* recognized that Congress could grant standing to a person injured by an agency decision even if the injury is not one from which Congress sought to protect the person challenging the decision. The challenger's injury may not constitute a reason for setting aside the agency action, but the challenger who has standing as a result of that injury is able to alert the reviewing court to any procedural or substantive errors committed by the agency in the process of reaching the decision that produced the harm. By setting aside the agency decision on the basis of those procedural or substantive errors, the reviewing court may cure the challenger's injury, but that relief must remain incidental to some other goal. In the FCC licensing context, Congress did not consider amelioration of a competitor's economic injury terribly important; if it had, the statute could have required the agency to take the economic injury factor into account in its license application deliberations. The statute did not, however, include such a requirement. Thus Congress and the Court must have conferred standing for a broader purpose: to bring the agency decision before a reviewing court in order for that court to have an opportunity to test the decision against a standard of lawful agency behavior.

Sanders Brothers differs conceptually from later decisions recognizing the standing of members of an audience served by a broadcaster.[73] This "audience standing" is analogous to the "neighborhood standing" the Supreme Court uses in the Fair Housing Act cases and would recognize standing of a member of the audience even under an analysis that collapses the standing and the claim for relief inquiries into one issue. The Federal Communications Act provides that the FCC may grant or renew a license only if the action would serve the public interest, necessity, or convenience.[74] Thus the statute apparently implies that viewers or listeners of a licensee have a legal right to be served by a broadcaster who operates consistent with the public interest.[75] Agency approval of a license application by an applicant who

73. *See e.g.*, Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1000-06 (D.C. Cir. 1966). *See generally* Padden, *The Emerging Role of Citizens' Groups in Broadcast Regulation*, 25 FED. COM. B.J. 82 (1972).

74. The Federal Communications Commission

> shall determine . . . whether the public interest, convenience, and necessity will be served by the granting of [a license] application, and if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

47 U.S.C. § 309(a) (1976).

75. Courts interpret the statutory standard in a way that allows a very close scrutiny of the licensee's conduct. One recent opinion stated that the "public interest standard of the Communi-

allegedly does not so operate therefore invades a legally protected interest of the listening or viewing challenger.[76]

The "audience standing" idea played no overt part in the *Sanders Brothers* standing decision. Congress conferred no legal right on Sanders Brothers Radio Station to be free from economic injury as a result of a competitor siphoning off limited advertising dollars.[77] As indicated previously, the case thus stands in part for the proposition that Congress can grant standing without also creating or recognizing a legal right to be free from the injury that supports standing.

B. *The Impact of* Havens Realty *on the* Sanders Brothers *Analysis.*

Havens Realty raises the possibility that Sanders Brothers Radio Station would not have standing if the issue were presented today. As a competitor, Sanders Brothers did not have a legally protected interest invaded by the action of the FCC. As a white tester, Willis also lacked a legally protected interest invaded by Havens Realty's conduct. In each case, the conduct challenged harmed the challenger,[78] but the allegation of that harm might not have constituted a claim for relief. If

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cations Act implies that the licensee be law-abiding in the operation of the station." White Mountain Broadcasting Co. v. FCC, 598 F.2d 274, 277 n.8 (D.C. Cir.), *cert. denied*, 444 U.S. 963 (1979). This broad interpretation of the duties imposed on the licensee gives a challenger a correspondingly broad range of issues on which to attack the license application.

76. The audience standing cases are direct descendants of The Chicago Junction Case, 263 U.S. 258 (1924), which Professor Jaffe characterizes as "the basic case . . . until the advent of *Sanders*." L. JAFFE, *supra* note 2, at 507. The parallel is apparent upon consideration of Professor Jaffe's analysis of *Chicago Junction*, an analysis that applies equally well to the audience standing idea. He concludes that standing in *Chicago Junction* rested

> on a determination that an interest intended by statute to be protected has been denied that protection. . . . It did not mean that there was a right that competition not be diminished. The plaintiff could not win simply by showing such dimunition. It did mean that the agency was required by the statute to have regard to competition as one factor in its decision; that it must if it disregards the effect on competition, give a reasoned explanation. . . . I would emphatically reject the conclusion that because there can be no rights—no "legal injury" in the traditional sense—we are driven to the opposite pole that there is only a "public interest." *Where the legislature has recognized a certain "interest" as one which must be heeded, it is such a "legally protected interest" as warrants standing to complain of its disregard.*

Id. at 507-08 (emphasis in original).

77. The Court did indicate that competition might reach such a destructive level as to adversely affect the public interest if neither competitor could provide adequate service to the listening audience. Emphasizing this aspect of the opinion could move the analysis of *Sanders Brothers* into the audience standing model of the *United Church of Christ* decision, *see supra* note 73, in which the level of competition becomes one of the factors the agency must consider in making the license decision. In the situation actually presented by *Sanders Brothers*, however, economic injury "is not a separate and independent element to be taken into consideration by the Commission." 309 U.S. at 476. The Court simply indicates that this "separate and independent element" of injury suffices to grant standing to the competitor.

78. This analysis accepts the characterization of the white tester's harm set out above. *See supra* text accompanying notes 44-45.

stating a claim for relief in the form of an invasion of a legally protected interest is to become part of the new standing jurisprudence of the Supreme Court, as *Havens Realty* seems to indicate, then Sanders Brothers Radio Station would lack standing to contest the FCC's decision granting a license to the Telegraph Herald.

Some scholars view the *Sanders Brothers* case as one involving public action and thus as unpersuasive precedent for extending standing to a broad class of potential plaintiffs.[79] A white tester's suit under the Fair Housing Act, however, can also lay claim to the label "public action,"[80] and any relaxation of standing rules appropriate for such actions[81] would apply to the tester as well. Part III of this article offers a method of analyzing standing questions that does not require classification into rigid, and perhaps meaningless, categories such as public or private actions.[82] But for those who may consider the collapsing of the standing and claim for relief issues into one inquiry to be a matter of no great significance, there is a practical illustration of the implications of *Havens Realty* upon judicial review of administrative action.

The Supreme Court of Colorado has explicitly adopted the position that the Supreme Court appears to be adopting *sub rosa* in *Havens Realty*: the white tester lacked standing as a tester because the defendants' conduct did not invade a legal right of the plaintiff, even though the plaintiff suffered what would otherwise be identified as an injury in fact. In *Wimberly v. Ettenberg*,[83] the Supreme Court of Colorado rejected the standing analysis of the *Association of Data Processing Serv-*

79. *See, e.g.*, L. JAFFE, *supra* note 2, at 500. ("It might be argued that whatever the purported rationale of *Sanders* . . . a decision upholding the justiciability of a suit brought by a person of a very limited class which is in fact adversely affected is not a precedent for permitting actions by the unlimited class of citizen or taxpayer.")

80. *See* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1302-04 (1976), for a "morphology of public law litigation." Professor Sedler says of the public action that it is "brought by the 'non-Hohfeldian' or 'ideological' plaintiff. In practice, it is a group effort, and the suit will be backed by group resources . . . in order to protect group interests and to advance group values that are infringed upon by the governmental action." Sedler, *Standing and the Burger Court: An Analysis and Some Proposals for Legislative Reforms*, 30 RUTGERS L. REV. 863, 864 (1977). The Fair Housing Act claims brought by the individual plaintiffs in *Havens Realty* fit this mold.

81. *See* Parker & Stone, *Standing and Public Law Remedies*, 78 COLUM. L. REV. 771 (1978). *But see* Sedler, *supra* note 80 at 864 ("by applying the same principles of standing to both types of action [public and private], the Court has severely restricted the use of the 'public action' ").

82. Professor Jaffe suggests that

> the line between the two cannot be conceived absolutely. . . . The difficulty involved in drawing a line between the two types may be one argument against any distinction based on the plaintiff's degree of involvement. But many courts do draw such a line, making the absence of sufficient interest either dispositive or an element in the exercise of discretionary jurisdiction.

L. JAFFE, *supra* note 2, at 460.

83. 194 Colo. 163, 570 P.2d 535 (1977).

ice Organization v. Camp, which sought to separate standing from the merits of a case:[84]

> In our view, a decision on the merits is always inextricably tied to every case which involves the issue of standing. When standing is in issue, the broad question is whether the plaintiff has stated a claim for relief which should be entertained in the context of a trial on the merits. If a person suffers no injury in fact, or suffers injury in fact, but not from the violation of a legal right, no relief can be offered, and the case should be dismissed for lack of standing.[85]

Wimberly produces a two step analysis for Colorado courts to follow in resolving issues of standing: "(1) did the plaintiff incur an injury in fact? (2) if so, was it to a legally protected interest encompassed by statutory or constitutional provisions which allegedly have been violated?"[86]

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84. *See* 397 U.S. 150, 152-53 (1970); *see also supra* note 38.

85. 194 Colo. at 166, 570 P.2d at 539. The *Wimberly* standing test of whether the plaintiff has suffered injury in fact to a legally protected interest as contemplated by statutory or constitutional provisions was announced in an action by bail bondsmen to enjoin a state judge from continuing a pre-trial release program that the bondsmen claimed was driving them "to the brink of bankruptcy." *Id.* at 537. The court held that the bondsmen failed to satisfy either of the prongs of the test the court was adopting: first, they suffered no injury in fact, only an "indirect and incidental pecuniary injury" as a result of the pre-trial release alternatives available to criminal defendants that did not require the use of these plaintiffs' services; and second, the "statutory provisions concerning bail do not purport to vest any persons other than criminal defendants with any legal rights in the determination of the terms, amount, or conditions of bail," so that the plaintiffs were "persons without any proteetable legal interest" who were attempting "to interfere with the manner in which the court dispatches its own affairs." *Id.* at 539.

86. Dodge v. Department of Social Serv., 198 Colo. 379, 381, 600 P.2d 70, 71 (1979). The "legal rights" analysis of standing in *Dodge* and *Wimberly* is subject to a number of criticisms, the most compelling of which is that the legal rights analysis provides an extremely narrow perspective on the interests affected by the challenged conduct. In a case in which the defendant's conduct provides only *benefits* to those with the legal rights conferred by a statutory scheme, society's interest in subjecting that conduct to judicial scrutiny is not well served by an analysis that limits standing to challenge the action to those who have been given the legal rights. This was true in *Wimberly* and is true as well in Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976). *See also infra* text accompanying note 91.

In *Simon*, for example, the Court addressed the standing of individual indigents and organizations composed of indigents to challenge an Internal Revenue Service Revenue Ruling "allowing favorable tax treatment to a nonprofit hospital that offered only emergency-room services to indigents." 426 U.S. at 28. The Court concluded that all of the plaintiffs lacked standing because no individual had established an actual injury that "fairly can be traced to the challenged action of the defendant, [rather than] injury that results from the independent action of some third party not before the court." *Id.* at 41-42. Because the challenged conduct expanded the class of hospitals qualifying as charitable organizations under I.R.C. § 501(c)(3) (1976), the hospitals had no incentive to attack the Revenue Ruling. Nor would persons making contributions to hospitals and deducting the donation tend to challenge the Revenue Ruling that increases the ability of hospitals to qualify for this tax treatment. By focusing on the legal rights of hospitals to be classified as charitable organizations and of benefactors to deduct their charitable contributions, the Court effectively insulated allegedly unlawful conduct of a government agency from judicial review. The result is that those who have rights created by the statutory scheme are advantageously

The effect that adoption of this analysis has on judicial review of administrative agency decisions emerges in *Cloverleaf Kennel Club, Inc. v. Colorado Racing Commission*.[87] The Racing Commission had granted a petition by Mile High Kennel Club for additional racing dates. Two competitors of Mile High challenged that decision in a petition for judicial review. Although the Supreme Court of Colorado held that the challengers had not suffered a competitive economic injury,[88] it also indicated that had the competitors established a competitive injury, the next inquiry would have been whether the statute under which the agency acted protects "economic interests from competitive harm."[89] Had the court construed the statute as neither protecting the economic interests of competitors nor conferring standing on competitors,[90] then the competitors—perhaps the only class of parties concretely interested in keeping the agency decisionmaking confined within its statutory boundaries—could not have challenged the agency decision. Owners of tracks granted additional racing dates could not be expected to challenge the agency action benefiting them, even if the agency failed to act in a manner that was procedurally and substantively proper. The effect of the legal injury test is that, as long as agency action confers a benefit on those who are regulated or protected by the agency's legislative authority, the action is, for all practical purposes, unreviewable.[91]

The United States Supreme Court has not stated in its post-*Data Processing* decisions that it seeks to return to a legal injury approach,[92]

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affected by the agency action, and thus have no reason to challenge the action, while those who are adversely affected and thus would be natural challengers, have no rights under the legislation.

Taking too limited a view of the court's role in the smooth functioning of a society governed by law, the *Wimberly* court said that "[i]f a person suffers . . . injury in fact, but not from the violation of a legal right, no relief can be afforded." 194 Colo. at 168, 570 P.2d at 539. That statement is simply not true. The court can examine the lawfulness of the challenged conduct, and upon a finding of unlawful behavior, can issue both injunctive and declaratory relief. Such relief in no way smacks of an advisory opinion. Instead, it resolves a real dispute concerning the proper functioning of one branch of government.

87. 620 P.2d 1051 (Colo. 1980), *aff'g* 42 Colo. App. 13, 592 P.2d 1341 (1978).

88. 620 P.2d at 1057.

89. *Id.*

90. The court stated that

> the economic impact of lawful competition . . . cannot confer standing under *Wimberly* unless the economic interest harmed is protected by a statutory or constitutional provision, i.e., unless a legislative intent to protect economic interests from competitive harm is explicit or fairly inferable from the statutory provisions under which an agency acts or if the legislature expressly confers standing on competitors to seek review of agency action.

Id.

91. *See supra* note 86.

92. The Supreme Court may hesitate to adopt the approach taken in Colorado in part because that approach can lead to expanded standing in some instances. For example, on taxpayer

but *Havens Realty* makes that conclusion a permissible inference. The Court's approach may in fact restrict standing even more than the Colorado court restricted standing in *Cloverleaf Kennel Club*. The Colorado court at least left open the possibility that the legislature could confer standing on competitors to seek review of administrative agency action,[93] which would be consistent with the *Sanders Brothers* analysis.[94] By framing its standing decision in *Havens Realty* in constitutional terms,[95] however, the United States Supreme Court may have effectively precluded any congressional grant of standing to anyone not suffering an invasion of a legally protected interest. For observers interested in maintaining effective judicial checks on the exercise of administrative agency authority, the restriction of standing suggested by *Havens Realty* is an alarming portent.

III. AN ALTERNATIVE FRAMEWORK FOR STANDING DECISIONS

The Supreme Court's standing decisions of the last decade display such a lack of coherence[96] that a continuation of the Court's haphazard and result-oriented[97] methods is no longer tolerable. Furthermore, as

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standing, *compare* Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982) *with* Dodge v. Department of Social Serv., 198 Colo. 379, 600 P.2d 70 (1979) *and* McCroskey v. Gustafson, 638 P.2d 51 (Colo. 1981).

93. 620 P.2d at 1057.

94. *See supra* text accompanying notes 68-72.

95. *See supra* note 39.

96. *See supra* note 12.

97. At times, the Court's standing decisions appear to reflect an attempt to control its ability to reach the merits of cases presenting sensitive issues. One critic of Warth v. Seldin, 422 U.S. 490 (1975), commented on this approach:

> The Supreme Court dismissed for lack of standing. Read the majority opinion and ask yourself whether standing is really the problem. I think you'll say no, the real problem is that the petitioners raised enormously sensitive issues of race and economic class the Court was unwilling to face. It chose to avoid them by adding some very complicated wrinkles to the already vexed law of standing.

Younger, *In Praise of Simplicity*, 62 A.B.A. J. 632 (1976). Charges of manipulation of standing can also cut the other way. One Justice accused the Court of indulging in a "series of speculations" in order to reach the merits, thus "serv[ing] the national interest" by "provid[ing] the country with an advisory opinion on an important subject." Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 103 (1978) (Stevens, J., concurring in the judgment).

Other commentators view the restrictive standing decisions of the Supreme Court as based on hostility not only to the merits of a particular case, but also to the kind of litigation vehicle used to assert certain claims. *See* Note, *Warth v. Seldin: The Substantial Probability Test*, 3 HASTINGS CONST. L.Q. 485 (1976):

> Apart from any considerations of substantive issues, the authors feel that the *Warth* case, as an example of public interest suits at their worst, afforded the Court, already adversely predisposed to such actions, an opportunity to place a gloss on the *Data Processing* test which would dramatically curtail this type of litigation.

Id. at 515-16. *But see* Comment, *Form and Function: Federal Standing Since* Warth v. Seldin, 18 SANTA CLARA L. REV. 183, 201 (1978) (*Warth* test as used in Simon v. Eastern Ky. Welfare

this article's analysis of the *Havens Realty* decision demonstrates, the Court's recent decisions may have significant and perhaps unintended negative results.[98] This final section sketches a foundation for a framework on which a flexible and manageable standing analysis can rest. Implementing such a rational standing framework requires two major steps: first, a cutting back of the constitutional component of standing from the proportions it has assumed under the Court's current approach; and second, the development of an analytical taxonomy for the practical considerations[99] that ought to go into a standing decision. After illustrating these steps, this section will demonstrate how the proposed analytical framework operates.

A. *Step One: Restricting the Constitutional Component of Standing.*

By limiting federal judicial power to "cases" and "controversies,"[100] Article III of the United States Constitution arguably requires only an adversary relationship between the parties on opposite sides of the litigation.[101] The concept of injury in fact as developed by the

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Rights Org., 426 U.S. 26 (1976), seen as simply a useful guideline for restricting the federal judicial power rather than as a means of avoiding difficult constitutional questions).

Whatever the suppositions of law review writers about the manipulation of the standing tests to reach or to avoid the merits, occasional displays of judicial frankness exist, such as the statement that "since we intend to decide this issue on its merits, we see no purpose to be served by debating the question of standing any further." Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 373 F. Supp. 208, 210 (N.D. Ill. 1974), *rev'd*, 517 F.2d 409 (7th Cir. 1975), *rev'd*, 429 U.S. 252 (1977).

98. *See supra* notes 61-95 and accompanying text.

99. The adjective "practical" is used deliberately in place of "prudential," the term encountered in the decisions. *See, e.g.*, Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979). The considerations set out at *infra* notes 127-156 and accompanying text are intended for use as guidelines for a case-by-case determination of whether a particular plaintiff has standing in a specific case. Focusing on "prudential principles" rather than "practical considerations" could undermine the flexibility of the suggested approach because the Supreme Court could adopt a set of prudential principles to be applied rigidly or inflexibly in all cases. *Cf.* Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 80-81 (1978) ("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 requested, the basic practical and prudential concerns underlying the standing doctrine are generally satisfied when the constitutional requisites are met.").

100. The judicial Power shall extend to all *Cases*, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to *Cases* affecting Ambassadors, other public Ministers and Consuls;—to all *Cases* of admiralty and maritime Jurisdiction;—to *Controversies* to which the United States shall be a Party;—to *Controversies* between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2 (emphasis added).

101. In his discussion of the meaning of case or controversy, Professor Bickel says that courts "may not decide *non-cases*, which do not require decision because they *are not adversary situations*

Supreme Court may serve as a fairly reliable indicator of the presence of an adversary relationship, but equating the two concepts and treating the more narrowly defined injury in fact as the sole method of establishing the constitutional component of standing[102] ignores the possibility that other adversary relationships can serve as a sufficient guarantee that a case or controversy exists.

Part of the problem created by the increased emphasis on the constitutional element of standing stems from treating the key nouns of Article III—"cases" and "controversies"—as terms of art.[103] At least insofar as standing decisions are concerned,[104] cases and controversies could be regarded simply as occasions for courts to define legal rights or obligations.[105] To qualify as an appropriate occasion for judicial action, the court's determination must directly affect at least one of the parties. For example, the plaintiff may request a judicial definition of

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and nothing of immediate consequence to the parties hangs on the result." A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 115 (1962) (emphasis added). The Supreme Court has required that the plaintiff have "alleged such a personal stake in the outcome of the controversy as to assure that *concrete adverseness* which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Baker v. Carr, 369 U.S. 186, 204 (1962) (emphasis added); *see also* Flast v. Cohen, 392 U.S. 83, 101 (1968).

102. "Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants." Warth v. Seldin, 422 U.S. 490, 501 (1975). *But see* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38 n.16 (1976) ("the focus upon the plaintiff's stake in the outcome of the issue he secks to have adjudicated serves a separate and equally important function."). Professor Tribe notes that the argument that injury in fact is constitutionally mandated by the cases and controversies limitation of Article III "cannot be deemed particularly persuasive." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 80 (1978) (footnote omitted).

103. See, e.g., the recent exchange between Professors Brilmayer and Tuslmet: Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297 (1979); Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698 (1980); Brilmayer, *A Reply*, 93 HARV. L. REV. 1727 (1980).

104. This qualification is crucial to an understanding of what is suggested. This article objects to the expansion of the constitutional limitation on standing. Questions dealing with other reasons to place restraints on the exercise of judicial power are beyond the scope of the article. Thus, the minimalist interpretation of case or controversy being offered here does not necessarily apply to justiciability issues outside of the standing context.

105. There is reference in the debates of the Constitutional Convention to "cases of a judiciary nature" as reflecting the meaning that Article III conveys in its use of the terms case and controversy. *See* J. RADCLIFFE, THE CASE-OR-CONTROVERSY PROVISION 19 (1978). The author states that this reference was as close as the Convention came to saying what was meant by a case or controversy. He concludes:

> The courts have generally adopted the legalistic view . . . that what constituted a case in law or equity in 1787 was what the framers intended to include in the case-or-controversy provision. It may have been that the framers thought the legalistic view to be self-evident, or on the other hand, that they never realized the judiciary's future political importance.

Id. at 20.

his rights *vis-a-vis* the defendant. The ruling by the court will then identify either the duty or the privilege of the defendant.[106] A judicial proceeding is no less a case or controversy, in the minimal constitutional sense suggested here, simply because the plaintiff requests a judicial definition of the defendant's obligations to persons other than the plaintiff.[107]

Fair Housing Act suits such as *Havens Realty* provide a fact setting that can illustrate this idea of "case" or "controversy". Assume that the realtors in the hypothetical city of Metropolis engage in racially discriminatory steering practices. Such conduct violates a duty Congress imposed on the realtors; that much can be determined without additional information.[108] Consider a series of differently-situated plaintiffs affected by the realtors' practices. The Group I plaintiffs are black purchasers who were told by the realtors that housing was unavailable in Lilywhite Acres, a subdivision of Metropolis. As to those plaintiffs, the court can make a dual determination: the realtors are breaching the duty Congress imposed on them, as well as invading the right Congress

106. The terms are those employed in W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING (1919). *See generally* J. STONE, LEGAL SYSTEM AND LAWYERS' REASONINGS 139-45 (1964).

107. In one of its most restrictive standing decisions, the Supreme Court has acknowledged that as long as the article III injury requirement is satisfied, "persons to whom Congress has granted a right of action . . . may have standing to seek relief on the basis of the legal rights and interests of others, and, indeed, may invoke the general public interest in support of their claim." Warth v. Seldin, 422 U.S. 490, 501 (1975). Unfortunately, relying on Congress to create a right of action limits standing to assert the rights of others by reference to a matter not always susceptible to lucid analysis. *See generally* Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1982). To link standing and the grant of a right of action may result in a distorted analysis of each of the two concepts because of judicial hostility toward one. If it is accurate to say that the Supreme Court "finds standing when it wishes to sustain a claim on the merits and denies standing when the claim would be rejected were the merits reached," Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 663 (1977), then decisions concerning whether to infer a right of action where Congress has not explicitly created one may be similarly affected by the Court's attitude toward the merits of the claim plaintiffs have asserted. Furthermore, reference to congressional ability to grant standing to assert the rights of others or to "invoke the general public interest" is misleading when manipulation of the constitutional element of the standing determination—that the plaintiff has suffered no injury in fact—can foreclose any consideration of congressional intent.

108. *But see* J. STONE, *supra* note 106, at 140 n.7b ("whether a particular duty imposed, e.g., by statute, has a right in some other person correlative to it cannot be decided on conceptual grounds merely, but turns on interpretation or policy or both"). If all that is meant is that a particular person may not have a correlative right to enforce the duty the statute imposes, Stone's statement is unobjectionable. If the suggestion is rather that it is impossible to decide conceptually whether some (in the sense of *any one*) person has a correlative right, then the statement is meaningless, because the concept of a statutory duty includes within it the normal incidents of a legal system operating to make available a mechanism to enforce that duty. *See* H. HART, THE CONCEPT OF LAW 27 (1961).

has conferred on the plaintiffs.[109] The Group II plaintiffs are current residents of Lilywhite Acres. In their suit against the realtors, the residents would obtain both a determination that the defendants were violating the duty Congress imposed on realtors and a definition of the plaintiffs' right. In this case, however, the right of the plaintiffs immediately affected by the realtors' conduct—and the right entitling these plaintiffs to relief—is the right to the benefits of racially integrated housing.[110] Group III plaintiffs are concerned Metropolis citizens who fit neither Group I (they are not black purchasers) nor Group II (they are not residents of target neighborhoods), but who object to the realtors' practices.[111] Those plaintiffs would sue to obtain a judicial definition of the duty of the realtors to comply with the Fair Housing Act. Even assuming that the realtors interfered with no specific right of the Group III plaintiffs,[112] the lawsuit filed by these plaintiffs displays the "concrete adverseness" required by Article III as much as do the lawsuits filed by Group I and Group II plaintiffs.[113]

Suppose now that Realtor A, who does not happen to have any listings in Lilywhite Acres, sues Realtor B, who does have such listings, and alleges that Realtor B engages in racially discriminatory practices. Perhaps Realtor A actually wants to establish Realtor B's obligation to comply with the Fair Housing Act. But if Realtor A also engages in steering practices as a matter of course, he may bring the suit not for the purpose of having the court define Realtor B's obligations but rather for the purpose of establishing that Realtor B has no duty to refrain from this type of conduct in which both parties are engaging. Such a "collusive" suit would raise no actual dispute between the parties, and thus does not present a case or controversy for judicial resolution.[114] If Realtor A files a declaratory judgment action to establish his

109. The buyer has the right to receive truthful information. 42 U.S.C. § 3604(d) (1976). *See supra* text accompanying note 33.

110. *See* Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 112 (1979); *see also supra* text accompanying notes 25-27.

111. Willis, the white tester plaintiff in *Havens Realty*, would fall into Group III if on remand he could not establish that he fit into Group II through evidence that he "lived in areas where petitioners' [realtors'] practices had an *appreciable* effect." 102 S. Ct. at 1123 (emphasis added). *See supra* text accompanying notes 63-64.

112. The qualification depends on the acceptance of the informational injury characterization. *See supra* text accompanying note 44, which would also apply to those Group III plaintiffs who acted as testers.

113. *See supra* note 101.

114. Realtor A's goal may be "not to end Realtor [B's] discriminatory practices but rather to impair Realtor [B's] ability to compete in the marketplace," by trying to injure the reputation of Realtor B. Note, *Federal Jurisdiction—Standing to Sue in Federal Court: The Direct Injury Standard*, 2 W. NEW ENG. L. REV. 793, 809 (1980). If that is the case, Realtor A would be more interested in adducing evidence affecting the reputation of the defendant than in trying to estab-

own lack of obligation, then the true nature of his interest would be apparent, and someone (presumably an administrative agency) actually opposed to that interest could serve as a party with an interest sufficiently adverse to the plaintiff seeking to establish a "right of defense."[115] But where a plaintiff seeks to establish the lack of obligation of another, *and the plaintiff's interest is identical to that of the defendant*, then the plaintiff has not presented the court with a case or controversy, and the action must be dismissed for failure to satisfy the constitutional component of standing.[116] The existence of a benefit accruing to the plaintiff as a result of the court's resolution of the issues in favor of the defendant serves as the distinguishing feature from the lawsuits in which there is an adversary relationship between plaintiff and defendant.[117]

B. *An Analytical Taxonomy of Practical Considerations in Standing Decisions.*

If the constitutional barriers to standing are lowered to the level suggested above,[118] all but the few suits that can be labeled "collusive" will clear the Article III hurdle.[119] To preserve standing as an effective method of setting limits on the cases that courts will hear necessitates a second level of inquiry. Categorizing the factors in this second-tier in-

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lish the various elements necessary to prove a Fair Housing Act violation. A court could find that Realtor A has no real interest in having the court define Realtor B's duty or obligation to comply with the Fair Housing Act, and thus deny Realtor A standing. In this kind of case, as well as the case where there is collusion in the sense of an agreement between the parties to defraud the court, the concern is that the plaintiff abuses the opportunity that the litigation system provides for the parties to retain "process control," that is, "control over the development and selection of information that will constitute the basis for resolving the dispute." Thibaut & Walker, *A Theory of Procedure*, 66 CALIF. L. REV. 541, 546 (1978).

115. Stewart and Sunstein define the right of defense as "the right of those regulated to obtain judicial review of allegedly unauthorized government controls." Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1198 (1982). *See generally id.* at 1246-55.

116. In Hohfeldian terms, the Group I-III plaintiffs were concerned with establishing rights and duties. The collusion hypothetical brings into play privileges and no-rights, the jural opposites of duties and rights. *See* Cook *Introduction, Hohfeld's Contributions to the Science of Law* 28 YALE L.J. 721 (1919) *reprinted in* W. HOHFELD, *supra* note 106, at 3-22. In that hypothetical Realtor A attempts to establish Realtor B's privilege to engage in racial steering, or correlatively the no-right of other persons to prevent Realtor B from engaging in such practices. The lack of a case or controversy is established because Realtor A actually seeks the privilege for himself and wants the no-right of others established as to his practices.

117. As to adversity, see generally J. RADCLIFFE, *supra* note 105, at 47-63.

118. *See supra* text accompanying notes 100-13.

119. It may be difficult to determine collusion on the face of the pleadings if the identity of interest is not disclosed. Because standing is a jurisdictional matter, *see supra* note 8, a court would be justified in dismissing whenever the collusive nature of the suit became apparent. Failure to discern the collusion at the outset of the litigation would not serve as a waiver of the standing objection. *Cf.* FED. R. CIV. P. 12 (h)(3) (lack of subject matter jurisdiction never waived).

quiry into practical, rather than constitutionally-imposed, considerations promotes two important interests. First, courts will be forced to acknowledge that a standing decision is a discretionary matter with significant policy implications,[120] and will no longer be able to hide behind the seemingly ministerial function of deciding whether a constitutional requirement has been met.[121] Second, Congress will retain a more decisive role in expanding and restricting the scope of standing than it has when the crucial factors are deemed to be constitutional in nature.[122]

An understanding of the practical considerations that should operate in reaching a standing decision can lead to a more cooperative mesh of substantive legislative and procedural judicial standing decisions. Such an approach would avoid the need to characterize congressional action as sweeping aside all prudential limitations on standing.[123] As a result, this approach would reduce the likelihood that courts will continue to expand the constitutional component of standing to encompass essentially prudential matters involving, for example, the proper relationship between the courts and the legislature or the precarious position of a court in a democratic society.[124]

The Supreme Court has at various times articulated prudential principles in the form of requirements that a plaintiff must satisfy in order to have standing.[125] The analysis suggested here is less rigid. It

120. The desire for flexibility leads to identifying practical factors that should be considered rather than to defining prudential principles that would be applied to standing issues. *See supra* note 99. The Court's goal should be "to abandon this maze of conceptions and categories and lay out the terrain on grander and simpler lines," L. JAFFE, *supra* note 2, at 503, and to provide the "rational conceptual framework" that Professor Tushnet finds lacking in the standing decisions of the Supreme Court. *See* Tushnet, *supra* note 107, at 663.

121. A sense of the inevitability of a denial of standing emerges in Part II of Justice Rehnquist's opinion for the Court in Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982).

122. Justice Brennan has objected to "the Court's insistence on resting [one of its most restrictive standing decisions] squarely on the irreducible Article III minimum of injury in fact, thereby effectively placing its holding beyond congressional power to rectify." Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 64 (1976) (Brennan, J., concurring in the judgment).

123. This has occurred, for example, in interpreting the standing provisions of the Fair Housing Act, 42 U.S.C. §§ 3610, 3612 (1976). *See supra* note 32.

124. *See, e.g.*, Valley Forge Christian College v. Americans United For Separation of Church & State, Inc., 454 U.S. 464 (1982); *see also* L. TRIBE, *supra* note 102, at 11-13, 47-52. *See generally* A. BICKEL, *supra* note 101, at 16-23.

125. Justice Powell recaps the "prudential principles" as including the following: (1) "a litigant normally must assert an injury that is peculiar to himself or to a distinct group of which he is a part, rather than one 'shared in substantially equal measure by all or a large class of citizens' "; (2) a litigant "must assert his own legal interests, rather than those of third parties"; and (3) the interest asserted by the litigant must "at least be arguably within the zone of interests to be protected or regulated by the statutory framework within which his claim arises." Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99-100 (1979).

presents a number of variables that need to be evaluated in cases other than the paradigm "case of a judiciary nature"[126] in which a private individual plaintiff seeks judicial relief from the violation of a legal right directly caused by the private individual defendant. These variables include the following:

(1) the status of the defendant;
(2) the ability of the plaintiff to represent adequately the interest asserted;
(3) the necessity of the plaintiff acting as an interest representative;
(4) the type of judicial proceeding employed;
(5) the nature of the remedy sought; and
(6) the type of conduct challenged.

1. *Status of Defendant*. Standing determinations typically focus on the plaintiff,[127] but one of the key variables that ought to be taken into account is the status of the party being sued. The useful distinction is between government defendants and private defendants.[128] Standing should generally have a broader scope when the plaintiff sues a government entity or official than when he sues a private person or institution. This guideline reflects a value judgment that if government stakes a claim to legitimacy, then it should stand especially accountable for its allegedly unlawful actions.[129] Particularly where nonmajoritarian government institutions are responsible for the challenged conduct,[130] the availability of a judicial avenue of control offers a more effective, more timely and more discriminating check on government unlawfulness

126. *See supra* note 105.

127. Occasions do arise when a defendant's standing is an issue. *See, e.g.*, Barrows v. Jackson, 346 U.S. 249, 254-60 (1953), where the Court had to decide whether a white defendant sued for damages for breach of a restrictive covenant had standing to assert the equal protection rights of blacks in the course of her defense to the action.

128. Professor Scott has also noted the usefulness of this type of distinction. *See* Scott, *supra* note 12, at 646. The distinction set forth in the text differs from the distinction between judicial review of administrative action and other judicial proceedings. While they are perhaps the most common of this type of lawsuit, challenges to administrative agency actions represent only one subset of the broader class of actions against a government defendant. For example, the category of government defendant would include government individuals and entities exercising legislative or judicial functions as well as those acting in executive or administrative roles.

129. This function of exercising control of the government is not performed with any regularity or reliability through the democratic process. *See* L. JAFFE, *supra* note 2, at 478-79 (if "even a well-run and responsive government gains from the energetic intervention of the individual . . . [then] a fortiori inefficient and corrupt governments, however democratic, stand in particular need of the 'aroused citizen' "). Lawsuits attempting to control what the plaintiffs alleged to be unlawful conduct at the highest levels of government are exemplified by Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973) and Halperin v. Kissinger, 424 F. Supp. 838 (D.D.C. 1976), 434 F. Supp. 1193 (D.D.C. 1977), *rev'd*, 606 F.2d 1192 (D.C. Cir. 1979), *aff'd by equally divided court*, 452 U.S. 713.

130. *See* J. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 74-77 (1978).

than would a resort to the political process.[131] Accordingly, the fact that a plaintiff challenges conduct attributable to a government entity should usually be weighed in favor of the plaintiff having standing to sue.[132]

Conversely, when a plaintiff sues a private individual, the scope of standing could become more restricted. The possibility of strike suits or nuisance suits, brought for the purpose of coercing a settlement rather than obtaining judicial relief, is highest in this situation.[133] An additional concern is that an imbalance of resources in favor of the plaintiff may produce circumstances where the result of a lawsuit is distorted by the inequality in the parties' ability to prepare for litigation or to pursue appellate review of unfavorable lower court decisions. That imbalance is unlikely to occur in a suit against a government defendant.[134]

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131. *See* J. VINING, *supra* note 12. In describing the options available to the plaintiffs in Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970), Professor Vining notes the following:

> The data processors could not look to Congress for relief; the comptroller of the currency was not appointed by Congress. In any event, Congress had already spoken, and by the time it could be brought to speak again the world would be a different place and the data processors might well have put their resources in another business and have become something other than data processors.

Id. at 3. *But see* L. JAFFE, *supra* note 2, at 476 ("the work done by public actions could, in my opinion, be better performed in most—though possibly not in all—cases by political and administrative controls. The prime argument, thus, for the public action would be the absence of these controls.").

132. When the defendant is an agency of the federal government, the review provisions of the federal Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1976), would govern the manner and scope of judicial review. Some analysts believe that actions under the APA should trigger less stringent standing requirements than are applied in other cases. *See, e.g.*, Comment, *Zoning-Discriminatory Intent Must Be Proved Before Courts May Reach Fourteenth Amendment Equal Protection Issues*, 6 FLA. ST. U.L. REV. 233, 238 (1978). No discernible pattern in Supreme Court standing decisions of the last decade supports the conclusion that the Court actually operates in such a manner. *Compare, e.g.*, Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976) (challenge to federal agency action governed by Administrative Procedure Act; very stringent standing requirements imposed) *with* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978) (non-Administrative Procedure Act review; very liberal standing decision).

133. In analyzing this point in the context of Fair Housing Act cases, one commentator observes that:

> the risk of harassment and groundless lawsuits is not unbearably high. Title VIII requires a private party to file his complaint within 180 days of a proscribed act. The burden of proof is on the complainant. Damages are discretionary with the court and are limited to actual damages and a maximum of $1,000 punitive damages. The expense of prosecuting such a suit would deter groundless suits. However, the risk of multiple lawsuits would serve as an incentive not to discriminate.

Comment, *The Fair Housing Act: Standing for the Private Attorney General*, 12 SANTA CLARA L. REV. 562, 572 (1972).

134. *See* Scott, *supra* note 12, at 673 ("The government does not lack for resources to prepare and defend the action, and plaintiffs will get no judgments by default.").

2. *Ability of the Plaintiff to Represent the Interest.* In the key standing decisions of the last decade, the United States Supreme Court focused on the plaintiff, asking whether he had suffered an injury in fact that will satisfy the constitutional test for standing.[135] The existence of an important issue raised by "able litigants" has not sufficed to overcome a lack of palpable and distinct injury traceable to the defendant's conduct and remediable by the relief requested from the court.[136] With the constitutional restrictions on standing satisfied by a showing of adverseness,[137] the ability of the plaintiff to represent the interest asserted becomes a crucial practical consideration in deciding the standing question.[138]

Filing a lawsuit may show a sufficient level of interest in the outcome of the litigation to raise an initial presumption of ability to represent the asserted interest.[139] Other factors that may support or rebut that presumption are how immediate or remote an interest the plaintiff has and how many others share the interest. If the defendant's conduct affects only the plaintiff, it is more likely that the plaintiff's initiation of the action satisfies the ability requirement; the risk of anyone other than the plaintiff being harmed should the plaintiff fail to represent the asserted interest remains so small that it should not detract from the plaintiff's standing. As the plaintiff's personal interest becomes more remote, however, courts should legitimately require that he show greater ability to represent not only his own ideological interests but also the practical interests of those most directly affected by the defendant's conduct.[140] Under these operating principles, then, an organiza-

135. *See supra* notes 16-60 and accompanying text.

136. *See* Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, (1982).

137. *See supra* notes 100-17 and accompanying text.

138. The importance of this factor increases when the suit is brought against a government defendant. *See supra* text accompanying notes 127-34. Government action affecting the plaintiff will likely affect others who are in the same relationship to the government as the plaintiff. Furthermore, when the relief sought will affect persons other than the plaintiff, see *infra* text accompanying note 152, representative ability takes on a heightened significance. *See* Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982), reflecting "due regard for the autonomy of those persons likely to be most directly affected by a judicial order," but indicating that Article III is the vehicle for displaying such regard. *See generally* Scott, *supra* note 12, at 675.

139. Professor Scott notes that "apart from collusive suits . . . [i]f plaintiff did not have the minimal personal involvement and adverseness which Article III requires, he would not be engaging in the costly pursuit of litigation." Scott, *supra* note 12, at 674. While the initiation of a lawsuit seems to be used by Scott as an indicator that the constitutional requirement of standing has been satisfied, it can also help establish whether, as a practical matter, a particular plaintiff can satisfactorily attack the conduct that gave rise to the litigation.

140. The evaluation of this practical consideration resembles the inquiry into the ability of a class representative to represent adequately the interests of class members. *See* FED. R. CIV. P.

tion with a historical commitment to solving a particular problem would appear to be an able plaintiff in a suit with widespread and diffuse effects involving that problem. For example, the Sierra Club would be a better environmental plaintiff than "an unincorporated association formed by five law students . . . to enhance the quality of the human environment for its members, and for all citizens."[141]

3. *Necessity of the Plaintiff as an Interest Representative.* Closely tied to the ability of the plaintiff to represent the interest he asserts is the consideration of whether failure to recognize the standing of the particular plaintiff before the court will, as a practical matter, mean that no one will assert the interest. The less likely it seems that someone else can (both as a practical and as a legal matter)[142] obtain a judicial definition of rights or obligations comparable to that sought by the plaintiff, the more freely a court should grant the plaintiff standing.[143]

23(a)(4). By analogy, therefore, possible factors to consider include the following: (1) the "honesty and conscientiousness" of the plaintiff; (2) the experience of plaintiff's counsel "in the particular type of litigation before the court;" (3) the "professional competence" of plaintiff's counsel as "demonstrated by the quality of the briefs and the arguments presented by the attorneys during the early stages of the case;" (4) the plaintiff's financial stake in the outcome; and (5) the plaintiff's counsel's stake in the outcome (attorney's fees). *See* 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1765-1767b (1972); *cf.* Scott, *supra* note 12, at 680 (the representativeness of the plaintiff is a factor to consider, but it should not be given much weight).

141. This describes one of the plaintiff organizations in United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 678 (1973). But compare the Supreme Court's treatment of the plaintiff's standing in that case with the treatment of the Sierra Club in Sierra Club v. Morton, 405 U.S. 727 (1972). Professor Scott suggests that

> a trade association or an organized interest group, though it could be said to have no interest of its own (*i.e.*, purely as a separate business entity), seems an appropriate spokesman for those interests of its members which it is its very purpose to advance. The self-appointed representative, on the other hand, has no credentials to vouch for his degree of representativeness, and the court can see this as making its judgment more difficult. In a doubtful case it might lead the court to deny standing.

Scott, *supra* note 12, at 680-81.

142. The practical barriers to maintaining Fair Housing Act suits include both the cost of the litigation and ignorance of the right Congress has conferred. *See* Note, Gladstone v. Village of Bellwood: *The Development and Application of Standing to the Fair Housing Act of 1968*, 9 CAP. U.L. REV. 175, 188 (1979). One of the obvious legal barriers would be the lack of anyone else with standing to sue, but this can quickly lead to circular reasoning in which it is not necessary to relax standing rules for the plaintiff because the standing of other potential plaintiffs might be recognized. Other legal barriers that could prevent persons other than the plaintiff who is actually before the court from asserting the same interest include the ripeness doctrine, mootness, failure to exhaust other remedies, jurisdictional difficulties, and statutes of limitations/laches problems.

143. One commentator on Fair Housing Act cases relied on this representative need factor to conclude that the Supreme Court's decision in Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979), "casts some doubt on the proposition that testers should have standing, simply because the principal argument in favor of it—that tester-plaintiffs are necessary to the full enforcement of the fair housing laws that Congress intended—is undercut by the availability of standing for local residents and municipalities." Schwemm, *supra* note 5, at 61. For the suggestion that the facts of the *Havens Realty* case indicate a need for tester plaintiff standing, see *supra* notes 63-64 and accompanying text.

Courts ought to relax the limitations on standing when presented with otherwise unreviewable action, particularly when the challenged conduct provides only a benefit to those directly affected.[144] People receiving a benefit from allegedly improper conduct will probably not seek to have the conduct declared unlawful. Similarly, when those whose rights are directly injured by the challenged conduct are unlikely to maintain their own action seeking judicial relief, courts ought to be more lenient in deciding that the plaintiff who is actually before the court does have standing.[145]

4. *Type of Judicial Proceeding.* The forum in which a plaintiff must challenge a defendant's conduct,[146] together with the type of proceeding that forum may entertain and the scope of review that will be employed, should affect how courts decide whether a plaintiff has standing. The relative flexibility of the type of proceeding that the plaintiff can use to challenge a defendant's conduct, the ease with which a plaintiff can obtain access to a judicial forum and the multiplicity of suits that a defendant might face all legitimately entitle a court to favor, as a prudential matter, a restrictive approach to standing. Conversely, when only a single forum[147] with a limited type of proceeding (such as a substantial evidence review of administrative agency action[148]) is available to a very limited number of litigants,[149]

144. *But see* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976); *supra* note 86.

145. *See* Singleton v. Wulff, 428 U.S. 106 (1976). "If there is some genuine obstacle to" the assertion of a person's own rights, "the third party's absence from court loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes by default the right's best available proponent." *Id.* at 116.

The existence of some public official's authority to bring an action should not be used to restrict the standing of private individuals to challenge the same conduct. As one commentator notes:

> The right of the Attorney General to originate suits under Title VIII is an important enforcement tool. However, realistically he should not be expected to do the total job. The vigor with which the Attorney General will pursue the right afforded to him will depend on the Administration's philosophy regarding the goal and the funds and manpower resources available.

Comment, *supra* note 133, at 573.

146. Much of federal administrative agency action is reviewable only in the federal courts of appeals. *See, e.g.*, 42 U.S.C. § 7607(b)(1) (Supp. I 1977) ("A petition for review of the [Environmental Protection Agency] Administrator's action in approving or promulgating any [Clean Air Act state] implementation plan . . . may be filed only in the United States Court of Appeals for the appropriate circuit."). In some cases, only the Court of Appeals for the District of Columbia Circuit may review the agency action. *See, e.g.*, 42 U.S.C. § 7607(b)(1) (Supp. I 1977) ("A petition for review of action of the [Environmental Protection Agency] Administrator in promulgating any national primary or secondary ambient air quality standard . . . may be filed only in the United States Court of Appeals for the District of Columbia."). In most other actions against either the government or private parties, a plaintiff will begin the litigation process in a state or federal trial court.

147. *See supra* note 146.

148. *See, e.g.*, 5 U.S.C. § 706(2)(E) (1976).

149. This limitation could involve both practical and legal considerations. *See supra* note 142.

prudence dictates that an expanded notion of standing would be appropriate in order to increase the likelihood that there will be some judicial consideration of the claims being asserted.[150]

5. *Nature of the Remedy Sought.* A plaintiff may seek a variety of judicial remedies in order to force others to behave in a lawful manner. The court should consider the type of relief sought in determining whether the plaintiff has standing. One type of remedy focuses primarily on control of the defendant's conduct in the future: declaratory and injunctive relief, as well as the prerogative writs that may be used to control government action,[151] fall into this category. Characteristically, these kinds of remedies tend to change the behavior of the defendant. A relaxed attitude toward standing ought to accompany judicial consideration of requests for such remedies, at least in part because the disposition of just a single action will achieve the goal of obtaining a judicial definition of the plaintiff's right, determining the defendant's duty or, as in the case of a declaratory judgment action, acknowledging the plaintiff's privilege.[152]

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150. These guidelines roughly correspond to the practical guideposts in the pre-*Data Processing* Supreme Court decisions regarding review of administrative action. In those decisions, when Congress had established a specific method of statutory review, *see generally* W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW CASES AND COMMENTS 145-46 (6th ed. 1974), and thus a more limited access to the courts, standing rules tended to be interpreted liberally. *See, e.g.*, FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940); *supra* notes 61-95 and accompanying text. When Congress had not specified any particular method of review, standing tended to contract. *See, e.g.*, Alabama Power Co. v. Ickes, 302 U.S. 464 (1968); Perkins v. Lukens Steel Co., 310 U.S. 113 (1940).

Professor Scott has made the somewhat different point on the same line of cases that, when the plaintiff utilizes a specific statutory review process, "the Court has before it only the implementing, secondary decision as to whether there is reason not to allow the particular plaintiff in question to be one of those who may invoke the review—and the standing rules tend to become much more liberal." Scott, *supra* note 12, at 656. On the other hand, absent a specified method of review, the

> Court has proceeded on the premise that the constitutional or statutory limitation which defendant is claimed to have violated should be thought of not as a restraint on the government or its agents, but as a benefit bestowed on some definable part of society. Thus, the Court has been able to view a plaintiff, if not a member of that favored group, as not possessing a sufficient interest to be allowed to enforce the limitation.

Id. at 654. Although Scott's statements concerning nonstatutory review contain hints of a legal injury approach by tying standing to membership in "that favored group," that is, those on whom a benefit has been bestowed, they nevertheless illustrate the proper effect the type of proceeding should have on the exercise of judicial discretion to recognize standing.

151. *See, e.g.*, 5 U.S.C. § 703 (1976). *See generally* L. JAFFE, *supra* note 2, at 165-94, for a discussion of these remedies in the context of obtaining judicial review of government conduct.

152. The potential for disruption of the defendant's operations inherent in this kind of remedy, particularly in the case of a government defendant, appears to encourage a restrictive approach to standing. For an explanation of why these potential disruptive effects should not, however, have much weight in a standing analysis, see Scott, *supra* note 12, at 678.

The plaintiff may seek the other general type of remedy, which focuses on correcting the harm the defendant's conduct has produced in the past and requires an examination and evaluation of the specific effects of his past conduct. In such cases—for example, the computation and award of compensatory damages—a court could properly display a tendency to restrict standing to those who have actually suffered the effect in question. By limiting standing in this way, a court increases the likelihood that the plaintiff will present it with the evidence and arguments that lead to an accurate correlation of the remedy that is sought and the duty that has been breached.

6. *The Type of Challenged Conduct.* A defendant may have violated any of a number of positive sources of law, including a constitutional provision, a statute or a rule of common law. The court should consider the particular source of the law that a plaintiff alleges a defendant to have violated in determining whether that plaintiff has standing to complain of the violation. The first step is to construct a hierarchy of the sources of law, with the constitution at the top and the common law rules at the bottom. A scale of standing can then be superimposed on that hierarchy, with the restrictive end of the standing scale corresponding to the common law end of the hierarchy and a more open approach to standing indicated at the constitutional end of the spectrum.[153]

The logic of this scale lies in the greater commitment a society should have to the fundamental principles embodied in its constitution. When a plaintiff alleges violations of those principles, courts normally should not deny him the opportunity to present the merits of his claim solely because of practical considerations about how best to use judicial power.[154] At the other extreme, courts requested to adjudicate rights derived from decisions of judges in prior disputes might well limit standing to those plaintiffs presenting the more traditional common law action between a directly injured plaintiff and a defendant responsible

153. In Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 484 (1982), the Court declared that it knew "of no principled basis on which to create a hierarchy of constitutional values or a complementary 'sliding scale' of standing." The approach suggested in the text does not involve a ranking of different provisions within each of the major categories: *e.g.*, constitution, statute, administrative rule, common law. It calls instead for a ranking of the categories themselves.

154. But see Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., *id.* at 473, where Justice Rehnquist indicated a reluctance to declare unconstitutional an act of the legislative or executive branches of government, seeing such judicial action as presenting "the ultimate threat to the continued effectiveness in performing" the judicial role of "vindicating individual rights."

for that injury.[155] Statutory rights and obligations, created as they are by the elected representatives of the people, deserve at least a presumption of enforceability in favor of those who have an interest in those rights and obligations, even absent a direct injury.[156]

C. *The Framework in Operation.*

To test the analytical framework just outlined, this section describes and analyzes a set of model cases, focusing on the practical standing considerations raised in the preceding section. The analyses assume a satisfaction of the constitutional requirement of standing as set out in part III(A) of the article; only a little thought is needed to reach the conclusion that each model exhibits the requisite adversary relationship between the parties that ensures the existence of a case or controversy.

1. *The five model cases.*

Model 1:

This type of case presents each of the various factors as they will appear at the most liberal end of the standing spectrum: an individual alleges a constitutional violation resulting from an administrative agency action that immediately affects his interests and files a petition in a court of appeals to set aside the administrative agency action.

Model 2:

The circumstances of this case are similar to those of Model 1, except that the plaintiff chooses to sue for injunctive relief, and the judicial forum is a federal district court rather than an appellate court.

Model 3:

An organization with a long history of concern for a particular interest sues in a federal district court to enjoin further government

155. Where the existence of the right a plaintiff asserts depends on the decision in a previous case or line of cases, courts would justifiably be reluctant to continue the common law development process without having before them plaintiffs able to demonstrate a direct interest in the establishment of that right and the defendant's duty.

156. If Raz's distinction between "duty-imposing laws" and "power-conferring laws" is valid, see J. RAZ, THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM 147-66 (2d ed. 1980), perhaps the presumption suggested in the text should only arise with respect to those statutes that prescribe behavior—"duty-imposing" statutes. In any event, a defendant might be able to rebut this presumption by demonstrating that Congress did not intend for persons other than those who suffer a direct invasion of statutorily-conferred rights to have an opportunity to challenge the defendant's conduct. Such rebuttal necessarily would include a showing of a specific negative legislative intent, and thus be distinguishable from current developments in the implied right of action cases, where the Supreme Court requires a showing of some basis from which to infer a congressional intent to confer a private right of action to enforce a statutory scheme. *See* Stewart & Sunstein, *supra* note 107, at 1196 n.5.

conduct that violates a statute and directly invades the interest that the organization asserts.

Model 4:

An organization formed to address a particular instance of unlawful conduct asks a trial court to enjoin further instances of a private individual's violation of a statute.

Model 5:

An individual with only an ideological interest in a problem asserts a claim for damages payable to those injured by a private individual's violation of a common law rule.

2. *The models analyzed.* In analyzing each of these five models within the framework of practical considerations developed above,[157] an "initial rough guess"[158] would identify a fairly clear-cut case against standing only in Model 5. In each of the other four models, the reasons for recognizing standing could outweigh whatever the prudential considerations of judicial economy and the like which call for a dismissal of the action without reaching the merits.

Model 1 presents the clearest case for a lenient approach to standing. The defendant, a nonmajoritarian institution,[159] can be kept under some sort of popular control only through the device of judicial review.[160] Congress has created a review mechanism in the courts of appeals. That process can result in a conclusive determination of the legality of the agency's conduct. Should the court set aside the agency action, all those adversely affected in any way by the action will have obtained relief. Should the court uphold the agency action, those af-

157. By way of review, that framework calls for a consideration of six factors: (1) the status of the defendant; (2) the ability of the plaintiff to represent the asserted interest; (3) the necessity of the plaintiff as interest representative; (4) the type of judicial proceeding; (5) the nature of the remedy sought; and (6) the type of challenged conduct. *See supra* notes 127-156 and accompanying text.

158. The term is borrowed from G. CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 140-43 (1970), to try to capture the first impression a case makes on the observer familiar with the framework and experienced in its application. It is this impression that is likely to be created by the pleadings in a case, and it is therefore on this basis that courts will often evaluate the plaintiff's standing.

159. *See* J. FREEDMAN, *supra* note 130, at 74-77.

160. Institutional constraints on administrative action, including a range of executive and legislative controls, do exist. *See generally* W. GELLHORN, C. BYSE & P. STRAUSS, ADMINISTRATIVE LAW CASES AND COMMENTS 50-146 (7th ed. 1979). But such controls are not as effective as judicial control. *See supra* notes 129-31 and accompanying text. Professor Jaffe notes that judicial control of government action provides a "modest measure of control of official action," and that although "there are probably better ways, . . . we have not yet seen fit to adopt them." He concludes that litigation as a method of control of government action is "at the least, not inconsistent with our democratic premises, and arguably [legal actions] reinforce them." L. JAFFE, *supra* note 2, at 483.

fected by the action will know how to accommodate their behavior to an official environment that includes the agency action. Two rationales explain this behavior modification: future challenges will be decided the same way; and subsequent challengers will be bound by the judicial decision under an issue preclusion doctrine that relaxes the requirement of mutuality of estoppel.[161] Government adherence to a nation's basic operating principles, as set out in its constitution, is so important that courts ought to grant standing to even remotely affected plaintiffs to pursue this avenue of judicial review. But given the possible widespread impact of the judgments issued by reviewing courts, they should carefully scrutinize plaintiff's ability to provide a full airing of the issues, for courts rely on plaintiffs to aid them in understanding the scope of the problem presented for judicial resolution.

In Model 2 the posture of the case changes from a petition for review in an appellate court to an action for injunctive relief in a trial court. The importance of the goal of providing judicial review of allegedly unconstitutional agency action remains just as high as in Model 1. Now, however, the agency faces the prospect of a multiplicity of actions and the corresponding possibility of inconsistent judicial demands. A multiplicity of suits also implies some wasteful duplication of judicial effort devoted to understanding and resolving the issues presented. Thus, some reluctance to recognize the standing of individuals with only a very remote interest in the agency action is appropriate. Courts might be restrictive in standing determinations in cases other than those that present for review some allegedly unconstitutional action by a government defendant. With directly affected individuals, such as the Model 2 plaintiff, however, courts should exercise their vital role in our political and judicial system, through which the government is held in check, by recognizing a plaintiff's standing if he will otherwise adequately represent the interest he asserts. If such directly affected plaintiffs are unable or unlikely to challenge the government action, courts need to acknowledge that they can fulfill their control function only by granting more remotely affected individuals and groups standing to make such challenges.

Model 3 presents a type of alleged misconduct for which a lowering of standing barriers is somewhat less compelling than the unconstitutional conduct of Models 1 and 2. The key variables consequently become the necessity for, and ability of, this organization to represent

161. *Compare* Montana v. United States, 440 U.S. 147 (1979) *and* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) *with* American Medical Int'l, Inc. v. Secretary of HEW, 677 F.2d 118 (D.C. Cir. 1981).

the interest asserted. If both necessity and ability seem relatively high, the court should grant standing to the organization.[162]

Model 4 differs from the previous model in that the Model 4 organization exists as an ad hoc arrangement to deal with a specific problem. In such cases the representative quality of the plaintiff organization becomes a crucial factor. The nature of the defendant has also changed: this model introduces a private defendant and the accompanying possibility of harassment through litigation. A grant of standing to the organization is still justified by the fact that the requested relief seeks to change the defendant's behavior in the future, rather than to assess some sort of penalty or obligation to compensate for past wrongs. Given the limited resources of the public institutions or authorities charged with enforcing private adherence to statutory directives, the kind of case presented in Model 4 can serve an important function in producing a society that operates under a rule of law.

In Model 5, the nature of the relief sought and the status of the defendant trigger a restrictive approach to standing. The difficulty of evaluating and awarding damages based on injury to persons who are not parties, in conjunction with the risk that a plaintiff not directly affected by the defendant's conduct may not offer the full range of evidence a court needs to fashion the remedy, would argue against granting standing to this plaintiff. The fact that the rights or obligations that the plaintiff seeks to have adjudicated arise from the common law may also indicate that the significance of those rights lies primarily in adjusting the relationships among private individuals, rather than effecting the broader ordering of society that might legitimately require relaxed standing decisions in order to be successful.

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162. The analysis of Models 2 and 3 along these lines would have produced different results in three of the Supreme Court's most egregiously restrictive recent standing decisions. *See* Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976); Sierra Club v. Morton, 405 U.S. 727 (1972). The Supreme Court has appeared to be the least willing to hold governmental institutions to a standard of lawful conduct in Model 2 and 3 cases and has based those refusals to review agency action on a lack of standing. Accordingly, the analytical framework offered here would likely produce the greatest change. It would transform the standing doctrine from a means of manipulating the range of substantive issues that courts wish to reach to a doctrine that is aimed purely at controlling access to the judicial process, and on a pragmatic rather than an abstract basis. *But see* Scott, *supra* note 12, at 670 & 684 (suggesting that standing can serve two functions: access standing as "a judicial determination of whether the nature and extent of the alleged harm to a plaintiff are such as to warrant deciding his case," and decision standing "to determine the proper scope of judicial policymaking responsibility," which should properly be seen as a justiciability question).

IV. CONCLUSION.

The current state of the Supreme Court's standing jurisprudence makes it difficult to determine where we are, let alone to try to predict where we are going. Two unfortunate trends do, however, assume major significance. First, the Court has increasingly constitutionalized the law of standing. Second, as this article demonstrates, the Court has begun to establish a foundation on which it can rebuild a legal injury approach to standing. Neither trend fits two increasingly important roles of the courts: first, to serve as a means of controlling the more overtly regulatory institutions of government; and second, to provide a vehicle for establishing and maintaining stability of relationships among the various components of society. The trends tend to downplay the significance of the public interest aspect of much litigation.[163]

The Supreme Court's decision with regard to the white tester plaintiff's standing in *Havens Realty* combines the two trends noted above. As a result of earlier decisions, any Fair Housing Act denial of standing must be a matter of constitutional limitations on standing.[164] By focusing narrowly on the rights created by the statute, and using that focus as the basis for its decision as to the standing of the white tester plaintiff,[165] the Court seems to be making the legal injury implications of its standing decision a matter of constitutional import. An analysis of the white tester standing issue in *Havens Realty* employing the alternative framework offered in this article will show how the judicial roles described above can be better fulfilled at the standing determination stage of litigation.

The constitutional requirement of an adversary relationship between plaintiff and the defendants would be established by plaintiff's status as an employee of HOME, the organization working to increase housing equality. Had plaintiff not been employed by or otherwise affiliated with such a group, some evidence of plaintiff's bona fide opposition to the defendants' practices could be demanded. Once this constitutional component of standing is satisfied, the focus shifts to a consideration of whether there are practical reasons to grant or deny standing to this particular plaintiff. Application of the six factors described in Part III (B) produces a basis for analysis of the white tester's standing. The plaintiff is suing a private defendant for the violation of

163. *See* L. JAFFE, *supra* note 2, at 522 ("Judicial review can serve two functions: to remedy the violation of a protected interest; to vindicate the public interest.").

164. *See supra* notes 32, 39.

165. *See supra* notes 16-60 and accompanying text.

a federal statute.[166] The complaint sought declaratory, injunctive and monetary relief from a federal trial court.[167] The ability of the plaintiff to represent the interest being asserted is reinforced by the organizational support he appears to have from the organization that employs him.

Having identified the factors for consideration, the court should then weigh the factors and evaluate the strength of plaintiff's case for standing. The fact that defendants are alleged to be violating a statute raises a presumption that the plaintiff has standing to enforce the statutory obligations Congress imposed on the defendants.[168] That presumption is not rebutted by a legislative intent to limit those who could enforce the statutory scheme for regulating realtors' conduct; in fact, examination of the standing provisions of the statute reinforces the presumption.[169] The defendants' private status may weigh against standing for the plaintiff,[170] particularly given the request for monetary relief.[171] As to the injunctive relief claim, however, the defendants are the precise targets of the legislation, and granting the plaintiff standing would reinforce the legislative purpose in enacting the Fair Housing Act. Although the claim is brought in a trial court, and thus indicates that defendants could be subjected to a multiplicity of lawsuits,[172] the defendants are apparently operating in a fairly limited geographical area, and thus would not face lawsuits dispersed across the country, as would, for example, a government agency. The prospect of multiple suits in a particular location would serve as an additional incentive for defendants to comply with the terms of the statute.[173] The plaintiff's ability to represent the interest in enforcement of the Fair Housing Act could use further investigation.[174] A significant point about this litigation, however, is its relatively simple nature; no complex scientific or technological proof is needed, nor is extensive factual evidence required. The proof of the elements of defendants' Fair Housing Act violation would seem to be well within the ability of a plaintiff who can

166. 102 S. Ct. at 1118 (suit against Havens Realty Corporation and one of its employees, alleging violation of 42 U.S.C. § 3604 (1976)).

167. *Id.*

168. *See supra* notes 153-56 and accompanying text.

169. *See* 42 U.S.C. §§ 3610, 3612 (1976) and *supra* note 32.

170. *See supra* notes 127-34 and accompanying text.

171. *See supra* notes 151-52 and accompanying text.

172. *See supra* notes 146-50 and accompanying text.

173. *See supra* note 133.

174. Because the *Havens Realty* lawsuit was a class action, *see* 102 S. Ct. at 1118, the examination of the plaintiff's ability to act as the class representative under FED. R. CIV. P. 23(a) will determine the plaintiff's ability to represent the interest at issue in the case. *See supra* note 140.

afford to retain competent counsel.[175] Perhaps the factor pointing most strongly toward a denial of standing is the existence in this suit of other plaintiffs, especially HOME, thus indicating that the need to grant standing to this plaintiff is weak.[176] Given the fact that the claim of one of the plaintiffs whose legal right to truthful information was violated is barred because of the limitations provisions of the statute, [177] however, the need for timely initiation of a lawsuit becomes an important consideration. Furthermore, reliance on an organization acting as plaintiff is subject to reservations similar to those encountered in relying on the Attorney General to sue:[178] the organization may have limited resources available for litigation, and may have difficulty in defining litigation aims.[179] On balance, the framework for analysis of standing questions developed in Part III produces the conclusion that the white tester plaintiff in *Havens Realty* does have standing. While the framework outlined here provides only the contours within which courts will have to exercise discretion, it does identify the factors courts should consider and indicates grounds on which courts can explain why they exercise that discretion in a particular way. With the increased recognition that there is judicial discretion in making standing determinations comes a heightened responsibility to identify and articulate the bases for standing decisions as access controls[180] to the federal courts.

175. This ability is increased by the statutory provision for an award of attorney's fees to a plaintiff who "is not financially able to assume said attorney's fees." 42 U.S.C. § 3612(c) (1976). Such a provision is further evidence of the importance that private enforcement plays in the legislative attempt to promote nondiscriminatory housing.

176. *See supra* notes 142-45 and accompanying text.

177. *See supra* note 32.

178. *See supra* note 145.

179. *See generally* R. KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1976) for a discussion of this problem in the context of litigation to desegregate education.

180. *See supra* note 162.