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Comment on Warth v. Seldin

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Comment on *Warth v. Seldin*

By Terrance Sandalow[1]

Although *Warth v. Seldin* is carefully cast in procedural terms, its significance is substantive. The real meaning of the decision is that the U.S. Supreme Court is not prepared to read into the federal constitution a limitation on suburban zoning power like that which the New Jersey Supreme Court read into the state constitution in *Mt. Laurel*.[2] *Warth* is, thus, the Court's most recent rebuff of the varied efforts to use the fourteenth amendment as a weapon against the inegalitarian consequences of metropolitan fragmentation.[3] Those who see in the vague language of that amendment a remedy for every social ill are sure to condemn the Court's passivity in the face of that malady. Yet, there is, as Paul Freund once wrote, "a morality of morality." The mere existence of a social ill does not authorize the courts to prescribe the cure.

The Substantive Significance of the Decision

In terms, Justice Powell's opinion for the Court hews to the traditional theory that "standing" is a threshhold question unrelated to the merits of the claim that the defendant has acted unlawfully. The opinion carefully avoids any expression of the Court's views on the question whether the exclusion of low- and moderate-cost housing from a suburban municipality is constitutional. It rests dismissal of the complaint solely upon the ground that none of the plaintiffs had a sufficient personal stake in the outcome to justify a federal court's adjudicating the validity of the Penfield zoning ordinance on their behalf.[4] In theory, accordingly, the validity of ordinances like Penfield's is open to adjudication in a subsequent suit by a proper plaintiff.

Yet, despite the apparently limited ground underlying the dismissal, the effect of the decision is to preclude any adjudication of the issue raised by the plaintiffs, not only in *Warth* but in any subsequent case. The gravamen of the *Warth* complaint was that Penfield had violated the federal constitution by adopting a zoning ordinance that prevented development of low- and moderate-cost housing within its borders. In holding that neither potential developers nor potential residents of such housing have standing to make such a claim unless local authorities have rejected a particular proposal for development, the Court has not merely postponed adjudication of the exclusionary zoning issue. It has eliminated the issue from future litigation. The effect of requiring a concrete proposal prior to development will be to shift the focus of subsequent litigation from the issue the plaintiff in *Warth* wanted to raise-the permissibility of excluding all low- and moderate-cost housing from a suburb- to the quite different issue of whether rejection of a particular proposal is constitutionally permissible. The focus, in other words, will be upon the issue so familiar in zoning litigation, whether the refusal to permit a particular development at a particular location is "reasonable."

To be sure, it is conceivable that a court confronted with rejection of a particular development proposal might consider whether the rejection is unconstitutional solely because the ordinance does not

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[2] South Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713, 27 ZD 282 (1975).

[3] *See*, e.g., Milliken v. Bradley, 418 U.S. 717 (1974); San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

[4] The Court's treatment of "standing" casts new gloom into an already dark area of the law, but I leave discussion of its inadequacies to the law reviews.

provide for low- and moderate-cost housing anywhere within the municipality. It is hard to see, however, how in such a case the court could avoid being influenced by the suitability of the particular development at a particular location. More important, it is hard to see why the Supreme Court would have imposed the standing requirement that it did unless it wished to cast federal constitutional challenges to exclusionary zoning ordinances in a mold that would require consideration of such issues. It would be pointless to require a specific proposal as a condition precedent to suit if the details of the proposal were then to be irrelevant to the issues posed by the suit.

The legal significance of the Court's supposedly procedural decisions is, thus, to foreclose the substantive issue plaintiff attempted to raise. The practical consequence is to preclude effective use of the federal constitution to open suburbia to additional low- and moderate-cost housing. If every rejection of a development proposal must be separately litigated under the uncertain standard of "reasonableness," the cost of formulating proposals and of litigating rejections is certain to deter all but the most determined developers. Indeed, the plaintiffs' real object in *Warth*, as the Court must have known, was to reduce that cost by obtaining a ruling, such as that in Mt. Laurel, which would impose upon suburban governments an obligation to free adequate land for low- and moderate-cost housing. A decision that permits litigation only after rejection of a specific development proposal is quite as inconsistent with that goal as would have been a decision avowedly denying plaintiffs' claim on the merits.

Exclusionary Zoning and the Fourteenth Amendment

The nominal defendant in *Warth* was the Town of Penfield. But the real defendant was a system of governmental land use controls that many believe to be an important contributing factor to the inadequate housing available to persons of moderate and low income. The real object of the litigation was not to establish the right of such persons to live in Penfield, but to increase the housing supply available to them, especially in those outlying areas of metropolitan regions that are experiencing economic growth.

Not even the most zealous advocate of reform is likely to maintain that the constitution should be read to invalidate an otherwise valid regulation of land use merely because it prevents persons of low and moderate income from acquiring housing in a particular municipality. Even Justice Hall, writing for the court in *Mt. Laurel*, felt called upon to qualify the newly created municipal obligation to "bear its fair share of the regional burden" of low- and moderate-cost housing. The obligation, he wrote, existed only because of the present fragmented system of land use control. Exclusion of such housing from some municipalities would be permissible, his opinion strongly suggests, if it were the product of regional planning[5]—unless, perhaps, the quantity and location of land made available for such housing were even then inadequate to satisfy a majority of the New Jersey Supreme Court.

Thus, the real issue in *Warth* was not whether a municipality may constitutionally adopt a zoning ordinance that effectively precludes development of moderate- and low-cost housing within its borders, but whether the nationally prevailing system of land use controls is constitutionally infirm because it unduly restricts the supply of such housing. The Court's reluctance to confront that issue is understandable—and right. Whatever can be said in favor of the *Mt. Laurel* decision, the U.S. Supreme Court, could not possibly formulate meaningful and sensible standards for determining whether the

[5] 336 A.2d at 132-33.

supply of land for moderate- and low-cost housing is unduly restricted in the variant conditions of each of the nation's 200-odd metropolitan areas.

The primary objection to the Court's undertaking such a task, however, applies equally to the state courts: the issues raised are beyond the competence of a court. How, for example, is a court to determine what is an adequate supply of land for low- and moderate-cost housing? Or what is each municipality's "fair share of the regional burden"? These questions are not—not even primarily—technical ones appropriate for resolution by planners. The crux of the questions is political: whose interests are to be sacrificed, and to what extent, to achieve what degree of additional choice for persons of low- and moderate-income?[6] Nothing in our constitutional tradition even remotely suggests an answer to these questions.

In the absence of such a tradition, a constitutional resolution of the exclusionary zoning issue represents nothing more than a statement of the judges' personal value preferences. The encomiums that have been lavished upon *Mt. Laurel* indicate that there are many who are happy to have the judges write those preferences into constitutional law- at least SO long as the judges' preferences coincide with their own. Yet the day may come again when those who are now prepared to accept such grounds for constitutional decision will respond more sympathetically to Justice Powell's appeal to the "proper—and properly limited—role of the courts in a democratic society."

[6] Resolution of these questions cannot, moreover, be achieved by a simplistic formula such as the one fashioned in the reapportionment cases. The underlying issues are simply too complex for so easy an answer. Yet, absent a formula that would supply judicially manageable standards, courts would be required to render essentially ad hoc decisions each time a developer or potential resident claimed that the supply of land was unduly restricted.