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CONSTITUTIONAL LAW

STANDING TO CHALLENGE FEDERAL AGENCY ACTIONS

City of Hartford v. Town of Glastonbury

The standing doctrine, as employed by federal courts, frequently operates as an effective obstacle to judicial review of allegedly illegal or unauthorized administrative action.¹ The concept of standing is of constitutional origin, grounded specifically in the article III limitation of federal judicial power to “cases and controversies”² and supplemented by court-imposed restraints on the exercise of the power of review.³ Given the necessity of determining whether the conflict is justiciable prior to reaching the merits of a particular case,⁴ standing has evolved as one of several significant threshold issues.⁵ Throughout the course of the development of the standing doctrine, the Supreme Court has refined the general guidelines by which the standing of a particular plaintiff seeking to challenge the

¹ See, e.g., *Starbuck v. City and County of San Francisco*, 556 F.2d 450 (9th Cir. 1977); *Bowker v. Morton*, 541 F.2d 1347 (9th Cir. 1976); *Pennsylvania v. Kleppe*, 533 F.2d 668 (D.C. Cir.), cert. denied, 429 U.S. 977 (1976); *Hood River County v. United States Dep’t of Labor*, 532 F.2d 1236 (1st Cir. 1975) (per curiam). See also *Goldberg v. Weinberger*, 546 F.2d 477 (2d Cir. 1976).

² U.S. CONST. art. III, § 2. The Supreme Court has construed the “cases and controversies” limitation to require in general a real and substantial dispute which affects the legal rights and obligations of parties having adverse interests and is susceptible to specific relief through a conclusive judicial decree. See, e.g., *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937).

³ See *Rescue Army v. Municipal Ct.*, 331 U.S. 549, 568-75 (1947). With respect to suits challenging the actions of administrative agencies, a self-imposed policy of restraint had been adopted, due in large part to the judiciary’s respect for the tripartite system of government. Consequently, the federal courts have been reluctant to invade the realm of the other branches of government by annulling legislative acts or enjoining activities of administrative agencies. See *Flast v. Cohen*, 392 U.S. 83, 95 (1968); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 151 (1951) (Frankfurter, J., concurring).

⁴ The concept of justiciability encompasses all of the considerations which enter into the determination whether a particular question may be adjudicated by the federal courts. See *Flast v. Cohen*, 392 U.S. 83, 95 (1968). In addition to barring claims of individuals who lack standing, the notion of justiciability prohibits the federal courts from rendering advisory opinions, e.g., *United States v. Fruehauf*, 365 U.S. 146 (1961); *Muskrat v. United States*, 219 U.S. 346 (1911), deciding moot cases, e.g., *DeFunis v. Odgaard*, 416 U.S. 312 (1974); *Doremus v. Board of Educ.*, 342 U.S. 429, 432-33 (1952), resolving political questions, e.g., *Commercial Trust Co. v. Miller*, 262 U.S. 51 (1923), and entertaining suits not ripe for adjudication, e.g., *United Public Workers v. Mitchell*, 330 U.S. 75 (1947).

⁵ One commentator has suggested that standing should not be treated as a threshold issue, but rather should be viewed as a component of a plaintiff’s claim for relief since its resolution necessarily involves substantive issues such as injury, duty, and causation. See *Albert, Standing to Challenge Administrative Action: An Inadequate Surrogate for Claims for Relief*, 83 YALE L.J. 425, 426-27 (1974) [hereinafter cited as *Albert*].

action of an administrative agency is to be ascertained.⁶ As a minimum requirement, the plaintiff must possess "such a personal stake in the outcome of the controversy as to assure . . . concrete adverse-ness."⁷ In addition, a nexus between the injury allegedly suffered and the challenged activity must be established.⁸ Recently, in *City of Hartford v. Town of Glastonbury*,⁹ the Second Circuit demon-

⁶ See notes 42-50 and accompanying text *infra*. See generally K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 22 (1976) [hereinafter cited as DAVIS]; 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22 (1958); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION chs. 12-13 (1965) [hereinafter cited as JAFFE]; Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970); Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645 (1973) [hereinafter cited as Scott]; Note, *The Causal Nexus: What Must Be Shown for Standing to Sue in Federal Courts*, 29 U. FLA. L. REV. 250 (1977); Comment, *Judicial Review of Agency Action: The Unsettled Law of Standing*, 69 MICH. L. REV. 540 (1971).

⁷ Baker v. Carr, 369 U.S. 186, 204 (1962).

⁸ See, e.g., Warth v. Seldin, 422 U.S. 490, 505 (1975). In codifying the right to obtain judicial review of certain administrative activity, Congress has retained the standing doctrine's primary requirement that the plaintiff be injured in fact by the activity he is challenging. Orders of the Federal Power Commission, for example, may be challenged by persons "aggrieved" thereby. See Federal Power Act § 313, 16 U.S.C. § 825f (1976). Similar provisions are contained in the Federal Communications Act § 402(b)(6), 47 U.S.C. § 402(b)(6) (1976), and the Securities Act of 1933 § 9, 15 U.S.C. § 77i(a) (1976). In addition, § 10 of the Administrative Procedure Act (APA), 5 U.S.C. § 702 (1976), provides: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." As a statute "designed to limit the unchecked power of federal administrative agencies by providing a minimum standard of review in the absence of an express review provision," S. REP. NO. 752, 79th Cong., 1st Sess. 30-31 (1945), the APA would appear to permit judicial review of all agency actions except those expressly exempted from review by other enactments. See 5 U.S.C. § 701a (1976).

Until quite recently, there had been considerable controversy as to the import of § 10 of the APA. Several courts had indicated that § 10 serves as a separate grant of subject matter jurisdiction, see, e.g., Pickus v. United States Bd. of Parole, 507 F.2d 1107, 1109 (D.C. Cir. 1974); Bradley v. Weinberger, 483 F.2d 410, 413 (1st Cir. 1973); Brennan v. Udall, 379 F.2d 803, 805 (10th Cir.), *cert. denied*, 389 U.S. 975 (1967), while other courts had concluded that the APA does not confer jurisdiction where it would not otherwise exist, see, e.g., Bramblett v. Desobry, 490 F.2d 405, 407 (6th Cir.), *cert. denied*, 419 U.S. 872 (1974); State Highway Comm'n v. Volpe, 479 F.2d 1099, 1105 n.7 (8th Cir. 1973); Zimmerman v. United States, 422 F.2d 326, 330 (3d Cir.), *cert. denied*, 399 U.S. 911 (1970). The Second Circuit had been inconclusive on the issue. See Aguayo v. Richardson, 473 F.2d 1090, 1101-02 (2d Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974). The Supreme Court has quite recently settled the issue in the negative. In Califano v. Sanders, 430 U.S. 99 (1977), the Supreme Court opted for the latter position, holding that § 10 of the APA does not provide an independent basis for the exercise of subject matter jurisdiction. *Id.* at 109. The Court noted that as a result of a 1976 amendment to 28 U.S.C. § 1331(a) (1970), Act of October 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721, which eliminated the amount-in-controversy requirement in suits involving federal questions brought against the United States or any of its agencies, a general jurisdictional predicate for review of agency activity now exists. Thus, it was concluded that § 10 need not be read as impliedly granting subject matter jurisdiction. 430 U.S. at 104-07. See generally Note, *Jurisdiction to Review Federal Administrative Action: District Court or Court of Appeals*, 88 HARV. L. REV. 980 (1975).

⁹ 561 F.2d 1048 (2d Cir. 1977) (en banc), *cert. denied*, 98 S. Ct. 766 (1978), *rev'g* City of

strated the difficulties inherent in determining whether there exists a sufficient connection between the alleged injury and the challenged administrative action to support standing.¹⁰ Sitting *en banc*, the *Hartford* court held that the city of Hartford, as well as two of its low-income residents, lacked standing to challenge the propriety of certain grants of federal funds¹¹ under the Housing and Community Development Act of 1974 (1974 Act).¹² The court based its holding upon the plaintiffs' failure to trace their alleged injury to the claimed unauthorized conduct of the Department of Housing and Urban Development (HUD), or to establish that such injury would be alleviated by the relief sought.¹³

Title I of the 1974 Act created the Community Development Block Grant program under which impoverished and blighted communities can obtain federal funds for various physical and economic improvements.¹⁴ To obtain funds under this program, a unit of local government must submit to the Secretary of HUD an application which includes a housing assistance plan designed to "accurately [survey] the condition of the housing stock in the community and [assess] the housing assistance needs of lower-income persons . . . residing or *expected to reside* in the community."¹⁵ Although Title

Hartford v. Hills, 408 F. Supp. 889 (D. Conn. 1976).

¹⁰ 561 F.2d at 1037-41, 1050-52.

¹¹ *Id.* at 1052.

¹² 42 U.S.C. §§ 5301-5317 (1976).

¹³ 561 F.2d at 1052.

¹⁴ The Housing and Community Development Act of 1974, 42 U.S.C. § 5301(c) (1976) provides in part: "The primary objective of this chapter is the development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income." Among the specific objectives delineated are "the elimination of slums and blight," "the expansion and improvement of the quantity and quality of community services," "the reduction of the isolation of income groups, . . . and the promotion of an increase in the diversity and vitality of neighborhoods through the spatial deconcentration of housing opportunities for persons of lower income."

¹⁵ 42 U.S.C. § 5304(a)(4) (1976) (emphasis added). This section provides:

No grant may be made pursuant to . . . this title unless an application shall have been submitted to the Secretary in which the applicant—

. . . .

(4) submits a housing assistance plan which—

(A) accurately surveys the condition of the housing stock in the community and assesses the housing assistance needs of lower-income persons . . . residing in or expected to reside in the community,

(B) specifies a realistic annual goal for the number of dwelling units or persons to be assisted, including (i) the relative proportion of new, rehabilitated, and existing dwelling units, and (ii) the sizes and types of housing projects and assistance best suited to the needs of lower-income persons in the community, and

I community development grants may not be used for housing construction,¹⁶ the housing needs detailed in the housing assistance plan serve as the basis for the issuance of low-income housing grants under Title II of the 1974 Act.¹⁷

During the first year of implementation of the 1974 Act, it became evident that the communities applying for Title I funds were experiencing considerable difficulty in arriving at an accurate "expected to reside" (ETR) figure.¹⁸ HUD resolved this problem by in effect waiving the required ETR computation for 1975 applications and promulgating regulations to guide the communities in arriving at this figure in subsequent years.¹⁹ Relying on this waiver, the Connecticut towns of Glastonbury and West Hartford submitted zero ETR figures in the housing assistance plan in their 1975

(C) indicates the general locations of proposed housing for lower-income persons, with the objective of (i) furthering the revitalization of the community, including the restoration and rehabilitation of stable neighborhoods to the maximum extent possible, (ii) promoting greater choice of housing opportunities and avoiding undue concentrations of assisted persons in areas containing a high proportion of low-income persons, and (iii) assuring the availability of public facilities and services adequate to serve proposed housing projects.

¹⁶ See 24 C.F.R. § 570.201(f) (1976). The community development grants are to be used for the installation of various public facilities, rehabilitation of deteriorated buildings and improvements, and other projects designed to better the community. See 42 U.S.C. § 5305(a) (1976); 24 C.F.R. §§ 570.200 & 570.201 (1976).

¹⁷ The Housing and Community Development Act of 1974, 42 U.S.C. §§ 1437-1440 (1976). Section 1439(d)(1) of the Act states:

In allocating financial assistance under the provisions of law specified in . . . this section, the Secretary, so far as practicable, shall consider the relative needs of different areas and communities as reflected in data as to population, poverty, housing overcrowding, housing vacancies, amount of substandard housing, or other objectively measurable conditions, subject to such adjustments as may be necessary to assist in carrying out activities designed to meet lower income housing needs as described in approved housing assistance plans submitted by units of general local government

The importance of the housing assistance plan is made evident by the statutory scheme and its legislative history. Title I allows the Secretary to dispense with almost all portions of the grant application *except* the housing assistance plan requirement. See 42 U.S.C. § 5304(b)(3) (1976). The legislative history indicates that the housing assistance plan requirement, together with the Title II provisions allocating "housing assistance funds to communities based, in part, on the housing needs specified in these plans, will make it possible for communities to plan unified community development and housing programs." H.R. REP. NO. 93-1114, 93d Cong., 2d Sess. 3 (1974). Indeed, the housing assistance plan has been characterized by HUD as "one of the most significant parts of the community development application process." 41 Fed. Reg. 2348 (1976).

¹⁸ 561 F.2d at 1049.

¹⁹ *Id.* The new regulations concerning application requirements appear at 24 C.F.R. § 570.303(c) (1976).

applications to HUD, while East Hartford submitted a figure derived from the waiting list of its public housing authority.²⁰

Plaintiffs, the city of Hartford and two low-income individuals residing therein, filed an action in district court against HUD and suburban towns in the Hartford vicinity, challenging the propriety of HUD's waiver of the ETR figure and seeking to enjoin the defendant towns²¹ from spending the Title I funds granted to them pending exact compliance with the 1974 Act.²² The defendants countered by questioning the plaintiffs' standing to bring the action.²³ The district court concluded that Hartford and its coplaintiffs had established that they had been "injured in fact" by HUD's waiver of the ETR figure, and that they were within the "zone-of-interests" sought to be protected by the 1974 Act.²⁴ Having found that HUD had indeed abused its discretion in approving the applications of the defendant towns, the court granted the requested injunction.²⁵

A divided Second Circuit panel affirmed.²⁶ On rehearing *en*

²⁰ 561 F.2d at 1037.

²¹ In plaintiffs' complaint, only HUD and several of its high-ranking personnel were named as defendants. Later joined as defendants, the towns relied upon HUD to defend the action in the district court. *Id.* at 1044 (Meskill, J., dissenting). After the district court rendered its decision, HUD decided not to appeal. The defendant towns, however, represented by attorneys who had not participated in the trial of the action, chose to appeal to the Second Circuit. *Id.* (Meskill, J., dissenting).

²² *Id.* at 1033. The plaintiffs argued that the submission of zero ETR figures in the housing assistance plans "effectively emasculated" the housing needs section of the applications. Without an accurate estimate of housing needs, the plaintiffs reasoned, the adequacy of the towns' proposed projects could not be assessed. Thus, it was contended that the Secretary was required to disapprove the applications under § 5304(c)(2) of Title 42, which requires him to do so when "the activities to be undertaken are plainly inappropriate to meeting the needs and objectives identified by the applicant [in the application for community development funds], 42 U.S.C. § 5304(c)(2) (1976)." 408 F. Supp. at 899.

²³ *Id.* at 893. Certain officials of the city of Hartford had been plaintiffs in the original action. The district court concluded that they had no legal interest in the outcome of the suit, and granted the defendant's motion to dismiss the complaint with respect to these officials. *Id.* at 895.

²⁴ *Id.* at 894. Applying the two-pronged test enunciated in *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970), *see* text accompanying nn. 46-47 *infra*, the district court found that the plaintiff city was within the "zone-of-interests" protected by the statute in question, since the 1974 Act was designed to ameliorate the problems of urban blight, a problem faced by Hartford. 408 F. Supp. at 894. The court went on to conclude that the city of Hartford and its low-income residents had suffered injury as a result of the Secretary's approval of the suburban town's grant application and thus had standing to sue. *Id.* at 897.

²⁵ *Id.* at 907.

²⁶ 561 F.2d at 1044. Judge Oakes, writing for the panel majority, found two bases for concluding that Hartford had been injured by HUD's allegedly unauthorized approval of the applications. First, the court reasoned that, had the grants to the other towns been disapproved, the funds involved would have been reallocated to other metropolitan areas, "among which Hartford would have had a priority position." *Id.* at 1037. Second, the court observed that HUD's approval of applications without ETR figures decreased the likelihood that the

banc,²⁷ however, the district court's decision was reversed and the complaint dismissed on the ground that the plaintiffs lacked standing.²⁸ Judge Meskill, who authored the *en banc* plurality opinion,²⁹ reasoned that to establish standing, the plaintiffs must show that they sustained an actual injury³⁰ which could be traced to HUD's allegedly unlawful acts³¹ and which was likely to be redressed by the

funds would be used to promote the spatial deconcentration objective. 561 F.2d at 1038-39. Thus, Hartford, as the direct beneficiary of spatial deconcentration activities of its suburban towns, obviously had been injured by HUD's approval of the incomplete applications. *Id.* at 1039.

Judge Meskill, in a dissenting opinion, concluded that the possibility of Hartford receiving reallocated funds was tenuous, since the injunctive relief sought would prevent the defendants from receiving grants only if they failed to resubmit acceptable applications. *Id.* at 1045-46 (Meskill, J., dissenting). Addressing the majority's second basis for finding that Hartford was injured, *i.e.*, that the exclusion of ETR figures retarded the achievement of the spatial deconcentration objective in the area, Judge Meskill contended that such an interest could not serve as a basis for standing. He noted that since such an assertion "is nothing more than an attempt to vindicate a general interest in the social and economic well-being of the citizenry," it is not of the genre of proprietary interests which a city may seek to protect by challenging government activity. *Id.* at 1047 (Meskill, J., dissenting). Additionally, Judge Meskill reasoned that since the injury allegedly sustained by the low-income plaintiffs, inadequate housing facilities, existed prior to the challenged action, these plaintiffs could be granted standing only upon a showing that the problem had been aggravated by HUD's conduct. *Id.* (Meskill, J., dissenting). The dissent concluded, therefore, that HUD's waiver did not produce any negative effects, but merely failed to produce expected positive effects. *Id.* at 1047-48 (Meskill, J., dissenting).

²⁷ 561 F.2d at 1048.

²⁸ *Id.* at 1052.

²⁹ Joining Judge Meskill in the plurality opinion were Judges Mansfield, Mulligan, Timbers and Van Graafeiland. Chief Judge Kaufman concurred in a separate opinion. Judge Oakes authored a dissenting opinion in which Judges Smith, Feinberg, and Gurfein joined.

³⁰ 561 F.2d at 1051 (citing *United States v. SCRAP*, 412 U.S. 669, 689 (1973)). The Court in *SCRAP* found that the plaintiffs, an environmental group composed of law students, had standing to challenge an ICC approved surcharge on railroad rates, since the students alleged a specific and perceptible injury flowing from the surcharge. *SCRAP's* contention, which the Court did recognize as somewhat attenuated, was that the surcharge would discourage use of recyclable materials and increase the consumption of natural resources, thereby impairing the use of forests and streams by the group's members. *Id.* at 688-89. See generally 40 *BROOKLYN L. REV.* 421 (1973). Professor Davis has noted that the Court reached an "all-time high in . . . liberality on the subject of standing" in *SCRAP*. Davis, *supra* note 6, at 489. In *Sierra Club v. Morton*, 405 U.S. 727 (1972), however, the Court denied the plaintiff standing to challenge a grant by the United States Forest Service of a permit to survey and explore Mineral King Valley, a national park located in California, as a potential site for a ski facility. The Court found that the plaintiff failed to allege specifically that its members would incur injury as a result of the challenged action. *Id.* at 738.

³¹ 561 F.2d at 1050 (citing *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.* (MHDC), 429 U.S. 252 (1977)). In *Arlington Heights*, the MHDC, a nonprofit housing development corporation, unsuccessfully applied for a zoning variance from the village of Arlington Heights in order to construct a low-and moderate-income housing project therein. Recognizing that several other obstacles would have to be overcome before the project could be completed, the Court nonetheless ruled that MHDC had shown an "injury [which was] indeed fairly traceable" to the village's action. *Id.* at 261.

remedy sought.³² To meet this standard, the plaintiffs contended that the waiver of the ETR requirement, coupled with the submission and approval of housing assistance plans containing zero or inaccurate ETR figures, rendered it less likely that they would benefit from the 1974 Act.³³ The Second Circuit dismissed this argument, finding that the plaintiffs' injury was at best only theoretically related to the waiver of the ETR requirement.³⁴ Pointing out that all of the Title II funds available for low-income housing subsidies had been exhausted, the plurality concluded that the lack of accurate ETR figures in the housing assistance plans was not likely to have had an effect upon plaintiffs' receipt of Title II monies.³⁵ In addition, Judge Meskill stated that it had not been shown, beyond the level of speculation, that the injunctive relief sought by the plaintiffs would alleviate their alleged injury.³⁶

In a vigorous dissenting opinion, Judge Oakes observed that the 1974 Act was designed to ameliorate the housing situation in central cities such as Hartford.³⁷ Consequently, Hartford possesses a "statutory right of entitlement" . . . to cooperation from its suburbs . . . with regard to the deconcentration of lower-income persons and the elimination of slums and blight."³⁸ Standing to sue,

³² 561 F.2d at 1050 (citing *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976)).

³³ 561 F.2d at 1050.

³⁴ *Id.* at 1051. The court noted that, to be granted standing, "[a] plaintiff must [prove] that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action." *Id.* (quoting *United States v. SCRAP*, 412 U.S. 669, 688-89 (1973)).

³⁵ 561 F.2d at 1051.

³⁶ *Id.* As to the contention that the plaintiffs would benefit from the reallocation provisions of Title I if the grant applications were disapproved, see note 26 *supra*, Judge Meskill found this indirect benefit inadequate to support standing:

The relief sought and obtained by the plaintiffs left the defendants two choices: they could revise their figures and receive their grants, or they could refuse to comply and forfeit their grants. Inasmuch as the first alternative would produce no benefit for plaintiffs, it is immaterial whether they might benefit from the second—at least absent a "substantial probability" that the second alternative will in fact be chosen Here, there was not the slightest showing that any of the defendant towns would choose to forfeit their grants rather than modify their applications.

561 F.2d at 1051 (citations and footnote omitted).

In a separate concurring opinion, Chief Judge Kaufman indicated his view that the evaluation of standing should focus upon whether there exists a "substantial likelihood that the [plaintiffs] will benefit personally from the [remedy] they seek." *Id.* at 1052 (Kaufman, C.J., concurring). Following the reasoning of the plurality, the Chief Judge concluded that since no additional Title II funds were available, none of the *Hartford* plaintiffs could benefit from the relief sought. *Id.* (Kaufman, C.J., concurring).

³⁷ *Id.* at 1056 (Oakes, J., dissenting).

³⁸ 561 F.2d at 1057 (Oakes, J., dissenting).

Judge Oakes concluded, arose from the "alleged deprivation of such a right."³⁹ Thus, the dissent found that Hartford and its low-income residents would benefit, if successful, from the suit to compel HUD and the suburban towns to comply with the requirements of the 1974 Act, since compliance was essential to achieving spatial deconcentration.⁴⁰ Furthermore, even if no additional funds were forthcoming, Judge Oakes noted that the presence of accurate ETR figures in housing assistance plans might lead to a rechanneling of available grants to those areas having the greatest need for housing.⁴¹

The Second Circuit's *en banc* decision in *Hartford* seems in accord with recent holdings of the Supreme Court restricting standing to challenge federal agency action.⁴² This current trend toward narrow treatment of standing issues⁴³ apparently marks the end of an era in which administrative action became more susceptible to

³⁹ *Id.* (Oakes, J., dissenting).

⁴⁰ *Id.* (Oakes, J., dissenting). See note 26 *supra*.

⁴¹ 561 F.2d at 1057 n.4 (Oakes, J., dissenting). The dissent noted that upward revision of the ETR figures would probably affect the "location and types of lower-income housing" which could be constructed with Title II monies. *Id.* (Oakes, J., dissenting). Such a redistribution would presumably direct funds to those areas in the greatest need of assistance. As to Hartford's potential for receipt of funds, Judge Oakes merely stated that at the time suit was initiated, there was a probability that some town would choose not to revise its original application and thereby forfeit its grant to the benefit of the plaintiffs. *Id.* at 1058 (Oakes, J., dissenting).

⁴² See notes 49-50 and accompanying text *infra*.

⁴³ Professor Davis has pointed out that all of the recent standing cases before the Supreme Court have been decided by a divided Court. Davis, *supra* note 6, at 507. The dissenting justices have been quick to criticize the current majority's overly technical and unswerving position. For instance, Justice Douglas, dissenting in *Warth v. Seldin*, 422 U.S. 490 (1975), argued that the technical barriers imposed by the majority would impair the courts' traditional function of dispensing justice. *Id.* at 519 (Douglas, J., dissenting). Justice Brennan offered what he believed to be the true explanation of the majority's denial of standing to the *Warth* plaintiff in his dissenting opinion:

I can appreciate the Court's reluctance to adjudicate the complex and difficult legal questions involved in determining the constitutionality of practices which assertedly limit residence in a particular municipality to those who are white and relatively well off, and I also understand that the merits of this case could involve grave sociological and political ramifications. But courts cannot refuse to hear a case on the merits *merely because they would prefer not to*

Id. at 520 (emphasis added) (Brennan, J., dissenting); *accord*, *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 66 (1976) (Brennan, J., dissenting); *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 1, 205 (1976), wherein it was stated that "[b]ecause causation is a manipulable concept, there may be few effective checks on a court's discretion under [*Eastern Ky. Welfare Rights Org.*] to decline to adjudicate difficult cases." *Id.* at 212 (footnote omitted). See generally Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 663-64 (1977), wherein the author concluded that "[t]he law of standing has thus become a surrogate for decisions on the merits, providing an especially useful approach for the Court when a decision on the merits overturns settled precedent."

challenge by plaintiffs who alleged injuries remotely linked to the activity at issue.⁴⁴ The culmination of the expansive period was perhaps signaled in 1970 by the Supreme Court decision in *Association of Data Processing Service Organizations, Inc. v. Camp*.⁴⁵ There, the Court held that a plaintiff seeking to obtain review of an administrative determination must allege that the challenged action has caused him *injury-in-fact*,⁴⁶ and, furthermore, establish that the interest impinged upon is "arguably within the *zone of interests* to be protected or regulated by the statute."⁴⁷

⁴⁴ Illustrative of the developments which occurred as the Court expanded the standing doctrine is the decision in *Flast v. Cohen*, 392 U.S. 83 (1968), wherein a taxpayer's standing to challenge a federal spending measure was sustained for the first time. *See id.* at 106. In subsequent cases, the interests which may serve as a predicate for standing were expanded beyond the traditional economic one. Thus, allegations of injury to aesthetic, environmental, or social interests now provide a basis for standing to challenge the source of the injury. *See, e.g., United States v. SCRAP*, 412 U.S. 669 (1973) (environmental injury); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972) (social injury).

⁴⁵ 397 U.S. 150 (1970). The *Data Processing* Court repudiated the original administrative standing test enunciated over thirty years earlier in *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118 (1939). In *Tennessee Electric*, the Supreme Court held that a citizen "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." *Id.* at 137 (emphasis added). The Court stressed that legal rights, which it defined as those rights arising out of property or contract, or protected against interference by the law of tort, conferred by statute as a privilege, must be impinged before standing will be granted. *Id.* Thus, the plaintiffs' allegation of injury arising from increased competition was *damnum absque injuria*, or damage resulting from conduct which was not violative of a right recognized by law, and could not support standing to sue the TVA. *Id.* at 140. *But cf. Hardin v. Kentucky Utilities Co.*, 390 U.S. 1 (1968) (allegation of competitive injury supported standing under a statutory provision enacted primarily to protect private utility companies from TVA competition); *accord, FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940).

In rejecting the legal interest test, the *Data Processing* majority stated that the test necessarily resulted in a commingling of the merits with the standing issue. 397 U.S. at 153.

⁴⁶ 390 U.S. at 152.

⁴⁷ *Id.* at 153 (emphasis added). In *Data Processing*, the plaintiff, an association composed of sellers of data processing services, challenged a ruling by the comptroller of the currency permitting national banks to make data processing services available to their customers. The Court granted standing, since the plaintiff had alleged that the ruling would cause its members competitive injury, and the members were within the zone-of-interest protected by § 4 of the Bank Service Corporation Act, 12 U.S.C. § 1864 (1976), which prohibits banks from engaging in non-banking services. *See also Investment Co. Inst. v. Camp*, 401 U.S. 617 (1971); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970) (per curiam). Concurring in the result but dissenting with respect to the majority's treatment of standing in *Data Processing*, Justices Brennan and White maintained that standing should be determined under the injury-in-fact standard, which, they contended, is sufficient to satisfy the case and controversy requirement. 397 U.S. at 168 (Brennan, J., dissenting). Professor Davis has long advocated the injury-in-fact test as the only means by which the complexities of standing can be effectively handled. *See DAVIS, supra* note 6, at 515-16.

It should be noted that commentators have questioned the viability of the "zone-of-interest" aspect of the *Data Processing* test, as the Supreme Court rarely invokes it. *See, e.g.,*

The advent of the *Data Processing* standard led several commentators to conclude that the doctrine of standing would no longer operate as a significant barrier to the litigation of issues arising from allegedly unauthorized agency activity.⁴⁸ Beginning in 1973, however, the Supreme Court, restrictively construing the *Data Processing* test, denied standing to plaintiffs who could not establish a sufficiently direct relationship between the injury alleged and the agency action at issue,⁴⁹ or show that the relief requested would alleviate such injury.⁵⁰

Housing and urban development cases provide a valuable backdrop for reviewing federal courts' struggle to apply these standards. On the one hand, where the plaintiff is the party primarily and immediately affected by certain agency action, the courts have not

DAVIS, *supra* note 6, at 509-16; Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450, 457-73 (1970); Comment, *Judicial Review of Agency Action: The Unsettled Law of Standing*, 69 MICH. L. REV. 540, 551-68 (1971). A possible explanation of the infrequent use of the zone-of-interest test may be found in *Evans v. Lynn*, 537 F.2d 571, 589 (2d Cir. 1976) (en banc), *cert. denied*, 429 U.S. 1066 (1977). There, the Second Circuit noted that the test is relatively insignificant in the ultimate determination of a plaintiff's standing if the plaintiff is unable to demonstrate that he suffered injury-in-fact. *Id.* at 592. The courts of appeal seem to apply the *Data Processing* test in a nonuniform manner. Some courts look only to the injury-in-fact aspect of the test, *see, e.g.*, *Park View Heights Corp. v. City of Black Jack*, 467 F.2d 1208, 1212 n.4 (8th Cir. 1972), while other courts utilize both prongs of the standard, *see, e.g.*, *Natural Resources Def. Council, Inc. v. EPA*, 481 F.2d 116, 119 (10th Cir. 1973); *Merriam v. Kunzig*, 476 F.2d 1233, 1241-42 (3d Cir.), *cert. denied*, 414 U.S. 911 (1973); *Constructores Civiles de CentroAmerica, S.A. (CONCICA) v. Hannah*, 459 F.2d 1183, 1188 (D.C. Cir. 1972).

⁴⁸ *See, e.g.*, Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970); Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363 (1973); Tucker, *The Metamorphosis of the Standing to Sue Doctrine*, 17 N.Y.L.F. 911 (1972).

⁴⁹ *See, e.g.*, *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976) (organization promoting indigents' access to health services denied standing to challenge IRS ruling); *Warth v. Seldin*, 422 U.S. 490 (1975) (residents of Rochester, New York, have no standing to challenge zoning ordinances of nearby town); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) (neither citizens nor taxpayers have standing to challenge reserve membership of members of Congress); *United States v. Richardson*, 418 U.S. 166 (1974) (taxpayer denied standing to object to secrecy of CIA expenditures); *O'Shea v. Littleton*, 414 U.S. 488 (1974) (no standing to enjoin judge's bond-setting and sentencing practices); *Linda R. S. v. Richard D.*, 410 U.S. 614 (1973) (mother of an illegitimate child denied standing to challenge Texas courts' nonenforcement of certain section of the penal code against fathers of illegitimate children).

⁵⁰ In *Warth v. Seldin*, 422 U.S. 490 (1975), the Supreme Court inaugurated the notion of viewing a party's standing to challenge government action in terms of the efficacy of the relief sought. The *Warth* Court stated that the plaintiff therein had failed to "allege specific, concrete facts demonstrating that the challenged practices harm *him*, and that he personally would benefit in a tangible way from the court's intervention." *Id.* at 508 (emphasis in original). This concept was subsequently applied by the Court in *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) and *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976). For a discussion of the possible ramifications of this test, *see The Supreme Court, 1975 Term*, 90 HARV. L. REV. 1, 205 (1976).

hesitated to proceed to the merits. Thus, for example, members of a displaced community, potential residents of an urban renewal project, and persons participating in a model cities plan have been granted standing to challenge HUD activity with respect to the particular project involved.⁵¹ On the other hand, in situations such as *Hartford*, where the plaintiff is not directly affected by the agency action, the courts have conducted a more extensive inquiry in order to determine whether the alleged injury is "fairly traceable to the defendant's acts or omissions."⁵² In making this determination, federal courts have focused on the relationship between the relief sought and the injury alleged. If the requested relief would operate to alleviate the injury, the necessary causal relationship has been deemed to exist and standing has been granted.

This test has been applied liberally by some lower federal courts to confer standing on plaintiffs who *might* benefit from a reallocation of funds resulting from a favorable finding on the merits of their claims.⁵³ Opting for a somewhat stricter standard, the District of Columbia Circuit recently found that a nationwide organization of community health centers had standing to challenge the propriety of a HEW remedial plan, because it was *probable* that the relief requested would increase the funding available to the plain-

⁵¹ See, e.g., *North City Area-Wide Council, Inc. v. Romney*, 428 F.2d 754 (3d Cir. 1970), cert. denied, 406 U.S. 963 (1972) (citizens group statutorily entitled to participate in model cities plan may challenge HUD's unilateral changes to such plan); *Shannon v. HUD*, 436 F.2d 809 (3d Cir. 1970) (residents and businessmen may challenge agency modification of proposed urban renewal project to be constructed in their neighborhood); *Norwalk CORE v. Norwalk Redev. Agency*, 395 F.2d 920 (2d Cir. 1968) (persons displaced by urban renewal project have immediate and personal interest in outcome of suit); *National Tenants Org., Inc. v. HUD*, 358 F. Supp. 312 (D.D.C. 1973) (public housing tenants have standing to challenge HUD's rent regulations); *Findrillakis v. HUD*, 357 F. Supp. 547 (N.D. Cal. 1973) (applicants may challenge HUD's determination of eligibility for tenancy in housing project); *Hicks v. Weaver*, 302 F. Supp. 619 (E.D. La. 1969) (potential tenant of proposed low-rent housing project may challenge selection of construction site); *Western Addition Comm. Org. v. Weaver*, 294 F. Supp. 433 (N.D. Cal. 1968) (persons displaced by urban renewal project may enforce HUD compliance with statute requiring formulation of relocation plan); *Powelton Civic Home Owners Assoc. v. HUD*, 284 F. Supp. 809 (E.D. Pa. 1968) (persons to be displaced by urban renewal project may challenge adequacy of relocation facilities). See also *Rodeway Inns of America, Inc. v. Frank*, 541 F.2d 759 (8th Cir. 1976), cert. denied, 430 U.S. 945 (1977) (hotel owners have standing to sue owners of apartment building being converted into hotel for violations of National Housing Act); *Aguayo v. Richardson*, 473 F.2d 1090 (2d Cir. 1973), cert. denied, 414 U.S. 1146 (1974) (New York City welfare organization and recipients have standing to challenge HEW approval of two experimental work project programs).

⁵² *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 261 (1977).

⁵³ See, e.g., *Clark v. Richardson*, 431 F. Supp. 105 (D.N.J. 1977); *NAACP v. Hills*, 412 F. Supp. 102 (N.D. Cal. 1976); *Knoxville Progressive Christian Coalition, Inc. v. Testerman*, 404 F. Supp. 783 (E.D. Tenn. 1975).

tiff.⁵⁴ Other courts have applied the test in an even more restrictive manner and have denied standing to plaintiffs who could not demonstrate that the relief sought *would* alleviate the claimed injury.⁵⁵

In denying standing to the plaintiff in *Hartford*, the Second Circuit appears to have aligned itself with those courts that have applied the causal nexus test restrictively. It is submitted that this strict approach to the causation requirement will often preclude judicial review of agency action. For example, the statute allegedly violated in *Hartford*, which benefits low-income city dwellers like the individual *Hartford* plaintiffs, is implemented through the agency's direct dealings with third parties, in this instance governmental units. This approach to achieving legislative objectives necessarily operates in an indirect manner. As a result, the beneficiary's connection with the agency activity will appear tenuous when examined under a restrictive causation standard.

The Second Circuit in *Hartford*, therefore, has adopted a narrow approach to standing issues arising in suits challenging federal agency activity.⁵⁶ In so doing, the court seems to have insulated

⁵⁴ National Ass'n of Neighborhood Health Centers, Inc. v. Mathews, 551 F.2d 321 (D.C. Cir. 1976). See also Philadelphia Welfare Rights Org. v. Embry, 438 F. Supp. 434 (E.D. Pa. 1977), wherein the plaintiff sought to enjoin the city of Philadelphia's expenditure of funds received under Title I of the 1974 Act, contending that the recipient city was required to allocate the funds for the benefit of low- and moderate-income families in proportion to the relative number of such individuals in the city's population. Distinguishing *Hartford* on the ground that, in *Hartford*, there was no guarantee that the plaintiffs would be benefited were their action to succeed, the district court in *Embry* upheld plaintiff's standing, stating that the reallocation of funds requested "will directly result in an increase in the availability of housing units for low-income people." *Id.* at 438.

⁵⁵ See *Starbuck v. City and County of San Francisco*, 556 F.2d 450 (9th Cir. 1976) (taxpayers and consumers of electricity have no standing to challenge activity of the Secretary of the Interior, since they could not show that rates would decrease if they were successful); *Bowker v. Morton*, 541 F.2d 1347 (9th Cir. 1976) (farmers have no standing to challenge operation of state irrigation project). In *Bowker*, the court held that the plaintiff "may not rely on 'the remote possibility, unsubstantiated by allegations of fact, that their situation might . . . improve were the court to afford relief.'" *Id.* at 1349 (quoting *Warth v. Seldin*, 422 U.S. 490, 507 (1975)).

⁵⁶ The Second Circuit adopted a similarly restrictive approach to the standing issue in *Evans v. Lynn*, 537 F.2d 589 (2d Cir. 1976) (en banc), cert. denied, 429 U.S. 1066 (1977). The plaintiffs in *Evans*, low-income minority residents of the New Castle, New York area, challenged a decision by HUD and the Department of Interior to grant funds to the town for the construction of sewers and parks. They argued that the grants in effect supported the town's primarily white, middle-class, single-family housing pattern and thereby violated the federal government's affirmative duty under the civil rights legislation to curtail discrimination in housing. *Id.* at 589. A majority of the Second Circuit panel initially upheld the plaintiffs' standing, finding that the asserted interest was within the zone of interests protected by the Civil Rights Acts. *Evans v. Lynn*, 537 F.2d 571, 577-78 (2d Cir. 1975). See *The Second Circuit Note, 1974 Term*, 50 ST. JOHN'S L. REV. 254, 303 (1975), for an in-depth discussion of the panel decision in *Evans*. After reconsidering the standing question in light of *Warth v. Seldin*, 422

certain agency activity from judicial scrutiny,⁵⁷ thereby impairing the judiciary's role of ensuring the legitimacy of agency action.⁵⁸ The result in *Hartford* suggests that the standing requirement has been construed too strictly and mechanically to facilitate just application in all cases. Courts must, of course, continue to adhere to the minimum constitutional case or controversy requirement, as well as the judicially created policy considerations designed to avoid unnecessary interference with the legislative realm.⁵⁹ A loosening of the causality standard, however, would appear to be called for in cases

U.S. 490 (1975), however, the *en banc* court reversed and held that the plaintiffs lacked standing, because they had failed to establish an actual injury. 537 F.2d at 595. Plaintiffs' contention that, had the grants not been approved, the funds "could conceivably have gone to some other, as yet totally *imaginary* project . . . which might have had the result of making more housing available to [the plaintiffs]," *id.* at 595 (emphasis in original), was, according to the *en banc* majority, purely conjectural and inadequate to support standing in light of the case and controversy limitation of Article III. *Id.*; cf. *Jones v. Tully*, 378 F. Supp. 286 (E.D.N.Y. 1974), *aff'd per curiam sub nom. Jones v. Meade*, 510 F.2d 961 (2d Cir. 1975), wherein the district court found that neighborhood residents had standing under § 10 of the APA, see note 8 *supra*, to challenge the proposed construction of a low- and moderate-income housing project to be funded with HUD monies. The grant of standing was premised on the theory that construction of the project would perpetuate racial concentration in violation of the Civil Rights Act. 378 F. Supp. at 287 n.1. The Second Circuit affirmed without addressing the standing issue. Judge Oakes, dissenting in *Evans*, noted the apparent inconsistency between *Jones* and the *en banc* majority's position in *Evans*. 537 F.2d at 604 (Oakes, J., dissenting).

⁵⁷ In his separate dissenting opinion in *Evans v. Lynn*, 537 F.2d 589 (2d Cir. 1975) (*en banc*), *cert. denied*, 429 U.S. 1066 (1977), Chief Judge Kaufman encouraged a more liberal use of the standing doctrine than that applied by the *en banc* majority:

[J]udicial review is, today viewed as a legitimate means of ensuring that agencies observe congressional mandates. . . .

Obviously, I do not suggest that we read the Art. III standing requirement out of existence. . . . But I do counsel against wooden application of the *Warth* precedent to an entirely different setting, and against extension of that holding to cover a situation which . . . is sharply distinguishable. Such an expansive reading of *Warth* unnecessarily . . . flies in the face of the recent trend favoring judicial oversight of the burgeoning administrative bureaucracy.

Under the majority's decision, it is unlikely that there could ever be a plaintiff who will be allowed access to the courts to challenge HUD's abdication of its congressionally-imposed duty.

537 F.2d at 610-11 (Kaufman, C.J., dissenting) (emphasis in original). In *Hartford*, however, the Chief Judge applied the restrictive efficacy-of-relief test in his concurring opinion. 561 F.2d at 1052 (Kaufman, C.J., concurring). See note 36 *supra*.

⁵⁸ See generally F. COOPER, *ADMINISTRATIVE AGENCIES AND THE COURTS* 305-15 (1951); JAFFE, *supra* note 6, at 320-27; Tucker, *The Metamorphosis of the Standing to Sue Doctrine*, 17 N.Y.L.F. 911, 921 (1972).

⁵⁹ That the separation of powers doctrine is still an effective limitation to the exercise of the federal judicial power is a proposition recently echoed by both the Supreme Court and the Second Circuit. See, e.g., *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976); *United States v. Richardson*, 418 U.S. 166 (1974) (Powell, J., concurring); *Evans v. Lynn*, 537 F.2d 589 (2d Cir. 1976) (*en banc*), *cert. denied*, 429 U.S. 106 (1977).

where, due to the statutory scheme, the necessity of demonstrating a direct relationship between the claimed injury and the challenged agency action places an insuperable burden on potential plaintiffs.⁶⁰ It is suggested that a more equitable approach than that currently followed would require courts to mitigate the rigors of the impartial direct causality standard when particular considerations warrant application of a less inflexible test.

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⁶⁰ See *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 46 (1976) (Brennan, J., dissenting). Commenting upon the majority's interpretation of the Article III requirement of injury-in-fact, Justice Brennan stated: "Thus, any time Congress chooses to legislate in favor of certain interests by setting up a scheme of incentives for third parties, judicial review of administrative action that allegedly frustrates the congressionally intended objective will be denied, because any complainant will be required to make an almost impossible showing." *Id.* at 64 (Brennan, J., dissenting).