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NOTES

Implying Standing to Sue from Statutory Authority: Applicability of a "Fair Reading" Standard

I. Introduction

A survey of the numerous comments[1] exploring the law of standing reveals an opinion shared by those commentators that the federal courts must come to grips with this doctrine lest they further confuse both themselves and the practicing bar.[2] Federal courts generally have relied heavily on certain key cases to develop standing law.[3] Although these cases have raised the issue and have afforded the Supreme Court ample opportunity to define the limits of the law of standing, the doctrine remains confused and without consistent direction.

It is submitted that steering this unsteady course has become a burden for principally two reasons. First of these considerations is that federal courts never have adequately reviewed the historical foundation of the theory supporting standing law. The doctrine should be viewed strictly in the context of the constitutional minima found in article III of the United States Constitution. It was not without regard to the parameters of available common law remedies that this nation's forefathers drafted the article III limitations. Accordingly,

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1 *See generally* Scott, *Standing in the Supreme Court—A Functional Analysis,* 86 HARV. L. REV. 645 (1973). *See also* Griswold, *Rationing Justice—The Supreme Court's Caseload and What the Court Does Not Do,* 60 CORN. L. REV. 335 (1975); Note, *Recent Standing Cases and a Possible Alternative Approach,* 27 HAST. L. J. 213 (1975); Note, *Federal Standing: 1976,* 4 HOFSTRA L. REV. 383 (1976); Note, *Standing and the Propriety of Judicial Intervention: Reviving a Traditional Approach?,* 52 NOTRE DAME LAW. 944 (1977). For articles providing significant background for the specific questions raised in this note, see Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief,* 83 YALE L. J. 425, 476 (1974); Capellitti, *Vindicating the Public Interest Through the Courts: A Comparativist's Contribution,* 25 BUFF. L. REV. 643 (1976); Fuchs, *Prerequisites to Judicial Review of Administrative Agency Action,* 51 IND. L. J. 817, 911 (1976); Jaffe, *Standing to Secure Judicial Review: Public Actions,* 74 HARV. L. REV. 1265, 1296 (1961); Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian of Ideological Plaintiff,* 116 U. PA. L. REV. 1033 (1968); Wolff, *Standing to Sue: Capricious Application of Direct Injury Standard,* 20 ST. LOUIS U. L. J. 663 (1975). *Cf.* Jaffe, *Public Interest Law—Five Years Later,* 62 A.B.A.J. 982 (1976).

2 Professor Davis recently highlighted this problem in his treatment of two 1976 Supreme Court decisions. In referring to Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976) (standing denied) and Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) (standing granted), Professor Davis remarked:

> The two main cases of 1976 are both extreme. What is worse is that one is extreme in one direction and the other is extreme in the opposite direction. The product is something less than evenhanded justice. *The whole law of standing is so confused and cluttered and yet so often decisive of litigation that it is vital to parties that the lower courts and practitioners especially need Supreme Court guidance.* The two 1976 decisions, taken together, subtract from the needed guidance.

K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 22.00-1 (1976 & Supp. 1977) (emphasis added).

3 Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252 (1977); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976); Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976); Warth v. Seldin, 422 U.S. 490 (1975); United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972); Association of Data Processing Organizations, Inc. v. Camp, 397 U.S. 150 (1970); Flast v. Cohen, 392 U.S. 83 (1968).

comprehension of the standing doctrine could be advanced by studying the framework of the common law mechanisms available to private citizens to challenge, *pro bono publico,* government action or inaction.[4] This historic overview, largely ignored by the federal courts, has been analyzed fully elsewhere and is beyond the scope of this note.[5]

The second consideration, by contrast, focuses on the more practical aspects of demanding that a party demonstrate standing to bring his claim before a federal judge. Federal courts have developed certain tests designed to prevent an overuse of the federal judiciary. Specifically, the tests for standing are instrumental in relieving congestion in the federal courts by requiring parties to resort to reform via the legislature in accomplishing that which is more appropriately matter for the legislature's concern. It is obvious from these standing cases that the courts fear government by litigation.[6]

The Constitution establishes a republican form of government which mandates that policy matters be formulated by the elected representatives of the people. As a co-equal, but separate and distinct branch of the government, federal courts will not allow parties to abuse the judiciary by asking it to articulate, address, and resolve these policy matters. The federal judiciary is designed to *protect* the rights of the parties before it; it is *not* designed to create rights or obligations not already imposed by the Constitution or by the legislative and executive branches. Any attempt to use the federal judiciary for purposes other than for the protection of rights already in existence will be met by the courts with an analysis under standing law.

In deciding the standing question, the courts may be called upon to balance certain constitutional values. The separation of powers issue, for example, may conflict with an individual freedom guaranteed by the Constitution. If the courts can be satisfied, however, that Congress has expressly established public policy, then the separation of powers concern is sufficiently resolved. The judiciary would be free to add judicial gloss to the legislatively articulated policy aims. To the extent that Congress has removed the potential for accusing the courts of usurping the legislature's policy-making powers, the courts should not fear government by litigation. Congress would have legislated public policy and would have thereby mollified any federal court concern which would require an invocation of the standing doctrine to insure against that fear.

Once the fear of court intervention in setting public policy is allayed, standing doctrine further requires that the party presenting himself before the court be a proper party to bring the action. The courts have developed an "injury in fact" test to measure that party's standing to sue.[7] The standard

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4 Foremost among the historical treatments accorded standing law are Jaffe, *The Right to Judicial Review,* 71 HARV. L. REV. 401 (1958) and Jaffe, *Standing to Secure Judicial Review: Public Actions, supra* note 1.

5 *See* Jaffe, *supra* note 4. *See also* Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?,* 78 YALE L. J. 816 (1968).

6 Many critics have investigated the propriety of judicial intervention into public policy-making. *See, e.g.,* Kurland, *Toward a Political Supreme Court,* 37 U. CHI. L. REV. 47 (1969); Government by litigation, rather than by legislation, seems to be foremost on the minds of those commentators.

7 Although this requirement dates to Frothingham v. Mellon, 262 U.S. 447 (1923), it was first articulated in Flast v. Cohen, 392 U.S. 83 (1968). The plaintiffs in *Flast* challenged

requires that any party seeking relief in the federal courts first be prepared to demonstrate sufficient injury, economic or otherwise, to satisfy the court that he has been harmed by the defendant in some judicially cognizable way.[8] Mere interest in a problem or the mere fact that an interest is widely shared will not be sufficient to demonstrate standing, regardless of the intensity with which the plaintiff asserts the interest and regardless of how qualified he is to evaluate the problem and seek a remedy.[9]

The "injury in fact" test therefore addresses another concern of the federal courts. The test serves to insure that the parties before the courts present an adversary relationship.[10] The adversary system presumptively assures the courts that all issues to be raised are addressed with intelligence and diligence, for each party would have a stake in the outcome of the case or controversy. For all of the foregoing reasons, federal courts conclude that no party has standing to sue absent a showing of judicially cognizable "injury in fact."[11]

II. Statutorily-Based "Injury in Fact"

Injury may be demonstrated in a number of ways. Infringement of one's

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as unconstitutional an appropriation and expenditure of federal funds for the use of parochial schools to finance, among other things, the purchase of textbooks for those schools. The plaintiffs claimed that Congress thereby provided religious institutions with financial support contrary to the establishment clause of the First Amendment. The Court focused on the injury requirement by indicating that "the taxpayer must [first] establish a logical link between that status and the type of legislative enactment attacked." *Id.* at 102. Without that link, there could be no injury; without injury, there can be no case or controversy; and absent a case or controversy, there is no justiciable issue.

The injury requirement resurfaced in Association of Data Processing Organizations, Inc. v. Camp, 397 U.S. 150 (1970), in the course of deciding whether the plaintiff was an "aggrieved" person under the meaning of Section 10 of the Administrative Procedure Act, 5 U.S.C. § 702 (1970). The Court extended the *Flast* reasoning to cases in the administrative setting and, at least for the present, firmly entrenched in the doctrine the requirement that some indication of concrete injury to the plaintiff is a *sine qua non* of justiciability.

8 Cases subsequent to *Data Processing* have held that the quantum of injury is not determinative; the *existence* of a judicially significant "injury in fact" is the key factor. The Supreme Court in *SCRAP* stated that an "identifiable trifle" of "injury in fact" is enough to establish standing to sue. 412 U.S. at 689.

9 405 U.S. 727.

10 The Supreme Court in *Flast* reminded litigants that the standing doctrine serves to "limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." 392 U.S. at 95.

11 *Data Processing* and *Sierra Club* identify the two other prongs of the three-part standing test.

The second prerequisite of standing is that the plaintiff show that he was "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." 397 U.S. at 153. At least one commentator argues that this "zone of interests" test should be allowed to die without fanfare. *See* K. DAVIS, *supra* note 2, at § 22.00-7; *see also id.* at § 22.02-11. The Supreme Court nevertheless adheres to this second prong of the three-prong *Sierra Club* test and lower courts occasionally consider the question. *See, e.g.*, Window Systems v. Manchester Memorial Hospital, 424 F. Supp. 331 (D. Conn. 1976).

The third prerequisite of standing is that the plaintiff show that the harm he alleges would cease to exist if the court's remedial powers were invoked. In other words, the remedy sought must stand to redress adequately the injury, lest the plaintiff be accused of asking the court to pass judgment on a matter over which it has no practical capacity to correct. The "adequacy of remedy" test is wholly consistent with article III requirements of justiciability because fundamental principles of judicial economy dictate that the federal courts hear no disputes absent a showing that they will ultimately possess effective remedial powers. Moreover, the federal courts may not issue advisory opinions. The "adequacy of remedy" test is discussed in another context at note 61 *infra*. *Cf.* note 49 *infra*.

own constitutional guarantees is an obvious example. Violation of statutorily-imposed duties where there is a concomitant *express* statutory provision granting standing is another.[12] A third way is available through clear implication from a relevant statute of a congressional conferral of standing.[13]

The Supreme Court does not contest the power of Congress to create legal rights by statute which, if invaded, would confer standing on a plaintiff.[14] The only restriction on congressional power in this regard is that it not authorize an exercise of judicial power in the absence of a case or controversy.[15] If, however, standing is to be implied from relevant statutory language, two inquiries must be made: (1) To what extent may the court *imply* that the statutory language in question creates a right to bring a claim for relief, and (2) to whom does that right flow, or, in other words, on whom is standing thereby conferred?

The extent to which federal courts may imply a congressional grant of standing provides the focal point of this note. This analysis ponders the question of whether or not the courts, under proper circumstances, could imply standing from statutory language purporting to confer standing in ways more subtle than ever before condoned by the judiciary. Answering this question requires a thorough comprehension of the purposes and scope of the legislation in question. To that end, an analysis of the statute's legislative history is necessary.

But one is not without case law to assist in measuring the extent to which such implications of standing are possible. The Supreme Court has already stated that implications of congressional grants of standing may be made, but only insofar as such conferral can be *clearly* implied from the statute.[16] It is contended, however, that the Court, in establishing this rather high threshold, was harboring fears of increased incidence of government by litigation. One of the purposes of this note, therefore, is to explore the extent to which the Supreme Court, when the public policy underlying the legislation is clearly expressed, could relax this stringent requirement of finding in the statute a "clear implication" of standing. Since public policy can be expressed either through the language of the statute itself or through expressions found in the legislative history, it is submitted that in such cases questions as to separation of powers difficulties dissolve, and implying a congressional grant of standing from a *fair reading*[17] of the relevant statutory language therefore would not compromise the justiciability issue.

Answering the second inquiry concerning to whom the implied right to bring a claim for relief flows will sometimes involve a balance of constitutional values, but will largely depend on the facts of each case. It is submitted that if a fair reading of a statute implies congressional conferral of standing on a plaintiff, and if public policy is clearly expressed, then the plaintiff has satisfied

12 *See, e.g.*, Copyrights Act, 17 U.S.C. § 501(d) (1976); Interstate Commerce Act, 49 U.S.C. § 5(2) (1887); Interstate Commerce Act, 49 U.S.C. § 26b (1887).

13 422 U.S. at 501; Animal Welfare Institute v. Kreps, 561 F.2d 1002, 1005 (D.C. Cir. 1977).

14 405 U.S. 727.

15 U. S. Const. art. III, § 2.

16 *See* note 14 *supra*.

17 It is suggested that the "fair reading" standard proposed in this note should refer to the understanding that an ordinary and reasonable person would acquire from reading the language of a relevant statute.

the "injury in fact" test for standing, and the right to challenge the defendant's actions thereby implicitly flows to the plaintiff. The second purpose of this note, therefore, is to show how the express statement of public policy by Congress can be used by the courts to determine whether the plaintiff has sustained merely an undifferentiated and indefinite injury, or has attempted merely to use the federal judiciary as a forum to air a generalized grievance, or actually has suffered a judicially cognizable injury.

III. Has Congress Articulated Public Policy?

Since the presence or absence of an express statement of public policy is critical in determining the extent to which federal courts may imply standing from statutory language and in defining the types of parties to whom those rights shall flow, it is logical to inquire first into whether or not Congress has specifically articulated that policy. It has been noted[18] that the principal fear confronting federal courts in dealing with standing cases is that the judiciary would be transformed into another forum in which plaintiffs could voice their general dissatisfaction with the government if standing doctrine were not raised as a bar to such litigation. In a system of government which places a premium on government by the people through their elected representatives, any notion that anyone should be able to turn to the judiciary to seek a more sympathetic ear when the legislature does not follow his wishes is repugnant to this basic constitutional structure. Standing doctrine is interposed by the courts to protect against such abuse of the judiciary.

A. *Has Congress Acted?*

Congress cannot be heard to complain that the courts have usurped its policy-making powers if policy is clearly articulated in a statute. The courts are bound to exercise such power as is consistent with their duty to interpret policy once it is set by the legislature.[19]

Analysis of congressional action or inaction on this front may be accomplished by a survey of the legislative history of the statute. If counsel for a plaintiff alleging standing within the framework suggested by this note must undertake research of congressional expression of public policy, two points should be kept in mind: (1) Is there a *clear* expression of public policy apparent from the relevant statutory language itself? (2) If not, does the legislative history of the act indicate a *clearly* expressed basis from which public policy may be *unambiguously* discerned or *clearly* implied? Succeeding on the first level of inquiry should always lead to success before the court, assuming, of course, that the court wishes to adopt the "fair reading" standard proposed by this note.

The second level of inquiry, however, affords the court a great deal of latitude so that counsel's success will be directly related to the persuasiveness of

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18 *See* text accompanying note 6 *supra*.

19 The Supreme Court's power to act as final arbiter in determining federal law finds its roots in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), and applies with equal force here.

his approach. It is contended that, in his analysis of the relevant legislative history, counsel should try to draw the line as closely as possible to an unambiguous expression of policy. Courts predictably will be less likely to allow implication of a congressional grant of standing from a fair reading of the relevant statute when articulation of the public policy can be discerned only from less than an express pronouncement of that policy..

B. *Implying Congressional Conferral of Standing: Current Law*

Once the court can be satisfied that Congress has articulated public policy and thus has removed any suspicions concerning separation of powers problems, the practitioner must next turn to applying those expressions of policy to his particular fact pattern to imply standing from the relevant statute. The relevant language may derive directly from the expression of public policy found in the statute itself[20] or from the statutory provisions made in order to implement that policy.[21]

Animal Welfare Institute v. Kreps[22] provides an excellent starting point, for it states the current law concerning implications of congressional grants of standing. Moreover, it shows how the express statements of public policy can be used in conjunction with the relevant statutory language to allow for an implication of standing. The plaintiffs in *Animal Welfare* were environmental groups challenging the government's waiver of a moratorium imposed by the Marine Mammal Protection Act[23] (MMPA) on the importation from South Africa of baby fur sealskins. The waiver allowed an importer, who had applied for a permit, to import some 13,000 sealskins from his 1976 harvest. After the customary administrative review was conducted, during which the plaintiffs made their objections known, the acting director of the National Marine Fisheries Service granted the permit. Plaintiffs immediately moved in the district court for a temporary restraining order and a preliminary injunction. The district court denied the motion and dismissed the suit on the grounds that plaintiffs lacked standing to sue.[24]

The court of appeals reversed and held that plaintiffs did have standing since the MMPA implicitly conferred such a right on them. The court found that the plaintiffs had clearly demonstrated that they had suffered an injury of the type defined by the statute.[25]

The *Animal Welfare* court looked to the Supreme Court standard for implying standing from statutes. In *Warth v. Seldin*,[26] the Court indicated that Congress can confer standing through its selection of statutory language either by an express grant of standing or through a conferral *clearly implied* from the

20 *See, e.g.*, Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1407 (1972); Housing and Community Development Act, 42 U.S.C. §§ 5301-5318 (1974).
21 *See, e.g.*, Pub. L. No. 94-167, § 9, 89 Stat. 1003, 1006 (1975) (Congress included a "lobbying clause" to prohibit certain use of funds appropriated to a commission; *see* text accompanying notes 50-64 *infra*.).
22 561 F. 2d 1002.
23 16 U.S.C. §§ 1361-1407 (1972).
24 561 F. 2d at 1005.
25 *Id.* at 1008.
26 422 U.S. 490.

statute.[27] The court in *Animal Welfare* found no trouble with meeting the stringent "clear implication" standard. It pointed to the language in the MMPA which gives permit applicants and "[*a*]*ny party opposed* to such permit [application an opportunity to] obtain judicial review of the terms and conditions of any permit issued by the Secretary under [the MMPA] or of his refusal to issue such a permit."[28] It is undeniable that the court correctly perceived the plaintiffs in *Animal Welfare* as parties opposed to the permit granted to the importer. As to the "injury in fact" issue concerning plaintiffs' standing challenge the Secretary's granting of the permit, there could be no dispute; Congress had *expressly* conferred standing on them.

But the court went a step beyond and *implied* standing to challenge the waiver of the moratorium as well. The court viewed the interrelationship between the waiver and the permit procedures. It also noted the policy reasons for enacting the MMPA *ab initio,* that is, to deter continued slaughter of baby seals by artificially reducing demand for coats manufactured from their pelts.[29] In light of public policy as articulated by the Congress and in view of the interrelationship between the waiver and permit procedures, the court concluded that "to find Congress gave [plaintiffs] standing to challenge permits, but not to challenge waiver regulations, would be to exalt form over substance."[30]

IV. Implying Congressional Conferral of Standing: A Suggested Alternative Approach

The court's position in *Animal Welfare* is wholly consistent with current law regarding the statutory bases for standing. The plaintiffs in *Animal Welfare* were able to meet the stringent "clear implication" standard without much difficulty. It is submitted, however, that future analysis of standing cases in this area should include a willingness to distinguish cases in which there is no clear congressional expression of public policy from those cases in which such articulation clearly can be identified from the relevant statute or its legislative history. There is no argument that for the former group of cases the more stringent "clear implication" test is to be preferred because the fear that the court might be usurping the legislature's policy-making authority multiplies as congressional statements of policy become more difficult to decipher. Anything short of requiring a "clear implication" of a conferral of standing would be tantamount to the court's *making* public policy by defining the class of persons upon which Congress intended to convey this benefit, instead of *interpreting* public policy from the declarations offered by Congress in enacting the relevant

27 422 U.S. at 501.

28 16 U.S.C. § 1374(d)(6) (1972) (emphasis added), *cited with approval in* 561 F. 2d at 1005.

29 *Id.* at 1010. The court quoted from the MMPA:

> [M]arine mammals have proven themselves to be resources of great international significance, esthetic and recreational *as well as economic,* and it is the sense of the Congress that they should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management and that *the primary objective of their management should be to maintain the health and stability of the marine ecosystem. . . .*

16 U.S.C. § 1361(6) (1972) (emphasis added).

30 561 F. 2d at 1006.

statute. It is therefore understandable that the federal courts would be loath to grant standing to all possible plaintiffs without first scrutinizing the statute for a "clear implication" of a statutory basis therefor.

A. *The Problem*

It is possible, however, that many plaintiffs who should benefit from congressional acts may be frustrated because they cannot meet the severe "clear implication" standard. What makes such a possibility more unsavory is the additional factor that Congress may have clearly expressed public policy. If the expression of public policy is clear,[31] then it is submitted that federal courts should permit a conferral of standing to be deduced from merely a *fair reading* of the statute in question. This less stringent "fair reading" standard, when combined with the prerequisite of the court's finding a clear expression of public policy, would satisfy the first step in meeting the "injury in fact" test, that is, determining whether or not an injury cognizable at law does exist. If so, the plaintiff will still have to show how he fits into the class of persons protected by the statute as one who has suffered the legally significant injury in a perceptible and differentiated manner, but the court will not be able to deny the plaintiff access for want of an injury at all.

B. *Two Illustrative Cases*

Two recent courts of appeals cases are helpful in showing how plaintiffs with interests arguably protected by the policy considerations for which a statute had been enacted would be frustrated under the current "clear implication" standard, but would gain access to the court through the proposed "fair reading" standard. It is contended that these cases demonstrate how the "fair reading" test would serve to promote public policy while the "clear implication" standard would at the same time tend to frustrate such policy.

1. The *City of Hartford* Case

The plaintiffs in *City of Hartford v. Town of Glastonbury*[32] were a municipality and two of its low-income residents. They challenged the propriety of a Department of Housing and Urban Development (HUD) ruling which led to

31 For federal courts to act within their constitutional authority, they must limit themselves to protecting rights while simultaneously refraining from creating rights where none existed before. The latter is a power exclusively reserved for Congress. *See* text accompanying note 6 *supra*. Accordingly, if the courts are to adopt the proposed "fair reading" standard, it is highly recommended that a congressional grant of standing be implied only in such cases as would not require the courts to make any assumptions en route to determining whether the parties before them are injured by the alleged violation of the relevant statutory provisions. If the courts would misinterpret the policy reasons underlying some statutory authority, then presumably the courts could also decide to grant standing to parties upon whom Congress would never have considered conferring standing. It is submitted that to avoid the problems cited herein, federal courts should demand proof of clear statements of public policy before allowing parties to argue that a "fair reading" of the statutory language relevant to their respective cases implicitly confers standing upon them. *See also* text accompanying note 68 *infra*.

32 561 F. 2d 1032.

HUD's approval of federal grants-in-aid to several suburban communities in the Hartford area. The Housing and Community Development Act of 1974[33] required HUD to elicit from each community applying for the grants-in-aid an "expected to reside" (ETR) figure. This figure represented an estimate[34] of the number of low-income people who would be expected to move into the community in the coming year. As the ETR for a given community increased, its proportionate share of the available federal funds would increase.

The defendants, several suburban communities of Hartford, relied on HUD's conditional waiver of that statutory requirement for 1975 and did not submit ETR figures for 1975.[35] Plaintiffs charged that defendants' collective failure to submit the ETR figures, if not enjoined, would cause the plaintiffs irreparable harm. If the grants to the defendants had been disapproved,[36] the funds under the program would have been reallocated to other metropolitan areas in Connecticut. Since the city of Hartford would have stood in a priority position in this reallocation,[37] plaintiffs claimed that defendants' collective failure to submit ETR figures would result in depriving the Hartford metropolitan area of an increased share of those grants-in-aid.[38]

The district court agreed with the plaintiffs and issued a permanent injunction preventing the suburban communities from spending any funds received through the program.[39] The district court found that the additional increment that would have been made available to the other Connecticut metropolitan

33 42 U.S.C. § 5303 (1974).

34 The plurality opinion referred to it as an "estimated guess." 561 F. 2d at 1049.

35 The defendants in *City of Hartford* had three options: (1) They could have submitted ETR figures for 1975, (2) they could have consented to HUD's calculation of their ETR figures, or (3) they could have refrained from submitting ETR figures and could have refused HUD's calculation simply by indicating on their applications the steps they would later take to "identify . . . more appropriate [ETR] figure[s] by the time of [their] second year submission[s]." *See* 561 F. 2d at 1036-37.

36 Plaintiffs alleged that the HCDA mandated that the defendants' applications be disapproved. *See* City of Hartford v. Hills, 408 F. Supp. 889 (D. Conn. 1976).

37 *Id.* at 895.

38 Plaintiffs alternatively alleged that had the defendants submitted ETR figures, the defendants' allocations would have been larger. Larger allocations to Hartford's suburban communities would, according to plaintiffs, promote the expansion of low and moderate housing opportunities in Hartford's suburbs. *Id.* at 892. It was alleged that such expansion would help relieve Hartford of the burdens of increasing concentration of low-income families in American cities.

The Second Circuit in its *en banc* plurality opinion summarized this argument by saying: "Plaintiffs allege that the Act is designed to encourage the wealthy to return to the cities and to facilitate the movement on the poor to the suburbs." 561 F. 2d at 1050. The opinion then adds a footnote indicating that the court would "accept [plaintiffs'] interpretation only for purposes of discussion [but the plurality believed that it was] by no means clear whether Congress sought to encourage *inter*-city spatial deconcentration or *intra*-city spatial deconcentration or both." *Id.* at n.2 (emphasis in original).

It is submitted that the distinction with which the plurality opinion apparently struggles has no bearing on the clear position of the HCDA that the purpose of that statute is to assist cities such as Hartford. For the purpose of measuring as a prerequisite to the proposed "fair reading" standard the clarity with which public policy is articulated (*see* discussion at note 31 *supra*), it is contended that the *manner* in which the deconcentration should occur is inconsequential. That such deconcentration occurs at all is of paramount importance.

Accordingly, since the foregoing reflects the policy behind the HCDA, and since that policy is clearly expressed by Congress, the plurality opinion's problems with the *manner* by which the desired deconcentration would occur would not pose any problems regarding a potential application of the "fair reading" standard for implying standing as proposed by this note. *See also* 408 F. Supp. at 901, n. 50.

39 408 F. Supp. at 907.

areas, when remitted to Hartford, would have promoted congressional intent by relieving Hartford from further concentration of low-income people in the central city.[40]

A divided panel of the Second Circuit affirmed.[41] On rehearing *en banc,* the Second Circuit reversed and based its holding on the theory that the plaintiffs lacked standing.[42]

The alignment of the Second Circuit judges in *City of Hartford* is significant. Four judges agreed that the plaintiffs had demonstrated *both* a legally cognizable "injury in fact" *and* the judicial capacity to frame adequately a remedy to ameliorate the harm.[43] Four judges disagreed and held that plaintiffs met neither condition and therefore lacked standing.[44]

The Chief Judge agreed with the latter group that the plaintiffs lacked standing, but he reached only the "adequacy of the remedy" issue. In concurring with those four judges denying standing, the Chief Judge agreed that the plaintiffs would not have benefited personally from the injunctive relief they sought. If the defendants were enjoined from spending the HUD funds, they would have faced two alternatives: the defendants could have done nothing and thereby would have forfeited the funds, or they could have submitted the ETR figures and thereby would have frustrated any benefit the plaintiffs may have realized. The Chief Judge concluded that when a remedy sought by the plaintiffs would leave the defendants with two equally available alternatives, one which would benefit the plaintiffs and one which would not, a remedy cannot be framed to ameliorate the alleged harm, and therefore, there could be no standing to sue.[45]

He chose not to address the "injury in fact" issue directly, but rather called upon his colleagues to leave "the [other] issues raised by both the plurality opinion and the dissent . . . for another day."[46] The Chief Judge elaborated:

> Hartford maintains that it will receive the very benefit Congress intended if the suburban towns successfully reapply for community development grants: relief from the burden flowing from concentration of low income people, all too often members of minorities, in the central cities. . . . In our system of coordinate powers, *the courts must ordinarily respect legislative judgments concerning the efficacy of statutes.* . . . Any other policy would require the judiciary to indulge in an independent assessment of the wisdom of Congressional action. To declare a duty prescribed by Congress too "speculative" to be enforced by an aggrieved litigant is tantamount to saying it shall not be enforced at all. Therefore, . . . *I would be exceedingly loathe to label "speculative" a chain of causation that,* on the [plaintiffs'] interpretation of the applicable law, *Congress must have considered plausible.*[47]

The public policy as articulated in the HCDA was to alleviate pressures on

40 *See id.* at 894-95.
41 561 F. 2d at 1044.
42 *Id.* at 1052.
43 *Id.* at 1059 (Oakes, J., dissenting).
44 *Id.* at 1052.
45 *Id.* at 1053 (Kaufman, C.J., concurring).
46 *Id.* at n. 1.
47 *Id.* at 1052-53 (emphasis added).

metropolitan areas experiencing increasing concentrations of low-income families within their city limits. This policy was clearly discernible from the legislative history of the HCDA and was acknowledged by the *City of Hartford* court.[48] It is presumable that at least four judges would have held that the plaintiffs would have had standing under a "clear implication" standard and that four judges would have denied standing under such a test. The Chief Judge reserved judgment on the issue and nothing can be drawn from his opinion to make a prediction as to what his position would have been under the "clear implication" test.

It is, however, supportable that the Chief Judge would have granted standing under the proposed "fair reading" standard. Public policy was clearly articulated by Congress. No problems with the separation of powers question remained. All that remained would have been an implication of standing from a fair reading of the statute. The statute was intended to assist metropolitan communities. Hartford is such a community; if any person attempts to do anything to impede a metropolitan community's enjoyment of the benefits available under the HCDA, standing to challenge such conduct should be implied. Moreover, the injury could not be speculative, for Congress did expressly impose duties on the defendants and HUD which, if breached, would cause a harm that the statute was designed to avoid, that is, a disproportionate distribution of federal appropriations.[49]

2. The *Mulqueeny* Case

Mulqueeny v. National Commission on the Observance of International Women's Year, 1975,[50] provides another instance of where an application of the proposed "fair reading" test would have resulted in a holding more in line with expressed public policy than did in fact result under either the court's analysis of the standing issue or the "clear implication" standard found in *Animal Welfare.*

The plaintiffs in *Mulqueeny* challenged the National Commission on the Observance of International Women's Year, 1975,[51] for having allegedly en-

48 *Id.* at 1050.

49 The speculativeness of an alleged injury is critical. It bespeaks the plaintiff's need to demonstrate a causal connection between the defendant's conduct and the alleged harm. In *City of Hartford,* the failure of the suburban communities to submit ETR figures, according to the plaintiffs, should have resulted in a disapproval of their grant applications. Such disapproval would relinquish certain funds which would be reallocated to other Connecticut applicants, of which the city of Hartford was the leading contender. The causal connection between defendants' conduct and the plaintiffs' injury in *City of Hartford* is clear; there can be no problem with speculativeness.

The issue is raised here, however, because the succeeding discussion of the Seventh Circuit's treatment of Mulqueeny v. National Commission on the Observance of International Women's Year, 1975, 549 F. 2d 1115 (7th Cir. 1977) will reveal that court's concerns regarding speculativeness. The Seventh Circuit's categorizing as speculative the *Mulqueeny* plaintiffs' alleged injury will be analyzed in light of *City of Hartford* and in connection with the proposed "fair reading" test. *See* text accompanying notes 62-67 *infra.*

50 549 F. 2d 1115.

51 The Commission was originally established by Executive Order and was comprised of 35 private citizens and two members of each House of Congress. Members were to serve without compensation, but travel expenses allowed under 5 U.S.C. § 5703 (1970) were to be reimbursed. Executive Order No. 11,832, 40 Fed. Reg. 2415 (1975). The Commission's life was extended by Executive Order No. 11,889, 40 Fed. Reg. 54765 (1975). Congress then perpetuated the Commission's existence by enacting Pub. L. No. 94-167, 89 Stat. 1003 (1975).

gaged in lobbying and publicity-seeking tactics urging support of the Equal Rights Amendment and advocating opposition to a constitutional amendment limiting abortion.[52] Plaintiffs asserted that this activity contravened the Commission's statutory powers. In that regard, plaintiffs alleged that such lobbying was neither consistent with the purpose for which Congress established the Commission nor within the purview of its powers as delineated by the enabling legislation.[53] They petitioned the district court to grant relief in the form of: (1) a judicial termination of the Commission, (2) an injunction framed to enjoin the Commission from committing these alleged statutory violations, or (3) an order compelling the appointment of individuals to the Commission who, by their opinions on the ERA and abortion issues, would transform it into a "fairly balanced" commission.[54]

Subsequent to plaintiffs' filing of the complaint, Congress appropriated $5,000,000 for the necessary expenses of the Commission[55] and expressly prohibited the use of these funds for "lobbying activities."[56] Plaintiffs accordingly amended their original complaint to ask for a preliminary injunction ordering the Commission to refrain from spending any of the appropriated $5,000,000 for lobbying purposes.[57]

The Commission attacked plaintiffs' standing to bring the action. Plaintiffs' responding affidavit attempted to demonstrate that plaintiffs, Mulqueeny and Boehnke, had standing as co-chairpersons of the Illinois branch of "Stop ERA," an organization intent on undermining any movement which would promote the ratification of the ERA. Plaintiffs asserted that they had spent a great deal of time, effort, and personal funds in support of this "keen" interest by coordinating the efforts of many other resource-contributing Illinois residents who shared the belief that the ERA would have harmful effects on women and society. Plaintiffs alleged that the Commission's "illegal [lobbying] actions" threatened imminent destruction of their four years of work and would impugn their hard-earned credibility and goodwill.

Plaintiffs argued that this affidavit sufficiently established themselves as parties "aggrieved by agency action" and that they therefore enjoyed the right to challenge the Commission pursuant to Section 10 of the Administrative Procedure Act (APA).[58] The district court found that the plaintiffs had satisfied the standing requirement and issued a preliminary injunction enjoining the Commission from spending any of the Commission's funds for lobbying in support of any proposed legislation or constitutional amendment under consideration by any legislative body. The Commission appealed from the issuance of the preliminary injunction, again claiming that the plaintiffs had no standing to request the relief they had received from the district court.

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52 549 F. 2d at 1119.
53 *Id.* at 1119-20.
54 *Id.* at 1119. The district court did not consider the first and third prayers for relief. *Id.* at n. 13.
55 Authorization for the federal appropriation is noted in Pub. L. No. 94-167, § 9, 89 Stat. at 1006 (1975).
56 *Id. See also* 549 F. 2d at 1118.
57 549 F. 2d at 1119, n. 12.
58 5 U.S.C. § 702 (1970).

Rejecting plaintiff's attempts to prove that they were aggrieved parties within the meaning of Section 10 of the APA, the Seventh Circuit vacated the preliminary injunction and remanded the case to the district court with directions to dismiss plaintiffs' complaint for lack of standing.[59] The Seventh Circuit concluded that the plaintiffs failed to demonstrate sufficient "injury in fact" to give them standing to challenge the Commission's conduct. The court found that the plaintiffs had suffered no concrete judicially cognizable harm. The court found trouble with the relationship between plaintiffs and defendant and concluded that "only through reliance on speculative inferences [could the connection] between defendant's conduct and plaintiffs' claimed harm [be] apparent."[60] Owing to the speculative nature of the injury, the court, in dictum, found that standing would not exist because the remedy plaintiffs requested would not ameliorate the harm.[61]

The Seventh Circuit's problems with the *Mulqueeny* plaintiffs' assertions of standing were similar to those confronting the Second Circuit in *City of Hartford*. In each case, plaintiffs had shown how clearly Congress had expressed public policy, yet in neither case could they convince the court that Congress meant to grant them standing to benefit from that public policy. Since the court in its *Mulqueeny* opinion showed no willingness to adopt a less severe standard regarding any aspect of standing law, and since the holdings of *Animal Welfare* and similar cases have entrenched the "clear implication" standard in the law of standing, it is arguable that if the plaintiffs in *Mulqueeny* had tried to *imply* a Congressional conferral of standing, the Seventh Circuit would have applied the "clear implication" standard.[62] Plaintiffs in *Mulqueeny* would have fared no better than those in *City of Hartford*. The statute applicable in the *Mulqueeny* case contained no language which would have withstood a "clear implication" test. Nothing in the enabling legislation or appropriation provisions supported a clear implication that plaintiffs would be harmed in a judicially cognizable way by violations thereof.

However, since Congress had articulated public policy in a clear manner in each case, it is submitted that if the plaintiffs had argued for implications from the relevant statutes of congressional conferrals of standing, then the courts

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59 549 F. 2d at 1122.

60 *Id.* at 1121.

61 *Id.* at 1121-22. Although the Seventh Circuit cited the correct "adequacy of remedy" issue (*see* note 11 *supra*) in its dictum, it misinterpreted the nature of the remedy which plaintiffs sought. In describing what it perceived to be the plaintiffs' objective, the court said:

> It is wholly conjectural whether the exercise of remedial powers possessed by the federal court, as desired by plaintiffs, would result in the maintenance of the status quo in the Illinois legislature's posture on the issue of ratifying the Equal Rights Amendment. . . . [I]t is . . . plausible that, were the injunctive relief requested by plaintiffs granted, the legislature would nevertheless elect to ratify the ERA.

549 F. 2d at 1121. This investigation into the speculative effect of the remedy is misplaced. The object of plaintiffs' seeking a permanent injunction was not the Illinois legislature. Rather, the *Mulqueeny* plaintiffs merely sought to enjoin the Commission from illegally spending any part of its appropriation for "lobbying activities." They wanted to see that the policy conditioning the appropriation of $5,000,000 for the Commission would be honored. Their objective was not to enjoin Commission-member lobbying per se, but rather to prevent the financing of such activity with federal funds.

62 *See* discussion of *Animal Welfare Institute* in text accompanying notes 22-30 *supra*.

should have been willing to review those arguments in the light of "fair readings" of those statutes.

The relevant statute in *Mulqueeny* read: "[No] funds authorized [under this act] may be used for lobbying activities."[63] The "lobbying clause" was included at the insistence of many Congressmen who feared that the Commission members would attempt to use part or all of any federal appropriation to promote their lobbying efforts. The legislative history of the National Women's Conference Act evidenced those fears.[64] Public policy could not have been more clearly defined. Only one question remained: Who was to enforce it?

A "fair reading" of the statute would have left the *Mulqueeny* court with no choice but to grant the plaintiffs standing to challenge the Commission's conduct. Assuming that the plaintiffs' purpose was limited to asking the court to restrain the Commission from using the funds illegally, it appears that standing should have been granted in *Mulqueeny*. Plaintiffs' counsel should have insisted that, given the legislative history and the purpose of including the "lobbying clause," a fair reading of the statute would have justified the Seventh Circuit's implying from such statutory language a congressional grant of standing to any party who could demonstrate (1) that he had engaged in lobbying activity in opposition to that allegedly engaged in by the Commission and (2) that he had been or would be injured by the illegal use of those funds.

Requiring a party to show that he had engaged in lobbying activity contrary to the Commission's alleged lobbying would serve to satisfy the requirement that an adversarial proceeding would take place. This has been identified above as a valid aim of standing doctrine.[65]

Requiring a party to show the nature of that injury, on the other hand, goes to the heart of the issue. Under a "clear implication" standard, the court cannot be sure that the Congress intended to grant plaintiffs standing to enforce public policy. Under a "fair reading" test, however, the court could make the requested implication of a statutory conferral of standing without compromising any of the reasons for which standing doctrine exists.

A fair reading of the "lobbying clause" in view of the policy considerations for which it was included in the statute would result in a finding that Congress meant to allow enforcement by anyone the act was designed to protect. That the statute was drafted so as to insure against government-subsidized lobbying is beyond any reasonable doubt. Anyone active in a lobbying effort contrary to that for which government funds were being used should have standing, by a fair reading of the relevant statute in *Mulqueeny*, to enforce the policy underlying the letter of the statute. In *Mulqueeny*, the plaintiffs did not object to lobbying by Commission members *per se*. They did, however, object to an alleged use of federal funds by the Commission members to support their lobbying efforts. A fair reading of the statute, accordingly, would have convinced

63 Pub. L. No. 94-167, § 9, 89 Stat. 1003, 1006 (1975).

64 The Seventh Circuit's review of the legislative history of the appropriations acts led it to point out that "[a]cute concern that any funds appropriated to the Commission would be misused for improper purposes surfaced during the hearings in both Houses." 549 F. 2d at 1118, n. 9.

65 *See* note 10 *supra* and accompanying text.

the court that public policy against Commission use of federal appropriations for lobbying purposes would have been promoted by implying from the statute a congressional grant of standing.

The Seventh Circuit's concern that the *Mulqueeny* plaintiffs had alleged only speculative injury also would have been assuaged by using a "fair reading" standard. As noted in the discussion of *City of Hartford*,[66] injury should not be deemed speculative if the chain of causation alleged by the plaintiff is substantially similar to the chain of causation against which the statutory language was designed to protect and which Congress thereby must have considered plausible. Measured under these standards, the injury alleged in *Mulqueeny* was not speculative. The legislative history of the relevant statute was replete with expressions of fear that public funds would be used to promote lobbying on a volatile political issue. To say that Congress did *not* intend to recognize that the Commission's use of its funds for lobbying purposes would cause injury to those lobbying against positions taken by that Commission's members would be to exalt form over substance. Alleged injury is speculative only if it can be supported solely by tenuous inferences drawn from an indefinite relationship between plaintiff and defendant. On the other hand, when there is a "clear implication" of standing in a relevant statute, an alleged injury is not speculative.[67] Since the proposed "fair reading" standard is designed to substitute for the "clear implication" standard when public policy is clearly discernible, an injury should not be considered speculative when standing is conferred through a "fair reading" of a relevant statute.

V. Conclusion

The "fair reading" standard proposed in this note should not be expanded to include cases in which public policy is not clearly articulated by Congress.[68] In such cases, court intervention through granting plaintiffs standing would result in judicial usurpation of the powers over policy-making reserved for Congress. The fears of increased government by litigation would be well-founded in such instances. The "fair reading" standard should rather be limited to cases in which plaintiffs are trying to enforce a clearly articulated public policy. The courts would then be acting wholly within their constitutional powers of *protecting* rights instead of *creating* rights where none existed before.

Accordingly, it is submitted that the court, in adopting a "fair reading" standard, should first make sure that public policy has been clearly expressed by Congress. This may be accomplished by reviewing the statute itself and by analyzing its legislative history for clear expressions of that policy.

The court should next investigate the facts of the case and decide whether or not the plaintiff is one of the parties protected by a "fair reading" of the statute. This analysis will serve two purposes: (1) by finding that the plaintiff is a party for whom the statute was designed to offer protection, the court

66 *See* text accompanying notes 46-49 *supra* and see especially discussion at note 49 *supra*.
67 *See* note 13 *supra*.
68 *See* note 31 *supra*.

satisfies the second prong of the three-prong *Sierra Club* test[69] and also assures itself of presiding over an adversarial proceeding, and (2) by identifying the injury as exemplary of the conduct which the statute was drafted to avoid, the court satisfies any concern that such injury is speculative because it acknowledges a chain of causation between plaintiff and defendant that Congress considered sufficiently foreseeable as to merit statutory provisions to prevent it.

The proposed "fair reading" standard, therefore, is intended as a substitute for the Supreme Court's "clear implication" standard only where there is a clear congressional expression of the public policy underlying a statute. The federal courts should determine the applicability of this proposed standard on the basis of the existence or absence of a clear statement of public policy. It is contended that if Congress has eliminated judicial fear of increased government by litigation by expressly articulating public policy, the courts should allow plaintiffs standing to sue if such standing can be "fairly read" from the appropriate statutory authority.

S. David Worhatch

69 *See* note 11 *supra.*