

BOSTON COLLEGE LAW REVIEW

VOLUME XXI

MARCH 1980

NUMBER 3

FEDERAL FUNDS AND FEDERAL COURTS— COMMUNITY DEVELOPMENT LITIGATION AS A TESTING GROUND FOR THE NEW LAW OF STANDING

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Struggles over the use of Community Development Block Grant funds do not simply involve interpretations of the [Housing and Community Development Act], but are part of much broader conflicts over the control and use of resources, and over broad public policy issues.

—from an "Advocacy Guide" to the Community Development Block Grant Program¹

INTRODUCTION

The doctrine of standing to sue in federal court has long been a favorite whipping boy for commentators and judges alike. Over the last decade, the Supreme Court's pronouncements on standing have created confusion and sharp differences within the lower federal courts,² and have called forth a steady drum beat of academic criticism.³ Most attention has focused on the effect of the standing doctrine upon constitutional challenges to federal, state and local actions; and on its effect upon challenges to decisions of federal regulatory agencies. This article focuses on the operation of standing in a slightly different context: federal grant-in-aid litigation.

Federal aid to state and local governments has risen dramatically over the last two decades from an annual level of 7 billion dollars in fiscal year 1960 to an estimated 85 billion dollars in fiscal year 1980.⁴ Between 1967 and 1977

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¹ 12 CLEARINGHOUSE REV. 601, 641 (1979 Supp.) [hereinafter cited as Advocacy Guide].

² An excellent example of judicial disagreement over how to approach standing issues is the split decision in *American Soc'y of Travel Agents, Inc. v. Blumenthal*, 566 F.2d 145 (D.C. Cir. 1977) (2-1 decision).

³ E.g., Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663 (1977) [hereinafter cited as Tushnet].

⁴ U.S. OFFICE OF MANAGEMENT AND BUDGET, SPECIAL ANALYSES BUDGET OF THE UNITED STATES GOVERNMENT FISCAL YEAR 1979, 175 (1978).

the average annual increase in federal grants to state and local governments was 16.2 per cent, while overall budgetary increases were at an average level of 9.8 per cent.⁵ There is strong evidence that the halcyon days of automatic increases are over, but grants will remain a major component of federal domestic outlays.

Along with the rise in funds has come a substantial volume of litigation concerning the uses of these funds. While grant litigation is a relatively new phenomenon, federal funds have generated a "veritable explosion" of lawsuits in recent years.⁶ For example, the number of suits by grantees against the grantor federal agencies concerning such matters as termination, reduction, or denial of grant funds is growing rapidly.⁷

The principal source of the explosion, however, is challenges by third parties: non-grantees who claim to be aggrieved either by the award, or potential award, of federal funds to a state or local government, or by the manner in which the grant is administered. Challengers have included the following: excluded direct beneficiaries of a grant program;⁸ indirect beneficiaries who claim that funds should have been awarded to benefit them rather than some other group;⁹ opponents, usually neighbors, of a federally aided project;¹⁰ public interest groups, such as civil rights advocates, who wish to invoke general "strings" in a grant program, such as a nondiscrimination provision, to alter existing practices in their communities;¹¹ and subgrantees and providers of services to grantees, who claim that the grantee has violated contractual obligations to them.¹²

Frequent invocation of threshold doctrines, and extensive analysis of them, pervade grant litigation. These obstacles can include lack of an implied right of action under the grant statute,¹³ failure to satisfy the jurisdictional amount,¹⁴ ripeness,¹⁵ and failure to exhaust administrative remedies.¹⁶ However, standing has been the threshold doctrine most frequently invoked by

⁵ *Id.* at 184.

⁶ F. MICHELMAN AND T. SANDALOW, *GOVERNMENT IN URBAN AREAS* 275 (1972 Supp.) (third party suits) [hereinafter cited as MICHELMAN AND SANDALOW]. This article deals principally with suits involving governmental, as opposed to private, grantees.

⁷ *E.g.*, *Southern Mut. Help Ass'n v. Califano*, 574 F.2d 518 (D.C. Cir. 1977); see Cappalli, *Federal Grant Disputes: The Lawyer's Next Domain*, 11 URB. LAW. 377 (1979).

⁸ Plaintiffs in the welfare cases are typical of this category, see, e.g., *King v. Smith*, 392 U.S. 309 (1968).

⁹ *E.g.*, *Philadelphia Welfare Rights Org. v. Embry*, 438 F. Supp. 434 (E.D. Pa. 1977).

¹⁰ *E.g.*, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

¹¹ *E.g.*, *NAACP v. Harris*, 607 F.2d 514 (1st Cir. 1979); see *United States v. City of Chicago*, 549 F.2d 415, 422 (7th Cir. 1977).

¹² *E.g.*, *People's Housing Dev. Corp. v. City of Poughkeepsie*, 425 F. Supp. 482 (S.D.N.Y. 1976).

¹³ *E.g.*, *id.*

¹⁴ *E.g.*, *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600 (1979).

¹⁵ *Knoxville Progressive Christian Coalition v. Testerman*, 404 F. Supp. 782 (E.D. Tenn. 1975).

¹⁶ *E.g.*, *Johnson v. County of Chester*, 413 F. Supp. 1299, 1310-11 (E.D. Pa. 1976); see *NAACP v. Wilmington Medical Center*, 426 F. Supp. 919 (D. Del. 1977), *rev'd*, 599 F.2d 1247 (3d Cir. 1979).

defendants, and the most troublesome for the federal courts. Most of the difficulties can be traced to the Supreme Court's decision in *Simon v. Eastern Kentucky Welfare Rights Organization*.¹⁷ The majority in *Simon* denied standing to indigent seekers of health care who asserted that a Revenue Ruling which allowed favorable tax treatment to hospitals offering only limited care to indigents encouraged the hospitals to deny them services and therefore deprived them of a benefit which Congress intended to confer by the charitable exemption provision of the Internal Revenue Code. As Justice Brennan pointed out in his dissent, the Court's emphasis on rigid standards of causation and redressability could have a serious negative impact on suits by individuals whom Congress intended to benefit by providing such incentives.¹⁸ Many grant programs fall within this category of incentive legislation, since the recipients are units of government,¹⁹ but the ultimate, albeit indirect, beneficiaries are citizens of those governments.

This article examines the impact of *Simon*, and standing doctrine generally, upon one area of grant litigation: third party law suits challenging awards of funds under the Housing and Community Development Act of 1974.²⁰ Since many of the numerous law suits which the community development program has generated²¹ have been brought by third parties, and since this litigation coincided with the emergence of a more restrictive approach to standing enunciated by the Supreme Court in cases such as *Simon* and *Warth v. Seldin*,²² it is not surprising that standing issues have dominated many of the community development cases.

Simon was the principal case upon which the Court of Appeals for the Second Circuit relied in ultimately denying standing in the celebrated *Hartford* litigation.²³ Indeed, shortly after *Simon* was handed down, a public interest group warned Congress that the decision would severely restrict community development suits, and recommended that the Housing and Community Development Act be amended to grant broad standing.²⁴

However, in all other reported cases, the federal courts appear ultimately to have found in favor of the plaintiffs' standing.²⁵ This string of victories

¹⁷ 426 U.S. 26 (1976).

¹⁸ *Id.* at 61-62 (Brennan, J., dissenting).

¹⁹ See R. CAPPALLI, RIGHTS AND REMEDIES UNDER FEDERAL GRANTS, 35-36 (1979) [hereinafter cited as CAPPALLI].

²⁰ 42 U.S.C. §§ 5301-5317 (Supp. II 1978).

²¹ See cases cited at note 106 *infra*.

²² 422 U.S. 490 (1975).

²³ *City of Hartford v. Hills*, 408 F. Supp. 889 (D. Conn. 1976), *aff'd*, *City of Hartford v. Towns of Glastonbury*, 561 F.2d 1032 (2d Cir. 1976), *rev'd en banc*, 561 F.2d 1048 (1977), *cert. denied*, 434 U.S. 1034 (1978).

²⁴ *Community Development Block Grant Program, Hearings Before the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 2d Sess. 368-69, 375 (1976) (statement of Amy Totenberg).

²⁵ *NAACP v. Harris*, 607 F.2d 514, 525-27 (1st Cir. 1979); *Monarch Chem. Works v. Thone*, 604 F.2d 1083 (8th Cir. 1979); *Lower Moreland Homeowners Ass'n v. HUD*, 479 F. Supp. 886, 896 (E.D. Pa. 1979); *Coalition for Block Grant Compliance v. HUD*, 450 F. Supp. 43, 51 (E.D. Mich. 1978); *Philadelphia Welfare Rights Org. v. Embury*, 438 F. Supp. 434, 437-38 (E.D. Pa. 1977); *NAACP v. Hills*, 412 F. Supp. 102, 106 (N.D. Cal. 1976); *Knoxville Progressive Christian Coalition v. Testerman*, 404 F. Supp. 783, 788-89 (E.D. Tenn. 1975) (by implication).

does not mean that Justice Brennan's reservations about *Simon* were unwarranted. Defendants in community development litigation have relied heavily upon the decision. In addition, the lower court discussions of standing are remarkably lacking in clarity. *Simon* is, at times, virtually ignored, and, at other times, distinguished by elaborate and questionable analysis. The article contends that, properly analyzed, the findings of standing in the community development cases are quite consistent with *Simon*. What is needed is a willingness on the part of the lower courts to confront the *Simon* issues head on, and to understand the nature of grant programs and the myriad of interests they create. The result will do nothing to stem the rise of grant litigation, a phenomenon whose utility many commentators are calling into question.²⁶ While this concern is legitimate, the answers to the problems generated by grant litigation should not generally be sought in the doctrine of standing.

I. THE NEW LAW OF STANDING

Since standing constitutes such staple fare for the authors of law review articles, one need only summarize the more salient recent developments in this area. The last decade has seen the emergence of at least two "new" laws of standing propounded by the Supreme Court. Moreover, several recent decisions suggest that the Court has abandoned the second of these approaches and returned to the first. The first development—hailed by Professor Davis as the "liberalized law of standing"²⁷—arose primarily in the context of challenges to administrative actions. In the 1970 cases of *Association of Data Processing Service Organizations v. Camp*²⁸ and *Barlow v. Collins*,²⁹ Justice Douglas, for the Court, rejected the legal interest test, which had previously presented a serious barrier for plaintiffs seeking non-statutory review of administrative action.³⁰ The Court limited the standing inquiry to two questions: whether the plaintiff had suffered injury in fact, and whether the plaintiff was "arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question."³¹ In essence, Justice Douglas rewrote the law of standing by reading the words "within the meaning of a relevant statute" in section 10(a) of the Administrative Procedure Act³² as referring not to the authorization of specific judicial review by an agency's underlying statutes, but as referring to the cluster of interests furthered or regulated by a given program created by statute. Thus section 10(a) conferred standing upon anyone who could be identified as arguably within the ambit of a particular statute and who was "adversely affected or aggrieved" by agency action.

²⁶ See, e.g., Stenberg, *Federalism in Transition: 1959-79*, 6 INTERGOVERNMENTAL PERSPECTIVE No. 1, 4, 9 (1980) [hereinafter cited as Stenberg]; CAPPALLI, *supra* note 19, at 168-71 (grantor-grantee disputes).

²⁷ K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 22.00 at 485 (1976) [hereinafter cited as DAVIS].

²⁸ 397 U.S. 150 (1970).

²⁹ 397 U.S. 159 (1970).

³⁰ *Id.* at 153. For an example of how the legal interest test was used to prevent judicial review of administrative actions, see *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940).

³¹ *Id.* at 153.

³² 5 U.S.C. § 702 (1976).

The Court's application of the zone of interests test suggested that it would be easy to meet. Furthermore, the 1972 decision of *United States v. Students Challenging Regulatory Procedures (SCRAP)*³³ seemed a clear signal that the injury in fact requirement had been diluted to the level of a "mere trifle."³⁴ Commentators viewed the new law of standing as a virtual endorsement by the Supreme Court of the concept of a "public action" brought by a "private attorney general."³⁵ Many of the lower courts apparently concurred.³⁶

Epitaphs for the law of standing, however, proved to be somewhat premature. A series of decisions between 1973 and 1976 revived the doctrine into a formidable obstacle for would-be federal court plaintiffs. The principal teaching of cases such as *Linda R.S. v. Richard D.*³⁷ and *Warth v. Seldin*³⁸ was the need for a convincing showing at the pleading stage that a judicially cognizable harm to the plaintiff had been caused by the defendant, and that there was a high degree of probability that a court ruling favorable to the plaintiff would remedy that harm. These cases arose in the context of constitutional challenges. *Simon*, by contrast, not only emphasized the importance of the causation-redressability inquiry, but extended it to challenges of administrative action on statutory grounds. Indeed, lower courts seeking to intone the black letter law of standing in administrative law challenges frequently rely on Justice Powell's statement in *Simon* that

when a plaintiff's standing is brought into issue, the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the article III limitation.³⁹

Justice Powell's test, and lower court reliance on it, demonstrate the significant barrier which plaintiffs challenging administrative action must overcome.

Simon is equally important because it illustrates the significance of the way in which courts apply the concept of judicially cognizable harm. The *Simon* majority saw the harm complained of as the actual denial of hospital services to the plaintiffs.⁴⁰ For Justice Brennan and the dissenters, the harm was injury to a beneficial interest—the plaintiffs' "opportunity and ability" to receive medical services.⁴¹ This, in turn, could lead to the "ultimate injury" of

³³ 412 U.S. 669 (1973).

³⁴ DAVIS, *supra* note 27, § 22.2, at 524.

³⁵ Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425, 475-76 (1974) [hereinafter cited as Albert].

³⁶ See, e.g., *National Automatic Laundry and Cleaning Council v. Shultz*, 443 F.2d 689, 693 (D.C. Cir. 1971) (standing has been deprived of "meaningful vitality" by recent Supreme Court decisions).

³⁷ 410 U.S. 614 (1973).

³⁸ 422 U.S. 490 (1975).

³⁹ 426 U.S. at 38, *quoted in* *City of Rohnert Park v. Harris*, 601 F.2d 1040, 1048 (9th Cir. 1979).

⁴⁰ 426 U.S. at 40-41.

⁴¹ *Id.* at 56 (Brennan, J., dissenting).

illness.⁴² One implication of the Court's approach is that any time plaintiffs suffer from a general, ongoing condition, such as poverty or isolation in inner city ghettos, and *that condition* is viewed as the ultimate harm of which they complain, causation and redressability may be exceedingly hard to prove whatever the defendants are alleged to have done.⁴³

Lower courts were quick to recognize that cases such as *Warth* and *Simon* "with their new emphasis upon causation and redressability" represented at least a "tightening up of pleading requirements"⁴⁴ and certainly a retreat from the liberal approach of *SCRAP*. Thus, for example, in *American Society of Travel Agents, Inc. v. Blumenthal*,⁴⁵ the Court of Appeals for the District of Columbia Circuit rejected on standing grounds a challenge by private travel agencies to the favorable tax treatment afforded the American Jewish Congress and other tax-exempt organizations which offered low-cost package tours to their members. The court relied heavily on *Simon* in finding, alternatively, that the plaintiffs had not alleged a judicially cognizable injury in fact, and that, even if they had, there was not sufficient possibility that the injury would be redressed by a favorable decision.⁴⁶ As to the first ground, the court cited the plaintiffs' failure to identify specific travelers who would use their services if the favorable tax treatment were terminated. The court viewed the plaintiffs' asserted harm as the "creation of an unfair competitive atmosphere," and rejected such an injury claim as "too speculative."⁴⁷ Alternatively, the court reasoned that even if the plaintiffs had alleged sufficient harm, they had "not demonstrated that they would reap any tangible benefits if the court were to order the relief sought." The opinion reasoned that non-profit organizations may benefit primarily from the use of volunteer labor, that their members might prefer to travel with them anyway, that they might shift to more religious or educational tour packages, or that travel by their members would simply decline. Thus, there was not sufficient likelihood of a favorable ruling benefiting the plaintiff.⁴⁸ Similar restrictive applications of *Simon* can be found in numerous other lower court cases.⁴⁹

Commentators have generally been outraged by the restrictive Supreme Court cases and their progeny. This new law of standing has been criticized from two distinct perspectives. One complaint is simply that the Court is not applying standing principles correctly, i.e., liberally.⁵⁰ A second and more fundamental critique is that the entire concept of standing should be aban-

⁴² *Id.* at 61 n.10 (by implication).

⁴³ *See, e.g., City of Hartford v. Towns of Glastonbury*, 561 F.2d 1032, 1047 (2d Cir. 1976) (Meskill, J., dissenting), *rev'd en banc*, 561 F.2d 1048 (1977), *cert. denied*, 434 U.S. 1034 (1978).

⁴⁴ *American Soc'y of Travel Agents, Inc. v. Blumenthal*, 566 F.2d 145, 151-52 n.7 (D.C. Cir. 1977).

⁴⁵ 566 F.2d 145 (D.C. Cir. 1977).

⁴⁶ *Id.* at 148, 150.

⁴⁷ *Id.* at 149.

⁴⁸ *Id.* at 149-51.

⁴⁹ *See, e.g., Bowker v. Morton*, 541 F.2d 1347 (9th Cir. 1976); *Forest Hills Early Learning Center v. Lukhard*, 480 F. Supp. 636 (E.D. Va. 1979).

⁵⁰ *E.g., Davis, supra* note 27, at 168 (Supp. 1978) (criticizing inconsistency of liberal and illiberal standing decisions).

doned. Professor Albert, drawing heavily on private law analogies, has suggested replacing standing with a public law of claims, under which a plaintiff's relationship to the statute in question would be treated as part of the merits, but would be considered prior to the legality of the defendant's conduct.⁵¹

Since 1977, however, the Court, while not "abandoning" standing, has qualified substantially the restrictive approach embodied in *Warth* and *Simon*. In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,⁵² Justice Powell emphasized that a plaintiff need not produce a "guarantee" that cessation of the defendant's conduct would produce the benefits sought.⁵³ Justice Powell returned to this theme in *Regents of University of California v. Bakke*.⁵⁴ In response to a challenge to Bakke's standing, Justice Powell stressed that he would not lack standing even if he could not prove that he would have been admitted in the absence of the special admissions program at issue in that case. "The [c]onstitutional element of standing is plaintiff's demonstration of any injury to himself that is *likely* to be redressed by favorable decision of his claim."⁵⁵ In *Duke Power Co. v. Carolina Environmental Study Group*⁵⁶—a case which Professor Davis called one of the most liberal standing decisions ever handed down⁵⁷—the Court rejected a nexus test that would have limited standing in constitutional cases to plaintiffs who suffer harm to an interest protected by the constitutional provision they invoke.⁵⁸

Most recently, in *Gladstone Realtors v. Village of Bellwood*,⁵⁹ the Court appeared to move toward Professor Albert's concept of a public law of claims, postponing until the merits the question whether the plaintiff should be able to challenge the conduct in question. In *Gladstone*, individual residents of a community challenged racial "steering" of prospective home buyers within that community. Some plaintiffs were residents of the "target community," toward which blacks allegedly were steered. The Court rejected the threshold challenge to their standing that the alleged injury was so diffused as, in reality, to be an injury to society generally.⁶⁰ The Court reasoned that change in the racial climate of a given neighborhood *might* constitute an injury to those living in it. The key issues would concern the characteristics of the neighborhood, and the Court stated that such matters "should be ascertainable on the basis of discrete facts presented at trial."⁶¹ The Court also noted that evidence about the general real estate practices of the area and of the defendants might be relevant in establishing the "necessary causal connection between the alleged conduct and the asserted injury."⁶² Again, the Court

⁵¹ Albert, *supra* note 35.

⁵² 429 U.S. 252 (1977).

⁵³ *Id.* at 261.

⁵⁴ 438 U.S. 265 (1978).

⁵⁵ *Id.* at n.14 (Powell, J.) (citation omitted) (emphasis added).

⁵⁶ 438 U.S. 59 (1978).

⁵⁷ DAVIS, *supra* note 27, at 168 (Supp. 1978).

⁵⁸ *Id.* at 78.

⁵⁹ 441 U.S. 91 (1979).

⁶⁰ *Id.* at 112-13.

⁶¹ *Id.* at 114 (footnote omitted).

⁶² *Id.* at 114 n.29.

stated that these matters should be developed at trial. In all these cases, the Court has seemed to step back from the strict standing requirements announced in the mid-1970's.

Nevertheless, *Warth* and *Simon* are routinely cited by the Court as the fundamental cases on the law of standing. There are no indications that they would be decided differently if they arose today, and they are the principal influence upon lower court standing decisions. Thus, standing still must be confronted and overcome by third party plaintiffs in grant-in-aid suits.

II. THE IMPORTANCE OF THRESHOLD DOCTRINES IN GRANT-IN-AID LITIGATION

The federal courts have not been uniform in their approach to grant litigation. Some have embraced it eagerly, in part based on a preference that federal tribunals adjudicate such disputes.⁶³ Judges who share this view have been exceedingly lenient in applying threshold doctrines. For example, courts have found jurisdiction under Section 1337 of Title 28 in cases involving the National School Lunch Act on the ground that the latter is an "Act of Congress regulating commerce" ⁶⁴

Some judges, however, have felt that principles of federalism might dictate a negative attitude toward federal court review of local spending decisions.⁶⁵ Such suits contain the potential for "federalizing" large areas of local government law and thrusting the federal courts deeply into the affairs of states and localities. Other judges have lamented the complexity of grant disputes, and have suggested strongly that these matters should be resolved by the administrative rather than the judicial processes. Judge Weinfeld, for example, once began an opinion in a Social Security Act case with the following observation: "This is a case that does not belong in this court. It involves three governmental agencies—federal, state and city—and centers about regulations so drawn that they have created a Serbonian bog from which the agencies seemingly are unable to extricate themselves."⁶⁶

Whatever force these reservations may have had, it is clear that threshold barriers to grant litigation have weakened, and, in some cases, have toppled completely.⁶⁷ Still, governmental defendants continue to invoke them almost as a reflex action. Occasionally a plaintiff is tossed out,⁶⁸ and the courts'

⁶³ *E.g.*, *Marquez v. Hardin*, 339 F. Supp. 1364, 1370 (N.D. Cal. 1969); *cf.* *Rosado v. Wyman*, 397 U.S. 397, 422-23 (1970) (duty of Supreme Court "to resolve disputes as to whether federal funds allocated to the states are being expended in consonance with the conditions that Congress has attached to their use.") (Harlan, J.).

⁶⁴ *E.g.*, *Marquez*, 339 F. Supp. at 1370-71.

⁶⁵ *Compare* *McCall v. Shapiro*, 416 F.2d 246, 250 (2d Cir. 1969) *with* *Andrews v. Maher*, 525 F.2d 113, 120 (2d Cir. 1975); *see* *Ulster County Community Action Comm. v. Koenig*, 402 F. Supp. 986, 992 (S.D.N.Y. 1975).

⁶⁶ *Feld v. Berger*, 424 F. Supp. 1356, 1357 (S.D.N.Y. 1976); *see* *City of Hartford v. Towns of Glastonbury*, 561 F.2d at 1052 (2d Cir. 1977) (en banc) (Kaufman, C.J., concurring), *cert. denied*, 434 U.S. 1034 (1978).

⁶⁷ *See generally* CAPPALLI, *supra* note 19, at 108-61.

⁶⁸ *E.g.*, *City of Rohnert Park v. Harris*, 601 F.2d 1040 (9th Cir. 1979).

analyses have been characterized by one commentator as "marked by considerable confusion, often bordering on incoherence."⁶⁹

In order to set the stage for a discussion of standing it will be helpful to examine briefly two other such doctrines: the existence of an implied right of action under grant-in-aid statutes and the requirement that a plaintiff meet the ten thousand dollar amount in controversy requirement of 28 U.S.C. § 1331.

Both of these obstacles are encountered only in the situation where the sole defendant is the grantee itself, as opposed to suits against the grantor agency with the grantee sometimes joined as a defendant. In suits against the grantor, the Administrative Procedure Act eliminates any right of action problems,⁷⁰ and the 1976 amendments to Section 1331 of Title 28 eliminate any jurisdictional amount problem.⁷¹ There are, however, numerous instances in which a plaintiff might choose to, or have to, sue only the governmental (state or local) grantee. The extreme case is represented by *Angell v. Zinsser*,⁷² in which residents of a community sued to enjoin the community from *withdrawing* an application for Community Development Block Grant funds. More frequent are suits by subgrantees, and suppliers who assert that the grantee has violated contractual obligations to them.⁷³ In other instances, potential beneficiaries of a grant program sue the grantee, rather than the grantor, because they do not seek to stop the grant, but want the court to issue a direct order to include them among the beneficiaries of the program. A good example is the case of *Cannon v. University of Chicago*.⁷⁴ In *Cannon* the plaintiff alleged that the defendant had unlawfully denied her admission. Rather than suing to terminate funds to the defendant, however, she sought the benefit of admission.⁷⁵

In such instances where the sole defendant is the grantee, the plaintiff may face the obstacles of an implied right of action and the jurisdictional amount. *Cannon* illustrates the potential for overcoming implied right obstacles by liberal application of the so-called "four factor" test of *Cort v. Ash*.⁷⁶

⁶⁹ CAPPALLI, *supra* note 19, at 109.

⁷⁰ See, e.g., *Falzarano v. United States*, 607 F.2d 506 (1st Cir. 1979) (by implication); *Cutler v. Kennedy*, 475 F. Supp. 838, 847 n.22 (D.D.C. 1979). But see *Chrysler Corp. v. Brown*, 441 U.S. 281, 317 (1979). Damages, however, would not be available in a suit under the APA.

⁷¹ Section 1331(a) now provides for a \$10,000 amount in controversy requirement, "except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, any officer or employee thereof in his official capacity." 28 U.S.C. § 1331(a) (1976).

⁷² 473 F. Supp. 488 (D. Conn. 1979).

⁷³ E.g., *People's Housing Dev. Corp. v. City of Poughkeepsie*, 425 F. Supp. 482 (S.D.N.Y. 1976); cf. *Ramirez, Leal & Co. v. City Demonstration Agency*, 549 F.2d 97 (9th Cir. 1976) (failure of grantee to follow preference policy expressed in grant statute).

⁷⁴ 441 U.S. 677.

⁷⁵ Plaintiff also sought damages, as well as declaratory and injunctive relief. *Id.*

⁷⁶ 422 U.S. 66 (1975). It should be noted that applications of the concepts of implied right of action and standing frequently overlap. See CAPPALLI, *supra* note 19, at 114-15.

The plaintiff asserted that she had been excluded from participation in federally assisted medical education because of her sex. Such exclusion would unquestionably violate section 901(A) of Title IX of the Education Amendments of 1972,⁷⁷ which provides that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activities receiving Federal Financial Assistance" The Seventh Circuit upheld a dismissal of the complaint on the ground that the plaintiff had no private right of action under Title IX.⁷⁸ The Supreme Court reversed by a margin of 6 to 3, although two concurring justices expressed grave reservations about the proliferation of private rights of action under federal statutes.⁷⁹ The plurality, rather routinely, applied the four factors originally set out in *Cort*.

The *Cort* test examines first, whether the plaintiff is one of the primary beneficiaries of the statute, one upon whom Congress intended to confer rights; second, the bearing of legislative history; third, the impact of allowing a private suit on the implementation of the statute; and, fourth, whether the suit is one which would normally be governed by state law.⁸⁰ It should be noted, however, that the *Cort* test arose in the context of federal regulatory legislation enacted under substantive grants of power such as the commerce clause. The routine transferral of the test to the context of grant programs enacted under the spending power raises serious questions.⁸¹

⁷⁷ 20 U.S.C. § 1681 (1976).

⁷⁸ *Cannon v. University of Chicago*, 559 F.2d 1063, 1077 (7th Cir. 1977).

⁷⁹ 441 U.S. at 717-18 (Rehnquist and Stewart, JJ., concurring).

⁸⁰ In *Cort v. Ash*, 422 U.S. 66 (1975), the Court developed the "four factor" test in the following manner:

In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff 'one of the class for whose *special* benefit the statute was enacted.' *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33, 39, 36 S.Ct. 482, 484, 60 L.Ed. 874 (1916) (emphasis supplied)—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? See, e.g., *National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U.S. 453, 458, 460, 94 S.Ct. 690, 693, 694, 38 L.Ed.2d 646 (1974) (*Amtrak*). Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? See, e.g., *Amtrak*, *supra*; *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412, 423, 95 S.Ct. 1733, 1740, 44 L.Ed.2d 263 (1975); *Calhoon v. Harvey*, 397 U.S. 134, 85 S.Ct. 292, 13 L.Ed.2d 190 (1964). And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? . . . *J. I. Case Co. v. Borak*, 377 U.S. 426, 434, 84 S.Ct. 1555, 1560, 12 L.Ed.2d 423 (1964); *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 394-395, 91 S.Ct. 1999, 2003-2004, 39 L.Ed.2d 619 (1961); *id.*, at 400, 91 S.Ct. at 2006 (Harlan, J., concurring in judgment).

Id. at 78, *quoted in Cannon v. University of Chicago*, 441 U.S. 677, 688 n.9 (1979).

⁸¹ CAPPALLI, *supra* note 19, at 115-16. Allowing the private suit turns the grant condition into a coercive norm which the grantee must obey. Under one view of grant theory, however, the grantee has the option of dropping out of the program, and any

Perhaps the most serious objection to transferring *Cort* to the grant context is that the four factor test can lead almost automatically to finding a private right of action. Since the ultimate beneficiaries of federal grant programs, and of cross-cutting strings such as anti-discrimination provisions, can almost always be identified both from the language of the statute and from its legislative history, the first factor usually will not be a problem for such plaintiffs. The second factor usually yields no evidence one way or the other. Since federal funds are involved, many judges are quick to assert a federal interest. This interest is then cited as satisfying the fourth factor, even though in the case of state and local governmental grantees, the activities assisted may well involve "an area basically of concern to the State."⁸² At this point the defendant's only hope is to convince the court that the existence of an administrative enforcement mechanism is sufficient to turn the third factor in its favor, thereby swinging the balance against the plaintiff's successful invocation of the first and fourth factors. *Cannon* and a growing number of cases in the lower courts suggest that beneficiary plaintiffs will usually win the implied right skirmish, although others may be less successful.⁸³

Ironically, the proliferation of implied right cases in the lower courts—applying the four factor analysis—continues even after the Supreme Court, at least in the regulatory context, has sharply curtailed use of the *Cort* test, almost to the point of renouncing it.⁸⁴ Plaintiffs may be able to avoid the obstacles of the implied right of action concept by relying, instead, on Section 1983 of Title 42.⁸⁵ This statute provides specifically for suit against "every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" ⁸⁶ Plaintiffs have argued, at times successfully, that, since the conditions of federal grant statutes are "laws" of the United States, it follows that governmental (state and local) officials who violate these conditions are subject to suit under Section 1983,⁸⁷ which thus becomes an express right of action against any such violation. The Supreme Court's recent decision in *Maine v. Thiboutot*⁸⁸ appears to accept this contention.

noncompliance can only be remedied by termination. See *id.* at 82-85 (limited enforcement powers of grantor agency). Moreover, the norm might be one which the federal government could not impose directly under any of its regulatory powers, thus raising constitutional questions. See generally Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 893-97 (1979).

⁸² *Cort v. Ash*, 422 U.S. 66, 78 (1975).

⁸³ Compare *Camenish v. University of Texas*, 616 F.2d 127 (5th Cir. 1980) with *City of Rohnert Park v. Harris*, 601 F.2d 1040 (9th Cir. 1979). As indicated, these individuals may be beneficiaries either of the underlying grant program, or of a national policy applicable to all or many grant programs.

⁸⁴ *Transamerica Mortgage Advisors, Inc. v. Lewis*, 100 S. Ct. 242 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979).

⁸⁵ 42 U.S.C. § 1983 (1976).

⁸⁶ *Id.* (emphasis added).

⁸⁷ *E.g.*, *Blue v. Craig*, 505 F.2d 830, 838 (4th Cir. 1974).

⁸⁸ 100 S. Ct. 2502 (1980). The issue is not free from doubt, however. Shortly before *Thiboutot* was decided, the Court asked the parties in *Pennhurst State School &*

In addition to the obstacles posed by the requirement for an implied right of action, the problem of the jurisdictional amount must be overcome in suits against the grantee. The ten thousand dollar amount in controversy requirement can be a difficult barrier to plaintiffs challenging violations of grant conditions.⁸⁹ This may happen if the individual claims are small, and cannot be aggregated under the doctrine of *Synder v. Harris*.⁹⁰ *Chapman v. Houston Welfare Rights Organization*⁹¹ is a good example of such a case. The hurdle may also arise in cases where a large grant is challenged and where the court does not view the amount of the grant itself as the amount in controversy, but requires individual plaintiffs to show a ten thousand dollar stake.⁹² In the community development context, one court has refused to allow the plaintiff to aggregate the dollar amount of a multi-year application, and insisted on treating each year as a separate "amount in controversy."⁹³

Partly, perhaps largely, because of such threshold obstacles, third party plaintiffs frequently sue the grantor agency. In these instances, third party suits against the grantor agency may avoid some barriers,⁹⁴ but they still are fertile territory for the defense of lack of standing. The defendant's ability to raise standing issues varies considerably from grant program to grant program. Some programs constitute a direct pass-through, with the grantee acting primarily as a disbursing agency.⁹⁵ In such a context it is easy to identify the beneficiaries of the program; their standing to challenge violations will rarely, if ever, be questioned. Other programs, however, constitute "grants to governments," as opposed to "grants to people." Obviously, individuals would be the ultimate beneficiaries of the funds received, but precisely who is to benefit, and in what way, may present exceedingly complex questions. The Community Development Block Grant program is an example of grants to governments. Therefore, it is not surprising that a number of difficult standing questions have arisen in the numerous cases brought under the Community Development Act.

III. THE COMMUNITY DEVELOPMENT ACT: AN OVERVIEW

"More legal challenges have been made in the first year of the [Housing and Community Development Act] than under the past decade of urban renewal and categorical grants."

—Professor Richard Kushner⁹⁶

Hosp. v. Halderman, cert. granted, 100 S. Ct. 2984 (1980) to brief the issue of the applicability of § 1983 to statutory claims.

⁸⁹ CAPPALLI, *supra* note 19, at 149-50. But see *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 675 (1979) (Stewart, J., dissenting).

⁹⁰ 394 U.S. 332, 336 (1969).

⁹¹ 441 U.S. 600 (1979).

⁹² E.g., *Schreiber v. Lugar*, 518 F.2d 1099, 1104-05 (7th Cir. 1975).

⁹³ *Johnson v. County of Chester*, 413 F. Supp. 1299, 1308-09 (E.D. Pa. 1976).

⁹⁴ The doctrines of primary jurisdiction and exhaustion of remedies are potential barriers in either type of suit. See generally CAPPALLI, *supra* note 19, at 162-65.

⁹⁵ The "welfare" programs under the Social Security Act are a good example. The grantee may, of course, have substantial responsibilities, such as provision of a matching share.

⁹⁶ Kushner, *Litigation Strategies and Judicial Review Under Title I of the Housing and Community Development Act of 1974*, 11 URB. L. ANN. 37, 98 (1976).

A. The Act

Title I of the Housing and Community Development Act of 1974⁹⁷ (Act) represented an important change in the federal grant-in-aid system. It consolidated seven pre-existing categorical grant programs into a single block grant (CDBG), with funding allocations determined largely by a formula. As enacted, this program fell short of the "Special Revenue Sharing" approach which President Nixon had advocated. Title I, however, did appear to increase substantially local discretion in the use of funds, while cutting back HUD's authority to second guess grantee choices.⁹⁸

Congress authorized \$11.3 billion for the first three and one half years. Eighty percent of the funds were allocated to Standard Metropolitan Statistical Areas (SMSA's). Most of these funds went to "entitlement communities." Cities were entitled if they were over 50,000 in population, the central city of an SMSA, or had participated in the folded-in categorical grants (so-called "hold harmless" communities). Counties were entitled if they met certain population criteria and were authorized to engage in community development activities (so-called "urban counties"). Entitlements were computed primarily by a formula based on population, overcrowded housing, and poverty. In 1977 the Act was amended to give grantees a choice between this formula and one based on poverty, age of housing stock, and the grantee's relative rate of growth.⁹⁹

Local discretion in the use of Community Development funds is not unlimited. Any expenditure must fall within the Act's list of eligible activities,¹⁰⁰ and must reflect, with limited exceptions, the priority of benefiting low and moderate-income persons.¹⁰¹ Projects must be included in the community development program submitted to HUD as a prerequisite of receiving a grant, even for "entitlement" communities.¹⁰² Other strings such as area-wide planning processes, citizen participation, environmental review, and anti-discrimination provisions must be complied with. Even so, communities have considerably more flexibility than under the categorical programs. Paradoxically, this very flexibility appears to be a principal source of the growing body of community development litigation.

⁹⁷ 42 U.S.C. §§ 5301-5317 (Supp. II 1978).

⁹⁸ See Fishman, *Title I of the Housing and Community Development Act of 1974: New Federal and Local Dynamics in Community Development*, 7 URB. L. ANN. 189 (1975).

⁹⁹ See Keating and LeGates, *Who Should Benefit from the Community Development Block Grant Program?*, 10 URB. LAW. 701, 702-04 (1978) [hereinafter cited as Keating and LeGates].

¹⁰⁰ 42 U.S.C. § 5305(a) (Supp. II 1978).

¹⁰¹ E.g., 42 U.S.C. §§ 5301(c), 5304(b)(2) (Supp. II 1978). The Act's ambiguity as to whether the permissible alternative purposes of alleviating slum and blight conditions and meeting "urgent" community development needs are of equally high priority has generated considerable controversy. See, e.g., Keating and LeGates, *supra* note 99, at 714-20, 730-31; Advocacy Guide, *supra* note 1, at 618.

¹⁰² 42 U.S.C. § 5304(a) (Supp. II 1978).

B. *The Volume of Community Development Litigation*

The volume of federal grant litigation—described in 1972 as a “veritable explosion”¹⁰³—continues to rise.¹⁰⁴ The Community Development Act has contributed its share of cases; a recent analysis of the program concluded that “each year of the CDBG program has seen an increasing number of cases brought”¹⁰⁵ The analysis presented in this article is based primarily on those federal cases reported in the National Reporter System. As of January 31, 1980, a search of the *Federal Reporter* and *Federal Supplement* yields eighteen cases involving the Act in more than a peripheral manner.¹⁰⁶ These reported decisions, however, represent only the tip of the iceberg. Some cases decided at the district court level are not reported in the *Federal Supplement*, but can be found in unofficial sources such as the *Clearinghouse Review*.¹⁰⁷ Other cases, apparently, are not reported anywhere, although their existence is well known to community development law specialists.¹⁰⁸ Of equal importance is the seemingly large number of suits which never reach the decision stage, either because they are settled or because action by the community moots the dispute.¹⁰⁹ Although these cases are not “reported,” it is occasionally possible to examine the terms of a settlement.¹¹⁰

C. *The Forms of Community Development Litigation—The Preponderance of Third Party Suits*

As indicated in the Introduction, grant litigation can arise in many different contexts. The community development cases follow this pattern to a

¹⁰³ MICHELMAN AND SANDALOW, *supra* note 6.

¹⁰⁴ CAPPALLI, *supra* note 19, at 1-7.

¹⁰⁵ Advocacy Guide, *supra* note 1 at 663.

¹⁰⁶ NAACP v. Harris, 607 F.2d 514 (1st Cir. 1979); Monarch Chem. Works v. Thone, 604 F.2d 1083 (8th Cir. 1979); Young v. Harris, 599 F.2d 870 (8th Cir. 1979); Goolsby v. Blumenthal, 597 F.2d 934 (5th Cir. 1979), *cert. denied*, 100 S. Ct. 462 (1979); City of Hartford v. Towns of Glastonbury, 561 F.2d 1032 (2d Cir. 1976), *rev'd en banc*, 516 F.2d 1048 (1977), *cert. denied*, 434 U.S. 1034 (1978); Colony Fed. Sav. & Loan Ass'n v. Harris, 482 F. Supp. 296 (W.D. Pa. 1980); Lower Moreland Homeowners Ass'n v. HUD, 479 F. Supp. 886 (E.D. Pa. 1979); Angell v. Zinnser, 473 F. Supp. 488 (D. Conn. 1979); Fox v. HUD, 468 F. Supp. 907 (E.D. Pa. 1979); Broaden v. Harris, 451 F. Supp. 1215 (W.D. Pa. 1978); Town of East Hartford v. Harris, 450 F. Supp. 512 (D.D.C. 1978); Coalition for Black Grant Compliance v. HUD, 450 F. Supp. 43 (E.D. Mich. 1978); Philadelphia Welfare Rights Org. v. Embry, 438 F. Supp. 434 (E.D. Pa. 1977); People's Housing Dev. Corp. v. City of Poughkeepsie, 425 F. Supp. 482 (S.D.N.Y. 1976); Johnson v. County of Chester, 413 F. Supp. 1299 (E.D. Pa. 1976); NAACP v. Hills, 412 F. Supp. 102 (N.D. Cal. 1976); Knoxville Progressive Christian Coalition v. Testerman, 404 F. Supp. 783 (E.D. Tenn. 1975); Ulster County Community Action Comm. v. Koenig, 402 F. Supp. 986 (S.D.N.Y. 1975). This list includes cases involving the Urban Development Action Grant Program added to Title I in 1977.

¹⁰⁷ E.g., NAACP v. Harris, 12 CLEARINGHOUSE REV. 915 (D. Mass.), *rev'd*, 607 F.2d 514 (1st Cir. 1979).

¹⁰⁸ See Advocacy Guide, *supra* note 1, at 675-77.

¹⁰⁹ *Id.* at 663.

¹¹⁰ See, e.g., *Community Development Block Grant Program, Hearings Before the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 2d Sess. 262 (1976) (stipulation of settlement, Edison, N.J.).

degree. Reported decisions include a grantee's challenge of a denial,¹¹¹ a sub-grantee's challenge to a refusal to fund its program,¹¹² neighborhood opposition to community development, funded projects,¹¹³ and attempts to invoke the Uniform Relocation Act.¹¹⁴ The Community Development Act has also spawned a highly unusual genre of lawsuit: challenges by central cities and their residents to grants to suburban jurisdictions on the ground that the latter were not meeting the Act's condition that they plan for potential low and moderate income residents.¹¹⁵ The most frequent form of community development suit, however, has been what might be termed "third party-alternative use" challenges to communities' applications for funds. The plaintiffs in such suits are low and moderate income residents of the applicant community. They assert that the activities proposed in the application do not meet their needs as Congress intended, and that, at least by implication, there are other potential activities which would meet those needs.¹¹⁶

The provisions of the Housing and Community Development Act furnish several grounds upon which to attack an application. The Secretary must approve an application unless:

- 1) on the basis of significant facts and data, generally available and pertaining to community and housing needs and objectives, the Secretary determines that the applicant's description of such needs and objectives is plainly inconsistent with such facts or data; or
- 2) on the basis of the application, the Secretary determines that the activities to be undertaken are plainly inappropriate to meeting the needs and objectives identified by the applicant pursuant to subsection (a) of this section; or
- 3) the Secretary determines that the application does not comply with the requirements of this title with specific regard to the primary purposes of principally benefiting persons of low and moderate income or aiding in the prevention or elimination of slums or blight or meeting other community development needs having a particular urgency, or other applicable law or proposes activities which are ineligible under this title. The Secretary may not disapprove an application on the basis that such application addresses any one of the primary purposes described in paragraph 3 to a greater or lesser

¹¹¹ *Town of East Hartford v. Harris*, 450 F. Supp. 512 (D.D.C. 1978).

¹¹² *People's Housing Dev. Corp. v. City of Poughkeepsie*, 425 F. Supp. 482 (S.D.N.Y. 1976).

¹¹³ *Monarch Chem. Works v. Thone*, 604 F.2d 1083 (8th Cir. 1979).

¹¹⁴ *E.g., Young v. Harris*, 599 F.2d 870 (8th Cir. 1979) (interpreting 42 U.S.C. § 4601 *et seq.* (1976)).

¹¹⁵ *E.g., City of Hartford v. Towns of Glastonbury*, 561 F.2d 1032 (2d Cir. 1976), *rev'd en banc*, 561 F.2d 1048 (1977), *cert. denied*, 434 U.S. 1034 (1978); *Coalition for Block Grant Compliance v. HUD.*, 450 F. Supp. 43 (E.D. Mich. 1978).

¹¹⁶ *Broaden v. Harris*, 451 F. Supp. 1215 (W.D. Pa. 1978); *Philadelphia Welfare Rights Org. v. Embry*, 438 F. Supp. 434 (E.D. Pa. 1977); *NAACP v. Hills*, 412 F. Supp. 102 (N.D. Cal. 1976); *Knoxville Progressive Christian Coalition v. Testerman*, 404 F. Supp. 783 (E.D. Tenn. 1975); *Ulster County Community Action Comm. v. Koenig*, 402 F. Supp. 986 (S.D.N.Y. 1975); see *Advocacy Guide*, *supra* note 1, at 664 ("increase in filings relating to the issue of targeting CDBG funds to meet low- and moderate-income needs . . .").

degree than any other, except that such application may be disapproved if the Secretary determines that the extent to which a primary purpose is addressed is plainly inappropriate to meeting the needs and objectives which are consistent with the community's efforts to achieve the primary objective of this title.¹¹⁷

Applications have been challenged on the additional grounds of insufficient citizen participation,¹¹⁸ insufficient performance under prior grants,¹¹⁹ and improper environmental reviews.¹²⁰ The proliferation of third party-alternative use challenges, however, cannot be explained simply by the fact that there are a number of potential legal grounds upon which to bring them. Rather, one must look to the nature and structure of the program itself to understand why "who should reap the benefits of the CDBG funds has been the single most important issue in the history of the program."¹²¹

D. *The Community Development Act as an Incentive to Conflict*

Although the Act's unclear language—the term "community development" is not defined—and HUD's asserted laxity in enforcing it may have contributed to the volume of cases,¹²² it is clear that the structure of the program represents an invitation to intra-community conflicts for funds. The shift from categorical programs to one block grant results in more involvement of generalist local officials—including city councils—and forces these officials to make choices.¹²³ Citizen participation provisions ensure that community development funding decisions will be highly visible. These funds are regarded as "new money," especially in jurisdictions which did not participate in the previous categorical programs. Even in those which did participate, new groups, particularly neighborhood groups excluded from the Model Cities Program, have emerged as forceful competitors.¹²⁴ Cambridge, Massachusetts, for example, was bombarded with citizen proposals totaling \$8 million for a program year during which its entitlement was \$2.8 million.¹²⁵ According to the Brookings Institution, a principal result of this intense intra-community competition is an understandable tendency on the part of local officials to spread out the funds among as many activities and neighborhoods as possible.¹²⁶

¹¹⁷ 42 U.S.C. § 5304(c) (Supp. II 1978).

¹¹⁸ E.g., *NAACP v. Hills*, 412 F. Supp. 102 (N.D. Cal. 1976).

¹¹⁹ *Broaden v. Harris*, 451 F. Supp. 1215 (W.D. Pa. 1978).

¹²⁰ *Ulster County Community Action Comm. v. Koenig*, 402 F. Supp. 986 (S.D.N.Y. 1975).

¹²¹ Advocacy Guide, *supra* note 1, at 616.

¹²² Keating and LeGates, *supra* note 99, at 705.

¹²³ P. DOMMEL, R. NATHAN, S. LIEBSCHUTZ AND M. WRIGHTSON, *DECENTRALIZING COMMUNITY DEVELOPMENT 198-99* (1978) (Brookings Institution) [hereinafter cited as DOMMEL ET AL.].

¹²⁴ *Id.* at 199.

¹²⁵ *Housing and Community Development Act of 1977, Hearings Before the Subcomm. on Housing and Community Development of the House Comm. on Banking, Finance and Urban Affairs*, 95th Cong., 1st Sess. 366-67 (statement of James L. Sullivan).

¹²⁶ DOMMEL ET AL., *supra* note 123.

E. The Community Development Litigation as a Step in the Political Process

As in other instances of competition for governmental benefits, the losers may end up going to court.¹²⁷ In the community development competition a significant group of actors treats the potential for judicial recourse as an important bargaining chip from the outset. These actors conduct their pre-application bargaining and trading in a manner calculated to "build a record" should they lose in the political arena.

The actors referred to are low and moderate income groups and the public interest lawyers who advise them. The Advocacy Guide cited frequently in this article makes it clear that lawsuits are to be viewed as one element in an overall political strategy.¹²⁸ Other important steps include active involvement in public hearings and other citizen participation vehicles, offering specific proposals of their own, and filing complaints with HUD if unsuccessful. The willingness of these groups to bring suit—potentially blocking the community's funding, or at least creating uncertainty over its release—is a powerful form of political leverage. Of course, if a challenge to their standing barred the courthouse door, this leverage would be reduced substantially.

IV. STANDING ISSUES IN THE COMMUNITY DEVELOPMENT LITIGATION

A. Intra-Community Challenges—Entitlement Jurisdictions

Third party-alternative use plaintiffs have encountered standing challenges. The reported standing cases all appear to have involved entitlement jurisdictions—communities which had a right to a set amount of funds, contingent upon submission of an acceptable application.¹²⁹ On the surface, at least, *Simon* might pose serious obstacles to such intra-community challenges. Viewed as a tax expenditure, the statute involved in that case represented a set of incentives to third parties to help the plaintiff beneficiaries. The Community Development Block Grant Program is similar: funds go to a third party (the grantee); they are not passed automatically through to the ultimate beneficiaries as is the case with income transfer programs.¹³⁰ Thus, under post-*Simon* standing doctrine, the effect of a successful suit upon the grantee's conduct must be considered at the pleading stage. Might the grantee simply forego a portion of its entitlement if the challenged activity is eliminated? How substantial is the likelihood that knocking out that activity will lead to the substitution of others which will, or might, benefit plaintiffs? For that matter, are courts equipped to engage in the complex task of identifying the beneficiaries of municipal expenditure programs?¹³¹

¹²⁷ E.g., *Scanwell Laboratories v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970) (disappointed bidder for government contract).

¹²⁸ Advocacy Guide, *supra* note 1, at 640-41.

¹²⁹ All five of the communities involved in the cases cited at note 116 *supra* are listed as having a direct entitlement in HUD's Directory of Allocations for Fiscal Year 1977 (on file with the author).

¹³⁰ Under some types of CD funded housing rehabilitation programs the funds will end up in the beneficiaries' hands.

¹³¹ See Stenberg, *supra* note 26.

Despite the potential obstacles posed by *Simon*, analysis of the cases leads to the conclusion that standing is "easily found" in such situations.¹³² The lower courts have, essentially, refused to confront the questions raised above. For example, in *Knoxville Progressive Christian Coalition v. Testerman*,¹³³ plaintiffs challenged the eligibility of a portion of the city's application involving the acquisition and improvement of property and a feasibility study for the 1980 World's Fair. Defendants, relying on *Warth*, argued that plaintiffs had not shown the requisite likelihood of benefit from judicial relief, since "the funds involved might be used for eligible projects other than plaintiffs' neighborhoods."¹³⁴ The court admitted that this contention presented a "difficult issue," but was troubled by its implications, namely that "it would be difficult to imagine any low or middle income plaintiff with standing to challenge alleged improper allocations of funds under the Community Development Act."¹³⁵ Rather than grapple with this issue, the court sidestepped it by holding that the controversy was not ripe, and, alternatively, that the activities were eligible.¹³⁶ Similarly, the court in *NAACP-Santa Rosa-Sonoma County Branch v. Hills*¹³⁷ found that low and moderate income plaintiffs would benefit from judicial invalidation of all or a portion of the grantee's application by presuming that "a favorable ruling might make Title I funds available for potential rehabilitation of their homes or acquisition of real property on which low-cost housing could then be constructed."¹³⁸ Finally, in *Philadelphia Welfare Rights Organization v. Embry*,¹³⁹ the court disposed of a challenge to third party-alternative use plaintiffs' standing by declaring that "the plaintiffs are not dependent upon the acts of third parties to alleviate the harm to them. The reallocation of Title I funds to benefit low income people will directly result in an increase in the availability of housing units for low income people."¹⁴⁰ The court's assertion in *Embry* does not recognize that under traditional grant-in-aid theory, the court could not order any re-allocation.¹⁴¹ A judicial decree might invalidate an existing application, but only the grantee—a "third party," as that term was used—could decide whether and how to amend it. The *Embry* court was able to distinguish *Simon* largely by dint of this misperception of the federal grant-in-aid system.¹⁴²

¹³² Advocacy Guide, *supra* note 1, at 666.

¹³³ 404 F. Supp. 782 (E.D. Tenn. 1975).

¹³⁴ *Id.* at 788.

¹³⁵ *Id.* (emphasis in original).

¹³⁶ *Id.* at 788-90.

¹³⁷ 412 F. Supp. 102 (N.D. Cal. 1976).

¹³⁸ *Id.* at 106 (emphasis added).

¹³⁹ 438 F. Supp. 434 (E.D. Pa. 1977).

¹⁴⁰ *Id.* at 438 (citation omitted) (emphasis added). Standing was not discussed in the *Broaden* and *Ulster County* cases. Those courts which did consider standing focused primarily on injury in fact problems, rather than on the additional requirement that plaintiff meet the "zone of interests" test. It is clear that this requirement is not a serious obstacle in the circumstances under consideration. See *id.* at 437.

¹⁴¹ See, e.g., *PAAC v. Rizzo*, 502 F.2d 306, 313-14 (3d Cir. 1975). It should also be noted that, with limited exceptions, new housing is not an eligible activity under Title I. Advocacy Guide, *supra* note 1, at 616.

¹⁴² Such misperceptions are not limited to the community development area. A panel of the Fifth Circuit held that revenue sharing funds were subject to the Uniform

One way to distinguish *Simon* might be to focus on the fact that it was a tax case, not necessarily applicable in the grant context. *Simon* could be read as establishing a narrow, prudential rule concerning third parties' standing to challenge the tax liability of others.¹⁴³ Justice Stewart's concurring opinion—which supplied the fifth vote in *Simon*—supports such a reading.¹⁴⁴ Stewart asserted that he could imagine no case, outside of the First Amendment area, "where a person whose own tax liability was not affected ever could have standing to litigate the federal tax liability of someone else."¹⁴⁵

A more helpful analysis of *Simon* is offered by Chief Judge Bazelon in his dissent in *American Society of Travel Agents v. Blumenthal*.¹⁴⁶ In *Simon*, he points out, "there was no way of knowing in advance whether the increased income from charitable contributions would exceed the increased cost of providing additional services."¹⁴⁷ Thus hospital behavior could not be predicted. In the community development context it is known precisely how much money is available to an entitlement community, and there is substantial likelihood that local officials will wish to retain those funds rather than be portrayed as having "lost" federal dollars. Thus the challengers can be seen as analogous to traditional opportunity plaintiffs, such as competitors for a grant.¹⁴⁸ It is true that these plaintiffs are indirect opportunity plaintiffs since they do not seek the actual funds, but the benefit from their expenditure. In some cases, such as housing rehabilitation programs, it is possible to identify the beneficiaries in advance. In other cases courts might apply a "rule of reason" that expenditures in a given area do, in fact, benefit the residents of that area. This approach to finding benefit to the plaintiffs is similar to that used in studies of the effects of the community development program.¹⁴⁹

The remaining question is whether there exist proposals for alternative uses of the funds which might be included if plaintiffs are successful and which show a likelihood of benefiting them. In the rare case where there is no such proposal—if, for example, plaintiffs simply are motivated by a general opposition to "downtown" projects—standing should be denied. The plaintiffs have an insufficient relationship to the funds at issue in the suit. In most

Relocation Act, despite the fact that revenue sharing is far different from the categorical grants which dominated the aid system when the URA was enacted. *Goolsby v. Blumenthal*, 581 F.2d 455 (5th Cir. 1978), *rev'd en banc*, 590 F.2d 1369 (1979), *cert. denied*, 100 S. Ct. 462 (1979).

¹⁴³ Cf. *American Soc'y of Travel Agents, Inc. v. Blumenthal*, 566 F.2d 145, 150 n.3 (D.C. Cir. 1977) (no need to reach tax challenge standing where "injury in fact" prerequisite not met).

¹⁴⁴ 426 U.S. at 47 (1976) (Stewart, J. concurring). Nevertheless, it is questionable whether a meaningful difference can be drawn in this context between tax expenditures and appropriations expenditures.

¹⁴⁵ *Id.*

¹⁴⁶ 566 F.2d 145 (D.C. Cir. 1977).

¹⁴⁷ *Id.* at 159 (dissenting opinion).

¹⁴⁸ E.g., *City of Newburgh v. Richardson*, 435 F. Supp. 1049 (S.D.N.Y. 1977); see CAPPALLI, *supra* note 19, at 118-23.

¹⁴⁹ E.g., R. NATHAN, P. DOMMEL, S. LIEBSCHUTZ AND M. MORRIS, *BLOCK GRANTS FOR COMMUNITY DEVELOPMENT* 305-06 (1977) (Brookings Institution).

cases, however, such proposals will exist, perhaps submitted by the plaintiffs. As indicated above, the third party-alternative use plaintiffs are likely to have participated in the application process from the outset.¹⁵⁰

The hard case would arise if the community made a plausible showing that the plaintiffs stood no chance to benefit since there were *other* proposals which it would substitute if the suit were successful, and that these proposed activities were not those which plaintiffs sought to have funded. The community might, for example, have used a scoring system—a common device in the grant context.¹⁵¹ Putting aside the question whether such an inquiry is best made at the pleading stage,¹⁵² what should a court do if the applicant demonstrates that plaintiffs' proposal ranked last and has virtually no chance of ever being funded?

Plaintiffs might attempt to derive support from *City of Newburgh v. Richardson*.¹⁵³ Even though Newburgh ranked 1,169 out of 1,379 New York applicants for a pool of federal public works funds, the court upheld its standing to challenge denial of its application.¹⁵⁴ Newburgh, however, was seeking to overturn the entire ranking *system*, including the statistics and computations utilized by the grantor agency. Thus the case does not provide support for community development plaintiffs challenging, say, ineligible activities, if the applicant makes a convincing showing that their proposals have virtually no chance of being funded. Under traditional standing doctrine, these hypothetical third party-alternative use plaintiffs appear to be out of luck.¹⁵⁵

In sum, the intra-community alternative use cases appear to be one area where standing need not be an irrelevant encumbrance. If the issues posed by

¹⁵⁰ See text at note 128 *supra*. A possible objection to this analysis is that it may convert *opportunities* for citizen participation, including the submission of proposals, 42 U.S.C. § 5304(a)(6)(A) (Supp. II 1978), into a *requirement* that this procedure be exhausted. It is not necessary, however, that plaintiffs have suggested the alternative use, only that the possibility exist.

¹⁵¹ See, e.g., *Massachusetts Dep't of Correction v. LEAA*, 605 F.2d 21 (1st Cir. 1979).

¹⁵² See generally Albert, *supra* note 35.

¹⁵³ 435 F. Supp. 1049 (S.D.N.Y. 1977).

¹⁵⁴ *Id.* at 1054-56.

¹⁵⁵ See CAPPALLI, *supra* note 19, at 121. Nonetheless, a court could allow their suit to proceed by recognizing what might be called "leverage standing." The suit is only one part of an overall strategy for success in the local bargaining process over community development funds. If it is known at the outset of that process that any group which has submitted a proposal will be able, if unsuccessful, to challenge the ultimate application in federal court, the leverage of such groups is increased. Thus they are better off, not because of any potential outcome of the suit, but because of the ability to bring it. The plaintiffs' harm is their weakness in bargaining with the defendants; it is redressed by giving them the added leverage of ability to sue.

Perhaps the shift away from focus on the immediate outcome of the suit cannot be squared with the policies embodied in the "case and controversy" requirement. The concept of leverage standing can be criticized as essentially circular. After all, according "public citizens" standing to challenge any illegal practice in court would increase the seriousness with which their initial objections are received out of court as well. Even though the leverage plaintiffs are not just private attorneys general, but competitors for a fund, granting them standing turns the suit into a form of blackmail which threatens the achievement of program goals for the community as a whole.

Simon are squarely faced, the doctrine can perform a reasonably good job of screening out those with no real interest in the subject matter of the suit. In more complex community development litigation, however, standing issues can be troublesome indeed.

B. *Intra-Community Challenges—Litigation as the Pathway
to Metropolitan Cooperation?*

One of the most complex forms of community development litigation has been actions by central cities and low and moderate income citizens thereof to enjoin HUD from awarding community development funds to nearby suburbs.¹⁵⁶ Plaintiffs in these cases do not attack the activities proposed in the application. Rather, they assert that the suburb has not fulfilled a condition of the Act that requires that the applicant file an adequate Housing Assistance Plan. One of the components of this plan is an estimate of the number of low and moderate income persons "expected to reside" there in the future.¹⁵⁷ Plaintiffs assert that this component is missing or inaccurate.

Many proponents of metropolitan integration view the Housing Assistance Plan—expected to reside (HAP-ETR) mechanism as a potentially important new weapon in the effort to breach the walls of "fortress suburbia."¹⁵⁸ If suburbs are to benefit from federal funds for such desired activities as recreational projects, they must, as a *quid pro quo*, confront seriously the issue of meeting their "fair share" of housing low and moderate income persons within their metropolitan area. Identifying that share and drawing up plans to meet it are important first steps. Thus federal incentives toward the achievement of metropolitan equity join the arsenal of coercive measures such as constitutional and statutory provisions.

Whether the HAP-ETR mechanism produces more than pious pledges depends largely on the strictness with which HUD enforces it. There is virtual unanimity among observers of the community development program that, at least at the outset, HUD required little if any compliance with the ETR provision.¹⁵⁹ Some critics charge that the Nixon-Ford administration ran the program as if Congress had enacted "Special Revenue Sharing" for community development instead of a block grant.¹⁶⁰ In its defense HUD asserted, not without justification, that the ETR concept was novel, and that many communities simply could not come up with the data.¹⁶¹ These statements did little to mute the intense criticism levelled at HUD's enforcement of the

¹⁵⁶ *E.g.*, *City of Hartford v. Towns of Glastonbury*, 561 F.2d 1032 (2d Cir. 1976), *rev'd en banc*, 561 F.2d 1048 (1977), *cert. denied*, 434 U.S. 1034 (1979); *Coalition for Block Grant Compliance v. HUD*, 450 F. Supp. 43 (E.D. Mich. 1978).

¹⁵⁷ 42 U.S.C. § 5304(a)(4)(A) (Supp. II 1978).

¹⁵⁸ See *Advocacy Guide*, *supra* note 1, at 635.

¹⁵⁹ ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *COMMUNITY DEVELOPMENT: THE WORKINGS OF A FEDERAL-LOCAL BLOCK GRANT* 37-38 (1977).

¹⁶⁰ See, *e.g.*, *Advocacy Guide*, *supra* note 1, at 611.

¹⁶¹ *Community Development Block Grant Program, Hearings Before the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 2d Sess. 490, 496 (1976) (statement of Assistant Secretary David O. Meeker, Jr.).

HAP-ETR mechanism. Critics took their case not only to Congress, but to the federal courts as well.

1. The Central City as Plaintiff—*Parens Patriae* in Disguise?

The most discussed community development case is *City of Hartford v. Towns of Glastonbury*.¹⁶² Hartford is the central city of a Standard Metropolitan Statistical Area. In many respects its situation is typical of the nation's fiscally stressed, older central cities. In particular, Hartford contains a dramatically higher proportion of low and moderate income persons and minorities than its surrounding suburbs. In 1975, Hartford, city officials and two low-income residents sued to prevent seven of these suburbs from receiving or expending community development funds on the ground that they had submitted improper applications. Plaintiffs attacked the ETR figures in the applications as inaccurate or omitted entirely. A decision on the merits in plaintiffs' favor was affirmed by a divided panel of the Second Circuit.¹⁶³ On rehearing *en banc*, however, the court of appeals held that the plaintiffs lacked standing to bring the suit.¹⁶⁴

Standing had been hotly contested at all stages of the suit. The previous opinion had upheld the standing of the city and the individual plaintiffs, while dismissing the city officials. Judge Oakes, for the panel, reasoned that HUD's approval had injured Hartford in two ways. First, if suburban applications were denied, it would be in a strong position to compete for re-allocated funds.¹⁶⁵ Alternatively, if the defendants complied by submitting accurate figures, Hartford would be "the direct beneficiary of spatial deconcentration efforts by its suburbs . . ."¹⁶⁶ Thus any favorable outcome would benefit Hartford and redress the dual harm of loss of opportunity to compete and absence of suburban cooperation.

As for the individual plaintiffs, Judge Oakes recognized that it was somewhat more difficult to identify any injury which they had suffered. Nonetheless, he reasoned that HAPs "were intended to lead to greater low income housing opportunities on a deconcentrated, regional basis . . .,"¹⁶⁷ and that, presumably, plaintiffs would take advantage of such opportunities if they arose.¹⁶⁸ Additionally, the individual plaintiffs stood to gain from any re-allocation of funds to Hartford, since it would have to use funds for the benefit of low and moderate income persons.¹⁶⁹

¹⁶² 561 F.2d 1032 (2d Cir. 1976), *rev'd en banc*, 561 F.2d 1048 (1977), *cert. denied*, 434 U.S. 1034 (1978).

¹⁶³ 561 F.2d 1032 (2d Cir. 1977), *aff'g* *City of Hartford v. Hills*, 408 F. Supp. 889 (D. Conn. 1976).

¹⁶⁴ 561 F.2d at 1048.

¹⁶⁵ *Id.* at 1037-38.

¹⁶⁶ *Id.* at 1039.

¹⁶⁷ *Id.* at 1040.

¹⁶⁸ *Id.* (by implication). The individual plaintiffs' interest in securing suburban housing does not appear to have been asserted as specifically as was the case, for example, in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264 (1977).

¹⁶⁹ 561 F.2d at 1040. This analysis involves a good deal of speculation. Hartford might, for example, use additional funds to eliminate slums or blight without any conceivable benefit to plaintiffs.

Relying heavily on *Simon*, Judge Meskill, who also wrote the plurality opinion in the *en banc* reversal, dissented. As for the city, he determined that any injury based on loss of opportunity to compete for re-allocated funds was far too speculative since Hartford had "failed to prove that the intervention of the federal courts will result in the availability of funds for re-allocation."¹⁷⁰ If the towns revised their application to comply with the HAP-ETR mechanism, Hartford would get nothing.

The key to Judge Meskill's analysis is his conclusion that the city would derive no benefit from such compliance. Despite Hartford's alternative asserted harm—municipal overburden, or a "bleak" housing situation—Judge Meskill determined that *Simon* compelled a denial of standing. It could not "fairly be said" that HUD's approval of the grants had caused this condition. Moreover, the possibility that better ETR figures would redress the harm was remote and speculative.¹⁷¹ Alternatively, Judge Meskill argued that the restrictions on *parens patriae* suits limited Hartford to asserting only "its own proprietary rights . . ."¹⁷² A general interest in improving its housing conditions, thereby enhancing "the social and economic well-being of the citizenry" was not such a right.¹⁷³

As for the individual plaintiffs, Judge Meskill treated their injury as that of being "trapped in a slum."¹⁷⁴ Again, *Simon* blocked their path. HUD's assertedly wrongful approval of the suburban applications neither caused nor worsened this situation. At first, the opinion seemed to suggest that a showing that HUD's action only left matters the same would not be sufficient to confer standing.¹⁷⁵ This application of standing is disturbing in a case like *Hartford*, since the statute which plaintiffs invoked was designed *not* to leave things the way they were. Judge Meskill, however, then applied the redressability component of *Simon* and concluded that "it is naive to imagine that plaintiffs' lot will be perceptibly improved merely by coercing the defendant towns into including accurate 'expected to reside' figures in their Block Grant applications . . ."¹⁷⁶ Housing problems in the metropolitan area are massive and complex, and the impact, if any, of ETRs on those problems is unknown. Thus, plaintiffs failed to satisfy the *Simon* criterion of "substantial likelihood" that a favorable decree would result in securing the benefit of better housing.

Judge Meskill's brief opinion for the *en banc* plurality is essentially a re-statement of his dissent. Treating all plaintiffs together, he emphasized the *Simon* obstacle that plaintiffs could not show a likelihood that their injury would be redressed by the court's action. Altering the suburbs' ETR figures "would have no greater impact on the number of future residents than a modification of tomorrow's weather forecast would have on tomorrow's weather."¹⁷⁷ Since plaintiffs lacked standing, the suit was ultimately dismissed without consideration of the merits.

¹⁷⁰ *Id.* at 1046.

¹⁷¹ *Id.*

¹⁷² *Id.* at 1047.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 1048.

¹⁷⁷ *Id.* at 1051.

The standing issues presented in *Hartford* are among the most difficult of any of the community development cases. The eleven federal judges who passed on the issue split six to five. The city's standing will be considered first, since it is more clearly established than that of the individual plaintiffs. The *parens patriae* objection that the city could not bring the action since it was not asserting its own property interest is of little force. Hartford was not asserting a mere general interest in "the social and economic well-being of the citizenry." If viewed as a potential competitor for funds its standing is somewhat similar to that of municipalities and other grantees denied funds.¹⁷⁸ The alternative harm—continued municipal overburden due to suburban failure to address the concentration of service dependent populations—can be analogized to environmental damage. Cities have standing to challenge the infliction of environmental harm.¹⁷⁹ Pollution affects not only the residents, but is also a potential drain on the city's fiscal resources given the increased expenditures for cleaning up and other service demands. Likewise, the presence of a large service dependent population and an eroding physical plant increases the pressure on municipal fiscal resources—a fact which Congress has recognized in the formula for awarding Community Development Block Grant funds.¹⁸⁰ Obviously, there can be no bright line drawn between a city's interests and that of its residents, since improving the former's financial condition by lessening expenditure pressures may benefit the latter through lower taxation. Still, to the extent that communities can ever bring suit in federal court, Hartford is asserting injury to itself *qua* governmental entity. The real question is not whose injuries are asserted, but whether the complaint meets the requirements of post-*Simon* standing doctrine.¹⁸¹

Of the city's two arguments in favor of standing, the potential re-allocation of the funds seems the weaker. It is true that unsuccessful competitors for grants, including governmental units, frequently have been held to have standing to challenge grant award decisions.¹⁸² In such cases an attack on a competitor's eligibility is at least implicit since the relief sought involves knocking someone else out of the race, assuming there are not enough funds to satisfy all applicants. Hartford, by contrast, may well get judicial relief which solidifies its competitors' position. Even if the court agrees with the plaintiff, defendants have only to submit satisfactory ETR figures. After this act of compliance there would be no funds to re-allocate, and no opportunity for plaintiff to compete for them. Winning amounts to losing. Since the sub-

¹⁷⁸ E.g., *City of Newburgh v. Richardson*, 435 F. Supp. 1049 (S.D.N.Y. 1977). But see CAPPALLI, *supra* note 19, at 145-46.

¹⁷⁹ E.g., *City of Rochester v. United States Postal Service*, 541 F.2d 967, 972 (2d Cir. 1977); *Township of Long Beach v. City of New York*, 445 F. Supp. 1203, 1213-14 (D.N.J. 1978).

¹⁸⁰ Among the factors utilized in the revised formula for the distribution of funds to entitlement communities are extent of poverty and age of housing stock. 42 U.S.C. § 5305(b) (Supp. II 1978). Age of housing serves as a proxy for determining the age of the city's infrastructure in general.

¹⁸¹ This article leaves open any questions of whether or not to discard the doctrine of standing altogether.

¹⁸² E.g., *City of Newburgh v. Richardson*, 435 F. Supp. 1049 (S.D.N.Y. 1977).

urbs have demonstrated that they want the funds by applying for them, it is understandable that a court might be reluctant to speculate on whether they will now forego the grants.

Hartford, however, ought to have standing on the ground that it would benefit from what it asked for: more cooperation from its suburbs in planning for the housing needs of its low and moderate income residents. Again, there is the potential speculation whether the suburbs will comply with any court decree or simply forego the funds. Still the case is not like *Simon* in that there is "no way of knowing." Given localities' strong desire for federal funds in general¹⁸³ and the fact that these particular suburbs have already gone through the difficult process of preparing applications, a strong argument can be made that there is a "substantial likelihood" that they will alter what is, after all, a somewhat tangential component of the application.

In any event, this initial speculation was not what compelled Judge Meskill to deny standing on the basis of *Simon*. He refused to accept the argument that more accurate ETR figures would ameliorate Hartford's burden as a central city. *Hartford* presents a close parallel to one of the main issues in *Simon*: how to characterize the injury. The *Simon* majority approach would appear to require that Hartford first show specific acts by its suburbs which harmed it in a judicially cognizable way—similar to the denials of medical services—and then satisfy causation and redressability requirements. Of course, the city could not do so. Its situation is analogous to that outlined by Justice Brennan: an "ultimate injury" (municipal overburden), and an immediate injury to an "opportunity and ability" to have that injury lessened. On the surface, Judge Meskill's invocation of *Simon* seems correct. There are, however, two critical distinctions between the community development context and the tax expenditures involved in *Simon*.

The first point to recognize is that awarding grants to suburbs which do not take steps to address the problem of metropolitan equity may hurt central cities by compounding municipal overburden. Community development funds are likely to support activities which make suburbs more attractive to upper income persons and to industries. These effects, in turn, further weaken the central city's tax base. Moreover, since community development funds require no local match, the suburbs can undertake the activities without raising their own taxes. This too enhances their attractiveness and competitive position *vis a vis* the central city. By contrast, the mere fact of the tax expenditures in *Simon* did not make the plaintiffs any sicker than they already were. Given that grants to suburbs may hurt central cities, Congress has attempted to introduce a compensating balance. The HAP-ETR mechanism extracts a form of promise that the suburbs will undertake to ease the cities' burden. For a court to say that the promise is meaningless raises serious questions of judicial deference to legislative fact finding.

The issue of judicial deference brings out a second distinction between the *Hartford* and *Simon* contexts: the Community Development Act represents a far more detailed attempt to produce specific benefits for identifiable classes

¹⁸³ The desire for, and dependence on, federal funds may increase as tax and expenditure limitations reduce the availability of own source revenues.

than does the general language of section 501(c)(3) of the Internal Revenue Code. The Act declares as its primary objective "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."¹⁸⁴ Among the specific objectives which further the overall goal of viable urban communities is "[t]he reduction of the isolation of income groups within communities and geographical areas 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"¹⁸⁵ Thus, as the dissenting judges argued in *Hartford*, inducing suburbs to address the problem of metropolitan equity represents an interest on the part of central cities (and their residents) created by statute.¹⁸⁶

The central question in evaluating *Hartford* is whether it was proper for the majority to second guess Congress by dismissing the possibility of benefit to central cities as a mere "legislative expectation."¹⁸⁷ It has been argued that a federal court lacks the power to undertake such an inquiry.¹⁸⁸ The Supreme Court, on the other hand, has indicated that Article III places some limitations on Congress' power to create new interests.¹⁸⁹ Perhaps the interest must be something more than the ability to bring a lawsuit.¹⁹⁰ There is judicial authority for the proposition that areawide planning—hardly an interest recognized at common law—can be a legitimate beneficial interest for governmental units.¹⁹¹ Moreover, the HAP is not the housing equivalent of a weather forecast. The analogy is faulty since a community has considerably more control over its housing mix than a forecaster has over the weather. In any event, although the standing of central cities to bring actions to enforce the purpose of the HAP is uncertain, the prospect of central cities as litigators in the quest for metropolitan equity raises interesting possibilities. *Hartford* represents a serious roadblock to such initiatives.

2. Low and Moderate Income Plaintiffs—Reverse *Parens Patriae*?

In his *en banc* dissent, Judge Oakes relied only on the city's standing. His earlier suggestion that the individual plaintiffs would benefit from any reallocation seems a questionable form of reverse *parens patriae* standing. Hartford's interest in applying for federal funds is one which should be asserted by the city itself, not by citizens.¹⁹² Moreover, any form of municipal overburden harm, such as grants to suburbs which ignore metropolitan equity

¹⁸⁴ 42 U.S.C. § 5301(c) (Supp. II 1978).

¹⁸⁵ 42 U.S.C. § 5301(c)(6) (Supp. II 1978).

¹⁸⁶ 561 F.2d at 1057 (2d Cir. 1977) (Oakes, J., dissenting).

¹⁸⁷ 561 F.2d at 1048 n.5 (Meskill, J., dissenting).

¹⁸⁸ Warren, *The Housing and Community Development Act Two Years After Hartford*, 30 AD. L. REV. 549, 557 (1978). But see Note, *Standing to Challenge Federal Agency Actions: City of Hartford v. Town of Glastonbury*, 52 ST. JOHN'S L. REV. 225, 236 (1978).

¹⁸⁹ *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41 n.22 (1976).

¹⁹⁰ See *Muskrat v. United States*, 219 U.S. 346 (1911).

¹⁹¹ *Texas v. United States*, 426 F. Supp. 74, 77 (W.D. Tex. 1976).

¹⁹² See *Lewis v. Richardson*, 428 F. Supp. 1164, 1166 n.2 (D. Mass. 1977).

issues, represents an injury to Hartford which it should seek to redress. Nonetheless, Congress intended the Community Development Act to benefit people as well as governments, even though it is the latter which receive the funds.¹⁹³ Thus, the Act may confer new interests upon low and moderate income persons, interests which will suffice to uphold their standing when challenging asserted violations. Can the possibility of suburban planning for low and moderate income housing fairly be characterized as such an interest?

The District Court for the Eastern District of Michigan answered this question in the affirmative in *Coalition for Block Grant Compliance v. HUD*.¹⁹⁴ On similar facts, the court rejected the *Hartford* holding. "In the language of Congress, the HAP alone is a benefit to these plaintiffs, and we are not willing to look beyond that Congressional decision to hold that plaintiffs are not *really* benefited by the HAP."¹⁹⁵ The *Coalition* court avoided any *Simon* problems simply by not discussing them. The most straightforward way of overcoming the *Simon* roadblock, however, would have been to rely on the statutory benefit analysis outlined above in dealing with the standing of communities. Unlike the central city, its low and moderate income residents cannot argue that the mere fact of the grant harms them. On the other hand, the numerous references to low and moderate income persons make clear that Congress intended them to be the primary beneficiaries of the statutory scheme.¹⁹⁶ One of the particular benefits which they are to receive is "the spatial deconcentration of housing opportunities. . . ." ¹⁹⁷ Thus, it can be argued that Congress conferred upon low (and moderate?) income ¹⁹⁸ central city residents an interest in having their housing needs planned for by any suburb receiving community development funds.¹⁹⁹

The question remains *which* central city residents can assert this interest in a suit against a non-complying suburb. The most obvious plaintiffs are those who wish to leave the city and who have some connection with the suburb, such as employment. Congress has deemed that having this desire planned for will help bring about its fulfillment, and that decision by Congress represents the creation of an interest which is more than simply the ability to bring a suit. Because of the precision with which Congress dealt with metropolitan housing needs—establishing planning for them as a non-

¹⁹³ For an excellent discussion of the problem created by the fact that grant program may "aid" both the grantee entity and ultimate individual beneficiaries, see CAPPALLI, *supra* note 19, at 35-36.

¹⁹⁴ 450 F. Supp. 43 (E.D. Mich. 1978).

¹⁹⁵ *Id.* at 51 (emphasis in original).

¹⁹⁶ *E.g.*, 42 U.S.C. §§ 5301(c), 5304(a)(2), 5304(c)(3) (Supp. II 1978). However, activities which do not benefit low and moderate income persons are eligible if they eliminate slums or blight or meet "other community development needs having a particular urgency. . . ." 42 U.S.C. § 5304(c)(3) (Supp. II 1978). See note 101 *supra*.

¹⁹⁷ 42 U.S.C. § 5301(c)(6) (Supp. II 1978).

¹⁹⁸ Both the reference to deconcentration and the description of the housing assistance plan's "expected to reside" component refer only to low income persons.

¹⁹⁹ The *Coalition* court made it clear that plaintiffs' harm was not their inability to live in Livonia, but rather Livonia's failure to plan for their needs and HUD's acquiescence in that failure. 450 F. Supp. at 51. This analysis is similar to Justice Brennan's characterization of the harm in *Simon*.

waivable condition of community development applications—courts can, and should, defer to the congressional finding that there is a substantial likelihood that such planning will redress the harm of lack of “spatial deconcentration of housing opportunities.”

C. *Intra-Community Non-Entitlement Challenges*

Though standing may be “easily found” in the context of alternative use challenges to entitlement communities’ grants, the issue is far more complex if the community is applying for discretionary funds. There is no assurance the community will get any funds at all, and the proposed activity challenged by the plaintiffs may well be the only one for which the applicant wants federal funds. Plaintiffs’ harm thus becomes more difficult to identify, as does the benefit to them of an order blocking benefits to their community. Although this question does not appear to have arisen in any of the reported cases involving the basic community development program, standing has played a major role in a challenge to a HUD grant under the related Urban Development Action Grant program (UDAG).²⁰⁰

The UDAG program authorizes grants “to severely distressed cities and urban counties to help alleviate physical and economic deterioration through reclamation of neighborhoods having excessive housing abandonment or deterioration, and through community revitalization in areas with population outmigration or a stagnating or declining tax base.”²⁰¹ The statute emphasizes the importance of using federal dollars to attract or “leverage” private sector funding. Many UDAG projects resemble the large, downtown projects that characterized urban renewal in the 1950’s and 1960’s. The program represents a return to the discretionary, categorized approach of federal community development efforts prior to passage of the Housing and Community Development Act.

Boston, renowned for its grantsmanship under the old urban renewal program, sought to take advantage of UDAG by submitting applications for funds to assist four projects, primarily industrial and commercial. The National Association for the Advancement of Colored People, Boston Branch, and a group of minority plaintiffs sued HUD to enjoin funding of the projects. They argued in *NAACP v. Harris*²⁰² that Boston’s proven history of racial discrimination and lack of progress in remedying it clearly rendered the city ineligible under the Act’s proviso that UDAG funds go “only to cities . . . that have, in the determination of the Secretary, demonstrated results in providing housing for persons of low and moderate income and in providing equal opportunity in housing and employment for low and moderate income persons and members of minority groups.”²⁰³ Alternatively, plaintiffs requested that any funding be conditioned on a comprehensive plan to combat discrimina-

²⁰⁰ This program was added to Title I in 1977. Act of October 12, 1977, Pub. L. No. 95-128, Title I, § 110(b), 91 Stat. 1125 (1977).

²⁰¹ 42 U.S.C. § 5318(a) (Supp. II 1978).

²⁰² 607 F.2d 514 (1st Cir. 1979).

²⁰³ 42 U.S.C. § 5318(b) (Supp. II 1978).

tion and its effects. The federal district court dismissed the suit on the ground that plaintiffs lacked standing.²⁰⁴

The Court of Appeals for the First Circuit reversed the dismissal and reinstated the complaint, at least temporarily.²⁰⁵ The opinion is a textbook example of the confused law of standing generally, and of the particular havoc which *Simon* wreaks in the area of grant litigation. The court first determined that the plaintiffs had no standing to challenge Boston's general eligibility for UDAG funds. Neither did it adopt the approach of conditioning grants on an overall remedial plan. Instead, it "construe[d] the complaint as in effect requesting, in the alternative, that the court take action to ensure that any *project* which HUD decides to fund is conducted in compliance with anti-discrimination laws and the federal constitution."²⁰⁶ The court reasoned that under this interpretation of the cases some plaintiffs did have standing: those who had suffered the injury of inability to find low cost housing in an integrated neighborhood. This injury could be redressed since "although none of the plaintiffs has specifically alleged an intention to seek housing in a UDAG financed development, it can reasonably be inferred from their complaint that they would accept such housing if it were physically safe and financially accessible to them."²⁰⁷

The principal flaw in this reasoning is that the projects for which funds were sought involved virtually no such housing. (One project included 365 units of *upper* income housing; another called for partial rehabilitation of 1,350 units in an area of minority concentration.)²⁰⁸ Unless the terms of the applications were *altered*, it is hard to see how observance of anti-discrimination laws would alleviate plaintiffs' housing problems. In order to find standing the court overlooked the fact that plaintiffs' attack was not so much on the projects themselves, as on HUD's funding them in an ineligible city without making Boston take steps to meet the eligibility criteria. *Those* steps might well remedy the plaintiffs' housing (and other) problems.²⁰⁹ The result is not necessarily a bad one for plaintiffs. Many members of the minority community have a strong interest in seeing the Boston UDAG projects constructed and operated in a non-discriminatory way—construction workers and potential employees, for example. But the confused route by which the court reached this result is discouraging.

The key to the decision lies in the court's refusal to accept the statutory interest analysis employed in *Coalition*, and its apparent agreement with the *Hartford* decision.²¹⁰ Examination of section 119 leads to the conclusion that

²⁰⁴ NAACP v. Harris, No. 79-1051 (D. Mass.), *rev'd*, 607 F.2d 514 (1st Cir. 1979).

²⁰⁵ 607 F.2d at 526.

²⁰⁶ *Id.* at 522 (emphasis added).

²⁰⁷ *Id.* at 525.

²⁰⁸ Plaintiffs' Complaint at 28, 30-31. In a companion case challenging a UDAG to Chelsea, Mass., the plaintiffs also alleged that HUD's failure to enforce the statute "decreased their chance to gain *employment* under Chelsea's CDBG or UDAG programs." 607 F.2d at 526 (emphasis added).

²⁰⁹ *Cf.* 607 F.2d at 525 n.13 (noting "litany of abuses").

²¹⁰ *Id.* at 521-22 (by implication).

the statutory interest analysis could, and should, have been applied in the UDAG context. Congress was concerned not only with funding particular types of projects, but also with the socio-economic conditions of applicant communities. Awards to cities which had not demonstrated "results in providing . . . equal opportunity in housing and employment for . . . members of minority groups" would harm minorities in those cities by not helping them. The proviso is a form of incentive designed to reward cities which have helped minorities and to encourage other cities to do so rather than remain ineligible for UDAG funds. There also is a substantial likelihood that a strong remedial plan along the lines sought by the Boston plaintiffs would have improved their housing opportunities. Thus they should have had standing to require conditional approval or to have Boston declared ineligible.

The court assumed that a declaration of ineligibility would help no one, including plaintiffs, other than providing spiteful satisfaction. This, however, is not necessarily the case. Such a declaration might have serious effects on Boston's eligibility for other federal funds,²¹¹ and Boston would presumably go to great lengths to avoid this effect. If found ineligible, it would have to undertake the kind of systemic remedial action plaintiffs sought.

Given the desirability and visibility of the UDAG projects in question, it is very unlikely that Boston would have withdrawn its application. Therefore, the possibility of a declaration of ineligibility increases the likelihood that Boston would have accepted the conditions which plaintiffs sought. In effect, the ability to get a declaration of ineligibility is highly beneficial to plaintiffs.²¹² Finally, since the court cannot force Boston to take the funds, it can only order the conditions as part of an either/or decree, assuming plaintiffs prevail on the merits: either accept the funds subject to conditions or be declared ineligible. Thus it makes little sense to say that plaintiffs "lacked standing" to ask for a degree of ineligibility.

It remains to be seen whether the First Circuit's UDAG decision will have generative force in other areas of community development litigation. For example, would low-income residents of a non-entitlement community have standing to challenge its application for a housing rehabilitation grant on the ground that the real beneficiaries would be upper and moderate-income persons? Under traditional standing doctrine, the answer seems to be no. The plaintiffs have not suffered any commonly recognized harm from the award. Nor is there any likely judicial decree which makes them better off; if they win the community gets nothing. There might be instances where plaintiffs have their own rehabilitation proposals, and seek declaratory relief that these proposals should be funded, but the court cannot order the community to seek funds for them. There is no substantial likelihood of the funds being available to plaintiffs at all. Plaintiffs in non-entitlement communities must seek to block their community's receipt of funds. In entitlement communities,

²¹¹ Cf. 31 U.S.C. § 1242 (1976) (a holding that a unit of government has engaged in discrimination triggers proceedings to terminate revenue sharing funds).

²¹² The UDAG plaintiffs are not asserting leverage standing of the sort discussed in note 81 *supra*. They seek not increased political power but the achievement of a result desired by Congress.

by contrast, plaintiffs seek to block approval of the application in its present form, but want the grant to be awarded so that they can have a second opportunity to compete for funds.

The best argument for standing in the non-entitlement context is an extension of the statutory interest analysis applied in *Coalition*. Under this approach it can be argued that Congress gave low and moderate income persons a right to have community development funds used primarily to benefit them, or at least some of them, and imposed on HUD a correlative duty not to approve applications that do not confer the intended benefit. Although the plaintiffs are not worse off as a result of the proposed project, they are not better off; the project hurts by not helping.

The statutory interest test may well not extend far enough to encompass this argument. Beyond harm-causation-redressability problems there is a representational issue. It may be that not all low and moderate income residents of a non-entitlement community can possibly benefit even if a proper application is filed. Who then should speak for this inchoate class to challenge an improper application? A far more fundamental problem is "the skepticism we feel about identifying single causes for complex events. The allocation of the burden of pleading in *Simon* ultimately rested on the court's judgment that plaintiffs should not be granted relief where governmental action has merely compounded the burdens of indigency."²¹³ The net result may be that no one has standing to challenge the hypothetical non-entitlement application. The *Coalition* court regarded this as an important factor which argued in favor of standing.²¹⁴ Whether it is a disturbing prospect may depend upon the extent of one's confidence in HUD to protect vigorously the interests of low and moderate income persons.

CONCLUSION

Review of the community development cases suggests that the new law of standing, especially as embodied in *Simon*, has not been the "insurmountable obstacle" which some have feared. The courts generally reach decisions—at times by "muddling through"—which grant standing to those whom Congress intended to benefit. Still, the muddled nature of many of these decisions is cause for concern. Perhaps the courts' difficulty in grappling with standing in the community development cases is strong support for those who would do away with the doctrine altogether.

Yet, one might advance a more modest hypothesis. Difficulty in dealing with standing in these cases is symptomatic of a general lack of familiarity with federal grant programs. Judicial misunderstanding of the grant system manifests itself frequently, and is not limited to the community development context.²¹⁵ Perhaps the fault lies not so much with the doctrine of standing, as with the fact that judges and lawyers alike have yet to recognize the

²¹³ Tushnet, *supra* note 3, at 687.

²¹⁴ 450 F. Supp. at 51; *but cf.* *United States v. Richardson*, 418 U.S. 166, 174 n.6 (1974) ("substantive issues" may be non-justiciable).

²¹⁵ See *Southern Mut. Help Ass'n, Inc. v. Califano*, 574 F.2d 518, 522 (D.C. Cir. 1977) (recognizing the novelty and difficulty of grant litigation).

emergence of a law of federal grants. When that recognition occurs, when courts no longer compare grant statutes to "King Minos' labyrinth in ancient Crete . . .,"²¹⁶ standing, and a host of other issues, will be far more easily understood and resolved than is the case today.

²¹⁶ *City of Hartford v. Towns of Glastonbury*, 561 F.2d 1032, 1052 (2d Cir. 1977) (Kaufman, C.J., concurring).