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Petition Clause Interests and Standing for Judicial Review of Administrative Lawmaking

Karl S. Coplan
Elisabeth Haub School of Law at Pace University

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By Karl S. Coplan[*]

One of the primary roles of agencies in the modern administrative state is the promulgation of rules and regulations governing primary conduct. Separation of powers and nondelegation concerns have evolved into very weak limits on the scope of agency lawmaking authority. Once the executive branch agencies have acted, Article III courts routinely step in to review the consistency of these regulations with congressional mandates. Particularly in the case of controversial regulations, the lawmaking process is not complete until judicial review. Entities burdened by such regulations—so called "regulatory objects"—enjoy presumed standing to challenge the scope of agency regulations. Groups of individuals benefited by such regulations enjoy no such presumption of "standing," rather, their right to challenge regulation depends on their ability to establish specific "injury in fact," and the "redressibility" of that injury through judicial decree.

Yet all citizens enjoy a First Amendment right to petition government, including the judicial branch, for redress of grievances. Judicial review of administrative rulemaking is a classic example of a petition for redress. The Supreme Court has repeatedly emphasized that petition clause interests are analyzed under the same rubric as speech and press clause interests. First Amendment doctrine recognizes the important role that freedom of expression plays in the process of self-governance, and looks with disfavor on rules governing expressive activity that have the effect of distorting the marketplace of ideas by favoring one viewpoint over another. Current standing doctrine has exactly such a viewpoint discriminatory effect, as it favors petitioning activity by regulatory objects arguing for less regulation, for whom standing is presumed, while it disfavors petitioning activity by regulatory beneficiaries arguing for more regulation, who under cases such as *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) must meet a high burden of establishing distinct "injury in fact," causation, and redressibility in order to have their grievances considered by the judicial system.

A 2000 case in the District of Columbia Circuit illustrates how standing doctrine results in differential access to judicial review afforded to regulatory objects versus regulatory beneficiaries. In *American Petroleum Institute v. EPA*, 216 F.3d 50 (D.C. Cir. 2000), various parties challenged a rulemaking by EPA that determined to list certain petroleum industry wastes as "hazardous" and not so to list certain other wastes. The final rule was challenged by both petroleum industry trade associations, who objected to the wastes that were listed as "hazardous," and by environmental organizations, who objected to the wastes that were not. Without so much as mentioning standing, ripeness, or justiciability issues, the Court of Appeals considered the industry challenges on the merits and vacated and remanded the portion of the rule that designated oil-bearing wastewaters as hazardous waste. At the same time, the Court dismissed the environmental challengers' claims, holding that they had no standing to challenge EPA's refusal to list oily storage tank residues as a hazardous waste. The Court rejected the environmental petitioners' standing even though the Sierra Club had submitted affidavits from members who lived close to non-hazardous waste landfills and expert analyses showing that these landfills received tank bottoms waste. According to the Court of Appeals, the environmental petitioners would have to establish that oily wastes had in fact contaminated the groundwater near these landfills to show standing. And even though the environmental petitioners included an affidavit from a member who had stopped canoeing in a bayou near one of the affected landfills because of pollution of the bayou, as well as an affidavit from a geophysicist attesting to the fact that oil residues had escaped into the bayou, the Court found this chain of injury lacking, as "neither affiant traces the pollution of concern to [storage tank] waste."

Other cases in the Courts of Appeals present similar disparities, where industry challenges to an agency rulemaking are considered on the merits while challenges by regulatory beneficiaries to the exact same rule in the exact same case were rejected because the organizations representing the beneficiaries could not identify a member who would certainly be harmed. Thus, in *Central and Southwest Services, Inc. v. EPA*, 220 F.3d 683 (5th Cir. 2000), the Fifth Circuit considered industry challenges to the EPA "mega rule" governing use and disposal of PCB containing materials, while simultaneously refusing to consider the Sierra Club's challenge to the same rule. In *Texas Independent Producers and Royalty Owners Association v. EPA*, 410 F.3d 964 (5th Cir. 2005), the Fifth Circuit also rejected NRDC's standing to challenge Clean Water Act general permits for stormwater discharges, on grounds that it could not show individual members who would definitely be harmed by such permits; at the same time allowing challenge to same general permits by

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[*] Associate Professor of Law, Pace University School of Law (kcoplan@law.pace.edu). The text of this article summarizes the author's analysis from an article titled Ideological Plaintiffs, Administrative Lawmaking, Standing, and the Petition Clause, which will be published in the Maine Law Review, Volume 61, No. 2 (2009).

industry representatives to proceed. The District of Columbia Circuit has since formalized this disparity in standing analysis; in *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002), it announced that petitioners in rule challenge proceedings must submit affidavits establishing their standing along with their petition, unless their standing to challenge the rule is "self evident" (i.e., they are regulatory objects as opposed to beneficiaries).

These "injury in fact" and redressibility requirements are most difficult to establish precisely in the context that underlies the modern regulatory schema; that is, regulation of societal risks such as environmental and consumer risks. These regulations seek to protect the public against harms that may have a low probability of occurrence for any given individual, but pose significant risks for society at large, or even for substantial groups of individual citizens. Courts have wrestled with the concepts of "injury" and "redressibility" in the context of probabilistic harms, and have split on the question of whether individuals, or combinations of individuals, can establish the requisites of justiciability based on low-probability events.

Several courts have recognized "probabilistic" standing on the part of organizations who can show they have enough members subject to the risk to make it likely that some of their members will suffer, or even on behalf of individuals exposed to the risk. Some courts have accepted that a probabilistic harm may constitute a sufficiently significant injury-in-fact to satisfy standing requirements for an individual plaintiff. These courts have reasoned that where the magnitude of the harm is sufficiently grave, even a very small probability of occurrence may satisfy the "injury in fact" requirement. For example, in *Baur v. Veneman*, 352 F.3d 625, 634 (2d Cir. 2003), the Second Circuit reversed a District Court dismissal of a challenge to a Department of Agriculture regulation allowing sale of meat from "downed" livestock to be sold for human consumption, posing a small threat to all meat consumers of contracting Creutzfeldt Jakob disease, an incurable and invariably fatal disease. The Court reasoned that a very low risk of an exceedingly grave harm (an incurable disease) was a sufficient individual injury in fact even without proof that any one individual was likely to contract the disease. This approach may be at odds with standing doctrine that requires individuation of harm, as the harm in *Bauer* was one shared by the population at large.

The District of Columbia Circuit took a more associationally oriented approach in a more recent case, *NRDC v. EPA (Methyl Bromide)*, 464 F.3d 1 (D.C. Cir. 2006). NRDC challenged an EPA regulation exempting methyl bromide, an ozone disrupting chemical, from the ban of the Montreal Protocol. Although EPA did not challenge NRDC's standing, the industry intervenors did. NRDC presented statistical evidence establishing that some of its 500,000 members would be likely to contract fatal cancers as a result of the incremental ultraviolet exposure caused by continued use of methyl bromide, and some larger number would contract non-fatal skin cancers. The D.C. Circuit panel initially dismissed the petition, finding the annual risk to NRDC's members to be too vanishingly small to be a cognizable injury in fact. On rehearing, in light of an EPA statistician's affidavit stating that the court's attempt to annualize the risk was invalid, the Court reversed itself and found that NRDC had standing based on the aggregate risk to all of its members, as NRDC established a statistical likelihood that at least one of its members would contract skin cancer as a result of the methyl bromide exemption.

Some member of NRDC will certainly be harmed by the methyl bromide regulation, and the D.C. Circuit accepted this harm as sufficient to support standing. The problem is that neither NRDC, nor the Court, can identify who that individual member is! NRDC thus has standing to challenge the methyl bromide exception as an organization, even though no one of its members would have a sufficiently significant increase in cancer risk to challenge the regulation in her own right. This synergistic approach to standing injuries is in tension with the usual formulation for representational standing; that is, that the organization must identify some individual member who would have standing as an individual. This aggregation of risk encapsulates the problem faced by regulatory beneficiaries seeking to challenge agency rules: someone will be harmed by the regulation, but it is impossible at the outset to determine who.

Many, if not most, rulemaking challenges by regulatory beneficiaries are brought by public interest organizations such as NRDC. These organizations usually have memberships ranging from thousands to millions of individuals. These organizational plaintiffs fall into the category of "ideological" plaintiffs, a term originally coined by Professor Louis Jaffe to describe parties who invoke the judicial process to establish and enforce public rights for the benefit of many people, who are not primarily motivated by individual gain. Ideological plaintiffs, litigating everything from religion clause issues to consumers' rights to environmental and health concerns, have had mixed success in establishing justiciability in Article III courts. These organizations have been required by Supreme Court doctrine to rely on the individual interests of their members to establish standing.

Although barely recognized by the courts in formulating standing doctrine, the Constitution contains a provision specifically meant to ensure the right of individuals to associate and seek remedies from all branches of the government, including the judicial branch. The First Amendment guarantees the "right of the people peaceably to assemble, and to petition the government for a redress of grievances." Like the First Amendment guarantees of speech and freedom of the press, this constitutional provision is designed to ensure public representation and participation in the lawmaking process. Constitutional jurisprudence likewise has evolved to ensure maximum input to the political processes that lead to legislation. This is particularly true in the area of First Amendment jurisprudence, where the Supreme Court has recognized the functional importance of political speech to a representative democracy.

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The Supreme Court's approach to the Speech Clause, and its emphasis on the systemic values of speech to a system of self government over individual autonomy values, contrasts sharply with the Court's approach to standing doctrine, which emphasizes individual values of "injury in fact" to the near exclusion of consideration of the systemic value that access to court for judicial review has in our system of government. Yet the Court has acknowledged, in *McDonald v. Smith*, 472 U.S. 479, (1985), that the Petition Clause guaranty of the First Amendment includes petitions to the judicial branch for redress and has suggested that the petition and speech clauses are "cut from the same cloth." If anything, the Petition Clause is textually more firmly anchored to the system of representative self-government and the relationship between citizen and state than the Speech Clause. After all, the Petition Clause directly guarantees the right to "petition *government* for the *redress of grievances*."

A functional First Amendment analysis of standing doctrine would recognize that the judicial system is not just a First Amendment public forum for the purpose of judicial petitioning rights, but is *the only* judicial public forum for petitioning rights. Differential access to such a forum should be subject to heightened scrutiny, and should be upheld only where the distinctions are substantially related to an important governmental interest. Similarly, as current standing doctrine has the effect of favoring one viewpoint (challenges to overregulation brought by regulated industry) over another viewpoint (challenges to underregulation brought by regulatory beneficiaries), this viewpoint discriminatory effect should invoke heightened scrutiny under a First Amendment analysis.

Under such a functional analysis, the rationales for a restrictive standing doctrine offered by the Supreme Court fail, as they fall short of the sort of governmental interests that justify restrictions on First Amendment interests or can be achieved with a less restrictive version of standing doctrine. These rationales include the avoidance of judicial intrusion into the Executive role to "take care that the laws are faithfully executed," avoidance of advisory opinions on hypothetical facts, avoidance of judicial intrusion into the Congressional legislative function, the assurance of sufficiently adverse presentation of concrete issues, and the avoidance of sham or collusive litigation. The separation of powers interest in avoiding judicial intrusion into the executive function is more than adequately protected by the highly deferential standard of judicial review applied to administrative rulemaking under *Chevron, Inc. v. N.R.D.C.*, 467 U.S. (1984). Similarly, the ripeness elements of *Abbott Laboratories v Gardner*, 387 U.S. 136 (1967) assures the avoidance of hypothetical or advisory opinions in judicial review of administrative rulemaking. Both of these independent doctrines assure the functional interests of standing doctrine without compromising petition rights in a viewpoint-differential way. Similarly, challenges to administrative rulemaking do not pose any risk of judicial intrusion into the Congressional legislative function, as the courts are asked to carry out Congressional mandates in such a case, not to countermand them.

These interests in ensuring concrete adverseness and avoiding collusive litigation might likewise be assured in a more viewpoint neutral approach to standing doctrine. Few doubt the institutional capacity and dedication of ideological interest groups such as the national environmental and consumer organizations to forcefully argue and present the pro-regulatory position, and their capacity is undoubtedly greater than that of individually harmed but resource limited plaintiffs. Both institutional litigating capacity and genuineness of interest are interests that courts routinely assess in a viewpoint neutral fashion—as, for example, where courts qualify lead plaintiffs and lead counsel in class action litigation.

No court has yet accepted the argument that the right to petition is a competing constitutional value that limits the restrictiveness of standing doctrine, although it was raised by amici in *Bennett v. Spear*, 520 U.S. 154 (1997). The Supreme Court is likely to address the issues of ripeness and standing in an environmental organization's challenge to agency procedural rules in *Summers v. Earth Island Institute*, No. 07-463, argued this Term; however, no petition clause arguments were raised in that case. Nevertheless, First Amendment petition clause interests are in stark contrast to the viewpoint differential application of standing doctrine as a limit on judicial review of agency rulemaking at the behest of public interest organizations. A straightforward application of First Amendment heightened scrutiny argues strongly for expanded standing rights for ideologically motivated organizations challenging agency rulemaking as underregulation.