



Challenging Deregulation: Ending Legal Standing's Pro-Corporate Bias

Overview

The Trump administration spent extraordinary time and energy rolling back Obama-era regulatory policies—often unlawfully. Unfortunately, challenging these deregulatory actions often proved difficult for many affected parties due to the legal doctrine of standing, which favors directly regulated entities (e.g., polluters, insurers, financial institutions, and industry) over most regulations' intended beneficiaries (e.g., workers, students, consumers, immigrants, and the environment). Fortunately, regulators are far from helpless in the face of standing's pro-corporate bias.

In "[Solving Standing's Corporate Bias: How Agencies Can Empower Advocates to Challenge Deregulation](#)," Rachael Klarman and Will Dobbs-Allsopp provide suggestions for designing and drafting regulations in ways that will help advocates establish standing to challenge future rollbacks. In addition to proposing the inclusion of "standing hooks"—proposals for administrative policy design that can be incorporated in future rulemaking—they also offer overarching best practices for the penning of final rules to balance the legal playing field.

What is Legal Standing?

Legal standing is a doctrine that courts use to ascertain whether a plaintiff is entitled to have a federal court adjudicate their claim on the merits. Federal courts use standing analysis to ensure that they only hear disputes about *concrete* legal questions from litigants with a *sufficiently significant* stake in the outcome. Organizations, like individuals, can establish standing. However, the criteria for doing so in some circuits are considerably more limiting. To prove standing, plaintiffs must show:

- **"Injury in fact":** Plaintiffs must show that they have suffered an injury that is "concrete and particularized" and "actual or imminent." Notably, for organizations to establish injury in the DC Circuit (where a lot of administrative litigation takes place), they must show that: (1) The challenged action impedes the organization's mission in a manner that inhibits daily operations; and (2) the organization has used its resources to counteract that harm;
- **Causation:** Plaintiffs must show that the injury is "fairly traceable" to the defendant's challenged action (i.e., not the result of the actions of some third party not before the court); and
- **Redressability:** Plaintiffs must show that the injury is likely to be redressed if the court rules in the plaintiff's favor.

Bias in Legal Standing

Constitutional standing doctrine tends to privilege corporate litigants over other advocates or organizations in the administrative law context. During the Trump era, these difficulties establishing standing plagued advocates across a range of policy areas. Sometimes, courts dismissed legal challenges before engaging with the merits of the case because of standing inadequacies; other times, advocates elected to not even pursue action given the burden of meeting standing requirements. The challenges of proving standing include:

- **Demonstrating injury:** It can be difficult to prove “injury in fact” when the purported harm from a regulatory rollback is the risk of injury to a broad class (e.g., a power plant’s pollution increases the risk of illness for those living nearby, but there is no way to determine the precise individuals whose health will be affected).
- **Predicting future harms:** Rules often attempt to mitigate future harms, but demonstrating that a present plaintiff will suffer future harm often proves difficult.
- **Valuation:** Regulatory benefits are notoriously difficult to value, especially when those benefits are non-monetary or uncertain.
- **Causation and redressability:** Regulations often place limits on one set of actors to benefit another (e.g., payday lending rules place restrictions on lenders to protect borrowers). Standing doctrine’s requirements about showing causation and redressability implicitly require additional showings from plaintiffs who are not themselves the direct object of regulations. The Supreme Court has explained that this makes establishing standing “substantially more difficult.”

In contrast, regulated entities generally face no problems getting into court because they can more easily prove direct costs, which easily satisfies all aspects of the traditional legal test for standing. This imbalance has profound implications for the government’s ability to place checks on corporate power.

Strategies to Establish Standing

Regulators Should Incorporate “Standing Hooks” into Rulemaking

The following two “standing hooks” are proposals for administrative policy design that can be built into future rulemaking. These hooks operate by giving public interest organizations a tangible stake in a given regulatory scheme, which makes it more likely that advocates will meet standing requirements in the event a future conservative administration attempts to undo pivotal regulation.

- **Add public information disclosure provisions.** Building robust disclosure provisions into rulemakings can give constituents (e.g., researchers, service providers, advocates) who use that information a path toward establishing standing. Specifically, in the event of a rollback, groups can argue that the cost of recreating data sets stemming from the agency action (in this case, halting data disclosures) constitutes an injury in fact, which the court has the power to redress.

- **Incorporate advocates in the implementation and enforcement of rules.** Alternatively, regulators can more directly involve advocates in the implementation and enforcement of rules. For example, a rule could require regulated entities (e.g., state or local governments) to seek input from advocates when developing standards or plans. This would help ensure that the consulted advocates could show a concrete injury (the absence of meaningful input) in the event that a future administration were to rescind the rule. Additionally, regulators could include advocates in the enforcement process, through providing a complaint mechanism that allows advocates to allege violations or request administrative action.

Regulators Should Write Final Rules in Ways That Help Advocates Establish Standing

Beyond incorporating standing hooks, there are several best practices regulators should follow when writing final rule documents.

- **Identify lists of intended beneficiaries (including advocates) and explain how they stand to benefit from a given rulemaking.** To help beneficiaries demonstrate that they meet the “causation” and “redressability” prongs of the constitutional standing test, regulators should use the final rule document to explicitly describe how these beneficiaries, including advocates, benefit from the new rulemaking.
- **Quantify the benefits for researchers and advocates of standing hooks and other provisions in the rule.** Regulators should specify benefits to specific subpopulations with identifiable characteristics (students, for instance) to make it easier for advocates to seek out these populations to prove “concrete and particularized” injury in fact. Agencies should also estimate the value of public disclosure, reporting, and other information-sharing provisions, perhaps by estimating the costs that beneficiaries would incur by attempting to recreate these data sets.

Advocates Should Push for the Inclusion of Standing Hooks and Use Them When Available

- **Organizations should advocate for the inclusion of standing hooks during the rulemaking process.** When regulators issue proposals that incorporate standing hooks, advocates should submit comments explaining how these hooks will benefit their daily operations.
- **After a rule goes into effect, advocates should use standing hooks in strategic ways that make it easier to generate organizational standing in the event of a rollback.** For instance, organizations should make sure to use public information disclosures in ways that both inform their strategy and would cost them money should the information be revoked or removed. If an organization loses access to publicly disclosed information, it should attempt to recreate the data set using different means.

Conclusion

The ease with which industry can establish standing to challenge new regulation compared to the difficulties facing everyday Americans trying to get into court to preserve important protections constitutes a grave power imbalance. Fundamentally, the regulatory state exists to improve the lives of consumers, workers, and families. Regulators and policymakers should incorporate the recommendations of this report into their processes to ensure we fulfill our obligation to the public and level the playing field so that ordinary Americans can fight to keep hard-won regulatory advances from being undone.

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