Michigan Law Review

Volume 77 | Issue 3

1979

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Recommended Citation
Michael Boudin, *Private Standing and Public Values*, 77 MICH. L. REV. 503 (1979).
Available at: https://repository.law.umich.edu/mlr/vol77/iss3/17

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PRIVATE STANDING AND PUBLIC VALUES

*Michael Boudin**

LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW. By *Joseph Vining*. New Haven and London: Yale University Press. 1978. Pp. xiii, 256. $16.00.

This highly interesting and unusual book has, as a central subject of inquiry, the developing law of standing in federal administrative litigation. It also has a predominating interest or perspective: the concept of legal identity and the role of litigants in personifying social values. Finally, its underlying thesis reflects Professor Vining's judgment that there is underway a basic change in the ordering principles of our legal process. The book thus concerns the interplay between these subjects—standing, legal identity, and the values that underlie the legal order.

I

The common law affords a long history of legal challenges to executive and administrative action, but only in the present century has this branch of litigation moved from the periphery to the forefront. As our economy and society have grown more complex and interdependent, the occasions for governmental regulation and intervention have vastly increased. In this cycle, action or inaction by the government comes to affect more people in more ways. The opportunity to challenge governmental conduct in court thus becomes ever more vital. So in turn do threshold doctrines—like standing—which narrow or widen that opportunity.[1]

Professor Vining begins his inquiry with the traditional legal order in which disputes about property were a paradigm of litigation and the protection of property rights was a basic function of the courts (ch. 2).[2] It was natural for developing civil litigation against government officials to be shaped to fit within the existing framework. Consonantly, suing an official implicated an inquiry whether the official had invaded the complainant's prop-

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1. Professor Vining has also written in depth about another of the so-called threshold requirements, the "ripeness" doctrine. *See* Vining, *Direct Judicial Review and the Doctrine of Ripeness in Administrative Law*, 69 MICH. L. REV. 1443 (1971).

2. J. VINING, LEGAL IDENTITY (1978).

erty rights or analogously protected legal interest *(e.g.,* liberty of person) such that, if the official were a private defendant, he would be liable to suit. Only if this invasion were demonstrated would the court have to address the further question whether the official's actions were justified by virtue of his official mandate (which in turn implicated questions of his jurisdiction, the proper exercise of his authority, and other now familiar grist of administrative litigation).

As Professor Vining explains, this framework became increasingly unsatisfactory. One reason was that individuals and business enterprises found that their own interests could be drastically affected by official action, or even inaction, directed solely at another entity: for example, a contract awarded to a competitor, a rate change ordered for shipment of its commodities, a failure to prohibit its misconduct. Litigants also perceived, and wished to challenge, the impact of official action on what are loosely called noneconomic interests, such as aesthetic or recreational values. In both Professor Vining's examples, and surely in other contexts as well, the traditional precondition of relief—a property or liberty interest—could not readily be established, even though the practical effect of the official action or inaction on the would-be litigant might be hard to deny.

Courts were not, of course, limited to ignoring repeated demands for review in such cases or, in the alternative, twisting notions of property and liberty out of recognition in order to afford review. A third course was to abandon old requirements and to evolve new standards for determining when judicial intervention might be justified (ch. 3). The new touchstones that emerged included resort to the particular language of the regulatory statute, professed discovery by courts of a "beneficiary" class intended by the legislature to have a right of review, the "private attorney general" concept and—most recently—the notion of a "zone" of protected or regulated "interests." A portion of the book is devoted to showing why certain of the older touchstones are unsound guides to resolution of standing questions today (chs. 5-7).

Professor Vining's second general subject—"legal identity"—is essentially another way of posing the question of standing. In his use of the phrase, it involves the court's willingness or unwillingness to recognize before it a person or entity entitled to invoke the court's authority.[3] And, in standing cases, discerning

3. Lawyers are more familiar with the concept, if not the phrase, in a different,

"who" is before the court to object to an official action often involves the court's perception of the interest or value that concerns or is represented by the petitioner. Of course, the cast of would-be litigants may cover a broad spectrum even though only a single official action has occurred.[4]

As I understand Professor Vining, he is suggesting that the question who may sue has tended to become a different kind of question as the scope of governmental action has expanded and its impact has become at once more various and widespread. In resolving standing questions, judicial concern with the complaining individual and "his" personal stake has diminished; and increasingly, petitioners in difficult standing cases are viewed as representing interested classes such as "consumers," "environmentalists," or "competitors." Ultimately, the class may be entirely abstracted—*e.g.*, will the court grant standing in this type of case to those plausibly professing injury to their environmental interests—and we will have reached the "personification" of values.

In Professor Vining's terms, when the personified value is recognized by a court as a basis for standing, it becomes a "public" value. For example:

> Consider whether an individual who does not swim is "directly" and "personally" affected by a decision not to build a swimming pool. As a "parent," perhaps he may be: Parent and child are seen as one. As one who enjoys, perhaps passionately enjoys, watching swimming? That would depend on whether swimming watching is understood and valued as something more than an idiosyncracy. It may become so with the televising of Olympic swimming and the spread of swimming as an art rather than a splashing. [P. 176]

Yet a neighbor opposing the pool's construction because he disliked the blue-green color of the water may never win recognition and be accorded standing to sue, however great his aversion to the color or his willingness to litigate. His "value" will be described, often without explanation, as a mere preference or idiosyncracy.[5]

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although related, context: determining whether a litigant has "capacity" to sue (*e.g.*, a child, a trust, a union).

4. For example, the petitioner challenging the condemnation of a house may be a home owner whose property is at stake, neighbors concerned with urban blight from construction of a new jail on the site, or a historical society seeking to preserve Georgian architecture. The illegality charged may be related to, or largely independent of, any of those concerns.

5. As Professor Vining observes, the process of establishing public values also operates in reverse. Values once accorded weight *(e.g.*, distinction in social rank)—and at least

Connecting these concepts—legal identity and evolution of public values—is not the end point of Professor Vining's inquiry. True, the concepts may serve as a prism for examining standing cases, helping to explain puzzling decisions or to predict the outcome of cases not yet decided. However, Professor Vining has a further and more ambitious objective: to relate the development of the standing doctrine to a basic change in the role of courts in the legal process and in the values underlying our legal order.

In his broad view, legislation and administration can be viewed as an ongoing, experimental resolution of diverse interests and values (ch. 9). No single interest or value predominates in the society, any more than it does in any sane person, and there is no permanent hierarchy of interests or values. Instead, as society changes, different public values emerge and the governmental process seeks to accommodate them. Through decisions on standing, courts help evolve the public values that will be recognized in this continuing process (ch. 10). "For in the very recognition of a 'person' who is 'harmed' courts formally cap the formulation of a value . . . , confirm it in our language and our thought, and permit a full and continuous search for its realization to begin" (p. 171).

Finally, this process of continuing accommodation itself represents an ordering principle that is becoming woven into our legal fabric. In the past, Professor Vining concludes, litigation has symbolized a legal order of clashing and exclusive claims to property—a world in the image of "castles upon hilltops" (p. 181). That world is increasingly remote and irrelevant as society has changed and as courts have become ever more sensitive to diverse values and remote effects. Both in function and as symbol, the emerging public litigation may come to reflect not the separate claims of individuals, but the vital interdependence of society.

II

In 1970, the Supreme Court announced a new formulation of standing doctrine designed to sweep away old cobwebs. Standing, it said, exists where the petitioner shows that he is injured "in fact" by administrative action and the "interest" asserted arguably falls within the "zone of interests" the statute in question was meant to protect or regulate.[6] Eight years later Professor

potentially significant in litigation—may cease to be recognized.

6. Association of Data Processing Serv. Organizations v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970).

Vining is prepared to describe recent standing decisions as evidencing "intellectual crisis" and judicial behavior which is "erratic, even bizarre" (p. 1). He is not alone is his dissatisfaction.[7]

My own sense is that, whatever the doctrine of standing should be, at the present time the doctrine has in practice no single rationale or office. It is an umbrella term sheltering a number of different impulses or considerations. This engenders exactly the confusion one might expect if, in a large family, all of the children were called by the same name.[8] It also helps to explain why standing decisions cannot easily be made to conform to a single pattern.

Surely one consideration underlying the standing doctrine is a sense that a litigant should be seen to be affected by the action he seeks to challenge before the wheels of litigation are set in motion. This requisite may not be invariable; and standing is not the only doctrine concerned with assuring the litigant's personal stake. However, as *Sierra Club v. Morton*[9] demonstrates, federal judges usually want more than a litigant and a stake: they want a connection between the two.

Even if the requisite stake and connection exist, however, the litigant's interest may be illegal, unwholesome, or otherwise unattractive to the court even if the governmental action is clearly unlawful. Or, the litigant's interest may be protected in some other context but may be so unrelated to the purpose for which the substantive rule was established that the court may see no reason to enforce the rule for the benefit of the litigant. Or, allowing one class of litigants to sue may interfere with anticipated litigation by another class of litigants to whom policy gives preference. The list could readily be extended.

Standing is complicated by yet another of its traits. Various of the considerations treated under the standing doctrine are associated not only with standing but also with still other threshold

7. Professor Davis approved of the injury-in-fact test but observed that in subsequent standing decisions the Supreme Court was divided in virtually every case. K. Davis, Administrative Law of the Seventies § 22.00, at 485-87 (1976). By 1977 Professor Davis was driven to conclude: "The whole law of standing is so confused and cluttered . . . that the lower courts and practitioners especially need Supreme Court guidance." *Id.* § 22.00-.01, at 167 (Supp. 1977).

8. The evolution of more precise nomenclature probably has more to do with legal development than one might at first suppose. In contrast to standing, consider the well-accepted distinction between "personal" and "subject matter" jurisdiction and the distinction, still occasionally compromised, between the merger/bar doctrine and collateral estoppel.

9. 405 U.S. 727 (1972).

prerequisites *(e.g.,* the case or controversy requirement) or with what we call the merits of the case. Whether one or another of the considerations is resolved by a decision on standing or in another phase of the opinion may be a matter of how the case was argued. Standing is not only a crowd, but a disorderly and wandering one. It is no wonder that judicial policemen have such trouble with it.

Given the diversity of elements and the overlap of standing with other doctrines and with the merits, it is quite possible to decide, as a matter of policy, that certain "standing" considerations—possibly all of them—should be detached from the standing concept and considered, if at all, under other heads, such as the merits. In fact, much of the current literature on standing seems to urge a recasting of the standing doctrine to simplify it, distinguish its elements, or even abolish it as an independent test.[10]

Quite apart from the multiple roles played by the standing doctrine, there are also multiple functions performed by judicial review of agency action. Assuring respect for public values and evolving those values is a part of process, but reviewing courts often have other things on their minds. Depending on the case at hand, the court's attention may range from fixing the final outcome of the controversy to its own program of agency reform only remotely related to any individual controversy.

Which of the various functions are proper, and when, raises a quite different set of problems. However, since courts do in fact exercise a range of functions in reviewing administrative action, it seems reasonable to suppose that these other functions may also shape the use that courts make of the standing doctrine and thereby shape the doctrine itself. A court persuaded by the merits to shake an agency by the neck may have only limited interest in "who" asked it to do so.

There is also a reverse side to the coin. Standing is one of the barriers to judicial review of official action. Like most such barriers, it has been pushed back further and further in recent years as courts have grown ever more ready to police, improve, and reform in matters once thought beyond the purview of judges. The extension of standing to new or remote interests, like the presumption of reviewability and the demand for "reasoned"

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10. *E.g.,* K. DAVIS, *supra* note 7, § 22.00, at 486; L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 459-500 (1965); Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claims for Relief,* 83 YALE L.J. 425 (1974); Scott, *Standing in the Supreme Court—A Functional Analysis,* 86 HARV. L. REV. 645 (1973).

decision-making, has gained a propulsive, almost irresistible life of its own. In this respect, the Administrative Procedure Act[11] has become a symbol far more potent than its express language.

Yet, there are countervailing pressures that resist judicial review and those pressures may in fact be stimulated by the outcome of such intervention. Even in an interdependent society, limits exist on what can be achieved through judicial review. Moreover, there are positive costs of intervention, including expense for litigants, judicial and administrative delay, and substitution of lay decision-making for asserted expertise. There is still some terrain, such as foreign and military affairs, which most judges are inclined to avoid. The future of the standing doctrine may depend, to a considerable degree, on how far it becomes the channel for the pressures and reservations that tend to limit intervention by courts.

Professor Vining's book develops and illuminates a central function of the standing doctrine: its role, through the personification of public values, in developing the interests society is prepared to protect. Like most "models"—a skeleton, a diagram of blood vessels, a chart of the nervous system—this model of the standing doctrine teaches by isolating, emphasizing, and explaining a single central theme. No reader should need reminding that this is not the only theme. Rather, it is the theme that Professor Vining has chosen in order to illustrate and illuminate arguments and ideas that go far beyond the bounds of standing doctrine.

III

One of the greatest attractions of this book is that it spins off intellectual sparks at a great rate. Some it fans into flames. Others smolder. A few get stamped out rather firmly. Several examples may be of interest.

A two-page "note" traces the history of standing as a legal term of art (pp. 55-56). Standing sounds to our ears like so familiar and basic a requisite that it is natural to seek its source in the common-law. But, as Professor Vining observes, common-law courts with authority defined by a system of writs "did not need to speak of standing. The question was whether a challenger was entitled to a writ, whether he had a cause of action, whether the writ lay" (p. 55). Compactly, determinations of standing, merits,

11. *E.g.*, 5 U.S.C. §§ 701-706 (1976).

and remedy were all embraced by the definition of the particular writ.

Standing—properly, *locus standi*—instead apparently emerged in parliamentary practice as a threshold requirement for those who sought to appear before parliamentary committees to oppose legislation (p. 55). Unless the bill would directly affect the opponent's property or interest, he could not speak against it (p. 55).[12] Not until the 1930s did courts in the United States begin commonly to talk of standing, although earlier references exist (p. 56). There is something more than antiquarian interest in tracing standing into the parliamentary world, especially for us whose courts play so significant a role in the governmental process.

Later in the book, Professor Vining devotes a chapter to what he calls "feigned personalities" (ch. 8). If the applicable standing doctrine allows a "consumer" but not a "competitor" to challenge an agency ruling on a company's advertising practices, what does the court say to the competitor who seeks to make the challenge and asserts that he too is a consumer? When should courts explore the underlying motivation or test the bona fides of the litigant in playing the role the litigant purports to fill? And may it be that the feigned role "fuels the popular sense . . . that law is a thing to be used and the profession a place for persons of manipulative mind and empty heart" (pp. 125-26)?

This problem is intimately related to standing, or at least to any doctrine of standing that purports to turn on the interests being represented or protected. The chapter on feigned personalities makes brief excursions into other fields of law where the origins and purposes of the suit may, or may not, be a basis for halting the challenger at the threshold (pp. 124-35).[13] Since this broader subject could exhaust a volume itself, Professor Vining cannot reasonably do more than touch upon it, but one may still welcome and enjoy a new vista.

At yet another point, Professor Vining discusses more briefly the implied private cause of action (pp. 107-09). Thus, where the statute forbids construction work to commence before 8:00 A.M., a neighbor may seek to sue to enjoin work at an earlier hour, and

12. By 1866, a treatise writer quoted by Professor Vining (p. 56) was complaining, with a distinctly familiar ring, that the precedents on standing were "most unsatisfactory" and that "[i]n many cases the legal advisers of petitioners were unable to make more than a mere guess as to whether their *locus standi* would be allowed or disallowed."

13. Among other instances cited are problems of invoking diversity jurisdiction by collusive assignment and the testing of shareholder motivation in suits, derivative or otherwise, to implement shareholder rights.

the statute may be silent on the issue of who, if anyone, is entitled to relief. There are both parallels and divergencies in comparing this doctrine with standing to challenge administrative action. In both cases, a rule has allegedly been disregarded by the intended defendant and the question is whether the private plaintiff will be allowed to demonstrate this disregard and obtain a judicial remedy.

On the other hand, the implied cause of action is usually—but not always—invoked to secure damages rather than prospective relief; and there is usually an official prosecutor or enforcement agency primarily charged with enforcing the rule in question.[14] It is not necessary here to describe the specialized use of the comparison made by Professor Vining. Rather, my point is that the comparison of standing and the implied cause of action is a valuable one that could readily be extended in a number of directions. Thus, the book is a continuing provocation to readers to carry its hints and suggestions beyond the author's own main theses.

It is also a book of extreme intellectual density. The thoughts are compressed so that the cautious reader, anxious not to miss a point, is constantly chipping out sentences to consider their implications and relationship to other thoughts. The writing is crafted, exact, indeed elegant, but the book is written at a very high level of abstraction. If written in the conventional style of an ordinary law review article, it would be several times its present length.

Fortunately, the style of the book is quite personal. Its high level of abstraction and analysis is enriched with illustrative examples, occasional dialogues, images, and wit. Equally unusual are the almost aphoristic passages or remarks which appear from time to time. While pertinent to the legal analysis, they could readily appear in a book of literary criticism or a spectatorial essay. For some, these passages will be the plums in a very fine pie.

The question what a judge "sees" in looking at a litigant is at once the most speculative and practical of questions. Chesterton once remarked that the callousness of courts and lawyers toward the accused in the dock is not the result of deliberate cruelty; it is rather that they do not see the prisoner at all but

14. Of course, in standing cases there may often be another class of petitioners who clearly do have standing to challenge the administrative action.

only "the usual man in the usual place." By bringing his spacious style and perspective to bear on what is commonly thought to be a dry and technical subject, Professor Vining has greatly rewarded us.