

## **Understanding (Legal) Standing**

Welcome to *Constitutional Context*. This is Professor Glenn Smith with another “five-minute bite of background about the Court and Constitution.”

Only half facetiously, I suggest to my students that, when there’s a lull in a cocktail-party conversation, they should spice things up by asking, “Should any citizen who thinks the government is acting illegally be able to challenge the government in court?”

When partygoers reply, “of course -- that’s what the rule of law means in America,” the questioner can then offer the surprising revelation that, under an arcane but important set of doctrines about “legal standing,” federal courts do not allow mere citizens to challenge alleged government illegality. Nor can Americans whose tax dollars go to support illegal government action usually sue on that basis.

Rather, over several decades the Supreme Court has held that judicial self-restraint and proper respect for the policy-making prerogatives of elected officials require that federal courts only open their doors to plaintiffs who can show that they are specially injured, now or in the imminent future, mainly by government action that can be remedied by appropriate judicial relief.

These are the *constitutional* requirements intended to serve the limits of federal judicial power provided in Article III of the document. Additionally, the Court has crafted several other requirements to promote a “prudent” judicial presence.

Before you roll your eyes at this parade of seemingly abstruse concepts, keep in mind what the stakes are in understanding (legal) standing. The path to disputing the constitutional or other legal merits of governmental action is paved with plaintiffs left (or seriously threatened with being left) “standing” by the roadside.

One high-profile example of the power of standing doctrines is the 2012 challenge to California’s voter-passed ban on same-sex marriage. After a federal district court found that Proposition 8 violated constitutional guarantees, the proponents of the Proposition (who had spent substantial time and money qualifying it as an initiative measure on the California ballot) sought to appeal the ruling. The stage was set for the Supreme Court to decide the highly controversial issue of same-sex marriage in a presidential-election year, and at a time when public concern was in a significant state of flux.

However, by a 5-4 vote, the justices held that Proposition 8 proponents lacked legal standing to press their court appeal. The majority found that voter-initiative proponents lack a special stake once an initiative is passed. Nor can proponents defend a proposition on behalf of a state’s voters and public officials. This holding delayed for three years the need for the justices to rule on the constitutionality of state same-sex-marriage bans, by which time public opinion had shifted significantly and lower courts had reached a legal consensus.

Recent headlines provide another illustration of the potency of “standing” concerns. They’re evident in a lawsuit filed by a non-profit organization to challenge President Trump’s alleged failure to sufficiently insulate his business empire from conflicts of interest and influence peddling by foreign governments. Asserting that the President’s business arrangements violate a constitutional ban on foreign governments enriching federal officials, the plaintiffs could not just claim to be a citizens group concerned about ethics in government.

Instead, the organization’s complaint seeks to show special injury by detailing how its attorneys and staff are spending significant amounts of time and resources investigating and publishing alleged ethical violations. The complaint also seeks to represent consumers, workers, and business entities arguably jeopardized by the risk that foreign governments will curry favor through sweetheart deals with Trump business concerns.

It remains to be seen whether these allegations will survive past Court skepticism about “self-inflicted” and “speculative” injuries,” and plaintiffs representing the interests of “third parties.”

But what is not in dispute is the crucial connection between “legal standing” and the fundamental ability of challengers to interest federal courts in allegations of government illegality.