

Standing To Sue In the Absence Of Prosecution: Can a Case Be Too Controversial for Case Or Controversy?

By

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"Generalizations about standing to sue are largely worthless as such."

Justice Douglas, generalizing about standing.¹

Abstract: *the Supreme Court has recognized that, except in highly unusual situations, a plaintiff has "harm in fact," and thus standing to sue, if a criminal statute outlaws conduct in which he intends to engage and which is arguably within the protections of the Constitution. Three Circuits have, however, evolved contradictory strings of caselaw, in which certain challenges are assessed in accord with the Supreme Court's teachings, while other, indistinguishable, challenges are subjected to much stricter standards, standards which are almost impossible to meet. The Circuits rarely attempt to reconcile the two sets of decisions, and when they do, the resolution is cursory and lacking in reason. In two of the Circuits, there has at least been an effort to narrow the caselaw which is not in accord with Supreme Court precedent.*

Beginning in 1968, the Supreme Court steadily liberalized citizens' powers to challenge the constitutionality of criminal statutes via civil actions. While the Court continued to identify the test as involving "realistic fear" or "genuine threat" of prosecution, it broadened the application of those terms to encompass challenges to almost any criminal statute that forbade conduct which a plaintiff desired to undertake, and whose enforcement the government had not foresworn. This paralleled an expansion of standing in civil challenges to environment-affecting actions, to the point where standing existed if the plaintiff changed his activities due to fear of exposure to environmental harm, even if it was proven that the harm had not occurred.

J.D., Univ. of Arizona 1975.

¹ *Data Processing Service v. Camp*, 397 U.S. 150, 151 (1970).

By and large the Circuits have followed the Court's lead. But several Circuits have done so in ways which yield inconsistent reasoning and unpredictable results. The only apparent explanation for these irregularities appears to be that these Circuits apply the modern, liberalized, standards to causes of action that find favor in their eyes, and much stricter standards to causes of action that do not.

This article will begin by tracing the Supreme Court's liberalization of its standing doctrines, then compare that to the caselaw of three Circuits. It will examine the anomalies found, the intellectual gymnastics necessary to create them, and the still more interesting gymnastics that later panels of these Circuits have employed to sidestep them without *en banc* reconsideration.

I. Standing To Sue: The Supreme Court Caselaw.

The Supreme Court's approach to the question of standing began as seemingly restrictive. In *Poe v. Ullman*² it rejected a challenge to a statute that prohibited dispensing contraceptives or advising on their use. While the complaint's allegations that the defendant meant to enforce the law were unchallenged, the Court noted that the statute had been on the books since the 19th century, was being flouted at will, and the only prosecution to date had been a test case. In the eyes of the *Poe* Court, plaintiffs simply could not demonstrate a "realistic fear of prosecution," the core of the "harm in fact" that established case or controversy.³

Poe, in turn, generated a quotation which has long been *de rigueur* in any defense brief on the subject, *viz*, Justice Stewart's concurrence in *Steffel v. Thompson*: "Cases where such a 'genuine threat' [of prosecution] can be demonstrated will, I think, be exceedingly rare."⁴ Justice Stewart's comment is, historically, a bit odd. The tide was already turning, and he was part of it, voting with the majority in every case from *Epperson* to *Babbitt*. The key cases in the transition were:

Epperson v. Arkansas upheld a challenge to a statute prohibiting the teaching of evolution, a statute that had been on the books for forty years without a prosecution. "It is possible that the statute is presently more of a curiosity than a vital fact of life in these States," the Court noted.

² 367 U.S. 497 (1961).

³ *Id.* at 508.

⁴ 415 U.S. 452, 476 (1974)

“Nevertheless, the present case was brought, the appeal as of right is properly here, and it is our duty to decide the issues presented.”⁵ *Epperson* dealt with *Poe* by ignoring it.

Doe v. Bolton involved a challenge to an abortion statute, and the Court again found plaintiffs had standing. It was sufficient that the statute “directly operate[d]” on the physician-plaintiffs, posing a “sufficiently direct threat of personal detriment,”⁶ despite the absence of prosecution or threat to prosecute. *Poe* was distinguished, since the statute at issue here was “recent and not moribund.”

Roe v. Wade, a companion case, held that a patient had standing to challenge abortion statutes applicable only to doctors, on the commonsense approach that whatever chilled the doctors’ practice affected the patient’s rights.⁷ Thus standing might be premised on the legislature having criminalized another person’s activity, if that activity involved providing constitutionally-protected services to the plaintiff.

Craig v. Boren, upheld a bar’s standing to assert the rights of its beer-drinking customers, apparently without threatened enforcement. The owner of the establishment was, the Court noted, “obliged either to heed the statutory discrimination, thereby incurring a direct economic injury through the constriction of her buyers’ market, or to disobey the statutory command and suffer, in the words of Oklahoma’s Assistant Attorney General, ‘sanctions and perhaps loss of license.’”⁸ It was sufficient that enactment of the statute required plaintiff to choose between unwilling compliance or a risk of prosecution.

Carey v. Population Services Internat’l made at least a tip of the hat to the concept of credible threat, but found that a letter requesting compliance, lest “the matter be referred to our Attorney General” sufficed.⁹

By the late 1970s, those cases that mentioned the concept of credible threat

⁵ 393 U.S. 97, 102 (1968).

⁶ 410 U.S. 179, 188 (1973).

⁷ 410 U.S. 113, 124-27 (1973). *See also Planned Parenthood of Mo. v. Danforth*, 428 U.S. 52, 62 (1976).

⁸ 429 U.S. 190, 194 (1976).

⁹ 431 U.S. 678, 682-83 & n.3 (1977).

did so in a context that made such threat the rule and its lack the exception, to be demonstrated by the government's forswearing of intent to enforce:

Babbitt v. United Farm Workers upheld standing, based on a criminal statute for which the "State has not disavowed any intention of invoking the criminal penalty provision..."¹⁰

Virginia v. American Booksellers Ass'n, did the same, since "[t]he State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise. We conclude that plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them"¹¹

Defendants who desired to argue lack of standing on this basis were well-advised to follow the example of Utah, and produce affidavits from prosecutors attesting that they had never brought cases of the type, and had no intention of doing so in the future.¹²

This liberalization was paralleled by the Court's expansive reading of the standards required to challenge agency action affecting the environment. Beginning in *Sierra Club v. Morton* (handed down four years after *Epperson*) the Court recognized aesthetic or recreational impairment as sufficient "harm in fact" to give standing.¹³ The effort culminated in *Friends of the Earth v. Laidlaw Environmental Services*,¹⁴ which upheld standing based on claims that plaintiffs had chosen to forego recreational opportunities on the river in question, out of fear of exposure to pollution, even though the Court accepted the finding that there was, in fact, no basis for that fear. Thus both in challenge to agency action, and in challenges to a criminal statute, plaintiffs could secure standing based upon having to forego action due to fear of harm.

II. Standing To Sue in the Circuits: A Certain Lack of Consistency

¹⁰ 442 U.S. 289, 298-99 & 302 (1979).

¹¹ 484 U.S. 383, 392 (1988).

¹² *D.L.S. v. State*, 374 F.3d 971 (10th Cir. 2004). The case involved a sodomy law, and the court referenced *Lawrence v. Texas*, 539 U.S. 558 (2003) as further proof the prosecutors were unlikely to change their minds.

¹³ 405 U.S. 727, 734 (1972). The ruling's more notable progeny includes *United States v. SCRAP*, 412 U.S. 669, 689 & n. 14 (1973) and *Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 231 n.4 (1986).

¹⁴ 528 U.S. 167 (2000).

It would seem that the law of standing was (for once) reasonably clear. But three of the Circuits have made quite an effort to undo this clarity, creating caselaw that is inexplicable except in terms of achieving a desired outcome.

The Ninth Circuit.

In certain settings, the Ninth Circuit has had no difficulty following the liberalized Supreme Court standards. In *Compassion in Dying v. Washington*,¹⁵ for example, it held that physicians had standing to contest an anti-euthanasia statute, even though there had been no threats to prosecute, correctly citing *Bolton* and *Babbitt* for the proposition that no such threat was necessary.

Yet the same year, in *San Diego County Gun Rights Comm. v. Reno*,¹⁶ the Ninth Circuit reached the opposite result in a case challenging the 1994 “assault weapon” ban. It found plaintiffs lacked standing because (1) the complaint did not specify when and where they might violate the law; (2) that violation would be a product of their own choice; (3) “a general threat of prosecution is not enough to confer standing. See, e.g., *Poe v. Ullman* ...”; and (4) there had been no prosecutions under the statute (which had been barely a year old when the district court dismissed the suit).¹⁷ The same four observations might be made of *Compassion in Dying*, decided only seven months before,¹⁸ and it is hard to see just how these standards comport with the Supreme Court’s post-*Poe* dictates.

The Ninth Circuit’s standards, if we can call them that, led toward the development of two bodies of caselaw, one requiring detailed proof of fear of prosecution, the other requiring no proof at all. In *Thomas v. Anchorage Equal Rights Commission*¹⁹ the issue was a regulation forbidding discrimination in housing on the basis of, *inter alia*, marital status, and the plaintiffs were conservative Christian landlords who argued the regulation infringed their free exercise of religion. An *en banc* court found they had no standing:

We have held that neither the mere existence of a proscriptive statute nor a generalized threat of prosecution satisfies the "case or controversy"

¹⁵ 79 F.3d 790 (9th Cir. 1996), *rev'd on other grounds sub nom. Washington v. Gluckberg*, 521 U.S. 702 (1997). See also *Klein v. San Diego County*, 463 F.3d 1029 (9th Cir. 2006) (Challenge to residential picketing ordinance; no threat of prosecution necessary).

¹⁶ 98 F.3d 1121 (9th Cir. 1996).

¹⁷ *Id.* at 1126-27.

¹⁸ And with one judge, Judge Fletcher, signing both opinions.

¹⁹ 220 F.3d 1134 (9th Cir. 2000) (*en banc*); *cert. denied* 531 U.S. 1143 (2001).

requirement. *See, e.g., San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126-27 (9th Cir. 1996). In a somewhat circular argument, the landlords contend that they are presently injured because they must violate the housing laws to remain true to their religious beliefs, even though their beliefs counsel against violating secular law. This argument is essentially another way of saying that the mere existence of a statute can create a constitutionally sufficient direct injury, a position that we have rejected before and decline to adopt now.²⁰

Yet only a few years later the same circuit, in a challenge to an election expenditure statute, found that plaintiffs had standing, and that the bare existence of a statute “arguably” restricting plaintiffs’ conduct indeed established case or controversy:

Our ruling in *Thomas* did not purport to overrule years of Ninth Circuit and Supreme Court precedent recognizing the validity of pre-enforcement challenges to statutes infringing upon constitutional rights.

.....

In the free speech context, such a fear of prosecution will only inure if the plaintiff’s intended speech arguably falls within the statute’s reach.²¹

The ruling made no attempt to reconcile *Thomas* with the Circuit’s past caselaw. It is hard to reconcile *Thomas* with the outcome of the later appeal, unless the panel meant to distinguish (on a rationale nowhere explained) between free exercise of religion and freedom of speech. Whatever distinguished the latter, favored, category apparently extended beyond freedom of expression, since the Ninth Circuit later found that, to challenge a statute restricting performance of abortion, the plaintiff “need not claim a specific intent to violate the statute” since the mere existence of the statute put a physician to a choice between violating it or restricting his practice.²² The decision made no mention of *San Diego County Gun Rights Committee* or of *Thomas*. Nor was the more liberal standard limited to challenges based on the Bill of Rights. When the Circuit addressed a commerce clause argument against the federal ban on medicinal marihuana, the *Thomas* and

²⁰ *Id.* at 1139.

²¹ *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003)

²² *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 920 (9th Cir. 2004)

San Diego Gun Rights Committee standards were cited only in the dissent;²³ the majority struck the ban without so much as acknowledging an issue with plaintiffs' standing.

San Diego Gun Rights Committee finally secured a mention in *National Audubon Society, Inc. v. Davis*,²⁴ where the issue was a state ban on trapping with leg-hold traps. But the Circuit paradoxically distinguished the earlier case by holding that the trappers' injuries were economic – although the economic harm only flowed from their refusing to use such traps out of fear of prosecution!

In this case, however, the core of the trappers' injuries is not a hypothetical risk of prosecution but rather actual, ongoing economic harm resulting from their cessation of trapping. That is, the trappers allege direct financial loss caused by Proposition 4. When such tangible economic injury is alleged, we need not rely on the three-factor test applied in *Thomas* and *San Diego Guns*...²⁵

The Ninth Circuit reaches inconsistent results by perpetuating inconsistent strings of caselaw, each of which ignores the other string. In cases where it desires to find a lack of standing, it cites to *San Diego County Gun Rights Committee* and *Thomas*: in cases where it desires to find standing, it cites the Supreme Court, or its previous decisions based upon the Supreme Court standards. The inconsistency can be found even within First Amendment challenges: free exercise of religion is assessed by the first standard, free speech by the second.

A reader is hard put to explain the variance except with the assumption that the Ninth Circuit applies the proper liberal standard to cases it favors – freedom of expression, right of privacy, challenges to medicinal marijuana – and a stricter, inconsistent, standard to those it disfavors – challenges to firearms law and equal accommodation statutes.

The Sixth Circuit

²³ *Raich v. Ashcroft*, 352 F.3d 1222, 1236 (9th Cir. 2003) (Beam, J., dissenting) *rev'd on other grounds* 545 U.S. 1 (2005). That the Supreme Court decided the substantive issue suggests that the Ninth Circuit's liberalized standard is the correct one.

²⁴ 307 F.3d 835 (9th Cir. 2002).

²⁵ *Id.* at 855. The court acknowledged that plaintiffs in *San Diego Gun Rights Committee* had alleged an economic injury – the statute forbade future manufacture of certain arms, which would inevitably cause the prices of existing ones to rise – but treated that as “sheer speculation.” *Id.* at 855 n. 9.

Like the Ninth Circuit, the Sixth Circuit faced a challenge to the federal “assault weapon” ban, and held that while licensed firearms dealers (as members of a tightly-regulated industry) had standing, non-dealers did not: “[t]he mere existence of a statute, which may or may not ever be applied to plaintiffs, is not sufficient to create a case or controversy within the meaning of Article III.”²⁶ The same could have been said of the situation in *Epperson* (where the statute had not been enforced in forty years), and most of its progeny.

Conversely, the Sixth Circuit did invoke the relevant Supreme Court caselaw when a challenge to abortion restrictions was at issue: the face of the statute was sufficient threat by itself: “Planned Parenthood has alleged its intention to engage in conduct arguably affected with a constitutional interest, and we believe the statutory language of the Ordinance evinces a credible threat of prosecution against Planned Parenthood.”²⁷ A later ruling held that, in this context, plaintiff need not even allege an intent to violate the statute involved.²⁸

The Sixth Circuit likewise found standing to attack an elections statute, where the plaintiff “has furnished an affidavit, not contradicted in any way, that he desires to continue his political activities and that he may make other assertions that could make him the subject of action by the Commission.”²⁹ Nor was lack of enforcement a bar to challenging restrictions on topless dancing as violative of freedom of expression.³⁰ *Magaw* was not even mentioned in these rulings. Essentially, *Magaw* applies to a challenge to a firearm law, and to no other manner of action.

At least the Sixth Circuit created an anomaly rather than a morass, and has since attempted to extricate itself from the inconsistency of *Magaw*. In a later challenge to a similar city “assault weapon” ban, the court found that plaintiffs did have standing, distinguishing its earlier ruling on the basis that plaintiffs already

²⁶ *NRA v. Magaw*, 132 F.3d 272 (6th Cir. 1997).

²⁷ *Planned Parenthood Association of Cincinnati Inc. v. City of Cincinnati*, 822 F.2d 1390, 1396 (6th Cir. 1987).

²⁸ *Cleveland Surgi-Center Inc. v. Jones*, 2 F.3d 686 (6th Cir. 1993). The district court’s dismissal was affirmed on other grounds; plaintiffs had essentially brought a federal action to challenge state court rulings under a facially-valid statute, and the Circuit held this failed the redressability requirement.

²⁹ *Pestrak v. Ohio Elections Commission*, 926 F.2d 573 (6th Cir. 1991).

³⁰ *G & V Lounge Inc. v. Michigan Liquor Control Commission*, 23 F.3d 1071 (6th Cir. 1994). The decision has, regrettably, little to say on how such dancing is expressive activity.

owned the firearms in question.³¹ The distinction seems a bit doubtful. The ordinance did not forbid the ownership of the listed firearms, but rather their possession within the city. Unless the plaintiffs brought them back within city limits, they would not violate the ordinance, and if they did, their situation would have been similar to that of plaintiffs in the earlier case, faced with a law which may or may not ever be applied to them. One is left with the impression that the Sixth Circuit adopted a standard for firearms cases that did not fit with Supreme Court jurisprudence, and has since had to evolve a legal “work-around.”

The District of Columbia Circuit

The D.C. Circuit has generated the most convoluted standing requirements and, like the Sixth Circuit, has had to circumvent them. As a generality the circuit readily embraced the Supreme Court’s liberalization of standing in the absence of prosecution. As early as 1971, when the process was but beginning, it noted that “[t]he Supreme Court's recent decisions have made the standing obstacle to judicial review a shadow of its former self, and have for all practical purposes deprived it of meaningful vitality.”³²

The D.C. Circuit, however, kept the ghost quite alive, indeed vigorous, in one narrow context. In *Navegar v. United States*,³³ plaintiffs challenged the federal assault weapons ban, which had two relevant components. The first banned future manufacture of specific guns by name and manufacturer, while the second banned any other firearm that had certain characteristics. Violating either ban was a federal felony.

The court allowed standing for manufacturers whose firearms were banned by name, noting that “[t]o require litigants seeking resolution of a dispute that is appropriate for adjudication in federal court to violate the law and subject themselves to criminal prosecution before their challenges may be heard would create incentives that are perverse from the perspective of law enforcement, unfair to the litigants, and totally unrelated to the constitutional or prudential concerns underlying the doctrine of justiciability.”³⁴ But it went on to hold that those manufacturers whose firearms were generically banned due to their characteristics lacked standing. “In such circumstances we cannot say that a genuine threat of

³¹ *Peoples Rights Organization Inc. v. City of Columbus*, 152 F.3d 522 (6th Cir. 1998)

³² *National Automatic Laundry v. George P. Shultz*, 443 F.2d 689, 695 (DC Cir. 1971).

³³ 103 F.3d 994 (D.C. Cir. 1997).

³⁴ *Id.* at 998.

enforcement has given rise to the requisite ‘injury in fact’ and thus given these parties standing.”³⁵ The court argued that the risk of enforcement was lesser, or less apparent, for the latter manufacturers; it did not explain why that risk fell below the level of “harm in fact,” nor why its analysis of the underpinnings of justiciability did not apply with equal force to them.

Navegar was followed by *Seegers v. Ashcroft*,³⁶ a challenge to the District of Columbia ban on handguns. The D.C. Circuit found that plaintiffs lacked standing: “plaintiffs allege no prior threats against them or any characteristics indicating an especially high probability of enforcement against them.”

Perhaps self-consciously, the court noted that “...we faithfully apply the analysis articulated by *Navegar*. We do so not because it represents our “law of firearms’.”³⁷ Yet the next sentence made it clear that that self-critical reference was quite on point. “We do so because it represents the only circuit case dealing with a non-First Amendment pre-enforcement challenge to a criminal statute that has not reached the court through agency proceedings....”³⁸

The substantive protections of the Bill of Rights essentially fall into three categories: (1) First Amendment rights; (2) Second Amendment rights; and (3) the penumbral right to privacy. This being the D.C. Circuit, all assertions of the third category have arisen in the context of a challenge to agency rulemaking. The D.C. Circuit’s standard thus applies a properly liberal standard to categories (1) and (3), and a much tighter, *Poe*-type standard³⁹ to (2); it is *very much* a Circuit “law of firearms,” applicable to a Second Amendment challenge and to nothing else.

Then came *Parker v. District of Columbia*,⁴⁰ another challenge to the city’s handgun ban. The *Parker* panel acknowledged that *Seegers* was in tension with the higher Court’s standards, but proclaimed itself unable to reconcile the two without rehearing *en banc*. But it then distinguished *Seegers* on the ground that one of the *Parker* plaintiffs had applied for, and been denied (since under the D.C. law,

³⁵ *Id.* at 999.

³⁶ 396 F.3d 1248 (D.C. Cir.), *cert. denied* 126 S. Ct. 1187 (2005).

³⁷ *Id.* at 1254.

³⁸ 396 F.3d 1248 (D.C. Cir. 2005).

³⁹ Indeed, the standard appears tighter than that of *Poe*, requiring proof that the government may apply a special priority to prosecuting plaintiffs. One might say an average level of “credible fear” is insufficient. The entire concept runs *contra* to the Supreme Court’s recognition that harm is widely shared is still “harm in fact.” See *United States v. SCRAP*, 412 U.S. at 688.

⁴⁰ 478 F.3d 370 (D.C. Cir. 2007).

issuance was impossible), registration of a handgun.⁴¹ Plaintiffs thus, paradoxically, had no standing to challenge a law forbidding an action, but had standing to object to the government's not issuing a permit to undertake the forbidden conduct.⁴² Equity may not require a futile act, but the law apparently does.

The solution did have, it must be acknowledged, a certain administrative elegance. But one might have hoped that the Circuit would go farther and abandon its "law of firearms!" As it is, a plaintiff in the D.C. Circuit shows "harm in fact" if he is emotionally disturbed by the sight of a lonely zoo animal,⁴³ but has no "harm in fact" if he is fearful of the choice between risking arrest and going unarmed in a high crime area.

Conclusion

The Supreme Court has made it clear that plaintiffs have broad rights to challenge criminal statutes directed at conduct that is arguably protected by the Constitution. Yet three circuits have applied, in varying degrees, especially strict and archaic tests for standing – but only if to constitutional challenges that, we may suspect, they disfavor. In that context, *Poe* survives in exceptional vigor, whereas in all others its holding is limited to its narrow facts – a statute in place for decades, and widely flouted without a hint of enforcement.

We may at least take hope in the fact that later panels in two of the circuits found interesting, if not always fully logical, ways to work around their earlier rulings, and bring them into closer accord with Supreme Court teachings.

⁴¹ *Id.* at 375. *Parker* also rejected *Seegars*' seeming differentiation between standing principles applicable to First and to Second Amendment challenges. *Id.* at 375 n. 1.

⁴² And, by the same token, a plaintiff can challenge a law that allows conduct if he obtains a permit, but not a law that forbids the conduct absolutely, despite the fact that the latter law is more restrictive.

⁴³ *Animal Legal Defense Fund Inc. v. Glickman*, 154 F.3d 426 (D.C. Cir. 1998). Plaintiff's "harm in fact" consisted of seeing primates in cages by themselves, one in a cage with only one swing, and some in cages near bears which he felt "made the monkeys frightened and extremely agitated." The distress he experienced at the sight did not prevent him from visiting the zoo nine times.