the FEDERALIST

The Supreme Court Was Right: Texas Didn't Have Standing

Thomas Berry

December 15, 2020

On Friday, the Supreme Court denied Texas's motion for leave to file a bill of complaint challenging the presidential election results in four states. The court's order explained that leave to file was denied "for lack of standing under Article III of the Constitution" because Texas had not "demonstrated a judicially cognizable interest in the manner in which another State conducts its elections."

This was the right result for the right reason, and originalists should support it. Standing doctrine is not just a technicality or an excuse to punt difficult cases—it's at the core of the judiciary's defined and limited role.

Constitutional Limits on Courts Are Important

Article III of the Constitution limits the "judicial Power" to only "Cases" and "Controversies." Very early in the nation's history, the Supreme Court affirmed that the original understanding of these terms was limited to disputes *between* parties, not disputes *about* the law.

In 1793, the Washington administration confronted several legal questions related to the enforcement of foreign treaties. Secretary of State Thomas Jefferson wrote a letter to the justices of the Supreme Court asking for their opinion on those questions.

The justices wrote back to President Washington declining to answer any of the questions, explaining that both the "Lines of Separation drawn by the Constitution between the three Departments of Government" and the Supreme Court as "a court in the last Resort" were "Considerations which afford strong arguments against the Propriety of our extrajudicially deciding the questions alluded to."

The key word in that explanation was "extrajudicially." Because the questions did not arise from a concrete dispute between two particular parties for the court to settle, providing an advisory opinion would have impermissibly crossed the boundary limiting the judicial branch to only cases and controversies. As the Supreme Court put it in the landmark case *Marbury v. Madison (1803)*: "The province of the Court is solely to decide on the rights of individuals, not to inquire how the Executive or Executive officers perform duties in which they have a discretion."

Letting Anybody Bring Suit Would Not Go Well

The response may well come: "But Texas was not asking for an advisory opinion; this case was a dispute between two parties. After all, it's right in the name of the case: *Texas v. Pennsylvania*."

There were indeed parties on both sides of the "v." And there's no doubt that Texas was pressing its views vigorously, to provide the court arguments on both sides of the legal dispute.

But the Supreme Court has rightly held many times that the "case or controversy" requirement demands more than just a party who believes the law has been violated and is willing to press that argument in court. As the Supreme Court put it in *Hollingsworth v. Perry (2013)*, "it is not enough that the party invoking the power of the court have a keen interest in the issue."

Why has the court imposed this limitation? Because if a keen interest were all that is necessary, the courts would soon turn into courts of *de facto* advisory opinions. As then-D.C. Circuit Judge Antonin Scalia explained in a 1983 essay, expanding standing doctrine to allow anyone to sue if he believes the law is being violated would give courts the "ability to address both new and old issues promptly at the behest of almost anyone who has an interest in the outcome."

We would not be far off, at that point, from the advisory opinions that the Supreme Court disclaimed in 1793. Anyone would be able to put an abstract legal question before the courts, even if he had no special and particular interest in the outcome.

Limiting the judicial branch to cases between parties would at that point be little more than a legal fiction. In practice, the courts would have unlimited authority to pass on every legal question just as if they had the power to issue extrajudicial opinions.

Texas's Theory of Harm Was Pretty Hypothetical

Still, Texas didn't necessarily dispute any part of this history and theory. Texas argued it had an interest in resolving the underlying election-law questions that *was* concrete and particularized and *did* go beyond a general interest in the law being followed correctly.

Noting that each state is guaranteed the right to equal suffrage in the Senate, Texas argued that "the States have a distinct interest in who is elected *Vice President* and thus who can cast the tiebreaking vote in the Senate. Through that interest, States suffer an Article III injury when another State violates federal law to affect the outcome of a presidential election." As Texas's theory goes, the wrongful election of a vice president means Texas's senators might in the future find themselves on the losing side of a 51-50 Senate vote when they should have been on the winning side.

Multiple factors all point to this argument as a clear loser under the Supreme Court's longstanding application of standing doctrine: the number of steps required to reach a point at which Texas is harmed, the uncertainty of that harm, the large number of viable plaintiffs this theory would create, and the large number of election-related claims this theory would give states standing to bring.

First, the number of steps involved and uncertainty of the hypothetical harm: As Justice Scalia wrote for the Supreme Court in *Lujan v. Defender of Wildlife (1992)*, "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish."

If a plaintiff's theory of individualized harm is based on either future events or a chain reaction, the plaintiff must still show "actual or imminent injury." Once again, without this requirement the number of potential plaintiffs who can show *hypothetical or potential* injury would be vastly expanded, and the limitations on judicial review would be largely reduced to a fig leaf.

That's why the Supreme Court held in *Lujan* that it was not enough to establish standing to challenge federal wildlife policy to say that one *might* visit the threatened habitats at issue; such a low bar could no doubt be satisfied by countless potential plaintiffs. Similarly, in *Linda R.S. v. Richard D. (1973)* the court held that a mother did not have standing to challenge the non-prosecution of a father for delinquency in his child support payments, because she could argue only that such prosecution *might* have incentivized the father to make his payments to her.

Anticipating a Possible Harm Isn't Good Enough

Texas's alleged injury was of a similarly hypothetical nature, and its rejection was well in line with the Supreme Court's pre-existing approach to standing. Texas could argue only that vice president-elect Kamala Harris *might* break a 50-50 tie in the Senate in the next four years, and that Texas's senators *might* be on the losing side of that vote. That possibility does not have the "imminence" required to ensure that judicial review is limited only to those with a *particularized* injury.

It's a far cry from perhaps the closest analogous case, *Coleman v. Miller (1939)*, which found that members of a state legislative body had standing to challenge the procedures by which a *particular* vote was taken. As the Supreme Court later explained, *Coleman* stands "at most . . . for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified."

Without a specific tie vote in the Senate to challenge, Texas's case falls far short of that level of alleged specific injury.

You Don't Want This Precedent, Trust Me

Similarly, the scope of Texas's theory is another indicator that it is the type of standing argument the Supreme Court has repeatedly rejected. While the Supreme Court has recognized that in some instances "concrete injury has been suffered by many persons, as in mass fraud or mass tort situations," generally the more potential plaintiffs a theory would create, the less plausible it is that the harm is particularized.

Texas's theory would create standing for every state to challenge not just the votes for presidential electors in every other state, but also the elections for senator in every other state (since those also could result in changing the outcome of Senate votes decided by a one-vote margin).

Also, as just noted, it would give states standing to challenge such elections *before* it became clear whether any of the challenged elections would affect the outcome of any future vote in the Senate. While not quite as expansive as the rejected doctrine of standing for every citizen to challenge unconstitutional acts, a new doctrine of "all-50-states standing" for every presidential and Senate election dispute would mean few practical limits on the number of election-law disputes that could be brought before the courts.

It's doubtful whether conservatives would appreciate such a doctrine quite so much if, for example, California brings a future challenge to Florida's felon disenfranchisement rules or New York brings a challenge to Texas's absentee ballot rules.

This Is a Case for Trump, Not Texas

Texas suggested such an outcome would not be out of line with the Supreme Court's standing doctrine because in *Massachusetts v. EPA (2007)*, the court held that states have "special solicitude" on standing analysis. That case held that the state of Massachusetts had standing to challenge federal policies related to global warming on the theory that it faced imminent injury in the erosion of its coasts.

But it's ironic that Texas and conservative supporters of the lawsuit have relied on this 5-4 case, given that Justice Scalia and three current Supreme Court members (Chief Justice John Roberts and Justices Clarence Thomas and Samuel Alito) vigorously dissented from the theory of "special solicitude" for state standing. If just two of the three justices appointed by President Trump are inclined to favor that dissenting opinion, it's likely that the theory of special solicitude could be overruled in a future case. It's certainly highly *unlikely* that the theory will ever be extended into another novel realm of state-led litigation.

It's thus unremarkable and entirely in line with both Supreme Court practice and the original meaning of Article III for the Supreme Court to have held that Texas did not have standing to challenge a presidential election in four other states. Such a holding did not mean that the election-law issues that Texas raised were entirely barred from the courthouse doors. The quintessential example of a party that does have standing in such disputes is the *losing candidate*, and President Trump took advantage of his own undisputed standing to bring such challenges in all four states at issue.

Alito and Thomas Didn't Dissent, Either

This leaves one question that conservatives have raised in the wake of the Supreme Court's terse order. Alito, joined by Thomas, noted that in his view the Supreme Court did not "have discretion to deny the filing of a bill of complaint in a case that falls within our original jurisdiction." Alito stated that he "would therefore grant the motion to file the bill of complaint but would not grant other relief," and he made clear to "express no view on any other issue."

Does this suggest any disagreement from Justices Thomas or Alito with the court's resolution of the case on standing grounds? No. As both Thomas and Alito have noted in prior cases, federal law states that the Supreme Court "shall have original and exclusive jurisdiction of all controversies between two or more States" 28 U.S.C. §1251(a).

As a textual matter, the use of "shall have" suggests *mandatory*, rather than discretionary, jurisdiction. And this textual interpretation is bolstered by the structure of federal law, which bars lawsuits between two states from being filed anywhere *but* the Supreme Court. For those two reasons, Justices Thomas and Alito plausibly believe that denying leave to file should not be an option in a suit between two states.

If They Took the Case, Texas Still Didn't Have Standing

But the Supreme Court's order, although not endorsing the view of Justices Thomas and Alito, does go further toward their approach than it has in the past. In both of the prior cases in which Thomas and Alito have dissented from denial of leave to file, the court's denial consisted of a single sentence: "The motion for leave to file a bill of complaint is denied."

In other words, a majority of the court believes *no* legal explanation is necessary to deny leave to file. Here, by contrast, the court included a legal *reason* for denying leave to file: Texas would have lost on standing grounds even if the filing had been accepted.

It may not be procedurally what Justices Thomas and Alito believe is legally necessary, but the outcome is, in practical effect, no different from what would have happened if the court had accepted the filing and then dismissed the case on standing grounds. Also, nothing in the statement of Justices Alito and Thomas suggests that, had that procedure been followed, they would have disagreed with the eventual outcome.

Ultimately, those disappointed in the outcome of this election and in the outcome of the Texas suit specifically should not lose sight of the structural constitutional values that will last far beyond any one lawsuit and any one election. Federal courts' limitation to cases and controversies is an important safeguard limiting the judiciary from becoming an even more powerful and uncabined branch than it already is. That's a limitation that, in the long run, conservatives, libertarians, and originalists should be grateful for.

Thomas A. Berry is a research fellow at the Cato Institute's Robert A. Levy Center for Constitutional Studies and managing editor of the Cato Supreme Court Review.