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Fighting for the Rights of Others: The Troubled Law of Third-Party Standing and Mootness in the Federal Courts

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Fighting for the Rights of Others: The Troubled Law of Third-Party Standing and Mootness in the Federal Courts

BY
MARC ROHR*

The author examines the development and current status of third-party standing in the federal courts, with special attention to its justification in light of the Supreme Court's decisions on mootness in class actions. Professor Rohr suggests that for the sake of clarity, economy, and consistency of approach, federal courts should grant third-party standing to any litigant who appears reasonably likely to give adequate representation to the interests of the third parties whose rights the litigant wishes to assert.

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I. INTRODUCTION

The Supreme Court, during the last eighty years, has stated consistently that a party to civil or criminal litigation has standing to raise only his own rights before a federal court in challenging allegedly illegal governmental action.¹ According to this general rule, a litigant may not argue that the governmental conduct that causes him harm should be enjoined or declared illegal simply because the conduct infringes on the rights of a third party. The Supreme Court has stated that the "case or controversy" clause of article III does not prohibit "third-party standing" (as I shall call it); that clause requires only that the litigant possess a "personal stake" in the outcome of the litigation—that he suffer "injury in fact," presently or imminently, from the conduct he challenges.² The third-party standing rule is clearly not of constitutional magnitude, but rather is a judicially self-imposed "prudential" limitation on the jurisdiction of the federal courts, including the Supreme Court.³

Federal courts have not applied this rule uniformly. In the last ten years, the Supreme Court has allowed third-party standing in at least seven of thirteen decisions in which it squarely faced the issue.⁴ By now it is well understood that there exist "exceptions"

1. *E.g.*, *Gladstone v. Village of Bellwood*, 441 U.S. 91, 100 (1979); *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 81 (1978); *Williams v. Eggleston*, 170 U.S. 304, 309 (1898).

2. *Singleton v. Wulff*, 428 U.S. 106, 112, 123 (1976); *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975).

3. *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Barrows v. Jackson*, 346 U.S. 249, 255 (1953).

4. The Court permitted third-party standing in: *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Craig v. Boren*, 429 U.S. 190 (1976); *Singleton v. Wulff*, 428 U.S. 106 (1976); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Runyon v. McCrary*, 427 U.S. 160 (1976); *Weinberger v. Weisenfeld*, 420 U.S. 636 (1975); *Eisenstadt v. Baird*, 405 U.S. 438

to the general rule.⁵ The question is whether the rule and its exceptions, taken together as a body of legal doctrine, makes sense. The problem is not primarily one of bad results, but of confused and confusing theory—which, of course, carries the serious potential for bad results in future cases.

With one notable exception,⁶ the Supreme Court did not use the rule against third-party standing in cases arising during the past decade to restrict access to the federal courts.⁷ Courts could use the rule for such purposes, however, unless it is properly redefined. The Supreme Court applied the rule for many years and in many cases, before attempting to fully explain it in *Singleton v. Wulff*.⁸ Because of the ad hoc development of exceptions to the rule in earlier cases,⁹ however, any attempt to harmonize those cases was bound to fail. The rule sweeps too broadly, and the stated exceptions seem to be mere rationalizations for past departures from an overbroad rule. The rule against third-party standing should be narrowly restated, particularly in light of the recent developments in the related area of mootness in class actions.¹⁰ Given the present exceptions to the rule, the resulting gain in theoretical harmony and correctness of results will probably not be offset by any significant increase in the caseloads of the federal courts. Moreover, eliminating the requirement of surmounting an unnecessary obstacle will better serve judicial economy.

(1972). The Court denied third-party standing in: *Gilmore v. Utah*, 429 U.S. 1012 (1976) (Stevens, J., concurring) (“Gilmore was competent to waive his right to appeal,” and as his access to the courts was unimpeded, “a third party has no standing to litigate an Eighth Amendment claim . . . on his behalf.” *Id.* at 1017); *Warth v. Seldin*, 422 U.S. 490 (1975); *Mercer v. Michigan St. Bd. of Educ.*, 419 U.S. 1081, *aff'g* 379 F. Supp. 580 (E.D. Mich. 1974); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972); *United States v. Reidel*, 402 U.S. 351 (1971).

The Court may also have implicitly permitted third-party standing in *Maness v. Meyers*, 419 U.S. 449 (1975), and *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

5. See *Singleton v. Wulff*, 428 U.S. 106 (1976); *Craig v. Boren*, 429 U.S. 190 (1976). See also notes 84-127 and accompanying text *infra*.

6. *Warth v. Seldin*, 422 U.S. 490 (1975).

7. Several commentators have criticized the restrictive standing decisions of the Supreme Court in the mid-1970's. See, e.g., Davis, *Standing*, 1976, 72 NW. L. REV. 69 (1977); Roberts, *Fact Pleading, Notice Pleading, and Standing*, 65 CORNELL L. REV. 390 (1980); Sedler, *Standing and the Burger Court: An Analysis and Some Proposals for Legislative Reform*, 30 RUTGERS L. REV. 863 (1977); Tushnet, *The New Law of Standing*, 62 CORNELL L. REV. 663 (1977); Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698 (1980). See also Varet, *Variable Justiciability and the Duke Power Case*, 58 TEX. L. REV. 273 (1980).

8. 428 U.S. 106 (1976).

9. See text accompanying notes 53-82 *infra*.

10. See text accompanying notes 221-70 *infra*.

This article sets forth the present federal law of third-party standing, critically examines the stated rationales for the rule and its exceptions, and argues for a restatement of the rule based upon pragmatic concerns and the need for clarity and consistency in the law.

II. THE LAW OF THIRD-PARTY STANDING IN THE SUPREME COURT

Before the re-emergence of the rule in constitutional litigation of the 1970's, the Supreme Court repeatedly invoked the rule against third-party standing during the first quarter of this century, often in response to constitutional challenges to state and federal laws regulating some aspect of economic life.¹¹

A. *The Development of the Third-Party Standing Doctrine*

1. THE HYPOTHETICAL VICTIM

*Heald v. District of Columbia*¹² illustrates well how the Court originally conceived of and applied the rule. A resident of the District of Columbia filed suit, seeking a refund of property taxes paid to the District. He argued that the Court should hold void the statute imposing the tax because it applied to persons engaged in business in the District, even if the property was not located within the District, thus exceeding the power of Congress to make laws pertaining to the District. The District responded "that such is not the correct construction of the act, that it has not in fact been so construed or applied by the taxing officials"¹³ The Supreme Court held that the plaintiff could not raise this objection, "even if otherwise well founded," because his property was located within the District and he resided therein. Mr. Justice Brandeis wrote:

It has been repeatedly held that one who would strike down a state statute as violative of the Federal Constitution must show that he is within the class of persons with respect to whom the act is unconstitutional and that the alleged unconstitutional feature injures him. In no case has it been held that a different rule

11. See, e.g., *Jeffrey Mfg. Co. v. Blagg*, 235 U.S. 571, 576 (1915); *Erie R. R. v. Williams*, 233 U.S. 685, 705 (1914); *Missouri, Kan. & Tex. Ry. v. Cade*, 233 U.S. 642, 648 (1914); *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531, 544 (1914); *Farmers Mechanics & Sav. Bank v. Minnesota*, 232 U.S. 516, 530 (1914); *Darnell v. Indiana*, 226 U.S. 390, 398 (1912); *Yazoo & Miss. Valley R.R. v. Jackson Vinegar Co.*, 226 U.S. 217 (1912); *Lee v. New Jersey*, 207 U.S. 67 (1907); *Hooker v. Burr*, 194 U.S. 415 (1904); *Lampasas v. Bell*, 180 U.S. 276 (1901); *Tyler v. Judges of the Ct. of Regis.*, 179 U.S. 405 (1900).

12. 259 U.S. 114 (1922).

13. *Id.* at 123.

applies where the statute assailed is an act of Congress; nor has any good reason been suggested why it should be so held.¹⁴

The Supreme Court applied this general rule in similar situations,¹⁵ in which a litigant conceded the constitutionality of the statute as applied to him, but contended that the statute applied unconstitutionally to at least one other category of persons within the purview of the statute; therefore, he argued, the court must find the statute unconstitutional and void as to all persons. Generally, courts rejected the argument, but rarely in terms of "standing" or in reference to article III, and rarely with as much explanation as Mr. Justice Brandeis gave in the *Heald* decision. The plaintiff in *Heald* did have article III standing, because the tax injured him; but he lacked a particular kind of standing—namely, standing to raise the third-party argument.

Before *Heald*, the most extensive explanation appeared in *New York ex rel. Hatch v. Reardon*,¹⁶ in which the Court rejected a constitutional challenge to a state tax statute based on the claim that the tax burdened interstate commerce. The party making the challenge had been convicted for nonpayment of a tax relating to a transaction unrelated to interstate commerce. The Court did not allow the litigant to raise this argument, stating that it would "not go into imaginary cases."¹⁷ "If the law is valid when confined to the class of the party before the court," the opinion continued, "it may be more or less of a speculation to inquire what exceptions the state court may read into general words, or how far it may sustain an act that partially fails."¹⁸ The Court restated this rationale in 1953 in *Barrows v. Jackson*,¹⁹ a case in which the rule against third-party standing was not applied.

One reason for this ruling is that the state court, when actually faced with the question, might narrowly construe the statute to obliterate the objectionable feature, or it might declare the unconstitutional provisions separable. . . . It would indeed be un-

14. *Id.*

15. *E.g.*, *United States v. Wurzbach*, 280 U.S. 396 (1930); *Aikins v. Kingsbury*, 247 U.S. 484 (1918); *Missouri, Kan. & Tex. Ry. v. Cade*, 233 U.S. 642, 648 (1914); *Darnell v. Indiana*, 226 U.S. 390, 398 (1912); *Yazoo & Miss. Valley R.R. v. Jackson Vinegar Co.*, 226 U.S. 217 (1912); *Standard Stock Food Co. v. Wright*, 225 U.S. 540, 550 (1912); *Williams v. Walsh*, 222 U.S. 415, 423 (1912); *Lee v. New Jersey*, 207 U.S. 67 (1907); *Smiley v. Kansas*, 196 U.S. 447, 457 (1905).

16. 204 U.S. 152 (1907).

17. *Id.* at 160.

18. *Id.* at 161.

19. 346 U.S. 249 (1953).

desirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation.²⁰

The Court applied the rule again in 1960, in *United States v. Raines*,²¹ in which the United States had sued Georgia county officials for equitable relief under the Civil Rights Act of 1957. The defendants challenged the Act on the ground that its terms did not limit its application to official (as opposed to purely private) action, and that it therefore exceeded Congress's power under the fifteenth amendment. The Court held that the defendants could not raise this objection, because their argument pertained to persons (private individuals) outside the defendants' classification.

The Court ruled correctly in *Heald* and *Raines*, basing its decisions on the reasoning expressed in *Hatch* and *Barrows*. Although the litigants had every incentive to litigate, they raised purely hypothetical applications of a statute to purely hypothetical "victims" of its alleged unconstitutionality. If a court can limit the statute by construction, the statute cannot be applied in the unconstitutional fashion suggested by the litigant. Even if the litigant challenges a federal statute, good reason may exist for the court to defer the task of construction, awaiting a more concrete factual setting.²² Although a federal court could simply state in advance that a particular statute must be construed in a certain way to be constitutional, to begin such a task probably would involve the courts in anticipating "every conceivable situation" that might arise.²³ Deferring such a decision would cause no great loss, especially because state courts, in a great many cases, will construe statutes to avoid unconstitutional applications.

It is in this "hypothetical victim" situation that the third-party standing rule has its purest and most desirable application.²⁴

20. *Id.* at 256.

21. 362 U.S. 17 (1960).

22. *E.g.*, *Heald v. District of Columbia*, 259 U.S. 114 (1922).

23. *Barrows v. Jackson*, 346 U.S. at 256.

24. *See H.L. v. Matheson*, 101 S. Ct. 1164 (1981); *County Ct. v. Allen*, 442 U.S. 140, 155 (1979).

The Supreme Court has long applied a salutary exception to the general rule governing statutory overbreadth (or "hypothetical victim") cases where the plaintiff claims the challenged statute infringes upon constitutionally protected freedom of speech. *E.g.*, *Lewis v. City of New Orleans*, 415 U.S. 130 (1974); *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965); *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940). The litigant raising such a challenge need not show that his own conduct is constitutionally protected. Mr. Justice Blackmun has stated concisely:

The reason for the special rule in First Amendment cases is apparent: An over-

But the early cases in which the Court applied the rule did not involve only hypothetical victims. With no additional explanation, the Court gave the same treatment to cases in which a category of third persons clearly existed and clearly had suffered injury as a result of the allegedly unconstitutional statute. In *Engel v. O'Malley*,²⁵ for example, the Court denied a plaintiff standing to challenge a state licensing statute on the ground that it imposed an allegedly unconstitutional residency requirement; the plaintiff satisfied this requirement, yet surely persons existed who did not satisfy the requirement.²⁶ In *Farmers Mechanics Savings Bank v. Minnesota*,²⁷ the Court held that a savings bank, as a defendant in a civil case brought under a statute, could not raise an equal pro-

broad statute might serve to chill protected speech. First Amendment interests are fragile interests, and a person who contemplates protected activity might be discouraged by the in terrorem effect of the statute. . . . The use of overbreadth analysis reflects the conclusion that the possible harm to society from allowing unprotected speech to go unpunished is outweighed by the possibility that protected speech will be muted.

Bates v. State Bar of Ariz., 433 U.S. 350, 380 (1977).

Courts applied this exception in a relatively simple manner until the Supreme Court decided *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). Mr. Justice White, writing for a bare majority of the Court, referred to the exception as "strong medicine," *id.* at 613, and stated that "particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 615. The Court held that, where plaintiffs conceded the constitutionality of the Oklahoma law governing political activities by state employees as applied to them, they lacked standing to challenge the statute as facially invalid. See also *Young v. American Mini Theatres*, 427 U.S. 50, 59 (1976); *Arnett v. Kennedy*, 416 U.S. 134, 162 (1974); see generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 12-24 to 27, at 710-18 (1978); Note, *First Amendment Vagueness and Overbreadth: Theoretical Revisions by the Burger Court*, 31 VAND. L. REV. 609 (1978). The Court has also declined to apply its exceptional first amendment overbreadth doctrine to professional advertising, viewing such commercial speech as unlikely to be easily deterred by overbroad regulation. *Bates v. State Bar of Ariz.*, 433 U.S. at 380 (1977).

One should not confuse overbreadth with vagueness, although a given statute often suffers from both vices. A court will hold a statute unconstitutionally vague if the statute fails to give fair notice of its meaning. For standing purposes, no exception to the general rule exists for a vagueness challenge even when the allegedly vague statute deals with speech. If the court finds the statute not vague as to the litigant (meaning that the statute gives fair notice of its application to *his* conduct even though it may be uncertain as to other applications), the court will not permit him to argue that the statute is vague as to others. *Parker v. Levy*, 417 U.S. 733, 756 (1974); *United States v. Wurzbach*, 280 U.S. 396, 399 (1930). See generally, L. TRIBE, *supra*, §§ 12-28 and 29, at 718-21; see also *Ward v. Illinois*, 431 U.S. 767, 773 (1977). Although this unexceptional treatment of standing to raise vagueness challenges in speech cases has received criticism as insufficiently sensitive to first amendment concerns, see Note, *supra*, at 636, it coincides with the general approach in "hypothetical victim" cases.

25. 219 U.S. 128 (1911).

26. *Id.* at 135.

27. 232 U.S. 516 (1914).

tection challenge to the validity of the statute's application to other kinds of banks that, along with the defendant, clearly fell within a certain classification under the statute.²⁸ In *Sprout v. City of South Bend*,²⁹ the Court found that a criminal defendant, required to carry liability insurance with an insurer authorized to do business in Indiana, could not claim that the state law discriminated improperly against other insurance companies.³⁰ In several decisions the Court determined that a litigant could not challenge a statute on the ground that it was under-inclusive in the protection it afforded to its beneficiaries, in violation of the equal protection clause of the fourteenth amendment.³¹ Again, there was no question that discriminatees existed. A later case, *Tileston v. Ullman*,³² fits into this "real-victim" category; a physician sought a declaratory judgment, asserting the unconstitutionality of a state statute that prohibited the giving of assistance in the use of contraceptives. The statute allegedly deprived three of the plaintiff's patients of their rights under the fourteenth amendment due process clause. The Court held that the plaintiff physician lacked standing to press this claim, because he did not belong to the class of persons who had suffered injury.³³

If these cases are correct, it is not because the litigants raised speculative controversies about purely hypothetical victims. What other reasons, then, support the application of the general rule in these cases?

2. CAUSALITY AND SEVERABILITY

In at least a few cases, one can justify the Supreme Court's invocation of the general rule by the application of other, more

28. *Id.* at 530.

29. 277 U.S. 163 (1928).

30. *Id.* at 167.

31. *Jeffrey Mfg. Co. v. Blagg*, 235 U.S. 571, 576 (1915) (employer challenging statute on grounds of discrimination against employees, held not covered by statute); *Erie R.R. v. Williams*, 233 U.S. 685, 705 (1914) (same); *Rosenthal v. New York*, 226 U.S. 260, 270 (1912) (criminal defendant convicted of receiving stolen goods challenging limitation on classes of victims, held protected by statute). A litigant raising such an equal protection claim has little chance of success. *See, e.g., Railway Express Agency v. New York*, 336 U.S. 106 (1949).

32. 318 U.S. 44 (1943).

33. *See also* *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), in which a black plaintiff had standing to challenge the racially discriminatory guest practices of a club, but not its membership policy; the club had denied him entrance as a guest, but he had not applied for membership. One cannot say with certainty that any black person had ever applied for membership in the club, but at the same time one can hardly characterize the dispute over the membership policy as hypothetical, in light of the reality of the guest policy.

fundamental principles. The Court in *Warth v. Seldin*³⁴ and *Simon v. Eastern Kentucky Welfare Rights Organization*³⁵ held that a plaintiff lacks standing when no causal relationship exists between the challenged governmental action and the plaintiff's injury. Thus, courts will not confer standing if a victory for the plaintiff will not likely provide him relief. One must look at the facts of each case and ask: If the court grants the relief requested, will this prevent or redress plaintiff's injury? Will this put him in a better position, vis-à-vis the defendant, than he is in at present? An affirmative answer supports a grant of standing. This makes sense as an aspect of the "personal stake" requirement, because it presumes that proper advocacy and concreteness depend on the plaintiff's having something tangible to gain from the suit.

When a plaintiff successfully challenges the validity of one section of a statute, but not of all the sections, the *entire* statute does not necessarily fall. The valid or unchallenged sections may stand, if the legislature that enacted the statute intended the remaining valid sections to stand despite invalidation of some sections by the court.³⁶ When a court finds that the legislature intended this principle to apply, the statute is "severable." If the court finds that the legislature had a contrary intent, the statute is nonseverable, and a successful challenge to any section will render the entire statute void. A similar analysis applies to multiple *applications* of a particular section of a statute. If a plaintiff successfully challenges a particular application, the court may deem the statute void in its entirety, or may deem it invalid, and therefore inapplicable, only as applied in a particular context.³⁷

This explains, in part, why constitutional challenges to statutory overbreadth on behalf of "hypothetical victims" should not and do not cause concern for courts. If the presently hypothetical victim should become, in the future, a real victim of the statute,

34. 422 U.S. 490 (1975).

35. 426 U.S. 26 (1976).

36. *Buckley v. Valeo*, 424 U.S. 1, 108 (1976); *United States v. Jackson*, 390 U.S. 570, 585 (1968). The Court, in both of these cases, quoted the following language from *Champlin Refining Co. v. Corporation Comm.*, 286 U.S. 210 (1932):

The unconstitutionality of a part of an Act does not necessarily defeat . . . the validity of its remaining provisions. Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

Id. at 234.

37. *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973); *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 375 n.3 (1971).

and a successful challenger thereto, the court probably will deem severable the statutory provision in question and avoid having to render all of its applications invalid. Combining these two principles, a plaintiff's challenge to a single provision of a severable statute must fail when that particular section did not cause the injury to the plaintiff; it must fail because the remainder of the statute, and thus his injury, will survive his legal challenge even if he succeeds in the suit. The plaintiff thus lacks standing under well-established principles, and the court need not invoke the rule against third-party standing.

Such cases have come before the Supreme Court, but rarely, if ever, has the Court expressly based its decision on severability and causation principles.³⁸ Rather, it has either spoken ambiguously or invoked the rule against third-party standing. *Engel v. O'Malley*³⁹ is an example. The plaintiff, who engaged in the business of receiving deposits of money for safekeeping or transmission to others, challenged a state law that forbade him from engaging in such activity without a license. He could not obtain a license because he could not afford to comply with the statutory requirements that he deposit ten thousand dollars and post a bond with the regulatory agency. The plaintiff claimed that the five-year residency requirement imposed by the state violated the fourteenth amendment; however, this requirement formed no apparent obstacle for him. "As the plaintiff alleges that he satisfies this requirement," wrote Mr. Justice Holmes, "he has nothing to complain of."⁴⁰ The Court should have denied standing to complain about this residency requirement, not because he raised the rights of others, but because the Court could have held the statute severable; the deposit and bond requirements of the statute would have continued to bar him even if his argument prevailed.⁴¹

38. *Board of Trade v. Olsen*, 262 U.S. 1, 42 (1923), represents one of those rare occasions; the statute contained a severability clause.

39. 219 U.S. 128 (1911).

40. *Id.* at 135.

41. See also *Williams v. Eggleston*, 170 U.S. 304 (1898). Pursuant to authority conferred by an 1893 Connecticut statute, a state board entered into a contract with the Berlin Iron Bridge Company for the construction of a certain bridge. Two years later, the legislature enacted a new statute repealing the 1893 statute, apparently terminating the contract with Berlin, and directing that five towns bear the cost of certain highway improvements. One of the towns, Glastonbury, challenged assessments made against it under the 1895 act, contending, *inter alia*, that the 1893 act improperly impaired the obligation of the state's contract with Berlin. Berlin, meanwhile, had been compensated to its satisfaction for the breach. The Court rejected the challenges stating: "The parties to a contract are the ones to complain of a breach, and if they are satisfied . . . , a third party has no right to insist that it

A variation on the theme occurs when the plaintiff, a party properly classified and regulated under a statute, argues that a similarly regulated class, to which the plaintiff does not belong, comprises the collective victims of improper discrimination under the fourteenth amendment's equal protection clause resulting from their inclusion in the statutory scheme. If the court finds the statute nonseverable, it should allow the challenge by the plaintiff, for the entire statute will fall if he succeeds, providing redress for the plaintiff. If the court finds the statute severable, however, plaintiff can succeed only in helping the class of third parties escape from the coverage of the statute, accomplishing nothing for himself; the court will properly deny standing.⁴²

The Supreme Court has allowed standing in the few cases in which a court has held nonseverable a federal statute⁴³ or regulation,⁴⁴ or state law.⁴⁵ Mr. Justice Brennan, writing for the Court in

has been broken." *Id.* at 309. Later, however, the Court noted that Glastonbury's injury, although resulting from the 1895 statute, did not result from that section of the statute abrogating the contract with Berlin. "It is not the breach of any contract, but an independent act of the legislature which casts the burden on the town of Glastonbury." *Id.* This is the real reason why the town's standing should have been rejected.

See generally *Burch v. Louisiana*, 441 U.S. 130, 132 n.4 (1979); *Ashcroft v. Freiman*, 440 U.S. 942 (1979), *aff'g* 584 F.2d 247 (8th Cir. 1978). State law governs the question of severability of a state statute, although a federal court may look to that state law in resolving such a question. See, e.g., *Moore v. Fowinkle*, 512 F.2d 629 (6th Cir. 1975). See also *Bell v. Hongisto*, 501 F.2d 346, 355 (9th Cir. 1974), *cert. denied*, 420 U.S. 962 (1975). It is generally true, however, that courts presently have no occasion to determine questions of severability in advance of determining questions of constitutionality, whereas my suggested approach would require them to do so. But the federal "test" of severability, see note 36, *supra*, approaches a presumption of severability, and one could fairly apply a similar presumption to state statutes; such a presumption, if unrebutted, would result in a denial of third-party standing.

42. See, e.g., *Morf v. Bingaman*, 298 U.S. 407, 413 (1936); *Farmers & Mechanics Sav. Bank v. Minnesota*, 232 U.S. 516, 530 (1914).

Orr v. Orr, 440 U.S. 268 (1979), suggests no contrary principles. That case involved a challenge to the constitutionality of Alabama alimony statutes which provided that husbands, but not wives, may be required to pay alimony upon divorce. Because the plaintiff husband apparently claimed no entitlement to alimony, the possibility existed that his challenge, if successful, would lead the state to amend the statute, and thus eliminate the discrimination, with no resulting gain for him. The Court held that he had standing, however, because the state might, in the alternative, repeal the entire statute in response to a victory for the plaintiff. *Id.* at 272. This case, then, did *not* involve a plaintiff who could not possibly gain by attacking a statutory classification. *Accord*, *Craig v. Boren*, 429 U.S. 190, 210 n.24 (1976).

43. E.g., *The Employers' Liability Cases*, 207 U.S. 463, 501 (1908). See also *Butts v. Merchants & Miners Trans. Co.*, 230 U.S. 126 (1913).

44. E.g., *Illinois Cent. R.R. v. McKendree*, 303 U.S. 514, 529 (1906).

45. E.g., *Dorchy v. Kansas*, 264 U.S. 286 (1924); *Mountain Timber Co. v. Washington*, 243 U.S. 219, 234 (1917); *New York Cent. R.R. v. White*, 243 U.S. 188, 197 (1917).

United States v. Raines,⁴⁶ described such a case as “that rarest of cases where this court can justifiably think itself able confidently to discern that Congress would not have desired its legislation to stand at all unless it could validly stand in its every application.”⁴⁷ In such a case the plaintiff, whom the statute could validly regulate, may challenge the constitutionality of the statute even with respect to third parties whose existence is uncertain. Because the court, having held the statute nonseverable, can strike down the statute in its entirety if it finds *anything* wrong with it, the court properly permits an injured litigant to show that the statute would have an unconstitutional application to a third party.

B. *Modern Justifications for the Third-Party Standing Doctrine*

But one cannot explain every case in which the Court has denied third-party standing on the basis of hypothetical overbreadth, on the one hand, or the severability and causation principles on the other. What other justifications underlie the general rule against third-party standing? Mr. Justice Powell provided one response to this question in 1975, writing for the majority in *Warth v. Seldin*.⁴⁸ After stating the general rule, he wrote:

Without such limitations—closely related to Article III concerns but essentially matters of judicial self-governance—the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.⁴⁹

But how is the question “abstract” when there is a real victim of the allegedly unlawful conduct, and a live controversy involving

46. 362 U.S. 17 (1960).

47. *Id.* at 23 (citing the Employers' Liability Cases, 207 U.S. 463, 501 (1908), and the Trade-Mark Cases, 100 U.S. 82, 97-98 (1879)). Mr. Justice Brennan conceded that cases existed in which the Court had not applied these rules “with perfect consistency,” 362 U.S. at 24 (citing *Illinois Cent. R.R. v. McKendree*, 203 U.S. 514 (1906), and *United States v. Ju Toy*, 198 U.S. 253, 262-63 (1905)). The Court might also have included *Wuchter v. Pizzuti*, 276 U.S. 13 (1928), in which the Court permitted a civil defendant who had been served with process to challenge a state statute which did not explicitly require that the defendant in such a case be personally served. The case falls into the hypothetical victim category, but may be explainable on the basis of nonseverability, although the Court did not address the issue.

48. 422 U.S. 490 (1975).

49. *Id.* at 500.

the injured litigant, even though the litigant may not be the theoretical victim of the unlawfulness? What defines judicial intervention as "unnecessary" in such a case, other than the conclusory reasoning that assumes the general rule? What is the relevance of the allegedly greater competence of other governmental institutions for a litigant who faces undesirable consequences if he cannot successfully challenge unlawful conduct?

In *Singleton v. Wulff*⁵⁰ in 1976, Mr. Justice Blackmun's plurality opinion offered the fullest discussion of, and a pragmatic explanation for, this legal doctrine:

The reasons are two. First, the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not. . . . Second, third parties themselves usually will be the best proponents of their own rights. The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them. The holders of the rights may have a like preference, to the extent they will be bound by the courts' decisions under the doctrine of *stare decisis*.⁵¹

The Court actually offers four rationales:

- (1) The third party may not wish to assert his rights.
- (2) The third party's enjoyment of his rights may remain completely unaffected by what happens to the litigant.
- (3) The court should hear from only the most effective advocate, who generally will be the third party.
- (4) A decision adverse to the litigant who asserts the rights of third parties will constitute unfavorable precedent that may impair the ability of the third party to assert his own rights later.

The first rationale is of questionable significance. Although one may waive a constitutional right, does anyone have a right not to have that right asserted by another? Because the right could surely be raised by another member of the class of third-party rightholders, the suggestion that nobody else should raise it is hardly persuasive.

Similarly, why should it matter that the third party's rights may remain unaffected by the result in the litigant's case? Giving

50. 428 U.S. 106 (1976).

51. *Id.* at 113-14.

importance to that possibility assumes that courts should confer third-party standing only in order to assist the third party. Aside from the hypothetical victim cases and other cases in which the court appropriately denies standing, however, in typical third-party standing cases the third party is a "real victim" of the allegedly unlawful conduct and would benefit (in theory, at least) from a victory for the litigant. The second rationale thus makes sense only if we deem it important that a defeat for the litigant would not necessarily result in a total defeat for the third party.

Significantly, four of the Justices expressed little interest in the third rationale. Mr. Justice Powell, writing for himself and three other Justices in his partially dissenting opinion in *Singleton*, took a different view of the reasoning behind the rule:

I agree with the plurality . . . that a fundamental policy behind the general rule is a salutary desire to avoid unnecessary constitutional adjudication The plurality perceives a second basis for the rule in the courts' need for effective advocacy. While this concern is relevant, it should receive no more emphasis in this context than in the context of Art. III standing requirements. There the need for effective advocacy or a factual sharpening of issues long was the touchstone of discussion.⁵²

In other words, the existence of "injury in fact" to the litigant suffices to insure the likelihood of effective advocacy. In Mr. Justice Powell's mind, then, only the conclusory characterization of third-party standing as typically leading to "unnecessary" adjudication remains as a reason for the rule.

The fourth reason also is unpersuasive; no member of a class of third-party victims could prevent a similarly situated member from bringing an action that would result in the creation of adverse precedent. If the court prevents a non-member of that third-party class from bringing the action, it should do so only because the court perceives him to be a less effective advocate. As Mr. Justice Powell has recognized, however, there is no general reason to reach that conclusion as long as the litigant was "injured in fact."

But what the Court has taken away under the general rule, it has largely given back under the attendant exceptions. Consider now some of the cases in which the Court has permitted third-party standing.

52. *Id.* at 124 n.3.

III. CASES GRANTING THIRD-PARTY STANDING

The famous case of *Pierce v. Society of Sisters*⁵³ implicitly permitted private schools to challenge the constitutionality of a state criminal statute requiring parents to send their children to public schools on the ground that the statute "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."⁵⁴ The Court noted that enforcement of the statute "would seriously impair, perhaps destroy, the profitable features of appellees' business and greatly diminish the value of their property,"⁵⁵ and observed that the plaintiff schools already had begun to lose students and income.⁵⁶ As Mr. Justice Powell noted in *Singleton*,⁵⁷ the *Pierce* Court did not discuss standing explicitly, but the decision represents a realization that the third-party standing rule must be reexamined.

A. *Explicit Grants of Third-Party Standing*

1. EARLY EXCEPTIONS TO THE RULE

The Supreme Court expressly permitted third-party standing in a number of civil rights cases, beginning with *Buchanan v. Warley*⁵⁸ in 1917. Buchanan, a white man, contracted to sell a parcel of real estate located in the City of Louisville to Warley, a black man. Under the circumstances of the case, a city ordinance prohibited a black person from residing on that property, and Warley relied on this ordinance in refusing to go through with the purchase. Buchanan thereupon sued Warley for specific performance, arguing that the court must hold the ordinance unconstitutional because it discriminated against blacks. A member of the "third-party" class thus opposed the litigant who raised the rights of that class (although, in this case, the defendant may have felt obliged to litigate but hoped he would lose in his defense of the ordinance).⁵⁹

The Court raised and quickly disposed of the standing issue; the Court apparently did not view *Buchanan* as a third-party

53. 268 U.S. 510 (1925).

54. *Id.* at 534-35.

55. *Id.* at 531.

56. *Id.* at 532.

57. 428 U.S. at 129 n.6.

58. 245 U.S. 60 (1917).

59. *Id.* at 72.

standing case, because

[t]he right of the plaintiff in error to sell his property was directly involved and necessarily impaired because it was held in effect that he could not sell the lot to a person of color who was willing and ready to acquire the property, and had obligated himself to take it.⁶⁰

It is not clear whether the Court meant that the white seller's own fourteenth amendment rights (the right to convey property free of racial restrictions) were involved, which would imply that this case did not involve third-party standing,⁶¹ or whether the Court simply confused the issue of third-party standing with the article III requirement of "injury in fact."

In 1953, the Court faced the issue of third-party standing in a second civil rights case, *Barrows v. Jackson*.⁶² The litigant, a white property owner, breached a restrictive covenant by selling the property to a black family. The case raised the question whether the seller could raise the constitutional rights of the purchasers in defending herself against a suit for damages brought by some of her co-covenantors. The Supreme Court, speaking for the first time in terms of an exception to the general rule, answered affirmatively. After setting forth the rule and its rationale,⁶³ the Court stated:

This is a salutary rule, the validity of which we reaffirm. But in the instant case, we are faced with a unique situation in which it is the action of the state court which might result in a denial of constitutional rights and in which it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court. Under the peculiar circumstances of this case, we believe the reasons which underlie our rule denying standing to raise another's rights, which is only a rule of practice, are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained.⁶⁴

60. *Id.* at 73.

61. "In the racial restriction cases, it would not be difficult to find a constitutional right of property owners to sell free of state-enforced restrictions based on race." 13 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3531 at 208-09 (1975). See also J. NOWAK, R. ROTUNDA & J. YOUNG, *HANDBOOK ON CONSTITUTIONAL LAW* 80 (1978).

62. 346 U.S. 249 (1953).

63. See text accompanying note 20 *supra*.

64. 346 U.S. at 257. A successful damage action, of course, would have the effect of discouraging the breach of such covenants.

The Court justified its decision by describing the defendant as "the only effective adversary of the unworthy covenant."⁶⁵ The Court stated that the *Pierce* case similarly had rejected the rule in favor of more important constitutional goals.⁶⁶

In *Runyon v. McCrary*,⁶⁷ a segregated private school in Virginia denied admission to two black children based solely on race. The Court made a simple reference to *Pierce* in explaining why racially-segregated private schools had standing to raise the asserted constitutional rights of white students and their parents (all of which the Court rejected) in defense of an action brought under section 1981 of the Civil Rights Act. "It is clear that the schools have standing to assert these arguments on behalf of their patrons," wrote Mr. Justice Stewart in a footnote, citing *Pierce*.⁶⁸

The Court carved out further exceptions in the context of controversies over the use of contraceptives and abortions. In *Griswold v. Connecticut*⁶⁹ a physician and an executive director of the Planned Parenthood League of Connecticut advised married couples about contraceptives; the Court granted them standing to raise the constitutional rights of married people in defending themselves against criminal prosecution for aiding and abetting the use of contraceptives. Mr. Justice Douglas distinguished the case of *Tileston v. Ullman*,⁷⁰ noting that there the physician was a plain-

65. *Id.* at 259.

66. *Id.* at 257. Another civil rights case, *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), relied heavily upon *Barrows* for resolution of a less crucial standing question. Sullivan, a white homeowner, owned two membership shares in Little Hunting Park, Inc., a corporation organized to operate a community park and playground facilities for the benefit of its shareholders. Sullivan leased one of his two houses in the area to Freeman, a black, and assigned Freeman one of his membership shares as well. The board of directors of Little Hunting Park refused to approve the assignment to Freeman, explicitly on racial grounds, and, moreover, expelled Sullivan. Both Sullivan and Freeman sued under 42 U.S.C. §§ 1981-82 (1976) for damages and injunctive relief. On the question of Sullivan's standing, Mr. Justice Douglas recalled the statement in *Barrows* "that the white owner is at times 'the only effective adversary' of the unlawful restrictive covenant. Under the terms of our decision in *Barrows*, there can be no question but that Sullivan has standing to maintain this action." *Id.* at 237. The majority opinion does not make clear, however, whether Sullivan had standing to raise Freeman's rights, or whether Sullivan had some claim of his own under the civil rights laws. See the dissenting opinion of Mr. Justice Harlan, *id.* at 254-55. Given Freeman's presence in the litigation, third-party standing seems unnecessary, and the reference to *Barrows* superfluous.

67. 427 U.S. 160 (1976).

68. *Id.* at 175 n.13.

69. 381 U.S. 479 (1965).

70. 318 U.S. 44 (1943). In *Tileston*, the Court denied standing to physician-petitioner to raise constitutional issues. The petitioner alleged that the state law, prohibiting use of drugs or instruments to prevent conception, prevented him from advising certain patients whose health could be endangered. The Court held that the patients themselves had to raise

tiff seeking declaratory relief.

Here . . . doubts [about the plaintiff's interest] are removed by reason of a criminal conviction for serving married couples in violation of an aiding-and-abetting statute. Certainly the accessory should have standing to assert that the offense which he is charged with assisting is not, or cannot constitutionally be, a crime.⁷¹

This statement, although appealing, conflicts with the general rule forbidding third-party standing when the accessory argues that the conduct unconstitutionally penalizes the principal. Did Mr. Justice Douglas intend to suggest that *Tileston* was still good law, and that a criminal defendant is an acceptable representative of third-party rights, whereas it will not so find for a civil plaintiff? Earlier case law, however, does not support this arguably valid distinction.⁷² Moreover, Mr. Justice Douglas placed *Griswold* with cases like *Pierce* and *Barrows*, as exceptions to the rule, adding: "The rights of husband and wife, pressed here, are likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind of confidential relation to them."⁷³

2. A THEORY EMERGES

Seven years later, the Court decided *Eisenstadt v. Baird*,⁷⁴ another civil rights case. Baird, convicted under a Massachusetts statute for unlawfully dispensing contraceptives, sought to challenge the statute as violative of the constitutional rights of single persons denied access to contraceptives; Baird did not belong to this class. The Court held that Baird had sufficient interest in challenging the validity of the statute, and granted standing. Mr. Justice Brennan's majority opinion, with respect to the standing issue, can be divided into two parts. First, in response to the argument that no relationship between litigant and victim existed here

the constitutional issues.

71. 381 U.S. at 481. As with the racial restriction cases, see notes 53-56 and accompanying text *supra*, it has been suggested that *Griswold* may not truly be a third-party standing case. "In *Griswold v. Connecticut*, it would be easy to find a constitutional right not to be convicted as an accessory to conduct that could not constitutionally be made criminal for the principals." 13 WRIGHT, MILLER & COOPER, *supra* note 61, § 3531 at 208.

72. The Court denied third-party standing for criminal defendants in *Sprout v. City of South Bend*, 277 U.S. 163, 167 (1928), and *Rosenthal v. New York*, 226 U.S. 260, 270 (1912). See also *Blair v. United States*, 250 U.S. 273 (1919) (civil contempt).

73. 381 U.S. at 481.

74. 405 U.S. 438 (1972).

as it did in *Griswold*, Mr. Justice Brennan compared this case to *Barrows*, which involved a "relationship between one who acted to protect the rights of a minority and the minority itself."⁷⁵ "And so here," he continued,

the relationship between Baird and those whose rights he seeks to assert is not simply that between a distributor and potential distributees, but that between an advocate of the rights of persons to obtain contraceptives and those desirous of doing so. The very point of Baird's giving away the vaginal foam was to challenge the Massachusetts statute that limited access to contraceptives.⁷⁶

What kind of relationship is that? More to the point, what is its significance? Would not *any* would-be advocate of third-party rights have that kind of relationship with the third parties? Is it important that the advocacy preceded the litigation (not clearly the case in *Barrows*) and, if so, why? But more important than the relationship, Mr. Justice Brennan continued, "is the impact of the litigation on the third-party interests."⁷⁷ Enforcement of the statute in this case would "materially impair the ability of single persons to obtain contraceptives."⁷⁸

The Court again encountered the third-party standing issue in *Planned Parenthood v. Danforth*,⁷⁹ in which two physicians challenged the constitutionality of the Missouri abortion statute. The Court, speaking through Mr. Justice Blackmun, decided quickly—and carelessly—that the physicians had standing. "This was established in *Doe v. Bolton*,"⁸⁰ stated Mr. Justice Blackmun, who went on to point out that, as in that case involving the Georgia abortion statutes, the physicians in *Planned Parenthood* faced possible criminal prosecution if they violated the statute; hence they satisfied the requirement of present or imminent "injury in fact."⁸¹ But at no point in the opinion did the Court explain why the physicians had standing to raise the constitutional rights of their patients.

75. *Id.* at 445.

76. *Id.*

77. *Id.*

78. *Id.* at 446. He also noted that mere users of contraceptives were not subject to prosecution, and thus "to that extent, . . . [were] denied a forum in which to assert their own rights." *Id.* This does not mean, however, that third parties were *completely* unable to assert their own rights.

79. 428 U.S. 52 (1976).

80. *Id.* at 62.

81. *Id.*

*Doe v. Bolton*⁸² does not help answer that question because in that case the group of plaintiffs consisted, in part, of the pregnant women themselves; because of this, the Court noted, the question of the physicians' standing in *Doe* became "perhaps a matter of no great consequence."⁸³ The opinion in *Doe* (unlike that in *Planned Parenthood*) referred to the constitutional rights of the doctors themselves. Therefore, one should not consider *Doe* a third-party standing case. Given *Griswold* and *Eisenstadt*, however, the implicit conclusion concerning the standing issue in *Planned Parenthood* should not have been surprising; in any event, this conclusion was explained by the plurality opinion in *Planned Parenthood's* companion case, *Singleton v. Wulff*.⁸⁴

In *Singleton*, two physicians sued to challenge a Missouri statute excluding all abortions not "medically indicated" from the procedures for which Medicaid made its benefits available to needy persons. The plaintiffs raised their own as well as their prospective patients' constitutional rights. The district court dismissed for lack of standing, but the Court of Appeals for the Eighth Circuit reversed.⁸⁵ All of the Justices agreed that the doctors had article III standing to raise their own rights, because the Medicaid funding limitation resulted in a direct financial injury to them. The Justices disagreed, however, about whether the doctors had standing to raise the rights of their prospective patients; this disagreement produced by far the most extensive discussion of third-party standing in which the Court has ever engaged.

Although the Court affirmed the Eighth Circuit on the standing issue, the debate apparently did not lead to a definitive resolution of the theoretical dispute among the Justices, since only Justices Brennan, Marshall, and White joined Mr. Justice Blackmun in his plurality opinion on this point. Mr. Justice Stevens concurred in the result without offering any specific reasoning;⁸⁶ the

82. 410 U.S. 179 (1973).

83. *Id.* at 188.

84. 428 U.S. 106 (1976).

85. 508 F.2d 1112 (8th Cir. 1978).

86. 428 U.S. at 121-22 (Stevens, J., concurring in part). Noting that the plaintiff physicians suffered injury in fact and raised constitutional arguments on their own behalf, Mr. Justice Stevens made this brief statement: "Because these two facts are present, I agree that the analysis in Part II-B of MR. JUSTICE BLACKMUN'S opinion provides an adequate basis for considering the arguments based on the effects of the statute on the constitutional rights of their patients." *Id.* at 121-22. Being uncertain whether the Blackmun analysis would sustain "the doctors' standing, apart from those two facts," he would not join the third-party standing section of Mr. Justice Blackmun's opinion. *Id.* at 122. This may or may not add up to the novel suggestion that if a litigant has article III standing plus at least one argument

other four Justices dissented.

After stating the basic rationale for the general rule,⁸⁷ Mr. Justice Blackmun turned his attention to its exceptions:

Like any general rule, however, this one should not be applied where its underlying justifications are absent. With this in mind, the Court has looked primarily to two factual elements to determine whether the rule should apply in a particular case. The first is the relationship of the litigant to the person whose right he seeks to assert. If the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue, the court at least can be sure that its construction of the right is not unnecessary in the sense that the right's enjoyment will be unaffected by the outcome of the suit. Furthermore, the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter.⁸⁸

As examples of cases involving this kind of relationship, Mr. Justice Blackmun cited *Griswold*, *Eisenstadt*, *Barrows*, and *Doe v. Bolton*.⁸⁹ But, assuming a rightholder typically can assert his rights more effectively than anyone else, why should a doctor-patient relationship, or any relationship other than a true fiduciary one, ensure advocacy as effective as that which the rightholder himself would provide? Furthermore, is Mr. Justice Blackmun's statement about the necessity of adjudication any different from requiring simply that there be a real, as opposed to a hypothetical, victim of the allegedly unlawful conduct?

But Mr. Justice Blackmun did not stop there. "The other factual element to which the Court has looked," he continued,

is the ability of the third party to assert his own right. Even where the relationship is close, the reasons for requiring persons to assert their own rights will generally still apply. If there is some genuine obstacle to such assertion, however, the third party's absence from court loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes by default the right's best availa-

based on a legal right of his own, a court may allow third-party standing, and that otherwise it may not.

87. See text accompanying note 51 *supra*.

88. 428 U.S. at 114-15.

89. The further suggestion that *Doe* so closely resembles *Singleton* as to nearly "control" it, *id.* at 115, seems rather surprising in light of *Doe's* differences and total lack of discussion of the third-party standing issue. See text accompanying notes 81-83 *supra*.

ble proponent.⁹⁰

To substantiate this proposition, he cited *NAACP v. Alabama*,⁹¹ *Eisenstadt*, and *Barrows*. Applying these principles to the case at hand, the plurality of Justices found present the requisite impact upon third-party rights and a sufficiently close relationship.⁹² They also perceived sufficient obstacles to the pregnant woman's assertion of her own rights, specifically the threat of imminent mootness for any particular woman and the chilling effect of publicity. Mr. Justice Blackmun recognized that these "obstacles" were "not insurmountable,"⁹³ as *Roe v. Wade*⁹⁴ had demonstrated, so that ultimately the "obstacle" requirement apparently amounted to nothing more than a mere "hurdle" requirement.

Mr. Justice Powell, in a dissent joined by three other Justices, argued that past decisions permit third-party standing only when "in all practicable terms" the victims cannot possibly assert their own rights,⁹⁵ citing *Barrows*, *NAACP v. Alabama*, and *Eisenstadt*. Mr. Justice Blackmun correctly refuted this sweeping statement,⁹⁶ although he probably went too far as well, in claiming that the victims in all of the aforementioned cases could have asserted their rights as plaintiffs in suits for injunctive or declaratory relief.⁹⁷

Barrows presents perhaps the most compelling case for third-party representation. The black purchaser in that case probably could not have challenged the validity of the racially restrictive covenant in 1953, before the enactment of the Civil Rights Act of 1968 and the discovery of section 1982 as a weapon against private racial discrimination.⁹⁸ It would appear, however, that nothing pre-

90. 428 U.S. at 115-16.

91. 357 U.S. 449 (1958). See text accompanying notes 178-83 *infra*.

92. Mr. Justice Blackmun pronounced the physician, generally, as "uniquely qualified to litigate" the validity of laws bearing upon the availability of abortions. 428 U.S. at 117. Presumably he did not intend this to be an additional requirement.

93. *Id.*

94. 410 U.S. 113 (1973). In *Roe*, the Court permitted the plaintiff, a pregnant woman seeking an abortion, to use a pseudonym to maintain her anonymity. The case was saved from mootness on appeal by the "capable of repetition, yet evading review" theory. See the discussion of mootness at text accompanying notes 221-30, *infra*.

95. 428 U.S. at 126.

96. *Id.* at 116 n.6.

97. In the classic case of *NAACP v. Alabama*, 357 U.S. 449 (1958), the Court viewed the true victims as unable to assert their own rights. As Mr. Justice Blackmun stated, however, it may not have been literally impossible for them to do so. 428 U.S. at 116 n.6.

98. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). At the time, only the theory of *Shelley v. Kraemer*, 334 U.S. 1 (1948), allowed a federal attack on such private discrimination, and one could not invoke this theory unless the discriminating party had to resort to a state court for enforcement of the covenant. Of course, the black buyer in *Barrows* did not

vented the victims from suing for declaratory relief in cases such as *Eisenstadt*,⁹⁹ *Griswold*, *Runyon*, *Pierce*, and *Buchanan*.¹⁰⁰

Mr. Justice Powell continued his argument in *Singleton* by rejecting the plurality's emphasis on the relationship between the litigant and the third party, and by offering a different basis for the result in the doctor-patient cases:

The principle they support turns not upon the confidential nature of a physician-patient relationship but upon the nature of the State's impact upon that relationship. In each instance the State directly interdicted the normal functioning of the physician-patient relationship by criminalizing certain procedures. In the circumstances of direct interference, I agree that one party to the relationship should be permitted to assert the constitutional rights of the other, for a judicial rule of self-restraint should not preclude an attack on a State's proscription of constitutionally protected activity. . . . But Missouri has not directly interfered with the abortion decision—neither the physicians nor their patients are forbidden to engage in the procedure.¹⁰¹

Mr. Justice Powell referred not only to criminal prosecutions, but to all cases involving criminal statutes, for he mentioned *Doe*¹⁰² and *Planned Parenthood*,¹⁰³ and he included not only cases involving close relationships, but *Eisenstadt*¹⁰⁴ as well.¹⁰⁵ It seems, then, that one can reduce his position to this: when a state says that it shall be a crime for *X* to engage in a certain activity, and *X* claims that this interferes with his relationship with *Y* and violates *Y*'s constitutional rights, *X* may assert *Y*'s rights; but if the state merely refuses to provide funds for *X* to engage in that activity, and *X* claims that this interferes with his relationship with *Y* and

really need any relief, having already purchased the house; the grant of third-party standing to the white seller, then actually benefited not so much *his* purchaser as future potential black purchasers facing similar obstacles. Furthermore, had the black purchaser faced legal action at the hands of a neighbor—e.g., a suit to eject him under the covenant—he *could* have utilized the *Shelley* theory in his defense.

99. Mr. Justice Powell apparently acknowledged that *Eisenstadt* might not support his argument. 428 U.S. at 127 n.4.

100. In the circumstances of *New York Cent. R.R. v. White*, 243 U.S. 188 (1917), an early case in which the Court permitted employers to raise the rights of their employees, the employee could have sued the employer on a negligence theory and challenged the validity of the workmen's compensation statute when the railroad raised it as a defense.

101. 428 U.S. at 128-29.

102. See text accompanying note 82 *supra*.

103. See text accompanying note 79 *supra*.

104. See text accompanying note 74 *supra*.

105. 428 U.S. at 127 n.4.

violates *Y*'s constitutional rights, *X* may not assert *Y*'s rights. One may ask the factual question whether the state has as effectively stopped *X* from engaging in the activity in the second case as in the first; in *Singleton*, Mr. Justice Blackmun answered affirmatively.¹⁰⁶ But even if one answers in the negative, what functional purpose does the distinction serve, other than arbitrarily to narrow the class of cases in which courts will grant third-party standing?¹⁰⁷

3. DEPARTURE FROM THE THEORY

Mr. Justice Powell closed his dissenting opinion in *Singleton* with the prediction that the case "may well set a precedent that will prove difficult to cabin."¹⁰⁸ "No reason immediately comes to mind, after today's holding, why any provider of services should be denied standing to assert his client's or customer's constitutional rights, if any, in an attack on a welfare statute that excludes from coverage his particular transaction."¹⁰⁹ His point seems well taken, in view of the ease with which the plurality found "genuine obstacles" to victim-initiated litigation and the existence of a sufficiently close "relationship" to justify representation. Two cases decided the next term proved him right.

The Court faced the same issue only months later in *Craig v. Boren*,¹¹⁰ a case involving a challenge to the constitutionality of an Oklahoma statute prohibiting the sale of "non-intoxicating" 3.2 percent beer to men under age twenty-one and women under eighteen. Two plaintiffs—a licensed vendor, and a man under twenty-one at the time of filing suit—sued to enjoin enforcement of the law, contending that it wrongfully discriminated against men. Because the young man had attained age twenty-one by the time the case reached the Supreme Court, the case became moot as to him. The Court therefore had to decide whether the vendor had standing to raise the rights of her prospective young male customers. The Court held that she did, in a seven-to-two decision with only the Chief Justice dissenting as to standing.¹¹¹

106. *Id.* at 118 n.7.

107. For Mr. Justice Powell, the ultimate question seems to be whether the litigant presents "a sufficiently compelling reason to justify departing from a rule of restraint that well serves society and our judicial system." *Id.* at 131.

108. *Id.* at 129.

109. *Id.* at 129-30.

110. 429 U.S. 190 (1976).

111. *Id.* at 215 (Burger, C.J., dissenting).

Mr. Justice Brennan, writing for the majority, did not question the vendor's standing under article III, because she faced a choice between economic injury if she obeyed the law and "sanctions and perhaps loss of license" if she did not.¹¹² Turning to the third-party standing question, he focused entirely on the effect that the denial of standing to the vendor would have upon the prospective male vendees. The vendor, he wrote, "is entitled to assert those concomitant rights of third parties that would be 'diluted or adversely affected' should her constitutional challenge fail and the statutes remain in force."¹¹³ "Accordingly," he continued, citing *Eisenstadt, Sullivan, and Barrows*, "vendors and those in like positions have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function."¹¹⁴ He reasoned that, since the law regulated the sale rather than the use of 3.2% beer, the vendor is "the obvious claimant."¹¹⁵

Aside from the reference to "vendors and those in like positions," the Court mentioned nothing about the requisite nature of the relationship between litigant and victim. Nor did it refer to the existence of any "obstacles" in the path of a vendee seeking to assert his own rights. Indeed, one vendee had joined as a plaintiff, and, as the Court apparently recognized,¹¹⁶ he could have overcome the mootness problem by bringing a class action.¹¹⁷ The Court focused only on the claim of indirect impairment of the third party's constitutional rights by virtue of the would-be litigant's compliance with the challenged law. Significantly, the Court distinguished *United States v. Raines*¹¹⁸ in a footnote: "The *Raines* rule

112. *Id.* at 194.

113. *Id.* at 195.

114. *Id.* *Craig* thus appears to have overruled *Cronin v. Adams*, 192 U.S. 108 (1904), a case in which the Court denied a tavern owner standing to assert the rights of women in challenging an ordinance prohibiting the sale of liquor in a saloon in which women were present, although the decision does not clearly rest on that point. *Craig* also suggests that a well-drafted complaint might now lead to a different result with respect to third-party standing than in *McGowan v. Maryland*, 366 U.S. 420 (1961). In *McGowan*, retailers challenging a Sunday closing law could not raise free-exercise claims on behalf of their patrons. "[S]ince appellants do not specifically allege that the statutes infringe upon the religious beliefs of the department store's present or prospective patrons, we have no occasion here to consider the standing question of *Pierce v. Society of Sisters* . . ." 366 U.S. at 429-30 (citation omitted).

115. 429 U.S. at 197.

116. *Id.* at 293 n.2.

117. See text accompanying notes 230-59 *infra*.

118. 362 U.S. 17 (1960). In *Raines*, the Attorney General brought suit against certain public officials to enjoin them from interfering with the voting rights of blacks. The Court

remains germane in such a setting, where the interests of the litigant and the rights of the proposed third parties are in no way mutually interdependent."¹¹⁹

Curiously, only the Chief Justice, who deserves credit for consistency, dissented on the standing point, noting the absence of either factor stressed in *Singleton*.¹²⁰ Mr. Justice Rehnquist, dissenting on the merits, may have agreed; however, he specifically did not discuss the standing issue.¹²¹ Mr. Justice Blackmun, the author of the elaborate analysis in *Singleton*, concurred without mentioning standing.¹²² Mr. Justice Stewart, who joined the Powell dissent in *Singleton*, expressly concurred on the standing issue.¹²³ Mr. Justice Brennan raised another factor that may have been important, although its effect is difficult to gauge. Apparently no party had raised the issue of standing before either the district court or, although it is not clear from the opinion, the Supreme Court.¹²⁴ In this situation, wrote Mr. Justice Brennan, when the trial court has already considered the merits of the claim, and no party has raised any jurisdictional objection, the "prudential objectives" of the third-party standing rule "cannot be furthered."¹²⁵ Thus, Mr. Justice Brennan continued,

a decision by us to forgo consideration of the constitutional merits in order to await the initiation of a new challenge to the statute by injured third parties would be impermissibly to foster repetitive and time-consuming litigation under the guise of caution and prudence. Moreover, insofar as the applicable constitutional questions have been and continue to be presented vigorously and "cogently," . . . the denial of *jus tertii* standing in deference to a direct class suit can serve no functional purpose.¹²⁶

Consider the latter point first: the third-party standing rule serves no purpose when there has been vigorous advocacy. But what about the ostensible purposes of the general rule cited by Mr.

stated: "[O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *Id.* at 21.

119. 429 U.S. at 195 n.4.

120. *Id.* at 215-16 (Burger, C.J., dissenting).

121. *Id.* at 217-28 (Rehnquist, J., dissenting).

122. *Id.* at 214 (Blackmun, J., concurring in part).

123. *Id.* (Stewart, J., concurring).

124. *Id.* at 193.

125. *Id.*

126. *Id.* at 193-94.

Justice Blackmun in *Singleton*? In *Craig*, two of those purposes were satisfied: the third party's rights were affected by what happened to the litigant, and it was clear that at least one member of the third-party class supported the litigant's cause. But Mr. Justice Blackmun stated in *Singleton* that the third party generally will be the most effective advocate. Did it matter that in *Craig* a member of the third-party class was effectively "present," even though the Court found his interests moot? Or did Mr. Justice Brennan's opinion suggest that, quite apart from its "exceptions," third-party standing will be permitted whenever it appears that the litigant has vigorously and cogently argued the merits of the case thus far? This suggestion¹²⁷ has its appeal, but one should note that it probably has no application to the *Craig* case, in which a vendee, whose rights became technically irrelevant after the case had become moot as to him, theoretically had provided effective advocacy in the lower court.

What of the failure of anyone to raise the standing issue before the case reached the Supreme Court? How does that situation differ, in terms of arguably wasted resources, from the situation in which the district court has ruled in favor of standing?

At any rate, one cannot know whether any of these factors truly influenced the grant of third-party standing in *Craig*, but it appears doubtful in light of the decision later that term in *Carey v. Population Services International*.¹²⁸ The litigant challenged a New York law prohibiting the distribution of contraceptives to minors under the age of sixteen. The Court held that a corporation engaged in the sale of contraceptives had standing to challenge the law on behalf of its potential customers. Writing for the majority, Mr. Justice Brennan briefly mentioned standing, and deemed *Craig* controlling.¹²⁹ Again, the Court discussed only the effect upon third parties.¹³⁰ In a footnote, however, the Court found the case for third-party standing even more compelling than in *Craig*, because the desire to avoid publicity might deter potential purchasers from asserting their own rights.¹³¹ Mr. Justice Powell expressly concurred on the standing issue,¹³² apparently giving

127. The Supreme Court often has denied standing, despite a grant of standing and a successful result on the merits for the litigant in the district court. *E.g.*, *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972); *United States v. Raines*, 362 U.S. 17 (1960).

128. 431 U.S. 678 (1977).

129. *Id.* at 683.

130. *Id.* at 684.

131. *Id.* n.4.

132. *Id.* at 703 (Powell, J., concurring in part).

greater weight to the direct interference with a relationship than to the absence of a genuine obstacle to litigation by the third parties themselves. The two dissenters said nothing about standing.

The decisions in *Craig* and *Carey* suggest that the present federal law of third-party standing may well coincide with the view, held by some commentators, that courts should allow such standing when denial of standing to the litigant would impair or "dilute" the enjoyment of constitutional rights by a third party.¹³³ One group of commentators has suggested that the Supreme Court may be "approaching a general rule that either party to a relationship that is regulated or prohibited by statute has standing to raise the rights of the other."¹³⁴

One must modify the latter suggestion, however, to take into account the situation in which successful assertion of third-party rights will not aid the litigant because the court finds it unnecessary to protect the litigant's interest in order to preserve the third party's rights. The classic (and perhaps only) example at the Supreme Court level is *United States v. Reidel*.¹³⁵ The federal government indicted Reidel for distributing obscene material through the mail, in violation of a federal statute. He moved to dismiss, alleging that the statute unconstitutionally impaired the rights of consenting adults, recognized in the case of *Stanley v. Georgia*,¹³⁶

133. "A practice of permitting claimants to assert *jus tertii* when the injury of which they complain also deprives third parties of constitutional rights is necessary to ensure that such rights are fully protected." Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423, 443 (1974). The actual recommendation by the author of that Note appears more complex than the quoted language from the author's concluding paragraph suggests. See *id.* at 431-35. See also *The Supreme Court, 1974 Term*, 89 HARV. L. REV. 47, 192 (1975): "Standing under this doctrine should be granted only when the claimant, if not relieved of a challenged legal obligation imposed on him or of the effects of such an obligation imposed on others, will act in such a way as to deny third parties their constitutional rights."

See also L. TRIBE, *supra* note 24, at 108:

[W]henever a denial of third-party standing to a derivatively injured litigant (one who is injured because of a legal duty imposed on a third party) can be shown likely to impair the third party's enjoyment of an allegedly protected right, standing should be granted and the allegations decided on the merits. A specific relationship of interdependence between the litigant and the third party will typically provide the causal link between derivative injury to the litigant and impairment of the third party's rights; but the presence or absence of such a relationship should not otherwise be relevant, nor should a relationship's "importance" or character matter for third-party standing except as it bears on the causal link.

134. See, 13 WRIGHT, MILLER & COOPER, *supra* note 61, § 3531, at 841 (Supp. 1980). See also L. TRIBE, *supra* note 24, at 207, 210.

135. 402 U.S. 351 (1971).

136. 394 U.S. 557 (1969).

to possess obscene matter in their own homes. The district court granted the motion to dismiss, reasoning that "if a person has the right to receive and possess this material, then someone must have the right to deliver it to him."¹³⁷ The Supreme Court unanimously reversed, stating: "The District Court gave *Stanley* too wide a sweep. . . . Whatever the scope of the 'right to receive' referred to in *Stanley*, it is not so broad as to immunize the dealings in obscenity in which Reidel engaged here"¹³⁸ In other words, the trial judge's conclusion did not follow from the hypothesis established by *Stanley*. The consumer has a right to possess pornography and perhaps, in some undefined sense, to "receive" it.¹³⁹ But this does not mean that anyone has the right to distribute it to him. More significantly, the Court found that it need not protect the rights of the distributor in order to protect the rights of the consumer.

The relevant comparison is with *Eisenstadt v. Baird*,¹⁴⁰ decided the following year, and *Griswold v. Connecticut*.¹⁴¹ In *Eisenstadt*, however, the litigant, a distributor of contraceptives to single persons in violation of a state statute, argued only that the statutory treatment of single persons, as opposed to married persons, denied single persons the equal protection of the law. If the Court found the discrimination against the distributees improper, then the distributor must be allowed to distribute contraceptives to them. In *Griswold*, the litigants dispensed prescriptions for and gave advice on contraceptives. They contended that the married persons for whom they performed these services had a constitutional right to use contraceptives. The Court's decision that married persons did indeed have a right to use contraceptives might not have embodied a further right to receive advice concerning and prescriptions for such contraceptives; but the result in *Griswold* makes clear that the decision did embody such a right and, further, that the Court deemed it necessary to protect the interests of the litigants in order to give full protection to the rights of those married persons.

In *Reidel*, to the contrary, the Court did not deem it necessary

137. Quoted at 402 U.S. at 355.

138. 402 U.S. at 355.

139. Mr. Justice Marshall, writing for the majority in *Stanley*, referred to "the right to receive information and ideas," along with the "right to be free . . . from unwanted governmental intrusions into one's privacy," 394 U.S. at 564, but ultimately seemed to rest on the "individual's right to read or observe what he pleases." *Id.* at 568.

140. 405 U.S. 438 (1972).

141. 381 U.S. 479 (1965).

to protect the interest of the distributor in order to protect the recognized rights of the distributee. This may simply be another way of saying that the Court took a more limited view of the constitutional protection enjoyed by the third-party rightholders in *Reidel* than it did in *Griswold*. Thus, when a court can confidently conclude, at the threshold of litigation, that protecting the rights of third parties will not help protect the interests of the litigant, the litigant cannot gain anything by asserting the third party's rights, and thus lacks standing to assert them.¹⁴²

B. *Implicit Grants of Third-Party Standing*

The Supreme Court has permitted third-party standing sub silentio on a number of occasions by resolving constitutional disputes with at least partial reliance upon rights of persons not parties before the Court. *Meyer v. Nebraska*¹⁴³ and *Bartels v. Iowa*¹⁴⁴ represent early and oft-cited examples of such judicial behavior. Both cases involved convictions of teachers under state laws prohibiting the teaching of foreign languages in public schools. In reversing these convictions and holding the statutes unconstitutional, the Court stated, in *Meyer*: "[The defendant's] right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the [fourteenth] Amendment."¹⁴⁵

More recently, *Johnson v. Avery*¹⁴⁶ held that a state could not deprive prison inmates of legal assistance supplied by fellow inmates.¹⁴⁷ The Court clearly based the decision on the rights of inmates who needed assistance, although the case had been brought by an inmate who wished to provide legal assistance to others. The Court did not address the standing issue.

142. One commentator suggests that "the scope of the substantive constitutional protection afforded to the third parties" bears upon the litigant's likelihood of success on the merits rather than upon his standing. Note, *supra*, note 133, at 433. As the analysis in the text indicates, I disagree.

143. 262 U.S. 390 (1923).

144. 262 U.S. 404 (1923).

145. 262 U.S. at 400. The Court in *Bartels* simply reversed on the authority of *Meyer*. *Id.* at 411.

146. 393 U.S. 483 (1969).

147. Lower courts have followed *Johnson* on this point, recognizing the standing issue but offering no attendant discussion beyond a reference to *Johnson*. *McDonald v. Hall*, 610 F.2d 16, 19 (1st Cir. 1979); *Haymes v. Montanye*, 547 F.2d 188, 191 (2d Cir. 1976), *cert. denied*, 431 U.S. 967 (1977). However, lower courts have not permitted third-party standing in this context with respect to a claim for damages. *Buise v. Hudkins*, 584 F.2d 223 (7th Cir. 1978).

*Maness v. Meyers*¹⁴⁸ provides another example of the Court's silent avoidance of the standing problem. The lower court held an attorney in contempt for advising his client, a trial witness, to refuse to respond to a subpoena duces tecum on fifth amendment grounds. The Supreme Court held that the attorney, acting in good faith, could not be held in contempt under these circumstances, because to do so would impair the client's enjoyment of his fifth amendment rights. One should keep in mind that the attorney was the litigant in the contempt proceeding.

In *Weinberger v. Wiesenfeld*,¹⁴⁹ the Supreme Court affirmed a district court opinion that addressed the standing question. A widower challenged provisions of the federal Social Security Act providing widows, but not widowers, with Social Security benefits following the death of the claimant's spouse. Wiesenfeld, a widower, wished to argue that the statutory scheme denied equal protection to female wage earners as well as to widowers. The district court addressed itself expressly to that issue, permitting the widower standing to assert the rights of women "because no other plaintiff could present a claim similar to hers [Wiesenfeld's wife] in a case ripe for adjudication" under the statute.¹⁵⁰ The Supreme Court, affirming the district court, apparently based the decision upon the equal protection rights of men and women, but the Court said nothing about Wiesenfeld's standing.

One may justify all of these decisions under a liberal application of the "relationship" and "obstacle" exceptions discussed in *Singleton*,¹⁵¹ and probably one can explain each of them under the "dilution" theory later employed by *Craig* and *Carey*. Interestingly, the Court evidently viewed the standing issue in the cases discussed in this section as neither troubling nor significant enough to warrant explicit attention in its opinions, even though standing is a "jurisdictional" issue that the Court often raises on its own.¹⁵²

148. 419 U.S. 449 (1975).

149. 420 U.S. 636 (1975), *aff'g* 367 F. Supp. 981 (D.N.J. 1973).

150. 367 F. Supp. at 989, n.25 (apparently suggesting that a woman, during her lifetime, could not have a concrete controversy with HEW under the statute).

151. *Johnson* and *Wiesenfeld* have weaknesses with the "relationship" factor, while *Maness* and *Meyer* have weaknesses with the "obstacle" factor.

152. See, e.g., *Orr v. Orr*, 440 U.S. 268, 271 (1979). Also, *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), may have implicitly permitted third-party standing. Mr. Justice Brennan, in dissent, stated that the majority considered only the rights of tenants in rejecting a challenge to a restrictive zoning ordinance originally brought by tenants and landlords, but which had become moot as to the plaintiff tenants. *Id.* at 10. One has difficulty discerning from the majority opinion of Mr. Justice Douglas whether Mr. Justice Brennan accurately characterized the majority's discussion.

C. Conflict: *Warth v. Seldin*

A single Supreme Court decision—*Warth v. Seldin*¹⁵³—sharply conflicts with the liberality of the third-party standing decisions of the past decade. Regarded by many as one of the Court's most unreasonably restrictive decisions on article III standing,¹⁵⁴ *Warth* involved a challenge to a zoning ordinance of Penfield, New York, a suburb of Rochester, on the ground that the restrictive ordinance had the purpose and effect of excluding persons of low and moderate income from residing in the town. A variety of plaintiffs brought suit; the Court denied standing to every one of them. The harshest and most crucial aspect of the opinion involved the denial of standing to the individually named low-income residents of Rochester who alleged that the zoning ordinance excluded them from residing in Penfield. The Court denied them standing, based on the individuals' failure to demonstrate in the record that if the ordinance were struck down, any builder would in fact build low-cost housing at prices that these plaintiffs could afford. Another group of plaintiffs, Rochester taxpayers, alleged that the Penfield ordinance caused the construction of more low-income housing in Rochester—and thus higher taxes—than would ensue if the ordinance did not exist. The Court found the injury to the taxpayers "conjectural" and the alleged line of causation tenuous.¹⁵⁵ But, wrote Mr. Justice Powell, even if the Court assumed the requisite injury and causation for these taxpayers, this would not entitle them to raise the rights of the low-income persons allegedly excluded from Penfield, and the taxpayers concededly raised no legal claims on their own behalf.¹⁵⁶ Mr. Justice Powell quickly reviewed the precedents and observed that in *Warth* the record did not reveal a special relationship or an adverse effect upon a special relationship, nor was third-party standing "necessary to insure protection of the rights asserted, as there is no indication that persons who in fact have been excluded from Penfield are disabled from asserting their own right in a proper case."¹⁵⁷

153. 422 U.S. 490 (1975).

154. See, e.g., Roberts, *supra* note 7, at 399-401; Sager, *Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest Enterprises, Inc.*, 91 HARV. L. REV. 1373, 1382-92 (1978); Sedler, *supra* note 7, at 873; *The Supreme Court, 1974 Term, supra* note 117, at 190-91; Note, *Standing to Challenge Exclusionary Land Use Devices in Federal Courts After Warth v. Seldin*, 29 STAN. L. REV. 323, 345-49 (1977).

155. 422 U.S. at 509.

156. *Id.*

157. *Id.* at 510. Third-party standing could also have been asserted, and without the added problem of causation, by Metro-Act of Rochester, Inc., an association 9% of whose

But as later cases have shown, the Court does not necessarily require either a meaningful relationship, or helplessness on the victim's part, for third-party standing.¹⁵⁸ In *Warth*, at least some people who perceived themselves as direct victims could not assert their own rights. Furthermore, they supported the cause, perceived themselves as having a personal stake, and undoubtedly would have voiced their "views" as amici curiae. Assuming injury in fact and causation for the sake of argument, as the Court did, there was no good reason to deny these taxpayers third-party standing, unless the Court believed that there were no real victims of the zoning ordinance. Certainly, there were victims of the assertedly unconstitutional ordinance (whether or not they included the named plaintiffs) who would gain by the plaintiffs' victory and would continue to suffer if the plaintiffs lost.

The discussion thus far has emphasized the similarities between *Warth* and the other recent cases on third-party standing and suggests that the Court, by its own standards of the late 1970's, may have decided *Warth* incorrectly on this point. But in all fairness, one can distinguish *Warth*. In virtually all of the other cases a relationship had arisen between litigants and victims such that, regardless of the importance or casualness of the relationship

members resided in Penfield and allegedly suffered deprivation of "the benefits of living in a racially and ethnically integrated community." *Id.* at 512. Because the association would clearly have standing if its members did, *see* notes 176-89 and accompanying text *infra*, the question became whether these Penfield residents had standing. The Court said "no" for two reasons: First, the Court suggested (without concluding) that this alleged deprivation did not satisfy the requirements of article III, notwithstanding the opinion in *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972). In *Trafficante*, the Court found that the Civil Rights Act of 1968 conferred upon white residents of segregated housing an actionable right to be free from the adverse consequences of segregation as to them. No such statute existed here. Justice Powell noted, "Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute." 422 U.S. at 514. It is unclear how Congress could have the power to supersede or minimize the supposed article III requirement of "injury in fact." The statute in *Trafficante* eliminated any third-party standing issue, but if the Court found article III satisfied, presumably it felt that plaintiffs suffered an actual loss, identical to the one suffered by the Penfield residents in *Warth*. But even assuming article III standing, the Court found a second reason to deny standing to this organizational plaintiff: the rule against third-party standing, with none of the exceptions to the rule present. *Id.*

The would-be intervenor, Rochester Home Builders Association, constituted another possible litigant on behalf of third parties. The Court denied standing for the same reasons it denied standing to the alleged victims themselves: inadequate allegations (in the Court's view) of causation of injury. *Id.* at 516.

The four dissenting Justices did not discuss the third-party standing issue.

158. *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Craig v. Boren*, 429 U.S. 190 (1976); *Singleton v. Wulff*, 428 U.S. 106 (1976); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

for any other purpose, the victims would suffer (*i.e.*, their rights would be "diluted") if those in the litigant's position complied with the challenged law. Thus, if the white seller abided by the covenant or ordinance, the black buyer would suffer;¹⁵⁹ if the private school closed, the students and their parents would suffer;¹⁶⁰ if the doctor would not perform the abortion, the patient would suffer;¹⁶¹ and if the distributor or vendor did not distribute or sell, the distributee or vendee would suffer.¹⁶² *Warth* presented a different situation, one in which any extra-judicial conduct by the taxpayer-plaintiffs would have no effect on the low-income persons. But what purpose does the rule serve by requiring such a relationship of litigant to victim, other than narrowing the availability of third-party standing? As we have seen, the existence of such a relationship has nothing to do with the ability of the victim to assert his own rights, nor (as *Warth* demonstrates) does the absence of such a relationship mean that the third-party victim will not benefit from the grant of standing to the litigant. Furthermore, there is no reason to link the "dilution" theory to the quality of advocacy one can expect from the litigant. The "dilution" exception apparently created by the *Craig* and *Carey* decisions represents a salutary extension of the availability of third-party standing in the federal courts. Because it remains an exception to an unnecessary general rule, however, it does not go far enough.

IV. RELATED CASES IN THE SUPREME COURT

A thorough exploration of the law of third-party standing must encompass a reference to several categories of cases in which the third-party standing issue appears to be raised, but does not actually play a part in the decision, given the Court's definition of the rights of the litigant. There are at least four lines of such cases.

159. *Barrows v. Jackson*, 346 U.S. 249 (1953); *Buchanan v. Warley*, 245 U.S. 60 (1917).

160. *Runyon v. McCrary*, 427 U.S. 160 (1976); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

161. *Singleton v. Wulff*, 428 U.S. 106 (1976); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

162. *Carey v. Population Servs. Int'l.*, 431 U.S. 678 (1977); *Craig v. Boren*, 429 U.S. 190 (1976); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). *See also* *Griswold v. Connecticut*, 381 U.S. 479 (1965) (involving the legality of a doctor advising a patient with respect to the use of contraceptives). *Tileston v. Ullman*, 318 U.S. 44 (1943), involved a similar relationship and "dilution" of rights, and it seems safe to say that the Court would decide the case differently today, notwithstanding the distinction noted in *Griswold* between criminal and civil cases in which the issue of third-party standing is raised. *See* Mr. Justice Brennan's more recent comment in *Craig*, 429 U.S. 190 (1976), concerning the insignificance of "the litigative posture of the suit." *Id.* at 196 n.5.

The first group comprises cases on the right of a criminal defendant to be tried by a jury selected in a non-discriminatory fashion. The second group consists of cases that contemplate the recently-articulated first amendment right to receive information. The third group embraces cases in which Congress has conferred a statutory cause of action on one who otherwise would lack standing to sue. The fourth group entails cases in which an association seeks access to courts on behalf of its members.

A. *Systematic Exclusion of Blacks from Jury*

In *Peters v. Kiff*,¹⁶³ a white defendant claimed that blacks were systematically excluded from both the grand jury that indicted him and the petit jury that convicted him. The Court held that he had standing to raise this challenge. Mr. Justice Marshall, writing for only three Justices, stated the essence of his rationale: "[T]he Court has also recognized that the exclusion of a discernible class from jury service injures not only those defendants who belong to the excluded class, but other defendants as well, in that it destroys the possibility that the jury will reflect a representative cross section of the community."¹⁶⁴

Thus, three Justices appeared to be saying that a white defendant's right to due process of law includes a right to trial by a jury selected under a system that does not discriminate against blacks. Viewed that way, the defendant raised no legal rights other than his own, although his own rights clearly overlapped with those of black citizens generally. Mr. Justice White, writing for a second group of three justices, concurred in the result.¹⁶⁵ The basis of his response to the standing question is somewhat unclear; possibly he subordinated the concerns of standing to the more compelling interest in prohibiting discrimination in the selection of jurors.¹⁶⁶

163. 407 U.S. 493 (1972).

164. *Id.* at 500.

165. *Id.* at 505. Chief Justice Burger dissented, for a third group of three Justices. *Id.* at 507. The standing issue was one of his concerns. See also *Otero v. Mesa County Valley Sch. Dist. No. 51*, 568 F.2d 1312 (10th Cir. 1977), in which Mexican-American students objected to discrimination in the assignment of Mexican-American teachers in public schools. The court appeared to view the alleged discrimination against the *teachers* as violative of the rights of the *students*.

166. It is . . . true that there is no case in this Court setting aside a conviction for arbitrary exclusions of a class of citizens from jury service where the defendant was not a member of the excluded class. I also recognize that, as in this case, the courts of appeal reflecting the generally accepted constitutional view, have rejected claims such as petitioner presents here. [However], I would implement the strong statutory policy . . . which reflects the central concern of the Fourteenth

Three terms later, in *Taylor v. Louisiana*,¹⁶⁷ the entire Court apparently adopted Mr. Justice Marshall's theory in *Peters*. Taylor, a male, successfully appealed from a state kidnapping conviction by showing that the state's jury-selection system improperly discriminated against women. The Court quickly rejected the state's challenge to Taylor's standing to raise this argument, citing *Peters*.¹⁶⁸ The Court reaffirmed this approach by entertaining a similar challenge in 1979, in *Duren v. Missouri*,¹⁶⁹ without even discussing the question of standing.

B. First Amendment Right to Receive Information

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,¹⁷⁰ the Court held that consumers had standing to challenge a governmental ban on advertising by pharmacists. Although it might appear that the plaintiffs were asserting the first amendment rights of pharmacists to advertise, the Court made it clear that "the protection afforded is to the communication, to its source and to its recipients both."¹⁷¹ Thus, as in the jury discrimi-

Amendment with racial discrimination, by permitting petitioner to challenge his conviction.

407 U.S. at 506-07 (White, J., concurring).

167. 419 U.S. 522 (1975).

168. *Id.* at 526.

169. 439 U.S. 357 (1979). Mr. Justice Rehnquist, however, raised questions, in dissent, as to whose rights the Court really allowed the male defendant to raise. *Id.* at 371.

See also *United States v. Robinson*, 421 F. Supp. 467 (D. Conn. 1976), *rev'd on other grounds sub nom.* *United States v. Newman*, 549 F.2d 240 (2d Cir. 1977), involving a white defendant's attempt to argue, on appeal from his conviction, that the prosecutor had improperly used his peremptory challenges to exclude all potential black jurors from defendant's jury. The court allowed the defendant to make this argument, but treated the case as a true third-party standing case.

A case in which the rights raised by the litigants probably *should* have been treated as their own is *Blair v. United States*, 250 U.S. 273 (1919). In *Blair*, the trial court held in civil contempt two witnesses subpoenaed to testify before a federal grand jury, for refusing to testify; the Supreme Court in a habeas corpus suit did not allow the witnesses to challenge the jurisdiction of the grand jury to inquire into the particular subject matter of its inquiry. The Court found it "no concern of one summoned as a witness whether the offense is within the jurisdiction of the court or not." *Id.* at 282. This aspect of the case, which suggests that the Court perceived the issue as one of third-party standing, seems wrong. The jurisdictional question is the witness' concern for *his* sake; one can view the jurisdiction of the grand jury as jurisdiction over the witness as well as jurisdiction with respect to the one ultimately indicted (if, indeed anyone is indicted). The Court, however, may in essence have spoken to the merits of this controversy by pointing out that the court and grand jury "have authority and jurisdiction to investigate the facts in order to determine the question whether the facts show a case within their jurisdiction." *Id.* at 283.

170. 425 U.S. 748 (1976).

171. *Id.* at 756. See also *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972), and cases

nation cases, the litigants had raised no legal rights other than their own.

Closely related to this line of cases, but arguably *sui generis*, is *Procurier v. Martinez*,¹⁷² in which state prisoners challenged the constitutionality of regulations relating to the censorship of mail between prisoners and outsiders. Avoiding the contention that prisoners' interests receive less first amendment protection than the interests of nonprisoners, Mr. Justice Powell pointed out that those who correspond with prisoners have protected interests in those communications as well, and that clearly these "outside" correspondents enjoy no second-class constitutional status. In the process of explaining the interests involved, Mr. Justice Powell stated: "We do not deal here with difficult questions of the so-called 'right to hear' and third-party standing but with a particular means of communication in which the interests of both parties are inextricably meshed."¹⁷³

Despite this disclaimer, however, the Court permitted the plaintiff prisoners to assert the rights of their correspondents. What makes this case arguably unique is that the Court deliberately sidestepped the question whether the rights of the third-party correspondents were greater than, or co-extensive with, the rights of the plaintiffs. Thus, possibly the plaintiffs did not assert any rights except their own; arguably they did not, and one can view the Court's discussion of the rights of third parties as nothing more than a reminder that this case implicated such other rights, thus obviating the need to define the full scope of the plaintiffs' rights.

C. Statutory Standing

Congress has eliminated the third-party standing problem in some situations by creating a statutory cause of action for a liti-

cited therein. *Cf. Richmond Newspapers, Inc. v. Virginia*, 100 S. Ct. 2814 (1980) (newspaper asserted both its right and public's right of access to criminal trial). See generally Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1; Note, *The Right to Know in First Amendment Analysis*, 57 TEX. L. REV. 505 (1979).

Although at least one lower court has stated that "the recognition of standing to assert the right to hear is fundamentally analagous to a grant of standing to assert the rights of a third party and ought, perhaps, to be governed by similar prudential restrictions," *Frissell v. Rizzo*, 597 F.2d 840, 848 (3d Cir.), *cert. denied*, 444 U.S. 841 (1979), the Supreme Court has never adopted this position and it would be strange indeed if the courts placed restrictions on the assertion of a constitutional right by the rightholder himself.

172. 416 U.S. 396 (1974).

173. *Id.* at 409.

gant who would otherwise lack standing to sue, when the litigant appears to be vindicating the rights of third parties. In *Trafficante v. Metropolitan Life Insurance Co.*,¹⁷⁴ two apartment complex tenants—one white, one black—sued the owner of the complex under the Civil Rights Act of 1968, alleging discrimination against nonwhites and resultant intangible injuries to themselves. The statute provides a cause of action for any “person aggrieved” by racial discrimination; finding that Congress intended these words to have broad application, the Court granted standing.¹⁷⁵

D. Associational Standing

The Supreme Court also has made it clear that, as a general rule, an association has standing to assert the rights of its members, provided that at least some of its members¹⁷⁶ have suffered or presently suffer injury as a consequence of the governmental action challenged. The Court has applied this principle frequently.¹⁷⁷ The decisions evidence a strong but superficial resemblance to third-party standing cases, notwithstanding the Court’s treatment of an early case on associational standing as a case on third-party standing.

In *NAACP v. Alabama*,¹⁷⁸ the state subpoenaed an association’s membership lists; the association resisted the attempt to compel disclosure of its membership, asserting the members’ first amendment rights of association for political purposes. In response to a challenge to the association’s standing, the Court observed that it may permit representatives to argue on behalf of absent

174. 409 U.S. 205 (1972).

175. *Id.* at 209. See also *Gladstone v. Village of Bellwood*, 441 U.S. 91 (1979). Related to these cases are those in which a litigant has been permitted to challenge administrative action, under a statute allowing any “aggrieved” person to do so, on any and all grounds, in order to vindicate the public interest. *E.g.*, *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940). See generally Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 654-58 (1973).

176. According to dictum in *Warth v. Seldin*, injury to only a single member of the association will suffice. 422 U.S. at 511. *Accord*, *River v. Richmond Metro. Auth.*, 359 F. Supp. 611, 625 (E.D. Va. 1973), *aff’d*, 481 F.2d 1280 (4th Cir. 1973). At least one lower court decision appears to contradict this, however, holding that a union could not join with one of its members as plaintiffs in an action for injunctive relief when the individual member suffered injury unique to herself. *Boyce v. Rizzo*, 78 F.R.D. 698, 704-06 (E.D. Pa. 1978).

177. *E.g.*, *Babbitt v. United Farm Workers*, 442 U.S. 289, 299 n.11 (1979); *Boston Stock Exch. v. State Tax Comm’n.*, 429 U.S. 318, 320 n.3 (1977); *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972); *National Motor Freight Traffic Ass’n. v. United States*, 372 U.S. 246 (1963). No doubt exists that an association has standing in its own right to seek judicial relief from injury to itself as an entity, asserting its own legal rights. *Warth v. Seldin*, 422 U.S. at 511.

178. 357 U.S. 449 (1958).

rightholders whose rights otherwise "could not be effectively vindicated,"¹⁷⁹ citing *Barrows v. Jackson*.¹⁸⁰ The Court concluded that to require the members to assert their own rights "would result in nullification of the right at the very moment of its assertion. Petitioner is the appropriate party to assert these rights, because it and its members are in every practical sense identical."¹⁸¹ The Court recognized that the association itself might well suffer injury if it could not litigate this action; thus, it had standing to assert its members' rights.

By the mid-1970's, the analysis in *NAACP v. Alabama* had become unnecessary, save for the characterization of the association and its members as "identical." By then there was general agreement that, as Mr. Justice Powell stated in *Warth v. Seldin*, "[e]ven in the absence of injury to itself, an association may have standing solely as the representative of its members."¹⁸² He continued:

The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. . . . So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.¹⁸³

In *Warth*, one of the associations seeking intervention in the action sought damages, but claimed no injury to itself as an entity. The Court denied this association standing to seek such relief, since the monetary claims of its members were unequal and would

179. *Id.* at 459.

180. 346 U.S. 249 (1953).

181. 357 U.S. at 459.

182. 422 U.S. at 511. Surprisingly, at least a few lower courts appear to have the mistaken impression that representative associational standing depends, as it apparently did in 1958, upon a showing that the members face an obstacle in the assertion of their own rights. See, e.g., *Black Coalition v. Portland School Dist. No. 1*, 484 F.2d 1040, 1043 (9th Cir. 1973); *Church of Scientology v. Cazares*, 455 F. Supp. 420 (M.D. Fla. 1978), *aff'd*, 638 F.2d 1272 (5th Cir. 1981) (Fifth Circuit, however, correctly overruled district court on representational standing question); *Let's Help Fla. v. Smathers*, 453 F. Supp. 1003, 1006-07 (N.D. Fla. 1978); *Boyce v. Rizzo*, 78 F.R.D. 698, 704-06 (E.D. Pa. 1978). See also *Ripon Soc'y v. National Republican Party*, 525 F.2d 567, 573 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976). Possibly these courts do not realize that later cases, such as *Warth*, superseded *NAACP* on this issue.

183. 422 U.S. at 511.

require individualized proof. Contrasting an action seeking purely prospective relief, Mr. Justice Powell found that this situation required each member to be a party to the suit.¹⁸⁴

Cases on associational standing clearly resemble the third-party standing cases in that, as in third-party cases, the court permits one legal "person" to assert the rights of another. The resemblance is superficial, however, because the association-litigant, in a very real sense, personifies the very third parties whose rights it asserts—its members. In theory, at least, the members govern a membership association through the process of democratic election of its leaders. The association represents the members generally, not merely in litigation, with respect to the issues or concerns that led to their organization. Allowing standing in such circumstances is therefore perfectly appropriate, at least when, as the Supreme Court further requires, the interests the association seeks to protect "are germane to the organization's purpose."¹⁸⁵ The result in no way offends the policy concerns that ostensibly underlie the rule against third-party standing, because the rights of the members are being advocated by their chosen representatives in a cause

184. *Id.* at 515-16. *Accord*, *United Steel Workers v. University of Ala.*, 599 F.2d 56 (5th Cir. 1979); *Local 194, Retail, Wholesale, & Dep't Store Union v. Standard Brands, Inc.*, 540 F.2d 864 (7th Cir. 1976). *But see* *Middlewest Motor Freight Bureau v. United States*, 525 F.2d 681 (8th Cir. 1975).

The courts have not applied the "indispensable party" exception to associational standing solely in cases in which plaintiff sought damages. In *Harris v. McRae*, 100 S. Ct. 2671 (1980), the Court held that an organizational plaintiff, seeking to enjoin enforcement of a public funding restriction for abortions, lacked standing under the free exercise clause of the first amendment to challenge the restriction. Mr. Justice Stewart wrote: "Since it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion . . . , the claim asserted here is one that ordinarily requires individual participation." *Id.* at 2690 (footnote omitted). *See also* *Associated Gen. Contractors v. Otter Tail Power Co.*, 611 F.2d 684, 691 (8th Cir. 1979). *But see* *Church of Scientology v. Cazares*, 638 F.2d 1272, 1280 (5th Cir. 1981).

185. *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). As one district court has said, "the association's representative capacity will seldom, if ever, extend to all of its members' interests. . . . It is necessary, therefore, to assess the interest asserted to be sure that it is one that the claimant can properly assert as a true representative." *Boyce v. Rizzo*, 78 F.R.D. 698, 704 (E.D. Pa. 1978). Another court has observed:

This requirement helps insure, not only that the party before the Court be a competent and effective advocate on the issues presented, but also that the members of the plaintiff organization have an opportunity to influence their representatives on positions related to the *particular* member injury at issue. Like the membership requirement discussed above, this too ultimately insures that it is the injured party, and not merely a well-intentioned advocate, who is, at least in effect, before the Court.

Health Research Group v. Kennedy, 82 F.R.D. 21, 28 (D.D.C. 1979).

which the members presumably support.¹⁸⁶ The Supreme Court has extended the associational-standing doctrine to an organization that is not a traditional voluntary membership association, so long as those whom the organization purports to represent possess "all of the indicia of membership in an organization,"¹⁸⁷ thus satisfying the policies underlying the associational-standing doctrine. The Court found such a situation in *Hunt v. Washington State Apple Advertising Commission*,¹⁸⁸ in which the Court granted standing to a state commission elected and financed by, and composed of, apple growers and dealers in the state. "In a very real sense, therefore," wrote the Chief Justice, "the Commission represents the State's growers and dealers and provides the means by which they express their collective views and protect their collective interests."¹⁸⁹

V. THIRD-PARTY STANDING DECISIONS IN THE LOWER FEDERAL COURTS

A thorough inquiry into the viability and wisdom of the present law of third-party standing must encompass a study of the pertinent decisions of the lower federal courts during the past decade, a period in which the federal judiciary devoted more energy than ever before to the evaluation and explanation of this doctrine. There have been many such decisions during the last ten years,

186. Although the Supreme Court has not yet addressed the question of internal dissension within the association with respect to support for the lawsuit, some lower courts have indicated that the existence of such dissension may supply adequate reason to deny associational standing. In *NCAA v. Califano*, 622 F.2d 1382 (10th Cir. 1980), the court allowed associational standing only upon an affirmative showing that at least one member supported the lawsuit and the absence of any indication that a majority of members opposed it. See also *Calvin v. Conlisk*, 520 F.2d 1 (7th Cir. 1975), vacated on other grounds, 424 U.S. 902 (1976), denying standing to an organization whose members would most likely be divided by the issues and relief sought in the action. But see *Rhode Island Chapter, Assoc'd Gen. Contractors, Inc. v. Kreps*, 450 F. Supp. 338, 346 n.3 (D.R.I. 1978), suggesting that a conflict of interests among its membership would not affect an association's standing.

See generally Note, *Associational Standing and Due Process: The Need for an Adequate Representation Scrutiny*, 61 B.U.L. REV. 174 (1981), in which the author urges the federal courts to allow associational standing only upon a threshold showing of the likelihood of adequate representation of the interests of members of the association.

187. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 344 (1977).

188. 432 U.S. 333 (1977).

189. *Id.* at 345. See also *Health Research Group v. Kennedy*, 82 F.R.D. 21 (D.D.C. 1979), denying standing to a non-membership organization which the court found lacking in sufficient "indicia of membership." For a debate over the wisdom of the result, see Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 319 (1979) and Tushnet, *supra* note 7, at 1703.

with a predictable variation of results ranging from excessive liberality to undue restrictiveness. The results have usually been satisfying, but the reasoning frequently has not.

A. *Decisions Granting Standing*

Many of the decisions have allowed third-party standing, often on the basis of a liberal application of Supreme Court precedents. Some courts, for example, have granted standing purely on the basis of the "relationship" exception stated in *Singleton*, although noting that denial of standing would impair the rights of third parties.¹⁹⁰ Others have permitted standing solely on the basis of the second factor discussed in *Singleton*—a perceived obstacle to the third party's assertion of his own rights.¹⁹¹ In more complete harmony with the plurality opinion in *Singleton*, at least one court has required the presence of both factors for standing.¹⁹² A few courts have looked only to the impact upon third-party rights, requiring no pre-existing or established relationship.¹⁹³ Still other

190. *Planned Parenthood v. Citizens for Community Action*, 558 F.2d 861, 865 n.3 (8th Cir. 1977) (abortion clinic asserting rights of female patients); *In re Investigation before April 1975 Grand Jury*, 531 F.2d 600, 606 n.10 (D.C. Cir. 1976) (attorney, as litigant, asserting right of client to have attorney of his choice); *Walgren v. Board of Selectmen*, 519 F.2d 1364, 1364 n.1 (1st Cir. 1975) (candidate asserting rights of voters); *Wounded Knee Legal Defense/Offense Comm. v. FBI*, 507 F.2d 1281, 1284 (8th Cir. 1974) (attorneys, as litigants, asserting rights of clients in challenging FBI harassment of attorneys); *Mancuso v. Taft*, 476 F.2d 187, 190 (1st Cir. 1973) (candidate asserting rights of voters); *Keker v. Procnunier*, 398 F. Supp. 756, 764-65 (E.D. Cal. 1975) (attorney, as litigant, asserting rights of client); *Henrie v. Derryberry*, 358 F. Supp. 719, 722 (N.D. Okla. 1973) (psychologist, psychiatrist, and minister asserting rights of females who consult them concerning abortions). One court stressed the relationship between the litigant and third parties, and found the third parties' rights "inextricably bound up with the activity the litigant wishes to pursue. . . ." *Czajkowski v. Illinois*, 460 F. Supp. 1265, 1274-76 (N.D. Ill. 1977), *aff'd without opinion*, 588 F.2d 839 (7th Cir. 1978) (cigarette retailer asserting fourth amendment rights of purchasers).

191. *Bell & Howell Co. v. NLRB*, 598 F.2d 136 (D.C. Cir.), *cert. denied*, 442 U.S. 942 (1979) (employer asserting rights of employees in opposing NLRB certification of union); *United States v. Robinson*, 421 F. Supp. 467 (D. Conn. 1976), *rev'd on other grounds sub nom. United States v. Newman*, 549 F.2d 240 (2d Cir. 1977) (black and white criminal defendants asserting rights of black citizens in challenging exclusion of black jurors through use of peremptory challenges by prosecutor).

192. *Francis v. Cleland*, 433 F. Supp. 605 (D.S.D. 1977), *rev'd on other grounds sub nom. Cleland v. National College of Business*, 435 U.S. 213 (1978) (educational institution asserting rights of veteran-students in challenge to statutory provisions concerning educational benefits). *See also Akron Bd. of Educ. v. State Bd. of Educ.*, 490 F.2d 1285, 1289-91 (6th Cir. 1974).

193. *Aladdin's Castle, Inc. v. City of Mesquite*, 630 F.2d 1029, 1036 (5th Cir. 1980), *cert. granted*, 49 U.S.L.W. 3851 (U.S. May 19, 1981) (No. 80-1577) (amusement center owner asserting rights of children under 17 to play coin-operated amusement machines); *Wilson v. Chancellor*, 418 F. Supp. 1358, 1367 (D. Or. 1976) (teacher asserting rights of communist speaker whom teacher invited to speak to his class); *Houston Chronicle Publishing Co. v.*

courts have taken a pragmatic approach to the question, allowing standing not through application of any of the Supreme Court's exceptions, but because the facts of the case satisfied the policies underlying the general rule.¹⁹⁴ In several other cases, most of them pre-dating the elaborate *Singleton* debate, courts permitted third-party standing on the basis of very questionable reasoning, given the Supreme Court precedents controlling at the time.¹⁹⁵

Another line of cases evolved from the Supreme Court's decision in *Board of Education v. Allen*.¹⁹⁶ In that case, a local board of education challenged the constitutionality of a New York law requiring local public school authorities to lend textbooks to students in private as well as in public schools. Although no party challenged the board's standing at the Supreme Court level, Mr. Justice White stated that there was "no doubt" that it had standing, given that the board members would have to choose between violating the statute, thus risking dismissal from office, or violating

Kleindienst, 364 F. Supp. 719, 723-25 (S.D. Tex. 1973) (newspaper asserting rights of prisoners in challenge to policy preventing prison interviews). See also *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 574 (3d Cir. 1980) (employer may assert employees' right to privacy). In *Westinghouse*, the court apparently focused upon the dilution of third-party rights, but noted as well the existence of an "ongoing relationship" between employer and employees. The same conclusion was reached in *United States v. Allis-Chalmers Corp.*, 498 F. Supp. 1027 (E.D. Wisc. 1980), with no apparent consideration of the established exception to the general rule.

194. *Rogers v. Brockette*, 588 F.2d 1057, 1060-63 (5th Cir.), cert. denied, 444 U.S. 827 (1979) (plaintiff an "appropriate party" to raise issues in question, given plaintiff's role in statutory scheme in question); *Southwestern Community Action Council, Inc. v. Community Servs. Admin'n*, 462 F. Supp. 289, 292-94 (S.D. W. Va. 1978) (corporation may assert rights of chairman of its board, since action will involve chairman). See also *Chadha v. INS*, 634 F.2d 408, 418 (9th Cir. 1980), where the court succinctly rejected a *jus tertii* objection to a claim based upon a separation of powers argument.

195. *Chicano Police Officers' Ass'n v. Stover*, 526 F.2d 431, 435 (10th Cir. 1975), vacated on other grounds, 426 U.S. 944 (1976); *Gajon Bar & Grill, Inc. v. Kelly*, 508 F.2d 1317, 1322 n.9 (2d Cir. 1974); *Park View Heights Corp. v. City of Black Jack*, 467 F.2d 1208 (8th Cir. 1972); *Doe v. Temple*, 409 F. Supp. 899, 903 (E.D. Va. 1976); *Stoner v. Fortson*, 379 F. Supp. 704, 707 (N.D. Ga. 1974); *Stoner v. Fortson*, 359 F. Supp. 579, 580-81 (N.D. Ga. 1972); *Sisters of Providence v. City of Evanston*, 355 F. Supp. 396, 400-02 (N.D. Ill. 1971). In *Spinkellink (sic) v. Wainright*, 578 F.2d 582, 612 n.36 (5th Cir. 1978), the court permitted a condemned murderer to challenge the death penalty by arguing, *inter alia*, that the penalty applied disproportionately to the killers of white persons, thus discriminating against black people. The litigant was white. The court said, on the issue of standing: "Spinkelink has standing to raise the equal protection issue, even though he is not a member of the class allegedly discriminated against, because such discrimination, if proven, impinges on his constitutional right . . . not to be subjected to cruel and unusual punishment," citing *Taylor v. Louisiana*, 419 U.S. 522, 526 (1975), described *supra* at text accompanying note 167. While one can understand the court's solicitous attitude toward a person in Spinkelink's position, the reasoning lacks clarity.

196. 392 U.S. 236 (1968).

(in their minds, at least) their oath to support the Federal Constitution.¹⁹⁷ The *Allen* holding actually represents, at best, an exception to the general rule, articulated by the Court six years later, that no person has standing to challenge governmental action that causes him no individualized injury but simply offends his sense of justice.¹⁹⁸

One should also note that the Court has been liberal in permitting challenges to legislation under the establishment clause of the first amendment, so long as the challenger has suffered actual injury caused by the legislation.¹⁹⁹ *Allen* allowed an establishment clause challenge by public officials on the basis of the "injury" caused them through the imposition of a choice between two unpalatable alternatives.²⁰⁰ Although *Allen* had nothing to do with third-party standing, at least a few lower courts have relied on its holding to permit public officials to bring actions in which they asserted the rights of third parties.²⁰¹

197. *Id.* at 241 n.5.

198. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166 (1974). At least one lower court has held that the *Allen* rationale did not survive these later decisions. *City of S. Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d 231 (9th Cir. 1980).

199. *McGowan v. Maryland*, 366 U.S. 420, 429-31 (1961). *Cf. Harris v. McRae*, 100 S. Ct. 2671 (1980) (indigent pregnant women, officers of women's division of church organization, and organization itself denied standing to challenge curtailment of funds for abortions under free exercise clause of first amendment, for failure to allege personal stake in controversy).

200. The Supreme Court, in earlier cases, however, held that a public official had standing to sue based simply upon the "injury" suffered by virtue of impairment of his ability to perform his official duties. *United States ex rel. Chapman v. Federal Power Comm'n*, 345 U.S. 153 (1953); *Coleman v. Miller*, 307 U.S. 433 (1939). *See also Brewer v. Hoxie School Dist. No. 46*, 238 F.2d 91, 95 (8th Cir. 1956); *Washington Utils. & Trans. Comm'n v. FCC*, 513 F.2d 1142, 1149 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975).

201. *Regents of Univ. of Minn. v. NCAA*, 560 F.2d 352 (8th Cir.), *cert. dismissed*, 434 U.S. 978 (1977); *Akron Bd. of Educ. v. State Bd. of Educ.*, 490 F.2d 1285 (6th Cir.) (alternative ground), *cert. denied*, 417 U.S. 932 (1974); *Aguayo v. Richardson*, 473 F.2d 1090, 1100 (2d Cir. 1973), *cert. denied sub nom. Aguayo v. Weinberger*, 414 U.S. 1146 (1974). In some of these cases, the court recognized that the litigant arguably raised a third-party standing issue, but treated the "official duty" theory as an entirely independent basis for standing. In *Regents*, for example, the plaintiffs challenged NCAA sanctions placed upon the university as a result of plaintiffs' failure to declare three basketball players ineligible for participation in intercollegiate competition. The plaintiff officials argued that the athletes had a constitutional right to a prior hearing, and that the defendant NCAA's actions interfered with the plaintiffs' performance of their constitutional duties. The court rejected the argument that the plaintiffs violated the rule against third-party standing, stating: "It is true of course, that plaintiffs here seek to assert the rights of student-athletes Thompson, Winey and Saunders. As our above comments make clear, however, their attempt to do so forms an integral part of their attempt to assert their own constitutional right." 560 F.2d at 364. Although the court stated earlier that the plaintiffs had a right to freedom from interference

B. Decisions Denying Standing

There have also been many lower court cases denying third-party standing, most of them quite properly. At the lower-court level, constitutional challenges to statutes on the basis of overbreadth, outside the first amendment context, continue to be brought and rejected.²⁰² Challenges to statutes on vagueness grounds have been similarly rejected if the court found the statute clearly covered the litigant's conduct and thus was not vague as to him.²⁰³ Other lower court cases have been decided on, or can be explained by, the severability and causation principles discussed earlier.²⁰⁴ Finally, the courts in many cases have properly denied

with the performance of their constitutional duties, *id.* at 363, it arrived at an incorrect ultimate conclusion. The violation of that "right" may constitute plaintiffs' "injury in fact," but surely one cannot say that these plaintiffs had a constitutional *right* to provide the three athletes with a prior hearing, in the same sense that one can say that a white criminal defendant has a right to a jury chosen freely of racial discrimination. See text accompanying notes 163-69 *supra*. Clearly the plaintiffs in *Regents* asserted rights other than their own, in the process of asserting their own "rights."

In the *Akron* case the court noted that the plaintiff local board's members might face liability in a later suit, at the hands of third parties, if the local board acquiesced in the challenged action of the state board. 490 F.2d at 1290. This case relates closely to *International Harvester Co. v. Wisconsin Dept. of Taxation*, 322 U.S. 435 (1944) and *Anderson Nat'l Bank v. Lueckett*, 321 U.S. 233 (1944). In each of these cases, the plaintiff (a private party) faced potential liability to third parties if a court later held the challenged statute unconstitutional; in each case the Court allowed standing to raise the rights of those third parties, without discussion. Although one commentator has suggested that these cases did not involve third-party standing because the (potential) double liability imposed would amount to a denial of due process to the plaintiffs, such a proposition is far from clear. See Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 *YALE L.J.* 599, 641 n.177a (1962).

Subsequent decisions have distinguished the *Allen* line of cases: *Finch v. Mississippi State Medical Ass'n*, 585 F.2d 765, 774 (5th Cir. 1978) (no threat of sanctions for non-compliance); *School Dist. of Kansas City v. Missouri*, 460 F. Supp. 421, 440 (W.D. Mo. 1978), *appeal dismissed*, 592 F.2d 493 (8th Cir. 1979) (plaintiff's duty fully discharged); *Athanson v. Grasso*, 411 F. Supp. 1153, 1158 (D. Conn. 1976) (no threat of sanctions for non-compliance).

202. *United States v. Harris*, 592 F.2d 1058, 1061 (9th Cir. 1979); *United States v. Mullen*, 583 F.2d 134, 140 (5th Cir. 1978); *Big Eagle v. Andera*, 508 F.2d 1293, 1297 (8th Cir. 1975); *United States v. Lippman*, 492 F.2d 314 (6th Cir.), *cert. denied*, 419 U.S. 1107 (1974).

203. *Daily v. Bond*, 623 F.2d 624 (9th Cir. 1980); *United States v. Herrera*, 584 F.2d 1137, 1148 (2d Cir. 1978); *United States v. Alfonso*, 552 F.2d 605, 615 (5th Cir.), *cert. denied*, 434 U.S. 857 (1977); *Paulos v. Breier*, 507 F.2d 1383, 1387 (7th Cir. 1974); *Pordum v. Board of Regents*, 491 F.2d 1281, 1286 (2d Cir.), *cert. denied*, 419 U.S. 843 (1973).

204. Cases explainable on this basis include *Savina Home Indus., Inc. v. Secretary of Labor*, 594 F.2d 1358, 1366 (10th Cir. 1979); *United States v. Warin*, 530 F.2d 103, 108 (6th Cir.), *cert. denied*, 426 U.S. 948 (1975); *United States v. Maestas*, 523 F.2d 316, 322 (10th Cir. 1975); *Lake Butler Apparel Co. v. Secretary of Labor*, 519 F.2d 84 (5th Cir. 1975); *Atlas Roofing Co. v. OSAHRC*, 518 F.2d 990, 1012 (5th Cir. 1975), *aff'd on other grounds*, 430 U.S. 442 (1977); *Tyler v. Ryan*, 419 F. Supp. 905 (E.D. Mo. 1975). Cases that the courts

third-party standing on the basis of the causation principle alone—*i.e.*, the litigant simply did not suffer injury from the statute he wished to challenge.²⁰⁵

On occasion, however, the lower federal courts have applied the general rule against third-party standing in cases in which there was no good reason to deny standing, in this author's view. The case of *Corey v. City of Dallas*²⁰⁶ in 1974 serves as an example. Plaintiff owned and operated massage parlors in San Antonio, and wished to open a massage parlor in Dallas. He needed a permit from the city but learned that he would not receive one, because a city ordinance prohibited anyone from administering a massage to a person of the opposite sex. He sued for declaratory and injunctive relief, arguing that the ordinance violated the constitutional rights of his prospective masseuses. He prevailed in the district court, but the court of appeals reversed on the ground that Corey lacked standing to raise the rights of others. The court recognized the "obstacle" exception to the general rule, but found it inapplicable, stating: "If any masseuses are ever prosecuted under the ordinance, they are free to defend by asserting their own equal protection rights. There is therefore no compelling need to permit Corey to assert their rights at this stage."²⁰⁷

Courts would probably decide the case differently today, in light of the Supreme Court's subsequent rulings in *Craig* and *Ca-*

more or less explicitly decided on this basis include *Wiren v. Eide*, 542 F.2d 757, 762 (9th Cir. 1976); *Adams v. Askew*, 511 F.2d 700, 704 (5th Cir. 1975); and *Bell v. Hongisto*, 501 F.2d 346, 355 (9th Cir. 1974), *cert. denied*, 420 U.S. 962 (1975). In *Bell* the court cited the general rule against third-party standing, and added: "A corollary of this rule is that, if a statute contains separable provisions, a person may challenge only those provisions which operate to injure him, and he may not challenge those provisions that cause him no harm." *Id.* at 356. The court appeared to assume the severability of the state statute involved.

205. *E.g.*, *Swift v. United States*, 436 F.2d 390 (8th Cir. 1970), *cert. denied*, 403 U.S. 920 (1971); *M.C.I. Concord Advisory Bd. v. Hall*, 447 F. Supp. 398, 403 (D. Mass. 1978); *Acevedo Montalvo v. Hernandez Colon*, 440 F. Supp. 238 (D.P.R. 1977). A case which should have been decided on that ground, but was not, *United States v. Lyman*, 592 F.2d 496 (9th Cir. 1978), *cert. denied*, 442 U.S. 931 (1979), involved a defendant who moved to dismiss a criminal indictment against him because it named three unindicted co-conspirators, thus prejudicing him and denying him due process of law. The court found the naming of the other persons in no way prejudiced Lyman, and then considered whether he could object on *their* behalf; it concluded that he could not because no applicable exception to the general rule applied. *Id.* at 502-03. The analysis should have stopped after the determination that Lyman had suffered no injury as a result of the alleged misconduct. *Accord*, *Application of Jordan*, 439 F. Supp. 199, 209 n.11 (S.D. W. Va. 1977) (dictum); *United States v. Hansen*, 422 F. Supp. 430, 436 (E.D. Wis. 1975).

206. 492 F.2d 496 (5th Cir. 1974).

207. *Id.* at 497. Judge Clark, concurring in the result, disagreed with the majority on the standing issue. *Id.* at 498.

rey,²⁰⁸ in which the Court effectively ignored both the "relationship" and "obstacle" exceptions articulated in *Singleton*; as noted above, the Court in those cases apparently predicated the grant of standing upon the conclusion that denial of standing to the litigant would "dilute" the rights of the third party. That appeared to be true in *Corey* as well; Corey simply could not legally open a massage parlor, or hire masseuses, unless he obtained a permit. Furthermore, there was no realistic probability that any prospective masseuse would bring suit to challenge the ordinance. The third-party victims remained as yet unidentified, but were not hypothetical. The court conceded that Corey himself suffered injury from the ordinance, and clearly a victory in the suit would have protected his interests. The *Corey* decision is therefore wrong, even under the present law of third-party standing.

*Construction Industry Association v. City of Petaluma*²⁰⁹ is another wrongly decided case. Two owners of land within the city, along with an association of builders, challenged a city plan that seriously limited annual housing development. The plaintiffs prevailed in the district court, arguing that the plan improperly impaired the constitutional right to travel—a claim asserted "on behalf of a group of unknown third parties allegedly excluded from living in Petaluma."²¹⁰ The Court of Appeals for the Ninth Circuit held that the plaintiffs lacked standing to make this argument, because they bore no "special, on-going relationship" with the third parties, and the third parties could assert their own rights.²¹¹ The plaintiffs had standing to assert their own rights,²¹² but the court ruled against them on the merits of those arguments. Thus, the plaintiffs were deprived in the court of appeals of the very legal argument that had brought them victory in the district court, with resulting defeat. The results in *Craig* and *Carey* suggest that the *Petaluma* case was wrongly decided as to the standing of the plaintiff association, because the third-party rights, if any, were "diluted" to the extent of the (plaintiff) builders' inability to build homes in the city. The landowner plaintiffs complained of the diminution in value and marketability of their land as a result of the

208. See notes 110-33 and accompanying text *supra*.

209. 522 F.2d 897 (9th Cir.), *cert. denied*, 424 U.S. 934 (1975); *accord*, *Rasmussen v. City of Lake Forest*, 404 F. Supp. 148, 154-58 (N.D. Ill. 1975).

210. 522 F.2d at 904.

211. *Id.*

212. "[A]ppellees have standing to challenge the Petaluma Plan on the grounds . . . that the plan is arbitrary and thus violative of their due process rights . . . and that the Plan poses an unreasonable burden on interstate commerce." *Id.* at 905.

plan. Their injury, like the injuries of the taxpayers and Penfield residents in *Warth v. Seldin*, had no impact on the rights of third parties, but the opinion reveals no good reason to deny them standing, either.²¹³

Another facet of the *Petaluma* decision deserves mention. Although plaintiffs filed suit under section 1983,²¹⁴ the court stated

213. Three other cases, arguably incorrect even under existing law, are *Dresser Indus., Inc. v. United States*, 596 F.2d 1231, 1238 (5th Cir. 1979), *cert. denied*, 444 U.S. 1044 (1980); *Fennell v. Carlson*, 466 F. Supp. 56 (W.D. Okla. 1978); and *Board of Elections v. Lomenzo*, 365 F. Supp. 50, 54 (S.D.N.Y. 1973). In *Dresser* the court said that a corporation cannot assert the rights of its employees under the federal Privacy Act; it appears, however, although the decision is not clear on this point, that the corporation suffered no injury as a result of the governmental action it challenged.

In *Fennell*, a prisoner claimed violation of a friend's rights when the friend did not receive visitor status; the court stated that the plaintiff lacked standing to assert the rights of the friend. The court did reach the merits, however, and denied the claim.

The plaintiffs in *Lomenzo*, organizations involved in volunteer voter registration, challenged a state election law prohibiting such activity on Sundays. The court held, as one of several grounds for its decision, that the plaintiffs lacked standing to raise arguments under the free exercise and equal protection clauses on behalf of Sabbatarians, because none of the plaintiffs practiced religion as Sabbatarians. In each of these cases, one can argue that the restriction or requirement placed upon the litigant diluted the rights of the third parties.

At least one other case, while correctly decided under present law, can be justified only on the basis of the general rule against third-party standing, and thus is wrong in this writer's opinion: *Appling County v. Municipal Elec. Auth.*, 621 F.2d 1301, 1307 (5th Cir. 1980). The case involved a challenge by a county and individual taxpayers to the constitutionality of a tax exemption for utilities under state law, asserting the interests of third-party bondholders; the holding against standing constituted one of several alternative grounds relied upon by the court.

At least three recent criminal cases denying third-party standing appear wrongly decided, in this writer's opinion, unless one can explain them under the theory of the *Reidel* case, discussed in text accompanying notes 135-42 *supra*: *United States v. Herrera*, 584 F.2d 1137, 1148 (2d Cir. 1978); *United States v. Pelton*, 578 F.2d 701, 710 (8th Cir.), *cert. denied*, 439 U.S. 964 (1978); *United States v. Garrett*, 521 F.2d 444 (8th Cir. 1975). *Herrera* involved a criminal prosecution for, among other things, using facilities of interstate commerce to conduct a house of prostitution; the court did not permit defendants to raise the rights of privacy of the prostitutes they employed. *Pelton* and *Garrett* both involved Mann Act convictions. In *Pelton* the defendant sought unsuccessfully to raise the right of the woman to seek legal employment in Nevada, their destination (where prostitution is legal in some areas). In *Garrett* the defendant apparently argued that the Mann Act denies equal protection to people (like himself) transporting females across state lines for immoral purposes, as opposed to those who transport males across state lines for immoral purposes. Possibly misunderstanding the defendant's theory, the court observed that *Garrett*, not a male victim of interstate transportation, lacked standing to raise this argument. Even if *Garrett had* argued on the basis of under-inclusiveness of the statute as to victims, as in *Rosenthal v. New York*, 226 U.S. 260 (1912), the court should have allowed him to do so, despite the fact that such an argument will almost certainly fail on the merits. *See, e.g., Railway Express Agency v. New York*, 336 U.S. 106 (1939). One should note that, in both *Pelton* and *Garrett*, the court drifted into the merits of the challenges, pointing out that courts had consistently upheld the constitutionality of the Mann Act.

214. 42 U.S.C. § 1983 (1976).

that, in addition to satisfying the article III requirement of "injury in fact," plaintiffs had to satisfy the court-imposed requirement that the "interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."²¹⁵ Other lower courts have also assumed that the "zone of interests" test applies to a 1983 action.²¹⁶ It is far from clear, however, whether the zone of interests test has any application outside the context in which it was announced—judicial review of federal administrative action under section 702 of the Administrative Procedure Act.²¹⁷ Regarding the rule against third-party standing as a "corollary" of the zone of interests test, the *Petaluma* court, somewhat unclearly, applied the zone of interests test by discussing the exceptions to the third-party standing rule.²¹⁸ Even if the "zone" test has general applicability, to equate that test with the third-party standing rule is a mistake.²¹⁹ In no way does the court-imposed "zone" requirement interfere with the ability of a federal court to permit third-party standing, as long as the *interest that the litigant may permissibly*

215. 522 F.2d at 903 (quoting *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)).

216. *E.g.*, *Corey v. City of Dallas*, 492 F.2d 496 (5th Cir. 1974); *Boyce v. Rizzo*, 78 F.R.D. 698, 704 (E.D. Pa. 1978). *See also* *Cornelius v. City of Parma*, 374 F. Supp. 730 (N.D. Ohio 1974), *remanded without opinion*, 521 F.2d 1401 (6th Cir. 1975), *cert. denied*, 424 U.S. 955 (1976) (§ 1981 action).

217. 5 U.S.C. §§ 551-559, 701-706 (1976). Some commentators have expressed the view that the "zone" test in fact represents an interpretation of the following language in § 702 of the APA: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 13 WRIGHT, MILLER & COOPER, *supra* note 61, § 3531, at 200; Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1731 (1974); *The Supreme Court, 1969 Term*, 84 HARV. L. REV. 1, 180-82 (1970). *But see* DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* § 22.02-11 (1976); L. TRIBE, *supra* note 24 at 658; Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450, 465-68 (1970); Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 658 (1973).

At least a few other courts have, to some extent, recognized this view. *E.g.*, *Baker v. Bell*, 630 F.2d 1046, 1051 (5th Cir. 1980); *Rogers v. Brockette*, 588 F.2d 1047, 1061 n.8 (5th Cir. 1979), *cert. denied*, 444 U.S. 827 (1980); *Civic Awareness Ltd. v. Richardson*, 387 F. Supp. 1086 (E.D. Wis. 1975). The striking omission of the "zone" test by Chief Justice Burger in his review of standing requirements in *Duke Power Co. v. Carolina Environ'l Study Group, Inc.*, 438 U.S. 59 (1978), a case involving judicial review of administrative action, has led some commentators to speculate that the Court "has either abandoned the test or confined it to those suits in which statutory rather than constitutional claims are at issue." *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57, 260 (1978). For the reasons expressed therein, the latter alternative appears more likely.

218. 522 F.2d at 904.

219. Professor Tribe clearly equates the two requirements. L. TRIBE, *supra* note 24, § 3-23, at 100-01. With all respect, I know of no authority supporting his interpretation of the "zone of interest" test, and he offers none in support of his position.

assert (under third-party standing analysis) falls within the zone of interests arguably protected or regulated by the relevant statute or constitutional provision. Thus, to decide whether *X* may challenge governmental conduct by asserting the rights of *Y* under a federal statute, we must ask: (1) Does *X* suffer injury in fact from the governmental conduct? (2) Is *X* permitted to assert the rights of *Y*? (This includes, of course, the question whether it will help *X* to do so.) (3) Finally, does the federal statute arguably protect one in *Y*'s position (*vis-à-vis* the particular issue at hand)?²²⁰

VI. CLASS-ACTION MOOTNESS DOCTRINE IN THE SUPREME COURT

Although the rule against third-party standing contains numerous exceptions, it becomes even more difficult to justify when one considers the closely related doctrine of mootness in the context of class actions. The doctrines are closely related because both stem from the "case or controversy" requirement of article III. When a case becomes moot, just as when a plaintiff lacks standing, the court cannot retain jurisdiction, because a case or controversy no longer exists.

A. *The General Rule*

Mootness results when a plaintiff somehow has obtained the result he desired from the litigation so that he no longer possesses the "personal stake" necessary to assure "concrete adverseness."²²¹ In other words, there is lacking the assurance that the plaintiff has the personal incentive to pursue vigorously the challenge to allegedly unlawful conduct—the incentive that is normally afforded by his having something to gain through victory, other than ideological or spiritual satisfaction. A court ordinarily will deem a case moot even if this personal stake exists throughout the proceedings at the trial court level, but is lost before the decision of a subsequent appeal.²²²

220. At least one lower court has committed the conceptual error of omitting the second question, thus bypassing the third-party standing analysis altogether, and simply asking whether the *litigant's* interest satisfied the "zone" test. *Secretary of Labor v. Farino*, 490 F.2d 885, 889 (7th Cir. 1973) (employers allowed to assert rights of alien employees).

221. *E.g.*, *Preiser v. Newkirk*, 422 U.S. 395 (1975); *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

222. *Sosna v. Iowa*, 419 U.S. 393, 402 (1975).

B. *Exception: Capable of Repetition, Yet Evading Review.*

The primary exception to the mootness doctrine is well-known and well-established: a court will not hold a controversy moot, notwithstanding the plaintiff's lack of any immediate gain by prevailing in the litigation, if 1) there exists a "demonstrated probability"²²³ that the dispute will recur between the defendant and the plaintiff, and 2) the factual context in which the dispute arose generally will not, by its very nature, exist long enough to allow a definitive disposition of the legal controversy. This type of controversy is defined as "capable of repetition, yet evading review."²²⁴ One must understand that courts have defined the word "repetition" in this phrase to mean repetition *with respect to the particular plaintiff*; because the problem could recur for this plaintiff, he has the requisite personal stake in the outcome and is not deemed merely the representative of others.

*United States v. New York Telephone Co.*²²⁵ presents a clear example of this principle. A telephone company resisted full compliance with a district court order to cooperate with the FBI in an investigation of certain telephone users. The FBI had completed the particular surveillance by the time the case reached the court of appeals, but little doubt existed that the government would seek similar court orders in the future, any of which would stay in effect for only a short time.²²⁶

Another example, *Roe v. Wade*,²²⁷ established a woman's fundamental right to an abortion. The plaintiff, a pregnant woman, desired an abortion when filing the suit, but was no longer pregnant by the time the case reached the Supreme Court. The Court reasoned that she might become pregnant again and desire an

223. *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975).

224. *SEC v. Sloan*, 436 U.S. 103, 109 (1978); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 546-47 (1976); *Super Tire Eng'r Co. v. McCorkle*, 416 U.S. 115, 125 (1974); *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911).

225. 434 U.S. 159 (1977).

226. *Id.* at 165 n.6. A related, but distinguishable, mootness exception arises in suits for injunctive relief when the initial skirmish giving rise to the litigation may or may not have ended; the defendant claims it has, saying in effect, "I'll be good now," but the plaintiff has no assurance that the defendant truly "has thrown in the towel." If the Court agrees with the plaintiff, it will not deem the case moot. *E.g.*, *Vitek v. Jones*, 445 U.S. 480 (1980); *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968); *United States v. W.T. Grant Co.*, 345 U.S. 629 (1953). In these situations there exists no inherent threat of mootness stemming from time factors. See generally Comment, *A Search for Principles of Mootness in the Federal Courts: Part One—The Continuing Impact Doctrines*, 54 *Tex. L. Rev.* 1289, 1292-93 (1976).

227. 410 U.S. 113 (1973).

abortion, but could never pursue her challenge from the time of filing a complaint to Supreme Court review while still in that condition.²²⁸ Obviously, one cannot determine with certainty the probability that any particular woman will become pregnant and desire an abortion a second time; however, the Court in *Roe* took no apparent interest in this difficulty. As one group of commentators has observed, "[l]ow levels of probable future impact on present plaintiffs have been accepted in recent cases applying the capable of repetition doctrine to challenges to abortion limitations and election requirements."²²⁹ The leniency in the Court's application of this exception is most striking in cases on challenges to requirements for elections already held; the Court has paid absolutely no explicit attention to the likely future political activity of the particular plaintiffs.²³⁰ The results even in these cases provide examples of litigants who may well have been simply carrying on the fight for others.

C. *Certified Class Actions*

This was the well-established state of the mootness doctrine before the Court's decision in *Sosna v. Iowa* in 1975.²³¹ Carol Sosna had petitioned for a dissolution of marriage in an Iowa state court one month after moving to Iowa. The lower court dismissed her petition because of Iowa's one-year residency requirement for obtaining a divorce. She then filed a federal lawsuit challenging this requirement on constitutional grounds. The district court certified the suit as a class action, but ruled against Sosna on the merits.²³² By the time the case reached the Supreme Court, Sosna had satisfied the Iowa residency requirement and even had obtained a di-

228. *Id.* at 125. Interestingly, the Court denied standing to a co-plaintiff, a woman not yet pregnant and desirous of an abortion, who believed she might achieve that status. Would the formerly pregnant woman likely supply more effective advocacy than the not-yet-pregnant one, simply because the first one had "been there"?

229. 13 WRIGHT, MILLER & COOPER, *supra* note 61, § 3533, at 288. See also Note, *The Mootness Doctrine in the Supreme Court*, 88 HARV. L. REV. 373, 385 (1974); Comment, *supra* note 226, at 1301-06.

230. *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974); *Rosario v. Rockefeller*, 410 U.S. 752, 756 n.5 (1973); *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969). See also *Dunn v. Blumstein*, 405 U.S. 330, 333-34 n.2 (1972), concerning a challenge to a residency requirement for voting by one who had satisfied the requirement by the time the case reached the Supreme Court, but as to whom the Court held the case not moot. Said one group of commentators: "This ruling strains the supposed requirement of individual future impact almost beyond recognition." 13 WRIGHT, MILLER & COOPER, *supra* note 61, at 289.

231. 419 U.S. 393 (1975).

232. *Id.* at 397-98.

voiced; thus, the question of mootness arose. With only Mr. Justice White dissenting on the mootness issue, the Court, per Mr. Justice Rehnquist, held the case not moot.²³³ He reasoned, in essence, that a "case" remained for the certified class. When the district court granted certification, "the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by appellant."²³⁴ In theory, the "capable of repetition, yet evading review" exception clearly did not apply to *Sosna*,²³⁵ although it did apply to unnamed members of the class. "[B]ecause of the passage of time," wrote Mr. Justice Rehnquist, "no single challenger will remain subject to its restrictions for the period necessary to see such a lawsuit to its conclusion."²³⁶ To find mootness in a case like this, he continued,

would permit a significant class of federal claims to remain unredressed for want of a spokesman who could retain a personal adversary position throughout the course of the litigation. Such a consideration would not itself justify any relaxation of the provision of Art. III which limits our jurisdiction to "cases and controversies," but it is a factor supporting the result we reach if consistent with Art. III.²³⁷

The Court stated that this policy reason for the result limited its holding: "In cases in which the alleged harm would not dissipate during the normal time required for resolution of the controversy, the general principles of Art. III jurisdiction require that the plaintiff's personal stake in the litigation continue throughout the entirety of the litigation."²³⁸ But if article III is satisfied by a live claim of a class member, why should it matter, for article III purposes, whether the case involves an inherent threat of mootness?

Mr. Justice White dissented vigorously and persuasively, arguing that *Sosna*

retains no real interest whatsoever in this controversy. . . . In reality, there is no longer a named plaintiff in the case. . . . A real issue unquestionably remains, but the necessary adverse party to press it has disappeared. . . . The legal fiction employed to cloak this reality is the reification of an abstract en-

233. *Id.* at 401.

234. *Id.* at 399.

235. *Id.* at 400. *Dunn v. Blumstein*, 405 U.S. 330 (1972), provided precedent for a holding of non-mootness as to *Sosna*, but represented a very questionable holding.

236. 419 U.S. at 400.

237. *Id.* at 401 n.9.

238. *Id.* at 402.

tity, "the class," constituted of faceless, unnamed individuals who are deemed to have a live case or controversy with appellees.²³⁹

Whether the inherent mootness factor stressed by Mr. Justice Rehnquist in *Sosna* makes sense, the Court clearly found it irrelevant the following year, in *Franks v. Bowman Transportation Co.*²⁴⁰ Plaintiff brought a class action on behalf of blacks against a private corporation, alleging racially discriminatory employment practices. The suit resulted in, among other things, priority hiring consideration for black job applicants, but the lower court denied plaintiff's claim for advanced seniority status. Plaintiff appealed the issue of seniority status to the Supreme Court, but the defendant had already hired and fired (for cause) the named representative. The Court refused to find the class action moot, although this case in no way presented a situation "capable of repetition, yet evading review": no inherent reason existed why the named representative could not remain a proper adversary throughout the duration of the litigation.²⁴¹ The Court's opinion by Mr. Justice Brennan did note, however, that the unnamed members of the class in this case consisted of identified individuals with a clear and continuing interest in the controversy.²⁴² "[T]here is no meaningful sense," he wrote for the majority, "in which a 'live controversy' reflecting the issues before the Court could be found to be absent."²⁴³

D. *The Demise of the Certification Requirement*

Until 1980, it appeared that the rule of *Sosna* and *Franks* applied only when the court certified the lawsuit as a class action, in compliance with Federal Rule of Civil Procedure 23, before the named representative's claim became moot. The Supreme Court developed this rule in three cases decided in 1975 and 1976.²⁴⁴ The Court in *Sosna*, however, suggested an exception to the certifica-

239. *Id.* at 412-13.

240. 424 U.S. 747 (1976).

241. *Id.* at 752-57.

242. *Id.* at 756.

243. *Id.* at 756-57.

244. *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976); *Weinstein v. Bradford*, 423 U.S. 147 (1975); *Board of School Comm'rs. v. Jacobs*, 420 U.S. 128 (1975). But, as Mr. Justice Blackmun pointed out in *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980), in each of those three cases the *defendant* petitioned the Supreme Court for review; the plaintiff did not appeal from a denial of class certification, as he did in *Geraghty*. *Id.* at 400-01 n.7.

tion requirement, and applied it in *Gerstein v. Pugh*.²⁴⁵ *Gerstein* involved a challenge to pretrial detention of unindicted arrestees without a prior judicial determination of probable cause for detention. The plaintiffs, who had filed a class action, were pretrial detainees. Inevitably, the plaintiffs were no longer *pretrial* detainees by the time the case reached the Supreme Court; furthermore, noted the Court, "the record does not indicate whether any of them were still in custody awaiting trial when the district court certified the class."²⁴⁶ The Court found that in this kind of situation, because there existed an inherent threat of mootness to the named representative before the court could even certify the class, the case was not moot as to the class. This, then, represented an exception to the *Sosna* certification requirement.²⁴⁷

In 1980, however, in *United States Parole Commission v. Geraghty*,²⁴⁸ the Court abandoned the prior-certification requirement of *Sosna* and *Franks*, at least when plaintiffs seek, and the court denies, class certification. Pursuant to adopted Parole Release Guidelines, the United States Parole Board had denied parole to Geraghty, a federal prisoner at the time he brought suit. He sued to challenge the guidelines on both statutory and constitutional grounds, but the district court denied class certification and entered summary judgment against him. Geraghty appealed, but prior to the decision of the Court of Appeals for the Third Circuit, he was released from prison. The court of appeals held the case not moot, and reversed the denial of class certification. The Supreme Court affirmed, in a five-to-four decision.

The Court may have adopted the theory that, given the rule of *Sosna* and *Franks*, a proper class action that would otherwise survive the mootness of the named representative's claim should not fail because of an erroneous denial of certification by the district

245. 420 U.S. 103 (1975). See also *Swisher v. Brady*, 438 U.S. 204 (1978).

246. 420 U.S. at 110-11 n.11.

247. *Sosna* itself suggested this result, where the Court said cases might arise in which the controversy as to the named plaintiffs "is such that it becomes moot as to them, before the district court can reasonably be expected to rule on a certification motion." 419 U.S. at 402 n.11. Mr. Justice Powell, dissenting in the *Geraghty* case, characterized *Gerstein* as falling within the "capable of repetition, yet evading review" line of cases, 445 U.S. at 415-16, but it seems questionable whether any of the named plaintiffs would likely suffer another arrest. Mr. Justice Powell, who wrote the majority opinion in *Gerstein*, did invoke the "capable of repetition" exception therein, observing that "[t]he individual could . . . suffer repeated deprivations . . ." 420 U.S. at 110 n.11. He recognized, however, that *Sosna* "ordinarily" requires class certification prior to mootness of the named plaintiffs' claims, and stated: "But this case is a suitable exception to that requirement." *Id.*

248. 445 U.S. 388 (1980).

court; in other words, reversal of the erroneous denial of certification would "relate back" to the date of the district court's decision, with the rule of *Sosna* and *Franks* applying from that time forward. But Mr. Justice Blackmun's majority opinion was not nearly that direct; indeed, it is difficult to say exactly what his theory was. The absence of any concurring opinions compounds the problem.²⁴⁹ Some of the surprising statements made by Mr. Justice Blackmun in the course of his opinion may have significance. Speaking of the "right" under the Federal Rules of Civil Procedure to have a class certified, assuming the party meets the requirements of rule 23, he stated: "This 'right' is more analogous to the private attorney general concept than to the type of interest traditionally thought to satisfy the 'personal stake' requirement."²⁵⁰ He continued:

[T]he purpose of the "personal stake" requirement is to assure that the case is in a form capable of judicial resolution. The imperatives of a dispute capable of judicial resolution are sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions. . . . We conclude that these elements can exist with respect to the class certification issue notwithstanding the fact that the named plaintiff's claim on the merits has expired. The question whether class certification is appropriate remains as a concrete, sharply presented issue. . . . Implicit in [*Sosna v. Iowa*] was the determination that vigorous advocacy can be assured through means other than the traditional requirement of a "personal stake in the outcome." Respondent here continues vigorously to advocate his right to have a class certified.²⁵¹

Two lines later, Mr. Justice Blackmun asserted: "The proposed representative retains a 'personal stake' in obtaining class certification sufficient to assure that Art. III values are not undermined."²⁵²

Mr. Justice Blackmun emphasized that Geraghty had standing at this point only to appeal the denial of class certification; only if he succeeded in that effort could he proceed, under *Sosna*, to litigate the merits of "his" claim. Still, nowhere does the opinion clarify how this would-be class representative had a personal stake in

249. Mr. Justice Stevens's concurring opinion in the companion case of *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 342-43 n.1 (1980), however, contains comments relevant to *Geraghty* as well.

250. 445 U.S. at 403.

251. *Id.* at 403-04.

252. *Id.* at 404.

any aspect of the litigation at this point, or how one could describe him as a "self-interested party."²⁵³

In a lengthy footnote toward the end of the opinion, Mr. Justice Blackmun explained his surprising emphasis on the pragmatic "effective advocacy" basis of article III:

Our point is that the strict, normalistic view of Art. III jurisprudence, while perhaps the starting point of all inquiry, is riddled with exceptions. And, in creating each exception, the Court has looked to practicalities and prudential considerations. The resulting doctrine can be characterized, aptly, as "flexible". . . .

. . . We do not attempt to predict how far down the road the Court eventually will go toward premising jurisdiction "upon the bare existence of a sharply presented issue in a concrete and vigorously argued case". . . .²⁵⁴

Mr. Justice Powell's dissent, for four members of the Court, details the obvious theoretical weaknesses of Mr. Justice Blackmun's majority opinion. What is significant for the instant analysis is Mr. Justice Powell's perception—shared by this author—of the potential impact of the *Geraghty* decision upon the law of standing. Referring to "the elementary principle that no one has a personal stake in obtaining relief for third parties, through the mechanism of class certification or otherwise," Mr. Justice Powell observed: "The Court rejects that principle today."²⁵⁵ Later, he noted that "the Court's new perception of Art. III requirements must rest entirely on its tripartite test of concrete adversity. . . . Although we have refused steadfastly to countenance the 'public action,' the Court's redefinition of the personal stake requirement leaves no principled basis for that practice."²⁵⁶ In a footnote, he added: "The Court's view logically cannot be confined to moot cases."²⁵⁷

In effect, only Mr. Justice Stevens wrote separately in favor of the result in *Geraghty*, by concurring in the result in *Deposit Guaranty National Bank v. Roper*,²⁵⁸ decided the same day as *Geraghty*. *Roper* held that the named representatives of an ostensible class had standing to appeal the denial of class certification,

253. "In the words of his own lawyer, respondent 'can obtain absolutely no additional personal relief' in this case." *Id.* at 413-14 (Powell, J., dissenting).

254. *Id.* at 404-06 n.11.

255. *Id.* at 419.

256. *Id.* at 421-22.

257. *Id.* at 422 n.18.

258. *Id.* at 326.

although the defendant had tendered the maximum amounts of damages that the named representatives could have recovered. The Chief Justice's opinion for the majority (with only Mr. Justices Powell and Stevens dissenting) proffered the theory that the named representatives retained a personal stake in the litigation because a classwide recovery of damages would reduce the amount of attorney's fees they would have to pay. The dissenters pointed out the factual questionability of this conclusion, but, in theory at least, the Chief Justice adhered to the personal-stake requirement. Because the majority found that the litigants retained this personal stake, the decision is not theoretically troubling. In any event, Mr. Justice Stevens's concurring opinion in *Roper* expressed a point of view equally applicable to the more dramatic holding of *Geraghty*. "In my opinion," he wrote,

when a proper class-action complaint is filed the absent members of the class should be considered parties to the case or controversy at least for the limited purpose of the court's Art. III jurisdiction. If the district judge fails to certify the class, I believe they remain parties until a final determination has been made that the action may not be maintained as a class action.²⁵⁹

But it is difficult to disagree with Mr. Justice Powell in his characterization as "a legal fiction"²⁶⁰ the description of absent class members as parties for article III purposes only.

Whether or not the Court decided *Geraghty* correctly, the fact remains that no member of the Court indicated any desire to overturn the rule of *Sosna* or *Franks*,²⁶¹ by which a certified class enables a suit to survive a mootness challenge.²⁶² As Mr. Justice White recognized in *Sosna*, even this rule can be seen as a "legal fiction."

The Justices, in the more recent third-party standing cases,

259. *Id.* at 342-44.

260. *Id.* at 358 n.21.

261. Seeking to distinguish *Sosna* from *Geraghty* in his dissenting opinion in the latter case, Mr. Justice Powell made these observations: "Certification is no mere formality. It represents a judicial finding that injured parties other than the named plaintiff exist Vigorous advocacy is assured by the authoritative imposition on the named plaintiffs of a duty adequately to represent the entire class. . . ." *Id.* at 415 n.8. But in any third-party standing case other than one of the "hypothetical victim" variety, other injured parties clearly exist, although not necessarily in the numbers required for a class action. Although the named plaintiff owes a duty of adequate representation to a certified class, why should a court consider his advocacy any less vigorous when he has a personal stake in the outcome, as he must in a third-party standing case?

262. See text accompanying note 239 *supra*.

did not ignore the implications of the *Sosna* theory, just as Mr. Justice Powell did not overlook the implications that *Geraghty* had for the law of standing generally. Mr. Justice Blackmun, in justifying the grant of third-party standing in *Singleton v. Wulff*,²⁶³ had noted that one alternative to the physicians' suit in that case was a class action brought by a pregnant woman, the implication being that bringing such a suit would obviate any potential mootness problems, under the *Sosna* theory.²⁶⁴ "But if the assertion of the right is to be 'representative' to such an extent anyway," wrote Mr. Justice Blackmun, "there seems little loss in terms of effective advocacy from allowing its assertion by a physician."²⁶⁵ Mr. Justice Brennan quoted this language in making the same argument in *Craig v. Boren*.²⁶⁶ The Court thus used the law of class action mootness to support a liberal application of the law of third-party standing, despite the statement made earlier in *Singleton* that a reason for the general rule against third-party standing was the expectation that the third party himself generally would be the best advocate of his own rights. The references to the law of class actions suggest that, ultimately, the Court believes one representative is as good as another, at least within a certain range of choices.

Moreover, I submit that a tavern owner like the one in *Craig* theoretically would better represent prospective male customers between eighteen and twenty-one years old, than would a twenty-one-year-old male serving as named representative of such a class in a lawsuit saved from mootness by the *Sosna* doctrine. The reason: the tavern owner retains a personal stake, other than a purely ideological one, in the outcome of the suit, whereas the former victim of discrimination does not. Granted, the class representative, at the beginning of the litigation, might permissibly assert his own rights, and thus arguably advocate those rights most effectively for at least some period of time. This need not mean, however, that (a) the tavern owner is an ineffective advocate, or (b) the litigation lacks concreteness if initiated by someone other than the rightholder; indeed, neither of these flaws was present in *Craig*, nor need we expect them to exist in third-party standing cases generally.

The Supreme Court did not necessarily decide *Sosna* and *Ger-*

263. 428 U.S. 106 (1976), discussed in text accompanying notes 84-109 *supra*.

264. *Id.* at 117.

265. *Id.* at 117-18.

266. 429 U.S. 190, 194 (1976).

aghty incorrectly, although it failed to explain the results adequately.²⁶⁷ Perhaps *Sosna* can best be harmonized with article III by saying that the named representative, having taken on the responsibility to represent a class of persons adequately, retains a sufficient stake in the outcome *as the representative* of the class, notwithstanding the court's having found his *personal* claim moot; it is only in his representative capacity that he is deemed and presumed to care sufficiently about the outcome of the litigation. Indeed, in the typical class action involving a claim for injunctive relief, only as a representative of others does the named plaintiff possess any interest, at *any* stage of the litigation, in having the lawsuit proceed as a class action. For example, if the district court dismisses the complaint and denies class certification in such a case, and plaintiff appeals from both rulings, what will the representative gain personally from a reversal of the certification ruling, assuming the appellate court reverses the dismissal of the complaint? In contemplating such a question, one realizes the anomalous nature of the named plaintiff's "right" to bring a class action under federal rule 23. The rule confers upon the plaintiff a procedural right that, by its very nature, often does not benefit the

267. Professor Champlin, writing in 1978, suggested that one could view *Sosna* as a decision based on the "inherent time limitation" in the case which brought it close to, but not quite within, the "capable of repetition, yet evading review" line of cases; a court could never review the residency requirement on appeal if it deemed the case moot. Champlin, *Personal Stake and Justiciability: Application to the Moot Class Action*, 27 KAN. L. REV. 85, 88 (1978). *Franks*, meanwhile, in Professor Champlin's view, involved a class of *identified* persons, some of whom the court had already granted partial relief (employment) in the lawsuit and who clearly desired the additional relief (retroactive seniority) which the representative sought on their behalf. "The members of the class," she suggested, "were in very much the same position as a named plaintiff vis-a-vis the attorney in terms of the personal stake-adverseness value." *Id.* at 98.

But Professor Champlin admitted that problems existed with her suggested explanation of *Sosna* (*id.* at 99), given the language of that and other decisions. Furthermore, the "inherent time limitation" theory fails to satisfy article III's "personal stake" requirement, regardless of its appeal. As to *Franks*, the involvement of some class members did in fact make clear that a real controversy still existed, but that fact did nothing to confer a "personal stake" upon the named representatives. (This was true in *Geraghty* as well. Six presently incarcerated federal prisoners, each of whom Geraghty's counsel represented, had moved to substitute or intervene. The Court saw no need to rule on these motions in light of its disposition of the case).

More generally, Professor Champlin suggested that in a Rule 23(b)(3) class action, which requires notice to the class, and in those rare 23(b)(2) class actions in which, as in *Franks*, the class receives notice of the action, the class does provide the functional equivalent of the named plaintiff's personal stake; by receiving notice and not "opting out" of the class, she argued, the class member "has indicated his or her desire to invoke the judicial process." *Id.* at 105. As a factual conclusion, this seems very doubtful.

plaintiff in any tangible manner.²⁶⁸ It would be odd if the court, on appeal, could not rectify the wrongful denial of this procedural right; but how does one reconcile the right to appeal such a ruling with the requirements of article III, when the named representative has nothing to gain thereby? The notion of "personal stake" in this context is probably a fiction, and there may or may not be others in the class who truly care about its fortunes. Still, a live controversy exists as to the class members; the case has arisen in a factually concrete setting; and the named plaintiff remains an adequate representative, in terms of the quality of his advocacy, because, in theory, the court would divest him of his role if he became an inadequate representative.²⁶⁹

The point, for purposes of this article, is that if the kind of representation that ultimately remained in cases like *Sosna* and *Geraghty* satisfies article III, it is inconsistent and pointless to cling to a "prudential" rule that purports to prohibit litigants who clearly satisfy the "personal stake" requirement of article III from

268. "The fiduciary responsibility of representative parties . . . explains why class representatives may ever raise matters bearing on the interests of class members even though they have no tangible personal interest in these matters—including the very question of class certification." *Gardner v. Westinghouse Broadcasting Co.*, 559 F.2d. 209, 219 (3d Cir. 1977) (Seitz, C.J., concurring), *aff'd*, 437 U.S. 478 (1978).

269. The fact that a court will not dismiss as moot the class action because of mootness of the named plaintiff's claim does not necessarily mean that the court will permit the named plaintiff to continue to represent the class. In *Sosna* it appeared that Ms. Sosna would continue to represent the class. Mr. Justice Rehnquist stated that the Court's conclusion as to mootness

does not automatically establish that appellant is entitled to litigate the interests of the class she seeks to represent, but it does shift the focus of examination from the elements of justiciability to the ability of the named representative to "fairly and adequately protect the interests of the class." . . . [T]he district court must assure itself that the named representative will adequately protect the interests of the class.

419 U.S. at 403.

He then acknowledged the competency of her advocacy thus far, and the lack of any likely conflicts within the class. The Court in *Franks* did not squarely address the question. In *Geraghty*, the Court decided only that *Geraghty* could continue to litigate the class certification issue on appeal, but Mr. Justice Blackmun clearly deemed it conceivable that *Geraghty* would continue to represent the class in all respects. 445 U.S. at 407. *See also* *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 343-44 (Stevens, J., concurring). One apparently can distinguish the situation typified by *Sosna* from the situation in cases like *East Tex. Motor Freight v. Rodriguez*, 431 U.S. 395, 403 (1977), in which the Court held that named plaintiffs who suffered no wrongful injury to begin with could not represent a class of persons who had. Presumably, one must treat a *Geraghty*-type case like *Sosna* for this purpose. *See generally* Comment, *The Headless Class Action: The Effect of a Named Plaintiff's Pre-Certification Loss of a Personal Stake*, 39 Md. L. Rev. 121, 168-72 (1979); Case Comment, *Goodman v. Schlesinger and the Headless Class Action*, 60 B.U.L. Rev. 348 (1980).

representing the real interests of real third parties²⁷⁰—at least when, as in class action settings, no reason exists to object on grounds of lack of concreteness (*e.g.*, ripeness), or inadequacy of representation.

VII. SUGGESTED APPROACH TO THIRD-PARTY STANDING

As the previous sections indicate, I recommend that courts permit litigants to assert the rights of third parties so long as the litigant appears reasonably likely to represent the interests of those third parties adequately. I do not mean to suggest that courts should view the litigant strictly, or even primarily, as the

270. The *Sosna-Geraghty* line of cases—particularly the emphasis Mr. Justice Blackmun placed in his *Geraghty* opinion on the quality of advocacy as a primary interest underlying the “case or controversy” requirement of article III—arguably conflicts not only with the third-party standing cases, but with cases like *O’Shea v. Littleton*, 414 U.S. 488 (1974), and *Rizzo v. Goode*, 423 U.S. 362 (1976), as well. In each of these cases the court dismissed complaints in class actions for injunctive relief partly because the named representatives could not establish any likelihood that they personally would incur any of the injuries of which they complained. Both suits involved civil rights violations within the criminal justice system. In each case the complaint depicted numerous instances of past misdeeds and amply supported the reasonable inference that such misconduct would continue to occur, with members of plaintiffs’ broadly-defined class as future victims. No particular person, however, could honestly assert that he or she would be among the future victims. Apparently because the Court considered the article III problem an alternative ground for dismissal in both cases, and because in *Rizzo* the Court considered the merits of the claim for relief, certain commentators have described both cases as “ambiguous,” and have suggested that the two cases do not prevent a federal court from conferring standing based only on the injury to absent class members, even if the named representative can show no injury. *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 240 n.19 (1976); *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1467-70 (1976), (hereinafter cited as *Class Actions*). I regret that I cannot agree with such an optimistic reading of these cases. See also Kane, *Standing, Mootness and Federal Rule 23—Balancing Perspectives*, 26 BUFFALO L. REV. 83, 97-98 (1977).

This means that if the government injures *X* and also injures members of the *ABC* class, *X* can bring a class action as their representative and, if the court deems him an adequate representative, continue to represent them even if his own claim for redress later disappears. If *X* has no injury of his own, however, he cannot represent the *ABC* class no matter how adequately he can represent the class, despite the fact that 1) *X* belongs to that class, 2) some members of the class definitely will suffer injury, and 3) no member of the class can sue presently because nobody can predict which members of the class will suffer injury. Arguably, no better reason exists to allow *X* to continue to litigate in the former situation than to allow him to bring suit in the latter. Indeed, one could argue that the class has a greater desire for his services in the latter situation, where nobody possesses a better ability to sue. To adopt this position, however, would necessitate an abandonment or significant redefinition of the traditional “personal stake” requirement of article III, neither of which is essential to my argument in favor of third-party standing. For a persuasive argument in favor of a much-altered view of the “case or controversy” requirement of article III, see Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698, 1706 (1980).

representative of the third parties, or that the courts should extend this procedural right to the litigant primarily for advancing substantive interests of third parties; if that were true it would probably lead me back to the "obstacle" exception stated in *Singleton v. Wulff*.²⁷¹ The position I advocate does not compel me to decide whether I advocate it for the sake of the litigant or for the third party; my argument stems from a desire to achieve clarity, consistency, economy, and simplicity in the law, in the absence of reasons to create greater complexity. Still, Mr. Justice Blackmun showed appropriate solicitude for third-party interests in *Singleton*.²⁷² Identifying a litigant as an adequate representative is, of course, far less important in the third-party standing context than in the class action context; a loss for the litigant merely creates adverse precedent for the third parties, whereas a loss for the class representative fully binds the members of the class.²⁷³ Although no one reasonably can expect protection against the unintended creation of adverse judicial precedent because of the efforts of a similarly-situated person, I completely approve of the decision to avoid creating that adverse precedent when the court reasonably believes that the litigant may not adequately represent the interests of third parties, despite his self-interested desire to do so. Unlike Mr. Justice Blackmun, however, I believe that it is more appropriate and realistic to make such determinations on a case-by-case basis than to impose a flat prohibition inspired by that concern. A court should permit third-party standing, then, unless it believes that third parties oppose the result sought by the litigant, or that the litigant may not adequately press for a desirable result for third parties.

In determining the likely adequacy of the representation of a class within the meaning of rule 23, courts have considered the personal character of the representative, his interest in the litiga-

271. See notes 93-100 and accompanying text, *supra*.

272. See text accompanying notes 50-52, *supra*.

273. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). One should note, however, that the absent class members can avoid the res judicata effect of the judgment in the class action if they have not received adequate representation (*Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973)), whereas there are no comparable measures in the third-party standing context. The court in a class action may also decertify the class at any time, approve or disapprove a proposed settlement, break the class into subclasses, allow class members to intervene, and otherwise closely monitor the litigation in order to protect the rights of absent class members. See generally 1 NEWBERG, CLASS ACTIONS § 1120q (1977). Needless to say, no comparable measures exist in the area of third-party standing, but, again, the lack of such measures in this context holds much less significance.

tion, and the competence and experience of his counsel.²⁷⁴ Generally, courts may appropriately consider these factors in the context of third-party standing as well. Probably the most important factor in determining the litigant's adequacy in representing third-party interests would be the well-established requirement under rule 23, that the interests of the litigant must not conflict with those he seeks to represent.²⁷⁵

A. Specific Limitations

1. CONFLICTS OF INTEREST BETWEEN LITIGANT AND THIRD PARTY

Given the existence of the general rule against third-party standing, federal decisions have not had to rely on considerations of adequacy of representation.²⁷⁶ Yet one can explain at least a few

274. See generally *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 562-64 (2d Cir. 1968); 7 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* §§ 1765-67 (1972); 1 Newberg, *supra* note 273, at § 1120. See also Note, *Associational Standing and Due Process: The Need for an Adequate Representation Scrutiny*, 61 B.U.L. REV. 174 (1981). Commentators have observed that courts usually presume the competency of counsel. 1 NEWBERG, *supra* note 273, at 222 n.316; *Class Actions*, *supra* note 270, at 1471 n.93; Comment, *The Class Representative: The Problem of the Absent Plaintiffs*, 68 Nw. L. REV. 1133 (1974). Much of the attention courts give to the financial ability of a named representative to litigate a class action stems from the fact that, at least in class actions brought under Fed. R. Civ. P. 23(b)(3), the representative must provide notice to the class and pay the initial cost of doing so. 417 U.S. 156 (1974). See generally *Kaye and Sinex, The Financial Aspect of Adequate Representation under Rule 23(a)(4): A Prerequisite to Class Certification?* 31 U. MIAMI L. REV. 651 (1977). This aspect of Rule 23 obviously does not apply in the third-party standing context.

275. See generally *Class Actions*, *supra* note 270, at 1471-78; 7 WRIGHT & MILLER, *supra* note 274, at § 1758. The court should not interpret mere silence or inactivity by the third parties as opposition to the litigant's point of view; one can find many possible explanations for such inactivity. See Note, *supra* 133, at 435 n.60.

276. One case that did rely in part on such considerations is *School Dist. of Kansas City v. Missouri*, 460 F. Supp. 421, 440-41 (W.D. Mo. 1978), in which a local school district sought unsuccessfully to join as a plaintiff with students seeking to desegregate schools on a metropolitan-wide basis. After finding unavailable the "official duty" exception to the general rule, see notes 179-84 and accompanying text *supra*, the district court noted the potential for conflicts of interest between the district and the other plaintiffs; acts of discrimination by the district itself might be discovered, and external factors might lead to loss of interest in the suit on the part of the district. The likelihood of the district's zealous advocacy of the rights of the students clearly concerned the court.

Two other lower court decisions may be explained on the basis of conflict between litigant and "third party": *Friedman v. Harold*, 638 F.2d 262 (1st Cir. 1981), and *Mountain States Legal Foundation v. Costle*, 630 F.2d 754 (10th Cir. 1980). In *Friedman*, plaintiff sought to raise the rights of a class of third parties to which defendant belonged. In *Mountain States*, the plaintiff association sought to assert the interests of Colorado citizens generally; the State of Colorado intervened in opposition to the plaintiff.

In *Charles v. Carey*, 627 F.2d 772 (7th Cir. 1980), the court conferred third-party standing, despite a plausible argument of conflict of interest between litigant and third parties.

Supreme Court decisions on the basis of conflict, or potential conflict, between the litigant and the third parties whose rights he sought to raise. Two early cases in which the Court denied third-party standing involved employers seeking to assert the rights of employees in challenges to state regulatory laws arguably beneficial to the employees.²⁷⁷ In each case the Court observed that no employee had complained; in one of the cases,²⁷⁸ an employee even opposed the employer. In 1974, the Supreme Court affirmed without opinion a district court decision that denied a public school teacher standing to assert the rights of students and parents in challenging a state law barring discussion of birth control in the public schools.²⁷⁹ The district court observed that no student or parent had intervened or filed his own suit, and the court expressed its concern that parents and students might not object to the law. In this case, unlike all of the modern cases in which the Supreme Court has permitted third-party standing, the interests of at least some members of the relevant class of third parties conceivably stood in opposition to the litigant's assertion of their legal rights.

*Gilmore v. Utah*²⁸⁰ provides the final, well-known example of such conflict. In 1976, a Utah trial court sentenced Gary Gilmore to death; his mother filed an application in the United States Supreme Court for a stay of execution. Gilmore, wishing to be executed, filed a response challenging his mother's standing to initiate any proceedings on his behalf. In a brief per curiam order, the Supreme Court found that Gilmore had knowingly and intelligently waived any federal rights he might have had; thus, the Court terminated the temporary stay it had granted. The Chief Justice, in a concurring opinion joined by Mr. Justice Powell, stated that unless the Court found Gilmore mentally incompetent, his mother lacked standing to seek relief for her son.²⁸¹ In a separate concurrence, Mr. Justice Stevens, joined by Mr. Justice Rehnquist, agreed.²⁸²

Id. at 779-80 n.10.

277. *Jeffrey Mfg. Co. v. Blagg*, 235 U.S. 571, 576 (1915); *Erie R.R. v. Williams*, 233 U.S. 685, 705 (1914). The Court permitted standing in a similar case brought by an employee, *New York Cent. R.R. v. White*, 243 U.S. 189 (1917), apparently on the basis of the non-severability of the statute.

278. 235 U.S. 571 (1915).

279. *Mercer v. Michigan State Bd. of Educ.*, 419 U.S. 1081 (1974), *aff'g* 379 F. Supp. 580 (E.D. Mich. 1974).

280. 429 U.S. 1012 (1976).

281. *Id.* at 1014.

282. *Id.* at 1017. Four Justices dissented; Mr. Justice White, joined by Mr. Justices Brennan and Marshall, appeared to say that a condemned man could not waive any eighth

2. IDENTIFIED PARTY ABLE BUT UNWILLING TO ASSERT HIS OWN RIGHTS

Somewhat related to cases evincing a clear or conceivable conflict of interest between the litigant and the third party are cases in which the litigant seeks to assert the rights of a single, identified third party who, although not objecting to the suit, does not assert his own rights despite an apparent ability and incentive to do so. For example, in *Davis & Farnum Manufacturing Co. v. Los Angeles*,²⁸³ the plaintiff, a subcontractor, contracted to build a water tank on certain land in Los Angeles. A city agency had voted to grant the landowner a permit to undertake the work, but the city later adopted an ordinance prohibiting this activity in the part of town in which the land was located. The subcontractor, having begun work, sued the city asserting the constitutional rights of the landowner against the city. The Court held that the plaintiff lacked standing to assert such rights. The result is intuitively appeal-

amendment rights he might have relative to his execution, and that therefore "there is no jurisdictional barrier" to prevent his mother from raising those rights. *Id.* at 1018. Mr. Justice Marshall, dissenting separately as well, took the alternate position that Gilmore had not knowingly and intelligently waived his rights. *Id.* at 1019. Mr. Justice Blackmun deemed the standing question "not insubstantial," and would have set the matter for a hearing. *Id.* at 1020.

283. 189 U.S. 207 (1902). See also *Williams v. Eggleston*, 170 U.S. 304 (1898), in which the third party, prior to plaintiff's challenge to a state statute based on the third party's rights, apparently had received compensation for any injury he suffered under that statute; and *Gregory v. Mitchell*, 634 F.2d 199, 202 (5th Cir. 1981), where the court denied a shareholder standing to bring a non-derivative action based on injuries to the corporation, despite the impairment to the value of their stock.

Frissell v. Rizzo, 597 F.2d 840 (3d Cir. 1979), cert. denied, 444 U.S. 841 (1980), raised a similar problem. Plaintiff, a Philadelphia resident, alleged that Mayor Rizzo improperly instructed city officials to withhold all of the city's legal advertising from the Philadelphia Evening Bulletin, in retaliation for what the mayor considered unfair reporting by that newspaper. Plaintiff contended that this action had a "chilling effect" on freedom of the press in the city, and sought to enjoin it. Although plaintiff claimed a "right to hear" (or read) what a newspaper prints see notes 170-73 and accompanying text *supra*, the court of appeals analogized this to a third-party standing case, finding that in general the speaker, and not the hearer, would be the more effective advocate. *Id.* at 848. Thus, the case did not really involve third-party standing and the court probably should not have treated it like one. The court went on to find a serious risk of conflict of interest between plaintiff and the Bulletin, and denied standing partly on that basis. Because the newspaper had the incentive and ability to sue, the court expressly assumed that its decision neither to sue nor intervene "reflects a considered judgment as to its most advantageous course of action." *Id.* Furthermore, "a reader's suit is unlikely to be prosecuted with the full sophistication of a claim presented by the newspaper. . . ." *Id.* In other words (to maintain the analogy), the court did not consider the plaintiff an adequate representative of the newspaper's rights. *Id.* at 849 n.7. The court (and perhaps the plaintiff) apparently overlooked the possibility that such a lawsuit might be welcomed by the city's other newspapers, who might have foregone bringing suit themselves for fear of retaliation.

ing, because one would have expected the landowner to assert her own right in such a case if she had any interest whatsoever in the matter. One also would have expected the landowner, however, to want the same result desired by the subcontractor; thus, one could draw competing inferences about the third party's wishes. As the situation typified by this case would fall within the ambit of Federal Rule of Civil Procedure 19, the court should bring the third party into the lawsuit when jurisdictionally feasible. If the court then determines that a conflict of interest exists between the litigant and the third party, it can dismiss the suit for lack of third-party standing; alternatively, if the third party seeks any relief, the lawsuit can continue with both points of view represented.²⁸⁴

In a civil action for damages, the court probably should never consider a litigant an adequate representative of a third party, absent a class action or a well-defined "privity" relationship traditionally recognized at law. As the Supreme Court has pointed out in *Warth*,²⁸⁵ even when a court permits an association to sue on behalf of its members, claims for individualized awards of money damages require the participation of the individual claimants. Furthermore, a litigant generally has no personal stake in seeking money damages for a third person—unless, for example, he stands to benefit as the promisee in a third-party beneficiary contract—and thus, under well-established principles, he ordinarily will lack standing to make such a request.²⁸⁶

The reverse situation occurs when the litigant seeks damages for *himself* based upon the violation of rights of third parties.²⁸⁷

284. Professor Tribe suggests that a court might appoint *amici curiae* to provide fuller representation of various interests. L. TRIBE, *supra* note 24, § 3-29, at 114 (1978). Note that the Supreme Court has indicated that the mere presence of the third party in a lawsuit does not necessarily resolve a third-party standing problem. *Smith v. Organization of Foster Families*, 431 U.S. 816, 841 n.44, 857 n.1 (1977). This conforms with the doctrine set forth in *Singleton*, although not necessarily with the practice in cases like *Craig*. If the courts created the rule to ensure effective advocacy without falsely portraying the desires of third parties, the restriction makes little sense when all points of view are represented. If, on the other hand, the rule purports to ensure that no one can ever assert the rights of third parties when the third parties clearly do not want to assert those rights, the question becomes whether the litigant will likely represent the third parties adequately when the facts indicate that at least one of those third parties—already a party to the lawsuit—takes a position contrary to that of the litigant. In that circumstance, fairness may require a denial of third-party standing.

285. *Warth v. Seldin*, 422 U.S. 490, 515-16 (1975).

286. See *American Dairy Queen Corp. v. Brown-Port Co.*, 621 F.2d 255, 258 (7th Cir. 1980), where the litigant, a lessee, sought injunctive relief running in favor of the third party, a sublessee.

287. This occurred in *United States Gen., Inc. v. City of Joliet*, 432 F. Supp. 346 (N.D.

The court should reject this option, one would think, for the simple reason that violation of the rights of one person ordinarily gives rise to no cause of action for damages in favor of anyone else. This conclusion is troublesome, however, because it applies with equal validity to claims for declaratory or injunctive relief.²⁸⁸ The fact that, to my knowledge, no federal court that has permitted third-party standing has ever gone on to ask the question, "What is the plaintiff's cause of action?", logically suggests that such a question is entirely subsumed by the third-party standing inquiry. To say that X may assert Y's rights, then, is to say that X has Y's cause of action.²⁸⁹ One must therefore go further to arrive at the conclusion

Ill. 1977). A developer of housing for low-income families sought damages from a city and its officials who refused to issue building permits for two housing projects, alleging racial discrimination vis-a-vis prospective tenants. The district court held that the developer lacked standing to sue for damages for itself based upon the legal rights of tenants, except upon its claims under the Fair Housing Act of 1968, 42 U.S.C. §§ 3601-3631 (1975). See *Trafficante v. Metropolitan Life Ins. Co.*, discussed in text accompanying notes 174-75 *supra*. *Javits v. Stevens*, 382 F. Supp. 131, 135 (S.D.N.Y. 1974) accords with *City of Joliet*. See also *Leonhard v. United States*, 633 F.2d 599, 618 (2d Cir. 1980). But see *Seneca Nursing Home v. Kansas State Bd. of Social Welfare*, 490 F.2d 1324, 1328-29 (10th Cir.), *cert. denied*, 419 U.S. 841 (1974).

288. This particular problem does not arise when the litigant is a defendant, which has occurred frequently in Supreme Court decisions raising the third-party standing issue, e.g. *Runyon v. McCrary*, 427 U.S. 160 (1976); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (in effect); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Barrows v. Jackson*, 346 U.S. 249 (1953), or when, as plaintiff, he clearly has a good cause of action of his own but wishes to rely on the rights of third parties to overcome an affirmative defense. E.g., *Buchanan v. Warley*, 245 U.S. 60 (1917) (plaintiff sued for specific performance). This does not mean, however, that a defense available to one person in a given context is necessarily available to other persons in other contexts, as cases manifestly have demonstrated. See *Harrison v. Chrysler Corp.*, 558 F.2d 1273, 1278 (7th Cir. 1977), where the court indicated that an employer, in defense to a suit by an employee, could not assert the contractual defense of failure to exhaust internal union remedies (a defense clearly available to the union) unless that exhaustion requirement could be deemed an implied term of the contract between employer and employee.

289. However, if the third party bases his cause of action on a statute, the court conceivably may read it to preclude its use by anyone other than the rightholder himself. A court might interpret 42 U.S.C. § 1983 (1976) in such a manner. This section provides in pertinent part: "Every person who . . . subjects . . . any citizen . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." (Emphasis supplied) Must "the party injured," i.e., the plaintiff, be the same person as the "citizen" who suffered deprivation of his rights? Or may "the party injured" be the one whose rights the court enforces, and therefore the one to whom the court holds the defendant "liable," even though "the party injured" is not the plaintiff? The Supreme Court apparently has never even considered the relevance of § 1983 to the third-party standing inquiry, although each of the four cases of the last decade in which the Court expressly allowed a plaintiff to assert the rights of third parties involved § 1983. In none of those opinions did the Court even mention § 1983. *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977), *aff'g* 398 F. Supp. 321, 325 (S.D.N.Y. 1975); *Craig v. Boren*, 429 U.S. 190 (1976), *aff'g* 399 F. Supp. 1304, 1306 (S.D. Okla. 1975); *Singleton v. Wulff*, 428 U.S. 106 (1976), *aff'g* 508 F.2d 1211 (8th Cir. 1974), *aff'g*

that litigants should have third-party standing in suits for injunctive or declaratory relief, but not in suits in which the litigant seeks damages, because in the latter instance the obligation of the defendant is drastically altered. Whereas suit for injunctive relief can, at most, enforce a duty already owed to a class of third parties, liability in damages to a plaintiff to whom the defendant owed no preexisting legal duty represents a new, unexpected, and potentially limitless obligation upon the defendant.

B. *Other Possible Limitations*

I find acceptable two further limitations on the availability of third-party standing. First, considerations very different from those raised in this article, bearing upon important governmental and individual interests, affect the issue of third-party standing in the federal law of criminal procedure. Conceptually, the courts could abolish the rule against third-party standing for all purposes except the invocation of the "exclusionary rule" of criminal procedure,²⁹⁰ and I make no recommendation to alter that specialized doctrine.

Second, it may be appropriate, at the risk of complication, to draw a distinction for present purposes between federal and state substantive law. Overwhelmingly, the federal cases dealing with third-party standing have concerned federal constitutional rights of third parties. The distinction suggested above, between suits for damages and suits for injunctive or declaratory relief, would in itself preclude third-party standing in most actions predicated on state common law, whereas third-party standing in a suit for specific performance of a contract, for example, would generally require the presence in the lawsuit of all parties to the contract, under Federal Rule of Civil Procedure 19.²⁹¹ If, however, cases

380 F. Supp. 1137, 1139 (E.D. Mo.); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1975), *aff'g* 392 F. Supp. 1362, 1365 (E.D. Mo. 1975). Apparently, then, § 1983 itself poses no obstacle to third-party standing.

290. The Supreme Court has made it very clear that a criminal defendant lacks standing to assert the fourth amendment rights of a third party in seeking to have unlawfully obtained evidence excluded at trial. *United States v. Salvucci*, 100 S. Ct. 2547 (1980); *United States v. Payner*, 100 S. Ct. 2439 (1980); *Rakas v. Illinois*, 439 U.S. 128 (1978). See also *United States v. Fredericks*, 586 F.2d 470, 480 (5th Cir. 1978), and cases cited therein.

291. FED. R. Civ. P. 19 states that a person shall be made a party to the action if:

(1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, mul-

arise under state law that the court considers appropriate for third-party standing under the criteria suggested in this article, it may be prudent to omit them from the treatment I suggest, for two reasons: (1) very few federal cases have raised the third-party standing issue in such a context, so that (a) little need may exist for such treatment and (b) problems, as yet unknown, may arise in extending third-party standing to state-law cases; (2) the *Erie* doctrine²⁹² probably compels such a distinction anyway, in a federal court sitting in a state that does not permit third-party standing. We could simply avoid *Erie* questions by explicitly limiting the new rule to federal claims and defenses raised in the federal courts.

VIII. CONCLUSION

The Supreme Court has never offered adequate justification for the rule against third-party standing in the federal courts. The Court has endorsed several exceptions to the rule, but has applied them in a fashion that has impaired the credibility of the Court's pronouncements on the subject; the two most recent decisions apparently depart entirely from the doctrine previously explained at length. The lower federal courts have sometimes paid close attention to the Supreme Court precedents, and sometimes have not, all the while engaging the time, energy, and expense of judges and litigants in trying to fit patterns of facts into one or another of the Supreme Court's ill-defined "exceptions." In addition, this "prudential" limitation on the standing of litigants who clearly satisfy the requirements of article III conflicts with the liberality of the Court's decisions in the area of class action mootness. Although other commentators²⁹³ have made reasonable suggestions that, if

title, or otherwise inconsistent obligations by reason of his claimed interest.

292. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938); see *Hanna v. Plumer*, 380 U.S. 460 (1965).

293. Some commentators suggest that "any direct regulation of [a] relationship should confer standing on any party to the relationship to argue all available grounds for invalidating the regulation," 13 WRIGHT, MILLER & COOPER, *supra* note 61, § 3531 at 79 (Supp. 1980). Professor Tribe has suggested that courts should allow third-party standing whenever a duty imposed on the litigant will likely impair the rights of a third party, or when the court can characterize the third party's failure to assert his own rights as an inability to do so. L. TRIBE, *supra* note 24, at 112 (1978).

The more complex recommendation by the author of Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423 (1974), is well-summarized in *The Supreme Court, 1974 Term*, *supra* note 133, at 192 n.32 (1975):

The two situations in which *jus tertii* claims should be permitted are (1) when the law imposes a duty on the claimant, the fulfillment of which would deprive third parties of their constitutional rights, . . . and (2) when the law imposes a

followed, would clear away the debris and chart a straighter path for the courts to follow, the rule nevertheless is basically unnecessary and should be abolished. This proposal would not affect the results in many, if not most, of the cases in which the courts have denied standing, because courts do and always should deny standing when (1) no causal connection exists between the injury to the litigant and the precise governmental conduct challenged (which frequently involves a severable statute), or (2) the litigant raises an overbreadth claim based on a hypothetical application of a statute to others.²⁹⁴

These two categories of cases aside, the courts should permit third-party standing (at least for federal claims and defenses), in suits for declaratory or injunctive relief in the federal courts, unless (1) the court reasonably believes that the litigant will not adequately represent the interests of the third parties whose rights he asserts, or (2) the factual context lacks the concreteness necessary to allow satisfactory adjudication of the third-party claims, in which case ordinary principles of ripeness²⁹⁵ apply. Adoption of this recommendation would bring greater clarity and consistency to the application of article III principles, and result in simpler and more economical litigation for all participants in third-party standing cases. As far as I can see, nothing will be lost.²⁹⁶

duty on third parties that both violates their constitutional rights and modifies their behavior in such a way as to injure the claimant, who, in turn, must alter his behavior in a fashion that makes exercise of the third parties' rights more difficult. . . .

Professor Sedler, writing in 1962, set forth an analysis designed to explain, rather than criticize, the Supreme Court decisions in this area. Sedler, note 201 *supra*. He concluded that the Court took into account four factors in deciding third-party standing cases: 1) the interest of the litigant; 2) the nature of the right asserted; 3) the relationship between the litigant and third parties; and 4) the ability of the third parties to assert their own rights. He admitted that the Court had rarely articulated its approach. *Id.* at 627, 648.

However, one can question his statement that this "factor technique . . . can be applied to a particular case with more ease and certainty than can a general rule subject to numerous exceptions." *Id.* at 648. Professor Sedler recommended, as a corollary to the "factor technique," that either party to a professional relationship should have standing to challenge action dealing with that relationship that infringes upon the rights of the other party to the relationship. *Id.* at 649.

294. But courts should continue to permit statutory overbreadth challenges based on first amendment rights. See note 24 *supra*.

295. Under the ripeness doctrine, a federal court will decline to hear a case it finds overly abstract, in the sense that plaintiffs have not yet suffered from any "concrete" effects of the challenged action. See generally *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967).

296. In discussing *Singleton v. Wulff*, 428 U.S. 106 (1976), one group of commentators suggested that the proper concerns may be ripeness and adequacy of representation, concluding:

Such considerations may, in the end, bring standing doctrine in this area close to

the individualized factual determinations of effective representation made in class actions. . . . The only loss seems likely to be the loss of comfortably certain doctrine; and the present lack of any such doctrine may well be found to indicate that certainty could be bought only at the price of too many undesirable results.

13 WRIGHT, MILLER & COOPER, *supra* note 61, § 3531, at 81 (Supp. 1980).