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Which One Here Is Not like the Others - No Third-Party Standing for Lawyers to Assert Indigent Criminal Defendants' Right to Counsel on Appeal

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Which One Here Is Not Like the Other? No Third-Party Standing for Lawyers to Assert Indigent Criminal Defendants' Right to Counsel on Appeal

Kowalski v. Tesmer[1]

I. INTRODUCTION

Every year, to thousands of constitutional law students, the doctrine of standing sounds rather boring. Yet this technical, prudential doctrine shapes all aspects of constitutional law. Realistically, standing does not direct constitutional law on its own behalf, but, like a puppet with nearly invisible strings, standing acts out the commands of its master hiding behind the curtain. By winnowing the class of plaintiffs able to bring a claim in federal court, standing directs the development of all areas of constitutional jurisprudence;[2] by expanding the class of citizens who may assert the rights of others, standing expands access to the federal courts[3] and allows new areas of law to develop;[4] and by serving as a mechanism to deny jurisdiction, standing is a useful tool for courts seeking to avoid controversial decisions.[5]

The requirement that plaintiffs must have standing to bring a federal constitutional claim is both a constitutional requirement and a mechanism to preserve the federal judiciary's power.[6] At its most basic level, standing is an element of Article III subject matter jurisdiction, which is applied by the

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1. 125 S. Ct. 564 (2004).

2. For example, the Supreme Court's application of standing to zoning disputes dramatically narrowed the class of potential plaintiffs, thus rendering a municipality's decision to classify an area as zoned for single family housing virtually unassailable in federal court. *See* Warth v. Seldin, 422 U.S. 490, 518 (1975) (5-4 decision) (Douglas, J., dissenting).

3. In Batson claims, the defendant has standing to assert the rights of jurors dismissed on the basis of race. *See* Powers v. Ohio, 499 U.S. 400, 416 (1991). Had the Court not allowed criminal defendants to assert the rights of potential jurors, peremptory challenges solely on the basis of race would face very few constitutional challenges. *Id.*

4. The right to privacy would not have developed had the Court not allowed doctors to assert the rights of their patients. *See generally*, Doe v. Bolton, 410 U.S. 179 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

5. For example, in *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974) (plurality opinion), the Supreme Court used standing to avoid addressing the constitutionality of the Vietnam War. *See* RICHARD L. PACELLE, JR., THE ROLE OF THE SUPREME COURT IN AMERICAN POLITICS 80-81 (2002).

6. PACELLE, *supra* note 5, at 79-81.

courts to maintain a court system of limited and restrained jurisdiction.[7] The prudential aspect of standing, however, illustrates the Supreme Court's desire to exercise self-restraint in the face of potentially awesome power.[8] As such, standing is a mechanism by which the Court may pick its battles so as not to alert the political branches that it is not the "least dangerous" branch Hamilton designed it to be.[9]

In *Kowalski v. Tesmer*, the Supreme Court held that attorneys lack standing to assert the rights of indigent criminal defendants.[10] The Court's application of its prudential rules of standing presents great concern, as it leaves thirty years of precedent in doubt. This Note examines the parameters of the Court's prudential standing requirements and the great shift in third-party standing after *Kowalski*.[11]

II. FACTS AND HOLDING

In 1994, Michigan amended its constitution to eliminate appeals of right for criminal defendants who plead guilty, guilty by reason of insanity or nolo contendere.[12] Following the amendment, several Michigan state judges began denying the requests of indigent defendants for appointed appellate counsel[13]

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7. Valley Forge Christian Coll. v. Am. United for Separation of Church and State, Inc., 454 U.S. 464, 471 (1981) (5-4 decision).

8. PACELLE, *supra* note 5, at 79-81.

9. THE FEDERALIST No. 78 (Alexander Hamilton).

10. 125 S. Ct. 564, 570 (2004). In finding the case nonjusticiable, the Court did not address the attorneys' claim that the Michigan law barring state-sponsored counsel for indigent criminal defendants who plead guilty violated the indigent's Sixth Amendment right to counsel. *See id.* at 569-70. While the Court's refusal to address an indigent defendant's right to counsel to file leave for appeal is perhaps troubling, it is beyond the scope of this note.

11. *See* discussion *infra* Part V.

12. *Kowalski*, 125 S. Ct. at 566 (quoting MICH. CONST. art. I, § 20). Prior to this amendment, the criminal appellant had an automatic right to a first appeal. The provision states that criminal defendants may:

> appeal as a matter of right, except as provided by law an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court; and as provided by law, when the trial court so orders, to have such reasonable assistance as may be necessary to perfect and prosecute an appeal.

MICH. CONST. art. I, § 20. For purposes of this Note, the indigent defendant's plea of guilty, guilty by reason of insanity or nolo contendere shall be referred to as "plead guilty" for reasons of brevity.

13. The Michigan system for appointing state-subsidized appellate counsel operates on a rotation system, wherein attorneys who have indicated their interest in and ability to represent indigents on their first appeal are assigned by the local circuit court. Brief for the Petitioners at *6 n.11, *Kowalski*, 125 S. Ct. 562 (No. 03-407). The attorneys that meet the state qualifications are placed on a rotating system of assign-

to prepare their applications for leave to appeal their plea-based convictions.[14] In 2000, the Michigan legislature codified this judicial practice by prohibiting judicial appointment of appellate counsel for indigents who plead guilty or nolo contendere with certain mandatory and permissive exceptions.[15] The law was scheduled to go into effect on April 1, 2000.[16]

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ments. *Id.* Trial judges use the list to appoint counsel to indigent defendants seeking to file their appeals or requests to appeal. *Id.*

14. *Kowalski*, 125 S. Ct. at 566. In this case, in 1999 defendant Judge John F. Kowalski denied plaintiff John Tesmer's request for appointed appellate counsel after he pleaded guilty to a charge of home invasion; defendant Judge William A. Crane denied appointed appellate counsel to plaintiff Charles Carter after his guilty plea to the charge of attempted murder; and defendant Judge Lynda L. Heathscott denied appointed appellate counsel to plaintiff Alois Schnell after her guilty plea of operating a motor vehicle under the influence. Tesmer v. Granholm, 114 F. Supp. 2d 603, 606 (E.D. Mich. 2000) [hereinafter *Tesmer I*]. Defendants Kowalski, Crane and Heathscott are hereinafter referred to as "the judges."

15. MICH. COMP. LAWS. ANN. § 770.3(a) (West 2000), *held unconstitutional by* Bulger v. Curtis, 328 F. Supp. 2d 692 (2004); Tesmer v. Granholm, 333 F.3d 683 (2003) [hereinafter *Tesmer III*]. The Michigan statute at issue provides:

> (1) Except as provided in subsections (2) and (3), a defendant who pleads guilty, guilty but mentally ill, or nolo contendere shall not have appellate counsel appointed for review of the defendant's conviction or sentence.
>
> (2) The trial court shall appoint appellate counsel for an indigent defendant who pleads guilty, guilty but mentally ill, or nolo contendere if any of the following apply:
>
> (a) The prosecuting attorney seeks leave to appeal.
>
> (b) The defendant's sentence exceeds the upper limit of the minimum sentence range of the applicable sentencing guidelines.
>
> (c) The court of appeals or the supreme court grants the defendant's application for leave to appeal.
>
> (d) The defendant seeks leave to appeal a conditional plea under Michigan Court Rule 6.301(C)(2) or its successor rule.
>
> (3) The trial court may appoint appellate counsel for an indigent defendant who pleads guilty, guilty but mentally ill, or nolo contendere if all of the following apply:
>
> (a) The defendant seeks leave to appeal a sentence based upon an alleged improper scoring of an offense variable or a prior record variable.
>
> (b) The defendant objected to the scoring or otherwise preserved the matter for appeal.
>
> (c) The sentence imposed by the court constitutes an upward departure from the upper limit of the minimum sentence range that the defendant alleges should have been scored.
>
> (4) While establishing that a plea of guilty, guilty but mentally ill, or nolo contendere was made understandingly and voluntarily under Michigan Court Rule 6.302 or its successor rule, and before accepting the plea, the court shall advise the defendant that, except as otherwise provided in this section, if the plea is accepted by the court, the defendant waives the

On March 2, 2000, three indigent criminal defendants[17] and two attorneys[18] filed suit in federal district court against the Michigan Attorney General[19] and three Michigan judges who engaged in the practice of denying requests for appellate attorneys.[20] The three indigents and two attorneys contended that the Michigan judicial practice and statute denied the indigents their federal constitutional right to counsel guaranteed by the Equal Protection and Due Process Clauses.[21] They sought declaratory and injunctive relief under 42 U.S.C. § 1983.[22] On March 31, 2000, the "day before the statute was to take effect, the [federal] District Court [entered a declaration] holding the practice and the statute unconstitutional."[23] Following the district court's

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right to have an attorney appointed at public expense to assist in filing an application for leave to appeal or to assist with other postconviction remedies, and shall determine whether the defendant understands the waiver. Upon sentencing, the court shall furnish the defendant with a form developed by the state court administrative office that is nontechnical and easily understood and that the defendant may complete and file as an application for leave to appeal.

16. *Kowalski*, 125 S. Ct. at 566.

17. The three *Tesmer* indigent criminal defendants were John Clifford Tesmer, Charles Carter, and Alois Schnell; hereinafter "the indigents." *Tesmer I*, 114 F. Supp. 2d at 606.

18. The two attorneys were Arthur M. Fitzgerald and Michael D. Vogler, hereinafter "the attorneys." *Id.* at 607.

19. Jennifer M. Granholm was the Michigan Attorney General. *Id.* at 603. The federal district court, in its March 31st order, dismissed the plaintiffs' claim against Granholm because the state attorney general had no relation to the statute and would have "absolutely nothing to do with enforcing it." *Id.* at 616.

20. *Kowalski*, 125 S. Ct. at 566; *Tesmer I*, 114 F. Supp. 2d at 606.

21. *Kowalski*, 125 S. Ct. at 566.

22. *Id.* Section 1983 states in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. § 1983 (2000).

23. *Kowalski*, 125 S. Ct. at 566 (citing *Tesmer I*, 114 F. Supp. 2d 603). Relying on *Powers v. Ohio*, the district court found the attorneys had standing to sue on behalf of the indigents, pursuant to the doctrine of *jus tertii*, because (1) the attorneys suffered an injury in fact giving them a "sufficiently concrete interest" in the adjudication of their claim;(2) the attorneys had a close relationship to the indigents they were

March finding, state Judge Heathscott continued "to refuse to appoint appellate counsel to indigents" who had pleaded guilty.[24] On June 30, 2000, the federal district court entered an injunction against enforcement of the statute and previous judicial practice.[25] The district court's injunction specifically bound all Michigan state judges.[26]

A panel of the United States Court of Appeals for the Sixth Circuit reversed the district court's injunction in part.[27] It held that the *Younger* doctrine[28] barred suit by the three indigents but that the two attorneys had third-party standing under the *jus tertii*[29] principle to assert the indigents' rights.[30] The appellate court also found the Michigan statute constitutional.[31]

The court of appeals, sitting en banc, granted a petition for rehearing and reversed the panel in part.[32] The Sixth Circuit en banc upheld the panel's decision granting third-party standing to the attorneys but found the Michigan statute unconstitutional as violative of the Equal Protection and Due Process Clauses.[33]

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suing on behalf of; and (3) the indigents faced a genuine hindrance in protecting their rights to counsel. *Tesmer I*, 114 F. Supp. 2d at 608-11 (quoting Powers v. Ohio, 499 U.S. 400, 410-11 (1991)).

24. Tesmer v. Kowalski, 114 F. Supp. 2d 622, 625 (E.D. Mich. 2000) [hereinafter *Tesmer II*]. Judge Heathscott argued that her obligation to follow Michigan state law compelled her to continue to deny appellate counsel. *Id.*

25. *Kowalski*, 125 S. Ct. at 566 (citing *Tesmer II*, 114 F. Supp. 2d 622). Under 42 U.S.C. § 1983, a federal district court may not enjoin a state court judge unless that court has entered a declaratory judgment and the state court has violated it. 42 U.S.C. § 1983.

26. *Kowalski*, 125 S. Ct. at 566 (citing *Tesmer II*, 114 F. Supp. 2d 622). In this case, the district court granted an expansive injunction against the practice and statute. *Tesmer II*, 114 F. Supp. 2d at 629. It extended to all Michigan judges rather than just those who had previously interpreted the state constitution to require a denial of counsel because the state did not provide for an initial appeal by right. *Id.*

27. *Kowalski*, 125 S. Ct. at 566 (citing Tesmer v. Granholm, 295 F.3d 536 (2002)).

28. *See* Younger v. Harris, 401 U.S. 37 (1971). In *Younger*, the United States Supreme Court held that a federal court is barred from granting a criminal defendant an injunction in federal court for a violation of constitutional rights when the defendant may raise those constitutional issues as defenses in the state criminal proceeding, because allowing a federal court to do so would violate "national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances." *Id.* at 41. The Court held that "the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it." *Id.* at 54.

29. "*Jus tertii*" translated literally means "the right of a third party." BLACK'S LAW DICTIONARY 881 (8th ed. 2004).

30. *Kowalski*, 125 S. Ct. at 566 (citing *Tesmer*, 295 F.3d 536).

31. *Id.* (citing *Tesmer*, 295 F.3d 536).

32. *Id.* (citing Tesmer v. Granholm, 333 F.3d 683 (2003)).

33. *Id.* at 566-67 (citing *Tesmer III*, 333 F.3d 683).

Michigan filed a petition for certiorari to the United States Supreme Court on the questions of whether the attorneys had standing to represent the rights of the indigents barred from federal court by the *Younger* abstention and whether the indigents had a constitutional right to state-provided counsel for a first appeal.[34] The Supreme Court granted certiorari on both issues and held that the attorneys did not have *jus tertii* standing to assert the indigents' right to counsel on appeal.[35] The Court reasoned that the attorney-client relationship was essentially hypothetical and the indigents did not face a sufficient hindrance to asserting their own rights by filing pro se applications for appeal.[36] The Court further reasoned that the notions of "[c]ooperation and comity" underlying the *Younger* abstention, as well as the potential policy implications of granting attorneys third-party standing to represent criminal defendants, counseled against granting standing.[37] In so holding, the Court remanded the case to the district court.[38]

III. LEGAL BACKGROUND

The Supreme Court's doctrine of standing contains two interrelated components: the minimum Article III[39] standard necessary to invoke the jurisdiction of the federal judiciary and the prudential policy of standing "designed to minimize unwarranted [intrusion] into controversies where the applicable constitutional questions are ill-defined and speculative."[40] Both concepts of standing strive to ensure "that the plaintiff is the right person to raise the particular cause of action."[41]

Article III of the United States Constitution limits the federal judiciary to "cases" or "controversies" arising under the United States Constitution,

34. Brief for the Petitioners at *1, *Kowalski*, 125 S. Ct. 564 (No. 03-407).

35. *Kowalski*, 125 S. Ct. at 567, 570.

36. *Id.* at 570.

37. *Id.* at 569-70.

38. *Id.* at 570.

39. U.S. CONST., art. III, § 2, cl. 1.

40. Craig v. Boren, 429 U.S. 190, 193 (1976) (plurality opinion). For a full discussion of the interrelation between Article III and prudential standing, see Warth v. Seldin, 422 U.S. 490, 498 (1975) (5-4 decision) ("In both dimensions it is founded in concern about the proper—and properly limited—role of the courts in a democratic society."); Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 471 (1981) (5-4 decision) ("But neither the counsels of prudence nor the policies implicit in the 'case or controversy' requirement should be mistaken for the rigorous Art. III requirements themselves.").

41. Cassandra L. Wilkenson, comment, *Constitutional Law: The Province and Duty of the Judicial Department: Why the Court Cannot Continue to Use Justiciability to Avoid Dealing with the Tension Between Congress and the President Regarding the War Powers*, 56 OKLA. L. REV. 697, 706 (2003).

treaties, or federal laws.[42] The Supreme Court has interpreted the "case or controversy" prerequisite of Article III as a threshold requirement for invoking federal subject matter jurisdiction.[43] As the Court stated in *United States v. Raines*, "[t]he very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them."[44] The Court further explained in *Warth v. Seldin*, "[a]s an aspect of justiciability, the standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf."[45] At the heart of the "case or controversy" minimum is a desire to preserve Article III courts for plaintiffs who have "suffered some threatened or actual injury resulting from the putatively illegal action."[46]

In addition to the minimum standing requirements contained in Article III, the Court has created "other limits on the class of persons who may invoke the courts' decisional and remedial powers."[47] The prudential standing requirement prohibits two separate varieties of claims: generalized grievances and *jus tertii*, or third-party, standing.[48] With respect to the later in *Warth v. Seldin*, the Court explained that plaintiffs "generally must assert [their] own legal rights and interests, and cannot rest [their] claim[s] [ ] on the legal rights or interests of third parties."[49] The Supreme Court's bar on third-party stand-

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42. U.S. CONST. art. III, §2, cl. 1.

43. United States v. Raines, 362 U.S. 17, 20 (1960).

44. *Id.* The Court has further explained that the Article III standing requirement "defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded." Allen v. Wright, 468 U.S. 737, 750 (1984).

45. Warth v. Seldin, 422 U.S. 490, 498-99 (1975) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

46. *Id.* at 499 (quoting Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973) (5-4 decision)). Article III standing requires three specific elements: (1) the plaintiff must have suffered an actual or imminent injury in fact that is concrete and particularized; (2) there must be a causal connection between the conduct complained of and the plaintiff's injury; and (3) the sought after remedy must likely redress the injuries complained of by the plaintiff. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

47. *Warth*, 422 U.S. at 499. *Warth* advanced the Court's self-imposed doctrine of standing, "which ordinarily precludes a person from challenging the constitutionality of [a law] by invoking the rights of others." Barrows v. Jackson, 346 U.S. 249, 255 (1953). However, the *Warth* Court also noted that Congress may grant an express cause of action to "persons who otherwise would be barred by prudential standing rules," and provided that the claimant meets minimal Article III standing requirements, those persons could "seek relief on the basis of the legal rights and interests of others." *Warth*, 422 U.S. at 501.

48. *Warth*, 422 U.S. at 499.

49. *Id.* at 499. Generalized grievances are those "shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant

ing, as a general rule, is based on a concern that "[w]ithout such limitations . . . 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."[50] Despite the Court's general bar on third-party standing, it noted that "[i]n some circumstances, countervailing considerations may outweigh the concerns underlying the usual reluctance to exert judicial power when the plaintiff's claim to relief rests on the legal rights of third parties."[51] Accordingly, prior to and since *Warth*, the Court has created several classes of exceptions to its prudential standing requirements.[52] At issue in this case is the court's doctrine of *jus tertii* standing.

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exercise of jurisdiction." *Id.* Taxpayer claims, as in *Warth*, are a notable example of generalized grievances. *Id.* at 509. In addition, the Court has often classified claims seeking to force the government to follow its own rules of governance as generalized grievances. *See, e.g.*, Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 212-13, 222 (1974) (plurality opinion) (denying standing to plaintiffs, a class of United States citizens, seeking to have the judicial branch compel the executive branch to act in conformity with the Incompatibility Clause).

50. *Warth*, 422 U.S. at 500. The reasoning of the *Warth* Court is highly instructive, because in *Warth,* the Court drew together the various strands of its doctrine of standing and synthesized them into its current doctrine. *Id.* at 510. While the Court has now formalized its test for third-party standing, the logic clearly traces back to the *Warth* Court. For example, the *Warth* Court noted that in addition to Congressional abrogation of the Court's prudential policies of standing, the Court itself had also allowed third-party standing in cases "when enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties' rights." *Id.* at 510; *see, e.g.*, Doe v. Bolton, 410 U.S. 179, 188 (1973) (plurality opinion); Griswald v. Connecticut, 381 U.S. 479, 481 (1965); Pierce v. Soc'y of Sisters, 268 U.S. 510, 535-36 (1925). Furthermore, in *Singleton v. Wulff,* the Court noted that "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." 428 U.S. 106, 113-14 (1976) (plurality opinion).

51. *Warth*, 422 U.S. at 500-01.

52. The *Warth* Court noted that "[i]n such instances, the Court has found . . . that the constitutional . . . provision in question implies a right of action in the plaintiff." *Id.* at 501. In addition to the Court's current formulation of *jus tertii* standing, its doctrine of substantial overbreadth in free speech cases is an area of law in which the Court has carved out a special exemption to its prudential standing requirements. Sec'y of State of Md. v. J.H. Munson Co., 467 U.S. 947, 956-57 (1984) (plurality opinion) (quoting Broadrick v. Oklahoma 413 U.S. 601, 612 (1973) (5-4 decision)). The exemption was based on the finding that the First Amendment's Free Speech Clause implies a right of action in the plaintiff to assert the claims of third parties potentially affected by a restriction on speech. *Id.* (quoting *Broadrick*, 413 U.S. at 612). As the Supreme Court has noted, in the First Amendment context, "[l]itigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally pro-

In *Powers v. Ohio*, the Supreme Court held that a criminal defendant had standing to assert the equal protection rights of a juror excluded from service on the basis of race,[53] synthesizing its prior holdings into a three-part test for *jus tertii* standing.[54] Under *Powers*, a litigant has standing to assert the rights of third parties if: (1) the litigant "ha[s] suffered an 'injury in fact' . . . giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute" (2) the litigant has a "close relation to the third party;" and (3) "some hindrance [exists] to the third party's ability to protect his or her own interests."[55]

Applying the first prong of the *jus tertii* test, the *Powers* Court found the defendant had suffered an injury in fact "because racial discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process,' and places the fairness of [the] criminal proceeding in doubt."[56] It argued that "[i]f the defendant has no right to object to the prosecutor's improper exclusion of jurors . . . there arise legitimate doubts that the jury has been chosen by proper means."[57] In analyzing the second prong, the Court reasoned that the excluded juror and the criminal defendant had a sufficiently close relationship because "[v]*oir dire* permits a party to establish a relation, if not a bond of trust, with the jurors" and that the "excluded juror and the criminal

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tected speech or expression." *Id.* (quoting *Broadrick*, 413 U.S. at 612). In *Virginia v. Hicks*, the Supreme Court held that

> [t]he showing that a law punishes a substantial amount of protected free speech, judged in relation to the statute's plainly legitimate sweep suffices to invalidate all enforcement of that law until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.

539 U.S. 113, 118-19 (2003) (quoting Broadrick v. Oklahoma 413 U.S. 601, 613-15 (1973) (5-4 decision)). For a more in-depth discussion of standing based on substantial overbreadth, see also Layla G. Taylor, Note, *Constitutional Law—The "Choose-Life" Specialty Plate Cases: Standing to Sue When the Government Manipulates Public Debate*, 26 W. NEW ENG. L. REV. 169, 177-78 (2004).

53. 499 U.S. 400, 410 (1991); *see also* Campbell v. Louisiana, 523 U.S. 392, 397-98 (1998) (holding that, under *Powers*, an accused defendant has standing to assert the rights of a potential grand jury foreperson denied the position because of his or her race); J.E.B. v. Alabama, 511 U.S. 127, 128 (1994) (plurality opinion) (finding that a putative father has standing to assert the rights of a potential juror dismissed because of his or her sex); Georgia v. McCollum, 505 U.S. 42, 56 (1992) (holding that the state has standing to assert the rights of a potential grand juror dismissed because of his or her race); Edmundson v. Leesville Concrete Co., 500 U.S. 614, 629 (1991) (holding that, under the same reasoning of *Powers*, a litigant has standing to assert the rights of a potential juror excused on the basis of race during a civil trial).

54. Powers v. Ohio, 499 U.S. 400, 413-414 (1991).

55. *Id.* at 410-11 (quoting Singleton v. Wulff, 428 U.S. 106, 115-16 (1976)).

56. *Id.* (quoting Rose v. Mitchell, 443 U.S. 545, 556 (1979) (plurality opinion)).

57. *Id.* at 412.

defendant have a common interest in eliminating racial discrimination from the courtroom."[58] The Court noted that there was

> no doubt that [the criminal defendant] will be a motivated, effective advocate for the excluded venirepersons' rights. . . . [as the defendant] has much at stake in proving that his jury was improperly constituted due to an equal protection violation, for . . . discrimination in the jury selection process may lead to the reversal of a conviction.[59]

Finally, the *Powers* Court, applying the third prong, held that excluded venirepersons face substantial challenges to asserting their equal protection rights for improper exclusion from the jury for several reasons. First, they are not parties to the criminal proceedings and do not have a right to be heard at the time of their exclusion.[60] Further, they cannot easily obtain equitable remedies when the discrimination "occurs through an individual prosecutor's exercise of peremptory challenges."[61] Excluded venirepersons also face significant challenges to proving a likelihood that the discrimination will recur.[62] Finally, excluded jurors face "considerable practical barriers" in pursuing their claims because of the cost of litigation and their small financial stake in such a suit.[63]

A. *"Injury in fact"*

The "injury in fact" prong of the *Powers* test for third-party standing is closely tied to the Article III standing requirements.[64] However, the contours change slightly when a litigant seeks to assert the rights of a third party.[65] In *jus*

58. *Id.* at 413. In *Edmundson v. Leesville Concrete Co.*, the Court further noted that an "[e]xclusion of a juror on the basis of race severs that relation[ship] in an invidious way." 500 U.S. at 629.

59. *Powers*, 499 U.S. at 414.

60. *Id.*

61. *Id.*

62. *Id.* at 414-15.

63. *Id.* at 415.

64. Singleton v. Wulff, 428 U.S. 106, 112 (1976) (plurality opinion). Article III standing requires that (1) the plaintiff must have suffered an actual or imminent injury in fact that is concrete and particularized; (2) there must be a causal connection between the conduct complained of and the plaintiff's injury; and (3) the sought after remedy must likely redress the injuries complained of by the plaintiff. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

65. In contrast with the Article III requirements, the injury-in-fact component of third party standing requires the plaintiff to show that she has experienced an injury in fact, or a "sufficiently concrete interest in the outcome of [the] suit to make it a case or controversy subject to a federal court's Art[icle] III jurisdiction." *Singleton*, 428 U.S. at 112. The line between the two standards is fuzzy at best as "[the court] ha[s] not exhaustively defined the prudential dimensions of the standing doctrine." Elk Grove Unified

tertii cases, the essential question is whether the plaintiff has "a sufficiently concrete interest in the outcome of [the] suit to make it a case or controversy."[66]

The Court has found that several types of injuries satisfy the third-party injury-in-fact requirement. First, it has held that litigants subject to the enforcement or threat of enforcement of a challenged restriction may raise the rights of third parties "when enforcement of the challenged restriction would result indirectly in the violation of third parties' rights."[67] In *Griswold v. Connecticut*, the Supreme Court held that medical professionals had standing to assert "the constitutional rights of the married people with whom they had a professional relationship."[68] The Court reasoned that as the medical personnel faced criminal conviction "for serving married couples in violation of an aiding-and-abetting statute" they should have standing "to assert that the offense which [they are] charged with assisting is not, or cannot constitutionally be[,] a crime."[69]

In *Doe v. Bolton*, the Court found that the threat of the enforcement of a statute criminally punishing physicians for performing abortions presented a sufficient injury for a doctor to assert a female patient's right to an abortion.[70] Justice Blackmun, writing for the majority, stated that:

> [t]he physician is the one against whom these criminal statutes directly operate in the event he procures an abortion that does not meet the statutory exceptions and conditions. The physician-appellants, therefore, assert a sufficiently direct threat of personal detriment. They should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.[71]

In *United States Department of Labor v. Triplett*, the Supreme Court recognized a second strand of enforcement cases in which plaintiffs may have

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Sch. Dist. v. Newdow, 124 S. Ct. 2301, 2309 (2004). As the remainder of the section will show, the "injury-in-fact" requirement for third party standing has considerable flexibility depending upon the case before the Court. *See Powers*, 499 U.S. at 416.

66. *Singleton*, 428 U.S. at 112.

67. Warth v. Seldin, 422 U.S. 490, 510 (1975) (5-4 decision).

68. 381 U.S. 479, 481 (1965).

69. *Id. Griswold*'s subject-to-enforcement injury is perhaps the most widespread injury in third-party standing. *See also* Barrows v. Jackson, 346 U.S. 249, 257-58 (1953) (holding that civil damages for breach of a racially restrictive covenant constitute a sufficient injury in fact for a white litigant to raise the equal protection rights of a black citizen); Meyer v. Nebraska, 262 U.S. 390, 399-401 (1923) (implying that criminal sanctions for teaching German to students before eighth grade is a sufficient injury to allow the teacher to raise the parents' rights to determine the education of their children free of state interference).

70. 410 U.S. 179, 188 (1973) (plurality opinion).

71. *Id.*

a sufficient injury in fact to assert *jus tertii* standing.[72] Focusing on the impact of a regulation on a recognized relationship rather than the impact of criminal penalties on a litigant,[73] the *Triplett* Court held that the litigant's injury was sufficient to establish third-party standing when the "enforcement of a restriction against the litigant prevents a third party from entering into a relationship with the litigant . . . to which relationship the third party has a legal entitlement."[74] The Black Lung Benefits Act of 1972 prohibited attorneys representing clients under the Act from receiving fees for their services unless approved by the agency or the court.[75] The *Triplett* Court found that "[t]here is no question that a due process right to representation is placed at issue" because the Act invalidated all contractual agreements between the attorney and client as well as barred fees if the client's claim was unsuccessful, thus affecting both present and future attorney-client relationships.[76]

Finally, the Supreme Court has recognized the loss of current and future income as a third category of injury sufficient to sustain third-party standing.[77] In *Pierce v. Society of Sisters*, the Supreme Court held that a private parochial school had standing to assert the rights of parents to make fundamental educational decisions for their children because "[b]y reason of the statute and threat of enforcement [the Society's] business [was] being destroyed and its property depreciated; parents and guardians are refusing to make contracts for the future instruction of their sons, and some are being withdrawn."[78] In so holding, the Court premised the school's third-party

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72. 494 U.S. 715, 720 (1990).

73. *Id.*

74. *Id.* While the Court noted that the relationship is "typically [ ] contractual," it did not limit its analysis to only regulations that impaired contracts. *Id.*

75. *Id.* at 717.

76. *Id.* at 718, 721; *see also* Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 624 n.3 (1989) (5-4 decision). In *Caplin & Drysdale*, the Supreme Court held that a $170,000 loss caused by the federal drug forfeiture statute failing to account for earned and future attorneys' fees before the client forfeited property earned from drug distribution constituted an injury in fact. *Id.* The Court reasoned that the statute's failure to account for the fees implicated criminal defendants' Sixth Amendment right to counsel. *Id.* The Court found that "there can be little doubt that petitioner's stake in $170,000 of the forfeited assets – which it would almost certainly receive if the Sixth Amendment claim it advances here were vindicated – is adequate injury in fact to meet the constitutional minimum of Article III standing." *Id.*

77. *See* Pierce v. Soc'y of the Sisters, 268 U.S. 510, 536 (1925).

78. *Id.* at 532-33. In *Pierce*, the citizens of Oregon passed an initiative requiring all Oregon parents to send their children to public schools. *Id.* at 530. The Society of the Sisters, a Catholic educational organization providing elementary and secondary parochial education and a panoply of other educational services to the citizens of Oregon brought suit to enjoin the law because it threatened to drive the statewide educational institution out of business. *Id.* at 529-533. As the Society was a corporation, it could not assert a Fourteenth Amendment right to liberty, but, instead, sought to assert the rights of the families currently and potentially enrolled in its schools. *Id.*

standing upon the loss of current and future profits because the law arbitrarily interfered with "the freedom of [its] patrons [and] customers."[79]

In *Singleton v. Wulff*, the Court held that physicians performing abortions had standing to challenge a Missouri law barring Medicaid coverage for abortions because "[i]f the physicians prevail in their suit to remove this limitation, they will benefit, for they will [ ] receive payment for the abortions."[80] Justice Blackmun, writing for a plurality, reasoned that there:

> is no doubt now that the [] physicians suffer concrete injury from the operation of the challenged statute. . . . they have performed and will continue to perform operations for which they would be reimbursed under the Medicaid program, were it not for the limitation of reimbursable abortions [for] those that are medically indicated.[81]

In *Craig v. Boren*, the Court found a beer vendor's loss of income sufficient to grant her standing to assert the equal protection rights of Oklahoma men subject to a higher minimum drinking age than women.[82] The Court reasoned that the lack of an equal drinking age violated the rights of men and resulted in fewer profits for the seller than if the drinking age applied equally to both sexes.[83] The Court determined that the vendor "is obliged either to heed the statutory discrimination, thereby incurring a direct economic injury through the constriction of her buyers' market, or . . . sanctions and perhaps loss of license."[84]

Finally, in *Diamond v. Charles*, the Court distinguished between concrete economic losses sufficient to maintain standing and "speculat[ive] and hoped-for fees" that are too insubstantial to support the Court's jurisdiction.[85] In *Diamond*, the Supreme Court held that a pediatrician did not have standing to assert the rights of the unborn in favor of an Illinois statute restricting abortion.[86] In so holding, the Court distinguished between the types of injuries a physician may allege to justify standing: a physician has standing to chal-

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at 535. In asserting the rights of parents, the Society alleged not only current loss of business as parents pulled their students out of school but a future loss of income and depreciation of property. *Id.* at 533.

79. *Id.* at 535-36.

80. 428 U.S. 106, 113 (1976) (plurality opinion).

81. *Id.* at 112-13 (quotation marks omitted).

82. 429 U.S. 190, 194-95 (1976) (plurality opinion).

83. *Id.* at 204-05.

84. *Id.* at 194 (quotation omitted). In *Craig*, the vendor faced not only the loss of income from the operation of the statute, but also the enforcement of the regulation against her business; however, the Court found both injuries sufficient to establish an injury in fact and did not elevate one injury above the other. *Id.*

85. 476 U.S. 54, 66 (1986).

86. *Id.* at 66-67.

lenge an abortion law if the physician demonstrates (1) that the law "poses for him a threat of criminal prosecution" or (2) "that abortion funding regulations have a direct financial impact on his practice."[87]

Conversely, the Court reasoned that a pediatrician's injury based upon hoped for future business from fetuses that might survive gestation was too attenuated.[88] The Court asserted that "[t]he possibilities that such fetuses would survive and then find their way as patients to Diamond are speculative, and 'unadorned speculation will not suffice to invoke the federal judicial power.'"[89] In so holding, the Court drew a line beyond which economic loss would not support standing.[90]

B. *"Close Relationship"*

The Court has spent considerably less ink on its analysis of "close relationship" than that of injury in fact.[91] In assessing the relationship between the litigant and the rights holder, the Court has focused on two criteria.[92] First, it examines the nature of the relationship between the parties by asking "[i]f the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue."[93] Second, the Court determines whether the litigant may represent the interests of the third party so that "the former is fully, or very nearly, as effective a proponent of the right as the latter."[94] In addition to those two criteria, the Court has relied heavily on its past findings, analogizing relationships it has found to be sufficiently "close" to new fact patterns.[95]

In the abortion line of cases, the Court focused on the doctor-patient relationship. Beginning with *Griswold*, it noted that "appellants have standing to raise the constitutional rights of the married people with whom they had a professional relationship."[96] The Court reasoned that the "rights of husband and

87. *Id.* at 65 (internal citations omitted)

88. *Id.* at 66.

89. *Id.* (quoting Simon v. Eastern KY Welfare Rights Org., 426 U.S. 22, 44 (1976)).

90. *Id.*

91. *See generally* U.S. Dep't of Labor v. Triplett, 494 U.S. 715, 720 (1990); *Diamond*, 476 U.S. at 56; Singleton v. Wulff, 428 U.S. 106, 114-15 (1976) (plurality opinion); Craig v. Boren, 429 U.S. 190, 194 (1976) (plurality opinion); Griswold v. Connecticut, 381 U.S. 479, 481 (1965); Pierce v. Soc'y of the Sisters, 268 U.S. 510, 535-36 (1925).

92. *Singleton*, 428 U.S. at 114-15.

93. *Id.*

94. *Id.*

95. *See* Campbell v. Louisiana, 523 U.S. 392, 397 (1998) ("On occasion . . . we can ascertain standing with relative ease by applying rules established in prior cases."); *Griswold*, 381 U.S. at 481 (relying on the parent-teacher relationship in *Pierce* as analogous to the doctor-patient relationship).

96. *Griswold*, 381 U.S. at 481.

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 [a] confidential relation[ship] to them."[97] The Court also noted the categorical relationships that supported its finding of standing in the past, including employer-employee,[98] parent-teacher,[99] and real estate seller-buyer.[100] Thus, the Court analyzed the relationship by examining the role the right played between the parties, the effectiveness of the litigant in asserting the third party's rights, and the category of the relationship between the parties.[101] In *Singleton*, the Court relied on its earlier analysis in *Griswold* and *Doe*, reasoning that:

> The closeness of the relationship is patent . . . . A woman cannot safely secure an abortion without the aid of a physician . . . . The woman's exercise of her right to an abortion . . . is therefore necessarily at stake here. Moreover, the constitutionally protected abortion decision is one in which the physician is intimately involved."[102]

In *Craig*, the Court found a beer vendor "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."[103] In so holding, the Court recognized that the vendor and customer shared sufficiently similar interests such that the vendor would vigorously advocate for the rights of the customer.[104] It reasoned that vendors "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."[105]

In the two cases in which the Court has granted a lawyer standing to represent the rights of a client, it has not focused on the personal relationship between the parties but on the rights bound up within that relationship.[106] In *Triplett*, the Court focused on the intrusion of the regulation of attorneys' fees into the attorney-client relationship.[107] It reasoned that "[a] restriction upon

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97. *Id.*

98. *Id.* (citing Truax v. Raich, 239 U.S. 33, 38 (1915)).

99. *Id.* (citing Pierce v. Soc'y of the Sisters, 268 U.S. 510, 536 (1925)). In *Pierce*, the Court actually found the standing to be between the schoolowner, the students, and the students' families; however, for the sake of brevity I have shorted the relationship to parent-teacher.

100. *Id.* (citing Barrows v. Jackson, 346 U.S. 249, 255 (1953)).

101. *See id.*

102. Singleton v. Wulff, 428 U.S. 106, 117 (1976) (plurality opinion).

103. *Craig*, 429 U.S. at 195 (quotation omitted).

104. *See id.*

105. *Id.*

106. *See* U.S. Dep't of Labor v. Triplett, 494 U.S. 715, 720-21 (1990); Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 623-24 n.3 (1989) (5-4 decision).

107. 494 U.S. at 720.

the fees a lawyer may charge that deprives the lawyer's prospective client of a due process right to obtain legal representation" intrudes upon the parties' contractual and business relationship to which the client has a constitutional right.[108] In *Caplin & Drysdale, Chartered v. United States*, the Court asserted that "[t]he attorney-client relationship . . . like the doctor-patient relationship in *Baird*, is one of special consequence."[109] Relying on the categorical acceptance of the attorney-client relationship as one in which special rights and privileges are bound, the Court granted the attorney standing to assert his client's rights against a statute that "may materially impair the ability of third persons . . . to exercise their constitutional rights."[110]

C. *"Genuine Obstacle"*

While the first two factors of the Court's *jus tertii* test involve the application of legal principles to the facts of the case, the third "genuine obstacle" is more of an inquiry into the factual and legal barriers that prevent right holders from bringing suit in their own names. In several cases, the Court ignored this requirement entirely or balanced it against the other two requirements.[111] For example, in *Triplett*, the Court scrutinized the attorneys' claim of injury in fact and close relationship with his client but did not even mention a need to show a genuine obstacle to the client's assertion of his own rights.[112] In *Caplin & Drysdale*, the Court found that the criminal defendant did not face a hindrance in asserting his own right to counsel.[113] However, it granted standing to the attorney to assert the defendant's rights based on its finding that the other two factors weighed in the attorney's favor.[114]

In the cases in which the Court has required a showing of a "genuine obstacle," however, the Court has exercised considerable leniency in its evaluation.[115] In *Singleton*, the plurality specifically reiterated that the right holder need not face an "impossible" obstacle, but that a "genuine obstacle" sufficed to maintain standing.[116] The Court reasoned that

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108. *Id.*

109. *Caplin & Drysdale*, 491 U.S. at 624 n.3.

110. *Id.* (quotation omitted).

111. See *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965) and *Pierce v. Soc'y of the Sisters*, 268 U.S. 510, 535 (1925), in which the Court did not require the litigants to prove that the parents were unable to assert their rights to substantive due process.

112. *See Triplett*, 494 U.S. at 720-21.

113. *Caplin & Drysdale*, 491 U.S. at 624 n.3.

114. *Id.*

115. Prior to *Kowalski*, the Court had primarily, and perhaps exclusively, required a showing of a hindrance or genuine obstacle only in the abortion cases and juror-removal cases. *See, e.g., supra* discussion Part III.A (outlining the Court's response to the hindrances facing venirepersons in challenging racially-motivated removals from juries).

116. Singleton v. Wulff, 428 U.S. 106, 116 & n.6 (1976) (plurality opinion).

> [i]f there is some genuine obstacle to such assertion . . . 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 available proponent.[117]

In so reasoning, the Court found that a woman faced genuine obstacles to asserting her right to an abortion, including a desire to protect the privacy of her decision from a public suit and the mootness problem caused by her ticking gestational clock.[118] The Court recognized that these obstacles were not overwhelming, for the woman could sue under a pseudonym, retain the right to litigate under the Court's "capable of repetition" exception to mootness, and/or file a class action.[119] Despite this, the Court found the obstacles sufficiently genuine.[120] In so finding, the Court reasoned that "if the assertion of the right is to be 'representative' to such an extent anyway, there seems little loss in terms of effective advocacy from allowing its assertion by a physician."[121]

IV. INSTANT DECISION

A. Majority Opinion

In addressing Michigan's challenge to the district court's injunction, Chief Justice Rehnquist, writing for the majority, stated that the Court's standing doctrine included "both constitutional limitations on federal-court jurisdiction and prudential limits on its exercise."[122] The Chief Justice noted that, in this case, the Court would assume the presence of Article III standing for the attorneys' claim.[123] Focusing instead on the prudential considerations, the Court

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117. *Id.* at 116.

118. *Id.* at 117.

119. *Id.*

120. *See id.* at 118.

121. *Id.* at 117-18. *See also* Craig v. Boren, 429 U.S. 190, 194 (1976) (plurality opinion).

122. Kowalski v. Tesmer, 125 S. Ct. 564, 567 (2004). Justices O'Connor, Scalia, Kennedy, Thomas, and Breyer joined the majority opinion.

123. *Id.* The court's assumption of Article III standing was largely driven by the procedural posture of the case. As the Michigan judges directly appealed the district court's denial of their 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, the facts underlying the attorneys' claim that the Michigan statute had "reduced the number of cases in which they could be appointed and paid as assigned appellate counsel" were unproven. *Id.* at 567 n.2. Because the facts supporting the attorneys' assertion of a direct, economic injury in fact were unproven, "[f]or purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." Warth v. Seldin, 422 U.S. 490, 501 (1975)

examined whether the attorneys had third-party standing to assert the indigents' claims by examining the second and third prongs of the *Powers* test.[124]

The Court began its analysis by restating its long adherence to the rule that parties must generally assert their own legal rights and cannot rest their claims on the rights of third parties.[125] It explained that the general bar on third-party standing "assumes that the party with the right has the appropriate incentive to challenge (or not challenge) governmental action and to do so with the necessary zeal and appropriate presentation."[126] The Court noted, however, that it has "not treated this rule as absolute . . . recognizing [situations] where it is necessary to grant a third party standing to assert the rights of another."[127] A litigant may assert the rights of a third party if the litigant has a "'close' relationship with the person who possesses the right" and there is a "'hindrance' to the possessor's ability to protect his own interests."[128]

The Court first examined the relationship between the attorneys and indigents barred from state-provided appellate counsel under the Michigan statute.[129] It categorized the relationship the attorneys sought to invoke as a "future attorney-client relationship with as yet unascertained Michigan criminal defendants who will request, but be denied, the appointment of appellate coun-

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(5-4 decision). As to factual allegations, the Court must have accepted the attorneys' contentions that the law directly affected their economic livelihood resulting in an injury in fact. *Kowalski*, 125 S. Ct. at 567 n.2. Thus, having assumed an injury in fact for the purposes of Article III standing and the first prong of *Powers*, the Court turned its attention to the other two prongs of the *Powers* test to determine whether the attorneys could assert third-party standing. *Id.* at 567.

124. *Kowalski*, 125 S. Ct. at 567.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* (citing Powers v. Ohio, 499 U.S. 400, 411 (1991)). The Court stated that in certain circumstances, it has applied the third-party standing requirements more loosely. *Id.* Specifically, the Court noted that, within the context of First Amendment claims and "when [the] enforcement of the challenged restriction [operates directly] against the litigant[, resulting] indirectly in the violation of third parties' rights," it has relaxed the prudential limitations. *Id.* at 567-68 (emphasis omitted). It further noted that *Kowalski* does not implicate any of the above examples and that, beyond these examples, the Court "ha[s] not looked favorably upon third-party standing." *Id.* at 568. While the Court uses the "special circumstances" analysis to show that it has favored certain areas of third-party standing, a more correct statement is that these are some of the areas (but not all) in which the Court has found an injury in fact sufficient to sustain third-party standing. As the Court explicitly assumed injury in fact in this case, *id.* at 567, the purpose of this analysis is unclear, although it may be an indication that the Court is seeking to change its third-party standing requirements by categorically elevating some classes of injuries above others. *See infra* discussion Parts IV.C and V.

129. *Kowalski*, 125 S. Ct. at 568.

sel, based on the operation of the statute."[130] The Court noted that in the two cases in which it had granted third-party standing to attorneys, both claims involved an existing, rather than hypothetical, attorney-client relationship.[131] The Court found that the relationship between the attorneys and their future clients did not establish the close relationship necessary for third-party standing.[132] It held that "[t]he attorneys before us do not have a 'close relationship' with their alleged 'clients'; indeed, they have no relationship at all."[133]

The Court next considered the hindrance faced by the indigents in advancing their own Sixth Amendment rights against the Michigan statute.[134] The Chief Justice noted that neither party contested that the indigents could challenge the denial of counsel pro se through the Michigan court of appeals and Michigan Supreme Court, ultimately seeking a determination of the validity of the statute from the United States Supreme Court.[135] The Court found unconvincing the attorneys' argument that "unsophisticated, *pro se* criminal defendants could not satisfy the necessary procedural requirements, and, if they did, they would be unable to coherently advance the substance of their constitutional claim."[136] It noted that while "an attorney would be valuable to a crimi-

130. *Id.* (quotation omitted). Because of the Sixth Circuit's holding that the *Younger* abstention barred the indigents whose requests for counsel had been denied from asserting their claims in federal court until the Michigan proceedings were concluded, the relationship asserted by the attorneys here necessarily involved the claims of those indigent defendants whose requests for counsel would be denied if the injunction preventing the operation of the statute were lifted. *See* Tesmer v. Granholm, 333 F.3d 683, 688-91 (6th Cir. 2003), *cert. granted*, 540 U.S. 1148 (2004), *rev'd & remanded*, 125 S. Ct. 564 (2004). Thus, only the rights of the *future* indigents were implicated, as the Younger abstention bars all *present* indigents until their Michigan proceedings have been concluded. *See id.* at 688.

131. *Kowalski*, 125 S. Ct. at 568. The Court distinguished *United States Department of Labor v. Triplett* from the present case, finding that in *Triplett*, the injury to the attorney was the enforcement of the challenged restriction against him, thus implicating his client's constitutional rights, and that the injury involved the representation of a known claimant. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 568-69.

136. *Id.* at 569. The Court reasoned that because, within the last three years, three pro se defendants had sought leave to appeal the denial of appointment of appellate counsel from the Michigan Court of Appeals, Michigan Supreme Court, and United States Supreme Court, the ability of these pro se defendants to appeal disproved the attorneys' arguments that the indigent defendants faced no hindrance to asserting their own rights to counsel on appeal. *See* Halbert v. Michigan, 125 S. Ct. 823 (2005); People v. Wilkins, 620 N.W.2d 528 (Mich. 2001); People v. Jackson, 620 N.W.2d 528 (Mich. 2001).

nal defendant . . . the lack of an attorney [is not] the type of hindrance necessary to allow another to assert the indigent defendants' rights."[137]

In addition, the Court expressed its fundamental concern that granting the attorneys third-party standing would allow the indigents to "short-circuit the State's adjudication of this constitutional question."[138] It reasoned that "[i]f an attorney is all that the indigents need to perfect their challenge in state court and beyond, one wonders why the attorneys asserting this § 1983 action did not attend state court and assist them."[139] Underlying the Court's concerns were the "complementary systems" of the state and federal courts.[140] Reiterating the principle of "Our Federalism" underlying the *Younger* doctrine, the Court stated that its "unwillingness to allow the *Younger* principle to be thus circumvented is an additional reason to deny the attorneys third-party standing."[141]

Finally, the Court expressed concern with the policy implications of granting attorneys third-party standing as "'it would be a short step from the . . . grant of third-party standing in this case to a holding that lawyers generally have third-party standing to bring in court the claims of future unascertained clients.'"[142] As one possible example of the slippery slope created by granting attorneys standing to represent their clients' interests, the Court hypothesized that "[a] medical malpractice attorney could assert an abstract, generalized challenge to tort reform statutes by asserting the rights of some hypothetical malpractice victim . . . who might sue."[143] Accordingly, the Court held that the attorneys did not have standing to assert the rights of indigent criminal defendants to counsel on appeal.[144]

B. Concurring Opinion

While agreeing with the majority that attorneys do not have third-party standing to assert the Sixth Amendment right to counsel of indigent defen-

137. *Kowalski*, 125 S. Ct. at 569.

138. *Id.*

139. *Id.*

140. *Id.* (quoting Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 586 (1999). The Court reasoned that "'[c]ooperation and comity, not competition and conflict, are essential to the federal design.'" *Id.* (quoting *Ruhrgas AG*, 526 U.S. at 586).

141. *Id.* at 569-70. In so holding, the Court reasoned that "forum-shopping of this kind is not a basis for third-party standing." *Id.* at 570.

142. *Id.* at 570 (quoting Tesmer v. Granholm, 333 F.3d 683, 709 (6th Cir. 2003), *cert. granted*, 540 U.S. 1148 (2004), *rev'd & remanded*, 125 S. Ct. 564 (2004)). (Rogers, J., concurring in part and dissenting in part)). The Court reasoned that "the lawyer would have to make a credible claim that a challenged regulation would affect his income . . . ; after that, however, the possibilities would be endless." *Id.* at 570 n.5 (citing *Tesmer III*, 333 F.3d at 709) (Rogers, J., concurring in part and dissenting in part).

143. *Id.*

144. *Id.*

dants, Justice Thomas would have preferred to explicitly constrict the Court's prudential standing jurisprudence.[145] Justice Thomas attacked the Court's historically broad, categorical application of the close relationship prong of its prudential standing test.[146] He complained that the Court had "granted third-party standing in a number of cases to litigants whose relationships with the directly affected individuals were at best remote."[147] Thus, although Justice Thomas agreed with the majority's finding that the attorneys had no relationship at all with the indigent defendants,[148] he noted that "given how generously our precedents have awarded third-party standing," the Court's determination that the attorneys did not have standing was not an obvious conclusion.[149]

C. Dissenting Opinion

Justice Ginsburg, writing for the dissent,[150] attacked the majority's elevation of a plaintiff's exposure to an enforcement action from a category within the injury-in-fact requirement of third-party standing to an essential element of third-party standing.[151] Justice Ginsburg then asserted that "[o]ur precedent leaves scant room for doubt that [the] attorneys . . . have shown . . . the requisite close relation[ship] to indigent defendants who seek the assistance of counsel to appeal from plea-based convictions."[152] Finally, Justice Ginsburg concluded that the "attorneys have demonstrated a formidable hindrance to

145. *See id.* at 570-71 (Thomas, J., concurring).

146. *Id.* at 570. Justice Thomas argued that the Court's "standing cases have gone far astray." *Id.* He strongly disagreed with the vast majority of the cases in which the Court had granting third-party standing. *See id.* at 570-71.

147. *Id.* at 570. In discussing the cases in which the Court had granted standing in which the relationships "were at best remote," Justice Thomas directly referenced the Court's finding of a relationship between a beer vendor and customer in *Craig v. Boren*, 429 U.S. 190 (1976) (plurality opinion); an excluded juror and a criminal defendant in *Powers v. Ohio*, 499 U.S. 400 (1991); a seller of mail-order contraceptives and a potential customer in *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); distributors of contraceptives and potential recipients in *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (plurality); and white sellers of land and potential black purchasers in *Barrows v. Jackson*, 346 U.S. 249 (1953). *Kowalski*, 125 S. Ct. at 570 (Thomas, J., concurring).

148. *Kowalski*, 125 S. Ct. at 571 (Thomas, J., concurring).

149. *Id.* Justice Thomas reasoned that "assuming it makes sense to grant litigants third-party standing in at least some cases, it is more doubtful still whether third-party standing should sweep as broadly as our cases have held that it does." *Id.* Nevertheless, he found the majority's application of the precedents in this case reasonable and joined it in full. *Id.*

150. *Id.* at 571 (Ginsburg, J., dissenting). Justices Steven and Souter joined fully in the dissent. *Id.*

151. *See id.* at 571-75.

152. *Id.* at 572.

the indigents' ability to proceed without the aid of counsel."[153] Finding that the attorneys thus met all three elements of the *jus tertii* standing test, Justice Ginsburg would have affirmed the Sixth Circuit's finding of standing and reached the merits of the case.[154]

Justice Ginsburg first attacked the support underlying the majority's elevation of "a plaintiff's exposure to an enforcement action" to a requirement for establishing injury in fact.[155] She asserted that the direct economic loss alleged by the attorneys is "hardly debatable" given the strict rotation system Michigan uses for assigning appellate attorneys to indigent defendants.[156] While she conceded that, in several of the cases in which the Court upheld standing on the basis of economic impact, the law at issue also "proscribed conduct in which the [litigant] sought to engage," Justice Ginsburg protested the majority's conclusion that an enforcement action was essential to an injury-in-fact determination.[157] Specifically, she argued that the loss of representation of "indigent defendants in appeals from plea-based convictions" for attorneys was highly analogous to the loss of Medicaid-supported abortions for physicians as in *Singleton* or the loss of tuition-paying students for schools as in *Pierce*.[158] In *Singleton*, argued Justice Ginsburg, the loss of income alone established a cognizable injury sufficient to support third-party standing.[159] Furthermore, she maintained, the attorneys' loss of income is an injury which is "concrete and particularized . . . actual or imminent, not conjectural or hypothetical."[160]

Justice Ginsburg next argued that "[o]ur prior decisions do not warrant the distinction between an '*existing*' relationship and a '*hypothetical*' relationship that the Court advances today."[161] She noted that the Court's precedents are replete with incidences in which it granted third-party standing based on a potential or prospective relationship.[162] Justice Ginsburg further

153. *Id.*

154. *Id.* at 576.

155. *Id.* at 572 n.1.

156. *Id.* at 572. Justice Ginsburg reasoned that "[w]ith fewer cases to be assigned under the new statute, the pace of the rotation would slow, and [the attorneys] . . . would earn less for representation of indigent appellants than they earned in years prior to the cutback on state-funded appeals." *Id.*

157. *Id.* at 572 n.1.

158. *See id.* at 572 n.1, 572-73; *see also* Singleton v. Wulff, 428 U.S. 106 (1976) (plurality opinion); Pierce v. Soc'y of the Sisters, 268 U.S. 510 (1925).

159. *Kowalski*, 125 S. Ct. at 572 (Ginsburg, J., dissenting).

160. *Id.* (quoting Friends of Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 180 (2000)).

161. *Id.*

162. *Id.* at 572-73. Justice Ginsburg noted that in *Carey v. Population Services International*, 431 U.S. 678 (1977), a "corporate distributor of contraceptives could challenge [a] state law limiting sale of its products, 'not only in its own right but also on behalf of its potential customers'" (quoting *Carey*, 431 U.S. at 683) (emphasis

reasoned that the Court's decisions have never suggested "that the timing of a relationship is key;" rather, it had "focused on the character of the relationship between the litigant and the rightholder."[163] Particularly significant to Justice Ginsburg was the fact that the "Court has twice recognized, in the third-party standing context, that the attorney-client relationship is of 'special consequence.'"[164] Finally, she asserted, the Court's reading of its precedent was inconsistent with its prior holdings.[165] In several cases, "the Court has found an adequate 'relation[ship]' . . . when nothing more than a buyer-seller connection was at stake."[166]

In Justice Ginsburg's estimation, the attorneys' standing turned on the third prong of the test, the ability of the indigents to assert their own rights.[167] She reiterated that "[t]he hindrance faced by a rightholder need only be 'genuine,' not 'insurmountable.'"[168] Finding the obstacles faced by the indigents to be sufficiently genuine, she argued that, "[e]ven assuming a requirement with more starch than the Court has insisted upon in prior decisions, this case satisfies the 'impediment' test."[169]

Justice Ginsburg supported her contention by assessing "the incapacities under which these defendants labor and the complexity of the issues their cases may entail," finding strikingly high levels among indigent defendants of functional illiteracy, reliance upon court appointed counsel, plea-based con-

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omitted); in *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965), the Court noted that in *Pierce*, 268 U.S. 510, "the owners of private schools were entitled to assert the rights of potential pupils and their parents" (emphasis omitted) and in *Barrows v. Jackson*, 346 U.S. 249 (1953), "a white defendant . . . was allowed to raise the [rights] . . . of prospective [black] purchasers." (emphasis omitted). *Kowalski*, 125 S. Ct. at 572-73 (Ginsburg, J., dissenting).

163. *Kowalski*, 125 S. Ct. at 573 (Ginsburg, J. dissenting). Justice Ginsburg reasoned that the Court's relationship analysis has traditionally relied on the nature of the relationship, looking at the consequence the law affords to the connection between the litigant and the right holder. *Id.*; *see Triplett*, 494 U.S. at 720-21; Caplin & Drysdale, 491 U.S. at 623-24 n.3; Sec'y of State of Md. v. J.H. Munson Co., 467 U.S. 947, 973 (1984) (plurality opinion) (Stevens, J., concurring); *Singleton*, 428 U.S. at 117 (1976). Furthermore, she noted, the Court's distinction between actual and hypothetical belied the Court's consistent approach to the relationship prong of standing and suggested that "[t]here can be little doubt that the plurality in *Singleton* would have recognized third-party standing even if the physicians had just opened their clinic at the time they commenced suit." *Kowalski*, 125 S. Ct. at 573, n.2 (Ginsburg, J., dissenting).

164. *Id.* (citing *Triplett*, 494 U.S. at 720-21 and *Caplin & Drysdale*, 491 U.S. at 623-24 n.3).

165. *Id.*

166. *Kowalski*, 125 S. Ct. at 577 (Ginsburg, J., dissenting).

167. *Id.*

168. *Id.* (quoting *Singleton*, 428 U.S. at 116-17).

169. *Id.*

victions and incarcerations.[170] Furthermore, Justice Ginsburg noted that these indigents face burdensome procedural requirements involved in filing a leave for appeal, including the 21-day application period, the number of copies to be filed, the nature of the application, the lack of adequate state-provided aid in filling out the form and the required application of the law to the facts within the form.[171] Thus, she argued, "[a]n inmate so handicapped surely does not possess the skill necessary to pursue a competent pro se appeal."[172]

Addressing the Court's three examples of successful pro se indigent appellants, Justice Ginsburg argued that "[t]he fact that a handful of pro se defendants has brought claims shows neither that the run-of-the-mine defendant can successfully navigate state procedures nor that he can effectively represent himself on the merits."[173] She found equally unconvincing the Court's policy concerns that granting standing in this case could lead to lawyers having general third-party standing to assert the rights of future clients.[174] She reminded the Court that, in its malpractice hypothetical, "the persons directly affected . . . would face no unusual obstacle in securing the aid of counsel" to challenge the statutory change and noted that, in their hypothetical, the injured parties would face no obstacle to asserting their own rights.[175] Justice Ginsburg further asserted that "[t]his case is 'unusual because it is the deprivation of counsel itself that prevents indigent defendants from protecting their right to counsel.'"[176]

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170. *Id.* at 573-74. She noted that approximately 80% of "state felony defendants use court-appointed lawyers;" "[a]pproximately 70% of indigent defendants represented by appointed counsel plead guilty;" "70% of those convicted are incarcerated"; and "68% of the state prison population[] did not complete high school . . . many lack[ing] the most basic literacy skills." *Id.* Justice Ginsburg highlighted that approximately 70% of prison inmates

> fall in the lowest two out of five levels of literacy—marked by an inability to do such basic tasks as write a brief letter to explain an error on a credit card [statement], use a bus schedule, or state in writing an argument made in a lengthy newspaper article.

Id. at 574.

171. *Id.* at 574. She argued that this last requirement "would not be onerous for an applicant familiar with law school examinations, but it is a tall order for a defendant of marginal literacy." *Id.* at 575.

172. *Id.* at 574.

173. *Id.* at 575 n.4.

174. *Id.* at 575.

175. *Id.*

176. *Id.* (quoting Brief of Amicus Curiae NACDL at *17, *Kowalski*, 125 S. Ct. 564 (2004) (No. 03-407)). She argued "[t]hat the challenged statute leaves indigent criminal defendants without the aid needed to gain access to the appellate forum and thus without a viable means to protect their rights." *Id.* In so arguing, Justice Ginsburg relied on *Evitts v. Lucey*, in which the Court stated that "the services of a lawyer will for virtually every layman be necessary to present an appeal in a form suitable for

Finally, Justice Ginsburg addressed the Court's federalism concerns.[177] She responded to the Court's irritation that the attorneys "short-circuited" the state system, arguing that while the Court believed the attorneys "could have 'attend[ed] state court and assist[ed] [indigent defendants],'" had the attorneys assisted them in state court rather than filing in federal court, "hundreds, perhaps thousands, of criminal defendants would have gone uncounseled while the attorneys afforded assistance to a few individuals."[178] Indeed, [i]n order to protect the rights of *all* indigent defendants, the attorneys sought prospective classwide relief to prevent the statute from taking effect."[179] Furthermore, Justice Ginsburg noted, the Court's application of *Younger* was misplaced, as a federal court's need to "abstain under *Younger* is . . . [different] from whether a [litigant] has standing to sue."[180] As "no state criminal proceeding governed by the statute existed" at the time the attorneys filed their suit, the federal court's jurisdiction over the matter did not interfere with any state criminal proceeding, and therefore, *Younger* did not apply.[181] Finding that the case implicated "none of the concerns underlying the Court's prudential criteria," Justice Ginsburg would have found that the attorneys had standing to maintain their suit and proceeded to the merits of the case.[182]

V. COMMENT

A major problem with the Court's third-party standing jurisprudence is that it is entirely unclear from the case law whether the three *Powers* requirements are elements of a test that must be pleaded and established, elements of a balancing test that the Court may adjust depending on the merits of each case, or general, non-exclusive guidelines that the Court may consider as it sees fit.[183] The Court has applied the *Powers* test in each manner, and while

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appellate consideration on the merits." *Id.* (quoting Evitts v. Lucey, 469 U.S. 387, 393 (1985)).

177. *See id.*

178. *Id.* (alterations in original).

179. *Id.*

180. *Id.* at 576.

181. *Id.*

182. *Id.* at 575-76. Justice Ginsburg would have affirmed the Sixth Circuit en banc's finding that the Michigan statute was unconstitutional. *Id.* at 576.

183. *See id.* at 567 (majority opinion) ("But we have limited this exception by requiring that a party seeking third-party standing make two additional showings."); *Id.* at 571 ("The Court has recognized exceptions to the general rule, however, when certain circumstances combine . . . ."); Reply Brief for the Petitioners at *4, *Kowalski*, 125 S. Ct. 564 (2004) (No. 03-407) ("What they describe as 'requirements' are not hard-and-fast prerequisites, all of which must be met; they are simply examples of the type of prudential considerations the Court has examined in determining whether to permit an entity to litigate a particular claim."); Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 16-17 (2004) ("[W]e have not exhaustively defined the prudential

the Court admits it "ha[s] not exhaustively defined the prudential dimensions of the standing doctrine," by failing to provide definition, it has created an ill-defined doctrine that mutates at the will of the Court without express or even clearly implied revocation of previous rules.[184]

The instant decision exemplifies the Court's muddled approach. In *Kowalski*, the Court assumed that the attorneys had a plausible Article III injury in fact but then went out of its way to suggest that it has only granted standing based on the "subject to regulation" category of injury.[185] In fact, since 1925, the Court has recognized a limited form of economic injury sufficient to maintain standing.[186] It has applied this category in examining both Article III and prudential standing requirements.[187] Yet, the Court did not even respond to the dissent's argument that the attorneys' economic loss would have been sufficient had the Court considered their injuries. The purpose and effect of the Court's elevation of "subject to regulation" injury to a requirement of third party standing is unclear. It certainly, however, calls the standing granted by the Court in *Pierce*, *Craig*, *Carey* and *Singleton* into doubt.[188]

Perhaps most alarming, however, is the substantial change the Court made to its "close relationship" analysis. Since its limited recognition of third-party standing in *Pierce*, the Court has never distinguished between actual and hypothetical relationships. In fact, the vast majority of its *jus tertii* standing cases have been based on hypothetical or potential relationships, harkening back to the potential students in *Pierce*.[189] Furthermore, the Court has never so much as suggested that the personal interaction between the litigant and the rightholder was salient. Instead, it has focused on whether "enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue," the ability of the litigant to advocate for the third-party rights, and the categorical or precedential value in the relationship.[190] Relying on its long history of allowing doctors to assert the rights of patients, the Court has had no problem analogizing the doctor-patient relationship with the

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dimensions of the standing doctrine . . ."); Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 624 n.3 (1989) (5-4 decision) ("The second of these three factors counsels against review here . . . . We think that the first and third factors, however, clearly weigh in petitioner's favor."); Singleton v. Wulff, 428 U.S. 106, 114 (1976) (plurality opinion) ("[T]he Court has looked primarily to two factual elements to determine whether the rule should apply in a particular case.").

184. *Newdow*, 542 U.S. at 16-17.

185. *See Kowalski*, 125 S. Ct. at 567-68.

186. *See supra* notes 82-100 and accompanying text.

187. *See supra* notes 82-100 and accompanying text.

188. *See supra* section III.A

189. While the school in Pierce had many existing students, the Court specifically addressed the effect of the state statute upon its ability to recruit future students. Pierce v. Soc'y of the Sisters, 268 U.S. 510, 536 (1925).

190. *See* text accompanying *supra* note 103.

attorney-client relationship in the past, based solely upon the categorical relationship that hypothetically exists in an attorney-client relationship.[191] Yet, in *Kowalski*, the Court suddenly reversed this approach and insisted that it has historically required a showing of actual relationships.[192]

The unmistakable conclusion to be drawn from *Kowalski* is the Court wanted to rein in its ability to grant third-party standing by restricting all three elements of the *Powers* test. What is bewildering is why the Court insisted on asserting that its precedent supports the "actual relationship" reasoning when it actually created the analysis out of whole cloth. The Court created the prudential standing requirements and can change them as it sees fit; it need not use subterfuge. Perhaps the best evidence that *Kowalski* implicitly modified the *Powers* test is Justice Thomas' concurrence, in which he noted he would have expressly rolled back the Court's relationship analysis, but because he believed that the Court accomplished the same thing in this case by its reading of the precedent, he joined the opinion.[193]

Furthermore, in applying the third prong of the *Powers* test, the *Kowalski* Court suddenly required a greater showing of hindrance on the part of the rightholder. While the Court's "genuine obstacle" reasoning is underdeveloped its application has, until now, been quite clear.[194] The Court examines the factual and legal impediments to the rightholder asserting his or her own claim.[195] If these impediments are genuine, the Court allows the litigant to assert the third party's rights.[196] While those Justices in dissent have often argued for a higher standard, the Court has never adopted one, nor did it expressly adopt an "impossible" standard in this case.[197] Perhaps future claimants should act on the presumption that the Court raised the hindrance standard in this case, but even that is unclear.

Somewhat ironically, the Court's policy concerns about granting lawyers standing to assert the rights of their clients would be allayed by a clean application of the genuine obstacle standard. For example, the Court's medical malpractice hypothetical[198] would never survive a 12(b)(1) motion to dismiss for lack of standing because there is no obstacle to the third parties asserting their own rights, and thus, no need for a lawyer to intervene. The Court's concerns about future standing problems are unfounded and easily resolved by an inquiry into the genuine obstacles faced by the rightholder.

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191. *See supra* notes 101-22 and accompanying text.

192. *See* Kowalski v. Tesmer, 125 S. Ct. 564, 567-68 (2004) (plurality opinion).

193. *See id.* at 570-71 (Thomas, J., concurring).

194. *See supra* notes 123-32 and accompanying text. The third prong of the *Powers* test is underdeveloped because the Court has only really applied it in abortion and juror-removal cases. *See supra* note 127.

195. *See supra* notes 123-32 and accompanying text.

196. *See supra* notes 123-32 and accompanying text.

197. *See* Singleton v. Wulff, 428 U.S. 106, 125-30 (1976) (plurality opinion) (Powell, J., concurring in part and dissenting in part).

198. *See supra* notes 155 and 186 and accompanying text.

Instead, the Court's inconsistent application of the "genuine obstacle" standard increases the muddiness of *jus tertii* standing.

The *jus tertii* standing rules were created by the Court to constrain its own power. However, when they are applied in such an arbitrary and confusing manner, they start to look like political tools. In Justice Brennan's dissent in *Warth*, he chided the majority for allowing the merits of the case to influence its analysis of standing.[199] Justice Brennan asserted that "the opinion, which tosses out of court almost every conceivable kind of plaintiff who could be injured . . . can be explained only by an indefensible hostility to the claim on the merits."[200] Although Justice Brennan "appreciate[d] the Court's reluctance to adjudicate the complex and difficult legal questions" and understood that the merits of the case involved "grave sociological and political ramifications," he cautioned that "courts cannot refuse to hear a case on the merits merely because they would prefer not to."[201]

In *Kowalski*, it is not clear that the Court was hostile to the claim on the merits. In fact, in an opinion released in June 2005, the Court found the Michigan appellate scheme at issue in *Kowalski* unconstitutional as violative of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[202] In that case, *Halbert v. Michigan*, an indigent defendant from Michigan appealed his right to counsel via a habeas corpus petition without resorting to third-party standing.[203] While *Kowalski* could be explained as the Court preferring to hear the merits from the rightholder himself instead of allowing attorneys to use third party standing to assert the indigent's claims, that does not explain the clear change in the Court's standing requirements. As these cases were a mere eight months apart,[204] the Court could have avoiding changing its standing requirements by holding the attorneys' petition over for reargument. It could have consolidated the *Kowalski* attorneys' claim with the *Halbert* indigent's habeas corpus petition. The Court could have expanded *Younger* by barring third-party claims based on rights controlled by the *Younger* doctrine.[205] Or it could have clearly and explicitly changed its own third-party standing jurisprudence as Justice Thomas would have clearly preferred given his strong disagreement with the reach of the Court's standing doctrine.[206]

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199. 422 U.S. 490, 520 (1975) (5-4 decision) (Brennan, J., dissenting).

200. *Id.*

201. *Id.*

202. *Halbert v. Michigan*, 125 S. Ct. 2582, 2586 (2005).

203. *See id.*

204. The Court heard *Halbert* in April 2005, *id.* at 2582, and *Kowalski* in October 2004, 125 S. Ct. 564 (2004).

205. While the *Kowalski* Court, in dicta, mentions that granting the attorneys standing would violate the spirit of the *Younger* abstention because the district court did not have jurisdiction to grant an injunction to the rightholders themselves under *Younger*, it did not rely on *Younger* as an independent ground to deny the attorneys' claim. *See Kowalski*, 125 S. Ct. at 569-70.

206. *Id.* at 570-71 (Thomas, J., concurring).

The lengths that the Court employed to deny standing in this case suggest something else in the wind. Given the breadth of the Court's third-party standing jurisprudence called into question, one wonders the purpose behind *Kowalski*. While there is little to suggest that the Court is hostile to the merits of the *Kowalski* claim, the Court is clearly hostile to the merits of another claim; otherwise, the Court could change the standing requirements explicitly. Of course, most of the effects of this case are as of yet unknowable, except that it calls a great deal of relatively settled law into question and confuses an already muddled area even more.

One possible motivation for the Court's subterfuge is the degree to which the abortion cases rely upon doctors to assert the rights of their prospective patients. The conspiracy theory, not entirely unreasonable considering the degree to which the Court has changed its own prudential policies without admitting to the change, goes something like this. The Court cannot pull together a majority to overturn *Roe v. Wade*[207] because five of the nine Justices who sit on the Court support a basic right to abortion.[208] Several cases are pending in federal district courts and courts of appeals in which doctors are asserting the rights of female current and prospective patients to late-term abortions, to late-term abortions based on the health of a prospective client, or abortions unencumbered by unduly burdensome state regulations.[209] These doctors are relying on the Court's historical granting of third-party standing to doctors to assert the rights of current and prospective patients.[210] If the Court can restrict standing in a nonabortion case so as to avoid suspicion, it may rely upon that decision to deny standing to the doctors and uphold the ban on late-term abortions without overturning the right to an abortion. Conceivably, Justice Kennedy and similarly aligned future justice might find this option attractive because they could avoid the political backlash

207. 410 U.S. 113 (1973).

208. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (plurality). With Justice Rehnquist's death and Justice O'Conner's retirement, the Court now has only three sitting justices, Justices Kennedy, Souter and Stevens, who voted in favor of upholding the right to abortion in *Casey*. Justices Ginsburg and Breyer, however, both voted with the majority in *Lawrence v. Texas* to hold that a State may not criminalize consensual homosexual conduct. 539 U.S. 558 (2003). As *Lawrence* relied upon the basic privacy analysis of *Roe* and its progeny and ratified the central holding in *Casey*, it seems more than likely that both Justices would vote to uphold the basic abortion right. 539 U.S. at 564, 573. Because there are currently five sitting Justices who support a right to abortion, it is doubtful that Chief Justice Roberts and the pending replacement for Justice O'Connor will be able to overturn *Roe*.

209. *See, e.g.*, Richmond Med. Ctr. for Women v. Hicks, 409 F.3d 619 (4th Cir. 2005), Nw. Mem'l Hosp. v. Ashcroft, 362 F.3d 923 (7th Cir. 2004), Carhart v. Gonzalez, 413 F.3d 791 (8th Cir. 2005); Planned Parenthood Minn. v. Rounds, No. Civ.05-4077, 2005 WL 2338863, *1 (D. S.D. Sept. 23, 2005); National Abortion Federation v. Ashcroft, 330 F. Supp.2d 436 (S.D. N.Y. 2004).

210. *See supra* notes 73-75, 106-13, and 127-132 and accompanying text.

from overturning the remarkably popular ban.[211] Thus, the Court could uphold the ban on late-term abortion until such a time as the law's opponents can find a suitable woman with Article III and prudential standing to sue to enforce her rights. Delaying dealing with the issue on the merits gives the Justices a momentary postponement of the political pressure such a case would cause. Of course, as a conspiracy theory, this is pure speculation. Unquestionably, however, the changes to the prudential standing rules made in *Kowalski* make such a theory plausible if not possible.

VI. CONCLUSION

When the Supreme Court is at its best, standing is a beautiful thing. The doctrine ensures that all claims heard by the federal judiciary are sufficiently concrete, adversarial, and argued by the party with the greatest interest in the outcome. Standing is a mechanism by which the Court may act modestly in the face of great potential power. However, when the Court is at its worst, standing is an awful thing. It becomes a tool of political power, used to advance the personal interests of members on the Court and to avoid contentious issues. *Kowalski* is an example of the Court at its worst. The fundamental dishonesty shown by the Court, its manipulation of precedent, and its refusal to acknowledge the havoc it wreaked leaves a great deal of constitutional law in disarray and creates the opportunity for continued judicial abuse in the future.

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211. *Halbert* is an excellent example of this phenomenon. In *Kowalski*, where the Court framed the appeal in terms of standing, both Kennedy and O'Connor voted with the majority to deny standing. 125 S. Ct. at 565. In *Halbert*, however, where the Court considered the Due Process and Equal Protection rights of the indigent criminal defendant, both Justices voted with the Court to overturn the Michigan law and judicial practice. 125 S. Ct. at 2585. One suspects the same would occur if the right at issue changed from the right to an attorney on appeal to the right to an abortion.